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# Almand v. DeKalb County, Georgia: Where to Draw the Line between a Police Officer's Private Acts and Acts Taken under the Color of State Law

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## *Almand v. DeKalb County, Georgia:* Where to Draw the Line Between a Police Officer's Private Acts and Acts Taken Under the Color of State Law

### I. Introduction

The issue of whether a person acts under the color of state law for the purpose of 42 U.S.C. section 1983[1] ("section 1983") "is no simple question of fact;"[2] it is a detailed factual inquiry.[3] The intricacy of this question is further compounded when a police officer is named as a defendant in a section 1983 claim because the distinction between a private act and an act accomplished under the color of state law becomes much more difficult to define.[4]

In order to establish a successful claim under section 1983, a plaintiff must show that the defendant acted under the color of state law and deprived her of a constitutional right.[5] The Supreme Court has given an expansive reading to the provision

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

42 U.S.C. § 1983 (1994).

2. Almand v. DeKalb County, Georgia, 103 F.3d 1510, 1513 (11th Cir. 1997) (citing Blum v. Yaretsky, 457 U.S. 991, 996-98 (1982)).

3. *See id.*

4. *See id.* at 1514-15.

5. *See* 42 U.S.C. § 1983 (1994).

to allow damage suits against state officers.[6] The Court has adopted the rule that "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color' of state law."[7] At first blush, it may appear that an act committed by a state officer who deprives another of either their constitutional or federal statutory rights is under the color of state law.[8] However, not all acts by state employees are acts under the color of state law.[9] The Supreme Court has held that "the dispositive issue is whether the official was acting pursuant to the power he/she possessed by state authority or acting only as a private citizen."[10] Hence, a person whose status as a police officer has made it possible for him to deprive another of a constitutional right has acted under the color of state law.[11] Although the Supreme Court provides some guidance,[12] drawing the line between private acts and acts under the color of state law may be a difficult task.

Recently, in *Almand v. DeKalb County, Georgia*,[13] the Eleventh Circuit held that a police officer, who allegedly raped the plaintiff did not act under the color of state law pursuant to section 1983.[14] The police officer gained access to the plaintiff's apartment on the pretense of discussing police business, left the apartment, and then forcibly reentered.[15] The majority restricted the Supreme Court's interpretation of section 1983 by drawing the line between acting under the color of state law and acting as a private individual, at the front door of the plaintiff's apartment.[16] Dismissing the plaintiff's section 1983 suit, the majority noted that if the defendant had raped the plaintiff dur-

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6. *See* Leon Friedman, *New Developments in Civil Rights Litigation and Trends in § 1983 Actions*, 554 PLI/Lit 7, 15 (1996).

7. United States v. Classic, 313 U.S. 299, 326 (1941).

8. *See supra* note 1.

9. *See Almand*, 103 F.3d at 1513.

10. Edwards v. Wallace Community College, 49 F.3d 1517, 1523 (1995) (citing Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled on other grounds by* Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978)).

11. *See id.*; *see also Classic*, 313 U.S. at 326.

12. *See Edwards*, 49 F.3d at 1523.

13. 103 F.3d 1510.

14. *See id.*

15. *See id.*

16. *See id.* at 1515.

ing his initial entry into her apartment, his actions would have been under the color of state law.[17]

On the other hand, the dissent maintained that the defendant's actions were taken under the color of state law.[18] The dissent's opinion, in the tradition of the Supreme Court's reading of section 1983 where a state officer is named as defendant, applies a more expansive notion of acting under the color of state law to the facts of *Almand*.[19] The dissent found that it was possible for a fact finder to conclude that the defendant was able to rape Almand because he was clothed with the authority of state law.[20]

Under the circumstances of *Almand*, the majority inappropriately engages in line drawing where there is a genuine issue of fact as to whether the defendant acted under the color of state law.[21] The majority's narrow definition of the acting under the color of state law requirement, in effect, makes it difficult for a victim to bring a section 1983 claim against a state officer, and thus limits the statute's purpose.

Part II begins with the history of section 1983 and its treatment by the Supreme Court and the federal circuit courts. Part III discusses the Eleventh Circuit's treatment of section 1983 in the context of *Almand v. DeKalb County, Georgia*.[22] Part IV analyzes the Eleventh Circuit's treatment of section 1983 in light of the Supreme Court interpretation, reaching the ultimate conclusion that the majority's analysis was flawed and that the dissent's opinion applied the correct analysis. In addition, Part IV proposes a balancing test to assist the courts in resolving the question of whether the unlawful action by a state officer was taken under the color of state law.

17. *See id.*

18. *See Almand*, 103 F.3d at 1516 (Aldrich, J., dissenting).

19. *See id.*; *see also supra* note 6 and accompanying text.

20. *See* Almand, 103 F.3d at 1516-17.

21. *See id.* at 1515; *see also supra* text accompanying note 15.

22. 103 F.3d 1510.

## II. Background

### A. *History*

Originally, 42 U.S.C. § 1983 was passed as section one of the Civil Rights Act of 1871, known as the Ku Klux Klan Act,[23] in response to the terrorism of the Ku Klux Klan directed at blacks in the South.[24] Its purpose was not to create a remedy against the Ku Klux Klan or its members, but against those who represented a state in some capacity and failed to enforce the state's criminal laws against the Ku Klux Klan.[25] The bill was passed by Rep. Samuel Shellabarger (R., Ohio); "[Section one], now codified as 42 U.S.C.A. § 1983, was the subject of only limited debate and was passed without amendment."[26] For the first seventy years of its existence, section 1983 was largely ignored.[27] Between 1871 and 1920, only twenty-one cases were decided under section 1983 due to the ineffectiveness of the civil rights laws after Civil War Reconstruction and the political developments of the period.[28] In the South, Democrats resented the radical reconstructionist control of their state governments by Republicans and were determined to weaken Republican control and black gains.[29] During the middle to late 1870s, "[r]acial prejudice, in both the North and the South, undermined the radical Republican position and strengthened that of the Southern Democrats."[30] Therefore, the civil rights laws of the 1860s and early 1870s did not develop.[31] Not until the twentieth century would the American social, political, and economic climate facilitate "even modest enforcement of civil rights laws."[32] Therefore, much of the meaning of section 1983 and its

23. *See* Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 628 (1979) (noting section one of the 1871 Civil Rights Act "was modeled after section two of the 1866 [Civil Rights Act]. . .it granted a private cause of action; and. . .it encompassed the deprivation, under color of state law, of 'any rights privileges, or immunities secured by the Constitution of the United States'").

24. *See* THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION CASES AND MATERIALS, 65 (Michie, 4th ed. 1996).

25. *See* Monroe v. Pape, 365 U.S. 167, 175-76 (1961).

26. Monell v. New York City Dep't of Social Services, 436 U.S. 658, 665 (1978).

27. *See* Friedman, 554 PLI/Lit at 7.

28. *See* Eisenberg, at 69-70.

29. *See id.*

30. *Id.* at 70.

31. *See id.*

32. *Id.*

usefulness is derived from modern interpretation by the Supreme Court.

### B. *Supreme Court's Treatment of Section 1983 Requirements*

#### 1. *Acting Under the Color of State Law Requirement*

A plaintiff is required to prove that the defendant was acting under the color of state law to bring a successful section 1983 claim.[33] The Supreme Court addressed the meaning of acting under the color of state law in *Monroe v. Pape*,[34] and interpreted this requirement broadly to allow damage suits against state officers.[35] In *Monroe*, the plaintiffs' home was searched without a warrant by the Chicago police, and Mr. Monroe was arrested without a warrant or an arraignment.[36] The plaintiffs claimed that such action by the Chicago police "constituted a deprivation of their 'rights, privileges and immunities secured by the Constitution' within the meaning of section 1983."[37] Before ruling in favor of the plaintiffs, the Court noted that the existence of Illinois' constitution and laws that outlaw unreasonable search and seizure did not supplant the availability of a federal remedy.[38] Ultimately, the Court decided that the defendants' actions amounted to a violation of section 1983,[39] relying upon *United States v. Classic*,[40] which held that "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under the color of state law."[41]

The *Monroe* Court also relied upon its decision in *Screws v. United States*,[42] which reaffirmed the expansive construction of the "under the color of state law" concept set forth in *Classic*. In *Screws*, the plaintiffs claimed that state officers did not make an

33. *See* 42 U.S.C. § 1983.
34. 365 U.S. 167 (1961).
35. *See id.*; *see also supra* note 6 and accompanying text.
36. *See Monroe*, 365 U.S. at 169.
37. *Id.* at 170.
38. *See id.* at 183.
39. *See id.*
40. 313 U.S. 299 (1941).
41. *Monroe*, 365 U.S. at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).
42. 325 U.S. 91 (1945).

effective arrest and were liable under section 1983.[43] There, the defendants argued that a federal remedy should not apply where there is adequate state relief.[44] The Court rejected this argument and held once again that the federal remedy is supplemental to the state law.[45]

Thus, the Court in *Monroe* adopted the *Classic* rule which provides for a broad reading of "under the color of state law" and made it clear that the availability of a state remedy is irrelevant to section 1983 analysis.[46] The Court held that if a state officer acted under the color of his legal authority he could be sued under section 1983, even if his acts were unlawful under state law.[47]

### 2. *Deprivation of Federal Statutory and Constitutional Rights Requirement*

To establish a section 1983 claim, a plaintiff must also prove that the defendant violated a federal statutory or constitutional right.[48] Section 1983 originated from section one of the Civil Rights Act of 1871, and it only provided a cause of action for violations of constitutional rights.[49] In 1874, Congress consolidated the United States laws, and the phrase "and laws" was added.[50] It states in pertinent part: "or immunities secured by the Constitution *and laws* shall be liable to the party injured in the action at law, suit at equity, or other proper proceeding for redress."[51] However, it is difficult to assess what Congress meant by the insertion of the phrase because the legislative history is sparse and thus, does not provide a clear explanation of Congress' intent.[52] Therefore, the Supreme Court, confronted with the issue of what type of laws or statutory

43. *See Monroe*, 365 U.S. at 184 (citing Screws v. United States, 325 U.S. 91, 108 (1945)).

44. *See id.*

45. *See id.*; *see also supra* note 38 and accompanying text.

46. *See Monroe*, 365 U.S. at 183-87.

47. *See id.*

48. *See supra* note 1.

49. *See* EISENBERG, at 111.

50. *See* Thiboutot v. Maine, 448 U.S. 1, 15 (1980).

51. 42 U.S.C. § 1983 (1994)(emphasis added).

52. *See Thiboutot*, 448 U.S. at 7 (citing generally Chapman v. Houston, 441 U.S. 600 (1979)).

rights section 1983 encompasses, has relied on a plain meaning analysis and precedent.[53]

The Supreme Court interpreted the phrase "and laws" and explained the scope of section 1983 in *Maine v. Thiboutot*.[54] In *Thiboutot*, the Court addressed the issue of "whether the phrase 'and laws' as used in § 1983, means what it says, or whether it should be limited to some subset of laws."[55] The case involved a claim under section 1983 by welfare recipients alleging that the Maine Department of Human Services violated the Social Security Act by terminating their welfare benefits.[56] The state argued that the phrase "and laws" should only include civil rights or equal protection laws, but this argument was rejected by the Court.[57] The Court held that section 1983 included the deprivation of federal statutory rights, in particular, the Social Security Act. Looking to the plain language of the statute, the Court stated that the words "and laws" clearly encompass a violation of a federal law such as the Social Security Act.[58]

Next, the Court focused on previous cases which interpreted section 1983 to include federal statutory violations in addition to constitutional violations.[59] One such case was *Rosado v. Wyman*.[60] There, the Court decided that a remedy under section 1983 was appropriate where the state violated a Social Security Act provision.[61] Relying on *Rosado* and other precedent, the Court concluded that the welfare recipients stated a cause of action under section 1983.[62] As a result of the *Thiboutot* decision, the Court has given a broad reading to the phrase "and laws," thereby expanding the scope of section 1983 to reach a greater number of plaintiffs.

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53. *See id.* at 4 (The Court stated that "[e]ven were the language ambiguous, however, any doubt to its meaning has been resolved by our several cases suggesting, explicitly, or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." *Id.*).

54. 448 U.S. 1.

55. *See id.* at 4.

56. *See id.* at 2.

57. *See id.* at 6.

58. *See id.* at 4.

59. *See Thiboutot*, 448 U.S. at 4-5.

60. 397 U.S. 397 (1970).

61. *See Thiboutot*, 448 U.S. at 4-5.

62. *See id.* at 4-6.

### 3. *The Relationship Between the Concepts of Action Under the Color of State Law and State Action*

The Supreme Court has held that the Fourteenth Amendment requirement of state action and the "under the color of state law" requirement in section 1983 are not necessarily identical concepts.[63] There may be action under the color of state law, as a matter of statutory interpretation, that does not constitute state action.[64] One such example is where a private claimant himself invokes a state statute, without meeting requirements of the Fourteenth Amendment set forth by the Supreme Court.[65] According to the Supreme Court, in order for action under the color of law to be state action the following must be satisfied: (1) "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible";[66] (2) "the party charged with the deprivation must be a person who may be fairly said to be a state actor."[67] Where a private person looks like a state actor, state action can be found when there is a "close nexus" or "symbiotic relationship" between acts of private persons and a state.[68] However, the Supreme Court has maintained that in a section 1983 claim brought against a police officer, or other state official, the action under the color of state law and the constitutional state action requirements are identical.[69]

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63. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 n.18 (1982). The Court reaffirmed its holding in an earlier case, *Flagg Brothers v. Brooks*, 436 U.S. 149 at 155-56 (1978), and stated that action under the color of state law may not always qualify as state action. *See id.*

64. *See Lugar*, 457 U.S. at 935 n.18.

65. *See id.*

66. *Id.* at 937.

67. *Id.*

68. *See Friedman*, 554 PLI/Lit at 21 (citing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961)).

69. *See Lugar*, 457 U.S. at 929 (citing Ex parte Virginia, 100 U.S. 339, 346-347 (1879) (where the Court ruled that the actions of a state officer who exceeds the limits of his authority constitute state action for purposes of the Fourteenth Amendment)).

C. *The Qualified Immunity Defense*

In *Almand*, the defendant moved for summary judgment on qualified immunity grounds.[70] His motion was denied by the district court and he appealed to the Eleventh Circuit.[71] In granting the defendant's summary judgment motion, the court relied on the procedures set forth by the Supreme Court in *Harlow v. Fitzgerald*.[72]

The *Harlow* Court defined qualified immunity or "good faith" immunity as "an affirmative defense that must be pleaded by a defendant official."[73] It has both subjective and objective elements. The Court has held that the "objective element involves a presumptive knowledge and of respect for 'basic, unquestionable constitutional rights'[,]"[74] while the subjective element is the officer's intent.[75] Therefore, considering both the objective and subjective elements, the qualified immunity defense does not cover an official who "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action *with malicious intention* to cause a deprivation of constitutional rights or other injury. . . ."[76] In order to avoid insubstantial claims, when a public official pleads a defense of qualified immunity on summary judgment, the judge appropriately may determine whether the law was clearly established at the time an action occurred.[77] If the law was clearly known, the defense should fail since a reasonably competent official should know the law governing his conduct.[78]

In *Siegert v. Gilley*,[79] the Supreme Court, applying *Harlow*, held that "a necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted [that is, the

70. *See Almand*, 103 F.3d at 1512.
71. *See id.*
72. 457 U.S. 800 (1982).
73. *Id.* at 815.
74. *Id.* at 815 (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).
75. *See Harlow*, 457 U.S. at 815-16.
76. *Id.* at 815 (emphasis added).
77. *See id.* at 815-19.
78. *See id.*
79. 500 U.S. 226 (1991).

qualified immunity question] is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."[80] The rationale for the Court's decision involved a concern for judicial economy; "one of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit."[81]

*Siegert* demonstrates the strength of qualified immunity as a defense for a state officer defending a section 1983 claim. Since the plaintiff in *Siegert* failed not only to allege the violation of a constitutional right that was clearly established at the time of Gilley's actions, but also failed to establish any constitutional right at all, he was not able to defeat the defendant's qualified immunity defense.[82] A section 1983 claimant who cannot defeat a defense of qualified immunity has not established a violation of any constitutional rights and fails to fulfill the elements of a section 1983 claim. In essence, a successful qualified immunity defense allows a state officer to circumvent a section 1983 claim.

### D. *The Circuit Courts' Interpretation of Acting Under the Color of State Law*

Recent federal circuit opinions further define the meaning of section 1983 and its impact. In *Parker v. Williams*[83] a jury found that a chief jailer who raped an arrestee, the sheriff who hired him, and the county were all liable under section 1983.[84] On appeal to the Eleventh Circuit, the jury's determination that the chief jailer acted under the color of law was not challenged.[85]

Lolita Parker was arrested in Alabama after "she hit a woman on the head with a glass during a bar scuffle."[86] Parker spent the night in the Macon County jail.[87] The next morning, James Williams, the chief jailer, agreed to arrange for her bail if

80. *Id.* at 232.
81. *Id.*
82. *Id.*
83. 862 F.2d 1471 (11th Cir. 1989).
84. *See id.* at 1474.
85. *See id*
86. *Id.* at 1473.
87. *See id.*

she would pose nude for sexually explicit photographs.[88] Williams arranged for Parker's bail and she was supposed to meet him at a nearby store but instead she went to a friend's house.[89] Williams learned of Parker's location and, while in his uniform, went to her friend's house.[90] He informed Parker that her bail had been revoked and that she would have to return to jail with him.[91] Parker left with Williams, believing that she was going back to jail, but instead, he took her to his house and raped her.[92]

The jury concluded that the defendant abused his power as a state official, thereby violating section 1983.[93] They relied on the fact that the defendant, a uniformed and on-duty police officer, coerced the plaintiff into leaving with him so that he could bring her to his house to rape her.[94]

The Fifth Circuit, in *Bennett v. Pippin*,[95] concluded that a section 1983 claim was established when a sheriff raped a murder suspect.[96] In *Bennett*, the plaintiff shot her husband in the chest after a violent domestic dispute, during which he pointed a gun at her.[97] The violence and subsequent murder occurred in their rental home in Archer County.[98] Following the shooting, Bennett drove over the county line into Wichita Falls and reported herself to the Wichita authorities.[99] The Wichita police arrested Bennett and held her until the Archer County sheriff, Presly Pippin, arrived to take her into custody.[100] Pippin returned the plaintiff to her home, but she was later taken to the Archer County Sheriff's Office by a deputy sheriff.[101] After the

88. *See Parker*, 862 F.2d at 1473.
89. *See id.*
90. *See id.*
91. *See id.*
92. *See id.*
93. *See Parker*, 862 F.2d at 1473.
94. *See id.*
95. 74 F.3d 578 (5th Cir. 1996).
96. *See id.*
97. *See id.* at 583.
98. *See id.*
99. *See id.*
100. *See Bennett*, 74 F.3d at 583.
101. *See id.*

plaintiff was "booked" and questioned, she signed a statement and she was allowed to return to her home.[102]

When the plaintiff arrived at her home, she discovered Pippin on her porch waiting to talk to her.[103] According to Ms. Bennett, they both sat on the porch and drank coffee while the sheriff questioned her about the shooting.[104] Ms. Bennett alleged that during the questioning, the sheriff touched her leg in a way that made her feel uncomfortable, and the plaintiff told the sheriff she did not want to answer any more questions until the following day.[105] Ms. Bennett saw the sheriff off the porch and went to bed.[106] She awoke and found the sheriff standing naked over her, attempting to remove her clothes.[107] Although the plaintiff protested, the sheriff told her that he was the sheriff and could do what he pleased.[108] Then the sheriff allegedly raped Ms. Bennett.[109]

The Fifth Circuit held that the finding that the sheriff acted under the color of law was not erroneous.[110] The court agreed that the sheriff "wielded coercive power over Gail Bennett."[111] The court reasoned that "the Sheriff's actions were an abuse of power held uniquely because of a state position"[112] and "the explicit invocation of governmental authority constituted a 'real nexus' between the duties of the Sheriff and the rape."[113]

In *Dang Vang v. Vang Xiong X. Toyed*,[114] the Ninth Circuit upheld the jury's determination that the defendant acted under

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102. *See id.*

103. *See id.*

104. *See id.*

105. *See Bennett*, 74 F.3d at 583.

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *See Bennett*, 74 F.3d at 589.

111. *Id.*

112. *Id.* (citing United States v. Classic, 313 U.S. 299, 326 (1941)).

113. *Id.* (citing Doe v. Independent School District, 15 F.3d 443, 452 n.4 (5th Cir. 1994), *cert. denied*, 513 U.S. 815 (1994)) (where the defendant took advantage of his position as a teacher and coach to seduce the plaintiff. The court explained that the defendant's conduct was taken under the color of state law because a "real nexus" existed between the activity out of which the violation occurred and the defendant's duties as a teacher).

114. 994 F.2d 476 (9th Cir. 1991).

the color of state law.[115] The defendant, an employee of Washington State Employment Security Office, raped women looking for employment when Toyed met them under the pretext of providing services pursuant to his job.[116] The plaintiffs were Hmong refugees from Laos and each contacted the defendant seeking employment.[117] The defendant was unsuccessful in finding employment for one of the plaintiffs, Yia Moua, nevertheless, the defendant assisted Moua in learning to drive.[118] The defendant picked up Moua and told her that he was going to take her to a place where they could study for the driver's exam.[119] The defendant drove Moua to a motel and raped her.[120]

The other plaintiff was Maichao Vang, who stated that the defendant "raped her at least sixteen times and on each occasion he relied on the pretext of a potential employment opportunity."[121] During one of the incidents, under circumstances similar to those surrounding Moua's rape, the defendant represented to Vang that he was going to help her obtain her driver's license.[122]

The Ninth Circuit concluded that the plaintiffs demonstrated the elements of a section 1983 claim.[123] The court stated that it was clear that the plaintiffs' "constitutional right to be free from sexual assault was violated."[124] In determining that the defendant acted under the color of state law, the court relied upon the Supreme Court's interpretation that "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law."[125] Therefore, the Ninth Circuit held that a reasonable juror could conclude that the defendant used his government position to contact and sex-

115. *See id.*
116. *See id.*
117. *See id.* at 478.
118. *See id.*
119. *See Dang Vang*, 944 F.2d at 478.
120. *See id.*
121. *Id.*
122. *See id.*
123. *See id.* at 478-80.
124. *Dang Vang*, 944 F.2d at 479.
125. *Id.* (citing Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982)(quoting United States v. Classic, 313 U.S. 299, 326 (1941))).

ually assault these plaintiffs, and thus, acted under the color of state law.[126]

## III. Statement of the Case

### A. *Facts*

In *Almand v. Dekalb County, Georgia*,[127] Mary Almand brought a section 1983 action against Floyd Bryant, a DeKalb County police officer, alleging that he raped her while acting under the color of state law.[128] Almand first encountered the defendant in July 1990, when she was searching for her daughter, Monique, who was missing from home.[129] The defendant offered to assist Almand in her search for her daughter on the condition that she go out on a date with him.[130] Almand did not accept the date, but she gave the defendant her phone number so that he could contact her with any information he obtained about her daughter.[131]

"About one week after [her] disappearance, Monique returned home with the help of the Atlanta Police Department."[132] Almand learned that Monique had gone with a neighbor to what she believed to be an audition for a concert.[133] Instead, Monique was held against her will in a hotel, where she was raped by two men.[134] Almand revealed to the defendant what had happened to her daughter and the defendant expressed that he had an idea of where Monique had been held and who the rapists were.[135] At this point, the Atlanta Police Department told Almand that what had happened to her daughter had occurred often in the area and that it was likely that nothing could be done to find the rapists.[136] One week after Monique's return home, the defendant called Almand and offered to disclose to her important information about her daughter's rape, if

126. *See Dang Vang*, 994 F.2d at 480.
127. 103 F.3d 1510 (1997).
128. *See id.* at 1512.
129. *See id.* at 1511.
130. *See id.*
131. *See id.*
132. *Almand*, 103 F.3d at 1512.
133. *See id.* at 1511 n.2.
134. *See id.*
135. *See id.* at 1512.
136. *See id.*

she agreed to have sex with him.[137] Although Almand rejected the defendant's demand for sexual favors, he agreed to continue to assist Almand with her daughter's investigation.[138]

In August 1990, the defendant showed up at Almand's apartment and wanted to discuss urgent matters about her daughter.[139] The defendant was off-duty and not in uniform.[140] She admitted the defendant and he immediately began to make sexual advances towards her.[141] Almand asked the defendant to leave, he eventually agreed and walked out the door.[142] Almand closed the door behind him but did not have a chance to lock it before the defendant pushed it open, reentered the apartment, and forcibly raped her.[143]

### B. *Procedural History*

Almand filed her complaint in the United States District Court for the Northern District of Georgia against Bryant and several other defendants.[144] Her complaint invoked, *inter alia*, 42 U.S.C. section 1983, and alleged that Bryant, a state actor, had violated her rights under the Fourth and the Fourteenth Amendments by forcibly raping her.[145] Bryant moved for summary judgment based on qualified immunity, but the district court denied his motion.[146] Bryant appealed to the United States Court of Appeals, Eleventh Circuit, and the court reversed and remanded the case to the district court.[147]

### C. *Majority Holding*

A majority of the Eleventh Circuit rejected the district court's decision and held that summary judgment should be

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137. *See id.*
138. *See Almand*, 103 F.3d at 1512.
139. *See id.*
140. *See id.* at 1514 n.10.
141. *See id.* at 1512.
142. *See id.*
143. *See Almand*, 103 F.3d at 1512.
144. *See id.* The defendants included DeKalb County and others who were not specifically named in the opinion. *See id.*
145. *See id.*
146. *See id.* All of the other defendants' motions for summary judgment were granted. *See Almand,*103 F.3d at 1512; *see also supra* Part II.C (discussing the qualified immunity defense).
147. *See Almand*, 103 F.3d at 1510.

granted to the defendant on qualified immunity grounds.[148] Upon review, the majority determined that Almand did not establish that the defendant acted under the color of state law for the purposes of section 1983.[149] The majority explained that

> [i]n qualified immunity cases, '[a] necessary concomitant to the determination of whether the constitutional right asserted by the plaintiff is 'clearly established' at the time the defendant acted [that is the qualified immunity question] is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.[150]

Based upon this standard, the majority concluded that the plaintiff did not assert a violation of a constitutional right because at the time the defendant raped Almand, he was acting as a private citizen.[151] The majority noted that if the defendant was acting under the color of state law when he raped her, a constitutional violation of the right to bodily integrity would have been asserted.[152] Since Almand failed to establish that the defendant acted under the color of state law, she did not have a claim under section 1983.[153]

The majority discussed the criteria necessary for a plaintiff to prevail on a section 1983 claim, stating that "[a] successful § 1983 action requires that the plaintiff show that she was deprived of a federal right by a person acting under the color of state law."[154] The majority acknowledged that, under certain circumstances, the rape of a person by a police officer or other

148. *See id.* at 1510, 1511 n.1. The court notes that on summary judgment all disputed facts are resolved in the Plaintiff's favor and the Plaintiff is given "the benefit of all reasonable inferences—for the purposes of reviewing a summary judgment decision." *Id.* (citing Rodgers v. Horsley, 39 F.3d 308, 309 (11th Cir. 1994)).

149. *See id.* at 1511; *see also generally supra* Part II.C.

150. *Almand*, 103 F.3d at 1515 n.12 (citing *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)).

151. *See Almand*, 103 F.3d at 1515.

152. *See id.*; *see also id.* at 1516 (dissent notes that the majority conceded that if there was an action taken under the color of state law, then the plaintiff's constitutional right to bodily integrity was violated).

153. *See id.* at 1511.

154. *See id.* at 1513 (citing Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992)) (citing Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155-56 (1978)).

state actor could violate the Constitution.[155] As an example of such circumstances, the majority cited *Parker v. Williams* and *Dang Vang v. Vang Xiong X. Toyed*.[156] The majority noted that *Parker* involved a rape by a uniformed deputy sheriff of a woman in his custody, made possible because he told her that her bail had been revoked and that she would have to return to jail with him.[157] *Dang Vang* was also cited as an example of action taken under the color of state law because the defendant raped women under the pretext that he could find them employment pursuant to his state job.[158] However, the majority distinguished these cases from *Almand*, because Bryant was not acting under the color of state law at the pertinent time.[159]

Consequently, the focus of the majority's opinion dealt with the issue of when a police officer acts under the color of state law for the purpose of a section 1983 claim.[160] The majority detailed the distinction between an official acting as a private person or as a state actor.[161] It noted that "not all acts by state employees are acts under the color of law."[162] Relying on a Supreme Court opinion, the majority held that "[t]he dispositive issue is whether the official was acting pursuant to the power he/she possessed by state authority or acting only as a private person."[163] Here, the majority agreed that the defendant was not acting under the color of state law, but as a private person when he forcibly reentered Almand's home and raped her.[164] It was likely that the defendant's first entry into Almand's home was acquired under the color of state law because he claimed that he had information about Almand's daughter, in order to

155. *See id.*; *see also* Parker v. Williams, 862 F.2d 1471 (11th Cir. 1989). Bodily integrity derived from the Fourth Amendment and applied to the States through the Fourteenth.

156. *See Almand*, 103 F.3d at 1513.

157. *See id.*

158. *See id.*

159. *See id.*

160. *See id.* at 1511.

161. *See Almand*, 103 F.3d at 1513.

162. *Id.* (citing Edwards v. Wallace Community College, 49 F.3d 1517, 1523 (11th Cir. 1995)).

163. *Almand*, 103 F.3d at 1513 (quoting Monroe v. Pape, 365 U.S. 167, 183-84 (1961), *overruled on other grounds* by Monell v. Department of Social Services, 436 U.S. 658 (1978)).

164. *See Almand*, 103 F.3d at 1514.

gain access.[165] However, the majority determined that the defendant's forcible reentry and his rape of Almand were private acts because he did not accomplish them by using his status as a police officer.[166] It further explained that by breaking into Almand's apartment and forcibly raping her, "he was no different from any other ruffian," and that these acts were not "made possible only because the wrongdoer [was] clothed with the authority of state law."[167]

The majority distinguishes *Almand* from cases such as *Bennett v. Pippin* and *Dang Vang*, where the defendants' acts were accomplished due to their status as state officials.[168] The majority noted that the *Bennett* defendant's statement, "I can do what I want, I'm the sheriff" intimidated the rape victim and overcame her resistance.[169] It also noted that the *Dang Vang* defendant "used his government position to exert influence and physical control over the plaintiffs."[170]

Because Almand did not establish that the defendant was acting under the color of state law pursuant section 1983, it remains that the defendant was acting as a private individual and therefore, no constitutional right was violated. Finding no constitutional violation allowed the majority to opine that the defendant was entitled to qualified immunity from the plaintiff's section 1983 claim.[171] Accordingly, the Eleventh Circuit reversed the decision of the district court and granted the defendant's summary judgment motion.

### D. *Dissenting Opinion*

The dissent maintained that, assuming the defendant did rape Almand, there was at least a genuine issue as to whether he did so under the color of state law.[172] Focusing on the ele-

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165. *See id.* at 1514-15.

166. *See id.*

167. *Id.*

168. *See id.* at 1515.

169. *See Almand*, 103 F.3d at 1515 (citing Bennett v. Pippin, 74 F.3d 578, 589 (5th Cir. 1996)).

170. *Id.* (citing Dang Vang v. Vang Xiong X. Toyed, 944 F.2d 476, 479 (9th Cir. 1991)).

171. *See id.* at 1515 n.12.

172. *See* Almand v. DeKalb County, Georgia, 103 F.3d 1510, 1516 (11th Cir. 1997) (Aldrich, J., dissenting).

ments of section 1983 which provide for the plaintiff to show that (1) a person acting under the color of state law (2) deprived her of a right secured by the United States Constitution or other federal laws,[173] the dissent observed that under certain circumstances, it has been accepted that a rape by a police officer could violate a constitutional right, successfully fulfilling the elements of a section 1983 suit.[174] Therefore, the dissent concluded that since "there was a genuine issue as to the circumstances under which the Bryant may have raped Almand, there was a genuine issue as to whether the defendant deprived her of a constitutional right."[175]

Similar to the majority, the dissent also explored the issue of when a defendant acts under the color of state law for the purposes of section 1983.[176] The dissent, relying on the Supreme Court's interpretation of section 1983, noted that "a defendant acts under the color of state law when he exercises the power 'possessed by virtue of state law and made possible only because the wrong doer is clothed with the authority of state law.'"[177] The dissent concluded that a defendant "acts under the color of state law when he abuses a position given to him by the state."[178]

The dissent opined that there was a genuine issue of material fact as to whether Almand's rape was made possible only because the defendant abused his position as a police officer.[179] In order to support its opinion, the dissent relied upon the evidence of the unlocked door through which the defendant forcibly reentered Almand's apartment.[180] Almand unlocked her apartment door and allowed the defendant to enter because he had

173. *See id.* at 1516 (citing Duke v. Smith, 13 F.3d 388, 392 (11th Cir. 1994)).

174. *See Almand*, 103 F.3d at 1516. The dissent refers to the portion of the majority opinion where they discuss circumstances under which a rape by an official could violate the Constitution. The dissent concludes that "[t]he majority apparently concedes that, if Bryant did rape Almand under the color of state law, then he violated her constitutional right to bodily integrity." *Id.* (citing Albright v. Oliver, 510 U.S. 266, 271-73 (1994)).

175. *Almand*, 103 F.3d at 1516.

176. *See id.*

177. *Id.* (quoting West v. Atkins, 487 U.S. 42, 50 (1988)).

178. *Almand*, 103 F.3d at 1516.

179. *See id.* at 1516.

180. *See id.*

told her that he had police business to discuss with her.[181] Although the defendant did leave upon Almand's request, he reentered before Almand had a chance to lock the door.[182] The dissent asserted that "a reasonable fact finder could find that Bryant's position as a police officer induced Almand to unlock the door so that he could rape her."[183] Furthermore, the dissent refuted the majority's contention that the defendant was like "any ruffian" because a ruffian could not have raped the plaintiff in the same way as the defendant did.[184] Therefore, the defendant's act of raping Almand was made possible only because of his role as a police officer, and he acted under the color of state law.[185]

The dissent concluded that the defendant's motion for summary judgment on qualified immunity grounds, which requires inquiry into whether a constitutional right was violated, should not have been granted.[186] Because a reasonable fact finder could conclude that the defendant raped Almand under the color of state law and violated her constitutional right to bodily integrity, the qualified immunity question could be answered in the affirmative.[187] Thus, according to the dissent, Almand's section 1983 claim should not have been dismissed.

## IV. Analysis: The Difficulty of Drawing the Line Between a Public Official's Private and Public Actions

The Supreme Court has interpreted the acting under the color of state law requirement for a section 1983 claim broadly to allow for damages against state officers.[188] Whenever there is a misuse of power by a state officer, whether authorized or not, the Court has held that the officer acted under the color of state law.[189] However, the Court has acknowledged that not all unlawful acts by police officers are committed under the color of

181. *See id.*
182. *See id.*
183. *Almand*, 103 F.3d at 1516-17.
184. *See id.* at 1517.
185. *See id.*
186. *See id.*
187. *See id.*
188. *See supra* note 6 and accompanying text.
189. *See* Friedman, 554 PLI/Lit at 15.

state law; they may be private acts.[190] In order to distinguish between an official's public and private acts for the purposes of section 1983, the Court ruled that "the dispositive issue is whether the official was acting pursuant to the power he/she possessed by state authority and not acting only as a private citizen."[191]

In *Almand*, the majority restricts the Supreme Court's reading of acting under the color of state law by drawing the line at the front door of Almand's apartment, thereby holding that the defendant was acting as a private citizen when he crossed over that line and reentered the apartment.[192] In making the decision that the defendant did not gain entry into Almand's apartment "by virtue of any authority he might have been given by the state to act as a police officer,"[193] the court relies upon other federal court opinions that have interpreted the Court's misuse rule involving a rape by a state officer.[194] Although those defendants' actions were found to be under the color of state law, this court was able to distinguish the above cases.[195]

### A. *The Problems with the Majority's Argument for Distinguishing Relevant Precedent*

In *Almand*, the majority held that under certain circumstances a rape by a state official could violate a person's constitutional right to bodily integrity and relied on *Parker* as a case where those circumstances existed.[196] It distinguished *Parker* but did not give a detailed explanation.[197] It merely noted that *Parker* involved a rape by a uniformed chief jailer that was made possible because he had told the plaintiff that her bail had been revoked and she had return to jail.[198] As a result, the

190. *See supra* notes 9-11 and accompanying text.
191. *See supra* note 10 and accompanying text.
192. *See supra* notes 164-67 and accompanying text.
193. *Almand*, 103 F.3d at 1515.
194. *See id.* The majority compares *Bennett v. Pippin*, 74 F.3d 578 (5th Cir. 1996) and *Dang Vang v. Dang Vang Xiong X. Toyed*, 944 F.2d 476 (9th Cir. 1991) and notes that these cases are distinct from *Almand*. *See id.*
195. *See Almand*, 103 F.3d at 1513, 1515.
196. *See id.* at 1513.
197. *See id.*
198. *See id.*

plaintiff left with the defendant, and he raped her.[199] The court appears to distinguish the two cases based on the fact that the defendant in *Parker* was in uniform and Bryant was not.[200] However, this is a weak argument and may be easily refuted by the majority's own concession that if Bryant had raped Almand upon his initial entry, there would have been action under the color of state law.[201] Since Bryant was neither on duty nor in uniform at the time of his initial entry,[202] it may be determined that the majority does not place a great deal of emphasis on this factor.

The issue in *Dang Vang v. Vang Xiong X. Toyed* is parallel to that in *Almand*,[203] and thus, was relied upon by the majority.[204] It distinguished *Dang Vang* based on the fact that "Hmong refugees were 'in awe' of government officials" and a reasonable jury could have concluded "that the 'defendant used his government position to exert influence and physical control' over the plaintiffs."[205] The majority reasoned that, unlike *Dang Vang*, there was no evidence that the defendant's status as a police officer was related to his conduct.[206] However, there are more similarities between the two cases than differences and consequently, the majority's reasoning is problematic in light of all the evidence.

The plaintiffs in *Dang Vang* came into contact with the defendant because of their need for employment,[207] and in *Almand*, the plaintiff came into contact with the defendant because of her need for police assistance in finding her daughter and then later her daughter's rapist.[208] In *Dang Vang*, the plaintiffs had an understanding that defendant and his department could be relied upon to supply jobs to Hmong refugees,[209] and Almand had understood that the rest of the department had given up on the investigation and relied on the defendant to

199. *See id.*
200. *See Almand*, 103 F.3d at 1513, 1515.
201. *See supra* note 165 and accompanying text.
202. *See supra* note 140 and accompanying text.
203. *See supra* note 11 and accompanying text.
204. *See Almand*, 103 F.3d at 1513, 1515.
205. *Id.* at 1515.
206. *See id.*
207. *See supra* notes 116-17 and accompanying text.
208. *See supra* notes 129-30 and accompanying text.
209. *See supra* notes 116-17 and accompanying text.

continue the search for her daughter's rapist.[210] The *Dang Vang* court concluded that the jury could have found that each plaintiff was raped during a meeting with the defendant related to provision of services pursuant to his state employment.[211] Likewise, in *Almand*, a reasonable jury could have found that the defendant gained access to the plaintiff's apartment on the pretense of discussing police business in order to rape her.[212]

The majority also distinguishes *Dang Vang* on the grounds that the defendant there was acting under the color of law at the "pertinent time" (the time of the rape), and that Bryant was not.[213] The defendant in *Dang Vang* raped the plaintiffs during meetings, under the pretense of providing them with state services.[214] The majority notes that Bryant's police duties ended when the plaintiff closed the door, and that he was no longer acting under the color of state law when he reentered and raped her.[215] It placed a great deal of importance on this notion of "pertinent time."[216]

However, the majority devalues the importance of the "pertinent time" factor by citing *Bennett*, as a case where action under the color of state law was properly found.[217] In *Bennett*, as in *Almand*, the rape occurred after the plaintiff asked the state officer to leave.[218] If pertinent time is as decisive a factor as the *Almand* majority espouses it to be, then *Bennett*, would have been decided differently. Nonetheless, action under the color of state law was found in *Bennett*. The majority finds *Bennett* distinguishable for a different reason and shifts its focus to the fact that the defendant in *Bennett* explicitly invoked his authority through the use of a verbal statement.[219] The majority ignores the pertinent time factor it deemed so important in *Dang Vang*.

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210. *See supra* note 135-38 and accompanying text.
211. *See supra* notes 116-26 and accompanying text.
212. *See generally supra* Part III.A.
213. *See Almand*, 103 F.3d at 1513.
214. *See id.*
215. *See supra* notes 165-67 and accompanying text.
216. *See Almand*, 103 F.3d at 1513.
217. *See id.* at 1515.
218. *See supra* notes 105-07, 141-43 and accompanying text.
219. *See supra* note 112 and accompanying text.

Due to the *Bennett* defendant's statement that he was the sheriff and that he could do what he pleased,[220] the majority concluded that the defendant there "overcame [the plaintiff's] resistance by intimidation linked to his authority."[221] The majority could not find this linkage between intimidation and state authority in *Almand*.[222] Instead, it noted that Bryant, "resorted to sheer force to break, to enter, to rape, and his status as police officer had no bearing on his wicked behavior."[223]

However, other evidence in *Almand* would allow a reasonable juror to conclude that Bryant coerced Almand into allowing him into her home only because he was a police officer conducting an investigation.[224] Almand was on a quest to find her daughter's rapist, and the police department had told her that it was likely that nothing could be done to find the rapist.[225] The defendant was her only hope, and he assured her that he would continue the investigation.[226] Prior to the rape, the defendant made sexual advances towards Almand, but she tolerated the defendant's improper behavior because she feared that he would withdraw his police services and she might never find her daughter's rapist.[227] When the defendant knocked on Almand's door and asked to come in because he had police business to discuss, she submitted to his request and allowed him to enter.[228] Any reasonable juror could conclude from the evidence that the defendant misused his authority to intimidate Almand and consequently rape her.[229] The plaintiff knew who the defendant was, she knew the power he had over her, and she did not need to be told.[230] Thus, the majority's rationale for distinguishing this case from *Bennett* is weak.

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220. *See supra* note 108 and accompanying text.

221. *See Almand*, 103 F.3d at 1515 (citing *Bennett*, 74 F.3d at 589).

222. *See Almand*, 103 F.3d at 1515.

223. *See id.*

224. *See supra* Part III.A.

225. *See supra* notes 136-38 and accompanying text.

226. *See id.*

227. *See supra* notes 130-31, 137-38 and accompanying text.

228. *See supra* notes 139-40 and accompanying text.

229. *See supra* notes 139-43 and accompanying text.

230. *See generally supra* Part III.A.

### B. *The Dissent's Opinion Offers the Correct Application of Section 1983*

The Supreme Court has not yet decided a section 1983 case where a police officer raped a person during a police investigation or other police business. However, the Court has interpreted section 1983 in a case where a state officer violated constitutional rights and has given a broad reading of the provision.[231] Therefore, the issue of where to draw the line between a police officer acting as a private person and as an officer of the state carrying out police duties is a difficult one for the courts because there is no bright line, hence it is a fact specific analysis.[232] Courts have to rely on the law as stated by the Supreme Court, which has used broad phrases such as "clothed with the authority of state law,"[233] and "abuse of power held uniquely because of a state position."[234] In accordance with the Supreme Court's expansive interpretation of under the color of state law, the dissent in *Almand* offers the correct application of section 1983 to the facts.[235] The dissent concluded that "defendant's abuse of his position as an officer of the state made the rape of *Almand* possible."[236] The dissent was able to distinguish the defendant's rape of *Almand* "from that of any other ruffian."[237] They relied on evidence that the defendant merely had opened a door that had been unlocked for him because he was a police officer[238] and concluded that a reasonable fact finder could find that "Bryant's abuse of his position as a police officer induced Almand to unlock the door so that he could rape her."[239]

The dissent relies on the *Dang Vang* case and argues that it is analogous to *Almand*.[240] In *Dang Vang*, the defendant, a state employee, on the pretense of taking women job hunting,

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231. *See supra* Part II.B.2.

232. *See supra* notes 2-4 and accompanying text.

233. *Supra* note 7.

234. *See Classic*, 313 U.S. at 326.

235. *See generally supra* Part III.D.

236. *See Almand*, 103 F.3d at 1517; *see also* notes 183-85 and accompanying text.

237. *See Almand*, 103 F.3d at 1517; *see also supra* note 184 and accompanying text.

238. *See id.*

239. *See Almand*, 103 F.3d at 1517; *see also supra* notes 184-85 and accompanying text.

240. *See Almand*, 103 F.3d at 1517.

lured them to a hotel room and raped them.[241] There, the Ninth Circuit found that based on the fact that the plaintiffs came into contact with the defendant because of their need for employment, the defendant used his government position to rape them.[242] Similarly, the dissent found that Almand came into contact with the defendant because of her need for police help, and Bryant used his position to gain access to her home in order to rape her.[243] The dissent notes that "'any other ruffian' could have raped Almand, but Bryant's status as a police officer made it possible for him to do so in a way that another could not."[244]

### C. *A Proposal for Where to Draw the Line Without Violating the Expansive Notion of "Under the Color of State Law"*

The majority's concern for unwarranted liability that may be placed on the state, when a police officer is charged as a defendant in a section 1983 suit,[245] forced the *Almand* court to engage in arbitrary line drawing.[246] In a somewhat conclusory manner, the majority decided that the plaintiff's act of closing the door transformed Bryant into a private actor, as opposed to an officer acting under the color of state law.[247] However, by hastily dismissing this claim on summary judgment, the court ignored the "totality of the circumstances" that led to the rape of the plaintiff.[248]

Almand first came into contact with Bryant in July 1990, when she was searching for her missing daughter and he offered to assist her if she went out on a date with him.[249] Once her daughter was returned home and Almand had learned that she had been raped, Bryant informed her that he might know who raped her daughter.[250] Later, the Atlanta Police Department told Almand that what happened to her daughter was a common occurrence in the area and that it was unlikely that

241. *See supra* note 116 and accompanying text.
242. *See supra* note 126 and accompanying text.
243. *See supra* note 183.
244. *See Almand*, 103 F.3d at 1517.
245. *See supra* note 148-49 and accompanying text.
246. *See supra* notes 164-66 and accompanying text.
247. *See id.*
248. *See infra* notes 258-61 and accompanying text.
249. *See supra* notes 129-30 and accompanying text.
250. *See supra* notes 132-35 and accompanying text.

they would find the rapist.[251] Shortly after this, and prior to Almand's rape, Bryant offered to give Almand information on her daughter's rape if she agreed to have sex with him.[252] Thus, when Bryant showed up at Almand's door in August 1990 to rape her, Almand had been in contact with the defendant for one month.[253] During this time, he had requested sexual favors in return for his assistance with the investigation for her daughter's rapist.[254]

Disregarding of the aforementioned facts, the majority focused on the plaintiff's acts of asking Bryant to leave and closing the door behind him moments before he reentered and raped her[255] as the acts that broke the link between Bryant's status as a police officer and the rape.[256] The majority held that when the plaintiff closed the door and Bryant reentered, he returned as "any ruffian."[257]

The majority should not have drawn a line at the front door. Rather, the majority should have balanced the plaintiff's evidence (the "totality of the circumstances") against the plaintiff's act of closing the door (the potentially "link breaking act") and then decided whether a reasonable juror could conclude that the closing of the door terminated Bryant's status as a police officer, thus transforming him into a private actor not within the realm of section 1983.[258] By weighing all of the evidence against the "link breaking act," the court could have addressed its concern for expanding section 1983 beyond manageable limits regarding police officers,[259] and remained within the Supreme Court's expansive interpretation of "under the color of state law."[260] By doing so, this court undoubtedly would have minimized the significance of the act of closing the door in light of the overwhelming evidence supporting the plaintiff's claim.[261]

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251. *See supra* note 136 and accompanying text.
252. *See supra* note 137 and accompanying text.
253. *See supra* notes 129, 139 and accompanying text.
254. *See supra* notes 130, 137 and accompanying text.
255. *See supra* notes 140-41 and accompanying text.
256. *See supra* notes 164-67 and accompanying text.
257. *See supra* note 167 and accompanying text.
258. *See supra* notes 141-43 and accompanying text.
259. *See supra* note 232 and accompanying text.
260. *See generally supra* Part II.B.2.
261. *See supra* note 143 and accompanying text.

This analysis conforms with the dissent's opinion that there was enough evidence for a reasonable juror to conclude that the defendant used his status to rape Almand in a way that no other could.[262] Because Almand had relied on the defendant for his police services for approximately one month prior to the rape,[263] and because he was the only officer in the department who continued to investigate her daughter's rape,[264] he possessed a unique power. Aware of this power, Bryant misused it to make sexual advances and ultimately to get Almand to unlock her door and allow him into her home.[265] Once the door was unlocked, this made it easier for Bryant to reenter and rape Almand.[266] Such facts weigh heavily in favor of the plaintiff stating a section 1983 claim and outweigh the notion that the plaintiff's act of closing the door marked the end of Bryant's initial entry into the apartment under the pretense of police business.[267] The reentrance happened within moments of Bryant's initial entry.[268] The momentary lapse in time between the initial entry and the reentrance was not enough to break the chain between Bryant's abuse of state authority and the rape.

## V. Conclusion

The factual scenario presented in *Almand v.DeKalb County, Georgia*, is a difficult one. Given little guidance by the Supreme Court, the *Almand* majority designated the closing of the plaintiff's front door as the determinative factor in answering the color of state law issue. Though the court's concern for limiting the state's potential liability when its police officers engage in illegal conduct is not without merit, had the majority taken a more comprehensive look at trends in section 1983 cases, it would have expanded the statute's scope to include Officer Bryant's conduct. Furthermore, not only did this court ignore precedent, but it turned its back on basic civil procedure,

262. *See supra* notes 183-85 and accompanying text.
263. *See generally supra* note 253 and accompanying text.
264. *See supra* note 136 and accompanying text.
265. *See supra* notes 139-43 and accompanying text.
266. *See supra* note 143 and accompanying text.
267. *See supra* notes 164-66 and accompanying text.
268. *See generally supra* note 143 and accompanying text.

in which a genuine issue of material fact is left to the jury to decide.

An appropriate rationale for determining what constitutes abuse of one's authority as a state actor is that adopted by the dissent. By holding that Bryant's position as a police officer made the rape possible, it correctly applied the law. The dissent makes it clear that Bryant's status allowed him to initially encounter the plaintiff, remain in contact with her, coerce her into unlocking her front door, and ultimately rape her. Bryant committed this crime in a way that "any ruffian" could not.

The majority's concern for unwarranted liability placed on state officials is not discredited by this suggested approach. Rather, the balancing test proposed incorporates both the majority's concern for unwarranted liability of the state and the Supreme Court's expansive interpretation of section 1983. By weighing all of the plaintiff's evidence of state action against the possible "link breaking act," only then can it be determined whether a reasonable jury could conclude that the defendant's action was taken under the color of state law.

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