WHEN IS ENOUGH TOO MUCH? THE BROADCAST DECENCY ENFORCEMENT ACT OF 2005 AND THE EIGHTH AMENDMENT'S PROHIBITION ON EXCESSIVE FINES[†]

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The next slip of the tongue or of the blouse will hit broadcasters where it hurts: their wallet. With the recent passage of the Broadcast Decency Enforcement Act of 2005 ("BDEA"),[1] Congress raised potential fines ten-fold in an attempt to clean up the airwaves and prevent the televised snafus that have occurred with increasing frequency during the past five years.[2] From the broadcast of a barely covered breast during the 2004 Super Bowl[3] to the on-air announcement of a four-letter expletive on a prime-time awards show,[4] indecent expression has attracted the attention of the general

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1. S. 193, 109th Cong. (2006).

2. *See, e.g.*, Marylyn Geewax, *Stiffer Fines for Smut on Radio, TV; Bush to Sign Legislation Increasing FCC's Clout*, ATLANTA JOURNAL-CONSTITUTION, June 8, 2006, at A1; Amy Schatz, *Congress Toughens TV-Indecency Fines,* WALL ST. J., June 8, 2006, at B2.

3. *See* Joe Flint & Anne Marie Squeo, *Super Bowl Halftime Stunt Angers NFL, CBS, FCC,* WALL ST. J., Feb. 3, 2004, at B1. During the 2004 Halftime Show, produced by MTV in conjunction with CBS, Janet Jackson's right breast was exposed. While she was singing a duet with Justin Timberlake, he grabbed at her black bustier-style top, which ripped. The only thing covering her breast was a metal nipple ornament.

4. *See* Anne Marie Squeo & Joe Flint, *FCC Overturns Staff on Bono Profanity*, WALL ST. J., March 19, 2004, at B3. Singer Bono used the phrase "f---ing brilliant" during NBC's primetime broadcast of the 2003 Golden Globe Awards. Although the FCC Enforcement Bureau initially deemed the phrase not indecent given the non-sexual context, the commissioners overturned the ruling. Despite the FCC ruling that the language was indecent and profane, no fines were issued.

public,[5] advocacy groups,[6] the Federal Communications Commission ("FCC"),[7] and even Capitol Hill.[8] In 2004 alone, the FCC assessed more than $7.9 million in indecency fines, up from a mere $440,000 in fines in 2003.[9] The cost of airing future indecent material increased exponentially when President George W. Bush signed the BDEA into law on June 15, 2006.[10] Although the number of fines being issued had already increased, the FCC and a majority of Congress did not believe that the relatively low maximum fine per incident was enough to prevent multi-billion dollar broadcasters from choosing to air indecent content and pay what to them was a nominal fine.[11] The Broadcast Decency Enforcement Act of 2005, which had been floating around Capitol Hill in various iterations since November 2004, thus raised the maximum fine per violation ten-fold, from $32,500 to $325,000.[12] Consequently, broadcasters now face liability of up to $3 million in indecency fines for one syndicated broadcast aired on multiple stations in multiple markets.[13]

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5. A Westlaw search of the Major U.S. Newspapers database using the terms "indecency" and "FCC" in the same paragraph found 311 results since January 1, 2004. More than 44,000 hits were located using the Google search engine and the phrase FCC "indecency fines" while limiting the search to English pages updated in the past year.

6. *See*, *e.g.*, Citizens for Community Values, http://www.ccv.org/Indecent_Broadcasting.htm (last visited Apr. 26, 2004). This website defines the outlines of indecent broadcasting as a public service.

7. *See* FCC Enforcement Bureau, News Releases, http://www.fcc.gov/eb/News_Releases/Welcome.html (last visited Apr. 26, 2004) (listing numerous news releases regarding FCC decisions on indecency complaints).

8. Since January 2004, both houses of Congress have considered a variety of measures concerning indecency in broadcasting. *See, e.g.*, Broadcast Decency Enforcement Act of 2004, H.R. 3717, 108th Cong. (as passed by House, March 11, 2004) (intended to stiffen the penalties for indecent broadcasting by increasing fines and toughening requirements for license renewal); Families for ED Advertising Decency Act, H.R. 1420, 109th Cong. (2005) (to prohibit advertisements for erectile dysfunction medication).

9. Indecency Complaints and NALs: 1993–2005, http://www.fcc.gov/eb/oip/Stats.html (last visited June 7, 2006).

10. Pub. L. No. 109-235 (signed by George W. Bush on June 15, 2006); Broadcast Decency Act Enforcement Act of 2005, S. 193, 109th Cong. (as passed by Congress on June 7, 2006). Although officially titled for the year of its congressional introduction, the Broadcast Decency Enforcement Act of 2005 did not become law until 2006.

11. Frank Ahrens, *The Price for On-Air Indecency Goes Up: Congress Approves Tenfold Increase in Fines FCC Can Assess,* WASH. POST June 8, 2006, at D1 ("'We hope that the hefty fines will cause the multibillion-dollar broadcast networks finally to take the law seriously,' said L. Brent Bozell, PTC president.").

12. Pub. L. No. 109-235; Broadcast Decency Act Enforcement Act of 2005, S. 193, 109th Cong. (2006).

13. *Id.*

This Article examines the increase in indecency fines in light of the United States Supreme Court's Eighth Amendment jurisprudence relating to the prohibition of excessive fines. Section I begins with a historical overview of the evolution of indecency regulation and the role the FCC played in that evolution. A discussion of the FCC's current approach to regulating indecent broadcasting is also included.[14] Section II reviews the Supreme Court's interpretation of the Eighth Amendment's prohibition of excessive fines and examines the extent of the constitutional protection from such fines. Section III addresses the Broadcast Decency Enforcement Act's ten-fold increase of indecency fines and evaluates this increase in light of legal precedent. Section IV closes the Article with a discussion of the constitutionality of the increased fines and the subsequent policy implications of increasing fines for indecent broadcasts.

I. THE FCC AND INDECENCY REGULATION: THE STATUTES, THE CODE, AND THE COURTS

Attempts to control the content of expression in the United States have been around longer than the government,[15] and efforts to regulate indecent broadcasting began with the Federal Radio Commission ("FRC").[16] When Congress passed the Communications Act of 1934, it transformed the FRC into the FCC and expanded the role of the agency from addressing signal interference to overseeing

14. *See infra* Section I.

15. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 16–62 (2003). Levy discusses the lack of tolerance that existed in the American Colonies for expression that contained ideas that were found to be detestable to the listening party. He notes:

> "The persistent image of colonial America as a society in which freedom of expression was cherished is an hallucination of sentiment that ignores history. . . . The American people simply did not believe or understand that freedom of thought and expression means equal freedom for the other person, especially the one with hated ideas."

Id. at 16.

16. The Federal Radio Commission was the predecessor to the present-day Federal Communications Commission and was established under The Radio Act of 1927. It consisted of five members to be appointed by the president with the advice and consent of the Senate. *See* Pub. L. No. 69-632, 44 Stat. 1162 (1927). For a discussion of the development from the FRC, which was primarily designed to deal with licensing and interference among radio signals, to the FCC's current role of regulating broadcast television and radio as well as telephony, see Seth T. Goldsamt, *"Crucified by the FCC"? Howard Stern, the FCC, and Selective Prosecution*, 28 COLUM. J.L. & SOC. PROBS. 203 (1995).

the development of telecommunications.[17] It was this law that began the FCC's foray into the regulation of obscenity and indecency.[18] Today, regulation of broadcast content in the United States comes from several different sources, all of which inform the FCC and the parties subject to the FCC's jurisdiction.

The FCC's legal authority to regulate indecency is codified at 18 U.S.C. § 1464. At only twenty-eight words, the statute makes it a violation of federal law to broadcast obscene, indecent, or profane material. The condensed statute reads, "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."[19] The statute's enforcement provision provides the FCC with the right to imprison or fine parties found guilty of broadcasting violations.[20] Until 1994, the statute contained a $10,000 cap on per-violation fines.[21] In that year, the maximum fine amount was raised to $27,500 per violation.[22] In June of 2004, the FCC raised the amount to $32,500 to adjust for inflation.[23] Now, the BDEA provides for even greater fines against broadcasters who air indecent content.[24]

Although 18 U.S.C. § 1464 prohibits the broadcast of obscene, profane, or indecent material by broadcasters, the federal government cannot completely expunge indecent material from the broadcast airwaves due to the Supreme Court's recognition of such material's limited First Amendment protection.[25] Consequently, the FCC has

17. *See* Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified at 47 U.S.C. § 559). For an in-depth review of the Communications Act of 1934, see A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 (Max D. Paglin ed., 1989).

18. 47 U.S.C. § 559.

19. Broadcasting Obscene Language, 18 U.S.C. § 1464 (2006).

20. *Id.*

21. Pub. L. 103-322, § 330016(1)(L), 108 Stat. 1796 (1994).

22. *Id.*

23. Reuters, *Broadcast Indecency to Get Higher Fines*, N.Y. TIMES, June 21, 2004, at C1.

24. S. 193, 109th Cong. (2006) (discussed *infra* Section IV).

25. *See generally* FCC v. Pacifica Found., 438 U.S. 726 (1978) (holding that the FCC acted within constitutional bounds when it regulated a broadcast of "patently offensive words" including "obscene" content because the FCC had statutory authority to impose such regulations and because the First Amendment does not guarantee absolute protection to indecent language); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (holding that 49 U.S.C.S. §223(b) (1988), though enacted for the compelling purpose of protecting children from pornography, was not tailored narrowly enough to meet constitutional scrutiny under the First Amendment because it banned not only all "obscene" interstate commercial telephone messages, but also all "indecent" messages); U.S. v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (holding that § 505 of the Telecommunications Act of 1996 was unconstitutional because

established a safe-harbor period during the hours between 10 p.m. and 6 a.m., when children are unlikely to be among the viewing audience, wherein indecent material may be broadcast.[26] Nonetheless, because the § 1464 proscription only constrains broadcasters, cable operators do not have to conform their indecent-programming schedules to meet the safe-harbor requirements.[27]

Section 1464 provides little guidance for broadcasters facing enforcement for broadcasting ostensibly indecent material outside of the regulatory safe harbor. Such broadcasters may be subject to fines or forfeitures. Instead of containing specific guidelines, the provision serves as a general warning. For example, it contains no definition of the terms "obscene," "indecent," or "profane."[28] Also absent from the statute is a definition of "radio communication," making it difficult to determine precisely which broadcasts may be covered. And although the FCC has defined "indecent material,"[29] it has done little else to further define or clarify the other terms contained in § 1464. Rather, it focuses more on administrative procedure than substantive law.[30]

Fortunately, the FCC's regulations do provide some guidance for enforcement by describing the forfeiture process in more detail, establishing guidelines for assessing forfeitures under the Communications Act, and discussing the administration of the forfeiture process.[31] In addition, in 2001 the FCC authored an Indecency Policy Statement to illustrate how indecency determinations are to be made.[32]

Under the 2001 policy statement, the FCC must make two determinations before it can conclude that material is indecent.[33] First,

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it was not shown to be the least restrictive means to prevent unauthorized transmission of sexually-explicit material).

26. Enforcement of 18 U.S.C. § 1464 (restrictions on the transmission of obscene and indecent material), 47 C.F.R. § 73.3999 (1995).

27. *Playboy Entm't Group, Inc.,* 529 U.S. at 803.

28. 18 U.S.C. § 1464 (2006).

29. *Pacifica Found.,* 438 U.S. at 732 (defining "indecent material" to encompass "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs").

30. Forfeiture Proceedings, 47 C.F.R. § 1.80 (2004).

31. *Id.*

32. In the Matter of Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rec. 7999 (2001) [hereinafter FCC Indecency Policy Statement].

33. *Id.* at 8002.

the FCC must determine whether the material falls within the definition of "indecent content," which specifically requires that the FCC determine whether the material involves sexual or excretory conduct.[34] If the material does not, it falls outside the subject matter proscribed by the indecency regulations.[35] However, if the material does involve sexual or excretory conduct, the FCC must make a second determination because sexual or excretory conduct is necessary, but not sufficient, to render material indecent.[36] Thus, the FCC must also determine whether the broadcast was "patently offensive."[37]

The FCC's offense test differs from the obscenity test established by the Supreme Court in *Miller v. California*.[38] There, obscenity was defined based upon contemporary community standards.[39] Obscenity is material that the average person would find, when taken as a whole, to appeal to the prurient interest; to depict or describe in patently offensive terms; sexual or excretory functions that are specifically defined by state law; or that lacks serious literary, artistic, political or scientific value.[40] By contrast, the FCC's determination of offensiveness does not rely on particular community standards; instead, it relies on a national standard for the broadcast community.[41] The FCC is also unconcerned with the individual sensitivities of a particular complainant.[42] Rather, it applies a reasonable person standard that posits whether the average listener would be offended.[43]

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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. 413 U.S. 15, 24 (1973).
39. *Id.*
40. *Id.*
41. FCC Indecency Policy Statement, *supra* note 32, at 8002. This creates some interesting First Amendment concerns given the FCC's reliance on complaints from listeners as opposed to a uniform monitoring process. Because the FCC only investigates the complaints it receives, particularly sensitive callers are likely to make repeated referrals of programming they find to be personally objectionable. This leaves programming at the fringes of political and social acceptance highly susceptible to an FCC complaint. One way the FCC attempts to combat this is its reliance on a reasonable person standard to determine offensiveness. However, the sea of complaints has already been "self-screened" given the referral nature of the FCC's regulation process. *See also* FCC v. Pacifica Found., 438 U.S. 726, 731–33 (1978).
42. FCC Indecency Policy Statement, *supra* note 32, at 8002.
43. *Id.*

Once the FCC deems a broadcast indecent, it actuates the enforcement procedures established in the Code of Federal Regulations.[44] Under these procedures, the FCC traverses a series of steps before exacting a fine or forfeiture from a broadcaster.[45] Once the FCC determines that indecent content was broadcast, it then determines the amount of the forfeiture.[46] The guidelines list various factors to be consulted by the FCC in determining the fine, such as the nature, circumstances, extent, and gravity of the violations, as well as the broadcaster's degree of culpability, history of prior offenses, and ability to pay the fine.[47] Section II of the regulation provides more discretionary factors on which the FCC can base downward or upward departures from the fining norms, such as "egregious misconduct," "substantial harm," and "good faith or voluntary disclosure."[48]

The BDEA may soon lead to clearer agency guidelines on fines for indecent broadcasts, in addition to forfeitures. Prior to the Act's passage, the FCC could not fine a broadcast licensee more than $32,500 per broadcast violation for a total of $325,000 per act of indecency. For example, in a situation where one company may air an indecent song on ten of its affiliated radio stations, the company could be fined up to $32,500 for each one of the ten stations, bringing its total to $325,000 in fines.[49] This in fact occurred in January 2004 when the FCC determined that content on the "Bubba the Love Sponge" radio show was indecent. After its determination, the FCC fined Clear Channel Communications $715,000 in response to seven separate broadcasts of indecent material on twenty-six stations.[50]

A. The Pacifica Case

While the federal regulations provide some guidance on the application and enforcement of § 1464, the courts have been more prolific in their interpretations of the provision.[51] The Supreme Court

44. 47 C.F.R. § 1.80 (2004).
45. *Id.* § 1.80(a).
46. *Id.* § 1.80(b)(4).
47. *Id.*
48. *Id.* § 1.80.
49. *Id.* § 1.80(b)(1).
50. FCC Notice of Apparent Liability for Forfeiture EB-02-IH-0261, adopted January 26, 2004, *available at* http://www.fcc.gov/eb/Orders/2004/FCC-04-17A1.html.
51. *See* cases cited *supra* note 25.

endorsed the FCC's authority to regulate indecent broadcasting in *FCC v. Pacifica Foundation*.[52] In that case, which concerned the daytime broadcast of George Carlin's "Filthy Words" monologue on a California radio station, the Court noted that the statute is written in disjunctive language, granting the FCC the power to regulate indecency, obscenity, and profanity.[53] The Court also explicated the meaning of "indecent."[54] Indecency, Justice John Paul Stevens wrote for the majority, is a matter of taste, incapable of being categorically defined but capable of being evaluated.[55] The Court found that as indecent content occupies the outer realm of First Amendment protection, the FCC has the authority to restrict its broadcast.[56] Accordingly, the Court held that the FCC need not prove that a broadcast's content rises to the level of obscenity, which is afforded no First Amendment protection, as established by *Miller v. California*.[57] From its beginnings in *Pacifica*, the Court continued to develop the nuances of indecency regulation through a series of cases over the next two decades.

B. The Sable Communications Case

While *Pacifica* dealt with indecent broadcasts via the radio airwaves, the Court's next case addressed indecency via the telephone. In *Sable Communications of California, Inc. v. FCC*,[58] Sable Communications challenged a federal law that banned obscene and indecent "dial-a-porn" telephone services. The Court ruled that the prohibition of obscene telephone calls was constitutional under *Miller v. California* because obscene materials fell outside the scope of the First Amendment protections for speech.[59] More importantly, the

52. FCC v. Pacfica Found., 438 U.S. 726, 738 (1978) (concluding that "§ 326[, the anti-censorship provision of the Communications Act,] does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting").

53. *Id.* at 739–40.

54. *Id.* at 739–41.

55. *Id.* at 742 (noting that, "[t]hat approach is appropriate for courts as well as the Commission when regulation of indecency is at stake, for indecency is largely a function of context—it cannot be adequately judged in the abstract").

56. *Id.* at 750.

57. *Id.* at 741 (citing Miller v. California, 413 U.S. 15, 24 (1973)). The Court dryly explains, "[w]e simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." *Id.* at 750–51.

58. 492 U.S. 115 (1989).

59. *Id.* at 124.

Court upheld the FCC's ability to regulate broadcast speech based on its indecent content, so long as the restriction was narrowly tailored to achieve a substantial government interest.[60] Nevertheless, the Court held that the law at issue, which prevented adults from accessing indecent telephone messages, was not narrowly tailored to achieve the avowed interest of keeping the indecent content away from minors, because it also infringed upon the ability of adults to access material to which they had a legal right. Consequently, the law did not withstand the strict constitutional scrutiny applied to content-based restrictions of speech and therefore violated the First Amendment.[61]

C. The Playboy Entertainment Case

In *United States v. Playboy Entertainment Group*, the Supreme Court extended protections to cable operators by providing sexually-oriented programming the full protection of the First Amendment when it struck down § 505 of the Telecommunications Act of 1996 for not meeting the strict constitutional scrutiny applied to content-based restrictions of speech.[62] Playboy Entertainment Group challenged a federal law designed to protect children from obscene and indecent content by requiring signal scrambling.[63] Section 505 was aimed at preventing signal bleed, a technical phenomenon whereby subscribers to some cable channels may receive video or audio for channels to which they do not subscribe.[64] Often, these channels do not come in clearly; instead, the signals are fuzzy and static-filled.[65] Nonetheless, § 505 required cable operators who provide sexually-oriented programming to either "fully scramble or otherwise fully block" the content or restrict the broadcast of such programming to the safe-harbor hours.[66]

Playboy Entertainment Group, which operates the Playboy channels, asserted that the First Amendment protected its right to provide indecent content and that the measures required by the content-based regulation were not the least restrictive means to

60. *Id.* at 126.
61. *Id.*
62. 529 U.S. 803, 807 (2000). The Telecommunications Act of 1996 was also known as the Communications Decency Act of 1995, when first introduced. *Id.*
63. *Id.* at 806.
64. *Id.*
65. *Id.* at 819.
66. *Id.* at 806.

prevent children from accessing indecent content.[67] Because the First Amendment provides protection for indecent content, Playboy asserted that the law must comport with strict scrutiny, and the Supreme Court agreed.[68] The Supreme Court ruled five to four that cable operators enjoy the same rights as publishers and Internet providers of indecent content.[69] Thus, Playboy Entertainment Group could not be forced to scramble its signals to prevent signal bleed, nor could it be forced to confine its programming to the designated safe-harbor hours.[70]

D. Summary

The Supreme Court has interpreted the First Amendment to provide broadcasters with some protection from indecency regulation. The First Amendment continues to serve as the most logical basis for constitutional challenges to the imposition of FCC fines. However, given the recent increases in fines, the Eighth Amendment's prohibition on excessive fines may play a new role in broadcasters' attempts to challenge the FCC. Broadcasters used the novel Eighth Amendment approach in the early 2000s, but the Supreme Court never granted certiorari.[71] With the advent of the BDEA's potential $3 million fines, broadcasters may find new strength in an argument for the Eighth Amendment protections.

II. THE EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE

The Eighth Amendment's[72] origins trace back to the 1776 Virginia Declaration of Rights.[73] The Virginia convention adopted language into its Declaration of Rights that was subsequently incorporated by eight other states into their state constitutions.[74] This paved the way

67. *Id.* at 823.
68. *Id.* at 814.
69. *Id.* at 813–15.
70. *Id.* at 815.
71. *See* Grid Radio v. FCC, 278 F.3d 1314 (D.C. Cir. 2002) (discussed *infra,* Part IV).
72. The Eighth Amendment reads, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
73. Section 9 of the Declaration of Rights adopted by the Virginia convention read "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." 1 THE PAPERS OF GEORGE MASON 288 (R. Rutland ed., 1970).
74. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning,* 57 CAL. L. REV. 839, 840 (1969).

for the inclusion of the Eighth Amendment's Excessive Fines Clause, after minimal debate in Congress, into the federal Constitution.[75] As compared to its sibling clause, the prohibition against cruel and unusual punishment, which has been the topic of numerous legal battles and scholarly articles, the Excessive Fines Clause has resided relatively unnoticed.[76]

A. Delineating the Scope of Excessive Fines Protection

The Supreme Court has only recently begun to address the meaning and scope of the Eighth Amendment's prohibition on excessive fines, hearing its first Excessive Fines Clause case in 1989.[77] Throughout the late 1980s and 1990s, the Court decided a number of cases that together developed its Eighth Amendment excessive fines jurisprudence.[78] Early on, the Court intimated that the Excessive Fines Clause would apply only in the context of criminal proceedings,[79] a view that it solidified in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, where Justice Blackmun, writing for the majority, noted that the courts had long concerned themselves only with interpreting the excessive fines prohibition to "apply primarily, and perhaps exclusively, to criminal prosecutions and punishments."[80]

In *Browning-Ferris*, a civil action appealing a $6 million punitive damages award for antitrust violations, the Court relied on the history of the Excessive Fines Clause to hold that the Clause does not control the amount of punitive damages awarded in civil cases.[81] However, the Court restricted the reach of its holding, thus preserving the possibility that the prohibition may apply in other situations. The

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75. 1 ANNALS OF CONG. 782–83 (J. Gales & W. Seaton eds., 1789).

76. Granucci, *supra* note 74, at 840.

77. Browning-Ferris Indus. of Vt. v. Kelco Disposal, 492 U.S. 257 (1989).

78. *See* United States v. Bajakajian, 524 U.S. 321 (1998) (holding that forfeiture of nearly $300,000 could violate the Eighth Amendment's Excessive Fines Clause); *Browning-Ferris*, 492 U.S.. (holding that the Eighth Amendment's Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties); Alexander v. United States, 509 U.S. 544 (1993) (holding that forfeiture of assets is the equivalent of a fine, for the purposes of the Eighth Amendment's prohibition against imposing excessive fines); Austin v. United States, 509 U.S. 602 (1993) (holding that the Eighth Amendment's Excessive Fines Clause applies to in rem civil forfeiture proceedings)..

79. *See* Ex Parte Watkins, 32 U.S. 568, 573–74 (1833) ("The Eighth Amendment is addressed to courts of the United States exercising criminal jurisdiction.").

80. *Browning-Ferris*, 492 U.S. at 262.

81. *Id.* at 264 n.4.

Court first asserted that it "need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases." The Court then clarified that "[w]hatever the outer confines of the Clause's reach may be," it was only deciding that "[the Clause] does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[82] What is clear in light of *Browning-Ferris* is that the Eighth Amendment's prohibition on excessive fines continues to apply to actions taken under the auspices of federal criminal law. However, *Browning-Ferris* says little to control the issue with regard to indecency fines levied against broadcasters, because the money received from such fines will be directed back to the government's coffers, unlike the damages that were awarded in *Browning-Ferris*.

Six years after *Browning-Ferris*, the Court established the current test used to determine whether a fine or forfeiture is governed by the Excessive Fines Clause. The Court held in *Alexander v. United States*[83] that statutory forfeitures of money or assets were analogous to criminal fines and thus subject to the Eighth Amendment.[84] In *Alexander*, the defendant was convicted of violating federal obscenity and racketeering laws.[85] As a result, he was fined and sentenced to prison time.[86] In addition, the government sought to exact a forfeiture of his assets under the Racketeer Influenced Corrupt Organizations Act ("RICO").[87] The Court remanded the Eighth Amendment claims,

82. *Id.* at 263–64.
83. 509 U.S. 544 (1993).
84. *Id.* at 559.
85. *Id.* at 543.
86. *Id.*
87. *Alexander*, 509 U.S. at 546. See also 18 U.S.C. § 1963 (2003), the RICO statute which provides that,

> [w]hoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—(1) any interest the person has acquired or maintained in violation of section 1962; (2) any—(A) interest in; (B) security of; (C) claim against; or (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962. The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property

ruling that the Eighth Amendment applies to both the fine and forfeiture. In doing so, the Court noted "[t]he *in personam* criminal forfeiture at issue here is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional fine."[88] Additionally, the Court opined that when determining whether the fine and forfeiture were excessive, the appellate court must consider the length and severity of the defendant's violative conduct.[89] Thus, under *Alexander,* statutory fines exacted for indecent broadcasts would be controlled by the Eighth Amendment's Excessive Fines Clause.

The *Alexander* opinion was one of two Eighth Amendment Excessive Fines Clause cases decided within the same term. In *Austin v. United States*,[90] the Court held the Eighth Amendment applicable to in rem civil forfeitures.[91] After the defendant was convicted of violating state drug laws, the United States filed an in rem civil action seeking forfeiture of his assets.[92] Relying on *Browning-Ferris* and the history of the Excessive Fines Clause, the *Austin* Court found that the prohibition was designed to prevent the government from exacting too high a price from its citizens and abusing its power to punish.[93] Thus, the dispositive factor is not whether the action is criminal or civil, but whether the money or assets are exacted as a form of punishment.[94]

The *Austin* Court stipulated that before one can determine whether a fine or forfeiture has been exacted as a form of punishment, an examination of the purposes for exacting the sanction must be conducted.[95] In formulating this requirement, the Court relied on *United States v. Halper*,[96] wherein it was stated that "a civil sanction

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described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Id.

88. *Alexander*, 509 U.S. at 558.
89. *Id.* at 559.
90. 509 U.S. at 602 (1993).
91. *Id.* at 604.
92. *Id.*
93. *Id.* at 607.
94. *Id.* at 610.
95. *Id.* at 611.
96. 490 U.S. 435 (1989), *overruled on other grounds by* Hudson v. United States, 522 U.S. 93 (1997).

that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[97] Additionally, the *Austin* Court discussed the historical view of fines and forfeitures at the time the Excessive Fines Clause was written. In the context of doing so, it determined that both were meant to be punitive in nature at the time of the Eighth Amendment's enactment.[98]

B. Defining "Excessive" under the Eighth Amendment

Once it has been determined that a fine or forfeiture is punitive in nature, the fine or forfeiture is allowed unless it is deemed excessive in violation of the Excessive Fines Clause. The Court began to articulate its excessive analysis in *Austin*. It further clarified the test in *United States v. Bajakajian*,[99] noting that proportionality forms the primary focus of the inquiry.[100] Proportionality requires the fine or forfeiture to be in line with the seriousness of the violation it is designed to punish.[101] Thus, the *Bajakajian* Court clarified that a fine greatly disproportional to the violation would be unconstitutional.[102]

Because determining whether a fine or forfeiture is greatly disproportionate is not an exact science, the Court showed considerable deference to both the legislature, which determines the range of possible fines, and the trial courts, which determine the actual fine assessed in a particular case.[103] Thus, no bright-line rule can

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97. *Id.* at 448.

98. *Austin*, 509 U.S. at 614 (noting "[o]ur cases also have recognized that statutory *in rem* forfeiture imposes punishment").

99. 524 U.S 321 (1998).

100. *Id.* at 334.

101. *Id.*

102. *Id.* at 334–35. "The text and history of the Excessive Fines Clause demonstrate the centrality of proportionality to the excessiveness inquiry; nonetheless, they provide little guidance as to how disproportional a punitive forfeiture must be to the gravity of an offense in order to be 'excessive.'" *Id.* at 335.

103. *Id.* at 335–36. The Court explains the factors that it takes into account:

> We must therefore rely on other considerations in deriving a constitutional excessiveness standard, and there are two that we find particularly relevant. The first, which we have emphasized in our cases interpreting the Cruel and Unusual Punishments Clause, is that judgments about the appropriate punishment for an offense belong in the first instance to the legislature. . . . The second is that any judicial determination regarding the gravity of a particular offense will be inherently precise.

be applied to the proportionality analysis.[104] Instead, courts must compare the amount of the fine or value of the forfeiture to the severity of the crime to determine if they are grossly disproportionate.[105] If so, then the fine or forfeiture is unconstitutional under the Eighth Amendment protection against excessive fines.[106]

III. UPPING THE ANTE: INCREASING INDECENCY FINES

Congress examined several variations of the legislation aimed at increasing the FCC's ability to regulate broadcast indecency before passing the Broadcast Decency Enforcement Act of 2005.[107] The earlier legislation proposed a variety of potentially harsh punishments, ranging from increased fines to tougher license-renewal procedures.[108] In addition, both the House and Senate held hearings in early 2004 to address the recent indecent broadcasts. While on Capitol Hill, the FCC commissioners testified that they needed the ability to strengthen current indecency regulations.[109] To garner this ability, the commissioners proposed a number of changes to the then-current policy.[110]

The commissioners' proposed changes to indecency regulation focused on a number of areas, including the amount of the fines and the ability to revoke broadcast licenses. All of the commissioners supported an increase in the current fine structure, with some of the commissioners noting that the current $32,500 per-violation cap was

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Id. at 336.

104. *Id.* The Court notes that "[b]oth of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense, and we therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents." *Id.*

105. *Id.*

106. *Id.*

107. *See* Broadcast Decency Responsibility Enforcement Act of 2004, S. 2147, 108th Cong. (2004); Broadcast Decency Enforcement Act of 2004, H.R. 3717, 108th Cong. (2004); Broadcast Decency Enforcement Act of 2004, S. 2056, 108th Cong. (2004).

108. *See* S. Res. 283, 108th Cong. (2003) (affirming the Senate's "need to protect children in the United States from indecent programming").

109. *The Broadcast Decency Enforcement Act of 2004: Hearing on H.R. 3717 Before the Subcomm. on Telecomms. and the Internet of the Comm. on Energy and Commerce,* 109th Cong. 78, 83, 93, 97, 101 (2004) [hereinafter *Broadcast Decency Hearing*] (statements of FCC Commissioners Michael Powell, Kevin Martin, Kathleen Abernathy, Jonathon Adelstein, and Michael Copps, respectively).

110. *Id.*

hardly enough to punish media giants like Clear Channel.[111] They encouraged Congress to increase the amounts the FCC could exact from broadcasters. One proposal, supported by the commissioners, would have raised the maximum fine to $500,000 per violation.[112] In addition, this proposed legislation also contained provisions that toughened licensure and provided for other punishments for indecent broadcasts; for example, broadcasters found in violation of the FCC's indecency policy would have been required to air public-service announcements addressing the listening and educational needs of children.[113] That proposed legislation also made indecency violations a consideration for license renewal by considering whether the broadcaster had paid any fines that had been assessed.[114] It also would have enacted a potential three-strikes policy that would allow the FCC to suspend a broadcaster's license after three indecent broadcasts.[115]

Ultimately, the BDEA adopted some of the earlier proposals' provisions while abandoning the harshest proposed penalties. Most notably, the Act provided for the large increase in indecency penalties.[116] However, it abandoned the licensing strictures and the public service announcement provisions, focusing instead on the monetary aspects of regulating indecency.[117]

IV. EXCESSIVE FINES IN THE FUTURE

Provisions increasing the amount of possible fines for indecent broadcasting will likely face considerable challenges in the courts. For example, CBS, which lost its appeal regarding the FCC fines levied

111. *Id.* at 101 (statement of FCC Commissioner Michael Copps).

112. Broadcast Decency Enforcement Act of 2004, H.R. 500; S.R. 283 (2003).

113. Broadcast Decency Enforcement Act of 2004, H.R. 3717, § 6, 108th Cong. (2004). It notes that,

> the Commission may, in addition to imposing a penalty under this section, require the licensee or permittee to broadcast public service announcements that serve the educational and informational needs of children. Such announcements may be required to reach an audience that is up to 5 times the size of the audience that is estimated to have been reached by the obscene, indecent, or profane material, as determined in accordance with regulations prescribed by the Commission.

Id.

114. *Id.*

115. H.R. 3717 § 9.

116. Broadcast Decency Enforcement Act of 2005, S. 193, 109th Cong. (2006) (enacted).

117. *Id.*

against it for the 2004 Super Bowl, will likely proceed all the way through the federal courts in an effort to get the $550,000 exactment dropped.[118] To date, the Supreme Court has not addressed the Eighth Amendment Excessive Fines prohibition in the context of indecency fines. The closest example came in a District of Columbia Circuit Court of Appeals case that questioned the constitutionality of FCC fines for a 2002 unlicensed broadcast.[119] There, the FCC fined a low-power radio broadcaster for operating without a license as required under 47 U.S.C. § 301.[120] In *Grid Radio v. FCC*, the court paid little attention to the broadcaster's Eighth Amendment claim.[121] Instead, the court held that the fine for unlicensed broadcasting was statutory in nature, which meant it was not subject to unlimited discretion under § 301, and would therefore be constitutional under the Eighth Amendment.[122] The court's ruling grants nearly unlimited discretion to the FCC and Congress to set fines approaching unlimited amounts without worrying about the constitutionality of the proposals. Thus, for a broadcaster to win a case under the theory that heightened indecency fines violate the Eighth Amendment, it likely would have to take the case all the way to the Supreme Court, where it would invoke not only the Eighth Amendment but also the First Amendment's free speech guarantees. Given the corporate media landscape, CBS's current predicament, and the potential for dramatic increases in both indecency complaints and fines, this is not out of the question.

As the number of media corporations decreases and the number of outlets they own increases, concern regarding the per-violation fine amount will naturally grow. As profit-driven industry players, media conglomerates will seek to decrease operating costs while maximizing their audience. Syndicated programming that can be broadcast on numerous stations owned by a single company provides one way to

118. Brooks Boliek, *No 'Malfunction' for the FCC: $550,000 Super Bowl Fine Against CBS Upheld*, THE HOLLYWOOD REPORTER, June 1, 2006, at 1.

119. Grid Radio v. FCC, 278 F.3d 1314 (D.C. Cir. 2002) (holding that the FCC's imposition of fines against an unlicensed low-power FM broadcaster did not violate the Eighth Amendment).

120. *Id.*

121. *Grid Radio*, 278 F.3d at 1322.

122. *Id.* (noting, "[t]he $11,000 represents the statutory penalty (adjusted for inflation) for unlicensed operation of a radio station, or for each day of a continuing violation. The amount is neither indefinite nor unlimited, nor does it seem excessive in view of Szoka's continued and willful violation of the licensing requirement.").

accomplish this. Infinity's reliance on the Howard Stern radio show during the early part of this century is an example of this conduct.[123] The relationship between Infinity and Stern also typified another concern facing broadcasters: wider liability. When Howard Stern broadcast indecent content on his show, Infinity was liable for each broadcast. Thus, if Infinity aired Stern on thirty-five stations, it could be fined thirty-five times for indecent content that hit the airwaves. The potential for such enormous repercussions has left many broadcasters with no choice but to alter their programming. Since 2004, Stern and Bubba the Love Sponge have left the commercial airwaves in favor of subscription-based satellite radio services that, like cable operators, are not subject to indecency regulation.

Under these circumstances, tougher regulations could spur an intense Eighth Amendment battle, pitting the proportionality of indecency fines against the severity of indecency violations. Such a challenge would require the courts to examine the Eighth Amendment as it is applied to the companies while making First Amendment judgments about the potential value and taste of a broadcast's content. An analysis under the Excessive Fines Clause would determine quickly that the FCC's indecency fines fall within the Eighth Amendment protection because the fines are designed purely to punish broadcasters for undesirable conduct. Their punitive nature may well subject them to constitutional scrutiny.

A. Problems with Proportionality

Courts might find that the FCC's proposed fine increases would run afoul of the Constitution under the proportionality analysis. Because each review for excessiveness is highly fact-sensitive, the recent increase could be subject to both facial and as-applied challenges to its constitutionality. A facial review would merely examine the language of the BDEA without looking at the Act's application to a specific broadcaster.[124] Under this type of review, the

123. As a result of growing concerns over the regulation of indecent programming, Howard Stern left commercial radio in late 2004. Since January 2006, his show has been aired on Sirius Satellite Radio, which is not subject to control by the FCC. *See* Krysten Crawford, *Howard Stern Jumps to Satellite*, CNNMONEY.COM, Oct. 6, 2004, http://money.cnn.com/2004/10/06/news/newsmakers/stern_sirius/?cnn=yes (reporting Stern's move to satellite radio).

124. *See* Steffel v. Thompson, 415 U.S. 452, 474 (1974) (noting that a facial challenge posits that a statute is invalid "*in toto*—and therefore incapable of any valid application"); *see also* City of Chicago v. Morales, 527 U.S. 41, 55 n.22 (1999) (explaining that a party mounting a facial

recent increase likely would satisfy constitutional standards, because it is a statutory fine that sets only a maximum fine ceiling and delineates the criteria for assessing those fines. However, a challenge based on the application of the increased fines to a specific broadcaster would be more constitutionally troublesome.

As-applied review of the statute would require that courts examine a situation where the FCC found an actual broadcaster liable for indecency violations and then subjected it to a fine under the BDEA. An as-applied review would require a reviewing court to examine four main categories to determine whether a fine is constitutionally excessive. First, a court would need to review the facts of the incident as it occurred and take the content of the supposed indecent broadcast into account, reviewing a variety of factors. Potential constitutional conflicts could arise with this determination because it would require an evaluation of the broadcast's taste and value. This places the review at odds with the First Amendment jurisprudence. Some content, such as blatant sexual references, would likely merit stronger fines based simply on its offensiveness. A second excessiveness consideration would be the length and repetitive nature of an alleged indecent broadcast. Under the FCC's guidelines, fleeting references or implicit innuendo often receive less harsh treatment than lengthy and explicit broadcasts.[125] A third factor that courts should consider is the time of broadcast and possible audience. An indecent broadcast falling slightly out of the safe-harbor window of 10 p.m. to 6 a.m. would likely not be punished as severely as indecency that is broadcast at noon. Finally, courts would take into account the broadcaster's history of indecent broadcasting. Because the fines are intended to punish, both through punitive and deterrent means, it would seem only logical that a broadcaster should receive harsher fines if it has a history of indecency violations.

Together, these factors should play a role in a reviewing court's determination of whether a fine meets the proportionality test, or whether it is grossly disproportionate to the severity of the violation. Although consideration of these factors would best serve the Supreme Court's established standard of review for Eighth

challenge "seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question").

125. FCC Indecency Policy Statement, *supra* note 32, at 8002–03.

Amendment Excessive Fines Clause cases, they would also require the courts to walk a First Amendment tightrope.

B. Clearing Constitutional Hurdles

There are two situations where excessive indecency fines might pass constitutional muster. First, the courts would probably offer greater deference to FCC decisions, providing that the agency considered the above factors when determining an appropriate fine for each individual incident. Second, a court might also allow the FCC to exact the maximum fine against all broadcasters in all cases. Similar zero-tolerance policies have been upheld in other areas of criminal law. For example, mandatory minimum sentencing under the Federal Sentencing Guidelines has been held constitutional.[126] Thus, a plan that provided the FCC with only the discretion to determine whether a fine is merited might also be constitutional under the Eighth Amendment so long as the established fine amount is not facially excessive.

V. CONCLUSION

Nominal, cost-of-doing-business fines are not the answer to indecency regulation.[127] However, constantly upping the ante essentially allows wealthy media companies to pay to play indecent content and exercise their First Amendment rights while forcing smaller operations to self-censor in an effort to err on the side of caution. In addition, if not properly administered, the recent fine increases could contravene the Eighth Amendment's Excessive Fines Clause. Instead of exacting more money from broadcasters, the FCC should consider other measures, including tougher licensing and renewal processes, to encourage broadcasters to comply with indecency regulations. Self-regulation within the industry could also be explored. While many of these measures were addressed during Congress's two-year battle with indecency regulation, all were abandoned in favor of mere monetary penalties, which are arguably more lucrative and easier to enforce. But rather than relying on an

126. *See, e.g.*, Alamendarez-Torres v. United States, 523 U.S. 224 (1998) (holding that Congress has discretion in establishing statutory punishment ranges, including mandatory minimum sentences).

127. *Broadcast Decency Hearing, supra* note 109, at 78, 83, 93, 97, 101.

easy-to-enact system that will likely chill the expression of those broadcasters without large wallets, indecency regulation should instead focus on restrictions that best serve the needs of all broadcasters and their audiences given the changes in media ownership.