

Design *as* Crime

Conclusion

Design as Crime

“The thing about the whole trial — this whole experience — was that I really didn’t have to report anybody except to Colonel Gill. I was just on my own. I made all my own decisions for the whole damn thing, all the way through. I decided what I had to do, when it had to be done, where I’m going to get the materials. I even got the rug [for the main courtroom]. [The courtroom] had gray-green drapes on the walls. I found in the black market [that] I could by the rug that I wanted for \$40,000 [dollars]. I lost my courage then and I decided I’d better call. I acted like I was Humphrey Bogart. I had a trench coat and I went down to the black market. It was raining and everything. I didn’t smoke, but I was acting like a big gun here (sic) [laughs]. So I called Colonel Gill and I said, ‘Look, I can get this rug for \$40,000, but we shouldn’t buy this rug.’ He said, ‘Forget it. Buy it. The Germans will pay for it.’”⁵⁷⁵

Kiley’s account overflows with authorial energy; the same that defined his understanding of what it meant to be the *designer* of the stage for the trial. He frames the “whole experience” in terms of subjectivity and authorship. It is also an account that conveys the type of authority found in much of Kiley’s writings; one mostly limited by his military subordination to Colonel Gill. For the young architect, being on his own meant that he was in charge of determining both how and when things would be done. But his description of the process that led him to Paris in search of the ideal rug for the Nuremberg courtroom Kiley represents himself as both heroic and operating at the margins of law. Recalling the trip to the “black market” and his efforts to procure the rug, Kiley produces himself as a version of the archetypal Hollywood hero: autonomous, male, white, and confident of (or indifferent to) his moral high ground. After all, who will dare pass judgment on an American military man for procuring illegal objects that will provide the material setting for a war crimes trial against the Nazis? And yet in the final analysis, the young architect’s tale of authorial agency ends up

⁵⁷⁵ Kiley, *supra* note 1 at 20-21.

determined by the logic of a military chain of command. A logic within which, as Donna Haraway puts it, “[a]nything not decided in the presence of the authority is war.”⁵⁷⁶

With Kiley, “we are [still] in the story of the hero and the first beautiful words and weapons.”⁵⁷⁷ That is, we are still on the same terrain on which Telford Taylor hailed Murray Bernays as *the* legal architect of the Nuremberg trials. The acquisition of the rug in Paris’ illegal markets, while not entirely an account of victor’s justice, fits squarely with a theory within which “all the action remains within the narrative vise of trials of strength, of mortal combat, within which the knowledge of how to murder each other remains well entrenched.”⁵⁷⁸ Within this narrative Kiley’s recollection of Gill’s words, “the Germans will pay for it”, remains wedded to a logic of justice as retribution.

I want to suggest there is a different way to take up Kiley within the archive of the trials. In the context of the dissertation Kiley becomes the figure against which I have tried to think, write, and “stay with the trouble” of Nuremberg as a project that contests ideas of agency and the intentional subject that underlie the adjudication of criminal responsibility, while simultaneously inaugurating one of the most profound governance projects of the 20th century: the institutionalization of individual criminal responsibility for international crimes. In this sense, the dissertation is not about architecture, or designers, but about the movement — which I assert is a dialectical one — by which the designer receded to the background precisely at the moment when a constellation of design-thinking, design-uses, and design-theories came into being to inaugurate a new mode of thinking criminal responsibility.

⁵⁷⁶ Donna Haraway, *STAYING WITH THE TROUBLE: MAKING KIN IN THE CHTHULUCENE* (2016)

⁵⁷⁷ *Id.*

⁵⁷⁸ *Id.* Haraway’s most recent articulation of her critique of Bruno Latour takes seriously the relation between “hero stories” and the logic of war that she sees as essential to actor-network theory. Even though, she argues, Latour tries very hard to escape a theory of modernity that passes through the logic of policing, he cannot escape it.

If I have come to think about this as a dialectical movement it is in part by reading this movement through Walter Benjamin's essay *Critique of Violence* (CoV). Importantly, Kiley's self-representation of the designer as prominent authorial figure straddles a sense of moral ambivalence towards the idea of operating outside or against the law — as a criminal. It is this convergence in Kiley of the criminal *and* the designer that in retrospect, and thanks to Benjamin, I now read as offering an entry point to considering a genealogy of ICL defined by the historical reconfiguration of design *as* crime. I argue that if we are to think about design becoming a socio-technical object irreducible to modernist concepts of agency, causation or culpability, then we must stay with the trouble posed by the genealogy of *design-as-crime* that Benjamin, following Marx, inaugurates.

While I will not rehearse here a full-fledged reading of Benjamin's essay, I will conclude the dissertation by way of a tentative exercise in thinking about design as crime in light of Benjamin's CoV.⁵⁷⁹

According to Walter Benjamin criminality follows a *legal* logic: it is always already the time when law conjures up the extra-legal in order to justify (and thus preserve) itself *as* violence precisely by repressing it. The criminal simultaneously defies the legal order and calls into being law's violence as self-justification; an operation that Christoph Menke describes as the “repetition of the instauration of the law in its preservation.”⁵⁸⁰ Menke writes, “the law must again and again prevail by

⁵⁷⁹ Benjamin's CoV on its own is not sufficient to theorize the dialectic of design and crime I propose here. If Benjamin diagnoses capitalist modernity as the condition under which criminality becomes design and, inversely, design becomes criminal, this dialectic is legible only by considering CoV in light of Benjamin's essays on language and aesthetics, and in particular his famous essay *The Work of Art in the Age of its Technological Reproducibility*.

⁵⁸⁰ Christoph Menke, *LAW AND VIOLENCE* (unpublished manuscript on file with author). I thank Maria del Rosario Acosta for introducing me to Menke's work.

violent means over the extra-legal or non-law.”⁵⁸¹ *Again and again* law calls into being the criminal “for the sake of the preservation of its order, the establishment and enforcement of its categories, perspective, and language—for the sake of its pure power.”⁵⁸² In the moments of judgment and punishment of the criminal “the law violates the violator.”⁵⁸³

Benjamin’s *Critique of Violence* can be read as offering a way for understanding law’s violence as an aesthetic phenomenon; crime creates the restrictive conditions for a *coming into* form, one that is simultaneously authorization and reestablishment. This movement, following Benjamin, is bound to the temporality of repetition. For Benjamin “the preservation of the law always performs a ‘repetition’ of the original lawmaking.”⁵⁸⁴ As Menke points out, “the preservation of the law is never solely about the framing or application of this or that law, but about the reaffirmation of ‘the law itself.’” But because this repetition is possible only as a function of representation (of what Derrida described in his reading of Benjamin as language falling into instrumentality), law’s coming into form is at the same time bound by the logic of repetition and bound to exceed it.

Fred Moten picks up the aesthetic dimension of law’s violence in the sense figured by Benjamin in his essay *Uplift and Criminality*. For Moten, “[t]o be black, to engage in the ensemblic – necessarily social – performance of blackness, is to be criminal.”⁵⁸⁵ The repetition/excess dyad at the heart of criminality as simultaneously a form-giving, world-making, and an order-imposing practice. This is what constitutes, following Moten, the “structuring incommensurability” at the heart of blackness.⁵⁸⁶ The social death of the criminal — and of the black criminal more concretely — “can only be understood as operating in some articulated combination with necessarily political,

⁵⁸¹ *Id.*

⁵⁸² *Id.*

⁵⁸³ *Id.*

⁵⁸⁴ *Id.*

⁵⁸⁵ Fred Moten, UPLIFT AND CRIMINALITY in Susan K. Gillman (ed.) NEXT TO THE COLOR LINE: GENDER, SEXUALITY, AND W.E.B DU BOIS

⁵⁸⁶ Like Benjamin, Moten reads crime being bound not merely to “laws codified and enforced by power” but to power in its self-generating movement – what Moten describes as “to power itself as the self-(re)generating mystical foundation of its own authority.” *Id.*

necessarily aesthetic, necessarily erotic black social life. Each is the other's condition of possibility."⁵⁸⁷

It is within the space opened up by the “repetition (with a difference)” of the crime and its punishment that design's boundedness not merely to deviation, but to crime, might be considered.⁵⁸⁸ Design's relation to crime is design's relation to deviance, as repetition that exceeds; and it is this excess that returns us to Benjamin's CoV and to the function that representation plays in relation to law's violence. But the relation of design to the law's violence is not simply coeval with that between criminality and law's violence. The law that punishes crime “must endlessly repeat its instauration in its implementation”⁵⁸⁹ and design acts obsessively from that situation to adjudicate between the boundaries of instauration and preservation. Seen through this lens, design is both a social phenomenon and a particularly modern mode of discourse that refuses the historical condition under which “law-making, law-breaking, and law-enforcement are increasingly difficult to distinguish.”⁵⁹⁰ Nuremberg's insistence on prosecuting Nazis as designers of administrative crimes remains squarely within the terrain of a modernist formulation of design that refuses the entanglement of law and violence.⁵⁹¹

Caught in the dialectic of law and disorder, design becomes entangled with crime in no easy alignment: it is in its law-making function – because law cannot be purely preservative and thus even when it preserves itself it is *designing* – that discourses of criminality and design mutually constitute one another. This historical condition is the one that defines *design* as always occurring in the mode

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.*

⁵⁸⁹ Menke, *supra* note 580

⁵⁹⁰ Comaroff & Comaroff, *supra* note 319 at 36.

⁵⁹¹ Hammacher's formulation of Benjamin's argument highlights administrative crimes *as* representation of the entanglement modernist design refuses: “all that is law must rest on a law-making, law-positing, law-imposing violence, and such law-imposing violence is represented in all law-preserving or administrative violence.” Werner Hammacher, AFFORMATIVE, STRIKE 13 *Cardozo L. Rev.* 1133, 1134 (1992).

of [re]redesign.⁵⁹² Christopher Menke describes the situation from the perspective of legal philosophy; and even though Menke's text does not have design in mind, one can read the concept entering the field as socio-technical process of endless reform:

The law can never be conclusively enforced, can never prevail over non-law, because the law itself engenders what it aims to prevail over in its enforcement. By consequence, the law can never be purely preservative, proceeding in accordance with its normative logic; it must again and again oppose its power to the extra-legal in acts divorced from all normativity. The law cannot leave the act of its instauration behind. To be compelled to repeat it endlessly is the fate or the violence of the law.

It is because law can never be conclusively enforced that its imposition is always a moment of coming *into* form. It is at this point that I read the discourse of criminality and design meeting in Benjamin's text. "The violence of the law consists in its endless compulsion to repeat the violent enforcement in which it prevails over the extra-legal";⁵⁹³ the moment of criminality is also that of design.

For Marx, design becomes a socio-technical object, distinct from any philosophical or theological use of the term, with the rise and development of the capitalist mode of production. In this sense, Marx is without doubt the first to articulate a critical discourse of design. However, Marx's implicit analysis of design has been long sequestered by discussions of the place of the

⁵⁹² Legal scholars might prefer to frame this as reform. However, I stick to the term design deliberately, so as not to collapse the work that design does for law's sake without it being reducible to it.

⁵⁹³ Menke, *supra* note 580.

architect as the archetypical subject of production in *Capital*. A good example of this mode of reading Marx is found in Timothy Mitchell's well-known essay, *Can the Mosquito Speak*. In order to make the mosquito speak, argues Mitchell, we need to move past Marx's conception of the architect.

He writes:

Marx published some famous lines about an insect—not the mosquito, but the bee. Although it builds itself an elaborate hive, he wrote, the bee is no architect, for the architect “raises his structure in imagination before he erects it in reality.” Since Marx wrote those words we have come to believe more and more that this Cartesian notion of the mind-as-architect's-office is what captures the difference between ourselves and nature. The work of imagination puts together plans, images, ideal structures—in fact entire systems of culture and meaning—before they are taken outside and erected in reality. We have made do for too long with this misleadingly simple view of the world that Marx himself placed in question.

Mitchell offers a rather superficial reading of Marx's discussion of the architect in Chapter 6 of *Capital* V. 1. Here, the architect emerges as a figure through which Marx attempts to explain the labor process in general. For Marx, labor in general is “an exclusively human characteristic” insofar as it is the realization of man's own purposes in the materials he uses.⁵⁹⁴ “And this” he writes, “is a purpose he is conscious of, it determines the mode of his activity with the rigidity of a law, and he must subordinate his will to it.” Without doubt, Marx places great emphasis on the individual's “purposeful will” in the labor process as such, but as he makes explicit only a few lines later, Marx was interested in showing that it was not the willful subject engaged in production that which defined the uniqueness of the mode of production. For Marx, what makes this a historical configuration without precedent is that under conditions of capitalist production it is the labor process that increasingly determines man's activity, not the other way around. And it was in this

⁵⁹⁴ Karl Marx, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY*, VOLUME 1, 284 (1990)

increasing tendency of capital to subordinate the worker that Marx saw the emergence of a distinct type of socio-technical object irreducible to either the will of the capitalist, or the agency of the worker.

Marx has also been read as arguing “the non-human does not engage in planning.”⁵⁹⁵ Jake Kosek’s diagnosis of the “limits of historical materialism” suggests that for all its ambitions to describe the movement of capital as both objective and necessary — and therefore outside direct human control — Marx’s critique of political economy reified the agency of human actors.⁵⁹⁶ This claim rests on the conflation between Marx’s discussion of the labor process and his analysis of *planning* and *planners*.

Marx’s reflections on the factory plan, which precede only by a few years Bentham’s panopticon, already echo Foucault’s analysis of power as a configuration of space. During Marx’s lifetime, plans, or representations of abstracted social processes, became one of the emblematic forms of industrial modernity. The alignment between planning and military strategy that Marx noted in *Capital* has a deep history in the experiments of early city planning in Europe. This is essential for understanding Marx’s analysis of the factory plan and the plans’ greatest achievement: a framing of the hierarchies of production and division of labor in space that appears simultaneously rational and anideological.

For all of Marx’s lack of appreciation for the bee, he was interested in 19th century practices of planning whose effects went beyond the will of any individual agency or purposeful activity. He was interested in an emerging technical object, one irreducible to the figure of the architect and

⁵⁹⁵ “Karl Marx famously drew the line between the human and the nonhuman on the back of the bee. He wrote that “what distinguishes the worst architect from the best of bees is this, that the architect raises his structure in imagination before he erects it in reality” (Marx 1990:284). For Marx, the nonhuman does not engage in planning. Ironically, in war it is this exact attribute of the bee— the absence of planning, even intentionality—that is at the heart of its usefulness in modern warfare as a flexible, decentralized, adaptive form. Here, the shifting limits of animal and human are again remade, and we reach the limits of historical materialism, where political agency is reduced to the agency of human actors.” Jake Kosek, *ECOLOGIES OF EMPIRE: ON THE USES OF THE HONEYBEE* 25 *Cultural Anthropology* 650 (2010).

⁵⁹⁶ *Id.*

which he attempted to sketch as historically specific to the capitalist mode of production: the automated factory.⁵⁹⁷ It is in his discussion of the “factory system” (left aside by Mitchell and Kosek), that one can read the effort to describe a steering process without a subject. This is what I read as Marx’s introduction of the problem of design as constitutive of capitalist modernity.

It is indeed no coincidence that design came to the center of legal reasoning during the 19th century, precisely at the time that, as Marx shows, planning became one of the self-organizing principles of production. The world of industrial production Marx wrote about was one in which “design decisions” were still largely made by capitalists, but design increasingly became a distinct process through which commodities would anticipate the agents that would eventually animate them.⁵⁹⁸

Unsurprisingly, the proliferation of regimes of liability in the U.S. during the first part of the 20th century introduced new ways of thinking causality within ever more complex production processes. As Lochlann Jain has argued, “[t]hroughout the 1900s, tort law placed responsibility on the design and manufacturing processes as a way to protect consumers from predictable injuries and, where such injuries were impossible to avoid, to spread their costs.”⁵⁹⁹

Regulation of designed-in dangers and the socialization of their costs was certainly not exclusive to the U.S. As Paul Rabinow suggests, since the end of the nineteenth century these emerged as “social-insurance technologies” linked to industrialization.⁶⁰⁰ Design, like crime, is a

⁵⁹⁷ See Marx, *supra* note 20 at 545.

⁵⁹⁸ I reformulate Lochlann S. Jain’s idea that “[p]roducts anticipate the agents that will animate them temporally and statistically; products and humans simulate imagined relationships and worlds.” See S. Lochlann Jain, *INJURY: THE POLITICS OF PRODUCT DESIGN AND SAFETY LAW IN THE UNITED STATES* (2006).

⁵⁹⁹ See *Id.* See also Lochlann Jain, *DANGEROUS INSTRUMENTALITY: THE BYSTANDER AS SUBJECT IN AUTOMOBILITY*, 19 *Cultural Anthropology* 61 (2004). Ralph Nader’s seminal account of the relation between design and legal responsibility, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (1965), brought this question to the foreground of American political consciousness in the 1960s.

⁶⁰⁰ “... European societies at the end of the nineteenth century looked to a massive; social-insurance technology to solve the social, political and economic problems they were facing. With the introduction of new social legislation attention shifted from individual responsibility to assigning risk to socially objective causes. Previously, blame fell either on individual weakness or on chance. Only the former could be indemnified. Now people began to reconsider this position; fault was reinterpreted as an essential dimension of the working conditions themselves. It followed that

source of social order. Design, like crime, has a particularly European history as a lens through which societal failures and alternatives to existing socio-political order can be articulated. Those histories do not follow either a singular or even similar trajectory.

In an essay titled *Design and Crime*, Hal Foster argued that design can resist itself as the practice of imprinting subjectivity on all kinds of objects. What Foster has called “objects treated as mini-subjects.”⁶⁰¹ Foster critiques Art Nouveau precisely because it tries to suppress that which is violent in design: a commingling of subject and object from which all signs of death are banished. In contrast to Art Nouveau, modernist design instead claimed to transcend death – “a triumphant overcoming of limits.” Part of what the dissertation shows is how Nuremberg’s recruitment and mobilization of the concept of design cannot be reduced to either the Art Nouveau or modernist canons. It constitutes one moment within a constellation of events that reorganized disciplines and practices of design giving rise to a new historical condition; what Foster calls the “world of total design.”

It is from within a world of total design that the dissertation considers design *as* crime while refusing to either make the terms interchangeable or reproduce the liberal-humanist imaginary of “crime-as-sign.”⁶⁰² To suggest instead the formula crime-as-design is to engage head on with what

accidents resulting from the conditions of industrial production should be accounted for in advance and included in production costs. With social insurance, the employer and employee were no longer bound by any mutual moral obligations stemming from or arising out of their interpersonal relations or shared milieu; social insurance freed workers and patrons to be more rational and efficient, eliminating the animosity caused by political differences.” Rabinow, *supra* note 42.

⁶⁰¹ Hal Foster, DESIGN AND CRIME in DESIGN AND CRIME AND OTHER DIATRIBES 13 (2003).

⁶⁰² Comaroff & Comaroff, *supra* note 319. Thinking about crime, Jean and John Comaroff have recently argued, is inseparable from thinking about truth and about the social. But importantly there is a semiotechnique at the heart of the entanglement between these three terms. In their view it has to do with something intrinsic to the modern liberal-humanist imagination that gives significance to “crime-as-sign.” But not in the rather straightforward Durkheimian

Taylor Lowe has described as the disavowal at the heart of design practices.⁶⁰³ To refuse the disavowal (what Jake Halberstam calls the refusal of what has been refused) is implicit in the formula design *as* crime.⁶⁰⁴ An effort to reckon with a historically specific configuration between two terms whose alignment with the violent work of making a legal order cannot be effaced. If our worlds are designed *all the way down* then, are they also criminal *all the way down*?⁶⁰⁵ Taking seriously the idea that “crime has become *the* metaphysical optic by means of which people across the planet understand and act upon their worlds,” I consider how the archeology of the trials proposed in these chapters, and its impulse to take on the “ever greater, hyphenated complicity” of the worlds we inhabit, might fare as an effort to rethink the anthropology of design *as* anthropology of crime.⁶⁰⁶ Particularly, when the distinction between the terms design *and* crime remains essential to the foreclosure of ways for imagining modes of responsibility (and response-ability) beyond the illegal/criminal in the present.

trope of crime-as-sign of modern society’s “existence as an authoritative order.” In the Comaroffs’ view this aspect of our imagination is tied to a modern grammar of illegality that originates in the practice of crime detection. This grammar establishes a mode of reason – what Sherlock Holmes called reasoning backwards – that works “by deciphering the hidden meaning of illegal acts, and their signature, from the traces they left behind.” This grammar, I have tried to argue, is part of what Nuremberg reworked.

⁶⁰³ “Vilém Flusser observed “design” shares the same root as “sign” (to represent or give meaning) but with the disavowing prefix “de-.” To design is to de-sign, to recognize and change the sign’s representation. Latour explains that in French “design” glosses as “to re-look.” Design is thus a process negatively oriented towards its model sign. It looks at its prototype with suspicion and entails the boldness to reimagine and/or refashion it. The model persists, as a trace, as a negation of that form which has built upon but departed from its forbear.” I am grateful to Taylor Lowe for contributing this insight as part of the “DeSigning Praxis” series. This project, of which we are co-curators, brings theorists and practitioners of design in dialogue with each other. See Alejandra Azuero & Taylor Lowe, DESIGNING PRACTICE: A DIALOGUE SERIES, University of Chicago Center for Contemporary Theory (3CT), 2016-2017. <http://ccct.uchicago.edu/designing-praxis-1/>

⁶⁰⁴ Jack Halberstam, THE WILD BEYOND: THE WITH AND FOR THE UNDERCOMMONS in Fred Moten & Stephano Harney, THE UNDERCOMMONS: FUGITIVE PLANNING AND BLACK STUDY 8 (2013).

⁶⁰⁵ What are the stakes of making the terms interchangeable— or refusing to do so— in the present in light of the recent call for a politics of design to replace revolutionary politics? See Bruno Latour, CAUTIOUS PROMETHEUS (2008)

⁶⁰⁶ Comaroff & Comaroff, *supra* note 319.