No more

No more, *America*, in mournful strain
Of wrongs, and grievance unredress'd complain,
No longer shall thou dread the iron chain,
Which wanton *Tyranny* with lawless hand
Had made, and with it mean t' enslave the land.

(Phillis Wheatley, To the Right Honourable William, Earl of Dartmouth, 1773)¹

I think this is the time for artists. (Toni Morrison, 2005)²

It's somebody is trying to take your rhythm but not know your blues.
(Amanda Seales, 2019)³

Phillis Wheatley is widely regarded as the first published African-American poet.⁴ Her book of poetry, *Poems on Various Subjects, Religious and Moral*, was published in 1773 while she was still enslaved to the Wheatley family. Phillis had arrived in the United States in 1761 and, although there are no records of her birth or origin, she was believed to have been around seven years old due to the loss of her front teeth.⁵ Her name, Phillis Wheatley, reflects her proprietary status, being so named for the ship of her passage, *Phillis*, and the name of her master, John Wheatley. But her authorship carried both her poetic 'love of *Freedom*'⁶ and precipitated her actual emancipation. The Wheatley family freed her after the publication of her book, but Phillis lived only nine more years, dying in poverty at just 31.⁷ Phillis's life and death as a freed slave was not unusual. In a recent interview, the historian Mary

1. P Wheatley *Poems on Various Subjects, Religious and Moral* (A Bell Bookseller, London 1773) 74.

2. T Morrison, *Conversations* (University of Mississippi Press, Jackson 2008) 245.

3. Amanda Seales, quoted in T Gunn, 'Amanda Seales Accuses Kim Kardashian of Blackface and Cultural Appropriation', *Revolt*, 20 December 2019 <<https://www.revolt.tv/news/2019/12/20/21031896/amanda-seales-kim-kardashian-blackface-cultural-appropriation>>.

4. HL Gates Jr, *The Trials of Phillis Wheatley: America's First Black Poet and Her Encounters with the Founding Fathers* (Civitas, New York 2003). Wheatley's first poem was published in the *Newport Mercury* in 1767 after Susanna Wheatley had submitted it on her behalf (Gates p. 20). Her first publication in London was in 1771 (Gates, p. 22).

5. P Wheatley, *Memoir and Poems of Phillis Wheatley, a Native African and a Slave, also, Poems by a Slave*, 3rd edition (Isaac Knapp, Boston 1838) 11–12.

6. P Wheatley, *Poems on Various Subjects, Religious and Moral* (A Bell Bookseller, London 1773) 74.

7. HL Gates Jr, *The Trials of Phillis Wheatley: America's First Black Poet and Her Encounters with the Founding Fathers* (Civitas, New York 2003) 34. John Wheatley also wrote a letter of support for the publication and Nathaniel Wheatley, his son, took her to London to meet publishers because of the difficulties of getting published in the United States.

Frances Berry explains that after emancipation the environment for freed slaves was such that it ‘put many Blacks back into slave conditions’.⁸

The publication of Phillis’s poetry was not straightforward. Anticipating that the authorship would garner great suspicion from publishers and readers alike, John Wheatley wrote a letter of authenticity, which asserted, among other things, Phillis Wheatley’s fundamental authorial intentionality: ‘As to her Writing, her own Curiosity led her to it.’⁹ Further, although not formal court proceedings as such (as is sometimes suggested in the surrounding literature),¹⁰ to verify Phillis’s authorial status she was nevertheless examined by judges to determine her authenticity and ‘qualification’. The publisher considered it prudent to have Phillis interrogated by judges in order to declare her authorship in a formal Attestation provided as an assurance to the public. Lending whole new meaning to the concept of ‘qualified person’, the Attestation was subsequently printed in the frontmatter and the original was available to be viewed at the publisher’s premises: ‘We whose names are underwritten, do assure the World, that the Poems specified in the following Page were (as we verily believe) written by Phillis ... She has been examined by some of the best Judges, and is thought qualified to write them.’¹¹ There is no transcript of what took place in that Attestation process.¹²

Almost 250 years after Phillis’s ‘trial’ of authorship, on Memorial Day 2020, George Floyd died in police custody while pleading, ‘I can’t breathe’.¹³ The video of the restraint went all around the world and the circumstances resonated with the 2014 death of Eric Garner, also filmed and shared around the world.¹⁴ During his restraint, Garner also repeated several times, ‘I can’t breathe’,¹⁵ until he lost consciousness and died. The protests that have followed Floyd’s death have resounded, quite literally, with the repetition of the plea, ‘I can’t breathe’. The phrase has

8. MF Berry, ‘Historian Mary Frances Berry responds to the George Floyd Protests’, *Penn Today*, 5 June 2020 <<https://penntoday.upenn.edu/news/historian-mary-frances-berry-responds-george-floyd-protests>>.

9. P Wheatley, *Poems on Various Subjects, Religious and Moral* (A Bell Bookseller, London 1773) 6. See also P Wheatley, *Memoir and Poems of Phillis Wheatley, A Native African and a Slave, also, Poems by a Slave*, 3rd edition (Isaac Knapp, Boston 1838) 44.

10. For instance, see the play by Ronald B Wheatley, *The Trial of Phillis Wheatley* (2013), which presents the Attestation as a courtroom drama.

11. P Wheatley, *Poems on Various Subjects, Religious and Moral* (A Bell Bookseller, London 1773) 7. However, even with an Attestation, US publishers were unwilling to publish the poetry, the publication instead being produced with A Bell, Bookseller, Aldgate, London. See further HL Gates Jr, *The Trials of Phillis Wheatley: America’s First Black Poet and Her Encounters with the Founding Fathers* (Civitas, New York 2003): ‘That attestation was deemed absolutely essential to the publication of Wheatley’s book, and even with the attestation no American publisher was willing to take on her manuscript’ (Gates p. 30).

12. HL Gates Jr, ‘Phillis Wheatley on Trial’, *The New Yorker*, 20 January 2003, 82–7, 83.

13. D Bennett et al., ‘The Death of George Floyd’, *Washington Post*, 30 May 2020, <<https://www.washingtonpost.com/nation/2020/05/30/video-timeline-george-floyd-death/?arc404=true>>.

14. J Goldstein and M Santora, ‘Staten Island Man Died from Chokehold During Arrest, Autopsy Finds’, *New York Times*, 1 August 2014 <<https://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html>>.

15. O Laughland et al., ‘“We Can’t Breathe”: Eric Garner’s Last Words Become Protestors’ Rallying Cry’, *The Guardian*, 4 December 2014 <<https://www.theguardian.com/us-news/2014/dec/04/we-cant-breathe-eric-garner-protesters-chant-last-words>>.

become a shared expression underpinning the Black Lives Matter (BLM) movement, not as empty symbol but as an embodied entreaty. *It is impossible to breathe*.¹⁶

The phrase, ‘I can’t breathe,’ has become a catalyst, both auditory and visual, for transformation. There have been protests not only all over the United States, but also all over the world, and all over social media.¹⁷ The phrase adorns placards, embodies chants, emblazons t-shirts, and mobilizes social media protest art and expression,¹⁸ becoming ‘an ethical charge for those of us who are alive and remain to be caught up in the cause of justice against the violence’.¹⁹ ‘I can’t breathe’ has become a rhythmic refrain – protest and defence, territorial and sociable, inhalation and exhalation – the rhythm of change:²⁰ ‘It is the archetype of the vital element. It is the first condition and the hallmark of Art, as breath is of life.’²¹ The protests have instigated the beginnings of a reflective accountability on stifling environments across a range of cultural institutions, from policing to education to the law, demanding the transformation of basic social and cultural infrastructures that, to repeat, ‘put many Blacks back into slave conditions’.²² Quite simply, the demand is to be *free to breathe*.

Black Lives Matter is a movement invigorated and propelled through protest art.²³ The beat of protest art has always been a central part of arresting the arrhythmia of

16. Frantz Fanon examines this relationship between breathing, physiologically and as vital breath, and the distinction between this as a territorial revolt and ‘quite simply’ an inability to breathe. See F Fanon, *Black Skin, White Masks* [original title, *Peau Noire, Masques Blanc*], CL Markmann (trans) (Pluto Press, London 1952/[1986]): ‘It is not because the Indo-Chinese has discovered a culture of his own that he is in revolt. It is because “quite simply” it was, in more than one way, becoming impossible for him to breathe’ (p. 176).

17. On the increasingly political nature of Instagram content as a platform for Black Lives Matter, see E Stewart, ‘It’s Not Just Your Feed. Political Content has Taken Over Instagram’, *Vox*, 24 June 2020 <<https://www.vox.com/recode/2020/6/24/21300631/instagram-black-lives-matter-politics-blackout-tuesday>>.

18. B Makalintal, ‘On Instagram, Artists Are Creating a Shareable Language of Protest’, *Vice*, 9 June 2020 <https://www.vice.com/en_us/article/xg8d97/on-instagram-artists-are-creating-a-shareable-language-of-protest>.

19. AT Crawley, *Blackpentecostal Breath: The Aesthetics of Possibility* (Fordham University Press, New York 2017) 2.

20. Frantz Fanon recognizes such a rhythmic refrain in the expression of protest in Claude Nordey, who states: ‘This is rhythm in its primordial purity, this is rhythm in the masterpieces of Negro art, especially sculpture. It is composed of a theme—sculptural form—which is set in opposition to a sister theme, as inhalation is to exhalation, and that is repeated. It is not the kind of symmetry that gives rise to monotony; rhythm is alive, it is free. ... This is how rhythm affects what is least intellectual in us, tyrannically, to make us penetrate to the spirituality of the object; and that character of abandon which is ours is itself rhythmic.’ See ‘Ce que l’homme noir apporte’ in Claude Nordey, *L’Homme de couleur* (Plon, Paris 1939) 309–10, cited in F Fanon, *Black Skin, White Masks* [original title, *Peau Noire, Masques Blanc*], CL Markmann (trans) (Pluto Press, London 1952/[1986]) 93.

21. ‘Ce que l’homme noir apporte’, *ibid*.

22. MF Berry, ‘Historian Mary Frances Berry responds to the George Floyd Protests’, *Penn Today*, 5 June 2020. Andrew M Perry and Tawanna Black comment: ‘The racial attitudes that lead police to choke Black people ... are the same that exclude Black people from employment and investment opportunities.’ See AM Perry and T Black, ‘George Floyd’s Death Demonstrates the Policy Violence that Devalues Black Lives’, *Brookings*, 28 May 2020.

23. R Dunlea, ‘Black Lives Matter Co-Founder on Building a Movement Through Art’, *Rolling Stone* 2020, 23 June <<https://www.rollingstone.com/culture/culture-features/black-lives-matter-protest-art-patrisse-cullors-broad-museum-1019078/>>.

systemic racism and with recent events and expressions the tempo of revolution has increased: ‘*Rhythm!*’²⁴ The art of protest and the protest of art is a rhythmic pulsation: ‘And now how my voice vibrates!’²⁵ Protest reverberates through crowds with an identifiable rhythm, ‘Voices, hands and feet can unite in a pulsing wave of sound to create an infectious and repeatable rhythm.’²⁶ The interlocutory of creative and collective rhythm informs also the art itself. One artist, who has thus far remained anonymous, has been producing daily portraits of George Floyd and distributing the work through the Instagram account @artistsforgeorge, as well as producing posters with Shoestring Press to give out to protestors in New York City.²⁷ This repetition of images with each protestor, with each share, creates the posterity for the work. On walls, in crowds, on social media, protest art is thus freed from the institutional structures of the museum and its preservation, instead relying for its posterity on the spectator, the audience, the protestor. Not in spite of but perhaps because of the very many replicas being made, the original ‘work’ of art is animated and ventilated through its constant repetition and dissemination. And the audience is forced to do some work. With each repetition comes a new performance at the will of the spectator. All of us are artists. Just look now at all the raucous sound of protest. The protestor, the spectator, is on the move and free to breathe.

Monuments around the world have been marked,²⁸ toppled²⁹ and willingly removed³⁰ in the protests since George Floyd’s death. One of the most iconic moments

24. F Fanon, *Black Skin, White Masks* [original title, *Peau Noire, Masques Blanc*], CL Markmann (trans) (Pluto Press, London 1952/[1986]) 93. Fanon writes: ‘You come too late, much too late. There will always be a world—a white world—between you and us. ... The other’s total inability to liquidate the past once and for all. In the face of this affective ankylosis of the white man, it is understandable that I could have made up my mind to utter my Negro cry. Little by little, putting out pseudopodia here and there, I secreted a race. And that race staggered under the burden of a basic element. What was it? Rhythm!’ (pp. 92–3).

25. Fanon, *ibid* 93.

26. L English, ‘Voices, Hearts and Hands – How the Powerful Sounds of Protest have Changed Over Time’, *The Conversation*, 10 June 2020 <<https://theconversation.com/voices-hearts-and-hands-how-the-powerful-sounds-of-protest-have-changed-over-time-140192>>.

27. A Schonfeld, ‘The Art of Protest: Artists Create Images in Support of Black Lives Matter’, *Newsweek*, 25 June 2020 <<https://www.newsweek.com/art-protest-artists-create-images-support-black-lives-matter-1512810>>.

28. The statue of Edward Colston in Bristol was splashed in red paint before being toppled into Bristol harbour: T Wall, ‘The Day Bristol dumped its Hated Slave Trader in the Docks and a Nation Began to Search its Soul’, *The Observer*, 14 June 2020 <<https://www.theguardian.com/uk-news/2020/jun/14/the-day-bristol-dumped-its-hated-slave-trader-in-the-docks-and-a-nation-began-to-search-its-soul>>. The statue has since been retrieved from the water and there is now an attempt to preserve the graffiti as part of the overall restoration process: BBC Correspondent, ‘Edward Colston Statue Graffiti Will Be Preserved’, *BBC News*, 17 June 2020 <<https://www.bbc.co.uk/news/uk-england-bristol-53083939>>.

29. BBC Correspondent, ‘Confederate and Columbus Statues Toppled by US Protestors’, *BBC News*, 11 June 2020 <<https://www.bbc.co.uk/news/world-us-canada-53005243>>.

30. For example, the American Museum of Natural History is voluntarily removing the statue of Theodore Roosevelt on horseback flanked by an African man and a Native American on foot: N McGreevy, ‘The Racist Statue of Theodore Roosevelt Will No Longer Loom Over the American Museum of Natural History’, *Smithsonian Magazine*, 23 June 2020 <<https://www.smithsonianmag.com/smart-news/statue-theodore-roosevelt-removed-reexamination-racist-acts-180975154/>>. The statue of slave trader, Robert Milligan, was also removed by the Canal and River Trust from outside the Museum of London Docklands in order to ‘recognise the wishes of the community’, BBC Correspondent, ‘Robert Milligan: Slave Trader Statue Removed from

of the protests in the UK was when the statue of Edward Colston was pulled down and thrown into Bristol harbour.³¹ The removal was described by the mayor of Bristol, Marvin Rees, as a 'piece of historical poetry'.³² Colston was Deputy Governor³³ of the notorious Royal African Company (and other members of the Colston family were also members of the Company), which 'shipped more enslaved African women, men, and children to the Americas than any other single institution during the entire period of the transatlantic slave trade'.³⁴ The Company was infamous for the treacherous and crowded conditions of its trafficking. Many perished during the voyages and the bodies were discarded at sea: 'We have a statue of someone who made their money by throwing our people into water ... and now he's on the bottom of the water.'³⁵ But as potent as these images are, there is so much more to do. If we only monumentalize the symbols (both erecting and dismantling), the attention to systemic racism is at risk of being displaced and distracted, of being kept at bay in a sea of objects. There are calls for the targeted statues to be placed in secure museums, objects divested of context and preserved as icons: 'I strongly suspect that those who suggest that these statues should be moved there really think that museums are a useful dumping ground for old things you don't want, but don't feel you can actually throw away. How wrong can you get?'³⁶ Indeed, the discourse surrounding the permanence of statues, and their retrieval and preservation in secret locations or ultimately museums, is in stark contrast to the mobile properties of protest art and the proliferation and necessary repetition, imitation and copying that makes it.

And of course, events over the last month are not the first confrontations between race, monuments and rethinking history, including the Civil Rights protests in the 1960s United States.³⁷ More recently, calls to address the colonial and racist legacy of monuments

Outside London Museum', *BBC News*, 9 June 2020 <<https://www.bbc.co.uk/news/uk-england-london-52977088>>. And after many years of public protest, the governors of Oriel College, Oxford University, voted in favour of the removal of the statue of Cecil Rhodes: S Coughlan, 'Oxford College Wants to Remove Cecil Rhodes Statue', *BBC News*, 18 June 2020 <<https://www.bbc.co.uk/news/education-53082545>>.

31. O Elmi, 'Edward Colston: Why the Statue had to Fall', *BBC News*, 8 June 2020 <<https://www.bbc.co.uk/news/uk-england-bristol-52965803>> and BBC Correspondent, 'Edward Colston Statue Pulled Out of Bristol Harbour', *BBC News*, 11 June 2020 <<https://www.bbc.co.uk/news/uk-england-bristol-53004748>>.

32. Marvin Rees in interview, quoted in S Morris, 'Bristol Mayor: Colston Statue Removal was Act of "Historical Poetry"', *The Guardian*, 13 June 2020 <<https://www.theguardian.com/uk-news/2020/jun/13/bristol-mayor-colston-statue-removal-was-act-of-historical-poetry>>.

33. James II was Governor.

34. WA Pettigrew, *Freedom's Debt: The Royal African Company and the Politics of the Atlantic Slave Trade, 1672–1752*, University of North Carolina Press, Chapel Hill 2013) 11. Pettigrew notes also the cruel irony of the campaign to liberalize the slave trade, which was premised on arguments concerning the freedom of the traders to trade and their individual rights (pp. 104–5).

35. Marvin Rees, Mayor of Bristol, in an interview with Krishnan Guru-Murthy, Channel 4 News, 7 June 2020, <<https://www.channel4.com/news/we-have-a-statue-of-someone-who-made-their-money-by-throwing-our-people-into-water-and-now-hes-on-the-bottom-of-the-water-marvin-rees-elected-mayor-of-bristol>>.

36. M Beard, 'Statue Wars', *Times Literary Supplement*, June 2020 <<https://www.the-tls.co.uk/articles/statue-wars-blog-post-mary-beard/>>.

37. For example, there were attempts to destroy the Nathan Bedford Forrest monument in Memphis in the 1960s, followed by demands for its removal in the 1980s, and in 2009 the artist, Richard Lou, incorporated it into a performance/photography piece at the site entitled

have intensified around the world, and with that the risk of populist capture that comes with the conventional structuring of debate. In an extraordinary Facebook post of 2017, the then Australian Prime Minister, Malcolm Turnbull, likened protest graffiti to Stalinist purges and, in language that echoes the current divisive discourse of rewriting and ‘whitewashing’ history,³⁸ he called it ‘a deeply disturbing and totalitarian campaign to not just challenge our history but to deny it and obliterate it’.³⁹ More recent events have been met with a script of ‘patriotic unity’ as far-right groups in the UK demonstrated in retaliation to the destruction of statues and assembled to ‘defend’ monuments.⁴⁰ In this way, the rhythm of protest is at risk of being co-opted by populist language – the up and down of monuments, the on or off of television, and inevitably the us and them of the refrain itself – to #BlackLivesMatter, many on social media posted a perverse retort of #AllLivesMatter in a display of firmly entrenched populism and adversarial positioning of the issues. *Like taking your rhythm without knowing your blues.*

In other words, the force and value of that social rhythm provokes not only attention but also capture, and with that capture comes the risk that the basic structural problems will remain untested and unshifted: ‘If history is any guide to the future, politicians and leaders in every field will revert to the status quo ... History will note whether once again we refuse or simply cannot do the harder job of reducing the underlying causes of discontent identified in report after report.’⁴¹ This kind of populist capture arguably is facilitated by the discourse itself and the simplified division of history and debate into an attenuated expression of extremes or, as Mary Beard calls it, ‘goodies and baddies’.⁴² Such polarization not only serves to validate extreme views but also precludes the space for critique (and indeed commonality). The musician, Nick Cave, describes something similar when he suggests that political songs have ‘little patience for nuance, neutrality or impartiality’.⁴³ In an age of selfies and superheroes, ‘Maybe it

ReCovering Memphis: Listening to Untold Stories, and again in 2013 in *ReCovering Memphis: Courageous Love*. See further the discussion in J Stokes-Casey, ‘Richard Lou’s ReCovering Memphis’ (2016) 75(4) *Tennessee Historical Quarterly* 322–47.

38. CR Riley, ‘Don’t Worry about “Rewriting History”: It’s Literally What We Historians Do’, *The Guardian*, 10 June 2020, <<https://www.theguardian.com/commentisfree/2020/jun/10/rewriting-history-historians-statue-past>>.

39. C Knaus, ‘“No Pride in Genocide”: Vandals Deface Captain Cook Statue in Sydney’s Hyde Park’, *The Guardian*, 26 August 2017 <<https://www.theguardian.com/australia-news/2017/aug/26/captain-cook-statue-and-two-others-in-sydneys-hyde-park-attacked-by-vandals>>.

40. D Sabbagh, ‘Campaigners Fear Far-Right “Defence” of Statues such as Churchill’s’, *The Guardian*, 10 June 2020 <<https://www.theguardian.com/world/2020/jun/10/far-right-protesters-plan-defence-of-statues-such-as-churchills>>.

41. MF Berry, ‘Historian Mary Frances Berry Responds to the George Floyd Protests’, *Penn Today*, 5 June 2020 <<https://penntoday.upenn.edu/news/historian-mary-frances-berry-responds-george-floyd-protests>>.

42. M Beard, ‘Statue Wars’, *Times Literary Supplement*, June 2020 <<https://www.the-tls.co.uk/articles/statue-wars-blog-post-mary-beard/>>.

43. N Cave, *The Red Hand Files*, 102, June 2020 <<https://www.theredhandfiles.com/do-wish-more-politically-outspoken/>>. See further the discussion in W Richards, ‘Nick Cave Reveals Why He Doesn’t Write Political Songs: “It’s Just Not What I Do”’, *NME*, 23 June 2020 <<https://www.nme.com/news/music/nick-cave-reveals-why-he-doesnt-write-political-songs-its-just-not-what-i-do-2693839>> and J Campbell, ‘Nick Cave Explains Why He Doesn’t Make Protest Songs’, *GQ Australia*, 24 June 2020 <<https://www.gq.com.au/entertainment/music/nick-cave-explains-why-he-doesnt-make-protest-songs/news-story/bb226735c50175058dd28c706d83d87b>>.

is the act of heroizing that is the problem'.⁴⁴ After all, from authors to brands, the visual spectacle of intellectual property loves a hero.

In this context, the co-option of the rhythm of protest extends to absorbing the imagery and marks of the movement itself, and to do this, attempts have been made to recruit the intellectual property framework to facilitate (and validate) the appropriation. Georgios Demetriou, a Manchester businessman, faced considerable public criticism when he attempted to register 'I can't breathe' and 'Black Lives Matter' as trade marks with the UK Intellectual Property Office; he subsequently withdrew the applications.⁴⁵ But he is not alone. In fact, there have been numerous attempts since the protests to register 'Black Lives Matter' in the UK,⁴⁶ EU⁴⁷ and US.⁴⁸ However, earlier attempts also failed. In 2015 the US Patent and Trademark Office (USPTO) refused applications for 'I can't breathe' and #Icantbreathe, citing the possibility of falsely suggesting a connection with Eric Garner and noting that the addition of a hashtag did not render an unregistrable mark registrable.⁴⁹ What is especially curious about these

44. M Beard, 'Statue Wars', *Times Literary Supplement*, June 2020 <<https://www.the-tls.co.uk/articles/statue-wars-blog-post-mary-beard/>>. On the 'weaponization' of medical language and the George Floyd autopsy report, see A Crawford-Roberts et al., 'George Floyd's Autopsy and the Structural Gaslighting of America', *Scientific American*, 6 June 2020 <<https://blogs.scientificamerican.com/voices/george-floyds-autopsy-and-the-structural-gaslighting-of-america/>>. Indeed, in the language of social media, almost every difficulty is presented as a battle and every individual as a warrior, including in the discourse surrounding COVID-19. Costanza Musu explains that such language serves 'an inward-looking, my-country-first attitude' and that '[i]t is not by cultivating the image of warriors that governments will convince people to continue to comply with health authorities: it is by appealing to civic duty, solidarity and respect for fellow human beings': C Musu, 'War Metaphors Used for COVID-19 Are Compelling but Also Dangerous', *The Conversation*, 8 April 2020 <<https://theconversation.com/war-metaphors-used-for-covid-19-are-compelling-but-also-dangerous-135406>>.

45. UKTM 3497647 (Black Lives Matter); UKTM 3497640 (I can't breathe). See further I. Van Hagen, 'This British Businessman is Trying to Trademark "Black Lives Matter" and People Are Furious', *Indy*, 16 June 2020 <<https://www.indy100.com/article/businessman-trademark-black-lives-matter-reaction-9568681>> and R Day, 'Manchester Businessman Drops Efforts to Trademark "I Can't Breathe" and "Black Lives Matter"', *Manchester Evening News*, 17 June 2020 <<https://www.manchestereveningnews.co.uk/news/greater-manchester-news/manchester-businessman-drops-efforts-trademark-18432442>>.

46. At the time of writing, there were still two applications pending in the UK Intellectual Property Office which had not been withdrawn: UKTM 3499537 (Premier League footballer Troy Deeney and Alisha Hosannah); and UKTM 3501795 (series application; Patrice Adams).

47. At the time of writing, there was one application pending with the EU Intellectual Property Office which had not yet been withdrawn: EUTM 18255264.

48. At the time of writing, there was a total of 32 applications for 'Black Lives Matter' or versions of 'Black Lives Matter' on the USPTO register, of which 15 were still live and 17 abandoned, some of which date back to the protests following Eric Garner's death. For 'I can't breathe' or versions incorporating 'I can't breathe' there are 14 on the USPTO register, and all but two are still live. All but two are after George Floyd's death (the exceptions are the abandoned application of 2014 discussed below, and an application of September 2019 for clothing which was subsequently abandoned). See further the discussion in M Tobin, "'Black Lives Matter' Trademark Applications Surge After Protests', *Bloomberg*, 24 June 2020 <<https://www.bloomberg.com/news/articles/2020-06-24/-black-lives-matter-trademark-applications-surge-after-protests>>.

49. See further, 'USPTO Rejects "I Can't Breathe" Trademark Applications', 16 March 2015, *World Intellectual Property Review* <<https://www.worldipreview.com/news/uspto-rejects-i-cant-breathe-trademark-applications-8050>>.

registrations is that they appear to be a case of a recognizable ‘brand’ driving the contrivance of a good or service to exploit that brand. In other words, rather than attempting to devise a mark distinctive of an enterprise, these attempts indicate a move towards fashioning a business around a sign, a brand, and its pre-existing cultural meaning and import. Where attention has become a value in and of itself, these attempts to co-opt the momentum of recent events are a cynical and derisory example of the brand as the business and a perverse over-simplification of the language of revolution itself. How could any individual undertaking hope to make these protest rhythms distinctive when the identity will always already be mobilized within the movement? Notwithstanding the completely conflicting rationale (legally, politically and culturally) between trade mark registration and control on the one hand, and the ongoing engagement and dissemination of the movement’s protest rhythm through these refrains on the other, structurally, socially, implausibly, this is an utter miscalculation.

Compare instead the travails of the mark of the Punisher, a character of the Marvel universe, whose recognizable skull mark has been appropriated by the US military, police and subsequently white supremacists. One of the Punisher’s creators, Gerry Conway, decided to recruit the fandom itself to reclaim the mark for Black Lives Matter:⁵⁰ ‘I’m looking for young comic book artists of color who’d like to participate in a small fundraising project for #BLM to reclaim the Punisher skull as a symbol of justice rather than lawless police oppression.’⁵¹ As one commentator wrote, ‘Sometimes it takes a bootleg T-shirt to stop a bootleg T-shirt.’⁵² This is not a battle of original works, as such, but one of fans, of spectators, of users. And it is a striking example of the mobile properties of protest art and the repatriation of posterity with the audience itself. Working with the Black Cultural Zone Collaborative, Oakland artist and producer, Randolph Belle, explains: ‘At the heart of this, one word. Context. It’s the idea that these works came from a moment, and the moment from movement.’⁵³ This reference to movement is important, especially in resisting the appropriation of rhythms in ‘I can’t breathe’ and ‘Black Lives Matter’ within trade marks. This is the rhythm of protest, the beat of storytelling.

Returning to the statue of Edward Colston and its removal, a new kind of work came from that moment. The paint and graffiti will be preserved: ‘It has become part of the story of the object, of the statue, so our job is to try and retain that as

50. L McGuire, ‘Punisher Creator Hits Back at Police Co-opting Skull Logo, Supports BLM’, *Screenrant*, 7 June 2020 <<https://screenrant.com/marvel-punisher-skull-symbol-police-black-lives-matter/>>; I Lewis, ‘The Punisher Creator Asks Fans to Help Reclaim Marvel Superhero’s Logo for Black Lives Matter Movement’, *Independent*, 8 June 2020 <<https://www.independent.co.uk/arts-entertainment/books/news/the-punisher-black-lives-matter-logo-gerry-conway-skull-police-a9554551.html>>.

51. Gerry Conway quoted in S Cascone, ‘Police in the US Have Embraced the Punisher Skull as an Unofficial Logo. Now the Character’s Creator is Asking Artists of Color to Reclaim It’, *ArtNet*, 10 June 2020 <<https://news.artnet.com/art-world/punisher-black-lives-matter-1883013>>.

52. S Thielman, ‘How Do You Stop the Far-Right Using the Punisher Skull? Make it a Black Lives Matter Symbol’, *The Guardian*, 11 June 2020 <<https://www.theguardian.com/books/2020/jun/11/how-do-you-stop-the-far-right-using-the-punisher-skull-make-it-a-black-lives-matter-symbol>>.

53. Randolph Belle, Black Cultural Zone Collaborative, quoted in W Freedman, ‘“We Need Change”: Oakland Artists Explain Deeper Significance Behind George Floyd Murals’, *ABC News*, 24 June 2020 <<https://abc7news.com/society/oakland-artists-explain-deeper-significance-behind-george-floyd-murals/6263054/>>.

much as possible.⁵⁴ Randolph Belle describes a similar perspective in relation to street art: ‘These murals represent history, the kind that begins as a narrative on walls before it goes into books.’⁵⁵ Iconoclasm thus becomes a performance of protest art in and of itself. Mary Beard has called the Colston toppling ‘a rather moving piece of performance art’,⁵⁶ and Banksy has suggested the statue’s incorporation into a new and momentous installation: ‘We drag him out of the water, put him back on the plinth, tie cable round his neck and commission some life size bronze statues of protestors in the act of pulling him down. Everyone happy. A famous day commemorated.’⁵⁷ Context. A moment from movement.

More moments. In Sydney’s Hyde Park in Australia, the statue of Captain Cook was spray-painted with graffiti. And the artist, Nicholas Galanin, created the installation, *Shadow on the land, an excavation and bush burial* for the Biennale of Sydney.⁵⁸ The work consists of a ‘grave’ dug in the shape of the statue’s shadow in anticipation of the monument being laid to rest.⁵⁹ In Salt Lake City in the United States, red paint was poured over the two giant hands comprising the sculpture, *Serve and Protect*, by Gregory Ragland, installed outside the Salt Lake City police building. The transformation, as it were, seems poignant in its expression of blood on their hands, but the artist was more critical. Ragland argued that the sculpture was the ‘ideal’ of what would be expected from first responders and that ‘defacing the ideal does not help strengthen the dream or working toward that goal’.⁶⁰ He continued, ‘Some I know thought this was a perfect collaboration of another artist working over mine. I disagree. A collaboration is mutual, and this was a selfish act of vandalism.’⁶¹ This adherence to the integrity of the object ignores the rhythm of protest, the performance of the spectator, the cadence of storytelling, again ‘the kind that begins as a narrative on walls before it goes into books.’⁶² The posterity of the piece is arguably secured in this moment of engagement – this moment from movement.

Once again, this is the matter of context. This storytelling must be restored to history. While some have describing the removal of statues as hiding history, I would

54. BBC Correspondent, ‘Edward Colston Statue Graffiti Will Be Preserved’, *BBC News*, 17 June 2020 <<https://www.bbc.co.uk/news/uk-england-bristol-53083939>>.

55. Randolph Belle, Black Cultural Zone Collaborative, quoted in W Freedman, ‘“We Need Change”: Oakland Artists Explain Deeper Significance Behind George Floyd Murals’, *ABC News*, 24 June 2020 <<https://abc7news.com/society/oakland-artists-explain-deeper-significance-behind-george-floyd-murals/6263054/>>.

56. M Beard, ‘Statue Wars’, *Times Literary Supplement*, June 2020 <<https://www.the-tls.co.uk/articles/statue-wars-blog-post-mary-beard/>>.

57. Banksy, Instagram @Banksy 9 June 2020 <<https://www.instagram.com/p/CBNmTVZsDKS/>>.

58. A Duncan, ‘An Artist Dug Out a Grave for Sydney’s Captain Cook Monument at This Year’s Biennale’, *Pedestrian*, 21 June 2020 <<https://www.pedestrian.tv/news/captain-cook-statue-grave/>>.

59. An aerial photograph of the work is available to view on Biennale of Sydney’s Instagram <<https://www.instagram.com/biennalesydney/>>.

60. Gregory Ragland quoted in G Angeleti, ‘Monuments Across the US Are Toppled, Damaged as Protests over George Floyd’s Death Continue’, *The Art Newspaper*, 2 June 2020 <<https://www.theartnewspaper.com/news/monuments-dismantled-in-us-protests>>.

61. Ibid.

62. Randolph Belle, Black Cultural Zone Collaborative, quoted in W Freedman, ‘“We Need Change”: Oakland Artists Explain Deeper Significance Behind George Floyd Murals’, *ABC News*, 24 June 2020 <<https://abc7news.com/society/oakland-artists-explain-deeper-significance-behind-george-floyd-murals/6263054/>>.

argue that the hiding of history⁶³ is actually in the uncritical persistence of these monuments. Adding context markers to statues or contextual material to films is part of this process of ‘revealing’ history. Indeed, this is part of the re-presentation of films such as *Gone with the Wind*, which was temporarily removed from streaming services until it could be returned with contextual material.⁶⁴ Is this contextualization ‘vandalism’, to follow Ragland’s protestation, or an unauthorized collaboration? Or is this an acknowledgement of an active and engaged audience? Regardless of whether these kinds of practices would be, in principle, arguable within the criticism and review exception, or be declared an infringement upon moral rights, the veneration of the work within copyright is itself under review. It may not be copyright, but is it art?

Further, literary and cinematic practices of revisionist texts present other moments of context. Postcolonial literature regards a whole tradition of authors that revise the ‘histories’ provided by the privileged perspectives of classic texts, and literary theory presents a fresh insight into the legal wrangles.⁶⁵ The novel, *Gone with the Wind*, was itself the subject of a revisionist text, *The Wind Done Gone* by Alice Randall, which continued the story from the slave perspective. This reimagined sequel led subsequently to a copyright dispute and a preliminary injunction, but ultimately this was vacated on appeal on the basis of fair use.⁶⁶ Marcus CJ specifically noted, ‘Indeed, the book is critical by constitution, its main aim being to shatter *Gone With the Wind*’s window on life in the antebellum and Civil War South ... Randall radically reshapes what she borrows from Mitchell.’⁶⁷

And this matter of context must be taken to the curriculum as well, to the way in which the law is studied and developed. The writings of Locke are a staple of undergraduate and postgraduate intellectual property teaching and across the wider curriculum. And yet conventional approaches to teaching these texts frequently neglect the colonial context, and Locke’s valorization of the colonizer’s use of property as opposed to the ‘waste’ or lack of industry in the colonized⁶⁸ becomes a ‘background assumption’.⁶⁹ This is the kind of contextualization that is at the heart of Critical Race Theory and ‘legal storytelling.’⁷⁰ This disruption of the authority of dominant discourse and

63. S Coughlan, ‘Don’t Hide History, Says Oxford Head in Statue Row’, *BBC News*, 11 June 2020 <<https://www.bbc.co.uk/news/education-52999319>>.

64. C Isidore, ‘“Gone with the Wind” Returns to HBO Max’, *CNN*, 25 June 2020 <<https://edition.cnn.com/2020/06/25/media/gone-with-the-wind-returns-hbo-max/index.html>> and S Adams, ‘*Gone with the Wind* Is Back on HBO Max With this New Introduction’, *Slate*, 26 June 2020 <<https://slate.com/culture/2020/06/gone-with-the-wind-hbo-max-introduction-video.html>>.

65. For instance, see the discussion in Z Staffer, ‘Po-Mo Karaoke or Postcolonial Pastiche – What Fair Use Analysis Could Draw from Literary Criticism’ (2007) 31(1) *Columbia Journal of Law and the Arts* 43–90; N ten Kortenaar, ‘Law and Literature in the Postcolony’ (2014) 2(1) *Cambridge Journal of Postcolonial Literary Inquiry* 1–3.

66. *Suntrust Bank v Houghton Mifflin Company*, 136 F.Supp.2d 1357 (N.D.Ga 2001); and on appeal, 268 F.3d 1257 (11th Cir. 2001).

67. *Suntrust Bank v Houghton Mifflin Company*, 268 F.3d 1257, 1277 (11th Cir. 2001).

68. John Locke, 1632–1704, *The Second Treatise of Government*, Chapter 5, ‘Of Property’.

69. This law without context is arguably related to the law of economy or parsimony. Elliot Sober explains, ‘Only because of a set of background assumptions does parsimony connect with plausibility in a particular research problem. What makes parsimony reasonable in one context therefore may have nothing in common with why it matters in another.’ See E Sober, ‘Let’s Razor Ockham’s Razor’ (1990) 27 *Royal Institute of Philosophy Supplements* 73–93, 77.

70. R Delgado and J Stefancic, *Critical Race Theory* (NYU Press, New York 2017) Chapter 3. See further KW Crenshaw, ‘Unmasking Colorblindness in the Law: Lessons from the Formation of Critical Race Theory’, in KW Crenshaw et al. (eds), *Seeing Race Again* (University of California Press, Oakland 2019) 52–84.

legal frameworks includes active critique in the classroom. In my own teaching and legal storytelling,⁷¹ I strive to contextualize the subject matter, to complicate things rather than merely deliver the rules, and my students are introduced to film theory and criticism, fashion theory, art history, as well as other critical tools for interpreting the law. While there is always the occasional objection to this straying from a strictly doctrinal approach to intellectual property, it invariably encourages far greater critical thinking in my students, an enriched teaching experience for me, and a very noisy classroom full of discussion and debate. This is the kind of noisy learning that is arguably needed, not only in supposedly niche courses, although such courses are very important to maintain, but also as part of the curriculum of mainstream, 'doctrinal' areas. These are not just 'niche' concerns, they are part of the law's physiology. This needs to be part of not only what we teach, but also the way we teach and the way we think about the law. The expressions of change through attention to monuments and media are significant, fundamental and essential, but the harder job of reciprocity through structural transformation of institutionalized and systemic racism extends of course beyond statues, consumer goods and entertainment and must be addressed. It includes the law: how it is written, how it is practised and how it is studied.⁷²

Toni Morrison affirms, 'You've got to keep asserting the complexity and the originality of life; and the multiplicity of it, and the facets of it. And this is about being a complex human being in the world – not about having a villain to blame.'⁷³ The real work ahead is in making sure that this gets a lot more complicated than the scheduling of television programmes. For the real institutional work to be done, things must get more complicated.⁷⁴ The law needs context. This is part of the work ahead in providing the story for law. Ockham's razor is blunt because it always forgets the forgetting of context.

Speaking with Pam Houston in 2005, Toni Morrison declared, 'I think this is the time for artists.'⁷⁵ She was responding to the events in Iraq and the Middle East and in particular the White House invitation to poets which was subsequently rescinded:

When these poets [were] asked to gather at the White House, and then [the administration] called it off, you think, *Really?* They really *do* believe the poets are the legislators of the world, and they really are the philosophers, and they really control – you always thought that, but now you see they are frightened of what the poets might say. It is as clear a test as anything. So with that feeling of necessity for clarity and for the power of imagination to do the work, I sank into that work – and I am still feeling it for any project I undertake. This is no time for anything else than the best that you've got.⁷⁶

71. Intellectual property and fashion, intellectual property and film, animal law and welfare, and animal law, media and culture.

72. Responses to calls to address this in fundamental ways in the university curriculum are uncertain. See D Batty, 'Only a Fifth of UK Universities Say They Are "Decolonising" Curriculum', *The Guardian*, 11 June 2020 <<https://www.theguardian.com/us-news/2020/jun/11/only-fifth-of-uk-universities-have-said-they-will-decolonise-curriculum>>.

73. T Morrison, *Conversations* (University of Mississippi Press, Jackson 2008) 245.

74. Mary Beard has also argued for the importance of complexity in critical thinking: 'What is the role of an academic, no matter what they're teaching, within political debate? It has to be that they make issues more complicated. The role of the academic is to make everything less simple.' In an interview with Zoe Williams, 'Mary Beard: "The Role of the Academic Is to Make Everything Less Simple"', *The Guardian*, 23 April 2016 <<https://www.theguardian.com/books/2016/apr/23/mary-beard-the-role-of-the-academic-is-to-make-everything-less-simple>>.

75. T Morrison, *Conversations* (University of Mississippi Press, Jackson 2008) 245.

76. Ibid 245.

I want the words of Phillis Wheatley to close as well as open this story. Doubts of Phillis Wheatley's authenticity persist, but not for the act of writing itself. Now it is for the sentimentality of the experience and the authority of her voice in poems such as 'On being brought from Africa to America': 'Twas mercy brought me from my *Pagan* land ... Remember, *Christians, Negros*, black as *Cain*, May be refin'd, and join th' angelic train.'⁷⁷ As Henry Louis Gates Jr explains, it is not for us to take Wheatley as a symbol, we must read her as an author: 'What would happen, then, if we ceased to stereotype Wheatley, to cast her in this role or that, but, instead, *read* her, with all the resourcefulness that she herself brought to her craft? That's the only way to let Phillis Wheatley take the stand.'⁷⁸

Should you, my lord, while you peruse my Song,
Wonder from when my love of *Freedom* sprung,
Whence flow these wishes for the common good,
By feeling hearts alone best understood,
I, young in life, by seeming cruel fate
Was snatch'd from *Afric*'s fancy'd happy feat:
What pangs excruciating must molest,
What sorrows labour in my parent's breast?
Steel'd was that foul and by no misery mov'd
That from a father seiz'd his babe belov'd:
Such, such my case. And can I then but pray
Others may never feel tyrannic sway?⁷⁹

At this time, people are taking the stand in their thousands. This is the time for artists.

Johanna Gibson
April 2020

77. P Wheatley, *Poems on Various Subjects, Religious and Moral* (A Bell Bookseller, London 1773) 18.

78. HL Gates Jr, 'Phillis Wheatley on Trial', *The New Yorker*, 20 January 2003, 82–7, 87.

79. P Wheatley, *Poems on Various Subjects, Religious and Moral* (A Bell Bookseller, London 1773) 74.