Good Intentions Gone Awry: Privacy as Proportionality Under Rule 26(b)(1)

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I. INTRODUCTION

The 2015 amendments to the Federal Rules of Civil Procedure relocated the proportionality concept to Rule 26(b)(1), making it part of the very definition of discoverable evidence.[1] This was intended to focus courts

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1. *See* Max Kennerly, *A Plaintiff's Guide to Fed. R. Civ. P. 26 Discovery Proportionality*, LITIGATION & TRIAL: THE L. BLOG OF PLAINTIFF'S ATTORNEY MAX KENNERLY (July 12, 2017), https://www.litigationandtrial.com/2017/07/articles/attorney/frcp-26-discovery-proportionality/ [https://perma.cc/88M4-AMN6]; Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 SEDONA CONF. J. 1, 16 (2015).

and practitioners alike on cabining pretrial discovery that was perceived as excessive.[2] At the same time, society at large has become more conscious of privacy values as a consequence of factors such as the accumulation of vast amounts of private information on personal devices,[3] widespread collection of personal data by websites and social media providers,[4] revelations about government surveillance,[5] and the enactment of data privacy regulations

2. Indeed, the Rules Advisory Committee considered it important to reiterate the advisory committee note that had been appended to the rule in 1983 when the proportionality provisions were first introduced into the rules.

> The 1983 Committee Note stated that the new provisions were added "to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse."

FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment.

3. *See* Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 HARV. J.L. & PUB. POL'Y 403, 404 (2013) ("Modern cellular phones can carry an extraordinary amount of information. The storage capacity of the popular Apple iPhone 5 ranges from 16GB to 64GB, which is the equivalent of many millions of pages of text and similar to the typical storage capacity of a home computer sold in 2004." (footnote omitted) (citing APPLE STORE, https://web.archive.org/web/20121209163751/store.apple.com/us/browse/home/shop_iphone/family/iphone5)). Since Professor Kerr's article was published, the capacity of cellular phones has continued to expand, with some Apple models now offering 512 GB of storage. *See* Joan E. Solsman, *iPhone 13 Pro Line Finally Gets 1TB of Storage, Creating the Most Expensive iPhone Ever*, CNET (Sept. 15, 2021, 5:27 AM), https://www.cnet.com/tech/mobile/iphone-13-pro-line-finally-gets-1tb-of-storage-creating-the-most-expensive-iphone-ever/ [https://perma.cc/U3LQ-QP65].

4. Facebook, for example, was taken to task by Congress when the personal information of up to eighty-seven million persons that it had collected ended up in the hands of Cambridge Analytica, a voter-profiling company. Natasha Singer, *What You Don't Know About how Facebook Uses Your Data*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/technology/facebook-privacy-hearings.html [https://perma.cc/FMD4-DA3R]. Similarly, Google records "[e]very search you perform and every YouTube video you watch." Dale Smith, *There's a Way to Delete The Frightening Amount of Data Google Has on You*, CNET (Jan. 31, 2022, 1:30 PM), https://www.cnet.com/how-to/google-collects-a-frightening-amount-of-data-about-you-you-can-find-and-delete-it-now/ [https://perma.cc/2SX6-369U]. "Google Maps even logs everywhere you go, the route you use to get there and how long you stay, no matter if you have an iPhone or an Android." *Id.*

5. For instance, in early 2013, Edward Snowden, a former Central Intelligence Agency contractor, leaked information to the media that revealed that the National Security Agency (NSA) had obtained a secret order directing Verizon to turn over the telephone records for millions of its customers on a daily basis and that the NSA had tapped directly into the servers of internet providers including Google and Microsoft to track online communications. *See Edward Snowden: Leaks That Exposed US Spy Programme*, BBC NEWS (Jan. 17, 2014), https://www.bbc.com/news/world-us-canada-23123964 [https://perma.cc/4LBZ-CB32].

both in the United States[6] and abroad.[7] The parallel emergence of these currents—a demand for proportionality in discovery in civil cases and an increased concern about privacy rights—has led some courts and commentators to the conclusion that the two should be joined: that privacy should be considered as one factor in the proportionality analysis conducted pursuant to Rule 26(b)(1).[8]

This is a trend that should be resisted. The instinct to protect private information against intrusive discovery is commendable, but treating privacy

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6. California has enacted a comprehensive privacy statute, the California Consumer Privacy Act (CCPA), CAL. CIV. CODE §§ 1798.100–1798.199.95 (2018), while Illinois has adopted legislation specifically targeting the use of biometric information, the Biometric Information Privacy Act (BIPA), 740 ILL. COMP. STAT. 14/1–14/99. These laws are, of course, both a result of increased awareness of privacy interests and a factor in amplifying that awareness.

7. One of the most comprehensive privacy regimes is the European Union's General Data Protection Regulation (GDPR), Council Regulation 2016/679, 2016 O.J. (L 119) 1, which repealed the 1995 European Data Protection Directive, Council Directive 95/46, 1995 O.J. (L 281) 31 (EC). *See What Is GDPR, The EU's New Data Protection Law?*, GDPR.EU, https://gdpr.eu/what-is-gdpr [https://perma.cc/8LXB-S66W]. Other nations have also enacted their own privacy laws. *See What is the LGPD? Brazil's Version of the GDPR*, GDPR.EU, https://gdpr.eu/gdpr-vs-lgpd/ [https://perma.cc/C4DT-BEJZ]; Rogier Creemers, Paul Triolo & Graham Webster, *Translation: Cybersecurity Law of People's Republic of China (Effective June 1, 2017)*, NEW AMERICA: CYBERSECURITY INITIATIVE BLOG (June 29, 2018), https://www.newamerica.org/cybersecurity-initiative/digichina/blog/translation-cybersecurity-law-peoples-republic-china/ [https://perma.cc/YC7X-YCS9]; Takeshige Sugimoto, Akihiro Kawashima & Tobyn Aaron, *A New Era for Japanese Data Protection: 2020 Amendments to the APPI*, FPF (Apr. 13, 2021), https://fpf.org/blog/a-new-era-for-japanese-data-protection-2020-amendments-to-the-appi/ [https://perma.cc/NJ3U-4LRT].

8. Robert D. Keeling & Ray Mangum, *The Burden of Privacy in Discovery*, 20 SEDONA CONF. J. 415, 417 (2019) ("As a result [of the 2015 amendments to the Federal Rules of Civil Procedure], an emerging consensus of courts and commentators has concluded that privacy may—indeed, should—be considered as part of the proportionality analysis required under Rule 26(b)(1)."); Agnieszka A. McPeak, *Social Media, Smartphones, and Proportional Privacy in Civil Discovery*, 64 U. KAN. L. REV. 235, 288 (2015) ("In order to achieve proportionality, courts should (1) acknowledge the privacy concerns that exist with discovery of digital data compilations; (2) include burdens *on privacy* within the proportionality test; and (3) consider protective orders when granting broad access to digital data compilations."); Henson v. Turn, Inc., No. 15-cv-01497-JSW, 2018 WL 5281629, at *5 (N.D. Cal. Oct. 22, 2018) ("While questions of proportionality often arise in the context of disputes about the expense of discovery, proportionality is not limited to such financial considerations. Courts and commentators have recognized that privacy interests can be a consideration in evaluating proportionality, particularly in the context of a request to inspect personal electronic devices." (footnote omitted) (citing Tingle v. Hebert, No. 15-626-JWD-EWD, 2018 WL 1726667, at *7–8 (M.D. La. Apr. 10, 2018))).

as a factor under Rule 26(b)(1) is the wrong means to achieve this end. It does violence to the purpose and logic of the proportionality analysis, it has serious negative consequences both for judicial decision making and for the transparency of the discovery process, and it is ultimately unnecessary.

Part II of this Article discusses how courts have traditionally protected private information in discovery by utilizing Rule 26(c). It addresses the history and text of that Rule and investigates how judges have used protective orders to foreclose discovery of personal data, to limit the scope of its disclosure, and to prevent its dissemination if and when it is produced in discovery.

Part III explores the evolution of proportionality in Rule 26(b), with particular emphasis on the purposes underlying each successive modification of the Rule. It discusses the case law and commentary advocating treatment of privacy as a proportionality factor and demonstrates that this position has no support in the Rule itself. Further, it shows that many of the cases that purport to rely on Rule 26(b)(1) to protect privacy interests are, in fact, engaged in an analysis not materially different from that which is performed under Rule 26(c).

In Part IV, this Article examines the consequences of treating privacy as a proportionality factor. It argues that, at least in some cases, the choice between relying on Rule 26(b)(1) or Rule 26(c) can make the difference as to whether the information at issue will be discoverable. Treating privacy as a proportionality factor also has an adverse impact on the quality of the decision-making process itself, making it less transparent and potentially devaluing privacy interests. Perhaps most importantly, including privacy as a factor under Rule 26(b)(1), and therefore as part of the definition of what constitutes discoverable evidence, enables parties to make decisions about preserving, collecting, and producing information based on a unilateral determination about the significance of privacy interests in relation to proportionality factors.

Finally, Part V suggests a resolution of the tension between privacy and discovery that addresses privacy concerns under Rule 26(c) while reserving the proportionality analysis of Rule 26(b)(1) for predominantly economic considerations. Some overlap is inevitable, but in the proportionality analysis, consideration of privacy should be limited to circumstances in which the need to preserve privacy interests generates the kind of financial cost and burden that is properly within the scope of Rule 26(b)(1).

II. PROTECTION OF PRIVACY UNDER RULE 26(C)

Privacy is nowhere mentioned in the text of the Federal Rules of Civil Procedure and, therefore, is not an express constraint on discovery.[9] Nevertheless, "many of the existing limits, at their core, draw on privacy-related values. In essence, courts already recognize that overly intrusive discovery violates individual rights and should not be permitted without justification."[10] Indeed, for decades courts have routinely limited discovery based on the private nature of the information sought, sometimes even characterizing the right of privacy as "constitutionally-based."[11]

Courts have traditionally relied upon Rule 26(c) to protect privacy.[12] That rule states in pertinent part that "[t]he court may, for good cause, issue

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9. Agnieszka McPeak, *Social Data Discovery and Proportional Privacy*, 65 CLEV. ST. L. REV. 61, 70 (2016).

10. *Id.*

11. *See* Strike 3 Holdings, LLC v. Doe, No. 18-14114, 2019 WL 5446239 (D.N.J. Oct. 24, 2019), *rev'd on other grounds*, 2020 WL 3567282 (D.N.J. June 30, 2020); EEOC v. CTI, Inc., No. CV-13-1279-TUC-DCB, 2014 WL 12639916, at *1 (D. Ariz. Mar. 26, 2014) ("An employee's personnel records and employment information are protected by an individual's constitutional right to privacy." (first citing Blotzer v. L-3 Commc'ns. Corp., 287 F.R.D. 507, 509 (D. Ariz. Apr. 11, 2012); and then citing Bickley v. Schneider Nat'l, Inc., No. C 08-5806 JSW, 2011 WL 1344195 (N.D. Cal. Apr. 8, 2011))); Soto v. City of Concord, 162 F.R.D. 603, 616 (N.D. Cal. 1995) ("Federal Courts ordinarily recognize a constitutionally-based right of privacy that can be raised in response to discovery requests."). In some circumstances, this constitutional right of privacy is linked to the First Amendment because revelation of the information at issue would have a chilling effect on expression or association. *See, e.g.*, NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 462 (1958) ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations."); London-Sire Recs., Inc. v. Doe 1, 542 F. Supp. 2d 153, 162–64 (D. Mass. 2008) (denying discovery of defendants' identities in file-sharing copyright case on basis of "two First Amendment issues–the right to anonymous speech and the right to whatever creative activity is involved in the defendants' acts"). In other cases, the constitutional foundation is less clear because the Fourth Amendment, which directly relates to privacy, regulates only the conduct of government actors and does not apply to discovery by a private party. United States v. Jacobsen, 466 U.S. 109, 113 (1984). Similarly, while certain personal choices, such as those to utilize contraceptives or terminate a pregnancy, are (or, until recently, have been) constitutionally protected under the doctrine of substantive due process, and information about those choices is consequently entitled to some protection from discovery, courts have not found that substantive due process creates privacy rights more generally. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Roe v. Wade, 410 U.S. 113, 153 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

12. *See, e.g.*, Garnett-Bishop v. N.Y. Cmty. Bancorp, Inc., No. CV 12-2285, 2013 WL 101590, at *1 (E.D.N.Y. Jan. 8, 2013) ("Rule 26(c) 'serves in part to protect parties'

an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."[13] The Supreme Court has observed that "[a]lthough the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule."[14] And, while the Rule specifically provides that a court may enter an order "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way,"[15] one commentator noted early on that "courts have regularly entered protective

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privacy interests.'" (quoting Duling v. Gristede's Operating Corp., 266 F.R.D. 66, 71 (S.D.N.Y. 2010))).

13. FED. R. CIV. P. 26(c)(1). The full text of FRCP Rule 26(c) is as follows:

> (c) Protective Orders.
>
> (1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending – or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
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> (A) forbidding the disclosure or discovery;
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> (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;
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> (C) prescribing a discovery method other than the one selected by the party seeking discovery;
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> (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
>
> (E) designating the persons who may be present while the discovery is conducted;
>
> (F) requiring that a deposition be sealed and opened only on court order;
>
> (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
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> (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.
>
> (2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.
>
> (3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

Id. at 26(c).

14. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 n.21 (1984).

15. FED. R. CIV. P. 26(c)(1)(G).

orders [under Rule 26(c)] not only to protect trade secrets, but also to avoid other undesirable consequences such as the invasion of litigants' privacy."[16]

When the Federal Rules of Civil Procedure were first adopted in 1937, the provisions regarding protective orders were contained in Rule 30(b), which governs depositions.[17] According to the advisory committee notes, these provisions were "introduced as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 26."[18] In 1970, the protective order language was transferred to its current home in Rule 26(c) and was modified to make it applicable to discovery generally.[19] As the Rules Advisory Committee noted at the time, "Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b) . . . ."[20] As the Supreme Court has observed, protective orders under Rule 26(c) further the purposes of Rule 1 "to secure the just, speedy, and inexpensive determination of every action."[21]

The standard for issuance of a protective order under Rule 26(c) is deceptively simple: the party seeking the order must establish "good cause."[22] Good cause, however, is not self-defining. Accordingly, courts have developed a balancing test for determining when a protective order should be granted.

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16. Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 2 (1983) (footnote omitted).

17. *See* FED. R. CIV. P. 30(b) advisory committee's note to 1970 amendment (stating the "[e]xisting Rule 30(b) on protective orders has been transferred to Rule 26(c)").

18. FED. R. CIV. P. 30(b), (d) advisory committee's note to 1937 adoption; *see also* 8A CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2036 (3d ed. 2022) ("Rule 26(c) was adopted as a safeguard for the protection of parties and witnesses in view of the almost unlimited right of discovery given by Rule 26(b)(1).").

19. FED. R. CIV. P. 26(c) advisory committee's note to 1970 amendment. Since 1970, the Rule has been amended twice in ways immaterial to the issue of privacy. First, in 1993, a clause was added requiring the party moving for a protective order to certify that it attempted to confer with the other relevant parties in order to avoid the need for a motion. FED. R. CIV. P. 26(c) advisory committee's note to 1993 amendment. Then, in 2015, subsection (c)(1)(B) was amended to recognize that one function of a protective order may be to shift the costs of discovery. FED. R. CIV. P. 26(c) advisory committee's note to 2015 amendment.

20. FED. R. CIV. P. 26(b) advisory committee's note to 1970 amendment.

21. Herbert v. Lando, 441 U.S. 153, 177 (1979) (quoting FED. R. CIV. P. 1 (1992) (amended 2015) (alterations omitted)).

22. *See, e.g.*, Gambale v. Deutsche Bank AG, 377 F.3d 133, 142 (2d Cir. 2004); Foltz v. State Farm Mutual Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003); *In re* Terra Int'l, Inc., 134 F.3d 302, 306 (5th Cir. 1998).

"Although the burden is on the movant to establish good cause for the entry of a protective order, the court ultimately weighs the interests of both sides in fashioning an order."[23] "[U]nder Rule 26(c), the appropriateness of protective relief from discovery depends upon a balancing of the litigation needs of the discovering party and any countervailing protectible interests of the party from whom discovery is sought."[24] In other words, the court will balance the requesting party's need for the information in connection with the lawsuit against the interest of the producing party in avoiding harassment, embarrassment, disclosure of proprietary information or trade secrets, or, as is relevant here, invasion of privacy.[25]

Courts have long utilized this balancing test to protect privacy rights in the context of civil discovery. In a 1957 admiralty case, a district court observed that "[m]atters of discovery are the subject of protective orders where a party fears the invasion or destruction of rights of privacy."[26] Similarly, in a putative class action challenging alleged employment discrimination, the Fifth Circuit approved the lower court's determination not to issue a blanket protective order with respect to the personal information of employees and applicants, but also acknowledged that some of the application information might be "of a nature that would be embarrassing or denigrating to reveal—for example, physical or emotional handicaps, diseases disqualifying an applicant for certain employment, dissatisfaction with present employment."[27] As to such information, the court invited the defendant to review its records and seek from the district court "further protective orders that will give appropriate regard to the privacy and the dignity of the individuals affected."[28] Finally, in a case involving records of juveniles, the Ninth Circuit, after "[b]alancing the invasion of these minors' rights of privacy against the plaintiffs' need for this information as found

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23. Duling v. Gristede's Operating Corp., 266 F.R.D. 66, 71 (S.D.N.Y. 2010) (citing Mitchell v. Fishbein, 227 F.R.D. 239, 245 (S.D.N.Y. 2005)); *see also* Winfield v. City of New York, No. 15-cv-05236, 2018 WL 840085, at *4 (S.D.N.Y. 2018); Chevron Corp. v. Donziger, 325 F. Supp. 3d 371, 387 (S.D.N.Y. 2018).

24. Apex Oil Co. v. DiMauro, 110 F.R.D. 490, 496 (S.D.N.Y. 1985).

25. When the protective order sought does not simply involve the disclosure of information in discovery but, for example, is a request to prevent public access to information that the parties are using in the litigation, courts have expanded the balancing test to consider the public interest in transparent judicial proceedings. For instance, the Third Circuit has crafted a non-exhaustive list of factors for the courts to consider in such circumstances. The factors include privacy interests, purpose of discovery, "health and safety," and "fairness and efficiency." Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787–88 (3d Cir. 1994). Because these public access cases raise unique concerns that do not relate directly to the treatment of privacy as a proportionality factor, they will not be discussed further.

26. Estate of Darling v. Atl. Contracting Corp., 150 F. Supp. 578, 580 (E.D. Va. 1957).

27. Carr v. Monroe Mfg. Co., 431 F.2d 384, 390 (5th Cir. 1970).

28. *Id.*

by the district court," upheld a decision to issue a narrowly tailored protective order rather than foreclose discovery of the records altogether.[29]

Then, in 1984, in *Seattle Times Co. v. Rhinehart*,[30] the Supreme Court explicitly identified Rule 26(c) as a source of protective orders to safeguard privacy interests. The case involved a defamation action brought by Keith Rhinehart, the spiritual leader of a religious group known as the Aquarian Foundation, against the Seattle Times, which had published less than flattering stories about Rhinehart and the Foundation.[31] Although the case was brought in Washington state court, Washington's procedural requirements tracked the Federal Rules of Civil Procedure.[32] In response to the Seattle Times's motion to compel discovery, the trial court ordered the defendants to disclose the identity of all donors to the Foundation for five years prior to the date of the complaint, the amounts of their contributions, and enough membership information to substantiate any claims that the Foundation had suffered a loss of members.[33] However, the court also issued a protective order pursuant to the state analogue to Rule 26(c) forbidding publication or use of this information outside of the litigation.[34] The Washington Supreme Court affirmed both the order compelling discovery and the protective order,[35] and the Seattle Times brought the case to the United States Supreme Court, challenging the protective order as a violation of the First Amendment.[36]

While the constitutional issue is not germane here, the Supreme Court opinion provides significant insight into the means for protecting privacy interests during civil discovery. First, the Court observed that "[b]ecause of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c)."[37] Next, the Court found that the scope of discovery is not limited by privacy concerns:

29. *See* Breed v. U.S. District Court, 542 F.2d 1114, 1116 (9th Cir. 1976).
30. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).
31. *Id.* at 22–23.
32. *Id.* at 29 n.14 ("The Washington Rule that provides for the scope of civil discovery and the issuance of protective orders is virtually identical to its counterpart in the Federal Rules of Civil Procedure.").
33. *Id.* at 25.
34. *Id.* at 26–27.
35. *Id.* at 27–28 (citing Rhinehart v. Seattle Times Co., 98 Wn.2d 226 (Wash. 1982)).
36. *Id.* at 30–31.
37. *Id.* at 34.

> The Rules do not differentiate between information that is private or intimate and that to which no privacy interests attach. Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action. Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties.[38]

Nevertheless, the Court endorsed an expansive view of the types of evils that a protective order might address: "It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties."[39] The Court then explicitly found that protective orders were the appropriate means to protect privacy. It said:

> Rule 26(c) includes among its express purposes the protection of a "party or person from annoyance, embarrassment, oppression or undue burden or expense." Although the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule.[40]

Finding that the dissemination of the identities of the Foundation's donors could "result in annoyance, embarrassment, and even oppression,"[41] the Court upheld the protective order at issue.

In the wake of *Seattle Times*, courts have routinely taken up the Supreme Court's suggestion and relied on Rule 26(c) as the mechanism for protecting privacy interests. A good example is *Johnson ex rel. Johnson v. Thompson*,[42] a case in which the parents of children born with myelomeningocele, a form of spina bifida, brought claims against the medical team who had provided care and had conducted a study concerning treatment.[43] The medical team made recommendations concerning whether the children would receive surgical intervention and antibiotics or only palliative care, and the plaintiffs alleged that these recommendations were improperly based on handicap and socioeconomic status.[44] During the course of discovery, a dispute arose over whether the plaintiffs would have access to the identities of all other children in the study.[45] The magistrate granted a protective order, finding "that the privacy interests of the other study participants outweighed

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38. *Id.* at 30.
39. *Id.* at 34–35 (footnote omitted).
40. *Id.* at 35 n.21 (quoting FED. R. CIV. P. 26(c)).
41. *Id.* at 37 (quoting Rhinehart v. Seattle Times Co., 98 Wn.2d 226, 257 (Wash. 1982)).
42. Johnson *ex rel.* Johnson v. Thompson, 971 F.2d 1487, 1487 (10th Cir. 1992).
43. *Id.* at 1490–91.
44. *Id.* at 1491.
45. *Id.* at 1497.

the [plaintiffs'] need for the information."[46] The Tenth Circuit upheld the order, concluding that the court had engaged in the proper weighing of privacy interests:

> The decision whether to administer heroic life-sustaining treatment to a severely handicapped newborn is one of the most heartwrenching decisions a parent can be called upon to make. Parents who have had to make such a decision are entitled to privacy and confidentiality. We believe that the magistrate was correct to balance the relevance and necessity of the information the appellants requested against the rights of other participants to maintain their privacy.[47]

The court in *In re Sealed Case (Medical Records)*[48] engaged in a similar analysis. The plaintiffs in the case were two residents of a group home for the mentally disabled in the District of Columbia.[49] They alleged that they were sexually assaulted by a third resident, and they sued the agency that operated the home, arguing that it had failed to protect them from a known predator.[50] The plaintiffs sought discovery of the entire file of the alleged assailant, and the district court granted the application, with the limitation that the information could only be used in connection with the litigation.[51] The guardian ad litem for the alleged assailant appealed, and the Court of Appeals for the District of Columbia vacated the discovery order.[52] Quoting *Seattle Times*, the court held that privacy interests are grounds for issuance of a protective order under Rule 26(c).[53] Indeed,

> the "court, in its discretion, is authorized by this subsection to fashion a set of limitations that allows as much relevant material to be discovered as possible, while preventing unnecessary intrusions into the legitimate interests—including privacy and other confidentiality interests—that might be harmed by the release of the material sought."[54]

The court of appeals then faulted the district court for failing to conduct any balancing whatsoever, despite the fact that the intrusion on the privacy of the resident was "breathtaking."[55] The court acknowledged that for some

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46. *Id.*
47. *Id.* (internal citation omitted).
48. *In re* Sealed Case (Med. Recs), 381 F.3d 1205 (D.C. Cir. 2004).
49. *Id.* at 1207.
50. *Id.* (citation omitted).
51. *See id.* at 1216.
52. *Id.* at 1208.
53. *See id.* at 1215 (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 n.21 (1984)).
54. *Id*. at 1216 (quoting Pearson v. Miller, 211 F.3d 57, 65 (3d Cir. 2000)).
55. *Id.* at 1216–17.

of the records in the file, the probative value could well outweigh the resident's privacy interests.[56] "But," said the court, "it would be surprising if there were not also documents that—although hugely invasive of the [resident's] privacy—are of only marginal relevance. And it would also be surprising if there were not others that—while equally intrusive—have nothing at all to do with the plaintiffs' claims."[57] Accordingly, the court "conclude[d] that the district court abused its discretion by requiring the District of Columbia to produce all of the [resident's] 'mental retardation records' to counsel for the plaintiffs . . . without weighing the [resident's] privacy interests against the plaintiffs' evidentiary need for the . . . records."[58]

Of course, not every balancing of privacy interests under Rule 26(c) will result in issuance of a protective order. *In re Apple Inc. Device Performance Litigation*[59] is a recent example of a contrary outcome. The case was a class action in which the plaintiffs alleged that Apple concealed defects in the iPhone battery and failed to disclose that certain software updates would adversely affect the phone's performance.[60] A special discovery master entered an order authorizing the forensic imaging of the iPhones of ten of the named plaintiffs so that the performance testing could be conducted by a neutral third-party expert.[61] The plaintiffs appealed that order and the court found that the plaintiffs had a protectible privacy interest in their devices; indeed, "personal devices . . . are afforded special privacy protections."[62] Nevertheless, the court held that Apple had a compelling need for the forensic images.[63] The judge observed that "[t]he compelling interest standard may be a higher bar than relevance and proportionality, but it does not require Apple to make a threshold showing that the sought-after information will be admissible, scientifically reliable, and 'necessary.'"[64] Rather, because the performance of the devices was integral to the plaintiffs' claims and because the plaintiffs had therefore placed those devices "at issue" in the litigation, the court allowed the imaging.[65]

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56. *Id.* at 1217.
57. *Id.*
58. *Id.* at 1218 (citation omitted).
59. *In re* Apple Inc. Device Performance Litig., No. 5:18-md-02827-EJD, 2019 WL 3973752 (N.D. Cal. Aug. 22, 2019). Although the opinion does not explicitly cite Rule 26(c), it is evident from the court's reasoning that this rule was the basis for its analysis. *See id.* at *2–3.
60. *In re* Apple Inc. Device Performance Litig., 386 F. Supp. 3d 1155, 1162 (N.D. Cal. 2019).
61. *In re* Apple Inc. Device Performance Litig., 2019 WL 3973752, at *1 (citation omitted).
62. *Id.* at *2.
63. *Id.*
64. *Id.* at *3.
65. *Id.* at *3–4.

As Judge Lee H. Rosenthal and Professor Steven S. Gensler have observed,

> [p]rotective orders have been used to shield private information in part because they are wonderfully flexible. They can prevent discovery into information—even if it is otherwise discoverable—because it is private. They can allow the discovery but reduce the intrusion by restricting how the information is accessed, used, or disseminated. Protective orders can be sought by or issued to parties and nonparties.[66]

Rule 26(c), then, provides a well-established framework for the protection of privacy rights in discovery, a framework that has been recognized by the Supreme Court and long utilized by the lower courts.[67]

III. PROTECTION OF PRIVACY UNDER RULE 26(B)(1)

A. The Evolution of Proportionality

Notwithstanding the availability of protections for private matter under Rule 26(c), some have advocated incorporating privacy as a proportionality factor under Rule 26(b)(1).[68] To evaluate the wisdom of this approach, it is important to understand the history of proportionality in the Federal Rules.

When the Federal Rules of Civil Procedure were first adopted in 1937, they did not include a comprehensive proportionality provision and discovery was largely unbounded. The scope of discovery was broadly defined to reach "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."[69] Furthermore, in 1946, the Rule was amended to make clear that information that would be inadmissible at trial was nevertheless discoverable if it "appears reasonably calculated to lead to the discovery of admissible evidence."[70]

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66. Lee H. Rosenthal & Steven S. Gensler, *The Privacy-Protection Hook in the Federal Rules*, 105 JUDICATURE 77, 78 (2021).

67. *See, e.g.*, Choice, Inc. of Tex. v. Graham, 226 F.R.D. 545, 547–48 (E.D. La. 2005) (issuing protective order allowing plaintiffs and witnesses who sought or obtained reproductive health services to remain anonymous); Keith H. v. Long Beach Unified Sch. Dist., 228 F.R.D. 652, 657–58 (C.D. Cal. 2005) (allowing disclosure of private information of juveniles, but redacting identifying information); Cook v. Yellow Freight Sys., Inc., 132 F.R.D. 548, 551–52 (E.D. Cal. 1990) ("[T]he court will weigh the present defendant's concern with protecting the privacy interests associated with the names and addresses of its employees against the plaintiffs' interest in discovering such information for the purpose of presenting their case.").

68. *See supra* note 8 and accompanying text.

69. FED. R. CIV. P. 26(b) (1937) (amended 2015).

70. FED. R. CIV. P. 26(b) (1946) (amended 2015).

Perceived misuse of discovery, however, led to calls to impose greater control. "By the 1970s . . . judges, scholars, and lawyers were lamenting the abusive nature of the civil discovery process. Citing over-broad, costly and, oppressive tactics by counsel, critics began to advocate for greater limits on the amount and scope of discovery."[71] For example, the American Bar Association's Section of Litigation issued a report in 1977 concluding that "abuse of discovery is a major problem" and that amendments to the rules were necessary to "reverse the trend toward increasingly expensive, time-consuming and vexatious use of the discovery rules."[72] According to Milton Pollack, a prominent federal district judge writing in 1978, "misdirected and unbridled discovery can become an engine of harassment, impeding the administration of justice and inflating tremendously and unfairly the costs of litigation."[73]

In 1983, the rules were amended to meet these concerns. According to Professor Edward D. Cavanagh, "[t]hese amendments [were] designed to improve the conduct of discovery by eliminating improper practices and making discovery more cost-effective for the parties, and thereby helping the pretrial phase of an action to run more smoothly."[74] In particular, the drafters included, for the first time, a multi-factor proportionality framework in Rule 26:

> The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).[75]

With respect to subsection (iii), the proportionality provision, Professor Cavanagh observed:

> Simply put, the rule will not permit litigants to use a bazooka where a water pistol will do. The rule contemplates that the parties will be selective in invoking various discovery devices; parties no longer are free, necessarily, to follow a discovery program that leaves "no stone unturned." Nor will parties be permitted to follow

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71. McPeak, *supra* note 8, at 249 (footnote omitted).

72. Am. Bar Ass'n, *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137, 138 (1980).

73. Milton Pollack, *Discovery–Its Abuse and Correction*, 80 F.R.D. 219, 222 (1979).

74. Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 768 (1985).

75. FED. R. CIV. P. 26(b)(1) (1983) (amended 2015).

> a "scorched earth" discovery policy calculated to coerce an adversary into capitulation. Thus, it would appear that a discovery program costing $50,000 in a case involving claims for $10,000 ordinarily would transgress rule 26(b)(1)(iii).[76]

The amendments, and most particularly the introduction of the proportionality factors, were "aimed most squarely at curbing the types of duplicative, excessive, 'scorched earth' discovery practices prevalent at the time—i.e., at the problem of so-called 'overdiscovery.'"[77] The focus of the rulemakers in 1983 was plainly on the cost—in terms of money and time—of the excessive use of discovery in civil litigation. As the Advisory Committee on the Federal Rules wrote,

> [T]he spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.[78]

"After several decades of broad discovery orders, the legal community, focusing not on privacy but on the economic burden associated with these requests, demanded reform," and the result was "a list of factors . . . for courts

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76. Cavanagh, *supra* note 74, at 789.

77. Keeling & Mangum, *supra* note 8, at 418–19; *see also* McPeak, *supra* note 8, at 252 ("Some of the proportionality factors first appeared in the rules in the 1983 amendment. They existed to protect against 'disproportionate discovery' and allow judges to discourage 'discovery overuse.'" (quoting FED. R. CIV. P. 26 advisory committee's note to 1983 amendment)). Some courts took up the challenge and applied the proportionality principles. *See, e.g.*, Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., No. 88–9752, 1991 WL 183842, at *4 (E.D. Pa. Sept. 16, 1991) ("While relevancy is crucial to a determination of discoverability, I cannot be guided by this factor alone. Even were I to find some remote relevance in the [plaintiffs'] requests, the 1983 amendments to Rule 26(b)(1) of the Federal rules emphasized that discovery must be proportional, as well as relevant to the lawsuit and must be tailored to the case at hand. The Rule of Proportionality is intended to 'guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.'" (quoting FED. R. CIV. P. 26(b) advisory committee's note to 1983 amendment)); Johnston Dev. Grp., Inc. v. Carpenters Local Union No. 1578, 130 F.R.D. 348, 353 (D.N.J. 1990) (finding that "any discovery must pass the proportionality test of Rule 26(b)(1)"); *In re* Convergent Techs. Sec. Litig., 108 F.R.D. 328, 331 (N.D. Cal. 1985).

78. FED. R. CIV. P. 26 advisory committee's note to 1983 amendment.

to balance when evaluating the proportionality of a discovery request to the needs of the case."[79]

Ten years later, the proportionality provision was seen as having fallen short of its goal. According to the Rules Advisory Committee, "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression."[80] Accordingly, in 1993, Rule 26(b) was amended again. First, the reference to "burden or expense" was modified to make it clear that the central consideration was the relation between any burden and the concomitant benefit of the discovery requested.[81] Second, an additional factor was added: the importance of the requested discovery in resolving the issues in the case.[82] These changes were intended "to enable the court to keep tighter rein on the extent of discovery."[83] At the same time, the text of the rule was reorganized, with the definition of discoverable evidence remaining in Rule 26(b)(1) while the proportionality factors were moved to Rule 26(b)(2)(iii).[84]

Then, in 2000, "a sentence was added to Rule 26(b)(1) reminding litigants and courts that the proportionality provisions of Rule 26(b)(2) apply to all discovery."[85] This clarified that "[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1)."[86] Although "otherwise redundant," this amendment was considered necessary because "[t]he Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated."[87]

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79. Babette Boliek, *Prioritizing Privacy in the Courts and Beyond*, 103 CORNELL L. REV. 1101, 1128–29 (2018) (citing FED R. CIV. P. 26(b) advisory committee's note to 1083 amendment).

80. FED. R. CIV. P. 26(b) advisory committee's note to 1993 amendment.

81. FED. R. CIV. P. 26(b)(2) (1993) (amended 2015).

82. *Id.*

83. FED. R. CIV. P. 26(b) advisory committee's note to 1993 amendment; *see also* Linda Sandstrom Simard, *Seeking Proportional Discovery: The Beginning of the End of Procedural Uniformity in Civil Rules*, 71 VAND. L. REV. 1919, 1928–29 (2018).

84. After the 1993 amendments, the proportionality provision read as follows:

> The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2) (1993) (amended 2015). In 2006, the Committee reorganized Rule 26 again and the proportionality provision was moved to Rule 26(b)(2)(C)(iii). FED. R. CIV. P. 26(b)(2)(C)(iii) (2006) (amended 2015).

85. 8 WRIGHT, MILLER & MARCUS, *supra* note 18, at § 2008.1.

86. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2000 amendment.

87. *Id.*

In 2015, the Rules Committee addressed proportionality yet again. In the advisory committee note, it quoted the reference in the 1993 advisory committee note to "the information explosion" and how it had created the potential for increasing the "cost of wide-ranging discovery and . . . for discovery to be used as an instrument for delay or oppression."[88] The Committee went on to observe that "[w]hat seemed an explosion in 1993 has been exacerbated by the advent of e-discovery."[89] In response, the Committee moved the proportionality factors from Rule 26(b)(2)(iii), where they were characterized as limits on discovery, to Rule 26(b)(1), as part of the very definition of discoverable information.[90] The Committee viewed this as "restoring" proportionality to its proper place.[91] According to the Committee note, when the proportionality factors were introduced in 1983, they "[were] explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1)" because "Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery" that was disproportionate.[92] The Committee now felt, however, that the 1993 amendments had inadvertently softened the impact of the proportionality factors by placing them in a subsection separate from the definition of discoverable information.[93] According to the Committee, "[s]ubdividing the paragraphs . . . was done in a way that could be read to separate the proportionality provisions as 'limitations,' no longer an integral part of the (b)(1) scope provisions."[94]

In addition to repositioning the proportionality factors, the 2015 amendments reordered them and added a new factor. The reordering brought to the

88. *Id.* at advisory committee's note to 2015 amendment.
89. *Id.*
90. *See id.*
91. *See id.*
92. *Id.*
93. *Id.*
94. *Id.* The argument that this amendment merely "restored" the original intent of the role of proportionality when the concept was introduced in 1983 is a bit disingenuous. In 1983, the Rule included a definition of the scope of discovery, as to which the proportionality factors were an explicit limitation. FED. R. CIV. P. 26(b) advisory committee's note to 1983 amendment. In 1993, when scope was moved to a different subsection, the substantive relationship remained the same. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment. It was the 2015 amendment that worked a substantive change, since the proportionality factors were now no longer characterized as limits, but rather as part of the definition of scope. *Id.* This is consequential because by making proportionality part of the definition of discoverable evidence, the rule now invites the responding party to make unilateral determinations about whether the requested information is proportional, just as parties make such determinations about relevance. *See infra* Part IV.

forefront consideration of the importance of the issues at stake in the litigation. This was consistent with the Advisory Committee's belief that it was necessary to "repeat the caution that the monetary stakes are only one factor, to be balanced against other factors."[95] The Committee also added as a factor "the parties' relative access to relevant information . . . ."[96] This was intended to address the issue of "information asymmetry," where one party controls the vast majority of relevant information, and therefore may have a greater obligation to respond in discovery.[97] In its current form, Rule 26(b)(1) provides:

> 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 in evidence to be discoverable.[98]

It is evident, then, that the history of proportionality in the Federal Rules is marked by a consistent effort to focus the courts and the litigants on making the cost and burden of discovery commensurate with the needs of the case. The proportionality concept was introduced in response to the perception that unbridled discovery had become too expensive and time-consuming. And, each successive amendment was designed to ameliorate these problems. As one commentator has observed, "[e]ven with the renewed emphasis on proportionality in the 2015 amendments, the proportionality test itself largely focuses on economic concerns. Indeed, the 'burden or expense' that the court weighs against the needs of the case are largely *financial* burdens."[99]

B. Caselaw Treating Privacy as Proportionality

There is no evidence that the rulemakers at any time intended to broaden the definition of proportionality beyond these concerns, much less to do so by introducing privacy as a proportionality factor.[100] Yet, some courts

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95. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment.
96. FED. R. CIV. P. 26(b)(1).
97. *Id.* at advisory committee's note to 2015 amendment ("[T]hese circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.").
98. FED. R. CIV. P. 26(b)(1).
99. McPeak, *supra* note 8, at 253.
100. This is not surprising, as privacy is a very different consideration from the kinds of material concerns that animated the drafting of the proportionality rules. As one commentator has observed, "[t]he burden of privacy is distinct and independent from the

have now begun to do just that. This trend, however, is not as substantial as might first appear. While a few courts have actually engaged in a proportionality analysis in which they consider privacy as one of the relevant factors, most courts that have alluded to privacy as a proportionality consideration have in fact used an analytical framework distinct from Rule 26(b)(1). Some simply balance the impact on privacy against the need for the requested discovery, without regard to any other proportionality factor—an exercise indistinguishable from a Rule 26(c) analysis. Others refer to requests for aggregations of data as being disproportionate because the data includes private information that is irrelevant to the litigation. And some courts simply refer to requests for private information as disproportionate without any analysis whatsoever.[101]

The case that has gone into the greatest depth discussing privacy as proportionality is *Henson v. Turn, Inc.*[102] This was a class action in which the plaintiffs alleged that Turn, Inc. had violated their privacy rights by placing "zombie cookies" on their computers and mobile devices.[103] Generally, "cookies" consist of software that tracks the users' browsing history and use of applications.[104] As the name implies, zombie cookies never die. Users cannot delete or block them, or if the user tries to delete them, they "respawn."[105] The plaintiffs alleged that the use of zombie cookies constituted a deceptive business practice and "trespass to chattels."[106]

In discovery, the defendant sought to compel the named plaintiffs to turn over their "mobile devices for inspection or produce complete forensic

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expense of litigation, and the risks to privacy are felt primarily after, rather than before, production." Keeling & Mangum, *supra* note 8, at 440 (footnote omitted).

101. Indeed, even proponents of privacy as proportionality recognize that courts have not applied this construct frequently or uniformly. For instance, Keeling and Mangum note that "while many cases . . . have cited privacy concerns, few have done so within the framework of a Rule 26(b) proportionality analysis. It is not that these cases have rejected this proportionality framework, but rather that they have simply ignored it." *Id.* at 425. Similarly, McPeak observes that "[d]espite the flexibility of the proportionality factors, cases applying the proportionality test mainly focus on financial burden." McPeak, *supra* note 8, at 256.

102. Henson v. Turn, Inc., No. 15-cv-01497-JSW, 2018 WL 5281629, N.D. Cal. Oct. 22, 2018).

103. *Id.* at *1.

104. *Id.*

105. *Id.* at *1–2.

106. *Id.* at *1.

images of their devices."[107] The plaintiffs objected and the court held that the request called for information "that is not relevant and is disproportional to the needs of the case."[108] With respect to relevance, the court found that Turn's demand "threatens to sweep in documents and information that are not relevant to the issues in this case, such as the plaintiffs' private text messages, emails, contact lists, and photographs."[109] As to proportionality, the court began with the proposition that privacy interests are properly taken into consideration under Rule 26(b)(1):

> While questions of proportionality often arise in the context of disputes about the expense of discovery, proportionality is not limited to financial considerations. Courts and commentators have recognized that privacy interests can be a consideration in evaluating proportionality, particularly in the context of a request to inspect personal electronic devices.[110]

The precedent upon which *Henson* relied will be discussed below, but the court's application of what it characterized as proportionality is instructive.

Pursuant to an agreed protocol for production of information from the plaintiffs' devices, Turn had issued nine requests for production, and the plaintiffs had responded.[111] As to all but two, there was apparently no dispute as to the adequacy of the response.[112] The court said,

> Given this, and in light of the fact that the plaintiffs' devices likely contain information not relevant to this case, may contain privileged information, and implicate significant privacy concerns, Turn's request for the plaintiffs to allow it to directly inspect their devices (or produce complete forensic images of their devices) is not relevant or proportional to the needs of this case.[113]

To the extent that forensic imaging would have included irrelevant or privileged information, the holding is unexceptional and is consistent with Rule 26(b)(1)'s definition of discoverability, which excludes such information. And there is no suggestion that a forensic image would have revealed any new information relevant to the first seven requests, to which the plaintiffs had already responded. Accordingly, proportionality does not seem to have played any role in this portion of the court's analysis.

Turn also sought the forensic images in order to review the plaintiffs' full web browsing history and cookie data.[114] The court found that the

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107. *Id.* (citing Joint Letter Brief at 2–5, Henson v. Turn, Inc., No. 15-cv-01497-JSW, 2018 WL 5281629 (N.D. Cal. Oct. 22, 2018)).
108. *Id.* at *5.
109. *Id.*
110. *Id.* (footnote omitted) (citing Tingle v. Hebert, No. 15-626-JWD-EWD, 2018 WL 1726667 (M.D. La. Apr. 10, 2018)).
111. *Id.* at *7.
112. *Id.* (citing Joint Letter Brief, *supra* note 107, at 6).
113. *Id.*
114. *Id.* at *7–8.

plaintiffs agreed to produce the Turn cookies from their devices and their web browsing history for sites that worked with Turn cookies, so, as to that information, there was no dispute.[115] With respect to three other categories of requested data, the court found that Turn could obtain the necessary information without taking a full forensic image.[116] Turn did not need all of the plaintiffs' cookies in order to compare its cookies with standard browser cookies; it could determine whether the plaintiffs regularly deleted their cookies and browsing histories by examining date ranges rather than the full content of the cookies and browsing histories; and Turn failed to show why it needed the plaintiffs' full browsing history in order to determine whether the plaintiffs' cookies transmit browser histories back to Turn, because that was "information . . . presumably within Turn's possession."[117] The court concluded that "[g]iven all this, and in light of the significant privacy concerns present here, Turn has not shown that its request for plaintiffs' full browsing history or cookies is relevant or proportional to the needs of this case."[118]

Here, then, the court's analysis was more than relevance, but was it proportionality? The court did not weigh the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, or the parties' resources, all of which are factors identified as potentially relevant to proportionality under Rule 26(b)(1). It did consider the burden or expense of the proposed discovery in relation to its likely benefit, but only if the burden is deemed to include an imposition on privacy interests, because the court did not take into account any economic burden. Finally, it did evaluate the importance of the requested information in resolving the issues in dispute. But, at bottom, this was the only balancing that the court did. It compared the potential impact on the privacy interests of the plaintiffs to the defendant's need for the information, an analysis indistinguishable from that conducted in response to a request for a protective order under Rule 26(c).

Likewise, the cases cited in *Henson* speak of privacy as a proportionality factor but do not engage in anything approaching a complete proportionality analysis under Rule 26(b)(1). In *Tingle v. Hebert*,[119] for example, the court

115. *Id.* at *8.
116. *Id.* at *7–8.
117. *Id.* at *8.
118. *Id.*
119. Tingle v. Hebert, No. 15-626-JWD-EWD, 2018 WL 1726667 (M.D. La. Apr. 10, 2018).

rejected the defendants' application to take forensic images of the plaintiff's personal cell phone and email accounts.[120] The defendants argued that the plaintiff had failed to produce text messages from a cell phone issued by the defendant employer and subsequently returned to the employer.[121] The court found that the employer had not shown that the devices at issue contained any relevant information not already disclosed and noted that the employer had not bothered to examine a phone that the plaintiff had returned.[122] To be sure, the court recited the Rule 26(b)(1) proportionality factors,[123] but it held that the defendants' demonstrated discovery needs did not outweigh the plaintiff's significant privacy interests.[124]

Crabtree v. Angie's List, Inc.,[125] also cited in *Henson*, was a Fair Labor Standards Act case in which the plaintiffs sought compensation for unpaid overtime.[126] The defendants sought to conduct a forensic examination of the plaintiffs' personal computers, cellular telephones, smartphones, tablets, and other communication devices to obtain geolocation information that would establish the whereabouts of the plaintiffs when they were purportedly working.[127] The court first noted that under Rule 26(b)(2)(C)(i), it was empowered to limit discovery where the equivalent could be "obtained from another source that is more convenient, less burdensome, or less expensive."[128] And, it observed that the advisory committee notes to Rule 34 cautioned against "creat[ing] a routine right of direct access to a party's electronic information system" because of the intrusiveness that would result.[129] Finally, the court relied on Rule 26(b)(1) and found that, in order to ascertain when the plaintiffs were performing job-related functions, the defendant already had access to the plaintiffs' cell phone records and the defendant's own SalesForce information that included badge swipe data showing when the employees were present at the defendant's premises as well as log-in data showing when they were connected to their work

120. *Id.* at *6.
121. *Id.* at *2 (citation omitted).
122. *Id.* at *6–7.
123. *Id.* at *7 (citing FED. R. CIV. P. 26(b)(1)).
124. Indeed, the court quoted *John Crane Grp. Corp. v. Energy Devices of Tex., Inc.*, No. 6:14-CV-178, 2015 WL 11112540 (E.D. Tex. Oct. 30, 2015), for the proposition that "[t]he utility of permitting a forensic examination of personal cell phones must be weighed against inherent privacy concerns." *Id.* at *1.
125. Crabtree v. Angie's List, Inc., No. 1:16-cv-00877-SEB-MJD, 2017 WL 413242 (S.D. Ind. Jan. 31, 2017).
126. *Id.* at *1.
127. *Id.* at *2.
128. *Id.* at *3 (citing FED R. CIV. P. 26(b)(2)(C)(i)).
129. *Id.* (quoting FED. R. CIV. P. 34 advisory committee's note to 2006 amendment) (emphases omitted).

computers.[130] The court concluded that "the forensic examination of Plaintiffs' electronic devices is not proportional to the needs of the case because any benefit the data might provide is outweighed by Plaintiffs' significant privacy and confidentiality interests."[131] Thus, this court, too, only balanced the need for the discovery against the privacy interests of the party from whom information was requested. It did not analyze any of the other Rule 26(b)(1) proportionality factors. The same is true of each of the other cases referred to in *Henson* in support of the proposition that privacy is appropriately considered under that Rule.[132]

Cases postdating *Henson* follow the same pattern. *Hardy v. UPS Ground Freight, Inc.*,[133] for example, was a case in which the plaintiff alleged that he was discharged for "complaining about racial discrimination in the workplace."[134] After the plaintiff deleted or failed to produce certain text messages, the defendant sought to obtain a forensic image of his cell phone.[135] In denying the request, the court cited the Rule 26(b)(1) proportionality analysis.[136] However, its reasoning bears little resemblance to that framework.

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130. *Id.*

131. *Id.*

132. *See* John Crane Grp. Corp. v. Energy Devices of Tex., Inc., No. 6:14-CV-178, 2015 WL 11112540, at *2 (E.D. Tex. Oct. 30, 2015) ("[Alleged inconsistencies in witness testimony] do not rise to the level of conduct that warrants the extreme measure of setting aside the inherent privacy concerns associated with a forensic examination of personal cell phones."); Hespe v. City of Chicago, No. 13 C 7998, 2016 WL 7240754, at *3–5 (N.D. Ill. Dec. 15, 2016) (upholding magistrate judge's ruling rejecting forensic examination of plaintiff's electronic devices where such examination was not "'proportional to the needs of this case' because any benefit the inspection might provide is 'outweighed by plaintiff's privacy and confidentiality interests'") (citation omitted); Areizaga v. ADW Corp., 3:14-cv-2899-B, 2016 WL 9526396, at *3 (N.D. Tex. Aug. 1, 2016) (finding request to image all of plaintiff's personal devices "not proportional to the needs of the case" when weighing defendant's "showing as to the information that it believes might be obtainable and might be relevant against the significant privacy and confidentiality concerns implicated by [defendant's] request"); *In re* Anthem, Inc. Data Breach Litig., No. 15-md-02617 LHK, 2016 WL 11505231, at *1 (N.D. Cal. Apr. 8, 2016) (rejecting request for forensic image of all plaintiffs' devices because "it would further invade plaintiffs' privacy interests and deter current and future data theft victims from pursuing relief"); Johnson v. Nyack Hosp., 169 F.R.D. 550, 562 (S.D.N.Y. 1996) (evaluating discovery demands under the old proportionality provision in Rule 26(b)(2)(C)(iii) and holding that the need for certain discovery outweighed privacy concerns while the need for other discovery did not).

133. Hardy v. UPS Ground Freight, Inc., No. 3:17-cv-30162-MGM, 2019 WL 3290346 (D. Mass. July 22, 2019).

134. *Id.* at *1.

135. *Id.*

136. *Id.* at *2 (quoting FED. R. CIV. P. 26(b)(1)).

First, the court found that much of the information swept up by a forensic analysis would simply be irrelevant.[137] Then, with respect to the remaining data that might be relevant, the court held that its probative value was outweighed by the plaintiff's privacy interests.[138] Like many cases cited in *Henson*, this is in essence a Rule 26(c) balancing because it ignores most of the factors identified in the Rule 26(b) proportionality test.

Santana v. MKA2 Enterprises, Inc.[139] is similar. In this Title VII race discrimination case, the defendant sought to image and inspect all of the plaintiff's cell phones.[140] The court observed that "[p]laintiff's cell phone likely contains a tremendous volume of information, including possibly text messages, email messages, phone logs, and photographs that are not at all relevant to the claims or defenses in this case."[141] The court concluded that the defendant's request was "overly broad, unduly burdensome and not proportional to the needs and issues of this case."[142] Because the defendant sought information that the court found not to be relevant, the request was indeed "overly broad." But once the irrelevant information is set aside, it is unclear how the court applied the proportionality criteria of Rule 26(b)(1) to the request. Although the court referred to the potential invasiveness of the request, thus suggesting that it considered privacy to be a 26(b)(1) factor, it did not allude to any of the other factors identified by the rule. Other recent cases likewise pay lip service to Rule 26(b)(1) while balancing the need for discovery exclusively against privacy interests.[143]

C. Theoretical Justifications

To the extent that courts intend to treat privacy as a true proportionality factor, they are hard-pressed to find a theoretical basis for doing so. It is

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137. *Id.* at *3.
138. *See id.* at *3–4.
139. Santana v. MKA2 Enters., Inc., No. 18-2094-DDC-TJJ, 2019 WL 130286 (D. Kan. Jan. 8, 2019).
140. *See id.* at *1.
141. *Id.* at *2.
142. *Id.* at *3.
143. *See, e.g.*, Johns v. Chemtech Servs., Inc., No. 20 C 7299, 2021 WL 4498651, at *3 (N.D. Ill. Aug. 27, 2021) (quoting Henson v. Turn, Inc., No. 15-cv-01497-JSW, 2018 WL 5281629, at *8–9 (N.D. Cal. Oct. 22, 2018); *In re* Marriott Int'l, Inc. Customer Sec. Breach Litig., No. 19-MD-2879, 2021 WL 961066, at *10–11 (D. Md. Mar. 15, 2021); Guo Wengui v. Clark Hill, PLC, 338 F.R.D. 7, 15 (D.D.C. 2021) (quoting FED. R. CIV. P. 26(b)(1)); Williams v. United States, 331 F.R.D. 1, 5 (D.D.C. 2019); Prado v. Equifax Info. Servs. LLC, 331 F.R.D. 134, 137–39 (N.D. Cal. 2019); Tingle v. Hebert, No. 15-626-JWD-EWD, 2018 WL 1726667, at *6–8 (M.D. La. Apr. 10, 2018); Hespe v. City of Chicago, No. 13 C 7998, 2016 WL 7240754, at *3–5 (N.D. Ill. Dec. 15, 2016).

apparent that the proportionality factors identified in the Rule do not include privacy. Furthermore, the language of the Rule does not suggest that the listed factors are merely examples; the Rule does not say "including" or "such as" the enumerated considerations.[144] Of course, as the Supreme Court noted in *Seattle Times*, Rule 26(c) does not explicitly mention privacy either. However, the language it uses to characterize the circumstances where protective orders are warranted—where there is the threat of "annoyance, embarrassment [or] oppression"—is certainly capacious enough to include intrusions on privacy, as the Supreme Court found.[145] By contrast, it is difficult to shoehorn privacy interests into any of the factors identified in Rule 26(b)(1).

Nevertheless, some commentators have made the effort. Professor Agnieszka McPeak contends that some proportionality factors

> expressly contemplate non-financial considerations, such as the importance of the issues at stake in the litigation. This factor implicates broader societal values that are not subject to mathematical calculation. Thus, the proportionality analysis necessarily incorporates non-monetary considerations, such as vindication of personal or private values, even though the expense of discovery is the main focus of the proportionality inquiry in many cases.[146]

True, the "importance of the issues at stake in the litigation" incorporates non-monetary societal values and is not susceptible to mathematical calculation. That does not mean, however, that this factor somehow encompasses the privacy interests of the parties that might be implicated in discovery. Rather, as the advisory committee note makes clear, this factor is concerned with whether the case in its entirety involves broad societal interests or only narrow private ones—whether it is a First Amendment case, for example, or merely a garden variety contract dispute.[147] The importance of the issues

144. *See* FED. R. CIV. P. 26(b)(1).

145. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35–37 (1984) (quoting Rhinehart v. Seattle Times Co., 98 Wn.2d 226, 247 (Wash. 1982)).

146. McPeak, *supra* note 8, at 256 (footnotes omitted).

147. When the proportionality factors were introduced in 1983, the Advisory Committee noted that

> [T]he 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 amounts involved. The court must apply the standards in an even-handed manner that will prevent the use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

FED. R. CIV. P. 26(b) advisory committee's note to 1983 amendment. Dean John L. Carroll anticipated in 2010 what the Rules Committee sought to do five years later when it reordered

at stake in the litigation is independent of the privacy issues that might arise in discovery. A demand to image a cell phone, for instance, is as likely to be made during discovery in the contract case as in the First Amendment case, but it would not alter the importance to society of the issues at stake in either case. The factor of the "importance of the issues at stake in the litigation,"[148] then, provides no support for importing privacy into the proportionality analysis.

A more promising argument might be that the "burden" in "the burden or expense of the proposed discovery"[149] is not limited to financial burden and that the term is broad enough to encompass privacy interests. Professor McPeak makes this argument as well. She acknowledges that "[u]nder the proportionality test, the 'burden' of discovery usually looks to economic costs and financial burden," but then goes on to contend that "[a]lthough financial burdens are important, nothing in the Federal Rules limits this consideration to finances alone."[150] There are several reasons why this approach also fails. First, courts are not free to expand the reach of a rule without regard to its purpose and drafting history.[151]

Second, as discussed above, the impetus behind the Rule related entirely to issues of cost and delay. Professor Babette Boliek, in discussing the creation of the proportionality factors in 1983 states, "[d]espite the courts' preexisting authority to limit discovery based on privacy concerns, the word 'privacy' was curiously absent from this new list of factors."[152] There is, of course, nothing curious about it if one recognizes that the purpose of the drafters

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the proportionality factors to move the importance of the issues at stake in the litigation to the fore, ahead of the amount in controversy:

> A more fundamental problem with proportionality needs to be discussed: the danger that monetary value of a case, alone, will control the proportionality analysis, impeding the discovery efforts of parties with limited resources and failing to acknowledge the non-pecuniary importance of public policy-related suits, such as those involving allegations of discrimination.

John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 464 (2010). Similarly, Theodore C. Hirt argued for the recognition of "non-monetary" factors in judging proportionality, but he linked this specifically to the importance of the issues in the case. *See* Theodore C. Hirt, *The Quest for "Proportionality" in Electronic Discovery—Moving from Theory to Reality in Civil Litigation*, 5 FED. CTS. L. REV. 171, 197–99 (2011).

148. FED. R. CIV. P. 26(b)(2).

149. *Id.*

150. McPeak, *supra* note 8, at 289.

151. Indeed, in construing a rule or regulation, "a court must 'carefully consider' the text, structure, history, and purpose." Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) (quoting Pauley v. Bethenergy Mines, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)).

152. Boliek, *supra* note 79, at 1129.

was to reduce cost and delay, not to protect privacy or other interests.[153] As Rosenthal and Gensler argue,

> [i]t is true that the term "burden" is open-ended and captures noneconomic concerns. But we struggle to accept the idea that the Advisory Committee interjected privacy into the proportionality calculus (and therefore into the scope of discovery) without using the word privacy in the rule test or the committee notes—and all while repeatedly telling people that the addition of the term "proportionality" was intended to reinforce existing discovery norms rather than change them.[154]

Third, once the term "burden" is unmoored from the context in which the drafters utilized it, it can encompass virtually any information that a party responding to discovery is disinclined to produce. Of course, in the colloquial sense, it is a "burden" to disclose privileged material, work product, trade secrets, tax returns, or, for that matter, information that might demonstrate the liability of the producing party. Yet, no one has suggested that a proportionality analysis should encompass these categories. One reason may be that, like privacy, each reflects a unique set of values that may dictate a different type of balancing when the information at issue could be material in a litigation.

Robert D. Keeling and Wayne Mangum, who are likewise proponents of privacy as proportionality, take a slightly different tack. They focus not on how burden was defined when the proportionality factors were created, but on the 2015 amendments. They argue that "[t]he renewed prominence of the Rule 26(b) proportionality factors as part of the definition of the scope of discovery has provided a solid textual basis for giving weight to such privacy 'burdens' in defining the scope of discovery."[155] This is a non sequitur. If the word "burden" did not previously encompass privacy interests, the transfer of the proportionality factors to Rule 26(b)(1), whatever else it may have accomplished, could hardly have changed the meaning of the unaltered text.[156]

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153. Keeling and Mangum likewise find the absence of discussion of privacy by the rulemakers to be confounding. They say, "[i]t is . . . surprising to look back to the pre-2015 history of the amendments to the scope of civil discovery under Rule 26(b) and find little mention of privacy interests in the discussion. Rather, early discussion of the proportionality factors focused primarily on economic factors." Keeling & Mangum, *supra* note 8, at 423 (footnote omitted).

154. Rosenthal & Gensler, *supra* note 66, at 81.

155. Keeling & Mangum, *supra* note 8, at 417.

156. Interestingly, Keeling and Mangum also purport to find support for their position in the advisory committee note that accompanies the 2006 amendment, not to Rule 26, but

Lacking textual or historical support for interpreting the proportionality factors as including privacy, advocates ultimately resort to policy arguments. Professor McPeak, for example, contends that "[b]y including privacy burdens in the proportionality test, courts can prevent abusive access to highly personal, aggregated data in civil litigation."[157] Elsewhere, she argues that "[s]tructuring the law around merely financial considerations would be short-cited [sic] given the pace at which new technology evolves."[158]

If it furthers protection for privacy interests, then why not incorporate these interests in the proportionality analysis, even if doing so stretches the reach of Rule 26(b)(1)? After all, as discussed above, some courts have engaged in a truncated proportionality analysis under Rule 26(b)(1) that is functionally the same as a balancing of privacy interests against the need for discovery under Rule 26(c). Does it matter which rule the courts rely upon? It turns out that it matters very much, both to the integrity of the decision-making process and to the behavior of counsel.

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to Rule 34. At that time, Rule 34 was modified to make clear that it authorizes testing or sampling of electronically stored information. According to Keeling and Mangum:

> As the advisory committee notes explain, "issues of burden and intrusiveness" raised by Rule 34(a)(1) include "confidentiality and privacy." Notably, the advisory committee concluded that such issues "can be addressed under either the proportionality factors formerly codified in Rule 26(b)(2) or under the protective order procedures set forth in Rule 26(c)." An important assumption in this directive was the advisory committee's intent that the burden of privacy should be considered in setting the scope of discovery.

Id. at 424 (footnotes omitted) (quoting Fed. R. Civ. P. 34(a)(1) advisory committee note to 2006 amendment). Examination of the advisory committee note itself belies this interpretation. The note states in pertinent part:

> As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c). Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy.

FED. R. CIV. P. 34(a) advisory committee's note to 2006 amendment. A straightforward reading of this note is that issues of burden, that is, cost and delay, could be addressed under the proportionality principles which were then incorporated in Rule 26(b)(2) (but were not then part of the scope of discovery) while intrusiveness—invasions of privacy—could be addressed under Rule 26(c). This construction is consistent with the note to the 1973 amendment to Rule 34, which stated that "[p]rotection may be afforded to claims of privacy or secrecy or of undue burden or expense under what is now Rule 26(c) (previously Rule 30(b))." FED. R. CIV. P. 34(a) advisory committee's note to 1970 amendment.

157. McPeak, *supra* note 9, at 62.

158. McPeak, *supra* note 8, at 289–90.

IV. THE CONSEQUENCES OF PRIVACY AS PROPORTIONALITY

A. The Impact on Judicial Decision Making

Whether privacy is treated as an independent consideration under Rule 26(c) or melded into the proportionality analysis under Rule 26(b)(1) can, at the margin, change the result in a particular case. Imagine a case in which it is a close call whether the requested discovery is proportional, considering only the traditional economic burdens. And, it is also a close call whether the privacy concerns of a party or non-party outweigh the requesting party's need for the information sought. Conducting a Rule 26(b)(1) analysis, the court finds that the economic burden of the discovery is slightly outweighed by the requesting party's need for it. Similarly, under Rule 26(c), the court holds that the infringement on privacy is outweighed by the need for the discovery. Accordingly, the discovery is allowed.

But, the result may be different if privacy is included as a proportionality factor under Rule 26(b)(1). Because it was a close case based on economic burden alone, the addition of privacy as a factor to be weighed against discovery as part of the same balancing process may tip the scales the other way. Now, instead of granting the requested discovery, the court will deny it. None of the facts have changed, but because of the altered decision framework, the outcome is different.[159]

Treating privacy as a proportionality factor also expands judicial discretion while, at the same time, reducing the clarity and consistency of court decisions. If courts aggregate objective financial burdens with their subjective views of the severity of infringement on privacy, it becomes difficult to ascertain the extent to which the ultimate decision depends on one factor or another. This makes appellate review of any multi-factor decision difficult. One commentator has described the drawbacks of a decision rule that relies on multiple considerations:

> There are two major problems with this approach. First, the efficacy of balancing depends on the judge's ability to acquire and evaluate accurate information about the relevant factors, and this is bound to be difficult given bounded rationality, information access, and strategic obstacles. Second, to strike a sound balance, the judge must assign weights and compare values across the various factors. Without clear principles to guide this normative task, the resulting process can easily turn into ad hoc weighing that lacks meaningful constraint and jeopardizes

159. Of course, this analysis, standing alone, does not tell us which decision-making methodology is better; it merely demonstrates that it can make a difference to the outcome whether privacy is addressed under Rule 26(b)(1) or Rule 26(c).

> principled consistency over the system as a whole. This is especially true when, as is so often the case, the factors listed in a Rule encompass everything conceivably relevant to the decision.[160]

Similarly, Professor Cass Sunstein has noted the indeterminacy of a factor-based regime:

> [U]nder a system of factors, the content of the law is created in large part by those who must apply it to particular cases, and not by people who laid it down in advance. To a considerable extent, we do not know what the law is until the particular cases arise.[161]

This is due, in part, to the fact that the factors at issue may be what Sunstein characterizes as "incommensurable."[162] That is, their values cannot be measured on a common scale; we cannot translate a deprivation of privacy into dollars to compare it to a financial burden. And, because privacy and economic burden are not commensurable, there can be no clear standard for when some combination of intrusion on privacy and expense becomes "disproportionate."

A surprising corollary of this observation is that treating privacy as a proportionality factor may actually threaten to devalue privacy interests. This is because considering privacy and economic factors together suggests that if the cost of the requested discovery were less, then the discovery might be allowed, notwithstanding the impact on privacy. Only if the economic costs are zero, or if they are not considered as a factor alongside privacy, does the value assigned to privacy interests in a particular case become apparent.

Finally, treating privacy as a proportionality factor can tempt judicial decision makers to cut analytic corners. As many commentators have observed, the proliferation of digital data and the ease of storage have led to the aggregation of information of widely varying types in a single location or on a single device.[163] Take social media. The personal information posted on a "Facebook account captures a detailed picture of [the account owner's] daily activities and emotions. When looked at in the aggregate, the account

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160. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2016 (2007) (footnotes omitted).

161. Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 964 (1995).

162. *Id.* at 1002–03.

163. *See* Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 HARV. J.L. & PUB. POL'Y 403, 404 (2013) ("In 2013, most people walking down the street carry a cell phone. More than half of those cell phones are so-called 'smart phones,' which are multifunctional computers that just happen to have telephone capabilities." (footnote omitted)); McPeak, *supra* note 9, at 65 ("By its very nature, social data touches upon the most intimate details of life in an aggregated data set that may include daily content spanning years.").

conveys highly personal, private information about [the owner's] life."[164] Similarly, an "iPhone is a portal to a complete, intimate portrait of [the user's] entire life."[165] Thus, when a party seeks access during discovery to its adversary's social media account or cell phone or hard drive that contains some relevant information, there are serious privacy implications because that data is aggregated with other information that may be personal or irrelevant.

The solution to this problem, according to McPeak, is to treat privacy as a proportionality factor. "By considering proportional privacy, courts effectively can disaggregate digital data compilations to prevent overly intrusive discovery and otherwise shield litigants from unnecessary whole-cloth disclosure of the highly personal information compiled in their social data."[166] Some courts have likewise taken this approach when addressing aggregations of data. For example, in *Crabtree v. Angie's List*,[167] discussed above, the court rejected a request to take a forensic image of the cell phone of each plaintiff, finding that, under Rule 26(b)(1), "the forensic examination of Plaintiffs' electronic devices is not proportional to the needs of the case because any benefit the data might provide is outweighed by Plaintiffs' significant privacy and confidentiality interests."[168] Similarly, in *In re Premera Blue Cross Customer Data Security Breach Litigation*,[169] the defendant sought forensic images of the plaintiffs' cell phones, arguing that examination might reveal that personal data that the plaintiffs alleged had been misused had, in fact, been compromised by malware or a computer virus rather than by the data breach at issue.[170] Although the court found that the phones could contain some relevant information, it rejected the discovery request.

> Considering the limited relevance of Plaintiffs' Devices, the fact that the Devices are not closely related to the claims and defenses in this case, and the burden to Plaintiffs and their privacy interests, the Court finds at this time and based on the information and arguments presently before the Court, that Premera's request for

164. McPeak, *supra* note 8, at 242.
165. *Id.* at 245.
166. McPeak, *supra* note 9, at 76.
167. Crabtree v. Angie's List, Inc, No. 1:16-cv-00877-SEB-MJD, 2017 WL 413242 (S.D. Ind. Jan. 31, 2017).
168. *Id.* at *3.
169. *In re* Premera Blue Cross Customer Data Sec. Breach Litig., 329 F.R.D. 656 (D. Or. 2019).
170. *Id.* at 669–70.

> a forensic image of Plaintiffs' devices is not proportional to the needs of the case.[171]

And, in *Areizaga v. ADW Corp.*,[172] a Fair Labor Standards Act case, the defendant requested an image of each of the plaintiff's electronic devices in order to test his claim that he had logged overtime hours working at home.[173] The court declined to order this discovery, holding that the request "is too attenuated and is not proportional to the needs of the case at this time, when weighing ADW's explanation and showing as to the information that it believes might be obtainable and might be relevant against the significant privacy and confidentiality concerns implicated by ADW's request . . . ."[174]

The problem with this approach is that, contrary to McPeak's argument, it does not "disaggregate" data at all. Rather, it looks at the mass of information contained on a device or in a social media account, observes that some material portion of that data is likely private (or irrelevant), and declares the discovery request in its entirety to be disproportionate. But discovery cannot be deemed out of proportion under Rule 26(b)(1) until the request has been reduced to "manageable analytic bites."[175] Thus, for example, in a personal injury case, some of the information contained in the private area of the plaintiff's social media account could well be relevant because it reveals the extent of the plaintiff's physical activity after the accident, while other information in the same account would be plainly irrelevant or personal. A meaningful proportionality analysis cannot be done until the pertinent information is separated out. Only then can it be determined whether the marginal value of each such bit of information to the determination of the case outweighs the cost of production, whether in economic terms or in terms of privacy. This is what the court did in *Ehrenberg v. State Farm Mutual Automobile Insurance Co.*[176] First, the court rejected the defendant's demand for access to the plaintiff's entire Facebook account.[177]

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171. *Id.* at 670. In another data breach case, *In re Anthem, Inc. Data Breach Litigation*, No. 15-md-02617, 2016 WL 11505231 (N.D. Cal. April 8, 2016), the defendant made a similar argument for obtaining forensic images of all of the plaintiffs' devices and was met by a similar response by the court: while the request might unearth some relevant information, it was not sufficiently "targeted and proportional to the needs of the case," as required by Rule 26(b)(1). *Id.* at *2.

172. Areizaga v. ADW Corp., No. 3:14-cv-2899-B, 2016 WL 9526396 (N.D. Tex. Aug. 1, 2016).

173. *Id.* at *1–2.

174. *Id.* at *3.

175. This is a phrase coined by Justice Sandra Day O'Connor in a wholly different context. *See* Blessing v. Freestone, 520 U.S. 329, 342 (1997).

176. Ehrenberg v. State Farm Mut. Auto. Ins. Co., No. 16-17269, 2017 WL 3582487 (E.D. La. Aug. 18, 2017).

177. *Id.* at *3.

It then went on to identify those categories of data where the plaintiff's privacy interests were outweighed by the need for the information, including "[p]osts or photos that refer or relate to the accident" and "[p]osts or photos that refer or relate to physical injuries that Ms. Ehrenberg alleges she sustained as a result of the accident and any treatment she received therefore."[178]

The failure to disaggregate data is not a problem related exclusively to the treatment of privacy as a proportionality element. Frequently, courts confronted with discovery requests that seek data collections encompassing both relevant and irrelevant information will deny the requests on grounds of proportionality because of the presence of the irrelevant data, rather than winnowing out the relevant data and determining its proportionality. Nevertheless, including privacy within the proportionality analysis provides overburdened jurists a further excuse for dismissing a discovery request out of hand without doing the hard work of disaggregation first.

B. Impact on Party Behavior

The impact of treating privacy as a proportionality factor on judicial decision making is significant, but it pales in comparison to the impact on the conduct of the parties to litigation. If privacy is part of the proportionality analysis, it is part of the definition of discoverable evidence. As such, it has implications for every step of the discovery process.[179]

The determination of whether information must be preserved in anticipation of litigation is guided, in part, by principles of proportionality.[180] Accordingly, Keeling and Mangum recognize that treating privacy as a proportionality factor influences the pretrial preservation of evidence.

> To achieve proportionality, . . . a producing party may appropriately consider not only what is likely to be relevant but also what is likely to implicate privacy interests. Privacy interests therefore may serve as appropriate factors to reasonably limit the scope of preservation in many cases. For example, a party employee's personal email account—even if used on rare occasion for business purposes—might therefore lie outside of the appropriate scope of discovery.[181]

178. *Id.*
179. Keeling & Mangum, *supra* note 8, at 432–33.
180. *See* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment ("Another factor in evaluating the reasonableness of preservation efforts is proportionality."); Small v. Univ. Med. Ctr., No. 2:13-cv-0298-APG-PAL, 2018 WL 3795238, at *67 (D. Nev. Aug. 9, 2018).
181. Keeling & Mangum, *supra* note 8, at 434.

Consider what this means. Under the standard definition of the preservation obligation, "anyone who anticipates being a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary."[182] Yet, if privacy is considered an element in the very definition of discoverable evidence, a party anticipating litigation would be empowered to make a unilateral decision that private information is not discoverable and therefore may be destroyed even if it is potentially relevant to that litigation.

Take Keeling and Mangum's example. Because they posit an employee's personal email account that is sometimes used for business purposes, they are presumably talking about anticipated litigation that would involve the employer, and they are assuming that the employer has possession, custody, or control over the account, such that it *could* affect a legal hold. Yet they would relieve the employer of the obligation of preserving the potentially relevant information because it is aggregated with private data. The adversary in the anticipated litigation is thus deprived of material evidence.

In a sense, this example illustrates only part of the problem. Often, it is not the privacy interest of a third party—here, the employee—that is at issue, but the interest of a party to the potential or actual litigation. There are numerous cases where parties have been sanctioned for destroying devices or deleting accounts or documents relevant to litigation, where the spoliated information could reasonably have been deemed "private."[183] Yet, if privacy is considered a proportionality factor, litigants who choose to delete their Facebook postings, burn their diaries, or wipe their cell phones when litigation is anticipated or already pending could do so without being subject to sanctions because they could plausibly maintain that providing access to those sources of information would have disproportionately implicated their privacy rights and that the lost information was therefore not discoverable. The fact that the information may be highly relevant to the claims or defenses in the anticipated litigation will, of course, influence the proportionality analysis, but it will not be determinative. Even if the data is relevant, the party could conclude that it is so private that destruction is warranted.

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182. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

183. *See, e.g.*, Schmidt v. Shifflett, No. CIV 18-0663, 2019 WL 5550067, at *6 (D.N.M. Oct. 28, 2019) (discussing spoliation of personal cell phone); Cordova v. Walmart P.R., Inc., Civ. No. 16-2195, 2019 WL 3226893, at *4 (D.P.R. July 16, 2019) (discussing deletion of Facebook account); Nutrition Distrib. LLC v. PEP Rsch. LLC, No. 16cv2328-WQH-BLM, 2018 WL 6323082, at *1–2 (S.D. Cal. Dec. 4, 2018) (discussing deletion of Facebook posts) *aff'd*, 804 Fed. Appx. 759 (9th Cir. 2020); Brown v. Certain Underwriters at Lloyds, London, No. 16-cv-02737, 2017 WL 2536419, at *4 (E.D. Pa. June 12, 2017); Little *ex rel.* Little v. McClure, No. 5:12-CV-147, 2014 WL 3778963, at *1–3 (M.D. Ga. July 31, 2014).

Indeed, when a party fails to preserve information because it deems the data irrelevant or disproportionate, the loss may never become known to the adversary in the litigation. To be sure, the adversary may be savvy enough to elicit answers at deposition that reveal the destruction, but in some instances it will not, and the producing party is under no obligation to volunteer what non-discoverable information it has not preserved.

Keeling and Mangum argue, with some justification, that the potential impact on privacy increases as a case proceeds through the discovery process.[184] While simply retaining data in place pursuant to a legal hold may have minimal implications for privacy interests, the potential for intrusion expands in the collection, review, and production phases, both because the information is intentionally exposed to more sets of eyes and because the possibility of inadvertent exposure through data breach or otherwise also increases. When information is collected, for example, it may be exposed to the company's information technology personnel, an eDiscovery collection vendor, an eDiscovery review vendor, in-house counsel, and outside attorneys.[185] Thus, even if information that is ostensibly private is preserved at the outset, if the producing party considers collection disproportionate because of the impact on privacy, that information will not be gathered, but will remain part of an undifferentiated mass of information in the party's inventory.

Like collection, review triggers an additional level of disclosure of private information, because "[i]n large reviews, dozens or even hundreds of lawyers, including contract lawyers retained solely for the purpose of review, will read and classify the collected materials."[186] And so, even if a party has collected relevant information potentially responsive to a discovery request, it may never review that material if it makes the decision that to do so would be disproportionate because of the private content.

Finally, the production of information in discovery often has the greatest impact on privacy because the data is no longer being shared only with the party's own attorney or agents of that attorney.[187] Rather, it is being conveyed to persons who have an antagonistic relationship with the party —the adversary itself or opposing counsel. If the producing party deems such a disclosure to be disproportionate, then, again, the information is not made available in the litigation.

184. *See* Keeling & Mangum, *supra* note 8, at 432–41.
185. *Id.* at 434.
186. *Id.* at 437.
187. *Id.* at 438–39.

As discussed above, a party's decision to destroy information on the basis of a proportionality analysis may never come to light. The same is true with respect to determinations not to collect, review, or ultimately produce information because of proportionality considerations.[188] It is true that, in 2015, Rule 34 was amended to provide, in part, that "[a]n objection must state whether any responsive materials are being withheld on the basis of that objection."[189] But the scope of this obligation is open to debate. A producing party can argue that documents that are not discoverable under Rule 26(b)(1) are not "responsive" under Rule 34, and therefore need not be identified. After all, Rule 34(b)(2)(C) can hardly be read to create an obligation to identify or log documents that are not being produced in discovery because they are irrelevant.[190] The same may be said for documents withheld from discovery as disproportionate based on their private nature. Of course, this assumes that the producing party *could* identify the withheld documents if required to do so. If the information has not been collected or reviewed because it was considered disproportionate to do so, then the producing party has disabled itself from identifying what it has not produced. The only recourse for the requesting party would be to take discovery regarding the choices that the producing party made with respect to collection and review, and that would surely be resisted as "discovery on discovery."[191]

Treating privacy as a proportionality factor, then, perturbs judicial decision making. More importantly, it creates a mechanism for producing parties to make self-serving decisions not to produce potentially relevant information in discovery, or even to destroy that information, as part of a process that is opaque to the adversary and, consequently, unlikely to be reviewed by the courts. Thus, policy considerations, as well as the text and drafting history

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188. *See* Rosenthal & Gensler, *supra* note 66, at 78 (stating that parties could unilaterally exclude information at the preservation, collection, search, and review stages as well as make "privacy redactions").

189. FED. R. CIV. P. 34(b)(2)(C).

190. *See* SEC v. Merkin, No. 11-23585-CIV, 2012 WL 3203037, at *3 (S.D. Fla. Aug. 3, 2012); Schanfield v. Sojitz Corp. of America, 258 F.R.D. 211, 213 n.2 (S.D.N.Y. 2009).

191. Generally, "discovery about discovery" is permitted only where there is an "adequate factual basis," such as a showing that draws into question the compliance of a party with its discovery obligations. *See* Gross v. Chapman, No. 19 C 2743, 2020 WL 4336062, at *2 (N.D. Ill. July 28, 2020) (quoting *In re* Caesars Ent. Operating Co., No. 15 B 1145, 2018 WL 2431636, at *13 (Bankr. N.D. Ill. 2018)); Grant v. Witherspoon, 19-CV-2460, 2019 WL 7067088, at *1 (S.D.N.Y. 2019) ("Where, as here, a party seeks 'discovery on discovery,' that party 'must provide an 'adequate factual basis' to justify the discovery, and the Court must closely scrutinize the request 'in light of the danger of extending the already costly and time-consuming discovery process *ad infinitum*.'" (quoting Winfield v. City of New York, No. 15-cv-05236, 2018 WL 840085, at *3 (S.D.N.Y. Feb. 12, 2018))); Crocs, Inc. v. Effervescent, Inc., No. 06-cv-00605-PAB-KMT, 2017 WL 1325344, at *8 (D. Colo. Jan. 3, 2017); Mortg. Resol. Servicing, LLC v. JP Morgan Chase Bank, N.A., No. 15 Civ. 0293, 2016 WL 3906712, at *7 (S.D.N.Y. July 14, 2016).

of the Rule, undermine the suggestion that impact on privacy should be considered in the proportionality analysis under Rule 26(b)(1).

V. RESOLUTION

Privacy, then, should not be considered an unarticulated component of the Rule 26(b)(1) proportionality analysis. This does not imply, however, that it is unimportant. As discussed above, a threat to privacy posed by discovery has long been a basis for issuing protective orders under Rule 26(c),[192] and this approach has distinct advantages.

A protective order can be modulated to correspond to the nature and strength of the privacy interest at issue. It can foreclose discovery of certain information altogether; it can restrict the disclosure of the information to particular persons, as with an attorneys'-eyes-only provision; or it can prevent the dissemination of data beyond the litigation.[193] This flexibility is important because the umbrella term "privacy" encompasses a wide range of personal interests, some of which could be fully served by a narrowly-tailored protective order, while others might require a more comprehensive shield.[194] By contrast, proportionality under Rule 26(b)(1) operates in a binary manner. That is, once it is determined that a request is disproportionate, the information sought is simply not discoverable. In those circumstances, a great deal rides on the court's determination of whether the privacy interest is sufficiently strong to render a request disproportionate.[195]

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192. *See supra* Part II.

193. *See* Duling v. Gristede's Operating Corp., 266 F.R.D. 66, 74–77 (S.D.N.Y. 2010) (granting a protective order barring dissemination of employee personnel file information except insofar as it cannot be attributed to individuals); Hasbrouck v. BankAmerica Hous. Servs., 187 F.R.D. 453, 455 (N.D.N.Y. 1999) ("The protective order may wholly preclude the discovery, or provide for limitations as necessary to protect the moving party." (citing FED. R. CIV. P. 26(c))); Burka v. N.Y.C. Transit Auth., 110 F.R.D. 660, 663–67 (S.D.N.Y. 1986) (refusing to deny discovery of non-party employee information regarding positive drug tests, but limiting disclosure to plaintiffs, counsel, and counsel's agents).

194. For discussions of the multifaceted nature of privacy and the legal rights that are associated with it, see generally Keigo Komamura, *Privacy's Past: The Ancient Concept and Its Implications for the Current Law of Privacy*, 96 WASH. U. L. REV. 1337 (2019); Jeremy A. Blumenthal, Meera Adya & Jacqueline Mogle, *The Multiple Dimensions of Privacy: Testing Lay "Expectations of Privacy,"* 11 U. PA. J. CONST. L. 331 (2009); William C. Heffernan, *Privacy Rights*, 29 SUFFOLK U. L. REV. 737 (1995).

195. *See supra* Section IV.A. To be sure, a protective order under Rule 26(c) could work in tandem with a proportionality analysis. *See* Dongguk Univ. v. Yale Univ., 270 F.R.D. 70, 73 (D. Conn. 2010). Thus, for example, a court could conclude that a request that impacts privacy would be proportionate, taking into account all the Rule 26(b)(1)

Furthermore, non-parties are entitled to guard their interests by seeking a protective order under Rule 26(c). By the plain language of the rule, a court may issue an order to protect a party *or person*, the latter including any non-party to the litigation.[196] Indeed, the showing of good cause necessary to obtain a protective order is relaxed when the person whose interest is at stake is not a party to the litigation.[197] And courts have routinely issued protective orders specifically to safeguard the privacy interests of non-parties.[198] Indeed, that was precisely the case in *Seattle Times*, where the Supreme Court upheld an order safeguarding the identities of the non-party donors to one of the plaintiff entities.[199] By contrast, were privacy treated as one of the proportionality factors, the analysis of non-party interests would become more complicated. While the impact on privacy would be a "burden" on the non-party, the financial burden of production would fall on the party that is the custodian of the non-party's information. Thus, the court would be judging proportionality by weighing different types of impacts on multiple entities in a manner not contemplated by Rule 26(b)(1).

Addressing privacy exclusively under Rule 26(c) would have the additional benefit of maintaining the relative simplicity of the proportionality analysis under Rule 26(b)(1). It would effectively be a straightforward cost-benefit calculation, calibrated according to the interests at stake in the litigation. In other words, a producing party might be required to incur greater costs to produce information of a particular degree of utility in a civil rights

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factors, only if the information were disclosed pursuant to an attorneys'-eyes-only restriction. But this seems unnecessarily complicated, since the privacy interest would be furthered by the protective order alone, without the need to perform the proportionality analysis. *See id.*

196. *See* FED. R. CIV. P. 26(c)(1).

197. *See In re* Northshore Univ. Health Sys., 254 F.R.D. 338, 342 (N.D. Ill. 2008) (holding "the burden to show good cause is less demanding on non-parties"); Wauchop v. Domino's Pizza, Inc., 138 F.R.D. 539, 546 (N.D. Ind. 1991) ("Good cause may be shown more easily by a non-party than by a party." (citing Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985))); Avirgan v. Hull, 118 F.R.D. 252, 255 (D.D.C. 1987) (finding movant's "concerns are more weighty because he is not a party to the underlying action").

198. *See* Knoll v. AT&T Co., 176 F.3d 359, 365 (6th Cir. 1999) ("[P]rotective orders are commonly granted . . . as a means of protecting the privacy interests of nonparties while yet serving the needs of litigation."); *In re* Gen. Motors LLC Ignition Switch Litig., Nos. 14-MD-2543, 14-MC-2543, 2015 WL 4522778, at *6 (S.D.N.Y. July 24, 2015); FDIC v. Broom, No. 12-cv-03145-PAB-MEH, 2013 WL 3381353, at *2 (D. Colo. July 8, 2013) (holding "the disclosure of confidential information regarding non-parties is an appropriate basis upon which to enter a protective order." (citing Gillard v. Bolder Valley Sch. Dist., 196 F.R.D. 382, 385–86 (D. Colo. 2000))); Dorsett v. Cnty. of Nassau, 762 F. Supp. 2d 500, 521 (E.D.N.Y. 2011) (noting that "the privacy interests of third parties carry great weight" in determining whether documents are protected from disclosure).

199. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33–37 (1984).

class action, for example, than it would in a private contract dispute.[200] This is not necessarily a simple determination, but it becomes infinitely more complex if privacy interests are added to the mix.

The most logical approach is to treat proportionality and privacy protection as sequential analyses. The court first determines what portion of the requested information meets the proportionality standard, applying the factors set out in the Rule. Then, with respect to that narrowed universe, the privacy interests of the producing party are weighed against the need for the information in the litigation under Rule 26(c). Courts appear to have conducted this two-step calculation without adverse effect on privacy values.[201]

Finally, using Rule 26(c) exclusively to protect privacy values does not eliminate privacy from the Rule 26(b)(1) proportionality analysis altogether. Certainly, to the extent that a party is obligated to expend resources to safeguard the privacy interests of itself or of a non-party whose information it holds, those expenditures are properly considered in a traditional proportionality calculation. Thus, the costs of disaggregating data to isolate that which is private, of redacting personal information, or of anonymizing data in order to shield the identity of non-parties are all burdens appropriately included in the proportionality analysis.[202]

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200. This is not to suggest that the only costs to be placed in the balance are actual dollars expended. Certainly, time expended by a producing party's employees constitute an actual burden, and ultimately a financial one. *See In re* Namenda Direct Purchaser Antitrust Litig., No. 15 Civ. 7488, 2017 WL 4700367, at *3 (S.D.N.Y. Oct. 19, 2017) (crediting representations of time necessary to respond to discovery requests, but finding it outweighed by other proportionality factors); *In re* Dental Supplies Antitrust Litig., No. 16 Civ. 696, 2017 WL 10181026, at *2–3 (E.D.N.Y. June 10, 2017) (crediting producing party's estimate of time necessary to respond to discovery demand); Acheron Med. Supply, LLC v. Cook Med., Inc., No. 1:15-cv-1510-WTL-DKL, 2016 WL 5466309, at *2 (S.D. Ind. Sept. 29, 2016) (considering, in proportionality analysis, estimated hours that would be expended by producing the documents requested).

201. *See, e.g.*, Hem and Thread, Inc. v. Wholesalefashionsquare.com, No. 2:19-cv-00283 CBM, 2020 WL 7222805, at *2 (C.D. Cal. July 31, 2020); Minke v. Page Cnty., No. 5:18-cv-00082, 2019 WL 2411450, at *3 (W.D. Va. June 17, 2019); Pac. Coast Surgical Ctr. v. Scottsdale Ins. Co., No. CV 18-3904 PSG, 2019 WL 1873228, at *2 (C.D. Cal. Apr. 24, 2019).

202. *See, e.g.*, Heredia v. Sunrise Senior Living LLC, No. 8:18-cv-01974-JLS, 2020 WL 3108699, at *7 (C.D. Cal. Jan. 31, 2020) (considering, in proportionality analysis, cost of redaction of private information).

VI. CONCLUSION

The simplest solution is generally the best.[203] So it is here. Rule 26(c) provides an entirely adequate tool for protecting the privacy interests of litigants and non-parties alike in the context of civil discovery. Efforts to wedge privacy considerations into the proportionality construct of Rule 26(b)(1) are misguided. Neither the language nor the drafting history of that rule supports such an interpretation. Moreover, treating privacy as a proportionality factor has an adverse impact, both on judicial decision making and on the fairness and transparency of the discovery process.

203. This is an everyday version of Occam's razor: *pluralitas non est ponenda sine necessitate* (plurality should not be posited without necessity). Brian Duigan, *Occam's Razor*, BRITANNICA (May 28, 2021), https://www.britannica.com/topic/Occams-razor [https://perma.cc/22Y4-649R]. Often called the rule of parsimony, this maxim is attributed to William of Occam (or Ockham), a fourteenth century scholastic philosopher. *Id.*