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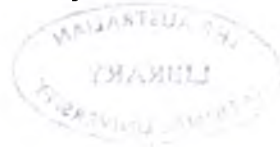
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MERCY

The Concept and its Moral Standing

by



Andrew James Brien

A thesis submitted for the degree of Doctor of Philosophy


of

The Australian National University

March, MCMXCI

Statement

This is to certify that, unless otherwise indicated, this thesis is entirely my own work. It is the result of research carried out by me while a candidate for the degree of Doctor of Philosophy, in The Division of Philosophy and Law, Research School of Social Sciences, at The Australian National University.

A handwritten signature in black ink, appearing to read 'Andrew Brien', followed by a period.

Andrew Brien.

12 March, 1991.

Acknowledgements

In the course of writing this dissertation I have incurred many debts of gratitude that it is now my honour to record. In small and great ways the people I mention here have all contributed to the realisation of this project. I record my thanks to Associate Professor David Londey who first suggested an examination of mercy to me. His suggestion led to my (1986) honours thesis which was an analysis of Seneca's *De Clementia*. The present work grew directly out of that thesis. While writing my honours thesis I discovered that, with the exception of Seneca's essay and apart from short papers, no extended discussion of mercy had occurred. The topic was ripe and inviting of examination, and without Londey's initial suggestion I would not have been so fortunate as to have found a field so fertile yet largely untilled.

I commenced research for this thesis in 1987 at the University of New England. Dr Fred D'Agostino, my supervisor there, and Professor Peter Forrest assisted me in many different ways. I would also like to record my thanks to the Department of Philosophy at the University of New England who, in two successive years, conferred upon me a grant from the Professor D.R Grey Foundation in Philosophy. While at the University of New England I made frequent use of the Inter-Library Loans Unit. I thank the staff there, especially Mrs L. Wiseman and Ms Debora Close, for their painstaking location of sources.

In late 1988 I transferred my studies to the Australian National University. There is most likely no other place in the World that could accommodate and encourage a dissertation such as this. The bulk of the research and all the writing was done there and thus there are many people who must be thanked. My fellow students have always provided a source of inspiration, most notably amongst them, Dawn Partridge, Robin Davies, and Joe Mintoff. I would also like to thank the following members of staff who discussed ideas with me: Bob Goodin, Michael Tooley, and Frank Jackson. As well, Kathinka Evers, Richard Hall, Roy Perrett and especially Graham Oddie (all visitors to the Department) all at one time or another discussed with me issues raised in this thesis. I should also like to thank Loraine Hugh for typing a large portion of the dissertation so efficiently and graciously; for proof reading and suggestions, I am pleased to thank Dawn Partridge, Debbie Trew and

Andrew Gleeson; in the Menzies Library, Ms M.A. Jones of the Inter-Library Loans Unit, tracked down many hard-to-find sources. I owe a special thanks to Dennis and Debbie Trew for all that they did when I was preparing the submission copy of the dissertation; and Charles Bako for last minute assistance.

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I would also like to thank my parents, but can only now thank my mother, for the various forms of assistance they gave in the inevitable moments of family crisis. As well, I want to thank my aunt and uncle, Mrs G. and Mr M. Coy who provided at various times much appreciated assistance.

Finally, and most importantly, I want to thank my family. They have had to contend with a father and husband distracted by a seemingly interminable project. Through being who they are they have provided the encouragement to continue. They give content and meaning to the personal and particular values that I have attempted to understand philosophically. Without them this project while philosophically interesting would have been meaningless.

Abstract

Despite its high moral evaluation in both secular and religious worlds, philosophers have surprisingly paid relatively little attention to mercy. The discussion that has developed has produced an image of mercy that is to say the least, equivocal. Moreover, the contemporary discussion rests upon a number of problems that have a long and venerable philosophical pedigree. Unfortunately, these problems have neither been clearly identified nor the issues they raise clearly set out. Further, mercy has always been examined in relation to justice, in a broad retributive and deontological context. Mercy's relationship to consequentialism and its moral standing have received next to no attention. The aim of this dissertation is, through an analysis of the concept and an examination of its relationship to other moral entities, to remedy these omissions.

In Chapter One I motivate the project. The problems are introduced and solutions offered by others are examined. As well, I set out the approach that will be followed in the remainder of the thesis.

Chapter Two consists of an extended analysis of the concept of mercy. I conclude that mercy is both a particular sort of action and a property of agents. As a property of agents, it is a sensitivity to the great need of another person that produces a responsive attitude of concern and care for their welfare. As an action, it is a response to the great need that another agent possesses. In both cases this arises from the perception of the beneficiary's powerlessness and vulnerability to the acts or omissions of the person holding the power. Thus, mercy rests upon a number of beliefs that agents have, as well as specific relationships between, and properties that, the actors within a merciful context possess. Finally, I distinguish mercy from some of its near relatives.

In Chapter Three I examine mercy's relationship to deontology, through an examination of three types of justice: retributive, comparative and consensual. I conclude that, although mercy is sometimes incompatible with some forms of justice, this poses neither conceptual nor moral problems. More importantly, I conclude that mercy is compatible with deontology.

Chapter Four is concerned with an examination of mercy's relationship to consequentialism. I conclude that mercy is compatible with consequentialism. If mercy is to achieve wide compatibility with this outlook, however, certain extensive modifications must be made to the traditional account of consequentialism, modifications so radical that many consequentialists would find them unacceptable.

Chapter Five contains an account of how deontology and consequentialism can accommodate mercy when it is supererogatory. As well, I examine the apparently incoherent claim that mercy is both required, as shown by the arguments in Chapters Three and Four, while also being in some (attenuated) sense supererogatory, a gift and optional. I conclude that, although mercy is often morally required, it is sometimes still supererogatory, a gift and morally optional.

In Chapter Six I move from the theoretical examination of mercy to an examination of it within a practical context. I examine mercy within its most typical practical context — the legal justice system. I recast the problems examined in Chapter Three within this practical context. I conclude that there are no barriers, in principle or in practice, to incorporating mercy into a practical context, of which the legal system is a paradigm example. Thus, it is a permissible act-option for, and property of, institutional agents. I also set out the notion of mercy within legal justice and explain how it is possible and justified.

With Chapter Six I conclude the negative case for mercy. The general conclusion of Chapters Three to Six is that mercy is a coherent concept and that the difficulties that have been traditionally raised against it can be overcome. Therefore mercy is capable of being part of our moral pantheon.

Chapter Seven contains the positive case for mercy. After examining some further problems I set out mercy's moral standing. I argue for its adoption and the cultivation of an attitude of mercy as a part of what it is to live a good life. I suggest that the moral standing of mercy rests upon the importance placed upon relationships between people and our valuation of traits of character, in particular those traits that dispose a person to care for and be concerned with the well-being of other people who are in need. As such, it is a disposition to be cultivated and an action to be practised in today's world.

In Chapter Eight I explain briefly why the problems discussed in the foregoing chapters arise. Then I conclude the thesis with a short review of the country traversed in the preceding seven chapters.

Dedication

For

Jane, Elizabeth, and Isaac.

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Abbreviations

A. Journals

<i>AJP</i>	Australasian Journal of Philosophy
<i>APQ (MS)</i>	American Philosophical Quarterly, (Monograph Series)
<i>APQ</i>	American Philosophical Quarterly
<i>CJP</i>	Canadian Journal of Philosophy
<i>HLJ</i>	Harvard Law Journal
<i>JHI</i>	Journal of the History of Ideas
<i>JP</i>	Journal of Philosophy
<i>JSP</i>	Journal of Social Philosophy
<i>JVI</i>	Journal of Value Inquiry
<i>LP</i>	Law and Philosophy
<i>PAS</i>	Proceedings of the Aristotelian Society
<i>PASS</i>	Proceedings of the Aristotelian Society, Supplementary Volume
<i>PPA</i>	Philosophy and Public Affairs
<i>PPR</i>	Philosophy and Phenomenological Research
<i>PQ</i>	Philosophical Quarterly
<i>PR</i>	Philosophical Review
<i>SJP</i>	Southern Journal of Philosophy
<i>SPP</i>	Social Philosophy and Policy
<i>YLJ</i>	Yale Law Journal

B. Books, etc.

<i>Blackstone (Commentaries)</i>	W. Blackstone, <i>Commentaries On The Laws of England</i> ,
<i>Gowers' Report</i>	E. Gowers, (Chairman), <i>Report of the Royal Commission on Capital Punishment, 1949-1953</i> , Command Paper 8932. HMSO, London, 1953, reprinted, 1973.
<i>SVF</i>	Stoicorum Veterum Fragmenta
<i>Nic. Eth.</i>	Nicomachean Ethics

Preface

I have undertaken, Nero Caesar, to write on the subject of mercy, in order to serve in a way the purpose of a mirror, and thus reveal you to yourself as one destined to attain the greatest of all pleasures. For though the true profit of virtuous deeds lies in the doing, and there is no fitting reward apart from the virtues themselves, still it is a pleasure to subject a good conscience to a round of inspection...(Seneca, *De Clementia*, Bk.I.1.1)

Over the past quarter of a century the concept of mercy, its justification, the relationship between mercy and other moral concepts, as well as mercy's moral standing, has been the subject of an ongoing debate. A cursory glance at the literature, which consists of little more than two dozen articles, reveals a veritable confusion of images: some writers believe mercy to be basically supererogatory, optional,¹ a gift² or in some sense gratuitous, freely given, and a matter of grace.³ Others believe that mercy can be deserved, and when justified is in some sense required,⁴ or obligatory⁵ that it is closely related to, if not identical with some aspect of, justice;⁶ while others think that mercy is always unjustified.⁷ Some confine mercy to the realm of punishment, claiming that 'there is something odd and disturbing about being merciful to someone who has done nothing wrong'.⁸ Others claim that mercy can be exercised in contexts other than purely punitive ones, such as to 'those who are powerless to help themselves' like 'the widow, the fatherless,

1. E.g., G.E.M. Anscombe, 'Comment on , "Practical Reason and the Logic of Requirement"', by R. Chisholm', in S. Korner, (ed.), *Practical Reason*, Oxford, 1974, pp.17-21 at p.21; J. Rawls, *A Theory of Justice*, Oxford, 1976, pp.109, 117; H.S. Hestevold, 'Disjunctive Desert', *APQ*, (20:1983), pp.357-363, esp.357, and 'Justice to Mercy' *PPR*, (46:1985), pp.281-291, esp.281-282; J. Murphy, 'Mercy and Legal Justice' as Chapter 5 in J. Murphy and J. Hampton, *Mercy and Forgiveness*, Cambridge, 1988, p.181.

2. E.g., Murphy, *op. cit.*, pp.166, 181.

3. E.g., H.R.T. Roberts, 'Mercy', *Philosophy*, (46:1971), pp.352-353 at p.353; P. Twambley, 'Mercy and Forgiveness', *Analysis*, (36:1975-1976), pp.84-90, at p.87.

4. E.g., A. Smart, 'Mercy', *Philosophy*, (43:1968), pp.345-359, at p.353; C. Card, 'On Mercy', *PR*, (81:1972), pp.182-207, esp.192.

5. E.g., J. Sterba, 'Can A Person Deserve Mercy?' *JSP*, (9-10:1978-79), pp.11-14, at p.13.

6. E.g., Card, *op. cit.*, p.182; Hestevold (1983) *op. cit.*, *passim*.

7. E.g., Roberts, *op. cit.*, p.353.

8. E.g., Smart, *op. cit.*, p.354.

and the destitute'.⁹ Some ally mercy with charity,¹⁰ others with benevolence, love or compassion,¹¹ while others assume it to be some sort of morally valuable action, and an independent virtue.¹²

This diversity of opinion merely reflects the conflicting images and the diverse contexts of mercy that we discover when our pre-theoretical ideas are examined. For example, non-philosophers believe that mercy ought to be given and that it is a moral failing not to be merciful, such as in the case of a person convicted under a harsh and inflexible law, or who committed some crime in extreme circumstances. On other occasions, they believe quite the opposite: namely, that it is optional, supererogatory and a gift, such as when the winner of a hard fought duel declines to kill his adversary. Moreover, just about everyone, it seems, is in someone else's mercy: debtors are at the mercy of their bankers, offenders are at the mercy of judges, juries, Attorney's-General and Governors, and students at the mercy of their examiners. There are mercy flights to save a person's life and mercy killings to end a particularly miserable one. The vanquished are at the mercy of the victor, the yachtsman at the mercy of the sea, and the general public, if one believes the popular press, are at the mercy of greedy entrepreneurs and radical unionists. The list could go on.

Further, it seems that mercy sits awkwardly with important moral notions, such as justice, supererogation, desert and consequentialism. It appears to raise difficult questions about the consistency of our values and our capacity to be rational moral agents and compassionate ones as well. J.R. Lucas put some of the problems this way:

For the retributivist, mercy is logically possible but morally wrong. A man's crime calls for a certain penalty: we may choose not to inflict it, but if so, we are failing to do what is required...For the utilitarian, mercy is not even logically possible except as a foolish failure to do what is best for the criminal and for society as a whole....If ever it could be right to let somebody off, then it is mandatory to do so and there is no argument for any heavier penalty at all.¹³

9. J. Kleinig, 'Mercy and Justice', *Philosophy*, (44:1969), pp.341-342, at p.341, and *Punishment and Desert*, The Hague, 1973, pp.87-88.

10. E.g., Card, *op. cit.*, p.198.

11. E.g., Kleinig (1969), *op. cit.* p.341; Murphy, *op. cit.*, p.166.

12. E.g., Murphy, *loc. cit.*

13. 'Or Else', in J Rachels, (ed.), *Moral Problems*, New York, 1971, pp.222-237, at p.223.

While James Sterba set two related but different problems out thus:

If we assume that a person can deserve mercy and that justice is giving people what they deserve then mercy would be required by justice. But then, what are we to make of the admonition to temper justice with mercy? On the other hand, if mercy is not something that a person can deserve and men have no obligation or duty to show mercy then acts of mercy would at least be supererogatory. But then it would not be possible to condemn some one as merciless.¹⁴

Mercy has a central place in our culture. It is found centre stage in Christianity;¹⁵ the concept was examined by some of the earliest philosophers;¹⁶ it enjoys a long and an intimate association with secular institutions such as the law¹⁷ and the crown;¹⁸ it has long and venerable tradition in English literature.¹⁹ As well, mercy's paradigm contexts — justice and punishment — have suffered in recent years intense examination. It has (generally) a high moral evaluation amongst ordinary moral agents. Thus, while the quality of mercy may not be 'strained, its moral standing and nature are certainly elusive. It is surprising therefore, that mercy, compared to related notions in philosophy, has not been much examined,²⁰ though the bonds between members of communities have increasingly been the object of attention.²¹

14. J. Sterba, *op. cit.*, p.11.

15. The Bible can be viewed as a chronicle extolling the virtue and practice of mercy. (Cf K.D. Moore, *Pardons: Justice and Mercy and the Public Interest*, New York, 1989, who makes a similar point.) God's response to the fratricide Cain was that he should be banished and dwell in the land of Nod, (Gen. 4:16). Citations extolling mercy are numerous, of which this is typical: '...and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God', (Mic. 6:8).

16. Eg., Seneca, *De Clementia*, *op. cit.*

17. *Vide*, 27 Hen.VIII. Cap.24 (1535): An Act Reconstituting Liberties in the Crown; F. Bresler, *Reprieve: A Study Of A System*, London, 1965; C.H. Rolph, *The Queen's Pardon*, London, 1978. For the existence of the prerogative of mercy in ancient times, see, G.R. Driver, and J.C. Miles, *The Babylonian Laws*, Oxford, 1955, Vol. I, pp.281-281 and 348-349; R.J. Bonner and G. Smith, *The Administration of Justice from Homer to Aristotle*, New York, 1970, Vol. 2, pp.353ff. For a general history, *vide*, A. Brien, 'Mercy: The History of an Idea', unpublished paper, Division of Philosophy and Law, Research School of Social Sciences, Australian National University, Canberra, 1990.

18. The English monarch, swears in the coronation oath to 'cause law and justice, in mercy, to be executed' in all their judgements'. Blackstone, *Commentaries*, i.6.

19. Shakespeare, *The Merchant of Venice*, and other of his plays: predating Shakespeare is *Piers Ploughman*.

20. There are two extended discussions that I know of. The first is Seneca's, *De Clementia*, *op. cit.* Although now little studied, *De Clementia* has at times been highly respected, and, a brief reading shows that this is rightly so. (For example, Calvin's first work was an edition of *De Clementia* and the essay inspired Portia's eloquent defence of mercy in the *Merchant of Venice*.) *Vide*, Seneca: *Letters From a Stoic*, translated by Robin Campbell, Harmondsworth, 1985, pp.24-5. The second, Carla Johnson, *Mercy: Its Nature and Moral Status*, (Ph.D Thesis, University of Minnesota, 1988).

21. A few examples, *vide*, A.C. Baier, 'Trust and Antitrust', *Ethics*, (96:1986), pp. 231-260; L.A. Blum, *Friendship, Altruism, and Morality*, London, 1980; R.S. Downie, 'Forgiveness', *PQ*,

Even given mercy's high evaluation, it seems rarely practised and its exercise not actively encouraged. We are surrounded in our day to day life by a veritable orgy of revenge, vendetta, domination, violence and retribution. The streets of our towns and cities, and the belief systems of ordinary people and sadly, philosophers, are filled with these ideas. These practices are widely accepted, and the little humanity there is in our world is tempered by these feelings. Few wonder whether such ways of life are legitimate; indeed increasing numbers of philosophers argue that they can be defended.²² The temper of the times, socially and philosophically, is that retribution, and its near relatives are morally acceptable, and from the point of view of institutional theory, justified and necessary. An examination of mercy, and its relations, forgiveness, compromise, reconciliation and so on, is needed to present the other side of the story, the other moral option.

As Aristotle observed, in one of his most misunderstood remarks, 'human beings are by nature political animals',²³ meaning only that they live in communities, in groups, and that they interact with each other. Understanding how they do interact, and more importantly, how they ought to interact, is the job of the social and political philosopher. We need not only to justify the institutions and ideas that influence our lives but understand as well, the ways in which they interact and fit together — if indeed they do — so as to allow each person to create, within known limits, their own version of the good life. This is all the more important given the enormous changes that have occurred and will continue to occur, in personal relationships, and indeed in the nature of the community itself, in advanced industrial societies. To put this bluntly,

(15:1965), pp.128-134; and *Roles and Values*, London, 1971; A. Oldenquist, 'Loyalties', *JP*, (79:1982), pp.173-193; P. Pettit, 'The Paradox of Loyalty', *APQ*, (25:1988), pp.163-171; R. Brown, *Analyzing Love*, Cambridge, 1987.

22. E.g., A. Oldenquist, 'The Case for Revenge', *Public Interest*, (82:1986), pp.72-80; J. Murphy, 'Hatred: A Qualified Defence', as Chapter 3 in, Murphy and Hampton, *op. cit.*, pp.88-110. A policy of grounding the criminal law on retributive justice and just deserts has been explicitly proposed in Commonwealth jurisdictions. *Vide*, Law Reform Commission – Australia, *Report No. 44, Sentencing*, Australian Government Publishing Service, Canberra, 1988, §26-§29. In the United States this trend is even more marked – especially in regard to Capital Punishment. Leigh Dingerson, Director, National Coalition to Abolish the Death Penalty, remarked that, 'Deterrence was the argument [for the death penalty] in the early 1980's. Now that argument has been refuted by any number of studies, and what remains in this country is a sense that "they deserve it." Retribution is the argument of the nineties.' 'Playing for Time', Mark MacNamara, *Vanity Fair*, November 1990, p.88.

23. *Politics*, I.2.9, (1253a).

no one can doubt the importance of the role of benevolence, care, solicitude, and love in human life, but there has been remarkably little attention paid to them, compared to other notions in social, political and moral philosophy. Therefore, an examination of mercy is indicated so as to redress some part of this neglect.

It has not always been the case that philosophy has neglected mercy or its near relatives. In fact, worries about mercy have a long and distinguished pedigree. Aristotle, perhaps, had in mind a worry when, in a well known section of the *Nicomachean Ethics*, he gives an account of how the departure from a rule, justified within a system of justice, can itself be justified²⁴ — a problem that is found frequently in the contemporary discussion of mercy. Seneca, writing c. A.D. 55, in *De Clementia* was concerned with analyzing legal mercy, justifying it, distinguishing it from pardon and pity and recommending it to an absolute ruler — the Roman Emperor Nero. Moreover, Seneca's essay was clearly part of a Stoic tradition that examined notions similar and related to mercy. For example, Chrysippus wrote a book entitled *Concerning Acts of Kindness* and his predecessor, Cleanthes, wrote a treatise on the same subject.²⁵ Thus, interest in these sorts of actions can be traced almost to the very beginning of philosophy. Closer to our own times, Saint Anselm examined the apparent incoherence of ascribing Divine mercy and Divine punishment and justice to God.²⁶

This dissertation is an attempt to remedy the deficiencies in the discussion. I aim to discern some order in this welter of phenomena that surrounds mercy. I shall set out an account of mercy, its moral standing and role in the moral life a virtuous person, as well as our social institutions. Along the way we will examine, sometimes all too briefly, some of the most topical problems in moral philosophy: the importance of the virtues, feminist moral theory, the role of universalism, impartiality, supererogation, the idea that there could be a limit to the

24. Aristotle, *Nic. Eth.* 1137b 5-30.

25. *SVF.* 2.1082 and 1.579, 1.580. Cf. M.E. Reesor, *The Political Theory of the Old and Middle Stoa*, New York, 1951, pp.21-22. Seneca's *De Clementia* also falls within that genre concerned with giving advice to absolute monarchs, *peri basileias*, in much the same way as Machiavelli's *The Prince* a millennium later. Cf. M.T. Griffin, *Seneca: A Philosopher in Politics*, Oxford, 1976, pp.148-149.

26. St Anselm, *Proslogion*, Chapters 9 - 11, *The Prayers and Meditations of St Anselm*, (translated by Sister Benedicta Ward), Harmondsworth, 1979, pp. 249-253.

actions we can be enjoined to perform, and the idea that sometimes less than the best can be morally good enough.

I do not pretend that I have told the whole story, or even a large part of it, or written the last word. The aim was rather more modest: to define the problems and suggest some answers.

The Division of Philosophy and Law,
Research School of Social Sciences,
Institute of Advanced Studies,
Australian National University,
Canberra,
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