

# The Possibility of Preemptive Forgiving

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This essay defends the possibility of preemptively forgiving. That is, I defend the claim that one can forgive an action before the action has taken place. Forgiving need not be retrospective. I suspect that some—perhaps many—readers will initially balk at this idea. But I hope to reveal it to be a coherent moral possibility.

Of course, it is hardly controversial that, in some circumstances, people can prospectively alter the normative status of another person's action, relieving that person of being blamed for the action. Granting permission or consent can, in the right circumstances, make another person's action permissible where it otherwise would have been impermissible. So there is nothing foreign about a person releasing another prospectively.

My claim, however, is that, before an action is performed, it may be possible to forgive the action in question without thereby granting permission or consent. In other words, I will argue that, in at least some circumstances, one can do something before another person acts that,

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1 in some sense, releases that person from one' s censure without, at the  
2 same time, releasing her from the duty that she owes.

3 The phenomenon of preemptive forgiving is worth thinking about  
4 for at least two reasons. First, there are rich philosophical questions about  
5 the nature of forgiveness. But the philosophical discussion has almost  
6 entirely assumed that forgiving occurs exclusively in response to past  
7 actions of others. If preemptive forgiving is a real phenomenon, attend-  
8 ing to it may alter how we think about forgiveness. There is also a second  
9 reason for thinking about preemptive forgiving, unrelated to the litera-  
10 ture on forgiveness. The possibility of preemptively forgiving illuminates  
11 a gap between directed duties and accountability. Preemptive forgiving  
12 suggests that one can waive one's complaint—one's standing to hold  
13 another accountable— without necessarily waiving the relevant duties  
14 that one is owed. In other words, preemptive forgiving sheds light on  
15 the nature of certain normative concepts, which matters for everything  
16 from broad philosophical accounts of interpersonal morality to concrete  
17 doctrinal questions in the law.

18 The essay proceeds in three parts. Part 1 examines what I take to be  
19 the two basic arguments against the possibility of preemptively forgiving.  
20 One argument focuses on the connection between forgiving and grant-  
21 ing permission, the other on the connection between forgiving and  
22 emotion. I begin with in-depth explication of these arguments because,  
23 if preemptive forgiving is possible, then much can be learned from turn-  
24 ing these arguments on their heads. As they say, one person' s *modus ponens*  
25 is another person' s *modus tollens*.

26 Part 2 consists of my argument that preemptive forgiving is poss-  
27 ible. I offer a series of examples and arguments to suggest that preemptive  
28 forgiving can occur without collapsing into a grant of permission. I hope  
29 to suggest that preemptive forgiving can serve important purposes. I then  
30 reject the reply that these apparent instances of preemptive forgiving are  
31 actually instances of promising to forgive in the future.

32 Part 3 sketches, roughly, some of the implications that preemptive  
33 forgiving may hold both for philosophical understanding of forgiving  
34 and relational normativity as well as concrete practical issues like liability  
35 waivers.

### 36 1. Two Arguments against Preemptive Forgiving

37 Forgiving typically happens ex post. Philosophical accounts of forgive-  
38 ness often assume that this is a necessary feature of forgiving— that for-  
39  
40

## *The Possibility of Preemptive Forgiving*

giving can occur only after the act that is forgiven. The following statement from Horsburgh (1974, 269) is representative: “There can be no question of forgiveness unless an injury has been inflicted on somebody by a moral agent. There must be something to forgive.” But this explanation is insufficient unless it is coupled with some reason for thinking that future actions cannot be part of our metaphysics. Certainly there must be something to forgive, but why can’t the something be something that hasn’t happened yet?

Ultimately, I mean to argue that we can forgive an action that is yet to be performed. The main argument for this claim, however, does not come until the next section of the essay. I forgive (now) the impatient reader if she wishes (in the future) to skip ahead to that portion of the essay. Before turning to examples of preemptive forgiving, however, I want to discuss the arguments for the view that forgiving is necessarily retrospective.

### *1.1. Forgiving and Permission*

There is an argument— what I will call the *First Argument against Preemptive Forgiving* — that, if pressed, I believe many philosophers would be inclined to endorse. David Londey (1986, 4) offers a particularly nice articulation of the basic idea:

Forgiving someone for something is quite a complex act, as can be seen from the fact that the utterance “I forgive you for doing A” only has its full intended illocutionary force if a number of conditions are satisfied. In the first place, it must be the case that you have already done A—I cannot forgive you for what you have not done (although I can either predict that I shall forgive you if you do A, or give you permission to do it, thus removing any question of having to forgive you for it in the future).

The thought here is that forgiving must occur *ex post*. Anything beforehand would be something other than forgiveness— perhaps permission or prediction.

The argument purports to stem from the nature of our moral concepts. The claim is not merely that, as a contingent and empirical matter, acts of forgiving come after the wrongful acts that they reference. Rather, it is the conceptual claim that an act cannot be an act of forgiving if it precedes the wrongful act that it references.

Why think that forgiving is necessarily retrospective? The thought— exemplified by Londey— is that forgiving would cease to be forgiving if it occurred beforehand. Prospective forgiving is impossible

because that conceptual space is already occupied by other forms of interpersonal address. In particular, I will focus on the claim that prospective forgiving would collapse into granting permission. The thought is that forgiving operates as a form of release, but releasing someone beforehand would constitute granting permission, not forgiveness. Pre-emptive forgiving is supplanted by granting permission.<sup>1</sup>

The connection between granting permission and forgiving is natural. Both, it seems, can be performatives.<sup>2</sup> Both involve changing one's relationship with another by virtue of some expression. When I say, "I grant you my permission to *f*," under the proper conditions, that utterance changes what is permissible for you to do. That is, saying it makes the world different; it is not merely reportive. Similarly, when I say, "I forgive you for *f*ing," under the proper conditions, that utterance makes things different between us. It alters our moral relationship.

Not only are forgiving and granting permission both performatives; they both appear to effect somewhat similar alterations in the moral landscape. Both, for example, can sometimes be accomplished by saying, "It's okay." Granting permission and granting forgiveness share an element of moral release. Permission can be viewed as release from the perspective of either the recipient or the speaker. From the recipient's perspective, permission operates to release one from a duty. Of course, for permission to release one from a duty, the duty in question must be owed *to another* in a manner that correlates with a Hohfeldian claim-right. So, from the speaker's perspective, permission operates to waive one's right or claim. For example, if I grant you permission to draw water from my well, then I have waived my right to exclude you from the well and you have been released from your duty not to take water from the well.

Forgiving can also be viewed as a release. Again, this can be seen from the perspective of either the recipient or the speaker. From the recipient's perspective, forgiveness operates as a release from a moral debt. One is released from being any longer held to account morally for a

1. For an applied example of this argument, consider the following discussion of presidential pardons: "A pardon can only forgive past actions. A president cannot use the pardon power to preapprove an offense, because that is suspension of the law and not a pardon. This is just inherent in the word 'pardon', and it limits the president even though the Pardon Clause says nothing more explicit about it" (Kalt 2012, 44).

2. Austin (1962) never lists "I forgive" as a performative, though he does countenance similar utterances like "I accept your apology" and "I pardon." The claim that forgiving can be a performative has been defended by Pettigrove (2012), Norlock (2009), Pettigrove (2004), and Haber (1991).

## *The Possibility of Preemptive Forgiving*

wrong. Symmetrically, from the speaker's perspective, forgiving involves giving up some form of holding the other person accountable. Famously, forgiving can be characterized as, in some fashion, relinquishing one's resentment.<sup>3</sup> As Pamela Hieronymi (2001) has pointed out, resentment here should not be understood as simply a bare negative emotion from which we try to rid ourselves. Rather, resentment is a judgment-sensitive response to a wrong; it is a complaint or a protest against one's treatment.<sup>4</sup> To forgive, then, is to give up or forsake this protest. For example, if you have injured me by cutting down my apple tree but I forgive you, then I have given up resenting you and you are released from bearing such censure.

So forgiving, like permission, dissolves some moral connective tissue.<sup>5</sup> But, even granting this similarity, why think that forgiving would *collapse into* permission if it occurred beforehand? Why suppose that preemptive forgiving would offer *the same thing* as permission?

The answer, I think, reflects a common assumption about the relationship among our ethical concepts. From what has been said thus far, forgiving and permission involve different moral releases: granting permission waives a claim-right and releases someone from a duty, whereas forgiving waives a complaint and releases someone from a moral debt. It is natural, however, to view these concepts as deeply connected. According to this view—which a number of moral philosophers have recently defended—rights and directed duties are bound up with complaints and reactive attitudes. To have a right or a claim *ex ante* is to be one who would

3. Something roughly like this idea is found in Bishop Butler's (1726) *Fifteen Sermons*. The rich scholarly literature interpreting Butler can be read as largely a debate over what, precisely, must be given up in forgiveness. On a standard reading of Butler, forgiving involves giving up one's resentment and revenge. But this may be too strong. Garcia (2011) argues that Butler believes only that forgiveness involves giving up revenge and malice, not resentment. Westlund (2009) suggests that Butler requires only moderating one's resentment, such that it mirrors the indignation of a neutral observer. Regardless, the point of consensus is that forgiving involves giving up some form of holding another accountable. Strawson (1962, 6) accepted some version of this idea, writing, "To ask to be forgiven is in part to acknowledge that the attitude displayed in our actions was such as might properly be resented and in part to repudiate that attitude for the future (or at least, for the immediate future); and to forgive is to accept the repudiation and to forswear the resentment."

4. One challenge for Hieronymi's account is to explain who it is that has the standing to resent and thus to forgive. See Zaragoza 2012. I believe that any adequate account of forgiving should face precisely this challenge.

5. See Owens 2012.

1 have a complaint *ex post*.<sup>6</sup> To owe a duty to someone is to be liable to  
 2 wronging that person if one fails.<sup>7</sup> In short, rights, duties, complaints, and  
 3 resentment are all elements of the same ultimate moral connection  
 4 between two persons.

5 If that's correct, then forgiving and permission do start to look like  
 6 conceptual siblings. Permission waives a claim and forgiving waives a  
 7 complaint, but each ultimately dissolves the same underlying connection  
 8 between agents. The only difference seems to be the temporal context.<sup>8</sup>  
 9 This idea— that permitting constitutes the prospective analogue of  
 10 forgiving—is sometimes explicit. For example, Piers Benn (1996, 380)  
 11 argues that one can forgive only on one's own behalf, “much as I can  
 12 offer someone my own services, but not the services of another without  
 13 first gaining their permission.” Or, to take a less high-brow example, this  
 14 parallel seems to be presupposed by the slogan, “it is easier to ask  
 15 for forgiveness than permission.”<sup>9</sup> Either way, the idea is that permission  
 16 and forgiveness are different manifestations of what is ultimately the  
 17 same normative shift. A similar assumption is often found in legal argu-  
 18 ment too. For example, in patent cases, courts regularly assert that a non-  
 19 exclusive license (that is, granting permission) is equivalent to releasing  
 20 liability (that is, waiving a complaint).<sup>10</sup>

21 These reflections might give the impression that, far from being  
 22 impossible, preemptive forgiving is possible and familiar—we just call it  
 23 “granting permission.” The final step in the argument involves showing  
 24 that granting permission cannot count as a form of forgiving. The reason  
 25 is that forgiving does not make an action permissible. To forgive an action  
 26 is not to say that what was done was not wrong or not blameworthy.<sup>11</sup>

28  
 29 6. See, for example, Darwall 2009, 4: “If [someone stepping on your foot] accepts that  
 30 you can demand that he move his foot, he must also accept that you will have grounds  
 31 for complaint or some other form of accountability-seeking response if he doesn't.”

32 7. See, for example, Thompson 2004.

33 8. This thought might be bolstered by pointing out that, analogously, granting  
 34 permission after the fact is impossible because all that one can do is forgive. See Quynh  
 35 Truong v. Allstate Ins. Co., 147 N.M. 583, 599 (N.M. 2010): “Allstate essentially argues for a  
 36 retroactive grant of permission. This approach is contrary to the plain meaning of ‘per-  
 37 mitted’ and ignores the important distinctions between obtaining permission and seek-  
 38 ing forgiveness.”

39 9. Widely attributed to Rear Admiral Grace Hopper.

40 10. See *TransCore, LP v. Elec. Transaction Consultants Corp.*, 563 F.3d 1271, 1276  
 (Fed. Cir. 2009), stating that “a non-exclusive patent license is equivalent to a covenant not  
 to sue” and collecting citations for this proposition.

11. This fact is part of what Kolnai (1974) labeled “The Paradox of Forgiveness.”

## *The Possibility of Preemptive Forgiving*

Unlike condoning, which implies that whatever putative wrong has been committed was not objectionable, or excusing, which implies that the actor was not blameworthy for the wrongful act committed, forgiving must retain the view that the action in question was impermissible and blameworthy. "It's okay," in the context of forgiving, does not mean, "It was okay." As Seana Shiffrin (2007, 729) puts it: "In response to another's wrong, we have the elective power to forgive, but forgiveness involves, among other things, recognition of a past wrong, not a power to make it the case that a wrong was never a wrong." So, granting permission cannot be forgiving's preemptive form.

This is the First Argument in a nutshell: If it were possible, preemptive forgiving would essentially amount to granting permission, but then it would no longer be a form of forgiving at all. For precision, here is a more formal articulation:

- (1) If preemptive forgiving were possible, then it would involve  $X$  forgiving  $Y$  for  $f$ ing in the future.
- (2) A person forgives another iff he or she gives up his other standing to complain against the person.
- (3) Thus, if preemptive forgiving were possible, then it would involve  $X$  giving up the standing to complain against  $Y$  for  $f$ ing in the future. [From 1 and 2]
- (4)  $X$  has a claim/right against  $Y$  not to  $f$  only if  $X$  would have the standing to complain against  $Y$  if  $Y$   $f$ s.
- (5) Thus, if preemptive forgiving were possible, then it would involve  $X$  giving up the claim/right that  $Y$  not  $f$ . [From 3 and 4]
- (6) A person grants permission to another to  $f$  iff he or she gives up his or her claim/right that that person not  $f$ .
- (7) Thus, if preemptive forgiving were possible, it would involve  $X$  granting permission to  $Y$  to  $f$ . [From 5 and 6]
- (8) Granting permission makes an instance of  $f$ ing permissible.
- (9) Forgiving someone for  $f$ ing does not make an instance of  $f$ ing permissible.
- (10) Therefore, preemptive forgiving is not possible. [From 7, 8, and 9]

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The basic puzzle is that if an actor is culpable for wrongdoing, then forgiving may appear unduly condoning; but if an actor is not (or is no longer) culpable, then forgiving may appear inapt. As Kolnai (1974, 97 - 98) puts it, "[Either] forgiveness is objectionable and ungenuine inasmuch as there is no reason to forgive ... [or] at the other end of its spectrum, forgiveness seem to collapse into mere redundancy, or the mere registering of moral value in the place of moral disvalue."



The argument turns on important assumptions about the nature of forgiving (2, 9) and the connection between moral concepts (4). If, as I shall argue, this argument is incorrect, then that may shed new light on these assumptions.

### 1.2. *Forgiving and Emotion*

Before turning to the argument for preemptive forgiving, there is another argument worth discussing. It starts from a different perspective on forgiveness. The First Argument relies on the idea that forgiving, like granting permission, can be a performative. But not everyone accepts that idea. If forgiving is an explicit performative, then the act of forgiving consists in saying "I forgive you." Rather, the objection goes, true forgiving consists in a change of heart.<sup>12</sup> As Jeffrie Murphy puts it, "Forgiveness is primarily a matter of changing how one feels with respect to a person who has done one injury" (Murphy and Hampton 1988, 167). Forgiving, then, is not a speech act at all but rather an attitudinal shift. Govier and Verwoerd (2002, 97) offer a nice articulation of this position:

"I forgive you" is not a performative in the way that "I promise you" is. If a woman says "I forgive you" to her husband, who has confessed an affair, but then continues to remind him of it, appeal to his unfaithfulness to score points in their domestic battles, and nag him about his comings and goings, all this goes to show that regardless of what she said, she has not forgiven him. The emotional and attitudinal shifts involved in forgiveness occur over time and, in a case of serious wrongdoing, will typically involve considerable reflection and struggle.

There is a shift in attitudes that this woman has not yet adopted. And we might naturally describe this by saying that she has not "truly" forgiven her husband. One might conclude, as Govier and Verwoerd have, that forgiving cannot be accomplished by utterance.

The idea that forgiving requires an attitudinal shift is the basis for the *Second Argument against Preemptive Forgiving*. It runs as follows: Forgiving requires relinquishing negative reactive attitudes; one acquires negative reactive attitudes only after an action is performed; therefore, forgiving can occur only after an action is performed. In other words,

12. See Downie 1965, 131: "It is not satisfactory to say that the mere uttering of the words 'I forgive you' constitutes forgiveness. The uttering of these words or their equivalent, is certainly not sufficient to constitute forgiveness. Unless the words are accompanied by the appropriate behavior we shall say that A has not really forgiven B."



## *The Possibility of Preemptive Forgiving*

preemptive forgiving is impossible because one has not yet experienced the wrongdoing and acquired the resentment that forgiving relinquishes. Recall Horsburgh's remark that there "must be something to forgive." The Second Argument gives this thought content by explaining that if nothing has happened yet, then there is no emotional response to overcome.

There are two important premises supporting this Second Argument. First, the Second Argument assumes that forgiving exclusively or principally involves attitudinal changes. This is a strong claim. Acknowledging that forgiving often refers to an attitudinal shift does not mean that there is not also a performative element to forgiving. Some elements or forms of forgiving may still occur without the paradigmatic attitudinal shift. For example, in Govier and Verwoerd's example, the wife's utterance "I forgive you" does effect an important change.<sup>13</sup> After the wife utters this, her continued complaints become inappropriate in a way that they were not otherwise.<sup>14</sup> By speaking as she did, the wife surrendered some standing to hold her husband accountable.<sup>15</sup> Her utterance altered the discursive norms going forward; it changed what it was appropriate for her to do and say.<sup>16</sup> One way to understand this is as something like a promise not to hold the other party to account — "a promise not to use the past against the future" (Digeser 2001, 71).<sup>17</sup> In this way, the expression of forgiveness can function to change what one may and may not do, much like a promise does. Forgiving thus seems to have an outward dimension, irrespective of attitudes, that shapes how we relate to one another.

Even granting that forgiving can have a performative aspect, one might still insist that this is only derivative, the attitudinal shift ultimately

13. Owens (2012, 52) rejects the claim that forgiving is a performative, but he recognizes that "forgiveness changes the normative situation by ensuring that guilt and blame for that wrong are no longer apt."

14. This can be obscured by the way that the example is described. Perhaps "nagging" and attempting to "score points" are always wrong. But not all complaints or expressions of resentment are inappropriate if one has yet to forgive.

15. Dzur and Wertheimer (2002, 12) explain: "It may be thought that to say 'I forgive you' without experiencing the relevant emotions is empty. But that is false. The request for and granting of forgiveness has behavioral consequences. If V says 'I forgive you', V cannot continue to express a desire to see O suffer, or to demand additional apologies."

16. One might describe forgiving in terms of what Helmreich (2015) has described as "stance-taking."

17. As Norlock (2009, 101) notes, "a negotiation rather than a unilateral promise" may sometimes be a better metaphor.

being fundamental. For example, immediately after acknowledging that forgiving has two aspects, Margaret Holmgren (2012, 44 – 45) writes:

Viewing forgiveness as a performative puts the cart before the horse. We must first determine whether an *attitude* of forgiveness is an appropriate response to wrongdoing. . . . If we believe that an attitude of forgiveness is morally appropriate in a given situation, but we have not yet managed to overcome our resentment, we will have to decide whether it is better to be honest with the offender or to offer him the peace of mind that he might gain from hearing us say “I forgive you.”

Holmgren makes it sound like, whatever the illocutionary force of forgiving might be, the attitude of forgiving is conceptually prior. To utter “I forgive you” without the attitudinal shift is not “honest.”

This assumption that the attitudinal shift, and not the utterance, constitutes “true” forgiving— an essential premise of the Second Argument— strikes me as severe. It precludes the more neutral position that “either can be considered manifestations of forgiveness and, depending on the circumstances, exercising one of these is not inferior to exercising both” (Norlock 2009, 97). In a range of circumstances, forgiving apart from an attitudinal shift serves important purposes. Sometimes, the speech act will precede changing our attitudes and serve as a first step along the way. We may want our child to say “I forgive you,” then later remind him that he forgave the person that he is now treating resentfully. On other occasions, the speech act may have important effects in terms of welcoming a person back into a group or community. For example, it may be important to declare that one forgives one’s coworker so that others in the office can move on, even if one has not gotten over it oneself. It seems unnatural to claim that instances like these are not real cases of forgiving, or are somehow infelicitous forgiving.

The Second Argument also turns on another rather strong premise; namely, that reactive attitudes arise only after a wrong act is performed. Of course, resentment paradigmatically arises after someone has committed a wrong. But it may also be that one sees in advance that a wrong is going to be committed and begins to acquire the negative attitudes beforehand. For a vivid example, consider the following passage from Kazuo Ishiguro’s novel *The Buried Giant*, explaining the bloodlust of soon-to-be genocide victims:

I speak of people at the end of a brutal road. . . . [N]ow comes an invading army of overwhelming size. The fort may hold several days, perhaps even a week or two. But they know in the end they will face their own slaughter.

### *The Possibility of Preemptive Forgiving*

They know the infants they circle in their arms will before long be bloodied toys kicked about like cobbles. . . . They know this is to come, and so must cherish the earlier days of the siege, when the enemy first pay the price for what they will later do. In other words . . . it' s vengeance to be relished *in advance* by those not able to take it in its proper place. (Ishiguro 2015, 139 – 40; emphasis added)

The point can be seen in more mundane examples as well. Consider the emotion felt when you see that a driver, whom you have watched weaving in and out of traffic, is about to cut you off. It seems odd to insist that our emotional reactions never arrive first. Such anticipatory resentment makes sense, in part, because we resent the fact that the person *would* commit the wrong, which is revealed to us in our anticipation. If a spouse believes that a partner is going to cheat, resentment is intelligible partly as a response to that merely being a realistic possibility.

As I will argue below, I believe that preemptive forgiving is possible and that the Second Argument is false. But this is not to deny its force. One virtue of the Second Argument is that it explains why preemptive forgiving is not paradigmatic forgiving. Even if it is possible, preemptive forgiving will always be, in a way, an imperfect form of forgiving because of how it is situated relative to our emotional responses. Paradigmatic forgiving will involve both performative elements and shifts in attitudes—attitudes that paradigmatically arise *ex post*. Preemptive forgiving will not look like this, and that is philosophically significant.

## 2. Preemptively Giving Up One's Complaint

Having described the arguments for thinking that preemptive forgiving is impossible, I want now to suggest that, in fact, preemptive forgiving is possible.

### Some Initial Examples

Superficially, at least, it looks like we can engage in forgiving one another preemptively. Our linguistic practices don't seem to preclude it. We can say things like "I forgive you if you do such-and-such." For example, in Stendahl's *The Red and the Black*, Madame Rênal, fearing that her lover is ending their affair, dramatically writes to him: "I shall never survive our final separation by a single day. . . . Go! I forgive you if you love me no more. . . . It is a small thing in my eyes to pay for the happy days that I have just passed in your arms with the price of my life" (Stendahl 1916, 127).

Madame Rênal appears, at least, to be forgiving her lover for the departure that he has not yet made. Somewhat differently, in a legal context, a contract might state, "I hereby waive my complaints should such-and-such happen." Ostensibly, locutions like these forsake some entitlement to hold another accountable before the action in question occurs.

But ordinary language is hardly decisive, and one might insist that utterances like these aren't truly examples of forgiving or waiving a complaint. In fact, locutions like these might appear to be ways of granting permission, lending credence to the First Argument. "You won't hear me complain" can be a colloquial way to say, "You have my permission." Reading significance into the difference would be pointless parsing of words. I mean to resist this view.

The case for preemptive forgiving requires not mere linguistic evidence but evidence from the functioning of our ethical practices. Consider an example. Two soldiers are on patrol, when an explosive device wounds one of them. Although the camp is only a few miles away, the wounded soldier is unable to get up the steep hillside, even with the other soldier's help. They are able to call for assistance, but they are informed that it will be several hours before aid can be dispatched to their location. The unharmed soldier promises that he will stay by the wounded soldier's side until help comes. But after an hour of sitting in the cold rain, the unharmed soldier is visibly shivering and the gunfire is approaching. The wounded soldier says, "I forgive you if you leave me." The soldier leaves.

One might say that the soldier has acted wrongly by leaving. He has broken his promise and abandoned his comrade. Insofar as he has acted wrongly, it is because he has violated the obligations that he owed to his fellow soldier. But how can we make sense of this evaluation in light of the wounded soldier's statement? There cannot be a violation of the soldier's obligations if those obligations were waived. One possible response is to say that the wounded soldier didn't really mean what he said. Although it looked like waiving or forgiving, the statement was merely a ritualistic expression of appreciation or sympathy. This is not implausible and might, in some situations, be the correct interpretation. But it has the disadvantage of refusing to take the wounded soldier's statement at face value. Although he said that he wouldn't hold it against his comrade, it turns out that he can hold it against him.

I want to suggest that there is another possibility: the wounded soldier has waived his future complaints and yet has not released the other soldier from the obligation he owes him. He does not relieve his

## *The Possibility of Preemptive Forgiving*

comrade of his obligation, but he has disclaimed holding him to blame for its violation in the future.<sup>18</sup> This possibility takes the wounded soldier's statement at face value—he forgives the other soldier. But it does not treat that as equivalent to waiving the duty that was owed to him. If one assumes the strong conceptual tie between obligations and complaints, then there are only two possibilities—either the statement had no real moral significance or it was a waiver of the obligations owed to the wounded soldier. My suggestion is that there is an intermediate option: waiving the complaint but not the obligation.

Lest one get too caught up in one example, consider a second from one of the most oft-told stories in the Western tradition.

Jesus was troubled in spirit and testified, "Very truly I tell you, one of you is going to betray me." His disciples stared at one another, at a loss to know which of them he meant. One of them, the disciple whom Jesus loved, was reclining next to him. Simon Peter motioned to this disciple and said, "Ask him which one he means." Leaning back against Jesus, he asked him, "Lord, who is it?" Jesus answered, "It is the one to whom I will give this piece of bread when I have dipped it in the dish." Then, dipping the piece of bread, he gave it to Judas, the son of Simon Iscariot. As soon as Judas took the bread, Satan entered into him. So Jesus told him, "What you are about to do, do quickly." But no one at the meal understood why Jesus said this to him. (John 13:21 - 29)

Although its meaning is the subject of some controversy, Jesus' conduct toward Judas is often read to express something like the statement, "I forgive you for what you are about to do."<sup>19</sup> But Judas' action was still wrong and a sin. Interpreting Jesus as forgiving Judas' betrayal in

18. Preemptive forgiving is, in some sense, necessarily conditional. It takes the form, "I forgive you if you *f*." This raises questions about how to understand what has happened if you do not *f*. There appear to be two possibilities. First, we might say that no forgiving occurred, interpreting it as "[I forgive you] if [you *f*]." Alternatively, we might say that I forgave something nonactual, interpreting it as "I forgive [you if you *f*]." (If forgiving something nonactual sounds mysterious, consider forgiving a transgression that one mistakenly believes to have been committed.) I will remain neutral between these views. What is essential to my argument is that if the wrong is committed, it has *already* been forgiven.

19. The passage in John seems to portray Jesus' treatment as forgiving, if not encouraging, Judas' betrayal. This interpretation is reinforced by the famous plea: "Father, forgive them, for they know not what they do" (Luke 23:34). Matthew paints a somewhat darker picture: "Woe be to that man by whom the Son of man is betrayed! It would have been better for that man if he had not been born" (Matthew 26:23 - 24). The contrast between these two portrayals only highlights my point. It should be possible to say that

advance is not taken to imply that he granted permission or that it was any less a betrayal.

Whether or not forgiveness is the correct biblical interpretation is unimportant. Insofar as this interpretation is intelligible, it illustrates a certain moral possibility. It's conceptually coherent to think that Jesus forgave without granting permission. The story thus provides an example of preemptively waiving one's prerogative to hold another accountable without, at the same time, waiving one's entitlement to be treated justly.

One way to see that the waiver of complaint in these examples does not operate as a waiver of the duty is to consider the evaluation of some other member of the moral community. While the wounded soldier in the first example and Jesus in the second example may both have given up any complaint about the wrongfulness of the act done to them, this would not stop the rest of us from blaming the wrongdoers.<sup>20</sup> Not only could we say that the acts are blameworthy, but, more importantly, we could say that the acts were a violation of duties owed to the other person. Although the wounded soldier may be barred from saying it, the rest of us can say that, in leaving him, the unharmed soldier violates the duty he owed to his wounded companion. And, regardless of whether Jesus preemptively forgave him, the rest of us can say that Judas betrayed Jesus—violated his duties to him. If this is correct, then waiving the complaint does not mean the elimination of the directed duty. The right—understood as the Hohfeldian correlate of that directed duty—survives the waiver of the potential complaint.

One thing that the two examples above have in common is that both involve situations in which it would be hard to imagine the mere words making the action permissible. In the promise-to-stay example, it's possible that nothing the wounded soldier might say could truly release the other soldier. The soldier knew the situation when he made the promise, the promise is reinforced by background norms of soldiering, and the wounded soldier is now vulnerable. Similarly, in the Judas story, it seems hard to imagine that anyone can grant permission for—truly make permissible—a betrayal

Judas's betrayal was forgiven (as we get in John) even though it was very wrong (as we get in Matthew).

<sup>20</sup> Owens (2012) argues that forgiving makes it the case that even third parties should relinquish reactive attitudes. This strikes me as implausible, at least as a general matter. Although forgiving may sometimes affect how others should treat a wrongdoer, I do not think that it demands that they give up all censure.

## *The Possibility of Preemptive Forgiving*

1           It is probably not coincidence that preemptive forgiving appears  
2 in examples like these. The sense that the rights in these examples are  
3 largely unwaivable operates to cancel the conversational implicature  
4 between waiving one's complaint and waiving one's right. While normally  
5 preemptively waiving a complaint might be understood to imply per-  
6 mission, that implication is blocked in these cases.

7           Still, I don't believe that unwaivable duties are necessary for pre-  
8 emptive forgiving. The implication can be blocked in other ways— for  
9 example, by explicit statement. Suppose a woman promises her down-on-  
10 her-luck friend that she will take her on a camping trip. As the weekend  
11 approaches, however, the woman receives an invitation to a professional  
12 event that might be a prime career opportunity for her. She explains the  
13 situation to her friend, essentially requesting to be released from her  
14 promise to go camping that weekend. Imagine the friend responds by  
15 saying something like this: "If you want me to let you off the hook, the  
16 answer is no. You promised me, and you owe me this. But I can't make you  
17 go. If you decide to bail on me, I understand and I forgive you. I know this  
18 is a tempting opportunity for you, and we've all been there. So I won't  
19 complain or hold it against you." I believe that there is nothing contra-  
20 dictory or incoherent in this. The friend refused to release the promise,  
21 but she nonetheless forgives the prospective breaking of that promise—  
22 that is, forsakes the future complaint she would otherwise have. Both  
23 these things must be explicitly stated because, otherwise, the one might  
24 imply the negation of the other. But this implication can be blocked by  
25 explicit disavowal.

### *2.2. Preemptive Forgiving's Functions*

28           Even if these examples suggest that preemptive forgiving might, theo-  
29 retically, be possible, one might wonder what purpose it could serve.  
30 Resistance to the phenomenon might be partly based on the sense that  
31 it can have little function and is therefore at best anomalous. In this  
32 section, I want to explore the possible motivations for preemptively for-  
33 giving. I hope to suggest that there are actually a wide variety of contexts  
34 in which preemptively forgiving may play a valuable function. I describe  
35 nine such contexts, but I don't take this survey to be exhaustive.

36           First, preemptive forgiving may arise where granting permission is  
37 impossible. As already noted, one way that this can happen is if the right  
38 in question cannot be waived. Consider the following passage from Her-  
39 bert Morris (1968, 497):  
40



It is only each person himself that can have his choices respected. It is no more possible to transfer this right than it is to transfer one's right to life. ... If without our permission, without our choosing it, someone used us as a shield, we may, I should suppose, forgive the person for treating us as an object. But we do not thereby waive our right to be treated as a person, for that is a right that has been infringed and what we have at most done is put ourselves in a position where it is inappropriate any longer to exercise the right to complain.

Morris' s claim here is that there is an inalienable right to have one's choices respected.<sup>21</sup> The inalienability is demonstrated by the fact that the most one can do is forgive, or, as he puts it, put ourselves in a position where we can no longer complain. Another way that granting permission may be impossible is when permission is not one's to give. In some cases, a party who is not the victim of a wrong will nevertheless have standing to forgive. The parent, for example, might resent the wrong done to his or her child.<sup>22</sup> In such cases, a party will not be in position to grant permission and preemptive forgiving will be all that is available. For example, imagine that a divorced parent recognizes that the other parent is on the verge of ducking out of their children's lives. That parent could not give permission insofar as the duty is owed to the children. But the parent might, I think, say something like, "I forgive you if you abandon them" (assuming that abandonment is not simply unforgivable). Here, again, the possibility of preemptive forgiving makes sense because granting permission does not seem possible.

Second, preemptive forgiving may make sense when one anticipates that forgiving ex post will not be available. The vivid case arises when one anticipates death. When, for example, the wrong countenanced is one's own killing, then preemptive forgiving is the only option.<sup>23</sup> But one

21. For the distinction between alienation and waiver, see Feinberg 1978. What is important to me is that a right be, in some particular context, unwaivable. Morris is focused on inalienability, which entails unwaivability in all circumstances.

22. The standard response is that parents are victims in their own right when their children are harmed. See Horsbrugh 1974, 276; Murphy and Hampton 1988, 56n16; Haber 1991, 49. Pettigrove (2009) offers a compelling rejection of this contention. I believe third-party forgiving arises because a party may have a personal complaint without being the bearer of the right in question.

23. Forgiving one's own killing seems to be a good place to see the phenomenon of preemptive forgiving. In 2004, the last words of a prisoner executed by the state of Virginia were, "I forgive you for what you're doing." In the Hollywood film *Faster* (2010), Dwayne Johnson (a.k.a. The Rock) is about to execute an evangelist who wronged him when the preacher says, "That's all right. ... Because I forgive you for what you're about to do."

### *The Possibility of Preemptive Forgiving*

might anticipate being unable to forgive afterward for less dramatic reasons. One might know that one will be beyond communication, or one may worry that one will forget the transgression so completely that one would forget to forgive. Particularly interesting cases, I think, arise when one anticipates being unwilling to forgive *ex post*. Suppose that you see your beloved child poised to do you a severe wrong. Knowing yourself prone to holding grudges excessively, you fear that, once the wrong is committed, you will be unable to bring yourself to forgive. But at present—before the sting of the injury has been felt—you want to express your present stance toward the wrongdoing as, though wrong, not destroying your relationship. Like the person who anticipates death, you want now to forgive out of a fear that you will be unable to do so later.

Third, preemptive forgiving may be a useful mechanism for avoiding conflict.<sup>24</sup> One may have a coworker or neighbor who one sees is set on committing a wrong. The resulting tension might be undesirable—because it is awkward or because it would require a waste of energy. Fore-swearing resentment in advance may be a means to diffuse the tension before it arises. This function may be particularly important where there are conflicting understandings of the relevant norms. I forgive you if you parody my god, not because I think it permissible but because I recognize that you believe quite differently than I do.

A related fourth possibility is that preemptive forgiving may serve as a token of goodwill. A poetic example can be found in one telling of the Scottish story *The Lovers of Gudrun*. One man says to the old friend with whom he is now in conflict, “Let us never forget . . . the joyous days of old and the love that knit us together. Let us forgive whatever ill the one may have done to the other—yea, let us forgive beforehand whatsoever of wrong may yet fall out between us—so that our love may be remembered of men and not the strife into which we are surely drifting” (Edgar 1907, 178). Here, preemptive forgiving is viewed as a way to express goodwill for the purpose of mending a friendship. But the gesture might be equally used to build, not just rebuild, a relationship.

Fifth, preemptive forgiving may function compassionately to relieve the burdens on a wrongdoer in anticipation of a wrong. We may, in certain circumstances, want to relieve the transgressor from some of

24. Dillon (2001, 72), in a rare discussion of forward-looking forgiveness, describes as “preservative self-forgiveness” a disposition not to form negative evaluations and emotions that would need to be overcome. Dillon’s concern is with a disposition or character trait, whereas my concern is an act.

1 the burdens — like guilt or punishment — that he or she will feel in facing  
 2 a difficult choice. For example, imagine that you have been helping a  
 3 friend battle addiction. You see that she is in danger of using again, but  
 4 that she is deeply pained by the guilt of letting you down. The guilt  
 5 associated with her backsliding may be, one can imagine, as destructive  
 6 as the substance abuse itself. Wishing to mitigate the damage, you may  
 7 want to express the fact that you forgive her for what she is going to do,  
 8 even though you do not condone it. Something similar, I think, motivated  
 9 the Obama administration's decision in 2015 to announce that they  
 10 would no longer prosecute families that negotiate with kidnappers.  
 11 This announcement did not make negotiating permissible — the legal  
 12 prohibition was retained — but it did acknowledge that the government  
 13 would no longer hold people accountable for violations. Preemptive for-  
 14 giving, in these cases, serves as compassionate relief to avoid compound-  
 15 ing the harm of an inevitable transgression.

16 Relatedly, a sixth purpose for preemptive forgiving arises when  
 17 someone is excessively concerned with avoiding committing a wrong.  
 18 Although people are more often inadequately attentive to their duties,  
 19 occasionally people are overly concerned about avoiding wrongs. When  
 20 this is true, preemptive forgiving may help someone to apply the appro-  
 21 priate level of care. For example, imagine that an experienced actor and a  
 22 novice are rehearsing a love scene involving various forms of physical  
 23 contact. The novice is extremely tentative, afraid of clumsily touching  
 24 the other actor inappropriately. Seeing that this fear is undermining the  
 25 scene, the experienced actor might tell the struggling novice that the  
 26 actor forgives any inappropriate touching that might inadvertently  
 27 occur.<sup>25</sup> This is not permission to grope; it does not make inappropriate  
 28 touching appropriate. But it may help to alleviate the excessive caution  
 29 that is undermining the scene. Only by relieving future blame can they  
 30 engage in the shared activity successfully. If this seems like a peculiar  
 31 example, it is worth noting that many liability waivers serve something  
 32 of this function as well. A service provider may be able to offer me the  
 33 service that I desire in the fashion that I desire it only if I am willing to  
 34 waive liability — otherwise the service will be burdened by so many safe-  
 35 guards and associated costs that it will not be what I want.

36  
 37  
 38 25. This example is loosely based on my experience as an unconvincing Ferdinand in  
 39 a high school production of *The Tempest*. If it adds texture to the example, imagine one  
 40 actor as an awkward teenage boy and the other as a seasoned female drama club mainstay.

## *The Possibility of Preemptive Forgiving*

Of course, liability waivers are not always a mechanism for enabling joint activity unhindered by fear of liability. Sometimes they are a negotiated concession, and this suggests a seventh purpose that preemptive forgiving may serve. I may agree to forgive you for the bad thing that you are contemplating only in exchange for something from you or from someone else. Negotiated forgiveness is familiar in political contexts, but something similar happens even in interpersonal cases. One can agree to forgive because one is getting something in return. And preemptive forgiving can serve this purpose.

Eighth, preemptive forgiving may be a way to avoid hypocrisy. In the camping trip example, the self-deprecating statement, “we’ve all been there,” helps make sense of the friend’s preemptive forgiving. It helps the listener understand how the speaker can, on the one hand, insist on the existence of the duty and yet, on the other hand, forgive its transgression before it has even occurred—or, put another way, how she can retain her claim even while forsaking any future complaint. Perhaps some self-deprecation—a recognition of one’s own sins or a recognition of one’s own luck in not sinning—is at the root of all acts of forgiving.<sup>26</sup> Even if it is not, preemptively waiving one’s complaint may be an acknowledgment that one would not have standing to complain against some particular wrong.

Finally, preemptive forgiving may serve an important function where a conflict exists between *pro-tanto* obligations. By preemptively forgiving, I may acknowledge that another person has an all-things-considered duty to do something that the person has a *pro-tanto* obligation to me not to do. For example, suppose that you have mistakenly made two conflicting promises about what you will do on Saturday. Recognizing that your promise to take your mother to the doctor is more important than your promise to meet my parents and me for lunch, I might tell you that I forgive you if you have to cancel. Forgiving here functions as an acknowledgment that you now face other competing obligations. But preemptively forgiving, here, need not amount to a release. You still have an obligation to my parents and me to try, if possible, to meet us. Preemptive forgiving serves as a way to acknowledge that one recognizes the conflict.

26. For psychological evidence that it might be, see Exline et al. 2008. For a rich philosophical account along these lines, see Garrard and McNaughton 2003. This may be one way to cultivate the compassion that can underwrite forgiveness. See Novitz 1998.

Preemptive forgiving serves a wide array of purposes. As many of the above examples suggest, preemptive forgiving may offer only an imperfect response to nonideal circumstances. But this should not lead us to say that these are not truly instances of forgiving. Something meaningful occurs. Preemptive forgiving— even where the forgiving is not paradigmatic and comprehensive— serves important functions in our interpersonal lives, nonideal as they often are.

### *2.3. Preemptive Forgiving versus Promising to Forgive*

There is an important reply to consider at this point. In the face of the examples above, a skeptic might attempt to recharacterize them as promises to forgive in the future. That is, one might insist that presently waiving one's future complaint or resentment is impossible, seeing instead only promises not to complain or resent. This response avoids detaching rights from the standing to complain. The person doesn't lose his or her standing to complain. When the violation occurs, the person still, in some sense, *has* the complaint, but she has promised not to avail herself of it. One might bolster this response by noting that, in the law, people frequently make promises to hold others harmless— that is, covenants not to sue— and that such promises seem to be our way of waiving an unformed future complaint.<sup>27</sup>

I wish to make three points about this response. First and most importantly, this response strikes me as simply unable to explain our moral experience adequately. The response implies that forgiving requires that something be done in the future, even if that is just refraining from holding the other person accountable; what I have been calling preemptive forgiving is merely a prologue to the actual forgiving. But this interpretation seems implausible, I believe, when one imagines that the future action is, or becomes, unavailable. Suppose that the wounded soldier says, "I forgive you if you leave me," and then loses consciousness. Minutes later, as gunfire approaches, the unharmed soldier leaves. Through binoculars from a safe distance away, the soldier sees his wounded comrade struck by an explosion and killed, having never regained consciousness. According to my view, the wounded soldier already forgave the act of leaving. But the promise-to-forgive response would say that he only promised to forgive it, and now he is dead. We can imagine this difference mattering if the surviving soldier is plagued by the question of

27. In part 3.3 below, I will question this understanding of liability waivers.

## *The Possibility of Preemptive Forgiving*

whether his friend forgave him.<sup>28</sup> I see no reason to say that the forgiveness was inadequate or incomplete.<sup>29</sup> So, even if there are some cases that should be interpreted as promises to forgive, I do not believe that all can be.

Second, this response is somewhat unstable. When one tries to spell out the idea of a promise to forgive, it seems to collapse into either preemptive forgiving or a promise that one cannot give. Consider first how it might collapse into preemptive forgiving. Recall that, according to certain views, performative forgiving is basically like promising. Forgiving can be understood, more or less, as a promise not to hold a past wrong against the wrongdoer. If that's right, then a promise to forgive would be a promise to make a promise in the future. Now, that's a weird structure. In certain instances—for example, land purchases and wedding engagements—we do promise, contingent on certain conditions, to make a promise. But, if I say, without any conditions, "I promise you that tomorrow I will promise you that I will take you to the airport," then it is tempting to say that I have already effectively promised to take you to the airport. Similarly, unless it is conditional, the promise to forgive may start to look like presentforgiving.<sup>30</sup>

Now, one might respond by saying that the promise to forgive *is* conditional—it depends on the wrong being committed. But this gets tricky. Is the promise to forgive conditional or is the not holding accountable conditional?<sup>31</sup> The reason for thinking that the promise must be

28. One might object, here, that what one cares about is what the wounded soldier thought and felt, not whether he performed the act of forgiving per se. But I don't think that's entirely accurate. Norlock discusses a case in which Simon Wiesenthal was asked by a Nazi soldier to forgive him. Norlock uses the example to show how we often care about the performative, not an internal emotional state: "The soldier who asked Simon Wiesenthal for forgiveness didn't seem to be asking for a report of how Wiesenthal felt. It was critical to him that someone express something like forgiveness to him for his war crimes before he died" (Norlock 2009, 105).

29. Compare Helmreich 2015, 85, 102, on the meaningfulness of deathbed apologies.

30. This is a bit quick. It seems plausible to say, "I promise to forgive you next week, but right now I cannot." But it is important, in that case, that there is a temporal gap. It preserves some role for the complaint or resentment to play. Similarly, one might say, preemptively, "If you do that, I promise to forgive you within a week." But it seems much more odd to say, "If you do that, I promise to forgive you that very instant."

31. To see the point better, consider the two-layer airport promise again. Compare the following: (1) "I promise you that tomorrow, if my wife agrees, I will promise you that I will take you to the airport the following day." (2) "I promise you that tomorrow I will promise you that if it is raining, I will take you to the airport." In (1), the condition is a

conditional is, presumably, that the conditions for forgiving are not yet in place until after the wrong is committed. Forgiving, one might insist, requires an emotional transition, not merely a rational choice. One cannot give up holding another accountable until one experiences the resentment. But this point can lead to instability in the opposite direction. If that is the worry, then why think that one can make a promise to experience the emotions in this way? Once forgiving is viewed as a matter of having and releasing certain emotions, it no longer looks like something we are in a position to promise. Thus, interpreting all apparent instances of preemptive forgiving as promises to forgive starts to feel precarious.

Third and finally, even if the above problems could be overcome, the response operates largely by linguistic stipulation. It loses the connection between having a complaint and having the standing to complain. What I have been describing are cases in which one seems to have a right and yet one seems to have given up the entitlement—the position or standing—to complain upon the right’s violation. On my view, having a complaint is understood in terms of being able, morally speaking, to do something—namely, to hold the other person accountable. The promise-to-forgive response simply posits another, different sense of ‘having a complaint’ that has nothing to do with being able to do anything. ‘Having a complaint’ in this sense means simply that one had a right violated. It is merely a placeholder to retain the desired conceptual connection.

The artificiality of the response is plain when one considers its full implications. Is every waiver of a complaint like this? Is it impossible to forsake one’s moral complaint, and possible only to promise not to use it? Note that the same points might apply to waiving a right. Why not say that one never waives a right but only promises not to exercise it? These questions, I believe, highlight the fact that at least one important sense of having a right and having a complaint involves being able, normatively speaking, to do something. When we give up this normative ability, we

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condition on making the second promise and the two-layer structure makes some sense. In (2), the condition is on the action being promised, and the two-layer structure is essentially pointless. That is, (2) collapses into a promise to take the person to the airport if it is raining. Now the present question is in what sense is preemptive forgiving conditional: (1a) “I promise that if you do the wrong, I will promise not to hold it against you” or (2a) “I promise that I will promise that I will not hold it against you if you do the wrong” ? If the former, then the two-layer structure has a role to play, but, if the latter, it does not and the conditionality is merely that alluded to in note 18.



## *The Possibility of Preemptive Forgiving*

have, in at least one sense, given up the right or complaint. One can, of course, insist on not using the terms in this way but doing so will not change the moral phenomena.

### 3. The Significance of Preemptive Forgiving

I think that preemptive forgiving is intrinsically interesting. But I also think that its possibility holds further significance. If the arguments against preemptive forgiving are wrong, then one or another of their central assumptions must be mistaken. These arguments must have mischaracterized the nature of forgiving or the nature of our normative concepts or both. In this final section, I want to sketch, roughly, some of these possible implications, both at the conceptual level and at the very practical. My remarks here are meant less as conclusive argument than as a preliminary exhibition of preemptive forgiving's potential ramifications.

#### *3.1. Performative and Attitudinal Forgiving*

The Second Argument, described in part 1, relied on two important premises: that forgiving necessarily requires an emotional shift and that the necessary reactive attitudes cannot be present until after wrongdoing takes place. If the argument were correct, then preemptive forgiving would not be possible.

But it is possible. This means that the Second Argument might be run in reverse, so to speak. Insofar as preemptive forgiving is possible, either forgiving need not involve an emotional shift or reactive attitudes can be present before an action occurs. I suspect that both are true, but I will focus here on whether forgiving requires an emotional shift.

Examples of preemptive forgiving are generally examples of forgiving operating as a performative. Preemptive forgiving typically involves a declaration or communication that one surrenders holding another accountable. A first implication of preemptive forgiving, then, is that it generates an argument against— or at least a challenge for—accounts of forgiving that characterize forgiving as essentially attitudinal. If forgiving necessarily involves a shift in attitudes, how can one make sense of the apparent phenomenon of people forgiving before the attitude-triggering event occurs?<sup>32</sup> Even if this challenge can be answered,

32. One response, of course, would be to give up the Second Argument's other premise and accept that reactive attitudes arise before wrongdoing transpires. While I

it may clarify or complicate the connection between forgiving and shifting one's attitudes.

One temptation, I think, in reacting to the debate between attitudinal and performative accounts of forgiving is to conclude that there are simply two different phenomena, both labeled as "forgiving." In one sense, the wounded soldier forgave his comrade, and, in another sense, he never had the chance. There is performative forgiving and attitudinal forgiving, and that's all there is to it. This solution, however, is rather unsatisfactory. There must be some deep connection.

Based on what I have said about preemptive forgiving, I will briefly venture a hypothesis: All forgiving is giving up one's complaint, but this can happen in two ways. A complaint involves both a standing and an invocation. One can give up one's complaint—that is, forgive—by giving up either the standing or the invocation (or both).

I have been characterizing performative forgiving as surrendering one's standing. It is a declaration that alters the appropriateness of making a complaint. Attitudinal forgiving can also be viewed as giving up one's complaint. Earlier, I mentioned Hieronymi's (2001) thought that the attitude of resentment is a form of protest. If this is right, then giving up one's resentment is giving up one's protest—or, we might say, one's complaint. The attitude shift in forgiving occurs when one relinquishes the attitude of complaint or protest.<sup>33</sup> The two forms of forgiving, then, are unified as forms of giving up one's complaint. This is just a hypothesis, but it is made palpable through preemptive forgiving's illustration of surrendering standing in a nonreactive way.

### 3.2. *Claims and the Standing to Complain*

For me, perhaps the most intriguing possible implication of preemptive forgiving is that it might offer a window into the connection—or the disconnect—between certain ethical and juridical concepts. Just as the Second Argument might be run in reverse, so too might the First Argument. As I described it in part 1, the First Argument relies on a premise

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believe that reactive attitudes can arise beforehand, this strikes me as implausible as a general explanation of preemptive forgiving. In the various examples of preemptive forgiving in part 2, I doubt that all the forgivers should be described as already feeling resentment.

33. Calhoun (1992, 95) also describes forgiving as giving up one's second-personal address: "Aspirational forgiveness is the choice not to demand that [the wrongdoer] improve."

## *The Possibility of Preemptive Forgiving*

about the relationship between having a right or a claim and having the standing to complain or resent. Preemptive forgiving appears to show the possibility of relinquishing one's standing to complain without thereby releasing someone from his or her duty. If so, then having a claim or a right is not necessarily tied to having the standing to complain.

At the risk of being pedantic, this reverse argument might be laid out as follows:

- (1 ·) If preemptive forgiving were possible, then it would involve *X* forgiving *Y* for *f*ing in the future.
- (2 ·) Forgiving someone for *f*ing does not make an instance of *f*ing permissible.
- (3 ·) Granting permission makes an instance of *f*ing permissible.
- (4 ·) Thus, if preemptive forgiving were possible, then it would involve *X* forgiving *Y* for *f*ing in the future without thereby granting permission. [From 1 ·, 2 ·, and 3 ·]
- (5 ·) A person forgives another iff he or she gives up his or her standing to complain against the person.
- (6 ·) Thus, if preemptive forgiving were possible, then it would involve *X* giving up the standing to complain against *Y* for *f*ing in the future without thereby granting permission. [From 1 · and 5 ·]
- (7 ·) A person grants permission to another to *f* iff he or she gives up his or her claim/right that that person not *f*.
- (8 ·) Thus, if preemptive forgiving were possible, it would involve *X* giving up his or her standing to complain against *Y* for *f*ing in the future without *X* giving up his or her claim/right that *Y* not *f*. [From 6 · and 7 ·]
- (9 ·) Preemptive forgiving is possible.
- (10 ·) Therefore, it is possible for *X* to give up *X*'s standing to complain against *Y* for *f*ing in the future without *X* giving up his or her claim/right that *Y* not *f*. [From 8 · and 9 ·]
- (11 ·) Therefore, it is not the case that *X* has a claim/right against *Y* not to *f* only if *X* would have the standing to complain against *Y* if *Y* *f*s. [From 10 ·]

The premises — save for the claim that preemptive forgiving is possible — are copied directly from the First Argument.

Why might one have thought that having a right requires having the standing to complain? Because philosophers sometimes suggest as much. In tackling the important task of articulating how obligations can be “directed” or “bipolar” or “second-personal,” philosophers often

1 appeal to the idea of the standing to complain or hold accountable.<sup>34</sup>  
 2 Darwall, for example, says that the obligation “presupposes” an authority  
 3 to hold accountable. We have claims insofar as we *could* lodge a special  
 4 kind of complaint. Jay Wallace (2007, 90) writes, “It is characteristic of  
 5 relational normativity, as I understand it, that the person who is wronged  
 6 by you has a privileged basis for complaint against you, an objection to  
 7 your conduct that is not shared by mere observers to what was done.” The  
 8 basic idea is that we can understand relational obligations in terms of the  
 9 standing to hold accountable.

10 I fear that this explication can give the false impression that the  
 11 sphere of relational normativity is more unified and homogenous than it  
 12 is. We have both directed duties, claims that others have on our conduct  
 13 ex ante, and accountability relations, complaints that others can make  
 14 against us after we have transgressed. These things can, and often do, go  
 15 together. But perhaps not necessarily. Preemptive forgiving, in which a  
 16 party gives up her standing to complain while continuing to be owed the  
 17 duty, seems to provide an example of these normative concepts coming  
 18 apart.

19 Of course, no one thinks that it is always appropriate to hold  
 20 another accountable whenever one’s rights have been violated. A wrong-  
 21 doer may have an excuse that would relieve accountability. Or some other  
 22 consideration, like the potential for harm or the passage of time, may  
 23 render it inappropriate for a victim to bring forth her complaint. Every-  
 24 one would acknowledge that one’s complaint upon being wronged will be  
 25 defeasible in these sorts of ways.

26 But I think that preemptive forgiving may offer more of a chal-  
 27 lenge. In cases of excuse, the victim still has the standing to complain—  
 28 this is why the excuse is given *to her*—but the wrongdoer has an answer to  
 29 that complaint. In cases where there is some reason not to complain, the  
 30 victim again retains the standing to complain, but she ought not exercise  
 31 that standing. In preemptive forgiving, however, having a right threatens  
 32 to come apart, not merely from successful and appropriate complaint,  
 33 but from the standing to complain.<sup>35</sup> The sense in which a preemptive  
 34

35 34. See, for example, Gilbert 2004, 90: “If you fail to give me what I have a right to  
 36 through your promise, I have the standing, as your promisee, to rebuke you on that  
 37 account. Similarly, should you threaten to break your promise, I have the standing, as  
 38 your promisee, to command or insist that you act as promised, and thus pressure you to  
 39 perform.”

40 35. There may be other contexts in which these concepts diverge as well. They seem  
 to come apart when people other than the victim have the standing to complain, even

### *The Possibility of Preemptive Forgiving*

forgiver *cannot* complain is not merely that any complaint would be defeated or wrong; complaint is made inapt. If this is correct, then preemptive forgiving offers a glimpse into a gap between two concepts of relational normativity—rightholding and the standing to hold accountable—that are typically thought to be tightly connected.<sup>36</sup>

#### *3.3. Liability Waivers as Preemptive Forgiving*

This point about rights and the standing to complain may sound abstract. In this final section, I want to suggest how significant it can be even for very practical matters. I will suggest that we cannot understand the run-of-the-mill liability waiver without appreciating the distinction. This is because liability waivers are, I believe, a form of preemptive forgiving.

Liability waivers look to be a context in which one can abandon one's complaint without thereby granting permission. When I go to a ski resort and I sign a liability waiver releasing the resort from liability if I break my leg, I am not thereby giving them permission to break my leg. One natural way to interpret this is to say that I have given up any complaint that I may have should they violate my rights. I have given up my complaint without giving up my rights. That is, I preemptively forgive the ski resort if they break my leg.

This is not, however, the way that liability waivers are typically conceptualized in the law. Any attorney would say that liability waivers are promises not to sue. Superficial appearances seem to confirm this. Liability waivers are often couched as “an agreement to hold harmless” and “a covenant not to sue.” This is contract language. So it looks like liability

though the right belongs only to the victim. See Cornell 2015. This standing to complain, apart from any right or claim, is evident in such parties' standing to forgive. See Pettigrove 2009. Hypocrisy is arguably another case, like preemptive forgiving, in which one might lose standing to complain without losing one's rights. See Cohen 2013. The complaints of wrongdoers can thus raise significant puzzles for accounts of relational normativity that are unwilling to distinguish having a right from having the standing to complain. See Smilansky 2006. While each of these phenomena raise their own sets of questions, they all pose similar challenges to any view that connects having a right and having the standing to complain too tightly.

36. Acknowledging this difference, one might argue that preemptive forgiving operates by introducing second-order, exclusionary reasons. Compare Raz 1990. On this view, the victim still has first-order reasons to complain—albeit excluded reasons—and thus rightholding still corresponds with a person having reasons to complain. Even if this is correct, it would not preserve the supposed connection between having a right and having the standing to complain.

waivers are not present waivers of a legal complaint but rather contractual promises not to exercise whatever legal complaint might arise.

Earlier, I argued that it is possible to preemptively forgive as opposed to promise to forgive in the future. I want to suggest that this is how we should generally understand liability waivers. Contrary to the widespread legal description, they are not promises of future conduct but present waivers of future unrealized complaints.

To see the practical difference here, one must understand that the law's typical response to breach of a contractual promise is to require the breaching party to pay damages. If you breach your contract to buy my goods, then I can sue you and make you pay me for the profits I've lost. But liability waivers don't typically work like that. If I sue the ski resort for breaking my leg, my lawsuit will get dismissed. The ski resort doesn't sue me to recover their losses as a result of my lawsuit. So, if the liability waiver is actually a contractual promise not to bring suit, then why does it operate to bar a lawsuit? Why doesn't enforcement of a liability waiver take the form of an action for expectation damages?

A first answer might be that the covenant not to sue operates as a bar to a suit because, if it did not, pointless circularity would result. The defendant could turn around and sue the plaintiff for whatever damages were recovered, so it is simply more efficient to bar the action to begin with. Here is how one legal treatise explains the issue: "A covenant not to sue... is a bar to the original cause of action. This is to avoid circuity of action; for if the plaintiff in the original action were to recover, the defendant could recover precisely the same damages back for breach of the covenant to forbear or not to sue" (Williston and Lord 1990, 677 - 78). This circularity makes it pointless to have a separate action for damages instead of simply barring the original action.

But it may not always be pointless. Suppose, for example, the plaintiff values the expressive function of obtaining a judgment,<sup>37</sup> even if he or she will have to forfeit any damages right back to the defendant. I may want the court to declare that the ski resort wronged me, even if I have to break my promise not to sue them and I will have to turn over any damages that I receive. A more practical difference will arise where the damages for breach might exceed the damages obtained in the underlying case. For example, if I sue the ski resort, the resort may wish to counterclaim for breach of contract and recover additional damages,

37. On the expressive value of obtaining a legal judgment, see Hershovitz 2014.

### *The Possibility of Preemptive Forgiving*

such as attorney fees. Can it do this? A minority of jurisdictions do conclude that a party in breach of a covenant not to sue can be held liable for attorney fees.<sup>38</sup> The explanation for this position appeals to the idea that a covenant not to sue is a promise and subject to the normal remedies for breach.<sup>39</sup>

But there is a second option. The covenant not to sue can be viewed not as an additional promise but rather as a present waiver. Here is how an early opinion from the Supreme Court of Michigan puts it: “An agreement never to sue . . . operates as a release. Not as it has so often been said, upon the principle of avoiding circuity of action, but because in substance and effect it is a release. . . . [W]e think it is clear that an agreement not to sue . . . is never a distinct and independent undertaking, upon which an action is maintainable, but a mere modification or extinguishment . . . and as such may be availed of in defense.”<sup>40</sup> What the court is keen to express, here, is that the covenant not to sue should not be conceived as its own separate promise but rather as a release. To allow a separate action for damages would be, as another early court put it, “marking out a crooked path for litigants to travel, and one that was in nowise contemplated by their contract.”<sup>41</sup>

The leading case on this issue is a Second Circuit opinion by Judge Friendly. The crucial passage declares:

Certainly it is not beyond the powers of a lawyer to draw a covenant not to sue in such terms as to make clear that any breach will entail liability for damages, including the most certain of all—defendant’s litigation expense. Yet to distill all this out of the usual formal covenant would be going too far; its primary function is to serve as a shield rather than as a sword. . . . In the absence of contrary evidence, sufficient effect is given the usual covenant not to sue if, in addition to its service as a defense, it is read

38. See, for example, *Divine Tower Int’l Corp. v. Kegler, Brown, Hill & Ritter Co.*, L.P.A., 2008 U.S. Dist. LEXIS 85246, 9 – 10 (S.D. Ohio Sept. 24, 2008): “In Ohio, where there is a breach of a covenant not to sue, an available remedy is actual damages, which are measured by the attorney fees and costs incurred in defending the lawsuit.”

39. See, for example, *Colton v. New York Hospital*, 55 A.D.2d 588, 589 (N.Y. App. Div. 1976): “A covenant not to sue is . . . merely an agreement not to enforce an existing cause of action. . . . Thus, the party possessing the right of action is not precluded thereby from thereafter bringing suit; however, he may be compelled to respond in damages for breach of the covenant.”

40. *Morgan v. Butterfield*, 3 Mich. 615, 624 – 25 (1855), affirming *Robinson v. Godfrey*, 2 Mich. 408 (1852).

41. *Staver & Walker v. Missimer*, 6 Wash. 173, 175 – 76 (1893).



as imposing liability only for suits brought in obvious breach or otherwise in bad faith.<sup>42</sup>

Judge Friendly' s point is that while one could make a full-blown contract not to sue, the ordinary liability waiver should be read as something that merely releases the other party— something that can be used as a shield but not as a sword. A majority of American jurisdictions— though not all— follow this approach.<sup>43</sup>

I think that Judge Friendly gets this precisely right. What is important is what the parties are intending to do. And, at least ordinarily, when one agrees not to sue, what one intends to do is give up whatever future complaint one might have. It is not meant as undertaking a contractual obligation but rather as a surrender of one' s standing to complain. It is waiving one' s complaint, not promising not to complain. In a legal sense, it is preemptive forgiving. The jurisdictions that take the opposite view have, I think, been handcuffed by not recognizing this as a coherent conceptual possibility.

This legal discussion offers just one illustration of the importance of preemptive forgiving as a normative phenomenon. If we do not appreciate the gap that exists between having a right and having a complaint— the gap that preemptive forgiving opens up— then we cannot understand something as commonplace as a liability waiver. Preemptive forgiving may thus provide a window into the complexity of the relational normative concepts that we use on a day-to-day basis.

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42. *Artvale, Inc. v. Rugby Fabrics Corp.*, 363 F.2d 1002, 1008 (2d Cir. 1966).

43. See *Bukuras v. Mueller Group, LLC*, 592 F.3d 255, 266 (1st Cir. 2010) (collecting cases).

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