

COMBATTING THE SWATTING PROBLEM: THE NEED FOR A NEW CRIMINAL STATUTE TO ADDRESS A GROWING THREAT

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INTRODUCTION

A tired law student, John, has just arrived home and decides to start his weekend by playing a video game with his friends online.¹ John is having a great time until another person in his online gaming session gets angry at him for beating his team in a match.² John brushes off the person's comment and moves on to the next match.³ Just a few minutes later, however, he hears a series of loud bangs at his front door, followed by the police busting into his apartment.⁴ John is stunned as the police, dressed in military-like gear, draw their guns and order him to get down to the ground.⁵ John knows he has done nothing illegal and is naturally confused as to why the police have stormed into his apartment, but he quickly complies with the officers' orders.⁶ Eventually, things calm down, and the police inform John that they received a report of an ongoing hostage situation at his address, but the report was clearly false.⁷ The officers apologize for the

1. See PLAYSTATION.NETWORK, <https://www.playstation.com/en-ie/explore/playstation-network/> [<https://perma.cc/7ALU-3SL7>] (last visited Nov. 25, 2019) (discussing how video game consoles can connect to the Internet and allow individuals to play with other people no matter where someone is physically located); see also Patricia Hernandez, *What You Can Do Without a Paid PlayStation Plus Account on the PS4*, KOTAKU (Oct. 30, 2013), <https://kotaku.com/what-you-can-do-without-a-paid-playstation-plus-account-1455089775> [<https://perma.cc/Z6NU-JGZQ>] (explaining that today's PlayStation customers can directly communicate with other users via voice and text chat through the video game platform).

2. See, e.g., "SWATing" Prank Call Led to Officer-Involved Shooting, *Police Say*, CBS NEWS (Dec. 29, 2017), <https://www.cbsnews.com/news/andrew-finch-wichita-swating-death-call-of-duty-missouri/> [<https://perma.cc/K5WL-D6P8>] [hereinafter *Prank Call*] (discussing how one online video game—the action game *Call of Duty*—led to an online argument between two people).

3. See *Matchmaking*, GIANT BOMB, <https://www.giantbomb.com/matchmaking/3015-3334/> [<https://perma.cc/65BG-WJS8>] (last visited Nov. 25, 2019) (describing how video game players can more easily move to a new match against other players at their skill level through a process known as "matchmaking").

4. See *Don't Make the Call: The New Phenomenon of 'Swatting'*, FBI (Feb. 4, 2008), <https://archives.fbi.gov/archives/news/stories/2008/february/swatting020408> [<https://perma.cc/GN35-V4DL>] [hereinafter *New Phenomenon*] (describing how police often respond to swatting calls).

5. See *id.* (noting that police respond to these reports heavily armed).

6. See Matthew James Enzweiler, Comment, *Swatting Political Discourse: A Domestic Terrorism Threat*, 90 NOTRE DAME L. REV. 2001, 2006 (2015) (explaining police officers typically have an aggressive mindset when responding to these types of calls).

7. See *New Phenomenon*, *supra* note 4 (noting that swatting incidents are always false reports of emergency situations and that police officers are unaware these reports are false until after they respond).

intrusion and then leave.⁸ John glances at his television screen and notices a message on the screen saying that the person had called the police on John for revenge.⁹ It suddenly dawns on John that his ordeal was not an accident; the person John was playing video games against was hoping that police officers would rush to John's apartment.¹⁰

This hypothetical is an example of a growing problem facing society today often called "swatting."¹¹ Swatting, despite commonly starting out in the virtual world, has resulted in serious real-world consequences, including the death of an innocent person.¹² In order to hold swatting offenders responsible, new state-level criminal statutes are necessary because the current laws and academic proposals are insufficient to address the growing swatting problem facing society today.¹³ In light of this problem, the new statutes need to define swatting incidents, specify a recklessness standard for the mens rea element required for criminal acts, and recognize different levels of penalties depending on the amount of harm caused.¹⁴

8. Rebecca Trylch, 'Swatting' Call Leads Midland Police to Surround House with Guns Drawn, ABC12 (Jan. 19, 2018), <https://www.abc12.com/content/news/ONLY-ON-ABC12-Midland-mother-shares-details-of-swatting-incident-470191153.html> [<https://perma.cc/GQU7-GZ8S>] ("Police quickly determined no one needed help and left.")

9. See *Prank Call*, *supra* note 2 (reporting that anger over online video games led to a swatting incident).

10. See *id.* (explaining that hackers can manipulate electronic data to find personal information and then use that information to make false reports).

11. See *id.* (reporting an incident of the phenomenon that is widely referred to as swatting). The above hypothetical is similar to real swatting cases, including one case described in a law review article. See Nellie Veronika Binder, Comment, *From the Message Board to the Front Door: Addressing the Offline Consequences of Race- and Gender-Based Doxxing and Swatting*, 51 SUFFOLK U. L. REV. 55, 55 (2018) (describing a factually similar swatting incident not involving video games in her introduction).

12. See *Prank Call*, *supra* note 2 (reporting that an online swatting incident eventually led to a police shooting and killing an innocent person, Andrew Finch).

13. See, e.g., CAL. PENAL CODE § 148.3(a) (West 2014) (prohibiting false reports of emergencies but not specifically recognizing swatting); MICH. COMP. LAWS § 750.411a(1) (2019) (prohibiting false reports of crimes in progress but not specifically mentioning swatting); Enzweiler, *supra* note 6, at 2001 (calling for swatting to be classified as a form of domestic terrorism and noting the numerous elements required to obtain domestic terrorism convictions).

14. See generally, e.g., Adrienne Jeffries, *Meet 'Swatting,' the Dangerous Prank that Could Get Someone Killed*, THE VERGE (Apr. 23, 2013, 10:00 AM), <https://www.theverge.com/2013/4/23/4253014/swatting-911-prank-wont-stop-hackers-celebrities> [<https://perma.cc/BKZ8-XLFC>] (reporting a swatting incident involving a homeowner opening his door and seeing several officers pointing assault

This Comment examines how the nature of swatting incidents does not fit within existing criminal statutes.¹⁵ Part I of this Comment explains swatting and its history and growth in the United States.¹⁶ Part II discusses the current literature and laws on swatting.¹⁷ Lastly, Part III identifies the issues with current criminal laws and explains why a new criminal statute is necessary to properly address swatting incidents.¹⁸

I. THE HISTORY, METHOD, AND DANGER OF SWATTING

In order to propose a new solution to swatting, one must understand what swatting is, how it occurs, and the dangers posed by these false reports.¹⁹ Because swatting is a new phenomenon, no court decisions have discussed swatting incidents or analogous situations.²⁰ Thus, swatting incidents will be cases of first impression for appellate courts in the coming years.²¹ However, the existing scholarly literature

rifles at him); Trylch, *supra* note 8 (reporting a swatting incident in Michigan that resulted in officers surrounding homes with guns drawn).

15. See *infra* Part II (examining the current laws that have been used to prosecute offenders and noting the problems with stretching existing statutes to fit swatting incidents).

16. See *infra* Part I (explaining how swatting got its name, how swatting incidents occur, and the dangers that swatting poses to both victims and police officers).

17. See *infra* Part II (discussing the current legal academic literature and laws on swatting).

18. See *infra* Part III (analyzing the problems with current laws and proposing a new statute to ensure all swatting incidents can be prosecuted).

19. See *The Crime of 'Swatting': Fake 9-1-1 Calls Have Real Consequences*, FBI (Sept. 3, 2013), <https://www.fbi.gov/news/stories/the-crime-of-swatting-fake-9-1-1-calls-have-real-consequences1> [<https://perma.cc/E3HR-QP6S>] [hereinafter *Real Consequences*] (discussing how swatting occurs, the dangerous consequences of swatting, and possible motivations for people to making false emergency reports).

20. See *Ex parte Poe*, 491 S.W.3d 348, 352–53 (Tex. App. 2016) (noting that swatting exists in a case unrelated to swatting); see also Elizabeth M. Jaffe, *Swatting: The New Cyberbullying Frontier After Elonis v. United States*, 64 *DRAKE L. REV.* 455, 468 (2016) (noting the lack of court decisions on swatting). Due to the technology-based nature of swatting, the rise of swatting incidents is necessarily quite recent; however, people have made prank phone calls since the 1970s, if not earlier. See *New Phenomenon*, *supra* note 4 (explaining that swatting is a “new, much more serious twist” on the old crime known as “phone phreakers,” where some individuals hacked phone lines and made hoax long distance calls during the 1970s).

21. See *United States v. Davenport*, 935 F.2d 1223, 1232 (11th Cir. 1991) (discussing what cases of first impression are and explaining that these situations require courts to look to other related authorities).

and state laws on swatting provide a useful starting point for identifying the appropriate legal responses to swatting.²²

A. What Is Swatting?

Swatting is a term commonly used to describe hoax emergency reports in which the first responders are typically members of Special Weapons And Tactics (SWAT) teams.²³ While swatting commonly occurs because of phone calls people make over video game arguments, some swatting incidents have nothing to do with the offender or the victim playing video games.²⁴ The typical swatting incident involves a person, commonly referred to as the “swatter,” making a false call or report to emergency dispatchers, often after having a disagreement with the victim.²⁵ Because an emergency response is difficult to direct without a specific location to send the responding officers to, the swatter first needs to obtain the victim’s physical address.²⁶ A swatter can get a victim’s address through

22. See Online Safety Modernization Act of 2017, H.R. 3067, 115th Cong. (2017) (proposing the creation of a federal criminal law that specifically addresses swatting); see also Eric Brumfield, *Chapter 284: Deterring and Paying for Prank 911 Calls that Generate a Swat Team Response*, 45 MCGEORGE L. REV. 571, 575 (2013) (focusing on specific California statutes on swatting); Jaffe, *supra* note 20, at 456 (discussing how swatting applies in the context of cyberbullying laws).

23. See Brumfield, *supra* note 22, at 571, 575 (discussing that the term “swatting” comes from the fact that police typically deploy SWAT units in their response to these false reports); Patrica R. Recupero, *New Technologies, New Problems, New Laws*, 44 J. AM. PSYCHIATRY L. 322, 325 (2016) (discussing the origin of the term “swatting”).

24. See, e.g., Alan Duke, *Boy Admits ‘Swatting’ Ashton Kutcher, Justin Bieber*, CNN (Mar. 12, 2013), <https://www.cnn.com/2013/03/11/showbiz/kutcher-swatting-conviction/index.html> [<https://perma.cc/WNR5-N5L7>] (reporting that celebrities have also been targeted in swatting incidents unrelated to video games). In this incident, a twelve-year-old boy made false emergency calls stating that people had been shot in Ashton Kutcher’s home, causing “dozens” of officers to enter the home, only to find that the situation was calm and quiet. See *id.* (discussing the officers’ response to the false report).

25. See Jamie Ducharme, *Swatting Led to an Innocent Man’s Death in Kansas. Here’s What to Know About It*, TIME (Dec. 31, 2017), <http://time.com/5082806/what-is-swatting-tyler-barriss-troy-livingston/> [<https://perma.cc/9N7F-VWR3>] (referring to people who make false reports as “swatters”); *Real Consequences*, *supra* note 19 (discussing the process of making a false call to emergency services). In this Comment, the term “swatter” will be used to discuss the person who makes a false report.

26. See Bryn Lovitt, *Why Would Someone Call a SWAT Team on a Stranger?*, ROLLING STONE (Jan. 5, 2018, 11:26 PM), <https://www.rollingstone.com/culture/culture-news/why-would-someone-call-a-swat-team->

methods ranging from a simple Google search to more complex Internet Protocol (IP) address tracking and hacking.²⁷

Once the swatter has the victim's address and calls an emergency dispatcher, the swatter will claim that a serious situation is underway that warrants an immediate police response, such as an active shooter inside a house.²⁸ To add to their credibility, more sophisticated swatters will use additional technology to "spoof" their location.²⁹ For example, this technology could allow a caller from San Diego, California, to make it appear to the police dispatcher that the swatter is calling from East Lansing, Michigan.³⁰ Because the police department's job is to protect the public, officers naturally feel compelled to respond to these incidents to resolve the reported threat.³¹ Responding officers are often heavily armed and expect the worst—swatting calls are never about routine complaints of minor offenses

on-a-stranger-128920/ [https://perma.cc/3JA2-553J] (discussing that one of the main elements of a swatting incident is the offender making a report about a serious crime in progress at a specific physical location, such as an apartment).

27. See P.J. Vogt & Alex Goldman, *How Not to Get Swatted*, DIGG (Mar. 11, 2015, 9:28 AM), <http://digg.com/2015/how-not-to-get-swatted> [https://perma.cc/T8PS-V767] (discussing how swatters can sometimes find their target's physical address by performing a google search, while others have the technical ability to find the victim's Internet Protocol (IP) address and use that information to approximate the victim's real physical location); *id.* (implying that a swatter does not have to be a computer expert in order to pull off a convincing swatting report).

28. See *Ex parte Poe*, 491 S.W.3d 348, 352–53 (Tex. App. 2016) (briefly discussing a party's description of a typical swatting incident); *New Phenomenon*, *supra* note 4 (discussing the typical ways in which swatters try to trigger a police response).

29. See Brumfield, *supra* note 22, at 572 (explaining that some swatters use "spoofing" technology); Lovitt, *supra* note 26 (discussing the technology known as "spoof[ing]," which allows a person to appear to emergency dispatcher's caller identification systems as if they are in an entirely different geographic location).

30. See Alicia Hatfield, *Phoney Business: Successful Caller ID Spoofing Regulation Requires More Than the Truth in Caller Act of 2009*, 19 J.L. & POL'Y 827, 828 (2011) (discussing how spoofing technology can trick others into thinking a call is coming from a desired location); Lovitt, *supra* note 26 (explaining that swatters will use spoofing technology to make it appear to emergency dispatchers that they are calling from the same city that the victim lives in, even though they may live across the state or even the country).

31. See *State v. Frankel*, 775 A.2d 665, 670 (N.J. Super. Ct. App. Div. 2001) (agreeing that 911 reports justify emergency police responses); *New Phenomenon*, *supra* note 4 (explaining that swatting incidents cause police officers to believe a serious crime is in progress and that their help is needed immediately).

like noise violations because those situations would never trigger an emergency response.³²

After the officers have learned of a purported emergency and launched their response, they will attempt to arrive at the location, often a house or apartment, as soon possible.³³ The soon-to-be victims often have no idea that the police officers are coming to their address.³⁴ Upon arrival at the reported address, some officers, believing an emergency exists, will immediately enter the house or apartment.³⁵ Other police departments use a more cautious approach but will still have multiple officers point their assault rifles at the victim's front door, waiting for an unsuspecting person to open it.³⁶

Once police make contact with the resident, the initial interaction is often tense, if not outright hostile.³⁷ However, if both parties remain calm, officers are often able to determine that no violent or emergency situation exists, so the incident is quickly resolved.³⁸ The police leave, and the victim is left to deal with the aftermath.³⁹ The officers may then make an investigation into the matter if they have the time and resources to track down the caller.⁴⁰ Tracking the caller down is sometimes easy because the swatter will make a public social media

32. See Enzweiler, *supra* note 6, at 2003 (noting the aggressive response of police officers to emergency reports); *New Phenomenon*, *supra* note 4 (discussing how officers often respond with a SWAT team, which includes fully automatic assault rifles and tactical gear, among other equipment).

33. See *New Phenomenon*, *supra* note 4 (describing how law enforcement personnel usually rush to the scene of a swatting incident on high alert).

34. See Jeffries, *supra* note 14 (reporting an example of journalist Brian Krebs, who was making dinner in his house when he suddenly was faced with “around [ten] to [twelve] police officers” approaching his front door).

35. See Duke, *supra* note 24 (reporting that officers “rushed to [Ashton] Kutcher’s home . . . only to find workers inside and no emergency”).

36. See Jeffries, *supra* note 14 (reporting that officers approached the homeowner’s front door and ordered the homeowner to come outside).

37. See *id.* (reporting at least ten officers pointed assault rifles at the homeowner and shouted at him to freeze and keep his hands in the air).

38. See *id.* (reporting the homeowner, who had been previously threatened with swatting, had “[f]ortunately . . . realized immediately” that this situation was a swatting incident and was able to diffuse the encounter with the officers).

39. See Trylch, *supra* note 8 (reporting that the officers determined the report was a swatting incident because no crime had occurred or was in progress and promptly left the scene).

40. See *Police Investigate ‘Swatting’ Incident in Watertown*, WWNYSV (Aug. 20, 2018, 5:29 PM), <https://web.archive.org/web/20180820231757/http://www.wwnyt.com/story/38922950/police-investigate-swatting-incident-in-watertown> [<https://perma.cc/PDP4-BXST>] (reporting that the police department was pursuing leads while investigating a local swatting incident).

post bragging about what he or she has done.⁴¹ Unfortunately, not every case is as simple because some swatters are able to conceal their identities and phone numbers, requiring police to attempt to track down the offender.⁴² According to the FBI, around 400 swatting incidents occur every year.⁴³ The increase in these incidents has caused authorities and other individuals to search for the motivations behind swatting.⁴⁴

The FBI believes that most swatting incidents are committed by serial offenders who either want revenge on someone who disrespected them online or because they believe that swatting is a funny prank to pull on someone.⁴⁵ However, Tyler Barriss, who has admitted to multiple swatting incidents, claims he does not have a reason for making swatting reports.⁴⁶ Thus, people who study swatting do not agree on a single, well-defined motivation for swatting, but the dangers of swatting are nonetheless real.⁴⁷

B. Why Should People Care About Swatting?

Due to the typical nature of a swatting incident, every report and ensuing police response poses multiple risks; an obvious one is

41. See Lovitt, *supra* note 26 (discussing how some swatters will “[m]orally . . . turn to social media to brag” about their actions).

42. See *Real Consequences*, *supra* note 19 (quoting an FBI agent who stated that “we continue to refine our technological capabilities and our investigative techniques to stop the thoughtless individuals who commit these [swatting] crimes”).

43. See Jeffries, *supra* note 14 (discussing a conversation with an FBI spokesperson who mentioned that although the FBI does not currently possess a formal tracking system for swatting incidents, the information it received allows them to estimate that around 400 incidents occur annually).

44. See, e.g., Callie H. Burt & Ronald L. Simons, *Self-Control, Thrill Seeking, and Crime: Motivation Matters*, 40 CRIM. JUST. & BEHAV. 1326, 1333 (2013) (discussing the numerous different theories of why individuals commit crimes and noting criminals do have some kind of motivation driving their behavior).

45. See *Real Consequences*, *supra* note 19 (stating that swatters “either want to brag about their swatting exploits or exact revenge on someone who angered them online”).

46. See Leanne Suter, *Kansas Fatal Swatting Suspect Tyler Barriss Opens Up in Jail Interview*, ABC7 (Jan. 14, 2018), <https://abc7.com/la-swatting-suspect-opens-up-in-jail-interview/2941562/> [<https://perma.cc/237M-B9JM>] (quoting Barriss in the interview: “There [was] no motivation. I [did not just] get bored and decide to make a [swatting] call.”).

47. Compare *Real Consequences*, *supra* note 19 (discussing the motivation for dangerous swatting acts as revenge or bragging rights), with Suter, *supra* note 46 (reporting a swatter who claims he simply had no motivation for swatting).

physical danger to the victims.⁴⁸ Officers arrive on the scene already on edge due to the nature of the crime they believe they are about to encounter, while the victims have no idea what is coming.⁴⁹ The officers are often heavily armed and part of a group trained to react quickly.⁵⁰ The victim is just one wrong move away from being shot by the officers.⁵¹ While only one reported swatting incident has involved a fatality, even one death demonstrates the seriousness of these incidents.⁵²

The reality that a swatting incident can cause an innocent person to be killed is exemplified by an incident that occurred in 2017 in Kansas City, Missouri, where Andrew Finch died after police shot him in the confusion caused by a false 911 report.⁵³ The 911 report indicated that there was a hostage situation inside Finch's home, and the police immediately responded.⁵⁴ Finch heard the police arrive and opened his front door.⁵⁵ The officers later stated they saw Finch reaching for his waistband, causing the officers to shoot him because they feared he was reaching for a weapon.⁵⁶ The swatter, Tyler Barriss, was caught and charged with involuntary manslaughter, interference with law enforcement, and false alarm.⁵⁷ Barriss was originally

48. See Suter, *supra* note 46 (highlighting a typical swatting incident).

49. See *Real Consequences*, *supra* note 19 (“‘People who make these swatting calls are very credible,’ [FBI Special Agent Kevin Kolbye] said. ‘They have no trouble convincing 9-1-1 operators they are telling the truth.’”); see also Jeffries, *supra* note 14 (reporting that the homeowner was just making dinner in his house and was surprised when the officers showed up at his front door).

50. See Enzweiler, *supra* note 6, at 2003 (noting the tense situations that swatting reports create); *New Phenomenon*, *supra* note 4 (discussing the typical responses to swatting incidents, which involve emergency response teams of officers who carry “assault rifles”).

51. See *New Phenomenon*, *supra* note 4 (discussing an example of a swatting response that resulted in police officers pointing “assault rifles . . . directly at” the victim who had picked up a knife because he thought an intruder was breaking into his house and noting that the situation could have easily resulted in the officers shooting the victim).

52. See *Prank Call*, *supra* note 2 (reporting that a man was killed by police responding to a swatting incident).

53. See *id.* (reporting that the officers shot Mr. Finch because the officers feared he was reaching for a weapon).

54. See *id.*

55. See *id.*

56. See *id.*

57. See James Queally & Richard Winton, *L.A. ‘Swatting’ Suspect Charged with Manslaughter in Kansas Over Hoax Call that Led to Fatal Police Shooting*, L.A. TIMES (Jan. 12, 2018), <http://www.latimes.com/local/lanow/la-me-ln-kansas-swatting-20180112-story.html> [<https://perma.cc/WD9A-FWCU>] (explaining the local prosecutor's response to this incident).

scheduled for trial on the state charges in March 2019.⁵⁸ The federal government also charged Barriss for his conduct in this tragedy, which he has recently pleaded guilty to.⁵⁹ After Kansas prosecutors learned of Barriss's federal plea agreement, they dropped all state charges.⁶⁰

The local prosecutor's office cleared the responding officers of any criminal wrongdoing.⁶¹ However, the victim's family is suing the officers and the department, claiming the officers used excessive force and the department failed to properly train its officers.⁶² While the Finch tragedy is the most serious incident regarding swatting to date, numerous other cases around the country have nearly resulted in, or have actually caused, injuries to victims.⁶³

58. See Lily Wu, *Mother of Andrew Finch Demands Answers After Deadly Swatting Call*, KAKE NEWS (Dec. 18, 2018), <http://www.kake.com/story/39664343/mother-of-andrew-finch-demands-answers-after-deadly-swatting-call> [<https://perma.cc/N725-CLLK>] (discussing the current status of the state charges against Barriss).

59. See Plea Agreement at 4–5, *United States v. Barriss*, No. 18-10154-01-EFM (D. Kan. Nov. 13, 2018) (discussing the federal charges—including providing false information about an explosive device, making threats to injure in interstate commerce, and other charges—to which Barriss had pleaded guilty); *The Latest: Kansas Dropping Charges After Sentencing*, AP (Mar. 29, 2019), <https://www.apnews.com/c9dee1d2218541fbab8df8ec25fc5ca3> [<https://perma.cc/L44D-ZHHY>] (reporting Barriss's sentence of twenty years in prison for his actions and Kansas prosecutors dropping the pending involuntary manslaughter charge).

60. See *The Latest: Kansas Dropping Charges After Sentencing*, *supra* note 59 (“Kansas authorities are dropping involuntary manslaughter and other state charges against a California man who was sentenced in federal court to 20 years in prison for a hoax emergency call that led to a Wichita man’s death.”).

61. See Dakin Adone & Keith Allen, *Officer Won’t Face Charges in Kansas Swatting Death*, CNN (Apr. 13, 2018), <https://www.cnn.com/2018/04/13/us/police-no-charges-swatting-death/index.html> [<https://perma.cc/JR46-MHJN>] (reporting the prosecutor concluded that the officers acted reasonably in their decision to use deadly force).

62. See Ray Sanchez, *Family of Man in ‘Swatting’ Death Sues City of Wichita and Police*, CNN (Jan. 23, 2018), <https://www.cnn.com/2018/01/23/us/kansas-police-shooting-swatting-lawsuit/index.html> [<https://perma.cc/357K-VRD9>] (reporting Mr. Finch’s family had filed a civil rights lawsuit against the city and police department of Wichita).

63. See, e.g., Press Release, DOJ, *Catonsville Man Pleads Guilty to Conspiracy in “Swatting” Incident* (Nov. 7, 2017) [hereinafter *Catonsville Man Pleads Guilty*] (on file with the Department of Justice U.S. Attorney’s Office for the District of Maryland), <https://www.justice.gov/usao-md/pr/catonsville-man-pleads-guilty-conspiracy-swatting-incident> [<https://perma.cc/AEG4-QUNC>] (discussing a swatter’s guilty plea to conspiracy to commit a terrorism hoax charge after his false report resulted in the responding officers shooting and wounding an innocent person with rubber bullets); Loureen Ayyoub & Lauren Botchan, *Texas Family Targeted in ‘Swatting’ Prank*, ABC NEWS (May 16, 2018), <https://abcnews.go.com/US/News/>

In addition to the danger posed to the victims, the responding officers are at risk of a homeowner mistaking the officers for intruders or criminals.⁶⁴ A recent example, while not a swatting incident, highlights the realistic threat officers face in these situations.⁶⁵ In Maryland, an apartment resident shot and wounded two police officers who entered his apartment.⁶⁶ The police arrived at his apartment complex to serve a search warrant on a unit that the officers suspected belonged to a dangerous drug dealer.⁶⁷ The officers announced their presence but received no response, so they forcibly entered the apartment.⁶⁸ This entry startled the resident, who fired his shotgun at the officers because he believed intruders were breaking into his home.⁶⁹ The resident then realized the individuals were police officers and dropped his weapon.⁷⁰ In the ensuing investigation, the police determined that the officers had gotten the wrong address for the search warrant and had broken into an innocent person's apartment.⁷¹ The police chief decided not to pursue charges against the resident.⁷² This example shows what can happen when the police show up at an

texas-family-targeted-swatting-prank/story?id=55206749 [https://perma.cc/5W6E-7SRH] (reporting on a false active shooter report that resulted in fifteen officers responding to the scene which was resolved without injuries); Trylch, *supra* note 8 (reporting on a false hostage report in Michigan that occurred after an online gaming disagreement, which the police diffused through careful action).

64. See *New Phenomenon*, *supra* note 4 (discussing a swatting incident where the victim, thinking the officers were actually intruders because he had no reason to think armed men would be at his residence, picked up a kitchen knife and confronted the men). The homeowner, apparently recognizing that the men were police officers in time, did not make any attempts to attack the officers, but injury to either party could have resulted if the homeowner had not realized this fact in time. *See id.* (noting the confrontation could have quickly escalated to physical violence).

65. See Jack Pointer, *2 Prince George's Co. Officers Shot After Warrant Served at Wrong Home: Police Chief*, WASH.'S TOP NEWS (Sept. 20, 2018), <https://wtop.com/prince-georges-county/2018/09/prince-georges-chief-on-shooting-warrant-was-served-at-wrong-address/> [https://perma.cc/D2QY-39L2] (reporting that a resident shot a police officer who suddenly entered his apartment).

66. *See id.* (reporting that one officer received outpatient treatment, while another officer needed surgery on his arm).

67. *See id.*

68. *See id.* (reporting that it later appeared the man had been asleep and did not hear the knock on his door).

69. *See id.*

70. *See id.*

71. *See id.* (reporting the police chief admitted that the officers made a mistake in their investigation, which caused the officers to get a search warrant for the wrong address).

72. *See id.*

unsuspecting person's residence and is analogous to police responses in swatting cases.⁷³

While conflicts between residents and police officers are an obvious danger, the fact that officers often respond to emergencies by driving at high speeds creates another danger.⁷⁴ Since swatting involves reports of emergency situations, police feel compelled to respond as quickly as possible.⁷⁵ Thus, a swatter starts a chain of events that leads to police driving at high speeds to get to the reported location; the high speeds then create unnecessarily heightened risks of officers getting into automobile accidents and hurting themselves or other motorists.⁷⁶

One last example of the dangers that swatting poses is wasted time and police resources.⁷⁷ One estimate by the FBI comes from an investigation of a small group of swatters in the Dallas FBI field office area.⁷⁸ This investigation found that local swatting incidents between 2002 and 2006 alone resulted in over \$250,000 in wasted emergency response deployments.⁷⁹ In addition, while the SWAT team is engaged in the response to the swatting call, the police will be delayed in responding to a real emergency should one occur during that same time.⁸⁰ Thus, swatting poses numerous dangers.⁸¹

73. See *id.* (discussing that an innocent person will be surprised by police officers showing up and take action to defend him or herself from what the individual has perceived as a threat to his or her safety).

74. See Hongwei Hsiao et al., *Preventing Emergency Vehicle Crashes: Status and Challenges of Human Factors Issues*, 60 HUM. FACTORS 1048, 1049 (2018) (explaining that when officers receive reports of emergencies, they will typically respond in their automobiles and drive at high rates of speed to reduce response times).

75. See *New Phenomenon*, *supra* note 4 (discussing that officers often believe they are responding to real emergencies and attempt to get to the reported crime scene as soon as possible).

76. See Hsiao et al., *supra* note 74, at 1049 (discussing that driving under emergency conditions adds additional stress and leads to higher risk of crashes).

77. See Brumfield, *supra* note 22, at 577 (discussing the problem swatting causes in wasting public agency funds); *New Phenomenon*, *supra* note 4 (discussing that swatting calls, which are false emergencies, cause police departments to spend unnecessary resources).

78. See *New Phenomenon*, *supra* note 4 (discussing an investigation into the resources swatting reports waste).

79. See *id.* (discussing a particular FBI investigation into five swatters who had made repeated calls across multiple states).

80. See Binder, *supra* note 11, at 60 (discussing the divergence of police officers from real emergencies); *New Phenomenon*, *supra* note 4 (noting that officers responding to false swatting calls are taken "away from real emergencies").

81. See Hsiao et al., *supra* note 74, at 1050 (discussing the heightened risk of injury to both officers and the general public during emergency police vehicle

Swatting poses threats to victims, to police, and to the general public.⁸² In recognition of the growing dangers that swatting causes, a few legal scholars have proposed solutions.⁸³ In addition, a few states have introduced new legislation designed to target false emergency reports.⁸⁴

II. THE RESPONSE TO SWATTING SO FAR

While swatting is a relatively new concept, knowledge of the problem is not confined to just technology-savvy individuals or obscure Internet bloggers.⁸⁵ Many people acknowledge that the swatting issue exists, and multiple individuals have attempted to explore this issue or propose solutions.⁸⁶ In the legal field, responses have come from prosecutors, academics, and legislatures.⁸⁷

A. Categorizing Swatting Under General Criminal Laws

Some prosecutors have brought charges against swatters under existing statutes.⁸⁸ Additionally, some scholars have argued that

responses); *New Phenomenon*, *supra* note 4 (discussing wasted time and police resources); Pointer, *supra* note 65 (discussing the dangers officers face when responding to wrong addresses); Wu, *supra* note 58 (discussing the dangers victims face when police arrive at their residence).

82. See discussion *supra* Section I.B (discussing the ways in which swatting threatens different individuals).

83. See, e.g., Enzweiler, *supra* note 6, at 2004 (“Part IV concludes with the argument that . . . swatting should in fact be classified as an act of domestic terrorism when used to intimidate political adversaries or coerce advocates of a particular viewpoint to withdraw from participation in political discourse.”); Jaffe, *supra* note 20, at 483 (stating that “there is a necessity for the enactment of new laws to address swatting”).

84. See, e.g., CAL. PENAL CODE § 148.3(a) (West 2014) (criminalizing false reports of emergencies); MICH. COMP. LAWS § 750.411a(1) (2019) (prohibiting false emergency reports of crimes).

85. See, e.g., Ducharme, *supra* note 25 (discussing the swatting problem in the news outlet *Time*).

86. See generally Jaffe, *supra* note 20 (discussing the issue of swatting in the context of cyberbullying).

87. See generally § 148.3(a) (providing an example of a government response to swatting by passing a new statute); Jaffe, *supra* note 20 (providing an example of an academic response to swatting).

88. See, e.g., Plea Agreement, *supra* note 59, at 4–5 (reporting a federal conviction for a swatter who the prosecutor had charged with violations of existing federal laws).

swatting can be classified under current criminal laws.⁸⁹ However, even those individuals who think that swatting can be prosecuted under existing laws disagree as to which laws should be used in swatting cases.⁹⁰

Because no federal law currently addresses swatting, no federal cases squarely address legal issues on the swatting problem.⁹¹ However, one federal prosecutor has gone after swatters despite the lack of a specific statute on swatting.⁹² In a recent case, Zachary Lee and Robert Walker-McDaid conspired to place a false call to have someone's house swatted.⁹³ Their plot was successful and caused a swatting incident at their intended victim's home.⁹⁴ Law enforcement was able to track the offenders down and arrest them.⁹⁵ The prosecutor then obtained an indictment against the defendants on federal false information and hoax charges as well as conspiracy charges.⁹⁶ The hoax statute prohibits false reports of crimes but only applies to a narrow range of conduct that is specifically prohibited by other federal statutes, such as making a bomb threat relating to interstate

89. See generally Enzweiler, *supra* note 6 (arguing that swatting can be treated under domestic terrorism laws).

90. See Jaffe, *supra* note 20, at 468 (discussing how prosecutors have used statutes ranging from witness interference to conspiracy to commit device fraud to prosecute swatting cases and highlighting significant legal problems with using existing statutes for swatting incidents).

91. See Online Safety Modernization Act of 2017, H.R. 3067, 115th Cong. (2017) (proposing to create a federal law against swatting); see also Jaffe, *supra* note 20, at 468 (noting that no federal laws directly match the nature of swatting incidents).

92. See Catonsville Man Pleads Guilty, *supra* note 63 (reporting that the prosecutor had charged a swatter with existing criminal violations under federal law).

93. See *id.* (describing that one defendant told the other, "I have someone I need sw@tted").

94. See *id.* (describing how over forty police officers responded to the swatting call because the officers were expecting to find a very serious crime in progress at the reported residence).

95. See *id.* (noting that local and federal law enforcement worked together to track down the offenders).

96. See Indictment at 1, 5, United States v. Lee, No. 1:17-CR-00013 (D. Md. Jan 11, 2017) (discussing the violations of existing statutes that the defendants admitted to violating).

commerce.⁹⁷ Lee pleaded guilty to the conspiracy and hoax charges.⁹⁸ He was sentenced to the maximum term under his plea agreement, which was two years of incarceration followed by three years of probation.⁹⁹

At the state level, the Andrew Finch swatting death drew widespread attention.¹⁰⁰ The local prosecutor in that case charged the defendant with offenses including manslaughter and false alarm after a swatting prank led to the victim's death.¹⁰¹ However, the local prosecutor ultimately dismissed the state charges, so there is no way to know if the prosecutor would have been able to obtain a conviction against the swatter at trial.¹⁰²

Prosecutors are not the only ones who have looked to current laws to deal with swatting; one scholar suggests that swatting is a form of domestic terrorism and should be prosecuted under existing terrorism statutes.¹⁰³ Instead of taking a general approach to swatting, the scholar specifically argues that swatting is a “[w]eapon in [p]olitical [d]ebate.”¹⁰⁴ To support this argument, he explains that some individuals commit swatting acts because the swatters have

97. See 18 U.S.C §§ 842, 922, 1038 (2018) (prohibiting acts involving the use of explosives and certain acts involving the use of firearms and limiting the scope of the statute to conduct that violates other specified portions of federal law); Catonsville Man Pleads Guilty, *supra* note 63 (asserting that the defendant's conduct in this case violated these statutes).

98. See Catonsville Man Pleads Guilty, *supra* note 63 (describing the offenses prosecutors used to charge Lee and noting he faced up to two years in prison under the plea agreement).

99. See Tyler Waldman, *Catonsville Man Sentenced in 'Swatting' Incident*, WBAL NEWS RADIO (Jan. 18, 2018), <http://www.wbal.com/article/288849/3/catonsville-man-sentenced-in-swatting-incident> [<https://perma.cc/95QN-ATWD>] (reporting that the court accepted Lee's guilty plea to the charges and rendered the maximum permissible sentence under the agreement). Robert Walker-McDaid, Lee's co-conspirator, is also being pursued by federal prosecutors, but he is a resident of the United Kingdom and needs to be brought to the United States. See Catonsville Man Pleads Guilty, *supra* note 63 (“Walker-McDaid has been arrested in the United Kingdom and is currently in extradition proceedings.”). The current status of Walker-McDaid's extradition hearings is unknown.

100. See Queally & Winton, *supra* note 57 (discussing the Andrew Finch swatting incident); *supra* Part I (discussing the Andrew Finch swatting incident).

101. See Wu, *supra* note 58 (noting the charges that the defendant is facing).

102. See *The Latest: Kansas Dropping Charges After Sentencing*, *supra* note 59 (reporting that Kansas officials have dropped all charges against Barriss after learning of his federal plea agreement for the same incident).

103. See Enzweiler, *supra* note 6, at 2001 (discussing and exploring a potential solution to swatting).

104. See *id.* at 2008; see also *id.* at 2038 (“[A]cts of swatting should be properly branded as domestic terrorism . . .”).

political disagreements with the victims.¹⁰⁵ The author goes on to explain the elements of domestic terrorism and applies each element to swatting incidents to show how domestic terrorism laws could apply to swatting.¹⁰⁶ He asserts that classifying swatting as a domestic terrorism crime could have a beneficial impact on swatting cases by providing stronger punishments for violations, which may also deter future incidents.¹⁰⁷ The author acknowledges that not all swatting incidents would qualify as domestic terrorism because of the number of required elements as well as the specific motivations needed to prove domestic terrorism.¹⁰⁸ His article thus leaves open ways to treat swatting incidents, especially incidents that would not qualify as domestic terrorism.¹⁰⁹

B. Categorizing Swatting as Its Own Crime

Some legislatures have recognized the swatting problem and responded through new statutes and bills targeting the problem.¹¹⁰ Some scholars have also identified the need for new specific swatting laws.¹¹¹ However, despite the general agreement that new swatting laws are necessary, states and scholars disagree over what swatting laws should look like.¹¹²

Professor Elizabeth Jaffe focuses on swatting as a type of cyberbullying issue.¹¹³ Cyberbullying is a type of harassment that

105. *See id.* at 2027 (discussing the political nature of swatting incidents).

106. *See id.*

107. *See id.* at 2026, 2036–38 (discussing the definitions of domestic terrorism and positing that many swatting incidents can be said to fall within domestic terrorism statutes).

108. *See id.* at 2037 (“[C]ertainly not every instance of swatting merits treatment as an act of terrorism . . .”).

109. *See id.* (analyzing swatting cases as treated under domestic terrorism statutes).

110. *See, e.g.*, LA. STAT. ANN. § 14:126.1.1(A) (2018) (prohibiting swatting); Jaffe, *supra* note 20, at 467–68 (noting some jurisdictions have passed or proposed laws on swatting).

111. *See, e.g.*, Binder, *supra* note 11, at 69 (calling for new federal laws on swatting).

112. *Compare* OR. REV. STAT. § 162.375(1) (2018) (treating swatting cases as misdemeanor offenses), *with* MICH. COMP. LAWS § 750.411a(1)(a)–(e) (2019) (providing multiple levels of penalties for swatting offenses, including felonies punishable by up to fifteen years of imprisonment).

113. *See* Jaffe, *supra* note 20, at 470 (discussing the issue of swatting in the age of other technological crimes).

occurs over an electronic medium.¹¹⁴ Her article centers on a recent Supreme Court cyberbullying case *Elonis v. United States*.¹¹⁵ This case involved a defendant who made posts on Facebook about harming his ex-wife and FBI agents.¹¹⁶ The defendant tried to defend himself by claiming his post was merely fictional and he was never actually going to carry out his threats.¹¹⁷ The defendant was convicted under a federal threat statute.¹¹⁸ He challenged his conviction by arguing he did not intend his statements to be threats.¹¹⁹ The Supreme Court agreed, holding that a person must either intend a threat or actually know his or her language will be seen as a threat in order for the speech to constitute a violation of the statute.¹²⁰ Jaffe then applies the *Elonis* decision to swatting cases, asserting that swatters can avoid violating existing statutes by arguing that they did not mean to do anything more than play a “prank” on the victim.¹²¹ Jaffe offers a solution to the intent problem by suggesting that courts should look to both the intent of the defendant’s words combined with other circumstances, such as who the threats were made to.¹²² She concludes her article by opining how the Court’s decision could create significant problems with future swatting cases brought under current laws, so new laws are needed to properly address the swatting phenomenon.¹²³

George Washington Law graduate Lisa Li also argues that current laws do not properly address swatting.¹²⁴ She calls for a federal solution to the problem, noting that multiple legislators have proposed

114. *See id.* at 463 (“[T]he cyberbully will use any form of technology to cause harm to the intended victim, and cyberbullying can take place anytime the cyberbully posts something that is seen and conveyed to the victim.”).

115. 135 S. Ct. 2001 (2015). *See generally* Jaffe, *supra* note 20 (discussing the world of cyberbullying following the decision in *Elonis v. United States*).

116. *See Elonis*, 135 S. Ct. at 2002.

117. *See id.* at 2004–05.

118. *See id.* at 2004 (discussing the federal threat statute, 18 U.S.C. § 875(c), the defendant was charged under).

119. *See id.*

120. *See id.*

121. *See* Jaffe, *supra* note 20, at 478–79 (noting the Court applied a specific intent standard even though the statute seems to be based only on a general intent standard).

122. *Id.* at 479 (“Perhaps the courts need to develop a test whereby intent is found in the spoken or written word in conjunction with the surrounding circumstances of the speaker and target audience.”).

123. *Id.* at 483 (“As a new form of cyberbullying, there is a necessity for the enactment of new laws to address swatting.”).

124. *See* Lisa Bei Li, *Data Privacy in the Cyber Age: Recommendations for Regulating Doxing and Swatting*, 70 FED. COMM. L.J. 317, 319 (2018) (discussing the need for new laws on swatting).

federal swatting bills.¹²⁵ However, she notes that no federal law specifically prohibits swatting.¹²⁶ She also suggests amending the federal obstruction of justice statute to include language that could cover swatting, such as phrases about electronic communications.¹²⁷

Law student Nellie Binder calls for new swatting laws but believes the laws need to be designed with women and minority victims in mind.¹²⁸ She discusses swatting primarily in the context of another concept known as “doxxing,” which involves releasing personal information about someone over the Internet without his or her consent.¹²⁹ She argues that many individuals commit both swatting and doxxing based on gender and race-based discrimination and that women and minorities are targeted more often than average.¹³⁰ Like Li, Binder explores proposed federal legislation, including multiple federal swatting bills, but mainly focuses on how these laws could protect victims’ rights with regard to their personal information.¹³¹ She does not propose any other new laws or solutions to the swatting problem in general; rather, she argues that the current proposals will increase accountability for offenders, address race- and gender-based harassment, and allow law enforcement to be more effective in combating harassment.¹³² She leaves open other solutions on how to handle swatting cases.¹³³

125. See *id.* at 325 (discussing the different federal bills that Congress has considered).

126. See *id.* (noting that none of the federal swatting bills were adopted as of late 2018).

127. See *id.* at 326, 326 n.82 (arguing that Congress should modify the language of the statutory obstruction to include language such as “use of electronic mail” or expand the statute to include federal agents); see also 18 U.S.C. § 1511 (2018) (stating that the federal obstruction of justice statutes currently prohibit, among other acts, obstruction of the enforcement of state or local laws about gambling).

128. See Binder, *supra* note 11, at 57 (arguing that swatting and doxxing pose especially serious risks to women and minorities).

129. See *id.* at 57–58 (explaining what doxxing is and how it impacts the victims).

130. See *id.* at 57, 61 (arguing that swatting targets women and minorities more than any other class of victim and defining doxxing as “the public release of an individual’s personal information”).

131. See *id.* at 72 (discussing current proposals to add accountability for criminals who commit these offenses).

132. See *id.* (identifying three problems with current laws and explaining how the bills would solve each of the respective problems posed by swatting and doxxing).

133. See *id.* (calling for adoptions of new laws but not ruling out other solutions to the swatting problem).

Scholars are not alone in their call for new laws.¹³⁴ In 2017, Congresswoman Katherine Clark introduced a bill in the House of Representatives that would make swatting a federal crime.¹³⁵ The bill would make it a crime to knowingly make false reports that are likely to result in the police responding to an emergency situation.¹³⁶ The bill would require the report to relate to or affect interstate commerce in order to be actionable.¹³⁷ This limitation, of course, stems from the constitutional limitations on all federal laws.¹³⁸ The swatting bill recognizes different levels of punishment depending on the level of harm caused to the victim, ranging from a maximum of one year to life in prison.¹³⁹ As of September 2019, the bill failed to advance out of the committee stage, meaning that no existing federal law specifically prohibits swatting.¹⁴⁰ Since the new Congress took over in January 2019 before the bill passed, the bill is dead, and the lawmaking process must restart.¹⁴¹

Unlike the federal government, a few state governments have already responded to the rise of swatting incidents by passing specific statutes that target the swatting problem.¹⁴² In Michigan, a person who

134. See Online Safety Modernization Act of 2017, H.R. 3067, 115th Cong. § 201 (2017) (recognizing what swatting incidents are and proposing to make swatting a federal crime).

135. See *id.*

136. *Id.* (requiring an individual to “knowingly transmit false or misleading information” to constitute an offense).

137. See *id.* (“Whoever . . . uses the mail or any facility or means of interstate or foreign commerce to knowingly transmit false or misleading information that would reasonably be expected to cause an emergency response . . .”).

138. See U.S. CONST. art. I, § 8, cl. 3 (stating that Congress only has the power to regulate domestic commerce that involves multiple states).

139. See H.R. 3067, at § 201 (explaining the different subsections that discuss the range of penalties that can be applied).

140. See *id.* (proposing to create a federal swatting statute); see also H.R. 3067 – *Online Safety Modernization Act of 2017*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/3067/actions?q=%7B%22search%22%3A%5B%22H.R.+3067%22%5D%7D&r=1&s=2> [<https://perma.cc/32DR-FAQA>] (last visited Nov. 25, 2019) (reporting that the bill did not make it before the 116th Congress, which began in January 2019); Li, *supra* note 124, at 325 (noting that there are no federal laws addressing swatting specifically as of 2018).

141. See NAACP Washington Bureau Fact Sheet: *What Happens to Bills When the Congress Ends?*, NAACP, <https://www.naacp.org/wp-content/uploads/2016/04/PRIMERBillLife.pdf> [<https://perma.cc/QSK9-7DLU>] (last visited Nov. 25, 2019) (explaining that congressional bills still pending when a new Congress sits are killed and the legislative process must restart).

142. See, e.g., CAL. PENAL CODE § 148.3(a) (West 2014) (prohibiting the act of making false emergency reports of serious crimes occurring at a given location);

intentionally makes an emergency report of a crime can be charged under a dedicated statute.¹⁴³ To gain a conviction, the state must prove that (1) the defendant made a report; (2) the reported act did not actually occur; (3) the defendant knew that the act did not occur; and (4) the report was about a specific crime.¹⁴⁴ The offense is broken down into multiple levels of culpability depending on the level of harm caused; punishments range from low-level misdemeanors in cases not resulting in injuries to felonies punishable by up to fifteen years in prison for reports causing fatalities.¹⁴⁵ The statute provides jurisdiction for any reports that target individuals living in Michigan or reports that were made by offenders in Michigan.¹⁴⁶

Instead of requiring the report to be of a crime, California's false report statute prohibits falsely reporting an emergency, which is a broader definition.¹⁴⁷ This statute allows convictions when an individual either knew or should have known that the false report would lead to police or other agencies making an emergency response.¹⁴⁸ At one time, the legislature considered amending the statute to impose strict liability, meaning that a person would be guilty

MICH. COMP. LAWS § 750.411a(1) (2019) (criminalizing the false emergency report of a crime); *see also* *Torres v. Lynch*, 136 S. Ct. 1619, 1625 (2016) (recognizing that the United States Constitution guarantees the states' broad authority to pass laws for the safety of their residents and stating further that "State legislatures, exercising their plenary police powers, are not limited to Congress's enumerated powers; and so States have no reason to tie their substantive offenses to those grants of authority").

143. *See* MICH. COMP. LAWS § 750.411a(1) (explaining that an individual must make a report while "knowing the report is false" in order to be in violation of the statute).

144. *See* *People v. Ylen*, No. 320861, 2015 WL 4599494, at *1 (Mich. Ct. App. July 30, 2015) (discussing the elements of Michigan's statute that the government must prove).

145. *See* MICH. COMP. LAWS § 750.411a(1)(a)–(e) (discussing the different classifications of offenses with the central focus being on the whether there was any physical harm to anyone in the course of the response and investigation of the false report call).

146. *See* § 750.411a(7) (providing jurisdiction in cases involving victims or offenders from out of state if the report starts or ends in Michigan); *see also* *Heath v. Alabama*, 474 U.S. 82, 84–86 (1985) (noting that jurisdictions could work together on cases such as here where authorities in Alabama and Georgia worked together to solve a murder case).

147. *See* CAL. PENAL CODE § 148.3(c) (defining emergency as "any condition that results in, or could result in, the response of a public official in an authorized emergency vehicle" or "any condition that jeopardizes or could jeopardize public safety").

148. *See id.* (discussing the requisite mens rea of the false report statute).

by simply making a false report.¹⁴⁹ However, this proposal was rejected out of concerns that innocent reporters could be convicted of a crime.¹⁵⁰ Similar to Michigan, the statute also provides multiple levels of punishment depending on the level of harm the report caused.¹⁵¹ However, California’s statute does not distinguish between whether a false emergency call causes either death or serious injury for the purposes of the maximum punishment.¹⁵²

Oregon does not require a false report to be about a specific crime or emergency in order for it to be unlawful.¹⁵³ Instead, the statute prohibits individuals from knowingly making a false report to any government agency that deals with emergency situations, including law enforcement agencies and fire departments.¹⁵⁴ A violation of the statute is always a misdemeanor offense, whether the false report results in injuries or death for the victim or police officers.¹⁵⁵ However, if serious injury or death does occur as a result of the report, the judge is required to sentence the defendant to at least thirty days in jail.¹⁵⁶

Louisiana’s definition of false reports includes both crimes and other emergency situations made “with the intent to cause an emergency response.”¹⁵⁷ Louisiana’s statute also provides for multiple levels of penalties that vary depending on the level of physical harm caused.¹⁵⁸ Violations that result in an emergency response but do not result in injury carry a maximum punishment of five years of

149. See S. COMM. ON PUB. SAFETY, BILL ANALYSIS, S.B. 333, at 4 (Cal. 2013) (debating whether to impose strict liability for false reports).

150. See Brumfield, *supra* note 22, at 575 (noting that the California legislature rejected this proposal).

151. See *id.* (specifying multiple penalty levels).

152. See § 148.3(b) (describing an offense that is “likely to cause death or great bodily injury, and great bodily injury or death [that] is sustained by any person as a result” of the false report is a felony punishable by a maximum of ten years in prison).

153. See OR. REV. STAT. § 162.375(1) (2018) (placing emphasis on the agency to which a person makes a report rather than specifically what a person says).

154. *Id.* (“A person commits [a] crime . . . if the person knowingly initiates a false alarm or report that is transmitted to a fire department, law enforcement agency[,], or other organization that deals with emergencies involving danger to life or property.”).

155. See *id.* §§ 162.375(2), 162.375(3)(b)(A) (providing for mandatory minimum sentences in certain situations and calling for a mandatory minimum sentence of ten days in jail if a SWAT team is deployed to respond to the report).

156. OR. REV. STAT. § 162.375(3)(b)(B).

157. LA. STAT. ANN. § 14:126.1.1(A) (2018).

158. See *id.* (describing four different levels of offenses, which increase in severity depending on the amount of physical harm that occurs as a result of the report).

imprisonment, while violations that cause serious bodily injury require a minimum of eight years of incarceration.¹⁵⁹ The statute does not specify a maximum penalty for this category.¹⁶⁰ If the report results in a death, the penalty is a ten-year mandatory minimum imprisonment period, with the possibility of up to forty years in prison.¹⁶¹ The Louisiana legislature appears to have carefully considered the appropriate penalties for these cases because the legislature debated and then amended the original bill to increase the maximum penalties from five years to the current forty-year maximum.¹⁶²

Despite the creation of these statutes in Michigan, California, Louisiana, and Oregon, no court cases have been brought under these statutes.¹⁶³ The lack of case law makes it difficult to determine how effective these statutes are at deterring or enabling prosecutors to seek justice for swatting victims.¹⁶⁴ While the lack of cases means these statutes have not been tested, swatting laws are gaining attention across the United States as more states introduce swatting bills.¹⁶⁵

For example, in Massachusetts, a state legislator has proposed a bill that would criminalize false emergency reports, but the bill requires the government to prove that the defendant's report was made "with the intent to annoy or harass" in order to obtain a conviction.¹⁶⁶ This bill provides for varying levels of punishment depending on the level of harm caused, and it also allows repeat offenders to be

159. *See id.* (describing the penalty levels for violations of the statute).

160. *See id.* (specifying the penalties that occur for offenses that result in an emergency response with no injury and mandating minimum sentences for violations causing serious bodily injury).

161. *See id.* (discussing the different levels of penalties that the statute provides depending on the level of harm that is caused to any person who is involved in the swatting incident).

162. *See* S.B. 42, 266th Gen. Assemb., Reg. Sess., at 4 (La. 2018) (reengrossed bill draft) (discussing amendments to penalties and noting approval of increasing penalties).

163. *See* Jaffe, *supra* note 20, at 469 (noting the lack of court cases on swatting).

164. *See id.* (maintaining that the way courts will analyze swatting cases under existing statutes is an open question).

165. *See, e.g.,* Assemb. B. 2847, 218th Leg., 1st Sess., at 3–4 (N.J. 2018) (proposing to increase penalties for false reports that result in SWAT team responses in New Jersey); H.B. 3130, 190th GEN. COURT, AN ACT RELATIVE TO SWATTING, at 2 (Mass. 2017) (proposing a swatting bill in Massachusetts).

166. H.B. 190-3130, at 2 (noting that this bill is intended to amend the criminal code to prohibit false reports and explaining the elements of an offense under the proposed statute).

punished more severely, regardless of the level of harm caused.¹⁶⁷ For violations resulting in death, the bill provides that the offender may be convicted under the state's manslaughter statute.¹⁶⁸ The bill would require the government to prove that the report was not made in "good faith," but the bill does not define what this phrase means.¹⁶⁹

In addition to the Massachusetts bill, a New Jersey legislator has proposed a bill that would update New Jersey's false alarm statute.¹⁷⁰ The bill seeks to add on to an existing false report statute that does not specifically address emergency responses.¹⁷¹ While the bill does not mention swatting by name, the bill would increase the penalties for false emergency reports that result in police officers having to resort to the use of force or a threat of force when responding to an emergency report.¹⁷²

Both academics and governments have offered responses to the growing problem of swatting, but they have varying opinions on what the proper response to swatting is.¹⁷³ In addition, some prosecutors have used existing statutes to hold offenders criminally liable, although sustained and widespread success is unknowable given the lack of case law on the subject.¹⁷⁴ In light of the significant differences

167. *See id.* (discussing that punishments for the proposed crime can range from two and a half years for incidents not causing any injury to a penalty equivalent to the state's manslaughter maximum sentence for fatal cases).

168. *See id.* (proposing that any deaths that occur as a result of the false report would constitute a violation of Massachusetts's existing manslaughter statute without needing to prove the separate manslaughter statute elements).

169. *See id.* (noting that the proposed statute "shall not apply to telephone calls made in good faith").

170. *See* Assemb. B. 218-2847, at 1 (proposing to increase penalties in New Jersey for false alarm reports that involve police responding with force or threats of force such as SWAT teams).

171. *See id.* (proposing to modify existing law to specifically address emergency responses caused by false reports).

172. *See id.* (proposing to increase the crime of a false report to a second-degree offense if force or threat of force is used and increasing the penalty under a strict liability regime if the false report results in death).

173. *Compare* Binder, *supra* note 11, at 61 (calling for a focus on the race- and gender-based discrimination that occurs with swatting), *with* Enzweiler, *supra* note 6, at 2008 (calling for the treatment of most swatting cases as a form of domestic terrorism). Academic articles are not the only area of disagreement; state governments also disagree with how to handle swatting. *Compare* OR. REV. STAT. § 162.375 (2018) (classifying false emergency reports as only misdemeanor offenses), *with* LA. STAT. ANN. § 14:126.1.1 (2018) (classifying false emergency reports as felony offenses punishable by up to forty years imprisonment).

174. *See* Catonsville Man Pleads Guilty, *supra* note 63 (reporting federal plea agreement against two co-defendants in a separate swatting case also charged under existing federal statutes). *See generally* Plea Agreement, *supra* note 59,

over how to classify swatting, a new statute that provides more uniform elements for swatting offenses and appropriate penalties for violations is needed to provide consistent prosecution of swatters.¹⁷⁵

III. THE NEED FOR A NEW SWATTING STATUTE

Current proposals and statutes do not provide a comprehensive solution to the swatting problem because the proposals are too narrow in scope and current laws do not prescribe the necessary elements to effectively prohibit swatting.¹⁷⁶ However, the existing literature and statutes do provide valuable ideas that, when combined together and expanded upon, lead to a statute that can handle all future swatting incidents that may arise.¹⁷⁷ A new swatting statute that properly defines offenses, modifies the requisite mens rea of an offense, and specifies appropriate penalties for violations will provide society with an effective legal tool to handle swatting incidents.¹⁷⁸

A. The Problems with Current Academics' Proposals, False Report Statutes, and Swatting Bills

A few individuals and states have offered ways to define and categorize swatting incidents.¹⁷⁹ However, these proposals involve

(demonstrating a federal plea agreement resulting from a swatting case brought under existing federal statutes).

175. See Jaffe, *supra* note 20, at 467 (highlighting mens rea and intent problems that exist with charging swatters under existing cyberbullying statutes).

176. See, e.g., MICH. COMP. LAWS § 750.411a(1) (2019) (requiring reports to be of other Michigan crimes to constitute a violation); OR. REV. STAT. § 162.375(2) (providing only for misdemeanor penalties for swatting offenses, even if they result in death); Enzweiler, *supra* note 6, at 2008 (calling for swatting to be treated as domestic terrorism).

177. See, e.g., LA. STAT. ANN. § 14:126.1.1(A) (providing an effective definition of swatting acts); Jaffe, *supra* note 20, at 468–69 (highlighting problems with current federal threat statutes and what those issues mean for state swatting laws).

178. See MICH. COMP. LAWS § 750.411a(1) (requiring the false report to be about a Michigan crime).

179. See, e.g., LA. STAT. ANN. § 14:126.1.1(A) (prohibiting swatting in the state of Louisiana); Enzweiler, *supra* note 6, at 2008 (calling for swatting to be categorized as domestic terrorism). Even in states that have not passed swatting laws, some legislatures have proposed bills on swatting. See, e.g., Online Safety Modernization Act of 2017, H.R. 3067, 115th Cong. § 201 (2017) (proposing to make swatting a federal crime); H.B. 3130, 190th GEN. COURT, AN ACT RELATIVE TO SWATTING, at 2 (Mass. 2017) (proposing a swatting bill in Massachusetts).

disagreements over how to categorize swatting acts.¹⁸⁰ Furthermore, the existing statutes have inconsistencies over what mental state should be required and what the appropriate penalties for violations should be.¹⁸¹

1. *Issues with Categorizing Swatting Incidents Under Current Laws*

A few prosecutors have creatively used existing statutes to bring justice to swatting victims.¹⁸² One federal prosecutor used federal hoax and conspiracy statutes to indict and ultimately convict swatters under a plea agreement.¹⁸³ In Kansas, a local prosecutor indicted a swatter on charges of involuntary manslaughter, interference with law enforcement, and false alarm for his role in the swatting incident that led to the death of Andrew Finch.¹⁸⁴ In the same case, a federal prosecutor has also charged the swatter with making a false bomb threat in interstate commerce, which the swatter recently pleaded guilty to.¹⁸⁵ These cases illustrate that prosecutors can obtain convictions under current laws.¹⁸⁶

180. Compare MICH. COMP. LAWS § 750.411a(1) (creating a separate offense of making false emergency reports), with Enzweiler, *supra* note 6, at 2008 (proposing to categorize swatting under existing domestic terrorism statutes).

181. See MICH. COMP. LAWS § 750.411a(1) (requiring a mens rea of knowledge that the report is false and specifying penalties of up to fifteen years in prison); H.R. 3067, at § 201(a) (recommending a mens rea requirement for false reports similar to recklessness and specifying penalties of up to life in prison).

182. See Catonsville Man Pleads Guilty, *supra* note 63 (reporting on a federal prosecutor who charged defendants with hoax and conspiracy to commit hoax for their roles in a swatting incident); Queally & Winton, *supra* note 57 (reporting that a Kansas prosecutor charged a swatter with violations of multiple state laws, including manslaughter).

183. See Catonsville Man Pleads Guilty, *supra* note 63 (announcing the defendant's plea agreement to the federal hoax and conspiracy to commit a hoax charge).

184. See Queally & Winton, *supra* note 57 (discussing the arrest of the swatter and the charges the prosecutor has filed against the defendant).

185. See Plea Agreement, *supra* note 59, at 4–5 (explaining that Barriss pled guilty to committing federal charges including making a false report about an explosive device and making a threat in interstate commerce).

186. See Catonsville Man Pleads Guilty, *supra* note 63 (discussing a federal conviction in a swatting incident obtained via plea agreement); Plea Agreement, *supra* note 59, at 1–2 (discussing a federal conviction in a swatting incident obtained via plea agreement).

These examples naturally raise the question of why specific swatting laws are necessary at all.¹⁸⁷ The fact that both federal cases ended in a plea agreement creates doubt regarding how courts will react to these statutes, especially at the appellate level.¹⁸⁸ Additionally, Kansas dismissed the state charges against Tyler Barriss after learning of his federal sentence; no judge or jury will decide whether his swatting act constituted involuntary manslaughter or false alarm.¹⁸⁹ Because the cases never went beyond the indictment phase, no courts have made any determinations on the applicability of these statutes to swatting cases beyond probable cause.¹⁹⁰ Even if prosecutors would have obtained a guilty verdict in those cases, little other data exists on swatting cases or other analogous situations.¹⁹¹ The lack of data makes it difficult to be confident in a prosecutor's ability to consistently obtain swatting convictions under current laws.¹⁹² A second argument in favor of specific swatting laws is the fact that governments often pass statutes that cover very specific crimes, to the point that a single act can conceivably be brought under multiple statutes.¹⁹³ Swatting is no different, as some states have passed their own swatting laws.¹⁹⁴

187. See, e.g., Plea Agreement, *supra* note 59, at 4–5 (noting that a swatting incident was resolved through a plea agreement under existing criminal statutes).

188. See *id.* at 3–4 (noting that the court only looked for a basic factual basis before accepting the plea agreement); Wu, *supra* note 58 (noting the state case against Barriss is still pending); see also Plea Agreement, *supra* note 59, at 4–5 (including no judicial analysis on the application of the statutes to the facts of the case but only an agreement as to the basic facts of the case); *id.* at 14 (including a waiver of the defendant's right to appeal his conviction, so no appellate review of the case will occur, and noting the defendant's waiver of his right to appeal).

189. See *The Latest: Kansas Dropping Charges After Sentencing*, *supra* note 59 (reporting that Kansas prosecutors dismissed the charges against Barriss).

190. See *Catonsville Man Pleads Guilty*, *supra* note 63 (reporting that the defendants pled guilty after a grand jury indictment and making no mention of a jury or judicial finding of guilty beyond a reasonable doubt).

191. See Jaffe, *supra* note 20, at 465 (noting a lack of existing cases on swatting and questioning how future court cases will analyze swatting under existing laws).

192. See Queally & Winton, *supra* note 57 (noting that the most serious swatting case to date has not yet been tried, inferring that the prosecutor will try to prove the charges of involuntary manslaughter and false alarm, and concluding that the outcome will be uncertain).

193. See CAL. PENAL CODE § 148.3(a) (West 2014) (criminalizing false reports of emergencies but not stating that prosecutors are barred from using other statutes to prosecute false reports).

194. See, e.g., *id.* (criminalizing false reports of emergencies); MICH. COMP. LAWS § 750.411a(1) (2013) (criminalizing false reports of crimes).

The idea that society needs a better way to classify swatting under criminal law is not without support.¹⁹⁵ Notre Dame Law School graduate Matthew Enzweiler suggests treating swatting as a form of domestic terrorism.¹⁹⁶ In making this assertion, he first assumes that many swatting incidents are done for political purposes.¹⁹⁷ While this fact may be true in some cases, even Enzweiler concedes that not all swatting incidents would fit the domestic terrorism analysis.¹⁹⁸ Additionally, in the course of arguing that swatting should be treated as domestic terrorism, Enzweiler lays out the numerous and demanding elements that the government must prove under these statutes.¹⁹⁹ The problem with a domestic terrorism approach is that this approach is simply too narrow in scope because domestic terrorism statutes are not applicable to every swatting incident.²⁰⁰ Thus, the solution to swatting should not be to only use domestic terrorism statutes.²⁰¹

Another scholar, Nellie Binder, argues that swatting is also used by individuals who want to harass and discriminate against women and minorities.²⁰² She focuses on how the new swatting statutes could provide more accountability for offenders and give law enforcement tools to help women and minority victims, which is true, but she does not go into a detailed examination of how these laws would affect swatting generally.²⁰³ The concern with focusing too much on how

195. See Jaffe, *supra* note 20, at 483 (calling for new laws on swatting).

196. See Enzweiler, *supra* note 6, at 2008–09 (arguing that swatting has been used as a “weapon” in politics and is such a serious offense that it should be treated as a form of domestic terrorism).

197. See *id.* at 2008 (citing incidents to support the assertion that swatting has been used for political gains).

198. See *id.* at 2037 (“[N]ot every instance of swatting merits treatment as an act of domestic terrorism . . .”).

199. See *id.* at 2026–36 (analyzing swatting under the six-part test of the federal domestic terrorism statute to determine whether swatting could qualify as domestic terrorism according to existing federal law).

200. See *id.* at 2036 (arguing why swatting should be treated as domestic terrorism but acknowledging arguments on whether domestic terrorism statute should apply to all swatting incidents).

201. See CAL. PENAL CODE § 148.3(a) (West 2014) (creating a separate offense for false reports of emergency situations).

202. Binder, *supra* note 11, at 55–56 (“[D]oxxing and swatting disproportionately affect women and people of color, and are often coupled with threats of physical and sexual violence.”).

203. See *id.* at 72–74 (discussing how swatting could solve the issues posed by race- and gender-based swatting incidents but not going into more detail about the general problem of swatting).

swatting affects specific groups of individuals is that such an argument implies swatting primarily affects certain people.²⁰⁴

In reality, swatting can impact a person of any race in any location.²⁰⁵ While some cases of swatting are motivated by political gains or by race- or gender-based discrimination, others are committed for different reasons altogether that do not fall within these specific contexts.²⁰⁶ Laws do not need to focus on the specific motivations for why swatting offenses occur in order to hold a person accountable for committing a swatting act.²⁰⁷ A new swatting statute that does not concern itself with the reason behind swatting acts avoids problems with prosecutors having to prove a defendant had a specific bias against someone because of his or her characteristics and can provide justice for all swatting victims.²⁰⁸

Even in California, Louisiana, Michigan, and Oregon, where swatting is a specific offense, legislatures disagree about how to classify swatting.²⁰⁹ Each statute prohibits false reports, but the statutes differ on the definition of a qualifying report.²¹⁰ Oregon's law prohibits individuals from illegally making a "false alarm or report," but the statute does not define what conduct the report needs to claim is

204. See *id.* at 55 (arguing that swatting "disproportionately affect[s]" women and minorities); Duke, *supra* note 24 (noting that even famous and wealthy celebrities, such as Ashton Kutcher and Justin Bieber, are not immune from swatting).

205. See Duke, *supra* note 24 (discussing multiple instances of swatting).

206. See Binder, *supra* note 11, at 69 (analyzing swatting in the context of race- and gender-based swatting incidents); Enzweiler, *supra* note 6, at 2008 (analyzing swatting in the context of political domestic terrorism); *Real Consequences*, *supra* note 19 (arguing that swatters make false reports for either revenge purposes or to brag about their accomplishments online); Suter, *supra* note 46 (reporting a conversation with one admitted swatter who claimed he did not have any reason at all for making swatting calls).

207. See LA. STAT. ANN. § 14:126.1.1(A) (2018) (criminalizing swatting in Louisiana without requiring a specific motivation for committing the crime).

208. See *id.* (providing a broad definition for swatting offenses); Jaffe, *supra* note 20, at 483 (calling for new laws on swatting).

209. See CAL. PENAL CODE § 148.3 (West 2014) (criminalizing false emergency reports in California); LA. STAT. ANN. § 14:126.1.1(A) (criminalizing swatting in Louisiana); MICH. COMP. LAWS § 750.411a(1) (2019) (criminalizing false reports of crimes in Michigan); OR. REV. STAT. § 162.375(1) (2018) (criminalizing false emergency reports in Oregon).

210. See CAL. PENAL CODE § 148.3(a) (criminalizing false reports of emergencies in California); LA. STAT. ANN. § 14:126.1.1(A) (criminalizing false reports of crimes or emergencies in Louisiana); MICH. COMP. LAWS § 750.411a(1) (criminalizing false reports of crimes that are known to result in an emergency response in Michigan); OR. REV. STAT. § 162.375(1) (criminalizing false reports made to agencies that deal with emergency responses in Oregon).

occurring at the specified location.²¹¹ This vague definition leaves the law vulnerable to the judiciary’s interpretation of the statute, which is an unnecessary risk that can be easily fixed by providing a specific definition in the statute.²¹²

Michigan’s statute, while more specific, is also problematic because it requires the false report to be *of a crime*.²¹³ This element necessarily requires the prosecutor to prove that the swatter reported a specific act that is a crime under Michigan law.²¹⁴ This definition of report raises two concerns from society’s perspective.²¹⁵ First, such a requirement is a needless element for the government to prove.²¹⁶ Second, the element leaves open the possibility, however unlikely, that an otherwise solid case could fail because the swatter’s reported situation did not constitute a crime under Michigan law.²¹⁷

Instead of defining swatting as a report of crime, Michigan should have written the statute as responding to a report of an emergency.²¹⁸ For example, California’s statute requires only that the report be of an emergency, and it also defines what qualifies as an emergency response.²¹⁹ The definition of emergency is broad, and it includes police responses in emergency vehicles or any other situation

211. See OR. REV. STAT. § 162.375(1) (stating that a violation occurs when a “false alarm or report . . . is transmitted” to the police but not defining report within the statute).

212. See Jaffe, *supra* note 20, at 478–79 (discussing the problems that can occur when a statute is vague on its elements and thus forces a court to interpret the statute for itself).

213. MICH. COMP. LAWS § 750.411a(1) (“[A] person who intentionally makes a false report of the commission of a crime . . . is guilty of a crime.”).

214. See *id.* (requiring the report to reference an act that is itself a crime under Michigan law).

215. See, e.g., Jaffe, *supra* note 20, at 477–78 (describing the problems that can occur when prosecutors are required to prove unclear elements including a court overturning what would otherwise be a probable conviction).

216. See CAL. PENAL CODE § 148.3(a) (West 2014) (not requiring false emergency reports to be about a crime).

217. See MICH. COMP. LAWS §§ 750.411a(1)(b), 750.411a(a)(1)(a) (requiring false reports to be a felony under Michigan law in order to trigger a felony penalty crime and providing for a misdemeanor penalty if the false report involves a statement that proves the defendant is committing a misdemeanor).

218. See CAL. PENAL CODE § 148.3(a) (stating that any person who falsely reports that an emergency exists to a government agency violates the law); MICH. COMP. LAWS § 750.411a(1) (requiring reports to be about a crime in violation of Michigan law).

219. See CAL. PENAL CODE § 148.3(c) (defining what constitutes an “emergency” to include, among other situations, “any condition that results in, or could result in, the response of a public official in an authorized emergency vehicle, aircraft, or vessel, any condition that jeopardizes . . . public safety”).

that may endanger the public, which provides prosecutors more leeway in proving the false report element.²²⁰ Louisiana agrees with California about classifying swatting as a false report of an emergency as Louisiana's statute defines report as situations that pose a threat to public safety.²²¹

The benefits of having a swatting statute with a similar definition to California and Louisiana would ensure that a prosecutor does not have to demonstrate that the report a swatter made was a crime, and it also covers reports of other false emergencies, such as a housefire.²²² False reports of events such as a housefire may not pose a direct threat to an individual, but the ensuing emergency response by the fire department would needlessly endanger the public.²²³ A statute that adopts this broader definition ensures that individuals who make any kind of false reports that cause emergency responses can be held accountable.²²⁴

2. *Problems with the Mens Rea Required for Swatting Incidents Under Current Laws*

Under existing federal threat laws, prosecutors face a serious problem in proving a swatter had the mens rea needed to establish a conviction.²²⁵ In *Elonis v. United States*, the Supreme Court ruled that under a federal threat statute the government must show that the defendant had intent to make a threat; a person just saying words that others perceive as a threat is insufficient for a conviction.²²⁶ The

220. See *id.* (listing a broad range of conditions that qualify as an emergency within the meaning of the statute thereby making it easier for prosecutors to fit false reports within the statute).

221. See LA. STAT. ANN. § 14:126.1.1(A) (2018) (describing an emergency response to include reports of crimes that would cause police to immediately respond as well as reports of other situations that claim an immediate danger to public safety).

222. See *id.* (covering all offenses that would trigger a broad range of emergency responses from public agencies such as fire departments).

223. Cf. Hsiao et al., *supra* note 74, at 1048–49 (noting the increased danger of accidents when police officers respond to emergencies by driving at high speeds).

224. See, e.g., CAL. PENAL CODE § 148.3(a) (stating that any report of an emergency situation constitutes an offense); LA. STAT. ANN. § 14:126.1.1(A) (recognizing that reports can either be of serious crimes or other emergencies).

225. See Jaffe, *supra* note 20, at 479 (discussing the problems with proving intent under current threat statutes and expressing concern that these problems could even extend to state statutes).

226. See *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) (holding that “purpose” or “knowledge” will satisfy the mens rea component of the statute but,

problem with treating swatting offenses under the federal threat statute at issue in *Elonis* and similar existing statutes is that according to the reasoning of *Elonis*, the government must prove a swatter intended to threaten the victim.²²⁷ In other words, the prosecutor has an additional burden of proving that a defendant intended to communicate a threat to the victim, which is especially challenging given that the swatter does not speak directly to the victim in making the report.²²⁸ Additionally, a swatter could argue his or her report was just meant as a prank, like the defendant in *Elonis* who successfully argued he was simply expressing himself in his Facebook posts, not threatening others.²²⁹

Recognizing the difficulty of proving that a swatting report was intended as a threat, Professor Jaffe proposes that courts develop a new test that finds intent from the words the defendant makes combined with other circumstances, such as who the threats are made to.²³⁰ While this test is certainly a better solution than the status quo, the test is not explained in great detail and seems to only apply to current threat statutes; Jaffe herself leaves open other solutions to swatting.²³¹ Independent swatting state statutes avoid issues with federal threat statutes in light of *Elonis* and would also not require a subjective balancing test of statements or reports a person makes.²³² Instead, a

because neither party raised the argument, declining to consider whether “recklessness” would be enough).

227. See *id.* (discussing that the statute in question requires the government to prove that the individual, at the least, recklessly disregarded the fact that his or her statement could be seen as a threat); see also Jaffe, *supra* note 20, at 479 (expressing concerns that prosecutors may not be able to prove the report was intended as a threat).

228. See Jaffe, *supra* note 20, at 479; see also *Prank call*, *supra* note 2 (discussing an example of the typical swatting incident where the swatter makes a report to the police without the victim knowing a swatter made a false report about him or her until the police arrive at his or her residence).

229. See Jaffe, *supra* note 20, at 479 (noting that a swatter could argue that he was not intending to threaten or hurt anyone).

230. *Id.* (“Perhaps the courts need to develop a test whereby intent is found in the spoken or written word in conjunction with the surrounding circumstances of the speaker and target audience.”).

231. See *id.* at 483 (calling for new laws on swatting).

232. See LA. STAT. ANN. § 14:126.1.1(A) (2018) (defining swatting as a separate crime with its own elements); see also *Elonis*, 135 S. Ct. at 2012 (interpreting only a specific federal threat statute); Jaffe, *supra* note 20, at 479 (calling for a test that would seek to find, based on all the circumstances, whether a threat was intended in any given case).

statute could simply state that the act of making a false emergency report, with a specified mens rea, is a criminal offense.²³³

However, even in states that already have specific swatting statutes, the mens rea required may be too stringent to ensure justice can be served.²³⁴ For example, in Michigan, a defendant can only be convicted if the government can prove that the defendant's mindset was to intentionally make a report that the defendant knew was false.²³⁵ Louisiana's statute requires intent to cause an emergency response.²³⁶ Intent and knowledge are high bars for the government to prove.²³⁷

An ideal swatting statute should require a person to knowingly make a false report with a reckless disregard for the fact that such a report will cause an emergency response.²³⁸ The benefit of adopting a statute with these changes is that the statute would avoid situations where the government cannot prove the defendant knew the police would respond.²³⁹ At least one legislator in Congress has agreed and proposed a federal bill that would require only a reckless mens rea in order to obtain a conviction.²⁴⁰

Of course, some may argue that lowering the mens rea will make it easier to convict defendants charged under these swatting statutes,

233. See LA. STAT. ANN. § 14:126.1.1(A) (stating that a false report of an emergency is a crime).

234. See S. COMM. ON PUB. SAFETY, BILL ANALYSIS, S.B. 333, at 5 (Cal. 2013) (presenting concern that having to convince a jury that a reasonable person would have known the consequences of a report is typically not overly difficult but that prosecutors could lose on this element, debating the proper use of mens rea for the statute, and implying that higher levels of mens rea would only increase the chance of a prosecutor failing on this element).

235. See MICH. COMP. LAWS § 750.411a(1) (2019) (stating the mens rea elements that must be proven to constitute a violation of this statute).

236. See LA. STAT. ANN. § 14:126.1.1(A) (requiring intent that the false report will result in an emergency response).

237. See *Elonis*, 135 S. Ct. at 2010 (discussing different levels of mens rea and noting that knowledge and intent are on the top end of the spectrum of mental states).

238. See Online Safety Modernization Act of 2017, H.R. 3067, 115th Cong. § 201(a) (2017) (proposing to allow swatting convictions where the swatter made a report that "would reasonably be expected to cause an emergency response"); H.B. 3130, 190th GEN. COURT, AN ACT RELATIVE TO SWATTING, at 2 (Mass. 2017) (proposing to establish the crime of swatting when the person "has reason to know" the report is false).

239. See *Elonis*, 135 S. Ct. at 2014 (Alito, J., dissenting) (discussing different levels of mens rea in every statute and noting recklessness is a lower level of culpability and thus requires a lesser level of proof).

240. See H.R. 3067, at § 201(a) (proposing a federal swatting bill that would not require intent or knowledge that the report would lead to an emergency response from police or other agencies).

which risks erroneous convictions.²⁴¹ This fact may be true; for example, a swatting statute imposing strict liability would be too low.²⁴² In fact, the legislative history of California's statute demonstrates that the legislature considered amending the false report statute to remove the knowledge requirement.²⁴³ The legislators ultimately decided against strict liability over concerns of convicting innocent people who did not understand the consequences of their actions, which shows the legislature was aware of the importance of an appropriate mens rea in a swatting statute.²⁴⁴

Another argument in favor of lowering the mens rea of swatting statutes is that courts have upheld felony crimes requiring only a reckless state of mind, and recklessness is not an automatic win for the government.²⁴⁵ While the most appropriate mens rea for swatting is debatable, serious public safety concerns outweigh the interests defendants may have in requiring a higher mens rea.²⁴⁶ The FBI has recognized that swatting is a serious problem that is continuing to grow.²⁴⁷ In order to deter individuals from swatting, offenders need to be held accountable.²⁴⁸ Adopting a mens rea that provides prosecutors with a good chance of obtaining convictions, while rejecting a strict

241. See *Elonis*, 135 S. Ct. at 2011–12 (agreeing with the defendant's argument that mere negligence would make convictions easier for the government and run the risk of convicting innocent people).

242. See Brumfield, *supra* note 22, at 575–76 (noting that California's false report statute could have required no mens rea and established a strict liability for making false reports); *id.* at 576 (discussing the legislature's concerns over mens rea and noting that strict liability risks convicting people who genuinely had no idea of the consequences of the making such a false report, which the legislature recognized).

243. See ASSEMB. COMM. ON PUB. SAFETY, BILL ANALYSIS, S.B. 333, at 1–2 (Cal. 2013) (discussing amendments to the statute).

244. See *id.* (debating strict liability); Brumfield, *supra* note 22, at 575–76 (noting that the California legislature ultimately rejected strict liability in favor of a higher mens rea requirement).

245. See *Elonis*, 135 S. Ct. at 2009–11 (positing that knowledge of the “threatening nature” of the suspected wrongdoing factors into a recklessness-based mens rea determination for federal felonies and remanding the case for a decision on whether the government will be able to prove this higher standard).

246. Cf. Queally & Winton, *supra* note 57 (commenting on the serious dangers of swatting cases including the risk of an innocent person's death as a result of the swatter's conduct).

247. See Jeffries, *supra* note 14 (discussing the FBI's belief that around 400 swatting incidents occur every year and implying that this number could be increasing).

248. See Brumfield, *supra* note 22, at 577 (discussing the importance of deterring future swatting offenses from occurring and noting that increasingly frequent prosecutions would deter future incidents).

liability or negligence approach, achieves a fair balance between public safety and concerns for defendant's liberties.²⁴⁹

3. Identifying the Appropriate Penalties for Swatting Incidents

Existing statutes, as well as proposed bills on swatting, vary significantly on penalties for violations.²⁵⁰ While variance among states is not necessarily a bad thing, the major variance demonstrates a lack of agreement on how to handle swatting cases, which may result in unsatisfactory penalties in certain states.²⁵¹ An injury-based approach is the best way to penalize violations because not all swatting instances are created equal—some cases involve no injury, while one case caused the death of an innocent person.²⁵² An ideal swatting statute should have three penalty levels, similar to Louisiana's current statute.²⁵³

The first level should apply to false reports that either do not trigger an emergency response, such as when the police figure out that a report is false before responding, or to situations that do not result in any harm.²⁵⁴ Many of the existing statutes already have a system like

249. See Online Safety Modernization Act of 2017, H.R. 3067, 115th Cong. § 201 (2017) (proposing a recklessness-based mens rea for offenses); ASSEMB. COMM. ON PUB. SAFETY, at 1–2 (expressing concerns over strict liability for swatting incidents).

250. Compare LA. STAT. ANN. § 14:126.1.1(B) (2018) (providing for multiple levels of offenses in Louisiana and a maximum penalty of forty years of incarceration) and MICH. COMP. LAWS § 750.411a(1)(e) (2019) (providing a maximum penalty of up to fifteen years in prison), with OR. REV. STAT. §§ 162.375, 162.615(1) (2018) (providing only “Class A” misdemeanor sentences, which carry a potential maximum sentence of 364 days).

251. Compare LA. STAT. ANN. § 14:126.1.1(B) (describing swatting as a serious felony punishable by up to decades in Louisiana state prison), with OR. REV. STAT. § 162.375(2) (stating false reports are only a misdemeanor in Oregon).

252. See Catonsville Man Pleads Guilty, *supra* note 63 (noting that the responding officers shot the swatting victim with rubber bullets and caused the victim to suffer significant injuries); Queally & Winton, *supra* note 57 (reporting a fatal swatting incident); Trylch, *supra* note 8 (reporting a swatting incident that was quickly resolved without incident).

253. See LA. STAT. ANN. § 14:126.1.1(B)(2)–(4) (authorizing three levels of punishment when an emergency response is triggered). This statute does specify a separate penalty for reports that do not cause emergency responses, but this is not necessary as the definition would simply be reworded to not require the emergency response to occur for the base-level offense. See § 14:126.1.1(B)(1) (stating that a violation of this statute is a misdemeanor if no emergency response occurs).

254. See CAL. PENAL CODE § 148.3(a) (West 2014) (not requiring an emergency response or any injuries to occur to establish a base-level violation).

this in place, but the statutes have inconsistent approaches that need to be remedied.²⁵⁵ Louisiana's statute, for example, draws a major distinction in penalties based on whether an emergency response occurs.²⁵⁶ It calls for just six months of incarceration if no response occurs but five years of incarceration if a response does occur.²⁵⁷ An ideal swatting statute should be concerned about the *risk* of what could happen as a result of the report, not whether a response results from the report.²⁵⁸

Additionally, states disagree over whether false reports should be misdemeanors or felonies.²⁵⁹ For example, Oregon's statute provides that swatting is always just a misdemeanor, while other states prescribe felony violations in most cases.²⁶⁰ Because swatting incidents pose a serious safety risk and society wants to deter these swatting reports from occurring in the future, even swatting incidents that cause no injury should be classified as a felony offense.²⁶¹ The maximum penalty should be imprisonment for two years.²⁶²

The second level should include false reports in which an emergency response occurs and results in any amount of physical

255. Compare LA. STAT. ANN. § 14:126.1.1(B) (requiring an emergency response to occur to trigger all but the lowest penalty level), with CAL. PENAL CODE § 148.3(b) (establishing that an emergency response *is not* a necessary trigger) and MICH. COMP. LAWS § 750.411a(1) (establishing that an emergency response *is not* a necessary trigger).

256. See LA. STAT. ANN. § 14:126.1.1(B)(1)–(2) (distinguishing offenses solely on whether a response actually occurs).

257. *Id.*

258. See CAL. PENAL CODE § 148.3(a) (criminalizing the act of making the false report regardless of whether a response occurs); MICH. COMP. LAWS § 750.411a(1) (declining to focus on whether a response actually occurs).

259. Compare OR. REV. STAT. § 162.375(2) (2018) (classifying all false report incidents as misdemeanors), with LA. STAT. ANN. § 14:126.1.1(B) (classing certain false reports as felonies) and MICH. COMP. LAWS § 750.411a(1)(b) (classing most false report situations as felonies).

260. See OR. REV. STAT. § 162.375(2) (classing all false reports as misdemeanor offenses); see also, e.g., CAL. PENAL CODE § 148.3(b) (authorizing felony charges); MICH. COMP. LAWS § 750.411a(1)(b) (authorizing felony charges).

261. See MICH. COMP. LAWS § 750.411a(1)(b) (authorizing felony charges even for reports that do not result in injuries); Brumfield, *supra* note 22, at 585 (noting the importance of deterring swatting incidents); *New Phenomenon*, *supra* note 4 (noting the serious dangers that swatting poses).

262. Cf. MICH. COMP. LAWS § 750.411a(1)(b) (creating a penalty for felony offenses of up to four years of imprisonment for cases that do not result in any injuries).

injury to police officers or victims.²⁶³ Existing statutes, such as Michigan's, are unnecessarily complex in this area because they call for multiple categories of injuries.²⁶⁴ A better solution is to have a single penalty level that applies if any injury occurs at all so that prosecutors can easily know what level is appropriate, instead of haggling over when an injury becomes a serious injury.²⁶⁵ A counterargument is that severe injuries deserve more punishment, but that concern can be remedied by having a single level with a high maximum punishment and then allowing the judge to decide how close to the maximum the sentence should be.²⁶⁶ This level should be a felony offense punishable by up to ten years of incarceration.²⁶⁷

The third and most severe level should be reserved only for cases that result in the death of the swatting victim or responding police officers.²⁶⁸ The incident that caused Andrew Finch's death serves as an example of the need for this third level.²⁶⁹ Oregon's statute, which provides that swatting is just a misdemeanor even if death results from the report, offers far less punishment compared to what other states prescribe.²⁷⁰ Thus, if the Finch incident had occurred in Oregon, the

263. See CAL. PENAL CODE § 148.3(b) (specifying a penalty level for a report causing a response and an injury); MICH. COMP. LAWS § 750.411a(1)(a)–(e) (specifying multiple levels of punishment if harm results from a false report).

264. See MICH. COMP. LAWS § 750.411a(1)(b)–(d) (establishing different penalty levels for reports resulting in harm and calls resulting in serious harm).

265. Cf. *id.* (recognizing a penalty level for false reports that is triggered when any physical injury occurs without requiring specific proof over its severity).

266. See *id.* (recognizing a distinction between injuries and serious injuries for penalty purposes). Michigan's statute states that the penalty is either "not more than" five years or ten years depending on the level of harm caused, which implies that the court has discretion to set the penalties. See *id.* (discussing maximum penalties). The implication is that a judge could go up to the classification's maximum based on how serious he or she views the injury; a single injury level with a high maximum could accomplish the same result. Cf. *id.* (not mandating a minimum penalty, thus implying the court has a sentencing range).

267. See *id.* (calling for ten years in prison for offenses that cause serious injuries but recognizing that cases resulting in minor injuries should be a felony offense punishable by up to five years in prison).

268. See, e.g., CAL. PENAL CODE § 148.3(b) (authorizing higher penalties for offenses resulting in death); LA. STAT. ANN. § 14:126.1.1(B)(4) (2018) (specifying a punishment tier for swatting incidents that result in death); MICH. COMP. LAWS § 750.411a(1)(e) (creating a penalty category for false reports that result in death).

269. See *Prank Call*, *supra* note 2 (reporting on the swatting incident that led to Andrew Finch's death).

270. See OR. REV. STAT. § 162.375(2) (2018) (authorizing only a misdemeanor offense for false reports even if it results in a person's death).

defendant could only have been charged with a misdemeanor.²⁷¹ Reasonable people can disagree over the ideal penalty, but a misdemeanor for causing the death of an innocent person is significantly out of line with what other states have deemed appropriate.²⁷² For example, the legislative history of the Louisiana statute shows that its legislators carefully considered the maximum punishment for swatting deaths and amended the bill to increase the penalty from five years of incarceration to forty years.²⁷³ This severe punishment reflects the legislature’s understanding of how serious swatting incidents are.²⁷⁴ Michigan’s top-level offense provides for up to fifteen years of incarceration for swatting incidents that result in death.²⁷⁵ While this penalty is much higher than Oregon’s, the punishment is still significantly less than other jurisdictions’ statutes, such as Louisiana’s.²⁷⁶ Similarly, the most recent federal swatting bill would authorize up to life imprisonment for swatting cases resulting in death.²⁷⁷ To strike a fair balance among the existing penalties for these reports, the maximum punishment should be twenty-five years.²⁷⁸

At this top penalty category, the statute should also include a mandatory minimum sentence because the swatter is responsible for taking someone’s life.²⁷⁹ When a false report results in death, multiple

271. See *id.* (authorizing only a misdemeanor in Oregon based on the facts of the Andrew Finch case); see also *Prank Call*, *supra* note 2 (reporting a swatting incident that led to Andrew Finch’s death).

272. Compare OR. REV. STAT. § 162.375(2) (stating that swatting offenses resulting in death are misdemeanors), with LA. STAT. ANN. § 14:126.1.1(B)(4) (stating that swatting deaths should carry up to forty years of imprisonment) and Online Safety Modernization Act of 2017, H.R. 3067, 115th Cong. § 201(a) (2017) (proposing that swatting deaths should carry up to a life sentence).

273. See S.B. 42, 266th Gen. Assemb., Reg. Sess., at 2 (2018) (enacted) (discussing amendments to penalties and noting approval of increasing penalties).

274. See LA. STAT. ANN. § 14:126.1.1(B)(4) (authorizing Louisiana courts to sentence violators to up forty years in prison and requiring at least ten years in prison).

275. See MICH. COMP. LAWS § 750.411a(1)(e) (2019) (authorizing up to fifteen years imprisonment for false reports resulting in death).

276. See LA. STAT. ANN. § 14:126.1.1(B)(4) (authorizing up to forty years imprisonment for cases resulting in death).

277. See H.R. 3067, at § 201(a) (calling for up to life imprisonment for swatting cases that result in death).

278. Compare LA. STAT. ANN. § 14:126.1.1(B)(4) (providing for up to forty years in prison), with MICH. COMP. LAWS § 750.411a(1)(e) (authorizing up to fifteen years in prison for offenses resulting in death).

279. See *Prank Call*, *supra* note 2 (exemplifying the severe consequences of swatting); see also LA. STAT. ANN. § 14:126.1.1(B)(4) (requiring mandatory minimum

states have agreed that a mandatory minimum sentence is appropriate, but the statutes vary significantly on the outcome.²⁸⁰ Oregon calls for just thirty days, while Louisiana calls for at least ten years.²⁸¹ Another reason in favor of a mandatory minimum is that deterring future swatting incidents is an important goal, and mandatory minimum sentences send a strong message against swatting.²⁸² In recognition that different states disagree on the actual sentence, the statute should be somewhere between existing extremes; a two-year minimum is a fair sentence.²⁸³ A statute with clear offense tiers will allow prosecutors to appropriately tailor the severity of the charge to the specific facts of a given case.²⁸⁴

B. The New Legislative Solution to Swatting

Based on the current literature and law on the swatting issue, society needs a new solution to handle swatting.²⁸⁵ The best way to respond to the swatting problem in the United States is with a new and comprehensive swatting statute.²⁸⁶ The threshold question is whether swatting should be prohibited by a national statute or state-level statutes.²⁸⁷

sentences causing death); OR. REV. STAT. § 162.375(2) (2018) (authorizing mandatory minimum sentences for false reports causing death).

280. See LA. STAT. ANN. § 14:126.1.1(B)(4) (mandating mandatory minimum sentences of ten years); OR. REV. STAT. § 162.375(2) (authorizing mandatory minimum sentences of thirty days).

281. LA. STAT. ANN. § 14:126.1.1(B)(4); OR. REV. STAT. § 162.375(2).

282. See LA. STAT. ANN. § 14:126.1.1(B) (requiring mandatory minimum sentences); Brumfield, *supra* note 22, at 575–76 (noting the importance of swatting penalties serving as a deterrent effect against future swatters).

283. Cf. LA. STAT. ANN. § 14:126.1.1(B)(4) (mandating minimum sentences of ten years); OR. REV. STAT. § 162.375(2) (authorizing mandatory minimum sentences of thirty days).

284. See, e.g., LA. STAT. ANN. § 14:126.1.1(B) (providing multiple levels of penalties that can apply based on the harmed caused).

285. See Binder, *supra* note 11, at 69 (discussing proposals for new laws that could help society respond to swatting incidents); Jaffe, *supra* note 20, at 483 (calling for new laws to help respond to swatting problems).

286. See Jaffe, *supra* note 20, at 483 (arguing that new laws will be needed to address swatting in the future, especially in the wake of recent court decisions on related topics such as cyberbullying).

287. Compare Online Safety Modernization Act of 2017, H.R. 3067, 115th Cong. § 201(a) (2017) (calling for swatting to be a federal crime), with H.B. 3130, 190th GEN. COURT, AN ACT RELATIVE TO SWATTING, at 2–3 (Mass. 2017) (proposing to make swatting a crime in Massachusetts).

1. *A National Statute or State-Level Statutes?*

Some individuals argue that the federal government should act because swatting incidents can occur anywhere in the country, and the swatter and victim may not reside in the same state.²⁸⁸ Thus, a given state might have difficulty finding and arresting the swatter if he or she happens to be outside of the state, especially considering the limited resources of most local police departments.²⁸⁹ This fact may be true, but an example of the solution to this problem already exists in Michigan’s statute, which provides that Michigan has jurisdiction for any offenses intended to occur in the state.²⁹⁰ It also allows prosecutions to occur in the state where the report originated.²⁹¹ If each state adopted this flexible jurisdiction language, states could coordinate their investigations and work together to solve any cases in which the offender and victim are in different states.²⁹² States are free to cooperate among themselves to find the offenders and discuss who should prosecute them.²⁹³

Another argument in favor of a state statute is that any federal swatting bill must, of course, be within Congress’s authority to regulate.²⁹⁴ The practical limits of the reach of a federal statute in the swatting context is best exemplified by the federal hoax statute, which

288. See H.R. 3067, at § 201(a) (calling for the federal government to act on the swatting problem by making it a federal crime); Binder, *supra* note 11, at 72 (discussing federal bills on swatting); Li, *supra* note 124, at 320 (arguing that the federal government should pass new laws to govern swatting); Lovitt, *supra* note 26 (discussing how the technology known as “spoofing” allows swatters to misrepresent their identity and locations to 911 phone systems).

289. See Jaffe, *supra* note 20, at 473 (noting the fairly limited budgets of many local police departments); *Real Consequences*, *supra* note 19 (discussing the difficulty in tracking down swatting offenders, especially individuals who take steps to hide their tracks).

290. See MICH. COMP. LAWS § 750.411a(7) (2019) (providing that Michigan’s courts have jurisdiction over false emergency reports that occur or are intended to occur in Michigan).

291. See *id.* (permitting prosecutions to commence in any jurisdiction where the report was either initiated or resulted in a response).

292. See *id.* (inferring Michigan authorities can work with other jurisdictions in false reports situations that occur in different states).

293. See *Heath v. Alabama*, 474 U.S. 82, 84 (1985) (noting that authorities in Alabama and Georgia worked together to solve a murder case).

294. See Online Safety Modernization Act of 2017, H.R. 3067, 115th Cong. § 101(a) (2017) (stating that the proposed law would only apply to reports that trigger interstate commerce concerns); see also U.S. CONST. art. I, § 8, cl. 3 (stating that Congress only has the power to regulate domestic commerce that involves multiple states).

only allows prosecutions for hoaxes that are related to offenses affecting interstate commerce.²⁹⁵ Another example of the limitation comes from a scholar's proposal to simply add language to a federal obstruction of justice statute to include swatting.²⁹⁶ George Washington Law graduate Lisa Li explains that the federal obstruction of justice statute only applies to federal investigations, meaning that state cases could not be brought under this statute.²⁹⁷ Perhaps a more compelling argument against a federal swatting law is the traditional principle that state governments have the primary police power and should resolve crimes that arise in their respective states.²⁹⁸ Thus, since the states have more authority to pass criminal laws and have also shown a willingness to pass swatting statutes that the federal government has not, each state should pass a new statute that specifically prohibits swatting.²⁹⁹

2. *The Proposed Swatting Statute*

While current false report statutes have significant problems, these statutes serve as a useful guidepost for the ideal swatting statute.³⁰⁰ Thus, the new swatting statute should incorporate much of the existing statutes, taking the best parts from each of them.³⁰¹ The

295. See Plea Agreement, *supra* note 59, at 4–6 (discussing the defendant's plea to federal hoax charges made in interstate commerce).

296. See Li, *supra* note 124, at 326 (proposing to solve the swatting problem placing it within the context of federal obstruction).

297. See *id.* (explaining that this would include only federal agencies such as the FBI).

298. See *Torres v. Lynch*, 136 S. Ct. 1619, 1625 (2016) (“State legislatures, exercising their plenary police powers, are not limited to Congress’s enumerated powers; and so States have no reason to tie their substantive offenses to those grants of authority.”).

299. See, e.g., OR. REV. STAT. § 162.375(1) (2018) (criminalizing false emergency reports in Oregon); *H.R. 3067 – Online Safety Modernization Act of 2017*, *supra* note 140 (noting that the most recent federal swatting bill failed to be enacted by Congress).

300. See, e.g., OR. REV. STAT. § 162.375(2) (providing only misdemeanor penalties for violations); MICH. COMP. LAWS § 750.411a (2019) (requiring reports of conduct that qualify as a crime under Michigan law and providing complex penalty levels).

301. See LA. STAT. ANN. § 14:126.1.1(B)(2)–(4) (2018) (describing three levels of penalties depending on the harm caused and mandatory minimum sentences); *Online Safety Modernization Act of 2017*, H.R. 3067, 115th Cong. § 201(a) (2017) (calling for lower levels of mens rea, knowledge of the report's falsity, and recklessness in that the report will likely trigger an emergency response); see also

proposed statute, entitled “Swatting and False Emergency Reports,” could read as follows:

It shall be an offense for any person to knowingly make a false report to a 911 operator, police department, or any other public agency with a reckless disregard to the fact that the report is likely to generate an emergency response to the specified location.³⁰² An emergency response is defined as any report, statement, or situation that is likely to cause an immediate law enforcement response to a 911 report or poses any immediate threat to public or individual safety.³⁰³ If the false report results in no injury, a violation is a felony punishable by up to two years imprisonment.³⁰⁴ If any bodily injury occurs as a result of the report, a violation is a felony punishable by up to ten years imprisonment.³⁰⁵ Finally, if the report results in death, a violation is a felony punishable by up to twenty-five years imprisonment, with a mandatory minimum sentence of two years of incarceration.³⁰⁶ The state shall have jurisdiction over any reports that target individuals present within the state.³⁰⁷ All law enforcement agencies are required to provide reasonable assistance to other jurisdictions if the report involves an offender and victim who are physically present in separate states.³⁰⁸

While this statute may not cover every possible swatting issue that will arise, states should adopt a version of this statute because it

CAL. PENAL CODE § 148.3(a) (West 2014) (defining false reports to include any situation that triggers emergency responses).

302. See CAL. PENAL CODE § 148.3(a) (listing qualifying crimes to include making knowingly false reports of an emergency); H.R. 3067, at § 201(a) (proposing to require recklessness when the false report generates an emergency law enforcement response).

303. See § 148.3(c) (defining “emergency” to broadly include responses in “authorized emergency vehicles” and any situations that would threaten public safety).

304. Cf. LA. STAT. ANN. § 14:126.1.1(B)(2) (providing for a felony punishable by up to five years in prison if an emergency response occurs); MICH. COMP. LAWS § 750.411a(1)(b) (stating that a false report in Michigan is punishable by up to four years in prison).

305. Cf. LA. STAT. ANN. § 14:126.1.1 (B)(3) (authorizing a mandatory minimum sentence of eight years in prison for violations resulting in “seriously bodily injury”); MICH. COMP. LAWS § 750.411a(1)(d) (establishing that violations of the statute resulting in “serious impairment of bodily functions” are punishable by up to ten years in prison).

306. Cf. LA. STAT. ANN. § 14:126.1.1 (B)(4) (authorizing up to forty years in Louisiana state prison for violations resulting in death and requiring minimum sentences of at least ten years); OR. REV. STAT. § 162.375(2) (2018) (requiring a mandatory minimum sentence of thirty days for false reports resulting in death).

307. See MICH. COMP. LAWS § 750.411a(8) (providing for jurisdiction over false emergency reports that occur or are intended to occur in Michigan).

308. Cf. *id.* (implying that Michigan officials should work with other states, if necessary, to investigate swatting incidents).

solves the problems with current statutes and avoids the problems identified by other scholars.³⁰⁹ This statute does not have to be the only solution; for example, some swatting incidents may qualify as domestic terrorism.³¹⁰ The adoption of this new statute, which uses existing laws as a foundation, would provide each state with an effective swatting statute that provides the proper criminal penalties for swatting acts and answers calls for action on the swatting problem.³¹¹

Some scholars have already proposed ways to address the swatting problem, while a handful of states already have statutes or bills that address the swatting problem.³¹² However, the scholars and states disagree over the solution to swatting, and existing proposals have problems that can be remedied with a new statute that specifically targets swatting.³¹³ An ideal swatting statute should occur at the state level, define swatting as a false report involving an emergency police response, require a reckless mens rea element, and provide appropriate levels of penalties depending on the harm caused during the response.³¹⁴

CONCLUSION

Swatting incidents are unquestionably dangerous and are an increasing threat in today's society.³¹⁵ Many states and scholars have recognized that swatting incidents are a serious problem, but so far the current proposals have not yet provided a complete response to the

309. See, e.g., MICH. COMP. LAWS § 750.411a(1) (limiting the scope of the offense to only include reports of conduct that qualify as a crime under Michigan law); Jaffe, *supra* note 20, at 482–83 (discussing the problems with treating swatting as cyberbullying under existing statutes and calling for new swatting laws).

310. See Enzweiler, *supra* note 6, at 2037–38 (noting that at least in some cases swatting incidents will meet all the elements of domestic terrorism and thus can be prosecuted under domestic terrorism statutes).

311. See LA. STAT. ANN. § 14:126.1.1(A) (providing for prosecutions of false emergency reports in Louisiana); Jaffe, *supra* note 20, at 483 (calling for new laws to help resolve issues with future prosecutions of swatting incidents).

312. See, e.g., OR. REV. STAT. § 162.375(2) (2018); MICH. COMP. LAWS § 750.411a(1); Jaffe, *supra* note 20, at 483; Enzweiler, *supra* note 6, at 2038.

313. See *supra* Part III (discussing the problems with current proposals from both scholars, individuals, and legislatures)

314. See *supra* Subsection III.B.2 (discussing the elements and penalties that should be included in the proposed state swatting statutes).

315. See, e.g., Queally & Winton, *supra* note 57 (reporting on the fatal swatting incident of Andrew Finch).

scope and severity of the problem.³¹⁶ Swatting should be classified as its own distinct offense separate from domestic terrorism statutes or threat statutes.³¹⁷ Specifically, each state should pass a new criminal statute that largely draws from existing statutes; the statute needs to define false reports as reports of emergencies, lower the required mens rea, and provide appropriate penalties for violations depending on the amount of harm caused as a result of the report.³¹⁸ While these statutes are unlikely to solve the problem of swatting entirely, the creation of the laws will provide society with appropriate legal solutions to future swatting incidents.³¹⁹

316. See, e.g., MICH. COMP. LAWS § 750.411a(1) (criminalizing false reports in Michigan); Jaffe, *supra* note 20, at 483 (identifying the growing swatting problem in society today and the need for new laws to address this issue).

317. See LA. STAT. ANN. § 14:126.1.1 (2018) (treating swatting as its own specific crime); Enzweiler, *supra* note 6, at 2001 (calling for treatment of most swatting offenses as a form of domestic terrorism).

318. See, e.g., CAL. PENAL CODE § 148.3(a) (West 2014) (stating that false reports can be of any type of emergency situation); LA. STAT. ANN. § 14:126.1.1(B) (specifying a clear set of penalties depending on the amount of harm a swatting incident causes); Online Safety Modernization Act of 2017, H.R. 3067, 115th Cong. § 503(1)–(2) (2017) (providing examples of lower mens rea elements).

319. See Brumfield, *supra* note 22, at 576 (noting the importance of deterrence and how swatting statutes can help achieve that goal); *New Phenomenon*, *supra* note 4 (discussing the various problems that swatting is causing in society and the rising incidents of these acts).