


NEUROSCIENCE, SINCERITY, AND THE LAW

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“The thought of man shall not be tried, for the devil himself knoweth not the thought of man.”

-- Chief Justice Bryan, 1468

The Problem of Sincerity in Law



- Conscientious Objection
- Neuroscience
- *Hobby Lobby*

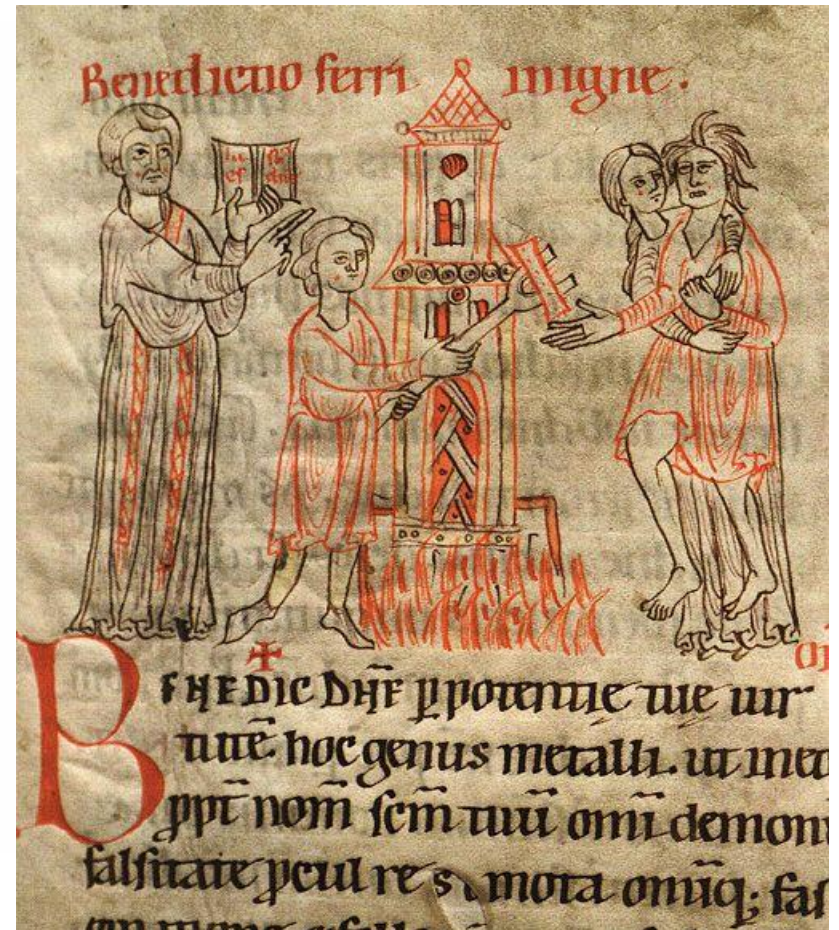
Modern Conscientious Objection

- U.S. v. Seeger (1965)
 - ▣ “the test of belief ‘in a relation to a Supreme Being’ is whether a given belief that is **sincere and meaningful** occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.”
- U.S. v. Welsh (1970)
 - ▣ Extends to “**deeply and sincerely** [held] beliefs that are purely ethical or moral”

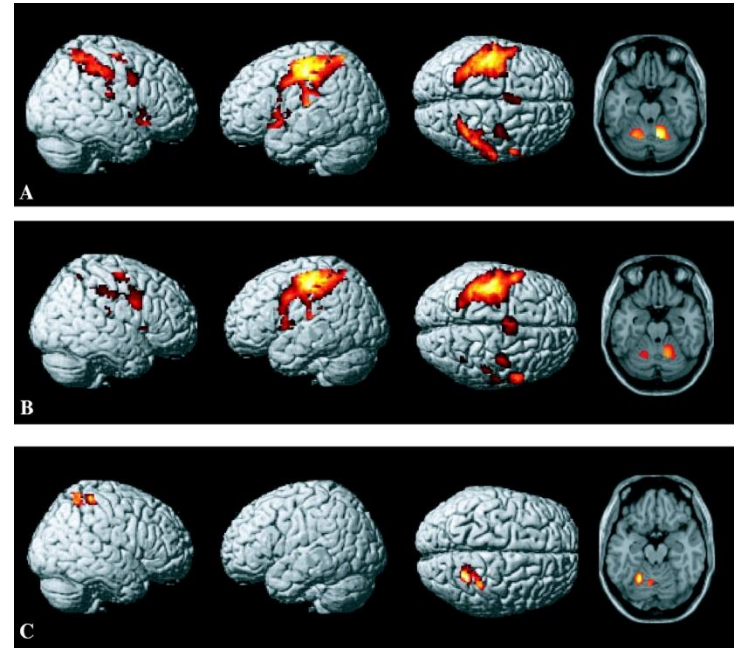
Sincerity Key but not engaged

- Membership in recognized sects originally served as proxy for sincerity
- Seeger and Welsh assume sincerity – only ask if belief occupies same place in life as in recognized sects.
- Simply comes back to traditional assessments of credibility and demeanor

Old Technology for Accessing states of Mind



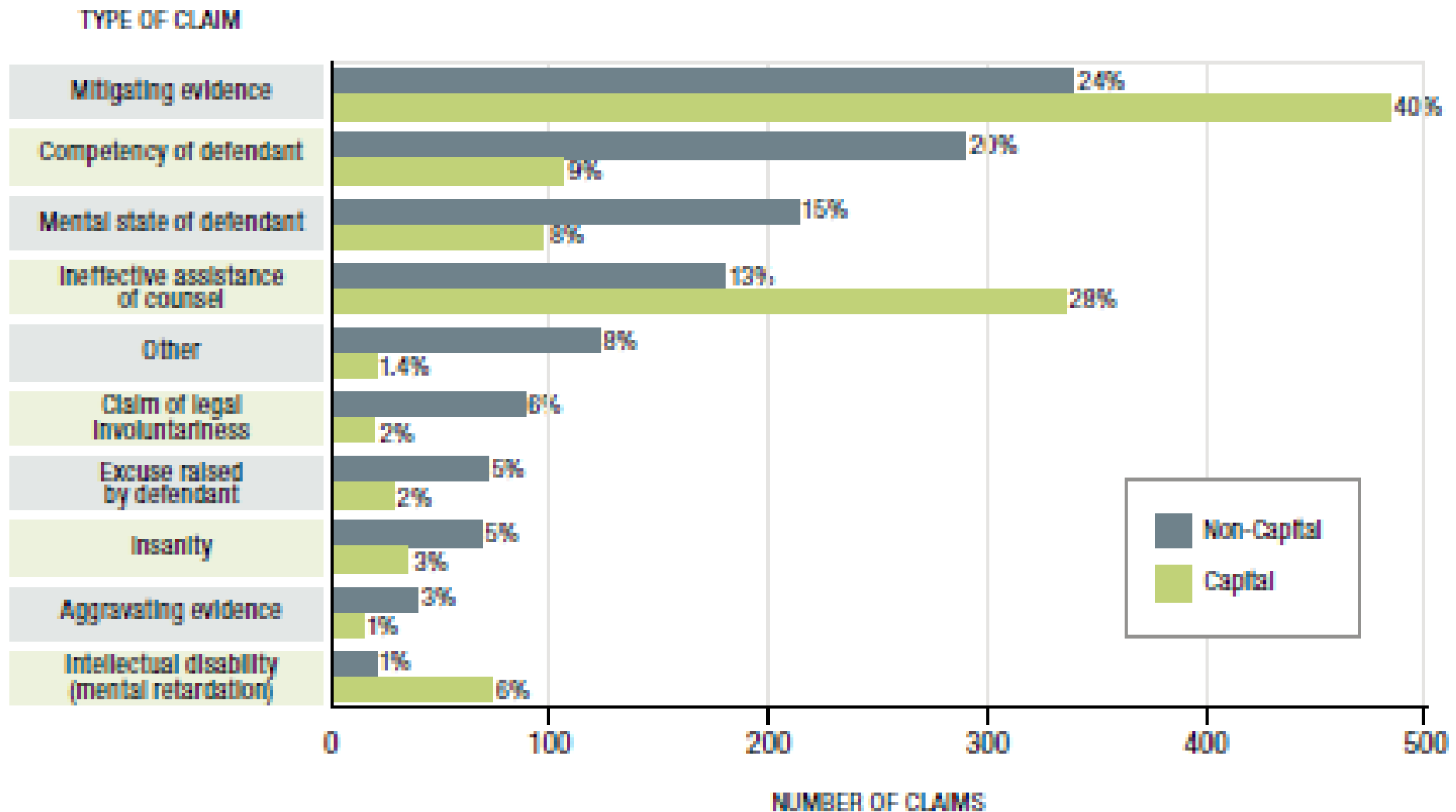
New Technology For Assessing States of Mind



fMRI in Court

- Mental Competence
- Injury
- Brain Development (Roper v. Simmons)
- Credibility/Lie Detection
 - ▣ generally not ready for prime time under Daubert (Semrau)
- But - Currently used in sentencing phases to request mitigation
- My own Skepticism
- Yet – looking to the future
 - ▣ Advocates recognize current limits but see real future potential

Figure 3: Claims Made Using Neurological or Behavioral Genetics Evidence in U.S. Capital and Non-Capital Criminal Cases



A total of 1800 judicial opinions (majority, plurality, concurrence, dissent) issued during 2005–2012 were included. Graph and analysis based on 1586 majority and plurality opinions only. Source: Farahany, N., Database 2014. On file at Duke University.

Veracity v. Sincerity in Court

- Statement often about objectively verifiable fact:
“did you steal the car?”
- Usually about some **past** event or state of mind:
“did you knowingly submit fraudulent claims?”

V.

- Evaluation of a subjective assertion of belief: “do you believe it is wrong to kill?”
- Usually concerning a **present** state of mind

Applied to Conscientious Objection

- Fewer technical concerns
 - ▣ Time not at issue

- Fewer Constitutional Concerns
 - ▣ Typically Draft Boards are skeptical
 - ▣ Offered by Claimant for own benefit

- Deter weak claims

Applied to *Hobby Lobby*

- RFRA: subjects any law that “substantially burdens a person’s exercise of religion even if the burden results from a rule of general applicability,” to strict scrutiny
- Issue: whether RFRA “permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners.”

Sincerity Not at Issue

- “no one has disputed the sincerity of [the] religious beliefs” of the families owning the plaintiff corporations.
- Alito: “the plaintiffs . . . assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity.”

What if Sincerity Were at Issue?

- Not about sincerity of belief that life begins at conception
- Real Issue: “Violate belief ” v. “Burden exercise”
 - ▣ i.e. the sincerity of their belief that complying with a general ACA mandate to provide insurance to employees, some of whom might someday make use of one of it to help pay for one particular form of contraception would substantially burden their religious practices.

Contrast with Welsh and Seeger

- Direct connection of Military Service to burdening exercise of belief that taking life is wrong.
 - ▣ Skepticism w.r.t. the belief itself
- Attenuated connection of providing health care that includes contraceptive coverage to burdening exercise of belief that life begins at conception.
 - ▣ Skepticism w.r.t. assertion that belief is burdened by this practice
- Need for Heightened Skepticism where connection is attenuated and 3d party interests are at stake

Enter fMRI

- No need to question sincerity or substance of a religious belief itself.
- Might question, in real time, the sincerity of an assertion that complying with the ACA mandate would substantially burden their exercise of that belief.
- Mechanism to deter weak claims, protect third party interests