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Failure to Prevent Offences – Reassessing the Boundaries of the Criminal Law

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The United Kingdom is currently leading the way in the development of one solution to address the issue of corporate offending: the 'failure to prevent' model of offence. Failure to prevent offences impose criminal liability upon corporates for failing to prevent employees and other associated persons from committing specified criminal offences. An offence of this kind was first enacted in s. 7 of the Bribery Act 2010, which makes it an offence for corporates to fail to prevent bribery. This model was recently expanded by the Criminal Finances Act 2017, which makes it an offence for employees to fail to prevent the facilitation of domestic and foreign tax evasion offences. There are important differences between the offences, however. For example, commission of the offence is s.7 of the Bribery Act 2010 is contingent upon the prosecution proving that the bribe was paid with the intention of obtaining or retaining business for the corporate. It could be argued that the boundaries of the criminal law are being stretched too far by making a corporate liable for an offence that was committed by an employee whose sole aim was self-enrichment. It is submitted that the answer to this question depends upon the justification for holding corporates liable for failing to prevent criminal offences committed by their employees. One argument that could be made is that liability ought to be confined to those cases where the employee intends to benefit the corporate. An alternative argument would suggest that the corporate ought to be liable on the basis that the employee's position within the corporate enabled him or her to commit the offence. This, however, would extend liability very far indeed and could constitute a form of vicarious liability. It is submitted that despite the fact they fall broadly within the same category of offence, the offence in s.7 of the Bribery Act 2010 and the new failure to prevent offences contained in the Criminal Finances Act 2017 represent subtly different approaches to imposing criminal liability upon corporates. The purpose of this paper is to analyse the development of the 'failure to prevent' model and examine how far the model can be extended, with reference to the justification for holding corporates liable for offences committed by their employees.

Karl Laird is a Fixed-Term Fellow and Tutor in Law at St Hilda's College. He has also taught at the Universities of Bristol, Cambridge and at the London School of Economics. He is the co-author (with Professor David Ormerod QC) of *Smith and Hogan's Criminal Law* (2015, 2018) and *Smith, Hogan and Ormerod's Text, Cases and Materials on Criminal Law* (2014, 2017). His sole-authored publications have appeared in leading journals such as the *Criminal Law Review*, the *Law Quarterly Review*, the *Modern Law Review*, and the *Statute Law Review*. Karl is case reporter and commentator for *Lloyd's Law Reports; Financial Crime,* writes monthly case notes for the *Criminal Law Review*, edits the monthly updates for *Blackstone's Criminal Practice* and edits the monthly criminal law e-letter on behalf of the Judicial College. Karl's work is widely cited, for example the Hong Kong Court of Final Appeal in its seminal judgment in *Chan Kam Shing* cited an article he co-authored with Professor Ormerod on joint enterprise. In October 2018, he will commence pupillage at 6KBW College Hill, the Chambers of David Perry QC.

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