
ESSAY

WHAT HATH 9/11 WROUGHT?

ARNOLD H. LOEWY¹

There was a time when this country took the Fourth Amendment seriously. Indeed, even today outside of airports we arguably still do. For example, in recent years, the Court has held that (1) when a car is stopped, the driver *and all of its passengers* are seized, and (2) if the seizure is unlawful, the passenger can challenge the unlawful seizure by excluding any evidence obtained from a subsequent search.² And, even more recently, the Court has invalidated a search of an automobile incident to an arrest in the absence of reason to believe that evidence relating to the crime of arrest would be found in the car.³ In so holding, the Court significantly retrenched from (some would say overruled) its prior *New York v. Belton* decision, in which it had held, seemingly without limit, that a search of the passenger compartment of a car driven or occupied by the arrestee would be subject to search.⁴

Of course, despite these cases, even apart from airport searches, the Court has hardly been overly friendly to Fourth Amendment con-

¹ George R. Killam, Jr. Chair of Criminal Law, Texas Tech University School of Law.

² See *Brendlin v. California*, 551 U.S. 249, 255-56 (2007).

³ *Arizona v. Gant*, 556 U.S. 332, 335 (2009).

⁴ 453 U.S. 454, 462-63 (1981). Subsequent to writing this article, the Supreme Court decided *United States v. Jones*, wherein it unanimously invalidated the practice of unwarranted installation and unlimited monitoring of a GPS system on a suspect's car. *United States v. Jones*, 132 S.Ct. 945 (2012). While the Court was badly split on the question of whether it was the installation or the monitoring that created the constitutional problem, the Court was unanimous in the conclusion that one or both created a constitutional problem. See Arnold H. Loewy, *United States v. Jones: Return to Trespass – Good News or Bad*, __ Miss. L.J. __ (forthcoming 2012).

cerns.⁵ In the very first *Elon Law Review*, I argued that post 9/11 cases such as *Hiibel v. Sixth Jud. Dist. Ct. of Nev.* (requiring one to identify himself to a police officer with reasonable suspicion, even when the stopped person does not understand why he is being asked for identification, is not a violation of the Fourth Amendment),⁶ *Scott v. Harris* (deadly force may be used to stop a reckless driver fleeing from the police),⁷ and *Hudson v. Michigan* (the exclusionary rule does not apply to a knock and announce violation)⁸ were examples of a Court overly influenced by 9/11.⁹

Since then, I have rethought those cases and concluded that I may have been too quick to blame (or credit, depending on your perspective) 9/11. In a recent article in the *Mississippi Law Journal*, I concluded that *Hiibel* probably was attributable to 9/11, *Harris* may have been partially attributable to 9/11 and partially attributable to other factors, and that *Hudson* most likely was attributable to other factors, namely the Court's longtime desire to substantially dismantle the exclusionary rule.¹⁰

But, if the truth be known, these issues are relatively minor compared to what is in fact going on at airports these days. Let us begin by looking at the way things used to be by examining a case from a bygone era, *Florida v. Royer*.¹¹ *Royer*, which seems so quaint today, involved a suspicious, young, casually dressed man, who flew under an assumed name, paid for his ticket in cash, carried two heavy American Tourister bags, and appeared extremely nervous.¹² The Court, believing that this constituted reasonable suspicion but not probable cause, invalidated his consent to search because he had been held for an unreasonably long time (fifteen minutes).¹³ Consequently the drugs found in his suitcase were inadmissible.¹⁴ Thus, his conviction was reversed.¹⁵

⁵ See *infra* notes 6-9 and accompanying text.

⁶ 542 U.S. 177, 186-87 (2004).

⁷ 550 U.S. 372, 386 (2007).

⁸ 547 U.S. 586, 599-602 (2006).

⁹ See Arnold H. Loewy, *Search and Seizure in a Post-9/11 World*, 1 ELON L. REV. 181, 183 (2009).

¹⁰ See Arnold H. Loewy, *Rethinking Search and Seizure in a Post-9/11 World*, 80 MISS. L.J. 1507, 1507-09 (2011).

¹¹ 460 U.S. 491 (1983).

¹² *Id.* at 493-94.

¹³ *Id.* at 507-08.

¹⁴ *Id.*

¹⁵ *Id.*

Now let us fast forward to 2012. If the Drug Enforcement Agency wanted to search Royer's suitcase, all they would have to do (I suppose) is ask the Transportation Security Administration to search it. After all, today the TSA warns people not to lock their suitcases lest the TSA will be required to break the lock when (if) they, in their sole discretion, decide to search the suitcase.¹⁶

Well, how should we feel about this secure new world? While I certainly have my reservations about it, I do think that notice helps. That is, because I now know that my checked (or carry-on) luggage is subject to being searched, I would not put anything in it that I would not want a stranger to see. I am still not completely happy about it because I can be reasonably sure that the suitcase I so neatly packed (or more accurately, that my wife so neatly packed) will not be quite so neat once the TSA folks get their hands all over it. Nevertheless, I am inclined to think that the importance of overall safety may be worth the personal inconvenience of being compelled to allow the search (though I remain open to being persuaded to the contrary). Similarly, I am inclined to support most of the TSA screening. I do have reservations about some of the rules, however. As I have noted elsewhere, France, from whence the notorious shoe bomber, Richard Reid, departed, does not require one to remove shoes when boarding an airplane.¹⁷ Of course, one could argue that we are right and they are wrong, even though to the best of my knowledge there has never been another attempted shoe bombing, even from airports that do not require shoe removal.

Similarly, as I have also recounted elsewhere, some of the distinctions as to what can and cannot be carried onto a plane are downright arbitrary: freezer packs to keep food cold, no; a bag of frozen peas to keep food cold, yes. Soft cheese, yes or no (it has gone both ways with me) depending on the proclivities of the TSA agent; bottled water, no (even if you take a sip before boarding). Toothpaste (other than mini-sized), no.¹⁸ Frankly, while screening for really dangerous stuff may make us safer, prohibiting much of the minutiae does not.

¹⁶ Transportation Security Administration, *TSA: The Screening Experience*, http://www.tsa.gov/travelers/airtravel/assistant/editorial_1052.shtm (last visited July 11, 2012) (warning travelers that "[i]f your baggage alarms and our [s]ecurity [o]fficers cannot gain access to your checked bag, [the] unrecognized lock may be broken.").

¹⁷ Loewy, *supra* note 10, at 1513.

¹⁸ *Id.*

What about the full body x-ray scanners that one must now go through at many airports (unless one prefers a thorough pat down of the type described in *Terry v. Ohio*)?¹⁹ Again, if one compares airports that do not use them (e.g., Lubbock, Texas) to those that do (e.g., Houston, Texas), one would be hard-pressed to detect a difference in danger. Furthermore, a plane from Houston to London will be populated by people who boarded in Houston, as well as those who boarded in Lubbock and changed in Houston. Only the former will have been subject to Houston's additional screening, and, of course, those poor souls will have to share the plane with those changing from Lubbock who were not subject to similar screening. Obviously I am not arguing for more screening at the relatively "lax" airports.²⁰ Rather, my point is that Houston's gratuitous invasion into personal privacy and autonomy is simply not worth the candle.

In an article that came out in the summer of 2011, I described the saga of one Hugo Torbet as a story of government run amuck.²¹ Although I will now review it briefly, it frankly seems mild compared to more recent horror stories. On a flight that took place just before 9/11, but generated a case that was decided post 9/11, Hugo Torbet, an attorney flying from Los Angeles to San Francisco, walked through a magnetometer and did not set it off.²² Nevertheless, he was told that he had been randomly selected to have his briefcase opened and searched.²³ Torbet refused, saying that he would rather leave the airport and cancel his trip than have his briefcase searched.²⁴ However, he was not given that option and his briefcase was searched over his protest.²⁵ Finding nothing untoward, the authorities permitted Torbet to continue on his flight to San Francisco, which he did.²⁶

¹⁹ *Terry v. Ohio*, 392 U.S. 1, 16-17 n.13 (1968) (describing a thorough pat down as one in which "[t]he officer must feel with sensitive fingers every portion of the prisoner's body. A through search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet."); *Id.* at 1514 n.25.

²⁰ Subsequent to the writing of this article, Lubbock has given up its laxity and has installed its very own "body orifice scanning system." Obviously, that does not change the principle. It simply puts Lubbock on the wrong, or undoubtedly in the opinion of some, the right side of the divide.

²¹ Loewy, *supra* note 10, at 1514-20.

²² *Torbet v. United Airlines, Inc.*, 298 F.3d 1087, 1088 (9th Cir. 2002).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

Subsequently, Torbet sued the airport, airline, police officer, and anybody else he could think of, claiming a denial of his Fourth Amendment rights.²⁷ Of course if the case arose today, the Government could argue that the public is at least aware of the fact that once they enter the secured area they are not free to leave without their bags and persons being searched (whether that renders the search reasonable is, of course, a separate question). But Torbet, in the pre-9/11 world, was not aware of any such rule. Nevertheless, the Ninth Circuit (of all places) held that he had no Fourth Amendment right to avoid the search.²⁸

Whatever one may think of Torbet and his failed Fourth Amendment claim, it pales in significance to some recent abuses. Let me mention two. The first occurred on the tenth anniversary of 9/11.²⁹ The event involved the detention of an American of Jewish/Arab descent, following a flight from Denver to Detroit.³⁰ The woman, of Middle-Eastern appearance, had the misfortune of being seated (apparently not by choice) next to two Indian men, whom she did not know.³¹ Apparently because the two men used the bathroom seriatim, somebody got suspicious of the three.³²

Without going into all of the grisly details, which are reproduced in the accompanying footnote, it seems fair to say that the woman was subjected to indignities that typically accompany an unceremonious arrest and held incommunicado for a substantial period of time before being released.³³ Perhaps the scariest part of the story is the FBI

²⁷ *Id.*

²⁸ *Id.* at 1090.

²⁹ Shoshana Hebshi, *Some Real Shock and Awe: Racially Profiled and Cuffed in Detroit*, STORIES FROM THE HEARTLAND (Sept. 12, 2011), <http://shebshi.wordpress.com/2011/09/12/some-real-shock-and-awe-racially-profiled-and-cuffed-in-detroit/>.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Although I cannot verify every detail of this first person account, if it is even substantially accurate, it should concern us all:

Silly me. I thought flying on 9/11 would be easy. I figured most people would choose not to fly that day so lines would be short, planes would be lightly filled and though security might be ratcheted up, we'd all feel safer knowing we had come a long way since that dreadful Tuesday morning 10 years ago.

But then armed officers stormed my plane, threw me in handcuffs and locked me up.

My flight from Denver landed in Detroit on time. I sent a text message to my husband to let him know we had landed and I would be home by dinner. The plane stopped on the tarmac, seemingly waiting to have the gate cleared. We

agent's parting words to the subject, "It's 9/11 and people are seeing

waited. I played on my phone, checking Facebook, scrolling through my Twitter feed. After a while of sitting there, I decided to call my husband to tell him the plane was being delayed and I would call him when I got off the plane.

Just as I hung up the phone, the captain came over the loudspeaker and announced that the airport authorities wanted to move the airplane to a different part of the airport. Must be a blocked gate or something, I thought. But then he said: Everyone remain in your seats or there will be consequences. Sounded serious. I looked out the window and saw a squadron of police cars following the plane, lights flashing. I turned to my neighbor, who happened to be an Indian man, in wonderment. What is going on? Others on the plane were remarking at the police as well. Getting a little uneasy, I decided the best thing for me to do was to tweet about the experience. If the plane was going to blow up, at least there'd be some record on my part.

Stuck on a plane at Detroit airport. . .cops everywhere

Soon the plane was stopping in some remote part of the airport, far from any buildings, and out the window I see more police cars coming to surround the plane. Maybe there's a fugitive on the plane, I say to my neighbor, who is also texting and now shooting some photos of the scene outside. He asks me to take a few, as I have a better angle from my window seat. A few dozen uniformed and plainclothes officers are huddled off the side of the plane. I don't see any guns, and it isn't clear what's going on.

So I continued to tweet:

A little concerned about this situation. Plane, moved away from terminal surrounded by cops. Crew is mum. Passengers can't get up.

Then what looked like the bomb squad pulled up. Two police vans and a police communication center bus parked off the road. I started to get nervous and rethink my decision to fly on 9/11.

Cops in uniform and plainclothes in a huddle in rear of plane.

We had been waiting on the plane for a half hour. I had to pee. I wanted to get home and see my family. And I wanted someone to tell us what was going on. In the distance, a van with stairs came closer. I sighed with relief, thinking we were going to get off the plane and get shuttled back to the terminal. I would still be able to make it home for dinner. Others on the plane also seemed happy to see those stairs coming our way.

I see stairs coming our way. . .yay!

Before I knew it, about 10 cops, some in what looked like military fatigues, were running toward the plane carrying the biggest machine guns I have ever seen—bigger than what the guards carry at French train stations.

My last tweet:

Majorly armed cops coming aboard

Someone shouted for us to place our hands on the seats in front of us, heads down. The cops ran down the aisle, stopped at my row and yelled at the three of us to get up. "Can I bring my phone?" I asked, of course. What a cliffhanger for my Twitter followers! No, one of the cops said, grabbing my arm a little harder than I would have liked. He slapped metal cuffs on my wrists and pushed me off the plane. The three of us, two Indian men living in the Detroit metro area, and me, a half-Arab, half-Jewish housewife living in suburban Ohio, were being detained.

The cops brought us to a parked squad car next to the plane, had us spread our legs and arms. Mine asked me if I was wearing any explosives. "No," I

said, holding my tongue to not let out a snarky response. I wasn't sure what I could and could not say, and all that came out was "What's going on?"

No one would answer me. They put me in the back of the car. It's a plastic seat, for all you out there who have never been tossed into the back of a police car. It's hard, it's hot, and it's humiliating. The Indian man who had sat next to me on the plane was already in the backseat. I turned to him, shocked, and asked him if he knew what was going on. I asked him if he knew the other man that had been in our row, and he said he had just met him. I said, it's because of what we look like. They're doing this because of what we look like. And I couldn't believe that I was being arrested and taken away.

When the Patriot Act was passed after 9/11 and Arabs and Arab-looking people were being harassed all over the country, my Saudi Arabian dad became nervous. A bit of a conspiracy theorist at heart, he knew the government was watching him and at any time could come and take him away. It was happening all over. Men were being taken on suspicion of terrorist activities and held and questioned—sometimes abused—for long periods of time. Our country had a civil rights issue on its hands. And, in the name of patriotism we lost a lot of our liberty, especially those who look like me.

I never had any run-ins with the law. Since 9/11, though I felt a heightened sense of how my appearance would affect my travel plans, I never had any concrete reason to think I would be targeted. I passed through security without excessive searching (except that one time they thought they saw a pocket knife in my husband's backpack, which they couldn't find anyway even though it was there). Because I am my father's daughter I am aware of the possibility of anti-Arab and anti-Semitic sentiments that have increased dramatically, but luckily no members of my family nor myself have had to endure what so many others have gone through in this country and throughout the world. As Americans we are scared and horrified by acts of terror. But I am not sure that what we are doing to dissuade and protect are working.

We arrived at an offsite building and remained in the squad car for a few minutes. The Indian man was taken out of the car first, and an officer stood at the door to make sure I didn't go anywhere. I asked him several times what was going on and he wouldn't answer me. It was like I was invisible. I felt so helpless and shocked. I was being treated like a criminal.

Then it was my turn. I got out of the car and was led, still cuffed, to a cell. "Are you serious?" I asked the officer, and he said yes. The heavy metal door was shut and locked behind me. Again, I asked what was going on and why was I here. Finally he said, they will let you know later. They are going to ask you some questions.

I sat down on the metal cot that hung off the wall. It had a thin, green vinyl mattress—mattress is a generous term—that offered no comfort. It was about a 6-by-10 cell, the concrete walls were painted a light yellow but were streaked with black dirt. The floor was some sort of stainless steel, and a stainless steel toilet that has probably never seen the good side of a scrubbing brush, instructed me to keep holding my stretched bladder as long as I could. Near the ceiling above the toilet there was a video camera.

A plainclothes officer stood came to my door and asked me if I spoke English. Something in me snapped at that question. Of course I spoke English I'm an American citizen, you asshole! Well, I left the expletive out. "Ok," he said and stood watch outside my door saying he wanted to make sure I didn't "flush anything." He also wouldn't tell me what was going on.

As I sat and waited, quietly contemplating my situation, the other Indian man was getting questioned in the main room outside. I couldn't see what was going on, but I could hear a bit. They asked him where he was from, did he have any family, where were his shoes. He talked quietly and agreeably. I

wondered if he was as incensed as I was or if he had entered this country expecting harassment from the American authorities.

They took him to another room, and I heard an officer tell him to remove his clothes. He was going to be searched. I could not fully grasp what was happening. I stared at the yellow walls and listened to a few officers talk about the overtime they were racking up, and I decided that I hated country music. I hated speedboats and shitty beer in coozies and fat bellies and rednecks. I thought about Abu Ghraib and the horror to which those prisoners were exposed. I thought about my dad and his prescience. I was glad he wasn't alive to know about what was happening to me. I thought about my kids, and what would have happened if they had been there when I got taken away. I contemplated never flying again. I thought about the incredible waste of taxpayer dollars in conducting an operation like this. I wondered what my rights were, if I had any at all. Mostly, I could not believe I was sitting in some jail cell in some cold, undisclosed building surrounded by "the authorities."

I heard the officers discuss my impending strip search. They needed to bring in a female officer. At least they were following protocol, or something to that nature. Still, could this really be happening?

Eventually a female uniformed officer came in. She looked like a fat Jada Pinkett Smith, and in a kind but firm voice explained what was going to happen. I was to stand, face the wall in a position so the camera above the toilet couldn't see, and take off my clothes. I complied. She commented on my tattoo, saying, "Oh you have one of those things—good and evil, right?"

"Yin and yang. Balance," I said, grabbing my clothes to redress.

"You understand why we have to do this, right? It's for our own protection," she told me.

Because I am so violent. And pulling me off an airplane, handcuffing me and patting me down against a squad car didn't offer enough protection. They also needed to make sure all my orifices were free and clear.

She apologized for having to do the strip search, and I asked her to tell me what was going on. She said she didn't know but someone would come and talk to me. She put my handcuffs back on and left. The other officer stood guard outside. I told him I needed to call my husband. He said I could use the phone later.

As I sat in my cell trying not to think about my full bladder, they brought another man in. I wondered if he had been on the plane as well. Were they going to bring everyone in or had they just singled us out? He spoke belligerently, and I couldn't understand much of what he was saying. But I did hear two officers talking about the man who stole a \$3,000 watch at the security checkpoint. Now there's a real crime. What was I doing here?

I had no idea how much time had passed. It was about 4:00 when I sent my last tweet on the plane. I couldn't tell if it was day or night. I was tired, confused, angry and bored. I wanted my phone. I wanted to call my husband so he could come to Detroit and rescue me. I wanted to update my status so my friends weren't freaking out. Did I also want a lawyer?

Another female officer, this one in jeans and a t-shirt came to visit me. She introduced herself as an agent—Homeland Security. She removed my handcuffs and had me follow her to a different room down a long hall and through a few doors. As we walked, I got a glimpse of the watch-stealer, a chubby middle-aged white guy with a buzz cut. He didn't look too different from some of the officers.

She led me to a small, white room where a man who introduced himself as an FBI agent was waiting for me. I sat on one of three chairs at a small metal

table, and the female agent sat across from me. They both offered me their badges for inspection, not that I would have known the difference, but they were calm and not pushy. I appreciated that. The male agent proceeded to ask me a series of questions about where I had been, where I was going, about my family, if I had noticed any suspicious behavior on the plane. The other agent took notes while I talked. They asked if I knew the two men sitting next to me, and if I noticed them getting up during the flight or doing anything I would consider suspicious.

I told them no, and couldn't remember how many times the men had gotten up, though I was sure they had both gone to the bathroom in succession at some point during the flight.

They had done some background check on me already because they knew I had been to Venezuela in 2001. They asked about my brother and sister and asked about my foreign travel. They asked what I did during the flight. I told them I didn't get up at all, read, slept and played on my phone (in airplane mode, don't worry). They asked about my education and wanted my address, Social Security, phone number, Facebook, Twitter, pretty much my whole life story.

Again, I asked what was going on, and the man said judging from their line of questioning that I could probably guess, but that someone on the plane had reported that the three of us in row 12 were conducting suspicious activity. What is the likelihood that two Indian men who didn't know each other and a dark-skinned woman of Arab/Jewish heritage would be on the same flight from Denver to Detroit? Was that suspicion enough? Even considering that we didn't say a word to each other until it became clear there were cops following our plane? Perhaps it was two Indian man [*sic*] going to the bathroom in succession?

He warned me that the last time an incident like this happened back in December, they had to interview everyone on the plane and no one got to go home for six hours. It was going to be a long haul.

They asked me if I wanted to add anything that they hadn't asked. I said no. Then they asked if I needed anything. I said I needed a real bathroom, and the female officer, saying she didn't blame me, offered to take me to the officers' bathroom. I must have peed straight for five minutes.

She walked me back to my cell, telling me it was for my own protection as they had brought in the rest of the passengers for questioning. They would fetch my stuff from the plane and allow me to call my husband. My cell had been occupied by the Indian man I had sat next to on the plane and in the squad car. So I waited for them to move him to the second cell that was holding the watch stealer. As I passed by the small window in that room I could see the watch stealer splayed out on the cot. He appeared to be asleep. I wondered where the Indian man would sit.

After fingerprinting me and asking me about my height/weight/place and date of birth and so on, a middle-aged white cop with a beer belly and a flat top returned me—without handcuffs—to the cell. I waited, wondering if I would be spending the night locked up. I thought about the last words my husband said to me while I was still on the plane waiting on the tarmac, "They must have found out there was a Hebshi on the plane." We joke about this at times, that because of my ethnicity I am being scrutinized but I had no intention of putting that out to the universe and making it happen.

I thought about Malcolm X and how bravely and fastidiously he studied and wrote while he was in prison, how his solitude enabled him to transform his anger into social change and personal betterment. That's when I decided to write this post. I needed to explain what had happened—was happening—to me. I was not going to be silent. Still, I wondered what my rights were, and

though I felt violated and scared I wasn't sure that our new laws protected me from this treatment.

The female agent returned to my cell with my cell phone. She wanted me to show her my tweets—that were simultaneously posted onto Facebook—I had composed while on the plane. She joked that she didn't even have a Facebook account. She left for a few minutes then returned and allowed me to call my husband. She said I would be released in a few minutes.

The sound of his voice brought me to tears, but I tried to remain calm. I gave him a one-minute recap of my situation, which only left him confused. I told him I would call him when I got to my car, which was parked in an airport lot.

I hung up the phone and followed the officer out of the cell and into another small room where the male FBI agent was waiting accompanied by another FBI agent—possibly the head honcho on duty. He said the three of us were being released and there was nothing suspicious found on the plane. He apologized for what had happened and thanked me for understanding and cooperating. He said, "It's 9/11 and people are seeing ghosts. They are seeing things that aren't there." He said they had to act on a report of suspicious behavior, and this is what the reaction looks like.

He said there had been 50 other similar incidents across the country that day.

I was led out another door and down a long hall where I gathered my bags, which had been removed from the plane and searched. In the hallway I saw the other two men who had also been detained. They seemed happy to be being released as well. It felt strange to smile at them, and I didn't know what to say, so I said nothing.

We walked outside of the building, and for the first time I saw that we were at the airport police station, which also doubled as the spot for the local Homeland Security office to reside—an office that didn't exist 10 years ago. It was starting to get dark. But I still didn't know what time it was.

Another officer drove me to my car in the airport parking lot. As he plopped into the drivers seat and me into the passenger's seat of the unmarked sedan, he apologized for not having air conditioning, but being a descendant of desert people I obviously didn't mind the heat. He asked me if I was OK to drive back to my home in Ohio, and I said I was, though I wasn't sure I was. I wasn't sure how this would affect me. I am still not sure.

All I know, is I probably won't be flying again on Sept. 11.

In the aftermath of my events on Sept. 11, 2011, I feel violated, humiliated and sure that I was taken from the plane simply because of my appearance. Though I never left my seat, spoke to anyone on the flight or tinkered with any "suspicious" device, I was forced into a situation where I was stripped of my freedom and liberty that so many of my fellow Americans purport are the foundations of this country and should be protected at any cost.

I believe in national security, but I also believe in peace and justice. I believe in tolerance, acceptance and trying—as hard as it sometimes may be—not to judge a person by the color of their skin or the way they dress. I admit to have fallen to the traps of convention and have made judgments about people that are unfounded. We live in a complicated world that, to me, seems to have reached a breaking point. The real test will be if we decide to break free from our fears and hatred and truly try to be good people who practice compassion—even toward those who hate.

I feel fortunate to have friends and family members who are sick over what happened to me. I share their disgust. But there was someone on that plane who felt threatened enough to alert the authorities. This country has oper-

ghosts.”³⁴ The FBI agent also stated that “there had been 50 other similar incidents that day.”³⁵ If that is even close to being accurate, we should be very scared, and not of the terrorists.

Some of you may think, “Gee this is terrible. Thank God I don’t look Middle-Eastern so I don’t have to worry.” Not so fast. Less than a month later, on Saturday, October 8, 2011, the following was reported on the criminal law professors website:

During a flight from NY to Columbus, Ohio last Saturday morning, a passenger said she heard “something beeping” in a bag in the overhead compartment. The cabin attendants walked up and down the aisles asking: “Who owns a brown roller bag at aisle 17?” But she got no response.

When the plane landed, the entire planeload of people (59 persons including Elvis Costello) was detained by the TSA and then the FBI for what turned out to be roughly four and a half hours. During this federal custody, everyone was subjected to a very thorough pat-down (inside waistbands, groin press and the whole nine yards). Until this search was completed, nearly 2 hours into the detention, passengers were not free to use the restrooms, which were in adjacent rooms. We were initially told that we were being held until the bomb squad arrived (which apparently took almost an hour) and finished checking out the situation on the plane.

A little less than halfway through the 4.5 hours of detention, a passenger using his iPhone discovered an online newspaper article that described the incident and indicated that the bomb squad had found nothing dangerous on the plane. Nonetheless, they did not let us go and an FBI agent later announced to us that “nobody is leaving until we find out who owns that brown bag.” This detention was clearly investigative. Whatever security threat there might have been was now definitely over. They knew there’d never been anything unsafe on the plane.

We were finally freed after one of the agents rephrased the question about bag ownership, asking more specifically: “Does anybody here own a brown roller bag with a letter ‘B’ on it?” A woman immediately piped up: “Oh! That’s mine!” The original beeping sound turned to be an alarm clock, which apparently was not even in the brown bag, but only near it. We were told that all of this was according to “procedure,” but as I sat there (one of the lucky ones who had a chair), I couldn’t help wondering: Does the Constitution really permit the use of mass detention to investigate whether there has been a crime?³⁶

So, we now know that one need not be Middle-Eastern looking to be subject to over-the-top treatment from the TSA and other Govern-

ated for the last 10 years through fear. We’ve been a country at war and going bankrupt for much of this time. What is the next step? *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Anonymous E-mail, CRIMPROF BLOG, http://lawprofessors.typepad.com/crimprof_blog/ (last visited Oct. 11, 2011).

ment officials, sadly including the FBI. How does one react to a story like this? My reaction, which I posted, was as follows:

I find this exceptionally troubling. If I put this on an exam, I cannot imagine a student who would not say that this was an unlawful seizure. Indeed, I suspect that a number would say: "Gee, how come you asked such an easy question"? Despite that truism, it happened. Is anybody doing anything about it (or even seriously protesting)? It would be nice if Elvis Costello was willing to be a plaintiff (particularly if the delay caused him to miss his concert). I assume the woman who claimed to have heard the ticking was also detained. In addition to all the other bad stuff that this event discloses, it will probably convince the whistle blower to keep her big mouth shut in the future (which is exactly what we don't want if we care about safety).

We clearly need the TSA and we need security (just as we need police). But we do not need an out of control TSA. I agree that airport security should be subject to a more lax 4th Amendment standard than other police work. But having said that does not mean (to paraphrase *Coolidge*) that airport or airplane is a talisman in whose presence the 4th Amendment disappears. We should not get to a point where we fear TSA more than terrorists, and we would not if TSA (like other police) operate under law.

Something needs to be done. A law suit in a case like this (perhaps from Elvis, perhaps from someone with an injured bladder by not being allowed to use the bathroom, or perhaps just from someone who doesn't believe that Americans should have to put up with such gratuitous humiliation) could send a message that this is America, not Nazi Germany.³⁷

Was I over the top, as one of my colleagues from another school suggested in regard to my analogy to Nazi Germany?³⁸ I don't think so. Of course, our criminal justice system is so far removed from theirs that they don't belong in the same sentence. But this incident is exactly what one might have expected in a dictatorship. One would not expect this in a country dedicated to the rule of law and of upholding a serious Fourth Amendment.

In closing, we would do well to heed the admonition of two of our former Justices. First, Justice Brandeis reminds us that "[t]hose who won our revolution were not cowards. . . [t]hey did not exalt order at the cost of liberty."³⁹ And as Justice Frankfurter, whom Justice Brennan later echoed, regrettably and prophetically in regard to modern

³⁷ CRIMPROF BLOG, http://lawprofessors.typepad.com/crimprof_blog/ (last visited Oct. 11, 2011) (my personal post on that blog).

³⁸ Because the comment was made in private correspondence, I choose not to reveal the identity of the colleague.

³⁹ *Whitney v. California*, 274 U.S. 357, 377 (1927). Although Justice Brandeis was talking about free speech, the sentiments apply equally to the Fourth Amendment. *See id.*

day airport searches and seizures said, “[h]istory bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.”⁴⁰

It seems obvious the TSA and FBI have reached the point of brazenness. Who knows which one of us will be next. It is time to stop this mockery of our Constitution now. We do not want the terrorists to win either by destroying us or by destroying what we stand for. It seems to me that they are already well on their way to the latter. We need to stand up for what we are supposed to believe, and we need to do it now!

⁴⁰ *United States v. Montoya de Hernandez*, 473 U.S. 531, 567 (1985) (Brennan, J., dissenting) (quoting *Davis v. United States*, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting)).

