Review Essay

Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality by F C Simon (2017) Routledge, 240 pp, ISBN 9781138233720

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Tolstoy's final remarks in *War and Peace* sum up the lesson to be taken from epic detail: the scope of our view influences our estimation of causes. He wrote:

> in astronomy the new view said: 'It is true that we do not feel the movement of the earth, but by admitting its immobility we arrive at absurdity, while by admitting its motion (which we do not feel) we arrive at laws,' so also in history the new view says: 'It is true that we are not conscious of our dependence, but by admitting our free will we arrive at absurdity, while by admitting our dependence on the external world, on time, and on cause, we arrive at laws.'
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> In the first case it was necessary to renounce the consciousness of an unreal immobility in space and to recognize a motion we did not feel; in the present case it is similarly necessary to renounce a freedom that does not exist, and to recognize a dependence of which we are not conscious.[1]

Yet the 'laws' of causation are the laws of chaos — chaos here refers not to disorder but to order (contingent dependence) which nonetheless defies determinability and prediction. Tolstoy leaves us with an awe-inspiring sense of the contingency of complex phenomena. Things are neither necessary nor impossible, and thus the staggering improbability, the wonder, of reality is manifest. It all could have gone differently but for a hardly-noticeable detail. Though not an epic of Tolstoyian proportions, F C Simon's book is a narrative of significant detail on 'the regulation of the Australian retail energy industry… over a 17-year period'[2] and it makes a comparable point: there is devilish detail,[3] and these differences make a difference,[4] depending on the viewpoint. As Tolstoy depicted how minor variables dramatically shifted the fate of battles, so, for example, Simon notes that 'mundane personal events … created (or at least contributed to) … a catastrophic political effect'.[5] It is 'the industry's experience',[6] the book's focus, which brings the concept of

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[1] Leo Tolstoy, *War and Peace* (Louise Maude and Aylmer Maude trans, Oxford University Press, revised ed, 2010) 1308.

[2] F C Simon, *Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality* (Routledge, 2017) xii.

[3] As Simon's respondents repeated, 'the devil is in the detail': ibid 61.

[4] I allude to Bateson's famous definition of 'information': a difference that makes a difference. Gregory Bateson, *Steps to an Ecology of Mind: Collected Essays in Anthropology, Psychiatry, Evolution, and Epistemology* (Intertext, 1972).

[5] Simon, above n 2, 99 cf 101.

[6] Ibid xii.

information to the fore: information is that which is noticed or internally registered. Shakespeare put it like this:

> The jewel that we find, we stoop and take't,
> Because we see it; but what we do not see,
> We tread upon, and never think of it.[7]

We might expect a text on the regulation of energy retail to be a bit dry, but there is high drama, with characters of varied disposition and clashing ideology; there is good and evil and a confusion of these befitting a good story — even one that tells the truth. It begins with meta-regulation, comparable to 'the fields of reflexive governance and corporate social responsibility',[8] as a professed solution. The problem is control through command, which, if the benevolence of the dictator wanes, can be oppressive to the controlled and unsustainably intense and demanding for the controller too.[9] The remedy is a good one — indeed, quite moral. To be 'meta' is to be 'one step removed from direct command and control'[10] and this is ethical because instead of coercion there is community. Rather than diktats, there are general commitments to a certain good way — our way. These commitments are in the form of flexible, negotiable 'principles' that reflect our values, at least as represented by 'parties', 'actors' or 'stakeholders'. Through the mutual observation of each other (here's the community, the 'transparency'), there is accountability in the sense of a more nurturing, 'responsive' control. It is no longer external control, but self-control.

The ideal meta-regulation is when ideals do the regulating. If the ideal is a values-based approach, then the endeavour becomes a question of producing shared values and the best way to do this is through consultation and good faith negotiation. This is an inspiring vision of a 'win-win'.[11] It is not surprising that it emerged along with notions of law and justice that are thought to be restorative of community itself. But if you expected Simon's account of meta-regulation in practice to be an affirmation of it, then prepare to be disillusioned. It is not that meta-regulation is a bad idea: 'It makes sense to identify that all regulation is ultimately *self*-regulation, and that businesses and regulators should be receptive to the needs of a broad stakeholder base.'[12] The problem, surprisingly, is morality. 'Morality is at the heart of meta-regulatory theory, with firms seen to require moral guidance'.[13] What could be more sensible, if the love of money is the root of all evil, than to temper this motivation by nurturing 'substantive social values'?[14] The problem is indeed in practice, in the complexity that, by all indications, makes morality something unlikely to be shared. Simon's exploration of the suitability of community values to

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[7]   William Shakespeare, *Measure for Measure* in *The Complete Works of William Shakespeare* (Wordsworth Editions, 1996) Act II, scene I, 791.

[8]   Simon, above n 2, 24.

[9]   Ibid 1, 222 (Table 7.2).

[10]   Ibid 3.

[11]   Cf ibid 41.

[12]   Ibid 5 (emphasis in original).

[13]   Ibid 4.

[14]   Ibid 4 (quoting Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) 207, 209).

regulate modern social dynamics is an empirical confirmation, or at least support, for the longstanding argument against 'lofty salvationist'[15] aspirations of some popular legal and political theory.

Over two decades ago, a debate played out in the *Sydney Law Review* (1995 vol 17) between one of the forerunners of the restorative justice movement and some less moral, but for that reason perhaps better (certainly not immoral!), social scientists and theorists of law. The idea was mooted that 'community values' could be ascertained and used as a foundation for legal decision-making in hard cases. The assumption, allegedly supported by survey data, was that there is 'near-universal support' for identifiable values and this 'consensus' could be practically fed into jurisprudence to better decisions.[16] Consensus, or shared values, is both the desired end and the a priori condition, and only '[s]andwiched in between' is there an openness 'to the most plural, multicultural, theoretically eclectic deliberation'.[17] Despite the searing critique,[18] this 'Habermasian' ideal of 'communicative rationality'[19] has survived the decades and, according to Simon, underpins meta-regulatory theory.

Not only is mutual ownership of shared values the expected product of meta-regulation, there is a presumption of a sort of singularity of 'interest' that 'the public' already has.[20] Homogeneity of values is not only presumed of 'third parties', such as activists and advocates, but the theory also expects solidarity between governments and regulators.[21] Yet Simon's inquiry shows that values in meta-regulation can be just as meaninglessly or 'vaguenessfully' agreeable — like, the vulnerable should be protected[22] — as Ziegert pointed out Braithwaite's 'community values' were 'doxic'.[23] To say that 'the public interest is not unitary or stable'[24] is to say more than that it changes; the very meaning of 'public interest' is in a state of flux, as there is varying interest in making 'public interest' mean what it means. Thus there is a complexity beyond that of a mere plurality of parties with competing interests. The meaning of 'interests' — not to mention the meaning of 'competition' — is also at stake in the coming together of 'multiple parties' with 'different perspectives'.[25] Communication as collaboration is, in meta-regulation,

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[15] Cf Simon, above n 2, 5.

[16] John Braithwaite, 'Symposium on Community Values in Law: Community Values and Australian Jurisprudence' (1995) 17(3) *Sydney Law Review* 351, 372, 368.

[17] Ibid 368.

[18] Klaus A Ziegert, 'Judicial Decision-Making, Community and Consented Values: Some Remarks on Braithwaite's Republican Model' (1995) 17(3) *Sydney Law Review* 373, 384. This is not to mention Luhmann's rigorous retorts to Habermas himself.

[19] Simon, above n 2, 25.

[20] Ibid 29.

[21] Ibid 27.

[22] Ibid 85.

[23] Bourdieu is cited to explain 'doxa' as beliefs the value of which cannot possibly be negated because no one even thinks of doing so, which merely covers over differences that might otherwise make a difference. In other words, 'doxa' means the untouched base upon which debates distinguishing orthodoxy and heterodoxy can happen. One implication is that doxic values cannot be an aspiration: Ziegert, above n 18, 379. See Pierre Bourdieu, *Outline of a Theory of Practice* (Richard Nice trans, Cambridge University Press, 1977) 164–71.

[24] Simon, above n 2, 46.

[25] Ibid 25.

supposedly the solution. Yet, for one example, 'consultation was never able to draw out what vulnerability meant'.[26]

Let us stand back to get a broader sense of the dramatic narrative. There are companies that sell energy. This is good because everyone needs energy. But the companies themselves are not necessarily good, because they are not premised on magnanimous philanthropy but are geared to make profit for themselves. For all we can trust, they might even be tempted toward wicked profiteering, using their power, literally, to extract resources from good citizens of the earth and indeed from the fragile earth itself. To the good folk there is truth in the urban myths, and rural ones too, of ominous oligarchies and fracking capitalistic cartels. Then, outrageous confirmation: an oil company was going to dump oil into the ocean![27] Thank God for Greenpeace![28] And, less spectacular but oh so human: a poor single mother-of-three is left without essential services to her home — the power company cut her off — because of financial hardship or, more's the point, for merely having paperwork incorrectly filled out, or lost, or not issued![29] Activists activate advocacy groups because, of course we all agree, something needs to be done.

The good guys set about bringing the bad guys to justice or to bind them from perpetrating injustice. But for that they need help from, along with the mass media, the real powers that be: law and government. So the government appoints regulators and now we have a full complement of stakeholders. The companies, for their part, say: We're not so bad. We appreciate our duties to customers and shareholders alike and we don't need to be forced to do our job quite well enough, at least considering the things we should consider, like markets and economic sustainability. Retailers, in vague submissions, want no prescriptive regulation other than in the event of 'market failure'.[30] But, sure, the industry is willing to cooperate. Only a book the length of Simon's could, and it does, do justice to the complications that ensue.

The risks in coercive domination are well known.[31] Going further than mere pragmatics of ruling, and to the heart of the definition of authority, Ziegert points out, '[p]ower comes to its limits where threat must be used to terrorise recipients into acceptance of values'.[32] So it would seem to make good sense, and be in agreement with normative meta-regulation, for all to work toward the baddies becoming goodies through communicatively accepted values. Simon explains that 'meta-regulation provides for businesses to undergo a moral conversion through communication with these third parties.'[33] If only the moral was so clear as to easily convert to consensus. And if only this conversion, even if difficult, were indeed

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26   Ibid 68.

27   Ibid 32–5.

28   But as it turns out, in the case of the infamous Brent Spar in 1995, Greenpeace was the villain; it demanded, on the basis of erroneous claims, a 'solution' that was just as damaging to the environment and involved putting personnel at greater risk of harm.

29   Simon, above n 2, 89–90.

30   Ibid 66.

31   Garland notes 'perhaps the only insight shared' by Nietzsche and Durkheim: 'Punitiveness … should be interpreted as a symptom of weak authority and inadequate controls': David Garland, 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' (1996) 36(4) *The British Journal of Criminology* 445, 445.

32   Ziegert, above n 18, 377.

33   Simon, above n 2, 31.

good! The problem is the 'ambiguity … [in] trying to follow a moral compass in a pluralistic society.'[34] Actually, there is no indication 'that any given group of beliefs is any more superior or more "moral" than any other given group of beliefs.'[35]

Activists and advocates, perhaps along with the meta-regulatory theorists, would beg to differ. Simon reports that parties were so convinced of their own 'rightness' that 'many were contemptuous towards those stakeholders who did not share their sense of right and wrong'[36] and 'debate only served to reinforce the differences.'[37] Here we get a sense that the solution, communication, is morphing into the problem.[38] Instead of collaboration being conducive to solidarity, '[h]aving people go through a process of considering their own and others' views can actually have the opposite of the desired effect and create further self-justification and distrust.'[39] Even those on the same, good side were not necessarily in agreement. Some, working with a particular concept of social justice, insisted that there should never be a disconnection of energy supply for the non-payment of bills, essentially espousing a form of 'debt waiver'.[40] As they were protesting what was, to them, an obvious injustice, they had justifications for their unapologetically partisan stance. Adversarial relations were par for the course because, as Simon repeats a Luhmannian insight,[41] 'the nature of protest is not oriented towards resolving conflict.'[42]

As you can imagine, the retailers thought this welfare function was not entirely their responsibility; it undercut a basic premise of market economy. Businesses said, naturally, 'there was a natural limit to what they should be expected to absorb as social costs.'[43] But the naturalness of this principle was not as foregone as they hoped.[44] They had to argue for their concept of 'shared responsibility' wherein they would have flexible payment arrangements for struggling customers but it was up to others to handle costs that, if left to them, would be commercially

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[34] Ibid 32.
[35] Ziegert, above n 18, 378.
[36] Simon, above n 2, 111.
[37] Ibid 88.
[38] Ibid 198.
[39] Ibid 89.
[40] Ibid 146.
[41] See the section on protest movements in Niklas Luhmann, *Risk: A Sociological Theory* (Aldine Transaction, 2002). The insight can be traced back to Simmel — for example:

> [T]he parties' consciousness of being mere representatives of supra-individual claims, of fighting not for themselves but only for a cause, can give the conflict a radicalism and mercilessness which find their analogy in the general behavior of certain very selfless and very idealistically inclined persons. Because they have no consideration for themselves, they have none for others either; they are convinced that they are entitled to make anybody a victim of the idea for which they sacrifice themselves.

> Georg Simmel, *Conflict and The Web of Group-Affiliations* (Kurt H Wolff and Reinhard Bendix trans, Free Press, 1955) 39.

[42] Simon, above n 2, 35 (emphasis altered).
[43] Ibid 131.
[44] Ibid 132.

unviable.[45] Governments ought to provide the necessary welfare *and* the conditions for a fairly free market,[46] and not by ordering business to do the government's job.

True enough! After all, it was the government that decided to deregulate energy prices for the sake of a 'well-functioning market'. Here the complications compound to such an extent as would defy clear storytelling, let alone analysis. But Simon does well to weave the narrative of governments being 'necessarily hypocritical'[47] in the impossible balancing of interests,[48] albeit only those 'interests' formed in the manner to which government is responsive; that is, as politics. A big problem is that no one really knows what 'well-functioning market' means.[49] Even the experts 'could not agree about what effective markets looked like.'[50] Obviously it means that businesses should not be hamstrung in doing business, and that affirms the meta-regulatory idea of imparting values and principles, rather than dictating the terms. The trouble is that it does not seem to work. Asking businesses to be responsible for producing outcomes that are broadly politically palatable is merely to 'pass the challenges of understanding societal complexity to business organisations, with no recognition that businesses might not function on these terms.'[51] In fact, '[r]etailers at an organisational level managed political uncertainty by not seeing it; this alone allowed for necessary action. This is the opposite effect to what is anticipated by normative meta-regulatory theory'.[52]

Consumer advocates could, in their respective ways, anticipate the blindness of business. This possibility, indeed probability in their eyes, must be resisted. There has to be resistance, perhaps abetted by mass media, to businesses with their notorious economic rationalism in the face of the poor and oppressed. This is precisely the sort of pressure that meta-regulators expect will bring reformation to the miscreant, valueless capitalists. Yet the story takes another twist. Activists were so convinced of business recalcitrance that they wanted proper political force brought to bear, and this meant that consumer advocates were unhappy with the lack of government dictation to the all-too-collaborative regulatory body. The government then saw the political advantage of politicising the ostensibly meta-regulatory regulator. Thus, it was the meta-regulatory commission's 'very

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45   Businesses essentially said they *should* be able to reduce real humans to 'customers' and further, to 'adult individuals [who] are accountable for their choices and actions': ibid 132 (quoting TRUenergy, *Submission to the Committee of Inquiry into Financial Hardship of Energy Consumers*, Parliament of Victoria, 2005). But 'the low-income consumer advocates regularly argued that consumers, particularly vulnerable consumers, were not the rational decision-makers of classical economic theory': at 88. And aggregated data also pointed to 'the messy and unpredictable world of "irrational" consumers': at 160.

46   This paradox is long known to theorists of the modern state. See, eg, David Garland, 'The Birth of the Welfare Sanction' (1981) 8(1) *British Journal of Law and Society* 29.

47   Simon, above n 2, 150.

48   This is why it is said that hypocrisy is 'not a moral judgement': ibid 29, citing Brunsson and Luhmann). See Niklas Luhmann, 'Politicians, Honesty and the Higher Amorality of Politics' (1994) 11 *Theory Culture & Society* 25.

49   Simon, above n 2, 167.

50   Ibid 187 (emphasis altered).

51   Ibid 211.

52   Ibid 210.

independence from government that caused concern for both the consumer advocates and the government itself.'[53]

The retailers were not exactly happy with the regulator's openness to a values-based approach either. Business's inconsistency is noted as follows: 'Although energy retailers claimed they wanted principles and not prescription, at every point they sought prescriptive rules in order to be able to act.'[54] This is not as inconsistent as it first seems, but, rather, points tellingly to the required distinction between political power and the function of law. Business did not want to be coerced by the (political) power to make them look bad if they, through the vicissitudes of economic decision-making, happened to make a government look bad. Yet they were in desperate need of what only law can provide, namely, stable expectations regarding what will happen, at least in law, if they act a certain way.[55] On the other side, other stakeholders have a vested interest in keeping things political, so much so that they cared less about non-compliance with explicit law and more about substantive (that is, their measurement of) 'performance'.[56] Here 'normative story tellers focused more on what they believed should have happened than on technical non-compliance.'[57] And governments, as usual, need to hedge. They 'tweak' the law, but it is never good enough. On one hand, the law cannot determine outcomes and is thus disappointing to those who want *performance* satisfactory to them. 'Inevitably the rules were seen to be unsatisfactory at guaranteeing specific outcomes'.[58] On the other hand, law's vagueness — too full of politics — fails to adequately found *expectations* and so disappoints those looking to reliably estimate the environment of and for commercial decision-making.

This is a mere sampling glimpse of the nuanced complexity of the empirical field,[59] which Simon portrays with well-referenced detail. Of course the book, too, is a reduction of complexity; but that is perhaps the key point. There is a certain necessity to all systems' (albeit contingent)[60] reductions of complexity. Back in 1995, Braithwaite dismissed Luhmann's theory for having the 'consequence of reducing complexity', and declared himself as being 'more interested in the virtuous

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[53]   Ibid 122.

[54]   Ibid 74.

[55]   After all, the retailers were seen to decide on the basis of economic risk and operations were changed not on community values, but when the regulator, using law, 'made the financial risk untenable. This was not corporate social responsibility or self-regulation in the normative meta-regulation sense but a response to old-fashioned deterrence measures': ibid 188. It is worth noting that deterrence really only makes sense in the realm of economic rationalism.

[56]   Simon notes that 'the concept of performance was flexible enough to account for subjective normative views of regulation rather than black letter law' and 'legitimacy' amounted to 'making the "right" decisions': ibid 149.

[57]   Ibid 140.

[58]   Ibid 141.

[59]   A further scene is the construction of 'effective competition' and a 'hot' market through registering of rates of customers switching providers, but, on closer examination, it is seen as rather 'uninformed' action and, by some measures, quite irrational and not at all a 'well-functioning market', considering, for example, that prices remained high despite the allegedly healthy competition: ibid 157–67.

[60]   The paradox of the necessity of contingency or the contingency of necessity is kept latent through and by communication, the maintenance of a doxic level of meaning — in the broadest sense, this is 'culture'.

side of complexity and in how it can be savoured and managed'.[61] Decades of sociological work, and now Simon's observations, have shown convincingly that the ineluctably selective savouring and managing of stimulating detail is always the operation of a system, and this is 'virtuous' only ever on the inside. It is a solution to complexity that only the inside has to be managed. And that solution is the problem of control, the out-of-control-ness of respective controls: how to control the relations of self-controlled systems? We can hope that they share values so that their systematic differences are dissolved into oneness;[62] or we can work with our observations of how different systems' sensitisations, including our own, function in self-control. This would be a science of systematic (that is, complexity-reducing) functionings and with this knowledge, as Simon concludes, '[a]t the least, we can adjust our expectations'.[63]

There are problems with coercive control and, then, communication is also a problem. Simon's 'view is that we *cannot* eliminate the drawbacks because to do so would be to imply a control that no entity or system possesses.'[64] Believers in values beyond mere interests and attitudes, and in the meta-ethical tradition of rationality for the regulation of action, will feel deep (internal) moral qualms about this apparent descent into relativism. 'Rationality is in the eye of the beholder at a particular point in time…' says Simon,[65] and 'rationality is not an objective concept… [r]ationality is much like morality in this regard.'[66] In this way rationality is brought down from the meta-realms, down from meta-ethics and meta-regulation and into the realm of empirical science as an object of observation.[67] Forms of observation, like morality, are observed for the sake of insight into the complexity of multi-rationality, because 'morality does not help us to understand'.[68] Far from politicised and moralised values and principles providing the solution, they formed a very immanent complex.[69] 'Morality [even in 'meta' mode] was not transcendental … morality created *negative* effects'.[70]

The moral of the story is that morals are not adequate for a sophisticated understanding of the story. The fact that moral communication can stir up trouble

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[61]   John Braithwaite, 'A Reply: Broadening Disciplines that Dull as well as Sharpen' (1995) 17(3) *Sydney Law Review* 397, 403.

[62]   A 'jurispathic' faith, we might call it, in the sense made by Robert Cover, 'Violence and the Word' (1986) 95(8) *The Yale Law Journal* 1601, 1610.

[63]   Simon, above n 2, 221.

[64]   Ibid (emphasis in original).

[65]   Ibid 45.

[66]   Ibid 47.

[67]   The fact/law distinction is a prerogative of the legal system's rationality but, for science, law exists as a matter of fact. Cf Chris Thornhill, 'On Norms as Social Facts: A View from Historical Political Science' (2008) 14(1) *Soziale Systeme* 47.

[68]   Simon, above n 2, 216.

[69]   The point was well noted at the same time as the Braithwaite–Ziegert exchange: William Rasch, 'Immanent Systems, Transcendental Temptations, and the Limits of Ethics' (1995) 30 *Cultural Critique* 193. See also William Rasch, 'The Limit of Modernity: Luhmann and Lyotard on Exclusion' in William Rasch and Cary Wolfe (eds), *Observing Complexity: Systems Theory and Postmodernity* (University of Minnesota Press, 2000) 199–214.

[70]   Simon, above n 2, 217 (emphasis in original).

prompted Luhmann to remark, 'The moral is not something good.'[71] The point — in the meta, so to speak — is to observe *how* things are observed as being good or not. In Simon's study of energy retail, '[t]he key question… relates to what the industry observed'.[72] Simon appears to be sympathetic — and for good, empirical reason — to the view that there was an oversupply of politics, thus too many competing norms, in the business.[73] The remedy would be to have law posit law with a clarity and certainty that facilitates expectations for decisions.[74] But Simon's conclusion is that 'meta-regulation is not really about law but about embedding politics (and a faulty view of the market) *instead of law*.'[75] The fact that 'politics was pervasive'[76] meant that everything had to be resolved through values and principles—and *that was the problem*. It is a problem for governments, because they can hardly fix things so much as beseech parties to work peaceably together. It is a problem for businesses because they only have principles that value whatever is conducive to profits and they need others to supply the necessary legal values for their profitable ends, legal values that protect them from the ravages of political values and principles. For the same reason that Ziegert criticised Braithwaite's 'community values' as an 'unlikely' solution, Simon finds fault with meta-regulation because it 'is *particularly* political.'[77] Law has to be allowed to do what it does precisely because politics can only do what it does, which is not much — and often that is not even good.

Simon set out with a sense that meta-regulation 'needs to be illuminated and contextualised, with a deeper exploration of communicative possibilities in practice, including how meaning is constructed.'[78] This illumination of the empirical context has been achieved to good effect. As for a critique of the undertaking: it is too easy to criticise anyone, even a systems theorist, for not making a full 'Luhmann-ation' of the construction of meaning and of the construction of this, their own, construction. Simon's portrayal of Luhmann's sociological tools is, necessarily, a sketch and perhaps does not ameliorate the mystification that still persists around such concepts as 'closure'. At one point, Simon refers to 'a functionally differentiated company',[79] but, if speaking strictly of Luhmann's theory, functional differentiation is not seen along company lines, and indeed the book itself illustrates that companies are hardly 'closed' in the same way that societal function systems more certainly are.[80] Companies are irritated by, say, politics in different ways from

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[71] Niklas Luhmann, 'The Code of the Moral' (1993) 14(3–4) *Cardozo Law Review* 995, 996. See also Niklas Luhmann, *Theory of Society: Volume 2* (Rhodes Barrett trans, Stanford University Press, 2013) 279.

[72] Simon, above n 2, 196.

[73] At one point it is remarked, 'surely all that could be required [of retailers] was compliance with the rules as they were written', because 'performance', if meant to be self-regulated action, would be difficult if it were always, as it was, 'according to (unstated) criteria that went beyond the compliance obligations in the Retail Code': ibid 144.

[74] This point, emphasised by Luhmann and Ziegert, about the importance of the functional distinction between law and politics, with law maintaining its separation from the tumult of political developments, is reiterated in a retort to Braithwaite by Martin Krygier and Arthur Glass, 'Shaky Premises: Values, Attitudes and the Law' (1995) 17(3) *Sydney Law Review* 385, 395.

[75] Simon, above n 2, 212 (emphasis in original).

[76] Ibid 222.

[77] Ibid 197 (emphasis in original).

[78] Ibid 24.

[79] Ibid 108.

[80] See Luhmann, *Theory of Society: Volume 2*, above n 71.

how, say, law is irritated. It makes sense enough, though, to note that companies and consumers are geared to handling complexity through their own particular economic rationality (budgets), however economically irrational that might appear to onlookers with their rationalisations of market (not mere budget) rationality. In this sense, companies are 'closed' such as to be able to identify themselves as commercial entities and not, say, charities. Such self-differentiation of identity allows for observations of it by others and attributions to it — even as immoral. To insist on companies being what we feel is moral is to arrive at absurdity, while to concede the goodness, which we do not feel, of distinct functions is to arrive at the truth of free, self-constituting identities.

The book makes clear that it is difficult 'to have objectively rational discussions about difficult topics'[81] but, for its part, the book does very well in this regard. The ultimate lesson we can draw from this drama, like all great tales of war and the strivings for peace and prosperity — not to mention power — is that complexity is the real villain of the piece.[82] Yet if we are interested, indeed awe-inspired by complexity, even, for example, in Luhmann's theory of it, then it can be seen as something good. It might even be quite moral to conclude from complexity that 'nobody may be to blame'[83] and it might be quite rational to regard as irrational the causal attributions and presumptions of 'rationality' that inhere in some of the theories of behavioural compliance through control technologies; for 'compliance was a contested concept.'[84] Surely it still is contested, just like goodness and rationality. To go beyond morality and rationality is to really meet an Other — beyond control. In practice, however, there is a complex of irritation: we regulate — albeit only ourselves, in chaotic contingency. To admit our freedom to simply secure consensus is to arrive at absurdity, while by admitting our inability to achieve values, we arrive at law.

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[81]   Simon, above n 2, 149.

[82]   Indeed, Simon provides personal testimony, of drafting regulations that resulted in unintended outcomes, in confirmation of a Luhmannian insight that *intention does not drive communication* — legal theories of statutory interpretation notwithstanding: ibid 139. See Niklas Luhmann, *Social Systems* (John Bednarz Jr and Dirk Baecker trans, Stanford University Press, 1995) 130, 151, 166, 365–6; Niklas Luhmann, *Theory of Society: Volume 1* (Rhodes Barrett trans, Stanford University Press, 2012) 45; Niklas Luhmann, *Introduction to Systems Theory* (Peter Gilgen trans, Polity, 2013) 184–7. 'For Luhmann, communication … emerges, so to speak, "unintentionally" — if it emerges. … Only retrospectively might the agents' actions be observed as intended and so raise expectations about consensus, understanding, and harmony.': Manfred Füllsack, 'Communication Emerging? On Simulating Structural Coupling in Multiple Contingency' (2012) 8(1) *Constructivist Foundations* 103, 103.

[83]   Simon, above n 2, 201 (quoting George Yarrow (2014) 'Energy Market Investigation: Response to the CMA's Statement of Issues', UK Competition and Markets Authority ('CMA') Energy Market Investigation). A comparable sentiment:

        We might summarize sociology's approach to person, personhood, and agency in three serious, all-too-serious, methodological rules of thumb. First, nothing is ever anyone's fault in particular. Second, no one can do all that much about anything. And third, fewer people actually care about anything you say or do than your vanity is willing to consider.
        Stephan Fuchs, 'Beyond Agency' (2001) 19(1) *Sociological Theory* 24, 30.

[84]   Simon, above n 2, 140.