

ever, runs afoul of the First Amendment.¹²¹⁵ Therefore, the city's bias-motivated crime ordinance, interpreted as banning the use of fighting words known to offend on the basis of race, color, creed, religion, or gender, but not on such other possible bases as political affiliation, union membership, or homosexuality, was invalidated for its content discrimination. "The First Amendment does not permit [the city] to impose special prohibitions on those speakers who express views on disfavored subjects."¹²¹⁶

In *Virginia v. Black*, the Court held that its opinion in *R.A.V.* did not make it unconstitutional for a state to prohibit burning a cross with the intent of intimidating any person or group of persons.¹²¹⁷ Such a prohibition does not discriminate on the basis of a defendant's beliefs: "as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. . . . The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages. . . ." ¹²¹⁸

Defamation.—One of the most seminal shifts in constitutional jurisprudence occurred in 1964 with the Court's decision in *New York Times Co. v. Sullivan*.¹²¹⁹ The *Times* had published a paid advertisement by a civil rights organization criticizing the response of a Southern community to demonstrations led by Dr. Martin Luther King, and containing several factual errors. The plaintiff, a city commissioner in charge of the police department, claimed that the advertisement had libeled him even though he was not referred to by name or title and even though several of the incidents described had occurred prior to his assumption of office. Unanimously, the Court

¹²¹⁵ 505 U.S. at 384.

¹²¹⁶ 505 U.S. at 391. On the other hand, the First Amendment permits enhancement of a criminal penalty based on the defendant's motive in selecting a victim of a particular race. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). The law has long recognized motive as a permissible element in sentencing, the Court noted. *Id.* at 485. It distinguished *R.A.V.* as involving a limitation on speech rather than conduct, and because the state might permissibly conclude that bias-inspired crimes inflict greater societal harm than do non-bias inspired crimes (*e.g.*, they are more likely to provoke retaliatory crimes). *Id.* at 487–88. See generally Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1.

¹²¹⁷ 538 U.S. 343 (2003). A plurality held, however, that a statute may not presume, from the fact that a defendant burned a cross, that he had an intent to intimidate. The state must prove that he did, as "a burning cross is not always intended to intimidate," but may constitute a constitutionally protected expression of opinion. *Id.* at 365–66.

¹²¹⁸ 538 U.S. at 362–63.

¹²¹⁹ 376 U.S. 254 (1964).