** 212061.P Speech First, Inc. v. Timothy Sands**

Published opinion after argument

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WILKINSON, Circuit Judge, dissenting:

Consider a 19-year-old sophomore at Virginia Tech sitting in a favorite class, one

involving the role that race, ethnicity, and gender play in contemporary American politics.

During a lively class discussion, an interesting but controversial topic comes up. She

considers raising her hand to add her thoughts to this fascinating debate, but she hesitates.

She remembers hearing about the University’s Bias Intervention and Response

Team, which Virginia Tech established to “eliminate acts of bias” through “immediate

direct or indirect responses to bias-related incidents.” She cannot recall how “bias incident”

was defined but thinks it was something about “expressions against a person” in a protected

class. She knows that biased speech can be reported anonymously online. In fact, Virginia

Tech “encourages” students “to make a report” if they “hear or see something that feels

like a bias incident” even if they are “unsure.” She vaguely remembers that those reported

for bias will be invited to a meeting with the Dean of Students or referred to another

University office. Students are told the meetings are voluntary, but word travels quickly on

college campuses, and she does not want to be “that girl who got reported.” She cannot

recollect whether those who get accused of bias get in trouble with the University, but she

knows the Dean of Students keeps a file of all complaints.

She thought she had an insightful comment to add to the discussion, but it might not

be worth risking an encounter with the bias response team, especially because the team

comprises representatives from the offices of Inclusion and Diversity, Student Conduct,

the Dean of Students, and the Virginia Tech Police Department.

Faced with these circumstances, what would a reasonable student do? Speak up and

risk an anonymous report? Or keep her head down, sit silently, and avoid the potential

fallout? A student in this situation will almost always choose the latter. And this is how

Virginia Tech objectively chills speech.

The First Amendment should prevent this danger. The Supreme Court has

underscored “in a number of cases that constitutional violations may arise from the

deterrent, or ‘chilling,’ effect of governmental regulations that fall short of a direct

prohibition.” Laird v. Tatum, 408 U.S. 1, 11 (1972). When pressure and intimidation lurk

behind the state’s policy such that a reasonable individual “is chilled from exercising her

right to free expression” and instead chooses “self-censorship,” the steadfast protections of

the First Amendment should be summoned into action. Benham v. City of Charlotte,

635 F.3d 129, 135 (4th Cir. 2011).

**My friends in the majority claim any fears about chilling are the product of the**

**“dissent’s misguided journey,” Majority Op. at 32, which I suspect was not intended as a**

**compliment.** Odysseys aside, the stark reality of the record is that programs like the Bias

Intervention and Response Team (BIRT) are being used in the service of discouraging that

open inquiry from which education draws its very meaning and sustenance.

**Virginia Tech’s Bias Intervention and Response Team is not the benign little system**

**the majority imagines.** It is intimidating to the extent that a student of “ordinary firmness”

would be deterred from exercising her First Amendment rights. Benham, 635 F.3d at 135.

Chilling effects of even well-intended government policies present “an evil of

constitutional proportions” for the government has an obligation to promote free speech, and at the very least, not to discourage it. Leslie Kendrick, Speech, Intent, and the Chilling

Effect, 54 Wm. & Mary L. Rev. 1633, 1655 (2013).

The majority today ignores the plight of the college sophomore, declaring instead

that Speech First fails to show that BIRT objectively chills speech. Due to Virginia Tech’s

perfunctory promise to uphold the First Amendment and its proffered assurance that BIRT

cannot directly punish students, the majority concludes that no reasonable student would

be dissuaded from exercising her free speech rights. This conclusion neglects real-world

consequences. The reality is that Virginia Tech has constructed a complex apparatus for

policing and reporting whatever administrators may deem “biased speech.” The intricate

program has a straightforward effect: students self-censor, fearing the consequences of a

report to BIRT and thinking that speech is no longer worth the trouble.

How did it ever come to this—that such a fine and distinguished university would

institute a policy with such incipient inquisitional overtones, one that turns its campus into

a surveillance state? The First Amendment guarantees to everyone not just passive access

to but active participation in the marketplace of ideas. Today, the majority breaks that

promise to a segment of society who needs it most—college students.

The damage done to the First Amendment is not confined to BIRT. It is compounded

by the University’s Informational Activities Policy. The whole is even worse than the sum

of its parts. The University has somehow managed to offend virtually every cardinal

principle of First Amendment law. The First Amendment comes in dead last by its

reckoning. The Amendment exists at the sufferance of a bureaucracy dedicated to

eliminating “bias.” To say that campus life has lost its way severely understates the distance from productive dialogue that once nurtured the capacity of young minds for critical

thought. Slowly the critical now succumbs to the conventional. How sad. I would remand

this case with directions to the district court to enjoin this ill-conceived experiment in its

entirety, thereby allowing the University a new start, one which returns the fresh air of free

speech to its rightful place in campus life.

The majority claims that this litigation comes to us in a premature posture. It argues

that the record is devoid of the injury needed to possess standing and is undeveloped as to

the application of the Informational Activities Policy. See Majority Op. at 32. The majority

asks that we kick this whole case down the road. What we have before us, however, is

wholly sufficient to resolve this matter here and now. The grant or denial of a preliminary

injunction is an appealable order. It is so for a reason. Where the appellants as here have a

strong case of ultimate success on the merits, they deserve preliminary injunctive relief and

will suffer irreparable harm if it is not awarded. See Winter v. Nat. Res. Def. Council, Inc.,

555 U.S. 7, 20 (2008). This is especially so in connection with the First Amendment. That

Amendment and those invoking its protections should not be placed at the sufferance of

extended rounds of litigation. In this sense, the Amendment functions like an immunity.

The longer its beneficiaries languish in litigation, the more its value and meaning is lost.

See Mitchell v. Forsyth, 472 U.S. 511, 525–29 (1985).

I am aware that this is a facial challenge to BIRT. I am further aware that facial

challenges are disfavored. Wash. State Grange v. Wash. State Republican Party, 552 U.S.

442, 450 (2008); United States v. Chappell, 691 F.3d 388, 392 (4th Cir. 2012). The majority

says the plaintiffs lack standing. Virginia Tech suggests that, even if Speech First has

standing, we ought to hold off any ruling until we receive evidence as to BIRT’s

application.

I would reject this course of action. In the First Amendment context, facial

challenges are appropriate where a “substantial number” of the applications of an

“impermissibly overbroad” policy are “unconstitutional[] judged in relation to the statute’s

plainly legitimate sweep.” Wash. State Grange, 552 U.S. at 449 n.6 (internal quotation

marks omitted). The depressive effect of this policy is so evident from its face that we do

not need to wait for one deprivation of protected speech after another to occur. I doubt we

shall ever know just how many deprivations there are, for the simple reason that self-

censorship seldom comes into view. The prohibitive effect on speech will follow from this

policy as surely as the night follows the day. See City Council of City of Los Angeles v.

Taxpayers for Vincent, 466 U.S. 789, 797 (1984) (explaining that policies are

“unconstitutional on their face” when “any attempt to enforce” such policies “would create

an unacceptable risk of the suppression of ideas”); see also Sec’y of State of Md. v. Joseph

H. Munson Co., 467 U.S. 947, 965 n.13 (1984) (collecting cases).

Reviewing the very terms of this scheme should persuade anyone that a regime this

inimical to campus free speech cannot be permitted to stand. The educative effect that

colleges should ideally have upon the exercise of basic civil liberty is set at naught by the

University’s view that speech freedom no longer belongs first and foremost to individual

Americans but to the collective and authoritative hand of the state that would suppress

them.

The majority would insulate this flawed system from challenge by holding that

Speech First lacks standing to bring suit. Plaintiffs must typically suffer an injury in fact to

establish standing. In the First Amendment context, however, plaintiffs may “refrain from

exposing themselves to sanctions under the policy, instead making a sufficient showing of

self-censorship,” thus establishing a “chilling effect on their free expression that is

objectively reasonable.” Abbott v. Pastides, 900 F.3d 160, 176 (4th Cir. 2018) (internal

quotation marks omitted). The majority makes much of the statement in Abbott that it is

critical that there be “a credible threat of enforcement” for a policy to objectively chill

speech. Id. Because BIRT does not directly punish students for speech, the majority

concludes there is no credible threat and therefore no chilling effect.

If we confine “credible threat of enforcement” to direct punishment by BIRT, we

leave out the policies that stop short of formal penalties but nonetheless exact a heavy toll.

What formal penalties is the majority waiting for? A reprimand? Probation? A suspension?

An expulsion? If BIRT does not formally impose the particular penalty, its referrals to other

offices nonetheless set the process in motion. Of course Speech First has standing. It has

shown that the policy at issue causes students to self-censor for fear of being reported, thus

effecting an objective chill on speech. The majority talks about such consequences as being

wholly fanciful and theoretical. How can it know? Thoughts that are formulated in the mind

but never escape the lips still detract from the store of First Amendment expression.

When a challenged policy “risks chilling the exercise of First Amendment rights,

the Supreme Court has dispensed with rigid standing requirements.” Cooksey v. Futtrell,

721 F.3d 226, 235 (4th Cir. 2013) (internal quotation marks omitted). Should constitutionally questionable policies escape judicial scrutiny due to overly stringent standing analysis, “[s]ociety as a whole then would be the loser.” Joseph H. Munson, 467 U.S. at 956. Speech First has shown a variety of ways in which BIRT will take action against protected speech, thus demonstrating a credible threat of enforcement.

Let’s examine some of these.

**BIRT’s own self-description lays bare Virginia Tech’s persistent efforts to impose**

**a bureaucratic superstructure that dampens speech. Because the majority glosses over the**

**policy’s practical consequences, it is important to lay it out from beginning to end exactly**

**as it is presented to students. Once the full policy is exposed, stripped of fig-leaf assurances,**

**its oppressive nature has nowhere to hide.**

The very terms of BIRT betray its chilling effect. Virginia Tech proclaims BIRT’s

purpose in the most practiced bureaucratese, saying a lot while saying nothing. Unpacking

its meaning is no small task. BIRT was created to “eliminate acts of bias” through

“immediate direct or indirect responses to bias-related incidents.” J.A. 369. The University

claims to need this policy because “[b]ias-related incidents often represent a conflict of

competing and opposing values,” and conventional solutions “will rarely go far enough to

do the adaptive work needed to resolve[] gaps between values, beliefs, and behavior.” Id.

The “Bias Intervention and Response Team” is thus meant to be “both proactive and

responsive” in addressing the “challenges presented in a community where inclusion and dissent exist in a way that often results in marginalization, isolation, and loneliness.”

J.A. 368.

How dense will all this get? The composition of BIRT seems further designed to

intimidate any student brave enough to utter controversial thoughts. To achieve its goals,

BIRT consists of “a representative from” the office of the “Dean of Students,” “Office for

Equity and Accessibility, Office for Inclusion and Diversity, Student Conduct, [and the]

Virginia Tech Police Department.” J.A. 370. Other “representatives from offices may be

called upon to participate with BIRT due to the nature of an incident.” Id. These

representatives are supposed to “compile a report for the community that offers a narrative

about[] . . . shift[ing] our culture towards a more positive and pluralistic society.” Id.

A reasonable student reading BIRT’s purpose is left with the ominous impression

that BIRT was created to “proactive[ly]” address problems caused by “dissent[ing]”

“values” and “beliefs,” whatever they may happen to be. BIRT will “resolve[] gaps

between values, beliefs, and behavior” whenever the supposed gaps appear because typical

solutions “will rarely go far enough.” To achieve its goal of eliminating bias, BIRT enlists

a cast of unnamed but high-ranking University officials and police.

This garbled declaration reads like a mission statement of a committee dedicated to

rooting out dissent. A student whose views fail to align with campus orthodoxy would think

twice before speaking under such a menacing regime. The majority says that “what matters

is the distinction between attempts to convince and attempts to coerce.” Majority Op. at 22

(quoting Okwedy v. Molinari, 333 F.3d 339, 344 (2d Cir. 2003)). When the stated goal of

the bias response team is to “eliminate” bias, we are faced not with a gentle effort to

convince students to be unbiased but with a systematic effort to coercively drive out views

that strike administrators the wrong way. Telling students “You should stop saying biased

things or else we might need to reeducate you” is no benevolent attempt at persuasion.

Moreover, as soon as students see that the bias response team includes members of the

Office of Student Conduct and Virginia Tech Police Department, they will adjust their

behavior to avoid getting reported. Their parents might be displeased and their future

prospects compromised if they had a run-in with disciplinary officials and local law

enforcement. Better to just keep quiet.

The plain language of its policy makes BIRT even more troubling. Virginia Tech

provides a vague but expansive definition of “bias.” Students are told that “bias incidents”

are “expressions against a person or group because of the person’s or group’s age, color,

disability, gender (including pregnancy), gender identity, gender expression, genetic

information, national origin, political affiliation, race, religion, sexual orientation, veteran

status, or any other basis protected by law.” J.A. 333.

With a definition this loose and rambling, almost anything could be framed as a bias

incident. Indeed, the number of bias reports nearly doubled from 2017 to 2018. Speech

First, Inc. v. Sands, No. 7:21-CV-00203, 2021 WL 4315459, at \*10 (W.D. Va. Sept. 22,

2021). This trend either shows Virginia Tech’s community is growing more biased—an

odd result given the University’s efforts to “eliminate” such problems—or it reveals that

members of the community are increasingly exploiting the policy’s uncertain language.

This trend will give rise to another—as reports increase, speech decreases.

Worse yet, the explicit language of the policy shows that BIRT invades the realm

of protected speech. It defines a “bias incident” as “expressions,” and lists examples such

as “words or actions that contradict the spirit of the Principles of Community,” “jokes that

are demeaning to a particular group of people,” and “posting flyers that contain demeaning

language or images.” Id. at \*8. Additionally, BIRT’s preset list of nineteen potential bias

offenses includes “Comment in Class or Assignment,” “Comment in Person,” “Comment

in Writing or on Internet,” “Comment via Email/Text,” “Comment via Phone/Voicemail,”

and “Written Slur.” J.A. 149.

The students in this case, through their submitted declarations, explained that they

“enrolled in the University because [they] wanted to learn in a challenging environment

where students and faculty are free to engage in lively, fearless debate and deliberation.”

Pl.’s Mot. to Supplement R. (Student Decl.) 8, 12, 16, 20, ECF No. 67. Yet they are told

that words contradicting the spirit of the community’s principles can be reported as biased

speech. Such an “overly broad” policy “creates a ‘danger zone’ within which protected

expression may be inhibited.” Dombrowski v. Pfister, 380 U.S. 479, 494 (1965). The plain

language alerts students that even their comments in class and online are constantly and

subjectively parsed for bias.

**In effect, the prolix text of the policy permits students to report speech for no other**

**reason than they were offended by what was said.** In fact, the district court recounted a few

such reports of bias, including the following:

[1] a report that the words “Saudi Arabia” were written on a whiteboard

outside of a student’s dorm room, alleging bias based on “national or ethnic

origin;” [2] a report that a student in a University residence hall overheard

several male students privately “talking crap about the women who were

‘playing’ in a snowball fight,” calling them not “athletic,” which the

complainant reported as discrimination based on “gender;” and [3] a report

that a student told a joke that included “Caitlyn Jenner’s deadname” during

a classroom lecture, which was reported as discrimination on the basis of

gender identity. Sands, 2021 WL 4315459, at \*10 (internal citations omitted).

These examples illustrate how students can report speech as biased based on nothing

more than its obvious poor taste or the fact that some listener took offense. But offensive

speech can seldom be isolated with precision. Speech exists in an environment in which

the useful and insightful are often commingled with the outrageous and profane. But the

“fact that society may find speech offensive is not a sufficient reason for suppressing it.”

FCC v. Pacifica Found., 438 U.S. 726, 745 (1978). To the contrary, “if it is the speaker’s

opinion that gives offense, that consequence is a reason for according it constitutional

protection.” Id.

Despite the “bedrock principle underlying the First Amendment” that the state may

not silence “the expression of an idea simply because society finds the idea itself offensive

or disagreeable,” Texas v. Johnson, 491 U.S. 397, 414 (1989), BIRT’s sweeping and vague

language enables students to report anything the most sensitive are offended by. The

students in this case fear that because the “definition of ‘bias’ is so broad and vague,” they

are “confident that someone will find [their] speech to be ‘biased.’” Student Decl. 9, 13,

17, 21. Those offended can take steps to avoid future exposure or, better still, engage the

speaker with their well-founded disapproval. The cure for distasteful speech is tasteful

dialogue, not the conversion of an illustrious campus into a First Amendment dead zone.

The BIRT policy goes from bad to worse. Virginia Tech establishes a regime of

comprehensive surveillance. The University enthusiastically encourages its students to

report a bias incident even if they are “unsure” that an incident qualifies as biased. J.A. 200.

As a “student, if you hear or see something that feels like a bias incident, statement, or

expression, we encourage you to make a report. In short, if you see something, say

something!” Id. Where students are urged to report on one another, mutual suspicions

fester, as any society bereft of basic freedoms can attest. Anyone at Virginia Tech can

submit reports of bias anonymously on Virginia Tech’s website through an online reporting

tool, called the Bias Incident Reporting Form. Sands, 2021 WL 4315459, at \*9.

Surveillance is total and constant: Undergraduate and professional students “can be

referred for bias-related behavior” from “admission to commencement.” J.A. 372. And

“bias-related incidents can occur on or off campus, including on social media and other

digital platforms.” Sands, 2021 WL 4315459, at \*9.

BIRT’s eye is nothing short of ubiquitous. In the classroom, on social media, and

off campus, Virginia Tech encourages its students to keep watch for any biased speech. By

extending its sphere of surveillance off campus, Virginia Tech stretches well beyond the

boundaries of acceptable regulation. Courts “must be more skeptical of a school’s efforts

to regulate off-campus speech, for doing so may mean the student cannot engage in that

kind of speech at all.” Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy, 141 S. Ct. 2038, 2046

(2021). Speech First’s student members wish to “engage in open and robust intellectual

debate with [their] fellow students” about controversial topics “in the classroom, in other

areas of campus, [and] online.” See, e.g., Student Decl. 9. But they are “reluctant to openly

express” their opinions because they know that their classmates can anonymously report

them on campus or off, creating an oppressive atmosphere of scrutiny from which there is

no reprieve. Id. In short, students stay silent because they can be reported anytime,

anywhere. It is “clear that the average college student would be intimidated, and quite

possibly silenced, by the [University’s] policy.” Speech First, Inc. v. Cartwright, 32 F.4th

1110, 1124 (11th Cir. 2022).

The majority believes all this evidence cannot show a chilling effect because

Virginia Tech soothes its students’ fears through numerous promises and assurances. First,

Virginia Tech emphasizes that BIRT itself does not have any authority to punish students

and only refers reports to other offices. Second, when someone is accused of bias, Virginia

Tech claims the most likely course of action is that the Dean of Students will invite the

accused to a voluntary meeting. Third, students have nothing to fear because how could

anyone even suggest that the bias response team would ever penalize constitutionally

protected speech.

All these placations miss the mark. Virginia Tech’s claims do not change the fact

that a reasonable student, considering the policy and accompanying repercussions as a

whole, would hardly regard the regime in a kindly, avuncular light.

Let’s take the matter of BIRT referrals first. Even if BIRT cannot formally punish

students and only refers cases to other offices, it gets the ball rolling. A referral to other

offices by definition carries its own administrative imprimatur. BIRT admits that it refers

cases to offices such as the Office of the Dean of Students, Fraternity and Sorority Life,

Student Conduct, Equity and Accessibility, Housing and Residence Life, and Title IX.

J.A. 360. Indeed, after a student reported that inappropriate words had been written on a

hallway whiteboard, BIRT reviewed the incident and “notified VTPD” and Title IX.

J.A. 172. The district court found that “BIRT has referred protected speech to” the Office

of Student Conduct “at least twice since 2017.” Sands, 2021 WL 4315459, at \*10.

So once a complaint is shipped to one of these other entities, reasonable students

could fear that they will be subject to that office’s disciplinary authority. Even if students

believe that BIRT itself cannot punish them (a big “if”), that hardly dispels their fears of

getting in trouble with another office. Indeed, the students below said that they are “afraid

that Dean of Students Office will keep a record on [them], share the allegations with others

at the university, call [them] in for meetings, or refer the allegations to the Office of Student

Conduct, the Office of Equity and Accessibility, or the Virginia Tech Police Department.”

Student Decl. 9, 13, 17, 21.

Consider the scenario in which an eavesdropper anonymously reports a student for

gender bias. Even if the accused student thinks that BIRT cannot punish him, he may fear

that BIRT will refer him to the office of Title IX which may well be hostile to the student’s

point of view. Then will he not worry that the office of Title IX may discipline him for his

alleged bias? It matters not that BIRT cannot dole out punishment if it can simply refer the

case to another office that can. Being reported to BIRT may be only the first step. Who

knows what awaits? Uncertainty itself can cause students to fall silent rather than speak up.

Virginia Tech also claims that, where BIRT or the Dean of Students directly

responds, all that will happen is the Dean will “invite” the accused student to a “voluntary

conversation.” Sands, 2021 WL 4315459, at \*10. An invitation is commonly thought of as

something one looks forward to. So what sort of invitation is this?

The majority claims that Speech First’s members have not offered “evidence that

they (or their peers) feel pressured to attend the meetings.” Majority Op. at 15. It

emphasizes that “the district court found as a fact that there was ‘no evidence that students

feel obligated to come to these voluntary meetings.’” Id. at 31 (quoting Sands, 2021

WL 4315459, at \*12).

Does the majority really believe this invite is no different from students inviting one

another to drop by down the hall for a Friday night pizza? No! This is an invitation from

the Dean to the student to come to the Dean’s office, not for tea or coffee, but for the

express purpose of discussing the student’s speech. There is an imbalance here. Dean

versus student. State versus the individual. This is precisely the sort of imbalance that the

First Amendment has historically refused to tolerate. Why should we ever do so here?

Speech First students not surprisingly explained that they are “afraid” that the Dean

will keep a record on them or share the allegations with others at the University. See, e.g.,

Student Decl. 17, 21. While the majority claims that no trace of the meeting will “appear

on a student’s academic transcript or disciplinary record,” Majority Op. at 31, there is no

dispute that a record of the meeting will be kept on permanent file within the Dean of

Students Office’s case management system, see id. at 4–5; J.A. 372. College students

hoping to stay on the administration’s good side will not view the “invitation” as voluntary

or as something to which one may simply send “regrets.” With the invitation comes

pressure to attend the meeting; better to avoid the whole darn thing by keeping one’s mouth

shut.

As the Eleventh Circuit recognized, “the students targeted here are . . . teenagers

and young adults who, it stands to reason, are more likely to be cowed by subtle coercion.”

Cartwright, 32 F.4th at 1123. In multiple areas of law, the Supreme Court has expressed

concern with state coercion of young people, as they are more susceptible to threats and

intimidation. See id. at 1123–24. Simply telling students the meeting is “voluntary” will do

little or nothing to put anyone at ease.

**Additionally, “the very name” Bias Intervention and Response Team “suggests that**

**the accused student’s actions have been prejudged to be biased.”** Speech First, Inc.

v. Schlissel, 939 F.3d 756, 765 (6th Cir. 2019). A reasonable student could certainly reach

this conclusion given the policy’s use of terminology such as “victim,” “bystander,”

“perpetrator,” “targeted,” and “accused.” J.A. 369–70. As such, the name and language of

BIRT “intimates that failure to” attend the meeting with the Dean may result in a type of

default judgment against the student. Schlissel, 939 F.3d at 765. If a student fears the

accusations will be taken as true unless he contests them, he would not skip the meeting

and risk exposure to “far-reaching consequences, including reputational harm or

administrative action.” Id. If he does skip the meeting, it may well be out of apprehension

as to what even worse possibilities await him there.

What’s more, although Virginia Tech claims a voluntary meeting on the carpet with

the Dean is the only response from the school, the policy communicated to students warns

otherwise. Virginia Tech touts numerous “interventions for addressing” bias, such as

“[a]dvocacy for community members impacted by mistreatment,” reporting “a narrative

about acts of bias-related behavior” to the community, and further educating the “campus

to ensure that bias-incident reporting systems are publicized.” J.A. 372. The University

also cautions students that “BIRT can consider an array of responses to include: temporary

or permanent changes to on-campus housing” or “a community alert” about the incident

“from the police department.” J.A. 368. Reasonable students could thus conclude that a

report to BIRT will result in more than a “voluntary meeting.” Despite the Dean’s

assurances, the reasonable student would likely keep quiet rather than gamble with the

repercussions.

When accused of chilling constitutionally protected speech, Virginia Tech’s

response is, “trust us, BIRT will uphold free speech.” Despite devoting much time and

many resources to BIRT and proclaiming a goal of eliminating bias, Virginia Tech declares

it will administer this policy with a dispassionate hand.

Why should this be comforting? What is protected speech to one may seem

unprotected to another. The First Amendment is not to be so casually consigned to the eye

of the beholder. It is true that Virginia Tech’s written policy affirms its commitment to free

speech by saying, “BIRT will examine and review each complaint through the lens of free

and protected speech.” J.A. 370. But this nebulous assurance offers cold comfort. The very