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Policy Exchange

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About the Author

Charles Wide QC was called to the bar in 1974, with a practice largely in criminal law, taking silk in 1995. He was a Circuit Judge (2001-2011) and Senior Circuit Judge, sitting at the Old Bailey (2011-2016).

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Introduction

On 7th June 2020, in Bristol, a statue depicting Edward Colston was pulled from its plinth, rolled and dragged across cobbles, and dropped into the harbour. Four people were charged with criminal damage: three of them on the basis of their involvement in pulling the statue down and one on the basis of his involvement in rolling the statue to and into the harbour. In January 2022, at trial, all four were acquitted. It seems that the Attorney General is still considering whether, or when, to refer the case to the Court of Appeal for its opinion on points of law which arose in the trial and, if so, which.[1] It is important to stress that the acquittal of the defendants is determinative and, rightly, cannot be altered by this process. It is not their fault if there is something amiss with the law, or the interpretation of the law, or the trial process.

The acquittals in this case resulted in an outpouring of contradictory comment. The outcome was greeted by *The Guardian* as 'a welcome sign that Britain is altering'[2] and criticised by *The Daily Telegraph* as 'a monumental mistake'.[3] The verdicts were widely depicted as 'perverse', as being contrary to the evidence and the law. Lord Sumption wrote that the members of the jury had 'dishonoured their oath and undermined the rule of law'.[4] In a leading article, *The Times*, while saying that 'the toppling of the statue was an act of unjustified vandalism', argued that the verdicts fell within the tradition of cases such *Penn and Mead* (where a jury refused to convict two Quakers) and, further, that Jacob Rees-Mogg had been right to say that the jury system was 'such an important protector of our liberties that we must take the rough with the smooth'.[5] The 'Secret Barrister', writing in *The Sunday Times*, expressed the view, widely held among lawyers experienced in criminal law, that valid defences had been raised and ventilated before the jury which, having considered the evidence and applied the trial judge's directions, was perfectly entitled to acquit and, further, that this did not represent either a 'loophole' or a legal precedent which gave the green light to pulling down other statues.[6]

The variety and strength of the responses to the verdicts demonstrate the need to understand what actually happened at the trial. On the basis of the evidence which the judge allowed the jury to hear and the legal directions which he gave, it is clear that the verdicts were not 'perverse'. That, however, begs a number of important questions. Did the judge get the law right – in relation to the admission of evidence and the defences which were legally available? Should the law be changed? Could or should the trial have been handled differently?

1. Under section 36 Criminal Justice Act 1972
2. https://www.theguardian.com/commentisfree/2022/jan/07/the-guardian-view-on-the-colston-four-taking-racism-down
3. https://www.telegraph.co.uk/opinion/2022/01/06/colston-statue-verdict-monumental-mistake/
4. https://www.telegraph.co.uk/news/2022/01/08/make-no-mistake-colston-four-verdict-undermined-rule-law/
5. https://www.thetimes.co.uk/article/the-times-view-on-the-acquittal-of-the-colston-four-monumental-decision-rsjdxwwpk
6. https://www.thetimes.co.uk/article/colston-four-jury-deliberations-explained-edward-colston-statue-slave-trade-dwv2v9md7

Standing back from the tangle of multiple defences which were raised in this case, there is a widespread sense that something had gone wrong. In a YouGov poll, conducted on 8th June 2020, only 13% approved of the statue being removed in the way that it was.[7] Many reasonable people, who are not lawyers, are surprised that, what seemed to be completely straightforward acts of criminal damage, did not break the law. This sense of unease needs to be addressed. The fate of many statues and memorials is hotly contested. It can be expected that the points raised in this case will be raised in others of a similar character. Analogous issues arise in the context of activism concerned with climate change, the arms trade, and other politically sensitive topics. The relationship between protest and the criminal law directly affects members of the general public, who do not themselves break (what seems to be) the law in order to express their opinions and may be prevented from going about their lawful business by those who do. If the boundary between legitimate protest and criminal conduct is unclear, this creates acute problems for the police, who have to steer an almost impossibly difficult course between permitting protest and protecting other legitimate interests. It also presents formidable challenges to the conduct of criminal trials, which are not appropriate arenas for the resolution of essentially political issues. Especially at this time of social media 'echo chambers', the ambit of defences based on 'possibly mistaken but honest belief' (even if ill-informed and unreasonable), should have clear boundaries. Clarity is needed for everyone's benefit: general public, protestors, police, lawyers, and judges.

The state of the law in this area is of such public importance that the Attorney General is, surely, justified in seeking the opinion of the Court of Appeal. Further appeal to the Supreme Court may also prove necessary.[8]

Put shortly, it will be contended in this paper that there are reasonable grounds for the following propositions:

- The judge permitted evidence to be given which was irrelevant and inadmissible in relation to the legal issues which the jury had to decide.
- The defence that the defendants may have been using reasonable force to prevent crime should not have been left for consideration by the jury.
- The defence that conviction may have been a disproportionate interference with the defendants' human rights should not have been left for consideration by the jury.
- If the law, in relation to the defences available in law to the defendants, is as the judge decided, changes are needed.[9]
- The case management of trials such as this, especially if essentially political issues must or may be explored, needs to be tightly performed in accordance with Part 3 of the Criminal Procedure Rules and this is the responsibility of all the parties, not only the judge.

7. In a poll of 4,300 adults, 13% approved of the statue being removed and in the way it was done; 40% approved of the statue being removed, but not the way in which it was done; 33% disapproved of the statue being removed; and 14% did not know. https://yougov.co.uk/topics/philosophy/survey-results/daily/2020/06/08/1ab21/1
8. In order to modify or reverse the decision in *DPP v. Ziegler and others* [2021] UKSC 23
9. Contrary to what has been said on behalf of the government, The Police, Crime, Sentencing, and Courts Bill, currently making its way through the legislative process, does not close any relevant 'loophole' https://www.theguardian.com/uk-news/2022/jan/06/minister-grant-shapps-crackdown-court-colston-four-statue

To follow the arguments of this paper, it is necessary to have an understanding of what happened at the trial. To that end, I have gone to transcripts of the closing speeches, the judge's legal directions to the jury, and his review of the evidence. It is possible in this way to get a feel for the trial, the issues, and how they were presented to the jury. Of course, this is no substitute for being present throughout the trial, hearing all the evidence and competing submissions (of which there must have been a number). There are areas about which one must remain tentative and open-minded. Here, it should be stressed that this paper is put forward more as comment than criticism. With the state of the law as it is, or may be, the conduct of such trials is fraught with manifold difficulties.

The case – a summary

What follows is a very brief summary of the case, as it is reflected in the trial judge's summing up, delivered on 4th and 5th January 2022. It is not intended to be an exhaustive recitation of all the issues and evidence. Where facts are stated, this is on the basis of the evidence given at trial, not as an assertion of incontrovertible factual accuracy. The purpose is to enable the reader of this paper to follow its commentary.

The trial judge's legal directions – see Appendix A – had been given in writing before Christmas and were not repeated. By these directions, there were multiple defences for the jury to consider. Put shortly, they were whether:

i. the statue had been damaged;
ii. each defendant intended to damage the statue or was, at least, reckless in that respect;
iii. each defendant may have had a lawful excuse for causing damage to the statue, subdivided into issues concerning:
    a. the use of reasonable force to prevent a crime or crimes,[10] committed by Bristol City Council in failing to remove the statue;
    b. honest, if mistaken, belief in the consent of the person or persons to whom the statue belonged (defendants B and D only); and
    c. whether conviction would be a disproportionate interference with each defendant's human rights.

It should be noted that juries do not give reasons for their verdicts. In a straightforward case, the reasoning should be apparent from the decision itself, because the jury is trusted to follow a written 'route to verdict'. Where, as here, there are multiple defences, there is no mechanism for discovering the basis on which a jury has acquitted, not least because different jurors might have reached their conclusions for different reasons.

Edward Colston [1636-1721] was born in Bristol and had a successful commercial career, involving a wide range of activities, which included 12 years as a member (an 'administrator') of the Royal African Company, becoming its deputy governor (analogous to being CEO) towards the end of that time, until 1692. The Royal African Company engaged in various commercial activities, including the horrors of the Atlantic slave trade, in

10. Contrary to section 5 of the Public Order Act 1986 and/or section 1 of the Indecent Displays (Control) Act 1981. There is a general defence under section 3 of the Criminal law Act 1967 that 'A person may use such force as is reasonable in the circumstances in the prevention of crime'.

which it had a monopoly in Colston's time. The slave trade was abolished 86 years after Colston's death, in 1807. The extent to which the slave trade added to his wealth (as opposed to other commercial activities) is unquantifiable but his active involvement in it is clear. He engaged in philanthropy in Bristol during his life (largely through the Society of Merchant Venturers) and bequeathed £70k to the city. Philanthropic activity, based on his wealth, continued through the 18th and 19th centuries (Colston being particularly memorialised during the latter).

In the 1890's, John Arrowsmith proposed the erection of a statue of Colston. Public subscription did not raise enough money and it may be that Arrowsmith largely had to fund it himself. The statue was put up in 1895. A plaque on the plinth reads, *ERECTED BY CITIZENS OF BRISTOL AS MEMORIAL OF ONE OF THE MOST VIRTUOUS AND WISE SONS OF THEIR CITY AD 1895*.

According to the judge's written directions, it was the Crown's case that the statue was maintained by Bristol City Council, which held it in trust on behalf of the people of Bristol. Whether this is right in law, what it means in terms of legal effect, how such a category could be with precision be identified, how 'the people of Bristol' might form a collective view, and how their permission might be discerned and communicated were not issues that were explored.

Controversy about the statue (seen together with its plaque) sharpened in the 1970's. It was listed Grade II in 1977. There have been campaigns, including petitions, to replace the plaque or remove the statue, at least since the 1990s. No agreed chronology detailing this activity seems to have been provided to the jury. Furthermore, it was left unclear how much support these campaigns had among the people of Bristol and the extent to which they were truly representative. An attempt to change the plaque's wording was said to have been frustrated by the Society of Merchant Venturers. Mr Finch, the Head of Culture and Creative Industries at Bristol City Council, said, when cross-examined, 'I believe that was derailed by the Merchant Venturers, from what you say'. In this, he seems to have been adopting something put by counsel, rather than speaking of something within his direct, personal knowledge. Exactly in what way and how the society could and did frustrate the will of the elected council – indeed, whether it did - was not pursued to definitive conclusion.

Mr Finch said that 'the council was undertaking a process looking to change the plaque as June 2020 approached'. A Legacy Steering Group was still considering the issue, though a former Lord Mayor of Bristol (a largely ceremonial position), Cleo Aiyay, did not think that 'proper democratic movement' would have resulted in the statue's removal. There was an online petition which had been running with 'modest take up' for 3 years. However, after the murder of George Floyd in Minneapolis on

25th May, this had taken off, generating about 10,000 signatures in the 13 days between 25th May and the toppling of the Colston statue.

The murder of Mr Floyd led to demonstrations across the world. It was widely known that there would be a march in Bristol on 7th June. During the evening of 6th June, defendants A and C were together at A's workshop. They discussed the possibility of toppling the statue. The next day, defendants A, B, and C met up at the demonstration. A and C had brought ropes. The ropes were attached to the statue (B climbed up the statue to assist with this) and, having made sure people were out of harm's way, used to pull it down. Both A and C were pulling on the ropes. Police Constable Haywood, in an uncontested statement which was read, said, 'As it crashed to the floor, the whole ground shook. The crowd were bordering on mass hysteria now, celebrating and jumping on the broken statue on the floor. I could see the statue was on the floor with bits of it everywhere.' The unchallenged evidence was, therefore, that the statue was damaged when it was pulled down from its 10ft high plinth. Defendant D, who was at the demonstration, received a telephone call from a friend to say that the statue had come down. He told the jury that he was thrilled, having wanted it to come down for years, and went to see for himself. In order to prevent it being put back up, he and others rolled and pushed the statue across some cobbles, damaging it further. When it was recovered, the statue had to be stabilised to stop it deteriorating further, at a cost of £3,750. It has not been returned to its plinth.

For the purposes of this paper, nothing turns on the police interviews with the defendants. I now turn to the gist (no more than that) of the evidence of each of them.

Defendant A admitted being involved in pulling the statue down. He said that, prompted by the murder of George Floyd, people had lost patience with issues that were being ignored. By 7th June he knew of Colston's involvement in the slave trade and the heinous nature of that trade. He said he thought the statue was disgraceful and, bearing in mind the multi-cultural diversity of Bristol, a statue to celebrate Colston was disrespectful and offensive to Bristolians. Everyone he spoke to felt the same. Petitions about the statue and the wording of the plaque had come to nothing. In any event, it was not 'possible to acknowledge the complexities of the issues on a plaque'. He decided to bring a rope to the scene because he thought it long overdue that the statue should come down, but he did not think he could do it on his own. He was not even sure it would be possible.

He described his part in pulling down the statue and his being 'part in shock, part ecstatic. And the way everyone was cheering it felt like a successful victory really to have the statue finally toppled'. From what he had seen, 'it was a massive offence to the people of Bristol … offensive to

the true character of Bristol' and he said that it was 'wrong to celebrate a figure who had such crimes against humanity in such a multi-cultural city. After the murder of George Floyd, everyone had had enough and statues were going to be even more sensitive and cause more harm'. He had not written to the council, nor made a complaint to the police, because previous attempts had been ignored. He had not contacted the council to see whether the subject had, in fact, been abandoned by it.

Defendant B said he had been brought up in an area which was not predominantly white and so he was well aware of inequality – a topic about which all his friendship group felt passionately. He had signed a number of petitions to have the statue removed but had given up because they were not listened to. He was aware of the forthcoming march and had met up with A and C during the evening of the 6th June. They talked about Colston's atrocities but the conversation about what would happen the next day was very vague. 'The cause of it was because Edward Colston was a murderer and racist and murdered thousands and enslaved more.' He maintained that the statue was a 'monument to racism … imagine having a Hitler statue in front of a holocaust survivor … it feels in a sense a hate crime … there's a huge Windrush population with a history of enslavement and he caused that history for them … if that's not an insult, I don't know what is … I believe it was lawful what I did to stop anguish and pain of fellow citizens of Bristol with no reply and no response from those higher up.' He admitted his part in pulling down the statue, saying it was not a violent action but was 'an act of love for my fellow man, if you have a person responsible for hate crime to your people.' He assumed that the council owned it and agreed that the council had not given him permission to pull it down.

Defendant C had moved to Bristol in about 2016. After George Floyd's murder, it came to her attention that people had been calling for the removal of the Colston statue. She did a little research and 'the insidious truths came out.' She also learned of protests, petitions, and attempts to reword the plaque. The wording of the plaque she thought to be 'vile' and made her feel complicit and 'if we don't speak up, we are complicit.' She believed that the people of Bristol 'had some ownership' of the statue. Her understanding was that when the Lord Mayor, Marvin Rees, had 'scrapped his plans for the plaque because no one could agree the wording … no one talked about it again … what do you do? How do you ask to be heard and not be listened to? … I believe democracy had well and truly broken down around that statue. I just think the council had had long enough to recognise how much harm a monument to a slave trader has had in a multi-cultural city.' She had not contacted the council because she 'did not believe official channels were working'. She had not contacted the police, though she 'believed it was criminal, mainly harmful to people'. The only defenders, she said, 'was an elite who had a vested interest in upholding the reputation of Edward Colston' and that she was not aware of the views

of people who wanted the matter decided democratically.

On 6th June, she discussed pulling down the statue with A. The online petition had encouraged her to 'believe that the people of Bristol would support the removal of the statue'. She had rope to use for the purpose but did not know if it would be possible. She described her part in pulling down the statue and the care she took to ensure that it could be done without endangering people. She said she had not given any thought to causing it damage. She accepted that, nonetheless, it had been damaged.

Defendant D said he was aware of the statue and that Colston was a slave trader. He thought it 'really offensive', though he had done no reading or research. He did not think the council had done its job properly – as they would have removed racist graffiti. All the petitions (which he had not signed as he is not that kind of person) had amounted to nothing.

He accepted that, on 7th June, he had been involved in rolling and dragging the statue across cobbles, 'It didn't enter my head about damaging it. What we had to do was make it more difficult for the council to put it back up, to make it nigh on impossible for them.' … 'All I cared about and was thinking was how to get it in the river to stop the council putting it back up again.' However, he agreed that the statue was damaged. He said he believed that 'the people consented to my actions that day' and referred to a poll by a local newspaper in which 60% of respondents 'voted afterwards that there was no harm done'.

Directions to and questions for the jury

The first four questions for the jury, posed by the trial judge, were these: whether they were sure that a defendant (jointly and together with others) damaged property belonging to another, intending to damage it or being reckless as to whether it would be damaged. In the light of each defendant's own evidence, it is hard to see how the jury could answer all these questions other than 'yes', in relation to each of them. The statue was pulled down from a 10ft high plinth by three of them and then dragged, by the fourth, for a considerable distance across cobbles to be thrown into the harbour, to ensure that it could not be put back. It would be surprising if the jury had been detained for long by the suggestion made by counsel for A that the statue may not have been 'harmed' because its 'historical or educational value' had been enhanced.

The nub of the case seems to have been whether the prosecution had made the jury sure, in relation to each defendant, that he or she did not have a lawful excuse. I will focus on these aspects:

- Prevention of crime: whether a defendant may have honestly (if mistakenly) believed that a factual situation existed which amounted to a crime committed by Bristol City Council and used reasonable force to prevent it;
- Proportionality: whether conviction would be proportionate, balancing the defendant's human rights and the interests of public safety or the rights and freedoms of others.

Prevention of crime

The admissibility of evidence is an important branch of the law. Essentially, evidence must be relevant to the determination of legally significant issues and, if disputed, susceptible to effective challenge. It should be noted that this defence entirely concerns a defendant's honest, if mistaken – even unreasonably so – belief. In his written directions, the judge put the defence submission in this way: 'the defence argue that they genuinely/honestly believed that a factual situation existed which amounts to these criminal offences[11] being committed by the council'. Plainly, the evidence which each defendant gave from the witness box is relevant and admissible on this issue. But what of other evidence which was given at the trial? The judge delivered what is called a 'notebook' summing up, going through his notes of the evidence in the order in which the witnesses were called (as opposed to dealing with the disputed issues discretely). Generally, he did not explicitly identify to which issue the jury could apply a particular piece of evidence, with one exception: the evidence of Professor David Olusoga.

Professor David Olusoga gave very extensive evidence about the evils of the slave trade, before and after Colston's involvement, and about Colston's involvement in it, as well as his philanthropy and memorialising. In his written directions, the trial judge directed the jury that Professor Olusoga's evidence was relevant only to the issue of whether the statue was 'indecent' or 'abusive' (elements of offences contrary to section 5 of the Public Order Act 1986 and/or section 1 of the Indecent Displays (Control) Act 1981). There is, arguably, a deep problem with this approach. The question was not what was in Professor Olusoga's mind, but what each defendant (rightly or wrongly) believed. On that basis alone, the obvious question is whether Professor Olusoga's evidence (which occupied more than 10% of the 54-page summing up) should have been admitted at all.

However, there is the further issue of whether this defence was, on the evidence and as a matter of law, rightly available to the defendants. If the defendants failed to establish the necessary evidential and legal basis for the defence of 'preventing crime' (thereby putting the burden on the prosecution to disprove it) it would follow, as the judge ruled that Professor Olusoga's evidence was relevant only to this defence, that his evidence would have to be completely excluded from the trial. Although the judge did not direct the jury about the use to which they could put

11. That is, offences contrary to section 1 of the Indecent Displays (Control) Act 1981 and section 5 of the Public Order Act 1986

the evidence given by three residents of Bristol (Lloyd Russell, Cleo Aiyay, and Gloria Daniel),[12] the same argument would seem to apply to them.

In relation to the defendants' own evidence, the judge's written directions to the jury said this, 'When they gave evidence you may consider that the defendants were saying that they used force to prevent the following crimes: the public display of indecent matter[13] [and] the display of a visible representation which is abusive, within the sight of a person likely to be caused distress by it.'[14] In fact, none of them gave explicit evidence to that effect. In their different ways, each deplored the statue, with its plaque, as 'a monument to racism', 'a hate crime', 'disgraceful', or 'offensive'. However, they did not use the words 'indecent' or 'abusive', which would, therefore, have to be inferred. The question arises as to whether, in each case, there was sufficient evidence that he or she did express the necessary belief, required by either statute, the terms of which, therefore, must be considered.

The definition of 'indecent' from the Oxford English Dictionary, which was in the written directions, was, arguably, of insufficient help to the jury in determining the specific meaning of the word in the context of section 1 of the Indecent Displays (Control) Act 1981. As a general rule of statutory interpretation, criminal legislation should be construed restrictively (on the basis that people should be able to know, in relation to the criminal law, just where they stand). In any event, there is good reason to doubt that section 1 of the Indecent Displays (Control) Act 1981 has any application to the circumstances of this case. Prosecutions under it are extremely rare. It was introduced as a private member's Bill for a very limited purpose, as described by Baroness Gaitskell in debate: 'I regard this Bill as a good Bill but a limited Bill. It was not intended that this Bill should cover the whole area of pornography; it was meant to help children by stopping displays that children might see.'[15] There was extensive debate about whether the word 'indecent' was the best expression to use. However, there was no hint that it might ever apply to anything like, or analogous to, a statue of a controversial historical figure who died 300 years ago and which has stood for 125 years without anyone claiming that its mere presence constituted this criminal offence.

There are further difficulties which may have been overlooked at the trial. The offence under the 1981 Act can only be committed by a person 'making the display or permitting the display to be made'. 'Making' is the act of creation. Bristol City Council neither made it (the statue or its installation) nor permitted it to be made. The council did not even exist in 1895. There is also the potentially difficult question of the circumstances in which a corporate body may be guilty of an offence, about which the jury received no assistance.

12. Lloyd Russell (concerned with his experiences of racism, not being taught black history at school, and the effect on him of the statue, 'a total disgrace and an embarrassment'); Cleo Aiyay (concerned with the harm, as she saw it, caused by the statue and the council's failure to give effect to protests about it) and Gloria Daniel (who also spoke of her feelings about her family being descended from slaves and the social and educational benefit of the toppling of the statue).
13. Section 1 of the Indecent Displays (Control) Act 1981
14. Section 5 of the Public Order Act 1986
15. https://api.parliament.uk/historic-hansard/lords/1981/jun/26/indecent-displays-control-bill

Section 5 of the Public Order Act 1986 reads, 'A person is guilty of an offence if he displays any visible representation which is abusive within the sight of a person likely to be caused distress thereby'. The judge did not attempt a definition of 'abusive'. It could properly be argued that it takes considerable ingenuity to interpret the combination of a statue and a laudatory plaque as denigration directed at someone living 125 years after it was put up and 300 years after the man commemorated. The offence does not appear to be a 'continuing offence' and the Public Order Act was not designed to have retrospective effect. Furthermore, there is a specific defence to this offence in section 6(4) of the Act: 'A person is guilty of this offence only if he intends the visible representation to be abusive or is aware that it may be abusive'. No defendant, in his or her evidence, expressly addressed this essential ingredient of the offence. Furthermore, the jury was given no direction about this, let alone told how it might apply to a corporate defendant, specifically, Bristol City Council.

The defendants complained about Bristol City Council's failure to remove the statue or agree a new text for the plaque (one might be forgiven for observing that it is in the nature of democracy that, where there are disagreements, some people do not get their own way and an issue may take some time to resolve). However, any suggestion that the police had, in some way improperly, failed to act is completely without substance. No one (let alone any defendant) had ever made a complaint to the police that the Bristol City Council was committing a crime by reason of the existence of the statue. This was not a situation where there was an urgent, critical need to intervene, in the emergency of a particular moment, to prevent commission of a crime. Primarily, discussions had been concerned with the wording of the plaque, rather than removing the statue. There is a strong case that the judge should have ruled that, even if the defendants believed facts which would constitute a crime or crimes committed by Bristol City Council, there could be no lawful justification for pulling it down as and when they did, instead of reporting the matter to the police for proper investigation.

For these reasons, in my view, there are reasonable, cogent grounds to conclude that the judge should have directed the jury that it was not open to them, in law, to acquit each defendant on the basis of the 'preventing crime' defence.

Proportionality

Articles 10 and 11 of the European Convention on Human Rights provide for the right to freedom of expression and freedom of assembly. However, by Articles 10(2) and 11 (2), these freedoms may be subject to laws 'which are necessary in a democratic society in the interests of … public safety, for the prevention of disorder or crime' By section 3 of the Human Rights Act 1998, 'So far as it is possible [domestic legislation] must be read and given effect in a way which is compatible with Convention rights.'

The jurisprudence of the European Court of Human Rights has developed the application of Articles 10 and 11, combining them, as it were, into a right to protest and to escape criminal liability for what would otherwise be crimes in certain circumstances. In the Colston statue case, the judge directed the jury that, in order to convict, the prosecution must make them sure that 'it is necessary in a democratic society, in the interests of public safety or for the protection of the rights of others, that the defendants should be convicted for their actions. Another way of looking at that question is to ask whether the interference in the defendants' rights, which a conviction for the offence of criminal damage would cause, is proportionate in all the circumstances, including the individual actions of each defendant'.

It follows that 'interference', in this context, has been taken to include conviction of a criminal offence (which happens long after the protest) as well as action taken by the police at the time. This approach has achieved a high point in this country in the Supreme Court case of *DPP v. Ziegler and others* [2021] UKSC 23. This case concerned protestors who blocked a road leading to an arms fair and had been charged with obstruction of a highway, contrary to section 137 of the Highways Act 1980. They were acquitted by a District Judge. The Divisional Court allowed the prosecutor's appeal and directed that convictions be entered. The Supreme Court restored the decision of the District Judge.

This paper is intended to identify the problems created by what seems to be the current understanding of this aspect of human rights jurisprudence, rather than to anticipate all the submissions which may appropriately be made to the Court of Appeal on this point (which, it should be emphasised was, contrary to some of the commentary about the case, by no means the principal focus of the trial). I will, however, point to two features of the Colston statue case which do not appear to have been explored at the trial and which go to the question of whether the issue of 'proportionality' was engaged at all and, therefore, whether this defence should have been left to the jury.

The concept of a 'peaceful' demonstration, which Convention rights are intended to protect, is not clear-cut. There is scope for argument about the extent to which the passive, but physical, prevention of members of the public going about their lawful business is, in reality, a use of force. What is clear, however, is that Article 11 only protects 'peaceful assembly', which 'does not cover a demonstration where the organisers and participants have violent intentions'.[16] Criminal damage is, unarguably, an offence of violence. Therefore, in relation to damage to the Colston statue, there are good grounds to hold that the issue of 'proportionality' simply did not arise.

Furthermore, was what happened to the statue actually a protest, exercising freedom of expression and assembly, thereby engaging Articles 10 and 11? 'Protest' has to do with seeking to persuade or put pressure on a person (or corporate body) to do (or stop doing) something. In this case, what happened was not to persuade or pressure Bristol City Council to remove the statue. The defendants simply achieved that object by pulling the statue down and rolling it away to be dropped in the harbour. This was not a 'protest' against a course of action (or a failure to act). It was simply a violent act, achieving an objective by force. It may have been at the same time as a BLM protest, but, according to the evidence to which the summing up refers, in relation to the statue, each defendant had entirely statue-focussed intention.

There are powerful reasons to simplify this area of the law to remove, or drastically reduce, the scope for litigating political controversy. Once 'proportionality' is an issue, the task for the tribunal of fact (magistrate, District Judge, or jury) involves consideration of a multiplicity of essentially political issues for which the criminal trial process is markedly unsuited: evaluating 'what is necessary in a democratic society'; balancing the legitimate aims of, for example, the Criminal Damage Act 1971 against the interference with the right to freedom of expression and assembly, in the context of a particular protest; whether the legitimate aim of the statute (however that is determined and expressed) could be achieved less restrictively; taking account of the 'importance of the issue' (but not whether the opinion of the protestor is right or wrong). Such questions raise great problems for the police, who must decide, often in a situation of real urgency and confusion, whether to intervene to clear a road or prevent damage being caused. A misstep could lead to successful claims for damages. Yet, failing to act could cause real loss or harm to the general public. Balancing interests when making law is the very stuff of democratic politics. There have never been more platforms for the expression of opinion and opportunities to try to persuade. Why should those who perform what would otherwise be criminal acts gain an advantage over those who profoundly disagree with them, but do not?

16. See *Ziegler*, paragraph 69.

The following situation is entirely plausible. A number of people block a road leading to a laboratory where they honestly, but wrongly, believe that unlawful experiments on animals are taking place. The road also leads to the maternity unit of a hospital. The husband of a wife in labour, believing that the protestors are committing an offence under the Highways Act, gets out of his car and tries, by force, to move them. He is helped by other motorists, of like mind. The protestors fight back, believing that they are not breaking the law but the motorists are. What are the police to do? How can they possibly conduct the balancing exercises the law seems to demand? Do they arrest everyone, or just one 'side'? The participants are all charged with assaulting each other. Each of them relies on the defence of using reasonable force to prevent crime. Are the two 'sides' tried together or separately? If everyone is acquitted (on the basis that they honestly, if mistakenly, believed different things), do they all have a potential action for damages against the police?

It is easy to think of this analogous situation. People gather, determined to pull down a statue, whose very existence they believe to constitute a crime. Others gather, believing that pulling down the statue would be commission of the offence of criminal damage, which they are entitled to use reasonable force to prevent. There is a fight. What should the police do? Or, later, the court? It is plainly in the public interest for the law to be both clear and workable as, at the moment, it does not appear to be.

Before leaving the issue of 'proportionality', further mention may be made of Professor Olusoga's evidence. The judge directed the jury that it was only relevant to the defence of 'prevention of crime'. It follows that it was not relevant to 'proportionality'. If it is to be argued that the judge got this wrong, it should be borne in mind that the seriousness of the issue of slavery was not, and could not be, in doubt and it is well established that whether a defendant's honest belief is right or wrong is irrelevant to the defence of proportionality. Therefore, it can properly be said that there is no basis on which Professor Olusoga's evidence should have been before the jury at all. Inevitably (given the subject matter) it must have had great emotional impact. The detail went far beyond Edward Colston's involvement. There was no context in terms of the history of worldwide slavery and its near universal acceptance in the 17th century (when even prisoners taken in the English Civil War, or 'War of the Four Kingdoms', were transported as slaves to the Caribbean). Edward Colston's philanthropy was attributed to 'reputational laundering' and his being memorialised in 1895 as, possibly, an attempt by the elite to assert their power and privilege. This is not, for a moment, to doubt Professor Olusoga's eminence and distinction as a historian. These are very important topics for historical investigation and understanding. But what relevance could they have had to any legal issue which the jury had to determine in a criminal trial?

Legislative change

It is to be hoped that taking these matters to the Court of Appeal (and, if necessary, the Supreme Court) would result in sufficient clarity and practicability, and not just in relation to the problems caused by the case of *Ziegler* – the ambit of the Indecent Displays (Control) Act 1981, section 5 of the Public Order Act 1986, and section 3 of the Criminal Law Act 1967 (all of which may, in future, play a significant part in comparable cases) would each benefit from the Court of Appeal's careful consideration. Until the results of any such reference are known, it may be unproductive to consider in detail what, if any, legislative change would be desirable. However, this much may be said. It would be entirely appropriate for the democratically elected and accountable Parliament to define where the balance should be struck between the important freedom to protest and the ability of those not protesting to go about their lawful business – people who may profoundly disagree with the protestors but confine themselves to ordinary democratic processes, relying on the quality of argument, rather than causing inconvenience, loss, or harm. Parliament may wish to draw an explicit line at offences of violence – either against the person or property. It may wish to consider whether a reversed burden of proof would be appropriate (so that someone who would otherwise be breaking the law would have to justify his or her actions). However, such questions are not for this paper.

Case management

A powerful reason for seeking practicable clarity in the law, by reference to the Court of Appeal, is demonstrated by the impact of the intrusion of essentially political questions into a criminal trial. It causes major difficulties for advocates (both defending and prosecuting) and judges. What are the evidential boundaries? What are the limits of legitimate comment? How is the judge to manage the trial, to be legally correct and fair to all sides? It can be hard to identify the line between emotive, purely political material and comment, on the one hand, and legally relevant admissible evidence, on the other. Even when that line has been identified, in the heat of the adversarial process, it can be exceptionally difficult to secure its observance. Any judge will be wary of seeming, in front of the jury, to shut out anything which may assist the cause of the defence (even though it is technically inadmissible). Prosecuting counsel may be reticent about taking objections for fear of appearing to the jury to be, for example, protecting the reputation of a slave trader. There is wide scope for reasonable disagreement among experienced, high-quality judges and advocates about how best to handle a trial in such circumstances. As already observed, I am deeply conscious that presence throughout a trial gives one a better 'feel' for it than reading transcripts. That said, there are features of the Colston statue case which provoke reflection and some comment.

It is noticeable that much hearsay evidence was admitted, apparently without formal application being made, as required by Part 20 of the Criminal Procedure Rules. Much of the evidence concerning the history of opposition to the statue, the actions of the Merchant Venturers, and opinions about the statue expressed by people who were not witnesses (including a police officer) was introduced in this way. Some of the material was emotive and of questionable relevance. Some was repeated in the summing up, without the conventional, cautionary direction to the jury as to how they should approach hearsay evidence. Other parts were referred to by defence counsel in their speeches.

So far as the defence speeches are concerned, it is striking how much freedom defence counsel understood themselves to have in making comment (some of it political and/or emotive) and referring to matters which were not in evidence. In relation to comment, the judge raised only one specific instance. Counsel for B had said to the jury, 'Make no mistake … your decision will reverberate, it will be transmitted round the world.

I urge you unapologetically to be on the right side of history.' When the judge raised it, counsel apologised to him. However, at the very start of his summing up, the judge said this to the jury, 'You've heard a lot of comments during speeches today, many of which I'm sure you will have found helpful in your own analysis and thinking. But during the course of those speeches today you've had some advocates use quite a lot of examples which have not featured at all during the course of the evidence in this trial.' And he reminded the jury of the importance of deciding the case on the basis of the evidence and that it was the 'defendants' explanations and reasons' that they would have to 'focus [their] decision making upon, not additional unevidenced examples drawn upon by advocates in their closing speeches which their clients didn't reference in their own accounts.' The stable door may have been closed after the horse had bolted.

There is a convention that counsel's speeches are not interrupted, but some might be surprised that the judge did not intervene earlier, and why it was only in relation to the comment urging the jury to be 'on the right side of history'. Some might also be surprised that prosecuting counsel did not intervene and invite the judge to define the appropriate boundaries. Of course, slavery is an emotive subject and no one wishes to be thought to be minimising its evil or to be mitigating the turpitude of someone involved in it (albeit more than 300 years ago, when attitudes were quite different). There were multiple examples of assertions, accompanied by emotive comment and controversial readings of history. It would be unfortunate if the jury were to gain, inadvertently and despite proper reminders to apply the law to the evidence, the impression that issues other than strict legality could inform its collective decision.

A number of comments made by defence counsel in their final speeches to the jury are set out below. It may be that the judge, with his experience of and 'feel' for the trial, putting the comments in the context of each speech as a whole, and having heard submissions, would have permitted all that was said (though his general direction to the jury suggests that, mostly, he would not). What follows demonstrates how difficult the trial process becomes once the door to political issues has been opened.

From counsel's speech on behalf of A:

- The defendants did not destroy but 'created history'.
- That on 7th June 2020, 'thousands came together to say "Enough is enough", to say, "We will not stand by any longer" and to say, "Now is the time to act"'.
- The involvement of Edmund Burke and Hannah Moore in the 18th century anti-slavery campaign.
- The life and work of a 19th century anti-slavery and social campaigner, Mary Carpenter.
- A Bristol bus boycott in the 1960s.

- That the defendants had been prosecuted 'by the state as they seek to pass the buck.'
- As to whether the statue was damaged (or 'harmed'), 'what, if anything has the city really lost?'
- 'You may think that, had the Prosecution been there when the Berlin Wall was torn down, they would have been standing by with cement and a trowel, wringing their hands, muttering about red tape and proper procedures not being following [sic], saying, "Well if the Berlin Wall comes down now, is Hadrian's Wall next?"'
- 'Without mass trespass on Kinder Scout we would not have the right to roam. Without the action and sacrifice of the suffragettes, we would not have rights for women'.[17]
- 'If you have a cancer like Colston festering in your city, you cut it out.'
- 'Despite the pressure they were put under, the jury [in the 1670 case of *Penn and Meade*] maintained their not guilty verdicts and did what was right'.

From counsel's speech on behalf of B:

- 'If you apply the evidence to the law, you will acquit B. If you do that, you will have quite rightly found the facts of slavery, the slave trade and the racism that endures in this country horrifying. You are entitled to feel horrified, disgusted, revolted.'
- 'Edward Colston advocated the murder and mutilation of children.'[18]
- There is a 'lack of emotion' … 'caused by a deliberate policy not to educate us on the history of slavery, the slave trade and Britain's role in it.'
- Any verdict other than 'Not guilty', would be 'a subversion of the evidence that you heard and a distortion of the law and also your emotions in this case. This trial concerns the ability of people to understand and share the feelings of others'.
- 'If you don't think venerating a slaver in the middle of the city was wrong, what I'm going to say is wasting all of our time. If you [sic], make no mistake members of the jury, your decision is not just going to be felt in this courtroom or this city, it will reverberate, it will be transmitted around the world. I urge you unapologetically to be on the right side of history'.
- 'Plenty of people may say that Colston's statue was no big deal. I suggest all those people will be white.'
- 'That was not an arbitrary act of vandalism, it was a deliberate act of solidarity with those who are oppressed, disrespected and undermined by the celebration of Colston's legacy.'
- 'Generations of people did nothing. Why? Because they were deliberately left uneducated and ignorant of the acts of this

17. In both cases, historians disagree as to whether reform was advanced or delayed by law-breaking. This is an illustration of the desirability of criminal trials being kept within the bounds of relevant, admissible evidence.

18. The judge's review of the evidence does not mention evidence to this effect.

appalling man and the horrific trade that this statue celebrated. Colston triumphed in his life. B and his fellow defendants saw it as their moral obligation not to let him triumph in death.'

- 'Racism is sadly alive and well in this country today'.
- The 1960s Bristol bus boycott.
- The recent experiences of black footballers.
- [In personal criticism of the present Prime Minister, who lives in a street named after a diplomat who supported slavery, for an article he had written[19]] 'A Prime Minister who thought that deliberately using racial terminology for laughs was OK. These are things still suffered by people of colour today.'
- 'The continued existence of that statue was a racist hate crime.'

From counsel's speech on behalf of C:

- The anti-slavery campaigning in the 19th century of an escaped slave Frederick Douglass.
- Reference to the toppling of the statue by the Rev'd Al Sharpton at George Floyd's funeral.
- 'Without [the suffragettes] a number of you would not be sitting here today.'[20]
- Martin Luther King's *Letter from a Birmingham Jail*, 'where he was himself imprisoned for alleged protest related crimes', was quoted as something which the jury could properly take into account. In the passage to which specific reference was made, Dr King advocated not delaying direct action.[21]
- A comparison was made between the philanthropy of Colston and that of Jimmy Saville and the statue of Colston and those of Nazis and Saddam Hussein (which had been destroyed).
- 'This city's history, this city now, and what it wants to be, at that particular moment in time, in response to that terrible murder of a black man, in the context of that Black Lives Matter march, demanding that black lives, that all black lives matter, as much as others, In all that context, I urge you, ladies and gentlemen of the jury, to acquit.'

From counsel's speech on behalf of D:

- Martin Luther King's *Letter from a Birmingham Jail*.[22]
- A quotation from Seamus Heaney, 'History says don't hope on this side of the grave, but then once in a lifetime, the longed-for tidal wave of justice can rise up and hope and history can rhyme.' It was then submitted that 'hope and history rhymed for that moment on seventh June. For hope and history to rhyme today, for justice to be done, I ask you to find D and all these defendants 'not guilty.'[23]

19. The article was written 20 years ago. It was intended to satirise Mr. Blair. Mr Johnson apologised for it 14 years ago.
20. See footnote 17.
21. There was no evidence before the jury about this letter, the circumstances in which it was written by the much-respected Dr King, nor the nature of the 'direct action campaign' he was proposing.
22. See footnote 21.
23. Some might find it hard to see much difference between this and asking the jury to be 'on the right side of history'.

The management of difficult trials, with a significant political dimension, deserves the attention of the Judicial College, in relation to judges and their training. The professional bodies responsible for the training of advocates should also take an interest in this topic. The importance of robust case management from the very start of the process cannot be overstated. Part 3 of the Criminal Procedure Rules requires judges to manage cases actively from the outset. It also requires the parties actively to assist the court in fulfilling its duty. That involves 'the early identification of the real issues' by the court, with the assistance of the parties. A Plea and Trial Preparation Hearing form must be completed, which includes identifying which witnesses are required to give evidence 'live' and setting out the 'relevant disputed issues' to which they are expected to speak. Each defendant must give a written defence statement, setting out his or her case.[24] Active case management includes 'ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way'.[25]

If evidence is not disputed, it should generally be reduced to writing as an 'admission' or 'agreed fact' (as the shortest and clearest way of presenting it). That way the judge retains, with the assistance of the parties, a desirable measure of control and there is no danger of a witness expanding unexpectedly into inadmissible territory. In a case where it is important that the emotional temperature is kept down (that is, almost all cases), the argument that an uncontested witness should give evidence 'live' to enhance the 'impact' of his or her evidence should usually be rejected as unhelpful to the jury in its task of dispassionate application of the law to the facts as, collectively, it finds them to be.

The pre-trial procedure should, therefore, establish the structure of the case before it starts. By this, the parties can know, from the outset, exactly the nature of each disputed issue and which evidence will relate to it. Once the boundaries of admissibility and relevance have been established, there can be no excuse for transgression. If in doubt, advocates can ask the judge for a ruling before adducing a piece of evidence or making a comment. If it becomes necessary, the judge may require advance notice of what an advocate intends to do or say.

As well as the challenges for judges that these cases present, there are great demands on advocates. All counsel need to know exactly where the boundaries are, so that they do not face interruption or criticism. Prosecutors face the additional dilemma of deciding to what extent the Crown should enter the political fray (if that is what the law permits). It may be that the traditional stance of prosecutors standing back, not calling evidence in rebuttal of defence evidence on political issues, and submitting to the jury that politics are irrelevant has, on the current state of the law, had its day.

24. Section 5 of the Criminal Procedure and Investigations Act 1996 and CrimPR 15.4.

25. *CrimPR 3.2(e)*

Appendix A

R v A, B, C, & D

LEGAL DIRECTIONS - JUDGE'S HANDOUT

My jobs –

1. To explain to you the law which applies in this case. I am responsible for decisions about what legal rules you have to follow.
2. All of my directions about the law, set out in this document, are compulsory for you to follow - you have no choice. If I get them wrong they can be corrected by an appeal.
3. To remind you of the core parts of the evidence to help you remember what witnesses have said, but you are the assessors of the evidence, not me. I will do that after you have heard the closing speeches of the advocates in the case.

Your jobs –

1. Appoint someone to chair your discussions. Choose someone in any way you want. That person should ensure everyone is given the opportunity of expressing their views and everyone listens respectfully to each other. The person you choose to chair your discussions doesn't have any special status – you are all equally important – you each have one vote. When you have made up your minds one of you will need to act as your spokesperson and answer a series of questions from the court clerk to tell us what verdicts you have reached.
2. Make the necessary decisions about the facts of this case, as a group of the 12 of you together, in order to come to your agreed verdicts of either 'guilty' or 'not guilty'. Here are some guidelines about how to approach your task

    - Assess what witnesses have said and assess the other material placed before you so as to decide what facts have been proved.
    - You are the only judges of the evidence.
    - Throughout your discussions as a jury you have to decide on the facts of the case. That's not for me, nor anyone else.

- Respect each others' opinions and value the different viewpoints you each bring to the case.
- Be fair and give everyone a chance to speak.
- It is okay to change your mind.
- Listen to one another.
- Do not be afraid to speak up and express your views
- Do not let yourself be pressured into changing your opinion, and do not pressure anyone else.
- Do not rush into a verdict to save time. Everyone involved in this case deserves your attention and thoughtful consideration.
- Do not under any circumstances make your own inquiries about anything to do with the case (as explained in the handout "Your Legal Responsibilities as a Juror" that you received on the first day of the trial).
- If someone is not following the instructions in this document, or refuses to engage, or relies on other information outside of the evidence presented to you then you must let me know by sending me a note straight away.
- You can vote on where you have all got to in your views at any stage of your discussions.
- You can take votes by raising your hands or by writing it down – that is up to you.

3. Your verdicts have to be unanimous: 12-0 decisions. (If the time were to come when I could accept any verdict from you involving fewer votes than 12 in favour of it you must wait until I call you back into court and tell you about it.)

Who has the job of proving the facts of the case?
The Prosecution has brought the case to court, so
the Prosecution has the burden of proving its allegations.
A Defendant does not have to prove anything or disprove anything.

How is something 'proved'?
Something is proved if, and only if, you are sure about it in the light of all of the evidence you have heard on that topic.
If, in the light of all of the evidence on that topic, you are not sure about it, then it hasn't been proved.

Separate verdicts
There are four Defendants and so there are four verdicts of 'guilty' or 'not guilty' you have to reach.
You must examine the evidence in relation to each Defendant - one by one, reaching a separate verdict on each, based upon your analysis of the evidence against each of them.
Your verdicts may well all be the same, but they might be different.
It all depends on your view of the evidence against each.

What is it that has to be proved by the Prosecution for 'Criminal Damage'?

The indictment charges contain a number of separate ingredients, all of which the Prosecution must prove before you can convict a Defendant.

The Prosecution has to prove all of the following against a defendant before you may find him/her guilty of causing criminal damage:-

1) The Defendant jointly and together with others
2) damaged property;
3) the property belonged to another;
4) The Defendant intended to damage it, or was reckless as to whether it would be damaged;

and

5) The Defendant did not have a lawful excuse for damaging it.

We are going to examine each of those five ingredients in a little more detail:-

1) The prosecution alleges that the Defendants acted "jointly and together with others". The law is that a person may be guilty of a crime either by carrying it out themselves, or, if they intended that the crime should be committed, by deliberately assisting or encouraging or causing it to be committed, even if it is actually carried out by others. A Defendant in this case may therefore be guilty, even if they did not personally cause damage to the statue, if they deliberately assisted/ encouraged/caused others to damage it by providing ropes or by attaching ropes to the statue, intending to assist others to intentionally or recklessly cause damage to the statue.
2) Property is "*damaged*" if it is temporarily or permanently physically harmed. Whether you are sure there was physical harm to the statue or not (which is a question of fact and degree) is a question for you to decide on the evidence which you have heard.
3) Property is to be treated as "*belonging*" to those who have custody or control of it and to those who have any proprietary right or interest in it. The Prosecution case is that the statue was maintained by Bristol City Council and held in trust on behalf of the people of Bristol. The Defendants have not suggested that the statue belonged exclusively to one or more of them – they do not dispute that it "belonged to another".
4) "*Intending to damage the statue, or being reckless as to whether it would be damaged.*" 'Intending' is a straightforward word which needs no further definition. The Defendant would have acted 'recklessly' as to whether the statue was damaged if the Defendant was aware of a risk that damage would occur and it was, in the circumstances known to the Defendant, unreasonable to take the risk. If the Defendant was unaware of a risk that damage would occur then the Defendant could not have been reckless.
5) It is for the Prosecution to disprove that a Defendant had

a "lawful excuse" for damaging someone else's property. In this case it is being argued that a Defendant had one (or more) lawful excuses.

You will have to examine the lawful excuses set out below and decide if the Prosecution has disproved them.

(i) *The use of reasonable force to prevent a crime.*

A person is to be treated as having a lawful excuse if:-

(1) they used such force as was reasonable in the circumstances as they believed them to be

(2) in the prevention of a crime.

(3) When they gave evidence you may consider that the Defendants were saying they used force to prevent the following crimes:

- the public display of indecent matter
- the display of a visible representation which is abusive, within the sight of a person likely to be caused distress by it.

I will explain a little more about each of those three parts of this lawful excuse which is relied upon by the Defendants, but I will do so in reverse order: (3), (2) & then (1), because that will make it easier to understand.

(3) May the Defendant have genuinely/honestly believed that a factual situation existed which amounts to a criminal offence (even if the Defendant's belief was a mistaken one)?

- There is a criminal offence of *displaying indecent matter publicly*.
- May the Defendant have genuinely/honestly believed Bristol City Council was displaying 'indecent matter' in public with this statue on the Centre? The definition of 'indecent' in the Oxford English Dictionary includes: "unbecoming; highly unsuitable or inappropriate; in extremely bad taste; unseemly; offending against the recognized standards of propriety and delicacy; highly indelicate…"
- There is a criminal offence of *displaying a visible representation which is abusive, within the sight of a person likely to be caused distress by it*. May the Defendant have genuinely/honestly believed that Bristol City Council was committing that crime by displaying an abusive statue, where one or more people were likely to have been caused distress by it?

The Defence argue that they genuinely/honestly believed that a factual situation existed which amounts to these criminal offences being committed by the Council.

The Prosecution argues that no criminal offence was being committed at all by the display of this statue - it was neither 'indecent' nor 'abusive', and you can be sure that the Defendants did not genuinely/honestly believe a factual situation existed which would have amounted to these crimes.

If you decide that the Defendant may have genuinely/honestly believed that a factual situation existed which amounts to these criminal offences, you need to go on to examine the following.

(2) Were the Defendant's actions carried out in order to prevent what they honestly/genuinely (even if mistakenly) believed to be a crime? The Defendants argue that that is what they were doing – their actions were done in order to prevent one or both of those crimes, which they honestly/genuinely believed to be happening.

The Prosecution argues that they were not trying to achieve that, but instead were trying to force their own agenda because they were frustrated by the lack of progress in the debate about the statue.

(1) Did the Defendant use 'reasonable' force to prevent a crime, in the circumstances as they believed them to be? It is for you to decide what force was reasonable by your own standards. It is not what the Defendant thinks was reasonable – it's what you think was reasonable. However, the 'circumstances' in which force was used are the circumstances as the Defendant believed them to be.

If the Defendant only did what they honestly and instinctively thought was necessary to prevent a crime, then that would be strong evidence that reasonable action was taken. In the case of the first 3 Defendants, did each of them honestly and instinctively think it was necessary to play a part in pulling down the statue to prevent a crime?

In the case of the fourth Defendant, did he honestly and instinctively think it was necessary to help roll the statue all the way to Pero's bridge to prevent a crime?

The Prosecution says that even if you were to conclude Bristol City Council may have been committing one or both of the crimes now alleged (which is disputed), and even if you were to conclude the Defendants honestly (even if mistakenly) took the action they did to prevent one or more of those crimes, it was unreasonable, in the circumstances as the Defendant believed them to be, to use force like this to prevent it, because there was a process through which concerns about the statue could have been dealt.

The Defendants argue that their actions were reasonable because any such processes had failed.

(ii) *Belief in the consent of the owners*
A person is to be treated as having a lawful excuse if he/she honestly believed, at the time of the acts alleged to constitute the offence,

that those who the person honestly believed were entitled to consent to the damage, would have consented to it, if they had known of the damage and its circumstances.

(It does not matter if the person's beliefs were justified or not, as long as they were honestly held.)

Neither A nor C have presented evidence that could form the basis of an argument that they had this lawful excuse.

B and D have given evidence to the effect that they had this lawful excuse for their actions, saying that on 7 June 2020 they honestly believed the statue was owned by the people of Bristol and honestly believed that, had the people of Bristol known of the damage and its circumstances, they would have consented to what was done.

The Prosecution argues that there is no way that they could possibly have honestly believed that the people of Bristol would have consented to what they did because they didn't take any steps to find out. If you consider that this lawful excuse applied, or may have applied, in the case of either of those two Defendants, then the Prosecution would have failed to disprove it and you will find that Defendant 'not guilty'.

(iii) The final *lawful excuse* you have to consider concerns all four defendants (and, again, the Prosecution has the burden of disproving it). However, I am going to deal with it under a separate bold heading:-

Would convicting the Defendant be a disproportionate interference with his/her rights?

Courts must read and give effect to legislation such as the Criminal Damage Act in a manner which is compatible with a number of rights which we all have.

Two of those rights are:

- the right to freedom of thought and conscience and to manifest one's beliefs;
- the right to freedom of expression, including to hold opinions and impart ideas.

These rights protect not only beliefs, such as anti-racism, and speech itself, but also actions associated with protest. Even where those actions have more than a minimal impact on the rights of other people, they need not result in a conviction. It is all a matter of fact and degree.

Limitations on these rights are permitted under laws like the Criminal Damage Act if they are necessary in a democratic society in the interests of public safety or for the protection of the rights and freedoms of others.

It requires balancing the defendants' rights to freedom of conscience and belief, to freedom of expression and to protest, as against the interests of public safety and the protection of the rights and freedoms of others, such as the property rights of the Council.

The Defendants will argue that even if you reject all of their other arguments, if you were to convict them it would be a disproportionate interference with them exercising those rights. You will therefore have to decide if the Prosecution made you sure that convicting them of criminal damage would be a proportionate interference with them exercising those rights.

Even if you are sure that all the other elements of the crime of criminal damage are made out and that no other lawful excuse applies, you must go on to consider whether it is necessary in a democratic society, in the interests of public safety or for the protection of the rights of others, that the defendants should be convicted for their actions.

Another way of looking at that question is to ask whether the interference in the defendants' rights, which a conviction for the offence of criminal damage would cause, is proportionate in all the circumstances, including the individual actions of each Defendant.

It is your task to make an assessment of where the balance lies, having regard to all the facts in the case.

In considering whether a conviction would be disproportionate for any Defendant, the question for you is not whether you agree with their actions or their aims, nor is it about sympathy or whether you think they are likeable. Everyone in the country has these rights and we each enjoy identical protection of those rights. This means that people with whom we fundamentally disagree have exactly the same protection as those with whom we agree.

When examining the facts of this case and deciding whether you are sure it would be proportionate to convict a Defendant, you may wish to consider the following factors. The list is not intended to be exhaustive and you are not obliged to consider any individual factor if you do not consider it to be helpful in reaching your verdict. It is also up to you what weight to give the factors you consider helpful.

(a) The extent of the interference with the rights of others, notably the rights of Bristol City Council and of other Bristolians on whose behalf they held this statue in trust.

(b) Whether the Defendant believed in the views which motivated their actions.

(c) Whether those views relate to very important issues.
(d) The importance to the Defendant of the method of protest adopted.
(e) Whether the actions of the Defendant was directly aimed at the matter of which they disapproved.
(f) Whether the Defendant's actions presented a danger to public safety.

'No comment' interviews

The words of the police 'caution' are: "You do not have to say anything. But, it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."

As it says, it is a suspect's right not to answer police questions, but there is also a warning that there might be damaging consequences if they do not mention something when questioned which they later rely on in court.

Two of the accused - A and D, declined to answer any police questions. When the Prosecution asked A and D why, they both told you they acted on the basis of advice from a Solicitor's representative.

They each acknowledged it was their own choice to decide whether or not to answer the police questions and face any consequences from a decision not to. They do not accept that the real reason behind their decisions not to answer questions was because they had not yet had time to think up answers which might provide them with the basis of a defence that they might be able to rely upon if they were charged with criminal damage.

They have now given you detailed accounts from the witness box. I will summarise their evidence in due course, but they were both asked: whether they had any lawful excuse for damaging it. Both replied "no comment". They have now put forward accounts from the witness box, during the course of which they have said they did have lawful excuses for what they did.

Could they have reasonably been expected to set out what lawful excuses they now rely upon to the police when asked about the allegation in their interviews back in 2020? Why didn't they answer the questions with the answers they have now given to you in court?

You must consider their explanations for that. They have each told you the real reason was because they took the advice they were given by a legal adviser. If you accept that may have been the real reason behind their decision to remain silent, then take this matter no further, don't hold it against them.

However, if you are sure that the real reason for keeping silent was

that that Defendant didn't have an answer to those questions and was giving himself time to make-up answers later to support a defence to the allegation, then you are entitled to hold their silence at the police station against them and treat the things they have said from the witness box as having less weight.

You should only reach that conclusion if the prosecution case was so strong as to call for an answer and you think it is fair and proper to do so. You must not convict that defendant wholly, or mainly, on the basis of this point – it is just one of the factors which may feature in your assessment of all of the evidence in the case.

C and B, on the other hand, answered many of the police questions and explained what motivated their actions. Do not hold it against them that they did not answer some police questions, because those questions have no bearing upon your assessment of whether they are guilty or whether any of the others are guilty.

Expert evidence

In this case you have heard the evidence of Professor Olusoga, who has been called on behalf of Sage Willoughby. Expert evidence is permitted in a criminal trial to provide you with information and opinion, within the witnesses expertise, which is likely to be outside your knowledge. You should look at it in its proper perspective – it is just part of the evidence as a whole to which you may have regard on one particular aspect of the case, namely if you think it helps you assess the question of whether displaying a monument of Edward Colston may be indecent or abusive. You are entitled to have regard to the historical information he has researched and interpreted when coming to your own conclusions. Bear in mind, however, that if, having given the matter careful consideration, you do not accept any parts of his evidence, or do not think it helps you answer the questions you have to answer, then you do not have to act upon it. It is for you to decide what evidence you consider relevant, what evidence you accept and what evidence you reject.

The relevance of the first three Defendants having no previous convictions

You should consider this in 2 different ways:

a) It is relevant to your assessment of their credibility as witnesses. Someone with previous criminal convictions might be considered less likely to be a truthful witness. Because they have not got criminal records you should take that into account in considering whether they are therefore more likely to have been truthful to you.

b) Would someone who has reached their ages without a criminal record have started offending now? It is relevant to your assessment of them because it may support the argument that they are not the sort of

people who have a tendency to be law breakers.

These are not defences, because obviously no one would otherwise ever be convicted for a first time if they could rely on these two points as an answer to an allegation. You must take them into account, but it is for you to decide how much weight you give them.

Comments
The Prosecution and Defence barristers will make comments to you in their speeches, seeking to convince you of the strengths of elements in their cases and weaknesses in the other side's case.

If those comments and arguments help you then please take them into account in your own thinking about the evidence, but you have to decide this case on the basis of your assessment of the evidence and not on the basis of anyone else's.

It is possible that you may sense that I have a view about some parts of the evidence. I do not intend to influence your views one way or the other and I don't intend to do so in this summing-up. You alone are the judges of the facts.

Evidence
What I will do is to pick out what I think may be the most useful and relevant parts of my notes to remind you of the evidence.

Because you are the judges of the evidence, not me, take no notice of any things I remind you about which you think are irrelevant. Equally, if you remember things which I do not mention, pay attention to what you recall.

Final practical points
Don't suffer in silence - if you need to be reminded of any of the evidence that has been given (remembering there cannot be any further evidence presented to you), or you need me to explain some part of the law more clearly, just send me a note and I will do what I can to help.

If some of you need the occasional break for a smoke then arrangements will be made for that.

Take all your papers with you when you go out to decide on your verdicts. There is no time pressure on you. If you are still discussing the evidence at around 4:30 and have not reached your verdicts I will have you back into court then and send you home overnight with some further legal directions. We will then resume again the next morning.

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Policy Exchange
1 Old Queen Street
Westminster
London SW1H 9JA

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