

WHEN DOES FORCE BECOME EXCESSIVE?

SUPREME COURT OF NEW YORK APPELLATE DIVISION, THIRD DEPARTMENT

People v. Atkinson¹
(decided July 17, 2014)

I. INTRODUCTION

Recently, news and social media outlets have debated the use of excessive force by police officers. However, the issue is not new and has led to numerous court decisions at both the state and federal levels. In deciding these cases, courts have applied the reasonableness standard to determine whether a police officer's use of force is excessive, and therefore, a violation of the Fourth Amendment of the United States Constitution.²

The reasonableness standard is objective; the facts of each case are analyzed to determine what a reasonable officer in a similar situation would do.³ Further, state, local, and federal law enforcement officers may be charged individually with a violation of the Fourth Amendment by use of excessive force under 42 U.S.C. § 1983.⁴ Section 1983 makes an officer liable for deliberately depriving any citizen of the United States of his or her Constitutional Rights.⁵

¹ 989 N.Y.S.2d 685 (App. Div. 3d Dep't 2014).

² See *Graham v. Connor*, 490 U.S. 386, 395 (1989). See also *Pacheco v. City of New York*, 961 N.Y.S.2d 408, 409 (App. Div. 1st Dep't 2013) ("To prevail on an excessive force claim, a plaintiff must show that law enforcement personnel exceeded the standard of objective reasonableness under the Fourth Amendment.").

³ *Graham*, 490 U.S. at 395.

⁴ Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1126 (2008).

⁵ 42 U.S.C. § 1983 (1996). This statute is not only intended for recourse against the police, but its purpose is to provide a solution when a citizen's rights which are afforded by the Constitution are violated:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, sub-

Specifically, this Note argues that the Fourth Amendment's objective reasonableness standard should be applied to excessive force cases in both civil and criminal courts because it accounts for all the circumstances involved when officers make split-second decisions during a seemingly dangerous situation.⁶ Section II of this Note discusses the issue in *People v. Atkinson*—whether police officers acted with excessive force under the Fourth Amendment in tasing the defendant during a search and seizure when narcotics were visible in the defendant's mouth and the defendant was resisting arrest.⁷ Section III describes the federal approach and analyzes excessive force cases in both the criminal and civil context.⁸ Section IV examines how New York courts have handled claims of excessive force. Finally, the last part of this Note explains why the Fourth Amendment's objective reasonableness standard should continue to be used when analyzing excessive force claims.

II. *PEOPLE v. ATKINSON*

A. Factual and Procedural Background

Police officers were looking for the defendant, Karseen Atkinson, on a parole violation warrant.⁹ The officers located Atkinson riding in the passenger seat of a vehicle, and executed a traffic stop in

jects, 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 injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

⁶ *Graham*, 490 U.S. at 396.

⁷ *People v. Atkinson*, 989 N.Y.S.2d 685, 687 (App. Div. 3d Dep't 2014).

⁸ Seth D. DuCharme, Note, *The Search for Reasonableness in Use-of-Force Cases: Understanding the Effects of Stress on Perception and Performance*, 70 *FORDHAM L. REV.* 2515, 2527 (2002).

⁹ *Atkinson*, 989 N.Y.S.2d at 687 ("According to the testimony at the suppression hearing, the police apprehended defendant on a parole violation, aware that he was a convicted felon who had absconded from parole and was allegedly trafficking drugs and in possession of a weapon.").

order to place him under arrest.¹⁰ The police officers stopped the vehicle, but Atkinson refused to comply with their orders to exit the car with his hands up.¹¹ An officer subsequently removed Atkinson from the car and put him on the ground.¹² While being removed from the car, the defendant attempted to resist by kicking.¹³ He also refused to “put his hands behind his back” by keeping them under his body.¹⁴ During the struggle, officers observed what they believed to be narcotics in Atkinson’s mouth and ordered him to spit them out.¹⁵ Unsure of whether he had a weapon, the officers warned Atkinson that if he did not comply with their orders, they would tase him.¹⁶

When Atkinson refused to comply with the officers’ orders, one of the officers tased his leg through his clothes for about four seconds.¹⁷ While being tased, Atkinson inadvertently opened his mouth, revealing a white substance in a plastic baggie.¹⁸ The officers once again ordered Atkinson to spit out the contents.¹⁹ Atkinson still refused to comply, so the officer tased him on the leg for a second time.²⁰ This second tase lasted about three seconds, but the officer was not aware that a fellow officer decided to simultaneously tase the defendant’s other leg.²¹ The defendant spat out the baggie from his mouth and the officers determined the substance was cocaine.²² The whole incident lasted only about one minute.²³ After the defendant was arrested, the police discovered another bag of cocaine in Atkinson’s pocket and a handgun in the trunk of the car.²⁴

Atkinson was charged with two counts of criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the fourth degree.²⁵ Atkinson moved to suppress the

¹⁰ *People v. Atkinson*, 975 N.Y.S.2d 227, 228-29 (App. Div. 3d Dep’t 2013).

¹¹ *Atkinson*, 989 N.Y.S.2d at 687.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Atkinson*, 989 N.Y.S.2d at 687.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 687-88.

²⁰ *Id.* at 688.

²¹ *Atkinson*, 989 N.Y.S.2d at 688.

²² *Id.*

²³ *Id.*

²⁴ *Atkinson*, 975 N.Y.S.2d at 229.

²⁵ *Id.*

cocaine obtained from his mouth while he was being tased, but the Tompkins County Court denied the motion without a hearing.²⁶ The defendant was convicted on all counts and subsequently appealed his conviction to the Appellate Division, Third Department.²⁷

B. Reasoning of the Court

The Appellate Division found that the county court erred in denying the defendant a suppression hearing for the cocaine seized from his mouth.²⁸ As a result, the Third Department remitted the case to the Tompkins County Court to hold a suppression hearing.²⁹ However, after the hearing, the county court denied the defendant's motion to suppress.³⁰ The defendant once again appealed to the Appellate Division.

The issue before the Appellate Division was whether the cocaine obtained from the defendant's mouth was the result of the police officers' use of excessive force, thus rendering the search and seizure of the defendant unreasonable under the Fourth Amendment.³¹ The Appellate Division affirmed the decision of the county court by analyzing the officers' actions "under the Fourth Amendment's objective reasonableness standard."³² The Appellate Division held that the officers did not use excessive force and, thus, the search and seizure was reasonable under the circumstances.³³

According to the court, the objective reasonableness standard requires a careful balancing of many factors.³⁴ These factors include the nature of the crime, the safety of both the defendant and the police officers, and whether the defendant was resisting or trying to evade arrest.³⁵ Thus, the court took a "totality of the circumstances" approach to determine whether the amount of force used was reasonable.³⁶

²⁶ *Id.*

²⁷ *Id.* at 230.

²⁸ *Id.*

²⁹ *Atkinson*, 975 N.Y.S.2d at 230.

³⁰ *Atkinson*, 989 N.Y.S.2d at 687.

³¹ *Id.* at 686-87.

³² *Id.* at 686-88.

³³ *Id.* at 687-88.

³⁴ *See id.* at 687. *See also Graham*, 490 U.S. at 396.

³⁵ *Atkinson*, 989 N.Y.S.2d at 687 (citing *Graham*, 490 U.S. at 396).

³⁶ *See id.* *See also Graham*, 490 U.S. at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9

After considering all of these factors, the court found that the officers' use of force in obtaining the drugs from the defendant's mouth was reasonable under the circumstances.³⁷ First, the incident "was a highly charged situation, where [the] defendant refused to comply with any orders."³⁸ The police officers were informed that Atkinson had a concealed weapon and was a previously convicted felon who "absconded from parole and was allegedly trafficking drugs."³⁹ Additionally, the defendant was actively resisting arrest by becoming violent.⁴⁰ The officers saw what they believed to be, and what turned out to be, narcotics in Atkinson's mouth.⁴¹ Furthermore, the entire incident occurred in less than one minute.⁴² The court found the police officers' use of physical force was reasonable because the police officers acted in the interests of both the defendant's safety as well as their own.⁴³ At trial both an investigator and an officer testified to the danger that may be caused by an individual's swallowing of an unknown quantity of narcotics.⁴⁴ In conclusion, the Appellate Division held that the police officers did not use excessive force and therefore, the lower court was correct in denying the defendant's motion to suppress the evidence.⁴⁵

(1985) (deciding whether the totality of the circumstances justifies a particular sort of . . . seizure)). In *Garner*, police officers responded to a call in which a woman claimed that someone was breaking into the house next door. 471 U.S. at 3. One of the officers went behind the house and saw a suspect flee from the scene and run across the backyard. *Id.* When the suspect reached the fence, the officer told him to "halt." *Id.* at 4. Using his flash light the officer was able to reasonably determine that the suspect was about eighteen years old and unarmed. *Id.* at 3. The suspect did not listen and started to climb over the fence. *Id.* at 4. The police officer shot the suspect thinking that if the suspect reached the other side of the fence, the police would not be able to catch him. *Garner*, 471 U.S. at 4. The bullet hit the suspect in the back of the head, and he died on the operating table. *Id.* A purse stolen from the home from which the officer saw the suspect fleeing and ten dollars were among the items found on the suspect. *Id.* The force used by the officer was deemed not excessive because he acted pursuant to both a Tennessee state statute as well as department policy. *Id.*

³⁷ *Atkinson*, 989 N.Y.S.2d at 688.

³⁸ *Id.*

³⁹ *Id.* at 687.

⁴⁰ *Id.*

⁴¹ *Id.* at 688.

⁴² *Atkinson*, 989 N.Y.S.2d at 688.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

III. THE FEDERAL APPROACH

A search and seizure becomes unreasonable if a police officer uses excessive force. The Fourth Amendment of the United States Constitution⁴⁶ provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁴⁷

Excessive force claims arise in two contexts: when a defendant, in a criminal case, seeks to suppress evidence on the ground that the excessive force rendered the search unreasonable, or when a party brings a subsequent civil action against the police, alleging the use of excessive force violated his or her civil rights under 42 U.S.C. § 1983.⁴⁸ Although the remedies are different, excessive force issues in civil and criminal proceedings are analyzed using the Fourth Amendment's objective reasonableness standard.⁴⁹ Further, motions in criminal court to suppress evidence generally fail due to a lack of causal nexus between the force used and the evidence seized.⁵⁰

A. Excessive Force: Civil Claims under § 1983

In civil cases involving the violation of a person's Fourth Amendment rights, federal courts have applied a four-part substantive due process test, derived from the United States Court of Appeals decision in *Johnson v. Glick*.⁵¹ Australia Johnson was an inmate who was being held in the Manhattan House of Detention before and throughout his trial in the state court for felony charges.⁵² He brought a civil rights action under 42 U.S.C. § 1983, alleging that during the

⁴⁶ U.S. CONST. amend IV.

⁴⁷ *Id.*

⁴⁸ See *supra* note 4 and accompanying text.

⁴⁹ DuCharme, *supra* note 8, at 2528.

⁵⁰ See *Hudson v. Michigan*, 547 U.S. 586, 592 (2006) (discussing seized evidence and how "[a]ttenuation can occur, of course, when the causal connection is remote").

⁵¹ *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973).

⁵² *Id.* at 1029.

process of being checked back into the Detention Center, an officer reprimanded him and other men for failing to follow instructions.⁵³ Johnson tried to explain that he was only following the instructions of another officer, but the officer “rushed into the holding cell, grabbed him by the collar and struck him twice on the head with something enclosed in the officer’s fist.”⁵⁴ During the incident, Johnson claimed that the officer threatened him by saying, “I’ll kill you, old man, I’ll break you in half.”⁵⁵ Johnson further claimed that the officer harassed him by keeping him in the holding cell for a long period of time before returning him to his own cell.⁵⁶ When Johnson asked for medical attention, the officer held him for an additional two hours before bringing him to the jail doctor.⁵⁷ Although the doctor gave Johnson pain medication, he continued to have severe headaches.⁵⁸

The court in *Johnson* recognized that the use of excessive force by law enforcement is a violation of a person’s Due Process rights under the Fourteenth Amendment.⁵⁹ In *Johnson*, the court considered four factors in determining whether an officer used excessive physical force:

- (1) The need for the application of force, (2) the relationship between that need and the amount of force that was used, (3) the extent of the injury inflicted, and (4) whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.⁶⁰

Although the decision mentioned that an occasional use of intentional force may be needed in the management of prisoners in a detention center, the court in *Johnson* found that the officer’s use of force was excessive.⁶¹ However, the defendant Glick, who was the warden and not the officer who assaulted Johnson, was found not liable for the

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Johnson*, 481 F.2d at 1029-30.

⁵⁶ *Id.* at 1030.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Johnson*, 481 F.2d at 1032 (“[Q]uite apart from any ‘specific’ of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law.”).

⁶⁰ *Id.* at 1033.

⁶¹ *Id.*

officer's actions.⁶²

Fifteen years after *Johnson*, the Supreme Court articulated the Fourth Amendment's objective reasonableness standard in *Graham v. Connor*.⁶³ Petitioner, Graham, suffered from diabetes and brought a § 1983 action to recover damages after sustaining injuries during an arrest.⁶⁴ The onset of an insulin reaction prompted Graham to ask a friend to drive him to the store for medication.⁶⁵ Upon entering the store, Graham noticed a large number of people and quickly exited because he needed immediate treatment.⁶⁶ He reentered the car so his friend could drive him somewhere else.⁶⁷ Connor, a police officer, witnessed Graham's hasty entrance and exit from the store, and became suspicious.⁶⁸ Connor followed the car in which Graham was traveling and performed an investigative stop.⁶⁹ When back up officers arrived, the police officers handcuffed Graham due to his strange behavior.⁷⁰ Graham's friend tried to explain to the officers that Graham's behavior was an effect of the insulin reaction, but the officers would not listen.⁷¹ Throughout the incident, four different officers threw and pushed Graham.⁷² Graham's injuries from the encounter included a broken foot, cuts to his wrists, a bruise on his forehead, and a shoulder injury.⁷³

After hearing the evidence, the United States District Court for the Western District of North Carolina applied the same four-factor "substantive due process test" that *Johnson* applied.⁷⁴ In doing so, the district court found that under the circumstances the officers' use of force was reasonable.⁷⁵ A divided panel of the Court of Appeals for the Fourth Circuit affirmed, finding that the district court applied the correct legal standard and that a reasonable jury could

⁶² *Id.* at 1033-34.

⁶³ 490 U.S. at 396.

⁶⁴ *Id.* at 388.

⁶⁵ *Id.*

⁶⁶ *Id.* at 388-89.

⁶⁷ *Id.* at 389.

⁶⁸ *Graham*, 490 U.S. at 389.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Graham*, 490 U.S. at 390.

⁷⁴ *Id.*

⁷⁵ *Id.* at 390-91.

come to the same conclusion after applying the same test.⁷⁶

On appeal, the Supreme Court disagreed with the Fourth Circuit's decision to apply *Johnson*'s four-factor test.⁷⁷ It rejected the notion that all claims of excessive force should be governed by one standard.⁷⁸ Instead, the Court fashioned its own test, known as the objective reasonableness standard.⁷⁹ The Court in *Graham* explained that this analysis "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake."⁸⁰ It also explained that the application of the test would rely on the facts and circumstances of each case. Among the circumstances to be considered are what crimes have been committed, whether there was a threat to the safety of the officers or other persons, and whether the person was resisting arrest or attempting to escape arrest.⁸¹ In the Court's view, reasonableness "must be judged from the perspective of a reasonable officer on the scene."⁸² Furthermore, the Court noted that "officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving."⁸³ The Court's reasoning in *Graham* explains why a flexible test is more appropriate than the previous approach of federal courts.

The Sixth Circuit applied this flexible test in *Landis v. Baker*,⁸⁴ to determine whether the force used by a Michigan state trooper and three county sheriffs while arresting the defendant was unreasonable.⁸⁵ In *Baker*, the daughter of a deceased arrestee brought a civil action under § 1983 against the arresting officers who caused the death of her father by the force used during his arrest.⁸⁶

In November 2004, several drivers called Livingston County 911 Central Dispatch, complaining that a bulldozer was blocking two lanes of the road and that a man was running away from the bulldoz-

⁷⁶ *Id.* at 391.

⁷⁷ *Id.* at 393.

⁷⁸ *Graham*, 490 U.S. at 396.

⁷⁹ *Id.* at 397.

⁸⁰ *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Graham*, 490 U.S. at 397.

⁸⁴ 297 F. App'x 453 (6th Cir. 2008).

⁸⁵ *Id.* at 460.

⁸⁶ *Id.* at 454.

er.⁸⁷ The officers arrived at the scene, and when one of them saw a man matching the description given by the 911 caller, he approached the man.⁸⁸ The man, who was later identified as Charles Keiser, started to flee, which led an officer to spray him in the face with pepper spray.⁸⁹ Even after being sprayed, Keiser managed to climb over a fence on the side of the road.⁹⁰ Another officer caught up with Keiser on the other side of the fence, while the first officer climbed over.⁹¹ The two were able to tackle Keiser, but while attempting to put handcuffs on him, Keiser escaped the hold and grabbed one of the officers by the throat.⁹² This led the other officer to beat Keiser with a baton on the arms and legs.⁹³ Keiser was then again sprayed in the face with pepper spray, which caused him to finally release his grip on the officer's throat.⁹⁴ Surprisingly, Keiser still evaded the officers and began to make his way towards the woods.⁹⁵

The officers eventually found Keiser in a swampy area.⁹⁶ Keiser was unarmed and one of the officers referred to his appearance as being lethargic and staring blankly.⁹⁷ When other officers arrived at the swamp, they asked Keiser multiple times to remove his hands from his pockets.⁹⁸ Keiser did not obey or verbally respond throughout the entire incident.⁹⁹ An officer then tased Keiser from a few yards away.¹⁰⁰ Keiser seemed to be unaffected by this, and the officers moved in towards him.¹⁰¹ The officers struck Keiser about ten times with batons but it too had no effect on him.¹⁰² Keiser fell into the water; he had one officer on his back, and two officers on either side of him.¹⁰³ While the officers were handcuffing Keiser, they

⁸⁷ *Id.* at 455.

⁸⁸ *Id.*

⁸⁹ *Baker*, 297 F. App'x at 455.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 456.

⁹⁴ *Baker*, 297 F. App'x at 456.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Baker*, 297 F. App'x at 456.

¹⁰⁰ *Id.* at 456-57.

¹⁰¹ *Id.* at 457.

¹⁰² *Id.*

¹⁰³ *Id.*

were unable to control one of his arms because Keiser was using it to support his weight above the water.¹⁰⁴ During the struggle in retrieving Keiser's other arm, Keiser was tased "five times in a span of one minute and thirty seven seconds."¹⁰⁵ After he was tased, one of the officers noticed Keiser's face was in the water. When the officer informed the others, they did not acknowledge the warning because they were still occupied with removing Keiser's other arm from beneath his body.¹⁰⁶ Once Keiser was handcuffed, the officer dragged him out of the water but he was unresponsive and his face was blue.¹⁰⁷ Although the officers and EMS squad tried to revive him, Keiser was pronounced dead when he arrived at the hospital.¹⁰⁸ The cause of death according to the autopsy was drowning.¹⁰⁹

The officers' motion for summary judgment was denied by the district court, which found that there existed issues of fact as to whether the officers used excessive force during Keiser's arrest.¹¹⁰ On appeal, the Sixth Circuit applied the objective reasonableness standard and affirmed the lower court's decision.¹¹¹ The Sixth Circuit based its decision on the facts that Keiser was beaten and tased multiple times, and when the struggle turned fatal he was no longer resisting arrest.¹¹²

B. Criminal Context: Suppression of Evidence

In *United States v. Ankeny*,¹¹³ a criminal defendant sought to have evidence obtained during his arrest suppressed due to the officers' use of excessive force. In *Ankeny*, police went to the defendant's home with a warrant after the mother of the defendant's child informed them that she believed the defendant was supplying drugs from the child's home.¹¹⁴ The officers also investigated the defendant and determined that he had a criminal record with many warrants

¹⁰⁴ *Baker*, 297 F. App'x at 457.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 458.

¹⁰⁸ *Id.*

¹⁰⁹ *Baker*, 297 F. App'x at 458.

¹¹⁰ *Id.* at 458-59.

¹¹¹ *Id.* at 461.

¹¹² *Id.*

¹¹³ 502 F.3d 829 (9th Cir. 2007).

¹¹⁴ *Id.* at 832-33.

outstanding for his arrest.¹¹⁵ The police decided to pursue the defendant at his home because they feared that the situation could escalate and wanted to protect the public.¹¹⁶

When the officers arrived at the home, they yelled that they had a warrant and then broke down the door.¹¹⁷ The defendant was sleeping on a chair near the door and stood up when the officers entered the home with weapons and lights.¹¹⁸ An officer instructed the defendant to show his hands and to get down.¹¹⁹ At the same time, a different officer threw a flash-bang device onto the ground.¹²⁰ The device exploded near the defendant's body, causing burns to his face, upper body, and arms.¹²¹ While this incident occurred on the first floor of the home, officers shot at the home with rubber bullets from the outside.¹²² Further, on the second floor, another flash-bang device exploded in a room which ignited a bed in which two people lay.¹²³ The officers ended up throwing the mattress out the window of the home when they were unable to extinguish the fire.¹²⁴

The police recovered multiple guns, ammunition, and suspected drugs from the defendant's home during the arrest.¹²⁵ The district court found the defendant guilty "on four counts of being a felon in possession of a firearm and one count of possession of an unregistered sawed-off shotgun."¹²⁶ The defendant appealed to the Court of Appeals for the Ninth Circuit and argued that his motion to suppress the evidence should have been granted by the trial court based on the excessive force used by the officers during the arrest.¹²⁷ The Court of Appeals applied the objective reasonableness standard to determine whether the force used by the officers and the manner in which the incident occurred was reasonable; however, it did not come to a conclusion on the issue.¹²⁸ Instead, the court cited other cases for the

¹¹⁵ *Id.* at 833.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Ankeny*, 502 F.3d at 833.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Ankeny*, 502 F.3d at 833.

¹²⁴ *Id.*

¹²⁵ *Id.* at 833-34.

¹²⁶ *Id.*

¹²⁷ *Id.* at 834.

¹²⁸ *Ankeny*, 502 F.3d at 837.

proposition that evidence is only suppressed when there is a causal nexus between excessive force and the evidence secured.¹²⁹

Although the court did not reach an ultimate conclusion on the excessive force issue, the court explained reasons why the officers' actions could be considered unreasonable.¹³⁰ First, it was not clear why the officers decided to shoot at the home with rubber bullets.¹³¹ Second and most importantly, the court found that the dangerous nature of the flash-bang devices could not be considered reasonable force under the Fourth Amendment, especially when thrown blindly into a room with occupants.¹³² Finally, the court believed that it was unclear whether officers considered the risk of injury that could have and did occur as well as any safer alternatives.¹³³ It appears that had the Ninth Circuit decided the issue of excessive force in this case, it would have found that the officers' use of force was unreasonable under the objective reasonableness standard after taking into account the totality of the circumstances.¹³⁴

IV. NEW YORK STATE APPROACH

In New York, if an excessive force claim is brought, a plaintiff will succeed if he or she shows that law enforcement officials violated the objective reasonableness standard.¹³⁵ Similar to the federal approach, most excessive force claims are brought civilly against officers under § 1983.¹³⁶ In *Pacheco v. City of New York*,¹³⁷ the plaintiff brought a § 1983 action against the city of New York.¹³⁸ Pacheco

¹²⁹ *Id.* ("The principle that the exclusionary rule applies only when discovery of evidence results from a Fourth Amendment violation is well-established."). See, e.g., *Hudson*, 547 U.S. at 592 ("[B]ut-for causality is . . . a necessary, not a sufficient, condition for suppression."); *Segura v. United States*, 468 U.S. 796, 804 (1984) (noting that the exclusionary rule reaches "evidence obtained as a direct result of an illegal search or seizure," or "found to be derivative of an illegality"); *United States v. Pulliam*, 405 F.3d 782, 791 (9th Cir. 2005) (denying suppression because "the indispensable causal connection" between the unlawful act and discovery of the evidence was absent).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Ankeny*, 502 F.3d at 837.

¹³⁴ *Id.*

¹³⁵ *Pacheco*, 961 N.Y.S.2d at 409.

¹³⁶ Kathryn E. Scarborough & Craig Hemmens, *Section 1983 Suits against Law Enforcement in the Circuit Courts of Appeal*, 21 T. JEFFERSON L. REV. 1, 5-6 (1999).

¹³⁷ 961 N.Y.S.2d 408 (App. Div. 1st Dep't 2013).

¹³⁸ *Id.* at 408-09.

suffered a seizure that prompted his girlfriend to call 911.¹³⁹ Emergency personnel arrived on the scene and informed the plaintiff that he would need to be hospitalized for further evaluation.¹⁴⁰ Upset by this news, the plaintiff became agitated and violent, and attacked the emergency workers who were helping him.¹⁴¹ Several responders were needed to control plaintiff, resulting in his being both handcuffed and strapped into a transport chair.¹⁴² Despite the restraints, plaintiff managed to kick his feet and even bite one of the officers.¹⁴³ Further assistance was needed, which led to the arrival of a police sergeant who ultimately tased the plaintiff to calm him down.¹⁴⁴ It was not until the plaintiff was tased that he began to cooperate with emergency personnel, who could then transport him.¹⁴⁵

The court in *Pacheco* decided that “given plaintiff’s repeated outbursts and the police officers’ testimony that he was emotionally disturbed, it was reasonable to taser him so that he could be hospitalized.”¹⁴⁶ The court based its decision on the fact that the defendant was both a danger to himself as well as the people around him.¹⁴⁷ Half a dozen responders were needed to control plaintiff and even after he was restrained, Pacheco continued to resist.¹⁴⁸ Furthermore, New York City Police Department’s Patrol Guide authorizes an officer to use a taser when restraining an emotionally disturbed person when that person threatens injury to others or himself.¹⁴⁹

*People v. Smith*¹⁵⁰ is a situation in which the force used by the officers was excessive when analyzed under the Fourth Amendment’s objective reasonableness standard. The defendant, Smith, was convicted on an assault charge, and his DNA was taken.¹⁵¹ When his DNA was entered into the CODIS system (Combined DNA Index System), his DNA matched evidence found at prior crime scenes, in-

¹³⁹ *Id.* at 409.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Pacheco*, 961 N.Y.S.2d at 409.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Pacheco*, 961 N.Y.S.2d at 409.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ 940 N.Y.S.2d 373 (App. Div. 4th Dep’t 2012).

¹⁵¹ *Id.* at 376.

cluding a home invasion and a gas station robbery.¹⁵² A buccal swab was taken from the defendant, but it was sent to the wrong lab which compromised the DNA sample.¹⁵³ Following the mistake with the lab, the court granted an order to have another sample of DNA taken from the defendant; however, the defendant was never given notice that a second sample was necessary.¹⁵⁴ Niagara Falls officers approached the defendant on the street and handcuffed him before putting him in the car to bring him to the police station to collect the second sample.¹⁵⁵ The defendant refused by not opening his mouth, and as a result, police officers tased him.¹⁵⁶

The court in *Smith* found that the police officers' action of tasing defendant constituted excessive force.¹⁵⁷ The court analyzed the facts of the case under the Fourth Amendment's objective reasonableness standard.¹⁵⁸ According to the court, the defendant did not pose an immediate threat to the safety of anyone involved in the situation, he did not try to evade the police officers by running away, and he did not physically fight or resist the officers; he merely refused to open his mouth for them.¹⁵⁹ The court reviewed the incident on tape, and found that the circumstances surrounding the situation did not warrant tasing the defendant.¹⁶⁰

In a civil case, once a plaintiff has first established that the force used by an officer was objectively unreasonable, New York courts require that the burden shifts to the police officer to prove that the force used in arresting a plaintiff was reasonable under the circumstances.¹⁶¹ In *Sanchez v. City of New York*,¹⁶² Damaris Sanchez sued the City of New York in a civil action under § 1983, for, among other things, claims of excessive force and false arrest.¹⁶³ The incident occurred at a movie theater when plaintiff's brother, who had

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Smith*, 940 N.Y.S.2d at 376.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 377.

¹⁵⁸ *Id.* at 377-78.

¹⁵⁹ *Id.* at 378.

¹⁶⁰ *Smith*, 940 N.Y.S.2d at 378-79.

¹⁶¹ *Sanchez v. City of New York*, 990 N.Y.S.2d 439, 43 Misc. 3d 1211(A), at *1-2 (Sup. Ct. Bronx County 2014).

¹⁶² 990 N.Y.S.2d 439, 43 Misc. 3d 1211(A) (Sup. Ct. Bronx County 2014).

¹⁶³ *Id.* at *1.

bipolar disorder, became noisy during the movie and prompted police officers to approach.¹⁶⁴ The police officers escorted the plaintiff, along with her brother and boyfriend, outside the theater.¹⁶⁵ Once outside, plaintiff's brother began yelling at the officers and the officers allegedly started to beat him.¹⁶⁶ Trying to protect her brother, plaintiff grabbed one of the officers.¹⁶⁷ Plaintiff claimed that she was then thrown to the ground, kicked, punched, and handcuffed.¹⁶⁸ Plaintiff further claimed that officers continued to hit her after placing her in handcuffs.¹⁶⁹

At trial, the court denied the defendants' motion for summary judgment.¹⁷⁰ Summary judgment was denied on the ground that the defendants did not prove by a preponderance of the evidence that the officers acted in a way that a jury would find objectionably reasonable under the Fourth Amendment.¹⁷¹ The court agreed with plaintiff that the police officers failed to offer sufficient evidence to establish that the officers acted with objective reasonableness as a matter of law, and the court found that because the officers neither admitted nor denied the claim of excessive force, summary judgment was inappropriate.¹⁷²

V. DISCUSSION

The objective reasonableness standard is the preeminent solution to evaluate excessive force claims because it is flexible and accounts for the different facts and circumstances of each case.¹⁷³ As previously mentioned, the Fourth Amendment's objective reasonableness analysis determines whether an officer's actions are *objectively* reasonable given the facts and circumstances of the particular situation.¹⁷⁴ Reasonableness of force must be viewed as the type of

¹⁶⁴ *Id.* at *5.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Sanchez*, 43 Misc. 3d 1211(A), at *5.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at *6.

¹⁷¹ *Id.* at *7.

¹⁷² *Sanchez*, 43 Misc. 3d 1211(A), at *7.

¹⁷³ *See supra* note 78 and accompanying text.

¹⁷⁴ *Id.*

force an officer in a similar situation would use.¹⁷⁵ When using this approach, courts frequently take into account the quick thinking actions of an officer when faced with a highly dangerous situation.¹⁷⁶

The court in *Atkinson* correctly decided that the police officers' use of force was not excessive after analyzing it under the Fourth Amendment's objective reasonableness standard.¹⁷⁷ The situation in *Atkinson* happened in less than one minute and the officers acted in a way that a reasonable officer in a similar situation would.¹⁷⁸ *Atkinson* was violently resisting arrest, he had an unknown quantity of narcotics in his mouth, and the officers were trying to both secure the evidence and protect the defendant's safety.¹⁷⁹ The totality of the circumstances, including the amount of force used by the officers along with how a similarly situated officer would have acted when being forced to make a split-second decision, accounts for the court's conclusion that the officers' use of force was objectively reasonable.

New York is trying to address the issue of excessive force by requiring police officers to wear body cameras while on duty.¹⁸⁰ The city has begun a pilot program in which sixty officers will begin to wear cameras in order to allow greater accountability for a police officer's actions.¹⁸¹ As a commentator recently noted, "The cameras, which attach to the uniforms officers wear on patrol, can offer visual evidence in he-said-she-said encounters between the police and the public."¹⁸²

Cameras may seem like an ideal solution—if a police officer is accused of using excessive force the video footage should allow the jury to make a decision. But cameras also create new problems for this already problematic area of the law.¹⁸³ Police officers may be

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See *supra* note 36 and accompanying text.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ J. David Goodman, *New York Police Officers to Start Using Body Cameras in a Pilot Program*, N.Y. TIMES (Sept. 4, 2014), available at http://www.nytimes.com/2014/09/05/nyregion/new-york-police-officers-to-begin-wearing-body-cameras-in-pilot-program.html?_r=0.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See Randall Stross, *Wearing a Badge, and a Video Camera*, N.Y. TIMES (Apr. 6, 2013), available at http://www.nytimes.com/2013/04/07/business/wearable-video-cameras-for-police-officers.html?_r=2& (analyzing a study conducted in Rialto, California in which police officers wore cameras similar to the ones that New York is using). Although the of-

more focused on the fact that they are wearing cameras, and less focused on their duties.¹⁸⁴ For example, police officers who are wearing cameras during highly charged situations may not react in a manner in which an officer normally would. In other words, officers may become more concerned with whether their actions will result in a troublesome encounter and, thus, prevent them from responding how they normally would in a dangerous situation. To counteract this problem, New York may want to follow California's lead and allow the officers to decide when to turn the cameras on.¹⁸⁵ However, leaving this decision to the officers' discretion may continue to lead to the analysis of claims of excessive force by police officers under the Fourth Amendment's objective reasonableness standard. To determine if the officer acted appropriately, courts will have to examine how a reasonable officer in a similar situation would act.

As mentioned previously, the issue of excessive force is ongoing. Capturing headlines in the news recently is the death of Eric Garner, a Staten Island man who was killed after an NYPD officer put him in a chokehold.¹⁸⁶ The incident occurred when two police officers dressed in plainclothes approached Mr. Garner and started questioning him about selling untaxed cigarettes.¹⁸⁷ A bystander caught the entire incident on video.¹⁸⁸ The video shows that Mr. Garner became angry and started cursing and yelling at the officers.¹⁸⁹ After more uniformed officers arrived at the scene, a struggle ensued, and one of the officers in plainclothes put Mr. Garner in a chokehold.¹⁹⁰ He repeatedly yelled "I can't breathe!"¹⁹¹ He continued to yell five more times, until the paramedics were finally called.¹⁹² Unfortunately, it was too late because Mr. Garner had

ficers in Rialto used force sixty percent less frequently than they previously did, many attributed this decrease to the fact that the officers in Rialto were able to choose which encounters to turn their cameras on for. *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Ken Murray et al., *Staten Island Man Dies after NYPD Cop Puts Him in Chokehold*, N.Y. DAILY NEWS (July 17, 2014, 10:41 PM), <http://www.nydailynews.com/new-york/staten-island-man-dies-puts-choke-hold-article-1.1871486>.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Murray et al., *supra* note 186.

¹⁹² *Id.*

died.¹⁹³ The officer who put him in the chokehold was stripped of his badge and gun.¹⁹⁴

The incident in Staten Island occurred just a few weeks before another local incident in Ferguson, Missouri attracted national attention for excessive force.¹⁹⁵ The killing of a teenager, Michael Brown, by an officer has been the center of many protests, which have become violent themselves.¹⁹⁶ The teen's killing was said to be excessive because he was shot six times, even while onlookers stated that the teen seemed to be raising his hands to surrender.¹⁹⁷

The grand juries decided against criminally charging either officer in the deaths of Eric Garner and Michael Brown.¹⁹⁸ It will be interesting to see whether the families of Eric Garner or Michael Brown will seek to sue the officers civilly under § 1983 on excessive force claims. Both cases seem to have facts and circumstances that can be analyzed under the Fourth Amendment's objective reasonableness standard to determine if the force used by the officers was in fact excessive.

VI. CONCLUSION

People v. Atkinson concerned an issue that has historically been a major source of debate and remains so in today's society. More likely than not, it appears that law enforcement's use of excessive force will continue to be an issue for the courts to resolve. Although imperfect, the Fourth Amendment's reasonableness standard remains the best way for courts to determine whether the force used was excessive. As technology progresses and excessive force claims continue to emerge, cameras may be the next best solution when it comes to deciding excessive force cases. However, even cameras may call for an analysis under the Fourth Amendment's objective

¹⁹³ *Id.*

¹⁹⁴ Verena Dobnik, *NYPD Officer Daniel Pantaleo Stripped of Gun, Badge after Chokehold Death*, HUFFINGTON POST (July 19, 2014, 10:03 PM), http://www.huffingtonpost.com/2014/07/19/nypd-daniel-pantaleo-chok_n_5602742.html.

¹⁹⁵ Sasha Goldstein, *Ferguson Police Chief Tom Jackson Apologizes to Michael Brown's Family*, N.Y. DAILY NEWS (Sept. 26, 2014, 12:44 AM), <http://www.nydailynews.com/news/national/ferguson-police-chief-apologizes-michael-brown-family-article-1.1952472>.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Jeremy Diamond, *Garner Decision Shock Waves Hit Capitol Hill*, CNN (Dec. 8, 2014, 7:18 PM), <http://www.cnn.com/2014/12/04/politics/congress-reacts-to-grand-jury-eric-garner/>.

reasonableness standard.

While problems exist regarding conflicting stories of police officers and defendants, the objective reasonableness test allows a jury to render a decision based upon all of the facts and circumstances in a particular case. Furthermore, as mentioned in *Johnson*, “[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates a [person’s] constitutional rights.”¹⁹⁹ Officers put their lives on the line every day, whether or not they are on duty. Because their actions and decisions must be made quickly, there should be discretion when determining how to respond in certain situations. The objective reasonableness standard appropriately balances the interests of law enforcement in reacting to highly charged situations with the interests of society in curtailing excessive police force.

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¹⁹⁹ *Johnson*, 481 F.2d at 1033.

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