Sins of Omission and "A Line-Drawing Exercise":

A Response to FCC Chairman Kevin Martin's Comments on the "Expansion of Indecency Regulation"

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The publication in the *Federal Communications Law Journal*[1] of the remarks of Kevin J. Martin, chairman of Federal Communications Commission, made during the November 2005 debate at the National Lawyer's Convention on the topic of the FCC's expansion of indecency regulation, provides an excellent opportunity to examine how far (or, perhaps, not so far) the FCC Commissioners have progressed in their ramped-up quest[2] to cleanse the public airwaves of content they deem indecent. In other words, a close parsing of the content of Chairman Martin's remarks from slightly more than two years ago can be very informative in providing a kind of "that was then, this is now" form of comparison. Put differently, in query form, what did Chairman Martin

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Suggested citation: Clay Calvert, *Sins of Omission and "A Line-Drawing Exercise": A Response to FCC Chairman Kevin Martin's Comments on the "Expansion of Indecency Regulation*", 60 FED. COMM. L. J. F. 1 (2008), http://www.law.indiana.edu/fclj/pubs/v60/no1/Calvert_Forum_Final.pdf.

[1] *Expansion of Indecency Regulation*, 60 FED. COMM. L. J. 1 (2007).

[2] The phrase "ramped-up quest" seems appropriate, as no less than former FCC Chairman Richard Wiley recently observed in this journal that 2004 witnessed "much more vigorous FCC enforcement" of its indecency rules. Richard E. Wiley & Lawrence W. Secrest, *Recent Developments in Program Content Regulation*, 57 FED. COMM. L.J. 235, 237 (2005).

envision happening back in November 2005 on the indecency front and what actually has transpired in the intervening two years? Similarly, have any of the problems about which he spoke back then, in terms of the FCC aggressively addressing indecency, actually changed, evolved or dissipated over the course of the past 24-plus months?

But before tackling this then-versus-now task, it is beneficial to address a more troubling problem from the debate—one that might be thought of as a sin of omission. In particular, beyond simply examining what Chairman Martin actually said at the debate, it's also extremely revealing and constructive to observe and study what was left *unsaid* and what went *unspoken*. Silence, it seems, may not always be so golden, especially when it comes to censorship.

Indeed, some critical assumptions about indecent content conveyed on the broadcast television airwaves simply were not addressed by either Chairman Martin or any of the other esteemed panelists. Specifically, despite some of the panelists' concerns about the need to protect children from indecent content and despite Chairman Martin's astute citation of Kaiser Family Foundation content analyses purporting to show increases in both sexual content and profanity on broadcast television in recent years, it apparently was just *assumed* or taken for granted by the panelists that, first, children do, indeed, like to watch (and do, in fact, regularly watch) this type content on television and, second and much more important, that children actually are harmed or injured by it. In fact, not a single panelist pointed to or cited any study demonstrating or proving that children suffer or sustain either short-term or permanent mental, psychological or social harm or injury caused either by watching the type of non-obscene sexual content or by hearing the type of profanity that is now available on free, over-the-air broadcast television.

The question of whether or not minors actually are harmed by such content begged for discussion, especially after Chairman Martin queried during the debate, "If the goal is really to protect kids, is this interest that compelling?" My follow-up questions would be:

- From what specific and proven harms or injuries is the FCC supposedly protecting kids when its regulates indecency on broadcast television?
- Where are the studies and experiments showing actual causation of harms or injuries from viewing supposedly indecent (not obscene or violent) broadcast content?
- Are kids today any more psychologically or socially scarred or harmed by consuming what is aired on free, broadcast television than were kids thirty years who watched what was then broadcast?

These questions are critical because if the goal is to protect kids, and if there is no social scientific proof and substantial evidence that viewing

the current level of sexual and excretory-related content that appears on broadcast network television today causes them any significant harm, then there is no compelling interest left to justify the FCC's vigorous enforcement of indecency standards in the past four years.

It is important to keep in mind that we are *not* talking about children watching sexually explicit adult movies featuring the likes of popular porn stars such as Jenna Jameson or Stormy Daniels on free, broadcast television, and that we are *not* talking about them watching violent content. The debate, instead, was about *indecency* regulation, and the FCC currently defines indecency as "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 organs or activities."[3] In brief, obscenity[4] and violence (the latter being a type of content that the FCC in 2007 announced a desire to see the government regulate[5]) are very different matters than indecency, a point that was never made clear during the debate, even when the conversation wandered off to an ongoing federal obscenity prosecution, *United States v. Extreme Associates*.[6] In fact, the panelists failed both to spell out the FCC's definition of indecency and to address its methodology in rendering indecency determinations, during a debate that supposedly focused on indecency. I'm not quite sure how one can have a true debate about the expansion of indecency regulation without at least considering the current definition of indecency and how that definition is interpreted and applied by the FCC. This certainly was a disappointing aspect of the debate, from my perspective.

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[3] FCC Consumer Facts: Obscene, Indecent, and Profane Broadcasts, FCC website, *available at* http://www.fcc.gov/cgb/consumerfacts/obscene.html (last visited Dec. 15, 2007).

[4] The United States Supreme Court made clear more than a half-century ago that "obscenity is not within the area of constitutionally protected speech or press." Roth v. United States, 354 U.S. 476, 485 (1957). The current test for obscenity is set forth in the Supreme Court's 35-year-old ruling in *Miller v. California*, 413 U.S. 15 (1973). The three-pronged *Miller* test focuses on whether the material at issue: 1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the perspective of the average person; 2) is patently offensive, as defined by state law; and 3) lacks serious literary, artistic, political or scientific value. *Id.* at 24.

[5] See Report at 21, In re Violent Television Programming And Its Impact On Children, FCC 07-50, MB Docket No. 04-261, Apr. 26, 2007, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-50A1.pdf (last visited Dec. 15, 2007) (writing that "we believe action should be taken to address violent programming," finding that "the current technology 'fix,' including but not limited to consumer understanding of the technology and voluntary ratings system, is not effective in protecting children from violent programming," and suggesting several ways in which Congress could address violent programming).

[6] 352 F. Supp. 2d 578 (W.D. Pa. 2005), *rev*'d, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 2048 (2006).

To return to the question of causation of harm stemming from indecency, the key is simply this: Without proof that children are harmed, either socially or psychologically, from watching the current level of content dealing with sexual or excretory content on broadcast television, then there simply is no compelling justification, under the strict scrutiny standard of judicial review,[7] for regulating it. As the United States Court of Appeals for the Second Circuit reminded the FCC in June 2007 when it rejected the FCC's recent policy decision to punish isolated and fleeting expletives, the government must prove there is "harm [that] is serious enough to warrant government regulation."[8] To support this proposition, the appellate court in *Fox Television Stations v. FCC* quoted from the United States Supreme Court's decision in *Turner Broadcasting System, Inc. v. FCC*,[9] where the high court wrote that the government "must demonstrate that the recited harms are real, not merely conjectural."[10]

So rather than just *assume* that children are harmed by the current levels of non-obscene sexual and excretory content and references on broadcast television, let's see the evidence of causation of real harm and significant injury that is substantial enough to overcome First Amendment speech concerns. Surely the same social scientists that churn out laboratory studies about harms minors supposedly suffer when playing violent video games are up to the task of turning their experimental focus to the indecency front. Then again, their evidence repeatedly has been rebuked by courts in the context of statutes limiting minors' access to violent video games.[11]

I'd love to see some hard data about the permanent and lasting psychological or social harm that minors suffered when they were exposed

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[7] *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (writing that a "content-based speech restriction" is permissible "only if it satisfies strict scrutiny," which requires that the law in question "be narrowly tailored to promote a compelling Government interest"); Sable Comm. Cal, Inc. v. FCC, 492 U.S. 115, 126 (1989) (writing that the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 903 (2d ed. 2002) (writing that "content-based discrimination must meet strict scrutiny").

[8] Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 461(2d Cir. 2007).

[9] 512 U.S. 622 (1994).

[10] *Id.* at 664.

[11] *See, e.g.*, Entm't Software Assoc. v. Foti, 451 F. Supp. 2d 823, 832 (M.D. La. 2006) (concluding that the social science evidence offered by Louisiana to demonstrate harms to minors caused by playing violent video games is "much of the same evidence has been considered by numerous courts and in each case the connection was found to be tenuous and speculative").

to one of Janet Jackson's breasts for less than one full second.[12] And let's see the data about the damage to minors caused by Bono's spontaneous utterance of the word "fucking" during an awards show.[13] Dare I bring in a lyrical reference to a slightly older musical group than Bono's band U2, I suspect "the kids are alright"[14] and that we "won't get fooled again"[15] by thinking that there ever really was any harm. But again, the panelists simply assumed that the kids *weren't* alright.

Ultimately, because the panelists failed to demonstrate what harm children suffer from watching and hearing non-obscene sexual images and words on broadcast television, we are left to speculate about how kids are injured. Could it be that, because they see and hear more sexual imagery and words on television than previous generations, kids today have become sex-crazed hedonists? In reality, despite the concerns about the proliferation of sexual content on broadcast television, the conservative-leaning *Washington Times* reported in November 2006 the findings of surveys showing that "the percentage of youths who had sex before 15 in the United States has dropped in the past three decades, from about 20 percent in 1975 to about 15 percent today."[16] What's more, the data show that "teen pregnancy rates have plummeted since the early 1990s. According to the Centers for Disease Control and Prevention, the percentage of high school students who reported having sexual intercourse dropped from 54 percent in 1991 to 47 percent in 2005."[17] Of course, even if these rates had gone up in a positive *correlation* with an increase in sexually racy content on broadcast television, that would say nothing about *causation*.

I suspect the only harm actually suffered is not by the kids but by the parents, who blush or turn a shade of crimson or cardinal when sexually-charged content comes on the broadcast airwaves, with the kids in the

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[12] *See* Forfeiture Order, Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 F.C.C.R. 2760, 2764 n.27 (2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-19A1.pdf (last visited Dec. 2, 2007) (noting that CBS disputed the FCC's finding "that the nudity lasted for 19/32 of a second," with the network contending that it was on for "9/16 of a second," but finding there was "no practical difference here").

[13] *See* Memorandum Opinion and Order, In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4976 n.4 (2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-03-3045A1.pdf (last visited Dec. 2, 2007) (noting that the "hundreds of complaints" received by the FCC about the broadcast "varied in their characterization of Bono's comments as either 'this is really, really fucking brilliant,' or 'this is fucking great'").

[14] THE WHO, *The Kids are Alright*, *on* MY GENERATION (Brunswick 1965).

[15] THE WHO, *Won't Get Fooled Again*, *on* WHO'S NEXT (Decca 1971).

[16] Jennifer Harper, *Marriage Beds Show Most Activity*, WASH. TIMES, Nov. 2, 2006, at A3.

[17] Ian Shapira, *You're Wearing What? Teen T-shirts Make Some Squirm*, SUNDAY NEWS (Lancaster, Pa.), Oct. 8, 2006, at G8.

room, or when Charlie Sheen cracks wise with a sexual reference in the show "Two-And-A-Half Men" that a child, in turns, asks his or her parents to explain just what was so funny.

A couple of more points related to the assumption-of-harm argument are important to remember here. First, as Judge Richard Posner reminded us in the context of the right of minors to access violent video games, "children have First Amendment rights."[18] The panelists, including FCC Chairman Martin, never once raised, addressed or discussed the speech rights of minors; instead, they obsessed about the concerns of parents. Of course, it's much easier for the FCC to succeed in its regulatory quest when it frames the issue of aggressive indecency enforcement as one about the rights of parents rather than addressing either children's speech rights or whether minors actually suffer either short-term or long-term psychological or social harm from watching what supposedly is indecent content currently conveyed on broadcast television. It thus was not in the least surprising to see Chairman Martin highlight what he alternately called during the debate "a growing frustration among parents" and "an increasing concern expressed by a lot of parents."

Chairman Martin's focus on the concerns of parents rather than the rights of kids leads to a second point that was not addressed—the government cannot, as one federal appellate court recently put it, "undermine the First Amendment rights of minors willy-nilly under the guise of promoting parental authority."[19] And when it comes to using numbers in the name of promoting parental authority, FCC Chairman Martin committed a major sin of omission when he stated that a huge increase in indecency complaints received by the FCC in recent years is "reflective of an increasing concern among parents and uncomfortableness about what is being put on over-the-air in television and radio, and also increasingly frustration about the responsiveness to their concerns." Indeed, there was a dramatic increase in the number of annual complaints filed from 2000 through 2004, as a document on the FCC's website demonstrates.[20] But by December 2004—eleven months prior to this debate—it already was well known that "in 2003, the Parents Television Council was responsible for filing all but 267 of the 202,032 indecency complaints received by the agency, or 99.86 percent."[21] Furthermore, in

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[18] American Amusement Machine Assoc. v. Kendrick, 244 F.3d 572, 576 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

[19] Interactive Digital Software Assoc. v. St. Louis County, 329 F.3d 954, 960 (8th Cir. 2003).

[20] Indecency Complaints and NALs, FCC website, *available at* http://www.fcc.gov/eb/oip/ComplStatChart.pdf (last visited Dec. 15, 2007).

[21] Deborah Caulfield Rybak, *A Single Group Filed Almost All Complaints*, STAR TRIB. (Minneapolis, Minn.), Dec. 5, 2004, at 10A.

2004, a Freedom of Information Act request revealed that, "excluding protests about Janet Jackson's exposed breast during the Super Bowl halftime show, the nonprofit group again filed 99.9 percent of 442,899 complaints to the FCC as of Oct. 7. The Super Bowl incident generated about half a million complaints, 65,000 from the Parents Television Council."[22] As columnist Tim Goodman of the *San Francisco Chronicle* put it, "a small group of highly mobilized conservative watchdogs has essentially driven the 'moral values' campaign directed at the FCC."[23] None of the panelists in November 2005, however, pointed out the omission of these critical facts.

A related point that flows out of the focus on the concerns of parents must be made, since it too was omitted from the debate; it's a point that goes back to fundamentals of First Amendment jurisprudence. Even assuming that a majority of parents of young children today want to see the government roll back television dialogue and imagery that focuses on sexual and excretory organs or activities, such public opinion and popular support would not, standing alone, justify government intervention. Why? Because the First Amendment guarantee of free expression does *not* protect or censor only that speech which the majority of the population feels or decides is fit for protection or censorship. The First Amendment is designed to protect unpopular expression that a minority of the population wants to receive or engage in. The Supreme Court has stressed that speech cannot be suppressed simply because "society finds the idea itself offensive or disagreeable."[24] More controversially, as Larry Flynt, a publisher well known for expression, published in *Hustler* and other venues, that is decidedly unpopular among cultural conservatives, once put it, "[i]f the First Amendment gives you any right, it gives you the right to be offensive."[25] The bottom line, then, is that the fact that a majority of parents might find some TV shows offensive because of the non-obscene sexual content they convey does not justify regulating that speech.

In summary, then, let's hope for a debate in the future in which the harms that broadcast indecency allegedly causes are made explicit by the panelists and established by substantial supporting evidence. Enough with the tired old rhetoric about protecting kids and helping parents. Unless the speech in question can, in fact, be proven to cause actual harm, there is no justification for the FCC's new aggressive approach to enforcing its

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[22] *Id.*
[23] Tim Goodman, *Couch Potatoes, It's Time to Drop the Remote*, S.F. CHRON., Dec. 13, 2004, at E1.
[24] Texas v. Johnson, 491 U.S. 397, 414 (1989).
[25] Clay Calvert & Robert D. Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMMLAW CONSPECTUS 159, 164 (2001).

indecency regulations. Instead of just citing survey data about the concerns of parents, let's see some hard data about causation of harm from the same type of over-the-air broadcast content the FCC now claims is indecent.

With this in mind, I turn from what was *not* addressed to what was, in fact, stated by Chairman Martin to see just what, if anything, has changed since his remarks in November 2005.

First, Chairman Martin noted during the debate that a then-recent report showed that sixty-nine percent of those surveyed "backed steeper fines" for indecency violations. In this area, the parents and Chairman Martin got their wish. In 2006, the minimum fine for a single instance of broadcast indecency was increased tenfold, from $32,500 to a whopping $325,000, which in turn has led to self-censorship efforts.[26] These include, ironically enough in 2007, the decision of the New York City-based Pacifica Foundation radio station—the same one targeted in the seminal (and only, at least for now) Supreme Court opinion addressing the FCC's power over broadcast indecency, *FCC v. Pacifica Foundation*[27]—to air a reading of the late beat poet Allen Ginsberg's work, "Howl."[28] Score one for the chairman. The goal of a substantially increased fine has been realized that may, indeed, be chilling the dissemination of indecent expression.

Second, Chairman Martin proclaimed during the debate that "trying to determine what's appropriate or inappropriate, at times, for what's on television or radio is probably one of the most difficult issues that the Commission faces." Certainly nothing has changed here in the past two years for the FCC. Indeed, the judicial rebuke in the majority opinion of the United States Court of Appeals for the Second Circuit in *Fox Television Stations, Inc. v. FCC*[29] has forced the FCC to go back to the drawing board to justify its policy decision to target the broadcast of isolated and fleeting expletives. The decision thus made it a whole lot more difficult for the FCC to engage in what Chairman Martin, in November 2005, described as "a line-drawing exercise." Drawing lines on indecency is as difficult as it ever was. Score one here for no one, because no one wins when vague laws like the FCC's current malleable definition of indecency are left in place that

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[26] *See generally* Frank Ahrens, *Six-Figure Fines for Four-Letter Words Worry Broadcasters*, WASH. POST, July 11, 2006, at A1 (reporting that "[s]ince President Bush signed a law in June upping the maximum Federal Communications Commission indecency fine to $325,000, business has spiked at California-based Prime Image Inc., which makes an electronic box that lets television stations edit out offensive language," and noting that "has sent radio and television stations and media giants scurrying to protect themselves, as the cost of uttering a dirty word over the air has turned a minor annoyance into a major business expense").

[27] 438 U.S. 726 (1978).

[28] Patricia Cohen, *'Howl' In an Era That Fears Indecency*, N.Y. TIMES, Oct. 4, 2007, at E3.

[29] 489 F.3d 444 (2d Cir. 2007).

allow for substantial discretion in their enforcement and create a chilling effect for those who wish to speak.[30]

Although I'm not engaged in the field of reading minds, I doubt that Chairman Martin suspected that, two years after the debate, the FCC would be fighting battles in two different federal courts in 2007 in order to justify and sustain its vigorous new approach to indecency guidelines. Indeed, in addition to the Second Circuit's blowback to the FCC in June 2007, the FCC faced a challenge before the Third Circuit to its Janet Jackson, Super Bowl halftime show ruling[31] that featured the attorney representing CBS, Robert Corn-Revere, accusing, during oral argument, "the F.C.C. of violating due process by abandoning its 30-year policy of cautious enforcement of decency rules and substituting instead a zero-tolerance policy, which he said the F.C.C. had applied retroactively to the incident."[32] Chairman Martin also probably did not anticipate what the *Philadelphia Inquirer* described during that oral argument as an "intense legal debate over the breadth of the First Amendment, the definition of indecency and whether CBS should be held liable for the actions of performers who plan nasty things without warning the network."[33] In brief, the FCC now is engaged in major federal appellate court battles over indecency that it wasn't fighting in November 2005.

Third, Chairman Martin was calling, during the November 2005 debate, for the cable industry to adopt what he then termed "some form of a la carte, some form of additional choice with packages," and he added that cable companies "certainly are fighting that tooth-and-nail on the Hill." Nothing has changed here. Still no a la carte system in the realm of cable television in December 2007, and none expected anytime soon, although the chairman artfully wove the idea into an FCC report released in April

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[30] Professor David Kohler of Southwestern Law School recently noted this fact, writing that:

> [W]ith the new indecency regime, we have seen vividly how vague, punitive regulations designed to protect our sensibilities do, in fact, undermine undeniably valuable expression, and why the concept of a chill continues to have such resonance. In November 2004, sixty-six ABC television affiliates declined to air an unedited Veteran's Day broadcast of the award-winning film Saving Private Ryan because it contained numerous expletives uttered by soldiers in the heat of battle, and they feared that the FCC might take punitive action against them.

David Kohler, *Reclaiming the First Amendment: Constitutional Theories of Media Reform: Self Help, the Media and the First Amendment*, 35 HOFSTRA L. REV. 1263, 1286 (2007).

[31] *Supra* note 12 and accompanying text.

[32] Rita K. Farrell, *CBS Appeals Its Punishment For Incident at a Super Bowl*, N.Y. TIMES, Sept. 12, 2007, at C9.

[33] John Shiffman, *Super Bowl Exposure Has Its Day in Court*, PHILADELPHIA INQUIRER, Sept. 12, 2007, at Features Magazine, D1.

2007[34] that calls for the government to regulate excessively violent programming on broadcast, cable and satellite television. But as the *New York Times* noted in November 2007, "[c]able executives have replied that a la carte would be a disaster for consumers because the more popular programs subsidize the less popular ones. They have complained to senior White House officials and top lawmakers that Mr. Martin has overreached."[35] Score this one as a victory for the cable companies.

Fourth, Chairman Martin spoke during the debate about encouraging television broadcasters "to try to reinstate a family hour, at least one hour of programming a night when they would have programming that is appropriate for families."[36] Of course, whatever "appropriate" means was left undefined during the debate and thus it apparently meant whatever the FCC would deem is appropriate. And as one newspaper in 2007 opined about the potential resurrection of a family-viewing hour that would screen out violent content, the concept "once again lags technology. Barring violent programming during the family viewing hour begs the question: With TiVo, VCRs, DVDs and Web access, when do those family hours really come. More and more viewers watch their shows when they want to, not when those shows are broadcast."[37]

Fifth, Chairman Martin recited during the debate facts and figures indicating parental concern about sexual content on broadcast television. Has anything in this area changed? A 2007 study by the Kaiser Family Foundation—an organization whose data the chairman cited back in November 2005—found that:

> Sixty-five percent of parents say they "closely" monitor their children's media use, while just 18% say they "should do more." This may help to explain why since 1998 the proportion of parents who say they are "very" concerned that their own children are exposed to inappropriate content – while still high – has dropped, from 67% to 51% for sexual content, from 62% to 46% for violence, and from 59% to 41% for adult language.[38]

Those figures should be very encouraging for all concerned. It must be noted, however, that the numbers above were *not* specific to the medium of broadcast television, but rather overall media consumption. Still

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[34] *See supra* note 5 and accompanying text.
[35] Stephen Labaton, *Size Limits For Cable Look Likely*, N.Y. TIMES, Nov. 29, 2007, at C1.
[36] *See Expansion of Indecency Regulation*, *supra* note 1, at 3-4.
[37] Editorial, *FCC and Congress: Not Much as Parents*, TRI-CITY HERALD (Wash.), May 8, 2007, at A10.
[38] Press Release, Kaiser Family Foundation, Parents Say They're Getting Control of Their Children's Exposure to Sex and Violence in the Media – Even Online But Concerns About Media Remain High, and Most Support Curbs on Television Content (June 19, 2007), *available at* http://www.kff.org/entmedia/entmedia061907nr.cfm (last visited Dec. 15, 2007).

disappointing is the fact that the vast majority of parents fail to take advantage of the V-Chip technology that would help them to screen out sexual content while allowing those who wish to receive it to do so. Much more heartening is the fact that those parents who actually care enough to use the V-Chip, in fact, find it very useful. Specifically, the report states:

> Among all parents, 16% say they have ever used the V-Chip (just under half of those who have a V-Chip and are aware of it). *Nearly three out of four parents (71%) who have tried the V-Chip say they find it "very" useful, a higher proportion than for any of the media ratings or advisory systems.* This is up from 64% in 2004.[39]

The fact that such a high percentage of parents who bother to use the V-Chip view it so positively should suggest, perhaps, to the FCC that it needs to place more focus and emphasis on encouraging its use. If Chairman Martin is still as concerned now about parents as he was in November 2005 during the debate, then he truly ought to be out there talking about how many parents, in fact, find the V-Chip such a valuable tool when they use it.

Sixth and finally, Chairman Martin concluded his opening statement during the debate by remarking, "I'm not sure exactly where our discussion will end up taking us, but why don't I just stop there . . ." I suspect that, ultimately, the debate about the FCC's expansion of its indecency regulation that was the focus of the November 2005 discussion at the National Lawyer's Conference could very well end up taking us, some thirty years after the ruling in *FCC v. Pacifica Foundation* was handed down in 1978, all the way back to the United States Supreme Court. Notably, the FCC in November 2007 petitioned the nation's high court for a writ of certiorari to hear the Second Circuit's decision in *Fox Television Stations*.[40] And that argument before the high court, should it ever come to pass in either the *Fox Television Stations* case or CBS's battle over the Super Bowl halftime show, and unlike the debate at the National Lawyer's Conference, must address what, if any, harm is truly wreaked on today's youth by the current crop of content conveyed on broadcast television that supposedly is indecent. To paraphrase Cuba Gooding, Jr.'s much-quoted signature line in "Jerry Maguire," show me the harm.

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[39] Parents, Children & Media: A Kaiser Family Foundation Survey at 10, Kaiser Family Foundation (June 2007), *available at* http://www.kff.org/entmedia/upload/7638.pdf (last visited Dec. 15, 2007) (emphasis added).

[40] *See generally F.C.C. Case Is Appealed To Justices*, N.Y. TIMES, Nov. 3, 2007, at C5 (reporting on the filing of the petition).