

Coming of Age in Minnesota

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Some years ago, I spoke at a conference on privacy, hosted by the now-defunct Freedom Forum Pacific Coast Center in Oakland, California.¹

My fellow panelists and I spent about two hours discussing the law and ethics governing news gathering and privacy rights before an audience that included journalists from a variety of news media. During my presentation, I mentioned that several states, including California, have laws that make it a crime to tape record a conversation without the consent of all parties.²

At the conclusion of my formal remarks, a broadcast journalist approached me. “What you had to say about the state law was really interesting,” he volunteered. “I had never heard of that before. I always figured, unless the FCC told me I couldn’t do something, it must be OK to do it.”

As an attorney, I was horrified by that reporter’s remark. Here he was, working as a journalist in California, seemingly oblivious to the fact that his state legislature had laws in place criminalizing conduct that the Federal Communications Commission (“FCC”) had no authority to interdict. Talk about a lawsuit, or a criminal prosecution, waiting to happen!³

But as I pondered the journalist’s remarks, I realized that there was more involved here than mere ignorance of the law. What I heard

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1. FREEDOM FORUM PACIFIC COAST CENTER, PRIVACY—WHAT’S LEGAL? WHAT’S ETHICAL? WHAT’S LIKELY?: CONFERENCE REPORT (1998).

2. CAL. PENAL CODE § 631-32 (West 1999).

3. See, e.g., Sanders v. ABC, 978 P.2d 67 (Cal. 1999); Sussman v. ABC, 971 F. Supp. 432 (C.D. Cal. 1997), *aff’d*, 186 F.3d 1200 (9th Cir. 1999).

convinced me of something that I had long suspected: broadcast journalists exist in a state of perpetual adolescence. I was reminded of the conversation when I reread Newton Minow's "Vast Wasteland" speech, in which Minow observed that "[t]elevision has grown faster than a teenager, and now it is time to grow up."⁴

But how can television "grow up" as long as the Commission tells it what to do? In a world circumscribed by rules, hearings, notices of apparent liability, and court orders, it is easy for broadcasters to conclude that the only thing that matters is what the Commission says matters. The kind of ethical decision making that print journalists routinely indulge in—asking not only what one has the right to do, but what is the right thing to do—is, at most, an afterthought for their electronic counterparts. For many broadcasters, it seems, unless the government specifically tells them that certain conduct is forbidden, it is allowed. By extension, that means it must also be "OK."

Or so it seemed to me in 1996. As of 2003, have things changed? Has television heeded Minow's admonition to "grow up"?

I asked myself this question after spending the evening of October 29, 2002—almost six years to the day after the Freedom Forum conference—watching local television in the Twin Cities of Minneapolis and St. Paul, Minnesota.⁵

Granted, this was an unusual evening. The previous Friday, incumbent Senator Paul Wellstone, together with members of his family and campaign staff, died in an airplane crash in northern Minnesota.⁶ The entire state reeled from the shock sustained less than two weeks before the midterm election.

On this particular night, a memorial service was scheduled at Williams Arena on the University of Minnesota campus, and was expected to draw more than 20,000 mourners from both inside and outside the state.⁷ Even with overflow seating, it was presumed that many of those who wished to attend would not be able to be accommodated at the site.

So, like many Minnesotans, I elected to watch the service from the comfort of my home. I had no difficulty doing this. All of the network affiliates—ABC, CBS, NBC, FOX—had announced that they would carry

4. Newton N. Minow, *Television and the Public Interest*, Speech Before the National Association of Broadcasters (May 9, 1961).

5. For the record, I do not have cable television at home, so my viewing on that particular evening was limited to terrestrial broadcast channels.

6. Brian Bakst, *Democratic Sen. Paul Wellstone Killed in Minnesota Plane Crash; Election Thrown into Chaos*, ASSOCIATED PRESS, Oct. 25, 2002.

7. Patrick Howe, *20,000 Attend Wellstone Memorial*, ASSOCIATED PRESS, Oct. 29, 2002.

the memorial service from beginning to end. One of the two local Public Broadcasting Service stations, TPT 17, aired the program as well, as did Minnesota Public Radio and other outlets. With saturation coverage on virtually every station except the home shopping and religious channels—and the WB network affiliate—no viewer who wished to see or hear the memorial service would be denied the opportunity, provided she could find an available television or radio. In fact, that viewer could hardly escape it.

There is no doubt in my mind that all of those television stations thought that they were acting in “the public interest, convenience and necessity.”⁸ The news directors and anchors were committed to covering the service in its entirety because they thought that this was what the viewers in Minnesota would want.

Whether they anticipated that the memorial would last for three-and-a-half hours is anybody’s guess. But it appears that nobody, except possibly the organizers, expected that the service would turn from a eulogy to a political pep rally.

There were plenty of warning signs, though. Vice President Dick Cheney was urged not to attend by the Wellstone family, reportedly because of concerns that heightened security measures would disrupt the spontaneity of the event.⁹ Republican Senate candidate Norm Coleman was tucked away in a corner, allegedly for his own safety.¹⁰ Senate minority leader Trent Lott was booed by many of the assembled multitude.¹¹ It had all the earmarks of a partisan evening.

Nevertheless, for the first couple of hours, the songs, reminiscences, and tributes for Wellstone and his companions seemed like a family memorial. But then sentimental eulogies gave way to boisterous partisanship. The nadir was reached when Rick Kahn, long-time friend of the late senator and his campaign treasurer, begged the audience to “win this election for Paul Wellstone.”¹² Kahn even asked Republicans to support Wellstone’s as-yet-undesignated replacement. Minnesota Governor

8. Radio Act of 1927, ch. 169, 44 Stat. 1162 (repealed 1934).

9. *Cheney Won’t Be at Wellstone’s Service*, ASSOCIATED PRESS, Oct. 29, 2002; Dan Wascoe Jr. & Pam Louwagie, *Today’s Service: A Labor of Love and Logistics*, STAR TRIB., Oct. 29, 2002, at 14A.

10. *Letters from Readers* (Cajetan Klein), STAR TRIB., Oct. 31, 2002, at 22A.

11. Samantha Santa Maria, *Lott Booed at Wellstone Memorial*, SUN HERALD (Biloxi, Miss.), Oct. 31, 2002.

12. *Kahn, Who Kicked Off Rally, A Longtime Aide to Wellstone*, ASSOCIATED PRESS, Oct. 29, 2002.

Jesse Ventura stormed out of the stadium, and later said he felt “used” and “violated.”¹³

Ventura’s outrage, however, was nothing compared to that of television viewers, both inside Minnesota and elsewhere, who immediately demanded “equal time” for the Republicans.¹⁴ So did the Minnesota Republican Party Chairman Ron Eibensteiner, who suggested that stations provide extended coverage to an upcoming campaign junket featuring President Bush, by way of recompense.¹⁵

Technically, of course, such demands were not legally justified. The Tuesday night memorial was not a “use” under Section 315 of the Telecommunications Act of 1996¹⁶ because, as of that particular evening, Walter Mondale was not yet a “legally qualified candidate.” And even if he had been, the service clearly constituted a bona fide news event. The stations did not produce the memorial service and had no control over the content. The *Star Tribune* (Minneapolis) and the *Saint Paul Pioneer Press* reported that station anchors and reporters were shocked and chagrined that the memorial service had suddenly become “a political story.”¹⁷

Maybe they should have anticipated that and been prepared to cut away when things got too partisan for comfort. Perhaps they should never have undertaken to cover the entire memorial live and unfiltered. But those decisions were, at most, lapses in news judgment, not dereliction of a licensee’s obligations.

The stations were home free, and could, at least from a regulatory standpoint, have done nothing further to provide balance or fairness.

But they did.

Minnesota Public Radio, which had not previously planned to cover a Republican rally featuring candidate Norm Coleman, invited him to appear on *Morning Edition* the day after the memorial service.¹⁸ The news director for KMSP-TV, the FOX affiliate, suggested that the “change in tone” would change the way the station covered other partisan events prior to the

13. Rochelle Olson & Bob von Sternberg, *GOP Demands Equal Time as Aide Apologizes*, STAR TRIB., Oct. 31, 2002, at 1A.

14. *Id.*; Neal Justin, *Media Didn’t Expect Service to Turn Political*, STAR TRIB., Oct. 31, 2002, at 15A; Steve Perry, *The Speech Heard Round the World*, CITY PAGES, Nov. 7, 2002, available at <http://www.citypages.com/databank/23/1144/article10857.asp>; Aron Kahn et al., *Democrats Apologize After Memorial Service Turns Political*, ST. PAUL PIONEER PRESS, Oct. 31, 2002; *Tone of Wellstone Memorial Generates Anger*, CNN.COM, Oct. 31, 2002, available at <http://www.cnn.com/2002/ALLPOLITICS/10/30/elec02.fallout.memorial>.

15. Olson & von Sternberg, *supra* note 13.

16. 47 U.S.C. § 315(a) (2000).

17. *See, e.g.*, Justin, *supra* note 14; Kahn et al., *supra* note 14.

18. Justin, *supra* note 14.

election.¹⁹ And as it turned out, the Republican events did receive thorough attention in the waning days of the election—not because the FCC told the stations to do this, but because they thought it was the right thing to do.

The memorial-turned-rally will go down in the history of political campaigns as a public relations debacle that turned off independent voters and helped pave the way for a Republican sweep in Minnesota.

But it may also mark the day that television news, in Minnesota at least, grew up.

19. Kahn et al., *supra* note 14.

