

The 5000-Year Circle of Debt Clemency: From Sumer and Babylon to America and Europe

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The notion of compulsory debt clemency has come full circle during the past five millennia. This progression has occurred over three relatively distinct periods. In the first period, rulers in ancient Sumer and Babylon imposed periodic debt amnesties to maintain social stability, especially a ready military base. This practice continued as a divine mandate for the ancient Hebrews in several passages of the Torah. In the several centuries surrounding the coming of Christ, however, a second period saw two millennia of waning enthusiasm for compelled debt forgiveness. Roman and later Islamic law mandated only a limited form of debt clemency, though both Christian and Muslim ideals encouraged creditors to offer full remission of distressed debts voluntarily. The circle began to close with the beginning of a third period in post-Enlightenment England and especially the new United States of America. The renewed notion of legally compelled debt clemency faced skepticism if not hostility elsewhere until the late 1900s and early 2000s, when the idea spread like wildfire throughout Europe. Modern legislators took up compulsory debt clemency for largely the same reasons as their Sumerian and Babylonian predecessors thousands of years earlier: to maintain social stability and maximize competitiveness with foreign powers, this time in an economic rather than a military sense.

I. Ancient Debt Clemency: Sumerian and Babylonian Edicts and the Hebrew Torah

Borrowing and debt have posed problems for organized society for all of recorded history, and probably well before that. Life in the ancient world was marked by chronic scarcity of resources, so people were driven to borrow or become indebted in other ways quite commonly, often to meet their basic needs. Much of this borrowing likely occurred at a relatively low level in friendly settings, where most members of close-knit society were both debtors and creditors virtually all of the time. As resource inequality grew, however, poor subsistence farmers began to become indebted to rich elites. Taxes and other “public” debts owed to rulers also weighed heavily on the shoulders of the ruled. Whatever the source of ancient debts, the consequences of default could be grave.

In ancient Mesopotamia, for example, debtors commonly ended up as the involuntary servants of their creditors in one of two ways. First, debt enforcement might lead to the transfer of the debtor’s family land rights to a creditor. Though such debtors would likely remain on the land, they were obliged to cultivate it for an absentee landlord, who extracted a substantial percentage of the harvest in a perpetual arrangement only slightly removed from slavery from the impecunious peasant’s perspective. The second path to involuntary servitude for debtors was more direct, being sold into slavery to pay off a debt or being enslaved to a creditor in debt bondage. The consequences of debt slavery were, of course, more dire, often including separation from the debtor’s family.¹

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¹ See Michael Hudson, *The Lost Tradition of Biblical Debt Cancellations* 14-29 (1993), online at <http://michael-hudson.com/wp-content/uploads/2010/03/HudsonLostTradition.pdf>.

Some of the earliest known records reflect ancient Mesopotamian rulers' decisive responses to the rampant problems caused by overindebtedness. The earliest available ancient records reflect that, from 2400 B.C.E. to 1636 B.C.E., a long list of Sumerian, Assyrian, and Babylonian rulers announced periodic debt amnesties. For example, the well-known Babylonian ruler, Hammurabi, issued four debt cancellation edicts in thirty years, much like his father before him and four other consecutive Babylonian rulers after him.² Indeed, Hammurabi's famous "Code" prescribes not only the sources of a variety of debts, but also at least two provisions for alleviating the burdens of debt: one frees debtor-farmers from the obligation to pay creditors in a year in which their crops fail or are destroyed, and another limits the period of forced labor for debtors who sell themselves or their families into servitude to pay debts—"they shall work for three years . . . and in the fourth year they shall be set free."³

Though varying considerably in form and language, these royal edicts shared at least two and often three principal effects. All restored both land and freedom to debtors who had lost these to their creditors. By freeing debt slaves and returning land to its original owners, these royal edicts "were based on the idea of freedom from debt and its worst consequences."⁴ Additionally, many of these proclamations explicitly cancelled all existing non-commercial debts. Even for those edicts that did not explicitly mention cancellation of debts, this seems little more than a semantic formalism, since the two primary if not exclusive means of coercive enforcement of these debts had been made unavailable.

These rulers were not likely acting out of humanitarian concern as caretakers of their subjects. They were trying to avoid their very societies being ripped apart as their hopelessly indebted subjects fled or became landless debt peons.⁵ These rulers needed motivated soldier-farmers to pay tribute from harvests and wage battle against foreign foes. Lifting the heavy hand of debt servitude and loss of family cultivation rights was a means of encouraging popular support, as it "gave [liberated debtors] a stake in the society whose boundaries they were fighting to extend."⁶ Moreover, these rulers were simply acknowledging, and forcing creditors to acknowledge, the unavoidable fact that these debts could not be paid, and further harassment of debtors was not only unproductive, but destructive.⁷

Similar motivations seem to have spurred Solon's famous *seisachtheia* debt-cancellation reforms in 6th century B.C.E. Athens. As Solon describes his reforms, they freed debt slaves and enticed debtors to return home to Athens ("Many men I brought up to their divinely-founded fatherland, men sold, one illegally, another legally, and others fleeing by forcible necessity . . ."), as well as freeing peasant farmers' land from the "boundary stones stuck in everywhere" indicating encumbrances in favor of rapacious creditors.⁸

² *Id.* at 8-9, 14-25.

³ The Code of Hammurabi ¶¶ 48, 117, online at <http://www.constitution.org/ime/hammurabi.pdf>.

⁴ Hudson, *supra* note 1, at 14.

⁵ See, e.g., David Graeber, *Debt: The First 5,000 Years* 64-65 (2011).

⁶ Hudson, *supra* note 1, at 21; see also *id.* at 18, 19, 36.

⁷ See, e.g., Michael Hudson, "The New Economic Archaeology of Debt," Michael Hudson blog entry, 23 Apr. 2002, online at <http://michael-hudson.com/2002/04/the-new-economic-archaeology-of-debt/>.

⁸ The Poems of Solon of Athens, poem 36 (John Lewis trans., 2006), online at <http://www.classicalideals.com/Solon%20Poetry.htm>.

A thousand years after the last Babylonian debt cancellation edict, similar debt clemency rules were recorded in one of the most influential law books of all time, the Torah. The Hebrews carried forward the Babylonian tradition of periodic freeing of debt slaves and cancelling of debts. The imperative for such action now emanated not from the unpredictable will of temporal rulers, however, but from a predictable and perpetual covenant with the Almighty.

The clearest and most repeated passages relate to the freeing of debt slaves: “When you buy a male Hebrew slave, he shall serve for six years, but in the seventh he shall go out a free person, without debt.”⁹ In addition, echoing both the concepts of freedom from debt slavery and return to ancestral land in the earlier Mesopotamian release edicts, as well as Solon’s *seisachtheia* reforms, Leviticus calls for a general “Jubilee” every fiftieth year, when debt slaves must be released: “They shall remain with you as hired or bound laborers. They shall serve with you until the year of the jubilee. Then they and their children with them shall be free from your authority; they shall go back to their own family and return to their ancestral property.”¹⁰ To these “traditional” forms of relief from slavery and land expropriation, Deuteronomy adds explicit reference to cancellation of debts as part of the seventh-year release.¹¹

Thus, periodic alleviation of the ravaging effects of overindebtedness is a constant theme over at least two-and-a-half millennia preceding the Common Era. As the Roman Empire expanded across both Europe and Mesopotamia, a different attitude toward debt clemency came to predominate. The concept of at least temporary, limited relief from the weight of overburdening debt persisted, and new religious movements would strongly encourage forgiveness, including debt clemency. But the kind of mandatory debt cancellation reflected in the earliest known legal documents would not reappear for nearly another two millennia.

II. Forgiveness Encouraged, Not Compelled: Caesar, Hillel, Jesus and Mohammad

Roman law remained totally unconcerned with the plight of distressed debtors until a landmark reform in the decades immediately preceding the arrival of Christ softened the impact of *pacta sunt servanda*. Though its precise content, application, and even authorship are unclear, the *cessio bonorum* introduced at least the possibility of relief from what otherwise were the exceedingly harsh debt enforcement rules of Roman law.

Caesar’s new relief procedure was a far cry from the ancient debt amnesties, however. Debtors could plead for relief after “ceding all of their goods” (hence the name, *cessio bonorum*), but a reprieve from the pursuits of creditors was limited in at least two important respects. First, the grant of relief to a good faith debtor was left to the praetor’s discretion.¹² Second, the *cessio* procedure did not result in a discharge of debt. Rather, it simply prevented the debtor from being imprisoned for debt, but as soon as the debtor acquired disposable assets, creditors could renew their enforcement efforts against this new source of value.¹³

⁹ Exodus 21:2 (New Revised Standard Version); *see also* Deuteronomy 15:12-14; Jeremiah 34:8-22.

¹⁰ Leviticus 25:40-41 (New Revised Standard Version).

¹¹ Deuteronomy 15:1-3 (“Every seventh year you shall grant a remission of debts,” though allowing enforcement against non-Hebrews); *see also* Deuteronomy 31:10-11; Nehemiah 10:31.

¹² J.H. Dalhuisen, *Dalhuisen on International Insolvency and Bankruptcy* ss. 1.01, 1.03 (1986) (emphasizing that relief “was available . . . exclusively as a favor”).

¹³ *See generally* Theodor C. Albert, “The Insolvency Law of Ancient Rome,” 28 *Cal. Bankr. J.* 365, 384-88 (2006).

The three Abrahamic religious traditions also struggled with an ambivalent attitude toward debt forgiveness. The high aspirations for debt clemency in the Torah faced increasing challenges in practice over time until, just before the advent of the Common Era, one of the greatest rabbis in history all but eviscerated the sabbatical-year debt release. Rabbi Hillel simplified and facilitated an exemption for debts accompanied by a simple legal formulation called a *prosbul*, which rendered debt clemency all but a dead letter in Jewish law.¹⁴

An even more famous Jewish leader, Jesus was clearly more focused on the life following this one, but while he offered little specific guidance as to the proper treatment of debtors in this world, his teachings reference temporal debts in a way that seems more than purely allegorical. Whatever linguistic and anthropological gymnastics one must achieve to explain how the Greek word “debt” reflects an idiomatic turn of phrase in Jesus’ original Aramaic,¹⁵ both versions of the Lord’s Prayer are phrased in terms of forgiveness from God “as we forgive our debtors” or because “we also forgive every one that is indebted to us.”¹⁶

This same juxtaposition of heavenly and temporal *debt* forgiveness appears even more explicitly in Jesus’ Parable of the Unforgiving Servant. When Peter asked whether he must forgive someone who had wronged him seven times, Jesus responded that Peter should offer forgiveness not seven times, but “seventy times seven,” and he amplified the point with a parable: A king sought to collect an enormous debt owed by one of his servants. Since the servant had no means to pay, he was about to be sold into slavery along with his family, but when he begged for the king’s patience, the king not only relented, he cancelled the entire debt. That same servant, however, turned around and accosted another servant who owed him a small debt. When the other debtor-servant begged for patience, the “unforgiving” servant had him thrown in jail for failure to pay. When the king learned of this, he was furious. He berated the creditor-servant, observing that the king had forgiven his enormous debt, so “Shouldn’t you have had mercy on your fellow servant just as I had on you?” The king cast the creditor-servant into prison to be tortured until the original debt was paid off, and Jesus ominously concluded, “This is how my heavenly Father will treat each of you unless you forgive your brother or sister from your heart.”¹⁷ Few would argue that this parable should be taken literally as commanding debt forgiveness, but it is hard to escape the moral imperative for clemency of all kinds here, certainly not excluding clemency for overburdening debt.¹⁸

With the advent of Islam in the mid-seventh century, debt clemency again received more focused and explicit attention. The Qur’an expressly mandates limited debt relief in a way that harks back to both the Roman *cessio bonorum* as well as Jesus’ call for charitable forgiveness.

¹⁴ Joseph Telushkin, *Jewish Literacy* 120-21 (1991) (explaining the *prosbul* as a simplification of a pre-existing evasion technique of creditors’ assigning their debts to a court, as the release was held inapplicable to debts owed to courts); *The Torah: A Modern Commentary* 941, 1440 (W. Gunther Plaut, ed. 1981); Hudson, *supra* note 1, at 39.

¹⁵ See Frederick Fyvie Bruce, *History of the Bible in English* 76 (James Clarke & Co., 3d ed. reprint 2002).

¹⁶ Matthew 6:12; Luke 11:4 (King James Version).

¹⁷ Matthew 18:21-35 (New International Version). The Parable of the Unjust Steward also involves partial debt forgiveness, though Jesus’ commentary is more opaque on the odd tactics in that parable. See Luke 16:1-8.

¹⁸ Compare Maria Mayo, “Forgive Us Our Student Loan Debts?” Huff Post blog, 6 June 2012, http://www.huffingtonpost.com/maria-mayo/forgive-us-our-student-loan-debts_b_1564098.html (“But there is nothing in the teachings of Jesus that suggests that literal, financial debt forgiveness is a moral or religious imperative.”) with Hudson, *supra* note __, at 41 (“[Jesus’] Parable of the Unmerciful Servant . . . leaves little doubt that the poor should be forgiven their debts.”).

Rather than ordering debt cancellation at periodic intervals, as in the Torah, the Qur'an commands temporary relief for distressed debtors whenever the need arises: "If the debtor is in a difficulty, grant him time 'til it is easy for him to repay."¹⁹ While the debtor must be discharged from prison, the debt is not cancelled; only a temporary respite holds creditors at bay until the debtor regains financial footing. Based on the guiding example set by Mohammad (the *sunnah*), Islamic legal scholars established that "difficulty" here means no property of any kind beyond bare essentials, and as the respite ends with the debtor's return to "ease," creditors are free to resume enforcement efforts against any valuable property the debtor might acquire later.²⁰ This first aspect of Islamic debt relief is thus virtually identical to the Roman *cessio bonorum*, which itself would be rediscovered and applied throughout Europe in the High Middle Ages.²¹

Unlike the Roman law, however, Islamic law expressly and powerfully encourages debt forgiveness. The respite verse quoted above concludes with an enticing admonition: "But if ye remit [the debt] by way of charity, that is best for you if ye only knew."²² Much like Jesus' warnings that God would treat creditors as they had treated their debtors, the thinly veiled suggestion here is that charitable remission of debt would draw a heavenly reward. This suggestion was confirmed in a story from Mohammad about a man who explained to God following his death that he had done no good in his life at all other than offering rich people more time to pay their debts and forgiving the debts of the poor, and for this alone, the man was forgiven all his sins.²³

III. Compulsory Debt Clemency Rediscovered: England, United States and Europe

For the next several centuries, the very limited debt relief of *cessio bonorum* and the Islamic respite would mark the outer boundaries of mandated responses to debt distress. After the dawn of the Enlightenment, however, Anglo-American law would unwittingly revive the ancient practice of debt cancellation. The English Parliament started this movement by issuing periodic, targeted debt cancellation laws for non-fraudulent debtors in the late 1600s and early 1700s.²⁴ The movement picked up speed as a formal discharge became part of English bankruptcy law in 1706,²⁵ though the English discharge in bankruptcy remained subject to substantial conditions, limitations, and restrictions (such as super-majority creditor consent) until late in the twentieth century.²⁶

While the practice of legally mandated debt clemency had been reborn in England, it grew and matured in the United States. After a few short-lived and restrained efforts in the early- and mid-1800s to extend relief to financially distressed individuals, the first permanent U.S. bankruptcy law went into effect in 1898. It offered all individual debtors, merchants and

¹⁹ The Holy Qur'an 2:280 (Yusuf Ali translation).

²⁰ See Jason J. Kilborn, "Foundations of Forgiveness in Islamic Bankruptcy Law: Sources, Methodology, Diversity," 85 *Am. Bankruptcy L.J.* 323 (2011).

²¹ See Dalhuisen, *supra* note 12, ss. 2.01[2], 2.02[1]-[7].

²² The Holy Qur'an 2:280 (Yusuf Ali translation).

²³ See Kilborn, *supra* note 20, at 333.

²⁴ Dalhuisen, *supra* note 12, s. 2.02[8].

²⁵ For a wonderfully detailed discussion of this landmark law, see Emily E. Kadens, "The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law," 59 *Duke L.J.* 1229 (2010).

²⁶ See, e.g., Douglass G. Boshkoff, "Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings," 131 *Univ. Pennsylvania L. Rev.* 169 (1982).

non-merchants alike, compulsory cancellation of most debts, with very few restrictions or conditions other than the turnover of (generally non-existent) non-essential assets. Elsewhere in the world, the idea of discharging debt in this way was long regarded as lying somewhere along a spectrum from ill-advised to fraudulent to essentially criminal.

That changed slowly but dramatically in Europe after a consumer credit crisis emerged in the 1970s and 1980s. At first, European lawmakers were reluctant to accept any incursion into the classical *pacta sunt servanda* foundation of the law of obligations. For example, a report by the German Commission on Insolvency Law in 1986 announced defiantly that “a discharge after the Anglo-American model is out of the question.”²⁷ Ultimately though, lawmakers in Germany and elsewhere gradually embraced the rediscovered concept of legally imposed debt clemency.

The first such laws restructured and discharged the debts of non-merchant individuals hesitantly and subject to careful restrictions. The landmark Danish law of 1984 extended relief only to “hopelessly indebted” individuals whose “behavior and circumstances otherwise speak in favor” of extraordinary relief.²⁸ As lawmakers and the public became accustomed to these new laws in the 1990s and early 2000s, however, more and more were adopted, and the restrictions, conditions, and limitations were gradually relaxed to provide greater relief in exchange for smaller (and more reasonable) sacrifices by debtors.²⁹ Indeed, in November 2010, France instituted a reform that allowed an administrative commission to recommend an immediate and unconditional discharge of an insolvent individual’s debts without a liquidation of assets, a more generous extension of relief than has ever been available even under the most liberal U.S. law.³⁰

Like their ancient predecessors in Sumer and Babylon, modern lawmakers have been motivated to compel debt clemency not primarily out of pity for suffering debtors, but out of concern for preserving the integrity of broader society. Continuing pursuit of practically uncollectible debts has a wide range of pernicious effects on debtors, their families, and their societies.³¹ These costs include not only wasted administrative and judicial resources, but also lost potential and productivity from disheartened debtors. In an age when national production and international competitiveness are matters of constant concern, lawmakers have powerful incentives to prevent creditors (both public and private) from imposing unnecessary losses on tax rolls and welfare budgets, destabilizing the crucial consumer financial system and economy, and depressing potential economic productivity and entrepreneurialism of significant numbers of financially distressed citizens.³²

²⁷ Kommission für Insolvenzrecht, *Zweiter Bericht der Kommission für Insolvenzrecht* s. 6.3 (1986).

²⁸ See Jason J. Kilborn, “Twenty-Five Years of Consumer Bankruptcy in Continental Europe: Internalizing Negative Externalities and Humanizing Justice in Denmark,” 18 *Int’l Insolvency Rev.* 155, 166-69 (2009).

²⁹ See, e.g., Jason J. Kilborn, “Two Decades, Three Key Questions, and Evolving Answers in European Consumer Insolvency Law: Responsibility, Discretion, and Sacrifice,” in *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* 307-29 (Johanna Niemi, Iain Ramsay & William Whitford eds., 2009).

³⁰ See Jason J. Kilborn, *Expert Recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984-2010*, at 49 (2011).

³¹ Often the costs to debtors become major losses for society, as revealed in particularly stark terms by recent reports of an uptick in “austerity suicides” in Greece, Italy, and England. See Ben Wedeman, “Death and taxes in Italy,” CNN.com, 10 Sept. 2012, online at <http://edition.cnn.com/2012/09/10/business/italy-economy-suicide/index.html>.

³² See The World Bank, *Draft Report on the Treatment of the Insolvency of Natural Persons* 26-39 (2012), online at <http://siteresources.worldbank.org/INTGILD/Resources/WBPersonalInsolvencyReportOct2012DRAFT.pdf>.

Just as Sumerian and Babylonian rulers used debt cancellation to reinvigorate their tax bases and military forces, modern lawmakers have increasingly legislated debt clemency in order to reinvigorate their tax bases and economic forces in an increasingly fierce global economic struggle. Far from a new or even revolutionary idea, compelled debt clemency has a long and rich history that today is finally completing a nearly 5000-year circle.