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10-22-2014

## **Cardozo Law Tech Talks Kick Off with Panel on Differences Between Surveillance Law in the U.S. and Europe**

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### **Recommended Citation**

Benjamin N. Cardozo School of Law, "Cardozo Law Tech Talks Kick Off with Panel on Differences Between Surveillance Law in the U.S. and Europe" (2014). *Cardozo News 2014*. 9.  
<https://larc.cardozo.yu.edu/cardozo-news-2014/9>

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BRINGING LAW TO LIFE

# CARDOZO LAW

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

## CARDOZO LAW TECH TALKS KICK OFF WITH PANEL ON DIFFERENCES BETWEEN SURVEILLANCE LAW IN THE U.S. AND EUROPE



October 22, 2014

*Professor Felix Wu speaks during "U.S. vs. E.U. Surveillance Law and Government Access to Consumer Data."*

### Cardozo Law Tech Talks Kick Off with Panel on Differences Between Surveillance Law in the U.S. and Europe

By Janice Weber

Cardozo Law opened its first series of Tech Talks with a panel discussion of global surveillance law, data collection and retention, and privacy policy as they intersect, often in very different ways, in the United States and in the European Union. Front and center: technology and how it has reprogrammed our very notion of privacy.

The event on October 7, 2014, focused on issues surrounding the emergence of smart technology and the Internet Age; whether our ideal of a "reasonable expectation of privacy" has changed; and what

### RELATED NEWS

September 20, 2019

[Second Annual Blockchain Conference Focuses on Enforcement \(/news/second-annual-blockchain-conference-focuses-enforcement\)](#)

Cardozo Law's Samuel & Ronnie Heyman Center on Corporate Governance and The Blockchain Project co-hosted the Second Annual Blockchain and the Law Conference on September 16.

September 19, 2019

[Cardozo Students Participate in Historical Jewish Moot Court Competition in Vienna and Tel Aviv \(/news/cardozo-students-participate-historical-jewish-moot-court-competition-vienna-and-tel-aviv\)](#)

Four Cardozo law students—John Walpole, Lauren Rosenfeld, Miriam Azizi and Esther Shuchat—participated in the Historical Jewish Moot Court, in February and August 2019, along with six students from Vienna, six students from Moscow, and

happens to our personal information in the hands of government entities or business.

In talking about privacy, security or surveillance law in the United States today, we have to be specific about what we're talking about, cautioned Joseph DeMarco, partner at DeVore & DeMarco who is a leading expert on Internet crime and the law relating to emerging technologies. There are three big buckets of privacy law, he explained, each with interesting questions attached to them: Are we talking about the government getting information about us? Are we talking about information from us that we give to the government? Or are we talking about third parties that we freely or unwittingly give that information over to?

“The tensions in litigation regarding phone records, e-mails and other communication really come down to whether you believe that the information stored by you through a third-party provider is within your expectations of privacy or not.”

As for the larger, philosophical view of privacy law, DeMarco said, “The mere fact of collection hurts the ecosystem; it hurts civil liberties. So even as a former government official and someone who is generally in the middle in these debates, I believe strongly we should care that there is a harm, something that we can trace back to the Magna Carta. It's our civil liberties.”

“There are distinct differences between U.S. and Swiss surveillance law,” according to Swiss attorney Sylvain Métille, who specializes in privacy and data protection, surveillance and advanced technologies.

For example, “In Switzerland, the authorities cannot do any monitoring that infringes on the right to privacy unless the Parliament passes specific laws allowing the State to do so.” In contrast, “the police in the U.S can do whatever they want as long as the Congress does not establish a specific prohibition.” In general, the focus of European surveillance law is on restricting data collection [AB1] and, in particular, limiting retention of information—how much information can be held, for how long, for what purpose and under whose aegis.

In 2006, the European Union issued a significant directive with broad surveillance implications, arguing that new rules were necessary to allow authorities to investigate and prosecute organized crime and terrorism. The directive required network services to retain data “for the prevention, investigation, detection and prosecution of criminal

eight students from Tel Aviv.

August 16, 2019

[Cardozo Welcomes the J.D. Class of 2022 \(/news/cardozo-welcomes-jd-class-2022\)](#)

Integrity, generosity, grit and joy were the guiding themes of Dean Melanie Leslie's welcome to the Class of 2022 for their first day of orientation.

July 24, 2019

[Professor Alex Reinert Named Max Freund Professor of Litigation & Advocacy \(/news/professor-alex-reinert-named-max-freund-professor-litigation-advocacy\)](#)

Professor Alexander Reinert has been named the Max Freund Professor of Litigation & Advocacy, the chair formerly held by founding faculty member Arthur Jacobson.

July 8, 2019

[Class of '19 Graduates Elected to Order of the Coif \(/news/class-19-graduates-elected-order-coif\)](#)

Cardozo School of Law is proud to recognize 27 members of the Class of 2019 who have been elected to membership in the Order of the Coif.

offences.” In April of 2014, the directive was voided by the European Court of Justice, and the former view of data retention was restored: “You cannot collect data on an unsuspecting person with the intent, or possibility, of using it later,” Métille said. “The collection, retention and transfer of data—each constitutes an infringement on privacy and needs to be justified as such.” In other words, “in accordance with the law and consistent with a democratic society, privacy is a constitutional right, accorded to all citizens.”

In comparing U.S. privacy policy with that of the European Union and Switzerland, Felix Wu, associate professor of law at Cardozo and faculty director of the Cardozo Data Law Initiative, pointed to the many different “policy levers” that could be used to determine the scope and nature of any given surveillance law both here and abroad. For example, international policy generally differs from U.S. policy in a number of key ways: the collection of content versus metadata, the bulk collection of telephone records without warrant versus a more targeted collection policy requiring a warrant before surveillance can take place, or the long-term retention of data until it is sorted out and a use found—as favored by the NSA—versus the limited retention of data favored by the European Court of Justice. And then there are different decision makers to consider. “Decisions about the legality of any given activity are being made by corporate executives, by those trying to prosecute crime, by intelligence agencies such as the NSA, and by judicial authorities like the European Court of Justice,” said Wu.

Professor Wu also referred to traditional Fourth Amendment law. “Why is it that we set up the home as the kind of sphere that the government is not supposed to intrude upon?” he asked. “Why is the home so important?” The home provides a place of repose, a private sphere in which to retreat, to have certain experiences without intrusion and free from the chilling effects of outside interference. “Just the fact that we have all of these search results aggregated and collected can be problematic. It makes it harder for people to investigate things, to find out things in the world, and that seems to be a distinct kind of harm, and something that happens as long as the act of collection is going on, whether it’s a government party or a private party.”

“While we are rightly concerned about government surveillance,” said DeMarco, “we should also be concerned about that surveillance that we ourselves bring into our homes.” With the explosion of the

“Internet of things,” he said, data-collecting devices become “part of the family. Our refrigerator communicates with FreshDirect so that the milk arrives on time; our dishwasher, our louvered blinds, our entertainment systems make life easier while continually communicating with us by our smart phones, using intermediary providers who are also storing data all along. Just don’t ask too many questions about where I’m going to keep that information for how long, or what I’m going to do with it.”

“Just wait for the robots,” says Demarco, “but that’s another story.”

*Cardozo Law Tech Talks is an ongoing series that brings together a broad range of experts—attorneys, academics, government officials, business leaders—to share their real-world experience and ideas and to discuss and debate the impact of technology on today’s ever-changing legal ecosystem.*

### **More about the event:**

Moderated by Nathan Wessler, who handles cases involving both free speech and privacy issues as staff attorney with the ACLU's Speech, Privacy, and Technology Project, the panel included:

Joseph V. DeMarco, partner at DeVore & DeMarco, where he specializes in information privacy and security, theft of intellectual property, computer intrusions, on-line fraud and the lawful use of new technology. His previous experience in private practice and as a U.S. Attorney handling cybercrime investigations has made him a leading expert on Internet crime and the law relating to emerging technologies.

Sylvain Métille, head of technology and privacy at BCCC Attorneys-at-Law in Geneva, Switzerland, specializes in privacy and data protection, surveillance, advanced and emerging technologies, and European Court of Justice laws regarding data collection and retention.

Felix Wu, associate professor at Benjamin N. Cardozo School of Law and faculty director of the Cardozo Data Law Initiative, combines his expertise in theoretical computer science with information law scholarship that spans freedom of speech issues, privacy law and intellectual property law.

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