

**THE NAZI’S ABUSE OF TREASONOUS ACCUSATIONS:
APPLICATION OF HÜBENER’S INDICTMENT UNDER MODERN
GERMAN AND UNITED STATES TREASON LAWS**

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I. INTRODUCTION

Committing a treason act is arguably regarded as *the most* severe crime in the United States¹— and it can be found to be “the greatest crime against faith, duty[,] and human society.”² Historically, when individuals were convicted of treason, several national governments suggested a punishment of life imprisonment or death.³ While these various forms of punishment create negative repercussions against the convicted, the government, however, achieves an inverse effect on deterrence and power.⁴

In one instance, Adolf Hitler adopted this approach when the Nazi government arbitrarily and successfully accused thousands of Jews for committing treasonous acts.⁵ In fact, at least 30,000 Jewish individuals were convicted and sentenced to death based on mere accusations of treason.⁶ Along with the

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¹ *Stephan v. United States*, 133 F.2d 87, 90 (6th Cir. 1943); *In re Charge to Grand Jury - Neutrality Laws & Treason*, 30 F. Cas. 1024, 1025 (C.C.D. Mass. 1851) (stating “[u]nder the laws of the United States, the highest of all crimes is treason.”).

² James Willard Hurst, *English Sources of the Law of Treason*, in *THE LAW OF TREASON IN THE UNITED STATES* 14, 29 (Stanley Kutler ed., Greenwood Publishing Corp. 1945) (quoting Lord Hale).

³ *United States v. Hoxie*, 26 F. Cas. 397, 397-98 (C.C.D. Vt. 1808) (No. 15,407).

⁴ See Thomas Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37, 71 (1983) (identifying how retribution gained additional favor by the Nazi regime when it placed emphasis on deterrence and sentencing); *but cf.* Matthew Lippman, *Nuremberg: Forty Five Years Later*, 7 CONN. J. INT’L L. 1, 18 (1991) (recognizing punishment and deterrence can only be obtained “through the direct, extrajudicial punishment of offenders.” It also suggests Nazi war criminals, in this instance, should face punishment in a “harsh and expeditious fashion.”).

⁵ *Germany Overturns Nazi-Era Treason Convictions*, THE TELEGRAPH (Sept. 9, 2009), <https://www.telegraph.co.uk/news/worldnews/europe/germany/6159350/Germany-overturns-Nazi-era-treason-convictions.html>.

⁶ *Id.*

development of the Nuremberg Race laws, this political tactic instilled a significant amount of fear amongst the Jewish population, thereby perpetuating the Nazi's governmental power.⁷

In Parts II and III of this article, we will explore modern-day treason law in the United States and Germany, respectively. Part IV will then discuss Helmuth Hübener's case, the youngest person convicted of treason during the Nazi regime. This section will also evaluate the case facts under both modern U.S. and German treason laws to determine whether a different outcome would have resulted. Lastly, Part V will discuss any similarities between both laws, consider several noteworthy differences, and conclude detailing why a change in German treason law was necessary after the collapse of the Nazi regime.

II. TREASON LAW IN THE UNITED STATES

Convictions of treason are rare, but when they come into effect, they can lead to severe repercussions.⁸ Moreover, it is unusual for the U.S. government to establish a claim against a person for committing treason,⁹ as the Supreme Court acknowledges the difficulty in trying to prove a person committed a treasonous act.¹⁰ Treason is one of three crimes listed in the U.S. Constitution.¹¹ Accordingly, Article III, Section 3 of the U.S. Constitution states:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in Open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason

⁷ LaSheyna T. Alexander, *The Hunt for Witches and Jews: Hatred Infused Within the Law*, 20 RUTGERS J.L. & RELIGION 84, 89 (2019) (recognizing how the Nazi regime "capitalize[d] off the fear of their believed inferiors" through the development of the Nuremberg Race laws).

⁸ See generally Richard Z. Steinhaus, *Treason, A Brief History with Some Modern Applications*, 22 BROOK. L. REV. 254, 254 (1956) (discussing the rare instances of treason prosecution in American history).

⁹ *Id.*

¹⁰ Haupt v. United States, 330 U.S. 631, 648 (1947) (Murphy, J., dissenting) (acknowledging "[t]reason is different from ordinary crimes, possessing unique and difficult standards of proof which confine it within narrow spheres.").

¹¹ Stephan, *supra* note 1, at 90.

shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.¹²

Based on the Constitution, the Treason Clause delineates two forms of treasonous conduct: levying war against the U.S. or aiding and comforting the U.S.'s enemies.¹³

First, several courts have narrowly construed the definition of “levying war” against the U.S. government.¹⁴ In one example, Chief Justice Marshall emphasized “conspiring to levy war” was rather distinct from *actually* “levying war” against one’s own country.¹⁵ Instead, when a group of individuals have gathered to effectuate or levy war against the U.S., the government can present charges against each individual for committing a treasonous act.¹⁶ Similarly, the Pennsylvania Circuit Court in *Case of Fries* found that one cannot “levy war” against the U.S.’s interests unless the government can prove the defendant “forcibly opposed” U.S. law.¹⁷ On the other hand, Circuit Judge Iredell stressed: “if the intention was merely to defeat [America’s] operation in a particular instance” due to some “private or personal motive,” the defendants’ actions would not amount to treason.¹⁸

Another form of committing treason is by aiding and comforting an enemy.¹⁹ This form can cover a variety of acts, including: “making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and hundreds of other things which impair [the U.S.’s] cohesion and diminish[es] our strength.”²⁰ However, these acts are not to be confused when “[a] citizen intellectually or emotionally . . . favor[s] the enemy and harbor sympathies or convictions disloyal to this country’s policy or interest, but so long as he commits no act

¹² U.S. CONST. art. III, § 3.

¹³ *Id.*

¹⁴ See Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 905 (2006).

¹⁵ *Ex parte Bollman*, 8 U.S. 75, 75, 126 (1807) (Chief Justice Marshall held: “To constitute a *levying of war*, there must be an assemblage of persons for the purpose of effecting *by force* a treasonable purpose.”).

¹⁶ *Id.*

¹⁷ Larson, *supra* note 14, at 905 (citing *Case of Fries*, 9 F. Cas. 826, 840 (Iredell, Circuit Justice, C.C.D. Pa. 1799) (No. 5126)).

¹⁸ *Id.* (internal quotations omitted).

¹⁹ U.S. CONST. art. III, § 3, cl. 1.

²⁰ *Cramer v. United States*, 325 U.S. 1, 29 (1945).

of aid and comfort to the enemy.”²¹ Essentially, sympathetic acts do not fall within the scope of aiding and comforting an enemy provided that the defendant does not contribute to the enemies’ motives by taking some direct action in furtherance of the treasonous act.²² The prosecutor, then, has the additional burden of establishing that the defendant had an *intentional* objective to aid and comfort an enemy, as distinguished from those that are merely negligent and accidental.²³

The Treason Clause also imposes procedural requirements on the prosecutor, as shown below. For example, prosecutors bear the burden in establishing that the “overt act” of the crime was committed based on two witness accounts or a confession made in open court to support the conviction.²⁴ As held in *Cramer v. United States*, overt acts are those that “manifest a criminal intention and tend towards the accomplishment of the criminal object.”²⁵ The Treason Clause does not, however, define treasonous intent within the realms of the crime itself.²⁶ Instead, the Treason Clause remains silent when describing intent; however, as Justice Douglas writing for the dissent observed: “[t]he treasonable project is complete as a crime only when the traitorous intent has ripened into a physical and observable act.”²⁷

Perhaps most noteworthy of the Treason Clause is its second paragraph, which vests Congress the power to establish punishment for committing treasonous acts.²⁸ According to 18 U.S.C. §2381, Congress mirrors the Constitution’s language by referring to the two forms of treason, and setting punishment by death or a prison sentence of at least five years.²⁹ After sentencing, the person will also face a fine of at least \$10,000, and they are barred from holding future public office.³⁰

²¹ *Id.*

²² *Id.*

²³ *Id.* at 30-31.

²⁴ U.S. CONST. art. III, § 3, cl. 2.

²⁵ *Cramer*, 325 U.S. at 7 n.4 (Judge Clancy also followed this view in District Court when “dismissing an indictment for treasonous acts [per] *U.S. v. Leiner*, S.D.N.Y.1943 (unreported).”).

²⁶ See U.S. CONST. art. III, § 3.

²⁷ *Cramer*, 325 U.S. at 61 (Douglas, J., dissenting).

²⁸ U.S. CONST. art. III, § 3, cl. 2.

²⁹ 18 U.S.C. § 2381 (1994).

³⁰ *Id.*

III. TREASON LAW IN MODERN GERMANY

To establish a claim for treason under German law, § 81 of the Strafgesetzbuch (StGB) (hereinafter “German Penal Code”) one must look to the elements of “High treason against the Federation.”³¹ To commit treason under German law, a citizen must act “by force[,] or threat of force, (1) to undermine the continued existence of the Federal Republic of Germany; or (2) to change the constitutional order based on the Basic Law of the Federal Republic of Germany.”³² Moreover, this section sets punishment by incarcerating the person “for life or not less than ten years.”³³ If the treasonous act is considered “less serious,” however, the person will be held in prison “from three months to five years.”³⁴

Furthermore, § 82 of the German Penal Code adopts similar language from § 81 and creates a separate charge for “High treason against *Land*,” the equivalent of a treasonous act committed against a German state.³⁵ The German Penal Code also considers other forms of treasonous crimes.³⁶ For instance, the German government can charge citizens in “preparation of high treasonous undertaking” under § 83 of the German Penal Code.³⁷ This offense is most analogous to an “attempted treason” charge.³⁸ As punishment, § 83 imposes “imprisonment from one to ten years” for treasonous attempts against the German government, and “from three months to five years” if attempted against one of Germany’s states.³⁹

Lastly, § 83a provides a plain-meaning definition of a “voluntary abandonment” under German treason law.⁴⁰ If the accused “voluntarily gives up the further commission of the offense and averts[,] substantially lessens any danger known to him that

³¹ STRAFGESETZBUCH [STGB] [PENAL CODE], § 81, subdivision 1-2, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

³² *Id.*

³³ *Id.*

³⁴ *Id.* at subdivision 2.

³⁵ *Id.* § 82, subdivision 1-2.

³⁶ STRAFGESETZBUCH [STGB] [PENAL CODE], § 83, subdivision 1-2, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at subdivision 1-3.

others will continue with the commission[,] or if he voluntarily prevents the completion of the crime,” the court has discretion in mitigating the sentence or dismissing the treasonous act committed altogether.⁴¹ Moreover, § 83a(3) of the German Penal Code suggests that the prevention of a completed treasonous act will hold if the contribution was voluntary and provided with the earnest effort to avert or lessen the danger.⁴²

IV. TREASON IN NAZI GERMANY

Accusations of treason were quite common during the Nazi regime.⁴³ Thousands of Germans were convicted of treason when they refused to participate in violence perpetrated against the Jews.⁴⁴ While some convictions concluded with brutal torture and unjust imprisonment, Germans faced the death penalty if they openly opposed Nazi ideologies.⁴⁵ As such, this section will discuss Helmuth Hübener’s “treasonous act” during the Nazi-era and apply it to modern German and U.S. treason laws. This section will also discuss any possible outcomes that could have resulted from committing this crime, and any viable defenses Hübener could have presented to help reach a different outcome in his case.

A. Helmuth Hübener’s Story

During Hitler’s slow rise to power, thirteen-year-old Helmuth Hübener, once a dedicated Boy Scout member, was eventually forced to become a part of the Hitler Youth.⁴⁶ In 1935, the Hitler Youth indoctrinated young German males to match Hitler’s ideology.⁴⁷ These young men “lived a spartan life of

⁴¹ STRAFGESETZBUCH [STGB] [PENAL CODE], § 83, subdivision 1-3, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

⁴² *Id.*

⁴³ Charles Hawley, *Overturing Hitler’s Military Tribunals: Germany Considers Rehabilitating Soldiers Executed for ‘Treason’*, SPIEGEL INT’L (June 29, 2007, 12:11 PM), <https://www.spiegel.de/international/germany/overturing-hitler-s-military-tribunals-germany-considers-rehabilitating-soldiers-executed-for-treason-a-491332.html>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Erin Blakemore, *Meet the Youngest Person Executed in Defying the Nazis*, HISTORY (Aug. 1, 2018), <https://www.history.com/news/meet-the-youngest-person-executed-for-defying-the-nazis>.

⁴⁷ *Id.*

dedication, fellowship, and Nazi conformity[.]”⁴⁸ Hübener’s loyalty to the program, however, came to a swift end when he involuntarily participated in Kristallnacht, the Night of Broken Glass.⁴⁹ The atrocities committed in the single night of Kristallnacht — ranging from vandalism, forcible excommunication of religious sanctuaries, to cold-blooded murder — did not sit well with Hübener, especially when realizing that others shared similar moral beliefs.⁵⁰

Hübener’s uneasiness only grew when he discovered his brother’s forbidden short-wave radio.⁵¹ On several occasions, Hübener cautiously tuned in on BBC’s live radio coverage and listened to reports that discussed the Nazis’ failed attempts of various battles during World War II.⁵² The latest reports provided information that was so much different from Nazi propaganda⁵³ that Hübener felt devoted to spreading the truth about the war to others.⁵⁴ Along with the help of his three friends, Hübener wrote, printed, and distributed 60 pamphlets, which specifically included information from live BBC reports.⁵⁵ He also publicly called on the German resistance against Hitler.⁵⁶

For months, Hübener continued to release factual information about the nation’s failed attempts at war and the Nazi

⁴⁸ *Hitler Youth: Nazi Organization*, ENCYC. BRITANNICA (Sept. 3, 2015), <https://www.britannica.com/topic/Hitler-Youth>.

⁴⁹ Blakemore, *supra* note 46; *Kristallnacht*, HISTORY (Dec. 16, 2009), <https://www.history.com/topics/holocaust/kristallnacht> (The Nazis murdered over 100 Jewish individuals, destroyed several Jewish synagogues, and vandalized businesses, schools, and homes. 30,000 Jews were also arrested and sent to concentration camps.).

⁵⁰ Blakemore, *supra* note 46.

⁵¹ *Id.*

⁵² *Id.*; *Nazi Propaganda*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/nazi-propaganda> (stating “[t]he Nazis effectively used propaganda to win the support of millions of Germans in a democracy and, later in a dictatorship, to facilitate persecution, war, and ultimately genocide”).

⁵³ Blakemore, *supra* note 46 (portraying how the BBC reports discussed impending victories that the allies held, while the Nazi regime used the media to praise inevitable German power, false victories, and bright prospects).

⁵⁴ *Id.*

⁵⁵ Blakemore, *supra* note 46; *Helmuth Hübener*, GEDENKSTÄTTE DEUTSCHER WIDERSTAND, https://www.gdw-berlin.de/en/recess/biographies/index_of_persons/biographie/view-bio/helmuth-huebener/?no_cache=1 (naming Hübener’s friends as Rudolf Wobbe, Karl-Heinz Schnibbe, and Gerhard Düwer).

⁵⁶ Blakemore, *supra* note 46.

Party's quick rise to power.⁵⁷ Nonetheless, in February 1942, a coworker witnessed Hübener writing several detailed pamphlets and turned him in to Nazi officials.⁵⁸ Hübener and his friends faced immediate imprisonment, all of whom suffered ten weeks of brutal torture before the beginning of their trials.⁵⁹ In recollection of Hübener's indictment, Hübener's friends described multiple accounts of the attorneys' ineffective assistance of counsel and discussed how Hübener was purposely baited before the judge to describe his political motivations.⁶⁰

The judge eventually convicted Hübener⁶¹ for conspiring to commit high treason and treacherous furthering of the enemy's causes when he was at the mere age of seventeen-years-old.⁶² While his friends were convicted and sentenced to life in prison, Hübener received the harshest sentence of all – capital punishment by beheading.⁶³ On October 27, 1942, Hitler personally refused to absolve Hübener of his crimes, and he was beheaded hours later, making him the youngest person executed by the Nazi regime for committing treasonous acts.⁶⁴

B. Application Under Modern German Treason Laws

If German Penal Code §§ 81-83a⁶⁵ was the governing law at the time, the judge would likely acquit Hübener of any treason charges based on these set of facts.⁶⁶ Under German law, the prosecutor would have to show Hübener “undert[ook] by force[,] or threat of force, (1) to undermine the continued existence of the Federal Republic of Germany; or (2) to change the constitutional order based on the Basic Law of the Federal Republic of Germany.”⁶⁷ Both conditions are unlikely to be met here.⁶⁸

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Blakemore, *supra* note 46 (facing conviction as an adult at the time).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 81-83a, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

⁶⁶ *See* Blakemore, *supra* note 46.

⁶⁷ STRAFGESETZBUCH [STGB] [PENAL CODE], § 81, subdivision 1, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

Furthermore, the prosecutor would likely lack evidence showing Hübener attempted to commit treason under German Penal Code § 83.⁶⁹

Under § 81 of the German Penal Code, the prosecutor bears the burden in establishing Hübener undermined the continued existence of Germany or changed the constitutional order of Germany's laws "by force or threat of force."⁷⁰ The prosecutor would likely argue Hübener was engaged in multiple forms of illicit activities, including listening to forbidden propaganda, actively spreading this media coverage to his community members, and inciting strong opposition against the Nazi regime.⁷¹ Specifically, Hübener's overt act by drafting, printing, and providing pamphlets to the general public should be enough to substantiate a treason charge because Hübener was attempting to change the constitutional order of Germany's government.⁷²

Conversely, Hübener could argue that he never tried to undermine the existence of Germany or the Nazi Party.⁷³ While he may not necessarily agree with their political ideologies, he was informing his community members of the truth about how World War II was progressing.⁷⁴ Hence, the prosecutor would lack the evidence to suggest that Hübener was trying to create a change in the constitutional order.⁷⁵ More specifically, Hübener may have called on the German's resistance to Hitler, but the prosecutor would likely have difficulty proving Hübener's resistance was enough to create hostile opposition against his country.⁷⁶ Lastly, under the German Penal Code, the prosecution would fail in demonstrating Hübener's *mens rea* or "guilty mind" at the time of the alleged committed act.⁷⁷ Thus, Hübener did not "forcibly" nor

⁶⁸ *Id.*

⁶⁹ *Id.* § 83, subdivision 1-2.

⁷⁰ *Id.* § 81.

⁷¹ Blakemore, *supra* note 46.

⁷² *Id.*

⁷³ STRAFGESETZBUCH [STGB] [PENAL CODE], § 81, subdivision 1, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

⁷⁴ Blakemore, *supra* note 46.

⁷⁵ STRAFGESETZBUCH [STGB] [PENAL CODE], § 81, subdivision 1, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

⁷⁶ Blakemore, *supra* note 46.

⁷⁷ STRAFGESETZBUCH [STGB] [PENAL CODE], § 81, subdivision 1, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

create a “threat of force” to overtake Germany’s government.⁷⁸ Instead, he simply informed the public of the Nazi Party’s fabrication of various battles and quick rise to power.⁷⁹

Under § 83 of the German Penal Code, the prosecutor would pose the same issues against an attempted treason charge;⁸⁰ however, this attempt would likely fail because Hübener was not planning or attempting to commit a treasonous act. Likewise, under § 83a, the prosecutor would contend that even if Hübener was not committing or attempting to commit a treasonous act, the court should not mitigate his sentence.⁸¹ Specifically, the prosecutor would argue that Hübener made no effort to voluntarily avert or substantially lessen the completion of the alleged treasonous act.⁸² Alternatively, Hübener would argue that this charge should not apply to him because he was not planning to commit a treasonous act in the first place.⁸³ Hübener was trying to prevent the Nazis from spreading false narratives of the war and therefore tried to inform the public of the truth.⁸⁴

In short, the prosecutor would have difficulty showing Hübener overthrew or attempted to overthrow the Nazi or German government by “force” or “threat of force” to undermine its existence or constitutional order.⁸⁵ Under current German treason law, then, Hübener would likely be acquitted and face no punishment.⁸⁶

C. Application Under Modern U.S. Treason Laws

Assuming Hübener’s set of facts applied to the Treason Clause, 18 U.S.C. § 2381, and Supreme Court precedent as governing law, the prosecutor would form a weak case when demonstrating Hübener’s actions were enough to support a

⁷⁸ *Id.*

⁷⁹ Blakemore, *supra* note 46.

⁸⁰ STRAFGESETZBUCH [STGB] [PENAL CODE], § 83, subdivision 1-2, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

⁸¹ *Id.* § 83a, subdivision 3.

⁸² *Id.* § 83a, subdivision 1-2.

⁸³ *Id.*

⁸⁴ Blakemore, *supra* note 46.

⁸⁵ STRAFGESETZBUCH [STGB] [PENAL CODE], § 81, subdivision 1, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

⁸⁶ *Id.*

treason claim.⁸⁷ While referring to the U.S. Constitution, the prosecutor must establish Hübener was levying war against the country or providing aid and comfort to the country's enemies to support a claim for treason.⁸⁸

First, the prosecutor could argue that Hübener was levying war against the country's interests.⁸⁹ By citing to *Case of Fries*, the prosecutor could show Hübener demonstrated "forcible opposition" to German laws.⁹⁰ Particularly, Hübener listened to forbidden radio reports and gathered people to incite some form of riot against the government.⁹¹ The prosecutor may also rely on *Cramer v. United States* and contend Hübener made speeches that were "critical of the government [and openly] oppos[ed] its measures" to aid in decreasing the government's strength.⁹²

On the contrary, Hübener could argue that he was not levying war against the government.⁹³ In response to the prosecution's reference to *Case of Fries*, Hübener could bring attention to Circuit Justice Iredell's words: "if the intention was merely to defeat [America's] operation in a particular instance' because of 'some private or personal motive,' the defendants' actions would not amount to treason."⁹⁴ Here, Hübener was providing the public with information based on his knowledge through the BBC reports.⁹⁵ He was not creating pamphlets with intentions of levying war against his own country.⁹⁶ Instead, Hübener could argue he was merely trying to inform the public of the truth.⁹⁷

Even if this argument did not hold, Hübener could potentially defend himself under the First Amendment.⁹⁸ His freedom of speech allows him to express how upset he is with the government.⁹⁹ On the other hand, the prosecutor could use this

⁸⁷ U.S. CONST. art. III, § 3; 18 U.S.C. § 2381; *see also Cramer*, 325 U.S. at 29.

⁸⁸ U.S. CONST. art. III, § 3, cl. 1.

⁸⁹ *Id.*

⁹⁰ *See Larson, supra* note 14, at 905.

⁹¹ Blakemore, *supra* note 46.

⁹² *Cramer*, 325 U.S. at 29.

⁹³ U.S. CONST. art. III, § 3, cl. 1.

⁹⁴ *See Larson, supra* note 14, at 905.

⁹⁵ Blakemore, *supra* note 46.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ U.S. CONST. amend. I (stating "Congress shall make no law . . . abridging the freedom of speech . . .").

⁹⁹ *Id.*

defense against Hübener as proof of Hübener's treasonous intent.¹⁰⁰ Essentially, the prosecutor would contend that Hübener's creation of pamphlets reaffirmed his opposition to the government and use it to establish his *mens rea*.¹⁰¹

For the prosecutor to support a claim that Hübener was trying to levy war against the government, the prosecutor needs to meet additional procedural requirements.¹⁰² The prosecutor must have two witnesses testify to the same overt act or have Hübener openly confess to his treasonous crime.¹⁰³ Hübener will likely not confess; however, the prosecutor can ask Hübener's coworker to testify about how he published and distributed pamphlets.¹⁰⁴ The prosecutor can also offer Hübener's friends a lighter prison sentence in exchange for the testimony of their alleged "overt acts."¹⁰⁵ If Hübener's friends choose not to cooperate, the prosecutor can then ask other German citizens if they saw Hübener providing pamphlets and ask them to testify to these acts.¹⁰⁶

While the prosecutor may have issue proving Hübener was levying war against the government or aiding and comforting enemies, they can certainly meet the constitutional procedural requirements.¹⁰⁷ Assuming Hübener faced conviction of treason under U.S. law, he would likely face the death penalty, or at the very least, five years of incarceration with a fine, depending on the judge's discretion.¹⁰⁸ Furthermore, when released from prison, Hübener cannot serve in federal public office.¹⁰⁹ Nonetheless, the judge would most likely dismiss Hübener's treason charges under U.S. law.

¹⁰⁰ See *Cramer*, 325 U.S. at 30-31 (describing the *mens rea* requirement when a defendant intends to commit a treasonous act).

¹⁰¹ Blakemore, *supra* note 46.

¹⁰² See U.S. CONST. art. III, § 3, cl. 1.

¹⁰³ *Id.*

¹⁰⁴ Blakemore, *supra* note 46.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ U.S. CONST. art. III, § 3, cl. 1.

¹⁰⁸ 18 U.S.C. § 2381.

¹⁰⁹ *Id.*

V. COMPARING AND CONTRASTING TREASON LAWS IN THE U.S.
AND GERMANY

Although it may seem that the U.S. and Germany have similar treason laws, the differences are actually striking, both procedurally and substantively. The main difference is that the Framers of the U.S. Constitution listed treason as the one of three crimes in the U.S. Constitution,¹¹⁰ while German legislators created a treason charge under the German Penal Code.¹¹¹ The German Penal Code, however, references the Basic Law for the Federal Republic of Germany—the equivalent of Germany's Constitution.¹¹²

Another critical distinction is that the U.S. Constitution permits Congress to set varying forms of punishment.¹¹³ Like most criminal penal codes, the German Penal Code expresses limitations in which a judge can set forth punishment.¹¹⁴ Based on § 81 of the German Penal Code, a judge can set punishment from ten years to life in prison.¹¹⁵ Alternatively, the U.S. Congress sets a harsher punishment limitation by including the possibility of a death sentence.¹¹⁶ If the judge rejects this standard, however, the person convicted can still face a fine and years in prison.¹¹⁷ Lastly, Congress prevents convicted individuals from holding public office,¹¹⁸ while the German Penal Code does not address this issue.¹¹⁹

Furthermore, Germany sets forth treason charges against a state,¹²⁰ attempted treason charges,¹²¹ and creates a plain-meaning

¹¹⁰ U.S. CONST. art. III, § 3, cl. 1.

¹¹¹ STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 81-83a, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

¹¹² *Id.* § 81, subdivision 1.

¹¹³ U.S. CONST. art. III, § 3, cl. 2.

¹¹⁴ STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 81-83a, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

¹¹⁵ *Id.* § 81, subdivision 1.

¹¹⁶ 18 U.S.C. § 2381.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 81-83a, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

¹²⁰ *Id.* § 82, subdivision 1-2.

¹²¹ *Id.* § 83, subdivision 1-2.

definition for “voluntarily abandoning” treasonous acts.¹²² On the other hand, the U.S. Constitution sets procedural requirements in place of varying forms of attempted treason.¹²³ For instance, under the Treason Clause, two individuals must bear witness to the same overt acts as committed by the person accused.¹²⁴ Overt acts hold a very nuanced definition; however, judges frequently use their discretion when considering whether the mere preparation of the treasonous act or a “substantial step” that would lead to the act actually constitutes an overt act.¹²⁵ While the U.S. Constitution does not create a plain-meaning definition for “overt acts,”¹²⁶ the German Penal Code sets forth its elements and provides a lesser punishment when the accused cooperates with prosecutors.¹²⁷

In terms of the laws’ similarities, both the U.S. and Germany require some undertaking by “forcible opposition,”¹²⁸ or threat of force, for a treasonous act to take place.¹²⁹ Furthermore, both laws describe how the accused must engage in some form of activity to change the government’s constitutional order.¹³⁰ Lastly, the U.S. Constitution and the German Penal Code allows for various types of punishment within its laws.¹³¹ In the U.S. Constitution, Congress is allowed to set the limits on punishment for committing treason.¹³² Germany, on the other hand, includes charges of treason within their Penal Code, while also providing recommended sentences for convicted individuals.¹³³

¹²² *Id.* § 83a, subdivision 3.

¹²³ U.S. CONST. art. III, § 3, cl. 1.

¹²⁴ *Id.*

¹²⁵ *Cramer*, 325 U.S. at 7.

¹²⁶ U.S. CONST. art. III, § 3, cl. 1.

¹²⁷ STRAFGESETZBUCH [STGB] [PENAL CODE], § 83a, subdivision 3, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

¹²⁸ *See Larson, supra* note 14, at 905.

¹²⁹ STRAFGESETZBUCH [STGB] [PENAL CODE], § 81, subdivision 1, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

¹³⁰ *Id.*; *see Larson, supra* note 14, at 905 (in demonstrating forcible opposition to U.S. laws).

¹³¹ *See* 18 U.S.C. § 2381; *see also* STRAFGESETZBUCH [STGB] [PENAL CODE], § 81, subdivision 1, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

¹³² U.S. CONST. art. III, § 3, cl. 2.

¹³³ STRAFGESETZBUCH [STGB] [PENAL CODE], § 81, subdivision 1, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

IV. CONCLUSION

Under U.S. and German law, Hübener would likely be acquitted of any treasonous crimes and avoid the death penalty. While U.S. prosecutors could potentially request for the death penalty under Hübener's set of facts, his acts would not amount to ones that levied war against the U.S. nor provided aid and comfort to the nation's enemies.¹³⁴ Similarly, Hübener would likely be acquitted under modern German treason law because his acts would not have resulted in a change in Germany's constitutional order, nor did he intend to undermine the government's existence.¹³⁵

Nevertheless, Hübener's story should serve as a reminder of one of the many injustices Jewish individuals faced during the Holocaust.¹³⁶ This is a lesson that lies at the heart of treason law, and why this political tactic should have never faced abuse during the Nazi regime. At the very least, "faith, duty and human society" made it necessary to effectuate change in modern German treason law, and it should continue to do so for centuries that come.¹³⁷

¹³⁴ U.S. CONST. art. III, § 3, cl. 1.

¹³⁵ STRAFGESETZBUCH [STGB] [PENAL CODE], § 81, subdivision 1, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0832 (Ger.).

¹³⁶ See Blakemore, *supra* note 46.

¹³⁷ Hurst, *supra* note 2.