

# **Chairman Kevin Martin on Indecency: Enhancing Agency Power**

## **A Response to Kevin Martin et al., *Expansion of Indecency Regulation*, 60 FED. COM. L.J. 1 (2007)**

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I. RELEVANCE? .....	20
II. BROADCAST REGULATION—THE ILLUSION OF THE FCC AS SIMPLY ENFORCING LONG-STANDING RULES .....	23
III. INDECENCY ON CABLE—A PROPOSED END-RUN AROUND REGULATORY LIMITS .....	28
IV. EMPIRICAL CLAIMS AND CONSUMER-RESPONSIVENESS .....	32

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Suggested citation: Lili Levi, *Chairman Kevin Martin on Indecency: Enhancing Agency Power*, 60 FED. COMM. L. J. F. 19 (2008), [http://www.law.indiana.edu/fclj/pubs/v60/no1/Levi\\_Forum\\_Final.pdf](http://www.law.indiana.edu/fclj/pubs/v60/no1/Levi_Forum_Final.pdf).

In 2005, Chairman Kevin Martin of the Federal Communications Commission (“FCC”) participated in a debate on “Expansion of Indecency Regulation.”<sup>1</sup> The Chairman argued that “it’s the responsibility of the Commission to enforce the rules[,]”<sup>2</sup> that “an increasing concern [has been] expressed by a lot of parents”<sup>3</sup> about broadcast content, that recent survey evidence supports the increasing number of complaints to the Commission,<sup>4</sup> and that cable should offer consumers choice in channel selection.<sup>5</sup>

The bottom line of this Response is that although Chairman Martin refers to the difficulties of engaging in the line-drawing necessary to enforce indecency regulations and although he characterizes self-regulation as the first line of defense,<sup>6</sup> his comments in fact reveal a tolerance for extensive regulatory intervention purportedly justified by a popular mandate. Three aspects of Chairman Martin’s remarks are noteworthy for an analysis of the FCC’s chosen course. The first concerns broadcast indecency regulation; the second is about extending such regulation to cable; and the third addresses the Commission’s reliance on consumer-responsiveness and empirical data about public attitudes toward sexual content on television. Chairman Martin’s comments: 1) suggest that the Commission is simply enforcing existing indecency rules when the reality is that the broadcast indecency regime has been extensively strengthened during his chairmanship; 2) call for a changed business model for cable in order to reduce indecent cable content indirectly without addressing the potentially significant consequences of such a change for diversity of programming overall; and 3) assert a popular mandate on the basis of ambiguous and under-analyzed empirical references. The result is an argument for virtually plenary regulatory power clothed in a description of modest regulatory responsiveness to public concern about an increasingly intolerable media landscape.

### I. RELEVANCE?

Before engaging those points, however, the first question must be whether—in light of subsequent events—an analysis of Chairman Martin’s 2005 comments can constitute anything more than an exercise in legal

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1. The transcript of that debate has now been published in the most recent volume of the *Federal Communications Law Journal*. Kevin Martin et al, *Expansion of Indecency Regulation*, 60 *FED. COMM. L.J.* 1 (2007).

2. *Id.* at 3.

3. *Id.*

4. *Id.* at 4-5.

5. *Id.* at 4, 15-16.

6. *Id.* at 2-3, 15.

history. After all, the FCC's broadcast indecency regime has been described as currently in "limbo."<sup>7</sup> Some forecast the end of the Commission's broadcast indecency rules at the hands of the judiciary.<sup>8</sup> Last summer, the Second Circuit overturned the Commission's "fleeting expletives" policy in *Fox v. FCC*.<sup>9</sup> Although it decided the case on administrative law grounds, the *Fox* majority took the occasion to issue extensive dicta on the likely constitutional infirmities of the rule.<sup>10</sup> The Third Circuit is currently contemplating CBS's challenge to the Commission's indecency finding in connection with the infamous Janet Jackson "wardrobe malfunction" during the 2004 Super Bowl half-time show.<sup>11</sup> Chairman Martin's attempts to curb indecency on cable by proposing that cable channels be offered to the public à la carte (rather than in bundled tiers)—and his more recent claim that cable's current market share is large enough to warrant re-regulation—have led to cable industry objections that Chairman Martin is engaged in a "vendetta" against cable.<sup>12</sup> Cable companies' complaints appear to have found receptive ears in Congress.<sup>13</sup> These developments might lead to the conclusion that the FCC

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7. John Eggerton, *FCC Profanity Crackdown in Limbo*, BROADCASTING & CABLE ON-LINE, Oct. 1, 2007, <http://www.broadcastingcable.com/article/CA6485633.html>.

8. Professor Clay Calvert, for example, argues in this Forum that the inability of the FCC to establish the harm of indecency to children means that indecency regulation cannot pass strict first Amendment scrutiny under recent Supreme Court precedent *United States v. Playboy*. See 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, 10 (2007), [http://www.law.indiana.edu/fclj/pubs/v60/no1/Calvert\\_Forum\\_Final.pdf](http://www.law.indiana.edu/fclj/pubs/v60/no1/Calvert_Forum_Final.pdf)

9. *Fox Television Stations v. FCC*, 489 F.3d 444 (2d Cir. June 4, 2007), *pet. for certiorari filed*, 76 U.S.L.W. 3255 (Nov. 1, 2007).

10. *Fox*, 489 F.3d at 462-66. The government has sought *certiorari* in the case. See John Eggerton, *Fox Gets Extension From Supremes On Profane Response*, BROADCASTING & CABLE ON-LINE, Dec. 20, 2007, <http://www.broadcastingcable.com/article/CA6514716.html>; John Eggerton, *U.S. Seeks Profanity Review*, BROADCASTING & CABLE ON-LINE, Nov. 5, 2007, <http://www.broadcastingcable.com/article/CA6497191.html>.

11. *CBS Corp. v. FCC*, No. 06-3575 (3d Cir. filed Dec. 22, 2006); see also John Eggerton, *Janet Jackson Case Gets Day in Court*, BROADCASTING & CABLE ON-LINE, Sept. 11, 2007, <http://www.broadcastingcable.com/CA6477436.html>.

12. John Eggerton, *V for Vendetta*, BROADCASTING & CABLE ON-LINE, Dec. 12, 2007, <http://www.broadcastingcable.com/article/CA6510927.html>; see also John Eggerton, *NCTA's McSparrow: Martin FCC Is Broken*, BROADCASTING & CABLE ON-LINE, Nov. 14, 2007, <http://www.broadcastingcable.com/article/CA6501258.html>.

13. John Eggerton, *FCC Under Investigation by House Subcommittee*, BROADCASTING & CABLE ON-LINE, Dec. 3, 2007, <http://www.broadcastingcable.com/article/CA6509174.html>; John Eggerton, *Republican Sens.: FCC May Be Overstepping Authority*, BROADCASTING & CABLE ON-LINE, Nov. 26, 2007, <http://www.broadcastingcable.com/article/CA6505171.html>; Jim Puzanghera, *FCC Target of House Panel's Investigation*, L.A. Times, Dec. 4, 2007, <http://www.latimes.com/business/la-fi-fcc4dec04,1,4417226.story>.

Recently, the Commission's governance processes have also been the subject of

is now regulatorily crippled and that indecency regulation will soon become a relic.

This Response argues otherwise. Congress passed legislation last year monumentally increasing the Commission's penalty authority in broadcast indecency cases.<sup>14</sup> The fifty-two notices of apparent liability issued recently for violations of indecency rules—including a \$1.4 million fine against ABC for nudity in a 2003 episode of *NYPD Blue*<sup>15</sup>—belie predictions of Commission timorousness in deploying this enhanced regulatory power. Following the Second Circuit opinion in *Fox*, bills have been introduced in Congress to overrule the decision legislatively by establishing statutory authority for the Commission to prohibit even fleeting broadcasts of indecency.<sup>16</sup> While the future of these bills is itself in doubt,<sup>17</sup> the enhanced indecency regime may have already borne fruit in the reduction of indecency complaints in the last quarter.<sup>18</sup> The U.S. Supreme Court is unlikely to grant the government's petition for *certiorari* in the

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congressional investigation. *See, e.g.*, John Eggerton, *Martin: FCC Doesn't Need Major Reform*, BROADCASTING & CABLE ON-LINE, Jan. 15, 2008; John Eggerton, *House Launches FCC Investigation; Warns Against Destroying Documents*, BROADCASTING & CABLE ON-LINE, Jan. 8, 2008, <http://www.broadcastingcable.com/article/CA6518202.html>; John Eggerton, *House Judiciary Chairman Asks Tough Questions of FCC Chairman*, BROADCASTING & CABLE ON-LINE, Nov. 26, 2007, <http://www.broadcastingcable.com/article/CA6505265.html>.

14. Broadcast Decency Enforcement Act, Pub. L. 109-235, § 2, 120 Stat. 491 (2006) (amending § 503(b) of the Communications Act to authorize significantly increased forfeiture penalties—\$325,000 per violation—and indicating Congressional concern about indecent broadcast programming).

15. John Eggerton, *FCC Proposes \$1.4M Fine Against ABC Stations for NYPD Blue*, BROADCASTING & CABLE ON-LINE, Jan. 25, 2008, <http://www.broadcastingcable.com/CA6525921.html>; John Eggerton, *Gone But Not Forgotten*, BROADCASTING & CABLE ON-LINE, Feb. 4, 2008, <http://www.broadcastingcable.com/article/CA6528305.html>.

16. Protecting Children From Indecent Programming Act, S. 1780, 110th Cong., 1st Sess., July 12, 2007; Protecting Children From Indecent Programming Act, H.R. 3559, 110th Cong., 1st Sess., Sept. 18, 2007. *See also* Family and Consumer Choice Act of 2007, H.R. 2738, 110th Cong., 1st Sess., June 15, 2007; Family Choice Act of 2006, H.R. 5919, 109th Cong., June 27, 2006.

17. John Eggerton, *Fleeting-Profanities Bill Unlikely to See Senate Floor Vote*, BROADCASTING & CABLE ON-LINE, Dec. 14, 2007, <http://www.broadcastingcable.com/article/CA6513036.html>; John Eggerton, *Stevens Urges Senate to Pass Indecency Bill*, BROADCASTING & CABLE ON-LINE, Dec. 6, 2007, <http://www.broadcastingcable.com/article/CA6510097.html>; John Eggerton, *FCC Chairman Pushes Cable Choice Bill*, BROADCASTING & CABLE ON-LINE, June 14, 2007, <http://www.broadcastingcable.com/article/CA6452175.html>.

18. John Eggerton, *FCC: Obscenity and Indecency Complaints Way Down*, BROADCASTING & CABLE ON-LINE, Jan. 17, 2008, <http://www.broadcastingcable.com/article/CA6523389.html>; FCC News Release, *Quarterly Reports on Informal Consumer Inquiries and Complaints Release*, Jan. 14, 2008, [www.fcc.gov](http://www.fcc.gov). *See also* n. 66, *infra*.

*Fox* case because of the narrow ground of the Second Circuit's decision.<sup>19</sup> If it does not, the FCC will face the choice of abandoning its "fleeting expletives" rule or justifying it with more persuasive arguments than those rejected by the *Fox* court. It is not as clear as some would suppose that the agency would be unable to do so. Finally, even if the fleeting indecency and profanity aspects of the recent resurgence in FCC regulation are eliminated, it does not follow that the FCC's enhanced attention to its traditional §1464 authority would be affected.

Thus, the regulatory map implicitly provided in Chairman Martin's 2005 remarks on indecency regulation<sup>20</sup> is likely to remain quite relevant today. He chairs a Commission unanimously committed to enhanced and disciplined regulation of indecency and authorized to impose extraordinarily onerous fines to punish broadcast indecency.<sup>21</sup> Whatever happens with respect to nonrepetitive uses of single expletives, circumstances indicate that the FCC will not be deterred from acting in the broader area in the future. Prodded by interest groups such as the Parents Television Council,<sup>22</sup> the Commission is likely to keep indecency on its regulatory agenda.

## II. BROADCAST REGULATION—THE ILLUSION OF THE FCC AS SIMPLY ENFORCING LONG-STANDING RULES

Chairman Martin makes no reference in his remarks to the changes in the Commission's approach to broadcast indecency since 2003. Completely avoiding the specifics of indecency regulation, the Chairman's comments emphasize the need for FCC intervention by citing to empirical data that assertedly reflect consumer concern about an increase in indecency on television.

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19. John Eggerton, *Deadlock on Fleeting Indecency*, BROADCASTING & CABLE ON-LINE, Jan. 28, 2008, <http://www.broadcastingcable.com/article/CA6525906.html> (recounting Fox and Media Access Project's views that "there is little chance of the Court hearing the FCC's appeal."). The broadcast networks have filed a petition with the Supreme Court opposing the grant of certiorari. See John Eggerton, *NBC Joins Other Big Four Networks in Supreme Court Filing vs. FCC*, BROADCASTING & CABLE ON-LINE, Feb. 4, 2008, <http://www.broadcastingcable.com/article/CA6528433.html>.

20. Kevin Martin et al, *supra* note 1.

21. This is not a partisan issue for the agency. Even though Commissioner Copps argues for greater stringency in enforcement (*see, e.g., Infinity Broadcasting Operations*, 18 F.C.C.R. at 19971 (2003) (separate statement of Comm'r Michael J. Copps, dissenting)) and Commissioner Jonathan Adelstein expresses concern that the agency may have taken its enforcement too far in certain cases (*see Omnibus Order*, 21 F.C.C.R. at 2726 (Comm'r Jonathan S. Adelstein, concurring in part, dissenting in part); *Super Bowl XXXVIII Half Time Show*, 21 F.C.C.R. at 2784)), all the Commissioners appear to support increased indecency enforcement generally.

22. *See, e.g.,* Parents Television Council, Broadcast Indecency Campaign, <http://www.parentstv.org/PTC/fcc/main.asp> (last visited Feb. 27, 2008).

Yet a close analysis of the Commission's actions since 2003 in the indecency arena shows significant procedural and substantive changes.<sup>23</sup> The most obvious developments are observable at the remedy end. The agency has been granted increased authority to impose large fines (called "forfeitures") for indecency broadcast outside the nighttime safe harbor period.<sup>24</sup> Along with high fines, the Commission has also entered into large-figure settlements with major broadcast groups<sup>25</sup>—settlements whose provisions increase the likelihood that broadcasters will censor their programming more than the government might be able to and which simultaneously avoid judicial assessment of the Commission's indecency approach.<sup>26</sup>

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23. For a fuller description of such changes, see Lili Levi, FIRST REPORT: THE FCC'S REGULATION OF INDECENCY (August 6, 2007), <http://www.firstamendmentcenter.com/PDF/FirstReport.Indecency.Levi.pdf>.

24. 47 U.S.C. § 503 (2006). Although the increase in forfeiture authority was enacted after Chairman Martin's remarks, the Commission had begun seeking such authority previously and had simultaneously enhanced the fines it imposed even under its prior forfeiture authority. See Levi, *supra* note 23, at 26.

25. For example, the agency settled with Viacom for a "voluntary contribution" of \$3,500,000 to the United States Treasury. In re Viacom, Inc., et al., 19 F.C.C.R. 23100 (2004) (attaching and incorporating Consent Decree), *aff'd*. In re Viacom, Inc., Order on Reconsideration, 21 F.C.C.R. 12223 (2006). The settlement with Clear Channel was for \$1,750,000. Clear Channel Communications Inc. Order, 19 F.C.C.R. 10,880 (2004)(attaching Consent Decree). See also In re Emmis Communications Corp., Order, 19 F.C.C.R. 16003 (2004), Consent Decree, 19 F.C.C.R. at 16007, 16008 ¶¶ 11, 13 (2004), *aff'd*, 21 F.C.C.R.12219 (2004) (noting \$300,000 payment and rejecting challenges to Emmis consent decree). Recently, the Commission entered into a settlement with CBS regarding a CBS station's airing of an episode of Without A Trace that had already been found indecent. Consent Decree, In re CBS Corporation KUTV Holdings, Inc., 22 F.C.C. Rcd. 20,2035, Nov. 21, 2007 (noting CBS's "voluntary contribution" of \$300,000). See also John Eggerton, *FCC-CBS Agreement on FUTV Irks PTC*, BROADCASTING & CABLE ON-LINE, Nov. 26, 2007, <http://www.broadcastingcable.com/article/CA6505234.html>; John Eggerton, *CBS Pays \$300K to Settle KUTV License Challenge*, BROADCASTING & CABLE ON-LINE, Nov. 23, 2007, <http://www.broadcastingcable.com/article/CA6504781.html>

26. The settlements require very specific employment-related decisions by the broadcasters. In the Clear Channel consent decree, for example, the company agreed to implement a company-wide indecency compliance plan including automatic suspension, remedial training, and significant time delays for programs upon the employees' return. See *Clear Channel Order*, 19 F.C.C.R. at 10886. See also *Emmis Order*, *supra* note 25, 19 F.C.C.R. at 16007. See also Michael Botein & Dariusz Adamski, *The FCC's New Indecency Enforcement Policy and Its European Counterparts: A Cautionary Tale*, 15 MEDIA L. & POL'Y 7, 24-30 (2005); Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 B.Y.U. L. REV. 1463-64, n. 5 (2005); Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1739, 1747 (2007); Staff, Editorial, *Pay for Play*, BROADCASTING & CABLE ON-LINE, Nov. 29, 2004, <http://www.broadcastingcable.com/article/CA483385.html>; Staff, Editorial, *The Silent Media, Committed to the First Amendment*, BROADCASTING & CABLE ON-LINE, Apr. 12, 2004, <http://www.broadcastingcable.com/article/CA409709.html>.

Less noticeably than the changes in remedy, the Commission has also made important changes in its enforcement process. Reduced requirements for the complaint process now greatly ease complainants' burdens.<sup>27</sup> These changes, when joined with spotty licensee record-keeping and FCC delay, have effectively shifted the burden of proof from complainants to licensees in indecency enforcement and have made it difficult for licensees to avoid liability.<sup>28</sup>

There have been substantive changes as well. Most notable is the FCC's decision to enforce the statutory prohibition against broadcasting "profane" as well as "indecent" material.<sup>29</sup> Additional substantive changes include the apparent development of some categories of virtually *per se* indecency<sup>30</sup>, the diminution in significance of the Commission's former

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27. Indecency enforcement has always been a complaint-driven process. In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 F.C.C.R. 7999, 8015 (2001) [hereinafter *2001 Policy Statement*]. Yet the Commission's decision that it can waive its prior practice of requiring supporting documentation for indecency complaints eliminates a significant hurdle for complainants. See Botein & Adamski, *supra* note 26, at 24-30. Since the early days of the indecency rules, the FCC has required complainants to provide the Commission with full or partial tapes of the offending program, the date and time of the broadcast, and the call sign of the station involved. *2001 Policy Statement*, 16 F.C.C.R. at 8015 and ¶ 24. Recently, however, the agency has proceeded on a number of indecency complaints despite the complainants' inability to provide such tapes or transcripts (*see, e.g.*, In re Entercom Portland License, LLC, 18 F.C.C.R. 25484, 25487 n. 21 (2003)), and has rejected the notion that such evidence is a mandatory requirement. In re Infinity Broadcasting Corporation of Los Angeles (KROQ-FM), 16 F.C.C.R. 6867, 6870 (2001).

28. Stations' ability to confirm or deny complainants' assertions depends on the existence of documentation and the recollections of station personnel. Yet broadcasters are no longer required to keep certain programming records that might otherwise help with indecency challenges. In re Retention by Broadcasters of Program Recordings, 19 F.C.C.R. 12626, 12628 n. 9 (2004) (citation omitted). See also Bill McConnell, *New Rules for Risque Business*, BROADCASTING & CABLE ON-LINE, March 4, 2002 at 5, <http://www.broadcastingcable.com/article/CA199409.html>. Indeed, broadcasters have often fired the very personnel whose recollections would become relevant in subsequent FCC indecency proceedings. Moreover, FCC delays increase the likelihood of staff changes and faded recollections. One of the consistent problems plaguing FCC indecency enforcement since the late 1980s is delay. *Action for Children's Television v. F.C.C. (ACT IV)*, 59 F.3d 1249, 1254-56 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996). The appeals process is also lengthy. See John Eggerton, *Facing Indecency Fines? Give Crigler A Call*, BROADCASTING & CABLE ON-LINE, Feb. 16, 2004, at 13, <http://www.broadcastingcable.com/article/CA381573.html> (noting that rescission of fine for indecency against KBOO(FM) Portland, Oregon, for airing Sarah Jones rap song *Your Revolution* took two years).

29. See *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664 (2006), *vacated in part*, In re *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13299 (2006), *vacated and remanded*, *Fox v. FCC*, 489 F.3d 444 (2d Cir. 2007).

30. An overview of the Commission's recent indecency decisions suggests that the following factors have developed presumptive weight: certain expletives, nudity, sex involving children/teenagers, whether the program in question is marketed for viewing by families with children and is the kind of show in which indecency would be unexpected, and

“fleeting use” exception, an apparent reduction in the mitigative effect of programming merit, increased skepticism toward claims of a “news reporting” exception or reliance on innuendo, refusal to excuse live programming and lack of broadcaster control for accidental indecency, use of full program context for inculcation rather than exculpation as in the past, and reliance on broadcasters’ failure to make full use of technology to block indecency as evidence of willful violation.<sup>31</sup>

In sum, looking at the post-2003 indecency policy overall permits us to see a veritable mosaic of changes—some large and others small—that as a whole pose significantly greater burdens on broadcasters than ever before in the history of broadcast indecency regulation. Yet none of these developments is even adverted to in Chairman Martin’s remarks. Even more startlingly, the Chairman consistently refers to the regulation of “inappropriate” speech rather than speaking of indecency.<sup>32</sup> “Inappropriate” speech potentially covers far more expressive ground than mere indecency.

Instead of addressing the specifics of the Commission’s enhanced indecency regime, the Chairman purports to ground regulation on moderation. He characterizes government intervention as a “second best” solution avoidable by voluntary efforts on the parts of both parents and broadcasters.<sup>33</sup> What is this rhetoric of moderation designed to achieve, especially against a backdrop of aggressive indecency enforcement? Certainly, its effect is to distract from questions about whether or not this particular set of strengthened rules is appropriate, moderate, or commensurate. It also means that the Chairman’s calls for self-regulation on the part of broadcasters are made against a regulatory backdrop whose coercive effects may be insufficiently transparent.

It is true that the recent Second Circuit decision in *Fox v. FCC* striking down the Commission’s new “fleeting expletives” policy puts into question the continued viability of the agency’s presumption that use of the expletives “fuck” and “shit” would be indecent and profane.<sup>34</sup> Yet it is unlikely that the entire FCC indecency regulatory regime is in jeopardy, given prior precedent.<sup>35</sup> This means that much of what has been described

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whether the program used sexual expression as a way to solicit audience participation.

31. See generally Levi, *supra* note 23.

32. Martin, et al., *supra* note 1, at 2.

33. *Id.* at 3.

34. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 461 (2d Cir.2007), *petition for certiorari filed*, 76 U.S.L.W. 3255 (Nov. 1, 2007).

35. Admittedly, some of the language in the *Fox* majority’s dicta regarding the constitutionality of the FCC’s fleeting expletives policy change could be read more expansively. This is one of the government’s major points in its petition for certiorari. *Petition for a Writ of Certiorari, Fox v. FCC*, 2007 WL 3231567 at \*28-30 (Nov. 1, 2007).

above as the mosaic of enhanced indecency enforcement will continue to guide Commission behavior without being subjected to public debate. Chairman Martin's remarks highlight that problem.

This has a predictably chilling effect on broadcasters. Accounts of broadcaster self-censorship abound, despite Chairman Martin's claims of increased indecency on television.<sup>36</sup> The most subtle chilling effect occurs not when programs are cancelled, but when they are subjected to overzealous editing by low-level station technicians deploying tape delay devices.<sup>37</sup> These effects are likely to extend to political as well as sexual or profane speech, raising fundamental questions about government interference with core First Amendment expression.<sup>38</sup> The FCC's actions have also shifted the locus of power between networks and affiliates, potentially allowing for more local censorship.<sup>39</sup> These effects are

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36. For a compilation of reported instances of self-censorship, see, e.g., Levi, *supra* note 23, at 44. See also Frank Ahrens, *Six-figure Fines for Four-Letter Words Worry Broadcasters*, Wash. Post, July 11, 2006 at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/10/AR2006071001245.html>.

37. See Jacques Steinberg, *Eye on the F.C.C., TV and Radio Watch Words*, N.Y. TIMES, May 10, 2004, at A1 (describing the "dump" button and a program director's instructions to technicians not to resist the urge to use it: "You will never be criticized for dumping something that may not have needed to be dumped. But God forbid we miss one and let it slip up.") When those decisions are made by technicians following broadly-phrased directions from management and aware that high-level talent has been fired for indecency, logic compels the conclusion that they will err on the side of caution. See generally Jonathan Rintels, *Big Chill: How the FCC's Indecency Decisions Stifle Free Expression, Threaten Quality Television and Harm America's Children*, Appendix to Brief for Intervenor Center for Creative Voices in Media at A-345, *Fox Television Stations, Inc. v. FCC*, No. 06-1760AG (2d Cir. Nov. 22, 2006) (describing chilling effect experienced by specific members of the organization).

38. Recently, for example, Fox television personnel attempting to comply with the indecency rules cut away from a political statement made by an actress receiving an award at the Emmys. Edward Wyatt, *Fox Explains Censorship of Actors at Emmys*, N.Y. Times, Sept. 18, 2007, <http://www.nytimes.com/2007/09/18/arts/television/18emmy.html>.

Former FCC Chairman Reed Hundt has argued that the FCC's new indecency regime can be a powerful tool to intimidate broadcasters from taking positions critical of government: the power to regulate indecency "acts, many believe, as an implicit threat designed to discourage the news side of the electronic media to broadcast anything, even if true, that would undercut the administration's efforts to obtain public opinion in favor of their political purposes." Reed Hundt, *Regulating Indecency: The Federal Communications Commission's Threat to the First Amendment*, 2005 DUKE L. & TECH. REV. 13 (2005) ("[t]he federal government has, wittingly or not, obtained and exercised sanctions that can be used to encourage cooperation between private means of publishing information and the political purposes of government."), <http://www.law.duke.edu/journals/dltr/articles/2005dltr0013.html>. Broadcasters concerned that the Commission could abuse its power by enforcing its indecency rules to deter news departments from fulfilling their roles as government watchdogs would likely censor themselves on both fronts.

39. Chairman Martin's remarks in 2005 make this clear: "I think they [the Commission] need to clarify . . . that the broadcast affiliates have the right to reject inappropriate programming that the networks are providing[.]" Kevin Martin et al, *supra* note 1, at 3. See also Levi, *supra* note 23, at 46.

significant. Chairman Martin's contention that the Commission is only exercising its responsibility to enforce existing indecency rules allows him to avoid addressing the costs of the agency's enhanced indecency regime.

### III. INDECENCY ON CABLE—A PROPOSED END-RUN AROUND REGULATORY LIMITS

Another noteworthy aspect of the Chairman's comments concerns indecency on cable. Since the beginning of his tenure at the helm, Chairman Martin has called for an à la carte approach to the provision of cable to consumers.<sup>40</sup> This position is an implicit admission that regulating indecency on broadcast stations alone is insufficient to address the overall issue adequately. After all, much indecency is aired on cable rather than over-the-air television and an effective solution must include (if not focus on) cable. At the same time, Chairman Martin's solution—centering on cable's method of distribution rather than regulating cable indecency directly—appears to come from an implicit recognition that direct regulation of cable indecency would face significant if not insuperable constitutional hurdles.<sup>41</sup> The fundamental problem is that Chairman Martin's attempt to deflect stringent constitutional scrutiny by couching his cable indecency measure as simply a pricing regulation—even if doctrinally successful—may entail potentially major costs for the diversity of cable speech overall.

Chairman Martin has advised cable operators of his view that government à la carte mandates would easily survive judicial scrutiny:<sup>42</sup>

In the first place, it is far from clear that any level of First Amendment scrutiny would be applied to a requirement to unbundle, for payment purposes, disparate video signals that comprise a programming package. While the Constitution protects the right to speak, it certainly

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40. See, e.g., Remarks of FCC Chairman Kevin J. Martin, National Cable & Telecommunications Association, Las Vegas, NV, May 7, 2007 (as prepared for delivery), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-272897A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-272897A1.pdf); John M. Higgins & P.J. Bednarski, *Congress and the FCC Turn Up the Heat*, BROADCASTING & CABLE ON-LINE, Dec. 5, 2005, <http://www.broadcastingcable.com/article/CA6288804.html>. The FCC issued a 2006 report supporting the viability of à la carte pricing and detailing the flaws in the previous report. Further Report on the Packaging and Sale of Video Programming Servs. to the Public, No. 04-207, 2006 WL 305873 (Feb. 9, 2006).

41. See, e.g., Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio*, 30 S. ILL. U.L.J. 243, 246-47 (2006); Christopher Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003).

42. See Remarks of FCC Chairman Kevin J. Martin, National Cable & Telecommunications Association, Las Vegas, NV May 7, 2007 (as prepared for delivery), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-272897A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-272897A1.pdf) (“I do not believe that requiring cable and satellite television providers to offer programming in a more à la carte manner raises any substantial difficulty under the First Amendment.”).

doesn't protect a right to get paid for that speech. Even if, however, the First Amendment were thought to apply to an a la carte regime, such a regime does not on its face favor or disfavor particular types of speech or impose a burden on speech based on a program's ideas or views. All of the versions of a la carte would keep government out of regulating content directly while enabling consumers, including parents, to receive the programming they want and believe to be appropriate for their families.<sup>43</sup>

At a minimum, however, one might reprise the argument made in response to the Chairman by another participant in the 2005 colloquy: that a position supporting consumer ability to exclude offensive cable channels does not necessarily entail, as a matter of logic, a reduction of charges for the available tier as a whole.<sup>44</sup> Moreover, the economic viability of retail à la carte is a contested question.<sup>45</sup>

Apart from its viability as a policy matter, Chairman Martin's à la carte proposals could be criticized as transparent and impermissible attempts to end-run appropriate constitutional review. It is true that FCC regulation has sometimes in the past sought to advance content-based goals by deploying content-neutral structural regulations as proxies and that such regulations have been subjected to less searching constitutional scrutiny than if they were directly content-based regulations.<sup>46</sup> But the use of à la

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43. *Id.*

44. If a consumer purchases a Cadillac but does not wish to use the air conditioning, s/he is able to turn it off, but the fact that s/he may not plan on using the air conditioning should not justify a government requirement to make the car available in a model with a no air conditioning if that is not what would be economical for the manufacturer. Martin et al., *supra* note 1, at 28 (argument of Dr. Roger Pilon, The Cato Institute).

45. See, e.g., Thomas W. Hazlett, *Shedding Tiers for A la Carte? An Economic Analysis of Cable TV Pricing*, 5 J. TELECOMM. & HIGH TECH. L. 253 (2006); John Eggerton, *Cable: Fit to Be Untied?*, BROADCASTING & CABLE ON-LINE, Jan. 14, 2008, <http://www.broadcastingcable.com/article/CA6522159.html>; John Eggerton, *Study: A la Carte Won't Work*, BROADCASTING & CABLE ON-LINE, June 4, 2007, <http://www.broadcastingcable.com/article/CA6448607.html>; John Eggerton, *FCC Chairman Pushes Cable Choice Bill*, BROADCASTING & CABLE ON-LINE, June 14, 2007, <http://www.broadcastingcable.com/article/CA6452175.html>; Michael Grebb, *Cable a la Carte Still Half-Baked*, Wired, July 14, 2004, <http://www.wired.com/print/politics/law/news/2004/07/64203>. An FCC study commissioned under Chairman Powell concluded that à la carte would not be economically viable, but a staff study commissioned by Chairman Martin criticized the prior study and pointed out the benefits of unbundling. See John Eggerton, *Peer Review Supports Pro-a-la-Carte FCC Study*, BROADCASTING & CABLE ON-LINE, Sept. 4, 2007, <http://www.broadcastingcable.com/article/CA6475146.html>. Chairman Martin has consistently claimed that à la carte would not reduce diversity in available cable programming. See, e.g., John Eggerton, *Martin: A la Carte Benefits Diversity*, BROADCASTING & CABLE ON-LINE, Aug. 22, 2007, <http://www.broadcastingcable.com/article/CA6471117.html>. The Parents Television Council has attempted to demonstrate that cable bills would be lowered if consumers could choose their desired channels. John Eggerton, *PTC Launches Cable a la Carte Calculator*, BROADCASTING & CABLE ON-LINE, Sept. 25, 2007, <http://www.broadcastingcable.com/article/CA6482733.html>.

46. See, e.g., Christopher Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L.

carte as an indirect way to control the production of indecency is distinguishable in important respects from previous instances of “architectural censorship” by the Commission.<sup>47</sup> Moreover, some scholars have argued that content regulation by proxy is constitutionally troubling in general.<sup>48</sup>

Contrary to the Chairman’s assurance, an à la carte model is designed to enlist the government’s help in suppressing one type of speech. Many claim that niche channels are best sustainable by being bundled with other more popular channels.<sup>49</sup> Without such bundling, it is argued, they are likely to disappear. If that is true, then the effect of à la carte might well be to assist those with the most conservative views to suppress what they consider indecent for the rest of the viewing audience. Since consumers can currently opt out of channels they do not wish to receive even in a bundled system, the only additional benefit of an à la carte choice model would be supposedly to reduce the cost of cable. Any such possible monetary savings for consumers, however, would be counterbalanced by the significant social cost of making programming unavailable even for those who would wish to receive it.

Moreover, substitution of an à la carte model might well suppress not only arguably indecent programming, but niche programming of all sorts. Thus, if the effect of bundling is to enhance programming diversity, then business models such as à la carte cable would sacrifice diversity across a whole variety of areas on the single altar of decency.<sup>50</sup> This is akin to killing a gnat with a sledgehammer.

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REV. 669 (2005).

47. For example, the Commission’s traditional prohibitions on multiple ownership of broadcast stations were justified on the ground that independent ownership was likely to lead to diversity of viewpoints on the air. While the ultimate goal sought by this kind of structural regulation was robust and diverse expression—a content-related goal—reviewing courts’ assessments of the regulation as structural were arguably acceptable because no content-based skews could be predicted and the regulation was designed to result in an increase rather than a decrease in overall expression. The situation might be significantly different in the à la carte context if it is true, as cable operators contend, that à la carte will predictably reduce the availability of sexualized expression. Thus, while the structural regulations that have been characterized as “architectural censorship” were designed to open the speech market, the design of Chairman Martin’s à la carte initiative is arguably an indirect attempt to circumscribe available speech because it would be considered offensive by some part of the audience.

48. See, e.g., Yoo, *supra* note 46.

49. See John Eggerton, *Greenwald Tries to ‘Outfox’ Fox News with Video*, *Petition, BROADCASTING & CABLE ON-LINE*, Nov. 8, 2007, <http://www.broadcastingcable.com/article/CA6499102.html>.

50. John Eggerton, *Study: A la Carte Won’t Work*, *BROADCASTING & CABLE ON-LINE*, June 4, 2007, <http://www.broadcastingcable.com/article/CA6448607.html>; John Eggerton, *Jackson: Martin’s 70/70 Finding ‘Deeply Disturbing.’* *BROADCASTING & CABLE ON-LINE*,

Whether Chairman Martin's prediction about the constitutionality of mandated cable à la carte is in fact true or logically compelling is also less important than the effect it might well have on cable operators. There is evidence that some cable operators have responded to Chairman Martin's à la carte suggestions by experimenting with family tiers of programming.<sup>51</sup> As noted above, Chairman Martin has recently called for more general cable re-regulation on the ground that cable has reached the level of penetration that should trigger regulatory review under cable legislation.<sup>52</sup> Cable representatives characterize this initiative as one designed to serve "an overarching agenda to impose à la carte on cable."<sup>53</sup> The threat of re-regulation has been characterized as "regulatory blackmail."<sup>54</sup> Ultimately, what cable companies will do over the longer term is likely to depend both on the economics of different distribution models and on political considerations. Even though cable operators and economists argue that à la carte at the retail level of the consumer is not economically viable, there is some disagreement within the cable industry itself with regard to unbundling at the wholesale level.<sup>55</sup> Cable operators' responses will also be influenced by the credibility of the Commission on the Hill. Chairman Martin's recent attempt to re-regulate cable has triggered controversy.<sup>56</sup> The cable industry's characterization of this initiative as a tool to force "voluntary" adoption of à la carte distribution could promote increased legislative skepticism toward à la carte. However, if the data in fact

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Nov. 19, 2007, <http://www.broadcastingcable.com/article/CA6504165.html>; John Eggerton, *Civil-Rights Groups Slam Martin Over a la Carte*, BROADCASTING & CABLE ON-LINE, Aug. 22, 2007, <http://www.broadcastingcable.com/article/CA6470890.html>.

51. See, e.g., Associated Press, *Cable Industry to Offer More Family-Friendly Options*, available at <http://www.firstamendmentcenter.org/news.aspx?id=16182>.

52. See, e.g., John Eggerton, *Martin Says FCC Has More Power to Regulate Cable*, BROADCASTING & CABLE ON-LINE, Nov. 12, 2007, <http://www.broadcastingcable.com/article/CA6500063.html>.

53. John Eggerton, *Republican Sens.: FCC May Be Overstepping Authority*, BROADCASTING & CABLE ON-LINE, Nov. 26, 2007, <http://www.broadcastingcable.com/article/CA6505171.html>.

54. John Eggerton, *Martin: FCC Doesn't Need Major Reform*, BROADCASTING & CABLE ON-LINE, Jan. 15, 2008, <http://www.broadcastingcable.com/article/CA6522942.html>.

55. See, e.g., John Eggerton, *FCC's Copps Still Undecided on Mandatory Wholesale a la Carte*, BROADCASTING & CABLE ON-LINE, Jan. 29, 2008, <http://www.broadcastingcable.com/article/CA6526748.html>.

56. The data on which Chairman Martin based his November 2007 call for cable regulation were immediately challenged. John Eggerton, *Reaction Pours In Over FCC's 70/70 Retreat*, BROADCASTING & CABLE ON-LINE, Nov. 28, 2007, <http://www.broadcastingcable.com/article/CA6506147.html>; John Eggerton, *FCC Meeting: Data Do Not Establish 70/70 Finding*, BROADCASTING & CABLE ON-LINE, Nov. 27, 2007, <http://www.broadcastingcable.com/article/CA6505784.html>; John Eggerton, *Cable: Fit to Be Untied?*, BROADCASTING & CABLE ON-LINE, Jan. 14, 2008, <http://www.broadcastingcable.com/article/CA6522159.html>. See also Editorial, *Curiouser and Curiouser*, BROADCASTING & CABLE ON-LINE, Dec. 3, 2007, <http://www.broadcastingcable.com/article/CA6508809.html>.

ultimately support the proposition that cable has achieved a seventy percent subscription level, then the Commission will likely claim expanded authority to re-regulate cable.<sup>57</sup> The final factor adding uncertainty to this issue is that some cable subscribers have apparently commenced a class action lawsuit against major cable programmers and operators, claiming that their refusal to offer cable channels except as bundled into tiers violates the antitrust rules.<sup>58</sup>

Ultimately, if cable companies “voluntarily” revise their distribution model in response to Chairman Martin’s urging, the change will evade judicial review. Similarly, if the Commission subjects cable to mandatory à la carte and courts accept the Chairman’s First Amendment argument, then significant impoverishment in the availability to the public of all sorts of other niche programming might follow. Reduction of indecency would then have been accomplished at the expense of other types of programming not considered socially harmful. On the other hand, if cable companies are successful in their attempts to resist either “voluntary” or mandatory à la carte, then indecency regulation will again be limited to the broadcast context. In a world in which distinctions between cable and broadcast are in many ways chimerical and in which cable has experimented with edgier programming, continuing stringent enforcement of indecency rules against broadcast stations would simply disadvantage broadcasters vis-à-vis their regulatorily exempt competitors without significantly reducing the availability of sexual content on television. This Response does not claim that à la carte will necessarily lead to the consequences detailed above. It simply argues that the Chairman’s failure to address the possibility that à la carte distribution could lead to either overbroad or underinclusive speech regulation is a significant omission.

#### IV. EMPIRICAL CLAIMS AND CONSUMER-RESPONSIVENESS

The final point about Chairman Martin’s remarks at the 2005 debate is that his focus on consumer-responsiveness and his reliance on empirical data to justify Commission action suggest an enhanced scope for regulatory intervention and increased agency discretion.

Chairman Martin’s remarks characterize the Commission simply as responding to broadcaster behavior and public outrage. He cites to the significant increase in consumer complaints about indecency and to studies claiming to prove an across-the-board increase in sexual content both on

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57. See John Eggerton, *Cable: Fit to Be Untied?*, BROADCASTING & CABLE ON-LINE, Jan. 14, 2008, <http://www.broadcastingcable.com/article/CA6522159.html>.

58. John Eggerton, *Viewers File Suit Over Bundling*, BROADCASTING & CABLE ON-LINE, Sept. 24, 2007, <http://www.broadcastingcable.com/article/CA6480856.html>.

television and on radio.<sup>59</sup> This is the story of an FCC drafted by consumers to regulate in response to broadcasters' own decisions to air increasingly offensive programming. By clothing itself in purportedly objective evidence of need, the Commission thus appeals to socially conservative viewers while subjecting liberal critiques to an empirical litmus test.

Moreover, Chairman Martin's emphasis on consumer-responsiveness may well contain the seeds of an argument in support of regulation even in the face of claims that the agency has not demonstrated the harm of broadcast indecency to children. There are those who think that the current Supreme Court would be likely to require more direct evidence of harm to children in order to justify indecency regulation grounded on the protection of children. Query whether Chairman Martin's consumer-responsiveness rationale, implicitly grounded on the pervasiveness of the electronic media, is intended to generate an evidence-based alternative to a child-protection rationale with weaker evidentiary support.

Specifically, the Chairman's emphasis on consumer-responsiveness suggests the possibility of a reframed pervasiveness rationale for regulating indecency. One way of reading the Chairman's position is that there is a market failure associated with the now-pervasive electronic media. To the extent that the market is providing the indecent material that some of the public desires, the advertising-supported nature of broadcast television will lead to an over-weighting of the programming desires of certain viewer demographics. Other segments of the public will therefore be subjected to negative externalities. Thus, Commission action in response to the concerns of those under-represented market participants is arguably akin to structural regulation to correct market failure.

However, both consumer responsiveness arguments and evidence-based regulatory justifications of these kinds are problematic. In prior indecency analyses, the number of consumer complaints has not figured centrally as the trigger for Commission action. Chairman Martin's reliance on complaints as justifying FCC action is in some tension with the Commission's long-articulated substantive position that it does not rely on

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59. Kevin Martin et al, *Expansion of Indecency Regulation*, 60 FED. COMM. L.J. 1, 4 (2007) (citing to Kaiser Family Foundation and Pew Research Center reports and Time magazine survey.) See also Brief for Amicus Curiae Parents Television Council at 10, Fox Television Stations Inc. v. FCC, No. 06-1706 (2d Cir. Dec. 12, 2006), available at <http://www.parentstv.org/PTC/fcc/images/PA-38-2ndCirAmicus.Brief.pdf>; Alessandra Stanley, *The TV Watch: It's a Fact of Life: Prime-Time Shows Are Getting Sexier*, N.Y. TIMES, Feb. 5, 2003, at E1, available at <http://query.nytimes.com/gst/fullpage.html?res=9F00E0DD1E38F936A35751C0A9659C8B63> (describing increasing explicitness of television programming and study supporting that conclusion).

audience reaction data in its assessment of whether a sexual depiction is patently offensive.

Moreover, Chairman Martin's empirical claims are also subject to critique on their own grounds. For example, Chairman Martin nowhere addresses the fact that virtually all of the indecency complaints since 2003 have been instigated by certain private interest groups such as the Parents Television Council ("PTC").<sup>60</sup> He ignores arguments that would challenge the appropriateness of the FCC initiating its public-regarding regulations at the behest of a particular interest group with a particular agenda and an arguably ideologically homogeneous membership base.<sup>61</sup> In addition, the meaning attributable to the increase in indecency complaints is more contested than Chairman Martin's remarks would suggest. Claims have been made, for example, that the apparent increase in the number of indecency complaints before the Commission after 2003 is in part due to changes in the way in which the agency counted complaints received from members of one organization.<sup>62</sup> This could give a misleading impression

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60. As noted above, virtually all the complaints received by the Commission in 2003 were generated by the Parents Television Council. Keith Brown & Adam Candeb, *The Law and Economics of Wardrobe Malfunction*, 2005 B.Y.U. L. REV. 1463, 1464-65 & n. 8 (2005) (citing to an FCC estimate obtained by Mediaweek attributing 99.9 percent of indecency complaints in 2003 to the PTC). See also Clay Calvert, *Bono, The Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and its New Path on Profanity*, 28 SEATTLE U. L. REV. 61, 70-88 (2004); Michael J. Cohen, *Have You No Sense of Decency? An Examination of the Effects of Traditional Values and Family-Oriented Organizations on Twenty-First Century Broadcast Indecency Standards*, 30 SETON HALL LEGIS. J. 113, 129-34 (2005).

The PTC has been continuing its vigilance regarding television indecency. Recently, the group focused on an interviewee's use of an expletive (for which she immediately apologized) on a morning news program. John Eggerton, *PTC Complains to FCC About Keaton's GMA F-Bomb*, BROADCASTING & CABLE ON-LINE, Jan. 16, 2008, <http://www.broadcastingcable.com/article/CA6523060.html>; John Eggerton, *What Happens in NBC's Las Vegas Stays on PTC's Agenda*, BROADCASTING & CABLE ON-LINE, Dec. 14, 2007, <http://www.broadcastingcable.com/article/CA6512971.html>.

61. For articles making similar arguments, see, e.g., Calvert, *Bono, The Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and its New Path on Profanity*, 28 SEATTLE U. L. REV. 61, 70-88 (2004); Michael J. Cohen, *Have You No Sense of Decency? An Examination of the Effects of Traditional Values and Family-Oriented Organizations on Twenty-First Century Broadcast Indecency Standards*, 30 SETON HALL LEGIS. J. 113, 129-34 (2005).

62. See, e.g., Michael Botein & Dariusz Adamski, *The FCC's New Indecency Enforcement Policy and Its European Counterparts: A Cautionary Tale*, 15 MEDIA L. & POL'Y 7, 17-18 (2005); John Eggerton, *ACLU Rep Calls Smut Actions "Ridiculous,"* BROADCASTING & CABLE ON-LINE, March 30, 2006, <http://www.broadcastingcable.com/article/CA6320491.html>; Frank Rich, *The Great Indecency Hoax*, N.Y. TIMES, Nov. 28, 2004, at 1; Staff, *PTC Drives Spike in Smut Grips*, BROADCASTING & CABLE ON-LINE, Nov. 14, 2005, at 12, <http://www.broadcastingcable.com/article/CA6283286.html>. See also, ADAM THIERER, THE PROGRESS AND FREEDOM FOUNDATION EXAMINING THE FCC'S

about public concern about indecency. Moreover, the Commission's method of counting indecency complaints suffers from methodological problems that permit double counting.<sup>63</sup> Some of the complaints have also demonstrably been by people who did not see or hear the programming in question.<sup>64</sup> In addition, while some programs have generated very significant numbers of public complaints, others have not.<sup>65</sup> Finally, the Commission's current data suggest that there has been a significant downturn in the number of indecency complaints.<sup>66</sup> The difficulty of relying on complaint data to justify regulation, however, is that the agency does not then use a decline in such complaints to justify a reduction of regulation. Rather, the consumer-responsiveness argument is used in remarks like those of Chairman Martin as a one-way ratchet.<sup>67</sup>

As for the studies relied upon by Chairman Martin, the empirical data are arguably more complex than the Chairman's remarks suggest.<sup>68</sup>

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COMPLAINT-DRIVEN BROADCAST INDECENCY ENFORCEMENT PROCESS 5-9 (November 2005), available at <http://www.pff.org>. Reply Brief of Petitioners CBS Corporation, et al. at 15 & n.6, *CBS Corporation v. FCC*, No. 06-3575 (3d Cir. Jan. 8, 2007); Brief of Amicus Curiae Center for Democracy & Technology and Adam Thierer, Senior Fellow with the Progress & Freedom Foundation ("PFF") and the Director of PFF's Center for Digital Media Freedom at 3-8, *CBS Corporation v. FCC*, No. 06-3575 (3d Cir. Jan. 8, 2007). There have also been charges that the agency has double-counted some complaints. *Id.*

63. Brief of Amicus Curiae Center for Democracy & Technology and Adam Thierer, *supra* note 62, at 3-8.

64. *See, e.g.*, Opposition to Notice of Apparent Liability for Forfeiture, Complaints Against Various Licensees Regarding their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003, File No. EB-03-IH-0162 (Dec. 3, 2004), available at <http://www.fcc.gov/eb/broadcast/Plead.html>. *See also* Comments of the Center for Creative Voices in Media, Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005 at 33 (FCC Sept. 21, 2006), available at <http://www.fcc.gov/DA06-1739/ccvm.pdf>. *Cf. Omnibus Remand Order*, 21 F.C.C.R. at 13328-29 ¶ 75 (dismissing indecency finding against NYPD Blue because complaints not made by viewers residing in markets in which complained-of programs aired outside of safe harbor).

65. For example, Fox' *Married by America* generated less than 160 complaints. *Married by America*, 19 F.C.C.R. 20191 ¶ 2 (2004).

66. *See, e.g.*, John Eggerton, *FCC: Obscenity and Indecency Complaints Way Down*, BROADCASTING & CABLE ON-LINE, Jan. 17, 2008, <http://www.broadcastingcable.com/article/CA6523389.html>; FCC News Release, Quarterly Reports on Informal Consumer Inquiries and Complaints Release, Jan. 14, 2008, available at [www.fcc.gov](http://www.fcc.gov).

67. One might respond that the reduction in complaints is simply evidence that the strengthened regulatory regime is working as intended. However, a reduction in complaints—particularly over time—could also be attributable to a reduction in public concern about indecency on the air. The Chairman's reliance on complaint data provides no way to distinguish between the two situations.

68. For example, although the Kaiser Family Foundation 2005 study referred to by Chairman Martin does conclude that there has been an increase in sexual scenes on television, the study also notes that talk about sex is far more common than depictions of sexual behavior. Regulable indecency, however, is limited to patently offensive descriptions or depictions of sexual or excretory material. In addition, the Kaiser study finds that most

Recently, the Martin FCC has been criticized for the Chairman's assertedly selective and result-oriented reliance on studies.<sup>69</sup> While this Response does not claim either that this criticism is accurate or that it is relevant to the Chairman's use of data in indecency discussions, it is important to note that empirical data—particularly about contested social issues—need to be subjected to searching inquiry before they can properly be used as the justification for policy change. Even the Time magazine poll cited by the Chairman reflects significant public disagreement on the issue of sex in the media and indicates that less than a majority of Americans would call for banning sexual content on television.<sup>70</sup> A 2007 survey concludes that although “two-thirds [of parents] say they are *very* concerned about the amount of inappropriate content children in this country are exposed to, . . .

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depictions of sex on television have very low levels of explicitness. Despite its finding of increased sexual content on television, the study shows that portrayals of intercourse were down in 2004-2005 from a high in 2001-2002. Also, sixteen percent of talk about sex concerned sex-related crimes. As for sexual behaviors, the study found that nineteen percent of such behaviors consisted of “physical flirting” and fifty-three percent of “passionate kissing.” See generally Report, Sex on TV 4, <http://www.kff.org/entmedia/7398.cfm> (last visited Feb. 27, 2008). A subsequent study of public attitudes by the same organization indicates that although many survey respondents stated that they were very concerned about the availability of sexual content in the media, significant numbers also expressed confidence in their level of control over their children's television viewing.

As for the Pew Research Center study of viewers' attitudes toward indecency enforcement relied on by Chairman Martin, the study concludes that Americans are ambivalent about the government's role in curbing sex, violence and indecency in the entertainment media. Although the study finds that seventy-five percent of respondents favor tighter enforcement of government indecency rules during hours when children may be watching, and although sixty-eight percent believe that seeing so much sex and violence on TV gives children the wrong idea about what is acceptable in society, the study concludes that respondents “have doubts about the effectiveness of government action, and believe that public pressure in the form of complaints and boycotts is a better way of dealing with the problem.” The Pew Research Center for the People and the Press, *Support for Tougher Indecency Measures, But Worries About Government Intrusiveness*, April 19, 2005, available at <http://people-press.org/reports/display.php3?ReportID=241>. The study also finds a “significant generation gap, both in attitudes toward government regulation and in opinions about what constitutes offensive content.” *Id.*

69. See, e.g., John Eggerton, *NCTA's McSparrow: Martin FCC Is Broken*, BROADCASTING & CABLE ON-LINE, Nov. 14, 2007, <http://www.broadcastingcable.com/article/CA6501258.html>.

70. Tara Regan, *Americans: Too Much Sex and Violence on TV - But Government Over-reacted to Janet Jackson "Malfunction,"* SRBI Survey, available at [http://www.srbi.com/time\\_poll\\_tv.html](http://www.srbi.com/time_poll_tv.html) (linking to Time Magazine/SRBI – March 15-17, 2005 Survey questions and results). For example, forty-five percent of the survey respondents do not believe that there is too much “explicit sexual content, such as nudity” on broadcast television, fifty-six percent of the respondents were not “personally offended” by “cursing and sexual language” on television (as opposed to forty-two percent who were), and fifty-nine percent of the respondents were not “personally offended” by “explicit sexual content, such as nudity,” on television (as compared to thirty-eight percent who were so offended). *Id.* See also, *New FCC Indecency Amendments Fail*, July 13, 2007, <http://www.fmqb.com>.

the majority of parents see inappropriate media primarily as someone else's problem: only one in five (twenty percent) say their *own* children are seeing "a lot" of inappropriate content."<sup>71</sup> To the extent that the data show satisfaction by parents who use the V-chip,<sup>72</sup> increased use of blocking mechanisms could further limit the significance of Chairman Martin's 2005 data. Of course, the underlying question remains whether consumer complaint data reflecting significant ambivalence about a particular social issue should properly be used to advance policy developments favoring one position rather than the other.

Finally, questions beyond the scope of this Response can be raised about the constitutional viability of the turn to consumer-responsiveness as a rationale for direct content regulation. The Supreme Court has on numerous occasions characterized the protection of children as a compelling governmental interest. By contrast, the attempt to argue that the strictest level of scrutiny should not be applied to content-based speech regulation appears to require significant shifts in current First Amendment doctrine.

Ultimately, the conclusion to be drawn from the three observations in this Response is that Chairman Martin's remarks—albeit robed in references to moderation, to the difficulties of deciding indecency cases, and to the likelihood that government could well err if it regulates<sup>73</sup>—are designed not to justify regulatory modesty, but to reinforce Commission power, whether wielded directly or used to induce "voluntary" regulatory compliance. Despite the limbo in which the Second Circuit has placed the Commission's "fleeting expletive" policy, it would be foolish to ignore this FCC's commitment both to broadening its regulatory footprint in the indecency area and to increasing its power to influence the media landscape overall.

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71. See, e.g., Kaiser Family Foundation, *Parents, Children & Media: A Kaiser Family Foundation Survey* at 1 (June 2007), <http://www.kff.org/entmedia/7638.cfm>. Two-thirds of parents claim they closely monitor their children's media use. See also *id.* at 10; Calvert, *supra* note 8, at 10.

72. Kaiser Family Foundation, *supra* note 71, at 10.

73. See, e.g., Kevin Martin et al., *supra* note 1, at 2.