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

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‘SAVAGERY’ IN THE SUBWAYS:
ANTI-MUSLIM ADS, THE FIRST AMENDMENT AND THE EFFICACY OF COUNTERSPEECH

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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. Representative Keith Ellison, D-Minn.²

“We learn from history that hate speech and hysteria have dire consequences, the result of societal complacency, failed leadership and the lack of courage to stand up and speak out against hate.”

U.S. Representative Mike Honda, D-CA³

I. INTRODUCTION

These excerpted passages by Representatives Honda and Ellison reflect the delicate balance U.S. constitutional law must achieve between competing national values characteristic of First Amendment debates concerning hate speech. As Americans, we pride ourselves on an almost sacred, sometimes extreme, constitutionally protected right

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³ Taimur Khan, “America’s anti-Muslim ads backfire,” The National (UAE), October 15, 2012 available at 2012 WLNR 21840717 (Congressman Honda was interned with his family in a US camp for people of Japanese descent during World War II).
to express ourselves 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\textsuperscript{4} speech, implicate U.S. national security concerns prompting a slew of queries fraught with moral and political complexities: should government entities restrict anti-Islam, 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?\textsuperscript{5} Alternatively, should such authorities restrict that vitriol – particularly where the expression of hate appears on government-owned property rendering a false impression of official sanction – 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 as alluded to by Representative Honda above? If so, do we risk compromising our First Amendment values? And if not censorship, what are appropriate responses by government entities and people of good will, to such odious speech?

In response to these and other related queries, this article argues that counterspeech is preferable to government suppression of dangerous, threatening or harmful expression. Indeed, the doctrine of counterspeech was first espoused in a concurring opinion by Justice Louis Brandeis in the criminal syndicalism 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.”\textsuperscript{6}

More specifically, this article reinforces counterspeech as the first self-help 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 of which reads,

"In the war between the civilized man and the savage, support the civilized man. Support Israel. Defeat Jihad."

The placards, funded by hate groups in an orchestrated campaign to defame American Muslims and the Islamic faith, were met, at least initially, by seemingly well-intentioned government censorship. In fact, at the time of this writing, the ad buys have culminated in First Amendment litigation in three distinct jurisdictions, including Washington, D.C., Detroit, Michigan and New York City. Each case ensued when transit authorities rejected the ads. In at least one district – our nation’s capitol – government officials cited national security concerns in refusing immediate placement of the hate ads, while anxieties with the ads’ stigmatic effects upon American Muslims were cited in others. These controversies represent a glaring example of First Amendment expression versus national security interests.

This article argues that in the instant case counterspeech is preferable to government suppression of such threatening speech but notes significant considerations concerning the effectiveness of such non-legal recourse to hate speech attacking minority communities in the U.S. It evaluates the issue in five congruent parts. The first section contextualizes the advertisements vis-à-vis a brief analysis of the status of anti-Muslim sentiment in the U.S. The next section 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 Yershulami. The third section examines the content of, and initial responses to, three variant strands of the anti-Muslim advertisements. The fourth part 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, Michigan and Washington, D.C. The final section examines notable manifestations of counterspeech as a preferred response to odious speech.

II. 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. To be sure, Islamophobia existed prior to 9/11 but has increased dramatically in the past ten years. See Islamophobia: Understanding Anti-Muslim Sentiment in the West, GALLUP, December 2011, http://www.gallup.com/strategicconsulting/153641/BRIEF-ENGLISH-Islamophobia-Understanding-Anti-
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. 

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, for instance, twenty-five percent (25%) of Americans believed Islam was more likely to encourage violence than other faiths while twice as many – fifty-one percent (51%) – disagreed. 

Almost a decade later, in March 2011, however, the research results confirmed suspicions of increased animus: forty percent (40%) of Americans believed that Islam was more likely than other faiths to inspire its adherents to commit violent acts – a marked increase from the 25% who espoused that view a mere six months following 9/11.

Another recent study, conducted by Gallup, found that even among Americans who claim to be unbiased towards Muslims, thirty-six percent (36%) hold prejudicial views about Islam. More predictably, about ninety-one percent (91%) of those who admitted to harboring anti-Muslim sentiments espoused anti-Islam views as well. It remains disconcerting that so many who profess no ill will towards Muslims, maintain unfavorable opinions about the faith to which they adhere. This may in fact be a testament to the efficacy of hate campaigns targeting the faith as described in greater detail below.

To be sure, Americans are not only concerned about the religion of Islam, but with Muslims, too. According to poll results from 2006, five years post 9/11, forty-four percent (44%) of Americans considered Muslims to be too extreme in their religious convictions; another twenty-two percent (22%) did not want a Muslim neighbor. And,

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10 See id.
12 See id.
13 See id.
that same poll depicted less than half of Americans thought American Muslims are loyal to the United States. 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 than their own. 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.

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. Approximately forty-two percent (42%) of Muslims under the age of thirty (30) 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.” Further, fifty-three percent (53%) of all American Muslims report that it has been more challenging to be a Muslim in the U.S. since 9/11.

Unfortunately, Gallup’s research illustrates that in addition to discrimination (19%), American Muslims describe their most significant challenges not as financial notwithstanding a global economic downturn but as being viewed as terrorists (15%), ignorance about Islam (14%), and stereotyping (12%). Indeed, unfavorable popular perceptions have measurable discriminatory outcomes in the lives of American Muslims as depicted immediately below.

B. Discriminatory Manifestations

As reviewed, a number of Americans harbor both implicit and explicit prejudices towards their fellow citizens. That individualized bias assumes various manifestations. In the decade that has elapsed since 9/11, the American Muslim community continues to
confront traumatic experiences with hate, fear and bias.22 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.

1. EMPLOYMENT DISCRIMINATION

Employment discrimination cases surged immediately following 9/11, then ebbed, and have been rising gradually in the last seven years.23 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.24 To place this figure in proper context, consider that the EEOC received a cumulative 2,734 charges in the years preceding 9/11.25

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 may be unaware of related legal protections or fear professional retaliation and backlash, others are held captive by a flailing economy and increased joblessness while still others are confused, apathetic or cynical about potential recourse. The lack of English language proficiency and/or concerns about one’s immigration status further aggravates matters.

Nevertheless the continuing upwards trend in discrimination cases is worrisome: while American Muslims constitute a mere one to two percent of the total U.S. population, Muslim claims comprise twenty-five (25%) of all religious discrimination charges filed with the EEOC.26 This provides a sense of the hostile work environment confronting Muslims.

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25 See id.

2. BIAS-BASED SCHOOL BULLYING

Bias-based harassment at work mirrors the experience of Muslim students in educational settings, and similar to unreported unemployment discrimination claims, under-ascertainment of bias-based bullying in schools is likely. Anecdotal evidence illustrates that Muslim students who encounter religiously and racially motivated bullying fail to report the harassment to the proper authorities for myriad 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 and fora.

This workshop experience is far from unique, in the author’s view. 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 up buildings" and "You are Muslim, you should go home." Notably, verbal harassment frequently escalates to physical threats and violence, such as in the case of an American Muslim eighth-grader who underwent surgery to insert pins and a plate to repair his jaw, broken in two places

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27 See id.
after an assault by another student who had subjected him to racial and religious bullying.29

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.30 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 thirty-one percent (31%) increase in reported cases of discrimination in school against students perceived to be Muslim.31 And, many more cases remain unreported.

So, what then 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.32

3. HATE CRIMES

A cursory look at the hate violence perpetrated against Muslim places of worship during a six-month period lends flavor to a discussion concerning hate crimes. 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.33 Shots were fired at a Morton, Grove, Illinois mosque 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.34 The rash of hate incidents erupted in Illinois

29 See id.
30 See id.
31 See id.
33 See Bill Morlin, Anti-Muslim attacks continue, SALON.COM, October 5, 2012, http://www.salon.com/2012/10/05/anti_muslim_attacks_continue/.
34 To be sure, these disturbing incidents merely reflect those reported to law enforcement entities and covered by media outlets. Many bias 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 towards recourse. 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. (2012) (written testimony of Engy Abdelkader, Vice President, KARAMAH: Muslim Women Lawyers for Human Rights), http://karamah.org/wp-
immediately following Islamophobic political rhetoric by a local Tea Party Congressman, Joe Walsh, who stated during a town hall meeting, “Muslims are trying to kill Americans every week” while indicating that they had already infiltrated American neighborhoods.\(^{35}\)

The atmosphere of rising anti-Muslim hostility towards American Muslims has provided a fertile ground for tragic events such as the massacre at the Sikh Gurdwara in Wisconsin only a few weeks later. While the Neo-Nazi skinhead shooter died, many suspect that Wade Michael Page may have mistakenly believed that members of the Sikh temple were in fact Muslim because of their turbans and beards.\(^{36}\)

A few months later, in late November 2012, a man entered a mosque in San Antonio, Texas, and vowed to shoot it up.\(^{37}\) Legal documents indicate 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.\(^{38}\) Fortunately, the violent plot was averted by local law enforcement officials.\(^{39}\)

Only a couple of weeks later, in December 2012, another man entered a mosque in Fremont, California and announced he was going to shoot everyone there.\(^{40}\) 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."\(^{41}\)

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 “growing phenomenon.”\(^{42}\) And 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 of places of worship.43

Specifically, they 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.44 In 2010, the FBI reported a fifty percent (50%) surge.45 According to the most recent 2011 hate crime statistics released by the FBI, violence against those perceived to be Muslim remained relatively high and has been attributed to “Islam-bashing” and “anti-Muslim propagandizing.”46

Notably, the FBI hate crime statistics – similar to those concerning bias-based bullying and employment discrimination – collected from state and local law enforcement agencies and compiled into an annual report, are understated according to the Department of Justice (DOJ) and community advocates, alike.47 According to various DOJ studies, approximately fifty-six percent (56%) of hate crimes are never reported and more than fifty percent (50%) of those that are reported to authorities are not recorded as hate crimes, and thus are never conveyed to the FBI.48 According to the DOJ, the actual hate crime level in the U.S. is approximately twenty to thirty times the number reflected by the FBI statistics.49 Still, the numbers give one a sense of popular violent trends confronting the Muslim minority community in America.50

4. OPPOSITION TO MOSQUE CONSTRUCTION AND EXPANSION PROJECTS

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).

45 See id.
46 http://www.salon.com/2012/12/10/fbi_anti_muslim_hate_crimes_still_up/singleton/
48 See id.
49 See id.
50 See id.
According to the DOJ, the greatest “growth industry” it is witnessing in anti-Muslim activity is the opposition to mosques.  Again, Perez, who directs the Civil Rights Division, recently remarked,

“Mosques that have been in communities for 20 or 30 years, participating in civic activities and being good neighbors, are being met with picket signs and demonstrations when they apply for building permits.”

He relates that since 2000, the DOJ has initiated thirty-one (31) cases involving discrimination and arbitrary action by local zoning boards against mosques, twenty-one (21) of which have just been opened in the past two years.

C. CONTRIBUTING CAUSES

There is no simple explanation, no single answer to the question: Why? Indeed, why is there continued hostility, prejudice and violence directed at Muslims in the U.S. today, particularly where a host of studies have illustrated a notable decrease in terrorist acts committed by self-described Muslims since 9/11. In fact, such violence accounts for less than .0002 percent of all murders perpetrated in the nation in a little over a decade. Further, additional studies credit 9/11 as 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. With this in mind, logic would dictate that the American Muslim civil rights experience would have improved over the past decade – but it did not do so. So, what and/or who accounts for the persistent – and in particular areas, growing – Islamophobia?

The short answer: It’s complicated, and arguably a result of a convergence of multiple factors and events, rather than just one. Certainly, our continued military presence in Muslim-majority countries like Iraq and Afghanistan may create a false impression that Muslims in America constitute an “enemy” within, perhaps accounting for some of the unfavorable popular opinions viewing Muslims as disloyal and undeserving of trust. Both popular and news media help cultivate fear and misunderstanding about Muslims.

52 See id.
53 See id.
55 See id.
56 See id.
Overrepresentation of Muslims as terrorists in both 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 also 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 fellow Americans increasingly oppose the construction and expansion of mosques, when we receive a steady stream of news details regarding law enforcement surveillance activities of 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, 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. In the 2012 Presidential run, Republican presidential candidates described Islamic law as a national threat notwithstanding the absence of evidence to substantiate the claim. Similarly, the 2008 Presidential contest was also wrought with Islamophobia, from those calling now President Obama a closet Muslim (clearly seeing the term as a pejorative), to Senator John McCain expressing his preference against Muslims assuming the U.S. presidency to Mitt Romney disapproving of any Muslim Cabinet appointments. Such virulent

57 See 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 Quran] 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. 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 ended his Army career: firing a gun near the head of a 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 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!” But 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.”)

58 See 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/

positions espoused by our nation’s political leaders have a negative impact upon society’s collective psyche.

Finally, one must contemplate the “growing phenomenon” of anti-Muslim hate groups. Traditionally thought of 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,

> “Angry and fearful fringe organizations not only exerted powerful influence on media discourse about Muslims in the aftermath of the September 11th 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.”

Notably, hate groups not only effectuate their message through traditional mainstream media, but also via books, blogs and well-placed advertisements (like on a bus or train, the virulent message to which an average commuter may be exposed 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 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 socio-economic 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 section profiles those individuals.

### III. The Anti-Muslim Hate Activists

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On July 22, 2012, a 32-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 (60) teenagers at a Labor Party youth camp on Norway’s Utoya Island. The confessed terrorist described his actions as “gruesome but necessary” to save Europe from “Muslimization.” In an extensive Manifesto, in which he pledges to attack the purported “ongoing Islamic Colonization of Europe,” Breivik also makes frequent reference to U.S. anti-Muslim hate activists who informed his violent worldview. These activists include Pamela Geller and Robert Spencer, the individuals responsible for the anti-Muslims 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, but across international boundaries, too. Domestically, we have also witnessed the potentially violent manifestations of anti-Muslim bigotry, as referenced above (e.g. the Wisconsin Gurdwara massacre in August 2012, a threatened shooting spree at a mosque in San Antonio, Texas in November 2012 and another at a Fremont, California mosque in the following month, etc.). 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 hated all Muslims and Hindus.

This Section identifies the various individuals – including Geller, Spencer and David Yershulami – who are 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 FLAMBOYANT FIGUREHEAD

63 See id.
64 See id.
66 See Fear, Inc., CENTER FOR AMERICAN PROGRESS, August 2011, http://www.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf (“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.”)
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Pamela Geller is a pseudo-expert on Islam with no formal university academic credentials. 68 The Southern Poverty Law Center (SPLC) recognizes Geller as “the anti-Muslim movement’s most visible and influential figurehead.” 69 She administers the Atlas Shrugs Blog, and directs two70 recognized hate groups, Stop the Islamization of America (SIOA) 71 and the American Freedom Defense Initiative (AFDI), the latter of which encompasses SIOA.72

As to the former, Geller depicts SIOA as a “human rights organization dedicated to freedom of speech, religious liberty, and individual rights; no special rights for special classes.”73 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.’ 74


70 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. See SPLC Profiles: Pamela Geller, SPLCENTER.ORG, http://www.splcenter.org/get-informed/intelligence-files/profiles/pamela-geller.


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

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.\(^75\)

Further, the hate group “acts against these evils,” by “sponsor[ing] anti-jihad bus and billboard campaigns…”.\(^76\) Indeed, AFDI paid for several anti-Muslim advertisement buys prominently featured on mass transportation systems around the country. It also initiated First Amendment litigation when transit authorities rejected those proposed Ads; those decisions will be analyzed in greater detail in Section Four below.

The self-professed expert on all matters Islamic has an unfortunate record – of commentaries, blog posts and media appearances - of making anti-Muslim remarks.\(^77\) To illustrate, Geller claims "the idea of a 'moderate' Islam does not exist... because the Koran says so and Muhammad said so."\(^78\) 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."\(^79\) 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

\(^{74}\) See id.
\(^{76}\) See id.
\(^{77}\) Among the things she 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: Exposing the Deception behind America’s Top 25 Pseudo Experts on Islam, MUSLIM PUBLIC AFFAIRS COUNCIL, September 11, 2012, http://www.mpac.org/assets/docs/publications/MPAC-25-Pseudo-Experts-On-Islam.pdf. Geller also warns that “devout Muslims should be prohibited from military service.” Fear, Inc., CENTER FOR AMERICAN PROGRESS, Aug. 2011, http://www.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf.
\(^{79}\) See id.
have no other recourse but to resort to violence."\(^80\) She views President Obama as "the culmination of the Islamic-leftist alliance."\(^81\)

Geller has a similar record of outrageous, conspiratorial allegations such as: Adolf Hitler and Nazism were inspired by Islam;\(^82\) President Obama is a Muslim\(^83\) and Malcolm X’s “love child”;\(^84\) Islamic supremacists have infiltrated our government;\(^85\) U.S. Supreme Court Justice Elena Kagan a stealth Nazi sympathizer;\(^86\) 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.\(^87\)

More recently, she co-authored a harsh diatribe targeting the National Geographic Museum exhibit – “1,001 Inventions: Discover the Golden Age of Muslim Civilization,” – showcasing contributions of Muslim scientists.\(^88\) Named the “Best Touring Exhibit” by the Museum Heritage Awards in 2011, the exhibit was originally opened in Los Angeles by Hillary Clinton.\(^89\) In her critique, Geller depicted the exhibit as "Islamist propaganda," while 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."\(^90\)

Geller further pontificated regarding the museum:

“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

\(^{80}\) See id.

\(^{81}\) See id.


\(^{83}\) See id.


\(^{89}\) See id.

\(^{90}\) See id.
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.”

While seemingly outlandish, incredible and perhaps even laughable, Geller’s spew of Islamophobic hate and vitriol have also been arguably effective. Contemplate, for instance, that Geller has acquired a measure of mainstream acceptability.92 In late March 2011, the Alaska House of Representatives invited her to testify on proposed anti-Islam legislation.93 She has also successfully influenced the media.94

B. ROBERT SPENCER: THE PSEUDO-SCHOLAR

Robert Spencer is a prolific author, blogger and commentator who directs the website Jihad Watch,95 which is affiliated with the David Horowitz Freedom Center.96 The center’s mission is to “defend the principles of individual freedom, the rule of law, private property, and limited government.”97 As an affiliate of the Freedom Center, Jihad Watch’s principal objective is to “track the attempts of radical Islam to subvert Western culture.”98

A professed expert on Islam and Muslims, Robert Spencer lacks formal academic credentials in either discipline.99 Generally, Spencer regards the Quran and its adherents as inherently violent, interpreting the holy text of Islam in a strictly literal and selective

91 See id.
93 See id.
96 See id.
97 See id.
98 See id.
fashion, wholly devoid of historical context, in order to support his thesis. 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.”

Indeed, in a September 12, 2011, interview with a conservative Canadian television station, Spencer claimed terrorism as 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." During another television interview the following month, Spencer argued that the Quran 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…"

Spencer also describes stories of Muhammad, the Prophet of Islam, as "fiction and elaborated" by Arab conquerors "in order to preserve and perpetuate their empire." He

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101 See Fear, Inc., CENTER FOR AMERICAN PROGRESS, Aug. 2011, [http://www.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf). 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…that 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: Exposing the Deception behind America’s Top 25 Pseudo Experts on Islam, MUSLIM PUBLIC AFFAIRS COUNCIL, September 11, 2012, available at [http://www.mpac.org/assets/docs/publications/MPAC-25-Pseudo-Experts-On-Islam.pdf](http://www.mpac.org/assets/docs/publications/MPAC-25-Pseudo-Experts-On-Islam.pdf).


103 See id.

104 See id.
falsely claims the Quran 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." 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. He describes The Brotherhood has having "a plan to do nothing less than conquer and Islamize the United States," with the aid of American Muslim front groups.

Also like Geller, with whom he founded SIOA and the AFDI, Spencer has enjoyed a troubling measure of success and is credited with generating misinformation used by political leaders, grassroots groups, and the media. Indeed, elected officials, including once Presidential hopeful U.S. Representative Michelle Bachman, has cited Spencer’s theory. 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. Notably, according to Carl Ernst and William Kenan, Professors of Religious and Islamic Studies at the University of North Carolina-Chapel Hill, Spencer’s alma mater, Spencer’s views have “no basis in scholarship.” Rather, Professor Ernst concludes that Spencer cherry-picks textual, religious evidence to mainstream the accusation that “Islam is not a religion of peace.”

C. DAVID YERUSHALMI: THE LAWYER WAGING LAWFARE


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105 See id.
106 See id.
107 See id.
and serves as counsel for SIOA.\textsuperscript{114} SANE is an anti-Muslim hate group dedicating to advancing the notion that Islam is innately seditious and Islamic law nothing more than a “criminal conspiracy to overthrow the U.S. government.”\textsuperscript{115}

An outspoken critic of Islamic religious law, Yerushalmi – like anti-Muslim cohorts Geller and Spencer – lacks academic credentials in Islamic legal studies to qualify him as a scholar on the subject.\textsuperscript{116} 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.\textsuperscript{117} Moreover, the only socially acceptable Muslim, in Yerushalmi’s perspective, is one who disavows Islamic customs and legal traditions.\textsuperscript{118} Further, Yerushalmi favors the mass deportation of American Muslims and other “non-Western, non-Christian” persons to preserve America’s “national character.”\textsuperscript{119}

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.\textsuperscript{120} In 2011 and 2012, seventy-eight (78) bills or amendments aimed at interfering with Islamic religious practices were considered in thirty-one (31) states and the U.S. Congress.\textsuperscript{121} Sixty-two of these bills contained language that was extracted

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\textsuperscript{114} 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. See Robert Steinback, \textit{The Anti-Muslim Inner Circle}, THE INTELLIGENCE REPORT, Summer 2011, Issue Number 142, http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues.


\textsuperscript{118} See id.

\textsuperscript{119} See 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).


\textsuperscript{121} CAIR written Statement on Hate Crimes and the Threat of Domestic Extremism submitted to the US Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Human Rights 2012, Testimony Prepared by Corey P. Saylor and Robert S. McCaw. See also Fear Inc., CENTER FOR
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Engy Abdelkader  
*Savagery in the Subways: Anti-Muslim Ads, the First Amendment & the Efficacy of Counterspeech*  
January 2013  
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from Yerushalmi’s American Laws for American Courts (ALAC) model legislation, explicitly created to outlaw Islamic law.\(^{122}\) Bills were signed into law in four states in 2011 including, Arizona, Kansas, South Dakota and Tennessee.\(^{123}\) These joined prior enacted laws in Oklahoma and Louisiana.\(^{124}\) Advocacy groups have expressed concern that such measures provide legitimizing cover for anti-Islam rhetoric, culminating in bias-motivated violence.\(^{125}\)

Yershulmai’s “lawfare” also encompasses aggressive First Amendment litigation challenging those he views as compromising America’s “Judeo-Christian” tradition.\(^{126}\) To this end, he has represented the Quran-burning Florida pastor Terry Jones\(^{127}\) and brought the First Amendment suits involving the controversial anti-Muslim Ads that are the subject of this article.

Notably, upon reviewing Yerushalmi’s work, as described above, the Anti-Defamation League found that he has a “record of anti-Muslim\(^{128}\), anti-immigrant\(^{129}\) and anti-black\(^{130}\) bigotry.”\(^{131}\)

Geller, Spencer, Yerushalmi: these are the individuals and 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 U.S. 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. The pernicious effects include stigmatization and marginalization of American Muslims socially, politically and legally. And, the

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\(^{122}\) See id.  
\(^{123}\) See id.  
\(^{124}\) See id.  
\(^{125}\) See id.  
\(^{127}\) See id.  
\(^{129}\) 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, [http://www.splcenter.org/get-informed/intelligence-files/profiles/david-yerushalmi](http://www.splcenter.org/get-informed/intelligence-files/profiles/david-yerushalmi).  
\(^{131}\) See id. (Yerushalmi said, “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?”)
following section examines the hate advertisements these activists sponsor to facilitate realization of their bigoted goals.

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

The incendiary transit advertisements may differ in wording but the message is uniform: hatred for Islam and against its adherents. This section 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. 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.

In Miami, Florida, the Miami-Dade County Transit Authority initially decided to remove the Fatwa on Your Head ads after receiving complaints from an American Muslim civil rights advocacy group. The transit authority reconsidered its decision, however, after Yerushalmi threatened First Amendment litigation on SIOA’s behalf. So effective was Yerushalmi’s demand letter that the transit authority not only placed the original ten contracted ads but it also placed an additional twenty ads at no additional expense to SIOA. Notably, Yerushalmi did not fare as well in Detroit, Michigan, however, where transit officials refused to place the ad buys. Yerushalmi subsequently mounted a legal challenge against city authorities; that litigation is discussed in greater detail in Section Four below.


133 See 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).

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

135 See id.

136 See id.
More recently, mass transit passengers were confronted with another incarnation of anti-Muslim messaging. This advertisement, sponsored by the AFDI, read: “19,250 deadly ISLAMIC attacks since 9/11. It's not Islamophobia, its Islamorealism.” After running on NYC trains, a local chapter of 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, associating Islam with terrorism and dismissing Islamophobia as Islamorealism, were featured. Unlike the ‘Fatwa on Your Head’ ad above, and the ‘Savages’ ad described below, the ‘Islamorealism’ ad ran unchallenged.

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” which created a firestorm of controversy culminating in legal challenges when city officials refused the ads. The hate placards read, “In any war between the civilized man and the savage, support the civilized man. Defeat Jihad. Support Israel.” The ads were deemed so controversial that the New York Metropolitan Transportation Authority rejected them as violating its ‘no-demeaning’ advertising standards. In Washington, D.C., the transit authority “deferred” placement of the ads “out of concern for public safety, given current world events.” Similarly, the authorities in Michigan had also refused to run the anti-Muslim ads. First Amendment litigation ensued in each of these jurisdictions, the outcomes of which are analyzed in the following section.

V. THE LITIGATION: THE IMPACT OF ‘FORUM ANALYSIS’ UPON FREE SPEECH

138 See CAIR-NY Email, 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.
139 See 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”).
As a preliminary matter, it is significant to note that 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. The type of forum dictates the applicable legal standard for determining the constitutionality of the speech restriction in question. 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. 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, such as public streets and parks, which have conventionally been employed by the public for assembly and the exchange of ideas. 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.

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. As such, the same legal standard governs: the court must subject content-based speech limitations to a strict scrutiny legal analysis.

Finally, “non-public forums” signifies government property that does not enjoy the same degree of expressive speech as found in a traditional public forum. When the

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144 See id.
145 See id.
146 See id.
147 See id. (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.)
150 See id. (Examples include airport terminals, military bases and restricted access military stores and jailhouse grounds.)
government property is classified as a non-public forum, the standard differs: content-based speech limitations need only be reasonable and viewpoint-neutral.151

A number of courts, including the U.S. Supreme Court, have applied these rules to advertising on mass transit systems with variant results. In Lehman v. City of Shaker Heights,152 for instance, the Supreme Court looked at a city’s advertising standards excluding political content from the interior of its transit system.153 The Court declined to find a designated public forum. Notably, 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.”154

The issue has also been addressed by the circuit courts. For instance, 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.155

In contradistinction, however, the Seventh Circuit found a designated public forum where a transit authority published all advertisements in the interior of its systems, while loosely applying its own standards excluding vulgar, immoral, or disreputable content thus

153 See id.
154 See Lehman, 418 U.S. at 303–04, 94 S.Ct. 2714.
155 See Children of the Rosary v. City of Phoenix, 154 F.3d 972, 978 (9th Cir.1998).
evincing an intent, the court reasoned, to create a public forum. Similarly, the Third Circuit has held that such advertising space represents a designated public forum. In Christ’s Bride Ministries, Inc. v. SEPTA, the Third Circuit found a designated public forum on account of the city’s established record of publishing all advertisements irrespective of controversial, or lack thereof, content. In the court’s view, such absence of regulation evinced intent to establish a forum open to public discourse.

Finally, in New York Magazine v. Metro. Transp. Auth., the Second Circuit held the 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.

The question surrounding 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 finding significantly influences the court’s First Amendment analysis.

A. NEW YORK: AFDI V. METROPOLITAN TRANSIT AUTHORITY - GOVERNMENT PROPERTY AS DESIGNATED PUBLIC FORUM

In AFDI v. MTA, the federal district court found that the MTA’s transportation vehicles constituted a designated public forum and as such, restrictions on speech must survive a strict scrutiny analysis. This analysis proved fatal to MTA’s ‘no-demeaning standard,’ the application of which culminated in the content-based speech restriction barring AFDI’s advertisement from placement on transit vehicles. This is so, the court reasoned, because the standard differentiated speech that demeaned on account of “race,

156 See Planned Parenthood Ass’n/Chicago Area v. Chicago Transit Auth., 767 F.2d 1225, 1232 (7th Cir.1985).
158 See id.
159 See Christ’s Bride, 148 F.3d at 253
160 See New York Magazine, 136 F.3d at 130.
161 The MTA is the public authority which provides mass transit in the New York City metropolitan area.
color, religion, national origin, ancestry, gender, age, disability or sexual orientation” from that which demeaned on an unprotected basis. The government could provide no justification for doing so and as such, the no-demeaning restriction was rendered unconstitutional. The decision is further examined below.

In March 2011, AFDI submitted an advertisement to the MTA to be placed on the exterior of New York City buses.\(^{162}\) The ad read: “In any war between the civilized man and the savage, support the civilized man.”\(^{163}\) The ad included series of photographs, including young soldiers wearing keffiyehs 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.\(^{164}\) Below the photographs, appeared the copy: “Support Israel / Defeat Jihad” and it directed readers to two websites, AtlasShrugs.com and FreedomDefenseInitiative.com.\(^{165}\)

AFDI soon withdrew that ad and submitted a modified one.\(^{166}\) The new ad differed from the first in that two photographs were removed and replaced (including by a photograph of an Arab woman wearing a hijab and holding a sign reading “God Bless Hitler”; the text below now read: “Support Israel / Defeat Islamic Fundamentalism.”\(^{167}\) AFDI was asked to modify this second ad because it violated the MTA’s advertising standards.

Notably, 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.\(^{168}\) Ad buys are subject to MTA’s advertising standards, first adopted in 1994 and thereafter revised in 1997, which specifically prohibit ads which “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 sexual orientation.”\(^{169}\) This prohibition is referred to as the “no-demeaning standard”.\(^{170}\)

In September 2011, AFDI submitted a third ad that culminated in the instant litigation.\(^{171}\) It contained no photographs and the copy, read: “In any war between the civilized man

\(^{162}\) See Am. Freedom Def. Initiative v. Metro. Transp. Auth., 11 CIV. 6774 PAE, 2012 WL 2958178 (S.D.N.Y. July 20, 2012) Before submitting the ad that is the subject of this case, AFDI had submitted two ads to the MTA; both were accepted.

\(^{163}\) See id.

\(^{164}\) See id.

\(^{165}\) See id.

\(^{166}\) See id.

\(^{167}\) See id.

\(^{168}\) See id.

\(^{169}\) See id.

\(^{170}\) See id.

\(^{171}\) See id.
and the savage, support the civilized man.”172 Below that, in blue, were two Stars of David, and the words, “Support Israel,” and beneath that, in red text: “Defeat Jihad.”173 The ad also directed readers to AtlasShrugs.com, SIOAonline.com and JihadWatch.com.174

MTA determined that the third ad violated its ‘no demeaning standard’ and so advised Geller. In response, Yerushalmi, in his capacity as AFDI’s counsel, emailed that the ad was not demeaning and that in any case, the no demeaning standard constituted viewpoint discrimination in violation of the First Amendment. He further advised that AFDI had no intention of revising this third ad.175 The 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.”176

On September 27, 2011, AFDI filed suit in federal district court thereafter seeking a preliminary injunction enjoining application of MTA’s advertising standards.177 In its Complaint, AFDI claimed that MTA’s no-demeaning standard is unconstitutional and that the rejection of its ad for non-conformity with that standard unlawfully restricted their free speech.178

To determine whether the injunction should issue, the Court first assessed whether the 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.179 Since MTA did not misapply its no demeaning standard, the Court turned next to the following inquiry: whether that prohibition violates the First Amendment.180 To make that assessment, the Court analyzed the forum, advertising space on MTA bus exteriors, to identify the applicable legal standard to MTA’s speech restriction.181 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). In New York Magazine, the Second Circuit 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.182 Since the same

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172 See id.
173 See id.
174 See id. (AFDI sought to run the ad on the tails of approximately 318 NYCTA buses for four weeks).
175 See id.
176 See id.
177 See id.
178 See id.
179 See id.
180 See id.
181 See id.
182 See id.
advertising space and standards were at issue here as in New York Magazine, the Court found the Second Circuit’s decision controlling by virtue of stare decisis.

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. MTA’s no-demeaning standard, the Court found, was in fact a content based restriction because it differentiated ads on that very basis. Further, the court reasoned, outside of the nine classifications - race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation – MTA’s standard allows all other demeaning ads. Further 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. As such, the Court held that the MTA no-demeaning standard, in its current form, violates the First Amendment. The Court granted the preliminary injunction enjoining the enforcement of MTA’s no-demeaning standard; it later entered a permanent injunction as well.

It is interesting to note the events which 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 it “does not imply MTA’s endorsement of any views expressed.” MTA will add disclaimers to political, religious or moral ads that could be deemed offensive; it has in fact added such disclaimers to political

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183 There had been no such changes in MTA's policies and practices governing bus ads since New York Magazine.
185 See id.
186 See id. (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.)
187 See id.
188 See id.
189 See id.
190 See id.
191 See Alfonso A. Castillo, MTA to add disclaimer, NEWSDAY, September 28, 2012 available at 2012 WLNR 20627762, at A44. (Among the other options available to the MTA: it could have more specifically delineate 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.). See also, Ten Mann, MTA Ad Policy Faces Overhaul, THE WALL STREET JOURNAL, September 26, 2012, http://online.wsj.com.
disclaimers to the ads in question here. The decision represents the first change to MTA advertising standards in fifteen (15) years.

**B. MICHIGAN: AFDI v. SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION – GOVERNMENT PROPERTY AS NON-PUBLIC FORUM**

In AFDI v. SMART, the Sixth Circuit found that the advertising space on SMART transit vehicles qualified as a non-public forum. As such, transit officials were afforded greater leniency in speech restriction determinations and SMART’s advertising standards, unlike MTA’s above, were found to comport with the First Amendment. The decision and ensuing analysis is discussed further here.

In May 2010, AFDI submitted an advertisement to the Suburban Mobility Authority for Regional Transportation (SMART), a state-run transit authority, to be placed on the exterior of city buses in Michigan. The advertisement read: “Fatwa on your head? Is your family or community threatening you? Leaving Islam? Got Questions? Get Answers! RefugefromIslam.com.”

Notably, advertising space is subject to SMART’s “Restriction on Content” policy, which limits the permissible content of advertisements displayed on SMART vehicles. The policy reads:

> In order to minimize chances of abuse, the appearance of favoritism and the risk of imposing upon a captive audience, [SMART] shall not allow the following content:

1. Political or political campaign advertising.
2. Advertising promoting the sale of alcohol or tobacco.
3. Advertising that is false, misleading or deceptive.
4. Advertising that is clearly defamatory or likely to hold up to scorn or ridicule any person or group of persons.
5. Advertising that is obscene or pornographic; or in advocacy of imminent lawlessness or unlawful violent action.

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193 See Alfonso A. Castillo, MTA to add disclaimer, NEWSDAY, September 28, 2012 available at 2012 WLNR 20627762, at A44.

194 See [AFDI v. SMART, -- F.3d – (2012)](https://example.com)

195 See id.

196 See id.

197 See id.
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.\textsuperscript{198} In response, AFDI filed suit in federal district court claiming a First and Fourteenth Amendment violation, seeking a preliminary injunction.\textsuperscript{199}

SMART countered that they have a “Restriction on Content” policy which contains particular prohibitions including “political or political campaign advertising” and “advertising that is clearly defamatory or likely to hold up to scorn or ridicule any person or group of persons.”\textsuperscript{200} SMART contends that they have actively enforced this policy and reject any and all advertising deemed to violate this policy.\textsuperscript{201} Upon receiving AFDI’s requested advertisement, SMART found it to be in violation of the policy, constituting political advertising and likely to hold up to scorn and ridicule a group of persons.\textsuperscript{202}

Similar to the MTA court, the court engaged in a forum analysis and concluded that SMART’s advertising space constituted a non-public forum.\textsuperscript{203} The court was thus required to engage in a rational basis review – a much more lenient standard than that employed above – to determine the constitutionality of SMART’s free speech restriction.\textsuperscript{204} This standard required SMART’s restriction to be reasonable and viewpoint neutral.\textsuperscript{205}

While SMART argued that its policy is both reasonable and constitutional, the district court, in apply Sixth Circuit law\textsuperscript{206}, concluded otherwise. The court characterized SMART’s policy as “arbitrary and capricious” because of the absence of any manual, standard or language to help guide officials’ determinations about what constitutes a political advertisement from a non-political one.\textsuperscript{207} The district 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

\textsuperscript{198} See id.
\textsuperscript{199} See id.
\textsuperscript{201} See id.
\textsuperscript{202} See id.
\textsuperscript{203} See id.
\textsuperscript{204} See id.
\textsuperscript{205} See id.
\textsuperscript{206} See id. (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.”)
\textsuperscript{207} See id.
The court found that this purportedly disparate treatment showed the absence of guidance.\textsuperscript{208} 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.\textsuperscript{209} SMART subsequently appealed to the United States Court of Appeals for the Sixth Circuit.\textsuperscript{210}

Notably, 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.\textsuperscript{211} 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.\textsuperscript{212} 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.”\textsuperscript{213} Moreover, and in contradistinction to 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 consistent with a non-public forum.\textsuperscript{214}

The Sixth Circuit found the Supreme Court holding in Lehman v. City of Shaker Heights, finding that advertising space sold on transit vehicles was not a public forum because the city had rejected all political advertisements, instructive.\textsuperscript{215} 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.”\textsuperscript{216} In the alternative, the court reasoned that the advertisement could reasonably have been viewed as nonpolitical.\textsuperscript{217}

Since the advertising space on SMART’s vehicles is a nonpublic 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.\textsuperscript{218} Unlike the federal district court below, the Sixth Circuit found that SMART’s advertising rules guide officials in distinguishing between permissible and impermissible advertisements.

\textsuperscript{208} See AFDI v. SMART, -- F.3d – (2012)
\textsuperscript{210} See AFDI v. SMART, -- F.3d – (2012)
\textsuperscript{211} See id.
\textsuperscript{212} See id.
\textsuperscript{213} See id.
\textsuperscript{214} See id.
\textsuperscript{215} See id.
\textsuperscript{216} See id.
\textsuperscript{217} See id.
\textsuperscript{218} See id.
in a non-arbitrary fashion. 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.” In the instant matter, the court explained, the fatwa advertisement was clearly political. Further, SMART’s restriction was viewpoint neutral, the court found, because it would have prohibited ads by advocates on either side of the debate pursuant to its ban on political advertising. As such, the Sixth Circuit ordered the removal of the injunction. In this respect, its reasoning and findings are similar to those in the Seventh Circuit, mentioned in the introductory analysis above.

Notably, 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

While the court found the advertising space in AFDI v. WMATA to constitute a designated public forum, similar to the MTA case, thus requiring the application of the harsher strict scrutiny standard, the timing of the AFDI ‘Savage’ ads distinguishes the WMATA case as unique. Indeed, 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. The U.S. Department of Homeland Security (DHS) and the Transportation Security Administration (TSA) advised WMATA against placement due to an increased threat of terrorist attack against the transit system. Consequently, WMATA deferred placement of the ads for an unspecified period of time. When AFDI sought a preliminary injunction, the federal district court found that while WMATA had certainly demonstrated a compelling government interest in protecting employees and subway passengers, it had not pursued the least restrictive

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219 See id.
220 See id.
221 See id.
222 See id.
224 See id.
225 See id. (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).
226 See id.
means to achieve this interest. The court’s findings and analysis are examined in greater detail below.

Prior to September 6, 2012, AFDI submitted its ‘Savages’ advertisement to the WMATA. While noting its controversial nature, WMATA counsel also advised the transit authority that the ad enjoyed First Amendment protection – WMATA approved its placement on subway platforms. The advertisements were scheduled to run for approximately one month beginning on September 24, 2012.

Before the date of placement, however, “The Innocence of Muslims,” an American-made movie trailer that denigrated Muhammad, the Prophet of Islam, sparking anti-American protests across many continents. As a result, WMATA officials contacted TSA regarding the potential safety risks surrounding placement of AFDI’s ads. The TSA conveyed its concern on account of increased risk of a terrorist attack targeting the D.C. Metro system. WMATA also received an official DHS warning of the risk of violence in response to the anti-Islam trailer. Consequently, WMATA decided to indefinitely delay placement of the ads and so advised AFDI.

In response, and as it had done in New York and Michigan, the AFDI sued for a preliminary injunction in federal district court. Notably, WMATA conceded that

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227 See id. (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.)
228 See id.
229 See id.
230 See id.
231 See id. See also, The ‘Innocence of Muslims’ Riots, THE NEW YORK TIMES, October 17, 2012 available at http://topics.nytimes.com (last visited Nov. 4, 2012) (“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 had been posted on YouTube was promoted by a shadowy assortment of right-wing Christians in the US. 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.”)
232 See id.
233 See id.
234 See id. (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 displayed).
235 See id.
236 See id.
advertising space on its subway platforms constituted a public forum for public discourse, thus triggering a strict scrutiny constitutional analysis.\textsuperscript{237}

More precisely, since the advertising space constituted a designated public forum, legal analysis of the speech restriction depended on whether that restriction was content neutral.\textsuperscript{238} If the restriction was content-based, WMATA was required to satisfy the strict scrutiny standard – necessary to serve a compelling government interest and narrowly drawn to do so.\textsuperscript{239} 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.\textsuperscript{240}

Ultimately, the court found that the restrictions were content based on account of its expressed alarm with the potential consequences the ad’s message could trigger (i.e. a terrorist attack).\textsuperscript{241} As such, the court reasoned that the 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.”\textsuperscript{242} Indeed, with respect to the first part of that inquiry, the court found that WMATA’s safety concerns constituted a compelling government interest.\textsuperscript{243}

In turning to the next component of the legal analysis, however, the court found that WMATA’s restriction was not in fact narrowly drawn.\textsuperscript{244} Alternative responses to an open-ended indefinite delay of the ads’ placement, the court reasoned, included: placing the ads elsewhere in one of the WMATA’s advertising venues; accompanying the ads with disclaimers articulating the city’s legal obligations under the First Amendment; and/or a more precise timeframe concerning placement.\textsuperscript{245} As such, since the WMATA’s content-based speech restriction was not narrowly tailored to achieve its stated interest, the court found that it failed to satisfy its legal burden and thus ordered the immediate placement of the ads.\textsuperscript{246}

Yet, this is not where the story ends. 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, “good speech.”
VI. EFFECTIVE NON-LEGAL RECOURSE TO ANTI-MUSLIM, ANTI-ISLAM HATE SPEECH

Predictably, the advertisements were defaced everywhere they appeared.\(^{247}\) Such acts of vigilante justice constitute private censorship, an attempt to remove a disfavored message from the marketplace of ideas.\(^{248}\) 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.”\(^{249}\)

Justice Brennan's point is equally applicable to private actions of vandals as it is to government-sponsored censorship.\(^{250}\) Rather, the most effective non-legal recourse to the anti-Muslim hate ads is counterspeech that underscores peace, community and pluralism\(^{251}\) and the collective moral rejection of the denigration of any faith group in our society. This Section examines counterspeech as a recommended response to the divisive ads as an effective means of redirecting the public’s attention, and re-educating them with positive messages concerning the subject community – while concurrently noting several significant considerations.

A. SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY’S (MUNI) COUNTER-AD – A NEW MODEL

The “Savage” advertisements arrived in the San Francisco Municipal Transportation Agency (“Muni”) system on ten (10) buses on August 7, 2012.\(^{252}\) While the transit authorities initially considered rejecting the ads, the court’s decision in New York informed its decision against doing so.\(^{253}\)

\(^{249}\) See id.
\(^{250}\) See id.
\(^{252}\) See Ron Scherer, Anti-Muslim groups’ ad in NYC subway calls jihad ‘savage.’ Is now a good time?, THE CHRISTIAN SCIENCE MONITOR, September 21, 2012 available at 2012 WLNR 20172074.
\(^{253}\) See Adam Server, Who’s Behind the Anti-Islam Ads on MTA and Muni? MOTHER JONES, August 15, 2012 available at http://www.motherjones.com/print/190856 (last visited Nov. 4, 2012) (“The ads were
Rather, 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.”

The release further indicates that SFMTA will donate its proceeds from AFDI’s advertisement to further the educational activities of the San Francisco Human Rights Commission. In fact, not only did Muni contribute the revenue raised to the Commission, it placed a counter-ad on the ten (10) buses, condemning AFDI’s ad next to which it appeared. 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.

Indeed, Muni’s initiative set the standard that community advocates would request their respective transit officials to emulate, including in Washington, D.C. and New York...
City. It is significant to note, however, that government officials in less progressive cities may not be as supportive or willing to engage in such counterspeech. Thus, in many instances where such counterspeech is necessary, it may not necessarily occur on an official level as it did in San Francisco.

**B. AMERICAN MUSLIM RESPONSES – INNOVATIVE CHALLENGES TO INTOLERANCE**

Perhaps the most innovative and arguably talked about response to AFDI’s “Savages” ad was a peaceful Twitter campaign, launched by American Muslims, with the hash tag “#MySubwayAd.” Representative tweets include:

“In NYC we speak 140 languages and hate isn’t one of them,”

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

“We all are the same. Keep love going. Sofia, age 4,“ 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.”

Significantly, various American Muslim advocacy organizations spoke out against the advertisements but in support of the First Amendment right for the ads to run. They

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261 See id.
262 See id.
263 See id.
264 See id.
265 See Ron Scherer, *Anti-Muslim groups’ ad in NYC subway calls jihad ‘savage.’ Is now a good time?,* THE CHRISTIAN SCIENCE MONITOR, September 21, 2012 available at 2012 WLNR 20172074. (“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*, PIT. POST-GAZETTE, October 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).
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engaged in grass roots organizing\textsuperscript{266} and also launched counter-ads to challenge the anti-Muslim hate with countervailing positive messages. For example, the Council on American Islamic Relations designed a counter ad featuring a verse from the Quran stating: “Show forgiveness, speak for justice and avoid the ignorant.”\textsuperscript{267}

In the same vein, the Muslim Public Affairs Council, launched its own campaign with an ad which reads: “The truly civilized man fights for peace” and “supports American values” wedged between an Islamic crescent and a Jewish Star of David\textsuperscript{268} while adding “Defeat racism and bigotry.”\textsuperscript{269} The ad is featured in NYC subways and on WMATA buses across the DC, Virginia and Maryland areas.\textsuperscript{270}

Another campaign involves reclaiming the word Jihad, which is often conflated with violence but to 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 chosen to be featured as part of the national ad campaign that defines Muslims in a proactive and positive manner, and reclaims a word and concept in Islam which is dear to all Muslims but has been defamed by anti-Muslim groups and leaders

\[\textsuperscript{266} \text{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 a large coalition of community groups to join us in condemning and marginalizing this anti-Muslim campaign. We reached out to Mayor Bloomsberg’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.” See CAIR-NY Email, 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}

\[\textsuperscript{267} \text{See CAIR Counters D.C. Anti-Muslim Ads with Message of Forgiveness, Justice, ASSOCIATED PRESS, October 12, 2012.}

\[\textsuperscript{268} \text{The ad includes a variety of other religious symbols including a cross.}

\[\textsuperscript{269} \text{See 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)}

\[\textsuperscript{270} \text{See id.}
American Muslim groups also worked with interfaith partners to counter the messaging by the anti-Muslim ads; the efforts of various faith groups are discussed immediately below.

C. INTERFAITH RESPONSES - REJECTING SUSPICION, ENHANCING INTERCULTURAL UNDERSTANDING

The response from the U.S. interfaith community, Christians and Jews alike, was indeed tremendous.

The Anti-Defamation League publicly characterized the “Savages” ad as “offensive and inflammatory,” 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.”

Notably, Rabbis for Human Rights – North America and the Christian group Sojourners launched respective ad campaigns. The ad by Rabbis for Human Rights, which ran near AFDI’s ad, says, “In the choice between love and hate, choose love. Help stop bigotry against our Muslim neighbors.” The Sojourners ad simply says, “Love your

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271 See CAIR-NY Email, 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

272 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. See ISNA Responds to Anti-Muslim Subway Ads, ISNA.NET, 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, DC 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, DC subway system, which reads: “Hate speech is not civilized. Support peace in word and deed. #mysubwayad.” See id.


274 See id.


276 See 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.)
Muslim neighbors.” Both ads initially ran in NYC’s subway system as did another counter-ad by another Christian group, United Methodist Women, which read, “Hate speech is not civilized. Support peace in word and deed.” Also in New York, the Commission of Human Rights worked to counter the anti-Muslim subway ads that tout the Big Apple’s diversity. The billboard features a red apple with a map of the world that looks like bites. It reads: “From many countries, one city.”

Groups similarly mobilized in response to the federal court decision in Washington, D.C. Illustrative is Sojourner’s Campaigns Assistant Janelle Tupper blog stating,

“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 ready for this development and has purchased “Love Your Muslim Neighbors” messages that will be going up in the 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. You can help respond to the latest developments in D.C. by clicking here.”

Diverse groups also engaged in grass roots organizing within a coalition. Representative is an anti-hate coalition of 127 organizations which asked Americans to contact the Washington Area Metropolitan Transit Authority (WMATA) to request that it help mitigate the negative impact of anti-Muslim advertisements. The broad based coalition

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277 See 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.”)
278 See id.
280 See id.
281 See id.
283 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
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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).  

Also in 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,’ said JCPA President Rabbi Steve Gutow. ‘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.’

The JCPA press release continued,

‘Support for Israel should not be juxtaposed with the denigration of any group,’ added JCPA Chair Larry Gold. ‘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.’

Moreover, political officials also entered into the mix with at least one US Congressman calling for a boycott of the capital’s metro system. Additional responses include Opinion and Editorial pieces by prominent Christian and Jewish community leaders in news media such as The New York Times and The Huffington Post.

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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.**

284 **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**

285 **JCPA Condemns Bigoted, Divisive and Unhelpful anti-Muslim Ads, STATES NEWS SERVICE, September 12, 2012.**

286 **See id.**

287 **See Taimur Khan, America’s anti-Muslim ads backfire, THE NATIONAL (UAE), October 15, 2012 available at 2012 WLNR 21840717. (“The right to free speech is a right I will defend to my grave,” Mike Honda, a Democrat from California said. “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.”)**

288 **See, e.g., Paul Brandeis Raushenbush, Muslims Are Not Savages, THE HUFFINGTON POST, September 25, 2012 available at http://www.huffingtonpost.com/paul-raushenbush (last visited Nov. 4, 2012) (“When did the memo go out that it was okay to call Muslims savages?… the 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**
D. LESSONS AND CONSIDERATIONS

The interfaith initiatives depicted immediately above are significant to strengthening community relationships and in rejecting the extremist messages of anti-hate groups domestically. But, the ripple effect has international consequence as well. Note, 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.291 Interfaith and other community initiatives, such as those described above, directly undermine Al Qaeda’s false assertions.

This essay has argued that counterspeech is the preferred self-help remedy to challenge anti-Muslim, anti-Islam hate messages, and several considerations are worth noting. With respect to the efficacy of counterspeech, it is significant to note the necessity of a community of good conscience to stand against bigotry. As such, the empowerment of the targets of hateful speech, such as American Muslims here, rests partly in the hands of members of the greater community who sympathize with them.292 Consequently, counterspeech may not be as effective in communities that tolerate and/or approve 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.”

289 See, e.g., Rick Jacobs, The Sin of Sowing Hatred of Islam, THE NEW YORK TIMES, September 25, 2012 available at www.nytimes.com (last visited Nov. 4, 2012) (“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….Yes, 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.”)


291 See Fear Inc., CENTER FOR AMERICAN PROGRESS

such anti-Muslim, anti-Islam bigotry. In the instant matter concerning inflammatory Islamophobic transit advertisements, counter-ads, coalition letters, opinion-editorial pieces, and other forms of counterspeech helped define an atmosphere demanding respect for all while underscoring the value in pluralism. It is indeed a story of collective success. Moreover, the collective success was further facilitated by the ability to call media attention to the counterspeech, thus amplifying the message.

Pointedly, in Detroit, Michigan, where the government successfully suppressed the hate advertisements, such a consensus did not materialize. 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 reprehensible bigotry at hand, to a new controversy regarding prior restraints on speech (potentially transforming hate speech perpetrator like Geller into a victim of censorship, deprived of her First Amendment rights).

Additionally, the opportunity to engage in counterspeech may have enhanced the American Muslim process of empowerment. By launching an innovative, peaceful Twitter campaign to counter the advertisements’ hateful message, for instance, the minority Muslim community showed the courage and initiative to challenge AFDI’s statements. They employed counterspeech effectively in the marketplace of ideas to morally defeat a message of division and hate. However, in other circumstances such responses may not have fared as well if the counterspeech is cause for further calumny and hate towards the subject community, or where the community is impoverished and otherwise unable to avail itself of such remedy.

Further, the anti-Muslim hate advertisements may also serve an important educative purpose insofar as they inform observers regarding the values of those responsible for the display. To this end, it bears noting that following the placement of the hate ads, FOX News was forced to disavow the subway initiative describing it as “inflammatory” and “anti-Muslim”; this is remarkable because Geller and Spencer are frequent favorites on the network.

293 See id.
294 See id.
297 See id.
298 See id.
299 See id.
300 See Oliver Willis, *Fox News Labels Pamela Geller's Work "Inflammatory" And "Anti-Muslim" After Promoting Her For Years*, MEDIAMATTERS.ORG, September 25, 2012,
VII. CONCLUSION

Government censorship, except where fashioned narrowly to achieve a necessary, compelling interest, while it may in fact be well meaning is not the appropriate response to Islamophobic hate speech. Rather, as this essay illustrates, although counterspeech is not always a flawless remedy, it may prove to be a very effective means for addressing harmful or threatening expression including Islamophobic speech. Its efficacy is largely contingent upon the willingness and ability of those targeted and the larger community around them to rise up to the unfortunate occasion to counter nefarious messages of hate. In this respect, President Obama’s observations bear noting:

“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.”

The effectiveness of counterspeech appears to be premised upon this notion.