



October 27, 2017

United States Senate  
Washington, DC 20510

Dear Senator:

On behalf of the hundreds of thousands of members of People For the American Way, I write to oppose the nomination of Stephanos Bibas to be a judge on the Third Circuit Court of Appeals.

Professor Bibas demonstrated very disturbing legal and ethical reasoning in 2009, when he wrote an article entitled “Corporal Punishment, Not Imprisonment.” His proposed remedy for the many flaws our existing criminal justice system shocks the conscience. And while he now repudiates his recommendations, that doesn’t change the fact that he supported them before.

In this article, which was not published, he recommended we step back in time and—rather than imprison people—impose corporal punishment (including electric shocks and Tasers) on those convicted of all but the most and least serious crimes:

We have overlooked corporal punishment, which was the norm until two centuries ago and remains practiced in many countries.

One version would involve putting offenders in the stocks or pillory, where they would sit or stand for hours bent in uncomfortable positions. Bystanders and victims could jeer and pelt them with rotten eggs and tomatoes (but not rocks). These punishments combine public shaming and mild corporate punishment. Offenders suffer discomfort as well as shame, while the public gets to express its condemnation.

The ordinary form of corporal punishment would need to be more severe for more serious crimes: perhaps multiple, calibrated electric shocks or Taser shots. Medical personnel would attend punishment, ensuring the offenders’ health could bear it. Punishers would be carefully screened and supervised to prevent sadism and brutality.

Alternatively, one could offer victims the option of pushing a button pre-set to deliver a specified number and voltage of shocks. They would not break bones, pull fingernails, slit noses, crop ears, or otherwise disfigure offenders. Nor would they waterboard them.

Bibas now rejects these suggestions, characterizing them as just some “crazy idea” he floated and soon rejected. But he clearly put a great deal of time and thought considering this “crazy idea,” which he proposed in a thoroughly-footnoted 61-page article. He delivered “Giving Corporate Punishment Another Look” presentations before a number of different audiences during the months from June to October 2009 not only in his home state of Pennsylvania, but also in Tennessee, Virginia, Florida, and Washington, DC.

Professor Bibas now acknowledges that “corporal punishment for crimes is wrong, it is cruel, and it is un-American.” He now admits that what he carefully and thoughtfully proposed as a replacement for most of our current criminal justice system “is degrading, inhumane, and an affront to human dignity.”

We agree. Most lawyers and law professors would be aghast at the idea of even considering completely restructuring our criminal justice system with such an extreme proposal. But not Professor Bibas. This article sounds an alarm bell about his legal and ethical reasoning. Changing your mind doesn’t change the fact that you thought a certain set of ideals were acceptable in the American legal system and in modern American society.

Law professors play an important role in our nation. Our legal system thrives from novel proposals that undergo deep scrutiny from the rest of the legal community. Some proposals eventually become the norm. Others are rejected but serve to enhance confidence in existing law. But some proposals are so beyond the strictures of our constitutional system—and of our civilization—that we cannot risk elevating their proponents to a court as powerful and influential as a federal circuit court of appeals.

We are deeply concerned that Bibas’ presence on the federal bench would be an enormous leap backward for our legal system and our national character. We urge you to oppose his nomination.

Sincerely,

A handwritten signature in cursive script that reads "Marge Baker".

Marge Baker  
Executive Vice President for Policy and Program