CHAPTER 12

"Naked Athena" and Classical Lines

Wayward Aesthetics of the Exposed Body

Anna Jayne Kimmel

> *The erasure of the body in civilized societies has everything to do with fear of the very violence upon otherized bodies on which civilization is built.*
>
> – Rocío Pichon-Rivière (*GLQ*, 2021: 446)

> *We cannot address the history of modern surfaces without also asking after the other history of skin, the violent, dysphoric one – the one about racialized nakedness inherited from the Enlightenment so necessary to Western constructions of humanity and the one that speaks of the objectification, commodification, and fetishization of racialized skin, especially black female skin.*
>
> – Anne Cheng (*Second Skin*, 2013: 11)

Literature in the legal humanities has begun to turn toward performance as a new site of analysis: as source, representation, and intervention. From *Law and Performance* (2018) to *Law as Performance* (2022), this belated comparison has garnered increasing traction.[1] But methods from dance and performance studies, those wayward disciplines where corporeality supersedes the literary, still make only passing appearances. The repercussions, however, exceed the methodological

[1] Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, eds. 2018. *Law and Performance*. Series in Law, Jurisprudence, and Social Thought. Amherst: University of Massachusetts Press; Julie Stone Peters, 2022. *Law as Performance: Theatricality, Spectatorship, and the Making of Law in Ancient, Medieval, and Early Modern Europe*. First ed. Law and Literature. Oxford: Oxford University Press.

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toward the most material. This chapter underscores the consequences for this absence by centering the lone figure, "Naked Athena," as a femme body in protest whose choreographic aesthetic of whiteness allowed particular flexibility under the law. Through her balletic performance of resistance, themes of discipline, elegance, and decorum swirl against the indecent, vulgar, and obscene labels afforded other protesters in the same scene. Motivated by this duality, I survey histories of the publicly exposed body as righteously revealed or promiscuously pornographic, a distinction theorized within aesthetics as the difference between nakedness and nudity yet left ambiguous in legal terms.

NAKED ATHENA: AN AMBIVALENT APPARITION

In response to the federal occupation of Portland, Oregon, in 2020, an uncanny figure emerged from the crowded protest scenes which spawned across the nation a rally cry for Black Lives Matter (BLM): a photograph features a young, femme body sporting only a face mask and stocking cap who approaches heavily armed officers and then poses in postures later captioned as ballet. At least ten law enforcement officers stand *en face*, armed, shielded, and planted in a wide, assertive stance. Uniformed, they aggregate as a living barricade. The glare of a police vehicle's headlights illuminates the pavement between the parties as both stage and interrogation, unsure which side is audience and which is performer; positioned directly across from the figure and photographer alike, the car beams cast a haloed glow around her "apparition."[2] Police lights elsewhere cast the periphery in a pale pink haze, a surrealist dreamscape all too real. From within this spotlight, she moves through a series of poses with her full front on display to the onlooking officers. Keeping her identity anonymous, news media christened this woman "Naked Athena," a heroic icon laid bare in a collision of vulnerability and bravery.

This arresting moment marked a summer of racial outcry against anti-Black violence following the murder of George Floyd, wherein inflamed

[2] Richard Read, "Out of Portland Tear Gas, an Apparition Emerges." *The Los Angeles Times*. July 19, 2020.

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participation resulted in the contentious call for Oregon's national guard to enter the arena.[3] Armored in the repertoire of ballet as a costume of whiteness, this Naked Athena sidestepped accusations thrown upon other protestors at the same time; rather than a looter or rioter (supposedly) worthy of social, political, and legal critique, nomenclature elevated her status to the divine.[4] Her open flesh starkly contrasted the camouflage fatigues, gear, and helmets of the state agents. In her exposed form, she approached the officers unequivocally unarmed, offering no excuse for reasonable alarm, retaliation, or subsequent justifications of imagined weaponry so often tabulated. She nevertheless caused a stir.

Juridical logics prompt us to emphasize legal moments in which accusations have been made – arrests, trials, and contract breaches – in order to understand the legitimacy of the claims. Less frequently do we pause to consider moments in which allegations have not been raised, in spite of their greater ubiquity. The scene of Naked Athena prompts such inverted attentions, as her nudity and the subsequent nonpolicing of her exposure – aimed directly at police authorities – becomes the focal point of my attention. I do not intend to exalt this singular figure and consequently overshadow the pressing stakes of the larger protest movement. Such words continue to need to be written and read. But here, I read deeply into what this scene reveals about the entanglement between legal and performance aesthetics and the subsequent corporeal ambiguity which emerges when not understood together. Obscenity doctrine and discernment of indecency coheres at this nexus, wherein perceptions of offense and calculated shock define prevailing orders of modesty. If clothing fashions a particular type of containment for the naked body, ballet styles a different restriction on the otherwise natural

[3] The 2020 BLM protests in Oregon lasted more than 100 consecutive nights; in the month of June, protestors established an "occupied zone" autonomous from police force in an abolitionist utopian vision. By July, federal forces were deployed to Portland under Protecting American Communities Task Force, but strongly criticized for the use of unmarked vehicles and officers.

[4] Others would, however, critique the widespread circulation of her image as representative of the protest. Affiliates of the BLM movement, for example, questioned that her performance may have unwittingly distracted from the rallying cause, which "Jen" herself acknowledged later in a podcast.

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body and facilitates the civilizing transition from perverse nakedness to permissible nudity. Unclothed and unnamed, the nude dancing body becomes site of critical concern for those of us attuned to the covert ways in which race, gender, and sexuality continue to animate legal hierarchies. This extends to the discernment of the obscene body in motion.

In the case of Naked Athena, her splayed legs and masked face could have been invoked to depict her as lewd, perverse, kink, or otherwise outside the normative bounds of the law. She herself would clarify an antagonizing intent when reflecting, "This fury arose in me … I said, I want to be naked. I want to confront them."[5] However, perhaps due to her slim figure and light skin, news media instead scripted her as "urban and civilized," "an apparition." No charges were filed against her wayward actions. Such a reading, while on the one hand progressive for its openness to sexuality and the nude body, foregrounds an ableist and racialized legal aesthetic in which nudity is elevated to rhetoric of deity when ascribed to white femininity: what Robin Bernstein laconically names as a "holy obliviousness" and Rebecca Chaleff extends to the imperial project of the ballet blanc.[6] The variously applied boundaries of obscenity seemingly emerge from a legal history in which whiteness has been constructed as property, secured and otherwise performed within hierarchies of race and desire.[7]

Instead, the deviance on display was read as nonviolent, arousing neither fear nor aggression, instead deflated by the vulnerability of exposed skin susceptible to wounding. In a world in which Blackness itself is already feared as a weapon, however, I caution against the conclusion that nakedness itself was enough to protect. Rather, her aesthetic

[5] Jen, cited in Rose Minutaglio, "Portland Protestor 'Naked Athena' on Why She Stripped Down." *Elle*. July 29, 2020.

[6] Robin Bernstein, 2011. *Racial Innocence: Performing American Childhood from Slavery to Civil Rights*. New York: New York University Press, 8; Rebecca Chaleff, 2020. "Dance of the Undead: The Wilis' Imperial Legacy." Ed. Susan Manning, Janice Ross, and Rebecca Schneider. *Future of Dance Studies*. Madison: University of Wisconsin Press. 413–430.

[7] Cheryl I. Harris, 1993. "Whiteness as Property." *Harvard Law Review* 106 (8): 1707–1791. See also Ian Haney-López, 2006. *White by Law: The Legal Construction of Race*. Rev. and Updated, 10th anniversary ed. Critical America. New York: New York University Press.

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legibility as a normative figure featured her perceived whiteness in spite of self-identification as a non-Black person of color, an interpretation further reinforced by her performance of the classical lines of ballet. The particular politics of her framing underscore this aesthetic ambivalence: a *New York Times* article suggests her to be a "light-skinned person of color," though others originally suggested her to be white.[8] From the embedded racial ambiguity we can conclude she passed as white, willfully or not. This motivates my reading of her whiteness in spite of factual claims toward her self-identified race. Additionally, I want to highlight the ways in which Naked Athena was allowed to remain anonymous, at most claiming the name (and potential pseudonym) "Jen" on a radio show after the event; anonymity itself can serve as a marker of racial privilege as people of color are historically oversurveilled. I intentionally draw attention toward the aesthetic logics of her circulation in excess of her politics for, as I will argue, it allows us to understand this nonpolicing within a larger narrative of modernism, not divorced from colonial efforts of *missionne civilisatrice*. From her performance and its mediated attention, I theorize an aesthetics of the legal rooted in racialized interpretations of the lewd, the indecent, and the obscene that can be traced through classical and modern aesthetics when read via dance studies.

The readings of Naked Athena that emphasize the balletic repertoire synthesize an underlying tension of race and privilege in the narrative surrounding the protest. On the one hand, such an interpretation passes as justified: Her straight spine, flexible limbs, and symmetric poses follow the aesthetics of ballet rehearsed for centuries. One photograph in particular mimics the balletic position of a *posé*: Her right leg lifts until her foot is pressed against the inside of her left knee as if in the resting position of a flamingo, her arms lifted overhead in informal *port-de-bras*, chin raised slightly. Yet a closer analysis contradicts such claims of this corporeal genealogy: Her supporting leg remains in parallel rather than the external rotation definitive of ballet training, her palms flex outward in her overhead reach against a balletic carriage, and her foot rests flatly

[8] Mitchell Jackson. "Who Gets to Be a 'Naked Athena'?" *The New York Times*. July 25, 2020.

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in its entirety against the inside of her leg rather than articulated through a pointed position. In this sense, the media outlets who instead chose to read her gestures as reminiscent of yoga positions had as much grounds for doing so, not least for the symmetry, flexibility, and static nature of the various positions associated with the non Euro-American practice. Her ascription as goddess further builds upon formulations of the Apollonian frame as the moral fetishization of the upright body as dignified and noble reflective of a normative, idealized body rooted in an ableist and classist aesthetic.[9]

I belabor this point of ambivalence to suggest that the choice not to center yoga, or the choice to center ballet in spite of the inaccuracy of the naming, suggests a decision based upon something other than corporeal analysis. The imposed passing then, assisted by quasi-balletic signals of class and race, begets a legal interpretation of white femininity that presumed nonthreatening intent. Translated to the street, the postures veil a confrontational (if still peaceable) disposition, with entrenched perceptions of decorum overriding legal lines of decency. Allowed to exit the scene without notable physical harm or arrest, her performance as a ballerina rendered her legible as an obedient, docile, and civil body in spite of her overt protest, willful defiance, and illicit gestures.[10] She escaped the bodily scrutiny leveraged elsewhere. Under this viewing her repertoire veils the politics beneath the choice to not police her public nudity as race, law, and aesthetics become entangled in unarticulated ways. Jen acknowledged the interpretative lens of nudity when she summarized intent: "My nakedness is political. It's my expression."[11] Her nakedness was nevertheless converted into a sheath of nudity, attesting to the politics projected onto her surface.

[9] Drawing upon Mikhail Bakhtin's reading of *Rabelais*, Owen Smith goes on to challenge the distinction between the noble body and folk body as upheld through corporeal techniques and racial assumptions. Owen Smith, 2005. "Shifting Apollo's Frame: Challenging the Body Aesthetic in Theater Dance," in *Bodies in Commotion: Disability and Performance*, ed. Carrie Sandahl and Philip Auslander. Ann Arbor: University of Michigan Press, 87–101.

[10] Once exposed, she was impacted by a rubber bullet to the foot, which drew blood. I do not mean to minimize this harm. She did not, however, report more serious injury or physical threat that others recounted during these escalated nights of protest.

[11] Jen, cited in Minutaglio, "Portland Protestor."

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EXPOSED FORM: A REVIEW OF PUBLIC INDECENCY

Oregon has unique leniency in its nudity laws, allowing for some exposure of the human figure without invoking indecency, be it public or private. In many ways echoing the Miller test for obscenity, the state tolerates nudity so long as there does not exist "the intent of arousing the sexual desire of the person or another person," or in the case of its private indecency laws, so long as exposure would not "reasonably . . . be expected to alarm or annoy the other person."[12] Portland maintains its own authority on the matter, declaring under City Code 14A.40.030 (Indecent Exposure): "It is unlawful for any person to expose his or her genitalia while in a public place or place visible from a public place, if the public place is open or available to persons of the opposite sex." Despite clear appreciation for the demonstrative force of the body, these legal codes place a greater emphasis on intent than reception – a term decidedly linked to the theatrical and performative and left largely undetermined in the legalese.

Not all exposure, however, is created equal. Given the historic hypersexualization of Black and Brown bodies, the invocation of "reasonable alarm" opens the possibility of racial bias in its interpretation as some figures are deemed inherently sexual a priori to the establishment of intent.[13] In most US states, indecent exposure laws are significantly gendered, as public lewdness extends to the exposure of all genitalia but only female nipples (exceptions occur in Hawaii, Maine, Ohio, New York, and Texas). This binarized legacy extends from *The People & C. Respondent* v. *Ramona Santorelli and Mary Lou Schloss* (1992), whose

[12] The public indecency law prohibits sexual acts in public, including exposing one's genitals for sexual gratification. The private indecency law prohibits exposure of the genitals to a person who does not consent in a manner that would alarm or annoy that person. For more, see Or. Rev. Stat. section 163.465 and Or. Rev. Stat. section 163.467 (Appendix 2).

[13] For more on the racist invocations of obscenity, I turn to Kimberlé Crenshaw, who deftly presents the selective application of obscenity prosecution by comparing the contentious case of the 2 Live Crew – an all-Black, male rap group whose sexually explicit lyrics were charged as obscene – and Madonna – a white female pop star who "acted out masturbation, portrayed the seduction of a priest, and insinuated group sex on stage" but was never prosecuted for obscenity.

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topless summer solstice picnic in Central Park intentionally led to their arrest and contestation of Penal Law § 245.01, to the *desnudas* performers of Times Square whose patriotically painted torsos leave little left unseen amongst other critical flashpoints in the legal regulation of the exposed form. It becomes further gendered given the antiwoman logic that female genitalia are less threatening than male genitalia for which public exposure/indecency laws are more stereotypically invoked (even while modesty of the femme form has received greater social scrutiny). Legal anxiety toward the trans body and homophobic attitudes only accentuate the disparate application of obscenity laws on the aesthetics of race, gender, and sexuality.

Legal concerns toward indecent exposure, public lewdness, and the obscene have been challenged under First Amendment protections of expressive material, including contemporary evaluation of immoral and scandalous remarks.[14] Classified as a misdemeanor, penalties for public exposure and indecency occur rather infrequently – as in the case of the Naked Athena whose performance went unrecorded before the law. From interpretations to the First Amendment's expressive freedoms to the Fourteenth Amendment's Equal Protection Clause, discerning nudity under legal provision remains an ambiguous task.[15] Even when toplessness and other partial nudity has been deemed permissible, arrests still frequently occur, as artist-advocate Holly Van Voast intentionally accentuates through performative interventions. Idiosyncratic and incomplete, these collective errancies in this law's application raise the questions: What purpose does obscenity doctrine serve if so subjectively enforced? Who is it meant to protect? Phrased in its inversion, who is it meant to criminalize?

[14] For consideration of a history of First Amendment expressive activity as it relates to scrutiny surrounding the exposed body, symbolic expression, and queer association, I turn to Paul Siegal 's work, "A Right to Boogie Queerly: The First Amendment on the Dance Floor," in *Dancing Desires: Choreographing Sexualities on and off the Dance Floor*, ed. Jane Desmond. Madison: University of Wisconsin Press, 2001. 267–283. For more recent address, see also the Supreme Court case *Iancu* v. *Brunetti* 588 US 388 (decided June 24, 2019).

[15] For example, see Anita L. Allen, 2006. "Disrobed: The Constitution of Modesty." *Villanova Law Review* 51: 841; James H. Taylor, 1992. "Constitutional Law: Nude Dancing's Marginal Status under the First Amendment." *Florida Law Review* 44: 141.

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An answer lies submerged in the entangled histories of law, aesthetics, and the nude. These categories, if often kept separate in academic discourse, converge to solidify hierarchies of race. Motivated by the famed nudity of twentieth-century performer Josephine Baker, humanities scholar Anne Cheng writes on the intimacies of modernism and primitivism as a site for understanding implications of racial difference. "The march of progress," submits Cheng, "is thus equated with the suppression and erasure of erotic material excess, deemed to be the exclusive and natural domains of sexual and savage primitives."[16] Modernity, morality, and flesh become overlapping projects. To make this argument, Cheng draws upon Adolf Loos's *Ornament and Crime* (2013), the title itself linking aesthetics and law. If Cheng emphasizes an aesthetic teleology that disappeared nakedness in its march of progress, such momentum reanimates through legal codes which regulate that very aesthetic space.

I return to Cheng's argument, however, as Naked Athena offers a near-perfect inversion of Cheng's primary case study, Josephine Baker: an anonymous twenty-first-century figure versus a twentieth-century celebrity, performed in the context of public protest versus proscenium-cabaret stage, a white-coded body performing ballet versus a Black body performing theatrical dance. Both examples center live events with visual and film circulation of the youthful, able-bodied female "wearing her nakedness like a sheath."[17] Located within these aesthetic developments, "the trope of skin/surface thus occupies a central place in the making of modern aesthetic and philosophical theory," writes Cheng. To this list, I would add legal codes, as concerns of morality sharpen at the same time, if in distinct and unacknowledged ways. Civil codes that restrict the naked body echo the aesthetic values of modernism, at least modern architecture, "defined as specifically the liberation from 'primitive' and 'feminine' inclinations."[18] A comparative reading, then, allows us to extend the aesthetic argument of Cheng toward new contexts, including legal domains with material stakes in the present moment.

[16] Anne Cheng, 2000. *Second Skin: Josephine Baker and the Modern Surface*. New York: Oxford University Press. 24.

[17] Cheng, *Second Skin*, 1. [18] Cheng, *Second Skin*, 25.

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CONTESTED MYTHOLOGY: CLASSICAL AND CONTEMPORARY VIEWS

Naked Athena of Portland, however, is far from the first woman to invoke her white femininity in exchange for legal protection. Against interpretations that Naked Athena's acceptance is a contemporary phenomenon indicative of some teleological progress of moral acceptance or anticonservative Christian becoming of society, I want to return to the Greek narrative of Phryne, uncanny in its parallels. One might be quick to recall her fabled biography (and question the adoption of Athena for this anonymous 2020 figure given her association as the goddess of warfare in lieu of the more analogous Phryne): a Greek *hetaira* known for beauty, Phryne became infamous during her trial for impiety (or *asebeia*), having "removed her robes, let down her hair and walked into the sea in full view of the other celebrants."[19] When the orator Hyperides defended her around 350 BCE, rhetoric alone failed to persuade the jury of her innocence. In an improvised act of sexuality, Phryne disrobed before the court. When the jury saw her bare breasts, she was acquitted: *non Hyperidis actione . . . sed conspectus corporis.*[20] The imagery of bare breasts in the courtroom as defense repeats throughout the centuries as a celebrated motif of protest when cast upon the white figure. Such reproductions include Orientalist Eugène Delacroix's *Liberty Leading the People* (1830), amongst other lauded examples. Yet rather than rhetoric of the primitive used at the time to describe the culture of colonized peoples who were similarly disrobed, Delacroix suggested instead that his painting depicted the "modern subject," again calling into question the racialized and heterosexual aesthetic gaze that undergirds sociolegal interpretations of indecency.[21]

[19] John Keefe, 1975. "An Ivory Figure of 'Phyrné': A New Attribution." *Bulletin of the Art Institute of Chicago (1973–1982)* 69 (4): 12–14.

[20] Trans: "Not by Hyperides actions . . . but by the sight of her body." Helen Morales, 2011. "Fantasising Phryne: The Psychology and Ethics of *Ekphrasis*." *The Cambridge Classical Journal* 57 (1): 71–104.

[21] Delacroix regularly featured the female nude in his work, including *The Triumph of Religion* (1821). See *Eugène Delacroix (1798–1863): Paintings, Drawings, and Prints from North American Collections* [Held at the Metropolitan Museum of Art, New York, April 10–June 16, 1991]. Metropolitan Museum of Art, 1991.

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Although the facticity of these events are disputed, including if Phryne disrobed herself or if this act was executed by the orator Hyperides (390–322 BCE), what remains consistent across the various accounts is that the revelation of Phyrne's breasts induced acquittal – that is, that her nude body was a legal advantage, not an illicit act of indecency (if accounts of the partiality of her nakedness differ). Reflecting on Phryne, classics scholar Ioannis Ziogas summarizes that "Female beauty, like [the] male heroism" of exposing wounds to evidence military courage, "acts as a barrier that checks the punitive hand of law."[22] Ziogas invites us to read Phryne's "irresistible beauty" in context of *The Trojan Woman* and the judgment of Helen, affirmed as nudity given its intertextual references to Greek myths and the divine. The parallel extends theorization of the aesthetics of law toward a larger attention to beauty and desire.[23] These themes slide analogously into the twenty-first century through repeated motifs in the scene of Naked Athena in which body made bare remained protected before the law. The masculinist bent of the intended audience repeats across each of these narratives, although in the most contemporary case, the all-male jury has been replaced by the masculine authority of the police.

I return to this courtroom performance by Phryne, not simply because it reveals a tension between rhetorical authority and embodied expression as evidence in legal scenes of judgment. Rather, I am also invested in the aloof shifting between nudity and nakedness presented in its retelling. For example, Quintilian asserts that "people believe that Phryne was acquitted not by Hyperides' speech, however admirable it was, but at the sight of her stunning body, which she bared by drawing aside her tunic."[24] Others yet "introduced Phryne in pitiable garb, beating her naked breast and tearing her tunic, and the jurors saw and acquitted her out of pity."[25] This shift in language toward the naked

[22] Ioannis Ziogas, 2018. "Law and Literature in the Ancient World: The Case of Phryne," in *Law and Literature*, ed. Kieran Dolin. Cambridge: Cambridge University Press. 79–93.

[23] Ziogas, "Law and Literature," 83.

[24] Quintilian, *Institutio Oratoria* 2.15.9. Cited in Ziogas, "Law and Literature," 79.

[25] Christian Walz, *Rhetores Graeci* (Stuttgart, 1832–1836), 7.335. Cited in Ziogas, "Law and Literature," 80.

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simultaneously invokes the wretched, far from the stunning sight of nudity previously framed. The jurors' reactions shift in these retellings too, as their affective response modulates from awe to pity respectively; the semantics, more than translational difference, code for ambivalence of law and the uncertainty of fleshly revelation.

Implicit to the logics of these retellings compiled here lies a juridical value in the aesthetic distinction between the naked and nude lost in contemporary applications of the law that continues to animate legal debate. This affective shift toward the exposed body, then, reflects the continued ambiguity associated with the articulation of emotional and aesthetic reception. Turning back to scholar Anne Cheng, she writes: "In spite of our political sophistication today, we still have few tools and little language for addressing what I call visual pleasure in the contaminated zone: those uneasy places of visual exchange where pleasure, law, and resistance converge."[26] This distinction also accounts for the varied reactions to exposed bodies across legal history, not least the "irreverent performances" of Calefurnia and Catherina Arndes featured by Julie Stone Peters.[27] Such is the renewed sophistication called for in this chapter, wherein knowledge from aesthetics and performance studies can inform corners of legal ambiguity still held within invocations of public exposure.

NUDE VERSUS NAKED: A MORALIZING AESTHETIC CODED BY LAW

Underneath the ambiguous articulations of the exposed body percolates an aesthetic distinction between the naked and the nude form already rehearsed within discourses of art history. Canonical authorities on the matter write:

> To be naked is to be oneself. To be nude is to be seen naked by others and yet not recognized for oneself. A naked body has to be seen as an object in order to become a nude. (The sight of it as an object stimulates the use of it

[26] Cheng, *Second Skin*, 167. [27] Peters, *Law as Performance*, chapter 4.

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as an object.) Nakedness reveals itself. Nudity is placed on display. To be naked is to be without disguises.[28]

To be naked is to be deprived of our clothes, and the word implies some of the embarrassment most of us feel in that condition. The word "nude," on the other hand, carries, in educated usage, no uncomfortable overtone. The vague image it projects into the mind is not of a huddled and defenseless body, but of a balanced, prosperous, and confident body: the body re-formed.[29]

Clark's aesthetic interpretation of the nude permeates public imagination including interpretation of legal codes that police the undressed body, if it has been critiqued as sexist and elitist. Interpreting Clark's *The Nude*, Harry Berger links the aesthetic values of affect, culture, and race when he asks "who the unembarrassed and uncivilized minority" might be, before going on to associate nakedness with the female body in particular.[30] Each, while discrete, acknowledge the sensitive differences between the naked and the nude as an aesthetic marker laden with sociocultural investment.

Across the larger lexicon, nudity becomes associated with the artistic, the refined, and the sublime whereas nakedness becomes proxy for excess, vulnerability, and shame – the contrasting values assigned to the dual forms of Naked Athena and Josephine Baker, respectively. Across both weave concerns for proximity, exposure, intimacy, legibility, and recognition. Nudity signals the transformation of naked toward an ideal of "proportion, symmetry, and harmony" – that is, the forms of ballet most legible to a mainstream public.[31] Read under these aesthetic conditions, nakedness, but not nudity, is disavowed under the American legal tradition, if its language does not always parse it with such clarity.

[28] John Berger, 1997. *Ways of Seeing: Based on the BBC Television Series with John Berger. A Book Made.* 37. pr., 1. publ. 1972 by British Broadcasting Corporation and 1977 by Penguin Books. London: British Broadcasting Corporation.

[29] Kenneth Clark, 1972. *The Nude: A Study in Ideal Form.* A. W. Mellon Lectures in the Fine Arts 2. Princeton, NJ: Princeton University Press.

[30] Harry Berger, 2005. *Situated Utterances: Texts, Bodies, and Cultural Representations.* 1st ed. New York: Fordham University Press, 363.

[31] Berger, *Situated Utterances*, 366.

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The distinction between the naked and nude body that took place across the fields of visual arts, medical research, and religious morality. Ideals of nudity over nakedness presume a moralizing stance endowed with Christian dogma. For many, nakedness as an illegal act follows the original sin in the fall from paradise, as sexuality became an illicit behavior and virginity cherished.[32] Contemporary Euro-American orientations toward the unclothed body continue to follow from Christian, medieval, and Enlightenment era traditions, replete with moralizing overtones. When Berger writes that "to be naked is to be deprived of our nudity," he implies it to be deprived of dignity, that is, without legible values before social norms – indicators codified by legal codes in the names of public decency.[33] If Berger views the nude as a "fictional ideal of the body," its implications linger in material and ideological ways despite any supposed facticity.[34] For example, reviews of an ivory figure of Phryne suggest that "the sculpture also tells much about mid-nineteenth century taste, which considered nudity acceptable if the subject were of a moralizing or 'improving' nature."[35] Such manifestation includes contemporary interpretations of codes of public decency and reveals larger tensions within the secular and separatist attitudes claimed by the US government.

Language of intention and consent contained within contemporary public exposure law repeat within critical formulations of the nude. "Consent is crucial when it comes to nakedness," writes queer theorist Rocío Pichon-Rivière. She continues: "On both sides of the intentional relation that is perception, consent is necessary to have intimacy rather than mere exposure."[36] This commentary productively challenges the legal language of indecent exposure, in which reception usurped intent. Power dynamics continue to vibrate: "While ... the history of colonial

[32] For example, Elizabeth Grosz writes: "While the Greek nude began with the heroic body proudly displaying itself in the palaestra, the Christian nude began with the huddled body cowering in consciousness of sin" (cited in Berger, *Situated Utterances*, 367).

[33] Berger, *Situated Utterances*, 365. [34] Berger, *Situated Utterances*, 374.

[35] Keefe, "An Ivory Figure," 14.

[36] Rocío Pichon-Rivière, 2021. "Nudes and Naked Souls: Critical Phenomenology of Skin Disclosure and Hemispheric Trans Theory." *GLQ: A Journal of Lesbian and Gay Studies* 27(3), 431–450, 446.

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sexual violence explains why skin exposure got to be seen as a loss of dignity, I add that nudity enforcement to this day perpetuates that economy of dignity. I think that the assumption implicit in the equation . . . is that being naked is always-already exposing oneself to domination by an abusive other (perhaps even 'asking for it')."[37] That nudity might be a sheath but nakedness an invitation to violence synthesizes the stakes of transdisciplinary engagement across law, aesthetics, and performance.

Beneath this terminology of the nude or naked amasses a question of the revealed body and its racialized reception. As dance choreographers and critics have probed in the US racialized society, can anything but the white body be seen as universal?[38] Put otherwise, does the racialized body – in dance or drawings or scenes of protest – always signal the particular? Afterall, as Margaret Miles writes in *Carnal Knowing*, "The nude body achieves universality at the expense of particularity."[39] By consequence, in a raced society, can the exposed body ever be viewed as nude and not naked, and thus not in violation and need of police response once exposed? Even as laws shift, aesthetic attitudes of the police state can be slow to keep up.[40]

Interpreted through these aesthetic frames, indecency laws criminalize the naked body but not the nude body. Such an observation forces acknowledgment of the racialized aesthetic practice behind this distinction. Although these binaries are false imaginaries of imperial import, their force still saturates contemporary legal theory. Nudity becomes an artful abstraction while nakedness becomes shorthand for the primitive, contributing to aesthetic categories of the civilized and uncivilized body. This canon invites simile between nakedness and the bare body, on the one hand, and the political body, on the other hand, in which only the latter engenders protection. As Ernesto Lacau distinguishes, "In Art

[37] Pichon-Rivière, "Nudes and Naked Souls."

[38] Choreographer Miguel Gutierrez frames this question most poignantly in the article, "Does Abstraction Belong to White People?"(2018) as he recounts a stream of personal events in which the politics of race tainted reception of contemporary dance. Michael Gutierrez, "Does Abstraction Belong to White People?" *The BOMB*. November 17, 2018.

[39] Cited in Berger, *Situated Utterances*, 364.

[40] Holly van Voast's punk drag performances as Harvey van Toast, specifically incited arrest to call attention to the non-uptake of the legal decision in *The People* v. *Ramona Santorelli and Mary Lou Schloss*, for example. These episodes reveal a delay of at least two decades between the decision of a court and a shift in police attitudes.

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History the distinction is often made between *the nude* (a body represented as it is, without reference to dress, as in Ancient sculpture) and the *naked* (where the absence of dress is fully visible, as in Northern painting of the Middle Ages and early Renaissance).[41] When scholars such as Berger locate nudity's "historical provenance in the art of antiquity," they omit any acknowledgment of non-Western tradition in which the unclothed body held its own aesthetic implications.[42] The distinction between nude and naked, then, separated low and high art across geopolitical lines. Put more assertively, "colonialism is a history of racist nudity enforcement," which reverberates throughout contemporary politics of the publicly exposed body.[43]

CIVILIZED OR CIVILIZING: CODES OF EXPOSED FLESH

Beyond the singular instance of Naked Athena's permissible protest, the wider argument of this chapter suggests the conflation of the civil body – as legal, political, and social being – and the civilized body – as aesthetic, ranked, and historical – that is, the Western body. As Julie Stone Peters argues, legal actors were historically trained in an aesthetics of decorum, disavowing the indecency of bodily gestures and dictating that one "should move around gracefully."[44] If she theorizes this performative act of dignity via rhetoric and oration, or what Cicero has termed the "eloquence of the body," it is also a choreographic space in which aesthetics of Western law were solidified. Such disciplined decorum became expected of the civilized body outside of the courtroom and halls of authority (where ballet also began). Whereas the line of each choreographed gesture for the ballerina connotes a sense of composure and premeditation, gestures on the non-balletically codified figure arouse potential anxieties toward the unruly, the wayward, the unrest.[45]

[41] Judith Butler, Ernesto Laclau, and Slavoj Žižek, 2000. *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*. Phronesis. London: Verso, 88–89.

[42] Berger, *Situated Utterances*, 365. [43] Pichon-Rivière, "Nudes and Naked Souls," 445.

[44] Peters, *Law as Performance*, 105–106.

[45] There are, of course, notable examples to the contrary; be it early modernist ballets like *Le Sacre du Printemps* or non-Western styles characterized as ephebic, the illegibility of control was met with frenzy.

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By considering these entangled aesthetic legacies via dance studies, we can begin to untangle the racializing force of law that continues to be enforced today in spite of law's supposed neutrality.

In *Law as Performance*, Julie Stone Peters draws our attention to decorum via Cicero's theorization on bodily eloquence. If not explicit, traces of civilizing aesthetics animate this text. Consider the following commentary by Thierry of Chartres on Cicero's *De inventione* (ca. 1130–1140):

> There was a time at the beginning of the world when men were savage and lived in the manner of beasts, [using] only their bodily strength, without any reason. At this time there was a certain man who was wise and eloquent, [and] recognized that . . . man was open to persuasion; and so . . . the wise man began to use eloquence and he drove out the savagery and brought men together to live by law, and he instructed the assembled people in the laws of living according to what is right.[46]

As Peters points out, there is an ethical ambiguity for Cicero on bodily eloquence as it contains both danger and virtue; strength sparred against reason. But there is also an aesthetic ambiguity that maps all too well onto the distinction of nude contra naked within concerns for indecency. For Cicero, decorum is that which has "three elements: beauty, tact, and taste" against the crude, the explicit, the vulgar.[47] Indeed, the legal containment of the naked body over the nude body expresses a civilizing function of law rooted in Euro-American aesthetic concerns for the appropriate body – that is, the civil body.

Beyond religious themes of purity, however, attention toward the nude body has frequently been invoked in state of nature philosophy, which parallels Eurocentric imaginaries of the (un)civilized as a political philosophical state of being. The protective valence of whiteness that shrouds Naked Athena bears traces to American modern and postmodern dance aesthetics in which the natural body was celebrated and

[46] Cited in Peters, *Law as Performance*, 98.

[47] M. Tullius Cicero, 1913. *De Officiis*. With an English translation by Walter Miller. Cambridge, MA: Harvard University Press. 126.

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whiteness was assumed as the epitome of (legal) neutrality.[48] Dance historian Ann Daly's scholarship on choreographer Isadora Duncan, an American icon and pioneer of the modern dance tradition, illustrates this lineage of concert dance's attention toward the divine. Reflecting on Duncan's desire for the natural body as embraced by the Greeks, Daly writes:

> Nature was Duncan's metaphorical shorthand for a loose package of aesthetics and social ideals: nudity, childhood, the idyllic past, flowing lines, health, nobility, ease, freedom, simplicity, order, and harmony. Through a series of correspondences, she elided Nature with science, religion, the Greeks, and finally, Culture. The Natural body was thus "civilized" (and white) as opposed to "primitive" (and Black). Functioning as the foundation trope for her artistic practice, the grace and clarity of the Natural body thus served to purify and elevate. . . . Functioning, too, as the foundational trope for her social agenda, it provided not just a blueprint for social order and harmony but also a template of social *control*, at a time of backlash against immigrants.[49]

Influenced by Dionysian values, Duncan sought to be "done into dance" as an act of divine purity – a Naked Athena prior to its pop-cultural circulation in 2020.

Duncan's aesthetic line of inquiry stands not as an exception but an exemplar of a larger dance movement that continues to dominate Euro-American concert dance. Cheng too highlights the importance of Isadora Duncan as an "apt example of the intimacy between neoclassicism and primitive and orientalist tropes."[50] From royal origins of court dance in France to modern figures like Martha Graham and Isadora Duncan, there exists in concert dance a prevalence of Greek and Roman themes that shape the affiliated movement vocabularies of grace, dignity, and decorum. As Clark writes, the nude represents "a far

[48] Dance scholar Thomas DeFrantz reflects on the juxtaposition of Black modernism, asking about the possibility for an American public to ever view the Black body outside of a racialized context.

[49] Ann Daly, 2002. *Done into Dance: Isadora Duncan in America*. Middletown, CT: Wesleyan University Press, 89–90.

[50] Cheng, *Second Skin*, 127.

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wider and more civilizing experience" than the naked, which has been deemed closer to the natural state. This aesthetic standard extends to less codified places, including ballroom culture where the American standards of whiteness are performed for categorical likeness or realness. But this invocation of the natural body in dance extends beyond the reach of art aesthetic into the realm of the legal, as concerns for the nude body become policed under law.

WAYWARD AESTHETICS AND BEAUTIFUL FUTURES

Julie Stone Peters establishes the theatrical manipulations and rhetorical theories inherent to the courtroom, as lawyers and litigants attempt to persuade a particular affective response to given evidence, reminiscent of Phryne's courtroom stunt. She writes that, in the courtroom, "the body may express the divinity of the human form; it may signify; it may entertain. Or it may be … indecorous, accidental, leaky, or sublimely obscene."[51] Yet queued by terms such as *hypokrisis*, *action*, and *pronuntiatio*, Peters narrows performance and bodily expression toward its animation in oral delivery – an emphasis on orator Hyperides over the gestures of Phryne. And in spite of her chapter's title, "Courtroom Oratory, Forensic Delivery, and the Wayward Body in Medieval Rhetorical Theory," waywardness and race fall from view (appearing only once on the penultimate page of the chapter). From Phryne's narrative to Naked Athena's performance, the exposed figure resurfaces these attentions when read in light of contemporary concerns for the indecent body.

The subtle yet strategic shifts between nude and naked opens space for wayward aesthetics of the exposed. Saidiya Hartman opens *Wayward Lives* (2019) with a cast of characters, nudging the reader into a liminal but illuminating space betwixt the theatrical and the theoretical, the performative and the political, the not-quite-real but more-than-mere-fiction. In other words, the possible. For Hartman, the wayward is the minor and anonymous figure, if not all together erased figure, of Black femme life in the twentieth century who "refuse[s] the terms of visibility imposed on them" – or she who capitalizes on the inability for history's

[51] Peters, *Law as Performance*, 95.

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gaze to see them any other way.[52] The wayward, then, assumes her own agency in deciding if she is to be viewed as naked or nude, uncivil or civilized, and ultimately, lawful or not. Perhaps Naked Athena is wayward as she dislocates classical ballet to open fire and pavement. Perhaps she is wayward as she approaches police authority against instinct to retreat. Or perhaps she rehearses a wayward aesthetic for as she bares it all, she refuses the protest to be about anything other than skin.

Hartman dwells on a different nude image as she breathes life into the beautiful experiments of wayward lives, including that of a young Black girl lying naked on an arabesque sofa for a prying, pseudo-scientific gaze, "a forensic picture of an act of sexual violence not deemed a crime at all."[53] In the case of Naked Athena, her verticality subverts characterization as a living odalisque mapped onto the other nude and anonymous figure. Her balletic postures render her legible as beautiful, as beyond the need for legal intervention into civilizing matters. I pause on Hartman's haunting questions when considering the images together: "Was it possible to annotate the image? To make my words into a shield that might protect her, a barricade to deflect the gaze and cloak what has been exposed?"[54] Time, place and historical contrast are markedly different as I shuttle between these two images, but nevertheless I am struck by the profound difference between the perceived flesh of these scenes. For the wayward youth of Hartman's attention, no authority recognized the legal violations inflicted upon her. For Naked Athena, no authority recognized the legal codes of which she herself was in violation. Read in their intimate reliefs, together these two figures contribute to a larger history of racialized femininity – one I have aimed to read here within legal discourse of the indecent.

Naked Athena's actions and subsequent nonpolicing invite an entanglement of race, gender, and aesthetics of the unclothed body read through contemporary legal regulations of public exposure. Articulating the politics of aesthetic categorization, Hartman writes: "Beauty is not a luxury; rather it is a way of creating possibility in the

[52] Saidiya V. Hartman, 2019. *Wayward Lives, Beautiful Experiments: Intimate Histories of Social Upheaval*. First ed. New York: W. W. Norton & Company, 18.

[53] Hartman, *Wayward Lives*, 33. [54] Hartman, *Wayward Lives*, 26.

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space of enclosure, a radical art of subsistence, an embrace of our terribleness, a transfiguration of the given. It is a will to adorn, a proclivity for the baroque, and the love of *too much*."[55] Exposure may very well be that *too much* when not predetermined as promiscuous, lewd, or indecent. My aim has not been to offer a normative or moralizing vision of the future of nudity in the United States, but to gesture toward the very real stakes held within the aesthetic values of law. The balletic performance in the heightened public scene of protest allowed for this reading, one scene of many in which wayward aesthetics of the civil body have been coopted toward classical lines.

APPENDIX

APPENDIX 1

The Miller test was developed in the 1973 case *Miller* v. *California*. It has three parts:

- Whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest,
- Whether the work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law,
- Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The work is considered obscene only if *all three* conditions are satisfied.

APPENDIX 2

Oregon Revised Statutes Crimes and Punishments § 163.465

1. A person commits the crime of public indecency if while in, or in view of, a public place the person performs:

[55] Hartman, *Wayward Lives*, 33.

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a. An act of sexual intercourse;
b. An act of deviate sexual intercourse; or
c. An act of exposing the genitals of the person with the intent of arousing the sexual desire of the person or another person.

2. Public indecency is a
   a. Class A misdemeanor.
   b. Notwithstanding paragraph (a) of this subsection, public indecency is a Class C felony if the person has a prior conviction for public indecency or a crime described in ORS 163.355 to 163.445 or for a crime in another jurisdiction that, if committed in this state, would constitute public indecency or a crime described in ORS 163.355 to 163.445.

Oregon Revised Statutes Crimes and Punishments § 163.467

1. A person commits the crime of private indecency if the person exposes the genitals of the person with the intent of arousing the sexual desire of the person or another person and:
   a. The person is in a place where another person has a reasonable expectation of privacy;
   b. The person is in view of the other person;
   c. The exposure reasonably would be expected to alarm or annoy the other person; and
   d. The person knows that the other person did not consent to the exposure.
2. Private indecency is a Class A misdemeanor.
3. Subsection (1) of this section does not apply to a person who commits the act described in subsection (1) of this section if the person cohabits with and is involved in a sexually intimate relationship with the other person.
4. For purposes of this section, "place where another person has a reasonable expectation of privacy" includes, but is not limited to, residences, yards of residences, working areas and offices.

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