

# Opacity of Character: Virtue Ethics and the Legal Admissibility of Character Evidence

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This is a handout corresponding to the essay  
It aims to provide a quick overview  
It is best read in conjunction with the essay, rather than as a standalone document  
Section numbers correspond to the essay's sections

**Precis:** This essay provides a virtue ethical defence of character evidence exclusion rules.

**Keywords:** Situationism, virtue ethics, character traits, conduct, character evidence law, Federal Rules of Evidence FRE 404(a), the structure of character judgements.

## §1. Introduction

- Evidence and inference based on a person's character are tightly regulated in legal investigations.
- In the US, for example, Federal Rules of Evidence (FRE) 404(a) holds:
  - FRE §404(a) Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
- These prohibitions can seem epistemically dubious.
  - Legal investigations have epistemic aims and so should not—absent good reason—exclude relevant probative evidence.
  - Inferences from a person's character to conduct seem ubiquitous and are often reliable.
  - And so, theorists claim, character evidence exclusions might be justifiable on moral or political grounds, but they are not justified on epistemological grounds.

## §2. Character and Conduct: The Situationist Challenge

- Trait theories in psychology claim that behaviour is largely explained by character.
- Situationism, by contrast, holds that behaviour is largely determined by external, contingent, apparently incidental, or normatively irrelevant features of the person's situation, rather than their character.
- We sketch two early influential situationist experiments, Darley and Batson's Good Samaritan experiments and the Milgram experiments on obedience to authority.
- We outline Harman's argument that situationism challenges virtue ethics in philosophy.

## §3. Character Evidence Prohibitions: Situationism and Virtue Ethics

- We explain why an epistemological defence of legal character evidence prohibitions is desirable.
- Situationism, if true, yields an epistemological justification of character evidence prohibitions.
  - If conduct is largely determined by situational features, rather than character, then evidence about character is not a good guide to conduct.
- It appears that virtue ethics, by contrast, cannot give an epistemological defence of these prohibitions.
  - This is because it appears that virtue ethics is committed to the claim that character evidence is a good guide to conduct.
- This essay disputes the above claim. Virtue ethics supports character evidence prohibitions.

#### §4. Virtue Ethical Responses to Situationism

- We sketch four influential families of virtue ethical rebuttals to situationism.
- These responses argue that virtue ethics is consistent with the conduct observed in the situationist's experiments.

##### Rarity responses

- Virtuous people are rare; we should not expect most people to act virtuously.
- Hence the experimental results do not threaten virtue ethics.

##### Conflicting traits responses

- The demands of one virtuous trait can conflict with those of another.
- A person might be honest, for example, yet deceive on an occasion because they also possess a different trait, such as obedience.

##### Narrow traits responses

- The virtues are more narrow and situation-specific than situationists appreciate; the situationists' taxonomy of traits is too coarse-grained.
- Thus, what the situationist interprets as behavioural inconsistency might instead be acting in accordance with finely-tuned "narrow trait" virtues.

##### Reasons-centring responses

- The situationist experiments observe actions, but virtue ethics foregrounds the reasons for which a person acts.
- The experiments thus do not impugn virtue ethics because they measure the wrong thing.

#### §5. The Abstruseness of Character Evidence

##### §5.i. The Structure of Character Judgement

Character judgements include two distinct kinds:

- 1.) Character ascriptions: Infer that a person has a particular character trait. (E.g. Dan is selfish.)
- 2.) Inferences from character ascriptions to conduct. These might be:
  - a.) Inferences to general *patterns* of conduct (E.g. Dan sometimes drives drunk.)
  - b.) Inferences to specific *instances* (E.g. Dan drove drunk last night.)

These assessments about character and conduct can be in two different modes:

- 1.) Discovery mode: Inquire about what facts obtain (E.g. Lily probably owns an iron.)
- 2.) Coherence assessment mode: Assess whether a proposition "fits" with other claims.
  - Coherence assessments aim to explain conduct, or render it intelligible, better understand a person, or simply see things as "making sense". (E.g. it is strange that Lily lacks an iron, given her professional attire.)

These distinctions all cut across each other:

- Discovery mode judgements and coherence assessments might be about specific actions, behavioural trends, or character assessments.
- Discovery mode judgements and coherence assessments can concern past, present, or future actions, actional patterns, or character traits.
- This yields many species of character judgement, each with importantly different epistemic properties.

## The Crux

- The character evidence rule FRE 404(a) prohibits a particular kind of character inference:
  - Discovery mode ascription-to-conduct judgements about specific unobserved past instances.
- Call these “specific action determinations”.
- Virtue ethical responses to situationism indicate that specific action determinations are evidentially onerous and often unreliable.
  - Sections 5(ii) to 5(v) explain why.
- Section six argues that this is consistent with the reliability of other species of character inference.
- Virtue ethical rebuttals to situationism thereby vindicate legal character evidence prohibitions.
- Virtue ethics centres character in explanations of conduct and moral value. But it does not follow that one can reliably predict or ascertain conduct from characterological features.

### §5.ii. Rarity Responses

- The rarity response predicts a prevalence of narrow, conflicting, inconstant, contingent, situation-specific behavioural dispositions.
- Under these conditions, character evidence is abstruse.
- Also, factfinders may erroneously assume that negative character traits attributed to defendants are unalloyed and uncommon.
  - They fail to realise that (i.) similar descriptions apply to everyone and (ii.) the defendants’ assailed traits are nuanced and morally heterogeneous.

### §5.iii. Conflicting Traits Responses

- Conflicting traits responses entail that character ascriptions are epistemically challenging.
  - Acting dishonestly does not indicate the person lacks honesty, for example.
  - They might be honest, and yet acting in accordance with a competing trait.
- And character-to-conduct inferences are also difficult.
  - Knowing that someone is honest is not sufficient.
  - One needs evidence about how this trait competes with other traits and which behavioural dispositions would surface in a given context, give the defendant’s other competing traits.

### §5.iv. Narrow Traits Responses

- If virtue traits are narrow, the factfinder must have evidence of the specific narrow character trait.
- Factfinders overestimate the probative value of broad trait ascriptions for ascertaining conduct.
- When judging others, our paintbrush is too broad.
- Different narrow traits may have been operative on the disputed occasion.

### §5.v. Reasons-Centring Responses

- A person’s reasons for acting can be hard to determine.
  - Particularly in complex situations that offer conflicting or ambiguous reasons for action.
- Situationist experimental conditions are characteristically designed to be complex.
  - The Good Samaritan confederate was intentionally ambiguous between a physical threat, merely drunk, and needing medical help (Darley and Batson, 1973: 102).
  - Milgram experiments intentionally pit demands of compassion against those of obedience and aim to emulate employment conditions of Nazi concentration camp guards.
- Reliably gathering and using character evidence hinges on determining which reasons are salient to a person, and how they interpret, assess, and weigh those reasons.
- Reason-centring responses thereby indicate the relationship between character and conduct is not straightforward or easily uncovered.

## Virtue Theories of Attention and Interpretation

- A person's attentional dispositions and interpretative frames interface between a person's environment and their interpretation of that environment.
- Virtue theories of attention, salience, and interpretation of environment illuminates this interface.<sup>1</sup>
- A virtue epistemology of attention might reveal the experimental subjects' actions were responsive to reasons and rooted in stable character traits, for example. But which reasons they perceive and respond to was influenced by situational and emotional features.

## **§6. Character Evidence in Law and Life**

- Section six responds to two objections.
  - The first compares character evidence to other kinds of abstruse evidence in legal contexts.
  - The second compares character evidence in legal contexts to ordinary contexts.
- They ask why the abstruseness of *character* evidence creates a distinctive problem for *legal* contexts.

### 1.) Law courts frequently admit technical and recondite evidence.

- So evidence's being epistemically challenging does not suffice for exclusion.
- Given this, why do the epistemic challenges of character judgements justify an exclusion?

### In response:

- a.) Expert witnesses help factfinders navigate recondite topics.
  - But experts in the psychology of character cannot supply the needed information.
  - They cannot provide testimony that is specific enough to help adjudicate a case and yet sufficiently reliable to satisfy the standards for admitting expert witnesses.
- b.) Errors stemming from character evidence (likely) disadvantage the defendant, on balance.
  - This conflicts with legal systems' aim of protecting defendants.
- c.) We distinguish two epistemic features of inculpatory evidence.
  - Evidence is "condemnatory" if, unless rebutted, conviction is extremely likely.
  - Evidence is "hard to shake" if the evidence is difficult to rebut.
  - These two properties can diverge.
  - Plausibly unfavourable character evidence is both condemnatory and hard to shed.
- d.) The features described in (c) suggest that unfavourable character evidence is unfair on innocent defendants because, like poop on a shoe, it is hard to shake off.
- e.) These features also suggest that character evidence leads to insensitive guilty verdicts.
- f.) For some evidence kinds adduced at trial, jurors can "downgrade" it.
  - When evidence is initially overvalued, downgrading it can be an epistemic corrective.
  - But, we argue, character evidence is difficult to downgrade in this way.

### 2.) Do our arguments against character inference in legal contexts impugn everyday epistemic practice?

- In response, we argue that epistemically responsible everyday character judgements do not resemble those prohibited by evidentiary rules like FRE 404(a).
- FRE 404(a) prohibits a specific kind of character judgement, "specific action determinations".
  - And legal verdicts are high stakes, evidentially constrained, and "final", i.e. not easily revisable.
- Everyday character judgements, by contrast, are often in the coherence-assessing mode.
  - And they are broad-brush character ascriptions, and are often in low stakes, evidentially rich contexts, and are readily revised.

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<sup>1</sup> Gardiner "Attunement: On the Cognitive Virtues of Attention" (*Social Virtue Epistemology*) offers a virtue theory of attention.