"Savagery" in the Subways: Anti-Muslim Ads, the First Amendment, and the Efficacy of Counterspeech

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From San Francisco to Washington, D.C. to Detroit to Chicago to New York, anti-Muslim hate placards have recently appeared on government-owned transit systems in various cities around the country. Anti-Muslim hate groups designed, funded, and placed the inflammatory advertisements, representing a well-orchestrated campaign to demean and attack the minority Muslim community. The ads have culminated in hate crime charges in the subway-pushing death of an immigrant of South Asian descent, as well as diverse manifestations of counter, official, and private speech and First Amendment litigation in at least three jurisdictions, where well-meaning transit officials attempted to prevent the ads' placement. Interdisciplinary in its orientation, this Article first contemplates anti-Muslim sentiment in the United States more than a decade following the tragic events surrounding 9/11. Then, it describes three variant strands of the hate ads after identifying the anti-Muslim activists responsible for them. The Article thereafter engages in a comparative analysis of the First Amendment litigation that followed upon the heels of seemingly well-intentioned government censorship of the odious speech in New York, Detroit and Washington, D.C. These vignettes are woven together with a singular analytic thread: the effectiveness of counterspeech by officials and private entities as the preferred self-help remedy of first instance. Ultimately, the Article illustrates that while counterspeech is admittedly not without flaw, it nevertheless represents an effective non-judicial means for empowering individuals, educating communities, and undermining harmful or threatening expression, including the anti-Muslim hate speech here.

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A lot of foreign leaders don't understand . . . this country. [Hassan Nasrallah of Hezbollah] doesn't understand that as a law-abiding person he'd be able to practice Islam more freely in America than anywhere else in the world. If you are a Shia Muslim in Saudi Arabia, life is going to be hard. A Sunni in Iran, life is going to be hard. If you want to wear a religious [emblem] in Turkey, tough times. France, they want to ban you from wearing religious symbols. . . . Freedom of speech, it's a good and bad thing. It applies to everybody. Once you start making exceptions, you start the erosion of the principle. —U.S. Rep. Keith Ellison, D-MN[1]

1. William Saletan, *Muslims For Free Speech*, PITT. POST-GAZETTE, October 4, 2012, at B5,

We learn from history that hate speech and hysteria have dire consequences, the result of societal complacency, failed political leadership and the lack of courage to stand up and speak out against hate. —U.S. Rep. Mike Honda, D-CA[2]

INTRODUCTION

U.S. constitutional law must achieve a delicate balance between oft-competing national values characteristic of First Amendment debates concerning hate speech. Americans pride themselves on an almost sacred, sometimes extreme, constitutionally protected right to express themselves liberally, even when that expression, explicit or not, is morally, politically, or socially repugnant. Yet legal safeguards surrounding free speech are far from guaranteed.

That delicate balance becomes even more acute when expressions of hate, such as Islamophobic[3] speech, implicate U.S. national security concerns, prompting a slew of queries fraught with moral and political complexities: should government entities restrict anti-Islam and anti-Muslim hate speech that not merely offends but, according to U.S. intelligence sources, endangers national security and/or regional peace and stability abroad?[4] Alternatively, should such authorities restrict that vitriol—particularly where the expression of hate renders a false impression of official sanction by appearing on government-owned property—if its ultimate effect is to demean an entire faith community, not only marginalizing it politically and stigmatizing it socially but potentially making those individuals, their homes, and collective places of worship more likely targets for violent attack? If so, do we risk compromising our First Amendment values? And if not censorship, what *are* appropriate responses by government and private entities to such odious speech?

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available at 2012 WLNR 21071691 (Congressman Ellison is the first American Muslim to serve in the U.S. Congress).

2. Taimur Khan, *America's anti-Muslim ads backfire*, THE NATIONAL (UAE), October 15, 2012), a*vailable at* 2012 WLNR 21840717 (Congressman Honda was interned with his family in a U.S. camp for people of Japanese descent during World War II).

3. Islamophobia is generally understood as "an exaggerated fear, hatred, and hostility toward Islam and Muslims that is perpetuated by negative stereotypes resulting in bias, discrimination, and the marginalization and exclusion of Muslims from social, political, and civic life." *Islamophobia: Understanding Anti-Muslim Sentiment in the West,* GALLUP 1 (Dec. 2011), http://www.gallup.com/strategicconsulting/153641/BRIEF-ENGLISH-Islamophobia-Understanding-Anti-Muslim-Sentiment-West.aspx. Its frequency and intensity has been exasperated by the tragic circumstances surrounding 9/11. In a 2011 assembly, the United Nations Alliance of Civilizations identified Islamophobia as a significant area of concern. *Id*.

4. *See, e.g.*, Sarah Chayes, *Does 'Innocence of Muslims' Meet the Free Speech Test*, L.A. TIMES (Sept. 18, 2012), http://articles.latimes.com/2012/sep/18/opinion/la-oe-chayes-innocence-of-muslims-first-amendment-20120918.

This Article argues that counterspeech is preferable to government suppression of dangerous, threatening, or harmful expression. The doctrine of counterspeech was first espoused in a concurring opinion by Justice Louis Brandeis in the case of *Whitney v. California*: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[5]

More specifically, this Article reinforces counterspeech as the first remedy to be employed by officials and private entities in response to the recent proliferation of anti-Muslim hate advertisements appearing on government-owned public transit systems in cities around the country. The most widely publicized advertisement read: "In the war between the civilized man and the savage, support the civilized man. Support Israel. Defeat Jihad." The advertisements, funded by hate groups in an orchestrated campaign to defame American Muslims and the Islamic faith, were initially met by seemingly well-intentioned government censorship. At the time of this writing, the ad buys have culminated in First Amendment litigation in three distinct jurisdictions, including Washington, D.C., Detroit, and New York City. Each case ensued when transit authorities rejected the ads. In at least one district, Washington, D.C., government officials cited national security concerns, while other districts cited anxieties concerning the ads' stigmatic effects upon American Muslims. These controversies represent a glaring example of First Amendment expression versus national security interests.

This Article argues that in such cases, counterspeech is preferable to government suppression but notes significant considerations concerning the effectiveness of such non-legal recourse to hate speech attacking minority communities in the United States. This Article evaluates the issue in five congruent parts. Part I contextualizes the advertisements vis-à-vis a brief analysis of the status of anti-Muslim sentiment in the United States. The next Part identifies the anti-Muslim hate activists who are involved with designing, funding, and placing the anti-Muslim advertisements, including Pamela Geller, Robert Spencer, and David Yerushalmi. Part III examines the content of, and initial responses to, three variant strands of the anti-Muslim advertisements. Part IV then analyzes the First Amendment litigation that ensued when local government officials rejected placement of the anti-Muslim advertisements on mass transit systems in New York City, Detroit, and Washington, D.C. The final Part examines notable manifestations of counterspeech as a preferred response to odious speech.

5. Robert D. Richards and Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 B.Y.U. L. Rev. 553, 553 (2000) (citing to 274 U.S. 357, 377 (Brandeis, J., concurring)).

I. ANTI-MUSLIM SENTIMENT IN CONTEMPORARY AMERICA

Following 9/11, the American Muslim, Arab American, and South Asian communities experienced a discriminatory backlash. This newly legitimized prejudice was commonly observed as an unfortunate response to a national trauma.[6] Still, more than a decade later, and in the absence of a comparable terrorist attack on U.S. soil, members of the American Muslim, South Asian, and Arab American communities continue to confront pervasive intolerance, discrimination, and violence.[7]

A. The Opinion Polls

Opinion polls gauging American sentiment toward Muslims and Islam over the last decade reflect this phenomenon of persistent, perhaps even growing, Islamophobia. According to a Pew research study conducted in March 2002, 25 percent of Americans believed Islam was more likely to encourage violence than other faiths while twice as many, 51 percent, disagreed.[8] However, almost a decade later, in March 2011, the research results confirmed suspicions of increased animus: 40 percent of Americans believed that Islam was more likely than other faiths to inspire its adherents to commit violent acts.[9]

In another 2011 study conducted by Gallup, researchers found that even among Americans who claim to be unbiased toward Muslims, 36 percent hold prejudicial views about Islam.[10] More predictably, about 91 percent of those who admitted harboring anti-Muslim sentiments espoused anti-Islam views as well.[11] It remains disconcerting that so many who profess no ill will toward Muslims maintain unfavorable opinions about the faith to which they adhere.[12] This may in fact be a testament to the efficacy of hate campaigns targeting the faith. Americans are not only concerned about the religion of Islam, but also with Muslims. According to poll results from 2006, five years post-9/11, 44 percent of Americans polled

6. Islamophobia existed prior to 9/11 but has increased dramatically in the past ten years. *See Islamophobia: Understanding Anti-Muslim Sentiment supra* note 3, at 1.

7. *See* Hate Crimes and the Threat of Domestic Extremism: Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, 112th Cong. 1 (2012) (written testimony of Engy Abdelkader, Vice President, KARAMAH: Muslim Women Lawyers for Human Rights), *available at:* http://karamah.org/wp-content/uploads/2012/09/KARAMAH-Congressional-Testimony-on-Hate-Crimes-.pdf.

8. *Public Remains Conflicted Over Islam*, THE PEW FORUM ON RELIGION AND PUBLIC LIFE (Aug. 24, 2010), http://www.pewforum.org/Muslim/Public-Remains-Conflicted-Over-Islam.aspx.

9. Continuing Divide in Views of Islam and Violence, Pew Research Center for the People and the Press, March 2011, http://www.people-press.org/2011/03/09/continuing-divide-in-views-of-islam-and-violence/.

10. *Islamophobia: Understanding Anti-Muslim Sentiment, supra* note 3, at 11.

11. *Id*.

12. *Id*.

considered Muslims to be too extreme in their religious convictions; another 22 percent did not want a Muslim neighbor.[13] And, that same poll revealed that less than half of Americans thought American Muslims were loyal to the United States.[14]

More recently, a Gallup research study found that one in five Americans viewed Muslims as intolerant of other faith traditions and of those with a distinct racial identity from their own.[15] In reality, the American Muslim population is a racially diverse one. According to research conducted by Pew, 40 percent of native-born Muslims self-identify as black, 18 percent as white, 10 percent as Asian and 10 percent as Hispanic. Regarding foreign-born Muslims, 38 percent self-identify as white, 28 percent describe themselves as Asian, 14 percent describe themselves as black, 16 percent as other/mixed race, and 4 percent as Hispanic.[16] Further, a 2011 Gallup research study found American Muslims to be the most tolerant of the religious communities in the United States.[17]

Notably, Gallup also found that approximately one-half of nationally representative samples of Mormons, Protestants, Catholics, Muslims, and Jews agree that the majority of Americans are biased toward American Muslims.[18]

Such research depicts commonplace views rooted in prejudice, ignorance, or misunderstanding. Of course, American Muslims are not wholly oblivious to these misperceptions or that such opinions manifest in acts of racial and/or religious discrimination. In fact, in its 2011 study, Gallup found that Muslim Americans are more than twice as likely as U.S. Jews, Catholics, and Protestants to indicate that they have experienced racial and/or religious discrimination in the past year.[19] Approximately 42 percent of Muslims under the age of thirty say in the past year they have "experienced verbal taunts, been treated with suspicion, been physically threatened or attacked, or been targeted by police because they are Muslims."[20] Further, 53 percent of polled American Muslims reported that

13. *Anti-Muslim Sentiments Fairly Commonplace*, GALLUP (Aug. 10, 2006), http://www.gallup.com/poll/24073/antimuslim-sentiments-fairly-commonplace.aspx.

14. *Id*.

15. *Islamophobia: Understanding Anti-Muslim Sentiment, supra* note 3, at 13.

16. A Demographic Portrait of Muslim Americans, PEW RESEARCH CENTER (Aug. 2011), http://www.people-press.org/2011/08/30/section-1-a-demographic-portrait-of-muslim-americans/.

17. Muslim Americans: Faith, Freedom and Future, GALLUP 41 (Aug. 2011), http://www.gallup.com/strategicconsulting/153611/REPORT-Muslim-Americans-Faith-Freedom-Future.aspx.

18. In addition, 66 percent of Jewish Americans and 60 percent of Muslim Americans say that Americans in general are prejudiced toward Muslim Americans. *Id*.

19. *Id*. at 39.

20. *Muslim Americans: Middle Class and Mostly Mainstream*, PEW RESEARCH CENTER 38, May 22, 2007, http://pewresearch.org/assets/pdf/muslim-americans.pdf.

it has been more challenging to be a Muslim in the United States since 9/11.[21]

Unfortunately, Gallup's research illustrates that in addition to discrimination, American Muslims describe their most significant challenges—notwithstanding a global economic downturn—as being viewed as terrorists, ignorance about Islam, and stereotyping.[22] Indeed, unfavorable popular perceptions have measurable discriminatory outcomes in the lives of American Muslims.

B. Discriminatory Manifestations

As reviewed, a number of Americans harbor both implicit and explicit prejudices toward their fellow citizens. That individualized bias assumes various manifestations. In the decade since 9/11, the American Muslim community continues to confront traumatic experiences of hate, fear, and bias.[23] A few of these trends—employment discrimination, bias-based school bullying, hate crimes, and opposition to mosque construction and expansion projects—are examined more closely below.

C. Employment Discrimination

Employment discrimination cases surged immediately following 9/11, ebbed, and have risen gradually in the last seven years.[24] Since 9/11, the Equal Employment Opportunity Commission ("EEOC") has received 7,019 discrimination claims by Muslims; the claims frequently assume religious and racial dimensions.[25] By comparison, the EEOC received a cumulative 2,734 charges in the years preceding 9/11.[26]

Yet, these numbers hardly paint an accurate picture of the American Muslim experience in the workplace because many who confront employment discrimination never file a related charge with the EEOC. In this author's experience with the Muslim minority community, some are unaware of relevant legal protections or fear professional retaliation and

21. *Id*.

22. *Id*.

23. *See* Robert Steinback, *Jihad Against Islam*, INTELLIGENCE REPORT, Issue Number 142 (Summer 2011), http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/summer/jihad-against-islam; *see also Assistant Attorney General Perez Speaks at the Grand Opening of the Islamic Center of Murfreesboro*, U.S. DEPT. OF JUSTICE (Nov. 18, 2012), http://www.justice.gov/crt/opa/pr/speeches/2012/crt-speech-1211181.html.

24. *Assistant Attorney General Perez Speaks at the Grand Opening of the Islamic Center of Murfreesboro*, U.S. DEPT. OF JUSTICE (Nov. 18, 2012), http://www.justice.gov/crt/opa/pr/speeches/2012/crt-speech-1211181.html.

25. *Sahar Aziz Testimony to EEOC on Religious Discrimination*, INSTITUTE FOR SOCIAL POLICY AND UNDERSTANDING 4 (Jul. 18, 2012), http://www.ispu.org/pdfs/7-18-12_Aziz_Testimony_to_EEOC_on_Religious_Discrimination_FINAL_2.pdf.

26. *Id*.

backlash. Others are held captive by a flailing economy and increased joblessness while many are confused, apathetic, or cynical about potential recourse. English language barriers and/or immigration status concerns further aggravate matters.

Nevertheless, the continuing upward trend in discrimination cases is worrisome: while American Muslims constitute a mere 1 to 2 percent of the total U.S. population, Muslim claims comprise 25 percent of all religious discrimination charges filed with the EEOC.[27] This provides a sense of the hostile work environment confronting Muslims.

D. Bias-Based School Bullying

The experience of Muslim students in educational settings mirrors bias-based harassment at work in underreporting incidents of discrimination.[28] Anecdotal evidence illustrates that Muslim students who encounter religiously and racially motivated bullying fail to report the harassment to the proper authorities for a myriad of reasons, including the apparent normalization of the anti-Muslim discrimination experience. Representative is this author's experience conducting a workshop on female empowerment in Manhattan in the spring of 2012.

The workshop's participants consisted of approximately twenty-five young American Muslim girls hailing from New York's five boroughs, and ranging in age from twelve to twenty. Notably, all but one attendee donned a hijab. When asked by a show of hands how many had experienced an act of discrimination or had been otherwise bullied in school, they looked perplexed until one asked aloud, "Do you mean being called a terrorist?" Upon responding in the affirmative, all of the participants raised their hands. When asked if they had related the incident to a parent, family member, or school administrator, none of the participants reported doing so. When asked why, they explained, "No one is going to do anything about it," and "We get called 'terrorist' all the time," while describing additional instances of harassment experienced in delis, at gas stations, on the street, and other places of public accommodation.

In this author's view, this workshop experience is far from unique. Time and again, while engaging with Muslim youth at schools, universities, and community forums, a common anecdotal thread characterizing their ultimate educational experience is underreported bias-based bullying and otherwise discriminatory incidents at school. The statistics barely glimpse the prejudice endemic to the Muslim educational experience.

American Muslim students frequently endure bigoted verbal assaults, such as "You terrorist," "People can't get jobs because of you," "You blow

27. *Assistant Attorney General Perez, supra* note 24.
28. *See id.*

up buildings," and "You are Muslim; you should go home."[29] Worse, verbal harassment frequently escalates to physical threats and violence. In one incident, an American Muslim eighth-grader underwent surgery to insert pins and a plate to repair his jaw, broken in two places after another student bullied and assaulted him because of his race and religion.[30]

In another widely publicized case, an American Muslim teen suffered nine months of physical and emotional abuse, including being kicked in the head and punched in the groin so hard he later saw blood in his urine, causing his grades to suffer, his personality to change, and ultimate withdrawal from friends and family.[31] Unfortunately, these are not isolated incidents, but merely the ones reported by victims and publicized by the media. According to the last civil rights report published by the Council on American Islamic Relations in 2009, there was a 31 percent increase in reported cases of discrimination in school against students perceived to be Muslim.[32] And, many more cases remain unreported.

So, what becomes of the bullying youth? According to Tom Perez, the Assistant U.S. Attorney General who serves at the helm of the U.S. Department of Justice's Civil Rights Division, they become tomorrow's perpetrators of hate crimes because their biased views and related activities remain unfettered.[33]

E. Hate Crimes

Federal law defines a hate crime as a "criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, ethnic origin or sexual orientation."[34] While not a distinct federal offense, the federal government investigates and prosecutes such crimes as civil rights violations;[35] however, state and

29. Engy Abdelkader, *Bullying Targets the Other*, THE RECORD (Nov. 28, 2010), http://www.northjersey.com/news/opinions/110927664_Bullying_targets__the_other_.html?c=y&page=2 [hereinafter Abdelkader, *Bullying Targets the Other*]; *see also*, Engy Abdelkader, *Islamophobic Bullying in Our Schools*, THE HUFFINGTON POST (Oct. 24, 2011), http://www.huffingtonpost.com/engy-abdelkader/islamophobia-in-schools_b_1002293.html; *see generally, Global Battleground or School Playground: The Bullying of America's Muslim Children*, INSTITUTE FOR SOCIAL POLICY AND UNDERSTANDING (Sept. 2011), http://www.ispu.org/pdfs/ISPU_Policy%20Brief_Britto_WEB.pdf.

30. Abdelkader, *Bullying Targets the Other*, *supra* note 29.

31. *Id*.

32. *Id*.

33. *See Assistant Attorney General Perez, supra* note 24.

34. *FBI: Hate Crimes Overview*, FBI.GOV, http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes/overview.

35. *Id*. (the FBI initiates a hate crime investigation when an allegation is received from a reliable source. Most complaints are received from the victim, a witness, or a third party. Many cases are also initiated by media reports, community group complaints, referrals from Department of Justice or U.S. Attorneys, and congressional inquiries. Under guidelines developed in conjunction with the Department of Justice, once a complaint is received, the FBI will determine if the matter warrants a preliminary or

local authorities typically handle cases involving hate crimes. In 2009, Congress enacted the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act.[36] The Act provides funding and technical assistance to state, local, and tribal jurisdictions to facilitate more effective investigations, prosecutions, and prevention initiatives.[37] A criminal offense that is also proven to be a hate crime carries increased penalties.[38]

In 2012, during the Muslim holy month of Ramadan, from July 20th to August 18th, American Muslims suffered "one of the worst spikes" of hate violence in more than ten years.[39] Shots were fired at a mosque in Morton Grove, Illinois, while about 500 people were inside; an acid bomb was thrown into a Muslim school in Lombard, Illinois, while people were worshipping inside; a Muslim cemetery was vandalized with hate graffiti, including racial epithets and insults against Muhammad, the Prophet of Islam, in Evergreen Park, Illinois; a mosque's welcome sign was destroyed in Rhode Island; a Missouri mosque was burned to the ground; pig parts were thrown onto the site of a proposed California mosque; and a Florida mosque was firebombed.[40] The rash of hate incidents erupted in Illinois immediately following Islamophobic political rhetoric by a local Tea Party Congressman, Joe Walsh, who stated during a town hall meeting that "Muslims are trying to kill Americans every week" while indicating that they had already infiltrated American neighborhoods.[41]

The atmosphere of rising anti-Muslim hostility toward American Muslims has provided a fertile ground for tragic events such as the massacre at the Gurdwara, a Sikh place of worship, in Wisconsin. While the neo-Nazi skinhead shooter died, many suspect that Wade Michael Page may have mistakenly believed that members of the Sikh temple were Muslim because of their turbans and beards.[42]

A few months later, in late November 2012, a man entered a mosque

full investigation).

36. *Id*.

37. *Id*.

38. *Id*.

39. Bill Morlin, *Anti-Muslim attacks continue*, SALON.COM (Oct. 5, 2012), http://www.salon.com/2012/10/05/anti_muslim_attacks_continue/.

40. These disturbing incidents merely reflect those reported to law enforcement entities and covered by media outlets. Many discriminatory incidents go unreported for a myriad of reasons including the victim's fear of compromising their immigration status, lack of English language and cultural proficiency, unfamiliarity with the criminal justice system and apathy toward recourse. Hearing Before the Senate Judiciary Subcommittee on the Constitution, *supra* note 7, at 1; *see also* Morlin, *supra* note 39.

41. *GOP Rep. Joe Walsh: Muslims are Trying to Kill Americans Every Week*, THINKPROGRESS (Aug. 13, 2012), http://thinkprogress.org/justice/2012/08/13/679561/gop-rep-joe-walsh-muslims-are-trying-to-kill-americans-every-week/.

42. Morlin, *supra* note 39.

in San Antonio, Texas and vowed to shoot it up.[43] Legal documents indicated that the perpetrator "had intentions of going to a mosque in the Medical Center area and was going to shoot as many people" as he could, and then shoot himself.[44] Fortunately, the plot was averted by law enforcement.[45] A couple of weeks later, in December, another man entered a mosque in Fremont, California and announced he was going to shoot everyone there.[46] The incident left at least one community advocate noting: "It is important to connect the dots between this alleged incident and the constant tide of hate rhetoric and Islamophobia that we are seeing across the country."[47]

Such hate rhetoric encompasses the anti-Muslim vitriol spewed by hate groups. According to the Southern Poverty Law Center, anti-Muslim hate groups are a "relatively new phenomenon."[48] American Muslim civil rights advocacy groups have expressed grave concern regarding the impact that such groups and their initiatives, such as the anti-Muslim transit advertisements, may have on those willing to carry out acts of violence, including vandalism, arsons, bombings, and shootings at places of worship.[49]

Specifically, the advocacy groups cite recent, rising rates of *reported* anti-Muslim hate crimes. While anti-Muslim hate crimes increased dramatically following 9/11, they waned for a number of years.[50] But in 2010, the Federal Bureau of Investigation ("FBI") reported a 50 percent surge.[51] According to the most recent 2011 hate crime statistics released by the FBI, violence against those perceived to be Muslim remains relatively high and has been attributed to "Islam-bashing" and "anti-Muslim

43. *Man threatened to shoot up San Antonio mosque,* KHOU.COM (Nov. 28, 2012), http://www.khou.com/news/texas-news/181174811.html.

44. *Id*.

45. *Id*.

46. *Man threatens to shoot worshipers in Fremont mosque*, MERCURYNEWS.COM (Dec. 14, 2012), http://www.mercurynews.com/breaking-news/ci_22193636/police-man-threatens-shoot-worshipers-fremont-mosque.

47. *Id*.

48. *Anti-Muslim Hate Groups: An Overview,* SOUTHERN POVERTY LAW CENTER, http://www.splcenter.org/get-informed/intelligence-files/ideology/anti-muslim (last visited November 7, 2012) (The organizations portray those who worship Islam as fundamentally alien and attribute to its followers an inherent set of negative traits. Muslims are depicted as irrational, intolerant and violent, and their faith is frequently depicted as sanctioning pedophilia, marital rape, and child marriage. Anti-Muslim hate groups also broadly defame Islam, which they tend to treat as a monolithic and evil religion. These groups generally hold that Islam has no values in common with other cultures, is inferior to the West, and is a violent political ideology rather than a religion.).

49. *See* Yasmin Amer and Moni Basu, *Spate of attacks near Ramadan trouble U.S. Muslims*, CNN.COM (Aug. 22, 2012), http://www.cnn.com/2012/08/18/us/ramadan-violence/index.html.

50. *See Assistant Attorney General Perez, supra* note 24.

51. *See id*.

propagandizing."[52]

According to the Department of Justice ("DOJ") and community advocates, the FBI hate crime statistics, which are collected from state and local law enforcement agencies and compiled into an annual report, are understated.[53] Various DOJ studies have shown that approximately 56 percent of hate crimes are never reported and more than 50 percent of those that are reported to authorities are not recorded as hate crimes and thus are never conveyed to the FBI.[54] In addition, the actual hate crime level in the United States is approximately twenty to thirty times the number reflected by the FBI statistics.[55] Still, the numbers demonstrate popular violent trends confronting the Muslim minority community in America.[56]

F. Opposition to Mosque Construction and Expansion Projects

According to the DOJ, the greatest "growth industry" in anti-Muslim activity is the opposition to mosques.[57] Perez, who directs the DOJ's Civil Rights Division, recently remarked, "Mosques that have been in communities for twenty or thirty years, participating in civic activities and being good neighbors, are being met with picket signs and demonstrations when they apply for building permits."[58] Perez relates that since 2000, the DOJ has initiated thirty-one cases involving discrimination and arbitrary action by local zoning boards against mosques, twenty-one of which have just been opened in the past two years. [59]

G. Contributing Causes

There is no simple explanation to the question: Why? Indeed, *why* is there continued hostility, prejudice, and violence directed at Muslims in the United States today? Particularly where a host of studies has illustrated a notable decrease in terrorist acts committed by self-described Muslims since 9/11?[60] Such violence accounts for less than .0002 percent of all

52. Mark Potok, *FBI: Anti-Muslim hate crimes still up,* SALON.COM (Dec. 10, 2012), http://www.salon.com/2012/12/10/fbi_anti_muslim_hate_crimes_still_up/singleton/.

53. *Id., see also* Engy Abdelkader, *Don't Overstate Anti-Muslim Bias. Really?*, THE HUFFINGTON POST (Mar. 19, 2011), http://www.huffingtonpost.com/engy-abdelkader/dont-overstate-antimuslim-bias_b_863889.html.

54. Potok, *supra* note 52.

55. *Id.*

56. *Id.*

57. *See Assistant Attorney General Perez, supra* note 24.

58. *Id.*

59. *Id.*

60. *See* Christopher Bail, *The Fringe Effect: Civil Society Organizations and the Evolution of Media Discourse about Islam since the September 11th Attacks*, 77 THE AM. SOC. REV. 855, 871 (2012), *available at* https://docs.google.com/file/d/0Byvk0A8Ic21YLVVsWGpfaWpoYkk/edit?pli=1.

murders perpetrated in the nation in a little over a decade.[61] Further, additional studies credit 9/11 with galvanizing the Muslim community against terrorism and religious extremism and cite the consistent and critical role played by American Muslims in foiling potential terrorist plots.[62] With this in mind, logic would dictate that the American Muslim civil rights experience would have improved over the past decade, but it has not. So *what* and/or *who* accounts for the persistent—and in particular areas, growing—Islamophobia?

The short answer: it is complicated and arguably a result of a convergence of multiple factors and events. Certainly, the continued U.S. military presence in Muslim-majority countries like Iraq and Afghanistan may create the false impression that Muslims in America constitute an "enemy" within. This may account for some of the unfavorable popular opinions of Muslims as disloyal and undeserving of trust, as discussed in the subsection above. Both popular culture and news media help cultivate fear and misunderstanding about Muslims. Overrepresentation of Muslims as terrorists in media helps to magnify the public's perception of the threat of such violence while reinforcing negative stereotypical associations. These impressions not only inform unfavorable opinions about Muslims but may also motivate and legitimize acts of private discrimination.

Moreover, selective government counter-terrorism practices that single out Muslims may also have a stigmatizing effect with social, political, and legal implications. It is not entirely surprising that Americans increasingly oppose the construction and expansion of mosques, given the sort of media coverage these efforts garner. Americans receive a steady stream of news relating to law enforcement surveillance activities that identify mosques as potential bastions of Islamic radicalism (notwithstanding the absence of evidence of criminal activity to warrant such surveillance). Such law enforcement policies and practices, carried out in the name of national security, signal to the public that American Muslims are inherently suspect, and again may legitimize private acts of discrimination.

Further, Islamophobic political rhetoric has intensified over the years.[63] In the 2012 presidential run, Republican presidential candidates

61. *Id*.

62. *Id*.

63. *See* Spencer Ackerman, *Bad Night for Congress's Anti-Islam Caucus*, WIRED.COM, (Nov. 2012), *available at* http://www.wired.com/dangerroom/2012/11/anti-islam-caucus/ ("West, a member of the House Armed Services Committee, professes that Islamist terrorism is merely authentic Islam. 'This is not a perversion, [the terrorists] are doing exactly what this book [the Qur'an] says,' West told a 2010 audience, following a disquisition on Charles Martel's fight against a Muslim army at the Battle of Tours in 732. When New York Mayor Michael Bloomberg defended the 2010 construction of an Islamic cultural center a few blocks from Ground Zero, West dismissed Bloomberg as ignorant of 'the history of Islamic conquest against western civilization.' West has been unapologetic about the act that

described Islamic law as a national threat notwithstanding the absence of evidence to substantiate the claim.[64] Similarly, the 2008 presidential contest was also fraught with Islamophobia. Incidents ranged from those calling President Obama a closet Muslim (clearly using the term pejoratively), to Senator John McCain expressing his preference against Muslims assuming the U.S. presidency, to Mitt Romney disapproving of any Muslim cabinet appointments.[65] Such virulent positions espoused by the nation's political leaders negatively impact society's collective psyche.

Finally, one must contemplate the growing phenomenon of anti-Muslim hate groups.[66] Traditionally perceived as fringe groups, these individuals and organizations have in many respects become disconcertingly mainstream. In fact, according to a recent quantitative study published by the American Sociological Review:

> [A]ngry and fearful fringe organizations not only exerted powerful influence on media discourse about Muslims in the aftermath of the September 11 attacks, but ultimately became some of the most influential mainstream groups in the field. . . . By 2008, these fringe organizations not only permeated the mainstream but also forged vast social networks that consolidated their capacity to create cultural change.[67]

Hate groups not only effectuate their messages through traditional mainstream media, but also via books, blogs, and well-placed advertisements (like on a bus or train, exposing the average commuter to their virulent messages on a daily basis).

Indeed, it is within this social, political, and legal context that the anti-Muslim hate advertisements appear on government-owned mass transportation systems in cities across the nation. The status of Muslims in America is significant to any discussion regarding the efficacy of

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ended his Army career: firing a gun near the head of an Iraqi detainee in 2003. In June 2011, West brought a Florida organization called Citizens for National Security to a congressional building to accuse thousands of American Muslims of being a 'fifth column' based on innuendo about the Muslim Brotherhood. West said the group's work was 'about the protection of each and every American citizen.' Later that year, West sneered at GOP presidential contender Herman Cain for apologizing for endorsing the banning of mosques. Back home at Broward County, West parried an American Muslim's criticisms by saying, 'You attacked us!' [Congresswoman] Bachmann won reelection with just 3,000 votes out of 350,000, months after she abandoned a presidential bid that brought her national fame. It also brought opprobrium for Bachmann's own anti-Muslim theories. In June, Bachmann accused an aide to Secretary of State Hillary Rodham Clinton of being part of a Muslim Brotherhood plot to infiltrate and undermine the government, based solely on the associations of the aide's family members.").

64. Alex Seitz-Wald, *Michele Bachman Wins: How the Anti-Muslim Fringe Hacked the Media*, SALON.COM (Dec. 12, 2005, http://www.salon.com/2012/12/05/michele_bachmann_wins_how_the_anti_muslim_fringe_hacked_the_media/.

65. *See* Abdelkader, *Don't Overstate Anti-Muslim Bias. Really?*, *supra* note 53.

66. *See Anti-Muslim Hate Groups, supra* note 48.

67. Bail, *supra* note 60 at 870, 856.

counterspeech to challenge and defeat Islamophobic messaging. Some observers may argue that Muslims are in a suboptimal position to engage in such tactics. This position may in fact hold credence in particular segments of the Muslim community characterized by relatively new immigration and low socioeconomic status. However, in many instances, engaging in counterspeech may provide Muslims an opportunity to engage and empower themselves against anti-Muslim hate activists. The next Part profiles that Islamophobic movement.

II. THE ANTI-MUSLIM HATE ACTIVISTS

On July 22, 2012, a thirty-two-year-old, white, blond-haired, blue-eyed Norwegian named Anders Breivik executed the sequential bombing of Oslo government buildings and the mass shooting of more than sixty teenagers at a Labor Party youth camp on Norway's Utoya Island.[68] The confessed terrorist described his actions as "gruesome but necessary" to save Europe from "Muslimization."[69] In an extensive manifesto, in which he pledged to attack the purported "ongoing Islamic Colonization of Europe," Breivik also made frequent reference to U.S. anti-Muslim hate activists who informed his violent worldview.[70] These activists include Pamela Geller and Robert Spencer, the individuals responsible for the anti-Muslim transit advertisements.

The tragic circumstances surrounding the Oslo terrorist attack serve as a worrisome reminder of how impactful anti-Muslim hate speech can be not just domestically[71] but also internationally.[72] Domestically, there have been a number of potentially violent manifestations of anti-Muslim bigotry. Most recently, and perhaps relatedly, a woman told police in New York that she pushed a man onto subway tracks and to his death because she hates all Muslims and Hindus.[73]

This Part identifies the various individuals—including Pamela Geller,

68. Wajahat Ali, *Fear, Inc.*, CENTER FOR AMERICAN PROGRESS 1 (Aug. 2011), http://www.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf.

69. *Id*.

70. *Id*.

71. The Southern Poverty Law Center attributes the surge in popular anti-Muslim sentiment in the United States to this small closely-knit cadre of activists. *See* Robert Steinback, *The Anti-Muslim Inner Circle*, THE INTELLIGENCE REPORT, Summer 2011, Issue No. 142, http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/summer/the-anti-muslim-inner-circle.

72. Ali, *supra* note 68, at 2. ("According to former CIA officer and terrorism consultant Marc Sageman, just as religious extremism "is the infrastructure from which Al Qaeda emerged," the writings of these anti-Muslim misinformation experts are "the infrastructure from which Breivik emerged." Sageman adds that their rhetoric "is not cost-free.").

73. Christopher Good, *NYC Subway Push Killing: Woman Charged with Murder*, ABCNEWS.COM (Dec. 29, 2012), http://abcnews.go.com/US/nyc-subway-push-killing-suspect-custody/story?id=18090508.

Robert Spencer, and David Yerushalmi—propagating anti-Islam vitriol by placing anti-Muslim advertisements on government-owned property, giving rise to state censorship, First Amendment litigation, and counterspeech.

A. Pamela Geller: The Inflammatory Figurehead

Pamela Geller is a pseudo-expert on Islam with no formal university academic credentials.[74] The Southern Poverty Law Center (SPLC) recognizes Geller as "the anti-Muslim movement's most visible and influential figurehead."[75] She administers the *Atlas Shrugs Blog*, and directs two[76] recognized hate groups, Stop the Islamization of America (SIOA)[77] and the American Freedom Defense Initiative (AFDI).[78]

Geller depicts SIOA as a "human rights organization dedicated to freedom of speech, religious liberty, and individual rights; no special rights for special classes."[79] In contradistinction, the Anti-Defamation League states that SIOA:

> Promotes a conspiratorial anti-Muslim agenda under the guise of fighting radical Islam. The group seeks to rouse public fears by consistently vilifying the Islamic faith and asserting the existence of an Islamic conspiracy to destroy 'American' values. The organization warns of the encroachment of shari'a, or Islamic law, and encourages Muslims to leave what it describes as the 'falsity of Islam.'[80]

SIOA is encompassed by AFDI, an umbrella hate group. According to its website, AFDI:

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74. *Not Qualified: Exposing the Deception behind America's Top 25 Pseudo Experts on Islam*, MUSLIM PUBLIC AFFAIRS COUNCIL 41 (Sept. 11, 2012), http://www.mpac.org/assets/docs/publications/MPAC-25-Pseudo-Experts-On-Islam.pdf.

75. Steinback, *supra* note 71.

76. In January 2012, Geller formed a third group titled Stop the Islamization of Nations (SION), a new international organization, with herself as executive director. SION joins SIOA with the European anti-Muslim group that inspired it, Anders Gravers' Denmark-based Stop the Islamization of Europe (SIOE). The new organization intends to create a "common American/European coalition of free people" to oppose the advance of Islamic law." It will also publicize the names of politicians, activists and others who promote the alleged Islamic agenda in the West. *SPLC Profiles: Pamela Geller*, SPLCENTER.ORG, http://www.splcenter.org/get-informed/intelligence-files/profiles/pamela-geller (last visited Apr. 26, 2013).

77. A group whose actions and rhetoric the Anti-Defamation League concluded "promotes a conspiratorial anti-Muslim agenda under the guise of fighting radical Islam." Ali, *supra* note 68, at 2. The U.S. Patent and Trademark Office refused to grant SIOA a trademark on the grounds that "[t]he applied for mark refers to Muslims in a disparaging manner because by definition it implies that conversion or conformity to Islam is something that needs to be stopped or caused to cease." *See Islamophobe Profile: Pamela Geller,* COUNCIL ON AMERICAN-ISLAMIC RELATIONS, http://www.cair.com/portals/0/pdf/Pamela_Geller.pdf (last visited Apr. 26, 2013).

78. *See* Steinback, *supra* note 71. The group seeks to rouse public fears by consistently vilifying the Islamic faith and asserting the existence of an Islamic conspiracy to destroy "American values." Ali, *supra* note 68, at 2.

79. Ali, *supra* note 68, at 70.

80. *Id*.

> Acts against the treason being committed by national, state, and local government officials, the mainstream media and others in their capitulation to the global jihad and Islamic supremacism, the ever-encroaching and unconstitutional power of the federal government, and the rapidly moving attempts to impose socialism and Marxism upon the American people.[81]

Further, the hate group "acts against these evils," by "sponsor[ing] anti-jihad bus and billboard campaigns."[82] Indeed, AFDI paid for several anti-Muslim advertisements prominently featured on mass transportation systems around the country and initiated First Amendment litigation when transit authorities rejected those proposed ads.[83] The results of those lawsuits will be analyzed in greater detail in Part IV below.

A self-professed expert on all matters Islamic, Geller has an unfortunate record of making anti-Muslim remarks through various public channels, including commentaries, blog posts, and media appearances.[84] To illustrate, Geller claims "the idea of a 'moderate' Islam does not exist . . . because the Koran says so and Muhammad said so."[85] She further claims that Muslims are bent on "the Islamization of America" which she describes as "imposing Islam on the secular marketplace . . . the mosqueing of the workplace, imposing Muslim prayer times on the union contracts, forcing non-Muslims to lengthen their day."[86] Geller also argues that Muslims are intent on restricting any and all speech deemed critical of Islam: ". . . free speech is the line in the sand. Once free men have lost that basic human freedom, they have no other recourse but to resort to violence."[87] She views President Obama as "the culmination of the Islamic-leftist alliance."[88]

The list of Geller's outrageous, conspiratorial allegations goes on: Adolf Hitler and Nazism were inspired by Islam;[89] President Obama is a

81. FREEDOM DEFENSE INITIATIVE, http://freedomdefense.typepad.com/about.html (last visited Nov. 4, 2012).

82. *Id*.

83. *Id*.; *see, e.g.*, Howard Friedman, *Miami Transit Authority Backs Off Decision to Pull Anti-Muslim Ads*, Religion Clause, April 22, 2010, *available at* 2010 WLNR 8290686.

84. Among the things Pamela Geller has said regarding Islam and the terrorists who attacked us on 9/11: "I will say that the Muslim terrorists were practicing pure Islam, original Islam. The Turkish prime minister. . . Well, the Turkish prime minister said to Obama there is no extreme Islam. [However,] There is no moderate Islam. Islam is Islam. It was pure Islam." *Not Qualified*, *supra* note 75, at 41. Geller also warns that "devout Muslims should be prohibited from military service." Ali, *supra* note 68, at 91.

85. *Stop Islamization of America (SIOA)*, ANTI-DEFAMATION LEAGUE 2 (2013), http://www.adl.org/assets/pdf/civil-rights/stop-islamization-of-america-2013-1-11-v1.pdf.

86. *Id*.

87. *Id*.

88. *Id*.

89. Ali, *supra* note 68, at 90–91.

Muslim[90] and Malcolm X's "love child";[91] Islamic supremacists have infiltrated our government;[92] and Muslim female Disneyland employees who wear their headscarves to the amusement park are covertly engaged in a cultural jihad aimed at imposing Islam upon a secular marketplace.[93]

More recently, she co-authored a harsh diatribe targeting the National Geographic Museum exhibit "1,001 Inventions: Discover the Golden Age of Muslim Civilization," which showcased contributions of Muslim scientists.[94] Named the "Best Touring Exhibit" by the Museum Heritage Awards in 2011, the exhibit was originally opened in Los Angeles by Hillary Clinton.[95] Geller's critique depicted the exhibit as "Islamist propaganda," observing: "It has indoctrinated hundreds of thousands of children into a rosy and romanticized view of Islam that makes them less appreciative of their own culture's achievements and more complacent about Islamization in the West."[96] Geller further pontificated regarding the exhibit:

> Sharia enforcement extends far beyond the obvious attempts to silence critics of jihad and sharia. The scrubbing of the 270 million victims of jihadi wars, land appropriations, cultural annihilations, and enslavements from academic texts has been going on for well over a decade. The demonization and smearing of politicians who dare speak against the most extreme and radical ideology on the face of the earth is virtually automatic at this point, as is the self-enforcing sharia compliance of the mainstream media.[97]

Disturbingly, Geller's spew of Islamophobic hate and vitriol have been arguably *effective*. For instance, Geller has acquired a measure of mainstream acceptability:[98] in late March 2011, the Alaska House of Representatives invited her to testify on proposed anti-Islam legislation.[99] She has also successfully influenced the media.[100]

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90. *Id*. at 91.

91. Steinback, *supra* note 71.

92. *Fear, Inc., supra* note 68, at 91.

93. *Fear, Inc., supra* note 68, at 90; *see also* Pamela Geller, *Workplace Jihad: Muslima sues Disney over hijab,* ATLAS SHRUGGED (Aug. 13, 2012), http://pamelageller.com/2012/08/workplace-jihad-muslima-sues-disney-over-hijab.html/.

94. Meredith Bennett-Smith, *Pamela Geller, Anti-Muslim Activist, Blasts National Geographic Museum Exhibit for Romanticizing Islam,* THE HUFFINGTON POST (Sept. 6, 2012), http://www.huffingtonpost.com/2012/09/06/pamela-geller-anti-muslim-advocate-national-geogrpahic-museum_n_1862458.html.

95. *Id*.

96. *Id*.

97. *Id*.

98. *See SPLC Profiles: Pamela Geller, supra* note 76.

99. *Id*.

100. *See* Robert Spencer, *New York Post Admits Pamela Geller is Right: Palestinian Jihadists are Savages,* JIHADWATCH.COM (Nov. 12, 2012, 06:26 AM), http://www.jihadwatch.org/2012/11/new-york-post-admits-pamela-geller-is-right-palestinian-jihadists-are-savages.html.

B. Robert Spencer: The Pseudo-Scholar

Robert Spencer is a prolific author, blogger, and commentator who co-founded AFDI. He also directs the website Jihad Watch,[101] which is affiliated with the David Horowitz Freedom Center.[102] The Center's mission is to "defend the principles of individual freedom, the rule of law, private property, and limited government."[103] As an affiliate of the Freedom Center, Jihad Watch's principal objective is to "track the attempts of radical Islam to subvert Western culture."[104]

Another self-professed expert on Islam and Muslims, Robert Spencer, like Geller, lacks formal academic credentials in either subject.[105] Spencer regards the Qur'an and its adherents as inherently violent, and interprets the holy text of Islam in a strictly literal and selective fashion, wholly devoid of historical context, in order to support his thesis.[106] In Spencer's opinion, Islam is:

> The only religion in the world that has a developed doctrine, theology and legal system that mandates violence against unbelievers and mandates that Muslims must wage war in order to establish the hegemony of the Islamic social order all over the world.[107]

In an interview with a conservative Canadian television station on September 12, 2011, Spencer claimed terrorism is wholly unique to the Islamic faith: "We don't see Christian groups, we don't see Jewish groups, we don't see Atheist groups, we don't see the kind of terrorist groups around the world on the scale that we see violent Islamic jihad groups all over the world."[108] During another television interview the following

101. Significantly, Spencer and his blog were cited 162 times in the nearly 1,500-page manifesto of Anders Breivik, the confessed Norway terrorist. Ali, *supra* note 68, at 1.

102. *Id*.

103. *Id*. at 45.

104. *Id*.

105. *See Not Qualified, supra* note 74 (Spencer's master's degree in religious studies from the University of North Carolina in Chapel Hill focuses, rather, on early Christianity).

106. *See* Steinback, *supra* note 71 (while bypassing peaceful narratives and an expansive interpretive tradition that has modified [Qur'anic] understanding over time); *see also Not Qualified, supra* note 74, at 61 (Spencer typically employs a cherry-picking, cut-and-paste methodology that rips passages from Islamic scripture out of context in order to fit his agenda of portraying the religion and its followers as inherently violent).

107. Ali, *supra* note 68, at 27. Spencer is also credited with saying: "Of course, as I have pointed out many times, traditional Islam itself is not moderate or peaceful. It is the only major world religion with a developed doctrine and tradition of warfare against unbelievers. . . . [T]hat the Qur'an doesn't teach violence any more than the "Bible or Torah" is flatly false. For while the Bible contains descriptions of violent acts committed in the name of God, nowhere does it teach believers to imitate that violence. Where people are commanded to commit acts of violence, these are commands directed to specific individuals or groups in particular situations: they are universal commands. The Qur'an on the other hand, quite clearly does teach believers to commit acts of violence against unbelievers[.]" *Not Qualified, supra* note 74, at 61.

108. *Stop Islamization of America (SIOA)*, *supra* note 85, at 4.

month, Spencer argued that the Qur'an promotes violence: "The Qur'an is very clear that it is the responsibility of believers, as a whole in the aggregate, to make war against unbelievers and subjugate them under the rule of Islamic law. . . ."[109]

Spencer describes stories of Muhammad, the Prophet of Islam, as "fiction and elaborated" by Arab conquerors "in order to preserve and perpetuate their empire."[110] He falsely claims the Qur'an commands Muslims to dominate all people: "According to the Qur'an 98:06 . . . the Muslims have the responsibility to extend the rule of Islamic law over them [unbelievers] and to subjugate them as inferiors because of their rejection of Islam."[111] Like Geller, he advances theories about Muslims bent on Islamizing America and believes the Muslim Brotherhood is the key driving force behind this furtive movement.[112] He describes The Brotherhood as having "a plan to do nothing less than conquer and Islamize the United States," with the aid of American Muslim front groups.[113]

Also like Geller, with whom he founded SIOA and the AFDI,[114] Spencer has enjoyed a troubling measure of success and is credited with generating misinformation used by political leaders, grassroots groups, and the media.[115] Elected officials, including once-presidential-hopeful U.S. Representative Michelle Bachman, have cited Spencer's theories.[116] He has led seminars on Islam and jihad for the U.S. Central Command, U.S. Army Command, and General Staff College, the U.S. Army's Asymmetric Warfare Group, the FBI, the Joint Terrorism Task Force, and the U.S. intelligence community.[117] According to Carl Ernst and William Kenan, Professors of Religious and Islamic Studies at Spencer's alma mater, the University of North Carolina-Chapel Hill, Spencer's views have "no basis in scholarship."[118] Rather, Professor Ernst concludes that Spencer cherry-picks textual, religious evidence to mainstream the accusation that "Islam is not a religion of peace."[119]

C. David Yerushalmi: The Lawyer Waging Lawfare

Profiled by the *New York Times* as "The Man Behind the Anti-Shariah Movement," lawyer David Yerushalmi directs the Society of Americans for

109. *Id*.
110. *Id*.
111. *Id*.
112. *Id*. at 4–5.
113. *Id*.
114. *See* Steinback, *supra* note 71.
115. *See Fear, Inc., supra* note 68, at 27.
116. *See Stop Islamization of America (SIOA)*, *supra* note 85, at 5.
117. *Fear, Inc., supra* note 68 at 44–45.
118. *Not Qualified, supra* note 74, at 62.
119. *Fear, Inc., supra* note 68, at 46.

National Existence ("SANE") and serves as counsel for SIOA.[120] SANE is an anti-Muslim hate group dedicated to advancing the notion that Islam is innately seditious and Islamic law nothing more than a "criminal conspiracy to overthrow the U.S. government."[121]

An outspoken critic of Islamic religious law, Yerushalmi, like anti-Muslim cohorts Geller and Spencer, lacks any academic credentials in Islamic legal studies to qualify him as a scholar on the subject.[122] Yerushalmi does not differentiate between Islamic law and radical extremism; he openly advocates outlawing the personal practice of Islamic legal traditions notwithstanding First Amendment protections prohibiting such exclusion.[123] Moreover, the only socially tolerable Muslim from Yerushalmi's perspective is one who disavows Islamic customs and legal traditions.[124] Further, Yerushalmi favors the mass deportation of American Muslims and other "non-Western, non-Christian" persons to preserve America's "national character."[125]

To further his ideological ends, Yerushalmi practices what he terms "lawfare"—a multi-platform attack on American Muslims' freedom, staged by pushing anti-Islam measures in state legislatures.[126] In 2011 and 2012, seventy-eight bills or amendments aimed at interfering with Islamic religious practices were considered in thirty-one states and the U.S. Congress.[127] Sixty-two of these bills contained language extracted from Yerushalmi's American Laws for American Courts ("ALAC") model legislation, explicitly created to outlaw Islamic law.[128] Bills were signed into law in four states in 2011 including Arizona, Kansas, South Dakota,

120. Yerushalmi drafted a proposed law filed in the Tennessee legislature that subjected anyone who advocates or adheres to Islamic customs to up to 15 years in prison; he drafted a similar bill in Georgia in 2008. Steinback, *supra* note 71.

121. In 2007, David Yerushalmi urged the United States to declare "War against Islam and all Muslim faithful." *SPLC Profiles: David Yerushalmi*, SOUTHERN POVERTY LAW CENTER, http://www.splcenter.org/get-informed/intelligence-files/profiles/david-yerushalmi.

122. Yerushalmi has a bachelor's degree in public policy and Juris Doctorate from Arizona State University. *Not Qualified, supra* note 74, at 65.

123. Steinback, *supra* note 71.

124. *Id*.

125. *Id*. ("On the so-called Global War on Terrorism, GWOT, we have been quite clear along with a few other resolute souls. This should be a WAR AGAINST ISLAM and all Muslim faithful. . . . At a practical level, this means that Shari'a and Islamic law are immediately outlawed. Any Muslim in America who adopts historical and traditional Shari'a will be subject to deportation. Mosques, which adhere to Islamic law, will be shut down permanently. No self-described or practicing Muslim, irrespective of his or her declarations to the contrary, will be allowed to immigrate to this country." –A 2007 commentary entitled "War Manifesto – The War Against Islam," as reported by The American Muslim).

126. *Yerushalmi: SPLC Profile*, *supra* note 121.

127. *Hate Crimes and the Threat of Domestic Extremism, supra* note 7, at 6.

128. *Id*.

and Tennessee.[129] These bills joined prior enacted laws in Oklahoma and Louisiana.[130] Advocacy groups have expressed concern that such measures provide legitimizing cover for anti-Islam rhetoric, culminating in bias-motivated violence.[131]

Yerushalmi's "lawfare" also encompasses aggressive First Amendment litigation that challenges those he views as compromising America's "Judeo-Christian" tradition.[132] To this end, he has represented the Qur'an-burning Florida pastor Terry Jones[133] and has initiated the First Amendment litigation involving the controversial anti-Muslim ads that are the subject of this Article.

Notably, the Anti-Defamation League has found that Yerushalmi's work shows a "record of anti-Muslim,[134] anti-immigrant,[135] and anti-black[136] bigotry."[137]

Geller, Spencer, Yerushalmi: these are the individuals and leaders of groups responsible for the hate advertisements placed on government-owned transit systems in cities around the country. Their collective campaign encompasses hate speech, attacking the minority Muslim community in the United States. They say they are trying to prevent the subversion of Western culture and violent overthrow of the U.S. government by Islam and its law. Their broader strategy, however, is the defamation of the faith and the collective denigration of its adherents. And their efforts are well funded.

In fact, according to research conducted by the Center for American Progress ("CAP"), these activists are part of a larger multi-million dollar network of activists, journalists, and politicians propagating anti-Muslim hate.[138] CAP found that approximately $40 million flowed from seven foundations over the course of ten years.[139] Its research depicts the well-

129. *Id*.

130. *Id*.

131. *Id*.

132. *David Yerushalmi: SPLC Profile*, *supra* note 122.

133. *Id*.

134. In *Middle East Quarterly,* he misstates that more than 80 percent of U.S. mosques advocate or promote violence. *Fear, Inc., supra* note 68, at 86.

135. Yerushalmi once called for undocumented immigrants to be placed in "special criminal camps," detained for three years, and then deported. *See David Yerushalmi: SPLC Profile, supra* note 122.

136. In a 2006 essay titled "On Race: A Tentative Discussion," Yerushalmi described "blacks as the most murderous of peoples." *Fear, Inc., supra* note 68, at 37.

137. Yerushalmi, in discussing race and statistics asked why people did not agree that "some races perform better in sports, some better in mathematical problem solving, some better in language, some better in Western societies and some better in tribal ones[.]" *David Yerushalmi: SPLC Profile*, *supra* note 122.

138. *See Fear, Inc., supra* note 68, at 13–23.

139. *Id*. (citing the donors as including: Capital Fund, Richard Mellon Scaife foundations, Lynde and Harry Bradley Foundation, Newton D. & Rochelle F. Becker foundations and charitable trust,

funded network as wielding great influence in national and international political debates, while amplifying fear and misinformation about Muslims and their faith tradition.[140]

The pernicious effects include stigmatization and marginalization of American Muslims socially, politically, and legally. The following Part examines the hate advertisements these activists have sponsored to facilitate realization of their bigoted goals.

III. PROPAGATING HATE THROUGH POLITICIZED ADVERTISEMENTS ON GOVERNMENT-OWNED PROPERTY

The incendiary transit advertisements may differ in wording but the message is the same: hatred for Islam and its adherents. This Part examines the content of three of those ads.

Since 2010, passengers riding mass transit buses in New York City, Detroit, and Miami have been exposed to SIOA advertisements encouraging Muslims to convert from Islam.[141] The advertisements question: "Leaving Islam? Fatwa on your head? Is your family threatening you? Got Questions? Get Answers," and thereafter direct readers to visit RefugefromIslam.com.[142]

The Miami-Dade County Transit Authority initially decided to remove the "Fatwa on Your Head" ads from its buses after receiving complaints from an American Muslim civil rights advocacy group.[143] The transit authority reconsidered its decision, however, after Yerushalmi threatened First Amendment litigation on SIOA's behalf.[144] So effective was Yerushalmi's threat that the transit authority not only placed the original ten contracted ads but also placed twenty more ads at no additional expense to SIOA.[145] Yerushalmi did not fare as well in Detroit, however, and his subsequent legal challenge is discussed in greater detail in Part V.

More recently, mass transit passengers were confronted with another onslaught of anti-Muslim messaging. This advertisement, sponsored by the

Russell Berrie Foundation, Anchorage Charitable Fund and William Rosenwald Family Fund, and Fairbrook Foundation).

140. *Id*. at 1.

141. Deepti Hajela, *Pamela Geller's 'Leaving Islam?' Bus Ads Cause Controversy,* THE HUFFINGTON POST (May 26, 2010), http://www.huffingtonpost.com/2010/05/26/pamela-gellers-leaving-is_n_591112.html.

142. *Id*. ("Eugene Volokh, a First Amendment expert at UCLA School of Law, said the ads could leave some Muslims reluctant to ride the bus. There could also be a risk that some extremist groups might bomb the buses, although that possibility wouldn't limit free speech rights, he said.").

143. Howard Friedman, *Miami Transit Authority Backs Off Decision to Pull Anti-Muslim Ads*, Religion Clause, April 22, 2010, *available at* 2010 WLNR 8290686.

144. *Id*.

145. *Id*.

AFDI,[146] read: "19,250 deadly Islamic attacks since 9/11/01. It's not Islamophobia, it's Islamorealism."[147] After running on NYC trains, a local chapter of the Council on American-Islamic Relations ("CAIR"), a national civil rights advocacy group for American Muslims, reported receiving a telephone call from a Muslim mother of three children in the Bronx who reportedly expressed a fear of riding trains where the ads were featured.[148] Unlike the "Fatwa on Your Head" ad above and the "Savages" ad described below, the "Islamorealism" ad ran unchallenged.[149]

Most recently, however, AFDI placed a third advertisement—initially in San Francisco, then in New York and Washington, D.C., and now in Chicago—equating Muslims with "savages." The ad created a firestorm of controversy culminating in legal challenges when city officials refused the ads.[150] They read: "In any war between the civilized man and the savage, support the civilized man. Defeat Jihad. Support Israel."[151] The ads were deemed so controversial that the New York Metropolitan Transportation Authority rejected them as violating its "no-demeaning" advertising standards.[152] Washington, D.C.'s transit authority "deferred" placement of the ads "out of concern for public safety, given current world events."[153]

146. Paul Murnane, *Controversial 'Islamorealism' Ads Go Up In Metro-North Stations in Westchester,* CBS.com (Aug. 17, 2012), http://newyork.cbslocal.com/2012/08/17/anti-islamic-ads-go-up-in-metro-north-stations-in-westchester/.

147. Email from CAIR-NY, *MTA Changes Policy in Response to Anti-Muslim Ads, CAIR-NY Demands More,* The CAIR-New York E-Newsletter, October 1, 2012, from mawad@cair.com (Mon, Oct. 1, 2012 at 3:00 PM).

148. *Id*. ("CAIR-NY was surprised by the racism posted in an MTA ad which associated Islam with terror, and we were surprised by the fact that many Muslim institutions and organizations had no idea that the ads ran for the entire month of August, and were unable to do anything about it.").

149. *Id*.

150. *See CNN Posts Entire Interview with Pamela Geller and Erin Burnett*, ATLASSHRUGS. http://atlasshrugs2000.typepad.com/atlas_shrugs/2012/09/cnn-posts-entire-interview-with-pamela-geller-and-erin-burnett.html (last visited Apr. 26, 2013); Seattle Mideast Awareness Campaign v. King County, 771 F.Supp.2d 1266 (W.D. Wash. 2011); Adam Serwer, *Who's Behind the Anti-Islam Ads on MTA and Muni?,* MOTHER JONES (Aug. 15, 2012), http://www.motherjones.com/print/190856; Matt Flegenheimer, *Ad Calling Jihad 'Savage' is Set to Appear in Subway,* N.Y.TIMES.COM (Sept. 18, 2012), http://www.nytimes.com/2012/09/19/nyregion/ad-demeaning-muslims-to-appear-in-new-york-subway.html?.

151. It bears noting that Geller has on numerous occasions described this particular line of advertisements as a response to anti-Israel ads. *See, e.g., CNN Posts Entire Interview with Pamela Geller and Erin Burnett,* ATLASSHRUGS, http://atlasshrugs2000.typepad.com/atlas_shrugs/2012/09/cnn-posts-entire-interview-with-pamela-geller-and-erin-burnett.html (last visited Apr. 26, 2013); *see also* Seattle Mideast Awareness Campaign v. King County, 771 F.Supp.2d 1266 (W.D. Wash. 2011). For additional information regarding the ads more generally, see Robert Mackey, *Anti-Islam Ads Remixed in San Francisco and New York,* N.Y.TIMES.COM (Aug. 21, 2012), http://thelede.blogs.nytimes.com.

152. *See* Adam Serwer, *Who's Behind the Anti-Islam Ads on MTA and Muni?,* MOTHER JONES (Aug. 15, 2012), http://www.motherjones.com/print/190856.

153. *See* Matt Flegenheimer, *Ad Calling Jihad 'Savage' is Set to Appear in Subway,* N.Y.TIMES.COM (September 18, 2012), http://www.nytimes.com/2012/09/19/nyregion/ad-demeaning-muslims-to-appear-in-new-york-subway.html?.

Authorities in Michigan also refused to run the anti-Muslim ads.[154] SIOA initiated First Amendment litigation in each of these jurisdictions, the outcomes of which are analyzed in the following Part.

IV. THE LITIGATION: THE IMPACT OF "FORUM ANALYSIS" UPON FREE SPEECH

In its First Amendment jurisprudence, the Supreme Court has sorted government property—such as the mass transit systems at issue here—into three groups: traditional public forums, designated public forums, or nonpublic forums.[155] The type of forum dictates the applicable legal standard for determining the constitutionality of the speech restriction in question.[156] Specifically, when the government imposes a speech restriction by foreclosing access to its own property, the level of judicial scrutiny the court is to apply to the restriction depends on the forum classification for speech.[157] Thus, this "forum analysis" is critical, as it often proves dispositive of the case's outcome.

The first category, the "traditional public forum," refers to areas that have conventionally been employed by the public for assembly and the exchange of ideas, such as public streets, sidewalks, and parks.[158] In a traditional public forum, the court must subject a content-based speech limitation to strict scrutiny to determine whether it is narrowly tailored to serve a compelling government interest.[159]

The "designated public forum" refers to property that the government has opened up to the same extent of expressive speech as a traditional public forum, such as a municipal meeting room, public university meeting facilities, and school board meeting rooms.[160] As such, the same legal standard governs: the court must subject content-based speech limitations to a strict scrutiny legal analysis.[161] Essentially, this means that content-neutral time, place, and manner restrictions are permissible only if they are

154. *See* Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp., 698 F. 3d 885, 889 (6th Cir. 2012).

155. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 797 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); Am. Freedom Def. Initiative v. Metro. Transp. Auth., 880 F. Supp. 2d 456, 469–70 (S.D.N.Y. 2012).

156. *Am. Freedom Def. Initiative*, 880 F. Supp. 2d at 469.

157. *Id.*

158. *Id.*

159. *Id.* (the government may impose content-neutral time, place, and manner restrictions but these must be narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication).

160. *See Perry Educ. Ass'n*, 460 U.S. at 46; *Am. Freedom Def. Initiative*, 880 F. Supp. 2d at 469.

161. *See Cornelius,* 473 U.S. at 797; *Perry Educ. Ass'n*, 460 U.S. at 46; *Am. Freedom Def. Initiative*, 880 F. Supp. 2d at 161 (content-neutral time, place, and manner restrictions are permissible only if they are narrowly tailored and leave open other avenues for expression).

narrowly tailored and leave open other avenues for expression.[162]

Finally, "non-public forums" signifies government property that does not enjoy the same degree of expressive speech as found in a traditional public forum.[163] Examples of "non-public forums" include airport terminals, military bases and restricted access military stores, and jailhouse grounds.[164] When the government property is classified as a non-public forum, the standard differs: content-based speech limitations need only be reasonable and viewpoint-neutral.[165]

A number of courts, including the U.S. Supreme Court, have applied these rules to advertising on mass transit systems with varying results. In *Lehman v. City of Shaker Heights*,[166] for instance, the Supreme Court looked at a city's advertising standards excluding political content from the interior of its transit system.[167] The Court declined to find a designated public forum. The Court reasoned:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles. . . . No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.[168]

The issue has also been addressed by the circuit courts. On the one hand, the Ninth Circuit has characterized exterior advertising space on transit systems as a limited public forum where the government entity has not rendered the space a place for general discourse by effectively regulating and restricting placement of content.[169]

On the other hand, the Seventh Circuit found a designated public forum where a transit authority published all advertisements in the interior

162. *Am. Freedom Def. Initiative*, 880 F. Supp. 2d at 469.
163. *See id.* at 470.
164. *Id.*
165. *See Perry Educ. Ass'n,* 460 U.S. at 46.
166. 418 U.S. 298, 301–03 (1974).
167. *Id.* at 303.
168. *Id.* at 303–04.
169. Children of the Rosary v. Phoenix, 154 F.3d 972, 978 (9th Cir. 1998).

of its systems, loosely applying its own standards excluding vulgar, immoral, or disreputable content, thus evincing an intent, the court reasoned, to create a public forum.[170] Similarly, the Third Circuit, in *Christ's Bride Ministries, Inc. v. SEPTA*, found that advertising space on mass transit systems constituted a designated public forum on account of the city's established record of publishing all advertisements irrespective of controversial, or lack thereof, content.[171] In the court's view, such absence of regulation evinced intent to establish a forum open to public discourse.[172]

Finally, in *New York Magazine v. Metropolitan Transportation Authority*, the Second Circuit held advertising space on the exterior of transit vehicles to be a designated public forum where the advertising standards allowed both commercial and non-commercial speech:

> Disallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in Lehman recognized as inconsistent with sound commercial practice. The district court thus correctly found that the advertising space on the outside of MTA buses is a designated public forum, because the MTA accepts both political and commercial advertising.[173]

The designation of forum is critical because as we shall see in each of the following matters—in New York, Michigan, and Washington, D.C.—that the forum finding significantly influences the court's First Amendment analysis.

A. New York: AFDI v. Metropolitan Transit Authority—*Government Property as a Designated Public Forum*

In *AFDI v. Metropolitan Transit Authority ("MTA")*, the federal district court found that the MTA's[174] transportation vehicles constituted a designated public forum, thus subjecting restrictions on speech in that domain to strict scrutiny analysis. This analysis proved fatal to MTA's "no-demeaning standard," which was applied to bar AFDI's advertisements from its transit vehicles.[175] The court found that MTA's standard differentiated speech that demeaned on account of "race, color, religion,

170. Planned Parenthood Ass'n. Chicago Area v. Chicago Transit Auth., 767 F.2d 1225, 1232 (7th Cir. 1985).

171. Christ's Bride Ministries, Inc. v. SEPTA, 148 F.3d 242, 254 (3d Cir. 1998), *cert. denied,* 525 U.S. 1068 (1999).

172. *Id.* at 253.

173. New York Magazine v. Metro. Transp. Auth., 136 F.3d 123, 130 (2d Cir. 1998).

174. The MTA is the public authority that provides mass transit in the New York City metropolitan area. *Id.* at 125.

175. *Id.* at 129–32.

national origin, ancestry, gender, age, disability, or sexual orientation" from speech which demeaned on an unprotected basis (i.e., marital status or socioeconomic background). Because the government could provide no justification to back such a distinction, its "no-demeaning standard" was rendered unconstitutional.[176] The decision is further examined below.

In March 2011, AFDI submitted an advertisement to the MTA intended for the exteriors of New York City buses.[177] The ad read: "In any war between the civilized man and the savage, support the civilized man."[178] The ad included a series of photographs, including young soldiers wearing keffiyehs[179] and holding weapons, a man standing behind a lectern and in front of three flags displaying the star and crescent, men in keffiyehs marching and giving a salute, and Adolf Hitler with his hands on the shoulders of a child wearing a keffiyeh.[180] Below the photographs appeared the copy: "Support Israel / Defeat Jihad" and it directed readers to two websites, AtlasShrugs.com and FreedomDefenseInitiative.com.[181]

AFDI soon withdrew that ad and submitted a modified one.[182] The new ad differed from the first in that two photographs were removed and replaced by a photograph of an Arab woman wearing a hijab and holding a sign reading "God Bless Hitler"; the text below was changed to: "Support Israel/Defeat Islamic Fundamentalism."[183] AFDI was asked to modify this second ad because it violated the MTA advertising standards.[184]

MTA accepts both commercial and non-commercial ads (i.e., ads by government agencies, not-for-profit and religious organizations, political ads, and public service announcements) for placement on transit vehicles and regards this as an important source of revenue.[185] Ad buys are subject to MTA's "no-demeaning standard," [186] first adopted in 1994 and thereafter revised in 1997, which specifically prohibits ads that "contain images or information that demean an individual or group of individuals on account of race, color, religion, national origin, ancestry, gender, age, disability or

176. *Id*. at 132.

177. Before submitting the ad that is the subject of this case, AFDI had submitted two ads to the MTA; both were accepted. Am. Freedom Def. Initiative v. Metro Transp. Auth., 880 F. Supp. 2d 456, 462 (S.D.N.Y. 2012).'

178. *Id*.

179. This refers to a traditional Arabic headdress or scarf fashioned from a square, made of cotton and featuring a black and white or red and white checkered pattern. *Id*.

180. *Id*.

181. *Id*.

182. It appears this was done voluntarily although the court documents do not explicitly state the same. *Id*.

183. *Id*.

184. *Id*.

185. *Id*. at 460.

186. *Id*. at 460–61.

sexual orientation."[187]

In September 2011, AFDI submitted a third ad that culminated in instant litigation.[188] It contained no photographs and the copy read: "In any war between the civilized man and the savage, support the civilized man."[189] Below that, in blue, were two Stars of David, and the words, "Support Israel," and beneath that, in red text: "Defeat Jihad."[190] The ad also directed readers to AtlasShrugs.com, SIOAonline.com, and JihadWatch.com.[191]

MTA determined that the third ad violated its "no-demeaning standard" and so advised Geller.[192] In response, Yerushalmi, in his capacity as AFDI's counsel, emailed stating that the ad was not demeaning and that in any case, the "no-demeaning standard" constituted viewpoint discrimination in violation of the First Amendment.[193] He further advised that AFDI had no intention of revising this third ad.[194] MTA thereafter sent Geller its final determination rejecting the ad while elaborating that the use of "savage" and "Jihad" to identify those who fail to support Israel "demeans a group (or groups) of individuals on account of their religion, national origin, or ancestry, including Palestinians or other Arabs or Muslims who do not share AFDI's views on Israel."[195]

On September 27, 2011, AFDI filed suit in federal district court seeking a preliminary injunction enjoining the application of MTA's advertising standards.[196] In its complaint, AFDI claimed that MTA's "no-demeaning standard" was unconstitutional and that the rejection of its ad for non-conformity with that standard unlawfully restricted its freedom of speech.[197]

To determine whether the injunction should be issued, the court first assessed whether MTA's "no-demeaning standard" prohibited the AFDI ad. The court found that it did because terming a person or people as "savage" was unquestionably demeaning to that individual or group.[198] Since MTA did not misapply its "no-demeaning standard," the court turned next to the following inquiry: whether that prohibition violated the First

187. *Id*. at 461.
188. *Id*. at 462.
189. *Id*. at 463.
190. *Id*.
191. *Id*. (AFDI sought to run the ad on the tails of approximately 318 NYCTA buses for four weeks).
192. *Id*. at 462–63.
193. *Id*. at 464.
194. *Id*.
195. *Id*.
196. *Id*. at 465.
197. *Id*.
198. *Id*. at 468.

Amendment.[199] To make that assessment, the court analyzed the forum, advertising space on MTA bus exteriors, to identify the applicable legal standard for MTA's speech restriction.[200] In so doing, the court followed the precedent set by the Second Circuit's decision in *New York Magazine v. MTA*, 136 F.3d (2d Cir. 1998), which found that the same forum, advertising space on the identical MTA bus exteriors, constituted a designated public forum, in which content-based restrictions on expressive activity are subject to strict scrutiny.[201] This is because the advertising standards allowed both commercial and political speech, and allowing the latter evidences a general intent to open a space for public discourse. Since the same advertising space and standards[202] were at issue here as in *New York Magazine*, the court found the Second Circuit's decision controlling by virtue of stare decisis.[203]

The court then applied the strict scrutiny analysis—requiring content-based restrictions to serve a compelling state interest and be narrowly drawn to achieve that end—to MTA's "no-demeaning standard" to assess the constitutionality of that speech restriction.[204] MTA's standard, the Court found, was in fact a content-based restriction because it differentiated ads on that very basis.[205] Further, the court reasoned, outside of the nine classifications—race, color, religion, national origin, ancestry, gender, age, disability, or sexual orientation—MTA's standard allowed all other demeaning ads.[206] Moreover, the Court found that MTA could not offer any basis for selectively allowing demeaning speech to appear on the exterior of its buses, let alone demonstrate that its content-based restriction is narrowly tailored to serve a compelling government interest as is necessary to survive strict scrutiny.[207] As such, the Court held that the MTA "no-demeaning standard," in its current form, violated the First Amendment.[208] The Court granted the preliminary injunction enjoining the enforcement of MTA's "no-demeaning standard,"[209] and later entered a permanent

199. *Id*. at 469.

200. *Id*. at 470.

201. *Id*. at 472.

202. There had been no such changes in MTA's policies and practices governing bus ads since *New York Magazine*.

203. *Id*.

204. *Id*. at 474.

205. *Id*.

206. *Id*. at 475 ("Thus, MTA's standard permits ads that demean individuals or groups based on a host of circumstances and characteristics—including place of residence, personal history, education, occupation or employment, physical characteristics (other than disability), political affiliation, union membership, point of view, or behavior[.]").

207. *Id*. at 476.

208. *Id*. at 477.

209. *Id*. at 478.

injunction.[210]

It is interesting to note the events that immediately followed the court's decision: the MTA board met and voted unanimously to require viewpoint advertisements displayed on government property to include a disclaimer clearly stating that running an ad "does not imply MTA's endorsement of any views expressed."[211] MTA's disclaimers will accompany all political, religious, or moral advertisements controversial in nature, including those that were the subject of the instant litigation.[212] Significantly, the MTA had not previously altered its advertising standards in nearly fifteen years.[213]

B. Michigan: AFDI v. Suburban Mobility Authority for Regional Transportation—*Government Property as a Non-Public Forum*

In *AFDI v. Suburban Mobility Authority for Regional Transportation ("SMART")*, the Sixth Circuit found that the advertising space on SMART's transit vehicles qualified as a non-public forum.[214] As such, transit officials were afforded greater leniency in speech restriction determinations and SMART's advertising standards. Unlike MTA's standards above, SMART's standards were found to comport with the First Amendment.[215]

In May 2010, AFDI submitted the "'Fatwa on your Head" advertisement to SMART, a state-run transit authority, to be placed on the exterior of city buses in Michigan.[216]

Advertising space on SMART buses is subject to its "Restriction on Content" policy, which limits the permissible content of advertisements displayed on SMART vehicles.[217] The policy reads:[218]

> In order to minimize chances of abuse, the appearance of favoritism and

210. *See* Am. Freedom Def. Initiative v. Metro. Transp. Auth., 889 F. Supp. 2d 606, 609 (S.D.N.Y. 2012).

211. Among the other options available to the MTA: it could have more specifically delineated types of speech that are forbidden, within the framework suggested by the court's ruling; dropped restrictions on provocative or offensive political statements; or restricted its advertisers to strictly commercial messages. Alfonso A. Castillo, *MTA to add disclaimer*, NEWSDAY, Sept. 28, 2012, *available at* 2012 WLNR 20627762, at A44. *See also,* Ted Mann, *MTA Ad Policy Faces Overhaul,* THE WALL STREET JOURNAL (Sept. 26, 2012), http://online.wsj.com/news/articles/SB10000872396390443507204578020822124447836.

212. Paul Burton, *Amid Chaos, N.Y. MTA Alters Advertising Policy*, BOND BUYER, October 1, 2012 available at 2012 WLNR 20697769.

213. Castillo, *supra* note 211, at A44.

214. Am. Freedom Def. Initiative v. Suburban Mobility Auth. For Reg'l Transp., 698 F.3d 885, 888 (6th Cir. 2012).

215. *Id*.

216. *Id*.

217. *Id*.

218. *Id*. at 888–89.

> the risk of imposing upon a captive audience, [SMART] shall not allow the following content:
>
> Political or political campaign advertising.
>
> Advertising promoting the sale of alcohol or tobacco.
>
> Advertising that is false, misleading or deceptive.
>
> Advertising that is clearly defamatory or likely to hold up to scorn or ridicule any person or group of persons.
>
> Advertising that is obscene or pornographic; or in advocacy of imminent lawlessness or unlawful violent action.

SMART refused to display AFDI's advertisement on the grounds that its policy prohibits content that is political or that subjects any group to scorn.[219] In response, AFDI filed suit in federal district court claiming a violation of its First and Fourteenth Amendment rights and sought a preliminary injunction.[220]

SMART countered that its policy was viewpoint neutral, rejecting all advertising deemed political, defamatory, or likely to ridicule an individual or group of individuals.[221] SMART contended that it had actively enforced this policy and rejected any and all advertising deemed to violate this policy.[222] Upon receiving AFDI's requested advertisement, SMART found it to be in violation of the policy, because it constituted political advertising and would likely hold a group of persons up to scorn and ridicule.[223]

Similar to the court in court in *AFDI v. MTA*, the Sixth Circuit engaged in a forum analysis and concluded that SMART's advertising space constituted a non-public forum.[224] The court was thus required to engage in a rational basis review—a much more lenient standard than that employed in MTA—to determine the constitutionality of SMART's free speech restriction.[225] This standard required SMART's restriction to be reasonable and viewpoint neutral.[226]

While SMART argued that its policy satisfied that standard, the district court, in applying Sixth Circuit law, concluded otherwise.[227] The court characterized SMART's policy as "arbitrary and capricious" because of the absence of any manual, standard, or language to help guide officials'

219. *Id*. at 889.

220. *Id*.

221. Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp., No. 10-12134, 2011 WL 1256918, *2 (E.D. Mich. S. Div. Mar. 31, 2011), *rev'd*, 698 F.3d 885 (6th Cir. 2012).

222. *Id*.

223. *Id*. at *1.

224. *Id*.

225. *Id*.

226. *Id*.

227. Sixth Circuit has held "the absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." *Id*.

determinations about what differentiates a political advertisement from a non-political one.[228] The court noted, as an example of this lack of guidance, that SMART had allowed an advertisement by the Detroit Coalition for Reason (the "atheist advertisement"), but disallowed AFDI's fatwa advertisement. The atheist advertisement read: "Don't believe in God? You are not alone. DetroitCoR.org."[229] The court found that this purportedly disparate treatment showed the absence of guidance.[230] As such, the district court concluded that SMART's policy had not satisfied the requisite rational basis review. It enjoined the transit authority's restriction on AFDI's expressive speech.[231] SMART subsequently appealed to the U.S. Court of Appeals for the Sixth Circuit.[232] The Sixth Circuit reviewed the case de novo and reversed the federal district court's decision issuing an injunction, finding that SMART's prohibition on political advertisements on its city bus exteriors, a non-public forum, constituted a reasonable content restriction.[233]

In classifying the advertising space as a non-public forum, the court was informed by the government's explicit statements, policy, and practice, as well as the nature of the space itself.[234] It noted SMART's "tight control" over the space and the numerous rules dictating advertising content, rendering the space "incompatible with the public discourse, assembly and debate that characterize a designated public forum."[235] Moreover, and unlike the MTA advertising standards described above, SMART specifically prohibited political advertisements—"speech that is the hallmark of a public forum"—thus demonstrating its intent to act as a commercial proprietor, an entity for which making money is its primary objective, consistent with SMART's status as a non-public forum.[236]

The Sixth Circuit applied the Supreme Court's holding in *Lehman v. City of Shaker Heights*, using the rule that advertising space sold on transit vehicles was not a public forum because the city had rejected all political advertisements.[237] As for the atheist advertisement, the court stated that "[o]ne or more instances of erratic enforcement of a policy does not itself defeat the government's intent not to create a public forum."[238] In the alternative, the court reasoned that the advertisement could reasonably have

228. *Id*.
229. *Id*.
230. *Am. Freedom Def. Initiative*, 698 F.3d at 889.
231. *Am. Freedom Def. Initiative*, No. 10-12134, 2011 WL 1256918, *6 (AFDI I).
232. *Am. Freedom Def. Initiative*, 698 F.3d at 888.
233. *Id. at* 890, 896.
234. *Id*. at 890.
235. *Id*.
236. *Id*. at 891.
237. *Id*. at 889–91.
238. *Id*. at 892.

been viewed as nonpolitical.[239]

Since the advertising space on SMART's vehicles was determined to be a non-public forum, the Sixth Circuit found SMART's content constitutional because SMART could reasonably view the fatwa advertisement as falling within the prohibition against political advertisements.[240] Unlike the federal district court below, the Sixth Circuit found that SMART's advertising rules guide officials in distinguishing between permissible and impermissible advertisements in a non-arbitrary fashion.[241] Notwithstanding the absence of guidelines, the court reasoned "there is no question that a person of ordinary intelligence can identify what is or is not political."[242] Thus, the court explained, the fatwa advertisement was clearly political.[243] Further, the court found that SMART's restriction was viewpoint neutral, because it would have prohibited ads by advocates on either side of the debate pursuant to its ban on political advertising. [244] As such, the Sixth Circuit ordered the removal of the injunction.[245] In this respect, its reasoning and findings are similar to those in the Seventh Circuit, mentioned in the introductory analysis above.

However, there is no record of mass mobilization around the ads and/or of members of the larger community engaging in counterspeech as discussed in greater detail below.

C. Our Nation's Capital: AFDI v. Washington Metropolitan Area Transit Authority—*Government Property as a Designated Public Forum*

The court found the advertising space in *AFDI v. Washington Metropolitan Area Transit Authority ("WMATA")* to constitute a designated public forum,[246] similar to the MTA case, thus requiring the application of the harsher strict scrutiny standard. Yet the timing of the AFDI "Savage" ads makes the WMATA case unique. The ads were scheduled for placement following the independent release of an anti-Muslim video, "The Innocence of Muslims," that incited violence in numerous parts of the world.[247] Due to these circumstances, the U.S. Department of Homeland Security ("DHS") and the Transportation

239. *Id*.
240. *Id*.
241. *Id*. at 893.
242. *Id*.
243. *Id*. at 894.
244. *Id*. at 895.
245. *Id*.
246. Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth., 898 F. Supp. 2d 73, 78–79 (D.D.C. 2012).
247. *Id*. at 77.

Security Administration ("TSA") advised WMATA against placing AFDI's ads due to an increased threat of terrorist attack against the transit system.[248] Consequently, WMATA deferred placement of the ads for an unspecified period of time.[249] When AFDI sought a preliminary injunction, the federal district court found that WMATA had certainly demonstrated a compelling government interest in protecting employees and subway passengers, but had not pursued the least restrictive means to achieve this interest.[250] The court's findings and analysis are examined in greater detail below.

Prior to September 6, 2012, AFDI submitted its "Savages" advertisement to WMATA.[251] Though WMATA counsel noted the ad's controversial nature, it also advised the transit authority that the ad enjoyed First Amendment protection. Accordingly, WMATA approved its placement on subway platforms, scheduling them to run for approximately one month beginning on September 24, 2012.[252]

Before the date of placement, however, the release of "The Innocence of Muslims," an American-made movie trailer that denigrated Muhammad, the Prophet of Islam, sparked anti-American protests across the Muslim world.[253] As a result, WMATA officials contacted the TSA regarding the potential safety risks surrounding placement of AFDI's ads.[254] The TSA expressed its concern on account of increased risk of a terrorist attack

248. The subway system had numerous unmonitored points of entry, was closely associated with the government, making it a unique target, and had received warnings from federal security administrations, as well as anonymous threats regarding the posters. *Id*.

249. *Id*. at 83.

250. Alternatives such as placing the posters in areas away from subway platforms, posting its disagreement with the posters and explaining its obligation to display them, or putting a time frame on its delay, rather than doing so indefinitely would all have been less restrictive means. *Id*.

251. *Id*. at 76.

252. *Id*.

253. *Id*. at 77*; see also The 'Innocence of Muslims' Riots,* N.Y.TIMES.COM (Sept. 18, 2012), http://web.archive.org/web/20120918124915/topics.nytimes.com/top/reference/timestopics/subjects/i/innocence_of_muslims_riots/index.html?8qa ("A string of anti-American riots broke out across the Islamic world in September 2012, after a short trailer for a supposed anti-Muslim film that had been posted on YouTube was promoted by a shadowy assortment of right-wing Christians in the U.S. The film claims Muhammad was a fraud. The trailer opens with scenes of Egyptian security forces standing idle as Muslims pillage and burn the homes of Coptic Christians. Then it cuts to cartoonish scenes depicting the Prophet Muhammad as a child of uncertain parentage, a buffoon, a womanizer, a homosexual, a child molester and a greedy, bloodthirsty thug. Muslims find it offensive to depict Muhammad in any manner, let alone insult the prophet. The turmoil began on Sept. 11 in Egypt where an angry mob breached the American Embassy's walls. That night in Libya, armed Islamic militants stormed and burned the American Consulate in Benghazi, killing the American ambassador and three staff members. By the end of the following week, protests against the film had spread to more than two dozen countries, including Tunisia, Sudan, Pakistan, Lebanon, Yemen, Bangladesh, Qatar, Kuwait, Afghanistan and Iraq.").

254. Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth., 898 F. Supp. 2d 73, 77 (D.D.C. 2012).

targeting the D.C. metro system.[255] WMATA also received an official DHS warning of the risk of violence in response to the anti-Islam trailer.[256] Consequently, WMATA decided to delay placement of the ads indefinitely and so advised AFDI.[257]

As it had responded in New York and Michigan, the AFDI sued for a preliminary injunction in federal district court.[258] Notably, WMATA conceded that advertising space on its subway platforms constituted a public forum for public discourse, thus triggering strict scrutiny constitutional analysis.[259]

Since the advertising space constituted a designated public forum, legal analysis of the speech restriction depended on whether that restriction was content-neutral.[260] If the restriction was content-based, WMATA's policy would be required to satisfy the strict scrutiny standard—necessary to serve a compelling government interest and narrowly drawn to do so.[261] However, the court reasoned, if WMATA's restriction was in fact content-neutral, then reasonable time, place, or manner restrictions could be placed so long as those restrictions were narrowly tailored.[262]

Ultimately, the court found that the restriction was content-based on account of WMATA's expressed alarm at the potential consequences the ad's message could trigger, such as a terrorist attack.[263] It reasoned that WMATA was required to demonstrate that its indefinite delay of the ads' placement was "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."[264] With respect to the first part of that inquiry, the court found that WMATA's safety concerns constituted a compelling government interest.[265]

In turning to the next component of the legal analysis, however, the court found that WMATA's restriction was not narrowly drawn.[266] Alternative responses to an open-ended indefinite delay of the ads' placement, the court reasoned, included: placing the ads elsewhere in one of WMATA's advertising venues; accompanying the ads with disclaimers articulating the city's legal obligations under the First Amendment; and/or

255. *Id*.

256. Additionally, shortly after WMATA postponed Plaintiffs' ad, it received an email threatening damage to Metro property and disruption to train and bus routes if the ad were not displayed. *Id*.

257. *Id*.

258. *Id*.

259. *Id*.

260. *Id*.

261. *Id*.

262. *Id*.

263. *Id*.

264. *Id*.

265. *Id*.

266. *Id*.

specifying a more precise timeframe concerning placement.[267] Because this indefinite delay failed the latter portion of the two-part inquiry, the court found that WMATA had failed to satisfy its legal burden and thus ordered the immediate placement of the ads.[268]

Yet this is where the story takes a turn. In response to the placement of AFDI's hate advertisements on city-run transit systems in these and other jurisdictions, the broader community mobilized and responded with even more speech—counterspeech.

V. EFFECTIVE NON-LEGAL RECOURSE TO ANTI-MUSLIM, ANTI-ISLAM HATE SPEECH

Predictably, the advertisements were defaced everywhere they appeared.[269] Such acts of vigilante justice constitute private censorship, an attempt to remove a disfavored message from the marketplace of ideas.[270] As Justice William Brennan articulated in holding that flag burning is a form of First Amendment protected speech: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[271]

Justice Brennan's point is as equally applicable to private actions of vandals as it is to government-sponsored censorship.[272] Ultimately, the most effective non-legal recourse to the anti-Muslim hate ads is counterspeech that underscores peace, community, and pluralism[273] and the collective moral rejection of the denigration of any faith group in our society. This Part examines counterspeech as a recommended response to the divisive ads. Counterspeech by officials and private entities is the most effective means of reeducating the public about the Muslim community and redirecting its attention with positive messages.

A. San Francisco Municipal Transportation Agency's (Muni) Counter-Ad—A New Model

The "Savage" advertisements arrived in the San Francisco Municipal

267. *Id*.

268. *Id*.

269. *See, e.g*., *Mona Eltahawy Arrested for Spray Painting Subway Poster,* THE HUFFINGTON POST, (Sept. 26, 2012) http://www.huffingtonpost.com/2012/09/26/mona-eltahawy-arrested-for-spray-painting-anti-jihad-subway-poster_n_1915832.html.

270. Richards and Calvert, *supra* note 5, at 558.

271. *Id*.

272. *See id*.

273. *See* Nathan Lean, *Don't deface anti-Muslim Metro ads,* WASHINGTON POST (Oct. 8, 2012), http://www.washingtonpost.com/blogs/guest-voices/post/dont-deface-anti-muslim-metro-ads/2012/10/08/ac457ebe-117c-11e2-ba83-a7a396e6b2a7_blog.html.

Transportation Agency (Muni) system on ten buses in August 2012.[274] While transit authorities initially considered rejecting the ads, the court's decision in New York informed its decision against doing so.[275]

One week later, on August 14, 2012, the Chairman of the San Francisco Municipal Transportation Agency ("SFMTA"), which oversees all transportation in the city, released a public statement in response to the AFDI:

> The city of Saint Francis has a long history of tolerance for all, and while we honor a person's right to self-expression, there are times when we must say 'enough.' The recent ad has no value in facilitating constructive dialogue or advancing the cause of peace and justice. While this ad is protected under the First Amendment, our ad policy and our contractual obligations, we condemn the use of any language that belittles, demeans or disparages others. Going forward, we will review our policies with regards to ads on the Muni system.[276]

The release further announced that SFMTA would donate its proceeds from AFDI's advertisement to further the educational activities of the San Francisco Human Rights Commission.[277] In fact, not only did Muni contribute the ad revenue it raised to the Commission, it also placed counter-ads on the ten buses directly next to AFDI's ads, condemning AFDI's message.[278] In what has been described as an unprecedented move, Muni's counter-ad provides "that its policy prohibits discrimination and states that it condemns statements that describe any group as savages."[279]

Muni's initiative set the standard that community advocates would subsequently request their respective transit officials to emulate, including in Washington, D.C.[280] and New York City.[281] It is significant to note,

274. Ron Scherer, *Anti-Muslim groups' ad in NYC subway calls jihad 'savage.' Is now a good time?,* THE CHRISTIAN SCIENCE MONITOR, Sept. 21, 2012, *available at* 2012 WLNR 20172074.

275. *See* Serwer, *supra* note 152 ("The ads were posted because they . . . weren't prohibited under our ad policy," Paul Rose, a spokesman for Muni said, adding that the agency had received "a lot of feedback" over the ads. When Mother Jones asked about the MTA court case in NY, Rose said, "it was something that we considered, it wasn't the sole deciding factor." A spokesperson for the MTA said they were "taking a careful look at their standards" in light of the ruling.).

276. *Press Release: Statement from Chairman of the SFMTA Board of Directors and SFMTA Director of Transportation on Advertisement*, SAN FRANCISCO MUN. TRANSP. AGENCY (Aug. 14, 2012),
http://archives.sfmta.com/cms/apress/StatementfromChairmanoftheSFMTABoardofDirectorsandSFMTADirectorofTransportationonAdvert.htm.

277. *Id*.

278. Scherer, *supra* note 274.

279. John Alston, *Muni condemns controversial bus ad,* ABC.COM (Aug. 18, 2012), http://abclocal.go.com/kgo/story?id=8778414.

280. *See Jewish groups join coalition against anti-Islam ads in U.S. subways,* AL ARABIYA, Oct. 17, 2012, *available at* 2012 WLNR 22034047 ("A group of Jewish organizations in the US have joined a coalition of religious groups critical to an anti-Islam ad in the Washington, D.C. metro system and urged that the profits made from the ad be donated to a charity").

281. *See* Flegenheimer, *supra* note 153.

however, that government officials in less progressive cities may not be as supportive or willing to engage in such counterspeech. As a result, in many instances where such counterspeech is necessary, it may not necessarily occur on an official level as it did in San Francisco, thus underlining the significance of counterspeech by private actors.

B. American Muslim Responses—Innovative Challenges to Intolerance

Perhaps the most innovative and arguably talked about response to AFDI's "Savages" ad was a Twitter campaign, launched by American Muslims, with the hashtag "#MySubwayAd."[282] Representative tweets include:

"In NYC we speak 140 languages and hate isn't one of them,"[283]

"In any subway you ride, anywhere in the world, may it be a one way journey from fear to love and ignorance to light,"[284]

"We all are the same. Keep love going. Sofia, age 4,"[285] and

"Hatred won't ever work as a solution, but it will always be a part of the problem. Don't fight hate with hate."[286]

Admirably, various American Muslim advocacy organizations spoke out against the advertisements but nonetheless supported the First Amendment right for the ads to run.[287] They engaged in grassroots organizing[288] and also launched counter-ads to challenge the anti-Muslim hate with countervailing positive messages. For example, the Council on

282. *See* Jahnabi Barooah, *#MySubwayAd: People Respond To Anti-Islamic Subway Ads,* THE HUFFINGTON POST (Sept. 24, 2012), http://www.huffingtonpost.com/2012/09/24/mysubwayad-muslims-respond-to-anti-islamic-subway-ads_n_1910652.html (The tweets can also be viewed at http://storify.com/islamoyankee/mysubwayad).

283. *Id*.

284. *Id*.

285. *Id*.

286. *Id*.

287. *See* Scherer, *supra* note 276 ("The First Amendment grants everybody rights, including to be a racist and bigot like Pamela Geller," says Ibrahim Hooper, national communications director for the Council on American Islamic Relations in Washington, D.C); *see also* William Saletan*, Muslims For Free Speech*, PITT. POST-GAZETTE, Oct. 4, 2012, at B5, *available at* 2012 WLNR 21071691 ("The best way to counter hatred is to defy it through convincing arguments, good actions and free debate. Much can be done to fight hatred without restricting speech, and governments should condemn hatred and set the example. Any legislation that restricts free speech, including religious symbols, can be used to quell social and political dissent." – The Muslim Public Affairs Council).

288. In an E-Newsletter to members, CAIR-New York: "To make sure hate groups would stop getting away with promoting anti-Muslim bigotry in NY, we organized a large coalition of community groups to join us in condemning and marginalizing this anti-Muslim campaign. We reached out to Mayor Bloomberg's office and the office of MTA Executive Joseph Lhota, we created materials and programs to educate the public and counter the message of the ads, and we contacted media to begin a campaign to expose the designated hate group behind the ads in the future." CAIR-NY Email, *supra* note 147.

American Islamic Relations placed a counter-ad featuring a verse from the Qur'an stating: "Show forgiveness, speak for justice and avoid the ignorant."[289]

In the same vein, the Muslim Public Affairs Council launched its own campaign with an ad that read: "The truly civilized man fights for peace" and "supports American values" wedged between an Islamic crescent and a Jewish Star of David[290] while adding "Defeat racism and bigotry."[291] The ad was featured in NYC subways and on WMATA buses across the D.C., Virginia, and Maryland areas.[292]

Another campaign involves reclaiming the word "Jihad," which is often conflated with violence, but for the vast majority of Muslims, denotes an internal spiritual struggle. In an email to its members, CAIR announced the "#MyJihad Campaign":

> Seizing the opportunity to correct misconceptions about Islam and Muslims, #MyJihad is a campaign to finally reclaim and correct the meaning of the word "jihad" in America. People around the world are being asked to share what their jihad is on social media. The best examples will be featured in the national ad campaign that defines Muslims in a proactive and positive manner while reclaiming a word and concept in Islam that is dear to all Muslims but has been defamed by anti-Muslim groups and leaders across the world.[293]

American Muslim groups also worked with interfaith partners to counter the messaging by the anti-Muslim ads;[294] the efforts of various faith

289. *CAIR Counters D.C. Anti-Muslim Ads with Message of Forgiveness, Justice*, PRNEWSWIRE.COM (last visited Apr. 12, 2014), http://www.prnewswire.com/news-releases/cair-counters-dc-anti-muslim-ads-with-message-of-forgiveness-justice-173903651.html.

290. The ad includes a variety of other religious symbols including a cross. *See MPAC's Metro Ads in DC & NYC Receive Widespread Attention*, Muslim Public Affairs Council (Nov. 16, 2012), http://www.mpac.org/issues/islamophobia/mpacs-metro-ads-in-dc-nyc-receive-widespread-attention.php#.U0l6ExadDzI.

291. MPAC Email to Members, *MPAC to Launch NYC & DC Metro Ads Opposing Racism & Bigotry,* (Thurs. Oct. 18, 2012 at 2:43), from news@mpac.org (The NYC ad campaign will kick off this Sunday evening at Columbia University during "HEART Over Hate: Repelling Bigotry through Art & Music," a free evening of music and entertainment).

292. *Id*.

293. CAIR-NY Email, *supra* note 147.

294. On September 24, in New York, ISNA National Director Dr. Sayyid M. Syeed joined the Interfaith Center of New York and other local faith organizations for a press conference to denounce the ads. *ISNA Responds to Anti-Muslim Subway Ads,* ISNA October 11, 2012, *available at* http://www.isna.net/articles/News/ISNA-Responds-to-Anti-Muslim-Subway-Ads.aspx (last visited Nov. 4, 2012). In October 2012, ISNA joined 126 other organizations in signing a letter to Washington, D.C. Mayor Vincent Gray and to the Washington Metropolitan Area Transit Authority (WMATA). The letters urged WMATA to work closely with organizations representing impacted Muslim and Arab communities during all phases of the response and follow up to these ads, and to issue disclaimers clearly stating that it does not endorse the content of the ads. ISNA also joined 23 other organizations to place an ad across the Washington, D.C. subway system, which reads: "Hate speech is not civilized. Support peace in word and deed. #mysubwayad." *See id*.

groups are discussed in the following Section.

C. Interfaith Responses—Rejecting Suspicion, Enhancing Intercultural Understanding

The response from the U.S. interfaith community was tremendous.

The Anti-Defamation League, historically a Jewish organization that battles anti-Semitism, publicly characterized the "Savages" ad as "offensive and inflammatory,"[295] while elaborating, "AFDI presents itself as a pro-Israel group. Our sense is that it's just a mischaracterization of who they are. They are an anti-Muslim activist group, and you don't have to be anti-Muslim to be pro-Israel."[296]

Rabbis for Human Rights–North America and the Christian group Sojourners also launched respective ad campaigns.[297] The ad by Rabbis for Human Rights, which ran near AFDI's ad, said: "In the choice between love and hate, choose love. Help stop bigotry against our Muslim neighbors."[298] The Sojourners ad simply said: "Love your Muslim neighbors."[299] Both ads initially ran in NYC's subway system, as did another counter-ad by another Christian group, United Methodist Women. Its ad read: "Hate speech is not civilized. Support peace in word and deed."[300] The Commission of Human Rights in New York also worked to counter the anti-Muslim subway ads with its own ads touting the Big Apple's diversity.[301] The billboard featured a red apple with a map of the world that looks like bites.[302] It read: "From many countries, one city."[303]

These religious groups similarly mobilized in response to the federal court decision in Washington, D.C. For example, Sojourner's Campaigns Assistant Janelle Tupper stated on its blog:

> Pamela Geller and the American Freedom Defense Initiative's hateful ads that refer to Muslims as "savages" were placed in Washington, D.C., Metro stations this week following a lengthy court battle. Sojourners was

295. Serwer, *supra* note 152.

296. *Id*.

297. Ashwaq Masoodi, *Pro-Muslim Subway Ads to Hang Near Anti-Jihad Ads,* THE N.Y. TIMES, October 4, 2012, *available at* 2012 WLNR 21099761.

298. *Id*. ("We wanted to make it clear that it is in response to the anti-Islam ad," said Rabbi Jill Jacobs, executive director of Rabbis for Human Rights, whose members include rabbis from all streams of Judaism.)

299. *Id*. (Sojourners' campaign manager, the Rev. Beau Underwood, said, "An essential tenet of Christianity is to love our neighbors." He added: "In the face of religious extremism, the best response is to treat others like we would want to be treated. Our ad campaign has a simple message that is at the heart of our faith.")

300. *Id*.

301. *Human rights group promotes NYC diversity,* ASSOCIATED PRESS (October 11, 2012), http://nypost.com/2012/10/11/ad-war-city-putting-up-subway-billboards-touting-diversity/.

302. *Id*.

303. *Id*.

> ready for this development and has purchased "Love Your Muslim Neighbors" messages that will be going up in some of the same Metro stations targeted by the American Freedom Defense Initiative and should appear by the 15th of October. The ongoing attacks against religious minorities both in the United States and around the globe are saddening and disturbing. . . .[304]

Diverse groups also engaged in coalition grassroots organizing. Representative of this is "an anti-hate coalition" of 127 organizations that asked Americans to contact WMATA to request that it help mitigate the negative impact of anti-Muslim advertisements with counterspeech.[305] The broad-based coalition was led by the American-Arab Anti-Discrimination Committee ("ADC"), CAIR, Jewish Voice for Peace–DC Metro ("JVPDC"), and the Washington Interfaith Alliance for Middle East Peace ("WIAMEP").[306]

Also in Washington, D.C., the Jewish Council for Public Affairs ("JCPA") issued a release stating:

> The message of these ads may be protected speech, but that does not make it good speech. . . . The fact that ads have been placed in the subway attacking Israel does not excuse the use of attack ads against Muslims. Effective discourse is never served by one statement of incivility being answered by another. The remedy for bad speech is good speech, not more bad speech. Support for Israel should not be juxtaposed with the denigration of any group. . . . In fact, the way to ensure a secure future for Israel is to promote peace, reconciliation and coexistence. We should build bridges, not burn them.[307]

Political officials also entered into the mix—with at least one U.S. Congressman calling for a boycott of the capital's metro system.[308] Additional responses include opinion and editorial pieces by prominent

304. Janelle Tupper, *As Hateful Ads Expand to D.C., So Does Sojourners' Response, Sojourners: Faith in Action for Social Justice,* SOJO.NET (October 10, 2010), http://sojo.net/blogs/2012/10/10/hateful-ads-expand-dc-so-does-sojourners%E2%80%99-response.

305. In its letter, the coalition requested that: "(1) WMATA work closely with organizations representing impacted Muslim and Arab communities during all phases of the response and follow up to the ads; (2) WMATA take a similar approach to that of the San Francisco Municipal Transportation Agency (SFMTA) in response to these ads by placing disclaimers that show that the hate speech promulgated by such ads do not represent the view of WMATA; and (3) WMATA provide free space for counter ads, focused on promoting understanding and tolerance regarding the greater metropolitan area's various Muslim and Arab communities, and awareness of the harm caused by Islamophobia and anti-Arab hatred and discrimination." *See CAIR Email Action: Ask Metro Officials to Meet with Anti-Hate Coalition, Oppose 'Savage' Ad,* CAIR, Sun, Oct 28, 2012 at 8:28AM from info@cair.com.

306. *Id*.

307. *JCPA Condemns Bigoted, Divisive and Unhelpful anti-Muslim Ads,* STATES NEWS SERVICE (Sept. 12, 2012), http://engage.jewishpublicaffairs.org/blog/comments.jsp?key=477&blog_entry_KEY= 6561.

308. *See* Khan, *supra* note 3. ("The right to free speech is a right I will defend to my grave," said Mike Honda, a Democrat from California. "The right not to support hate speech is also a right, which is why I encourage people to boycott, if possible, [the subways] until the ad buys are finished.")

Christian[309] and Jewish[310] community leaders in news media such as the *New York Times* and the *Huffington Post*.[311]

D. Lessons and Considerations

This Article has argued that counterspeech is the preferred self-help remedy of first instance to challenge anti-Muslim, anti-Islam hate messages. American Muslims employed social media innovatively to promote peace and community. They engaged in grassroots organizing and created educational materials and programs to counter the hate speech.[312] Further, members of the interfaith community also launched counter-advertisements directly challenging anti-Muslim sentiment with countervailing positive messages, as discussed in the Section above. Arguably, such initiatives not only serve an educative purpose but an empowering one as well. In the process of countering bad speech with good, Muslims become protagonists in their own stories of struggle for equality, peace, and justice in the post-9/11 era.

With respect to the efficacy of counterspeech, however, it is significant to note the necessity of a community of good conscience to stand against bigotry. While it is incumbent upon members of the Muslim community to rise up to the occasion of lawfully countering messages of anti-Muslim hate, so too must members of the greater community who are

309. *See, e.g.*, Paul Brandeis Raushenbush, *Muslims Are Not Savages,* THE HUFFINGTON POST (Sept. 25, 2012), http://www.huffingtonpost.com/paul-raushenbush/savages-anti-islam_b_1911205.html ("When did the memo go out that it was okay to call Muslims savages? . . . [T]he reality is the struggle is not 'us Americans' versus 'them Muslims.' The struggle is between those of 'us' who want to do the hard work of building peace around the world and 'them' who want to take part in the much easier work of destroying it. . . . It is 'us' who want to find a way to resolve the deep suspicion and sense of being wronged that is held on both sides, and 'them' who continually infect old wounds with distrust in order to keep fires of burning for a fight to the death.").

310. *See, e.g.*, Rick Jacobs, *The Sin of Sowing Hatred of Islam,* N.Y. TIMES (Sept. 25, 2012), http://www.nytimes.com/2012/09/25/opinion/the-sin-of-sowing-hatred-of-islam.html?_r=0 ("By using the term 'jihad' in the context of a war against savages, the ad paints Islam as inherently violent, evil, and bent on overthrowing the Western democracies and their key ally in the Middle East, Israel – even though, for the vast majority of Muslims, 'jihad' refers to a spiritual quest, not the more politicized idea of holy war…these ads are lawful. But they are wrong and repugnant . . . we must also defend against those who peddle hate, who would impose the sins of the extremists on more than a billion Muslims. They not only offend Muslims and those of us who value religious diversity and liberty for all; they pollute America's own public square at a time when our society is desperate for civility and respectful discourse. This fall, when religious hate speech appears in public places, when several mosques across the nation have been desecrated and burned, when Sikhs have been murdered, it is time for our nation to raise our voices in repudiation of all manner of hate mongering. This Yom Kippur, we will once again read these words from Deuteronomy 11:26: 'See, this day I set before you blessing and curse.' Those same choices are before us today. Let us, as a nation, reject the curse of hatred and instead choose the blessings of faith, acceptance, understanding and respect for all.")

311. *See* Nancy Fuchs Kreimer, *To Bigotry No Sanction,* THE HUFFINGTON POST (Oct. 3, 2012), http://www.huffingtonpost.com/nancy-fuchs-kreimer/to-bigotry-no-sanction_b_1923657.html.

312. CAIR-NY Email, *supra* note 147.

committed to peaceful and productive coexistence. [313]

In the case of the anti-Muslim ads, counter-ads, coalition letters, opinion-editorial pieces, and other forms of counterspeech helped define an atmosphere demanding respect for all, while underscoring the value of religious pluralism.[314] It is indeed a story of collective success, success that was amplified by the ability to call media attention to the counterspeech—a significant lesson to carry forward.[315]

Notably, in Detroit, where the government successfully suppressed the hate advertisements, such a consensus did not materialize.[316] In addition to depriving the community of a potential opportunity to learn how to respond appropriately to hateful messages, suppression of the objectionable speech also redirects attention from the bigotry to a controversy regarding prior restraints on speech, potentially transforming a hate speech perpetrator like Geller into a victim of censorship, deprived of her First Amendment rights.[317]

In New York City and Washington, D.C., however, the American Muslim community was empowered by seizing the opportunity to engage in counterspeech. By launching an innovative, peacemaking Twitter campaign to counter the advertisements' hateful messages, the minority Muslim community demonstrated courage and initiative in challenging AFDI's statements.[318] It employed counterspeech effectively in the marketplace of ideas to morally defeat a message of division and hate.[319] Muslim Americans worked to educate community members about their religious group in the United States, and in doing so, forged new alliances.

The anti-Muslim hate advertisements may also serve another important educative purpose, insofar as they inform observers of the values of those responsible for the display. Representative is SFMTA's public statement attributing the placement of their own counter-ads on Muni buses to the failure of the AFDI ads to facilitate constructive dialogue or promote the cause of peace and justice. Additionally, it bears noting that following the placement of the hate ads, FOX News disavowed the subway initiative, describing it as "inflammatory" and "anti-Muslim"; this speaks to the reprehensibility of Geller and Spencer's actions, as both are frequent contributors on the network.[320]

313. *See* Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249, 1261–62 (1995).

314. *See id*.

315. Richards and Calvert, *supra* note 5, at 586.

316. *See* Calleros, *supra* note 313, at 1261–62.

317. *See id*.

318. *See id*.

319. *See id*.

320. Oliver Willis, *Fox News Labels Pamela Geller's Work "Inflammatory" And "Anti-Muslim" After Promoting Her For Years,* MEDIA MATTERS FOR AMERICA (September 25, 2012),

Unfortunately, counterspeech may not be as effective in communities that tolerate and/or approve of such bigotry.[321] The interfaith initiatives depicted above are significant both for strengthening community relationships and rejecting the extremist messages of hate groups domestically. The ripple effect has international consequences as well. One of Al Qaeda's greatest recruitment and propaganda tools is the assertion that the West is at war with Islam and Muslims—an argument that is strengthened every day by those who suggest all Muslims are terrorists, and all those practicing Islam are jeopardizing U.S. security.[322] Interfaith and other community initiatives such as those described above directly undermine Al Qaeda's false assertions.[323]

CONCLUSION

Government censorship may be well meaning, but it often is not the most effective response to Islamophobic hate speech. Rather, this Article illustrates that despite its flaws, counterspeech is the most effective means for addressing harmful or threatening expression, including Islamophobic speech.[324] Its efficacy is largely contingent upon the willingness and ability of communities and those targeted to rise to the occasion and speak out against messages of hate. The effectiveness of counterspeech appears to be premised upon the notion underlying President Obama's words:

> We may not be able to stop all evil in the world, but I know that how we treat one another is entirely up to us. I believe that for all our imperfections, we are full of decency and goodness, and that the forces that divide us are not as strong as those that unite us.[325]

http://mediamatters.org/blog/2012/09/25/fox-news-labels-pamela-gellers-work-inflammator/190128.

321. S*ee id*.

322. *See Fear, Inc., supra* note 68, at 8.

323. For evidence that counterspeech reaches audiences outside of the United States, *see Jewish groups join coalition against anti-Islam ads in U.S. subways,* AL ARABIYA, October 17, 2012, *available at* 2012 WLNR 22034047 ("A group of Jewish organizations in the US have joined a coalition of religious groups critical to an anti-Islam ad in the Washington, D.C. metro system and urged that the profits made from the ad be donated to a charity.").

324. *See* Richards and Calvert, *supra* note 5, at 555.

325. *Obama's Remarks in Tucson,* N.Y TIMES (Jan. 13, 2011), http://www.nytimes.com/2011/01/13/us/politics/13obama-text.html?pagewanted=all&_r=0.