



Critical Review of International Social and Political Philosophy

ISSN: (Print) (Online) Journal homepage: <https://www.tandfonline.com/loi/fcri20>

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To cite this article: Jakob Thrane Mainz (2021) But anyone can mix their labor: a reply to Cheneval, *Critical Review of International Social and Political Philosophy*, 24:2, 276-285, DOI: [10.1080/13698230.2020.1764786](https://doi.org/10.1080/13698230.2020.1764786)

To link to this article: <https://doi.org/10.1080/13698230.2020.1764786>



Published online: 06 May 2020.



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ARTICLE



But anyone can mix their labor: a reply to Cheneval

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ABSTRACT

Francis Cheneval has recently argued that people have property rights over personal data about themselves. Until now, the discussion on data ownership has primarily been a discussion among legal theorists and economists. Cheneval's contribution to the discussion is a very welcome input from academic philosophy. Cheneval attempts to reach his conclusion through two distinct strategies. One strategy is to reach the conclusion through a Lockean inspired libertarian rights-based theory of property. The second strategy is to reach his conclusion through a Rawlsian account of distributive justice. According to Cheneval, his conclusion can be reached both ways. In this reply, I will focus exclusively on Cheneval's argument that people have Lockean inspired libertarian property rights over personal data. I will offer an objection, which – if correct – demonstrates how Cheneval's Lockean argument runs into a dilemma.

KEYWORDS Data ownership; Locke; Property rights; Personal data

Francis Cheneval has recently argued that people have property rights over personal data about themselves. Until now, the discussion on data ownership has primarily been a discussion among legal theorists and economists. Cheneval's contribution to the discussion is a very welcome input from academic philosophy. Cheneval attempts to reach his conclusion through two distinct strategies. One strategy is to reach the conclusion through a Lockean inspired libertarian rights-based theory of property. The second strategy is to reach his conclusion through a Rawlsian account of distributive justice. According to Cheneval, his conclusion can be reached both ways. In this reply, I will focus exclusively on Cheneval's argument that people have Lockean inspired libertarian property rights over personal data. I will offer an objection, which – if correct – demonstrates how Cheneval's Lockean argument runs into a dilemma.

In section A, I outline Cheneval's Lockean argument. In section B, I present my objection to Cheneval's Lockean argument in the form of a dilemma. In section C, I discuss the prospect of solving the dilemma. Finally, in section D, I conclude.

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Cheneval's argument

Cheneval argues that people have property rights¹ over personal data about themselves, and that these property rights should be acknowledged by law.² Granting legal property rights over personal data would give people far-reaching control over what happens to certain information about them (Cheneval, 2018, p. 3). An ownership regime like this would make it possible for people to hold a data bank, and buy and sell personal data on a free market. Such a data market might, according to Cheneval, correct certain misallocations in the 'data economy', and it could contribute to the financing of people's pensions (Cheneval, 2018, 2).

However, Cheneval does not think that people have property rights over *all* personal data, since this view would have strange implications, according to Cheneval (Ibid.). He writes:

For instance, Jones sees Smith eating in a restaurant at a certain point in time. It would be strange to argue that Smith holds privacy and property rights over the information Jones has stored about him in her brain after seeing him in the restaurant and that Smith alone can determine what Jones is allowed to do with that information. The meaningful object of privacy and property rights, especially if they are to be cast in law, is not personal information as such, but the way in which it is obtained, registered, certified, re-used, aggregated, made accessible and so forth. (Ibid, 3)

In order to avoid the strange implication, he delimits the scope of the property rights to include only what the EU includes in their definition of personal data: Personal data means data relating to an identified or identifiable natural person (data subject). This can for example, be a name, an identification number, location data, an online identifier, or a physical, physiological, mental, economic, cultural or social identity of that natural person (Union & regulation, 2016/67, article 4,1). It is not clear to me how this delimitation avoids the strange implication. It could plausibly be argued that Jones does indeed get access to e.g., location data about Smith, when Jones sees Smith in the restaurant. So, either the example of Smith and Jones is not a good example, or Cheneval's delimitation of the scope of what counts as personal data is problematic. Either way, it is not completely clear what the last sentence in the quote above means. What does it mean to own 'the way in which it is obtained, registered, certified, re-used, aggregated, made accessible and so forth'? On a charitable reading of this, it seems that what Cheneval has in mind is that people can come to own personal data when they are 'processing' the personal data in at least the following ways: 1) By obtaining the data, 2) by registering the data, 3) by certifying the data, 4) by re-using the data, 5) by aggregating the data, or 6) by making the data accessible.

Who can come to own personal data these ways? Cheneval thinks – uncontroversially – that people can come to own personal data about themselves. But, if a ‘counter-party’, as Cheneval calls it, processes the data in question, then this counter-party can obtain partial ownership of the data as well. Nevertheless, the person whom the data is about necessarily one of the owners of the data in question. Cheneval writes:

... for now it suffices to say that most schemes of legitimate private property of personal data will be arrangements of co-ownership with different bundles of rights in the hands of interactive co-owners. However, the point is that the natural person at the beginning of the value chain, however small her contribution, is necessarily one of the right holders of property rights of her personal data. (Cheneval, 2018, p. 4)

We can derive two important claims from this quote. The first claim is that it is possible to have co-ownership in personal data. The second claim is that the person who the data is about is necessarily one of the owners of the data. In order to support these claims, he appeals to the two Lockean ideas that i) ‘mixing labor’ with the data (by processing the data in the ways described in 1–6) generates prima facie ownership over the data, and ii) that people own themselves and thus also own data about themselves:

Building on this argument [a Lockean inspired libertarian argument] the property claim to personal data follows from the intuition that persons are the original owners of their personhood, bodies and minds, and hence of information that constitutes their personal identity and/or that is generated by their private data registration activities. Data that persons generate by registering their name and address, by engaging in transactions that leave decipherable traces, etc. are therefore prima facie the personal property of those persons in question. If information is digitally processed by the person’s own activity or by her participation in such activity, and if it specifically refers to a person as an individual, it is to be in the ownership and control of the person in question. If registered information on individual persons and personal activities is used in the activities of others, investing labour and capital in an economic endeavour, persons first of all ought to have a say what can be done with their personal data and they ought to have a partial claim to the benefits stemming from the economic activities that use their personal data as a resource. (Ibid)

The idea is that if you mix your labor with some personal data, be it data about yourself or someone else, then you get at least prima facie partial ownership over these data. And, since people are the ‘original owners of their personhood, bodies and minds’, they are also the owners of ‘information that constitutes their personal identity’. It is clear that these ideas have a Lockean flavor, but for the sake of overview, let us see how exactly Cheneval’s thinks his idea of data ownership can be derived from a Lockean account of property. Here is a standardized version of Locke’s original argument:

The Lockean Argument³

Premise 1: If persons are the original owners of their respective personhoods, bodies and minds, then mixing their labor with something unowned generates property rights over the thing in question (provided that a certain proviso is satisfied).

Premise 2: Persons are the original owners of their respective personhoods, bodies and minds.

Conclusion: Mixing a person's labor with something unowned generates property rights over the thing in question (provided that a certain proviso is satisfied).

Cheneval's idea is that data ownership can be justified by applying Premise 1 and/or Premise 2 of the Lockean Argument to personal data, as we saw in the quote above. Applying Premise 1 to personal data means to refer to the intuition that certain types of data processing (at least the ones in 1–6) constitute mixing of labor with the data in question. Applying Premise 2 to personal data means to invoke what has often been called the Self-Ownership Thesis (SOT). The SOT is the antecedent in Premise 1: Persons are the original owners of their respective personhoods, bodies and minds. Cheneval's idea seems to be that data *about* the self is part of what constitutes this self, and that the SOT thus applies to personal data too.⁴ Cheneval defends Premise 2 in the Lockean Argument against some of the prominent objections against the SOT as such. But he does not consider *any* objections against the view that the SOT applies to personal data. Neither does he consider *any* objections to the view that Premise 1 applies to personal data. If we stay true to Premise 1, it seems that there is a gap between *prima facie* property rights and full-blown property rights in Cheneval's argument. This gap can presumably be closed by adding a standard Lockean proviso, which says that 'enough-and-as-good' must be left for others.⁵ In relation to personal data, this proviso seems easily satisfied. There will certainly be 'enough-and-as-good' personal data about others left for them to obtain ownership over, especially when we consider that information is generally a non-rivalrous. This means that – contrary to tangible things like shoes – Smith can use his personal information while Jones also uses it. We have now seen how Cheneval thinks that the Lockean Argument applies to personal data. In the next section, I will present my objection to Cheneval's argument.

The objection

My main objection is this: Applying the Lockean Argument to personal data in the way Cheneval does leads to a dilemma. The dilemma consists in choosing between applying Premise 1 in the Lockean Argument to personal data, and applying Premise 2 in the Lockean Argument to personal data. Let us first consider an implication of accepting that Premise 1 applies to personal data.

It follows from Cheneval's argument that *anyone* can mix their labor with data about you, before you do it, and thus obtain at least partial⁶ property rights over these data about you. This has wildly counterintuitive implications. Let us see how this follows from Cheneval's argument. Cheneval writes the following conditional: 'If information is digitally processed by the person's own activity or by her participation in such activity, and if it specifically refers to a person as an individual, it is to be in the ownership and control of the person in question.' (Ibid, 8). In this quote, Cheneval claims that the fact that someone, call him Smith, *participates* in the processing of personal data about Smith, is a sufficient condition for Smith obtaining property rights over the personal data in question. But, as we saw earlier, Cheneval does not rule out that Jones, who also participates in the processing of Smith's data, can obtain at least partial ownership over the personal data about Smith too. Jones can get partial ownership over personal data about Smith, if Jones mixes his labor with these data. And, if Jones makes money off of these data, then Smith has a claim to at least some of the money. The question is now: What happens if *Smith* does not mix any labor with the data in question, while *Jones* does? In that case, it seems that Cheneval – straightforwardly applying Premise 1 to personal data – is committed to the view that Jones is now the sole owner of the personal data about Smith. This seems very counterintuitive to me. Let us consider an example:

Restaurant

Smith is a very famous actor. He is having dinner with his friend Jones at a restaurant. Jones is a freelance journalist, and unbeknownst to Smith, Jones is covering Smith's everyday life. Jones is secretly transcribing the entire conversation on his tablet. Smith reveals to Jones the fact that Smith has terminal cancer. The day after, Jones sells the transcript to the tabloid press.

According to Cheneval's argument, Jones has obtained at least partial ownership over the personal data about Smith by processing the data, and he can now rightfully transfer his ownership to the tabloid press. If Smith has not participated in the processing of the data, then Smith has no property claim to them. But, if Peter, Carl or Allan also start processing the personal data about Smith, then they obtain at least partial ownership over the data. There is no limit to how many people can obtain ownership over Smith's data, since data is a non-rivalrous good. The only way in which Smith can gain at least partial ownership over the personal data is by processing the data himself. And even in that case, Peter, Carl and Allan can still get partial ownership too.⁷

Now, there are at least three replies available to Cheneval, but I think that none of them work. The first reply available to Cheneval is this: As we saw earlier, one of the ways in which one can mix labor with personal data is by making the data 'accessible'. In Restaurant, Smith is indeed making the data

about his disease accessible to Jones by talking about it, so Smith owns the data before Jones transcribes it. Therefore, Smith does in fact have at least partial ownership over the data. Here is why I think this reply does not work: Imagine a slightly altered version of Restaurant. In this version Jones is a doctor, and he sees Smith's symptoms and writes down information about them, before Smith has told Jones anything about the disease. So, Smith has not mixed his labor with the data before Jones has mixed his labor with it. Should we now accept that Jones owns the data, and Smith does not? Clearly not. Cheneval might then reply that even having visible symptoms counts as making the data about the disease accessible, and therefore Smith owns the data before Jones the doctor starts transcribing. However, if having visible symptoms counts as making the data about the disease accessible, then it seems that the idea of 'making accessible' collapses into an idea of self-ownership. If I have a strange disease which causes a set of eyes to grow out of my shoulder,⁸ then I own these eyes because I own myself, not because data about them are made accessible to you.

The second reply available to Cheneval is this: Smith is the original owner of the data, and therefore it does not matter if he mixes his labor or not. After all, recall from one of the quotes earlier that Cheneval thinks that the person who the data is about is 'necessarily one of the right holders of property rights'. If Cheneval is right about this, it seems that Smith does in fact have at least partial ownership over the data. But here is the catch: If Smith has not mixed any labor with the data in question, then it seems very ad hoc to claim that Smith is 'necessarily one of the right holders of property rights'. In order to claim this in a non-ad hoc way, Cheneval needs to invoke Premise 2 in the Lockean Argument and apply it to personal data. If Smith owns the data because they are part of 'him', and he owns himself, then it seems clear that he is the *original* owner of the data. But in that case, if Smith is already the original owner of the data, then mixing labor contributes nothing to Smith's ownership over the data. And neither should Peter, Carl or Allan's mixing of labor with the data entail that they now get partial ownership over it. It is already Smith's data. Consider this analogy: If I am the original owner of my body, then a doctor does not get partial ownership over it, if she mixes her labor with it. If the SOT applies to personal data, then mixing labor plays no role at all.

The third reply available to Cheneval is this: The verdict over Restaurant is correct, but the reason is that Smith has forfeited his property rights over the personal data by talking about the disease in a public restaurant, and the data is therefore up for grabs for anyone who mixes labor with the data. When Peter, Carl and Allan mix their labor with the data, they each obtain partial ownership over the data. This reply, however, presupposes either that Smith was the original owner of the data, or that he owns the data due to mixing labor with it, since he would otherwise not be able to forfeit the right. If Smith

is the original owner of personal data about him, then Cheneval could just have explained data ownership in terms of the SOT alone. If Smith is not the original owner of the data, and if Smith makes *no* contribution to the processing of the data, then it is hard to see how, on Cheneval's own account, Smith can have *any* claim to the data.

In order to avoid the counterintuitive implication exemplified by Restaurant, Cheneval needs to explain data ownership in terms of the SOT alone. But we already saw the problem of this move in the discussion of the second reply above, namely that if he explains data ownership in terms of the SOT alone, then he cannot also explain how people can get partial ownership in personal data merely by mixing labor. Cheneval is thus caught in a dilemma consisting of the following options:

Option 1: Explain data ownership by applying Premise 1 in the Lockean Argument to personal data.

Option 2: Explain data ownership by applying Premise 2 in the Lockean Argument to personal data.

If he chooses Option 1, then his argument has a very counterintuitive implication (exemplified by Restaurant). In order to avoid this implication, he needs to apply Premise 2 to personal data, and thus he must choose Option 2.

If he chooses Option 2, then he cannot also defend data ownership through Premise 1, since an original owner of X does not lose any ownership in X just because someone else mixes labor with X. For this reason, if Cheneval chooses Option 2, then he loses his explanation for how people get partial ownership over personal data about other people, since his explanation consists in applying Premise 1 to personal data.⁹

The most promising way out for Cheneval seems to be Option 2, since Option 1 has the counterintuitive implication exemplified by Restaurant. And in order to avoid this implication, Cheneval needs to choose Option 2. The price of choosing Option 2 is to accept the view that people cannot get ownership over personal data about others simply by mixing labor with the data. This price may be worth paying, though. The next section is devoted to the prospects of Option 2.

The prospects of applying SOT to personal data

In the previous section we saw that the most promising option for Cheneval is Option 2. If people do have property rights in personal data at all, it seems intuitively more plausible that such property rights obtain from the SOT itself and not through the mixing of labor. In other words, it seems more plausible to argue for property rights in personal data by applying

Premise 2 – rather than applying Premise 1 – to personal data. This option avoids the counterintuitive implication spelled out earlier (exemplified by Restaurant), while it still allows for markets in personal data to obtain, since people can still own data and transfer the ownership by engaging in contracts.

Although applying Premise 2 seems *prima facie* more plausible than the applying Premise 1, it is not completely obvious that the SOT applies to personal data. Luciano Floridi has recently defended the view that personal data constitutes the *person*, rather than something *possessed* by the person (Floridi, 2013, p. 243). This is a controversial view which should be developed much further, before we can straightforwardly apply the SOT to personal data. Floridi, for one, does not seem to think that the SOT applies to personal data, even if the person is constituted by these data. In fact, Floridi seems to completely reject the idea that people own personal data (Floridi, 2013, 244). Furthermore, if Cheneval wants to defend data ownership by only applying the SOT to personal data, then the defense is vulnerable to the objections against the SOT in general. Of course, this would also be true if Cheneval wanted to defend data ownership only by applying the idea of mixing labor to personal data, since the idea of mixing labor relies on the SOT. Nonetheless, while Cheneval discusses and rejects several objections to the SOT, he leaves out some of the most hard-hitting ones (see e.g., (Lippert-Rasmussen, 2008)). If Cheneval can make a convincing argument for the claim that the SOT applies to personal data, then it seems that he has a plausible way out of the dilemma. But the price is that mixing labor plays no role when it comes to obtaining property rights over personal data, and therefore Cheneval needs another explanation if he wants to maintain that people can get partial ownership over personal data.

Concluding remarks

In this reply, I have tried to show that Cheneval's Lockean argument in favor of data ownership runs into a dilemma. Cheneval argues that 1) property rights over personal data can be derived through a Lockean process of mixing labor with the data. He also argues that 2) the SOT applies to personal data, and that people thus own data about themselves. I claim that 1) is false, since it has the counterintuitive implication that others can get to own personal data about you, if they mix their labor with it before you do. In order to avoid this implication it must be presupposed that the SOT applies to personal data, and therefore the avoidance of the implication relies on 2). This leaves us with 2), which seems *prima facie* more plausible. But if 2) is true, then Cheneval loses his explanation for how people get partial ownership over personal data about others, since his explanation relies on 1). One way to solve this dilemma is for Cheneval to go with 2) and abandon 1). However,

more work is needed in order to show why we should accept the view that the SOT implies original ownership over personal data.

In all fairness, Cheneval does not rely entirely on the Lockean defense of data ownership. He also claims that the same conclusion can be derived from an argument from Rawlsian distributive justice. If all I have argued in this reply is correct, I have not showed that data ownership as such should be ruled out. I have only showed that Cheneval's Lockean approach is problematic.

The philosophical discussion about data ownership is a very topical and very welcome one, especially considering the emergence of Big Data and data markets in various aspects of our lives. In order to continue the theoretically and practically important discussion of data ownership, I hope that Cheneval will further pursue the issues I have pointed out in this reply.

Notes

1. Throughout this reply, 'property rights' denotes moral property rights, unless explicitly specified otherwise.
2. For recent discussions on data ownership in legal theory and economics, see e.g., (Laudon, 1996); (Samuelson, 2000); (Thouvenin et al., 2017); (Cwik, 2016); (Cohen, 2017).
3. See (Locke, (1690) [1988], ch. 5.)
4. If this is true, then it seems rather ad hoc for Cheneval to delimit the scope of personal data to only include what the EU defines as personal data.
5. See e.g., (Narveson, 1999) for a good discussion of this proviso.
6. Given that Cheneval's account is supposed to Lockean, it is not clear why only *partial* property rights obtain when someone mixes her labor with data about you. On Locke's account, mixing labor with something unowned does not only generate partial, but full property rights over the thing in question (provided a certain proviso is satisfied).
7. This not a very Lockean idea. On Locke's account the first 'mixer' of labor would get full ownership, provided the proviso is satisfied. If Peter is the first to mix labor, then Carl and Allan gets no ownership at all. But on Cheneval's account, where mixing of labor is a sufficient condition for at least partial ownership, Carl and Allan would indeed get at least partial ownership.
8. This example is inspired by a classic thought experiment from Kasper Lippert-Rasmussen's discussion of the SOT (Lippert-Rasmussen, 2008, p. 98).
9. Cheneval can still say that people can get partial ownership over personal data by engaging in certain contracts. For example, you could voluntarily engage in a contract with a company which allows them to mix their labor with the data and get partial ownership over it.

Acknowledgments

I would like to thank Beate Rössler, Rasmus Uhrenfeldt, Jørn Sønderholm and Jens Damgaard Thaysen for very useful comments on an earlier version of this paper.

Disclosure statement

No potential conflict of interest was reported by the author.

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