RESOLUTION

RESOLVED, That the American Bar Association urges each federal, state, and territorial jurisdiction where capital punishment is permitted to adopt a statute or rule providing an appropriate judicial procedure whereby successors of an executed individual may bring and litigate a claim that the individual executed was in fact innocent of the capital offense.

FURTHER RESOLVED, That such statute or rule shall provide for the award of monetary compensation to the successors of the wrongfully executed individual for the period of the wrongfully executed individual’s wrongful incarceration awaiting his or her execution and also for the specific act of wrongfully executing the individual.
REPORT

This Resolution urges federal, state, and territorial jurisdictions\(^1\) that authorize the execution of individuals convicted of committing capital offenses to provide statutory or other legal means by which the successors\(^2\) of executed individuals may establish that those individuals were wrongfully executed. The Resolution further urges that these jurisdictions provide compensation for the successors of those who have been legally determined to have been wrongfully executed. Recovery under such statutes should compensate for both the wrongful incarceration leading up to the wrongful execution and for the act of wrongful execution itself.\(^3\)

Since 1989, there have been at least 1,324 individuals who have been found to have been wrongfully convicted and incarcerated in the United States.\(^4\) There are various known causes of wrongful conviction and incarceration. These include erroneous witness identifications, false confessions, invalid forensic evidence, false testimony by

\(^1\) Even if some jurisdictions do not currently authorize capital punishment, this Resolution urges that any jurisdictions adopting capital punishment in the future provide statutory or other legal means by which the successors of executed individuals may establish that those individuals were wrongfully executed and also provide compensation for individuals legally determined to have been wrongfully executed.

\(^2\) “Successors” of executed individuals include the executed individual’s heirs, devisees, and beneficiaries as defined by the law in which the executed individual was domiciled at the time of his execution. Cf. UNIFORM PROBATE CODE § 1-201(49) (2010) (defining “successors” as “persons, other than creditors, who are entitled to property of a decedent under his [or her] will or this [code]”). Where executed individuals have no heirs, devisees, or beneficiaries to attempt to establish the executed individual’s wrongful execution, “successors” of executed individuals may also include a non-profit legal organization, which may attempt to establish the wrongful execution. If such a non-profit legal organization successfully establishes a wrongful execution, the awarded compensation should be used to fund the legal representation of indigent criminal defendants or to assist other successors attempting to litigate wrongful execution claims within the jurisdiction.

\(^3\) For a more robust argument that jurisdictions should compensate for wrongful execution, see generally Meghan J. Ryan, Remediaying Wrongful Execution, 45 U. Mich. J.L. Reform 261 (2012).

government informants, government misconduct, and poor legal representation. Some jurisdictions have taken steps to address these various contributors to wrongful conviction, but it is difficult to identify and resolve all such potential errors in the criminal justice system. In 2005, the ABA House of Delegates adopted Resolution 108A, which “urges federal, state, local and territorial jurisdictions to enact statutes to adequately compensate persons who have been convicted and incarcerated for crimes they did not commit.” Today, twenty-nine states, as well as the federal government and the District of Columbia, have statutes providing some form of compensation for those who have been wrongfully convicted and incarcerated.

Although the ABA and various jurisdictions have recognized the concern of wrongful conviction and incarceration, there has not been similar recognition of the parallel, and even more egregious, matter of wrongful execution. To date, there have been no legal determinations that any individual has been wrongfully convicted and executed in the United States. But this is not necessarily because no wrongful executions have occurred. In fact, approximately 8% of the 1,324 exonerations since 1989 were of individuals sentenced to death, suggesting that it is certainly possible for an individual to be sentenced to death despite the more rigorous procedural protections provided for defendants in capital cases. Additionally, there are several cases in which death row defendants died in prison of natural causes but were later exonerated. For example, Frank Lee Smith—a man convicted of raping and murdering an eight-year-old girl but who then died of cancer on death row—was exonerated in 2000 after DNA evidence cleared him and the sole eyewitness in his case recanted. Similarly, Louis Greco and Henry Tameleo, who were convicted of murder in 1965 and sentenced to death but then later died in prison, were exonerated when it was discovered that the Federal Bureau of

7 Ryan, supra note 3, at 262.
8 See id. at 273, 302–03; National Registry of Exonerations, supra note 4. One recent study estimates that approximately 4% of individuals sentenced to death are innocent and maintains that, although many of these individuals are exonerated before they are executed, “it is all but certain that several of the 1,320 defendants executed since 1977 were innocent.” See Samuel R. Gross et al., Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death, PNAS EARLY EDITION (2014).
9 For several examples of such posthumous exoneration, see Ryan, supra note 3, at 277–78.
Investigation had participated in framing them. Moreover, there are several cases in which the guilt of an executed individual has been seriously questioned.

There are several hurdles to establishing wrongful execution. First, “[t]he attorneys and media that are often essential in bringing to light wrongful convictions tend to focus their resources on the stories of those who are still alive rather than those who have already been executed and thus cannot be saved.” Further, “it generally becomes more difficult to prove a defendant’s factual innocence as time passes because memories fade and evidence and witnesses disappear.” Perhaps most importantly, though, very few, if any, jurisdictions have provided legal avenues—aside from executive clemency—through which the families and friends of executed individuals can legally establish that the individual was wrongfully executed. In Texas, litigants have sought to make use of a state judge’s authority to establish a Court of Inquiry to investigate cases of public interest in their pursuit to have an executed individual exonerated. Virginia law provides for the grant of a “writ of actual innocence,” which could potentially be another vehicle for establishing wrongful execution. The law, however, requires the “petitioner” to have been convicted before the writ is granted, and the writ appears not to have been granted in any case in which the convicted defendant was deceased. A writ of coram nobis or coram vobis might also hold potential for establishing wrongful execution,

12 See, e.g., Hugo Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 STAN. L. REV. 21, 72 (1987) (empirically studying wrongful executions and near-wrongful executions, and cataloguing “twenty-three cases of persons we believe to be innocent defendants who were executed”); Ronald J. Tabak, Capital Punishment, in The State of Criminal Justice 2014 (forthcoming 2014) (telling the stories of several executed individuals who were quite possibly innocent of the crimes for which they were convicted).
13 Ryan, supra note 3, at 274.
14 Id. As Meghan J. Ryan explains, “[p]erhaps the only way to persuasively establish innocence is through DNA evidence. However, there is often no DNA evidence available for testing, and even when it is available, this evidence degrades over time and could be useless by the time the defendant is executed.” Id.
15 See id. at 272–78 (outlining the difficulties of establishing wrongful execution).
although neither writ appears to have ever been used for this purpose. Regardless of the vehicle used, though, it is important to learn whether innocent individuals have been, and are continuing to be, wrongfully executed. And because there is a very real possibility that this is the case, jurisdictions should provide legal avenues by which these claims can be argued and established. These legal avenues for determining whether there has been a wrongful execution should allow for a fair determination of actual innocence, and not include burdens of proof, or other procedural hurdles, that are so onerous as to make it virtually impossible for the claimant to prove innocence.

Once a case of wrongful execution has been legally established, existing compensation statutes are inadequate to address the wrong. First, several existing statutory compensation schemes fail to allow a deceased individual’s successors to inherit any amount owed to the deceased individual for his wrongful conviction and incarceration. For example, Nebraska’s compensation statute provides that “[a] claimant’s cause of action under the act shall not be assignable and shall not survive the claimant’s death.” Accordingly, once an individual is wrongfully executed, any right to compensation he had for wrongful conviction and incarceration vanishes under these statutes. Moreover, current compensation statutes fail to account for the act of wrongful execution, itself. While some statutes might provide compensation for an individual’s time incarcerated, they do not provide for death at the hand of the government. This is despite the fact that the act of execution has been found to be the worst punishment available in the United States. As the U.S. Supreme Court has stated over and over again, the punishment of death is unique due to its extreme severity.

It is important that jurisdictions imposing capital punishment be held responsible and accountable for wrongful executions. Not only would this be fairer, but it would also likely cause individual actors responsible for death decisions—such as state prosecutors and governors—to take these decisions more seriously. For example, when substantial funds are at risk, state governors may more carefully consider clemency in a capital case when substantial evidence has been raised suggesting the innocence of the convicted individual. Additionally, if wrongful executions are legally established, this might encourage some jurisdictions to abandon capital punishment altogether.

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20 See Ryan, supra note 3, at 305.
21 The possible innocence of executed individuals is of course a significant concern. See Meghan J. Ryan, Judging Cruelty, 44 U.C. DAVIS L. REV. 81, 146 (“One of the main concerns that seems to underlie the Court’s [Punishments Clause jurisprudence] is the possibility of wrongful execution.”). In 2003, Illinois Governor George Ryan commuted all state sentences of capital punishment due to this concern. See Jodi Wilgoren, Citing Issue of Fairness, Governor Clears Out Death Row in Illinois, N.Y. TIMES, Jan. 12, 2003, at A1 (“Condemning the capital punishment system as fundamentally flawed and unfair,
providing compensation to the successors of wrongfully executed individuals cannot make up for the egregious wrong of wrongful execution, it is at least a start to recognizing the existence of this wrong and a step toward holding the jurisdiction in which the wrongful execution occurred responsible and accountable for its actions.

If it is legally determined that someone has indeed been wrongfully executed, then the wrongfully executed individual’s successors ought to be able to recover for the deceased’s wrongful execution. To accomplish this, jurisdictions that already have statutes to compensate those who have been wrongfully convicted and incarcerated could amend their statutes to provide for the survival of the compensation claims and payments. Capital jurisdictions that do not already have such compensation statutes should enact statutes providing for compensation for those who are wrongfully convicted, incarcerated, and executed. Additionally, jurisdictions’ compensation statutes should provide for even greater compensation in cases of wrongful execution than in cases of other types of wrongful convictions.

22 Of the jurisdictions providing for compensation for wrongful conviction and incarceration, only nineteen are death penalty states; fourteen states providing for capital punishment have no such compensation schemes. Compare Compensating the Wrongfully Convicted, supra note 6, with States With and Without the Death Penalty, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Mar. 2, 2014).

23 The law of the jurisdiction in which the wrongful conviction, incarceration, and execution occurred shall control the availability and extent of compensation under this Resolution. Compensation for the wrongful conviction and incarceration component of the remedy set forth in this Resolution should mirror the compensation scheme laid out in ABA Resolution 108A. Compensation for the wrongful execution component of this remedy is a more novel concept, and jurisdictions should carefully consider the factors relevant to determining the monetary amount of this compensation.

At the request of the State and Local Government Section, we note here the suggestions that Section would make to legislatures regarding the details to be included in legislation providing compensation for wrongful execution. The State and Local Government Section suggests that, in determining the amount of compensation for the wrongful execution component of the remedy outlined in this Resolution, decisionmakers consider the following factors: proof of intentional harm by the jurisdiction or by a witness, the availability of liability insurance and collateral sources, and the availability of civil remedies and relevant limitations set forth in the applicable state tort claims act. The ABA State and Local Government Section also suggests that damages for the wrongful execution component of the remedy outlined in this Resolution should be based upon the present value of the wrongfully executed individual’s work life expectancy, loss of society and companionship of the wrongfully executed individual, and other damages typically available in tort law. The State and Local Government Section further recommends that the source of payment for compensation under this Resolution shall be identified—whether from a state-maintained fund, liability insurance, personal assets of the responsible party or parties, or any other source specified—by the state legislature.
wrongful conviction and incarceration. “Not only have wrongfully executed individuals been wrongly incarcerated, but they have also suffered what our nation has concluded is the worst punishment available in the United States: the death penalty. Accordingly, compensation for wrongful execution should reflect this even greater injustice by providing even greater compensation.”

Respectfully submitted,

Mathias H. Heck, Jr.
Criminal Justice Section
August 2014

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24 Ryan, supra note 3, at 304.
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Mathias H. Heck, Jr., Chair

1. **Summary of Resolution(s).** This Resolution urges federal, state, and territorial jurisdictions that authorize the execution of individuals convicted of committing capital offenses to provide statutory or other legal means by which the successors of executed individuals may establish that those individuals were wrongfully executed. The Resolution further urges that these jurisdictions provide compensation for the successors of those who have been legally determined to have been wrongfully executed. Recovery under such statutes should compensate for both the wrongful incarceration leading up to the wrongful execution and for the act of wrongful execution itself.

2. **Approval by Submitting Entity.** This resolution was approved by the Criminal Justice Section Council at its Spring meeting on April 12, 2014.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No similar resolution has been previously submitted.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** This resolution would not impact any existing resolutions. However, ABA Resolution 108A is relevant to this Resolution, in that this Resolution relies on Resolution 108A for some of the factors relevant to compensation under this Resolution.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** Not applicable.

6. **Status of Legislation.** (If applicable) Not applicable.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The policy will be distributed to various criminal justice stakeholders in order to encourage the necessary legislative action to provide means by which the successors of executed individuals may establish that those individuals were wrongfully executed. The policy will also be featured on the Criminal Justice Section website and in Section publications.
8. **Cost to the Association.** (Both direct and indirect costs) No cost to the Association is anticipated.

9. **Disclosure of Interest.** (If applicable) None

10. **Referrals.**
    At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2014 Annual Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:
    
    **Standing Committees**
    Ethics and Professional Responsibility
    Governmental Affairs
    Legal Aid and Indigent Defendants

    **Special Committees and Commissions**
    Center for Human Rights
    Center for Racial and Ethnic Diversity
    Coalition on Racial and Ethnic Justice
    Commission on Domestic and Sexual Violence
    Commission on Youth at Risk
    Death Penalty Representation Project

    **Sections, Divisions**
    Government and Public Sector Lawyers Division
    Individual Rights and Responsibilities
    Judicial Division
    Law Student Division
    Litigation
    State and Local Government Law
    Tort Trial and Insurance Practice
    Young Lawyers Division

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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Contact Name and Address Information. (Who will present the report to the House?
Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This Resolution urges federal, state, and territorial jurisdictions that authorize the execution of individuals convicted of committing capital offenses to provide statutory or other legal means by which the successors of executed individuals may establish that those individuals were wrongfully executed. The Resolution further urges that these jurisdictions provide compensation for the successors of those who have been legally determined to have been wrongfully executed. Recovery under such statutes should compensate for both the wrongful incarceration leading up to the wrongful execution and for the act of wrongful execution itself.

2. **Summary of the Issue that the Resolution Addresses**

   Although the ABA and various jurisdictions have recognized the concern of wrongful conviction and incarceration, there has not been similar recognition of the parallel, and even more egregious, matter of wrongful execution. To date, there have been no legal determinations that any individual has been wrongfully convicted and executed in the United States. But this is not necessarily because no wrongful executions have occurred. In fact, approximately 8% of the 1,324 exonerations since 1989 were of individuals sentenced to death, suggesting that it is certainly possible for an individual to be sentenced to death despite the more rigorous procedural protections provided for defendants in capital cases. Additionally, there are several cases in which death row defendants died in prison of natural causes but were later exonerated. Moreover, there are several cases in which the guilt of an executed individual has been seriously questioned.

3. **Please Explain How the Proposed Policy Position will address the issue**

   This Resolution would create the means by which the successors of executed individuals may establish that those individuals were wrongfully executed. The Resolution would further provide compensation for the successors of those who have been legally determined to have been wrongfully executed.

4. **Summary of Minority Views**

   None are known.