The *Ethics* of Research Confidentiality: A Response to Piron

John Lowman and Ted Palys

Florence Piron argues that "Towards a Research-Participant Shield Law" "cuts off many arguments … that would make it possible to start a real debate."[1] Her critique articulates arguments she claims we neglect, but only by dint of failing to engage the extant literature on research confidentiality. Because of limited space, we refer the reader to key sources in that literature to substantiate our principal objections to her critique:

1) Piron observes that "Shield Law" does not examine the reasons a court might order revelation of confidential information. As we have described these reasons at length elsewhere, [2] we cited but did not repeat them in "Shield Law."

2) She argues that we do not articulate the moral basis of research confidentiality; again, because we have done this elsewhere, we cited but did not repeat these arguments.[3]

3) She contends that inviting researchers to resist law places research "above the law" and "over democracy." These arguments rehash two already-published critiques of our work, both of which misrepresent us and "democracy."[4] Instead of engaging and enhancing this debate, Piron parodies our position, and then attacks the parody.

4) She misrepresents our position by suggesting that we see the courts as demons against which researchers must fight. When it comes to academic freedom, our main concern is not with the courts, which in the U.S. have assiduously protected research confidentiality,[5] but with institutional ethics czars who would foist the "Law of the Land" position on all researchers by requiring that they limit confidentiality *a priori*.[6] We have argued that, as a matter of academic freedom, researchers should be allowed to choose whether to follow the "Law of the Land" perspective - Piron's preference - or the "ethics-first" perspective we propose, one that requires no *a priori* limitation on confidentiality because it does not absolutely subordinate ethics to law. Nevertheless, we would defend Piron's right to follow the Law of the Land perspective. It is unclear if she would defend our right to follow our ethical conscience.

5) Piron raises the spectre of circumstances in which it might be appropriate to violate confidentiality without acknowledging that our writing on "heinous discovery" anticipates this

---

[1] We thank Prof. Piron for checking our English translation of her article for accuracy, and Charles Langer for helping us in that translation.

[2] See e.g. Lowman and Palys "Confidentiality in criminal justice research" *supra* "Shield Law" note 6, and Palys and Lowman "Ethical and Legal Strategies" *supra* "Shield Law" note 9.

[3] See Palys and Lowman "Ethical and Legal Strategies" *supra* "Shield Law" note 9.

[4] See e.g. G.R. Stone "Above The Law: Research Methods, Ethics And The Law Of Privilege 32 *Sociological Methodology* (2002) 19 (hereafter *Above the Law*); J. Lindgren "Anticipating Problems: Doing Social Science Research In The Shadow Of The Law" 32 *Sociological Methodology* (2002) 29 (hereafter *Anticipating Problems*); Lowman and Palys "Subject to the Law' – our response to Lindgren and Stone (*supra* "Shield Law" note 11; hereafter *Subject to the Law*).

[5] See e.g. Lowman and Palys "Confidentiality in criminal justice research" *supra* "Shield Law" note 6, and Palys and Lowman "Ethical and Legal Strategies" *supra* "Shield Law" note 9.

[6] For an example of this kind of assault on academic freedom, see Lowman and Palys "Institutional Conflict of Interest" *supra* "Shield Law" note 16.

very issue.[7] Ironically, she (falsely) accuses us of confidentiality absolutism, but then offers legal absolutism in its place.

6) When concluding that researchers should clarify their limits to confidentiality in the process of soliciting research participation, Piron fails to address any of the ethical dilemmas that we identify as arising from this tactic.[8]

7) She claims that a research-subject shield law would prevent researchers from discussing complex ethical issues with third parties. Why? Researchers can discuss all manner of ethical issues without necessarily disclosing the identity of a specific research participant.

8) Piron portrays us as arguing that a guarantee of confidentiality will automatically produce valid and reliable research. We make no such claim, arguing instead that a guarantee of confidentiality is a prerequisite to valid research on sensitive topics without which there will always be doubt about the research's validity.[9]

9) Her suggestion that using the law to defend confidentiality is tantamount to disrespecting the law reveals a misunderstanding of both law and democracy. By "putting up a fight," we do not necessarily mean disobeying the law, but using the common law to protect confidentiality.[10] We argue that the "*caveat emptor*" approach – which entails the researcher planning to hand over confidential information on receipt of a subpoena without engaging the common law to protect it – is ethically indefensible.

10) Piron does not clarify her position regarding the evidentiary privileges currently enjoyed by participants in Statistics Canada research, lawyers' clients, spouses, cabinet ministers, and police informants. Is the existence of these privileges also "opposed to fundamental democratic values"? Or is it simply that academic research has so little value compared to these other relationships that no research confidentiality is worth legal protection, even on a case-by-case basis?

All in all, we are surprised Piron would accuse us of stifling "real debate" when she fails to canvass the full range of our published arguments, many of which anticipate her objections and identify crucial problems with her proposed alternative.

---

[7] See, for example, T. Palys and J.Lowman "Social research with eyes wide shut: the limited confidentiality dilemma" 43 *Canadian Journal of Criminology* (2001) 255 (hereafter "*Eyes wide shut*"); I. Zinger, C. Wichmann, and P. Gendreau "Legal and ethical obligations in social research: The limited confidentiality requirement" 43 *Canadian Journal of Criminology* 269; J. Lowman and T. Palys "Limited confidentiality, academic freedom, and matters of conscience: Where does CPA stand?" 43 *Canadian Journal of Criminology* (2001) 497. (hereafter *Conscience*).

[8] For a description of these dilemmas, see *ibid*.

[9] For example, see Palys and Lowman "*Eyes wide shut*" *supra* 5; and Lowman and Palys "*Conscience*" *supra* note 7.

[10] For documentation of the resounding success of this tactic, see Lowman and Palys "*Subject to the Law*," supra note 4; *supra* "Shield Law" note 11.