

The Problem of Expertise for Democracy: The Case of
the New York State DNA Databank

by

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“We must remember the fact which we have encountered several times and which we shall have to discuss repeatedly: that “democracy” as such is opposed to the “rule” of bureaucracy, in spite and perhaps because of its unavoidable yet unintended promotion of bureaucratization.”

-Max Weber, Economy and Society, 991.

Introduction

Since the late 19th century, increasingly scientifically and otherwise complex policy issues have entered the purview of American government.¹ The proliferation of advisory committees on a wide range of issues demonstrates a belief that those with specialized training and expertise can give useful advice regarding the governance of policy issues with which they have experience.² The existence of both federal and state executive departments or agencies for most policy issues suggests that elected officials, who create these departments, believe that those with professional expertise can better, or at least more effectively, manage the details of governing substantive issues. While it is perhaps unremarkable that elected officials rely upon the knowledge of scientists on issues of scientific complexity, they also consult with experts on other topics that are complex, but not in the scientific sense. For example, legislators may consult with teachers and scholars of education when making education policy, or may work with representatives of the police force and criminologists when addressing crime reduction. In order to manage the governance of these issues, the legislative and executive branches have often turned to bureaucratic administrations, staffed by professionals, to implement a variety of policies.

¹ Ernest Gellhorn and Ronald Levin, *Administrative Law and Process* (St. Paul, MN: Thomson West, 2006).

² See Sheila Jasanoff, *The Fifth Branch, Science Advisors as Policymakers*, (Cambridge, MA: Harvard University Press, 1990).

Max Weber argues that bureaucratic governance increasingly gains technical superiority over other possible arrangements “the more complicated and specialized modern culture becomes.”³ In accord with this belief, bureaucratic administrations exist to oversee the implementation of most policies in the United States today, at both the federal and state level: the Environmental Protection Agency implements environmental policy, the Department of State oversees foreign relations, police organizations at various levels come up with methods and strategies of enforcing the law. Many departments and agencies not conventionally thought of as “bureaucratic” are nonetheless characterized by bureaucratic administration, with a hierarchical staff organizational system under a particular individual who may be elected or appointed.⁴ While legislators can delegate the most complex aspects of governance to administrative agencies, they still often lack specialized knowledge of a subject necessary to lawmaking; accordingly, legislators often work closely with a variety of individuals who work for government agencies, as well as outside experts, in crafting legislation.

In addition to specialized knowledge of a substantive area, staff members of state agencies develop a detailed knowledge of the often-complicated ways in which bureaucracies are organized and function. I call this type of knowledge “bureaucratic knowledge” or “bureaucratic expertise.” Though Weber argues that bureaucracies, by

³ Weber, *Economy and Society*, 975.

⁴ Weber argues that clearly established “office hierarchy” is a central feature of bureaucratic administration: “The principles of *office hierarchy* and of channels of appeal...stipulate a clearly established system of super- and sub-ordination in which there is a supervision of the lower offices by the higher ones. Such a system offers the governed the possibility of appealing, in a precisely regulated manner, the decision of a lower office...” Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich (Berkeley and Los Angeles: University of California Press, 1979), 957.

definition, are characterized by the following of rules and regulations,⁵ in practice, many protocols are either informal or part of internal procedures not published as regulations. Weber argues that those systems of law that “have achieved the highest measure of methodological and logical rationality” are virtually “gapless” systems; that is, each concrete legal decision must derive from abstract legal propositions, and all social actions can be understood as in accords with or in violation of legal propositions.⁶ At the same time, Weber argues that bureaucracy can be a particularly effective and “technically superior” method of governance precisely because bureaucrats can use their professional discretion to most effectively make decisions.⁷ I argue that in order for bureaucracy to function most effectively, then, certain “gaps” in the law *should* exist.

Weber explains that the arrangement whereby some individuals exercise power over others must be justified by some basis recognized as legitimate by the governed.⁸ Authority is “legitimate” when the governed recognize and respect the basis that gives rulers the power to issue commands that actually influence the conduct of the ruled in “a socially relevant way.”⁹ In the United States, elected officials and bureaucrats derive their legitimate authority to govern through formal, rational rules. When legitimate authority derives from rules rather than from “tradition” or “charisma,” the governed obey the decisions of an individual because

⁵ Weber, *Economy and Society*, 956.

⁶ Weber, as quoted in Duncan Kennedy, “The Disenchantment of Logically Formal Legal Rationality of Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought,” *Hastings Law Journal* 55 (2004), 17.

⁷ Weber, *Economy and Society*, 973.

⁸ Weber, *Economy and Society*, 953.

⁹ Weber, *Economy and Society*, 946, 953.

of his or her formal, rule-bound position.¹⁰ Individual legislators and the executive derive their authority to govern from the federal and state constitutions, which lay out the procedures for their election. While certainly charisma and even “tradition” may play some role in the electability of an individual, political authority, in the United States, is not *based upon* either of these characteristics; citizens and executive staff members obey the President because he was elected pursuant to constitutionally-derived standards, not because his father was president, or because he happens to be personable and charismatic. By electing an individual to office, the people vest the power to make political decisions on behalf of the electorate in an individual; that individual, in theory, is held accountable to the electorate through the prospect of re-election.

While elected officials derive their authority from the people, legal scholar Cass Sunstein¹¹ makes a strong argument for the idea that the American version of democracy should not be one where the individual preferences of the people should determine the content of law. Rather, informed by James Madison’s reasoning, Sunstein argues that the American version of democracy is a “deliberative” one, where citizens and representatives “...are required to offer reasons on behalf of one view rather than another...and to listen and to talk with one another...”¹² Accordingly, law and policy should not reflect the relative power and influence of a particular constituency, but rather the various strengths of different proposals.¹³

¹⁰ Weber argues that legitimate authority can be based in three main sources: “a system of consciously made *rational* rules,” “personal authority,” or “tradition.” Weber, *Economy and Society*, 954.

¹¹ Sunstein has taught at University of Chicago and Harvard Law Schools, and is currently the Administrator of the White House Office of Information and Regulatory Affairs

¹² Cass Sunstein, *The Partial Constitution*, (Cambridge, MA: Harvard University Press), 164.

¹³ This understanding rejects the notion that political pluralism, where decisions reflect the relative power of those seeking to influence, *should* characterize outcomes.

The rise of complex, increasingly expert- and bureaucratically-managed issues poses a potential problem for the notion of a deliberative democracy in three main ways. First, it is difficult to guarantee the accountability of bureaucrats in the absence of elections. Second, as legislators increasingly rely on unelected experts for both technical and policy information, the door is opened for experts to influence political decisions that they do not have legitimate authority to make. Finally, reliance on “experts” can limit the participation of “non-experts” in democratic deliberation. This thesis will primarily examine the first two of these questions, which are most prominent in the case of the New York State DNA databank.

At the same time, if government is to continue making and implementing effective law regarding a wide variety of issues, the use of bureaucratic administration and consultation with a variety of types of experts is not likely to disappear.¹⁴ As I will demonstrate, bureaucratic governance and consultation with both state and non-state experts can be quite an effective method of achieving political goals. The problem for democracy is balancing the effectiveness of governing with experts with the values of deliberative democracy. This thesis is a sociological examination of this problem in the context of modern mass democracy in the United States.

I use the policy debate surrounding the administration and the expansion of the New York State DNA databank as a case study to examine the implications for democracy when the state is faced with the governance of a scientifically and bureaucratically complex issue. A DNA databank is a computerized system

¹⁴ The normative question of whether government should be involved with complex issues that require the support of an administrative staff is beyond the scope of this thesis. I will assume that government will not cease to be involved with issues as diverse as education, health care, environmental regulation, and criminal justice, all of which are currently largely governed by bureaucratic staffs.

maintained by law enforcement agencies that enables the comparison of DNA profiles generated from crime scene evidence against the profiles of individuals convicted of, or in some states, arrested for, a qualifying offense. Its creation, operation, and management requires the work of scientists with expertise in forensic biology, population statistics, and genetics, who analyze samples and can determine the likelihood that two samples came from the same individual.

In addition to scientific complexity, the New York State DNA databank is characterized by bureaucratic complexity. It is managed and used by a number of separate administrative and law enforcement agencies. Many of the ways in which these agencies interact with each other is not written into regulatory code, but rather follows internal procedures and protocols. The New York State DNA databank is also part of a federal system of databanks, the Combined DNA Index System (CODIS), managed by the FBI. Accordingly, it is subject to both state and federal regulations and requirements. While the New York State DNA databank was created by an act of the legislature, the databank is managed and used by law enforcement, district attorneys, forensic analysts, scientists, and other officials working at administrative agencies. These individuals, as well as individuals representing a variety of non-state advocacy organizations who have developed expertise in the area of DNA databanks, also play a large role in influencing the lawmaking process surrounding the DNA databank.

Methods

My research draws from mostly primary sources, including interviews with a range of individuals involved in both the policy debate and the administration of the New York State DNA databank. I conducted a total of seven interviews with nine

participants. Interviews were semi-structured, and with the exception of the interview with representatives from the Office of the Chief Medical Examiner of New York City, audio-recorded.¹⁵ I obtained contact information for all interviewees who worked for the state through my contacts at the Queens District Attorney's Office, where I previously interned. I contacted representatives from the New York Civil Liberties Union by calling the phone number listed on the organization's website and asking if a representative might be willing to speak with me about my thesis. I was put in touch with Beth Haroules, and ultimately conducted a joint interview with both Beth Haroules and Robert Perry. I obtained contact information for Sheldon Krimsky through his faculty webpage.

I attempted to contact representatives from the Innocence Project, a non-profit organization dedicated to using DNA evidence to secure the exonerations of wrongfully-convicted individuals, but was denied an interview. As my thesis will demonstrate, the organization has played a prominent role in shaping the debate surrounding databank expansion in the legislature in recent years. I initiated contact with the organization through a Wesleyan alumnus working at the organization, who forwarded my request for an interview to Steve Saloom, the policy director. After speaking with Mr. Saloom, my contact sent me an email explaining "DNA database expansion is a complicated issue within innocence and DNA exoneration work. Because of the numerous issues surrounding our work, it doesn't appear that there is anyone available to be interviewed from the Innocence Project that would be of particular help to your paper."¹⁶ A family member also directly contacted Peter

¹⁵ OCME policy prohibits the audio recording of interviews with any of its representatives.

¹⁶ Staff member from Innocence Project, e-mail message to author, November 14, 2011.

Neufeld, the co-director of the Innocence Project, who told me to email the publications manager to arrange an interview, which I did. Despite these efforts, I was not able to obtain an interview with a representative of the organization.

Because of limited time, and given that my thesis focuses on how individuals other than legislators affect the policy process, I did not conduct interviews with state legislators. Instead, I analyzed two types of primary source materials for legislators' views: quotes cited in the media and in other published documents, and recorded footage of the meetings of various committees, public hearings, and sessions in which legislators participated.

Name/Position ¹⁷	Organization	Location and Date of Interview
Assistant District Attorney with Extensive Experience with DNA Prosecutions	A New York City District Attorney's Office	New York City, 10/25/11
Bureau Chief of A New York City Special Victims Bureau	A New York City District Attorney's Office	New York City, 10/25/11
Sheldon Krinsky, Professor, co-author of "Genetic Justice"	Tufts University	Phone Interview (Medford, MA), 11/1/11
Steve Hogan, Deputy Counsel	New York State Police	Phone Interview, (Albany, NY), 11/4/11
Mike Nardolillo, DNA Databank Coordinator	Department of Criminal Justice Services	Phone Interview, (Albany, NY), 1/8/11
Robert Perry, Policy Director	New York Civil Liberties Union	New York, NY, 11/22/11
Beth Haroules, Senior Staff Attorney	New York Civil Liberties Union	New York, NY, 11/22/11
Two Representatives	Office of the Chief Medical Examiner of New York City	New York, NY, 12/18/12

Fig. 1 Chart of Interviews

In addition to interviews, I searched the *New York Times* and the *Wall Street Journal* for articles related to the New York State DNA Databank. I chose these two newspapers because they have the highest circulation in New York State, and can best

¹⁷ Some names have been withheld at the request of interviewees.

be understood as reflecting the perceptions of mainstream media sources.¹⁸ I draw upon the information in news articles in a number of capacities. Newspaper articles were useful in obtaining direct quotes from elected officials, as well as representatives from the New York Civil Liberties Union, Innocence Project, assistant district attorneys, and state employees with whom I did not have the opportunity to speak. Archived newspaper articles also provided me with information about past legislative debates and actions, and with information regarding how the media's portrayal and public understandings of various issues related to DNA databanks have changed over time. In addition, because the New York State DNA databank was expanded while I was in the process of writing this thesis, I largely relied on newspaper sources for information regarding legislative developments.

I also analyzed materials published on the websites of a number of organizations and agencies, including those of the Innocence Project, the NYCLU, the New York State Association of Criminal Defense Lawyers, the New York State District Attorneys' Association, the New York State Association of Chiefs of Police, the New York State Department of Criminal Justice Services, numerous sites maintained by the FBI and federal government, and websites maintained by other advocacy groups, like DNAresource.com. I learned about and was referred to a number of sites by individuals that I interviewed. I looked at websites for information regarding how various groups attempt to influence the lawmaking process, and regarding their policy positions. In particular, I analyzed comments on legislation, testimony given before various committees or houses of the legislature, position

¹⁸ "US Newspapers," Audit Bureau of Circulations' Website, accessed April 8, 2012, <http://abcas3.accessabc.com/ecirc/newstitlesearchus.asp>.

papers, presentations, news releases, trainings, and lists of legislative priorities, and model legislation made available online.

I attended one meeting of the DNA subcommittee of the Commission on Forensic Science in person, and downloaded and watched several videos of the meetings of the Commission on Forensic Science from DCJS's website. I also obtained copies of several Commission on Forensic Science meetings from the Department of Criminal Justice Services through a Freedom of Information Law request. Watching these meetings gave me insight into how the DNA databank is administered, and the ways in which members voice the concerns of the interests they represent.

I traveled to Albany, where Steve Hogan, deputy counsel for the New York State Police, gave me a tour of the State Police's Forensic Investigation Center (FIC), which is located on the sprawling New York State Campus on the outskirts of the city. The campus contains the administrative offices of a number of state agencies. Convicted offender samples are housed and analyzed at the FIC in a highly secure area. I was not able to observe the processing of DNA samples, since members of the public are not allowed to enter the area where the databank is maintained. A high school student doing a report on forensic sciences and his mother were also present on the tour. Because of this, I was able to observe Hogan explaining issues related to the DNA databank to people with relatively less knowledge and background in forensic science and DNA.

My internship at the Queens District Attorney's Office also provided me with background knowledge regarding the databank. Through the internship, I observed trials where the defendant had been arrested pursuant to a "cold hit," or match

between a convicted offender and forensic profile,¹⁹ visited the Office of the Chief Medical Examiner for a tour, and attended a presentation about the DNA databank. Prior to the start of this project, I spoke informally with staff at the office regarding possible areas of focus for my thesis.

Though I worked as an intern for a district attorney's office, which has been vocally in favor of database expansion, my thesis does not seek to answer the question of whether or not the databank should have been expanded, or whether or not certain practices and policies that have been identified as problematic by advocacy organizations and academics²⁰ should or should not be permitted. My personal policy beliefs regarding the DNA databank and its administration are not relevant to this thesis. In addition to my work at the Queens District Attorney's Office, as a high school student I worked with my local chapter of the New York Civil Liberties Union on a campaign, and spoke on a panel at a conference organized by the association. I have been involved personally and professionally with both groups advocating and arguing against databank expansion.

Furthermore, I spoke informally with Steve Hogan, who is also a professor at SUNY Albany and the College of St. Rose, and David Lazer, a professor at Harvard's Kennedy School of Government who studies DNA databanks, regarding my approach to the topic. I also spoke with Wesleyan Professor Marc Eisner regarding my use of public policy theory.

Structure of Chapters

¹⁹ "Glossary," DNA Initiative, Department of Justice, <http://www.dna.gov/more/glossary/>.

²⁰ e.g., New York's partial match policy and the existence of the "Linkage database," which will be discussed in Chapter Three

In Chapter One, I provide an overview of the New York State DNA databank, and provide historical information regarding the evolution of the policy debate surrounding the databank. I demonstrate that questions regarding genetic privacy have become less prominent, at least in legislative debates, and that the inclusion of provisions to protect against wrongful convictions have come to play a large role in shaping the legislative debate in recent years.

In Chapter Two, I bring together Max Weber's sociology of law and bureaucracy with Cass Sunstein's idea of America as a "deliberative democracy." I discuss and explain why bureaucracy simultaneously lends itself to and poses problems for democracy. I argue that while formal rules are often seen as a mechanism to increase the accountability of bureaucrats, they can have the effect of making bureaucratic governance less effective, and in many cases, may have little meaning if bureaucrats and other non-legislators largely create them.

In Chapter Three, I examine how administrative agencies and groups, including the Department of Criminal Justice Services (DCJS), the New York State Police (NYSP), and the Commission on Forensic Science, govern the New York State DNA databank. Contrary to Weber's assertion, I argue that the law is not gapless, and its application to specific sets of facts often requires professional discretion. I argue that when problems are seen as "political" rather than "technical," advocacy groups often challenge the authority of bureaucrats and experts to decide questions.

In Chapter Four, I examine how a variety of actors have influenced the law-making process surrounding the New York State DNA databank in recent years. I explore the implications for a deliberative democracy when legislators lack both the

technical and bureaucratic expertise to make effective, well-informed law, and must gather information from outside sources.

I conclude by arguing that bureaucracy and governance with experts will always raise concerns regarding the legitimate authority underlying decisions in a democratic system. Though attempts can be made to reconcile the values of deliberative democracy and accountability, they cannot fully erase the tension that characterizes the existence of bureaucratic governance within a democratic system.

Chapter One: Background and History

The Development of DNA Profiling

In 1984, Alec Jeffreys and a team of scientists at the University of Leicester, in the United Kingdom, invented the first usable forensic DNA profiling technique.²¹ Forensic DNA profiling is premised on the understanding that, save for identical twins, no two humans have the exact same genetic makeup. Without going into scientific detail, a DNA molecule is a double helix made up of millions of pairs of four different nucleotides; the sequence in which these pairs occur represents an individual's genome. While most of the genetic code is nearly identical among all humans, each individual's genome also contains highly variable mutations that can be used to distinguish individuals from each other. A DNA profile consists of a specific segment of this highly variable material, which does not code for specific genetic traits.²² Forensic DNA profiling techniques compare these segments, which are unique to individuals. Analysts determine that two profiles "match" when they share the same sequence of pairs at these selected, highly variable locations.²³ A match between a profile generated from an unknown biological sample collected at a crime scene and a profile generated from a biological sample taken from a known individual suggests that the known individual is also the source of the unknown sample. Using population statistics, forensic analysts are able to determine the probability that the known individual was the source of the unknown sample; today, the likelihood is

²¹ Jay D. Aronson, *Genetic Witness: Science, Law, and Controversy in the Making of DNA Profiling*, (New Brunswick, NJ: Rutgers University Press, 2007), 1.

²² "Glossary," DNA Initiative, Department of Justice, <http://www.dna.gov/more/glossary/>.

²³ Aronson, *Genetic Witness*, 8-10.

extremely high. Profiling techniques have evolved since Jeffreys' 1984 discovery,²⁴ but the principle underlying the ability to make comparisons remains the same.

DNA Introduced into the Criminal Justice System

Shortly after the invention of DNA profiling techniques, Jeffreys and his research team assisted law enforcement in the UK in using forensic DNA in criminal investigations.²⁵ By the late 1980s, DNA evidence had been used in a number of trials in the United States. Despite the recent development of forensic DNA techniques, early attempts by defense attorneys to challenge the admissibility of DNA evidence were unsuccessful. The 1989 case of *People v. Castro*,²⁶ the defense succeeded in challenging admissibility, and the Court found that while DNA-profiling techniques “can produce reliable results”, in this particular case the laboratory did not adhere to “the generally accepted scientific techniques and experiments.”²⁷ Further challenges ensued in the courts and in science journals regarding the validity of forensic DNA, including the OJ Simpson Trial, which drew national attention to controversy regarding proper forensic DNA analysis techniques.²⁸

Historians of science argue that the “DNA wars” are long over.²⁹ Over the course of the 1990s, DNA profiling techniques and protocols for the handling of evidence were improved, and DNA's use in the criminal justice system increased and gained acceptance both in the courts and culturally. In 1994, the highest court in New York State ruled that DNA testing could be admitted in court as evidence; at that

²⁴ See “Interlude A: DNA Profiling Techniques,” in Michael Lynch, Simon Cole, Ruth McNally, and Kathleen Jordan, *Truth Machine: The Contentious History of DNA Fingerprinting*, (Chicago: University of Chicago Press, 2008), 24-38, for a discussion of the various techniques that have been developed.

²⁵ Lynch, Cole, McNally, and Jordan, *Truth Machine*, 49.

²⁶ *People v. Joseph Castro*, 144 Misc.2d 956 (1989).

²⁷ Lynch, Cole, McNally, and Jordan, *Truth Machine*, 61.

²⁸ Aronson, *Genetic Witness*.

²⁹ Aronson, *Genetic Witness*. Lynch, Cole, McNally, and Jordon, *Truth Machine*.

point, DNA evidence was not yet being widely used by all district attorney's offices throughout the state.³⁰ Today, many have argued that DNA has become so ubiquitous in criminal trials that juries may be hesitant to convict without DNA evidence.³¹

Early Development of DNA Databases

Law enforcement in the United Kingdom first developed the idea to harness DNA's potential to identify suspects into a database.³² Based on the reasoning that many criminals—especially violent ones—tend to be recidivists, keeping the DNA profiles of convicted offenders on file would facilitate the generation of leads if a criminal went on to leave biological evidence at the scene of a subsequent crime.³³ The data-banking of biological samples of DNA for future analysis for identification purposes was recommended to the New York State Legislature in 1988, when the Assembly held public hearings to learn more about the potential for DNA technology to aid criminal investigations.³⁴

Following the database proposal at the hearings, in the early 1990s many elected officials and law enforcement professionals hoped to create a DNA database in New York. In 1990, the FBI launched CODIS, the Combined DNA Index System,

³⁰ Ian Fisher, "Ruling Allows DNA Testing As Evidence," *New York Times*, March 30, 1994.

³¹ See the preface of Lynch, Cole, McNally, and Jordan, *Truth Machine*, for a discussion of the so-called "CSI effect."

³² David Lazer, "The Massachusetts DNA Database: Getting Started," Kennedy School of Government Case Program, C16-00-1570.0 (Cambridge, MA: President and Fellows of Harvard College, 2000), 2.

³³ From the beginning, the UK's database was expansive, containing samples from a wide variety of convicted offenders, as well as arrestees and suspects, including individuals who were asked to volunteer elimination samples based on their membership in "target populations."³³ Civil liberties guarded by the American Constitution and Bill of Rights played a large role in preventing the United States from beginning with such an expansive databank; even today, no state databanks allow for the inclusion of profiles generated elimination samples.

³⁴ Jerro S. Kotval, "Public Policy for Forensic DNA Analysis: The Model of New York State," in *DNA on Trial: Genetic Identification and Criminal Justice*, ed. Paul R. Billings, (Cold Spring Harbor, NY: Cold Spring Harbor Laboratory Press, 1992), 109-110.

as a pilot program serving 14 states.³⁵ The pilot program enabled laboratories to make comparisons between DNA profiles generated from crime scene evidence and the profiles of offenders convicted of certain felony sex offenses and other violent crimes.³⁶ In 1992, New York State Governor Mario Cuomo proposed a bill that would create a DNA database similar to the database already in place in New York for latent fingerprints, and similar to DNA databases being developed in other states.³⁷ Much like subsequent bills introduced to expand the DNA databank, Cuomo worked closely with experts in government administration while drafting the bill.³⁸ Cuomo's bill proposed to collect DNA samples from offenders convicted of homicide and violent sex crimes, and to establish a Forensic Science Review Panel at the state's Department of Criminal Justice Services.³⁹

Two years after Cuomo's initial proposal, the United States Congress passed the DNA Identification Act, which "authorized the FBI to establish a national database to 'facilitate law enforcement exchange of DNA identification information.'"⁴⁰ The Act provided statutory authority for the creation a federal system, CODIS, that would ultimately link together state DNA databases. The DNA Identification Act also allocated \$40 million to be distributed to state and local law enforcement agencies over five years to equip existing crime laboratories with the capacity to conduct DNA analysis and to establish state databases to ultimately feed

³⁵ Sheldon Krimsky and Tania Simoncelli, *Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties*, (New York: Columbia University Press: 2011), 29.

³⁶ Krimsky and Simoncelli, *Genetic Justice*, 29.

³⁷ Selwyn Raab, "Cuomo Seeks Genetic Data of Offenders," *New York Times*, May 10, 1992.

³⁸ "Richard H. Girgenti, the state's Director of Criminal Justice" helped Cuomo draft the bill." Raab, "Cuomo Seeks Genetic Data."

³⁹ Raab, "Cuomo Seeks Genetic Data."

⁴⁰ Lazer, "The Massachusetts DNA Database," 3.

into the national system.⁴¹ That same year, the New York State legislature ultimately passed a bill similar to Cuomo's 1992 proposal, which authorized the creation of a DNA databank based on a policy drafted by the newly created Commission on Forensic Science.⁴²

Experts and the Statutory and Regulatory Schemes Governing DNA Databanks:

The experts who have been involved in policy debates surrounding DNA databanks, in New York and elsewhere, include individuals with specialized knowledge and experience in areas much broader than genetics or population statistics. These include individuals with legal expertise in handling cases involving forensic DNA from both defense and prosecution; individuals from civil rights and civil liberties advocacy organizations; law enforcement officials who follow up on the leads generated by databank hits; advocates who work with victims of violent crimes; administrators working at state agencies that operate the DNA databank; and academics who study DNA technology and databases from a variety of perspectives. The expertise of these groups has been crucial to shaping the statutory and regulatory schemes governing the New York State DNA databank and the federal CODIS system.

Overview of Some Key Actors:

Law Enforcement and New York State Agencies

The law enforcement community and affiliated state organizations were quick to learn how to use forensic DNA in criminal trials; they brought this expertise, early

⁴¹ Lazer, "The Massachusetts DNA Database," 3.

⁴² "The NYS DNA Databank and CODIS," New York State Department of Criminal Justice Services (NYS DCJS), accessed April 4, 2012, <http://criminaljustice.state.ny.us/forensic/dnabrochure.htm>

on, to the development of DNA databanks, in New York and other states.⁴³ Law enforcement has been particularly vocal in pushing for the expansion of DNA databases to include the samples of more classes of offenders to help generate more investigative leads, and to improve their ability to ensure they are prosecuting the right person.⁴⁴ Expansion of databases to include the profiles of those convicted of lower level crimes is premised on the notion that most violent criminals are not “specialists,” and are likely to have committed other crimes.⁴⁵ Taking DNA following the conviction of a lower level crime can help identify the perpetrator of a violent crime whose DNA is already in the databank.⁴⁶

In New York, the Division of Criminal Justice Services (DCJS) and the New York State Police (NYSP), which houses the Forensic Investigation Center that holds the DNA databank, are the main agencies responsible for the operation of the databank. Representatives of these organizations offer legislators expertise regarding the actual operation of the databank. DCJS, in particular, is formally charged with assisting the governor in developing “...policies, plans, and programs for improving the coordination, administration, and effectiveness of the criminal justice system.”⁴⁷ Accordingly, DCJS has assisted the governor in developing policies for the establishment and expansion of the databank.

⁴³ Aronson, *Genetic Witness*, 7.

⁴⁴ The chief of a New York City Special Victims Bureau explained to me, with regards to the advent of DNA evidence, “the opportunities to identify correctly the perpetrators of these crimes and to not rely only on eyewitness identifications of confessions are tremendous. And makes me feel a lot more secure as a prosecutor knowing that that’s happening.” NYC Special Victims Bureau Chief, interview with the author, October 25, 2011.

⁴⁵ “Expanding the Database,” NYS Department of Criminal Justice Services’ Website, accessed April 10, 2012, <http://www.criminaljustice.ny.gov/forensic/index.htm>.

⁴⁶ Numerous individuals I spoke with explained that hits generated as a result of the 2006 expansion to collect DNA from those convicted of petit larceny have resulted in the solving of over 200 sexual assaults and over 50 homicides.

⁴⁷ N.Y. Exec. Law 35§ 837 (McKinney 2012).

Barry Scheck and Peter Neufeld

Assisting the defense team in *People v. Castro* to challenge the admissibility of DNA evidence marked an early achievement of two defense lawyers, Barry Scheck and Peter Neufeld, who would go on to become well known for their involvement and expertise regarding the use of DNA in the criminal justice system. The two were part of the “Dream Team” that successfully brought the Los Angeles Police Department’s handling of biological evidence into question during the OJ Simpson case.⁴⁸ Scheck served as a member of the National Commission on the Future of Forensic Science, created in 1998 at the request of Attorney General Janet Reno, to investigate how the Justice Department could most effectively use DNA evidence in both criminal investigations and to exonerate potentially wrongfully-convicted individuals.⁴⁹ In 1992, Scheck and Neufeld founded the Innocence Project as a law clinic at the Benjamin N. Cardozo School of Law at Yeshiva University in New York. The clinic seeks to use post-conviction DNA testing to exonerate wrongfully convicted individuals. The Innocence Project, which would go on to become a voice in the policy debate surrounding the New York State DNA Databank, became an independent non-profit organization in 2004.⁵⁰ Since the inception of the databank, both Scheck and Neufeld have worked directly with legislators to shape the statutory scheme that governs the DNA databank.⁵¹ In addition, both have served as members of the New York State Commission on Forensic Science, which regulates all crime

⁴⁸ Lynch, Cole, McNally, and Jordon, *Truth Machine*, 237.

⁴⁹Research and Development Working Group of the National Commission on the Future of DNA Evidence, “The Future of Forensic DNA Testing,” National Institute of Justice, (Washington, D.C.: U.S. Department of Justice, 2000), v.

⁵⁰ “About Us,” The Innocence Project’s Website, accessed April 6, 2012, http://www.innocenceproject.org/Content/What_is_the_Innocence_Project_How_did_it_get_started.

⁵¹ Comment of Peter Neufeld during the meeting of the Commission on Forensic Science June 2, 2009. Transcript of the Meeting of the New York State Commission on Forensic Science, June 2, 2009. On file with the New York State Department of Criminal Justice Services.

and forensic laboratories in the state, and is charged with promulgating policies to guide rulemaking regarding the DNA Databank.⁵²

Advocacy Organizations: The New York Civil Liberties Union and The Innocence Project

The New York Civil Liberties Union (NYCLU) is the New York State affiliate of the American Civil Liberties Union (ACLU). Both organizations seek to ensure that the civil liberties protected by the federal Constitution, the Bill of Rights, statutory law, and, for the NYCLU, the New York State Constitution, are respected by government.⁵³ The NYCLU has been active in advocating on behalf of the privacy and due process rights of individuals whose DNA is collected in connection with criminal justice proceedings. The organization has been vocal in opposing expansions of the New York DNA databank, as well as a number of practices related to the use of forensic DNA.⁵⁴

The Innocence Project is a non-profit organization dedicated to assisting prisoners who can be proven innocent through DNA testing.⁵⁵ In addition to providing direct representation and assistance in cases, the Innocence Project researches and advocates on behalf of policies that would facilitate the exoneration of wrongfully-convicted individuals and prevent future wrongful convictions. Issues

⁵² “Bio: Barry C. Scheck and Peter J. Neufeld,” The Innocence Project’s Website, accessed April 6, 2012, http://www.innocenceproject.org/Content/Barry_C_Scheck_Peter_J_Neufeld.php.

⁵³ “About the NYCLU,” The NYCLU’s Website, accessed April 6, 2012, <http://www.nyclu.org/content/about-nyclu>. “About the ACLU,” The ACLU’s Website, accessed April 6, 2012, <http://www.aclu.org/about-aclu-0>.

⁵⁴ In particular, the NYCLU is opposed to New York State’s partial match policy, which is discussed in detail in chapter 3. In addition, the NYCLU is opposed to the operation of non-CODIS databases by local crime labs, the collection of “abandoned” biological samples from suspects without the use of a search warrant, the retention of actual biological samples obtained from convicted offenders, amongst other concerns. For a thorough discussion on the NYCLU’s opinion on a wide variety of issues related to DNA databanks, see Krimsky and Simoncelli, *Genetic Justice*.

⁵⁵ “Mission Statement,” The Innocence Project’s Website, accessed April 8, 2012, <http://www.innocenceproject.org/about/Mission-Statement.php>.

related to DNA databases are considered a “related issue” for the organization.⁵⁶ In recent years, however, representatives of the organization have been active in the policy debate surrounding expansion of the New York State DNA databank by attempting to pass other wrongful conviction reform measures as part of an expansion package.

Overview of CODIS and the New York State DNA Databank

CODIS

The New York State DNA Databank is part of the CODIS system, which is operated by the FBI, and refers to an entire system that includes three different levels: the National DNA Index System (NDIS), the State DNA Index System (SDIS), and the local DNA Index System (LDIS). Under the FBI’s regulations, local laboratories, which generally serve a particular county, but may also serve a number of counties, can maintain their own local databases of forensic profiles, or profiles generated from biological evidence collected at a crime scene, and then upload approved profiles to the SDIS database. LDIS labs also analyze DNA samples collected in connection with a particular criminal investigation. LDIS databases may detect matches between forensic profiles, suggesting that a single perpetrator may be involved with a number of crimes. SDIS, or the state databank, contains forensic profiles uploaded by local laboratories throughout the state, forensic profiles uploaded by the state laboratory, as well as the profiles of convicted offenders. Matches between forensic profiles, as well as matches between forensic and convicted offender profiles can be made at the SDIS level. Not all profiles contained in SDIS may be uploaded to NDIS; state laws

⁵⁶ “Related Issues,” The Innocence Project’s Website, accessed April 8, 2012, <http://www.innocenceproject.org/fix/Related-Issues.php>.

governing the types of profiles and qualifying offenses that can be uploaded to SDIS may differ from federal regulations.⁵⁷ FBI guidelines and regulations, in addition to state regulations, apply to databases that are part of the CODIS system.

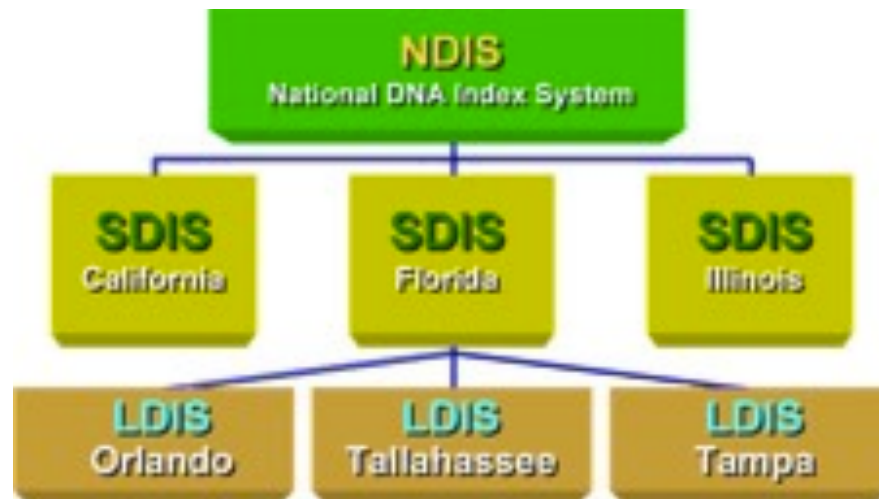


Fig. 2. Levels of CODIS.⁵⁸

New York State has eight LDIS laboratories, one of which is the State Police Forensic Investigation Center, which performs some forensic casework in addition to serving as the state’s SDIS laboratory and processing convicted offender samples.⁵⁹ Forensic analysts test biological evidence collected by law enforcement through the course of an investigation, as well as DNA samples obtained from

⁵⁷ “Levels of the Database,” DNA Initiative, US Department of Justice, <http://www.dna.gov/dna-databases/levels>.

⁵⁸ “Levels of the Database, DNA Initiative.

⁵⁹ New York State’s other LDIS laboratories include: Erie County Department of Central Police Services Forensic Laboratory; Monroe County Public Safety Laboratory; Nassau County Department of Forensic Genetics DNA Laboratory; New York City Office of the Chief Medical Examiner Department of Forensic Biology; Onondaga County Center for Forensic Sciences; Suffolk County Crime Laboratory; and Westchester County Department of Laboratories & Research Division of Forensic Sciences. “The NYS DNA Databank and CODIS,” NYS DCJS.

suspects, though these profiles are not uploaded to the state databank.⁶⁰ Analysts working at LDIS labs upload DNA profiles to SDIS, but do not have access to the information contained in the databank.

New York State DNA Databank

Prior Expansions

Article 49-b of the New York State Executive Law provides the statutory authority for the creation and administration of the New York State DNA databank. As mentioned, the legislature authorized the creation of the DNA databank in 1994, and DCJS began limited operation of the databank in 1996.⁶¹ The databank became fully operational in 1999, and the first hit linking a forensic profile to a convicted offender profile occurred in February of 2000.⁶² The databank has been expanded by the legislature a total of five times, in 1999, 2004, 2006, 2010, and 2012. In 1999, 2004, and 2010, a small number of qualifying offenses were added. In 2006, the database was expanded to include all felony offenses and 13 misdemeanors as qualifying offenses.⁶³ In 2012, the database was expanded to include the samples of those convicted of all crimes in the penal code except for certain low-level marijuana crimes in cases where the perpetrator has been convicted of no prior offenses. In addition, in 2006 DCJS created the “subject index” following the issue of Executive Order 143 by Governor George Pataki on December 5, 2005. The order mandated that DCJS create a new index of the databank containing the samples collected

⁶⁰ See Chapter 3 for a discussion of issues raised regarding storage of the DNA profiles of suspects in local level databases.

⁶¹ “DNA: The Fingerprint of the 21st Century,” New York State Department of Criminal Justice Services Website, <http://www.criminaljustice.ny.gov/forensic/index.htm>

⁶² “The NYS DNA Databank and CODIS,” New York State Department of Criminal Justice Services, accessed April 4, 2012, <http://criminaljustice.state.ny.us/forensic/dnabrochure.htm>

⁶³ N.Y. Exec. Law 49-b § 995 (Historical and Statutory Notes) (McKinney’s 2012).

pursuant to a plea agreement; as a condition for participation with a number of criminal justice programs; in relation to parole; or as a condition of probation.⁶⁴

Statutory Scheme

Article 49-b of the New York State Executive law authorizes the creation of the Commission on Forensic Science (“the Commission”) and charges it with the promulgation of a policy for the establishment and operation of a DNA identification index, as well as with the “development of minimum standards and a program of accreditation for all forensic laboratories in the state.”⁶⁵ Executive law requires the Commission to consult with the DNA Subcommittee, also created by article 49-b, and DCJS in creating a policy for the operation of the databank.⁶⁶ The Commission is technically independent of any particular agency, but largely relies on the resources of DCJS for the discharge of its duties, since it lacks both a staff and budget. Its fourteen members, twelve of whom are appointed by the governor, serve on a voluntary basis.⁶⁷ Section 995-c of the article 49-b lays out guidelines for the procedure of establishing and operating the DNA databank. Section 995-d lays out confidentiality requirements, and goes on to specify that information contained in the databank may not be released to “insurance companies, employers or potential employers, health providers, employment screening or personnel companies, agencies, or services, [and] private investigation services.” Section 995-f establishes penalties for breaching the confidentiality requirements.

⁶⁴ “Implementing the New Subject Index,” NYS DCJS, accessed April 8, 2012, <http://criminaljustice.state.ny.us/forensic/newssubjectindex.htm>.

⁶⁵ N.Y. Exec. Law 49-b§ 995-a (McKinney’s 2012).

⁶⁶ N.Y. Exec. Law 49-b§ 995-b (McKinney’s 2012).

⁶⁷ See Chapter Three, for a description and discussion of the Commission’s membership.

Early Privacy Concerns: “We say No! To New York’s Brave New World!”

The New York Civil Liberties Union began to draw attention to potential concerns for civil liberties beginning with the databank’s proposal.⁶⁸ Though concerns regarding the general reliability of forensic DNA techniques waned with time and increased scientific consensus regarding their reliability, genetic privacy and the potential consequences of government’s access to sensitive material continued to be an important issues for civil libertarians and their allies for much of the decade. In the late 1990s,⁶⁹ for example, the NYCLU published a legislative memo that raised concerns related to eugenics and genetic privacy. One section read:

In the worst case scenario, a government with the DNA sequences of its citizens archived in powerful computers will have no need to pin yellow stars or pink triangles on those people identified as undesirable. A government that wants to identify individuals they determine have the wrong ethnicity, wrong sexual orientation, or just too low an IQ, need merely tap out a few commands on a computer keyboard to initiate an automated sort.⁷⁰

The NYCLU drew upon broad fears largely based in the future potential of what a mal-intentioned government could do if large advances in genetic science were to be made. In the same memo, the NYCLU also raised concerns related to whether the government would keep records confidential if offered money from marketers and insurance companies. In an effort to protect against the creation of a slippery slope that could ultimately place civil liberties in grave danger, the NYCLU suggested the worst-case scenario as a warning of what could happen if the progression of science went unchecked.

⁶⁸ In 1992, Norman Siegel, the then-executive director of the NYCLU, and other civil liberties advocates, argued that the governor’s plan failed to assure the reliability of DNA evidence, and had the potential to violate peoples rights by compelling them to give blood samples that could be used against them in the future. Raab, “Cuomo Seeks Genetic Data of Offenders.”

⁶⁹ No date or particular bill is included with the memo.

⁷⁰ “Legislative Memo: DNA Databanking,” NYCLU, accessed April 8, 2012, <http://www.nyclu.org/content/legislative-memo-dna-databanking-0>.

In addition, the memo included strong constitutional claims, arguing that “forced DNA testing and databanking directly violate the Fourth Amendment.”⁷¹ In 2005, however, the U.S. Court of Appeals upheld a district court’s dismissal of a complaint, which argued that the 1999 amendments to the New York State Executive law requiring certain classes of convicted felons to provide a DNA sample to the databank violate the Fourth Amendment’s prohibition of unreasonable searches and seizures.⁷²

New York Times editorials published around the times of major legislative and gubernatorial action around the databank largely reflect the major critiques made by advocacy groups like the Innocence Project and the NYCLU. Rarticulating these concerns as the opinion of the editors of the one of the most influential and widely read newspapers in New York certainly influences popular perceptions of the DNA databank.⁷³ A *New York Times* editorial published following the 1999 expansion of the databank reflects the salience of genetic privacy concerns at the time. The editors argued:

The new law is silent...on a grave civil liberties question. What happens to the left-over DNA sample containing highly personal medical data and other information once a felon’s individual digital pattern is filed on a computer?...The law says that samples can be used only for forensic identification, but unless the left-over blood or saliva samples are destroyed, invasions of privacy and other abuses are possible.⁷⁴

The editorial demonstrates the NYCLU’s ability, in the late 1990s, to influence the policy debate surrounding the DNA databank, and media’s perception of that debate, even though the organization was not successful in preventing the expansion.

⁷¹ NYCLU, “Legislative Memo.”

⁷² *Nicholas v. Goord*, 430 F.3d 652 (2005), 655.

⁷³ An in-depth discussion of media representations of DNA databanks, however, is beyond the scope of this thesis.

⁷⁴ “Defects in the DNA Law,” Editorial, *New York Times*, August 16, 1999.

Giuliani and Pataki Clash with Civil Libertarians and Civil Rights Activists

The political climate in New York State and New York City likely played a large role in shaping concerns regarding the databank in the late 1990s. In addition, because the database has not yet gone “live,” concerns about privacy were not as readily met with examples of the databank’s ability to identify perpetrators in difficult to solve cases. New York City Mayor Rudolph Giuliani, in particular, had gained a reputation for being tough on crime and “cleaning up the city,” using tactics often criticized by advocates of the poor and people of color.⁷⁵ Public outrage regarding racial bias and brutality in the police force was at a high point in 1999.⁷⁶ With this tension as the political backdrop, advocates of civil rights and civil liberties strongly opposed giving police any modicum of access to the genetic information of criminals, arguing that bias in the criminal justice system would lead to unfair outcomes for communities of color.

Weeks after Giuliani said he had “‘no problem’ with the DNA testing and fingerprinting of all newborns” at a press conference about Governor Pataki’s proposal to expand the database to include the data of all convicted felons, civil libertarians and civil rights activists spoke out together.⁷⁷ The Rev. Al Sharpton, a

⁷⁵ In a 1999 survey conducted by the *New York Times*, 9 out of 10 black New York residents questioned thought that the police often engaged in brutality against blacks, and more than two-thirds said they thought the policies of the Giuliani administration have caused an increase in police brutality. Dan Barry with Marjory Connelly, “Poll in New York Find Many Think Police are Biased,” How Race Is Lived in America, *New York Times*, <http://partners.nytimes.com/library/national/race/031699race-ra.html>.

⁷⁶ 1999 saw the killing of Amadou Diallo, a 22-year-old African immigrant with no criminal history by police officers. The incident “set off massive protests in the city, and became a flashpoint for heightened frictions between minority leaders and the administration of Mayor Giuliani.” “Amadou Diallo,” Times Topics, *New York Times*, http://topics.nytimes.com/top/reference/timestopics/people/d/amadou_diallo/index.html?scp=1-spot&sq=amadou%20diallo&st=cse.

⁷⁷ Bruce Lambert, “Giuliani Backs DNA Testing of Newborns for Identification,” *New York Times*, December 17, 1998.

long-time prominent figure in the civil rights movement, and Norman Siegel, the then-director of the NYCLU, held a joint press conference where they promised to fight the governor's plan. They argued that database expansion would significantly implicate the privacy rights of people of color because of racial bias present in the criminal justice system. Citing dystopian fears, Rev. Sharpton argued that, "We can't become just numbered, medically identified pawns of the state. We must have the right to live our lives, but not as suspects."⁷⁸

The tension between Republic Governor George Pataki and civil libertarians and their allies in the state legislature reached a climax when the governor expanded the DNA database through executive order, bypassing the state legislature, in 2005. Despite lobbying for further expansion since 1999, by 2005 Governor Pataki was still not able to strike a compromise for a major databank expansion with the legislature.⁷⁹ Pataki signed Executive Order 143, ordering DCJS to create a fourth DNA index, the "subject" index.⁸⁰ After debating the issue, the Commission and DCJS revised the databank's implementation plan and adopted regulations creating the subject index.⁸¹

Assembly Democrats and civil libertarians were displeased with both the outcome and Pataki's methods. Donna Lieberman, who succeeded Siegel as executive director of the NYCLU in 2001, criticized Pataki's methods as undemocratic.⁸² She argued, "This is a clear end run around the Legislature. The governor has no right to seize the prerogative of the Legislature simply because he doesn't like what they've

⁷⁸ Susan Sachs, "Advocates Joining Forces to Fight Pataki DNA Plan," *New York Times*, January 10, 1999.

⁷⁹ Michael Cooper, "Pataki Calls for DNA From More Criminals," *New York Times*, December 7, 2005.

⁸⁰ Exec. Order No. 143 9 NYCRR 5.143.

⁸¹ "Implementing the New Subject Index," DCJS.

⁸² "NYCLU Staff," NYCLU's Website, accessed March 29, 2012, www.nyclu/content/nyclu-staff.

done. He is not King George, he is simply the governor.”⁸³ In her critique, Lieberman accuses Pataki of acting undemocratically and basing his decision on personal preference. Though Pataki justified his actions with reference to protecting the public, his method of not going through the legislature compromised the legitimacy of his decision in the eyes of the NYCLU.

The Legislature Votes to Authorize a Major Expansion in 2006

After years of heated debate, in 2006 the legislature passed a major expansion of the databank to include the DNA of all convicted felons and certain convicted misdemeanants. The Innocence Project, which became an independent non-profit organization in 2004, and the NYCLU were generally displeased with the agreement that had been reached, and called for greater privacy protections to be enacted.⁸⁴

Following the 2006 expansion, the type of arguments concerning the DNA databank made by the Innocence Project, and, to a lesser extent, the NYCLU began to change. For the Innocence Project, this likely had to do with the difficulty of simultaneously challenging and relying upon DNA,⁸⁵ and perhaps because other

⁸³ Cooper, “Pataki Calls for DNA.”

⁸⁴ Steve Saloom, “Innocence Project: Legislative Agreement Makes State DNA Database System Bigger, not Better, Calls on Governor and DCJS to Address Critical Questions Before Expansion is Enacted,” Press Release, Innocence Project, June 21, 2006, http://www.innocenceproject.org/Content/Innocence_Project_Legislative_Agreement_Makes_State_DNA_Database_System_Bigger_not_Better.php/.

⁸⁵ Many have commented that it is somewhat hypocritical that Scheck, Neufeld, and others at the Innocence Project seem to both seek to use and challenge forensic DNA. For example, David Lazer cites Bruce Budowle’s comment, “One attorney...had the position that thousands of innocent people are in jail because of DNA typing. That same attorney has this position—thousands of innocent people are in jail because of no DNA typing.” Lazer, “*DNA and the Criminal Justice System*,” 3.

issues were proving to be a greater threat to causing wrongful convictions than issues related to the databank.⁸⁶

Wrongful Conviction Reforms Attached to Database Expansion Bills

In 2007, the Innocence Project worked with legislators to introduce a reform package with the aim of preventing wrongful convictions and facilitating exoneration of the wrongfully convicted.⁸⁷ When these measures failed to pass through the legislature, the Innocence Project and allies in the legislature sought to couple these reforms with databank expansion. Unlike the wrongful convictions reforms, which would largely be difficult and costly for law enforcement to implement, databank expansion was a high priority for the law enforcement community. In contrast to concerns about the implications for privacy and due process rights of defendants raised in 2006, in 2011 Barry Scheck is quoted in a press release saying, “We are not opposed to responsible database expansion as long as it guarantees people with innocence claims access to the database and includes privacy protections...”⁸⁸ The 2011 press release, unlike the 2006 one, does not elaborate on many privacy protections. Rather, it focuses on the inclusion of other wrongful-convictions reform measures. One of the legislative reforms introduced, which eventually passed with the 2012 expansion of the databank, would have authorized judges to order the

⁸⁶ “Assemblyman Gianaris, Innocence Project and Victims of Wrongful Convictions Call for Passage of Innocence Commission,” The Innocence Project, Press Release, December 12, 2006.

⁸⁷ “Sweeping State Legislative Reform Package to Address Wrongful Convictions Introduced in New York,” The Innocence Project, News Release, May 3, 2007, http://www.innocenceproject.org/Content/Sweeping_State_Legislative_Reform_Package_To_Address_Wrongful_Convictions_Introduced_in_New_York.php.

⁸⁸ “Innocence Project Concerned that Reforms to Prevent Wrongful Convictions Are Being Abandoned in End of Session Efforts to Expand the DNA Database,” Innocence Project, New Release, June 20, 2011, http://www.innocenceproject.org/Content/Innocence_Project_Concerned_that_Reforms_to_Prevent_Wrongful_Convictions_Are_Being_Abandoned_in_End_of_Session_Efforts_to_Expand_the_DNA_Database.php.

comparison of crime scene evidence, including DNA evidence, to relevant databases.⁸⁹

The Innocence Project has recently criticized arguments favoring databank expansion that cite the databank's ability to exonerate the wrongfully convicted and prevent wrongful convictions in the first place, such as Senator Saland's argument that "DNA is a sword that cuts both ways."⁹⁰ In a press release published a week prior to the 2012 expansion, Innocence Project Policy Director Steve Saloom argued that "expanding the database isn't going to do a thing to prevent wrongful convictions, and as the bill is currently written, it doesn't even guarantee defendants access to the database to help prove their innocence."⁹¹ According to the Innocence Project, the New York State DNA Databank has been helpful in identifying the real perpetrator in only 2 of the 27 exonerations that have occurred in the state; the organization says claims that the database has been crucial in exonerating the innocent are overstated.⁹² Concerns regarding genetic privacy and the potential for errors in DNA testing, however, seem to have become less central for the organization. The organization now focuses more of its resources on promoting other legislative reforms, rather than advocating against expansion.

The NYCLU's position on DNA databanks has changed far less than the Innocence Project's over the years, though their approach has changed with evolving

⁸⁹ Innocence Project, "Sweeping State Legislative Reform Package."

⁹⁰ "New York State Senate Session—January 31, 2012," YouTube video, 1:25:41, posted by "nysenateuncut," January 31, 2012, <http://www.youtube.com/watch?v=Afdodx3sKP8>.

⁹¹ "Innocence Project Urges New York Lawmakers to Follow China's Lead and Require Mandatory Recording of Interrogations," Innocence Project, Press Release, March 9, 2012, http://www.innocenceproject.org/Content/Innocence_Project_Urges_New_York_Lawmakers_to_Follow_China's_Lead_and_Require_Mandatory_Recording_of_Interrogations.php.

⁹² Innocence Project, "Follow China's Lead." At the same time, many I spoke with argued that the database has prevented countless wrongful convictions by ensuring that the correct perpetrator is caught in cases where biological evidence is present.

cultural and political acceptance of the use of DNA in the criminal justice system. Beth Haroules, a senior staff attorney with NYCLU, informed me, “I think we still have concerns with anybody’s genetic material being maintained for any purpose in a databank.”⁹³ In press releases and in the media, though, the NYCLU has moved away from public statements using dystopian rhetoric such as, “We say no to New York’s ‘Brave New World,’”⁹⁴ and has refocused on issues related to local-level databases, the collecting of samples from suspects without a warrant, and the potential for error in DNA analysis.⁹⁵

The 2012 Expansion: (Almost) All Crimes in the Penal Code and Defense Access

On March 15, 2012 the New York State Assembly passed a bill expanding the DNA databank to include all crimes in the penal code except for low-level marijuana-related misdemeanors. The bill also guarantees defense attorneys access to both pre-trial and post-conviction DNA testing, even if a defendant has previously pleaded guilty. The bill ultimately passed represents a compromise between two bills: one was introduced by Senator Saland and was passed by the Senate on January 31, 2012, and did not guarantee defense access to the DNA databank; the second bill was introduced by Assemblyman Lentol, and had previously included many more wrongful convictions protections called for by advocates. The exclusion of low-level

⁹³ Beth Haroules, (Senior Staff Attorney, NYCLU), in interview with author, November 22, 2011.

⁹⁴ Norman Siegel’s comment, evoking Alodous Huxley’s dystopian portrayal of a dystopian future society characterized by reproductive engineering through technology, to the New York Times in response to Governor Pataki’s proposal to require every person convicted of a crime to provide a DNA sample to the databank to extend the statute of limitations for 16 felonies. C. J. Chivers, “Pataki Presses More DNA Use Against Crime,” *New York Times*, February 24, 2000.

⁹⁵ In 2007, for example, the NYCLU released a legislative memo regarding Governor Spitzer’s proposed expansion of the databank that focused on three main points: 1) forensic DNA evidence is not infallible; 2) Expansion of the datbank will overload crime labs and undermine effective criminal investigations; 3) New York permits local DNA laboratories to operate without regulatory oversight. “Legislative Memo: Expansion of the DNA Databank,” NYCLU, May 16, 2007, <http://www.nyclu.org/content/legislative-memo-expansion-of-dna-database>.

marijuana convictions was largely a concession to Democrats concerned with improper and biased marijuana arrests.⁹⁶

While the NYCLU was not pleased with the expansion, publishing a press release entitled “DNA Databank Expansion Long on Politics, Short on Justice,”⁹⁷ most other actors involved in the policy debate were optimistic about the deal. Though Lentol had worked for years on the passage of broader reforms, he told the *New York Times* that the deal represented “a monumental change as far as discovery is concerned.”⁹⁸ New York’s Chief Judge Jonathan Lippman convened a task force to study wrongful convictions that came up with findings similar to those of the Innocence Project. He commented, “This legislation is a major step forward in eliminating wrongful convictions in New York.” Robert Perry, legislative director of the NYCLU maintained, however, that the bill “...will have a negligible impact on enhancing public safety and increase significantly the likelihood for inefficiency, error, and abuse in the collection and handling of forensic DNA.” While a far cry from evoking fears of genetic engineering by the government, the NYCLU still identifies a basic due process concern with searching an individual’s DNA profile when there is no individualized suspicion of that person in a particular case. Perry argues that “this expansion simply creates a permanent class of usual suspects whose DNA will be tested by police for the rest of their lives.”⁹⁹ It remains to be seen what types of further legislative developments concerning the database occur in the future now that a virtually “all-crimes” bill has passed.

⁹⁶ John Eligon, “DNA Database Deal Reached in Albany,” Cityroom, *New York Times*, March 14, 2012.

⁹⁷ “DNA Databank Deal Long on Politics, Short on Justice,” NYCLU, March 15, 2012, <http://www.nyclu.org/news/dna-databank-expansion-long-politics-short-justice>.

⁹⁸ Eligon, “Deal Reached in Albany.”

⁹⁹ NYCLU, “Long on Politics.”

Chapter Two: Bureaucracy and Democracy

A Deliberative Democracy

The New York State Constitution, like the federal Constitution, vests the power to make law within the legislature. Article 3, Section 1 of the New York State Constitution reads, “The legislative power of this state shall be vested in the Senate and the Assembly.”¹⁰⁰ Modeled after the federal system, New York State has a bicameral legislature comprised of a Senate and an Assembly, the members of which are elected by the people. Federalist Paper No. 10, one of the most influential papers in the series published to promote the ratification of the newly drafted American Constitution,¹⁰¹ illustrates James Madison’s reasoning for having a legislature composed of elected officials. Federalist Paper No. 10 sheds light on the origin of values still widely-held today regarding how American representative democracy, in theory, should function. Madison envisioned a legislature composed of representatives of the people that would act as a mechanism to control the oppressive consequences of factions, or organized groups holding similar, self-interested opinions, and would temper and the views of the people. According to Madison, this type of legislature would

...refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.¹⁰²

¹⁰⁰ New York Const. art. 3 § 1.

¹⁰¹ Cass Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard University Press, 1993), 20. See Donald P. Kommers, John E. Finn, and Gary J. Jacobsohn, *American Constitutional Law*, 3d ed. (Lanham, MD: Rowman and Littlefield, 2010), 105-106. for a discussion of Madison’s contribution to the theory of separation of powers.

¹⁰² James Madison, “Federalist No. 10,” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, edited by Michael A. Genovese (New York: Palgrave Macmillan, 2009), 52.

According to Madison, a legislature made up of elected representatives of the people would be better positioned than the people themselves to consider the views of the citizenry at large and to make thought-out, justified decisions. He reasoned that,

Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for that purpose.¹⁰³

Unlike a direct democracy, a legislature made up of representatives of a large and diverse nation would ideally both prevent the extreme views of a faction from oppressing a minority, and would enable decisions to be made a step removed from the passions and short-sightedness of the populace at large.

As the technical complexity of the issues government handles has grown, legislatures have delegated some of their legislative power to regulate specific areas to administrative agencies. Courts have increasingly read the transference of most rulemaking and legislative duties as within the bounds of the Constitution.¹⁰⁴

Importantly, however, federal and state courts have consistently ruled that there is a limit to what legislatures can delegate. With regards to the delegation of rulemaking authority to administrative agencies, American jurisprudence has said that the legislature must at least provide an “intelligible principle” to guide rulemaking.¹⁰⁵

The courts have found, as well, that certain types of questions cannot be delegated to those unaccountable to the citizenry through election.¹⁰⁶ Sunstein argues a number of

¹⁰³ Madison, “Federalist No. 10,” 52.

¹⁰⁴ Proponents of the non-delegation doctrine argue that “the Constitution limits Congress’s ability to confer power on administrative agencies,” citing both the general scheme of separation of powers and Article 1 Section 1 of the Constitution. The Supreme Court, however, has not invalidated any laws on non-delegation grounds since the 1930s. Gellhorn and Levin, *Administrative Law and Process*, 11-18.

¹⁰⁵ *J. W. Hampton, Jr., & Co. v. U. S.*, 276 U.S. 394 (1928).

¹⁰⁶ Cass R. Sunstein, *After the Rights Revolution* (Cambridge, MA: Harvard University Press, 1990), 166.

cases that, in short, ruled, “the Constitution prevents certain disabilities from being visited on certain groups unless an accountable actor has so decided,” also demonstrate that particularly important decisions must be made by a politically accountable actor, not an unelected staff member.¹⁰⁷

My analysis builds upon this understanding, demonstrating that it is not only the *importance* of particular issues—certainly, safety standards set by administrative agencies are sufficiently “important” in that they have the potential to impact peoples’ health and lives—but the *political* nature of certain decisions that makes it so only those accountable have legitimate authority to decide. By the term “political,” I am referring to questions generally understood to implicate the relationship of the state to the individual in some way, or understood to be within the legitimate purview of certain state actors, such as the regulation of interstate commerce by Congress. Drawing upon Weber’s theory of legitimate authority, formal rules, generally in the form of a Constitution, give elected officials alone the legitimate authority to make political decisions on behalf of the people. Legislators are empowered to shape the citizen’s relationship with the state through legislation, so long as rules are within Constitutional bounds. Bureaucrats and other employees of the state also gain their authority through formal rules; generally speaking, however, the authority to make political decisions is not within the scope of their power as defined by rules. In principle, formal rules tend to give bureaucrats the authority to implement policies within the purview of an authorizing statute, or to advise elected officials regarding political issues.

¹⁰⁷ Sunstein, *Rights Revolution*, 166.

In order to assure against the government acting only in pursuit of self-interest, Sunstein argues that the Framers intended the Constitution to “create a deliberative democracy,” where decisions must be justified with reference to “public values.”¹⁰⁸ He argues that a key feature of American constitutional law is that “government must always have a reason for what it does.”¹⁰⁹ According to Sunstein, government decisions should not just reflect the preferences of a powerful majority, nor should they be the product of a compromise that reflects the relative power and influence of each group.¹¹⁰ Rather, Sunstein argues that the Framers believed that “people engaged in democratic discussion should...be ‘open to the force of argument’” and should “be prepared to give up their initial views when shown ‘the general benefit of the whole community.’”¹¹¹ Accordingly, representatives should use their own judgment and reasoning to come up with a publicly beneficial solution; they have the legitimate authority to use discretion to do so as trustees of the citizenry’s power to govern.

The existence of increasingly scientific, bureaucratic, and otherwise complex issues within the purview of government has the potential to pose problems for the notion of a deliberative democracy, and especially for the potential of democratic debate within legislatures. When unelected state actors make decisions with political implications, questions often arise regarding the legitimacy underlying those decisions. When legislators must turn to others for specialized information, the line between deliberation and pluralism can begin to blur. Even when unelected actors

¹⁰⁸ Sunstein, *Partial Constitution*, 27.

¹⁰⁹ Sunstein, *Partial Constitution*, 17.

¹¹⁰ Sunstein takes this to mean that the Founders were not pluralists—that is, they rejected the idea that “laws should be understood not as a product of deliberation, but on the contrary as a kind of commodity, subject to the usual forces of supply and demand.” Sunstein, *Partial Constitution*, 25.

¹¹¹ Sunstein, *Partial Constitution*, 23.

justify their policy goals with “public reasons,” Madison’s conception of elected officials as those with the ultimate responsibility to weigh competing views suggests that legislators hold the legitimate authority to balance competing *public* preferences and interests as well, such as public safety and individual liberty. This is in accord with Sunstein’s assertion that accountable actors should decide questions that result in the government significantly depriving some group of privileges; for example, according to this logic legislators should decide questions that result in the restriction of individual liberty for the sake of public safety. Without their own specialized knowledge, however, can legislators really effectively digest and differentiate between different types of policy information, or do they merely become spokespeople for a variety of groups, with ultimate decisions reflecting the relative power of different stakeholders?

Weber: Bureaucracy and Formal Rules

Max Weber’s sociology of law elucidates why complex issues principally managed by bureaucratically organized staffs often test the limits of democratic systems of government. Weber argues, “...Bureaucracy inevitably accompanies modern *mass* democracy, in contrast to the democratic self-government of small homogenous units.”¹¹² In an honorific system, “administrative functions and duties” are connected to pre-existing positions within the social structure.¹¹³ Awarding positions based on a system of honor, however, is at odds with the values of a democratic system that aspires to “equality before the law” and seeks to erase status based upon membership in a pre-determined class. In an effort to better conform to

¹¹² Weber, *Economy and Society*, 983.

¹¹³ Weber, *Economy and Society*, 983.

these values, those in charge must come up with a different method of distributing the work required to make government function.¹¹⁴

Bureaucratic administration is particularly appealing to modern mass democratic governance in three chief ways. First, from a technical perspective, a trained bureaucracy is able to accomplish tasks much more efficiently than other systems of management, such as rule by notables.¹¹⁵ Professional bureaucrats are much better equipped to handle tasks requiring specialized knowledge of both substantive areas and rules and regulations than those who lack formal training in a particular area. Second, in a democratic system where government decisions must be supported by public reasons, and decision making may not merely reflect the whims and desires of private individuals, bureaucracy offers a method for making decisions based on “purely objective considerations.”¹¹⁶ In theory, professional bureaucrats justify decisions based on their professional expertise, not personal political preferences. Third, positions are allocated to individuals, at least in theory, not based on their membership within a particular pre-determined status group, but based on their merit and qualifications. In short, bureaucratic management based upon merit allows for complex issues to be governed effectively while avoiding the problem of power to govern based on membership in a pre-determined status group.

This state of affairs creates a paradox, however: the very feature that makes bureaucracy well suited to democracy—the ability of bureaucrats to exercise professional discretion when making decisions—also has the potential to create problems. As discussed earlier, America’s version of mass democracy is a

¹¹⁴ Weber argues that “mass democracy...unavoidably has to put paid professional labor in place of the historically inherited ‘avocational’ administration by notables.” *Weber, Economy and Society*, 984.

¹¹⁵ Weber, *Economy and Society*, 973.

¹¹⁶ Weber, *Economy and Society*, 975.

representative one, where elected officials derive their authority to make decisions on behalf of the citizenry through election. Elected officials are held accountable for their decisions through the prospect of re-election. Bureaucrats, who are appointed based upon professional qualifications, are not accountable in the same way to the public. Theoretically, this should not be a problem, because bureaucrats should only be making decisions that are technical in nature, and do not require political considerations. When bureaucrats exercise discretion in decision-making, it should be *professional* discretion; they may legitimately draw upon their *specialized knowledge* to inform the decisions they make.¹¹⁷ Problems arise for democracy, though, when it is difficult to separate technical questions from political ones, and bureaucrats use their discretion to decide questions that may have political implications.¹¹⁸

In order to prevent bureaucrats from exercising discretion regarding political matters, legislatures create formal rules within authorizing statutes to limit the parameters of bureaucratic decision-making. As political scholar Terry Moe observes, “American public bureaucracy is not designed to be effective.”¹¹⁹ Building upon on Moe’s observations that statutory schemes that create bureaucracies are the product of political struggles, I argue that much bureaucratic inefficiency is also the result of legislative attempts to make bureaucracies more accountable. The use of formal rules to limit the scope of bureaucratic decisions largely explains why few Americans

¹¹⁷ The importance of the parameters of expert knowledge in American governance can also be observed in the use of expert witnesses in trials. Expert witnesses are empowered to speak only on the topics in which they have specialized training or qualifications. Lynch, Cole, McNally, and Jordan, *Truth Machine*, 46-57.

¹¹⁸ In her ethnography of Institutional Review Boards, Laura Stark describes how board members make decisions on the bases of knowledge not related to expert qualifications, such as personal experience and ideas about common sense. Laura Stark, *Behind Closed Doors: IRBs and the Making of Ethical Research* (Chicago: University of Chicago Press, 2011).

¹¹⁹ Terry Moe, “The Politics of Bureaucratic Structure,” in John E. Chubb and Paul E. Peterson (eds.), *Can the Government Govern?* (Washington, DC: The Brookings Institution, 1989), 267-329.

today would describe bureaucracy as “efficient,” as does Weber. In an attempt to guarantee equality before the law, the requirement that bureaucracies be inflexible and apply the law equally to everyone—since the discretion to determine what is “fair” would constitute a political decision beyond the purview of a bureaucrat’s duty—creates rigidity that often results in frustration. The move towards increased transparency and accountability to the people through record keeping creates endless paperwork and much of the “red tape” that comes to mind when most people think of bureaucracy. It is precisely the use of formal rules to make bureaucracy more accountable to the people that, at the same time, makes bureaucracy less efficient and responsive to the needs of the people.

Lawmaking and Lawfinding

Weber’s sociology of law is also useful in examining the implications for democracy when legislatures must create laws on complex subjects, and particularly on bureaucratically complex, subjects. Weber draws a distinction between “lawmaking, ” or “the establishment of general norms” and “lawfinding”, the application of norms to particular cases.¹²⁰ Duncan Kennedy argues that the process of lawmaking, according to Weber, is quite “open-ended,” as long as the lawmakers have a legitimate claim to authority. That is, there are no limits to what lawmakers can make law regarding, as long as they have legitimate authority to do so. Within the American system, though, the legitimate authority of lawmakers is curtailed by the bounds of Constitutional guarantees.¹²¹ Because constitutional democracies require

¹²⁰ Weber, *Economy and Society*, 653-654.

¹²¹ Many would also argue that the Constitution significantly limits the legitimate authority of government and lawmakers, by enumerating particular powers and reserving the rest to the states and the people. For the purpose of this thesis, though, I argue that most exercises of government power are

that laws be made within the confines of a constitution, lawfinding, in terms of interpreting the meaning of a Constitution, should actually be part of lawmaking. While the doctrine of judicial review gave the Supreme Court ultimate authority to determine the constitutionality of government actions,¹²² most would agree that legislators should still attempt to make law within constitutional parameters. This requires that legislators interpret the Constitution.

Weber argues that there is little room for discretion and interpretation in lawfinding; he argues that “established norms and legal propositions” can be “deduced, therefrom by legal thinking, to concrete ‘facts’ which are ‘subsumed’ under these norms.”¹²³ According to Weber, using rational legal reasoning, lawyers and judges can discover the meaning of legal propositions, and simply apply this meaning to particular sets of facts. When it comes to lawmaking, the promulgation of administrative codes, or the application of a law or regulation to a particular circumstance, “lawfinders” should have no trouble deducing the meaning of a Constitutional provision, law, or regulation and following its application through.

Sunstein, and nearly all scholars of Constitutional law,¹²⁴ however, disagree with this understanding of lawfinding. Sunstein rejects the notion that “...the meaning of texts is usually or always simply a matter of fact,” and that “the task of

understood by the citizenry and the Courts to be legitimate unless they violate some Constitutional provision.

¹²² See “Chapter Three: Judicial Power,” in Kommers, Finn, and Jacobsohn, *American Constitutional Law*, 61-79, for a discussion of judicial review.

¹²³ Weber, quoted by Kennedy, “Logically Formal Legal Rationality,” 15.

¹²⁴ Even proponents of “New Originalism,” like Antonin Scalia, who argue that texts should be analyzed in light of their generally understood meaning at the time that they were written, believe that understanding and discovering the “original meaning” requires a degree of discretion. Antonin Scalia, “The Originalist Approach to the First Amendment,” (21st Hugo L. Black Lecture on Freedom of Expression, Wesleyan University, Middletown, CT, March 8 2012).

interpretation is to uncover that fact.”¹²⁵ Scholars have offered a wide variety of suggestions regarding which sorts of guiding principles should govern the interpretation of legal texts, and their application to concrete cases.¹²⁶ If laws require interpretation and a body of law is not gapless, then lawfinders may have to interpret and apply existing legal norms to new sets of facts. Potential problems for democracy may arise when unelected bureaucrats must use their discretion in interpreting the law.

The fact that legislators, the staff of administrative agencies, judges, and even representatives of advocacy groups interpret the law would not pose much of a problem if lawfinding did not necessarily involve discretion. Legislators have increasingly delegated “lawmaking” to administrative agencies, by authorizing these agencies to promulgate rules to govern the implementation of statutes. As discussed previously, agencies sometimes are faced with decisions that implicate political questions. The very notion of a regulation, perhaps, has some political implications, since it is the mechanism by which government exercises control over the actions of individuals and firms. When gaps are left in the law so that those with greater expertise can provide more effective guidelines, questions with political implications increasingly come before bureaucrats.

Democracy and Bureaucracy

The staffs of administrative agencies are tasked with the elaboration of statutory laws through rule-making largely because of their greater expertise and flexibility to collaborate with other experts and research issues. As Chapter Four will

¹²⁵ Sunstein, *Partial Constitution*, 94.

¹²⁶ See “The Constitution and its Interpretation,” in Kommers, Finn, and Jacobsohn, *American Constitutional Law*, 31-55.

demonstrate, while legislators make use of several formal and informal opportunities to gain specialized knowledge about issues, they rarely manage to gain the same degree of expertise as those who devote their professional lives to particular issues. While elected officials may have or develop expertise in certain areas, qualifications for holding office rarely extend past age, citizenship, and residency requirements.¹²⁷ Administrative agencies, however, can hire staff members based on their expertise and training in a specialized area, and can require that staff members hold particular degrees.¹²⁸

The New York State DNA databank is a particularly useful case study for examining the types of problems the governance of scientifically and bureaucratically complex issues can raise for democracy. While professionally trained bureaucrats¹²⁹ may be better equipped to come up with solutions that effectively and efficiently address legislative goals, bureaucratic discretion invites accusations regarding illegitimate political decisions. This has been the case with a number of aspects of the governance of the DNA databank. In addition, with each expansion of the DNA databank, a wide variety of experts have weighed in, lobbying legislators and actually helping legislators craft legislation. While laws are established by the legislature with the aim providing guidelines for those who administrate and use the DNA databank,

¹²⁷ For example, in New York, qualifications for legislators include only citizenship and a state residency requirement of five years. New York Const. art. 3, § 7. Qualifications for governor include the requirement that an individual be a U.S. citizen, resident of the state for five years, and at least 30 years of age. New York Const. art. 4, §2. Like the federal constitution, the New York State constitution does not require any educational or professional qualifications for legislators or the executive.

¹²⁸ Weber, *Economy and Society*, 958. For example, ASCLD-LAB accreditation requires that forensic analysts take particular courses in addition to obtaining an appropriate degree. The New York State Police operates an academy where law enforcement professionals can gain further training.

¹²⁹ Members of the Commission on Forensic Science can be understood as “nonce bureaucrats,” or those who assume the role of a bureaucrat, empowered to make decisions on behalf of the state, for short periods of time and only in their roles as Commission Members. Donald Brenneis, “Discourse and Discipline at the National Research Council: A Bureaucratic Bildungsroman,” *Cultural Anthropology* 9(1994): 23-36.

including defense attorneys, it is precisely these individuals who often exercise the most influence over the lawmaking process. The challenge for a deliberative democracy in the 21st century, where expert staffs increasingly handle complex issues, is how to maintain accountability while still enabling government to function.

Chapter Three: Bureaucratic Management, Lawfinding, and the DNA Databank

Administration of the DNA Databank

Executive Law 49-b creates a somewhat complex regulatory scheme regarding the creation, management, and use of the DNA databank. While Sheila Jasanoff draws a distinction between administrative agencies, which have ultimate rule-making authority, and advisory committees, which are groups of experts assembled to provide administrative agencies with highly technical and specific information regarding an issue.¹³⁰ The line between these types of groups is somewhat blurred when it comes to the databank. As discussed, article 49-b charges three interrelated bodies with rulemaking and the creation of the DNA databank: the Commission on Forensic Science, the DNA Subcommittee of the Commission, and the Division of Criminal Justice Services (DCJS). DCJS, the only administrative agency with its own staff and resources, actually adopts rules that are entered into the Compilation of the Rules and Regulations of the State of New York (NYCRR). The Commission, though, is charged by the executive law with promulgating policies to guide DCJS's rulemaking.¹³¹ The process of rulemaking opens up the Commission's policies to public comment through publication in the New York State Register, but the content of these policies is largely the result of the Commission's decisions. Policies regarding DNA are to be made by the DNA subcommittee through binding recommendations to the Commission.

¹³⁰ Sheila Jasanoff, *The Fifth Branch: Science Advisors as Policymakers*, (Cambridge, MA: Harvard University Press, 1990), 4-15.

¹³¹ Subsection 1 of N.Y. Exec. Law 49-b§ 995-c (McKinney 2012) reads: "Following the promulgation of a policy by the commission pursuant to subdivision nine of section nine hundred ninety-five b of this article, the commission of criminal justice services is authorized to promulgate a plan for the establishment of computerized state DNA identification index within the division of criminal justice services."

Though the Commission is charged with guiding DCJS’s rulemaking, the policy-making process between the two bodies is not unidirectional. The Executive Law requires the Commission to review recommendations from DCJS and the DNA subcommittee in promulgating an implementation plan for the databank, and to ensure that the plan is “consistent with the operational capabilities” of DCJS.¹³² Accordingly, the Commission cannot give DCJS a version of an “unfunded mandate.” In addition, the Executive Law dictates that the Commissioner of DCJS serve as the chair of the Commission, further strengthening the tie between the Commission and DCJS. The Commission also has the authority to consult with DCJS and other agencies, which may employ experts that can help the Commission in performing its duties.¹³³

The Commission on Forensic Science’s Membership

The statutory scheme that guides the selection of the members of the Commission on Forensic Science is designed to create an environment where experts and stakeholders from a variety of areas involved with the administration and use of the databank can deliberate. While Commission members are not elected by the citizenry, they are chosen to be representatives of the various constituencies with which they are affiliated.¹³⁴ This arrangement mirrors an idealized version of a deliberative

¹³² N.Y. Exec. Law 49-b § 995-b (9) (McKinney’s 2012).

¹³³ N. Y. Exec. Law 49-b §995-b(5) (McKinney’s 2012).

¹³⁴ Section 995-a requires that the governor appoint the chair of the New York State crime laboratory advisory committee; a director of a forensic laboratory located in New York State; the director of the Office of Forensic Services of DCJS; two scientists with experience with laboratory standards and quality assurance, upon the recommendation of the Commissioner of the Department of Health; a representative of a law enforcement agency, upon the recommendation of the Commissioner of DCJS; a representative of prosecution services upon recommendation of the Commissioner of DCJS; a representative of the public criminal defense bar upon the recommendation of an organization representing public defense services; a representative of the private criminal defense bar, upon recommendation of an organization representing the bar; two members-at-large to be appointed upon

democracy, where representatives of various opinions and areas of expertise can discuss issues in order to come up with a fair solution that best advances the interests of the public.¹³⁵ Executive law requires that two members be scientists with expertise in quality assurance and that one be a judge or attorney with expertise in privacy and biomedical issues. This demonstrates that legislators, and others involved in lawmaking, believe that experts, who may or may not be directly involved with forensic science in New York, should have a say in decision-making. Provision to include a member with background in biomedical ethics, in particular, points to the idea that representatives of various groups alone might not be able to best assess implications for privacy and ethical issues; the role of this expert is to ensure that these issues are properly addressed. The inclusion of experts unaffiliated with the state suggests a belief that the representatives of various stakeholders might not come up with the best solution for the public on their own.

NYCLU Argues the Commission is “Too Political”

Citing the promulgation of the partial match policy, as well as problems regarding the oversight of a non-DNA forensic laboratory,¹³⁶ the NYCLU has been critical of the Commission on Forensic Science. Among its complaints, the NYCLU argues that the current Commission is “too political.” While Perry and Haroules conceded that the creation of the Commission alongside the establishment of the databank was

recommendation of the temporary president of the senate and speaker of the assembly; and an attorney or judge with background in privacy issues of biomedical ethics, upon recommendation of the chief judge of the court of appeals.

¹³⁵ This arrangement is true of many types of advisory boards. See, for example Laura Stark’s discussion of the guidelines for membership on Institutional Review Boards. Stark, *Behind Closed Doors*, 10.

¹³⁶ Office of the New York State Inspector General, *Investigation into the Nassau County Police Department Forensic Evidence Bureau*, (Albany, NY: NYS Office of the Inspector General, 2011).

“visionary,” given that New York State was the first state to create any sort of forensic oversight committee,¹³⁷ they argued that without a paid staff, the Commission does not have the capacity to keep up with increasingly scientifically complex issues, nor to provide sufficient oversight to forensic laboratories. In addition, Perry argued that the Commission is

...subject to a political process, in terms of appointment powers which has significantly compromised its independence and its rigor. It’s a volunteer commission: it has no staff, it has no budget. It’s simply not up to the task, especially in light of the complexity of the challenges we’re sort of setting out here.¹³⁸

Perry and Haroules argued that the political nature of appointments to the Commission is particularly problematic for the making of fair and objective decisions. Haroules explained that,

...part of [the problem with the Commission] is it’s all publicly elected individuals... Who are making their decisions about who their person is on the Commission. So if Sheldon Silver (the speaker of the Assembly) puts someone on there who says, “...We want to protect peoples’ privacy rights, and balance things appropriately,” then that gets used as fodder in the next campaign to unseat Sheldon Silver. You know, if the governor wants to be tough on crime, then we’re gonna put people on there who are just gonna say, “It’s great. Expand it as much as you want, and let’s go. Don’t put any constraints on it.”¹³⁹

That elected officials seek to please voters with their appointments, in this instance, is not a positive example of accountability. Rather, it demonstrates shortsightedness and prioritizing re-election over the more important cause of ensuring that well-informed, “objective” deliberation occurs. The NYCLU advocates for a Commission composed of politically unbiased experts who would base their decisions upon their *professional* knowledge, not their political inclinations. Because

¹³⁷ Kotval, “The Model of New York State,” 109-117.

¹³⁸ Perry, interview.

¹³⁹ Haroules, interview.

the Commission would still lack legitimate authority to decide political questions, it would act more like an advisory board to the legislature. Haroules went on to elaborate upon what this Commission would look like. She explained,

What you really want, I think, is back to the original conception in which was a functionally independent panel of experts in the areas of forensic science, law, sociology, genetic privacy issue, who come together, and weigh, in a public setting, in public debate, where the balances should be struck, right.... If you had this, I think, truly independent entity that was staffed with quality thinkers, smart people who know what the science is, and can articulate the societal balances that they're striking. That would be sort of the optimal model.¹⁴⁰

In order to achieve such a committee, the NYCLU advocates for making the appointment process “less political” by limiting the governor’s discretion. The NYCLU proposes having the governor appoint a committee to then in turn appoint members of the commission.¹⁴¹ In addition to strictly supervising all forensic laboratories, the Commission would deliberate upon scientifically and ethically complex issues, and then offer their findings to legislators to decide upon the ultimate political questions. This arrangement seems to concede that issues that are scientifically and bureaucratically complex benefit from being discussed by those with specialized expertise. At the same time, it aims to maintain the legitimacy of decisions by requiring that legislators decide how to balance the various concerns raised by Commission members.

Rule Experts and Knowledge Experts

Laura Stark distinguishes between “rule experts”—civil servants who, throughout the course of their work, gain specialization in the specifics of administrative rules—and “knowledge experts”, or “people who are already trained in specialist areas” with

¹⁴⁰ Haroules, interview.

¹⁴¹ Perry explained this proposal was similar to one suggested by the NYCLU regarding Congressional redistricting.

whom the government contracts to inform decision-making in specialized areas.¹⁴² I build upon this work by demonstrating that many individuals working for the state become both rule experts and knowledge experts, and, in addition, develop a sort of “bureaucratic expertise,” or specialized knowledge of the actual day-to-day management of an area that is not codified in formal rules. My research demonstrates that as individuals employed as “knowledge experts” work for state agencies, they also gain rule expertise. Likewise, as individuals hired as “rule experts”, such as legal counsel to various agencies, work in a substantive area, they gain a great deal of knowledge expertise. Both “rule experts” and “knowledge experts” also develop “bureaucratic expertise,” or a detailed understanding of the intricate workings of bureaucracy that is not laid out in formal rules. With regards to the DNA databank, for example, those who work for the state gain an understanding of how the various agencies interact to manage the databank, of the more technical aspects of the databank’s operation, and of the “internal procedures” that enact the broad directives laid out in both statutory and administrative law.

A number of individuals that I interviewed who work for the state exemplified the qualities of someone with expertise regarding rules, knowledge, and bureaucracy. For example, Steve Hogan’s official position as deputy counsel for the New York State Police requires that he be a “rule expert” to give legal advice, and to make sure that any information released from the NYSP is released according to rules and protocols.¹⁴³ Hogan has also developed a level of knowledge expertise regarding the techniques used to perform forensic DNA analysis and operate the databank. During

¹⁴² Stark, *Behind Closed Doors*, 3.

¹⁴³ Steve Hogan, (Deputy Counsel, New York State Police), in interview with the author, November 2011.

the tour he gave me of the Forensic Investigation Center, he explained the development and workings of a variety of forensic techniques, including DNA analysis. While he may not be qualified to perform forensic DNA analysis, Hogan can certainly well-communicate a basic understanding of scientific techniques and the databank's operation to legislators or other "non-experts." Hogan's professional expertise on DNA databanks extends far beyond what is likely formally required by his position at the NYSP. For example, Hogan is extremely knowledgeable regarding the political and academic debates surrounding forensic DNA and DNA databanks, and teaches courses related to the intersection of law and science at SUNY Albany and the College of St. Rose.¹⁴⁴ Many other individuals with whom I spoke also demonstrated an extensive knowledge of the science, rules, bureaucratic management, and the political and scholarly debates related to the databank. It is precisely this expertise, which results from professional devotion to a topic, that Weber argues makes bureaucratic management "technically superior" to other types of governance.¹⁴⁵

Frequent communication among different offices and agencies involved in managing the databank facilitates information sharing, both with regards to bureaucratic and knowledge expertise. The relationship between the New York State Police, DCJS, and other law enforcement agencies is facilitated by their location on the New York State Campus in Albany, which contains a large number of administrative buildings and offices. As common sense would suggest, coordination among agencies is easier when staff members have the opportunity to regularly

¹⁴⁴ Hogan, Interview.

¹⁴⁵ Weber, *Economy and Society*, 973.

interact with each other and develop personal and professional relationships. This is true of other state employees as well: forensic analysts and their supervisors and assistant district attorneys interact and develop working relationships when analysts testify in cases; assistant district attorneys, officials from DCJS, the NYSP, local law enforcement, and forensic analysts interact when investigating a case pursuant to a database hit. These relationships facilitate the sharing of many types of information, especially regarding the actual management and use of the databank, which one could not encounter without firsthand experience.

Gaps in the Law

Executive Law 49-b provides broad legal norms to guide the policy- and rule-making activities of the Commission, the DNA subcommittee, and DCJS. Some provisions of the executive law are largely fleshed out in regulatory law, while others leave agencies significant discretion to implement statutory law. For example, Section 995-b of the Executive Law charges the Commission with developing minimum standards for establishing a program of accreditation for forensic laboratories. 9 CRR-NY 6190.3 then requires that forensic laboratories performing DNA testing be accredited by ASCLD/LAB,¹⁴⁶ a national accrediting organization, and lays out provisions for filing and documenting accreditation with the Commission.¹⁴⁷ With such clear rules, individuals working in forensic DNA labs do not need to exercise much discretion in conducting analyses and otherwise operating labs properly; they follow accreditation standards, FBI guidelines, and their own standard operating

¹⁴⁶ American Society of Crime Laboratory Directors Laboratory Accreditation Board

¹⁴⁷ N.Y. Comp. Codes R. & Regs. tit. 9 § 6190.4 (2011)

procedures. In this instance, lawfinding, as Weber would expect, is very straightforward.

The lack of formal rules regarding certain aspects of the operation of the DNA databank demonstrates how, in many cases, administrators must exercise creativity in implementing legal directives. When a body of law is not “gapless,”¹⁴⁸ those working in state bureaucracies must use the guiding principles that do exist to address situations not provided for in statutory or regulatory code. Implementing statutory directives absent clear instructions requires that bureaucrats draw upon their knowledge and professional discretion to come up with specific ways to implement laws.

There are a number of instances in which the law does not formally specify how the staffs of offices and agencies should apply existing guidelines to new sets of facts with regards to the databank. In many cases, the vagueness of law actually enables those with both knowledge and bureaucratic expertise to more effectively handle issues, and tailor their actions to the circumstances at hand. While formal legal rules tell forensic laboratories to use ASCLAD-LAB standards, agency staff members must still draw up internal procedures and Standard Operating Procedures to ensure that even the most minute aspects of analysis are in line with accreditation standards, state law, and federal guidelines. This allows laboratories to apply formal guidelines to the particular bureaucratic organization of their offices.

The curricula and trainings developed by DCJS and NYSP for police officers and prosecutors also present examples of lawfinding requiring the use of professional

¹⁴⁸ Duncan Kennedy, “The Disenchantment of Logically Formal Legal Rationality of Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought,” *Hastings Law Journal* 55(2004), 14.

judgment. While executive law creates the databank as a tool to assist law enforcement in effectively solving crimes, it does not include any practical instructions on how law enforcement should use the database to this end. In part to address this, Steve Hogan, deputy counsel for the New York State Police, trains prosecutors and police officers in “Cold Hit to Criminal Conviction,” the process by which law enforcement can make use of a databank hit to generate a lead and ultimately prosecute the perpetrator of a crime. Again, Hogan can use his professional experience and detailed knowledge of the databank and the criminal justice system to explain the process, and can tailor trainings to specific groups with varying levels of experience. In addition, individual police departments and prosecutors may adjust the ways in which they pursue investigations based on their own professional experiences and knowledge of their jurisdictions and precincts. While a truly gapless law would spell out all procedures necessary for the use of the databank in criminal investigations, gaps in the law enable prosecutors and police officers to use their professional discretion and experience to make use of the information obtained through the databank most effectively.

The Importance of Limiting Discretion for the NYCLU, Innocence Project, and Defense Community

For the NYCLU, limiting bureaucratic discretion through the use of formal rules is an important way to make sure that civil liberties are not being violated. Both the NYCLU and ACLU operate according to “logically formal rationality,” making decisions that Weber would characterize as “value rational.” According to legal scholar Duncan Kennedy’s reading of Weber, when an actor uses logically formal

rationality, “he chooses a norm, without regard to the social consequences of his choice, and then applies it to the facts at hand, again without regard to the social consequences.”¹⁴⁹ In contrast to the uniform application of legal norms to each unique set of facts that characterizes value rationality, an actor using “substantive rationality” may seek to maximize some other set of values or goals, and to base decision-making around the balancing competing goals.¹⁵⁰

The ACLU’s formal mission is to preserve and uphold those liberties and rights guaranteed by the Constitution and the Bill of Rights,¹⁵¹ not to advance a social agenda derived from an alternative source such as a conception of natural rights or a theory of social justice.¹⁵² In each case, regardless of the particular facts, the ACLU and its affiliates attempt to protect civil liberties when faced with balancing individual freedom and other competing values.¹⁵³ The ACLU’s reasoning seems to be premised on the notion that government should not choose which values should be maximized in society, unless those values are Constitutionally derived. This orientation is, therefore, inherently opposed to unelected government officials having a great deal of discretion to make decisions based on the anticipated “best” outcome of a choice.

The legal defense community has a somewhat overlapping, but different, interest in limiting bureaucratic discretion and ensuring that all aspects of the criminal justice system are characterized by formal rules. First, because prosecutors are part of the

¹⁴⁹ Kennedy, “Logically Formal Legal Rationality,” 15.

¹⁵⁰ Kennedy, “Logically Formal Legal Rationality,” 15-16.

¹⁵¹ “About the ACLU.”

¹⁵² Of course, discerning the meaning of the Constitution and Bill of Rights is interpretive work. See, “Chapter 2, The Constitution and Its Interpretation,” in Kommers, Finn, and Jacobssohn, *American Constitutional Law*, 31-55.

¹⁵³ For example, the ACLU provided representation and advocated on behalf of the First Amendment rights of both students protesting the Vietnam War in *Tinker v. Des Moines*, and of Neo-Nazis holding a march in Skokie, IL, a community inhabited by many Holocaust survivors. *Tinker v. Des Moines*, 393 U.S. 503 (1969). *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

state apparatus, evidence and information that is held by other government offices, such as the police or forensic labs, is first given to the prosecutor who then must hand over any evidence material to the case to defense. Formal rules, especially regarding discovery, can help defense attorneys to limit the discretion available to prosecutors and the state to bias a case in favor of the prosecution. In addition, while private defense attorneys often have a great deal of knowledge regarding forensic DNA and resources available to thoroughly represent clients, court-appointed criminal defense attorneys may lack experience in cases involving DNA, or may lack the time and resources necessary to make a case for their client using available information. Underfunded public defenders may have less experience than prosecutors, and may lack ready access to experts from within the state, when trying a case involving DNA evidence.

Representatives of the defense community seek to create formal rules to limit discretion on the part of prosecutors and administrative agencies in order to protect their interests and the interests of their clients. For example, at a recent meeting of the Commission of Forensic Science, Scheck, Neufeld, and Marvin Schechter, who represents the public defense bar on the Commission, sought a written letter from the District Attorney's Association to ensure that each and every county district attorney's office would hand over lab results as a matter of official procedure.¹⁵⁴ They frequently underscored the importance of making sure this was done even if an inept defense attorney did not request the materials. They requested this despite reassuring other members of the committee that they were sure that District Attorneys were

¹⁵⁴ Video of the Meeting of the Commission on Forensic Sciences, November 9, 2011. On file with the New York State Department of Criminal Justice Services.

doing their job correctly, and despite the insistence of district attorneys present that they always hand over lab results, even if there is not written protocol to do so.

Representatives of the defense community sought to ensure that formal policies were in place in order to guard against any future problem that could result if a prosecutor were to choose not to share materials with a defense attorney who did not know to ask for these materials.

Reforms advocated by the Innocence Project to reduce wrongful convictions also seek to limit the discretion of law enforcement and administrative agencies. The proposal that all police interrogations be videotaped and recorded seeks to limit the methods used by officers by subjecting their actions to greater scrutiny by the defense. Formalizing guidelines for conducting line-ups would limit the discretion of officers, providing them with specific guidelines. Preventing police or prosecutorial misconduct and minimizing practices that could lead to wrongful convictions, for the defense community, translates to limiting the discretion of bureaucrats who are positioned to create the circumstances that could lead to these issues.

Maintaining Security through Internal Procedure

The maintenance of the DNA databank's security through internal procedure demonstrates how administrators use bureaucratic expertise to devise effective and efficient methods of governance. It also demonstrates how having gaps in the law enables bureaucracy to function more effectively. The executive law specifies confidentiality requirements and corresponding penalties for violating these requirements.¹⁵⁵ In order to facilitate the maintenance of confidentiality, regulatory code states, "The server on which the DNA databank resides shall be located in a

¹⁵⁵ N.Y. Exec. Law 49-b §995-d, 995-f (McKinney's 2012).

secure area to prevent unauthorized physical access in accordance with CODIS requirements.”¹⁵⁶ Regulations also require individual forensic laboratories to create written plans regarding security, and for all security measures in New York State laboratories to comply with CODIS standards.¹⁵⁷ While broad guidelines are laid out in formal rules, the actual procedures for maintaining confidentiality are not codified.

The actual system of security in place at the New York State DNA databank is quite novel and complex, and its creation required a great deal of knowledge regarding the bureaucratic management of the database. The agencies charged with maintaining the DNA databank have read the statutory law and regulations together to call for maintaining confidentiality within the databank and protecting against unauthorized uses; interpretation of the rules was largely straightforward. Gaps in the law, however, enabled the use of professional discretion and bureaucratic knowledge to come up with a method that makes effective use of the bureaucratic arrangement that characterizes the management of the databank. Mike Nardolillo, the DNA databank coordinator at DCJS, explained to me that DCJS and the NYSP came up with a new plan in 2008 to maintain confidentiality that draws upon the fact that two separate agencies were already involved in the management of the databank. Nardolillo explained that, unlike in other states, the NYSP’s Forensic Investigation Center actually analyzes convicted offender samples and houses the computer system that maintains the profiles, while DCJS keeps records of the identifying and demographic information of convicted offenders. Previously, the NYSP also maintained the names and information of offenders. By complicating the bureaucratic

¹⁵⁶ N.Y. Comp. Codes R. & Regs. tit. 9 § 6192.5.

¹⁵⁷ N.Y. Comp. Codes R. & Regs. tit. 9 § 6192.5.

management of the databank, the two agencies are able to make it more difficult for any one person to access all the information necessary to breach confidentiality requirements. For instance, if an individual working at NYSP were somehow able to illegally access an individual's DNA sample, that employee would not be able to link the specimen to an actual person without contacting DCJS. Likewise, DCJS has no ability to further search a particular individual's genetic material for new types of information. The agencies create greater security and limit the discretion of any one individual by further complicating the bureaucratic structure. Nardolillo explained that two agencies decided on this arrangement "to keep the integrity of the databank at its highest." He explained,

...in the beginning, actually up until just two and a half years ago, the State Police used to do all the data entry for the names. And my office took that over. We decided that it would be best if we had all that information and they had all the other information, then there'd be two separate entities that are involved.¹⁵⁸

Detailed knowledge of the bureaucratic management of DNA profiles, as well as the ease of communication between the involved agencies and offices, enabled staff at the NYSP and DCJS to coordinate and develop this internal policy. Flexibility, discretion, and a great degree of knowledge regarding the resources and capabilities of each agency enabled this arrangement to come about much more efficiently than it would have had either the legislature or the Commission attempted to come up with a similar security arrangement.

Advocacy Organizations Challenge Bureaucratic Management

The fact that administrators mainly use internal procedure rather than formal rules to maintain the confidentiality of the databank has not come without opposition.

¹⁵⁸ Nardolillo, interview.

While the Innocence Project webpage on DNA Privacy and DNA databases has recently been revised to state that the organization is currently updating its policy, prior to the most recent expansion of the New York Databank one segment read,

We don't know how secure DNA databases are. If hackers or lab employees ever compromised the privacy of this information, the incredibly sensitive and personal biological information contained within DNA test results could end up in the wrong hands.¹⁵⁹

This statement suggests that the Innocence Project took issue with the lack of formal rules governing the security of many state databanks, including New York's databank.

The Innocence Project and NYCLU seem to have succeeded in raising the question of lack of oversight regarding security as an issue for some legislators, as well. A bill introduced by Assemblyman Lentol that passed the Assembly in 2011¹⁶⁰ would have required the Commission on Forensic Science to "review the confidentiality safeguards which are maintained with respect to DNA samples before and after information from such samples is encoded into the state DNA identification index," and would have called for the Commission to determine whether existing safeguards were adequate. The bill would have also required that the Commission issue a report to the Senate majority leader and speaker of the Assembly describing how and why biological samples are retained, and recommending whether the legislature should initiate a program to destroy these samples.¹⁶¹

¹⁵⁹ "DNA Privacy and DNA Database Issues," Innocence Project's Website, <http://www.innocenceproject.org/fix/DNA-Privacy-Dna-databanks.php>, accessed January 15, 2012.

¹⁶⁰ Assem. 5886-B, 2011 Leg., (NY 2011).

¹⁶¹ The NYCLU, in particular, cites the retention of the actual biological samples as the source of many other potential privacy concerns. This argument to destroy biological samples is essentially aimed at limiting the potential discretion of law enforcement officials to use biological samples for information other than identification that could aid an investigation. Haroules and Perry, interview.

Guiding Administrators or Codifying Administrative Procedures?

The extent to which the push for greater regulatory oversight through formal rules created by the legislature could truly affect the actions of administrative agencies is questionable, given that those in administrative positions influence the lawmaking process. This will be discussed in greater detail in Chapter 4. It seems that in some circumstances, lawmaking involves codifying what is already standard procedure. For example, when I interviewed Mike Nardolillo, the DNA databank coordinator at DCJS, in November of 2011 he explained to me that his agency was responsible for coordinating the collection of biological samples among a variety of law-enforcement agencies. He explained this was DCJS's responsibility because

There's no law that says, you know, probation has to collect a sample, or prisons have to.... It's done because law enforcement's cooperating with each other. That's how it gets done.¹⁶²

The bill passed in March of 2012, however, does specify who should collect samples from designated offenders in different circumstances. For example, if a designated offender is sentenced to imprisonment, executive law now stipulates that a sample shall be collected by a "public servant to whose custody the designated offender has been committed"; if a designated offender is sentenced to a term of probation, executive law now stipulates that a probation officer will collect the sample.¹⁶³ These provisions seem to be the codification of a policy largely already in place, coordinated by DCJS. Though the executive law will certainly provide guidance to administrative agencies in collecting samples from the new categories of designated

¹⁶² Nardolillo, interview.

¹⁶³ S. 6733, 2012 Leg., (N.Y. 2012).

offenders, it seems that these guidelines were devised by the staff of DCJS, not by legislators.

Discretion, the “Linkage” Database and the Partial Match Policy

While numerous aspects of the DNA databank are managed by administrative agencies, the Commission, and forensic labs, two issues in particular have been raised as particularly problematic by the NYCLU and the Innocence Project: the existence of Office of the Chief Medical Examiner (OCME) of New York City’s “Linkage” database, and other similar databases, and the Commission’s promulgation of a “partial match” policy. The partial match policy allows for the release of a convicted offender’s identity to law enforcement, under certain circumstances, when the convicted offender is excluded as source of a forensic sample but a moderate stringency match suggests the source might be a close biological relative of the offender. An examination of both issues demonstrates that while governance by professionals can be an efficient and effective method of enacting legislative goals, it also tends to raise questions regarding the legitimate authority of unelected officials to interpret the law and to make decisions on issues that some identify as political.

The “Linkage” and “Local-Level” Databases

Concerns regarding the maintenance of “local-level,”¹⁶⁴ or local, non-CODIS databases reflect a belief that maintaining such a database amounts to a political decision that employees of forensic laboratories are not authorized to make.

According to critics like the NYCLU, employees should not be interpreting the meaning of constitutional guarantees without guidance. In New York State, four of

¹⁶⁴ I will use this term to refer to non-LDIS databases maintained by local forensic laboratories. The NYCLU has used the terms “rogue” or “unregulated,” but for the purposes of my discussion I choose to use less-charged terminology.

the nine laboratories that perform forensic DNA analysis maintain databases containing DNA profiles of some of the samples that the laboratory has processed, in addition to the profiles uploaded to CODIS.¹⁶⁵ These local-level databases are not part of the CODIS system; profiles that are not eligible for the NYS DNA databank are never sent to a system outside the laboratory. Representatives with whom I spoke from OCME explained that the “Linkage” database, as it is referred to within the organization, maintains crime-scene DNA profiles as well as profiles of individuals designated “suspects” by the NYPD that the lab has analyzed.¹⁶⁶ They explained that OCME does not maintain the profiles of victims or profiles generated from elimination samples in Linkage. While OCME does not analyze the convicted offender profiles uploaded to the convicted offender index of the NYS DNA databank, the office does analyze samples collected either voluntarily from suspects or defendants, or collected through abandoned DNA.¹⁶⁷ Representatives from OCME explained that it is best forensic practice for the laboratory that tested the evidence to also directly test the suspect or defendant’s DNA sample so as to be able to be able to directly testify about the results of a comparison. Because of this, OCME analyzes the profiles of many defendants who are ultimately convicted of a qualifying offense.

OCME argued that because the entire laboratory is subject to both state and federal

¹⁶⁵ According to an assistant district attorney I spoke to, laboratories in New York City, Nassau, Suffolk, and Erie Counties maintain local, non-CODIS DNA databases. NYC Assistant District Attorney with extensive experience with DNA prosecutions, interview with the author, October 25, 2011.

¹⁶⁶ Representatives of OCME, interview. I have not spoken to representatives from the crime labs in other counties, so I cannot speak to their protocols regarding local-level databases.

¹⁶⁷ A number of scholars, as well as the NYCLU and ACLU, find problematic the notion that DNA inadvertently shed in public is considered “abandoned property.” For discussion of this, see “Chapter 6: Surreptitious Biological Sampling,” in Krinsky and Simoncelli, *Genetic Justice*, 108-122. See also Elizabeth Joh, “Reclaiming ‘Abandoned’ DNA: The Fourth Amendment and Genetic Privacy,” *Northwestern Law Review* 100 (2006): 857-884.

accreditation standards, the Linkage database is in fact regulated and subject to these same standards.

Representatives from OCME explained to me that maintaining the Linkage database helps aid investigations in two primary ways. First, it allows OCME to alert law enforcement when a string of violent crimes are connected to the same perpetrator quickly, since forensic profiles are only uploaded to CODIS every two weeks. Because the Linkage database is not connected to any broader network, matches can only be detected if all crimes occur within New York City. Second, the Linkage databank enables OCME to quickly generate hits between crime scene evidence and suspect and convicted offender profiles.¹⁶⁸ As a result, the Linkage database enables the comparison of forensic profiles against both suspect and convicted offender profiles more frequently than does the State database.

While the representatives of the NYCLU I spoke with expressed general concerns regarding the expansion of the DNA databank to include people who had not been convicted of a crime,¹⁶⁹ the most problematic aspect of local-level databases for NYCLU is that such databases exist outside of the formal regulatory scheme laid out by New York State Executive Law. Robert Perry, legislative director at the NYCLU, explained that because local-level databases are not part of the state regulatory

¹⁶⁸ The NYCLU's issue with the maintenance of local-level databases is compounded by their concerns regarding the "surreptitious" collection of abandoned DNA. In the course of a criminal investigation, law enforcement sometimes collects DNA samples "abandoned" by suspects without obtaining a warrant. Genetic material is obtained by collecting a sample on something discarded by a suspect, like a cigarette butt or cup containing saliva cells. Though courts have long recognized that individuals have no privacy interest in abandoned property, NYCLU and a number of academics argue that there should be a distinction with genetic material because individuals cannot help but "abandon" genetic material. Local-level databases maintain profiles generated from samples collected in a way that NYCLU believes greatly infringes upon privacy rights.

¹⁶⁹ NYCLU is opposed to the expansion of DNA databases to include the DNA of arrestees. For a discussion of the organization's opposition, see Krinsky and Simoncelli, *Genetic Justice*, 43.

scheme, the legislature did not have a say in deciding from whom agencies could collect and store a sample, which the NYCLU understands to implicate Fourth Amendment rights. He explained local-level databases to me, arguing:

These are DNA databanks created...by local medical examiner offices that are operating outside and independent of the existing regulatory scheme that's supposed to govern the way samples are collected, and archived and utilized. So what's happening in the name of law enforcement, in some of these so-called "linkage" databanks? Requests of samples of witnesses at crimes, bystanders? They're taking victim samples and creating their own local databank, and then running—who knows?—to capture partial matches? And they are quite aware, because this issue has been hotly debated in the Courts and in the public policy arena, that they are operating, in fact, outside the existing regulatory scheme, and they are basically in defiance of it.¹⁷⁰

Perry highlights the notion that because local-level databases are not codified in formal state regulations, citizens cannot know for certain what types of information are held, what the information is used for, and how it is handled. This is essentially a concern regarding the absence of a mechanism to guarantee that laboratory employees are indeed respecting Constitutional privacy protections in the operation of local-level databases. Because these databases are not governed by the state statutory scheme, the NYCLU argues that they may also violate the confidentiality and privacy protections laid out in the statutory and regulatory schemes. Haroules explained,

They're not governed by the state and federal scheme because they're not authorized to exist under the federal or state law. So they really don't have any regulations, they don't have any privacy protections. We don't know what the standards are.¹⁷¹

Haroules acknowledged that crime labs would likely exercise precautions to avoid any potential problems with the chain of custody of evidence or potential criminal prosecutions, but maintained that the absence of formal regulations was highly

¹⁷⁰ Perry, interview.

¹⁷¹ Haroules, interview.

problematic. Implicit in this argument is the notion that bureaucrats—in this case, the staff of laboratories and law enforcement agencies—do not have the legitimate authority to make decisions regarding how government can affect individuals' Constitutional rights. Especially given the NYCLU's concern with the potential for errors to be made in forensic DNA analysis, the organization believes that forensic laboratories cannot, and should not, be trusted to make decisions regarding whose DNA to maintain and how to ensure that privacy protections are respected absent formal legislative and regulatory guidelines.

Problematic for the NYCLU is that in maintaining local-level databases, the staffs of crime laboratories seem to be interpreting guidelines and the Constitution themselves, without instructions in the form of statutes explaining how Constitutional privacy protections should be applied. Though accreditation standards are quite exhaustive, it seems that, for the NYCLU, only the legislature has the legitimate authority to provide guidance regarding the maintenance of Constitutional privacy standards. Laboratory accreditations, according to the NYCLU, do not carry this authority.

Case Study: The Commission on Forensic Science Passes the Partial Match Policy

On June 3, 2009, the Commission on Forensic Science voted 7-4 to adopt a policy to provide laboratories and state agencies with guidelines for handling a “partial match.”¹⁷² The FBI defines a partial match as “a moderate stringency candidate match between two single source profiles having at each locus all of the alleles of one

¹⁷² Representatives of the NYCLU consistently use the terms “partial match” and “familial searching” interchangeably. While there has been some disagreement about whether the terminology describes well the passage (See Transcript of the meeting of the Commission, June 2, 2009), I use the term “partial match” as defined above for clarity's sake.

sample represented in the other sample.”¹⁷³ Administrators use “moderate stringency” searches when routinely running a forensic profile against the convicted offender and subject indexes of the databank in order to be able to detect matches in case of clerical errors, as well as to detect matches in a case where a forensic sample might be partially degraded.¹⁷⁴ If a convicted offender profile is very similar to the forensic profile, administrators will go back to the documentation of the convicted offender profile to check whether a clerical error was made when inputting the convicted offender profile. If it seems that the two profiles exactly match, the convicted offender sample will be retested, and if it matches the forensic profile law enforcement agencies will be notified.¹⁷⁵ A partial match is detected if upon retesting the convicted offender is excluded as the source of the forensic sample. The partial match policy provides guidelines for the handling of such situations, and resulted in the adoption of regulations by DCJS. In contrast to the practice of familial searching, where a database is deliberately searched in an attempt to find similar, but not matching, profiles to a particular crime scene profile, partial matches occur inadvertently when moderate stringency searches are conducted.¹⁷⁶

While advocacy groups and academics opposed allowing partial matches and familial searches raise a host of concerns regarding the potential effects of such

¹⁷³ “FAQs on the CODIS Program and the National DNA Index System,” The FBI’s Website, <http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet>.

¹⁷⁴ Assistant district attorney with extensive experience with DNA prosecutions, interview. “FAQs on the CODIS Program,” The FBI’s website.

¹⁷⁵ Convicted offender samples are always retested prior to notifying relevant law enforcement agencies of a match, even if no clerical errors are suspected. Steve Hogan, interview.

¹⁷⁶ Moderate stringency searches are conducted in order to ensure that matches were not missed due to potential administrative errors in the entering of a DNA profile into the databank. In cases of a moderate-stringency match, DNA in the databank will be re-tested in order to determine whether an administrative error was made. If the profiles still do not match, the moderate stringency match will be evaluated to determine whether the owners of the two profiles might share kinship ties. NYC Assistant District Attorney with extensive experience with DNA prosecutions, interview.

policies,¹⁷⁷ most relevant for the topic at hand, and most central to the Commission’s debate of the issue, are questions regarding whether the Commission had the legitimate authority to promulgate the policy. I argue that most individuals who spoke at the Commission meeting where the policy was passed acknowledged that the policy included both technical and political aspects, though officials from DCJS saw the question as more technical than did others. Members of the Commission disagreed, however, on whether deliberative democracy was best served by having the legislature decide the issue, or by deciding the issue themselves. Though the question was framed by the Chair of the Commission as whether or not Commission in fact possessed statutory authority—largely a technical question—Commission members made arguments and justified their votes in terms of their understanding of how to best make a decision that would carry legitimate authority, would be well-informed, and would fairly and legitimately address competing values and interests.

DCJS cites several sections of the Executive Law, as well as case law, as granting the Commission the authority to promulgate the partial match policy.¹⁷⁸ In particular, subsection 12 of 995-b charges the Commission with the duty to “promulgate standards for a determination of a match between the DNA records contained in a state DNA identification index and a DNA record of a person submitted for

¹⁷⁷ For example, the NYCLU argues that partial match and family searching policies, which lead law enforcement to the relatives of convicted offenders, would exacerbate racial disparities by broadening law enforcement’s focus on racial groups already overrepresented in the databank. The NYCLU also argues that partial match and familial search policies have the potential to violate privacy and due process rights of convicted offenders and their family members. For a thorough analysis of issues related to familial searches, see Erin Murphy, “Relative Doubt: Familial Searches of DNA Databanks,” *Michigan Law Review* 109(2010): 291-348.

¹⁷⁸ DCJS cites the following: N.Y. Exec. Law § 837(13), 995-b (9) and (12).; *Gallo v. Pataki*, 15 Misc. 3d 824 (2007).

comparison therewith.”¹⁷⁹ The promulgation of the partial match policy prompted DCJS to amend the regulatory to include a definition of an “indirect association” and to provide guidelines for the release of a convicted offender’s information to law enforcement pursuant to the determination of an indirect association.¹⁸⁰

Commissioner McQuillan, a judge appointed to the Commission for his experience with privacy and ethics issues, argued that the statutory law did not give the Commission the authority to promulgate a partial match policy; in fact, it expressly forbid it from so doing. He explained,

The problem is this: The statutory law allows the release of database information if the match—I’m using statutory language now—establishes identification, and only one thing establishes identification, and that’s a complete match... The statutory law does not permit a New York custodian to release data concerning a partial match. There must be a full match. There must be a match that establishes identification. And when this stuff was being drafted ten, fifteen years ago, it was assumed that only a full match would release data from the database.¹⁸¹

McQuillan argues that it is not just the words of the statute, but the legislative intent and history that prohibit the Commission from defining a match as anything but a full match. McQuillan and Commissioner Peter Neufeld, co-director of the Innocence Project representing the private defense bar on the Commission, made an argument for accounting for legislative intent couched in terms of deliberative democracy. Ignoring the *intent* of the words overlooks the fundamental idea that laws are meant to reflect the legislature’s deliberation and agreement that government should act in a particular way because of particular reasons. In explaining why the executive law contains language authorizing the Commission to review, and if necessary,

¹⁷⁹ N.Y. Exec. Law N.Y. Exec. Law 49-b§ 995-b (12).

¹⁸⁰ N.Y. Comp. Codes R. & Regs. tit. 9 § 6192.1 (s), 6192.3 (e), (f), (2011).

¹⁸¹ Quotations used in the following case study are taken from the transcript of the Commission on Forensic Science Meeting, June 2, 2009, on file with NYS DCJS.

recommend modifications to a planned implementation of the DNA databank, Neufeld explains,

...As someone who was around and participated in the legislative history that gave rise to the statute in the first place...the reason that language appeared in the statute is there was a concern that the initial plan might not sufficiently be concerned with privacy matters. And there was a concern that once the database was up and running and this whole procedure was up and running that we may see from experience that there aren't sufficient protections of privacy concerns of individuals, and if need be, there was an opportunity to remedy that with greater restrictions...It was never intended to be read as you [Gina Bianchi, Counsel at DCJS] have, the freedom to simply expand the database in any way you see fit.

Neufeld is essentially arguing that interpreting the law in a manner inconsistent with legislative intent undermines deliberative democracy by ignoring the underlying reasons that legislators give and agree upon in making law. If statutes can be interpreted any way one likes, then legislative debate and compromise are hollow actions. Implicit here, as well, is the notion that lawfinding using rational legal thought is not objective; reading the statute alone, lawyers at DCJS found a different meaning than did either Judge McQuillan or Neufeld.

Moving beyond the question of legality, a number of Commission members weighed in on whether putting the question before the legislature would, or would not, result in greater deliberation, and in a more legitimate decision. Commission members often did not treat these two questions separately.

Commissioner Goldart, who represented the public defense bar on the Commission, argued that the legislature, not the Commission, should re-evaluate the political implications of advances in science that now enable scientists to infer that partial match may suggest a familial relationship. He argued,

...It is not for us to make the next leap. It is for the legislature, without doubt, to say “yes,” we’re now going to reexamine our enabling statute and in view of the science, either choose to expand or choose to stay with the current constraints.

Even though Goldart agreed that the “the progress of science” should prompt reconsideration how the databank should be used, he believed that legislators, not experts, must decide how New York should respond to scientific advancement. Implicit in this argument is that the partial match policy has political consequences that should be evaluated and decided upon by the legislature. Using Weber’s terminology, Goldart seems to argue that the Commission does not have the legitimate authority to decide political questions like whether or not administrators should release the name of an offender who has been excluded as a source of a forensic profile.

Commissioner Fitzpatrick, the Onondaga County District Attorney, who represented prosecution services, however, disagreed that having the legislature decide the matter would best advance the cause of deliberative democracy. Rather, he argued that the Commission members should decide because they are the ones who have carefully considered and debated the issue. He explained,

This is something that we’ve been studying. We’ve talked about it for two years. I’ve read Gina’s [Bianci, Counsel for DCJS] memo; I’ve read the judge’s [McQuillan] memo; I’ve listened to the speakers on both sides; and I’ve read the work that the DNA Subcommittee did and I’m ready to move forward on it.

Fitzpatrick’s description includes many of the defining features of a democratic decision based upon justified, public reasons: those making the decision have become knowledgeable on the subject, have heard from legal and scientific experts with competing opinions, and have had ample time to contemplate and discuss the issue. In response to the fact that Commission members still aren’t elected officials, Fitzpatrick

argues that the Commission is actually much more likely to actually deliberate and come to a reasoned agreement than the legislature. Somewhat snidely, he remarked,

And I do understand that we can say, “let’s do this legislatively”...Everybody at this table will be retiring by the time the state legislature does anything about anything unless it’s the Second Avenue subway,¹⁸² so let’s not kid ourselves.

Fitzpatrick’s argument suggests he believes the most important part of a democratic decision is that those deciding have actually heard various arguments and take the time to thoughtfully consider and debate competing opinions. The legislature, according to Fitzpatrick, may not be capable of this, especially given its crowded agenda.

The question of accountability and legitimate authority was less of an issue for Fitzpatrick than was the imperative to make decisions that effectively serve the interests of the people. For Fitzpatrick, enabling law enforcement to pursue potentially crucial leads in very serious cases is too important to leave to a slow-moving legislature. He argued,

I mean, you can’t tell me that in an agency such as this in a state such as New York that you can get scientifically valid information that the person who committed this heinous crime is a blood relative of someone who is in prison and that we have to pretend that we’re ostriches and don’t do anything about it. It’s unacceptable.¹⁸³

In this comment, Fitzpatrick seems to agree with Weber’s observation that professional bureaucrats are able to more effectively and efficiently make decisions, especially those that involve a great deal of complexity. Given the importance of the

¹⁸² The plan to build a subway line along Second Avenue in Manhattan has been discussed since World War I. In 2006, the legislature was working on implementing phase one of the plan.

¹⁸³ Commissioner Neufeld challenged the notion that a partial match is an effective way of generating a lead, and Fitzpatrick conceded that a partial match has the potential to help generate a lead, but may not necessarily do so.

issue, Fitzpatrick believes it is the Commission's duty to do something, because waiting for the legislature to act could compromise public safety. Fitzpatrick seems to argue that, in this case, protecting the public safety is more important than assuring the legislature decides upon a potentially political issue, especially when he believes the Commission could decide the issue just as well.

Commissioner Goldart, the representative of the public defense bar, however, was not convinced, and argued that it was incumbent upon the Commission to allow the legislature to handle the decision. He also held more confidence in the legislature's ability to make such a decision. He argued,

As much as I may not like the outcome of a particular legislative mandate, I think it's compelling on us, if nothing else, to recommend that such legislation be considered in view of the movement of science.... Let's put the question where the question should be put: to the Legislature. And we'll find out whether or not they can handle something other than the Second Avenue Subway. My feeling is that they can. They've amended the statute time and time again based on such compelling arguments.

Goldart proceeded to attempt to make motion to have the Commission submit a statement to the legislature asking them to consider the question, which the other Commission members initially found confusing, and did not pass. By requesting the Commission make a motion, Goldart acknowledged that the legislature might respond more readily to the issue if the Commission flagged it. Because of the political nature of the issue, Goldart seems to believe the Commission has a more appropriate role as an advisory board to the legislature, though he did not argue that the Commission should present a particular position.

Another point of contention included maintaining accountability and limiting bureaucratic discretion once the policy was implemented. Commissioner Neufeld

argued that the legislature should have the option of requiring greater oversight through legislation. He argued that judicial oversight through the use of warrants for partial matches might be a wise decision. Neufeld explained that the legislature should decide whether, “we want some kind of judicial supervision or would it be something we want to leave to the police and the prosecutor.” Fitzpatrick and Phil Pulaski, the Chief of Detectives at the NYPD,¹⁸⁴ who was invited to attend the Commission meeting, disagreed. They argued that law enforcement professionals are capable of handling potentially intrusive situations while still respecting Constitutional guarantees of civil liberties. In essence, Pulaski and Fitzpatrick argued that detectives, police officers, and prosecutors are capable of interpreting and keeping their actions in line with the Constitution. This argument implies the belief that lawfinding, in the form of Constitutional interpretation, is a relatively straightforward process. Pulaski attempted to assure against fears that the police department might hold on to swabs collected from potential family members who were not ultimately convicted, or would engage in anything that might violate Constitutional privacy protections. He explained,

We [NYPD] would not engage nor would we have the resources to engage in any type of life-long surveillance on anybody. We are governed by the Fourth Amendment in our own internal procedures, so whatever intrusiveness is permitted by the Constitutional standards, that would be what would guide us, in addition to any other types of restrictions that may be put on as a result of the Commission policies.

Even without strict oversight, Pulaski argued, the NYPD would be able to largely regulate itself in this situation by adhering to the legal norms laid out in law, Commission policies, and the Fourth Amendment.

¹⁸⁴ NYPD serves New York City, while the NYSP serves the entire state.

Similarly, Fitzpatrick argued that law enforcement professionals have significant experience with making decisions that require balancing public safety with civil liberties. In a sense, even though they are not elected by the people, Fitzpatrick's argument hinted at the idea that law enforcement officers actually develop a sort of professional expertise in lawfinding with regards to balancing the competing interests of privacy and safety. He argued,

...intrusiveness, invading people's privacy, is necessarily part of our job in law enforcement...but our goal is not be pains in the neck...Our goal is to try to find out who shot somebody on the street and that necessarily involves a level of intrusiveness...So this is not something that we're neophytes in, that we're going to say, "Wow, we got a partial hit here, let's go round up the guy's family from day one."

Fitzpatrick suggests that law enforcement officers are capable of assessing particular sets of facts and circumstances, and acting appropriately pursuant to careful reasoning and the balancing of competing interests.

Neufeld, however, disagreed wholeheartedly with Fitzpatrick and Pulaski. He argued that partial match searching, for one, poses new types of privacy concerns not previously handled by law enforcement, and that the legislature should provide guidance on these. Making an argument similar to that made by legal scholar Erin Murphy,¹⁸⁵ Neufeld explained that knocking on the door of someone believed to be a father or brother could reveal previously unknown or hidden biological relationships. He argued that law enforcement should not use their discretion to decide particularly sensitive and complex questions like this without guidance. According to Neufeld, law enforcement's stake in solving crimes quickly does not place it in a position in which it can fairly weigh competing interests. He argued,

¹⁸⁵ See Murphy, "Relative Doubt."

There are all kinds of consequences that could come about as a result of this, and your concern is that as someone who is trying to solve a crime, what's the most expeditious way to do that? And I think that's a perfectly appropriate role for you to play, but I think that it's the duty of the legislature to look at all the competing interests and say how do we best reconcile those differences rather than leaving it to people whose primary concern, if you will, is solving crimes? It's a good concern. It's a reasonable concern. But we leave it to the legislature to handle competing concerns.

To ensure that law enforcement adheres to whatever balance the legislature decides is most appropriate, Neufeld suggested that law enforcement obtain court approval when conducting partial matches; he argued that a judge is in a better position to determine whether contacting relatives in a particular case would violate privacy rights. He suggests judicial oversight as method to ensure that prosecutor's actions are kept within bounds. He explained, speaking to Pulaski

Your comment was, well, "we promise to follow the Constitution." I should certainly hope so. I wouldn't expect you to say that you weren't going to follow the Fourth Amendment of the Constitution. But we may want additional protections. People in the State of New York may want additional protection... Maybe the best way to do it is through the involvement of the judiciary and court orders when you specifically want to do less than identifying match to permit an additional investigation, which will have intrusive consequences, without a doubt.

The argument that the legislature should require judicial oversight of partial matches is an example of using formal rules to limit the discretion of bureaucrats and increase accountability in a particularly powerful way. Judicial oversight would ensure that prosecutors both follow the correct procedures and protocols and do not shift the balance struck by the legislature between public safety and civil liberties.

In the end, a majority agreed that going through the legislature was unnecessary, perhaps also fearing that such a process would in fact move as slowly as the construction of the Second Avenue Subway. This latter prospect was particularly problematic for Dr. Corrado, the lab director at the Onondaga County Center for

Forensic Sciences, who was invited to attend the meeting as a guest. Corrado explained that without any guiding principles made by some sort of accountable and deliberative body, she and other lab directors would be faced with making decisions about how to handle partial matches. It is more appropriate and better for the Commission to make these decisions, she argued, than individual laboratory directors. She explained,

I would just like to add as a lab director that I think there is an issue here and that we do need to move on this now...[because] when we get a fortuitous match, what should we do with it? And I for one should not want to sit here while there is a serial rapist on the loose in Onondaga County, and I'm informed there's a partial match, and we can provide that information to help catch that person. I don't want to be sitting on that. I think we need to address it now because we're thoughtful about it now...I don't want it to be where I have to make a five-minute decision right before it happens, what we're going to do. This is the time to do it because we can get this tomorrow. And what are we going to do if it shows up tomorrow?

Dr. Corrado's comment, as well, demonstrates a desire to act in accord with the values of a deliberative democracy. As a laboratory director, she is quite wary of being faced with the politically-charged decision of potentially withholding information that could help take a rapist off the street, or violating the law or Constitutional privacy protections. Acknowledging that the issue may arise before the legislature is able to address it, she argues that it is better to have a reasoned, well-informed guiding policy in place than to be forced to act quickly and without the benefit of time to deliberate.

Ultimately, the Commission passed the policy, with 7 in favor and 4 against. Commissioner Jenny, one of the scientists appointed to the Commission for his experience with laboratory standards and quality assurance, added the seventh vote,

after it was clarified that promulgating a policy would trigger regulation. Previously, he asked,

Why for such an important matter, is there a policy when, perhaps, writing a regulation will open for public comment and a wider circle of discussion that may further enlighten this Commission and perhaps the DNA Subcommittee.

The opportunity for consideration and input from a wider variety of individuals, as well as the transparency involved with publication of a rule in the State Register, seemed to make the move significantly “democratic” for Jenny’s endorsement.

Accordingly, the policy passed, and DCJS ultimately amended the regulatory code to reflect the policy.

Following the policy’s publication in the State Register, the NYCLU submitted comments arguing that the Commission and DCJS “lack the statutory authority to promulgate the proposed partial match policy.”¹⁸⁶ Similar to arguments made by Commission members, the NYCLU argued the policy contradicts the purpose of the DNA databank in a way neither planned for nor anticipated by the legislature. According to the NYCLU, in giving the Commission the duty to promulgate standards regarding the definition of a “match,” the legislature was delegating a purely technical task related to choosing relevant loci. The legislature did not anticipate a definition of a “match” that would, contrary to common sense, lead to the release of a convicted offender’s identifying information to law enforcement after

¹⁸⁶ 32 N.Y. Reg. 5 (October 13, 2010). In addition, the NYCLU argued that policy poses serious risks to the privacy rights of individuals whose DNA is held in the databank and those of their family members, and that the use of partial match techniques would primarily affect Blacks and Latinos. NYCLU, “Unanswered Questions.”

testing conclusively demonstrates that a biological sample does *not* belong to that offender.

Commissioner Jenny had hoped that the regulatory process would engage different groups and individuals in the debate, and perhaps result in greater deliberation. Instead, the NYCLU was alone in submitting comments, DCJS provided reasons explaining its disagreement with the NYCLU, and the rule was adopted. This perhaps illustrates the limits of measures intended to increase the “democratic-ness” of bureaucracy, such as requiring that rules be published in registers, or that transcripts and videos of meetings be made available to the public.¹⁸⁷ While these materials are made publicly available with the intention of increasing government transparency, in reality, few ordinary citizens thumb through the State Register or watch videos of obscure meetings. In addition, discussions are often focused on complex scientific and regulatory information beyond the comprehension of most citizens.

Conclusion

My findings challenge Weber’s assertion that rational bodies of law “must actually or virtually constitute a gapless system of legal propositions.”¹⁸⁸ In order for bureaucracy to function in the way Weber describes as most effective, individual bureaucrats must have some room to exercise professional discretion. In order for bureaucrats and advisory commissions to use their professional discretion to come up

¹⁸⁷ Over the course of the project, I certainly watched a number of Youtube videos of State Senate proceedings with view-counts in the double-digits, suggesting few citizens actually make use of publically-available information.

¹⁸⁸ Weber, quoted in Kennedy, “Logically Formal Rationality,” 14.

with better-informed and more effective solutions, certain gaps must necessarily be left in a body of formal law.

My findings extend and confirm several facets of Weber's explanation of how bureaucracy can pose problems for democracy. Weber argues that the problem of accountability raises concerns for democracy, and that the idea of a meritocracy tends to be less democratic than anticipated, in light of the reality of unequal access to educational resources. In addition, I argue that attempts to make bureaucracy more "democratic" and accountable by requiring that bureaucrats adhere to formal rules can make bureaucracy less effective. I argue further that concerns regarding accountability are exacerbated when bureaucrats exercise greater professional discretion. Though Weber argues that the professional expertise of bureaucrats enables them to make decisions based on "purely objective considerations," in actuality it can be difficult to separate technical questions from political ones. For example, a technical question regarding how best to maintain the security of the databank can also be understood as a political question that implicates privacy rights, because the presence or absence of proper security measures for the databank plays a large role in indicating whether or not government is in fact protecting privacy rights. The technical question of whether or not the executive law authorizes the Commission to promulgate guidelines for a partial match policy can be seen as a political question regarding whether or not the Commission has the legitimate authority to change the ways in which government can encroach upon the privacy rights of convicted offenders and their families. Because technical and political questions are not seen as entirely separate in these cases, bureaucrats' professional

discretion can be understood to be an illegitimate basis for decisions with political implications.

Chapter Four:

Lawmaking with Experts and Implications for Deliberative Democracy

The staff of state agencies including the Department of Criminal Justice Services, the New York State Police, district attorneys, and representatives of advocacy groups and professional organizations influence the process of lawmaking in two ways: they shape the legislative agenda and they influence the process of drafting laws, which often includes providing the language used in bills.¹⁸⁹ The involvement of representatives of administrative agencies, professional organizations, and advocacy groups in the direct process of lawmaking raises complicated questions for the idea of a deliberative democracy. Most would agree that in a representative democracy legislators should hear from the people, and should craft legislation at least partially in response to the will and desires of the people. Individual citizens, as well as organized groups of citizens, certainly have some legitimate role in agenda setting—that is, convincing legislators that they should address certain important issues in a particular way. According to Sunstein, though, government decisions should not reflect the private desires of either the ruler or of a powerful group of citizens. To guard against this, following Madisonian logic, it is the duty of legislators to ensure that government decisions account for the opinions of citizens, but do not amount to the promotion of pure individual interests. As discussed earlier, Madison's reasoning suggests that legislators should also debate and balance competing public interests. According to this reasoning, legislators should deliberate upon and balance

¹⁸⁹ For an explanation and discussion of the iron-triangle framework, see Francis E. Rourke, *Bureaucracy, Politics, and Public Policy*, (Boston: Little Brown, 1969).

the “public reasons” given by the law enforcement community, the defense community, and advocacy groups.

In Madison’s vision of the American representative democracy, elected officials would listen to claims and information from a variety of sources, but would have the ability to effectively weigh and evaluate competing claims to come up with a policy that best advances the interests of the citizenry. Legislators would deliberate upon issues and then balance competing private interests, public interests, and constitutional guarantees. With increasingly complex problems to address, whether or not elected officials always have the capacity to live up to this task is unclear.

In theory, because both the federal and New York State Constitutions vest the power to make law in the legislature, and put in place election requirements to maintain accountability, legislators alone have the legitimate authority—derived from formal rules—to decide what types of solutions are best for the public. If the public disagrees with legislators’ decisions, they can vote in new legislators; this plays a large role in maintaining the legitimacy of elected officials’ authority among the citizenry. If those who are determining the content of legislation have not actually been elected by the people, however, the option for the people to hold decision-makers accountable may be diminished. On the other hand, collaboration with a variety of groups can be understood as a way to include more citizen input into the democratic process, and as a way to enable legislators to make better-informed decisions on issues of which they may have little knowledge. Providing legislators with specialized information has the potential to help legislators more effectively deliberate on issues. The challenge for deliberative democracy is to effectively

advance political and societal goals through legislation, while maintaining accountability and the legitimacy of decisions.

Because legislatures make law on such a wide variety of complex subjects, it is impossible for every legislator to be an expert on every issue. With particularly scientifically and bureaucratically complex issues, even “specialist” legislators who have a degree of specialized knowledge on a subject may not know the details of an issue as well as someone who devotes all of their professional energies to that issue. If we are interested in living in a state characterized by laws that enable government to effectively address many issues of public concern, the input of a variety of experts will likely remain a crucial part of the lawmaking process. It is worth considering, however, what this means for the idea of a representative democracy, and how we might adjust our understanding of democracy to reflect the increasing input of experts on questions of governance and lawmaking.

Lawmaking: Empirical Models from Policy Research

Empirical models borrowed from policy research can help demonstrate the ways in which different types of outside actors influence the process of lawmaking. A clear understanding of how lawmaking works can in turn help in analyzing the implications of experts’ involvement for deliberative democracy.

Advocacy Coalition Framework:

Advocacy coalition framework, which emerged in the early 1990s in public policy theory, argues that in order to understand what drives broad policy change we should look to “policy substreams,” which are comprised of “those actors from a variety of public and private organizations who are actively concerned with a policy

problem or issue...and who regularly seek to influence public policy in that domain.”¹⁹⁰ Theorists working within the advocacy coalition framework argue that “our conception of policy subsystems should be broadened from traditional notions of iron triangles limited to administrative agencies, legislative committees, and interest groups at a single level of government to include various levels of government, as well as journalists, researchers, and policy analysts...”¹⁹¹ This framework allows for the influence of a broader range of actors to be considered.

While theorists of advocacy coalition framework tend to focus less on the processes and mechanisms of how policy proposals become written into law, their inclusion of actors beyond the traditional iron-triangle proves very useful to understanding the ways in which a variety of different types of actors and groups influence law-making, especially with regards to the DNA databank. A traditional iron triangle understanding would largely focus on interactions between legislators and their staffs, the Department of Criminal Justice Services, and interest groups representing firms that produce devices and materials used in DNA analysis.¹⁹² The groups that comprise the “policy substream” interested in the New York State DNA databank, however, are much more diverse. The substream includes the staff of state administrative agencies; federal groups like the Department of Justice’s Commission on the Future of DNA Evidence; non-profit advocacy groups dealing with wrongful convictions, civil liberties, and crime victims’ rights; district attorneys;

¹⁹⁰ Hank C. Jenkins-Smith and Paul Sabatier, “Evaluating the Advocacy Coalition Framework,” *Journal of Public Policy* 14 (1994): 180.

¹⁹¹ Jenkins-Smith and Sabatier, “Advocacy Coalition Framework”.

¹⁹² National-level interests groups do seek to influence legislation of various states. For example, the company Life Technologies, which produces technology and materials used in DNA analysis, provides resources and technical assistance to legislators and criminal justice professionals regarding DNA technology. DNAResrouce.com, accessed April 8, 2012.

representatives of a variety of law enforcement agencies; the governor; the mayor of New York City and other local elected officials; the editors of major newspapers; academics; and law enforcement professionals from other states.¹⁹³

Considering advocacy coalition framework together with a model of the lawmaking process is especially helpful in thinking through the influence of a variety of groups on lawmaking, from agenda setting to voting.¹⁹⁴ Based on empirical research, Paul Sabatier and David Whiteman developed a three-stage model to illustrate how state legislators receive information from a variety of sources, including legislative staff members, personal staff members, government agencies, and interest groups.¹⁹⁵ In applying their model to the DNA databank, I expand Sabatier and Whiteman's category of "administrative agencies and interests groups" to include the other groups discussed above.

In a state legislature like New York's, characterized by a relatively well-developed legislative staff system,¹⁹⁶ "specialist legislators" who are particularly knowledgeable about an issue under consideration, and may sit on the committee that handles a particular issue, learn a great deal of policy information from committee staff, who in turn learn most information from the staff of administrative agencies and interest groups.¹⁹⁷ Specialist legislators also interact with and learn directly from government agencies and interest groups, but to a lesser extent than do their staffs.

Non-specialist legislators, or those legislators who generally do not sit on the

¹⁹³ For example, a number of individuals I spoke with referred me to denverda.org, a website maintained by Mitch Morrisey, the Denver District Attorney, for general information

¹⁹⁴ An analysis of policy implementation is beyond the scope of this thesis.

¹⁹⁵ Paul Sabatier and David Whiteman, "Legislative Decision Making and Substantive Policy Information: Models of Information Flow," *Legislative Studies Quarterly* 10 (1985).

¹⁹⁶ Sabatier and Whiteman, "Legislative Decision Making," 399.

¹⁹⁷ Sabatier and Whiteman, "Legislative Decision Making," 400.

committee that deals with a particular issue, and do not have specialized knowledge regarding an issue, gain most of their policy information, as well as “political information,”¹⁹⁸ from specialist legislators. They may base their voting behavior on cues taken from specialist legislators with whom they generally share policy preferences.

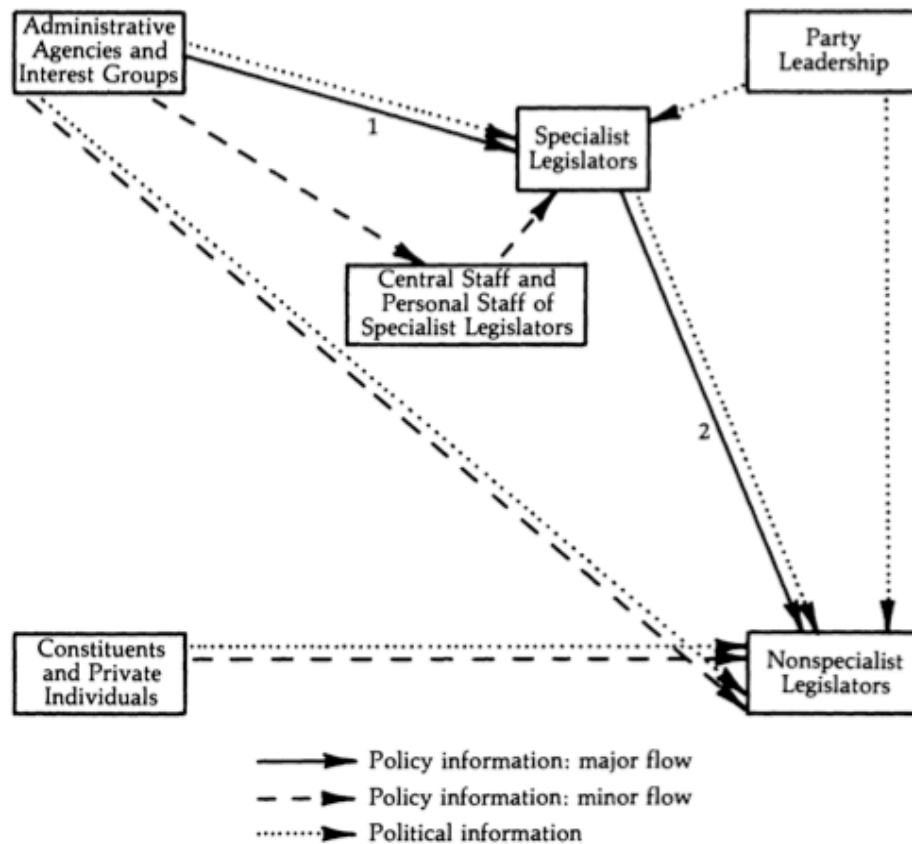


Figure 3. Sabatier and Whiteman’s Three-Stage Model of Information Flow¹⁹⁹

¹⁹⁸ Sabatier and Whiteman draw an important distinction between “policy information” and “political information”. Political information “refer[s] to information about the positions of other political actors on pending legislation and about the likely impact of the legislation on reelection or career prospects”, while policy information “include[s] information on the actual content of proposed legislative alternatives, the magnitude and causes of the problems they are designed to address, and their probable effects on society.” Sabatier and Whiteman, “Legislative Decision Making,” 397.

¹⁹⁹ Sabatier and Whiteman, “Legislative Decision Making,” 400.

Importantly, the above model highlights the fact that the relationship between state agencies and lawmakers goes in both directions; while laws authorize the existence and enable the funding of agencies, agencies also provide information that in turn shapes new laws. Especially when legislators make laws respecting an issue that is already under bureaucratic management, communication with agency staff is imperative to ensure that the results take into account the workings of bureaucratic management. For example, a number of individuals with whom I spoke explained that in attempting to eliminate “unregulated” databases, legislators would inadvertently eliminate other non-CODIS databases. Forensic laboratories generally maintain “lab types” databases that include elimination samples of lab workers to guard against contamination, as well as local-level missing persons databases, which would be prohibited by a provision forbidding the maintenance of non-CODIS databases or databases not established pursuant to executive law. The bureaucratic expertise of those who actually operate or work with local databases is necessary to avoid situations like this.

Lawmaking and the DNA Databank:

While the influence of administrators and representatives of interest and advocacy groups on lawmaking has been widely observed, it raises interesting and important questions regarding the legitimate authority to make political decisions. If those who are supposed to be guided by formal rules and law actually determine the content of laws, what is the role for legislators in a deliberative democracy? Are arguments like those made by Commissioners Neufeld, Goldart, and McQuillan regarding the partial match policy, discussed in Chapter Three, still meaningful if the very same people

sitting around the table at the Commission meeting play a large role in writing laws passed by the legislature anyway?

Using advocacy coalition framework and Sabatier and Whiteman's model of legislative decision-making helps to illustrate the process that has characterized legislative action regarding the New York DNA databank. Law enforcement and non-profit advocacy groups lay the groundwork by first influencing the legislative agenda of both the governor and the legislature. Not only do these groups flag which issues are important to address, but they also set the parameters for the ways in which lawmakers should go about addressing these issues. As numerous scholars of public policy have observed, interest and ideological groups must compete for a place on the legislative agendas of the executive and legislators.²⁰⁰ Christopher Asplen, the former executive director of the National Commission on Forensic Science, an expert committee convened to assist the Attorney General in assessing the state of forensic sciences, explained the answer he was given by a member of the National Conference of State Legislatures in response to pressure to fund DNA databanks. The legislator explained,

We're all pro-law enforcement. But let me tell you how we have to deal with the allocation of limited resources. Law enforcement comes to us and they say here's our list of the top things we want funded, and we go and we give law enforcement their top three. As soon as your issue gets into the top three, your issue will get funded, but don't tell us we're doing something wrong here until law enforcement is telling us they really need it.²⁰¹

Given the climate created by scarce resources, groups must compete to have legislators take up their particular issue. Groups use a variety of methods to do this,

²⁰⁰ Clarke E. Cochran, Lawrence C. Mayer, T.R. Carr and N. Joseph Cayer, *American Public Policy: An Introduction*, Ninth Edition (Boston: Wadsworth Cengage Learning, 2009), 9.

²⁰¹ As quoted in Lazer, *DNA and the Criminal Justice System*, 8.

including the direct lobbying of legislators, communicating with and educating legislators and their staffs about particular issues, leading citizen-campaigns to pressure legislators and governors to address issues, and raising attention around an issue in the media. By framing issues a certain way and suggesting particular policy solutions, outside groups pave the way for further involvement in every step of the lawmaking process, from the very beginning.

Once an issue, like the DNA databank, is on the legislative agenda, a variety of agencies coordinate and take cues from each other to promote particular policy approaches over others. This has a significant impact on which legislative solutions ultimately make it out of committee. For example, in the 2012 legislative session, nearly all supporters of expansion of the databank advocated for the inclusion of DNA samples from those convicted of all crimes in the penal code, but not for the taking of DNA at arrest. Twenty-five states currently have laws authorizing the taking of DNA at arrest in at least some circumstances,²⁰² and these laws are being actively promoted by a variety of national-level advocacy groups.²⁰³ Taking DNA at-arrest has certainly appealed to New York State legislators before; nearly every year since 2006, bills have been introduced that would require at least some arrestees to provide a DNA sample.²⁰⁴ A New York State District Attorney's Association publication from

²⁰² Gordon Thomas Honeywell Governmental Affairs, *States That Have Passed Arrestee DNA Database Laws (As of September 2011)*, accessed March 26, 2012, <http://dnaresource.com/documents/ArresteeDNALaws-2011.pdf>.

²⁰³ For example, I attended a webinar produced by the National Center for Victims of Crime about arrestee databank laws. I learned about the webinar through individuals I interviewed, who also attended.

²⁰⁴ For example, Senator Jeffrey Klein (D-Bronx), and Assemblyman Joseph Morrelle (D-Irroquoit) have repeatedly introduced bills to require the collection of DNA at arrest for certain felonies. Neither sits on the Codes Committee of their respective house. "Biography," Jeffrey Klein's Senate Webpage, <http://www.nysenate.gov/senator/jeffrey-d-klein>.

2011 endorses the expansion of the databank to include DNA taken at-arrest,²⁰⁵ and a number of law enforcement officials in New York State have likewise spoken in favor of taking DNA at arrest.²⁰⁶ Most recently, however, law enforcement officials and victim advocate groups active in New York State have been united in calling for an “all crimes” databank, not for taking DNA at-arrest. This is likely both because of budgetary constraints²⁰⁷ and vocal opposition from civil libertarian groups, with the former perhaps being most important.

Bureaucratic Expertise and Lawmaking

Many people whom I interviewed who work directly with the DNA databank explained that legislators often lack a thorough understanding of the operation of the databank, and of the resources that agencies have at their disposal to implement legislation. Put differently, legislators lack the “bureaucratic expertise” necessary to make laws in accord with the complex administration of the databank, and with its administrative capacity. Because of this, assistant district attorneys, staff at DCJS and the NYSP, and other law enforcement professionals often play a large role not only in signaling which issues are most important, but also in drafting and shaping the actual language of laws passed. One district attorney with extensive experience with DNA underscored the importance of “insider” bureaucratic knowledge, explaining:

²⁰⁵ District Attorney’s Association of New York. *Legislative Priorities for 2011*, accessed March 26, 2011, <http://www.daasny.org/DNA%20final.pdf>.

²⁰⁶ Howard Safir, former Police Commissioner of the New York City Police Department, for example, was vocal in pushing taking DNA at arrest in 1999. Jayson Blair, “Police Chiefs Join in Call for More DNA Sampling,” *New York Times*, August 16, 1999.

²⁰⁷ Many I spoke with explained that while expanding the databank to include all-crimes would cost the state a reasonable amount of money and would not require the construction of new laboratories or the hiring of a significant amount of new staff, expanding to at-arrest would greatly strain the state’s current capacity to process DNA samples. Given the perhaps political-impossibility of implementing such a costly measure at a time when the state is trying to reign in spending, such a legislative demand seems politically unwise and infeasible.

Look, the truth is, the DNA world is so new that the only people who truly understand it, the operation of the DNA databanks, the fiscal implications, the staffing requirements, the facilities requirements, the reporting mechanisms that are currently used, are those who work within it. I don't think it's possible for a professor to write on this. The whole thing's only existed for fifteen years. And those of us like myself and my counterparts around the city, the DNA CODIS administrators, we're the ones who truly understand how this all works. How on earth a professor could write about, I have no idea. You have to really see it from the inside.²⁰⁸

According to this assistant district attorney, it is not the scientific complexity of DNA that is particularly difficult for those not working with the databank to comprehend. Nor are the formal rules governing DNA databanks so complex that only a lawyer working for the state could understand them. Rather, the bureaucratic knowledge of the databank that is not formally codified, but exists within the Standard Operating Procedures of laboratories, the internal procedures promulgated pursuant to regulatory code, and the workaday environments of administrators, is crucial to creating effective law but unknowable to those who do not work with the databank as part of their professional lives.

An example of the importance of bureaucratic knowledge in lawmaking can be seen in the wording of a provision of the most recent expansion bill. The provision that guarantees defense attorneys greater access to the databank directly reflects the influence of those who work for the state, in addition to the influence of the defense community and the Innocence Project, who advocated for the inclusion of the provision. A number of prior bills that did not pass both houses called for the authorization of judges to order DNA testing in response to a motion by a defense attorney, and to have that evidence run against the DNA databank. The assistant

²⁰⁸ NYC assistant district attorney with extensive experience with DNA prosecutions, interview.

district attorney with extensive experience with DNA explained that the language of these bills posed serious problems for the operation of the DNA databank. He argued the language of earlier bills could have allowed a judge to order testing that might contradict CODIS rules. He explained,

If the lab were to do it [follow the judge's order], they'd lose their CODIS accreditation ... what if a defense lawyer wants to have a profile he had generated from the crime scene evidence at his own university lab, at John Jay [College of Criminal Justice], entered into CODIS? Well, you can't enter things into CODIS that weren't from an accredited crime lab. What if a judge ordered that? Then you've got a problem.

The assistant district attorney locates his concerns in the problem such a provision would cause for CODIS accreditation, not with the idea that it would offer defense greater access to information. In this situation, the assistant district attorney's rule expertise and bureaucratic expertise were necessary to understanding the issue created. The issue with the prior bills had to do with CODIS rules, not New York State regulations or statutes. Legislators and others who do not directly work with the databank would likely be unfamiliar with specific CODIS guidelines.

With the most recent expansion, a version of the provision discussed above was passed. The language ultimately entered into the bill reflects the concerns that the assistant district attorney I spoke with raised months prior during our interview. This is no coincidence, of course; the changes reflect a great deal of collaboration between law enforcement and legislators in actually writing legislation. The provision of the final bill that enables the court to order the prosecution to make available evidence for DNA testing includes a clause requiring the court to deny a request if, among other things, it would "threaten...the integrity of the processes or functions of a laboratory

conducting DNA testing.”²⁰⁹ This demonstrates how lawmakers turn to the staff of bureaucratic agencies and law enforcement regarding provisions that may not even be popular and may not originate with those agencies.

Conveying Information to Legislators

When interacting with legislators, those trying to influence the lawmaking process surrounding the DNA databank make use of a variety of methods to actually communicate information to include in bills. In order to convey information to legislators and members of their staffs, a number of agencies and associations representing groups that use the DNA databank publish and publicly promote particular policy agendas regarding the DNA databank.²¹⁰ These documents provide legislators and their staffs with clearly articulated policy information and reasons justifying these policies. Professional associations, in particular, publish legislative priorities and positions on various bills, conveying both policy and political information to legislators making and voting on laws. The New York State District Attorney’s Association, for example, publishes legislative priorities and names “bills of interest,” on their website.²¹¹ The New York State Association of Chiefs of Police also publishes legislative memoranda.²¹²

While written statements and memoranda can offer information to legislative staff members, explaining the importance of an issue and how to best legislatively

²⁰⁹ S. 6733, 2012 Leg. (2012) (N.Y. 2012).

²¹⁰ While crime laboratories process and analyze information that is uploaded to the DNA databank, they do not take any position regarding expansion, nor do they take positions on other policy-related matters. Representatives of the New York City Office of the Chief Medical Examiner, interview with author, January 2012.

²¹¹ “Legislation,” District Attorney’s Association of the State of New York’s Website, <http://www.daasny.org/Legislation.html>.

²¹² “Legislation Memoranda of Support/Opposition,” New York State Association of Chiefs of Police Website, http://www.nychiefs.org/legislation_memoranda.php.

pursue it requires more direct and personal effort. For example, representatives from the various law enforcement associations have traveled to Albany regularly to speak informally with legislators about the importance of the DNA databank, and to provide basic training and education about the use of DNA in the criminal justice system. Representatives from law enforcement and DCJS have also given testimony before the Codes Committees of both houses, which handle issues related to criminal justice, explaining the rationale behind databank expansions and answering legislators' questions.²¹³ Representatives of law enforcement also hold press conferences where they provide information to the media, which is then conveyed both to the public and to legislators.²¹⁴ On several occasions, district attorneys have brought in crime victims and their families to speak directly to legislators about how the databank helped to catch their assailants, and about how an expanded databank could have identified their assailants sooner.²¹⁵ Assistant district attorneys I spoke with argued that the efforts and testimony of crime victims, in particular, have been instrumental in convincing legislators of the importance of expanding the databank.

Legislative staff members also help legislators collect information regarding how legislation will affect state agencies. Legislative aides contact agencies that will be affected by expansion, like forensic laboratories, for information about how various policy choices would affect their work in order to gauge the feasibility of various proposals. Legislative aides can work directly with staff members of DCJS

²¹³ See, for example, Testimony of Sean Byrne, Acting Commissioner of NYS DCJS, "NYS Legislature Joint Budget Hearing on Public Protection," YouTube video, 7:47:31, posted by "nysenateuncut," January 30, 2012, <http://www.youtube.com/watch?v=nhwvVOgvKJY>.

²¹⁴ Senator Marcellino's Comments, "New York State Senate Session—January 31, 2012."

²¹⁵ Assistant District Attorney at Queens District Attorney's Office, Conversation with the author, July, 2011.

and the NYSP to gauge the agencies' capacities to manage different levels of expansion. The existence of legislative aides provides a formalized method of obtaining highly specific information possessed only by those working with the databank.

Representatives of advocacy groups also work directly with legislators to influence lawmaking. As discussed in Chapter Three, Peter Neufeld, co-director of the Innocence Project, explained to other members of the Commission on Forensic Science that he was a part of the effort to craft the legislation that first created the databank. He, along with Barry Scheck and other representatives of the Innocence Project, remain active participants in influencing legislation today. A number of state legislators, especially Assemblyman Joseph Lentol and Senator Thomas Duane, have cited the Innocence Project's work in news articles and publications related to databank expansion, indicating a relationship with the organization.²¹⁶ Scheck and Neufeld have also both testified before the legislature regarding wrongful-convictions provisions that have been coupled with bills to expand the databank.²¹⁷

Representatives of the NYCLU explained to me that they also seek to directly influence lawmaking, in addition to their litigation work. The NYCLU primarily attempts to influence the legislature through drafting and distributing legislative memoranda, which include the opinion of the NYCLU on bills being considered and

²¹⁶ In an op-ed published prior to the 2006 databank expansion, Senator Duane cited the Innocence Project's work and research, as well as *DNA and the Criminal Justice System*, an academic volume edited by David Lazer. Thomas K. Duane, "Think Before You Swab," *New York Times*, June 11, 2006.

²¹⁷ "New York State Senate Task Force to Hold Public Hearing July 2 on Preventing Wrongful Convictions," News Release, Innocence Project, 2008, http://www.innocenceproject.org/Content/NY_State_Senate_Task_Force_to_Hold_Public_Hearing_July_2_on_Preventing_Wrongful_Convictions.php.

flag issues that the NYCLU feels the legislature should address.²¹⁸ In our conversation, though, Beth Haroules argued that “one-to-one” conversation with legislators was the most effective method of communicating information and concerns.²¹⁹

Both the NYCLU and the Innocence Project also produce model legislation to assist lawmakers with the actual process of drafting bills.²²⁰ By facilitating the process of drafting laws, model legislation can reduce the amount of work required for legislators to introduce a bill, especially when it comes to issues with which legislators may not be familiar. Robert Perry, legislative director at the NYCLU, gave me copies of model legislation drafted by the Innocence Project and the ACLU regarding privacy issues and DNA databanks. The Innocence Project’s model is directed specifically at the New York DNA databank, while the ACLU’s is more general and must be tailored to specific states. While I was told that the Innocence Project does not primarily focus on DNA databanks,²²¹ the organization nevertheless produced the model legislation in 2006 presenting “...provisions that would increase the quality and effectiveness of the administration of New York’s Database.” As discussed in Chapter One, in 2006 the databank was a more prominent legislative priority for the Innocence Project.

²¹⁸ “Our Legislative Program,” The NYCLU’s Website, accessed April 5, 2012, <http://www.nyclu.org/content/our-legislative-program>.

²¹⁹ Perry and Haroules, interview.

²²⁰ I received copies of model legislation drafted by the staff at the national ACLU and by Steve Saloom, policy director at the Innocence Project, from Robert Perry during our interview. Steve Saloom, “Model ‘DNA Database and Forensic Science Improvement Act of 2006,’” Innocence Project, on file with author and NYCLU. ACLU, “Model Genetic Privacy and Justice Act,” on file with author and NYCLU.

²²¹ Issues related to DNA databases are listed as a “related issue” on the Innocence Project’s website. “Related Issues,” The Innocence Project, accessed March 26, 2012, <http://www.innocenceproject.org/fix/Related-Issues.ph>.

Both documents cover a wide variety of topics related to genetic privacy and the use of DNA to prevent wrongful convictions. The ACLU's legislation, for example, provides language for provisions requiring that law enforcement obtain "voluntarily submitted DNA samples" from individuals only after those individuals "have given their fully informed, written consent," and limits the circumstances under which law enforcement personnel can obtain a sample. As discussed in reference to local-level databases in Chapter Three, the ACLU and its state affiliates have been concerned about law enforcement and forensic laboratories collecting and possibly storing voluntarily collected elimination samples. According to the NYCLU and ACLU, consent cannot really be considered fully informed if individuals are unaware that their DNA might be stored in a local-level database, or when individuals fear they may become suspects if they do not give a sample. Whereas requiring that information in the database be kept confidential seems like a fairly obvious privacy precaution to take, legislators unaware of how forensic DNA is actually used and obtained over the course of criminal investigations would likely be unfamiliar with the concerns the NYCLU has raised regarding local-level databases.

The ACLU's model legislation is not specific to a particular state, and therefore does not use language tailored to a particular statutory scheme. The document flags certain issues as particularly important and provides guidelines and language for drafting legislation, but legislators and legislative staff members would still need to research the statutory and regulatory scheme of their state in order to put the model into action. Staff members of state affiliates, like the NYCLU, are likely willing to help tailor legislation.

The ACLU's model legislation provides a number of provisions that would limit law enforcement's discretion to use databanks in new and potentially intrusive ways not expressly prohibited by most statutory schemes. For example, one provision reads,

State and local law enforcement shall not use biological samples retained from crime scenes to identify individuals based on their race, ancestry, or any phenotypic characteristics.²²²

Currently, biological samples maintained in connection with DNA databases are only used to generate DNA profiles, which are then used to establish identification. The NYCLU's provision would clarify any statutory scheme that might be read to permit the use of samples to identify an individual based on phenotypical or genetic information contained in a sample in connection with a criminal investigation. The NYCLU believes that using DNA for this purpose would be extremely invasive and raise concerns for genetic privacy. Most lawmakers, however, likely have not considered such a possibility.

The Innocence Project's model legislation is specific to New York State's legislative scheme, providing the particular sections of the executive law and criminal procedure law that the model legislation would amend. It is written in legalese that could be directly inserted into a bill. In addition, the Innocence Project's model provides short explanatory statements at the end of each provision. These explain the purpose of various provisions to legislators, and also provide legislators with the language and rationale to defend and advocate on behalf of the positions endorsed by the model legislation. The document contains a provision for the "Elimination of

²²² ACLU, "Model Genetic Privacy and Justice Act."

rogue forensic databases,” which I discussed in Chapter Three. The text of the model legislation provides,

If any state or local law enforcement agency possesses the biological material of an individual, either voluntarily or pursuant to a court order or warrant and such material was not obtained pursuant to subdivision three of this section, once a DNA profile is created from that material that DNA profile may be compared only to the DNA profile of the crime sample or samples for which it was sought. In the event that such individual’s DNA profile does not match the DNA profile of the crime scene sample, that individual’s profile along with the biological material from that individual must be both immediately destroyed, along with any and all records of such profile, and the lab must so certify.²²³

Because legislators may not be familiar with the reasons why groups like the Innocence Project and NYCLU find the existence of local-level databases problematic, or may have not even known that local, non-LDIS databases are being maintained, the Innocence Project provides arguments to justify the provision. The summary and rationale reads:

The message behind this is: “The law is needed to ensure maximum cooperation and support of the people of New York to solve serious crimes. It is critical that people understand that by cooperating with criminal investigations and submitting DNA for exclusion, they do not subject themselves to having their DNA sample and/or profile retained by the government despite their demonstrated innocence.”²²⁴

The section goes on to explain how citizens in other states have voiced this concern, which has led to difficulty in securing cooperation with law enforcement. While legislators might understand the problem of “rogue” databases as one of genetic privacy, the explanation provided by the Innocence Project encourages legislators to frame it as a question of securing the public’s trust and cooperation in criminal

²²³ Innocence Project, “Model Legislation.”

²²⁴ Innocence Project, “Model Legislation.”

investigations. The model legislation provides not only technical language for implementing various provisions, but *reasons* as well.

Numerous provisions contained in the model legislation of both groups have been introduced into bills with slight changes. In particular, a bill introduced by Assemblyman Lentol that passed the Assembly in 2011 would have established a “State Commission for the Integrity of the Criminal Justice System.” The groundwork for the establishment of such a commission is provided in the Innocence Project’s 2006 model legislation, and much of the language in the bill mirrors the language of the model legislation.²²⁵

Implications for Democracy of Expert’s Influence on Lawmaking

Representatives from the NYCLU understand their role in influencing the legislature to be an important part of maintaining a deliberative democracy. In addition to litigating, they see it as their role to bring attention to important issues with implications for civil liberties that relate to DNA databanks, which are frequently overlooked by legislators, law enforcement, and the media. My interview with representatives of the NYCLU suggests that the organization believes educating legislators is imperative to the wellbeing of a deliberative democracy. If legislators often lack the knowledge necessary to make decisions on scientifically and technically complex topics, but nevertheless retain sole legitimate authority to make political decisions regarding these issues, then education of legislators is in fact quite important. For example, Robert Perry explained to me how legislators are often unaware that errors have been made in DNA analysis in a number of labs in the

²²⁵ S. 5660-A, 2012 Leg., (N.Y. 2012).

United States, and that this could be happening, or could happen in the future, in New York State. He explained to me:

... We operate under this, what Bill Thompson²²⁶ refers to as “CSI effect.” And it sounds fanciful but it’s true. I mean, people have their notions and their understanding of forensic DNA from watching television programs, in particular CSI. And it’s always very neat, and very clean, and very precise, and there are no errors... And that’s simply not the way it works. And legislators are under this illusion of infallibility. It’s a very dangerous environment in which to be making public policy, that directly implicates the liberty interest of folks.²²⁷

He argued that this knowledge was imperative for enabling legislators to deliberate in a meaningful way and make well-informed decisions about databank expansion.

Similarly, in a note appended to testimony he gave before the Assembly Committees on Codes and Correction on Legislation in 2006, Perry highlights the importance of democratic deliberation in creating legislation on complex issues with broad and important political consequences. He argues,

The issues before the committees are of significant importance and complexity; and yet they have been joined only in the final weeks of the legislative session... as with the processing of DNA evidence, legislation that is hastily crafted and whose analysis is driven by heightened political dynamics is likely to produce a flawed result. I urge the legislature to give the issues before it today the full deliberation they require.²²⁸

Perry’s argument largely captures the essence behind Madison’s reasoning in Federalist no. 10; Perry argues that the legislature *should* hear testimony like his, and then actually discuss and deliberate the various merits of competing views. The

²²⁶ William C. Thompson is a Professor of Criminology at University of California at Irvine who has written extensively on the limits various types of evidence and juries’ ability to evaluate evidence, specifically DNA. William C. Thompson’s Faculty Webpage, School of Social Ecology, UC Irvine, <http://socialecology.uci.edu/faculty/wcthomps>.

²²⁷ Perry, Interview.

²²⁸ “Testimony of Robert Perry on Behalf of the New York Civil Liberties Union, before the New York State Assembly Committee on Codes and the Committee on Correction on Legislation Addressing the State’s DNA Database,” June 27, 2007, accessed on March 26, 2012, <http://www.nyclu.org/content/legislation-addressing-new-york-states-dna-database>.

question, which I will explore later in a case study, is whether legislators actually *do* engage in meaningful deliberation amongst themselves.

In recent years, the Innocence Project's approach to influencing lawmaking regarding the DNA databank has perhaps seemed somewhat less committed to the ideals of deliberative democracy. Some have argued that the organization's attempt to tie broader reforms in the criminal justice system to databank expansion actually detracts from the legislature's ability to deliberate on both expansion and other reforms.²²⁹ While all of the reforms that the NYCLU has pushed for are directly related to the databank, as discussed, the Innocence Project has pushed for the coupling of expansion legislation with a variety of reforms intended to reduce the likelihood of wrongful convictions in cases where DNA evidence is not available, in addition to ensuring defense access to DNA testing. These reforms would amend the criminal procedure law in a variety of ways not directly related to the DNA databank.

Many individuals with whom I spoke that work in law enforcement argued that while there was consensus about the merits of databank expansion among the law enforcement community, the same was not true of other reforms promoted by the Innocence Project. This argument stresses that before legislatures enact laws, debate should first take place first among the citizenry, which includes both advocacy

²²⁹ William J. Fitzpatrick, an Onondaga county district attorney, commenting on a bill introduced by Assemblyman Lentol in the 2011 session that would have coupled reforms with expansion, told the *New York Times*, "As is typical with the Assembly, public safety has to be horse-traded, which is a disgrace. Fitzpatrick saw the attachment of these measures to the expansion bill as a political ploy to attach measures unpopular amongst law enforcement to the legislative item perhaps on the top of law enforcement's priority list. John Eligon, "The Politics of the State's DNA Database (Who's In It, Who Can See It)," Cityroom, *New York Times*, June 25, 2011.

organization and the law enforcement community.²³⁰ For example, The New York State Association of Police Chiefs opposed a bill introduced by Senator Perkins and Assemblyman Lentol related to the electronic recording of interrogations because of fiscal implications, the potential for the suppression of important evidence, concerns that the bill would preclude squad-car interrogations, among other reasons.²³¹ Many argued that databank expansion was used as a political tool to secure the passage of other measures; according to many advocates of database expansion, legislators would not support bills that didn't include the wrongful-conviction provisions in an effort to get allies of the law enforcement community to compromise, not because they were they actually opposed to expansion.

Though representatives of the Innocence Project frame these reforms as related to the DNA database because their necessity has been revealed through learning what went wrong in cases where DNA revealed a wrongful conviction,²³² they also acknowledge that these proposed reforms are attached to databank expansion in part due to political necessity. Barry Scheck, co-director of the Innocence Project, for example, told the *New York Times* during the 2011 legislative session, “the political reality...is that if the wrongful-conviction protections are not coupled with DNA database expansion, those protections will never pass.”²³³ While many may agree that other reform measures seeking to prevent wrongful-convictions are important, given that many of these reforms would be costly to implement, and do

²³⁰ The idea that debate among the citizenry should take place prior to the legislature's adoption of law traces its roots to common law. See Baldacchino, “The Unraveling of American Constitutionalism.”

²³¹ “Memorandum in Opposition: S7877 Senator Perkins A5213-A Assemblyman Lentol,” New York State Association of Chiefs of Police, http://www.nychiefs.org/legislative_memoranda/s7877.html.

²³² See Innocence Project, *Lessons Not Learned*.

²³³ Eligon, “The Politics of the State's DNA Database.”

not have the broad support of law-enforcement, their chances of gaining enough legislative support to pass are not promising. As the next section of this chapter will demonstrate, part of the reason why these measures have not been passed has to do with a lack of true deliberation about their merits and demerits among legislators.

Governor Andrew Cuomo's expression of willingness to address wrongful-conviction protections separately likely played a role in pushing the legislature to strike a compromise with the 2012 expansion. Governor Cuomo, whose initial expansion proposal did not contain any additional reform measures, told the *Wall Street Journal* that while many of the wrongful-conviction proposals were legitimate issues that deserved discussion, they should not be attached to a databank expansion bill. He argued, "they're making a legitimate discussion for how we conduct investigations, how we do confessions, how we do line-ups. There are a lot of issues we can discuss. This is about DNA."²³⁴ The final compromise included only reforms most directly related to the databank; the recording of custodial interrogations was left for another time, while rules guaranteeing defense access to DNA testing were included.

The 2012 Expansion

On March 15, 2012, a bill amending the criminal procedure and the executive laws to enable a judge to order DNA testing of evidence for a defendant or convicted individual with claims of innocence, and to expand the category of "convicted offender" to include those convicted of all crimes in the penal code excluding some low-level marijuana crimes if the offender has no prior convictions, passed both

²³⁴ Associated Press, "NY Weights Expanding DNA Bank to All Criminals," *Wall Street Journal*, March 3, 2012.

houses of the New York State legislature.²³⁵ The bill was signed into law by the governor on March 19. Previously, a similar bill that did not include amendments to the criminal procedure law, nor the exemption for low-level marijuana offenses, was introduced by Senator Saland, and passed the Senate on January 31, 2012.²³⁶ Because the details of the bill ultimately passed were hashed out during a late night session, which has been criticized as decidedly undemocratic,²³⁷ I analyze the passage of the earlier version of the bill to examine how outside sources influence democratic deliberation, when it actually occurs.

On January 31, 2012, the New York State Senate voted to pass S5560-A, a bill introduced by Senator Saland, a Republican representing Columbia and parts of Dutchess Counties, who currently serves as chairman of the Senate Codes Committee, which works on legislation pertaining to criminal justice.²³⁸ The bill was passed a day after the New York State Joint Budget Hearing on Public Protection, where Sean Byrne, Acting Commissioner of DCJS, answered legislators' questions about the Governor Andrew Cuomo's proposal to expand the databank, which was mirrored in Saland's bill.²³⁹ The bill would have expanded the definition of a "designated offense" to include all felonies and misdemeanors in the penal code. During the 2011 legislative session, Saland's bill passed the Senate on but failed to pass the Assembly. Saland's bill was referred back to the Senate Codes Committee on January 4, 2012. As of January 31, 2012, no "same as" had been introduced into the Assembly, though

²³⁵ S. 6733, 2012 Leg., (N.Y. 2012).

²³⁶ S. 5660-A, 2012 Leg., (N.Y. 2012).

²³⁷ See, for example, "Governor Cuomo Succumbs," Editorial, *New York Times*, March 16, 2012.

²³⁸ "Biography," on Senator Saland's webpage, accessed March 26, 2012, <http://www.nysenate.gov/senator/stephen-m-saland/bio>.

²³⁹ "NYS Legislature Joint Budget Hearing on Public Protection," January 30, 2012.

one was eventually introduced on February 13, 2012. At the time of the Senate's passage of S5560-A, a bill had been introduced into the Assembly by Joseph Lentol, the Democratic chair of the Assembly Codes Committee, and long-time advocate of coupling expansion with a broader reform package.²⁴⁰ His bill, A5886b-B, would have required the Commission to promulgate a policy regarding a minimum amount of time for the retention of forensic DNA samples; provided for the appointment of a crime victims' advocate and expert on biomedical ethics to the Commission; created the State Commission for the Integrity of the Criminal Justice System, which would have existed as an independent agency; guaranteed defense access to DNA testing; and prohibited the operation of any other DNA indexes aside from those established by executive law in addition to expanding the category of designated offenses to include all misdemeanors and felonies in the penal law.²⁴¹

Case Study: The Senate Debates S5560-A

During debate on the floor, and in explaining their votes, several state senators explicitly referenced the source of their policy information, or otherwise presented the views of law enforcement agencies, the NYCLU, and the Innocence Project. Several senators referenced the needs and support of the law enforcement community in justifying their support for the particular bill before the Senate. Senator Marcellino, a Republican representing parts of Nassau and Suffolk Counties explained,

Earlier today I attended a press conference...and at that press conference were members of the law enforcement community from all over the state and all levels of the law enforcement community. They spoke with one voice in support of this legislation. The key theme was that this legislation will free the

²⁴⁰ "Innocence Project and New York State Bar Association Urge Lawmakers to Include Wrongful Conviction Provisions in DNA Database Expansion," Press Release, March 5, 2012.

²⁴¹ Assem. 5886-b, 2012 Leg., (N.Y. 2012).

innocent, will exonerate the wrongly accused and will convict the guilty. That's absolutely an imperative... So this databank is an imperative issue and law enforcement really needs this tool in order to keep our communities safe... This bill may not be the most perfect bill in the world, but this bill, according to law enforcement, and according to other levels of government, will go a long way towards doing that.²⁴²

In his statement, Senator Marcellino made no reference to his own opinion on the bill; he did not, for example, compare this bill to others previously introduced, or give reasons justifying why all crimes, in particular, was the best approach to database expansion. For the most part, Senator Marcellino suggested he trusted the bill was well crafted because of law enforcement's vetting of the bill prior to endorsing it. As a legislator, Senator Marcellino has focused much of his career on developing environmental policy and writing environmental laws; he seems to be a "specialist" legislator in the area of environmental protection.²⁴³ Given that Marcellino may not have detailed knowledge of role the DNA databank play in investigations or of its operation, it is unsurprising that he would look to those with greater expertise for guidance on the bill.

In his statement, Senator Gallivan, a Republican representing Erie County, drew upon his own experience in law enforcement to make a case for the passage of the bill, and to counter points made by Senator Hassel-Thompson regarding the need to improve access to post-conviction DNA testing for those with innocence claims. Gallivan has been a legislator only since 2010, but had a long career in law

²⁴² Quotes from this section are taken from "New York State Senate Session—January 31, 2012."

²⁴³ "Biography," Senator Marcellino's State Senate Webpage, accessed March 31, 2012, <http://www.nysenate.gov/senator/carl-l-marcellino/bio>.

enforcement prior to election.²⁴⁴ He was previously elected Sheriff of Erie County and served with the New York State Police for 15 years.²⁴⁵ Citing his professional experience, he explained,

As a former law enforcement officer, I can say without hesitation that the use of DNA evidence in criminal investigations has proven to be the most effective tool of law enforcement at its disposal for identifying, arresting, and prosecuting criminals since the advent of fingerprinting. Since the state established the DNA databank in 1994, there have been no reported breaches of security or privacy that we are aware of...

As both a legislator and a representative of the law enforcement community, Senator Gallivan used his first-hand experience to provide contrary evidence to claims that the databank could pose a risk to privacy. This experience likely signaled to other legislators that he knew what he was talking about, and had carefully weighed and considered the various provisions of the bill. On the other hand, his association with law enforcement may have raised suspicion among legislators who are more skeptical of the interests of the law enforcement community.

Senator Gallivan also drew upon his experience to provide other legislators with a concrete example of the benefits that databank expansion could bring. Citing the possible prevention of rapes and murders highlighted the importance of expansion, and likely provided a strong counter-argument to concerns raised regarding the bill's flaws. Gallivan explained,

...In early 1991, an individual was charged and convicted with patronizing a prostitute. Had DNA evidence been used back then to the extent that we're proposing today, it would have been discovered that that individual was the notorious Western New York serial killer and rapist known as the bike-path rapist. Ultimately DNA evidence collected by other means led to the

²⁴⁴ "Biography," Senator Gallivan's State Senate Webpage, accessed March 31, 2012, <http://www.nysenate.gov/senator/pat-gallivan/bio>.

²⁴⁵ "Biography," Senator Gallivan's State Senate Webpage.

conviction of this individual as the bike-path rapist in 2007. But not after, in the intervening 16 years, many more women were brutalized. Women were murdered. And a man was falsely accused and convicted and spent nearly 20 years in prison. This law will ensure that justice is served, and as important, injustice is prevented.

By establishing himself as a former law enforcement official, Senator Gallivan demonstrates that he is someone with a degree of expertise regarding the issue to whom other less knowledgeable legislators can look for information. By giving a concrete example where collecting DNA from a broader range of crimes could have prevented murders and rapes, and where the use of forensic DNA resulted in exoneration, Gallivan makes a very strong, emotionally charged case for the proposed bill. While a representative from the Innocence Project might counter Gallivan's claim that databank expansion would prevent wrongful convictions, or give a similarly detailed and poignant example of a wrongfully convicted individual who toiled in jail because his attorney had difficulty securing post-conviction DNA testing, they were not present in the room to raise this concern. While some of the Innocence Project's allies, like Senator Hassel-Thompson and Senator Duane, were present, they have not developed the same familiarity and expertise on the subject as have representatives of the organization. Accordingly, legislators may not have been as well equipped to counter concrete examples made by former law enforcement officials involving heinous crimes.

Three senators also stood up to voice their opposition to the bill. Senator Ruth Hassel-Thompson, a Democrat representing parts of the Bronx and Westchester counties, spoke during the debate and explained her vote. Senators Bill Perkins and Thomas Duane explained their votes. In Hassel-Thompson's comments prior to the

vote, she made an argument that contained many points made by the NYCLU and Innocence Project. Hassel-Thomas certainly raised the most specific points regarding various provisions included or left out of the Senate Bill. The resemblance of her argument to those made by the NYCLU and Innocence Project, and the fact that she cites the NYCLU directly, suggests that either she or her staff worked closely with either or both groups in preparing her argument. This demonstrates that in addition to writing actual provisions into bills, advocacy organizations also inform the arguments that legislators rely upon when they debate issues on the floor.

Hassel-Thompson gave a long list of potential reforms left out the DNA bill, many of which were included in a bill Assemblyman Lentol had introduced into the Assembly. She argued,

...New York State should advocate for sequential and double-blind line-ups as used by the FBI. We need to enact eyewitness identification reform to prevent misidentification. The bill should require that custodial interrogation be videotaped or electronically recorded. We should better enable the wrongfully convicted to prove their innocence through post-conviction DNA testing. This includes removing needless barriers to testing, enabling judges to order comparisons of crime-scene DNA and fingerprints to DNA and fingerprint databases, enabling the judge then to order a search and inventory of evidence upon credible petition for post-conviction DNA testing, and enacting a moratorium upon the destruction of biological evidence until best-practices have been established by the New York State experts...

Using language that mirrored a line of argument put forth by the Innocence Project, Hassel-Thompson continued,

We must heed the lesson about how wrongful convictions happen. When we have learned from DNA exonerations, we can prevent future wrongful convictions, recognize wrongful convictions where they may have occurred, and prevent future victims at the hands of unidentified, real, perpetrators...²⁴⁶

²⁴⁶ Innocence Project, *Lessons Not Learned*, 25.

In response to her comments, no Senator took up the discussion of any of the specific points raised by Hassel-Thompson. Her arguments were not truly debated or deliberated on in any meaningful sense of the terms. Gallivan's assertion that "no known breaches of privacy or security have occurred" seemed like an attempt to address Hassel-Thompson's comments, even though most of her discussion focused on wrongful convictions protections, not privacy and security. No examples were offered in response to her points, and no one questioned why she believed various reforms were necessary.

Though she did briefly discuss the story of one of her constituents, Alan Newton, who was wrongly convicted and incarcerated for years while the property clerk's office claimed to have lost evidence from his trial, for the most part Hassel-Thompson delivered a long list of proposals recommended by advocacy groups. She did not detail the merits of any one proposal, in hopes that the Senate might be able to deliberate on the floor and perhaps vote to adopt it. In fact, at the beginning of her speech, Hassel-Thompson remarked,

I had thought to offer a hostile amendment on this bill, but it's been my experience that even when you have a better mouse trap, it doesn't necessarily work in this body, so I've just decided that I wanted to just speak on the bill.

Hassel-Thompson seemed to be alluding to past experiences with unsuccessful attempts to actually discuss and amend a bill on the floor. While it's unclear to which instances, in particular, Hassel-Thompson was referring, she suggested frustration with the difficulty of discussing and deliberating upon issues as a legislative body.

Concerns regarding the racial implications of database expansion elicited the most direct response from other legislators. Citing the NYCLU, Hassel-Thompson argued,

Expanding DNA databases in New York exacerbates racial disparities and inefficiencies. . . . Because people of color are more likely to be stopped, searched, arrested, prosecuted and convicted of low-level crimes also committed by others, the disproportionate race impact of the criminal justice system is exacerbated by the expansion to lower-levels of crime. Familial searching, in particular, if performed without proper protocols, can extend the racial disparity and disproportionality to innocent family members. Local DNA databases and the practice of familial or partial match searches must be regulated by this legislature.

Even still, legislators who seemed concerned by Hassel-Thompson's comments did not ask her for more information about particular issues, nor did legislators in favor of expansion jump to correct her use of the term "familial search," as did many of the individuals with whom I spoke throughout my research for this project.²⁴⁷

In response to the concerns raised by Hassel-Thompson, Senator Perkins, a Democrat representing the Upper West Side, Harlem, and Washington Heights, explained his "nay" vote on the bill, citing somewhat vague concerns about the potential for an "imperfect DNA bill" to hurt communities of color.²⁴⁸ He explained:

. . . The concern I have is that when it's not a perfect bill, who suffers the imperfection? And I raise that because, you know, in case we forget, there was a case that resulted in a great tragedy because of imperfect use of technology.

Senator Perkins recounted the story of five men from his district who were wrongfully convicted for the rape of the Central Park Jogger after they confessed to

²⁴⁷ Many individuals who work for the state with whom I spoke corrected the confounding of the terms "partial match" and "familial searching."

²⁴⁸ Senator Hassel-Thompson argued that "we can, and should, do a better bill, as the Empire State", and that "If the idea of the state of New York is to achieve justice, then a better bill is required." Senator Marcilleno, in attempting to garner support for the bill explained "This bill may not be the most perfect bill in the world, but this bill, according to law enforcement, and according to other levels of government, will go along way towards doing that."

the crime on videotape following hours of interrogation.²⁴⁹ Perkins told the Senate, “Technology, you might say, convicted them,” arguing that faith in the technology of video recording interrogations contributed to this wrongful conviction. It is clear that Perkins’ concern has more to do with lack of trust in the criminal justice system and law enforcement to use technology properly and fairly than with technology itself. He explained,

...Because of the railroading and the rush to judgment and the racial climate that was taking place at the time—very often which we still see when we talk about stop and frisk and mass incarceration—we cannot always assume that some technology, which may be state-of-the-art, is actually going to be used in the way that it’s said it’s going to be used, and whether it is in fact state of the art. So clearly just the notion, just the recognition that this science is not perfect, raises for me the concern as to who will become the victims of this imperfection.

Rather than making a particularized argument challenging the validity of DNA technology, Senator Perkins expressed a more general sense that if there is to be any potential problem with a new technology used by law enforcement, people of color will suffer the consequences.

Sociologist Troy Duster argues that historical experiences have led to the development of a strong mistrust of both law enforcement and the scientific community among African Americans, which has in turn led to a low-level of trust in DNA databanks and the use of forensic DNA techniques by law enforcement.²⁵⁰ The lack of trust in law enforcement to use technology fairly is certainly evident in

²⁴⁹ See Susan Saulny, “Convictions and Charges Voided in ’89 Central Park Jogger Attack,” *New York Times*, December 20, 2002, for a discussion the vacating of the convictions of five men wrongfully convicted in Senator Perkins’ district.

²⁵⁰ Troy Duster, “Explaining Differential Trust of DNA Forensic Technology: Grounded Assessment or Inexplicable Paranoia?,” *Journal of Law, Medicine, and Ethics*, DNA Fingerprinting and Civil Liberties, (Summer) 2006: 293-300.

Perkins' comment. DNA evidence contributed to the identification of the actual perpetrator in the Central Park Jogger case, which ultimately led to the vacating of Perkins' constituents' convictions in 2002. For Perkins, though, the incident seems to have resulted in a general distrust in technology when used by law enforcement rather than in a hope that DNA will bring race-blind justice, as others have argued.²⁵¹ While Senator Perkins' argument seems to evince a lack of nuanced understanding about the concerns being raised regarding the current bill, which generally did not challenge the validity of the science itself, and in fact called for the videotaping of custodial interrogations,²⁵² it does highlight how other law enforcement policies, such as the NYPD's stop and frisk policy, impact trust in law enforcement, especially among communities of color.²⁵³

Of the ten senators who voted against S5560-A, all were Democrats, seven of ten are members of the New York State Black, Puerto Rican, Hispanic and Asian Legislative Caucus,²⁵⁴ and eight represent districts in New York City. This voting pattern should raise concerns about how a lack of trust in the criminal justice system influences the level of democratic debate that can occur. A divide seems to exist within the Senate regarding the overall fairness of the criminal justice system. The

²⁵¹ "Men Wrongfully Convicted in the "Central Park Jogger" Case Mark Fifth Exoneration Anniversary" *Innocence Blog*, The Innocence Project, December 19, 2007, http://www.innocenceproject.org/Content/Men_wrongfully_convicted_in_the_Central_Park_Jogger_case_mark_fifth_exoneration_anniversary.php

²⁵² See Senator Hassel Thompson's comments.

²⁵³ Many Albany lawmakers, citing personal experience, have been fighting the NYPD's "stop and frisk" policy, disproportionately targets men of color; this policy has been a recent point of tension between communities of color and law enforcement. John Eligon, "Taking on Police Tactic, Critics Hit Racial Divide," *New York Times*, March 22, 2012.

²⁵⁴ "The New York State Black, Puerto Rican, Hispanic and Asian Legislative Caucus," Webpage on New York State Senate Website, accessed March 31, 2012 http://www.nysenate.gov/committee/The%20New%20York%20State%20Black,%20Puerto%20Rican,%20Hispanic%20and%20Asian%20Legislative%20Caucus/updates?type=press_release.

contrast between examples given by Senators Golden and Perkins illustrates this point. Senator Golden, a Republican representing a number of neighborhoods in Southern Brooklyn, in arguing for the passage of the bill, explained that

This bill helped to put 10,000 people into jail for crimes that they committed. 3,500 sexual assaults, 900 homicides. And since we've expanded this bill in 2006, another 1,400 people have gone to jail because of being able to identify those that were committing those crimes.

While the fact that the databank has resulted in large numbers of criminals going to jail may be seen as a measure of effectiveness for many legislators, it may raise red flags for others. While he was not likely referring to the incarceration of murders and rapists, Senator Perkins cited concerns regarding racial bias and “mass incarceration.” Golden’s comment may have raised concerns regarding the fairness of the convictions of the other 5,600 people put in jail because of the databank who did not commit homicides or sexual assaults. Without trust in the criminal justice system to be fair, a development lauded for leading to more incarcerations may look suspicious. Not taking concerns regarding perceived bias in the criminal justice system seriously can hinder democratic deliberation by preventing legislators from fully understanding the context of each other’s arguments. Legislators unaware of how racial bias influences the criminal justice and impacts the public’s trust may not be able to fully understand their colleagues’ concerns.

Senator Thomas Duane’s explanation for his vote perhaps best provides a counter-example to Madison’s hope that “the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if

pronounced by the people themselves...”²⁵⁵ His poorly articulated explanation, lacking in substance and specificity, also suggests that he perhaps received a great deal of help, either from the staff of the Innocence Project or his own staff, in drafting an op-ed he published in the *New York Times* in 2006.²⁵⁶ Seemingly attempting to echo the NYCLU, which has cited Bruce Budowle, a former FBI geneticist, in calling for greater study at the federal level of how often CODIS hits actually lead to convictions,²⁵⁷ Duane argued

There’s simply no data. There is no data that, well there’s no data. So there’s no data that proves that there are more cold-hit convictions [Overheard: “No data? Holy---]. I think we all know that this version of a DNA bill is going nowhere. Obviously we need more discussions generally... Those discussions, of course, should be around data. Of which there is no data that exists. There just is no data. It does not exist. So until we have real discussions, and we have real data I’m going to vote no.

While Senator Duane does call for greater “discussion,” his comment does not inspire faith in the ability of legislators to have a well-informed discussion about data.

Senator Duane’s inability to identify anything specific regarding what types of data are lacking, especially after many other Senators pointed to the number of investigations that have been aided by database hits, only worked to preclude any meaningful discussion about the existence of data that could have taken place.

While a number of legislators spoke on the floor of the Senate about the expansion bill, it is unclear to what extent “deliberation” and debate actually occurred. In most cases, legislators reiterated the views of either law enforcement or

²⁵⁵ Madison, “Federalist 10.”

²⁵⁶ The article cites specific work done by the Innocence Project, as well as compilation of scholarly essays edited by David Lazer regarding DNA databanks. Thomas K. Duane. “Think Before You Swab,” *New York Times*, June 11, 2006.

²⁵⁷ NYCLU, *Unanswered Questions*, 2-3.

advocacy organizations, and rarely did they discuss specific provisions of bill. The notion that through debate on the floor legislators might convince each other of better alternatives and amend the bill accordingly seemed out of the question. The debate that took place seemed to be almost a nod to the values of deliberative democracy, rather than an attempt to actually deliberate and reach a better agreement as a result.

The contrast between the Senate's debate and the Commission's debate is stark. Members of the Commission on Forensic Science debated issues in much greater detail, raised a variety of specific points, and engaged with each other's arguments. It was quite apparent that the majority of Senators lacked the specialized knowledge of issues related to databank to engage in such a debate.

The 2012 Expansion Bill is Signed Into Law

In the end, the bill that the Senate passed on January 31 was reworked and amended prior to becoming law. The compromise, however, was largely negotiated by a few key players, likely with the assistance of representatives from both state agencies and the Innocence Project. The deal did reflect a compromise between Lentol and Saland's earlier bills, and a provision was made to exclude low-level marijuana convictions if an offender has no prior convictions, at the request of legislators concerned about racial bias. In many ways, the final bill seemed to reflect a degree of deliberation and compromise. The deal was reached, however, during an all-night session during which Democratic Senators walked out in protest over a

decision regarding Congressional redistricting.²⁵⁸ While many legislators were absent for the vote, compromises were made, and many involved, as discussed in Chapter One, were pleased with the outcome of the deal.

Conclusion:

The staff of administrative agencies, law enforcement professionals, and representatives of the NYCLU and Innocence Project played a major role in all aspects of the progression of the legislative debate that resulted in the 2012 expansion of the New York State DNA databank. Their involvement raises questions about legislators' legitimate authority to govern and make political decisions. If representatives from a variety of groups actually determine the content of laws and provide the rationale that legislators use in advocating on behalf of particular legislative solutions, can we really say that legislators weigh and balance a variety of concerns, and come up with the better solution in the end? Or are they merely spokespeople for a variety of interests, providing the public with the illusion of a decision based upon their legitimate authority?

Comparing the Senate debate both to the process in which the ultimate deal was made, and the Commission on Forensic Science's meeting, demonstrates the complexity of the question *who* should govern and *how* if we are to advance the values of deliberative democracy. What does it mean when those who do not have legitimate authority to govern, and who are not accountable to the people through election, may actually engage in deliberation to a greater degree than legislators? While the process by which the ultimate compromise was reached may seem less

²⁵⁸ Thomas Kaplan and John Eligon, "New York Lawmakers Vote to Limit Public Pensions," *New York Times*, March 14, 2012.

characteristic of the values of a deliberative democracy than public debate on the Senate floor, in the end it seems that participants listened to each other and compromised to a much greater degree.

It is clear that Madison's conception of a democracy where elected representatives of the people debate and deliberate on various topics until they can jointly decide upon the best solution does not necessarily reflect how legislative debate actually occurs. While at the time of the founding Madison intended legislators to temper and refine the views of the people, with the rise of the regulatory state and increasingly scientifically and bureaucratically complex issues, legislators often have difficulty fully understanding the various issues brought before them. As my analysis of the New York State DNA databank demonstrates, though, looking to experts for help can undermine the legitimacy of decisions, and can have the effect of making legislators act largely as spokespeople and brokers between various opinions.

"We must remember the fact which we have encountered several times and which we shall have to discuss repeatedly: that "democracy" as such is opposed to the "rule" of bureaucracy, in spite and perhaps because of its unavoidable yet unintended promotion of bureaucratization."

-Max Weber, Economy and Society, 991.

Conclusion:

My analysis of the case of the New York State DNA databank demonstrates that the question of how to uphold the values of deliberative democracy and to ensure that decisions are made by those with legitimate authority in the face of increasingly scientifically and bureaucratically complex issues does not have a clear answer. A comparison of the Commission on Forensic Science's debate of the partial match policy to the Senate's debate of the 2012 expansion bill suggests that decisions made

by those with legitimate authority do not necessarily reflect reasoned discussion and deliberation. Likewise, the Commission's discussion suggests that groups of experts may be better able than legislators to debate complex issues, even if those complex issues have political implications. Accounting for the amount of influence that experts exercise over lawmaking, in addition, brings into question whether the legislator's deliberation over an issue results in a more legitimate decision. It was precisely the groups represented on the Commission on Forensic Science who most shaped the process of lawmaking most with regards to databank expansion.

In addition, my analysis demonstrates that gaps in the law are necessary to the optimal functioning of bureaucratic administration. At the same time, the difficulty in separating technical and political questions can raise concerns regarding the legitimate authority underlying bureaucratic decisions. Somewhat ironically, most attempts to guarantee the accountability of bureaucrats and to increase the legitimacy of their decisions involve the creation of more bureaucracy, and involve more experts in governance. The idea of an advisory commission is particularly appealing, since its composition seeks to foster an environment conducive to democratic deliberation. Convening a panel of experts representing varying viewpoints and areas of specialty, however, also introduces more experts into governance. Through membership on an advisory commission, knowledge and rule experts can increase their "bureaucratic expertise" of subject, thereby strengthening their indispensability to governance, and especially lawmaking.

Tension will likely continue to characterize the role of experts in democratic governance despite efforts to make bureaucracy more accountable. As Sunstein

suggests, a commitment to the values of deliberative democracy among all state actors can help to mitigate problems of legitimate authority. As increasingly more important issues are governed by administrative agencies, administrators will continually be faced with questions that can be understood as having political implications. Acknowledging these implications and justifying them with public reasons that reflect deliberation can help to strengthen the legitimacy of decisions. Attempts to educate and engage legislators on specific issues, too, can help to promote deliberation among representatives. Of course, those providing education to legislators will be experts, so this too introduces more experts into governance.

While there may be no satisfying answer to the problem of democracy, bureaucracy, and expertise, state and non-state actors can continue to attempt to strive towards the ideals of a deliberative democracy when making decisions. Even the most valiant attempts to increase transparency and deliberation, however, will not erase the inevitable concerns that will be raised regarding the legitimate authority of decisions not made by elected officials, nor will the most thorough attempts at educating legislators likely significantly reduce the influence of experts in governance.

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