

Closed Caption of Podcast 1.3:
Without My Consent: Tangible Tools to Combat Online Harassment

KRISTELYN:

Welcome to the Cyber Abuse Project (CAP) podcast series where we invite guests to talk about the use/misuse of technology in sexual assault, domestic violence, dating violence, and stalking (including cyber stalking). This project seeks to support the work of criminal justice professionals as they navigate these cases. I'm Kristelyn Berry, Training and Technical Assistance Specialist with the California Coalition Against Sexual Assault. Joining me is my co-host and colleague, Tyreena Heck, Community Initiatives Coordinator, with Break the Cycle. Hi Tyreena!

TYREENA:

Hi Kristelyn! Break the Cycle is excited to be working with the CA Coalition Against Sexual Assault as our partners in the CAP project, and we look forward to hearing from a variety of criminal justice professionals as this series continues. This is one of many resources the CAP project will be releasing to provide more focused technical assistance to criminal justice professionals that include law enforcement, campus safety, school resource officers, and school administrators.

KRISTELYN:

This podcast is the third in a series of six podcasts. This podcast will focus on nonconsensual distribution of intimate images. Our esteemed guest, Erica Johnstone, who is the Co-Founder and **Vice President** of Without My Consent, will be speaking on what's happening in the field around this issue and the impact that nonconsensual pornography has on its victims.

TYREENA:

We are so excited to have our guest Erica Johnstone. As Kristelyn stated, Erica is the Co-Founder and President of Without My Consent and is a partner with Ridder, Costa, and Johnstone, LLP. She specializes in defending reputations from unlawful online consent, and litigates online issues regarding harassment, and the right to privacy among other issues. Hi Erica!

ERICA:

Hi Tyreena. Thank you, it's great to be here.

TYREENA:

We are so excited to have you. We wanted to jump right in. Can you tell us about Without My Consent and how did it get started and why?

ERICA:

Sure. So I'm first and foremost a privacy lawyer, so I represent clients in court and I never imagined that I would confound a nonprofit. But in this world where abusers leverage digital

marketing tools and the architecture of the internet to terrorize their victims in front of a global online audience. 1-1 representation in the court just wasn't getting the job done, so let me walk back to 2009 and 2010. My law partners and I were litigating some of the first online Revenge Porn cases in the country and at that time a victim would contact his/her local personal injury attorney and that attorney would normally be sort of confused and say "Nothing can be done." And the more persistent victims contacted West Coast law professors, because the California law schools we had internet laws, courses, and professors and my law partners were affiliated with Stanford and were now in private practice. So those perspectives of clients and victims were routed to our law firm. So in 2009 and 2010, Coulette Vocal and I were representing victims of Revenge Porn in the courts and it was really frustrating, because we were often successful in reaching a resolution, but the path to the resolution was not clear and the rulings that we were getting from the courts were often very arbitrary and very dependent on the personality of the judge rather than any type of consistent application of the law. And that is because the law works best in a world where there is precedence for handling a certain problem and it becomes unpredictable when lawyers and judges are doing new things for the first time, because you have to grapple with ambiguity and argue by analogy. A teenager asking a parent to do something new for the first time. Like one personality type says, "You make some good points let's give it a shot and see what happens" and the other type says "No absolutely not, that is not how we do things around here." And that yes or no knee jerk reaction is often based on personality rather than the application of law is what we were finding. In 2011, we were at SXSW and the audience members still treated this as a one off event. We were talking about the headlines at the time of Tyler Clementi and Erin Andrews and we were having to explain to the audience that these were not one off isolated events that abuse wasn't going away and that it was going to get much worse. And so, there was that conversation and then also Revenge Porn is an interdisciplinary problem, because it involves laws from copyright, court law, family law, and they are also technological solutions that need to be in place too, so Withoutmyconsent can really focus all of that under one roof and give victims and their lawyers the access to tools they needed to address this problem. And so in my law practice while I can represent victims in sort of the 1-1 traditional attorney client relationship and I can still do that. Withoutmyconsent allows us to be funded to write a legal treatise on the topic to really empower victims everywhere to build their local teams of helpers that we could have these little seeds around the country of people learning how to handle these cases.

TYREENA:

That's awesome, so it's basically like a hub for victims who experience this nonconsensual pornography.

ERICA:

Absolutely, so Withoutmyconsent does not represent victims. What it does, is it provides all of the educational material, it's sort of a publication and production platform. Where if you go there, everything we have learned as lawyers in the trenches representing victims of digital abuse has been broken down into super straightforward like hand holding. This is step 1, step 2, step 3, from the moment the abuse happens until you get that court order, or settlement agreement

signed, because it teaches victims how to help themselves, because victims have a lot of homework to do in these cases because they are so resource intensive. It is going to be the organized victims that get help and that's what we try to empower our victims to be.

KRISTELYN:

It seems like you are taking a multidisciplinary approach to a really complex issue. So what is the difference between revenge porn and non consensual distribution of sexually explicit images? And what should we know about each of the terms?

ERICA:

Great question. So in conversation I use those words interchangeably, so if I'm meeting someone and they ask me "What do you do?" I say I litigate revenge porn, and that term jogs their memory, because they've heard of "Revenge Porn." The media coined this term Revenge Porn, because it is two things people love right like revenge and porn, so it works with a headline to grab that attention and then people read your article. So I'm grateful for the term, because it brought what used to be a weird niche legal symposium topic into mainstream conversation, but it is also a misnomer, because what we are really talking about is the non consensual distribution of sexually explicit images disclosed without consent and for no legitimate purpose, and there may be many reasons why someone does that. One motive is certainly post breakup destruction of the other person, but it doesn't have to be motivated by revenge for this type of sexual exploitation to be intrusive and unacceptable. And it's also done for money, entertainment, street cred or boredom. So I use those terms interchangeably. For the very superficial level of conversation these words are interchangeable, and then it really goes to how much information does this person I'm talking to want and sort of the supply and demand of like a conversation. Because if it were a client who's asking me what are my legal options in regards to a case for Revenge Porn posted on social media now we are zooming in on information privacy law, and we are looking at sources of the law whether its state common law, statutory law, civil, criminal, domestic violence act or federal copyright law. And then we are reading the elements of the law to see if our evidence moves beyond the burden of proof that we would have to prove in court.

TYREENA:

You know, now that you say that what are your top 3 points of advice for survivors of nonconsensual pornography? What would you tell them?

ERICA:

So the top three, the first one would be to go into this with the mindset that your help will be local, and that it is sort of up to you to build a local team, and then know that withoutmyconsent teaches you how to do that. So for example, if you go to withoutmyconsent resources we published a legal treatise called the "Something Can Be Done Guide" and the first chapter is on evidence preservation. The third chapter is on restraining orders, and that covers once I have preserved my evidence how do I find my helpers? And we teach you how to do that. So it's that initial mindset of we want to make that shift from being "I am a victim and I'm not sure where to

get help” over to “I am a victim and I know how to get help and this is how I do it and I am doing that right now. The second one is to do the homework. These cases are so resource intensive and the people who help you have so much discretion, and they are so overwhelmed with the number of these cases that they cannot possibly deal with all of them. They are going to pick and chose the cases where the victim is the most organized and the evidence is preserved in away that will be admissible in court. What’s so empowering about this is if you can take those initial steps to present your evidence in a compelling narrative then you can really change the world. My example is you know Holly Jacobs who was at one point in her life a victim of Revenge Porn and then went on to be the cofounder of the Cyber Civil Rights Initiative. She walked in to Mary Anne Frank’s office with a 3-ring binder, and that was the start of a relationship in a nonprofit that has had an enormous impact on the paths to justice for victims of digital abuse. I don't want to be discouraging that victims have to do a little bit of work. It's just that that's how it is and that's how you get help. My experience is that once the victim is able to organize and is able to tell a compelling narrative and we teach you how to do that, then everybody. These are not cases that people don't understand. People totally get it and want to help, it's just making that initial connection fruitful for the victim and the person who can help them.

TYREENA:

Ok, mindset and homework are the first two, and then what would you say would be the third point of advice?

ERICA:

The third is really more about tools to help survivors. Once it happened, you brought your team together you got release and you've been successful, then I would just embrace the tools for healing that are universal, and some of those that you know that I'm aware of or that your story becomes your strength or badge of honor and you find a community in the real world that helps you, you know develop the strengths, skills, and self sufficiency to make meaningful choices, and its in this community where you can share your vulnerability and your experience and your story that people are able to meet you there and you are able to sort of move through the trauma or stop defaulting to the trauma and that's where the growth happens. So I would say it's sort of like this 3 part plan where you know you go from being overwhelmed victim of this abuse to feeling empowered, to getting your team, to working with your team to help you solve this isolated problem of abuse, and then how you move on after that is really important too.

TYREENA:

That's so good, it's so important for other people to know and hear that there is actually a process, there is methods behind this that you could use and now I know we asked those three points of advice specifically for survivors, but what about for family members or a friend that wants to help a victim who is experiencing?

ERICA:

I would say that the best tips would be just to stay present and be a constant supportive presence in the victim's life, because one of the strategies of Revenge Porn is to make the victim feel completely gutted and isolated right, so one of the things that is so catastrophic to us is that we don't want to feel known and rejected and that is what the Revenge Pornographer is up too, he wants to put you into that box of like I am going to expose you in the most intimate way to this cyber mob that will sort of hurle this rejection onto you and that's going to make you feel isolated and unable to nurture your relationships and ashamed and alone and so the best thing that I think family members and friends can do is to combat that and say we are not going to let those feelings come into our relationship with you. So one is just being a dear person to the victim, and another I think is just being organized. People help in different ways sometimes people are natural nurtures and others have a to-do list it's half, and those people can help the victim get organized and develop a team of helpers that are the Domestic Violence advocates or law enforcement or a lawyer the more task oriented people can do that, but those are two great ways that you can really be there for a victim.

KRISTELYN:

Those were really helpful tips especially for family, sometimes they're not even sure what to do when this happens to someone and your also removing barriers for victims and so in our project we want to do the same thing we want to remove the barrier in between victims seeking services and law enforcement. What are some of the best practices you have seen from law enforcement in responding to nonconsensual pornography?

ERICA:

So what we are talking about is how to make that first connection fruitful. So we will often talk to a victim and say "When your safety is at physical risk or you feel that it might be we encourage you to file a police report." So we are talking to the victim that is now going to walk into a local police precinct and say "I have a problem" and there are a couple of things a victim can do to sort of facilitate that relationship being a really positive one with law enforcement, and the first one is to be organized. And again it's going back to the resources on evidence preservation that we have in our treatise and we've created is an evidence chart and I actually asked all of my clients in my law practice to complete this one intake as well. That's where this came from, but for each sort of sentence in your story you should be able to say the time and date on which it occurred. What happened, the evidence that it happened, whether that is a PDF or screenshot, or a sworn declaration under oath, who you think did it, and the evidence that that person did it and that is line by line. You go through your story, and you impose that framework on your story, and that's how you tell a compelling narrative. So we want to teach people it can't be a data dump. You know like the people who can help them there are way too many case to possibly deal with, so the victims job is to sort of sell it as I'm the victim you should help, because I've demonstrated that I'm committed to this case, I'm a credible victim, I have my evidence, and here is the game plan. And the victim could also take the cyber exploitation bulletin that was created for law enforcement, so in 2015 former California Attorney General Kamala Harris, she formed a working group on cyber exploitation, and among other things developed a police

bulletin, and that is available online at the office of attorney general California State government website, and you can just google cyber exploitation police bulletin, and print it out, and in addition to your binder of evidence that withoutmyconsent teaches you how to create, bring along the police bulletin, because you are sort of handing that baton to law enforcement, and then law enforcement sees through this bulletin that's been created for law enforcement that there is this top down mandate in the state of California to investigate these case. So I think that is just a very impressive way for victims to present themselves and then Withoutmyconsent also works to support law enforcement from their end too, and so one of things I have done is I've done trainings at cyberstalking conferences and in those audiences there will be district attorneys and so what I do is I then meet up the with the district attorneys and attend their training for law enforcement and a lot of them already are starting to incorporate digital abuse hypotheticals into those trainings, but then I can sort of supplement those trainings with more cyber law tips or withoutmyconsent resources so there is trainings happening from all sides. We bring all of our tools to bear by training everyone involved in the picture on how to have a fruitful interaction.

TYREENA:

That's amazing and I know you mentioned especially with talking about how you support law enforcement officers. Right now we are currently at a we are at a pivotal time for prosecuting technology crimes, you know there was a point in time when we didnt even think someone would be prosecuted for something like this, so what would your advice be to law enforcement to build momentum to take on these cases with limited resources?

ERICA:

So California is unique, because we have an E-crime unit. So Kamala Harris in 2011 created a E-crime unit, because we saw that the future of crime would be committed through the use of technology, but California is rare in fact one of Withoutmyconsent's educational tools is called the grade your state checklist and according to a survey in 2015 only 6 states California, Michigan, New Jersey, New York, Virginia, and Washington received a check mark for E-crime and law enforcement per the metrics used on our report and you know LAPD's chief Charlie Beck said that soon half of all crime in the US will be cyber crime. So a couple of things need to happen, residence in the state need to use their voice to engage in the democratic process to let their states top cops, the attorney general's know that having an e-crime unit is very important to the residents of that state, so that is sort of like the bottom up. And the attorney general has to create a top down mandate. The Attorney General is the top cop and he or she lets it be known to all of the law enforcement that were under the attorney general that this is a priority to figure out how we are going to handle E-crime in our state. And then I think there is going to be this new career path that opens up. I can see it as like the career path as a way to recruit millennial cops who might understand this technology and have an interest in it as a way to differentiate their career and to define themselves in what they do in law enforcement. So its driving momentum from sort of grassroots activism that is heard by the states attorney general that issues that top down mandate that creates the training for the E-crime then the prosecutors

that are members of the E-crime train their local law enforcement on how to investigate these crimes that's sort of how the system works and the role of each player in that system.

TYREENA:

That makes sense, your right I think we are going to see as shift in the future especially with some of the new provisions in law enforcement that developed from technology.

KRISTELYN:

With the scope of your work being national, has Without My Consent been seeing more victims from secondary or college campuses come forward?

ERICA:

Yes, so let me speak to the data, the patterns in my law practice and my conversations with Domestic Violence advocates on the ground in California. So with the data, according to a 2016 survey by the journal data and society 10.4 million Americans or roughly 1 in 25 have been a victim of nonconsensual porn. For women under 30 that figure rises to 1 in 10 and if you are LGBTQ that number goes even higher and a June 2017 Facebook survey by the anti revenge porn advocacy group cyber civil rights initiative found that 1 in 20 social media users have posted a sexually graphic image without consent. And in my law practice, I would say that in the beginning from 2009 - 2011 the exact scenario was frequently the nightmare ex who obtained intimate photos consensually for sort of what was applied threats in the context of an intimate relationship and the victims were usually 18 - 25 year old women this age group was particularly vulnerable because they don't have a lot of resources and there often just getting out the door too. So you can often make the content go viral and manipulate search engine optimization so that the first pages of search results would be pornographic content connected to the victim. I would say of this practice revenge porn has age it now does not necessarily target women like it used to be, so no when I get a call from a client. I would say its 50/50 whether the client is male or female and who the perpetrator or victim is has become more democratized in a sense since it has become more widespread. And what I'm seeing on the ground in California through the legal restraining order clinics kind of blows my mind. So Adam Dodge is the Legal Director of Laura's House in Orange County. I recently spoke to him and he told me that nonconsensual pornography is ubiquitous in domestic violence cases. So much so that he has trained his staff to screen on intake for revenge porn and the script is, "Does this person have a intimate photo of you? And has this person threatened to distribute these photos?" And he says that its extraordinarily common in all cases really, but particularly with teens that when they screen for nonconsensual pornography almost always they will tell us that they either have been threatened by their partner or the threat has been carried out and the images have been shared either with somebody else or the general public at large. As a means to exert power and control over the victim.

TYREENA:

So we see it across the board in both secondary and college campuses coming forward but more so with teenagers.

ERICA:

Yes, the abuse starts very young and that from that earliest relationship, you know sexually explicit images are apart of that relationship.

TYREENA:

You were talking about how Without My Consent does a really good job of providing resources for victims of Nonconsensual Pornography, and I know you gave us your three points of advice earlier, but what are some concrete actions a victim of nonconsensual pornography can take to, in your words, “get control back?”

ERICA:

Yes, so understand that there is a system we have solutions we have a system and really right now it's just getting the repetitions of that system so that each try is easier because we are doing sort of the same thing over and over again and you wear that groove. But you build your team go to Withoutmyconsent, check out the resources, the guide, and go into it with a mindset that you the victim will be building the team and your job is sort of to gather the evidence and tell that compelling story, and know that California already has everything in place, so it's just been a matter of connecting with the right people and we teach you how to do that too. And then the system that works is that we have all of these legal tools that go from the initial demand letter like a cease and desist to you know preserve all the evidence. You might register the copyright. You can use take down tools to remove it from the internet, you can go with a restraining order or a confidential settlement agreement or you can file a police report and file a civil lawsuit, so those are all the tools that are sort of on this menu to choose from and it will really just be the victim working with her local helpers to figure out which tools will should be used in her case. And then after you resolve the matter the final thing is just to heal and move on through the community. And just you know that unglamorous work of shifting from a place of trauma to a place of joy. And I feel like you know there are tools to help a victim do that too.

TYREENA:

Absolutely, and does this look similar for a victim who isnt in California? Maybe say someone who is from a different state would you give them the same type of advice?

ERICA:

Yes, I would, because if a victim is not in California, then a victim is just not as lucky. It doesn't mean that there is no path to justice. It just means that there is not one that is streamlined yet, so they are going to be part of the flow that is trying to change the framework of the state to sort of bring it up to code with California, so that in the future all states should be as easy as California to get justice. And we already have that blueprint that is California. So we wrote the guide for helpers in every state knowing that they would be able to read our guide and apply that framework to their state. So even though this is like domestic violence law, state, harassment, and stalking, and revenge porn. There are common patterns. And it's not so much the detailed facts of the cases that matter its the patterns and the helpers will be able to see

how those facts are how the law applies to fact in California and then compare the law of their state to see which laws they can fall back on.

KRISTELYN:

Awesome, thank you. I think that is very helpful. Yes, and that goes right into our last question. In 5-10 years, what legislation would you like to see around this issue?

ERICA:

So there are a couple of things. The first, is that I would love for other states to follow California's blueprint. There are 9 things every state needs and I know this because I've been involved in all 9 of them, and one of the turning points in California was when Kamala Harris made cyber exploitation a priority because she was able to bring the stakeholders into the room and I could talk as a lawyer about the obstacles that I encounter and as a team we fixed them. In some cases it was passing helpful criminal laws like for example like California does not want to pass anymore felonies because of prison overcrowding. So the California Revenge Porn law was passed as a misdemeanor, but a misdemeanor doesn't give law enforcement the power to serve a subpoena or search warrant. So even if you have a criminal law and police cannot investigate it, then it doesn't do any good so then we would troubleshoot that and say okay we should pass the companion law that gives law enforcement the power to serve a search warrant in cyber exploitation cases. And we really just went item by item and just removed the barriers to get a system that worked. Another trick is that in California family court are designed to be navigated per say meaning that you don't have to have a lawyer to represent you in family court. It can be helpful, but you can also go to the website and download the forms you need to complete to get a DV restraining order or a civil harassment restraining order. Any one can complete that and then go to court and you can get a restraining order. And those forms that already exist already cover revenge porn in California, because of the way our statutes are defined, so that is another area other states need to sort of modernize their stalking and harassment and abuse statutes. So I really just love for the audience that is interested in activism this is a really great way to make a big impact would be to form groups in every state that try to duplicate the California blueprint in every other state. So that is one and then the next things is not legislation, but I would love to see the next generation of lawyers to embrace this training sort of at scale, because right now there are only a handful of attorneys in the US that know how to handle these cases and its a cutting edge law practice, because it requires knowledge that does not overlap from the past. So it is understanding this technology underlying the internet. Knowing about other cyber law adjacent issues like copyright privacy defamation towards an intermediary liability, and then also knowing the ends and outs of family court. And there are not many lawyers currently in that venn diagram center, so i would love to see more people in that room. And then a third would be a federal law, a federal revenge porn law would be really helpful for a number of reasons. Many of the states laws are poorly written, and a federal law would sort of create a model standard that other states could follow. And it would allocate resources toward combating cyber crime and I think it sends a signaling function like when we as a country vote on laws and we say that this behavior is so important that it

deserves to be criminalized and that sends a message to would be perpetrators, and I think there is something very strong and consistent about having this federal law on this point.

Tyreena:

Amazing! Erica thank you so much! We really appreciate all of the insight and knowledge that you have brought to this podcast and we cannot wait to share your expertise with criminal justice professionals and campus administrators across the country. I think it is super helpful and definlnty needed and we're just super thankful that you joined us today.

ERICA:

Thanks it was great and I would love to do it again sometime.

KRISTELYN:

You just heard an interview with the Co-Founder and Vice President of Without My Consent, in our third episode of the Cyber Abuse Project's podcast series. Tyreena, Erica was absolutely amazing!

TYREENA:

Yes she was, and she gave us some great ideas on how to approach the criminal justice process specifically with survivors who have experienced the nonconsensual distribution of sexually explicit images.

KRISTELYN:

Yeah, Erica had some great ideas that could directly benefit victims of nonconsensual pornography and criminal justice professionals who work with these type of cases. What were your favorite takeaways from the interview?

TYREENA:

So one of the biggest things we heard from Erica is around informing survivors throughout the criminal justice process, of what their options are, and how widespread this issue is. For example, Erica talked about the importance of informing victims of evidence preservation. Working with law enforcement and attorneys on these cases are resource-intensive, so survivors will need to do some of their own homework to ensure that they can successfully move forward with prosecution if they choose to.

KRISTELYN:

Erica also mentioned how criminal justice professionals are overwhelmed by the significant number of cyber abuse cases they take on each year. So the survivors who are the most prepared and organized with evidence usually have a better chance of a successful outcome.

TYREENA:

Exactly. As Erica mentioned, in addition to being prepared and organized its important for survivors to also know how to tell a compelling story of their experience. For me, it was

interesting to hear that once other people hear the survivors story and see the amount of evidence they've collected, that typically other people in their community want to step in and help. So it's important to remember that forming a support team can provide assistance with the case and also help the survivor in their healing process.

KRISTELYN:

That's right. It sounds like Without My Consent has some resources that folks can use to educate and empower people about taking a stand against online invasions of privacy. Be sure to check out her website at withoutmyconsent.org, and check out their Twitter [@withoutconsent](https://twitter.com/withoutconsent) (there's no my) and Facebook [@WithoutMyConsent](https://www.facebook.com/WithoutMyConsent).

TYREENA:

Well that concludes our third episode in the Cyber Abuse Project Podcast Series. Thanks for joining and be sure to tune in to the remaining podcasts in the series by visiting breakthecycle.org.

TYREENA:

The Cyber Abuse Project addresses the use/misuse of technology in sexual assault, domestic violence, dating violence, and stalking (including cyber stalking) cases. CAP is a project of Break the Cycle and the CA Coalition Against Sexual Assault. It is supported by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this program are those of the authors and do not necessarily reflect the views of the U.S. Department of Justice, Office on Violence Against Women.

Visit Break the Cycle's website at breakthecycle.org and CA Coalition Against Sexual Assault at calcasa.org to learn more about our work and CAP resources.