42 U.S.C. § 1983:
A PRIMER AND AN UPDATE

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42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States…to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

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42 U.S.C. § 1983 does not itself establish or create any substantive rights. It is a remedy in damages for violations of constitutional or statutory rights. Liability is premised upon:

(1) an action under color of law and

(2) a violation of a constitutional or statutory right.

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Color of Law

The only proper defendants in a § 1983 claim are those who represent the government in some capacity, whether they act in accordance with their authority or misuse it." *See Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995). However, a defendant need not be an officer of the government in order to act under color of state law for purposes of § 1983 liability. Rather, courts have applied four separate tests to determine whether a private party acted under color of law in causing an alleged deprivation of federal rights:

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1. The nexus test, i.e., whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

2. The symbiotic relation test, i.e., whether the State has so far insinuated itself into a position of interdependence with the private party that there is a "symbiotic relationship" between them.

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3. The joint action test, i.e., if a private party is a willful participant in joint activity with the State or its agents, then state action is present.

4. The traditional public powers test or public functions test, i.e., where a private entity that exercises powers traditionally exclusively reserved to the State is engaged in state action.

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Violation of a Constitutional Right

First Amendment: for example, freedom of speech, damage to reputation, sexually oriented businesses, signs and other public displays of expression, violation of the Establishment Clause, interference with religious freedom, *see* the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).

Fifth Amendment: requires a property interest protected by the Constitution. *See Hillside Community Church v. Olson*, 58 P.3d 1021 (Colo. 2002). (Adjoining landowners had no property interest in special use permit or hearing sufficient to invoke procedural due process.)

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Procedural due process: the right to notice and hearing. This right does not apply to legislative actions, but does apply to quasi-judicial and administrative actions. A plaintiff must show that he or she was deprived of the opportunity for an appropriate hearing granted and a meaningful time and conducted in a meaningful manner. *Sundheim v. Board of County Commissioners of Douglas County*, 904 P.2d 1337 (Colo. App. 1995), *aff'd on other grounds*, 926 P.2d 545 (Colo. 1997).

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Substantive due process: the right to be free from irrational and unreasonable conduct. The Tenth Circuit Court of Appeals has held that in order to support a substantive due process claim for a violation of 42 U.S.C. §1983, the plaintiff must show that the challenged conduct was reckless, *see Medina v. City & County of Denver*, 960 F.2d 1493, (10th Cir. 1992), and must show that the conduct when viewed in total is "conscious-shocking." *Williams v. City and County of Denver*, 99 F.3d 1009, 1014-15 (10th Cir. 1997).

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Equal protection: Generally, the equal protection clause requires that the state and its subdivisions apply legislation and actions evenhandedly to all persons similarly situated in a designated class. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). As long as a claimant is not being discriminated against because of the exercise of a fundamental right or membership in a protected class, an equal protection claim will not succeed.

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Commerce Clause: U.S. Const. art. I, § 8, cl. 3. In addition to expressly empowering Congress to regulate commerce among the states, the Commerce Clause impliedly limits the states' power to burden interstate commerce. *Blue Circle Cement, Inc. v. Board of County Commissioners*, 27 F.3d 1499 (10th Cir. 1994). In this way the dormant Commerce Clause denies "'the states the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.' " *Id*.

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Conspiracy claims under 42 U.S.C. § 1983

A § 1983 conspiracy theory requires a plaintiff to demonstrate that government officials reached an understanding to deprive the plaintiff of his or her constitutional rights. *Brokaw v. Mercer County*, 253 F.3d 1000 (7th Cir. 2000).

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No Continuing Violation Theory

The 10th Circuit has not formally adopted the continuing violation doctrine for section 1983 claims. *See Gosselin v. Kaufman*, 2016 WL 3964909, slip op. at 2 (10th Cir. 07/19/16) (not selected for publication).

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MUNICIPAL LIABILITY

Municipal liability attaches only when actions are taken "pursuant to official municipal policy of some nature caused a constitutional tort." *Monell v. New York City Dep't of Social Servs*., 436 U.S. 658, 690, 691 (1978). *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818, 105 (1985). In particular, a local government cannot be liable under § 1983 "solely because it employs a tortfeasor...." *Id*. in other words, under § 1983, municipal liability cannot attach on a *respondeat superior* theory. A plaintiff must establish that the municipality has "officially sanctioned or ordered" an act. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

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In order to state a claim for municipal liability, a plaintiff must allege the existence of:
(1) an official policy or custom;
(2) a direct causal link between the policy or custom and the constitutional injury alleged; and
(3) deliberate indifference on the part of the municipality.

Schneider v. City of Grand Junction Police Dep't, 717 F.3d 760, 769 (10th Cir. 2013).

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A plaintiff may allege the existence of a municipal policy or custom in the form of:
(1) an officially promulgated policy;
(2) an informal custom amounting to a widespread practice;
(3) the decisions of employees with final policymaking authority;
(4) the ratification by final policymakers of the decisions of their subordinates; or
(5) the failure to adequately train or supervise employees.

Bryson v. City of Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010). A determination of whether an official constitutes a policymaker is a matter of state law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988).

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A plaintiff must also establish a direct causal link between the municipal policy and the injury alleged. *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, (1997). That is, the municipality must be the "direct cause" or "moving force" behind the constitutional violation. *Smedley v. Corr. Corp. of Am*., 175 Fed. Appx. 943, 946 (10th Cir. 2005). Furthermore, "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *City of Okla. City v. Tuttle*, 471 U.S. 808, 824 (1985).

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The deliberate indifference standard may be satisfied when the municipality has **actual or constructive notice** that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm.
In most instances, notice can be established by proving the existence of a pattern of tortious conduct.
In a narrow range of circumstances, however, deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a highly predictable or plainly obvious consequence of a municipality's action or inaction.

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Where a city's failure to provide training to municipal employees results in a constitutional deprivation, the municipality is liable only where the failure to train reflects deliberate indifference to the constitutional rights of its inhabitants. *See Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998) ("The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm.).

"In most instances, notice can be established by proving the existence of a pattern of tortious conduct." *Id*., citing *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 770 (10th Cir. 2013).

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However, the fact that:

- a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program. It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

City of Canton v. Harris, 489 U.S. 378, 390-91 (1989).

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A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate the municipality's deliberate indifference for purposes of a failure to train claim. *Connick v. Thompson*, 563 U.S. 51, 62 (2011).

A single violation (rather than a pattern) may lead to failure-to-train liability "when the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. *City of Canton*, 489 U.S. at 390.

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IMMUNITIES FROM INDIVIDUAL LIABILITY

Absolute Legislative Immunity: Government officials are entitled to absolute immunity for legislative decisions. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

Whether an act is legislative turns on the nature of the act rather than on the motive or intent of the official performing it. In *Bogan*, the Supreme Court found the ordinance in question to be within the ambit of traditional legislative activity, since it reflected a discretionary, policy-making decision and could have prospective implications affecting the community, not just a particular individual.

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Absolute Judicial/Quasi-judicial Immunity:
Government officials are entitled to absolute quasi-judicial immunity for actions taken in the exercise of their judicial function. *Whitesel v. Sengenberger*, 222 F.3d 861 (10th Cir. 2000). Quasi-judicial decisions include rezoning, decisions on variances and special use permits, and actions taken on development plans.

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Absolute Prosecutorial Immunity:
Prosecutors are absolutely immune from suit under 42 U.S.C. § 1983 for "advocatory functions closely related to the judicial process.
See Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) holding that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial and which occur in the course of her role as an advocate for the state are entitled to the protections of absolute immunity from suit.

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Qualified Prosecutorial Immunity:
Prosecutors are qualifiedly immune from suit for "investigative" or "administrative" functions, which have a more attenuated connection with the judicial process. *Higgs v. District Court*, 713 P.2d 840 (Colo. 1986).
In differentiating between prosecutorial and administrative functions, factors for the court to consider are: (1) whether the challenged conduct occurred prior or subsequent to the filing of formal criminal charges; (2) whether there existed safeguards that could deter or mitigate prosecutorial abuse and thus reduce the need for a civil action to redress constitutional violations; and (3) whether the challenged conduct more closely resembles traditional police conduct than prosecutorial conduct.

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Qualified Immunity:
Government officials performing discretionary functions are shielded from liability if "their conduct does not violate clearly established statutory or constitutional rights, of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

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The plaintiff has the burden of proving that the law was clearly established. *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988).

To satisfy this burden, a plaintiff may not merely identify in the abstract the clearly established right. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Anderson v. Creighton*, 483 U.S. 635 (1987).

The plaintiff has the additional burden of demonstrating how the defendant's conduct violated clearly established law. *Pueblo Neighborhood Health Centers, Inc., supra* at 646.

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The Tenth Circuit has explained the degree of specificity required from prior cases to clearly establish a violation of a statutory or constitutional right for qualified immunity purposes. *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004). *Pierce* acknowledged the fair notice standard articulated by the Supreme Court in the case of *Hope v. Pelzer*, 536 U.S. 730 (2002) and explained that under this standard:

- [t]he degree of specificity required from prior case law depends in part on the character of the challenged conduct. The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.

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EXAMPLES OF CASES DECIDING WHETHER QUALIFIED IMMUNITY APPLIES

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Davis v. Clifford, 825 F.3d 1131 (10th Cir. 2016)

Driver brought a §1983 action against police officers and the city alleging that the officers used excessive force in arresting her for driving with a suspended license.

- Driver pulled over on a traffic stop. Vehicle license plate had handicapped symbol.
- Police officer discovered an active warrant for her arrest for driving with a suspended license caused by failure to provide proof of insurance.
- Police officer called for backup assistance. Other officers arrived, and police vehicles surrounded her car on all sides.
- Driver heard batons banging on her car and, fearing for her safety, she locked the doors and rolled up her window.
- Through a gap in the window, driver asked why she had been pulled over and offered to show her license, insurance, and registration.

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- Police responded by commanding her to "step the fuck out of the car."
- Driver failed to exit the vehicle when ordered to do so. Driver asked officers for assurance that they would not hurt her.
- Police officers broke the driver's car window and pulled her through the broken window by her arms and hair; placed her face-down on the broken glass outside the car, and handcuffed her.
- There was no indication the arrestee had access to a weapon or threatened harm to herself or others.

Were the officers entitled to qualified immunity?

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Filarsky v. Delia, __U.S.__, 132 S. Ct. 1657 (2012)

Firefighter brought a § 1983 action against a city, its fire department and officials, and a private attorney alleging that an internal affairs investigation had violated his constitutional rights.

- Firefighter missed work and city hired a private investigation firm to conduct surveillance. Firefighter was seen buying building materials.
- City hired a private attorney to interview firefighter.
- In the interview, the firefighter acknowledged buying building supplies but denied having done any work on his home.
- Private attorney asked firefighter to allow a fire department official to enter his home and view the unused materials.
- When firefighter refused, private attorney ordered him to bring the materials out of his home for the official to see.

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- After the interview concluded, officials followed firefighter to his home where he agreed to produce the materials.
- Firefighter alleged that the private attorney's order to produce building materials violated his Fourth and Fourteenth Amendment rights.

Was the private attorney, who was not an employee of the City, entitled to qualified immunity?

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Lawrence v. Reed, 406 F.3d 1224 (10th Cir. 2005)

Landowner sued chief of police and others for violating her Fourth and Fourteenth Amendment rights after the city, acting without a warrant or a hearing, seized more than 70 vehicles from her property pursuant to its derelict vehicle ordinance.

- Prior to the seizure, the police chief consulted on several occasions with the city attorney. They discussed how to enforce the derelict vehicle ordinance, including its 30-day notice process and a 24-hour tagging requirement, as well as removal of the vehicles.
- The morning of the seizure, the police chief noted that the landowner had moved the vehicles. Police chief consulted with city attorney one more time and discussed whether or not to proceed. Decision to proceed was made.
- Over the next several days, the city towed over 70 of landowner's vehicles to a landfill.

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- In their conversations, the city attorney did not once mention a constitutional requirement of a warrant or of a constitutional requirement to notice and hearing prior to the seizure.
- Police chief alleged entitlement to qualified immunity based upon the receipt of legal advice from the city attorney prior to the seizure.

Was the police chief entitled to qualified immunity?

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McDonald v. Wise, 796 F.3d 1202 (10th Cir. 2014)

Mayoral appointee, who was terminated from his position based on a police officer's complaint that he had sexually harassed her, brought action under § 1983 against the mayor, mayor's press secretary, and others alleging due process violations (and state law claims).

- Mayor and press secretary informed news reporters that appointee was terminated from employment because of "serious allegations of misconduct."
- Among his claims, appointee alleged he was deprived of a liberty interest without due process; he was not given an name-clearing hearing (a public employee has a liberty interest in his good name and reputation as they relate to his continued employment).

Was the press secretary entitled to qualified immunity?

Was the mayor entitled to qualified immunity?

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Taylor v. Barkes, __U.S.__, 135 S. Ct. 2042 (2015)

Widow of deceased inmate brought § 1983 action against commissioner of state department of corrections, warden of correctional institution, and others, alleging that they violated Eighth Amendment in failing to prevent the suicide of her inmate husband.

- Inmate disclosed that he had a history of psychiatric treatment and was on medication, and that he had attempted suicide in 2003. Inmate indicated he was not currently thinking about killing himself.
- A nurse who worked for a contractor providing health care at the institution conducted a medical evaluation and gave inmate a routine referral to mental health services but did not initiate any special suicide prevention measures.
- Inmate was placed in a cell by himself. Despite what he told the nurse, that evening he called his wife and told her that he "can't live this way anymore" and was going to kill himself. Wife did not inform anyone at the institution of this phone call.

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- Inmate was discovered the next morning having hanged himself with a sheet.
- Widow's claim was that the individuals violated the inmate's civil rights failing to prevent his suicide by failing to supervise and monitor the private contractor that provided the medical treatment, including the intake screening.
- The Third Circuit Court of Appeals had held that it was clearly established at the time of the inmate's death that an incarcerated individual had an Eighth Amendment right to the proper implementation of adequate suicide prevention protocols. Thus, individual defendants were not entitled to qualified immunity.

Did the U.S. Supreme Court affirm or reverse the denial of qualified immunity?

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Browder v. City of Albuquerque, 787 F.3d 1076 (10th Cir. 2015)

Injured occupant of a motor vehicle and estate of deceased occupant brought § 1983 action alleging a violation of substantive due process against the city and a police officer after occupants' vehicle was struck by police cruiser driven by police officer.

- After finishing his shift, police officer drove police cruiser with emergency lights activated, but no siren, at an average of about 66 miles per hour on city surface streets. As he reached an intersection, the light was red, and he pressed the gas pedal, ignored the red light, and the collision occurred.
- Police officer insisted at the time of the accident he was pursuing another car operating in a dangerous manner. However, the evidence indicated to the contrary, supported by the fact that officer didn't call or radio dispatch to relate any infraction by any other driver. Witness said that police officer wasn't following anybody at the time of the crash.

Was the police officer entitled to qualified immunity?

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Mocek v. City of Albuquerque, 813 F.3d 912 (10th Cir. 2015)

Arrestee brought §1983 claims against city, city's aviation police department, chief of police, various police officers, and others alleging that defendants refused to permit him to video record the conduct of TSA agents at airport security screening checkpoint and arrested him for refusing to produce documentation of his identity.

- Arrestee attempted to go through security line checkpoint without identification.
- Arrestee began to film the encounter. TSA agent ordered him to stop, and when arrestee refused police were called.
- TSA agents told police that arrestee had been causing a disturbance, refused orders to put down his camera, and was filming the agents.
- Police officers witnessed at least three TSA agents attending to the situation, having left behind other duties.

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- Arrestee refused police order to stop filming and refused to identify himself.
- Arrestee was told that if he did not comply with TSA agent instructions he would be escorted out of the airport. Another officer threatened to arrest him.
- Arrestee continued to film and insisted he was in compliance with TSA regulations.
- Police officer told arrestee that he was under investigation for disturbing the peace and was required to present identification.
- Arrestee responded that he would remain silent and wanted to speak to an attorney.
- Police officer arrested him, and police confiscated the camera and deleted the video recordings.

Was the police officer who arrested him entitled to qualified immunity from liability for the arrest?

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Mullenix v. Luna, __U.S.__, 136 S. Ct. 305 (2015)

Representative of motorist's estate brought § 1983 action against a state trooper alleging that trooper used excessive force when he shot and killed motorist, who was fleeing from arrest during a high-speed pursuit.

- Police officer approached motorist's car to inform motorist that he was under arrest on an outstanding warrant. Motorist sped off and headed for interstate highway, and police gave chase.
- Motorist led officers on 18-minute chase at speeds between 85 and 110 mi./h.
- Motorist had twice called the police dispatcher claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit.
- Trooper, who had responded and intended to set up a spike strip, decided on another tactic - shooting at the motorist's car in order to disable it. Trooper had not received training in this tactic and had not attempted it before.

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- Trooper asked dispatch to inform the supervisor of his plan, but before receiving a response took his service rifle from his cruiser and set up a shooting position on an overpass.
- Upon spotting the motorist's vehicle, trooper fired six shots.
- It was later determined that motorist had been killed by four bullets which struck his upper body. There was no evidence that any shots hit the car's radiator, motor, or engine block.

Was the trooper entitled to qualified immunity?

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Estate of Reat v. Rodriguez, 824 F.3d 960 (10th Cir. 2016)

Estate of automobile passenger, who was fatally shot by attackers after 911 operator told driver to return to the city in which motorist and passenger were attacked, brought § 1983 action against the 911 operator.

- Driver called 911 to report that several men had thrown a bottle and broken the rear window of the car. Driver told 911 operator that he and his passengers had fled to a location outside the city.
- 911 operator told driver that because the attack had occurred in the city he needed to return to the city in order to receive help from the police.
- Over the course of the conversation, the driver told the 911 operator at least six times that he was injured, in shock, and afraid.
- Nevertheless, the 911 operator insisted that the police could not help unless he returned to the city. Driver agreed but remained on the phone with the 911 operator as he drove.

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- Nevertheless, the 911 operator insisted that the police could not help unless he returned to the city. Driver agreed but remained on the phone with the 911 operator as he drove.
- 911 operator instructed driver to stop in the city and wait for the officers who he would dispatch. 911 operator instructed driver to turn on his hazard lights so that the police could easily locate the vehicle.
- While waiting, another man in the car spoke to the 911 operator and repeated that they were all in shock and scared and asked whether police were on their way to provide help. 911 operator indicated he had sent the police, but in fact he had not.
- 911 operator asked to speak to the driver and had him confirm that his hazard lights were on and reiterated that the driver needed to wait at that location. 911 operator warned the driver that if he saw that the assailant had returned driver needed to call 911 right away.

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- Several seconds later, driver shouted that the assailants had returned, and another occupant informed 911 operator that men had returned and were shooting.
- 911 operator continued to ask what was occurring, who had been shot, where they were located, and whether the attackers were still there.
- 911 operator continued to ask questions about the victim, and officers were dispatched to the scene about one minute after the shooting.

Was the 911 operator entitled to qualified immunity?

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