

# Got a Warrant?: Breaking Bad and the Fourth Amendment

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## I. INTRODUCTION

This Article explores the advantages of using pop culture to study and teach criminal procedure. It begins by setting forth the pedagogical challenges of teaching students how to apply the criminal procedural law they learn in the classroom to real-world events, before a factual record has been established in court. Appellate decisions—“the primary text of legal education”<sup>1</sup>—do not teach students how to apply the law to new facts. Traditionally, professors use hypothetical fact patterns for this purpose. However, because hypotheticals typically set forth a clear statement of facts, students do not learn how to translate police-citizen encounters as they actually occur in the world to a verbal description of facts that can have legal significance. Instead, the professor has done that work for the students by providing the hypothetical. Moreover, casebooks march students through criminal procedure, one doctrine at a time. Accordingly, traditional classroom discussion does not necessarily teach students how to apply several doctrines to one fact pattern or to recognize how the resolution of one doctrinal issue can affect the analysis of others.

Incorporating pop culture in the classroom can help meet those challenges. After discussing the ways that videos of police-citizen encounters can supplement traditional classroom material, the Article provides a concrete example. If a picture is worth a thousand words,<sup>2</sup> a six-minute scene from the acclaimed television show “Breaking Bad”<sup>3</sup> may be worth millions, or at least the number of words necessary to provide an ideal fact pattern to recap the Fourth Amendment’s warrant requirement.

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<sup>1</sup> Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 *FORDHAM L. REV.* 787, 793 (2000).

<sup>2</sup> For a surprising discussion of the ambiguous origins of this now-familiar saying, see FRED R. SHAPIRO, *THE YALE BOOK OF QUOTATIONS* (FRED R. SHAPIRO ED., 2006) (outlining a number of early expressions of the idea).

<sup>3</sup> *Breaking Bad* (AMC television broadcast 2008–2013).

## II. THE TEACHING CHALLENGE

The Fourth Amendment's proscription sounds simple enough: no unreasonable searches and seizures. Law students soon learn that implementing this seemingly straightforward principle requires them to unpeel layers of interrelated doctrines to determine whether the government has complied with the Fourth Amendment. First, searches and seizures implicate separate interests of privacy and liberty, respectively, and students must learn the difference and then analyze each separately. Moreover, "search" and "seizure" are terms of art. Government conduct rises to the level of a search only if it implicates a reasonable expectation of privacy<sup>4</sup> or constitutes a common law trespass.<sup>5</sup> The government conducts a seizure only if it meaningfully interferes with a person's possessory interests in property<sup>6</sup> or, in the case of a seizure of a person, engages in conduct that would make a reasonable person feel that he is not free to leave.<sup>7</sup> If government conduct does not rise to the level of either a search or seizure, the Fourth Amendment "does not give a constitutional damn" about its unreasonableness.<sup>8</sup>

Once students determine whether—and when—a search and/or seizure has occurred, they must then turn to the question of whether it is reasonable, requiring several other layers of analysis. As a formal matter, the Court equates the reasonableness requirement with a presumptive requirement of a warrant based on probable cause,<sup>9</sup> but in practice, warrantless searches and seizures are the norm.<sup>10</sup> In some instances, the Court refrains from triggering the presumptive warrant requirement because of *quantitative* considerations about the degree of intrusiveness involved. For example, a *Terry* stop—the brief detention of a person to either confirm or quell suspicion—is a seizure, but distinguishable from a "full-blown" arrest in terms of time, physical movement, and other measures of impact on liberty.<sup>11</sup> Accordingly, a stop requires neither a warrant nor probable cause, and only reasonable suspicion.<sup>12</sup> Similarly, requiring a driver or passengers to step out

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<sup>4</sup> Katz v. United States, 389 U.S. 347 (1967).

<sup>5</sup> United States v. Jones, 132 S. Ct. 945 (2012).

<sup>6</sup> Jacobson v. United States, 466 U.S. 109, 113 (1984).

<sup>7</sup> United States v. Mendenhall, 446 U.S. 544, 554 (1980).

<sup>8</sup> Charles E. Moylan, *The Fourth Amendment Inapplicable vs. The Fourth Amendment Satisfied: The Neglected Threshold of 'So What'?*, 2 S. ILL. U. L.J. 75, 76 (1977) ("[W]here the [F]ourth [A]mendment is inapplicable, the law does not give a constitutional damn about noncompliance.").

<sup>9</sup> Johnson v. United States, 333 U.S. 10, 13–14 (1948).

<sup>10</sup> See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008).

<sup>11</sup> Terry v. Ohio, 392 U.S. 1 (1968).

<sup>12</sup> *Id.* at 27.

of a vehicle during a traffic stop is inherently reasonable in part because it is only a *de minimis* intrusion on Fourth Amendment interests.<sup>13</sup>

In other instances, the Court departs from the warrant requirement based on *qualitative* distinctions, examining the government's purpose in conducting the search or seizure. When the government seeks to investigate and prosecute crime, the warrant requirement presumptively applies.<sup>14</sup> However, the Court scrutinizes searches and seizures directly for "reasonableness" when the government pursues some other qualitatively distinguishable purpose, such as the protection of the borders (border searches<sup>15</sup>), the protection of property interests (inventory searches<sup>16</sup>), the health and safety of the community (community-caretaking<sup>17</sup>), the administration of a regulatory regime (administrative searches<sup>18</sup>), or any other governmental interest that is different from the needs of ordinary law enforcement (roadblocks<sup>19</sup> and special-needs searches<sup>20</sup>).

Even when the government pursues the traditional needs of law enforcement through full-blown searches or seizures, the Court may still dispense with the warrant requirement when doing so appears to be reasonable. Sometimes the Court uses a case-by-case standard to determine whether police should have obtained a warrant, as in the instance of "exigent circumstances" presented by concerns about destruction of evidence, escape of a suspect, or the safety of officers or the public.<sup>21</sup> In other scenarios, the Court fashions exceptions to the warrant requirement using bright-line rules, grounded either in whole or in part in exigency concerns. For example, the search incident to arrest exception is grounded largely in concerns about an arrestee's incentive either to destroy or hide evidence or to escape, but is also justified by the fact that the arrestee is being taken into custody.<sup>22</sup> Similarly, the automobile exception to the warrant

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<sup>13</sup> *Maryland v. Wilson*, 519 U.S. 408 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

<sup>14</sup> *Johnson*, 333 U.S. at 14.

<sup>15</sup> *United States v. Ramsey*, 431 U.S. 606 (1977); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

<sup>16</sup> *Colorado v. Bertine*, 479 U.S. 367 (1987); *Illinois v. Lafayette*, 462 U.S. 640 (1983); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

<sup>17</sup> *Cady v. Dombrowski*, 413 U.S. 433 (1973).

<sup>18</sup> *Camara v. Mun. Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967).

<sup>19</sup> *Illinois v. Lidster*, 540 U.S. 419 (2004); *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

<sup>20</sup> *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Chandler v. Miller*, 520 U.S. 305 (1997); *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989); *Nat'l Treasury Emp. Union v. Von Raab*, 489 U.S. 656 (1989); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>21</sup> *Brigham City v. Stuart*, 547 U.S. 398 (2006); *Richards v. Wisconsin*, 520 U.S. 385 (1997); *United States v. Santana*, 427 U.S. 38, 42–43 (1976).

<sup>22</sup> *Chimel v. California*, 395 U.S. 752 (1969) (grounding the search incident to arrest exception to the warrant requirement in concerns about exigencies created by custodial arrest). *But*

requirement exists in large part because cars are mobile, but also because people have lesser (though legitimate) expectations of privacy in their vehicles.<sup>23</sup>

Taken collectively, then, the Supreme Court's jurisprudence requires students and lawyers to work through the separate definitions of a search and a seizure, the requirements for obtaining and executing a valid warrant, and a lengthy list of exceptions to the warrant requirement that arguably swallow the rule. Then, even if a court determines that the government has violated the Fourth Amendment, another multi-tiered analysis governs the question of whether the defendant can suppress evidence pursuant to the exclusionary rule. First, the exclusionary rule must apply in the context where the defendant seeks its application.<sup>24</sup> Second, the defendant must demonstrate that the Fourth Amendment violation implicates his own privacy or liberty interests—not a third party's.<sup>25</sup> Third, the remedy he seeks must have a sufficient nexus to the Fourth Amendment violation.<sup>26</sup> Fourth, the government must not be able to demonstrate either an independent source<sup>27</sup> for the evidence or the inevitability of the evidence's discovery.<sup>28</sup> Finally, at least in some circumstances, the defendant will need to show that the Fourth Amendment violation resulted from more than "simple, isolated negligence," such as through "deliberate, reckless, or grossly negligent [police] conduct."<sup>29</sup>

Needless to say, it's a lot for students to keep track of.

But this is law school. With the assistance of appellate decisions, "the bedrock of the classroom experience,"<sup>30</sup> students learn to unpack the jurisprudence, piece by piece, and identify the nooks and crannies of each doctrine. They also learn how to apply the doctrines they glean from appellate decisions to new facts provided in any given hypothetical. For example, the following would be a typical hypothetical used to examine the search incident to arrest doctrine: "Police see D

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*cf.* Knowles v. Iowa, 525 U.S. 113 (1998) (declining to expand the search incident to arrest exception to the warrant requirement to cases in which the defendant was cited in lieu of custodial arrest).

<sup>23</sup> California v. Carney, 471 U.S. 386 (1985).

<sup>24</sup> The Supreme Court has declined to require the suppression of evidence when it concludes that suppression in that context is unnecessary to deter unlawful police conduct. *See, e.g.*, Pennsylvania Bd. of Prob. and Parole v. Scott, 524 U.S. 357, 364–65 (1998) (exclusionary rule does not apply to parole revocation hearings); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (exclusionary rule does not apply to civil cases, including deportation hearings); *United States v. Calandra*, 414 U.S. 338 (1974) (exclusionary rule does not apply during grand jury proceedings).

<sup>25</sup> *Rakas v. Illinois*, 439 U.S. 128 (1978).

<sup>26</sup> *Hudson v. Michigan*, 547 U.S. 586 (2006); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Harris v. United States*, 331 U.S. 145 (1947).

<sup>27</sup> *Murray v. United States*, 487 U.S. 533 (1988); *Segura v. United States*, 468 U.S. 796 (1984).

<sup>28</sup> *Nix v. Williams*, 467 U.S. 431 (1984).

<sup>29</sup> *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011); *Herring v. United States*, 555 U.S. 135, 143 (2009).

<sup>30</sup> Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 14–15 (2002).

jaywalk, search his backpack, and find drugs. Are the drugs admissible? What else might you need to know to answer the question?" The initial replies are usually straightforward. Is jaywalking a crime? Did the police conduct a custodial arrest or merely issue a citation? Where was the backpack? Less straightforwardly, does it matter if the police officer does not articulate a reason to look in the backpack, or that the officer was using the jaywalking arrest as a pretext to search for drugs? Most nuanced of all, what if the police did not search his backpack until after the defendant was secured in the back of the patrol car?

But the use of typical classroom hypotheticals to explore the application of doctrine to new facts is inherently artificial. Unlike the real world, a professor's description of a hypothetical creates a closed world of facts, immediately signaled as relevant merely by the incident of the professor's inclusion of them in the fact pattern. This limitation presents at least three separate pedagogical problems.

First, professors typically present a hypothetical for discussion immediately after teaching an appellate court decision setting forth an individual doctrine. Because students already know the topic of the classroom discussion, they already know the broad issue presented by the hypothetical. For example, the syllabus lists the assigned subject for the day as "Search Incident to Arrest," and the required reading consists entirely of cases applying the search incident to arrest doctrine. Logically, students automatically assume that the challenge of the backpack hypothetical is to determine whether it can be searched incident to an arrest for jaywalking. In fact, the signal is more than a hint. Chances are, any student who dared to raise alternative arguments for searching the bag would be viewed as wasting the class's time on an irrelevant tangent.

However, in the real world, criminal procedure issues are not pre-labeled. Police speak and act in certain ways, and citizens do the same. The job for lawyers and judges, after the fact, is to describe the actors' words and conduct, and then find legal labels that align with the chosen descriptions. Re-consider the hypothetical above: Police see D jaywalk, search his backpack, and find drugs. If I presented that hypothetical to judges or practicing attorneys, they would not immediately know from the bare facts that the topic for discussion was a search to arrest. Outside the confines of a law school classroom with an assigned syllabus topic for the day, they would seek out considerably more information before analyzing the situation. What happened between the officer's observation of the defendant's jaywalking and the search? In light of those facts, was D arrested, stopped, or merely encountered? Did the police ask D before opening the backpack? To whom did the backpack belong, how often did D use it, and for what purposes? Was there reason to believe that D might be carrying a weapon? Does the police department have an inventory policy, and, if so, what is it? Depending on the fact-intensive answers to these questions, the search of the backpack could be justified as a *Terry* frisk, search incident to arrest, consent search, or inventory search. Alternatively, the merits of the search's legality might never be reached at all if the defendant fails to show a reasonable expectation of privacy in the backpack. Although ordinary hypotheticals during the piece-by-

piece unpacking of the jurisprudence can help students identify and understand the nooks and crannies of any individual doctrine, they do not help students identify the relevant doctrine in the first place.

A second limitation of hypotheticals is that professors tend to select fact patterns that drill down on a single topic. The backpack hypothetical, for example, obviously calls on students to work through the geographic scope of a search incident to arrest (including containers within the wingspan) and the “automatic” nature of a search incident to arrest, meaning that an officer need not articulate a reason to believe that the search incident to arrest will actually yield anything incriminating.<sup>31</sup> However, the simple hypotheticals that many of us use in class fail to capture the ways that the relevant pieces of the Court’s criminal procedure jurisprudence cascade upon each other in practice. Few motions to suppress—even those arising from quick, simple, street-level police investigations—involve only one disputed issue. The resolution of a typical motion to suppress requires working through multiple levels of analysis.

For example, was the defendant searched or seized at all? If not, then the government prevails. If so, then the court’s characterization of the search of seizure—stop, arrest, frisk, search—will determine the required legal standard. Moreover, the character of police conduct can morph in a single interaction, often quickly. What begins as a casual conversation that does not amount to a seizure might lead to reasonable suspicion that subsequently justifies a stop, which then leads to a frisk, which then leads to probable cause to arrest, which then leads to an arrest, which then leads to a search incident to arrest, which then leads to probable cause to search an automobile, and so on.

In the real world, depending on the more extensive facts surrounding the backpack hypothetical, it is conceivable that the government would simultaneously argue several bases for admitting the drugs into evidence: that the defendant failed to establish a reasonable expectation of privacy in the backpack, that he consented to the search, that the bag was frisked for weapons, that it was searched incident to arrest, or that it was properly inventoried pursuant to police policy. While traditional hypotheticals can help students master the scope of a single doctrine, in the real world, there is often more than one way to skin the Fourth Amendment cat.<sup>32</sup> Only a fact pattern offered outside the context of any specifically assigned topic, after the class has covered multiple individual doctrines, will challenge students to know which questions to ask prior to a motion to suppress, to label the relevant legal issues on their own, to argue in the alternative, and to see how multiple doctrines can descend upon what appears to be a simple fact pattern.

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<sup>31</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>32</sup> See Devallis Rutledge, *Consent Searches: Extracting the rules from 17 Supreme Court decisions*, POLICE MAG. (Feb. 5, 2013), <http://www.policemag.com/channel/patrol/articles/2013/02/consent-searches.aspx> (advising readers in law enforcement that “it’s always a good idea to have at least two ways to skin the search-and-seizure cat”); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L. Q. 175, 190 (1991) (noting that the government can simultaneously assert multiple justifications for dispensing with the warrant requirement).

A third and perhaps most problematic pedagogical limitation to the traditional classroom hypothetical is that the professor, by creating the hypothetical, is serving as an implicit fact finder, reducing the students' task to applying the law to the given facts. A hypothetical presents a closed world of facts, cordoned off neatly by the professor, often complete with labels that are loaded with legal meaning. Again, to use the backpack hypothetical as an example, the professor has already identified the relevant observation by the police officer: the defendant "jaywalked." That description is at once both underinclusive and overinclusive. It is underinclusive in its omission of every other fact that might be relevant to the analysis: the time of day, the neighborhood, whether others were engaged in identical behavior at the same time, other conduct by or characteristics of either the officer or the defendant that might be relevant, and even a simple description of the actual "walking." It is overinclusive by providing a legal label to the defendant's actual conduct: walking is "jaywalking" only if defined as illegal. By telling students that the defendant "jaywalked," the professor has deprived the students of the opportunity to argue as a threshold matter whether the defendant's conduct implicates criminal law at all.

In practice, lawyers must know how to work with facts and characterize them in ways that are favorable to their clients given the legal landscape. The ability to translate facts through the lens of law is especially critical in criminal procedure practice, where case outcomes can be extremely fact-sensitive. Students do not learn how to work with facts when professors pre-label hypotheticals for them by setting up scenarios described as "routine traffic stops," "searches," "stops," or "arrests," or based on a stated level of suspicion such as "reasonable suspicion" or "probable cause." All of these are legal terms of art, and whether a given scenario rises to the level of a stop, arrest, or search, or is based on the requisite level of suspicion, are arguments that require students to work closely with facts.

For example, an encounter will be deemed consensual and not a seizure as long as "a reasonable person would understand that he or she could refuse to cooperate."<sup>33</sup> Determining whether a seizure has occurred requires examination of the totality of the circumstances, including such facts as the number of officers present, the display of weapons, the language and tone used during any conversation, whether officers told the person he or she was free to leave, any physical contact between police and the person, and any restriction or control over the person's property or freedom of movement.<sup>34</sup> Classroom hypotheticals, presented verbally, may require students to spot the legal significance of the presented facts. They do not, however, challenge students to identify and describe the relevant facts in a strategic manner, through the lens of criminal procedure law.

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<sup>33</sup> Florida v. Bostick, 501 U.S. 429, 431 (1991); United States v. Drayton, 536 U.S. 194, 206 (2002).

<sup>34</sup> Michigan v. Chesternut, 486 U.S. 567, 575 (1988); Florida v. Royer, 460 U.S. 491, 504 (1983); United States v. Mendenhall, 446 U.S. 544, 554 (1980).

## III. SHOW, DON'T TELL: USING POP CULTURE IN CLASS

Though appellate decisions and traditional hypotheticals continue to be the mainstays of the law school classroom, the advantages of employing non-traditional teaching devices are now familiar. Not all students share the same learning styles.<sup>35</sup> Some learn better visually than verbally.<sup>36</sup> Using visual tools allows students to learn in a variety of ways and to use different cognitive functions. Incorporating unexpected material also makes the classroom entertaining.<sup>37</sup>

Specifically, using a visual scene from a television show, a movie, YouTube, or another form of video can address the three pedagogic limitations of hypotheticals discussed in Part I. Unlike a verbal description of a fact pattern, which creates a closed world of limited facts, a video can communicate a tremendous amount of information quickly. A traditional hypothetical often signals to students which facts are critical, because students assume a professor would not mention a fact unless it were relevant. A video, because it conveys many facts at once, may include details that are “red herrings:” interesting perhaps, but legally immaterial. Students must focus on which facts are relevant under the law, and why.<sup>38</sup>

With video, students must translate what they see into words. They learn that a lawyer’s verbal description of events is not a throwaway step in the process, but a crucial component of the lawyer’s argument. For example, did a police officer “approach” a citizen or “confront” him?<sup>39</sup> Did the individual “turn away” from the

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<sup>35</sup> Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 329–48 (1995); Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. LEGAL EDUC. 402, 411–12 (1998).

<sup>36</sup> Kristin B. Gerdy, *Making the Connection: Learning Style Theory and the Legal Research Curriculum*, 19 LEGAL REFERENCE SERVICES. Q. 71, 77 (2001); Victoria S. Salzmann, *Here’s Hulu: How Popular Culture Helps Teach the New Generation of Lawyers*, 42 MCGEORGE L. REV. 297, 299 (2011).

<sup>37</sup> Many scholars have emphasized the importance of having “fun” in the law school classroom. Bryan Adamson et al., *Can the Professor Come Out and Play?—Scholarship, Teaching, and Theories of Play*, 58 J. LEGAL EDUC. 481, 517 (2008); Andre Hampton, *Legal Obstacles to Bringing the Twenty-First Century into the Law Classroom: Stop Being Creative, You May Already be in Trouble*, 28 OKLA. CITY U. L. REV. 223, 227 (2003); Kenney Hegland, *Fun and Games in the First Year: Contracts by Roleplay*, 31 J. LEGAL EDUC. 534, 534–35 (1981); Richard H. Seamon & Stephen A. Spitz, *Joint Teaching with a Colleague, For Just a Week or Two*, 52 J. LEGAL EDUC. 258, 266–67 (2002).

<sup>38</sup> Max Minzner, *Breaking Bad in the Classroom*, 45 N.M. L. REV. 398, 400 (2015) (“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.”).

<sup>39</sup> These alternative characterizations could affect whether a court evaluates the scenario as a volunteer encounter or as a seizure. See *Mendenhall*, 446 U.S. at 554 (determining whether a

officer or “flee?”<sup>40</sup> Disputes among students about how to describe the scene they all watched together can reveal how difficult it can be in practice to recreate the dynamics of a police-citizen interaction in the courtroom.<sup>41</sup> These skills are more representative of real lawyering than the artificial construct of a limited hypothetical.<sup>42</sup> Moreover, when students struggle to describe what they witnessed, the discussion may even lead to a related debate about whether videotaping various phases of an investigation would improve the criminal justice system.<sup>43</sup>

Because a video can display a great deal of information quickly, a video also makes it possible to present a scenario that raises multiple criminal procedure issues, enabling students to see how criminal procedural doctrines can intersect and cascade in practice. In contrast, a professor’s effort to create a verbal hypothetical that is sufficiently complete to present several legal issues at once can quickly become too long and/or convoluted to retain student attention.<sup>44</sup> And because a video makes a simultaneous discussion of multiple issues feasible, a video can be used to summarize and bring together large units of material, rather than signaling to students on any given day that the topic assigned on the syllabus provides the doctrine necessary to analyze the hypothetical at hand.

Despite the advantages of using a television or film clip in lieu of a typical hypothetical, professors should be mindful of some of the pitfalls that others have previously identified with incorporating pop culture in the classroom. First, bringing entertainment into the classroom can be distracting if students feel that the material is too unrealistic to be relevant to their education.<sup>45</sup> Students may disregard the exercise as mere comedic relief or, worse, a professor’s sycophantic attempt to appear youthful or, even worse, cool.<sup>46</sup> Conversely, some video clips

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reasonable person in the situation would feel free to leave by looking at a totality of the circumstances).

<sup>40</sup> A citizen is free to decline an interaction with police, but courts treat “unprovoked flight” as suspicious. *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000).

<sup>41</sup> See *Miranda v. Arizona*, 384 U.S. 436, 445 (1966) (noting the difficulty of describing what occurs during an interrogation).

<sup>42</sup> Salzmann, *supra* note 36, at 313; Alexander Scherr & Hillary Farber, *Popular Culture as a Lens on Legal Professionalism*, 55 S.C. L. REV. 351, 352 (2003). In this respect, teaching students the importance of framing facts favorably is not only a lesson in criminal procedure, but also an exercise in training them to think strategically as lawyers. See, e.g., Richard K. Neumann, Jr., *On Strategy*, 59 FORDHAM L. REV. 299, 301 (1990) (exploring the process of creating strategy).

<sup>43</sup> See generally Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. (forthcoming 2016).

<sup>44</sup> This author cannot be the only professor who has crafted a lengthy and clever hypothetical, just to have the responding student ask, “Can you repeat the question?” I have been known to respond, “No, I really cannot.”

<sup>45</sup> Scherr & Farber, *supra* note 42, at 378–79.

<sup>46</sup> Lee Skallerup Bessette, *What Are Students Tweeting About Us?*, INSIDE HIGHER ED (Sept. 8, 2013, 9:39 PM), <https://www.insidehighered.com/blogs/college-ready-writing/what-are-students-tweeting-about-us> (“No one, especially no professor, should try to be cool. Trying to be cool is the one sure way not to be cool.”).

might be *too* real, striking so close to home emotionally that some students may experience psychological distress that hinders their ability to learn.<sup>47</sup> Moreover, because the professor does not artificially limit the world of proffered facts, a video may open the door to discussing more or broader issues than the professor intended. For example, *The Wire*<sup>48</sup> and *The Shield*<sup>49</sup> are both critically acclaimed television shows filled with rich and fascinating depictions of police-citizen interactions. Set in Baltimore and South Central Los Angeles, respectively, the shows often depict (realistically) the targets of policing as overwhelmingly poor people of color. For many students, unless a professor intends to devote sufficient class time to discuss this aspect of any selected scene, leaving the subject unaddressed may detract from the clip's intended purpose.

Another potential problem with using video in the classroom arises if the students are not familiar with the material.<sup>50</sup> A pop culture reference that is either dated<sup>51</sup> or obscure<sup>52</sup> can lead to awkward silence and blank stares. A related consideration is the amount of classroom time spent explaining the selected excerpt. No matter how popular the source material, the professor needs to summarize the nature of the material to students who are not familiar with it, as well as provide context to an individual scene.<sup>53</sup> For example, I was surprised a few years ago when a student was shocked and disappointed by my use of a clip from the television show *The Shield*. Apparently I had neglected to make clear that the police characters in the show are frequently the ones breaking the rules, a basic premise of the plot that students generally knew when the show was on air, but now must be explained to students who have never heard of the series.

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<sup>47</sup> Scherr & Farber, *supra* note 42, at 383 (noting “domestic abuse, rape, or parental neglect and abuse” as the examples of narratives that may trigger psychological distress in some students). A recent debate on campuses is whether professors should provide “trigger warnings” prior to the discussion of material that students might deem troubling. See generally Colleen Flaherty, *Law School Trigger Warnings?*, INSIDE HIGHER ED (Dec. 17, 2014, 3:00 AM), <https://www.insidehighered.com/news/2014/12/17/harvard-law-professor-says-requests-trigger-warnings-limit-education-about-rape-law>.

<sup>48</sup> *The Wire* (HBO television broadcast 2002–08).

<sup>49</sup> *The Shield* (FX television broadcast 2002–08).

<sup>50</sup> Salzmann, *supra* note 36, at 314; Scherr & Farber, *supra* note 42, at 382.

<sup>51</sup> When this author first began teaching, she was eager to use Schneider, the ever-present handyman from the sitcom *One Day at a Time*, as a perfect hypothetical to discuss the authority of third parties to consent to a search. It was soon apparent that, sadly, not a single student was familiar with the show. *One Day at a Time* (CBS broadcast 1975–84).

<sup>52</sup> This author frequently uses “Bob Loblaw” as the name of any fictional lawyers in her hypotheticals. Few students seem to recognize this name as a character (and the author of The Bob Loblaw Law Blog) from the sitcom *Arrested Development* (Fox television broadcast 2003–06).

<sup>53</sup> Brian R. Gallini, *HBO's The Wire and Criminal Procedure: A Match Made in Heaven*, 64 J. LEGAL EDUC. 114, 115 (2014) (emphasizing the benefits of being able to reduce the amount of class time spent with “introductory matters” by using the same source material throughout the semester).

## IV. HOW TO BREAK BAD IN CRIMINAL PROCEDURE

This Part describes a class exercise that uses a video clip from the series *Breaking Bad* to summarize Fourth Amendment material. The scene is known among fans as the “junkyard scene” from “Sunset,” the sixth episode of the third season.<sup>54</sup> As the source material for a classroom discussion, the junkyard scene avoids the pitfalls of pop culture described above. Students know about the series. The show is recent and “buzzy.”<sup>55</sup> It was so popular that the phrase “breaking bad” is part of the cultural lexicon, shorthand for “shirking the rules,”<sup>56</sup> and a law review dedicated an entire issue to analyzing the legal issues in the show.<sup>57</sup> The series even spawned a successful prequel spin-off about rule-bending lawyer Saul Goodman,<sup>58</sup> which should keep future lawyers interested in *Breaking Bad* for years to come. Even for students who have never heard of the show, the basic premise can be captured by a sentence or two: When middle-aged high school teacher Walter White is diagnosed with cancer, he decides to use his impressive science skills to cook high quality meth, recruiting former student and current pothead Jesse Pinkman as his helper. Seemingly mild-mannered Walt is notorious on the streets, known by the ominous nickname “Heisenberg.”

The scene itself is also easy to introduce. Walt and Jesse have been using a beat-up recreational vehicle as their mobile meth lab. The DEA has linked the RV to Heisenberg, so Walt and Jesse have taken the RV to Old Joe’s Junkyard for disposal. A DEA agent named Hank Schrader tracks the RV to the junkyard. Side note: the DEA Agent has no idea that the man behind the Heisenberg persona is his own brother-in-law, Walt.

With that quick summary, the professor is ready to hit the play button.

A. *The Scene*

Walt and Jesse are inside the RV wiping down surfaces. Hank pulls into Old Joe’s junkyard and parks his unmarked car at an angle behind the RV. Stepping

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<sup>54</sup> *Breaking Bad: Sunset* (AMC television broadcast Apr. 25, 2010).

<sup>55</sup> Though the show’s finale aired on September 29, 2013, *Breaking Bad* continues to be popular on streaming services such as Amazon and Netflix. See generally Abby Abrams, *Breaking Bad is the Most Binge-Watched TV Show Ever, Study Finds*, TIME (June 25, 2014), <http://time.com/2924105/breaking-bad-is-the-most-binge-watched-tv-show-ever-study-finds/>; Michael Berliner, *House of Cards, Breaking Bad and Binge Viewing Pull Audiences Online*, THE GUARDIAN (Aug. 7, 2014, 2:00 AM), <http://www.theguardian.com/media-network-blog/2014/aug/07/house-cards-breaking-bad-netflix-amazon-data>.

<sup>56</sup> *Break Bad*, URBAN DICTIONARY <http://www.urbandictionary.com/define.php?term=Break+Bad> (last visited Aug. 30, 2015).

<sup>57</sup> *Special Edition: Breaking Bad and the Law*, 45 N. M. L. REV. ix (2015) (“dedicated to the intersection of the critically acclaimed television series *Breaking Bad* and the law”).

<sup>58</sup> *Better Call Saul* (AMC television broadcast 2015).

from the car, he approaches the RV. He tries the windows and the door, but they are locked. He tries to peer through the windows, but the curtains are drawn.

"You wanna add resisting arrest," he yells, "we'll add it. No skin off my ass. Last chance to do it the easy way."

Hearing no response, Hank returns to his own car and retrieves a crowbar, which he commences to pry beneath the RV door's edge.

"Got a warrant?" The voice comes from a disheveled, long-faced man standing a few feet away. It's Old Joe.

"Who are you," Hank asks, "and what do you know about this RV?"

"Well, I'm the owner of this lot, which means you're trespassing on private property. As far as the RV goes, seems to me, it's locked, which means you're trying to break and enter, so I say it again: You got a warrant?"

"Well," Hank says, "I don't need one if I've got probable cause, *counselor*."

"Probable cause usually relates to vehicles, is my understanding. You know, traffic stops and whatnot."

"See these round, rubber things? Those are wheels. This is a vehicle."

Old Joe appears to consider Hank's argument but is unpersuaded. "*This* is a domicile, a residence, and thus protected by the Fourth Amendment from unlawful search and seizure."

"Look, buddy, why don't you just go out—"

But the owner is not finished. "Did you see this drive in here?" he asks. "How do you know it runs? Did you actually witness any wrongdoing? Seems to me you're just out here... fishing. Don't see that holding up in a court of law."

Hank laughs and then reaches over to a spot on the RV door where five strips of duct tape are stuck. "Oh yeah? Look at these," Hank says, pulling off three pieces of tape—one by one—to reveal what appear to be bullet holes. "What do those look like to you? Sure look like bullet holes to me. There was a firearm discharged inside of this domicile. I bet there's a judge or two out there who would see that as probable cause."

While Hank and Joe continue to spar over the meaning of probable cause and exigency, the camera shifts to the interior of the RV, where Walt is whispering to Jesse. "How could you have known they were there before you took off the tape?"

"WHAT?!" Jesse asks.

Walt repeats the line to Jesse more urgently, and then instructs him, "Say it!"

Jesse refuses.

"Say it," Walt insists (presumably so his brother-in-law does not recognize his own voice).

Jesse musters his courage, moves to the RV door, and yells the line loud enough to be heard outside, where the camera perspective follows.

"That's right," Old Joe replies. "Probable cause needs to be readily apparent." Then he adds, "Huh, somebody in there."

Hank can then be heard saying that the person inside has "three seconds" to come outside, but, inside the RV, Walt continues to feed dialogue to Jesse, Cyrano

de Bergerac-style. Following instructions more compliantly now, Jesse yells, “This is my own private domicile and I will not be harassed...Bitch!”<sup>59</sup>

Sensing he’s been outwitted, Hank laughs and says, “Fine, you want your warrant? I’ll have my guys bring it out here and deliver it to you on a little satin pillow. How’s that? I’ve waited this long, I’ll wait a little longer.” He drags the crowbar along the side of the RV as he walks back to his car.

As Hank makes a call from his vehicle, the camera shifts back to Walt and Jesse in a panic. Walt makes a phone call of his own. He tells his sketchy lawyer, Saul Goodman, that they need a favor. Within seconds, Hank receives another phone call. A woman tells him she is a nurse at the hospital. His wife has been in a car accident, she reports: He needs to get there right away. Hank speeds off, and viewers see Saul’s secretary hanging up a phone, telling her boss she deserves a raise.

As Hank is searching for his wife in the hospital, his cell phone rings. It is his wife, calling about dinner plans. Hank realizes he was tricked. Meanwhile, back at the junkyard, a forklift rips through the RV and loads it into a crusher. Walt and Jesse are in the clear, for now.

## B. *The Discussion*

With this single six-minute scene, students are able to peel away and analyze multiple layers of Fourth Amendment issues.

### 1. Identifying Fourth Amendment Interests

The Fourth Amendment’s reasonableness requirement applies only to searches and seizures, so a threshold question is whether either occurred here. Certainly the opening of the RV’s windows and door would implicate reasonable expectations of privacy under *Katz*,<sup>60</sup> but they were locked. Whether Hank conducted a “search” by attempting to see inside the RV through small gaps in the otherwise drawn curtains is a closer question.<sup>61</sup> Perhaps under *Florida v. Jardines*, a police officer goes beyond social custom and conducts a search by

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<sup>59</sup> The look exchanged between Walt and Jesse when Jesse ad-libs the last word of the sentence escapes verbal description, but fills the classroom with laughter. Jesse’s fondness for the word has even inspired its own YouTube compilation. See SuperShortComedy, *Breaking Bad – Jesse Pinkman Complete Bitch Compilation (with Bitch Counter)*, YOUTUBE (Sept. 30, 2013), <https://www.youtube.com/watch?v=2o9cqa1M6fQ>.

<sup>60</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>61</sup> In *Minnesota v. Carter*, a police officer peered into a home through a gap in the window blinds. Because the defendant failed to show that he had a reasonable expectation of privacy in the home, the Court declined to decide whether the officer’s peek through the blinds constituted a search. *Minnesota v. Carter*, 525 U.S. 83 (1998).

peering into the window of a home from its curtilage.<sup>62</sup> Here, however, Hank was not within curtilage, but in a junkyard. He will argue that he did no more than any member of the public could have done by entering the business's premises and peering through any number of car windows.<sup>63</sup>

At first glance, the removal of the tape from the RV door appears to present a clear search.<sup>64</sup> The junkyard owner is right: probable cause must be "readily apparent."<sup>65</sup> Even a minimally intrusive search for evidence constitutes a search under the Fourth Amendment.<sup>66</sup> On the other hand, students may argue that removal of the tape was not a search for ordinary evidence, but instead evidence that a gun had been fired. This argument, if successful, would align Hank's inspection of the door to the public-safety interests that animate the Court's doctrine governing "frisks"<sup>67</sup> and "community caretaking" searches,<sup>68</sup> as opposed to ordinary searches for evidence. A problem with the public safety argument, however, is that it is unclear whether Hank had any reason at all to believe that the bullet holes were there prior to removal of the tape. Moreover, even if he knew about the bullet holes, he did not know how long they had been there.

What about Old Joe's claim that Hank is trespassing on private property? Under *Jones*, a common law trespass constitutes a search for Fourth Amendment purposes.<sup>69</sup> But if the junkyard is open to the public for business, Hank may enter as well.<sup>70</sup> On the other hand, once the owner of the property made it clear that Hank was not welcome, he may have revoked permission to enter so that Hank's continued presence is a trespass.<sup>71</sup>

Finally, separate from any search that occurred, Hank may have seized Walt, Jesse, and the RV. When he drove onto the junkyard property, Hank pulled his car directly behind the RV at an angle sufficient to impede the RV's ability to back

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<sup>62</sup> See *Powell v. State*, 120 So. 3d 577, 588 (Fla. Dist. Ct. App. 2013) (holding that a police officer could lawfully enter curtilage to approach a home's entrance, but conducted a search by peering into a window a few feet from the front door).

<sup>63</sup> See *Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013) (noting that "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'").

<sup>64</sup> See *Minzner*, *supra* note 38, at 415 (concluding that Hank's removal of the tape would require probable cause).

<sup>65</sup> See *Arizona v. Hicks*, 480 U.S. 321 (1987).

<sup>66</sup> *Id.*

<sup>67</sup> *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

<sup>68</sup> *Cady v. Dombrowski*, 413 U.S. 433 (1973).

<sup>69</sup> *United States v. Jones*, 132 S. Ct. 945, 952 (2012).

<sup>70</sup> *Maryland v. Macon*, 472 U.S. 463, 469 (1985).

<sup>71</sup> See *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013) (noting that a search occurs when a visitor exceeds the scope of the license extended either implicitly or explicitly); *Minzner*, *supra* note 38, at 415–16 (analyzing the trespass issues involved in Hank's presence at the salvage yard).

out.<sup>72</sup> Even if his initial conduct was not sufficient to constitute a seizure, Hank's subsequent statement— "You want to add resisting arrest"—indicated that the people inside the RV were not free to leave.<sup>73</sup> However, under *Hodari D.*, Walt and Jesse may not have been seized by this show of authority because they arguably did not submit to it.<sup>74</sup>

## 2. Whose Fourth Amendment Interests?

A related question asks *whose* Fourth Amendment interests are implicated.<sup>75</sup> Old Joe may well be correct that Hank conducted a search by trespassing, but the trespass would implicate Joe's Fourth Amendment interests, not Walt's or Jesse's.<sup>76</sup> If, however, Hank's method of parking constituted a "stop" of the RV, both Walt and Jesse would be considered "seized."<sup>77</sup>

If we assume that Hank conducted a "search" of the RV, it is unclear whether Walt and Jesse would be able to show they had a reasonable expectation of privacy or would even want to, as a matter of strategy. In *Minnesota v. Carter*, the Court held that a one-time visit to a house for purposes of packaging drugs for two hours was not sufficient to confer a reasonable expectation of privacy in the visitor.<sup>78</sup> Viewers of the show will know, however, that both Walt and Jesse had far more extensive ties, albeit not identical, to the RV. From a property perspective, Walt paid for the RV, but told Jesse to handle the purchase,<sup>79</sup> presumably to distance himself from any incriminating evidence that might arise from the transaction. They each used the RV numerous times over the course of months, both individually and together, even going so far as to take it on a four-day trip into the New Mexico desert, albeit to finish a marathon cook.<sup>80</sup> During a period when Walt decided to quit the drug business, only Jesse had control over the RV.<sup>81</sup> These

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<sup>72</sup> See *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988) (finding no seizure where, among other facts, officers did not use their car to block the defendant's path); see also *People v. Thomas*, 792 N.Y.S.2d 472, 475 (N.Y. App. Div. 2005) (considering the position of a police car as one factor in the intrusiveness of a stop).

<sup>73</sup> See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

<sup>74</sup> *California v. Hodari D.*, 499 U.S. 621 (1991) (holding that, even if the *Mendenhall* "free-to-leave" test is satisfied, a person is seized only if he submits to a show of authority or is physically seized).

<sup>75</sup> See *Rakas v. Illinois*, 439 U.S. 128 (1978).

<sup>76</sup> See *id.*

<sup>77</sup> See *Brendlin v. California*, 551 U.S. 249, 255–56, 263 (2007).

<sup>78</sup> *Minnesota v. Carter*, 525 U.S. 83, 87 (1998).

<sup>79</sup> *Breaking Bad: Pilot* (AMC television broadcast Jan. 20, 2008).

<sup>80</sup> *Breaking Bad: 4 Days Out* (AMC television broadcast May 3, 2009).

<sup>81</sup> *Breaking Bad: Caballo Sin Nombre* (AMC television broadcast Mar. 28, 2010).

facts give rise to a broader discussion about the values that the Fourth Amendment protects and prioritizes. Walt spent substantial time in the RV, but always for the purpose of cooking meth or otherwise conducting drug business. Jesse, on the other hand, slept in the RV for housing purposes after being kicked out of his parents' home.<sup>82</sup> Arguably, Jesse's single night of ordinary slumber provides him valuable "overnight guest" status more clearly than four nights spent in the RV for a meth cook.<sup>83</sup>

Moreover, as a matter of strategy, neither Walt nor Jesse may be eager to admit the extent of their ties to an RV used as a meth lab. On the one hand, any testimony they offered in the motion to suppress to establish their expectations of privacy in the RV would not be admissible against them in the government's case in chief.<sup>84</sup> On the other hand, in many jurisdictions, the testimony could be used to impeach them if either chose to testify at trial.<sup>85</sup> In addition, any admissions they made regarding the RV could affect their ability to negotiate favorable plea agreements.

### C. *Exceptions to the Warrant and Probable Cause Requirements*

The facts in the junkyard scene not only give rise to a rich discussion of affected Fourth Amendment interests, but also the potential justifications for an intrusion upon those interests. Several exceptions to the warrant requirement might apply.

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<sup>82</sup> See Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 403–04 (2003) (noting that "less well-off people are much more likely to live" in vehicles, which enjoy less Fourth Amendment protection than houses).

<sup>83</sup> See *Minnesota v. Olson*, 495 U.S. 91, 96–97 (1990) (holding that overnight guests have reasonable expectations of privacy such that they can challenge the government's search of the home in which they are staying). A discussant who is extremely familiar with the facts could go even further with this discussion. At the time Jesse spends one night in the RV for housing purposes, it is without Walt's knowledge or concern because Walt is no longer engaged in meth activity, a fact that would appear to elevate Jesse's interests in the RV over Walt's. On the other hand, Jesse crashes overnight in the RV while it is in the possession of a mechanic who is holding it as collateral while trying to repair it, a fact that conceivably makes Jesse a trespasser. *Breaking Bad: Down* (AMC television broadcast Mar. 29, 2009).

<sup>84</sup> *Simmons v. United States*, 390 U.S. 377, 389–94 (1968) (holding that a defendant's testimony in support of a motion to suppress cannot be introduced against him at trial on the issue of guilt).

<sup>85</sup> See WILLIAM E. RINGEL, SEARCHES AND SEIZURES ARRESTS AND CONFESSIONS § 20:16 (2d ed. 2015) (noting that "[w]hile the suppression hearing testimony cannot be used directly by the government against the defendant, such testimony has been held admissible to impeach the defendant on cross-examination"). *But see* WAYNE R. LAFAYE, SEARCH & SEIZURE § 11.2(d) (5th ed. 2014) (noting that some jurisdictions allow prosecutors to use suppression hearing testimony to impeach a testifying defendant at trial, but that "it is by no means apparent" that this approach is constitutionally permissible); *United States v. Salvucci*, 448 U.S. 83, 94 (1980) (declining to reach the issue).

### 1. Automobile Exception

Under the automobile exception to the warrant requirement, police can search a car without a warrant if they have probable cause to believe the car contains evidence, as long as the car is mobile and is not parked in a way that indicates it is being used as a residence.<sup>86</sup> In his exchange with Hank, Joe invoked both limitations on the definition of an “automobile.” First, he asked Hank whether he actually saw the RV drive onto the lot: “How do you know it runs?”<sup>87</sup> Though the automobile exception does not require that police observe the vehicle “actually moving,”<sup>88</sup> Joe is correct that a car that is incapable of movement does not fall under the automobile exception.<sup>89</sup> Here, the fact that the RV is parked at a junkyard could suggest a higher likelihood that it is no longer “readily mobile by the turn of an ignition key[.]”<sup>90</sup>

A second issue under the automobile exception is whether the RV was being used as a vehicle or a residence. In *Carney*, the defendant—similar to Jesse, without the colorful language—challenged a search of his mobile home under the automobile exception because of its ability to serve as a domicile.<sup>91</sup> Despite the fact that the defendant’s “vehicle possessed some, if not many of the attributes of a home,” the Court upheld the search, noting that the motor home was readily movable, was licensed to operate on public streets, and was parked in a public parking lot, not in a place where an objective observer would conclude it was being used as a home.<sup>92</sup> Accordingly, Jesse’s statement that the RV is his “domicile” is not determinative.<sup>93</sup> The location of the RV in a junkyard without any connection to power or water would likely defeat any claim that it was being used as a residence.

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<sup>86</sup> *California v. Acevedo*, 500 U.S. 565, 569 (1991); *California v. Carney*, 471 U.S. 386, 392–94 (1985); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970); *Carroll v. United States*, 267 U.S. 132 156–57 (1925).

<sup>87</sup> *See supra* Section III.A.

<sup>88</sup> *Carney*, 471 U.S. at 393 (observing that a car need not be “actually moving” to fall within the automobile exception).

<sup>89</sup> *Id.* (noting that a car is considered mobile as long as it is “readily mobile by the turn of an ignition key.”).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *See* Minzner, *supra* note 38, at 415 (applying the automobile exception to this same scene and concluding that “it is easy to imagine that either position is correct”).

## 2. Exigency

Even if the RV did not fall under the automobile exception, Hank might attempt to invoke the exigency exception to the warrant requirement.<sup>94</sup> The presumption that searches require a warrant does not apply when “the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.”<sup>95</sup> Fortunately for them, Walt and Jesse are the rare suspects who remain cool under pressure. They did not hand Hank any smoking-gun evidence of exigency, such as the sounds of people running away or scattering about inside to destroy evidence.<sup>96</sup> Nevertheless, Hank does have some facts on his side. The Court has recognized that drug evidence is especially easy to destroy.<sup>97</sup> Furthermore, once Hank heard voices inside the RV, he had reason to believe that the people inside were aware of law enforcement’s presence. In *Illinois v. McArthur*, the Court held that police did not violate the defendant’s Fourth Amendment rights when they prevented him from entering his home while they obtained a search warrant, in part because it was reasonable to conclude that the defendant knew that the police were aware that he had drugs inside.<sup>98</sup> Hank could argue that it was reasonable to believe that Walt and Jesse would destroy evidence if he permitted them to remain inside the RV while he sought a warrant.

In response, Walt and Jesse would argue that there were no exigent circumstances. Typically, drugs are easy to destroy because they can be easily flushed down the toilet or thrown down a drain.<sup>99</sup> Here, however, Hank believes the evidence is inside an RV that is not attached to any plumbing services, making destruction considerably more difficult. The only method of disposal under these facts would appear to be swallowing, a difficult feat where a large rock of meth is involved, let alone a large quantity of them. In addition to the drugs, the cooking equipment itself would be impossible to dispose of.

Moreover, although Walt and Jesse were aware that a DEA agent was outside, the Court has never held that a suspect’s knowledge that an investigator is present and suspicious of drug activity, standing alone, is sufficient to justify entry inside

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<sup>94</sup> *Warden v. Hayden*, 387 U.S. 294, 298–99 (1967) (holding that a warrantless search was reasonable where delay posed a danger); *Schmerber v. California*, 384 U.S. 757, 770–71 (1966) (upholding a warrantless blood test for alcohol where delay would have led to loss of evidence).

<sup>95</sup> *Mincey v. Arizona*, 437 U.S. 385, 394 (1978).

<sup>96</sup> *See Kentucky v. King*, 131 S. Ct. 1849, 1854 (2011) (officer testified that he “could hear people inside moving,” and sounds as if “things were being moved inside the apartment,” noises that suggested that evidence was being destroyed).

<sup>97</sup> *Id.* at 1857 (noting the ease with which drugs can be destroyed); *United States v. Banks*, 540 U.S. 31, 40 (2003) (noting that cocaine could be destroyed within seconds).

<sup>98</sup> *Illinois v. McArthur*, 531 U.S. 326, 337 (2001).

<sup>99</sup> *See King*, 131 S. Ct. at 1857 (noting that “drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain.”).

the premises without a warrant. In *Johnson v. United States*,<sup>100</sup> a police lieutenant received a tip about drug activity at a hotel room, and then, from the hotel hallway, smelled the odor of opium burning in the room. After he knocked on the door, there was a “slight delay,” followed by “some shuffling or noise in the room.”<sup>101</sup> The defendant opened the door, and the lieutenant entered without consent. Holding that the entry was an unlawful search, the Court noted that “[n]o evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time will disappear.”<sup>102</sup> And in *McArthur*, the Court emphasized the fact that the police merely kept the defendant from re-entering his home.<sup>103</sup> They neither entered the home nor arrested the defendant.<sup>104</sup>

Even if Hank could establish exigent circumstances, Walt and Jesse would argue that Hank created the exigency.<sup>105</sup> Under *Kentucky v. King*, police cannot invoke the exigent circumstances exception if they triggered the exigency by “engaging or threatening to engage” in unconstitutional conduct.<sup>106</sup> They will not, however, be deemed to have created exigency merely by engaging in lawful activities that put a suspect in fear of police detection.<sup>107</sup> Here, even if Hank did not violate the Fourth Amendment by pulling into the lot,<sup>108</sup> he arguably threatened to engage in unlawful conduct when he indicated he would charge the RV’s occupants with resisting arrest, and that they had a “last chance to do it the easy way.” He even used a crowbar to attempt to break into the RV and declared that the occupant(s) of the RV had “three seconds” to come out. Had Hank simply knocked on the RV door and announced that he was a DEA Agent, he would be better positioned to rely on the exigency doctrine.<sup>109</sup>

## V. CONCLUSION

The joys and difficulties of teaching investigative criminal procedure are familiar to those who have done it. The facts are intriguing, even dramatic, and students are interested. The cases allow us to take up weighty debates like the

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<sup>100</sup> *Johnson v. United States*, 333 U.S. 10, 12 (1948).

<sup>101</sup> *Id.* (internal quotations omitted).

<sup>102</sup> *Id.* at 15; *see also King*, 131 S. Ct. at 1862 n.5 (observing that in *Johnson*, “the Government did not claim that this particular noise was a noise that would have led a reasonable officer to think that evidence was about to be destroyed.”).

<sup>103</sup> *McArthur*, 531 U.S. at 327.

<sup>104</sup> *Id.*

<sup>105</sup> The exigency exception does not apply when police create the circumstances giving rise to the claimed exigency. *King*, 131 S. Ct. at 1858.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1857.

<sup>108</sup> Joe claims this is a trespass, but as discussed in Section III.B.2, it is unlikely that this trespass alone would implicate Walt or Jesse’s Fourth Amendment interests.

<sup>109</sup> *See King*, 131 S. Ct. at 1862.

balance between liberty and security, the meaning of equality and autonomy, the costs of police discretion, and the ability of courts to monitor and regulate policing on the streets.

Then there are the challenges. Between tying the lofty ideas to the nuts and bolts of doctrine, a criminal procedure class can feel like it bounces between either's and or's. One minute, students are debating the big, world-view questions of whether, for example, the "tax" of police activity is evenly distributed among citizens<sup>110</sup> or whether trial courts are sufficiently scrutinizing to detect and deter "testilying" by police officers.<sup>111</sup> The next, they're asking whether the back of a hatchback vehicle is more like the passenger compartment or the trunk.<sup>112</sup> An examination of doctrine outside the traditional classroom hypothetical allows the class to occupy a space in the middle.

This Article has offered one concrete example, a single scene from a popular television show, to demonstrate the importance of allowing students to examine the difficulties of criminal procedure litigation.<sup>113</sup> Presenting facts visually rather than verbally challenges students to translate a scene into words that may be legally charged. It also forces them to examine how multiple doctrines can collide in a single fact pattern. In this respect, fiction may be made to resemble the reality of criminal law practice.

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<sup>110</sup> See Randall Kennedy, *Suspect Policy*, NEW REPUBLIC, Sept. 13 & 20, 1999, at 30, 34 (characterizing racial profiling as an inequitable "tax" for the wars against illegal immigration and drugs); see generally DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 54 (1999) (noting that "well-to-do white people" would be more concerned about police practices if they were routinely subjected to policing activities).

<sup>111</sup> See I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835 (2008); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

<sup>112</sup> See *United States v. Caldwell*, 97 F.3d 1063, 1067 (8th Cir. 1996); *United States v. Russell*, 670 F.2d 323, 327 (D.C. Cir. 1982).

<sup>113</sup> For excellent examples of additional *Breaking Bad* scenes that could be used in the classroom, see Minzner, *supra* note 38.