



The public radio show about law and American life

# Justice Talking Radio Transcript

**Does Free Speech Stop at the Schoolhouse Door?—Air Date: 4/30/07**

*Should a high school student have a right to hang a banner saying “Bong Hits 4 Jesus” without fear of disciplinary action? That’s the question in Morse v. Frederick, a case argued recently in the Supreme Court that addresses whether school administrators can limit what is said both in school buildings and outside at school-sponsored events. And should the rules change if school authorities are trying to preserve order or ensure a singular message on the use of drugs? From school dress codes to school newspapers, free speech in schools—this week on Justice Talking.*

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MARGOT ADLER: This is Justice Talking, the public radio show about law and American life. I’m Margot Adler. On today’s show we’re talking about students’ rights to free speech in public schools: what they can say, wear, and write about at school. We’ll look at how these rights are being challenged all over the country from school newspapers to student theatre performances and school uniforms. We’ll also hear from two leading attorneys who usually find themselves on the same side, but in the “Bong Hits 4 Jesus” case currently before the Supreme Court they’re divided. Later in the show I’ll talk with Mary Beth Tinker, a woman who made history by wearing a black armband to school in protest of the Vietnam War. That Supreme Court decision in 1969 set the rule of law for student speech in America. But first, to find out exactly what rights students have to free speech and just how far those rights extend, I talked with Robert Richards, a professor of journalism and law and founding co-director of the Pennsylvania Center for the First Amendment at Penn State. Welcome to the show, Robert.

ROBERT RICHARDS: Thank you. It’s good to be here.

MARGOT ADLER: We’ll talk a lot on the show about various aspects of students’ speech, from things kids say to clothes they wear. There are so many aspects to this. What basic rights do students have?

ROBERT RICHARDS: Well back in 1969 the Supreme Court said that students do not shed their constitutional rights at the schoolhouse gate. It was a wonderful opinion. It certainly gave students a lot of expressive freedom in the United States. Since that time there has been some chipping away at that doctrine. Let me give you an example. What would happen in 1969 is-- there were a couple of students who wore black armbands to school in protest for the war in Vietnam.

MARGOT ADLER: And that was the Tinker case, correct?

ROBERT RICHARDS: That's correct. That's the Tinker case. And they were told by their principal: Hey you can't wear those anymore, and if you do, you're going to be suspended. So what did they do? As most students would do, they wore the armbands again and they were punished for doing so. They took the case into the federal court system all the way up to the U.S. Supreme Court. And the Supreme Court handed down this wonderful opinion that said, hey, you cannot, you the school officials, cannot censor student speech unless it creates a substantial and material disruption or a material interference with school activities. And that has been the guiding principle, or was the guiding principle, up until 1986. In 1986 in a case called *Frazier v. Bethel School District* the Supreme Court said well, there might be some limitation on that Tinker standard. And that limitation would be giving the school district wide latitude to restrict vulgar expression, which would include sexual innuendo and sexual double entendres, lewd expression, and it also said expression that is plainly offensive may be prohibited in schools although that's never been defined.

MARGOT ADLER: I have a sense that there's been new restrictions that have been put on students' free speech as a reaction to national events such as Columbine or 9/11. Am I right?

ROBERT RICHARDS: You are correct. A number of federal courts have focused on the Columbine issue and giving wide latitude to school districts to restrict expression.

MARGOT ADLER: What have the decisions been?

ROBERT RICHARDS: Well, violent expression, expression of art for example, if you have some type of art work that depicts a teacher being injured or other students being injured. The courts are kind of split on that. Is that something that really amounts to a true threat of violence? So the courts have been split on this because, again, there is no guidance by the Supreme Court as to how far the expression of a student can go before it crosses the line and becomes a true threat of violence. And I think we're going to see more of that particularly in light of the situation recently at Virginia Tech. I think we saw that in--with that individual, he had written stories or written scripts that were violent in nature. And as a result of that and what happened afterwards in the aftermath of the scripts with some of the professors and so forth on campus looking at it and looking askew at it, I think we're going to see courts giving more deference in the future.

MARGOT ADLER: Outside of the issue of violence, what are some of the different forms of student expression that have been challenged by school officials that we don't automatically think of as speech?

ROBERT RICHARDS: If they wear t-shirts with certain symbols on it, symbols that may be related to drug messages, symbols that may be anti-homosexual. Those are types of things that we have seen come into play recently.

MARGOT ADLER: Also, I gather there have been some theatre performances that have been banned.

ROBERT RICHARDS: Yeah, over time. In fact there was a case where some students actually performed the Vagina Monologues but there were told they could not say the word "vagina." They did and they were punished for it.

MARGOT ADLER: And how have the courts weighed in on what's protected and what's not in these cases?

ROBERT RICHARDS: Well again, they go back to the three cases they have before them: Tinker, Frazier, and Hazelwood.

MARGOT ADLER: So what did the courts decide in regard to the monologues, the Vagina Monologues?

ROBERT RICHARDS: The monologues--it hasn't gone to court. It just became a brew-ha-ha within the school district. And that's what sometimes happens in these cases, that they don't actually end up in court but they end up in the court of public opinion. Shows such as yours will bring them to light. Newspapers will bring them to light and then the public gets to weigh in and gets to see what the school district is doing, what school policies are and so forth. And that sometimes is even more effective than actually going to court, which takes several years. And the problem when you're talking about a high school student going to court and taking several years is often the student has graduated and then therefore is no longer, you know, sort of a viable plaintiff in the case. And often the court will say: Hey, the case is moot now; the student is no longer in school; the student has graduated and the case can't go forward. Now having said that, I should say that courts certainly have at their disposal the ability to keep a case alive if it is capable of repetition. Even though the student may not, the student him or herself, may not directly benefit from the result, the fact that the case is something that's capable of repetition for other students is enough to keep it alive. But sometimes courts will take the easy way out, which is say: Hey, the kid has graduated; the case is moot.

MARGOT ADLER: In 1996 President Bill Clinton endorsed school uniforms in his State of the Union Address and since then many schools around the country have set up mandatory uniform policies. First of all, what's the theory behind setting up these dress codes?

ROBERT RICHARDS: Behind these dress codes is the ability for schools to stay out of trouble in terms of censoring students' speech that comes in clothing such as t-shirt messages and the like. If everybody's wearing the same thing, i.e. a uniform, then you don't have that type of difficulty in the school system.

MARGOT ADLER: Well one of the things that they argue that--they argue first of all that it reduces gang violence, because I guess you can't wear gang colors. They also say that it helps discipline. I've never quite understood that argument.

ROBERT RICHARDS: Well, I think that there've been studies that have shown if people are wearing clothing that is more formal they are going to act more formally in schools, whereas if you're allowed to dress down they seem to be a little bit more rambunctious. You see that typically in school systems where there are uniforms and on certain days they have dress down days and the noise level in the school tends to go up.

MARGOT ADLER: How do the opponents of these policies respond? What do they say is at stake when it comes to a student's First Amendment rights to wear what they want?

ROBERT RICHARDS: Well, they say that it certainly restricts their creativity. It restricts their rights to express themselves in political messages. Students often use clothing to express political messages in the school system. Clearly from the Tinker case in 1969 through the Bretton Barber case a couple of years ago where he wore a t-shirt that said--had a picture of George Bush and said "International Terrorist" on it. He took the school system to court after being punished and he prevailed. And that clearly was considered political speech on his shirt and therefore should not have been censored by the school system. If there's a uniform then students don't have the opportunity to express themselves in those political statements through their clothing.

MARGOT ADLER: Give us some examples of where school dress codes have wound up in the courts.

ROBERT RICHARDS: In the Fifth Circuit the federal courts have upheld uniform policies and frankly they have been upheld because they're content-neutral. And what I mean by that is there is no specific viewpoint or content that is being restricted. They're simply saying you have to wear, you know, this type of a jacket and this type of pair of pants and this type of shirt. And they're not saying that you can't say things that are anti-drugs or pro-drugs; you cannot say things that are political. They're just staying out of the area of content so therefore it's a very easy call by the federal courts to uphold those types of policies. And they have been upheld by the federal courts.

MARGOT ADLER: Both sides in the question of uniforms have used Tinker to buttress their arguments, correct? But it seems to me that Tinker is not about clothing at all.

ROBERT RICHARDS: It really isn't. You're right. It's not about clothing in the sense of the original facts of the case. But since that time Tinker has been applied to clothing. Take a Confederate flag shirt for example. Can a student wear a Confederate flag on a shirt? Well, the answer is yes and no depending on where they live. In some federal circuits the courts have upheld the rights of students under the First Amendment to wear a Confederate flag, to display the Confederate flag on clothing. In other school districts they have upheld the school's right to censor that expression. And they've done it based on this notion of a substantial and material disruption. If it has disrupted the school then the schools can step in and censor the expression,

so you cannot wear a Confederate flag. If there has been a history of racial tension within the school, a documented history, then the school can say there cannot be Confederate flags because we're fearful that it will have the same type of result.

MARGOT ADLER: What do you think the battles in the future are going to be over some of these questions of students' speech?

ROBERT RICHARDS: I think they're going to be mostly internet-based. I think there's going to be MySpace and websites and blogs and those sorts of things. And I think where the students cross the line and whether or not it's on their own property and on their own servers rather than in school is going to be a big issue. What happens when a student writes something about a principal or a teacher and they do it on their own space, literally, on the internet and in cyberspace? Who gets to punish the student? Does anybody get to punish the student? Is it totally the prerogative of that student and their parents? Or does it become in the purview of the school system to say: hey, this is not right; this is disruptive to our educational mission and our educational environment? So that's one area where I see a big question. The next area is just this notion of educational mission that I just mentioned. How far can schools go in defining what their mission is? The *Morse v. Frederick* case currently pending at the Supreme Court may help to answer that. At the oral arguments some of the Justices batted that question about, asking whether or not the educational mission of the school is to have anti-drug messages. Is it to inculcate value systems in the students? Or are they there merely to teach Shakespeare? So just how far the educational mission goes is going to be something that I think courts are going to have to grapple with in the future.

MARGOT ADLER: Robert Richards is a professor of journalism and law and founding co-director of the Pennsylvania Center for the First Amendment at Penn State. Thank you so much for joining me.

ROBERT RICHARDS: Thank you.

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MARGOT ADLER: Coming up on Justice Talking, we'll debate a case currently before the Supreme Court about when an Alaskan high school student unfurled a banner that read "Bong Hits 4 Jesus" at a school-sponsored rally. Did his high school principal violate the student's right to free speech when she made him take it down?

UNIDENTIFIED MALE: We know what a bong is. And what's a hit? We know what a hit is. And the students know it. And that's the key.

UNIDENTIFIED MALE: You know, we made this statement in our brief for them. The message I think probably was uncommonly silly. I mean it was just this--I think he was probably looking for as much publicity as he was trying to get a message out.

MARGOT ADLER: The Bong Hits 4 Jesus case: How the Supreme Court could rule on student speech and why. Stay with us.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. Bong Hits 4 Jesus, that infamous banner, is now testing the limits of students' speech in a case that's before the Supreme Court, *Morse v. Frederick*. The Frederick here is Joseph Frederick. In January 2002 he was an 18 year old high school senior in Juneau, Alaska and as he tells it he wanted to conduct a free speech experiment. He picked a day like no other in Alaskan history, the day the Olympic torch was passing through the state for the first time and right in front of Frederick's school. Students and teachers gathered outside to watch. Frederick was there too, Bong Hits 4 Jesus banner in hand, waiting, he says, until the perfect moment.

JOSEPH FREDERICK: As the public eye, the TV cameras, passed by, I knew that if I held up the banner while in front of the camera that there was nothing that the school administrators could do about it. What I was really saying was look here. I have the right to free speech. I'm asserting it. I have it and I'm using it. I feel that if you don't use your rights then you lose them.

MARGOT ADLER: With the banner unfurled the school's principal, Deborah Morse, didn't see a free speech message but a pro-drug one. She demanded that he take the banner down. Frederick refused.

JOSEPH FREDERICK: The phrase Bong Hits 4 Jesus was never meant to have any substantive meaning. And it was certainly not intended as a drug or religious message. I conveyed this to the principal by explaining that it was intended to be funny, subjectively interpreted by the leader, and most importantly an exercise of my inalienable right to free speech.

MARGOT ADLER: Morse disagreed and suspended Frederick for 10 days. He in turn filed a lawsuit. The Bush administration has come out in support of Principal Morse, asserting that student speech can be banned if it is inconsistent with the school's basic educational mission, in this case one that includes an anti-drug message. That argument has galvanized not just the American Civil Liberties Union but religious groups who have come out in support of Frederick, fearing a restriction on student religious speech. Here to talk about the case are Ken Starr and Jay Sekulow. Ken Starr is the dean of Pepperdine University School of Law. He represented high school principal Deborah Morse and the Juneau Alaska School Board in *Morse v. Frederick*. Jay Sekulow is chief counsel for the American Center for Law and Justice. His organization supports Joseph Frederick in the case. Many say that this Supreme Court case will have wide repercussions. Ken, tell us the facts of the case.

KENNETH STARR: It was a cold day in January in 2002 and the Olympic torch on route to Salt Lake City for the Winter Olympics was coming for the first time in Alaskan history. And at about 9:30 in the morning the school adjourned classes and the students went outside. And in that pleasant setting, Joseph Frederick, an 18-year-old senior, unfurled a banner 14 feet long that read Bong Hits (the numeral) 4 Jesus, Bong Hits 4 Jesus. Deborah Morse, the principal of the school, was out and about looking on and enjoying the ceremony but also trying to maintain order, sees the sign, immediately goes over to Joseph and his fellow students, one was not a student, and says take it down. The other students sort of fled the scene. Joseph resisted.

Deborah Morse confiscated the banner. He was eventually suspended from school for a variety of infractions, but the key point was the display of this 14-foot banner. That's the background, with Joseph Frederick saying: What the principal did supported by the school board was a violation of my First Amendment rights to free speech.

MARGOT ADLER: Jay, one of the main disputes in the case is whether the banner was displayed as part of a school-sponsored event. Why does this matter?

JAY SEKULOW: Well when it's a school-sponsored event, of course there's a greater degree of control that the school administration can exercise over students' speech. What makes this one interesting is when there is, if there were deemed to be more school involvement here than we think there was, I think that, you know, tends to cut against or gives more control or authority to school officials. Not complete control, not total control. Students do possess these rights of freedom of speech even inside the schoolhouse. But it does create more of a situation where it's a school-sponsored event.

MARGOT ADLER: But you're arguing that it wasn't a school-sponsored event and Ken you're arguing that it was, correct?

KENNETH STARR: That's correct, and the courts that have addressed this thus far have concluded that it was in fact a school speech case. If it were not a school speech case the case would never have gotten where it is. So if Jay is right and if that's the way the court goes then Joseph Frederick was within his rights if he was not under student supervisory control by the schools. But I think the facts will be seen as such by the Supreme Court that it is a student speech case, so that really raises the issue of how far does the First Amendment protect the freedom of speech that students have in a school environment, admittedly a different environment. But the way I think that one should think about this case is that it essentially was a school assembly outside, or it was a field trip without having to get on the bus.

MARGOT ADLER: Ken Starr is the dean of Pepperdine University School of Law. Jay Sekulow is the chief counsel for the American Center for Law and Justice. Is "Bong Hits 4 Jesus" a pro-drug message, Ken?

KENNETH STARR: It was so interpreted and I think it was reasonably so interpreted. So the question becomes who do we look to interpret the message? If you simply ask a 100 people what does this mean, you'll probably get a whole bunch of different answers, maybe even a 100 different answers. So there is ambiguity in the message. The critical point we believe in the case is that there must be a message-interpreter in the school environment. And the meaning of this could, and Joseph Frederick admitted so in the litigation that it could, reasonably be interpreted and naturally be interpreted as promoting drug use. What is a bong? We know what a bong is. And what's a hit? We know what a hit is. And the students know it. And that's the key.

MARGOT ADLER: I'd like to let Jay get in here.

JAY SEKULOW: Sure.

MARGOT ADLER: How would you--how would you, you know, interpret this?

JAY SEKULOW: You know, we made this statement in our brief of them. The message I think probably was uncommonly silly. I mean it was just this--I think he was probably looking for as much publicity as he was trying to get a message out. I don't support the message obviously that he was advocating. Having said that, the fact that I don't particularly like, endorse, in fact even oppose strongly, the message the student was conveying, that doesn't mean that it loses its protection, and I'm very cognizant of the fact that schools do have problems with drug issues on many campuses in the country, but I've always drawn this line in my mind when it comes to these advocacy cases of is it inciting imminent lawless conduct. Is there the sense that if he's advocating something right now, to do that would create this lawless environment? So I couple that with the lack of that, in my view, that's not there, coupled with the fact that this, you know, kid wasn't even registered in school that day. And then I ask myself: You know, is this something where the school should be in the position of censoring this message that took place on a public sidewalk? I'm as concerned about where the case goes. Although Ken was quite clear, I need to say this, that in his briefing about making sure that student--what they consider legitimate student speech is protected but many of us were concerned where this case could go and the implications of it.

MARGOT ADLER: So much of this case is based on the precedence set by a landmark Supreme Court case in 1969 called *Tinker v. Des Moines School District*. In that case Mary Beth Tinker and several others wore black armbands to protest the Vietnam War. Jay, how did that case establish the protection of student speech?

JAY SEKULOW: Well, it's actually a very fascinating case. And it's a case that over the last few years has actually received some more traction, I would say. And that's because it's come up in a number of contexts. In 1969 the Supreme Court in the famous Tinker case makes this pronouncement that students nor teachers surrender the rights of freedom of speech at the schoolhouse gate. And then in the '80s the case was interpreted in different ways. And when--Ken's correct in pointing this out--when there is more school involvement, when there's more school control, the school has more ability to tailor the message. Interestingly last year, or two years ago now, we had a campaign finance reform case. I actually represented students that were under the act prohibited from participating in these political campaigns and the Court unanimously held that these students were protected in their speech and in their contributing to campaigns. And it cited, interestingly, the Tinker case.

MARGOT ADLER: And we're going to be talking to Mary Beth Tinker later in the show. Ken, according to Tinker, when can student speech be restricted?

KENNETH STARR: When it would cause disruption. That's in an actual disruption sense or when it is inconsistent with the work of the schools. And then in later cases the Supreme Court added that there can in fact be enforcement, as it were, of the way, the modes, of expression. And so that's where I think the real friction is likely to come: someone is taking offense at what you're saying. It's not that this is dangerous: go out and commit suicide, or why don't you think about how wonderful it would be to have the unthinkable, a Columbine/Virginia Tech kind of event right here at this school. I mean that obviously I think almost everyone, if not everyone,

would say of course the school has to keep a safe place. But can it go beyond that? And that's where I think the real conversation is going to occur on the Supreme Court.

MARGOT ADLER: Jay, let's put ourselves in Principal Deborah Morse's shoes. The Olympic torch is coming by. The TV cameras are rolling. Hundreds of kids are standing around. You're the school principal. You want your school to shine in this moment. Then Frederick, someone who has a history of rabble-rousing, unfurls the banner with a stupid phrase. Isn't pulling it down a natural response?

JAY SEKULOW: Well, I think it's a natural reaction. If you're the school administrator and you've got a student that has caused some difficulty before, you're saying, you know: What is he doing now? And I understand the role of the school administrator. At the same time the nature of the attention that this issue has drawn is certainly--was significantly increased by the fact that the student was suspended for this activity and there was disciplinary action taken against him. So in a sense the school's action brought about the increased attention. I understand that the school's legitimate pedagogical concerns--I understand their legitimate concerns about maintaining the proper decorum. The difficulty here is of course you've gone from the interior of the school to the exterior of really a public forum, a public sidewalk, and the rules change in that context. And the student, as I said, wasn't there that day, wasn't enrolled that day as a student. He had either skipped class or had not attended, which even brings up another interesting aspect of this. So I think it was--I think it was an over-reaction by the school administrator. But, look, I'm sensitive to the fact that school administrators are often times in difficult situations. It was difficult for the school administration in *Mary Beth Tinker's* case but then censoring the student because of that, censoring that message, censoring that speech, I think cuts against the values that undergird the First Amendment.

MARGOT ADLER: Jay Sekulow is chief counsel for the American Center for Law and Justice. We're also with Ken Starr, the dean of Pepperdine University School of Law, and our subject is student speech. Should rules about permissible speech in school be different in elementary, in middle schools, than for example in high schools? In *Morse v. Frederick* the student was 18 years old when the incident happened. Ken, if students can drive, if they can vote, if they can serve in the army, why should the government place any restrictions on their free speech?

KENNETH STARR: Because of the concept of "in loco parentis," parents are turning their children over perhaps at the age of 14 to a high school, 13, and it should be a safe place. And it should be a place that is free from messages that encourage anti-social and dangerous behavior. I do have to say one thing, because Jay's mentioned it a couple of times, about Joseph not being in school. He came to school and one of the points that we made is that if he had gone a block down the road and displayed his banner he would have been outside school authority.

MARGOT ADLER: So how much does that matter? And how much does it matter, Jay, that he was 18?

JAY SEKULOW: Well the fact that he's 18, the Supreme Court in this case I've mentioned, in the case involving campaign finance, it was actually dealing with students that were 17 and younger, and the court said those students had free speech rights. So look, the courts have said

that there are maturity level differentials, but there's also the statement that, you know, high school students in particular here are mature enough to understand that a school doesn't endorse everything it fails to censor. And I think that bodes well for the fact that students' speech should be robust in the public university context or in the high school context, that there should be robust free speech rights.

MARGOT ADLER: I'd like to get back to the content of the banner. Does the content really matter? Would things, Ken, be different, for example, if the banner said "I love Jesus" or "smoking pot is fun"?

KENNETH STARR: Well, the first I think would be completely protected as religious expression. The second under the school board's policy would not be because "smoking pot is fun" is in fact encouraging drug use, and that is one thing that the Juneau School Board, like virtually every school board in America, thousands of school boards agree, drugs have no place, and the encouragement of drug use has absolutely no place in public education. And we give that assurance to our--the parents. And that in my judgment is entirely consistent with the First Amendment because schools are special places with what the Supreme Court said in *Tinker* was "special characteristics." In other words, the First Amendment does not apply as fully with such strength as some might want it to in schools as elsewhere.

MARGOT ADLER: Jay, if the banner read "smoking pot is fun," would you be in this case?

JAY SEKULOW: Well, I tend to take the view on the student message, and as I said at the beginning of the broadcast, Margot, I, you know, think this was uncommonly silly. I mean it was--I don't know if it was a political statement or not. But I think we have to be careful to how we draw what is a message and what is not and what is an appropriate message and what is not. And while lines are always drawn in every case and in every situation I think here if it was as you just indicated I still would say look, it's probably protected speech here and we've got to be careful on the regulatory nature of it. But the message does matter. There has to be a real communicative message. And one of the things we said of this message--look, this is not a great case for review on a major principle in and of itself just because of the muddled nature of what was being said here.

MARGOT ADLER: And Jay, more broadly, what do you think is at stake in this case for religious speech?

JAY SEKULOW: Well, I think it's speech generally, and religious speech maybe in particular here, and that is depending on how the Court couches this. And Ken I think was effective, as he always is, in both the argument presentation and in his briefing, to try to make sure that they don't, which sometimes you do in cases make sure there is not an overreach here. And the Court comes out and there's a visceral reaction because they don't like the message and all of a sudden you see, you know, *Tinker* being tinkered with. On the liability issue I think Ken could have an overwhelming victory there on whether this principal was liable or not and I think you'll probably have an overwhelming victory there. I think the speech case is a little bit closer but, you know, you're not going to know that until the end of the term.

MARGOT ADLER: Ken, did you want to respond?

KENNETH STARR: I happen to agree. There's less disagreement here than meets the eye in terms of how everyone lined up. There were a lot of amicus briefs on both sides. It certainly is turning out to be one of the most closely watched cases of the term. But happily, almost everyone who weighed in--certainly it was the position of the Juneau School Board--we embrace Tinker and the principles of Tinker. Students do have very important rights. We respect those rights, but there are limits. Pro-drug messages are a very important part of those limits.

MARGOT ADLER: Kenneth Starr is the dean of Pepperdine University School of Law. He argued this case before the Supreme Court on behalf of Principal Deborah Morse and the Juneau School Board in Alaska. Jay Sekulow is chief counsel for the American Center for Law and Justice. His organization filed a brief supporting Joseph Frederick in *Frederick v. Morse*. Thank you so much both of you for coming on our show.

KENNETH STARR: My pleasure.

JAY SEKULOW: Thank you for having us.

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MARGOT ADLER: Coming up on Justice Talking we'll hear from Mary Beth Tinker, whose decision to wear a black armband to school as a protest against the Vietnam War when she was 13 paved the way for students to exercise their rights to free speech.

MARY BETH TINKER: Small things that you do have a big effect and they also can have a big effect on history. And we never know when we'll be called on. It happens all the time in our daily ordinary lives that we're called on to stand up for what we believe in and to make small statements that can make a big difference.

MARGOT ADLER: How one adolescent's decision became the law of the land for students' rights to free speech. Stay with us.

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MARGOT ADLER: This is Justice Talking, where we make the connection between law and American life. I'm Margot Adler. We're looking at the free speech rights of students in America on our show today. We've discussed the case that is currently before the Supreme Court, a case involving a high school student from Alaska who waved a banner that read "Bong Hits 4 Jesus" at a school rally. The ruling in that case could have an impact on religious speech in American public schools. There have been several incidents recently around the country where students have raised the ire of school officials after wearing anti-gay and Biblical quotes on t-shirts.

Reporter Brooke Binkowski visited a California high school just outside of San Diego where students are exercising their rights to free speech.

BROOKE BINKOWSKI: Students at Carlsbad High School are getting ready for the Day of Silence.

UNIDENTIFIED MALE: What size are you?

BROOKE BINKOWSKI: Parhoom Sayidi, student president of the Gay-Straight Alliance is in a classroom handing out Day of Silence t-shirts from a big pile.

PARHOOM SAYIDI: This one says “What are you going to do to end the silence?” and there’s a figure of a person with their eyes closed and X over their mouth and holding a heart. The next one says “Make your voice be heard with silence, Carlsbad High School.” This one is my favorite one I think: it says “Open your eyes; close your mouth.”

BROOKE BINKOWSKI: Carlsbad High is just one of thousands of schools nationally that takes part in an annual protest to support gay, lesbian, and transgender students. During the Day of Silence, participating students and faculty don’t speak. Instead they hand out cards. Sayidi reads from one.

PARHOOM SAYIDI: Ending the silence is the first step toward fighting harassment, prejudice and discrimination. Think about the voices you are not hearing today and what you are going to do to end the silence.

BROOKE BINKOWSKI: In the weight room across campus Coach Denny Cooper says the Day of Silence is just the latest in a long line of attempts to marginalize Christian students and staff.

DENNY COOPER: My own conviction is that us as Christians need to stand up for what we believe is right. It used to be you would take religion in school. Gone. So there comes a time that us as Christians need to stand up and say stop. You’ve taken away enough, no more.

BROOKE BINKOWSKI: That’s why two years ago, with a help of a Christian legal group called The Alliance Defense Fund, Cooper organized a local action called “The Day of Truth.” It’s part of a national campaign to counter what they say is the promotion of the homosexual agenda in schools. He uses some of the same strategies as the Day of Silence, like t-shirts and cards that say “The truth cannot be silenced.” The Day of Truth website offers informational videos like this one for students and teachers:

UNIDENTIFIED MALE: Students who engage in homosexual behavior already have the same rights as everyone else. Exercising your right to participate in the Day of Truth isn’t about taking away rights from anyone. Freedom of speech should apply to all persons, not just selected groups and individuals.

BROOKE BINKOWSKI: Both the Day of Truth and the Day of Silence have touched off controversy in schools across the country since their inception. At Carlsbad High School, students were initially suspended for staying silent, but now both days are embraced.

Administrators say that's because students should have every opportunity to express their thoughts and ideas under the umbrella of free speech. Coach Cooper agrees.

DENNY COOPER: You know, we stand--in my view, we stand hand-in-hand with Gay-Straight Alliance as the Fellowship of Christian Athletes and Christian Club. We stand hand-in-hand with them against the atrocities of any people.

BROOKE BINKOWSKI: That's a view echoed by Parhoom Sayidi of the Gay-Straight Alliance.

PARHOOM SAYIDI: They can have their Day of Truth. If you want to protest or if you want to say your point of view by all means you're more than welcome to. I think that's beneficial so everyone gets here's where this is coming from.

BROOKE BINKOWSKI: Both the Day of Silence and the Day of Truth are seeing record numbers of participating schools. Students and faculty by speaking out or staying silent continue to push the boundaries of free speech within the classroom and into the courts. For Justice Talking, I'm Brooke Binkowski.

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MARGOT ADLER: In addition to students' clothing, student newspapers are often places where the battle over free speech gets played out. These papers are places where school officials often clamp down on content that is viewed as having gone too far. To talk with me about some of these conflicts and how they play out is Mark Goodman. He is the executive director of the Student Press Law Center, which advocates for student free press rights. Welcome.

MARK GOODMAN: Thank you.

MARGOT ADLER: Throughout the show we've been talking about the landmark Supreme Court case the Tinker case, which established that students have the right to free speech. But it's a subsequent Supreme Court case in 1988 involving the Hazelwood School District in Missouri which really affected student newspapers. Tell us about the case and how the Court ruled.

MARK GOODMAN: The Hazelwood case involved a student newspaper at a school in suburban St. Louis that published stories about teen pregnancy and the impact of divorce on children. School officials didn't like the stories for reasons that even to this day I think are a little bit unclear, but ultimately decided to remove the two pages on which those stories appeared from the publication. The students went to court and eventually their case got to the U.S. Supreme Court and in January of '88 the Supreme Court upheld the school's authority to censor. Now it's interesting because up to that point the courts had in cases involving censorship of student publications, like a student newspaper, had all applied the standard the court had adopted in the Tinker case. Unless the school could show some kind of substantial disruption of school activities or invasion of the rights of others would result from the expression at issue, the school censorship would not be permitted under the First Amendment. What the Hazelwood Court did was say we're not going to overrule the Tinker case but we're going to cut out an exception to it; basically we're creating a new standard of censorship that will apply when the speech is school-

sponsored and when the venue for that expression has not been opened up as a public forum or a forum for student expression.

MARGOT ADLER: So I gather the ruling made a distinction between a student newspaper where the faculty or staff have some type of oversight versus a newspaper where students have complete editorial control. Is that right?

MARK GOODMAN: Right. Well, and, yeah, the distinction ultimately was who determines the content of the publication? You know, the fact is that at thousands of high school newspapers around the country today as well as in 1988, student editors do determine the content because the teachers of those classes that produce those publications insist on it. They believe that's the only way to teach students the responsibility as well as the freedom that goes along with journalism. But for those publications where a faculty member or a school administrator is ultimately determining the content, then the Court said in *Hazelwood* a lesser level of First Amendment protection applies. And it's important to note that the Court did not say the school had unlimited authority to censor even in that context. They still have to show that they have met some minimal First Amendment requirement before their censorship is permitted.

MARGOT ADLER: And what percentage--if you know--is run by the students and what percentage are really run by the faculty or administration?

MARK GOODMAN: My sense today is probably we're talking less than 20 percent that are true student publications where the school has by policy or practice allowed students to make their own content decisions. And I need to emphasize this is not saying that students can publish absolutely anything they want, but it's saying absent of, you know, material that's libelous or obscene, students have the authority to make their own content decisions. I would guess, yeah, 20 percent or less, and sad to say the number is decreasing every year.

MARGOT ADLER: Why is it decreasing?

MARK GOODMAN: The inclination to censor that is apparently inherent in those with power is only growing at public high schools around the country. You know, we hear from advisors to student publications at schools from coast to coast, many of whom have been teaching and advising student media for 20 years or more, who say the pressure on them and from their school officials to censor is greater today than it ever has been.

MARGOT ADLER: In the work that you do, what are some of the instances where you've seen school officials censor student newspapers?

MARK GOODMAN: Anything you can imagine and many things you can't, school officials have tried to censor. I mean I always use as an example a high school student in Alabama a few years ago described to me that her school principal would not allow them to use a score of a football game in a headline if the team had lost. If they won they were allowed to use that score but otherwise it had to be buried somewhere deep in the story. But on a more serious level, I mean, you know, what we see on a regular basis is students writing about the issues that the country's debating today, whether it be the war or issues relating to immigration. Another issue

of course that, you know, is a hot button is homosexuality. And in some communities even recognizing that gay people exists is enough to prompt censorship by school officials.

MARGOT ADLER: What would you say to a parent who would say to you: Shouldn't I be able to send my kids to a public school with a reasonable expectation that they won't see material like an article about sex or drinking? You know, that they might find questionable in the student newspaper?

MARK GOODMAN: The short answer to that is those articles already exist in the school. I mean they are in the news magazines and the newspapers available in the school library. The real question here is whether students should have the ability to offer their own perspective on these topics and any other topics that relate to their lives. You know, I think what we have to constantly remind ourselves is that we are preparing students for life in a democratic society where these issues are debated and discussed and very important to our lives. We cannot expect that students will graduate and be able to become functioning citizens if we don't give them the tools to do that in high school.

MARGOT ADLER: Several states have enacted laws to provide greater free speech protection to student journalists. They're called "anti-Hazelwood laws." Tell me about those.

MARK GOODMAN: You know, first I would say the anti-Hazelwood description has seemed a little less relevant today than it did 20 years ago. I think that name is becoming less in favor. More people today refer to them as "student free expression laws." What these laws do is provide some clear standards for when school officials can censor student expression and when they can't. In many cases what these laws have done is attempted to codify the Tinker standard, the material and substantial disruption of school activities standard, in a statute so that there is much less question and uncertainty about when school officials are exceeding their boundaries and when they're within them, and the same thing for students, too. I have to say these laws have been on the books again for--in many states that have them--for almost 20 years. They've been incredibly successful. If you look at Iowa, if you look at Kansas, if you look at Colorado, what you see is states where high school journalism is incredibly strong in part because there are clear state standards for student expression protection.

MARGOT ADLER: Mark Goodman is the executive director of the Student Press Law Center, which promotes students' rights to a free press. Thank you so much for talking with me.

MARK GOODMAN: You bet.

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MARGOT ADLER: We just heard how students' rights to free speech play out when it comes to newspapers and other student publications, and in every case it must be determined whether the action violates a 1969 Supreme Court ruling in the Tinker case. Mary Beth Tinker was 13 when she and several other students wore black armbands to school in protest of the Vietnam War. They were suspended from school and the case *Tinker v. Des Moines School District* went to the Supreme Court. The court ruled in their favor in 1969. Almost 40 years later Mary Beth Tinker

visits schools around the country and talks to students about free speech. Welcome to Justice Talking, Mary Beth.

MARY BETH TINKER: Thank you. Thank you for having me. I'm glad to be here.

MARGOT ADLER: I know you've probably talked about this thousands of times but how did it come to be that you, your brother, and other kids wore black armbands to school?

MARY BETH TINKER: Well, I was raised in the church. My father was a Methodist preacher and so we were raised to believe that peace was very important, as well as brotherhood and justice. And my parents also taught us by their example that it's not enough to just talk about these things on Sunday morning but that we should be out there making this reality in the world and taking action on what we believed in as well. So we would come home from school and look at the TV every night and see the news. The war was on TV every night and you would see burning huts and people running from their villages and soldiers being injured and shot and amputees and caskets. And so we were very upset by that as children, as teenagers, just as there are so many young people in the United States today that are upset about the war in Iraq right now.

MARGOT ADLER: And so what did you do? You actually--you wore the armbands and did you do any other form of protesting?

MARY BETH TINKER: We decided to wear black armbands to mourn the dead on both sides in the war and to support a Christmas truce that was being called for by Robert Kennedy. We also had a fast. We did a one-day fast and had some petitions signed by the kids.

MARGOT ADLER: Now you were only 13 when this happened?

MARY BETH TINKER: Yes. I was in eighth grade.

MARGOT ADLER: Yeah. It occurs to me that most of the things that we do at 13 don't often affect the rest of our lives. How did that one decision that you and your brother and some of your friends made almost four decades ago change your life?

MARY BETH TINKER: It's affected my life enormously and that's what I tell kids when I go out and speak to kids all over the country about standing up for their rights and encouraging them to do that and to get involved in the world that they live in, because small things that you do have a big effect and they also can have a big effect on history. And we never know when we'll be called on. It happens all the time in our daily ordinary lives that we're called on to stand up for what we believe in and to make small statements that can make a big difference. And that's really what we were doing. We just thought we were making a small statement and no one had any idea that it was going to have such big implications.

MARGOT ADLER: I'm sure that you've been following the "Bong Hits 4 Jesus" case. What do you think of it?

MARY BETH TINKER: I was lucky to be in Washington at the Supreme Court in March when the “Bong Hits 4 Jesus” case *Morse v. Frederick* was in the court and so I was able to listen to the oral arguments. I was really happy to be able to do that because it was so interesting. And they asked me afterwards if I thought that our message, which was a serious message about war, was more important than the message which may seem frivolous to some people of the young man Joseph Frederick. But I replied that his message was very serious because he meant to test free speech and the First Amendment. And he wanted to see if he really had free speech rights.

MARGOT ADLER: You said you were trained as a nurse. What are you doing now?

MARY BETH TINKER: I am a family nurse practitioner. I specialize particularly in pediatric health, so that’s another reason why I’m concerned about students’ rights, because I know that it has a big part to play in kids being healthy and feeling good and succeeding and graduation. I go out and speak to kids and teachers about students rights because I feel that they are really the best ones to lead the efforts to improve their conditions. And that’s always the way it’s been through history. There has never been a movement to change the world or to change conditions in the world without students and young people being actively involved, whether you look at the civil rights movement or the movement to end sweatshops, and to end child labor. All of these efforts have been heavily involving children and students.

MARGOT ADLER: Mary Beth Tinker’s free speech case *Tinker v. Des Moines School District* set a precedent in the U.S. for student speech. Thank you so much for talking with me.

MARY BETH TINKER: Thank you so much.

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MARGOT ADLER: That brings us to the end of our show today. You can go to our website, [justicetalking.org](http://justicetalking.org), to find out more about students’ rights to free speech, and while you’re there, let us know what you think. You can also check out our blog where the nation’s leading commentators weigh in from the right and the left. You can also podcast our show. Thanks for joining me. I hope you’ll tune in next week. I’m Margot Adler.

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