

PRIVACY SIGMA RIDERS EPISODE 5: Without My Consent

Host Michelle Dennedy discusses protecting the privacy of vulnerable victims of online abuse with Without My Consent Co-Founder Erica Johnstone and Lisa Bobbitt, Data Privacy Architect at Cisco.

Michelle Dennedy: Revenge porn: a hideous term for an equally hideous crime. The posting of intimate or explicit images of a person without that person's consent often condemns its victims to a life sentence of humiliation, emotional duress, and ruined reputation. It's illegal, of course, but without legal precedent, there's a gaping hole in the road to justice.

Fortunately, there's a Sigma Rider in the field of law who's paving the way for justice for all.

Cybersecurity, data protection, privacy ... You like to stay ahead of the curve and listen to experts who are leading the way in deriving greater value from data with a more organized approach to data privacy. You're like us, just a few deviations past the norm. You are a Privacy Sigma Rider.

Erica Johnstone, let's start with you. Can you tell us a little bit about your background, and why you're here today?

Erica Johnstone: Thank you, Michelle, for inviting me to be here. I'm always fascinated to connect with engineers, because I'm a lawyer, and a lot of times I meet with companies and it's almost like the lawyers are running interference -- because as lawyers, it's our job to say, "It wasn't my client's fault. My client doesn't have a duty to do anything. Really, I feel bad about the situation, but nothing can be done."

It's not until I meet with the engineers that we have these lightbulb moments of fixing a problem, and so I'm so happy to have this engineering audience, and to be able to talk in a human way about privacy problems and how we solve them together.

Michelle Dennedy: I love it. Tell us a little bit about your background.

Erica Johnstone: I started representing victims of revenge porn in 2009. I handled a lot of the very early cases in the US, where in cities around the country, a victim would go to a person injury attorney and was told nothing could be done. Then the more industrious victims would reach out to the California law professors at Stanford, and Santa Clara, and Berkeley, and say, "Surely there's something that can be done."

Michelle Dennedy: Absolutely.

Erica Johnstone: Then those cases were referred out to my law partner, Colette Vogeles, and me. We had those early repetitions.

Michelle Dennedy: Now here you are, really the authority in the field. It's exciting. We're honored to have you.

Erica Johnstone: Lisa Bobbitt, we've heard from you on past episodes, but for those who are just diving into the Privacy Sigma Rider world, please introduce yourself, and tell us how you know Erica.

Lisa Bobbitt: I am Cisco's very first privacy engineer. I came to that through a long time here at Cisco, touching much of what Cisco has done in the core at the edge through voice, video, and data, and then moving into security. Now looking at how you bring all that together with people is my passion. Michelle keeps teasing me that I fell into it by reading her book, and it's very true. Now I'm the one who is trying to move this into our products and applications.

I've known Erica since she was very young, because her parents worked with me at IBM, and then at Cisco, and now her brother's here at Cisco.

Michelle Dennedy: Amazing. I love it.

Lisa Bobbitt: Even though she's the lawyer in our family (my chosen family), we have lots of engineering background together.

Michelle Dennedy: I love it. As you know, my father is Tom Finneran, another co-author on the Privacy Engineer's Manifesto. I often joke that I was raised on a raised floor in the data center. I always appreciate another second-generation techno geek who also went to law school. Lots of touchpoints.

I want to go back and double-click a little bit. Erica's one of the good ones. This is not an easy field. I know that we have a mutual hate for the term "revenge porn." I know that it's the thing that gets the click. It's what this field is identified with, but can we talk a little bit more about that term, and why we both hate it?

Erica Johnstone: Yes. I would say I have a love-hate relationship with the term. What's been incredible is that the media coined the term revenge porn, because it's two things people love, revenge and porn. It works as a headline that grabs attention, 'cause you got to get those clicks.

Michelle Dennedy: That's the love.

Erica Johnstone: That's the love, because it made what used to be this weird niche conversation among lawyers at a symposium, brought it to Time Magazine over the summer, and now families are reading about the issue at their breakfast tables. That's

because of the term revenge porn. I think it's also a misnomer, and it distorts the conversation, because-

Michelle Dennedy: How does it happen? Let's really unwind. What is revenge porn?

Erica Johnstone: What we're talking about is the dissemination of sexually explicit information, particularly photographs, without a person's consent. There can be many reasons why this happened. You could have the webcam surreptitiously set up in a roommate's bedroom to film and encounter, and then stream that to your dorm mates. It could be Erin Andrews, the sportscaster, and a peeping tom set up a camera in the hotel room next to hers, and then recorded and put that online.

It could be filming of a sexual assault. I feel like I've seen a number of headlines where high school students are partying, and something turns into an assault situation and it's filmed, and then it's spread around the high school to further shame the victim of the assault.

Rather than focus on the motive of revenge ... Sometimes that is the case. Sometimes two people split up and one person wants to destroy the other. It doesn't matter what the intent is, because the harm is the same, and it should be impermissible to put sexually explicit photos on the internet without the consent of the person in the photos.

Michelle Dennedy: Right. In some of the cases that I've seen over the years, we've had soldiers who have been deployed for years, and their spouses have taken nude photographs. Before I think we're all so quick to judge and think, "What were they thinking? Why did you send that?" Sometimes there's a reason that couples who are intimate with each other take photographs of each other. I'm not here to judge that, but it's no one's right to consume those pictures without the person whose body it is.

It's an exploitation, I believe, of that individual's sanctity, their mental sanctity, their physical sanctity, and even sometimes their physical safety.

Erica Johnstone: It is. It's all of the above. What I've experienced with the victims is that they're just emotionally devastated. You are not in control of how you present your body to the world. That is something that's really core, that's just gutted. There's emotional devastation, and then they lose their ability to nurture their other relationships too, because they feel like they have nothing to offer anymore.

They're a mess, their relationships suffer, they're further isolated, and then everyone is sort of talking about them. "Can you believe that this happened?" and judging them for it happening to them.

Michelle Dennedy: Yeah. That's why I hate the porn word, like somehow you are being paid, participating in pornography.

Erica Johnstone: I know. Yeah, right. I dislike that too, because I also feel like pornography implies consent. Like you chose to engage in pornography. Just because someone is naked in their life, does not mean that they chose to engage in pornography. There's a difference between.

Michelle Dennedy: Many of us are naked every day.

Erica Johnstone: Right. It happens.

Michelle Dennedy: It happens. Nakedness happens, people.

Erica Johnstone: Yeah.

Lisa Bobbitt: I really like that you're pushing on the point of consent, because that's really a big piece of all of our stuff in privacy, but especially when it comes to our body, and to our images, and our voice, and the information that we want to share with other people in the market.

Michelle Dennedy: Yeah. I'm glad you're chiming in, Lisa, because I think consent is also ... it's kind of this emotional topic that we're talking about, but we're systems and network providers, so consent is also a mechanism of how are we planning for the sharing of images, the deletion of images, consent, people invading other people's devices to gather information, or even planting electronic recording devices in our vehicles, or in our hotel rooms, places where you feel like you have this refuge from the world.

There's a technological discussion here too. Isn't there Erica?

Erica Johnstone: There is. It's both legal and technological. One of the theories, when you file a lawsuit, you have causes of action that you can allege in the lawsuit. One of my favorite ones is breach of implied confidentiality, because I think that it creates this narrative of trust, and I think that's so important right now.

People-to-people have to trust each other; people to companies have to trust; and people to government have to trust; because everything good flows from trust. In the early ages of revenge porn, there's a lot of victim blaming. "Well, why did she do that? She was asking for it." The truth is that we build relationships by becoming vulnerable and trusting. A lot of times, this was that very close, confidential, this is what happens between us when the curtains are drawn, for your eyes only. I trust you, I promise to hold these safe.

It was a very normal, healthy way of expressing emotions for each other. I think that any time we have lawsuits in the courts right now, and can include that breach of implied confidentiality, I would like to see that, because it's not a

cause of action that has a lot of precedent. It's not well organized, and I think that the way the law can drive this forward is by bringing the cases and getting that precedent, so that we start to develop this narrative that trust is reasonable. We need it.

Michelle Dennedy: Yeah, we do. I wanted to highlight your [Without My Consent](#) initiative. Can you talk a little bit more about the legal tools that you're providing, and that are starting to be developed?

Erica Johnstone: Sure. Back in 2009, when Colette Vogeles and I were handling these cases, we were in the courts, and we were in state court primarily. We hadn't yet figured out family court. In state court, one of the challenges was bringing a Doe versus Doe lawsuit.

Michelle Dennedy: What is that? A Doe versus Doe?

Erica Johnstone: What that means is when you don't know who the defendant is, you file suit against a Doe defendant. That's because a person is anonymous, and you have to ask for permission to serve a subpoena to get the IP address to unmask the identity of the poster.

Courts had seen that once, but not many. What we were talking about was a Doe plaintiff, because in these egregious invasion of privacy cases, court records are public documents. If the plaintiff proceeds under her true name and then tells the story, and there's this salacious content, that then is going to be blogged, and Tweeted, and indexed. Then the act of seeking justice through the courts will just exacerbate her harm.

Michelle Dennedy: All right. She's basically, by seeking justice, she's creating another searchable term, and that's gonna be the first thing an employer, or a family member, or even a potential romantic partner finds online.

Erica Johnstone: Yes. Every issue was new. It was the Doe versus Doe lawsuit. It was if you were gonna go to family court to get a restraining order, did you have time and permission to serve a subpoena to get the IP address to prove that it was the ex who did it?

Michelle Dennedy: Did these family court folks, police, lawyers, judges know how to do that?

Erica Johnstone: Right. Did they know how to do it. How should you ask companies to take down the content? What tone of voice? What tools should you use? Then what should that final order look like, that the judge writes? What type of conduct can it restrain, and what would violate the first amendment?

These are all cutting edge legal issues that would require very expensive motion practice to brief them, and there's no precedent. When there's no precedent in the law, the answer really just comes down to the judge's personality. That's so

human, which is, when we are overworked, and kind of stressed, and we have a lot of issues that we're dealing with in our day to day, and suddenly we get this new request.

Is your instinct to say, "No. I don't have time for that. This is not a priority for me."? Or do you stick your neck out and say yes? Especially because you know that all of these rulings will be appealed, because they're matters of first impression. You're gonna have to stick your neck out, it's gonna be appealed, you're gonna have to put it in writing, you're gonna have to defend what you did, and it could go either way.

If you are looking to have an easy day, you're gonna say no, because it's always easier to say no than to grapple with a situation where there is no precedent.

Michelle Dennedy: Yeah. We're talking about the good ones that want to seek justice for these victims saying no. Let's talk about a little more of what can I find when I go to withoutmyconsent.org when I'm not driving that's running behind Lisa's house right now? What will I find there? What kind of materials? And who's the right person? Is this for lawyers? Is this for individuals? Is this for who?

Erica Johnstone: The right person is a victim who is committed to doing his or her own homework to help himself, and then take that work and organization to a helper in their local community. The helper in the local community will be your local precinct, and you talk with a detective, and you file a police report. You'll want to find the domestic violence support agencies in your local community.

Michelle Dennedy: I want to slow you down for a quick second here, because I think, particularly if you are in a consensual relationship, you've taken intimate photos of yourself, you may not consider yourself a victim of quote, unquote "domestic abuse", but that is where the legal hooks are for you if your former partner has done something like this.

Erica Johnstone: Yes. In California, it should be true that every victim can walk into a California family court, and get a same day restraining order that covers non-consensual porn and other cyber facilitated forms of abuse. The case law is there, it just has to be applied.

One of the things that Without My Consent created is a digital abuse restraining order cheat sheet for family court judges. This is state specific, so our cheat sheet is just for California law, but it briefs all of the issues about the definitions of abuse, how they are defined, and how case law has defined the issues to show that non-consensual pornography falls within those definitions of abuse. It's form driven relief in California, so you can print a five page form, fill in some blanks, check some boxes, and get a court order that requires the perpetrator to take down the revenge porn and stop posting it.

Michelle Dennedy: I like that this is putting it back on the shoulders of the person who has done the bad deed, because you were telling me earlier about a case where it was an individual's mother who had to spend time. Tell us a little bit more about that. Then, Lisa, I want to get back to the technology. I could have this conversation for a very long time, but ...

Erica Johnstone: Yeah. In the old days, this was an excruciating crime to commit, because the platforms, Google hadn't yet de-indexed revenge porn from search, and the platforms didn't have accurate web forms for taking down non-consensual porn.

Michelle Dennedy: There were all these crazy sites, like My Crazy Ex-Girlfriend, and horrible things that were set up as a service.

Erica Johnstone: The perpetrator would take the content and post it to the revenge porn websites, like My Ex, but also to user generated porn sites that don't vett whether there was consent or not, and it's just the porn is uploaded. I think that the most recent number I read from an article by Mary Anne Franks is that there are 10,000 sites like this. You just upload the images, and then the PornTubes start grabbing them.

Michelle Dennedy: These are 10,000 people who are running these sites who really need to get a day job.

Erica Johnstone: Yes.

Michelle Dennedy: I'm gonna judge here. We're officially judging you. If you're listening to me and you have a revenge porn site, you're a loser.

Erica Johnstone: Right. Just imagine you are an employer, and you're meeting someone for the first time, and you just Google their name to see what to expect, and it's just page after page of PornTube. The person's name, click through to see the nude content.

Michelle Dennedy: Even if you like the person, how distracting is that for all your other employees? You're gonna be biased against that person.

Erica Johnstone: Right. You're not gonna want the drama, and it creates a weird environment at work, which could raise some issues about how your other employees are going to handle it, and it sort of tees up some type of bullying event or whatever. It's a can of worms.

It was so harmful because these kids were just getting out the door. This was happening to them in high school and college, and it's when they really need that first job, or it's gonna derail their career.

On June 19 of 2015, two years ago, Google agreed to de-index nonconsensual porn on search. That was when the victims could breathe again, because when

you could Google their name, you could give Google that URL, and it would be taken off the index. You still had to deal with the PornTubes, and that was a nightmare, but unless someone had the direct URL to the PornTube, it was going under.

Michelle Dennedy: For the mainstream stuff, at least there's some relief.

Erica Johnstone: Yes. There was some relief. Before that, I had a client, and her mom, we sort of delegated the take down duties to her mom. The mom conservatively spent 500 hours between May and October sending DMCA take down requests to PornTubes. That's a full time job.

Michelle Dennedy: It's horrifying, and so I'm cognizant of time. We're at 20 minutes. I could talk to you for days on this. Lisa, some final thoughts on the technology side of this and where this fits into our world of privacy engineering.

Lisa Bobbitt: All of this needs to be things that are implicit in the baseline of what we do in the network, in the Cloud, in IOT. We've got to have that baseline of saying, "Here's what this is being used for. I agree that this is the purpose of what I'm doing." If it is between me and my husband or my mate, that I make that decision, and I find ways to protect it and the work with that authorized use.

Then the next piece of it being that each of us become very aware that we are part of the solution, and not be part of the problem of helping others understand what privacy is, and how they can in turn have that built into their world, so that it's not just a matter of having to go back and take it out after the fact, but that we build it in at the beginning.

That's my passion for what we're doing, Michelle, is that these things would not be even possible, because we are allowed to control our own data.

Michelle Dennedy: Yeah. I think looking at Without My Consent through several lenses, I've got two daughters, of course, and I'm having them look through what is going on in the world and being aware of this. As my 16 year old says, "The prevention of idiot making" before some of these images are made by kids who may not have the judgment.

Also, if you are a system designer, and you're capturing any sort of photographic or video content, go to withoutmyconsent.org, be a part of the 50 state solution, be a part of an international solution for our international listeners. I'm really looking at this as, when I'm hearing what you're saying, Erica, about how you're having to gather evidence of a crime and causing release, so something as simple as de-indexing on the mainstream search sites, these are things that we can do as technologists to partner so that we are having the fun and excitement of having live video, and we all enjoy all of that content, but understanding that if there is a technological trigger that allows you to take

some of this stuff down when there is a problem, that's something we can build in organically, as Privacy Sigma Riders.

To close this out, Lisa, I'll start with you, I'll finish with Erica. What gives you hope in this space, Lisa?

Lisa Bobbitt: My hope is that A, we can see that vision, but currently, that we have some ways now, with the work that Erica, and her team, and their nonprofits are doing to actually help people today. That gives me hope. Getting this awareness out to everyone is a short-term answer that I think we can all be part of. Then long term, finding ways to make this part of our trusted environments that we live, work, and play in.

Michelle Dennedy: Erica, do you have hope and what keeps you going?

Erica Johnstone: I do have hope. I'm gonna tell a story about why I do. There's a law firm out there called K&L Gates. They started a pro-bono project, The Cyber Civil Rights Initiative. They represent victims of revenge porn for free, big law style. They get excellent care. They will file the lawsuit, they'll litigate it to conclusion, and you will get a judgment.

In 2014, I trained them. I was like, "This is how I do what I do. Here are the documents. This is how a normal case goes. This is how much it costs." I gave them budgets, training, everything. They started the clinic, filed a lawsuit in 2015, litigated it for two years, and in 2017, they got a jury verdict for \$8.9 million, which tells me a couple of things. One, these cases are worth a lot of money, so every lawyer in America should be reading the legal treatise--

Michelle Dennedy: There's a market.

Erica Johnstone: ... ergo, the [Something Can be Done Guide](#), because it holds your hand and it will take you start to finish.

Michelle Dennedy: Is that what it's called? the Something Can be Done Guide?

Erica Johnstone: Yes.

Michelle Dennedy: I love it.

Erica Johnstone: Something Can be Done Guide. Also, now when I write a demand letter, I can cite that comp. That work that they did, that building of precedent, just gave every lawyer in the country a comp that we can use when we write that demand letter, and something that will make the other side want to come to the table and reach a settlement agreement without spending a lot of money, without spending a lot of time in the courts, creating those public records. That's kind of win, win.

Michelle Dennedy: I love that. It's not really about the money, of course. It's about the other party coming in, doing their part to take down these images and make sure that that person has their integrity back, build back their good reputation and good name, and hopefully their mental healthiness.

Erica Johnstone: Peace of mind.

Michelle Dennedy: I love that. If it takes creating a \$2.9 million market, so be it. I thank you for your work, Erica. It's just a delight to have you. We'll probably pull you back into the show again at some future point to highlight what's going on in your world. My takeaway from this is that there are real specifications and requirements that we can build in as the technology providers.

There's obviously a lot of work we can do to educate ourselves and our communities. Please go to www.withoutmyconsent.org. It's chock full of ways that you can communicate with your loved ones about this real phenomena, wherever you are in the world. If you happen to be in the US, there's a ton of information about legal and advocacy positions you can take.

I've actually shared Erica's work with my 16-year-old, who's taking it back into her high school, so there's a lot that can be done here. We've got tech people spawning lawyers, we've got lawyers spawning tech people, dogs and cats living together. It's a beautiful thing.

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