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Financial Privacy

Financial records are among the most sensitive personal data sets. Financial records can offer near unparalleled levels of information about daily activities, employment and other labour arrangements, legal and taxation liabilities, personal tastes and preferences, health problems, and even sexual proclivities, marital difficulties, and sexual preferences. As we interact with different services in the economy we leave a digital financial trail from which those with access to that data can infer details about our lives. Like metadata drawn from phone records, anonymized financial records can be easily reidentified. A study published in *Science* in 2015 found that it took just four instances of credit card metadata—the date in which a purchase was made, a unique credit card number, a transaction price, and the store—to reidentify shoppers in 90 per cent of cases.[1]

This chapter considers two key issues in the debate about financial privacy: banking secrecy and tax competition, and the maintenance or elimination of physical currency. Financial privacy is rarely discussed in

[1] Yves-Alexandre De Montjoye, Laura Radaelli, and Vivek Kumar Singh, "Unique in the Shopping Mall: On the Reidentifiability of Credit Card Metadata," *Science* 347, no. 6221 (2015).

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C. Berg, *The Classical Liberal Case for Privacy in a World of Surveillance and Technological Change*, Palgrave Studies in Classical Liberalism,
https://doi.org/10.1007/978-3-319-96583-3_11

the privacy literature except insofar as it is one of the narrow domains (along with medical records) in which there already exists a specific legal framework for privacy protection. In the United States for instance the Financial Privacy Act of 1978 governs the protection of financial records from government searches. Here we focus on these two issues because they expose controversies about financial records that are unresolved, increasingly important and illuminate further privacy dilemmas and trade-offs that have been raised in previous chapters.

Secrecy in Banking

The Tax Justice Network ranks Switzerland, with its famous banking secrecy laws, the top country on its Financial Secrecy Index (which measures both secrecy provisions in law and the scale of the financial sector). Switzerland, they write, is "grandfather of the world's tax havens, one of the world's largest offshore financial centres, and one of the world's biggest secrecy jurisdictions or tax havens."[2] Along with other 'tax havens' like the Guernsey and Cayman Islands, and liberal banking regimes like Hong Kong and Singapore, Swiss banking has long been a target of governments that are worried that their citizens and resident firms are avoiding tax by moving funds offshore.[3] For the economist Thomas Piketty, bank secrecy is a barrier holding back the introduction of heavy capital taxes. Arguing for automatic international sharing of information about wealth, Piketty writes that

> Of course the tax havens regularly invoke other excuses for maintaining bank secrecy. One of these is the alleged worry that governments will misuse this information … [but] the most plausible reason why tax havens defend bank secrecy is that it allows their clients to evade their fiscal obligations, thereby allowing the tax havens to share in the gains.[4]

[2] Tax Justice Network, "Financial Secrecy Index 2015: Narrative Report on Switzerland," (2018).

[3] Sinclair Davidson and I offer an overview of the tax haven and profit shifting debate in Chris Berg and Sinclair Davidson, "'Stop This Greed': The Tax-Avoidance Political Campaign in the OECD and Australia," *Econ Journal Watch* 14, no. 1 (2017).

[4] Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge, MA: The Belknap Press of Harvard University Press, 2014), 521.

On the other hand, the Swiss themselves offer a moral argument for maintaining confidentiality of financial information. The Swiss Banking Association argues that

> Having one's privacy protected is a human desire. Bank clients wish freedom for personal development, without interference from others and without being exposed publicly. It is doubtful that anyone should want to live in a reality such as the one described in George Orwell's novel "1984", which was published in 1949. As a result, personal privacy enjoys constitutional protection, just as does, for example, personal freedom, freedom of religion and conscience, or freedom of speech.[5]

Although Swiss banking secrecy can be traced back to the medieval period, it was in the second half of the nineteenth century that Switzerland became a major financial centre. As large European states such as France raised their taxes in the 1870s, capital flight drove financial activity into Geneva, Basel, and Zurich.[6] Positioning themselves as a tax haven from the industrial and financial centres of Paris and London, Swiss banks emphasized to potential clients the "utmost discretion" with which they would treat the accounts of foreign customers.[7] This market took off during the First World War, as Switzerland remained neutral and Swiss banks became a refuge for European wealth. After the war, a number of European countries such as France and Belgium tried to get the Swiss banks to reveal the names of their clients, with the goal of enforcing tax obligations on them, but this was roundly refused by the Federal Council and the banks themselves. In the interwar period, Switzerland was a liberal hold out in a European continent that was otherwise significantly growing the tax burden.

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[5] Swiss Bankers Association, "Protection of Privacy," http://www.swissbanking.org/en/topics/information-for-private-clients/protection-of-privacy.

[6] R. Palan, R. Murphy, and C. Chavagneux, *Tax Havens: How Globalization Really Works* (Ithaca, NY: Cornell University Press, 2013).

[7] Much of this history is drawn from Sébastien Guex, "The Origins of the Swiss Banking Secrecy Law and Its Repercussions for Swiss Federal Policy," *Business History Review* 74, no. 2 (2000); Robert Vogler, "The Genesis of Swiss Banking Secrecy: Political and Economic Environment," *Financial History Review* 8, no. 1 (2001); Christophe Farquet, "Tax Avoidance, Collective Resistance, and International Negotiations: Foreign Tax Refusal by Swiss Banks and Industries between the Two World Wars," *Journal of Policy History* 25, no. 3 (2013).

The Great Depression brought about a crisis in Swiss banking, followed by domestic pressure to regulate capital flows and increase banking supervision. In 1934 the parliament passed the Banking Law that explicitly protected banking secrecy—converting the Switzerland's tradition of discretion into statute. Sébastien Guex attributes the formalization of banking secrecy to a number of factors: renewed agitation from France and Germany, including a highly controversial raid by French authorities on the Paris offices of a Swiss bank, a Federal court case expanding the exceptions to bank secrecy in the case of bankruptcy, increased popular agitation from socialists and rural agricultural conservatives against the policy, and the introduction of prudential regulation and other regulatory supervision.

This last factor provides an illustration of the interaction between economic regulation and the right to privacy. Switzerland had a relatively free banking system, with free and then regulated private money issuance until the first decade of the twentieth century. It was only with the 1934 Banking Law that direct supervision of banks for the purposes of managing financial stability and other prudential concerns was introduced. In the years before the Second World War, exactly how regulatory authorities would impose prudential control on the banks, and what regulatory and legal tools would be available to them, was an open question. To the extent that prudential regulation is desirable, it involves placing limits on the risk-taking decisions of private bankers, and to a large extent involves second-guessing those bankers' decisions about appropriate investments. The prospect of direct supervision by government authorities raised concerns in the banking community that the supervisors would have access to information about bank clients—and would be able to pass that information on to other government agencies. As the managing director of Credit Suisse argued in 1932, "A matter which regularly provokes reservations [in business circles] is the preservation of absolute discretion during inspections conducted by authorities external to the bank."[8] The purpose of explicit bank secrecy rules was to ensure that depositors could be confident that banking regulators would be unable to track individual bank accounts and depositors. Jean-Marie Musy, a member of the Swiss Federal Council, reassured the banking

[8] Guex, 246.

sector that supervision would not be conducted directly by the state: "The intervention of official investigators would alarm … customers, who attach great importance to the preservation of discretion, on which they want to be able to rely."[9]

While few other jurisdictions had the same tradition of bank secrecy as Switzerland, similar concerns about the privacy of individual account holders was raised in other countries as they developed their own systems of prudential bank regulation. In Australia, for example, prudential regulation of banking was developed in the late 1930s and introduced at the end of the Second World War. The Labor government wanted the state-owned Commonwealth Bank—which had until that time been for the most part just a state-owned retail bank—to guarantee the solvency of the private banks that it was to supervise. In response, the Commonwealth Bank argued that if it was to accept this responsibility it would need the power to "inspect and to direct a bank regarding its investments" which "would have to be applied in individual cases."[10] In the event, this power was not granted.

The secrecy principle has never been absolute. Swiss banking secrecy has three dimensions.[11] First, bankers are bound by confidentiality as to the holdings of their clients, with a penalty of a stiff fine for non-compliance, although on the order of a court or supervisory authority information might be released for civil cases, criminal proceedings, or debt recovery. In the post-war period the Swiss parliament carved out exceptions to the secrecy provision for activities that were illegal under Swiss law: tax fraud, money laundering, insider trading, and so forth. In the Swiss conception, tax fraud constitutes the deliberate forging of documents or otherwise fraudulently misrepresenting tax liabilities. By contrast, tax evasion (the omission, deliberately or otherwise, of information about assets or income) was not a crime, and was therefore protected by

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[9] Ibid.

[10] Cited in Chris Berg, "The Curtin-Chifley Origins of the Australian Bank Deposit Guarantee," *Agenda: A Journal of Policy Analysis and Reform* 22, no. 1 (2015), 32; see also Chris Berg, "Safety and Soundness: An Economic History of Prudential Bank Regulation in Australia, 1893–2008," PhD Thesis (RMIT University, 2016).

[11] This schema comes from Simon Steinlin and Christine Trampusch, "Institutional Shrinkage: The Deviant Case of Swiss Banking Secrecy," *Regulation & Governance* 6, no. 2 (2012).

banking secrecy.[12] The second dimension is nondisclosure to foreign authorities. The third dimension of banking secrecy is a self-regulatory approach to identity management for Swiss banking, coordinated by periodic agreements with the Swiss Banking Association.

The story of the end of Swiss banking secrecy is the story of the increasing role that financial information sharing is playing in maintaining high tax rates in an era of financial globalization, with attendant consequences for financial privacy. Global multilateral efforts to crack down on tax havens from the 1980s onwards identified banking secrecy as a major stumbling block. In 1978 the Parliamentary Assembly of the Council of Europe demanded member governments to "abolish unduly strict rules on bank secrecy, wherever necessary, with a view to facilitating investigations in cases of tax evasion or concealing income arising from other criminal activities," and the United States' 1981 Gordon Report into tax havens and their use by US taxpayers named Switzerland as the "prototype of the modern tax haven."[13] An OECD report in 1985 declared the need to relax bank secrecy so national tax authorities could access and share data bank holdings.[14] When in the 1990s the OECD began a concerted effort to reduce "harmful tax competition" that the G7 believed was eroding national tax bases, the regulatory case against bank secrecy was well established.[15] Nevertheless, Swiss banking secrecy for the most part survived the harmful tax competition campaign.

The major blow against Swiss bank secrecy occurred after the Global Financial Crisis sparked another round of international concern about tax havens. In response to media claims about corporate and personal income tax avoidance, in 2009 the G20 declared that the "The era of

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[12] François-Xavier Delaloye, Michel A. Habib, and Alexandre Ziegler, "Swiss Banking Secrecy: The Stock Market Evidence," *Financial Markets and Portfolio Management* 26, no. 1 (2012).

[13] Parliamentary Assembly, "Co-Operation between Council of Europe Member States against International Tax Avoidance and Evasion," (Council of Europe, 1978); Richard A. Gordon, "Tax Havens and Their Use by United States Taxpayers: An Overview," (Washington, DC: Department of the Treasury, Internal Revenue Service, 1981), 21.

[14] Organisation for Economic Co-operation and Development, *Taxation and the Abuse of Bank Secrecy* (Paris: OECD Publishing, 1985).

[15] *Harmful Tax Competition an Emerging Global Issue* (Paris: OECD Publishing, 1998); *Improving Access to Bank Information for Tax Purposes* (Paris: OECD Publishing, 2000).

banking secrecy is over."[16] The OECD launched a new campaign against what was now called base erosion and profit shifting (BEPS) and specifically named Switzerland—which had been one of the OECD's founding member states—on a grey list of jurisdictions which had failed to implement a new internationally agreed tax standard that would facilitate international information sharing.[17] Sinclair Davidson and I have argued that the harmful tax competition and BEPS programme exhibit the classic signs of a moral panic; a sudden, dramatic, and hyperbolic media focus on an exaggerated problem.[18] Nonetheless, the campaign was effective and Switzerland abandoned its distinction between tax fraud and tax evasion to avoid being subject to possible financial sanctions.

What are the consequences of the end of banking secrecy? The OECD's attitude to tax competition has been that competitive pressures between states drive down tax rates globally, limiting the ability of governments to raise funds. From a classical liberal perspective, this dynamic is a welcome one, offering competitive protection against excessive expropriation of private earnings. The end of Swiss banking secrecy is a casualty of that international fiscal dispute. But the end of bank secrecy has significant privacy implications for those who may have used the services of these banks. A 2012 paper by the economists François-Xavier Delaloye, Michel A. Habib, and Alexandre Ziegler looking at the stock market reaction to the events that led to the end of banking secrecy between 1998 and 2011 finds that "tax evasion accounts for less, and privacy concerns for more of the value of banking secrecy than might have previously been thought."[19] Swiss bank secrecy protected not only Swiss citizens but global clients who have been subject to oppressive governments. As Chris Edwards and Dan Mitchell of the free market think tank the Cato Institute point out, bank secrecy is valued by holders of private wealth in states that are corrupt or where wealthy individuals are subject to extortion and kidnapping,

[16] G20, "The Global Plan for Recovery and Reform," (2009).

[17] Organisation for Economic Co-operation and Development, "Addressing Base Erosion and Profit Shifting," (Paris: OECD Publishing, 2013); "A Progress Report on the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standard," (Paris: OECD Publishing, 2009).

[18] Berg and Davidson.

[19] Delaloye, Habib, and Ziegler, 174.

where minorities might be persecuted and have their assets seized or where financial systems are instable or insecure. When liberal governments remove privacy protections in the pursuit of higher tax revenues, they reduce the freedoms of citizens of illiberal governments who had been relying on those services. As Edwards and Mitchell write,

> The OECD has acknowledged that bank secrecy "has deep historical and cultural roots in some countries" and "is also a fundamental requirement of any sound banking system." Yet the OECD—like the United Nations—is apparently willing to suspend important human rights safeguards for unsound tax policy reasons. These bureaucracies are putting the interests of high-tax governments before the safety and liberty of the world's citizens.[20]

How Cursed Is Cash?

The first money was physical money: to pay for a good or service involved the physical exchange of a physical token. Now an enormous amount of money transactions are conducted digitally with credit cards and direct digital transfers. Indeed, the payments system in the developed world is now predominantly digital. A number of countries, such as Sweden, are nearly cashless. In his 2016 book, *The Curse of Cash*, the economist Kenneth Rogoff mounts an argument for the staged elimination of physical paper and plastic currency (perhaps keeping small notes and heavy coins in circulation indefinitely).[21] Rogoff is not the only analyst who has argued for the end of physical currency, but his is the most comprehensive statement of the case against cash. His book is worth considering in detail to underscore the significance of financial privacy.

For Rogoff, the case against cash is twofold. First, the existence of cash has prevented the use of some monetary tools which could allow central banks to pursue monetary stimulus while interest rates are at the 'zero bound'—that is when the nominal interest rate is at or near zero. In these

[20] Chris Edwards and Daniel J. Mitchell, *Global Tax Revolution: The Rise of Tax Competition and the Battle to Defend It* (Washington, DC: Cato Institute, 2008).

[21] Kenneth S. Rogoff, *The Curse of Cash* (Princeton: Princeton University Press, 2016).

circumstances, central banks are prevented from pursuing negative interest rates by the fact that banks and consumers would switch their holdings to cash—effectively a zero-interest bond. Some economists have argued that the zero-bound prevented monetary policy from being effective during the Global Financial Crisis, prolonging and exacerbating the economic downturn. The second argument against cash for Rogoff is that the existence of large denomination bills is significantly implicated in criminal activity. Looking at cash in the American economy, Rogoff notes that there is the equivalent of US$4200 in outstanding currency per capita. Eighty per cent of this cash is in the form of rarely used $100 notes. He argues that these large denomination notes are used primarily in the underground economy. Electronic payments leave a digital trail, whereas cash facilitates anonymous transactions. Cash is therefore most attractive for evading taxation (by doing work 'cash in hand'), money laundering, conducting outright illegal activity (such as drug crime), corruption (bribes typically are paid in anonymous cash), and financing human trafficking, illegal immigration, and terrorism. Additionally, physical cash has a hygiene problem that can communicate disease. In Rogoff's argument, there are almost no valid uses for the anonymity properties of large denomination cash, and therefore on both law enforcement, taxation, and monetary policy grounds it should be eliminated.

Rogoff is sceptical that there might be any legitimate liberty interest in keeping large bills, but his scepticism is combined with a striking lack of scepticism about the desirability of current legal and regulatory institutions. While it is obviously desirable to reduce terrorism and human trafficking, not all the criminal activities he lists are so obviously bad. One revealing example he gives is the use of cash to pay for organ donations. Paid organ donations are illegal in the United States, and donors and recipients will sometimes circumvent this prohibition by either overpaying for other exchanges or through the use of cash. However the absence of a market for organs has had negative welfare consequences, leading to a significant undersupply of organs.[22] The challenge of matching organ donors with recipients is so great that when Alvin Roth developed a matching market for organ

[22] Gary S. Becker and Julio J. Elias, "Introducing Incentives in the Market for Living Organ Donations," *The Journal of Economic Perspectives* 21, no. 3 (2007).

supply in the absence of price signals and enforceable contracts he received a Nobel Prize.[23] Cash allows some people to go around this illiberal and harmful regulation. Cash is also a key part of the market for illegal drugs, yet many economists—and many classical liberals—would argue that this illegality is wrong from both a liberty perspective and a utilitarian perspective, given the harm that the drug war has caused. Likewise it is hard to be concerned that undocumented migrant workers accept cash payments in order to remain undiscovered in a world where discovery by immigration officials can lead to forced (and traumatic) deportation. In each of these cases, cash facilitates voluntary transactions that are prohibited by illiberal laws. Rogoff might object that closing our eyes to currently illegal acts is no replacement for reforming the law—and he suggests some support for drug reform and increase immigration—but in the absence of that reform cash provides an escape valve preventing worse harms.

In this sense, the major plank in the case against cash pivots on how liberal the government is and how effectively the payments network functions. Poorly functioning regulatory and legal frameworks can create a need for cash. For example, as Rogoff notes, marijuana stores in Colorado require cash payments because while marijuana is illegal in that state, it is illegal at a federal level. Federally regulated financial institutions are prohibited from doing business with entities breaking federal law, and so marijuana firms have to operate using cash. This policy stalemate remains, even as the legal recreational marijuana industry has grown to $7 billion in sales in 2018.[24] Rogoff argues that this is one reason for keeping small bills in circulation, but these kinds of perverse policy interactions are a good reason for scepticism about the case against cash as a whole: the possibility that government policy might be inconsistent and unpredictable is reason to maintain an anonymous payments system. In a federal system such as the United States, some activities can be both legal and illegal and anonymous financial technologies like cash can smooth over the regulatory paradox. It

[23] Alvin Roth, *Who Gets What—And Why: The Hidden World of Matchmaking and Market Design* (London: William Collins, 2015).

[24] "Why Marijuana Retailers Can't Use Banks," *The Economist*, 22 January 2018.

seems unlikely that marijuana retailers will be the last policy area where such regulatory inconsistencies occur.

Anonymous cash can also protect individuals against illiberal government policies. For example, in the United States civil asset forfeiture laws allow law enforcement and taxation authorities to confiscate assets—including digital financial assets—even in the absence of a charge or conviction of a crime. The burden of proof for recovering those assets rests not on the state but on the assets' owners. In this case, physical, concealable cash provides a protection against illiberal state activity. Even when we might trust our own state, other states might seek and access private financial information. In 2006 it was revealed that American intelligence agencies had been able to access transaction data from Society for Worldwide Interbank Financial Telecommunication (SWIFT) networks which manages international transactions between 8000 banks worldwide.[25] A 2006 Working Party of the European Commission concluded that this access was in violation of European data protection principles and law.[26]

Anonymous payment technologies do not only hide transactions from the state. The anonymity of cash anonymity is asymmetrical; the buyer typically has more information about the identity of the seller than the seller has about the buyer.[27] Paying for goods or services with a credit card hands over more than just the payment, it also hands over a unique and traceable identification number and a name which the seller might exploit and compare with previous transactions. Buyers might not trust sellers to secure their digital identification or records of their purchases. For example, the Swedish central bank has raised a number of concerns in the wake of the Cambridge Analytica debate that the country's move to a cashless society has raised potential privacy issues that may be challenging

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[25] Maria Tzanou, *The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance* (New York and London: Bloomsbury Publishing, 2017); Laura Poitras, Marcel Rosenbach, and Holger Stark, "'Follow the Money': Nsa Monitors Financial World," *Der Spiegel*, 16 September 2013.

[26] Article 29 Working Party, "Press Release on the Swift Case Following the Adoption of the Article 29 Working Party Opinion on the Processing of Personal Data by the Society for Worldwide Interbank Financial Telecommunication (Swift)," (2006).

[27] Charles M. Kahn, James McAndrews, and William Roberds, "Money is Privacy," *International Economic Review* 46, no. 2 (2005).

to unwind.[28] Furthermore, buyers might want to hide transactions from abusive or judgemental family members who might have access to their digital records. The Australian Securities and Investment Commission, for instance, notes that one of the signs of financial abuse is having to justify to a partner or family member about how money is spent.[29] As we have seen throughout this book, privacy protections are not solely the domain of protections against the state; individuals seek private domains from other people who might use that information to ostracize, dominate, or otherwise control them.

Rogoff completes his book with a consideration of the potential alternative of cryptocurrencies for illegal transactions and as a hedge against negative interest rates. I continue this discussion in the next chapter. As we have seen throughout this book, technological changes shift the balance and boundaries of privacy in complex and often unpredictable ways. This chapter has painted an unhappy picture of the decline of institutions that have protected privacy such as banking secrecy and anonymous cash. There is no doubt that the pressures towards reducing those protections will continue. But against those pressures, a suite of new technologies—such as block chains and new cryptographic techniques like zero-knowledge proofs—promise to empower consumers and citizens to regain control of their private information.

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[28] Amanda Billner, "In Shadow of Facebook, Cashless Sweden Fears Data Privacy Risks," *Bloomberg*, 23 March 2018.

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