

# Evaluating Telecommunications Surveillance in Germany: The Lessons of the Max Planck Institute's Study

Paul M. Schwartz\*

## Table of Contents

Introduction .....	1244	R
I. The MPI Study's International Comparisons .....	1245	R
A. International Similarities and Dissimilarities .....	1246	R
B. Evaluating Relative Amounts of Surveillance in Different Countries .....	1250	R
II. The MPI Study's Findings Regarding Germany .....	1254	R
A. Mobile Phones: The Locus of Surveillance .....	1255	R
B. E-mail: Ignored by German Law Enforcement .....	1256	R
C. Disparate Rates of Surveillance Throughout Germany .....	1258	R
D. Measuring the "Efficiency" of Telecommunications Surveillance .	1259	R
Conclusion .....	1263	R

## Introduction

The publication in 2003 of a long-awaited empirical study of telecommunications surveillance in Germany has opened a window into existing law and practices in that country.<sup>1</sup> Under the sponsorship of the Federal Department of Justice, three researchers at the Max Planck Institute for Foreign and International Criminal Law in Freiburg ("MPI") carried out a detailed examination of relevant German and international developments.<sup>2</sup> The resulting volume by Hans-Jörg Albrecht, Claudia Dorsch, and Christiane Krüpe has now appeared under the boldly unwieldy title: *Legal Reality and Efficiency of the Surveillance of Telecommunications Under §§ 100a, 100b of the Criminal Procedure Code and Other Concealed Measures for Investigations* ("MPI Study").<sup>3</sup>

While the MPI Study reaches some flawed comparative conclusions, it reveals much about German telecommunications surveillance.<sup>4</sup> This Article will first examine the MPI Study's international comparisons and fault the

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\* Professor of Law, Brooklyn Law School. For their comments on an earlier version of this paper, I would like to thank Ted Janger, Lance Liebman, and Daniel J. Solove. Thanks as well to *The George Washington Law Review* for their invitation to participate in this Symposium. Finally, I am grateful for generous support from the Dean's Scholarship Fund of Brooklyn Law School. All translations are my own.

<sup>1</sup> HANS-JÖRG ALBRECHT ET AL., *ÜBERWACHUNG DER TELEKOMMUNIKATION NACH DEN §§ 100A, 100B STPO UND ANDERER VERDECKTER ERMITTLUNGSMASSNAHMEN* [LEGAL REALITY AND EFFICIENCY OF THE SURVEILLANCE OF TELECOMMUNICATIONS UNDER §§ 100a, 100b OF THE CRIMINAL PROCEDURE CODE AND OTHER CONCEALED MEASURES FOR INVESTIGATIONS] (Institutsverlag) (2003) [hereinafter MPI Study].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *See infra* Part II.

MPI researchers for relying on problematic data-sets to reach hard-edged conclusions about comparative levels of telecommunications surveillance in different countries.<sup>5</sup> The MPI researchers confidently note that in terms of telecommunications surveillance, Germany belongs in “the mid-field among continental European countries.”<sup>6</sup> One would have been better served by a simple admission regarding the difficulty of reaching any verdict about relative amounts of telecommunications surveillance in different countries.

Regarding German law and practice, however, the MPI researchers develop a more solid basis for analysis—and one based on their own extensive and impressive field research. This Article examines the MPI Study’s conclusions for Germany regarding: (1) the heavy emphasis on surveillance of mobile telephones; (2) the relative insignificance of e-mail surveillance; (3) the disparate rate of surveillance in different states (*Länder*); and (4) the extent to which telecommunications surveillance can be said to be “efficient.”

### I. *The MPI Study’s International Comparisons*

Two introductory points are necessary about the scope of the MPI Study. First, the MPI Study generally focuses on surveillance of telecommunications *content*.<sup>7</sup> The words spoken in a conversation or the words found in the message part of an e-mail are telecommunications content; the intended contrast is with noncontent, or “telecommunications attributes.”<sup>8</sup> Noncontent refers to such information as the telephone numbers dialed; customer information associated with a telecommunications account (name, address, billing choices); e-mail addresses to which a message is sent; and digital data, such as bank account numbers, that are transmitted with use of digital telephones.<sup>9</sup>

German regulations for law enforcement access to the content of telecommunications and noncontent telecommunications attributes are different. Yet, the MPI researchers pay scant attention to the latter area. One can understand that as an empirical study focused primarily on content, the MPI Study already faced sufficient challenges. Nevertheless, one can still wish that the MPI researchers had taken on the additional topic of the regulation of law enforcement access to telecommunications attributes. Noncontent data are increasingly detailed, reveal much about the behavior of the individ-

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<sup>5</sup> See *infra* Part I.

<sup>6</sup> MPI STUDY, *supra* note 1, at 435.

<sup>7</sup> The study does occasionally mention the collection of other kinds of information, *see, e.g., id.* at 8, but its main focus remains on the collection of content data.

<sup>8</sup> I use the term “telecommunication attributes” in the same sense that Susan Freiwald defines “communication attributes.” Susan Freiwald, *Uncertain Privacy: Communication Attributes After the Digital Telephony Act*, 69 S. CAL. L. REV. 949, 953 (1996). In contrast to “contents,” she refers to “communication attributes” as “all the other characteristics of a communication that can be learned about it.” *Id.* Freiwald adds: “These attributes include the existence, duration and subject matter of a communication, the identities of the parties to it, their physical locations and their electronic addresses.” *Id.*

<sup>9</sup> For a comparative discussion of this kind of information, see Paul M. Schwartz, *German and U.S. Telecommunications Privacy Law: Legal Regulation of Domestic Law Enforcement Surveillance*, 54 HASTINGS L.J. 751, 783–91 (2003). For a discussion focusing on the United States, see Orin S. Kerr, *Internet Surveillance After the USA PATRIOT Act: The Big Brother That Isn’t*, 97 NW. U. L. REV. 607, 632–33 (2003).

uals placed under surveillance, and are increasingly important to law enforcement officials.<sup>10</sup>

Second, the MPI Study focuses only on surveillance of telecommunications in Germany by *domestic* German law enforcement agencies. It does not include the activities of those German agencies concerned with international terrorism and foreign spies; the *foreign intelligence* agencies are regulated by a different set of statutes.<sup>11</sup> Here, again, one can have sympathy for the MPI researchers' choice of research parameters but nevertheless wish that they had looked at this additional topic, especially since the terrorist attacks in the United States on September 11, 2001, have made the response of law enforcement agencies to international terrorism such an important issue. For example, post-9/11, there has been a debate in Germany and the United States alike on the merit of existing legal divisions regarding the sharing of data between domestic law enforcement and foreign intelligence agencies.<sup>12</sup>

Having pointed to certain research topics not examined by the MPI researchers, this Article can now evaluate the road taken. The MPI Study proceeds along four tracks. First, the MPI researchers engaged in comparative analysis of telecommunications surveillance in sixteen countries other than Germany.<sup>13</sup> Second, they examined a large sample of criminal justice case files in Germany in which telecommunications surveillance had been ordered.<sup>14</sup> These files were drawn from one year, 1998, which was chosen because it was necessary for the MPI researchers to pick a date far enough in the past to be able to measure the impact of surveillance on the outcome of any ensuing criminal prosecutions.<sup>15</sup> Third, the MPI researchers drew up a questionnaire and distributed it to German police, prosecutors, criminal defense attorneys, and judges.<sup>16</sup> Finally, they carried out detailed interviews with representatives of these groups.<sup>17</sup> The result is a book of nearly 500 pages with 139 graphs and 48 tables.

#### A. *International Similarities and Dissimilarities*

The MPI Study examined telecommunications surveillance in sixteen countries other than Germany. Inside Europe, the study looked at twelve countries, including European Union Member Nations and countries outside

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<sup>10</sup> Freiwald has noted the expanded capacity to record new kinds of telecommunication attributes by using new generation pen registers in surveillance of pagers and cellular phones. See Freiwald, *supra* note 8, at 986–89.

<sup>11</sup> For a discussion of the legal framework governing the collection of telecommunications data by these German spy agencies, see Schwartz, *supra* note 9, at 778–82. For the leading statutory provision, see Gesetz zu Artikel 10 Grundgesetz [Law to Art. 10 of the Constitution], v. 26.6.2001 (BGBl I S. 1254) (codified as amended at v. 9.1.2002 (BGBl. I S.361), § 15).

<sup>12</sup> On the U.S. debate, see Peter Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306 (2004). For a proposal to look to the German approach as a model for the United States, see Jeffrey Rosen, *How to Protect America, and Your Rights*, N.Y. TIMES, Feb. 6, 2004, at A25.

<sup>13</sup> MPI STUDY, *supra* note 1, at 59–109.

<sup>14</sup> *Id.* at 154–88.

<sup>15</sup> *Id.* at 132–33.

<sup>16</sup> *Id.* at 137–40.

<sup>17</sup> *Id.* at 141.

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the European Union.<sup>18</sup> Beyond Europe, the comparative survey extended its focus to four countries: Australia, Canada, New Zealand, and the United States.<sup>19</sup>

As an initial finding, the MPI Study discovered that the level of telecommunications surveillance generally increased throughout the 1990s in the surveyed countries.<sup>20</sup> Moreover, during this period, the surveyed countries expanded the number of “listed” criminal offenses, the investigation of which permits authorization of telecommunications surveillance.<sup>21</sup> In other words, telecommunications surveillance can generally be used only to investigate a limited number of serious crimes, ones that are listed *ex ante* in the criminal code as being significant enough to justify surveillance. In Germany, for example, the listed offenses are set out in section 100a of the German Code of Criminal Procedure.<sup>22</sup> The United States makes use of a similar concept—it requires a “predicate offense” to justify wiretapping.<sup>23</sup> In the United States, the number of predicate offenses was expanded throughout the 1990s and then after 9/11 by the USA PATRIOT Act.<sup>24</sup> Despite this international trend of a broadening of statutory grounds for telecommunications surveillance, however, the MPI Study found that telecommunications surveillance predominately takes place in the surveyed countries to combat crimes related to the trade in illegal drugs.<sup>25</sup> This result certainly continued post-9/11 in the United States, as shown by the most recent wiretap statistics.<sup>26</sup>

The countries under examination share other similarities. They generally restrict use of telecommunications surveillance by law enforcement agencies to situations in which other tactics will fail to gather needed information.<sup>27</sup> Also, judicial authorization generally is required to permit telecommunications surveillance.<sup>28</sup> This requirement is also frequently accompanied by an emergency exception, which allows prosecutors to authorize telecommunications surveillance when time constraints will not permit

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<sup>18</sup> *Id.* at 62–88.

<sup>19</sup> *Id.* at 89–100.

<sup>20</sup> *Id.* at 101–02.

<sup>21</sup> *Id.*

<sup>22</sup> Überwachung der Telekommunikation [Telecommunications Surveillance Act], § 100a StPO 246 BB [hereinafter StPO]. For concise analysis of this section of the law, see GERD PFEIFFER, STRAFPROZESSORDNUNG UND GERICHTSVERFASSUNGSGESETZ: KOMMENTAR [CODE OF CRIMINAL PROCEDURE AND JUDICIARY ACT: TREATISE] § 100a, at 206–13 (4th ed. 2002).

<sup>23</sup> The predicate offenses are listed in Authorization for Interception of Wire, Oral, or Electronic Communications, 18 U.S.C. § 2516 (2000).

<sup>24</sup> The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272, added to the list of predicate offenses crimes of terrorism, production or dissemination of chemical weapons, and felony violations of the law related to computer fraud and abuse. The amendments introduced by the USA PATRIOT Act have been codified at 18 U.S.C. § 2516.

<sup>25</sup> MPI STUDY, *supra* note 1, at 439–40.

<sup>26</sup> ADMIN. OFFICE OF THE U.S. COURTS, 2002 WIRETAP REPORT 9–10, available at <http://www.uscourts.gov/wiretap02/contents.html> (last visited Apr. 17, 2004).

<sup>27</sup> MPI STUDY, *supra* note 1, at 102.

<sup>28</sup> *Id.*

informing a judge.<sup>29</sup> Under the emergency exception, judicial authorization must still be obtained afterwards.<sup>30</sup>

Despite the shared international emphasis on judicial oversight, the MPI Study found that courts in the surveyed countries rarely refuse requests for surveillance.<sup>31</sup> As an initial example, the MPI Study evaluated data for Switzerland from 1998 and found that the Swiss judiciary granted all 1,951 surveillance requests.<sup>32</sup> In the United States, the judiciary refused only three wiretap orders between 1991 and 2001.<sup>33</sup> The MPI Study discovered a similarly low rate of judicial refusals of surveillance requests for Australia,<sup>34</sup> Canada,<sup>35</sup> and Germany.<sup>36</sup> Examining this question in some detail for Germany, the MPI researchers identified some evidence, based on their interviews, that prosecutors and police officials sometimes informally discuss possible surveillance requests.<sup>37</sup> The researchers even found one judge who admitted to them that prosecutors might telephone to request his opinion about a possible surveillance request, and that if he replied that “a petition was pointless,” it would end the matter.<sup>38</sup> In contrast, some lower court judges in Germany told the MPI researchers that they would be surprised if such informal refusals took place.<sup>39</sup> Thus, it is unclear whether a pattern of informal refusals of surveillance requests occurs in Germany. A similar lack of clarity on this question exists for the other countries in the MPI Study.

Beyond the similarities among the surveyed nations, the MPI researchers discovered dissimilarities as well. One dissimilarity concerned the explicit legal authority granted to law enforcement officials in some European nations to engage in “preventive” or “forefield” (*Vorfeld*) telecommunications surveillance.<sup>40</sup> Preventive surveillance is different from the traditional use of telecommunications surveillance to investigate a specific criminal offense, which requires proof that a crime has taken place or is likely to occur.<sup>41</sup> Preventive surveillance lacks any such connection to a *specific criminal act*; rather, its focus is on investigating *organizations* that are devoted to ongoing criminal behavior.<sup>42</sup>

Some countries in Europe now explicitly permit preventive surveillance. For example, Italy allows “a preventively oriented collection of information” that serves in “preparation of a formal intervention.”<sup>43</sup> France and the

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<sup>29</sup> *Id.*

<sup>30</sup> *See id.* A similar statutory regulation of an emergency exception exists in U.S. law. *See* 18 U.S.C. § 2518(7) (2000).

<sup>31</sup> MPI STUDY, *supra* note 1, at 440.

<sup>32</sup> *Id.* at 70.

<sup>33</sup> *Id.* at 97.

<sup>34</sup> *Id.* at 91.

<sup>35</sup> *Id.* at 99.

<sup>36</sup> *Id.* at 77–78.

<sup>37</sup> *Id.* at 250.

<sup>38</sup> *Id.* at 254–55.

<sup>39</sup> *Id.* at 255.

<sup>40</sup> *Id.* at 440.

<sup>41</sup> *Id.* at 66.

<sup>42</sup> *Id.* at 66, 102.

<sup>43</sup> *Id.* at 66.

Netherlands also permit these kind of wiretaps.<sup>44</sup> In France, “administrative” wiretaps do not even require judicial authorization.<sup>45</sup> A legal requirement in France, however, restricts their maximum number per year to 1,540 and their maximum length to four months.<sup>46</sup>

In Germany, a new development at the state level has been the interest in the enactment of statutes that allow limited preventive surveillance.<sup>47</sup> As the MPI Study points out, however, preventive wiretapping has traditionally not been permitted in Germany—although, as the MPI Study observes, the line between traditional “repressive” telecommunications surveillance and preventive wiretapping is not set in stone.<sup>48</sup> As one prosecutor commented to the MPI researchers: “In prosecuting [organized criminality], everything that one does repressively also is preventive. Criminal coalitions are not a rigid thing, but rather extremely animated.”<sup>49</sup> At any rate, in a development not discussed by the MPI Study, some German states have enacted, or plan to enact in the near future, laws that do allow the police some authority to carry out preventive surveillance.<sup>50</sup> Thus, some but not all countries in the MPI Study permit preventive surveillance.

A further difference between surveyed countries concerns the kind of official information available about surveillance practices. The MPI researchers discovered that only “Anglo-American countries” required law enforcement authorities to file detailed, annual public reports concerning surveillance activities.<sup>51</sup> As the MPI Study states:

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<sup>44</sup> *Id.* at 62–63, 78.

<sup>45</sup> *Id.* at 62.

<sup>46</sup> *Id.* Extensions are possible, and there are no limits placed on the number of extensions. *Id.*

<sup>47</sup> Such a statute has been enacted in Thuringen and proposed in states such as Lower Saxony, Rheinland-Pflaz, and Bavaria. See *Telefonüberwachung: Die Oma orten [Telephone Surveillance: Locating Grandma]*, DER SPIEGEL, Dec. 8, 2003, at 50, available at <http://www.spiegel.de/spiegel/0,1518,278074,00.html> (last visited Apr. 17, 2004). A “Big Brother Award” for Germany for 2003 was awarded by civil liberties organizations to the responsible public officials in the states in question, who are advocating laws to allow preventative telecommunications surveillance. See *Der Big Brother Award im Bereich Politik*, at <http://www.bigbrotherawards.de/2003/pol/> (last visited May 19, 2004). For objections raised by the Data Protection Commissioner of Lower Saxony to a state statute permitting preventive telephone surveillance in that state, see *Präventive Telekommunikationsüberwachung, Thesen und Anmerkungen des Landesbeauftragten für den Datenschutz Niedersachsen insbesondere zur präventiven Telekommunikationsüberwachung in § 33a des Entwurfs eines Gesetzes zur Änderung des Niedersächsischen Gefahrenabwehrgesetzes (NGefAG)*, available at [http://www.lfd.niedersachsen.de/master/0,,C2216997\\_N2216723\\_L20\\_D0\\_I560,00.html](http://www.lfd.niedersachsen.de/master/0,,C2216997_N2216723_L20_D0_I560,00.html) (last visited May 19, 2004).

<sup>48</sup> MPI STUDY, *supra* note 1, at 195, 454.

<sup>49</sup> *Id.* at 206–07.

<sup>50</sup> These new state laws are sometimes justified so police can contact cell phone companies to obtain location information for a cell phone, as in the case when someone might be missing or considering suicide. *Telefonüberwachung: Die Oma orten, supra* note 47. Noting its suspicion of this argument, the *Spiegel* magazine commented that no privacy advocate would be protesting “were the new laws only regulating the search for missing children, grandmas, and accident victims.” *Id.* The privacy experts were worried about something else, namely “a new expansion of the zone for eavesdropping.” *Id.*

<sup>51</sup> MPI STUDY, *supra* note 1, at 441.

In continental Europe, a certain reserve exists in the statistical registration of orders for surveillance and their disclosure. Such a reserve is not justified considering the experience that has been made with the detailed duty to report in the Anglo-American system. It is becoming clear that the corresponding duty to report leads (subsequently) to a transparency of investigation activity that works against the impression of methodical, systematic, secret and comprehensive surveillance.<sup>52</sup>

The MPI Study argues that public reports can help both legal authorities and citizens.<sup>53</sup> For judges, prosecutors, and law enforcement agencies, the reports can detail technical and other obstacles that arise in attempting to carry out telecommunications surveillance.<sup>54</sup> Annual reports can also reveal the impact of surveillance measures on the public. These reports thereby offer a chance for the public to demand “political responsibility for the kind and manner as well as the extent of surveillance activity.”<sup>55</sup>

In the United States, the law requires the Administrative Office of the U.S. Courts to collect statistical information about telecommunications surveillance by federal and state officials and to publish a detailed annual report.<sup>56</sup> The statute in question, 18 U.S.C. § 2516, also details the kind of information that prosecutors and judges must file with the Administrative Office.<sup>57</sup> In 2001, the USA PATRIOT Act<sup>58</sup> modestly expanded these reporting requirements.<sup>59</sup> In contrast, in Germany, the Telecommunications Act of 1996, in section 88(5), sets out less stringent reporting requirements for telecommunications providers.<sup>60</sup> As the MPI Study also notes, official guidelines for collection of this information in Germany were not put in place until 2002.<sup>61</sup>

#### *B. Evaluating Relative Amounts of Surveillance in Different Countries*

In its comparative section, the MPI Study does much to depict the complex landscape of comparative telecommunications surveillance law.<sup>62</sup> Less

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> These reports are available online from the Administrative Office of the U.S. Courts at <http://www.uscourts.gov/wiretap.html> (last visited Apr. 17, 2004).

<sup>57</sup> 18 U.S.C. § 2516 (2000).

<sup>58</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

<sup>59</sup> The extended reported requirements are codified at 18 U.S.C. § 3126 (2000). For a discussion, see Schwartz, *supra* note 9, at 786.

<sup>60</sup> § 88(5) Telekommunikationsgesetz [Telecommunications Act] (TKG) v. 25.7.1996 (BGBl. I S.1120) [hereinafter TKG].

<sup>61</sup> MPI STUDY, *supra* note 1, at 39. The federal government (*Bundesregierung*) annually releases some statistical data about telecommunications surveillance to the German Parliament. *Id.* This data is collected from government officials rather than telecommunications providers and measures telecommunications surveillance according to somewhat different criteria than that collected under section 88(5). *Id.*

<sup>62</sup> *Id.* at 59–100.

successfully, however, it does not hesitate to draw conclusions regarding the relative amount of surveillance in the countries analyzed.<sup>63</sup> The MPI Study creates a common yardstick for its comparison by taking the available statistics for each country and calculating the surveillance orders per 100,000 inhabitants.<sup>64</sup> It finds the highest amount of orders in Italy and the Netherlands (76 and 62 orders respectively per 100,000 inhabitants) and the lowest amount in the United States and Canada (0.5 orders and 0.4 orders respectively).<sup>65</sup> Within this scale, Germany falls in the middle range with 15 orders per 100,000 inhabitants.<sup>66</sup>

German privacy experts have sometimes complained about the frequency of telecommunications surveillance in their nation,<sup>67</sup> and, hence, one can understand a desire of the authors of the MPI Study to evaluate this criticism. The MPI Study notes: “In a comparison of its relative frequency of surveillance orders per 100,000 inhabitants, Germany is . . . to be placed in the mid-field among continental European countries.”<sup>68</sup> In drawing a different analogy while reaching this same conclusion, the MPI researchers observe elsewhere in their study: “At the end of the 90s, Germany belongs in a European comparison certainly not at the summit, as is frequently critically observed, but well under the average . . . .”<sup>69</sup>

This judgment is problematic, however, first, due to differences and even flaws in the maintenance of *statistics* in the various countries;<sup>70</sup> and, second, due to differences in the underlying *legal regimes* in the surveyed countries.<sup>71</sup> Germany may or may not be a world leader in telecommunications surveillance, but one cannot ascertain its status from the available data-sets. This point deserves elaboration—it demonstrates the difficulties of finding any empirical basis for comparative scholarship of telecommunications surveillance.

As an initial illustration, one can look to statistics from two countries, namely, Germany and the United States. As noted, Germany would appear to engage in far more telecommunications surveillance than the United States; the MPI Study states that it has 15 orders per 100,000 inhabitants compared to the United States with 0.5 orders per 100,000 inhabitants.<sup>72</sup> But these numbers actually do not reveal much about the relative amount of surveillance activity in the two countries. Two problems arise when one tries to compare the relative levels of telecommunications surveillance in Germany and the United States.

The first problem is that German wiretap statistics reflect a separate counting for each time that a telecommunications connection (*Anschluss*) is

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<sup>63</sup> *Id.* at 101–06.

<sup>64</sup> MPI STUDY, *supra* note 1, at 104.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> For the MPI Study’s noting of the complaint concerning the comparative frequency of German telecommunications surveillance, see *id.* at 105.

<sup>68</sup> *Id.* at 435.

<sup>69</sup> *Id.* at 104.

<sup>70</sup> See *infra* notes 76–79 and accompanying text.

<sup>71</sup> See *infra* notes 80–81 and accompanying text.

<sup>72</sup> MPI Study, *supra* note 1, at 105.



placed under surveillance.<sup>73</sup> In other words, the German law enforcement statistics do not count merely surveillance *orders*, but *connections* that are placed under surveillance.<sup>74</sup> In contrast, in the United States a single judicial order can be used to authorize surveillance on multiple lines, and no breakdown is provided in the U.S. statistics as to the number of connections placed under surveillance.<sup>75</sup>

The second problem stems from variations in the legal regulation of telecommunications surveillance in Germany and the United States. In Germany, constitutional safeguards under Article 10 of the Basic Law, the German Constitution, generally remain in place unless *all* parties to a communication offer their consent to telecommunications surveillance. This result is a consequence of Article 10's explicit protection of "telecommunications secrecy" (*Fernmeldegeheimnis*).<sup>76</sup> In the United States, in contrast, under both constitutional and statutory law, any *one* party's consent to surveillance of telecommunications to which she is a party releases the government from any obligation to obtain a judicial order that authorizes surveillance.<sup>77</sup> Consequently, an unknown number of "consent" wiretaps in the United States fall outside the national wiretap statistics, where similar law enforcement activities in Germany are counted in its national statistics.

Thus, the respective German and U.S. statistics measure different phenomena. The MPI researchers do concede at one juncture that an exception exists in the United States for one-party consent to surveillance, and that this exception is likely to have a significant impact on U.S. wiretap statistics.<sup>78</sup> Yet, the authors of the MPI Study prove unable to resist the temptation to take the raw national data for Germany, the United States, and other surveyed nations, divide each data-set by the respective country's population, and plot the result onto a single chart.<sup>79</sup>

Moreover, beyond these difficulties in making direct comparisons between German and U.S. data-sets, grounds also exist for concern about statistics from other countries used in the MPI Study. As an example, the MPI Study reports Austria as having 9 surveillance orders per 100,000 inhabitants.<sup>80</sup> Yet, as the MPI Study also notes, the Austrian national statistics lack any information for Vienna.<sup>81</sup> This gap is a significant one; Vienna is both the largest city in Austria and its leader in crime statistics.<sup>82</sup> As a result, the

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<sup>73</sup> For a detailed discussion, see Schwartz, *supra* note 9, at 763.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> GRUNDGESETZ [GG] [Basic Law] art. 10 (F.R.G.). For a discussion, see HANS D. JARASS & BODO PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND: KOMMENTAR [BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY: TREATISE] 305–15 (6th ed. 2002).

<sup>77</sup> Schwartz, *supra* note 9, at 762.

<sup>78</sup> MPI STUDY, *supra* note 1, at 95.

<sup>79</sup> For the chart, see *id.* at 104.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 105.

<sup>82</sup> For a breakdown of criminal proceedings in Austria by region, see STATISTISCHES JAHRBUCH ÖSTERREICH 462–63 (2004), available at <http://www.statistik.at/jahrbuch/pdf/k34.pdf> (last visited May 19, 2004).

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most frequent use of telecommunications surveillance in Austria is likely to occur in the one locality absent from the statistics on which the MPI Study relies. Regarding the missing Vienna statistics, the MPI researchers admit that more complete data would likely place Austria closer to the European average.<sup>83</sup> Yet, no adjustment is made to the Austrian statistics.<sup>84</sup> This lack of statistical information about Vienna could have an even greater effect if Austria has regional disparities in the frequency of surveillance as are commonplace in Germany. In Part II.C below, this Article discusses German regional disparities.

The available statistical data are not only flawed for Austria. The German numerical data, upon closer analysis, prove likely to contain weaknesses. The MPI Study handles these potential flaws for the German data-set in a fashion similar to its treatment of the other numerical information; it discusses the grounds for possible imprecision of the data-set—and then still relies upon it.<sup>85</sup> Understanding the nature of the difficulties with the German statistics requires a short explanation of how these data are collected.

Until the enactment in 1996 of the Telecommunications Act, and specifically § 88(5), German law required the Deutsche Bundespost, the national postal, telephone, and telegraph company, to collect telecommunications surveillance statistics for Germany.<sup>86</sup> Under Telecommunications Act § 88(5), the Regulatory Authority for Telecommunications and Mail [hereinafter Regulatory Authority], a new agency, was given responsibility for collecting statistical data from telecommunications providers.<sup>87</sup> Once this system for collecting data was in place, surveillance statistics dramatically increased compared to the previous year.<sup>88</sup> The MPI Study attributes this increase to the creation through Telecommunications Act § 88(5) of a system for more complete reporting of surveillance.<sup>89</sup> But the MPI Study also argues that these statistics still contain flaws.<sup>90</sup> Its logic on this topic is worth examining.

The MPI researchers first looked at the data that the federal government made available to the Parliament.<sup>91</sup> The MPI researchers pointed out that “the cost of ascertaining the corresponding numerical data in the past was so great that the federal government could only give limited information to parliamentary inquiries because not all state justice agencies could deliver a suitable contribution and therefore reliable figures were not submitted.”<sup>92</sup> In other words, the statistics from the federal government were flawed, because of the expense associated with collection. As for the more recent period when telecommunications providers became obliged to report information about surveillance orders, the MPI researchers state: “For telecommunica-

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83 MPI STUDY, *supra* note 1, at 105.

84 *Id.* at 85–86, 104–05.

85 *Id.* at 39.

86 *Id.* at 39, 45–46.

87 § 88(5) TKG, *supra* note 60. For a discussion, see JÖRG EHMER, BECK'SCHER TKG-KOMMENTAR § 88, at 1421–22 (Wolfgang Büchner et al. eds., 2d ed. 2000).

88 MPI STUDY, *supra* note 1, at 39.

89 *Id.*

90 *Id.* at 39.

91 *Id.* at 39, 45–46.

92 *Id.* at 39.

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tions providers, the collection of statistics may be similarly costly, and so a transfer of these thoughts seem thoroughly plausible.”<sup>93</sup> This language is somewhat opaque, but its meaning can be parsed. The MPI researchers are proposing that current data-sets for Germany, collected pursuant to the Telecommunications Act § 88(5), are also likely to be flawed because of the cost of collecting them.

This analysis resonates as a sad reflection on the scant importance given in Germany to gathering accurate information about practices in this area. Indeed, the Federal Ministry for the Economy has in the past called for a repeal of the obligation of telecommunications providers to furnish information under Telecommunications Act § 88(5), and no movement is underway at present to improve the process of collecting statistical data about surveillance.<sup>94</sup>

Why then even try to reach conclusions about the relative amounts of surveillance activity in different countries? For the authors of the MPI study, the presence of statistics for each of the surveyed countries, even if imperfect, may have simply proved too tempting. The MPI researchers may also have been eager to refute claims that wiretapping in Germany was at an especially frequent level and to demonstrate that Germany was simply in the “mid-field” or “well under the average” for its surveillance rate. Upon the study’s release, the Justice Minister of Germany, Birgitte Zypries, did, in fact, trumpet this aspect of the study.<sup>95</sup>

Yet, the available statistics require far more cautious treatment. In the final volume of a classic trilogy about children and the law, *In the Best Interests of the Child*, Joseph Goldstein and his coauthors urged experts to keep in mind the proper limits of their role.<sup>96</sup> They wrote: “[P]rofessionals must be alert not to use their reputations as experts to assume roles for which they have no special competence in furtherance of their personal values or of the preferences of those who engage their services.”<sup>97</sup> Goldstein and his coauthors encouraged experts to confront any situation openly in which their base of expert knowledge fell short.<sup>98</sup> In a similar fashion, the MPI researchers should either have resisted the urge to reach comparative conclusions based on the data-sets available or, at a minimum, indicated where their arguments or conclusions exceed the bounds of available data.

## II. *The MPI Study’s Findings Regarding Germany*

As promised by its title, the MPI project also focused on the “legal reality and efficiency” of telecommunications surveillance in Germany. This Article concentrates on the study’s findings for Germany concerning: (1) the relation of the increase in telecommunications surveillance to the rise in use

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<sup>93</sup> *Id.*

<sup>94</sup> Johann Bizer, *Die Evaluierung der TK-Überwachung: Anmerkung zur MPI-Studie*, 4 KRIMINOLOGISCHES J. 280, 288–90 (2003).

<sup>95</sup> Press Release, Bundesministerium der Justiz, Zypries: Telefonüberwachung wirksam und massvoll (May 15, 2003), at <http://www.bmj.bund.de/ger/>.

<sup>96</sup> JOSEPH GOLDSTEIN ET AL., *IN THE BEST INTERESTS OF THE CHILD* 17 (1985).

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* at 120–21.

of mobile phones; (2) the scant surveillance of e-mail; (3) the wide disparity in the rate of surveillance in different German states; and (4) whether telecommunications surveillance in Germany can be said to be “efficient.”

A. *Mobile Phones: The Locus of Surveillance*

One of the MPI Study’s key findings for Germany concerns the relation of the increase in telecommunications surveillance to the adoption of mobile phone usage in that country. In Germany, according to one count, the number of wiretaps increased from 2,494 in 1990 to 15,741 in 2000.<sup>99</sup> By 2002, another major leap had taken place for a total of 21,874 connections placed under surveillance.<sup>100</sup> The study convincingly attributes this increase in telecommunications surveillance to the growth of mobile phone usage in Germany.

For the MPI researchers, the critical comparison is between the change in the amount of mobile phone usage and the change in the amount of surveillance orders directed against mobile telephones.<sup>101</sup> Both areas marked increases over the last decade, but one grew at a far greater rate: the number of Germans with mobile telephones.<sup>102</sup> Based on this comparison, the MPI Study generates a surprising statistic: the relative proportion of surveillance orders per participant using mobile phones actually *declined* from 1997 to 2002.<sup>103</sup> The drop was 0.46 connections placed under surveillance per 1,000 mobile phone users in 1997 to 0.35 per 1,000 in 2002.<sup>104</sup> This drop was made possible by a staggering increase in mobile phone usage in Germany; by 2002, 71.7% of Germans had a mobile telephone account.<sup>105</sup> Thus, while there was an increase in surveillance orders directed toward mobile telephones, it did not keep pace with the leap in use of this telecommunications medium.

Another interesting development, and one not explored by the Study, is German law enforcement’s heavy concentration on mobile phone usage compared with other forms of telecommunications. To an extraordinary extent, telecommunications surveillance in Germany now means surveillance of mobile telephones. Consider in this regard the annual statistics collected by the Regulatory Authority pursuant to Telecommunications Act § 88(5).<sup>106</sup> This data-set, whatever its flaws, supplies a breakdown by telecommunications media, which proves highly instructive.<sup>107</sup> Of the 27,200 new surveillance orders that these statistics list for 2002, for example, 24,924 were placed on mobile phone connections.<sup>108</sup> This represents almost eighty percent of the total surveillance orders for Germany. In comparison, 3,927 surveillance or-

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<sup>99</sup> MPI STUDY, *supra* note 1, at 29.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 30–39.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 38.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 34.

<sup>106</sup> Regulierungsbehörde für Telekommunikation und Post, Jahresstatistik nach § 88 Abs. 5 TKG 2002/2003, at 186 (on file with The George Washington Law Review).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

ders were placed on analogue telephone lines and 1,597 on digital telephone lines in 2001.<sup>109</sup> And, perhaps most surprisingly, only five surveillance orders were reported to the Regulatory Authority for e-mail for all of 2002.<sup>110</sup>

This breakdown confirms the MPI Study's findings of the relation between the increase in telecommunications orders and the rise of mobile phone usage. As the MPI researchers conclude: "The development of telecommunications surveillance is thereby certainly partially explainable as a consequence of a dynamic development and shifting of communication . . . ."<sup>111</sup> Other questions remain, however, about the focus of German law enforcement on mobile telephones. For example, these same law enforcement officials have not shown the same interest in surveillance of e-mail. In the following section, I will develop this point about the lack of attention to e-mail.

To conclude this section, I wish to note that possible explanations do exist for this emphasis on surveillance of mobile phone usage. For example, criminals in Germany may rely on mobile phones more heavily than other forms of telecommunications. Alternatively, mobile phone usage may be relatively easier as a technical matter to place under surveillance than e-mail—although this explanation is at best incomplete as it does not explain why more attention is not paid to traditional telephone usage. At any rate, the MPI Study does not undertake to sort out why German law enforcement officials engage in so much surveillance of mobile phone usage and so little, relatively speaking, of other forms of telecommunications.

#### *B. E-mail: Ignored by German Law Enforcement*

As this Article has noted, the statistics from the Regulatory Authority reported merely five instances of law enforcement surveillance of e-mail in 2002.<sup>112</sup> In 2001, there were no reported instances of e-mail surveillance.<sup>113</sup> In contrast, the MPI Study's in-depth analysis of a cross-section of case files for 1998 found four instances of surveillance of e-mail.<sup>114</sup> The MPI Study's findings confirm the low level of surveillance for e-mail, again pointing to the insignificant place of e-mail within the landscape of German telecommunications surveillance.<sup>115</sup> These findings, in turn, again raise the question of why German law enforcement officials have such scant interest in obtaining access to e-mail.

The MPI researchers respond to this question in only a broad fashion. Their interviews with prosecutors and judges pointed to a combination of legal uncertainty and technical problems as the twin obstacles to surveillance of e-mail.<sup>116</sup> As the researchers summarized:

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* In 2001, no surveillance orders were reported for e-mail. *Id.*

<sup>111</sup> MPI STUDY, *supra* note 1, at 38.

<sup>112</sup> Regulierungsbehörde für Telekommunikation und Post, Jahresstatistik, *supra* note 106, at 186.

<sup>113</sup> *Id.*

<sup>114</sup> MPI STUDY, *supra* note 1, at 445.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

The experts . . . mostly characterized the surveillance of e-mail as legally somewhat unclear and technically sometimes difficult. Moreover, this surveillance still plays no significant role in the process of investigation, not because the communications are not already taking place, but rather more so because . . . [the government] lags behind developments in this area.<sup>117</sup>

Unfortunately, the MPI researchers do not explain the precise nature of the technical problems regarding e-mail surveillance.<sup>118</sup> Rather, they record more general complaints from different law enforcement officials.<sup>119</sup> The MPI researchers note how one prosecutor stated that “e-mail surveillance still did not play a great role, but that its use would increase in the future” and that the government “is limping behind the technical developments.”<sup>120</sup> Another prosecutor observed: “An updating and clearing up of matters is necessary in the area of e-mail surveillance—chaos prevails there.”<sup>121</sup>

As for the legal difficulties, the MPI researchers elicited general complaints.<sup>122</sup> These mostly concerned the complexity of the applicable sections of the Criminal Code of Procedure.<sup>123</sup> As one prosecutor commented on a section of the Criminal Code: “[D]espite plentiful experience, he ‘had to read [it] ten times in order to understand it.’”<sup>124</sup> While these collected comments about the complexity of the German Criminal Code of Procedure have merit, the MPI researchers might also have developed concrete suggestions for statutory improvements. Despite its analysis of case files, distributed questionnaires, and interviews, the MPI Study does not explain how German law discourages e-mail surveillance and the kind of statutory amendments that would end these existing difficulties. The applicable law has certainly proved amendable in the past. At the federal level, for example, the German legislature has amended the Criminal Procedure Code on numerous occasions over the last decade in response to developments in telecommunications technology.<sup>125</sup> The most recent amendment to this statute is section 100i, which allows, under certain circumstances, the tracking of a person’s location from her mobile phone as well as the recording of GSM card numbers.<sup>126</sup> The question remains as to whether additional amendments to the Criminal Procedure Code are needed.

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<sup>117</sup> *Id.*

<sup>118</sup> Regarding more general comments about technical problems with telecommunications surveillance, see *id.*

<sup>119</sup> *Id.* at 202.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 203–04.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 204.

<sup>125</sup> For a concise discussion of these new sections of the StPO, see PFEIFFER, *supra* note 22, at 223–26.

<sup>126</sup> § 100i StPO. GSM telephones contain a removable “smart card” containing subscriber information. MICROSOFT COMPUTING DICTIONARY 242 (5th ed. 2002).

*C. Disparate Rates of Surveillance Throughout Germany*

The MPI Study finds important regional variations in the rate of surveillance in different states throughout Germany.<sup>127</sup> This finding confirms earlier empirical research by Johann Bizer on the relative rate of surveillance throughout Germany.<sup>128</sup> For Bizer, these disparities are especially troubling because of the strong constitutional protections in Germany concerning both telecommunications secrecy and the equal application of constitutional law.<sup>129</sup> For the MPI researchers, in contrast, the different rates of surveillance merely fit a pattern of regional disparities in law enforcement administration.<sup>130</sup> Of course, there may also be regional flaws in the maintenance of these statistics, which would skew the results and undercut the finding of regional disparities. Assuming that any under or over counting of orders is reasonably similar throughout Germany, one might reasonably conclude that these statistics reveal striking regional variations in surveillance levels.

In Germany, the leader in surveillance orders for 2001 was Bremen with 10.2 orders per 100,000 inhabitants, and the national laggard was Brandenburg with 2.9 orders.<sup>131</sup> As Bizer points out, German states with similar population structures also had notable differences in their surveillance rates.<sup>132</sup> Thus, Hamburg had 7.1 orders per 100,000 inhabitants and Berlin merely 4.0 orders.<sup>133</sup> German states with governments with similar political orientations (whether conservative or social-democratic) also featured disparities in their surveillance rates.<sup>134</sup> Here, one can point to two conservative states, Baden-Württemberg with 6.3 orders per 100,000 inhabitants in 2001, and Bavaria with 4.5 orders during the same period.<sup>135</sup>

A final comparison is also possible concerning relative rates of surveillance—albeit one not made by the MPI researchers. One might see whether a statistically significant division exists in the surveillance rates of the “new” German states, i.e., ones formed out of the area that had been part of the German Democratic Republic, or East Germany, compared to the “old” states, i.e., those that had been part of the Federal Republic of Germany, or West Germany since its founding. A rough calculation is possible based on the statistics in the MPI Study; the calculation is rough because it necessarily leaves out Berlin, which post-Unification contains areas that were once part of either East and West Germany. This analysis reveals that the average rate of telecommunications surveillance in German states that had been part of West Germany proves to be higher than in the German states formed from the areas that had been part of East Germany.<sup>136</sup>

<sup>127</sup> MPI STUDY, *supra* note 1, at 47–53.

<sup>128</sup> Johann Bizer, *Praxis der TK-Überwachung*, 26 DATENSCHUTZ UND DATENSICHERHEIT 216, 218 (2002).

<sup>129</sup> *Id.*

<sup>130</sup> MPI STUDY, *supra* note 1, at 53.

<sup>131</sup> *Id.* at 52.

<sup>132</sup> Bizer, *supra* note 128, at 218.

<sup>133</sup> MPI STUDY, *supra* note 1, at 52.

<sup>134</sup> Bizer, *supra* note 128, at 218.

<sup>135</sup> *Id.*

<sup>136</sup> The relevant table is found at MPI STUDY, *supra* note 1, at 52. My calculation shows the

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What is one to make of these differences in surveillance in different parts of Germany? For the MPI Study, the variations are of scant importance.<sup>137</sup> The MPI researchers observe: “Differences in administration are nevertheless to be expected. Regional differences in the administration of criminal law are not surprising; they can be observed, after all, at all levels of decision-making.”<sup>138</sup> In contrast, Bizer takes a different position.<sup>139</sup> He points out that the German Federal Constitutional Court in its case law since 1960 has emphasized the constitutional obligation of the German states to carry out an “essentially uniform execution of federal laws.”<sup>140</sup> Moreover, under this case law, “an important criterion for the suitability of an intervention concerns how many persons have how intensive an adverse effect” from surveillance.<sup>141</sup> As a consequence, Bizer faults the MPI researchers for being “entirely indifferent to the different administration” of surveillance in the different states.<sup>142</sup>

Regional differences in law enforcement are not unique to Germany; certain geographical areas in the United States also prove responsible for most wiretapping.<sup>143</sup> In the United States, moreover, state law enforcement officials generate far more wiretap authorizations than federal officials, and a few states prove responsible for most wiretaps. As the Administrative Office of the U.S. Courts observed regarding the 2002 Wiretap Report: “Wiretap applications in New York (404 applications), California (143 applications), New Jersey (81 applications), Pennsylvania (79 applications), Maryland (54 applications), Florida (37 applications), and Illinois (25 applications) accounted for 96 percent of all authorizations approved by state judges.”<sup>144</sup> These geographical differences in surveillance rates reveal the limits of legal regulations in shaping the law enforcement decision to engage in telecommunications surveillance. Moreover, these regional differences point to a great need for field research about the dynamics of the choice by law enforcement agencies whether or not to engage in telecommunications surveillance.

#### D. *Measuring the “Efficiency” of Telecommunications Surveillance*

A final question tackled by the MPI researchers concerns the “efficiency” of telecommunications surveillance. The researchers admit the complexity of this issue: “The empirical evaluation of the efficiency of measures of telecommunications surveillance . . . confronts the general difficulty of judging police proceedings under a criteria of efficiency.”<sup>145</sup> As for its basic

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“new” German states, i.e., formed out of East Germany, have an average surveillance rate of 4.7 orders per 100,000 inhabitants, and the “old” German states, i.e., the states of West Germany, an average rate of 5.9.

<sup>137</sup> *Id.* at 53.

<sup>138</sup> *Id.*

<sup>139</sup> Bizer, *supra* note 128, at 218; see Bizer, *supra* note 94, at 292.

<sup>140</sup> Bizer, *supra* note 94, at 292.

<sup>141</sup> *Id.* For critical language by the German Federal Constitutional Court on this issue, see *Entscheidungen des Bundesverfassungsgerichts [BVerfGE]*, 100 (1999), 313 (376).

<sup>142</sup> Bizer, *supra* note 94, at 292.

<sup>143</sup> For a discussion, see Schwartz, *supra* note 9, at 759.

<sup>144</sup> ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 26.

<sup>145</sup> MPI STUDY, *supra* note 1, at 454 (footnote omitted).



concept of “efficiency,” the MPI researchers define it as “the relationship between the achieved result and the applied means in the sense of an input-output relation.”<sup>146</sup> Evaluating this relationship is difficult, however, because of the “incalculability and unpredictability” associated with police work.<sup>147</sup> Put differently, it is hard to know what criminals will do, and much law enforcement activity cannot be judged to be efficient or inefficient.<sup>148</sup> Hence, “a simple cost-achievement calculation (*Kosten-Leistungsrechnung*) does not appear possible.”<sup>149</sup>

In place of calculating a “cost-achievement” ratio, the MPI Study proposed a variety of different ways to measure whether or not telecommunications surveillance had a positive result.<sup>150</sup> One of its chief approaches was to “define and operationalize” the concept of an “investigation success” (*Ermittlungserfolge*) for telecommunications surveillance.<sup>151</sup> A broad, three-part definition of “success” allowed the MPI researchers to identify an “investigation success” in approximately sixty percent of their cross-section of case files. An investigation success could be (1) direct; (2) indirect; or (3) “other findings.”<sup>152</sup> All three categories counted toward the MPI Study’s calculation that a use of telecommunications surveillance had led to an investigative success.<sup>153</sup> It is worth considering the MPI’s three categories of successful investigation.

For the MPI researchers, a direct success could be “exoneration; self-incrimination; declaration of a third party because of a listed offense; broadening of the accused criminal offense; [or] identification of the place of residence of the accused party.”<sup>154</sup> An indirect success included “evidence of crimes of third parties, evidence of new crimes of an accused, and indirect investigative leads, because of a listed offense.”<sup>155</sup> Finally, the category of “other findings” was “findings . . . that could not themselves be subsumed under any of the other categories,” but were judged to have reached “the ‘threshold’ of success.”<sup>156</sup> As examples of these “other findings,” the MPI researchers pointed to:

- Findings regarding the structure of the group of perpetrators: who is “head” of the gang, who makes the decisions?;
- Findings regarding structure of a firm, for example, in reference to fictitious firms;
- Identification of the immediate social environment; . . .
- Constant exchanges of mobile telephones.<sup>157</sup>

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<sup>146</sup> *Id.* at 454 n.451.

<sup>147</sup> *Id.* at 454.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 454–55.

<sup>151</sup> *Id.* at 455.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 454–55.

<sup>154</sup> *Id.* at 358–59 (internal quotation marks omitted).

<sup>155</sup> *Id.* at 359.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 382–83.

The MPI Study's sixty percent figure for investigation success following telecommunications surveillance proved controversial. The Ministry of Justice welcomed it as a strong indication of the necessity of telecommunications surveillance.<sup>158</sup> The Federal Data Protection Commissioner at that time, Joachim Jacob, had the opposite reaction, finding that it was significant that forty percent of the examined files showed no "investigative success."<sup>159</sup> Jacob stated: "There are constantly too many cases in which the evidentiary basis for regarding suspicions is meager and the outlook for usable results negligible."<sup>160</sup> A conference of state data protection commissioners also issued a statement criticizing this relative lack of success.<sup>161</sup>

Two points remain regarding the question of the "efficiency" of telecommunications surveillance in Germany. The MPI researchers could not identify an empirical link between the successful use of telecommunications surveillance as defined in their Study and any increase in convictions for a listed offense.<sup>162</sup> As the MPI Study dryly notes: "A statistically significant link is not detectable between the success of measures of telecommunications surveillance and the listed offenses, which formed the basis for the investigation."<sup>163</sup> Indeed, it turns out that telecommunications evidence itself is rarely introduced in trials; the MPI Study attributes this prosecutorial reluctance to "economic reasons, to trial strategy grounds, and to speed up matters."<sup>164</sup>

Finally, the MPI Study also found significant flaws in the administration of telecommunications surveillance that relate to the question of its "efficiency."<sup>165</sup> The first of these flaws concerns the files of prosecutors and judges, which were frequently so incomplete that the researchers could not tell whether a surveillance order was in fact justified.<sup>166</sup> The MPI researchers found that the poor state of official case files allowed it to declare only twenty-two percent of the judicial orders to be "substantively justified."<sup>167</sup> An earlier empirical study in Germany came to similar findings regarding the incomplete nature of judicial files.<sup>168</sup> This study from 2002, led by Professor Otto Backes and Professor Christoph Gusy of the University of Bielefeld, found that only a quarter of the surveyed judicial wiretap orders fulfilled the full legal criteria.<sup>169</sup>

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<sup>158</sup> See Press Release, Bundesministerium der Justiz, *supra* note 95, at 1.

<sup>159</sup> Press Release, Der Bundesbeauftragte für den Datenschutz, Pressemitteilung (May 18, 2003), at <http://www.bfd.bund.de/Presse/pm20030519.html> (last visited Apr. 17, 2004).

<sup>160</sup> *Id.*

<sup>161</sup> *Konsequenzen aus der Untersuchung des Max-Planck-Instituts über Rechtswirklichkeit und Effizienz der Überwachung der Telekommunikation*, Res. 66. (Sept. 25–26, 2003), adopted by Konferenz der Datenschutzbeauftragten des Bundes und der Länder, at <http://www.datenschutzberlin.de/doc/de/konf/66/telekommunikation.htm> (last visited Apr. 17, 2004).

<sup>162</sup> MPI STUDY, *supra* note 1, at 456.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 457.

<sup>165</sup> *Id.* at 169–76, 276–77, 451.

<sup>166</sup> *Id.* at 169–76, 276–77.

<sup>167</sup> *Id.* at 228.

<sup>168</sup> OTTO BACKES ET AL., *WIRKSAMKEITSBEDINGUNGEN VON RICHTERVORBEHALTEN BEI TELEFONÜBERWACHUNGEN* (2002), available at [http://www.uni-bielefeld.de/Universitaet/Aktuelles/pdf/backes\\_kurzfassung\\_telefonueberwachung.pdf](http://www.uni-bielefeld.de/Universitaet/Aktuelles/pdf/backes_kurzfassung_telefonueberwachung.pdf) (last visited May 19, 2004).

<sup>169</sup> *Id.*

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As a second administrative flaw, the legal obligation to inform those placed under surveillance afterwards appears in most cases to not have been followed.<sup>170</sup> In only 6.4% of the case files could the MPI researchers determine that this obligation was carried out.<sup>171</sup> This failure to inform raises significant constitutional questions. Subsequent to the publication of the MPI Study, the German Federal Constitution Court declared unconstitutional certain elements of the Criminal Procedure Code's regulation of the process by which affected parties are informed of the surveillance of their physical premises.<sup>172</sup> The Constitutional Court handed down this decision in the "Great Eavesdropping Offensive" (*Grosser Lauschangriff*) case, which emphasized the fundamental nature of the right of an individual to be informed that she had been placed under surveillance.<sup>173</sup>

More generally, the "Great Eavesdropping Offensive" decision also brings into question other aspects of the current legal regulation of telecommunications surveillance in Germany. To be sure, part of this decision rests on the important role that one's home and its physical space plays in insuring a "right to be let alone" ("*das Recht . . . in Ruhe gelassen zu werden*").<sup>174</sup> But the Constitutional Court also emphasized, consistent with its previous case law, that the constitutional protection of human worth extends broadly to situations in which an individual "communicates with others."<sup>175</sup> Peter Schaar, the newly selected Federal Data Protection Commissioner, has noted: "I see myself supported by the Great Eavesdropping Offensive opinion in my call for placing on the test stand the entire area of the governmental authority for intervention ("*staatlichen Eingriffsbefugnisse*"), especially concerning surveillance of telecommunications."<sup>176</sup>

Turning back to the MPI researchers, one can return to the observations by Goldstein and his co-authors about the role of experts. Ultimately, the reader is left with a sense of how difficult it is to evaluate as an empirical matter the impact of telecommunications surveillance on the outcome of criminal prosecutions in Germany. The MPI Study did as much as it could with the case files that were available about Germany, and to its credit gave a detailed reading of this material, bolstered by its extensive questionnaires and interviews.

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<sup>170</sup> MPI STUDY, *supra* note 1, at 276.

<sup>171</sup> *Id.* at 451.

<sup>172</sup> Bundesverfassungsgericht, [BVerfGE] [Federal Constitutional Court], 1 BvR 2378/98, ¶¶ 288–318 (2004) [hereinafter Great Eavesdropping Offensive], available at [http://www.bverfg.de/entscheidungen/rs20040303\\_1bvr237898](http://www.bverfg.de/entscheidungen/rs20040303_1bvr237898) (last visited Apr. 19, 2004).

<sup>173</sup> *Id.* ¶¶ 290–92. See generally *id.* ¶¶ 288–318. The Court also declared other aspects of the Criminal Procedure Code unconstitutional, such as its mandated procedures regarding: (1) use of gathered information in other trials and investigations, *id.* ¶¶ 328–47, and (2) the erasure and final destruction of collected information, *id.* ¶¶ 348–54.

<sup>174</sup> *Id.* ¶ 104.

<sup>175</sup> Great Eavesdropping Offensive, *supra* note 172, ¶ 136.

<sup>176</sup> Press Release, Der Bundesbeauftragte für den Datenschutz, Schaar: Regelungen zur Telefonüberwachung müssen auf den Prüfstand (Mar. 16, 2004), at <http://www.bfd.bund.de/Presse/pm20040316.html> (last visited Apr. 17, 2004).

### *Conclusion*

The MPI Study of German and international developments in telecommunications surveillance has both weaknesses and strengths. Its weaknesses concern the MPI researchers' reliance on spotty international statistics to reach conclusions about relative amounts of surveillance activity in different countries. More successfully, the MPI researchers trace the similarities and dissimilarities in the regulation of telecommunications surveillance in different countries. To a large extent, this survey indicates a convergence among a core of shared legal approaches: a requirement of judicial approval of surveillance orders; an emergency exception to this requirement; and a use of telecommunications surveillance only as a last resort when other means of law enforcement will not reveal necessary information.

Regarding its analysis of Germany, the MPI Study reveals the heavy emphasis of law enforcement agencies on surveillance of mobile telephones. This emphasis is all the more striking due to a relative lack of German law enforcement activity concerning surveillance of e-mail or traditional telephones. The MPI Study proved unable to account for these differences; it also neglected to explore the roots and significance of the disparate rate of surveillance in different German states. Finally, the MPI researchers tackled perhaps the most complex question of all in this area: can one empirically measure the impact of telecommunications surveillance? Here, the MPI researchers confronted the limits of their data-sets more frankly than in the context of their international survey; yet they, once again, felt obliged to generate a statistical result, which in this context proved to be a sixty-percent "success" rate for telecommunications surveillance.

Ultimately, one is left pondering one area for further research. In both Germany and the United States, there is the pattern of strong regional differences in the rate of telecommunications surveillance. This result points to a strong influence of regional law enforcement norms and nonlegal factors on the decision whether to engage in telecommunications surveillance. An important area for future research concerns how legal regulations are affecting or not affecting these local norms. The necessary future focus should be on why and how governmental officials decide whether to seek a surveillance order.