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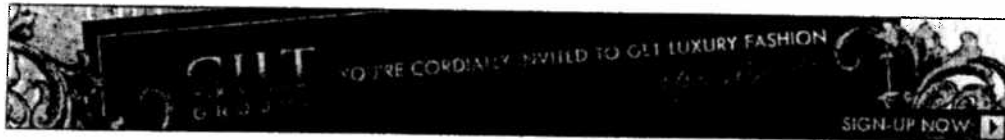
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## Citing Cost, States Consider End to Death Penalty

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A county jail in Lawrenceville, Va., was designed for half as many inmates as it houses. Many states are trying to cut prison costs.

By IAN URBINA  
Published February 24, 2009

ANNAPOLIS, Md. — When Gov. Martin O'Malley appeared before the Maryland Senate last week, he made an unconventional argument that is becoming increasingly popular in cash-strapped states: abolish the death penalty to cut costs.

Mr. O'Malley, a Democrat and a Roman Catholic who has cited religious opposition to the death penalty in the past, is now arguing that capital cases cost three times as much as homicide cases where the death penalty is not sought. "And we can't afford that," he said, "when there are better and cheaper ways to reduce crime."

Lawmakers in Colorado, Kansas, Nebraska and New Hampshire have made the same argument in recent months as they push bills seeking to repeal the death penalty, and experts say such bills have a good chance of passing in Maryland, Montana and New Mexico.

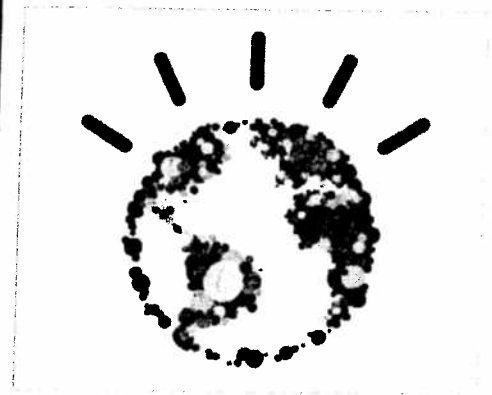
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Gov. Martin O'Malley

Death penalty opponents say they still face an uphill battle, but they are pleased to have allies raising the economic argument.

Efforts to repeal the death penalty are part of a broader trend in which states are trying to cut the costs of being tough on crime. Virginia and at least four other states, for example, are considering releasing nonviolent offenders early to reduce costs.

The economic realities have forced even longtime supporters of the death penalty, like Gov. Bill Richardson of New Mexico, to rethink their positions.

Mr. Richardson, a Democrat, has said he may sign a bill repealing capital punishment that passed the House last week and is pending in a Senate committee. He cited growing concerns about miscarriages of justice, but he added that cost was a factor in his shifting views and was "a valid reason in this era of austerity and tight budgets."

Capital cases are expensive because the trials tend to take longer, they typically require more lawyers and more costly expert witnesses, and they are far more likely to lead to multiple appeals.

In New Mexico, lawmakers who support the repeal bill have pointed out that despite the added expense, most defendants end up with life sentences anyway.

That has been true in Maryland. A 2008 study by the Urban Institute, a nonpartisan public policy group, found that in the 20 years after the state reinstated the death penalty in 1978, prosecutors sought the death penalty in 162 felony-homicide convictions, securing it in 56 cases, most of which were overturned; the rest of the convictions led to prison sentences.

Since 1978, five people have been executed in Maryland, and five inmates are on death row.

Opponents of repealing capital punishment say such measures are short-sighted and will result in more crime and greater costs to states down the road. At a time when police departments are being scaled down to save money, the role of the death penalty in deterring certain crimes is more important than ever, they say.

"How do you put a price tag on crimes that don't happen because threat of the death penalty deters them?" said Scott Shellenberger, the state's attorney for Baltimore County, Md., who opposes the repeal bill.

Kent Scheidegger, legal director of the Criminal Justice Legal Foundation, an organization in Sacramento that works on behalf of crime victims, called the anticipated savings a mirage. He added that with the death penalty, prosecutors can more easily offer life sentences in a plea bargain and thus avoid trial costs.

But Eric M. Freedman, a death penalty expert at Hofstra Law School, said studies had shown that plea bargaining rates were roughly the same in states that had the death penalty as in states that did not.

"It makes perfect sense that states are trying to spend their criminal justice budgets better," he said, "and that the first place they look to do a cost-benefit analysis is the death penalty."

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States are looking elsewhere as well.

Last year, in an effort to cut costs, probation and parole agencies in Arizona, Kentucky, Mississippi, New Jersey and Vermont reduced or dropped prison time for thousands of offenders who violated conditions of their release. In some states, probation and parole violators account for up to two-thirds of prison admissions each year; typical violations are failing drug tests or missing meetings with parole officers.

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## Citing Cost, States Consider End to Death Penalty

2-4pm ET Tuesday, Feb. 24, 2009

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As prison crowding has become acute, lawsuits have followed in states like California, and politicians find themselves having to choose among politically unattractive options: spend scarce tax dollars on expanding prisons, loosen laws to stem the flow of incarcerations, or release some nonviolent offenders.

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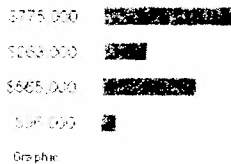
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The costs of death penalty cases can be extraordinarily high.

The Urban Institute study of Maryland concluded that because of appeals, it cost as much as \$1.9 million more for a state prosecutor to put someone on death row than it did to put a person in prison. A case that resulted in a death sentence cost \$3 million, the study found, compared with less than \$1.1 million for a case in which the death penalty was not sought.

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The Cost of Capital Cases

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In Kansas, State Senator Carolyn McGinn introduced a bill this month that would abolish the death penalty in cases sentenced after July 1. "We are in such a dire deficit situation, and we need to look at things outside the box to solve our budget problems," said Mrs. McGinn, a Republican. Kansas is facing a budget shortfall of \$199 million, and Mrs. McGinn said that opting for life imprisonment without parole rather than the death penalty could save the state over \$500,000 per capital case.

But skeptics contend that prosecutors will still be on salary and will still spend the same amount, just on different cases. In Colorado, lawmakers plan to consider a bill this week that would abolish the death penalty and use the savings to create a cold-case unit to investigate the state's roughly 1,400 unsolved murders. While the police must continue investigating these cases, there is no money in the budget for that. A group of families who lost relatives in unsolved murders has lobbied lawmakers on the bill.

In Virginia, competing sentiments are evident in the legislature.

While lawmakers have proposed allowing prison officials to release low-risk offenders up to 90 days before the end of their sentences, citing a potential saving of \$50 million, they are also considering expanding who is eligible for capital punishment to people who assist in killings but do not commit them and to people convicted of murdering fire marshals or auxiliary police officers who are on duty.

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It is considered unlikely, however, that Gov. Tim Wain, a Democrat who opposes capital punishment, would sign such a bill.

In 2007, New Jersey became the first state in a generation to abolish the death penalty.

That same year, a vote in Maryland to abolish the death penalty came up one vote short of passing. In December, however, a state commission on capital punishment recommended that Maryland abolish the death penalty because of the high cost and the danger of executing an innocent person.

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## Capital Cases Stall as Costs Grow Daunting

By SHARLENE DEWANEY and JEFFREY M. HERSHMAN  
Published: November 4, 2007

ATLANTA, Nov. 3 — When Hilton M. Fuller Jr., a semiretired judge of the silver-haired, Southern-gentleman variety, agreed to preside over the trial in a notorious courthouse shooting here, he took a job no one else wanted — the legal community was still in shock over the death of a judge, a court reporter, a sheriff's deputy and a federal agent.



But now, two years later, the truly thankless nature of Judge Fuller's task has become evident. The legislature has threatened to impeach him.

Columnists have taken him to task. On Friday, the district attorney sued him in State Supreme Court. Even fellow judges have abandoned their usual reticence. On a recent afternoon, he received a copy of an e-mail message from a colleague calling him a "debacle," an "embarrassment" and a "fool." And the trial has yet to begin.



Two men involved in the shooting of a federal judge in a courthouse in Atlanta. The judge, Hilton M. Fuller Jr., was killed. The man, Brian Nichols, is accused of killing the judge, a court reporter, a sheriff's deputy and a federal agent. (AP Wirephoto)

The anger directed at Judge Fuller revolves around an issue more and more states are being forced to confront — the rising cost of an adequate defense in death-penalty cases. Even as an examination of lethal injection by the Supreme Court has seemingly suspended the practice across the country, many experts predict that the cost issue will have far broader implications for the future of the death penalty.

States unwilling to pay the huge costs of defending people charged in capital cases may be unable to conduct executions.

For Brian Nichols, accused of killing four in the courthouse shooting in March 2005, the costs have already reached \$1.2 million. That, together with legislative cuts, has left the state public defender system with no money. Until the bills are paid, the judge has delayed the trial, saying that it is unconstitutional not to pay the defense and thus pointless to proceed. In turn, lawmakers have accused him of conspiring to end the death penalty in

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Georgia.

The state could avoid the multimillion-dollar trial by dropping the death penalty option. Mr. Nichols has offered to plead guilty to a sentence of life without parole, but the district attorney, Paul L. Howard Jr., has declined.

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Judge Fuller is not the only jurist to try to force states to pay for a defense that will pass muster with higher courts. Last month, the New Mexico Supreme Court suspended the prosecution of two prison inmates accused of killing a guard, saying their lawyers' pay was so low it was unlikely they could be effective. In Utah, a judge has asked if he can force a lawyer to represent a convicted killer on appeal because, at fees amounting to less than \$10 an hour, no one wants the job.

In California, a federal judge complained in May that death row inmates were waiting more than three years to get a lawyer because the state would not raise the hourly rate. Arizona, Texas and Louisiana are having similar troubles.

"I don't think there's any question that lethal injection is going to be allowed, it's just a question of how," said Stephen B. Bright, a capital defense lawyer and president of the Southern Center for Human Rights in Atlanta. "But the right to counsel is as fundamental as it gets — every other right depends on it."

Defense costs are just one factor in the steep price states are beginning to consider. A 2005 study by New Jersey Policy Perspective, a liberal research group, estimated that capital punishment had cost the state \$256 million since 1983, including \$60 million for defense, and the state has not executed a single inmate in that time. A bill to abolish the death penalty is given a fair chance of passing.

But the issue has come into sharpest relief here, thanks to the scrutiny of the courthouse case, arguably the most complicated murder case in state history.

State Senator Preston W. Smith, the Republican chairman of the Judiciary Committee, has complained that Mr. Nichols is receiving a "high-end, O.J.-style defense" that most taxpayers could not afford. But while the price sounds high, especially for a man whose guilt no one doubts, the cost of even a minimal capital defense has been driven up by technology and the increasing sophistication of law enforcement.

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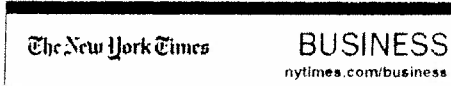

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## Capital Cases Stall as Costs Grow Daunting

By Steven Nash and David L. Mustin

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Mr. Nichols faces a 54-count indictment, a team of five prosecutors, and 400 potential prosecution witnesses. Prosecutors gave the defense team 32,000 pages of documents and 400 hours of taped telephone calls. The defense team has an obligation to review all of the information and investigate each witness. To the irritation of lawmakers, Judge Fuller has kept budget requests sealed to keep the defense strategy from becoming public.

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Judge Fuller is bound by recent Supreme Court decisions that have underscored the importance of the defense counsel's performance during the sentencing phase of the trial, when juries consider mitigating and aggravating factors in deciding whether to impose the death penalty. In a 2003 case, the court

ordered a new sentencing hearing because defense lawyers failed to fully investigate their client's background and present evidence of severe childhood sexual and physical abuse. In a 2005 case, the Supreme Court again found that a more thorough review by the defense would have unearthed information that the jury should have heard.

In both cases, the court cited guidelines issued by the American Bar Association in 2003, which detail the special skills capital defenders must have and the "extraordinary efforts" they must undertake because of the irreversible punishment. Capital defendants must have at least two lawyers, the guidelines say, and each phase of the appeals process should include an independent investigation.

Exonerations have also highlighted the need for a competent defense. "We have all this new evidence being discovered 10 years later," said George H. Kendall, who has monitored capital defense in Georgia and now works in the New York office of Holland & Knight. "If there was a real defense at the time, it would have come up then."

The Nichols defense team, which plans to argue that its client was suffering from a mental disorder, says the anger at Judge Fuller is misplaced. The defense budgets are first presented to the Georgia Public Defender Standards Council, which has not objected to any of the requests as unreasonable. It has simply said it cannot pay.

But neither the judge nor the council has been spared.

The council was established as a statewide public defense system in 2005 in response to widespread problems, including divorce lawyers assigned to capital cases and lawyers

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sleeping through trials. Three months later, the Nichols trial became the first major test of lawmakers' commitment to the new system. They have seized control of the council and gutted its capital defense budget, cutting it to \$4.8 million from \$7 million a year.

Courts have repeatedly demanded a better defense in capital cases, but states have repeatedly refused to pay for it. In 1996, Congress established a "fast track" that would shorten federal deadlines in capital cases if states agreed to provide competent representation to death row inmates. No state has fulfilled the requirements.

Capital defense lawyers face the highest possible stakes, but in many states the job is one of the lowest-paid in the legal system. In New Mexico, for example, appointed capital defenders work under a contract system that caps their fee at \$24,500, a salary that amounts to an hourly wage of just \$19.50 for the average death penalty case, not enough to cover their overhead, according to a brief filed by the New Mexico Criminal Defense Lawyers. In contrast, private criminal defense lawyers in New Mexico made an average of \$161 per hour in 2004.

The lead lawyer in the Nichols case, Henderson Hill, is billing \$175 an hour instead of his usual \$325. Another of his four lawyers has waived her fee. None have been paid since July.

Lawmakers say Judge Fuller and the defense lawyers are deliberately driving up the costs to make sure that the death penalty is too expensive for the state.

And in fact, better-financed systems do reduce the number of capital cases — coming closer, advocates say, to ensuring that the death penalty is reserved for the worst of the worst offenders. North Carolina, which instituted what is often pointed to as a model capital defense system in 2001, has gone from an average of 24 capital convictions a year to 5. It is too soon to know if the reversal rate, extraordinarily high in death penalty cases, has also been reduced.

When Judge Fuller took on the Nichols trial, prosecutors and defense lawyers alike praised the choice, saying he had rarely, if ever, been overturned on appeal. But his reputation has since taken a beating.

"I'm beginning to think I am a fool for taking this case," the judge said, rereading the e-mail message in which a fellow judge called him one. "I thought people would give me the benefit of the doubt. That was naive."

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February 19, 2009

## Study Calls for Oversight of Forensics in Crime Labs

By **SOLOMON MOORE**

Crime laboratories around the country are grossly underfunded, lack a scientific foundation and are compromised by critical delays in analyzing physical evidence, according to a broad study of forensic techniques published Wednesday by the National Academy of Sciences, the nation's premier scientific body.

Among its many criticisms, the study counted a backlog of 359,000 requests for forensic analysis in 2005, a 24 percent increase in delays since 2002. A survey of crime laboratories found 80 percent of them to be understaffed.

A new federal agency is needed to regulate these laboratories, standardize forensic techniques and pay for research, according to the report, which was financed by Congress in 2005.

The study recommends that an agency, to be called the National Institute of Forensic Science, be created and be independent of the Justice Department, which has traditionally been the nation's primary forensics research agency. Crime laboratories should be managed separately from police departments to ensure that their findings are protected from bias, the report said.

"The potential for conflicts of interest between the needs of law enforcement and the broader needs of forensic science are too great," the authors wrote.

The report, the product of a two-year review by the academy, an independent body, is not legally binding. But legislators from both parties have already committed to holding hearings on the study, and officials from all the federal law enforcement agencies are reviewing the document in anticipation of possible policy changes.

"I am troubled by the report's general finding that far too many forensic disciplines lack the standards necessary to ensure their scientific reliability in court," said Senator Patrick J. Leahy, Democrat of Vermont and chairman of the Judiciary Committee.

Senator Arlen Specter of Pennsylvania, the ranking Republican on the committee, said he was also troubled by the findings.

The report calls into question the scientific merit of virtually every commonly used forensic method, including analysis of fingerprints, hair, fibers, blood spatters, ballistics and arson. Only DNA, which the panel said had benefited from rigorous scientific scrutiny and peer review outside of the forensics discipline, escaped significant criticism.

"The fact is that many forensic tests, such as those used to infer the source of tooth marks and bite marks,

have never been exposed to stringent scientific scrutiny," the report said. The report highlights crime laboratory scandals involving hundreds of tainted cases handled by police agencies in Michigan, Texas and West Virginia, and by the Federal Bureau of Investigation. At least 10 wrongly convicted men have been exonerated as a result of those laboratory investigations, and the cases of hundreds of other people convicted with the help of those facilities are under review.

The panel also found that most of the nation is served by death investigation offices that lack accreditation. It cited an 18-year-old high school student in Indiana who was recently elected deputy coroner after a short training course.

The academy said that in addition, judges and lawyers generally lacked the scientific expertise necessary to "comprehend and evaluate forensic evidence in an informed manner."

Attorney General Eric H. Holder Jr. said his office would be reviewing the report over the next several days.

"We have the potential to solve a lot of crimes, to find people who are guilty and to absolve a lot of people who are not through the use of these great forensic techniques," Mr. Holder said.

Justice Department officials declined to comment on specific recommendations, including the establishment of a National Institute of Forensic Science.

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## Science Found Wanting in Nation's Crime Labs

Forensic evidence that has helped convict thousands of defendants for nearly a century is often the product of shoddy scientific practices that should be upgraded and standardized, according to accounts of a draft report by the nation's pre-eminent scientific research group.

The report by the National Academy of Sciences is to be released this month. People who have seen it say it is a sweeping critique of many forensic methods that the police and prosecutors rely on, including fingerprinting, firearms identification and analysis of bite marks, blood spatter, hair and handwriting.

The report says such analyses are often handled by poorly trained technicians who then exaggerate the accuracy of their methods in court. It concludes that Congress should create a federal agency to guarantee the independence of the field, which has been dominated by law enforcement agencies, say forensic professionals, scholars and scientists who have seen review copies of the study. Early reviewers said the report was still subject to change.

The result of a two-year review, the report follows a series of widely publicized crime laboratory failures, including the case of Brandon Mayfield, a lawyer from Portland, Ore., and Muslim convert who was wrongly arrested in the 2004 terrorist train bombing in Madrid that killed 191 people and wounded 2,000.

American examiners matched Mr. Mayfield's fingerprint to those found at the scene, although Spanish authorities eventually convinced the Federal Bureau of Investigation that its fingerprint identification methods were faulty. Mr. Mayfield was released, and the federal government settled with him for \$2 million.

In 2005, Congress asked the National Academy to assess the state of the forensic techniques used in court proceedings. The report's findings are not binding, but they are expected to be highly influential.

"This is not a judicial ruling; it is not a law," said Michael J. Saks, a psychology and law professor at Arizona State University who presented fundamental weaknesses in forensic evidence to the academy. "But it will be used by others who will make law or will argue cases."

Legal experts expect that the report will give ammunition to defense lawyers seeking to discredit forensic procedures and expert witnesses in court. Lawyers could also use the findings in their attempts to overturn convictions based on spurious evidence. Judges are likely to use the findings to raise the bar for admissibility of certain types of forensic evidence and to rein in exaggerated expert testimony.

The report may also drive federal legislation if Congress adopts its recommendations. Senator Richard C. Shelby, Republican of Alabama, who has pushed for forensic reform, said, “My hope is that this report will

provide an objective and unbiased perspective of the critical needs of our crime labs.”

Forensics, which developed within law enforcement institutions — and have been mythologized on television shows from “Quincy, M.E.” to “CSI: Miami” — suffers from a lack of independence, the report found.

The report’s most controversial recommendation is the establishment of a federal agency to finance research and training and promote universal standards in forensic science, a discipline that spans anthropology, biology, chemistry, physics, medicine and law. The report also calls for tougher regulation of crime laboratories.

In an effort to mitigate law enforcement opposition to the report, which has already delayed its publication, the draft focuses on scientific shortcomings and policy changes that could improve forensics. It is largely silent on strictly legal issues to avoid overstepping its bounds.

Perhaps the most powerful example of the National Academy’s prior influence on forensic science was a 2004 report discrediting the F.B.I. technique of matching the chemical signatures of lead in bullets at a crime scene to similar bullets possessed by a suspect. As a result, the agency had to notify hundreds of people who potentially had been wrongfully convicted.

In its current draft report, the National Academy wrote that the field suffered from a reliance on outmoded and untested theories by analysts who often have no background in science, statistics or other empirical disciplines.

Although it is not subject to significant criticism in the report, the advent of DNA profiling clearly set the agenda. DNA evidence is presented in less than 10 percent of all violent crimes but has revolutionized the entire science of forensics. While DNA testing has helped to free more than 200 wrongfully convicted people, “DNA was a shock to police culture and created an alternative scientific model, which promoted standardization, transparency and a higher level of precision,” said Paul Giannelli, a forensic science expert at Case Western Reserve University School of Law who presented his research to the National Academy. Enforcement officials, Mr. Giannelli said, “chose to say they never make mistakes, but they have little scientific support, and this report could blow them out of the water.”

Peter J. Neufeld, a co-director of the Innocence Project, a nonprofit group that uses DNA evidence to exonerate the wrongfully convicted, presented to the academy a study of trial transcripts of 137 convictions that were overturned by DNA evidence and found that 60 percent included false or misleading statements regarding blood, hair, bite mark, shoe print, soil, fiber and fingerprint analyses.

The courts have long struggled with the proper role of scientific evidence. In a 1993 landmark decision, *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court held that scientific testimony had to meet an objective standard. Federal courts have occasionally excluded evidence like handwriting and hair analysis.

Donald Kennedy, a Stanford scientist who helped select the report’s authors, said federal law enforcement agencies resented “intervention” of mainstream science — especially the National Academy — in the courts.

He said the National Institute of Justice, a research arm of the Justice Department, tried to derail the forensic study by refusing to finance it and demanding to review the findings before publication. A bipartisan

vote in Congress in 2005 broke the impasse with a \$1.5 million appropriation

Mr. Shelby also accused the National Institute of Justice of trying to infiltrate the forensic study panel with lobbyists for private DNA analysis companies, who were seeking to limit the research to DNA studies.

The National Institute of Justice said it would not comment until the report was released. But a preview of potential turf wars played out in the presentations to the National Academy in December 2007. A forensic expert from the Secret Service blasted the F.B.I. for developing questionable techniques "on an ad-hoc basis, without proper research."

He said the Secret Service wanted the National Academy "to send a message to the entire forensic science community that this type of method development is not acceptable practice."

Everyone interviewed for this article agreed that the report would be a force of change in the forensics field.

One person who has reviewed the draft and who asked not to be identified because of promises to keep the contents confidential said: "I'm sure that every defense attorney in the country is waiting for this report to come out. There are going to be challenges to fingerprints and firearms evidence and the general lack of empirical grounding. It's going to be big."

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