



Trinity College Dublin  
Coláiste na Tríonóide, Baile Átha Cliath  
The University of Dublin

# With Great Power Comes Great Responsibility: Can Existing Duties on Directors as Fiduciary Agents Suitably Moderate the Social Controversies Associated with Commercialisation of Synthetic Biology?

*Deirdre Ahern, Trinity College Dublin*

***Regulating the Corporation and  
Morally Significant Technologies***

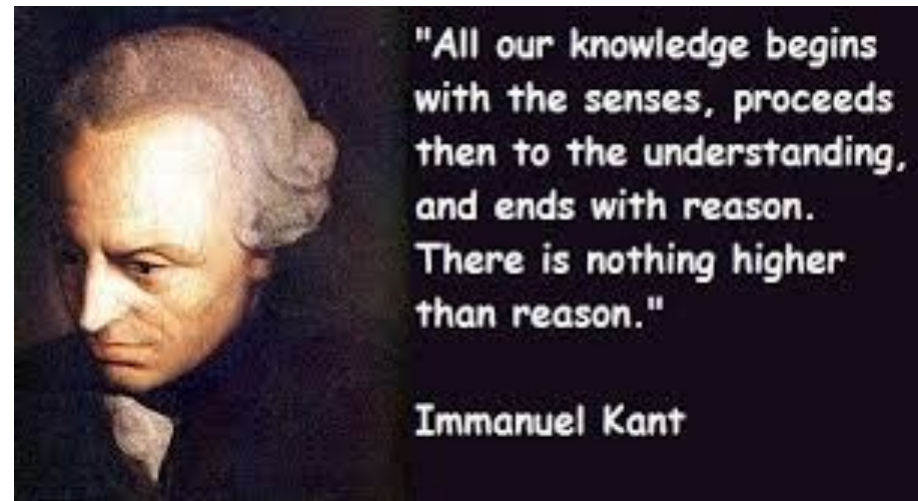
Centre for Life, Newcastle upon Tyne, 12 June 2018

# An Evolving Debate



# Lessons from Moral Philosophy

- A Kantian perspective permits profit maximisation provided that stakeholders are treated morally (Altman, *Kant and Applied Ethics: The Uses and Limits of Kant's Practical Philosophy* (2011)).



# Profiting from Genetic Screening

FDA controversy.



# Paws for thought ...



Shadow and Chance: @WeLovedDylan

# 2014 Kickstarter Campaign for **Glowing Plants**



**Cory Doctorow**

- Blogger, journalist, and science fiction author
- Co-editor of the weblog Boing Boing

“The project's lead looks like he has the necessary experience”

# 2014 Kickstarter Campaign for **Glowing Plants**

- **What we are offering:**
- All backers from the USA who back the project with \$40 or more will receive seeds to grow a [glowing plant](#) at home. Once we have the plant, it is just a matter of breeding enough offspring to grow seeds for all backers. **You can expect around 50-100 small seeds in the packet.**
- **\*\*\*Update - We met our stretch goal. If you back the project at the \$150 we will ship you a glowing rose as well when it's completed. Delivery will be 6-12 months after the delivery of the glowing plant\*\*\***
- For those outside the USA we are waiving additional international shipping charges to compensate for not being able to send you the seeds. If you get the book and write to us after the project **we will also send you a vial of the DNA that way if it's legal in your country (your responsibility to check) and you can source the other ingredients (eg Agrobacterium) you can follow the instructions in the book and make your own plant.**



# Bayer/ Monsanto 7 June 2018 Merger



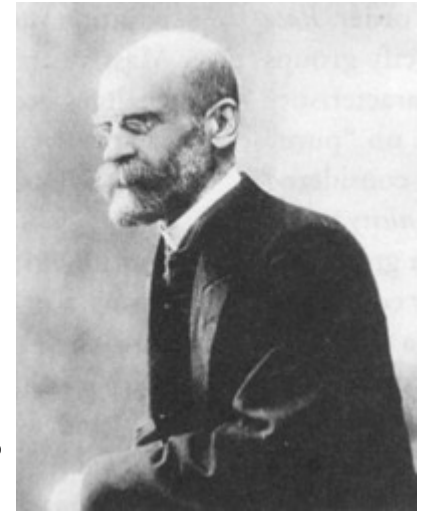


# Re-evaluating Traditional Agency Theory

- Characterisation of agents as self-interested value maximisers.
- Relevance of altruistic motives.
- Bowie and Freeman, *Ethics and Agency Theory* (1992): moral perspectives as relevant to agency theory.

# The Corporation as a Social Institution

- Emile Durkheim and functionalism – emphasising societal interdependence.



- Chasm between stakeholder theory and operationalisation.

# Enlightened Shareholder Value: Section 172 of the Companies Act 2006

(1) A director of a company must act **in the way he considers, in good faith**, would be most likely to **promote the success of the company** for the benefit of its members as a whole, **and in doing so have regard (amongst other matters) to—**

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

**(d) the impact of the company's operations on the community and the environment,**

**(e) the desirability of the company maintaining a reputation for high standards of business conduct,** and

(f) the need to act fairly as between members of the company.

# Limited Ambit of Section 172

- Easy out: Good faith subjectively tested.
- Directors' duties should not be forced to do a job they were not meant to do: *R (People & Planet) v HM Treasury* [2009] EWHC 3020.
- Cannot usurp role of subject-specific legislation and regulation.

## What About 172(2)?

“Where or to the extent that the purposes of the company consist of or include **purposes other than the benefit of its members**, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.”



# LabEasy (Popup Community Biotech Lab)



<https://madlab.org.uk/wp-content/uploads/2014/11/thomas2.jpg>

# Interface with Duty of Care, Skill and Diligence: s.174 CA 2006

*Secretary of State for BIS v Akbar* [2017] EWHC 856 (Ch), [92] Judge Davis-White QC:

*“If a director bona fide considers the position and acts, bona fide, in what he considers promotes the interests of the company then it is not for the court to gainsay that position. **If his judgment is sufficiently badly wrong then it may be that it is one that can be attacked as being taken negligently, even recklessly, in breach of the duty of care and skill.**”*

# Countervailing Benefits Permit Calculated Risk-Taking

*ASIC v Mariner [2015] FCA 589 Beach J:*

*“one expects management including the directors to take calculated risks. The very nature of commercial activity necessarily involves uncertainty and risk taking. **The pursuit of an activity that might entail a foreseeable risk of harm does not of itself establish a contravention of s 180.** Moreover, a failed activity pursued by the directors which causes loss to the company does not of itself establish a contravention of s 180.”*

# Aspects of Duty of Care in the Evolving Synbio Sector

*Secretary of State for Trade and Industry v Baker*  
[1999] 1 B.C .L.C. 433, Parker J.:

- Duty of continuing self-education.
- Adequate supervision.
- Adequate monitoring.
- Professional, legal and ethical advice.

# Bio-safety/Bio-security and the Duty to Exercise Care, Skill and Diligence

- Obvious health and safety breaches will likely be caught by s.174: *Brumder v Motornet Service and Repairs Ltd* [2013] EWCA Civ 195.
- The challenge of ‘unknowingness’.
- Disqualification a possibility where high threshold of incompetence justifies unfitness finding.
- Potential for extension of ‘protection of public’ rationale in disqualification beyond economic consequences?

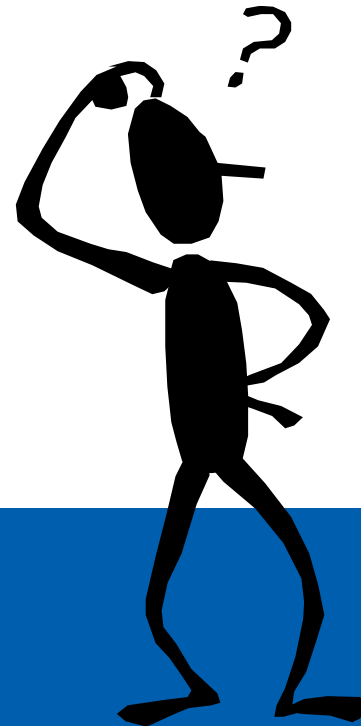


# Comparative Perspectives on Compliance Failures

- Australia: “The duty ... does not impose a wide-ranging obligation on directors to ensure that the affairs of a company are conducted in accordance with law. It is not to be used as a back-door means for visiting accessorial liability on directors.” (*ASIC v Mariner* [2015] FCA 589, Beach J.)
- *Caremark* claims in the United States.

# Limitations of Directors' Duties: Gaps between Stakeholder Theory, Public Expectation and Operational Reality

- Rhetoric of public interest is out of alignment with legal reality of private duty.



**BEYOND MINIMUM COMPLIANCE  
WITH LEGAL DUTIES**

# Post-Financial Crisis

## Focus on Back to Basic Values



# Organisational Culture in SynBio Companies

- A duty 'to care'?
- Relevance of 'tone from the top' in the absence of legal mandation.
- Supererogatory behaviour.
- Avoiding reputational risks.
- Race to the top or race to the bottom?



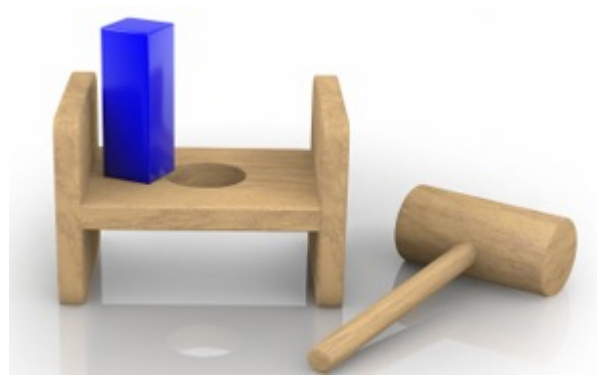
# Approaching Development of Proportionate Responsive Regulation for SynBio

- Deploy a ‘new governance’ regulatory approach - recognises the role of regulated actors in shaping norms rather than simply as regulatory subjects.

D Ahern, “Turning Up the Heat? EU Sustainability Goals and the Role of Reporting under the Non-Financial Reporting Directive” [2016] 13(4) ECFR 599.



# CONCLUSIONS



- Directors' duties control for abuse of agent power.
- Directors' duties cannot plug regulatory and ethics gaps.
- Contribution of corporate law and governance debate to norm building for corporation as a societal actor.
- Role of principle-based, adaptive regulation with multi-stakeholder involvement.



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Thank you.

Questions  
and  
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