Can the "Public Interest" Justify Non-Consensual Searches of Homes in Bankruptcy Cases?

A. Mechele Dickerson
CAN THE “PUBLIC INTEREST” JUSTIFY NON-CONSENSUAL SEARCHES OF HOMES IN BANKRUPTCY CASES?

A. Mechele Dickerson

INTRODUCTION

Everybody seems to enjoy berating people who file for bankruptcy. While the Enron and WorldCom scandals have somewhat shifted the anti-bankruptcy animosity from people who file for bankruptcy personally to people who cause businesses to file, there remains a persistent perception that individuals abuse bankruptcy laws by running up too much debt, then discharging that debt without even attempting to repay it. Critics specifically argue that existing bankruptcy laws make it too easy for people to shield assets from their creditors either by using state exemption laws to keep valuable property or simply by hiding their assets from creditors.¹ For the last five years, Congress has responded to those criticisms by introducing legislation designed to prevent such abuse.²


One debtor's recent attempt to shield assets from his creditors caused a court to condone the use of a process not typically associated with civil proceedings: a non-consensual search of the debtor's home.\(^3\) Specifically, the court in *In re Barman* concluded that the government's interest in ensuring that people comply with civil bankruptcy laws justified the intrusion into the privacy of a person's home.\(^4\) This Article considers the reasonableness of the search in *Barman* and broadly considers whether searches should ever be authorized in civil bankruptcy proceedings.

Part I generally discusses the constitutional limits of searches. This Part suggests that, notwithstanding the recognized exceptions to the warrant requirement, courts closely scrutinize searches of private homes. This Part further notes that, even when courts have authorized residential searches based on less than probable cause, those courts first have determined that a strong governmental interest justified invading the sanctity of a home.

Part II of the Article discusses the use of search or "inspection" orders in bankruptcy cases. After briefly summarizing the general duties of debtors and trustees in Chapter 7 cases, I discuss *In re Barman* and the Chapter 7 Trustee's decision in that case to request permission to search all parts of a debtor's home.\(^5\) This Part suggests that the *Barman* court's decision to permit a broad search, though arguably consistent with bankruptcy policy, fails to properly weigh the debtor's privacy interests in his home. This Part further argues that the search was not consistent with the Fourth Amendment requirement that warrants specify the property to be searched and that the Trustee failed to establish that the search was needed to advance a strong governmental interest. Moreover, I suggest that, even if there is a public interest in ensuring that debtors fully and fairly participate in federal bankruptcy proceedings, this interest does not justify allowing private attorneys to execute search warrants to search a private residence.

The Article concludes by arguing that current law simply does not support a trustee's request to search a debtor's home. No statute, rule, or regulation gives courts the authority to issue warrants or orders to search a debtor's home. Moreover, whereas searches typically are performed by law enforcement officers or government officials, the *Barman* court authorized a search that was conducted by a private attorney.\(^6\) I argue that searches might be appropriate if, at the time a debtor files her bankruptcy petition, she consents to having her home searched. Likewise, I suggest that searches might be appropriate if the Bankruptcy Code\(^7\) is

---


\(^4\) *See id.* at 419.

\(^5\) *See infra* notes 156–172 and accompanying text.

\(^6\) *See id.*

amended to give courts the explicit authority to authorize trustees to search debtors' homes.

I. FOURTH AMENDMENT

A. In General

The Fourth Amendment protects citizens against unreasonable searches and seizures by officers acting under a general warrant by providing that warrants cannot be issued except "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fourth Amendment is not violated if the affected party (or someone with common authority over the searched property) voluntarily consents to the search. Absent voluntary consent, however, courts must evaluate the search under standards of reasonableness and must assess the degree to which the search intrudes upon a person's privacy and is necessary to promote a legitimate governmental interest. Moreover, if the search is conducted pursuant to a warrant, courts must also consider whether it specifies the place to be searched or the thing(s) to be seized.

B. Reasonableness of a Search

Reasonableness is the ultimate standard when applying the Fourth Amendment to a search. A warrantless search of a home is presumptively unreasonable, and thus unconstitutional. Indeed, to deter unreasonable intrusions, courts have

---

8 U.S. CONST. amend. IV. The Supreme Court has noted that "[t]he rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating" the often opposing interests of law enforcement and the citizen's right of privacy. Brinegar v. United States, 338 U.S. 160, 176 (1949).
9 United States v. Matlock, 415 U.S. 164, 171 (1974) (holding that a warrantless search is valid if consent is given by a person who has "common authority" over the home).

At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances.
fashioned an “exclusionary rule,” under which evidence produced by an illegal search or seizure cannot be used against a criminal defendant in court to prove her guilt.\textsuperscript{13} The Supreme Court has narrowed the scope of the exclusionary rule by creating exceptions to the warrant requirement. Those exceptions include the good faith exception\textsuperscript{14} and exceptions based on exigent circumstances, such as the need to pursue a fleeing felon,\textsuperscript{15} prevent the destruction or removal of evidence,\textsuperscript{16} or conduct a limited search incident to an arrest to protect the arresting officers.\textsuperscript{17}

The Supreme Court has crafted specific limitations to the warrant requirement for searches that are peripheral to (but not actually inside) the home. For example, the Court held as constitutional a police request for trash collectors to sift through trash left in front of a defendant’s home because the homeowner had no objectively reasonable expectation of privacy in garbage that was deposited in an area inspectible by the public and that had been left for strangers to take.\textsuperscript{18} Similarly, the Court held that police did not need a warrant to fly a helicopter at a low altitude to observe the interior of a partially-covered greenhouse in the back yard of a private

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{13} See, e.g., Mapp v. Ohio 367 U.S. 643, 655 (1961) (holding that “evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court”). The exclusionary rule is designed to protect Fourth Amendment rights before they are violated on the theory that the police will be less likely \textit{ex ante} to violate a defendant’s rights if they know that evidence seized during an illegal search will be inadmissible in court. Sharon L. Davies, \textit{The Penalty of Exclusion — A Price or Sanction?}, 73 S. CAL. L. REV. 1275, 1276 (2000).
\item \textsuperscript{14} This exception provides that, where a neutral judge or magistrate determines that a home can be searched and issues a warrant, neither the police investigation nor criminal prosecution should be penalized if the warrant is later found to be invalid. The officers’ action must be objectively reasonable, and they must act in good faith. See United States v. Leon, 468 U.S. 897, 907, 913–14 (1984). This exception assumes that police officers could not have intended to violate a defendant’s constitutional rights if they performed a search or seized evidence pursuant to the apparently valid warrant. Thus, even if the search is later determined to be invalid, the evidence obtained in the search will not be excluded from trial if police officers obtained the warrant from a judge or magistrate. See id. at 922.
\item \textsuperscript{15} See Warren v. Hayden, 387 U.S. 294, 298–99 (1967).
\item \textsuperscript{16} For example, the Court in Segura v. United States, 468 U.S. 796 (1984), held that police who observed a drug deal, then made a warrantless arrest of one of its participants, could enter and occupy the defendant’s apartment for nineteen hours (while they waited for a magistrate to issue a search warrant) to prevent the defendant from tampering with evidence. See id. at 810.
\item \textsuperscript{17} See, e.g., Chimel v. California, 395 U.S. 752, 762–63 (1969) (“When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape.”). Under the “protective sweep” exception, police who are inside a home to make a lawful arrest may make a cursory warrantless inspection, or “sweep,” of the premises if they have a reasonable belief that the areas to be swept may pose a danger to them. See Maryland v. Buie, 494 U.S. 325 (1990).
\item \textsuperscript{18} See California v. Greenwood, 486 U.S. 35 (1988).
\end{itemize}
\end{footnotesize}
residence. Because the greenhouse was not fully shielded from public view, the Court concluded that the defendant could not reasonably have expected the contents of his greenhouse to be immune from examination by an officer seated in an aircraft flying in navigable airspace at an altitude similar to that routinely used by private and commercial flights. Even with these exceptions, the home — especially its interior — receives greater protection than other venues because it is a place "that traditionally has been regarded as the center of a person's private life, the bastion in which one has a legitimate expectation of privacy protected by the Fourth Amendment." Thus, the exceptions articulated for searches inside private residences are drawn narrowly.

A classic case in which the Supreme Court articulated this principle is Kyllo v. United States. The Kyllo Court was asked to consider whether aiming a thermal imaging device from a public street to scan the interior of a home (to determine whether the heat emanating from the home was consistent with the type of intensity that radiates from lamps used to grow marijuana) is a search. The government argued that it could use this sense-enhancing technology without first obtaining a warrant because the defendant made no attempt to prevent or otherwise conceal the heat that escaped from the home, and thus had no reasonable expectation of privacy in the exterior temperature of his home. Moreover, the government contended that using an external device to scan the interior heat was not a search because it failed to expose any intimate details of the defendant's life, did not show any people or activities that were taking place in the home, and could not reveal conversations that were taking place during the scan.

The Supreme Court observed the difficulty it faced in deciding whether a search occurred, given the use of technology that did not exist at the time the Fourth Amendment was adopted. In rejecting the government's arguments, the Court initially noted that the sense-enhancing technology the police used was not in general public use and that it allowed the government to obtain information concerning the home's interior that would have not been possible without using the technology. Though conceding that the government is entitled to use some technological devices that did not exist at the time the Fourth Amendment was

---

20 Though the homeowner intended — and probably expected — that the greenhouse would not be open to public inspection (and took precautions to protect against ground-level observation), the sides and roof of the greenhouse were left partially open, thus exposing the contents of the greenhouse to viewing from the air. Id. at 450.
21 Id. at 450–52.
24 Id. at 29.
25 Id. at 30, 35–39.
26 Id. at 34.
adopted, the Court stressed that the government did more than just engage in "naked-eye" surveillance of a home and that this technology potentially allowed the government to "shrink the realm of guaranteed privacy." Because the government obtained information that "would have previously been unknowable without physical intrusion," the Court concluded that the surveillance was a presumptively unreasonable warrantless search. The Supreme Court affirmed the principle that interior searches, even if conducted pursuant to a warrant, are to be closely scrutinized in Richards v. Wisconsin. The Court in Richards was asked to consider whether police officers are required to knock and announce their presence when executing a search warrant in a felony drug investigation. The Court acknowledged the possibility that felony drug crimes will involve an extremely high risk of serious (if not deadly) injury to the police and that suspects may destroy or dispose of drugs before the police enter. The Court concluded, however, that not all felony drug investigations pose these risks. Given this, the Court required police, before they may dispense with the knock-and-announce requirement, to provide either specific information about the potential danger of a search or the likelihood of evidence being destroyed.

C. Warrant Specificity

The Fourth Amendment requires that the warrant describe the items to be seized with "as much specificity as the government's knowledge and circumstances allow." The specificity requirement both limits the discretion of the executing officer and informs the subjected person where the officer is entitled to search.

---

27 Id. at 33–34.
28 Id. at 40.
30 Id. at 389–92.
31 Id. at 391.
32 Id. at 392–93.
33 Id. at 394.
34 Id. at 393 n.5.
35 United States v. Leary, 846 F.2d 592, 600 (10th Cir. 1988).
36 See, e.g., Rickert v. Sweeney, 813 F.2d 907, 909 (8th Cir. 1987) (requiring that a warrant be specific in describing the items to be taken).
Thus, warrants that authorize the government to search for any evidence relating to the commission of a crime, that refer to a broad federal statute to limit the scope of the warrant, or that generally allow "an exploratory rummaging of a person’s belongings" are conclusively invalid. For example, a warrant that authorized the seizure of any property that was evidence that the defendant violated the federal mail fraud statute, or a warrant that is limited only by references to the parameters provided by a general conspiracy or tax evasion statute, fail to sufficiently limit the scope of a search warrant. Likewise, warrants that authorize a search or seizure of "all records" generally will be found to be overbroad, especially if it is an all records search of a residence. A general warrant will not be held invalid if the government has done the best that reasonably could be expected under the circumstances or otherwise has acquired all descriptive facts which a reasonable investigation could be expected to cover. In other words, if information was not available to make the warrant more particular, then the use of generic terms will not invalidate it. However, a warrant that is capable of being specific but fails to sufficiently particularize the place to be searched or the things to be seized is unconstitutionally overbroad.

Though evidence seized during a general search ordinarily must be excluded

---

37 United States v. LeBron, 729 F.2d 533, 536 (8th Cir. 1983) (finding the search warrant to be overbroad and, therefore, invalid).
38 See United States v. George, 975 F.2d 72, 74–75 (2d Cir. 1992) (holding the warrant to be overbroad, because it authorized a search for other evidence relating to the commission of a crime).
39 Roche v. United States, 614 F.2d 6, 7 (1st Cir. 1980) (holding that a warrant must be limited to evidence supporting probable cause).
40 See, e.g., Rickert, 813 F.2d at 909 (noting that the general conspiracy and tax evasion statutes included in the warrant “do not limit the search in any substantive manner”).
41 See United States v. Humphrey, 104 F.3d 65, 69 (5th Cir. 1997) (explaining that the language in a search warrant must identify evidence that directly links to the criminal investigation).
42 United States v. Leary, 846 F.2d 592, 604 (10th Cir. 1988); United States v. Fuccillo, 808 F.2d 173, 176 (1st Cir. 1987).
43 Humphrey, 104 F.3d at 69.
44 Stanford v. Texas, 379 U.S. 476, 485–86 (1965). The specificity requirement is designed to ensure that the government will limit its search only to the areas in which it has probable cause to believe the item in question will be found. As noted in Maryland v. Garrison:

The manifest purpose of [the] particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. 480 U.S. 79, 84 (1987).
from the criminal trial, the good faith exception sometimes is applied to a facially invalid warrant. That is, if an officer performs a search pursuant to a facially overbroad warrant, the search will not be invalidated unless the warrant was so facially deficient that the executing officer could not have reasonably, and in good faith, believed that it authorized the search. Lower courts, however, have narrowly construed this good faith exception, particularly when — as discussed earlier — the search warrant provided only generic information even though the searching officer appeared to have possessed information that could have been used to limit the scope of the search.

D. Special Needs/Administrative Searches

Notwithstanding the importance of the warrant requirement, warrantless searches — even of private homes — may be authorized if the search is needed to protect the public or to advance legitimate governmental interests. The Supreme Court has permitted exceptions to the warrant requirement where special governmental needs make either that requirement or the probable cause requirement impracticable. Thus, the Court has recognized the congressional authority to enact laws that sanction either warrantless searches or searches based on warrants issued with less than probable cause, even if the “quantum of evidence” used to justify the search would not support the grant of a search warrant in the criminal context. These “special needs” or “administrative” searches are conducted pursuant to state

46 Id. at 486.
47 See supra note 14 and accompanying text.
48 See supra notes 37–38 and accompanying text.
49 For example, the Court has authorized warrantless searches of employees’ desks and offices on less than probable cause. See O’Connor v. Ortega, 480 U.S. 709 (1987). Similar treatment has been given to warrantless searches of student property. See New Jersey v. T.L.O., 469 U.S. 325 (1985).
50 See, e.g., Griffin v. Wisconsin, 483 U.S. 868, 878 n.4 (1987) (“In the administrative search context, we formally require that administrative warrants be supported by ‘probable cause,’ because in that context we use that term as referring not to a quantum of evidence, but merely to a requirement of reasonableness.”); see also United States v. Gordon, 655 F.2d 478 (2d Cir. 1981) (holding that a warrantless search of an insurance business by federal insurance regulators did not violate the Fourth Amendment due to the long-standing tradition of “close supervision and inspection” of the insurance industry); Paramount Pictures Corp. v. Doe, 821 F. Supp. 82 (E.D.N.Y. 1993) (noting generally that, in the civil context, the reasonableness standard is less demanding than in the criminal context); Nixon v. Adm’r of Gen. Servs., 408 F. Supp. 321, 366 (D.D.C. 1976) (“[A] less strict and particularized government showing is necessary to comply with the Fourth Amendment’s reasonableness requirement when the search is entirely ‘civil’ in nature.”).
or federal regulations\textsuperscript{51} and generally are upheld if there is a strong governmental need to protect the public safety.

1. Searches of Businesses

Courts are more likely to permit special needs/administrative searches of businesses than homes. Indeed, federal courts routinely authorize searches of businesses in pervasively regulated enterprises that have a long tradition of supervision and inspection.\textsuperscript{52} The Supreme Court has held that warrantless inspections are permissible if the searches are reasonably necessary to further an important federal interest and if the regulatory scheme is comprehensive and predictable.\textsuperscript{53} Furthermore, the Court has noted that, if the industry is regulated closely and the owner of the business is required to either obtain a federal license or comply with complex federal regulations, administrative searches are permissible because the owner has notice that the government will periodically inspect the business for specific purposes.\textsuperscript{54} Courts generally uphold the constitutionality of administrative searches based largely on their conclusion that people who choose to participate in a closely regulated business — or accept a federal license — knowingly and willingly accept both the burdens (including unannounced or


\textsuperscript{53} Donovan v. Dewey, 452 U.S. 594, 600 (1981) (holding that the Fourth Amendment was not violated by warrantless searches executed to protect the public’s health and safety).

\textsuperscript{54} Id. at 600. For example, in United States v. Goff, 677 F. Supp. 1526 (D. Utah 1987), the district court considered the identity of the agency — the Treasury Department — that filed a motion to suppress evidence (guns and other firearms) seized on the business premises of a licensed firearms manufacturer. Id. at 1529. Although the agents actually obtained a warrant in this case, the district court concluded that warrants are not required for regulatory inspections of federally licensed firearms dealers, because the Secretary of the Treasury (or its designee) is statutorily authorized to inspect both the dealer’s records and the actual firearms. Id. at 1537. Therefore, the dealer should have been on notice that his property might be searched. Id. at 1545–46; see 18 U.S.C. § 923(g) (2000); see also New York v. Burger, 482 U.S. 691 (1987) (authorizing the warrantless search of a junkyard); Donovan v. Dewey, 452 U.S. 594 (1981) (authorizing the search of a business in the mining industry); Biswell, 406 U.S. at 316, noted in Goff, 677 F. Supp. at 1533 nn.4–5 (reasoning that a firearms dealer reasonably should expect unannounced, warrantless searches to occur).
warrantless searches)\textsuperscript{55} and benefits of engaging in that business. By voluntarily agreeing to participate in a closely regulated industry, courts reason that the participants have a lesser expectation of privacy.\textsuperscript{56}

Courts have authorized administrative searches of businesses that were not part of a pervasively regulated industry only when there was a legitimate governmental need for the search. For example, the IRS requested an ex parte order to enter private property to search and seize property for delinquent taxes.\textsuperscript{57} In that case, the IRS argued that the search was authorized by a federal statute granting federal district courts jurisdiction to issue writs and "such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate."\textsuperscript{58} In evaluating the reasonableness of the search, the Tenth Circuit relied on Supreme Court cases that characterized tax collection as a paramount right of the federal

\textsuperscript{55} For example, the Supreme Court upheld a warrantless, non-consensual inspection of a locked storeroom of a federally licensed alcoholic beverage dealer's business premises in \textit{Colonnade Catering Corp. v. United States}. Federal law required federally licensed alcohol dealers to consent to inspections of their premises. \textit{Colonnade Catering Corp.}, 397 U.S. at 73-74. The dealer in this case refused to consent to an inspection. The Court upheld the warrantless, non-consensual search based on: (1) the long history of regulating the liquor industry; (2) the statutory authorization for agents to search the business; and (3) the fact that the historical regulation and the statute gave the defendant notice that its premises were subject to search by federal agents. \textit{Id.} at 77. Likewise, federal courts routinely uphold warrantless or administrative searches of pharmacies and pharmaceutical companies because of this industry's "long history of supervision and inspection." \textit{Jamieson-McKames Pharmaceuticals, Inc.}, 651 F.2d at 537. Federal regulations provide that federal agents may enter (at reasonable times) and inspect establishments that manufacture food, drugs, devices, or cosmetics. 21 U.S.C. § 374(a) (2000). Courts justify giving drug manufacturers decreased privacy rights primarily due to the strong public interest in protecting the consuming public from defective drug products. Thus, the court concluded that government agents could search a pharmaceutical company without a warrant in \textit{United States v. Jamieson-McKames Pharmaceuticals}, 651 F.2d 532 (8th Cir. 1981), in part, because this business is part of a pervasively regulated industry. \textit{Jamieson-McKames Pharmaceuticals, Inc.}, 651 F.2d at 537.

For similar reasons, the court in \textit{United States v. Prendergast} affirmed a criminal conviction of a business searched by DEA agents to ensure that it was complying with the Comprehensive Drug Abuse Prevention and Control Act. \textit{United States v. Prendergast}, 585 F.2d 59 (3d Cir. 1978).


\[T\]he validity of the regulations depends not upon the consent of those regulated, but on the existence of a federal statute embodying a congressional determination that the public interest . . . outweighs the businessman's interest in preventing a Government inspector from viewing those areas of his premises which relate to the subject matter of the regulation. \textit{Marshall}, 436 U.S. at 338.

\textsuperscript{57} Carlson v. Dist. Court, 580 F.2d 1365, 1378 (10th Cir. 1978).

\textsuperscript{58} 26 U.S.C. § 7402(a) (2000).
government. The court cited the public interest in tax collection to support its conclusion that the IRS was not required to show probable cause to conduct the administrative search. Instead, the court opined that the public need for effective enforcement of federal tax laws justified the intrusion on the lower standard of reasonableness applicable to administrative searches.

2. Searches of Homes

Special needs/administrative searches of homes are scrutinized more closely than searches of businesses and generally will be permitted only when public health or safety needs outweigh the homeowner’s privacy rights. Camara v. Municipal Court, the first Supreme Court case to directly address the Fourth Amendment’s applicability to administrative searches, considered a statute that allowed city employees to enter and search private residences in apartment buildings if the search was necessary for the performance of their duties. The Court held that the Fourth Amendment prevented building inspectors from entering private residences to search for building code violations unless they first obtained a warrant. While agreeing that “a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman’s search for the fruits and instrumentalities of crime,” the Court stressed that the Fourth Amendment applies to more than suspected criminal behavior. The Court concluded that: (1) a person’s private property is fully protected; (2) warrantless administrative searches significantly intrude upon an individual’s privacy interests; and (3) the statutory authority for warrantless administrative searches was “insufficient to justify so substantial a weakening of the Fourth Amendment’s protections.”

While holding that the warrantless search violated the Fourth Amendment, the Court stated that, under certain circumstances, administrative inspections can be

---

60 Carlson, 580 F.2d at 1380–81.
61 Id. at 1373.
63 Id. at 526 (citing S.F., CAL., HOUSING CODE § 503). While conducting a routine inspection of the apartment building, a housing inspector attempted to search the defendant’s apartment because of a suspicion that there were housing code violations. The defendant was arrested after he refused (several times) to permit the inspector to search his apartment. Id. at 526–27.
64 See id. at 534.
65 Id. at 530.
66 Id. at 534.
conducted if needed to protect the public health and safety. The Court initially observed that the goal of the search in *Camara* was to secure compliance with physical standards for private property and that there is a strong governmental interest in preventing the "development of conditions that are hazardous to public health and safety." Although the Court stated that the reasonableness standard of the Fourth Amendment is still the "ultimate standard," it concluded that the showing needed to obtain a "suitably restricted search warrant" for an administrative inspection for health or safety violations is different from the showing necessary for the issuance of a criminal search warrant. Specifically, the Court noted that a strong public interest, coupled with the fact that the search is "neither personal in nature nor aimed at the discovery of evidence of crime," eliminated the need for inspectors to show probable cause that a violation existed to obtain the required warrant. Instead, the Court determined that if a "valid public interest justifies the intrusion contemplated," then there is probable cause in a civil setting to issue the search warrant.

Another Supreme Court decision, *Michigan v. Tyler*, also approved of the use of administrative searches while illustrating the heightened standard imposed on searches of a private residence. The Court was asked to decide whether fire inspectors may make warrantless entries into private residences to determine whether a fire was the result of arson. The Court found that a property owner's expectation of privacy is not diminished and the owner does not have lesser Fourth Amendment protections merely because a firefighter conducts a search while attempting to ascertain the cause of a fire, rather than for the purpose of discovering evidence of a crime. The Court agreed that the Fourth Amendment applies to entries and searches by fire officials but refused to require firefighters to obtain warrants before entering buildings to fight fires or during the "reasonable time" that they remain in the buildings "to investigate the cause of [each] blaze." The Court, however, held that any additional entry to investigate the cause of a fire must be made pursuant to the warrant procedures governing administrative searches, and any search designed to gather evidence for a possible criminal prosecution may be performed only if the official obtains a warrant upon a traditional showing of probable cause applicable to searches for evidence of a crime. In so holding, the

---

68 *Id.* at 535.
69 *Id.* at 539.
70 See *id.* at 537.
71 *Id.* at 539.
73 See *id.* at 501.
74 *Id.* at 507–08.
75 *Id.* at 511.
76 *Id.* at 511–12.
Court acknowledged that, if the only purpose of the civil search is to gather evidence for a criminal prosecution, then the officials performing the search must obtain a criminal search warrant. 77

Finally, in Wyman v. James, 78 the Court balanced the governmental interest in protecting minor children — by allowing case workers to visit the homes of the public aid recipients — against the homeowner's desire for privacy. The Court found that visits conducted for the purpose of determining the family's continued eligibility for federal assistance did not violate the Fourth Amendment because no search occurred. 79 The Court noted, however, that even if the caseworker's entry did constitute a search, several factors would make the search reasonable. 80 The Court initially stressed the public's strong interest in the well-being of dependent children and stated that their needs are paramount and generally outweigh a mother's needs or privacy rights. 81 Likewise, the Court cited the public interest in having a "gentle" means of determining that the recipients of tax funds are actually entitled to receive the funds. 82 Moreover, the Court emphasized that the visits were announced and conducted pursuant to a civil proceeding, "not by the police for criminal investigation purposes." 83 Though the Wyman Court attempted to characterize the caseworker as a "friend to one in need" and not a "sleuth," it conceded that if such a visit "should... lead to the discovery of fraud and a criminal prosecution should follow, then... that is a routine and expected fact of life." 84

Finally, the Court has held that the need to ensure that the public is not harmed by a probationer's presence in the community creates a special need that "permit[s] a degree of impingement upon privacy that would not be constitutional if applied to the public at large." 85 The Supreme Court recently revisited the constitutionality

77 See id. at 508–09; see also Indianapolis v. Edmond, 531 U.S. 32 (2000) (holding that a vehicle checkpoint program whose primary purpose is to discover and interdict illegal drugs is an unreasonable search and seizure).
79 See id. at 318.
80 Id.
81 Id.
82 Id. at 319.
83 See id. at 310.
84 Id. at 323. Not surprisingly, while subsequent federal courts citing Wyman have stated that administrative searches should not be used as a pretext for a criminal prosecution, they nonetheless have upheld some criminal convictions obtained as a result of evidence found during warrantless administrative searches. See United States v. Burger, 482 U.S. 691, 712–16 (1987) (upholding conviction for possession of stolen property resulting from an administrative inspection of a junkyard but recognizing, in principle, that such searches cannot be used as a pretext for a criminal search).
of warrantless searches of a probationer’s home in *United States v. Knights.* The probationer in *Knights* was sentenced to probation for a drug offense and signed a probation order that required him to submit his person and property to search by a probation or law enforcement officer at anytime with or without a warrant. Though he signed this order, he later argued that a search of his apartment which revealed explosive devices and drug paraphernalia was unreasonable.

The Court suggested that searches of probationers’ homes might not violate the Fourth Amendment because the government’s interest in apprehending violators of the criminal law and protecting potential victims of crime may justify depriving a probationer of certain freedoms (including privacy) enjoyed by law-abiding citizens. Because the Court found that the officers had reasonable grounds to suspect the probationer had violated his parole, it stopped short of holding that the mere status of being on probation gives the government the right to search a probationer’s home. Instead, the Court based its holding on the fact that the probationer voluntarily consented to the searches when he signed the probation order. Though the Court acknowledged that the search provision affected the probationer’s privacy rights, the majority stressed that the probationer’s knowledge of (and consent to) this provision “significantly diminished [his] reasonable expectation of privacy.”

II. THE PROPRIETY OF SEARCHING DEBTORS’ HOMES

A. Role of the Chapter 7 Trustee

When an individual or business files a petition for relief under Chapter 7 of the Bankruptcy Code, a trustee will either be appointed or, in rare instances, elected. The Office of the United States Trustee (OUST), a component of the Department of Justice, monitors the conduct of debtors and appoints, then supervises the trustees who oversee Chapter 7 cases. In most districts, trustees are assigned randomly from a rotating standing panel of local attorneys or accountants.

---

87 See id. at 114.
88 Id. at 116.
89 Id. at 119–20.
90 See id.
91 Id. at 120.
92 See id. §§ 701–702. In most cases, the appointed interim trustee will continue to serve throughout the case. The Code does, however, give creditors the right to elect a trustee to replace the interim trustee. See id. § 702.
94 See U.S. Dep’t of Justice, Office of Research & Planning, The United States Trustee’s Role in Consumer Bankruptcy Cases, at http://www.usdoj.gov/ust/fs05_duties-
Although panel trustees operate under the direction of the OUST, they are not government employees. The Chapter 7 panel trustees’ primary responsibilities are to collect assets, maximize those assets for distribution to creditors, and report debtors who appear to have engaged in criminal conduct to law enforcement officers. Specifically, once a bankruptcy case is filed, title and right to the possession of the property of the estate passes to the panel trustee, whose primary responsibility is to use or sell all non-exempt assets to pay creditor claims. The panel trustee will manage the debtor’s non-exempt assets, investigate the debtor’s financial affairs, pay her debts, and object (if necessary) to claims creditors file in the bankruptcy case. The trustee has an obligation to furnish information concerning the estate upon the request of any party in interest (which includes all creditors) in the debtor’s case.

Assuming the debtor has not engaged in acts of misconduct (typically involving fraud or hiding assets), she will receive a discharge after the panel trustee completes her duties. In contrast, if the debtor has concealed property, failed to keep proper documentation of her financial affairs, or otherwise engaged in fraudulent acts, the trustee (or a creditor) may object to the debtor’s discharge and examine the debtor’s “acts and conduct” to determine whether grounds exist to deny a discharge. Indeed, trustees have several remedies in cases where debtors fail to adequately account for property. If a debtor disposes of property during the period immediately
before the bankruptcy filing, or if she makes unauthorized property transfers after
the filing, under certain circumstances the trustee can recover the transferred
property from the third-party transferee. Moreover, if a debtor knowingly and
fraudulently makes a false declaration or statement under penalty of perjury in
relation to any bankruptcy case, she can be fined or imprisoned. Finally, if the
panel trustee suspects that the debtor has committed bankruptcy fraud, he must
report this suspicion to the United States Attorney.

B. Overview of a Debtor's Bankruptcy Obligations

Debtors are required to file a list of creditors, disclose their assets, liabilities,
current income and expenditures, and file a statement of their financial affairs.
These documents (which are filed either with the clerk's office or electronically)
become a matter of public record and must disclose the description, location, and
market value of the debtor's property. Debtors also must consent to be examined
at a meeting of their creditors (or at other times as ordered by the court). In
addition, they are required to cooperate with the trustee's preparation of an
inventory of their property and must give the trustee their non-exempt property
(which will become property of the bankruptcy estate) and any documents relating
to property of the estate. Debtors must help the trustee perform its duties and
specifically are required to give the trustee all property that the trustee may use, sell,
or lease to maximize the recovery to creditors on their claims.

C. Searches in Bankruptcy Cases

Most judicial opinions involving searches performed in bankruptcy cases arise
out of actual or threatened criminal prosecutions. For example, in United States v.
Travers, the Eleventh Circuit considered an overly broad warrant in an appeal of

---

105 See id. §§ 547–549. For example, trustees have the right to recover some transfers made within ninety days of the bankruptcy filing as preferences under § 547, can recover fraudulently conveyed property under § 548, and can avoid property transfers made after the bankruptcy filing under § 549.
111 Id. § 521(3)–(4).
112 Id. § 521(3); BANKR. R. 4002.
114 233 F.3d 1327 (11th Cir. 2000).
a bankruptcy fraud conviction. The defendant was accused of orchestrating a complex financial fraud scheme and was charged with mail fraud, bankruptcy fraud, equity skimming, and money laundering.\textsuperscript{115} Though ultimately concluding that the officers acted in good faith, the district court held that the search warrant was overly broad because it authorized the officer to search for \textit{all} documents or materials that reflected potential fraud.\textsuperscript{116} The Eleventh Circuit stressed that when a warrant “is so overly broad on its face that [an] executing officer[.] could not reasonably . . . presume[.] it to be valid,” the officer conducting the search would not be deemed to have acted in objective good faith.\textsuperscript{117}

In another bankruptcy case, \textit{United States v. Patrick},\textsuperscript{118} the United States Inspector General, at the request of the Government Printing Office, applied for a search warrant to be executed on the premises owned by a debtor company. After the Chapter 7 trustee consented to the search, the defendants (officers of the debtor) argued that the trustee lacked the authority to waive the debtor’s Fourth Amendment rights by consenting to the search.\textsuperscript{119} The bankruptcy court was asked to consider “whether a bankruptcy trustee can waive [a] debtor’s Fourth Amendment right to be free from unreasonable search[e[s] and seizure[s].”\textsuperscript{120}

The court concluded that a trustee has the right to cooperate with a criminal investigation of the debtor corporation, including consenting to a search of corporate books and records.\textsuperscript{121} The court then considered whether the warrant was overbroad because it permitted the government to search and seize all business records and neither limited which documents could be seized nor suggested how the documents related to specific criminal activity.\textsuperscript{122} The court concluded that the warrant did not satisfy the Fourth Amendment specificity requirement because it failed to confine the search to particularly described evidence related to a specific crime for which there was probable cause.\textsuperscript{123} The court further rejected the government’s good faith defense, finding that the degree of overbreadth and lack of particularity of the warrant precluded a reasonable reliance on the warrant.\textsuperscript{124}

\textit{In re Benny} is another case that involved a criminal prosecution of a debtor.\textsuperscript{125} At the request of the U.S. Postal Service, the Chapter 7 trustee filed change of address requests to have the debtor's mail rerouted from his business and residential

\begin{footnotes}
\footnotetext[115]{\textit{Id.} at 1330.}
\footnotetext[116]{\textit{Id.} at 1330–31.}
\footnotetext[117]{\textit{Id.} at 1330.}
\footnotetext[118]{916 F. Supp. 567 (N.D. W. Va. 1996).}
\footnotetext[119]{\textit{Id.} at 569–70.}
\footnotetext[120]{\textit{Id.} at 570.}
\footnotetext[121]{\textit{Id.} at 571.}
\footnotetext[122]{\textit{Id.} at 573.}
\footnotetext[123]{\textit{Id.} at 574.}
\footnotetext[124]{\textit{Patrick, 916 F. Supp. at 574.}}
\footnotetext[125]{29 B.R. 754 (N.D. Cal. 1983).}
\end{footnotes}
addresses to the trustee’s office. The trustee did not give the debtor notice or an opportunity to object, and he did not have a court order that specifically approved the mail redirection. The trustee contended that, because he had the right to operate the debtor’s business, he also had the right to receive any mail addressed to the business. Because the trustee received letters from the debtor’s criminal defense and bankruptcy counsel, the debtor argued that the redirection damaged the attorney-client relationship. The court considered both the First and Fourth Amendment ramifications of a trustee’s unilateral decision to re-direct mail of a debtor under indictment for mail fraud.

The court characterized the practice of redirecting a debtor’s mail as an “intrusion into personal matters” and stated that such an unregulated ability to redirect a debtor’s personal and business mail would be an “overbroad invasion of privacy” that was not justified by the need to obtain information about the debtor’s assets which may be transmitted through the mail. The court further observed that allowing an unrestricted mail redirection would “permit, if not encourage, trustees to intrude upon the privacy” of a debtor’s communications with his attorney. In considering whether the redirection violated the protections afforded by the First Amendment, the court stated that the “demands of efficiency and enforcement of the bankruptcy laws do not necessarily outweigh interests in privacy and free expression.”

Though the court’s opinion primarily focused on the First Amendment implications of redirecting the debtor’s mail, it also considered whether the mail redirection violated the Fourth Amendment by treating the redirection as a government seizure. Because the bankruptcy and criminal proceedings were “intricately interwoven” and the trustee is statutorily authorized to “communicate regularly with creditors who may have a particular interest in assisting the criminal prosecution,” the court was particularly troubled by the trustee’s ability to unilaterally redirect the debtor’s mail without giving the debtor notice. The court ultimately sanctioned the use of mail redirection, but only if the trustee gives the debtor notice before commencing the redirection.

\textsuperscript{126} Id. at 757.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 758.
\textsuperscript{130} Id. at 765–69.
\textsuperscript{131} Benny, 29 B.R. at 764–65.
\textsuperscript{132} Id. at 765.
\textsuperscript{133} Id. at 766.
\textsuperscript{134} Id. at 767.
\textsuperscript{135} Id. at 768.
\textsuperscript{136} Id. at 761–63.
\textsuperscript{137} Benny, 29 B.R. at 769–70.
Finally, the debtor in *United States v. Weldon*\(^{138}\) moved to suppress evidence obtained during a warrantless search of his apartment. FBI agents obtained a warrant to arrest the debtor after receiving reports that the debtor was in possession of money that he knowingly and fraudulently had concealed from the trustee.\(^{139}\) They seized property from his apartment while there to arrest him.\(^{140}\) The court noted that the law enforcement officers were in the apartment because the debtor was charged with the crime of concealing assets from a panel trustee and the debtor’s possession of concealed assets in the presence of the arresting officers constituted a crime.\(^{141}\) The court authorized the agent's seizure of the debtor's property by characterizing the property as fruits of a crime (of concealing assets from the trustee).\(^{142}\)

Judges tend to react less favorably to requests to search a debtor’s property if the debtor is not the subject of a criminal prosecution. For example, in *In re Luikin*,\(^{143}\) the trustee subpoenaed the debtor’s business records from a receiver who had been appointed to take possession of the debtor’s law practice. The trustee issued the subpoena pursuant to Rule 2004 of the Rules of Bankruptcy Procedure, which generally gives parties in interest the right to question a debtor about her acts, conduct, or property (or her liabilities and financial condition), or any matter which may affect the administration of the debtor’s estate or her right to a discharge.\(^{144}\) The debtor moved to limit the scope of the Rule 2004 examination and argued that, because law enforcement officials and a creditor also wanted to see his business records, the subpoena was a subterfuge for a warrantless search of his records.\(^{145}\) The court held that the trustee acted within his statutory authority in subpoenaing the debtor’s records in the receiver’s possession but prevented the trustee from granting any third-party access to those documents without prior court approval unless such access was in response to a search warrant or subpoena issued by a state or federal court.\(^{146}\) The court found it “problematic” for a third-party to subpoena business records of the debtor that were in the possession of a third-party.\(^{147}\)

Finally, another bankruptcy court also considered whether panel trustees are state actors and concluded that they were not.\(^{148}\) In *In re Application of Trustee in Bankr. for a Search Warrant*, 173 B.R. 341 (N.D. Cal. 1997) the trustee was authorized to search the debtor's law practice in the absence of a warrant. The court held that the trustee was not a state actor because he was not acting under state law. See *In re Application of Trustee in Bankr. for a Search Warrant*, 173 B.R. 341 (N.D. Cal. 1997).

---

\(^{138}\) 112 F. Supp 192 (S.D. Cal. 1953). This case was decided under the Bankruptcy Act of 1898, the predecessor to the current Bankruptcy Code.

\(^{139}\) *Id.* at 193.

\(^{140}\) *Id.* at 194.

\(^{141}\) *Id.* at 195.

\(^{142}\) *Id.*

\(^{143}\) 255 B.R. 204 (Bankr. E.D. Tenn. 2000).

\(^{144}\) *Id.* at 208.

\(^{145}\) *Id.* at 213.

\(^{146}\) *Id.* at 214.

\(^{147}\) *Id.*

Bankruptcy for a Search Warrant, the trustee asked the bankruptcy court to issue a search warrant because the trustee suspected that the debtors were unlawfully secreting assets of the estate. The court’s opinion cited Federal Rule of Criminal Procedure 41, which regulates the issuance of search warrants and provides that search warrants may be issued “upon the request of a federal law enforcement officer or an attorney for the government . . .” This court concluded that a bankruptcy trustee is neither a federal law enforcement officer nor an attorney for the government. The opinion also noted that there appeared to be no statutory authority for a trustee to apply for issuance of a search warrant. The trustee asserted that it was entitled to a search warrant because the debtor was secretly and unlawfully hiding assets of the bankruptcy estate.

The court rejected the trustee’s argument, finding that, notwithstanding the trustee’s stated purpose, the trustee’s true interest in searching the debtor’s property was to uncover criminal activity. The court concluded that neither a private person, nor an attorney acting on behalf of that person in litigation, has the authority or responsibility to investigate or prosecute alleged violations of federal law. Instead, only law enforcement officers or government attorneys have the authority to search the debtor’s property. Thus, the court opined that the trustee had no legal basis for obtaining a warrant to search the debtor’s home because only the United States Attorney’s Office or another federal law enforcement agency had the authority to investigate criminal activity.

D. In re Barman

1. The Debtor’s Acts

The debtor in Barman owned a vending and video machine business and appeared to have orchestrated a complex scheme to hide property from his creditors and the Chapter 7 trustee. Before filing his bankruptcy petition, he appeared to have removed video machines from his business and hidden his ownership interest
in several real estate parcels. The trustee contended that the debtor purchased a home (Home I) for himself, titled it in his parents' names, and furnished it with furniture valued at over $40,000. The debtor then sold Home I (for over $150,000), used the sale proceeds to purchase Home II (also titled in his parents' name), and furnished Home II with some of the furniture from Home I. Although the debtor was ordered not to transfer or encumber Home II, he violated that order by refinancing Home II and transferring the equity proceeds to his parents. The debtor then withdrew these proceeds from his parents' account and at approximately the same time, the debtor's wife purchased Home III.

Notwithstanding these transactions (and the fact that his parents had testified in their own earlier bankruptcy case that they purchased $5,000 worth of furniture for him), the debtor listed only $500 in apparel on his bankruptcy schedules and did not explain how he disposed of other property. He specifically denied owning or possessing any video machines even though a process server testified to seeing fifteen to twenty video machines in the garage of Home III. Moreover, although his wife appeared to use the equity proceeds from Home II to purchase Home III, they denied that he owned this home, even though he lived there and a third-party (who was involved in post-petition litigation with the debtor) reported that the debtor had a trailer at Home III that contained personal property.

2. The Search

The Chapter 7 trustee suspected that the debtor would soon move himself and his property from Home III. Given his past behavior and what appeared to be his present intent to continue hiding assets, the trustee brought an ex parte motion to inspect Home III and appraise (but not seize) any personal property found there. The trustee asked the court to allow a U.S. Marshal, his counsel, and an appraiser to accompany him during the inspection due to the "past history of the Debtor's lack of cooperation with respect to bankruptcy proceedings." The court granted the
inspection order based on its findings that the debtor’s assets most likely consisted of more than $500 in clothing, that the debtor had a pattern of placing property in the names of other people, and that it would be difficult to trace assets in the video/vending machine business. In responding to the debtor’s argument that the search violated his Fourth Amendment privacy rights, the Barman court considered three main issues: (1) whether the trustee is a state actor; (2) whether the search was reasonable; and (3) whether the warrant specified the property to be searched.

a. The Trustee as a State Actor

Although the OUST considers panel trustees to be private parties (not government employees), the Barman court concluded that trustees were state actors for Fourth Amendment purposes and, as private parties, had the authority to search the debtor’s home. Because the Bankruptcy Code gives trustees the authority to collect property of the estate and to investigate the debtor’s financial affairs, the court concluded that a trustee acts “under the authority of law when inspecting a debtor’s residence to search for property of the estate.” The court further noted that an official of the Department of Justice (the OUST) appoints panel trustees and stressed that such trustees must seek court approval to be paid or to employ professionals, and are subject to removal by the court.

While conceding that the trustee is not a government employee, the court found that a trustee has a relationship “sufficiently close to the government that the Fourth Amendment applies.” The opinion acknowledged that the Bankruptcy Code does not state or imply an obligation upon the debtor to permit a warrantless inspection. In addition, the opinion did not cite any statute that specifically authorizes a panel trustee to apply for — much less execute — a search warrant to prepare to execute a restraining order against the debtor.

See id. Because this matter came before the court on the Debtor’s Motion to Suppress, much of the court’s opinion arguably is dicta as these Motions are designed to suppress evidence in a criminal prosecution, not a civil proceeding. In denying the motion to suppress, however, the Barman court raises (and decides) issues that would be applicable if a debtor sought to sue a Trustee for searching a home in a civil bankruptcy proceeding.

See supra note 95. Barman, 252 B.R. at 419. See id. at 412 (citations omitted).

Id.; see also In re Benny, 29 B.R. 754, 764 n.19 (N.D. Cal. 1983) (stressing that the trustee is “substantially under the control of the bankruptcy court” and suggesting that “the action of the trustee may be said to be sufficiently entwined with that of the government to justify a finding of ‘state action’”). See Barman, 252 B.R. at 414–15.
search a debtor's private home. Nonetheless, the court concluded that, because "every aspect of a trustee's position and function is subject to either statutory obligation or to federal executive or judicial branch control," the Trustee is a state actor with the right to search a debtor's home.

b. Reasonableness of the Search

The court observed that the standard for reasonableness in a civil or administrative situation is less stringent than the standard applied in criminal cases. Relying principally on Camara and Wyman, the court found that the trustee's search of the debtor's residence was reasonable because the trustee could not "carry out his statutory obligation to account for all of the property of the estate without an inspection of the debtor's residence." Although bankruptcy cases are designed to give debtors a fresh start and to collectively maximize a debtor's estate to repay creditors' claims, the court concluded that the trustee's inspection of the debtor's home is attributable to the government, not to private interests. Moreover, because of the "strong public interest in the full and proper administration of a bankruptcy case... including a full investigation of the debtor's assets," the court found the search to be reasonable.

In discussing a debtor's right to privacy, the court noted that debtors are required to disclose (in files available for inspection by the public) all property they and their spouses own, as well as the market value of that property. Considering this requirement, the court concluded that the debtor had limited privacy right because a "natural consequence of the substantial and detailed disclosures that are inherent in the bankruptcy process" is that people who file for bankruptcy have a diminished expectation of privacy in their houses, papers, and effects. The court reasoned that making these disclosures "substantially reduce[s] a debtor's reasonable expectation of privacy regarding his property interests." Though the court agreed that debtors retain diminished expectations of privacy, it concluded that this expectation must be balanced against (but, in this case, ultimately is secondary to) the trustee's interest in fulfilling his statutory obligation to find and administer estate property.

See id.

Id. at 412.

Id. at 413.

See Barman, 252 B.R. at 417.

Id. at 412–13.

Id. at 417.

See id. at 414.

Id.

Id.

Barman, 252 B.R. at 415–16.
c. Specificity Requirement

Despite the Fourth Amendment's warrant specificity requirement,\textsuperscript{190} the panel trustee’s request did not specifically describe the estate property that was the object of the search.\textsuperscript{191} In addition, the court’s inspection order placed no restrictions on where the trustee could search in Home III even though the debtor’s wife (who had \textit{not} filed for bankruptcy) lived in the home and arguably owned property located there.\textsuperscript{192} Instead, the court permitted the trustee to search all places in the debtor’s home — both hidden and in plain view.\textsuperscript{193} Notwithstanding the breadth of the search in \textit{Barman}, the court rejected the debtor’s general warrant challenge.\textsuperscript{194} The court concluded that the trustee was not required to list with specificity the places to be searched because, “if the trustee establishes reason to believe that there are estate assets on the premises that the trustee proposes to inspect, the [F]ourth [A]mendment permits the trustee the opportunity to inspect those premises without restriction as to specific property . . . .”\textsuperscript{195}

III. CRAFTING REASONABLE SEARCHES IN BANKRUPTCY CASES

\textit{Barman},\textsuperscript{196} though helpful to trustees who are attempting to find and administer estate property, has troubling implications for those subjected to the search. The next sections of this Article explain why the search authorized by the \textit{Barman} court\textsuperscript{197} was not consistent with the privacy protections traditionally afforded to residences and why searches generally are inappropriate in bankruptcy cases. I then suggest ways that trustees, using current law, could persuade debtors to consent to a search, then conclude by proposing revisions to current law to make searches in non-criminal bankruptcy cases constitutionally sound.

A. The Barman Search Was Overboard

Though many of the Supreme Court cases discussing the reasonableness of


\textsuperscript{191} \textit{Barman}, 252 B.R. at 418.

\textsuperscript{192} See id. at 417.

\textsuperscript{193} See id. (”[T]he object of inspection may be anywhere in the debtor’s residence, hidden in private places or in plain view . . . .”).

\textsuperscript{194} Id. at 403.

\textsuperscript{195} Id. at 419.


\textsuperscript{197} Id. at 420.
residential searches involve warrantless searches (a situation not present in *Barman*), the Supreme Court cases that address the need to obtain a warrant and the exceptions to the warrant requirement nonetheless are instructive because they demonstrate the Supreme Court’s consistent view that a person’s home is a greatly protected venue.\(^{198}\) Moreover, these cases suggest that, although it might be appropriate for a trustee to obtain a warrant to search a debtor’s business, trustees should not be allowed to search a debtor’s home absent extraordinary circumstances involving public safety or welfare.\(^{199}\) In any event, the warrant must be specific.

As one court observed: “Because everyone has some kind of secret or other, most people are anxious that their personal privacy be respected. For that very human reason the general warrant, permitting police agents to ransack one’s personal belongings, has long been considered abhorrent to fundamental notions of privacy and liberty.”\(^{200}\) The inspection order in *Barman* was facially deficient in its description of the items to be seized, as it failed to list the property likely to be found or to place any limitations on where the trustee could search.\(^{201}\) In addition, notwithstanding the fact that the debtor’s non-debtor spouse lived at — and purportedly owned — the home, the search failed to limit the trustee to searching only non-exempt property of the debtor’s estate.\(^{202}\)

In rejecting the debtor’s general warrant challenge to the trustee’s search of his home, *Barman* implicitly agreed that trustees be given the power not only to enter a debtor’s home, but also the right to search every corner of that home.\(^{203}\) Such authority is not consistent with Fourth Amendment principles, which require warrant specificity unless the government is unable to acquire information that would limit the search. When, as here, the trustee had information that the debtor was hiding large objects (furniture and arcade games), the court should have limited the search to those items and restricted the trustee’s search powers to areas in which these items might reasonably be found.\(^{204}\) A search of the debtor’s cabinets,

---


“Crime, even in the privacy of one’s own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.”

\(^{199}\) See supra notes 63–65 and accompanying text.

\(^{200}\) United States v. George, 975 F.2d 72, 74 (2d Cir. 1992).

\(^{201}\) *Barman*, 252 B.R. at 418–19; see supra text accompanying notes 192–93.

\(^{202}\) *Barman*, 252 B.R. at 418–19; see supra text accompanying notes 190–93.

\(^{203}\) *Barman*, 252 B.R. at 419.

\(^{204}\) See id. at 409 (“The trustee further alleges the ‘probable existence’ of property of the debtor that was not disclosed, including furniture and video machines . . . .”).
drawers, or closets, for example, would be an overly broad search for these large items. Had the court limited the trustee’s search powers to the items believed to be in the debtor’s residence and to areas where those items logically could be found, the intrusive nature of the trustee’s search would have been reduced dramatically.

B. The Government Has No Compelling Interest in Non-Criminal Bankruptcy Proceedings

Because of the requirements imposed by the Bankruptcy Code, debtors reasonably should expect that their creditors, the trustee, and the bankruptcy judge will scrutinize their personal financial records. That is, debtors must disclose detailed information about their financial affairs in documents filed either in the bankruptcy court clerk’s office or electronically. Individuals who file bankruptcy petitions on behalf of their businesses also should expect that the Chapter 7 trustee will either search or seize those business records because the trustee has the statutory authority to directly operate business debtors. Moreover, debtors should expect that law enforcement officers or government attorneys would have the right to enter and search their homes if they have been indicted for bankruptcy fraud. Nothing in the Bankruptcy Code or Rules (or any other federal statute or regulation), however, places debtors on notice of the possibility that a private attorney or accountant appointed as a Chapter 7 trustee would have the authority to enter and search their homes in a non-criminal bankruptcy proceeding.

Bankruptcy cases generally do not implicate the public health or safety issues

---

205 See, e.g., Maryland v. Garrison, 480 U.S. 84 (1987), in which the court quipped: "[P]robable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom . . . ." Id. at 87; see also United States v. Evans, 92 F.3d 540, 543 (7th Cir. 1996) ("If they are looking for a canary’s corpse, they can search a cupboard, but not a locket. If they are looking for an adolescent hippopotamus, they can search the living room or garage but not the microwave oven.").

206 See supra text accompanying note 176.

207 Because the information debtors include on their electronic filings arguably is available to anyone who has access to the Internet, government and academic commentators recently have questioned the use of electronic filings, especially in districts where they are mandatory, because they expose a debtor’s sensitive private information (including their social security numbers) to anyone who has access to the World Wide Web. See OFFICE OF MGMT. & BUDGET, STUDY OF FINANCIAL PRIVACY AND BANKRUPTCY: JANUARY 2001, at 3 (2001) (finding that the “use of electronic systems provides more efficient services, [but] it may create new hazards for the privacy of personal information”); Peter C. Alexander & Kelly Jo Slone, Thinking About the Private Matters in Public Documents: Bankruptcy Privacy in an Electronic Age, 75 AM. BANKR. L.J. 437 (2001).


209 See supra text accompanying notes 107, 114–15.
raised in administrative search cases.\textsuperscript{210} Instead, bankruptcy laws are designed to structure the relative rights debtors and creditors have in a debtor’s property.\textsuperscript{211} Even if the government is a party in interest in a bankruptcy case, it has rights that are no greater than any other creditor unless it proves that it is acting pursuant to its "police and regulatory power" rather than acting merely to protect its status as a creditor.\textsuperscript{212} Specifically, the Bankruptcy Code contains an exception to the automatic stay that generally enjoins all collection activities against a debtor\textsuperscript{213} for the “commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit’s . . . police or regulatory power.”\textsuperscript{214} Whereas governmental units can continue litigation that relates to its police powers, that exception would not allow it to file actions, including criminal actions, if the action is instituted solely for the purpose of collecting a debt.\textsuperscript{215} Instead, before a governmental unit will be allowed to proceed against a debtor, a court must determine the primary purpose of the law that the state is attempting to enforce. If obtaining the repayment of a debt is the motivating factor behind the institution of a criminal proceeding, the state would not be allowed to pursue the proceeding using its police powers.\textsuperscript{216}

\textsuperscript{210} Some of these issues include the need to prevent fire hazards, to protect children, or to protect the public from defective drugs or the unauthorized manufacture or sale of firearms or ammunition.


\textsuperscript{213} \textit{Id.} § 362(a).

\textsuperscript{214} \textit{Id.} § 362(b)(4).


\textsuperscript{216} Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 864 (4th Cir. 2001) (denying a preliminary injunction to owners of hazardous waste sites, thereby preventing a state regulatory agency from closing their facility); Yellow Cab Coop. Ass’n v. Metro Taxi, Inc. (\textit{In re Yellow Cab Coop. Ass’n}), 132 F.3d 591, 597 (10th Cir. 1997) (finding the state public utilities commission’s decision to prohibit full transfer of debtor-taxicab company’s operating certificate to purchaser of debtor’s assets was a “governmental regulatory action” and thus excepted from automatic stay provision); Universal Life Church, Inc. v. United States (\textit{In re Universal Life Church, Inc.}), 128 F.3d 1294, 1297 (9th Cir. 1997) (finding that the IRS’s revocation of debtor-religious organization’s tax exempt status fell within the automatic stay exception); Javens v. Hazel Park (\textit{In re Javens}), 107 F.3d 359, 367–68 (6th Cir. 1997) (finding the municipalities’ actions in demolishing condemned buildings of the debtor were exercises of police powers and excepted from automatic stay); United States v. Commonwealth Cos. (\textit{In re Commonwealth Cos.}), 913 F.2d 518, 523 n.6 (8th Cir. 1990) (stating that the government was not prohibited from joining debtors in a civil fraud suit); NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 942 (6th Cir. 1986) (analyzing the National Labor Relations Board’s unfair labor practice proceeding against a corporate employer that had filed a bankruptcy petition allowed under exception); EEOC v. Rath Packing Co., 787 F.2d 318, 325–26 (8th Cir. 1986) (allowing Title VII action against debtor because it vindicated the public interest, though the enforcement of money judgment against
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. Although the trustee statutorily has the right to manage a debtor's estate, the trustee will not be allowed to maximize the value of the debtor's property by using or selling estate property until it is clear that the property is included in the estate and that the debtor does not have the right to exempt the property under applicable law. In addition, even if the property is included in the estate and cannot be exempted, the trustee is entitled to only so much of that property as is necessary to pay creditor claims. Allowing a debtor to hide property from his creditors arguably would make the federal bankruptcy court a vehicle for fraud, though that would be true any time a private plaintiff used the federal court system to pursue relief but refused to fully comply with the rules of court. Moreover, as the next section notes, 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.

C. Civil Litigants Have No Right to Search Their Adversary's Homes

Parties in civil litigation in federal court may demand that their adversary: (1) produce copies of documents that will be used to support its claims or defenses; (2) disclose the names of witnesses (including experts) who may testify at trial; (3) respond to interrogatory requests; (4) testify under oath in a deposition; and even submit to physical or mental examination if the person's physical or mental condition "is in controversy." If a party involved in commercial civil litigation is asked to produce documents but either claims that the documents do not exist or refuses to produce them, the requesting party does not have the right to search the

---

218 It is, of course, possible that a governmental entity may also be a creditor. Though this gives the public a greater interest in the case, the nature of the dispute would remain debt collection, not public safety.
219 Certain property is excluded from the bankruptcy estate. This property includes a debtor's interest in a spendthrift trust and a tax-qualified retirement plan. 11 U.S.C. § 541(c)(2) (2000).
220 Id. § 704.
221 FED. R. CIV. P. 26(a)(1)(B), 34(a).
222 FED. R. CIV. P. 26(a)(2).
223 FED. R. CIV. P. 33.
224 FED. R. CIV. P. 28.
225 FED. R. CIV. P. 35.
non-producing party's home even if the requesting party has proof that information relevant to the litigation — or demanded pursuant to the Federal Rules of Civil Procedure — is contained in the home. Likewise, if a governmental unit is a litigant, the government does not have the authority to search another party's home if the dispute between the two parties involves a simple commercial dispute. Instead, a party who fails to comply fully with an appropriate discovery request may be sanctioned and ordered to pay his adversary's costs and expenses, have a claim or defense dismissed, and in some circumstances, have a default judgment entered against it.226

This same discovery process, and the rights of parties to refuse certain discovery requests, applies in most disputes between a trustee and a debtor concerning property of the estate because the discovery rules applicable to federal civil litigation also apply to most bankruptcy proceedings.227 For example, O'Halloran v. Williams,228 the trustee sought to recover funds that the debtor corporations had transferred to third parties. The trustee sent interrogatories and requests for production of documents to one of the debtor's former directors.229 When the director refused to respond to certain interrogatories, raising the Fifth Amendment privilege against self-incrimination, the trustee did not then have the authority to search the director's home to obtain the documents.230 Instead, the court concluded that because complying with the trustee's request (made in a civil bankruptcy proceeding) gave the former director "reasonable cause to apprehend danger," the former director had the right to refuse to respond to the discovery requests.231 The court reasoned that the director had properly invoked his Fifth Amendment privilege.232

Although litigants in private commercial disputes do not have the right to search their adversaries' homes, they do — under certain limited circumstances — have the right to ask a court to seize their adversaries' property before a judgment is entered. Specifically, Rule 64 of the Federal Rules of Civil Procedure, which applies in bankruptcy proceedings,233 provides that a party may request a court order allowing it to seize specified property for the purpose of securing the satisfaction of any judgment ultimately entered in the case.234 However, the Federal Rules of

226 FED. R. CIV. P. 37(b).
227 Whether the dispute is characterized as an adversarial proceeding or a contested matter, the discovery rules apply. See BANKR. R. 6009, 7001, 7026-37, 9014.
229 See id. at 397.
230 Id. at 399, 404.
231 Id. at 402.
232 Id.
233 BANKR. R. 7064.
234 FED. R. CIV. P. 64. However, such a seizure may violate due process if it occurs without notice or a prior hearing. See N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601
Civil Procedure do not give a plaintiff (or a trustee) the right to search her adversary’s home pre-judgment, even if the plaintiff may have reasonable cause to believe that the debtor is hiding assets. The private party’s rights under federal law and a majority of state laws are limited to having specifically identified property seized — temporarily — until the underlying litigation is resolved or the court determines that the seizure is unwarranted.\(^{235}\)

Because the trustee is entitled to manage the debtor’s non-exempt estate property, the trustee arguably could be treated like a judgment creditor who has the right to obtain a writ of execution to direct a law enforcement officer to levy and sell non-exempted goods to satisfy the judgment.\(^{236}\) However, a recent state

...(1975) (holding a Georgia garnishment statute violative of due process because: (1) it permitted the court clerk to issue the writ based on a conclusory affidavit provided by the plaintiff; (2) there was no provision for an early hearing; (3) the defendant was denied access to and use of the garnished property pending litigation; and (4) the law gave the defendant no method other than filing a bond to dissolve the writ).

\(^{235}\) In limited circumstances, plaintiffs will be permitted to attach or seize a defendant’s property pre-judgment. In most cases, the plaintiff must file an affidavit with the court that sets forth the nature of her claim, the amount of damages, the type of property to be attached, and the value of that property. In addition, the plaintiff must give the defendant proper notice and a chance, in most cases, for a preliminary hearing. See CONN. GEN. STAT. ANN. § 52-278e (West 2002) (permitting attachment upon plaintiff’s demonstration of probable cause that a judgment will be rendered in her favor, and upon a showing of reasonable likelihood that the defendant will flee or dispose of property (yet affording defendant the right to a hearing to object to the attachment), requiring that the plaintiff post bond or show that his property is exempt); D.C. CODE ANN. §§ 16-501 to 16-502 (1996) (permitting attachment upon a showing that the plaintiff has a “just right” to recover, that the defendant “has removed or is about to remove” or attach his property, and that the plaintiff has posted a bond for twice the amount of her claim); MONT. CODE ANN. § 27-18-402 (2002) (permitting attachment upon filing a copy of the writ with the court and serving notice on the defendant); N.H. REV. STAT. ANN. §§ 511-A:1, 511-A:2, 511-A:8 (2002) (permitting attachment upon notice to defendant of his right to a preliminary hearing and, in exceptional circumstances, permitting attachment prior to providing notice to the defendant); W. VA. CODE ANN. §§ 38-7-1 to 38-7-8 (Michie 2002) (allowing pre-judgment attachment when the plaintiff files an affidavit with the court and posts bond for at least double the estimated value of the property to be attached, as well as affording the defendant an opportunity for a pre-judgment hearing); WYO. STAT. ANN. § 1-15-201 (Michie 2002) (permitting pre-judgment attachment upon filing of an affidavit attesting to: (1) the value of the property seeking to be attached; (2) the good faith basis for the pre-judgment attachment, and (3) the grounds for the attachment).

\(^{236}\) See ARK. CODE ANN. §§ 16-66-104, 16-66-110 (Michie 2002) (permitting judgment creditor to obtain a writ of execution directing the sheriff to enter the debtor’s property and take possession of specified property or money equal to the amount the property to be seized); IDAHO CODE § 11-102 (Michie 2002) (permitting the issuance of a writ of execution describing the specific details of the judgment and allowing the sheriff to enter onto the debtor’s property to satisfy the judgment and costs out of the debtor’s real or personal property); MONT. CODE ANN. § 25-13-213 (2002) (allowing a writ of execution to be issued by a judge against the debtor upon the filing of an affidavit by the judgment creditor...
supreme court opinion questioned the state’s interest in searches pursuant to debt collection lawsuits. The court in Dorwart v. Caraway, considered a Montana statute that allowed judgment creditors to obtain a writ of execution to seize a debtor’s personal property by filing a praecipe with the clerk’s office. As an initial matter, although the writ expressly authorized entry into a private home to seize specifically identified property, it did not authorize officials to enter the private home to search for that property. The issuance of the writ itself was purely ministerial and required no action or review by a court. The Montana Supreme Court held that law enforcement officials must obtain a writ of execution issued by a judge upon reasonable cause before entering a private residence to search or seize property located at the residence.

The State Attorney General argued that the search should be permitted due to the state’s compelling interest in “the enforcement of monetary judgments by the seizure of a judgment debtor’s property and the preservation of the credibility of the judicial system.” The Court acknowledged that certain state interests — including when the state acts to enforce criminal laws or to protect other fundamental rights of its citizens — justify an intrusion into a person’s privacy. The Court, however, specifically rejected the argument that there was a compelling

---

237 At least one federal court has suggested that an inventory of the contents of a home performed pursuant to a writ of assistance will satisfy the Fourth Amendment’s less stringent requirement of reasonableness in civil searches, as long as the creditor submits an affidavit in support of the writ of assistance and a judicial official reviews and approves the writ. Owens v. Swan, 962 F. Supp. 1436, 1440 (D. Utah 1997).

238 966 P.2d 1121 (Mont. 1998).

239 Id. at 1136.

240 Id. at 1135.

241 Id. at 1136–37.

242 Id. at 1138.

243 Id.
state interest that justified an intrusion into a person's privacy in this case because the purpose of the search was to enforce a civil judgment between two private citizens.\textsuperscript{244}

The federal government does not have a compelling interest in what is essentially a dispute between private parties, \textit{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.\textsuperscript{245} 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.\textsuperscript{246} A trustee should not be allowed to search a debtor's home to inventory property because private parties could not do so in a pre-judgment attachment proceeding. In addition, the trustee (like a private judgment creditor) \textit{at most} should be entitled to conduct a search only if she specifies the property likely to be found.

\textbf{D. Allowing Trustees to Search Homes Is Not Authorized by, or Consistent with, Bankruptcy Laws}

The Chapter 7 trustee is a “creature of statute and has only those powers conferred thereby.”\textsuperscript{247} Federal Rule of Criminal Procedure 41(a) authorizes law enforcement officials and government attorneys to obtain search warrants. No such rule applies in civil litigation in the federal courts. The trustee in \textit{Barman} was not a law enforcement officer or a government attorney and did not appear to have been trained to search debtors' homes.\textsuperscript{248} Indeed, the trustee appeared to understand one

\begin{itemize}
  \item \textsuperscript{244} \textit{Id.}
  \item \textsuperscript{245} \textit{See supra} text accompanying notes 96–102, 111.
  \item \textsuperscript{246} \textit{See id.}
  \item \textsuperscript{247} \textit{In re} Benny, 29 B.R. 754, 760 (N.D. Cal. 1983).
\end{itemize}

Though not all administrative searches are performed by trained law enforcement officers, they are conducted by government employees who ostensibly were trained to perform the search. \textit{See, e.g.,} United States v. Goff, 677 F. Supp. 1526, 1541 (D. Utah 1987) (discussing a search in a bankruptcy fraud prosecution performed by an agent of the Bureau of Alcohol, Tobacco and Firearms who was trained in such inspections). The search in \textit{Camara v. Municipal Court}, 387 U.S. 523 (1967), was conducted by a municipal health inspector, whereas the search in \textit{Wyman v. James}, 400 U.S. 309 (1971), was attempted by a caseworker for Aid to Families with Dependent Children. That a warrant is executed outside the presence of a law enforcement officer does not make the search \textit{per se} unreasonable. Indeed, in some instances a civilian search may be more reasonable than a search by a law enforcement officer, especially if the civilian has greater technical expertise in the matter in dispute. \textit{See} United States v. Bach, 310 F.3d 1063, 1067 (8th Cir. 2002) (permitting employees of an
of the primary practical benefits of having searches performed by law enforcement officers when he asked the court to allow an armed Federal Marshall to accompany him during the search. 249 Whereas panel trustees are given most of the powers provided in the Federal Rules of Civil Procedure, the bankruptcy rules do not incorporate the Federal Rules of Criminal Procedure. As such, trustees have no explicit statutory authority to request or execute a search warrant. Moreover, whereas panel trustees are supervised by a federal agent, the OUST views panel trustees as private parties, not government lawyers.

The Barman trustee should have had the right to cooperate with a criminal investigation of an individual debtor just as the trustee in United States v. Patrick had the right to assist the Inspector General’s criminal investigation. 250 Likewise, a panel trustee should — and, in fact, must — cooperate with a criminal bankruptcy fraud investigation. However, the fact that a trustee should help facilitate a criminal investigation does not mean that she can help conduct the investigation by searching the debtor’s home for property the debtor failed to disclose or relinquish. That is, whereas trustees should be allowed to give the debtor’s records to law enforcement officials, they should not have the right to search the debtor’s home to find those records. This is especially true in light of the heightened privacy protections given to the home and the fact that courts have permitted trustees to waive debtor’s constitutional rights only in cases involving corporate, not individual, debtors. 251

Though the bankruptcy court has the authority to order debtors to both disclose the existence of assets and deny a discharge to any debtor who fails to do so, permitting trustees to search debtors’ homes simply is not consistent with the administrative scheme designed in the Bankruptcy Code. No federal statute embodies a congressional determination that the public has an interest in forcing debtors to repay all their debts. Instead, the federal Bankruptcy Code serves to facilitate federal debt collection cases that either a debtor or its creditors have initiated, and it permits debtors to discharge most debts in Chapter 7 liquidation cases (and even more debts in Chapter 13 wage earner cases). 252 Neither the public’s interest in having uniform bankruptcy laws nor the “demands of efficiency and enforcement of the bankruptcy laws” 253 outweigh a person’s interest in preventing the government — or a private attorney associated with the

Internet service provider to search an e-mail account outside the presence of a law enforcement officer for evidence of child pornography).

249 Barman, 252 B.R. at 411.
251 See, e.g., Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343 (1985) (allowing trustee to waive a debtor-corporation’s attorney-client privilege with respect to pre-bankruptcy communications).
government — from searching his home.

E. Allowing Searches Will Permit — If Not Encourage — Pretextual Searches

The *Barman* opinion relied heavily on the fact that the trustee’s inspection of the debtor’s home was “not for the purpose of discovering evidence of crime.”254 Notwithstanding the civil nature of the search, the greatest concern raised by the *Barman* court’s decision to grant the inspection order is the risk that the holding will encourage trustees to search a debtor’s home in order to bolster a later criminal bankruptcy fraud prosecution. Indeed, the court’s reliance on the “civil,” rather than “criminal,” nature of this dispute belied the fact that the elements required to prove that a debtor fraudulently conveyed property are substantially the same ones required to prove that the debtor engaged in criminal bankruptcy fraud.255

To establish that a debtor has fraudulently conveyed property, the trustee must either rely on the state fraudulent transfer law (which generally requires a showing that a debtor intentionally transferred property to hinder creditor collection attempts, or transferred property for less than fair value)256 or section 548 of the Bankruptcy Code (which requires the trustee to prove actual fraud or that the debtor transferred property for less than the reasonably equivalent value and that the transfer rendered him insolvent).257 The court can deny a debtor a discharge under Chapter 7 if the party objecting to the discharge introduces evidence that the debtor: (1) concealed, destroyed, or failed to keep financial records; (2) gave false statements during the case; (3) failed to explain a loss of assets; or (4) withheld records or property from the trustee.258 Given the similarity between the elements required to prove that a debtor fraudulently conveyed property and that a debtor committed bankruptcy fraud, fraudulent conveyance actions potentially subject the debtor to criminal liability for knowingly or fraudulently concealing property of the estate from the trustee or for making fraudulent statements about the bankruptcy case.259 Indeed, the court in *Barman* conceded that the trustee was required to give the United States Trustee any evidence of crime, which the U.S. Trustee would then give to the United States Attorney presumably for the U.S. Attorney to determine whether the debtor should be criminally prosecuted.260 A criminal prosecution was a real possibility in *Barman* (and probably a justifiable one), given the debtor’s past behavior.261 Similarly, the results of the trustee’s search in this case could cause the

255 See id. at 412–13, 416.
258 Id. § 727(a)(3), (5).
260 *Barman*, 252 B.R. at 417.
261 Id. at 407–10.
debtor’s wife and parents to be prosecuted for knowingly and fraudulently receiving property from the debtor post-petition if their intent was to help the debtor defeat his obligations under the Bankruptcy Code.\footnote{See 18 U.S.C. § 152(5) (2000).}

Bankruptcy fraud prosecutions are rare and generally will not be brought unless the debtor has concealed a significant amount of property.\footnote{Craig Peyton Gaumer, \textit{A Call to Arms: How Can the Department of Justice Better Combat Bankruptcy Crimes?}, AM. BANKR. INST. J., Feb. 1999, at 8.} Even if the risk of a bankruptcy fraud prosecution is low, because the government has no compelling interest in private debt collection disputes, and because allowing trustees to rummage through a debtor’s home encourages pretextual searches, courts should not allow panel trustees to perform non-consensual home searches, absent clear statutory authority.

\section*{F. Possible Solutions}

\subsection*{1. Existing Remedies}

A person who files for bankruptcy relief ordinarily does so to receive a discharge of most debts and to keep exempt property. The Code contains penalties for debtors who file a bankruptcy petition for improper reasons or who fail to comply with the requirements imposed by the Code.\footnote{11 U.S.C. § 110(2) (2000).} For example, the court can issue an order requiring the debtor to turn over non-exempt property or property the debtor has improperly converted to exempt property if the evidence establishes the existence of the property (or its proceeds).\footnote{See Lawrence v. Chapter 7 Trustee (\textit{In re Lawrence}), 251 B.R. 630, 639 (S.D. Fla. 2000) (ordering the turn over of \textit{res} in an offshore trust settled by the Chapter 7 debtor immediately before a $20.4 million arbitration award was entered against him).} A debtor who refuses to comply with a turn-over order may be held in contempt, fined, and incarcerated until he complies with the order.\footnote{See Lawrence v. Goldberg (\textit{In re Lawrence}), 279 F.3d 1294, 1297 (11th Cir. 2002).}

A debtor who intentionally hides estate property from the Trustee and then lies about the existence of the property on bankruptcy forms or schedules or during an examination under oath can be prosecuted for perjury.\footnote{18 U.S.C. § 152(3) (2000).} In addition, debtors who refuse to turn over estate property or to disclose financial information can be sanctioned by having the court refuse to grant a discharge.\footnote{If a trustee has enough proof to convince a court to issue a search warrant, the trustee certainly should have enough proof to convince the court to deny the debtor a discharge, which is exactly what the trustee did in \textit{Solomon v. Barman (In re Barman)}, 244 B.R. 896 (Bankr. E.D. Mich. 2000). Given the debtor’s failure to keep records and apparent loss of}
of a discharge, an individual debtor remains liable for all debts.\textsuperscript{269} Moreover, in Chapter 7 cases involving primarily consumer debts, trustees can move to dismiss the case for substantial abuse.\textsuperscript{270} A debtor who consistently refuses to disclose assets or cannot satisfactorily explain the disappearance of those assets could be viewed as substantially abusing the bankruptcy process. Finally, any case involving a debtor who appears to have engaged in fraudulent conduct when hiding assets could (and should) be referred to the U.S. Trustee or U.S. Attorney for a bankruptcy fraud investigation.\textsuperscript{271}

2. Potential Remedies

Though debtors have a diminished expectation of privacy in the financial information they disclose in their bankruptcy schedules, as discussed earlier,\textsuperscript{272} none of the rules applicable to bankruptcy cases give debtors notice that filing for bankruptcy grants a private attorney the authority to enter and search their homes. If there is a legitimate governmental interest in ensuring that debtors comply with the Bankruptcy Code and Rules,\textsuperscript{273} then Congress should revise either the Bankruptcy Code or Rules to provide that one of the debtor’s duties is to consent to a search of their homes. Debtors currently are required to provide information about their assets on the schedules they submit with their bankruptcy petitions. Because debtors are required to disclose everything they own — whether large or small, personal or not — trustees may already feel as if they are probing into the intimacies of debtors’ lives when they review debtors’ bankruptcy petitions and schedules. No matter the level of detail that debtors are required to disclose on paper, however, there simply is a difference between the feeling that you are rummaging through a person’s lingerie drawer and actually being allowed to physically rummage through those drawers. In addition to requiring that they declare under penalty of perjury that they have read the schedules and affirm that they are true and correct, debtors could be required to affirm that they understand that submitting the bankruptcy petition and schedules subjects them to a search of

\textsuperscript{269} 11 U.S.C. § 727(a)(3) and (a)(5).

\textsuperscript{270} 11 U.S.C. § 707(b) (2000).


\textsuperscript{272} See supra text accompanying notes 186–89.

\textsuperscript{273} Even if there is a legitimate governmental interest in ensuring compliance with federal law, it is unclear whether there is sufficient abuse of the bankruptcy process to warrant such an intrusion into the lives of each person who files a bankruptcy petition. That is, while Mr. Barman clearly appeared to have abused the protections provided by the Bankruptcy Code and there are other debtors who have committed similar abuses, it is hard to determine whether this is a case that confirms the adage that “bad facts make bad law” or whether there is a genuine need to increase the Trustee’s existing powers to respond to debtor abuse.
their homes. Likewise, in addition to informing debtors that they can be fined up to $500,000 or imprisoned for up to five years under the bankruptcy fraud statute if they intentionally provide inaccurate information, debtors also could be told at the beginning of the process that their homes may be searched if the trustee suspects that they have hidden assets.

A second remedy would be for Congress to revise the dischargeability provisions of the Bankruptcy Code to make the debtor’s consent to a residential search a condition of discharge, thereby placing debtors on notice of the possibility that their homes may be searched. Debtors who desire to discharge their debts would file their petitions knowing that they will not be granted a discharge unless they consent to the search of their homes.274

Third, Congress could give bankruptcy courts the explicit authority to issue administrative search warrants. Again, this would make clear that there is a public interest in ensuring that debtors fully disclose their assets to the trustees and would, again, place the debtor on notice of the possibility of having her home searched. The Code also would need to clarify that searching (or supervising a search of) debtors’ homes is one of the trustee’s duties. Trustees either should be given the authority to perform the searches themselves275 or should be allowed to request that law enforcement officials conduct the search. If a trustee is concerned about her safety such that she feels the need to request the presence of a law enforcement officer, or feels unqualified to search a debtor’s home, courts should require a law enforcement officer to perform the search in the presence of the trustee.

CONCLUSION

The Barman court held that the trustee’s obligation to “marshal and account for all property of the estate” outweighed the debtor’s Fourth Amendment expectation of privacy in his home.276 However, the court failed to adequately consider established Fourth Amendment precedent when it allowed a private party to

---

274 I realize that proposing that all debtors “consent” to waiving their right to privacy in their homes may, to some, appear both to be a stretch to the concept of “consent” (unless one assumes the validity of coerced consent) and unnecessary (especially if one assumes that only a small percentage of debtors abuse the bankruptcy process by hiding assets). However, courts consistently hold that a discharge in bankruptcy is a privilege, not a right, that should inure only to the benefit of honest debtors. See In re Juzwiak, 89 F.3d 424, 427 (7th Cir. 1996) (citing cases). Thus, assuming Congress imposed by the Code, requiring debtor consent would at least alert debtors of the possibility that a private attorney might come into their homes to search for estate property and would give them the opportunity to choose not to take advantage of the “privilege” of the discharge.

275 If Congress gives trustees the authority to search the homes of individuals, however, the OUST would need to provide some type of training for the trustees.

perform a general, non-consensual search of the debtor's home in a non-criminal bankruptcy proceeding. Specifically, Barman noted the intrusive nature of allowing a trustee to search a debtor's home, yet failed to accommodate the extremely protected status afforded to the home under Fourth Amendment precedent. Barman's balancing of interests put too much emphasis on the trustee's need to investigate the debtor's property and far too little emphasis on the privacy interests the debtor had in his home. Moreover, the broad search the court authorized in Barman seems unwarranted, since the trustee had more than ample cause to ask the court to deny the debtor a discharge (thus obviating the need to recover property of the estate) or to refer the case for a possible bankruptcy fraud prosecution (where a search of the home would have been appropriate).

Searches in bankruptcy cases are especially problematic and should be viewed as presumably unreasonable because (1) the Bankruptcy Code does not require debtors to consent to searches of their residences, (2) nothing in either the Bankruptcy Code, Bankruptcy Rules, or Federal Rules of Civil Procedure (which generally are incorporated in bankruptcy proceedings) place debtors on notice that their homes are subject to search, and (3) none of the rules applicable to non-criminal bankruptcy cases authorize trustees to either request or execute a search warrant. Requiring debtors to consent to a search of their homes as a condition of filing a bankruptcy petition, or giving trustees the authority to search the debtor's home, would make the rules applicable in bankruptcy law cases similar to state and federal statutes that give notice to those in closely regulated businesses that governmental officials have the right to search their businesses. Moreover, forcing debtors to consent to a search would clarify that debtors in bankruptcy proceedings — like probationers or other persons subject to federal regulations — have a diminished expectation of privacy both in their businesses and their homes.

The debtor in Barman was not a saint. Far from it. Indeed, like many of the criminal defendants in court cases that have found constitutional violations, the debtor most likely did everything the trustee accused him of doing. But that is not the point. Debtors — even those who hide assets from their creditors — retain basic constitutional protections, including a reasonable expectation that their homes will not be searched by anyone other than law enforcement officers or officers entrusted to protect a legitimate governmental interest.

---

277 See id. at 411–12.
278 See id. at 417–18.
279 See id. at 419–20.