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LAW AND RHETORIC

*Richard H. Weisberg**

HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW. By *James Boyd White*. Madison: The University of Wisconsin Press. 1985. Pp. xviii, 251. \$22.50.

For the past fourteen years, since the publication of *The Legal Imagination*,¹ James Boyd White has been the foremost rhetorician of law in our academic culture. With a consistency approaching self-confessed repetitiveness,² White has sought to save law from science, bureaucracy, and, particularly in his latest book, from the social sciences. Law is, for him, neither exclusively a knowable series of rules available for application to any given case, nor a governmental power base, nor a mechanism designed to fulfill particular ends, such as economic efficiency or even the betterment of the general welfare. Law is, largely, rhetoric, "the art of establishing the probable by arguing from our sense of the probable" (p. 31). For White, law consists of the eternally shifting relationships of speaker to audience; he believes less in the power of the individualized speech act (say, of the poem or judicial opinion) than of the relationship, the dialogue itself. Ours is "a culture of argument, perpetually remade by its participants" (p. 35).

In *Heracles' Bow*, White attempts to redeem rhetoric not only for its central place in law but also in its own right. Admitting that rhetoric suffers both from purely contemporary and considerably more long-standing disaffection (Plato attacked it as "a false art" (p. 31)), White nonetheless affirms his admiration for rhetoricians:

This means that the rhetorician — that is, each of us when we speak to persuade or to establish community in other ways — must accept the double fact that there are real and important differences between cultures and that one is in substantial part the product of one's own culture. The rhetorician, like the lawyer, is thus engaged in a process of meaning-

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1. J.B. WHITE, *THE LEGAL IMAGINATION* (1973) [hereinafter *THE LEGAL IMAGINATION*]. See also J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984).

2. White calls this book "the third in a series" (p. xiv), and later points out that "[o]ther versions of some of the ideas at work here . . . can be found" in the two earlier books (p. xviii). Far from criticizing this repetitive aspect, I applaud it in the practice of this review, for it is the constancy in White that I most fully address — his views on law as rhetoric and literature. Indeed, I do not treat at length here the more idiosyncratic chapters in this book, see, e.g., Chapter Four, "The Invisible Discourse of the Law: Reflections on Legal Literacy and General Education," and Chapter Nine, "Making Sense of What We Do: The Criminal Law as a System of Meaning."

making and community-building of which he or she is in part the subject. To do this requires him or her to face and to accept the condition of radical uncertainty in which we live: uncertainty as to the meaning of words, uncertainty as to their effect on others, uncertainty even as to our own motivations. [pp. 39-40]

For White, the rhetorician positively reflects, rather than negatively emphasizes, the "radical uncertainties" (p. 40) of human existence. The predominant metaphors in *Heracles' Bow* evoke the fluidity both of life and language; to survive the unpredictable swells of our relativistic culture, what better protection than the equally slippery, swampy medium of words? It is as though we are to picture a system concerned less with mastering or resisting our elemental doubts than with replicating and furthering them through rhetoric.

Where can one place such a world view in the context of late-twentieth-century thought? How can a belief in words, and in their power both to validate an institution (law) and to ennoble the individual, make sense to us at the end of a century in which, to many minds anyway, words have been hideously debased, employed more to distort and destroy than to co-exist with or improve their listeners? White, who himself suggested the antinomy between rhetoric and ethics in the section on American slavery laws in *The Legal Imagination*,³ still struggles to answer this question in *Heracles' Bow*. Like Jürgen Habermas for philosophy,⁴ like some left-wing reformist thinkers for religion,⁵ White here tries to provide for lawyers a validation of the pursuit of intersubjective language in a world correctly skeptical of words and doubtful that their institutional purveyors truly seek dialogue more than domination.⁶

3. See THE LEGAL IMAGINATION, *supra* note 1, at 432-82.

4. See J. HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY (1984), and J. HABERMAS, LEGITIMATION CRISIS (1975). The notion of dialogue in the latter text is critiqued in JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 65-66 (1984).

5. See, e.g., H. KÜNG, J. VEN ESS, H. VON STIETENCRON & H. BECHERT, CHRISTIANITY AND THE WORLD RELIGIONS: PATHS OF DIALOGUE WITH ISLAM, HINDUISM, AND BUDDHISM (1986).

6. The foremost modern anti-rhetorician or, as I might better call him, "dialogue-skeptic," is of course Friedrich Nietzsche. Nietzsche, himself a brilliant stylist, always warned against writers and institutions primarily centered around the word; he consistently exhorted his readers to distrust the word, to get behind it, and to detect the essentially nonverbal will to power that had generated the words themselves. This explains, for example, his lifelong attack on Flaubert, in whose work, Nietzsche felt,

life no longer resides in the whole. The Word gets the upper hand and jumps out of the sentence, the sentence stretches too far and obscures the meaning of the page, the page acquires life at the expense of the whole — the whole is no longer a whole. But that is the simile for every style of *decadence*.

NIETZSCHE WERKE, pt. 6, vol. 3, at 21 (1968) (Berlin: Walter de Gruyter & Co.) (Wagner's Case, Aphorism 7) (my translation). He believed that rhetoric furthered the negative aims of the resentful institutions that had come to dominate modern Europe. See, e.g., THE GENEALOGY OF MORALS 259 (F. Golfing trans. 1956) (Essay III, Aphorism 14) (on the perversion of justice by modern German law). For the twentieth-century observer, Nietzsche's skepticism is all the more

White thus makes a controversial claim that, as he defends it, becomes increasingly instead of decreasingly problematic. His assertion that law is rhetoric seems more intuitively accurate than, say, the view that law is science or economics. But his defense of legal rhetoric finally lacks the two elements provided by both traditional jurisprudence and the social sciences: a normative scale on which to judge legal behavior and a forthright analysis of such behavior as it is in fact practiced.

The absence of prescriptive knowledge in White's writings seems at first harmonious with most Law and Literature theory. Since Cardozo's famous essay, "Law and Literature,"⁷ American proponents of that interrelation have taken it as axiomatic that law can never be reduced to norms; along with the neo-realists, but with more of an interest in narrative, Law and Literature theorists expounded the complete individuality of all legal players. Much less bound to rules or theory than was elsewhere suggested, the legal actor was perceived as consistently in the business of expressing his or her own interests or values through narrative. Sometimes the narrative act inspired and transformed the actor (Cardozo's belief⁸); at other times it merely couched self-interest in acceptable or even overwhelming narrative structures (my own, more pessimistic view⁹); but in no difficult case was the actor assumed in fact to be significantly more constrained than by the power of his or her own rhetorical talent.¹⁰

Often White assumes the posture of the narrative realist, albeit in the guise of several long footnotes directed at various modern legal theoreticians.¹¹ But predominantly he breaks from this Law and Literature tradition, promising his reader norms rather than realities:

I should perhaps also make explicit, although it should be obvious enough, that my account of law is not meant to be a description of the way it is actually practiced by most judges and lawyers but a representation of the possibilities I see in this form of life both for its practitioners and for the community at large. My apology for the possibilities of the life of the law should thus not be misread as a defense of existing arrangements; rather, it should be taken as an elaboration of the hopes I

valid: after Hitler, or even (much more benignly) during the era of mass media communication, we cannot look naively at the notion of "dialogue" or the institutional purveyors of rhetoric.

7. B. CARDOZO, *Law and Literature*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 339 (M. Hall ed. 1947) (originally published in 14 YALE REV. 699 (1925)) [hereinafter *Law and Literature*].

8. B. CARDOZO, *THE GROWTH OF THE LAW* 89 (1924).

9. R. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* (1984) (chap. 9).

10. Thus Cardozo: "The [judicial] opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb, and the maxim. Neglect the help of these allies, and it may never win its way." *Law and Literature*, *supra* note 7, at 342.

11. See, e.g., p. x n.1 and p. xi n.2.

think we can and should have for the law and for ourselves as lawyers, which may in fact serve as a ground upon which a criticism of law at once idealistic and realistic can rest. [p. xv]

Yet White never manages to convey systematically what these "hopes" are. Perhaps they are too simple to need systematic elaboration. As another reviewer of *Heracles' Bow* has recently suggested, there may be little more to White prescriptively than the wish that we shall all continue to talk to one another, and the hope that in so speaking we shall change minds while keeping our own minds open to counterargument.¹² These are fine sentiments, but I am not sure that, even in today's still anti-literary legal climate,¹³ we need three books and a dozen essays to make the point.

Instead, White's strengths appear to be descriptive. He quite accurately, and I think extremely clearly,¹⁴ describes the way law has always been practiced. Far from identifying the "ideal possibilities of the forms of speech and life we call the law" (p. 242), White elaborates an apologia for the way it actually is done. But his descriptive analysis stumbles, not only because he denies its presence, but also because he often seems not to notice (or at least not to articulate overtly) the implications of his data.

Although one should, one need not go beyond the first chapter of *Heracles' Bow* to seize the paradox of White's rhetorical mode. This chapter, "Persuasion And Community In Sophocles' *Philoctetes*" (pp. 3-27), furthers the reputation of its author as a knowledgeable and insightful critic of classical texts.¹⁵ Sophocles' *Philoctetes*, which also provides the book's title, tells the story of Heracles' bow, Philoctetes' magical weapon, sought by Odysseus on behalf of the Greek warriors.

12. See Carter, Book Review, 20 GA. L. REV. 793, 798-803 (1986).

13. While the characteristic affection of law for literature (see, e.g., R. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE (1984)) in this country is again on the upswing, serious scholars such as Frederick Schauer continue to display a dismally undereducated antipathy towards literary expression. See, e.g., Schauer, *Liars, Novelists, and The Law of Defamation*, 51 BROOKLYN L. REV. 233, 253 (1985) (novelists are accurately called "liars"); *id.* at 257 ("it should not be at all surprising that any society would consider truth, in its unadulterated form, as having some primacy over fiction"). Judge Bork also has seemed insensitive to literary art's "higher truths" and pervasive impact on the polity. See Bork, *Neutral Principles*, 47 IND. L.J. 1, 28 (1971). Since Professor Schauer is acknowledged by Professor White for his help in commenting on portions of *Heracles' Bow* (p. xvii), I may be underestimating his potential awareness of the value to our culture of literary expression. Other signs, such as Richard Posner's recent entrance into the Law and Literature debates, see, e.g., Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986) [hereinafter *A Relation Reargued*]; LaRue, *Posner on Literature*, 85 MICH. L. REV. 325 (1986) (response to Posner); Posner, Book Review, 96 YALE L.J. 1173 (1986) (reviewing R. WEISBERG, *supra* note 9) portend a verification of J. Allen Smith's interdisciplinary vision in Smith, *The Coming Renaissance in Law and Literature*, 7 U. MD. L.F. 84 (1977).

14. I disagree with Posner's characterization of White's recent writings as "pitched at so high a level of abstraction that" one might lose "the thread of his discourse." *A Relation Reargued*, *supra* note 13, at 1392 (referring to an essay that became Chapter Two of *Heracles' Bow*). I find White's writing clear and invariably coherent.

15. See, e.g., *A Relation Reargued*, *supra* note 13, at 1359.

They need the bow to defeat the Trojans, but to get it they must convince the exiled Philoctetes to hand it over. Since Odysseus partially brought about that exile, he realizes that he would stand little chance of success, so he convinces Achilles' son Neoptolemus to confront Philoctetes. Reluctant at first to do so, since the task involves either lying or force, Neoptolemus fairly quickly¹⁶ accedes to Odysseus' arguments that the bow is a necessity both for his own honor and for the greater glory of the Greeks.

Neoptolemus thus approaches the exiled Philoctetes, woos him falsely, undergoes the reversal of empathizing with him, and finally succeeds only in having him agree to return to Greece with the bow. That remedy will not do, however; the majestic Heracles himself has to appear to remind both Philoctetes and Neoptolemus that their heroic destiny requires bringing the bow immediately into battle against the Trojans. Like the ghost in Act III of *Hamlet*, Heracles encourages others to action more by the rhetoric of his presence than by words: he requires a scant forty lines to convince Philoctetes and Neoptolemus to join the battle. This powerful, essentially nonverbal rhetoric of presence White chooses not to recognize (or at least not to analyze), but it is unanswerable. The play ends with Philoctetes stirred to the very action that Odysseus desired at its beginning.

I do not argue with White's original position regarding this play, namely, that it well describes the kinds of rhetoric available to lawyers. As Odysseus persuades Neoptolemus, and then the latter alternately conquers and is conquered by Philoctetes, the viewer does see several models of lawyer-like rhetoric. Furthermore, White forthrightly states that Odysseus' (and for that matter Heracles') goal-oriented forms of persuasion succeed pithily, whereas Neoptolemus' (and in a sense Philoctetes') more empathetic and variable rhetoric fails to convince or finally to affect the outcome of events. But White professes a lack of concern with mere "ends." Here, and throughout the book, he claims to be interested in the *means* used by a speaker, means that must comprehend both the humanity of others and the "conditions of uncertainty that render [ends-means] 'rationality' worse than useless" (p. 23).

By this test, according to White, Odysseus utterly fails. White says this of him:

Odysseus is not a model of the crafty lawyer after all, unscrupulous but effective, rational but base, but an example of a lawyer who is bad in both senses of the term. At just the level where his claims for himself are most seriously made, that he is a pragmatic success, he is in fact a total failure.

16. It takes Odysseus a mere seventy lines to convince Neoptolemus to assist in the task of seizing Heracles' bow from Philoctetes. See SOPHOCLES, *Philoctetes*, in SOPHOCLES II 190, 197-200 (Greene & Lattimore eds. 1957) (lines 50-120).

What Odysseus misses is the reality of the social world, and its power. His cast of mind, which itemizes the world into a chain of *desiderata* and mechanisms, is incapable of understanding the reality and force of shared understandings and confidences . . . or, in terms of this play, [of deriving] confidence and pleasure in those activities by which Neoptolemus and Philoctetes create a world of action and significance. [p. 20]

White sees Odysseus as the poorest sort of lawyer (at one point he calls him a corporatist, "more fascist than Benthamite" (p. 9 n.1)), a man "whose whole being is spent in the service of ends he cannot examine" (p. 21). On the other hand, "Neoptolemus' position, by contrast, is based upon his own character or identity. . . . His initial response to Odysseus' suggestion is a kind of instinctive reaction, learned but not wholly understood: for him force and persuasion are both acceptable, but deceit is not" (p. 9).

The claim that Odysseus loses himself and sacrifices others through a deceitful and all-consuming quest for ends, and that Neoptolemus preserves his sense of self by treating others honestly and as complete "persons," cannot withstand scrutiny, however. First, the play itself is much kinder to Odysseus; as the chorus proclaims, "Odysseus was one man, appointed by many, by their command he has done this, a service to his friends."¹⁷ Odysseus seeks no personal gain, and he may (for all we are told) have fully examined the merits of his task. After all, Heracles himself finally proclaims the rightness of Odysseus' goals, and the audience simply cannot doubt their justness.

What is more, Odysseus' *means* are always communicated overtly. He never hides from Neoptolemus the sordid side of dealing with Philoctetes and frankly advises him to forgo his own sense of virtue temporarily for the greater welfare of the Greek community. (To condemn this would be to condemn, in *Measure for Measure*, the doomed Claudio's plea to his virtuous sister, Isabella: "Sweet sister, let me live:/ What sin you do to save a brother's life,/ Nature dispenses with the deed so far/ That it becomes a virtue."¹⁸ These situations cannot be treated as unambiguous or morally clear.)

As for Neoptolemus, his failure to resist Odysseus' argument speaks more to his own weakness than to any fault in Odysseus. Far from embodying honesty, he goes on to employ pure deceit on the pathetic Philoctetes, lying to him over a dramatic space more than ten times greater than Odysseus' frank seventy-line dialogue with Neoptolemus himself. When the dismayed title hero finally learns of Neoptolemus' deceit, the play's most terrifying moment of cruelty and

17. SOPHOCLES, *supra* note 16, at 239-40 (lines 1142-43).

18. W. SHAKESPEARE, *Measure for Measure*, act III, scene i, lines 134-37, in 1 THE ANNOTATED SHAKESPEARE, 720 (Rowse ed. 1978).

catharsis arises. The viewer cannot deny the emotional effect of Neoptolemus' deliberate and long-lasting mistreatment of Philoctetes.

Yet, as to Neoptolemus' tactics, White has this to say:

[D]espite his conscious intentions, Neoptolemus is at the most basic level in fact not dishonest: both his own story and his responses to Philoctetes' story are in a deep sense true. The false surface version of his story, that Odysseus has deprived him of the arms of his father, has its deeper true version (to which we have just been witness) in the scene in which Odysseus does deprive Neoptolemus of himself — "give me yourself for just a shameless part of a single day." In thus disintegrating him, Odysseus has deprived Neoptolemus of his capacity as a man, of his nature and inheritance as a coherent and virtuous self speaking a coherent language — of his "arms" indeed. What Neoptolemus pretends is in fact true: he and Philoctetes are bound together by similar injuries at the same hands. [p. 13]

Here, White the rhetorician gets the better of White the critic. Apparently he wants his reader to reject Odysseus' mere quest for ends (however meritorious) and at the same time to endorse Neoptolemus' means (which are dishonest) while preserving the right to interpret falsehood as truth, down as up, wrong as right. Odysseus' grimy directness is thereby devalued as somehow inhumane and Neoptolemus' long-winded lies revalued as "in fact not dishonest" (p. 13). If White means this to be normative — and we are here dealing with his most important chapter — the lesson is hardly edifying. Apparently the rhetorically sound lawyer should be neither effective as to goals nor totally honest as to means. Neoptolemus' cruel lies to Philoctetes, if rationalized as truths, proffer a norm that seems to condone hypocrisy. Perhaps we should lie, expecting our falsehoods to be interpreted later as truths. Or perhaps White hopes that we ourselves, like Neoptolemus, will renounce our deceit. Yet only the sight of Philoctetes' physical agony from the wounds he has been suffering in exile moves Neoptolemus (after 700 lines!) to sympathetic honesty. How many lawyers, caught in the web of lies, will be saved by this kind of Sophoclean reversal? Neoptolemus' wordy equivocation, taken as a norm, might produce more deception and cruelty than Odysseus' forthright commitment to a respectable goal.¹⁹

19. In the play itself, the bad rhetorician is identified (by Philoctetes) as Thersites, not Odysseus. I have had occasion in the past to challenge White's view of legal rhetoric with the example of Thersites, the ignoble, argumentative Greek. See Weisberg, Book Review, 74 COLUM. L. REV. 327, 331 (1974) (reviewing J.B. WHITE, *THE LEGAL IMAGINATION*). The relationship of rhetoric to community (means-end?) seems positive in the pithy leader Odysseus, hateful in the wordy coward Thersites.

I think White fails to see a vital aspect of the Odysseus-Thersites dichotomy. For the Greeks, "community" was an essentially *nonverbal* phenomenon. It fell outside of rhetoric. It was claimed and established by the intuition of the group, who shared values inspired by education and affection. In disputes, the sight of which great leaders stood for which position often was as determinative as were elegant arguments. In *Philoctetes*, there is simply no doubt that Odysseus' "ends" are just. No rhetoric can change this fact. So Odysseus, brutally honest (unlike a Thersites-type), does not deign to distort his position through needless verbiage.

Yet without so intending it, I believe, White here accurately portrays the lawyer's rhetorical enterprise. Once a client imposes a task on a lawyer, the latter must often replicate Neoptolemus' prevarication. Quite a few matters in every career contain distasteful elements; no lawyer has the lifelong opportunity to pick and choose his tasks. (Some clients, like Odysseus in my reading at least, have reflected on the merits of their position *before* retaining counsel.) The role of lawyer then usually compels the already doubtful practitioner to create rhetoric in the service of those goals. In almost every case, the lawyer falsifies, or at least grossly exaggerates, some aspect of the existing facts or law. (White euphemizes this by saying, throughout *Heracles' Bow*, that the lawyer acts upon a received body of wisdom and rhetoric, and in so acting changes it.) Rarely if ever does the object of this falsification (the Philoctetes-figure), whether opposing party and counsel, judge, or jury, inspire in a workaday lawyer sufficient sympathy to reverse his (or her) tactics. Instead, exaggerations expand until checked by an adversarial act of power, symbolized in the play by Heracles' appearance.

Yet, perhaps by analogy to an almost Dostoevskian irrationality that lies within each of us, legal rhetoric usually produces some resolution acceptable to the client and also to the other parties. And so, until and unless political events (as they often have) raise the moral stakes immeasurably,²⁰ the systematic use of questionable rhetoric seems attuned to our culture's desires.

If Neoptolemus stands as the model of a good lawyer, it can only be within a system as just described. But in fact Sophocles leaves open the question of whether Odysseus and Heracles, in their frank espousal of a single, reflected goal, may not offer us a less deceptive, more efficient,²¹ and, I would be tempted to say, more Judaeo-classical model

20. I am in the process of studying legal behavior during one of those periods when discursive lying of the sort unchallenged here by White contributed to a rotten structure of annihilation and terror. See Weisberg, *Avoiding Central Realities: Narrative Terror and the Failure of French Culture Under the Occupation*, 5 HUM. RTS. Q. 151 (1983). White himself sensitively treats an equivalent American period of hideous legal rhetoric in *The Legal Imagination*, see note 3 *supra*. Surprisingly, there has been little development of the implications for his rhetoric of such historical periods.

21. White denigrates efficiency throughout this book. See, e.g., pp. 30-32, 214. I think his theory of language, more perhaps than his pro-"means" epistemology, explains White's sharp antipathy to law and economics. His rhetoric has always privileged "inconsistency and tension, the openness to ambiguity and uncertainty" (p. 124) — the single writer's "many-voicedness" (p. 124) or "writing two ways." Not all legal rhetorics, of course, need strive for such complexity and absence of directness. I think that White can mislead legal writers by suggesting that the single, clear, harmonious (indeed, "efficient") voice is somehow foreign to law. Indeed, he explicitly suggests this in a curious chapter of this book, "The Invisible Discourse Of The Law: Reflections On Legal Literacy and General Education," in which he makes the claim that the recent "Plain English" movement in law will be fruitless, because legal thinking will automatically render any system of words (even "plain" ones) strange and unfamiliar. See p. 72. While it may seem that White is being an elitist here, I think not; he means that lawyers *among themselves* will never be able to simplify their manner of writing. I take a considerably different approach to legal writing in R. WEISBERG, *WHEN LAWYERS WRITE* (1987).

for law.²² Admittedly, such a model requires us to do what White attempts only occasionally in his book: *to analyze the ends themselves* before proceeding, to make certain that our own fundamental values are sound (not, as in White's terraqueous world, always in flux) and then to proceed forthrightly in the service of those values. To put it in White's own terms, Odysseus becomes a "fascist" only if the ends he is serving are rotten and vicious (as they here are not); Neoptolemus risks becoming a fascist every time he willingly places his mouth at the service of anyone who has the rhetorical force (or the capital) to induce him to speak up at length and without conviction.²³

In the final chapter of *Heracles' Bow*, White continues his apology for legal rhetoric by creating a dialogue in the manner of Plato's *Gorgias*. His aim is to respond to that dialogue's attack on rhetoric by having two modern lawyers converse with Socrates on the merits of their position. The first of these, Euerges, seems wholeheartedly pleased with acquisition and power (all his *urges* are fulfilled by the system as it is). But the second, like White himself, tries to rationalize the law as a noble rhetorical enterprise. His name, aptly chosen, is Euphemes. This idealist perceives the lawyer as consistently enriching the lives of all around him (or her), beginning with the client: "I will not treat you shabbily; do not expect me to treat others so. I will not be your mouthpiece, but your lawyer" (p. 234).

Distinguishing the case of a lawyer in an utterly corrupt system (but nonetheless suggesting that, as in modern-day South Africa, it might be better to persevere within the system (p. 230)), Euphemes rationalizes the lies and distortions endemic to the lawyer's rhetorical workplace. To White's credit, he has Socrates challenge Euphemes in some of the most difficult areas of rhetorical behavior: cross-examination of the truthful witness, arguments to convince a judge, etc. As to the latter, Euphemes observes:

What this view of the law means about the ethics of legal argument is this. First, while I am in a sense "insincere" when I say to a judge, for example, that "justice requires" or the "law requires" such and such result, this insincerity is a highly artificial one, for no one is deceived by it. No one in the courtroom would be surprised to learn that this is a form of argument and not a statement of personal belief. But at the same time I am implicitly saying something else, with respect to which I am by any standard being sincere: that the argument I make is the best one that my capacities and resources permit me to make on this side of the case. This is a statement made by performance rather than in explicit

22. White correctly identifies the modern manifestations of the Neoptolemus-Philoctetes rhetorical mode as "a restatement of the basic Christian ethic." P. 5. But this is a Greek text from the fifth century B.C.!

23. It is always easiest to blame the one who plants an idea rather than the one (or the millions) who somehow find it within their moral make-up to bring the idea to fruition. In this case, as the chorus suggests, the originating idea is not even a corrupt one. See note 17 *supra* and accompanying text.

conceptual terms, and it is a statement not about the nature of "justice," but about the nature of the resources our legal culture affords for defending or attacking a particular result. But it is a statement honestly made.

In making this statement the lawyer's audience is the judge, and we serve her directly not by telling her what we actually think she ought to do, but by showing her something about the nature of her own situation in our culture. Together, the arguments of the two lawyers define the boundaries within which the judge operates by showing what even these parties, opposed as they are, must agree to, and they tell her what topics the culture requires her to face and deal with. Our arguments also provide her with a testing ground for her own thoughts. [pp. 225-26]

Given this description, there are few situations, however morally intolerable, that a lawyer could not rationalize and even promote through rhetoric. The last sentence particularly brings us back to Neoptolemus and his relationship with Philoctetes. For, as the former deceives and injures the latter, he also cedes to Philoctetes his moral integrity as surely as he had surrendered it to Odysseus. Philoctetes plays the White-ian judge to Neoptolemus' legalistic distortions. "Listen to my lies but perceive them as honest. Show me by your own potential forthrightness the path I should follow!" If this is the program White desires (through Euphemes, and perhaps with some sense of irony) for law, he has created an apologetically descriptive, not a normative, manual for what goes on anyway. I do not think that White intended such complacency.

If I have stressed the first and last chapters of *Heracles' Bow*, it is because they (like Chapter Two, from which I have already cited²⁴) represent the rhetorical body of the book. But there is also the book's soul. It is the soul of White the literary critic. When he moves in on the single text — legal, literary, or other — White is often superb. Thus Chapters Seven and Eight strike me as the strongest in the book, covering quite astutely Gibbon's *History of the Decline and Fall of the Roman Empire* (which White includes to demonstrate both that history is also poetic and that writing often transforms the project of the writer), Aeschylus' *Oresteia*, and Katherine Anne Porter's "Noon Wine." These chapters, together with Chapter Five ("Reading Law and Reading Literature: Law as Language") convincingly further White's view that "the life of the lawyer is at its heart a literary one" (p. 77).

It is in the waters between rhetoric and poetics that White seems to founder. And if he has not succeeded in the formidable task of justifying rhetoric, either generally or as he would like it to be practiced, he surely extends admirably his once equally ambitious project (now, thanks in part to him, fully acceptable) of emphasizing the imaginative, narrative, and fictive elements that pervade the lawyer's life.

24. See text following note 2 *supra*.