

Say What YOU MEME

MEMES AS EVIDENCE IN COURT.

WRITTEN BY JOHN G. BROWNING

MEMES—YOU’VE UNDOUBTEDLY SEEN THEM, or even used them yourself in online discourse. Defined by Merriam-Webster Dictionary as “an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online, especially through social media,” memes have become an integral part of online communication. From the “crying Michael Jordan” to the “condescending Willy Wonka,” and from “distracted boyfriend” to “success kid” or “Kermit the Frog drinking tea,” memes—much like emojis—have become a kind of cultural shorthand. As one scholar has described memes as communicative tools, they “may contain little to no text at times, yet they can convey emotions, concerns, points of view, and even feelings that are unable to be expressed by the longhand written word.”¹ Described by others as “one of the newest and most significant forms of communication in the world,”² multiple researchers around the world have even concluded that viewing memes can increase positive emotions and reduce stress levels.³ For lawyers, however, memes have taken on a different significance—as sources of evidence in court.

With increasing frequency, memes provide critical evidence of a criminal defendant’s motive or intent. For example, in the high-profile trial of James Fields for the hate crime of driving his car into a group of counter-protesters at the August 12, 2017, “Unite the Right” rally in Charlottesville, Virginia—killing one and seriously injuring eight others—the prosecution introduced two memes that Fields had circulated to acquaintances and on Instagram. Both depicted “a motor vehicle violently driving into a group of pedestrians, running some over, and flinging others into the air, because the driver was ‘late for work.’”⁴ Fields’ memes included the caption, “When I see protesters blocking” and “You have the right to protest, but I’m late for work.”⁵ Fields appealed his conviction, arguing (among other grounds) that any probative value of the memes was outweighed by their danger for unfair prejudice. The appellate court disagreed,

holding that “Memes depicting a car driving destructively into a crowd of protesters constituted relevant circumstantial evidence that was probative of Fields’ intent due to the memes’ striking similarity to the act Fields committed.”⁶ As the court observed, the fact that Fields sent or posted two images involving the same type of violence that he later acted out demonstrated that the trial judge had a basis for believing that the memes had significant probative value.

Similarly, in another murder and hate crime trial, racist memes stored on the defendant’s cellphone were introduced as evidence of motive. Sean Urbanski, a member of a white supremacist group, was convicted of stabbing to death U.S. Army Lt. Richard Collins, a Black man, at a bus stop on the University of Maryland campus on May 20, 2017. Urbanski appealed his murder conviction (he was acquitted of the hate crime charge because the trial court could not find that Collins was murdered “solely because of” his race), claiming that the memes were protected First Amendment speech unrelated to any criminal act. The Maryland Court of Special Appeals disagreed, noting that the memes were “not just racially offensive,” but also “encouraged and promoted violence against Black people.”⁷ The court concluded that “Memes depicting violence against Black people constituted relevant evidence that was probative of [Urbanski’s] intent to violently harm Lt. Collins,” and so was admissible to prove motive.⁸

In 2020, the U.S. Court of Appeals for the 10th Circuit weighed in on the admissibility of memes in the appeal of an individual, Melvin Alfred, convicted of federal charges of facilitating prostitution. Among the evidence admitted as intrinsic proof of the crimes charged were six memes (defined by the court as “pictures with text over them or pictures of text”) posted by Alfred on social media. All the memes “contained laudatory references to pimping and pimping culture and also contained graphic depictions suggesting dire consequences of engaging in prostitution without a pimp.”⁹ Alfred appealed his conviction, claiming the memes were only “a historical record of things that he has thought and said and did and posted,” and that the memes’ admission violated Federal Rule of Evidence 403 because their probative value was outweighed by the risk of unfair prejudice. The 10th Circuit disagreed with Alfred’s contention that the memes were merely “riffs on oftentimes mundane social situations or cultural-specific wordplay”; instead, it found that “a jury could conclude

from the memes that Mr. Alfred was branding himself as a pimp,” and that the memes were probative of Alfred’s attempt “to facilitate a pimping business by demonstrating to his potential recruits [on social media] the benefits of having a pimp.”¹⁰

Texas courts have also been caught up in the trend of admitting memes as evidence, and not just in criminal cases. In one case from the 9th Court of Appeals in Beaumont, for example, a mother and father appealed the termination of their parental rights due to using drugs and engaging in domestic violence. The father in particular claimed that the trial court had erred in admitting “certain ‘unseemly and potentially grotesque’ Facebook memes and posts whose prejudicial nature exceeded any probative value they might have.”¹¹ The appellate court dismissed this argument, ruling that the father’s Facebook memes and posts were relevant to the trial court’s best interests of the child determination, and consequently did not violate Texas Rule of Evidence 403.

In a 2020 case from the 10th Court of Appeals in Waco, a convicted methamphetamine dealer appealed his conviction, arguing that certain Facebook posts and memes had not been properly authenticated under Texas Rule of Evidence 901. One of the memes was of actor Gene Wilder with a caption referring to drugs, while the other was of actor Leonardo DiCaprio with the accompanying text “When the cops pull you over . . . and you don’t have any outstanding warrants and there’s no dope in the car.”¹² Pointing out Rule 901’s low bar for authentication of evidence, the court affirmed the conviction.

Not surprisingly, meme evidence has also played a part in cases involving defamation claims and Texas’ anti-SLAPP law, the Texas Citizens Participation Act, or TCPA. In one such case, the memes admitted suggested that women were incompetent, and the female plaintiff sued for defamation—only to be met by the defendant’s successful TCPA assertion that his communications were protected by the statute because they were made in connection with a matter of public concern.¹³ In another TCPA case, an anonymous blog (the Barker) was sued for defamation by the Iola Independent School District’s director of technology (Monica Hurst) over the blog’s post commenting about a meme Hurst had posted from the movie *Men in Black*.¹⁴ It depicted Tommy Lee Jones’ and Will Smith’s characters holding up a “neuralizer” device that wipes out witnesses’ memories, with superimposed

text stating “Come Form Your Own Opinion.” The blog, which prevailed on its TCPA claim, had analogized the meme to school district administrators’ letting community members form their own opinions, only to ignore them.

But perhaps the most interesting Texas case involving meme evidence is the most recent one, because it discusses the significance of these forms of communication in proving motive or in negating claims of self-defense. Like the *Fields* and *Urbanski* cases discussed earlier, *Land v. State* involved a convicted murderer (LaVonie Land) contesting his conviction on the grounds that meme evidence was admitted in violation of Texas Rule of Evidence 403.¹⁵ Land, a Black man, had posted a number of memes on Facebook that contained negative depictions of white people, and the prosecution introduced them at trial. Land claimed that the allegedly racist memes were so inflammatory that they unfairly prejudiced the jury during the punishment phase. The appellate court disagreed, analogizing memes to drawings by a defendant that “can reflect his character and/or demonstrate a motive for his crime.” “Memes,” the court elaborated, “could very

well be considered the modern-day equivalent of drawings that . . . had an inferential bearing on appellant’s character for violence and were evidence of his hatred for non-African Americans.”

The environment of digital evidence in criminal and civil cases continues to grow, with memes now joining text messages, social media posts, and emojis as sources that attorneys on either side of a case need to take into account. Lawyers cannot dismiss memes as trivial or inconsequential to a case; instead, they must investigate and consider memes for what they are: yet another form of electronic communication. **TBJ**

NOTES

1. Catherine Dvorak, *Digital Discursive Spaces: Exploring How Internet Memes Function as Communicative Tools to Produce and Process Multiple Layers of Meaning* (unpublished honors thesis, Rutgers University, Mar. 25, 2019).
2. Steven Dwyer, *Memes, Community and the Evolution of Communication*, HANSON, INC. (2021), <https://blog.hansoninc.com/memes-community-and-the-evolution-of-communication/>.
3. Jonathan F. McVerry, *Viewing Memes Online Increases Positive Emotions, Helps Cope With Pandemic*, PENN ST. U. (Oct. 18, 2021), <https://www.psu.edu/news/research/story/viewing-memes-online-increases-positive-emotions-helps-cope-pandemic/>.
4. *Fields v. Commonwealth*, 73 Va. App. 652, 662 (2021).
5. *Id.*

6. *Id.* at 674.
7. *Urbanski v. State of Maryland*, No. 1318 (Md. Ct. Spec. App., Dec. 7, 2022).
8. *Id.*
9. *United States v. Alfred*, 982 F.3d 1373, 1376 (2020).
10. *Id.* at 1390.
11. *In the Interests of A.M.*, 2019 WL 4064579 (Tex. App.—Beaumont 2019, pet. denied).
12. *Abney v. State*, 2020 WL 7866943 (Tex. App.—Waco 2020, no writ.). Photos of DiCaprio from multiple movies have inspired memes, from the “laughing Jordan Belfort” from *Wolf of Wall Street* to the “pointing Rick Dalton” from *Once Upon a Time in Hollywood*, to the “laughing Calvin Candie” from *Django Unchained*.
13. *David Martin Camp & Bargains for Millionaires, LLC v. Patterson*, 2017 WL 3378904 (Tex. App.—Austin 2017, no writ.).
14. *Barker v. Hurst*, 2018 WL 3059795 (Tex. App.—Houston [1st Dist.] 2018, no writ.). In what is believed to be a Texas first, the court’s published opinion contains the actual meme.
15. *Land v. State*, 2022 WL 10224790 (Tex. App.—Houston [14th Dist.] 2022, no writ.).
16. *Id.*



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