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# THE ROLE OF PATHOLOGY IN FIRST AMENDMENT THEORY: A SKEPTICAL EXAMINATION*

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## I. INTRODUCTION: THE NATURE AND RATIONALE OF THE PATHOLOGICAL PERSPECTIVE

FOR MUCH OF this century, legal scholars and jurists have debated the appropriate analytical approach to the protection of free speech. Reasonable minds have long differed over both the first amendment's scope[1] and rationale.[2]

Most recently, an analytical model has been developed which turns not on assumptions or conclusions about the proper values fostered by the free speech guarantee, but rather on a strategic assessment of the judiciary's institutional capital within the political process. This model, labeled by its creator, Professor Vincent Blasi, the "pathological perspective,"[3] posits that the scope of first amendment protection should at all times be determined in light of how

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1. I refer to the longstanding debate among self-proclaimed absolutists (*see, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978)); balancers (*see, e.g.*, Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); *see also* Dennis v. United States, 341 U.S. 494, 542-44 (1951) (Frankfurter, J., concurring)), and categorizers (*see, e.g.*, Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962)).

2. *Compare* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971) (value of first amendment limited to furthering political process) *with* EMERSON, *supra* note 1, at 6-9 (first amendment multi-valued); M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 9-60 (1984) (all conceivable first amendment values explainable as sub-values of broader goal of individual self-realization).

3. Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449 (1985).

the free speech right will function during so-called "pathological" periods. These are defined as intermittent times characterized by "the existence of certain dynamics that radically increase the likelihood that people who hold unorthodox views will be punished for what they say or believe."[4] That such periods have occurred is beyond dispute, as both the "Red Scare" of the 1920s[5] and the McCarthy period during the 1950s prove.[6] That such periods will continue to occur intermittently is, Blasi asserts, equally certain, primarily because of his rather pessimistic view of human nature:

> The aggressive impulse to be intolerant of others resides within all of us. It is a powerful instinct. Only the most sustained socialization—one might even say indoctrination in the value of free speech—keeps the urge to suppress dissent under control. . . . Because the instinct to suppress dissent is basic, primitive, and aggressive it tends to have great momentum when it breaks loose from the shackles of social constraint. Aggression is contagious, and hatred of strangers for what they believe is one of the safest and most convenient forms of aggression.[7]

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4. *Id.* Blasi notes that "[t]hose dynamics may operate primarily in the legislative or executive branches of government and may influence only decisions relating to criminal prosecution or the distribution of governmental benefits. Or the repressive dynamics may penetrate the judicial psyche and cause judges to interpret the first amendment restrictively." *Id.*

5. *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941). Cases that were the by-product of this era include such well-known decisions as Schenck v. United States, 249 U.S. 47 (1919) (conviction under Espionage Act of 1917 for distribution of pamphlets urging resistance to the draft upheld); Abrams v. United States, 250 U.S. 616 (1919) (conviction under Espionage Act for distribution of circulars opposing United States involvement in war against Germany upheld); Gitlow v. New York, 268 U.S. 652 (1925) (conviction under Criminal Anarchy statute for distributing leaflets advocating violent overthrow of the government); and Whitney v. California, 274 U.S. 357 (1927) (conviction under Criminal Syndicalism Act for mere membership in a group that advocated violent overthrow of the government).

6. Decisions of this era include Dennis v. United States, 341 U.S. 494 (1951) (conviction of Communist Party leader under act prohibiting advocacy of violent overthrow of the government) and Barrenblatt v. United States, 360 U.S. 109 (1959) (contempt conviction for refusal to respond to questions about membership in Communist Party posed by the House Un-American Activities Committee upheld).

7. Blasi, *supra* note 3, at 457 (footnote omitted). Surprisingly, Blasi provides no support from the psychological or anthropological literature for so sweeping an assertion about human nature, and surely not all philosophers concur with such a pessimistic view of human nature. *See, e.g.*, E. CAHN, THE SENSE OF INJUSTICE: AN ANTHROPOCENTRIC VIEW OF LAW (1949).

The only citation Blasi provides is to the commentary of a legal scholar about the Skokie incident, involving a planned Nazi march into an area heavily populated by Jewish concentration camp survivors; *see* Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617 (1982). Human behavior during such a unique, emotionally charged incident can hardly be taken to imply a pervasive, inherent intolerance of unorthodox ideas in human nature. We need not belabor the point, however, for in my critique I am willing to assume, solely for purposes of argument, the correctness of Blasi's assumptions about human nature and the resulting likelihood of future pathological periods.

In order to achieve optimal protection of what he labels "core" free speech values in such times of constitutional stress, Blasi urges the structuring, in calmer times, of a first amendment that is both lean and mean—in Blasi's words, "adjudication in ordinary times should be heavily influenced by the goal of strengthening the central norms of the first amendment tradition against the possibility of pathological challenges."[8]

Blasi determines what is a "central norm" of the first amendment by reference to traditional first amendment practice. His emphasis on "central norms" appears to exclude, or at least seriously reduce, the level of constitutional protection given to "non-traditional" types and forms of expression, including, for the most part, varieties of non-political speech.[9] In addition, Blasi argues that the pathological perspective dictates use of simplified tests of first amendment protection,[10] as well as rejection of ad hoc analyses focused on the level of dangerousness associated with particular

8. Blasi, *supra* note 3, at 458. This "trimmed down" version of the first amendment has been characterized by another of its supporters, Professor Frederick Schauer, as the "Freddy Patek" version of the first amendment. As any true baseball fan over the age of 30 surely knows, this label makes reference to the diminutive but generally effective shortstop of the Kansas City Royals of the 1970's. It may be worthy of note, however, that in reality, Patek was not all that successful a ballplayer, never batting over .267. *See* THE BASEBALL ENCYCLOPEDIA 1228 (J. Reichler, 5th ed. 1982). In any event, as my subsequent analysis will demonstrate, a more appropriate athletic description would be the "Doug Flutie" version of the first amendment, named after the relatively small quarterback who starred in college but has been something of a flop in the pros: Like Flutie, this approach to first amendment analysis may seem satisfactory in academic circles, but is insufficiently strong to withstand attacks in the real world.

9. "A preference for the pathological perspective should lead lawyers and judges to analyze modern issues with reference to the central understandings of the constitutional framers and the teachings of classic, time-honored precedents." Blasi, *supra* note 3, at 499.

> Adoption of the pathological perspective should lead courts to think carefully before extending the protective principles of the first amendment to types of communication that have not traditionally been considered essential to the maintenance of an open society. This does not mean that the ambit of first amendment concern should remain fixed. . . . But the pathological perspective counsels that this development will best preserve the constitutional regime if it proceeds cautiously, with careful attention to the costs of expanding the amendment's reach. Those costs seem highest when the activities encompassed by a doctrinal innovation bear little intuitive resemblance in terms of social function or moral significance to the activities that have been at the center of the traditional understanding of the first amendment.

*Id.* at 479-80.

It should be noted that Blasi believes that on occasion, adoption of the pathological perspective will actually increase the level of first amendment protection over current standards. *See id.*, at 496-97. While I concur with Professor Blasi's conclusions on this point, there is no reason to believe that adoption of the pathological perspective is a precondition to acceptance of these extensions of first amendment protection.

10. *Id.* at 471.

expression.[11]

There is much that is troubling in Professor Blasi's pathological perspective. While clearly intended as a means of ultimately strengthening the first amendment, the pathological perspective is premised on wholly speculative assumptions concerning human behavior[12] and is inconsistent with the lessons of both historical evidence and common sense.[13] In fact, a strong case can be made that the pathological perspective would actually prove counter-productive to the attainment of its asserted goal.[14] But even if one were to assume that the pathological perspective did achieve its goal of assuring protection of so-called "core" speech in times of crisis, its costs to the nurturing of first amendment values would still be so great as to be prohibitive.[15] It is therefore advisable to reject the pathological approach as a viable mode of first amendment analysis. This essay is designed to explore both the fallacies and costs of the pathological perspective.

## II. THE FAILURE OF THE PATHOLOGICAL PERSPECTIVE TO ATTAIN ITS GOAL

The logic of the pathological perspective proceeds basically along the following path of reasoning: (1) in so-called "pathological" times, internal widespread public pressure is placed upon "core" first amendment speech;[16] (2) in order to avoid, or at least ameliorate such pressure, it is necessary to restructure first amendment protection in non-pathological times;[17] (3) wide-ranging extension of first amendment protection to non-traditional forms and subjects of expression dilutes the authority of the free speech guarantee, thereby reducing the credibility and power of all first amendment protection in the eyes of the public;[18] (4) such dilution and undermining of credibility will reduce the protective force of the first amendment during pathological periods of great political

11. *Id.* at 474.

12. George Christie has persuasively criticized Professor Blasi's analysis because of its undue emphasis on strategic considerations of gaining public acceptance in developing first amendment doctrine. *See* Christie, *Why the First Amendment Should Not Be Interpreted From the Pathological Perspective: A Response to Professor Blasi*, 1986 DUKE L.J. 683. My criticisms, however, take a different path.

13. *See infra* notes 16-20 and accompanying text.

14. *See infra* notes 21-23 and accompanying text.

15. *See infra* notes 29-31 and accompanying text.

16. Blasi, *supra* note 3, at 450.

17. *Id.* at 452-53.

18. *Id.* at 456-57.

stress, thereby increasing public pressure against "core" first amendment protections and undermining the judiciary's ability to resist such pressures;[19] (5) therefore in order to reduce the dangers to core free speech values during pathological periods, it is necessary to severely limit the extension of the first amendment's scope in more normal times.[20] As Blasi states, the lesson of the pathological approach is that "[w]e must constantly take care not to trivialize the meaning of free speech."[21]

Blasi's analysis is amazing for its sweeping, totally unsupported assumptions about the nature of human reason and reaction in times of great political stress.[22] Even if we were to engage in Blasi's practice of speculation about such matters, it is by no means intuitive that the stress placed on so-called first amendment "core" values during pathological periods will be ameliorated by adoption of a narrow reach of first amendment protection during less pressured times. Is it reasonable to surmise that individuals crazed with fear about the danger created by holders of a particular unorthodox political view (for example, anarchists, communists, or nazis) will be any less outraged at the judicial extension of first amendment protection to the speech of these groups, merely because during normal times the Supreme Court had chosen not to extend free speech protection to commercial speech, video games, or pornography? A more likely scenario, I believe, is that the level of public outrage during this period will be determined largely, if not exclusively, by the level of the public's fear of the groups in question, rather than on the basis of unrelated first amendment doctrine. Indeed, that no direct correlation exists between Supreme Court extension of constitutional protection to novel forms of expression on the one hand and the intensity of negative public reaction to the first amend-

19. *Id.* at 458-59.

20. *Id.* at 456-58.

21. *See* Blasi, *supra* note 3, at 478-79:

> In pathological periods, courts need to present the forces of repression with strict, immutable legal constraints. That kind of implacable judicial posture is easier to assume when the basic reach of the first amendment is modest and compatible with widely shared intuitions regarding the natural ambit of the commitment to expressive liberty. If courts are ever to contribute to the stemming of destructive political tides, what judges say must ring true, at some level of consciousness, with the most influential shapers of public opinion. . . .
>
> [T]here appears to be a close correlation between the ambit of coverage and the ability of courts to keep doctrine simple, informed by tradition, and dominated by principles.

22. *Id.* at 463-66 (footnotes omitted). Professor Blasi's actions become somewhat less amazing when it is realized that he often proceeds in this manner. *Compare* Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 63-64 (1981) *with* M. REDISH, *supra* note 2, at 142-43. *See also supra* note 7.

ment's application to unpopular groups during pathological periods on the other is historically demonstrated by the two previous pathological periods to which Blasi points: the "Red Scare" of the 1920s and the anti-communist period of the 1950s.[23] It can hardly be suggested that prior to either period, the Court had in any way extended constitutional protection to novel forms of speech. In the 1920s, the Court had barely extended the constitutional protection even to purely political speech, and on several occasions in the 1940s the Court had expressly rejected such arguably diluting extensions.[24] Obviously, the Court's refusal to make novel first amendment extensions did not prevent the development of first amendment pathology at its most intense. Why, then, is there any reason to suppose that current refusals to engage in such extensions will in any way prevent similar levels of severity during future pathological periods?

Of course, it might be responded that as harmful as those previous pathological periods were, they may well have been worse had the Court actually engaged in such novel extensions. But one could always engage in such a "tailchasing" form of argumentation; when public pathology reaches the intense levels it did in the 1920s and 1950s, it becomes reasonably clear that a judicial refusal to extend novel first amendment protection is an inadequate means of bringing pathology under any real level of control. More to the point, it is unreasonable to suppose that those who were caught up in the anti-communist fervor of those periods would have been more antagonistic to first amendment protection for communists had the Court extended first amendment protection to such expression as commercial speech. It is unlikely that one involved in a debate in 1950 over first amendment protection of communist speech would have persuasively argued against such protection on the ground that the first amendment had already been trivialized by its extension to commercial speech. Though I do not personally recall the nature of public debate in the early 1950s, I would assume that the first amendment arguments focused, as they logically should have, solely on the weighing of the need to preserve free exchange of ideas against the threat to national security presented by communist speech. It is difficult to believe that anything the Supreme Court

23. Blasi, *supra* note 3, at 451.

24. *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52 (1942) (summarily rejecting protection of commercial speech); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (rejection of protection for "fighting words"; establishment of "two-level" theory of first amendment coverage).

had said about the outer reaches of first amendment theory in wholly unrelated areas would—or should—have had any effect on that debate.

In any event, the main problem during these pathological periods arguably was not the existence of widespread public antagonism to free speech protection for communists, but rather the failure of the Supreme Court itself to resist "the paranoia of the age."[25] Examination of the major Supreme Court decisions during these two periods fails to reveal a judicial submission to public pressure, but rather demonstrates substantial concern on the part of the Justices themselves with the very dangers that troubled the public. Thus, even in *Schenck v. United States*,[26] where a majority purported to adopt the seemingly protective clear and present danger test, Justice Holmes utilized the test to suppress speech absent any showing of immediate danger arising from it. Though Holmes changed his view in subsequent decisions, a majority continued to uphold suppression of speech on grounds of danger, though, even at the time, the danger must have appeared to all to be at best remote.[27]

Similarly, in *Dennis v. United States*[28] the Court upheld a conviction of Communist Party leaders solely for engaging in speech activities, absent any real showing of any temporally-linked danger of attempted overthrow. Instead, the majority justified suppression on the basis of "the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go of our relations with countries with whom petitioners were in the very least ideologically attuned."[29] The Court relied upon this asserted linkage, even though Chief Justice Vinson's opinion neither alleged nor proved any link between the petitioners' activities and any of these conditions in foreign nations, or with any foreign power.

It is, of course, possible that each of these opinions merely reflected an implicit fear of negative public reaction from a speech protective result. This is a complex psychological issue upon which we can only speculate. But the tenor of the opinions surely reflects no obvious reluctance on the Justices' part to make the decisions that they reached. Rather than succumbing to public pressure, the authors of these opinions actually seem to be leading the charge in favor of suppressing unpopular political views. In all of these deci-

25. Ely, *supra* note 1, at 1501.
26. 249 U.S. 47 (1919).
27. *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919).
28. 341 U.S. 494 (1951).
29. *Id.* at 511.

sions, then, it appears that the problem was not fear of public pressure, but simply disregard by a majority of the Justices of the judiciary's fundamental role as the ultimate protector of minority rights and constitutional values. Unless and until the Court becomes imbued with this essential lesson of constitutional democracy, the serious constitutional harms that take place during pathological periods will not be reduced, regardless of what the Court does or does not do about novel extensions of first amendment protection.[30]

It is, admittedly, difficult to predict what would have happened had the Court, during those periods of political stress, met its constitutional obligation. Perhaps public animus would have intensified, and been redirected towards the Court itself. On the other hand, it is equally conceivable that a persuasive articulation and defense of fundamental constitutional values by the Justices would have had the exact opposite effect, by defusing the public's mob psychology. In either event, it is difficult to believe that whatever the Court had previously done on the frontiers of first amendment doctrine would have had anything more than a marginal or remote impact on public receptivity to judicial protection of political views that are widely feared and despised.

Even if one were to accept Professor Blasi's asserted linkage, it is at least equally arguable that extension of the first amendment's scope to novel areas during normal times would actually have a beneficial effect during pathological periods. If we accept the view that the Supreme Court is engaged in a moral interchange with the public,[31] as Professor Blasi apparently does,[32] it is conceivable that reserving the essence of first amendment protection for major political battles could actually cause the first amendment to atrophy.

30. Professor Blasi contends that "[r]espect for the understandings of the framers and for classic, time-honored precedents can also assume special importance in pathological periods as the source of a stable perspective for judges who otherwise would be swept up in the disoriented, fearful mentality of the times." Blasi, *supra* note 3, at 470. Such an analysis, however, represents an unduly condescending attitude towards the influences on a judge's decisionmaking process. Surely, Supreme Court Justices should not require precedents containing simplistic assertions concerning basic first amendment values in order to recognize their obligation in a constitutional democracy; if they fail to live up to their role absent such simplistic assertions, it is difficult to imagine that the existence of such precedents would make much difference. Indeed, during both pathological periods in this century, the Court's majority had available to it the eloquent exposition on first amendment values of such notable dissenters as Holmes, Brandeis, Black, and Douglas. Yet these were insufficient to change the result.

31. *See* M. PERRY, THE CONSTITUTIONS, THE COURTS, AND HUMAN RIGHTS 115 (1982).

32. Blasi, *supra* note 3, at 502.

The lives of most people are not directly affected by such cases. If the Court could, by means of decisions extending the first amendment's reach, articulate how the values fostered by the free speech right affect issues which most people face regularly, perhaps public understanding of and sympathy with these values will become more immediate and concrete.

In certain situations, use of Professor Blasi's approach may even result in a form of *reverse* dilution: refusal to extend the first amendment's scope may logically imply reduced protection in more traditional areas of coverage. For example, the primary justification cited in support of the constitutionality of the proposed ban on cigarette advertising is that such advertising is aimed largely at those who are easily persuaded and incapable of making a valid judgment on their own.[33] If such an argument were used to justify suppression of truthful speech receiving *full* first amendment protection, it would of course be summarily rejected; it is only because commercial speech is thought not to fall within the first amendment's "core" that such an argument could even be seriously suggested. Yet if we accept this logic in the cigarette advertising context, it is possible that we will have conceded more than we had thought. For once we accept the theory that individuals are incapable of evaluating truthful information in making life-affecting decisions as a justification for governmental suppression of such information, we may well have laid the groundwork for a process of reverse dilution: some may subsequently draw on the logic of the cigarette advertising ban as a justification for the suppression of truthful information in other contexts. Rejection of a reduced level of protection for commercial speech, however, would preclude acceptance of the asserted justification in the cigarette advertising context, just as it would today in the context of political speech, thus precluding the danger of future expansions of this precedent into other areas of first amendment protection.

Admittedly, these assertions amount to little more than speculation, but the point to be emphasized is that the exact same thing could be said of Professor Blasi's suggested linkage. Since the most that can be said for the pathological perspective is that it is no more likely to be accurate in its fundamental assumptions than the exact opposite presumption, it is quite doubtful that the bulk of current

33. *See* Blasi & Monaghan, *The First Amendment and Cigarette Advertising*, 256 J.A.M.A. 502 (1986).

free speech theory should be shaped to meet its dictates: the pathological perspective has failed to meet its burden of production.

## III. ASSESSING THE COSTS OF THE PATHOLOGICAL PERSPECTIVE: ADOPTING A POSITIVE APPROACH TO FIRST AMENDMENT THEORY

Rejection of the pathological perspective does not necessarily lead to the conclusion that the first amendment's reach should, in fact, be extended to new frontiers. Rather, it means only that the question of whether such extensions are to be made would be resolved by an assessment of the values properly thought to be served by the free speech right and the implications that can be logically drawn from those values, instead of on the basis of an attempted strategic linkage designed with the primary goal of attaining public acceptance. It is the virtual exclusion of such a value analysis that is the most troubling element of Professor Blasi's pathological perspective. By adopting what amounts to a garrison state mentality, the pathological perspective attempts to save the first amendment by reducing it to a barebones minimalist model, without ever inquiring whether fundamental free speech values are sacrificed as a result.

It is no doubt important to maintain the constant protective vigilance derived from the theoretical pessimism of the pathological perspective. But it is also important not to sacrifice what we are trying to protect in a paradoxical attempt to preserve it. It is therefore necessary to recognize the importance to free speech theory of a positive perspective on the first amendment—to focus on the positive role of the free speech guarantee as a catalyst in tapping and developing the uniquely human creative and intellectual capacities of the individual.[34] Such a revised focus would enable us to recognize the Pyrrhic nature of any possible victory to which the pathological approach might lead.

Of course, if one's value analysis of the free speech guarantee led one to conclude that it is only the traditionally protected, largely political speech that deserves protection in any event, then the costs of adopting the pathological perspective are virtually non-existent. To be sure, certain scholars[35]—including Professor Blasi[36]—have

34. *See* M. REDISH, *supra* note 2, at 9-86; Baker, *supra* note 1.

35. *See, e.g.*, A. MEIKLEJOHN, POLITICAL FREEDOM 79 (1965); Bork, *supra* note 2, 20.

36. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

reached a conclusion similar to this, wholly apart from the insights of the pathological perspective. But Professor Blasi does not rest his arguments in favor of the pathological perspective on such independent theoretical grounds. If he had, I would be more than willing, as I have in the past, to point out the fallacies in his thinking.[37] Instead, Blasi implies that one should accept the pathological perspective, regardless of one's theoretical approach to the values of free speech. Indeed, his analysis barely makes reference to these broader theoretical questions. Such an absence of any broad-based value analysis inherently dooms Blasi's defense of the pathological perspective, since it completely ignores the costs that ensue from acceptance of his model.

## IV. CONNECTING MEANS AND ENDS: PROBLEMS WITH THE FIRST AMENDMENT METHODOLOGY OF THE PATHOLOGICAL PERSPECTIVE

In addition to deriving insights about the substantive scope of the first amendment's protection from the precepts of the pathological approach, Professor Blasi infers from his analytical model a number of lessons for the general formulation of first amendment doctrine. Basically, he asserts two points concerning first amendment methodology: first, "courts that adopt the pathological perspective should search for methods of justifying their judgments that appeal to the common, unsophisticated understanding of what law is."[38] This "quest for simplicity"[39] is necessary, he asserts, because "[c]omplicated, subtle, imaginative legal arguments are not calculated to convince resistant officials and their constituencies that tolerance of threatening dissenters is a constitutional imperative."[40] Second, he urges that courts reject "any doctrine that directs courts to focus on the quality or quantity of danger generated by dissenting speech,"[41] because "the effect of the clear-and-present-danger test has been to promulgate the view that the nature of

37. M. REDISH, *supra* note 2, at 41-45. Other scholars who at one time endorsed a rigid version of the "political speech" model later recanted. Alexander Meiklejohn, for example, subsequently recognized that first amendment values extend to such categories of expression as art, literature and science. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

38. Blasi, *supra* note 3, at 470-71.

39. *Id.* at 472. At another point, Professor Blasi states that "courts that adopt the pathological perspective should strive to emphasize . . . simple precepts and principles." *Id.* at 479.

40. *Id.* at 471.

41. *Id.* at 483 (footnotes omitted).

the danger generated by certain forms of speech constitutes the dominant, indeed sole, determinant of first amendment protection. Such a legitimation of risk aversion can only lend support to the forces of repression in times of widespread worry about internal or external threats to the society."[42]

Neither of these suggested methodologies, however, is likely to prove beneficial to first amendment interests. The goal of emphasizing simple precepts in first amendment analysis can be extremely dangerous, to the interests in free speech as well as to society's competing concerns. As my previous work has demonstrated, development of first amendment doctrine in this manner "represent[s] a yearning for a simplicity and ease of application that just does not comport with reality."[43] Issues of first amendment protection often entail difficult and controversial comparative value analyses and rough predictions as to future events. As a result, by denying the existence of complex interest-balancing, the court does not avoid use of a balancing process; rather, it merely transforms the process into an unstated, and therefore likely unthinking and less refined balancing.[44]

It is in the very area of free speech analysis centrally involved in pathological times that this point is underscored: regulation of advocacy of unlawful conduct. It is here, Professor Blasi argues, that a case-by-case examination of the danger of particular speech would be most harmful to the interests of the pathological perspective. Ironically, it is the *adoption* of Professor Blasi's suggested methodology, rather than its rejection, that would most seriously undermine the purposes sought to be achieved by the pathological perspective.

An emphasis in first amendment analysis on the concrete danger of the advocacy sought to be suppressed is quite probably the best possible form of judicial self-defense against the excesses of pathology. This is because, as I have argued previously:

> [I]f the courts are able to stand back and in each case demand a showing of a real likelihood of serious harm, crazed majorities will not be able to get away with vague or conclusory assertions about threats. Indeed, a full and honest emphasis on danger of harm would no doubt have led to reversals of convictions in [the

42. *Id.* (footnote omitted).

43. M. REDISH, *supra* note 2, at 256.

44. *Id.* at 232. In my earlier work, I attempted to demonstrate how the search for simplistic, easily-applied first amendment formulae has proven unworkable on such methodological questions as the prior restraint doctrine, *id.* at 127-71, the overbreadth doctrine, *id.* at 213-57, and content regulation, *id.* at 87-126.

> unlawful advocacy cases of the post-World War I period] and *Dennis*. Instead, in each of these cases the Court emphasized what was said, rather than the danger of what was said, and in so doing upheld suspect convictions. The simple realities are that unlawful advocacy by fringe political groups rarely represents a real and immediate danger of serious harm. If, on the other hand, we were to look only to what is being said, the possibility of locking into the public's wild fears is significantly increased, since wild, fringe groups often say wild, fringe things.[45]

In fashioning his suggested methodologies, Professor Blasi was apparently influenced in part by consideration of the persuasiveness, during pathological times, of the Court's first amendment analysis to both government officials and their constituents. However, it is doubtful that the Court should rely on the persuasiveness of the reasoning of its individual decisions as the primary means of gaining public acceptance. Such an approach would imply public authority to pick and choose among Supreme Court decisions on the basis of ultimate agreement with the judicial logic, rather than the public's obligation to obey these decisions simply because of the general value of the rule of law. Moreover, as Blasi seems to admit, it would reduce Supreme Court opinions to the lowest common denominator of public understanding, effectively requiring the court to resolve complex and sensitive issues by means of oversimplified concepts and formulae.

Even if we were to agree, for the moment, with Professor Blasi's suggested strategic goal, an exclusion of a substantial emphasis on danger of harm in determining the constitutional protection of unlawful advocacy would constitute the height of folly. For nothing could undermine the legitimacy of a Supreme Court decision protecting the speech of unpopular groups during pathological periods more than the Court's complete unwillingness to consider the imminence and severity of the harm to which that speech might lead. If Professor Blasi believes in reliance on simple, but forceful first amendment precepts, surely one that would receive much attention during pathological times is the old saw, "the first amendment is not a suicide pact." A public convinced that the reason for its hatred of an unpopular group is the danger caused by that group, rather than merely the unorthodoxy of its views, would no doubt give little credence to a speech protective judicial decision waxing eloquent about the value of free speech, but failing to mention the possible link between that speech and the danger of severe and im-

45. *Id.* at 200 (footnote omitted).

mediate societal harm. Nor is it totally inconceivable that the speech of one of these groups could, in fact, give rise to a significant danger of immediate physical harm. If so, it would seem to be improper for the Court to exclude this factor from its first amendment calculus purely as a matter of common sense, wholly apart from considerations of public acceptability.[46]

Thus, a judicial focus on the danger of speech would likely provide significant benefits to the protection of basic speech values in judicial decisionmaking, as well as to the public acceptance of speech-protective judicial decisions, during pathological times. Judicial recognition that truly and immediately dangerous speech is not to receive constitutional protection could do much to preserve judicial legitimacy in the eyes of the public. Moreover, requiring the government to prove the existence of a real and temporally close danger of substantial harm could do much to keep the judiciary itself from becoming a part of the widespread public hysteria that surrounds it during such times.

## V. CONCLUSION

The pathological perspective is theoretically flawed and potentially harmful to basic free speech interests. Premised on highly speculative—indeed, arguably counter-intuitive and historically invalid—assumptions about human and political behavior, the pathological perspective unwisely attempts to push to the background of first amendment debate fundamental issues of free speech value. Nothing Professor Blasi states in support of the pathological perspective convinces me that potentially so high a cost must be paid in order to maintain a strong and viable constitutional guarantee of free speech.

46. As I have previously stated, "I simply refuse to believe that anything in first amendment language or policy requires us to protect the statement of a mob leader, outside a poorly defended prison, urging his torch-carrying compatriots to lynch a prisoner inside." M. REDISH, *supra* note 2, at 53-54 (footnote omitted).