A Delicate Balancing Act: Satisfying the Fourth Amendment While Protecting the Bankruptcy System From Debtor Fraud

Michael Sousa
A DELICATE BALANCING ACT: SATISFYING THE 
FOURTH AMENDMENT WHILE PROTECTING THE 
BANKRUPTCY SYSTEM FROM DEBTOR FRAUD

Michael D. Sousa∗

To them the fraudulent debtor was always an actuality; they knew that no celestial city would ever descend with him absent; and so the same old thing was required of every debtor as the price of the new privileges, namely, full submission to the court.1

I. INTRODUCTION

Since the dawn of the twentieth century, American consumer bankruptcy law has been predicated on two foundational principles: first, providing an individual debtor with a “fresh start” in life, free and unhampered by pre-existing indebtedness; and second, providing for an equitable distribution of the debtor’s available assets among the various creditor constituencies.2 The second of these principles is entirely

∗ Assistant Professor of Law, University of Denver Sturm College of Law. The author would like to thank (in alphabetical order) Professors Rachel Arnow-Richman, J. Robert Brown, Jr., Roberto Corrada, Federico Cheever, Sam Kamin, Richard Lieb, and Susannah Pollvogt for their useful and insightful comments on an earlier draft of this article. Their collective time, energy, and intellect is much appreciated.


2 George H. Singer, Section 523 of the Bankruptcy Code: The Fundamentals of Nondischargeability in Consumer Bankruptcy, 71 AM. BANKR. L.J. 325, 325 (1997) (“Bankruptcy law is grounded upon the public policy of freeing the honest, but unfortunate, debtor from the financial burdens of prepetition indebtedness and thereby allowing the debtor to make an unencumbered fresh start.”) (citation omitted); Charles G. Hallinan, The “Fresh Start” Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory, 21 U. RICH. L. REV. 49, 50 (1986) (“One firmly established tenet of time-worn bankruptcy lore holds, of course, that the bankruptcy system serves two functions: the protection and payment of creditors; and the provision of shelter and a ‘fresh start’ to overburdened debtors.”) (citation omitted); Richard E. Flint, Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor, 48 WASH. & LEE L. REV. 515, 515-16 (1991) (“The essence of our consumer bankruptcy law is the discharge. The discharge of a consumer debtor frees the debtor from the shackles of existing debt and places him on the economic treadmill once again – to earn, consume and borrow.”) (citations omitted); Thomas H. Jackson, The Fresh Start Policy in Bankruptcy Law, 98 HARV. L. REV. 1393, 1393 (1985) (“The principle advantage bankruptcy offers an individual lies in the benefits associated with discharge. Unless he has violated some norm of behavior specified in the bankruptcy laws, an individual who resorts to bankruptcy can obtain a discharge from most of his existing debts in exchange for surrendering either his existing nonexempt assets or, more recently, a portion of his
subverted when individual debtors fraudulently conceal the extent of their assets available for distribution, a potentially serious problem in the present bankruptcy law system. Accordingly, this Article is concerned with enhancing the powers a bankruptcy trustee has at his or her disposal to detect and expose such fraud.

While many, if not most, individual debtors file for bankruptcy protection with honest intentions, there is also an underside to the current American bankruptcy system that often goes unreported and ignored in the scholarly literature, namely, the commission of fraud by debtors who seek protection under the Bankruptcy Code. Almost a century ago, F. Regis Noel, in his work, A History of the Bankruptcy Law, astutely recognized the existence of two classes of debtors in society, the truly unfortunate and the fraudulent, which, in his view, warranted “different regulations” and complicated the bankruptcy system. 3

Indeed, bankruptcy law has been concerned with preventing and deterring the fraudulent debtor since at least the Middle Ages. 4 For example, England promulgated the first Anglo-bankruptcy law in 1542 during the reign of King Henry VIII, 5 and its primary purpose was not the rehabilitation of debtors, but the prevention of fraud by debtors upon their creditors. 6 The subsequent English bankruptcy statutes treated a debtor as a criminal felon and a moral failure. 7 The harshness of these bankruptcy

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3 F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW 7 (Chas. H. Potter & Co. 1919).
4 Cf. Gregory E. Maggs, Consumer Bankruptcy Fraud and the “Reliance on Advice of Counsel” Argument, 69 AM. BANKR. L.J. 1, 11 (1995) (“Because bankruptcy debtors have the most to lose from the smooth functioning of these laws, they have throughout history faced the temptation to thwart the process by concealing or giving away their property.”).
6 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW Volume VIII pg. 236 (Little, Brown & Co. 1926). This Act specifically recounted the common occurrence of debtors, who after “crafily obtaining into their hands great substance of other men’s goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors, their debts and duties, but at their wills and pleasures consume the substance obtained by credit of other men. . . .” 34 & 35 Henry VIII c.4 (1542-43).
7 Vern Countryman, A HISTORY OF AMERICAN BANKRUPTCY LAW, 81 COM. L.J. 226, 227 (1976) (“The bankrupt who did not honestly surrender up his property and disclose his affairs was, under this law, to be ‘adjudged a fraudulent bankrupt’ and a felon.”). See also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 199 (Simon & Schuster 3d ed. 2005) (“Bankruptcy originally had a quite punitive ring. It was at one time a crime, later a disgrace.”).
proceedings, and the brutal treatment of debtors in general prior to the late nineteenth century in both England and the United States, is well documented.\textsuperscript{8} Not only were debtors liable for imprisonment for debt, but a penalty of pillory “and the loss of an ear” could be imposed upon a debtor “who failed to show that bankruptcy was due solely to misfortune.”\textsuperscript{9} In addition to the power to punish, the English bankruptcy statutes empowered “commissioners” to investigate whether debtors were concealing assets.

The first United States bankruptcy law, passed in 1800,\textsuperscript{10} “had as its conceptual origin the English bankruptcy system familiar to the Framers of the United States Constitution.”\textsuperscript{11} Much like its English antecedents, the Bankruptcy Act of 1800 established bankruptcy fraud as a criminal offense, and jails were overflowing with imprisoned debtors in the various states.\textsuperscript{12} As the nineteenth century progressed, however, legislators in both England and the United States began to recognize a moral distinction between fraudulent debtors on the one hand, and those individuals who had succumbed to financial calamity through life’s misfortunes on the other.\textsuperscript{13}


\textsuperscript{10} Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803).

\textsuperscript{11} Curry v. Castillo (In re Castillo), 297 F.3d 940, 949 (9th Cir. 2002). See also Charles Jordan Tabb, The History of Bankruptcy Law in the United States, 3 AM. BANKR. INST. L. REV. 5, 6-7 (1995) (“The first United States bankruptcy law, passed in 1800, virtually copied the existing English law.”) (internal citations omitted); David A. Skeel, Jr., Debt’s Dominion: A History of Bankruptcy Law in America 90 (Princeton University Press 2001) (“The Bankruptcy Act of 1800 was derived from English law, as were parts of the 1841 and 1867 acts . . . .”); Charles Warren, Bankruptcy in United States History 13 (BeardBooks 1935) (noting that the initial bankruptcy bill introduced in the United States closely followed the English Bankruptcy Act).

\textsuperscript{12} Charles Warren, Bankruptcy in United States History 22 (BeardBooks 1935). See also Vern Countryman, A History of American Bankruptcy Law, 81 COM. L.J. 226, 228 (1976) (noting that “the colonies and then the states had carried over the English system of imprisonment for debt only some of the states had insolvency laws which would give the debtor a discharge or at least a release from jail”).

The successive American bankruptcy acts, enacted in 1841, 1867 and 1898, respectively, moved slowly but surely in the direction of the liberal treatment of debtors. The modern Bankruptcy Code, enacted in 1978, is now considered by many to be a pro-debtor statute.

To be sure, “the attitude towards and the treatment of delinquent debtors have been subject to significant changes since the days of torture and slavery under the Roman law and the days of pillory and imprisonment under English law.” Today, the “enlightened approach” is to afford the honest, but unfortunate debtor an opportunity to free himself or herself from the burden of debt through the bankruptcy discharge. Despite the pro-debtor focus of the current Bankruptcy Code, however, the potential for debtors to commit fraud, “keep house” or otherwise conceal assets from the bankruptcy process remains a concern; the reported cases are rife with examples of debtors attempting to hide or shield assets from their creditors.

17 The concept of “keeping house” refers to the act of a debtor who intentionally seeks refuge in his or her home for the purpose of avoiding creditors and civil process. See Jay Cohen, The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy, 3 J. Legal Hist. 153, 155 (1982); Rhett Frimet, The Birth of Bankruptcy in the United States, 96 Com. L.J. 160, 163 (1991). See also Israel Treiman, Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law, 52 Harv. L. Rev. 189, 194 (1938) (“This was the notorious practice of ‘keeping house,’ by which a debtor, protected by the sanctified English maxim that a man’s house is his castle, would betake himself to his home and there consume his creditors’ goods, utterly immune to forcible intrusion by legal process.”) (citation omitted).
18 See, e.g., United States v. Conner, 25 F. Cas. 595 (C.C.D. Mich. 1845) (debtor indicted under criminal law for failing to disclose certain assets in the bankruptcy proceeding); United States v. Shapiro, 101 F.2d 375 (7th Cir. 1939) (debtor convicted of concealing money from the bankruptcy trustee); Stegeman v. United States, 425 F.2d 984 (9th Cir. 1970) (debtor convicted of violating 18 U.S.C. § 152 after fraudulently transferring certain assets to third parties before the institution of an involuntary bankruptcy proceeding against them); Youngman v. Bursztyn (In re Bursztyn), 366 B.R. 353 (Bankr. D.N.J. 2007) (debtor attempted to conceal approximately $250,000 worth of assets from the bankruptcy proceeding); Vill. of San Jose v. McWilliams, 284 F.3d 785 (7th Cir. 2002) (debtor denied discharge after attempting to transfer property prior to commencing bankruptcy); Banc One, Tex., N.A. v. Braymer (In re Braymer), 126 B.R. 499 (Bankr. N.D. Tex. 1991) (debtor denied discharge after exhibiting a pattern of behavior to hide assets from her creditors); Boroff v. Tully (In re Tully), 818 F.2d 106 (1st Cir. 1987) (debtor denied discharge for failing to disclose significant assets in the bankruptcy process); United States v. Cluck, 143 F.3d 174, 176 (5th Cir. 1998) (“Thus, before invoking the power of Title 11, he perceived that it might be useful to keep some jaguars in reserve, some money within easy access, and, maybe, just for good measure, a few of his favorite things beyond the reach of his creditors and the bankruptcy court.”); United States v. Christner, 66 F.3d 922 (8th Cir. 1995) (debtor convicted under 28 U.S.C. § 152 for concealing approximately $36,000 from the bankruptcy proceeding); United States Trustee v. Gardner (In re Gardner), 344 B.R. 663 (Bankr. M.D. Fla. 2006) (debtor denied discharge for failing to disclose his interest in a corporation); Roudebush v. Sharp (In re Sharp), 244 B.R. 889 (Bankr. E.D. Mich. 2000) (debtor...
Beginning in 1996, and continuing to the present, well over one million individuals file for consumer bankruptcy protection each year.\(^1\) Moreover, since 1989 through the present, more than 90\% of all bankruptcy petitions filed in the country represent individual consumer debtors.\(^2\) These figures are significant, because for years the Department of Justice has suggested that fraud is committed in approximately 10\% of all civil bankruptcy cases.\(^3\) And although for obvious reasons it is difficult to provide any quantification or empirical data on the reach of bankruptcy fraud, it has been estimated that bankruptcy fraud costs creditors, the federal government, and local governments approximately $1 billion a year.\(^4\) Simply using the suggested percentage provided by the Department of Justice, this means that approximately one hundred thousand separate acts of bankruptcy fraud are committed by consumer debtors each year, about 1.5 million instances of bankruptcy fraud since 1996.\(^5\) Moreover, one empirical study conducted a decade ago revealed disturbing results.\(^6\) According to the study, 38\% of the assets administered in the studied bankruptcy cases were not disclosed by the debtors in their initial filings, and 41\% of the cases had undisclosed assets.\(^7\)
At present, the bankruptcy laws provide two mechanisms to redress fraudulent conduct: civil and criminal. On the civil front, if a debtor is suspected of committing bankruptcy fraud, including concealing assets from the bankruptcy court, the Bankruptcy Code provides two remedies. First, the bankruptcy court or the bankruptcy trustee could seek to dismiss the bankruptcy case; second, the bankruptcy trustee or one of the creditors could attempt to object to the debtor’s discharge. On the criminal front, 18 U.S.C. § 152 makes it a crime punishable by fine or up to five years imprisonment, or both, for a debtor to either “knowingly and fraudulently” i) conceal assets from the bankruptcy proceeding; ii) make a “false oath or account” in a bankruptcy case; or iii) make a “false declaration” in connection with a bankruptcy case.

The available civil and criminal remedies for the commission of bankruptcy fraud, though seemingly powerful, are less than effective in practice. While the singular purpose for filing for bankruptcy protection is to receive a discharge of indebtedness, which results in the extinguishment of personal liability on the debt, a denial of a discharge leaves the debtor in no worse of a position vis-à-vis his or her creditors than before filing for bankruptcy protection. In other words, after a denial of discharge the existing creditors remain empowered to collect their debts.

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30 See Bankruptcy Fraud: A Roundtable Discussion, 6 AM. BANKR. INST. L. REV. 275, 279 (1998) (noting that actions to deprive a debtor of his or her discharge fail to deter attempts at fraud); James M. Cain, Proving Fraud in Credit Card Dischargeability Actions: A Permanent State of Flux?, 102 COM. L.J. 233, 256 (1997) (observing that the withholding of a discharge is often an empty threat to debtors whose lack of assets removes any fear of civil remedies); Luther Zeigler, The Fraud Exception to Discharge in Bankruptcy: A Reappraisal, 38 STAN. L. REV. 891, 917 (1986) (arguing that the penalty of nondischargeability is not an effective penalty for debtor fraud).

31 In re Hawkins, 377 B.R. 761, 766 (Bankr. S.D. Fla. 2007) (noting that a Chapter 7 discharge “voids all of the debtor’s personal liability on a debt”) (citation omitted).

32 Nevin M. Gewertz, Act or Asset? Multiplicitous Indictments Under the Bankruptcy Fraud Statute, 18 U.S.C. § 152, 76 U. CHI. L. REV. 909, 912 (2009) (“Significantly, however, civil penalties impose no greater penalty than the original debt itself. If successful in his fraudulent act, the debtor retains the value of any concealed assets; if caught, the debtor remains in no worse position relative to his creditors.”) (citations omitted). See also Ralph C. McCullough, Bankruptcy Fraud: Crime Without Punishment, 96 COM. L.J. 257, 284 (1991) (“Demanding that a debtor restore to the estate assets he has appropriated will help make up what has been stolen, but it leaves the debtor no worse off than he would have been had he originally surrendered the assets. He risks nothing by attempting to hide assets that may later be recovered.”).
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from the debtor in personam. As for the remedy of criminal punishment, it is no secret that institutional resources for prosecuting instances of bankruptcy fraud are limited, “and resulting prosecutions of bankruptcy fraud alone are few and far between.”

Notwithstanding the possibility of facing both civil and criminal remedies for committing bankruptcy fraud, “many persons who file for relief choose to try to cheat the system.” The potential for abuse is exacerbated because once a bankruptcy petition is filed there is no real mechanism by which the bankruptcy trustee or the court can positively check the accuracy of the information provided by the debtor in his or her bankruptcy petition and accompanying schedules. In other words, the present bankruptcy system is “essentially one of self-reporting.” As presently constituted, the Bankruptcy Code “relies on a debtor to make a complete, full, and honest disclosure of all required information.” As Professor Lynn M. LoPucki has observed, though the present bankruptcy system mandates an investigation of every debtor’s financial affairs, it does not happen in actuality.

As a result of these deficiencies with the current consumer bankruptcy system, a bankruptcy trustee should be afforded an additional measure towards uncovering fraudulent conduct, namely, the ability to

33 IRS v. Cousins (In re Cousins), 209 F.3d 38, 41 (1st Cir. 2000) (“The debtor remains personally liable, however, for any nondischargeable debts.”) (citation omitted).


35 Craig Peyton Gaumer, The Hazard of Concealing Assets in Bankruptcy, 22 AM. BANKR. INST. J. 8, 8 (2003). Indeed, Professor Gregory Maggs acknowledged this reality well over a decade ago: “Consumer debtors frequently attempt to cheat the bankruptcy system by devising ways to hide their property or income from the bankruptcy trustee, thereby keeping it from their creditors. Most schemes require little imagination or cunning. Some debtors give their property to relatives prior to filing a bankruptcy petition. Others lie or fail to make a full disclosure about what they own or earn in documents submitted in court. Whatever the technique, the debtor’s goal is always to obtain a discharge at the least possible personal cost . . . . The debtor does not need a law degree to figure out that the bankruptcy trustee assigned to the case will not be able to distribute to creditors any property or money that the trustee does not know about and cannot find. Some debtors, as a result, simply lie on their bankruptcy schedules.” Gregory E. Maggs, Consumer Bankruptcy Fraud and the “Reliance on Advice of Counsel” Argument, 69 AM. BANKR. L.J. 1, 4 (1995) (citations omitted).


37 Yoppolo v. Sayre (In re Sayre), 321 B.R. 424, 427 (Bankr. N.D. Ohio 2004). See also United States v. McIntosh, 124 F.3d 1330, 1334 (10th Cir. 1997) (noting that in a bankruptcy proceeding, the duty to disclose assets falls upon the debtor).

search a debtor’s home for the concealment of assets. Notably, a distinction must be drawn between the honest, but unfortunate, debtor, and a debtor who is unable or unwilling to repay his or her creditors as a result of resorting to fraudulent machinations.\textsuperscript{39} It is to the latter category of debtors that this Article is aimed. Such a suggested remedy, however, “involves significant issues regarding the intersection of a bankruptcy trustee’s statutory duties under the Bankruptcy Code and the application of the Fourth Amendment to the United States Constitution.”\textsuperscript{40}

Since the enactment of the modern Bankruptcy Code, only two reported decisions have squarely addressed the issue of a bankruptcy trustee’s authority to search a debtor’s residence and the concomitant need to comply with any Fourth Amendment constitutional restrictions.\textsuperscript{41} Both decisions permitted the bankruptcy trustee to search the debtors’ homes, but after the trustee first applied to the court for a search order. As will be discussed below, these decisions do not go far enough in enabling a bankruptcy trustee to carry out his or her task of investigating the financial affairs of a consumer debtor.

Consequently, the purpose of this Article is to propose a normative framework under which a bankruptcy trustee can conduct a warrantless search of a debtor’s residence upon suspicion that a debtor is attempting to commit fraud by failing to disclose assets to the bankruptcy court. The Article initially examines whether a bankruptcy trustee is a state actor for purposes of the Fourth Amendment. After answering this inquiry in the affirmative, the Article then advances the thesis that a bankruptcy trustee, though bound by the Fourth Amendment, can conduct a warrantless search of a debtor’s home based upon the following three distinct theories: i) that the bankruptcy process be deemed a “special needs” administrative search exception to the Fourth Amendment warrant requirement; ii) that the bankruptcy law system be equated to a “closely regulated industry” under Fourth Amendment jurisprudence; and iii) implied consent. Part II of this Article provides a brief, contextualized overview of the consumer bankruptcy process. Part III examines whether a bankruptcy trustee is a state actor for Fourth Amendment purposes. Part IV discusses the two reported cases on this issue, namely, \textit{Taunt v. Barman (In re Barman)}\textsuperscript{42} and

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\textsuperscript{39} See W.S. Holdsworth, \textsc{A History of English Law} Volume VIII pg. 229 (Little, Brown, and Co. 1926) (noting that the bankruptcy laws of England in the seventeenth century attempted to make this distinction).
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*Youngman v. Bursztyn (In re Bursztyn)*. Part V advocates for an extension of Barman and Bursztyn and advances the thesis of the Article. Finally, Part VI offers a conclusion.

**II. THE CONSUMER BANKRUPTCY PROCESS, THE DISCHARGE, AND THE FRESH START**

Individuals contemplating filing for bankruptcy protection can generally choose to file either for Chapter 7, Chapter 13, or Chapter 11. The ultimate decision of selecting a particular chapter of the Bankruptcy Code largely depends upon the debtor’s financial status and the significance of his or her assets. This Article is aimed at the Chapter 7 and Chapter 13 bankruptcy process, because Chapter 11 filings usually come with a presumption that individual case trustees will not be appointed to oversee and direct the distribution of assets and the allocation of creditors’ rights.

By far, the most common type of bankruptcy case for individuals is a liquidation proceeding governed by Chapter 7 of the Bankruptcy Code. Once a Chapter 7 bankruptcy petition is filed, the Bankruptcy Code mandates that a bankruptcy trustee be appointed to serve in the case. The primary function of a bankruptcy trustee in a Chapter 7 proceeding is to collect and liquidate “property of the estate” that is otherwise not exempt from the bankruptcy process, and in turn to distribute any proceeds from the liquidation to creditors in accordance with the priority scheme set forth in the Bankruptcy Code.

During the pendency of the bankruptcy case, creditors are enjoined, or “stayed,” from any attempts to collect their claims from the debtor or the

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46 The commencement of a bankruptcy case is usually a voluntary act by the debtor. However, the Bankruptcy Code provides for the involuntary filing of a bankruptcy petition against a debtor, if certain conditions are met. See *6 Collier on Bankruptcy* ¶ 700.02 (15th ed. rev. 2010). See also 11 U.S.C. § 303(b) (2010).
49 Upon the filing of a bankruptcy petition a mythical bankruptcy “estate” is created that is comprised of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a) (2010).
50 *In re Tarrant*, 349 B.R. 870, 875 (Bankr. N.D. Ala. 2006) (“A ‘Chapter 7 trustee’s duty is to reduce to money the legal or equitable interests owned by the debtor in these various assets so that the proceeds may be distributed to unsecured creditors in accordance with Section 726.’”) (citation omitted).
bankruptcy estate.\textsuperscript{51} In exchange for relinquishing any non-exempt assets to the bankruptcy trustee for liquidation, the Chapter 7 debtor is permitted to retain his or her post-petition earnings free from the claims of his or her pre-bankruptcy creditors.\textsuperscript{52} Without question, the goal of a consumer debtor in a Chapter 7 bankruptcy proceeding is to obtain a discharge of his or her pre-petition indebtedness, which as noted previously, results in the extinguishment of the debtor’s \textit{in personam} liability for the debt.\textsuperscript{53}

In contrast to Chapter 7, Chapter 13 of the Bankruptcy Code “permits individual debtors to restructure and repay debt through repayment plans and to obtain a discharge and retain assets in consideration of paying their disposable income to creditors under a plan which is supervised by a trustee.”\textsuperscript{54} A Chapter 13 debtor is protected from the collection efforts of his or her creditors by virtue of the automatic stay while a plan of repayment is developed and thereafter approved by the court.\textsuperscript{55} In a Chapter 13 bankruptcy case, the Chapter 13 “standing trustee” serves as the principal administrator in the proceeding.\textsuperscript{56} “Unlike the Chapter 7 trustee, the Chapter 13 trustee does not sell the debtor’s nonexempt property. Instead, the Chapter 13 trustee’s main function is to collect a debtor’s plan payments and make payments to creditors in accordance with the Chapter 13 plan.”\textsuperscript{57} That said, however, like the Chapter 7 trustee, the Chapter 13 trustee is also charged with the responsibility of, \textit{inter alia}, investigating the financial affairs of the debtor and opposing the discharge of the debtor, if warranted.\textsuperscript{58} Although the Chapter 13 trustee, like its Chapter 7 counterpart, has the responsibility of investigating the debtor’s financial affairs, unlike the Chapter 7 trustee the Chapter 13 trustee “does not take possession or liquidate property of the estate, except with respect to money collected for the purpose of making distributions to creditors under a

\textsuperscript{52} 11 U.S.C. § 541(a)(6) (including in property of the estate “[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case”). \textit{See also} CHARLES JORDAN TABB, \textsc{The Law of Bankruptcy} 3 (2d ed. Foundation Press 2009) (“An individual debtor thus may keep his future earnings for himself, free from the claims of his pre-bankruptcy creditors.”).
\textsuperscript{53} Notably, “a bankruptcy discharge extinguishes only one mode of enforcing a claim – namely, an action against the debtor \textit{in personam} – while leaving intact another – namely, an action against the debtor \textit{in rem}.” Johnson v. Home State Bank, 501 U.S. 78, 84 (1991).
\textsuperscript{54} NANCY C. DREHER & JOAN N. FEENEY, 2 \textsc{Bankruptcy Law Manual} § 13:1 (5th ed. 2009). \textit{See also} In re McCollum, 348 B.R. 377, 393 (Bankr. E.D. La. 2006) (“As part of the deal a debtor makes with his or her creditors when electing to file under chapter 13, as opposed to chapter 7, the debtor retains all pre-petition property in exchange for committing all post-petition disposable income to the payment of creditors under a plan of reorganization.”) (citations omitted).
\textsuperscript{55} NANCY C. DREHER & JOAN N. FEENEY, 2 \textsc{Bankruptcy Law Manual} § 13:1 (5th ed. 2009).
\textsuperscript{56} NANCY C. DREHER & JOAN N. FEENEY, 2 \textsc{Bankruptcy Law Manual} § 13:9 (5th ed. 2009).
\textsuperscript{57} NANCY C. DREHER & JOAN N. FEENEY, 2 \textsc{Bankruptcy Law Manual} § 13:9 (5th ed. 2009).
An individual debtor’s proverbial fresh start is accomplished through the discharge of most of his or her pre-petition indebtedness. The linchpin of the consumer discharge is that the debtor must demonstrate forthrightness and honesty throughout the bankruptcy proceeding, including in the disclosures and financial information provided on the bankruptcy petition and accompanying schedules. The idea that bankruptcy should be a respite for only the honest debtor has existed since the early nineteenth century. Indeed, the granting of the discharge is not an absolute right, but is dependent upon the ingenuous dealings of the debtor. Accuracy, honesty, and complete disclosure by the debtor are critical to the functioning of the bankruptcy system, and are “inherent in the bargain for the discharge.” To this end, unless the individual debtor violates a proscribed form of behavior contained within the Bankruptcy Code or developed through federal bankruptcy law, an individual who files for bankruptcy relief can ordinarily obtain a discharge from the majority of his or her pre-petition debts in exchange for surrendering any non-exempt debts.

60 In perhaps the most cited recitation of the fresh start principle, the Supreme Court of the United States stated as follows in Local Loan Co. v. Hunt: “One of the primary purposes of the Bankruptcy Act is to ‘relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.’ This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.” Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (internal citations omitted). See also United States Dep’t of Health & Human Servs. v. Smith, 807 F.2d 122, 123 (8th Cir. 1986) (“The bankruptcy laws embody a congressional policy to free an honest debtor from his [or her] financial burdens and thus allow him [or her] to make an unencumbered fresh start.”) (citing Kokoszka v. Belford, 417 U.S. 642, 645-46 (1974)).
61 See In re Slentz, 157 B.R. 418, 420 (Bankr. N.D. Ind. 1993) (“Since the proper operation of the bankruptcy system depends, to a large extent, upon debtors honestly and forthrightly completing the schedules and statements which are filed with the court, attempts at cheating cannot be made to appear too attractive.”) (citation omitted).
62 As early as 1817, Congress was petitioned to pass a bankruptcy statute that would “shelter the honest and unfortunate debtor.” Petition of Chamber of Commerce of Philadelphia for Uniform System of Bankruptcy (14-2) Misc. 422, House of Rep., Jan. 13, 1817. As Professor Margaret Howard notes, “[t]hroughout the nineteenth century, petitions asking congress to pass a bankruptcy law and the legislative histories of the various statutes passed reveal a concern that discharge be available only for honest debtors.” Margaret Howard, A Theory of Discharge in Consumer Bankruptcy, 48 Ohio St. L.J. 1047, 1050 (1987) (citation omitted).
63 See In re Williams, 286 F. 135 (W.D.S.C. 1921) (“The granting of a discharge is not an absolute right, existing at the time of the filing of a petition in bankruptcy. It is dependent upon the square dealings and honest purpose of the bankrupt as evidenced by his [or her] acts and doings after the filing of his [or her] petition.”).
64 In re Mascolo, 505 F.2d 274, 278 (1st Cir. 1974).
assets.\textsuperscript{66}

The types of prohibited conduct that would lead to a denial of the discharge relate to either the debtor’s behavior leading up to the bankruptcy filing or his or her conduct during the bankruptcy proceeding itself. For example, a court may deny a debtor’s discharge if he or she: i) transferred or concealed any property from the bankruptcy process so as to defraud any creditor;\textsuperscript{67} ii) transferred or destroyed property within one year before the filing date with the intent to hinder, delay, or defraud a creditor;\textsuperscript{68} iii) transferred or destroyed “property of the estate” after the bankruptcy petition is filed;\textsuperscript{69} iv) concealed, destroyed, mutilated or falsified any financial documents;\textsuperscript{70} v) made a false oath or presented a false claim in connection with the bankruptcy case;\textsuperscript{71} or vi) failed to obey any lawful order of the bankruptcy court.\textsuperscript{72}

Quite significantly, then, a debtor who either transgresses a prohibited behavioral norm, fails to perform his or her duties in the bankruptcy case, or abuses the bankruptcy process itself will be denied a discharge of his or her pre-petition debts.\textsuperscript{73}

\section*{III. Bankruptcy Trustees and State Action}

Before addressing whether a bankruptcy trustee possesses the authority to search a debtor’s home, a preliminary inquiry is whether a bankruptcy trustee is even bound by the dictates of the Fourth Amendment. To be sure, the Fourth Amendment “is applicable only to governmental activity; it does not regulate private searches and seizures.”\textsuperscript{74} That is, the Fourth Amendment is inapplicable to “a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.”\textsuperscript{75} It follows, therefore, that if there is no

\textsuperscript{75} United States v. Jacobsen, 466 U.S. 109, 113 (1984) (quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting). See also United States v. Jones, 31 F.3d 1304, 1309 (4th Cir. 1994) (“The Fourth Amendment protects this reasonable expectation of privacy against government intrusion. It has long been established that the security provided by the Fourth Amendment against unreasonable search and seizure applies solely to government intrusions.”)}
governmental intrusion, the Fourth Amendment is simply not implicated.76
A bankruptcy trustee, however, occupies a grey area “between the extremes
of overt governmental participation in a search and the complete absence of
such participation.”77 This is so because a bankruptcy trustee possesses
characteristics of both a private and governmental actor. As such, the
determination of whether the Fourth Amendment applies to a bankruptcy
trustee is not absolutely free from doubt.

While de minimis or incidental contacts between a private party and
a governmental agency or law enforcement official will not create the
necessary nexus for constitutional purposes, if the government is “involved
either directly as a participant or indirectly as an encourager of the private
citizen’s actions,”78 then the private actor will be deemed to be an
instrument of the state under the Fourth Amendment. In general, courts ask
the following two questions prior to deciding that a sufficiently close nexus
exists to implicate the Fourth Amendment; namely, whether: i) the
government knew of and acquiesced in the intrusive conduct; and ii) the
party performing the search intended to assist law enforcement efforts or to
further his or her own needs.79

Prior to the enactment of the Bankruptcy Code in 1978, “all the
administrative aspects of bankruptcy, including the appointment of trustees,
were performed by the judiciary.”80 For various reasons, including a fear
that the bankruptcy courts would fail to appear impartial to the public and
the participants in the process, Congress created the United States Trustee
Program to oversee the administration of the bankruptcy laws in the United
States.81

The Department of Justice, indisputably an agency of the United

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(citations omitted); United States v. Walther, 652 F.2d 788, 791 (1981) (“A wrongful search or
seizure by a private party does not violate the Fourth Amendment.”) (citations omitted); United States
v. Ellison, 469 F.2d 413, 415 n.2 (9th Cir. 1972) (“Where the search and seizure is by private persons
not assisted by or arranged for by the police, the Fourth Amendment does not apply.”) (citations
omitted).

77 United States v. Walther, 652 F.2d 788, 791 (9th Cir. 1981) (citation omitted).
78 United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982).
79 See United States v. Snowadzki, 723 F.2d 1427, 1430 (9th Cir. 1984) (citations omitted). See
also United States v. Parker, 32 F.3d 395, 398 (8th Cir. 1994) (“Two critical factors in assessing
whether a private party acts as an agent of the government are (1) the government’s knowledge of
and acquiescence in the search, and (2) the intent of the party performing the search.”) (citation
omitted); United States v. Soderstrand, 412 F.3d 1146, 1153 (10th Cir. 2005) (adopting the same two-
part inquiry).
80 1 COLLIER ON BANKRUPTCY ¶ 6.01 (16th ed. 2009).
81 1 COLLIER ON BANKRUPTCY ¶ 6.01 (16th ed. 2009).
States, \(^{82}\) statutorily created the Office of the United States Trustee, which is under the supervision of the United States Attorney General.\(^ {83}\) The Attorney General, through the Office of the United States Trustee, is charged with appointing one United States Trustee for each of the twenty-one regional federal districts across the country.\(^ {84}\) Pursuant to the strategic plan published by the United States Department of Justice, the Office of the United States Trustee is described as “a high-performance, litigating component of the Department of Justice with growing capacities to fulfill its mission, including combating fraud and abuse in the bankruptcy system.”\(^ {85}\) In turn, the twenty-one United States Trustees are charged with the responsibility of executing the United States Trustee Program, which, in part, “acts in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system.”\(^ {86}\)

Each of the twenty-one United States Trustees across the country that are supervised by the Attorney General\(^ {87}\) (and the Office of the United States Trustee) has a statutorily-prescribed list of duties, the most significant of which for present purposes is that each individual United States Trustee “shall establish, maintain, and supervise a panel of private trustees that are eligible and available to serve as trustees”\(^ {88}\) in Chapter 7 bankruptcy cases.\(^ {89}\) Thus, in each district the United States Trustee appoints a number of individuals to serve as Chapter 7 trustees in the bankruptcy cases that are filed in that geographical region.\(^ {90}\) These “panel trustees” serving in the individual bankruptcy cases are predominantly, if not always, private parties, usually an attorney or accountant engaged in private practice.\(^ {91}\)

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\(^{87}\) See 28 U.S.C. § 586(c) (2010).


\(^{89}\) By far, Chapter 7 bankruptcy cases are the most common type of bankruptcy case filed across the country. CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 2 (2d ed. Foundation Press 2009). In a Chapter 7 bankruptcy proceeding, otherwise known as a “liquidation,” the debtor’s existing and available assets are sold and the net proceeds are distributed to creditors in accordance with the priorities established by the Bankruptcy Code. CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 2 (2d ed. Foundation Press 2009).

\(^{90}\) 1 COLLIER ON BANKRUPTCY ¶ 6.01[2][b] (16th ed. 2009). “Cases generally are assigned to trustees in blind rotation.” 1 COLLIER ON BANKRUPTCY ¶ 6.01[2][b] (16th ed. 2009).

Consequently, these private attorneys and accountants serving as trustees in each bankruptcy case would be the persons seeking authority to search a debtor’s home for potentially concealed assets. This scheme can cause confusion for the federal courts. To be sure, the Office of the United States Trustee considers the panel trustees to be private parties, and not governmental employees. Furthermore, the federal courts have held that a bankruptcy trustee is not an officer or employee of the United States government. At the same time, however, once appointed a bankruptcy trustee is under the supervision and direction of the bankruptcy court, and is sometimes afforded derived judicial immunity because he or she “is performing an integral part of the judicial process.” Thus, as a result of the construction of the United States Trustee Program, an individual panel trustee “possesses characteristics of the executive branch, judicial branch, and of a private party.” This amalgamation of traits raises the ultimate issue of whether a private trustee’s conduct can be sufficiently attributed to governmental action so as to implicate a debtor’s Fourth Amendment privacy interests.

The two reported decisions to confront this issue in the context of a search of a debtor’s residence, namely, Taunt v. Barman (In re Barman) and Youngman v. Bursztyn (In re Bursztyn) both concluded that a bankruptcy trustee represents a sufficiently close nexus to the government so as to cause his or her actions to connect with the Fourth Amendment. As the Barman court held, while a bankruptcy trustee is a private actor, “every aspect of a trustee’s position and function is subject to either statutory obligation or to federal executive or judicial branch control.” That is, a bankruptcy trustee is appointed and supervised by an official of the Department of Justice, namely, the United States Trustee. Therefore,

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93 Cromelin v. United States, 177 F.2d 275, 277 (5th Cir. 1949). See also Wells v. United States, 98 B.R. 806, 810 (N.D. Ill. 1989) (noting that a bankruptcy trustee is not under the control of the United States).
95 Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096, 1096 (9th Cir. 1986) (citations omitted); Balser v. Dep’t of Justice, 327 F.3d 903, 910 (9th Cir. 2003) (noting that private trustees “were protected by quasi-judicial immunity, because some ‘acts in bankruptcy proceedings which taken out of context would appear ministerial . . . are actually part of the judicial function’”) (citation omitted).
each bankruptcy trustee serves at the discretion of the United States Trustee.\textsuperscript{101} In addition, the Attorney General of the United States is charged with the responsibility of prescribing the “rule qualifications for membership on the panels” of private trustees that are in turn established by the regional United States Trustees.\textsuperscript{102}

Moreover, it is the Office of the Attorney General and the Office of the United States Trustee, a division of the Department of Justice, that dictate the policy objectives of the United States Trustee Program, which every bankruptcy trustee is bound to follow. In protecting the integrity of the bankruptcy system, one of the Department of Justice’s asserted goals is to “[e]nforce compliance with federal bankruptcy laws and take civil actions against parties who abuse the law or seek to defraud the bankruptcy system.”\textsuperscript{103} To that end, the manual for United States Trustees encourages panel trustees to bring any evidence of fraud or misconduct to the attention of the United States Trustee, who in turn is charged with referring such matters to the appropriate United States Attorney.\textsuperscript{104}

Admittedly, “it is not the United State Trustee’s function to formally direct a trustee’s action in a particular case.”\textsuperscript{105} However, while this is true, based upon the foregoing it is sensible to conclude that the government is involved either directly as a participant or indirectly to encourage a panel trustee’s actions in a particular bankruptcy case. Thus, based upon the foregoing, the conduct of a bankruptcy trustee is sufficient state action to implicate the Fourth Amendment. Despite this conclusion, however, while a bankruptcy trustee is bound by the Fourth Amendment, he or she does not necessarily need to request a warrant prior to searching a debtor’s home.


\textsuperscript{102} See 28 U.S.C. § 586(d)(1) (2010) (“The Attorney General shall prescribe by rule qualifications for membership on the panels established by United States trustees under paragraph (a)(1) of this section, and qualifications for appointment under subsection (b) of this section to serve as standing trustee in cases under chapter 12 or 13 of title 11.”).


\textsuperscript{104} To this end, 18 U.S.C. § 3057(a) provides as follows: “Any judge, receiver, or trustee having reasonable grounds for believing that any violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed. Where one of such officers has made such report, the others need not do so.” 18 U.S.C. § 3057(a) (2010).

\textsuperscript{105} 1 COLLIER ON BANKRUPTCY ¶ 6.11 (16th ed. 2009).
IV. PRIOR COURT DECISIONS ADDRESSING THE INTERSECTION BETWEEN BANKRUPTCY LAW AND THE FOURTH AMENDMENT

As previously noted, to date only two reported decisions have squarely addressed the question of whether a bankruptcy trustee can conduct a search of a debtor’s home, and its related intersection with the Fourth Amendment. Both decisions authorized a search of a debtor’s home, albeit after the bankruptcy trustee obtained a warrant from the court. 106

The first reported bankruptcy court decision to tackle directly the intersection of bankruptcy law and the Fourth Amendment is Taunt v. Barman (In re Barman). 107 In Barman, Norman Barman filed a petition for Chapter 7 relief; 108 in his schedules accompanying the bankruptcy petition, Barman listed wearing apparel worth $500 as his only asset. 109 However, Barman was apparently engaged in a scheme to place personal property beyond the reach of creditors and purchase parcels of real property in the names of others in order to avoid liability to his own creditors. Upon learning of this plan, the bankruptcy trustee filed a complaint against Barman, alleging in part that he fraudulently transferred funds to his wife for the purchases of various homes and concealed assets belonging to the bankruptcy estate. 110 In addition, the trustee sought to revoke Barman’s discharge. 111

Contemporaneous with the filing of the complaint, the bankruptcy trustee filed an ex parte motion for an order authorizing the trustee to enter Barman’s home “and to inspect, inventory, and appraise personal property.” 112 The need to request ex parte relief was premised on the trustee’s belief that “the debtor would attempt to conceal assets at the home if given advance notice” 113 based upon “the [d]ebtor’s previous violation of a bankruptcy court order . . . and his experience in moving assets in a

106 Although beyond the scope of this Article, the ability of a bankruptcy trustee to obtain a search warrant from a bankruptcy court is not free from doubt. See generally In re Application of Trustee in Bankruptcy for a Search Warrant to Uncover Property of the Estate Held in Violation of 18 U.S.C. § 152, 173 B.R. 341 (N.D. Ohio 1994) and Spacone v. Burke (In re Truck-A-Way), 300 B.R. 31 (E.D. Cal. 2003).
variety of situations.” The bankruptcy court granted the motion.

Following the subsequent search, Barman attempted to suppress the evidence obtained by the bankruptcy trustee during the search of his home on the grounds that the search violated his rights against unreasonable searches and seizures under the Fourth Amendment. For many of the reasons expressed in Part III of this Article, the Barman court first concluded that a bankruptcy trustee has a sufficiently close nexus “to government and its power that it is necessary and appropriate to apply to the trustee the fourth amendment limits on government power.” From this conclusion, the court then considered the nature and scope of a debtor’s expectation of privacy for Fourth Amendment analysis. On this note, the bankruptcy court observed that debtors have a significantly reduced expectation of privacy in their homes. According to the court, this reduced expectation of privacy “is a natural consequence of the substantial and detailed disclosures that are inherent in the bankruptcy process.”

Despite this conclusion, however, the bankruptcy court did not go so far as to hold that a debtor has no reasonable expectation of privacy in his or her residence or personal property upon filing for bankruptcy relief. For the Barman court, three considerations militated against such a finding. First, the court noted “that unlike the written and filed disclosures that are available to the public by law, an inspection of a debtor’s home is not open to the public.” Second, the court observed that “nothing in the Bankruptcy Code states or implies an obligation upon a debtor to permit an inspection by a trustee without a court order.” That is, “[n]either the

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obligation to file written disclosures nor the obligation to appear at the creditors’ meeting relates at all to an inspection of a debtor’s residence by the trustee."  

Third, the court held that although the Bankruptcy Code causes the debtor’s property to be brought into the bankruptcy estate upon the filing of a bankruptcy petition, the estate’s interest in the property “is quite limited, both in time and in function, and the debtor retains a substantial practical and beneficial interest in that property even while it is temporarily property of the estate.”

Having determined that a bankruptcy trustee is bound by the Fourth Amendment and that a debtor in bankruptcy still possesses a reduced expectation of privacy in his or her residence, the Barman court then defined the specific protections to which a debtor in bankruptcy is entitled under the Fourth Amendment. Without much, if any, explication of why it chose to do so, the Barman court accepted the ultimate dictate of Camara v. Municipal Court of the City and County of San Francisco, namely, that a bankruptcy trustee needs to secure a search warrant prior to searching a debtor’s home for concealed assets. The court did not consider the possible constitutionality of a warrantless search.

As the Barman court conceded, experience “demonstrates that in carrying out the trustee’s obligations under the Bankruptcy Code, the trustee may need to inspect a debtor’s residence for property of the estate.” Significantly, and again as the court recognized, “such a need may arise when, as here, the trustee has reason to believe that there are undisclosed assets to be administered for the benefit of the estate.” The court further observed that bankruptcy trustees may have no way to fulfill the statutory obligation to account for all of the property of the estate without an inspection of a debtor’s residence. To this end, the Barman court held as follows in this regard: “The Court also considers that a procedure for an inspection order in bankruptcy would be an ordinary part of the judicial and administrative processes of bankruptcy. Indeed, allowing trustees to perform inspections without a court order would be ‘out of place.’” Taunt v. Barman (In re Barman), 252 B.R. 403, 417 (Bankr. E.D. Mich. 2000) (citing Wyman v. James, 400 U.S. 309, 324 (1971)). But see Spacone v. Burke (In re Truck-A-Way), 300 B.R. 31, 38 (E.D. Cal. 2003) (stating in dicta that it strongly disagreed with the Barman court’s interpretation of a bankruptcy court’s authority under the Fourth Amendment).

concluded that as a result of a debtor’s obligation to disclose all of his or her assets and cooperate with the bankruptcy trustee as a condition to receiving a discharge of indebtedness, a search of a debtor’s home may be “a crucial part of the process and therefore a matter of substantial need.”

Ultimately, in balancing the public need for the proper administration of the bankruptcy process against the disruption caused to a debtor by a residence search, the court sided with the ability of a bankruptcy trustee to search a debtor’s home after first obtaining a warrant from the court and complying with the following procedures. First, the bankruptcy trustee must file a written motion requesting an inspection order, setting forth the facts establishing reason to believe that there is property of the estate on the premises to be inspected. Second, the motion should presumptively be filed according to the regular motion process utilized by the court, that is, upon notice and an opportunity for the debtor to be heard. Third, the motion should seek to conduct the search during regular business hours, in the debtor’s presence, without forcible entry. Fourth, the contemplated order must identify the premises to be inspected. Fifth, and finally, any warrant granted by the court would not authorize the seizure of any property, only the inspection, inventory, and appraisal of such property.

Barman argued against the use of the warrant insofar as it failed to specifically describe the property that constituted the object of the search,

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133 The Barman court denominated such a request an “inspection order.” However, there is no appreciable difference between this and a search warrant for purposes of investigating the constitutionality of such a procedure. Cf. United States v. Kone, 591 F. Supp. 2d 593, 608-09 (S.D.N.Y. 2008) (“The Government’s argument fails, however, because the Order, unlike a Fourth Amendment warrant, did not necessarily issue upon a finding of probable cause. Although the Order was not labeled a ‘warrant,’ nomenclature is not dispositive.”) (citation omitted).
thereby analogizing the authorization to a “general warrant.”\textsuperscript{139} The \textit{Barman} court rejected this argument, stating that “such a restriction would unduly compromise the trustee’s ability to carry out his [or her] statutory obligations and potentially reward the dishonest or sloppy debtor.”\textsuperscript{140}

Although the ability of a bankruptcy trustee to conduct a warrantless search of a debtor’s home was not before the \textit{Barman} court, the decision is nevertheless significant to the thesis advanced herein in several respects. First, the court recognized that by filing for bankruptcy relief, a debtor experiences a significantly reduced expectation of privacy in his or her home which society is prepared to consider reasonable.\textsuperscript{141} This observation undergirds the application of bankruptcy law to the “special needs” exception to the warrant requirement. Second, the \textit{Barman} decision observed that in order to fulfill the statutory obligation to investigate the financial affairs of the debtor, a trustee may need to inspect a debtor’s residence if there is reason to believe the debtor is hiding assets from the bankruptcy process.\textsuperscript{142} Thus, the argument that a bankruptcy trustee should be authorized to search a debtor’s home should not appear outlandish. Indeed, if the findings of the empirical study that 41\% of filed bankruptcy cases involve debtors attempting to conceal assets from the bankruptcy process are accurate, and can be extrapolated as representative of national bankruptcy filings, then the need for a bankruptcy trustee to search a debtor’s home for concealed assets is a matter of serious concern. Third, the court, in the application of its balancing test, concluded that the public interest in full disclosure by debtors in the bankruptcy system outweighs the privacy interests of any single debtor.\textsuperscript{143}

Approximately seven years after the \textit{Barman} decision, another court issued its opinion in \textit{Youngman v. Bursztyn (In re Bursztyn)}.\textsuperscript{144} In \textit{Bursztyn}, Miriam Bursztyn filed a voluntary petition for bankruptcy relief under Chapter 7 of the Bankruptcy Code.\textsuperscript{145} On her bankruptcy petition, Bursztyn listed as her only assets: a bank account, costume jewelry, nominal household goods and clothing, a claim against her former husband, and two

used luxury vehicles.\textsuperscript{146} Significantly, the debtor answered “none” on the inquiry as to whether she owned any pictures or other objects of art.\textsuperscript{147} Furthermore, on her “Statement of Financial Affairs,”\textsuperscript{148} Bursztyn answered “none” to a series of questions asking whether she had parted with any personal property, either voluntarily or involuntarily, during the period of time preceding the filing of her bankruptcy petition.\textsuperscript{149}

During the course of the bankruptcy trustee’s investigation into Bursztyn’s financial affairs, the trustee obtained two written judicial decisions rendered in the Debtor’s ongoing state court divorce proceedings that belied the disclosures made by Bursztyn on her bankruptcy petition and accompanying schedules.\textsuperscript{150} Apparently over the course of their marriage, the Bursztyns acquired a significant art collection comprised on lithographs, photographs and original paintings by various artists.\textsuperscript{151} Moreover, the Debtor’s former husband had also given her many pieces of fine jewelry.\textsuperscript{152} During her matrimonial trial, Bursztyn claimed to be no longer in possession of any artwork or jewelry.\textsuperscript{153} However, both the state trial court and state appellate court simply found Bursztyn to lack credibility on the issue, and based upon the developed factual record, believed that Bursztyn remained in possession of the jewelry and artwork.\textsuperscript{154}

Based upon these findings, the trustee applied \textit{ex parte} to the bankruptcy court for an order authorizing her to enter Bursztyn’s residence “with the assistance of the United States Marshal’s Service, her counsel, and an appraiser to search for, seize, and appraise estate property located within the residence.”\textsuperscript{155} After evaluating the trustee’s request, the

\textsuperscript{148} All consumer debtors are required to complete a “Statement of Financial Affairs” as part of his or her bankruptcy petition, which provides a summary of the debtor’s financial history, transactions, and operations over certain periods of time before the commencement of the case. \textit{See} 11 U.S.C. § 521(a)(1)(B)(iii) (2010). \textit{See also} \textit{Fed. R. Bankr. P.} 1007.
\textsuperscript{149} Youngman v. Bursztyn (\textit{In re} Bursztyn), 366 B.R. 353, 356 (Bankr. D.N.J. 2007). As all consumer debtors must, Bursztyn certified the responses and representations made on both her bankruptcy petition and accompanying schedules under penalty of perjury.
\textsuperscript{150} Youngman v. Bursztyn (\textit{In re} Bursztyn), 366 B.R. 353, 356 (Bankr. D.N.J. 2007). The second of these state court matrimonial decisions was issued only three months before Bursztyn filed her bankruptcy petition.
bankruptcy court entered an order authorizing the bankruptcy trustee, her counsel, an appraiser, and representatives of the United States Marshal Service to enter Bursztyn’s residence during normal business hours to search for, seize, and appraise the uncovered assets, namely, artwork and jewelry. The bankruptcy trustee subsequently uncovered various fine jewelry and artwork amounting to approximately $243,000.00, located in various places in the home, including in laundry bags and suitcases tucked away in the bottom of the debtor’s bedroom closet. The report generated by the appraiser encompassed eighteen pages; in all, the search uncovered 189 pieces of fine jewelry and 10 works of art. Understandably, Bursztyn thereafter filed an opposition to the bankruptcy trustee’s actions, but the court concluded that the bankruptcy trustee’s search of her residence was reasonable under the circumstances, and thus, constitutional.

Although the analysis in Bursztyn largely reflected the conclusions reached by the Barman decision preceding it, the Bursztyn decision is itself important in two very significant ways. First, the bankruptcy court explicitly adopted the balancing test created by the United States Supreme Court in instances of civil administrative searches. Second, the bankruptcy court observed that incursions on the protections granted by the Fourth Amendment are only modified “to deal with special circumstances,” implicitly concluding that bankruptcy is, in fact, one such special circumstance.

Both the Barman and Bursztyn decisions aptly noted that in performing his or her duties, a bankruptcy trustee may need to inspect a debtor’s residence for potentially undisclosed assets of the estate to be administered for the benefit of creditors. Indeed, as both decisions recognize, “a trustee may have no alternative in carrying out his or her statutory obligations to marshal and account for all of the property of the estate without an inspection of the debtor’s residence.” Thus, the necessity for such a remedy has already been acknowledged; the remaining inquiry is what standard should govern such conduct.

While *Barman* and *Bursztyn* demonstrate that a bankruptcy trustee can obtain a warrant to search a debtor’s home, several factors weigh in favor of a warrantless search standard in the bankruptcy context. First, the bankruptcy courts are not in concert on the issue of whether they have the power and authority to issue a search warrant. Second, if the concealment of assets and debtor fraud is in fact a systemic problem plaguing the bankruptcy law system, then an unannounced warrantless search is needed where personal assets are easily moved or hidden. Third, if there is cause to believe that a particular debtor is hiding assets, then any advance notice to the debtor of a trustee’s efforts to secure a warrant would possibly defeat the goal of the search. In other words, the assets would simply “disappear.” Fourth, and similarly, the delay inherent in obtaining a warrant would not promote the need for a bankruptcy trustee to act swiftly before any dissipation of assets. For example, in *Bursztyn* almost a week elapsed between the initial application for a search order by the trustee and its issuance by the bankruptcy court. Such delays would frustrate the trustee’s ability to fully investigate the debtor’s financial affairs. Fifth, and finally, the capacity of a trustee to conduct a warrantless search of a debtor’s home, while still satisfying the Fourth Amendment, will serve to deter any fraudulent conduct by future debtors who voluntarily seek bankruptcy relief but would otherwise intentionally fail to comply with the mandated statutory duties.

**V. The Capacity Of A Bankruptcy Trustee To Conduct A Warrantless Search Of A Debtor’s Home**

The Fourth Amendment to the United States Constitution protects people against unreasonable searches and seizures.\(^{164}\) To date, the Supreme Court’s Fourth Amendment jurisprudence has been described in the scholarly literature as “an embarrassment,”\(^{165}\) a “doctrinal incoherence,”\(^{166}\) “the Supreme Court’s tarbaby,”\(^{167}\) and an utter “mess.”\(^{168}\)

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\(^{164}\) The Fourth Amendment to the Constitution provides as follows: “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.” U.S. CONST. amend. IV.


But despite the differences of opinion regarding modern Fourth Amendment doctrine, several observations can be made with relative assurance. First, the indiscriminate and suspicionless searches and seizures carried out by British officials under the authority of the writs of assistance “were the immediate evils that motivated the framing and adoption of the Fourth Amendment.”169 Second, particularly because the execution of the writs of assistance enabled British officials to search an individual’s home without restraint, the concern for privacy in the home has been described as “the root of the Fourth Amendment itself.”170 Indeed, the United States Supreme Court has consistently recognized a special privacy protection for intrusions into the home.171 The Court in Payton v. New York expressed this sentiment in unmistakable terms: “The Fourth Amendment protects the individual’s privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home.”172


170 Craig M. Bradley, “Knock and Talk” and the Fourth Amendment, 84 Ind. L.J. 1099, 1101 (citation omitted). As Professor Tracey Maclin explains: “Protecting the security of private homes was certainly a priority for the Framers. Indeed, one could say that the Framers were particularly sensitive about safeguarding private homes from governmental intrusion, as the constitutional privilege against unreasonable search and seizure ‘arose from the harsh experience of householders having their doors hammered open by magistrates and writ-bearing agents of the crown. Indeed, the Fourth Amendment is explainable only by the history and memory of such abuse.’ The intrusions that the colonists experienced at the hands of British customs officers ‘had done violence to the ancient maxim that ‘A man’s house is his castle.’” Tracey Maclin, Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged, 82 B.U. L. Rev. 895, 933 (2002).


172 Payton v. N.Y., 445 U.S. 573, 589 (1980). See also Silverman v. United States, 365 U.S. 505, 571 (1961) (“The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”) (citation omitted); Kyllo v. United States, 533 U.S. 27, 31 (2001) (stating the same) (quoting Silverman v. United States, 365 U.S. 505, 571 (1961)).
Third, the overriding function of the Fourth Amendment “is to protect personal privacy and dignity against unwarranted intrusion by the state.” 173 To that end, in order to claim the protection of the Fourth Amendment against unwarranted intrusions, an individual must satisfy the two-part test enunciated by Justice Harlan in Katz v. United States, 174 first, the individual must exhibit an actual subjective expectation of privacy, and second, this expectation of privacy must be one that society is prepared to recognize as reasonable. 175 Fourth, a condition precedent for constitutional scrutiny is the occurrence of a government-initiated “search” or “seizure.” Under the Fourth Amendment, a “search” occurs “when an expectation of privacy that society is prepared to consider reasonable is infringed.” 176 Further, a “seizure” of property occurs for Fourth Amendment purposes “when there is some meaningful interference with an individual’s possessory interests in that property.” 177 Fifth, the Fourth Amendment applies in both the criminal and civil contexts. 178

This is where the consensus regarding the Fourth Amendment ends. The Amendment itself “is generally interpreted as containing two clauses: one speaking to unreasonable searches and seizures, and the other discussing the requirements for the issuance of warrants.” 179 “During the twentieth century, debate among the Justices and between scholars has focused on the relationship between the Fourth Amendment’s two clauses.” 180 “The relationship between these two clauses is murky at best and has been the topic of much controversy in the two-hundred-plus years since their drafting.” 181

176 United States v. Jacobsen, 466 U.S. 109, 113 (1984) (citations omitted). Because defining government entry into the home as a search is so conventional, this Article presumes that such conduct by a bankruptcy trustee would constitute a search under the Fourth Amendment. See Marisa Antos-Fallon, The Fourth Amendment and Immigration Enforcement in the Home: Can ICE Target the Utmost Sphere of Privacy?, 35 Fordham Urb. L.J. 999, 1016 (2008) (“Indeed, defining government entry into the home as a search is so commonplace that it is not frequently discussed in judicial opinions.”) (citation omitted).
181 Sam Kamin, The Private is Public: The Relevance of Private Actors in Defining the Fourth Amendment, 46 B.C. L. Rev. 83, 88 (2004). Professor Tracey Maclin describes the essence of the controversy in the following terms: “One side of the debate argues that the clauses of the amendment are independent declarations. The first clause, the Reasonableness Clause, merely guarantees a freedom from unreasonable searches and seizures. The second clause, the Warrant Clause, merely specifies the form and content of search and arrest warrants. Accordingly, the proponents of a
Despite this controversy, the Court has in fact been steadfast in its application of the Fourth Amendment to the home. Indeed, the Court has repeated the principle that “[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.” 182 Because a bankruptcy case is a civil proceeding, many of the exceptions to the warrant requirement, such as exigent circumstances or a search incident to a lawful arrest, obviously do not apply. That said, however, there are at least three distinct theories by which a bankruptcy trustee need not comply with the warrant requirement prior to conducting a search of a debtor’s home: i) the “special needs” administrative search exception; ii) the “closely regulated industry” search exception; and iii) implied consent.

**A. Bankruptcy As A “Special Needs” Administrative Search Exception To The Warrant Requirement**

Beginning in the middle of the twentieth century, the United States Supreme Court was called upon to determine the applicability of the Fourth Amendment in the civil, as opposed to the criminal, context. The Court first considered the application of the Fourth Amendment to civil searches in *Frank v. State of Maryland*. 183 In the decision, the Court addressed the issue of whether a homeowner’s conviction pursuant to a Baltimore City Code for resisting a warrantless inspection of her home to uncover possible rodent infestation violated the Fourth and Fourteenth Amendments of the Constitution. 184 The Court upheld the warrantless search, emphasizing in

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its holding that the Fourth Amendment protects against governmental intrusion where the purpose is for eventual criminal prosecution. In light of the “long history” of health ordinances and of the “modern needs” to conduct inspections, the Court held that the Fourth Amendment did not apply to an administrative search.

The holding in Frank, however, was short-lived. In the companion cases Camara v. Municipal Court of the City & County of San Francisco and See v. City of Seattle, the Court articulated a preference for obtaining a warrant as a condition precedent to searching both residential dwellings and commercial premises. Since the issuance of the Camara and See decisions in 1967, the administrative search cases under the Fourth Amendment have applied to a variety of different contexts, including, but not limited to: commercial property; inspections for housing code violations; so-called “heavily regulated industries”; inspections under the Aid to Families with Dependent Children program; investigations for possible arson; searches of children in public schools; searches of state and federal governmental employees; searches of probationers and parolees; drug and alcohol testing of railroad employees; and hospital


Frank v. State of Maryland, 359 U.S. 360, 365 (1959) (“Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to realize what history makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought.” overruled by Camara v. Mun. Ct., 387 U.S. 523 (1967) (internal citation omitted).


See generally Griffin v. Wis., 483 U.S. 868 (1987); United States v. Grimes, 225 F.3d 254
patients.\textsuperscript{198} Although the permutations of the possible types of administrative searches are myriad, what is absent is any application of the administrative search doctrine, and in particular its “special needs” strain, to the bankruptcy law context.

The earliest Supreme Court administrative search cases undeniably expressed a preference for complying with the Warrant Clause, thereby requiring a warrant prior to undertaking an administrative search.\textsuperscript{199} However, shortly thereafter, “the Court developed its administrative search doctrine, in which it assessed the constitutionality of civil searches of commercial premises solely under the Reasonableness Clause.”\textsuperscript{200} In its modern iteration, the Court has “resolved the debate concerning the relationship between the Fourth Amendment’s two clauses in favor of limiting the Warrant Clause’s application to criminal searches, while resolving the constitutionality of all civil searches solely under the Reasonableness Clause.”\textsuperscript{201} From a jurisprudential perspective, within the framework of its administrative search doctrine the Supreme Court fashioned its “special needs” principle, “as civil search litigation less often involved commercial premises and increasingly involved challenges to more personalized searches.”\textsuperscript{202}

Unlike its criminal law counterpart, the Supreme Court’s administrative search jurisprudence has proven relatively stable over the past several decades.\textsuperscript{203} Starting with the \textit{Camara} decision, the Court has clearly differentiated between searches undertaken in the criminal context from the civil context. Most notably, the \textit{Camara} Court recognized that the
traditional concept of criminal law “probable cause” as a preliminary showing prior to the issuance of a warrant would simply prove unworkable in the administrative setting. Consequently, in concluding that reasonableness is the ultimate standard regarding the constitutionality of a search, the Court in Camara first articulated what is now the generally accepted test for reasonableness in the civil context; namely, a balancing of the need to search against the invasion which the search entails.

Commencing with New Jersey v. T.L.O., the United States Supreme Court has asserted under its Fourth Amendment jurisprudence that “departures from the warrant and individualized suspicion models are justified where the intrusion serves a ‘special need’ that is ‘divorced from the State’s general interest in law enforcement.’” The nomenclature “special need” was first articulated by Justice Blackmun in his concurring opinion in T.L.O., wherein he espoused that “[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.” But as Professor Thomas K. Clancy has observed, the term “special need” is misleading. According to Professor Clancy, the Supreme Court does not refer to “any ‘need’ in the sense of necessity; rather it speaks of a special interest.” That is, interests of a governmental purpose other than criminal law enforcement.

Although Justice Blackmun qualified the special needs cases as the exceptional circumstances, the application of the doctrine has proliferated in the twenty-five years since the T.L.O. decision. During this time, the

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204 See Michael R. Dimino, Sr., Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness, 66 WASH. & LEE L. REV. 1485, 1498-99 (2009) (noting that in the law enforcement context, “the Fourth Amendment’s probable-cause requirement generally sets the balance between the public interest in the potential discovery of crime, evidence, or a suspect against the privacy interests that would be sacrificed by the intrusion”) (citations omitted).
205 Camara v. Mun. Ct., 387 U.S. 523, 538 (1967) (“Where considerations of health and safety are involved, the facts that would justify an inference of ‘probable cause’ to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken.”).
208 THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION § 11.3.4.4.2.2 (Carolina Academic Press 2008).
212 For a critique of this expansion of the special needs doctrine, see generally Jennifer Y. Buffaloe, “Special Needs and the Fourth Amendment: An Exception Poised to Swallow the Warrant
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special needs exception to the warrant requirement has been adopted in a variety of contexts, including: i) a search of a public school student;\textsuperscript{213} ii) a public employer’s search of a public employee’s office;\textsuperscript{214} iii) a search of a probationer or parolee’s home;\textsuperscript{215} and iv) drug testing of railroad employees, state civil service employees, United States Customs Service employees, and high school students engaged in extracurricular activities.\textsuperscript{216}

Following \textit{T.L.O.}, in the companion cases of \textit{National Treasury Employees Union v. Von Raab}\textsuperscript{217} and \textit{Skinner v. Railway Labor Executives’ Association},\textsuperscript{218} the Supreme Court continued the development of the special needs doctrine by initially reaffirming “the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance.”\textsuperscript{219} The reasonableness of a particular search depends ultimately “on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.”\textsuperscript{220} Consequently, to test the constitutionality of a search under the Reasonableness Clause, where a governmental intrusion serves special needs, beyond the normal need for crime detection, a court will balance the individual’s privacy expectations against the government’s interests in conducting the search or seizure.\textsuperscript{221}

The context in which the Court has chosen to utilize the special

\textsuperscript{221} Nat’l Treasury Employees Union v. Von Rabb, 489 U.S. 656, 665 (1989) (citation omitted). See also Wyo. v. Houghton, 526 U.S. 295, 299-300 (1999) (“[W]e must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”) (citations omitted).
needs exception to the warrant requirement bears a direct connection in its applicability to the bankruptcy law system.\textsuperscript{222} A survey of the special needs cases evidences its use when either: i) an individual is compelled to take some action, such as public school students who are required to attend schools;\textsuperscript{223} ii) there is a need for safety to protect the general public from hazardous conditions;\textsuperscript{224} or iii) the individual voluntarily accepts some status, condition, or benefit from the government.\textsuperscript{225} It is this third special needs application, the voluntariness of some status, condition or benefit which has the closest correlation to the bankruptcy law process. More precisely, it is the special needs cases involving probationers or parolees\textsuperscript{226} that have the most analogous circumstances to consumer debtors in the bankruptcy law system.

The first Supreme Court decision to apply the special needs doctrine to probationers or parolees was \textit{Griffin v. Wisconsin}.\textsuperscript{227} In \textit{Griffin}, Joseph Griffin, who was on probation after being convicted of a felony offense, had his home searched by probation officers acting without a warrant.\textsuperscript{228} After

\begin{itemize}
\item \textsuperscript{222} Michael R. Dimino, Sr., \textit{Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness}, 66 WASH. & LEE L. REV. 1485, 1522 (2009) ("Thus in special-needs cases it is typically the context of the search, and not its object, that earns it the appellation.") (citation omitted). \textit{See also} Chandler v. Miller, 520 U.S. 305, 314 (1997) ("When . . . 'special needs' – concerns other than crime detection – are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.").
\item \textsuperscript{223} \textit{See}, e.g., N.J. v. T.L.O., 469 U.S. 325 (1985); Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010 (7th Cir. 1995).
\item \textsuperscript{224} \textit{See}, e.g., Nat'l Treasury Employees Union v. Von Rabb, 489 U.S. 656 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989).
\item \textsuperscript{226} Although used interchangeably herein, differences exist between parole and probation. Parole "is the conditional release of a convict before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on violation of the condition of the parole." Beavers v. State, 666 So.2d 868, 870 (Ala. Crim. App. 1995) (citation omitted). By contrast, probation "ordinarily refers to judicial action taken prior" to the prison door being closed on the defendant. Patuxent Inst. Bd. of Review v. Hancock, 620 A.2d 917, 926 (Md. 1993) (citation omitted).
\item \textsuperscript{227} Griffin v. Wis., 483 U.S. 868 (1987).
\item \textsuperscript{228} Griffin v. Wis., 483 U.S. 868, 870 (1987). Under Wisconsin statutory law, probationers are subject to conditions set by the court and regulations established by the Wisconsin Department of Health and Social Services. Griffin v. Wis., 483 U.S. 868, 870 (1987). One of the Department’s regulations permits any probation officer to search a probationer’s home without a warrant as long as there are “reasonable grounds” to believe the probationer is in possession of any contraband or weapons. Griffin v. Wis., 483 U.S. 868, 870-71 (1987).
\end{itemize}
Griffin’s probation officers conducted the warrantless search of his home and discovered a handgun, a violation of the terms of his probation, Griffin attempted to suppress the evidence seized during the search in connection with his subsequent charge with possession of a firearm by a convicted felon.229

In upholding the warrantless search under the Fourth Amendment, the Court held that a state’s operation of a probation system is a special need beyond normal law enforcement, and probationers, even in their homes, “do not enjoy ‘the absolute liberty to which every citizen is entitled, but only conditional liberty properly dependent on [the] observance of special probation restrictions.’”230 In other words, the special need of supervising probationers permitted “a degree of impingement upon privacy that would not be constitutional if applied to the public at large.”231 Furthermore, in addition to the diminished expectation of privacy probationers experience in their homes, another factor swaying the Court to approve the warrantless search was the existence of the ongoing, partly adversarial relationship between a probationer and his or her probation officer.232 That is, given the nature of this relationship, the Court concluded that it would be “both unrealistic and destructive of the whole object of the continuing probation relationship to insist upon the same degree of demonstrable reliability” as in other contexts requiring a warrant.233

Finally, other factors militating in favor of foregoing the warrant requirement included the delay in obtaining the warrant, thereby making it more difficult for probation officers “to respond quickly to evidence of misconduct,” and the associated reduction in the “deterrent effect that the possibility of expeditious searches would otherwise create.”234 In its next case involving probationers, United States v. Knights,235 the Court supplemented this special needs doctrine. In upholding the warrantless search of a probationer’s apartment, the Court balanced the competing interests in favor of the government, concluding that a “reasonable suspicion” on behalf of the government is all that is needed to justify the search.236

236 United States v. Knights, 534 U.S. 112, 121 (2001) (“When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is
In its last special needs case regarding probationers or parolees, *Samson v. California*, the Court addressed an issue left unresolved by *Knights*, namely, whether a condition of release can so diminish or eliminate a released prisoner’s reasonable expectation of privacy that a suspicionless search would pass Fourth Amendment scrutiny. Based predominantly upon the California Penal Code and the state’s parolee supervisory system, the Court held that the Fourth Amendment permits a suspicionless search of a parolee. For purposes of analogizing the probation or parole special needs doctrine to the status of consumer debtors, *Samson* is distinguishable from *Knights* and *Griffin* in two very important respects.

First, the search in *Samson* did not occur in the parolee’s home, but rather on a public street. Second, and as Justice Stevens’ dissent makes plain, “neither *Knights* nor *Griffin* supports a regime of suspicionless searches, conducted pursuant to a blanket grant of discretion untethered by any procedural safeguards, by law enforcement personnel who have no special interest in the welfare of the parolee or probationer.” Importantly, and particularly because a bankruptcy trustee’s intrusion on privacy would occur in the home, the special needs exception for bankruptcy law advocated herein would require an element of individualized suspicion of the debtor prior to any search, namely, reasonable suspicion that the debtor was concealing assets from the bankruptcy process. Nonetheless, *Samson* is useful to the analogy between probationers or parolees and consumer debtors for the reasons expressed below.

Although analogizing consumer debtors to parolees and probationers may appear at first blush distasteful to many, the purpose of the exercise is not to impugn the character of consumer debtors as a group, but rather to demonstrate a similarity of circumstances, which if turn should lead to a rationale conclusion that the creation of a new special needs exception to the Fourth Amendment for bankruptcy law would not be so shocking.

First, while Article I, § 8, clause 4 of the United States
Constitution grants Congress the authority to enact a uniform, national bankruptcy law, an individual does not have a constitutional right to file for bankruptcy protection. More particularly, federal courts have routinely noted that a discharge in bankruptcy is not a right, but a privilege bestowed upon deserving debtors pursuant to federal statutory law. This privilege is exercised by the bankruptcy court “only so long as the judicial process which provides it is not abused.” Moreover, and quite significantly, in the overwhelming majority of cases, a consumer debtor voluntarily seeks relief under the Bankruptcy Code. Similarly, “by accepting the privilege of parole a prisoner consents to the broad supervisory and visitatorial powers which his parole officer must exercise over his person and property until the term of his sentence shall have expired or been terminated.”

Indeed, courts have concluded that like the filing of a bankruptcy petition, “[r]elease on parole is a privilege and not a right.” Further, like the filing of a bankruptcy petition to obtain the discharge of debt, the acceptance of probation or parole is a voluntary act accepted for a corresponding benefit, that is, release from custody.

Consequently, both the consumer debtor
and the probationer voluntarily accept a benefit bestowed by the
government or the court – the discharge of one’s debts and the release from
incarceration – in exchange for agreeing to be bound by certain conditions.

Second, regarding the acceptance of conditions, consumer debtors,
in order to receive the benefit of a discharge of their pre-petition
indebtedness, must fully cooperate in the bankruptcy process by, among
other things, completely disclosing the extent of their assets.\textsuperscript{250} To be sure,
“[c]andor, accuracy and integrity are required of a debtor in bankruptcy.”\textsuperscript{251}
And while the conditions imposed upon probationers and parolees can be
varied and do not necessarily hinge upon candor and integrity, the parole
and probation systems depend upon a parolee or probationer complying
with the conditions imposed by a court, statute, or regulation.\textsuperscript{252} More
specifically, like the denial or revocation of the benefit of the discharge for
violating some behavior norm provided by the Code,\textsuperscript{253} the benefit of parole
or probation, namely, serving part of the sentence in the community rather
than in prison, may be revoked for non-compliance.\textsuperscript{254}

Third, as a result of having filed for bankruptcy protection,
consumer debtors have a “significantly” reduced expectation of privacy in
their houses, papers and effects that society is prepared to recognize as
reasonable.\textsuperscript{255} As the court in \textit{Burgener} noted, this significantly reduced

\textit{Burgener}, this defendant entered into a voluntary agreement whereby he waived his right to privacy
in exchange for the privilege of being released on probation. Unlike \textit{Burgener}, this defendant had
every right to refuse to accept the terms and conditions of probation proffered by the court.”\textsuperscript{256}
terms fixed by the . . . court, he may challenge an invalid condition of probation in his habeas corpus
proceeding.”) (citation omitted).

\textsuperscript{252} Melissa Weiss, \textit{Interpreting Searches of Pretrial Releasees Through the Lens of the Fourth
Amendment Special Needs Exception}, 35 Hofstra L. Rev. 363, 400 (2006) (“Releasee compliance is
essential to furthering the aims of the bail system.”). \textit{Cf.} Rizzo v. Terenzi, 619 F. Supp. 1186, 1189
(E.D.N.Y. 1985) (“The viability of the parole system depends upon certain restrictions, among them
the ability to monitor and control travel.”) (citation omitted).
\textsuperscript{256} Jennifer Taylor, \textit{Some Bargain: How Bankruptcy Courts May Now Require a Debtor to Relinquish
(“Given the disclosure requirements imposed upon individual debtors by the Bankruptcy Code, a
debtor cannot reasonably expect to retain the same level of privacy inside of bankruptcy as out.”)
(citations omitted); Mary Jo Obee & William C. Ploutffe, Jr., \textit{Privacy in the Bankruptcy Courts}, 14
the Bankruptcy Code acquiesce to some invasion of their privacy rights”); United States v. Andujar,
2006 WL 3741843, *3 (3d Cir. Dec. 12, 2006) (holding that a debtor in bankruptcy has a reduced
expectation of privacy in his or her documents); Wade v. Smith, 1991 WL 504873, *6 (S.D. Ind. May
30, 1991) (“[A] bankrupt cannot reasonably expect to be free from intrusions by the trustee, who is
expectation of privacy “is a natural consequence of the substantial and detailed disclosures that are inherent in the bankruptcy process.”

Likewise, by agreeing to be bound by certain conditions, it has repeatedly been held that probationers and parolees also have a significantly diminished expectation of privacy in their homes.

Fourth, it is unquestionably accepted that a state’s operation of its probation system presents a special need beyond normal law enforcement, due both to the need to ensure community safety while the probationer or parolee is on release and to make certain that the restrictions placed on the individual are observed. The purpose of the supervisory release system is not to uncover criminal conduct, but rather to maintain compliance. In a like manner, insuring the efficiency and integrity of the national bankruptcy law system is of interest to the Department of Justice, the Office of the United States Trustee, the federal courts, and, most importantly, to the economic interests of the entire country. This notion is so axiomatic that in 1898 in Federalist No. 42 James Madison articulated as follows: “[t]he power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties live, or their property may lie, or be removed into different States, that the expediency of it seems not likely to be drawn into question.” As F. Regis Noel has observed, Madison’s statement on the centrality of the bankruptcy laws to our national economy “shows that relief from debt was considered important and desirable in that early and undeveloped stage of our country’s commerce.” Tellingly, Madison’s pronouncement in Federalist No. 42 and Noel’s observation are no less entitled to possession of the bankrupt’s property.”) (citation omitted).

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259 Schechter v. Hansen (In re Hansen), 325 B.R. 746,757 (Bankr. N.D. Ill. 2005) (“Indeed, the very integrity of the bankruptcy court and the successful administration of the bankruptcy system rest upon compliance with the debtor’s obligation of disclosure.”) (citation omitted); United States v. Wagner, 382 F.3d 598, 608 (6th Cir. 2004) (noting that the “efficiency and manageability of the bankruptcy system relies heavily on the free flow of accurate information”); Garcia v. Coombs, 193 B.R. 557, 565 (Bankr. S.D. Cal. 1996) (“The veracity of the bankrupt’s statements is essential to the successful administration of the Bankruptcy Act.”) (citation omitted); Roudebush v. Sharp (In re Sharp), 244 B.R. 889, 892 (Bankr. E.D. Mich. 2000) (stating same) (citation omitted); Wolinsky v. Maynard (In re Maynard), 269 B.R. 535, 542 (D. Vt. 2001) (“In addition to the important public interest in upholding the integrity of the bankruptcy system and preventing tainted compromise, there is a public interest in encouraging [the] just, speedy, inexpensive, and final resolution of disputes.”).
260 See also Mark Bradshaw, The Role of Politics and Economics in Early American Bankruptcy Law, 18 Whittier L. Rev. 739, 755 (1996) (“By creating a uniform bankruptcy law that preempted the then existing numerous state laws, the federalists concentrated power in the national legislature and created important national economic policy.”) (emphasis added).

261 F. Regis Noel, A HISTORY OF THE BANKRUPTCY LAW 6 (Chas. H. Potter & Co. 1919).
significant today. 262 Indeed, in the legislative history to the Bankruptcy Reform Act of 1978, Congress noted the strong national interest in the proper administration of bankruptcy cases. 263 As one court has noted:

Our nation’s economy depends extensively on the availability of credit to individuals. Hundreds of thousands of bankruptcy petitions are filed each year—most of them by individuals seeking to extinguish or restructure overwhelming debts. Not only do these debtors have a gravely important interest in obtaining a fresh start so that they need not toil the remainder of their years attempting to win an unwinnable battle with crushing debt . . . their creditors have a similarly grave interest in a uniform system of asserting and protecting their rights and in being treated fairly. The flow of consumer credit, the very lifeblood of the national economy, would almost certainly be constricted by the absence of a bankruptcy system comparable to that established by the Bankruptcy Code. Our nation’s economic welfare undeniably has come to depend upon ordinary consumers making purchases on credit that are unsecured by collateral. For these reasons, the federal government’s interest in maintaining the bankruptcy system is one of the highest order and must, therefore, be regarded as compelling. 264

As such, there certainly exists a strong governmental and national interest in the proper functioning of the federal bankruptcy law system; a compelling interest on equal ground with the need to ensure the proper operation of a state’s parole and probation system.

Despite this last observation, however, Professor A. Michele Dickerson argues that the government does not have a compelling interest to prevent fraud in consumer bankruptcy cases because “bankruptcy laws are designed to structure the relative rights debtors and creditors have in a

262 Cont’l Air lines, Inc. v. Hillblom (In re Cont’l Air Lines, Inc.), 61 B.R. 758, 768 (S.D. Tex. 1986) (“Bankruptcy proceedings have long held a special place in the federal system due to their importance to the smooth functioning of the nation’s commercial activities.”).


debtor’s property,”265 and do not implicate “the public health or safety issues.”266 Professor Dickerson characterizes the potential for discovering undisclosed assets that will in turn be used to pay creditors as merely a private, commercial dispute between two parties.267 In support of this conclusion, Professor Dickerson analogizes the dynamic of the trustee in the bankruptcy system to a private party engaged in litigation. To this end, Professor Dickerson argues that “if a private party suspects that an adversary is withholding information or documents in private litigation, their recourse is to seek sanctions – not to search their adversary’s home.”268 In other words, because a private party in a non-bankruptcy collection proceeding cannot obtain authorization to search his or her adversary’s residence upon suspicion of concealed assets, Dickerson argues that this same limitation should be placed upon a trustee in bankruptcy.269

Professor Dickerson’s analogy of a bankruptcy trustee to a private litigant attempting to collect a debt in a simple, two-party commercial dispute is flawed for several reasons. First, unlike a private litigant who solely represents his or her own interests, a bankruptcy trustee is a representative of the estate and of the body of unsecured creditors.270 Stated slightly differently, unlike a private party, a bankruptcy trustee is a fiduciary for the bankruptcy estate and must act for the collective benefit of all creditors.271 Second, dissimilar to a private litigant, a bankruptcy trustee is

267 A. Michele Dickerson, Can the “Public Interest” Justify Non-consensual Searches of Homes in Bankruptcy Cases?, 11 WM. & MARY BILL RTS. J. 267, 294 (2002) (“Notwithstanding the Barman court’s attempt to draw comparisons between the search in this case and those sanctioned by the Supreme Court in other civil contexts, discovering assets that will be included in a debtor’s bankruptcy estate and then used to pay a debt is a private, commercial dispute.”) (citations omitted).
268 A. Michele Dickerson, Can the “Public Interest” Justify Non-consensual Searches of Homes in Bankruptcy Cases?, 11 WM. & MARY BILL RTS. J. 267, 294 (2002).
269 A. Michele Dickerson, Can the “Public Interest” Justify Non-consensual Searches of Homes in Bankruptcy Cases?, 11 WM. & MARY BILL RTS. J. 267, 292-298 (2002). In particular, Professor Dickerson argues as follows: “The federal government does not have a compelling interest in what is essentially a dispute between private parties, i.e., the debtor and his creditors. Once a trustee is appointed, the trustee has the right to title and possession of property of the estate, and debtors statutorily are required to assist trustees. Notwithstanding this, existing law does not justify giving trustees the right to search the home of a debtor to find property (or documents related to that property) that the trustee may use to pay creditor claims any more than it would justify giving a private plaintiff the right to search a home to get documents or objects that could be used to support its claim or pay any judgment subsequently rendered in the case.” A. Michele Dickerson, Can the “Public Interest” Justify Non-consensual Searches of Homes in Bankruptcy Cases?, 11 WM. & MARY BILL RTS. J. 267, 298 (2002) (citations omitted).
270 In re Parker, 186 B.R. 208, 210 (Bankr. E.D. Va. 1995).
271 Germain v. Conn. Nat’l Bank, 988 F.2d 1323, 1330 n.8 (2d Cir. 1993) (“The Chapter 7 trustee is an officer of the court and owes a fiduciary duty both to the debtor and to the creditors as a
specifically charged with the statutory obligations to investigate the financial affairs of the debtor, to secure possession of estate assets, \(^{272}\) and to collect all non-exempt property of the estate to liquidate for the benefit of creditors.\(^{273}\) No such charge is bestowed upon an adverse party in private, two-party litigation. Third, unlike a private litigant searching for property to levy against to satisfy a judgment, by virtue of § 541 of the Bankruptcy Code a bankruptcy trustee is a custodian of any property owned by the debtor, and succeeds to any interests in such property which the debtor possesses.\(^{274}\) Consequently, unlike a private party, a bankruptcy trustee exercises significant control and dominion over a debtor’s personal property. Fourth, and perhaps most importantly, the United States Trustee’s *raisons d’être* is to oversee and protect the integrity of the bankruptcy system.\(^{275}\) More fundamentally, the United States Trustee Program, which is in turn effectuated by panel trustees in individual cases, is designed to act as a guardian against fraud, dishonesty and overreaching in the bankruptcy arena.\(^{276}\) Consequently, in analogizing a bankruptcy trustee to a private litigant in a two-party commercial dispute, Professor Dickerson simply fails to account for the national public interest in the efficient and proper operation of the federal bankruptcy system.\(^{277}\) It is precisely because of the strong national interest in ensuring a debtor’s compliance with the mandates of the Bankruptcy Code that justifies a reasonable intrusion into an individual’s privacy concerns, particularly when a debtor voluntarily


\(^{273}\) Ernst & Young v. Matsumoto (*In re United Ins. Mgmt., Inc.*), 14 F.3d 1380, 1386 (9th Cir. 1994) (citing 11 U.S.C. § 704). See also *In re Duque*, 177 B.R. 397, 403 (Bankr. S.D. Fla. 1994) (“Discovery of, and recovery of, the Debtor’s assets are among the Trustee’s principal duties as bankruptcy trustee.”).


\(^{275}\) *In re Nies*, 246 B.R. 866, 870 (Bankr. E.D. Wis. 2000) (citation omitted).

\(^{276}\) *In re Nies*, 246 B.R. 866, 870 (Bankr. E.D. Wis. 2000) (citations omitted). See also McDow v. We the People Forms & Serv. Ctrs., Inc. (*In re Douglas*), 304 B.R. 223, 235 (Bankr. D. Md. 2003) (noting that the United States Trustee is clothed by law with the duty of policing the bankruptcy system to prevent abuse); Clipps v. Russell (*In re Russell*), 392 B.R. 315, 364 (Bankr. E.D. Tenn. 2008) (“The U.S. Trustee ha[s] the authority and the duty to investigate to determine whether the debtor is abusing the bankruptcy system and whether grounds exist for opposing a discharge of her debts.”) (citations omitted).

\(^{277}\) See Jennifer Taylor, *Some Bargain: How Bankruptcy Courts May Now Require a Debtor to Relinquish Expectations of Privacy as a Condition of the Bankruptcy Bargain*, 56 HASTINGS L.J. 609, 623 (2004) (noting that the “public has a strong interest in the negative impact that a faulty bankruptcy system has on the economy”) (citation omitted).
chooses to obtain the benefits of the bankruptcy process. Such an
overriding national interest does not exist in a garden variety, two-party
private commercial contract dispute.

Fifth, and finally, in balancing the government’s interests in
conducting a search against the privacy interests possessed by the individual
to determine the ultimate reasonableness of a search, in the case of
probationers and parolees the Court often relies upon the status as a
probationer or parolee to inform the inquiry.\textsuperscript{278} In other words, taking the
probationer or parolee’s diminished expectations of privacy together with
his or her voluntary acceptance of the terms of released supervision, and
balancing this against the government’s legitimate interest in ensuring the
successful operation of the parole and probation systems, the federal courts
routinely approve warrantless searches of residences based upon “no more
than reasonable suspicion.” In a similar vein, given a consumer debtor’s
significantly reduced expectations of privacy together with his or her
voluntary act of filing for bankruptcy relief, balanced against the
government’s interest in ensuring the integrity of the national bankruptcy
system, it should be likewise concluded that a bankruptcy trustee is
authorized to conduct a warrantless search, inventory, and appraisal of a
debtor’s home so long as the trustee possesses reasonable suspicion that the
debtor is concealing distributable assets from the bankruptcy process.\textsuperscript{279}
Therefore, it should not be at all discomforting for the federal courts to
conclude that upholding the bankruptcy law is a new special needs
exception to the Fourth Amendment.

It must be noted, however, that there exists one distinguishing
feature in the analogy between parolees or probationers and consumer
debtors. In the parolee or probationer situation, there usually exists a state
statute or regulation that authorizes a search of the individual’s home. If
none exists, then it is commonplace for the probationer or parolee to sign a

\textsuperscript{278} State v. Turner, 297 S.W.3d 155, 161 (Tenn. 2009) (citing Wyo. v. Houghton, 526 U.S. 295,
300 (1999)).

\textsuperscript{279} The actions of a bankruptcy trustee are not aimed at ferreting out criminal conduct. Instead,
through a thorough investigation of the debtor’s financial affairs, including a potential search of a
debtor’s home based upon reasonable suspicion of asset concealment, a trustee is acting in a civil
capacity, namely, to inventory, collect and distribute any and all non-exempt assets to the universe of
existing creditors. Notably, the fact that a finding of concealed assets in a debtor’s residence through
a bankruptcy trustee’s search may also constitute a bankruptcy crime under 18 U.S.C. § 152 should
not affect the constitutionality of the search itself, because as the United States Supreme Court stated
in \textit{Burger}, “the discovery of evidence of crimes in the course of an otherwise proper administrative
inspection does not render that search illegal or the administrative scheme suspect. N.Y. v. Burger,
482 U.S. 691, 716 (1987) (citation omitted). \textit{See also} United States v. Simons, 206 F.3d 392, 400
(4th Cir. 2000) (“FBIS did not lose its special need for ‘the efficient and proper operation of the
workplace,’ merely because the evidence obtained was evidence of a crime.”) (citation omitted).
probation order agreeing to a search of the home, with or without a warrant. 280 That is, a parolee or probationer knows in advance that his or her residence can be subject to a warrantless intrusion prior to its occurrence. Indeed, it would be disingenuous to suggest that this fact has not played a role in the Court’s decisions in this regard. 281

Simply put, there is nothing in the Bankruptcy Code that would alert a debtor in advance of the possibility of a home search. 282 This fact does admittedly make the analogy less than perfect, but not ultimately unworkable. At present, the federal courts are split on the issue of whether a probationer or parolee can be subject to a warrantless search of his or her home in the absence of a statute or regulation authorizing such intrusion. 283 More importantly, though, while a consumer debtor arguably does not forfeit all expectations of privacy in his or her home upon filing for bankruptcy, it also cannot be said that a debtor is unaware of the scrutinizing aspect of the bankruptcy process itself, given the extensive disclosures and personal information that needs to be contained on the bankruptcy petition and accompanying schedules. Irrespective of the split of authority regarding whether some advance notice is needed prior to conducting the search, the needs of protecting the integrity of the bankruptcy system requiring full disclosure by consumer debtors outweigh the expectations of privacy of the particular debtor who has voluntarily sought the benefits of the bankruptcy process. 284


282 One way around this dilemma would be for Congress to amend the Bankruptcy Code to authorize trustees to search debtors’ homes.

283 Compare United States v. Yuknavich, 419 F.3d 1302, 1311 (11th Cir. 2005) (permitting a warrantless search in the absence of any regulation or condition authorizing the search), and United States v. Keith, 375 F.3d 346, 350 (5th Cir. 2004) (concluding that a warrantless search by probation and police officers was reasonable despite the lack of probation condition or state regulation authorizing such searches because “the needs of the probation system outweigh the privacy rights of the probationers generally”), with United States v. Kone, 591 F. Supp. 2d 593 (S.D.N.Y. 2008) (finding the warrantless search of a probationer’s home unreasonable in the absence of a probation condition or statute authorizing the search), and United States v. Carnes, 309 F.3d 950, 962-63 (6th Cir. 2002) (holding that a warrantless search by parole and police officers was unreasonable where neither parole agreement nor state regulation authorized searches without a warrant).

284 In re Lufkin, 255 B.R. 204, 211 (Bankr. E.D. Tenn. 2000) (holding that the interests of the trustee and the public outweigh any privacy interests which the debtor may possess).
Ultimately, if called upon to do so in the future, it would be practical for the federal courts to adopt a new special needs exception to the Fourth Amendment warrant requirement that would enable a search of a debtor’s home based upon reasonable suspicion, one that would promote the effectual operation of the bankruptcy laws.

B. The Bankruptcy Law System as a Closely Regulated Industry Under The Fourth Amendment

In addition to the special needs exception to the warrant requirement, the Supreme Court has also upheld warrantless administrative searches for closely regulated industries, such as liquor stores,\(^{285}\) pawnshops,\(^{286}\) firearms dealers,\(^{287}\) underground mines,\(^{288}\) automobile junkyards,\(^{289}\) racing tracks,\(^{290}\) dental offices,\(^{291}\) and commercial trucking.\(^{292}\) As it currently stands, the warrantless exception for regulated industries would not apply to a bankruptcy trustee’s contemplated search of a debtor’s residence, primarily because the Bankruptcy Code does not currently provide for an “administrative scheme” that would substitute for a warrant. However, it would be entirely reasonable for the federal courts to extend the ever-expanding list of “industries” falling under the warrantless exception to the Fourth Amendment to include the bankruptcy law system, so long as the Bankruptcy Code is amended to provide for a warrantless search of a debtor’s residence.\(^{293}\)

Perhaps in accordance with its Fourth Amendment jurisprudence in general, the Supreme Court has not been entirely consistent in its historical application of the administrative search doctrine to closely regulated industries.\(^{294}\) The Court first expressed a preference for a governmental authority to secure an administrative warrant prior to entering and

\(^{286}\) Winters v. Bd. of County Comm’rs, 4 F.3d 848 (10th Cir. 1993).
\(^{291}\) Beck v. Tex. State Bd. of Dental Exam’rs, 204 F.3d 629 (5th Cir. 2000).
\(^{292}\) United States v. Maldonado, 356 F.3d 130 (1st Cir. 2004); United States v. Parker, 587 F.3d 871 (8th Cir. 2009).
\(^{293}\) The possibility of amending the Bankruptcy Code to authorize a trustee to search a debtor’s residence has previously been raised by Professor A. Michele Dickerson. See generally A. Michele Dickerson, Can the “Public Interest” Justify Non-consensual Searches of Homes in Bankruptcy Cases?, 11 WM. & MARY BILL RTS. J. 267 (2002).
\(^{294}\) For a detailed account of the historical development of the closely regulated industry exception to the warrant requirement, see 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.2 (Thomson-West 2004).
inspecting commercial premises. Yet only three years later, the Court approved a warrantless search of an establishment selling liquor based upon the long history of close supervision of that industry. Then, two years later, the Court approved a warrantless search of a gun dealer’s locked storeroom during operating hours primarily because the Federal Gun Control Act specifically contemplated and provided for a warrantless inspection of business premises.

The modern iteration of the administrative search doctrine for closely regulated industries was expressed by the Court in *Donovan v. Dewey* and *New York v. Burger*. In *Donovan*, the Court held that warrantless inspections without prior notice to the operators of underground mines was reasonable under the Fourth Amendment because the Federal Mine Safety and Health Act provided a “sufficiently comprehensive and predictable” statutory inspection scheme. More particularly, the Court concluded that a warrant is not constitutionally required when Congress “has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined [so] that the owner of commercial property cannot help but be aware that his [or her] property will be subject to periodic inspections undertaken for specific purposes.”

Taking its lead from *Donovan*, the Court in *Burger* refined the parameters of a warrantless search of a closely regulated industry. At issue in *Burger* was the constitutionality of a warrantless search of an automobile junkyard, conducted pursuant to a state statute authorizing such a search. After first recognizing that owners or operators of a closely regulated industry have reduced expectations of privacy in their premises, the Court concluded that a warrantless search of a closely regulated industry would be

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295 See v. City of Seattle, 387 U.S. 541, 544 (1967) (“We find strong support in these subpoena cases for our conclusion that warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises.”).


297 United States v. Biswell, 406 U.S. 311, 317 (1972) (“We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute.”).


considered reasonable under the Fourth Amendment if three factors are satisfied: i) there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; ii) the warrantless inspection must be necessary to further that regulatory scheme; and iii) the administrative scheme at issue must provide a constitutionally adequate substitute for a warrant.\footnote{303} To fulfill the last requirement and serve as a warrant substitute, the regulatory statute must advise the property owner that the search is being conducted pursuant to law, the search itself must have a “properly defined scope,” and the statute must limit the discretion of the officials undertaking the search.\footnote{304} To limit the discretion of the searching officials, the statute must limit the time, place and scope of any contemplated search.\footnote{305} Finally, the administrative scheme must apprise the property owner in advance of the potential for a search of the premises.\footnote{306}

In requiring a bankruptcy trustee to obtain a warrant prior to searching a debtor’s home, both the Barman and Bursztyn courts expressed a hesitancy to sanction such conduct precisely because no section of the Bankruptcy Code “states or implies an obligation upon a debtor to permit an inspection by a trustee without a court order.”\footnote{307} Furthermore, both courts observed that while the statutory requirements of disclosure and cooperation placed upon debtors are onerous, these obligations have never been construed to require a debtor to allow a search of his or her residence absent a court order.\footnote{308} However, these legitimate concerns can be mollified by amending the Bankruptcy Code to provide for a warrantless search that would satisfy the standards of Burger.

Filing for personal bankruptcy is not akin to operating a commercial enterprise, but the underlying notions are essentially the same. The bankruptcy process and a closely regulated commercial industry do share a common characteristic, namely, the regularity and pervasiveness of governmental oversight. Indeed, the moment a debtor files for bankruptcy protection the federal government, through the Department of Justice and the Office of the United States Trustee, regulates and oversees every aspect of the consumer bankruptcy process. Like the operation of a pawnshop,
underground mine, automobile junkyard or dental office, the instant a voluntary bankruptcy petition is filed, an act analogous to a business establishment applying for and obtaining an operator’s license, every aspect of the case is supervised by units of the federal government. The pervasiveness of such governmental oversight can be traced back at least three decades with the enactment of the Bankruptcy Code and the creation of the United States Trustee Program.

In *Burger*, the requirement of a substantial governmental interest was satisfied because the State of New York demonstrated a need to regulate the vehicle dismantling industry “because motor vehicle theft ha[d] increased in the State and because the problem of theft is associated with th[e] industry.” Moreover, the Court observed that automobile theft had become a “significant social problem,” thereby placing “enormous economic and personal burdens upon the citizens of different States.” By analogy, if the commission of fraud by consumer debtors is as frequent and common as it is believed to be, then it is equally appropriate to conclude that the failure of consumer debtors to disclose all of their distributable assets is a systemic national problem which places serious economic strains on private creditors, administrative agencies, the federal government, and local governments. If available figures are even remotely accurate, this could amount to a collective loss of $1 billion a year. This represents debtors who voluntarily file for bankruptcy protection to obtain the benefit of the discharge, but who also choose to improperly conceal assets from the reach of their creditors. Because of this loss of assets and the need for debtors to be candid in their bankruptcy disclosures, the federal government has a substantial interest in protecting the integrity of the bankruptcy law system from debtor fraud.

Further, a warrantless search of a debtor’s residence is necessary to further the bankruptcy law regime of full disclosure and honest dealings. Despite the longstanding existence of both civil and criminal remedies to deter and punish debtor fraud, it is suspected that such conduct is a serious national problem. Returning to *Burger*, the Court concluded that the warrantless inspection of an automobile junkyard was necessary to further the New York statutory scheme because “a warrant requirement would

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interfere with the statute’s purpose of deterring automobile theft accomplished by identifying vehicles and parts as stolen and shutting down the market in such items. This was so because “stolen cars and parts often pass quickly through an automobile junkyard.” Thus, the Court observed, frequent and unannounced inspections were necessary to detect stolen parts.

Again, analogy can be made to the bankruptcy law process. As the facts in Bursztyn demonstrate, it is notoriously easy for consumer debtors to hide assets from disclosure, most notably valuable items of personal property such as cash, jewelry, collectibles, artwork, stock certificates, and antiques. Moreover, like the automobile parts in Burger, an individual’s personal property can be “passed quickly” and moved from location to location if one is determined to defraud his or her creditors. Because of the mobility of most consumer debtor’s assets, any advance warning of a forthcoming or requested inspection by the bankruptcy trustee could result in the “disappearance” of the assets and a resultant loss to creditors. For this reason, the Barman court’s prescription that any motion by a bankruptcy trustee to search a debtor’s home be filed upon notice to the debtor might prove to be an exercise in futility. Similar to Burger, an unannounced search would be crucial if the bankruptcy system is truly aimed at remedying the suspected widespread problem of debtor fraud.

Continuing the analogy, in order to satisfy the dictates of Burger, the bankruptcy law scheme must provide a constitutionally adequate substitute for a warrant. As mentioned above, no provision in the Bankruptcy Code currently exists that advises a debtor that his or her residence could be subject to a search by a bankruptcy trustee. However, if the concealment of assets is in fact a systemic problem, then Congress should amend the Bankruptcy Code to add that one of the debtor’s duties is to permit an inspection of his or her residence should the trustee have some suspicion that the debtor is harboring assets, or alternatively promulgate a provision in the Code that would alert a debtor in advance that a search of his or her home might be part of the investigation into his or her financial affairs.

315 In addition to amending the Bankruptcy Code in these ways, Professor A. Michele Dickerson
Amending the Code in this way would apprise a debtor in advance that a residence search could possibly occur, and would alert a debtor that the search was being conducted pursuant to statute and not according to a discretionary act by the bankruptcy trustee. Further, any revision to the Bankruptcy Code should also satisfy the requirement of a “properly defined scope” and limit the discretion of the bankruptcy trustee by only authorizing a search during normal business hours, in the debtor’s presence, and without forcible entry. Unlike a statute of the kind examined in Burger, any revision of the Bankruptcy Code should not provide that a trustee search could be made on a frequent or regular basis, nor should it; preserving the diminished expectations of privacy a consumer debtor retains in his or her home remains a countervailing governmental interest, and permitting repeated searches of a particular debtor’s home would be unduly abusive.

Finally, any amendment to the Bankruptcy Code providing for a statutory search of a debtor’s home would necessarily need to account for a related issue that has been the subject of dispute in the federal courts, namely, whether a bankruptcy court has the authority to issue a search warrant or inspection order aimed at a debtor’s residence.\(^{316}\) Simply stated, Congress would also need to include a provision in the Bankruptcy Code explicitly authorizing a bankruptcy court to issue an administrative search warrant.

Much like its special needs counterpart, it would be practical for the federal courts to alternatively carve out an exception to the Fourth Amendment warrant requirement based upon the bankruptcy law system constituting the equivalent of a closely regulated industry.

C. IMPLIED CONSENT TO A SEARCH OF THE HOME

A third theory by which a bankruptcy trustee could conduct a warrantless search of a debtor’s home is implied consent. Pursuant to the consent exception to the search warrant requirement, state actors may search private premises without a warrant provided the individual whose property is searched “freely and voluntarily” consents to the search.\footnote{Palmieri v. Kammerer, 690 F. Supp. 2d 34, 42 (D. Conn. 2010) (citing United States v. Deutsch, 987 F.2d 878, 883 (2d Cir. 1993)). See also United States v. Taylor, 2010 WL 2640525, *5 (W.D. Tenn. June 29, 2010) (noting that consent for Fourth Amendment purposes “can be in the form of words, gestures, or conduct”) (citation omitted).} For Fourth Amendment inquiry, the requisite consent can be implied by actions or conduct.\footnote{Samuel C. Rickless, The Coherence of Orthodox Fourth Amendment Jurisprudence, 15 GEO. MASON U. CIV. RTS. L.J. 261, 267 (2004).} It can be granted explicitly or tacitly.\footnote{United States v. Kelley, 594 F.3d 1010, 1013 (8th Cir. 2010).} Whether an individual provided consent in a given instance is a factual question;\footnote{Palmieri v. Kammerer, 690 F. Supp. 2d 34, 42 (D. Conn. 2010) (citation omitted).} the standard for measuring the scope of the consent is one of objective reasonableness under the totality of the circumstances.\footnote{Brandy L. Kuretich, Bankruptcy and the Fourth Amendment: Should the Test be “Reasonable” or “Administrative?” 81 U. DET. MERCY L. REV. 31, 32 (2003) (citation omitted). But see Jennifer Taylor, Some Bargain: How Bankruptcy Courts May Now Require a Debtor to Relinquish Expectations of Privacy as a Condition of the Bankruptcy Bargain, 56 HASTINGS L.J. 609, 628 (2004) (arguing that “surrendering the right to privacy is not a condition clearly incident to filing an individual bankruptcy petition as may be the case for a corporate debtor”).}

Due to the numerous obligations placed upon debtors when taking advantage of the bankruptcy process, and the countervailing duties imposed upon trustees to investigate a debtor’s financial affairs, it is valid and reasonable to conclude that under the totality of circumstances a debtor impliedly consents to a search of his or her residence when he or she voluntarily files for bankruptcy relief. As one commentator has argued: “By voluntarily submitting himself [or herself] and his [or her] assets to the jurisdiction of the bankruptcy court, a debtor has a decreased expectation of privacy and the Fourth Amendment should not be an obstacle to the trustee’s ability to perform his [or her] duties.”\footnote{See 11 U.S.C. § 521(a)(1) (2010).}

The bankruptcy petition and accompanying schedules,\footnote{See FED. R. BANKR. P. 1008.} documents which every debtor must complete and file with the bankruptcy court under penalty of perjury,\footnote{See 11 U.S.C. § 521(a)(1) (2010).} serve as a foreshadowing of the intrusiveness of the bankruptcy process to every debtor. In exchange for being granted an
immediate automatic stay upon the filing of the petition against most attempts of creditors to collect pre-petition debts, and the future possibility of obtaining a discharge of such debt, the required schedules cause the debtor to disclose all of his or her property, together with the following personal information. As previously stated, the trustee is largely at the mercy of the debtor regarding the disclosure of assets that are available for distribution to creditors. Because the bankruptcy system relies heavily on self-reporting, it provides “the opportunity for, and the lure of, fraud.”

Schedule A calls for the debtor to list and describe all real property held by the debtor, together with its current value and the amount of any secured claims against the property. Schedule B requires the debtor to list, describe, and value all personal property, including, but not limited to, the following: i) cash on hand; ii) deposit accounts; iii) household goods and furnishings; iii) wearing apparel; iv) annuities; v) life insurance policies; vi) interests in IRAs; vii) stocks and bonds; viii) alimony, maintenance, and support payments, if any; ix) all types of vehicles; and x) any collectibles and hobby equipment. Schedules E through F necessitate the debtor to list the identity of all known creditors and the amounts owed to each. Schedule I requires a debtor to divulge a detailed account of his or her income, including the reasons for any anticipated increase or decrease, and the identity of his or her employer. In addition, Schedule J requires a debtor to itemize and calculate his or her current monthly expenditures, including for such items as food, utilities, rent, medical expenses, and entertainment expenses. Schedule J also causes a debtor to identify and calculate his or her monthly net income. Finally, the “Statement of Financial Affairs” requires a debtor to divulge another set of personal information, including, but not limited to, any sources of additional income, any pending lawsuits or administrative proceedings involving the debtor, any repossessions or foreclosures occurring in the period preceding

326 In re Beitzel, 333 B.R. 84, 92 (Bankr. M.D.N.C. 2005) (“The importance of having a debtor submit complete and accurate bankruptcy schedules is paramount; the bankruptcy system relies heavily on self-reporting by debtors.”) (citations omitted). See also Mary Jo Heston, The United States Trustee: The Missing Link of Bankruptcy Crime Prosecutions, 6 AM. BANKR. INST. L. REV. 359, 364 (1998) (“Bankruptcy is predominantly a civil matter that relies heavily on self-reporting and voluntary disclosure.”) (citation omitted).
328 See Official Bankruptcy Form 6A.
329 See Official Bankruptcy Form 6B.
330 See Official Bankruptcy Form 6D.
331 See Official Bankruptcy Form 6I.
332 See Official Bankruptcy Form 6J.
the bankruptcy filing, and the existence, location, and contents of any safe
deposit boxes held by the debtor, if any. These documents, and all
pleadings filed in a bankruptcy case, are available for unlimited inspection
by the general public.

Importantly, these documents contain information that enables a
reader to construct a very concrete picture regarding the debtor’s life
conditions. That is, the documents describe what the debtor does for a
living, where he or she is employed, how long he or she has worked there,
and reveals the nature of his or her relationships with people by showing
with whom he or she lives, together with the contents of the debtor’s
home. Furthermore, it illustrates the debtor’s character and personality
“by showing life circumstances such as what he [or she] reads, medical
problems, where he [or she] spends his [or her] income, detailed cash flows,
information on schooling, any businesses entered into, lawsuits pending,
and if and where he [or she] attends” any religious congregation.

To be sure, the foregoing is only the beginning of the process on the
path towards discharge. Pursuant to § 521(a)(3) of the Bankruptcy Code, a
debtor is required to “cooperate with the trustee as necessary to enable the
trustee to perform the trustee’s duties” as laid out by § 704(a) of the
Code. Quite significantly, § 704(a) prescribes the duties of a bankruptcy
trustee, in part, as including an affirmative obligation to collect and
liquidate property of the estate for the benefit of creditors, and to investigate
the financial affairs of the debtor. Furthermore, § 521(a)(4) of the Code
commands that a debtor surrender to the trustee all property of the estate,
and pursuant to § 343 of the Code, within a reasonable time after
commencing the bankruptcy case a debtor must submit to an examination
by creditors concerning his or her financial condition in what is known as
the § 341 “meeting of creditors.” Because the § 341 meeting of creditors
lasts for only a short period of time, a debtor can also be questioned about
his or her financial affairs and the whereabouts of his or her estate through a

333 See Official Bankruptcy Form 7.
334 See Mary Jo Obee & William C. Plouffe, Jr., Privacy in the Federal Bankruptcy Courts, 14
nearly unlimited access to records and proceedings in the main bankruptcy case.”).
335 See Mary Jo Obee & William C. Plouffe, Jr., Privacy in the Federal Bankruptcy Courts, 14
336 See Mary Jo Obee & William C. Plouffe, Jr., Privacy in the Federal Bankruptcy Courts, 14
creditors to examine the debtor).
separate deposition-like process known as a Rule 2004 examination.\textsuperscript{341} Unlike a traditional deposition, however, a Rule 2004 examination is often described as a “fishing expedition,”\textsuperscript{342} and its avowed purpose “is to allow a trustee, or others interested in accomplishing the same ends, to discover and investigate how to bring to light possession of assets of the debtor which might be intentionally concealed or overlooked in ignorance or haste.”\textsuperscript{343} In addition to these bankruptcy specific discovery methods, parties may utilize the federal civil discovery rules during certain proceedings by or against a debtor.\textsuperscript{344}

The applicable Bankruptcy Code sections and procedural rules are designed so that the participants in the process can make intelligent, informed decisions based on fact rather than fiction. Indeed, the Bankruptcy Code “requires the fullest disclosure, the utmost good faith,” and the surrender of all non-exempt assets of the debtor.\textsuperscript{345} But despite all of these investigatory techniques and voluntary disclosure requirements placed upon debtors, it is suggested that tens of thousands of individual debtors attempt to “play fast and loose with their assets or with the reality of their affairs.”\textsuperscript{346} As one commentator has noted, when a debtor fails to live up to his or her affirmative obligations of disclosure and candor, he or she “undermines the implicit compromise that he [or she] strikes with creditors through the bankruptcy process: fair and efficient distribution of all assets in return for a discharge of his [or her] debts.”\textsuperscript{347}

The\textsuperscript{348} Barman and\textsuperscript{349} Bursztyn courts correctly observed that nothing in the Bankruptcy Code explicitly imposes an obligation upon a debtor to permit an inspection of his or her residence by a trustee without a court order, but the decisions incorrectly presume that nothing implies such ability to do so. That is, a fair reading of the debtor’s duties of cooperation and surrender, together with the trustee’s countervailing

\textsuperscript{343} In re Valley Forge Plaza Assocs., 109 B.R. 669, 674 (Bankr. E.D. Pa. 1990) (citations omitted).
\textsuperscript{345} In re Breitling, 133 F. 146, 148 (7th Cir. 1904).
\textsuperscript{346} Boroff v. Tully (In re Tully), 818 F.2d 106, 110 (1st Cir. 1987).
\textsuperscript{349} As a noted treatise on bankruptcy law observes, “[c]ooperate is a broad term, . . . and must be construed that whenever the trustee calls upon the debtor for assistance in the performance of his
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responsibilities to collect and liquidate estate property and to investigate the financial affairs of the debtor, leads to the reasonable conclusion that upon the filing of a voluntary bankruptcy petition, a debtor impliedly consents to the search and inventory of his or her residence for purposes of Fourth Amendment scrutiny. Indeed, without this ability of the trustee to verify the debtor’s disclosures and representations during the bankruptcy proceeding, “there is nothing to deter potential debtors from abusing the system by failing to disclose valuable assets.”350 The credibility and integrity of the entire bankruptcy system “is dependent on the ability of the trustee to verify the information in the schedules and uncover hidden assets.”351

While this result may appear unduly intrusive, two factors should help assuage any objections to this prescription. First, due to the volume of Chapter 7 and Chapter 13 bankruptcy cases, a trustee would most assuredly not exercise this power and act on this implied consent unless he or she had serious cause to believe a debtor was improperly shielding assets. Second, while the debtor’s implied consent makes the obtaining of a warrant unnecessary, the search itself still must not be unreasonable under the Fourth Amendment. If a debtor challenged the reasonableness of a search after its occurrence, and a court concluded that a bankruptcy trustee violated the Reasonableness Clause, it is presumed that the trustee could be held liable for such a violation.

Consequently, the debtor’s act of voluntarily filing for bankruptcy relief, and the totality of circumstances underlying the nature of the bankruptcy process itself, leads to the justifiable conclusion that a consumer debtor impliedly consents to the search of his or her home to uncover assets of the estate.

VI. CONCLUSION

The bankruptcy process was designed to help only the “honest but unfortunate” class of debtors.352 And while the majority of debtors who file for bankruptcy protection appear to fit this description, a number of debtors attempt to reap the benefits of the bankruptcy process while at the same time try to defraud their creditors by failing to disclose or turn over all of duties, the debtor is required to respond, at least if the request is not unreasonable.” 4 COLLIER ON BANKRUPTCY ¶ 521.15[5] (16th ed. 2009).


351 Brandy L. Kuretich, Bankruptcy and the Fourth Amendment: Should the Test be “Reasonable” or “Administrative?” 81 U. DET. MERCY L. REV. 31, 49 (2003).

their distributable assets to the bankruptcy trustee, and, in turn, the court.

Bankruptcy fraud is a recurring, ongoing problem that affects not only the participants in the bankruptcy process, but society in general and the national economy.\footnote{Mary Jo Heston, The United States Trustee: The Missing Link of Bankruptcy Crime Prosecutions, 6 AM. BANKR. INST. L. REV. 359, 359 (1998) (“Bankruptcy fraud is a problem that affects all participants in the bankruptcy process.”).} And despite all of the available techniques to uncover undisclosed assets of the estate, it is estimated that tens of thousands of instances of bankruptcy fraud are committed each year. To protect the integrity of the bankruptcy process, and in an effort to prevent and deter future fraudulent debtors, bankruptcy trustees, the direct overseers of individual debtors, must be afforded additional abilities to investigate and expose suspected efforts of fraud.

To date, the Supreme Court has not permitted a warrantless administrative search of an individual’s residence unless commercial activity was conducted in the home or the search was directed at convicted felons still serving sentences of probation or parole.\footnote{Anobile v. Pelligrino, 303 F.3d 107, 119 (2d Cir. 2002).} But as consumer bankruptcy filings continue to increase and the Department of Justice, through the Office of the United States Trustee, increases its efforts to uncover debtor fraud, the Supreme Court may in the future be called upon to decide whether a search of a debtor’s home, with or without a warrant, is constitutional under the Fourth Amendment to the United States Constitution.

The current civil and criminal remedies for the concealment of assets have not stopped debtors from committing fraud upon their creditors. Therefore, as an additional remedy to inhibit and deter such abuse, a trustee should be authorized to conduct a warrantless search of a debtor’s home under one of the three alternative theories articulated in this Article. To that end, the bankruptcy trustee should be permitted to conduct only a search and to appraise any property found on the premises; a trustee should not be authorized to seize any property, primarily due to its potential exemption from the bankruptcy process, and no forcible entry should be allowed. Furthermore, because of the ease and speed by which debtors can move, hide, or transfer personal property, the search must be conducted without prior notice to the debtor. While arbitrariness and unconstrained discretion is the chief evil which the Fourth Amendment aims to prevent, the practical realities of bankruptcy would not lend themselves to such misuse. Due to the annual volume of filed consumer bankruptcy cases, a trustee would...
most assuredly not exercise this power unless he or she had serious cause to believe a debtor was improperly shielding assets.

Bankruptcy law presents its own unique context, different from all other civil settings; the Bankruptcy Code attempts to harmonize the interests of the debtor with his or her creditors. That said, however, the bankruptcy process is incredibly powerful, enabling individuals to shed burdensome debt to the detriment of their creditors. In order to realize this benefit, debtors must fully submit themselves and their assets to the court. As a condition of voluntarily choosing bankruptcy relief, debtors should expect intrusions into their privacy. And when there is evidence that a debtor is not being completely forthcoming and candid, they should not be permitted to use the Fourth Amendment as a shield to further these destructive efforts.