FINANCIAL INCLUSION AND THE "WAR *FOR* CASH"

FEDERICO LUPO-PASINI*

I
INTRODUCTION

When digital payments took the fight for financial inclusion to a new level, cash was seen by many as its most prominent victim—a relic of a not so distant past to be sacrificed on the altar of financial innovation and economic efficiency.[1] The great tech saviors of financial inclusion, products like M-Pesa in Africa, AliPay in China, or PayTM in India, all try to create a digital ecosystem with a main goal of bypassing the constraints of the cash economy.[2] Their ultimate objective is to build a totally new financial infrastructure that connects users and merchants while circumventing the limits of the traditional banking and currency systems. Not surprisingly, the big players of the inclusion world—donors like the Gates Foundation or the World Bank—and private investors alike have channeled their efforts into incentivizing the adoption of digital payment solutions, which soon became the big frontier of the economic development agenda.[3]

Roughly at the same time, governments in the United States, Europe, and Asia started a parallel battle to slowly reduce the role of cash in the economy—

This Article is also available online at http://lcp.law.duke.edu/.
* Associate Professor, Durham Law School, Durham University.

1. In this Article, cash is the informal way to describe central bank-issued fiat currency in the form of coins and banknotes. Throughout the essay, I will refer to cash, banknotes, and currency to describe the very same concept. Yet, while cash comprises both central banks issued coins and banknotes, most of the problems surrounding the disappearance of cash are related to banknotes.

2. *See, e.g.*, MCKINSEY GLOB. INST., DIGITAL FINANCE FOR ALL: POWERING INCLUSIVE GROWTH IN EMERGING ECONOMIES 7 (2016), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/Employment%20and%20Growth/How%20digital%20finance%20could%20boost%20growth%20in%20emerging%20economies/MGI-Digital-Finance-For-All-Executive-summary-September-2016.ashx [https://perma.cc/2R6C-U3VG] (discussing M-Pesa's work to build digital economies in Kenya); *see also* BENJAMIN D. MAZZOTTA ET AL., THE INST. FOR BUS. IN GLOB. CONTEXT, THE COST OF CASH IN INDIA 77 (2014), https://sites.tufts.edu/digitalplanet/files/2020/06/Cost-of-Cash-India.pdf [https://perma.cc/8VMP-4N2B] (discussing PayTM's work to offer digital wallets to customers); *see generally* VISA, ACCELERATING THE GROWTH OF DIGITAL PAYMENTS IN INDIA: A FIVE-YEAR OUTLOOK (2016), *available at* https://www.yumpu.com/en/document/read/56210871/accelerating-the-growth-of-digital-payments-in-india-a-f-ive-year-outlook [https://perma.cc/5VKB-TC5Z] (discussing the growth of digital finance in India).

3. *See generally* WORLD BANK, DIGITAL DIVIDENDS: WORLD DEVELOPMENT REPORT 2016 (2016), https://openknowledge.worldbank.org/bitstream/handle/10986/23347/9781464806711.pdf [https://perma.cc/J26Q-BRZW].

what some commentators dubbed as the "war on cash."[4] Evidence shows that banknotes are the main vehicle for laundering and storing illegal money.[5] Because of the inherent anonymity of cash transactions, and the impossibility to trace them across the payment system, cash is used to finance all sorts of illegal activities.[6] For the same reason, it is also a major vehicle for tax evasion. In his influential book, *The Curse of Cash*, Harvard economist Kenneth Rogoff argued that suppressing cash would also provide fundamental benefits to the conduct of monetary policy, thus giving a new tool to central banks.[7] The war on cash included the deployment of certain new monetary policies, such as the abolition of high-denomination banknotes, limits on the maximum value of cash payments, and more stringent reporting requirements on banks for cash deposits above a certain value.[8]

Despite their efforts, the level of cash circulating in Western economies has not reduced in aggregate, primarily due to the desire of users to keep it as a safe asset.[9] This is a phenomenon particularly relevant during the COVID-19 pandemic, where cash withdrawals increased as a precaution against the fear of a possible malfunctioning of the payment system or an economic collapse: what the Princeton sociologist of money Frederick Wherry calls "comfort-food hoarding."[10]

What we see, instead, is a very quick decline in cash payment transactions, in favor of digital payments. In the United Kingdom, for instance, the volume of cash payments has reduced from 60% in 2008 to 28% in 2018 and is projected to decline to 9% in 2028.[11] In the United States, there is also a visible decline in the

4. Lawrence H. White, *The Curse of the War on Cash*, 38 CATO J. 477, 477 (2018) (explaining the meaning and origin of the phrase "war on cash").

5. *See, e.g.*, EUROPOL, WHY IS CASH STILL KING? A STRATEGIC REPORT ON THE USE OF CASH BY CRIMINAL GROUPS AS A FACILITATORY FOR MONEY LAUNDERING (2015), https://www.europol.europa.eu/printpdf/publications-documents/why-cash-still-king-strategic-report-use-of-cash-criminal-groups-facilitator-for-money-laundering [https://perma.cc/4KBU-LW4D].

6. *See generally* Peter Sands, *Making it Harder for the Bad Guys: The Case for Eliminating High Denomination Notes* (Harv. Kennedy Sch. Mossavar-Rahmani Ctr. for Bus. & Gov't, Working Paper No. 52, 2016) (discussing the use of high denomination notes in crime).

7. *See generally* KENNETH ROGOFF, THE CURSE OF CASH: HOW LARGE-DENOMINATION BILLS AID CRIME AND TAX EVASION AND CONSTRAIN MONETARY POLICY (2016).

8. White, *supra* note 4, at 479–81.

9. *See, e.g.*, MORTEN BECH ET AL., BANK FOR INT'L SETTLEMENT, PAYMENTS ARE A-CHANGIN' BUT CASH STILL RULES 67–80 (2018), https://www.bis.org/publ/qtrpdf/r_qt1803g.pdf [https://perma.cc/8E9V-CJVY] (explaining that the total amount of certain currency denominations in circulation, including the U.S. Dollar, has increased, likely as a result of increased demand from abroad as a mechanism of saving.).

10. Brendan Greeley, *The Comfort of Cash in Time of Coronavirus*, FIN. TIMES (July 16, 2020), https://www.ft.com/content/b0182ea4-afc2-4d5d-a8cf-fc7407fa8a18 [https://perma.cc/7X4H-HA9K].

11. UK FIN., UK CASH AND CASH MACHINES SUMMARY 2019, at 3 (2019), https://www.ukfinance.org.uk/sites/default/files/uploads/pdf/UK%20Cash%20and%20Cash%20Machines%202019%20SUMMARY.pdf [https://perma.cc/4KJ3-6UD7].

use of cash payments, albeit not as steep as the United Kingdom's.[12] Together with the decline in transactions, we are also witnessing a dismantling of the cash distribution and management network, due to the progressive disappearance of ATMs and bank branches.[13] The slow disappearance of cash as a retail payment solution was not only the result of a regulatory agenda to suppress cash. It had mostly to do with changing consumer habits in favor of more efficient digital payments.[14] This is because cash, indeed, is not efficient. It comes with all sorts of problems, from security risks, withdrawal and distribution costs, and a shrinking infrastructure that reduces the incentive for users to prefer it over the burgeoning mobile and card payment system.

Yet, as I will demonstrate in this Article, the decline of cash transactions and the slow dismantling of the cash infrastructure is creating a very serious problem for the poorest and more marginalized parts of society—those who do not have access to the banking and digital payment system, and who rely on cash to pay for their necessities. Despite its inefficiencies, cash remains a fundamental, albeit neglected, tool in the war for financial inclusion. Parliamentary inquests, central bank reports, and civil society organizations have recently voiced their fear about the impact that a pure cashless economy would have on the most vulnerable parts of our society.[15] This is so much so that we are now witnessing a return of the regulatory tide in favor of cash: a war *for* cash that strives to keep it alive amidst the social and economic pressure of digital payments.

The remainder of this Article will be divided in three parts. In Part II, I explain why the disappearance of cash has a detrimental impact on financial inclusion. Parts III and IV introduce and discuss some of the new regulatory trends in favor of cash—notably, the question of cash discriminations, and the revamp of the structural regulation on cash distribution. While the goal of this Article is to make a general theoretical contribution to the understanding of the role of cash in Western economies, the analysis will be largely based on the

12. *See generally* DAVID PERKINS, CONG. RSCH. SERV., R45716, LONG LIVE CASH: THE POTENTIAL DECLINE OF CASH USAGE AND RELATED IMPLICATIONS 23 (2019) (describing the decline in cash payments in the U.S.).

13. Patrick Collinson, *Hundreds of Cash Machines Close as UK Turns to Contactless Payments*, GUARDIAN (June 29, 2018), https://www.theguardian.com/money/2018/jun/29/hundreds-of-cash-machines-close-as-uk-turns-to-contactless-payments [https://perma.cc/3QS2-MNAA]; Josh Robbins, *1,250 Free ATMs Started Charging Fees in Just One Month*, WHICH? (May 1, 2019), https://www.which.co.uk/news/2019/05/exclusive-1250-free-atms-started-charging-fees-in-just-one-month/ [https://perma.cc/C4AH-97UQ].

14. *See* ACCESS TO CASH REV., FINAL REPORT 12 (2019), https://www.accesstocash.org.uk/media/1087/final-report-final-web.pdf [https://perma.cc/XZ8T-67G8] (explaining use of debit cards and contactless payments are increasing, while use of cash is decreasing).

15. *See id.* at 24 (reporting that decreasing accessibility to cash would negatively impact those who rely on it); *see also* SELECT COMM. ON FIN. EXCLUSION, TACKLING FINANCIAL EXCLUSION: A COUNTRY THAT WORKS FOR EVERYONE?, 2016-17, HL 132, at 9 (UK) (describing the negative effects of a cashless society on financial inclusion); PERKINS, *supra* note 12, at 23 (describing the risk that a cashless society poses to economically vulnerable groups); URSULA DALINGHAUS, CASH MATTERS, VIRTUALLY IRREPLACEABLE: CASH AS PUBLIC INFRASTRUCTURE 54 (2019) (describing public fears of the impacts of a cashless society on stability).

United Kingdom's experience, with some occasional references to the United States'. While the complexity of the current evolving monetary system would probably need to extend the analysis on cash to the issue of Central Bank Digital Currencies, I will leave this to the myriad of existing publications on the topic.[16]

II
MONETARY EXCLUSION AND CASH

The debate on financial inclusion has typically categorized the problem of access to financial services into two distinct phenomena. On the one hand, there is a problem of access to credit and savings, which prevents or makes it more difficult for certain categories of individuals and firms to access the formal banking and pension system.[17] On the other hand, financial exclusion can be seen also as a problem of access to payments. In the latter case, the issue lies in the inability of individuals and firms to extinguish debts by transferring monetary value through one of the various payment instruments, such as bank transfers, checks, e-money payments, or banknotes, to name just a few.[18] Both these issues can be conceptualized as market failures. Both private payment firms and credit institutions are unable or unwilling to provide to certain parts of the population commercial services that are perceived as social goods.

The disappearance of cash lies perhaps at the intersection between these two areas. I prefer to categorize this as a problem of monetary exclusion.[19] While coins and banknotes are commonly understood as payment instruments, fiat currency—the technical name for central bank-issued coins and banknotes—is

---

16. *See generally* BANK FOR INT'L SETTLEMENT, BIS ANNUAL ECONOMIC REPORT 2020, § III (2020), https://www.bis.org/publ/arpdf/ar2020e.pdf [https://perma.cc/U86L-U8AN] (discussing central bank digital currencies); TOBIAS ADRIAN & TOMMASO MANCINI-GRIFFOLI, FINTECH NOTES: THE RISE OF DIGITAL MONEY (2019), https://www.smefinanceforum.org/sites/default/files/FTNEA2019001.pdf [https://perma.cc/YU58-RUCW].

17. *See, e.g.*, Abbye Atkinson, *Rethinking Credit as A Social Provision,* 71 STAN. L. REV. 1093, 1093, 1110–11 (2019) (explaining that, although many commentators characterize access to credit as a social good, reliance on credit may negatively impact low-income populations because of high interest rates); *see, e.g.*, Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?* 87 MINN. L. REV. 1, 11 (2002) (explaining that most payday loan customers lack access to traditional credit); Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers,* 86 TEX. L. REV. 451, 458 (2008) (describing the perils of lack of access to credit to low-income families); Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color,* 17 GEO. J. ON POVERTY L. & POL'Y 165, 187 (2010) (describing the lack of access to credit in minority communities); LISA SERVON, THE UNBANKING OF AMERICA: HOW THE NEW MIDDLE CLASS SURVIVES 81 (2017) (describing the payday loan systems that many people without access to traditional credit are forced to use); Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283, 1341 (2014) (describing access to credit as a "public need").

18. *See* COMM. ON PAYMENTS & MKT. INFRASTRUCTURES, BANK FOR INT'L SETTLEMENTS & WORLD BANK GRP., PAYMENTS ASPECTS OF FINANCIAL INCLUSION 5–6 (2016), https://www.bis.org/cpmi/publ/d144.pdf [https://perma.cc/Y99E-2P68] [Hereinafter PAYMENTS ASPECTS OF FINANCIAL INCLUSION] (describing the need for access to payment methods).

19. *See generally* Federico Lupo-Pasini, *Is it a Wonderful Life? Cashless Societies and Monetary Exclusion,* 40 REV. BANKING & FIN. L. 155 (forthcoming 2021).

also one of the main forms of money in modern economies.[20] Indeed, currency is an IOU issued by central banks to the rest of the economy. Together with bank deposits and central bank reserves, currency makes up the bulk of the money in our economy. Unlike central bank reserves, which can be accessed only by banks, and bank deposits, which are essentially a service provided by commercial banks for profit, currency is available to everyone. It is the closest thing to a public good we have in our economy.[21] The disappearance of cash is, therefore, much more than a simple market failure of the payment system. On the contrary, it underlines the broader inability of individuals to access the most basic form of public money, and the parallel retrenchment of the state in the provision of a public good—a place that has been occupied by banks, the gatekeepers to the modern payment world.

A. Cash as a Public Good

Since the advent of modern banking in the late nineteenth century, unbanked individuals or firms willing to make or receive a payment had essentially two means of doing so. On the one hand, they could access bank-issued negotiable instruments, such as checks. While checks are now disappearing, they were for a long time a very important payment tool, whose negotiability allowed them to be traded by everyone without having to open a bank account. On the other hand, they could use the other negotiable instrument: banknotes. Banknotes, for a certain time, were also issued by private banks. However, the inefficiency of the private banknote system and the parallel rise in the importance of central banks led to central banks' monopoly in the issue of currency.[22] Thus, fiat money became a public service provided by the state.

Cash has three fundamental legal properties that make it the most inclusive payment method. First, banknotes are negotiable instruments which allow an immediate transfer of value once the physical possession of the note is obtained by the payee. The legal attribute of negotiability, and that of transferability associated with it, while quite technical from a legal viewpoint, are what make banknotes and coins so freely tradable and accessible to anyone. As Simon Gleeson clearly puts it, negotiability "gives the transferee a claim which is an independent free-standing right not dependent on the performance of the

20. *See* Micheal McLeay, Amar Radia & Ryland Thomas, *Money Creation in the Modern Economy,* 54 BANK ENG. Q. BULL. 4, 8 (2014) (defining "fiat" currency as "money that is not convertible to any other asset").

21. *See* DALINGHAUS, *supra* note 15 (describing cash as a public good).

22. *See, e.g.*, Gary Gorton, *Pricing Free Bank Notes,* 44 J. MONETARY ECON. 33 (1999) (describing private banks' historic ability to issue banknotes); LAWRENCE H. WHITE, FREE BANKING IN BRITAIN: THEORY, EXPERIENCE, AND DEBATE 35–38 (2d ed. 1995) (describing the history of private banks issuing banknotes in the United Kingdom); *see generally* GARY GORTON, MISUNDERSTANDING FINANCIAL CRISES: WHY WE DON'T SEE THEM COMING (2012); Benjamin Geva, *Bank Money: The Rise, Fall, and Metamorphosis of the 'Transferrable Deposit', in* MONEY IN THE WESTERN LEGAL TRADITION: MIDDLE AGES TO BRETTON WOODS (David Fox & Wolfgang Ernst eds., 2015) (explaining central banks' rise in importance as the issuers of banknotes).

contract in respect of which the payment obligation was owed in the first place."[23] This is because a negotiable instrument is able to embody a legal claim in a commercial receivable: in the case of currency, a claim against the central bank.[24]

Generally speaking, when currency is offered for payment, the payee can rely on the presumption that the payer is the legitimate owner of those chattels, thus avoiding the risk that the good faith payee might be required to return them.[25] This is because the rule of commercial law of *nemo dat quod non habet*[26] has never been applied to cash whenever the transferee got possession of the instrument in good faith, an innovation famously advanced in *Miller v. Race*.[27] This specific quality, which makes the circulation of banknotes much faster, was succinctly expressed in a well-known obiter dictum by Lord Haldane LC:

> In most cases money cannot be followed. When sovereigns or bank notes are paid over as currency, so far as the payer is concerned, they cease ipso facto to be the subject of specific title, as chattels. If a sovereign or bank note be offered in payment, it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason for this is that chattels of such kind form part of what the law recognises as currency and treats as passing from hand to hand in point, not merely of possession, but of property.[28]

Yet, the specific possessory attributes of currency make cash a formidable payment tool as they disentangle cash holders from the complex regulatory requirements for access to banking. In other words, although cash ultimately presumes the presence of the banking and private payment system underneath it to distribute it across the territory, not all users of cash need to have a direct relationship with a bank through a bank account to intermediate it. This is what makes cash accessible to anyone.

Second, cash is an immediate and final means of payment which does not expose the payee to the risk of default of the payer, thus guaranteeing an immediate and final transfer of value in extinguishment of a debt. Banknotes do not entail any counterparty risk: holders of banknotes do not need to worry about the solvency of the issuer—a critical aspect in the era of private banknotes which ultimately led to their demise—as they are backed by the state. Indeed, the credibility of cash does not depend on the individual's own creditworthiness or social status, but only on the trust in the entity that issued it: the central bank. This does not apply, for instance, to the other negotiable instrument, the check, which always exposes the payee to the risk of the insolvency of the account holder. This aspect is also critical for the sustainability of a monetary system, as rumors about the insolvency of the money issuer would reduce the appeal of this

23. SIMON GLEESON, THE LEGAL CONCEPT OF MONEY 107 (2019).

24. *Id.* at 108.

25. *Id.* at 127–28.

26. This maxim provides that no one, in general, can sell personal property and convey a valid title to it unless he is the owner or lawfully represents the owner. *See, e.g.*, *Mitchell v. Hawley*, 83 U.S. 544, 550 (1872).

27. *See* Miller v. Race (1758) 97 Eng. Rep. 398; 1 Burr 452 (Gr. Brit.); CHARLES PROCTOR, MANN ON THE LEGAL ASPECT OF MONEY 43 (7th ed. 2012).

28. Sinclair v. Brougham [1914] AC 398 (HL) 418 (appeal taken from Eng.).

medium of exchange among users, thus lowering the value of the money transferred.[29]

Third, as I will explain below, cash has the property of anonymity, which insulates it from the various identity requirements applicable to other methods.

B. Banks as Gatekeepers and Monetary Exclusion

Cash was for a long time the main retail payment instrument, used by everyone. However, over time, the availability of bank deposits became so widespread that private banks became the main suppliers of retail payment services, alongside their core business of taking deposits and providing credit. As Benjamin Geva said, banks became "paymasters."[30] The rise of the bank-deposit account as the key point of access to the payment system is central to the analysis of the disappearance of cash.

The importance of the deposit account—sometimes referred to as the transaction account—rose slowly and steadily, so much so that the deposit account is now the key to every payment service. It is a product without which no other mainstream payment method except cash is accessible. Initially, the benefit of the deposit account could only be seen for larger non-retail payments, as banked individuals and firms had to visit a branch to benefit from the speed and network effects of the bank-led payment network. The advent of credit and debit cards, which are operated by private firms but nonetheless linked to bank accounts, made the bank-based payment system even more convenient for retail payments. Finally, when banks started to set up their digital payment infrastructures through websites or phone apps, making a payment became even simpler as the need to visit a bank branch was totally removed.

Crucially, the importance of the deposit account extends also to the various digital payment mechanisms, like ApplePay, Venmo, or PayPal. The digital aspect of payment is probably the most innovative phenomenon in retail finance in the last few years as new incumbents managed to disrupt the long-standing bank monopoly on retail payments and offer faster and cheaper payments to consumers.[31] Yet, with the exception of cryptocurrencies, which are used in a very tiny fraction of retail payments, e-money products and all electronic payment facilities still require users to have a bank account.[32] Indeed, in order to open a

29. In other words, because payees would not trust that the entity issuing the money would back its promise to redeem it, the actual value of the money traded would be lower than its face value. The problem of trust applies only partially to bank deposits, as deposit insurance schemes guarantee public backing against the bank's default. However, it can apply sometimes to non-bank e-money and e-payments, which are not always subject to the same public backstop of bank deposits.

30. BENJAMIN GEVA, BANK COLLECTIONS AND PAYMENT TRANSACTIONS: A COMPARATIVE LEGAL ANALYSIS (2001).

31. *See* Adam J. Levitin, *Pandora's Digital Box: The Promise and Perils of Digital Wallets*, 166 U. PA. L. REV. 305, 307 (2008) ("Digital wallets are poised to transform the world of consumer payments and commerce.").

32. *See, e.g.*, Izabella Kaminska, *The Finance Franchise and FinTech (Part 2),* FIN. TIMES (Aug. 18, 2017), https://ftalphaville.ft.com/2017/08/18/2192493/the-finance-franchise-and-fintech-part-2/ [https://perma.cc/E5Y5-VAZ5]; Izabella Kaminska, *Why There is No Such Thing as A Trustless Financial System*,

private e-money account it is necessary to buy e-money, which can only be done by exchanging deposit money for e-money.

On top of that, while digital payments generally provide large benefits for the financial system, as they allow faster and cheaper access to payments, thus bypassing some of the constraints of the standard bank retail payments and cash, they do come with their own challenges. As clearly shown by the U.K. Access to Cash Review, and by other new studies, digital payments are inaccessible for a minority of the population.[33] This is due to a number of reasons ranging from digital illiteracy, lack of access to broadband and internet, and idiosyncrasies in operating digital devices. Thus, as cash disappears due to changing consumer habits that favor digital payments, e-money is typically not a viable alternative for the unbanked as it still depends on access to a deposit account and technological accessibility.

So, what's left in terms of payments for the unbanked? Very little, unfortunately. In developing countries, the agent banking system—a new distribution channel that allows financial institutions and other commercial actors to offer financial services outside traditional bank premises—does allow cash to be converted into e-money products, although even agent banking requires identity verifications.[34] Agent banking, however, is basically absent in Western countries. A few card providers do allow cash to be converted into digital money. But those cards do not have an extensive network to tap into, thus reducing their economic effect for the unbanked. On top of that, neither of these solutions solve the underlying problem of exclusion. If cash disappears, no conversion of official money into e-money will be possible. The unbanked will be simply locked out of the same payment systems that are causing the disappearance of cash.

As the bank deposit is central to our retail payment system, and as viable payment alternatives like e-money largely depend on access to a bank deposit account, banks have become the gatekeepers to the payment world. This position of quasi-monopolism is challenged only by cash and some fringe cryptocurrencies. The importance of the deposit account is nothing new. In a seminal research paper on the payment aspects of financial inclusion, the Bank for International Settlements warned that access to a transaction account is a key element in the fight for financial inclusion.[35] Yet, while the importance of deposit

---

FIN. TIMES (July 31, 2017), https://ftalphaville.ft.com/2017/07/31/2192105/why-there-is-no-such-thing-as-a-trustless-financial-system/ [https://perma.cc/manage/create?folder=14471]; Robert C. Hockett & Saule T. Omarova, *The Finance Franchise,* 102 CORNELL L. REV. 1143, 1202 (2017) (describing cryptocurrencies' "one-to-one" model of finance); Morgan Ricks, *Money as Infrastructure*, 3 COLUM. BUS. L. REV. 757, 833–36 (2018).

33. ACCESS TO CASH REV., *supra* note 14, at 24.

34. *See* Gautam Ivatury, Timothy Lyman & Stefan Staschen, *Use of Agents in Branchless Banking for the Poor: Rewards, Risks, and Regulation*, CGAP FOCUS NOTE, no. 38, 2006 (defining "branchless banking" or "agent banking").

35. PAYMENTS ASPECTS OF FINANCIAL INCLUSION, *supra* note 18, at 5 (describing transaction accounts as "the cornerstone for providing electronic payment services").

accounts increases, individuals are still experiencing the same problems in accessing them. In the United States, profitability is still an issue, as retail account applications for low-income individuals are sometimes refused by banks. Very basic financial literacy is also a problem, especially for those individuals with cognitive disabilities or little education.

Yet, by far the most important barrier to banking access is probably the presence of regulatory requirements on identity verification. At present, financial institutions are required to comply with anti-money laundering (AML) and combating the financing of terrorism (CFT) regulations, which prevent them from opening anonymous accounts to customers. In the House of Lords Financial Exclusion Committee Report, know-your-customers regulations were identified as one of the key issues preventing access to a bank account.[36] Certain groups, like homeless people, people with mental disabilities, undocumented immigrants, or people fleeing their homes might find it extremely challenging to provide the documentation required to open a bank account.[37] The same problem extends also to mainstream digital payment providers, as access to the digital payment system, with the exception of cryptocurrencies, needs users to be vetted. This makes it impossible for anonymous users to access the cashless payment system. A recent Bank of England discussion paper on central bank digital currencies admits that identity verification would still be necessary even if the Bank of England were to issue its own digital currency, thus making anonymous payments impossible.[38] Thus, in our financial system, access requires identification.

In this light, we can see how the anonymity of cash and the fact that it does not require any identification to use it make it the most equitable payment instrument and a real vehicle of financial inclusion. The attributes of negotiability and transferability inherent in banknotes separate the user's identity from the value of the instrument offered in discharge of debt. They do so by linking that value to the identity—and the credit—of the issuing entity, either a private bank or the central bank. In essence, they make currency anonymous. This third key attribute of currency was clearly identified in a very famous judicial decision, *Moss v. Hancock*,[39] in which money is described as: "that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted *equally without reference to the character or credit of the person who offers it. . . .*"[40]

Yet, identity regulation is not simply a question of checks and risks, as a superficial analysis of AML and CFT requirements might suggest. On the contrary, it underpins a much deeper vision of which category of individuals a monetary system considers worthy of protection. Depending on the design of

36. SELECT COMM. ON FIN. EXCLUSION, *supra* note 15, at 59–62.

37. *Id.* at 60.

38. BANK OF ENG., CENTRAL BANK DIGITAL CURRENCY: OPPORTUNITIES, CHALLENGES AND DESIGN 32 (2020).

39. Moss v. Hancock [1899] 2 QB 111 (UK).

40. *Id.* at 116 (emphasis added).

those rules and their scope, access could be open to anyone, including homeless persons or undocumented migrants, as is characteristic of cash, or limited to those who have a legal proof of identity and residence, as required by bank deposits. This is an important consideration if central banks will indeed decide to issue central bank digital currencies to offset the decline of cash. Without disentangling digital currencies from identity verification, digital cash will not be a feasible payment instrument for many unbanked individuals.[41]

To conclude, the availability of different payment mechanisms and a new type of money was heralded by the economic development and financial literature as a steppingstone for financial inclusion. However, the progressive disappearance of cash is creating a hole in the monetary and payment system that deprives unbanked individuals from their only means of payment. In the end, the contemporary disappearance of cash, the difficulty in accessing bank products, and the rise of bank-led payments creates a triple whammy that locks the most disadvantaged parts of society out of the economy.

III

CASH DISCRIMINATIONS

The disappearance of cash, particularly visible in the United Kingdom and other advanced cashless economies, has shown how our societies rely on this basic and yet somehow fundamental form of money. As a result, a movement to preserve cash started to gain traction, propelled by civil society and consumer groups organizations. In the United Kingdom, a parliamentary inquiry, the Access to Cash Review, was set up to look at the issues raised by the disappearance of cash and the reasons behind it.[42] A similar initiative was implemented in the United States with *Long Live Cash*, a U.S. congressional report on the decline of banknotes.[43] As a result, we are now entering a new phase in the regulation of cash, which for the first time looks at how to keep cash alive. In this Part and the next, I will discuss two key regulatory trends: the rebooting of legal tender legislation to address cash discriminations, and the structural reforms on cash supply and distribution.

A. Rebooting Legal Tender

In the free market of payments, network externalities often determine the success of one payment instrument over another. A payment system finds one of its core strength in the scope of the network that users can rely on to discharge

41. *See generally* EUR. CENT. BANK, EXPLORING ANONYMITY IN CENTRAL BANK DIGITAL CURRENCIES (2019) (describing a proof of concept for maintaining anonymity in digital currency issued by central banks).

42. ACCESS TO CASH REV., *supra* note 14, at 4.

43. *See* PERKINS, *supra* note 12, at 1 (describing the decline in cash usage in the U.S.).

their debts.[44] The more users choose a specific form of payment to settle their debts, the higher the value of that payment network. The same also applies to money. Since money is a claim, the more people trust that money will keep its value, the higher the chance that payees will accept it in discharge of debts and use it themselves to settle their debts. In the case of currency, the success of this medium of exchange is based on trust that the token or the claim will be redeemable or transferred on to someone else without losing value. Economic history shows that it is ultimately the market that decides whether a specific form of money is successful or not. If this is not the case, either because users do not trust the issuer's pledge to keep the value of the money stable over time, or because of other difficulties in using that type of money, the money will lose its strength as a medium of exchange. Yet, governments have for a long time tried to nudge users to choose a specific form of money—the state fiat currency—over others.[45] One way to do so is to prohibit payees from refusing currency when tendered for payments by payers, and from accepting anything other than the designated currency—the so-called legal tender.

The use of legal tender as a monetary tool is not uniform around the world. While certain countries, like France, have kept the refusal of cash payments punishable by an administrative fine, most legal tender legislations have lost their original purpose, and are now nothing more than a nudge to vendors. In the United Kingdom, the concept of legal tender only obliges the payee to accept Bank of England notes and coins as discharge of debt when tendered for payment by the payer. However, it does not oblige the parties to pay only with legal tender, as they routinely do when paying with checks, bank transfers, or bank cards. Nor does it excuse a payer from paying with a different payment method when that was contractually agreed or when the creditor refuses it. A creditor is still free to sue on the debt in court after he has refused a valid tender. But he will be barred from claiming the interest accruing on the debt after the date of tender and he will have to pay the costs of the action.[46] As Gleeson points out, legal tender is nowadays useful in English law only as a strategic litigation device that allows debtors to claim a breach of contract.[47]

In the United States, legal tender legislation is similarly in favor of payees, who have the right to refuse cash. Indeed, while the Coinage Act of 1965 stipulates that "United States coins and currency are legal tender for the all debts, public charges, taxes, and dues","[48] there is no federal law mandating that shops,

44. *See* JOHN A. WEINBERG, FED. RESERVE BANK OF RICHMOND, NETWORK EXTERNALITIES AND PUBLIC GOODS IN PAYMENT SYSTEMS 4 (1996) ("The value to an individual user of a network service depends on the number of other users to whom the individual connects through the network.").

45. *See* GLEESON, *supra* note 23, at 133–34 (describing historical government attempts to incentivize the use of state fiat currency).

46. I thank the anonymous commentator on an earlier draft of this Article for this point.

47. GLEESON, *supra* note 23, at 140–41.

48. 31 U.S.C. § 5103 (2018) ("United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues."); 31 C.F.R. § 100.3 (2019).

individuals, and businesses must accept currency for payments.[49] Thus, despite legal tender laws making it illegal to refuse a payment in cash to settle a debt, payees can circumvent this requirement by posting a sign limiting transactions to those paid by card, or by making the contractual performance only after the customer pays, as most fast food restaurants do.[50]

While for most of modern history legal tender was largely ignored as a legal tool, it might make a surprising comeback as a result of the rise of cash discriminations. Since mobile payments took hold, a few businesses have started to refuse cash for payment, perhaps because of the risk of robberies or as a part of the shop's broader shift towards technology. The issue is not confined to some trendy hipster bars, but also extends to certain gig-economy services such as Uber, which specifically require payment through debit cards. The problem of cash discriminations, however, was exacerbated further during the COVID-19 pandemic. A lot of news establishments reported that shops in the United Kingdom, France, and the United States refused or openly discouraged cash due to the fear that the exchange of cash would transmit the disease through surface contamination.[51] The problem was so widespread that the Bank for International Settlement issued a report on the effective transmission risks attached to banknotes.[52]

The disappearance of cash both before and during the COVID-19 pandemic led to a backlash from civil society organizations, which raised awareness of the impact that the cashless economy has on the weakest parts of the population. As a result, we are now witnessing a new regulatory trend to reboot legal tender legislation and to enforce it more heavily. We can see the first real signs of this regulatory trend in the United States, which is paradoxically the most cash friendly among Western economies. In 2019—prior to the COVID-19 pandemic's exacerbation of the problem—two different bills, the Cash Always Should Be Honored Act and the Payment Choice Act of 2019, were introduced concomitantly to address the problem of cash discrimination. If approved, those bills would make the refusal of cash illegal and allow customers to sue any retail establishment that does not accept cash as a mean of payment.[53] Similar laws were issued at the state level. For instance, a 1978 law from the State of Massachusetts states: "No retail establishment offering goods and services for sale shall discriminate against a cash buyer by requiring the use of credit by a buyer in order

49. Samuel Erlanger, *A Cashless Economy: How to Protect the Low-Income*, 2019 CARDOZO L. REV. DE-NOVO 166, 170 (2019); U.S. DEPT. OF TREASURY, LEGAL TENDER STATUS, https://www.treasury.gov/resource-center/faqs/Currency/Pages/legal-tender.aspx [https://perma.cc/96AA-LNC4].

50. Erlanger, *supra* note 49, at 190–91.

51. Izabella Kaminska, *How Covid-19 Has Reframed the War on Cash*, FIN. TIMES (June 24, 2020), https://ftalphaville.ft.com/2020/06/24/1592998802000/How-Covid-19-has-reframed-the-war-on-cash-/ [https://perma.cc/CV5J-T72B].

52. *See* RAPHAEL AUER, GIULIO CORNELLI & JON FROST, BANK FOR INT'L SETTLEMENT, COVID-19, CASH, AND THE FUTURE OF PAYMENTS 1 (2020) (describing both the real risk of COVID-19 transmission via banknotes and the public's perception of such risk).

53. Cash Should Always be Honored (CASH) Act, H.R. 2630, 116th Cong. (2019); Payment Choice Act of 2019, H.R. 2650, 116th Cong.

to purchase such goods and services. All such retail establishments must accept legal tender when offered as payment by the buyer."[54] The effect of these laws is to forcibly keep the demand for cash up, thus artificially maintaining the network externalities that cash needs in order to survive. The marginalized groups that rely on cash as a mechanism of payment will therefore be included in the economic system.

In Sweden, where cashless payments led to the quasi-disappearance of cash, consumer and pensioners groups lobbied heavily to raise awareness on the cost of cash discriminations.[55] As a result, the Sveriges Riksbank, the national central bank, has called upon regulators to amend the legislation on legal tender to make cash acceptance mandatory for all shops and retail establishments selling vital goods and services in order to protect those social groups that rely mostly on cash. At present, in Sweden, cash acceptance is mandatory only in states of heightened alert such as in the event of war, natural disasters, and other similar events. Interestingly, an opinion of the Sveriges Riksbank argues that keeping cash alive is a strategic economic interest as it would be very difficult to get the cash system to function during emergencies if it was not already in use during normal times.[56] Alternatively, in France, where legislation makes refusal to accept cash payments an administrative violation punishable by a fine, the French Competition Authority has decided to open a number of investigations on the widespread violation of legal tender law.[57]

B. The European Court of Justice Case

The question of the role of legal tender in protecting against cash discrimination is currently being discussed in a high-profile case at the European Court of Justice (ECJ), the highest court in European Union law. The case arose from a complaint initially litigated in German courts by a cash activist, Johannes Dietrich, against the German public broadcaster, which does not allow subscribers to pay their annual fee in cash. The plaintiff alleges that the inability to pay the TV license in cash is in violation of the EU law, which sets an unconditional and unrestricted obligation to accept euro banknotes as a means for the settlement of monetary debts.[58] While in the Eurozone there is a common

54. MASS. GEN. LAWS ch. 255D § 10A (1978).

55. Maddy Savage, *The Swedes Rebelling Against a Cashless Society*, BBC NEWS (Apr. 6, 2018), https://www.bbc.com/news/business-43645676 [https://perma.cc/VV2H-DTB6].

56. SVERIGES RIKSBANK, SEPARATE STATEMENT OF OPINION BY CHRISTINA WEJSHAMMAR 4, https://www.riksbank.se/en-gb/press-and-published/notices-and-press-releases/notices/2019/proposed-new-sveriges-riksbank-act/ [https://perma.cc/HE7Y-PGED] (proposing an earlier effective date for Riksbank's legislative proposal regarding cash acceptance on the grounds that implementing a cash acceptance mandate only once a crisis has occurred would be inefficient).

57. Guillaume Lepect, *France: Controversy over Stores Refusing Cash Steps up*, CASHESSENTIALS (May 28, 2020), https://cashessentials.org/france-controversy-over-stores-refusing-cash-steps-up/ [https://perma.cc/W2ZL-4TQZ].

58. *See* Joined Cases C-422/19 and C-423/19, Johannes Dietrich & Norbert Häring v. Hessischer Rundfunk, ECLI:EU:C:2020:756 ¶19 (Sept. 29, 2020) (explaining that 2016 O.J. (C 202) 103, 2016 O.J. (C 202) 230, and 1998 O.J. (L 139) 5 set an unconditional obligation to accept euro banknotes).

legislation on the role of the euro as the official currency, there is no definition of what legal tender means in practice, thus leaving member states flexibility in drafting local payment legislation, including providing exemptions for non-cash payments.[59] The ECJ was asked by the German Federal Court to provide a preliminary ruling under EU law on the freedom of EU member states to decide the ambit of application of legal tender legislation. While the specific legal questions to be clarified by the ECJ are quite technical and concern the role of euro banknotes as a means of payment in the Eurozone, they nonetheless deal with a very basic question: whether EU members have the right to set legislation that limits the practical application of legal tender legislation and, in turn, the use of euro banknotes as means of payment. [60]

The importance of this judgment cannot be understated. Far from being a dispute on an arcane provision of EU monetary law, the ECJ case has the potential to reframe the role of fiat currency across the entire Eurozone, thus forcing the harmonization and strengthening of legal tender legislation in all euro countries. Moreover, it would also for the first time allow the highest court of EU law to properly flesh out the relationship between cash discriminations and the fundamental rights enshrined in EU legislation. According to sources, the European Commission's representative argued that the ability to pay in banknotes or coins was a fundamental right of every EU citizen, which should not be restricted unduly.[61] This position echoed what was said not long before by Yves Mersh, a member of the Executive Board of the European Central Bank, thus formally representing the ECB's view on the topic. In a speech on the role of euro banknotes as legal tender he said that:

> Cash, as a medium of transaction in many instances, opens the way for the exercise of many fundamental right . . . such as the right to "informational self-determination", freedom of action and freedom of speech . . . . The store-of-value function of cash is directly linked to property rights. The easy accessibility to cash, especially for the elderly, the socially vulnerable or minors, allows people to participate in society and, for example, allows children to learn how to handle money. In particular, when socially vulnerable people use cash, they face none of the barriers involved in applying for a credit card or, despite all their efforts, opening a current account.[62]

Thus, the ECJ's judgment has the potential to restore the role of cash in the Eurozone by granting the most vulnerable people access to a viable payment mechanism.

59. *See, e.g.,* 2016 O.J. (C 202) 103; 2016 O.J. (C 202) 230; 1998 O.J. (L 139) 5 (all declining to expressly define the term "legal tender" in reference to euro banknotes).

60. Martina Horakova, *Cash, Legal Tender, and the Future of Euro Banknotes*, CASHESSENTIALS (Aug. 3, 2020), https://cashessentials.org/cash-legal-tender-and-the-future-of-euro-banknotes/ [https://perma.cc/GV3J-VXHK].

61. *See id.*

62. Yves Mersch, The Role of Euro Banknotes as Legal Tender (speech given at the 4th Bargeldsymposium of the Deutsche Bundesbank, Frankfurt am Main) (Feb. 14 2018), (transcript available at https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180214.en.html [https://perma.cc/Z8GD-5MWM]).

IV

ADDRESSING STRUCTURAL REGULATIONS

Addressing the demand side of cash alone would not guarantee its survival. Very deep structural problems in the distribution of cash also make its supply very challenging. This is particularly evident in the United Kingdom, where the overly complex ATM distribution network was identified as the main challenge in the war *for* cash.[63] Indeed, while cash can be used by anyone, it is private banks and ATM providers—and their customers—that bear the direct costs of its distribution, effectively subsidizing the social cost of cash for the unbanked. In a private market, however, the functioning of the cash distribution system is predicated on its profitability, which was until recently guaranteed by the volume of cash withdrawals. Yet, as soon as the reduction in the total demand of cash reached a trigger point, the entire edifice of cash distribution started to crumble.

In the United Kingdom, users can get cash from five different sources: paid ATMs, free ATMs, stores (commonly known as "cashback"), the Post Office, and bank branches. None of these options are free from costs for the consumers and the providers. The ATM network is managed by private providers—in the United Kingdom by LINK, Mastercard, and Visa—which charge banks around twenty-five pence every time a bank customer withdraws cash in one of the many ATMs in their networks.[64] The interchange fee is what makes the cash system profitable for the providers, but competition between providers and the need to cut costs have put pressure on the sustainability of the system. LINK has over time tried to subsidize ATMs in deprived areas and reduced the fees. A study from the University of Bristol shows that the closure of ATMs affects precisely those geographical areas where the percentage of cash-dependent users is higher.[65] However, given that ATMs have fixed and variable costs that make the cost per transaction higher than the fee, they do not make a profit unless they are used frequently.[66]

Various solutions were proposed by consumer groups and the industry to address the rising cost of cash and disappearance of ATMs. One option was for the Payment System Regulator (PSR) to intervene directly to set the interchange fees in a way that would have guaranteed the geographical spread of the ATM network and the protection of vulnerable cash users. This option was not accepted due to the reluctance of the U.K. regulator to intervene in a private market issue. Another was to impose a universal service obligation on banks and

63. *See* ACCESS TO CASH REV., *supra* note 14, at 114 (describing the decline in ATM withdrawals in the United Kingdom); *see also* FIN. CONDUCT AUTH., GUIDANCE CONSULTATION: BRANCH AND ATM CLOSURES AND CONVERSIONS (2020) (providing guidance to firms involved in operating ATMs).

64. Unless the consumer withdraws cash from the bank's own ATM, in which case it is free. *See The Issue of ATMs*, WHICH? (2019) (unpublished article, on file with author).

65. DANIEL TISCHER, JAMIE EVANS & SARA DAVIES, MAPPING THE AVAILABILITY OF CASH: A CASE STUDY OF BRISTOL'S FINANCIAL INFRASTRUCTURE 48 (2019) (describing the vulnerability of cash-reliant communities to ATM closures or the conversion of free ATMs into fee-charging ATMs).

66. PAYMENT SYS. REGUL., CP19/5 – CALL FOR VIEWS: CONSIDERING THE INCENTIVES TO DEPLOY FREE-TO-USE ATMS IN THE LINK NETWORK 9–10 (2019).

payment system providers which would have them intervene by providing cash free of charge in those areas where the costs are higher. A similar strategy was adopted in Sweden, where a new law—the Obligation for Certain Credit Institutions to Provide Cash Services—was enacted in early 2021.[67] The law, which requires banks to guarantee access to cash withdrawal and deposit services for all citizens, was one of the first moves by the Swedish government to protect the role of cash in the economy, after years in which the focus was on growth of the digital payment system.[68]

With no agreement between the PSR, the banks, and the other private firms involved, the solution was for a long-time evasive. At the core of the problem was the absence of an overarching statutory framework on the protection of cash, similar to that applied to other financial services. Until very recently, cash was subject to very light touch regulation, which only covered the competition and consumer protection aspects of the cash disbursement network.[69] This meant that there was no overarching statutory obligation on any of the various financial authorities in the United Kingdom to look at the financial inclusion implications of the disappearance and cost of cash.

The pressure caused by the COVID-19 crisis on the United Kingdom's economy somehow made the need to protect cash and speed up some of the more daring regulatory reforms more visible. In its 2020 Budget, the Chancellor of the Exchequer has announced that the Government will put forward legislation to guarantee access to cash and to ensure that the United Kingdom's cash infrastructure is sustainable in the long-term.[70] As a first move in that direction, HM Treasury, the Bank of England, the Financial Conduct Authority (FCA) and the PSR have set up the Joint Access to Cash Strategy Group, which oversees the strategy for cash in the United Kingdom.[71] As a second move, in July 2020, the FCA published a draft Guidance to firms on maintaining access to cash for customers. According to the Guidance, when firms decide to reduce the access to cash for their customers, either by closing an ATM or a branch, they need to inform the regulator and evaluate the impact that the closure will have on

---

67. *See* SVERIGES RIKSBANK, PAYMENTS IN SWEDEN 2019, at 12, https://www.riksbank.se/globalassets/media/rapporter/sa-betalar-svenskarna/2019/engelska/payments-in-sweden-2019.pdf [https://perma.cc/4B99-UG77]

68. *See id.*; *see also* EUROPEAN CENTRAL BANK, OPINION OF THE EUROPEAN CENTRAL BANK OF 26 NOVEMBER 2019 ON THE REQUIREMENT FOR CERTAIN CREDIT INSTITUTIONS AND BRANCHES TO PROVIDE CASH SERVICES 2, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019AB0041&from=EN [https://perma.cc/DG24-GPAH].

69. This covered the LINK interchange fees, which was based on an individual exemption by the Office of Fair Trading (OFT) under the Competition Act 1998. PAYMENT SYS. REGUL., *supra* note 66, at 18–19.

70. Jim Pickard & Nicholas Megaw, *Rishi Sunak Acts to Preserve Access to Cash for the Vulnerable*, FIN. TIMES (March 6, 2020), https://www.ft.com/content/d4590be4-5fcd-11ea-8033-fa40a0d65a98 [https://perma.cc/EPZ9-W7PX].

71. *The FCA's And PSR's Joint Approach To Access To Cash,* FIN. CONDUCT AUTH. (June 16, 2020), https://www.fca.org.uk/news/statements/fca-psr-joint-approach-access-cash [https://perma.cc/6ZRW-7496].

customers, and vulnerable customers in particular.[72] Yet, at present, it is impossible to say whether the U.K. strategy will work, or whether more interventions will be required. Given the complexity of the entire economic environment in the United Kingdom as a result of the COVID-19 pandemic, only time will tell.

V
CONCLUSION: GOODBYE CASH?

Cash is still a fundamental aspect of the armory for financial inclusion. Despite the security risks and overall management costs attached to it, cash has properties that are simply not replicable in any other monetary instrument, from bank deposits to e-money or even central bank digital currencies. The anonymity of cash, while certainly posing a problem of tax evasion and security, nonetheless guarantees the highest level of inclusion. Cash allows the most disadvantaged parts of the population to access the monetary system and to participate in the economic life of the society they live in. Yet, it is subject to an inevitable decline that will soon make its costs too high to bear for banks and cash distribution providers. At some point, a choice will have to be made about the level of exclusion we are ready to accept in our society. For those who believe that undocumented individuals and homeless persons have the same right to pay for their food as anybody else, the preservation of cash is mandatory, even if it comes at a cost. Perhaps it is time for central banks to consider their public role and be ready to simply subsidize the cost of cash.

72. FIN. CONDUCT AUTH., *supra* note 63, at 3.