

2009

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Setting the Record Straight: A Sur-Reply to Professors Lawless et al.

Rafael I. Pardo[†]

I. INTRODUCTION

I have recently engaged in a scholarly exchange with Professors Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A. E. Pottow, Deborah K. Thorne, and Elizabeth Warren regarding the conclusions they have drawn in their first report from the 2007 Consumer Bankruptcy Project (the “First Report”).¹ I wrote my critique in the spirit of academically vigorous exchange with the hope of providing constructive commentary that would assist the First Report’s authors with their ongoing project. I did not, and do not, intend the critique to be a personal attack, and I made every effort in writing the commentary to set forth my arguments convincingly without being strident.

Unfortunately, the reply of Professors Lawless et al. to my critique mischaracterizes, misinterprets, and does not fully engage with the constructive commentary that I suggested. In their conclusion, Professors Lawless et al. write the following:

Professor Pardo has written some insightful and helpful pieces of scholarship in the bankruptcy field that we have expressly relied upon in our own individual research projects. This commentary, in our opinion, is not one of them. Instead of offering useful ideas of how to explore the available empirical data or build new data sets, he impugns our methodology, our logical assumptions, and our very understanding of BAPCPA’s means test. With respect for our col-

[†] Associate Professor of Law, Seattle University. For helpful suggestions, I am grateful to Lily Kahng, Jonathan Nash, Charles O’Kelley, Nina Pardo, and David Skover.

1. See Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A. E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349 (2008) [hereinafter Lawless et al., *Did Bankruptcy Reform Fail?*] (the First Report); Rafael I. Pardo, *Failing to Answer Whether Bankruptcy Reform Failed: A Critique of the First Report from the 2007 Consumer Bankruptcy Project*, 83 AM. BANKR. L.J. 27 (2009); Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A. E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Interpreting Data: A Reply to Professor Pardo*, 83 AM. BANKR. L.J. 47 (2009) [hereinafter Lawless et al., *Interpreting Data*].

league, we do not find these critiques grounded in either a compelling theory of the operation of the bankruptcy system or a thorough understanding of our data.²

The manner in which the tone of the exchange has devolved is unfortunate, particularly because my goal has been for fruitful scholarly exchange that will sharpen future analyses of the effects of BAPCPA by motivating new research approaches.³ For this reason, I am writing a sur-reply to clarify the misperceptions and mischaracterizations of my commentary by Professors Lawless et al. and to demonstrate that my arguments not only are grounded in a compelling theory of the operation of the bankruptcy system and an understanding of the First Report's data, but also offer useful ideas for exploring available empirical data.

This sur-reply will identify three of the main substantive points made in my critique that Professors Lawless et al. misinterpret and/or mischaracterize and will clarify why these original points are valid.

II. QUESTIONING THE ASSUMED INCOME PROFILE OF THE 2007 NONFILING POPULATION

My critique of the First Report posits that one of the questionable assumptions upon which the Report is based is the assumption that the combined income profile of the 800,000 debtors who were deterred from filing for bankruptcy in 2007 (the "2007 deterred population") and those who actually filed in 2007 (the "2007 filing population") is similar to the income profile of debtors who filed in 2001 (the "2001 filing population").⁴ In reply, Professors Lawless et al. recast their assumption as one of "assuming that the incomes of deterred filers are indistinguishable from actual filers."⁵ It is at this point that they misinterpret and mischaracterize one of the arguments that I offered to suggest that the assumption is questionable:

Does Professor Pardo offer any theories of his own regarding the income of the excluded [i.e., the 2007 deterred population]—how they might be higher . . . or lower . . . ? He does offer, in a footnote, that some of the excluded filers might have been driven away by higher attorney's fees after BAPCPA. If we take that theory as cor-

2. Lawless et al., *Interpreting Data*, *supra* note 1, at 60–61 (footnote omitted).

3. BAPCPA refers to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended primarily in numerous sections of 11 U.S.C., and secondarily in scattered sections of 28 U.S.C.), the most recent overhaul of the Bankruptcy Code. I use the term "Bankruptcy Code" to refer to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended primarily at 11 U.S.C. §§ 101-1532).

4. Pardo, *supra* note 1, at 31.

5. Lawless et al., *Interpreting Data*, *supra* note 1, at 60.

rect, and if we posit that those with lower incomes are the ones least able to pay at the margin when attorney's fees increase, then the income of the excluded 800,000 should be *lower* than the filing population. This would make our findings about the regressive impact of BAPCPA even stronger. *Thus, not only is Professor Pardo unable—as we are—to construct a hypothesis under which the income of the excluded debtors would be higher in light of the available income data that we have, but his only speculation of the matter suggests that the income profiles of the excluded might be lower, which buttresses our conclusions.*⁶

Professors Lawless et al. misinterpret my argument. In suggesting the theory that debtors deterred from filing in 2007 due to the increase in attorneys' fees (the "2007 fee-deterred population") would "be lower than that of the group of debtors deterred by the means test"⁷ (the "2007 means-test-deterred population"), I did not hypothesize about the extent by which the income of the means-test-deterred population would exceed that of the fee-deterred population. I did, however, argue that the exclusion of a group like the fee-deterred population from the 2007 deterred population could alter the income distribution of the combined population of the 2007 deterred population and the 2007 filing population.⁸ The following example suggests one possibility that undercuts the First Report's conclusion.

The data from the First Report indicate that the average income of bankruptcy filers was \$30,743 in 2001 and \$30,863 in 2007, a difference that is statistically insignificant.⁹ Imagine that, in 2007, there were 200,000 fee-deterred debtors and that the annual income of each debtor in that group was \$18,200. Also imagine that, in 2007, there were 600,000 means-test-deterred debtors and that the annual income of each debtor in that group was \$35,000. Under these facts, the average income for the 2007 deterred population is \$30,800—virtually the same as the 2001 filing population. If, however, one excludes the fee-deterred debtors from the 2007 deterred population, the average income of the means-test-deterred debtors is \$35,000, a figure that is higher than the average income of the 2007 filing population. Thus, here is one possibility where the average incomes of the 2001 and 2007 filing populations are the same, but where the average income of the subpopulation deterred by the means test is higher than the 2007 filing population. Hopefully, this example (1) clarifies why I originally had doubts about their assumption

6. *Id.* (second emphasis added).

7. Pardo, *supra* note 1, at 31 n.21.

8. *Id.* at 31.

9. Lawless et al., *Did Bankruptcy Reform Fail?*, *supra* note 1, app. III at 404.

and (2) corrects the mischaracterization made by Professors Lawless et al. that the assumption “is actually somewhat consistent with predictions Professor Pardo himself makes elsewhere in his critique.”¹⁰

III. FRAMING THE APPROPRIATE RESEARCH QUESTION

Yet another ground on which I critique the First Report is the manner in which it framed its research question for answering whether BAPCPA’s means test failed. I suggested in my commentary that “any evaluation of whether the means test has been a success would, at a minimum, need to consider its effects on the filing population that it has targeted—specifically, by examining the dismissal and conversion of Chapter 7 cases under the abuse-dismissal framework.”¹¹ Professors Lawless et al. describe my critique as an accusation that they “misconceive the true role and function of the means test and, as such, embark upon a fool’s errand with [their] Report.”¹² (Along the same lines, they state that “[t]he thrust of Professor Pardo’s commentary, however, is his second point—that we simply ‘don’t get’ the means test.”¹³ It is disturbing that they place the phrase “don’t get” in quotation marks. It suggests that I used such language in my critique, which I did not.)

Nowhere in my critique do I suggest that it is not worthwhile to investigate the deterrent effect of the means test. To the contrary, I posit that a comprehensive analysis of the means test does require an inquiry into its deterrent effect.¹⁴ My criticism is that, by not considering the operative effect of the means test (i.e., its effects as a mechanism for case administration), the result is “an incomplete analysis of the effectiveness of the means test.”¹⁵ Stating that the First Report’s analysis is incomplete is a far cry from suggesting that the Report constitutes a fool’s errand. In fact, it completely misrepresents my expressed belief that deterrence is a necessary component of any evaluation of the means test’s success (as is the test’s operative effect). If one is going to make sweeping conclusions such as “BAPCPA’s much-touted means test was a failure,”¹⁶ then one must explore the test’s efficacy in all relevant regards, including the test’s operative effect.

10. Lawless et al., *Interpreting Data*, *supra* note 1, at 47–48 (citing Pardo, *supra* note 1, at 30 n.21).

11. Pardo, *supra* note 1, at 33–34.

12. Lawless et al., *Interpreting Data*, *supra* note 1, at 48.

13. *Id.*

14. Pardo, *supra* note 1, at 34 n.31.

15. *Id.* at 32.

16. Lawless et al., *Did Bankruptcy Reform Fail?*, *supra* note 1, at 363.

Professors Lawless et al., however, dismiss my suggestion of exploring the means test's operative effect, suggesting that it is an invalid research question:

We hold to our understanding of the means test and the concomitant research questions it generates. With respect, Professor Pardo's alternative strikes us as naïve because it assumes that all debtors (and their lawyers) simply file their cases and *then* wait to see if they pass the means test. We think nothing of the sort occurs. Rather, debtors who know they will flunk the means test simply are advised not to file—and do not file—in chapter 7. It is whimsical to suggest that they do file, presumably checking the box to indicate that they flunk the means test, and then wait for their dismissal (perhaps hoping they'll slip through the cracks?).¹⁷

Professors Lawless et al. misstate my critique. Nowhere do I argue that lawyers and their clients blindly file for Chapter 7 relief hoping that the means test will work out in their favor. Quite the opposite, I expressly state that debtor attorneys will counsel their clients not to file for bankruptcy in those instances where the clients would be deemed ineligible for Chapter 7 relief on the basis of abuse (whether via the means test or otherwise).¹⁸

An inquiry into the operative effect of the means test is a worthwhile research question because of the inherent uncertainty and ambiguity in applying the means test,¹⁹ a point that I raised in my critique.²⁰ Because of this uncertainty and ambiguity, it is reasonable to conclude that many attorneys and their debtor clients will file for Chapter 7 relief with the good-faith belief that they do not run afoul of the means test but may nonetheless end up facing a dismissal motion due to a different expectation of outcome by the moving party. Herein lies the significance of studying the operative effect of the means test. BAPCPA's means test marked a transition away from a standard-based to a rule-based approach for defining abuse of the bankruptcy system. But as I have observed elsewhere, a great deal of judicial discretion persists under this rule-

17. Lawless et al., *Interpreting Data*, *supra* note 1, at 49.

18. Pardo, *supra* note 1, at 35 (“[B]y virtue of the shadow of the law, an attorney who advises an individual considering filing for bankruptcy will surely consider the effect that the means test could have on his or her client’s eligibility for Chapter 7 relief—if not because the attorney looks out for the client’s best interest, then because of BAPCPA’s provision that the signature of an attorney on a petition constitutes a certification that the attorney determined that the petition does not constitute an abuse of Chapter 7.”).

19. See, e.g., Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 482–84 (2007).

20. See Pardo, *supra* note 1, at 35 (citing Pardo, *supra* note 19, at 482–84).

based approach.²¹ One might ask, therefore, whether the means test has effectively curbed the “great deal of variance [that] characterized courts’ assessment of the level of surplus future income that would trigger a finding of substantial abuse,”²² the pre-BAPCPA standard for dismissing a case on the basis of abuse of the bankruptcy system.²³

Interestingly, Professors Lawless et al. refer to the inherent uncertainty in application of the means test to refute my point that “[h]igh-income debtors need not worry about the means test provided that they have a level of disposable income that is insufficient to trigger the presumption of abuse under the means test.”²⁴ They state that “[t]he means test gauntlet subjects debtors to pervasive judicial and creditor scrutiny and opens the door to objections whose resolutions can render a debtor ineligible for chapter 7.”²⁵ They conclude: “Suffice it to say our sense of realism under the means test differs from his; perhaps he has a stronger belief in the legal clarity of BAPCPA’s deductions, the ease with which the expenses can be calculated and verified, or the fortitude of debtor nerves.”²⁶

Yet again, here is a mischaracterization that requires correction. As already stated, I believe interpretation of the means test to be fraught with uncertainty.²⁷ The example I gave merely contemplated a situation where the debtor would know that he or she passes the means test because of low disposable income and would therefore not have to worry about ineligibility for Chapter 7 relief on the basis of the means test’s presumption of abuse. Nowhere did my statement indicate how the debtor would arrive at the low disposable-income figure. Professors Lawless et al. assumed that I envisioned an easy case of passing the means test on the basis of expense deductions allowed under the means test.²⁸ But this is not at all what I had in mind. There are scenarios that are much more clear cut. For example, an above-median income debtor owing a high amount of priority tax debt may pass the means test if the monthly payments on such debt exceeded his or her current monthly in-

21. Pardo, *supra* note 19, at 479–86.

22. *Id.* at 477.

23. See 11 U.S.C. § 707(b) (2000) (amended 2005).

24. Pardo, *supra* note 1, at 41.

25. Lawless et al., *Interpreting Data*, *supra* note 1, at 54.

26. *Id.* at 55. It should be noted that Professors Lawless et al. appeared to have a strong belief in the legal clarity of BAPCPA when they set out to conduct their empirical study. See Lawless et al., *Did Bankruptcy Reform Fail?*, *supra* note 1, at 354 (“The decision to study debtors who filed for bankruptcy in 2007 was a difficult one. By that date, enough time had plausibly elapsed after the October 1, 2005 effective date of BAPCPA so that the enforcement of the new law had reached a normal state.”). My critique questioned this assumption. See Pardo, *supra* note 1, at 43 n.69.

27. See *supra* notes 19–21 and accompanying text.

28. See Lawless et al., *Interpreting Data*, *supra* note 1, at 54–55.

come.²⁹ Surely there are situations where the amount of priority tax debt owed by the debtor would not be disputed by any party such that the debtor could be confident about passing the means test.³⁰

In any event, in the same way it is reasonable for Professors Lawless et al. to envision a scenario where “debtors who know they will flunk the means test”³¹ will not file for Chapter 7 relief, so too is it reasonable for me to have envisioned a scenario where the debtor knows he passes the means test. These are the cases at the extremes. In the middle are the cases with uncertainty where some debtors will file believing that chances are more likely than not that they have passed the means test. While an abuse dismissal may materialize, it may nonetheless be worthwhile for the debtor to file given the reward of a discharge that awaits if the debtor survives the motion (if brought). Again, it is in these cases where we ought to care about the means test’s operative effect.

Despite conceding in their reply the inherent uncertainty in the application of the means test, Professors Lawless et al. dismiss my suggestion to study the operative effect of the means test by analogizing to their hypothetical “‘Litigation Masculinization Reform Act’ [LMRA] that requires any civil complaint filed by a female plaintiff to be dismissed.”³² Through this hypothetical analogy, they impute to me the approach they think I would take to researching the effects of the LMRA and attempt to portray me in an unfavorable light as someone who would pursue inappropriate research questions. Their simplistic analogy, however, merely serves to reinforce my original point: Professors Lawless et al. “could have delineated the manner in which BAPCPA amended the Bankruptcy Code and how those statutory changes would be expected to affect a debtor’s evaluation of his or her choices in considering (1) whether to file for bankruptcy and (2) the chapter of relief under which the debtor would file.”³³

The LMRA analogy is inapt because it involves a single bright-line rule that considerably reduces discretion (albeit not completely).³⁴ In

29. See 11 U.S.C. § 707(b)(2)(A)(i) (2006) (setting forth the means test); *id.* § 707(b)(2)(A)(iv) (providing rule for calculating monthly payment of priority claims); *id.* § 507(a)(8) (setting forth tax claims entitled to priority).

30. Similarly, one could imagine a scenario where a debtor’s monthly secured debt payments are sufficiently high to negate a debtor’s current monthly income, thus eliminating the possibility of the presumption of abuse arising under the means test. See *id.* § 707(b)(2)(A)(iii) (providing rule for calculating average monthly payments of secured debts).

31. Lawless et al., *Interpreting Data*, *supra* note 1, at 49.

32. *Id.* at 50.

33. Pardo, *supra* note 1, at 34.

34. What result when a complaint is filed by a female plaintiff on behalf of a male plaintiff, or vice versa? What result when a complaint is filed by a male plaintiff who subsequently undergoes a transgender operation before the litigation has concluded? And so on and so forth.

stark contrast, the means test (a rule) is part of a broader statutory framework to evaluate whether a Chapter 7 filing by an individual debtor can be dismissed on the basis of abuse (a standard). The means-test presumption of abuse can be rebutted by showing “special circumstances”³⁵ (a standard). Thus, above-median debtors who initially flunk the means test may be able to stay in the system by rebutting the presumption. In cases where the presumption of abuse does not arise or is rebutted, the court must consider whether “the totality of the circumstances . . . of the debtor’s financial situation demonstrates abuse”³⁶ (a standard). Thus, below-median debtors who are not subject to the means test may nonetheless be kicked out of the system. The precursor to this framework for analyzing abuse of the bankruptcy system by Chapter 7 debtors was “substantial abuse”³⁷ (a standard), a term which the Bankruptcy Code did not define. Thus, part of the legislative push for the framework shift was eliminating judicial discretion over these sorts of questions. But, as already noted, discretion abounds. And so, operative effect matters.³⁸

IV. TOTAL INCOME OR DISPOSABLE INCOME?

Finally, one of the major points on which I critique the First Report is its use of a debtor’s total income (or gross income)³⁹ as a metric for testing the deterrent effect of the means test. I argue that the metric is inappropriate because the means test focuses on disposable income rather

35. 11 U.S.C. § 707(b)(2)(B).

36. *Id.* § 707(b)(3)(B).

37. *Id.* § 707(b) (2000) (amended 2005).

38. Professors Lawless et al., however, remain unconvinced: “[R]ather than apologize for our purportedly ‘un-nuanced’ understanding of the means test, we stand by it. We think we accurately comprehend what the years of legislative squabbling were all about and were consequently correct to focus on deterrence in framing our research questions.” Lawless et al., *Interpreting Data*, *supra* note 1, at 50.

39. Whereas I use the phrase “total income” in my critique, *see* Pardo, *supra* note 1, at 41–43, Professors Lawless et al. use the phrase gross income, *see* Lawless et al., *Interpreting Data*, *supra* note 1, at 53–57. As I note in my critique, the First Report does not specify the source from which the income data were derived, and I assume, for reasons explained in my critique, that those data were obtained from Official Form 6I (“Schedule I—Current Income of Individual Debtor(s)”), *see* 11 U.S.C. app. at 458 (2006). *See* Pardo, *supra* note 1, at 41. I avoid using the phrase “gross income” since the first item on Schedule I requires the debtor to list “[m]onthly gross wages, salary, and commissions.” Official Form 6I, 11 U.S.C. app. at 458 (2006). Schedule I then allows a debtor to deduct payroll taxes, among other things, from his or her monthly gross wages. *See id.* My assumption that the First Report’s income data were derived from Schedule I includes the assumption that the information recorded from Schedule I was the debtor’s “average monthly income,” which takes into account the deductions from gross wages. *See id.* Accordingly, I use the phrase “total income” to refer to a debtor’s “average monthly income” as reported on Schedule I (and assume that Professors Lawless et al. use the phrase “gross income” to refer to the same).

than total income. Professors Lawless et al. defend their decision “on both normative and methodological grounds.”⁴⁰

Professors Lawless et al. normatively justify using total income based on their view that “[t]he means test has two parts: the gross income screen and the disposable income screen.”⁴¹ Respectfully, I disagree that the total-income screen is a component of the means test. It is a limitation on standing to bring an abuse dismissal motion based on the means test.⁴² But the screen itself does not test the means of the debtor to repay past debts from future income.⁴³ The statutory language of the Bankruptcy Code supports this view. When Code §707(b)(2)(D) refers to “means testing,”⁴⁴ it clearly is not referring to Code § 707(b)(7)(A), the total-income screen that limits standing to bring an abuse dismissal motion predicated on the means test.

If one takes an expansive view that the total-income screen is part of the means test, then why not consider all of the means test, including the mathematical formula that determines whether a debtor has sufficient disposable income to trigger the presumption of abuse,⁴⁵ as well as the provision that would allow a debtor to rebut the presumption by demonstrating special circumstances?⁴⁶ If Professors Lawless et al. insist on making the sweeping conclusion that “BAPCPA’s much-touted means test was a failure,”⁴⁷ then it seems only reasonable that their analyses should address how all aspects of the means test (particularly the test itself) could shape its deterrent effect, and thus the income profile of the filing population.

Professors Lawless et al. also justify on methodological grounds their use of total income to test the deterrent effect of the means test. In doing so, they reject my suggestion to use a variable for disposable income calculated as the difference between the debtor’s income (derived from Schedule I) and expenses (derived from Schedule J):

40. Lawless et al., *Interpreting Data*, *supra* note 1, at 54.

41. *Id.*

42. See 11 U.S.C. § 707(b)(7)(A) (2006) (stating that “[n]o judge, United States trustee (or bankruptcy administrator, if any), trustee, or other party in interest may file a motion under paragraph (2)” with respect to a debtor whose annual income is less than or equal to the state median income for a family size comparable to that of the debtor’s household).

43. Debtors who are not subject to means testing may still be scrutinized for income-based repayment ability, *see id.* § 707(b)(3)(B), a point raised in my critique, *see Pardo*, *supra* note 1, at 44–45, 45 n.74.

44. *Id.* § 707(b)(2)(D) (“Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of *means testing* . . . if the debtor is a disabled veteran . . . and the indebtedness occurred primarily during a period during which he or she was . . . on active duty . . . or . . . performing a homeland defense activity” (emphasis added)).

45. *See id.* § 707(b)(2)(A)(i).

46. *See id.* § 707(b)(2)(B)(i).

47. Lawless et al., *Did Bankruptcy Reform Fail?*, *supra* note 1, at 363.

The problem, however, with this idea is endogeneity. Here is the conundrum: if a researcher attempts to work out people's food expenses, car expenses, secured debt, etc., per the means test standards by plucking numbers from Schedule Js in the 2001 cases, it will be necessary to assume that if those people had filed under a BAPCPA regime their reported expenses would have been identical. But we cannot know that. . . . A synthetic means-test "disposable income" variable constructed from 2001 cases cannot tell us reliably how those same debtors would have reported (and even incurred) expenses in 2007. This challenge brings us to an important point regarding the conduct of empirical research: investigators must make judgment calls based on logical inference and common sense. *Guided by caution, we concluded that we could not be safe in constructing 2001 hypothetical means-test disposable income and so empirical prudence required staying with the more objective and consistent gross income measure.*⁴⁸

My efforts in the critique to assuage endogeneity concerns regarding a disposable-income construct were summarily dismissed by Professors Lawless et al. without engaging the substance of my analysis.⁴⁹ I still stand by that analysis. That said, let us assume for the sake of argument that Professors Lawless et al. are correct that the endogeneity concerns they identify cannot be explained away. If they are correct, then the data they offer to support their conclusion regarding the means test's failure suffer from the same endogeneity concerns they raise regarding my disposable-income construct.

Presumably, the income data set forth in the First Report are derived from Schedule I.⁵⁰ Under the abuse dismissal framework, income has taken on added significance post-BAPCPA. Income is the basis for both (1) the total-income screen that limits standing to bring an abuse dismissal motion based on the means test and (2) the starting point of the means-test equation for determining whether a debtor has sufficient disposable income to trigger the presumption of abuse. By the logic offered by Professors Lawless et al., the comparison of the income profiles of the 2001 and 2007 debtors requires us to assume that the income figures reported by the 2001 debtors in their schedules would have been identical to the figures they would have reported in their schedules had they filed in 2007. If, according to Professors Lawless et al., it would not be sound

48. Lawless et al., *Interpreting Data*, *supra* note 1, at 55–56 (emphasis added).

49. *See id.* at 56 n.48 ("Professor Pardo . . . confronts the potential concern of endogeneity in the third paragraph of a multi-paged footnote. . . . We refer interested readers to that lengthy discussion if so inclined; suffice it to say we are less sanguine than Professor Pardo at dismissing the endogeneity issue presented.") (citation omitted).

50. *See supra* note 39.

to make such an assumption with respect to Schedule J expenses, why is it sound to make the assumption with respect to Schedule I income? Professors Lawless et al. offer no justification and simply conclude that “empirical prudence required staying with the more objective and consistent gross income measure.”⁵¹

Added concern arises from the fact that the total-income screen and the means test center on the concept of “current monthly income,” which the Bankruptcy Code defines as the average monthly income that the debtor receives from all sources during one of two possible historical six-month periods.⁵² As I pointed out in my critique, “[t]he fact that ‘current monthly income’ is based on an historical average raises the possibility that ‘current monthly income’ could either be higher or lower than the debtor’s actual monthly income at the time he or she files for bankruptcy, depending on whether the debtor experienced income fluctuations prior to filing.”⁵³ Nowhere in the First Report do Professors Lawless et al. explain why, for purposes of evaluating the deterrent effect of the means test, it is appropriate to marshal Schedule I income data when debtors would rely on the “current monthly income” that would be reported in Official Form B22A (“Chapter 7 Statement of Current Monthly Income and Means-Test Calculation”)⁵⁴ to ascertain eligibility for Chapter 7 relief.

V. CONCLUSION

In writing this sur-reply, my intent has been to clarify mischaracterizations and misconceptions of the arguments set forth in my critique of the First Report. I certainly agree with Professors Lawless et al. that we must all move on to more productive ventures.⁵⁵ Hopefully, the clarifications set forth here will facilitate this.

51. Lawless et al., *Interpreting Data*, *supra* note 1, at 55–56.

52. *See* 11 U.S.C. § 101(10A) (2006).

53. Pardo, *supra* note 1, at 36.

54. *See* 11 U.S.C. app. at 533.

55. Lawless et al., *Interpreting Data*, *supra* note 1, at 61.