Fourth Amendment Search Incident to Arrest in the Home: Why Gant’s New Vehicular Rules Should Supersede Chimel

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ABSTRACT

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The purpose of this article is to reveal and propose a solution for the current misguided search incident to arrest doctrine in homes and vehicles. As a result from modern Supreme Court cases, the rules controlling searches incident to arrest are inverted for homes and vehicles. Homes possess a higher expectation of privacy, but currently have less protection from invasive police searches than vehicles. This constitutionally incorrect doctrine is a consequence of Arizona v Gant’s decision to return vehicular searches to the original intent of Chimel v California. However, interpretations of Gant failed to make the same adjustment in home searches. To reconcile the doctrinal tension, the Courts have two options: 1) overturn Gant so that Chimel is once more the controlling doctrine for both homes and vehicles or 2) import Gant’s restricted reaching distance and evidence gathering prongs into the home to restore constitutional privacy expectations. This article proposes that the Courts need to import Gant’s two prongs because it will not only reconcile the doctrines, but it also acts as a corrective decision that re-tethers search incident to arrest doctrine to its original purpose.
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**Introduction**

The Fourth Amendment protects the American people from unreasonable police searches and seizures, and no area is more constitutionally protected than the home. This Constitutional provision is intrinsic in our national fabric and is the basis for many legal doctrines. Reasonableness can be qualified by the presence of a search warrant issued with probable cause. There are numerous exceptions to this broad Fourth Amendment definition of reasonable searches, including warrantless searches incident to a lawful arrest.

Search incident to arrest is a situation in which an officer is allowed a warrantless search of the arrestee’s person and the area within the arrestee’s immediate control. It seems relatively straightforward but has a history of meandering Supreme Court decisions, operating on a pendulum as opposed to the linear path of precedent. The tumultuous history depicts a trend that conveys the Court’s varying preference for privacy rights versus crime control. In the sixties the Court interpreted search incident to arrest in a way that was very protective of privacy rights; however, by the eighties, the Court reinterpreted search incident to arrest into an adaptation more favorable for law enforcement.

These polarizing interpretations are descriptive of the political climate of both decades, which speaks to the instability of Supreme Court decisions. Currently, doctrinal tension is a problematic consequence of the swinging interpretations of search incident to
arrest. Homes have been routinely more protected from police searches than vehicles, but modern Supreme Court rulings have switched the levels of protection for searches incident to a lawful arrest. Homes are protected under *Chimel* while vehicles are controlled by *Gant’s* doctrine. Officers are allowed to search a home under a lenient interpretation of reaching distance, whereas officers have a much more restricted reach in vehicular cases. As a result of the varying interpretations of reaching distance, vehicles receive greater protection than homes. This is an issue that has to be resolved through the Courts.

*Arizona v Gant* is the case responsible for search incident to arrest doctrinal conflict because it affords vehicles greater protection from police intrusion than homes. By overlooking the standard expectation that homes warrant more privacy protection than vehicles, the Court incorrectly designated law enforcement’s range and authority to search incident to arrest by creating stricter rules for vehicles. However, the juxtaposition of *Chimel v California* (homes) and *Gant* (vehicles) exposes the fictional reasoning behind modern search incident to arrest doctrine. *Gant* doctrinally erodes the modern lenient interpretation of *Chimel* and returns *Chimel* to its original intent in vehicles but has not eroded *Chimel* in homes. Search incident to arrest doctrine has been erratic for the last century and the lack of consistency created a complication that cannot be allowed to remain in the American legal framework.

By trying to reverse one hundred years of uncertainty, the Court inverted the consistent range of police authority. The Court curtailed the reach of law enforcement in vehicles but let their reach remain unchecked in homes. *Gant* restricts the reaching distance available to officers but supplements this restriction with an evidence gathering
search to balance diminished police interest. The logic behind *Gant* is simple, *Chimel*’s attempt to restrict police intrusion through reaching distance is no longer tenable. However, by confining *Chimel* to its stringent interpretation and incorporating an evidence gathering search to offset the subsequent limitations, the original purpose of *Chimel* will be achieved.

This article argues that there are two solutions to the current doctrinal tension problem. Either overturn *Gant*’s decision and re-unify the two spaces or import *Gant*’s restricted reaching distance and evidence gathering into the home. *Gant* exposes *Chimel* as the case that arbitrarily overturned precedent and ignored common law to become the nexus of modern search incident to arrest confusion. Because *Gant* is a corrective decision, it logically follows that it should be imported into the home instead of being overturned.

The pattern of search incident to arrest reveals a consistent attempt to orchestrate palatable doctrine regardless of reality. It began with *Chimel v California*’s deviation from precedent and common law. *Chimel* removed evidence gathering as a tool for law enforcement and changed the justification behind search incident to arrest to the dual rationale of officer safety and evidence preservation. *Chimel* set two guidelines to control the scope of law enforcement once a search is allowed. 1) Searches must be contemporaneous to the arrest and 2) within the “immediate control” of the arrestee. However, there was disagreement on a consistent range and scope to define “immediate control.” The result was a litany of litigation to provide clear guidelines for police procedure.
New York v Belton clarified Chimel’s scope by creating a bright line rule that delineated the space available to search in vehicles. By implementing a one size fits all policy, it revealed the true justifications behind Chimel. The Belton search removed the spatial and temporal components of Chimel, in other words it removed the two supposed justifications to search. After the Belton decision, officers were always able to search the interior of the vehicle, passenger compartment, and all containers within following an arrest.

Law enforcement was able to conduct the search even if the suspect was handcuffed and removed from the scene. They could perform the same expansive search in every situation, no matter the reason for the arrest. The intention was to further solidify officer safety and to offer a template to decrease confusion regarding the definition of “immediate control”. However, Belton’s new rules clearly failed to abide by Chimel’s two justifications.

Arizona v Gant overturned Belton because it exceeded Chimel’s boundaries, but the Court did not limit their inspection at Belton. Once Belton bypassed Chimel’s rules, the Court began to question the validity of Chimel as a single entity. Were Chimel’s rules arbitrary? Was the true purpose behind its two justifications to conduct evidence-gathering searches under a politically correct guise? The article proposes that was exactly what Chimel did and the Gant Court recognized this.

Arizona v Gant acknowledged the original miscarriage of legality, the mutated evolution of justifications behind the reasons to search incident to arrest, and corrected the problem in vehicular cases. Because Gant was a case about a search incident to arrest in a vehicle, it was easy to narrow the subsequent policy to only vehicles. Gant and
Belton both operated in a vehicular context. Because of this, Chimel’s original doctrine has remained unscathed in spaces that are not vehicles. As a result, home searches are easier to perform under search incident to arrest guidelines, despite having a greater privacy expectation than vehicles.

Gant overturned Belton but did not stop there; it also restricted Chimel’s reach by compelling police procedure to follow a logical application of officer safety and evidence preservation. Rationally, evidence preservation and officer safety will not allow expansive searches. Chimel’s broad interpretation led to confusion because it makes no sense. Once the suspect has been patted down and handcuffed, there is a significant decrease in the probability they will be able to harm an officer or destroy evidence.

Chimel had the right impulse as well as the correct conclusion, enforcing a greater level of privacy protection for American citizens. However, the means they undertook were soon revealed to be a fiction. By narrowing law enforcements reaching distance as the medium to increase privacy protection, the Courts opened a maelstrom of misinterpretation and abuse of their decision. The intent of the decision was quickly mutated by subsequent cases such as Belton. This article argues that the Court should have enacted greater privacy protection by instigating a narrow evidence gathering search instead of a narrowed reaching distance.

Gant created doctrinal conflict when it corrected the original issue derived from a broad application of Chimel and restricted police scope in vehicular searches. Therefore, there are two options to rectify the doctrinal tension. Either overturn Gant and return to the broad adaptation of Chimel or make Gant’s decision widespread. Since Gant’s
justification is legitimate, this article proposes the best option is to further extend it into
the home.

This article contends that extending Gant’s evidence gathering rule into the home has firm justification founded in precedent, as well as correcting entangled doctrine. It will look at the implications of importing Gant into the home and the measures needed to ensure a smooth transition.

Importing Gant’s restricted reach and evidence gathering into the home is the logical extension of modern search incident to arrest doctrine. It is necessary to unify the separate spheres in which it operates and rectify the anomaly of greater vehicular protection. Once the broader issue is resolved and vehicles have equal or less protection than homes, then the main concern becomes workability of extending Gant. It is illogical to import only half of a doctrine. Importing Gant’s restricted reaching rule is imperative to resolve the doctrinal tension. However, it must be followed by the importation of evidence gathering searches to prevent decreased crime control and protect police interests.

There must be guidelines to ensure consistent police procedure and protect the privacy of the home. By constraining evidence gathering searches to the boundaries of a Bouie search and creating a digital device exception, police intrusion will be minimal. The policy and procedural impact make the changes logical, but the justification is in precedent. Chimel artificially narrowed common law and Gant’s revival of evidence gathering is simply returning to a time honored American tradition.
I. Fourth Amendment Reasonableness

In order to study search incident to arrest law, one must first understand the surrounding legal context and possess a basic comprehension of the Fourth Amendment. This section will explore the fundamental definition of a search and seizure, what makes it reasonable, the requirements to conduct a search or seizure, necessary levels of information to obtain a warrant, and what happens if the Fourth Amendment is disregarded by law enforcement.

The simple purpose of the Fourth Amendment is to protect American citizens from unreasonable searches and seizures conducted by law enforcement. However, the Fourth Amendment is more complicated than it first appears and has been controversial since its inception. As it states,

“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.”

The Fourth Amendment can be divided into four general segments. First, the people have a constitutionally recognized protection from searches and seizures. Second, this protection is only against unreasonable searches and seizures. Third, warrants are required to make a search or seizure reasonable. Fourth, warrants will not be issued unless there is probable cause to justify them. The amendment narrows as it is written,
providing a detailed layer of requirements for law enforcement. The Court holds Fourth Amendment protection in such high esteem that it enacted the punitive exclusionary rule, a measure to deny evidence that is the result of Fourth Amendment infractions.

A. Search and Seizure

After recognizing the purpose of the Fourth Amendment, it is imperative to understand when it is applicable. The Fourth Amendment has authority only in situations where police conduct can be classified as a search or seizure. If the police are not performing a search or seizure, one cannot claim their Fourth Amendment rights are being violated.

A search involves a visual observation or physical intrusion that infringes upon a person’s reasonable expectation of privacy (Kyllo v United States). Where a seizure requires some meaningful interference with an individual’s liberty (an arrest) or possessory interests (a seizure of property) (Michigan v Chesternut). If neither of these two situations occur, the Fourth Amendment is irrelevant (Abramson 29).

Searches are centered on privacy rights that can be subtly manipulated, whereas seizures are more concrete. A person is seized when they are physically or constructively taken into custody and detained, significantly depriving them of their freedom of movement. A person is not only seized when they are detained. A person can be considered seized if they are submitting to a show of authority and do not feel free to leave (Florida v Bostick). However, if a person is running from law enforcement and refuses to submit to their authority, they are not considered seized until the suspect is
subjected to physical force. If the police are in hot pursuit of a suspect, they are not seized and the Fourth Amendment protections do not apply until the suspect is apprehended (Abramson 30).

Defining a search can be more complex than a seizure because of the ever-changing constitutional jurisdiction. Modern Fourth Amendment interpretation is tethered to a person’s right to privacy, which is divided into a subjective or reasonably objective expectation for privacy. Throughout precedent, the Fourth Amendment has evolved from distinct “constitutionally protected” areas to a broader jurisdiction intended to protect general privacy expectations. Instead of protecting only the explicitly written variables (person, house, papers, and effects), the Fourth’s jurisdiction expanded to encompass a person’s right to privacy.

The landmark case, *Katz v United States*, shifted the perception regarding the privacy rights afforded to citizens, and the spaces that qualify a search. Police electronically monitored Katz’s telephone conversation in a public phone booth. Katz motioned to have the evidence from his phone conversation suppressed, claiming it violated his Fourth Amendment right against an unreasonable search (*Katz* 507). Until this case, the constitutionally protected areas that the Fourth Amendment applied to solely consisted of a man’s house, papers, person, and effects. All of which are tangible objects that the person has a legal right to protect and consider private.

A phone booth does not fall under the constitutionally protected criteria, just as a conversation is not a tangible object that can be protected. However, the Court determined that the Fourth Amendment’s intent was to protect citizens from police intrusion in situations where the person could reasonably expect privacy. With the
development of electronic listening devices and other sense enhancing tools, the court had to reevaluate how far the Fourth Amendment’s protection extends. Courts decided the protection stretched much further than the literal wording of the Constitution.

When the Court switched from constitutionally protected areas to a reasonable expectation of privacy, it allowed the public phone booth to fall under the protection of the Fourth and greatly altered modern interpretation. This is significant because it legitimizes a person’s right to generalized privacy that is more inclusive than described in the text of the Constitution. If the person has a subjective expectation of privacy that is supported by a reasonable and objective expectation of privacy, then he is protected by the Fourth.

There is an exception to Katz’s privacy expectation against police surveillance. If a suspect is talking to the police officer, even without knowledge they are law enforcement, and says something incriminating, it is admissible in court. The rationale is that a defendant cannot reasonably expect to be certain that the person with whom they are conversing is not an officer of the law. Once a defendant displaces his control over information, by discussing it with another party, he diminishes his expectation that the information is confidential (Abramson 30).

While applying the Fourth Amendment to legal situations, it is imperative to remember the Fourth is only applicable if a search or seizure is made. Therefore, Fourth Amendment protection does not extend in situations where there is undercover law enforcement or a suspect is running from the police. These are a couple of the exceptions to search and seizure requirements. Mitigating warrant exceptions, all other search and seizures are controlled by the Fourth Amendment.
B. Reasonableness

Once police action is qualified as a search, the next step is to determine whether the search is reasonable. Courts ascertain the reasonableness of a search by “evaluating the degree of intrusion on a person’s privacy and the extent to which the search is necessary to promote legitimate governmental interests” (Wyoming v Houghton). There is a balance between police interests and individual rights, with the balance favoring individuals if law enforcement is guilty of excessive intrusion into a person’s privacy (Abramson 29).

Because of Katz’s role in the modern interpretation of the Fourth, what qualifies as excessive intrusion has to be re-evaluated in the face of privacy protection versus property protection. Excessive intrusion often involves sense-enhancing tools, such as listening devices that allow an officer to witness or hear more than he would normally be capable of. It is reasonable for a person to expect privacy if an officer could not gain access to information without the help of devices, instead of relying on his own abilities. However, a person cannot have a reasonable expectation of privacy if they are conducting their business in plain sight or in a public place. A police officer has the right to witness what a normal citizen would be able to see or hear, and then react as a member of law enforcement (Abramson 36).

Because of the decision to extend Fourth Amendment protection, there are varying expectations of privacy for people and their possessions. Aligning with the Fourth, an American citizen has the greatest expectation of privacy in their house. However, this expectation of privacy exceeds the simple physical boundaries of the constitutionally protected home.
There is more to a search than walking through the front door and examining the suspect’s possessions. If law enforcement does not have a warrant, it is illegal to use sense-enhancing devices to determine what is happening within the confines of the home. This includes listening devices, recording devices, and heat sensors. Without a warrant, it is unreasonable for police to search the home, even if they never actually cross the threshold.

The home is a man’s castle, and has routinely possessed the greatest constitutional protection against unreasonable searches and seizures. Stringent legal protections restrict home intrusion. A warrant is required to enter a man’s house and conduct a search, in the exception of an in home arrest. An arrest warrant is required to arrest someone in their own home, barring exigent circumstances. The evolution of the Fourth Amendment from property protection to privacy protection resulted in litigation to create a template for law enforcement to follow during searches and seizures.

During litigation, the most contentious issue is the definition of “unreasonable.” What constitutes a reasonable search and seizure? Is it the presence of a warrant issued by a judge or magistrate? Because of varying expectations of privacy, there is a spectrum of reasonableness. Vehicles and homes have different expectations; therefore, there are different required levels of reasonableness for each space.

C. Warrants and Warrant Exceptions

In most situations, a home or vehicular search is only considered reasonable in the presence of a warrant. Search warrants are based on probable cause and give the police access to the entire home, with the ability to seize fruits or evidences of a crime. The
The purpose of a search warrant is to incorporate a neutral judge as a third party who can objectively determine whether the intrusion is justified. Searches conducted without a warrant approved by a judge or magistrate are inherently unreasonable under the Fourth Amendment (Abramson 39).

Warrants allow expansive searches but there are many situations in which law enforcement is able to reasonably conduct a search without providing a warrant. The list of exceptions includes: exigent circumstances, consent searches, plain view searches, stop and frisk searches, the automobile warrant exception, inventory searches, and search incident to lawful arrest.

Exigent circumstances are classified by concern for imminent destruction of evidence, risk of danger to police or others, or hot pursuit of a fleeing suspect. Consent searches are when the suspect waives his Fourth Amendment rights. Plain view exception is very common; when an officer is in a place he has a right to be and sees illegal activity or contraband he has the right to seize items that are in his “plain view.”

Stop and frisk searches are a temporary seizure of a person with the intent to clarify an ambiguous situation in which the officer has objective and subjective reason to believe a person may be armed and dangerous or criminal activity is occurring. The automobile exception allows police to search a car if they suspect to discover the fruits, instrumentalities, or evidence of a crime within the vehicle. This warrant exception comes from the exigent nature of vehicular mobility. Inventory searches are known as “booking searches” in which the police station searches and catalogues the personal effects of a person under lawful arrest as a part of routine administrative procedure (Abramson 53-89).
Law enforcement frequently uses all of these exceptions, but this article focuses on warrantless search incident to arrest. Once a person is lawfully arrested, police are not required to procure a search warrant to search the arrestee’s person or the area incident to his arrest. The nature of the arrest allows for a warrantless search. An arrest warrant is required to arrest a person within their home. The only exception to an arrest warrant is the presence of exigent circumstances, such as a fleeing criminal.

This means that if a person is arrested in his home, with an arrest warrant, police are allowed to search the home incident to his arrest despite the absence of a search warrant. Being legally arrested diminishes the defendant’s expectation to privacy and allows for a warrantless search incident to arrest. If a person is not arrested in their home, then neither an arrest warrant nor a search warrant is required to conduct a search. If a person is in a public setting or in a vehicle, the police are allowed to search incident to a lawful arrest without any type of warrant.

The Fourth Amendment is meant to protect citizens from unreasonable searches and seizures by employing warrants and detailed warrant exceptions. Broad warrant exceptions are dangerous because they can be interpreted in a way that infringes on people’s rights. Because of that, there are clear boundaries and requirements that must be present for the police to institute a search incident to arrest. The search must be contemporaneous to the arrest and within the area of “immediate control” to the arrestee. Temporal and spatial requirements prevent abuse of this warrant exception (Abramson 56).

There are three justifications to reasonably search a person who has been lawfully arrested; 1) to make sure he does not have a weapon on his person or within reach, 2) to
prevent the destruction of evidence, 3) to discover evidence of the crime he has committed, or to find the fruits of the committed crime. Officer safety, evidence preservation, and discovering probative evidence are all critical to enhancing crime control and safety in the field (Abramson 56).

D. Probable Cause

The Fourth Amendment requires probable cause for issuance of a search warrant or an arrest warrant (Abramson 39). Probable cause is based on the totality of the circumstances, how incriminating information is obtained, and the credibility of informants. Probable cause is determined reasonable or unreasonable based on the information law enforcement has before the arrest is made. Any information revealed post warrant is irrelevant to the reasonableness of the warrant.

Information derived from other police officers, informants, anonymous tipsters, and private citizens establish probable cause. A judge must make a “common sense decision” based on the information garnered from different sources. The common sense is based on the totality of the circumstances. Probable cause does not require rigid categories of proof but is dependent on the reliability of information.

For example, a citizen’s information may be more credible than an informant’s. The government has a two-prong test when determining the reliability of an informant; how the informant obtained his information and why the informant is reliable (Abramson 40). These prongs are often called the underlying circumstances prong and the credibility prong (Abramson 40).
To issue an arrest warrant the government must prove that there is a “fair probability” that a crime has been committed and the person they are arresting committed the crime. Without an exigent circumstance, an arrest warrant is required for law enforcement to arrest someone in his home.

To issue a search warrant, the government must be able to demonstrate a fair probability that the government is searching for specific items that are evidence of criminal activity and that those items are presently located at the specified place described by the warrant (Abramson 40). Fair probability is determined with a common sense approach by the judge or magistrate. If it is reasonably inferable, the police will most likely acquire the capabilities to search a person’s home or arrest them in their home.

If law enforcement enters a person’s home without a warrant to either arrest or search, anything seized in the house is inadmissible in a court of law. While it is legal to search without a search warrant in the presence of an arrest warrant, the search does not extend to the entire home. The police can only search the areas within immediate control of the arrestee. If there is a search warrant, police are allowed to search within the parameters of the issued warrant, which could be the entire home.

Because of the importance placed on a man’s home in the Fourth Amendment, the only time law enforcement can enter a home without some form of warrant is under exigent circumstances. For example, if the police are in hot pursuit of a suspect or they believe there is an injured person inside the home. If there are not exigent circumstances, the police must have a search or arrest warrant to gain entry into the home or any evidence gathered is inadmissible.
E. Exclusionary Rule

The exclusionary rule prohibits prosecutors from using evidence that was obtained in violation of a person’s Fourth, Fifth, or Sixth Amendment rights (Abramson 9). In the case of Fourth Amendment violations, excluding evidence that came from an illegal search or seizure is meant to act as a deterrent against police misconduct. The exclusionary rule is used as a constitutional remedy to ensure every person is afforded their Fourth Amendment rights to privacy.

The cost of the exclusionary rule is a loss of evidence and the potential that a criminal goes free as a result of a law enforcement mistake. Often the law enforcement mistake is made at the magistrate level. If the warrant was not reasonable or was the product of judicial oversight, there is no need to deter police officers because the Constitutional infraction is not their doing. When a defendant motions to remove evidence from a trial based on a violation of Fourth Amendment rights, he is calling into effect the exclusionary rule. However, there is a good faith exception to the exclusionary rule that allows for police mistakes but not misconduct.

The exclusionary rule does not apply “where a law enforcement officer has acted in reasonable “good faith” on the basis of an unconstitutional search warrant” (Abramson 15). Not employing the exclusionary rule in this instance means that an officer’s reliance on an invalid search warrant will not negate the evidence found during the search. However, if the officer should be concerned about the validity of the warrant, say he saw the magistrate sign a warrant without reading it, then he can not claim he acted in good faith and the exclusionary rule will apply.
II. Search Incident to Arrest

This section gives a brief overview of search incident to arrest doctrine and history. It details the requirements to perform a search incident to arrest, as well as the different categories of privacy protection that exist in the doctrine. It also looks at the two eras of search incident to arrest doctrine and distinguishes them into cases that support an earlier evidence gathering capability versus modern cases that place importance reaching distance rules.

Legal arrest is necessary for law enforcement to implement a search incident to arrest. A “legal” arrest occurs when the police take a suspect into custody in order to bring charges (Abramson 55). A citation or summons to court does not qualify as an arrest and does not justify a search.

Search incident to legal arrest has three categories; an arrest in a public place, an arrest in a suspect’s home, and arrest in a vehicle. Each of these categories has a varying level of expected privacy and protection. An arrest made in a public place is the least protected, then vehicular arrest, then an arrest made in a home.

In a public setting, the additional complication of searching a space the arrestee has constitutional rights to, such as his vehicle or home, is absent. It is common law that police are capable of arresting a person in a public place without an arrest warrant. There must be probable cause that the suspect has committed a felony to justify a public arrest, but that is the only requirement.
*Chimel’s* doctrine controls home arrests. The area within immediate control of the arrestee determines the reaching distance of the police officer. *Chimel* home searches are carried out to prevent the danger to the police officer and destruction of evidence. Officers are looking for weapons and evidence that the arrestee could destroy. Articulable fear of danger to the officer or evidence is not required, despite these being the only two reasons to conduct a search.

*Gant’s* doctrine controls vehicular searches. Officer’s reach is dependent on *Chimel’s* rules; however, articulable fear is mandatory to implement the search. Translated, an officer’s reaching distance is extremely restricted in vehicles. Homes do not require articulable fear for officer danger or evidence preservation but vehicles do. To balance this constraint *Gant* incorporated evidence gathering into vehicular searches as a way to offset the restricted reaching distance.

A search incident to arrest is reasonable because the arrestee might have a weapon on his person or within reach that can endanger law enforcement or be used to effect an escape, or there may be incriminating evidence that he can destroy. Officer safety and evidence preservation are the two rationales that justify searching without a warrant.

Temporal and spatial dimensions are required components of search incident to arrests. The search must be relatively contemporaneous to the arrest as well as within the “immediate control” of the arrestee. These components place boundaries around the warrant exception to protect defendants from potential abuse of the exception. A police officer may search closed containers on the person, containers immediately associated with the arrestee, and containers within their immediate control.
In practice, this means that law enforcement cannot arrest someone in a room and come back two hours later to search it. It also means that once a person is arrested, the officer is able to search containers such as purses, closed cigarette containers on the person, or any type of container that is in proximity to the arrestee.

**A. Early Era Evidence Gathering**

It was understood in early American case law that law enforcement had the capability to search for evidence of the crime. Common law practices that date back to England are clear that evidence gathering was a common and accepted practice. Justice Alito reveals that when pre-*Weeks* authorities discussed search incident to arrest, their main basis for the rule was the collection of “probative evidence.” Officer safety and evidence preservation cannot be the only reasons to search a person following an arrest if the central focus used to be on collecting evidence for prosecution of the crime.

J. Bishop, Criminal Procedure (1872) states

> “If an arresting officer finds about the prisoner’s person, or otherwise in his possession, either goods or moneys which there is reason to believe are connected with the supposed crime as its fruits, or as the instruments with which it was committed, or as directly furnishing evidence relating to the transaction, he may take the same, and hold them to be disposed of as the court may direct.”

Bishop’s description is important because it breaks down the three acceptable types of items that can be seized. Two of the three types are present in modern search incident to arrest doctrine, but the other is the source of contention. Officers can seize:
fruits of the crime (material objects acquired in a criminal act), the instruments with which a crime was committed (for example, a gun or lock picking kit), or directly furnishing evidence relating to the transaction (for example, clothing that a suspect was seen wearing while robbing a store).

i. Weeks v United States (1914)

*Weeks v United States* established that precedent uniformly maintains that a police officer has the right to search incident to arrest. Weeks was arrested, without warrant, for using the mails to transport lottery tickets. An officer arrested him at his work place in the Union Station in Kansas City, Missouri. While he was being arrested at his place of employment, officers went to his home, found the key and searched his room.

They seized papers and other articles found there, then turned them over to the United States marshal. The marshal returned to Week’s home hours later to conduct his own search, he was admitted into the house by a boarder, and left with more letters from the defendant’s room. Weeks petitioned to have his property returned to him, but the Court returned only materials impertinent to the case and retained evidence that could be used to assign guilt.

The Court decided that all of the evidence found in Mr. Weeks room had to be returned and could not be used in the trial. Justice Day’s opinion expressly stated that the judgment was not negating the authority of search incident to arrest; they did not decide the case based on that right. The absence of legitimate search incident to arrest allowed for Justice Day to clarify the requirements constituting a reasonable search incident to arrest.
The first component is spatial; law enforcement cannot search a man’s home under the guise of “search incident to arrest” if they did not arrest him there. The only legal way a police officer may enter a home, without being allowed in, is with the presence of an arrest or search warrant, neither of which the police had.

There is also a temporal aspect; had Mr. Weeks been arrested in his home and a search made, the United States Marshall still could not have returned hours later to conduct another search. The search must be contemporaneous to the arrest to be considered a search incident to arrest. Searches must be made in the area under the arrestee’s “immediate control” and must be done in a timely fashion. The two determining qualities are whether the search is made in the space of the arrest and if it is made in a timely manner.

ii. United States v Rabinowitz (1950)

In United States v Rabinowitz, the Court determined the police were allowed to search Mr. Rabinowitz’s office incident to his arrest, without a search warrant, even though they had time to procure one. Rabinowitz was convicted of selling and of possessing and concealing forged and altered United States stamps with the intent to defraud. Mr. Rabinowitz was a repeat offender and possessed a plate used to overprint Government postage stamps.

Knowing that Rabinowitz was a repeat offender, and that there was reliable information that he possessed several thousand altered stamps bearing forged overprints, the police obtained a warrant for Mr. Rabinowitz’s arrest. They went to his place of business with two stamp experts and, against his objections, searched his desk, safe, and
file cabinets. Police found and seized 573 forged stamps. They did not have a search warrant, despite clear intention to conduct a search.

Rabinowitz motioned to suppress evidence pertaining to the 573 stamps that he claimed were illegally seized in violation of his Fourth Amendment rights. The Court expressed that “No one questions the right, without a search warrant, to search the person after a valid arrest” (Rabinowitz 432). Regardless of the dual purpose to arrest and search, the only required warrant is for an arrest. The right for law enforcement to search a person incident to their arrest has always been recognized in the United States and England. Rabinowitz maintains the firm foundation of search incident to arrest in American common law.

The search is valid because of the arrest, but the next ambiguity the Court clarifies is the scope allowed to the police. There is no doubt that officers are allowed a lawful search to detect weapons or that police are allowed to seize fruits of the crime or the means by which it was committed. The Court references an earlier decision *Agnello v United States*,

The right to ‘search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed’ seems to have stemmed not only from the acknowledged authority to search the person, but also from the longstanding practice of searching for other proofs of guilt within the control of the accused found upon arrest (433).

However, it is also recognized that the police look for evidence of the crime while searching a defendant incident to arrest. It is a “longstanding practice” to search the
accused for evidence of the crime, not for the purpose of officer safety or evidence preservation.

**B. Modern Era: Reaching Distance Rules**

Modern reaching distance rules that have been the standard for homes and vehicles since 1969 and 1981, respectively, are derived from *Chimel v California* and *New York v Belton*. In *Chimel*, the police are allowed to search the arrestee and the area within the defendant’s “immediate control”. The justification behind this search is to find weapons that could endanger the officer or evidence that the suspect could destroy.

In 1981, *Belton* broadened the scope of *Chimel* and expanded the reaching distance allowed in vehicular searches. Police are allowed to search the entire car (minus trunk), the passenger compartment, and all containers within the vehicle. Police are also allowed to remove the arrestee from the scene of the crime and return to search after the fact. *Belton* claims the same two justifications as *Chimel*, but created a bright-line rule meant to be easier for police to follow and remove perverse incentives for police to leave potentially dangerous suspects near the area they want to search.

Neither *Chimel* nor *Belton* require officers to articulate a reasonable fear for his safety or the safety of the evidence. Both claim the situation is inherently dangerous and searches are always justified based on officer protection and evidence preservation. This seems like a reach in the face of *Belton’s* lenient approach to *Chimel*. 
i. Officer Safety and Evidence Gathering: Chimel v California (1969)

Chimel v California altered the justification behind search incident to arrest doctrine by instigating a two-prong rationale of officer safety and evidence preservation to explain the purpose of the searches. Officers came to Chimel’s home with a warrant for his arrest, but no search warrant. They proceeded to search his entire home, including small containers, under the justification that they were allowed to search incident to Chimel’s arrest. The search lasted around an hour and the officers gathered evidence that was used in Chimel’s trial. Chimel motioned that the evidence be suppressed under a violation of his Fourth Amendment rights.

The Supreme Court’s opinion held that “warrantless search of defendant’s entire house, incident to defendant’s proper arrest in house on burglary charge, was unreasonable as extending beyond defendant’s person and area from which he might have obtained either weapon or something that could have been used as evidence against him” (Chimel 2034).

This decision was made to legitimately narrow the scope of the police and set definite rules regarding the spaces available to police search. To do this the Court created twin rationales that the police must adhere to. There must be a threat to officer safety or the possibility an arrestee is able to destroy evidence.

Both rationales logically allow for the police to search the person as well as the area “within the arrestee’s immediate control.” The confusion came once people began to debate what constitutes “immediate control” of the arrestee. Without a clear definition of the available space for police to search, there was individual litigation determining the permissible area beyond the arrestee that a search can cover.
ii. Robinson v United States (1973)

In Robinson v United States the police officer made a full custodial arrest because Robinson was driving with a revoked license. Once the arrest was made, the officer searched Robinson’s person and found a crumpled cigarette carton, which he opened and found heroin. Robinson motioned to suppress the heroin under the claim that the officer’s search exceeded its bounds once he ascertained that there was not a weapon.

The Court of Appeals suppressed the evidence under the reasoning that the officer would be unable to find evidence of a revoked license, the offense for which the respondent was charged, therefore the frisk of the arrestee should take on the qualities of a Terry frisk. The Supreme Court overturned their decision because they claim it is unnecessary for there to be case-by-case adjudication regarding law enforcement’s reasons behind a search. The valid arrest is reason enough. The Court explains,

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would, in fact, be found upon the person of the suspect (477).

Once a lawful arrest is made, the officer is allowed to search the arrestee. During a lawful search, the officer was entitled to inspect the cigarette carton and once he found the heroin, he was entitled to seize it as “fruits, instrumentalities, or contraband” probative of criminal conduct.
This is significant because the Court is saying that Robinson’s search is reasonable, despite the lack of concern over Chimel’s two policy reasons. There was no concern over loss of evidence or the danger of a weapon. The frisk revealed no weapons and there would be no further evidence of a revoked license on the person being searched. This decision kept the requirements to search incident to arrest extremely broad by and further removed from the Court’s two justifications.
III. Vehicular Search Incident to Arrest

This section will discuss *New York v Belton*’s bright line approach to search incident to arrest and *Gant*’s subsequent modification of *Belton*’s rule with the superseding restricted reaching distance and evidence gathering rules.

Until the *Belton* decision in 1981, vehicles were considered in the same category as homes, and fell under *Chimel*’s doctrine. However, from 1981 to 2009 police enforcement has operated under a bright-line rule that always allows law enforcement to search the inside of a vehicle (minus trunk), the passenger compartment, and all containers within the car. *Belton* overrides the “immediate control” scope of *Chimel*. This decision was made for simplicity and continuity in the field, but had a far more reaching consequence than intended.

A. Bright Line Reaching Distance Rules Belies False Search Justifications:

**New York v Belton (1981)**

*New York v Belton* was a Supreme Court case that implemented a user-friendly version of *Chimel v California*. Roger Belton was pulled over for speeding, during their interaction after the stop, the police officer smelt burning marijuana and saw an envelope that he suspected contained marijuana. The officer arrested Belton and the other passengers of the car. After their arrest, the officer searched the passenger compartment of the car and a zipped jacket pocket in which he found cocaine. Belton motioned to
suppress the cocaine found in the jacket, claiming it violated the Fourth and Fourteenth Amendments.

The Supreme Court denied Belton’s motion to suppress evidence on the grounds that *Chimel v California* held,

> The lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area. Such searches have long been considered valid because of the need to ‘remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape’ and the need to prevent the concealment or destruction of evidence (Belton 2862).

*Chimel’s* decision was meant to create a standard, easily applicable, and “predictably enforced” rule for police to follow in the field; an officer may reasonably search a person and the area incident to a lawful custodial arrest. However, the intended simplification failed because it was too broad. This created a necessity for *Belton* to explicitly define the available scope of law enforcement.

*Chimel* did not offer a straightforward rule, as evidenced by the amount of subsequent litigation. It established that a search incident to arrest may not exceed the space within the “immediate control of the arrestee” but that statement is too general. In a theoretical sense, the court could be reduced to measuring a suspect’s wingspan.

The Court balanced privacy interests with law enforcement interests and determined it was appropriate to sacrifice privacy to ensure a rule is predictably enforceable. The purpose was to prevent unnecessary litigation trying to define reaching
distance. *Belton* also wanted to prevent fostering bad incentives for police to generate dangerous situations to gain access to search a crime scene.

Following the continuity of the Court’s simplification process, *Belton* created a bright-line rule that allowed police to search the interior of a vehicle, its passenger compartment, and all containers within the body of the car (excluding the trunk). Law enforcement are awarded this search even once the arrestee has been arrested, handcuffed, and removed from the immediate scene of the crime.

However, the bright-line rule intended to simplify *Chimel*, revealed the false justifications the Court used to allow searches. The reason for *Chimel* is either officer safety or evidence preservation, but *Belton* makes those two rationales completely arbitrary. Belton’s motion to suppress evidence is denied because of the *Chimel* reasoning, but within its own determination *Belton* completely disregards the intended purpose of *Chimel*.

**B. Newly Restricted Reaching Distance Rule and Reintroduced Evidence Gathering: Arizona v Gant (2009)**

*Arizona v Gant* overturned *Belton* and reevaluated the purpose of *Chimel*. *Belton*’s disregard of the temporal and spatial components of *Chimel* illustrated the inappropriate application of search incident to arrest, which then highlighted the lenient approach towards *Chimel*’s twin rationales. *Gant* recognized that it was unlikely for the purpose of the search to be officer safety or evidence preservation if the suspect was restrained in a squad car. *Chimel*’s justifications are valid, both are important reasons to
search following an arrest. However, if law enforcement performs searches based only on those two rationales, there would be far fewer searches available to the police.

Officers were responding to an anonymous tip that drugs were being sold out of a home when they knocked on the front door and Gant answered. After they left, the officers did a records search and saw that Gant had an outstanding arrest warrant for driving with a suspended license. They returned to the house and arrested two other people for drug charges when Gant drove up the driveway. Gant was then arrested for driving a car with a suspended license and handcuffed. The two other arrestees were in the squad car so the arresting officer waited for backup, then placed Gant in a squad car as well. Once all three people were handcuffed and removed from the scene, the officers searched Gant’s car which contained a gun and a bag of cocaine. Gant was charged with possessing drugs to sell and paraphernalia. Gant motioned the Court to have the narcotics suppressed, claiming his Fourth Amendment rights had been violated when the police searched the vehicle.

Gant argued that his situation did not fall under *Belton’s* jurisdiction because of two reasons. First, Gant was not a threat to the officers once he was handcuffed and placed in the patrol car. Second, there was no need to search the vehicle to find evidence of a suspended license. The scenario seems obvious; Gant was connected to a drug racket and the officers were likely hoping to find evidence of narcotics. The Court evaluated Gant’s argument and recognized its validity. The opinion states,

> When ‘the justifications underlying Chimel no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer,’ the court concluded, a
“warrantless search of the arrestee’s car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence” (Gant 1716).

Because of Belton’s time of arrest doctrine and spatial bright line rule, the police legally searched Gant’s vehicle. However, the Court reexamined Belton’s justifications and decided to narrow its reach “Construing Belton broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis” (Gant 1721). The Court determined that the search of Gant’s car was unconstitutional because Gant could not have reached a weapon or evidence within his vehicle,

This Court rejects a broad reading of Belton that would permit a vehicle search incident to a recent occupant’s arrest even if there were no possibility the arrestee could gain access to the vehicle at the time of the search. The safety and evidentiary justifications underlying Chimel’s authorize a vehicle search only when there is a reasonable possibility of such access (Gant 1713).

Once the Court overturned Belton for exceeding the justifications set by Chimel, they reevaluated the original intent of Chimel. They saw that the rationale used to conduct most searches was being overextended. To combat the overuse of Chimel, the Court placed heavy restrictions on when its two rationales can be used to justify a search incident to arrest. Gant restricted Chimel’s reaching distance rule but reintroduced evidence gathering to offset the limitation.
The *Gant* court determined that vehicles get the additional evidence gathering justification in search incident to arrest. Even if there is no threat to the officer’s safety or evidence preservation, if the police believe there is a reasonable suspicion that evidence of the crime of arrest will be found in the vehicle they have the right to conduct a search. Despite this addition to vehicular search incident to arrest policy, *Gant* fails both requirements needed for police intrusion. Gant was not within reach of his vehicle and there is no reason for officers to search his vehicle for evidence of a suspended license.
IV. No Extension of Evidence Gathering Search to Digital Devices: Riley v California (2014)

This section will discuss an important constraint on evidence gathering, digital data exceptions. *Riley* established that a cellular device does not fall under the umbrella of search incident to arrest. Law enforcement must obtain a warrant to search a cell phone because of the vast quantities of information it stores. The facts of *Riley* are simple, digital data is too expansive to search without a warrant and cannot be examined, even under *Gant’s* evidence gathering prong.

Riley was convicted on a weapons charge after being arrested for a traffic violation. In the search incident to his arrest, the officer searched Riley’s person and took his cell phone from his pocket. Riley’s phone was a “smart phone” with advanced computing, large amounts of storage and Internet capabilities (*Riley* 2480). Photos, contacts, videos, emails, and text messages are a few examples of available information that could be accessed off of a smart phone.

The officer read the information on the phone and noticed suspicious material. There were multiple mentions of a term associated with the “Blood” street gang. He noticed that some words, either in messages or contacts, were preceded with the letters “CK.” This created more suspicion because “CK” is a common moniker for Crips Killer. Hours after Riley’s arrest, a detective who specialized in gangs, further examined the phone’s content.
The detective testified that he searched Riley’s phone “looking for evidence, because gang members will often video themselves with guns or take pictures of themselves with guns” (Riley 2480-2481). While there were many interesting things found on Riley’s phone, the most incriminating piece of evidence was a photo. Riley was pictured in front of a car that had been involved with a shooting a few weeks earlier. The information garnered from the phone connected Riley to this previous crime.

With evidence gained from the cellular device, Riley was charged and convicted of firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder. The State also argued that Riley committed these crimes for a criminal street gang, which resulted in an enhanced sentence of fifteen years. Riley motioned to suppress the evidence retrieved from his phone, claiming the search violated his Fourth Amendment rights because there was no exigent circumstance to justify searching the phone without a warrant.

Following the decisions in Chimel and Robinson, the Court would allow police to search a cell phone found within the immediate control of the arrestee. Chimel gave the two reasons justifying search incident to arrest; officer safety and evidence preservation. Then Robinson declared that the “two risks identified by Chimel are present in all custodial arrests” (Riley 2482-2485). This means there does not need to be an articulable fear because all searches incident to arrest are inherently dangerous. This logic was used in People v Diaz (2011) in which the court held that the Fourth Amendment allowed warrantless search of a cell phone incident to arrest, as long as the phone is immediately associated with the arrested person. However, if the Court uses the same reasoning as Gant, it is clear that digital searches fail Chimel’s two rationales. There is no way a
digital search will reveal a weapon and there is not enough risk of evidence destruction to do anything beyond seize the phone. The only reason to search a phone is to uncover the evidence hidden within its data.

A person’s expectations to privacy are diminished once they are arrested. However, cell phones with the capabilities of the modern smart phone were not written in the nation’s fabric when Chimel and Robinson were decided. Diaz followed the standard set by those two decisions, just as Riley did in the Court of Appeals by upholding the cellular search.

In the case of Robinson, the pat down and inspection of the cigarette pack only added, “minor additional intrusions,” unlike the examination of a cell phone. The storage capacity of modern cell phones creates a weightier privacy concern. Because of the vast quantities of personal information that can be stored on phones, the Court determined that officers must secure a warrant before searching. The massive privacy intrusion combined with Riley’s failure to withhold the scrutiny of Chimel’s twin rationales mean that there is no valid justification to allow law enforcement warrantless digital data searches. The resurgence trend of evidence gathering was stopped at searching cellular devices.
V. Why Courts Should Import Arizona v Gant Search Incident to Arrest Rules into the Home

This article contends that the two *Arizona v Gant* search incident to arrest prongs, evidence gathering and restricted reaching distance, should be imported into the home. There are four reasons to import both rules into the home, as opposed to constraining them to vehicular searches. First, this approach would cure the doctrinal disconnect between the scope of searches available in vehicles and homes. Second, importing only Gant’s restricted reaching distance prong without the evidence-gathering prong will result in a loss of crime control and create perverse incentives for law enforcement to manipulate the reaching distance rule by engaging in dangerous conduct. Third, there are historical justifications and earlier case law legitimizing evidence gathering as a grounds to search in homes. Lastly, this approach promotes an ease of administration with concise rules pertaining to both vehicles and homes.

A. Curing the Anomaly: Vehicles have more Privacy Protection than Homes

Doctrinal reconciliation is important for search incident to arrest policy because it harmonizes the two doctrines that began the anomaly of homes possessing less privacy protection than vehicles. This is not an abstract need for symmetry; there is a policy conflict that disregards varying levels of Constitutional protection. Vehicles and homes have two opposing doctrines detailing the range of law enforcement’s reaching distance.
The difficulty with having two doctrines, other than general confusion, is that they are inversely assigned relative to privacy expectations of the home and vehicle. Reconciling the two doctrines will mean having a single standard for both areas. Retaining opposing doctrines is only reasonable if the difference between homes and vehicles is too expansive to reconcile. However, the doctrines are reconcilable because Gant narrowed the difference between the privacy expectations of vehicle and home by instigating a strong precedent for vehicular privacy. The two spaces are no longer distinctive enough to warrant opposing doctrines, especially doctrines that are incorrectly classified.

Courts need to import Gant’s restrictive reaching distance rule into the home to avoid the anomaly of providing greater privacy protection to vehicles than homes. The home claims the greatest expectation of privacy afforded by the Fourth Amendment, yet it has less protection from police intrusion than vehicles. This is a contradiction between legal expectation and the reality of law enforcement.

Cars possess less privacy protection than homes because of the exigency derived from mobility and diminished expectation of privacy. Diminished expectation of privacy requires that a vehicle must be “readily mobile” and subjected to the regulations associated with vehicles (Abramson 62). This includes cars, other transport vehicles, and mobile homes that are considered readily mobile.

Chimel advocates police intrusion because of its wide interpretation in lower courts. Gant, on the other hand, is much more restrictive to law enforcement. In Chimel, law enforcement is always able to search the arrestee’s person and the area within the immediate control of the arrestee at the time of the arrest. In Gant, police are only able to
search the vehicle if there is a reasonable possibility of access to a weapon or evidence. *Chimel* and *Gant* differ on one major point, the time of arrest guideline to searching. *Chimel* allows searches of an area the arrestee could have reached *at the time of arrest* whereas *Gant* does not allow that expansive access.

The *Chimel* rule is the current standard for home searches, giving police more opportunities to conduct warrantless searches. *Chimel* allows broad searches for the purpose of officer safety and preservation of evidence. It is an automatic search; the officer is not required to articulate a reasonable fear for their safety or evidence destruction. For example, they are allowed to search the area within the immediate control of the arrestee after it is no longer in the arrestee’s immediate control. The arrestee could be handcuffed and in the police car, but the police would still retain the right to search based on the two *Chimel* rationales.

The *Gant* rule is the current standard for vehicles and utilizes a tailored interpretation of *Chimel*, despite a vehicle’s diminished expectation of privacy. To search the inside of a vehicle the police must be able to articulate a reasonable fear for their safety or destruction of evidence, but law enforcement is not held to that stringent standard when searching a home. For example, once the arrestee is handcuffed and removed from the scene, law enforcement is not allowed to use the *Chimel* rules to justify a search of the vehicle.

When looking at the search incident to arrest doctrinal issue, it is clear that the answer cannot be a more aggressive reaching distance rule for vehicles than that of homes. The doctrines must be fixed because the current reaching distance rules anomalously afford more privacy protection for vehicles than homes, and that is
nonsensical. Either vehicles and homes have equal privacy protection or vehicles have less; there is no legitimate reason or expectation for vehicles to have more protection than homes.

To reconcile these two opposing doctrines, courts have two options; they either overrule Gant or Chimel. The reasoning behind the Gant decision is sound. Chimel placed a false label of police protection and evidence preservation to produce a politically correct rationalization for the scope of searches. Creating palatable doctrine does not validate inverting expected privacy protection. Gant overturned the use of Chimel’s doctrine for vehicular searches because it was incorrectly justified.

On the rare instance that the officer is unable to secure the scene, he is focused on controlling the unsecured suspect, not searching the vehicle for evidence. In most situations, the officer is able to secure the scene of the crime, so their safety is not in question once the search begins. The recurring exigency of destruction of evidence is in the same vein as officer safety; the suspect is typically in lawful custody and unable to access the vehicle and evidence within it.

Logically, if the arrested suspect is handcuffed and detained in the back of a squad car, they are unable to reach a weapon or destroy evidence following the search of their person. However, under the twin rationales of Chimel, law enforcement has the authority to search the inside of the vehicle, all containers within, and the passenger compartment despite the absence of real danger. This creates an obvious tension between what Chimel intended and its actual application.

Justice Alito explicitly explains his doubt of the twin Chimel rationales in his Riley v. California concurrence, “I am not convinced at this time that the ancient rule on
searches incident to arrest is based exclusively (or even primarily) on the need to protect
the safety of arresting officers and the need to prevent the destruction of evidence” (Riley
2495).

Because of incorrect application of the Chimel decision, the courts should
overturn its current standard in the home and adopt Gant’s vehicular restricted reaching
distance rule. The Gant ruling specifically narrowed the police’s reaching distance to
return law enforcement practices to the intended purposes of Chimel. Chimel’s decision,
the nexus of search incident to arrest doctrine, is not tethered to vehicles, so it follows
that Gant’s return to Chimel would also not be restricted to vehicles.

To combat the resulting loss of crime control, Gant reinstated the historic
common law evidence-gathering search. Gant’s creation of a more protective system
against police intrusion would be too severe if there was not another component to
protect law enforcement’s interests as well. In the Court’s opinion of Gant, Justice
Stevens wrote in agreement with Justice Scalia’s Thornton concurrence,

Although it does not follow from Chimel, we also conclude that
circumstances unique to the vehicle context justify a search incident to a
lawful arrest when it is reasonable to believe evidence relevant to the
crime of arrest might be found in the vehicle (Gant 1714).

Previous searches were justified using Chimel’s rationales, but the Gant court
recognized the true purpose is to discover evidence of criminal activity. Disconnect
between police procedure and police justification led to reevaluating the mislabeled law
enforcement. Once the purpose of the searches is admitted, courts gain the ability to
monitor and regulate evidence gathering as a tool available to the police.
The dual rules of vehicular restricted reaching and evidence gathering ensure greater accountability from law enforcement without infringing on their crime control interests. Without operating under both prongs, vehicular searches would be few and far between. It is necessary to have the dual prongs for a workable vehicular doctrine, just as it was necessary to restrict the reaching distance.

Because of the same faulty justification that led to overturning *Chimel* in vehicles, the courts need to overturn *Chimel* for the home to prevent tension and illogical doctrine. Once it is apparent that the restrictive reaching distance rule should be imported into the home, the rest of *Gant*’s decision must be examined. In vehicular searches the restriction on reaching distance is offset by the revival of evidence gathering. Therefore, once the *Gant* reaching distance rule is imported into the home, the question is whether the Courts should import the additional evidence-gathering rule to sustain a holistic doctrinal shift.

### B. Impeding Law Enforcement

Importing both prongs of *Gant*’s decision is necessary to prevent evidence loss or police orchestration of dangerous scenarios. If the narrow reaching distance is not offset with evidence gathering, there will be an unequal balance between privacy protection and law enforcement interest, crippling the interest of law enforcement. There will be a surge of unsafe police practices, intended to elude the narrow scope set by half of the *Gant* decision, to combat the inevitable diminished ability of law enforcement.

Without importing an offsetting evidence-gathering rule into the home, the restricted reaching distance impedes investigative efforts. It also provides officers with perverse incentives to fabricate dangerous situations to generate a more expansive search
of the home. Operating under a stricter reaching rule, the police will be denied access to search parts of the home that they would have been admitted to under the lenient interpretation of *Chimel*.

The reality of *Gant*’s restricted reaching distance is that officers will search the person they are arresting, handcuff them, place them in the squad car and then *leave*. There will not be an organic opportunity to search the room the person is arrested in, other than finding evidence in plain view. This severe consequence is because the first course of police procedure is to remove the potentially dangerous suspect from the scene of the crime. Once the suspect is detained, there is no threat to officer safety or evidence within the home. Therefore, under *Gant*, there is no search of the home.

Because of diminished police access, there will be less evidence following an arrest. Obtaining evidence is the true purpose of most searches, even though that fact is not overtly stated. Removing the opportunity to search the home will endanger police collection of incriminating information. Without incriminating evidence, crime control will decrease and the police will be hindered in investigative work.

Courts already acknowledge that these searches are primarily used to find evidence of criminal activity. Justice Scalia wrote in his Gant concurrence, “We should recognize Belton’s fanciful reliance upon officer safety for what it was: return to the broader sort of [evidence-gathering] search incident to arrest that we allowed before *Chimel*” (*Gant* 1725). Clearly, evidence-gathering searches were allowed before Chimel, and should be reinstated as a means to avoid decreased crime control and negative incentives for police officers.
Denying the true purpose of these searches, gathering evidence of the crime, will inevitably lead to law enforcement orchestrating situations to evade the restrictions *Gant* places on their scope. If the singular opportunity police have to search for evidence is dependent on articulating a reasonable fear for officer safety or the destruction of evidence, then there is motivation to leave a suspect un-handcuffed and present in the room. There are perverse incentives to allow a suspect mobility, solely to gain the ability to take a look around the room in which they are arrested.

Courts have to import *Gant’s* restricted reaching distance into the home to harmonize the current anomalous doctrine. Importing *Gant’s* restricted reaching distance will impede law enforcement and decrease police access to search the home. With less access comes less evidence and diminished crime control. To balance the interest of law enforcement with privacy rights, the courts have to import *Gant’s* evidence gathering prong in conjunction with the restricted reaching distance.

**C. Historical Foundation Evidence Gathering**

The second reason to import *Gant* into the home is the American legal foundation of gathering evidence of the crime following an arrest. *Chimel v California* broke with common law when it overcame prior precedent by imposing new limitations and rejecting broader justifications to search without a warrant. T. Taylor’s *Two Studies in Constitutional Interpretation* (1969) details the history of warrantless search incident to arrest, “Neither in the reported cases nor the legal literature is there any indication that search of the person of an arrestee, or the premises in which he was taken, was ever challenged in England until the end of the nineteenth century” (Taylor 29).
In history there was no rationalization based on police safety or preservation of evidence, though they were convenient side benefits. Evidentiary searches were an understood right of law enforcement independent of Chimel’s two reasonings. Conducting evidentiary searches after an arrest has been a part of America’s legal fabric since the inception of the country.

i. Support from Common Law and Early American Case Law

Common law supporting police ability to search for evidence incident to an arrest was present before the Fourth Amendment was written. It is not suggested that the Fourth Amendment overruled or altered this common law. In fact, search incident to arrest falls under the extensive list of warrant exceptions, proving the Founding Fathers considered the implications of police enforcement searching arrested defendants for evidence.

Pre-Weeks case trials were firm in their stance that not only was it legal, but it was also imperative for police enforcement to search for probative evidence following a person’s arrest. In the 1839 case Dillon v O’Brien the court declared, “it is clear, and beyond doubt, that… constables… are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution of that crime” (Riley 2495). Collecting evidence is a significant purpose of searching a defendant following their arrest. In 1839, the precedent made it clear to the court that it is acceptable to search and seize evidence to aid in the suspect’s prosecution.

J. Bishops’ 1872 Criminal Procedure claims that an officer may seize anything that is “directly furnishing evidence related to the transaction.” This means that officers
may seize evidence to use in the prosecuting trial. In 1880, F. Wharton’s *A Treatise on Criminal Pleading and Practice*, paralleled the *Dillon v O’Brien* approach to evidence gathering, “Those arresting a defendant are bound to take from his person any articles which may be of use as proof in the trial of the offense with which the defendant is charged” (Riley 2496).

Other than their consistent approval of the legality and importance of gathering evidence following an arrest, all three sources agree that the evidence must be connected to the crime committed. This places an automatic restriction on the scope of evidentiary searches. Even in the 1800s, an officer could not arrest someone for a mundane offense as pretence to search for evidence of an unrelated crime. Evidence gathering searches are not an automatic and pervasive intrusion. They are a beneficial component of crime control that occurs after a defendant has decreased his rights to privacy as a result of his criminality.

### ii. Support from Weeks, Rabinowitz, and Gant

*Weeks* solidified a common law foundation that allows officers to seize evidence of a crime following a search incident to lawful arrest. *Rabinowitz* concurred with *Weeks* but enacted a search restriction by adding a required quantum of suspicion. Subsequently, *Gant* revived the validity of historical evidence gathering searches, in part based on these two cases. *Chimel* broke with American legal tradition, and *Gant* exposed the incorrect reasoning behind its decision. These three cases have finely tuned search incident to arrest doctrine to remain in line with American legal history while offering citizens protection from intrusion.
1. Weeks

*Weeks v United States* is a cornerstone of search incident to arrest doctrine that set three standards: 1) search incident to arrest is a recognized rule, 2) a man’s home is classified as his castle, and 3) there is a spatial component in place to restrict the scope of searches. These three standards have remained consistent in the century following this decision, despite inconsistencies with other interpretations of search incident to arrest doctrine.

Justice Day stated in the Court’s opinion, “It is not an assertion of the right on the part of the government always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases” (Weeks 344). This is another example of a pre-*Chimel* decision supporting the right to seize evidence of a crime. Day’s opinion clarifies that the police’s right to search incident to arrest is a recognized rule in American law.

Justice Day writes that the privacy of a man’s home is of “high value” to citizens, to the degree of being written in the Constitution, and it is the most important of the constitutionally protected areas. It is afforded Fourth Amendment protection against unreasonable search and seizure, a truth held in high esteem in our country. However, while a man’s home is his castle, and is afforded the greatest expectation of privacy, that privacy is diminished once there is a lawful arrest made within the home.

There is historical precedent to seize the evidence of a crime, not dependent on *Chimel’s justifications of officer safety or evidence preservation*. Justice Day’s opinion
on search incident to arrest reveals the intended purpose of the search, which is to collect evidence. It is not simply fruits of the crime that can be seized, such as contraband, but also evidence of the defendant’s guilt. For example, if a witness noticed the suspect wore an identifying piece of clothing, the police could seize the clothing if they found it while searching the person. It is not fruit of the crime, but it is evidence incriminating the suspect of the crime he was arrested for.

The United States lost this case because the police searched Weeks’ home despite the arrest being made in another location, exceeding the scope of the warrant exception. Search incident to arrest has a required spatial element; it is outside the bounds of law to search a man’s home without a warrant if he was not arrested in the house. It is in the name, the search must be incident to the arrest made. It has to be in the same space as well as contemporaneous to the arrest. However, it is within the historical legal scope to search his home for evidence incident to arrest.

2. Rabinowitz

Justice Minton states in the Court’s opinion that there is a longstanding history of searching for evidence following an arrest, but acknowledges that there are restrictions placed on the authority of law enforcement. It is an indisputable right to search the place where an arrest is made to discover and seize; fruits of the crime, weapons, the means by which the crime was committed, and tools that can be used to escape custody. This right is born, “not only from the acknowledged authority to search the person, but also from the longstanding practice of searching for other proofs of guilt within the control of the accused found upon arrest” (Rabinowitz 433). It is common law that warrantless searches
of the scene of arrest are legal. It is also common law that officers are able to search for “proofs of guilt.” There is an American legal tradition of looking for evidence of the crime during the lawful search of the arrested and the scene of the arrest.

American courts condemn purely exploratory searches as a counterweight to the legal tradition of evidence-gathering searches. They constitute an unreasonable search incident to arrest and are illegal with or without a warrant. Most cases have expressed delineation between evidence-gathering and exploratory searches. They are two very different entities and search incident to arrest doctrine is specific in protecting people from exploratory searches.

Condemning exploratory searches places an expectation for police to express a reasonable suspicion that there will be evidence of the crime committed where they are searching. There must be a quantum of suspicion to make evidentiary searches reasonable under the Fourth Amendment. This is a protective measure against intrusive police invasion, to search for something they cannot legitimately reason to be there.

It is a common law right for officers to conduct warrantless searches incident to a lawful arrest. However, citizens are protected from intrusive exploratory searches because the court system differentiated them from evidence gathering. Holding legal evidence-gathering searches to a high standard is necessary to protect privacy rights and prevent officers from searching a person without justification.

3. Gant

Gant is the court’s response to Belton’s bright line rule, whose intent was to clarify Chimel’s definition of vehicular reaching distance as well as prevent unnecessary
litigation, officer confusion, and incentives to generate dangerous situations. *Gant* overturned *Belton*, rejecting its broader interpretation of *Chimel*. Because of *Belton*'s search incident to arrest doctrine, police were always able to search the vehicle passenger compartment and all containers within the interior, excluding trunks. *Belton* takes “always” literally; officers never have to articulate a fear for their safety or evidence destruction to warrant a search. This reveals the faulty justification of *Chimel’s* twin rationales.

*Belton* disregarded *Chimel’s* original intent to protect officers and evidence when it instituted a “time of arrest” approach, which lower courts adopted for almost thirty years. The officer can arrest the defendant, remove them from the scene, and then go back to conduct a search based on where they could have reached *at the time of arrest*. By applying this procedure, there can be no doubt that the true nature of the search is to collect evidence.

*Belton*’s bright line rules were intended to elucidate *Chimel* while allowing the police to continue conducting routine searches but with less risk. However, it removed the temporal and spatial requirements that might have justified *Chimel’s* reasoning of officer safety and evidence preservation in police procedure. The Court examined *Belton*’s interpretation of *Chimel’s* two policy reasons, instead of seeing a bright line rule that prevented perverse incentives, the Court recognized that the *Belton* ruling had completely diluted the twin rationales of *Chimel*,

To read *Belton* as authorizing a vehicle search incident to every recent occupant’s arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our
statement in Belton that it ‘in no way alters the fundamental principles established in the Chimel case’’ (Gant 1719).

Once Belton was overturned and the dilution was removed, it remained clear that Chimel did not fulfill its reported purposes and its two reasonings were almost completely arbitrary in actual application. Chimel had simply created politically correct evidence gathering searches. It had artificially, without full explanation, become an outlier in search incident to arrest legal history. Not only did it deviate from precedent and break common law, it also was an ill-disguised attempt to hide the truth behind police procedure.

Chimel inadvertently created a system that offers less protection from police intrusion. By using its broad justification, officers were able to consistently conduct intrusive searches after any type of legal arrest. To protect privacy interest, Gant decided that there must be “reasonable possibility of access” to a weapon or evidence, returning Chimel to its original justification of officer safety and evidence preservation.

There is not a “reasonable possibility of access” if the defendant is handcuffed in the back of the squad car. Because Gant overturned the Belton ruling, to return to the original intention in Chimel, it reduced the number of searches police can conduct based on a defendant’s reaching distance. Once the Court returned to Chimel, it acknowledged that Chimel was not fulfilling its purpose so the Court narrowed the scope of Chimel’s search to the “reasonable possibility of access.”

To offset the restrictive reaching distance and subsequent loss of evidence, Gant added an evidence-gathering prong to protect police interests. Reviving the longstanding evidence-gathering capability of the police prevents the restricted reaching distance from
impeding law enforcement. This adds more control and accountability. Evidence gathering searches are more restricted because of their up-front description so there is less opportunity to abuse the search.

The previous reaching distance rule allowed officers to make a valid arrest for any reason, for example, a suspended license, and search the interior of the vehicle despite the absence of a legitimate reason to search the vehicle for evidence of a suspended license. However, to conduct an evidence-gathering search, the officer must be able to articulate a reasonable suspicion that there will be fruits of the crime or evidence regarding the crime within the car. Comparatively, evidence-gathering searches are more in line with restrictions that require an articulable suspicion of guilt, which should be the real reason behind a defendant’s diminished privacy expectation

*Gant* eroded *Chimel*, opening a wider variety of searches available to law enforcement. However, the wider variety does not translate to a more intrusive police presence. To restrain widespread evidence-gathering searches, incident to arrest, the officer must be able to articulate a reasonable suspicion that there is legitimate belief evidence will be found in the allotted search area. This addition creates a more stringent accountability for law enforcement, despite appearances to the contrary.

This ruling is meant to legitimize the faulty rationales of *Chimel* and overturn the incorrect decision of *Belton*. As the opinion of the Court said, “We have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice” (*Gant* 1722). However, by tethering police procedure to the wording of *Chimel*, the Court needed to incorporate evidence gathering searches to ensure law enforcement interest are not overrun.
D. Simplicity of Uniform Rules

Importing evidence gathering into the home will construct uniform rules that will supply greater clarity for police enforcement to apply congruent doctrine for each arrest situation. As the current doctrine stands, police must operate on two completely different standards for vehicles and homes. Operating under the purview of one standard doctrine will create consistency for law enforcement, the public, and the Court system.

If it is possible to have the identical doctrine for both scenarios, it is sensible to use uniform operating procedure for simplicity in teaching and enforcement. Confusion about the scope of law enforcement will decrease, as well as confusion among citizens who are not well informed of their privacy rights. With a consistent doctrine, there will be a greater understanding of what is allowed and with a better understanding comes a more accountable law enforcement.
VI. Defining the Contours of the Evidence Gathering Search in the Home

To regulate privacy intrusion, the Court needs to set restrictive rules to define the area available to search under Gant’s evidence-gathering prong. Tightly balancing privacy protection with law enforcement interest is the only way evidence gathering searches will be effective. It is vital to ensure workability and ease of adopting for the police department. There are three constraints the courts can employ to limit intrusive searches.

1) Implementing a finite spatial dimension that law enforcement cannot exceed will restrict the potential intrusiveness of searching the entire home under the guise of evidence gathering. Having a standard range will assist in an easy transition for law enforcement and cut down on legislation that argues law enforcement is overreaching their bounds.

2) Maintaining a required and articulable quantum of suspicion ensures police are accountable for justifying the instigation of the search. It will protect privacy against the easily abused search incident to arrest doctrine if an arrest does not automatically constitute an evidence-gathering search.

3) There must be a digital data exception to ensure the defendant’s privacy is fully protected. Modern cellular and digital devices contain a surplus of information that exceeds the scope of evidence typically available in a physical search. A warrant is necessary to prevent that heightened level of intrusion.
A. Spatial Dimension of Search: Spaces Immediately Adjoining the Places of Arrest

Once evidence gathering is recognized as a legitimate police search in homes, boundaries must be set to prevent abusing the scope of the search. The evidence-gathering prong does not authorize the police to search the entire home, basement to attic, but has perimeters to regulate the intrusiveness. The place of arrest holds firm. Police are not allowed to manipulate the suspect and walk him through the home before officially arresting him or taking him on a tour of his home on the way to the squad car, all for the guise of broadening the space available to police search. Trying to work around the restricted search area is illegal and creates dangerous situations for police officers. Where the police find the suspect is where law enforcement is bound to arrest him, and from that spot the police are allowed to implement the Buie sweep and subsequent evidence gathering search.

While performing a home arrest, police are currently allowed a Buie sweep of the areas that immediately adjoin the place of arrest as a protective measure against attacks from accomplices of the arrestee. Combined with plain view doctrine, there is already a search for evidence happening in these areas. The police are allowed to go into adjoining rooms, open closet doors, and seize any contraband or fruits of the crime that are visible. If the room is already free game for a search, the only difference evidence gathering will make is the ability for officers to look in containers that are too small for a person to hide in.

Confining Gant’s evidence gathering search onto the boundaries set by the Buie sweep keeps the doctrine consistent for the purposes of law enforcement and future
litigation in courts. Searches of the areas immediately adjoining the arrest are already permitted and the police can seize anything in plain view, so the addition of evidence gathering in these locations does not result in a drastic alteration of current procedure.

Aligning the *Gant* evidentiary searches to the Buie sweep sets the spatial dimension of evidence gathering to an area already available for police inspection, which will simplify the transition to evidence gathering searches. It will also maintain set boundaries to protect the privacy of the home and ensure there are not widespread evidence gathering searches throughout the entire home.

It will be beyond the scope of the police to search the entire, if not most, of the home solely for evidence. The home is man’s castle and has the greatest protection available under the Constitution. Setting perimeters to prevent police abuse of *Gant*’s rule for home searches is imperative to protect the Constitutional integrity protecting the home.

**B. Required Quantum of Suspicion**

*Gant* is not an automatic blanket search but has a requirement of an articulable quantum of suspicion; law enforcement must articulate a reasonable suspicion that there is legitimate potential to find evidence of the crime committed for an evidence-gathering search to take place. This is a protective measure against manipulative arrests made to access a space in which there may be evidence of another crime.

There is a dispute over *Gant*’s quantum of suspicion because the decision’s wording claims the required quantum of suspicion is a “reasonable basis to believe.” It is understood that a reasonable basis to believe does not constitute probable cause. This is
clarified because vehicles already have probable cause automobile exception. Officers are allowed to search an automobile if there is probable cause that evidence or contraband is in the vehicle. This exception is in place because of the inherent exigency caused by vehicular mobility. Because there is already a probable cause exception, it would make no sense for the Court to reiterate what is already there. That insinuates that the quantum of suspicion is lower than the current quantum required to enact the automobile warrant exception. If the required quantum of suspicion is not probable cause, then the next standard is a “reasonable suspicion.” It is a well-litigated standard that can be used in homes and vehicles. There is no reason to think the Court created a third level of suspicion between probable cause and reasonable suspicion because there is no need to complicate an issue that is already well understood by law enforcement.

If law enforcement pulls over a suspected drug dealer for driving with a suspended license, they are not authorized to search the car because it is unreasonable to expect to find evidence of a suspended license within the vehicle. If the police want to search the car to find narcotics, they will have to arrest the suspect for a crime related to narcotics. Falsely made charges will not meet the requirements necessary to search the vehicle.

The same logic holds for a home, if the police are called for a noise complaint and arrest the perpetrator because they were uncooperative, an evidence search will not be conducted. There will not be evidence of the arrestee’s loud music or disagreeable nature within the home. Therefore, the only search allowed would be the Buie sweep for dangerous persons. Plain view will, of course, still be available to the police but they will not be able to look into small containers.
Enforcing a quantum of suspicion that requires reasonableness will act as a deterrent against routine instigation of evidence-gathering searches. If a judge has the power to decide in court that the police searched for evidence without reasonable suspicion, the evidence found from the search can be suppressed based on the exclusionary rule. With more accessibility to the home, the police have a higher standard to explain their actions.

Importing evidence gathering into the home is the logical extension of the *Gant* decision, especially when one examines the restrictions that will be in place. However, there are subsequent cases that deal with evidence gathering that need to be considered when importing *Gant* into the home.

*Riley v California* complicates the introduction of evidence gathering into the home because it prohibits officers from searching the cellular device of the arrestee for the sole purpose of gaining evidence. However, if *Riley* is considered an exception to the evidence-gathering rule, then importing *Gant* into the home is still possible.

Incorporating a bright line exception of digital data in the search and seizure of an arrestee’s home artifacts, will allow evidence gathering in the home. While the evidence-gathering search is restricted to the boundaries set by Buie, there is an exception to the scope of the search based on the Supreme Court decision in *Riley* that protects digital data from being searched and seized without a warrant. If digital data falls within Buie’s parameters, it will still require a warrant for police search.
C. Digital Device Exception Following Riley v California

To ensure consistent doctrinal execution, the courts must insert a digital device exception into the home evidence-gathering prong. In *Riley v California* the Supreme Court decided that law enforcement must generate a search warrant during a lawful search incident to arrest before they are able to search the information accessible on a cell phone.

Comparatively speaking, claiming a cell phone has a higher expectation of privacy and requires a search warrant insinuates that the home, which also has a higher expectation of privacy, will require a search warrant for an evidence-gathering search. However, if one looks at the proposed scope of the home evidence-gathering search, they will see the similarities in vehicular and cellular searches that align the privacy expectation of the home with vehicles.

A room is similar to the interior of a vehicle, while a computer is similar to a cellular device. A room and vehicle have a reasonable limit to the amount of physical items and evidence that can be inside them. A computer or cell phone does not have a reasonable limit and they operate in a cyber world as opposed to a physical one. Restricting access to digital data is another boundary that will protect privacy interests.

It would support both *Gant* and *Riley* to allow evidence gathering in a room but to exclude digital data. The reasoning behind the exclusion lies in the vast amounts of information available to the police upon inspection of a computer. Within one digital device, there could be information equivalent to enough documentation that would physically exceed the space of the entire room or be connected to other properties the suspect owns.
Justice Alito explains the reasoning behind the *Riley* decision “many cell phones now in use are capable of storing and accessing a quantity of information, some highly personal, that no person would ever have had on his person in hard-copy form” (*Riley* 2496). There is more information readily available than law enforcement has ever been able to access in the past. If police wanted to see incriminating photos, they used to have to develop the film in an analog camera. The only pictures available would be the twenty or so on the film roll. Now if the police went to a person’s photo file on the computer or phone, they could access years of pictures and gather much more information about the person. Because of the widespread use and role of digital devices, it is necessary to balance privacy and law enforcement on the digital stage.

While there should be an exception for digital data because of the above reasoning, Justice Alito calls for Congress to write legislation to respond to the changing digital data sphere. He claims, “It would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment” (*Riley* 2497). It is not within the judiciary's power to handle the intricacies of digital legality. It is better for the courts to stay separate and not attempt to find the solution to digital privacy through a court decision.

The best way the courts can protect the people’s privacy, with the “blunt instrument of the Fourth Amendment” is to make a standard exception to digital data in warrantless searches. By creating a broad standard, the judiciary expresses their opinion on its right to privacy protection but recognizes that the legislature will have to be the guiding force in digital policy. The Courts do not possess the nuance to deftly orchestrate digital data rules by case law alone.
VII. Academic Literature Review

In the years following *Arizona v Gant*, academic literature has clarified *Gant’s* implications on search incident to arrest doctrine and its construction in the face of police procedure. Three questions consistently arise when examining *Gant*: 1) whether *Gant* is applicable to all searches, 2) the meaning of “reasonable possibility of access”, and 3) the functionality of the evidence-gathering rule. However, there is a hole in academic literature regarding the doctrinal implications of *Gant* and *Chimel*. This thesis is the first to argue that *Gant* cannot remain the standard for only vehicles and not also be extended into homes because it inverts the logical range of police authority.

By examining three articles on these issues, this article hopes to shine a light on the current debates regarding *Gant* in academic literature and where this thesis falls on the spectrum. The article will also be looking at oppositional articles and examining the academic reasoning not to adopt Gant. Then it will look at a lower court case’s interpretation of *Gant* and the implications it has on the proposal to incorporate *Gant* into the home.

Sean Foley argues that *Gant* is applicable to all types of searches in his article “The Newly Murky World of Searches Incident to Lawful Arrest: Why the *Gant* Restrictions Should Apply to All Searches Incident to Arrest.” His article claims that there are logical, doctrinal, and Constitutional reasons to extend *Gant* beyond a vehicular context. However, Foley is only arguing about the extension of *Gant’s* reaching distance
and not the importation of evidence gathering into the home. This is a critical oversight in his argument and the importance of accounting for Gant’s second prong cannot be overstated.

If one logically reviews the purpose of the case, it is evident that Gant is not confined to vehicular situations despite its narrow holding. Gant “resurrected and retethered” search incident to arrest to Chimel’s original policy goals. Chimel did not involve car searches but dealt with home searches. Despite Gant being a case about vehicles, the doctrine that justifies its reasoning is broader than vehicular situations.

The reasoning behind Gant, restricting officer’s reach based on their possibility to access to weapons or evidence, is not refuted by the absence of a vehicle. The same justification applies for arrests made in homes as well as public places. Chimel is the authority for all search incident to arrest cases. Therefore, if Gant returns police procedure to Chimel’s intended purpose, it is logical that Gant would apply to all cases that Chimel controls. Foley’s argument supports the most fundamental component of my argument; it is an obvious extension to broaden Gant’s scope beyond a vehicular context. But Foley only focuses on the restricted reaching distance, and ignores evidence gathering

As Foley writes, “An access limitation ‘ensures that the scope of a search incident to arrests is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the arrest that an arrestee might conceal or destroy’” (779). Gant’s interpretation that a defendant must have access to the area being searched is not constrained in vehicular searches. If an arrestee does not have access to his home, say they have already been placed in the squad car, then the rationales of officer safety and
evidence preservation are arbitrary. Because of this, *Gant’s* doctrine needs to extend to all searches incident to arrest.

Another reason to extend *Gant* is the constitutional ramifications of having a broad warrant exception. To ensure privacy protection, warrant exceptions should be narrowly construed. Foley explains, “This exception should be read narrowly and limited to those situations in which society does not require a neutral and detached magistrate to stand between the citizen and ‘the officer engaged in the… competitive enterprise of ferreting out crime’” (777). It is always better to err on the side of protecting a known constitutional guarantee such as the warrant requirement.

Foley’s article fails to account for more than just the extension of evidence gathering in conjunction to restricted reaching distance. The one reason to expand *Gant* that Foley’s article does not account for is the doctrinal disconnect *Gant* causes between home and privacy expectations. His arguments are valid, it is logical to assume that by returning to *Chimel* the search incident to arrest decisions fall beneath *Chimel’s* scope, the doctrinal decision behind *Gant* does not change with the absence of a vehicle, and it protects constitutional interests to have narrow warrant exceptions. However, Foley overlooks one of the most important issues, vehicles anomalously have more privacy protection than homes because of the *Gant* decision. That is the most significant reason *Gant* must be imported into the home.

The second question, what does “real possibility of access” mean in application, is discussed in Anthony Ruiz’ article, “Defining *Gant’s* Reach: The Search Incident to Arrest Doctrine After *Arizona v Gant*. ” Ruiz argues that there are doctrinal reasons to incorporate a strict interpretation of “real possibility of access.”
Lower courts have divided opinions regarding the leniency police operate under when determining “real possibility of access.” Originally, the Court claimed the standard was whether the arrestee was “unsecured and within reaching distance” at the time of the search. However, courts have deviated from this practical application and have opted for a more nebulous reading. Now, the debate is between a theoretical possibility of access or a reasonable one.

*United States v Shakir* rejected the two-prong reasonableness approach and refocused on the wording of *Gant* to allow a broader interpretation of possibility of access. Shakir was handcuffed and restrained by two officers but the court upheld the search of his bag, showing a clearly lenient approach. The court argued that handcuffs are not a completely infallible and should not be the basis for determining reasonable possibility of access. The decision fulfilled its intended purpose of awarding police greater opportunity to search suspects.

However, the *Shakir* decision was controversial in the face of *Gant*’s return to a strict *Chimel*. In *United States v Perdoma*, Judge Bye’s dissent claimed the search conducted was invalid because of the same circumstances that *Shakir* claimed were reasonable. Perdoma was handcuffed, moved to another area, and secured by officers who then searched his bag, finding methamphetamine. Judge Bye argued that Perdoma’s possibility to access a weapon or evidence was “farfetched” and the search should have been illegal. As Ruiz writes, “A repudiation of *Belton* is thus a repudiation of the lenient standard it created. And, in most instances, once an officer has handcuffed a suspect, there is no reasonable possibility of access” (354).
Because the Court rejected Belton, they simultaneously rejected the justification behind broad and lenient interpretations of warrantless searches. This assumption can be validated with the Court’s wording in the Gant opinion. They were clear that officers will almost always be secure at the scene of the crime and there will be few instances where a reasonable possibility of access will justify a search incident to arrest. In application, Chimel’s rationales are typically useless when searching a vehicle. Their claim that it will be a “rare case” in which an arrestee possesses reasonable possibility of access insinuates that most situations would not allow searches incident to arrest. If searches are significantly decreased, it is doubtful the Court desired a lenient standard to determine an arrestee’s access.

Ruiz’s article aligns with this article’s proposed interpretation of Gant. When Gant overturned Belton and retethered search incident to arrest doctrine to the literal wording of Chimel, it made a statement about the excessive intrusiveness of police procedure. Without following the proposed restricted reaching distance, there is no need to revive the evidence gathering search. However, by restricting unnecessary police intrusion and then balancing police interests by allowing evidence gathering searches, the courts have returned to the historical and common law legal foundation of search incident to arrest. It legitimizes police procedure and realigns with precedent. It is imperative that courts uphold the intended corrective purpose of Gant.

The third question, what does the evidence gathering rule look like, is examined in Seth Stoughton’s article, “Modern Police Practices: Arizona v Gant’s illusory restriction of vehicle Searches Incident to Arrest.” Gant heavily restricted law enforcement’s reach but compensated for potential crime control loss by resuscitating the
evidence-gathering search. Does the evidence gathering search free police from the restraints placed on their *Chimel* shackles?

Police are only allowed to conduct an evidentiary search if there is a reasonable suspicion that evidence of the crime for which the person is arrested, will be found in the vehicle. Critics argue that this will be restrictive to police enforcement, but the reality is that only one in three officers makes an arrest for a traffic violation in the span of a year. *Gant* eliminates traffic offense searches, stopping the manipulation of traffic laws to comprehend suspects of other crimes. However, if only one in three officers even makes arrests for a traffic offense, then most arrests are obviously not of that nature.

Stoughton argues, “Vehicle occupants are arrested for crimes for which the fact of arrest itself establishes reasonable suspicion” (1748). This means that officers typically arrest a vehicle occupant for driving under the influence or possession of contraband, both of which would authorize the officer to search the vehicle. Even though it is not criminal to possess alcohol in a vehicle, finding alcohol in the car of a person charged with a DUI is inculpatory and can be seized as incriminating evidence against the arrestee.

To put this in context, Belton was arrested for a drug crime whereas Gant was arrested for driving with a suspended license. Both were pulled over for traffic violations, Belton for speeding and Gant for a suspended license, but Belton was arrested because of drugs, not the traffic violation. The officer then had the right to search Belton’s car for more narcotics and whatever he found while conducting the search can be used as evidence. However, since Gant was arrested for a suspended license, there was no reasonable suspicion that evidence of that arrest could be found within the car.
The assumption that *Gant* will significantly decrease officer’s opportunity to search a vehicle incident to arrest is erroneous. Evidence gathering will prevent the restriction because the majority of traffic related arrests are situations that give an officer reasonable suspicion to search the vehicle for evidence of a crime. Even when a vehicular search is not warranted, the officer will be able to search the person they arrest. If drugs or contraband is found on the person, then they will have a reasonable suspicion to extend the search into the car.

Stoughton’s statistics support my claim that adding evidence gathering balances the interests of law enforcement with the privacy interests of the public. Restricting the reaching distance will prevent manipulative arrests, but when combined with evidence gathering, it will not prevent officers from conducting much needed searches. Privacy protection is important, but it is just as important to allow police the space and capabilities to perform their job to control crime.

Among the multitude of articles that attempt to clarify *Gant*, there are some that claim it should not be adopted at all. David L. Berland’s article, “Stopping the Pendulum: Why Stare Decisis Should Constrain the Court from Further Modification of the Search Incident to Arrest Exception” details three policy issues with *Gant* and the more encompassing judicial dependence of stare decisis.

Broadly speaking, search incident to arrest doctrine has had a tumultuous history with the Court either overturning or modifying search incident to arrest doctrine seven times (Berland 729). The doctrine has yo-yoed between strict and lenient but has consistently been decided based on Justices finding the “correct outcome.” This is problematic because it erodes the stability of the judicial branch. Their power comes from
the fact that their decisions, once made, are supposed to be permanent. It is clear that is
not the case; Justices are not constrained by stare decisis if they have been able to change
their minds seven times.

Berland makes valid points about the importance of stare decisis and the
instability derived from failing to abide by it. However, it should not be the cause for
overturning Gant. As the Court has stated, stare decisis does not prevent the court from
overturning decisions that are unconstitutional and most can agree that Belton’s doctrine
was invasive.

Despite the clear dismissal of stare decisis in the past, the Court should not
abruptly stop their evolution of search incident to arrest doctrine simply to conform to
stare decisis because of exasperation that the pendulum has gone on long enough. It
seems likely that during the seven doctrinal modifications, some were made despite a
constitutional precedent and thus were opinion based. However, in Gant’s case it is a
decision based on unconstitutional grounds and should not be diminished because of the
history it is building upon.

Berland’s most persuasive arguments against the Gant decision are police reliance
on Belton’s doctrine, the workability of Gant, and the absence of changed circumstances.
Berland claims that police are reliant on the bright-line rules that are already in place.
However, Justice Stevens acknowledges the implications of redoing the police standard
and claimed it negligible to the merit of overturning unconstitutional doctrine. Berland
argues that in the interim of police mastering Gant’s rules “more evidence will be
suppressed because officers will unwittingly continue to commit what are not
unconstitutional Belton searches” (720). He makes the sweeping claim that disregarding the reliance on Belton impacted not only the police officers but also society at large.

The reasoning for claiming that reliance is a significant hurdle is faulty at best. From an ideological standpoint, it is against everything America represents to knowingly allow unconstitutional practices, especially privacy intrusion, for the convenience of a governmental body. Disregarding the blatant indifference for American values, it also discounts the intelligence of the police. Constraining their standard operating procedure should not result in a failure of police enforcement, and even if it does it should not be a significant length of time.

The Gant rule is simultaneously so strictly lenient that it should be easy to follow. It is strict in the sense that if an officer arrests someone for any reason, such as an expired license, that will not have evidence of the crime within the vehicle, they cannot search the vehicle. The only exception to that is if there is a reason to believe there is danger to the officer or evidence. It will be a rare instance when the officer searches the vehicle because of danger to an officer or evidence preservation. The officer will always search the body of the person, restrain them, and then remove them from the scene of the incident.

However, it is lenient because the officer has the authority to search a vehicle if there is a reasonable expectation that there will be evidence of the crime committed in the vehicle. Most vehicular arrest will fall under this jurisdiction and there will be inherent justification that there might be evidence because of the nature of the situation. Also, if the police arrest a defendant for something that does not justify a search but they find evidence of a crime on their person, they will have a reasonable excuse to extend the
search to the vehicle. Because of the dichotomy of strict and lenient, intentionally orchestrated in that manner, the police have fairly straightforward rules to follow. However, even if the rules were significantly more difficult, that is not reason to remain with unconstitutional doctrine.

Workability is the next issue Berland points to, stating that the phrase “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle” will result in new ambiguities (721). Because of the ambiguous phrasing, Berland claims that Belton was more workable than Gant. However, defining reasonable is not too difficult, mainly because it has been present throughout the entirety of American legal history. The Fourth Amendment itself protects citizens from unreasonable seizures, insinuating that a reasonable seizure is recognizable. It is not an amorphous concept but one that is established throughout case law.

The third issue, and the one that has the most credence, is the lack of changed circumstances to prompt a reworking of policy. The reason for a stricter rule is that Belton undermines the two purposes of Chimel, officer safety and evidence preservation. Justice Alito points out that the Supreme Court knew in 1981 that there was little likelihood of a person accessing weapons or evidence once handcuffed in a squad car. Not only did the Court know this in 1981, they also applied Belton five years before the Gant decision in the case Thornton v United States. Granted the argument that nullifies this mimics the other faults of Berland’s article. It simply does not matter if the court was aware of the same circumstances if the previous decision is deemed unconstitutional.

Berland’s claim that stare decisis supports upholding Belton instead of implementing Gant, but this article argues that Gant is a corrective decision that is
unifying the pendulum of search incident to arrest precedent. *Chimel* is an outlier in search incident to arrest doctrine that reworded the reasons behind police searches, and exasperated the controversy of search incident to arrest. *Belton* made the issue even worse. *Gant*, on the other hand, overturned the faulty *Belton* and tied *Chimel* to the history of search incident to arrest doctrine by reviving evidence gathering searches.

Literature that examines the application of *Gant* argues that *Gant* should extend to all searches, there should not be a lenient interpretation of “real possibility of access,” and reintroducing evidence gathering will ensure continued law enforcement. *Gant* should extend to all searches because it is founded in *Chimel*, which is the precedent for all search incident to arrest situations. There should be a strict interpretation of “real possibility of access” because the *Gant* court heavily hinted that was their intention with the decision. Evidence gathering will continue the authority of the police but will have its foundation in realistic and truthful explanations.
Conclusion

Importing Gant’s restricted reach and evidence gathering into the home is the logical extension of modern search incident to arrest doctrine. It is necessary to unify the separate spheres in which it operates and rectify the anomaly of greater vehicular protection. Once the broader issue is resolved and vehicles have equal or less protection than homes, then the main concern becomes workability of extending Gant. It is illogical to import only half of a doctrine. Importing Gant’s restricted reaching rule is imperative to resolve the doctrinal tension. However, it must be followed by the importation of evidence gathering searches to prevent the loss of crime control and balance police interests. There must be guidelines to ensure consistent police procedure and protect the privacy of the home. By constraining evidence gathering searches to the boundaries of a Bouie search and creating a digital device exception, police intrusion will be minimal. The policy and procedural impact make the changes logical, but the justification is in precedent. Chimel artificially narrowed common law and Gant’s revival of evidence gathering is simply returning to a time honored American tradition.

This article is a small component of a bigger issue concerning what privacy can citizens reasonably expect. Do the police have the right to search without a warrant and/or a valid justification? That is what Chimel and Belton subtly insinuate. The law drifted further and further from protecting the rights of the people, until Gant resurrected legitimate police concern and privacy interests. Police search to gather evidence. However, if the legal community paints that as an aberration and tries to hide the reality
behind nicely worded doctrine, the police are given even more power. Instead, the truth needs to be exposed so that it can be regulated. Gant is controversial because it plainly states the intention of law enforcement. This intention is the same in vehicles and homes. Police are looking for evidence. It is baffling to look at doctrine that ensures homes have less protection than vehicles, but that is a product of gilded law enforcement. This problem would never have been an issue if the Courts were transparent concerning the basic truth of searches. This article is meant to strike the appropriate balance between privacy interests and police interests in the Fourth Amendment. Ultimately, search incident to arrest doctrine boils down to interpreting constitutional provisions. This version of interpretation is faithful and true to the text of the Fourth Amendment, while balancing the protection of people’s rights with the societal benefits of crime control.
Works Cited


