Merciful Judgments and Contemporary Society: Legal Problems, Legal Possibilities explores the tension between law’s need for and dependence on merciful judgments and the suspicions that regularly accompany them. Rather than focusing primarily on definitional questions or the long-standing debate about the moral worth and importance of mercy, this book focuses on mercy as a part of, and a problem for, law.

Whether one starts from a worry about rules and discretion, about the attitudes of citizens and their leaders, or about ways to undo the past, merciful judgments challenge and perplex, just as they help sustain, our legal system. Charting these possibilities and problems is the work that this book seeks to do. Here we ask: What challenges do merciful judgments pose for law? When and why do those judgments encourage and nurture legal ingenuity and resourcefulness? When and why do they precipitate crises and breakdowns in legal authority?

This book is a product of the University of Alabama School of Law’s symposia series Law, Knowledge, and Imagination. This series explores the ways law is known and imagined in a diverse array of disciplines, including political science, history, cultural studies, philosophy, and science. In addition, books produced through the Alabama symposium explore various conjunctions of law, knowledge, and imagination as they play out in debates about theory and policy and speak to venerable questions as well as contemporary issues.

Austin Sarat is William Nelson Cromwell Professor of Jurisprudence Political Science at Amherst College and Justice Hugo L. Black Senior Faculty Scholar at the University of Alabama School of Law. He is author or editor of more than seventy books, including The Road to Abolition? The Future of Capital Punishment in the United States; The Killing State: Capital Punishment in Law, Politics, and Culture; When the State Kills: Capital Punishment and the American Condition; The Cultural Lives of Capital Punishment: Comparative Perspectives; Law, Violence, and the Possibility of Justice; Pain, Death, and the Law; Mercy on Trial: What It Means to Stop an Execution; When Law Fails: Making Sense of Miscarriages of Justice; and the two-volume Capital Punishment. Sarat is editor of the journal Law, Culture and the Humanities and Studies in Law, Politics and Society. He is currently writing a book titled Hollywood’s Law: Film, Fatherhood, and the Legal Imagination. His book When Government Breaks the Law: Prosecuting the Bush Administration was recognized as one of the best books of 2010 by the Huffington Post. In May 2008 Providence College awarded Sarat with an honorary degree in recognition of his pioneering work in the development of legal study in the liberal arts and his distinguished scholarship on capital punishment in the United States.
Merciful Judgments and Contemporary Society

LEGAL PROBLEMS, LEGAL POSSIBILITIES

Edited by

Austin Sarat

Amherst College
To Stephanie, with gratitude for her abiding love, and to Ben, for the joy he brings into my life.
Contents

Acknowledgments
Contributors

When Can or Should Legal Judgment Be Merciful?
An Introduction
Austin Sarat
1

1 The Place of Mercy in Legal Discourse
Robert A. Ferguson
19
Commentary on Chapter 1: Response to “The Place of Mercy in Legal Discourse”
James Leonard
83

2 Mercy, Crime Control, and Moral Credibility
Paul H. Robinson
99
Commentary on Chapter 2: Thoughts on Mercy and Self-Examination
William S. Brewbaker III
124

3 Defending a Role for Mercy in a Criminal Justice System
Jim Staihar and Stephen Macedo
138
Commentary on Chapter 3: Commentary on “Defending a Role for Mercy in a Criminal Justice System”
Pamela Bucy Pierson
195
### Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>Actions of Mercy</td>
<td>205</td>
</tr>
<tr>
<td></td>
<td><em>Alice Ristroph</em></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Commentary on Chapter 4: Reflections on “Actions of Mercy”</td>
<td>234</td>
</tr>
<tr>
<td></td>
<td><em>Steven H. Hobbs</em></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>A Feminist View of Mercy, Judgment, and the “Exception” in the Context of Transitional Justice</td>
<td>247</td>
</tr>
<tr>
<td></td>
<td><em>Susan H. Williams</em></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Commentary on Chapter 5: The Interpretative Process: Feminist Reconstructions</td>
<td>291</td>
</tr>
<tr>
<td></td>
<td><em>Timothy Hoff</em></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Index</td>
<td>305</td>
</tr>
</tbody>
</table>
Acknowledgments

This volume is the product of a symposium held at the University of Alabama School of Law on September 24, 2010. I want to thank the colleagues, students, and staff who helped make that such a successful event. I am grateful for the financial support of the University of Alabama Law School Foundation. A special word of thanks to Dean Ken Randall for his unstinting support, for sharing the vision of legal scholarship reflected in these pages, and for making me feel so at home at the law school.
Contributors

William S. Brewbaker III is William Alfred Rose Professor of Law and Associate Dean for Special Projects at the University of Alabama.

Robert A. Ferguson is George Edward Woodberry Professor of Law, Literature, and Criticism at Columbia University.

Steven H. Hobbs is Tom Bevill Chairholder of Law at the University of Alabama.

Timothy Hoff is Gordon Rosen Professor of Law, Emeritus, at the University of Alabama.

James Leonard is James M. Kidd Sr. Professor of Law and Associate Dean for Legal Information Services at the University of Alabama.

Stephen Macedo is Laurance S. Rockefeller Professor of Politics and Director of the University Center for Human Values at Princeton University.

Pamela Bucy Pierson is Bainbridge-Mims Professor of Law at the University of Alabama.

Alice Ristroph is Professor of Law and Eileen Denner Research Scholar at Seton Hall University School of Law.
Contributors

Paul H. Robinson is Colin S. Diver Professor at the University of Pennsylvania School of Law.

Austin Sarat is William Nelson Cromwell Professor of Jurisprudence Political Science at Amherst College and Justice Hugo L. Black Senior Faculty Scholar at the University of Alabama School of Law.

Jim Staihar is Assistant Professor at the Robert H. Smith School of Business at the University of Maryland.

Susan H. Williams is Walter W. Foskett Professor of Law and Director of the Center for Constitutional Democracy at Indiana University’s Maurer School of Law.