

# TRANSCRIPT

## Death Row Decision

**Boalt's Death Penalty Clinic weighs in at the Supreme Court.**

**DEATH ROOM:**  
Execution chamber  
at the Louisiana  
State Penitentiary in  
Angola, Louisiana.



When the members of Boalt Hall's Death Penalty Clinic returned from hearing the oral arguments before the Supreme Court in *Baze v. Rees* in January, they were dog-tired, but elated. One was nursing a cold. A few hadn't seen their spouses in ages. Two—students Joy Haviland and Vanessa Ho, both class of '08—had camped overnight in front of the court to make sure they could get inside.

In September 2007, the Supreme Court surprised watchers by agreeing to review *Baze*, in which two Kentucky death row inmates argue that the state's lethal injection procedures risk causing pain that would violate the 8th Amendment's prohibition against "cruel and unusual" punishment. Similar challenges exist in many states, but few had expected the court to choose Kentucky's, where lethal injection has only been used once.

"Our principal goal is to defend our clients," says Professor Elisabeth Semel, who has directed the clinic since its founding in 2001. "But a parallel goal is to be engaged in cases where there are systemic issues at stake—something that would

end up at the Supreme Court. We were surprised, like everyone else, that it was *Baze*.”

*Baze* does not question the constitutionality of the death penalty, nor of lethal injection itself. Rather, the Court will decide what legal standard states should use to ensure that their lethal injection protocol is constitutional, and may also decide whether Kentucky’s meets those standards. The Boalt team had only six weeks to churn out a complex amicus brief describing how lethal injection executions can—and have—gone wrong.

The clinic’s Eighth Amendment Fellow, Jen Moreno ’06, had already launched a Web site, [www.lethalinjection.org](http://www.lethalinjection.org), as a resource for attorneys and journalists. It provides in-depth information about the three-drug regimen used for executions in most states—an anesthetic, followed by a paralytic that halts breathing, then a drug that causes cardiac arrest. The clinic’s amicus brief argues that while in theory, lethal injections can be performed humanely, in practice this regimen is often improperly administered by poorly trained personnel, causing inmates to remain conscious and in excruciating pain throughout the execution. This risk of pain, the brief argues, is foreseeable, unnecessary, and much greater than the risk associated with an alternative: a single, massive dose of anesthetic similar to that used in animal euthanasia.

Clinic students combed through records from the many states in which lethal injection has been challenged to find evidence of incompetent administration. “We had to go through thousands and thousands of records, depositions, photographs, pleadings, and orders to figure out which were the most compelling facts,” recalls the clinic’s associate director, Ty Alper.

It was uphill work. “So much of the lethal injection process is shrouded in secrecy, everything from the way the protocols were developed in the first place, to the way that they’re administered, to the qualifications of the people conducting the executions,” Alper says. Some states wouldn’t release records, or had them under seal. Others hadn’t kept them in the first place. Worse, since the paralytic drug masks the dying person’s ability to communicate pain, suffering can go undetected even by watchful record keepers.

### True horror stories

Nevertheless, the clinic’s brief contains some horrifying revelations. Among them: In six of the past 11 executions in California, inmates continued breathing longer than they should have after anesthetization, indicating that they were perhaps conscious when the other drugs

were injected. In 2006, it took 90 minutes, and 19 needle punctures, to complete an Ohio execution; the inmate actually lifted his head and complained that the drugs weren’t working. That same year, a Florida execution team mistakenly inserted the IV catheters into an inmate’s soft tissue, rather than his veins, producing foot-



**CLINIC OBSERVERS:** The Boalt team on the steps of the Supreme Court. Front row (left to right): Ty Alper, Elisabeth Semel, Jen Moreno ’06. Back row (left to right): Vanessa Ho ’08, Mojgone Azemun ’08, Joy Haviland ’08.



**TOP:** Ty Alper in front of the press briefing. **CENTER:** Elisabeth Semel and Ty Alper. **BOTTOM:** The ticket line for the public.

long, fluid-filled blisters on his arms. Although this failed to anesthetize him, the executioners still injected the second and third drugs, then repeated the entire sequence again.

The likelihood of error, and therefore pain, the brief argues, is exacerbated because executions are often performed by prison employees, not medical experts. They frequently have little experience with mixing drugs or manipulating IV lines and syringes, and do not know how to react when problems arise. According to the brief, workers in some states have never even read the execution protocol.

“Getting to work on something like this has definitely been the highlight of law school,” says student Vanessa Ho. [Editor’s note: On April 16, the Supreme Court upheld Kentucky’s lethal injection procedure in a 7–2 ruling. Justices Ruth Bader Ginsburg and David Souter dissented.] —Kara Platoni

