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The Law and Economics of Proportionality in Discovery

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THE LAW AND ECONOMICS OF PROPORTIONALITY IN DISCOVERY†*

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TABLE OF CONTENTS

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I. INTRODUCTION

This Article analyzes the proportionality standard in discovery. Proponents of this standard believe it 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. 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. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.[1]

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[1] The proportionality standard entered the Rules in 1983 as part of Rule 26(b)(1)(iii). *See* FED. R. CIV. P. 26, advisory committee notes (effective 1983) (describing the function of the proportionality standard). 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 that 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.

FED. R. CIV. P. 26(g)(1).

A frequently expressed perception is that judges have been hesitant to apply the proportionality standard on a regular basis.[2] Amendments to the rules in 1993 and 2000 aimed at promoting the responsible use of the proportionality standard failed to produce tangible results.[3] 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.[4] The 2015 Amendments continue this trend by proposing further organizational changes to the rules.[5]

This Article assumes that the organizational changes contained in the 2015 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

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[2] *See, e.g.*, Memorandum from Judge David G. Campbell to Judge Jeffrey Sutton, at B-8 (June 14, 2014), http://www.uscourts.gov/file/18218/download (stating both that "three previous Civil Rules Committees in three different decades have reached the same conclusion as the current Committee — that proportionality is an important and necessary feature of civil litigation in federal courts" and that "proportionality is still lacking in too many cases," such that "[t]he previous amendments have not had their desired effect"). For academic commentary to the same effect, see Ronald J. Hedges, *A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123 (2005) (noting that the proportionality rule was not being used by judges); Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 349–70 (2000) (noting that proportionality standards are "seldom-used" and "something of a dud"); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 773–74 (1998) [hereinafter Marcus, *Discovery Containment Redux*] (noting that the proportionality amendment "seems to have created only a ripple in the caselaw"); Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 163 (1999) (noting non-use of proportionality provisions).

[3] *See* Marcus, *Discovery Containment Redux*, *supra* note 2, at 764 (discussing the 1993 Amendment); Hedges, *supra* note 2, at 125–26 (discussing the 2000 Amendment).

[4] *See* Marcus, *Discovery Containment Redux*, *supra* note 2, at 764 (discussing the 1993 Amendment); Hedges, *supra* note 2, at 125–26 (discussing the 2000 Amendment).

[5] FED. R. CIV. P. 26 (effective Dec. 1, 2015).

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 against 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 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."[6]

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 Article considers how these facts shape the decisions facing judges who, if the future matches the Advisory Committee's aspirations, will now manage proportionality assessments.

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[6] FED. R. CIV. P. 26(b)(1) (effective Dec. 1, 2015).

II. THE 2015 AMENDMENTS AND A BRIEF HISTORY OF THE PROPORTIONALITY STANDARD IN THE FEDERAL RULES OF CIVIL PROCEDURE

The 2015 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.[7] Specifically, the 2015 Amendments move the language containing the proportionality standard from Rule 26(b)(2)(C)(iii) (limits on discovery) to a more prominent place in Rule 26(b)(1).[8] Amended 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.[9]

In moving the proportionality standard back to its original home in Rule 26(b)(1), the 2015 Amendments continue the Advisory Committee's focus on amendment by reorganization.[10]

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[7] *Id.*

[8] *Compare id., with* FED. R. CIV. P. 26(b)(2)(C)(iii) (effective Dec. 1, 2015).

[9] FED. R. CIV. P. 26(b)(1) (effective Dec. 1, 2015) (emphasis added).

[10] *Id.* 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.

The proportionality provisions were moved from Rule 26(b)(1) to their pre-2015 Amendment location in Rule 26(b)(2)(C)(iii) as part of the 1993 amendments.[11] 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.[12]

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.[13] The committee suspected that the location of the proportionality standard, "buried among other discovery provisions, hindered its effectiveness."[14] 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).[15]

The 2015 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

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Memorandum from Judge David G. Campbell, *supra* note 2, at B-8.

[11] FED. R. CIV. P. 26, advisory committee's note, 1993 Amendments.

[12] FED. R. CIV. P. 26(b)(2)(C) (amended 1993) (emphasis added).

[13] FED. R. CIV. P. 26, advisory committee's notes, 2000 Amendments.

[14] THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COMMENTARY ON PROPORTIONALITY IN ELECTRONIC DISCOVERY 3 (Jan. 2013).

[15] FED. R. CIV. P 26(b)(1). The last sentence, added in 2000, reads: "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)."

focus on organizational changes in the 2015 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 2015 Amendments will create that awareness.

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.[16] 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.[17]

Sometimes, though, some costs are borne by those other than the actors themselves, or some benefits are received by others. Economists say that such costs or benefits are *externalized* when no regulatory or market mechanism functions to ensure that the parties take such costs and benefits into account.[18] When there are uninternalized costs, the private costs facing individual economic actors will be lower than the social costs resulting from

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[16] 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.

[17] 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.

[18] *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 42 (1960) (demonstrating that, in the absence of transaction costs, the full costs and benefits of an action or activity will be internalized by contracting parties).

their actions. Conversely, uninternalized benefits cause the private benefits individual economic actors realize to exceed the benefits society overall receives from these actions. For example, pollution caused by factory operations may harm people other than the factory owners without creating any legal duty of compensation. Furthermore, the harms may be diffuse, so that the costs of using market mechanisms to mitigate these harms are prohibitive.[19] 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 uninternalized pollution costs means that, absent environmental regulations of one sort or another, 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 Article, we point out that *litigation in general* involves both externalized costs and externalized benefits; we discuss *discovery in particular* in the next Part.[20] Analyses comparing the private and social incentives to use the legal system demonstrate how these incentives can diverge with respect to both the 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.[21]

On the cost side, the private and social costs of litigation diverge because litigation costs are not fully internalized.[22] For

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[19] *See* Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13, 27 (1972) (identifying settings where prohibitively high transaction costs can prevent the full internalization of certain types of harms).

[20] Steven Shavell, *The Fundamental Divergence between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 584 (1997) [hereinafter Shavell, *The Fundamental Divergence*]. *See also* Steven Shavell, *The Social versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 334 (1982) (comparing the private costs and benefits to the social costs and benefits of litigation); Louis Kaplow, *Private versus Social Costs in Bringing Suit*, 15 J. LEGAL STUD. 371, 371 (1986); Peter S. Menell, *A Note on Private versus Social Incentives to Sue in a Costly Legal System*, 12 J. LEGAL STUD. 41, 44 (1983); Susan Rose-Ackerman & Mark Geistfeld, *The Divergence between the Social and Private Incentives to Sue: A Comment on Shavell, Menell, and Kaplow*, 16 J. LEGAL STUD. 483, 483 (1987).

[21] Shavell, *The Fundamental Divergence*, *supra* note 20, at 577–78.

[22] For a discussion of market mechanisms and the viability of Coasian bargaining in the context of reducing cost externalization in legal discovery, *see* Jonah B. Gelbach,

example, except when a court would refuse to enter a default judgment, the mere act of a plaintiff's 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 deterrence, incentives to take care, the benefits of precedent, or other social benefits that would be generated through litigation.[23] 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.[24] Via statute, Congress has provided procedural features such as damage multipliers and fee-shifting, which encourage litigation of statutorily created causes of action.[25] These procedural choices can be rationalized within the present

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Discovering Coase, Technical Report, U. Pa. Law School (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2713897; Jonah B. Gelbach, *Can Simple Mechanism Design Results be Used to Implement the Proportionality Standard in Discovery?*, 172 J. INSTITUTIONAL & THEORETICAL ECON. 200 (2016). *See also* Kenneth A. Shepsle & Barry R. Weingast, *When Do Rules of Procedure Matter?*, 46 J. POL. 206, 206 (1984) (applying Coasian analysis to the design of procedural rules); J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59 (2016); and J.J. Prescott, Kathryn E. Spier & Albert Yoon, *Trial and Settlement: A Study of High-Low Agreements*, 57 J.L. & ECON. 699 (2014).

[23] *See, e.g.*, Chris W. Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1264–65 (2001) (examining how evidentiary rules on the admissibility of character evidence affect the incentives to engage in criminal activity); Kathryn E. Spier, *A Note on the Divergence Between the Private and Social Motive to Settle Under a Negligence Rule*, 26 J. LEGAL STUD. 613, 613 (1997) (discussing the effects on victim's incentives to bring private suits on public deterrence).

[24] *See, e.g.*, 20 U.S.C. §§ 1681–1688 (2012) (creating a cause of action for victims of sex discrimination).

[25] *Id.* (allowing fee-shifting).

discussion as springing from a view that certain favored types of litigation bring substantial social benefits that are external to the litigants themselves.[26]

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.[27]

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.

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[26] For a wide ranging discussion of procedural and legislative issues related to private enforcement, see SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES (2010); Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1560 (2015).

[27] *See* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 337 (1994) (arguing that accuracy is only beneficial in certain situations).

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.[28] Discovery allows one party to externalize a large share of the responsibility and costs of his discovery request to his adversary.[29] 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 the requesting party.[30] The costs fall where they lie, so that the party that receives the discovery request bears the costs of responding to the discovery request.[31] The responding party's production costs might be many times the requesting party's modest costs of formulating the request and

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[28] Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 773 (2011); Bruce H. Kobayashi, *Law's Information Revolution as Procedural Reform: Predictive Search as a Solution to the* In Terrorem *Effect of Externalized Discovery Costs*, 2014 U. ILL. L. REV. 1473, 1476.

[29] Redish & McNamara, *supra* note 28, at 779 (distinguishing between costs of discovery and other litigation costs).

[30] FED. R. CIV. P. 26(b)(1).

[31] *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").

reviewing the produced information.[32] Parties' incentives to request expansive discovery are 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 requesting parties themselves—might exceed the costs of complying with the requests.[33]

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.[34] That gives them discretion whenever the discovery request is at all vague or ambiguous when applied to a given document (or other object of discovery).[35] 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.[36]

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.[37] As a result,

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[32] Kobayashi, *supra* note 28, at 1476.

[33] *Id.*

[34] FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.").

[35] William W. Schwarzer, *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).

[36] *See* Redish & McNamara, *supra* note 28, 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 and McNamara would allocate the costs of responding to a discovery request to the requesting party under the theory of *quantum meruit*. *Id.* at 788–91.

[37] As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*, 329 U.S. 495, 516 (1947):

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.[38] By limiting their effort in accurately sorting between relevant and irrelevant documents, the responding party's lawyer will produce fewer relevant documents and more irrelevant ones. The result will be (i) an increase in 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.[39]

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 has the opposite features—it involves litigation

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> [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.

See also Griffin B. Bell, Chilton Davis Varner & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery-The Rush to Reform*, 27 GA. L. REV. 1, 40–46 (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).

[38] *See* Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 BYU L. REV. 579, 582 (suggesting that lawyer-client agency costs generated by hourly billing practices were a contributing cause of overdiscovery). *See generally* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987); Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503 (1996); A. Mitchell Polinsky & Daniel L. Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 AM. L. & ECON. REV. 165 (2003); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707 (1998).

[39] Redish & McNamara, *supra* note 28, 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).

expenditures that serve only or primarily to divide a fixed pool.[40] 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. Further, 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 only of judgments and remedies, but also of resulting precedents.[41]

C. AN ILLUSTRATIVE NUMERICAL EXAMPLE

We can illustrate the points discussed above using a simple numerical example. Suppose a plaintiff sues a defendant for $100,000 in tort injuries. Without extensive discovery, the plaintiff believes the probability she will win judgment is .5 so that the expected judgment is $50,000.[42] With extensive discovery, which costs the plaintiff nothing but costs the defendant $30,000, the plaintiff's chance of winning rises from fifty percent to seventy-five percent. 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-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.[43] Thus, in this example, the marginal cost of extensive discovery exceeds the marginal benefit to the plaintiff.

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[40] *See supra* Part III.

[41] On this latter point, consider the fact that appellate courts typically remand for proceedings that will further develop the record in a case.

[42] For simplicity, we assume that the parties are both risk-neutral; nothing important about the example turns on this assumption.

[43] 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

A judge imposing a cost-sensitive rule such as that contained in the Rule 26's proportionality standard 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 Rule 26(c)(1)(B).[44] 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 Rule 26 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.[45] Looking only at the private costs and benefits, this might be the sort of efficient cost-reduction result that the proportionality standard is 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 ten percent chance of losing at trial—yielding a defendant's

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from Judge David G. Campbell, *supra* note 2, 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)); *id.* at B-6 (stating that "[a]lmost 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.

[44] FED. R. CIV. P. 26(c)(1)(B) (effective Dec. 1, 2015).

[45] 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.

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).

Assume that the defendant believes that with extensive discovery, the plaintiff's chance of winning will be fifteen percent.[46] 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

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[46] Thus, the defendant believes that the extensive discovery will have relatively little benefit to the plaintiff—increasing the plaintiff's win probability by only five percentage points.

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.[47]

V. THE LAW AND 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

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[47] For more on these and related issues, see Shavell, *The Fundamental Divergence*, *supra* note 20.

earlier discussions of the proportionality standard contained in Rule 26, on the one hand, and the economic analysis of discovery costs, on the other.

The Advisory Committee Notes to the 2015 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."[48] In addition, the Committee Note states that the 2015 amendment is not "intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional."[49] 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 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:

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.[50]

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[48] FED. R. CIV. P. 26, advisory committee's notes, 2015 Amendment; Memorandum from Judge David G. Campbell, *supra* note 2, at B-39.

[49] *Id.*

[50] FED. R. CIV. P. 26(b)(1) (effective Dec. 1, 2015).

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 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 party 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 factor 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, for example, $100,000, is it ever appropriate to approve a discovery request that will cost even more than that—for example, $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."[51] 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 Notes to the 2015 Amendment to Rule 26 recognizes this point:

> [T]he 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.[52]

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."[53] 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.

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[51] *Id.*

[52] FED. R. CIV. P. 26, advisory committee's notes, 2015 Amendment; Memorandum from Judge David G. Campbell, *supra* note 2, at B-41–B-42.

[53] Elrod v. Burns, 427 U.S. 347, 373 (1976).

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.[54] 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.[55] 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?

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[54] Memorandum from Judge David G. Campbell, *supra* note 2, at B-40 ("A party requesting discovery . . . may have little information about the burden or expense of responding.").

[55] *Id.* (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, judges will encounter 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 defendant'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 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."[56] 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."[57] 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

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[56] *Id.*

[57] *Id.*

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.

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[58] 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.[59] That is, in a system with regular litigation of proportionality disputes, parties might change their behavior so that judges are called on to

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[58] The Advisory Committee Note considers such cases especially important for proportionality purposes. *See* FED. R. CIV. P. 26, advisory committee's notes, 2015 Amendment; Memorandum from Judge David G. Campbell, *supra* note 2, 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.").

[59] One commenter on the 2015 amendments suggests this timing point is one of special concern. *See* Letter from Stephen B. Burbank, David Berger Prof. for the Admin. of Justice, Univ. Pa. Law Sch., to Committee on Rules of Practice and Procedure (February 10, 2014), http://www.uscourts.gov/uscourts/RulesandPolicies/rules/2010%20report.pdf (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).

adjudicate such disputes earlier than current practice would otherwise lead us to expect.[60]

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,[61] as well as factor 2 (the amount in controversy). Such 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.

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[60] 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 DUKE L.J. 889 (2009); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989) (noting that high information costs are likely to make any such judicial regulation "hollow").

[61] 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 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.

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.[62]

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 Committee Notes emphasize 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."[63] 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.[64]

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."[65] In the present context, that

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[62] *See* the example in Part IV.C.

[63] FED. R. CIV. P. 26, advisory committee's notes, 2015 Amendment; Memorandum from Judge David G. Campbell, *supra* note 2, at B-41–B-42 (quotation marks omitted).

[64] Even so, the Committee has emphasized that there are limits on such equitable considerations. *See* Memorandum from Judge David G. Campbell, *supra* note 2, 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").

[65] *See generally* Cass R. Sunstein, *The Limits of Quantification*, CAL. L. REV. (forthcoming) (Harvard Law Sch. Pub. L. & Leg. Theory, Res. Paper Series, Paper No. 14-13, 2014), http://ssrn.com/abstract=2424878. *But see* Daniel A. Farber, *Breaking Bad? The Uneasy Case for*

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 a 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 Rule 26(b)(1) functionally provides judges with equitable discretion to consider normative issues. The standard therefore will carry the same advantages and limitations of any other balancing test.[66] 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.[67]

Regulatory Breakeven Analysis (Apr. 28, 2014), http://ssrn.com/abstract=24 30263 (responding to Sunstein and arguing against the general use of breakeven analysis).

[66] While cost-benefit analysis is controversial in some quarters, it is widely viewed as a useful conceptual framework to design rules or regulations. However, it is also widely recognized that the practical usefulness of implementing a particular cost-benefit analysis will be context dependent. *See, e.g.*, John H. Cochrane, *Challenges for Cost-Benefit Analysis of Financial Regulation*, 43 J. LEGAL STUD. S63 (2014) ("The devil is in the details — what benefits, what costs? How are they measured?").

[67] This is hardly the only place in procedural law where a cost-benefit analysis is written into the Rules, of course. For example, Fed R. Evid. 403 states that:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

However, the generalized cost-benefit standard contained in Fed. R. Evid. 403 is supplemented in Fed. R. Evid. Art. IV by specific rules of admissibility that are "concrete applications evolved for particular situations" that reflect the policies underlying Fed. R. Evid. 403. FED. R. EVID. 403, advisory committee's notes, 1972 Proposed Rules. Thus, direct application of Fed. R. Evid. 403 is limited to "situations for which no specific rules have been formulated." *Id.* No such supporting rules yet exist to guide application of the generalized cost-benefit test contained in the proportionality standard. *See, e.g.*, Ctr. for Judicial Stud., Duke Law Sch., Discovery Proportionality Guidelines and Practices, 99 JUDICATURE 47, 47 (2015) (discussing concerns about the ambiguity of certain factors enumerated in the proportionally standard and suggesting guidelines for applying the standard).

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 more fundamental changes to the American discovery system.[68] 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 a 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

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[68] 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 28, at 778 (discussing costs as a litigation subsidy); 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 217–19 (Foundation Press 2003); Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 435 (1994); Easterbrook, *supra* note 60, at 638. 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 2015 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 Judge David G. Campbell, *supra* note 2, at B-33–B-34 (discussing what courts will allow). 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* note 28, at 1477 (addressing cross-party agency costs). Still another alternative relies even more heavily on judicial management than does proportionality; *see* Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 882–94 (2015) (discussing possible implementation the British approach to litigation budgeting in American courts).

an increase in the variation in adjudication due to the discretionary factors written into the proportionality standard.

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.