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# Clemency in Texas - A Question of Mercy?

Allen L. Williamson

# CLEMENCY IN TEXAS - A QUESTION OF MERCY?



## INTRODUCTION*

A man and a woman each brutally murdered multiple victims. Both experienced difficult childhoods. Both received a fair trial and were sentenced to die by a jury of their peers. Both were convicted in the State of Texas. Both exhausted all viable appeals. While incarcerated, one became a model prisoner and religious leader, the other confessed to killing over 600 people and took great delight in recounting the gruesome details of the crime. Each one attracted national media attention and was scheduled to die in 1998. Both asked the same governor for clemency. One was granted clemency and the other died by lethal injection on February 3, 1998.

Some people reading this story would assume that the model prisoner was spared. Others, out of a sense of chivalry, would assume that the woman was spared. Some would hypothesize that the professed killer of over 600 would be the one lethally injected. All would be wrong. The principle of clemency is being misused across the United States and especially in Texas. What started as an act of mercy has evolved into a process whereby the governor substitutes his judgment for the judgment of a jury.[1] Likewise, the governor may also

* For the purposes of the introduction, the specific citations are omitted. All statements are fully cited later in the paper.

1. A main principle of criminal jurisprudence is that a jury should make the determination of guilt. *See* TEX. CRIM. PROC. CODE ANN. § 36.13 (Vernon 1997 & Supp. 1998). "Unless otherwise provided in this Code, the jury is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed

overrule the opinions of several levels of appellate courts.[2] The appellate courts, not the governor, should remedy any legal error in the guilt/innocence phase. Governor Bush has stated that he will exercise clemency if there are any doubts about a defendant's guilt.[3] Once an individual has been convicted and exhausted all appeals, there should be no doubt about guilt. The governor must abandon his stand on the issue of guilt and innocence and require that clemency be granted only if and when the governor feels mercy is appropriate. If the governor feels that there are extenuating circumstances and the defendant deserves mercy, then, by all means, it is his prerogative to grant clemency, but it should not be done in a veil of second-guessing the judicial process.

## I. EVOLUTION OF CLEMENCY IN THE UNITED STATES

The word clemency is simple to define, but difficult to understand. It has been around in one form or another, arguably since the creation of the world. Clemency is defined as "[k]indness, mercy, forgiveness, leniency," and is used "to describe [an] act of [a] governor of [a] state when he commutes [a] death sentence to life imprisonment, or grants pardon."[4] Synonyms include mercy, charity, and lenity.[5] In recent times, the idea of clemency has become controversial due to the argument that the executive preempts the judicial determination of guilt or innocence. Although clemency is a hotly debated issue, it remains an important and powerful tool in the United States system of justice.[6]

### A. *Early Origins of Clemency*

While the roots of clemency in the United States descend directly from the English system,[7] clemency by no means started in England. Arguably, the idea of clemency has been around since the creation of the world, and several scholars have argued that clemency dates back to biblical times.[8] Rather than the traditional "eye for an eye" punishment that was required at the time, Cain was banished to the Land of

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thereby." *Id.* One of the main principles of criminal jurisprudence is that the guilt or innocence of an individual is to be determined by a jury of his peers.

2. *See* TEX. CRIM. PROC. CODE ANN. § 44.02 (Vernon 1997 & Supp. 1998). "A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed . . . ." *Id.*

3. *See* Ken Herman & Mike Ward, *Bush Defends State Process for Clemency, Resists Changes*, Austin Am.-Statesman, Dec. 19, 1998, at A1.

4. BLACK'S LAW DICTIONARY 252 (6th ed. 1990).

5. *See* WEBSTER'S NEW DICTIONARY OF SYNONYMS 152 (1984).

6. *See generally* Coleen E. Klasmeier, Note, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. REV. 1507, 1515 (1995).

7. *See* SIDNEY M. MILKIS & MICHAEL NELSON, THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT 1776-1993, at 46-47 (2d ed. 1994).

8. *See* Stephen E. Silverman, Note, *There is Nothing Certain Like Death in Texas: State Executive Clemency Boards Turn a Deaf Ear to Death Row Inmates' Last Appeals*, 37 ARIZ. L. REV. 375, 384 (1995).

Nod after he brutally murdered his brother Abel.[9] Although the law demanded his death, he was allowed to live in exile.[10]

The Bible is not the only ancient text that refers to the idea of clemency. The ancient societies of Greece and Rome also exercised a form of mercy.[11] In Greece, the Athenian Civil War gave the democratic society of Athens its chance to exercise clemency.[12] The Athenians used a poll to conclude who should be pardoned.[13] A candidate had to comply with the process of adeia,[14] which required the support of 6000 citizens. Because the approval of so many people was required, clemency was usually reserved for celebrities.[15] The Greeks did not have a monopoly on the process of clemency. The Romans frequently used the power, but often for political gain. Perhaps the most famous example of Roman clemency was Pilate's pardon of Barabas rather than Jesus.[16] Clemency evolved from these ancient societies, and now resides in almost every modern country.[17] While there are certain similarities between these differing systems, the English tradition best reflects the ideals of clemency as they relate to capital punishment in

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9. *See id.* (citing *Genesis* 4:8-10, 15-16).

> Now Cain said to his brother Abel, "Let's go out to the field." And while they were out in the field Cain attacked his brother Abel and killed him. Then the Lord said to Cain, "Where is your brother Abel?" "I don't know," he replied. "Am I my brother's keeper?" Then the Lord said, "What have you done? Listen! Your Brother's blood cries out to me from the ground . . ." But the Lord said to him, "Not so; if anyone kills Cain, he will suffer vengeance seven times over." Then the Lord put a mark on Cain so that no one who found him would kill him. So Cain went out from the Lord's presence and lived in the land of Nod, east of Eden.

*Genesis* 4:8-10, 15-16 (NIV); *see also Deuteronomy* 19:21 (NIV) ("Show no pity, life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.").

10. *See* Silverman, *supra* note 8, at 384 (citing *Genesis* 4:16 (NIV)).

11. *See id.*; *see also* Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 583-86 (1991).

12. *See* Kobil, *supra* note 11, at 583 (citing N. HAMMOND, A HISTORY OF GREECE TO 332 B.C. at 446-47 (1967)).

13. *See id.* at 589 (citing D. MACDOWELL, THE LAW IN CLASSICAL ATHENS 258-59 (SURVEY OF RELEASE PROCEDURES 150-53 (1978), explaining that Athletes and Orators were the ones most likely to be granted clemency because so many people knew them).

14. *See id.* at 583. The process of adeia is essentially a poll of citizens, but it must be done in secret. *See* MACDOWELL, THE LAW IN CLASSICAL ATHENS at 254 (1978).

15. *See* Kobil, *supra* note 11, at 583.

16. *See id.* at 584 & n.83 (discussing *John* 18:38-40) (King James).

> "What is Truth?" Pilate asked. With this he went out again to the Jews and said, "I find in him no fault at all. But ye have a custom, that I should not release unto you one at the passover: will ye therefore that I release unto you the king of the Jews:" Then cried they all again, saying, "not this man, but Barabas."

*John* 18:38-40 (NIV).

17. *See* Kobil, *supra* note 11, at 575. Of course, it is not always called clemency or mercy, some countries view the practice with disdain. The same may be said of some Texans.

the United States because the laws of the United States were written by once-loyal subjects of the King.[18]

### B. *Mercy from the King – Clemency in England*

The English system of clemency is the closest in relation to the United States' because individuals intricately familiar with the English system of laws wrote the Constitution.[19] While the founding fathers believed that America should not have a king or queen,[20] they nonetheless felt that clemency power should rest in a chief executive.[21] In the Federal arena it would be vested in the President, or in the states it would be vested in the governor.

Many commentaries have been written about the clemency power as it existed in England.[22] Perhaps the most famous author was Sir William Blackstone, who noted in his commentaries that the Crown's use of the pardon power, to ensure that justice was administered with mercy, was one of the greatest advantages of monarchy over any other type of government because it softened the rigors of the general law.[23] Blackstone recognized the Roman roots of British clemency when he denounced the cruelty of the inhabitants of the Isle of Gurnsey because they failed to postpone the execution of a pregnant woman.[24] His argument was that if there were ever a case for mercy it was the mercy owed to the unborn child.[25]

The clemency power of the King was absolute in England for 165 years until a dispute occurred over whether the King could pardon the Treasurer of England who was in the process of being impeached by Parliament.[26] The King in fact did grant a pardon, but a frustrated Parliament succeeded in limiting the royal power with various acts including: the Habeas Corpus Act of 1679,[27] the 1689 Bill of Rights,[28]

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18. *See* Michael A.G. Korengold et al., *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 354 (1996).

19. *See generally* MILKINS & NELSON, *supra* note 7, at 2.

20. *See id.* at 61.

21. *See* JAMES IREDELL, ANSWERS TO MASONS OBJECTIONS: MARCUS I-V (1788), *reprinted in* DEBATE ON THE CONSTITUTION, PART ONE 379 (Bernard Bailyn ed., 1993).

22. *See* Kobil, *supra* note 11, at 586.

23. *See id.* Blackstone observed that acts of clemency "endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection and personal loyalty, which are the sure establishment of a prince." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND OF PUBLIC WRONGS, 464-5 (1962).

24. *See* Kobil, *supra* note 11, at 585-86. *See also* BLACKSTONE, *supra* note 23, at 466.

25. *See* BLACKSTONE, *supra* note 23, at 465.

26. *See* Kobil, *supra* note 11, at 586-87.

27. *See id.* at 587 (citing Habeas Corpus Act of 1679).

> . . . and the person . . .who shall knowingly frame . . . any warrant for such commitment . . . contrary to this act . . . shall be disabled from thenceforth to bear any office of trust or profit within the said realm of England . . . and be

the 1700 Act of Settlement,[29] and finally, in 1721, Parliament gained the power to pardon by legislative act.[30]

The King's grant of clemency was seldom granted to those incarcerated in error, but was instead extended to win the support of differing political factions. In some cases, pardons were for sale on the open market.[31] These transactions were commonplace and eventually led to vast amounts of criticism.[32] Although the clemency system in England was by no means perfect, this background pervaded the minds of the drafters of the Constitution.

### C. *Federal Clemency Power*

The drafters of the Constitution arrived at a concept that, while British in nature, allowed the chief executive to be elected by the people. This was a great deviation from the centuries of monarchy to which the British were accustomed. There was much debate among the delegates of the Constitutional Convention about the purposes and procedures of executive clemency.[33] Ultimately, the Constitution was ratified and Article II vested the "Power to grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment" entirely in the President.[34]

In the years that have followed, presidents have had little hesitation in utilizing this power.[35] Presidents Washington, Adams, and Jefferson granted many pardons at the birth of the country.[36] President Lincoln and President Johnson granted pardons for those who fought

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> incapable of any pardon from the king, his heirs or successors, of the said forfeitures, losses, or disabilities, or any of them.

Habeas Corpus Act, 1679, 31 Car. 2, ch. 2, §11 (Eng.), *reprinted in* WILLIAM S. CHURCH, A TREATISE OF THE WRIT OF HABEAS CORPUS 49 (1884).

28. *See* Kobil, *supra* note 11, at 587 (citing Bill of Rights, 1689, W. & M., ch. 2, §2 (Eng.)).

29. *See id.* (citing 1700 Act of Settlement, 13 H.C. JOUR. 624 (1701); 16 H.L. JOUR. 737 (1701)).

30. *See id.* (citing Act of Settlement, 1721, 7 Geo. 1, ch. 29 (Eng.)).

31. *See id.*

32. *See id.* at 588 (citing 13 H.C. JOUR. 624 (1701); 16 H.L. JOUR. 737 (1701)).

33. *See* MILKIS & NELSON, *supra* note 7, at 46-47.

34. U.S. CONST. art. II, §2, cl. 1.

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

*Id.*

35. *See* Kobil, *supra* note 11, at 592.

36. *See id.* at 592-93; *see also* MILKIS & NELSON, *supra* note 7, at 84-86. Washington's use of the pardoning power arose after the Whiskey Rebellion of 1794. *See id.*

against the Union during the Civil War, in exchange for their promise to uphold the Constitution.[37]

In modern times, the President himself has been pardoned.[38] At the end of his tenure in office, President George H. Bush pardoned many of the key players in the Iran-Contra scandal.[39] The pardoning power of the president is alive and well.

### D. *Clemency in the 50 States*

In the early American colonies, the hand of the King was always apparent.[40] Each colony was governed by an administrator who had been delegated the power of clemency from the King. The American Revolution provided the emergence of the state government to supplant the governing power of the King.[41] After the Revolutionary War, the states voted to elect governors. Most individual state constitutions were modeled after the United States Constitution thus, the power of clemency became vested in the executive office – the state governors. Some citizens, fearful of the abuses that had occurred in the past, wished to limit the power of the executive.[42] Many of the states limited the pardoning power of the governor by requiring consent of an executive council.[43]

The structures designed by the early colonies have survived today. Of the fifty states, twenty-eight place the clemency power in the governor alone, although many have an advisory board that will issue

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37. *See* Kobil, *supra* note 11, at 593; *see also*, Act of July 17, 1862, ch. 195, § 13, 12 Stat. 589, 592, *repealed by* Act of Jan 21, 1867, ch. 8, 14 Stat. 377:

> [T]he President is hereby authorized, at any time hereafter, by proclamation to extend to persons who may have participated in the existing rebellion in any State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare.

*Id.*

38. *See* MILKIS & NELSON, *supra* note 7, at 349. Gerald Ford's pardon of Richard Nixon during the Watergate scandal is still considered by many to be the reason Ford lost the presidency to Jimmy Carter. *See id.* at 349-351.

39. *See* Proclamation 6518, Grant of Executive Clemency, 28 WEEKLY COMP. PRES. DOC. 2382 (Dec. 24, 1992), *reprinted in* 57 Fed. Reg. 62145 (1992). Iran-Contra is the term coined for an alleged Hostage for Arms negotiation during the Reagan years. During the last month of President Bush's term, he pardoned many of those still under indictment including Weinberger, Clarridge, George, Abrams, Fiers and McFarlane. *See id.*; *see also Report of the Independent Counsel: Iran-Contra Affair* (visited April 1, 1999) <http://www.webcom.com/pinknoiz/covert/icsummary.html>.

40. *See* MILKIS & NELSON, *supra* note 7, at 2-3.

41. *See id.* at 2.

42. *See* Korengold, *supra* note 18, at 355.

43. *See* SAMUEL BRYAN, REPLY TO WILSON'S SPEECH: CENTINEL II (1787), *reprinted in* THE DEBATE ON THE CONSTITUTION, PART ONE, 77-91 (Bernard Bailyn ed., 1993). These councils were a result of expanding duties and powers of the governor. The primary concern for the drafters of the constitution was a fear of corruption in the use of clemency. *See id.*

non-binding opinions.[44] In sixteen states, the governor shares power with some sort of administrative board.[45] In the five remaining states, a panel, usually appointed by the governor, has the principle authority to make clemency decisions.[46] Essentially, this board acts as an executive would.[47]

## II. CLEMENCY PROCEDURE IN TEXAS

Texas is one of the sixteen states that utilize the dual power structure for the grant of executive clemency.[48] These states use both the board and the governor and do not rely solely upon one or the other. They are in fact a hybrid of the aforementioned forms. In these states, the endorsement of an independent board is required before the governor may grant clemency. In Texas, this panel is the Pardons and Paroles Board.[49] The states of Arizona[50] and Pennsylvania[51] stand alone in that they guarantee some form of hearing before any action is

44. *See* U.S. DEP'T OF JUSTICE, GUIDE TO EXECUTIVE CLEMANCY AMONG THE AMERICAN STATES, NATIONAL GOVERNOR'S ASSOCIATION CENTER FOR POLICY RESEARCH, 17-20 tbl. I (1988) [hereinafter GUIDE TO STATE CLEMENCY]. (Comparative View of Clemency in the United States and Territories). The twenty-nine states are: Alaska, Arkansas, California, Colorado, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See id.*

45. *See id.* The sixteen states are: Arizona, Delaware, Florida, Indiana, Maine, Massachusetts, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Texas, and Utah. *See id.*

46. *See id.* The five states are: Alabama, Connecticut, Georgia, Idaho, and South Carolina. *See id.*

47. *See id.*

48. *See* Kobil, *supra* note 11, at 605; *see also* TEX. CONST. art. IV, § 11.

a) Board of Pardons and Paroles; parole laws; reprieves, commutations and pardons; remission of fines and forfeitures.

b) The legislature shall by law establish a Board of Pardons and Paroles and shall require it to keep record of its actions and the reasons for its actions. The legislature shall have authority to enact parole laws and laws that require or permit courts to inform juries about the effect of good conduct time and eligibility for parole or mandatory supervision on the period of incarceration served by a defendant convicted of a criminal offense.

c) In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and pardons; and under such rules as the Legislature may prescribe, and upon the written recommendation and advice of a majority of the Board of Pardon and Paroles, he shall have the power to remit fines and forfeitures. The Governor shall have the power to grant one reprieve in any capital case for a period not to exceed thirty (30) days; and he shall have power to revoke conditional pardons. With the advice and consent of the legislature, he may grant reprieves, commutations of punishment and pardons in cases of treason.

*Id.*

49. *See* TEX. CONST. art. IV, § 11.

taken on a particular individual's case. The remaining states at least have in place a procedure for the institution of clemency.

Texas stands as the maverick state in that the only way an inmate is given a hearing by the Pardons and Paroles Board is at the total pleasure of the Board.[52] Nothing in the Texas Constitution or in any enacted statutes requires the Pardons and Paroles Board to act in any particular instance.[53] If the Pardons and Paroles Board chooses not to review a case there is absolutely no avenue for relief.[54] Texas has been the subject of much debate over how the process is employed. Sadly, this debate has been largely academic. Since the death penalty was reinstated in 1976,[55] Texas has never commuted the sentence of a death row inmate – that is until 1998. Clemency was granted, not for a model prisoner and born-again Christian,[56] but rather a self-proclaimed killer of over 600.

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50. *See* Silverman, *supra* note 8, at 387; ARIZ. CONST. art. V, § 5: "The Governor shall have power to grant reprieves, commutation, and pardons after convictions, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as may be provided by law." *Id.*; *see also* ARIZ. REV. STAT. ANN. § 31-402(c)(2) (West 1996).

> After a hearing for which the victim, county attorney and presiding judge are given notice and an opportunity to be heard, may make recommendations to the governor for commutation of sentence after finding by clear and convincing evidence that the sentence imposed is clearly excessive given the nature of the offense and the record of the offender and that there is a substantial probability that when released the offender will conform the offender's conduct to the requirements of the law.

*Id.*

51. *See* Silverman, *supra* note 8, at 387; *see also* PA. CONS. STAT. § 9(a) (amended 1997)

> a) In all criminal cases except impeachment the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, and in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board of Pardons, after full hearing in open session, upon due public notice. The recommendation, with the reasons therefor at length, shall be delivered to the Governor and a copy thereof shall be kept on file in the office of the Lieutenant Governor in a docket kept for that purpose.

*Id.*

52. *See* TEX. CONST. art. IV, § 11.

53. *See id.*

54. *See id.*

55. *See* Gregg v. Georgia, 428 U.S. 153, 175 (1976) (plurality opinion) (validating death penalty statutes).

56. Make no mistake, the author is not advocating that simply because of a death row conversion should Karla Faye Tucker be given any special consideration. The point to be made is simply to show that there was a national outcry for mercy due to her religious conversion.

### A. *Mercy Denied – The Case of Karla Faye Tucker*

> I come to you a person, an individual, seeking commutation of my death sentence, sharing with you what I hope you will use in making your decisions. Please know . . . I am in no way attempting to minimize the brutality of my crime. It obviously was very, very horrible and I do take full responsibility for what happened the night of June 13, 1983. I know that the choices I made, to do drugs and other things, led up to my actions that night. I also know that justice and law demand my life for the two innocent lives I brutally murdered that night. If my execution is the only thing, the final act that can fulfill the demand for restitution and justice then I accept that.[57]

The case of Karla Faye Tucker brought the eyes of America to the state of Texas to watch the final hours of a born-again Christian as she faced her own death at the hands of the state. Lawyers for Karla Faye Tucker vehemently attacked the constitutionality of the clemency procedure in Texas. They argued that although the condemned has a statutory right to clemency, the fact that there is no history of clemency in Texas makes commutation *de facto*[58] unavailable. The argument is really quite simple. If no one is ever granted clemency, then it is in fact unavailable due to the lack of precedent. If the Pardons and Paroles Board will never give clemency, then their existence is a mockery of the inmates and attorneys that steadfastly rely upon the Pardons and Paroles Board. In the end the argument failed for Karla Faye Tucker, but the principle has picked up steam after her execution.

On June 13, 1983, Jerry Lynn Dean and Deborah Thornton were brutally murdered while they slept. The murder weapon, a pickax, was left embedded in Thorton's chest. Investigators quickly arrested Karla Faye Tucker and Daniel Ryan Garrett. Both were charged and convicted of capital murder and both sentenced to death.[59] During the trial, it was revealed that Tucker and Garrett had broken into Dean's house with the intent to steal money and motorcycle parts.

They were surprised to find Dean asleep in his bed. Garrett proceeded to beat Dean over the head with a hammer. Tucker then struck Dean over 20 times to stop the "gurgling sound he was making."[60] Once realizing that Thorton was under the sheets next to Dean, Tucker turned the axe on her. Tucker boasted at her trial that

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57. *See* Letter from Karla Faye Tucker to Gov. George W. Bush, *reprinted in Karla Faye Tucker: Challenging Clemency*, AUSTIN AM.-STATESMAN, Jan. 22, 1998, at A1.

58. *See Ex parte* Karla Faye Tucker, No. 388,428-B (180th Dist. Ct., Harris County, Tex. Jan. 22, 1992).

59. *See* Court TV Online, *Texas v. Karla Faye Tucker: A Question of Mercy* (visited Oct. 27, 1998) <http://www.courttv.com/casefiles/tucker/background.html>. Garrett died in prison in 1994 of liver disease. *See id.*

60. *Id.*

she experienced an orgasm each time she plunged the axe down upon her victims.[61]

The details of this crime, while appalling, demonstrate the severity of Tucker's crime. Amongst all the factors taken into consideration in deciding clemency for Karla Faye Tucker, there should be no doubt about her guilt because in subsequent years she has admitted her role in the murders. The Tucker case is intriguing, not in the details of the crime but rather the details of the life after the crime. Karla Faye Tucker became a model prisoner and converted to Christianity.[62] This, in and of itself, does not necessitate a grant of clemency. The analogy begs the question, "What would a person have to do to receive clemency?" There are really two schools of thought.[63] The first is that her life should be spared because of her conversion and her steadfast resolve to help other prisoners. Another side of the debate would simply say that her conversion does not change the fact that two people died at her hands. Both sides to this argument have valid propositions, and who is to say which is correct.

Tucker became a celebrity in the months leading up to her death. She appeared regularly on "Larry King Live" and "The 700 Club." Thousands of letters were written on her behalf, from average citizens, Pat Robertson, the homicide detective working the case, Pope John Paul II, and even from siblings of the victims.[64] Certainly, if someone deserved clemency then it should be prisoner #777, Karla Faye Tucker.

When clemency was denied, Karla Faye Tucker was executed by lethal injection on February 3, 1998. Before the injection Tucker made a brief statement: "I am going to be face to face with Jesus now . . . . I love all of you very much. I will see you when I get there. I will wait for you."[65] Just hours before the execution, Governor Bush made his own statement denying a stay in the case. He had previously stated publicly that, in the evaluation of her case, he would only consider doubts about guilt and/or whether the trial had been fair. In his statement on February 3, he said, "Like many touched by this case, I have sought guidance through prayer. I have concluded judgment about the heart and soul of an individual on death row are best left to a higher authority."[66]

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61. *See id.*

62. *See* Herman & Ward, *supra* note 3, at A1.

63. *See generally* Paul Whitlock Cobb Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 393-396 (1989) (discussing the factors affecting Governors as they consider the exercise of clemency).

64. *See* Court TV Online, *supra* note 59.

65. *See* Mike Ward & Rebeca Rodriguez, *Texas Executes Tucker*, AUSTIN AM.-STATESMAN, Feb. 4, 1998, at A1.

66. Gov. George W. Bush, *Statement by Governor George W. Bush: Karla Faye Tucker* (Feb. 3, 1998) (visited Jan. 22, 2000) <http://www.governor.state.tx.us/message/Record98/statement-kft.html> (press release) (on file with the Texas Wesleyan Law Review).

After the execution of Karla Faye Tucker, many considered clemency to be dead in Texas. If Tucker did not warrant clemency, then it never would be granted. What more could a prisoner do to receive the grace of the governor and the Pardons and Paroles Board? The conclusion was that Texas had no room for mercy and that was justified.[67] If the Pardons and Paroles Board did not wish to exercise *mercy* then the principles of clemency remained intact. However, the Pardons and Paroles Board did not keep clemency intact because they issued clemency to another convict, not as an act of mercy but rather, because they doubted his guilt.[68] Clemency should not be used to combat doubt. The clemency granted to Henry Lee Lucas changed the parameters of the debate forever.

### B. *Orange Socks Lost – The Case of Henry Lee Lucas*

The body was found in a ditch off Interstate 35 near Georgetown, Texas, just north of Austin. The body was nude except for a pair of orange socks on her feet. She was young and to this day her identity is unknown. "I've killed by strangulation, I've killed by knifings, I've killed by hit and runs, shootings, robberies, hangings, every—every type of crime, I've done it,"[69] said Henry Lee Lucas. A drifter, Henry Lee Lucas, became the center of one of the most bizarre murder investigations in Texas history. Lucas was arrested in Texas and charged with murdering Becky Powell, his common-law wife, and Kate Rich, an elderly friend. While in jail, Lucas began confessing. In 1983, Lucas' incredible stories of murder received great interest from law enforcement. Law officials from across the country flooded into Texas to attend standing room only conferences and to hear about his crimes. When Lucas finally stopped talking, he had given roughly 3,000 confessions that enabled police to solve 600 murders across the country.[70] Lucas enjoyed the attention. He would gleefully take police to the crime scene and point out the specifics of the crime. In return, he would receive hamburgers, milkshakes, and cigarettes.[71] Later Lucas recanted most of his confessions. He contends that law enforcement fed him details of the crimes and allowed him to read the investigative reports to give details in his confessions.[72] Ken Anderson, Williamson County District Attorney and one of the prosecutors in the Orange Socks case, disputes the allegation that the confessions

67. *See* Don McLeese, *Ultimate Responsibility in the Hands of the Fallible*, AUSTIN AM.-STATESMAN, Feb. 3, 1998, at B1.

68. *See* Kathy Walt, *Parole Board Recommends Lucas be Spared*, HOUSTON CHRON., June 26, 1998, at 1A.

69. *The Today Show* (NBC television broadcast, June 23, 1998), *available in* 1998 WL 13520048.

70. *See id.*

71. *See id.*

72. *See* Walt, *supra* note 68, at 1A.

were fictional, stating that "[h]is confession contained information that only the killer would have known."[73]

In the end, it was an investigation led by the then-Attorney General of Texas, Jim Mattox, that raised serious doubts about the case of Orange Socks.[74] Evidence surfaced that suggested that Lucas was elsewhere when Orange Socks was murdered.[75] The Pardons and Paroles Board concluded that there were serious doubts about Lucas' guilt and recommended sparing Lucas' life.[76] The Governor, following the Board's recommendation, granted a commutation to Henry Lee Lucas.

This was the first time since the death penalty was reinstated in 1976 that a prisoner had been granted a reprieve. Ken Anderson stated that Lucas was "a monster. . .who was prove[n] guilty beyond a reasonable doubt to twelve citizens. The case has been reviewed by twenty-three judges over the past fourteen years. The only other reason to grant clemency is for reasons of mercy. There is no one less deserving of such than Lucas."[77]

Mr. Anderson raises the essential question in the debate over the clemency process: should the Governor, by way of the Pardons and Paroles Board, substitute his judgment for the judgment of a jury? If that sort of power is allowable, should it not at least be held in check? Possibly, the power should be used only with consent of the judicial branch. While Lucas' death sentence was commuted, he is serving six life sentences for other murders. He will never leave prison, but the fact that he will not die at the hands of the state has angered many of his victims' families.[78] Other relatives of victims whose deaths were attributed to Lucas are outraged at the Texas Rangers Task Force they say created Henry Lee Lucas.[79] Joyce Lemons, whose daughter was murdered in 1975, stated that it took her and her husband four years to reopen their daughter's case after records showed that Lucas was lying.[80] The murders that Lucas committed forever changed the lives of his victims' families. Yet, from jail his false confessions tragically affected the lives of families to which he never had contact with the victims. While no one doubts that Henry Lee Lucas committed many horrific crimes, there were doubts about Orange Socks and so his sentence was commuted.[81]

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73. *See* Today Show, *supra* note 69.
74. *See* Walt, *supra* note 68, at 1A.
75. *See id.*
76. *See id.*
77. Walt, *supra* note 68, at 1A.
78. *See id.*
79. *See id.*
80. *See id.*
81. *See id.* Although justice is blind, the principles of fairness would never allow someone to be punished for a crime that they did not commit. The author is not suggesting that Lucas be punished for a crime that he did not commit, or punished

## III. Due Process Clemency Procedure

These two cases converged in 1998 to set off a firestorm of debate concerning the Texas clemency process. The controversy has reached an international scale with opponents ranging from Pope John Paul II to Bianca Jagger.[82] In addition to the many arguments against the death penalty in general, a significant number more specifically address the due process requirement as it pertains to clemency proceedings. Does the United States Constitution require due process in grants of clemency? If it does, then clearly Texas is in violation because inmates are guaranteed no due process whatsoever. The issue is still debated all over the country and especially in Texas.

To understand the debate, one clear distinction must be made between the two cases discussed above. In the case of Tucker, there is no doubt about her guilt. In the Lucas case, there are substantial doubts about his guilt for the crime for which he was convicted. Many would argue that this distinction alone separates the two cases and there should be no further comparison. If one agrees that clemency should be used only as a safeguard to override the determination of the courts, then perhaps guilt is the only distinction. However, history, precedent, and the United States Supreme Court do not view clemency as another device to measure guilt. If a governor has doubts about the guilt or innocence of an individual, then he/she, by the act of clemency, can substitute his/her judgment for that of the jury and courts of appeal. Is it acceptable for the clemency power to be arbitrarily exercised? Traditionally, clemency is a method of grace. What guidelines, if any, should states be required to follow in dispensing this grace? The United States Supreme Court attempted to promulgate guidelines for the states to follow concerning clemency procedures.

### A. *Supreme Court Guidelines:* Ohio Adult Probation Authority v. Woodard[83]

The very first question that must be answered in any due process debate is whether the Constitutional due process requirement is applicable in a clemency proceeding. The Supreme Court has never clearly answered the question, but a recent opinion provides great insight.[84]

In March of 1998, the Supreme Court took up two issues concerning the application of the Due Process Clause of the Constitution to clemency proceedings. The court addressed whether an inmate has a protected life or liberty interest in clemency proceedings, thus

because he committed other crimes. The author contends that his guilt in the Orange Socks case was proven to a jury and withstood the entire appeals process. *See id.*

82. *See* John Moritz, *Clemency Process in Texas is Upheld: Judge Criticizes Secrecy, Lifts Two Execution Stays*, Fort Worth Star-Telegram, Dec. 29, 1998, at A1.

83. 523 U.S. 272 (1998).

84. *See id.*

necessitating due process under the Fifth and Fourteenth Amendments.[85]

"Eugene Woodard was sentenced to death for aggravated murder committed during the course of an Ohio carjacking."[86] The Ohio Supreme Court affirmed the conviction and sentence and the Supreme Court of the United States denied certiorari.[87] Woodard was unable to obtain a stay of execution and thereafter, the clemency authority of Ohio commenced a clemency investigation.[88] The clemency authority informed Woodard that he was entitled to an interview and a hearing, but rather than request the interview, Woodard objected to the short notice and requested that the clemency authority provide assurances that Woodard's counsel could attend and participate in the interview and hearing.[89] The clemency authority did not respond and Woodard filed suit in United States District Court.[90]

The District Court granted the state's motion for judgment on the pleadings, however the Court of Appeals for the Sixth Circuit affirmed in part and reversed in part.[91] The court of appeals applied a "dual strand" test.[92] The first strand requires that the defendant show a protected life or liberty interest.[93] The second strand analyzed the "role of clemency in the entire punitive scheme."[94] Under the first strand, the court concluded that the respondent had failed to establish a protected life or liberty interest.[95] The court cited many Supreme Court cases that clearly supported the principle that there is no life or liberty interest in clemency at the state or federal level.[96] The court of appeals agreed that there is a due process requirement for clemency procedures.[97] The court held that because clemency was far from the procedure of a trial, then the process due could in fact be minimal.[98] The Supreme Court stated the court of appeals found that although

85. *See id.* at 1247. The second issue before the court is whether participating in an interview for clemency violates an inmate's Fifth Amendment right against self-incrimination. *See id.* For the purposes of this discussion, the second issue will be omitted as it is not germane.

86. *Id.*

87. *See* State v.Woodard, 623 N.E.2d 75 (Ohio 1993), *cert. denied*, 512 U.S. 1246 (1994).

88. *See* Woodard v. Ohio Adult Parole Authority, 107 F.3d 1178, 1181 (6th Cir. 1997).

89. *See id.* at 1182.

90. *See id.*

91. *See id.* at 1194.

92. *See id.* at 1182.

93. *See id.*

94. *See id.* at 1186.

95. *See id.*; *see also* Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 277 (1998).

96. *See Woodard,* 107 F.3d at 1183-86 (citing Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981)); *see also* Olim v. Wakinekona, 461 U.S. 238 (1983); Sandin v. Conner, 515 U.S. 472 (1995).

97. *See Woodard,* 107 F.3d at 1182-83.

98. *See id.* at 1183-84.

clemency "was not required by the Due Process Clause, [clemency] was a significant, traditionally available remedy for preventing miscarriages of justice when judicial process was exhausted."[99] Therefore, the Supreme Court indicated the appellate court's conclusions fell under "the *Evitts*[100] framework as an 'integral' part of the adjudicatory system."[101] The *Evitts* Court, however, refused to decide what the minimal process would be and remanded the case to the district court for that purpose.[102]

The Supreme Court summarily rejected the Court of Appeals' argument as to the first strand of the analysis.[103] The Supreme Court concluded that clemency was totally an act of grace from the executive and as such was not a protected life or liberty interest.[104] While the first strand posed no intrigue to the court, the second strand was given much consideration.[105] The court of appeals relied heavily on *Evitts v. Lucey*[106] to support the due process argument.[107]

*Evitts* addressed a prisoner's right to effective assistance of counsel on an appeal of right.[108] In the *Woodard* opinion, the Supreme Court made clear that the *Evitts* decision did not create a new "strand" of due process analysis.[109] *Woodard* argued clemency and the first appeal of right were substantially similar.[110] The 6th Circuit Court of Appeals' holding rested on *Evitts'* argument that clemency was an integral part of Ohio's system of deciding guilt and innocence; therefore, the clemency process was entitled to due process protection.[111] The Supreme Court rejected this argument.[112] While a clear majority of the Supreme Court held that Ohio clemency law did not violate due process, there was disagreement among the justices about the due process requirement in general.[113] Chief Justice Rehnquist, along with Justices Scalia, Kennedy, and Thomas concluded that there was not a due process requirement in clemency cases.

> Clemency proceedings are not part of the trial—or even of the adjudicatory process. They do not determine the guilt or innocence of

99. *Woodard*, 523 U.S. at 277.
100. *See id.*; *see also* Evitts v. Lucey, 469 U.S. 387 (1985) (holding that when a state acts in an area with significant discretionary elements it must act in accord with the constitution particularly with the due process clause).
101. *See Woodard*, 523 U.S. at 283.
102. *See id.* at 277-79.
103. *See id.* at 284.
104. *See id.* at 281.
105. *See id.* at 283.
106. 469 U.S. 387 (1985).
107. *See Woodard*, 107 F.3d at 1186.
108. *Id.* at 1188.
109. *See Woodard*, 523 U.S. at 284.
110. *See id.* at 283.
111. *See Woodard*, 107 F.3d at 1186.
112. *See Woodard*, 523 U.S. at 283-85.
113. *See id.* at 288-89.

> the defendant and are not intended primarily to enhance the reliability of the trial process. They are conducted by the Executive Branch, independent of direct appeal and collateral relief proceedings. *Greeholtz*, 443 U.S. at 7-8. And they are usually discretionary, unlike the more structured and limited scope of judicial proceedings. While traditionally available to capital defendants as a final and alternative avenue of relief, clemency has not traditionally "been the business of courts."[114]

Although in agreement with the Court's holding that Ohio clemency law did not violate constitutional due process requirements, Justices O'Connor, Souter, Ginsburg, and Breyer disagreed with the majority about the due process requirement itself. In a concurring opinion, they contended that there is a minimal requirement for due process in the United States. The concurring opinion clearly opines that there should be some minimal procedural safeguards.

> A prisoner under a death sentence remains a living person and consequently has an interest in his life. The question this case raises is the issue of what process is constitutionally necessary to protect that interest in the context of Ohio's clemency procedures. It is clear that "once society has validly convicted an individual of a crime and therefor established its right to punish, the demands of due process are reduced accordingly."[115]

Justice O'Connor's concurring opinion posed two hypotheticals in which judicial intervention might be warranted: where a state official merely flipped a coin, or where a state arbitrarily denied a prisoner any access to its clemency process.[116] Justice Stevens took a harsher tone and found fault with the opinion written by Chief Justice Rehnquist.[117] Justice Stevens contended that, under the majority opinion, a clemency proceeding could never violate the Due Process Clause.[118] He cited instances of "bribery, personal or political animosity, or the deliberate fabrication of false evidence would be constitutionally acceptable."[119] Perhaps Justice Stevens' most persuasive argument arrived later in his opinion when he posed the question of a governor

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114. *Id.* at 285 (citing Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981)). The court compares *Woodard* with *Herrera v. Collins*, 506 U.S. 390, 411-415 (1993), which recognized "the traditional availability and significance of clemency as part of executive authority, without suggesting that clemency proceedings are subject to judicial review." *Id.* Also compared was *Ex parte Grossman*, 267 U.S. 87, 120-21 (1925), stating "executive clemency exists to provide relief from harshness or mistake in the judicial system, and is therefore vested in an authority other than the courts." *Id.* at 285.

115. *Id.* at 288 (O'Connor, J., concurring in part and concurring in judgment, joined by Souter, Ginsburg, Breyer, J.J.) (citing Ford v. Wainwright, 477 U.S. 399, 429 (1986)).

116. *See id.* at 289.

117. *See id.* at 290 (Stevens, J., concurring in part and dissenting in part).

118. *See id.*

119. *Id.* at 291.

ignoring the commands of the Equal Protection Clause and using race or religion in determinations of clemency. Would even this action be acceptable under the Constitution? Clearly, such an action would go against the spirit of volumes of case law supporting the Equal Protection Clause. What is unclear, is whether this action would violate the due process requirement for clemency proceedings. Justice Stevens argued that under the majority opinion of "minimal requirements of due process" it would not.[120] Justice Stevens also clearly pointed out that if a "[s]tate adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause."[121] He also points out that the death punishment should be given greater protection than liberty because of both its severity and finality.[122] "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be . . . based on reason rather than caprice or emotion."[123]

The *Woodard* case is extremely important to the Texas clemency procedure because it reveals the disposition of the Justices as to the issue. The case reveals that a majority of the Justices[124] will most likely agree that there must be some sort of minimal due process requirement for state clemency procedures. The exact nature of the requirement is yet to be determined but arguably, a state must provide some due process. The question then turns to whether Texas provides that minimal due process.

### B. *Texas Courts Stand on the Process*

The Texas court system has recently taken up the issue in several cases brought to test the clemency procedure in Texas. Once the clemency procedure in Texas was placed in the spotlight, the Pardons and Paroles Board was bombarded by lawsuits.[125] On November 30, 1998, a state district judge ruled that the Board's procedures violated the State Constitution and Open Meetings Act.[126] Judge Paul Davis ordered the Board to make public its meetings, to deliberate clemency petitions, to vote in public, and record reasoning.[127] The Texas Supreme Court blocked Judge Davis' order[128] and so attorneys for

120. *Id.* at 290.
121. *Id.* at 292.
122. *See id.* at 294 (quoting Gardner v. Florida, 430 U.S. 349, 357-58 (1977)).
123. *Id.*
124. *See id.* at 288-90 (Stevens, O'Connor, Souter, Ginsburg, Breyer,).
125. *See* Jim Henderson, *Clemency Procedures Under Fire: The Case of a Canadian Man on Texas' Death Row Sparks Debate in Federal Court*, FRESNO BEE, Dec. 22, 1998, at D13.
126. *See id.*
127. *See id.*
128. *See id.* The Texas Supreme Court dismissed the order as moot. *See also In Re* Texas Bd. of Pardons and Paroles, 989 S.W.2d 360 (Tex. 1998).

Danny Lee Barber and Joseph Stanley Faulder brought an action in federal court.[129] After an intense series of hearings, Judge Sam Sparks upheld the Texas clemency procedures, but in his nineteen-page order the judge lambasted the process, calling it "extremely poor and certainly minimal."[130] He urged the Board to change its methods, but noted repeatedly that the Supreme Court only requires minimal due process.[131] Barber and Faulder also sued in state district court just after the ruling by Sparks.[132] State District Judge Scott McCown of Austin also held that the Constitution of Texas did not require public hearings or stated reasons for their recommendation to the governor.[133] Judge McCown echoed the sentiments of Federal Judge Sparks in his ruling, "What is troubling to this court is that the Board of Pardons and Paroles *never* meets to consider *any* petition for clemency. . . ."[134] Although the courts have recently upheld the Pardons and Paroles Board methods, neither Judge Sparks nor Judge McCown expressed any confidence or pleasure with the clemency process. Both Judges recognized a drastic need for improvement.

## IV. THE NEED FOR CHANGE

The current procedures of the Pardons and Paroles Board are in desperate need of change. History is clear that the power of clemency should be vested in the executive and dispensed with care.[135] Every other state in the union has some sort of guidelines as to how the power is regulated.[136] In Texas, the Pardons and Paroles Board must make a recommendation before the governor can even consider the merits of the case.[137] The Paroles Board is under no obligation to exercise any factors in a consideration;[138] its members are allowed to meet in private or by telephone.[139] No record is kept and the Board is not required to have a reason.[140] If a board member wishes to simply

129. *See* Henderson, supra note 125 at D13. Faulder has also gathered national attention because he is a Canadian national. His execution has stirred international treaty debate. Canadian officials argue that his execution violates certain treaties between Canada and the United States due to the latter's failure to contact the Canadian consulate upon the suspect's arrest. *See id.*

130. *See* Moritz, *supra* note 82, at 1A.

131. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272.

132. *See* Henderson, *supra* note 125, at D13.

133. *See* John Moritz, *State Wins Decision on Parole Hearings*, FORT WORTH STAR-TELEGRAM, Jan. 9, 1999, at 1B.

134. Moritz, *supra* note 82, at 1A (noting that lawyers arguing the case also asked the judge to award them $122,000 in attorney's fees for their efforts in challenging the clemency process in Texas); *see also* John Moritz, *Lawyers Pressing Clemency Issue Ask for Over $122,000*, FORT WORTH STAR-TELEGRAM, Jan. 8, 1999, at 1B.

135. *See* Silverman, *supra* note 8, at 390.

136. *See* GUIDE TO STATE CLEMENCY, *supra* note 44.

137. *See* TEX. CONST. art. IV, § 11.

138. *See id.*

139. *See id.*

140. *See id.*

"flip a coin" then nothing in the current law would bar them from doing so.[141] There are no deliberations, and since 1993, the Board has rejected 75 of 76 requests.[142]

If clemency is never granted, then at least the system is the same for all. If the Governor chooses to grant one application and not another, then there must be some accountability as to how the power is used. Any argument that clemency is to be only used in questions of guilt is inherently flawed, because under the law the jury determines whether inmates are guilty.[143] United States District Judge Sam Sparks openly criticized the clemency process: "What is the horror of a hearing, since a majority of the other states require a hearing? I do not understand the resistance. For God's Sakes, (you) don't want to have a hearing."[144]

It is unclear how the rash of lawsuits will affect the Paroles Board. While recent court rulings in Texas uphold the constitutionality of the Paroles Board's actions,[145] these rulings act as a floor rather than a ceiling on due process requirements. The Pardons and Paroles Board must take its own initiative and change its manner of doing things. It has the ability to make these changes of its own volition, before the legislature changes things for it. State Representative Elliott Naishtat (D-Austin) has legislation pending that would require the Paroles Board to conduct public meetings and develop criteria to guide the panel when it considers clemency issues.[146] Nothing requires that it grant clemency, but if it wishes its credibility to withstand attack, then it must at least offer some sort of criteria and consistency. One of the cornerstones of American jurisprudence lies in the faith of the public. Where can the public derive this faith, if there is no public meeting, deliberation, or reasoning?

One should never criticize the status quo unless there are apparent means of improvement. In this current controversy, there are clearly some ideas that would vastly improve the current state of the Pardons and Paroles Board in Texas. In addition, it is unnecessary to look outside of the United States. Most of the other states[147] have created a clemency board that rises above the one set by the Texas Legislature.

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141. *See id.*

142. *See* Mortiz, *supra* note 82, at 1B. The board members do not meet to discuss their reasoning. They simply call or fax in their votes. *See id.*

143. *See* TEX. CRIM. PROC. CODE ANN. § 36.13 (Vernon 1997 & Supp. 1998). "Jury is judge of facts. Unless otherwise provided in this Code, the jury is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed thereby." *Id.*

144. *See* Mike Ward, *Clemency Process Secrecy Scorned*, AUSTIN AM.-STATESMAN, Dec. 22, 1998, at A1.

145. *See* TEX. CRIM. PROC. CODE ANN. § 36.13 (Vernon 1997 & Supp. 1998).

146. *See* Tex. H.B. 397, 76th Leg., R.S. (1999).

147. *See* GUIDE TO STATE CLEMENCY, *supra* note 44; *see also* TEX. PEN. CODE ANN. § 11 (Vernon 1974 & Supp. 1998).

First, the Pardons and Paroles Board must clearly outline guidelines for the granting of clemency. Second, it must begin meeting in the open. Last, it must make known its reasoning for granting or denying clemency for "[h]e who conceals his disease cannot expect to be cured."[148] If the Board chooses never to grant clemency, then so be it, but as government officials they must allow their decision-making process to be revealed.

## CONCLUSION

The State of Texas is known across the country as a fierce proponent of the death penalty. Capital punishment is the most severe punishment known to man. A great debate has raged in this country over whether the death penalty is a deterrent of crime or a huge blight on the criminal justice system. Traditionally, clemency is an act of grace from the executive toward the condemned. In recent years, it has become a tool to measure the guilt of the accused. In 1998, Texas Governor George W. Bush commuted the death sentence of a self-professed murderer of over 600 people. While that number is extremely large, and it is very hard to believe that one individual killed that many people, it is not hard to believe that he killed one. A jury of twelve citizens convicted Henry Lee Lucas of the brutal murder of Orange Socks. His case made its way through our justice system and his guilt was endorsed by several levels of appeals. In the end, he was granted clemency because the Governor and the Pardons and Paroles Board doubted his guilt. Doesn't this act simply replace the court system's determination with the judgment of the governor? If the governor can decide guilt or innocence, why the need for a jury?

At the other end of the spectrum, a born-again Christian and model prisoner was denied clemency because the Governor had no doubt about her guilt. These two cases converged in 1998 and drastically changed the view of clemency in Texas. The Governor and Pardons and Paroles Board of Texas have a tremendous power that is grossly unregulated. They hold in their hands the power to stop an execution, but there are absolutely no guidelines for the exercise of that power. The Constitution of the United States guarantees due process for every individual. This due process requirement should also extend to clemency.

*Allen L. Williamson*

148. RHODA THOMAS TRIPP, THE INTERNATIONAL THESAURUS OF QUOTATIONS 99 (1970).