“No Justice, No Peace”: Black Lives Matter, Institutional Racism, and Legal Order
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published in
Journal of the British Society for Phenomenology
2024

DOI (link to publisher)
10.1080/00071773.2023.2240376

document version
Publisher's PDF, also known as Version of record

Link to publication in VU Research Portal

citation for published version (APA)

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Download date: 08. Aug. 2024
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To link to this article: https://doi.org/10.1080/00071773.2023.2240376

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Published online: 04 Aug 2023.

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“No Justice, No Peace”: Black Lives Matter, Institutional Racism, and Legal Order

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ABSTRACT
Following the murder of George Floyd, the Black Lives Matter-movement (BLM) took to the streets to protest against institutional racism. In these protests, one could often hear the slogan “No Justice, No Peace”. Drawing on legal theory, speech act theory and phenomenology, this article investigates what kind of justice and peace are called upon and how the slogan functions as a claim addressed to the legal order. First, the article shows that the rule of law provides a comprehensive normative framework to evaluate what went wrong during the arrest of George Floyd. Second, the article maintains that the slogan should be understood as a passionate utterance in the sense of Stanley Cavell. Finally, drawing on a responsive phenomenology of legal order inspired by the work of Bernhard Waldenfels, the article concludes that the slogan is an extraordinary claim questioning the legal order, showing its contingent origins.

1. Introduction

The anger, grief and indignation following the murder of George Floyd were directly related to the fact that he was the victim of institutional racism by the American police. He was not the first Black person who was a victim of brutal police violence. He was also not the last. What exactly makes this form of racism institutional or structural? While I take these concepts as synonymous, I prefer to speak of institutional racism in this article. Coined by Stokely Carmichael and Charles Hamilton, the concept of institutional racism describes

the policies, programs, and practices of public and private institutions that result in greater rates of poverty, dispossession, criminalization, illness, and ultimately mortality of African Americans. Most importantly, it is the outcome that matters, not the intentions of the individuals involved.1
Institutional racism is both structural and practiced by institutions. Institutional is first and foremost opposed to incidental. Indeed, there is no longer incidental racist police violence in the United States now that Floyd is yet another Black victim. The violence is deep-rooted, or structural, i.e. part of a well-established pattern and inherent to the system. When speaking of institutional racism, one also refers to the word “institution”. Following John Rawls, one may take an institution to point to “a public system of rules, which defines offices and positions with their rights and duties, powers and immunities, and the like” and where these rules “specify certain forms of action as permissible, others as forbidden, and they provide for certain penalties and defences, and so on, when violations occur.” Accordingly, the police can be seen as an institution within a legal order.

In his lectures on the concept, Maurice Merleau-Ponty highlighted the temporal dimension of an institution: they last and form the fertile soil for future meaningful behaviour. From a phenomenological point of view, institutions appear as incarnations of order, pointing to sedimented meaning, acquired knowledge and embodied behaviour. As a result, the actions of that institution appear legitimized and become structural in the sense of sustainable. This is where the two meanings of institutional overlap: because racism is embedded within an institution, such as the police, it endures and is structural. As Claudia Card formulates it:

In a broad sense of “structural,” all institutional evils are structural. (...) Yet, an evil or an injustice is most apt to be explicitly called “structural” when the responsible structure is not self-consciously created or administered, when there is not a conspicuous tyrant or tyrannical group, or when the practice comes over time to be interconnected with other practices in ways not specifically intended and then, owing to those connections, has consequences not specifically intended.

This article explores the role of the rule of law and the legal order when confronted with institutional racism, taking its cue from the slogan “No Justice, No Peace”. In this way, the article pursues a twofold aim. First, it seeks to contribute to an understanding of institutional racism, specifically in its relation to the rule of law and legal order. More precisely, the article inquires into the justice and peace at stake for the Black Lives Matter-movement (BLM), actually “a loose collection of far-flung organizations”. Second, the article aims to make a contribution to the multidisciplinary project of critical phenomenology, showing its value for problems within legal philosophy.

The argument unfolds as follows. In the next section, I analyse the behaviour of the police officers responsible for the death of George Floyd from the perspective of the rule of law. I argue that the rule of law provides an important framework to reflect on what went wrong during the arrest of George Floyd. Furthermore, it offers one interesting reading of the notions of justice and peace of the slogan. Nevertheless, another reading is possible and more promising for grasping what is at stake for BLM, namely interpreting the slogan as a passionate utterance in the specific sense introduced by Stanley Cavell. The slogan, in that interpretation, is describing the injustice of racism

3 Merleau-Ponty 38. For an elaboration of Merleau-Ponty’s concept of institution in the field of legal philosophy, see Corrias, The Passivity of Law.
4 Waldenfels, Order in the Twilight 47.
5 Card 69.
6 Morris.
from the first-person perspective of the victim. The third section reads the notions of justice and peace through this Cavellian lens, arguing that, whereas the justice and peace provided by the rule of law form an important and necessary means to fight institutional racism, the problem and solutions go beyond law. Section 4 draws on the responsive phenomenology of Bernhard Waldenfels to shed light on the specific claim BLM makes on the legal order arguing that “No Justice, No Peace” confronts it with its “blind spot”. I end with a short conclusion in which I sketch some of the possible consequences of my reading of justice and peace for the way in which to deal with institutional racism.

Before moving on, it is important to say something about positionality. I am not a Black person and I do not claim to speak on behalf of Black people and/or BLM. Rather, I write this article as a legal philosopher who is interested in the specific way in which BLM addresses the legal order. Accordingly, this article does not claim to be more than a philosophical reflection and makes no assertions whatsoever regarding what it means to experience racial discrimination as a victim.

2. The Murder of George Floyd and the Rule of Law

The slogan “No Justice, No Peace” that was often heard after the murder of George Floyd has frequently been used in protests against racial discrimination and police violence. In his blog post, linguist Ben Zimmer traces its use back to 1986–1987 when it was chanted during protests after the killing of Michael Griffith by a group of white youth in Howard Beach. While Zimmer stresses that the slogan may have different meanings for different people, he distinguishes between a conjunctive and a conditional reading. According to the former, the slogan is more of a descriptive nature: “(There is) no justice and (there is) no peace.” Interpreted as a conditional, the slogan takes the form of a threat: “If (you give us) no justice, (we will give you) no peace.” This latter reading has prevailed. Taking the conditional reading as my starting point, in the remainder of this Section 1 argue that justice and peace may both be understood in light of the rule of law.

2.1. The Rule of Law

There are different (national) traditions of the rule of law, or the Rechtsstaat. Nevertheless, the core function of the rule of law is to prevent the arbitrary exercise of state power, also known as the rule of men. Preventing arbitrariness is particularly important in criminal law, where government interference in the freedom of individual citizens can go very far. The rule of law sets standards for government action by legally anchoring power in the law. In this way, the government itself is bound by law. Political philosophers, legal theorists and constitutional scholars debate the content and scope of the rule of law. For the purpose of this article, I interpret the ideal of the rule of law as consisting of four pillars. This reading can be called a thick or substantive vision. Using a thick vision, instead of a purely formal or thin one, will both show the potential value of the rule of

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7 Zimmer.
8 See also Wikipedia’s entry on the slogan at: https://en.wikipedia.org/wiki/No_justice,_no_peace.
9 Krygier.
10 Krygier.
law in evaluating police action and ensures the strongest possible reading of the ideal is discussed when pointing out its limits. Thus, I seek to avoid making it into a strawman.

The four pillars of the rule of law may be formulated as follows:

Properly understood, the rule of law is (...) the moral ideal of governance according to law in its primary sense – the sense in which it enforces a scheme of rights and duties that provides for each individual a domain of liberty, secure from the threat of domination either by public officials or powerful private interests. Of equal importance to compliance with the precepts of formal legality, applicable to legislation, is adherence to the requirements of procedural fairness and due process as regards the application of law to particular cases. There must be a separation of powers between parliament, government, and judiciary, enabling the courts to act impartially and independently. (...) And the demands of due process are inextricably bound up, in practice, with the law’s permissible content: the exercise of administrative discretion must respect the citizen’s fundamental rights and the limits of legitimate government. No powers can be lawfully conferred on a public agency that would violate constitutional rights; a statutory mandate must always be interpreted in the light of the proper limits of state authority.11

Accordingly, the four minimum requirements of the rule of law are: legality, separation of powers, human rights and access to an independent and impartial judge. This framework proves to be very suitable for understanding what went wrong when George Floyd was arrested.

2.2. The Murder of George Floyd

First of all, George Floyd never saw a judge. As is well known, he was arrested when he was suspected of using counterfeit money and died during his arrest.12

His human rights were violated: his right to life and his right not to be discriminated against. Criminal guarantees to which he was entitled as a suspect were also violated, such as the right to a fair trial and the right to be treated as innocent until proven otherwise. A violation of his civil rights was also established by the judge.13

There was no separation of powers. The officers who arrested Floyd acted as prosecutor, judge and executor of the verdict. Not only was there no death penalty for the crime of which Floyd was suspected, but it also demonstrates the importance of the separation of powers: the principle that prevents the concentration of power by separating legislative, executive and judicial powers and/or allowing them to control each other in a system of checks and balances. Excessive police violence should therefore be rejected not only as a brutal act of violence, but also because it affects an essential element of the rule of law.

What happened in the case of George Floyd, and so many Black Americans before him, is that the police acted as legislator, judge and executioner.14 As Black Americans are not treated as equal persons before the law, their lives are not or less protected by the rule of law and its institutions. Consequently, they fall victim to the arbitrary rule of

11 Allan 218–219.
12 United States of America v Derek Michael Chauvin, 2–6.
13 United States of America v Derek Michael Chauvin, 2–6. In State of Minnesota v Derek Michael Chauvin 4 it was established that “Mr.Chauvin treated George Floyd with particular cruelty”. At 22, the Court concluded: “Part of the mission of the Minneapolis Police Department is to give citizens “voice and respect.” Here, Mr. Chauvin, rather than pursuing the MPD mission, treated Mr. Floyd without respect and denied him the dignity owed to all human beings and which he certainly would have extended to a friend or neighbor.”
14 See Arendt 287–288 for a comparable role of the police vis-à-vis refugees and stateless people.
(police) (wo)men. Their just treatment is no longer a right, as it is for white Americans, but a privilege for individual police officers to grant or take away. This is a state of legal uncertainty.15

Finally, the requirement of legality has not been met, either. The point here is that every act of government officials is based on a prior given and recognizable law. Legality thus transforms power into legal competence: power given and limited by law, to be used only in specific circumstances, for specific reasons. When Floyd was arrested, the police did not abide by its powers, but grossly violated them, which resulted in his death.16

The conclusion is therefore that none of the four requirements of the rule of law were met. George Floyd was not treated as a (legal) person by the representatives of the American legal order, and more specifically that of the State of Minnesota, and did not enjoy legal protection.

2.3. Justice and Peace: The Legal View

What does this entail for the understanding of BLM’s slogan? Justice is understood in a formal legal sense, as the abstract equality before the law. Justice demands general rules and the certainty that violations of the law are met by an appropriate legal response (e.g. punishment) executed by following a legal procedure, or trial. The American judge has punished the police officers involved in George Floyd’s death. This is the justice of a correct and unprejudiced application of the rule of law. It should not be undervalued. In this respect, it is noteworthy that Derek Chauvin, the police officer directly responsible for Floyd’s death was found guilty of murder and manslaughter and was eventually sentenced to 22 and a half years of imprisonment but appealed this verdict.17 Furthermore, next to Chauvin, three other police officers were also convicted for violating George Floyd’s civil rights,18 with criminal charges against them still pending.

As Hannah Arendt has argued, equality is always an abstraction. In real life, we find only inequality: no two persons are the same. Accordingly, we need law to institute equality.19 The law does this by abstracting from given inequalities. Let me stress here that this is something good, something we value as constitutive for the very idea of law. Differences in the real world, in terms of gender, religion, race, etc. render us unequal, yet the law is blind to these differences and promises an equal treatment to all. That is why equality calls for general laws. These are applied to all equally, without regard to given inequalities, without prejudices. Justice differs from prejudice because of this blindness. Lady Justice’s blindfold helps her to give each his due – suum cuique tribuere, as one of the oldest definitions of justice stipulates. “Without regard” means literally without a look, not seeing, disregarding the inequalities that actually exist. This abstract equality is

15 Garret and Slobogin 1527:

Of course, the use of deadly force by police is sometimes justifiable. But when the triggering circumstances are ambiguous, Black people are far more likely to be killed by the police than white people. Indeed, police use of force is a leading cause of death for Black men in the United States.

16 Mr Chauvin “abused a position of trust and authority”. See State of Minnesota v Derek Michael Chauvin 4.

17 State of Minnesota v Derek Michael Chauvin 22; Derek Chauvin appeals his conviction for George Floyd’s murder.

18 Ex-police officers guilty in George Floyd death.

19 Arendt 301: “Equality, in contrast to all that is involved in mere existence, is not given to us, but is the result of human organization insofar as it is guided by the principle of justice. We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.” See also the comments on this passage in Van Roermund 114–115.
not always fair to the actual circumstances in which people live. In the case of Black Americans, this means disregarding the inequalities, e.g. in social-economic or health conditions, which can be traced back to the slavery, segregation and ongoing institutional discrimination that have led Charles Mills to speak about a “racial contract”.20

What about peace? In a legal view, peace refers to civil order, or civil peace. This is a normative ideal corresponding to ‘“order of a particular kind,’ one characterized by ‘living under the governance of law,’ an order sustained on Rechtsstaat or rule of law ideals.”21 This ideal both makes state intervention possible – when civil order is absent – and limits it – since any state intervention should be within the framework provided by the rule of law, in contradistinction to state intervention in a totalitarian state.22 Civil order denotes the idea that law enforcement ought to be within the bounds of the law and normatively acceptable.23 Understood in this fashion, civil order or peace and criminal law are interdependent.24 A breach of civil order constitutes a public wrong triggering action of the state to perform its principle task: providing an orderly civil state on its territory.25 The exact content of civil peace depends on the constitutive values of a state. These values are, or that is the idea, shared among its citizens and common between citizens and state officials.26 Criminal law asserts and enforces those values.27

Writing explicitly on the slogan “No Justice, No Peace”, criminal law scholar Darryl Brown sees the exact meaning of the core values of a state as the subject of an ongoing discussion among citizens and officials.28 According to him, “No Justice, No Peace” is a case in point. Pitted against unjustified police intervention, the slogan is a political act that challenges and disrupts civil peace, yet ultimately also affirms it.29 He understands it “as an ordinary, legitimate part of a polity’s ongoing conversation about its constitutive values and collective practices.”30 While Brown seems to be concerned with arguing in favour of the legitimacy of “No Justice, No Peace”, he pays a high prize for this argument. For stressing the everyday nature of the use of this slogan prevents him from grasping the radical nature of its challenge.31 Now that police violence against Black people has become institutionalized and thus structural or even normal, “No Justice, No Peace” does not only affirm the values of civil order but also radically questions them. Brown argues that the pluralism as exemplified in the racial inequality that characterized the time before and immediately after the civil war era constitutes a much greater challenge to civil order than “No Justice, No Peace” does. In my opinion, there is no qualitative but only a quantitative difference

20 Mills.
21 Brown 90.
22 Brown 89–91.
23 Brown 91.
24 Brown 86.
26 Brown 85.
27 Brown 86.
28 Brown 85.
29 Brown 94–96.
30 Brown 98.
31 It is fair to remark that Brown’s article was written and published before the murder of George Floyd. On the other hand, as he himself points out in his article, the slogan “No Justice, No Peace” has been used for decades by those protesting racial police violence.
between then and now. Indeed, I submit that one should understand “No Justice, No Peace” as an extra-ordinary challenge to the legal order.

Concluding this part of the article let me stress that I do not want to undervalue the importance of a just legal response to institutional racism from the perspectives of the victims and survivors. Nevertheless, I argue that the legal framework of the rule of law is insufficient to capture what is at stake in institutional racism. In order to develop this argument, in the next section I show that “No Justice, No Peace” may be read in a different way.

3. “No Justice, No Peace” as a Passionate Utterance

I propose to understand the slogan as an example of what Stanley Cavell calls a passionate utterance, i.e. “a mode of speech in or through which, I declare my standing with you and single you out, demanding a response in kind from you, and a response now, so making myself vulnerable to your rebuke, thus staking our future.”32 In Sub-section 3.1, I give some background to BLM as a necessary context to understand their speech acts. I subsequently describe what Cavell’s notion of a passionate utterance entails before returning to “No Justice, No Peace” in Sub-section 3.2.

3.1. BLM and Its Ideals

Founded by Alicia Garza, Patrisse Cullors and Opal Tometi, BLM started out in the wake of the court case against George Zimmermann who was found not guilty of killing Trayvon Martin in February 2012.33 Alicia Garza remembered how she was completely shocked by the verdict and by the reactions on social media:

It was as if we had all been punched in the gut. (...) It wasn’t Trayvon Martin’s fault that (Zimmerman) stopped him and murdered him. ... It really has to do with a society that has a really sick disease and that disease is racism.34

Co-founder Opal Tometi says about her feelings after the acquittal of Zimmerman:

Although many people think that justice would have meant finding him guilty, we know that it’s beyond that. (...) Black Lives Matter is really an affirmation for our people. It's a love note for our people, but it's also a demand. We know that the system was not designed for justice for us. Even if we were going to get an indictment or a guilty verdict, that actually would not provide us with the larger vision of liberation that our communities actually deserve. Absolutely, I have a huge concern in relying on the current apparatuses we have for “justice” for our people. It’s never going to be a solution for us.35

BLM explicitly refers to itself as not another ordinary civil rights movement because of its loose and horizontal leadership, open acceptance policy, decentralized structure and its roots in the LGBTQ + community and its history of activism.36 In the “Herstory” of BLM, Alicia Garza stresses how the movement breaks with the patriarchal organization

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32 Cavell 185.
33 Chase 1092–1094.
34 Guynn.
35 Smith.
36 Chase 1105–1108.
of earlier Black movements by giving central stage to previously marginal groups, such as queer women, trans and disabled people. Garza describes the movement as follows:

Black Lives Matter is an ideological and political intervention in a world where Black lives are systematically and intentionally targeted for demise. It is an affirmation of Black folks’ contributions to this society, our humanity, and our resilience in the face of deadly oppression.  

It was a reaction to the systemic racism that had become “a way of life” in many communities in America. Indeed, BLM understands itself as “committed to struggling together and to imagining and creating a world free of anti-Blackness, where every Black person has the social, economic, and political power to thrive.”

In an interview, Garza clarifies some of the aims of BLM:

Part of the dialogue that we want to be having is around investment, around resourcing, around intersections, around how state violence looks in a multitude of ways and how it impacts us in many aspects of our lives. And we also want to be having the conversation about the leadership of women, and the leadership of queer folks, and the leadership of trans folks, as folks who are often left out of the narrative but who are also often doing most of the actual work.

In this respect, it is not surprising that Crenshaw’s idea of intersectionality has a strong influence on the movement. In an article written with Gerald Lenoir, co-founder Opal Tometi writes:

Black Lives Matter is often called a “civil rights” movement. But to think that our fight is solely about civil rights is to misunderstand the fundamental aspirations of this movement. (...) It is about the full recognition of our rights as citizens; and it is a battle for full civil, social, political, legal, economic and cultural rights as enshrined in the United Nations Universal Declaration of Human Rights. (...) Police brutality was just a symptom in a long line of structural injustices and social ills.

On its website, BLM presents its mission and vision as working inside and outside of the system to heal the past, re-imagine the present, and invest in the future of Black lives through policy change, investment in our communities, and a commitment to arts and culture. (...) Black Lives Matter Global Network Foundation imagines a world where Black people across the diaspora thrive, experience joy, and are not defined by their struggles. By achieving liberation, we envision a future that is fully divested from police, prisons, and all punishment paradigms to be replaced with investment into justice, joy, and culture.

### 3.2. Passionate Utterances

Now that we have some background to BLM, I will present the concept of a passionate utterance as it was introduced by Cavell. It is important to understand the notion against

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37 Garza.
38 Chase 1100.
39 Black Lives Matter, “What We Believe”.
40 Garza and Kauffman.
41 Chase 1109.
42 Tometi and Lenoir.

the background of J.L. Austin’s speech act theory.\textsuperscript{44} In a number of now classical works, Austin introduced the notion of performative speech acts, performatives for short.\textsuperscript{45} These are speech acts in which saying amounts to doing. A performative, in other words, is an utterance that is neither true, nor false but may, under certain conditions, do something. Examples include promising, baptizing a ship, and the “I do” in wedding ceremonies. As already transpires from the last example, performatives are often connected to specific conventions or (formal) procedures. In order to be successful, or “felicitous” as Austin puts it, performatives need to comply with six cumulative conditions that again refer to these conventions. Another important aspect of Austin’s theory is the distinction between the locutionary, the illocutionary and the perlocutionary.\textsuperscript{46} The locutionary is the actual saying of something meaningful. The illocutionary is what is done in saying. The perlocutionary is what is done or achieved by saying, thus referring to the affective or passionate dimension of language. It is important to note here that Austin explicitly writes that he focuses solely on the illocutionary.\textsuperscript{47} In other words, he does not develop the perlocutionary further.\textsuperscript{48}

Cavell’s attention for passionate utterances is aimed at undoing this limitation.\textsuperscript{49} He explicitly presents this concept as an extension of Austin’s theory that remains faithful to the latter’s pioneering groundwork.\textsuperscript{50} Cavell formulates a number of conditions for passionate utterances, (most of them) analogous to the ones sketched by Austin for performatives.\textsuperscript{51} Hereafter, I give the conditions and apply them to BLM’s slogan.

\textit{Analogous Perlocutionary Condition 1:} There is no accepted conventional procedure and effect. The speaker is on his or her own to create the desired effect. (…)

\textit{Analogous Perloc 2a:} (In the absence of an accepted conventional procedure, there are no antecedently specified persons. Appropriateness is to be decided in each case; it is at issue in each. I am not invoking a procedure but inviting an exchange. Hence:)

I must declare myself (explicitly or implicitly) to have standing with you (be appropriate) in the given case.

\textit{Analogous Perloc 2b:} I therewith single you out (as appropriate) in the given case. (…)

(The setting or staging of my perlocutionary invocation, or provocation, or confrontation, backed by no conventional procedure, is grounded in my being moved to speak, hence to speak in, or out of, passion, whose capacities for lucidity and opacity leave the genuineness of motive always vulnerable to criticism. With that in mind:)

\textit{Analogous Perloc 5a:} In speaking from my passion I must actually be suffering the passion (evincing, expressing, not to say displaying it – though this may go undeciphered, perhaps willfully, by the other), in order rightfully to

\textit{Analogous Perloc 5b:} Demand from you a response in kind, one you are in turn moved to offer, and moreover

\textsuperscript{44} This part of the article draws on Corrias, “Environmental Law and Youth Protests”.
\textsuperscript{45} Austin, \textit{How to Do Things with Words}; Austin, “Performative Utterances”.
\textsuperscript{46} Austin, \textit{How to Do Things with Words} 109–110.
\textsuperscript{47} Austin, \textit{How to Do Things with Words} 103.
\textsuperscript{48} Cavell 170–171.
\textsuperscript{49} Cavell 172.
\textsuperscript{50} Cavell 156–157.
\textsuperscript{51} Cavell 180–182.
**Analogous Perloc 6:** Now. (…)

**Perloc 7:** You may contest my invitation to exchange, at any or all of the points marked by the list of conditions for the successful perlocutionary act, deny that I have the standing with you, or question my consciousness of my passion, or dismiss the demand for the kind of response I seek, or ask to postpone it, or worse. I may or may not have further means of response. (We may understand such exchanges as instances of, or attempts at, moral education).52

Because of the last condition, refusal becomes an integral part of the passionate exchange.53 The same goes for interpretation: in a passionate exchange, interpretations are offered but can also be revoked and then offered anew.54 What is at stake in this back-and-forth is the relationship between a speaker (“I”) and the addressee (“you”).55 Cavell wants to draw attention to speech as confrontation.56 In his words: “A performative utterance is an offer of participation in the order of law. (…) A passionate utterance is an invitation to improvisation in the disorders of desire.”57

### 3.3. “No Justice, No Peace” as a Passionate Utterance

Let us now see whether “No Justice, No Peace” satisfies the conditions that Cavell has formulated for passionate utterances. BLM uses the slogan in a non-conventional setting, that of political protests. BLM does not invoke a procedure but it rather invites an exchange with the authorities. In this way, it implicitly declares its standing, as a representative of Black people. The authorities – those responsible for the institutional racism and violence of the police – are singled out as the appropriate addressees in this specific case. Crucially, BLM is moved to speak out of passion: the anger and sadness caused by the injustice suffered by Black people for centuries. Accordingly, “No Justice, No Peace” is exactly a demand or claim in kind, one that the authorities are moved to offer, now. Finally, the invitation to exchange may be contested or denied by the addressee. Both reactions have been seen as a response to BLM.58 There were also some more hopeful signs that a process of moral education has started, for instance when the BLM-protests in the U.S. sparked similar gatherings around the globe where also white people joined. As the slogan meets all the conditions, we may conclude that it indeed constitutes a passionate utterance in the sense of Cavell.

### 4. Institutional Racism and the Blind Spot of Legal Order

#### 4.1. Making a Claim

Aletta Norval points out the political value of Cavell’s passionate utterances by interpreting them as acts of claim-making, opening the space where new claims may be heard.59 Making a claim is of pivotal importance for it

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52 Cavell 181–182.
53 Cavell 183.
54 Cavell 184.
55 Cavell 184–185.
56 Cavell 187.
57 Cavell 185.
58 Havercroft and Owen 750–755.
59 Norval, “Passionate Subjectivity, Contestation and Acknowledgement: Rereading Austin and Cavell” 164.
tells us something about the character of the community invoked and contested. It implies relations of equality, and not only of equivalence. It characterizes the place of assent and dissent as internal to the constitution of a democratic community. And it provides us with a clear account of the place of the individual within the account of community, and the responsibility of each for his or her claims.  

More critically, she also points out how Cavell’s distinction between the conventional (law) and the unconventional (desire) is too strict and is mitigated at other points in his work.  

Norval highlights the following characteristics of passionate utterances: (1) the absence of conventional procedures (thus giving space to every kind of political claim or demand); (2) the fact that neither speaker nor addressee are specified in advance (thus making it dependent upon the acknowledgement of the addressee whether or not (s)he is convinced and making the relationship between the “I” and the “You” dependent upon the expression of this identity); and (3) that everything may be contested within this process (thus ensuring that identity remains dependent on the process of response and revocability where no last word exists). Demanding a response makes a difference because a new terrain for claims and counter-claims is opened and remains open. What is at play in making claims is not so much relying on a given community but rather the invocation and founding of community. Norval stresses that responding in this sense does not presuppose a shared “humanity”. Crucial is this elemental responsiveness: both the individual responsibility for claims and the fact that in every claim a community is invoked.  

Reading “No justice, peace” as a passionate utterance unlocks the significance of the slogan as a cry testifying to an injustice that cannot be caught in legal terms alone. Passion refers to suffering. Yet, interestingly, whereas suffering has all too often simply been juxtaposed to action and even to politics, interpreting “No justice, No peace” as a passionate utterance means taking its political dimension seriously. Here, “political” does not stand in opposition to law but encompasses and goes beyond law. The passionate utterance is the first move in an ongoing exchange for which no clear endpoint exists. Uttering words is an important act, since speaking – even if speech is not everything – is important under conditions of forced speechlessness. Under such circumstances, speaking may become an act of resistance.  

BLM did not, however, simply address the authorities. With “No Justice, No Peace”, BLM presented a claim to the legal order. As one legal scholar has pointed out:  

Black Lives Matter marches across the world recently have brought into stark relief the plight, anger and demands of people of colour when exposed to justice systems which  

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60 Norval, Aversive Democracy 179.  
61 Norval, “Passionate Subjectivity” 174–175.  
63 Norval, “Passionate Subjectivity” 176.  
64 Norval, Aversive Democracy 173.  
65 Norval, Aversive Democracy 171.  
66 Norval, Aversive Democracy 171.  
67 Cavell 155–156.  
68 Cavell 183–184.  
69 Cavell 179.
continue to disproportionately arrest them, punish and imprison them – and ultimately kill them.\textsuperscript{70}

Yet, this justice system does not stand on its own but exists in a discriminatory climate.\textsuperscript{71} In settler-societies, such as the US, cultural violence prevails in the discriminatory prejudices and racial stereotypes that govern society.\textsuperscript{72} Black people are being persecuted by a criminal justice system that presupposes their inferiority.\textsuperscript{73} The lives of Black Americans are not valued at the same level as those of white Americans and their citizenship does not count in the same way.\textsuperscript{74} Being “white” is the norm upon which American society, the legal order and its institutions are built.\textsuperscript{75} We may speak of separate legal regimes for Black Americans on the one hand and white Americans on the other hand: in practice, the law is simply not the same for these groups.\textsuperscript{76} As a result, a gap remains between the formal legal principle of equality and the concrete freedom of self-determination and it is this that gives way to the ongoing state of injustice and inequality of Black Americans.\textsuperscript{77}

\textbf{4.2. The Order and the Alien}

To develop a deeper understanding of the nature of BLM’s claim vis-à-vis the legal order, I draw on the responsive phenomenology of Bernhard Waldenfels. Interestingly, Waldenfels devotes ample attention to the phenomenon of order. The pre-modern order of the cosmos has no outside.\textsuperscript{78} The cosmos is a total order in which everything forms part of one integrated whole.\textsuperscript{79} In contradistinction to this complete order, any legal order is a modern order in the specific sense of a bounded whole. Legal orders come about by way of a process of self-inclusion and exclusion wherein “the own” is delineated by drawing boundaries. Hence, the establishment of modern (legal) orders should be interpreted from a first-person perspective, as a process of self-establishment. Drawing boundaries (1) hides the act of drawing from the order drawn, as an origin that cannot fully be recovered and (2) comes about from an inside distinguishing itself from an outside, thus giving rise to a “preference in the difference”.\textsuperscript{80}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{70} Auty 317.
  \item \textsuperscript{71} Taylor 217.
  \item \textsuperscript{72} Shaw and Kidwai: “Cultural violence is prevalent in these societies. It occurs when certain beliefs become so deeply embedded within the fabric of a society that they are uncritically reproduced throughout generations. The perception that the non-whites are primitive and intellectually inferior to the Caucasians has carried well into the 21st century. The discrimination faced by the descendants of the former slaves and the first generation of non-white immigrants attests to that. In turn, direct and structural violence that diminishes their (out-group) capacity to access essential services and resources otherwise granted to the privileged group (in-group), continues to occur. They are a subsequent impact of the cultural violence which normalises the racial stereotypes and subsequently results in the dehumanisation of a given community.”
  \item \textsuperscript{73} Taylor 3.
  \item \textsuperscript{74} Taylor 108.
  \item \textsuperscript{75} Mills; Gatta 4–5.
  \item \textsuperscript{76} Taylor 150. Since I will introduce the notion of a legal order in the next sub-section, it is important to clarify that with “legal regimes” I mean different ways in which people or groups of people are treated without a good legal reason to account for this difference in treatment. The whole point of the argument here is that different legal regimes – for white and Black Americans – exist within one and the same legal order – that of the U.S. This is exactly (legal) institutional racism.
  \item \textsuperscript{77} Taylor 192.
  \item \textsuperscript{78} Waldenfels, \textit{Phenomenology of the Alien: Basic Concepts} 10.
  \item \textsuperscript{79} Waldenfels, \textit{Order in the Twilight} 53–54.
  \item \textsuperscript{80} Waldenfels, \textit{Phenomenology of the Alien: Basic Concepts} 15.
\end{itemize}
\end{footnotesize}
The self-establishment of orders marks them as radically contingent: they can always be different from what they are. This gives every order something arbitrary that points to a blind spot of the order, i.e. “something unordered that does not merely constitute a deficit.”

What is excluded from the order of the self is the strange or the alien. The alien questions the own giving rise to a need to respond. Discarding both a relation of causality and the intentionality that is central to classical phenomenology, Waldenfels develops a responsive phenomenology. Here, the order of the self responds to the questioning of the alien, as it is affected by it. In this respect, Waldenfels is close to Levinas when he speaks of a radical or original passivity. Importantly, the call of the alien is of a double nature presenting both “an appeal that is directed at someone and a claim or pretension to something”. As a claim, the call corresponds to a certain content. Yet, responding cannot be exhausted by this. For as an appeal, the call is creative and singles me out as responsible. As a result, responding involves meeting the alien’s call, thus giving rise to a “response logic.”

4.3. BLM’s Call to the Legal Order

I argue that “No Justice, No Peace” can be understood as a passionate utterance that is a call to the legal order, in the specific sense developed by Waldenfels. As a claim, the call points to a content: justice and peace. Yet, these go beyond the legal interpretations, as the claim is intertwined with the appeal. In this sense, “No Justice, No Peace” seems to be both a cry telling the injustice of institutional racism and a call for peace and justice. Legal justice bears its own injustice in not taking into account the given inequalities between white Americans on the one hand and Americans of colour on the other. The abstract equality of the law is always instituted in a process that equalizes what is not equal.

In a similar way, the civil peace presupposed by criminal law executed and enforced under the rule of law has its own blind spot. It does not recognize that the US civil order is out of joint: there is a fundamental disorder in American society which is the institutional racism that lies at the basis of police violence against Black Americans:

The [BLM] movement has shown that violent policing does not exist in a vacuum: it is a product of the inequality in our society. The police exert their authority in a fundamentally disordered society. The clearer we can see these threads connecting police mayhem to the disorder in our society, the clearer we can express our need for a different kind of world.

81 Waldenfels, Phenomenology of the Alien: Basic Concepts 11.
82 Waldenfels, Phenomenology of the Alien: Basic Concepts 13. For the notion of a blind spot of legal order, see also Hans Lindahl 248.
83 Waldenfels, Phenomenology of the Alien: Basic Concepts 16.
84 Menga 11: “[T]he alien (...) can be conceived of as the extra-ordinary, which exceeds, surmounts and, therefore, can constantly put into question the order itself, by maintaining alive its contingent structure and its impossibility to give itself as a totality.”
86 Waldenfels, Phenomenology of the Alien: Basic Concepts 29.
87 Waldenfels, Phenomenology of the Alien: Basic Concepts 37.
89 Waldenfels, Phenomenology of the Alien: Basic Concepts 38.
90 Waldenfels, Order in the Twilight 56.
91 Taylor 217.
The rejection of the current order and the wish for “a different kind of world” entails that BLM’s claim goes beyond the liberal logic of inclusion of Black lives among those that count and actually argues that in American society today Black lives have no value. Danielle Allen points this out very powerfully:

This discourse of exclusion and inclusion has for a long time been the basic strategy for dealing with the failings of liberalism’s supposed commitments to universal rights. When universal institutions prove to be otherwise, get everyone included and then we can move on with our lives. But two generations of scholarship in history and political philosophy have shown that the inclusion/exclusion paradigm is inadequate to reality. Our problem is not exclusion, to be solved by inclusion. Our problem is domination, to be solved by non-domination. Liberal institutions in America were built on documents and principles that provided liberty for some and domination for others. These differential statuses were not accidentally but intrinsically connected to each other.

Liberalism, and one could argue that the same goes for the ideal of the rule of law, is predicated on the logic of casting problems in terms of exclusion (of certain rights) and solutions in terms of ever more inclusion. This conceptual framework fails to grasp institutional racism for the strict dichotomy of inclusion and exclusion misrecognizes that Black Americans are included within the legal order but as less worthy of protection and at the same time excluded from the political ideals of freedom and equality that lie at the basis of the order. Situated in a parallel legal universe, Black Americans are aliens within their own country. This is what BLM tries to articulate in the slogan “No Justice, No Peace”.

5. Conclusion

In this article, I have taken my cue from the well-known slogan “No Justice, No Peace” in order to investigate the claim that BLM makes on the (US) legal order. In the first section, I have argued that the framework of the rule of law gives us a powerful set of concepts to analyse what went wrong when George Floyd was arrested and murdered. Yet, I rejected a reading that would reduce justice and peace to legal categories. With Cavell, I developed a reading of the slogan as a passionate utterance and a claim to the legal order. Drawing on Waldenfels, I argued that this claim of BLM is “out of place”: Black Americans are aliens in their own legal order. Furthermore, BLM’s claim shows the blind spot of the US legal order: its peace and justice are founded on the disorder and injustice of institutional racism.

Tackling the problem of institutional racism goes beyond the legal vocabulary of the rule of law. The claim of BLM cannot be understood solely in terms of equal rights and equal legal protection in the event of violation of those rights, however important these are. Institutional racism appears as a form of injustice that damages the being of its victim at the most basic level. BLM describes the experience of institutional racism: we experience no justice and no peace as long as the injustice of racism continues to exist. BLM’s cry is of one who knows of No Justice, No Peace, who is suffocated and made speechless. Beyond the legal forms of justice and peace that the rule of law can offer, BLM seeks

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92 Gatta 2–3.
93 Allen.
94 For a similar argument in international politics with regard to the notion of humanity, see Graf.
“Black liberation” that does not simply aim for the revision of one single institution.95 In that respect, it is important to stress that BLM is not about “defund the police” only, however important fundamental changes to that institution are.96 Rather, the reconstitution of the whole social order is called for.97

An American legal scholar, writing just after the murder of George Floyd, has pointed out how BLM’s protests signal a lack of trust in the American justice system and between different groups in society.98 This is another reason why politicians struggle when they are confronted with BLM. As the reaction of several politicians shows, the response to BLM is usually one of embarrassment, indignation, or even anger.99 This lack of trust connects immediately to the vulnerability of the Black body as it is attested to on basically every page of Between the World and Me.100 In order to establish lasting trust, next to punishing those responsible for Floyd’s murder, what is needed is a process of transitional justice in which truth telling and reparations take central stage.101 How such a process would look like falls outside of the scope of this article. Nevertheless, it is obvious that there are no simple and quick fixes for the enduring problem of institutional racism. What is needed are continuous efforts to seek for solutions together with victims and survivors, while listening to their specific needs and wishes. Only in this way, justice and peace will stand a chance.

Acknowledgements

Earlier versions of this article were presented at the Conference “Confronting Discrimination: Phenomenological and Genealogical Perspectives” at the Department of Philosophy, University of Innsbruck (online) in October 2021 and at the Conference “People on Streets. Critical Phenomenologies of Embodied Resistance” at Paderborn University in May 2022. I am grateful to audiences at and organizers of both conferences for their remarks and questions, and especially to Marieke Borren and Maria Robaszkiewicz for including my contribution in this special issue. Many thanks also to the two anonymous reviewers of this journal for their very helpful comments. Any remaining mistakes are entirely my responsibility.

Disclosure Statement

No potential conflict of interest was reported by the author(s).

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95 Taylor 194: “Perhaps at its most basic level, Black liberation implies a world where Black people can live in peace, without the constant threat of the social, economic, and political woes of a society that places almost no value on the vast majority of Black lives. It would mean living in a world where Black lives matter. While it is true that when Black people get free, everyone gets free, Black people in America cannot “get free” alone. In that sense, Black liberation is bound up with the project of human liberation and social transformation.”

96 “BLM Demands”. For a concise and critical overview of the law on police force in the United States and recommendations for change, see Garret and Slobogin, “The Law on Police Use of Force in the United States.”

97 Allen: “In order to achieve our egalitarian aspirations, we need not so much include the excluded as reconstitute our social order. In this sense our project is no longer one of racial justice, of fixing something for a part of the population, as the image of inclusion suggests. Instead we need an egalitarian order for everyone.”

98 McGonigle Leyh.

99 Havercroft and Owen 750–755.

100 Coates, Between the World and Me.

101 McGonigle Leyh.
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