NEW MEXICO LAW REVIEW

Volume 45
Issue 2 *Breaking Bad and the Law*

Spring 2015

Breaking Bad in the Classroom

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BREAKING BAD IN THE CLASSROOM

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ABSTRACT

Breaking Bad *is often described as the transformation of Walter White—Mr. Chips becomes Scarface.*[1] *Equally significant, though, are the journeys of Hank Schrader, his DEA pursuer, and Hank's colleagues. The show is a study of law enforcement investigation in action. As a result,* Breaking Bad *can serve as a tool of pedagogy in criminal procedure.*

This Essay seeks to serve two ends. First, it provides a map for the use of the Breaking Bad *series in the core constitutional criminal procedure course focusing on the limits on police investigation arising from the Fourth and Fifth Amendments. Video is a powerful mechanism for presenting hypotheticals to students. Recent work on other shows such as* The Wire *has recognized the value of television as an alternative pedagogical technique in the law school curriculum.* Breaking Bad *deserves to take its place as a teaching aid in a criminal procedure classroom. The first part of this Essay identifies usable scenes for both faculty and students, and provides a preliminary analysis of the doctrine.*

The second goal of this Essay is to expand the focus of the traditional course beyond the United States Constitution. Breaking Bad *is more than a show about cops and criminals. It is a show about New Mexico. As a result, for those of us training New Mexico's future prosecutors and defense lawyers, it provides a mechanism to introduce students to state criminal procedure. As is true in many states, the New Mexico Constitution contains parallel protections to the Fourth and Fifth Amendments that have been interpreted more broadly than their restrictive federal counterparts. This Essay is a call to law school faculty to incorporate state constitutions into the criminal procedure class. Because criminal law is fundamentally state law, these are the provisions our students will implement in practice. As a result, they deserve significant time in the criminal procedure course.*

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1. This description was central to Vince Gilligan's original pitch for *Breaking Bad*. *See* Breaking Bad*: Vince Gilligan On Meth and Morals*, NATIONAL PUBLIC RADIO (Sept. 19, 2011, 11:28 AM), http://www.npr.org/2011/09/19/140111200/breaking-bad-vince-gilligan-on-meth-and-morals.

As legal education changes, law school faculty members teaching doctrinal classes are increasingly called on to make traditional law school courses more practical. The central goal of these efforts is to make our graduates more practice-ready and to increase the realism of legal education. The constitutional criminal procedure course is perhaps the best place to start. The core of the course is practice-oriented and will be implemented by our graduates as soon as they begin a career in criminal law. Breaking Bad *is one mechanism for faculty members to use. In this way, the use of fiction can make criminal procedure more realistic.*

INTRODUCTION

Legal education is changing. Critics of traditional pedagogy have called for reform on numerous fronts.[2] A central goal of the reform movement has been to make law school more practical and relevant to ensure that new lawyers have the skills necessary to immediately start practicing in the field.[3] These efforts have taken on new relevance as the costs of a law degree have increased as tuition has gone up. Simultaneously, the benefits have arguably declined as the job market tightens. This combination suggests that law school needs to be more focused on meeting student needs. With more effort to build the skills students need in practice, law professors can strive to improve the value proposition for students.

Many of these reform efforts have focused on making law school more experiential. As a result, law schools that have previously lacked strong clinical programs have begun the effort of developing them. The American Bar Association has followed this movement and expanded the experiential education requirement for law school accreditation.[4] How-

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2. In some sense, the modern reform movement dates to the release of the MacCrate Report in the early 1990s. ROBERT MACCRATE, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT]. More recent efforts include the near-simultaneous release of ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) [hereinafter BEST PRACTICES], and WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW (2007) [hereinafter CARNEGIE REPORT].

3. BEST PRACTICES, *supra* note 2, at 5; CARNEGIE REPORT, *supra* note 2, at 48; MACCRATE REPORT, *supra* note 2, at 135.

4. *See* AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 16 (2014–2015), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter3.authcheckdam.pdf (providing that law schools must now require at least six cred-

ever, law school faculty interested in making law school more practical should not ignore opportunities in the traditional classroom, because for the near future, students will continue to spend far more time in traditional doctrinal courses than in classes with a practice component.

The foundational law school criminal procedure course involving the constitutional regulation of law enforcement is an excellent starting point for this discussion. In this Essay, I argue that *Breaking Bad* provides two lessons in making the search and seizure classroom more practical. First and most centrally, the show itself is a teaching tool in constitutional criminal procedure. Video clips of law enforcement conduct outlined in Section I explore many of the major issues in constitutional criminal procedure. The show often raises surprisingly complex and intricate questions relating to the constitutionality of the conduct portrayed. Second, *Breaking Bad* is an entry point to talk about state constitutional criminal procedure. For those of us teaching in the state where the show is set, we cannot ignore the fact that our state constitution governs along with the federal constitution. However, for faculty at any institution, state constitutional law should be a central focus of this course. Students pursuing a career in criminal law at virtually every law school are likely to start their practice in the state where they attended law school and are going to begin by handling state criminal matters. As a result, they are best served with a strong exposure to state law.

I. TEACHING *BREAKING BAD*

Criminal procedure is among the most practical doctrinal courses currently offered at law schools. Among other topics, the basic class covers the Fourth Amendment regulation of search and seizure law and Fifth Amendment regulation of interrogation. The class provides a central focus on the suppression of evidence. Especially for possessory offenses—narcotics, firearms, child pornography—the seized contraband is often the crucial evidence against the defendant. Its admission or exclusion is effectively the only important issue to litigate. These offenses are large components of the criminal dockets in both state and federal court.[5] Even in cases involving other offenses, prosecutors depend crucially on seized

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its of experiential education, which can include a simulation course, a live-client clinic, or a field placement).

5. *See* U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2010, 12 tbl.6 (Dec. 2013), http://www.bjs.gov/content/pub/pdf/fjs10.pdf (demonstrating that in 2010, the combination of narcotics, firearms and sex offenses constituted just fewer than 28% of federal criminal matters). *See* U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009-STATISTICAL TABLES, 3 tbl.1 (Dec. 2013), http://www

physical evidence or confessions. If the evidence is excluded, the case often collapses.

As a result, new prosecutors and defense attorneys immediately apply in practice the doctrine taught in the class. Of course, a key component in training students to be able to apply the law is to practice it. Students need to take the law and apply it to problems: hypothetical fact patterns with enough depth to see the complexities of the law in action. This problem-based approach to legal education is hardly novel.[6]

Standard ways to present hypos include an oral recitation to students or distributing written descriptions of the fact pattern. In my view, showing video in class is often superior to the standard methods. As I argue in Section I.A., video presentations of factual scenarios, repeatedly drawing on the same characters and underlying investigation is more memorable, more interesting, and provides a richness often unavailable in traditional ways of presenting facts. Section I.B., the heart of this Essay, outlines the scenes from *Breaking Bad* that I believe are most useful and helpful in the criminal procedure classroom.

A. The Value of Video

Video is a natural teaching tool.[7] Video is high-impact and memorable. Students who are presented content in a video form recall it long after that class occurs. Moreover, video clips are much richer than written hypotheticals. When fact patterns are presented in writing, the legally significant facts often stand out unless they are buried in a large number of unimportant facts. Video does not have this problem and the facts flow naturally together, forcing students to separate the important from the irrelevant.

.bjs.gov/content/pub/pdf/fdluc09.pdf (showing that at the state level in the largest counties, narcotics and weapons cases made up about 36% of arrests in 2009).

6. *See* Beverly Petersen Jennison, *Beyond Langdell: Innovating in Legal Education*, 62 CATH. U. L. REV. 643, 663 (2013) (describing efforts to bring problem-based approaches into the law school classroom); Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems,* 42 J. LEGAL EDUC. 241, 244–245 (1992) (advocating for the use of problem solving in legal education).

7. The literature demonstrating the effectiveness of video in fields outside law is vast. *See, e.g.*, Ronald A. Berk, *Multimedia Teaching with Video Clips: TV, Movies, YouTube, and mtvU in the College Classroom*, 5 INT'L J. TECH. IN TEACHING AND LEARNING 1, 5 (2009) (describing research results and collecting sources); Sarah M. Tomen & Carl F. Rak, *The Use of Cinema in the Counselor Education Curriculum: Strategies and Outcomes*, 40 COUNS. EDUC. & SUPER. 105, 112 (2000); David B. Comer, *From Monty Python to Total Recall: A Feature Film Activity for the Cognitive Psychology Course*, 23 TEACHING OF PSYCHOL. 1, 33 (1996).

The use of video clips in the law school classroom, of course, is not a new concept. Many faculty use movie clips to present issues from a variety of sources. Using a single show, though, presents significant advantages over a more diverse assortment of sources. Once students are familiar with the characters and the major plot developments, class time can be saved and used for other topics. In addition, students also develop an interest in the show and may start watching it in its entirety, providing depth to the classroom experience.[8]

Video presentation of hypotheticals certainly has its costs as well. A key downside of video is that students cannot take it with them. A written hypo remains available to students after the class ends. Unless students purchase *Breaking Bad*, the in-class viewing is their only opportunity to see the scene. Equally important, video is inherently misleading. It can provide a false certainty that it accurately displays the facts exactly as they occurred.[9] In particular, video is misleading in the criminal procedure class in doctrinally significant ways. Facts relating to search and seizure or interrogation come into evidence in very specific and narrow contexts. The key witnesses are either law enforcement officers or the defendant. In practice, law enforcement witnesses are the only ones who testify, either as a live witness or through an affidavit. As a result, the evidence about probable cause or consent is not seen through the lens of a video camera, but instead the eyes of a police officer.

My view is that these weaknesses are teachable moments in the criminal procedure classroom. Students cannot easily remember the contents of a video clip, a reality that reinforces the lesson that we should not overvalue eyewitness testimony.[10] Finally, while video is usually unavaila-

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8. Brian R. Gallini, *HBO's* The Wire *and Criminal Procedure: A Match Made in Heaven,* 64 J. LEGAL EDUC. 114, 115 (2014) (identifying these two values for using *The Wire* repeatedly in class).

9. This topic has received particular attention in the literature since the decision in Scott v. Harris, 550 U.S. 372, 378–381 (2007), where the court held that video evidence from a police chase was so persuasive to permit a grant of summary judgment. *See* Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009) (suggesting that the reaction to *Scott* (and video overall) is very sensitive to cultural and other factors). *See also* Naomi Mezey, *The Image Cannot Speak For Itself: Film, Summary Judgment, And Visual Literacy*, 48 VAL. U. L. REV. 1, 28 (2013); Neal Feigenson, *Visual Evidence*, 17 PSYCHONOMIC BULLETIN & REV. 149, 151 (2010) (discussing the costs and benefits of video evidence in legal contexts).

10. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 45–72 (2011); JAMES M. DOYLE, TRUE WITNESS: COPS, COURTS, SCIENCE AND THE BATTLE AGAINST MISIDENTIFICATION 130 (2005) (noting that eyewitness misidentification is widely recognized as a key source of wrongful convictions).

ble in the search and seizure context, a significant fraction of cases are starting to be preserved on video. The rise of dashboard cameras has meant that many car stops are recorded.[11] Similarly, many jurisdictions are requiring officers to wear and use body cameras when they interact with the public.[12] If video is becoming more available in court, students should be exposed in the classroom to its costs and benefits.

B. The Scenes

Breaking Bad spanned five seasons from 2008 until 2013.[13] It focused on the transformation of Walter White, the central character, from a public school science teacher into a criminal mastermind running a methamphetamine empire. The series begins as White is diagnosed with cancer. In order to support his family after his death, White decides to utilize his chemistry skills to cook and sell methamphetamine. He partners with Jesse Pinkman, a former student, to begin cooking methamphetamine in a recreational vehicle. Hank Schrader, a DEA agent married to White's wife's sister, begins to investigate this new methamphetamine operation, not knowing his brother-in-law is responsible.[14] The partnership eventually retains a lawyer, Saul Goodman, to facilitate the operation and launder the proceeds. White and Pinkman begin to work with Gus Fring, a local businessman, who also operates a large-scale narcotics distribution organization, and Mike Ehrmantraut, a former police officer now working for Fring.[15] Initially a purchaser of the partnership's output, Fring hires Pinkman and White to work for him in a new methamphetamine factory concealed beneath a laundry. After learning that Fring intends to replace them with a new chemist, Gale Boet-

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11. *See* David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police,* 43 TEX. TECH. L. REV. 357, 360 (2010) (describing rise of dashboard cameras); INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING 6 (2003), http://www.cops.usdoj.gov/Publications/video_evidence.pdf (noting that by 2003 almost 75% of state patrol vehicles had dashboard cameras).

12. *See* Martina Kitzmueller, *Are You Recording This?: Enforcement of Police Videotaping*, 47 CONN. L. REV. 167 (2014) (containing a recent discussion of the rise in both use and relevance of law enforcement lapel cameras).

13. The best overall source of information relating to *Breaking Bad* is the wiki for the series. *See* BREAKING BAD WIKI, http://breakingbad.wikia.com/wiki/Breaking_Bad_Wiki (last visited Jan. 24, 2015) (illustrating that while comprehensive, it shares the potential flaws of any wiki source – community editing with no centralized oversight).

14. *See Season 1*, BREAKING BAD WIKI, http://breakingbad.wikia.com/wiki/Season_1 (last visited Jan. 24, 2015).

15. *See Season 2*, BREAKING BAD WIKI, http://breakingbad.wikia.com/wiki/Season_2 (last visited Jan. 24, 2015).

ticher, Pinkman murders Boetticher,[16] and White eventually kills Fring.[17] White and Pinkman continue their operation, now distributing internationally, but Schrader realizes that White is the target of the investigation. Pinkman eventually turns on White, leading to his downfall and death.[18]

The remainder of this section is organized (roughly) in the order of the standard criminal procedure course. It begins with scenes relating to the foundational issues in the class – probable cause, the exclusionary rule, and the definition of search and seizure. It then turns to scenes relating to various "exceptions" to the warrant requirement, such as consent and exigency. Finally, it covers interrogation under the Fifth Amendment. For each scene, I provide a description of the action followed by a discussion of the relevant doctrine. For criminal procedure teachers, the scenes can be treated as an opportunity to open class discussion or to begin a Socratic dialogue. For students, the scenes are a chance to test the ability to apply their understanding of the material.

1. Probable Cause

Season 1, Episode 6, *Crazy Handful of Nothin'*

Scene 1, 21:00-23:30

The DEA has recovered a respirator in the desert used by Walt and Jesse to make meth. The label on the respirator indicates that it came from Walter White's high school chemistry lab. Agent Schrader visits Walter at his school and asks him if he was aware that respirators were missing. When Walt indicates that he was not, Hank informs Walt that he will "need to take a look at" the inventory of his lab. With Walter's permission, Hank inventories the storeroom of the chemistry lab and finds that two respirators are missing along with multiple pieces of glassware.[19]

Scene 2, 32:30-33:30

Over a poker game, the White and Schrader families discuss the fact that Agent Schrader arrested a school janitor, Hugo, for the theft from Walt's lab. Schrader indicates that they identified Hugo

16. *See Season 3*, BREAKING BAD WIKI, http://breakingbad.wikia.com/wiki/Season_3 (last visited Jan. 24, 2015).

17. *See Season 4*, BREAKING BAD WIKI, http://breakingbad.wikia.com/wiki/Season_4 (last visited Jan. 24, 2015).

18. *See Season 5*, BREAKING BAD WIKI, http://breakingbad.wikia.com/wiki/Season_5 (last visited Jan. 24, 2015).

19. *Breaking Bad: Crazy Handful of Nothin'* (AMC television broadcast Mar. 2, 2008).

> because he had a record of possession offenses, had a key, "fit the profile," and they searched his truck and found marijuana. Schrader then informs the family that they obtained a search warrant for Hugo's house and found substantial amounts of marijuana but no evidence of the material stolen from the chemistry lab.[20]

This straightforward scene lays out the evidence in the hands of law enforcement at the time they conducted an arrest and obtained a search warrant. Hank Schrader apparently describes the series of events in chronological order—DEA agents realize that equipment useful in a drug operation is missing from a school chemistry lab; they investigate the individuals with access to the lab, and learn that one of them has a record for drug offenses. They then search his truck, find marijuana, and arrest him. A judge then issues a search warrant for his home and more marijuana is recovered.

This scene provides an excellent introduction to the complexities of the probable cause analysis after *Illinois v. Gates*[21] through a fact pattern that, in my view, is extremely common. The narcotics investigation initially focused on one crime (theft of drug manufacturing equipment), identified a particular individual primarily based on his criminal record, and eventually uncovered evidence of an unrelated possession offense. Students can struggle with the question of whether the combination of access to the lab and a criminal record provide probable cause to arrest Hugo for the theft, to search Hugo's car for evidence without a warrant,[22] and to obtain a search warrant for Hugo's home.[23] In particular, the scene highlights the difference between a search (requiring evidence of a nexus to a location) and an arrest (which does not).[24] Similarly, because the arrest occurs at school, it provides an opportunity to discuss why law enforcement needed a warrant to conduct a search of his home[25] while a

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20. *Id.*

21. Illinois v. Gates, 462 U.S. 213, 230 (1983) (holding that probable cause should be determined based on the totality of the circumstances).

22. I usually have not reached the automobile exception at this point in the course. *See, e.g.*, California v. Carney, 471 U.S 386 (1985); *see also* Carroll v. United States, 267 U.S. 132 (1925). (providing a nice opportunity to note the difference between the warrantless search of the car and the need for a search warrant for the home, even if you are not ready to discuss these cases in depth yet).

23. Unlike some other scenes, I would not try to leave students with the belief that there is a right answer here with respect to probable cause. I am sure that in some jurisdictions, judges would see this case as clearly sufficient while others would believe that the evidence is obviously inadequate.

24. United States v. Grubbs, 540 U.S. 90, 95 (2006) (explaining probable cause to search requires evidence that a particular location contains evidence of a crime).

25. *See, e.g.*, Vale v. Louisiana, 399 U.S. 30, 33–34 (1970).

warrantless arrest in public is acceptable under the Constitution.[26] The scene also allows you to expose students to the ways in which many Fourth Amendment questions become moot. Whether or not the DEA had probable cause to arrest Hugo on the theft, the arrest is almost certainly justified once narcotics are found in his car. Additionally, even if probable cause was absent for the search of the house, the good faith exception makes the evidence from his home admissible.[27]

If only used to explore the questions related to probable cause, the first scene involving the conversation between Walt and Agent Schrader is probably unnecessary. However, either at this point in the class or later in the course, it provides nice discussion example of blended issues relating to *Katz*: standing, and consent. Students can be asked whether Hugo could successfully seek to suppress the evidence recovered during the scene. The first question is whether Hugo possesses a reasonable expectation of privacy in the chemistry lab storeroom.[28] It is his workplace and he, along with a limited number of other key holders, have access to the location.[29] Second, is Walt's consent adequate to justify the search? Whether or not Hugo has standing, the answer to this second question is yes. As the co-occupant of the space who is present on the scene, his consent will preclude a successful suppression motion.[30]

2. The Exclusionary Rule and Regulating Law Enforcement Conduct

Season 5, Episode 6, *Buyout*, 42:53-45:46

> Agents Schrader and Gomez meet with Saul Goodman, a lawyer, and his client, Mike Ehrmantraut, in a DEA conference room. Goodman accuses the agents of harassing Ehrmantraut through unwarranted and extensive surveillance. Schrader and Gomez deny knowing about the surveillance. Goodman points out that they have been constantly following Ehrmantraut including watching him in the park with his granddaughter.[31] Goodman

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26. *Compare* United States v. Watson, 423 U.S. 411 (1976) (authorizing a warrantless arrest in a public place), *with* Payton v. New York, 445 U.S. 573 (1980) (requiring a warrant to conduct an arrest in a home).

27. United States v. Leon, 468 U.S. 897, 920 (1984) (asserting that searches conducted in good faith reliance on a search warrant are exempt from the exclusionary rule).

28. Rakas v. Illinois, 439 U.S. 128, 143 (1978) (setting out test for standing).

29. Mancusi v. DeForte, 392 U.S. 364, 369 (1968) (explaining how expectation of privacy in shared workspace with restricted access should be analyzed).

30. United States v. Matlock, 415 U.S. 164, 170 (1974) ("[T]he consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.").

31. This scene is described below. *See infra* note 51 and accompanying text.

> claims that Ehrmantraut is suffering ill effects from the stress of the surveillance and points out that the agents do not have warrants to tail Ehrmantraut. Gomez and Schrader respond by pointing out that the tails are completely legal and do not require warrants. Goodman agrees, but asserts that extensive surveillance of this nature amounts to a state law stalking violation. He tells the agents that he has requested a temporary restraining order against the DEA on behalf of his client. Goodman suggests that the TRO has been issued by a judge concerned with police harassment of a senior citizen and that a sheriff will serve them with a copy within the hour. Ehrmantraut and Goodman leave but listen to a conversation between Gomez and Schrader over a hidden microphone. The agents admit that they have to back off as a result of the TRO. However, Schrader states that the TRO will not stand up and that Goodman knows it. Ehrmantraut and Goodman then discuss the TRO and agree that it will be dismissed within 24 hours.[32]

Early on in a criminal procedure course, students are exposed to the exclusionary rule and its limitations. The right to exclude evidence in a criminal case is valuable to criminal defendants from whom contraband was seized, but provides little or no benefit to others. Notably, it provides no remedy for violations of the search and seizure rights of individuals never charged with a crime. This observation naturally leads to discussions of alternatives[33] that could supplement or replace the exclusionary rule.

Here we see another alternative – state law equitable remedies as a means to control or restrain federal law enforcement. Is this plausible? The answer is somewhat unclear. As an initial matter, the scene raises the distinction between an injunction aimed at the officers seeking to prevent Fourth Amendment violations and an injunction based on state law. An injunction designed to prevent constitutional violations might theoreti-

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32. *Breaking Bad: Buyout* (AMC television broadcast Aug. 19, 2012).

33. *See, e.g.*, Max Minzner, *Putting Probability Back Into Probable Cause*, 87 TEX. L. REV. 913 (2009) (advocating for the evaluation of law enforcement success rates when gathering evidence based on probable cause); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (arguing for the abolition of the exclusionary rule); L. Timothy Perrin, et. al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call For a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669 (1998) (calling for limitation of the exclusionary rule to evidence seized by intentional or willful misconduct and proposing an administrative remedy whereby individuals injured by police misconduct could sue for civil damages).

cally be possible,[34] but the conduct is probably consistent with the United States Constitution since the officers are simply following the target in public.[35]

Just because the Fourth Amendment does not bar the conduct, though, does not mean it is immediately lawful. The state court judge appears to conclude that the law enforcement tail violates state stalking law.[36] While the agents and Goodman treat the TRO as meritless, state courts may in fact have the power to issue such an injunction, although the question is an open one.[37] The agents, though, need not litigate the action in state court. Any state action against federal officers operating in a law enforcement capacity may be removed to federal court.[38] In the end, the practical outcome here is straightforward. The DEA agents will be able to remove the action, and a federal court is very likely to dismiss the TRO.

3. Definition of "Search"

Season 4, Episode 8, *Hermanos* 19:25-22:55[39]

> Agent Schrader and Walter White are sitting outside Gus Fring's restaurant. Schrader explains to White that he believes that Fring is a major dealer of methamphetamine. Schrader reminds White of the murder of Gale Boetticher and tells White that Fring's fingerprints were found at the murder scene. Schrader describes the interrogation of Fring and the fact that the DEA and the Albuquerque Police Department found Fring's explanation persuasive. As a result, Fring is not an official law enforcement suspect but

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34. Rizzo v. Goode, 423 U.S. 362, 373 (1976) (ruling out injunctive relief against state law enforcement agencies, but leaving open the possibility of injunctions aimed at an individual officer).

35. *See infra* note 52 and accompanying text.

36. Andrew D. Selbst, *Contextual Expectations of Privacy,* 35 CARDOZO L. REV. 643, 658 n.88 (2013) (discussing this scene).

37. *Compare* First Jersey Sec. Inc. v. S.E.C., 476 A.2d 861, 866 (N.J. Super. Ct. App. Div. 1984) ("There is substantial lower court authority providing that a state court does not have the power to enjoin a federal officer from carrying out his public functions . . . .") *with* Ruffalo by Ruffalo v. Civiletti, 702 F.2d 710, 718 n.16 (8th Cir. 1983) (noting that the question is open). *See also* Richard Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385, 1406 (1964) ("[R]eason and the basic principles of our federal system compel the conclusion that state courts have power to issue injunctions against federal officials.").

38. *See* 28 U.S.C. § 1442(a)(1).

39. This clip is somewhat longer than some of the others described in this Essay. The first two minutes provide useful exposition for students have not watched the entire show. To limit the clip to the material necessary for a doctrinal discussion, start at about 21:26.

> Schrader still believes that he is guilty. Schrader then asks Walt for a favor. He points out Fring's car to Walt and asks Walt to place a GPS tracking device on the car. He describes to Walt the operation of the tracker. He tells Walt that the magnet on the tracker will stick to the vehicle and that he purchased it from SkyMall. He explains that it does not provide "live-view" data so they will have to return later, recover the device, and download the tracking data to a computer. Walt asks Hank whether the placement of the device is illegal or constitutes some sort of unlawful search. Hank describes it as "extralegal."[40]

Assuming the tracker produced inculpatory information suggesting that Fring is in fact involved in narcotics, is the evidence admissible against him? This use of the GPS tracker naturally introduces the holding of *United States v. Jones*.[41] As in *Jones*, the attachment of the tracker to the exterior of the vehicle "encroached on a protected area"[42] and would ordinarily constitute a search. Here, though, Walter (at Agent Schrader's instigation) installs the device. Purely private searches do not run afoul of the Fourth Amendment.[43] In other words, does Agent Schrader's ploy work here?

No. This is a nice example of a case where the private citizen is acting as the agent of a public law enforcement officer.[44] The test is context-specific and requires a case-by-case analysis of the extent of the law enforcement involvement in the conduct.[45] The Courts of Appeals have frequently looked to 1) the extent to which law enforcement is aware of the search, and 2) whether the search was motivated by a desire to help law enforcement or for some other reason.[46] The scene shows that Agent

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40. *Breaking Bad: Hermanos* (AMC television broadcast Sept. 4, 2011).

41. United States v. Jones, 132 S. Ct. 945 (2012).

42. *Id.* at 952.

43. United States v. Jacobsen, 466 U.S. 109, 113–14 (1984) ("This Court has also consistently construed this protection as proscribing only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'") (quoting Walter v. United States, 447 U. S. 649, 662 (1980) (Blackmun, J., dissenting)).

44. Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971) (recognizing that private citizens acting as agents of law enforcement might violate the Fourth Amendment).

45. Skinner v. Railway Lab. Execs. Ass'n, 489 U.S. 602, 614 (1989).

46. *See, e.g.*, United States v. Jarrett, F.3d 339, 344–45 (4th Cir. 2003) (providing the two-part test and collecting cases); United States v. Leffall, 82 F.3d 343, 347 (10th Cir. 1996).

Schrader was not only aware of the search, but actively encouraged it[47] and convinced Walt to install the device solely in order to develop evidence against Fring.[48] Those actions should be sufficient to convert Walt into a government agent.

Another approach here is to assume that the installation of the tracker is a private search and does not raise Fourth Amendment issues. The scene clearly shows, though, that Agent Schrader intends to take the tracking data and use it to investigate Fring's movements. Schrader, a DEA agent, will personally conduct those actions. Suppression then turns on whether use of long-term tracking data qualifies as a search. The scene then directly raises the issue the majority avoided in *Jones* – does GPS tracking itself (apart from the installation) need a warrant or other justification under the Constitution? I anticipate most Criminal Procedure classes already explore this issue after *Jones*. Because the scene sharply divides the installation and the tracking, it allows a stark presentation of that question.

The scene also allows a discussion of the role of internal law enforcement policy in the search and seizure analysis. Even if the use of the GPS tracker were otherwise acceptable, Agent Schrader is acting without authorization. He makes clear that the DEA and APD have accepted Fring's story, closed the case, and do not intend to investigate further. Assuming that the DEA has an internal rule limiting investigations to open cases,[49] this fact pattern provides an opportunity to explore the possibility of an exclusionary rule for non-constitutional violations. The doctrine is straightforward here – mere violations of internal executive branch rules do not lead to suppression.[50] To the extent that a Criminal Procedure course explores alternatives to the current exclusionary rule doctrine, the effectiveness and enforcement of law enforcement self-regu-

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47. *See* United States v. Smythe, 84 F.3d 1240, 1243 (10th Cir. 1996) ([T]he government agent must . . . affirmatively encourage, initiate or instigate the private action.").

48. The question may become more complicated if the scene is extended. After receiving the device from Agent Schrader, Walt enters the restaurant and shows the tracker to Fring. Knowing that Walt is working with the DEA, Fring tells him to install it on the car. As a result, Fring likely consented to the search.

49. The agencies also probably regulate the scope of citizen involvement in investigations. If so, Agent Schrader's enlistment of Walter White is also potentially a violation of internal policy.

50. United States v. Caceres, 440 U.S. 741, 754-55 (1979) ("In view of our conclusion that none of respondent's constitutional rights has been violated here, either by the actual recording or by the agency violation of its own regulations, our precedents enforcing the exclusionary rule to deter constitutional violations provide no support for the rule's application in this case.").

lation of its own investigation is an important topic. Agent Schrader's conduct and how to restrict it can be a useful starting point for that discussion.

4. Abandonment

Season 5, Episode 6, *Buyout*, 9:25-11:40

> A DEA agent is conducting surveillance of Mike Ehrmantraut through binoculars from a vehicle near a park. He is joined in the car by a second agent, his supervisor, Steven Gomez. The agent informs Gomez that Ehrmantraut is in the park playing with his granddaughter. The agents continue to use the binoculars to observe him. They see that he writes a note on a piece of paper that he then conceals under a nearby trashcan. Gomez identifies this as a "dead drop," suggesting that he has left the note for someone to recover. They take note of the time and start to videotape the scene. Ehrmantraut leaves the park with his granddaughter. The agents discuss the fact that it might be hours before someone comes to recover the note. Agent Gomez leaves the car. He puts on latex gloves, lifts the trashcan, and recovers the note. The note contains an obscenity, reflecting that Ehrmantraut was aware of the surveillance.[51]

This scene provides a nice companion to the discussion of the GPS tracker in *Hermanos* described above. This type of observation, surveillance of a target's activities in a public park, is a routine component of police work and does not violate the Fourth Amendment.[52] However, it demonstrates why the use of GPS technology is extremely attractive to law enforcement. The surveillance in the scene is labor-intensive and boring. Only a small fraction of the time officers spend watching a target produces evidence of criminal activity. Most of the experience involves watching potential criminals conduct routine activities. In addition, the scene reflects some of the weaknesses of GPS technology and why officers continue to conduct this type of surveillance. Officers watching Ehrmantraut's movements remotely through a GPS tracker likely would not learn that he had left a note beneath a trashcan. Knowledge of the defendant's movements is not the same as knowledge of his activities.

Once the officers observe the dead drop, they need to make two decisions. First, can they recover the note? The answer to this question is

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51. *Breaking Bad: Buyout* (AMC television broadcast Aug. 19, 2012).

52. *See, e.g.*, United States v. Knotts, 460 U.S. 276, 281 (1983) (holding that a person traveling by car on public roadways has "no reasonable expectation of privacy").

almost certainly yes. Abandoned property is open to inspection by members of the public, including by law enforcement.[53] Perhaps the best argument is that the note was not placed in the trashcan, but was instead hidden underneath it. However, property left in public, even with some attempt to conceal it, should be outside the protection of the Fourth Amendment.

The more interesting question is whether the officers *should* recover the note. As they discuss in the scene, they have a choice to make. As an alternative to an immediate seizure, the agents could wait and see whether someone came along to collect it. After that happens, the agents might plausibly be able to arrest that person and interrogate them. Officers need not make an arrest or conduct a search at the first moment they have probable cause.[54] Of course, a delayed seizure involves an additional commitment of resources to surveillance. In this scene, the officers decide that the potential for delay is too costly. In that sense, it realistically shows the role of law enforcement resource constraints and the extent to which they can be as (or more) important than the constraints of the Constitution.[55]

5. Exigency/Community Caretaker

Season 3, Episode 6, *Sunset*, 0:00-3:48

> This episode opens with a radio call to a tribal police officer. The dispatcher requests that the officer check in on an elderly woman because the woman's daughter in California had not heard from her recently and was worried. The officer heads to the woman's house, a rural residence off a dirt road. The officer approaches the house and knocks on the door. There is no answer. He heads to a window that is covered by a transparent curtain and looks in. He observes candles burning. He next notices that two identical garments are hanging on a clothesline next to the house. He goes to the back door and tries to enter, discovering that the house is locked. Turning around, he observes flies buzzing next to a small building that appears to be a shed or outhouse. When he investigates, he finds a body under a blanket behind the building. He

53. *Cf.* California v. Greenwood, 486 U.S. 35, 40 (1988) (holding that garbage placed on the curb for collection is not subject to Fourth Amendment protections).

54. *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 417 (1966) ("Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have minimum evidence to establish probable cause.").

55. *See* Max Minzner & Christopher M. Anderson, *Do Warrants Matter?*, 9 REV. L. & ECON. 169 (2013) (arguing that budget constraints shape law enforcement behavior).

> draws his gun, conceals himself behind his truck, calls in to report the death as a homicide and requests backup. He calls out to anyone in the building and a young man exits. The officer orders him to raise his hands.[56]

In a hypothetical prosecution of the young man for the murder, students can wrestle with a motion to suppress the body found by the officer outside the home. First, they might be asked whether the officer conducted a search. The officer peers through a window covered by a semi-opaque curtain. If students have read *Minnesota v. Carter*,[57] this activity presents a nice application of the issue that a majority of the court avoided resolving in that case – does looking through a curtained window qualify as a search?[58] Additionally, the scene clearly illustrates the notion of curtilage.[59] Because the residence is rural, there is little apparent distinction between the woman's property and the undeveloped desert. However, the location where the body is actually discovered is immediately next to an outhouse. Almost certainly, the area lies within the curtilage of the house.

As a result, the entry needs some justification. The scene most closely fits within the emergency aid exception to the warrant requirement.[60] Under *Stuart*, "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[61] Here the officer acts on the information from the dispatcher that an elderly resident of the house is not responding to her daughter. After the officer hears no answer at the door, he continues the investigation around the sides of the house. After he sees the flies, he investigates behind the outhouse and discovers the body. While not certain, *Stuart* very likely authorizes the conduct here.[62]

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56. *Breaking Bad: Sunset* (AMC television broadcast Apr. 25, 2010).

57. Minnesota v. Carter, 525 U.S. 83 (1998).

58. *Id.* at 104–05 (Breyer, J., concurring) (noting that the defendants lacked standing and that the Court did not reach the question of whether an officer's effort to see through partially obscured window constituted a search).

59. Oliver v. United States, 466 U.S 170, 180 (1984); Hester v. United States, 265 U.S. 57, 59 (1924).

60. Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006).

61. *Id.*

62. For those who have seen the entire series, exclusion is unlikely for another reason — the defendant almost certainly lacks standing to challenge the search. The young man in the scene is one of a pair of brothers who have entered the country to take revenge on (among others) Walter White. They appear to have killed the woman and taken over her residence. After Jones v. United States, 362 U.S. 257, 267 (1960), standing seems to require (at least) that the defendant is legitimately present on the premises. A home invader lacks standing. *See* Rakas v. Illinois, 439 U.S. 128, 143 n.12

The identity of the officer and the location of the search raise an additional issue here. As a matter of constitutional law, the Fourth Amendment does not apply to searches that tribal police officers conduct on tribal land.[63] However, it is plausible to imagine that this search could violate the tribal restraints on the conduct of its own police through its internal version of the Fourth Amendment. The homicide prosecution here is virtually certain to proceed in federal court.[64] Should the federal court apply the exclusionary rule in cases involving violations of tribal search and seizure restrictions that do not rise to the level of federal constitutional violations?[65] Even in criminal procedure courses where tribal issues are not discussed, the parallel questions involving state constitutional law are worthy of consideration. As discussed later on in this Essay, state constitutions frequently contain parallel search and seizure provisions to the Fourth Amendment that provide broader protection. If state law enforcement comply with the Fourth Amendment but violate the state constitution, should that evidence be admissible in a federal prosecution?[66] On the other hand, if federal officers act in a manner prohibited by the state constitution, should that evidence be admitted in a prosecution in state court? This second question has significant practical relevance in narcotics cases where DEA or other officials make narcotics seizures that federal prosecutors decline to pursue and thus get charged in state court.[67]

(1978) ("A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'"). Because the relationship between the defendant and the property is not apparent in the scene, it may take some explanation to explore this issue.

63. *See* Talton v. Mayes, 163 U.S. 376 (1896); *see also* 25 U.S.C. §1302(a)(2) (2013) (creating comparable statutory protections from search and seizure by tribal law enforcement).

64. The scene appears to involve the murder of a tribal member by a non-Indian, a crime falling within the scope of the Indian Country Crimes Act, 18 U.S.C. §1152 (2013).

65. The circuits to consider this question have held that the evidence remains admissible. *See* United States v. Male Juvenile, 280 F.3d 1008, 1023 (9th Cir. 2002); United States v. Hornbeck, 118 F.3d 615, 617–18 (8th Cir. 1997).

66. The short answer is that law enforcement violations of state law do not produce exclusion unless the officers also violate federal law. California v. Greenwood, 486 U.S. 35, 43-44 (1988).

67. State v. Cardenas-Alvarez, 2001-NMSC-017, ¶¶ 5–6, 130 N.M. 386 (noting that state law prohibits introducing evidence resulting from violation of the state constitution by federal agents).

6. Automobile Exception

Season 3, Episode 6, *Sunset*, 34:30-39:03

> Agent Schrader is trying to open a small window of a recreational vehicle at a salvage yard. Schrader knows Pinkman is inside the RV but is unaware that White is with him.[68] Schrader then tries the door and discovers that it is locked. Schrader calls out to Pinkman to encourage him to leave the vehicle. Schrader then obtains a crowbar from his car and starts to force the door open. A man approaches Schrader from behind and asks him if he has a warrant. Schrader does not answer but asks the man to identify himself and inquires about his knowledge of the RV. The man states that he is the owner of the lot. He tells Schrader that he is trespassing and that it appears that he is attempting to break into the RV. He asks him again whether he has a warrant. Schrader states that he does not need a warrant if he has probable cause. The owner argues that probable cause only applies to vehicles and Schrader responds that the RV is a vehicle because it is on wheels. The lot owner counters that it is a residence. He asks Schrader if he saw the RV drive into the lot and claims that the agent has no reason to believe that it is operational. He accuses Schrader of lacking evidence and merely engaging in a fishing expedition. The agent then removes duct tape from the side of the RV, revealing bullet holes, and claims that because a firearm was discharged in the vehicle, a judge would accept that as probable cause. Inside the RV, White encourages Pinkman to yell out that Schrader could not have known about the bullet holes before lifting the tape. The owner and Schrader hear Pinkman and the owner agrees that probable cause must be apparent. White then suggests that Pinkman shout out that it is his domicile. Schrader then relents and returns to his car and places a phone call. He appears to be seeking help in obtaining a warrant.[69]

Who is right – the lot owner or Agent Schrader? This scene clearly presents the issue from *California v. Carney*.[70] Law enforcement officers ordinarily need a search warrant to enter a house. Under the automobile exception, they can search a car purely based on probable cause. A recreational vehicle is the boundary case testing the range of that rule. *Carney*

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68. If students have not been exposed to the RV so far in the course, it would be useful to explain its relevance. White and Pinkman used it early in the series as a mobile laboratory to cook methamphetamine. Schrader became aware of the RV and followed Pinkman to the salvage yard believing that it contains evidence of his narcotics operation.

69. *Breaking Bad: Sunset* (AMC television broadcast Apr. 25, 2010).

70. California v. Carney, 471 U.S. 386 (1985).

holds that the automobile exception extends to an RV, at least to the extent that it is readily mobile, subject to a pervasive regulatory and licensing regime, and located in a place where an objective observer would conclude that it was being used as a vehicle.[71]

Carney sets aside cases where the RV appears to be a home:

> We need not pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence. Among the factors that might be relevant in determining whether a warrant would be required in such a circumstance is its location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road.[72]

Applying that rule to these facts is complicated. Schrader correctly notes that the RV is on wheels (not blocks) and there is no evidence that it is connected to utilities. However, there is no evidence it has been driven recently, it is parked on a salvage lot not immediately accessible to a road, and contains an individual claiming that it is his residence. Under *Carney*, it is easy to imagine that either position is correct.

Furthermore, even if the RV is within the exception, does probable cause exist? Agent Schrader has been seeking an RV matching the description of this one that he (correctly) believes has been used in a narcotics operation. Moreover, he knows that Pinkman is involved in the narcotics conspiracy and he has followed Pinkman to the location. Schrader, then, has a strong argument that there is probable cause to search the RV. However, he cannot rely on the bullet holes. Walt and the lot owner correctly note that they were not visible before Schrader removed the tape covering them. This action exposed something that was previously concealed and was not apparent to the public.[73] Even such a relatively minor invasion of privacy requires some Fourth Amendment justification and, if probable cause were not already present, the damage to the RV will not create it.

The scene presents one other issue. Agent Schrader enters the salvage lot, a business location, without a warrant. The Fourth Amendment certainly extends to businesses.[74] Here, though, the lot appears to be open to the public. As a result, Schrader's initial entry is almost certainly acceptable. However, the lot owner informs him that he is trespassing. Law

71. *Id.* at 393.
72. *Id.* at 2071 n.3.
73. *See* Arizona v. Hicks, 480 U.S. 321, 325 (1985).
74. Dow Chem. Co. v. United States, 476 U.S. 227, 237 (1986).

enforcement can enter areas that business owners have made open for public use. Remaining though, once that license has been revoked raises Fourth Amendment concerns.

Season 3, Episode 5, *Mas,* 9:40-11:55

> Agent Gomez, sitting in a DEA vehicle at night, watches Agent Schrader through binoculars with night-vision technology. Schrader is examining the exterior of a recreational vehicle located in an RV park. Schrader returns to the car and tells Gomez that the RV is "buttoned up." He could not see anything inside. Gomez tells Schrader that he does not think that this is the RV they are looking for. He notes that there is no smell or smoke that would suggest that the vehicle is being used to make methamphetamine. Schrader responds that he heard movement inside and the operation could be just getting underway. Gomez suggests that they leave for the night and return the next day with a search warrant. Schrader refuses and then leaves the car again. He approaches the RV again. At the back of the RV, Schrader notices an exterior ladder leading to the roof of the vehicle. He climbs the ladder and looks through a skylight. He sees an elderly couple in their underwear playing cards. They notice him looking down and are frightened.[75]

Paired with the previous scene, this vignette sharpens the discussion of the scope of the automobile exception while adding some new elements. Here the RV is much more clearly mobile. It is located in a facility designed for RV parking, rather than in a salvage lot. On the other hand, the arguments for probable cause are far weaker. Schrader knows (at most) that the RV fits the description of his target vehicle and has no apparent tie to anyone involved in the operation.

If probable cause is lacking, can Schrader's action in looking through a skylight be justified otherwise? He likely would be able to look through the open window of a vehicle.[76] The skylight, though, is quite different. Even though it is exposed to the public in some sense, Schrader trespassed on the roof of the vehicle to look inside.[77] By accessing a loca-

75. *Breaking Bad: Mas* (AMC television broadcast Apr. 18, 2010).

76. *See* Texas v. Brown, 460 U.S. 730, 740 (1983) (plurality opinion) (holding that no search occurs when an officer observes the interior of a vehicle from outside).

77. *Id.* at 737 (noting that an officer must lawfully be in a place to view a particular area).

tion not open to the general public, Schrader has exceeded the boundaries authorized for a warrantless search.[78]

Second, the scene is a very nice example of the limited nature of the exclusionary remedy. The couple is quite reasonably frightened to be startled at night by a man on the roof of their RV. Agent Schrader has invaded their privacy and has violated the constitution. Because they were not involved in criminal activities, though, there is no prosecution and no evidence to suppress. Although a civil action under *Bivens*[79] is theoretically an option, qualified immunity presents a significant barrier to any civil suit.[80] Additionally, their limited damages weigh against bringing a civil case. In practice, they are left without any remedy for the violation of their rights.

7. Consent Searches

Season 4, Episode 12, *End Times*, 9:09-12:22

> The scene opens with Agent Schrader and Gomez discussing Schrader's hunch that a large industrial laundry is concealing a superlab – an enormous, highly sophisticated production facility. The agents explicitly discuss the fact that they lack probable cause and that no judge would sign a search warrant for the location. Schrader convinces Gomez to conduct a "knock and talk" and develop some additional information.
>
> At the laundry, Gomez speaks with the manager of the facility. He asks for permission to search the location. He states (falsely) that he had arrested a chef on heroin possession. The arrestee claimed that he was unaware of the heroin and it must have been placed in his clothes at the laundry without his knowledge. Gomez tells the manager that he knows the story is false and that he is only proceeding to search because the chef's father is a United States Senator. The manager hesitates to agree to the search, indicating that he needs to check with his boss, which might take some time. Agent Gomez states the he understands but that "he will have to go get a warrant and do it official" which will require the facility to shut down for the day since the execution of the search warrant will require 20 agents. He then claims that the search "will be less trouble if it is just us two." After the manager confirms that it will be just the two of them, he agrees. After he

78. United States v. Amuny, 767 F.2d 1113, 1127 (5th Cir. 1985) (constituting a search when officers climbed on an airplane and looked in a window).

79. Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

80. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982).

> agrees, the agents bring a dog out of the vehicle to the surprise of the manager.[81]

With only three minutes of class time, this scene raises all three of the core doctrinal issues relating to consent searches – authority, voluntariness, and scope. Authority is the easiest of these questions given the facts. The on-site manager of a commercial facility almost certainly possesses the actual authority to consent to the search. Even if actual authority is absent, these facts provide a clear example of consent by an individual who the officers reasonably believe has such authority.[82] The scene does provide the opportunity to explore the question of the manager's statement that he had to check with his boss – under what circumstances are law enforcement bound to take seriously a disclaimer of authority if the individual later consents to search?

The voluntariness issue is somewhat more complex. Students are generally surprised to find that the extent of the deception in the scene might not invalidate the search.[83] Similarly, with respect to the threat of a search warrant, this discussion nicely demonstrates a doctrinal distinction between statements that in practice may sound quite similar. Compare Agent Gomez's statement and the facts of *Bumper v. North Carolina*.[84] The *Bumper* Court invalidated a consent search where law enforcement claimed to possess a search warrant.[85] Here Gomez claims to the manager that he will have to go get a warrant (after explicitly admitting privately that he lacks probable cause). Under *Bumper*, false statements about the existence of a warrant will make a search invalid. False statements about obtaining a warrant may also make a consent search invalid, although an officer who merely indicates his intent to seek one is on safer ground.[86]

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81. *Breaking Bad: End Times* (AMC television broadcast Oct. 2, 2011).

82. Illinois v. Rodriguez, 497 U.S. 177, 188–89 (1990).

83. The Supreme Court has not answered this question clearly. The deception here relates to the purpose of the search. *See generally* WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.2(n) (5th ed. 2012). The officers do not mislead the manager about the fact that they are looking for narcotics, but are seeking a different type of drug and in larger quantities than they suggest. Assuming that the officers do not go beyond the scope of the consent actually granted, this is an open question. *Id.* at 178 (noting the difficulty of the consent issue "when the police deliberately misstate what they wish to search for and then find what they are actually looking for in a consent search of no greater intensity than they represented they would make").

84. Bumper v. North Carolina, 391 U.S. 543 (1968).

85. *Id.* at 547–48.

86. *See* LAFAVE, *supra* note 83, at 97 (noting the distinction between seeking and obtaining a warrant).

Finally, the scope of the search ultimately conducted may well exceed the consent granted. The laundry manager is clear that he believes that he is only consenting to the entry of the two agents. However, the discussion centers on the disruptive nature of a larger group of individuals conducting a search.[87] Does the addition of the dog go beyond the consent?[88] This question is perhaps the most difficult of the three.

8. Custodial Interrogation

Season 4, Episode 8, *Hermanos*, 6:15-8:10

> Gus Fring receives a phone call at his place of work. He simply says, "Yes, Detective," and then the scene cuts to a shot of Fring at a police station. Four law enforcement officers welcome Fring into a conference room. The conversation reveals that Fring already knows many of them and their families personally. One of the officers invites Fring to sit at the end of a table and asks for his permission to record the conversation. He informs Fring that he has asked the other agents, representatives of the DEA, to participate in the conversation because their investigation overlaps with his own. A DEA agent tells Fring that they appreciate his appearance, but he has the right to have an attorney present for the conversation. Fring states that he does not see why that is necessary, but he also has no idea why he is there. The agent then asks if Fring wishes to continue. Fring agrees and indicates that he is anxious to learn what is going on. An officer states that Fring's fingerprints were found at a crime scene. Fring responds with surprise. The officer continues by saying "a drug-related homicide." Fring next admits that he knew the victim.[89]

Imagine Fring is charged for his involvement in the murder. The statement that he knew the victim is certainly useful for law enforcement. Is it admissible given the absence of *Miranda* warnings? This scene sets

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87. Florida v. Jimeno, 500 U.S. 248, 251 (1991) (turning on what a reasonable person would have understood the words said to have meant).

88. The scope of the consent limits the intensity of the search as well. *See* United States v. Perez, 37 F.3d 510, 516 (9th Cir. 1994) (internal citations omitted) (concluding that the addition of a dog to a search did not exceed the scope of the consent when "the search was not more intrusive than Perez had envisioned when giving his consent, but rather simply more effective. . . . Using a narcotics dog to carry out a consensual search of an automobile is perhaps the least intrusive means of searching because it involves no unnecessary opening or forcing of closed containers or sealed areas of the car unless the dog alerts."). Here the facts are less favorable to the government since the manager explicitly indicated that he was just consenting to the two officers.

89. *Breaking Bad: Hermanos* (AMC television broadcast Sept. 4, 2011).

out the limits of *Miranda v. Arizona*[90] and the specific characteristics of "custodial interrogation" that triggers the warning requirement. Notably, Fring is not asked a direct question in this scene. Students can explore whether a series of declarative statements by law enforcement should constitute an interrogation. At least within the meaning of *Rhode Island v. Innis*,[91] Fring is the subject of interrogation. *Innis* recognized that interrogation is not limited "to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response."[92] A series of direct statements, even those not presented in the form of a question, indicating that Fring's fingerprints were found at the scene of a drug-related homicide, are enough to meet the requirements of *Innis*.

As a result, if Fring is in custody, he is entitled to his *Miranda* warnings. Under *Berkermer v. McCarty*,[93] this depends on whether "a reasonable man in the suspect's position would have" believed he was subject to "restraints comparable to those associated with a formal arrest."[94] The location of the interrogation certainly plays a central role in deciding this question. *Miranda* itself was primarily concerned with interrogations at the police station.[95] However, even though the interrogation occurs at the station here, Fring appears to have been invited to the station, not compelled to appear. *Oregon v. Mathiason*[96] recognized that warnings are not required before interrogation where the defendant was invited to appear at the station. While we do not hear the contents of the phone call between the detective and Fring, there is no evidence that he is appearing under any compulsion.[97]

If Fring is in custody, the statements are inadmissible. Fring receives a modified and inadequate version of the warnings. The warnings classically have four components: 1) the right to remain silent; 2) the fact that a failure to remain silent will be admissible against the defendant; 3) the

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90. Miranda v. Arizona, 384 U.S. 436 (1966).
91. Rhode Island v. Innis, 446 U.S. 291 (1980).
92. *Id.* at 301.
93. Berkermer v. McCarty, 468 U.S. 420 (1984).
94. *Id.* at 441-442.
95. *Miranda*, 384 U.S. at 440 (1966).
96. Oregon v. Mathiason, 429 U.S. 492, 495 (1977).
97. One interesting issue to explore is whether Fring's close relationship with the officers involved is relevant to the custody question. *See* Yarborough v. Alvarado, 541 U.S. 652, 666–68 (2004) (suggesting that inexperience with law enforcement is not a consideration in determining that a situation has become custodial). Is the opposite also true? Does Fring's experience here further reduce the custodial nature of the interaction?

right to counsel; and 4) the right of indigent defendants to have counsel appointed.[98] Fring is informed only that he has a right to counsel, not of his right to remain silent. The scene, though, does provide an interesting test of the question of whether the final warning, relating to the appointment of counsel, would be required. *Miranda* suggests that this warning is not required if the police know that the subject can hire a lawyer.[99] Fring clearly has sufficient wealth to hire counsel and it appears that the officers know that fact.

Finally, is there any constitutional relevance that Fring received a partial (but ineffective) version of the *Miranda* warnings? Put differently, does providing some or all of the *Miranda* warnings convert this conversation into a custodial interrogation? The answer is probably (but not certainly) no. The federal circuits are split on this question with some suggesting that the provision of otherwise unnecessary warnings is irrelevant to the analysis about custody while others treat it as a fact worth considering.[100]

II. TEACHING STATE CONSTITUTIONAL CRIMINAL PROCEDURE

For those of us on the faculty at the University of New Mexico School of Law, *Breaking Bad* has another wonderful quality. It is set in our home state. Hank Schrader chases the methamphetamine empire created by the elusive Heisenberg against a backdrop of New Mexico's desert, mountains, and clear blue skies.[101] As a result, the law enforcement conduct in the show is not only regulated by the Fourth Amendment, but

98. California v. Prysock, 453 U.S. 355, 363 (1981).

99. *See Miranda*, 384 U.S. at 473 n.43 ("While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in *ex post facto* inquiries into financial ability when there is any doubt at all on that score.").

100. *See generally* United States v. Harris, 221 F.3d 1048, 1051 (8th Cir. 2000) (noting the split); Aurora Maoz, Note, *Empty Promises: Miranda Warnings in Noncustodial Interrogations*, 110 MICH. L. REV. 1309 (2012).

101. Vince Gilligan has emphasized the role of Albuquerque's natural beauty in the success of the show. *See generally* Vince Gilligan, *Vince Gilligan on Albuquerque*, DEPARTURES (Aug. 9, 2013), http://www.departures.com/articles/vince-gilligan-on-albuquerque ("Albuquerque—light and dark, yin and yang—was, in hindsight, the only conceivable location for *Breaking Bad*. It teems with all the personality and flavor our postmodern western could ever need. I think of dark blue skies dotted with cotton-ball clouds hanging over an endless desert plain. I try to picture what our show would be without those skies, and I can't.").

also by the New Mexico Constitution, which provides separate and independent rights to the targets of the investigations in the show.

Like other states, the Constitution of the State of New Mexico contains its own search and seizure clause. Article II, Section 10[102] also prohibits unreasonable searches and seizures and imposes its own warrant requirement. Similarly, the State Constitution independently limits police interrogation. Article II, Section 15, like the Fifth Amendment, protects against compelled self-incrimination.[103]

For each of these clauses, the New Mexico Supreme Court faces a choice in every case. If the United States Constitution does not require exclusion, should the court read the state provision more broadly? In New Mexico, at least, the court has repeatedly interpreted the constitutional protections differently from the federal counterpart. For instance, New Mexico retains the two-prong *Aguilar*/*Spinelli*[104] approach to determining informant veracity and has rejected the totality of the circumstances test in *Illinois v. Gates*.[105] New Mexico does not apply the good faith exception. Defendants may litigate probable cause even when a search is conducted pursuant to a warrant.[106] The automobile exception does not apply under our State Constitution. Officers need exigency, in addition to probable cause, to search vehicles without a warrant in the state.[107]

These, and other cases, are a core component of my Criminal Procedure course. For every major topic, from the foundational questions of the definitions of search and seizure through the warrant requirement and its exceptions, to the restrictions on interrogation, students look at doctrine from the state courts in addition to the federal cases. They explore how the New Mexico Supreme Court has accepted or rejected the federal case law.

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102. N.M. CONST. art. II, § 10 ("The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.").

103. N.M. CONST. art. II, § 15 ("No person shall be compelled to testify against himself in a criminal proceeding.").

104. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

105. Illinois v. Gates, 462 U.S. 213, 230 (1983). New Mexico rejected the *Gates* approach in State v. Cordova, 1989-NMSC-083, ¶ 17, 109 N.M. 211.

106. *Compare* State v. Guttierez, 1993-NMSC-062, 116 N.M. 431 (rejecting good faith exception), *with* U.S. v. Leon, 468 U.S. 897 (1984).

107. State v. Gomez, 1997-NMSC-006, ¶ 39, 122 N.M. 777.

Faculty at other law schools, of course, should not be teaching New Mexico constitutional law. However, they should be teaching the cases from their home state. This Section outlines the value of teaching the search and seizure and interrogation provisions of the state constitution. First, as a practical matter, students will immediately face these issues when entering practice. Most students stay close to home when leaving law school, and students who practice criminal law tend to start their careers in state courts. Second, including state constitutional law brings inherent pedagogical benefits. Students gain when they explore alternatives to the approaches adopted by the United States Supreme Court.

A. Teaching What Our Students Practice

For straightforward reasons, the classic criminal procedure casebooks are aimed at a national audience. Books focused on the law of specific states are simply less likely to sell. However, this fact means that the law that students learn in the classroom is not the same law that confronts them when they graduate. The practice of criminal procedure is not exclusively (or even largely) the practice of federal constitutional law. To a large degree, we know where our students end up practicing – they mostly start in state court. As a result, defendants are in a position to make suppression arguments not just under the United States Constitution, but also under any relevant provisions of the state constitution. Moreover, students do not end up spread across the country. Graduates end up where they start. Students practice in the states where they get their law degree.[108]

When students begin their careers in criminal law immediately after law school, they start in state court. If they become prosecutors, they become Assistant District Attorneys ("ADA"), not Assistant United States Attorneys ("AUSA"). As a practical matter, AUSA positions are unavailable to recent graduates and require at least a few years of practice experience. ADA positions, though, are often open to brand-new graduates.[109] In addition, the number of openings annually for state prosecutors far exceeds the number of federal prosecutorial vacancies. Only between 300 and 400 new Assistant United States Attorneys are hired nationally each year.[110] The District Attorney offices in New York City alone hire in

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108. *See infra* notes 113–16 and accompanying text.

109. A United States Attorney's Office typically requires several years of experience for a permanent hire. District Attorney offices are more likely to be willing to hire a graduating student and train them on the job, but will also be will also hire laterally." *See Criminal Prosecution*, YALE LAW SCHOOL, at 12, 14 (2013), http://www.law.yale.edu/documents/pdf/CDO_Public/Public_Version_Crim_Pro_2012.pdf.

110. *Id.* at 11 (noting 329 hires in FY2011 and 342 hires nationally in FY2010).

excess of 200 new ADAs annually.[111] The pattern is the same for criminal defense jobs. State public defender positions are open to recent graduates but positions for federal public defenders are largely unavailable.[112]

Students practicing criminal law do not just start in state court generally – we know the state where they usually start. Law schools primarily feed into their home state market. The National Association of Law Placement surveys law schools annually to determine their student's employment outcomes. The NALP data demonstrates the local nature of law school hiring. For the Class of 2012, in 42 states, at least half of the employed graduates of law schools located in the state stayed in that state.[113] Only in four states do fewer than 45% of graduates stay local.[114] Notably, in 15 states, more than 75% of graduates stay in state.[115] The national median is 69% of graduates remain in state.[116] Indeed, this process of counting states does not fully reflect how local law schools hiring remains. Only one state —Virginia— where fewer than 45% of employed gradu-

111. *See* THE NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE, *FAQs* (2013) http://manhattanda.org/faqs (noting that the Manhattan District Attorney's office indicates between 30–40 new hires per year); OFFICE OF THE BRONX DISTRICT ATTORNEY, *Career Opportunities, Legal Staff*, http://bronxda.nyc.gov/office/legal.htm (last visited Jan. 26, 2015) (noting that the Bronx DA hired 80 new ADAs in 2013); BROOKLYN DISTRICT ATTORNEY'S OFFICE, *Legal Recruiting*, http://www.brooklynda.org/office/legal-recruiting_v1.html (last visited Jan. 20, 2015) (noting that the Brooklyn District Attorney hires 60–70 new ADAs each year); Press Release, Queens County District Attorney, Queens District Attorney Richard A. Brown Appoints 21 New Assistant District Attorneys (Sept. 2, 2014) http://www.queensda.org/newpressreleases/2014/september/ada_fall_2014_class_%20release.pdf (noting that Queens added 21 lawyers in 2014); SI LIVE, *D.A. and his 46 Assistants Sworn in for Another Term* (Jan. 21, 2012) http://www.silive.com/northshore/index.ssf/2012/01/da_and_his_46_assistants_sworn.html (noting that, in 2012, Staten Island added 46 new ADAs).

112. *Careers in Indigent Defense: A Guide to Public Defender Programs*, OFFICE OF PUBLIC INTEREST ADVISING, HARVARD LAW SCHOOL (2012) at 6, http://www.law.harvard.edu/current/careers/opia/toolkit/guides/documents/2012pdguide.pdf ("Most, but not all, of the attorneys hired for the Federal Public Defender offices are experienced attorneys, either from state or local public defender organizations or from large private firms.").

113. *See* NATIONAL ASSOCIATION OF LAW PLACEMENT: JOBS & JDS EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES: Class of 2012, at 81 (noting that the states where more than half of the employed graduates left were: Connecticut, Delaware, Indiana, Massachusetts, Michigan, New Hampshire, Virginia, and Vermont).

114. *Id.* (noting that the states are Delaware (16.6% remain in state); New Hampshire (27.3%); Virginia (37.2%); Vermont (24.7%)).

115. *Id.* (noting that they are Arizona (75.9%); Arkansas (76.7%); California (84.4%); Colorado (85.3%); Florida (79.1%); Hawaii (91.5%); Maine (81%); Minnesota (79.1%); Montana (83.9%); Nevada (88%); New Mexico (86.15%); New York (76.9%); South Dakota (79.4%); Texas (89.5%); West Virginia (80.6%)).

116. *Id.* at 80.

ates remain in state, graduates a substantial number of law students. The other three — Delaware, New Hampshire, and Vermont —all produce relatively few law students. In contrast, the four states producing the largest number of 2012 graduates with known employment status — New York, California, Florida, Texas— all had at least 75% of their employed graduates staying in state.

This data suggests that the goal of reaching a national audience in the traditional criminal procedure course is misplaced. Students are overwhelmingly likely to stay in the state where they receive their legal education. If they begin their careers in criminal law, they are likely to be in the courts of that state. As a result, the constitution of the state where the law school is located has significant practical relevance to students at the start of their career.

B. The Value of Constitutional Comparisons

Even outside the practical benefits to students, state constitutional law provides significant additional pedagogical benefits. As a simple matter, looking beyond the United States Supreme Court obviously provides a richer body of case law. If a federal constitutional case on a topic does not work well in the classroom, the parallel state case can be a valuable supplement.

Importantly, state court constitutional cases vary from their United States Supreme Court counterparts in predictable ways. Of course, states are not in a position to provide less protection than the Fourth and Fifth Amendments. The federal constitution provides a floor beneath the rights guaranteed under state law. This means that state supreme courts are always in the position of deciding whether to interpret their state constitution as identical to the United States Constitution or whether to deviate. State court opinions often include discussions of the strengths and weaknesses of the federal opinion. These cases provide useful examples of judges engaged in the same enterprise as students—struggling with the doctrine provided by the Court and trying to decide whether it is coherent.[117]

Moreover, state cases provide examples of the "road not taken." The Supreme Court often has to make predictions about law enforcement

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117. For example, in New York v. Belton, 453 U.S. 454, 460 (1981), the Supreme Court suggested that the search incident to arrest doctrine permitted a search of an automobile even when the arrestee no longer had access to the car. The New Mexico Supreme Court rejected that approach as inconsistent with the underlying justification behind the doctrine. *See* State v. Rowell, 2008-NMSC-041, ¶ 21, 144 N.M. 371. The United States Supreme Court followed suit the next year in Arizona v. Gant, 556 U.S. 332 (2009).

behavior in the criminal procedure context. The Court either rejects particular approaches as overly restrictive on law enforcement conduct or endorses bright-line rules because the possible exercise of judgment on a case-by-case basis is purportedly too complicated. If the state court takes the step and constrains the prosecution, the state doctrine provides a case study testing the Court's concerns. For instance, the Supreme Court has held that a custodial arrest is permitted even for the most minor offenses.[118] Such an arrest also automatically entitles the police to conduct a full-scale search incident to arrest.[119] Both bright-line rules are based on a fear that a more flexible doctrine restricting law enforcement discretion would be unmanageable.[120] State constitutional decisions rejecting these doctrines test the assumption that only bright-line rules can work.[121]

Finally, state court cases provide a substantially more realistic view of criminal practice. Of course, the only criminal cases that the Courts of Appeals hear are federal cases. Even in the Supreme Court, federal cases make up a large portion of the criminal procedure docket. Federal prosecutions, though, are fundamentally different that state prosecutions. While both state and federal criminal dockets are heavily slanted toward narcotics cases, the quantities in federal cases are invariably much larger.[122] More fundamentally, federal cases and state cases generally start in substantially different ways. Federal cases are often (but not exclusively) proactive.[123] They begin with an investigation against a target.

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118. Atwater v. City Lago Vista, 532 U.S. 318 (2001) (holding a warrantless arrest permissible for fine-only misdemeanor seat belt violation that carried no possible jail time).

119. United States v. Robinson, 414 U.S. 218 (1973).

120. *See, e.g.*, *Atwater*, 532 U.S. at 347; *Robinson*, 414 U.S at 235.

121. State v. Paul T., 1999-NMSC-037, ¶ 1, 128 NM 360 (refusing to permit a search of a juvenile taken into custody for a curfew violation).

122. United States Attorney's Offices typically have intake guidelines that determine what cases they will accept and what cases will be declined in favor of state prosecutions. A common input in narcotics cases is the weight of the drugs involved.

> U.S. Attorney's offices have intake guidelines—criteria that must be satisfied before a case is accepted for prosecution. When I was the Chief of the Criminal Division in the U.S. Attorney's office in the Eastern District of New York, we prosecuted persons caught trafficking in marijuana (absent special circumstances) only if more than a ton of marijuana was involved. If a federal agent called and said she had just arrested three men in a Queens warehouse with 800 kilos of marijuana, we would refer her to the District Attorney.

John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When US Attorneys Recommend Against the Death Penalty,* 89 VA. L. REV. 1697, 1703 (2003).

123. *See* Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2575 (2007) (distinguishing proactive and reactive cases).

State cases are much more often reactive. They start with a law enforcement observation of a crime. As a result, the criminal procedure issues at play in state and federal court are often very different.

For example, consider car stops. In much of the United States, especially outside of the largest cities, the most common police/citizen encounter occurs when an officer pulls a driver over for a traffic infraction or for some other reason.[124] These interactions then can develop in a large number of ways and can produce prosecutions for a wide range of offenses. These cases, though, are almost always state court cases. Car stops will rarely produce a federal prosecution. The United States Supreme Court has taken cases and ruled on questions relating to car stops, of course,[125] but at a disproportionately low rate given the frequency of the interaction.

This means that some very basic questions about car stops are unanswered under the Fourth Amendment. For example, do routine traffic stops require probable cause or are the justifiable under the lower reasonable suspicion standard that applies to a stop and frisk? Language in the Supreme Court cases points in different directions.[126] Moreover, it is quite unclear the extent to which the limits on the time and scope of investigative detentions apply during car stops.[127] In contrast, state courts do not have the luxury of leaving these questions open. Car stops gener-

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124. *See, e.g.*, Maryland v. Wilson, 519 U.S. 408, 418 (1997) (Stevens, J., dissenting) (noting that one million traffic stops occur annually in Maryland alone).

125. *See, e.g.*, Berkermer v. McCarty, 468 U.S. 420 (1984); Delaware v. Prouse, 440 U. S. 648, 653 (1979); Pennsylvania v. Mimms, 434 U. S. 106, 109 (1977) (per curiam); United States v. Martinez-Fuerte, 428 U. S. 543, 556 (1976); United States v. Brignoni-Ponce, 422 U. S. 873, 878 (1975).

126. *Compare* United States v. Whren, 517 U.S. 806, 810 (1996) ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."), *with Prouse,* 440 U.S. at 663 ("We hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver . . . are unreasonable under the Fourth Amendment."), *and Berkermer*, 468 U.S. at 439 ("[T]he usual traffic stop is more analogous to a so-called '*Terry* stop,' . . . than to a formal arrest."). *See generally* WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.3(a) at 478 (5th Ed. 2012) (describing the doctrinal ambiguity).

127. Florida v. Royer, 460 U.S. 491 (1983) (*Terry* stops must be limited in both time and scope to the reasons for the stop). *See* LAFAVE, *supra* note 126, at 485 (noting that the temporal limits are "loosely observed" and the "intensity limitation is treated as if it did not exist at all").

ate so many cases that these issues often are resolved clearly.[128] Teaching state cases provides a depth that will be inherently absent looking solely at federal courts.

CONCLUSION

Criminal Procedure – the constitutional doctrines regulating police investigations – is an enormously practical class that is foundational for students seeking a criminal law career. *Breaking Bad* supplements the class in important ways. It produces valuable hypotheticals to test student understanding. It also pushes us in the direction of state constitutional law, a crucial component of student's doctrinal education. I hope you find it as helpful in your course as I have in mine.

128. *See, e.g.*, State v. Leyva, 2011-NMSC-009, ¶ 56, 149 N.M. 435 (holding that traffic stops are analyzed under *Terry* in New Mexico and that the time and scope limitations are enforceable).