The Law and Economics of Proportionality in Discovery†*

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I. Introduction

This paper analyzes the proportionality standard in discovery. Many believe this standard has the potential to infuse discovery practice with considerably more attention to questions related to the costs and benefits of discovery. The 1983 Amendments introduced proportionality into Rule 26, setting forth a cost-benefit standard designed to:

- address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. The rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of

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discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.”

A frequently expressed perception is that judges have been hesitant to apply the proportionality standard on a regular basis. Amendments to the rules in 1993 and 2000 aimed at promoting the responsible use of the proportionality standard failed to produce tangible results. These amendments, which focused on organizational changes to the rules, were motivated by the assumption that sparse use of the proportionality rule resulted, in part, from the courts’ and litigants’ lack of knowledge regarding the Rules’ applicability to their case. The 2014 Amendments continue this trend by proposing further organizational changes to the rules.

This paper assumes that the organizational changes contained in the 2014 Amendments will deliver litigants and judges who are fully informed about the proportionality standard’s existence and applicability. Thus we focus on the issues that judges and litigants will face as they attempt to apply the proportionality standard in practice. In particular, we focus on the potentially difficult questions and the related measurement issues that must be overcome in order to carry out the proportionality standard’s cost-benefit test with any precision.

While some of these questions may often be resolved by evidence that is relatively straightforward to acquire and measure, others frequently will not. For example, in some cases measuring the costs of a discovery request relative to the amount in controversy may be a relatively straightforward calculation. However, the implications for limiting a discovery request based on a particular ratio of costs to stakes are less straightforward. Such an inquiry will require judges to weigh

1 The proportionality standard entered the Rules in 1983 as part of Rule 26(b)(1)(iii). See Federal Rules of Civil Procedure Rule 26, Advisory Committee Notes, 1983 Amendment. Proportionality also appeared in Rule 26(g)(1); this subparagraph’s present language states that by signing a discovery request, “an attorney or party certifies to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry … (B) a discovery request, response, or objection, is … (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”

costs and benefits to both parties and to society as a whole. This latter task will often require a more difficult accounting of less quantifiable questions such as "the importance of the issues at stake in the action" when attempting to ascertain "whether the burden or expense of the proposed discovery outweighs its likely benefit".

Courts considering proportionality issues in individual cases will have to grapple with three key economic facts about the U.S. discovery system: (1) the cost externalization that occurs because a party’s discovery requests impose economic burdens on the responder; (2) the agency problems that arise when the responder has superior information about either (a) its own cost of discovery production or (b) how the production would alter the strategic position of each party to the litigation; and (3) the divergence between social and private benefits of discovery, e.g., in litigation with important precedential or social value that will not be internalized by the litigants. The rest of this paper considers how these facts shape the decisions facing judges who, if the future matches the Advisory Committee’s aspirations, will now manage proportionality assessments.

II. The Proposed 2014 Amendments and a Brief History of the Proportionality Standard in the Federal Rules of Civil Procedure

The [proposed] 2014 Amendments to the Federal Rules of Civil Procedure seek to promote the responsible use of the proportionality standard by courts and litigants by incorporating the standard’s cost-benefit analysis into the general scope of discovery. Specifically, the [proposed] 2014 Amendments move the language containing the proportionality standard from Rule 26b(2)(C)(iii) (limits on discovery) to a more prominent place in Rule 26(b)(1). [Proposed] Rule 26(b)(1) reads:

1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible to be evidence to be discoverable. (Emphasis added.)

In moving the proportionality standard back to its original home in Rule 26(b)(1), the [proposed] 2014 Amendments continue the Advisory Committee’s
focus on amendment by reorganization. The proportionality provisions were moved from Rule 26(b)(1) to their current [pre-2014] location in Rule 26(b)(2)(C)(iii) as part of the 1993 amendments. Rule 26(b)(2) was added to highlight the flexibility that courts possessed when addressing high-volume and high-cost discovery. In particular, the rule required that:

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: ... (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. (Emphasis added.)

Based on a perception that the organizational changes contained in the 1993 amendment did not result in the proportionality standard being implemented “with the vigor that was contemplated”, more organizational changes to the rules were made as part of the 2000 Amendments. The committee suspected that the location of the proportionality standard, “buried among other discovery provisions, hindered its effectiveness.” In an attempt to draw greater attention to the standard, the 2000 Amendments added a “redundant” cross-reference to the limitations in Rule 26(b)(2) to the end of Rule 26(b)(1).

The [proposed] 2014 Amendments reflect the assumption that the organizational changes contained in the 2000 Amendments, like the ones contained in the 1993 Amendments, did not adequately promote the responsible use of the proportionality standard. The focus on organizational changes in the 2014 Amendments suggests the committee continues to assume that the apparent shortfall in judges' and parties' use of the proportionality standard results partly from a lack of awareness of the proportionality standards' applicability to their case. As noted above, we will assume that the 2014 Amendments will create that awareness.

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3 The Committee's chair relates that it used organization in self-consciously substantive ways: its Chair stated that “the Committee ... reversed the order of the initial proportionality factors to refer first to ‘the importance of the issues at stake’ and second to ‘the amount in controversy.’ This rearrangement adds prominence to the importance of the issues and avoids any implication that the amount in controversy is the most important concern.” Memorandum from Hon. Judge David G. Campbell, note 2, supra, at B-8.

4 FRCP 26, Advisory Committee Notes to the 2000 Amendment.


6 FRCP 26(b)(1). The last sentence, added in 2000, reads: “All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).” As an aside, it is interesting to consider the Advisory Committee's explanation of this sentence, as provided in the Committee Note to the 2000 Amendments: “This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.” In other words, this is a self-conscious declaration, in the functional equivalent of legislative history, that the canon of surplusage should be ignored.
III. Why Private and Social Benefits and Costs of Litigation Can Diverge

Economic actors who are adept at pursuing their own self-interest, at least as these actors themselves perceive those interests, will make choices so that the private marginal costs and private marginal benefits of those actions are equal. For example, if apples cost a dollar, and a person buys exactly one apple, then that person must have regarded that apple as worth at least a dollar while regarding a second apple as worth less than a dollar. When economic actors bear all the costs of their actions, or are able to collect all the benefits, economists say that costs or benefits are fully internalized. When a person buys one apple at a price of a dollar, she bears all the ordinarily relevant consequences of this action. As a matter of social policy, we are usually comfortable allowing her both to buy that apple and to not buy an additional one.

Sometimes, though, some costs are borne by those other than the actors themselves, or some benefits are received by others. In such a situation, economists say that costs or benefits are externalized. For example, in the absence of environmental regulations of one sort or another, pollution costs are often externalized: pollution caused by factory operations may harm people other than the factory owners without creating any legal duty of compensation. When there are external costs, the private costs facing individual economic actors will be lower than the social costs resulting from their actions. Conversely, external benefits cause the private benefits individual economic actors realize to exceed the benefits society overall receives from these actions. Suppose that the benefits of the factory owner’s actions are fully internalized, so that the private and social benefits are the same. Then the existence of externalized pollution costs means that, absent environmental regulation, our factory owner will find it privately worthwhile to pollute too much: the social costs of the pollution he emits will exceed the private (and thus the social) benefits.

In this Part of the paper, we point out that litigation in general involves both externalized costs and externalized benefits (we discuss discovery in particular in the next Part). Analyses comparing the private and social incentives to use the legal system demonstrate how these incentives can diverge with respect to both the

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7 Here, “marginal costs” refers to the added cost of the last unit of action, while “marginal benefits” refers to the added benefit of that unit.
8 Of course, if there were a communicable infectious disease on the apple, we would feel differently; the “ordinarily relevant consequences” phrase does some work here.
costs and the benefits of the legal system. As a result, the privately determined level of litigation can be either socially excessive or socially inadequate.

On the cost side, the private and social costs of litigation diverge because litigation costs are not fully internalized. For example, except when a court would refuse to enter a default judgment, the mere plaintiff’s act of filing a complaint will always impose some costs on a defendant. On the defendant’s side, filing, say, a Rule 12(b)(6) motion forces the plaintiff to argue against the motion and might force the plaintiff to investigate and collect evidence she did not have at the time she filed her complaint. Analogizing the litigation process to economic behavior generally suggests that one effect of the partial externalization of litigation costs is to generate litigation activity whose aggregate social costs exceed its aggregate social benefits.

However, this tendency to overuse the legal system may be offset by differences between the private and social benefits of litigation. A tort victim seeking money damages does not collect all the social benefits that accrue to society from the effect a judgment will have on either the deterrence of incentives to take care, the benefits of precedent, or other social benefits that would be generated through litigation.\(^\text{10}\) Over the years, Congress has created many private rights of action that function to deter unlawful activity such as discrimination on the basis of race, sex, or religion. Via statute, Congress has provided procedural features such as damage multipliers and fee-shifting, which encourage litigation of statutorily created causes of action. These procedural choices can be rationalized within the present discussion as springing from a view that certain favored types of litigation bring substantial social benefits that are external to the litigants themselves.\(^\text{11}\)

On the other hand, the private benefits from using the litigation system may also exceed the social benefits. This will happen when litigation primarily divides stakes, a situation that economists sometimes describe as “rent dissipation.” Interpleader actions are a classic example featuring this litigation dynamic, as multiple parties fight over a fixed pool of resources. Debt-collection actions against an insolvent party constitute another such example; the risk and costs of the race to the courthouse in such actions are one important reason why our bankruptcy system features the automatic stay. The key point for our purposes is that rent dissipation actions involve lower social than private benefits because these actions produce little or no socially valuable incentives such as deterrence of malfeasance or incentives to take care.\(^\text{12}\)

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\(^{11}\) For a wide ranging discussion of procedural and legislative issues related to private enforcement, see Sean Farhang, *The Litigation State* (20XXX) as well as Burbank & Farhang XXX.

This discussion shows that both the costs and the benefits of litigation can be partly external to those making litigation decisions. Since external social costs are associated with too much litigation, while external social benefits are associated with too little, there are gross effects operating in both directions. As a matter of simple arithmetic, then, the net impact of these gross effects might point in either direction. Thus, whether there is too much, too little, or just the right amount of litigation in general is not a conclusion that can be drawn on a priori grounds. We turn next to a discussion of issues specifically connected to discovery.

IV. Cost and Benefit Externalization in Discovery

Applying the logic of the previous Part yields two observations concerning the American discovery system. First, since discovery requests impose costs borne by the responder, some of our discovery system’s costs are externalized. In some cases, this effect may predominate. When and where it does, limitations on discovery-as-of-right, such as the proportionality standard, might be worth imposing. Second, though, it is important to remember that in some cases, discovery will create social benefits by inducing revelation of evidence that yields socially beneficial litigation outcomes.

A. Externalization of discovery costs

Some authors have argued that the cost externalization effect discussed above is magnified in discovery.\(^{13}\) Discovery allows one party to externalize a large share of the responsibility and costs of his discovery request to his adversary.\(^{14}\) Under current discovery practice, the party responding to a discovery request is expected to engage in a search to identify non-privileged documents and information in its possession that is responsive to the request, and to produce them for inspection by requesting party. The costs fall where they lie, so that the party that receives the discovery request bears the costs of responding to the discovery request.\(^{15}\) The responding party’s production costs might be many times the requesting party’s modest costs of formulating and reviewing the produced information.\(^{16}\) Parties’ incentives to request expansive discovery is limited only by the costs of processing the material the responder produces. Consequently, parties have incentives to make requests whose private benefits—their benefits to the


\(^{14}\) Redish & McNamara, supra note _ at 779 (distinguishing between costs of discovery and other litigation costs).

\(^{15}\) See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978) (noting that the “presumption is that the responding party must bear the expense of complying with discovery requests ....”)

\(^{16}\) Kobayashi, supra.
requesting parties themselves—might exceed the costs of complying with the requests.\(^\text{17}\)

Discovery involves a second source of misaligned incentives not present for other litigation expenditures—the creation of cross-party agency costs. Responding parties must sort out relevant from irrelevant documents based on the requesting party’s discovery request. That gives them discretion whenever the discovery request is at all vague.\(^\text{18}\) Under these circumstances, the responding party’s attorney is forced to make substantive decisions about whether a document is covered by the request. For all functional purposes, that is tantamount to asking an attorney to decide whether a document is useful to her adversary’s case. This feature of our discovery system effectively requires a responding party’s attorney, under threat of court-imposed sanctions, to act as his adversary’s agent.\(^\text{19}\)

Requiring lawyers to provide such benefits to their adversaries conflicts with the ethical duty lawyers otherwise owe to clients, inverting the adversarial system’s usual obligations.\(^\text{20}\) As a result, one feature of our discovery system is cross-party agency costs, whose misaligned incentives may be even stronger than those that exist in the well-studied agency relationship between a lawyer and his client.\(^\text{21}\) By limiting his effort in accurately sorting between relevant and irrelevant documents, the responding party’s lawyer will produce fewer relevant documents and more

\(^{17}\) Id.
\(^{18}\) William W. Schwarzer, \textit{In Defense of “Automatic Disclosure in Discovery”}, 27 GA. L. REV. 655, 661 (1993) (noting the similarities between a lawyer's duty to respond to automatic disclosure under the 1993 amendments to Rule 26 and lawyers duty to respond to “vague, catch-all” traditional discovery requests that are “routinely” observed in litigation).
\(^{19}\) See Redish & McNamara, \textit{ supra note ...} at 779, noting that “the extent of a [responding] party’s discovery costs are determined not by the litigant himself but by the scope and content of the request filed by his opponent, and none of those expenditures benefits the producing party's own case.” Redish & McNamara would allocate the costs of responding to a discovery request to the requesting party under the theory of quantum meruit. \textit{Id.} at 788-91.
\(^{20}\) As Justice Jackson noted in his concurring opinion in \textit{Hickman v. Taylor}, 329 U.S. 496, 516 (1947):

[\text{\[A\] common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.}]

\textit{See also} Griffin B. Bell, Chilton Davis Varner, & Hugh Q. Gottschalk, \textit{Automatic Disclosure in Discovery—The Rush to Reform}, 27 GA. L. Rev. 1, 46 (1992) (noting that how the automatic disclosure requirement to disclose information “relevant to the disputed facts alleged with particularity in the pleadings”, contained in the 1993 Amendments to F.R.C.P. 26, would undermine the adversary system).

irrelevant ones. The result will be (i) an increase the requesting party’s cost of discovery (since requesters must sift more); (ii) a reduction in the requesting party’s value of discovery (because of requesters’ sifting costs and because of limited production of relevant materials where responders have discretion); and (iii) a reduction in the responding party’s costs. Thus, the discovery system’s cross-party agency problems promote “shirking” by responders, which harms the requesting party by increasing its costs and reducing the value to the requester of what is produced.22

B. Externalization of discovery’s benefits

Uninternalized spillover effects are not limited to the cost side. In many cases, the private benefits of discovery will diverge from the social value of litigation. Discovery in aid of rent-dissipating litigation (see Part III, supra) has the opposite features—it involves litigation expenditures that serve only or primarily to divide a fixed pool. On the other side of the ledger, discovery often is necessary to vindicate the private rights created by public law, e.g., through anti-discrimination statutes such as Title VII. By increasing both the cost of litigation and the probability of losing a judgment, discovery disincentivizes primary behavior that causes both traditional common law harms such as contract breach or tort injury and contemporary public-law harms such as employment discrimination. And, by its nature, discovery often creates a more fulsome record for the proper adjudication of cases with important public law dimensions, increasing the quality not just of judgments and remedies, but also of resulting precedents.23

C. An illustrative numerical example

We can illustrate the points discussed above using a simple numerical example.

Suppose Plaintiff sues Defendant for $100,000 in tort injuries. Without extensive discovery, the plaintiff believes the probability she will win judgment is $\frac{1}{2}$, so that the expected judgment is $50,000$.24 With extensive discovery, which costs the plaintiff nothing but costs the defendant $30,000, the plaintiff’s chance rises from $\frac{1}{2}$ to $\frac{3}{4}$. This means extensive discovery increases the plaintiff’s expected judgment from $50,000 to $75,000, so that the private value of the information to the plaintiff is $25,000. If the discovery actually occurs under the usual responder-

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22 Redish & McNamara, supra note _ at 790 (noting the benefits to requesting parties from responding parties’ actions in discovery; these benefits are reduced by the actual discovery system’s cross-party agency costs).
23 On this latter point, consider the fact that appellate courts typically remand for proceedings that will further develop the record in a case.
24 We assume for simplicity that the parties are both risk-neutral; nothing important about the example turns on this assumption.
pays cost allocation rule, this means that the defendant will have to spend $30,000 to provide the plaintiff with an expected benefit of $25,000.\textsuperscript{25} Thus, in this example, the marginal cost of extensive discovery exceeds the marginal benefit to the plaintiff.

A judge imposing a cost-sensitive rule such as that contained in the proposed amendments to Rule 26 might choose either to (i) block such discovery based on the fact that the costs of discovery exceed the value of the information to the plaintiff, or (ii) require the plaintiff to bear the costs of the extensive discovery pursuant to the explicit cost allocation rule in the proposed amendment to Rule 26(c)(1)(B). In the latter case, a plaintiff interested in maximizing her expected judgment net of litigation costs would not be willing to spend the $30,000 in question, so these two judicial decisions would have the same effect in our example.

This example shows that when a judge deploys the Rule 26 amendments as contemplated in our hypothetical case, the use of extensive discovery is averted. Consequently, the plaintiff loses $25,000 in expected judgment value, while the defendant saves $30,000 in discovery costs.\textsuperscript{26} Looking only at the private costs and benefits, this might well be the sort of efficient cost-reduction result that the Rule amendments are meant to achieve: via judicial management, the defendant is spared discovery expenditures that cost more than the financial gain the plaintiff would realize from the requested information.

But that conclusion may be overturned when we take into account social considerations, rather than just those involving the particular parties to the litigation in question. To illustrate, suppose the defendant is more optimistic about her chances than the plaintiff is; in particular, the defendant believes she has only a 10 percent chance of losing at trial—yielding a defendant’s expected judgment amount of $10,000. Assume that without extensive discovery, the defendant will bear $15,000 in litigation costs. Then from the moment when the tort cause of action materializes, the defendant who is protected by a proportionality/cost-shifting rule will expect that such a case will cost a total of $25,000 ($10,000 in expected judgment and $15,000 in litigation costs).

\textsuperscript{25} It is possible that the defendant will decide to settle to avoid this result. But if parties always settled when one faced the threat of disproportionate discovery costs, there would be no actual disproportionate discovery expenditures. The Advisory Committee is on record suggesting that disproportionate discovery does actually occur; see, e.g., Memorandum from Hon. Judge David G. Campbell, note 2, supra, at B-36 (citing the 1983 Committee Note for the proposition that the purpose of proportionality rules in discovery “is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery”) (emphasis added), or, e.g. id., at B-6 (stating that “Almost half of the [surveyed lawyers from the American College of Trial Lawyers] believed that discovery is abused in almost every case, with responses being essentially the same for both plaintiff and defense lawyers.”) Thus, following the Committee’s discussion, we assume that this case will not settle due only to the threat of such expensive discovery.

\textsuperscript{26} Note that the plaintiff’s lost expected judgment value corresponds to an additional benefit to the defendant, since the defendant is the one paying any damages the plaintiff wins at judgment; we ignore this issue to avoid engaging in a lengthy but tangential analysis.
Assume that the defendant believes that with extensive discovery, the plaintiff's chance of winning will be 15 percent. Then a defendant facing extensive discovery will expect to bear a total cost of $60,000 from litigation—$15,000 in expected judgment, $30,000 in extensive discovery costs, and $15,000 in additional litigation costs.

Now imagine the defendant is considering how much care to take in its primary behavior. For example, the defendant might be a construction company deciding how much to spend delineating and sheltering an area of sidewalk near a construction site. Suppose the defendant can take either a high or low amount of care. With a high amount of care, there will be no injuries. With a low amount of care, there will be an average of one injury during the project's pendency. Taking a high amount of care costs $40,000 more than taking a low amount of care.

We have seen that when the construction company does not have to worry about extensive discovery, its expected costs related to an injury will be $25,000. We have also seen that the company could eliminate the injury risk at a cost of $40,000. A profit-maximizing firm will not spend $40,000 to save $25,000. So without the threat of extensive discovery costs, the construction company will not take a high amount of care, and a person will be injured. On the other hand, if it will have to pay for extensive discovery when it is sued, the firm will expect that an injury will cost it $60,000. A profit-maximizing firm will spend $40,000 to save itself $60,000. Thus, the firm in this example will take care if, and only if, it would bear the cost of extensive discovery in the event of litigation.

By assumption in our example, a plaintiff's injuries have a monetary value of $100,000. The additional care necessary to prevent this injury costs only $40,000. Thus, it is efficient for the construction company to take the high level of care in order to avert injury. Yet, a switch to a proportionality-based discovery policy induces the company not to take this level of care: the change in discovery policy causes an inefficient level of care. This result occurs because the threat of future extensive discovery costs induces the company—which, as a defendant, will be unduly optimistic about its litigation chances—to take appropriate care.

This example is, of course, highly contrived. But it works well to demonstrate how the aggregate social value of extensive discovery can exceed the private value to a plaintiff in a litigation process that has already commenced. Discovery's role in raising the net cost of litigation creates the same basic dynamic in myriad other settings besides the simple tort example just developed. For example, the risk of expensive civil rights litigation serves to encourage large employers to develop policies that prevent discrimination against minorities, women, and other groups.
whom Congress has chosen to protect. Discovery costs, no less than legislated features such as one-way fee shifting, play a part in these socially chosen incentives.

V. The Law & Economics of the Six Proportionality Factors

The observations in the previous Part underscore the practical challenge facing judges. Judges will have to apply discovery limits without limiting discovery in cases where the private and external social benefits from discovery together are substantial enough to warrant a responding party’s expenditures? There is no magical solution to this problem. Rather, it will require a case-by-case analysis of numerous factors. In this Part, we synthesize our earlier discussions of the proposed amendments to Rule 26, on the one hand, and the economic analysis of discovery costs, on the other.

The Advisory Committee Note to the proposed amendment to Rule 26 emphasizes that proportionality is for both the parties and the judge to effect: “The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.”28 In addition, the Committee Note states that the proposed amendment is not “intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.”29 But presumably the scope for parties to carry out their collective responsibility will depend critically on how judges resolve those disputes that do make their way into court. Likewise, whether refusals become boilerplate or remain the exception to the rule will depend on how litigated discovery disputes are resolved. Thus we focus our discussion on discovery disputes that make it before a judge.

Here it is helpful to recall the proportionality-related points of proposed Rule 26(b)(1)’s language. Discovery’s scope is limited to whatever is “proportional to the needs of the case,” considering the following enumerated factors (stated verbatim but without quotation marks):

1. the importance of the issues at stake in the action;
2. the amount in controversy;
3. the parties’ relative access to relevant information;
4. the parties’ resources;
5. the importance of the discovery in resolving the issues, and
6. whether the burden or expense of the proposed discovery outweighs its likely benefit.

We break our discussion of these factors into four sections. Section A concerns factors 1 and 2 in the Rule’s list: “importance” factors that relate to the

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29 Id.
qualitative and quantitative magnitude of the issues and the amount in controversy. Section B turns to factors 3 and 4—“party access” issues that have to do with the parties’ ability to obtain information and their resources. Section C considers factor 5 which we call the “forecasting” factor since it requires judges to determine how important yet-to-be-provided information would be in determining issues at stake. Finally, Section D considers the “balancing” factor, factor 6, which will require judges to conduct a cost-benefit analysis involving disputed discovery requests.

Throughout, we will emphasize the extent to which each is objective in nature, and measurable in practice. Judgments concerning objective factors might be expected to be relatively uncontroversial, but even objective factors can be difficult to measure. This is especially true when parties have incentives not to accurately report true quantitative values, as we believe will often be the case in proportionality disputes. In addition, the enumerated proportionality factors will inevitably involve unavoidable and practically important normative judgments. Thus in discussing the six enumerated factors, we emphasize both objective measurability and the extent to which normative judgments are necessary in implementing each factor.

A. Factors 1 and 2: Importance of Issues and the Amount in Controversy

In many cases—certainly, when money damages are the sole requested relief—the amount in controversy (factor 2) will be the most objectively determinable. When the amount in controversy is, say, $100,000, is it ever appropriate to approve a discovery request that will cost even more than that—say, $500,000? At first blush, it seems difficult to justify forcing a defendant to engage in discovery production that costs five times the amount for which the defendant has been sued. Even so, it is impossible to answer this question without reference to factor 1, “the importance of the issues at stake in the action.” As we have seen, there may be substantial external benefits to the general litigation in question; thus, discovery costs that seem exorbitant when only the instant litigants are considered can, in context, be justifiable. The Committee Note to the proposed amendment to Rule 26 recognizes this point:

The monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized “the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.” Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.30

30 Memorandum from Hon. Judge David G. Campbell, note 2, supra, at B-41—B-42.
Consider, for example, a hypothetical case in which a plaintiff alleges a constitutional rights violation, demanding only injunctive relief. The Supreme Court has held that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”\(^{31}\) Certainly, then, “the importance of [First Amendment] issues at stake” would justify requiring the government to spend more than zero dollars on discovery. But what is the limit on the amount that a proper proportionality analysis would suggest the government should have to spend? Recognizing the inherent line-drawing nature of this challenge underscores the fundamentally normative judgments that judges will have to make in implementing the proportionality standard.

### B. Factors 3 and 4: Parties’ Access to Information and Resources

A party may have limited or extensive access to information, but its access is whatever it is; thus factor 3 is objective. That said, parties may have conflicting ideas about access to information.\(^{32}\) Measuring access can thus be expected to pose a substantial challenge for judges in implementing proportionality, because it might be quite difficult for judges to observe a party’s ease of providing information in discovery.\(^{33}\) Similarly, requesters will have incentives to minimize their ability to obtain the information in question on their own, or to overstate their costs of doing so. Thus, in a proportionality system backstopped by judicial refereeing, disagreements and posturing concerning the ease of accessing information are likely sources of litigation.

Factor 4, the parties’ resources, is objective, because a party’s resources may be great or slight, but they are what they are. It might be practically difficult to measure party resources, though. How should a judge consider the resources of a corporation with relatively little cash on hand, for instance? Should it matter whether that corporation has easy access to financial markets? Whether it is a subsidiary with a cash-rich corporate parent? Individual litigants’ resources could also be difficult to measure in practice. How should a court regard the resources of individual litigants with little liquidity but substantial amounts of either home equity or retirement-fund assets? And what about the frequently relevant example of an individual litigant who has limited personal net worth but is represented by a wealthy lawyer working on contingency?


\(^{32}\) Memorandum from Hon. Judge David G. Campbell, note 2, supra, at B-40 (“A party requesting discovery ... may have little information about the burden or expense of responding.”).

\(^{33}\) Memorandum from Hon. Judge David G. Campbell, note 2, supra, at B-40 (stating that access-related “uncertainties should be addressed and reduced in the parties’ Rule 26(f) conference and in scheduling and pretrial conferences with the court” but recognizing that “if the parties continue to disagree, the discovery dispute could be brought before the court”).
C. Factor 5: Forecasting

Factor 5 calls for judges to make fine-grained forecasts concerning how as-yet unknown information will affect parties’ chances of winning (whether at trial or beforehand via summary judgment). Judges conducting factor 5 analysis will encounter three kinds of challenges.

First, there will be incentive problems in determining important objective facts known to parties concerning the likely contents of disputed discovery. Parties sometimes will have a good idea of how important requested information is to the case. Smoking-gun inculpatory evidence in a party’s possession will obviously wreck its case, for example. But whether judges can discern the beliefs that parties hold in more marginal cases is another question.

Second, the parties may be off base in their understanding of the merits importance of these facts. The Advisory Committee Note states that a “party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party.” For this reason, the Committee suggests that a “party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them.” Of course, a party requesting information may believe information is important without having a good sense of the extent of this importance; indeed, the parties’ informational posture might be just the opposite of that posited by the Committee. In many cases, then, a responding party claiming that a request is not important should be able to explain why not.

In sum, factor 5 will require substantial reliance on parties’ own reports concerning the impact of requested information on a case’s merits resolution. Requesters will have strong incentives to exaggerate the importance of requested discovery. Would-be responders will have strong incentives to minimize it. And of course, judges will be involved only in cases in which the parties disagree strongly enough for each party to believe litigating the discovery dispute is worthwhile. Judges, who generally won’t have any more information about the case at bar than the least well informed party, will have to decide which party to believe. And of course, even a party who is well informed about the content of requested information might have mistaken beliefs about the marginal impact of that content on a case’s future merits determination.

Third, judges must make their own assessments concerning the merits impact of the requested information. Even with accurate descriptions of the parties’ beliefs as to this impact, judges won’t always forecast correctly.

34 Memorandum from Hon. Judge David G. Campbell, note 2, supra, at B-40.
35 Memorandum from Hon. Judge David G. Campbell, note 2, supra, at B-40.
A final point involves timing. When prospective discovery requests are at issue, a judge paying attention to *marginal* costs should ignore whatever has already been spent on earlier discovery. Consequently, parties who will do most of the responding in cases in which the discovery burden is asymmetric\(^{36}\) can be expected to press the issue of proportionality early in discovery. This observation might affect the informational base that judges have in deciding proportionality disputes.\(^{37}\) That is, in a system with regular litigation of proportionality disputes, parties might change their behavior so that judges are called on to adjudicate such disputes earlier than current practice would otherwise lead us to expect.\(^{38}\)

**D. Factor 6: Balancing Costs and Benefits**

Factor 6 is where the proportionality standard’s rubber meets the road: it asks judges to conduct a cost-benefit analysis in determining “whether the burden or expense of the proposed discovery outweighs its likely benefit.” The first five factors can be viewed as the “inputs” in this determination, so it will be useful to understand how factors 1-5 function in relation to the balancing contemplated by factor 6.

One position a judge could conceivably take is that disputed discovery will not be allowed in a damages-only action if the cost of providing the requested information exceeds the *total* amount in controversy. This approach would require the judge to measure the marginal cost of discovery. That implicates only factor 3, since a responding party’s ease of access to information determines the costs of providing that information,\(^{39}\) as well as factor 2 (the amount in controversy). Such

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\(^{36}\) The Advisory Committee Note considers such cases especially important for proportionality purposes; *see* Memorandum from Hon. Judge David G. Campbell, note 2, *supra*, at B-40 (“One party — often an individual plaintiff — may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.”)

\(^{37}\) One commenter on the proposed amendments suggests this timing point is one of special concern; *see* Stephen B. Burbank, Comment on the Proposed Amendments on the Federal Rules of Civil Procedure, February ____, 2014 [CHECK CITE] (suggesting that the burden of establishing proportionality will, as a de facto matter, fall on those seeking discovery, and stating that the incidence of proportionality and/or burdensomeness disputes will be “exacerbated” because when proportionality “is part of the scope of discovery, the judge will be called in at the outset, when there is no sufficient informational basis to make an informed decision”).

\(^{38}\) For more on the important role of timing in discovery, *see generally* Scott A. Moss, *Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics Of Improving Discovery Timing In A Digital Age*, 58 DUKES J. 889 (2009); and Frank H. Easterbrook, *Discovery as Abuse*, 69 B. U. L. REV. 635, 638 (1989) (noting high information costs are likely to make any such judicial regulation “hollow”).

\(^{39}\) Note, though, that factor 3 also might speak to marginal benefits. In situations where the requesting party could access the requested information on its own, one benefit of allowing requested information is that the requester needn’t spend its own resources acquiring the same information. A judge who believes the requester will spend its own resources obtaining the
an approach involves a strong normative component. Consider a plaintiff who will surely win a lawsuit if $2 million is spent on discovery. If the suit is for $1 million in damages, the judge who adopts this approach will refuse discovery. That will prevent a plaintiff with a meritorious suit from obtaining redress to which she is entitled, in the name of saving the defendant a greater amount. This is a fundamentally distributional—and hence normative—choice.

Another approach would be for the judge in a damages-only action to refuse a disputed discovery request whenever the cost of the requested information exceeds the marginal effect of the discovery on the expected damage amount. This approach also takes into account factors 2 and 3, while also taking into account factor 5, which concerns the impact of requested information on the forecast probability that the plaintiff will win. Like the first approach to balancing, this approach has a fundamentally normative component.40

Several of the proportionality factors allow judges to soften the force of normative rules as blunt as the two just discussed. Most notably, as we discussed supra in reference to factor 1, the Advisory Committee Note emphasizes that monetary stakes must be “balanced against other factors,” taking into account that “many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.”41 Factor 4, the parties’ resources, presumably also allows equitable balancing: presumably a judge balancing all factors would hesitate before requiring a resource-poor party to spend a large share of its resources obtaining discovery that its wealthier adversary could provide at little or modest relative cost.42

As this discussion illustrates, implementing the proportionality standard will in many cases require quantifying benefits implicated by intrinsically nonquantifiable factors. Cass Sunstein has argued that such difficulties can sometimes be usefully addressed via “breakeven analysis”.43 In the present context, that would mean asking how large the nonquantifiable benefits of litigation would have to be to justify allowing particular discovery requests. If intuition suggests the required benefits are very likely above or below the breakeven level, then the course of action is easy to determine. It is important to recognize that even when

information in question, if the discovery is disallowed, should recognize that only the distribution, and not the level, of expenditures on discovery would be affected by refusing the discovery request.

40 See the example in Part IV.C.
41 Memorandum from Hon. Judge David G. Campbell, note 2, supra, at B-41—B-42 (quotation remarks removed).
42 Even so, the Committee has emphasized that there are limits on such equitable considerations. See Memorandum from Hon. Judge David G. Campbell, note 2, supra, at B-42 (stating that “consideration of the parties’ resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party”).
breakeven analysis is practical to carry out, different judges will have different normative intuitions concerning nonquantifiable benefits of litigation.

In sum, the proportionality standard written into proposed Rule 26(b)(1) provides judges with explicit equitable discretion to consider normative issues. The standard therefore will carry the same advantages and limitations of any other balancing test. It will allow judges to take note of case-specific issues that implicate justice, speed, and expense. It will also involve subjectivity and a reduction of predictability.

VI. Concluding Thoughts

Our mission in this paper has been to discuss key economic aspects of beefing up the proportionality standard in discovery. We have seen that the externalization of both costs and benefits plays a central role in our discovery system. We have also seen that agency problems are endemic to discovery in an adversarial system. Because our focus has been on the Advisory Committee’s chosen course, we have not discussed alternative changes to the American discovery system. Instead, we have focused on assessing the six factors around which the proportionality standard will revolve.

Greater reliance on a judicially managed proportionality standard will involve a number of challenges. Will parties have the proper incentives to report the information that judges need to carry out proportionality analysis? Will the parties even have that information at the time that the standard will be applied? How will judges determine the implicit weight to place on nonquantifiable factors involving the importance of nonmonetary issues in a case? How good a job will judges do forecasting the merits value of the (yet-to-be-provided) requested information in question? Whatever the answers to these questions, we can expect an increase in the variation in adjudication due to the discretionary factors written into the proportionality standard.

44 For example, some authors suggest that a better system would require requesting parties to internalize the costs of their requests directly, through a default rule requiring that requesters pay; see, e.g., Redish & McNamara, supra note _; Martin H. Redish, Electronic Discovery and the Litigation Matrix, 51 DUKE L.J. 561, 608 (2001); Robert G. Bone, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE, Foundation Press (2003) at 217-19; Robert D. Cooter & Daniel L. Rubinfeld, An Economic Model of Legal Discovery, 23 J. LEG. STUD. 435 (1994); Frank H. Easterbrook, Discovery as Abuse, 69 B. U. L. REV. 635, 638 (1989). This approach is currently used in exceptional cases, e.g., the expert deposition cost allocation rule under FRCP 26(b)(4)(C)(i), as well as the proposed amendment to Rule 26(c)(1)(B), which would allow courts, “for good cause,” to “specify[] terms, ... including the allocation of expenses, for the” requested discovery. See Memorandum from Hon. Judge David G. Campbell, note 2, supra, at B-33—B-34. Other approaches would focus on minimizing cross-party agency costs by making the requesting party responsible for carrying out and bearing the costs of the search. See Kobayashi, supra. Still another alternative relies even more heavily on judicial management than does proportionality; see Jay Tidmarsh, The Litigation Budget 68 VANDERBILT L. REV. ___ (2015).
In pointing out these challenges, we do not mean either to praise or to criticize the re-emphasized proportionality standard. Our goal has been to elaborate, from an analytical perspective, the economic considerations that arise from the standard as written. We hope that this discussion will facilitate the future of both judicial management of proportionality and litigation more generally.