When Should the Master Answer? Respondeat Superior and the Criminal Law

Abstract:
Respondeat superior is a legal doctrine conferring liability from one party onto another because the latter stands in some relationship of authority over the former. Though originally a doctrine of tort law, for the past century it has been used within the criminal law, especially to the end of securing criminal liability for corporations. Here, I argue that on at least one prominent conception of criminal responsibility, we are not justified in using this doctrine in this way. Firms are not answerable for the crimes committed by their employees, because firms cannot answer as to why the crime was committed; they lack the authority to offer the employee's reasons for action. Though this rules out respondeat superior as a general principle, I show contexts in which vicarious liability is still appropriate in the criminal law, and I briefly consider how we can best hold firms criminally responsible without respondeat superior.

Respondeat superior ('let the master answer') is a legal doctrine conferring liability from one party onto another because the latter stands in some relationship of authority over the former. For example, if my child breaks a vase in your house while we are over for dinner, I seem appropriately on the hook for the breaking of the vase. I am the one who is ultimately responsible. Not just any relation of authority will do. And the doctrine will not cover just *anything* done by that agent under one's authority. What the doctrine is meant to capture, though, is the culpability of someone in authority as expressed or demonstrated through the culpable behavior of someone in their remit.

Applications of respondeat superior license vicarious liability, a form of strict liability where the agent is held liable for the actions of another and without requiring proof of *mens rea* concerning certain elements of the offence. Traditionally, this was a doctrine within tort law, where one can find it in a number of contexts. Since 1909, however, respondeat superior has also been applied within the criminal law, specifically in the context of corporate criminal liability.[1] Prosecutors use respondeat superior to charge employers and firms criminally responsible for what is done by their employees, specifically what is done within the scope of their employment and with an intent to benefit the firm. And this has become a dominating way of holding corporations criminally liable.

It's not hard to understand its popularity in this context. We want to hold corporations criminally responsible.[2] But many forms of criminal responsibility would require proof of *mens rea* concerning the crime committed, and it is controversial how we could demonstrate *mens rea* for a firm or if firms themselves are even capable of instantiating a culpable state of mind.[3] And so, this is a way to hold firms responsible without having to take anything for granted about their mentality. We can infer their culpability straightaway on the basis of the demonstratable crimes of the employees.

With that said, using respondeat superior in particular to secure corporate criminal liability has been challenged from the start. Authors have long suggested that the doctrine is overinclusive,

[1] See *New York Central & Hudson River R. R. Co. v. United States*, 212 U. S. 481 (1909).

[2] This is only natural if we take corporations themselves to be capable of being morally responsible and capable of failing in their responsibilities. See *inter alia* Tom Donaldson, *Corporations & Morality* (Englewood Cliffs, N.J.: Prentice-Hall, 1982); Peter French, "The Corporation as a Moral Person", *American Philosophical Quarterly* 16(3) (1979): 207-215; Kendy Hess, "Because They Can: The Basis for the Moral Obligations of (Certain) Collectives", *Midwest Studies in Philosophy* 38 (2014): pp. 203-221; Philip Pettit, "Responsibility Incorporated", *Ethics* 117 (2007): pp. 171-201. This assumption will be brought out and discussed below.

[3] That it was assumed they could not was the original explanation for why corporations were not criminally liable: William Blackstone, *Commentaries on The Laws of England* (Clarendon Press, 1765), p.464.

because it would hold firms responsible for the conduct of rouge employees.[4] Others have brought out how it may be underinclusive, because it will not clearly implicate the firm when it is not clear which individual employee satisfies the elements of the crime.[5] Or it may be both.[6] Even apart from these challenges, we may worry that it punishes too harshly[7] or that it has focused on satisfying aims inappropriate for the criminal law.[8]

Despite the concerns with respondeat superior, I want to focus on whether it really is appropriate to appeal to it as a doctrine in the criminal law on a picture of criminal liability that requires *desert*. The doctrine may be argued as being a powerful motivator for firms to police their members, providing a clear deterrence-based justification for its use. However, I want to put that argument to one side, instead focusing here on the question of whether firms or employers can deserve to be held liable on the basis of the criminal conduct of their employees. So, I am assuming that appealing to the doctrine is only appropriate if it genuinely defeasibly licenses judgments of criminal liability given a theory of when agents are criminally responsible.

Given this, in section (I), I present the view offered by Antony Duff on which criminal responsibility is understood in terms of moral responsibility, in particular in terms of the concept of answerability. There is a worry about whether the offered picture can capture cases of strict liability, and this is especially problematic for us. So, in section (II) I raise this issue and show how the view can survive this worry. In section (III), I take up the question of the article: Does respondeat superior preserve judgements about answerability? I will argue that it does not, and answer concerns about the argument in section (IV). This leads us to the conclusion that the doctrine should not be used in the criminal law.

However, this is not the end of the story. Apart from leaving untouched the rationale for strict liability generally and showing how certain forms of vicarious liability may be licensed, this view also leaves space for corporate criminal liability. In section (V), I conclude by clarifying how firms may still be directly liable for wrongdoing, including in cases in which employees commit crimes. This does justice to the role that claims of due diligence play in criminal proceedings, and it sets an agenda for what we should focus on in holding firms accountable.

I. The Basis of Criminal Responsibility

We talk in terms of responsibility across both the moral and legal domains. So, one would hope that there is a coherent notion of responsibility at work between them, or that we could understand the relation between them or the differences between them in terms of the differences between these domains.[9] At the very least, there is clear overlap—we are criminally responsible for many things for which we take ourselves to be morally responsible, and we may think there is a moral obligation (at least prima facie) to obey the law.

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[4] E.g., Preet Bharara, "Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure of Corporate Defendants", *American Criminal Law Review* 44 (2007): pp. 53-114.

[5] E.g., Stacey N. Vu, "Corporate Criminal Liability: Patchwork Verdicts and The Problem of Locating a Guilty Agent", *Columbia Law Review* 104 (2004): pp. 459-495.

[6] E.g., Patricia S. Abril and Ann M. Olazabal, "The Locus of Corporate Scienter", *Columbia Business Law Review* 1 (2006): pp. 81-166; Mihailis Diamantis, "Corporate Criminal Minds", *Notre Dame Law Review* 91 (2016): pp. 2049-2090; Will R. Thomas, "Corporate Criminal Law is Too Broad—Worse, It's Too Narrow", *Arizona State Law Journal* 53 (2021): pp. 199-271.

[7] Andrew Weissmann, "A New Approach to Corporate Criminal Liability", *American Criminal Law Review* 44(4) (2007): pp. 1319-1342.

[8] Robert Luskin, "Caring about Corporate 'Due Care': Why Criminal Respondeat Superior Liability Outreaches Its Justification", *American Criminal Law Review* 57(2) (2020): pp. 303-330.

[9] In particular, we may think that criminal liability should be drawn together with moral responsibility, as is discussed below, in contrast with tortious liability, which many take to be a matter of *causal* responsibility. See Desmond M. Clarke, "Causation and Liability in Tort Law", *Jurisprudence* 5(2) (2014): pp. 217-243. Cf. Larry A. Alexander, "Causation and Corrective Justice: Does Tort Law Make Sense?", *Law and Philosophy* 6(1) (1987): pp. 1-23.

One particularly strong reason to draw together moral and criminal responsibility comes down to our understanding of crime. On a popular way of conceiving of what a crime is (or what should be a crime), crimes themselves are a certain kind of moral infraction. Specifically, they are public wrongs. We may say that public wrongs are a matter of wrongs done to the public itself, or that they are wrongs that are of special concern to the public,[10] or that they are only those wrongs of public concern that the state ought to punish.[11] Regardless of precisely how we understand the view, it leads us to draw an explicit connection between moral and criminal responsibility. Crimes just are a kind of wronging, and so responsibility for crimes reduces to moral responsibility for a kind of wrong done.

This alone suggests quite a lot about the justification of respondeat superior. Insofar as it is only appropriate to hold someone morally responsible insofar as the sanctions they are opened up to are deserved for their wrongdoing, tying criminal responsibility to moral responsibility will only justify holding someone criminally responsible if the punishment is deserved given the crime committed. This already runs afoul of more instrumental conceptions of the criminal law, but it opens a path towards judging respondeat superior, as we can ask after whether the master really does *deserve* the punishment for the wrongdoing of those under their charge.

Saying only this much leaves us still a bit lost concerning how to pursue our question. However, given how much has been written on what it is to be morally responsible, there is the promise of leveraging a prominent account to consider whether employers satisfy it when employees commit crimes. Duff himself has advocated in a number of places for understanding criminal responsibility in terms of what those writing on moral responsibility have characterized as *answerability*.[12]

Critical to what it is to be responsible in the sense of answerability is that it is appropriate to demand of an agent answerable for some deed why it was done. Answerable agents can be called to answer for their conduct, where the expectation is that they can offer an explanation for why they performed the particular action in terms of the reasons available to them. More specifically, we may think that a contrastive element is required, where agents can be expected to answer why the action was done rather than another, or why the agent acted in accordance with some of their reasons and not others.[13]

This is a powerful understanding of moral responsibility,[14] as we may take our practices of moral responsibility to almost entirely consist in holding ourselves to be answerable for our conduct and soliciting others to answer for what they have done when necessary. And Duff maintains that this sense of responsibility is especially well-suited for understanding criminal responsibility. In particular, he sees this process of answerability as played out in the law through criminal proceedings. In the offensive stage of the criminal trial, the prosecution sets forth the

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[10] See R. A. Duff, "Towards a Modest Legal Moralism", *Criminal Law and Philosophy* 8 (2014): pp. 217-235; S. E. Marshall and R. A. Duff, "Criminalization and Sharing Wrongs", *Canadian Journal of Law and Jurisprudence* 11(1) (1998): pp. 7-22; R. A. Duff and S. E. Marshall, "Crimes, Public Wrongs, and Civil Order", *Criminal law, Philosophy* 13 (2019): pp. 27-48.

[11] Ambrose Y. K. Lee, "Public Wrongs and the Criminal Law", *Criminal Law and Philosophy* 9 (2015): pp. 155-170.

[12] See R. A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007); "Legal and Moral Responsibility", *Philosophy Compass* 4(6) (2009): pp. 978-986; "Responsibility and Reciprocity", *Ethical Theory and Moral Practice* 21 (2018): pp. 775-787; "Moral and Criminal Responsibility: Answering and Refusing to Answer", in D. J. Coates & N. A. Tognazzini, (eds.), *Oxford Studies in Agency and Responsibility (Vol.5)* (Oxford University Press, 2019: pp. 165-190).

[13] See David Shoemaker, *Responsibility from the Margins* (Oxford University Press, 2015: ch.2).

[14] Some take answerability to even be the primary sense of responsibility. See Graham Hubbs, "Answerability Without Answers", *Journal of Ethics and Social Philosophy* 7(3) (2013): pp. 1-15; Angela M. Smith, "Attributability, Answerability, and Accountability: In Defense of a Unified Account", *Ethics* 122(3) (2012): pp. 575-589; "Responsibility as Answerability", *Inquiry: An Interdisciplinary Journal of Philosophy* 58(2) (2015): pp. 99-126. In contrast, answerability is argued to be one of three distinct concepts of responsibility in David Shoemaker, "Attributability, Answerability and Accountability: Toward a Wider Theory of Moral Responsibility", *Ethics* 121 (2011): pp. 602-632, and *Responsibility from the Margins*.

case for why the agent satisfies the criteria for having committed the crime. Then, in the defensive stage, the defendant has the opportunity to argue that they were either justified or should be excused for what they did. The defendant is called to answer for what has been done, and they respond by either admitting guilt or providing a sufficient explanation. This captures how the criminal law centrally involves our calling wrongdoers to account.[15]

Once we have this conception of culpability in the criminal law laid out, it becomes easier to assess whether respondeat superior is a valid doctrine. We use respondeat superior to take us from the responsibility for wrongdoing of an employee to the responsibility of the employer. Given that we have tied criminal responsibility for some conduct generally to a conception of responsibility as answerability, whether or not respondeat superior is a valid doctrine rests on whether employers generally are answerable for what employees do. This would allow us to infer corporate responsibility from employee responsibility. So, we can assess the validity of respondeat superior by assessing whether it really is true that employers are answerable when employees are.

II. Answering When One is Strictly Liability

Before taking up this project in earnest, it is worth acknowledging how much theoretical baggage we are taking on here. Judgments of criminal responsibility must be justified some way or other, and I have laid out what I take to be a compelling story in the literature for how to judge when someone is responsible for some crime. But it is at odds with other stories, and it does come with a number of commitments. So, it is worth pausing to consider whether these commitments are necessary.

We are taking for granted a view about crime itself, that it is a matter of public wronging. But the view is controversial.[16] It strikes me as correct, but it is worth noting that our project does not hinge on accepting this view of crime. Accepting it does allow us to assimilate criminal responsibility to moral responsibility, and this entitles us to apply fleshed out notions of responsibility from that literature. After all, on this view criminal responsibility is just an instance of this broader concept of responsibility for wrongdoing. However, even if crimes were not best understood in terms of public wrongs (or moral wrongs of any kind), it may still make sense to understand criminal responsibility in terms of answerability. The notion of answerability for crimes would likely still be the same notion, as answerability as a form of responsibility is found in moral and non-moral contexts.[17]

A more significant challenge, then, puts pressure on this idea that we genuinely are answerable in all cases in which we are responsible for some crime. Against Duff's picture, Shoemaker does just this.[18] He points to cases where we may really want to say that individuals are

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[15] See R. A. Duff, "Towards a Theory of Criminal Law?", *Aristotelian Social Supplementary Volume* 84 (2010): pp. 1-28. Duff is careful to distinguish this part of the criminal process, of calling defendants to account, from actually holding the guilty accountable through sanctions. To distinguish them, Duff in a number of places refers to the former aspect in terms of someone's being *criminally responsible* and the latter aspect in terms of being *criminally liable*. If someone is criminally responsible for some act, then they are answerable for it, though they may not be liable if they can offer a sufficient in terms of a justification or excuse for action. Our primary focus here is on criminal responsibility. So, I take the doctrine of respondeat superior to be one that licenses the inference of employer responsibility (for instance) from established employee responsibility. (The principle is put in terms of liability in the first sentence, and we can read this as allowing us to infer that the master is *defeasibly* liable.)

[16] For challenges, see James Edwards and Andrew Simester, "What's Public about Crime?", *Oxford Journal of Legal Studies* 37(1) (2017): pp. 105-133. For responses, see R. A. Duff and S. E. Marshall, "Crimes, Public Wrongs, and Civil Order", *Criminal law, Philosophy* 13 (2019): pp. 27-48.

[17] For instance, you can be responsible in the sense of being answerable for making a move in chess in that the move is an expression of your agency for which it can be appropriate to expect you to be able to have an explanation for why you made that move rather than another, though nothing hangs on your answer, and it is not owed to anyone.

[18] David Shoemaker, "On Criminal and Moral Responsibility", in M. Timmons (ed.), *Oxford Studies in Normative Ethics* (Vol.3) (Oxford: Oxford University Press, 2013: pp. 161-165).

criminally responsible, but where they do not seem morally responsible, and that this is borne out by the fact that these individuals would not be answerable as answerability is often understood. As an example, consider a case where a shopkeeper inadvertently sells some tainted meat. The shopkeeper can still be criminally liable for selling tainted meat as a matter of strict liability,[19] but we may not think that the shopkeeper is properly answerable for the crime. Duff suggests that the shopkeeper could answer sufficiently for this crime by bringing to bear evidence of due diligence,[20] but Shoemaker is unconvinced by this suggestion.

As we saw, being answerable involves being able to answer in terms of one's reasons, specifically the reasons why one performed the act rather than another. And this is something that Shoemaker thinks the shopkeeper cannot do. Duff needs to say that the shopkeeper is answerable for the crime as a matter of strict liability, but how can the shopkeeper be answerable in this sense when she didn't even know that the meat was tainted? She cannot answer the question necessary for answerability: "Why did you Φ phi *in light of the reason(s) not to* Φ?"[21] As Shoemaker goes on to explain,

> …even if I can give you an answer for why I sold meat voluntarily, I cannot give you an answer for why I sold meat voluntarily *in light of the reason not to do so* (that is, it was tainted), because from my position at the time I had access to no such reason; that reason certain shone no light on me. But in saying that I had no access to reasons not to sell the meat, I have only "answered" the question by saying that there just is no answer of the sort being sought.[22]

Critical for why an agent may *not* be answerable for some deed is if the reasons for why not to do it are *not* accessible to her. The claim is thus that in cases of inadvertent behavior like the shopkeeper's, she does not properly have access to the reason for why not to perform the action she does, and so she cannot offer those reasons when prompted.

If agents cannot be answerable in cases of strict liability, then this spells trouble for our project here in particular. Our aim is to consider whether the individuals implicated as liable by respondeat superior are actually responsible for those crimes, and the way we are to judge this is by considering whether these individuals are properly answerable. But since respondeat superior is understood as licensing strict liability, if we cannot trust that strictly liable agents will be answerable for the crimes committed, then we cannot see through this project. We cannot argue against the validity of respondeat superior in the criminal law by showing that the purportedly liable agents are not answerable.

Luckily, Duff has recently responded to these concerns of Shoemaker.[23] There, he seems to agree that these reasons for why not to perform the action in question are important, but he disagrees over their being inaccessible to the agent. He says,

> …there is reason not to act in that way—to sell this food will be to sell unsafe food…; and that reason is accessible to me, in the sense that I can understand it with hindsight, and could have understood it at the time…So I would say, as against Shoemaker, that I had reason not to sell the food…; and that I can now be called to answer for my action of selling this unfit food…My answer might involve giving my reasons for the intentional action that turned out to be an action of selling unfit food…it might also involve explaining why I did not take further precautions that might have revealed the reason not to act thus…[24]

As we see, Duff's response involves accepting that answerability does involve being the appropriate target of the question about why you acted as you did in light of the reasons not to. What he denies is that the reasons not to in cases of non-culpable inadvertence are inaccessible to us. There *were* reasons for the shopkeeper not to sell the meat. And the shopkeeper is apt to understand them and will recognize them in hindsight. This is what he takes to secure the

[19] See the Food Safety Act 1990, ss 8, 21.
[20] Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*: p. 257.
[21] Shoemaker, *Responsibility from the Margins*: p. 164, emphasis in original.
[22] Ibid.: pp. 164-165.
[23] Duff, "Moral and Criminal Responsibility".
[24] Ibid.: p.170.

answerability of the shopkeeper. She is answerable even if the answers given will not involve why the shopkeeper sold the meat despite the clear reason not to, but rather why the shopkeeper sold the meat and why she engaged in other conduct did not reveal any reason not to.

Frankly, it can be hard to see how this is a successful response to Shoemaker's objection. Yes, there *was* a reason for the shopkeeper to not sell the meat. But as the shopkeeper went to sell the meat, it is surely a stretch to say that this reason was accessible to her, just because it would have revealed itself upon intensive investigations.[25] Stretch or no, the real question is: Does this reason count as accessible in the sense relevant for answerability if the agent merely in principle could have discovered it, or does the reason need to be epistemically accessible to the agent *as she decided to act* for her to be answerable for that action? In answer to this question, I think that both authors are right in a certain way.

Shoemaker is right that the reasons relevant for answerability are the reasons that the agent in fact acted in light of. If the reason not to sell the meat only existed in an objective sense and was not apparent to the agent, then she is not able to answer as to why she did not heed it. That she cannot answer, however, is not to say that she should not be held as answerable. It may be that she cannot answer for this or that action; however, she may nevertheless be held to a standard on which it is appropriate to demand an answer of her, even if none is forthcoming.

The point is that the agent is still the appropriate target of the demands of answerability. As a shopkeeper legally permitted to sell meat, the agent *assumes* responsibility for making sure that the meat is not tainted.[26] And this involves being willing to *take* responsibility should anything go wrong.[27] Whether or not the shopkeeper has reasons to give, she takes upon herself the duty to search out reasons of the relevant kind and offer them when asked. If she has no answer, as in the case of inadvertence, then her reply will not be a matter of undermining the appropriateness of the question, as Shoemaker suggests. Instead, what she says will be an explanation of why there is no answer to offer, which amounts to presenting an excuse for the wrongdoing, as Duff suggests.

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[25] Even appealing to the most up-to-date literature on the nature of reasons, it is hard to say whether the reasons in this case count as accessible to the agent. For some consideration to count as a reason one has, it may be critical that the agent knows it, as argued for in Clayton Littlejohn, Littlejohn, "How and Why Knowledge is First", in A. Carter, E. Gordon, & B. Jarvis (eds.), *Knowledge First* (Oxford: Oxford University Press, 2017) and Errol Lord, *The Importance of Being Rational* (Oxford: Oxford University Press, 2018). Or one may only need to be aware of it, as argued for in Paul Silva, "Possessing Reasons: Why the Awareness-First Approach is Better than the Knowledge-First Approach", *Synthese* (forthcoming): pp. 1-23, DOI: 10.1007/s11229-020-02916-5. But all parties to the debate seem to grant that you do not *actually* have to know the information as long as it is suitably close to hand. For instance, Lord's (*op. cit.*) recent book has two chapters on possessing reasons, yet it is hard to say on his account whether the shopkeeper will count as possessing the reason not to sell the meat. Lord says, "…inattentiveness does not get one off the hook for taking into account reasons that one has what we'll call *broad access* to." ([emphasis in original], p. 74). But he does not characterize 'broad access' beyond noting that if you fail to act in light of these reasons, then we would judge you to be acting irrationally. It seems likely on these views that whether the reason is taken to be accessible to the shopkeeper will depend on whether she would have come upon it in performing due diligence. However, Duff wants to say (as do I) that you can be answerable for some deed even if you satisfied your obligations of due diligence. In this case, the shopkeeper would count as answerable without possessing the reason not to sell the meat.

[26] We may say that the shopkeeper puts herself forth as sufficiently competent to avoid selling tainted meat. So, to draw on Joseph Raz's work on how to capture culpability for inadvertence, not selling tainted meat is within the shopkeeper's 'domain of competency' (Joseph Raz, *From Normativity to Responsibility* (Oxford University Press, 2012)). Alternatively, we may say that in opening a shop, individuals commit themselves to being criminally liable for being competent in this way.

[27] This notion of 'taking responsibility' specifically has garnered discussion in the responsibility literature. See Susan Wolf, "The Moral of Moral Luck", *Philosophical Exchange* 31 (2001): pp. 4-19; David Enoch, "Being Responsible, Taking Responsibility, and Penumbral Agency", in Heuer and Lang (ed.), *Luck, Value and Commitment: Themes from the Ethics of Bernard Williams* (Oxford University Press, 2011); Stephen Bero, "Holding Responsible and Taking Responsibility", *Law and Philosophy* 39 (2020): pp. 263-296. Mason argues explicitly for using it to capture responsibility for inadvertence (Elinor Mason, *Ways to Be Blameworthy: Rightness, Wrongness, and Responsibility* (Oxford University Press, 2019: ch.8).

It is a much larger conversation to nail down the right way to conceive of answerability and to puzzle out apparent differences in how it is used to explicate moral and criminal responsibility. Hopefully, our purposes do not require seeing through such a task. I have conveyed a plausible way of cashing out criminal responsibility in terms of answerability prominent in the literature, and I have defended this conception against the charge that it cannot work specifically for cases of strict liability. Taking this for granted, then, I want to move on to consider whether respondeat superior is justified as a doctrine of the criminal law.

III. Is Respondeat Superior Justified?

As we have seen, for respondeat superior to be a valid doctrine within the criminal law, it must be appropriate to ascribe criminal responsibility to an authoritative party on the basis of the criminal responsibility of the individual(s) under their authority. So, understanding criminal responsibility in terms of answerability, the question becomes: Are authoritative individuals like firms answerable when their employees are answerable for criminal wrongdoing?

Where respondeat superior is a doctrine meant to license strict liability, I think the answer here is 'no.' Consider a case in which an employee blackmails a government agent, threatening to expose the agent's affair unless he awards her firm a coveted government contract. It is clear that the employee herself is answerable for her crime. This is an action she performed for various reasons, and we can easily expect her to be in a position to answer why she chose to blackmail rather than bid fairly on the contract. Even if, for whatever reason, she in fact could see no other way forward *but* to blackmail the government agent, it is still appropriate to hold her criminally responsible in that she has put herself up as answerable for her conduct as an employee generally. She is charged with navigating the firm's business within the bounds of the law. In this case, though, I do not think that the firm is answerable for her crime.

An easy way to secure this result might be to fall back on the idea that the employee's conduct here isn't properly attributable to the firm. The firm didn't *do* anything to be answerable for, and so the firm is not criminally responsible. In some cases, I think this response is not out of line. For cases where the employee has been expressly banned from engaging in this illegal conduct and where the employee goes out of her way to hide this conduct, it does seem like the firm has done all it can to disassociate themselves from and disavow the conduct.

Worried about just this sort of uncontrollable, low-level employee conduct, some have suggested that refining respondeat superior as a principle to only concern those higher-up officials in the firm capable of directly expressing the firm's values with their conduct, and so which cannot as easily be disavowed.[28] Or else, we may try only appealing to respondeat superior in the context of the firm's previous criminal history and track record of compliance.[29] The latter is clearly an attempt to pin liability on the firm only when the conduct is truly attributable to the firm. Though a reasonable suggestion, it can prove hard to demonstrate exactly which employees count as relevant in this context. But the problems with this suggestion go much deeper. First, this seems perhaps connected to the thought that what the firm does *just is* what certain top employees do, but this idea itself faces problems,[30] chief among them is that respondeat superior is still a doctrine

[28] This concern is reflected in the Model Penal Code §2.07(1)(c). See Kathleen F. Brickey, "Rethinking Corporate Liability under the Model Penal Code", *Rutgers Law Journal* 19(3) (1988): pp. 593-634.

[29] Lucian E. Dervan, "Re-Evaluating Corporate Criminal Liability: The DOJ's Internal Moral Culpability Standard for Corporate Criminal Liability", *Stetson Law Review* 41 (2011): pp. 7-20.

[30] Though it is less relevant for our purposes here, it is worth noting that someone (like myself) looking for ways to charge firms with being morally and criminally responsible is particularly unlikely to identify the firm's conduct with the conduct of top employees. We are more likely to think that the firm can be responsible even if *none* of the employees are responsible. See David Copp, "On The Agency of Certain Collective Entities: An Argument from Normative Autonomy", *Midwest Studies in Philosophy* 30 (2006): pp. 194-221. We are also likely to think that what top

of *vicarious* liability. And we cannot re-work the doctrine so that we only find the firm liable for the *firm's* actions.

The bigger problem with this approach is that while we may be happy to screen-off the conduct of certain extremely uncompliant employees, we generally do want to say that much of what employees do for the firm is attributable to the firm. The firm's hiring the employee is in part causally responsible for what crime the employee commits in virtue of their employment. Further, we are typically ready to say that employers and employees stand in a principal-agent relation, where employees act as the agents of employers. On this model, it does seem as if the actions of employees are meant to stand for the actions of the firm; employees act on behalf of the firm. So, I am willing to grant this idea that the crimes of an employee can be attributed to the firm.

The better place to challenge the answerability of the firm for employee crime is to consider whether the firm is able to offer the needed reasons demanded by answerability for this crime. In the case of the blackmail, the employee has reasons for why she engaged in blackmail. And she may be aware of the reasons for her to not have blackmailed the government agent. Even if we are ready to have this employee's conduct somehow redound onto the firm, it is hard to see how the firm could answer for the crime in terms of *her* reasons. The flat-footed way to put the point would be to say that the firm has its own reasons; it can't appropriate the employee's reasons for action. Even if the conduct of the employee is attributable to the firm, her reasons for acting are particular to her own normative standpoint, and this is a standpoint not shared by the firm.

The claim is not just that the reasons are *hers* and not the *firm's*. It's not about the possession of reasons. After all, these reasons are only considerations that bear on the employee's conduct, and the firm may well be positioned itself to recognize these considerations as objective features of the environment in which the employee acts. (At least, it is in principle possible for firms to have extensive monitoring mechanisms to assess employee conduct and interactions.) We can take for granted that the firm is somehow able to report on the condition of its employees sufficiently to be able to say what considerations should have borne on the commission of the crime in question.

What the firm is not in a position to do is to answer *why* the employee committed the crime. They cannot say what reasons were active in motivating the agent, and the degree to which that motivation reflected the agent's reasons against committing the crime. I do not think that a firm can answer why the employee's act was committed in light of her reasons, and this is in large part because corporations have their own reasons for acting as they do and ways of answering in terms of those reasons, and the way that firms answer makes it even clearer why firms are not in a position to offer the employee's motivating reasons.

As economic actors, firms embody their own normative perspective, their own rational point of view of what is to be done in light of their reasons to act.[31] It is a challenge to say precisely what those reasons are, where they come from, how those reasons are recognized and acted on. But there is work to try to meet this challenge,[32] and those convinced that firms are agents with distinct values can be sure that the reasons firms negotiate are distinct from the set of reasons that bear on the conduct of individual employees.

Moreover, firms have particular ways of speaking to the reasons for which they behave as they do. Philip Pettit has recently discussed how firms can and often do have spokespeople that offer the firm's reasons for action.[33] Pettit accepts that firms can be called to justify what they do,

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employees do does not exhaust the scope of what the firm itself counts as doing and that what is genuinely attributable to the firm can involve the actions of many lower-level employees.

[31] See Carol Rovane, *The Bounds of Agency: An Essay in Revisionary Metaphysics* (Princeton University Press, 1998); Kendy Hess, "The Modern Corporation as Moral Agent: The Capacity for 'Thought' and a 'First-Person Perspective'", *Southwest Philosophy Review* 26(1) (2010): pp. 61-69.

[32] See Kenneth Silver, "Group Action Without Group Minds", *Philosophy and Phenomenological Research* (forthcoming): pp. 1-22, DOI: 10.1111/phpr.12766.

[33] Philip Pettit, "The Conversable, Responsible Corporation", in E. W. Orts and N. C. Smith (eds.) *The Moral Responsibility of Firms* (Oxford: Oxford University Press, 2017: pp. 15-35).

and he accepts that they should do so in terms of their reasons. What is special about spokespeople, for Pettit, is that they are empowered within the firm to offer these reasons. It's not that spokespeople are in some special epistemic position to *recognize* the reasons why the firm behaves as it does. Rather, spokespeople have been given the authority to *commit* the firm to particular the justifications offered.

Though the firm itself may have authority over certain activities of the employees, spokespeople cannot answer why some employee commits some crime. Since the firm is distinct from the employee, spokespeople lack the authority to determine this fact,[34] even if they are in a good position evidentially to suggest a likely reason. If the crime committed furthered the interests of the firm, it is not hard to guess that it was done in part for that reason. But this is something that *anybody* could guess, not something that the firm itself is actually in the right position to know. It is not a matter that a spokesperson can settle. Given this, the firm is not in a position to meaningfully answer for the crimes of their employees. As a matter of strict liability, if those crimes provide the offensive case against the firm, there are no resources through which the firm could offer a defense, because they do not have the authority and so the ability to provide the explanations sought after.

IV. Answering Concerns

I am suggesting here that respondeat superior is not a valid doctrine in general, because it cannot deliver the conclusion that the superior in the corporate context is responsible. To clarify this point, let's look through a few possible concerns.

As a first concern to address, we may worry about whether the above discussion primarily around corporate criminal responsibility really can apply to corporations, because we may have strong views about the nature of firms and their capacities. Some of the above discussion suggested that firms have reasons to behave as they do and that they can answer in terms of them. But, on a fairly common way of thinking about corporations, this is all quite anthropomorphic. References to corporations are, after all, just references to a certain plurality of individuals[35] or else a legal fiction.[36] So, there's no sense to be made of talking about their reasons for action. Understanding firms as abstract entities of some kind, we may also question whether any conduct of employee's can *really* be attributed to them.

Now, I disagree with this characterization of corporations. Following a long line of proponents of corporate moral agency,[37] I think that corporations can act and be responsible. They are not mere fictions. But this is not the place to see through this central debate. Instead, we should quickly note two points that hold even if I am wrong about corporate agency: First, if nothing can be attributable to firms themselves non-metaphorically, and they cannot really have reasons, then the case is even stronger for saying that we are unjustified in using respondeat superior to conclude their criminal responsibility.[38] It may be that we cannot *use* the corporate case as I have to argue

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[34] A similar point is made in G. E. M. Anscombe, *Intention* (Basil Blackwell, 1957, §4): "Now it can easily seem that in general the question what a man's intentions are is only authoritatively settled by him".

[35] E.g., John Hasnas, "Where is Felix Cohen when We Need Him: Transcendental Nonsense and the Moral Responsibility of Corporations", *Journal of Law & Policy* 19 (2010): pp. 55-82.

[36] E.g., Michael C. Jensen and William H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure", *Journal of Financial Economics* 3 (1976): pp. 305-360.

[37] *Supra* note 2.

[38] It could be argued that we are still justified in using respondeat superior in this context. We would only be unjustified, so goes the thought, if it would cause us to act unjustly or unfairly to some deserving party. Since there is no corporate entity that we are being *unfair* to, though, we are permitted to draw the inference of their responsibility. In other words, corporations don't have rights to fair treatment, so why not impose liability on them? Even if corporations themselves do not deserve any kind of fair treatment, we may worry that holding them criminally responsible will necessarily involve unjustly harming their stakeholders, as argued for in John Hasnas, "Reflections on

against the validity of respondeat superior as a doctrine, because there is no actual superior whose responsibility we are failing to validly infer. Still, the damage done is much the same. The primary use of respondeat superior in the criminal law is applied to corporations, and we will have seen that this is inappropriate.

Even apart from corporations, though, the challenge to respondeat superior as a general doctrine stands. We may wonder, for example, whether we should infer parental responsibility from the responsibility for crimes committed by children. However, it seems just as plausible to say that even when the conduct of children is appropriately attributable to the parents, those parents lack the ability to answer for the crimes of children in terms of the reasons why the crime was committed. Parents may often have authority over their children, but they do not seem to have the general authority to set the reasons of their children by themselves answering why the crime was committed. We do not need to resolve any metaphysical debate about corporations to see this point, and it equally suggests that respondeat superior is invalid.

As a second concern for the above proposal, one might think that I am being drawn into the same line of thought as Shoemaker in his objection to Duff as discussed above. Have I not just said, as Shoemaker did, that the agent in this case is not answerable because they cannot answer in terms of the relevant reasons? Going back to the blackmail case, Duff may recognize that the firm cannot offer the reasons of the employee, but he can nevertheless say that the firm answers in terms of what they have done for due diligence. Moreover, using what I said above, perhaps the firm could take responsibility for the conduct of their agents, taking themselves to be generally answerable for this conduct even if in this specific case they cannot answer in terms of the employee's reasons.

Though the importance of due diligence will be appealed to below, the problem with this approach is that I just do not think it is true that the firm is generally answerable for the employee's conduct. It's not simply the special case of illegal activity in which the firm is unable to offer the employee's reasons. The firm generally lacks access to or authority over these reasons.[39, 40]

As a third possible confusion, we might doubt that the firm needs access to these reasons to be answerable. It may seem misguided to think that the firm would need to answer the charge of their criminal responsibility in terms of the employee's reasons. After all, why should they

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Corporate Moral Responsibility and the Problem Solving Techniques of Alexander the Great", *Journal of Business Ethics* 107 (2012): pp. 183-195. (This is a worry that vanishes if corporations are morally responsible [reference omitted for blind review].) Moreover, I think it would just be inappropriate to use the criminal law to hold firms liable if we really thought this about corporations. On the role of the criminal law assumed here, it is a tool for redressing public wrongs. Given this picture, what is the motivation to use the criminal law against corporations if corporations only exist metaphorically? So understood, firms could not commit or answer for public wrongs. And any desired remuneration for damage done or else attempt at deterrence could be administered through tort law instead.

[39] The firm also cannot take itself to be answerable any more directly while maintaining that we are discussing vicarious liability. For instance, one strategy to capture liability in this case would be to try to assimilate it to a case of inadvertence just like the shopkeeper example. The firm does many things through its employees, and so one could argue that when the employee acts illegally in the scope of their employment, this *is* the firm's acting a certain way, and the firm is in a position generally to offer reasons about why it acts as it does. No reasons are available in this case, because the firm has inadvertently committed a crime, but it would still have the firm as answerable for this crime. This will not save respondeat superior, though, because the liability in this case will not be vicarious even if it is strict. Even so, there may be something to the charge, but it seems implausible to understand the firm as inadvertently blackmailing people.

[40] If the firm could take responsibility in this context, it may be in a much weaker sense than desired, not to the standard of genuine criminal culpability. As some support for this, I direct the reader back to Enoch (*op. cit.*). Though he maintains that we can take responsibility vicariously for what is done by others in some instances (and he uses parents taking responsibility for the bad conduct of children as an example), it is clear Enoch does not think that the agent taking responsibility is genuinely responsible or answerable for this conduct. Instead, taking responsibility is closer to expressing involvement in the situation or not disowning the actually guilty party. But a firm could meet this standard well before accepting criminal fault.

answer for *that* crime if this is genuinely a case of vicarious liability? It is stipulated by this that they did not commit the crime.

Our response should be to note that the issue is not whether the firm is responsible and answerable for *anything* in these cases; in fact, as we will see below, I think that it is. But our question concerns whether it could make sense to say that the firm could be answerable *for that crime committed on their behalf*. If this turns out to involve some kind of incoherence, then that's much the worst for vicarious liability generally in the criminal law. However, and importantly, I do not think that this is necessary incoherent.

In law pertaining to military conduct, for instance, there is much discussion of 'command responsibility.' This is taken to be a principle analogous to respondeat superior used to hold those in command responsible for the conduct of subordinates.[41] As a context for vicarious liability, I think this stands a much better chance of successfully conferring liability onto superiors. And the reason is simple: Subordinates are often acting directly on the orders of superiors. The reason the subordinate does this or that *comes from* the superior officer.

When we think about how superior officers may be guilty of criminal wrongdoing because of the conduct of their subordinates, it may be that they are guilty in some stronger sense. Perhaps they explicitly directed the subordinate to act illegally, and this may constitute an inchoate crime like solicitation, conspiracy, or incitement. But suppose they did not direct the illegal conduct. Still, the superior has such explicit command of the conduct of the subordinate, regularly enjoining them to do this or that, that it is more plausible to say that they are answerable for what the subordinate does. Not only is the subordinate's conduct more clearly attributable to them, but superior officers are in a position to answer for the reasons motivating their subordinates to act insofar as they are understood to be the fount of those reasons.

Military superiors have the ability to answer for why a subordinate acted as they did because the military is structured to dominate the agency of servicemembers. It is taken for granted that subordinates act at the behest of their superiors because that is the standard set for all of their conduct. So, a limited form of respondeat superior does seem appropriate in this context, as superior officers are answerable for the conduct of their subordinates. That conduct is done for the reasons superiors give to them. In cases where subordinates act illegally but outside of their directives (though perhaps not explicitly against their standing orders), then the superiors are answerable—not in the sense that they can give answers in this case, but because they generally assume responsibility for the conduct of those under their charge.

This provides for vicarious liability of some kind in the criminal law. If I am wrong, then so much the worse for the legitimacy of respondeat superior. Even if I am right, though, the story for how this works is simply implausible in most cases in which respondeat superior is typically appealed to. In workplace, non-military cases, many employees have wide discretion concerning how they spend their time and execute their duties in the firm's interest. But this wide discretion undermines the idea that the firm can generally expect to be answerable for employee conduct. This looser authority relation makes it harder to understand even an employee's immediate superior as answerable for their conduct, and it makes it even more implausible to understand the firm itself as answerable.[42]

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[41] See Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010: ch.10). Despite claiming this connection between command responsibility and respondeat superior, Solis himself suggests that command responsibility should be understood as a matter of a superior's responsibility for neglecting a duty regarding crimes committed by subordinates. However, as we will discuss below, this is not the same as the strict liability of respondeat superior, and it requires a higher burden of proof in the offensive stage of the trial.

[42] Whether I am right in distinguishing the case of the workplace from the military may in the end depend on the workplace. See Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Princeton University Press, 2017), which argues at length that many workplaces do dominate their employees perhaps in a similar fashion. In some workplaces, employees are rigidly controlled and at all times subject to managerial interference even in when they go to the bathroom. When the control is that tight, I think this may shift the presumption such that firms should take themselves to be answerable. So, this provides some way of perhaps pursuing

It may certainly be that employees can have their reasons influenced by the reasons that bear on the firm's conduct – they may purposefully act in the firm's interest. They may even commit crimes in part in the interest of the firm. If they were encouraged to do this by managers or the incentives of the firm, then perhaps there is again a more direct story to tell for how either managers or the firm itself may be guilty of an inchoate crime. Absent this direct evocation, however, it is hard to see how the authority of the firm is such as to guarantee firm responsibility for employee wrongdoing. So, as responsibility for a crime for an individual in authority cannot be generally inferred from the fact that the crime is committed by an individual under their authority, the doctrine of respondeat superior is invalid.

V. If Not Respondeat Superior, Then What?

Although I have challenged the doctrine of respondeat superior in the criminal law, this does not mean that entities like firms are therefore not to be held criminally liable. It could well be that firms are directly responsible for many kinds of actions or processes. It is a current largescale challenge to show what a firm itself is directly responsible for rather than any of the employees, especially since our intuition tends to be that anything done by the corporation must be done by employees. And it is also a challenge to show how firms can satisfy *mens rea* criteria for various crimes. However, even if respondeat superior is an invalid doctrine, it may be that we can meet these challenges to hold firms liable. Indeed, those favoring corporate criminal liability for reasons of desert (rather than deterrence) must think that we can meet these challenges.

Apart from their general culpability, we may still find ways to argue that firms are criminally responsible when their employees commit crimes. Moohr, for instance, suggests that it can be appropriate to hold firms responsible as accomplices to the criminal act, guilty of aiding and abetting.[43] If the prosecution can show evidence of the firm engaging in extra conduct to facilitate the employee's conduct or cover-up their crime, then this charge feels appropriate. Even failing this, I think we can still hold onto the idea often suggested that firms can be criminally responsible insofar as they fail in their duty of due diligence.

If respondeat superior were appropriate in the case of criminal firm misconduct, then we would say that firms may answer for their crimes in terms of meeting a standard of due diligence (as Duff might). The prosecution will have shown how the crime can be attributed to the firm in the offensive portion of the trial, and the burden would shift to the firm to show how they warrant an excuse for this misconduct by meeting a reasonable standard of due diligence. As I have argued against respondeat superior in this context, I would purpose accounting for the importance of due diligence slightly differently.

Rather than attempting to hold the firm strictly liable for crimes committed by their employees, I would suggest holding the firm responsible for criminal negligence, where they failed to meet a reasonable standard of due diligence to discourage illegal conduct.[44] This charge is different such that the crime of the employee does not thereby establish the crime of the firm; instead, it is evidence that such a crime has been committed. Proof of a failure of sufficient due diligence then falls onto the prosecution, where this must be established before the firm is called

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respondeat superior in the corporate context, though it would surely be better if firms did not dominate their workforce.

[43] Geraldine S. Moohr, "Of Bad Apples and Bad Trees: Considering Fault-Based Criminal Liability for Complicit Corporations", *American Criminal Law Review* 44(4) (2007): pp. 1343-1364.

[44] This kind of move has been argued for in Weissmann, "A New Approach to Corporate Criminal Liability" and Andrew Weissmann and David Newman, "Rethinking Corporate Criminal Liability", *Indiana Law Journal* 82(2) (2007): pp. 411-452. And a view of criminal responsibility with a negligence component is advocated for in Erin L. Sheley, "Tort Answers to the Problem of Corporate Criminal Mens Rea", *North Carolina Law Review* 97 (2019): pp. 773-842, though Sheley construes the view offered with this component as somehow preserving respondeat superior (rather than abandoning it).

to defend itself via some justification or excuse. This is a higher standard, and so it will be a harder charge to establish. But I think it is appropriate for the crime actually committed. The firm has failed to do enough to adequately control its agents, not inadvertently committed crimes. In demonstrating due diligence, the firm shows why it didn't really do anything wrong, rather than offering an excuse for wrong done.

I will end by acknowledging that there are real challenges with this approach. For one thing, my approach requires thinking much more about how to justify the crime the firm is committing in failing to do sufficient due diligence. It is one thing to say that the firm has a duty not to inadvertently commit crimes, and it exercises this through due diligence. But it is quite another for the firm to need to exercise due diligence in order to satisfy a duty to cease/report the crimes of the employees. Does my view require accepting a duty to avoid the crimes of others generally? Would this suggest a similar duty for parents to monitor and report on their children, for instance, where they could be criminally negligent for failing to do so?

There is a decent case for thinking that there is a duty to report crimes to which you are privy.[45] Further, there will be a reasonable expectation that firms will be privy to many of the crimes of employees, given the firm's authority over employees and power to monitor them,[46] and given a moral responsibility for remaining vigilant.[47] So, it is plausible that firms will have a duty to learn of and report employee wrongdoing. I cannot make this case fully here that a failure of this kind should be a crime or consider the implications for or differences with other cases of crimes committed by those under our authority. Rather than being a cost of my view; however, this engages with ideas worthy of separate consideration.

As a final concern, we may worry about the efficacy of this approach. Kimberly Krawiec notices a trend towards holding firms to a standard of criminal negligence as a means of pushing compliance regimes and is disparaging of this approach.[48] She maintains not only that it is harder to find firms liable, but it promotes whole professions of compliance experts pushing programs and seminars that have largely shown to be inefficacious in securing compliance.

This is concerning. We need to be sensitive to what works and who is pushing for what kinds of compliance regulations. However, it is highly plausible that standards for compliance are how we can hold firms accountable for the conduct of their employees. So, I take it that this is again a challenge that we must rise to meet.

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[45] See Candice Delmas, "The Civic Duty to Report Crime and Corruption", *The Ethics Forum* 9(1) (2014): pp. 50-64.

[46] See Rory van Loo, "The Revival of Respondeat Superior and Evolution of Gatekeeper Liability", *Georgetown Law Journal* 109 (2020): pp. 141-189.Van Loo argues that, as technology allows firms to improve in their capacities to monitor and control, this suggests a revival of respondeat superior as firms can become responsible for the acts of third parties associated with them. I agree that the considerations brought out speak in favor of higher due diligence standards for firms and greater responsibility, though I am skeptical that firms have sufficient control to count as answerable for the crimes of third parties. And again, I would not want firms to expand the grip of their control sufficiently to count as answerable.

[47] See Samuel Murray, "Responsibility and Vigilance", *Philosophical Studies* 174(2) (2017): pp. 507-527.

[48] Kimberly D. Krawiec, "Organizational Misconduct: Beyond the Principal-Agent Model", *Florida State University Law Review* 32(2) (2005) : pp. 571-616.