Personal Liability of Public Officials for Constitutional Wrongdoing: A Neglected Issue of *Charter* Application

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THE CONSTITUTIONAL REMEDY OF MONETARY REDRESS for the infringement of the *Canadian Charter of Rights and Freedoms*[1] is increasingly attracting scholarly attention.[2] Academic commentators have been busy expounding the principles that should be applied by the courts in determining when a monetary award will be "appropriate and just" within the meaning of subsection 24(1) of the *Charter*.[3] In discussing the issue of the appropriate defendant in a constitutional suit for damages, writers have treated the choice between personal liability of government officials and institutional liability as being purely a matter of remedial policy. It appears, in other words, to have been generally assumed that individual civil servants can be made privately liable to provide monetary redress for a breach of the *Charter* solely on the basis that a court of competent jurisdiction considers it "appropriate and just" pursuant to subsection 24(1).

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1 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "the *Charter*"].

2 See, for example, M.L. Pilkington, "Damages as a Remedy for Infringement of the *Canadian Charter of Rights and Freedoms*" (1984) 62 Can. Bar Rev. 517; M.L. Pilkington, "Monetary Redress for *Charter* Infringement" in R.J. Sharpe, ed., Charter *Litigation* (Toronto: Butterworths, 1987) 307; K. Cooper-Stephenson, "Past Inequities and Future Promise: Judicial Neutrality in *Charter* Constitutional Tort Claims" in S.L. Martin & K.E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 226; K. Cooper-Stephenson, "Tort Theory for the *Charter* Damages Remedy" (1988) 52 Sask. L. Rev. 1; K. Cooper-Stephenson, Charter *Damages Claims* (Toronto: Carswell, 1990); A. Braën, "L'action en dommages et la violation des droits linguistiques" (1990) 21 R.G.D. 473; G. Otis, "La responsabilité de l'administration en vertu de la *Charte canadienne des droits et libertés*" in Y. Blais, ed., *Développements récents en droit administratif* (Cowansville, Quebec: Editions Y. Blais, 1992) 65; G. Otis, "La *Charte canadienne* et le nécessaire dépassement du modèle diceyen de la responsabilité publique" (1993) 3 N.J.C.L. 243.

3 Subsection 24(1) reads as follows: "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

This article challenges this widespread assumption and argues that the basis and scope of personal constitutional liability cannot be determined without an examination of the threshold question of whether such liability is constitutionally permissible in light of subsection 32(1) of the *Charter* which restricts *Charter* obligations to "government."[4] Civil servants can no doubt be sued under subsection 24(1) of the *Charter* as mere instruments of government — that is, in their governmental capacity. In this type of situation, any money award will be enforceable against the government as opposed to the individual. But subsection 32(1) raises the question of whether a government official can be made *personally* liable under the *Charter* for actions taken in the exercise of governmental power. As the following analysis reveals, only a novel theory of personal constitutional wrongdoing will render the personal liability of government officials compatible with subsection 32(1) of the *Charter*. It will be argued that this new approach to official liability under the *Charter* requires a departure from both traditional common law thinking and American constitutional tort doctrine.

Part I of the essay examines the widely overlooked problem of *Charter* application raised by official liability. Part II proposes a distinction between personal and purely institutional wrongdoing as a means to reconcile personal remedial duties with subsection 32(1). An in-depth discussion of when personal liability should ultimately be imposed to achieve specific remedial goals is beyond the limited ambit of this essay.

I. THE THRESHOLD ISSUE OF *CHARTER* APPLICATION

THE POLICY IMPLICATIONS OF PERSONAL LIABILITY for breach of constitutional rights and freedoms have been extensively canvassed. While there is general agreement on a purposive approach to *Charter* monetary claims, divergent theories have been put forward with respect to constitutional suits against public servants personally. In the opinion of some analysts, the widely accepted remedial objectives of compensation and deterrence are best effected through exclusive institutional liability.[5] Others take the view that the long-standing common law precept of

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[4] Subsection 32(1) provides: "[t]his Charter applies a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." See, in particular, *RWDSU* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229; *Hill* v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

[5] See K.J.W. Sandstrom, "Personal and Vicarious Liability for the Wrongful Acts of Government Officials: An Approach for Liability under the *Charter of Rights and Freedoms*" (1990) 24 U.B.C.L. Rev. 229 at 261–68; L. Sossin, "Crown Prosecutors and Constitutional Torts: The Promise and

personal responsibility should be imported into *Charter* jurisprudence so as to ensure a measure of direct accountability, at least in instances of egregious misconduct on the part of public officials.[6]

However, as noted above, this growing literature on monetary redress for *Charter* infringement has not addressed in detail the threshold question of whether personal liability accords with the restriction of *Charter* duties to government.[7] It is, nevertheless, not so obvious that an individual governmental actor who violates a right or freedom guaranteed by the *Charter* can be sued personally on the basis of the constitutional cause of action created by subsection 24(1).[8] This is because section 24 is, of course, just as much part of the *Charter* as the substantive provisions and is consequently equally subject to subsection 32(1).[9] It would appear, therefore, that personal obligations — as opposed to purely institutional ones — will only arise under subsection 24(1) of the *Charter* if it can be shown that this

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Politics of *Charter* Damages" (1993) 19 Queen's L.J. 372 at 405; and K. Roach, *Constitutional Remedies in Canada* (Aurora, On.: Canada Law Book, 1994) at 11.22–11.25. These authors have been strongly influenced by the important work of Professor Schuck. See P.H. Schuck, *Suing Government* (New Haven: Yale University Press, 1983).

6 Cooper-Stephenson, Charter *Damages Claims*, *supra* note 2 at 24–27; Pilkington, "Damages as a Remedy for Infringement of the *Canadian Charter of Rights and Freedoms*", *supra* note 2 at 555–56.

7 Barry Strayer has, however, observed that "[t]here may well be limitations as to the persons or bodies against whom such remedies are available. Since the Charter creates the liability, it must be defined in terms of the Charter. Thus, since s. 32 of the Charter makes it applicable to Parliament, Legislatures, and governments, arguably only those bodies incur liability for its breach. While public officers may be restrained in various ways from exercising governmental powers in a way that would contravene the Charter, there is a serious question as to whether they can be held personally liable, in an action by another private party." B.L. Strayer, *The Canadian Constitution and the Courts*, 3d ed. (Toronto: Butterworths, 1988) at 309.

8 Courts and writers generally agree that subsection 24(1) of the *Charter* creates a cause of action which, being grounded on the constitution itself, is distinct from common law and statutory remedies. See Cooper-Stephenson, "Tort Theory for the *Charter* Damages Remedy", *supra* note 2 at 71–72; Pilkington, "Damages as a Remedy for Infringement of the *Canadian Charter of Rights and Freedoms*", *supra* note 2 at 529; R. Dussault & L. Borgeat, *Traité de droit administratif*, Vol. III, 2d ed. (P.U.L., 1989) at 736–69; Y. Ouellette, "Les recours en dommages contre le gouvernement et les fonctionnaires pour faute administrative" (1992) 26 R.J.T. 169 at 183; Otis,"La responsabilité de l'administration en vertu de la *Charte canadienne des droits et libertés*", *supra* note 2 at 66–67. Notable cases recognizing the *Charter* as a separate source of liability include *Prete* v. *Ontario* (1994), 16 O.R. (3d) 161 (C.A.) application for leave to appeal dismissed by the Supreme Court of Canada, April 28, 1994 and *Guimond* v. A.G. *Quebec*, [1995] R.J.Q. 380 (Q.C.A.) leave to appeal granted by the Supreme Court of Canada, June 1, 1995. In *Nelles* v. *Ontario*, [1989] 2 S.C.R. 170 at 195–96, Lamer J., as he then was, dealt with the *Charter* as a discrete basis for claiming damages.

9 As Madame Justice Wilson observed in *Lavigne* v. *OPSEU*, [1991] 2 S.C.R. 211 at 241, "[b]ecause the *Charter* only applies to government, the issues of liability and relief can only be determined in relation to government and not private actors."

constitutional instrument binds public officials personally, at least in some incidental way.

The problem cannot be avoided by suggesting that personal liability to pay damages conforms to subsection 32(1) whenever it is imposed in respect of actions taken in a governmental capacity. This reasoning fails to account for the true nature of the constitutional duty created by personal liability. An individual defendant can only be regarded as subject to Charter remedies as a repository of governmental power if resort to the power or authority normally attached to the defendant's governmental status is sufficient to ensure compliance with the constitutional order. Thus, remedies such as the injunction, *habeas corpus*, *mandamus*, or an order to return unconstitutionally seized property, do not result in a governmental actor being bound in his or her private capacity. Given that there has been full compliance with the decree, the individual typically remains unaffected privately. This is a situation where he or she seems to be subject to the *Charter qua* governmental actor as opposed to being bound in a private capacity.

In contrast, the personal liability of government officials for damages directly affects the private funds or property of the individual defendant. The constitutional duty engendering personal liability clearly stretches well beyond the individual's status as an arm of government. In a very real sense, it binds him or her as a private individual. It follows, therefore, that it is improper to characterize personal *Charter* liability as "governmental" within the meaning of subsection 32(1) simply because it flows from actions taken in a governmental capacity.

Nor would it be possible simply to borrow from conventional tort theory to resolve this difficult issue. Dicey has long ago demonstrated that the common law binds public officials *qua* individuals and not specifically as governmental actors.[10] The central tort principle of individual responsibility dictates that an official's tort is first and foremost a private personal wrong. When a government official is found personally liable to pay damages at common law, it is normally because the court

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[10] In his most famous dictum, Dicey maintained that it was a central feature of the rule of law that "every man, whatever be his rank or condition, is subject to the ordinary law of the realm" such that "every official from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." A.V. Dicey, *The Law of the Constitution* (London: MacMillan, 1885) at 177–78. Dicey's "doctrine" has frequently been relied upon by the Supreme Court of Canada as a sound summation of the common law. See *National Harbours Board* v. *Langelier*, [1969] S.C.R. 60 at 65; *Chartier* v. *The Attorney General of the Province of Quebec*, [1979] 2 S.C.R. 474 at 498; and *Scowby* v. *Glendinning*, [1986] 6 W.W.R. 481 at 509 (S.C.C.). In *Beauregard* v. *Canada*, [1986] 2 S.C.R. 56, Beetz J. correctly remarked that the most celebrated Canadian application of Dicey's conception of the rule of law may be found in *Roncarelli* v. *Duplessis* (1959), 16 D.L.R. (2d) 689 (S.C.C.). In *Nelles*, *supra* note 8, the Court reaffirmed its commitment to the doctrine of personal responsibility of government officials, even those exercising the highest state functions, by finding that the Attorney General enjoys no common law immunity from personal suits based on the tort of malicious prosecution.

has identified a situation where the defendant has either breached a duty of care that was personally owed to the plaintiff or committed some other recognized tort governing relations between two individuals.[11] The tort of misfeasance in a public office, which applies exclusively to defendants purporting to act in a public capacity, provides the only exception to this general rule .[12] It is therefore not so illogical that Dicey should have understood this area of the law to be "all in terms of individuals."[13] It has become fashionable to assail the Diceyan analysis by pointing to the development of "special rules" of governmental liability.[14] However, despite the fact that there are indeed special defences or immunities that benefit only public officials or public authorities,[15] a separate body of general rules forming a truly autonomous basis for governmental liability has yet to emerge.[16]

The *Charter* is aimed specifically and exclusively at the government. This marks a departure from the common law, whose tendency to equate governmental actors with private citizens has been decried as a "lamentable weakness in our jurisprudence."[17] Common law reasoning, which treats an individual *Charter* infringement as a private tort capable of giving rise automatically to personal liability under subsection 24(1), overlooks a fundamental difference in the respective nature of a tort and a *Charter* violation. The individual is subject to constitutional duties not

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[11] One commentator correctly observed that under this Diceyan approach "an effective way to control bureaucratic power is to make bureaucrats as *individuals* subject to the same legal rules as non-bureaucrats." D. Cohen, "Thinking About the State: Law Reform and the Crown in Canada" (1986) 24 Osgoode Hall L.J. 379 at 390.

[12] See P.W. Hogg, *Liability of the Crown*, 2d ed. (Toronto: Carswell, 1989) at 111–12.

[13] G. Zellick, "Government Beyond the Law" [1985] P.L. 283 at 284.

[14] See, among others, M. Aronson & H. Whitmore, *Public Torts and Contracts* (Sydney: The Law Book Company, 1982). There, the idea of special rules is the central theme of the first part of the book (at 1–138). See also S. Flogaitis, *Administrative Law et Droit Administratif* (Paris: L.G.D.J., 1986) at 205–26 and Y. Ouellette, "La responsabilité extra-contractuelle de la Couronne fédérale et l'exercice des fonctions discrétionnaires" (1985) 16 R.G.D. 49.

[15] See J. Beatson, " 'Public' and 'Private' in Administrative Law" (1987) 103 L.Q.R. 34 at 36. See also P. Cane, "Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept" in J. Eekelaar & J. Bell, eds., *Oxford Essays in Jurisprudence*, 3d series (Oxford: Clarendon Press, 1987) 57 at 72–75.

[16] For a comparative review of this aspect of the law in various Commonwealth and European jurisdictions, see J. Bell & A. Bradley, eds., *Governmental Liability: A Comparative Study* (United Kingdom National Committee of Comparative Law, 1991).

[17] Zellick, *supra* note 13 at 295. See also N. Johnson, *In Search of the Constitution: Reflections on State and Society in Britain* (Oxford: Pergamon, 1977) at 149; Ouellette, "La responsabilité extra-contractuelle de la Couronne fédérale et l'exercice des fonctions discrétionnaires", *supra* note 14 at 65–66; J.B.D. Mitchell, "The State of Public Law in the United Kingdom" (1966) Int. & Comp. L.Q. 133 at 140; and Law Reform Commission of Canada, *The Legal Status of the Federal Administration* (Working Paper 40, 1985) at 53–54.

as "any other citizen" but primarily as a functional extension or instrument of the state apparatus, it cannot automatically be assumed that personal obligations have been breached by an official whose conduct has triggered a constitutional claim.

Furthermore, in contrast to tort law, the *Charter* reflects a conception of the state's organization which is not necessarily modelled on or reducible to the individual actor. Thus, the Supreme Court of Canada has shown that it is prepared to review systemic or strictly organizational failures.[18] It is reasonable to suggest that the *Charter* tends to "depersonalize" an individual's actions by giving them constitutional significance only when they are integrated into the larger structure of government. In other words, the complex reality of the governmental process can overshadow the individual in a way that makes the traditional dogma of individual responsibility a questionable theoretical starting point in developing a system of constitutional liability.

Must we therefore conclude that subsection 32(1) erects a barrier against personal liability based on subsection 24(1) of the *Charter*? Absolute personal immunity would mean that a public official could never, for the purpose of constitutional remedies, be dissociated from the government entity. The official would therefore invariably assume the identity of that entity. If this were true, any pecuniary claim against public servants in their personal capacity for conduct impinging on constitutional rights would have to be slotted within the four corners of a recognized common law tort.[19]

However, the better view, as argued in the next section of this article, is that subsection 32(1) should not be regarded as an insurmountable obstacle to personal remedial duties under the Charter.

II. A THEORY OF PERSONAL CONSTITUTIONAL WRONGDOING

THE SOLUTION TO THE ISSUE of personal constitutional liability is not to be found in a blanket assertion that an individual governmental actor can never be bound by the *Charter* in his or her private capacity; nor does it lie in the assumption that every constitutional violation involving an individual governmental actor is a *prima facie* actionable personal wrong. Instead, the problem should be resolved by ascertaining what type of behaviour the provisions of the *Charter* actually prohibit or

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[18] See, for example, those cases which involve systemic breaches of subsection 11(b), including *R. v. Askov*, [1990] 2 S.C.R. 1199 and *R. v. Morin*, [1992] 1 S.C.R. 771.

[19] Although subsection 24(1) of the *Charter* adds to the remedies available to the victim, it cannot be regarded as excluding traditional common law causes of action. As Professor Hogg has written, "it would require clear language to exclude traditional remedies from *Charter* cases, and ss. 24(1) does not purport to do so." P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 694. See also D. Gibson, "Tort Law and the *Charter of Rights*" (1986) 16 Man. L.J. 1 at 4.

regulate. Personal duties, for example, can hardly arise if the *Charter* invariably treats the individual governmental actor as nothing more than a cog in the machine of the state. On the other hand, if a finding of constitutional wrongdoing can be made by specific reference to the "personal" conduct of an individual acting within the machinery of government, the idea of incidental personal obligations would clearly appear defensible.

It would seem, then, that personal obligations can be said to come into existence when a substantive provision of the *Charter* brings the individual governmental actor personally to the forefront of the constitutional dispute. This could occur, for example, whenever central relevance is given either to individual's idiosyncratic motives, or to his or her state of mind. If the personal state of mind of an individual constitutes an integral or decisive component of a substantive wrong, a situation is created where, in a very real sense, substantive constitutional norms reach the individual personally while acting in a governmental context.[20]

In those situations where the very unconstitutionality of governmental conduct is intertwined with the subjective features of a specific individual who has substituted his or her own values for those of the *Charter*, it is submitted that the Constitution reaches this individual not strictly as an emanation of government but also, incidentally, *qua* individual. A constitutional wrong is at the same time a personal wrong, which should then become enforceable as such pursuant to subsection 24(1).

There are many examples in Canadian jurisprudence where substantive constitutional norms have themselves been regarded as giving central relevance to such individualized conduct as malice, deliberate wrongdoing or indifference to constitutional rights.[21] This suggests that constitutional norms are sensitive to individual realities within the state organization, rather than being exclusively aimed at

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[20] Of course, *Charter*-based liability arises only when an individual is acting in a governmental capacity, as opposed to his private capacity. The courts will thus have to devise a "governmental capacity" test to determine whether the *Charter* applies at all. In *Hill* v. *Church of Scientology of Toronto*, *supra* note 4 at paragraph 75, the Supreme Court of Canada suggested that there will be governmental action when an individual's conduct is either requested or controlled by the government. The Court also writes, at paragraph 74, that "actions taken by Crown Attorneys which are outside the scope of their statutory duties are independent of and distinct from their status as agents of the government." However, this cannot be taken to mean that *ultra vires* or unauthorized conduct by defendants purporting to be acting in their governmental capacity would escape *Charter* scrutiny. It would be a most ironic contradiction of the *Charter*'s basic commitment to freedom from abuse of governmental power if officials were permitted to resort to a defence of *ultra vires* in order to escape liability.

[21] Among Supreme Court decisions, see R. v. *Beare*, [1988] 2 S.C.R. 387; *Nelles* v *Ontario*, *supra* note 8; R. v. *Greffe*, [1990] 1 S.C.R. 755. For cases involving successful damages claims against both public officials and their employer, see *Lord* v. *Allison* (1986), 3 B.C.L.R. (2d) 300 (S.C.); R. v. *B.B.* (1986), 69 A.R. 203 (Prov. Ct.); *Rollinson* v. R. (1991), 40 F.T.R. 1 (T.D.); and *Persaud et al.* v. *Donaldson et al.* (1996), 130 D.L.R. (4th) 701 (Ont. Gen. Div.).

anonymous bureaucratized governmental entities. It is submitted, therefore, that in the case of strongly individualized wrongdoing, it is inappropriate to draw a line between the actor's constitutional position as a mere instrumentality of government and his or her position as an individual.[22]

But how can this theory of personal constitutional obligations be reconciled with subsection 32(1) of the *Charter* which suggests that individuals are bound by the *Charter* only in their governmental capacity? By restricting *Charter* duties to the relationship between government and the governed, subsection 32(1) recognizes that both the magnitude of the state's power and the possibility of it being abused require special constitutional treatment and attract unique obligations.[23] The deliberate or indifferent abuse of governmental power by those individuals who wield it must therefore have been a central concern underlying the enactment of subsection 32(1). As a result, one can trace the very prohibition of abuse of power by substantive Charter provisions — which is at the core of the proposed notion of personal wrongdoing — to the rationale behind subsection 32(1).

If, as argued above, the incidental personal obligations implied in the substantive prohibition of deliberate or indifferent abuse of power are compatible with subsection 32(1), so should be the personal remedial duties created under subsection 24(1) to implement the substantive provisions. A measure of personal liability clearly exists, therefore, as a means of redress for, or control of, such personal wrongs.

However, in those situations when a constitutional violation is found without any personal wrongdoing, the position of the individual governmental actor involved seems to be that of a mere functional part in a faceless governmental machinery. Such an infringement should be treated as impersonal, purely governmental and capable of producing only direct institutional liability. The notion of purely governmental infringement embraces a broad range of situations which

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22 Assuming that negligence or objectively unreasonable conduct is constitutionally relevant, the question arises whether such conduct amounts to personal wrongdoing. Lack of due care does not constitute the type of misdemeanour that would bring the actor's individuality into sharp relief so as to taint the governmental process with the personal features of that individual. This is because the reasonable care inquiry relates not to the individual actor's subjective conduct but to the exemplary person. In other words, the reasonableness test of negligence is impersonal in the sense that it embodies a standard which gives little weight to "the idiosyncracies of the particular person whose conduct is in question": see *Glasgow Corporation* v. *Muir*, [1943] A.C. 448 at 457. There is undoubtedly a conceptual "twilight zone" within which it is difficult to differentiate a personal from an impersonal norm of conduct. It is submitted that negligence does not separate the individual from the governmental actor to such an extent that one can say that he or she is bound personally beyond his or her governmental capacity.

23 In *McKinney*, *supra* note 4 at 267, La Forest J., writing for the majority, held that "[g]overnment is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of individuals."

include, among others, systemic, organizational and legislative breaches of the *Charter*.

The *Charter* recognizes the special reality of government as a complex institutional arrangement, instead of clinging to a simplistic individualistic model of governmental behaviour. Thus, when it is the institutional environment which generates a constitutional violation, without any personalized contribution by the individual through whom the wrong manifests itself, no personal duty can be said to have been breached. In this type of situation, only a novel form of direct institutional liability can be envisaged pursuant to subsection 24(1).[24]

The proposed distinction between personal and purely institutional wrongdoing would be a unique feature of Canadian constitutional law. In the United States, the constitutional tort doctrine is essentially centered on personal liability. State officials are made personally liable by an Act of Congress now codified as 42 U.S.C. section 1983 .[25] This statutory remedy is directed against "any person," acting under

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[24] In *McGillivary* v. *New Brunswick* (1994), 116 D.L.R. (4th) 104 (N.B.C.A.), the New Brunswick Court of Appeal stated at 107 that, under section 24 of the *Charter*, "[c]laimants are not restricted to suing government officials when the government itself is responsible for the constitutional infringement." There are cases where direct institutional liability has been imposed under subsection 24(1). See, for example, *Bertram S. Miller Ltd.* v. *The Queen* (1985), 15 C.R.R. 298 (F.C.T.D. reversed on the issue of infringement (1987), 31 D.L.R. (4th) 210 (F.C.A.)); *Johnson* v. *Ontario* (1990), 75 O.R. (2d) 558 (C.A.); *Lewis* v. *Burnaby School District No. 41* (1992), 71 B.C.L.R. (2d) 183 (S.C.); *Moore* v. *Ontario* (1990), 20 A.C.W.S. (3d) 630 (Ont. Dist. Ct.); and *R.* v. *F.(R.G.)* (1991), 90 Nfld & P.E.I.R. 113 (Nfld. S.C., T.D.). For an important precedent in the Commonwealth, see *Maharaj* v. *Attorney-General Trinidad and Tobago (No. 2)*, [1979] A.C. 385 (P.C.). It must be noted, however, that in *Schachter* v. *Canada*, [1992] 2 S.C.R. 679, the Supreme Court of Canada has taken an apparently restrictive position with respect to damages awards for legislative breach of the *Charter*. Without offering any explanation, Lamer C.J. wrote at 720 : "[a]n individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available." For a critical examination of this particular aspect of *Schachter*, see G. Otis, "Que reste-t-il de l'article 24 après l'affaire *Schachter*?" (1993) 72 Can. Bar Rev. 162.

[25] This Act, commonly referred to as "section 1983," was adopted pursuant to the Fourteenth Amendment. The Amendment provides for its enforcement by Congress. Section 1983 reads as follows: "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Although originally designed to enforce the provisions of the Fourteenth Amendment and to protect the constitutional rights of black citizens in the South during the Reconstruction, the remedial function of section 1983 has since been interpreted broadly by the federal courts to extend it beyond the context of racial discrimination to violations of any substantive rights secured by the constitution or federal law: see *Monroe* v. *Pape*, 365 U.S. 167 (1961) at 172–87. For a detailed and critical account of the enlargement of the scope of section 1983, see T. Eisenberg, "Section 1983: Doctrinal Foundations

the colour of state law, who violates the constitution or federal law. It has been construed by the Supreme Court of the United States "against the background of tort liability which makes a man responsible for the natural consequences of his actions."[26] Until the decision in *Monell* v. *Department of Social Services*[27], section 1983 had been regarded by the United States Supreme Court as generating a strictly personal form of liability. However, the Court in *Monell* ended the exclusivity of personal suits by holding that the term "person" comprised local government entities.[28]

As for federal officials, no specific provision of the American constitution or any federal statute provides for a monetary cause of action for their unconstitutional actions. Nevertheless, in the landmark case of *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*,[29] the United States Supreme Court developed a "non-statutory" cause of action against federal officials in their personal capacity for breach of constitutional rights.[30] It does not appear, however, that the *Bivens* remedy, as it is currently understood, can be regarded as firmly enshrined in the Constitution itself, for its availability depends very much on congressional will.[31]

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and an Empirical Study" (1982) 67 Cornell L. Rev. 482.

26 *Monroe* v. *Pape*, *supra* note 25 at 187. For a critical assessment of the use of tort doctrine in American suits for constitutional wrongdoing, see S. Nahmod, "Section 1983 Discourse: The Move From Constitution to Tort" (1989) 77 Geo. L.J. 1719.

27 436 U.S. 658 (1978).

28 Municipal liability, however, is restricted to injuries caused by the "execution of a goverment's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy": *Monell*, *ibid.* at 694. See also S.M. Mead, "42 U.S.C. Section 1983 Municipal Liability: The *Monell* Sketch Becomes a Distorted Picture" (1987) 65 North Carolina L. Rev. 517.

29 403 U.S. 388 (1971).

30 According to the majority, at 396–97: "[o]f course, the Fourth Amendment does not in so many words provide for its enforcement by an award of monetary damages ... it is well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done ... . The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts." The *Bivens* type of action was afterwards extended to breaches of other constitutional guarantees: see *Davis* v. *Passman*, 442 U.S. 228 (1979, dealing with the Fifth Amendment; *Carlson* v. *Green*, 446 U.S. 14 (1980), dealing with the Eighth Amendment; and *Bush* v. *Lucas*, 462 U.S. 367 (1983), where the Court did not exclude the extension of the remedy to the First Amendment in suitable cases.

31 The Court in *Bivens* held that the remedy can be displaced by an "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover damages from the agents, but must instead be remitted to another remedy, equally effective in the

To a large extent, the central importance of personal liability in the American law of constitutional torts derives from the continuing vitality of the doctrine of sovereign immunity. This doctrine still shields both the individual States and the United States of America from liability for the infringement of constitutional rights.[32] As a result, American authors have convincingly argued that the emphasis on personal liability borrowed from tort law has become a solution based on "fiction and convenience,"[33] given that officials are often sued as "surrogates" for the government.[34] This reflects the general view that personal liability for constitutional violations in American law seems to exist, in many cases, simply as an expedient to circumvent governmental immunity.[35]

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view of Congress": *supra* note 29 at 397. See also *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988) and *McCarthy* v. *Machgain* (1992), 117 L Ed. 2d 291. The *Bivens* remedy has been described as part of a "substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions: in amendment, modification, or even reversal by Congress": H.P. Monaghan, "The Supreme Court 1974 Term-Foreword: Constitutional Common Law" (1975) 89 Harv. L. Rev. 1 at 3–4 and 23–24. One commentator has posed the question in the following terms: "[i]f ... the Constitution by its own force truly demands the recognition of causes of action for the violation of rights to be free from unreasonable searches, invidious discrimination, or cruel and unusual punishments, it would seem to be of little consequence what Congress thinks of the matter. But even the most agressively written *Bivens* opinions assert a judicial willingness to defer to 'alternative remedies' created by Congress, or to '*explicit* congressional declaration[s]' that [injured person] ... may not recover money damages": G.R. Nichol, "*Bivens, Chilicky*, and Constitutional Damages Claims" (1989) 75 Virginia L. Rev. 1117 at 1124.

32 The United States Supreme Court has ruled that Congress, when it enacted s. 1983, did not intend to override State immunity under the Eleventh Amendment and that such immunity applies to suits in both federal and State courts. See *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Will* v. *Michigan Dept. of State Police*, 491 U.S. 52 (1989); and *Hafer* v. *Melo* (1991), 116 L Ed 2d 301. Likewise, the Court held in *Bivens*, *supra* note 29, that the remedy against federal officials cannot displace the immunity of the United States from suit (at 410).

33 C.B. Whitman, "Constitutional Torts" (1980) 79 Mich. L.R. 5 at 58.

34 L.E. Wolcher, "Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations" (1981) 69 Calif. L. Rev. 189 at 249.

35 However, even personal liability has been kept within rather narrow confines by the United States Supreme Court, which has developed a number of immunities in order to shield public officers from actions in constitutional tort. For example, most officials are entitled to a qualified immunity which bars suits except in cases of unreasonable conduct in the light of clearly established law: see *Elder* v. *Holloway* (1994), 127 L Ed 2d 344; *Wyatt* v. *Cole* (1992), 118 L Ed 2d 504; *Hunter* v. *Bryant*, (1991) 116 L Ed 2d 589; *Anderson* v. *Creighton*, 483 U.S. 635 (1987); *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985); and *Davis* v. *Scherer*, 468 U.S. 183 (1984). Moreover, judges, legislators and prosecutors, when acting as such, are absolutely immune from suit: see *Buckley* v. *Fitzsimmons* (1993), 125 L Ed 2d 209; *Mireles* v. *Waco* (1991), 116 L Ed 2d 9; *Burns* v. *Reed* (1991), 114 L Ed 2d 547; *Forrester* v. *White*, 484 U.S. 219 (1988); *Davis* v. *Passman*, *supra* note 30; *Butz* v. *Economou*, 438 U.S. 478 (1978); *Stump* v. *Sparkman*, 435 U.S. 349 (1978); and *Pierson* v. *Ray*, 386 U.S. 547 (1967).

The Canadian courts are not hampered by similar rules relating to Crown immunity from suit.[36] They are therefore clearly in a position to delineate personal and institutional liability under subsection 24(1) solely on the basis of whether a personal or purely governmental duty has been breached. Personal liability should therefore not find its way into the Charter as a result of an unquestioning observance of American solutions any more than as a duplication of the common law.

The distinction between personal and purely institutional wrongdoing propounded in this article is not, however, totally without analogy, having regard to the field of comparative law. The dichotomy bears some resemblance to basic principles of French public law. Administrative liability in France revolves around a fundamental distinction between *faute personnelle* and *faute de service*. The origin of the dichotomy between these two concepts is inseparable from the establishment of separate administrative courts after the French Revolution.[37] In the celebrated *Pelletier* case,[38] it was decided that since the actions of the administration could not be judged by the ordinary courts, monetary suits brought against government officials personally could not be entertained by such courts either, unless the alleged fault pertained to "personal" conduct,[39] as opposed to a defect attributable to the process of the service or the administration.

In a parallel development, it was established that the administration could be sued before administrative courts for any *faute de service* — that is, any fault ascribable to the functioning of the administration itself.[40] Thereafter, the concept of *faute de service* was gradually extended to faults which, although personal for the purpose of imposing personal liability in ordinary courts, are nonetheless so connected to

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36 The courts in Canada have correctly taken the view that, because of the constitutional status of the Charter, both the common law and statutory immunities enjoyed by the Crown do not extend to constitutional damages suits: see *Perley v. Sypher et al.* (1989), 96 N.B.R. (2d) 354 (N.B.Q.B.); *Moore v. Ontario, supra* note 24; *Prete v. Ontario, supra* note 8; and *McGillivary v. New Brunswick* (24 November 1993), New Brunswick M/C/1058/90 (N.B.Q.B.). See also *Guimond, supra* note 8.

37 See generally N. Brown & J.F. Garner, *French Administrative Law*, 3d ed. (London: Butterworths, 1983) at 27–40.

38 T.C. 30 July 1873.

39 A series of enactments were adopted immediately after the fall of the old regime prohibiting ordinary judges from entertaining any claim against administrators. This system of protection of officials was called the *garantie administrative*. In *Pelletier, ibid.*, the Tribunal *des conflits* interpreted a decree passed in 1870 which purported to abolish the *garantie*, as merely lifting immunity from suit in ordinary courts in relation to personal faults. It is generally agreed that the Tribunal construed the decree in this manner in order to preserve the principle of the separation of powers, which it regarded as a constitutional doctrine of fundamental importance. See M. Paillet, *La faute du service public en droit administratif français* (Paris: L.G.D.J., 1980) at 19–20, and J.C. Venezia & Y. Gaudemet, *Traité de droit administratif*, 11th ed (Paris: L.G.D.J., 1990) at 774–75.

40 See *Blanco*, T.C. December 6th, 1875.

the service itself that concurrent administrative liability is justifiable in administrative courts.[41]

The French courts have thus developed a doctrine of *faute personnelle* whose historical and constitutional underpinnings are unique but whose function is similar to that of the proposed notion of personal wrongdoing under the *Charter*. In both cases, the dichotomy between personal and purely governmental action aims at distinguishing situations where the law should reach individual governmental actors personally from those situations where the law should merely treat them as impersonal components of the government apparatus. It is particularly relevant to note that in French administrative law, the dominating factor in characterizing an official's fault as personal in nature is whether a wrongful state of mind can be established.[42] In effect, such misconduct sufficiently separates the individual actor from the administration so as to make him or her personally liable in a civil action. Given that the *Charter* constitutes an unreservedly public law instrument, , it may well be useful to look at other legal systems which, like that of France, enjoy a strong public law tradition in the field of governmental liability.

III. CONCLUSION

TO DATE, THE IMPACT OF SUBSECTION 32(1) of the *Charter* on the choice of the appropriate defendant under subsection 24(1) has been insufficiently canvassed by academic writers. However, as the foregoing essay indicates, the singling out of the state's institutions as the targets of *Charter* duties, and the regulation of individual conduct only where it forms an integral part of the governmental process, both indicate that personal liability pursuant to subsection 24(1) cannot be justified by reference to conventional Diceyan thinking.

Nevertheless, the *Charter*, although offering great potential for a new form of direct institutional liability, is not insensitive to the fact that misuse of governmental power is sometimes highly individualized and idiosyncratic. If individual governmental actors commit constitutional violations that are "personal", in the sense of being tainted by subjective values or other personalized forms of intent, those individuals can be made personally liable, for they have breached substantive constitutional duties which can be regarded as making them incidentally liable in their personal capacity. In effect, this article has argued that, in this type of situation, personal remedial obligations can be reconciled with one of the purposes of

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[41] Paillet, *supra* note 39 at 20–22; Venezia & Gaudemet, *supra* note 39 at 729–35; D. Rasy, *Les frontières de la faute personnelle et de la faute de service en droit administratif français* (Paris: L.G.D.J., 1963).

[42] See Paillet, *supra* note 39 at 35, and Venezia & Gaudemet, *supra* note 39 at 771–72.

subsection 32(1); namely, to combat abuse by the repositories of the state's extraordinary powers.

Although this article has not examined the question of when personal liability should, as a matter of remedial policy, be contemplated as an "appropriate and just" means to vindicate *Charter* rights, it is noteworthy that the theory of personal wrongdoing advocated in this essay would provide the basis for an effective scheme of monetary redress under subsection 24(1). Under this theory, personal liability would be necessarily confined to egregiously unconstitutional conduct. The door would consequently be opened to a beneficial measure of direct and public accountability of wrongdoers to their victims, who usually have no guarantee that governmental authorities will be willing to take appropriate disciplinary measures against the official at fault. Liability would arise in situations where the defendant could not argue that he or she was "more anvil than hammer,"[43] or was being victimized for what really amounted to an institutional failure.

Doubts might be expressed about the practical significance of personal liability in *Charter* litigation, given the difficulty of proving subjective wrongdoing.[44] While it is true that such a state of mind requirement raises evidential problems, the prospect of a successful *Charter*-based personal suit is not so remote as to be discounted as insignificant. The law reports already contain several *Charter* cases where a subjective wrong was found in the context of section 24,[45] including a number of cases where monetary awards were made.[46] The difficulty of proving a personal wrong, while it is clearly not insurmountable, may be useful in discouraging speculative or frivolous claims and thus fend off the threat of undue inhibition of public officials in the performance of their duties.[47]

There are, of course, a number of practical factors to be considered when discussing personal constitutional liability. For example, although personal liability might foster accountability and deterrence, it will not ensure that the individual

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[43] See Schuck, *supra* note 5 at 102.

[44] See Cooper-Stephenson, Charter *Damages Claims*, *supra* note 2 at 199 and 234, and Roach, *Constitutional Remedies in Canada*, *supra* note 5 at 11.27–11.28.

[45] Evidence is frequently excluded pursuant to subsection 24(2) because of deliberate and wilful constitutional infringements by police officers. For an example from the Supreme Court of Canada, see *R.* v. *Greffe*, [1990] 1 S.C.R. 755.

[46] See *Crossman* v. *The Queen* (1984), 12 C.C.C. (3d) 547 (F.C.T.D.), *R.* v. *B.B.*, *Lord* v. *Allison*, *Rollinson* v. *R.*, and *Persaud* v. *Ottawa (City) Police*, *supra* note 21.

[47] Similar reasoning was expressed in *Nelles*, *supra* note 8 at 197 *per* Lamer J.. The need to avert any "chilling effect" on vigorous administrative decision-making is sometimes expressly invoked by judges to dismiss *Charter* claims against public officials in the absence of bad faith: see *McCorkell* v. *Riverview Hospital Review Panel* (1993), 104 D.L.R. (4th) 391 (B.C.S.C.), and *Stenner* v. *British Columbia (Securities Commission)* (1993), 23 Admin. L.R. (2d) 247 (B.C.S.C.).

defendant will have the means to pay any substantial compensatory awards that are granted.[48] This compensation rationale may well render "appropriate and just" a degree of institutional liability even in cases of personal wrongdoing. In fact, it would seem possible to devise a regime of shared constitutional responsibility, whereby the respective scope of institutional and personal liability would be delineated on a purposive basis. Reconciliation of effective compensation and deterrence could be attained, for example, by making the individual the exclusive target of a purely deterrent award[49] while ensuring that an institutional defendant is available to compensate the victim for any injury occasioned by the constitutional wrong.

In the end, instrumental policy will be decisive in delineating the extent of official liability under subsection 24(1). As this article has shown, however, such policy does not exempt the courts from addressing the threshold issue of *Charter* application and fashioning a doctrine of personal liability under the *Charter* that is truly independent from tort law orthodoxy.

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[48] This argument is frequently made in favour of exclusive institutional liability. See, for example, Sandstrom, "Personal and Vicarious Liability for the Wrongful Acts of Government Officials", *supra* note 5 at 261–62 and Roach, *Constitutional Remedies in Canada*, *supra* note 5 at 11.23.

[49] An exemplary award would be an appropriate remedy as it would foster compliance with constitutional guarantees. For cases where this type of award was made, see *Lord* v. *Allison* and *Rollinson* v. *R.*, *supra* note 21; *R.* v. *F.(R.G.)*, *supra* note 24; *Crossman* v. *The Queen*, *supra* note 46; and *Gittens* v. *C.U.M.*, JE-862 (Q.C.).