

Crossover Freedom of Speech

A contribution to the Ri:Call for Papers: freedom of speech and Louis D. Brandeis

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I.

Sometimes TV series or even movies feature a so-called "crossover". In such a crossover, several characters from independent series appear in a common episode. But not only on screen, in real life too there can be crossovers of different eras: For example, the years 1927 and 2020 – Washington D.C. and Hanover.

November 21, 2020, Hanover, in front of the Opera House:

On stage is Jana from Kassel, 22 years old. At the "Querdenken"-demonstration, she says among others, the following sentence:

"I feel like Sophie Scholl, because I've been active in the resistance here for months, making speeches, going to demos, handing out flyers and since yesterday registering meetings too."¹

As she continues and affirms, among other things, that she will continue to "stand up for freedom," a steward steps up, accuses her of trivializing the Holocaust, and announces that he will no longer perform his stewarding duties "for such bullshit."

Jana bursts into tears, throws the microphone away and leaves the stage.²

May 16, 1927, Washington, D.C., Supreme Court:

The conviction of *Charlotte Anita Whitney* under the 1919 California Criminal Syndicalism Act for her activities in

founding and supporting the Communist Labor Party of America, which was accused of propagating and teaching the violent overthrow of the government, is upheld by the United States Supreme Court.

Louis D. Brandeis, the first Jewish judge on the Supreme Court of the United States, submitted his special opinion on the aforementioned decision. There he stated in particular:

"If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."³

Charlotte Anita Whitney was later pardoned. The pardon was based on the special vote of Judge *Brandeis*.

II.

In Germany, freedom of speech is part of the freedom of opinion in Art. 5 (1) of the Basic Law (GG). According to this, everyone has the right to freely express and disseminate his or her opinion in speech, writing and image. Freedom of opinion finds its limits – "barriers" – in Art. 5 (2) GG: "These rights find their limits in the provisions of general laws, the legal provisions for the protection of youth and in the right of personal reputation." The general laws mentioned there, insofar as they restrict freedom of opinion, are in turn to be interpreted in the light of freedom of opinion, i.e. limits – "barriers-barriers" – are also imposed on the restriction of freedom of opinion (the "interaction doctrine" of the German Federal Constitutional Court).

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¹ Video of the "speech" available, for example, via WDR Aktuell YouTube at: <https://www.youtube.com/watch?v=gMuNRcBXe9c> (last accessed 11/16/2021).

² Video of the "speech" available, for example, via WDR Aktuell YouTube at: <https://www.youtube.com/watch?v=gMuNRcBXe9c> (last accessed 11/16/2021).

³ *Whitney v. California*, 274 U.S. 357 (1927), full text available at: <https://caselaw.findlaw.com/us-supreme-court/274/357.html> (last accessed Nov. 16, 2021).

In the U.S., freedom of speech is enshrined in the 1st Amendment to the Constitution of the United States of America. Accordingly, Congress may not enact any law that restricts freedom of speech. ⁴The greatest defense of free speech in U.S. history occurred in the above-mentioned *Whitney v. California* case in 1927 by Louis D. Brandeis, one of the chief justices of the United States of America.

Brandeis first argued in his special opinion that freedom of speech can, in principle, be restricted:

*"The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral."*⁵

Regarding the restriction of free speech, at that time Oliver Wendell Holmes Jr. also a United States Supreme Court Justice, developed the so-called "clear and present danger" test. In the 1919 *Schenck v. United States* decision, he stated as follows:

*"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."*⁶

Accordingly, freedom of speech was to be restricted if the exercise of this right would create a "clear and present danger." However, the question, when a danger to the community is clear and present, and thus when the restriction of free speech is justified, had not yet been answered at the supreme court level, as Brandeis pointed out in his special opinion:

*"This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgement of free speech and assembly as the means of protection. "*⁷

Brandeis then developed the "clear and present danger" test

further, speaking of the requirement of not only a "present" danger, but an "imminent" danger:

*"Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent."*⁸

For Brandeis, the possibility of being able to criticize the government without having to fear reprisals had to be guaranteed. He made it clear that there were high hurdles to overcome in order to enforce the restriction of free speech. As long as the exercise of free speech did not pose an immediate and imminent danger to the community or to the state (to imagine such an imminent danger, it might be helpful to look, for example, at the storming of the Capitol in Washington in January 2021), the solution would have to be "more speech, not enforced silence." For Brandeis, freedom of speech was indispensable to the democratic process; unpopular opinions must be able to be expressed and debated. State repression would breed hatred, and hatred threatened social stability. Brandeis urged Americans to actively defend free speech and to challenge laws that restrict free speech without sufficient grounds ("clear and imminent danger").

Brandeis' special vote is rightly being called the greatest defense of free speech in the history of the United States of America.

III.

Fast forward to 21st century Germany. In contrast to 1927, we are neither in a war nor do we have one behind or ahead of us. Instead, the COVID-19 pandemic has been raging for almost two years. It was in this context that the "Querdenken"-movement was born. When the federal and state governments began taking protective measures to contain the pandemic, protests also began, claiming that to be the defenders of the constitution against government infringements. Since then, various demonstrations have taken place in different cities – the demonstration in Hanover on November 21, 2020 should receive special attention "thanks to" Jana from Kassel.

⁴ <https://usa.usembassy.de/etexts/gov/gov-constitutiond.pdf> (last accessed 11/16/2021).

⁵ *Whitney v. California*, 274 U.S. 357 (1927), full text available at: <https://caselaw.findlaw.com/us-supreme-court/274/357.html> (last accessed Nov. 16, 2021).

⁶ *Schenck v. United States*, 249 U.S. 47 (1919), full text available at: <https://caselaw.findlaw.com/us-supreme-court/249/47.html> (last accessed Nov. 16, 2021).

⁷ *Whitney v. California*, 274 U.S. 357 (1927), full text available at: <https://caselaw.findlaw.com/us-supreme-court/274/357.html> (last accessed Nov. 16, 2021).

⁸ *Whitney v. California*, 274 U.S. 357 (1927), full text available at: <https://caselaw.findlaw.com/us-supreme-court/274/357.html> (last accessed Nov. 16, 2021).

There is no need to go into the content-related evaluation of the comparison with the resistance fighter *Sophie Scholl*; unlike *Sophie Scholl*, Jana from Kassel did not have to fear any reprisals at the time. Instead, the video of her performance went viral (pun intended at this point). In addition to sharp criticism, there was mainly malice for Jana. The media treated the topic objectively; in addition to evaluating the content of the *Sophie Scholl* comparison, for example, reference was made to the importance of classifying in what context the statements were made and how "Querdenker" systematically reinterpret history.⁹ The online shitstorm against Jana was also analyzed.¹⁰

Particularly noteworthy is the commentary by *Wilm Hüffer* on SWR2 on November 22, 2020.¹¹ *Hüffer* commented on the appearance of the steward as follows:

"A clear, harsh rejoinder – even that was too much for them. Yet such backtalk is essential now."¹²

Even more important are *Hüffer's* comments at the end of his commentary:

"Overnight, Jana from Kassel has become a new figure of hate. On social networks such as Facebook and Twitter, there is a hail of insults and curses.

That is understandable. But there is also a danger in this. Angry reactions will not bring the so-called "Querdenker" to their senses. Quite the opposite. Anger and hatred will only confirm these people in their absurd self-perception. They will reinforce their self-righteous conviction that they are living in a dictatorship of opinion in which they are no longer allowed to speak openly.

This is precisely where the dangerous mechanisms that threaten our democracies begin: hatred breeds counter-hatred – and in the end the inability to deal with it. That's why we need to take a clear stance against all those

who think they feel like Sophie Scholl. But please with arguments. Without foaming at the mouth. Without anger, without hate. Because in the end, both will only help the demagogues."¹³

Even if this is not a matter of state repression, hatred generates counter-hatred and ultimately threatens social stability. It is the famous "having to endure": Unpopular opinions must be able to be expressed and discussed. Discourse – the exchange of opinions and ideas, the friction and the energy or conclusion generated by it – is the central foundation of our democracy, and freedom of speech as part of freedom of opinion is therefore an indispensable, high good. The state has to ensure that citizens can exercise their freedom of speech – within the applicable limits. In case of doubt, this means that even views and ideas that a dictatorship of opinion prevails in Germany in the 21st century can be expressed publicly and that it can be asserted on an open stage protected by stewards that one is no longer allowed to speak openly.

IV.

Opennplatz in Hanover as the marketplace of ideas¹⁴ described by *Holmes* and *Brandeis* ("free trade in ideas within the competition of the market")¹⁵:

Brandeis' views in the form of the steward at the "Querdenken"-event, which on the one hand protects freedom of speech, on the other hand challenges Jana's speech and thus sparks the discussion about it.

A society in which unpopular opinions can be expressed without fear of governmental consequences, in which these opinions can be debated, in which freedom of speech and expression is guaranteed and occupies the high and important position that *Brandeis* outlined in his 1927 special opinion.

What a successful crossover freedom of speech.

⁹ Deutschlandfunk Nova, interview with *Pia Lamberty*, Nov. 24, 2020, social psychologist at the University of Mainz, available at: <https://www.deutschlandfunknova.de/beitrag/janaauskassel-es-ist-zu-leicht-sich-ueber-jana-nur-lustig-zu-machen> (last accessed Nov. 16, 2021).

¹⁰ *Ruhdorfer* in *Krautreporter*, Nov. 26, 2020, available at: <https://krautreporter.de/3573-jana-aus-kassel-hat-uns-den-moment-beschert-den-wir-uns-seit-monaten-wunschen> (last accessed Nov. 16, 2021).

¹¹ *Hüffer*, SWR2, Commentary, Nov. 22, 2020, available at: <https://www.swr.de/swr2/leben-und-gesellschaft/gefahr-fuer-die-demokratie-jana-aus-kassel-fuehlt-sich-wie-sophie-scholl-100.html> (last accessed Nov. 16, 2021).

¹² *Hüffer*, SWR2, Commentary, Nov. 22, 2020, available at: <https://www.swr.de/swr2/leben-und-gesellschaft/gefahr-fuer-die-demokratie-jana-aus-kassel-fuehlt-sich-wie-sophie-scholl-100.html> (last accessed Nov. 16, 2021).

¹³ *Hüffer*, SWR2, Commentary, Nov. 22, 2020, available at: <https://www.swr.de/swr2/leben-und-gesellschaft/gefahr-fuer-die-demokratie-jana-aus-kassel-fuehlt-sich-wie-sophie-scholl-100.html> (last accessed Nov. 16, 2021).

¹⁴ So first designated by Justice *William O. Douglas* in his special opinion on *United States v. Rumely*, 345 U.S. 41, 56 (1953).

¹⁵ *Abrams v. United States*, 250 U.S. 616 (1919), full text available at <https://supreme.justia.com/cases/federal/us/250/616/#619> (last accessed Nov. 16, 2021).