

PUBLIC ORDER, PUBLIC PROTEST AND PUBLIC MONUMENTS

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Much public protest in recent years has been directed towards monuments to controversial figures who have profited from the slave trade or other exploitative activities. The most striking example in the United Kingdom has been the fate of the four individuals accused of damaging the statue to Edward Colston in Bristol as part of a Black Lives Matter demonstration. This article examines the arguments relied on by the defence at trial and in the Attorney-General's Reference which followed their acquittal. The article begins by setting protest relating to public monuments in its international and historical context.

I INTRODUCTION

This article will use the recent prosecutions following the forceful removal of the statue of Edward Colston in Bristol as a way of considering broader controversies over reliance on the criminal law to punish those who damage, remove or destroy monuments or other cultural property as part of public protest.¹ The link with Tony Smith's scholarship is obvious: Tony has made an immense contribution to our understanding of the law of both public order and criminal damage.²

In Part I of this article, I set out a working definition of monuments and other cultural property and then say something about the history of those who have damaged or destroyed them. The Colston trial and the Court of Appeal's clarification of the role of the European Convention on Human Rights (ECHR) in prosecutions relating to public protest law (following the acquittal of the Colston defendants) form the substance of Part II. Part III draws some final conclusions from the trial and its aftermath.

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1 The background to the removal of the Colston statue is described below nn 36–39 and associated text.

2 ATH Smith *The Offences Against Public Order* (Sweet & Maxwell, London, 1987), described by David Bonner in his review in [1988] PL 480 at 482 as: "a real *tour de force*, destined, one feels, to become the 'bible' in this area". And so, one might say, it came to pass. See ATH Smith *Property Offences: The Protection of Property Through the Criminal Law* (Sweet & Maxwell, London, 1994) at [27-68]–[27-70], where Tony analyses a number of cases in which criminal damage was caused during public protest.

II DEFINITIONS AND CONTEXT

It is fairly straightforward to define what we mean by a monument: it is a symbolic object intended to commemorate a person, group or event. As a matter of ordinary language, it is narrower than the term "memorial" which can additionally apply to, say, a silent vigil or a march.³ However, the United Kingdom Parliament has chosen to use the term "memorial" in the primary legislation passed following (and in consequence of) the Colston acquittals and to define it as:⁴

- (a) a building or other structure, or any other thing, erected or installed on land (or in or on any building or other structure on land), or
- (b) a garden or any other thing planted or grown on land,

which has a commemorative purpose.

According to the Act, something has a "commemorative purpose" if one or more of its purposes is to commemorate one or more individuals (whether alive or identifiable or not), animals or an event. Monuments (like memorials) vary considerably: from a modest English Heritage blue plaque on the wall of a London townhouse to vast physical structures such as the Voortrekker Monument outside Pretoria or Nelson's Pillar on O'Connell Street in Dublin (before the Golden Jubilee of the Easter Rising, that is, when it was blown up).

The subject matter of this article is not confined to monuments or memorials and extends to other tangible examples of artistic expression which are not designed to commemorate an individual or event, but have become the focus of damage or protest for other reasons.⁵ The Hague Convention of 1954 defines cultural property to include:⁶

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- 3 To lawyers, the term "memorial" also has an entirely distinct meaning as a written summary of a party's legal argument. In England and Wales, the more usual term for such documents is "skeleton argument" (for example, Civil Procedure Rules 1998, Practice Direction 52A, r 5). Judicial reaction to skeleton arguments is mixed: Lord Bingham CJ once adopted one of Edward Fitzgerald KC's as his judgment (Tom Allen "A Radical Lawyer in Action" *Counsel* (online ed, United Kingdom, 28 February 2010)); at the other end of the scale, Jackson LJ described the skeleton argument filed by the unfortunate Adam Tear, a solicitor advocate, as "35 pages of rambling prolixity" in *Inplayer Ltd v Throrogood* [2014] EWCA Civ 1511 at [56].
 - 4 Police, Crime, Sentencing and Courts Act 2022 (UK), s 50 inserts new subsections (11A)–(11D) in the Magistrates' Courts Act 1980 (UK), s 22. This definition goes on to explain that something left at, or on, a memorial if it also has a commemorative purpose is to be regarded as a memorial in itself. The Act gives as an example "a bunch of flowers" which, I assume, is the only time that concept has been enshrined in English legislation. The amendment is addressed further at n 29 below.
 - 5 The definition of a memorial does not cover artworks, which may explain why Louis McKechnie and Emily Brockbank appeared before Westminster Magistrates' Court for gluing themselves to the frame of Van Gogh's *Peach Trees in Blossom* at the Courtauld Gallery in London on 30 June 2022. They were both convicted of criminal damage.
 - 6 The Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 249 UNTS 240 (opened for signature 14 May 1954, entered into force 7

... movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest ...

An obvious example of an attack on cultural property was that on the depiction of *The Toilet of Venus* (painted by Diego Velázquez and generally known as the *Rokeby Venus*) in the National Gallery in London in 1914. The *Rokeby Venus* was attacked with a machete by Mary Richardson in support of the women's suffrage movement and in protest at Emmeline Pankhurst's imprisonment.⁷

As to the history of damage deliberately done to monuments and other art, it is difficult to say anything sensible by way of summary since it stretches back beyond the Classical era and covers such a great range of motivations and forms of action. Dario Gamboni identifies the "major moments of iconoclasm" which have been the subject of critical analysis as "Byzantium, then the Reformation, then ... the French Revolution" and after that the Nazi persecution of *Entartete Kunst* or "degenerate" art.⁸ While these may be the "major moments", the history of damaging art and monuments extends

August 1956) was spurred, in particular, by the destruction caused by the German bombing of Reims Cathedral and the Library at Louvain: Dario Gamboni *The Destruction of Art—Iconoclasm and Vandalism since the French Revolution* (Reaktion Books, London, 2018) at 53–56. The definition applies "irrespective of origin or ownership". The definition of a work of art in the old Malicious Damage Act 1861 (UK) 24 & 25 Vict c 97, s 39 (see further at n 27 below) was comprehensive and applied to anyone who damaged or destroyed:

... any Book, Manuscript, Picture, Print, Statue, Bust, or Vase, or any other Article or Thing kept for the Purposes of Art, Science, or Literature, or as an Object of Curiosity, in any Museum, Gallery, Cabinet, Library, or other [public] Repository, ... or any Picture, Statue, Monument, or other Memorial of the Dead, painted Glass, or other Ornament or Work of Art, in any Church, Chapel, Meeting House, or other Place of Divine Worship, ... or to any University, or College or Hall of any University, or to any Inn of Court, or in any Street, Square, Churchyard, Burial Ground, Public Garden or Ground, or any Statue or Monument exposed to Public View, or any Ornament, Railing, or Fence surrounding such Statue or Monument ...

- 7 Lena Mohamed "Suffragettes: The Political Value of Iconoclastic Acts" in Tabitha Barber and Stacy Boldrick (eds) *Art Under Attack: Histories of British Iconoclasm* (Tate Publishing, London, 2013) 114 at 124–125 discussed further below. The popular name of the work comes from the fact that it hung from 1813 in Rokeby Park, County Durham (later the family home of Sir Andrew Morritt, Chancellor of the High Court of England and Wales in the early part of this century).
- 8 Gamboni, above n 6, at 12. David Freedberg *Iconoclasm* (University of Chicago Press, Chicago, 2021) has chapters on "Art and Iconoclasm, 1525–1580: The Case of the Northern Netherlands" and "The Structure of Byzantine and European Iconoclasm". As to the Reformation in England, see generally Eamon Duffy *The Stripping of the Altars* (2nd ed, Yale University Press, New Haven, 2005); and Margaret Aston *Broken Idols of the English Reformation* (Cambridge University Press, Cambridge, 2015) which carries the story into the 17th century. The methods used by Reformation iconoclasts varied very considerably from the stripping of the altars to undermining the spiritual power of objects by giving them to children as toys: Joe Moshenska *Iconoclasm as Child's Play* (Stanford University Press, Redwood, 2019).

at least as far back at Ancient Egypt. Egyptian rulers were well known for effacing the monuments of such of their predecessors as they disliked or had fallen out of general favour.⁹ Another motive was to re-dedicate a monument to their own glory without being put to the expense of having to build the thing from scratch.¹⁰ That tendency spread through the Classical World. One of the greatest surviving monuments in Rome, the Arch of Constantine, is mostly decorated with panels and roundels removed from earlier monuments to Trajan, Hadrian and Marcus Aurelius, with the earlier emperors' faces re-carved.¹¹ Such conduct is an example of what Martin Warnke has called iconoclasm "from above": where those in power destroy or remove what was there before (sometimes replacing it with a monument to themselves).¹² The contrast is with iconoclasm "from below" which does not traditionally lead to replacement and is, by definition, more likely to be prosecuted by the state.¹³ Iconoclasm from below is therefore of greater relevance to this discussion.

The motives of those who destroy or damage monuments "from below" is almost as varied as the range of historical examples: from those caught up in popular revolutionary movements to the

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- 9 Although it does not pretend to be a historical record, Act Three of Philip Glass' opera, *Akhnaten* (1984), depicts the destruction of the royal palace complex at Amarna (which symbolised the Pharaoh's attempt to impose the monotheistic worship of Aten on the polytheistic Egyptian people) and the restoration of the Temple of Amun after Akhnaten's death. The eponymous Pharaoh was also known as Akhenaten or Amenhotep IV.
- 10 Rameses II was notorious for re-dedicating monuments to his own military (or just general) glory and in seeking to protect his own monuments from later adaptation by insisting that the reliefs and lettering be more deeply carved into the stone than was the tradition up to that time: Penelope Wilson "Naming names and shifting identities in ancient Egyptian iconoclasm" in Jeff Johnson and Anne McClanan (eds) *Negating the Image: Case Studies in Iconoclasm* (Ashgate, Farnham, 2005) 113.
- 11 Bente Kiilerich "Defacement and Replacement as Political Strategies in Ancient and Byzantine Ruler Images" in Kristine Kolrud and Marina Prusac (eds) *Iconoclasm from Antiquity to Modernity* (Ashgate, Farnham, 2014) 57 at 64–67; and Mary Beard *SPQR—A History of Ancient Rome* (Profile Books, London, 2015) at 534. Marcus Aurelius may have been posthumously appeased by the fact that the great bronze equestrian statue of him which now graces the Capitoline Museum in Rome only escaped destruction by zealous Christians because it was thought to be of Constantine (regarded as the first Christian Emperor): see generally Catherine Nixey *The Darkening Age: The Christian Destruction of the Classical World* (Macmillan, London, 2017) at 91–117.
- 12 Martin Warnke "Bildersturme" in Martin Warnke (ed) *Bildersturm: Die Zerstörung des Kunstwerks* (Fischer Taschenbuch Verlag, Frankfurt, 1988) 7 at 11. Gamboni distinguishes iconoclasm from vandalism on the basis that iconoclasm "implies an intention, sometimes a doctrine": Gamboni, above n 6, at 23.
- 13 Unusually, a little over a month after the toppling of the Colston statue, the artist Marc Quinn installed his resin and steel sculpture *A Surge of Power (Jen Reid) 2020* on the vacant Colston pedestal. Jen Reid was one of the protestors on 7 June who had mounted the pedestal and made the black power salute of the raised right fist. The statue was removed the next day by, and at the expense of, the Council. The state's reaction to the actual or proposed destruction of monuments "from below" is not always prosecution: the Nazis in 1938 Germany proposed a law which would have provided that the theft (and presumably subsequent destruction) of "degenerate" art from public institutions was legally acceptable: Neil MacGregor *Germany—Memories of a Nation* (Penguin Books, London, 2016) at 451.

individual and delusional.¹⁴ As Gamboni said of the French Revolution: "desecrating images contributed to the delegitimization of the King before his eventual elimination".¹⁵ On the other side of the line fall those who act for self-aggrandisement or out of psychosis. Herostratus is said to have set fire to the Temple of Artemis in Ephesus in 356 BCE in order that "his name might be spread throughout the whole world".¹⁶ More recently, Laszlo Toth who attacked Michelangelo's *Pieta* with a hammer in 1972 and the individual who set about Rembrandt's *The Night Watch* in the Rijksmuseum with a knife in 1975 exclaimed "I am Christ" and "I am the Messiah" as they wielded the hammer and the knife respectively.¹⁷

Another motivation for iconoclasm (or a defence or limitation to it) is aesthetic. For example, during the Paris Commune in 1871, a crowd pulled down the column in the Place Vendome which Napoleon I had built on the model of Trajan's Column (modestly surmounted by a statue of himself). The painter Gustav Courbet had repeatedly called for the statue to be pulled down as a symbol of militarism. After the violent suppression of the Commune, Courbet sought to defend his incitement in part on the basis of the low aesthetic value of the column. The Third Republic showed itself unsympathetic to that argument by ordering him to pay 323,091 gold francs for its reconstruction.¹⁸ The Bolshevik Revolution of 1917 provides a further example in the form of Lenin's decree of 12 April 1918 that monuments to Tsars and their servants should be removed unless they were of artistic or historical value.¹⁹ Presumably, Falconet's magnificent equestrian statue of Peter the Great which has stood in St Petersburg since 1782 qualified for preservation on both counts.²⁰

14 Freedberg has a chapter on "Iconoclasts and Their Motives" in *Iconoclasm*, above n 8, at 133–150.

15 Gamboni, above n 6, at 39.

16 The quotation comes from Valerius Maximus *Memorable Doings and Sayings* (DR Shackleton Bailey (ed, translator), Harvard University Press, Cambridge, 2000) vol 2(8).

17 Toth may have felt a sense of urgency as he was shortly to turn 34: "a serious drawback for his identification with Christ": Gamboni, above n 6, at 249. Freedberg notes that the attack on *The Night Watch* may also have been related to a religious sense of good and evil: the attacker stated that he identified Rembrandt as the master of light, but that in *The Night Watch* the artist was under the influence of the dark (evil): Freedberg, above n 8, at 141.

18 Gamboni, above n 6, at 50–52. Depending on how you look at it, it was not quite as bad for Courbet as it appeared as he died before he was required to pay a *sous* of the fine.

19 At 67–68. Interestingly, under the decree, those statues removed were to be either stored or re-purposed and not destroyed.

20 As well as being the inspiration for Pushkin's narrative poem, *The Bronze Horseman* (1833), the statue later became the symbol of the freedom of the city and was heavily protected with sandbags during the 900-day siege of Leningrad (as it then was) during the Second World War. Peter the Great has been memorialised again in post-Soviet Russia in the unwelcome form of a colossal statue designed by Zurab Tsereteli which was erected in Moscow in 1997 to represent his founding of the Russian navy: it is the eighth highest statue, and has been voted the tenth ugliest building, in the world.

An extreme version of the aesthetic reaction to monuments is the sexual: the classic (and classical) example of which is the sculpture known as the Aphrodite of Knidos, generally ascribed to Praxiteles. It is said that the statue proved so irresistible in its then novel depiction of female nudity that one admirer left what Pliny described as the "tell-tale stain of desire" on the marble.²¹ An altogether more English reaction was that of the two ladies who were said to have been so offended by the size and prominence of the angel's testicles on Jacob Epstein's tomb for Oscar Wilde in the Pere Lachaise cemetery in Paris that they hacked them off and presented them to the *gardien* (who was said to have used them as a paperweight for several years).²²

Motive is not traditionally regarded as relevant to criminal liability, but it may be an important part of the legal context in cases of iconoclasm where the defendants rely on the fact that they were exercising their rights to freedom of expression or freedom of assembly. This creates a further problem of how to determine the defendant's motive. Mary Richardson explained her motivation shortly after her attack on the *Rokeby Venus* in the following terms:²³

I have tried to destroy the picture of the most beautiful woman in mythological history as a protest against the government for destroying Mrs Pankhurst, the most beautiful character in modern history. Justice is an element of beauty as much as colour and outline on canvas.

Yet, in an interview in 1952, she added a further (and very different reason) for her conduct: "I didn't like the way men visitors gaped at it all day long".²⁴ This illustrates the importance of retaining some scepticism about the accounts of their motivation provided by the attackers themselves. They may have many reasons for seeking to rationalise their motives retrospectively, particularly if they are facing prosecution and hope to bolster their defence.²⁵

The punishments handed to those who have damaged or destroyed monuments have also varied considerably. Herostratus was sentenced to death and oblivion (the *damnatio memoriae*). The severity of that sentence was undermined by the fact that he remained well known throughout antiquity and

21 Pliny the Elder *Natural History* (David Eichholz (translator), Harvard University Press, Cambridge, 1962) vol 2(36) at 22, described in Nigel Spivey "Revealing Aphrodite" in *Understanding Greek Sculpture* (Cambridge University Press, Cambridge, 2013) 173. This would certainly fulfil the legal definition of damage as anyone who has ever attempted to remove a liquid stain from marble would attest. David Freedberg devotes a chapter to "Arousal by Image" in *The Power of Images: Studies in the History and Theory of Response* (University of Chicago Press, Chicago, 1989) 317.

22 Gamboni, above n 6, at 187–188.

23 *The Times* (11 March 1914) at 9.

24 Lynda Nead *The Female Nude: Art, Obscenity and Sexuality* (Routledge, London, 1992) at 34–40.

25 Two of the Colston defendants gave no comment interviews to the police on arrest, but then relied on a number of beliefs which they claimed to have motivated their conduct (at the time) as a defence. The Judge's directions to the jury are appended to Charles Wide "Did the Colston trial go wrong? Protest and the criminal law" (Policy Exchange, 2022) Appendix A at 33–34.

that his name has now been given to a syndrome applied, among others, to those responsible for the terrorist attacks in the United States on 11 September 2001.²⁶ Sentencing did not, of course, arise in the Colston case, but the appropriate punishment for damage to works of art has been controversial in England for at least a century. In sentencing Mary Richardson to six months' imprisonment for her attack on the *Rokeby Venus*, the trial Judge lamented that this was the maximum permitted for the offence of damaging a work of art in a public museum under s 39 of the Malicious Damage Act 1861 (UK).²⁷ As the Judge said, if she had broken a window instead of damaging a masterpiece, he could have sent her to prison for three times as long.

The example of the Lenin decree of 1918 raises the question of whether a less tolerant approach to prosecution and/or more serious punishment is appropriate for those who have damaged a work of great artistic value. There is an obvious risk of relativism in introducing an aesthetic standard, but the alternative of saying that Laszlo Toth's attack on the *Pieta* was no more serious than that carried out by the Colston defendants is counter-intuitive.²⁸ The Criminal Damage Act 1971 (UK) avoids such issues by calibrating the value of a damaged object by the philistine yardstick of its market value—and by the cost of repair where an object is damaged.²⁹ This may disguise the extent to which the impact of damage to a monument extends beyond the interests of the owner and anything that can be calibrated in financial terms. There may be a significant aesthetic loss to the public in general in the contemplation of a work of art that has been damaged even if the damage is not visible to the naked eye after restoration because the viewer knows that, say, the brush strokes are no longer all those of the original artist.³⁰ The Hague Convention captures something of this in its Preamble which states:

26 Albert Borowitz *Terrorism for Self-Glorification: The Herostratus Syndrome* (Kent State University Press, Kent, 2005) at 4–9.

27 The 1861 Act created 50 distinct offences of criminal damage with some very fine distinctions being drawn: for example, between setting fire to stacks of corn as opposed to crops of corn.

28 The Colston statue could not be described as a great work of art. English Heritage listed the Colston statue, in part, on the basis of its "group value with other Bristol memorials": Historic England "Statue of Edward Colston" <<https://historicengland.org.uk>>. We may have reacted differently if the protestors had damaged the monument to Colston in All Saints Church (just around the corner from the now empty pedestal), dating from a century and a half earlier and by the more skilled hand of John Michael Rysbrack.

29 *Cox v Riley* (1986) 83 Cr App R 54 (Divisional Court) at 57; and *R v Henderson and Battley CA* (Crim), 29 November 1984. The cost of the damage caused is also relevant generally to the mode of trial (with damage valued at less than £5,000 generally meaning a summary trial: Magistrates' Courts Act 1980 (UK), s 22 and sch 2). The 2022 amendment (see above n 4) makes trial on indictment mandatory for all cases involving damage to memorials.

30 There is a great debate, of course, among art historians about how much of a given work of art can be attributed to the named artist, rather than their studio or even later restorers. A further strand of recent art criticism is that iconoclasm should not be regarded as purely destructive but as generating new meaning in a piece. Stacey Boldrick argues that the cleaver marks left by Mary Richardson in the *Rokeby Venus* may themselves be a form of art: Stacey Boldrick *Iconoclasm and the Museum* (Routledge, London, 2020) at 5–9. That argument

"that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind". The loss of a monument to an individual may also have more immediate impact, the power of which is captured by Eamon Duffy in this passage from his description of the English Reformation:³¹

... the stripping away of the externals of Catholic worship between 1547 and 1553 must often have had a profound if not always conscious effect. Whether done under official pressure or not, the removal of the images of the saints, of the altars, and perhaps most of all the brasses and obit inscriptions calling for prayers for the dead, which were ripped up from gravestones and sold by the hundredweight from 1548 onwards, were ritual acts of deep significance. Like the silencing of the bede-rolls, the removal of the images and petitions of the dead was an act of oblivion, a casting out of the dead from the community of the living into a collective anonymity.

A further set of interests are those of the artist and their successors. Article 6 of the Berne Convention gave the creator of a work the right "to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation".³² An example of the assertion of the artist's right to object to the removal of a statue he created is provided by Nicolai V Tomsy's statue of Lenin in the former Leninplatz, Berlin. After the reunification of Germany, the Berlin authorities proposed that the statue should be removed (and the square renamed). Tomsy's widow sought unsuccessfully to challenge the decision: the Berlin City Court ruled that Tomsy's interest in his work had to yield to the city's interest in removing the monument as a scandalous symbol of an absolute system. The Court considered the weight to be attached to Tomsy's interests was diminished by the fact that he had placed his art "in the service of a propagandist hero cult".³³

III THE COLSTON TRIAL AND THE ATTORNEY'S REFERENCE

Against this background, the facts leading to the Colston trial can be briefly summarised.³⁴ There had been a statue commemorating Edward Colston in the centre of Bristol from 1895 until 7 June 2020 when it was pulled down and rolled into Bristol harbour as part of an otherwise peaceful protest

is weak in relation to the *Rokeby Venus*, but unanswerable in relation to the Colston statue because of Bristol Council's reaction to the protest.

31 Duffy, above n 8, at 494.

32 Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 as amended by the Paris Act 1161 UNTS 3 (opened for signature 24 July 1971, entered into force 15 December 1972).

33 Anna Saunders *Memorializing the GDR: Monuments and Memory after 1989* (Berghahn Books, New York, 2018) at 68–72; and Gamboni, above n 6, at 97–104.

34 *Attorney General's Reference on a Point of Law (No 1 of 2022)* [2022] EWCA Crim 1259, [2023] 1 Cr App R 1 [*Attorney's Reference*] at [5]–[10].

organised by the Black Lives Matter movement.³⁵ Colston was born in Bristol in 1636 and accumulated a very substantial fortune, in part from his shareholdings in the Royal African Company which enjoyed a monopoly on English trade with Africa until 1688. Colston therefore profited heavily from the Transatlantic slave trade. Colston died without heirs in 1721 and his substantial fortune was put to philanthropic use in founding schools, alms houses and other charitable projects.³⁶

As a result of these philanthropic activities, Colston was commemorated in the names of streets, Bristol's main concert venue as well as commercial buildings and public houses. However, Colston had to wait until 1895 before a statue was erected on his eponymous Avenue and then as a result of a private initiative by the publisher James Arrowsmith, rather than an act of the Bristol Corporation (as the local authority was then called). The statue was cast in bronze by the sculptor John Cassidy and with its pedestal and plinth reached a height of over six metres. The inscription on a bronze plaque on the pedestal made no mention of his involvement with the slave trade and described Colston as "one of the most virtuous and wise sons" of the city. English Heritage (now Historic England) decided in 1977 that the statue should be listed Grade II.

The protest on 7 June 2020 attracted more than 10,000 demonstrators, most of whom had peacefully passed the statue when a group (including three of the four defendants in the trial) congregated around the statue. Two of the defendants had brought ropes with them which they and others used to topple the statue and its plinth. The prone statue was then sprayed with red paint and others (including the fourth defendant) rolled it several hundred yards before it was pushed into Bristol harbour. Avon and Somerset Police decided not to intervene as the statue was roped up and then pulled down. Instead, the police requested that the public help them to identify those involved who were caught on camera. In due course, a number of individuals were identified. Five individuals accepted a conditional caution which involved paying a fine and carrying out some community work. Those five must have mixed feelings about that decision in light of what happened to the four defendants who elected for trial by jury.

We shall, of course, never know which of the defences advanced on behalf of the Colston Four were accepted by the jury. It remains an offence to disclose information about statements made, opinions expressed, or votes cast by members of a jury in the course of their deliberations.³⁷ However,

35 Black Lives Matter is an amorphous gathering of activists in the United States of America, Canada and the United Kingdom which appeared after the acquittal of George Zimmerman for the shooting of Trayvon Martin in Sanford, Florida in 2012. The immediate trigger for the Bristol protest was the death of George Floyd on 25 May 2020 while being restrained by Minneapolis police officer, Derek Chauvin. Derek Chauvin was convicted of the second-degree murder of Mr Floyd in April 2021 and sentenced to 22 years in prison.

36 Colston's career is outlined in *Attorney's Reference*, above n 34, at [5]. The role of the Royal African Company is described in Hugh Thomas *The Slave Trade* (Macmillan, London, 1997) at 196–209 and 442–443.

37 Juries Act 1974 (UK), s 20D. Tony has written about this too in Patricia Londono, David Eady and ATH Smith *Arlidge, Eady and Smith on Contempt* (5th ed, Sweet & Maxwell, London, 2017) at [10-182] and, in a series of case notes in the Cambridge Law Journal, he analysed some of the leading cases on public protest:

the Legal Directions given by the trial Judge, his Honour Judge Peter Blair KC, are in the public domain.³⁸ As a result, it is clear that some or all of the defendants relied on four main arguments: (i) that the statue was not in law damaged in the protest; (ii) that they believed that the owners of the statue would have consented to any damage which was caused; (iii) that they used no more than reasonable force to prevent the commission of a crime; and (iv) that their conviction for conduct which was protected by arts 10 and 11 of the ECHR would be disproportionate in the circumstances.

As we shall see below, the first of those arguments is sound.

A Damage

I shall deal with this defence briefly because I set out my views at some length before the trial.³⁹ My argument was that the definition of damage which has been developed under the Criminal Damage Act 1971 is such that the actus reus depends in certain cases on the subsequent reaction of the owner of the property to the defendant's conduct.⁴⁰ As stated above, if the owner is put to the expense of restoring an object to its original state, the costs of such restoration constitute the extent of the damage caused to it. However, the converse of this must also be true: if the owner decides not to restore the object to its former state, but instead to preserve the evidence of the defendant's conduct and, in future, to use the object to serve a different purpose (to which the defendant's actions have contributed), there is in law no damage.⁴¹ The reaction of Bristol Council was not to repair the damage to the fabric of

ATH Smith "Regulating Protest" (1996) 55 CLJ 404; ATH Smith "Policing Protest after the Human Rights Act 1998" (2004) 63 CLJ 535; and ATH Smith "Protecting Protest: A Constitutional Shift" (2007) 66 CLJ 253.

38 Wide, above n 25, at 26–35. Blinne Ni Ghraigh, counsel for two of the defendants, helpfully provided this author with copies of written submissions made by the defence.

39 Ivan Hare "Statues, Statute and Freedom of Expression" [2021] PL 691 at 692–696.

40 The Criminal Damage Act 1971 (UK) contains no definition of damage and the authorities insist that the definition is a matter of fact and degree for the tribunal of fact: *Roe v Kingerlee* [1986] Crim LR 735 (Divisional Court). "[I]njury impairing value or usefulness" is as close as the law has come to a definition: *Cox v Riley*, above n 29, at 57. That definition was fulfilled where a protestor had painted the outlines of human figures on a pavement in whitewash to highlight the threat of nuclear weapons. Although it would have washed away at the first rain, the local authority went to the expense of washing it off and so damage was made out: *Hardman v Chief Constable of Avon and Somerset* [1986] Crim LR 330 (Crown Court). The Court of Appeal in the Colston case suggested that prosecuting or convicting in a case of political protest using water soluble paint "might well be a disproportionate response": *Attorney's Reference*, above n 34, at [116]. See further Katherine Grevling "Damaging Property" [2020] Crim LR 497.

41 Ian Edwards gives a number of examples of where graffiti may have enhanced the value of the owner's property in "Banksy's graffiti: a not-so-simple case of criminal damage?" (2009) 73 J Crim L 345. Tony addresses "ameliorisation as damage" by reference to the case of *R v Fancy* [1980] Crim LR 171 (Crown Court) in which there was found to be no case to answer where the defendant went equipped to paint out National Front slogans which had been daubed on someone else's wall: Smith *Property Offences*, above n 2, at [27-23].

the statue (which was considerable), but to take conservation measures to stabilise the damage and preserve the graffiti. As the Council's conservation and documentation manager put it:⁴²

Our main concern is making sure that we can conserve the paint, the graffiti that's on him now ... It has become part of the story of the object, of the statue, so our job is to try and retain that as much as possible.

The statue was then displayed (with its damage and preserved graffiti) in a prone position in the M Shed gallery in Bristol between June 2021 and January 2022 with other material from the 7 June protests and explanatory boards detailing Colston's background and the events leading to the statue's otherwise surprising appearance. It is proposed that the statue will in due course be placed on permanent display in a museum as part of an exploration of Bristol's prominent role in the slave trade.

The same argument about the legal definition of damage does not necessarily apply to the costs of retrieving the statue from the harbour. However, there are three points about that. First, only one of the Colston Four (Jake Skuse) was charged in relation to the statue being dropped in the harbour. As such, this aspect is not relevant to the culpability of the other three. Secondly, it appears that dropping the statue into the harbour may have been a significant part of the message which those involved wished to convey. It is a well-known feature of the Transatlantic slave trade that enslaved people were thrown overboard if they died or became ill. Indeed, in the notorious case of the slave ship *Zong*, more than a hundred enslaved people were thrown overboard in order to preserve water supplies for the crew and other captives.⁴³ This part of the Colston protest played an important part of the context in which the Colston statue was initially displayed by the Council and hence how the statue has been "re-purposed" to illustrate the strength of feeling among parts of the population about the city's role in the slave trade. Thirdly, retrieving the statue from the harbour was no part of the value of the damage identified by the Council: their figure of £3,750 was the cost (without VAT) of a new base and support for the statue (in its prone position) from Cliveden Conservation.⁴⁴

For all of these reasons, if the jury decided to acquit the Colston Four on the basis that the prosecution had failed to prove that the statue had been damaged, they would have been correct to do so. The same cannot be said of the other defence arguments relied upon.

42 "Edward Colston statue graffiti will be preserved" *BBC News* (online ed, United Kingdom, 17 June 2020).

43 Thomas, above n 36, at 488–489; and James Walvin *The Zong: A Massacre, the Law and the End of Slavery* (Yale University Press, New Haven, 2011). The case became a major spur for the abolitionist movement when the ship owners sued on their insurance policy for losses caused by necessity or the perils of the sea (at a rate of £30 per head). The claim succeeded at first instance, but was sent for retrial which appears never to have occurred: *Gregson v Gilbert* (1783) 3 Doug KB 232, 99 ER 629 (KB). The case prompted the Slave Trade Act 1788 (GB) 28 Geo III c 54, which aimed to reduce overcrowding on slave ships by imposing a limit on the number of captives per ton of shipping capacity and inspired JMW Turner's painting, *Slave Ship* (1840), now in the Museum of Fine Arts in Boston.

44 This emerged as a result of a Freedom of Information Act 2000 (UK) request by the author.

B Consent of the Owner

Section 5(2)(a) of the Criminal Damage Act 1971 provides that a person has a lawful excuse:

... if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances ...

Two of the Colston defendants (Milo Ponsford and Sage Willoughby) argued that they honestly believed that the Colston statue belonged to the people of Bristol and that they (the people) would have consented to what was done. The first of these beliefs had some evidential foundation in that the prosecution relied on the witness statement of Mr Jon Finch (Head of Culture and Creative Industries at the Council) who stated:

The Colston statue (the statue) was gifted to the people of Bristol in 1895, and has been held in trust by Bristol City Council (the Council) for the people of Bristol since that time.

It is difficult to understand what "held in trust ... for the people of Bristol" can mean in this context. It plainly does not mean that the people of Bristol (however defined) are the legal owners of the statue since the Council is identified as the trustee. Equally, it cannot sensibly be suggested that there is a trust according to which the people of Bristol are in a legal sense the beneficial owners of the statue. Perhaps the precise legal analysis does not matter in this context since it is clear from the Criminal Damage Act 1971 that it is the defendant's belief that is relevant and whether that belief is justified, or even reasonable, is relevant only to whether the jury accepts that it was genuinely held.

Whatever the position as regards the defendants' belief as to ownership, the second belief is surely implausible. To make this out, the defendants must have believed that the citizens of Bristol would have consented not only to the removal of the statue, but also to its removal by a small group of protestors without any opportunity for the Council and other members of the community to participate in the decision as to its fate. The future of the Colston statue had been a matter of active debate and protest in Bristol for some time, but the evidence suggested that a majority of the people of Bristol were not in favour of removal of the statue. These two defendants (one of whom did not even live in Bristol) admitted at the trial that they had taken no steps to inform themselves of the wishes of the citizens of Bristol. Even though the issue of the defendants' state of mind on this issue too is subjective, it is very difficult to argue that their claimed belief in consent is plausible. Since this argument was relied on by only two of the defendants and all were acquitted, it is likely that the jury rejected this defence. If so, the jury was correct to do so.

C Prevention of Crime

The third argument (relied on in some form by all four defendants) was that they used reasonable force to prevent the commission of a criminal offence. The defendants relied principally on two criminal offences: the "public display" of "any indecent matter" (contrary to the Indecent Displays

(Control) Act 1981 (UK), s 1); and the display of a "visible representation" which is "abusive" within the sight of someone likely to be caused "distress thereby" (contrary to the Public Order Act 1986 (UK), s 5(1)). The legal background to both potential defences is the Criminal Law Act 1967 (UK), s 3(1) which provides (as relevant):

(1) A person may use such force as is reasonable in the circumstances in the prevention of crime ...

Taking those offences in turn, the Indecent Displays (Control) Act 1981, s 1 provides:

(1) If any indecent matter is publicly displayed the person making the display and any person causing or permitting the display to be made shall be guilty of an offence.

The Act does not define what is meant by "indecent" and there is certainly scope for ambiguity in the term when considered in the abstract. Indeed, as long ago as 1979, the Williams Committee on obscenity recommended that "terms such as ... 'indecent' ... should be abandoned as having outlived their usefulness" on account of their "vagueness and confusion".⁴⁵ However, by the time the 1981 Act was passed, there was clear appellate authority for the proposition that "indecent" related to sexual matters. *Regina v Stanley*⁴⁶ concerned a prosecution for sending a postal packet which enclosed "any indecent or obscene print, painting photograph, lithograph, engraving, cinematographic film, book, card or written communication" contrary to the Post Office Act 1953 (UK), s 11(1)(b).⁴⁷ Giving judgment for the Court, Lord Parker CJ stated:⁴⁸

The words "indecent or obscene" convey one idea, namely, offending against the recognised standards of propriety, indecent being at the lower end of the scale and obscene at the upper end of the scale.

45 Bernard Williams *Report of the Committee on Obscenity and Film Censorship* (HMSO, Cmnd 7772, November 1979) at [9.21] and [13.4.2].

46 *Regina v Stanley* [1965] 2 QB 327 (Crim App) at 333. The offending article was a film brochure which had been requested by 14-year-old Thomas Watters (whose father was probably by this time regretting buying him a projector as a present). Young Thomas must have had some quick thinking to do when he was called before the Quarter Sessions to give evidence as to the impact of the brochure upon him.

47 Post Office Act 1953 (UK) 1 & 2 Eliz II c 36. The offence was repealed by the Postal Services Act 2000 (UK) which reproduces the substance of the offence in s 85(3) and (4).

48 *Stanley*, above n 46, at 333. It could be argued that the case of *R v Kirk* [2006] EWCA Crim 725 presents a problem for this analysis because the defendant's conviction on one count of sending a package which bears any words which are "of an indecent or obscene character" contrary to the Postal Services Act 2000 (UK), s 85(4) was upheld by the Court of Appeal. Kirk had sent a package bearing a swastika and addressed: "To the sons and daughters of Dr Joseph Mengele, @ Bloody Huntingdon Life Sciences, an Auschwitz Laboratory." There are three answers to this: first, Kirk concerned a different Act; secondly, it was based on the very substantial latitude given to a jury by the principle established in *Brutus v Cozens* [1973] AC 854 (HL) that the meaning of ordinary words is the province of the tribunal of fact; and thirdly, *Kirk* was in any event wrongly decided. Kirk should plainly have been charged with the offence of sending a "grossly offensive" message with the intention of causing distress contrary to the Malicious Communications Act 1988 (UK), s 1.

The issue is placed beyond doubt by the mischief of the proposal identified by the promoter of the Indecent Displays (Control) Bill:⁴⁹

It is because we have long recognised the difference between people making a conscious choice to look at sex films, magazines or displays of so-called sex aids and having such material thrust in front of them when they do not wish to see it and find it not only distasteful but in most cases extremely offensive that the Bill is most required.

The fact that the Indecent Displays (Control) Act 1981 was a private member's Bill and runs to only five sections reinforces the argument that it was intended to address a limited social problem. Other provisions of the Act provide further support for the idea that it is aimed at displays in sex shops. For example, s 1(3)(b) exempts from liability a shop which has an adequate warning outside and which makes provision for excluding those under 18 years of age.⁵⁰ There is also a power to issue a warrant for the police to seize indecent matter. Neither of these provisions would make sense if the Act were intended to apply to public statues. Finally, in what must be one of the oddest provisions in an English statute, s 1(5)(b) provides that in determining whether any displayed matter is indecent, "account may be taken of the effect of juxtaposing one thing with another". That can only have meaning in this context if indecent relates to sexual content.

Taken together, these considerations make an overwhelming case that Bristol City Council could not be guilty of an offence under the Indecent Displays (Control) Act 1981 in relation to the Colston statue⁵¹—quite apart from questions about its corporate liability for such an offence. However, instead of providing guidance based on the law, the learned Judge in the Colston trial simply claimed to have quoted the definition of "indecent" given in the Oxford English Dictionary which is much broader: "unbecoming; highly unsuitable or inappropriate; in extremely bad taste; unseemly; offending against the recognised standards of propriety and delicacy; highly indelicate".⁵² This does not provide sufficient guidance to the jury and gives the offence a much broader scope than the cases indicate was Parliament's intention. The direction also creates deep uncertainty: terms such as "unbecoming", "unseemly" and "highly indelicate" do not provide sufficiently clear and objective standards by which behaviour can be judged to be criminal.

49 (30 January 1981) 997 GBPD HC 1167 (Indecent Displays (Control Bill) – Second Reading, Tim Sainsbury).

50 A point made by JR Spencer in "Toppling statues – and upsetting the legal apple-cart?" (2022) 2 Arch Rev 7 at 8.

51 It is noticeable that the Attorney-General did not refer this issue to the Court of Appeal in the *Attorney's Reference* on the ground that references under the Criminal Justice Act 1972 (UK), s 36 are only appropriate in cases where the law is unclear and it was clearly established law that this issue should not have been left to the jury: *Attorney's Reference*, above n 34, at [3].

52 This definition does not appear in the full or the shorter *Oxford English Dictionary*.

The trial Judge also failed to provide adequate guidance to the jury on the meaning of the offence under the Public Order Act 1986, s 5 (which provides):

(1) A person is guilty of an offence if he—

...

(b) displays any writing, sign or other visible representation which is threatening or abusive,

within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

The defendants argued that the statue was a visible representation which was "abusive" and caused distress to some of the population of Bristol. As with the Indecent Displays provision, a moment's reflection demonstrates that the public display of a statue which had been in place for 125 years was not within the contemplation of those who promoted and passed the Public Order Act 1986. As Tony correctly points out in his commentary on the potential breadth of s 5, the White Paper which preceded it identified a series of examples of low-level acts of hooliganism to which this provision was directed: such as groups of youths shouting abuse and obscenities at people waiting for public transport or throwing things down communal staircases on housing estates or knocking over dustbins.⁵³ There have been some regrettably broad decisions on the scope of this provision,⁵⁴ but the better view of its effect was captured in the Divisional Court case of *Percy v Director of Public Prosecutions* concerning a conviction in relation to protests at a United States airbase which involved, first, defacing the United States flag by placing a bar and the words "Stop Star Wars" across it, and then placing the flag on the ground and stepping on it.⁵⁵ In the context of protest, Hallett J (as she then was) said:⁵⁶

Peaceful protest was not outlawed by section 5 of the Public Order Act. Behaviour which is an affront to other people, or is disrespectful or contemptuous of them, is not prohibited ...

Further, the direction of travel in recent legislative policy in relation to the Public Order Act 1986 has been to narrow, rather than expand, s 5. Section 5 originally covered "threatening, abusive or insulting words or behaviour", but the Act was amended in 2013 to remove the term "insulting".⁵⁷

53 Smith *Public Order*, above n 2, at [7-02], quoting the White Paper which preceded the 1986 Act.

54 Most notably *Hammond v Director of Public Prosecutions* [2004] EWHC 69 (Admin), [2004] Crim LR 851; and *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin), [2003] Crim LR 888, which are both convincingly criticised by James Weinstein in "Extreme Speech, Public Order, and Democracy: Lessons from *The Masses*" in Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press, Oxford, 2009) 23 at 30–61.

55 *Percy v Director of Public Prosecutions* [2001] EWHC Admin 1125, [2002] Crim LR 835. A certain Mr K Starmer appeared for the appellant. One wonders what became of him.

56 At [25] (citations omitted).

57 The same cannot be said of public order law more generally: the current Government has introduced a series of further restrictions on the right to protest in pt 3 of the Police, Crime, Sentencing and Courts Act 2022 (UK) (including allowing the police to impose conditions on public assemblies, increasing the penalty for

Hickinbottom LJ explained the significance of the change in the Divisional Court in *Campaign Against Antisemitism v Director of Public Prosecutions*:⁵⁸

However, that balance [between public order and freedom of expression] was shifted by Parliament, in favour of freedom of expression, in section 57(2) of the Crime and Courts Act 2013 which amended those sections of the 1986 Act by removing "insulting", so that, to be criminal, the words or behaviour now have to be "threatening or abusive".

Hickinbottom LJ concluded:⁵⁹

As the authorities stress, article 10 does not permit the proscription or other restriction of words and behaviour simply because they distress some people, or because they are provocative, distasteful, insulting or offensive.

For these reasons, the better view is that the continued display of the Colston statue could not legally constitute either of these criminal offences and the defendants' assertion that they believed that it did should have been rejected.⁶⁰

In any event, there is one element of these defences which has an objective element to it: that the force used by them has to be reasonable for the Criminal Law Act 1967 defence to be made out. What is reasonable depends, in part, on the circumstances as the defendant perceived them to be, but must also be considered against the background that citizens living in a democracy:⁶¹

... are normally expected to call in the police and not to take the law into their own hands.

...

obstruction of the highway and creating new offences relating to encampments) and has introduced further new offences (such as protestors "locking on" to others, an object or land and of interfering with key national infrastructure) in the Public Order Act 2023 (UK).

58 *Campaign Against Antisemitism v Director of Public Prosecutions* [2019] EWHC 9 (Admin) at [9].

59 At [50]. To similar effect, see *Overd v Chief Constable of Avon and Somerset Constabulary* [2021] EWHC 3100 (QB).

60 The principle that the defendant may rely on a mistaken, but honestly held, belief has its limits and does not extend to a mistaken belief about the criminal law if those facts do not in law amount to a crime: *R v Baker* [1997] Crim LR 497 (CA) at 498.

61 *Regina v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136 at [78] and [94] (in the context of criminal damage at air bases in opposition to the Iraq War), applied in *Regina v Roberts (Richard)* [2018] EWCA Crim 2739, [2019] 1 WLR 2577 at [33]–[34] (to those convicted of public nuisance for blocking main roads for several days in protest at hydraulic fracturing) and *Regina v Thacker* [2021] EWCA Crim 97, [2021] QB 644 at [97]–[103] (to those charged with endangering the safe operation of an aerodrome in order to prevent the deportation of a number of individuals to West Africa).

In a case in which the defence requires that the acts of the defendant should in all the circumstances have been reasonable, his acts must be considered in the context of a functioning state in which legal disputes can be peacefully submitted to the courts and disputes over what should be law or government policy can be submitted to the arbitrament of the democratic process. In such circumstances, the apprehension, however honest or reasonable, of acts which are thought to be unlawful or contrary to the public interest, cannot justify the commission of criminal acts and the issue of justification should be withdrawn from the jury.

For the same reasons, the defence of preventing a breach of the criminal law in the Colston trial should not have been left to the jury.⁶²

D Disproportionate Interference with Convention Rights

Finally, the Colston defendants argued that convicting them of criminal damage in the circumstances of their cases would amount to a disproportionate interference with their right to protest as protected by the common law and by arts 10 and 11 of the ECHR which provide qualified protection for the rights to "freedom of expression" and "freedom of peaceful assembly".⁶³ Again, the trial Judge decided to leave this matter to the jury. As I have sought to explain above, this issue would not have arisen if the Judge had properly directed the jury to acquit on the basis that the *actus reus* of criminal damage could not be made out on the facts. That did not happen and the issue of proportionality was therefore referred to the Court of Appeal on the basis of a flawed premise.

The Court of Appeal concluded that it was not necessary for the jury to consider proportionality in the circumstances of the Colston case on two alternative bases: that the conduct of the defendants fell outside the scope of the Convention altogether; or, in the alternative, that where significant damage is caused to public property, the elements of the definition of criminal damage were sufficient to demonstrate that a conviction was proportionate without the need to consider the individual circumstances of the case.

As to the first basis (that the conduct fell outside the Convention altogether), the starting point is that the right to freedom of expression under the ECHR and at common law is broadly drawn: it is not limited to the use of language to communicate one's message and therefore also includes conduct; expression on matters of political controversy is entitled to the highest level of protection; and such expression does not lose its protection because it causes anger or resentment or offence or because it

62 The trial judge is entitled to withdraw an issue from the jury if no reasonable jury properly directed could reach the conclusion, for example, that the defendant had a reasonable excuse: *Regina v Nicholson* [2006] EWCA Crim 1518, [2006] 1 WLR 2857 at [9]; and *Regina v G* [2009] UKHL 13, [2010] 1 AC 43 at 87.

63 These Convention rights are given effect in domestic law by the Human Rights Act 1998 (UK). The present Government's plans to repeal the Human Rights Act 1998 and replace it with a new Bill of Rights were proposed in December 2021, shelved in September 2022, but appear to have been taken back down again and dusted off as I write in November: Oscar Bentley "Which new laws have been held up or shelved?" *BBC News* (online ed, United Kingdom, 11 November 2022).

could have been expressed in a different way.⁶⁴ There can be little doubt that the Colston Four intended their conduct to be expressive: whether the statue should be removed had been a matter of considerable controversy in Bristol for around 30 years and a number of protests had been arranged around it in the past.⁶⁵ Once the Colston statue had been pulled down, red paint was daubed on its hands and two protestors knelt on the neck of the statue to evoke the fate of George Floyd. As stated above, even dropping the statue into the harbour reflected the fate of many enslaved Africans who were thrown from slave ships on the Middle Passage.

The Court held that the Colston defendants' conduct fell outside the Convention by the following reasoning: the parties conceded that there was no relevant difference between the scope of arts 10 and 11; art 11 only protects the right to "peaceful assembly"; the ordinary meaning of "violence" includes the exercise of physical force so as to cause injury to the person or damage to property; as such, where the relevant conduct involved significant damage, it is not peaceful and falls outside the scope of Convention rights. The Court cited no Strasbourg authority which directly supports the proposition that significant damage to property constitutes violence and hence renders an assembly non-peaceful. On the other hand, there are a number of Strasbourg cases which demonstrate that even certain conduct which would be regarded as an offence against the person (such as throwing stones at the police) does not take the individual outside the scope of protected activity altogether.⁶⁶ The Court of Appeal's broad definition of non-peaceful assembly is therefore questionable.

However, there are two more serious objections to the Court's reasoning. The first is that it fails to engage with the argument advanced above that the Colston defendants cannot be found to have damaged the Colston statue given the way in which Bristol Council had decided to re-define its value, not as a memorial to Colston's philanthropy, but as part of the story of Bristol's involvement in the slave trade and, more specifically, the strength of feeling in the city at the time that led to the statue's

64 The classic cases are analysed in Eric Barendt *Freedom of Speech* (2nd ed, Oxford University Press, Oxford, 2005) at 78–88 and 155–162; and Ivan Hare "Is the Privileged Position of Political Speech Justified?" in Jack Beatson and Yvonne Cripps (eds) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Clarendon Press, Oxford, 2000) 105.

65 This frequently took the form of placards, but was sometimes more ambitious and more striking: for example, in 2018 protestors surrounded the pedestal with dozens of concrete figurines which re-created the form of the well-known engraving and model of the *Brookes* slave ship to demonstrate how enslaved Africans were crammed into the holds of slave ships: Thomas, above n 36, at 509–510. A proposal by MSMR Architects to create a permanent monument around the statue on which the outlines of human figures feature in a similar configuration won an English Heritage competition earlier in 2018, but was never commissioned: Helen Paul "The Colston Cult and the Material Culture of Bristol" in Marjorie Trusted and Joanna Barnes (eds) *Toppling Statues* (Public Statue and Sculpture Association Publishing, Watford, 2021) 54 at 55–56.

66 For example, *Taranenko v Russia* ECHR 19554/05, 15 May 2014 at [93], where the European Court of Human Rights said that "the protesters' conduct, although involving a certain degree of disturbance and causing some damage, did not amount to violence".

toppling. The Court did not address the application of the legal definition of damage under the Criminal Damage Act 1971 at all and simply stated (incorrectly as a matter of law):⁶⁷

Although this case did not involve the destruction of the statue, the damage that was caused was clearly significant. Pulling this heavy bronze statue to the ground required it to be climbed, ropes attached to it and then the use of a good deal of force to bring it crashing to the ground.

The Court also referred to the fact that the threshold for a trial by jury in a criminal damage case is £5,000. It is obviously correct that damage which cost that sum to repair would properly be regarded as significant, but it is not relevant to the Colston case. The indictment charged the defendants with causing damage "of value unknown" and, as explained above, the only figure put forward by Bristol Council turns out to have been the cost of the replacement plinth designed to support Colston horizontally as part of the initial exhibition of the statue after its recovery.⁶⁸ That sum does not therefore represent the cost of any "damage". This is fundamental because the Court goes on to accept that "causing damage which is transient or insignificant" does not take the perpetrator outside the protection of the Convention. When the law is correctly applied, the Colston defendants were not guilty of any damage to the statue and it follows that the Court's reliance on "significant damage" as taking them outside the scope of the Convention is incorrect. Further, the Court failed to address at all the fact that one of the Colston defendants was only charged in relation to throwing the statue into the harbour. The Court therefore reached no conclusion as to whether any "damage" was caused during that part of the protest. The Court's reliance on the financial threshold for jury trial is also likely to be short-lived in cases affecting memorials. As explained above, the 2022 Act will make all cases involving alleged damage to memorials triable on indictment. The intention of that legislative change appears to have been to expose defendants to the deterrent effect of the maximum sentence of 10 years. As the Colston case demonstrates, in many cases, it is more likely to provide a sympathetic jury with the opportunity to acquit where a magistrate or district judge would have convicted.

The second basis of the Court's reasoning is equally vulnerable to this analysis because it held that there is no need to engage in an individual assessment of the proportionality of the prosecution where the damage is significant because in proving the elements of the offence to the criminal standard, the prosecution will necessarily be proportionate. As explained above, that basis for the decision cannot apply in the Colston case.⁶⁹

⁶⁷ *Attorney's Reference*, above n 34, at [122].

⁶⁸ See above n 44.

⁶⁹ The Court of Appeal's conclusion that a general measure like the Criminal Damage Act 1971 (UK) avoids the need to determine the proportionality of the prosecution in the individual circumstances of a case involving public protest is also highly dubious in light of, for example, *Perinçek v Switzerland* (2016) 63 EHRR 6 (Grand Chamber, ECHR) at 275 and the Supreme Court's decision in *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [2022] AC 408 (obstruction of the highway in protest at an international arms fair). This part of the Court of Appeal's reasoning follows that in *Director of Public Prosecutions v Cuciurean*

For these reasons, the relevance of the defendants' Convention rights could not be so readily dismissed and required some analysis. However, the spectre of a bonfire of the vanities of public monuments by activists sheltering behind the Human Rights Act 1998 (UK) is a fantasy as long as sensible decisions are made as to what offences to charge.⁷⁰ The Colston defendants could have been charged with the offences of riot or violent disorder under the Public Order Act 1986 and would not then have been able to rely on the re-purposing of the statue as a defence.⁷¹ If they had been so charged, it would not have been difficult to demonstrate that their conviction would be proportionate to the legitimate aim of preventing disorder and/or protecting the rights of others.

IV CONCLUSIONS

The Colston statue has now joined a long list of controversial public monuments to historical figures which have been threatened or removed in order to express disapproval for the conduct or legacy of those depicted: from the Duke of Cumberland to King Leopold II and Cecil Rhodes to Robert E Lee.⁷² This is all the more surprising since the removal of the statue was entirely avoidable. When it became clear that a small group of protestors was attempting to pull down the statue, the police should have intervened to instruct them to desist and, if they refused, arrest them. There was no basis for suspecting that this would have led to an unmanageable breakdown in public order. There would certainly have been grounds for arrest at that stage in that the police reasonably suspected that an offence of criminal damage was being attempted or that of violent disorder was imminent.⁷³ As it was, the police stood by and observed while the statue was pulled down and then rolled several hundred yards and dropped into the harbour. A week after the acquittal of the Colston defendants, the police again stood by and watched (for four hours) as a man repeatedly struck the statues of *Prospero and Ariel* outside the BBC offices on Portland Place (while an accomplice filmed the incident).⁷⁴ It therefore appeared as if the police had simply lost confidence in dealing with destructive protest. This

[2022] EWHC 736 (Admin), [2022] 3 WLR 446 (aggravated trespass by digging and occupying a tunnel under the proposed route of the High Speed 2 rail link).

70 Ivan Hare "The Colston Four should never have been charged with criminal damage" *Apollo Magazine* (online ed, London, 14 January 2022).

71 Tony discusses the broad definition of "violence" in the Public Order Act 1986 (UK), s 8 which includes "violent conduct towards property" in Smith *Public Order*, above n 2, at [3-06]–[3-07].

72 Robert Bevan *Monumental Lies: Culture Wars and the Truth About the Past* (Verso, London, 2022) at 27–28 and 38–41; and Alex von Tunzelmann *Fallen Idols* (Headline Publishing, London, 2021) at 177–183.

73 The arrests would have removed the possibility of damage to the statue. In any event, the reasonableness of that belief at the time of the arrests would not have been affected by any decision subsequently made by the Council as to how to deal with the statue.

74 The attack was said to have been motivated by the fact that the artist, Eric Gill, was a self-confessed paedophile who had sexually abused his daughters. He also claimed to have enjoyed sexual relations with his dog.

reminds us of one of the axioms of public order law and a point Tony has always emphasised: the role of the police in preserving the peace.⁷⁵

As a result of the failings of the police and prosecution, the Colston defendants have become celebrated as champions of freedom of expression. Even if we do not go as far as Martin Warnke in asserting that "the conditions that had, for millennia, made iconoclasm a legitimate form of expression have become today obsolete",⁷⁶ our response to such conduct should be informed by the fact that, unlike previous generations of iconoclasts, the Colston defendants live in a democratic society governed by the rule of law where (as the European Court of Human Rights put it): "debates about the fate of a public monument must be resolved through the appropriate legal channels rather than by covert or violent means".⁷⁷

It must also constitute a major qualification on the Colston defendants' right to free speech as a matter of principle that the manner in which they chose to express their disapproval of Colston deprived all other members of the community in Bristol and more broadly of their right to participate in the debate about the statue's future.⁷⁸ The Colston statue is now housed in a museum where it is intermittently on display and where only those who seek it out will have to address his uncomfortable legacy, depriving us of what Gamboni calls the "historically necessary confrontation with the object".⁷⁹ This important point has been captured more succinctly: when the statue of Felix Dzerzhinsky, founder of Bolshevik secret police, was removed from his pedestal outside the Lubyanka in Moscow, one woman lamented that she would no longer be able: "to tell her son that this guy was a bastard".⁸⁰

75 Smith *Public Order*, above n 2, at 1–10; and David Williams *Keeping the Peace: the police and public order* (Hutchinson, London, 1967) at 114–117. In the Colston case, the errors did not end with the police: the Crown Prosecution Service charged the defendants with the wrong offence and the trial Judge lost control of the trial (Wide, above n 25, at 14 and 21–22, justifiably criticises the expert and hearsay evidence which was permitted to be placed before the jury about the history of the slave trade, the Merchant Adventurers and so on).

76 Warnke, above n 12, at 8.

77 *Handzhiyski v Bulgaria* (2021) 73 ECHR 15 at [53].

78 Hare, above n 39, at 702–706.

79 Gamboni, above n 6, at 88.

80 At 80.

