

## Failed Justice: Convicted but Innocent

by {ga=krentas}

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Photo (cc) [mag3737](#) How does one move on from a wrongful conviction?

With Dr. Seuss's pink hardcover of "Oh Say Can You Say?" tucked under his right arm, Alan Newton politely follows the energetic students down [Jackie Robinson P.S. 375](#)'s beige halls. The children scout out a class for Newton. It's

[Read Across America](#)

day and his chance to read aloud Seuss' book of clever tongue twisters.

Newton had arrived around 10 a.m. to help organize and direct volunteers. But now it is close to 1 p.m. and most of the classes received their readings earlier. Teachers have resumed their lesson plans. Newton missed his chance.

Newton has missed many chances in life. Now 48, he spent almost half his life in upstate prisons for rape, robbery and assault charges stemming from a June 1984 crime against a woman in the Bronx. Not until 2006 did DNA absolve him of the 1985 conviction. He was innocent.



Exonerated after spending 22 years in prison, Alan Newton waits in the hall of P.S. 375 after participating in Read Across America.

Newton's story is just one of hundreds nationwide that have weakened faith in the justice system. New Mexico Gov. Bill Richardson [repealed](#) the death penalty in his state in March, citing the potential for executing the wrong person among the many reasons.

Here in New York, the state [bar association](#) has begun identifying the causes of wrongful convictions in New York. In a recent report, [an association task force](#) reviewed 53 cases of vacated convictions. Its findings do not conclude that each was a case of

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innocence, but that errors and lapses in due process led to "a conviction [that] was wrongfully obtained."

A number of bills to address wrongful convictions have been proposed in the state legislature, and a previous attempt to expand the state's DNA database could have resulted in fewer conviction errors.

"No one benefits from a wrongful conviction. Not the police, not the prosecutor, not the judge, not the jury, not the victim," said Stephen Saloom, policy director at the [Innocence Project](#). "The only person that really benefits is the perpetrator."

### Causes of Wrongful Conviction

The 53 cases studied by the bar association represent only a sample of cases, although it's difficult to determine the extent of wrongful convictions in New York. The state [Division of Criminal Justice Services](#) does not keep track of wrongful convictions, said John Caher, the director of public information. Whatever the number, criminal justice experts and professionals agree that flaws in the system need to be addressed.

Newton's case exemplifies how things can go so terribly wrong. Soon after Newton's arrest, he said his then fiancée presented his alibi: Newton was in Queens with her at the time of the rape. But a Bronx store clerk identified Newton in a lineup as the male customer who trailed the victim out of the store. The victim, too, identified Newton. She chose him in a photo array as the man who forced her into his vehicle after she left the store, dragged her to a park and raped her, then stalked her as she tried to flee. He then allegedly brought her to an abandoned building where he raped her again and blinded her in the left eye with a box cutter.

Newton said in 1979 police had slapped him with a misdemeanor assault charge after he and his teenage friends grappled with an opposing group of teens. Five years later, his arrest photo was shown to the rape victim.

"Her testimony and the store clerk's testimony convicted me," Newton said. "That photograph is ultimately the reason why I'm here today."

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Improvements in forensic science finally caught up with the evidence in Newton's case. Newton began requesting DNA testing on the victim's rape kit in 1994, nine years into his 13 and a half to 40-year sentence. Officials say they could not find the evidence.

The Innocence Project took up Newton's case. Since 1992, the non-profit legal organization has helped free 234 people based on DNA evidence, said a spokeswoman. Through its efforts, the kit was found in 2005 where it should have been all along, Saloom said.

Newton's case was among the 53 the task force studied. Mishandling of forensic evidence and/or not using DNA testing contributed to a wrongful conviction in almost half the cases. In most, as in Newton's case, which involved mishandling of forensic evidence and misidentification, more than one factor contributed to the wrongful conviction.

The task force found that errors by defense attorneys, false confessions and false testimony by jailhouse informants also contributed to imprisoning the wrong person. About 58 percent of vacated convictions stemmed from errors by a prosecutor, officer or judge. The most common cause of wrongful convictions, misidentification of the accused, accounted for about 67 percent of the cases.

Newton felt wronged but did not hold a grudge against the victim, he said. He thinks it was an honest case of mistaken identity. But he is definitely mad at the justice system.

"It's almost like there's no incentive for them to find out the truth about an innocent person because the cops solve the crime, they get a promotion or a raise or whatever," Newton said. "When a person is exonerated and a cop goes out his way to help the person, you don't hear about him getting no accolades."

### Prosecutorial Problems

The state bar association's task force tackled the 53 cases last year in an effort "to pinpoint where the system let us down," said Bernice Leber, a partner at law firm [Arent Fox](#) and president of the bar association.

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The task force reviewed cases and interviewed some of the judges, lawyers and the exonerated, Leber said. Their findings showed what other legal experts and advocates knew: The system needs reform.

In 31 cases, government malpractices contributed to a wrongful conviction. These included a prosecutor's failure to hand over information the defense had a right to examine and a prosecutor's purposeful use of false testimony. Failure to collect and preserve evidence and police not investigating other potential suspects were also cited by the report.

"I think if a prosecutor knowingly presents false testimony and it can be shown, then it's a crime and it's a kind of behavior from any lawyer that the system can't tolerate," said defense attorney [Joel Rudin](#). He estimates he has helped overturn about 15 convictions.

Prosecutors argue that purposeful misconduct happens infrequently. But unintentional errors sometimes occur, such as not giving the defense evidence that the police unintentionally withheld from the prosecutor, said Anne Swern, first assistant district attorney for Brooklyn District Attorney Charles Hynes, a member of the task force. On appeal, the prosecutor's failure to hand over evidence to the defense could be called prosecutorial misconduct even if it was not a "willful mistake," Swern said.

To limit the argument over withheld evidence, the task force suggests requiring a pre-trial conference that would establish that the defense has assessed evidence held by police and the prosecutor.

### **A Deficient Defense**

Sometimes, though, defense counsel may be at fault. They do not always adequately review evidence or represent their clients. Supposedly on the side of the accused, defense attorneys have contributed to their client's wrongful convictions "usually [through] a failure to fully investigate or to offer alternative theories and/or suspects," according to the report.

"That's fundamental," Saloom said about every defendant's right to reliable counsel. "Our

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system relies upon an adequate defense --period."

For quality control of defense attorneys, the task force suggests additional resources that allow lawyers to investigate further and receive more supervision of their work. Additional funding could also provide poor defendants with lawyers even after appeal, when they are trying to get their convictions vacated, Rudin said.

"In our system now, no one has the right to a lawyer once they've lost appeal," he said. "You have all these people in prison with no resources whatsoever and no legal training, and most of the time they end up representing themselves and don't know how to do it."

False confessions have also contributed to wrong convictions. In 1990, five teenagers were convicted in the beating and rape of a [Central Park](#) jogger. They confessed to the crime on videotape but DNA later implicated a lone man, not the teenagers. In 2002, their convictions were [vacated](#) amid accusations of racism and police misconduct during the original investigation.

False confessions helped cause a wrong conviction in 12 of the 53 cases, the task force found.

### A Taped Record

Some, including Assemblymember Joseph Lentol of Brooklyn, advocate for videotaping interrogations, not just confessions. This, they maintain, would provide reliable evidence of whether coercion played a role in a confession.

But even those who support videotaped interrogations are leery of the costs involved. If police taped all confessions and the entirety of interrogations, prosecutors would have to view hours of tape, some of which might not be of evidentiary use, and the tapes would have to be stored for years. This all costs money, said Swern, who serves on the board of the [National District Attorney's Association](#).  
. Paying for the equipment could also be an issue in some jurisdictions.

"Indeed, if adequate funding is not provided, there could be an unwitting failure to comply with

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the mandate and, depending on the sanction for non-compliance, strong and persuasive evidence of a defendant's guilt (i.e., his voluntary confession) may be suppressed," wrote Swern in an e-mail. "That result would not further the cause of justice."

A former prosecutor and defense attorney, [Lentol](#) says he plans to push for funding support of proposals like videotaped interrogations.

"Even if it costs money, how much is a human life worth? Do we want to risk a valuable citizen because we didn't have a few bucks?" he said.

With the status of videotaped interrogations up in the air, critics argue that police need more training in interrogations and recognizing false confessions elicited under extraordinary pressure.

"I think police need to be educated more than they probably are that there are such things as false confessions," said Judge Barry Kamins, a former prosecutor and chair of the task force. "If you ask the public most people would think, 'Why would you confess to something you didn't do?' It is a strange phenomenon but it does happen."

### Mistaken Identity

Several studies in the last few years single out the misidentification of the accused as the primary reason for wrongful convictions. The task force recommends changes in police procedures that can make the process fairer and more accurate.

The recommendations include assigning an officer who does not know the identity of the suspect to administer lineups and photo arrays. This prevents intentional or unintentional influence by the officer on the witness.

In one of the most egregious instances, Leber said, "the accused was handcuffed to a table during the lineup and no one else was."

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Each step in the identification process should be documented, including the witness's degree of certainty when describing the suspect or picking a suspect from a photo or lineup, according to the report. The New York Police Department did not return requests for comment on the recommendations.

### The New Tool

To undo the potential for human error posed by, for example, witnesses or police, the courts have relied heavily on the absolutes of DNA profiling. Since its inception in 1985, the evolution of DNA profiling and its use in solving crimes has led to a push for increased DNA testing. But many support DNA database expansion more as a strategy to catch the guilty than to clear the innocent.

Former Gov. Eliot Spitzer sought to [expand](#) the DNA database by including anyone convicted of a misdemeanor or a felony, instead of just some felonies, like sexual assault. But that fell through with his governorship.

Rockland County State Sen. Thomas Morahan has proposed new legislation to mandate DNA samples from everyone convicted of a felony since Jan. 1, 2003. His motivation for the expansion: helping police solve sex crimes. And in his State of the City speech last year, Mayor Michael Bloomberg proposed that arrestees, not just convicts, be required to add their [DNA swab](#) to the database.

But less than 5 percent of cases involve DNA evidence that can 100 percent prove innocence or guilt, said Saloom. Rudin said none of his wrongful conviction cases included DNA that could absolve his client. In those cases he couldn't argue innocence based on DNA, but instead had to attack the "fairness of the process."

"The reason we're supposed to have a fair process is to increase the likelihood that the result will be consistent with what really happened," Rudin said.

### Reducing Mistakes

The task force's proposals, as well as those from the Innocence Project and some members of

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the state legislature, seek to increase the fairness and accuracy of the criminal justice system. Lentol, for one, has [sponsored legislation](#) that makes it easier for the accused to request post-conviction DNA testing on evidence, such as rape kits. Presented in February, the bill has been referred to the Committee on Codes, of which Lentol is chair.

This bill accompanies a package of legislation that would expand the state's DNA database, require videotaping of interrogations and establish an Innocence Commission, Lentol said. The commission would investigate and reconstruct cases of wrongful convictions -- as investigators reconstruct a plane crash -- to find the faulty parts, he said. If his bills make their way through the political and bureaucratic obstacles, Lentol said he expects them to come up for a vote in late April or May.

[Another bill](#) in the Assembly, similar to Lentol's Innocence Commission, has spent two years working its way down the pipe. Sponsored by Assemblymember Michael Gianaris of Queens and picked up in the Senate in 2008 by Sen. Eric Schneiderman of Upper Manhattan, the bill would create the State Commission for the Integrity of the Criminal Justice System. The bill has been referred to the Ways and Means Committee in the Assembly and the Judiciary Committee in the Senate.

The permanent commission would investigate cases of wrongful convictions to establish their causes. The unpaid commission members would submit to the attorney general and governor recommendations on how to prevent wrongful convictions. Schneiderman says he thinks the governor and legislature would take the recommendations seriously because "the evidence of wrongful convictions that has developed in the last decade has had a tremendous effect on public policy."

### Life After Wrongful Imprisonment

The crime Newton was convicted for is still an unsolved mystery. DNA excluded Newton but has not linked police to the actual perpetrator. Newton said he wishes the rapist had been caught 20 years ago. But he focuses on his present life and reminds himself that it feels good to be home.

On Read Across America day he opted for the professional look: a dark, well-fit suit paired with a red and gold striped tie. This might be his regular get-up in the next few years. After spending countless hours reviewing his own case while in prison, Newton wants to be a lawyer.

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"I tell people I've been studying law for 20 years," he said.

He hasn't applied to law schools yet, so until then he has his job in the [Male Development and Empowerment Center](#)

at Medgar Evers College. He recruits male students and sticks with them to encourage them to graduate. The center also organizes community service events, like reading to children at local elementary schools. While working at Medgar Evers, Newton earned his B.A. in business administration. It didn't take the average four years --he earned college credits while in prison.

While he has adjusted to his new life, nostalgia for what his life could have been is evident when he talks about his former fiancée. His family liked her and her family liked him, he said. But his conviction changed all that.

"One of the things she told me, she said, I hurt her because I told her I was coming home, and I didn't come home," Newton said. They never married.

For his time lost, pain and suffering, Newton is suing the city and the state for \$50 million each. He filed his suits for compensation in late 2006, yet he is still not close to a conclusion.

"One thing I have plenty of is patience," Newton said. "What were you doing all that time in that cage? You were waiting."

Compensation for New Yorkers wrongfully convicted has varied wildly. Victor Ortiz won [\\$530,000 in damages](#)

in 2000. He served nine years for rape and sodomy that DNA evidence later helped overturn.

But in October 2008, Rudin helped

[Shih-Wei Su](#)

obtain \$3.5 million for his 12 years in prison.

The task force suggests setting a minimum level of compensation, but if the convicted person opts to seek more, the minimum amount is waived. Other states have set minimum compensation amounts, but some have a hard time placing a dollar amount on an individual's

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life.

The state's claims law also currently excludes compensation for anyone who falsely confesses. The task force wants to see that change, too.

Aside from compensation after incarceration, which can take years, some argue that counseling, job training and other assistance for the wrongfully convicted is lacking.

"I think they need the most help of all because they shouldn't have been there," said Kamins. "After all, somebody in jail for 20 years for something they didn't do and you just open the door and say, 'Goodbye, here's some train fare.' That's just not appropriate."

But state officials dispute that; saying that the wrongfully convicted can access reintegration services as any other formerly incarcerated individual could.

Luckily, Newton, who said there was no government help for him after his release, had family he could rely on and an education underway. He doesn't mind the media attention, he says, because people need to know the system is flawed.

"A lot of times people don't believe this happens," Newton said. "This doesn't happen to the billionaires, this happens to ordinary people. They think it happens to other people. We all are those other people."