

Essays on State Actors, Privately Run Prisons, Charter Schools, Section 1983, Section 1988, Qualified Immunity, Ethical Pitfalls and Dilemmas, and Attorney Fee Payments

Donald L. Buresh, Ph.D., Esq.

Touro University Worldwide

ABSTRACT: This paper consists of five essays on state actors, privately run prisons, charter schools, Section 1983, Section 1988, qualified immunity, and attorney fee payments. The first essay examines litigation tools as vehicles for policy change. The second essay discusses state actors, privately run prisons, and charter schools. In the third essay, Section 1983, Section 1988, and qualified immunity are described. In the fourth essay, Section 1983 ethical pitfalls and dilemmas are discussed. Finally, the fifth essay focuses on attorney fee awards when prevailing plaintiffs are not obliged to pay any fees. This fee payment system is appropriate when prevailing plaintiffs engage for-profit firms or non-profit organizations. Pro se prevailing plaintiffs have no such legal protection.

KEYWORDS: Attorney Fee Payments, Charter Schools, Privately Run Prisons, Qualified Immunity, Section 1983, Section 1988, State Actors

DONALD L. BURESH BIOGRAPHY

Donald L. Buresh earned his Ph.D. in engineering and technology management from Northcentral University. His dissertation assessed customer satisfaction for both agile-driven and plan-driven software development projects. Dr. Buresh earned a J.D. from The John Marshall Law School in Chicago, Illinois, with a focus on cyber law and intellectual property. He also earned an LL.M. in intellectual property from the University of Illinois Chicago Law School (formerly, The John Marshall Law School), an LL.M. in cybersecurity and privacy from Albany Law School, graduating summa cum laude, and an LL.M. in financial compliance and risk management from Albany Law School, graduating summa cum laude. Dr. Buresh received an M.P.S. in cybersecurity policy and an M.S. in cybersecurity, with a concentration in cyber intelligence, both from Utica College. He has an M.B.A. from the University of Massachusetts Lowell, focusing on operations management, an M.A. in economics from Boston College, and a B.S. from the University of Illinois-Chicago, with a major in mathematics and philosophy. Dr. Buresh is a member of Delta Mu Delta, Sigma Iota Epsilon, Epsilon Pi Tau, Phi Delta Phi, Phi Alpha Delta, and Phi Theta Kappa. He has over 25 years of paid professional experience in Information Technology and has taught economics, project management, negotiation, business ethics, business law, quality management, and cybersecurity at several universities. Dr. Buresh is an avid Chicago White Sox fan and keeps active by fencing épée, foil, and now sabre at a local fencing club. Dr. Buresh is a member of the Florida Bar.

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INTRODUCTION

This paper consists of five essays on state actors, privately run prisons, charter schools, Section 1983, Section 1988, qualified immunity, and attorney fee payments. The first essay examines litigation tools as vehicles for policy change. The second essay discusses state actors, privately run prisons, and charter schools. In the third essay, Section 1983, Section 1988, and qualified immunity are described. In the fourth essay, Section 1983 ethical pitfalls and dilemmas are discussed. Finally, the fifth essay focuses on attorney fee awards when prevailing plaintiffs are not obliged to pay any fees. This fee payment system is appropriate when prevailing plaintiffs engage for-profit firms or non-profit organizations. Pro se prevailing plaintiffs have no such legal protection.

ESSAY ON LITIGATION TOOLS FOR POLICY CHANGES

This essay attempts to answer the following questions:

- Do successful civil lawsuits ensure accountability?
- Does it matter whether the lawsuits are settled or are decided by a judge or a jury?
- Are damages actions for civil rights violations effective deterrents?
- Can these lawsuits bring about policy change?
- Are different strategies and tactics required to bring about policy changes?

Each question is addressed in turn.

Do Successful Civil Lawsuits Ensure Accountability?

Successful civil lawsuits can achieve partial accountability, but not necessarily complete accountability. Civil lawsuits typically guarantee financial compensation or forced settlements for victims but do not necessarily ensure criminal convictions, compel systemic institutional change, or ensure that defendants have the money to pay the settlement.¹

It should be remembered that the civil justice system provides justice via liability, where enforcing comprehensive accountability may be limited. The limitations include:²

- **The Scope of Accountability Is Financial:** Civil lawsuits typically desire monetary damages rather than an admission of guilt, even when punitive damages are present.
- **There May Be Collection Issues:** Winning a judgment does not necessarily imply that a plaintiff will receive money. Defendants can file for bankruptcy, refuse to pay, or appeal the judgment.
- **Confidentiality and Non-Disclosure Agreements May Need to Be Signed:** Over 95 percent of civil cases are settled before trial. Under such circumstances, Non-Disclosure Agreements protect defendants from public scrutiny.
- **There May Be a Lack of Systemic Mandates:** Civil courts cannot usually change a company's internal corporate policy. They also cannot strip a doctor or a police officer of their license or job. A separate hearing is needed.

Understanding and appreciating the gaps between civil liability and accountability can help plaintiffs set reasonable expectations.

Does It Matter Whether Lawsuits Are Settled or Decided by a Judge or a Jury?

It matters whether lawsuits are settled or decided by a judge or jury. The way or method that a case is resolved affects the speed of the case, payout amount, the risk of winning or losing, and the case's confidentiality. It should be remembered that 95 percent of civil suits are settled out of court. It is essential to understand the different resolution options so one can make an informed decision based on one's circumstances.

According to the Legal Information Institute, a settlement is "an agreement that ends a dispute and results in the voluntary dismissal of any related litigation. Regardless of the exact terms, many parties choose to keep their settlement agreements private. In business law, a settlement is the payment, satisfaction, and closing of an account."³ In a settlement, there is usually no admission of fault.⁴ The advantages of a settlement include guaranteed compensation, a relatively speedy resolution, lower legal fees, and the opportunity to keep the terms confidential. On the other hand, the disadvantages of a settlement are that the amount is a negotiated compromise likely lower than a jury award, and that negotiations may be heavily influenced by the defendant or the defendant's insurance company.⁵

In contrast, a jury trial means a group of citizens hears the evidence and decides liability and damages.⁶ The advantages of a jury verdict include the potential for greater compensation than a settlement, emotional validation, public vindication, and the ability to hold the defendant publicly accountable. The disadvantages of a jury verdict include the high risk of losing and getting nothing, trial

¹ Howard M. Erichson, Victim Civil Litigation and the Elusive Goal of Corporate Accountability, 72 *DePaul Law Review* 239 (2023), available at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2276&context=faculty_scholarship.

² Luke Baumgartner, How Civil Litigation Can Hold Hate Groups Accountable, *Lawfare* (Apr. 21, 2025), available at <https://www.lawfaremedia.org/article/how-civil-litigation-can-hold-hate-groups-accountable>.

³ LII Staff, Settlement, *Legal Information Institute* (n.d.), available at <https://www.law.cornell.edu/wex/settlement>.

⁴ ABA Staff, How Courts Work, *American Bar Association* (Sep. 9, 2019), available at https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/cases_settling/.

⁵ JJ Prescott, Kathryn E. Spier, & Albert Yoon, Trial and Settlement: A Study of High-Low Agreements, *University of Michigan Law School Scholarship Repository* (Aug. 2010), available at https://repository.law.umich.edu/cgi/viewcontent.cgi?date=1286302693&article=1133&context=law_econ_current&preview_mode=

⁶ IBA Staff, A Guide to Jury Service, *Illinois State Bar Association* (2023), available at <https://www.isba.org/public/guide/juryduty>.

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expenses, the emotional stress of a trial, and the time it takes to resolve the case.⁷ If a plaintiff decides on a bench trial without a jury, the trial is typically shorter, simpler, and less expensive than a jury trial.⁸

Are Damages Actions for Civil Rights Violations Effective Deterrents?

In reality, damages for civil rights violations are marginally effective as deterrents. Although they offer critical financial compensation and can compel institutional policy changes, their ability to deter additional civil rights violations is typically dampened by legal doctrines that protect bad actors from financial liability.⁹ Key factors that limit deterrence include:¹⁰

- **Qualified Immunity:** In the United States, government officials (e.g., police officers) are protected by qualified immunity, which protects them from liability unless their actions violate a statutory or constitutional right.
- **Indemnification:** When damages result from a civil rights lawsuit, the governmental entity is likely responsible for payment rather than the government official. This means that the deterrent effect against the individual is minimized or nullified.
- **Judgment-Proof Defendants:** Protected individuals and low-level government officials typically lack the financial resources to pay substantial civil rights damages, thereby ensuring that lawsuits for monetary relief against them are impractical.
- **Litigation Obstacles:** Civil rights litigation is costly, time-consuming, and usually complex. These issues can prevent potential plaintiffs from filing civil rights lawsuits.

Even so, damages from civil rights actions may deter future violations in various ways. First, large settlement payouts, including compensatory and punitive damages, will likely generate financial and political pressure on state and local governments and corporations to change their practices. Furthermore, many civil rights statutes include fee-shifting provisions that allow plaintiffs to recover attorney's fees, thereby ensuring that powerful organizations can be held accountable.¹¹

Can Lawsuits Bring About Policy Changes?

Lawsuits can drive policy changes in the public and private arenas. Lawsuits can force entities to settle, generate new legal precedents, require structural reforms, and promote the passage of new laws.¹² The primary means for attaining policy changes via the legal system include:¹³

- **Strategic or Impact Litigation:** Individuals and civil rights groups, at times, file lawsuits to change government policies, seeking binding precedents or policy reform.
- **Class-Action Lawsuits and Settlements:** Successful class actions can result in settlements that legally force defendants to change their internal policies, redesign products, or institute new safety standards.
- **Regulation via Litigation:** Lawsuits against major industries can force legislators and administrators to create new and sweeping laws and regulations.
- **Direct Pressure on Legislators:** Threats of continued, costly lawsuits can prompt the rewriting of flawed laws or the updating of administrative policies, given the economic and reputational costs of a lawsuit.

Are Different Strategies and Tactics Required to Bring About Policy Changes?

Different strategies and tactics may be required to ensure that policy changes occur. Different strategies or high-level plans include:¹⁴

- Work with government officials and lobbyists to create legislation or negotiate with individuals and officials;
- Mobilize public opinion to pressure legislators to pass the desired legislation; and
- Use the court system to challenge existing policies or enforce legal rights.

⁷ *Id.*

⁸ *Id.*

⁹ See generally, Joseph A. Seiner, The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change, 50 *William & Mary Law Review* 735 (2008), available at <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1065&context=wmlr>.

¹⁰ U.S. Commission on Civil Rights, Revisiting *Who Is Guarding the Guardians?* Chapter 5 Remedies and Legal Developments, *U.S. Commission on Civil Rights* (n.d.), available at <https://www.usccr.gov/files/pubs/guard/ch5.htm>.

¹¹ Susan Bennett, Attorney's Fee Statutes in Civil Litigation: The State of the Art, 18 *Maryland Bar Journal* (1985), available at https://digitalcommons.wcl.american.edu/facsch_lawrev/1520.

¹² IIL Staff, What Is Impact Litigation?, *Immigration Impact Litigation* (n.d.), available at <https://www.immpactlitigation.com/about-us/what-is-impact-litigation/>.

¹³ Heather Leigh Krick, Barry C Taylor, & Jessica Stender, The Power of Class Action Lawsuits: A Primer, *American Bar Association* (Mar. 7, 2025), available at <https://www.americanbar.org/groups/crsj/resources/on-demand/power-class-action-lawsuits-primer/>.

¹⁴ Coach Hub Staff, Strategy vs Tactics: How to Balance Long-Term Vision with Short-Term Execution, *Coach Hub* (Jan. 18, 2023), available at <https://www.coachhub.com/blog/strategy-vs-tactics>.

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In contrast, tactics involve specific actions and methods used to implement an existing strategy. This includes drafting policy memos, organizing expert testimonies, or legislative lobbying. It also involves organizing protests, generating petition drives, or managing digital advocacy. It should be remembered that effective advocacy demands both strategy and tactics to ensure broad support for the desired outcome.¹⁵

Conclusion to Litigation and Policy Changes Essay

In conclusion, successful civil lawsuits can indeed ensure accountability. The characteristics of a lawsuit can determine the level of accountability. If an individual or an organization wants to change a particular law or policy, a successful lawsuit may be the appropriate vehicle. In the end, it is a matter of will and commitment to change that decides what occurs.

ESSAY ON STATE ACTORS, PRIVATELY RUN PRISONS, AND CHARTER SCHOOLS

This essay discusses the state actor issue with regard to privately run prisons and charter schools.

The paper responds to the following subjects and questions:

- Definition and elements of a state actor
- Are privately run prisons state actors?
- Are charter schools state actors?
- Ethical and legal consequences of privately run prisons and charter schools
- Have the functions of government expanded over time?
- When is a private party not a state actor?

The potential opinion of the Supreme Court is addressed last because the state actor issue is complex. The reason it appears last is that understanding the issue requires appreciating its many nuances. Then, and only then, can the Supreme Court opinion be explained in any detail.

Definition and Elements of a State Actor

According to the Cambridge Dictionary, a state actor is a “person or an organization that is part of a government, and is involved in or important in politics, society, etc. in some way, because of their actions.”¹⁶ In other words, a state actor is an individual, entity, or organization that functions on behalf of a government or is officially cloaked with government authority.¹⁷ Classifying an individual, entity, or organization as a state actor ensures its accountability under government law or constitutional constraints.¹⁸ It should be remembered that private individuals or businesses can be state actors if they are carrying out a traditionally exclusive public function, acting under color of law, or having a closely intertwined relationship with the government.¹⁹

The elements of being a state actor as a business include:

- **Public Function Test:** The business performs a function that is typically traditionally and exclusively reserved for the government.²⁰
- **State Compulsion Test:** The government coerces, significantly encourages, or dictates the business's actions, thereby ensuring that the business is acting on behalf of the state.²¹
- **Joint Action / Symbiotic Relationship:** The business and the state are deeply entangled in sharing profits, regulatory authority, or property.²²
- **Extensive Regulation:** Pervasive and heavy state regulation transforms the private business into an instrument of state policy.²³

When a business acts as a state actor, it no longer possesses standard private-actor immunities, thereby making the entity liable for violations of due process, equal protection, or civil rights.²⁴

¹⁵ *Id.*

¹⁶ State Actor, Cambridge Dictionary (n.d.), available at <https://dictionary.cambridge.org/us/dictionary/english/state-actor>.

¹⁷ Michael L. Wells, Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context, 26 *Cardozo Law Review* 1, 998-125 (Nov. 2004), available at https://digitalcommons.law.uga.edu/fac_artchop/247/.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Congress.gov Staff, Amdt1.7.2.4 State Action Doctrine and Free Speech, *Constitution Annotated* (n.d.), available at https://constitution.congress.gov/browse/essay/amdt1-7-2-4/ALDE_00013541/.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ LII Staff, Amdt14.2 State Action Doctrine, *Legal Information Institute* (n.d.), available at <https://www.law.cornell.edu/constitution-conan/amendment-14/state-action-doctrine>.

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Are Privately Run Prisons State Actors?

Privately run prisons are facilities operated by private corporations that are contracted by local, state, or federal governments to incarcerate individuals. These organizations contain inmates for profit via per diem payments.²⁵

How Privately Run Prisons Operate

Privately run prisons have the following characteristics:²⁶

- **Funding and Contracts:** Governments usually pay privately run prisons at a specified rate per inmate or per available bed. When the latter applies, it usually does not matter whether the facility is fully occupied.
- **Corporate Entities:** In the United States, the privately run prison industry is largely dominated by companies such as CoreCivic, formerly known as Corrections Corporation of America, and The GEO Group.
- **Services:** Some contracts cover only the operation of the privately run prison, while others deal with the design, construction, and management.

The Inmate Population at a Privately Run Prison

On the federal level, privately run prisons primarily can incarcerate immigration detainees awaiting deportation or individuals who were given relatively short sentences. Typically, high-security inmates or inmates with expensive medical needs are not held at privately run prisons because the needs of these individuals reduce corporate profits.²⁷

Controversies Associated with Privately Run Prisons

The controversies surrounding privately run prisons include:²⁸

- **Profit Incentives:** Privately run prisons have financial incentives to lobby legislators for stricter sentencing laws to ensure high incarceration rates, thereby securing their revenue stream.
- **Cost and Quality:** Those in favor of privately run prisons argue that private facilities reduce costs and operate more efficiently than state-run facilities because they have lower staff levels and less training. However, privately run prisons usually have high rates of inmate violence.
- **Transparency:** Privately run prisons are sometimes exempt from private record laws, making it harder to compare with state-run facilities.

Are the State Actor Elements Satisfied for Privately Run Prisons?

All of the elements of being a state actor as a business are satisfied. First, the public function test is satisfied because a privately run prison is performing a function that is traditionally and exclusively conducted by the government. Second, the state compulsion test is fulfilled because governments typically dictate the actions of a privately run prison so that those actions conform with the actions of that government. Third, there is a symbiotic relationship between a privately run prison and the government because they share regulatory authority over inmates. Fourth, the extensive regulation element is satisfied because privately run prisons are subject to extensive government regulation. Thus, privately run prisons are indeed state actors.

Are Charter Schools State Actors?

Charter schools may be state actors depending on the result of applying the public function test and state-specific law. Due to the complexity of various state laws, charter schools may or may not be state actors.²⁹ If a charter school is privately operated but publicly funded, its status as a state actor depends on how the courts apply the Fourteenth Amendment.³⁰ The debate centers around the public function test and state-specific laws.

²⁵ Anastasia Glushko, Doing Well and Doing Good: The Case for Privatising Prisons, 32 *Policy* 1 (Autumn 2016), available at <https://www.cis.org.au/wp-content/uploads/2016/04/32-1-glushko-anastasia.pdf>.

²⁶ Kristen M. Budd, Private Prisons in the United States, *The Sentencing Project* (Feb. 21, 2024), available at <https://www.sentencingproject.org/reports/private-prisons-in-the-united-states/>.

²⁷ *Id.*

²⁸ Megan Mumford, Diane Whitmore Schanzenbach, & Ryan Nunn, The Economics of Private Prisons, *The Hamilton Project* (Oct. 20, 2016), available at <https://www.hamiltonproject.org/publication/paper/the-economics-of-private-prisons/>.

²⁹ S. Ernie Walton, Charter Schools and State Action: An Analysis Through the Lens of Agency Law, 77 *Oklahoma Law Review* 915, 915-52 (2025), available at <https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=2338&context=olr>.

³⁰ Beth Daley, What Is a Charter School, Really? Supreme Court Ruling on Whether Catholic Charter Is Constitutional Will Hinge on Whether They're Public or Private, *The Conversation* (Feb. 27, 2025), available at <https://theconversation.com/what-is-a-charter-school-really-supreme-court-ruling-on-whether-catholic-charter-is-constitutional-will-hinge-on-whether-theyre-public-or-private-249428>.

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The Public Function Test

Is operating a charter school an exclusive state function? Here are the arguments, both pro and con, regarding this issue.³¹ In some jurisdictions, the courts have opined that charter schools are not state actors. For example, in *Rendell-Baker*,³² the Supreme Court found that for employment and wrongful termination purposes, a charter school was not a state actor. On the other hand, in *Peltier*,³³ the Fourth Circuit opined that a North Carolina public charter school is a state actor and that it was subject to the Equal Protection Clause when dealing with dress codes. The Supreme Court declined to review this decision.

State-Specific Laws

Charter schools are created by state legislation. State constitutions and laws are a significant factor in determining their status. Many states explicitly define charter schools as public schools. Thus, charter schools are required to respect state constitutional rights, such as free speech and due process.³⁴

Controversies Associated with Charter Schools

The debate over whether charter schools are state actors determines how they operate with respect to civil rights and discrimination, as well as religion and public funds. The Oklahoma Statewide Virtual Charter School Board approved an application from the Catholic Archdiocese of Oklahoma City to sponsor St. Isidore, which planned to operate as the nation's first publicly funded religious charter school.³⁵ The Oklahoma Attorney General Gentner Drummond challenged the contract, arguing that it violated the Oklahoma Constitution and the First Amendment's Establishment Clause.³⁶ The Oklahoma Supreme Court agreed, ruling the school unconstitutional. By an equally divided United States Supreme Court, where Justice Barrett recused herself, the Oklahoma lower court decision was affirmed. The ruling set no nationwide precedent and applied only to the parties before the Oklahoma Supreme Court.³⁷

Are the State Actor Elements Satisfied for Charter Schools?

For charter schools to be state actors, they must satisfy all four elements above. However, in general, charter schools do not satisfy the public function test, let alone the other three elements. Based on the information above, a charter school may or may not be a state actor, depending on state law.

Ethical and Legal Consequences of Privately Run Prisons and Charter Schools

This section is divided into two subsections. First, the ethical and legal consequences for privately run prisons are discussed. Second, the ethical and legal consequences for charter schools are examined. Each one occurs in turn.

Privately Run Prisons

The ethical consequences of asserting that privately run prisons are state actors encompass:³⁸

- **Conflicting Incentives:** Linking incarceration to corporate profits creates perverse incentives. Privately run prisons rely on high occupancy to ensure a continued revenue stream. The result can be that privately run prisons may lobby for harsh sentencing laws.
- **Compromised Rehabilitation:** From economics, the goal of a for-profit institution is to maximize profit, or equivalently, minimize costs.³⁹ In other words, privately run prisons have an incentive to reduce mental health and educational facilities.
- **Labor Exploitation:** It should be remembered that inmates at privately run prisons are frequently utilized for corporate manufacturing and facility maintenance, earning significantly below federal and state minimum wage laws.

³¹ Jack Salt, Skirting State Action: Section 1983 Challenges to Education and Charter Management Organizations After *Peltier v. Charter Day School, Inc.*, 102 *North Carolina Law Review* 1, 281-302 (Dec. 1, 2023), available at <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=6954&context=nclr>.

³² *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), available at <https://supreme.justia.com/cases/federal/us/457/830/>.

³³ *Bonnie Peltier v. Charter Day School, Inc.*, No. 20-1001 (4th Cir. 2022), available at <https://law.justia.com/cases/federal/appellate-courts/ca4/20-1001/20-1001-2022-06-14.html>.

³⁴ Preston C. Green III, & Suzanne E. Eckes, All Aboard!: Making Charter School Boards All-Purpose State Actors Under the Supreme Court's *Amtrak* Case, 71 *Duke Law Review* 561, 561-98 (Dec. 26, 2024), available at <https://drakelawreview.org/wp-content/uploads/2024/12/green-9.1.pdf>.

³⁵ *Oklahoma Charter School Board v. Drummond*, 605 U.S. ____ (2025), available at <https://supreme.justia.com/cases/federal/us/605/24-394/>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Alex Friedmann, The Societal Impact of the Prison Industrial Complex, or Incarceration for Fun and Profit—Mostly Profit, *Prison Legal News* (Jan. 15, 2012), available at <https://www.prisonlegalnews.org/news/2012/jan/15/the-societal-impact-of-the-prison-industrial-complex-or-incarceration-for-fun-and-profitmostly-profit/>.

³⁹ Paul Krugman, & Robin Wells, *Economics* (Worth Publishers Dec.12, 2017).

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The legal consequences of concluding that privately run prisons are state actors are:⁴⁰

- **Civil Rights Accountability:** In privately run federal prisons, inmates are typically prevented from suing for monetary damages for constitutional violations because the Fourth, Fifth, and Eighth Amendments do not apply to private employees in the same manner as state actors.
- **Safety and Security Lapses:** Several investigations have shown that there are high rates of violence, contraband smuggling, and use of force in privately run prisons.

Charter Schools

The ethical consequences of positing that charter schools are state actors include:⁴¹

- **Resource Drainage:** It should be remembered that when a student leaves a traditional public school to enroll in a charter school, the public funding associated with that student follows them. This resource drain is particularly substantial for low-income students and for students who speak English as a second language.
- **Segregation and Cream-Skimming:** Furthermore, charter schools are attractive to high-performing students and those students with actively involved parents. By selectively admitting students or by not admitting difficult students, there is the potential racism and socioeconomic segregation will increase.

The legal consequences of specifying that charter schools are state actors are:⁴²

- **Fraud and Corruption:** Charter schools can be susceptible to self-dealing, nepotism, and financial mismanagement because they may be exempt from public accounting and open meeting laws.
- **The State Actor Dilemma:** Charter schools utilize public funds, but are typically run by private boards of directors. This means that students and instructors may not possess due process, free speech, and civil rights protections that apply in traditional public schools.
- **Federal Anti-Discrimination Laws:** It should be remembered that charter schools are legally bound by Title VI, Title IX, and the Individuals with Disabilities Education Act (IDEA). However, enforcing these laws requires vigorous federal oversight.

Have the Functions of Government Expanded over Time?

According to Higgs, over the very long run, governments have increased in size and scope. However, in the short run, these two measures may diverge significantly. One should also consider a government's power, or its authority and capacity to exercise its ability to force change. It should be remembered that size, scope, and power have expanded at different rates in specific intervals. Governments may substitute growth in one dimension for growth in another. Even so, growth in one dimension usually precipitates growth in another. For example, when the Social Security Act was passed in 1935, it expanded the federal government's power and scope. Two decades later, the operation of the Social Security system had a substantial effect on federal spending.⁴³

When Is a Private Party Not a State Actor?

A private party is not a state actor when its everyday operations cannot be attributed to a federal, state, or local government. Under the state action doctrine, a federal, state, or local government cannot violate an individual's rights, such as free speech. In contrast, a private entity generally has the ability to violate a person's rights.⁴⁴

In terms of the elements of a state actor listed in this essay and what is contained herein, a business is not a state actor if one or more of the four elements are not satisfied. Even so, if one or more elements are not satisfied, a business is not a state actor unless it is specifically designated as such and there is no legislation requiring it to be one. Finally, in a specific context, a business is not a state actor if federal or state courts have not opined that it is, or if federal and state courts have expressly stated that it is not.

⁴⁰ Michael M. O'Hear, Private Prisons and Accountability, *Marquette University Law School Faculty Blog* (Jan. 17, 2012), available at <https://law.marquette.edu/facultyblog/2012/01/private-prisons-and-accountability/>.

⁴¹ Madeline W. Donley, Fourth Circuit Says Public Charter Schools Are State Actors, Supreme Court Declines to Weigh In, *Congress.gov* (Jul. 19, 2023), available at <https://www.congress.gov/crs-product/LSB10958>.
Admin, Are Charter Schools Bad? Pros and Cons to Consider, *Career Prep High School* (Mar. 25, 2025), available at <https://careerprepschool.org/blog2026/are-charter-schools-bad>.

⁴² Jessica Anne Schneider, What Rights Do Students Have in the Charter School Era?, *American Bar Association* (Mar. 30, 2017), available at <https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/what-rights-do-students-have-charter-school-era/>.

⁴³ Robert Higgs, Government Growth, *EconLib* (n.d.), available at <https://www.econlib.org/library/Enc/GovernmentGrowth.html#:~:text=Again%2C%20over%20the%20very%20long,rates%20in%20particular%20short%20intervals..>

⁴⁴ David M. Howard, Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts, 16 *Connecticut Public Interest Law Journal* 2, 221-80 (2017), available at <https://cpilj.law.uconn.edu/wp-content/uploads/sites/2515/2018/10/16.2-Rethinking-State-Inaction-An-In-Depth-Look-at-the-State-Action-Doctrine-in-State-and-Lower-Federal-Courts-by-David-M.-Howard.pdf>.

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Conclusion to the Essay on State Actors, Privately Run Prisons, and Charter Schools

In conclusion, the state actor issue is complicated and, at times, fraught with pitfalls. Whether a business is a state actor depends on the business's activities and state law. The closer a business's activities are to those of the government, the greater the likelihood that the business is a state actor. Even so, there are circumstances in which a business is a state actor, whereas in other situations it is not. *Rendell-Baker* is an excellent example of this state of affairs: a business was deemed not to be a state actor in the termination of employment. Assuming the Court takes up this issue, it is likely to issue an opinion that is both finely tuned and difficult to read and understand. It is the nature of the state actor issue.

ESSAY ON SECTION 1983, SECTION 1988, AND QUALIFIED IMMUNITY

In this essay, the first section describes the scenario under consideration. The second section defines the terms related to qualified immunity. Qualified immunity is defined, followed by a description of the two-part qualified immunity test. The third subsection defines the phrase "clearly established," while the next subsection talks about the important distinctions related to qualified immunity. The third section lists possible arguments against qualified immunity. In the fourth section, potential arguments in favor of qualified immunity are highlighted. The conclusion states that the facts of the case do not seem to tip the scales one way or the other. Thus, to be conservative, qualified immunity should be denied so that the case can be tried on its merits.

Definitions and Characteristics of Terms

This section contains the definitions of Section 1983, Section 1988, qualified immunity, its two-part test, what it means for conduct to be clearly established, and significant differences between individual and entity liability, civil and criminal law, and the existence of blanket protection.

Definition and Characteristics of Section 1983

Section 1983 (42 U.S.C. Section 1983) is a federal law that permits individuals to sue state and local government officials for violating constitutional or federally protected rights. It provides a mechanism to obtain monetary damages or injunctions. Section 1983 did not create any new rights.⁴⁵

Thus, Section 1983 law was probably born out of a desire to maintain some semblance of American society, particularly in 1871, six years after the end of the American Civil War and during the height of the Reconstruction era.⁴⁶ The elements of a valid Section 1983 lawsuit include:

- **Under Color of State or Local Law:** The individual who is being sued was acting on behalf of a state or local government agency, such as a police officer, mayor, prison guard, or school official.⁴⁷
- **Deprivation of Rights:** The government official's act or negligence violated a clearly established federal right, such as the Fourth Amendment protection against unreasonable searches and seizures, the Eighth Amendment shield against cruel and unusual punishment, and the Fourteenth Amendment, which defends against violations of due process and equal protection.⁴⁸

The purpose of Section 1983 is to hold local authorities accountable for excessive force or false arrest by police officers, malicious prosecution, cruel and unusual punishment that violates an inmate's Eighth Amendment rights, or due process violations, such as the deprivation of life, liberty, or property without a fair procedure.⁴⁹

Definition and Characteristics of Section 1988

Section 1988 (42 U.S.C. § 1988) is also known as the Civil Rights Attorney's Fees Awards Act (CRAFAA). It permits courts to order the losing party in a civil rights lawsuit to pay the prevailing plaintiff their attorney fees.⁵⁰ In the United States legal system, the plaintiff and the defendant pay their own legal fees regardless of who wins. Section 1988 ensures that when an individual's rights have been violated, they can obtain legal representation, even if they cannot pay for attorney fees.⁵¹

⁴⁵ TR Staff, What Are the Elements of a Section 1983 Claim?, *Thompson Reuters* (Jun. 13, 2022), available at <https://legal.thomsonreuters.com/blog/what-are-the-elements-of-a-section-1983-claim/>.

⁴⁶ Eric Foner, Reconstruction, *Britannica.com* (May 8, 2026), available at <https://www.britannica.com/event/Reconstruction-United-States-history>.

⁴⁷ TR Staff, *supra*, note 45.

⁴⁸ Web Services Librarian, Federal Civil Rights Claims, *The People's Law Library of Maryland* (Mar. 26, 2026), available at <https://www.peoples-law.org/federal-civil-rights-claims>.

⁴⁹ NGK Law Firm, A Short History of Section 1983 of the United States Code, *NGK Law Firm* (Oct. 9, 2022), available at <https://www.ngklawfirm.com/firm-news/2022/october/a-short-history-of-section-1983-of-the-united-states-code/>.

⁵⁰ Brian Buckley, Washington Courts Get Stingy: Improper Denial of Attorney's Fees under 42 U.S.C. §§ 1983 and 1988, 70 *Washington Law Review* 2 (Apr. 1, 1995), available at <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=4101&context=wlr>.

⁵¹ Susan M. Murray, Attorneys' Fees in Civil Rights Cases: Contingent Fee Awards under Section 1988, 17 *McGeorge Law Review* 4, 1275-1300 (Jan. 1, 1986), available at <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=2799&context=mlr>.

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Here is how Section 1988 works. Section 1988 applies to legal actions that enforce specific federal civil rights, such as claims related to due process, equal protection, and unlawful discrimination, filed under Section 1983.⁵² Section 1988 applies to prevailing plaintiffs in Section 1983 cases.⁵³ However, prevailing defendants can receive their attorney fees from plaintiffs if the plaintiff's lawsuit was frivolous, unreasonable, or brought in bad faith.⁵⁴

In 2025, the Supreme Court tightened the requirements for qualifying as a prevailing party under Section 1988. According to the new rules, a prevailing plaintiff must secure enduring, judicially ordered relief that directly benefits them. Prevailing plaintiffs can no longer receive a temporary change or a voluntary settlement absent a court order.^{55 56 57}

Definition and Characteristics of Qualified Immunity

Section 1983 established a way for plaintiffs to sue state and local government officials for violating civil or constitutional rights. Qualified immunity is a judicially conceived defense that protects government officials from individual civil liability when they did not violate clearly established rights.^{58 59}

Qualified immunity is the legal default when the defendant is a government official. Plaintiffs are required to satisfy the following two prongs to overcome qualified immunity:⁶⁰

- **Constitutional Violation:** A plaintiff is required to prove that a government official's actions violated a statutory or constitutional right, such as the Fourth Amendment's prohibition against excessive force during seizures, the Eighth Amendment's bar against excessive force used on convicted prisoners, or the Fourteenth Amendment's bar against unconstitutional conduct while in pre-trial custody.^{61 62 63 64}
- **Clearly Established Right:** A plaintiff must show that a specified right was clearly established under law at the time the event occurred.⁶⁵

Definition of the Phrase "Clearly Established"

A statutory or constitutional right is clearly established if a hypothetical objective reasonable government official would have known that their conduct was unlawful, based on existing judicial precedent. According to the Supreme Court, it is insufficient for a right to be expressed in general terms. The features of the right must be specifically described so that the unlawfulness of the action is beyond debate and reproach.^{66 67}

⁵² Brian Buckley, *supra*, note 50.

⁵³ Richard Gans, The Supreme Court's Interpretation of Section 1988 and Awards of Attorney's Fee for Work Performed in Administrative Proceedings: A Proposal for a Result-Oriented Approach—North Carolina Department of Transportation v. Crest Street Community Council, Inc., 107 S. Ct. 336 (1986), 62 *Washington Law Review* 4, 889-911 (Oct. 1, 1987), available at <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=3720&context=wlr>.

⁵⁴ Mark R. Brown, A Primer on the Law of Attorney's Fees Under § 1988, 37 *The Urban Lawyer* 4, 663-89 (Fall, 2005), available at [https://www.criminallegalnews.org/media/publications/A%20Primer%20on%20the%20Law%20of%20Attorneys%20Fees%2C%20Urban%20Lawyer%20\(Brown\)%2C%202005.pdf](https://www.criminallegalnews.org/media/publications/A%20Primer%20on%20the%20Law%20of%20Attorneys%20Fees%2C%20Urban%20Lawyer%20(Brown)%2C%202005.pdf).

⁵⁵ *Lackey v. Stinnie*, 640 U.S. 192 (Feb. 25, 2025), available at <https://www.oyez.org/cases/2024/23-621>.

⁵⁶ Nora Freeman Engstrom, Kelsea Jeon, & Sharon Driscoll, The Supreme Court's Decision in *Lackey v. Stinnie* and What It Means for Plaintiffs' Access to Courts, *Stanford Law School* (Mar. 2025), available at <https://law.stanford.edu/2025/03/03/the-supreme-courts-decision-in-lackey-v-stinnie-and-what-it-means-for-plaintiffs-access-to-courts/>.

⁵⁷ Benjamin J. Mills, & Jeremy J. Stewart, U.S. Supreme Court Limits Section 1988 Attorney's Fees for Property Owners and Other Civil Rights Litigants, *Snell & Wilmer* (Apr. 8, 2025), available at <https://www.swlaw.com/publication/u-s-supreme-court-limits-section-1988-attorneys-fees-for-property-owners-and-other-civil-rights-litigants/>.

⁵⁸ *Pierson v. Ray*, 386 U.S. 547 (1967), available at <https://supreme.justia.com/cases/federal/us/386/547/>.

⁵⁹ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), available at <https://supreme.justia.com/cases/federal/us/457/800/>.

⁶⁰ CRS Staff, Policing the Police: Qualified Immunity and Considerations for Congress, *Congressional Research Service* (Jun. 10, 2020), available at https://www.congress.gov/crs_external_products/LSB/PDF/LSB10492/LSB10492.1.pdf.

⁶¹ See generally, LII Staff, Qualified Immunity, *Legal Information Institute* (n.d.), available at https://www.law.cornell.edu/wex/qualified_immunity.

⁶² U.S. Const. amend. IV, available at <https://constitution.congress.gov/constitution/amendment-4/>.

⁶³ U.S. Const. amend. VIII, available at <https://constitution.congress.gov/constitution/amendment-8/>.

⁶⁴ U.S. Const. amend. XIV, available at <https://constitution.congress.gov/constitution/amendment-14/>.

⁶⁵ Joseph Fawbush, Qualified Immunity: Both Sides of the Debate, *FindLaw* (Mar. 24, 2023), available at <https://supreme.findlaw.com/supreme-court-insights/pros-vs-cons-of-qualified-immunity-both-sides-of-debate.html>.

⁶⁶ CRS Staff, *supra*, note 60.

⁶⁷ LII Staff, *supra*, note 61.

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Important Distinctions

In this subsection, the distinctions among individual versus entity liability, civil versus criminal law, and blanket protection are explained.

- **Individual versus Entity Liability:** Qualified immunity does not protect a city, county, or state. It safeguards individual government officials, such as police officers, social workers, or teachers.⁶⁸
- **Civil versus Criminal Law:** Qualified immunity does not apply to criminal prosecutions or internal disciplinary action. It only affects civil lawsuits involving monetary compensation.⁶⁹
- **No Blanket Protection:** The qualified immunity defense applies to all government officials who are not plainly incompetent or who knowingly violate the law. The idea behind qualified immunity is that it provides government officials with the ability to make reasonable but mistaken legal or factual judgments.⁷⁰

Arguments Against Qualified Immunity

This subsection contains five arguments against qualified immunity. Each argument is outlined in turn.

- **The "Clearly Established" Hurdle:** When overcoming qualified immunity, a plaintiff must show that a government official violated a "clearly established" statute or constitutional right. Practically speaking, this means that a plaintiff must find a previous case with facts almost identical to those of the current case. Critics of this element believe it creates an almost impossible loophole, in which government officials are not liable because the abuse was novel.⁷¹
- **Lack of Legal Foundation:** The notion of qualified immunity was not originally contained in the text of 42 U.S.C. Section 1983, which was passed by Congress in 1871. Qualified immunity was invented by the Supreme Court in *Pierson*⁷² in 1967 and expanded in *Harlow*⁷³ in 1982. Critics have argued that the judiciary exceeded its bounds when it created this protection because it usurped Congress's authority.⁷⁴
- **Illusory Need for Financial Protection:** A critical argument in favor of qualified immunity is that it protects government officials from financial ruin or from defending frivolous lawsuits. However, empirical evidence indicates that this is a myth. Government officials rarely pay damages themselves because damages and legal fees are usually paid for by the government agency that employs them.⁷⁵
- **Promotion of Lawlessness and Impunity:** One issue with Section 1983 law is that it can potentially excuse unconstitutional behavior by dismissing a case on a technicality rather than determining a government official violated a statute or a right. The doctrine can create a culture of impunity. Critics have stated that qualified immunity communicates to government officials that they are above the law. In other words, qualified immunity erodes public trust in the rule of law by emboldening additional misconduct.⁷⁶
- **Denial of Victims' Day in Court:** Qualified immunity is an absolute bar to lawsuits by plaintiffs early in the litigation process. Individuals who are victims of police brutality or government official misconduct are often prevented from presenting their evidence to a jury. Critics have observed that qualified immunity denies victims their day in court as guaranteed by the Constitution, as well as financial compensation for any injuries they experience.⁷⁷

⁶⁸ Robert W. Patterson, What is Qualified Immunity? Definition, Practical Application, and Its Impact on Police Hiring and Retention, *Government Technology & Services Coalition's Homeland Security* (Apr. 20, 2026), available at <https://www.hstoday.us/perspective/what-is-qualified-immunity-definition-practical-application-and-its-impact-on-police-hiring-and-retention/>.

⁶⁹ Police1 Staff, Qualified Immunity: What Is It, and How Does It Work?, *Police1 News and Analysis* (Apr. 18, 2025), available at <https://www.police1.com/legal/qualified-immunity-what-is-it-and-how-does-it-work>.

⁷⁰ Joseph Fawbush, *supra*, note 65.

⁷¹ Bobbi Reilly Sheahan, Qualified Immunity Today, *Law Enforcement Bulletin* (Oct. 10, 2023), available at <https://leb.fbi.gov/articles/featured-articles/qualified-immunity-today>.

⁷² *Pierson v. Ray*, 386 U.S., *supra*, note 58.

⁷³ *Harlow v. Fitzgerald*, 457 U.S., *supra*, note 59.

⁷⁴ Whitney K. Novak, Policing the Police: Qualified Immunity and Considerations for Congress, *Congress.gov* (Feb. 21, 2023), available at <https://www.congress.gov/crs-product/LSB10492>.

⁷⁵ Joseph Fawbush, *supra*, note 65.

⁷⁶ Jay Schweikert, Qualified Immunity: An Unlawful Shield for Police Misconduct, *American Bar Association* (Feb. 2, 2026), available at https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/.

⁷⁷ Joanna C. Schwartz, What Happens If We Eliminate Qualified Immunity?, 43 *UCLA Law Magazine* (Fall 2020), available at <https://law.ucla.edu/news/ucla-law-magazine-2020/meeting-moment/meeting-moment-20-years-critical-race-studies-ucla-law/what-happens-if-we-eliminate-qualified-immunity>.

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Arguments For Qualified Immunity

This subsection presents five arguments in favor of qualified immunity. Each argument is discussed in turn.

- **Protection from Financial Ruin:** Individuals who advocate for qualified immunity contend that without qualified immunity, government officials could face continual threats of personal bankruptcy. The reason is that lawsuits are expensive, and qualified immunity protects government officials from personal financial ruin when they act in good faith while on duty.⁷⁸
- **Preventing the “Chilling Effect”:** A major reason for qualified immunity is that the fear of personal liability could make government officials hesitant to perform their duties. Without qualified immunity, proponents believe that government officials may become overly cautious, hesitating in split-second or life-or-death situations. The lack of qualified immunity could ensure that government officials avoid being proactive for fear of a lawsuit.⁷⁹
- **Preventing Frivolous Lawsuits:** Proponents believe that qualified immunity is a necessary gatekeeper that saves the court time and resources. It is suggested that it protects government agencies and officials from an onslaught of malicious lawsuits that are filed by dissatisfied plaintiffs. Qualified immunity permits government officials to focus on serving their community.⁸⁰
- **Parity with Other Professions:** Qualified immunity advocates observe that many civil servants are protected, including police officers. Additionally, government officials such as judges and prosecutors frequently possess the broader notion of “absolute immunity.”⁸¹
- **Room to Learn and Train:** One advantage of the “clearly established law” standard is that it provides public officials fair warning of what the law demands. Proponents opine that qualified immunity provides some flexibility for reasonable mistakes when addressing complex areas of the law. Qualified immunity safeguards government officials whose acts are consistent with their training and official agency protocols.⁸²

Conclusion to the Essay on Section 1983, Section 1988, and Qualified Immunity

Courts usually reject qualified immunity in life-threatening emergencies, but in many other circumstances courts rule in favor of qualified immunity. In some instances, the “clearly established” is not necessarily controlling. For example, in *Hope*, a government official may not be eligible for qualified immunity when a reasonable government official should have known that their action was unconstitutional.⁸³ In other words, qualified immunity depends on the objective reasonableness of a government official’s actions.⁸⁴

ESSAY ON ETHICAL PITFALLS AND DILEMMAS IN SECTION 1983 CASES

This essay responds to the following two questions:

- What are the most concerning ethical pitfalls for attorneys in Section 1983 litigation?
- How can attorneys avoid charges of ethical misconduct and claims of malpractice in Section 1983 litigation?

The answer for each question is divided into four parts, further clarifying its response.

What Are the Most Concerning Ethical Pitfalls for Attorneys in Section 1983 Litigation?

Section 1983 presents interesting ethical pitfalls, typically involving conflicts of interest that may arise when fee-shifting occurs, settlement negotiations take place, and specialized client counseling is provided to trauma survivors.⁸⁵ The four major pitfalls include:^{86 87}

- Simultaneous settlement of merits and attorney’s fees;
- Conflicting client interests in class actions and institutional reform;
- Zealous representation versus trauma-informed counseling; and
- Obligations of government and defense counsel

⁷⁸ Joseph Fawbush, *supra*, note 65.

⁷⁹ Jason Tiezzi, Robert McNamara, & Elyse Smith Pohl, The Controversy Over Qualified Immunity, *Institute for Justice* (Feb. 2024), available at <https://ij.org/report/unaccountable/the-controversy-over-qualified-immunity/>.

⁸⁰ Police1 Staff, *supra*, note 69.

⁸¹ NAAG Staff, Qualified Immunity, *National Association of Attorneys General* (n.d.), available at <https://www.naag.org/issues/civil-law/qualified-immunity/>.

⁸² LII Staff, *supra*, note 61.

⁸³ *Hope v. Pelzer et al.*, 536 U.S. 730 (2002), available at <https://supreme.justia.com/cases/federal/us/536/730/>.

⁸⁴ *Id.*

⁸⁵ Samuel B. Cohen, Ethical Considerations in §1983 Practice: Retainer Structuring and Client Counseling, *Lawline* (Jan 23, 2017), available at <https://www.lawline.com/course/ethical-considerations-in-1983-practice-retainer-structuring-and-client-counseling>.

⁸⁶ C-235, *State Bar of Michigan* (May 1985), available at https://www.michbar.org/opinions/ethics/numbered_opinions/c-235.

⁸⁷ David W. Lee, *Handbook of Section 1983 Litigation* (Wolters Kluwer Law & Business 2014 ed.) (Here, see Chapter 8 Pleadings, Motions, and Affirmative Defenses and Chapter 9 Injunctions and Declaratory Relief).

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Each one of the pitfalls will be addressed in turn.

Simultaneous Settlement of Merits and Attorney's Fees

Under 42 U.S.C. Section 1988, courts may award attorney's fees to the plaintiffs who succeed in a civil rights case. This fact may create a structural conflict of interest during settlement negotiations. The reason is that an attorney for a prevailing plaintiff may attempt to negotiate for an even higher settlement if they know their fees are directly tied to the settlement amount.⁸⁸

- **The Pitfall:** Frequently, defense attorneys employ lump sum or package deal settlement offers that include client damages and attorney fees. The deal may rest on the plaintiff's attorney completely waiving their fees.⁸⁹
- **Ethical Dilemma:** The defense may want to set the attorney's financial interest against a client who only desires a favorable settlement. This conflict of interest is recognized by the American Bar Association (ABA) when attorneys negotiate on behalf of a client, thereby limiting a plaintiff's access to justice.⁹⁰

Conflicting Client Interests in Class Actions and Institutional Reform

When Section 1983 cases involve prison conditions or police misconduct, they typically involve multiple plaintiffs or are class actions.⁹¹

- **The Pitfall:** It should be remembered that different clients may have competing goals. For example, one client may seek immediate injunctive relief, while another is concerned only with maximum financial damages. Also, multiple clients may disagree whether to settle or go to trial.⁹²
- **Ethical Dilemma:** When a single attorney or firm represents the entire group, they must constantly monitor for possible conflicts. They must also ensure that they give each client the same amount of independent judgment from the beginning to the end of the case.⁹³

Zealous Representation versus Trauma-Informed Counseling

Frequently, Section 1983 plaintiffs have suffered significant trauma from police officers or state actors.⁹⁴

- **The Pitfall:** Due to the fact that clients may have experienced emotional, physical, or psychological trauma, attorneys must zealously advocate for their client while navigating a difficult path to a resolution.⁹⁵
- **Ethical Dilemma:** Attorneys are neither psycho therapists nor mental health counselors. Even so, an attorney has a duty to ensure that the client has the capacity to make reasoned decisions, such as accepting a plea or a settlement.^{96 97}

Obligations of Government and Defense Counsel

Attorneys who represent municipal organizations or individual government officials may also experience issues.

- **The Pitfall:** Defense attorneys are required to represent their client, while at the same time attempting to reveal possible *Monell* violations⁹⁸ or unconstitutional issues. Under *Monell*, municipalities are "persons" under Section 1983 and thus can be liable for monetary damages and injunctive relief. However, local governments are not liable under a theory of *respondeat superior*

⁸⁸ Paul D. Reingold, Requiem for Section 1983, 3 *Duke Journal of Constitutional Law & Public Policy* 1 (2008), available at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1039&context=djclpp>.

⁸⁹ C-235, *supra*, note 86.

⁹⁰ ABA Staff, Rule 1.7 Conflict of Interest: Current Clients – Comment, *American Bar Association* (n.d.), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/comment_on_rule_1_7/.

⁹¹ JLH Staff, Chapter Two: Overview of Types of Lawsuits and the Prison Litigation Reform Act, *Jailhouse Lawyer's Handbook* (n.d.), available at <https://www.jailhouselaw.org/overview-types-lawsuits-and-prison-litigation-reform-act>.

⁹² Samuel B. Cohen, *supra*, note 85.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Rebecca Howlett, & Cynthia Sharp, The Legal Burnout Solution: Core Principles and Strategies of a Trauma-Informed Law Practice, *Ohio Bar* (Nov. 6, 2023), available at <https://www.ohiobar.org/member-tools-benefits/practice-resources/practice-library-search/practice-library/section-newsletters/2023/the-legal-burnout-solution-core-principles-and-strategies-of-a--trauma-informed--law-practice/>.

⁹⁶ Justin Paperny, Risks of Rejecting a Plea Agreement, *White Collar Advice* (n.d.), available at <https://www.whitecollaradvice.com/risks-of-rejecting-a-plea-agreement/>.

⁹⁷ *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal. 3d 752 (1984), available at <https://law.justia.com/cases/california/supreme-court/3d/36/752.html>.

⁹⁸ *Monell v. Department of Social Services*, 436 U.S. 658 (1978), available at <https://supreme.justia.com/cases/federal/us/436/658/> (Here, a *Monell* violation permits an individual to hold local governments and municipalities liable for civil rights violations under 42 U.S.C. § 1983).

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or vicarious liability. Furthermore, a municipality is not automatically liable just because one of its employees violated the Constitution.⁹⁹

- **Ethical Dilemma:** Attorneys must balance their duty of confidentiality to their client against their duty as officers of the court to reveal deliberate cover-ups, perjury, or false reports by state actors.¹⁰⁰

How Can Attorneys Avoid Charges of Ethical Misconduct and Claims of Malpractice in Section 1983 Litigation?

An attorney may avoid claims of ethical misconduct in Section 1983 litigation by adhering to the following suggestions:¹⁰¹

- Avoiding frivolous filings;
- Retainer and fee structuring considerations;
- Maintaining ethical communication and confidentiality; and
- Navigating conflicts of interest when dealing with municipal employees or class actions.

It should be remembered that civil rights and Section 1983 litigation demands exacting risk management to avoid malpractice liability and a potential loss of an attorney's license to practice law. Each of the above issues will be addressed one after the other.

Avoid Frivolous Filings

Frivolous filings are covered under Rule 11 in the Federal Rules of Civil Procedure (FRCP).¹⁰² According to Rule 11, a court can strike pleadings and impose disciplinary sanctions on attorneys or pro se litigants who abuse the signing of pleadings or otherwise act in bad faith while in court.¹⁰³

- **Conduct Thorough Pre-Suit Investigations:** Courts heavily scrutinize Section 1983 actions. The courts look for claims without legal or factual support. Such claims can result in Rule 11 sanctions or countersuits.¹⁰⁴
- **Understand Pleading Burdens:** Ensure that claims satisfy the personal responsibility requirement by clearly identifying the federal rights violated to avoid malpractice on the merits. Do not rely on state law violations.¹⁰⁵
- **Screen Cases Rigorously:** According to the ABA, plaintiffs in Section 1983 actions are typically traumatized. Even so, an attorney must be cool-headed and remain objective. It is important for an attorney to deny accepting to represent claims that lack merit.¹⁰⁶

Retainers and Fee Structuring

In this section, retainers and fee-structuring issues are discussed.

- **Address Fee-Shifting Clearly:** It should be understood that 42 U.S.C. Section 1988 permits fee-shifting for the prevailing parties. This law may generate serious retention challenges. Retainer agreements should clearly specify how statutory fees, costs, and contingent percentages if a party wins a case.^{107 108}
- **Avoid Overpromising:** It goes without saying that attorneys should never make predictions regarding victory or huge monetary verdicts. Misleading clients about how to overcome hurdles such as qualified immunity can be a one-way ticket to a malpractice claim.¹⁰⁹

Ethical Communication and Confidentiality

Ethical communication and confidentiality issues are outlined in this section.

⁹⁹ *Id.*

¹⁰⁰ Charles F. Thompson Jr., The Attorney's Ethical Obligations When Faced With Client Perjury, 42 *South Carolina Law Review* 4, 1-22, available at <https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=3173&context=sclr>.

¹⁰¹ Karen M. Blum, Basic Principles of Section 1983 Litigation, *Suffolk University Law School* (Feb. 1, 2006), available at <https://www.njd.uscourts.gov/sites/njd/files/basic%20principles.pdf>.

¹⁰² LII Staff, Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions, *Legal Information Institute* (n.d.), available at https://www.law.cornell.edu/rules/frcp/rule_11.

¹⁰³ *Id.*

¹⁰⁴ Regina K. Tetik, An Attorney's Primer on Federal Rule of Civil Procedure 11, 23 *Tulsa Law Review* 1, 149-64 (Fall 1987), available at <https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1795&context=tlr>.

¹⁰⁵ Staff Attorneys for the District Courts of the Seventh Circuit, Guide for Attorneys Recruited to Represent Plaintiffs in Section 1983 Cases, *Seventh Circuit of the United States Court of Appeals* (2017), available at <https://www.insd.uscourts.gov/sites/insd/files/Guide%20for%20Recruited%20Lawyers.pdf>.

¹⁰⁶ *Id.*

¹⁰⁷ Samuel B. Cohen, *supra*, note 85.

¹⁰⁸ Jon Loevy, Section 1983 Litigation In A Nutshell: Make A Case Out of It!, 17 *The Journal of The DuPage County Bar Association* (2004-05), available at <https://www.dcba.org/mpage/vol171004art2>.

¹⁰⁹ Mark K. Osbeck, Lawyer as Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law, 123 *Penn State Law Review* 1, 41-102 (Sep. 1, 2018), available at <https://insight.dickinsonlaw.psu.edu/cgi/viewcontent.cgi?article=1034&context=pslr>.

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- **Do Not Respond to Online Reviews:** It is not advisable to respond to disgruntled clients online via any website. Such activities can precipitate the disclosure of attorney-client privileged information. If an attorney faces a grievance, it is suggested that the attorney consult a legal ethics expert.^{110 111}
- **Avoid Direct Contact with Represented Parties:** Under the ABA's Rule 4.2, an attorney should not communicate about a legal matter with an opposing party if the attorney knows that the opposing party is represented by counsel. However, such communication is permissible if the opposing party's attorney consents, is authorized by law, or the court orders the communication.¹¹²
- **Understand the Duty to Report:** An attorney should understand their state's Rules of Professional Conduct. It should be remembered that attorneys have a mandatory duty to report other attorneys who commit ethical breaches.¹¹³

Navigating Conflicts of Interest

In this subsection, attorney behavior regarding Section 1983 claims involving multiple defendants and client trust accounts is examined.

- **Multiple Defendants:** In Section 1983 cases, an attorney may represent both a government official and a municipality. An attorney should get informed written contract waivers if there is the possibility that a municipality will not indemnify a government official's intentional acts.¹¹⁴
- **Client Trust Accounts:** For any settlement funds, including settlements in Section 1983 cases, settlement funds must be safely kept, including advanced expenses. Any settlement funds or advanced expenses must be strictly kept in accordance with Model Rule 1.15.¹¹⁵

Conclusion to the Essay on Ethical Pitfalls and Dilemmas in Section 1983 Cases

In conclusion, the two questions asked at the beginning of the essay have complex answers that defy simple analysis. The responses delve deeply into Section 1983 law and attempt to show that it is a complex subject. The four pitfalls and ethical dilemmas are not necessarily comprehensive. It is likely that other pitfalls and ethical dilemmas exist that were not covered in the essay. Please understand that some pitfalls and ethical dilemmas were omitted for brevity. Also, regarding the responses to the second question, four major issues were again discussed. The essay highlighted the more important issues to ensure that attorneys reading it know what to do and what not to do. In this way, the responses to the second question act as a reasonable guide for practicing attorneys. This seems to be the responsible thing to do.

ESSAY ON ATTORNEY FEE AWARDS IN SECTION 1983 CASES WHEN THE PREVAILING PLAINTIFF IS REPRESENTED BY A NON-PROFIT ORGANIZATION

This essay responds to the following two questions regarding whether prevailing plaintiffs in Section 1983 cases are entitled to the same reasonable fees as prevailing plaintiffs who engage for-profit law firms:

- Is it fair to assess attorney fees against defendants when prevailing plaintiffs are not obliged to pay any fees?
- How should courts account for when prevailing plaintiffs do not pay their legal fees?

Each question is addressed in turn.

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¹¹¹ Colleen Joyce, Protecting Attorney-Client Privilege in Virtual Communication, *LawyerLine.com* (Apr. 21, 2025), available at <https://www.lawyerline.ai/post/protecting-attorney-client-privilege-in-virtual-communication>.

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Is It Fair to Assess Attorney Fees Against Defendants when Prevailing Plaintiffs Are Not Obligated to Pay Any Fees?

It is fair to assess attorney fees against defendants when prevailing plaintiffs are not obliged to pay any fees. According to the Supreme Court, fee awards are intended to uphold constitutional rights, not merely to compensate a prevailing plaintiff's expenses.¹¹⁶

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Fee Awards Are Both Fair and Necessary

The fairness and reason for assessing fees when a prevailing plaintiff does not pay a fee to their attorney are based on the following legal principles:

- **The "Private Attorney General" Concept:** Congress enacted 42 U.S.C. Section 1988 to enable private individuals to enforce civil rights through the judicial system. Congress safeguarded the civil rights of victims so they could have competent counsel even when they were unable to pay.¹¹⁸
- **Detering Constitutional Violations:** By moving the financial burden of Section 1983 litigation to defendants who violate civil rights, it is a deterrent against future constitutional violations by state actors.¹¹⁹
- **Encouraging Pro Bono and Public-Interest Work:** Nonprofit entities and legal aid societies rely on fee-shifting provisions to continue operating. If attorney fees were denied because a prevailing plaintiff was unable to pay them, it would constitute a financial windfall for defendants who violated the law. It would also inhibit public interest organizations from litigating these claims.¹²⁰

How Fees Are Calculated for Nonprofits

The calculation of fees is the same regardless of whether a prevailing plaintiff engaged a traditional law firm, nonprofit entity, or pro bono attorney. Courts usually utilize the *lodestar method*.¹²¹ This formula multiplies the number of hours reasonably expended by a reasonable hourly rate.¹²² Other issues that courts examine include:

- **Prevailing Market Rates:** The Supreme Court acknowledged that nonprofit entities are entitled to recover fees based on prevailing market rates in their community for comparable legal services, rather than the money they expended.^{123 124}
- **Avoiding Windfalls:** It should be remembered that courts seek to ensure that fee awards are not windfalls for nonprofits. Amounts requested by prevailing plaintiffs may be decreased if a prevailing plaintiff achieved limited success or if the hours that were billed seem to be excessive.^{125 126}

The law does not compel a prevailing plaintiff to prove that they actually paid for legal representation for a defendant under Section 1983 to recover reasonable attorney fees.¹²⁷

Section 1983 Pro Se Litigants

In contrast to litigants who hire for-profit firms or engage not-for-profit legal organizations, a pro se litigant who acts as their own attorney does not reap the benefit of receiving their attorney fees when they prevail. In *Kay*,¹²⁸ the Supreme Court ruled that the "overriding statutory concern is the interest in obtaining independent counsel for victims of civil rights violations."¹²⁹ The Court

¹¹⁶ *Lackey v. Stinnie*, 640 U.S., *supra*, note 55.

¹¹⁷ Brian Buckley, *supra*, note 50.

¹¹⁸ *Hensley v. Eckerhart*, 461 U.S. 424 (1983), available at <https://supreme.justia.com/cases/federal/us/461/424/>.

¹¹⁹ Brian Buckley, *supra*, note 50.

¹²⁰ Christopher Dunn, Column: Civil Rights Attorneys' Fees Only for Profiteers? (New York Law Journal), *American Civil Liberties Union of New York* (Aug. 28, 2007), available at <https://www.nyclu.org/commentary/column-civil-rights-attorneys-fees-only-profiteers-new-york-law-journal>.

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¹²⁶ *Holford v. Exhibit Design Consultants*, 218 F. Supp. 2d 901 (W.D. Mich. 2002), available at <https://law.justia.com/cases/federal/district-courts/FSupp2/218/901/2360048/>.

¹²⁷ *Blanchard v. Bergeron*, 489 U.S. 87 (1989), available at <https://supreme.justia.com/cases/federal/us/489/87/>.

¹²⁸ *Kay v. Ehrler*, 499 U.S. 432 (1991), available at <https://supreme.justia.com/cases/federal/us/499/432/>.

¹²⁹ *Id.* at 499.

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determined that the “statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.”¹³⁰ In other words, pro se plaintiffs, regardless of whether they prevail, are not entitled to attorney fees in Section 1983 cases.

How Should Courts Account for When Prevailing Plaintiffs Do Not Pay Their Legal Fees?

As previously stated, in Section 1983 civil rights cases, prevailing plaintiffs are normally entitled to reasonable attorney fees under 42 U.S.C. Section 1988, even when represented by a nonprofit organization or pro bono counsel. This ensures that plaintiffs can access a vigorous justice system.¹³¹ Courts account for nonprofit representation by using the following principles:

- **Low Overhead Issues:** Courts will not decrease a fee merely because an organization receives public monies or operates with low overhead.^{132 133}
- **The Lodestar Calculation:** Nonprofit fee awards are calculated using the *lodestar method*, in which the reasonable number of hours expended is multiplied by a reasonable hourly rate.^{134 135}
- **Evidence of Market Value:** When determining a reasonable hourly rate, a nonprofit or a pro bono attorney must provide a court with sufficient evidence, such as affidavits in a community with similar skills and experience, that demonstrate that the attorney fee provided is consistent with the market rate.¹³⁶
- **A Fee Calculation Nuance:** In *Blum v. Stenson*, the Supreme Court opined that nonprofit attorneys are frequently dedicated to public-interest and civil-rights litigation. This devotion does not reduce the quality of their service. On the contrary, these attorneys are entitled to the same reasonable fees as those charged by for-profit law firms.¹³⁷

Conclusion to the Essay on Fee Awards for Prevailing Plaintiffs in Section 1983 Cases

In conclusion, the courts believe that it does not matter whether a prevailing plaintiff pays for legal counsel in a Section 1983 case. The issue is that regardless of the circumstances, attorneys are entitled to reasonable attorney fees. The *lodestar method* is typically used to calculate a reasonable fee by multiplying the reasonable number of hours expended by a reasonable hourly rate. The reasonable hourly rate depends on the market rates in the local community.¹³⁸ This seems to be the appropriate way to address this issue.

CONCLUSION

Section 1983 law and litigation are both complex. In 1967, *Pierson* defined qualified immunity under Section 1983, and in 1982, *Harlow* expanded it. Section 1983 was enacted by Congress in 1871, but qualified immunity is judge-made law established by the Supreme Court in *Pierson*. The apparent goal of Section 1983 was to allow plaintiffs to sue government officials, while qualified immunity protected officials from lawsuits by plaintiffs harmed by their actions. It should be noted that qualified immunity came into existence in 1967, during the height of the civil rights movement in the United States.¹³⁹ One could infer that, at the time, government officials were likely actively violating people’s civil rights. In 1967, the United States was in turmoil, where massive demonstrations occurred frequently.¹⁴⁰ It was a long, hot Summer in 1967.¹⁴¹ Government officials, particularly police officers, were likely beside themselves as they worked to uphold order and prevent a violent revolution. Thus, Section 1983 qualified immunity was likely adopted by the Supreme Court to prevent a complete breakdown of law and order by immunizing government officials from liability for their actions, legal or otherwise.¹⁴²

¹³⁰ *Id.*

¹³¹ *Hensley v. Eckerhart*, 461 U.S., *supra*, note 118.

¹³² *Blum v. Stenson*, 465 U.S. 886 (1984), available at <https://supreme.justia.com/cases/federal/us/465/886/>.

¹³³ Gary Spencer, Third Department Amends Opinion on Counsel Fees, *Law.com* (Apr. 30, 1998), available at <https://www.law.com/article/almID/53GC-JG21-DY35-F0DG-00000-00/>. (Here, in an amended legal fee ruling, the appellate court withdrew its statement that a law school clinic would justify a reduced fee award.)

¹³⁴ *Meister v. Regents of the University of California*, 67 Cal. App. 4th 437 (Oct. 23, 1998), available at <https://law.justia.com/cases/california/court-of-appeal/4th/67/437.html>.

¹³⁵ Sheldon H. Nahmod, *supra*, note 121.

¹³⁶ *Engstrom et al. v. Secretary of Health and Human Services*, United States Court of Federal Claims, No. 16-1152V (Aug. 7, 2019), available at https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016vv1152-61-0.

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¹⁴¹ *Id.*

¹⁴² *Id.*

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Thus, Section 1983 law was probably born out of a desire to maintain some semblance of American society, particularly in 1871, six years after the end of the American Civil War and during the height of the Reconstruction era.¹⁴³ Today, Section 1983 law could be perceived as an artifact of a bygone era. Whether it still benefits society is, for all intents and purposes, an open question, one that begs for a response that takes into account society as it exists in 2026. Even though it appears to be settled law, Section 1983 claims involving qualified immunity remain controversial. Section 1983 law and qualified immunity will likely remain on the books, but then again, as times change, the law may change as well.

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