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UTAH’S CHILDREN NEED A TOURNIQUET, NOT A BAND-AID:
WHY UTAH SHOULD ADOPT A SEPARATE INVOLUNTARY
CIVIL COMMITMENT STATUTE
FOR INCOMPETENT SEXUAL OFFENDERS

Tara Pincock*

I. INTRODUCTION

The Utah legislature recently amended the civil commitment statute to expand the definition of substantial danger to include harmful sexual conduct.¹ The amendment allows the state to involuntarily commit sexual offenders who are incompetent to stand trial.² The amendment, however, will not protect the residents of the state, nor will it help those committed receive the treatment they desperately need. This Note proposes that Utah adopt a more stringent statute similar to the sexually-violent-predator (“SVP”) statutes that have recently swept the nation. Currently, Utah’s statute only applies to recidivist sex offenders who are incompetent to stand trial.

On December 14, 2002, Susan Gall was killed by her son—a schizophrenic with a history of not taking his medication—when he attacked her with an ax.³ Susan attempted to have him committed on several occasions before the attack.⁴ She was not successful, however, because mental health professionals concluded he was not an “imminent danger to himself or others” and was therefore, “not eligible for involuntary commitment” per Utah’s civil commitment statute at the time.⁵

As a consequence, Utah’s legislature passed the Susan Gall Involuntary Commitment Amendments in 2003.⁶ The amendments replaced the “immediate danger” standard with a “substantial danger” standard for the purposes of

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¹ H.B. 14, 59th Leg., Gen. Sess., 2012 Utah Laws ch. 248 (to be codified in UTAH CODE ANN. § 62A-15-602).

² Roxana Orellana, *Statutemakers Like Bill to Lock Up Potential Sex Offenders*, SALT LAKE TRIB. (Oct. 19, 2011, 8:51 PM), <http://archive.sltrib.com/article.php?id=17570461&itype=storyID>.

³ Linda Thomson, *Man Who Killed Mom with Ax Sent to State Hospital: Plea Bargain Aimed at Getting Treatment—Not Prison Time*, DESERET NEWS (Sept. 11, 2003, 12:00 AM), <http://www.deseretnews.com/article/510053425/Man-who-killed-mom-with-ax-sent-to-state-hospital.html>.

⁴ *Utah v. Gall*, 158 P.3d 1105, 1107 (Utah Ct. App. 2007).

⁵ *Id.*

⁶ S.B. 27, 55th Leg., Gen. Sess., 2003 Utah Laws ch. 303 (codified at UTAH CODE ANN. §§ 62A-15-103, -602, -631 (West 2010)), available at http://www.dsamh.utah.gov/docs/SB27_enrolledcopy.pdf.

involuntary commitment.⁷ As defined in the amended act, a person was considered a “substantial danger” if that person was at “risk to cause or attempt[s] to cause serious bodily injury[] or . . . has inflicted or attempted to inflict serious bodily injury on another” due to mental illness.⁸ “Serious bodily injury” included any bodily injury that “involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”⁹ Sexual offenses did not qualify under this standard.

The inadequacy of Utah’s civil commitment statute became apparent when the state released Lonnie Johnson in 2011.¹⁰ Johnson, a convicted sex offender,¹¹ was charged in 2007 with sexually abusing his stepdaughter and her cousin over a five-year period.¹² Due to a cognitive disorder, Johnson was deemed incompetent to stand trial.¹³ He spent the next few years in a hospital where doctors attempted, but failed, to restore his competency.¹⁴ His doctors testified that he was unlikely to ever regain competency but was not a danger to himself or others.¹⁵ Even though the prosecution wanted to civilly commit Johnson, the judge was obligated to release him because he did not qualify as “substantially dangerous.”¹⁶

Johnson’s release created a public outcry and drew national media attention.¹⁷ Utah’s legislators realized that the Susan Gall Amendments of 2003 had inadvertently narrowed the class of individuals who could be subjected to involuntary civil commitment and quickly drafted an amendment.¹⁸ The amendment expanded the definition of “substantial danger” to include “serious risk to cause or attempt to cause serious bodily injury or engage in harmful sexual conduct.”¹⁹ The term “harmful sexual conduct” was given a fairly broad

⁷ *Id.*

⁸ UTAH CODE ANN. § 62A-15-602(13) (West 2010).

⁹ *Id.* § 62A-15-602(12).

¹⁰ See Barry Leibowitz, *Sex Offender Lonnie Hyrum Johnson Freed Despite New Charges, Found Incompetent to Stand Trial*, CBSNEWS (April 8, 2011, 2:40 PM), http://www.cbsnews.com/8301-504083_162-20052163-504083.html.

¹¹ Lonnie Johnson was previously convicted in Washington for raping a child. Jim Dalrymple, *Accused Child Rapist Returns to Utah for Evaluation*, DAILY HERALD (Sept. 28, 2011, 12:20 AM), http://www.heraldextra.com/news/local/crime-and-courts/article_e78c5cd1-0be2-5c57-acf8-5c809fa3a3d9.html.

¹² Jennifer Dobner, *Sex Offender Closer to Freedom After Provo Hearing*, SEATTLE TIMES (Apr. 1, 2011, 2:17 PM), http://seattletimes.nwsourc.com/html/localnews/2014662160_aputsexoffenderrelease2ndldwritethru.html.

¹³ See Leibowitz, *supra* note 10.

¹⁴ *Id.*

¹⁵ Dalrymple, *supra* note 11.

¹⁶ Leibowitz, *supra* note 10.

¹⁷ *Id.*

¹⁸ H.B. 14, 59th Leg., Gen. Sess., 2012 Utah Laws ch. 248 (to be codified in UTAH CODE ANN. § 62A-15-602).

¹⁹ *Id.*

definition.²⁰ However, this amendment will not protect the residents of Utah against recidivist sex offenders who are incompetent to stand trial. Utah needs to adopt a statute that will protect Utah residents while providing treatment for sex offenders.

This Note will 1) explain why the amendment is inadequate, 2) discuss a proposed statute and how it will resolve many of the problems related to the currently amended civil commitment statute, and 3) address some of the criticisms of SVP statutes.

II. THE AMENDMENT FAILS TO TREAT ISOS ADEQUATELY OR PROTECT AGAINST RECIDIVIST ISOS

The amendment to the involuntary commitment statute is inadequate to keep incompetent sex offenders (“ISOs”) from slipping through the cracks. First, the civil commitment system is insufficient to securely house ISOs due to lack of resources. Between lack of funding, an inadequate number of beds, and no long-term secure-facility options, the current system cannot handle the increased demands of committed ISOs. Second, ISOs will not receive the treatment they need to allow them to safely reintegrate into society.

Lack of funding is one of the major challenges local authorities face and one of the main reasons Utah’s residents do not receive the treatment they need.²¹ In Utah, local authorities (typically the county where the patient resides) provide mental health services.²² The Utah Association of Counties opposed the amendment because the statute is “an unfunded mandate” on the counties.²³ The state requires local authorities to match “at least 20% of the State funds allocated to them.”²⁴ Counties provided more than \$15,000,000 for mental health services in 2011.²⁵ An estimated 38,000 adult individuals needed mental health services in Salt Lake County alone during 2011, but only 11,000 received treatment.²⁶

²⁰ *See id.* (“‘Harmful sexual conduct’ means any of the following conduct upon an individual without the individual’s consent, or upon an individual who cannot legally consent to the conduct including . . . sexual intercourse; penetration, however slight, of the genital or anal opening of the individual; any sexual act involving the genitals or anus of the actor or the individual and the mouth or anus of either individual, regardless of the gender of either participant; or any sexual act causing substantial emotional injury or bodily pain.”).

²¹ DIV. OF SUBSTANCE ABUSE & MENTAL HEALTH, UTAH DEP’T OF HUMAN SERVS., 2011 ANNUAL REPORT 23 (2011), *available at* http://www.dsamh.utah.gov/docs/Annual_report_2011.pdf.

²² *Id.* at 3.

²³ UTAH ASS’N OF CNTYS, 2012 GENERAL LEGISLATIVE SESSION RECAP 13 (2012), *available at* http://www.uacnet.org/wp-content/uploads/downloads/2012/04/2009_General_Legislative_Session_Recap1.pdf.

²⁴ DIV. OF SUBSTANCE ABUSE & MENTAL HEALTH, *supra* note 21, at 4.

²⁵ *Id.* at 5 (providing substance abuse services funding totals for county/local funds, and other county revenue).

²⁶ *Id.* at 24.

Lack of beds for inpatient treatment is another resource problem that needs addressing. Since most counties do not provide sex-offender treatment,²⁷ the counties will have to refer ISOs to the Utah State Hospital, which provides intensive, inpatient treatment.²⁸ Due to a decrease in state funding, the hospital recently reduced its capacity from 354 beds to 329 beds,²⁹ which are apportioned between pediatric, adult, and forensic patients—that is, those referred by the courts.³⁰

Between 2003 and 2004, the state involuntarily committed 562 people.³¹ The average person was committed for 108 days, with only 28 days in inpatient treatment before he or she was given a community placement.³² To make matters worse, the state admits it lost—that is, was unable to locate for follow-up—48 individuals, and around 65% of those absconded from community placement.³³ The amount of time the ISO will have in a secure facility is not long enough to protect the residents of the state, nor is it long enough to provide proper treatment, especially considering that future budget cuts may further reduce the hospital's capacity to house those who need inpatient treatment. The only way to protect potential victims is to keep ISOs off the streets until they are no longer a threat; the amended civil commitment statute will not do this.

Even if the state and counties have the resources necessary to house ISOs, the ISOs will probably not receive the treatment they need. Utah's amended civil commitment statute is only designed to sequester the ISO in order to protect society and does not provide for treatment as a precondition for release.³⁴ Utah already has a comprehensive program for convicted sex offenders that could easily be adapted to treat ISOs.³⁵ It is a personalized- and targeted-treatment program that lasts anywhere from six to eighteen months.³⁶ The goal of the program is to decrease recidivism and to control deviant sexual behavior.³⁷ It was designed to

²⁷ UTAH ASS'N OF CNTYS, *supra* note 23.

²⁸ See *Superintendent's Welcome Message*, UTAH STATE HOSP., <http://www.us.h.utah.gov/welcomemessage.htm> (last visited May. 20, 2012).

²⁹ DIV. OF SUBSTANCE ABUSE & MENTAL HEALTH, *supra* note 21, at 71.

³⁰ UTAH STATE HOSP., *supra* note 28.

³¹ UTAH DIV. OF SUBSTANCE ABUSE & MENTAL HEALTH, REPORT TO THE HEALTH AND HUMAN SERVICES INTERIM COMMITTEE ON DATA COLLECTED FROM THE COMMUNITY MENTAL HEALTH CENTERS CONCERNING GENERAL SESSION 2003 S.B. 27, SUSAN GALL INVOLUNTARY COMMITMENT 3 (2004), available at http://www.dsamh.utah.gov/docs/SB27_executivesummary.pdf (reporting the “possible effects of implementing” the Susan Gall Involuntary Commitment Act).

³² *Id.*

³³ *Id.* at 2–3.

³⁴ See H.B. 14, 59th Leg., Gen. Sess., 2012 Utah Laws ch. 248 (to be codified in UTAH CODE ANN. § 62A-15-602).

³⁵ UTAH DEP'T OF CORR. & UTAH COMM'N ON CRIMINAL & JUVENILE JUSTICE, SEX OFFENDER TREATMENT IN UTAH 7 (2010), available at <http://www.justice.utah.gov/Documents/Research/SexOffender/Sex%20offender%20treatment%20report%202010.pdf>.

³⁶ *Id.* at 2.

³⁷ *Id.* at 3.

treat the mentally ill and offenders who are cognitively, intellectually, and academically challenged.³⁸ The recidivism rate for offenders who have completed the program is less than half the recidivism rate for offenders who have not completed the program.³⁹ Additionally, between 1994 and 2001, only 0.5% of the program's completers had a new criminal conviction for a sexual offense within one year of release.⁴⁰ However, while the program seems successful in treating convicted sex offenders, ISOs are not getting similar treatment even though they need the treatment and continue to pose a risk to society.

Therefore, while the amended civil commitment statute may appear to solve the problems created by the Susan Gall Amendment,⁴¹ it is clear that it will not protect the public from recidivist ISOs due to lack of resources, nor will it provide ISOs with the treatment they desperately need to safely reintegrate into society. The whole point of civilly committing an ISO is to protect society from those who cannot or choose not to control themselves. Utah's civil commitment statute does not address these problems. Most involuntary commitment procedures are primarily intended to "provide short-term treatment to individuals with serious mental disorders and then return them to the community."⁴² The amendment may alleviate the fears of the community, but it does not protect future victims from recidivist sex offenders.

III. PROPOSED ISO STATUTE

Utah should adopt a separate civil commitment statute that will allow the state to commit recidivist ISOs. Utah's statute could be modeled after similar statutes passed in Kansas⁴³ and Washington,⁴⁴ except Utah's statute would not apply to convicted sex offenders who are about to be released from prison.⁴⁵ The ISO would be housed in a secure facility (probably the Utah State Hospital), would receive treatment, and would not be eligible for release until a court determines the ISO no longer poses a threat to society.

³⁸ *Id.*

³⁹ 19.5% for completers compared to 42.1% for non-completers. *Id.* at 10.

⁴⁰ *Id.*

⁴¹ S.B. 27, 55th Leg., Gen. Sess., 2003 Utah Laws ch. 303 (codified in UTAH CODE ANN. §§ 62A-15-103, -602, -631 (West 2004)).

⁴² D.A.H. v. Seattle Times Co., 924 P.2d 49, 50 (Wash. Ct. App. 1996).

⁴³ KAN. STAT. ANN. § 59-29a01 (2005).

⁴⁴ WASH. REV. CODE ANN. § 71.09.010 (West Supp. 2012).

⁴⁵ Utah's use of an indeterminate sentencing scheme means competent sexual offenders do not need to be included in the civil commitment process. In 1995, Utah passed an amendment to its sentencing requirements that gave judges more discretion in sentencing sex offenders and theoretically keeps recidivist sex offenders in prison for the rest of their lives. See Paul Eric Stuhff, Comment, *Utah's Children: Better Protected Than Most by New Civil Sex Offender Incapacitation Laws?*, 24 J. CONTEMP. L. 295, 313-14 (1998).

The ISO statute would solve many of the resource problems discussed above.⁴⁶ Funding would not be an issue because the program would be run by the state, which would alleviate the need for cash-strapped counties to bear the expense. Since the number of individuals who would be affected by the ISO statute is relatively small, Utah would not need to invest millions of dollars to build a large, new facility to house and treat ISOs.⁴⁷ Utah State Hospital could have a separate unit designated solely for these individuals—whether by adding new beds or reserving some that are already available. The facility would be secure and the ISO would not be eligible for community placement—thus removing all possibility for the ISO to abscond and create a risk of sexually assaulting new victims. The ISO statute would also allow the state to treat the ISO by using the treatment program currently used on convicted sex offenders. Completion of the program should be a condition for release.

SVP statutes have two purposes: “(1) to protect the public by sequestering the sexually dangerous person until such time as the individual is recovered and released, and (2) to subject the sexually dangerous person to treatment such that the individual may recover from the propensity to commit sexual offenses and be rehabilitated.”⁴⁸ Utah’s amended civil commitment statute does neither. The proposed statute would sequester the ISO and thereby protect the citizens of the state from those who cannot control their behavior. It would also allow the state to treat and hopefully rehabilitate the ISO. This period of confinement need not be a life sentence, but if the ISO is unable or unwilling to change, it would protect the public by keeping the ISO in a secure facility and away from potential victims.

Of course, incompetent individuals add an additional wrinkle to the process because the state must first prove the individual committed the act for which he was accused.⁴⁹ Therefore, a trial would be conducted similar to a criminal trial with the same rules of evidence and constitutional rights except the “right not to be tried while incompetent.”⁵⁰ If the court finds, beyond a reasonable doubt, that the individual did commit the charged act, the court would then decide the civil commitment issue.⁵¹

IV. CRITICISMS OF SVP STATUTES

Despite the United States Supreme Court’s approval, SVP statutes have garnered considerable opposition since their inception. Some opponents argue that future criminal propensity is difficult to predict—at least from an actuarial

⁴⁶ See *supra* Part II.

⁴⁷ Virginia spent sixty-two million dollars on a three-hundred-bed facility to house sex offenders committed under the state’s sexually violent predator statute. Bill Sizemore, *Cost of Sex Offender Program Shocks Lawmakers*, THE VIRGINIAN-PILOT (Jan. 15, 2011), <http://hamptonroads.com/2011/01/cost-sex-offender-program-shocks-law-makers>.

⁴⁸ *People v. McVeay*, 706 N.E.2d 539, 545 (Ill. App. Ct. 1999).

⁴⁹ *E.g.*, KAN. STAT. ANN. § 59-29a07(g) (2005).

⁵⁰ *Id.* § 59-29a07(g).

⁵¹ See *id.* § 59-29a07(g).

standpoint—and should not be used as a factor for incarceration, potentially for life.⁵² The United States Supreme Court stated in *Schall v. Martin*,⁵³ “from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions”⁵⁴ Therefore, predicting future dangerousness from past behavior is appropriate for those who have shown they have a difficult time controlling their sexual impulses.⁵⁵ It is reasonable to assume these individuals are more likely to attack someone in the future. “Involuntary civil commitment is justified in those cases in which a mental abnormality predisposes a person to dangerous conduct and the abnormality sufficiently compromises the person’s rationality and responsibility for such conduct.”⁵⁶

Another argument is that recidivism rates for sex offenders are actually lower than the recidivism rates of other offenders.⁵⁷ A report released by the United States Department of Justice in 1994 found that only 3.5% of sexual offenders were convicted of a new sex crime during the three-year period following the offenders’ release from prison.⁵⁸ At the state level, a survey of Washington state offenders found that “[a]fter five years, 15% of sex offenders return to prison for new offenses compared to 43% of offenders convicted of property crimes.”⁵⁹ These statistics may be misleading, however, because few victims of sexual abuse report the incident to the police.⁶⁰ A survey conducted by the California Coalition Against Sexual Assault found that “42% of the rape victims told no one about the

⁵² Leam A. Craig et al., *Risk Scales and Factors Predictive of Sexual Offence Recidivism*, 4 TRAUMA, VIOLENCE, & ABUSE 45, 65 (2003) (“The predictive accuracy among specific sexual reoffending actuarial risk assessments is limited.”).

⁵³ 467 U.S. 253 (1984).

⁵⁴ *Id.* at 278.

⁵⁵ *Minn. ex rel. Pearson v. Probate Court of Ramsey Cnty.*, 309 U.S. 270, 274 (1940).

⁵⁶ Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1036 (2002).

⁵⁷ See PATRICK A. LANGAN ET AL., U.S. DEP’T OF JUSTICE OFFICE OF JUSTICE PROGRAMS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 2 (2003), available at <http://www.bjs.gov/content/pub/pdf/rsorp94.pdf>.

⁵⁸ *Id.*

⁵⁹ SENTENCING GUIDELINES COMM’N, STATE OF WASH., SEX OFFENDER SENTENCING 1 (2004), available at http://www.hawaii.edu/hivandaids/Washington_Sex_Offender_Sentencing_Guidelines_Commission_2004.pdf.

⁶⁰ See Tifany Sharples, *Study: Most Child Abuse Goes Unreported*, TIME (Dec. 2, 2008), <http://www.time.com/time/health/article/0,8599,1863650,00.html> (estimating that as few as one in ten instances of abuse are confirmed by social services).

assault, and only 5% reported it to the police.”⁶¹ Another study suggests that 90% or more of sexual assault victims do not report the incident to the authorities.⁶²

The financial burdens placed on the state provide one of the strongest arguments against SVP statutes. The average annual cost per SVP in the United States in 2006 was \$97,000.⁶³ In contrast, the average annual cost per inmate for the Department of Corrections in the United States was \$25,994.⁶⁴ In other words, it is more than 3.5 times more expensive to house an SVP than to put the same person in prison. California spends on average \$166,000 per year per SVP⁶⁵ at a time when the state is facing a financial crisis.⁶⁶

While it is hard to refute that the costs of these programs are exorbitant and need to be kept to a minimum, nobody can deny that the cost to victims of sexual abuse and assault is great—both financially and emotionally. One survey found that 31% of female rape victims suffer from posttraumatic stress disorder, 30% suffer depression, and victims of sexual assault are more likely to seek mental health services.⁶⁷ Treating and counseling victims of sexual assault and abuse can cost billions of dollars.⁶⁸ It is estimated that it costs the victims and society between \$123,000 and \$141,000 for every victim of rape or child molestation.⁶⁹ By focusing solely on the costs the states incur to keep sex offenders off the streets, the opposition is losing sight of the amount states are saving by not having to treat the would-be victims of those who are locked away.

Furthermore, the number of individuals who would be subject to Utah’s ISO statute is relatively small. One reason why other states’ costs seem extremely high may be the number of individuals subject to the statutes. For instance, the cost of Virginia’s program has increased tenfold over the last eight years and is expected to reach \$32 million in 2012.⁷⁰ Part of the reason may be attributable to the state’s decision to increase the crimes eligible for consideration under the SVP statute

⁶¹ *Facts & Myths Concerning Sexual Assault*, SEXUAL ASSAULT & RELATIONSHIP ABUSE PREVENTION & SUPPORT AT STANFORD, <http://www.stanford.edu/group/svab/myths.shtml> (last updated 2006).

⁶² DEIRDRE M. D’ORAZIO ET AL., *THE CALIFORNIA SEXUALLY VIOLENT PREDATOR STATUTE: HISTORY, DESCRIPTION & AREAS FOR IMPROVEMENT* 11 (2009), available at <http://ccoso.org/papers/CCOSO%20SVP%20Paper.pdf>.

⁶³ *Id.* at 2.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Alan Greenblatt, *States Struggle to Control Sex Offender Costs*, NPR (May 28, 2010), <http://www.npr.org/templates/story/story.php?storyId=127220896> (“California’s budget shortfall currently stands at \$19 billion and the corrections budget is already under deep stress. The state is releasing 6,500 prisoners early this year in part to save money. California is under court order to release 40,000 prisoners over the next two years, and perhaps many more over three years, because of overcrowding.”).

⁶⁷ Mark A. Cohen & Ted R. Miller, *The Cost of Mental Healthcare for Victims of Crime*, 13 J. INTERPERSONAL VIOLENCE 93, 94 (1998).

⁶⁸ *Id.* at 101.

⁶⁹ D’ORAZIO ET AL., *supra* note 62, at 19.

⁷⁰ Sizemore, *supra* note 47.

from four to twenty-eight, in addition to allowing the commitment of first-time offenders.⁷¹ Utah's statute would only apply to incompetent individuals—who are theoretically few and far between. The state could keep costs down even more by only committing repeat offenders.

V. CONCLUSION

Amending Utah's civil commitment statute was an insufficient attempt by the legislature to protect the citizens of Utah. An ISO needs to be sequestered until such a time that he is no longer a threat to society. The state also needs to treat the individual's deviant sexual desires. The amended civil commitment statute will do neither of these things. The current system is inadequate to keep dangerous ISOs off the streets. These individuals tend to be confined for a short time and are ultimately returned to the community without receiving the treatment they need to control their behavior.

Utah needs to close the loophole that allows ISOs to be released by adopting a separate civil commitment statute. Utah should model its statute after similar statutes passed in Kansas and Washington, except Utah's statute should only apply to incompetent individuals who are unlikely to regain competency. This separate civil commitment procedure will ensure that the ISO is sequestered until such a time that he is no longer a threat to society. The state could house those committed under this statute at a secure facility, such as the Utah State Hospital. The state could then use the sex-offender-treatment program used on convicted sex offenders to treat the ISO.

While it is true that the number of individuals who would be subjected to the ISO statute is small, that is no reason to ignore the problem. Whether incompetent or not, an ISO inflicts incomprehensible harm on his victims. That harm is not lessened merely because the ISO is incompetent. As a matter of fact, the harm may be more substantial since the abuser is allowed to continue the abusive practices. Furthermore, the abuser has no reason to stop his abusive practice if he is not sequestered for the long term and given proper treatment. Allowing even one ISO to fall through the cracks is too large a price to pay, both for future victims and for society at large.

⁷¹ *Id.*