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Introduction

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Introduction

Welcome to the second issue of Volume 45 of the *New Mexico Law Review*. On behalf of the editorial board and staff, it is my privilege to present our 2015 Special Edition dedicated to the intersection of the critically acclaimed television series *Breaking Bad* and the law. This Special Edition is presented just as AMC and executive producer Vince Gilligan have introduced a spin-off series titled *Better Call Saul*, which focuses on the ethically questionable exploits of a lawyer, Saul Goodman, who played a central role in *Breaking Bad*. As the only academic journal in the State of New Mexico dedicated to general legal analysis, we are proud to present this Special Edition highlighting the legal issues addressed in a television series that is arguably New Mexico's largest contribution to pop culture since the Roswell UFO incident.

Breaking Bad was set in Albuquerque and aired on the AMC network from 2008 to 2013. The series not only utilized our state's breathtaking scenery, but also regularly addressed numerous social and legal issues that are prevalent in our community. As the show grew in popularity, more and more national attention was focused on New Mexico at-large. Dedicated fans, particularly those employed in the legal arena, recognized the show's tendency to raise significant legal issues through the depiction of criminal activity, law enforcement practices, and lawyer-client relationships.

Given the array of legal issues raised, our editorial board was excited to take the opportunity to present analysis of *Breaking Bad* by scholars and legal practitioners. In April 2014 we issued a call for papers requesting abstracts on topics including the application of the Fourth Amendment to drug crimes under the New Mexico and/or U.S. Constitutions; the War on Drugs; ethical duties of lawyers; drug offense sentencing; drug enforcement in rural, urban, and/or Tribal areas; and substance abuse and the law. We received over fifty submissions and were pleased to secure the eight articles presented here.

Before I introduce the essays, please find below a brief synopsis of *Breaking Bad*. The purpose of this synopsis is not to introduce every character or plot point in the series. However, for the reader who is unfamiliar with the series, this section will provide orientation with respect to the backdrop from which the legal issues analyzed arise.

Breaking Bad tracks the transformation of Walter White from a mild-mannered high school chemistry teacher to a methamphetamine kingpin in Albuquerque, New Mexico. In the earliest episodes, Walt is diagnosed with terminal lung cancer and is faced with the reality that he will soon die and be unable to provide for his wife, Skyler, his son Walt Jr., and his unborn

daughter, Holly. After interacting with a former student, Jesse Pinkman, while buying marijuana to alleviate the side effects of chemotherapy, Walt hatches a plan use his substantial chemistry skills to produce a higher quality meth than was available on the streets of Albuquerque, and distribute that product through a partnership with Jesse.

As Walt and Jesse move up through the meth-trafficking hierarchy from minor players to international distributors, they engage in frequently violent encounters with various parties involved in the meth trade including: drug dealers Krazy-8, Tuco Salamanca, and Gustavo Fring; former police officer turned enforcer Mike Ehrmantraut; Neo-Nazi Jack Welker and his gang; chemist Gale Boetticher; and methylamine source and international distributor Lydia Rodarte-Quale. Paralleling the encounters in the meth world are Walt and Jesse's interactions with Walt's brother-in-law and DEA Agent Hank Schraeder, DEA Agent Steven Gomez, ethically challenged lawyer Saul Goodman, Jesse's love interests Jane Margolis and Andrea Cantillo, and Walt's former business partners Gretchen and Elliot Schwartz.¹

Although each of these characters is essential to the story presented, it was Walt who created the show's dramatic appeal. *Breaking Bad* began as a story of a man desperate to provide for his family and willing to break the law to do so. It concluded, five years later, as a story of a man driven by a thirst for respect, power, and revenge. Walt stopped at nothing to accomplish these goals—including killing (almost) anyone who stood in his way, and sacrificing his own life in furthering his final act of revenge. The legal issues that arose throughout the show are the direct result of Walt's acts of physical and psychological violence against all in his path.

Hopefully the articles and essays contained in this issue will trigger discussion related to the power of media to influence public perception of legal and social issues. While incorporating the relevant plot points from the series, the articles present quasi-traditional legal analysis of criminal law, constitutional law, business law, ethical responsibilities and professional conduct of lawyers, and more.

We begin this Special Edition with Professor Max Minzner's *Breaking Bad in the Classroom*. In this essay, Professor Minzner advocates for the value of video as an effective tool for teaching in the law school classroom and provides a scene-by-scene demonstration of how to use *Breaking Bad* to convey the substance of criminal procedure. The scenes identified by Professor Minzner assist students with the fact-specific inquiries frequently required in determining the constitutionality of law enforcement activity. In addition, Professor Minzner argues for the value of

1. For a comprehensive description of the plot of *Breaking Bad*, or for a list of characters, please see BREAKING BAD WIKI, http://breakingbad.wikia.com/wiki/Breaking_Bad_Wiki (last visited Mar. 29, 2015).

integrating state constitutional criminal procedure into the foundational course given the degree to which recent law school graduates entering the practice of criminal law must consider and apply judicial interpretations of state analogues to the federal Fourth, Fifth, and Sixth Amendments. The editorial board would like to thank Professor Minzner for his encouragement and guidance in undertaking this Special Edition, and for his demonstrated commitment to excellence in legal instruction.

Next is the first of two articles related to capital trials and sentencing. In *Why We Would Spare Walter White: Breaking Bad and the True Power of Mitigation*, Professor Bidish J. Sarma offers a look into the capital sentencing process that would face Walter White following a hypothetical arrest near the end of the series. First, Professor Sarma explains the basic framework for the death-determination in a capital trial. He then provides in-depth analysis of Walt's "aggravating" and "mitigating" factors available to persuade jurors that a sentence of death is or is not appropriate. The essay concludes that viewers of the show would likely hand down a sentence less than death to Walt, and encourages lawyers representing death-eligible defendants to draw upon the story-telling lessons captured by *Breaking Bad* to bring jurors to the same place many viewers found themselves at the show's end.

Then we have an article by Mr. Armen Adzhemyan and Ms. Susan M. Marcella entitled "*Better Call Saul*" *If You Want Discoverable Communications: The Misrepresentation of the Attorney-Client Privilege on Breaking Bad*. In this article, the authors use various attorney-client communications featured on the show to explore the contours of the attorney-client privilege under federal common law and New Mexico's state law jurisprudence. After discussing the establishment and elements of the privilege and the circumstances of waiver, the authors analyze specific attorney-client communications featured on *Breaking Bad* and demonstrate how the show exaggerates the scope of the protection afforded by the privilege, while severely minimizing the risk of waiver.

In *The Good and (Breaking) Bad of Deceptive Police Practices*, Professor Elizabeth N. Jones discusses the possible association between *Breaking Bad*'s depiction of investigative strategic police deception and the Department of Justice's recent finding of a "pattern or practice of excessive force" by some Albuquerque Police Department officers. The shared timeline between the two phenomena provides an opportunity to explore the dual role of television as both entertainer and educator, and to analyze recognized research in behavioral social science. Professor Jones contrasts the favorable public exposure *Breaking Bad* bestowed upon Albuquerque with the possibility of its damaging influence on the local police subculture.

Stuck Between a Rock and a Meth Cooking Husband: What Breaking Bad's Skyler White Teaches Us About How the War on Drugs and Public Antipathy Constrain Women of Circumstance's Choices, by Ms. Holly Jeanine Boux and Professor Courtenay W. Daum examines the

Skyler White character to highlight how sociocultural expectations, the War on Drugs, and public antipathy intersect to constrain the choices available to women of circumstance. Through their analysis, the authors reveal how women such as Skyler find their options sharply constrained by the complicated dynamics of three related institutions—the legal system (and its practices), the family (and its concomitant obligations), and society (and its prevailing cultural expectations about women). This article highlights how these constraints do not just emerge from a solitary character’s choices, but rather are reflective of and conditioned by broader societal beliefs about women’s roles as wives and mothers in patriarchal sociocultural institutions including the family and the legal system.

Next is Professor Jennifer W. Reynolds’s *Breaking BATNAs: Negotiation Lessons from Walter White*. In this article, Professor Reynolds examines five scenes featuring negotiations, one from each of the five seasons of the show. In these close readings, she demonstrates how Walter White uses foundational negotiation techniques and theories—including trust, interest-based practice, BATNA (best alternative to a negotiated agreement), coalitions, and leverage—to negotiate his nefarious way through the criminal underworld. Ultimately, Professor Reynolds argues that watching Walter White negotiate reminds us that negotiation does not come with built-in ethical boundaries, suggesting the importance of vigorous analysis and discussion of the ethical choices negotiators make in pursuit of their self-interest.

The Political Geography of Plea Bargaining in Federal Death Penalty Cases, by Professor Greg Goelzhauser, is the second article related to a hypothetical prosecution arising from the plot of *Breaking Bad*. Professor Goelzhauser uses *Breaking Bad*’s emphasis on federal law enforcement in New Mexico to motivate an empirical analysis of plea-bargaining outcomes in federal capital cases. After using events depicted on *Breaking Bad* to provide an overview of the federal death penalty and to discuss the theoretical implications of New Mexico’s switch to a non-death penalty state in 2009, Professor Goelzhauser employs new data on plea-bargaining outcomes in federal death-eligible cases and concludes that federal cases proceeding in states that authorize the death penalty are less likely to be resolved through plea bargaining.

Finally, in *Don’t Bake—Litigate! A Practitioner’s Guide on How Walter White Should Have Protected His Interests in Gray Matter, and His Litigation Options for Building an “Empire Business” Through the Courts, Not the Cartel*, Mr. Michael C. Mims, Esq., argues that White’s foray into the world of methamphetamine production could have been avoided if he had consulted legal counsel before selling his shares of Gray Matter Technologies. Mr. Mims argues that legal counsel could have helped White negotiate a more favorable exit strategy from Gray Matter by better protecting (1) the value of his stock, (2) his right to compete, and (3) his ownership of his intellectual property. Additionally, Mr. Mims

offers strategies for aggressive litigation tactics for entrepreneurs who feel they have been “cut out,” and proposes that White could have asserted actions for patent infringement and minority shareholder oppression.

Discussions related to this Special Edition began more than a year ago and have culminated in the publication presented here. I hope that you enjoy revisiting the *Breaking Bad* plot line while considering the legal and social issues invoked. I would like to thank the members of the editorial board and staff for their hard work throughout the solicitation and publication process. The board would also like to express its appreciation to faculty members Dawinder “Dave” Sidhu, Carol Suzuki, and Max Minzner for their contributions, and to the School of Law administration and library staff for accommodating our request to publish this Special Edition as a stand-alone piece. Finally, we would like to thank the creators of *Breaking Bad* for producing a series that draws attention to the vibrant culture, natural beauty and uniqueness of New Mexico. As soon-to-be graduates of New Mexico’s only law school, we look forward to serving the community highlighted in *Breaking Bad* and discussed by viewers around the world. We will, however, require a substantial retainer for potential clients going by the name of Heisenberg.

—Matthew Zidovsky, Editor-in-Chief