CAN VICTIMS' RIGHTS GO WRONG? PROSECUTING DIGITAL CHILD PORNOGRAPHY CRIMES IN ARIZONA

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I. INTRODUCTION

The adversarial criminal justice process in the United States is a cornerstone of our cultural identity. Concepts like "innocent until proven guilty" reflect our desire to be free from government intrusion absent significant evidence of guilt. In recent years, however, many of our foundational principles have dissolved as a reaction to elevated crime rates and fear of victimization. As a result, both the States and the Federal Government have enacted countless "crime control policies of severity . . . unmatched in other Western countries today."[1]

Arizona v. Berger[2] is an excellent example of how Arizona has cracked down on the particularly unsettling and heinous crime of possessing child pornography. In *Berger*, the Arizona Supreme Court upheld the 200-year sentence of a school teacher convicted on twenty counts of possession of images of child pornography.[3] While the Court in *Berger* was primarily concerned with the Eighth Amendment's prohibition on cruel and unusual punishment,[4] the powerful emotions elicited by crimes against children have led to other laws that seem to chip away at core principles of due process.

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1. MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 97 (2004). Tonry argues that the crime control model has grown out of control due to moral panic incited by "pusillanimous politicians," and is in dire need of reform. *Id.* at viii–x.

2. 134 P.3d 378 (Ariz. 2006), *cert. denied*, 549 U.S. 1252 (2007).

3. *Id.* at 394; *see also* ARIZ. REV. STAT. § 13-3553 (2009) (defining sexual exploitation of a minor); ARIZ. REV. STAT. § 13-705(D), (M) (2009) (mandating consecutive sentences in such cases).

4. *Berger*, 134 P.3d at 379.

For instance, all American jurisdictions recognize that defendants have a fundamental right to access and examine the evidence against them in order to prepare an adequate defense. In Arizona, "the prosecutor shall make available," *inter alia*, all "papers, documents, photographs or tangible objects" allegedly belonging to the defendant.[5] However, victims' rights concerns in cases of child pornography led to the passage of Rule 15.1(j) of the Arizona Rules of Criminal Procedure, which states that "[t]he prosecutor shall make [evidence of child pornography] *reasonably available* for inspection with such conditions as are necessary to protect the rights of the victims."[6] This means that a defendant accused of possessing child pornography in Arizona may only conduct expert analysis of the evidence—typically a computer hard drive—under Government supervision at the State's evidence storage facilities; that is, unless the defendant can exhibit a "*substantial showing* . . . that reproduction or release for examination . . . is required for the effective investigation or presentation of a defense."[7] So, in Arizona, while the defendant's access to the evidence against him is limited, he can overcome that limitation by manifesting a

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5. ARIZ. R. CRIM. P. 15.1(b) (2007).

6. *Id.* at (j) (emphasis added). Called "Reproduction or Release for Inspection of Items Prohibited by Title 13, Chapter 35.1," subsection (j) says, in its entirety:

> Except as provided below, nothing in this rule shall be construed to require the prosecutor to reproduce or release for testing or examination any items listed in Rule 15.1(b)(5) if the production or possession of the items is otherwise prohibited by Title 13, Chapter 35.1.1 The prosecutor shall make such items *reasonably available* for inspection with such conditions as are necessary to protect the rights of victims. Upon a *substantial showing* by a defendant that reproduction or release for examination or testing of any particular item is required for the effective investigation or presentation of a defense, such as for expert analysis, the court may require reproduction or release for examination or testing of that item, subject to such terms and conditions as are necessary to protect the rights of victims, to document the chain of custody, and to protect physical evidence. Reproduction of or release for examination and testing of such items shall be subject, in addition to such other terms and conditions as are ordered by the court in any particular case, to the following restrictions: (1) the item shall not be further reproduced or distributed except as allowed in the court's order; (2) the item shall only be viewed or possessed by the persons listed in the court's order; (3) the item shall not be possessed by or viewed by the defendant outside the direct supervision of defense counsel, advisory counsel, or defense expert; (4) the item must first be delivered to defense counsel or advisory counsel, or if expressly permitted by order of the court, to a specified defense expert; (5) defense counsel or advisory counsel shall be accountable to the court for any violation of the court order or this Rule; and (6) the item shall be returned to the prosecutor by a deadline ordered by the court.

Id. (emphasis added).

7. *Id.* (emphasis added).

substantial showing that reproduction and disclosure of the evidence is necessary to his defense.

The Federal Government goes even further. Under § 3509(m),[8] a lesser-known component of the Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"),[9] "the [G]overnment must remain in possession of child pornography . . . and the court can deny a defendant's request for duplicating the evidence 'so long as the Government makes the property or material *reasonably available* to the defendant.'"[10] Reasonable availability under § 3509(m) is determined by whether or not the defendant had an "*ample opportunity*"[11] to inspect the evidence at the government's facilities.

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8. 18 U.S.C. § 3509(m) (2012). Called "Prohibition on reproduction of child pornography," subsection (m) says, in its entirety:

> (1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court.
>
> (2)(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material *reasonably available* to the defendant.
>
> (B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides *ample opportunity* for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

Id. (emphasis added).

9. The Adam Walsh Act was primarily intended to standardize sex-offender registration by creating the standardized National Sex Offender Registry. *See* 42 U.S.C. § 16919 (2012).

10. Elizabeth C. Wood, *The Adam Walsh Child Protection and Safety Act of 2006: A Violation of the Criminal Defendant's Sixth Amendment Rights to Confrontation and Compulsory Process*, 37 STETSON L. REV. 985, 985–86 (2008) (quoting 18 U.S.C. § 3509(m) (2007)). It is important to note that both the Arizona and the federal rule use the same "reasonably available" language as the baseline due process threshold, but that the determination of what constitutes reasonable availability falls on the defendant's ability to exhibit a substantial showing under Rule 15.1(j) in an Arizona prosecution, or the Government's furnishing of an ample opportunity under § 3509(m) at the federal level.

11. § 3509(m) (emphasis added). This is the operative language in § 3509(m) outlining the Government's minimum obligation to defendants in these cases. Most district courts have read this standard to be very low. Even if the Government fails to provide this opportunity, a court may order reproduction of evidence just as easily as a revisitation of the terms of the inspection agreement in order to provide the requisite ample opportunity. This is rarely an issue because defendants typically argue that inspection under the supervision of the opposing party at a remote facility is inherently inopportune, which is difficult to prove. *See, e.g.*, United States v. Knellinger, 471 F. Supp. 2d 640, 649–50 (E.D. Va. 2007) (ordering reproduction when inspection at the government facility presented significant logistical and economic challenges such that it precluded Knellinger from retaining an expert). *But see* United States v. Flinn, 521

If so, reproduction is strictly prohibited. This reflects a clear choice at the Federal level to place victims' rights, at least in child pornography cases, above traditional conceptions of fairness and due process in a criminal trial.

But are the "substantial showing" standard of Rule 15.1(j) and the "ample opportunity" standard of § 3509(m) compatible? If so, can the gap between victims' rights and defendants' rights be bridged under either standard? More importantly, what happens if the two standards come into conflict? In *Arizona v. Johnson*,[12] an Arizona defendant charged with possession of child pornography manifested his substantial showing under Rule 15.1(j).[13] However, the FBI, which is governed by federal law, initiated the investigation and retained possession of the evidence.[14] So despite the disclosure order from the Arizona courts, § 3509(m) explicitly precluded the FBI from releasing the evidence,[15] and the Arizona courts were left with little recourse but to dismiss the case against Johnson.[16] If Johnson actually did possess images of the sexual exploitation of minors, the end result of this unusual state–federal collaboration frustrates the very concept of victims' rights. The Adam Walsh Act's attempt to protect the rights of the victims in this case resulted in the release of an allegedly dangerous sexual predator. This troubling result not only violates notions of victims' rights, but raises concerns of community protection and the safety of potential future victims as well.[17] Because this scenario can recur, it is necessary to resolve these doctrinal and procedural incongruities before an offender, released on a technicality, harms another child victim.

In this comment, I will argue that a balance must be struck between victims' rights and defendants' rights in order to see that these two fundamental values are preserved and that our communities remain protected. More importantly, however, I will argue that the rules themselves are not necessarily dispositive of what the appropriate balance is, or should be, and that proper symmetry can and has been reached under both systems. Specifically, the Arizona courts under Rule 15.1(j) and at least one federal

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F. Supp. 2d 1097, 1102–03 (E.D. Cal. 2007) (declining to permit "the defense . . . to manipulate § 3509(m) by merely positing conceptual difficulties" and declining to follow *Knellinger*'s interpretation that disclosure can be ordered when a defendant is not afforded an ample opportunity because "concerns about the wisdom of legislation are to be raised before Congress").

12. No. 1 CA-CR 09-0300, 2010 WL 1424369 (Ariz. Ct. App. Apr. 8, 2010).
13. *Id.* at *3.
14. *Id.* at *1.
15. *Id.*
16. *Id.* at *2, *6.
17. My thanks to Jeffrey Roseberry, J.D., for contributing this thought.

district, under its own pragmatic interpretation of § 3509(m),[18] have found equilibrium between the competing interests. The challenge is that many jurisdictions, including most federal districts, have not come to the same conclusion. Ordinarily such a policy disagreement between jurisdictions would not present a significant problem, but the nature of federal supremacy has created a serious conflict in the case of state–federal collaborations.[19] This conflict can present serious repercussions, as evidenced by the outcome of *Johnson*. In order to highlight the severity of this conflict, I will begin in Section II by explaining the history and the nature of both § 3509(m) and Rule 15.1(j). In Section III, I will discuss the competing values of defendants' rights and victims' rights, and how they operate in the background of policy choices as rules are adopted and subsequently applied in court. I will proceed in Section IV by analyzing both the Arizona rule and the federal rule under those rubrics, and I will explain why the Arizona courts have reached the more just and reasonable balancing of all the interests at stake. Finally, in Section V, I will explain how important it is that we preserve Arizona's current policies, despite federal tension, and I will conclude by offering some possible solutions to the apparently differing standards of Rule 15.1(j) and § 3509(m).

II. DIFFERENT STANDARDS IN FEDERAL AND STATE DISCLOSURE RULES FOR CHILD PORNOGRAPHY EVIDENCE

A. The Federal Rules under the Adam Walsh Act.

Adam Walsh was abducted from a Sears department store in Hollywood, California on July 27, 1981.[20] Two weeks after his disappearance, six-year-

18. United States v. Knellinger, 471 F. Supp. 2d 640 (E.D. Va. 2007).

19. At least one other state, Ohio, has found its evidentiary jurisprudence in conflict with the new federal standards. *See* State v. Brady, 894 N.E.2d 671, 679 (Ohio 2008) (reversing prior Ohio practice similar to Arizona's in response to federal interference with an order of reproduction). In *Brady*, the Ohio trial court ordered disclosure of the evidence to the defendant's forensic analyst, but the FBI executed a search warrant on the expert's home office and confiscated the evidence as contraband. *Id.* at 673. The case against Brady was dismissed, much like the case against Johnson in Arizona, but the Ohio Supreme Court reversed and interpreted their evidentiary rules to require that the state retain possession of this evidence under all circumstances, as long as the defendant's experts are given access at a government facility. *Id.* at 679.

20. John Holland, *Adam Walsh Case is Closed After 27 Years*, L.A. TIMES, Dec. 17, 2008, http://articles.latimes.com/2008/dec/17/nation/na-adam17.

old Adam's severed head was discovered in Vero Beach, Florida.[21] The ensuing media frenzy led to overinflated estimates of child abductions and fueled public outcries.[22] John Walsh, Adam's father, of *America's Most Wanted* fame, has since made victims' rights advocacy his life's work.[23] On the twenty-fifth anniversary of Adam's abduction, his work culminated in the passing of the Adam Walsh Act, a "tough-as-nails law to track and apprehend convicted sex offenders who disappear after their release from prison."[24]

The primary purpose of the Adam Walsh Act was to provide a comprehensive and uniform system to track registered sex offenders after they are released from prison.[25] This Sex Offender Registration and Notification Act (SORNA), Title 1 of the Adam Walsh Act, sought to implement this uniform system by offering economic incentives encouraging states to create their own enforcement schemes that are in "substantial compliance" with SORNA.[26] Jurisdictions not in substantial compliance with SORNA and the Adam Walsh Act by July 27, 2011 began to suffer a cumulative reduction in Byrne Justice Assistance Grant funds[27] of ten percent each year.[28]

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21. *Id.* After twenty-seven years of "tips, psychic revelations, often-botched police work, and a serial killer's chilling admissions," Ottis Toole, then dead, was declared the killer and the case was closed. *Id.*

22. Diane Divoky, *Missing Tot Estimates Exaggerated*, LODI NEWS-SENTINEL, Feb. 18, 1986, at 2, *available at* http://news.google.com/newspapers?nid=dXBh7-90p_YC&dat=19860218&printsec=frontpage&hl=en.

23. *About John Walsh*, AMERICA'S MOST WANTED, http://www.amw.com/about_amw/john_walsh.cfm (last visited Apr. 3, 2013).

24. *Id.*

25. This portion of the Adam Walsh Act was codified at 42 U.S.C. §§ 16911–29 (2012).

26. The final registration deadline for States believing they had substantially implemented the Adam Walsh Act was July 26, 2011. *Reauthorization of the Adam Walsh Act*, SMARTWATCH, http://www.ojp.usdoj.gov/smart/smartwatch/11_spring/pfv.html (last visited Mar. 22, 2013).

27. The Byrne Justice Assistance Grant (BJAG) program is a Congressional initiative intended to streamline federal crime control and prevention funding to States, Tribes, and local governments based on local needs. *See About the Bureau of Justice Assistance*, BUREAU OF JUSTICE ASSISTANCE, https://www.bja.gov/About/index.html (last visited Mar. 22, 2013).

28. *Id.* As of August 15, 2011, twenty-five jurisdictions (fourteen states, ten tribes, and one territory) had substantially implemented the SORNA. *The Adam Walsh Act: States in "Substantial Compliance" Very Low?*, CONGRESS, COURTS, AND SEX OFFENDERS (July 27, 2011), http://congress-courts-legislation.blogspot.com/2011/07/adam-walsh-act-states-in-substantial.html. Those jurisdictions were the States of Alabama, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, South Carolina, South Dakota, and Wyoming; as well as the Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes and Bands of the Yakama Nation, Grand Traverse Band of Ottawa and Chippewa Indians, Iowa Tribe of Oklahoma, Kootenai Tribe of Idaho, Little Traverse Bay Bands of Odawa Indians, Nottawaseppi Huron Band of the Potawatomi, Pueblo of Isleta, The

In addition to creating the three-tier classification system for sex offenders,[29] tier I being the most dangerous and tier III the least,[30] the Adam Walsh Act greatly expanded the definition of "sex offender."[31] So far, this aspect of the Adam Walsh Act has been met with the most significant and vocal legal and academic disapproval.[32] The broad yet rigid definitions under the Adam Walsh Act, which were intended only as a minimum upon which States could expand, have led to sex offender classification for numerous juveniles engaging in intuitively non-qualifying behaviors, such as consensual "sexting" and public urination.[33] Because of the attention garnered by the national sex offender registry component and the sweeping implications of the sex crime definitional modifications, some other portions of the Adam Walsh Act have simply passed into our accepted body of laws with relatively little in the way of serious public attention or academic scrutiny.

Section 3509(m) is one such law.[34] It was added to the Adam Walsh Act as an evidentiary caveat supplementing the Federal Rules of Criminal Procedure in order to "protect[] the child victims from repeated exploitation."[35] Typically, under the Federal Rules of Criminal Procedure, a defendant can compel disclosure of any documents or objects entered into evidence that are either: (1) material to the preparation of his defense; (2) intended to be used in the prosecution's case-in-chief at trial; or (3) allegedly obtained from or belong to the defendant.[36] But the toxic and easily transmittable nature of digital child pornography poses a significant threat of repeat victimization. Assistant U.S. Attorney Alice Fisher remarked that "once the child pornography is created and posted on the [I]nternet, it becomes a permanent record of the abuse that will haunt the

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Tohono O'odham Nation, Upper Skagit Indian Tribe; and also the United States territory of Guam. *Id.*

29. 42 U.S.C. § 16911(2)–(4) (2012).

30. *See id.*

31. For a comprehensive list of crimes that constitute sex offenses under the Adam Walsh Act, see *SORNA*, U.S. DEP'T OF JUSTICE, http://www.ojp.usdoj.gov/smart/sorna.htm (last visited Mar. 22, 2013).

32. *See, e.g.*, Lara Geer Farley, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471 (2008) (arguing that the "uniform" classification system failed to achieve its goals because States independently broadened their definitions of sex offenses); *see also* Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435 (2010) (arguing that laws like the Adam Walsh Act have gone beyond normal crime control and are, in effect, declaring a war on sex crime at the cost of our civil liberties).

33. Farley, *supra* note 32, at 478–80.

34. 18 U.S.C. § 3509(m) (2012).

35. Wood, *supra* note 10, at 997.

36. FED. R. CRIM. P. 16(a)(1)(E).

victim forever."[37] Accordingly, Congress concluded that "child pornography constitutes prima facie contraband and thus cannot be distributed to, or copied by, the defense."[38]

The constitutionality of § 3509(m) has been consistently upheld in district courts, despite challenges on ex post facto, separation of powers, effective assistance of counsel, and due process grounds.[39] The general consensus among district courts is that, under the canon of constitutional avoidance, the "ample opportunity" standard of § 3509(m) "must be read to include *at least* every opportunity for inspection, viewing, and examination required by the Constitution."[40] When read in this way, courts retain the authority to order disclosures of evidence outside of a government facility when the opportunity afforded falls short of traditional due process standards.[41] In fact, the court in *United States v. Knellinger*[42] suggested that this "ample opportunity" might, in some circumstances, include even greater access than the Constitution requires.[43] In drawing this conclusion, the court relied on *United States v. O'Rourke*,[44] a similar case in the District of Arizona, which concluded that "[t]he word 'ample' means 'generous or more than adequate in size, scope, or capacity.'"[45] *Knellinger* went on to find that § 3509(m) "requires, *at a minimum*, whatever opportunity is mandated by the Constitution; therefore, an opportunity that is 'generous' or

37. Wood, *supra* note 10, at 997 n.91 (citing *Sen. Comm. on Com., Sci. & Transp.*, 109th Cong. 2 (2006) (statement of Alice S. Fisher, Assistant U.S. Att'y)).

38. *Id.* at 998 (citing Pub. L. No. 109-248, § 501, 120 Stat. 587, 624 (2006)).

39. *See* United States v. Knellinger, 471 F. Supp. 2d 640 (E.D. Va. 2007); *see also* United States v. Tyson, No. 06-CR-6127, 2007 WL 2859746 (W.D.N.Y. Sept. 26, 2007); United States v. Doane, 501 F. Supp. 2d 897 (E.D. Ky. 2007) (Adam Walsh Act does not violate ex post facto prohibitions); United States v. Battaglia, No. 5:07cr0055, 2007 WL 1831108 (N.D. Ohio June 25, 2007) (Adam Walsh Act violates neither due process nor ex post facto prohibitions); United States v. Sturm, 560 F. Supp. 2d 1021, 1027–28 (D. Colo. 2007) (Adam Walsh Act stands up to Fifth Amendment due process requirement and Sixth Amendment right to effective assistance of counsel); United States v. Flinn, 521 F. Supp. 2d 1097, 1100 (E.D. Cal. 2007); United States v. O'Rourke, 470 F. Supp. 2d 1049 (D. Ariz. 2007) (using the canon of constitutional avoidance to construe the "ample opportunity" requirement of § 3509(m) as coterminous with due process); United States v. Renshaw, 1:05-CR-00165, 2007 WL 710239 (S.D. Ohio Mar. 6, 2007) (also applying the canon of constitutional avoidance); United States v. Spivack, 528 F. Supp. 2d 103, 107 (E.D.N.Y. 2007) (finding that Section 3509(m) is "not unconstitutional on its face," does not constitute a violation of separation of powers, and is consistent, "or at least coterminous with constitutional due process").

40. *Knellinger*, 471 F. Supp. 2d at 644 (emphasis added); s*ee, e.g.*, *O'Rourke*, 470 F. Supp. 2d at 1056; *Renshaw*, 1:05-CR-00165, 2007 WL 710239, at *1–2.

41. *Knellinger*, 471 F. Supp. 2d at 644.

42. 471 F. Supp. 2d 640 (E.D. Va. 2007).

43. *Id.* at 645.

44. 470 F. Supp. 2d 1049 (D. Ariz. 2007).

45. *Id.* at 1055–56 (citing WEBSTER'S NEW COLLEGIATE DICTIONARY 39 (1981)).

'more than adequate' may, in some circumstances, require more access than what would be mandated by the Constitution alone."[46] The ample opportunity standard is *at least* as substantial in its requirements as the Constitution, and in some circumstances, a court may even order reproduction when constitutional standards have been met, but the statutory standard has not.[47] Accordingly, § 3509(m) is not facially unconstitutional.[48]

In fact, in *Knellinger*, the court determined that the defendant had not received his ample opportunity and ordered disclosure of the evidence in question.[49] Because possession of "fake" child pornography is not illegal,[50] Knellinger's defense was that the images found on his computer were not made with actual minors.[51] Knellinger presented several expert witnesses who testified that performing the complex analyses required to determine whether or not digital pornography was made with actual minors under § 3509(m) would prove "extremely burdensome."[52] Because nothing in the record challenged Knellinger's witnesses' assertion that analysis under the Government's conditions would be impracticable, the court found that Knellinger's defense "cannot be conducted feasibly by outside experts in the facilities as offered by the United States."[53] Under the circumstances, the court concluded that even transportation of the experts' equipment to the government facilities wasn't possible because "the practical reality is that experts would not agree to such terms and that Knellinger ultimately would be prevented from conducting his analysis at all."[54] Although the serious expense that comes with transportation of specialized equipment is a concern, the court found that the inconvenience associated with cost was not the determinative factor[55] but rather, that the experts' collective reluctance to engage in analysis under the conditions proffered by the Government denied Knellinger his ample opportunity.[56]

Knellinger represents the furthest the district courts have gone in construing § 3509(m) in favor of the defendant. Although no Federal court has disagreed with the *Knellinger* court's assertion that § 3509(m) is

46. *Knellinger*, 471 F. Supp. 2d at 645 (emphasis added).
47. *Id.* at 645–46.
48. *Id.* at 646.
49. *Id.* at 650.
50. *See generally* Ashcroft v. Free Speech Coal., 535 U.S. 243 (2002) (finding certain provisions of the Child Pornography Prevention Act of 2006 overbroad because they proscribed images made with adults who were made to appear as minors).
51. *Knellinger*, 471 F. Supp. 2d at 646–47.
52. *Id.* at 648.
53. *Id.* at 649.
54. *Id.*
55. *Id.* at 647.
56. *Id.* at 648.

constitutional, most have distinguished *Knellinger* and found that, under similar circumstances, the Government had provided the defendant his ample opportunity.[57] Regardless, *Knellinger* stands for the notion that § 3509(m) is *at least* as stringent as traditional conceptions of due process, and defendants in the federal courts, in order to avoid a more significant challenge to the constitutionality of § 3509(m), *can* compel disclosure of evidence in child pornography cases where the Government has not sufficiently protected their right to build an adequate defense.[58]

But *Knellinger*, despite being in good analytical company with cases from other districts, reached a peculiar result. On the other end of the spectrum is *United States v. Flinn*,[59] a similar case that held not only that the defendant had received his ample opportunity[60] but that the court did not have the authority to order disclosure under § 3509(m) because Congress was explicit that reproduction was never permitted.[61] In a way, *Flinn* is also an outlier, because most courts agree with *Knellinger* and *O'Rourke* insofar as § 3509(m) is constitutional under the canon of avoidance and that they do have the power to compel reproduction if a defendant would otherwise be denied due process of law.[62] Nonetheless, *Knellinger* is currently the only case that has made such a finding.

B. The Arizona Rules under 15.1(j).

Rule 15.1(j) was passed in response to *Cervantes v. Cates*.[63] Cervantes was charged with "four counts of exploitation of a minor and numerous counts of sexual offenses against children."[64] During discovery, the State refused to copy the evidence against Cervantes for examination by the defense and instead permitted Cervantes and his counsel to examine the evidence at the jail while under the supervision of a detective—though the

57. *See, e.g.*, United States v. Flinn, 521 F. Supp. 2d 1097, 1101–03 (E.D. Cal. 2007) (holding the Adam Walsh Act is constitutional, even without Knellinger's court-created rule for compelling disclosure in the absence of ample opportunity).

58. Except in those districts that disagree with Knellinger's interpretation, such as Eastern California. *See id.*

59. 521 F. Supp. 2d 1097 (E.D. Cal. 2007).

60. *Id.* at 1102–03.

61. *Id.* at 1103.

62. *See* United States v. Doane, 501 F. Supp. 2d 897 (E.D. Ky. 2007); *accord* United States v. Sturm, 560 F. Supp. 2d 1021, 1027 (D. Colo. 2007); United States v. Renshaw, 1:05-CR-00165, 2007 WL 710239 (S.D. Ohio Mar. 6, 2007); United States v. Spivack, 528 F. Supp. 2d 103, 105 (E.D.N.Y. 2007).

63. 76 P.3d 449 (Ariz. Ct. App. 2003), *review denied*, (Mar. 16, 2004).

64. *Id.* at 451.

detective was required to remain out of earshot.[65] After twelve hours of fruitless analysis at the jail, Cervantes reaffirmed his objections to the discovery process and requested disclosure of the evidence.[66] The trial court denied his request but did grant a stay of the trial while the Arizona Court of Appeals determined whether the procedures in place were sufficient.[67] The appellate court responded by interpreting then-existing rules as placing the burden on the Government to show that disclosure would be inappropriate.[68] Essentially, this relaxed standard made reproduction of child pornography the rule rather than the exception.[69]

Although the Arizona Supreme Court did not grant review of *Cervantes*, it did respond by adding Rule 15.1(j) to the Arizona Rules of Criminal Procedure. Rule 15.1(j) effectively superseded *Cervantes* by making non-disclosure the norm in child pornography cases.[70] Like § 3509(m), Rule 15.1(j) creates a baseline standard whereby a defendant is given access to the evidence at a government facility.[71] However, unlike § 3509(m), Rule 15.1(j) provides the defendant with an express method to overcome the standard: a court can order reproduction if a defendant can exhibit a "substantial showing" that reproduction is necessary "for the effective investigation or presentation of a defense."[72] Although the statute does not define "substantial showing," much like § 3509(m) fails to define "ample opportunity," the official comment to 15.1(j) sheds some light on the Supreme Court of Arizona's intentions:

> A court should order reproduction or release of such items only when such reproduction or release is necessary to protect a defendant's right to a fair trial. Such a circumstance may be present when the items must be examined by an expert in order to determine whether actual minors are depicted in the materials or when a computer hard drive or other digital storage medium must be examined by an expert to determine whether the defendant was responsible for downloading the materials or had actual knowledge of the existence of the materials on the computer hard drive or digital storage medium, but only if the defendant shows that inspection of the items under the specific conditions offered

65. *Id.*
66. *Id.*
67. *Id.* at 452.
68. *Id.* at 456–57.
69. My thanks to Patience Huntwork for this perspective.
70. *See* ARIZ. R. CRIM. P. 15.1(j) (2005).
71. *Id.*
72. *Id.*

> by the state is not sufficient to protect the defendant's rights to a fair trial.[73]

The Court clearly sought to enshrine traditional conceptions of due process and used the two most technical and complicated defense analyses as examples of when a defendant's limited access might conflict with his due process rights: analysis to determine whether actual minors were used in the contraband images and analysis to determine if the contraband was unknowingly deposited on the defendant's computer by a third party or malicious software.[74] Although the comment clearly indicates that a defendant must show that his right to a fair trial is in jeopardy under the "specific conditions offered by the state,"[75] at least one trial court has found that a defendant met his substantial showing burden by showing that he had prior difficulties or difficulty under similar conditions in other jurisdictions despite not being able to show difficulties in the instant case.[76]

Thus, the Arizona rule seems to have been written contemplating preservation of the rights of the accused. The rule seems to present a mixed question of law and fact, measured by balancing the defendants' right to a fair trial and the victims' rights not to have their exploitation reproduced and unnecessarily scrutinized. This objective analysis is evaluated under the totality of the specific circumstances, including such factors as the digital information that must be analyzed[77] and the degree of the burden placed on the defendant.[78] The entire analysis is then reviewed with great deference to the trial judge's discretionary ruling, which is to be upheld absent a clear abuse of discretion.[79]

Some of Arizona's neighbor states have come to similar conclusions. For example, California permits court ordered disclosures upon a "showing of good cause,"[80] or if the prosecutor determines that "disclosure is required

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73. ARIZ. R. CRIM. P. 15.1(j) cmt. (2005).

74. *Id.*

75. *Id.*

76. State v. Hall, 2011 WL 3761079 (Ariz. Ct. App. 2011) (depublished). *See also* Petition for Review of a Special Action Decision of the Court of Appeals, State v. Robles, No. CV 11-0202-PR (Ariz. June 30, 2011), 2011 WL 3561079; Response to Petition for Review of a Special Action Decision of the Court of Appeals, State v. Robles, No. CV 11-0202-PR (Ariz. July 11, 2011), 2011 WL 5074383.

77. State v. Hall, 2011 WL 3761079 (Ariz. Ct. App. 2011) (depublished), appx. Exhibit E (citing State v. Williams, Citation Not Available (Pima County trial cited by appellant).

78. *See* State v. Hall, 2011 WL 3761079 (Ariz. Ct. App. 2011) (depublished); State v. Johnson, No. 1 CA-CR 09-0300, 2010 WL 1424369 (Ariz. Ct. App. Apr. 8, 2010).

79. *Cf.* Larsen v. Decker, 995 P.2d 281, 283 (Ariz. Ct. App. 2000) (applying this standard generally to all evidentiary rulings).

80. CAL. PENAL CODE § 1054.10(a) (West 2003).

for [the] preparation" of the defendant's case.[81] Although Washington doesn't have a specific rule governing disclosures in child pornography cases, the Washington Supreme Court has interpreted its general disclosure rules as requiring protected reproductions in cases where experts must analyze the digital evidence to determine if "someone other than the defendant caused certain images to be downloaded."[82] Accordingly, it seems that some states, being under less pressure from public outcries and lobbyists than Congress, saw the potential that tough-on-crime laws like the Adam Walsh Act have to erode due process and sought to prevent it.

Johnson came to such an undesirable conclusion—a procedural dismissal of charges against an accused child predator—because Arizona has made a fundamental policy choice to set a lower, more attainable standard for defendants. The Federal Government, with the exception of the approach taken by the *Knellinger* court, typically operates under a much less flexible construction of the Adam Walsh Act's disclosure preclusions. Because Arizona's approach is more workable for defendants and victims, and because nothing ought to preclude a state from implementing a more equitable administration of criminal justice for its citizens than the Constitution's baseline, we must avoid such problems in the future by building a bridge between federal and state standards.

III. THE "CONFLICTING" INTERESTS OF DEFENDANTS' RIGHTS AND VICTIMS' RIGHTS

The distinction between these two rules represents a line-drawing process between victims' rights and the rights of the accused—a process both difficult to ascertain and susceptible to manipulation. Nobody deserves to experience the nightmare of being falsely accused or convicted of possessing child pornography, and everyone is entitled to full due process of law. Similarly, no victim of child pornography deserves to be continually victimized by the reproduction and repeated viewing of the images of his or her abuse. The Federal Government chose to draw the line at giving a defendant an *ample opportunity* to access the evidence in its custody.[83] Arizona has a similar standard but allows a defendant to compel reproduction upon a *substantial showing* that it is necessary for his or her defense, such as when lengthy and complex expert analyses must be

81. *Id.* at (b).

82. State v. Boyd, 158 P.3d 54, 60–61 (Wash. 2007) (interpreting CrR 4.7(a)(1)(v) (2007)).

83. *See supra* Section II.A.

performed to determine if the contraband was remotely downloaded.[84] In order to determine which rule comes closest to protecting the different interests at stake, I will first analyze the separate and distinct concerns of defendants' rights and victims' rights.

A. The Defendant's Right to Due Process and the Purpose of Prosecutorial Disclosure.

The Fifth Amendment requires that "[no] person . . . shall be deprived of life, liberty, or property, without *due process of law*."[85] Although the Fifth Amendment does enshrine certain mainstays of due process, such as the protections against double jeopardy and self incrimination,[86] the varied and technical particularities of what constitutes due process of law—largely developed from English common law—have evolved into what is now a uniquely American conception of justice.[87] The due process clause was once described as "frozen-in-history," such that if a challenged procedure was an acceptable (or unacceptable) practice under common law at the time of the drafting of the Constitution, it remained per se the same.[88] Furthermore, any procedure not available at common law was presumably acceptable, provided that it did not conflict with established procedural standards.[89] For instance, because spousal privilege existed at common law before the drafting of the Constitution, compelling spousal testimony was a per se due process violation.[90] Conversely, the idea of accountant/client privilege, which did not develop until later, could be disregarded without violating due process.[91]

While the Supreme Court temporarily departed from this standard, it has recently returned to a model similar to the historical approach.[92] Modern courts now consider antiquity, federalism, the weight given to a challenged procedure, and reliance on a given procedure when conducting a

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84. *See supra* Section II.B.

85. U.S. CONST. amend. V (emphasis added).

86. *Id.*

87. *See generally* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.7(c), at 80 (5th ed. 2009) (describing the three "guideposts" of post-incorporation era due process).

88. *Id.* at 80–81 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856)).

89. *Id.*

90. *Cf. id.*

91. *Cf. id.*

92. *Id.* at 82–83 (explaining the settled usage approach). However, we do now recognize that per se common law concepts can still be found unconstitutional, despite their long standing usage. *Id.*

"fundamental fairness" due process calculus.[93] However, courts do not engage in wholesale review of procedures, because "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."[94] Accordingly, policies not based in common law, such as modern prosecutorial discovery procedures, are presumed to go beyond due process clause requirements.[95] This presumption is strengthened when statutes or court rules give structure to the discovery system of a given jurisdiction.[96] Thus, the relevant issue here concerns the modern system of pretrial discovery, and particularly whether a defendant has a due process right to disclosure, by reproduction, of evidence of child pornography, bearing in mind that the disclosure procedures in question are not afforded the same level of deference as common law procedural standards.

On the one hand, evidentiary disclosure is widely accepted and heavily relied upon in the criminal justice system. On the other, limiting disclosure in cases where reproduction or release of the evidence proves highly dangerous is a practice equally accepted and relied upon.[97] Disclosure is defined as "[t]he act or process of making known something that was previously unknown; a revelation of facts."[98] Although "[a]lmost all of the jurisdictions with general discovery provisions authorize prosecut[orial] discovery of documents and tangible objects . . . ,"[99] disclosure can be limited by protective orders.[100] When a court determines "that the disclosure would result in a risk or harm outweighing any usefulness of the disclosure," then protective orders limiting or restricting disclosure may be appropriate.[101] Although "[t]he burden of establishing a need for a protective order rests, of course, on the [G]overnment as the party seeking the order,"[102] that burden has been shifted to the defense under both § 3509(m) and Rule 15.1(j) to show that the need for reproduction outweighs the need for state custody. However, authorization of discovery remains paramount, and protective orders cannot wholly prevent the accused from building a defense.[103] This longstanding idea is now deeply rooted in our

93. *Id.* at 84–85.
94. Medina v. California, 505 U.S. 437, 451 (1992).
95. *See* LAFAVE ET AL., *supra* note 87, § 20.1(a), at 953–54.
96. *See id.* § 20.2(b), at 958–59.
97. *See, e.g.*, *id.* § 20.3(l), at 973–74.
98. BLACK'S LAW DICTIONARY 477 (8th ed. 2004).
99. LAFAVE ET AL., *supra* note 87, § 20.5(g), at 989.
100. *See id.* § 20.3(l), at 973–74.
101. *Id.* § 20.3(l), at 973 (internal quotation marks omitted).
102. *Id.*
103. *Id.*

system and heavily relied upon by almost all criminal defendants in state and federal prosecutions, making some form of discovery an element of "fundamental fairness" in criminal trials.[104]

The argument then depends on whether or not this process of making something known, this revelation of facts, can occur under either the ample opportunity standard of § 3509(m) or the substantial showing standard of Rule 15.1(j). Although neither standard has been found to facially subvert a defendant's capacity to build his defense, the cases where defendants have been successful in compelling reproduction, such as *Knellinger* and *Johnson*, exhibit factual circumstances where due process was subverted by precluding the defendant from reasonably accessing the evidence and building an adequate defense.[105] Such a showing can prove quite difficult when the presumption is in favor of the constitutionality of the process, and the burden rests on the defendant to establish how current standards fail to comport therewith. For constitutional challenges under due process standards, the greatest concern is the prevention of "trial by surprise."[106] Essentially, if § 3509(m) and Rule 15.1(j) are, at heart, standing protective orders governing the particular circumstances of child pornography prosecution, then a defendant must show that the governing standard goes beyond what is necessary to prevent harm and subjects him to a *de facto* trial by surprise in which he cannot build an adequate defense. This would represent a derogation of the fundamental fairness in the trial, and thus would infringe significantly on due process rights. In practice, this burden is quite demanding, indeed.

B. The Concern for Victims' Rights.

Contrary to long standing and deeply rooted, if a little confusing, conceptions of due process, victims' rights are a "comparatively recent

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104. *Id.*

105. Although neither rule is facially unconstitutional under either the Fifth or Sixth Amendments, the inability to build a defense in a particular case raises additional concerns by denying a criminal defendant effective assistance of counsel under the Sixth Amendment, which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the *Assistance of Counsel* for his defence.

U.S. CONST. amend. VI (emphasis added).

106. LAFAVE ET AL., *supra* note 87, § 20.4(m), at 974–75.

development" to our criminal justice model.[107] Traditionally, prosecutors have represented the people as a collective whole, but modern developments have led to the idea that "the victim may stand apart from the interests of the community" as a kind of third party with vested rights, which are often constitutionally protected, and may have a significant impact on the outcome of a trial.[108] Despite the relatively recent advent of victims' rights as a weighty concern in criminal procedure, "system changes instituted with this objective in mind have been so widespread and have impacted so many different aspects of the process that addressing the concerns of victims can readily be characterized today as a *cornerstone objective* of the process."[109] Nearly all American jurisdictions have some form of codified victims' rights legislation, and a majority of states have gone as far as to adopt constitutional amendments to further protect the interests of criminal victims beyond their historical role as mere sources of evidence.[110]

Although the breadth and scope of victims' rights laws across jurisdictions "are far too diverse to be neatly categorized,"[111] Arizona's system is relatively concise. Rule 39, which falls under the Powers of Court section of the Arizona Rules of Criminal Procedure, was passed in 1989 and was the first rule enacted in Arizona to protect victims' rights.[112] It was followed shortly by the addition of the Victims' Bill of Rights to the Arizona Constitution.[113] Both Rule 39 and the Victims' Bill of Rights focus heavily on a victim's right to be protected, both physically and psychologically, from the defendant.[114] They accomplish this goal by ensuring the right to be aware of the location of the defendant and to be present at almost every stage of the procedure at which the defendant has a right to be present, including parole hearings. In passing Rule 39, the Supreme Court of Arizona stated that "[t]he purpose of the entire proceeding initiated by this Court was to ascertain and ameliorate, if possible, the problems encountered by victims."[115]

By ratifying the Victims' Bill of Rights, the people of Arizona clearly demonstrated that the state not only supported Rule 39, but that victims' rights deserved the kind of protection that only a constitutional amendment

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107. *Id.* § 1.8(k), at 50.
108. *Id.* §1.8(k), at 51.
109. *Id.* §1.8(k), at 50 (emphasis added).
110. *Id.* §1.8(k), at 50–51.
111. *Id.* §1.8(k), at 51 (outlining seven categories of victims' rights legislation).
112. ARIZ. R. CRIM. P. 39.
113. ARIZ. CONST. art. II, § 2.1.
114. *See id.*; *see also* ARIZ. R. CRIM. P. 39.
115. ARIZ. R. CRIM. P. 39 cmt.

could provide. In fact, Arizona supports victims' rights so much that its representatives have twice gone so far as to push for Congress to propose a similar amendment to the U.S. Constitution, in 1998 and in 2004.[116] The 2004 memorial said, in pertinent part:

> [C]riminal defendants are afforded numerous federal rights and procedural protections; and . . . victims of crime are not afforded any federal rights or protections; and . . . the people of [Arizona] believe in the individual rights and liberties of all persons and have amended the Constitution of Arizona to provide crime victims with rights and yet it is clear that without federal constitutional rights, crime victims' rights are less meaningful and enforceable. Wherefore your memorialist, the senate of the state of Arizona, the house of representatives concurring, prays[] [t]hat the [C]ongress of the United States propose to the people an amendment to the constitution of the United States that provides rights to crime victims and that embodies [principles similar to the Arizona Victims' Bill of Rights] . . . .[117]

This demonstrates that Arizona has found victims' rights to be a concern of significant weight, nearing the significance of the rights of the accused, and that Arizona's concerns are enduring, considering the length of its campaign for victims' rights.

Although no such amendment to the U.S. Constitution has been ratified, Congress has passed several acts intended to protect the rights of victims in criminal trials, the most relevant of which have been codified under 18 U.S.C. § 3771.[118] Section 3771 largely enshrines many of the same protections as Rule 39 and the Arizona Victims' Bill of Rights, drawing on the "right to be reasonably protected from the accused,"[119] to ensure, *inter alia*, notice, opportunity to be heard, restitution, speediness, and dignity concerns for crime victims.[120] The Federal Government also has an extensive Victim Compensation and Assistance scheme to ensure that crime victims have adequate recourse, both during and after the trial.[121] However, the rights of victims have not been enshrined with the same significance and binding authority as the rights of the accused under the U.S. Constitution. Statutory protection is meaningful, to say the least, but if the two interests

116. S.C.M. 1003, 56th Leg., 2d Reg. Sess. (Ariz. 2004), *available at* http://www.azsos.gov/public_services/Chapter_Laws/2004/46th_Legislature_2nd_Regular_Session/SCM_1003.pdf.

117. *Id.*

118. 18 U.S.C. § 3771 (2012).

119. *Id.* § 3771(a)(1).

120. *Id.* § 3771(a)(1)–(8).

121. 42 U.S.C. §§ 10601–10608 (2012).

were to come into conflict, it is clear that the supremacy of the Constitution and the Bill of Rights would prevail over § 3771. Thus, victims' rights, though significant, must necessarily take a back seat to the rights of the accused when they conflict with constitutionally protected standards of due process.

It is important to note that the victims' rights concerns in a child pornography case differ significantly from those in other prosecutions. The mere existence of the images is a continual violation of the victims.[122] The long term effects on child victims of sexual abuse, such as victims of child pornography, can be devastating.[123] Such victims "are generally unable to form normal sexual relationships," and they are prone to "fall into destructive lifestyles, such as drug and alcohol addiction."[124] Sadly, many go so far as to commit suicide.[125] Considering the ease with which images of child pornography can be proliferated via the Internet, it is clear that this repeat, continual victimization is a serious concern and that every reasonable effort should be made to protect the victims of child pornography.

IV. ANALYSIS OF CURRENT RULES OF CRIMINAL PROCEDURE UNDER BOTH RUBRICS

Despite the seemingly inherent conflict between victims' rights and the rights of the accused, the relationship between the two is not necessarily reciprocal. That is to say, promoting one does not require a collateral abatement of the other. Arizona's ratification of the Victims' Bill of Rights, in fact, does not intrinsically cut back on traditional conceptions of due process.[126] The symmetry of enshrined constitutional rights is—in a way—an illusion, and Article II, § 2.1's constitutionalization of victims' rights does not actually limit the scope of due process in Arizona. The entire criminal justice system might be viewed as a memorialization of victims' rights in and of itself.[127] Defendants' rights are carved out of this model as a form of insurance that the Government, in the exercise of its duty to seek justice for the victims of crime, will not circumvent acceptable procedure

122. *See* Wood, *supra* note 10, at 997–98.

123. MARGARET C. JASPER, VICTIM'S RIGHTS LAW 34 (1997).

124. *Id.*

125. *Id.*

126. Arizona's Victims' Bill of Rights significantly protects the dignity of crime victims as well as their right not to be notified, present, and heard along with the defendant, but in no way challenges or even conflicts with the rights of the accused outlined in the Bill of Rights as incorporated by the Fourteenth Amendment. *See* ARIZ. CONST. art. II, § 2.1.

127. My thanks to Professor Mary Sigler for this idea.

when a case is particularly difficult or emotional. Unfortunately, over time, individual victims came to be seen as little more than sources of evidence in this process.[128] Thus, the constitutionalization of victims' rights can be viewed not so much as an attempt to strike back against bloated or overly expansive defendants' rights, but rather as an attempt to protect victims against an increasingly detached and mechanical justice process which no longer holds their individual well-being in high regard. In this way, victims' rights and the rights of the accused have very much in common: they both seek to secure justice for an individual against a faceless government entity. Thus, it is inaccurate to view victims or defendants as mere instruments of the justice system. Instead, they are independent actors with separate and distinct interests that can be properly balanced without compromising one over the other.

So in analyzing § 3509(m) and Rule 15.1(j) under the rubrics of victims' rights and the rights of the accused, we must consider what triggers these separate, though not entirely unrelated, concerns. The question is not whether victims' rights are being infringed in the name of due process, or vice versa, but whether these rules are sufficiently protecting both of these important interests. In order to determine whether § 3509 or Rule 15.1(j) has struck the right balance, we must consider both what triggered them and how they achieve their purported goals.

A. Analysis of the Adam Walsh Act

"As summarized by Congress: 'It is imperative to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims, so long as the government makes reasonable accommodations for the inspection, viewing, and examination of such material. . . .'"[129] Congress also found that "[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of victims and a repetition of their abuse."[130] Accordingly, "[c]hild pornography constitutes prima facie contraband, and as such should not be distributed to, or copied by, child pornography defendants or their attorneys."[131] Based on these conclusions, Congress passed the Adam Walsh

128. LAFAVE ET AL., *supra* note 87, § 1.8(k), at 50.

129. State v. Boyd, 158 P.3d 54, 68 (Wash. 2007) (quoting Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, § 502(2)(F), 120 Stat. 587, 624 (2006)).

130. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, § 502(2)(D), 120 Stat. 587, 624 (2006)).

131. *Id.* § 502(2)(E), 120 Stat. at 624.

Act on July 25, 2006, and President George W. Bush signed it into law on July 27, 2006.

The congressional record demonstrates overwhelming support for the Adam Walsh Act, particularly the uniform classification of sex offenders and the creation of dozens, if not hundreds, of new Assistant United States Attorney positions to aid in the prosecution of child predators.[132] However, the record contains almost no discussion of Section 504 of the Act, which was ultimately codified as § 3509(m).[133] Without more evidence, it is unclear whether there was any dispute over the inclusion of § 3509(m) as an additional measure of protection for victims of child pornography or whether anybody even realized the potential consequences of its limitations on evidence reproduction and disclosure. However, it is clear that the sensational nature of the subject matter and the powerful emotional sway that the story of Adam Walsh's murder exerted over the public created a situation where any legislator would have been committing political suicide by vocalizing concerns for the process due to defendants in child pornography prosecutions.

This is precisely the kind of "moral panic" that Michael Tonry warns can "focus attention on a troubling event or problem and generate emotions that can be harnessed."[134] Because emotions and collective reactions to nationally publicized tragedies can be exploited by people and organizations with specific agendas,[135] "we need to distinguish the dynamics of moral panics from their outcomes. Sometimes a perceived crisis can trigger changes that warrant applause and sometimes that warrant condemnation. Deciding which is which inevitably is contentious and implicates questions of values and ideology."[136]

So what about § 3509(m)? Does this law warrant applause or condemnation?[137] Does this legislation, or any legislation resulting from moral panic, for that matter, actually accomplish its seemingly noble intentions? If the actual purpose of § 3509 is to prevent repeat victimization,

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132. *See* Adam Walsh Child Protection and Safety Act of 2006 § 504, 120 Stat. at 629.

133. *See id.*

134. TONRY, *supra* note 1, at 92–93.

135. Tonry cites the passage of the Gun Control Act of 1968, "the first meaningful federal gun control law of modern times," which was passed in response to the deaths of Martin Luther King and Robert Kennedy, as an example of tragedy exploitation to accomplish criminal justice agendas that arguably limit the civil liberties enshrined by the Bill of Rights. *Id.* at 93.

136. *Id.* at 94.

137. For a persuasive argument that § 3509(m) is, in fact, deserving of condemnation, *see* Elizabeth C. Wood, *The Adam Walsh Child Protection and Safety Act of 2006: A Violation of the Criminal Defendant's Sixth Amendment Rights to Confrontation and Compulsory Process*, 37 STETSON L. REV. 985 (2008).

how real is that threat when disclosure is accompanied with a rigorous protective order? Is it that much less likely to occur under the supervision of government agents? Is the benefit really worth the significant burden it places on the accused? Not likely.

Despite Congress's assertion that every repeated viewing of child pornography is an additional victimization,[138] the Adam Walsh Act itself recognizes that viewings by experts, or even defendants, are both necessary and acceptable.[139] Whether such viewings constitute "acceptable" victimizations, or are, in fact, *not* actual victimizations, is a different question altogether. In fact, such viewings for legitimate legal purposes are in many ways mandatory. First, possession of child pornography is a specific intent offense, requiring that a defendant know the contraband images were made with underage victims.[140] Proving this element of the offense usually requires expert testimony by a pediatric specialist who can reasonably estimate the age of the victims in the images, because many times the victims are either unidentifiable or unlocatable. Second, the judge, both the prosecution and defense counsel, and all members of the jury must view the evidence of the crime at some point before reaching a legitimate guilty verdict.[141] Thus, it would appear either that not every viewing of the contraband is, in fact, a victimization or that at least some viewings are permissible—even necessary—in the pursuit of justice.

Clearly, a technical examination of contraband evidence by a professional computer forensic expert in order to establish a legal defense is one such permissible viewing. So why then do we prefer to limit this examination to the physical confines of the government's facilities? One valid explanation is that we fear the horrific repercussions should the contraband find its way into the hands of another pedophile, or even worse, onto the Internet, where countless predators will have access to it for years

138. Although the degree of victimization, if there is such a thing, is relatively low compared to the dangerously sensational pathos of this claim, at least outside of Internet distribution circumstances.

139. *See* 18 U.S.C. § 3509(m)(B) (2012) (requiring that the ample opportunity to inspect be extended to "the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial").

140. *See* 18 U.S.C. § 2252A(a)(5)(B) (2009) (A defendant is guilty only if he or she "*knowingly* possesses, or *knowingly* accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography. . . ." (emphasis added)).

141. Some courts have permitted exhibition of such contraband before a jury despite a defendant's stipulation that the contraband constituted child pornography. *See, e.g.*, United States v. Hay, 231 F.3d 630, 638–39 (9th Cir. 2000).

to come.[142] However, such a danger clearly constitutes a risk worthy of a protective order to prevent such an occurrence.[143] These orders can be incredibly detailed, and they almost always include provisions that the contraband never be connected to a network, or even a printer, and they often require confirmation of destruction by both parties as well as the court after expert analysis has been completed.[144] Furthermore, there is a very small community of experts who are both willing and qualified to provide these services. Tami Loehrs,[145] for example, is perhaps one of the most highly respected computer forensic experts in computer crime prosecutions in the Southwest. She has testified in hundreds of child pornography cases across the United States[146] and has successfully exonerated many people wrongly accused of possessing child pornography.[147] Forensic experts like Tami Loehrs perform a particularly difficult but necessary function in the criminal process. As a result, they are in an incredibly unpopular position that places them under a significant amount of professional and public scrutiny. This, combined with the highly professional nature of their services and the great deal they stand to lose by non-compliance with protective orders, makes it highly unlikely that release to an expert witness for analysis will result in revictimization any more often than that same analysis when performed in the custody of the Government. Hence, nothing

142. Recall Assistant U.S. Attorney Alice Fisher's testimony that child pornography that finds its way onto the internet creates a permanent record of the victims' horrific experiences. *See Online Child Pornography: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 109th Cong. 2 (2006) (statement of Alice S. Fisher, Assistant Att'y Gen., Criminal Div., United States Dep't of Justice), *available at* http://commerce.senate.gov/public/?a=Files.Serve&File_id=e30b9dd6-e11c-4049-9d38-a24687d83c47.

143. *See generally* LAFAVE ET AL, *supra* note 87, § 20.3(l), at 973.

144. The protective order in *State v. Robles* contained twenty separate provisions to prevent repeated victimization of the children in the images upon reproduction. *See* State v. Robles, Petitioner's Brief Appendix H, (No. 2 CA-SA 2011-0037), 2011 WL 3561079 (on file with author).

145. Ms. Loehrs is the founder of Loehrs & Associates, LLC, "a computerized litigation support company providing IT support services, computerized litigation services, e-discovery and computer forensics services" in various kinds of computer related litigation, including child pornography prosecutions. *About Us*, LOEHRS & ASSOCIATES, http://www.forensicsexpert.net/ (last visited Mar. 25, 2013).

146. For a list of several cases Ms. Loehrs has participated in, see *What Have We Done?*, LOEHRS & ASSOCIATES (2011), http://www.forensicsexpert.net/ (last visited Mar. 25, 2013). For more information about her credentials and qualifications, see her curriculum vitae. *Biographies: Tammi Loehrs*, LOEHRS & ASSOCIATES, http://www.forensicsexpert.net/ (last visited Mar. 25, 2013).

147. *See, e.g.*, Sarah Fenske, *Doubting Thomas: County Prosecutors Charged a Teenager with Looking at Kiddy Porn. Turns Out They Hadn't Done Their Homework*, PHOENIX NEW TIMES (Jan. 25 2007), http://www.phoenixnewtimes.com/2007-01-25/news/doubting-thomas/.

has actually happened to endanger the child victims by ordering reproduction under these circumstances.[148] In fact, although there are several known series or strings of child pornography that have made it to the internet and continually recur as duplicated by download in child pornography prosecutions, it is difficult to find a single example of such a leak happening while the evidence is under the dominion and control of a computer forensic expert—or as a result of any other reproduction under a protective order, for that matter. Nonetheless, the risk is still there, and if even one image is ever uploaded to the Internet under such conditions, that would be an immeasurable tragedy.

On the other hand, the Adam Walsh Act does meet constitutional minimum standards of due process,[149] and it was passed by elected representatives who formally speak for the people of the United States. This procedure is the result of a value-laden policy choice enacted through the legislative process. Furthermore, although it is difficult to overcome the ample opportunity standard and compel reproduction, it can be done when a defendant is actually being denied an opportunity to build a defense. First, a grand jury must indict, making an initial finding that the images constitute child pornography.[150] If there is no indictment for possession of child pornography, or the images are of "other material that the [G]overnment claims is child pornography that is not the subject of any charges and therefore has not been found by the grand jury to be child pornography," then the restrictions of § 3509(m) do not apply.[151] Under such circumstances, the burden rests with the Government to show good cause that the evidence should not be released from custody.[152]

Even once § 3509(m) has been triggered, a defendant may still be able to compel reproduction if he has not received his ample opportunity.[153] In *Knellinger*, the defendant was able to demonstrate such a necessity.[154] Because Knellinger was able to show that his experts had difficulty transporting their equipment to and from the government facilities,[155] that

148. My thanks to Patience Huntwork for this perspective.

149. *See, e.g.*, United States v. Spivack, 528 F. Supp. 2d 103, 105–07 (E.D.N.Y. 2007).

150. *See* United States v. Battaglia, No. 5:07cr0055, 2007 WL 1831108, at *2 (N.D. Ohio June 25, 2007) ("Where, as here, there is an indictment, a federal grand jury has already found probable cause to believe that the material at issue is child pornography.").

151. *See* Craig W. Albee, *Discovery in Child Pornography Cases After Adam Walsh: 20 Questions*, FED. DEFENDER ORG. 1, 3, http://www.fd.org/docs/select-topics---common-offenses/20-questions-discovery.pdf?sfvrsn=4 (last visit Mar. 28, 2013).

152. *Id.*

153. For a brief overview on how to "demonstrate that a copy of the computer data is necessary to the defense of the case," see *id.* at 7–9.

154. United States v. Knellinger, 471 F. Supp. 2d 640, 650 (E.D. Va. 2007).

155. *Id.* at 647.

the Government's prohibitive access regime resulted in at least one expert declining to provide his services,[156] and that the remaining experts would charge more than $400,000 on top of the typical $135,000 fee,[157] the court concluded that he had not been given the statutorily required ample opportunity.[158]

However, *Knellinger* stands alone. For the most part, federal courts tend to side with the Government and conclude that the defendant has received his ample opportunity.[159] In fact, some federal courts do not even recognize the power to compel disclosure in the event of a failure to provide ample opportunity.[160] But this "uneven playing field" that resulted from the passage of the Adam Walsh Act may not be entirely unfair.[161] In considering whether § 3509(m) is a good policy under the "questions of values and ideology" that Tonry suggests are paramount,[162] the ultimate choice is one of degrees and probability. Although disclosure to an expert witness is unlikely to ever result in a repeat victimization, the remote possibility of this potential tragedy is difficult to accept. On the other hand, the difficulty of demonstrating that one has been denied the requisite ample opportunity is almost certain to result in regular injustices.

So which interest is greater? As a simple question of degrees and probabilities, it is easy to accept that even the unlikely dissemination of contraband reproduced under an exhaustive protective order is enough to justify a presumption of Government custody, as § 3509(m) does. However, it is neither unlikely nor uncommon for a defendant to be wrongly accused, and often his only defense is precisely the complex analyses that experts have difficulty performing at a government facility under standard § 3509(m) procedures. With this in mind, it is clear that the relatively unlikely danger of repeat victimization should give way to the danger of erroneous

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156. *Id.*

157. *Id.* The court was careful to note that it did not make this finding based on the inconvenience of either the experts or the defendant, but rather because the expert analysis under the Government's terms would be nigh impossible. *Id.* at 647–48.

158. *Id.* at 649–50.

159. *See* United States v. Tyson, No. 06-CR-6127, 2007 WL 2859746, at *3 (W.D.N.Y. Sept. 26, 2007); United States v. Doane, 501 F. Supp. 2d 897, 902 (E.D. Ky. 2007); United States v. Battaglia, No. 5:07cr0055, 2007 WL 1831108, at *1 (N.D. Ohio June 25, 2007); United States v. Sturm, 560 F. Supp. 2d 1021, 1027 (D. Colo. 2007); United States v. Flinn, 521 F. Supp. 2d 1097, 1100 (E.D. Cal. 2007); United States v. O'Rourke, 470 F. Supp. 2d 1049, 1063 (D. Ariz. 2007); United States v. Renshaw, No. 1:05-CR-00165, 2007 WL 710239, at *1–2 (S.D. Ohio Mar. 6, 2007); United States v. Spivack, 528 F. Supp. 2d 103, 105 (E.D.N.Y. 2007).

160. *See*, *e.g.*, *Flinn*, 521 F. Supp. 2d at 1102–03.

161. *See* Albee, *supra* note 151, at 4–5.

162. TONRY, *supra* note 1, at 94.

conviction when a defendant's due process right to build a defense depends almost entirely on traditional discovery and reproduction of evidence. This is what the *Knellinger* court concluded.[163] Unfortunately, most other federal courts are not so guarded with these interests, especially in light of the sensationalism and influence of the Adam Walsh Act.

B. Analysis of Arizona Rule 15.1(j)

Unlike the Adam Walsh Act, Rule 15.1(j) was enacted by the a court rather than an elected body. However, like the Adam Walsh Act, Rule 15.1(j) was passed in response to an appalling situation: the decision in *Cervantes v. Cates*.[164] The *Cervantes* court held that a defendant charged with possession of child pornography has an automatic right to reproduction of this evidence, and the state has the burden to challenge this reproduction for good cause.[165] This unqualified opposite extreme was highly unsettling. Even so, *Cervantes* was not remotely as sensational or well publicized as Adam Walsh's murder. Hence, the notable lack of moral panic motivating the rule change and the comparatively sterile judicial administrative promulgation made the enactment of Rule 15.1(j) significantly less suspect than § 3509(m).[166] Moreover, the Supreme Court of Arizona is often regarded as one of the most competent high courts in the United States.[167] They employ a team of distinguished staff attorneys who administer a rigorous administrative note and comment process before the Court decides to modify or adopt any new court rule.[168] Under Rule 28,[169] after the public

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163. *Knellinger*, 471 F. Supp. at 650.

164. Cervantes v. Cates, 76 P.3d 449 (Ariz. App. 2003), *review denied* Mar. 16, 2004.

165. *Id.* at 451.

166. The distinctive absence of Tonry's "pusillanimous politicians" in this process evinces the minimal emotional influence on the rule's development. *See, e.g.*, TONRY, *supra* note 1, at vii.

167. *See* Stephen J. Choi, Mitu Gulati, & Eric A. Posner, *Which States Have the Best (and Worst) High Courts?* 7 tbl. 1 (John M. Olin Law & Econ., Working Paper No. 405), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2803&context=faculty_scholarship&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3D2002%2520chamber%2520of%2520commerce%2520survey%2520judges%2527%2520competence%26source%3Dweb%26cd%3D1%26ved%3D0CBsQFjAA%26url%3Dhttp%253A%252F%252Fscholarship.law.duke.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D2803%2526context%253Dfaculty_scholarship%26ei%3DL2SsTp-AJaOFsgKvy4H_Dg%26usg%3DAFQjCNE23G9GoBT5k2z2ys5T41T5Z0oOgQ%26sig2%3DsrjUZbBBOg6ndKT3fg6NmQ#search=%222002%20chamber%20commerce%20survey%20judges%20competence%22 (citing *2002 Chamber of Commerce Survey—Judges' Competence*).

168. *See* John C. Rea & Carrie Brennan, *Supreme Court Practice*, ARIZ. ATT'Y, Feb. 1997, *available at* http://www.myazbar.org/AZAttorney/Archives/Feb97/2-97a1.htm.

comment period is complete, the Court weighs all proffered concerns and suggestions, with aid of the detailed analyses and recommendations of the Court's experienced staff attorneys and then makes an informed decision based on objective balancing of all the interests at stake.[170] Although Congress likely went through a similar vetting process with § 3509(m), the records of this process are of limited availability, and it is uncertain if defendants' rights were ever addressed in a similar capacity during the drafting of that rule.

So on the one hand, the Arizona rule was arguably adopted by a branch of government not directly beholden to majoritarian concerns.[171] Interestingly, Arizona has overwhelmingly ratified the Victims' Bill of Rights, along with almost every other significant victims' rights law. Considering Arizona's decidedly conservative and "tough-on-crime" reputation, it is indeed an anomaly that the Arizona rule is so much more defendant-friendly than the federal rule;[172] perhaps this is evidence that the Arizona Supreme Court did, in fact, reach a conclusion contrary to the general wishes of the people.

However, this argument is not entirely persuasive. As previously discussed, it is not necessarily the case that victims' rights are in conflict with the rights of the accused.[173] As a matter of fact, the Arizona Supreme Court itself enacted the very first victims' rights rule.[174] Furthermore, the Court represents one third of the State's authority, empowered by the people thereof. Accordingly, a counter-majoritarian decision by the Arizona Supreme Court is still representative of the will of the people. Even if it were the case that the Arizona courts are acting contrary to majoritarian concerns in this matter, perhaps this is the precise circumstance in which a detached and impartial judiciary is required to preserve unpopular but imperative minority interests. By operating in relative isolation from the political arena, the Arizona Supreme Court is not susceptible to the moral panics prone to manipulation by Tonry's pusillanimous politicians. Accordingly, they are free to engage in objective balancing in ways that politicians perhaps cannot, even though they might reach an unpopular conclusion that is more favorable to defendants.

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169. ARIZ. SUP. CT. R. 28.

170. *See id.*; Rea & Brennan, *supra* note 168.

171. Arizona's merit based selection system for the judiciary responds to these concerns by providing for regular retention elections. For an overview of how Arizonans can have an impact on the judiciary, see *Judicial Nominating Commissions*, ARIZ. JUD. BRANCH, http://www.azcourts.gov/jnc/Home.aspx (last visited Mar. 23, 2013).

172. My thanks to Patience Huntwork for this perspective.

173. *See supra* Section IV.

174. *See* ARIZ. R. CRIM. P. 39.

Thus, the Arizona Supreme Court passed Rule 15.1(j) under a process arguably less susceptible to manipulation than that of Congress. The Court's attention to victims' rights, and the fact that 15.1(j) was passed in direct response to overly broad disclosure procedures,[175] indicate that the threat of repeat victimization was a significant concern to the Court. The fact that Rule 15.1(j) was signed into law by then Chief Justice Ruth McGregor in 2005,[176] merely one year before the Adam Walsh Act, suggests that the Arizona rule, passed in a similar political climate, reached the more balanced, less sensational result. Furthermore, among numerous negative comments, only two comments were filed in support of the proposed Rule 15.1(j),[177] one of which was actually the initial petition to amend Rule 15.1, written by Arizona Voice for Crime Victims,[178] a victims' rights advocacy group. They not only supported Rule 15.1(j) but argued that the proposed rule would "accommodate both the rights of the victim and the rights of the accused."[179]

Thus, there seems to be little to support the conclusion that Rule 15.1(j) does anything but adequately balance both prevailing concerns. Unsurprisingly, the substantial showing standard written into Rule 15.1(j) expressly permits the kind of accommodation that the *Knellinger* court had to read into § 3509(m). Because the rule contains an express method for compelling disclosure, Arizona courts have been much more amenable to due process arguments when defendants are prejudiced by the state's non-disclosure. Although the standard for manifesting a substantial showing is vague, defendants have succeeded in compelling disclosure with arguments as attenuated as the mere conceptual difficulties feared by the *Flinn* court.[180] While it may seem that the Arizona courts, under Rule 15.1(j), are more liberal with their reproduction orders than is absolutely necessary, this is not the case. The Arizona courts have simply found a functional balance, and that balance entails permitting defendants to examine the evidence against

175. Cervantes v. Cates, 76 P.3d 449 (Ariz. Ct. App. 2003), *review denied*, No. CV-03-0393-PR, 2004 Ariz. LEXIS 32, at *1 (Ariz. March 16, 2004)..

176. Order Adopting a Previous Amendment to Rule 15.1(j) in Final Form, Supreme Court No. R-04-0015 (July 2005) (on file with author).

177. *See* Petition to Amend Rule 15.1, Arizona Rules of Criminal Procedure, May 7, 2004 (on file with author).

178. *Id.*

179. *Id.* at 17–19.

180. *See*, *e.g.*, Petition for Review of a Special Action Decision of the Court of Appeals, at 1–2, Arizona v. Robles (No. 2 CA-SA 2011-0037), 2011 WL 3561079; Response to Petition for Review of a Special Action Decision of the Court of Appeals, at 2, Arizona v. Robles (No. 2 CA-SA 2011-0037), 2011 WL5074383.

them when there is no indication that reproduction under a protective order will result in repeat victimization.

C. Balance Under Federal Imbalance

The Bill of Rights sets out the minimum standard for civil rights and due process in a criminal proceeding. For example, the hotly debated existence of a right to privacy[181] in the U.S. Constitution is explicitly enshrined by the Arizona Constitution.[182] So Arizona's choice to afford increased process beyond that offered by the Federal Government is, in many ways, a true exercise in federalism.[183] Arizona is not alone in this choice. Washington and California both have similar procedures.[184] Because the Adam Walsh Act does not preempt States from making such a value-laden policy determination differently from the Federal Government,[185] these expansions of due process are completely acceptable. In fact, they may be preferable considering the more equitable balancing that the Arizona courts employ.

Yet the federal system does not necessarily avoid conflicts with state trials. Of course, there is *Johnson*, where Arizona was forced to dismiss the charges because the F.B.I. retained custody of the evidence and refused to reproduce it under the Adam Walsh Act despite the court's finding that the defendant had manifested his substantial showing under Arizona law.[186] Though this result is frightening, it is an example of Arizona's commitment to maintaining defendants' rights.[187] The Federal Government's interference in the prosecution forced Arizona to make a choice: abandon the carefully drafted disclosure standards of Rule 15.1(j), or send a message to the Federal Government that Arizona takes its elevated conception of due process and informed balancing seriously.

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181. The right to privacy, in criminal law terms, is usually extrapolated from the Fourth Amendment's protection against unreasonable searches and seizures. *See* U.S. CONST. amend. IV. It can be argued that we have a more general *penumbra* right to privacy as synthesized from the Third, Fourth, Fifth, Seventh, Ninth, and Fourteenth Amendments operating in unison.

182. ARIZ. CONST. art. II, § 8.

183. My thanks to Jeffrey Roseberry, J.D., for this thought.

184. *See* CAL. PENAL CODE § 1054.10(a) (2012) (California's equivalent rule); *see also* State v. Boyd, 158 P.3d 54, 60–61 (Wash. 2007) (interpreting Washington's rules of criminal procedure to require similar procedures, despite textual silence on this specific issue).

185. *See Boyd*, 158 P.3d at 59 n.4; State *ex rel.* Tuller v. Crawford, 211 S.W.3d 676, 679 (Mo. Ct. App. 2007).

186. State v. Johnson, No. 1 CA-CR 09-0300, 2010 WL 1424369, at *3 (Ariz. Ct. App. Apr. 8, 2010).

187. *See id.*

But not every state is as committed as Arizona. For instance, in *State v. Brady*,[188] the Ohio Court of Appeals upheld a dismissal where the defendant successfully moved for reproduction of the evidence, but the F.B.I. subsequently seized the evidence from his expert, who also happened to be an attorney.[189] However, the Ohio Supreme Court reversed, [190] finding that the lack of expert witness exceptions to the Adam Walsh Act did not deprive the defendant of expert assistance where the state rules provided for access at the government's facilities in a similar fashion.[191] The F.B.I.'s interference with Ohio's sovereignty was effectively ratified by the Ohio Supreme Court's reversal of the dismissal. Essentially, the Ohio Court, faced with the same choice as Arizona in *Johnson*, decided that it would rather conform to federal standards than sanction the release of a potential predator.

Although neither the Adam Walsh Act nor Rule 15.1(j) directly conflict with victims' rights or the rights of the accused, federal intrusions, such as those in *Johnson* and *Brady*, represent a significant challenge. On the one hand, if a State chooses to exercise its right to offer more process than the Adam Walsh Act, dangerous criminals may be released on a technicality, which undoubtedly tests the limits of our conceptions of justice and victims' rights. On the other hand, a State could acquiesce to federal standards, which, although not facially inconsistent with due process minimums, calls into question both longstanding concerns for state sovereignty in our federal system and the difficult value choices inherent in these complex and easily sensationalized issues.

V. CONCLUSION

Ultimately, Rule 15.1(j) does seem to be the better rule, primarily because its informed adoption resulted in an explicit protection in the event that custodial examination frustrates due process. However, this same kind of internal balancing has been employed under § 3509(m) to reach the same result, overcoming the Adam Walsh Act's seemingly categorical preclusion against reproduction when it obstructs traditional notions of fairness and process, in at least one federal district.[192] Thus, the only real problem here

188. State v. Brady, No. 2005-A-0085, 2007 WL 1113969 (Ohio Ct. App. 2007), *rev'd*, 894 N.E.2d 671 (Ohio 2008).

189. *Id.* at *3–5.

190. *Brady*, 894 N.E.2d at 679.

191. *Id.*

192. *See* United States v. Knellinger, 471 F. Supp. 2d 640, 644 (E.D. Va. 2007).

lies in the unnecessary conflict between federal and state policy choices. If the Constitution itself represents a minimum standard upon which states are encouraged, if not expected, to expand, then why shouldn't statutory procedural caveats do the same? If § 3509(m)'s ample opportunity represents an opportunity that can be even greater than what the Constitution provides,[193] then why can't Arizona's substantial showing standard be the measurement by which Arizona courts determine whether a defendant has been afforded his ample opportunity? At their core, neither § 3509(m) nor Rule 15.1(j) constitute a *facially* unacceptable policy under either the victims' rights rubric or the rights of the accused. In fact, equilibrium between victims' rights and defendants' rights can be achieved under either rule. Despite their distinct standards, both rules purport to ensure that evidence is "reasonably available" to defendants.[194] But reaching this balance is considerably more likely in Arizona than under the Adam Walsh Act. Nonetheless, at least two recent cases have indicated a federal willingness, if not a policy, to intervene when states choose to expand disclosure procedures beyond federal minimums, despite ostensibly comporting with victims' rights concerns. This intervention, aside from challenging deeply rooted American principles of federalism and state autonomy, stands in direct conflict with both victims' rights and defendants' rights, depending on the given state's reaction. If a state chooses, as Arizona did in *Johnson*, to uphold its elevated disclosure policies, then dismissal of charges is likely to follow. In this case, not only have the victims suffered by being robbed of their chance for justice, but recidivism rates for sexual predators suggest a significant probability that the released defendant, if he was, in fact, guilty, will likely go on to victimize even more children.[195] On the other hand, if a state chooses, as Ohio did in *Brady*, to abandon its elevated standards and conform to federal minimums, the interests again fall out of balance and the rights of the accused in that jurisdiction take a significant blow.

Four possible solutions come to mind. First, Congress could amend § 3509(m) to explicitly permit orders of reproduction, at least when collaborating with states that have chosen to adopt higher procedural safeguards for these criminal defendants. Unfortunately, because of the

193. *See supra* Part II.A.

194. *Compare* ARIZ. R. CRIM. P. 15.1(b) ("The prosecutor shall make such items *reasonably available* for inspection . . . ." (emphasis added)), *with* 18 U.S.C. § 3509(m) (2009) ("so long as the Government makes the property or material *reasonably available* to the defendant" (emphasis added)).

195. *See* Carl Bialik, *How Likely Are Sex Offenders to Repeat Their Crimes?*, THE WALL ST. J. (Jan. 24, 2009), http://blogs.wsj.com/numbersguy/how-likely-are-sex-offenders-to-repeat-their-crimes-258/.

nature of politics, it seems unlikely that any elected official is going to risk his or her office in order to push for what will certainly be perceived as a soft approach to child sexual predators.[196] Second, States with more liberal reproduction standards, such as Arizona, can simply conform to the more stringent Adam Walsh Act, eliminating such conflicts by creating a uniform system. However, this approach challenges the generations-old principle that the states are laboratories of democracy,[197] free, even encouraged, to employ different solutions to problems until an ideal solution emerges. States would be giving up their authority to further restrict the Government and elevate defendants' rights even higher. Third, the Federal Government could simply prosecute every case over which they retain custody of the evidence. But this also seems unrealistic, considering that the Government can more readily investigate crime and gather evidence than it can prosecute every single meritorious crime that it uncovers.[198] Their ability to uncover illegal activity is vast, while their ability to prosecute it is comparatively small. Cooperation is an absolute necessity in order to see federal resources used to their fullest potential.

The fourth and most viable solution is for the circuit courts to review some of these cases. The reason we have so many interpretations of § 3509(m) in the federal courts is that district courts do not create binding precedent, and the circuits are not required to grant interlocutory appeals of rulings on motions to compel reproduction. Accordingly, I urge the circuit courts to begin hearing appeals on § 3509(m) rulings and to start the long process of fleshing out a binding jurisprudence that permits disclosure under the right circumstances. Ideally, this jurisprudence would resemble the *Knellinger* approach—that due process is paramount, even in the context of legislation aimed at protecting children. As appointed judges, the circuit courts are not faced with the same repercussions as Congress for loosening the evidence reproduction standards of the Adam Walsh Act.

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196. The "great danger" of urgent, pathos driven moral panics "is that they lead to actions and policies based on stereotype, anger, and emotion, rather than on careful assessment of problems, cool reflection, and rationality." TONRY, *supra* note 1, at 96. Now that the panic has been incited, it is nearly impossible to assuage the public's concerns; even if some brave Congressmen attempted to lead a return to reasonability on these matters, their chances of success would seem slim next to the likelihood of scapegoatism and professional alienation. *See generally id.* at 195–200.

197. *See, e.g.*, Michael S. Greve, *Laboratories of Democracy: Anatomy of a Metaphor*, 6 FEDERALIST OUTLOOK 1, 3–6 (2001), *available at* http://www.aei.org/files/2001/03/31/Laboratories%20of%20Democracy%20Anatomy%20of%20a%20Metaphor.pdf.

198. *Cf.* Mark Motivans, & Tracey Kyckelhann, *Federal Prosecution of Child Sex Exploitation Offenders, 2006*, U.S. DEP'T OF JUST. BULL. (2007), *available at* http://www.bjs.gov/content/pub/pdf/fpcseo06.pdf.

Accordingly, they are in the best position to do what needs to be done, both to preserve balance in the disclosure procedures of child pornography prosecutions, and to create compatible state–federal standards such that no collaboration ever again results in the procedural dismissal of a potentially dangerous child predator.