
International legal positivism and new approaches to international law

SAHIB SINGH*

A prominent scientist had just given a brilliant lecture on the foundations of the universe. During the question period an elderly lady suggested that there was a problem with the professor's analysis. 'What is that?' asked the professor cautiously. 'It's all wrong,' the woman replied, 'because the universe actually rests on the back of a giant turtle.' The professor, taken aback, forced a smile and then countered: 'If that's the case there is still the question, what is that turtle standing on?' The audience tittered, but the woman, undaunted, replied: 'Another, much larger turtle.' 'But . . .' objected the professor. 'I'm sorry, Professor, it's turtles all the way down.'¹

1 Introduction

Theory is an unrelenting and inescapable act of manipulation. It is an act perpetrated by both the form and substance of a theory, by its rhetorical economy and its substantive claims. My task, here, is to unravel these acts. But in unmasking the manoeuvres of particular theories, this chapter and these very words contrive to perpetuate a different form of control, no less violent than those used by what it seeks to dethrone. Manipulation is inescapable and this chapter is, therefore, culpable. To understand theory as a politically violent and power-based aesthetic is to remove it from

* An extended version of this chapter, with an application to Kelsen and Hart, will be published as: Sahib Singh, 'The Politics of Theory: Form' (forthcoming). Observations concerning the way in which this project has been presented are premised on an introduction written by the editors in October 2011 and comments/observations made in a workshop held in Amsterdam in November 2011. The former has since been significantly amended, but not viewed by this author.

¹ Roger Cramton, 'Demystifying Legal Scholarship' 75 *Georgetown Law Journal* (1986–1987) 1 at 1–2.

the realm of innocence and abstraction.² It is upon this foundation that this chapter will examine the relationship between neo-international legal positivism (neo-ILP)³ and new approaches to international law (NAIL). Specifically, it will examine the politics that structure this *relationship* and the complicity of form in the politics of theory.

Neo-ILP and NAIL cannot solely be understood as a collection of substantive claims, of turtles, of ideas. They must be understood as projects.⁴ They must be understood as deliberate social constructs whose ideological postures occur within a specific historical context, buttressed by material bases that ground their socio-political dimensions. There is insufficient space in this chapter to do justice to each of these angles as regards the stated projects, but they will not be entirely neglected in the analysis that follows. The power of an idea does not lie in its intrinsic merit. To receive, process and become self-conscious of an idea is insufficient for this idea to become consequential. It must be deployed according to accepted *forms* of knowledge-transmission⁵ and it must affect one's socio-cognitive practices. The reduction of theory, as a collection of ideas, concepts and relationships, to the ideational – is corrosive (see also Section 2.3).⁶ It elevates the power of a theory's substantive claims above its form, the ideational over the material, and the rational over the non-rational.

² Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan (tr.), 2nd edn Vintage 1995) 170; Michel Foucault, 'Two Lectures' in Colin Gordon (ed.), *Michel Foucault Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Pantheon 1980) 78–108 at 81–85.

³ All references to neo-ILP in this chapter only seek to refer to the present project and the works of Kammerhofer, d'Aspremont and early Beckett. There is undoubtedly other contemporary positivist work being produced, but these are not subject to the critique presented here – even if such critique may be applicable.

⁴ This term is deliberate and intended to take on the meaning provided by Duncan Kennedy: '[a] project is a continuous goal-orientated practical activity based on an analysis of some kind (with a textual or oral tradition), but the goals and the analysis are not necessarily internally coherent or consistent over time. It is a collective effort, but all the players can change over time, and people at any given moment can be part of it without subscribing to or even being interested in anything like all the precepts and practical activities.' Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Harvard University Press 1997) 6.

⁵ Michel Foucault, 'What is Critique?' in Sylvère Lotringer (ed.), *The Politics of Truth: Michel Foucault* (Lysa Hochroch (tr.), Semiotexte 1997) 23–82 at 52; Harry Johnson, 'The Keynesian Revolution and the Monetarist Counter-Revolution' 61 *American Economic Review* (1971) 1–14 (identifying how both revolutionary and counter-revolutionary ideas in economics had to obey a certain form).

⁶ See generally David Harvey, 'Revolutionary and Counter Revolutionary Theory in Geography and the Problem of Ghetto Formation' in Harald Bauder, Salvatore Engel-Di Mauro (eds), *Critical Geographies: A Collection of Readings* (Praxis 2008) 110–125; Robert Gordon, 'Historicism in Legal Scholarship' 90 *Yale Law Journal* (1981) 1017–1056.

These biases pervade philosophy and normative jurisprudence. Both fields are pathologically obsessed with talking *around* turtles, i.e. substantive claims.⁷ Neo-ILP and NAIL are not exceptions. But I have little interest in turtles. Of greater interest to me is *form*. To speak of form is to speak of how theories manipulate, manoeuvre and control. To speak of form is to speak of the language, grammar and aesthetics⁸ of a theory – each of which frames our debates. It is to speak of a hidden, subtle exercise of power that enables ideas to flourish with the image of innocence. To expose form is to begin exposing the politics of theory. It is an attempt to reveal the concealed forces that shape our legal unconscious. This is the task I undertake in relation to the present project.

But turtles cannot be avoided.⁹ Nor can the inevitable slippage and feelings of crises that follow. Of course, NAIL and neo-ILP are sets of substantive theoretical claims (i.e. turtles). Their respective positions may sometimes conflict, sit in uncomfortable agreement or simply look past each other. In organising the relationship between theories, a theorist is often defined by an underlying structure of feeling. It is a feeling of rupture, fracture and instability that arises from the realisation that no theory can sustain itself solely on its own terms. Epistemic crises emerge because rival theories make equally justifiable claims upon the theorist. This is both a modern and post-modern condition.¹⁰

⁷ Friedrich Nietzsche, *Beyond Good and Evil: Prelude to a Philosophy of the Future* (Marion Faber (tr., ed.), Oxford University Press 1998) 5–15. Normative jurisprudence is obsessed with talking around turtles in several senses: some theories seek to prove the old lady's point (critical legal studies), others reject the latter for being *too* anti-foundationalist while claiming that they are not being foundationalist – making claims on the type of turtle on which law rests, even if it is not the ultimate turtle, while discarding all other types of turtle as irrelevant (Kelsen's *Grundnorm*, Hart's Rule of Recognition, Rawls' justice, Dworkin's self-image, etc.).

⁸ This term is meant specifically as defined and circumscribed by Pierre Schlag: 'the aesthetic pertains to the forms, images, tropes, perceptions, and sensibilities that help shape the creation, apprehension, and even identity of human endeavors . . . [it is] those recurrent forms that shape the creation, apprehension, and identity of law . . . [it is] something that a legal professional both undergoes and enacts, most often automatically, without thinking . . . [and] aesthetics help shape the cognitive, emotive, ethical, and political preoccupations, goals, values, and anxieties of legal professionals.' Pierre Schlag, 'The Aesthetics of American Law' 115 *Harvard Law Review* (2002) 1047–1118 at 1050–1053.

⁹ Form always collapses into substance and vice versa: Sahib Singh, 'Narrative and Theory: Formalism's Eternal Return' 84 *BYBIL* (forthcoming, 2013) at Section 1.

¹⁰ Alasdair MacIntyre, 'Epistemological Crises, Dramatic Narrative, and the Philosophy of Science' 60 *The Monist* (1977) 453–472 at 453–455; David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Basil Blackwell 1990) 9, 39; Richard Bernstein, 'Incommensurability and Otherness Revisited' in Richard Bernstein

To do theory is then to realise two things. First, that any sense of identity (of the self and of law) is displaced by rationality itself: one is always shifting to a position of disagreement with the position that one has already settled on. Second, that because there is no position outside theory where one may adjudge a theory, progress or change in theoretical thought is not so much the result of the progressive evolution of ideas, but rather the product of particular socio-political conditions or the structure from which they emerge.¹¹ These structuring feelings impact on how we can address the substantive positions that are integral to neo-ILP and NAIL. As lawyers, we should be concerned with delineating the boundaries and particularities of law. But theoretical positions precede our capability to engage with and cognise it, for they define what we perceive it to be. And yet any rational being will realise that no theory can sustain itself, given both internal (a ‘hidden awareness of the impossibility of its own project’)¹² and external conditions (socio-political considerations). The issue that then emerges is our ability to delineate the boundaries of our discipline with any security. But what shields us from these concerns, and the existential angst that inevitably follows, is the form of theory. It insulates a theory from that which can destabilise it (and the theorist). The analysis that follows looks at the form of the relationship between neo-ILP and NAIL. This foundational examination is elsewhere complemented with a detailed look at the form of Kelsenian and Hartian approaches – the main strands within neo-ILP.¹³

2 The politics of theory: comments on the form of a relationship

The present project, neo-ILP, is premised on a discursive engagement between theories. It asks where neo-ILP stands as a scholarly approach, where its future potential lies and what it has learned from the NAIL

The New Constellation: The Ethical-Political Horizons of Modernity/Postmodernity (MIT Press 1992) 57–78 at 57–58.

¹¹ Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr.), Columbia University Press 2004) 107–112.

¹² David Kennedy, ‘A Rotation in Legal Scholarship’ in Christian Joerges, David M. Trubek (eds), *Critical Legal Thought: An American–German Debate* (Nomos 1989) 353–396 at 359.

¹³ Sahib Singh, ‘The Politics of Theory: Form’ (forthcoming); Sahib Singh, ‘International Law as a Technical Discipline: Critical Perspectives on the Narrative Structure of a Theory’ in Jean d’Aspremont (ed.), *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (2nd edn Oxford University Press 2013) 236–261; Singh, n. 9.

charge.¹⁴ Certainly, engagement is a significant and welcome advance on the ‘detached, disengaged affair’¹⁵ or lack of ‘meaningful debate’¹⁶ that typified the relationship between new and mainstream legal scholarship in the 1990s and 2000s. But it also comes with its own politics: the subtleties of how the debate is framed, the positions ascribed to various theories (and how these positions are evaluated), as well as the manner in which confrontation is avoided and at other times embraced. It is the narrative structure,¹⁷ or rhetorical economy, and aesthetics of a project that expose these politics.¹⁸ An analysis of form reveals the strategies of persuasion, manipulation and control that often go unnoticed and delicately structure an enquiry. I hope to make these explicit as regards the present project by looking at three different choices that structure the way in which dialogue between neo-ILP and NAIL is cast by the former.

2.1 The politics of choice → the politics of definition

Theory is rife with political struggle. On an ideational level, this struggle is enacted on the very paraphernalia of which theories are comprised. Concepts, categories, labels and constructed relationships are all primed

¹⁴ Jörg Kammerhofer, Jean d’Aspremont, ‘Introduction: Mapping 21st Century International Legal Positivism’ (unpublished paper, 2010) at 2 [Editors’ note: the author refers to the first version of the introductory chapter; in order to preserve the references, that version has been made available at: <http://ssrn.com/abstract=2372778>]; Jörg Kammerhofer, ‘International Legal Positivism in a Post-Modern World: A Proposal for Greater Focus in Scholarship’ 3 *AjV Newsletter* (2013) 2–4 at 2–3.

¹⁵ Deborah Cass, ‘Navigating the Newstream: Recent Critical Scholarship in International Law’ 65 *Nordic Journal of International Law* (1996) 341–383 at 342.

¹⁶ Thomas Skouteris, Outi Korhonen, ‘Under Rhodes’ Eyes: The “Old” and “New” International Law at Looking Distance’ 11 *LJIL* (1998) 429–440 at 430; see also Thomas Skouteris, ‘Bridging the Gap? The 1999 Annual Meeting of the American Society of International Law’ 12 *LJIL* (1999) 505–509.

¹⁷ For an introduction to critical narrative analysis as method in international law, see Singh, ‘Discipline’, n. 13; Singh, n. 9.

¹⁸ A brief comment on method: the relationship between narrative/rhetoric and aesthetics is an uneasy one. On the one hand, aesthetics may be but a subset of the rhetorical economy of a text; on the other hand, it structures that very rhetorical economy. Both are treated as interlinked but fundamentally distinct methods of analysis in the context of this chapter. But as methods, they can *only* perform a critical endeavour. An aesthetic or narrative understanding of theory and law precludes a claim to correctness: it only opens up an ontologically different position from that under examination and it cannot preclude that another narrative interpretation is any less ‘correct’. Furthermore, this chapter is an aesthetic and narrative construct that cannot claim any further claim to being right – it does not seek to do so. By being reflexive, it can, however, be transparent in its motives. Both methods are forms of ideology critique.

for symbolic conflict. They do not have fixed meanings and contours, but cannot do without historical ones; they rather provide the surface upon which social and ideational conflict is waged and made visible.¹⁹

So, how the editors of this project frame the debate between neo-ILP and NAIL becomes increasingly important. What visions of these projects are foregrounded, which are marginalised and why? What is meant by the 'post-modern world' in which neo-ILP strives to exist? Is Critical Legal Studies (CLS) equated with the 'post-modern critique' in law? Why is there a felt need to reconstruct the theoretical foundations of neo-ILP in light of such critiques? What are the consequences of considering the works of Kennedy and Koskenniemi to be ones of deconstruction? Why are Kennedy and Koskenniemi engaged with and not Allott, Chimni, Anghie, Miéville or Marks?²⁰

I contend that these rhetorical and symbolic manoeuvres, under the guise of description, legitimate, consciously or unconsciously, the prevailing legal ideology. The constructed narrative is one of neo-ILP as the underdog, the contemporary outsider so relegated in the battle of theories for discursive dominance. It is insulated from a range of critiques and elevated as a necessary and modern method. NAIL, on the other hand, suffers from reductionism, misapprehension and the consequences of negative connotations.

The first question-begging manoeuvre is the positioning of CLS (here, NAIL) alongside deconstruction.²¹ Koskenniemi's and Kennedy's early works are often cast as ones of deconstruction, in my opinion incorrectly.²² But neither *International Legal Structures* (*Structures*), nor *From Apology to Utopia* (*FATU*) are works of deconstruction, but rather, as stated by the

¹⁹ Ernesto Laclau, *Emancipation(s)* (Verso 1996) 36–46, 84–104.

²⁰ Kammerhofer and d'Aspremont, n. 14 at 4, 6–7; Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011) 90–95, 110–117.

²¹ Kammerhofer and d'Aspremont, n. 14 at 7. While the editors use CLS to indicate critical thought in international law, I will use this to refer to the American school of thought that flourished between the 1960s and 1990s. Instead, NAIL will refer to the strain of critical thought in international law that came into ascendance in the 1980s and continues today. There are considerable and important differences between the two schools.

²² E.g. Iain Scobbie, 'Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism' 61 *BYBIL* (1990) 339–362 at 339. Critical theorists also make this mistake: Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law' 2 *EJIL* (1991) 66–96 at 69–70. Others get it right: Emmanuelle Jouannet, 'Koskenniemi: A Critical Introduction' in Martti Koskenniemi, *The Politics of International Law* (Hart 2011) 1–32.

authors themselves,²³ of structuralism. The differentiation is vital. It may be, as I contend, that these are works settled in modernity and are not ‘post-modern critiques’.²⁴ If accepted, this has obvious consequences for the present project. Let me begin by first demonstrating my argument.

There are vital differences between structuralism and deconstruction.²⁵ Deconstruction undoes structuralism, while simultaneously making structuration unavoidable. Structuralism depends on a centre, ‘that is, a set of constitutive norms and procedures through the totality of which the ideal model of a given activity is practically established, changed and enacted’.²⁶ This centre defines, imports and escapes, simultaneously, a totality (whether it be international law or some other structure). Deconstruction is the historical rupture that questioned the existence of the centre. It redefined how we think about the structurality of structure:

Thus it has always been thought that the center, which is by definition unique, constituted that very thing within a structure, which while governing the structure, escapes structurality. This is why classical thought concerning structure could say that the center is, paradoxically, *within* the structure and *outside* it. The center is the center of the totality, and yet, since the center does not belong to the totality (is not part of the totality), the totality *has its center elsewhere*. The center is not the center.²⁷

For the deconstructionist, the centre does not exist, but becomes ‘a function, a sort of nonlocus in which an infinite number of sign-substitutions came into play . . . everything [becomes] discourse’.²⁸ Deconstruction would have potentially devastating consequences if applied to international law.²⁹ But in Koskenniemi’s 1989 *FATU*, we find far more Saussure,

²³ David Kennedy, ‘Critical Theory, Structuralism and Contemporary Legal Scholarship’ 21 *New England Law Review* (1986) 209–289 at 266 (fn. 137); Martti Koskenniemi, ‘Letter to the Editors of the Symposium’ 93 *AJIL* (1999) 351–361 at 355. Koskenniemi refers to his 1989 work as having deconstructionist elements: see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers’ Publishing Co. 1989, reissued Cambridge University Press 2005) 6–14, 536–537, 541. This perhaps elevates the potential for misapprehension, but see below.

²⁴ Kammerhofer and d’Aspremont, n. 14 at 4.

²⁵ See Derrida’s famous deconstruction of structuralism: Jacques Derrida, ‘Structure, Sign and Play in the Discourse of the Human Sciences’ in Jacques Derrida, *Writing and Difference* (Alan Bass (tr.), University of Chicago Press 1978) 278–293.

²⁶ Akbar Rasulov, ‘International Law and the Poststructuralist Challenge’ 19 *LJIL* (2006) 799–827 at 801.

²⁷ Derrida, n. 25 at 279 (emphasis in original). ²⁸ Derrida, n. 25 at 280.

²⁹ For an overview, see Rasulov, n. 26 at 810–816.

Lévi-Strauss and the Frankfurt School's Critical Theory than we do Derrida. But there is plenty of room for ambivalence in his deployment of structuralism and Critical Theory.³⁰

Koskenniemi, at points, refers to the method employed in *FATU* as deconstructionist.³¹ But he is also perfectly aware that 'many' deconstructionists would not call, or accept, it as such.³² The entire premise of *FATU* is to explicate the 'grammar', 'deep structure' or '*langue*' of international law. It attempts to describe the *structural* conditions that circumscribe what can be said in international legal argument. Apology and utopia, normativity and concreteness are opposites that *function as centres and structure the conditions of possibility* within and between which international legal argument operates.³³ A structuralist sustains the argumentative structure of law (however wide this may be), a deconstructionist throws them wide open, demonstrating the inevitable and continuous discursive slippage that follows from unavoidably proceeding outside of the structure.³⁴ Koskenniemi remains avowedly structuralist despite his

³⁰ I relegate my reading of Kennedy's *Structures* to a footnote because I consider it to be a clear-cut example of structuralist work. In contrast, Koskenniemi's *FATU* is somewhat more difficult to qualify; despite its methodological transparency. Kennedy looks at how international law is structured by a deep incoherence, between respecting sovereigns and governing them. It was an internal examination of international law that demonstrated the circular and recurring rhetorical structure. But the deep incoherence was precisely what structured the discipline. It is structuralist precisely because it sustained specific schema as stable and as constitutive of international law as a structure. See David Kennedy, *International Legal Structures* (Nomos 1987).

³¹ See references in n. 23. ³² Koskenniemi, *FATU*, n. 23 at 10 and fn. 8.

³³ Koskenniemi, *FATU*, n. 23 at 11.

³⁴ For a great demonstration of this, see Pierre Schlag, 'Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction' 40 *Stanford Law Review* (1988) 929–972. Another way of viewing Koskenniemi's work is as artificially and prematurely arrested deconstruction. It has been terminated at precisely the point at which it could reconfigure and undermine international law as law. It has been terminated by Koskenniemi precisely so that he can sustain the functioning and identity of the international lawyer as social agent (Koskenniemi, *FATU*, n. 23 at 546–561). Chapter 8 of *FATU* tempers everything that came before it. Deconstruction is terminated in order to sustain a certain politics or normative agenda. The issue is not so much that one could want deconstruction to carry on forever, but that it has been terminated too soon. It has been terminated before it can shake the centres that determine the structure of international law. This position (the premature termination of deconstruction) is explained and critiqued in Pierre Schlag, 'Le Hors de Texte, C'est Moi': The Politics of Form and the Domestication of Deconstruction' 11 *Cardozo Law Review* (1989–1990) 1631–1674; Pierre Schlag, 'The Problem of the Subject' 69 *Texas Law Review* (1991) 1627–1743; Pierre Schlag, 'A Brief Survey of Deconstruction' 27 *Cardozo Law Review* (2005) 741–752; Peter Dews, *Logics of Disintegration: Post-Structuralist Thought and the Claims of Critical Theory* (Verso 1987)

contextualisation and historically contingent examination of the structure of international law. Koskenniemi's field of analysis is the international legal profession, not merely texts and doctrines – it proceeds, at its edges, to be an examination of a culture. Much as Lévi-Strauss did with myths,³⁵ Koskenniemi sought to take apart the assumptions and rules that governed the production of international legal arguments. This exposition made explicit the repeating patterns that transcend and order the content of individual arguments, exposing them to be part of a system of shifting internal references generated and sustained by various acts of abstraction. But Koskenniemi's structuralism was also complemented by Critical Theory. The former is not a theoretical straitjacket (given the contrasting approach to history taken in each of these).

Koskenniemi's structuralism sought to shake the normalcy and routine of objectified legal positions. In this endeavour he found an ally in the Frankfurt School and the works of Adorno, Habermas, Horkheimer and Marcuse.³⁶ But Critical Theory not only buttressed his critical endeavour. It also enabled Koskenniemi to sustain his politically idealistic belief in the agency of the international lawyer.³⁷ Koskenniemi sought to undo all 'objectifying knowledge [which] has seemed to work as an ideology, or a "false consciousness"'.³⁸ In this context, ideology is a form of consciousness that acts to change and limit the actions and ideas of the international lawyer, while simultaneously imposing itself on the world through the actions of said lawyer. In short, Critical Theory seeks to undo false consciousness. It does so by positing a theory that both exists in the

33–44, 200–219. For a similar reading of Koskenniemi to mine, see Outi Korhonen, 'New International Law: Silence, Defence or Deliverance?' 7 *EJIL* (1996) 1–28 at 19–21. A further point of note is that Koskenniemi relies a great deal on the work of Roberto Unger, perhaps one of the few forefathers of CLS to *never* come close to deconstructive analysis.

³⁵ In particular, Claude Lévi-Strauss, *Structural Anthropology*, Vol. 1 (Claire Jacobson, Brooke Grundfest Schoepf (tr.), Penguin 1968); Claude Lévi-Strauss, *The Savage Mind* (University of Chicago Press 1966) (developing the concept of *bricolage* at 16–33).

³⁶ Koskenniemi, *FATU*, n. 23 at 537–543. This reading of Koskenniemi finds certain agreement in Korhonen's cave metaphor – as a third reading of Koskenniemi, see Korhonen, n. 34 at 23–26.

³⁷ Emancipation from objectifying knowledges must be through society (of international lawyers), through the actualising of theory in life. Critical Theory is heavily dependent on a mechanism for agency, just as Koskenniemi's reconstructive project and ethics of responsibility is. See, on Critical Theory, Max Horkheimer, 'Traditional and Critical Theory' in Max Horkheimer, *Critical Theory: Selected Essays* (Matthew J. O'Connell et al. (trs), Seabury Press 1972) 188–243 at 212–213. For Koskenniemi on critical normative practice and the international lawyer, see Koskenniemi, *FATU*, n. 23 at 545–563.

³⁸ Koskenniemi, *FATU*, n. 23 at 538.

world and acts in the world to bring about changes in social behaviour. A critical theory avoids substituting its own false consciousness because its own claim to the social world is subject to its own critique: it is self-reflective.³⁹ By turning to the Frankfurt School, Koskenniemi was able to refine his critique of objectivity by developing his notion of critique, historically situate his structuralist analysis and open up the conceptual space to sustain his politico-moral stance on the reconstructed role of international lawyers and their agency. It was – in short – a deft, and necessary, methodological turn.⁴⁰

If one accepts these arguments and their logic, *FATU* is not a work of deconstruction. The tragedy lies in the reading. Rhetorically, as a matter of form, neo-ILP first misapprehends nascent NAIL – not without the help of the latter. It then etches this misapprehension within Koskenniemi's text. And these moves are not without consequences. First, it invites the judgment and accusations of legal nihilism that inevitably accompany the label 'deconstruction'. James Crawford was almost certainly not alone when he commented that Koskenniemi had shown 'with overwhelming erudition the impossibility of our discipline'.⁴¹ This is a common mainstream position. It reproaches early-NAIL for seeking to eliminate international law. And it is normally accompanied with other crude reductions (for example, reading 'international law is irreducibly political' as 'international law is politics').⁴² The problem is that the narratives of liberalism and that of its critique have both inherited twin dichotomous reductions. Liberalism resorts to the reductionist allegation of nihilism in the face of a threat

³⁹ Koskenniemi, *FATU*, n. 23 at 540–543 (Koskenniemi avoids instituting his own false consciousness).

⁴⁰ The intellectual marriage of the two traditions (structuralism and Critical Theory) is highly problematic – but we do not see the inconsistencies emerge in Koskenniemi's anti-formalistic methodology. See, generally, Michel Foucault, 'Truth and Power' in James D. Faubion (ed.), *The Essential Works of Foucault 1954–1984*, Vol. 3: *Power* (Robert Hurley et al. (trs), Penguin 2002) 111–133 at 115–116.

⁴¹ James Crawford, [Introductory Remarks to Martti Koskenniemi, 'The Wonderful Artificiality of States'] 88 *Proceedings of the American Society of International Law* (1994) 22 at 22; see also Rasulov, n. 26 at 807; Jason Beckett, 'Countering Uncertainty and Ending Up/Down Arguments: *Prolegomena* to a Response to NAIL' 16 *EJIL* (2005) 213–238 at 213; Nigel Purvis, 'Critical Legal Studies in Public International Law' 32 *Harvard International Law Journal* (1991) 81–127 at 121; Scobbie, n. 22.

⁴² For a rebuttal, see Martti Koskenniemi, 'What Should International Lawyers Learn from Karl Marx?' in Susan Marks (ed.), *International Law on the Left: Re-Examining Marxist Legacies* (Cambridge University Press 2008) 30–52 at 43. Early NAIL circumvents nihilism through situationality and perspectivism; see Koskenniemi, *FATU*, n. 23; Korhonen, n. 34; Cass, n. 15.

to its form, and critical theories make similar reductionist allegations of objectivism. By giving Koskenniemi's and Kennedy's work the label of deconstruction, we are thrown into these beside-the-point rhetorical manoeuvres that are embedded within the ideologies of various positions. It is an inherited reality of the language: its myth. But this is not the real problem. Not only does neo-ILP inscribe a misapprehension into the theory of early-NAIL, but it exports this misapprehension. Its purported engagement with NAIL is premised on a falsity – on the exported misapprehension.⁴³ This not only nullifies the constructive potential of any such engagement, but more importantly, it stunts any transformative capacity that early-NAIL work may carry. The politics of choice are masked by the neutrality of definition. But definition is never neutral. It is the empty form on, and through, which social struggle is conducted. But it is an unjustified violence when it is wrong. Ideas are inhibited, subsumed and co-opted by precisely this manoeuvre. History has, however, taught us that none of these neutralising effects is new to dissident or revolutionary theories.⁴⁴

2.2 *Insulating a theory: the politics of incommensurability*

Theorists make consistent and considered efforts to safeguard their ideas from competing theories. Theories must, after all, defend the conceptual space in which they wish to function. Part of doing so requires shielding the reader: she ought not to be torn in several different directions, between competing ideas and considerations. For epistemological rupture cannot aid in the socio-cognitive assimilation of an idea.⁴⁵ Different theories use different strategies – dependent on their intellectual heritage and determining aesthetics. Essentialist and incorrect delineations (with their

⁴³ It undermines the foundational questions on which the present project is based; see Kammerhofer and d'Aspremont, n. 14 at 4. Holistically, the project seems premised on a fallible house of cards: (a) CLS is founded upon the work of Kennedy's *Structures* and Koskenniemi's *FATU* and no other references are given to the school's diverse work; (b) these CLS works are deconstructionist and post-modern critiques; (c) neo-ILP is possible in this post-modern world if it can sustain its theoretical foundations given (a) and (b). Obviously, if either (a) or (b) are undermined, then the project – at least on its own terms – collapses, or at the very least, fails to deliver on its promises.

⁴⁴ See Section 2.3 below for further comments on the relationship between counter-revolutionary and revolutionary theories.

⁴⁵ On epistemological rupture, see text accompanying n. 10. Also see Singh, 'Discipline', n. 13 at 236.

inherited biases) regularly come to the fore. But perhaps most prominent in neo-ILP is the theory's approach to incommensurability.

A Kuhnian incommensurability thesis begins from the proposition that certain theories exist and 'practice their trades in different worlds'.⁴⁶ Incommensurable theories cannot make 'complete contact with the other's viewpoints',⁴⁷ and may disagree on the definition of the problem, methods used to solve it and the standards imported into such methods. The thesis is one that posits an understanding of *how* theories can be compared and evaluated. Because there is no completely common language, translation between competing incommensurable theories is the site for political conflict.⁴⁸ The posited degree of incommensurability (or commensurability) between theories, as well as the nature of the translation that takes place between them, determines the extent, productivity and political economy of any discursive engagement between them.

Here, I argue that the incommensurability thesis – in various guises and forms – permeates the form and texture of the neo-ILP project. NAIL and neo-ILP have 'completely different points of origin', they disagree on the 'framework of academic enquiry', function with different linguistic theories, 'diverge [in regards the] constructive side in positivist epistemology' and take opposing views regarding the Enlightenment project.⁴⁹ The narrative established here, and elsewhere,⁵⁰ is that these theories occupy different ideational and conceptual worlds. They are, for the large part incommensurable, as regards the traditions they belong to, the intellectual

⁴⁶ Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2nd edn University of Chicago Press 1970) 150; See also Thomas S. Kuhn, 'Theory Change as Structure Change: Comments on Sneed Formalism' in Robert E. Butts, Jaakko Hintikka (eds), *Historical and Philosophical Dimensions of Logic: Methodology and the Philosophy of Science* (Reidel 1977) 289–309; Paul Feyerabend, 'Explanation, Reduction and Empiricism' in Herbert Feigl, Grover Maxwell (eds), *Scientific Explanation, Space, and Time* (University of Minnesota Press 1962) 28–97; Bernstein, n. 10.

⁴⁷ Kuhn, *Structure*, n. 46 at 148 (emphasis added); see also Kuhn, 'Theory Change', n. 46 at 300–301.

⁴⁸ Incommensurable theories can still be compared because of the openness of our linguistic horizons. Translation occurs where there is no common language between incommensurable theories. Language enables communication. A given tradition is not *linguistically* rooted in its own world and rules. The 'myth of the framework' was rejected by Karl Popper, 'Normal Science and Its Dangers' in Imre Lakatos, Alan Musgrave (eds), *Criticism and the Growth of Knowledge* (Cambridge University Press 1970) 51–59 at 56.

⁴⁹ Kammerhofer and d'Aspremont, n. 14 at 6–7.

⁵⁰ See also d'Aspremont, n. 20 at 105–116; Jean d'Aspremont, 'Reductionist Legal Positivism in International Law' 106 *Proceedings of the American Society of International Law* (2012) 368–370 at 369.

frameworks they advance and the methods they use. But this must not be viewed as a self-evident categorisation, but a constructed one. Incommensurability is a methodological manoeuvre engineered to ensure a limited, but vital, immunity from the effects of critical positions. It may be manipulated to be both a shield and a sword, to insulate a theory from adversaries and to attack them.⁵¹

2.2.1 Insulation technique 1: false essentialism

If we accept, for the moment, that NAIL and neo-ILP are largely incommensurable theories, then in the very moment of acceptance we must acknowledge that neo-ILP is making a validity claim upon the premises of another theory – here, NAIL. In order to make statements and judgments on incommensurability, neo-ILP *must* assume and determine a set of characteristics for NAIL. I argue that these assumptions and determinations are not reasonable reductions, but fall under the rubric of what is often considered false essentialism. '[F]alse essentialism violently distorts the sheer complexity of overlapping traditions.'⁵² It is a form of reductionism that disables communication between, and the comparability of, theories: one is disabled from *fully* discerning the points of overlap, conflict or incommensurability. False essentialism is perpetrated when NAIL theories are equated with deconstruction and post-modernism, when the early works of Kennedy and Koskenniemi are presumed to speak on behalf of the NAIL project. When considering NAIL why only consider Koskenniemi and Kennedy in early-NAIL and not Allott and Carty, who wrote equally influential work in the 1980s? Why only take up the NAIL critique of the 1980s and not of the late 1990s and 2000s: why not consider the work of China Miéville, Susan Marks, Anne Orford and the later work of Martti Koskenniemi? Why only consider the relationship of NAIL to deconstruction and not neo-Marxist theory, ideology critique, Critical Theory, Foucauldian genealogy or Polanyi's political economic thought?⁵³ The intellectual breadth and historical evolution of NAIL is all but nullified.

⁵¹ Singh, 'Discipline', n. 13 at 240–243; Singh, n. 9 (critiquing how incommensurability is so used in d'Aspremont n. 20; d'Aspremont, n. 50).

⁵² Bernstein, n. 10 at 66.

⁵³ The historical complexity of NAIL is explored in Akbar Rasulov, 'New Approach to International Law: Images of a Genealogy' in José María Beneyto, David Kennedy (eds), *New Approaches to International Law: The European and American Experiences* (T. M. C. Asser Press 2012) 151–192. See also generally Umut Özsü, 'The Question of Form: Methodological Notes on Dialectics and International Law' 23 *LJIL* (2010) 687–707.

False essentialism ensures that the various and complex points of interaction between neo-ILP and NAIL are not explored. Points of direct conflict are not seen, let alone addressed. Allott's evisceration of Hart would surely have some relevance for Jean d'Aspremont's reconstruction of the latter. Miéville's invocation of Pashukanis surely brings back images of the interaction between the latter and Kelsen. This conflict over theorising the legal form would surely go to the heart of Jörg Kammerhofer's project. Unger, Koskenniemi and Marks' reliance on ideology that perpetuates a false consciousness would surely have something to say about the ideological dominance of neo-ILP. NAIL has certainly not spared the social thesis or the formalised structure of Kelsen. Each of these threatens the foundations of the neo-ILP project, but they are cast aside. False essentialism insulates neo-ILP from those ideas that directly threaten it. Discourse, conflict and disagreement are all avoided as incommensurability is superficially and strategically deployed.

2.2.2 Insulation technique 2: specialisation and the post-modern form

The post-modern sensibility can be loosely defined by fragmentation, plurality and a 'resistance to all forms of *abstract* totality, universalism and rationalism'.⁵⁴ Incommensurability is itself a concept that emerges within this paradigm of thought. The concern to balance plurality/unity, commonality/difference, and the self/other is one that has emerged with vigour in our post-modern world. Intellectual and material fragmentation has been enabled by and is being perpetuated by specialisation. In the world of ideas, specialisation has become the norm, but it has also become representative of a distinctly post-modern form. Neo-ILP has adopted this particular aspect of the post-modern form: it has narrowed its claims and seeks to be 'modest'.⁵⁵ But the appropriation of the post-modern form is only a veneer under which the theory, yet again, insulates itself from critique.

The foundational tenet of neo-ILP is in fact one of a narrow formalism. The validity of a norm, its legal existence, is determined solely by its pedigree: its conformity with a system's sources.⁵⁶ Neo-ILP is *only*

⁵⁴ Bernstein, n. 10 at 57 (emphasis in original); see also Harvey, n. 10 at 9, 46–48; Terry Eagleton, 'Awakening from Modernity' *Times Literary Supplement*, 20 February 1987, 194.

⁵⁵ D'Aspremont, n. 50 at 370.

⁵⁶ Kammerhofer and d'Aspremont, n. 14 at 8; d'Aspremont, n. 50 at 368–369; Jörg Kammerhofer, 'The Pure Theory of Law and Its "Modern" Positivism: International Legal Uses

concerned with the cognition, identification and existence of legal rules. This claim to particularity allows for and necessitates other theories that can ‘explain the whole phenomenon of law’.⁵⁷ This specialised claim is complemented by an effort to wrestle with unity and coexistence with other theories in the pluralised world of international legal theory. Neo-ILP has ‘doctrinal conciliatory virtues . . . it helps reconcile some of the allegedly antonymic trends in international legal scholarship’.⁵⁸ Neo-ILP’s formalism can ‘underpin the continuously mutually enriching character of . . . multiple strands of contemporary legal scholarship’, because it is ‘non-exclusive, non-confrontational and conciliatory’.⁵⁹ Neo-ILP promotes ‘ecumenism’⁶⁰ or unity within international legal scholarship. Neo-ILP’s specialised claims underpin the potential for unity in legal scholarship.

To embrace specialisation is to take up post-modernism (and modernism) on its invitation to consider the world as irredeemably complex and as a consequence narrow any claimed conceptual ground. Adopting this post-modern form allows neo-ILP to achieve two things. First, it further insulates the theory from critical charges. Specialisation allows neo-ILP to carve up scholarly enquiry into a number of component parts each governed by different theories. Neo-ILP can govern the identification of rules; international legal realists, constructivists and NAIL can examine the international legal discipline as a social and material construct, as well as critiquing the *application* of legal rules; and so on.⁶¹ This allows theoretical enquiry to be neatly pigeonholed. This process allows neo-ILP to cast aside competing theories as pertaining to different aspects of jurisprudential enquiry, even if these theories have plenty to say about how claims to the existence of rules are constructed, not to mention the pitfalls of neo-ILP’s normative reconstruction of sources theory. Specialisation enables insulation.

for Scholarship’ 106 *Proceedings of the American Society of International Law* (2012) 365–367 at 366; Jason Beckett, ‘Behind Relative Normativity: Rules and Process as Prerequisites of Law’ 12 *EJIL* (2001) 627–650 at 627.

⁵⁷ D’Aspremont, n. 50 at 370. ⁵⁸ D’Aspremont, n. 20 at 217, 218.

⁵⁹ D’Aspremont, n. 20 at 218, 219. ⁶⁰ D’Aspremont, n. 50 at 370.

⁶¹ This is also present within the neo-ILP project itself. Note the tension between Kammerhofer’s Kelsenian project and d’Aspremont’s Hartian project. ‘Sure, Kelsen says, we can conduct sociological studies into whether the law is generally obeyed or not; this is a very valuable field of study. But sociologists or other empirical studies can only capture the periphery, not the norms themselves.’ Kammerhofer, n. 56 at 366.

Second, specialisation allows neo-ILP to import a discourse of conciliation and harmony amongst plurality. But this is no more than a hegemonic manoeuvre garbed in conciliatory clothing. The discourse of conciliation and happy coexistence presumes the presence of incommensurability and elevates the image of a reasonable theorist: one that is aware of competing arguments and theoretical claims, but is capable of weaving himself between them. But a theory that lays claim to reality cannot be carved in terms of specialisations: its substantive claims may not be neatly categorised. The claims of totality cannot be so easily set aside. Matters are not so neat. Theory cannot be non-confrontational. It especially cannot be so when laying claim to international law's form. The sources of international law are the gateway to legality. Normative claims as to how formal they should be, or are, are not innocent and non-confrontational. When one considers that neo-ILP's specialisation (laying exclusive claim to being able to *identify* legal rules) alongside its importation of a series of normative projects, it is difficult to not conceive of neo-ILP's formalism as seeking a theoretical monopoly on international law's key: its sources. The 'responsibility assigned to [neo-ILP] remains, in my view, of primary importance'.⁶² Conciliation and specialisation hides a certain exercise of power.

2.2.3 Privileging technique 1: post-modernism appropriated in the rationalist form

There is an incontestable incommensurability that implicitly structures the editors' project. In neo-ILP, we find the reconstruction of rationalist and partly modernist theories (Hartian and Kelsenian variants) that seeks to exist in a post-modern world.⁶³ '[P]ost-modern international legal

⁶² D'Aspremont, n. 50 at 370.

⁶³ Kammerhofer and d'Aspremont, n. 14 at 1, 2, 7. For clarification, the argument here is not that Hart's or Kelsen's theories are in every way modernist and rationalist. Nor is this stated as regards d'Aspremont's reconstruction of Hart and Kammerhofer's of Kelsen. My argument is that both traditions are somewhat intellectually rooted in modernist and rationalist predispositions. These traditions are not controlling or total in their effect, but important enough to have a lasting effect on how the theories are deployed or function. They are modernist in their anti-foundationalism and rationalistic in their fidelity to the Enlightenment project. The incommensurability between rationalism and modernism (and between Hart and Kelsen) is set aside here, despite its importance. On the incommensurability between rationalism, modernity and post-modernity, see Pierre Schlag, 'Missing Pieces: A Cognitive Approach to Law' 67 *Texas Law Review* (1989) 1195–1250.

positivism⁶⁴ seeks intellectual progress: to transcend its historical lineage in one paradigm and to subsist in another. And of course in rationalism/modernism and post-modernity, we find largely incommensurable intellectual and cognitive frameworks.⁶⁵ This incommensurability is just as true for those intellectual projects that embrace the Enlightenment project, such as neo-ILP, and those that reject its call to subservience to rationality, such as a variety of post-modern thinkers. How can ideas that draw upon and retain a limited fidelity to modernist and rationalist traditions *fully* sustain themselves in the incommensurable paradigm of post-modernity? Ideational progress and incommensurability sit in uncomfortable tension.

But neo-ILP's narrative prioritises its own lineage through the *rationalist* ideal of progress above the consideration of incommensurability. We do not need to shift frameworks – from modernism to post-modernism – and to abandon the rationalist/modernist elements of neo-ILP in order to exist in a post-modern world. In elevating this narrative, the extent of the incommensurability between post-modernism and modernist/rationalist frameworks is subsumed and relegated. Old ideas can exist in the new world, they just need to adjust or tinker their substantive claims and shed old skins. This incommensurability that structures this project is hidden from view and the narrative of *coherent* ideational evolution is implicitly elevated.⁶⁶ Neo-ILP as a theory seeks to function in a post-modern world, but sustain and promote an incommensurable rationalist form (aesthetic).⁶⁷

⁶⁴ Kammerhofer and d'Aspremont, n. 14 at 2.

⁶⁵ There is perhaps one notable dissenter to this largely shared opinion: Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington, Brian Massumi (trs), Manchester University Press 1984) 79 ('A work can become modern only if it is first post-modern. Post-modernism thus understood is not modernism at its end but in the nascent state.') The majority of scholars, including Eagleton, Harvey, Jameson, Foucault, Habermas, etc. advance the contrary position – as advocated here.

⁶⁶ The argument in this paragraph is also premised on the editors' own construction of what is post-modern (alongside Section 2.2.1). The post-modern seems to be equated to whatever work NAIL or CLS has produced in legal theory (this is a position taken by others; see Anne Peters, 'Realizing Utopia as a Scholarly Endeavour' 24 *EJIL* (2013) 533–552 at 548). More specifically it is equated to the works of Koskenniemi and Kennedy. On *their narrative of post-modernism*, there should be a greater understanding of incommensurability. But as Section 2.1 highlights, their understanding of Koskenniemi and Kennedy is incorrect. I posit later that both neo-ILP and early NAIL work is premised in the modernist tradition: the level of incommensurability between neo-ILP and NAIL is not as great as one would think. And certainly to overcome NAIL is not to make neo-ILP post-modern.

⁶⁷ Schlag, n. 63 at 1212–1213 (discussing the aesthetics of rationalism).

2.3 *Theory as theory: co-opted ideas*

So far we have seen how neo-ILP employs specific rhetorical subtleties to defend, sustain and promote its positions. These have predominantly focused on the specificities of neo-ILP and NAIL: an exacting examination of the politics of definition and incommensurability that structure the relationship between the two theories. This section will take a step back: towards (and away from) epistemology and tradition. It argues that the reduction of theory to a set of ideas, concepts and relationships, to the ideational, is corrosive. To abstract knowledge from its materialistic basis, privileges certain theories and simultaneously sustains existing power inequalities (and claims to such).

Traditional (legal) theory is not about challenging the process, form and practice of our own thought. In such theory, the privileged reader is one who is fully informed and can make an autonomous choice between positions. The preservation of theory-independent (and therefore self-validating), rational and autonomous *choice* is key. Neo-ILP imports this liberal, plural rationalism.⁶⁸ Early-NAIL is arguably just as guilty.⁶⁹ It regards the choice of scholarly approach to be arbitrary and introduces a pluralist value-relativism regarding legal methodology.⁷⁰ According to this narrative, theories are a collection of ideas and one can make a choice between them in a non-political and neutral framework.⁷¹ Neo-ILP reduces *all* legal theory down to a question of substance – *what* to think. But certain theories, like NAIL, question *how* we think. Such theories are subsumed by neo-ILP's rationalism as merely *another substantive* way to think, another theory: we can internalise this theory that questions how we think, if we so choose. Questioning how we think becomes merely another way to think about things: another idea, another theory that can be adopted. Rationalism is privileged as any challenge of form is reduced to another substantive idea. Rather than taking subject-decentring theory seriously on its own terms – as questioning the practice of theory – the impeding theory is co-opted. The point I wish to make is that neo-ILP

⁶⁸ Singh, 'Discipline', n. 13 at 246–247.

⁶⁹ See ns 36–40 and accompanying text. Also see Allott, who was so influential in early-NAIL: Philip Allott, *Eunomia: New Order for a New World* (2nd edn Oxford University Press 2001) 6–7, 39–52.

⁷⁰ Kammerhofer and d'Aspremont, n. 14 at 8.

⁷¹ For a critique, see Koskenniemi, 'Letter', n. 23 at 352–353.

subsumes the NAIL challenge by distorting and degrading its nature. Let me explain.⁷²

As we have seen, early-NAIL (as narrowly defined in this project) was intellectually rooted in the Frankfurt School and structuralism (Section 2.1). Both are schools of thought firmly embedded in totalising traditions.⁷³ This intellectual heritage is one of modernism, not post-modernism.⁷⁴ But even then, to be more specific, there is far more Habermas in Koskenniemi's writing than there is Adorno (and far more Horkheimer) – let alone Lyotard. Koskenniemi's project is both a part of modernity and a critique of it.⁷⁵ It aims to highlight the underside of reason, not abandon it.

Applied in international law, the critical programme takes under scrutiny existing consciousness about international law and reality as this is expressed in conventional legal concepts and categories . . . Therefore, it tries to penetrate the naturalness of givenness (objectivity) of those concepts and reveal their context-bound character. Once conventional consciousness will thus appear as contingent and contestable, the actual will manifest itself in a new light . . . It seeks to undo the naturalness of conventional ways of thinking about law and proceeds to show that the way we conceptualise it binds us to certain, more fundamental commitments – commitments which may or may not be ones that we like to make.⁷⁶

The modernist seeks to highlight and situate the limits of reason. She normally does so through some totalising, structuring construct. In the case of Koskenniemi, it is the discursive structure of international law. This is the crucial difference between the post-modern and the modern.⁷⁷ The latter does not seek to completely abandon the Enlightenment project

⁷² A large part of what follows is influenced by the work of Pierre Schlag. See references in n. 34; Pierre Schlag, 'Normativity and the Politics of Form' 139 *University of Pennsylvania Law Review* (1991) 801–932; Pierre Schlag, 'Normative and Nowhere to Go' 43 *Stanford Law Review* (1990) 167–191.

⁷³ Kennedy, n. 23 at 271–276; Derrida, n. 25; Foucault, n. 40.

⁷⁴ See n. 54; Fredric Jameson, *The Political Unconscious: Narrative as a Socially Symbolic Act* (Cornell University Press 1981) 55.

⁷⁵ For a somewhat similar self-understanding, see Koskenniemi, n. 42 at 31–32. In many ways, Koskenniemi's fidelity to his descriptive or cognitive project requires that he so situate himself. This is the influence of the Critical Theory.

⁷⁶ Koskenniemi, *FATU*, n. 23 at 540–541.

⁷⁷ Jürgen Habermas, 'The Normative Content of Modernity' in Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* (Frederick Lawrence (tr.), MIT Press 1987) 336–367 at 337–338; Fredric Jameson, 'The Politics of Theory: Ideological Positions in the Postmodernism Debate' 33 *New German Critique* (1984) 53–65 at 57–59.

and the rationality it imports. If anything, the modernist seeks to deepen the Enlightenment project.⁷⁸ Contrary to the narrative asserted by this project, early-NAIL, and in particular Koskenniemi, is neither deconstructionist nor post-modernist. Rather, it belongs within the best critical traditions of modernism. What emerges is a scathing critique of liberalism without the abandoning of its ideals. Again, this is just so much Habermas, with perhaps a splash of Horkheimer. Early-NAIL does *not* abandon the Enlightenment project, but takes it to its logical, contradictory and conflicting conclusions.⁷⁹ It forces us ‘into seeing that commitment in a new light’.⁸⁰

But modernism, and particularly this variant, challenges *how* one thinks about theory. Theory is both cognitive and emancipatory.⁸¹ It can only be so if it is self-reflexive. For this, it must be both part of the world and a point of critique for it. An individual does theory as a historical subject.⁸² Her relationship to the social is a matter of social production with a particular history. Any theory must apply this insight to itself: it must acknowledge that its cognitive vision of the world is subject to its own critique. Theory is both situated within and constitutive of the social. Theory is, then, among other things, about itself. In contrast, empiricist or rational theories, such as neo-ILP, are not self-reflexive and seem to presume the cognitive conclusions they posit.⁸³ For the critical theorist, theory no longer functions purely on the plane of epistemology or hermeneutics. ‘Reason is simultaneously subject to the interest in reason. Reason, it can be said, pursues an emancipatory cognitive interest which aspires to the act of reflection as such.’⁸⁴

⁷⁸ See David Kolb, *The Critique of Pure Modernity: Hegel, Heidegger and After* (University of Chicago Press 1986) 1–19.

⁷⁹ The attentive reader will note that the insulating incommensurability asserted by neo-ILP, between itself and NAIL, is now not so stark (see Section 2.2). That incommensurability is starting to crumble and along with it the insulation in which neo-ILP has clothed itself.

⁸⁰ Koskenniemi, *FATU*, n. 23 at 556.

⁸¹ Koskenniemi, *FATU*, n. 23 at 537–538; Jameson, n. 74 at 281–299.

⁸² Horkheimer, n. 37 at 200.

⁸³ Herbert Marcuse, *One Dimensional Man: Studies in the Ideologies of Advanced Industrial Society* (2nd edn Beacon Press 1991) 115–116. See Singh, ‘Discipline’, n. 13 at 249–260 (demonstrating how this takes place regarding neo-Hartian theories such as Jean d’Aspremont’s).

⁸⁴ Jürgen Habermas, *Knowledge and Human Interests* (Jeremy J. Shapiro (tr.), Beacon Press 1971) 197–198.

This is apparent in early-NAIL writing,⁸⁵ but the challenge it represents is subsumed and co-opted by a single stroke. The critical position is reduced to just another idea, another theory. It is cast as another *ideational* position that can be adopted upon one's whimsy.⁸⁶ It presumes and sustains the image of the liberal autonomous individual who believes the privilege of his choice; to decide with complete autonomous rationality which idea may be used, which idea is useful and which is not.⁸⁷ This is the snare of liberal methodological pluralism. It privileges reason without recognising how it is thoroughly abused, and it assumes and sustains the very mechanism which enables this: 'the autonomous, coherent, integrated, rational, originary self.'⁸⁸ So when neo-ILP considers its relationship with NAIL, it assumes the very form or approach to theory that co-opts and subsumes the challenge of NAIL. It becomes a relationship determined by rational value-relativism, autonomy and the ideational.

This ideational co-option of NAIL has prevented the complete flowering of said thought. There is, then, some intuitive merit in considering neo-ILP as a counter-revolutionary theory.⁸⁹

A counter-revolutionary theory is one which is deliberately proposed to deal with a proposed revolutionary theory [here, NAIL] in such a manner

⁸⁵ It is also found in a less totalising form in late-NAIL writings (post 2000). Notably, see Susan Marks, 'International Judicial Activism and the Commodity-Form Theory of International Law' 18 *EJIL* (2007) 199–211 at 208–209. This post-modernist approach to ideology critique can be contrasted with the modernist impulse we see in neo-Marxist strands of late-NAIL scholarship: China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005).

⁸⁶ '[I]t is to treat all these outlooks as if they were on the same footing, in the same philosophical competition – each waiting for you and me to buy its philosophical furniture for an already-created world.' Schlag, n. 63 at 1204–1205. See also Schlag, 'Normativity', n. 72 at 892–896.

⁸⁷ Schlag, n. 63 at 1213–1217. Schlag also demonstrates how this takes place where one recognises one's choices are socially and rhetorically constructed. His notion of the 'relative autonomous self' concedes both autonomy and construction, but he demonstrates that autonomy always trumps. See Schlag, 'Normativity', n. 72 at 895; Pierre Schlag, 'Fish v. Zapp: The Case of the Relatively Autonomous Self' 76 *Georgetown Law Journal* (1987–1988) 37–58.

⁸⁸ Schlag, 'Normativity', n. 72 at 175 (but talking about post-modernism, not high modernism: although the insight applies equally).

⁸⁹ I draw upon the following insight of David Harvey: 'it seems intuitively plausible to think of the movement of ideas in the social sciences as a movement based on revolution and counter-revolution in contrast to the natural sciences to which such a notion does not appear to be so immediately applicable.' Harvey, n. 6 at 113.

that the threatened social changes which general acceptance of the revolutionary theory would generate are, either by cooptation or subversion, prevented from being realized.⁹⁰

But ideational co-optation still hides another level of privilege: arguably the driving level at which privilege is sustained. These are, of course, the material bases of neo-ILP and NAIL as well as the traditions they belong to. At the level of the academy, the institutional bases of NAIL are extremely limited (Harvard, LSE, SOAS, Helsinki, Toronto being the only sustained examples).⁹¹ In contrast, to think of international law in terms of its social practice (judgments, ILC Reports, etc.), or even as a set of self-governing rules, is dominant in the university. These approaches govern education through supposing, and constantly buttressing the idea, that they alone speak about law. But neo-ILP will always assume a material and ideational dominance because the driving force behind paradigm formation in international law is its *practice*. Neo-ILP buttresses practice in a manner that NAIL cannot.

It may be essential to examine how the relationship between theories is cast. The rhetorical and discursive frameworks that are used to influence and manipulate the way in which we think about international law is key to accessing the discipline's operation. And it may be important to look at the politics of form between theories, to make transparent modes of manipulation. But it is perhaps more important to situate these forms, these politics, these theories in their material contexts. Ideas do not emerge, dominate or subjugate in a vacuum. This is a task which approaching theory as 'theory' sidelines. But only if one adopts a rationalist approach to theory. And one must resist being seduced by this dominantly solipsistic way of thinking.

3 Conclusion

This chapter is about the politics of theory. It has sought to briefly examine the structure and form of NAIL and neo-ILP, as well as their intellectual heritages. It has demonstrated how the form and structure of a theory is central to protecting and privileging it. Form will always be violent; it will always make a claim to an object outside of its own content. But to recognise how it constrains, structures and enables our choices is essential. This is all the more important when one considers international

⁹⁰ Harvey, n. 6 at 114. ⁹¹ See Rasulov, n. 53.

legal theory to be a competition between ideas that make demands on how we see the socio-legal world. Perspective is everything. And theory precedes perspective: 'society's theories are the atmosphere it breathes'.⁹²

My task here has to been to highlight how form is complicit in structuring the way in which we think about both theory and the world. Confronting form allows us to confront the politics of theory and challenge our existing consciousness. To examine how, on an ideational level, theories reify certain visions of the world. Uncovering the creative and aesthetic aspects of our intellectual endeavours is but one way to take form seriously. With no sense of irony, neo-ILP seeks to transcend incommensurable frameworks of enquiry (modernism/rationalism and post-modernism) by utilising post-modern concepts and tactics (incommensurability, specialisation). To unmask these steps and contradictions is the modest step I have taken in this chapter.

⁹² Allott, n. 69 at 31.