

# THE POLITICAL GEOGRAPHY OF PLEA BARGAINING IN FEDERAL DEATH PENALTY CASES

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## INTRODUCTION

*Breaking Bad*<sup>1</sup> is a character study depicting Walter White's transformation from high school chemistry teacher and dedicated family man to first-rate methamphetamine cook and criminal mastermind. Walt's terminal lung cancer diagnosis triggers this transformation.<sup>2</sup> As Walt segues from "Mr. Chips to Scarface,"<sup>3</sup> the fallout is considerable. Although the series is driven by its narrative complexity and penetrating character development, law plays an important subsidiary role,<sup>4</sup> primarily through the Drug Enforcement Agency's (DEA) efforts to track Walt's criminal exploits. Indeed, DEA Agent Hank Schrader spends much of the series investigating the criminal activities that derive from the production and distribution of "blue meth," not knowing his brother-in-law was also the man he sought called "Heisenberg."<sup>5</sup>

Hank ultimately arrests Walt after Walt's accomplice and former chemistry student Jesse Pinkman works with Hank to procure Walt's acknowledged involvement in six potentially death-eligible killings under federal law during a monitored telephone conversation.<sup>6</sup> Had Walt's busi-

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1. *Breaking Bad* is a critically acclaimed television series.

2. *Breaking Bad: Pilot* (AMC television broadcast Jan. 20, 2008).

3. David Segal, *The Dark Art of 'Breaking Bad'*, N.Y. TIMES, July 6, 2011, [www.nytimes.com/2011/07/10/magazine/the-dark-art-of-breaking-bad.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/07/10/magazine/the-dark-art-of-breaking-bad.html?pagewanted=all&_r=0) (quoting series creator Vince Gilligan).

4. Law plays an important role in several great television series. See generally *Deadwood* (HBO television broadcast 2004–2006); *The Sopranos* (HBO television broadcast 1999–2007); *The Wire* (HBO television broadcast 2002–2008).

5. Hank first briefs the Albuquerque District Office about "the purest [meth] they've ever seen" midway through Season One. *Breaking Bad: Cancer Man* (AMC television broadcast Feb. 17, 2008). The meth turned blue after Walt changed the cooking method in the Season One finale. *Breaking Bad: A No-Rough-Stuff-Type Deal* (AMC television broadcast Mar. 9, 2008).

6. *Breaking Bad: To'hajililee* (AMC television broadcast Sept. 8, 2013) (speaking to Jesse in what Walt believes to be a private conversation, Walt says: "Can't you see I needed you on my side to kill Gus? I ran over those gang bangers! I killed Emilio and

ness associate Jack Welker (“Jack”) and his white-supremacist gang not killed Hank and the only other agent who knew about Walt’s arrest shortly after it occurred, federal law enforcement might have discovered that Walt actually arranged, ordered, or committed twenty-seven murders: Emilio Koyama (poisoned),<sup>7</sup> Krazy-8 (strangled with a bike lock),<sup>8</sup> two unnamed drug dealers (run over and shot),<sup>9</sup> Tyrus Kitt and Gustavo Fring (bomb explosion),<sup>10</sup> two unnamed employees of Gustavo Fring (shot),<sup>11</sup> Mike Ehrmantraut (shot),<sup>12</sup> ten prisoners (contract killing),<sup>13</sup> Lydia Rodarte-Quayle (poisoned),<sup>14</sup> six white-supremacist gang members (shot by remote-activated gun),<sup>15</sup> and Jack (shot).<sup>16</sup>

What if federal law enforcement had unraveled the mysteries surrounding “blue meth” and sought the death penalty against the characters on *Breaking Bad* that committed federal death-eligible offenses? Some of Walt’s murders may be death-eligible offenses under federal statutes covering murder as part of a continuing criminal enterprise,<sup>17</sup> murder-for-hire,<sup>18</sup> and murder accompanied by damage to a building used in interstate commerce.<sup>19</sup> Walt could also face the death penalty because of the volume of meth he produced and distributed, and the amount of money he earned while he was “in the empire business.”<sup>20</sup> And of course Walt’s offenses comprise only a fraction of those committed by *Breaking Bad*’s characters, at least some of which may also be death-eligible under federal law.<sup>21</sup> What makes the counterfactual potentially interesting, how-

Krazy-8!”). Although Hector Salamanca technically killed Gus by detonating a bomb attached to his own wheelchair, Walt planned the incident, built the bomb, and attached it to Hector’s wheelchair, with Hector’s consent. *Breaking Bad: Face Off* (AMC television broadcast Oct. 9, 2011) See also *infra* Part I (describing how Walt could face the federal death penalty for his role in Gus’s death).

7. *Breaking Bad: Pilot* (AMC television broadcast Jan. 20, 2008).

8. *Breaking Bad: . . . And the Bag’s in the River* (AMC television broadcast Feb. 10, 2008).

9. *Breaking Bad: Half Measures* (AMC television broadcast June 6, 2010).

10. *Breaking Bad: Face Off* (AMC television broadcast Oct. 9, 2011).

11. *Id.*

12. *Breaking Bad: Say My Name* (AMC television broadcast Aug. 26, 2012).

13. *Breaking Bad: Gliding All Over* (AMC television broadcast Sept. 2, 2012).

14. *Breaking Bad: Felina* (AMC television broadcast Sept. 29, 2013).

15. *Id.*

16. *Id.*

17. 21 U.S.C. § 848(e)(1)(A) (2013).

18. *Id.*

19. 18 U.S.C. § 844(h)(i) (1970).

20. *Breaking Bad: Buyout* (AMC television broadcast Aug. 19, 2012); 18 U.S.C. § 3591(b)(1) (1994).

21. See *infra* Part I.

ever, is not which crimes were committed, but where they were committed.

On March 18, 2009, just days after viewers watched Walt implement his “fugue state” alibi after being held captive by former business associate Tuco Salamanca (“Tuco”),<sup>22</sup> New Mexico’s then-Governor Bill Richardson signed legislation repealing the state’s death penalty.<sup>23</sup> New Mexico’s lack of a death penalty differentiates it from its five bordering states.<sup>24</sup> Moreover, New Mexico’s lack of a death penalty differentiates it from California, which is where series creator and show runner Vince Gilligan originally planned to set the series before network executives asked for a switch to New Mexico in order to take advantage of a tax rebate.<sup>25</sup> The decision to set *Breaking Bad* in New Mexico rather than California, in conjunction with New Mexico’s subsequent decision to repeal its death penalty, may have affected the expected punishment its characters could have faced under federal law.

This Article employs the *Breaking Bad* counterfactual to motivate a preliminary empirical analysis of plea bargaining outcomes in federal capital cases.<sup>26</sup> Given the Justice Department’s express commitment to apply-

22. *Breaking Bad: Grilled* (AMC television broadcast Mar. 15, 2009).

23. *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 18, 2009, [http://www.nytimes.com/2009/03/19/us/19execute.html?\\_r=0](http://www.nytimes.com/2009/03/19/us/19execute.html?_r=0); See LARRY W. KOCH ET AL., THE DEATH OF THE AMERICAN DEATH PENALTY 50–61 (2012); see generally Marcia J. Wilson, *The Application of the Death Penalty in New Mexico, July 1979 Through December 2007: An Empirical Analysis*, 38 N.M. L. REV. 255 (2008) (providing a comprehensive history of the death penalty in New Mexico).

24. New Mexico borders Arizona, Colorado, Oklahoma, Texas, and Utah—all of which permit capital punishment under state law. The extent to which states actually seek and carry out death sentences varies. See, e.g., William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity*, 87 IOWA L. REV. 1505 (2002) (discussing state-level variation in death sentencing). In Colorado, for example, the death penalty has been described as “dormant.” Ginny McKibben, *Is State Death Penalty Dead? Judicial System Impeding the Will of the People*, DENVER POST, Mar. 13, 1994, at A01.

25. J.C. Frenan, *Interview: Vince Gilligan*, SLANT (March 29, 2010), <http://www.slantmagazine.com/features/article/interview-vince-gilligan>. In July 2014, a federal district court judge ruled that California’s death penalty system violates the Eighth Amendment’s prohibition against cruel and unusual punishment. *Jones v. Chappell*, 31 F.Supp.3d 1050 (C.D. Cal. 2014). California is appealing the ruling, but could also implement changes to satisfy the constitutional infirmities identified by the district court ruling. In 2012, California voters rejected a ballot measure that would have repealed the state’s death penalty. James Queally, *Support for the death penalty in California at lowest point in 50 years*, LOS ANGELES TIMES, Sept. 13, 2014, <http://touch.latimes.com/-section/-1/article/p2p-81359343/>.

26. Although the counterfactual can be a useful mechanism for speculating about causal inference, its limitations are well known. See STEPHEN L. MORGAN & CHRISTO-

ing the federal death penalty uniformly across states, New Mexico's lack of a death penalty should be immaterial in determining whether Walt and other characters would have faced the federal death penalty.<sup>27</sup> Nonetheless, scholars have demonstrated that there is considerable geographic variation in the federal death penalty's administration.<sup>28</sup> Moreover, scholars have devoted considerable attention to illuminating the "[s]ignificant federalism and state sovereignty issues lurk[ing] beneath the surface of a nationally uniform federal death penalty."<sup>29</sup>

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PHER WINSHIP, COUNTERFACTUALS AND CAUSAL INFERENCE: METHODS AND PRINCIPLES FOR SOCIAL RESEARCH (2007); see also Gregory Mitchell, *Case Studies, Counterfactuals, and Causal Explanations*, 152 U. PA. L. REV. 1517 (2004); Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339 (1992); Cass R. Sunstein, *What if Counterfactuals Never Existed? Studying History with Hypotheticals*, NEW REPUBLIC (Sept. 20, 2014), <http://www.newrepublic.com/article/119357/altered-pasts-reviewed-cass-r-sunstein>. Any empirical insights derived from this project are motivated by—but do not depend on—the *Breaking Bad* counterfactual.

27. See *infra* notes 109–111 (discussing the Justice Department's uniformity goal).

28. See G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425 (2010); see also Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO N.U. L. REV. 529 (2000) [hereinafter Little, *Future*]; Rory K. Little, *The Federal Death Penalty: History and Some Thoughts about the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347 (1998) [hereinafter Little, *History*]. See Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305 (2009) (providing an overview of the process); see also Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360 (2008); Brandice Canes-Wrone et al., *Judicial Selection and Death Penalty Decisions*, 108 AM. POL. SCI. REV. 23 (2014); John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities*, 11 J. EMPIRICAL LEGAL STUD. 637 (2014); Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209 (2004); Greg Goelzhauser, *Prosecutorial Discretion Under Resource Constraints: Budget Allocations and Local Death-Charging Decisions*, 96 JUDICATURE 161 (2013); Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. RES. 485 (1995); Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. REV. 227 (2012); Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006).

29. Little, *History*, *supra* note 28, at 357. See John Brigham, *Unusual Punishment: The Federal Death Penalty in the United States*, 16 WASH. U. J. L. & POL'Y 195 (2004); see also Michele Martinez Campbell, *Federalism and Capital Punishment: New England Stories*, 36 VT. L. REV. 81 (2011); Eileen M. Connor, *The Undermining Influence of the Federal Death Penalty on Capital Policymaking and Criminal Justice Administration in the States*, 100 J. CRIM. L. & CRIMINOLOGY 149 (2010); John Gleeson, *Essay: Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L.

The federalism issues surrounding federal death penalty enforcement in non-death penalty states recently surfaced in Rhode Island.<sup>30</sup> In 2010, a federal grand jury in Rhode Island indicted Jason Pleau for robbing and murdering a gas station manager making a bank deposit.<sup>31</sup> At the time of the federal indictment, Pleau was already in state custody for a parole violation.<sup>32</sup> When the federal government moved to have Pleau extradited into federal custody, Rhode Island Governor Lincoln Chafee refused given his expectation that the federal government would seek the death penalty—a punishment that is not authorized in Rhode Island.<sup>33</sup> Explaining his refusal to turn Pleau over to federal custody, Governor Chafee noted that “Rhode Islanders have long opposed the death penalty, even for the most heinous crimes,” adding: “[t]o voluntarily let Mr. Pleau be exposed to the federal death penalty for a crime committed in

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REV. 1697 (2003); Rory K. Little, *Good Enough for Government Work: The Tension Between Uniformity and Differing Regional Values in Administering the Federal Death Penalty*, 14 FED. SENT. R. 7 (2001) [hereinafter Little, *Tension*]; Rory K. Little, *Why a Federal Death Penalty Moratorium?*, 33 CONN. L. REV. 791 (2001) [hereinafter Little, *Moratorium*]; Sean M. Morton, Comment, *Death Isn't Welcome Here: Evaluating the Federal Death Penalty in the Context of a State Constitutional Objection to Capital Punishment*, 64 ALB. L. REV. 1435 (2001); Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. PA. J. CONST. L. 57 (2009); Michael J. Zydney Mannheimer, *When the Federal Death Penalty is “Cruel and Unusual”*, 74 U. CIN. L. REV. 819 (2006). There is also an extensive literature devoted to the normative and public policy consequences of geographic variation within states in the implementation of state death penalty regimes. See, e.g., Andrew Ditchfield, *Challenging the Intrastate Disparities in the Application of Capital Punishment Statutes*, 95 GEO. L.J. 801 (2007); Adam M. Gershowitz, *An NTSB for Capital Punishment*, 47 TEX. TECH. L. REV. 151 (2014); Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307 (2010); James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255 (2011).

30. In an ongoing case, the federal government is seeking the death penalty against Boston Marathon bombing suspect Dzhokhar Tsarnaev. Polling shows that 33 percent of Massachusetts residents favored the death penalty in that case, while 57 percent favored a life sentence. However, a nationwide poll revealed that 70 percent of respondents favored the death penalty in that case. Katharine Q. Seelye, *U.S. Weighs Pursuit of Death Penalty for Suspect in Boston Bombing*, N.Y. TIMES, Jan. 23, 2014, [http://www.nytimes.com/2014/01/24/us/us-weighs-pursuit-of-death-penalty-in-boston-bombing.html?\\_r=0](http://www.nytimes.com/2014/01/24/us/us-weighs-pursuit-of-death-penalty-in-boston-bombing.html?_r=0).

31. *United States v. Pleau*, 680 F.3d 1, 3 (1st Cir. 2012) (en banc).

32. *Id.*

33. Lincoln D. Chafee, *My Pleau Stand Affirms Core R.I. Values*, PROVIDENCE JOURNAL, Aug. 24, 2011, at 6 (explaining reasons for refusing extradition). While in state custody, Pleau agreed to plead guilty and accept life in (state) prison without parole.

Rhode Island would be an abdication of one of my core responsibilities as governor: defending and upholding the legitimate public-policy choices made by the people of this state."<sup>34</sup> Subsequently, the First Circuit ordered Rhode Island to deliver Pleau into federal custody.<sup>35</sup> Although the federal government did file a notice of intent to seek the death penalty against Pleau, it was dropped after Pleau agreed to plead guilty and spend life in prison without parole.<sup>36</sup>

This Article advances our understanding of the federal death penalty by offering a preliminary empirical analysis of plea bargaining outcomes in federal death-eligible cases across states with and without their own death penalty regimes.<sup>37</sup> The key result is that authorized federal capital cases are about 28 percent less likely to be resolved through plea bargaining when they arise in death penalty states.<sup>38</sup> Moreover, this result is not simply due to variation in public support for the death penalty across states.<sup>39</sup> Accordingly, the answer to the *Breaking Bad* counterfactual may turn in large part on the series being set in New Mexico rather than California as originally planned, along with New Mexico's subsequent decision to repeal the death penalty.<sup>40</sup> This result yields important insight into the political geography of federal death penalty enforcement.

The rest of this Article proceeds as follows. Part I provides an introduction to the federal death penalty through the lens of *Breaking Bad*. Rather than attempt to provide a comprehensive account of the federal death penalty,<sup>41</sup> Part I utilizes factual circumstances surrounding several of the criminal offenses committed by certain *Breaking Bad* characters to illustrate some of the jurisdictional elements that can make crimes death eligible under federal law. Next, Part II draws from the extensive literature on prosecutorial politics and behavior to unravel the competing theoretical expectations regarding the relationship between state death penalty regimes and plea bargaining outcomes in federal capital cases.

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34. *Id.*

35. *Pleau*, 680 F.3d at 8.

36. Katie Mulvaney, *Pleau Enters Guilty Plea in Killing*, PROVIDENCE JOURNAL, Aug. 1, 2013, at 8.

37. Most existing empirical studies of federal death penalty enforcement rely almost exclusively on descriptive statistics. *See, e.g.*, U.S. DEP'T OF JUSTICE, SURVEY OF THE FEDERAL DEATH PENALTY SYSTEM (2000), <http://www.justice.gov/dag/survey-federal-death-penalty-system>.

38. *See infra* Part III(B).

39. *Id.*

40. As Jesse might say, "Yeah, science!" *Breaking Bad: A No-Rough-Stuff-Type Deal* (AMC television broadcast Mar. 9, 2008).

41. *See* Little, *History*, *supra* note 28 (providing a comprehensive history of the federal death penalty).

Part III presents a preliminary empirical analysis of plea bargaining outcomes in federal death-eligible cases from 1989 through June 2011, with a special emphasis on answering key counterfactuals regarding *Breaking Bad*. Part III also discusses important data limitations that currently complicate our ability to draw valid inferences from empirical studies of the federal death penalty.

## I. FEDERAL DEATH-ELIGIBLE CRIMES IN *BREAKING BAD*

The federal death penalty's modern era began with the Supreme Court's landmark decision in *Furman v. Georgia*.<sup>42</sup> In addition to creating a *de facto* moratorium on state death penalty regimes, many observers agreed with Justice Blackmun's conclusion in dissent that "provisions of the federal statutory structure that permit the death penalty [were] apparently [also] voided."<sup>43</sup> After the Supreme Court signaled its acceptance of revised state statutory frameworks in cases such as *Gregg v. Georgia*<sup>44</sup> and *McClesky v. Kemp*,<sup>45</sup> Congress began an extensive re-implementation of the federal death penalty.<sup>46</sup> Although the exact number of federal death-eligible offenses depends on the counting method employed, the Justice Department's *Criminal Resource Manual* lists fifty "capital eligible statutes."<sup>47</sup> The federal death penalty is so extensive that one commentator suggested "[t]hat the federal government has the ability to prosecute virtually every homicide in the United States."<sup>48</sup> Some of the crimes *Break-*

42. *Furman v. Georgia*, 408 U.S. 238 (1972).

43. *Id.* at 411 (Blackmun, J., dissenting).

44. *Gregg v. Georgia*, 428 U.S. 153 (1976).

45. *McClesky v. Kemp*, 481 U.S. 279 (1987).

46. Members of Congress introduced numerous bills to re-implement the federal death penalty during the years between *Gregg* and *McClesky*. However, most of these efforts stalled due in part to political gridlock and continuing uncertainty about the death penalty's constitutionality. See Little, *History*, *supra* note 28, at 372–80.

47. U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL 71, [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00071.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00071.htm). See also ELIZABETH B. BAZAN, CAPITAL PUNISHMENT: AN OVERVIEW OF FEDERAL DEATH PENALTY STATUTES (2005) (discussing federal death penalty statutes). The Federal Death Penalty Act of 1994 ("FDPA") greatly expanded the number of death-eligible offenses under federal law. See, e.g., RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 974–76 (3rd ed. 2006) (listing the FDPA's newly-created death-eligible offenses, the existing offenses made death-eligible under the FDPA, and the pre-*Furman* statutes that were resurrected under FDPA); see also George Kannar, *Federalizing Death*, 44 BUFF. L. REV. 325, 328 (1996) (noting that "the real 'federalizing death' extravaganza" occurred with passage of the FDPA).

48. Connor, *supra* note 29, at 156. This expansion of the death penalty also raises potential federalism concerns. See, e.g., FRANKLIN E. ZIMRING, THE CONTRADIC-

*ing Bad* depicts offer a useful introduction to the range of federal death-eligible offenses and statutory elements that must be satisfied to invoke federal jurisdiction.<sup>49</sup>

#### A. Death-Eligible Offenses Under the Drug Kingpin Statute

In 1988, Congress took a major step toward re-implementing the federal death penalty by amending the Continuing Criminal Enterprise (“CCE”) statute to allow federal prosecutors to seek the death penalty against certain drug kingpins.<sup>50</sup> As the primary law focusing on drug-related killings, the so-called “Drug Kingpin Statute”<sup>51</sup> may have played an important role in prosecuting some of the federal offenses *Breaking Bad* depicts. To constitute a “continuing criminal enterprise,” there must be:

a continuing series of violations . . . undertaken . . . in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management . . . from which such person obtains substantial income or resources.<sup>52</sup>

Although the statute’s “complicated structure” may complicate enforcement,<sup>53</sup> there is little doubt that methamphetamine distributor and fast food restaurant chain owner Gustavo Fring (“Gus”) satisfies the various elements.<sup>54</sup>

TIONS OF AMERICAN CAPITAL PUNISHMENT 71 (2003) (“[One] problem with a detailed federal code of substantive death penalty law is that it creates tension with the deference to state and local judgments, which is the emotional center of federalism.”).

49. This is not a comprehensive review of whether various crimes depicted on *Breaking Bad* are death-eligible offenses under federal law. Several of the crimes discussed might be prosecuted under more than one statute, and other potential offenses are not discussed at all. Furthermore, to simplify the discussion I do not consider potential aggravating or mitigating factors notwithstanding their obvious importance in determining whether to seek the federal death penalty. *See, e.g.*, Robert Steinbuch, *Reforming Federal Death Penalty Procedures: Four Modest Proposals to Improve the Administration of the Ultimate Penalty*, 40 IND. L. REV. 97 (2007) (discussing the importance of several aggravating factors in seeking the federal death penalty).

50. Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, 102 Stat. 4181. *See* Sandra D. Jordan, *Death for Drug Related Killings: Revival of the Federal Death Penalty*, 67 CHI.-KENT L. REV. 79 (1991) (discussing the law’s provisions).

51. *See* U.S. v. Shear, 962 F. 2d 488, 493 (5th Cir. 1992); *see also* Christopher Q. Cutler, *Death Resurrected: The Reimplementation of the Federal Death Penalty*, 23 SEATTLE U. L. REV. 1189, 1204 (1999–2000).

52. 21 U.S.C. § 848(c) (2013).

53. Little, *History*, *supra* note 28, at 381 n.187.

54. The “continuing series” requirement has been interpreted to mean at least three violations. *See, e.g.*, U.S. v. Young, 745 F. 2d 733, 747 (2d Cir. 1984) (“[T]here is



Prosecutors may seek the death penalty under the Drug Kingpin Statute against “any person engaging in or working in furtherance of a continuing criminal enterprise . . . who intentionally kills . . . an individual . . . .”<sup>55</sup> As a result, federal prosecutors could seek the death penalty against Gus for killing his employee Victor assuming they could demonstrate that Gus was “engaging in or working in furtherance of” a continuing criminal enterprise at the time.<sup>56</sup> Although Gus did not explain the reasons behind Victor’s murder, several plausible explanations suggest that Gus was “engaging in or working in furtherance of” the continuing criminal enterprise. First, Gus may have killed Victor because bystanders spotted him at the scene of Gale Boetticher’s (“Gale”) murder.<sup>57</sup> Later, Walt (who may not have known that Victor was spotted at the scene) reflects on the incident while taking to Jesse:

I’ve been thinking about Victor. . . . All this time, I was sure that Gus did what he did to send me a message. Maybe there’s another reason. Victor trying to cook that batch on his own, taking liberties that weren’t his to take. Maybe he flew too close to the sun—got his throat cut.<sup>58</sup>

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a consensus of authority that to establish a ‘series’ the government must prove at least three felony violations.”). The Supreme Court held that a jury must agree on three specific violations constituting the continuing enterprise. *Richardson v. U.S.*, 526 U.S. 813 (1999). Gus clearly committed at least three felony violations of federal narcotics law. Gus also clearly held a “management” position. In one episode, for example, Mike refers to Gus as “boss” and “employer.” *Breaking Bad: Half Measures* (AMC television broadcast June 6, 2010). The eleven employees that Lydia Rodarte-Quayle suggests were involved in Gus’s drug operations seem to satisfy the “in concert with” provision, but there are many others as well (e.g., Walt, Jesse, Mike, and Lydia). *Breaking Bad: Madrigal* (AMC television broadcast July 22, 2012). Lower courts have held that the supervisor need not have direct contact with each employee. *See U.S. v. Rosenthal*, 793 F.2d 1214, 1226 (11th Cir. 1986) (“An individual need not have direct communications with participants in order to be their supervisor.”). As for the substantial income requirement, Walt notes that Gus’s business is big enough to be listed on NASDAQ. *Breaking Bad: Cornered* (AMC television broadcast Aug. 21, 2011).

55. 21 U.S.C. § 848(e)(1)(A) (2006).

56. *Breaking Bad: Box Cutter* (AMC television broadcast July 7, 2011).

57. Victor mentions upon returning to the lab that he could not “sweep” for evidence because there were “people there,” at which point Mike asks twice whether he was spotted by these people. *Id.*

58. *Breaking Bad: Hazard Pay* (AMC television broadcast July 29, 2012). Although it is clear from the episode’s context that Walt is conveying a message to Jesse about his frustration with Mike in these comments, it is possible that they also represent a genuine rumination about Gus’s intentions.

Any of these possibilities satisfy the “engaging in or working in furtherance of” requirement because of the direct connection to Gus’s drug enterprise.<sup>59</sup>

In addition to direct killings, the Drug Kingpin Statute allows prosecutors to seek the death penalty against “any person engaging in or working in furtherance of a continuing criminal enterprise . . . who . . . counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results.”<sup>60</sup> Under this statute, prosecutors could seek the death penalty against Gus for ordering his employee Mike Ehrmantraut (“Mike”) to kill cartel hit man Leonel Salamanca (“Leonel”) while in police custody at the hospital,<sup>61</sup> or against Walt for counseling or inducing Jesse to murder Gale in order to save his life and position within the organization.<sup>62</sup> Jesse could also face the death penalty for Gale’s murder under this provision, with prosecutors arguing that the murder was designed to protect Walt’s position within the organization and perhaps his own as well.

Walt would probably be considered a kingpin under the CCE statute for several additional crimes that he committed while not working for Gus.<sup>63</sup> Indeed, Hank may have been referencing the statute when he tells

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59. Although each of these plausible explanations are directly related to Gus’s drug enterprise, lower courts have generally held that at least one motive, among other possible motives, is sufficient to satisfy the statutory requirement “as long as there is a substantive connection between the defendant’s role in the murder . . . and his participation in the drug [enterprise].” *U.S. v. Desinor*, 525 F.3d 193, 202 (2d Cir. 2008).

60. 21 U.S.C. § 848(e)(1)(A) (2013).

61. *See Breaking Bad: I See You* (AMC television broadcast May 9, 2010) (depicting that Gus’s order is inferred, albeit not directly observed).

62. *Breaking Bad: Full Measure* (AMC television broadcast June 13, 2010).

63. It is not clear whether Walt would satisfy the kingpin elements while working for Gus. The key questions would be whether he acted “in concert with five or more other persons with respect to whom [he] occupie[d] a position of organizer, a supervisory position, or any other position of management.” 21 U.S.C. § 848(c)(2)(A) (2013). Although Walt and Jesse describe themselves as “partners” while working for Gus, prosecutors may be able to demonstrate that Walt held “a supervisory position” over Jesse in terms of leading the cooks. While working for Gus, for example, Jesse refers to Walt as his “boss” during a narcotics anonymous meeting; in the same speech, he refers to Gus as the “owner.” *Breaking Bad: Kafkaesque* (AMC television broadcast May 16, 2010). Walt also supervises Gale and Victor during various cooks. To satisfy the five-person statutory requirement, prosecutors might argue that Walt supervised the three laundry employees he once paid to clean lab equipment while Jesse worked with Mike. *Breaking Bad: Cornered* (AMC television broadcast Aug. 21, 2011). Although the Supreme Court has noted that the CCE statute was not designed to cover “lieutenants and foot soldiers,” lower courts have read the statutory language broadly. *Garrett v. U.S.*, 471 U.S. 773, 781 (1985). The First Circuit, for example, has

fellow DEA agents that “Albuquerque might just have a new kingpin” as a result of the early investigation into the high-quality (but not yet blue) meth that was found in Krazy-8’s car.<sup>64</sup> When Walt kills Mike in Season Five, for example, the various CCE elements are clearly satisfied.<sup>65</sup> Furthermore, prosecutors could argue that the “engaging in or working in furtherance of” provision was satisfied by Walt’s desire to secure the list of names for those jailed individuals who might have had knowledge about Walt’s involvement in meth production. Prosecutors could also argue that one motive was to keep Mike from conveying information about Walt to the police, given that Mike quit the criminal enterprise, was wanted by the police, and planned to leave Albuquerque.

The CCE statute also allows prosecutors to seek the death penalty against “any person engaging in an offense punishable under section 841(b)(1)(A) . . . who intentionally kills.”<sup>66</sup> The referenced section sets out the criminal penalties for violating a separate statutory provision that makes it “unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”<sup>67</sup> Section 841(b)(1)(A) sets different minimums for different controlled substances, with a minimum of fifty grams for meth.<sup>68</sup> Although it is not clear how much meth Walt and Jesse produced in the pilot episode, it was likely more than fifty grams.<sup>69</sup> As a result, Walt could even face the federal death penalty under

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held that “[t]he government need not establish that the defendant managed five people at once, that the five acted in concert with each other, [or] that the defendant exercised the same kind of control over each of the five,” adding: “In essence, the management element is established by demonstrating the defendant exerted some type of influence over another individual as exemplified by that individual’s compliance with the defendant’s directions, instructions, or terms.” *U.S. v. Possick*, 849 F. 2d 332, 335-36 (8th Cir. 1999). It would actually be easier to demonstrate that Mike was a kingpin under the CCE given that lower courts have held that the statute applies to a “middleman” as long as the individual supervises at least five other individuals in some capacity and satisfies the other statutory requirements. *U.S. v. Mannino*, 635 F. 2d 110, 117 (2d Cir. 1980). Characters such as Tuco and Jack may also be kingpins under the statute.

64. *Breaking Bad: Cancer Man* (AMC television broadcast Feb. 17, 2008).

65. The “in concert with” provision would be satisfied, for example, by Skyler, Lydia, and the Vamonos Pest employees.

66. 21 U.S.C. § 848(e)(1)(A) (2013).

67. 21 U.S.C. § 841(a)(1) (2013).

68. 21 U.S.C. § 841(b)(1)(A)(viii) (2013).

69. Referring to a different batch in episode six of the first season, Jesse tells Walt that he earned \$2,600 (\$1,300 for each of them) by selling “about one ounce.” *Breaking Bad: Crazy Handful of Nothin’* (AMC television broadcast Mar. 2, 2008). This statement suggests a market price of about \$2,600 per ounce. Earlier in the season,

the CCE statute for murdering Emilio Koyama (phosphine gas) and Krazy-8 (strangulation with a bike lock) despite the fact that he had not yet satisfied statutory requirements such as engaging in a “continuing series of violations . . . in concert with five or more” people.<sup>70</sup>

As the series progresses, the quantity of meth produced increases dramatically: in Season One Walt sells Tuco 4.6 pounds;<sup>71</sup> in Season Two, Walt sells Gus thirty-eight pounds;<sup>72</sup> and in Season Five, Walt and Jesse produce 200 pounds per week (fifty pounds per batch) in the Vamanos Pest-treated houses.<sup>73</sup> This is important because federal prosecutors can seek the death penalty against a kingpin on the basis of the quantity of the controlled substance involved in the offense or the profit amount—even if no death resulted from the continuing criminal enterprise.<sup>74</sup> Specifically, federal prosecutors can seek the death penalty against “a principal administrator, organizer, or leader” of a “continuing criminal

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Jesse gave Walt \$4,000 for his share of selling the first batch, suggesting \$8,000 in total sales. *Breaking Bad: Cancer Man* (AMC television broadcast Feb. 17, 2008). Assuming Jesse did not change the price (Walt does not suggest this until later in the season), this implies a sale of more than three ounces, which would be more than eighty-five grams—easily satisfying the statutory minimum. And that does not include the first-batch samples Jesse provides to Combo and Skinny Pete, or the two grams that the DEA found in Krazy-8’s car after Jesse provided him a free sample. *Id.* Although it was not ultimately mentioned in the pilot episode, the original script suggested that the first batch would yield one pound of meth. Vince Gilligan, *BREAKING BAD* 36 (May 27, 2005) (unpublished screenplay), available at [http://www.pages.drexel.edu/~ina22/splaylib/Screenplay-Breaking\\_Bad-Pilot.pdf](http://www.pages.drexel.edu/~ina22/splaylib/Screenplay-Breaking_Bad-Pilot.pdf).

70. Although Walt and Jesse appear to be working alone at this early stage, Jesse refers to the “smurfs” (i.e., “the dudes who go to the drug stores and get a couple of boxes [of over-the-counter products containing pseudoephedrine] at a time and then sell them to me”) he meets each week while explaining to Walt that the “meth ferry” will not deliver the pseudoephedrine he needs to fulfill a deal with Tuco. While these “smurfs” may count toward satisfying the “in concert with” element, it is not clear how many were employed. *Breaking Bad: A No-Rough-Stuff-Type Deal* (AMC television broadcast Mar. 9, 2008). Lower courts have held that a supervisor does not have to communicate directly with the individuals who satisfy the “in concert with” element. *U.S. v. Rosenthal*, 793 F. 2d 1214, 1226 (11th Cir. 1986) (“An individual need not have direct communications with participants in order to be their supervisor.”).

71. *Breaking Bad: A No-Rough-Stuff-Type Deal* (AMC television broadcast Mar. 9, 2008).

72. *Breaking Bad: Mandala* (AMC television broadcast May 17, 2009).

73. *Breaking Bad: Hazard Pay* (AMC television broadcast July 29, 2012).

74. There is some question about whether the death penalty is constitutional for certain non-homicide crimes following the Supreme Court’s invalidation of a state statute making rape a death-eligible offense. *Coker v. Georgia*, 433 U.S. 584 (1977). See, e.g., Eric Pinkard, *The Death Penalty for Drug Kingpins: Constitutional and International Implications*, 24 VT. L. REV. 1 (1999); Jeffrey C. Matura, *When Will It Stop: The Use of the Death Penalty for Non-Homicide Crimes*, 24 J. LEGIS. 249 (1998).

enterprise” if the violation involves at least 2,000 grams of meth or if the gross receipts received during any twelve-month period total more than \$10,000,000.<sup>75</sup> Given that 2,000 grams is equivalent to slightly more than 4.4 pounds, the quantity threshold is not particularly high compared to the volume produced and distributed by the show’s possible kingpins. Gus, for example, easily satisfied the gross receipts and quantity requirements each week that Walt worked for him.<sup>76</sup> If Walt meets the kingpin elements during his time with Gus, it may be that his crimes satisfy the quantity requirement but not the gross receipts requirement.<sup>77</sup> While working under Vamonos Pest, however, Walt satisfied both the quantity and gross receipts requirements.<sup>78</sup>

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75. See 18 U.S.C. § 3591(b)(1) (2013) (requiring “not less than twice the quantity of controlled substance described in [21 U.S.C. § 848(b)(2)] or twice the gross receipts described in [21 U.S.C. § 848(b)(2)(B)]”). See also 21 U.S.C. § 848(b)(2)(A) (2013) (mentioning “at least 300 times the quantity of a substance described in subsection 841(b)(1) [5 or more grams of meth]”); 21 U.S.C. § 848(b)(2)(B) (referencing “\$10 million dollars in gross receipts during any twelve month period”). But see 21 U.S.C. § 848(s) (2013) (establishing a “special provision for methamphetamine” that substitutes 200 for 300 in § 848(b)(2)(A), and five million for ten million in § 848(b)(2)(B)).

76. See *Breaking Bad: Kafkaesque* (AMC television broadcast May 16, 2010) (depicting Jesse’s estimate that Gus sold blue meth at wholesale for \$40,000 per pound, which would have equaled \$8,000,000 per week based on Walt and Jesse’s standard production of 200 pounds per week).

77. Gus initially paid Walt \$3,000,000 for three months, which he in turn split equally with Jesse. Walt then agreed to an indefinite deal at \$15,000,000 per year, but it is not clear how long he worked for Gus at that rate. *Breaking Bad: Kafkaesque* (AMC television broadcast May 16, 2010). By the end of season four, Walt did not have enough money to pay the estimated \$500,000 fee to relocate his family in order to avoid Gus’s retaliation. *Breaking Bad: Crawl Space* (AMC television broadcast Sept. 25, 2011).

78. Jesse said they produced fifty pounds of meth per batch under Vamonos Pest. *Breaking Bad: Hazard Pay* (AMC television broadcast July 29, 2012). Assuming they received about the same \$40,000 valuation per pound that Jesse referenced earlier, that would be \$2,000,000 per batch. At one point, Walt, Jesse, and Mike split what Walt said should have been \$1,379,560 from what is presumed to be one batch, after the dealers were paid. *Id.* Although it is not clear how many batches Walt cooks under the Vamonos Pest banner, he claims toward the end of the series that he has \$80,000,000 in cash. *Breaking Bad: Ozymandias* (AMC television broadcast Sept. 15, 2013). The vast majority of this money is earned within a twelve-month period. Although precise dates are unknown, the methylamine required for increased production and distribution is stolen from the train one episode after Walt turns fifty-one. *Breaking Bad: Fifty-One* (AMC television broadcast Aug. 5, 2012). Walt turns fifty-two in the series finale. *Breaking Bad: Felina* (AMC television broadcast Sept. 29, 2013).

## B. Death-Eligible Offenses Under Other Federal Statutes

### 1. Murder of a Federal Officer

In addition to the Drug Kingpin Statute, there are other statutory options for charging some of *Breaking Bad*'s characters with death-eligible crimes under federal law. For example, Jack and five members of his white-supremacist gang open fire on Hank and fellow DEA Agent Steven Gomez ("Gomie"), resulting in a shootout that leaves Gomie dead and Hank injured from a gunshot wound to the leg.<sup>79</sup> After the shootout ends, Jack kills Hank with a single bullet to the head.<sup>80</sup> Federal law allows prosecutors to seek the death penalty against anyone who "kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties."<sup>81</sup> The gang members might argue that Gomie and Hank were not performing "official duties" at the time, given that Hank's investigation into Walt occurred on personal time toward series end. However, Hank had long led the DEA's investigation into the production and distribution of blue meth. Moreover, they had just secured Walt's confession to several crimes on a monitored phone call—information that they used to place him under arrest moments before the shootout. Because Gomie and Hank were "acting within the scope of what [they were] employed to do,"<sup>82</sup> the "performance of official duties" requirement is likely satisfied.<sup>83</sup> As a result, federal prosecutors could seek the death penalty against all six gang members at the scene.<sup>84</sup>

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79. *Breaking Bad: To'hajilee* (AMC television broadcast Sept. 8, 2013).

80. *Breaking Bad: Ozymandias* (AMC television broadcast Sept. 15, 2013).

81. 18 U.S.C. § 1114(1) (2013).

82. *See* *United States v. Heliczer*, 373 F.2d 241, 245 (2nd Cir. 1967) ("The test is whether the agent is acting within that compass or is engaging in a personal frolic of his own.").

83. *United States v. Street*, 66 F.3d 969, 978 (8th Cir. 1995) (citing lower court interpretations that federal officers act within their official capacity when their actions "fall within the agency's overall mission").

84. Hank screams "police—drop your weapons" prior to the shootout. Jack and another gang member ask for identification, and Jack adds: "We'll give ourselves up if you show us your badges." Hank and Gomie do not respond, and the gang members begin shooting shortly thereafter. After the shootout, but before killing Hank, Jack learns that Hank and Gomie were DEA agents from Gomie's badge. *Breaking Bad: Ozymandias* (AMC television broadcast Sept. 15, 2013). In any event, there is no statutory requirement that defendants know they are killing or attempting to kill a federal employee or officer. *Cf.* *U.S. v. Feola*, 420 U.S. 671, 684 (1975) ("We conclude . . . that in order to effectuate the congressional purpose of according maximum

## 2. Murder Using a Weapon of Mass Destruction

In the series finale, Walt meets Lydia Rodarte-Quayle (“Lydia”) and Todd Alquist (“Todd”) in a café, and offers to teach Todd a new way to cook meth without methylamine in exchange for \$1,000,000.<sup>85</sup> The meeting and offer, however, were pretense. Knowing where Lydia would sit and what she would order, Walt laced a package of Stevia with ricin, and left it as the only package on the table knowing that Lydia would put it in her tea.<sup>86</sup> It is a death-eligible federal offense when death results from the use of “a weapon of mass destruction,”<sup>87</sup> which is defined in part to include “any weapon involving a biological agent, toxin, or vector.”<sup>88</sup> Ricin is a toxin under federal law,<sup>89</sup> which potentially makes Lydia’s murder a death eligible offense under this statute.

## 3. Murder for Hire

Other murders depicted on *Breaking Bad* provide examples of how incidental factual issues can be important determinants in whether federal jurisdiction exists over a particular crime. In one episode, for example, Walt meets with Jack and other members of the white-supremacist gang in a hotel room to arrange killing ten prisoners (Mike’s lawyer and nine of Gus’s former employees) in order to prevent them from providing information about Walt to the DEA.<sup>90</sup> Under the federal murder-for-hire statute, a death-eligible offense occurs when a “death results” following the use of “any facility of interstate . . . commerce, with [the] intent that a murder be committed . . . as consideration for a promise or agreement to pay . . . anything of pecuniary value.”<sup>91</sup> Assuming meeting in the hotel

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protection to federal officers by making prosecution for assaults upon them cognizable in the federal courts, [the statute prohibiting assaults on federal officers] cannot be construed as embodying an unexpressed requirement that an assailant be aware that his victim is a federal officer. All the statute requires is an intent to assault, not an intent to assault a federal officer.”)

85. *Breaking Bad: Felina* (AMC television broadcast Sept. 29, 2013).

86. *See id.* *See also Breaking Bad: Gliding Over All* (AMC television Sept. 2, 2012) (depicting Walt’s initial but not enacted plan to poison Lydia with ricin at that café if she did not deliver the names of Gus’s former employees who were imprisoned).

87. 18 U.S.C. § 2332a (2013).

88. 18 U.S.C. § 2332a(c)(2)(C) (2013).

89. *See, e.g., U.S. v. Leahy*, 169 F.3d 433 (7th Cir. 1999) (recognizing that ricin is a toxin under federal law).

90. *See Breaking Bad: Gliding Over All* (AMC television broadcast Sept. 2, 2012).

91. 18 U.S.C. § 1958 (2004).

satisfies the facility of interstate commerce requirement, Walt could face the federal death penalty under this statute.<sup>92</sup>

#### 4. Malicious Damages to an Instrument of Interstate Commerce where Death Results

In Season Four, Walt and Hector conspire to kill Gus with a home-made bomb.<sup>93</sup> When Gus visits Hector's assisted-living facility to confront him about talking to the DEA, Hector detonates a bomb built and attached to Hector's wheelchair by Walt, killing himself, Tyrus Kitt, and Gus.<sup>94</sup> The bomb also damaged Hector's room inside the assisted-living facility.<sup>95</sup> Federal law makes it a death-eligible offense to "maliciously damage [ ] . . . any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" when death results.<sup>96</sup> According to the Supreme Court, this provision extends to "all business property."<sup>97</sup> As a result, the damage to the assisted-living facility likely provides a jurisdictional hook for federal prosecution.

#### 5. Bank Robbery where Death Results

Although there are many other potentially death-eligible offenses depicted in *Breaking Bad*, one more will suffice to further illustrate how a minor factual issue can trigger federal jurisdiction. In Season Two, two unnamed individuals steal one ounce of blue meth from Skinny Pete, one

92. The murder-for-hire statute would likely apply even if the hotel was in New Mexico and all of the meeting's participants arrived from New Mexico, because the "intrastate use of interstate facilities" (where "facilities" are equivalent to "instrumentalities") is sufficient to invoke federal jurisdiction. *U.S. v. Marek*, 238 F.3d 310, 317 (5th Cir. 2001) (en banc). *See also* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (discussing a hotel as an instrumentality of interstate commerce). In addition to use of the hotel, prosecutors could argue that the cellphone call Walt received relaying that the killings were completed, or the presumed use of a car to drive to the hotel, were sufficient to trigger federal jurisdiction. *See, e.g., U.S. v. Mandel*, 647 F. 3d 710 (7th Cir. 2011) (discussing the intrastate use of a car and use of a cellphone as jurisdictional triggers under the federal murder-for-hire statute).

93. *Breaking Bad: Face Off* (AMC television broadcast Oct. 9, 2011); *see also Breaking Bad: End Times* (AMC television broadcast Oct. 2, 2011) (depicting Walt's failed unilateral attempt to kill Gus by planting a homemade bomb on Gus's car, and watching from a nearby rooftop for an opportunity to detonate the bomb).

94. *Breaking Bad: Face Off* (AMC television broadcast Oct. 9, 2011).

95. *Id.*

96. 18 U.S.C. § 844(h)(i) (1970).

97. *See Russell v. U.S.*, 471 U.S. 858, 862 (1985) (holding that an apartment building used as rental property was sufficient for satisfying the statutory provision); *see also Jones v. U.S.*, 529 U.S. 848 (2000) (distinguishing a private residence from commercial property under the Act).



of Walt and Jesse's street dealers.<sup>98</sup> In the next episode, Skinny Pete informs Jesse that the thieves were a man called "Spoooge" and an unnamed female accomplice referred to as "[Spoooge's] woman."<sup>99</sup> Persuaded by Walt to recover the lost money and signal that their sellers cannot be "robbed with impunity,"<sup>100</sup> Jesse visits Spoooge's house to demand payment.<sup>101</sup> When Jesse arrives at his house, Spoooge says he has the money and shows Jesse a locked automated teller machine ("ATM") that he and his accomplice stole from a fruit and vegetable store.<sup>102</sup> The store clerk was killed during the theft.<sup>103</sup> Although the ATM looks generic on screen, Jesse exclaims, "Yo, that's my bank!" upon seeing it.<sup>104</sup> This statement may be important for determining whether federal jurisdiction is triggered. The federal bank robbery statute makes it a death-eligible offense when death results from "tak[ing] or carr[ying] away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$1,000 belonging to, or in the care, custody, control, management, or possession of any bank."<sup>105</sup> Although the case law is not clear on this point, theft of a bank-operated ATM from a non-bank location is generally considered sufficient to invoke federal jurisdiction under the statute, whereas theft of a non-bank-operated ATM is considered insufficient for triggering federal jurisdiction.<sup>106</sup> Assuming Jesse is correct that a particular bank operated that ATM, rather than it being operated by the store, Spoooge and his accomplice could have faced the federal death penalty for the clerk's death.<sup>107</sup>

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98. *Breaking Bad: Breakage* (AMC television broadcast Apr. 5, 2009).

99. *Breaking Bad: Peekaboo* (AMC television broadcast Apr. 12, 2009).

100. *Breaking Bad: Breakage* (AMC television broadcast Apr. 5, 2009).

101. *Breaking Bad: Peekaboo* (AMC television broadcast Apr. 12, 2009).

102. *Id.*

103. *Id.*

104. *Id.*

105. 18 U.S.C. § 2113 (1948).

106. See U.S. DEP'T OF JUSTICE, 9 UNITED STATES ATTORNEYS' CRIMINAL RESOURCE MANUAL, § 1358, [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm01358.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01358.htm) (making a distinction for federal prosecutors considering bank robbery charges on the basis of whether the ATM is bank-operated). Compare *Indep. Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 951-952 (D.C. Cir. 1976) (holding that bank-operated customer-bank communication terminals not located on bank premises are "branches" under the National Bank Act), with *Indep. Bankers Ass'n v. Marine Midland Bank*, 757 F.2d 453, 463 (2d Cir. 1985) (holding that an ATM owned and operated by a non-bank company did not constitute a "branch" under the National Bank Act).

107. Spoooge seems to confirm Jesse's recognition of the ATM as being operated by a particular bank when he replies "it's FDIC insured, yo." *Breaking Bad: Peekaboo* (AMC television broadcast Apr. 12, 2009). The federal statutory definition of "bank"

## II. THE POLITICAL GEOGRAPHY OF PLEA BARGAINING

The counterfactuals regarding federal death charges for crimes depicted in *Breaking Bad* raise an interesting issue concerning the political economy of federal death penalty enforcement in light of the fact New Mexico does not authorize the death penalty. This Part briefly considers how state-level death penalty regimes may influence plea bargaining outcomes in federal capital cases. Although the incentives that drive plea bargaining outcomes are complex, this simplified analysis suggests that there are conflicting plausible explanations concerning expected plea bargaining outcomes in federal capital cases across death penalty and non-death penalty states.<sup>108</sup>

The Justice Department explicitly favors geographic consistency with respect to plea bargaining practices in federal capital cases. According to the Death Penalty Protocol, “[a]bsent the authorization of the Attorney General, the United States Attorney or Assistant Attorney General may not enter into a binding plea agreement that precludes the United States from seeking the death penalty.”<sup>109</sup> A Justice Department memorandum explaining changes to the Protocol in 2007 noted that this provision was “intended to ensure that all major decisions affecting the federal administration of the death penalty are centrally reviewed and conform to national standards.”<sup>110</sup> More generally, the 2007 revision expressed the sentiment that “[n]ational consistency requires treating similar cases similarly, when the only material difference is the location of the crime.”<sup>111</sup> In 2001, however, a Justice Department report suggested that “geographic ‘disparities’ are neither avoidable nor undesirable,” adding: “There is nothing illegitimate about a district focusing on the actual needs of the geographic area for which it is responsible in decisions about the

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includes “any institution the deposits of which are insured by the Federal Deposit Insurance Corporation.” 18 U.S.C. 2113(f). If prosecutors could demonstrate that “[Spoo]ge’s woman” killed Spoo]ge by crushing his head with the ATM in part to “avoid apprehension” for the crime (in addition to her anger about the expletive he repeatedly called her), she could face the death penalty for this act as well. 18 U.S.C. 2113(e). Otherwise, it does not appear to be a death-eligible crime under federal law to commit murder with a facility of interstate commerce.

108. See Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 484–92 (2013) (discussing the competing incentives structuring plea negotiations).

109. See U.S. DEP’T OF JUSTICE, *supra* note 106106, at § 9–10.120, [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/10mcrim.htm#9-10.120](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/10mcrim.htm#9-10.120).

110. Memorandum from Paul J. McNulty, Deputy Attorney Gen., U.S. Attorney’s Manual, Death Penalty Protocol Revisions (June 25, 2007), <http://www.justice.gov/sites/default/files/dag/legacy/2010/08/17/dag-memo-06252007.pdf>.

111. Tirschwell & Hertzberg, *supra* note 29, at 82 (quoting the 2007 Protocol).

exercise of federal jurisdiction. Rather, a U.S. Attorney who failed to do so would be derelict in his or her basic responsibilities.”<sup>112</sup>

The sentiment expressed in the Justice Department’s 2001 report is consistent with the law and economics literature on plea bargaining. Conceptually, this literature analogizes plea bargaining to contractual negotiations designed to manage risk.<sup>113</sup> The prosecution’s incentive to secure a plea is based in substantial part on its belief about the expected trial outcome.<sup>114</sup> Although many factors combine to inform the prosecution’s belief about the expected trial outcome, geography is an important consideration.<sup>115</sup> With respect to the federal death penalty, for example, scholars and lawyers plausibly assume that the government’s likelihood of securing a capital conviction will be higher in states that authorize capital punishment.<sup>116</sup> As one scholar noted, it makes sense for federal prosecutors to refrain from seeking the death penalty “when the local cultural milieu opposes capital punishment.”<sup>117</sup> Indeed, one federal judge published an op-ed in the *New York Times* urging the Justice Department to adopt “[a] more prudent and realistic approach” to the federal death penalty in part so that the “community’s will” is not “ignored.”<sup>118</sup> Another federal judge noted that “it will be a long time before Georgia [a death penalty state] becomes just like Vermont [a non-death penalty state],”

112. U.S. DEP’T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW, at 17 (June 6, 2001), <http://www.justice.gov/archive/dag/pubdoc/deathpenaltystudy.htm>.

113. See, e.g., Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 969 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 909 (1992). For a discussion on the limitations of this approach, see Stephanos Bibas, *Plea Bargaining outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004).

114. See, e.g., Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983); Rebecca Hollander-Blumoff, *Getting to “Guilty”: Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115 (1997); William M. Landes, *An Economic Analysis of the Courts*, 14 J. L. & ECON. 61 (1971).

115. See, e.g., Little, *Tension*, *supra* note 29, at 9 (“U.S. Attorneys likely attempt to incorporate the views of their local jury pool when deciding whether and when to pursue a death penalty.”).

116. See, e.g., Tirschwell & Hertzberg, *supra* note 29, at 87–94 (discussing perspectives on implementing the federal death penalty in non-death penalty states suggesting that the probability of obtaining a capital conviction in those states is likely to be lower on average).

117. Little, *History*, *supra* note 28, at 469.

118. Frederic Block, *A Slow Death*, N. Y. TIMES, Mar. 15, 2007, [http://www.nytimes.com/2007/03/15/opinion/15block.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2007/03/15/opinion/15block.html?pagewanted=all&_r=1&).

adding that any “attempt to achieve uniformity by compelling U.S. Attorneys to seek the death penalty is a bad idea.”<sup>119</sup>

This emphasis on expected trial outcomes suggests that we may observe more federal capital cases resolved through plea bargaining in states that do not authorize the death penalty because prosecutors will expect the probability of securing a death sentence at trial in those states to be lower on average. However, incorporating the defendant’s plea bargaining position complicates this expectation. As with the prosecution, the defendant’s incentive to plea bargain is based in substantial part on the expected trial outcome.<sup>120</sup> Like the prosecution, the defendant should assume that the probability of conviction in a federal capital case is higher in states that authorize the death penalty. If this incentivizes the defendant to plea, we may plausibly expect to observe more federal capital cases resolved through plea bargaining in death penalty states. Alternatively, the competing incentives facing the prosecutor and defendant might cancel each other out such that we observe no difference in plea bargaining outcomes between death penalty and non-death penalty states.

Other theoretical approaches to the politics of prosecution generate equivocal expectations as well. The political economy literature on prosecutorial behavior commonly begins with the proposition that prosecutors are motivated by a desire to maximize some combination of convictions and sentence severity.<sup>121</sup> However, the relative emphasis federal prosecutors place on securing convictions versus maximizing sentence severity is unclear, and may depend on factors such as how the tradeoff affects post-tenure employment prospects.<sup>122</sup> Prosecutors primarily interested in securing convictions may be more likely to facilitate plea bargains, and this effect might be particularly strong in non-death penalty states where the expected probability of securing any conviction at a capital trial is assumed to be lower on average. On the other hand, prosecu-

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119. See Gleeson, *supra* note 29, at 1728. See also *id.* at 1719 (demonstrating that in addition to being less likely to secure a capital conviction, federal prosecutors may risk not securing any conviction by moving forward with death charges in non-death penalty states).

120. Psychological biases and cognitive disorders may disproportionately affect a defendant’s ability to make a rational calculation about the expected trial outcome. See, e.g., Albert Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 664 (1981); Bibas, *supra* note 113, at 2496–2527; Thaxton, *supra* note 108, at 490.

121. Landes, *supra* note 114, at 63–65.

122. See, e.g., JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS (The Johns Hopkins University Press, 1978); Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. ECON. REV. 379 (2005).

tors primarily interested in maximizing sentence severity may be less likely to facilitate plea bargains, and this effect might be particularly strong in death penalty states where the expected probability of securing any conviction at a capital trial is assumed to be higher on average. But here again the competing incentives might cancel each other out such that we observe no difference in plea bargaining outcomes across death penalty and non-death penalty states. This canceling effect might also occur if prosecutors shift their preference for securing convictions versus more severe sentences with changes in the expected trial outcome.

Two additional theoretical perspectives on the political economy of prosecution generate competing predictions with respect to differences in plea bargaining outcomes across death penalty and non-death penalty states. First, although it can be a useful simplifying assumption to suggest that prosecutors are motivated by a desire to maximize some combination of convictions and sentence severity, their motivations are surely more complex in practice.<sup>123</sup> This complexity is illustrated in part by considering how U.S. attorneys secure their positions. Although U.S. attorneys are formally nominated by the president and confirmed by the Senate, their selection is often driven in practice by the norm of senatorial courtesy.<sup>124</sup> Since senatorial courtesy ensures that U.S. attorneys will typically be drawn from the pool of attorneys in the states they represent, it is not surprising that they tend to represent local values.<sup>125</sup> As a result,

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123. See Sanford C. Gordon & Gregory A. Huber, *The Political Economy of Prosecution*, 5 ANN. REV. SOC. SCI. 135 (2009) (providing a general overview of the political economy literature on prosecution). In addition to maximizing some combination of convictions and sentence severity, prosecutorial behavior is shaped by the prosecutor's institutional environment. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (Oxford University Press, Inc. 2007); Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334 (2002); Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553 (1999); Michael J. Nelson, *Responsive Justice? Retention Elections, Prosecutors, and Public Opinion*, 2 J. L. COURTS 117 (152); H.W. Perry, Jr., *United States Attorneys – Whom Shall They Serve*, 61 LAW & CONTEMP. PROBS. 129 (1998); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 681 (2009).

124. E.g., Andrew B. Whitford & Jeff Yates, *Policy Signals and Executive Governance: Presidential Rhetoric in the “War on Drugs”*, 65 J. POL. 995, 998 (“Appointment usually occurs with Senatorial courtesy and creates a bond between the appointee and the Senators from the state within which the district lies.”).

125. See Little, *Tension*, *supra* note 29, at 9 (“It should not be surprising that U.S. Attorneys selected [by state-based politicians] reflect, unconsciously and in good faith, the community values of their community and State.”); see also Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV.

all else equal, this suggests that we may plausibly expect to observe more federal capital cases being resolved through plea bargaining in non-death penalty states.

A second relevant theoretical perspective on the politics of prosecution centers on prosecutors leveraging the death penalty to secure a guilty plea. The Protocol states that “[t]he death penalty may not be sought, and no attorney for the Government may threaten to seek it, solely for the purpose of obtaining a more desirable negotiating position.”<sup>126</sup> Of course, this express limitation does not necessarily mean that leveraging does not occur by design or otherwise. State prosecutors, for example, tend to deny leveraging the death penalty to secure plea bargains themselves while simultaneously acknowledging that other prosecutors engage in the practice.<sup>127</sup> Moreover, there is mounting empirical evidence that state prosecutors leverage the death penalty to secure guilty pleas.<sup>128</sup> If this practice does occur at the federal level, it is likely to be more successful in states that authorize the death penalty. The reason is that defendants will presumably perceive a prosecutor’s threat to move forward in pursuit of the death penalty absent a plea bargain to be more credible in death penalty states, where the expected likelihood of a jury imposing a death sentence at trial is assumed to be higher.

### III. EMPIRICAL ANALYSIS

#### A. Data and Measurement

This Part presents an empirical analysis of plea bargaining outcomes in authorized federal death penalty cases. Data on authorized federal capital cases are available from the Federal Death Penalty Resource

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183 (2007) (describing how prosecutorial “passion,” or how much a prosecutor cares about a particular case, can influence plea bargaining strategy); Andrew B. Whitford, *Bureaucratic Discretion, Agency Structure, and Democratic Responsiveness: The Case of the United States Attorneys*, 12 J. PUB. ADMIN. RES. & THEORY 3 (2002) (providing a discussion regarding empirical evidence that federal prosecutorial decision making is influenced by local values in addition to national pressures).

126. U.S. DEP’T OF JUSTICE, *supra* note 106, § 9-10.120.

127. Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study*, 29 JUST. SYS. J. 313 (2008); Susan Ehrhard-Dietzel, *The Use of Life and Death as Tools in Plea Bargaining*, 37 CRIM. JUST. REV. 89 (2012).

128. See, e.g., Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York’s 1995 Reinstatement of Capital Punishment*, 8 AM. L. & ECON. REV. (2006); Nicholas Peterson & Mona Lynch, *Prosecutorial Discretion, Hidden Costs, and the Death Penalty: The Case of Los Angeles County*, 102 J. CRIM. L. & CRIMINOLOGY 101, 117–121 (2002).

Counsel.<sup>129</sup> The sample analyzed here includes authorized federal capital cases from 1989 (the start of the modern era) through June 2011. The unit of analysis is the case. The dependent variable is an indicator variable scored one if a plea deal was reached and zero if the case proceeded to trial.<sup>130</sup> Out of 313 death-eligible federal cases in the sample, 115 (36.7%) were resolved through plea agreements.<sup>131</sup>

The key explanatory variable is an indicator variable scored one if the judicial proceedings occurred in a state that authorized the death penalty in a particular year and zero otherwise (*Death Penalty State*). States that authorized the death penalty for some years in the sample but not others were scored one during years the death penalty was authorized and zero during years it was not authorized. Several control variables are included to account for alternative explanations of plea bargaining outcomes in federal capital cases. As an initial matter, state-level death penalty support is a potentially confounding factor insofar as it may be associated both with whether a state has the death penalty and plea bargaining outcomes in federal capital cases. To capture state-level support for the death penalty, I utilize estimates generated using multilevel re-

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129. FEDERAL DEATH PENALTY RESOURCE COUNSEL, <http://www.capdefnet.org/fdprc/> (last visited Mar. 11, 2015).

130. Cases that were awaiting trial are excluded because of the possibility that plea bargaining could still occur.

131. The conventional wisdom is that ninety percent or more of all criminal cases are resolved through plea bargaining. See GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 223 (2003) (reporting that ninety-four percent of federal cases were resolved through plea bargaining in 2001); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979) ("One statistic dominates any realistic discussion of criminal justice in America today: roughly ninety percent of the criminal defendants convicted in state and federal courts plead guilty rather than exercise their right to stand trial before a court or jury."); Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 AM. ECON. REV. 749, 749 (1983) ("It is estimated that over 90 percent of convictions in criminal cases in the United States result from a negotiated plea of guilty."). However, it is also well known that plea bargaining rates are lower in capital cases. One reason for the lower rate is that prosecutors are assumed to offer worse plea deals in capital cases. Bibas, *supra* note 113, at 2473 n.28 ("For the most serious crimes, especially murder, public scrutiny and press coverage pressure prosecutors not to offer generous plea bargains. Because prosecutors must offer less generous plea bargains, fewer defendants plead guilty."). But defendants may also be less likely to accept plea offers in capital cases. Welsh White, *Plea Bargaining in Capital Cases*, 20 CRIM. JUST. 38, 43 (2005) ("Persuading the defendant to accept the plea offer [in a capital case] . . . presents an even more formidable challenge [than securing a plea offer from the prosecutor].").

gression and post-stratification on state respondents to a national survey question about support for the death penalty (*Death Penalty Support*).<sup>132</sup>

Two sets of variables are included to account for the influence of legal factors on plea bargaining outcomes.<sup>133</sup> First, I include variables capturing the number of murders the defendant is alleged to have committed. Given the distribution of these data, I include three indicator variables: one for defendants alleged to have committed two murders (*2 Murders*), one for defendants alleged to have committed three murders (*3 Murders*), and one for defendants alleged to have committed four or more murders (*4+ Murders*). The excluded baseline category is for defendants alleged to have committed one murder. All defendants in the sample were alleged to have committed at least one murder. Second, I include three indicator variables capturing the number of aggravating factors said to be present: two aggravating factors (*2 Aggravators*), three aggravating factors (*3 Aggravators*), and four or more aggravating factors (*4+ Aggravators*). The excluded baseline category is for one aggravating factor. All cases in the sample involved at least one alleged aggravating factor.<sup>134</sup>

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132. Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 152–53 (2012). As a robustness check, I also fit the model with a yearly measure of citizen ideology. William D. Berry et al., *Measuring Citizen and Government Ideology in the American States, 1960-1993*, 42 AM. J. POL. SCI. 327 (1998). The results are similar. The correlation between death penalty support and citizen conservatism is  $r = 0.65$ .

133. See, e.g., Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 713 (1988) (noting the importance case strength in shaping plea bargaining decisions). Each of the personal and case-level variables were collected from documents compiled by the Federal Death Penalty Resource Counsel.

134. Unfortunately, data on other legal factors that may impact plea bargaining negotiations such as prior criminal history are not available for the entire sample. However, many case-level factors are not likely to be correlated with the *Death Penalty State* indicator. For example, the highest correlation between *Death Penalty State* and any of the case-level legal factors included in the model is  $r = -0.06$ . As a result, even though other case-level factors may be associated with the probability of observing a plea bargain, it is unlikely that there is a serious omitted variable bias concern given the lack of correlation between case-level factors and a state law. See GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 168–76 (1994) (explaining that omitted variable bias arises when the omitted variable is correlated with the independent variables and the dependent variable); see also Kevin A. Clarke, *The Phantom Menace: Omitted Variable Bias in Econometric Research*, 22 J. CONFLICT. MGMT & PEACE SCI. 341 (2005) (demonstrating that adding additional control variables may decrease or increase omitted variable bias assuming that the potential for omitted variable bias cannot be eliminated entirely).



The defendant's race has long been shown to be an important determinant in death penalty enforcement decisions.<sup>135</sup> To account for the defendant's race, I include three indicator variables: a variable scored one if the defendant is black and zero otherwise (*Black Defendant*), a variable scored one if the defendant is Hispanic and zero otherwise (*Hispanic Defendant*), and a variable scored one if the defendant is nonwhite, but not black or Hispanic, and zero otherwise (*Other Nonwhite Defendant*). As a result, the excluded baseline for comparison in the model is to white defendants. Existing empirical studies have also demonstrated that female defendants are less likely than male defendants to face the death penalty.<sup>136</sup> To account for possible differences in plea bargaining by sex, I include an indicator variable scored one if the defendant is male and zero if the defendant is female (*Male Defendant*). Last, to account for possible enforcement differences across Democratic and Republican presidential administrations I include an indicator variable scored one for cases proceeding under a Republican presidential administration and zero for cases proceeding under a Democratic presidential administration (*Republican Administration*).<sup>137</sup>

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135. See generally David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 NEB. L. REV. 486 (2002); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Influxion of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1994); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: The Case of Victim-Based Discrimination*, 18 L. & SOC. REV. 437 (1984); Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

136. See Songer & Unah, *supra* note 28; Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433 (2002); Victor L. Streib, *Rare & Inconsistent: The Death Penalty for Women*, 33 FORD. URB. L.J. 101 (2005). But see Tara N. Richards et al., *An Examination of Defendant Sex Disparity in Capital Sentencing: A Propensity Score Matching Approach*, 39 AM. J. CRIM. JUST. 681, 681 (2014).

137. See Gleeson, *supra* note 29 (discussing enforcement differences across administrations); Little, *History*, *supra* note 28; Tirschwell & Hertzberg, *supra* note 29.

## B. Analysis and Results

Given that the dependent variable is binary, I utilize logistic regression to fit the model.<sup>138</sup> Table 1 (below) presents results from a logistic regression analysis on the determinants of plea bargaining in authorized federal death penalty cases from 1989 through June 2011. The standard errors are clustered by federal judicial district to account for non-independence within districts.<sup>139</sup> Overall, the model fits the data well: 69 percent of cases in the sample are correctly predicted, which corresponds to a 16 percent reduction in error over simply guessing the modal outcome of going to trial.

Federal death-eligible cases are less likely to be resolved through plea bargaining in death penalty states as indicated by the negative and statistically significant estimated coefficient on the *Death Penalty State* variable in Table 1. Moreover, the substantive effect is considerable. Given that estimated coefficients generated with logistic regression are difficult to interpret directly, I calculate predicted probabilities holding state death penalty support at its mean sample value and all binary variables at their modal sample values.<sup>140</sup> The predicted probability of observing a plea bargain resolution to a federal capital case is 0.61 [0.27, 0.96] in non-death penalty states and 0.33 [0.06, 0.61] in death penalty states, a change of -0.28 [-0.49, -0.07].<sup>141</sup> On average, this means that federal defendants charged with death-eligible crimes in death penalty states are about 28 percent less likely to have their cases resolved through plea bargaining than they would be in non-death penalty states.

Turning to the control variables, the estimated coefficient on the *Hispanic Defendant* variable is positive and significant, indicating that Hispanic defendants are more likely than white defendants on average to

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138. See generally ANDREW GELMAN & JENNIFER HILL, DATA ANALYSIS USING REGRESSION AND MULTILEVEL/HIERARCHICAL MODELS 79 (2007) (“Logistic regression is the standard way to model binary outcomes.”); J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES (1997) (providing information on logistic regression).

139. See generally David M. Primo et al., *Estimating the Impact of State Policies and Institutions with Mixed-Level Data*, 7 ST. POL. & POL’Y Q. 446 (2007) (discussing clustering standard errors to account for non-independence within categories).

140. J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA 2d 157 (2006) (“In general, the estimated parameters from the [binary response model] do not provide directly useful information for understanding the relationship between the independent variables and the outcome.”).

141. Brackets contain 95% confidence intervals.

reach a plea agreement in federal capital cases.<sup>142</sup> Substantively, the predicted probability of a white defendant striking a plea bargain in a federal capital case is 0.33 [0.06, 0.60] compared to 0.68 [0.38, 0.99] for a Hispanic defendant, a change of 0.35 [0.19, 0.51]. Cases proceeding under a Republican presidential administration were less likely to be resolved through plea bargain as indicated by the negative and statistically significant estimated coefficient on the *Republican Administration* variable. Substantively, the predicted probability of a plea being struck decreases from 0.70 [0.42, 0.98] in cases proceeding under a Democratic administration to 0.33 [0.06, 0.61] under a Republican administration, a change of -0.37 [-0.48, -0.26]. The remaining explanatory variables were not associated with plea bargaining outcomes in federal capital cases.

It is important to note that existing data limitations pose substantial obstacles to drawing confident inferences about the relationship between state death penalty regimes and plea bargaining outcomes in federal capital cases. Although data limitations such as these exist in nearly every empirical study, they are perhaps particularly salient in the death penalty literature due to the subject's public policy importance.<sup>143</sup> As an initial

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142. One of the important findings on race and capital punishment is the interactive effect between defendant and victim race—particularly in the case of a nonwhite defendant and a white victim. See, e.g., Michael L. Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981); Isaac Unah, *Empirical Analysis of Race and the Process of Capital Punishment in North Carolina*, 2011 MICH. ST. L. REV. 609 (2011); Isaac Unah, *Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham, County, North Carolina*, 15 MICH. J. OF RACE & L. 135 (2009). To account for this potential interactive effect, I also fit a model including a variable scored one for cases involving a white victim and zero otherwise along with interactions between this variable and the three nonwhite defendant variables. The *Other Nonwhite Defendant x White Victim* interaction drops from the model due to quasi-complete separation as a result of there being no plea bargains in cases where the interaction term is set to zero. Given that omitting a variable due to quasi-complete separation can result in specification bias, I also estimated the model using Firth's penalized likelihood correction. See generally Christopher Zorn, *A Solution to Separation in Binary Response Models*, 13 POL. ANALYSIS 157 (2005) (discussing the methodological problems induced by quasi-complete separation in binary response models and the use of Firth's penalized likelihood correction). The results were substantively similar. Moving forward, the interplay between defendant and victim race in federal death penalty cases is an issue that warrants further study.

143. This is perhaps best illustrated by the empirical debate over whether death penalty enforcement deters murders. See, e.g., Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005); Jeffrey Fagan et al., *Capital Punishment and Capital Murder: Market Share*

matter, existing data do not allow researchers to account for the sorting of potential federal capital cases into the state or federal system.<sup>144</sup> Second, the Justice Department does not provide individual-level data on death-eligible cases that were submitted, but for whatever reason did not result in a death penalty authorization. Both of these factors raise selection bias concerns. There are additional data limitations for the cases that are included in this sample. It would be more instructive, for example, to have information about whether plea deals were proposed by either side (in those cases that were not resolved through plea bargaining) and, if so, the terms of these proposals.<sup>145</sup> Access to this information would allow scholars to test more precise plea bargaining theories. Our ability to draw valid inferences from the empirical results presented here must also be tempered by an understanding that some potentially important information is not widely available even for the federal capital cases that we observe. Although several case-level factors are included in the models, for example, there is no systematic information available on potentially relevant considerations such as criminal history, egregiousness, or public salience. Data-availability constraints also make it difficult to analyze potentially relevant district-level factors such as death penalty support and preference divergence with Main Justice.

More generally, federal death penalty enforcement is particularly difficult to study empirically because of its multi-tiered processing structure and lack of publicly-available data regarding decision making at various stages.<sup>146</sup> As a result of these data limitations, it is important to be circumspect about the empirical results presented here. However, it is also important to continue to push forward with the empirical project of

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*and the Deterrent Effects of the Death Penalty*, 84 *TEX. L. REV.* 1803 (2006); Lawrence Katz, *Prison Conditions, Capital Punishment, and Deterrence*, 5 *AM. L. & ECON. REV.* 318 (2003); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impact Among States*, 104 *MICH. L. REV.* 203 (2005).

144. This potential selection bias exists whenever there is concurrent jurisdiction between state governments and the federal government. For an attempt to analyze the sorting of defendants into state or federal criminal justice systems, see Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 *AM. L. ECON. REV.* 259 (2000).

145. See John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 *AM. J. CRIM. L.* 215, 221 (1977) (noting plea bargains are “secret covenants secretly arrived at”). See also Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 *U. CHI. L. REV.* 931, 934 (1983) (referring to plea bargaining as “an essentially secret system of justice”).

146. See U.S. DEP'T OF JUSTICE, U. S. ATT'Y MAN. 9-10.010 (2014); David J. Novak, *Anatomy of a Federal Death Penalty Prosecution: A Primer for Prosecutors*, 50 *S.C. L. REV.* 645 (1988) (providing an overview of the process).

understanding federal death penalty enforcement. Existing studies of federal death penalty enforcement such as those released by the Justice Department rely almost exclusively on descriptive statistics.<sup>147</sup> As a result, the extent to which scholars and policy makers can draw valid inferences about enforcement is necessarily limited there as well. Going forward, it will be important to resolve some of these limitations to further advance our understanding of federal death penalty enforcement.

### C. *Application of Analysis to Breaking Bad Counterfactuals*

The empirical model's main result is a general albeit preliminary one: federal death-eligible cases are less likely on average to result in plea bargains when they proceed in states that authorize the death penalty. Although several important factors in plea bargaining outcomes cannot be incorporated in the empirical model due to a lack of data as noted previously, we can employ the results to approximate answers to several *Breaking Bad* counterfactuals. For example, setting explanatory variables at their relevant values,<sup>148</sup> the repeal of New Mexico's death penalty during Season Two ultimately increased the predicted probability of Walt entering a plea bargain from 0.32 [0.16, 0.49] to 0.60 [0.37, 0.83], a change of 0.28 [0.07, 0.49]. Regarding the series location change: Walt's predicted probability of entering a plea bargain increases from 0.30 [0.12, 0.49] in California to 0.60 [0.37, 0.83] in New Mexico, a change of 0.30 [0.08, 0.52].<sup>149</sup>

It is also instructive to compare Walt's case to Gus's. Gus was a Chilean national.<sup>150</sup> As a Hispanic defendant, Gus's predicted probability of reaching a plea bargain increased from 0.67 [0.50, 0.84] to 0.87 [0.73, 0.99] with repeal of New Mexico's death penalty, a change of 0.20 [0.06, 0.33]. The switch in series settings from California to New Mexico increased Gus's predicted probability of reaching a plea bargain from 0.65 [0.47, 0.84] to 0.87 [0.73, 0.99], a change of 0.21 [0.06, 0.37]. In short, accounting for the factors that can be modeled using available data, New

147. U.S. DEP'T OF JUSTICE, *supra* note 37.

148. *Death Penalty Support* was set to its New Mexico-specific value. Furthermore, rather than hold binary variables at their modal values, I set them to approximate the state of the world for Walt prior to this death: a white male defendant alleged to have committed four or more murders with four or more aggravating circumstances in a case proceeding under a Democratic administration.

149. In this estimate, *Death Penalty Support* changes from its California-specific value to its New Mexico-specific value along with the change in *Death Penalty State* from zero to one.

150. *Breaking Bad: Hermanos* (AMC television broadcast Sept. 4, 2011) (depicting a conversation between Hank and Gus where Hank says, "I know you're a Chilean national.").

Mexico's death penalty abolition, and switching series settings from California to New Mexico, increased Gus's expected probability of reaching a plea deal about ten percent less than it increased Walt's expected probability of reaching a plea deal, although Gus's baseline predicted probability of reaching a plea deal was considerably higher.

## CONCLUSION

Although *Breaking Bad* will be remembered for its nuanced storytelling far more than its foray into the intricacies of federal criminal law, the unlawful activities depicted in the series, combined with the decision to switch series settings from California to New Mexico, and New Mexico's subsequent decision to repeal the death penalty, motivate an important but unanswered real-world policy question: does a state's death penalty regime influence federal death penalty enforcement? The preliminary empirical analysis presented here suggests that federal death-eligible cases are less likely to be resolved through plea bargaining when they arise in death penalty states. Ultimately, while this result may not matter for our understanding of *Breaking Bad*, it does have important real-world federalism implications and helps to build an empirical foundation for the broader scholarly and public policy debate concerning federal death penalty enforcement. In addition to resolving the existing data limitations discussed previously, future work on this subject should analyze whether other outcomes in federal capital cases—such as the imposition of a death sentence—are also impacted by the state's death penalty regime.

Table 1: Logistic Regression Analysis of Plea Bargaining Outcomes in Federal Capital Cases

	Estimated Coefficient (Standard Error)
Death Penalty State	-1.16* (0.45)
Death Penalty Support	0.02 (0.03)
Black Defendant	0.11* (0.37)
Hispanic Defendant	1.46* (0.39)
Other Nonwhite Defendant	0.83 (0.86)
Male Defendant	0.12 (0.90)
2 Murders	-0.11 (0.51)
3 Murders	0.13 (0.50)
4+ Murders	-0.58 (0.35)
2 Aggravators	-1.04 (0.68)
3 Aggravators	-0.84 (0.61)
4+ Aggravators	-1.02 (0.62)
Republican Administration	-1.55* (0.27)
Intercept	0.54 (2.57)
Observations	313

\*  $p < .05$  (two-tailed). Standard errors clustered by district.

