Comment

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Complicity and Rape

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Christopher Cowley
University College Dublin, Ireland

Abstract

The case of *R v Clarkson* (1971) concerns the complicity of three non-participating observers to a vicious gang rape. The observers were charged with 'encouraging' the rape, but this was rejected by the Court of Appeal on the ground that two of them had been 'mere' observers, and there was no evidence that they had encouraged the perpetrators by word or gesture. This case is regularly cited to this day, without critical comment, as a limit on complicity under English common law. In this article, I want to challenge the Court of Appeal's judgment and argue that the two observers should have been found complicit. My argument is based on the special nature of rape, and the capacity for a male observer to compound the female victim's humiliation by their mere presence. My argument is even more justified in the case of *Clarkson*, I argue, because it took place on a British army base abroad.

Keywords

Complicity, abetting, encouragement, rape, bystander

The case of *R v Clarkson* (1971)[1] concerns a vicious gang rape by four soldiers (henceforth the 'principals' or the 'rapists') at a British army base in Germany. The victim was an 18-year-old German civilian who lived near the base. During the rape, three other soldiers, one of whom was Clarkson (henceforth the 'observers'), happened to be passing, heard the commotion and came into the room out of curiosity. They stayed and watched the rapes. Later the four principals were all apprehended, charged with rape and duly sentenced by a court martial. Although 'there was no evidence of direct physical participation or verbal encouragement by the defendants',[2] the three observers were charged with 'counselling', that is, complicity in the rapes. Their continuing, non-accidental[3] and uncoerced presence not only encouraged the perpetrators and discouraged the victim but allowed the jury to infer their endorsement of the offence. Therefore, they were to be 'punished as a principal offender', in accordance

1. *R v Clarkson (David)* [1971] 55 Cr. App. Rep. 445.
2. Ibid at 1402.
3. Their initial presence was accidental, but their *continuing* presence was not. In addition, they felt no impulse to defend the victim or report the incident to their superiors.

Corresponding author:
Christopher Cowley, School of Philosophy, University College Dublin, Dublin 4, Ireland.
E-mail: christopher.cowley@ucd.ie

with the 1861 Accessories and Abettors Act. Two of the observers (Clarkson and Carroll) successfully appealed the decision. (In contrast, there was sufficient evidence that the third observer, Dodd, had actively participated, and his appeal was rejected.)[4]

First, Clarkson and Carroll argued that they were both privates, and therefore lacked the authority to command the principals to stop; and they had no duty of care to the victim. Second, they argued that there was no general legal duty to prevent or report a crime either during its commission or afterwards. Third, and most importantly, they argued that their 'mere presence', without voicing any encouraging words or making gestures, was not enough to constitute counselling in the sense of the 1861 Act. Fourth, they denied that they endorsed the principals' project, that they intended to encourage that project and they denied that the principals were in fact encouraged by the observers' presence—they would have committed the same offence in the same way. Finally, the observers denied any readiness to assist.[5]

The case has become an important precedent in English law; it is cited *without critical comment* in three important recent English legal textbooks[6] as marking the limits of complicity. There seem to be no critical discussions of the case in the legal literature.

In this article, I wish to challenge the *Clarkson* appeal verdict, not as a matter of limited historical interest but in order to challenge this aspect of the present law of complicity in England and Wales.[7] In so doing, I will be discussing the philosophical problem of complicity, the distinctive nature of the crime of rape and the importance of context when assessing the role of the criminal law.

My scope is relatively narrow: when it comes to most other types of crime, I will accept that an accidental, silent 'mere observer' should not be liable for encouragement (and may also have a defence of reasonable fear when explaining why they did not intervene). I will also accept, for the purposes of this article, the general legal principle that there is no obligation to assist victims, or even to report crime, without an explicit duty of care to the victim. The paradigm here would be passing pedestrians who observe the robbery of a jewellery store on the high street. However, I will argue that rape is fundamentally different from robbery because the rapist targets the victim directly. After all, the robbers are after the jewels, and any victims such as the shopkeeper will only suffer insofar as they present obstacles to the robbers' plans: the robbers are not really interested in the victims. Most rapists, on the other hand, are interested not only in sexual gratification but above all in dominating and humiliating the victim.[8] In that sense, they are directly interested in their victims and in their victims' trauma. I want to argue that the centrality of humiliation to the victim's experience means that there is no such thing as 'merely' observing: even without overt encouragement or assistance, mere observation is complicit because it compounds the humiliation of the victim.

4. Ibid at 1404.
5. The readiness to assist, or 'conditional assistance', involves an otherwise passive observer being ready (and perhaps being known to the principal *as* ready) to assist the principal if the latter requests it or appears to need it. The *Clarkson* appeal judgment (p. 1406) quotes the case of *R v Allam* [1965] 1 QB 135, where the court rejected the possibility of conditional assistance, on the basis that it would amount to convicting a person on the basis of their thoughts only. The would-be assister needs to have already demonstrated engagement with the proceedings: even if the lookout does not have cause to alert the bank robbers during the robbery, she is still standing on lookout as planned.
6. For example, D Ormerod and K Laird, *Smith and Hogan's Criminal Law* (14th edn OUP: Oxford 2015) 227–8; AP Simester, JR Spencer, GR Sullivan, GJ Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (5th edn Hart Publishing: London 2013) 210; D Baker and G Williams, *Glanville Williams Textbook of Criminal Law* (Sweet and Maxwell: London 2013) section 14–039, 472.
7. The situation surrounding complicity in English law has been complicated by Part II of the Serious Crime Act (SCA) 2007. That statute differs from the Accessories and Abettors Act in allowing acts of 'assistance' and 'encouragement' to be inchoate, that is, to be essentially culpable rather than deriving their culpability from the culpability of the principal. If Clarkson had been judged according to the SCA, a different approach might have been taken and a different verdict reached. I will not discuss that here, however.
8. On this see V Munro, 'Sexual Autonomy' in M Dubber and T Hoernle (eds), *The Oxford Handbook of Criminal Law* (OUP: Oxford 2014) 747–67.

The Court of Appeal Judgment

The *Clarkson* appeal judgment cited the 1882 precedent of *Reg. v Coney*,[9] which ruled that non-accidental presence was not conclusive of aiding and abetting. The case concerned an organised bare-knuckle fight with paying spectators. The court found both fighters guilty of assault occasioning actual bodily harm (despite their consent to the fight) and found several of the spectators guilty of aiding and abetting the assaults:

> To constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting. It may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, or gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder.[10]

There are two broad exceptions to this: first, where the mere observer has a position of authority and a duty of care, such as a parent or doctor or police officer. When such people merely observe and fail to intervene (because, for example, they have been bribed to look the other way), they will be liable as accessories.[11] The second exception, one that has proved controversial, involves very serious crimes such as terrorism, where separate legislation[12] broadens the scope of complicity much further during the preparation of a terrorist act. The idea is that detecting and disrupting the preparations is so important as to justify police intervention based on less evidence and justify setting the threshold of complicity much lower.

In the original rape case, Clarkson, Carroll and Dodd had been convicted of rape on the grounds of being accessories encouraging the principals and of their conditional readiness to assist.[13] Here is part of the summing up to the jury of the original judge advocate:

> You must be satisfied that they participated in the act, either by doing something with the intent of assisting the perpetrator, actually assisting him, or sharing his intent and the intent of others present that the offence should take place and encouraging, by their presence, by their preparedness, to go to assist, if necessary, the perpetrator and support him in a way that would encourage him to commit the offence.[14]

In response, however, the Appeal Court stressed the importance of *intention* to complicity. It was not enough that one's acts in fact encouraged the principal, it was not enough that the accessory was aware that his acts could or would encourage the principal: he had to have *two* intentions: (i) the intention to encourage the principal, and (ii) the intention that the principal be encouraged on his way to committing this particular unlawful act.[15]

9. 8 QBD 534 [1882].
10. Cited in *Clarkson* [1971]: 1405–06.
11. In the case of *R v Dytham* [1979] QB 722, a police officer stood by while a bouncer kicked a man to death. It is relevant that the British police website has an FAQ section, listing the question 'is there a legal requirement to report a crime', to which the answer is: 'Whilst there is no legal requirement to report a crime, there is a moral duty on everyone of us to report to the police any crime or anything we suspect may be a crime' <https://www.askthe.police.uk/content/Q514.htm> accessed June 2016.
12. Most importantly the Terrorism Act 2000, the Prevention of Terrorism Act 2005 and the Terrorism Act 2006.
13. Note that there is no crime of complicity or complicity to rape—the accessories are charged with *rape*, even if they did not commit the *actus reus* of rape.
14. Cited in *Clarkson* [1971]: 1403.
15. There is a debate about whether the accessory or principal can be genuinely mistaken about the nature and lawfulness of the act they are encouraging or perpetrating. One notorious example of this is *Morgan* [1975] 2 WLR 913; [1976] AC 182, which allowed the possibility that an 'honest belief' could be a defence against an accusation of rape. This possibility was eliminated

Megaw LJ concluded:

> [the secondary party] might stay on the scene in the capacity of what is known as a voyeur; and, while his presence and the presence of others might in fact encourage the rapers [*sic*] or discourage the victim, he, himself, enjoying the scene or at least standing by assenting, might not intend that his presence should offer encouragement to rapers and would-be rapers or discouragement to the victim; he might not realise that he was giving encouragement; so that, while encouragement there might be, it would not be a case in which, to use the words of Hawkins J., the accused person 'wilfully encouraged'.[16]

There are a number of revealing choices of words here. The first is 'voyeur'. This goes beyond mere curiosity about an unfamiliar situation or about new information; there is the element of *arousal*, and this involves a greater engagement with the proceedings than mere passive observation, and perhaps such engagement is strong enough to amount, if not to a full intention that the principals commit the rape, then at least to an endorsement of the proceedings. At any rate, it is more engaged than the curious high street shoppers are during the jewellery heist. What is interesting is that Megaw assumes that voyeurism is a wholly private experience, without any necessary correlative impact on the *people being voyeuristically observed*, and in this sense falls short of intention. This is the main assumption I want to challenge. My challenge draws from the spirit of criminalising voyeurism in s. 67 the Sexual Offences Act 2003; importantly, voyeurism is illegal even when the victim is unaware of it.

Second, Megaw assumes that lingering voyeurism does not come close enough to an intention to encourage or assist, and therefore this undermines any accusation of complicity. Certainly, the three observers themselves would deny that they 'wilfully encouraged' or intended anything; they merely happened on and remained at an event that was taking place anyway. In terms of sine qua non causality, the rape would certainly have taken place if the observers had not been there.

Third, Megaw allows the possibility that the observers might not even have realised that they were giving encouragement to the rapists and discouragement to the victim, even if they in fact were. Perhaps they were so wholly absorbed by the voyeuristic arousal that the effect of their presence may simply not have occurred to them, just as it may not have occurred to them that their non-intervention and non-reporting was shameful. This has to do with the larger question of subjectivity and objectivity in the criminal law, and the degree to which the lack of awareness, of sensitivity, of imagination and of courage should be culpable. I will return to this below.

Rape and Humiliation

At the time of the case (1971), the definition of rape was contained in s. 1(2) of the UK Sexual Offences Act 1956:[17]

> A man commits rape if—(a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and (b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.

I will take it as uncontroversial that Clarkson and Carroll clearly understood that the victim did not consent, they understood that the crime of rape was taking place, but they considered it none of their business. However, I want to suggest that the above legislative definition is incomplete and makes an important assumption about the offence of rape, and that concerns the offender's motivation. I am assuming that most rapes are not about sexual gratification, but about power, domination, revenge,

by the Sexual Offences Act 2003. For the purposes of this article, I will assume that there was no doubt in either the principals' minds or in the observers' that the woman was being raped.

16. Cited in *Clarkson* [1971]: 1406.
17. The operative definition today is to be found in s. 1(1) of the UK Sexual Offences Act 2003.

misogynistic hatred, humiliation, or about masculine solidarity, and the assertion or restoration of masculine pride (for simplicity, I will henceforth summarise these various motivations under the concept 'humiliation').

Humiliation depends not only on submission to certain typically humiliating *acts*; but crucially it depends on being *witnessed*, either at the time of the act or later on a video recording; at the very least, humiliation depends on the acts being later described. Although one can feel shame on one's own and without anyone ever discovering one's shame, humiliation essentially requires witnessing and publicity. The horror of rape is not only the violence and the pain and the degradation of the act and the contemptuous assault on the victim's sexual identity, it is also the fact that at least one other person—the rapist—has witnessed such degradation. And here's the point: the humiliation is then compounded if a third party is observing, even if the third party does not take part in the rape itself, does not assist or encourage the rape, but 'merely' observes.

It is commonplace to say that rape victims are doubly humiliated: first by the rape itself, and second by other people's subsequent reactions once they hear about it.[18] It is hardly surprising that many victims choose not to report it to the police. Then there is a possible court appearance, being cross-examined by skilled defence lawyers, whose strategy is so often to argue that the consent of the alleged victim could be inferred, for example, by 'what she was wearing', by her 'flirtatious behaviour' that evening and by her 'past promiscuity'. In addition, since the crime is usually committed in private without observers, then the worry is that it will boil down to the rapist's word against the victim's.

The use of the term 'sexual assault' might suggest that rape is just another kind of assault, but it is important to remember that sexual offences are generally seen and classified as a very separate category of crime. As Gardner and Shute[19] put it, rape is *sui generis*. In order to demonstrate this, they ask us to imagine a woman being raped when unconscious. She then regains consciousness, but has no memory of anything untoward, and no pain or damage on her body. Despite the woman's present physical condition, Gardner and Shute argue that we would still want to say that the rape was an egregious violation, and that it would make sense for the victim to feel deeply humiliated if she learned of it. This is much more serious than theft or assault of an unconscious victim. An assault is much more clearly limited to the body, and when I awake I can more plausibly speak about my body being attacked instead of *me* being attacked. In contrast, rape is a direct violation of the victim's identity, and a direct mockery of the victim's intimate private relationships. While theft involves real harm, the stolen property is physically separate from the owner and often (in principle) recoverable or replaceable. No such recovery is possible after rape. If rape is to be compared to any other crime, it would be not to assault or theft but to lynching and other hate crimes, which are similar expressions of power to remind people 'of their place'.[20]

I have been distinguishing between the 'mere' observation of rape and the high street pedestrian's mere observation of the jewellery heist, and I have been arguing that the crucial difference is the capacity for an observer, in the first case but not the second, to compound the victim's humiliation. There might be other situations where humiliation could also be compounded: racist verbal harassment, a punishment beating and non-sexual assault in front of one's peers. More generally, it could be argued that the crime of murder is such a serious moral violation that it too is essentially humiliating, although here it is

18. Indeed, I would go so far as to say that the naming of the victim in the *Clarkson* judgment also compounded the humiliation. There was no need for that.
19. J Gardner and S Shute, 'The wrongness of rape' in J Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (Clarendon Press: Oxford 2000).
20. By 'humiliation' I am referring to the *objective situation* rather than to the *subjective feelings*. It may be the case that a particular victim is able to resist humiliating feelings even when she is put in a humiliating situation. It may be that another victim is so used to humiliating situations that this additional humiliating situation does not *feel* especially humiliating. For the purposes of this article, I am only interested in the objective situation, and I would base the moral wrong entirely on that. In a Kantian vein, I would reject the possibility of different victims suffering different wrongs depending on the luck of how they happen to feel in response to the same situation—too often this leads to the phenomenon of blaming certain victims more than others.

confusing if the victim does not survive to be humiliated; in that sense it might be better to describe the victim as defiled, such that the defilement continues after death. In addition, assault and murder and violence more generally can be just as arousing as sex, and this would support widening my argument to include these other acts. But for the moment I will restrict myself to the circumstances of *Clarkson*.

Observers as Participants

Because of the nature of humiliation, I contend that there is no such thing as a mere observer of a rape. In this context, observation—and arousal—is wrongly conceived as the passive absorption of images or the harmless gathering of information. Instead, it is an *activity;* and it is freely and knowingly *embarked on* by the observer. Even if Clarkson and Carroll stumbled on the scene accidentally, they chose to remain, they evidently allowed themselves to become aroused, and to that end they voluntarily contributed to the humiliation. To be raped by one man is bad enough; to be raped by four much worse—and to be raped by four with three further men watching is even worse again.

I am drawing on Sartre's famous example of the peeping Tom.[21] He kneels in front of a door on a landing in a stairwell of a block of flats. He looks through the keyhole at a couple having sex, inside, unawares. While the peeping Tom is alone, he controls the situation, he chooses where to look and what to make of the world; right now he is wholly absorbed by the couple's sexual acts. Suddenly, however, he hears footsteps on the stairs; someone is coming up, someone who is bound to observe the peeping Tom peeping. The man becomes aware of himself through the gaze of the other, becomes aware of himself as a peeping Tom and feels ashamed. Sartre's point is that he does not feel ashamed *until* he can imagine himself observed doing this lewd thing. (The peeping Tom does not even need to *be* observed—the footsteps are still only sounds.)

The 1956 law defined rape with reference to (i) certain physical acts, carried out intentionally, (ii) while the perpetrator is at least reckless about the possibility that the victim might not be consenting and (iii) the absence of the victim's consent. However, this definition does not contain the full wrong of rape, since the essential humiliation is magnified by the number of pairs of eyes watching it and being aroused by the sexual act and the violence, *even when* no explicit encouraging sounds or gestures are performed. (The 2003 Sexual Offences Act changed many aspects of the 1956 Act, but not in ways that are relevant to this point.) In contrast, when three bystanders watch the jewellery heist on the high street, this additional observation adds little to the shop owner's experience of the loss. For the shop owner's suffering is one of shock, outrage, resentment, but not humiliation. This means that Clarkson and Carroll *did* encourage the rapists by their not-so-mere presence, they *did* contribute to the wrong caused to the victim, they *did* participate in a rape, and their appeal should have been rejected.[22]

However, there is still the question of intention. For complicity, the English law requires that the encourager somehow endorse the offence. The *Clarkson* court of appeal stated that Clarkson and Carroll did not have a *mens rea* that came sufficiently close to intention or endorsement. The defendants were aware that this woman was being raped, that she was going to be raped anyway, and they were simply indifferent to her fate; moreover, they had no duty of care toward the woman, and so no obligation to attempt to prevent the rape or to inform a superior.

But again, it depends how we define rape. The intention of the principals was not only to engage in sexual intercourse without the woman's consent; it was *also* to dominate and humiliate. And therefore I contend that the three aroused observers intentionally chose to participate in this humiliation, in this part of the act. Moreover, I would suggest that the experience of the rapists themselves was heightened by the

21. J-P Sartre, *Being and Nothingness*, H Barnes (trs) (Philosophy Library: New York 1956 [1943]) 347.

22. I have been careful to use the word 'contribute' so as to avoid the debate surrounding causation in complicity. (See, for example, the exchange between Christopher Kutz and John Gardner in volume 1 of the journal *Criminal Law and Philosophy*, 2007.) It is clear that the gang rape would have happened anyway, with or without Clarkson's presence. And yet I am saying that Clarkson made the victim's humiliated suffering worse by his presence.

humiliation being compounded in this way; the element of masculine self-assertion is always multiplied by the group dynamic of performance and solidarity. It is not just that the rapists drew 'permission' from the inactivity of the observers, they probably welcomed the extra element of performance. (In this sense, the gaze of Sartre's other can also *promote* as well as demote one's self-concept.) In addition, we have to remember that rape takes a certain amount of time, and in this case the rapists were taking turns. So the observers' mere presence not only encouraged the rape that they stumbled across, but the subsequent rapes too: each new rapist's intentions were partly validated by the element of performance for the gallery of their aroused peers. The problem is not so much that Clarkson observed, but that he continued to observe, during rape after rape after rape; he only had one reason to remain, without any mistake about what he was observing. The only way for Clarkson and his two friends to avoid charges of complicity, I would suggest, would have been for him to physically leave the premises immediately after accidentally discovering what was going on. Without reporting it, such a departure would still have been moral cowardice, but at least it would not have amounted to complicity.

There is a separate question about whether foreknowledge of a serious crime should affect culpability; that is, if the rape had been planned for a time and place, and Clarkson had known about it in advance, and then gone to the advertised location for the purpose of observing. The scheduling of observation might be enough to inculpate or at least to aggravate; but the main question would remain whether he actively encouraged by word or gesture.

It is true that certain circumstances may also reduce the observers' complicity: if they are under duress from the rapists, for example; or if they are planning to linger long enough to gather evidence for later testimony against the rapists. There was no evidence of either circumstance in the trial record, and presumably the burden of presenting such evidence would have to lie with the defence.

It might be objected that my proposed expansion of complicity to include mere observers who were not making any overt encouraging noises or gestures risks including other observers who were not even present at the crime. Imagine if Clarkson had watched the rape from another room through a one-way mirror or CCTV feed, and the victim was aware of this. Indeed, the CCTV link might be made available as a live stream over the Internet. In one sense, the victim's awareness of being observed by a faceless stranger beyond the wall is worse than being observed by someone here and now. And surely the knowledge of being watched by an untold number of Internet users would be worst of all. There is a question of how far it is practical to apply the law, so let me just consider the CCTV Clarkson. Intuitively I would want to *morally* criticise him for his voyeurism, and perhaps for his failure to notify the authorities, but I would stop short of holding him *legally* complicit. I would argue that the element of *physical presence* is still crucial for the process of 'full' humiliation. Part of the humiliation lies in being presented with the aroused faces of the observers. Part of the humiliation lies also in first beholding a physically present observer, and daring to hope for help or intervention of some kind and being further discouraged by seeing only cruelty and indifference.[23]

Other Ways of Holding the Observer Liable

I have been assuming that Clarkson, insofar as he had no duty of care to the rape victim, had no legal duty to prevent the rape, and no legal duty to inform anyone (either his military superior or the military police) about the rape, either during or after. This presents a question. I have been arguing that Clarkson should have been held liable for complicity to rape. Under the Accessories and Abettors Act 1861, the accessory is to be punished for the same thing as the principal, so this would mean charging Clarkson with rape, as the Court Martial (the court of first instance) had done. At the same time, the appeal of the third

23. Insofar as the distribution and consumption of child pornography is criminalised, it is not through complicity with the original crime against the children in the videos. Instead, the penalty is meant to deter abuse and exploitation of other children in the future.

'observer' Dodd was rejected because there *was* sufficient evidence that he had directly assisted the rape, and so he was then charged with rape as well. Given my argument in this article so far, am I therefore saying that Clarkson's mere aroused observation was just as culpable as Dodd's direct assistance? Perhaps the Court of Appeal's reluctance to charge Clarkson stemmed from a desire to distinguish the two kinds of complicity, since the law at the time was straightforwardly binary: either Clarkson would be charged with rape or with nothing at all, and it would seem that Dodd had simply *done* more than Clarkson.

As such, this article's primary argument—that Clarkson ought to have been liable under the existing laws at the time—could entail a secondary argument for *changing the law* to allow greater and lesser degrees of complicity, based on the causal contribution to the principal's crime. According to a new law, Dodd would be held liable for 'full' complicity in the rape and punished as if he had been one of the perpetrators, while Clarkson would have been liable for 'partial' complicity and punished less severely. Such a proposal has been made before, most notably by Dressler, and I do not have anything new to say in its favour.[24] However, I would resist Dressler's use of the word 'trivial' to denote the lesser form of complicity—for I still believe there is nothing trivial about Clarkson's compounding of the victim's humiliation. But there would seem to be a relevant distinction between Clarkson's relatively detached engagement and Dodd's 'hands-on' engagement in the crime. This would be a matter for more detailed discussion, but suffice to say that differentiated complicity laws are usually rejected on the grounds of introducing too much complication and as undermining the deterrent effect of the law: by holding all accessories equally liable as the principal, the message is clear that one should avoid *any* complicity at all with a crime as serious as rape. At any rate, in the absence of any new law of differentiated complicity, I would argue that someone who did what Clarkson did should be held fully complicit.

More generally, of course, the *Clarkson* case could be used as part of an effort to introduce new legislation. One new offence could be 'knowingly causing additional humiliation', for example. Another would be a 'Bad Samaritan' law that would penalise those who fail to assist a victim or at least report a crime when they find out about it before, during, or after.[25] This might be one 'solution', although I think it would fail to distinguish sufficiently clearly between the High Street jewellery heist and the gang rape: Clarkson was not so much guilty of detached inaction, but rather of overzealous engagement in a criminal act. With this difference in mind, it is worth saying one more thing about the context of the *Clarkson* gang rape, that it took place on an army base.

The Army Base Context

Even if the above argument fails, and the 'mere observers' of a rape are not liable, I suggest that it is relevant that the offence took place on a British military base; and what's more, a base in a foreign country (Germany). This fact was not considered relevant at all in the judgment, but I think it is. The army base is an almost entirely all-male environment, where soldiers are being systematically and collectively trained in acts of lethal violence and maintained in a state of excitable readiness to deploy such violence at short notice. In addition, this base is a foreign country, where the soldiers do not speak the language, where their presence and alcohol-fuelled loutishness is probably resented by the locals, and these facts further isolate them. They are away for long periods of time from the restraining influences of wives, girlfriends, mothers and other female family members.[26]

24. See, for example, J Dressler, 'Reforming Complicity Law: Trivial Assistance as a Lesser Offence?' (2007–2008) 5 *Ohio State Journal of Criminal Law* 427.
25. See J Dressler, 'Some brief thoughts (mostly negative) about "Bad Samaritan" laws' (1999) 40 *Santa Clara Law Review*. Dressler argues that such laws, although enacted in some US states, are hard to implement consistently across all non-rescuers, given the difficulties of distinguishing, on the basis of non-action, between culpable indifference on the one hand and exculpating ignorance, misunderstanding, fear and so on on the other.
26. Finally, it is just possible that, in 1971, at the time of the events, the soldiers might have despised the local Germans since the Second World War defeat was still in living memory—if not the memory of the principals and observers themselves, then at

Because of these influences, there is a consequentialist argument for applying the law with even greater thoroughness, and for widening the scope of complicity even further, than in a domestic British context—and this greater thoroughness would be well publicised as a deterrent. The primary beneficiaries would be the German women working on or near the military base; but presumably the British women working on the base would also be more vulnerable than their peers working on military bases in Britain, and certainly more than British women in normal British urban contexts.

In broadening complicity in the manner I am suggesting, we are therefore shifting our understanding of complicity from being based only in the mental states and physical actions of the observers themselves (under general descriptions, regardless of context), to being based partly on the increased vulnerability of a clearly identifiable group, and on the 'incitement' of the discourse that pervaded the isolated army base environment. I would suggest that the Court Martial (the court of first instance) understood this context well, and this understanding supported their conviction of Clarkson and Carroll, a conviction which was then overturned by the civilian Court of Appeal who understood this less clearly.

The occurrence of the crime on an army base made this a particularly egregious mistake, I would maintain, but the army base context is not necessary for the general point I have been trying to make about humiliation and complicity. In terms of context, there is one last point to make. In the early 1970s, feminism was only just beginning to gain currency and certainly would not have made its way very far into the military barracks. It is fair to say that even soldiers would be more sensitive nowadays to the rights of women to equal respect and to the importance of consent in sexual intercourse, especially since women have begun serving combat roles in the British army.[27] However, my criticism has not been about an obscure case of 45 years ago, but of a case that could still take place today.

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least the memory of some of their superiors; there might have been a sense, as there certainly was immediately after the war, that German women were still part of the victor's spoils, and blind eyes could be turned.

27. See the Army <https://apply.army.mod.uk/what-we-offer/what-we-stand-for/women-in-the-army> accessed October 2018.