

JUDICIAL FUNDAMENTALISM, THE FOURTH AMENDMENT, AND ASHCROFT V. AL-KIDD

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INTRODUCTION ..... 2
I. ASHCROFT V. AL-KIDD ..... 3
II. PRETEXTUAL ARRESTS ..... 6
III. WHREN V. SPECIAL NEEDS AND ADMINISTRATIVE SEARCHES ..... 8
IV. STATUTORY INTERPRETATION ..... 14
V. THE JURISPRUDENTIAL DEBATE ..... 20
VI. EMASCULATING FOURTH AMENDMENT PROTECTIONS ..... 24
CONCLUSION ..... 28

ABSTRACT

The Supreme Court's opinion in Ashcroft v. Al-Kidd is a classic of judicial fundamentalism.1 The decision held that the former U.S. Attorney General was immune from a lawsuit alleging he misused the Material Witness Statute as a pretext for detaining individuals suspected of terrorist activities. The article argues that the decision is based on an untenable interpretation of precedent, and is rooted in a fundamentalist judicial philosophy long advocated by Justice Antonin Scalia, who wrote the opinion. The article then surveys the potential impact of the decision on Fourth Amendment protections, and concludes with brief remarks on the intellectual foundations of Scalia's judicial philosophy.

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1 Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011).

## INTRODUCTION

Fundamentalism—whether found in religion (where the term originated),<sup>2</sup> politics,<sup>3</sup> economics,<sup>4</sup> or law<sup>5</sup>—is a form of extremism whose essence is a belief in a small, “fundamental” set of principles that are supposed to yield all the answers to complex social or political questions. Fundamentalism is quintessentially a belief in a reductive form of decision-making: fundamentalists answer complicated social or political questions by relying on a few purportedly simple and rigid considerations— notwithstanding the occasional impractical or seemingly unreasonable solutions these yield. Fundamentalism is therefore a form of willful narrow-mindedness, combined with a hardheaded willingness to live with the consequences whatever they be.

Understood against this definition, Justice Antonin Scalia’s textualist philosophy is a paradigm of judicial fundamentalism. Scalia has long claimed that statutory text should be given virtually exclusive weight in statutory interpretation, to the exclusion of all other considerations—including such time-honored factors as statutory purpose, legislative history, changed conditions, equity, morality, or coherence.<sup>6</sup> And he often

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<sup>2</sup> The term “fundamentalism” originated as a form of self-description among American Protestants in the 19th century. See MALISE RUTHVEN, *FUNDAMENTALISM: THE SEARCH FOR MEANING* (2004) at 10-11.

<sup>3</sup> See, e.g., Kelly O’Connell, *Leftists Want to Ban Believers From Office—But Who Are the Real Fundamentalists? Political Fundamentalists—A Grave Threat to World Liberty*, CANADA FREE PRESS, (Nov. 27, 2011), available at <http://www.canadafreepress.com/index.php/article/42739>.

<sup>4</sup> See, e.g., JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 14, 58, 102 (2002).

<sup>5</sup> See, e.g., CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005); Morton J. Horwitz, Foreword, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 43 (1993).

<sup>6</sup> See generally, ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997). His most recent iteration of this philosophy appeared in a recent 500-page tome, where Scalia writes that judges should “look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters’ extratextually derived purposes and the desirability of the fair reading’s anticipated consequences.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) at xxvii.

adheres to textualist resolutions no matter how absurd or unreasonable they may be.<sup>7</sup> I will later return to this issue of judicial fundamentalism, but will start with the occasion for this discussion—the Supreme Court’s 2010 decision *Ashcroft v. al-Kidd*, where Scalia’s fundamentalism was on full display.<sup>8</sup>

## I. ASHCROFT V. AL-KIDD

Abdullah al-Kidd, born Lavoni T. Kidd, is an American-born, former college football player who converted to Islam.<sup>9</sup> He was arrested by FBI agents in March 2003,<sup>10</sup> when he was about to board a flight to Saudi Arabia in order to study on a scholarship at a Saudi university.<sup>11</sup> His arrest warrant was issued under the federal Material Witness Statute,<sup>12</sup> which authorizes the detention of individuals not themselves suspected of criminal wrongdoing if their testimony is “material in a criminal proceeding”<sup>13</sup> and if it may “become impracticable to secure the presence of the person by subpoena.”<sup>14</sup> The warrant application declared that al-Kidd’s testimony was “crucial” to the prosecution of one Sami Omar al-Hussayen for visa fraud.<sup>15</sup> The application contained some false allegations (for example, that al-Kidd was flying on a one-way ticket),<sup>16</sup> omitted important information (for example, that al-Kidd was an American citizen and that he had previously cooperated with the FBI),<sup>17</sup> and did not specify what material information al-Kidd possessed.<sup>18</sup> Nevertheless the warrant was issued and al-Kidd was arrested.<sup>19</sup>

Al-Kidd was interrogated (mostly about his involvement with Islam) before being transferred to a high-security facility, where he remained for sixteen days.<sup>20</sup> He was held in harsh conditions: his legs,

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<sup>7</sup> See *infra* notes 124-140 and accompanying text.

<sup>8</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).

<sup>9</sup> *Al-Kidd v. Ashcroft*, 580 F.3d 949, 952 (9th Cir. 2009), *rev’d*, 131 S. Ct. 2074 (2011).

<sup>10</sup> *Id.* at 952–53.

<sup>11</sup> *Id.* at 952.

<sup>12</sup> See *id.* at 952.

<sup>13</sup> 18 U.S.C. § 3144 (2012).

<sup>14</sup> *Id.*

<sup>15</sup> *Al-Kidd*, 580 F.3d at 953.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Ashcroft*, 131 S. Ct. at 2088 n.2.

<sup>19</sup> See *al-Kidd*, 580 F.3d at 953.

<sup>20</sup> *Id.* at 951.

wrists, and waist were shackled whenever he was moved;<sup>21</sup> he was allowed out of his cell only one to two hours each day;<sup>22</sup> and his cell was kept lit twenty-four hours a day.<sup>23</sup> When he was finally released, it was on the conditions that he limit his travels, live with his wife at his in-laws' home, report regularly to a probation officer, and consent to home visits.<sup>24</sup> These conditions lasted over a year, during which al-Kidd separated from his wife (that's what happens when you live with the in-laws).<sup>25</sup>

Al-Kidd was never asked to testify in any criminal proceeding.<sup>26</sup> In fact, according to his lawsuit, al-Kidd's detention was never meant to secure his testimony at any criminal trial.<sup>27</sup> he was arrested for investigative purposes.<sup>28</sup> Indeed when FBI Director Robert Mueller testified before Congress in 2003, he listed al-Kidd's arrest as one of five major successes in the FBI's efforts to dismantle terrorist networks in the United States.<sup>29</sup> As we now know, that was utter nonsense: the FBI never had a shred of evidence implicating al-Kidd in any terrorist activity.<sup>30</sup>

Al-Kidd's lawsuit alleged that John Ashcroft, the U.S. Attorney General at the time, implemented a policy authorizing the arrest and detention of people suspected of having ties to terrorism, often on the flimsiest of grounds (and without any probable cause) under the pretext that they were material witnesses.<sup>31</sup> Many dozens were apparently arrested and detained pursuant to that policy.<sup>32</sup> The allegation was supported by statistical data (many individuals arrested as material witnesses post-9/11 were never asked to testify in any criminal proceeding), and by official statements and affidavits of DOJ officials—including Ashcroft's own public statement that the Material Witness Statute was an important tool in "taking suspected terrorists off the street."<sup>33</sup> The lawsuit claimed that this

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 953.

<sup>23</sup> *Id.* Prisoners detained in the facility for actually committing serious crimes were treated less harshly, *id.* at 978.

<sup>24</sup> *Id.* at 953.

<sup>25</sup> *Id.* at 953–54.

<sup>26</sup> *Id.* at 954.

<sup>27</sup> *See id.* at 960.

<sup>28</sup> *See id.*

<sup>29</sup> *Id.* at 964.

<sup>30</sup> *Id.* at 952.

<sup>31</sup> *See id.* at 954.

<sup>32</sup> Naftali Bendavid, *Material Witness Arrests Under Fire*, CHI. TRIB., Dec. 24, 2001, at N1.

<sup>33</sup> *Al-Kidd*, 580 F.3d at 954. Other statements included those of Alberto Gonzales, White House Counsel at the time; Michael Chertoff, the head of the Department of Justice's Criminal Division, who stated publicly that the Material Witness Statute

pretextual use of the Material Witness Statute violated the Statute, as well as the Fourth and Fifth Amendments to the U.S. Constitution (the latter because of unlawful conditions of confinement).<sup>34</sup>

In fact, John Ashcroft has a history of such off-label uses of statutes: in 2001, Ashcroft issued a directive claiming that the federal Drug Abuse Prevention and Control Act, whose stated purpose is the prevention of drug abuse and addiction, made it a criminal offense for Oregon doctors to help terminally ill patients die, as authorized by Oregon's Death with Dignity Act.<sup>35</sup> The Supreme Court declared that directive unlawful in 2006 (Justice Scalia filed a dissenting opinion<sup>36</sup>).<sup>37</sup>

Ashcroft sought to dismiss al-Kidd's lawsuit by claiming that even if the allegations were true and he did implement a policy of pretextual arrests under the Material Witness Statute, he was nevertheless immune because he acted in his capacity as Attorney General.<sup>38</sup> The Ninth Circuit Court of Appeals first rejected Ashcroft's claim of *absolute* immunity,<sup>39</sup> and then turned to examine his claim of *qualified* immunity—to which he was entitled only if he did not violate al-Kidd's constitutional rights, or, if he did, did so without violating a clearly established law.<sup>40</sup> The Ninth Circuit then rejected Ashcroft's claim of qualified immunity as well.

The appellate court first held that “[t]o use a material witness statute pretextually, in order to investigate or preemptively detain suspects without probable cause, is to violate the Fourth Amendment.”<sup>41</sup> It then determined that this was a violation of a “clearly established law”—if only because such misuse of the Material Witness Statute “gutt[ed] the substantive protections of the Fourth Amendment’s ‘probable cause’

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was “an important *investigative* tool in the war on terrorism,” *id.* at 962 (emphasis added); and then-FBI Director Robert Mueller, who said in a 2002 speech that “a number of suspects were detained . . . on material witness warrants,” Brief for Respondent in Opposition at 16, *Ashcroft*, 131 S. Ct. 2074 (No. 10-98). The Office of Inspector General of the Department of Justice is working on a report “reviewing the Department’s use of the material witness warrant statute, 18 U.S.C. 3144 [and] investigating whether the Department’s post-September 11th use of the statute in national security cases violated civil rights and civil liberties.” U.S. Department of Justice, Office of the Inspector General, *Semiannual Report to Congress October 1, 2011 – March 31, 2012*, at 17, available at <http://www.justice.gov/oig/semiannual/1205/index.pdf>.

<sup>34</sup> *Al-Kidd*, 580 F.3d at 955–56.

<sup>35</sup> *Gonzales v. Oregon*, 546 U.S. 243, 253–54 (2006).

<sup>36</sup> *Id.* at 275–99 (Scalia, J., dissenting).

<sup>37</sup> *Id.* at 275.

<sup>38</sup> *Al-Kidd*, 580 F.3d at 952.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 964.

<sup>41</sup> *Id.* at 970.

requirement [by] giving the state the power to arrest upon the executive's mere suspicion."<sup>42</sup> If al-Kidd's allegations were true, Ashcroft made a deliberate end run around the Fourth Amendment's probable cause requirement: could there be a clearer violation of established law?<sup>43</sup>

The Supreme Court reversed on both issues. First, the five conservative Justices (Chief Justice Robert, and Justices Scalia, Kennedy, Thomas, and Alito) joined in an opinion holding that al-Kidd's Fourth Amendment rights were not violated.<sup>44</sup> Second, in a part joined by all eight Justices participating in the decision (Justice Kagan recused herself from the case because of her involvement in it as solicitor general), the Court also found that Ashcroft, in any case, did not violate a clearly established law.<sup>45</sup> That is to say, even if al-Kidd's constitutional rights *were* violated, those rights were not clearly established and therefore Ashcroft could not be sued for violating them: "Ashcroft deserves . . . qualified immunity even assuming—contrafactually [sic]—that his alleged detention policy violated the Fourth Amendment."<sup>46</sup> Thus, not one Justice thought that arresting al-Kidd and holding him as a material witness without any intention of using him as a witness was a clear violation of the U.S. Constitution.

The three participating liberal justices—Breyer, Ginsburg, and Sotomayor—claimed that the Court should not have reached the Fourth Amendment issue, since it was not necessary for the decision.<sup>47</sup> But the conservative justices were unwilling to relinquish that part. This was unsurprising: weakening Fourth Amendment protections has long been on the agenda of the Roberts court.<sup>48</sup> But for Justice Scalia there was an additional reason: the Fourth Amendment ruling was squarely based on his judicial dogma.

## II. PRETEXTUAL ARRESTS

The question before the Supreme Court was whether arresting an individual as a material witness when there was no intention of using him

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<sup>42</sup> *Id.* at 972.

<sup>43</sup> *Id.* at 980–81.

<sup>44</sup> *Ashcroft*, 131 S. Ct. at 2083. Justice Kennedy also penned a concurring opinion.

<sup>45</sup> *See id.* at 2085.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 2088.

<sup>48</sup> Perhaps the most prominent example of this assault is the weakening of the Fourth Amendment's exclusionary rule in *Herring v. United States*, 555 U.S. 135 (2009). See Section VI for a discussion of additional decisions.

as a witness violated the Fourth Amendment.<sup>49</sup> The Court determined that it didn't by relying on a line of cases that refused to examine police officers' purpose or intent when deciding whether a Fourth Amendment violation occurred.<sup>50</sup> The principal precedent was *Whren v. United States*<sup>51</sup>—another Scalia opinion—where officers wishing to investigate a vehicle stopped it for a minor traffic violation.<sup>52</sup> The car's occupants claimed that the officers violated their Fourth Amendment rights on the theory that investigatory stops, even if supported by probable cause to believe that some minor traffic violation had occurred, were unreasonable unless they would have been made *absent the investigatory motive*.<sup>53</sup> After all, they claimed, “the use of automobiles is so heavily and minutely regulated that . . . a police officer will almost invariably be able to catch any given motorist in a technical violation” (or just claim that he did<sup>54</sup>).<sup>55</sup>

A unanimous Supreme Court rejected the claim. In an opinion written by Justice Scalia, the Court held that it did not matter whether the police officers who made the traffic stop did so in order to investigate the vehicle and its occupants: if there was probable cause for a traffic violation, the stop was constitutional.<sup>56</sup> The reason for this, said the Court, was not so much the difficulty of discovering police officers' subjective intent, but the fact that “the Fourth Amendment's concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.”<sup>57</sup> The officers' subjective intent was simply irrelevant to the constitutionality of their actions.

The *al-Kidd* Court found that this principle also applied to al-Kidd's arrest: just as police officers' investigatory motivation was irrelevant to the constitutionality of their traffic stops, so was Ashcroft's investigatory motivation for arresting al-Kidd irrelevant to the constitutionality of the arrest.<sup>58</sup> Thus, assuming that the facts supported a

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<sup>49</sup> See *Ashcroft*, 131 S. Ct. at 2079.

<sup>50</sup> See *id.* at 2080–81.

<sup>51</sup> *Whren v. United States*, 517 U.S. 806 (1996).

<sup>52</sup> *Id.* at 808.

<sup>53</sup> *Id.* at 809.

<sup>54</sup> *Id.* at 810. Research consistently shows that police officers lie on the stand when questioned about possible Fourth Amendment violations, and that judges collude in such perjuries. See, e.g., Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992). And minor traffic violations—like crossing a solid white line or failing to signal—are exceedingly easy to fabricate.

<sup>55</sup> *Whren*, 517 U.S. at 810.

<sup>56</sup> *Id.* at 806.

<sup>57</sup> *Id.* at 807.

<sup>58</sup> See *Ashcroft*, 131 S. Ct. at 2081–82.

determination that al-Kidd was a material witness, it was irrelevant—so far as the Fourth Amendment was concerned—that he was arrested for investigative purposes. To sum up: the Fourth Amendment is not violated when people are arrested and detained under the Material Witness Statute even if there is no intention to secure their testimony and their arrest and detention are done for investigative purposes, so long as the statute’s requirements of “materiality” and “impracticability” are satisfied.<sup>59</sup> That—said the *al-Kidd* decision—is the teaching of *Whren*.

### III. *WHREN* VERSUS SPECIAL NEEDS AND ADMINISTRATIVE SEARCHES

The Ninth Circuit, by contrast, thought that *Whren* was beside the point.<sup>60</sup> In *Whren* there was probable cause to believe that the seized individuals committed a crime.<sup>61</sup> If there was such suspicion of criminal wrongdoing, the officers’ subjective intent did not matter: why should we care about police officers’ intent if they act on probable cause of criminal activity? Where there is probable cause to believe a person committed a crime, that person can be constitutionally detained no matter whether the arresting officer does so for the purpose of investigating another crime.

But, in *al-Kidd* there was no probable cause to believe al-Kidd engaged in any criminal wrongdoing.<sup>62</sup> Al-Kidd was detained as a material witness, not as a criminal suspect.<sup>63</sup> Thus, said the Ninth Circuit, the governing precedent is not *Whren* but the line of cases dealing with searches and seizures conducted without suspicion of criminal wrongdoing—the so-called “special needs” and “administrative searches”

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<sup>59</sup> The Court explicitly refused to address the constitutionality of the Material Witness Statute itself. *See id.* at 2084–85 (“It might be argued, perhaps, that when, in response to the English abuses, the Fourth Amendment said that warrants could only issue ‘on probable cause,’ it meant only probable cause to suspect a violation of law, and not probable cause to believe that the individual named in the warrant was a material witness. But that would make all arrests pursuant to material-witness warrants unconstitutional, whether pretextual or not—and that is not the position taken by al-Kidd in this case.”). *But see*, *al-Kidd v. Ashcroft*, 598 F.3d 1129, 1139 (9th Cir. 2010) (noting that the federal Material Witness Statute has existed since 1789, *Bacon v. United States*, 449 F.2d 933, 938 (9th Cir. 1971), every state has adopted a version of the statute, *id.* at 939, and (at least until now), “[t]he constitutionality of th[e] statute apparently has never been doubted,” *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929)).

<sup>60</sup> *Al-Kidd*, 580 F.3d at 968.

<sup>61</sup> *Whren*, 517 U.S. 806.

<sup>62</sup> *Ashcroft*, 131 S. Ct. at 2079.

<sup>63</sup> *Id.*

cases.<sup>64</sup> Such searches and seizures include, among others, routine drug testing of railroad employees,<sup>65</sup> drug testing of school pupils,<sup>66</sup> and routine stops of vehicles near the Mexican border in search of illegal immigrants<sup>67</sup>—all targeting individuals not suspected of any criminal wrongdoing.

In contrast to the *Whren* decision, in these cases Supreme Court precedents found that the purpose, or “subjective intent,” behind the search or the seizure did matter for its constitutionality under the Fourth Amendment. Specifically, the Court conditioned their constitutionality *on that purpose being something other than investigating crime*. Thus, the Court affirmed the constitutionality of suspicionless drug testing of railroad employees on the ground that they were aimed at railroad safety.<sup>68</sup> It found suspicionless vehicle stops and questioning within 100 miles of the Mexican border constitutional because they were aimed at intercepting illegal border-crossers.<sup>69</sup> And it found suspicionless drug testing in schools constitutional because the aim was to deter drug use in schools.<sup>70</sup> These searches and seizures were constitutional because they were not aimed at investigating and prosecuting crime but at some other legitimate purpose.<sup>71</sup>

Thus, the Supreme Court clearly relied on the purpose or motive behind a search or a seizure in the “special needs” and “administrative searches” contexts: if the purpose or motive was criminal investigation (and there was no criminal suspicion to justify a search or a seizure), these searches or seizures were unconstitutional. Accordingly, in *Ferguson v. City of Charleston* the Supreme Court held unconstitutional a program of mandatory drug testing of maternity patients in public hospitals because “the immediate objective of the searches was to generate evidence for law enforcement purposes”;<sup>72</sup> and in *City of Indianapolis v. Edmond* the Court struck down motor vehicle checkpoints set up “to interdict unlawful drugs” because their purpose was, similarly, investigatory, while the stopped drivers were not individually suspected of any wrongdoing.<sup>73</sup>

These cases, according to the Ninth Circuit, stand for the proposition that *without sufficient suspicion of criminal wrongdoing*, it is a

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<sup>64</sup> *Al-Kidd*, 580 F.3d at 968–69.

<sup>65</sup> *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602 (1989).

<sup>66</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

<sup>67</sup> *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).

<sup>68</sup> *Skinner*, 489 U.S. at 620.

<sup>69</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–62, 562 n.15 (1976).

<sup>70</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *Earls*, 536 U.S. 822, at 836–37.

<sup>71</sup> *See, e.g., id.* at 833.

<sup>72</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 83 (2001).

<sup>73</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 35 (2000).

Fourth Amendment violation to conduct searches or seizures with an investigatory purpose in mind.<sup>74</sup> And since in *al-Kidd* there was no probable cause justifying al-Kidd's arrest, arresting al-Kidd solely for investigatory purposes was unconstitutional.

But the Supreme Court rejected that argument by claiming that the Ninth Circuit misunderstood the cases.<sup>75</sup> The “special needs” and “administrative searches” cases made the officers’ purpose relevant not because these searches or seizures were conducted in the absence of any suspicion of *criminal* wrongdoing, but because they were conducted without any “*individualized* suspicion”—whether criminal or not.<sup>76</sup> Where there is no “individualized suspicion” of the target of the search or the seizure—some evidence pointing to that *particular individual* as a proper target—the search or the seizure is constitutional only if done for some legitimate *non-investigative* purpose (and the purpose or intent of the officers is relevant). But purpose inquiries are irrelevant where there is such “individualized suspicion,” as in *al-Kidd*:

[T]he affidavit accompanying the warrant application . . . gave individualized reasons to believe that [al-Kidd] was a material witness and that he would soon disappear. The existence of a judicial warrant based on individualized suspicion takes this case outside the domain of . . . our special-needs and administrative-search cases . . .<sup>77</sup>

To summarize: what distinguished the cases where purpose or motive was relevant from those where it was not, was whether the search or seizure was based on “individualized suspicion.” And the term “individualized suspicion” was *not* limited to the suspicion of criminal wrongdoing (as the Ninth Circuit would have it),<sup>78</sup> but to the “suspicion” that the person is the proper subject of *any* constitutional search or seizure, whether based on criminal wrongdoing or not. (The term “suspicion,” said the Court, is often used in relation to perfectly innocuous activities, as in “I have a suspicion she is throwing me a surprise birthday party”).<sup>79</sup> And since al-Kidd was the subject of such “individualized suspicion” (a magistrate judge found that he qualified for arrest as a material witness), his case fell outside the scope of the “special needs” and “administrative

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<sup>74</sup> *Al-Kidd*, 580 F.3d at 968–69.

<sup>75</sup> See *Ashcroft*, 131 S. Ct. at 2082–83.

<sup>76</sup> See *id.* at 2081 (emphasis added).

<sup>77</sup> *Id.* at 2082.

<sup>78</sup> See also *id.* at 2088. (Ginsburg, J., dissenting in part and concurring in part).

<sup>79</sup> *Id.* at 2082.

searches” cases, and the actual purpose or motive of executive officials was irrelevant to the constitutionality of his arrest.

This reading of the cases (which was lifted from the government’s brief) is absurd: the distinction between cases where purpose or intent inquiries are essential (“special needs” and “administrative searches”) and those where they are not (*Whren*) cannot possibly revolve around the presence or absence of “individualized suspicion” as the *al-Kidd* Court understood that term—that is, as a finding of individualized eligibility for a search or a seizure *whether based on criminal suspicion or not*.<sup>80</sup> If that were the case it would mean, for example, that under *Skinner v. Railway Labor Executives’ Association* (approving drug testing of railroad employees because it was aimed at railroad safety rather than at investigating crime), a determination that a particular individual was in fact a railroad employee would have made the purpose inquiry irrelevant to the constitutionality of the ensuing blood test.<sup>81</sup> (After all, employment status was the “suspicion” that made the subject eligible for the search.) Or it would mean that under *United States v. Martinez-Fuerte* (approving seizures of vehicles located within 100 miles of the Mexican border because they were aimed at intercepting illegal border-crossers), a determination that a person’s vehicle was located within 100 miles of the Mexican border would make the purpose of that vehicular seizure constitutionally irrelevant.<sup>82</sup>

That, to repeat, is an absurd reading of the cases. These decisions considered it important to inquire into the actual purpose of the search or the seizure not because the search or the seizure lacked the safeguard of an individualized determination of employment or location (it was simply *assumed* that the targets were indeed railroad employees or located within 100 miles of the Mexican border), but because the sole reason these searches were constitutional was that they were not aimed at investigating crime—and therefore did not require probable cause of criminal wrongdoing (or any other level of criminal suspicion justifying an investigatory search or seizure).<sup>83</sup> Indeed in *Skinner* (blood tests for railroad employees) the Court commented that it would be silly to even

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<sup>80</sup> See *id.* at 2082.

<sup>81</sup> See *Skinner*, 489 U.S. 602.

<sup>82</sup> See *Martinez-Fuerte*, 428 U.S. 543.

<sup>83</sup> “The policies behind the warrant requirement are not implicated in an inventory search, nor is the related concept of probable cause[,] . . . particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations. . . . [I]nventory procedures serve to protect an owner’s property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger,” *Colorado v. Bertine*, 479 U.S. 367, 371–72 (1987).

consider the safeguard of a warrant and its determination of individualized suspicion because “a warrant would do little”<sup>84</sup> to further the traditional aims of the warrant requirement, and “there are virtually no facts for a neutral magistrate to evaluate.”<sup>85</sup> Again: these cases were concerned with motive or purpose not because these searches or seizures were not supported by a warrant or an individualized determination of eligibility (such eligibility was simply presumed), but because the argument for why these searches or seizures were constitutional was that they were not concerned with investigating crime and therefore did not have to be based on the suspicion that their targets committed a crime.

The “special needs” and “administrative searches” cases clearly meant by “individualized suspicion” what the Ninth Circuit opinion meant by it: individualized suspicion *of criminal activity*. In the absence of individualized suspicion that the person committed or was about to commit a crime, these searches and seizures were constitutional only if they were not aimed at investigating crime but at some other legitimate purpose (ensuring railroad safety, deterring drug use in school, nabbing illegal border-crossers) and were not investigating crime under a pretext (the Court explicitly mentioned the absence of a claim of pretext when upholding special needs programs).<sup>86</sup> Indeed if these cases meant by “individualized suspicion” what the *al-Kidd* majority claimed they did, so that an investigatory purpose would be irrelevant to the constitutionality of a search or seizure whenever there was a determination that an individual was the proper subject of a search—be it because of criminal suspicion or because she is a material witness or a railroad employee or a school pupil or within 100 miles of the Mexican border—these programs could become an easy means of subverting regular Fourth Amendment requirements: detentions and searches of criminal suspects could take place without probable cause simply because the target was somehow eligible for some *other* constitutional search or seizure aimed at some non-investigatory purpose.<sup>87</sup>

The proper interpretation of the special needs precedents is the one proffered by the Ninth Circuit: if suspicion of criminal wrongdoing is the

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<sup>84</sup> *Skinner*, 489 U.S. at 622.

<sup>85</sup> *Id.*

<sup>86</sup> *See, e.g., id.* at 621 (“Absent a persuasive showing that the [Federal Railroad Administration's] testing program is pretextual, we assess the FRA’s scheme in light of its obvious administrative purpose.”). *See also Colorado v. Bertine*, 479 U.S. 367, 371 (1987) (“The . . . concept of probable cause [is not implicated] . . . when no claim is made that the protective procedures are a subterfuge for criminal investigations.”).

<sup>87</sup> *See also al-Kidd*, 580 F.3d at 980–81.

basis for the intrusion, motive inquiries are irrelevant to its constitutionality; but if a purpose other than investigating crime is the basis for the intrusion, the intrusion is constitutional only if that purpose is in fact the real basis for the search or the seizure and not a sham meant to cover for criminal investigations. Al-Kidd's lawyers and the Ninth Circuit got it right—notwithstanding Scalia's preposterous declaration that "only an undiscerning reader" could read the precedents differently than him.<sup>88</sup>

There are additional good reasons as to why *Whren* should not govern *al-Kidd*, above and beyond proper reading of precedents. First, while rejecting motive inquiries may make sense in the context of low-ranking police officers, *al-Kidd* dealt with policy-making at the highest level. This meant not only that the alleged misconduct impacted multitudes of searches and seizures (rather than a single one), but also that, unlike in *Whren*, there was no need to "probe [the] subjective intent" of any individual.<sup>89</sup> Policy-making is not a matter of subjective thought but of explicit directives.<sup>90</sup> As the Ninth Circuit put it, "we are not probing into the minds of individual officers at the scene; instead, we are inquiring into the programmatic purpose of a general policy"<sup>91</sup>—a general policy that must be manifested in explicit written or oral directives.

True, *Whren* did not rest merely on the difficulty of establishing subjective intent; indeed, *Whren* insisted that the more important factor in rejecting the motive inquiry was the fact that motive was simply *irrelevant* to the constitutional inquiry ("the Fourth Amendment's concern with reasonableness allows certain actions to be taken . . . whatever the subjective intent").<sup>92</sup> And since it was irrelevant whether a police officer detaining a suspect pursuant to a traffic violation did so solely with an investigatory purpose in mind, it was equally irrelevant—so went the claim—whether the U.S. Attorney General instituted a policy that detained individuals pursuant to the Material Witnesses Statute for the sole purpose of investigating them.

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<sup>88</sup> *Ashcroft*, 131 S. Ct. at 2082.

<sup>89</sup> *Id.* at 2077.

<sup>90</sup> The Court noted that al-Kidd's complaint must demonstrate not only that Ashcroft implemented the policy which al-Kidd claimed he did, but also that his particular arrest was a result of that policy, *id.* at 2083 n.4—a determination that may also necessitate the "subjective" inquiry that was blocked in *Whren*. But if al-Kidd could prove that an official unlawful policy was applied at the time, it seems reasonable to place the burden of proof on the government that his arrest was not conducted pursuant to that unlawful policy. In any case, it would be absurd to block al-Kidd's claim on the ground that even if his constitutional rights were violated, proving it may involve a "subjective" inquiry.

<sup>91</sup> *Al-Kidd*, 580 F.3d at 969.

<sup>92</sup> *Whren*, 517 U.S. at 814.

But the analogy fails for the following fundamental reason: when police officers detain individuals pursuant to probable cause to believe they committed a traffic violation, they are properly enforcing the traffic laws that authorize the detention, even if they do so solely for an investigatory purpose; but when they detain someone pursuant to the Material Witness Statute solely for an investigatory purpose, they do not properly enforce the Material Witness Statute, and the detention is not authorized by the statute.

The issue is one of first principle: can the Material Witness Statute authorize the detention of individuals in cases where there is no intent to use them as witnesses? How do we determine when a statute properly applies, and therefore what it authorizes or requires? That question lay at the heart of al-Kidd's argument before the Supreme Court.

#### IV. STATUTORY INTERPRETATION

Al-Kidd's lawyers argued that if al-Kidd was arrested without the intent to secure his testimony, his arrest could not have been authorized by the Material Witness Statute. The statute, they claimed, allows the government to detain people for the purpose of securing their testimony in criminal proceedings; it does not and cannot authorize the detention of people for investigatory or preventive purposes, even when—in theory—they could qualify as material witnesses under the statute. If the government has no interest in securing a person's testimony, the statute does not apply. In 2005, a federal district court agreed with this rather commonsensical proposition—albeit in dicta.<sup>93</sup>

The claim was the centerpiece of al-Kidd's Fourth Amendment argument before the Supreme Court: “[T]he statute itself authorizes arrests only for the limited purpose of securing testimony,” read the brief, “[i]t does not permit material witness arrests to detain and investigate suspects whom the government lacks probable cause to arrest for a crime.”<sup>94</sup> And this meant, in turn, that al-Kidd's arrest violated the Fourth Amendment: “[A] demonstrated purpose to misuse the statute . . . is directly relevant to the Fourth Amendment analysis”:<sup>95</sup> if the warrant was not authorized by the statute, there could be no constitutional basis for al-Kidd's arrest.

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<sup>93</sup> See *United States v. Awadallah*, 349 F.3d 42, 59 (2003) (dictum) (“it 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”).

<sup>94</sup> Brief for Respondent at 12, *Ashcroft*, 131 S. Ct. 2074 (No. 10-98).

<sup>95</sup> *Id.* at 11–12.

The material witness statute is designed for a singular purpose—to secure testimony. As a matter of both the Fourth Amendment and statutory construction, the government must therefore adhere to that purpose. Otherwise, the government could circumvent the traditional rule barring custodial investigative arrests in the absence of probable cause of wrongdoing.<sup>96</sup>

The government, in response, dedicated much of its brief to the claim that “the statute . . . permits a witness to be detained, regardless of the prosecutor’s motive in seeking detention.”<sup>97</sup> Thus, whether the Material Witness Statute could be read to authorize the detention of individuals never intended to be used as material witnesses was a question that lay at the heart of the arguments submitted to the Court (and was indeed the opening point in al-Kidd’s oral argument).<sup>98</sup>

It was therefore surprising that the opinion issued in May 2011 appeared to be silent on this issue: nowhere was it stated in any explicit manner whether the statute did or did not authorize pretextual arrest warrants. And yet, there is little doubt but that the Court squarely decided it did.

The opinion repeatedly relied on the assumption that al-Kidd was detained pursuant to a *valid* warrant issued under the authority of the Material Witness Statute. The validity of the warrant was even presumed in the Court’s framing of the issue before it.<sup>99</sup> The warrant’s validity was also central, as we saw, to the way in which the Court distinguished away the “special-needs” and “administrative-searches” cases<sup>100</sup> (the warrant supplied the determination of individualized “suspicion”), and also figured prominently in the Court’s summation of its holding.<sup>101</sup> The Court never as

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<sup>96</sup> *Id.* at 42–43.

<sup>97</sup> Reply Brief for Petitioner at 16, *Ashcroft*, 131 S. Ct. 2074 (No. 10-98).

<sup>98</sup> See Transcript of Oral Argument at 21, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (No. 10-98), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-98.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-98.pdf).

<sup>99</sup> *Ashcroft*, 131 S. Ct. at 2079 (“We decide whether a former Attorney General enjoys immunity from suit for allegedly authorizing federal prosecutors to obtain valid material-witness warrants.”). This was a very different formulation than the one appearing in the grant of certiorari (*see cert. granted*, 131 S. Ct. 2074 (Oct. 18, 2010) (No. 10-98)).

<sup>100</sup> *Ashcroft*, 131 S. Ct. at 2081 (“The Government seeks to justify the present arrest on the basis of a properly issued judicial warrant—so that the special-needs and administrative-inspection cases cannot be the basis for a purpose inquiry here.”).

<sup>101</sup> *Id.* at 2085 (“We hold that an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as

much as hinted that the warrant may not have been properly issued under the statute, and in fact expressed explicit disapproval of the view that the Material Witness Statute could not authorize pretextual arrests (a view appearing in the above-mentioned 2005 federal district court opinion).<sup>102</sup> Indeed it is hard to see how the Court could have concluded that the Fourth Amendment was not violated by al-Kidd’s arrest if the arrest warrant was not authorized by the Material Witness Statute.<sup>103</sup>

Nevertheless, a footnote in the opinion did claim that, contrary to an assertion made in Justice Ginsburg’s concurrence, the “validity” of the warrant was in fact not decided by the Court:

The validity of the warrant is not *our* “opening assumption” post, at 2088 (Ginsburg, J., concurring in judgment); it is the premise of al-Kidd’s argument. Al-Kidd does not claim that Ashcroft is liable because the FBI agents failed to obtain a valid warrant. He takes the validity of the warrant as a given, and argues that his arrest nevertheless violated the Constitution because it was motivated by an illegitimate purpose.<sup>104</sup>

What are we to make of this disclaimer? After all, as we saw, al-Kidd strenuously objected to the validity of the warrant, claiming that the statute did not authorize it.<sup>105</sup> Indeed in his reply to the government’s brief—

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unconstitutional on the basis of allegations that the arresting authority had an improper motive.”).

<sup>102</sup> *Id.* at 2083–84 (“A district-court opinion had suggested, *in a footnoted dictum devoid of supporting citation*, that using such a warrant for preventive detention of suspects ‘is an illegitimate use of the statute’—implying (we accept for the sake of argument) that the detention would therefore be unconstitutional.” (emphasis added)). Also note that the Court “accept[ed] for the sake of the argument” the claim that *if* the statute did not authorize the warrant, the arrest would be unconstitutional. The Supreme Court, of course, ended up deciding that the detention *was* constitutional.

<sup>103</sup> The fact that the statute did not authorize the warrant does not automatically mean, of course, that the arrest was unconstitutional. But if the statute did not authorize the arrest, it is hard to think of a constitutional basis for it, given that there was no probable cause to suspect al-Kidd of criminal wrongdoing, and no intent to use him as a witness in any criminal proceeding (according to the allegations of fact which the Court had to accept in this motion to dismiss). *See also supra* note 102.

<sup>104</sup> *Ashcroft*, 131 S. Ct. at 2083 n.3.

<sup>105</sup> See Brief for Respondent at 29–30, *Ashcroft v. al-Kidd* 131 S. Ct. 2074 (2011) (No. 10-98) (“The statute’s text provides that a warrant may issue only where ‘the

where the same preposterous claim was made—al-Kidd stated unequivocally:

[R]espondent does not concede that the warrant was “valid.” Even assuming that the material witness statute’s materiality and impracticability requirements were met (18 U.S.C. 3144), the position of respondent (and the Ninth Circuit) is that both the Fourth Amendment *and* the statute itself prohibit a material witness arrest for the purpose of investigating a suspect, rather than for securing testimony.<sup>106</sup>

How could the Court then claim that “[h]e takes the validity of the warrant as a given?”<sup>107</sup>

The key to understanding that claim is to distinguish between what the Court means by the warrant’s “validity,” and the question of whether the Material Witness Statute authorizes pretextual arrests. Al-Kidd obviously never conceded the latter, but he did concede—for purposes of the question before the Supreme Court—that the falsities and omissions in the warrant application did not invalidate the warrant. (To be precise, al-Kidd did not concede that point either, but that aspect of his claim was not accepted for review by the Supreme Court.) Thus, when the Court claimed that al-Kidd “takes the validity of the warrant as a given” it did *not* mean that al-Kidd conceded that the Statute could authorize pretextual warrants: that claim was simply rejected on the merit.

A similar (unwitting) obfuscation occurred in Justice Kennedy’s opinion.<sup>108</sup> Kennedy joined the majority opinion in full, but also wrote a concurring opinion where he stated:

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testimony of a person is material *in a criminal proceeding*’ and it may become ‘impracticable to secure *the presence of the person* by subpoena’ in that criminal proceeding, 18 U.S.C. § 3144 (emphasis added). These textual requirements belie petitioner’s contention that the government need not intend actually to secure testimony for a criminal proceeding and can simply be seeking to investigate the witness himself. Indeed, if petitioner’s reading of the materiality and impracticability requirements were correct, then the government could inform a magistrate judge, under oath, that it believed it would be impracticable to secure the witness’s “presence’ at the proceeding—even if the government had no intention to call the witness at any such proceeding. That is not a commonsense interpretation of the statute’s materiality and impracticability requirements.”)

<sup>106</sup> Brief in Opposition at i, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (No. 10-98), 2010 WL 3777221, at i.

<sup>107</sup> *Ashcroft*, 131 S. Ct. at 2083 n.3.

The Court's holding is limited to the arguments presented by the parties and leaves unresolved whether the Government's use of the Material Witness Statute in this case was lawful. See *ante*, at 2083 (noting that al-Kidd "does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant"). . . . [T]he Court is correct to address only the legal theory put before it, without further exploring when material witness arrests might be consistent with statutory and constitutional requirements.<sup>109</sup>

That statement—like the majority's own—does not refer to the claim that there is no statutory authority for a pretextual warrant.<sup>110</sup> Indeed Kennedy clearly believed that the decision addressed the "legal theory put before it," and the claim that there was no statutory authority for the warrant was, of course, a central part of al-Kidd's theory.

In short, notwithstanding some confusing statements to the contrary, a careful reading of the opinion shows that the Court rejected al-Kidd's argument that the Material Witness Statute could not have authorized a pretextual arrest warrant. Unfortunately that point was apparently lost on the three liberal Justices. The three joined two

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<sup>108</sup> Though note that Justice Kennedy's concurrence was joined by all the justices who refused to join the Fourth Amendment ruling and by none of the justices who did join it.

<sup>109</sup> *Id.* at 2085–86 (Kennedy, J., concurring).

<sup>110</sup> *Id.* The opinion continued: "The scope of the statute's lawful authorization is uncertain. For example, a law-abiding citizen might observe a crime during the days or weeks before a scheduled flight abroad. It is unclear whether those facts alone might allow police to obtain a material witness warrant on the ground that it 'may become impracticable' to secure the person's presence by subpoena. The question becomes more difficult if one further assumes the traveler would be willing to testify if asked; and more difficult still if one supposes that authorities delay obtaining or executing the warrant until the traveler has arrived at the airport. . . . The typical arrest warrant is based on probable cause that the arrestee has committed a crime; but that is not the standard for the issuance of warrants under the Material Witness Statute. . . . If material witness warrants do not qualify as 'Warrants' under the Fourth Amendment, then material witness arrests might still be governed by the Fourth Amendment's separate reasonableness requirement for seizures of the person. See *United States v. Watson*, 423 U.S. 411 (1976). Given the difficulty of these issues, the Court is correct to address only the legal theory put before it, without further exploring when material witness arrests might be consistent with statutory and constitutional requirements." *Id.*

concurring opinions, by Justices Ginsburg and Sotomayor, which criticized the majority for simply *assuming* (but not deciding) that the statute could authorize an arrest warrant in the absence of any intent to use al-Kidd as a witness.<sup>111</sup> Indeed Justice Ginsburg went so far as to accuse the Court of making that assumption under the false pretense that al-Kidd conceded that point (“[n]owhere in al-Kidd’s complaint is there any concession that the warrant gained by the FBI agents was validly obtained. But cf. *ante*, at 2083, n.3 (majority opinion)”<sup>112</sup>).

Justice Ginsburg is of course correct that al-Kidd never conceded the validity of the warrant so far as statutory authority was concerned; but contra to her assertion, the Court actually decided that issue (albeit without defending it explicitly). Indeed to claim otherwise is to accuse the Court of momentous judicial misconduct: our entire adversarial system is based on accurate representation of litigants’ claims. If Justice Ginsburg is right and the majority simply lied about al-Kidd’s argument to the Court, then Ginsburg’s allusion to this matter—which appeared in a footnote—is itself a disgrace for making a mere passing comment on such a major breach of judicial duty.

No, the better interpretation is not to attribute dishonesty to the Court but to realize that the opinion decided, rather than assumed, that the Material Witness Statute could authorize the arrest of individuals not intended as witnesses (so long as its materiality and unavailability requirements were met).

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<sup>111</sup> See *Ashcroft*, 131 S. Ct. at 2090 (Sotomayor, J., concurring) (“The majority assumes away these factual difficulties . . .”); *id.* at 2087 (Ginsburg, J., concurring) (“In addressing al-Kidd’s Fourth Amendment claim against *Ashcroft*, the Court assumes at the outset the existence of a *validly obtained* material witness warrant”). The two concurring opinions by Justices Ginsburg and Sotomayor raised explicit doubts about the possibility that the Material Witness Statute could authorize arrests in the absence of intent to use the arrestee as a witness. Justice Sotomayor wrote it was “unclear” whether “the affidavit supporting the warrant was sufficient” because, among other things, “its failure to disclose that the Government had no intention of using al-Kidd as a witness at trial may very well have rendered the affidavit deliberately false and misleading. Cf. *Franks v. Delaware*, 438 U. S. 154, 155–156 (1978).” *Id.* at 2090 (Sotomayor, J., concurring). Justice Ginsburg similarly questioned whether a warrant was “‘validly obtained’ when the affidavit on which it is based fails to inform the issuing Magistrate Judge that ‘the Government has no intention of using [al-Kidd as a witness]’ . . . .” *Id.* at 2087 (Ginsburg, J., concurring) (brackets in original). This somewhat contrived way of putting things amounts in practice to the same thing—namely, doubts that the Material Witness Statute could authorize the arrest of people not intended to be used as witnesses.

<sup>112</sup> *Id.* at 2087 n.1 (Ginsburg, J., concurring).

This interpretation is superior not only because it does not rely on a claim of dishonesty and dissimulation, but also because it coheres very well with the judicial philosophy of the opinion's author. Indeed the important question of statutory construction underlying the case may have eluded a number of Justices, but it could not have eluded Justice Scalia—whose fundamentalist judicial philosophy naturally leads to the conclusion that the Material Witness Statute could authorize pretextual arrests.

## V. THE JURISPRUDENTIAL DEBATE

The question of statutory construction involved in the case is a familiar one.<sup>113</sup> It is a variation of the debate pitting those who regard statutory purpose or legislative intent as an indispensable factor in statutory interpretation<sup>114</sup> against those who think that analyzing statutory purpose or legislative intent allows for too much judicial discretion (indeed manipulation), and should therefore be virtually eliminated as a judicial consideration.<sup>115</sup> As an alternative to the use of legislative purpose they propose textualism: forget about purpose or intent (or anything else, for that matter) and concentrate exclusively on the literal text.<sup>116</sup> This methodology—so goes the claim—allows for a more objective, less discretionary and therefore less politicized form of legal interpretation, thus reducing the ability of judges to impose their ideological preferences on the legal materials.<sup>117</sup> Justice Scalia is, as we know, a leading proponent of this approach. His advocacy of clear textual commands as the only relevant consideration appears regularly in his scholarly works<sup>118</sup> and in his judicial output.<sup>119</sup>

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<sup>113</sup> One of its most famous manifestations is the Hart-Fuller debate in the Harvard Law Review. Compare H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) with Lon Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

<sup>114</sup> See generally, e.g., Fuller, *supra* note 113; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

<sup>115</sup> See generally, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

<sup>116</sup> See generally, *supra* note 6.

<sup>117</sup> *Id.*

<sup>118</sup> See, e.g., SCALIA, *supra* note 115, at 24 (“words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible”).

<sup>119</sup> See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994) (Scalia, J.) (judges “are bound, not only by the ultimate purposes Congress has

The claim that the Material Witness Statute can authorize pretextual arrests is in lockstep with this textualist approach. Simply put, just as legislative purpose should be irrelevant to the application of statutes, so should executive purpose be irrelevant. Indeed the government, well aware of Justice Scalia's position, made that very point in its Supreme Court brief in *al-Kidd*:

Respondent . . . contends (Br. 24-31) that Section 3144 precludes the use of a material-witness warrant for the subjective purpose of investigation . . . . Respondent arrives at his reading of the statute with little discussion of the statutory language, which contains two requirements: that the testimony be material and that securing the presence of the witness be impracticable. 18 U.S.C. 3144. Those are objective criteria, and nothing in the statute calls for an inquiry into the motive or purpose of the prosecutor who seeks the warrant.

Rather than focus on the text of the statute, respondent attempts to demonstrate (Br. 27) that Congress did not intend "to turn the law into a detention and investigation tool." Congress provided an objective standard for obtaining a material-witness warrant, however, and that standard, on its face, does not turn upon the prosecutor's alleged motive. Cf. *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." [opinion by Justice Scalia]).<sup>120</sup>

The claim sounds absurd: the Material Witness Statute, claimed the government, authorizes the arrest of people who are not intended to serve

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selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes"); Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (Scalia, J.) ("[A]ssuming . . . that Congress did not 'envisio[n] that the [Americans with Disabilities Act] would be applied to state prisoners,' in the context of an unambiguous statutory text that is irrelevant." (second alteration in original) (citation omitted)); W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98–99 (1991) (Scalia, J.) ("[T]he purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President." (citation omitted) (final disposition later superseded by statute)).

<sup>120</sup> Reply Brief of Petitioner at 15, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (No. 10-98) (brackets added).

as witnesses. Al-Kidd’s brief underlined that absurdity by asking what judge would sign a Material Witness Warrant that disclosed such circumstances.<sup>121</sup> But the Supreme Court accepted it.

Indeed notwithstanding his repetitive claim to the contrary,<sup>122</sup> over the years Justice Scalia has repeatedly embraced unreasonable legal solutions (as have many of his fellow textualists).<sup>123</sup> Here are two prime examples—the first taken from a case decided eleven months before *al-Kidd*, the second from a case involving another legally dubious action by Attorney General John Ashcroft.

*Hamilton v. Lanning* involved an interpretation of the federal Bankruptcy Code.<sup>124</sup> In calculating the payments that bankrupt debtors must make, the Code requires a determination of debtors’ future earnings.<sup>125</sup> A 2005 amendment to the Code, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, defined a debtor’s future earnings as “the average monthly income . . . during the 6-month period ending on [one of two specified dates],” minus certain specified expenses.<sup>126</sup> The case before the Supreme Court involved a debtor who received an exceptional one-time payment during the statutory six-month period.<sup>127</sup> As a result, the statutory formula yielded a projected monthly income that was more than double the actual one, which translated into monthly payments that the debtor clearly could not make.<sup>128</sup> The Supreme Court held that the calculated expected income needed to be adjusted, notwithstanding the clear statutory language: “the method outlined [in the statutory formula] should be determinative in most cases,” said the Court, “but . . . where significant changes in a debtor’s financial circumstances are

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<sup>121</sup> Brief for Respondent at 29–30, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (No. 10-98).

<sup>122</sup> Justice Scalia wrote on various occasions that he subscribes to the “absurdity doctrine,” which allows judges to reject absurd results even if these are mandated by the statutory text. *See, e.g.*, *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 449 n.4 (2002) (Scalia, J., dissenting) (citing the rule that “a statute should not be interpreted to produce absurd results”).

<sup>123</sup> A textualist Michigan Supreme Court, for example, made a number of absurd decisions. *See, e.g.*, *Devillers v. Auto Club Ins. Ass’n.*, 473., 562 (Mich. 2005) (an insured must sue or lose her rights for payments owed under insurance policy even before the insurer denied the claim); *Cameron v. Auto Club Ins. Ass’n.*, 718 N.W.2d 784 (Mich. 2006) (a statute tolling the time for minors to sue does not also toll their right to damages from their lawsuits).

<sup>124</sup> *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010).

<sup>125</sup> *Id.* at 2469; *see* 11 U.S.C. §§ 1306(b), 1321, 1322(a)(1), 1328(a).

<sup>126</sup> 11 U.S.C. § 101(10A)(A).

<sup>127</sup> *Hamilton*, 130 S. Ct. at 2470.

<sup>128</sup> *Id.*

known or virtually certain, a bankruptcy court has discretion to make an appropriate adjustment.”<sup>129</sup>

Justice Scalia alone dissented from that decision. “The Court . . . can arrive at its compromise construction only by rewriting the statute,” he wrote,<sup>130</sup> and added: “The Court says [that the formula] makes no sense unless the debtor is actually able to pay an amount equal to his projected disposable income. But it makes no sense only if one assumes that the debtor is entitled to [bankruptcy protection].”<sup>131</sup> That assumption, said Scalia, was wrong: if the debtor cannot make the payments required under the bankruptcy program, then she is simply not entitled to file for bankruptcy. In other words, if textualist construction results in denial of bankruptcy protection because of a fluke, so be it.

The same methodology also led Justice Scalia to dissent in *Gonzales v. Oregon*, where Attorney General John Ashcroft resorted to shenanigans similar to those alleged in *al-Kidd* when attempting to block Oregon’s Death With Dignity Act (“ODWDA”).<sup>132</sup> The Act exempts from civil and criminal liability physicians who, following the strict requirements of the statute, prescribe lethal doses of drugs to terminally ill patients who request them.<sup>133</sup> John Ashcroft, a religious conservative who opposed ODWDA, issued a directive under the Controlled Substances Act (“CSA”)—a 1970 federal statute aimed at combatting drug use and addiction—declaring that Oregon physicians who prescribe drugs under ODWDA do not do so “for a legitimate medical purpose” and their license to practice medicine therefore could be revoked.<sup>134</sup> The directive was challenged as unlawful, and the U.S. Supreme Court agreed: the CSA did not allow the Attorney General to prohibit Oregon doctors from prescribing regulated drugs for use in physician-assisted suicide.<sup>135</sup>

Justice Scalia, joined by Justice Thomas and Chief Justice Roberts, dissented:

We have repeatedly observed that Congress often passes statutes that sweep more broadly than the main problem they were designed to address. . . . “[I]t is ultimately

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<sup>129</sup> *Id.* at 2469.

<sup>130</sup> *Id.* at 2479 (Scalia, J., dissenting).

<sup>131</sup> *Id.* at 2481.

<sup>132</sup> *Gonzales v. Oregon*, 546 U.S. 243 (2006).

<sup>133</sup> ORE. REV. STAT. § 127.800 et seq. (2003).

<sup>134</sup> Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56607-08 (Nov. 9, 2001) (was to be codified at 21 C.F.R. pt. 1306).

<sup>135</sup> *Gonzales*, 546 U.S. at 274–75.

the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>136</sup>

That the purpose of the Controlled Substances Act was to combat drug addiction was irrelevant for its applicability to the prescription of drugs for terminally ill patients wishing to control the time and manner of their death. The only thing that mattered was the text of the statute; and that text, said Scalia, could bear the meaning that Ashcroft gave it.

The legal literature contains extensive debates over the textualist approach. In truth, these debates should have ended long ago. Lon Fuller, for one, had already demonstrated the absurdity of the textualist position in the 1950’s.<sup>137</sup> Justice Scalia’s opinions are more grist for the mill: a statute targeting drug addiction is used to block Oregon’s Death with Dignity Act; calculations of debtors’ future income are allowed to result in denial of bankruptcy protection; and a statute allowing the exceptional detention of witnesses authorizes the detention of criminal suspects. This is the distorted legal universe inhabited by Justice Scalia and his fellow judicial fundamentalists. But then again, such absurdities mean little to these fundamentalists: indeed some of them explicitly claim that judges have a duty to adopt absurd solutions if that’s where the fundamentalist methodology leads.<sup>138</sup> Such absurd results, they say, should be left to be corrected by the legislative process (no matter the harm caused in the meantime, or whether they actually ever get corrected).

## VI. EMASCULATING FOURTH AMENDMENT PROTECTIONS

The *al-Kidd* decision is not only a paragon of poor craftsmanship, as well as a shining example of judicial fundamentalism; it is also a real threat to Fourth Amendment protections. Its guiding principle—that the state of mind of executive officers is irrelevant for the constitutionality of

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<sup>136</sup> *Id.* at 288 (Scalia, J., dissenting) (citation omitted).

<sup>137</sup> It would mean, he said, that an ordinance forbidding “vehicles” from entering a municipal park also forbade the erection of a World War II memorial consisting of a World War II truck; and that an overworked professional dozing on a subway bench was guilty of an ordinance forbidding people from sleeping in subway stations, whereas a homeless person lying supine but awake was innocent. *See Fuller, supra* note 113, at 499.

<sup>138</sup> *See, e.g.,* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2393 (2003) (calling for the abandonment of the absurdity doctrine). *See also* *Cameron v. Auto Club Ins. Ass’n.*, 718 N.W.2d 784, 790–91 (Mich. 2006) (denying the claim that judges should reject absurd results).

searches and seizures (“the Fourth Amendment,” proclaimed the opinion, “regulates conduct rather than thoughts”<sup>139</sup>)—is at odds both with precedent and with sound Fourth Amendment doctrine.

Examples abound. In *Franks v. Delaware*, the Supreme Court recognized that false warrant applications made “knowingly and intentionally, or with reckless disregard for the truth” could invalidate the ensuing warrants.<sup>140</sup> Thus, the very same warrant application could produce a valid or an invalid warrant, depending on the officer’s state of mind. In *Hill v. California*, the Supreme Court held that even where there is no probable cause for an arrest, an arrest and a subsequent search incident to arrest are constitutional if conducted by officers who reasonably and in good faith mistook that individual for another.<sup>141</sup> The constitutionality of these actions revolved, once again, around what transpired in the arresting officers’ minds: if those officers knew they were detaining the wrong individual, the arrest would have been unconstitutional no matter how objectively reasonable the contrary belief would have been.

Similarly, in *Maryland v. Garrison* the Supreme Court held that officers who searched the wrong apartment did not violate the Fourth Amendment if they reasonably and actually believed that they were searching the premises for which they held a search warrant.<sup>142</sup> Indeed the Court has stated that the very existence of probable cause may depend on the personal experiences of the police officers involved.<sup>143</sup> In fact, the Fourth Amendment itself puts stock in officers’ thoughts: by requiring that warrant applications be “supported by Oath or affirmation,” the Amendment makes clear that the honesty of police officers’ representations is a constitutional requirement.<sup>144</sup>

Additionally, a long line of cases makes the operation of the Fourth Amendment’s exclusionary rule dependent on officers’ thoughts (for example, the cases dealing with the “good faith” exception).<sup>145</sup> A recent Supreme Court decision went so far as to hold that the exclusionary rule

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<sup>139</sup> *Ashcroft*, 131 S. Ct. at 2080.

<sup>140</sup> *Franks v. Delaware*, 438 U.S. 154, 155 (1978).

<sup>141</sup> *Hill v. California*, 401 U.S. 797, 803–04 (1971) (“[T]he officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But . . . the officers’ mistake was understandable and the arrest a reasonable response to the situation facing them at the time.”).

<sup>142</sup> *Maryland v. Garrison*, 480 U.S. 79, 88 (1987) (“Prior to the officers’ discovery of the factual mistake, they perceived McWebb’s apartment and the third-floor premises as one and the same . . .”).

<sup>143</sup> *Ornelas v. United States*, 517 U.S. 690, 699–700 (1996).

<sup>144</sup> U.S. CONST. amend. IV.

<sup>145</sup> *See, e.g., United States v. Leon*, 468 U.S. 897, 914, 919–23 (1984).

applies only to instances involving “deliberate, reckless, or grossly negligent conduct” on the part of the police.<sup>146</sup> Whether an officer acted “deliberately or recklessly” is, of course, not a matter of “conduct” but of “thought.”

True, a number of these cases declared that the inquiry is “objective”: “[t]he pertinent analysis,” proclaimed one such typical pronouncement, “is objective, not an ‘inquiry into the subjective awareness of arresting officers.’”<sup>147</sup> But as the Court was quick to concede, this “objective” inquiry does depend on “a particular officer’s knowledge and experience . . .”<sup>148</sup> Like it or not, the inquiry is about officers’ state of mind. The insistence on “objectivity” may come to guarantee that the inquiry does not deteriorate into mere psychological speculation. But *al-Kidd* certainly did not seek to support his allegations with psychological speculation but with verifiable facts regarding Ashcroft’s executive policy (public declarations, executive orders, etc.). In any case, if an arrest can become constitutional, despite the absence of probable cause, because the officer acted in good faith, why can’t an arrest turn unconstitutional because the Attorney General acted in bad faith?

The *al-Kidd* decision joins a number of recent cases that, together, leave Fourth Amendment protections in tatters. Among other things, current doctrine allows the police to arrest individuals for the pettiest of crimes if they have probable cause to believe a crime has been committed (seatbelt violation, jaywalking, driving with an inoperable headlight, riding a bicycle without an audible bell, violating a dog leash law)<sup>149</sup>—even if statutory law forbids an arrest for such a petty offense.<sup>150</sup> And once arrested, a person can be subjected to an invasive strip search, no matter the cause for the arrest (the suspect can be stripped naked while an officer examines her entire body for scars and tattoos and then peers into her mouth, ears, nose, hair, scalp, armpits, anus and genitals).<sup>151</sup> (Again, the Supreme Court authorized this procedure for people arrested for dog leash violations.<sup>152</sup>)

When litigants voiced concern that officers will use common minor violations, including ubiquitous traffic violations, as pretexts for such invasive searches and seizures, the Court brushed these arguments aside:

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<sup>146</sup> *Herring v. United States*, 555 U.S. 135, 144 (2009).

<sup>147</sup> *Id.* at 145.

<sup>148</sup> *Id.* at 145.

<sup>149</sup> *See generally* *Atwater v. Lago Vista*, 532 U.S. 318 (2001).

<sup>150</sup> *Virginia v. Moore*, 553 U.S. 164 (2008).

<sup>151</sup> *Florence v. Bd. of Chosen Freeholders of Burlington*, 132 S. Ct. 1510, 1514 (2012).

<sup>152</sup> *Id.* at 1527 (Breyer, J., dissenting).

The dissent insists that a minor traffic infraction “may often serve as an excuse” for harassment . . . [and that] the rule that we recognize today . . . “carries with it grave potential for abuse.” Post, at 371, 372. But the dissent’s own language (e.g., “may,” “potentially”) betrays the speculative nature of its claims. Noticeably absent from the parade of horrors is any indication that the “potential for abuse” has ever ripened into a reality.<sup>153</sup>

But with *Whren* and *al-Kidd* it does not even matter, so far as the Fourth Amendment is concerned, if these concerns “ripen into a reality”: officers and executive officials are explicitly authorized to make pretextual searches and seizures.<sup>154</sup> Indeed if *al-Kidd* is taken at its word, officials can search people’s homes for evidence of a crime if a magistrate finds that their home is eligible for a fire inspection.<sup>155</sup> Given the reasoning of the Court, it may not even violate the Fourth Amendment for the police to arrest or search people for punitive or vindictive purposes, so long as there is some “objective” basis for the search or the arrest.<sup>156</sup> In fact, last June the Court held that Secret Service agents were immune from lawsuit for arresting a man for his expressed opposition to the Iraq war, since there was probable cause for his arrest.<sup>157</sup> The Court did not even stop to consider whether such a vindictive, retaliatory arrest comported with the Fourth Amendment: it simply assumed that it did, and only granted review over the question of whether the arrest violated the First Amendment (the Court then concluded it didn’t).<sup>158</sup>

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<sup>153</sup> *Atwater*, 532 U.S. at 353 n.25. But see Charles L. Becton, *The Drug Courier Profile: “All Seems Infected That th’ Infected Spy, as All Looks Yellow to the Jaundic’d Eye”*, 65 N.C. L. REV. 417, 427 (1987) (linking racial profiling to pretextual searches and seizures).

<sup>154</sup> See *Whren*, 517 U.S. 806.

<sup>155</sup> See *Camara v. Mun. Court of S.F.*, 387 U.S. 523 (1967) (authorizing entry of homes for purposes of safety inspection based on area-wide evaluation of such need).

<sup>156</sup> See *Ashcroft*, 131 S. Ct. at 2085 (2011).

<sup>157</sup> See *Reichle v. Howards*, 132 S. Ct. 2088 (2012).

<sup>158</sup> “The questions presented are: . . . 2. Whether the Tenth Circuit erred by denying qualified and absolute immunity to petitioners where probable cause existed for respondent’s arrest, the arrest comported with the Fourth Amendment, it was not (and is not) clearly established that *Hartman* does not apply to First Amendment retaliatory arrest claims, and the denial of immunity threatens to interfere with the split-second, life-or-death decisions of Secret Service agents protecting the President and Vice President.” Petition for Certiorari at i, *Reichle v. Howards*, 634 F.3d 1131 (10th Cir. 2011) (No. 11-262), 2011 WL 3809375 at i.

## CONCLUSION

The *al-Kidd* decision is a natural outgrowth of Justice Scalia's judicial philosophy. And that judicial philosophy is, of course, equally applicable to other bodies of law revolving around the purposes or motives of legislative or executive officials—from the First Amendment to Equal Protection guarantees to issues of federalism.<sup>159</sup> It remains to be seen whether, and to what extent, these doctrines would also fall prey to Scalia's interpretive dogma.

The problem with this sort of fundamentalism—like the problem with political or religious fundamentalism—is its reductive approach to complex social and political problems. Judicial fundamentalism wants lawyers and judges to reach legal conclusions while closing their eyes to considerations that everybody considers relevant and important to legal requirements—like fairness, justice, efficiency, and, of course, the purpose of a statute or an executive action. No one denies that purpose, fairness, justice, and efficiency are relevant and important factors in using the coercive power of the state; yet judicial fundamentalists call for banishing these factors from legal decision-making, and for leaving them exclusively to the consideration of legislative or executive officials.

Why? What's behind this impoverished approach to judicial reasoning? The wish to eliminate judicial discretion is, of course, the immediate cause: conservative jurists like Scalia embrace textualism as a way to curb what they see as an elitist liberal judiciary bent on reading its liberal ideology into the law. But the deliberate impoverishment of judicial decision-making has deeper intellectual roots.

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<sup>159</sup> See, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general. See, e.g., *Bd. of Ed. of Westside Community Sch. (Dist. 66) v. Mergens*, 496 U.S. 226, 248 (1990) (plurality opinion); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 106–107 (1968); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963); *Everson v. Bd. of Ed. of Ewing*, 330 U.S. 1, 15–16 (1947).”); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986); *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 471 n.15 (1981); See generally *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 861 (2005) (“[G]overnmental purpose is a key element of a good deal of constitutional doctrine . . .”).

In *The Open Society and Its Enemies*, Karl Popper explored the antagonism between an “open society” characterized by commitment to answering social, moral, and political questions through critical rational deliberations, and a “closed society” marked by commitment to unquestioned authority and political totalitarianism.<sup>160</sup> Popper—who traces the antagonism back to Athenian democracy and its enemies—locates the essence of the conflict in the antagonists’ approach to *reason*: “The great difference [between the two camps] is the [belief in the] possibility of rational reflection . . . .”<sup>161</sup> The proponents of the closed society, who advocate strict obedience to authority, exhibit deep skepticism toward rationality in the domains of politics and ethics: “[A]uthoritarian or conservative principles are usually an expression of ethical nihilism; that is to say, of an extreme moral scepticism, of a distrust of man and of his possibilities.”<sup>162</sup> The ethical and political norms endorsed by the “closed society” camp are therefore derived from authority and tradition, as opposed to norms formulated in rational deliberations.

Such outlook, it seems to me, is reflected in Justice Scalia’s take on legal decision-making. Scalia is by no means an ethical nihilist: to the contrary, he is a moralist who considers purely moralistic legislation (like the prohibition of homosexual sodomy or adultery or even masturbation) perfectly constitutional.<sup>163</sup> But this moralistic position, with its roots in religion and tradition, is similarly rooted in deep skepticism over the possibility of objectively rational deliberations on matters of social policy and morality.<sup>164</sup>

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<sup>160</sup> KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES*, Vol. I (4th ed. 1963).

<sup>161</sup> *Id.* at 1732.

<sup>162</sup> *Id.* at 72; *see also* KARL R. POPPER, *CONJECTURES AND REFUTATIONS* 6 (2d ed. 1962) (“*Man can know: thus, he can be free.* This is the formula which explains the link between epistemological optimism and the idea of liberalism. This link is paralleled by the opposite link. Disbelief in the power of human reason, in man’s power to discern the truth, is almost invariably linked with distrust of man. Thus epistemological pessimism is linked, historically, with a doctrine of human depravity, and it tends to lead to the demand for the establishment of powerful traditions and the entrenchment of a powerful authority which would save man from his folly and wickedness . . . . [W]e can interpret traditionalism as the belief that, in the absence of an objective and discernible truth, we are faced with the choice between accepting the authority of tradition, and chaos; while rationalism has, of course, always claimed the right of reason and of empirical science to criticize, and to reject, any tradition, and any authority, as being based on sheer unreason or prejudice or accident.”).

<sup>163</sup> *See* *Lawrence v. Texas*, 539 U.S. 558, 585–605 (2003) (Scalia, J., dissenting).

<sup>164</sup> *See, e.g.*, ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 17–18 (1997) (“[U]nder the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires . .

It may sound unfair—perhaps even paradoxical—to accuse textualism of authoritarian affinities, since the very justification of textualism is its purported fidelity to democracy: textualists claim that non-textualist adjudication usurps the role of elected representatives by legislating from the bench, and that textualism is therefore the one truly democratic method of legal interpretation.<sup>165</sup> But the fundamentalists’ declared fidelity to democracy need not mean, of course, that their position is actually faithful to it. (Conversely, as Popper reminds us, Socrates’ alleged opposition to democracy leaves intact his exemplification of the democratic spirit of open and critical inquiry.<sup>166</sup>)

Judicial fundamentalism is rooted in skepticism toward judicial rationality in matters of politics and morality, and such skepticism, claimed Karl Popper, has historically and intellectually aligned itself with the forces of authoritarianism against the forces of freedom. Popper’s observation strikes me as intuitively correct and also applicable to Justice Scalia and his ideological allies: there is an authoritarian streak to their judicial fundamentalism—both to its decision-making process and (as *al-Kidd* amply demonstrates) to the substantive decisions it manages to make.

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. . . When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant* . . . your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean—which is precisely how judges decide things under the common law . . .”); Antonin Scalia, *Originalism: the Lesser Evil*, 57 U. CINN. L. REV. 849, 863 (1989) (“Now the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law . . . . Nonoriginalism, which under one or another formulation invokes ‘fundamental values’ as the touchstone of constitutionality, plays precisely to this weakness. It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are ‘fundamental to our society.’”).

<sup>165</sup> See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

<sup>166</sup> See POPPER, *supra* note 160. Popper offers a reinterpretation of Socrates, which depicts Plato’s description of Socrates as an opponent of democracy as a misrepresentation and a great betrayal of the Master.