8:30 - 9:00  Welcome and Introduction
Dean Kenneth Randall
School of Law, University of Alabama
Austin Sarat
Justice Hugo L. Black Visiting Senior Faculty Scholar
School of Law, University of Alabama
and Amherst College

9:00-10:15  Session I: Articulations of Mercy and the American Regime of Punishment
Robert A. Ferguson, Columbia Law School

The questions that this essay will ask and seek to answer include some of the following:

To what extent does the concept of mercy exist in the American regime of punishment? If so, where does the concept exist in practice, and when should it apply? How important is it? Finally, do the questions and answers offered above have anything to do with the relative harshness of the American regime of punishment in comparison with comparable societies?

The essay will distinguish between such concepts as “mercy,” “mercy in a legal understanding,” “forgiveness,” “pardon,” “clemency,” “amnesty,” and “equity” in the knowledge that frequent conflation of these terms, found as early as Sir Edward Coke, is in part responsible for current discrepancies between articulation of the concept and the meaningful practice of it. The key to the definition used here will depend upon J.L. Austin’s notion of “performative utterance.”

Mercy in the legal process requires a fully formed locutionary, illocutionary, and perlocutionary act [articulation in a contextually realized situation with knowing and accepting reception]. The essay will also turn to definitions in the scholarship with the claim that mercy in law must be based on an exercise of compassion that delivers a punishment less than deserved to a person properly the subject of punishment.

One aspect of the essay will trace and wield derivations. Differences between pagan notions of mercy based on epieikeia [Greek] and clementia or misericordia [Latin] with references to Aristotle and Seneca, on the one hand, and a more culturally dominant Judeo-Christian notion of mercy, on the other hand, complicate contemporary understandings of the concept of mercy. Separations of church and state in contemporary legal thought and legal doctrine force legal articulation of mercy toward the pagan understanding of mercy even as a speaker relies on the far
more familiar Judeo-Christian form of the concept. Conflation here has hidden elements that do not help the punished.

We see as much as earlier as Portia’s famous offer of mercy to Shylock in *The Merchant of Venice* (iv:i:182-202), a passage regularly cited and just as regularly misused in legal scholarship. The scene on stage can be played either way, but a close reading of this passage reveals that entrapment rather than a meaningful offer of mercy defines Portia’s agenda even this early within the second of her four offers of mercy. At issue is an ongoing rhetorical posture in the law in which mercy is more talked about than offered in reality. The language of mercy, rather than its full articulation, often hides an unrelieved judgment soon to follow.

These implications will be traced not only in modern jurisprudence but beyond judgment into ongoing punishment in the American penal system. The nature of American prisons, the designations reserved for a convicted felon, the acknowledged failures in rehabilitation that make their way into law, and the shrouded nature of *ongoing judgmental* punishment once formal *judgment* has been rendered will be subjects here. At stake is an increasingly rocky road back from misbehavior in American society. The culture of second chances applies less and less where the convicted are concerned.

A growing conspiracy of silence around such terms as “empathy” and “mitigation” in the legal process will figure in a conclusion. To the extent that mercy is robbed of full articulation in the law, it ceases to exist in meaningful form and contributes to the comparative harshness of the American punishment regime.

**Moderator and Commentator: Jamie Leonard, University of Alabama**

10:15-10:45  Break

**10:45-12:00  Session II: Mercy, Desert and Criminal Law’s Moral Credibility**
Paul H. Robinson, University of Pennsylvania Law School

If, in the criminal justice context, "mercy" is defined as forgoing punishment that is deserved, then much of what passes for mercy is not. Giving only minor punishment to a first-time youthful offender, for example, might be seen as an exercise of mercy but in fact may be simply the application of standard blameworthiness principles, under which the offender's lack of maturity may dramatically reduce his blameworthiness for even a serious offense. Desert is a nuanced and rich concept that takes account of a wide variety of factors. The more a writer misperceives desert as wooden and objective, the more likely the writer is to mistake judgments of blamelessness for exercises of mercy.

Should a criminal justice system exercise mercy in its real sense (of giving an offender less punishment than he deserves, using a fully nuanced and rich account of desert)?

One can imagine enormous benefits to the exercise of mercy by individuals in their personal
dealings with others. A tendency toward mercy seems an admirable personal trait. However, it
does not follow that mercy would be a desirable practice for a criminal justice system. Our
strong interest in equality of treatment of like offenders and offenses suggests that mercy, if used,
would need to be regularized in its application; punishment ought not depend upon the tendency
toward mercy, or lack thereof, of the particular decision maker in the case at hand. But to
institutionalize mercy is to create an expectation and right to it that may be inconsistent with its
fundamental character of giving a relief or mitigation from punishment to which an offender is
not entitled.

Further, one can imagine serious effects detrimental to the effective operation of the criminal
justice system were mercy to be institutionalized. Classic arguments against it would cite its
effect in undermining deterrence and the incapacitation of dangerous offenders. While some of
us might find these arguments unpersuasive, even the desert advocate would have reason to be
concerned. A "mercy program" would seem to similarly undermine both deotological and
empirical desert, failing to do justice both as moral philosophers and as the community's shared
intuitions of justice would assess it.

On the other hand, what if it were determined – as recent research suggests – that community
intuitions tend to support some exercise of what might be seen as mercy? If one sought to
distribute criminal liability and punishment in a way to maximize the criminal law's moral
credibility, might such evidence of principles of mercy shared by the community suggest that
such principles ought to be instantiated in law?

Moderator and Commentator: Joseph Colquitt, School of Law, University of Alabama

12:00-1:30  Lunch and Keynote Address: “Justice, Community, and Mercy”
Stephen Macedo, Princeton University

Mercy would seem to be a virtue that mitigates the severity of justice. In order to think about the
proper place of mercy in systems of criminal justice we need to situate it relative to related
concepts and the practice of criminal justice. What is the purpose of our system of criminal
justice, properly understood, and how should it work? What place does mercy properly occupy
within that system (ideally described)? How is mercy to be distinguished from related practices
such as forgiveness? In addition, how does the role of mercy change when we move from ideal
description to actual practice?

I will sketch what seems to me to be a plausible view of our system of criminal justice ideally
conceived (and then refine it after the conference). Following James Strahir, it seems to me
reasonable to regard the system of criminal justice as having three broad functions: deterrence,
incapacitation, and correction and restoration (taken together). The first two are fairly obvious,
and I won’t belabor them: society has a right to regard those properly convicted of crimes as a
danger to society who may be confined in order to protect the innocent and deter other potential
wrongdoers. But for how long are we entitled to deprive people of their liberty, and to what
additional purpose?
Those who commit crimes offend against the minimum reasonable mutual expectations of mutual respect. Punishment properly aims to correct their character in order to restore them to a condition of trustworthiness. The length of punishment is proportional to the magnitude of the corrective and restorative project: the more serious the offence the more protracted and onerous the project of correction and reform of character, and restoration of conditions of trustworthiness. Strahir suggests that, of course, the nature of punishment in our system ought to be radically reformed in order to fulfill its ideal function: community service seems most appropriate. At the end of this process we properly forgive those who have willingly submitted to correction and restoration: we recognize that they have paid their debt to society.

Mercy can be understood as a mitigation of sentence for those who have not paid (or not fully paid) their debt to society. Under some circumstances, exacting the full normally justified sentence would be cruel, and therefore we mitigate the sentence. Examples would include cases where someone develops terminal cancer after serving the greater portion of a long sentence; or merciful temporary release for someone who’s parent has become terminally ill. That’s ideal mercy.

What role should mercy play in the world of criminal justice as we know it, as opposed to the (very different!) world of ideal theory?

Moderator and Commentator: Pamela Bucy, School of Law, University of Alabama

1:30-1:45 Break

1:45-3:00 Session III: Actions of Mercy
Alice Ristroph, Seton Hall University, School of Law

Scholars puzzle over mercy, and frequently, characterize it as an extralegal distortion of principles of legal justice. The main thrust of the typical critique is that to extend mercy is, by definition, to depart from what justice and desert require. In this essay, I seek neither to praise nor to bury mercy, but to suggest that the distance between mercy and justice may be much shorter than we have acknowledged. In theorizing mercy, scholars have tended to focus on a human decision maker who chooses or declines to extend mercy. But to understand a merciful judgment, we must understand what comes before and after it. When we trace the action of mercy, we are likely to find that mercy has already operated on those of us ostensibly too good to need it.

In the first part of the essay, I examine mercy in the criminal justice system, with a focus on judgments of clemency or sentencing leniency. A study of such judgments helps us move from the general liberal critique of mercy to two more specific reasons that mercy is mistrusted. First, religion often plays a role in merciful judgments, and such judgments should be situated in the larger debate over the degree to which religious belief may permissibly serve as the basis of
political and legal decisions in a liberal state. Second, mercy can legitimate prejudice, or rather, an apparently merciful judgment is often deeply intertwined with a racial, socioeconomic, or some other illiberal bias. One can put the point in terms of public reason: we doubt whether mercy can ever function as a permissible public reason in a liberal democracy. Perhaps there are good reasons to mistrust mercy. But are we right to trust the legal framework against which mercy seems to operate?

In the second half of the essay, I suggest that mercy may simply make explicit the extralegal considerations that always inform our judgments. We use the language of mercy only after a judgment that wrongdoing has occurred and punishment is deserved. The fact of the earlier condemnation produces the sense that justice and mercy conflict. But, I shall suggest, judgments of desert are in fact often characterized by the same underlying motivations that make mercy troubling.

Moderator and Commentator: Steven H. Hobbs, School of Law, University of Alabama

3:00-3:30 Break

3:30-4:45 Session IV: Mercy, Judgment, and the Epistemology of the “Exception” in the Context of Transitional Justice
Susan H. Williams, Indiana University Maurer School of Law

This paper explores the epistemological assumptions underlying the claim that mercy is outside the bounds of legal judgment in the context of issues of transitional justice. The claim considered here is that mercy is the “exception” in a Schmittian sense: the arbitrary exercise of sovereign power that marks the boundaries of the rule of law. In this understanding, mercy is analogous to the emergency powers exercised by a sovereign that are similarly seen as an exercise of prerogative and as marking the limits of the legal order. This view may appear to have particular relevance in the context of transitional justice, where the boundaries of law and the chaos beyond those boundaries have been a painful part of a nation’s recent experience. Building on the literature on the “exception” in relation to emergency powers, the paper will first outline the elements involved in this claim in relation to mercy in the context of transitional justice.

The paper then draws out and critiques the assumptions on which these elements rest. The assumptions concern the nature of legal judgment, the relationship between sovereignty and democracy, and the conditions under which a legal system must exist and to which it must respond. Legal judgment is imagined as relatively coherent, complete, and determinate; sovereignty is imagined as conceptually (if not historically) independent of democracy; and the conditions to which law is addressed are imagined as a Hobbesian war of all against all. The critique will rely upon the epistemological work of feminist philosophers to suggest that these assumptions are neither inevitable nor gender-neutral. When these issues are approached from the perspective of feminist theory informed by women’s experiences, an alternative set of assumptions becomes apparent. In this alternative, legal judgment is understood as
fundamentally contextual, open-textured, dialogic, and personal; sovereignty is seen as dependent upon and continually reproduced by an ongoing process of democracy; and the underlying condition to which legal judgment is addressed is understood as one including the possibilities for connection, generosity, and trust. This alternative set of assumptions, I will argue, provides a better starting point for assessing the role of mercy in legal judgments.

Finally, the paper will begin the process of working out the implications of this alternative set of assumptions in the application of mercy to crimes committed during civil war or by an earlier regime in a country moving to a more democratic form of government. This application will be informed by my work as a constitutional advisor to the democracy movement in Burma and the questions raised there by the crimes of the current military regime. I will consider some of the institutional mechanisms that would be appropriate vehicles for the exercise of mercy in these settings and some of the limits on that exercise.

Moderator and Commentator: Timothy Hoff, School of Law, University of Alabama

4:45 Reception