

# Translation as a Mode of Thought

James Boyd White

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

James Boyd White, *Translation as a Mode of Thought*, 77 Cornell L. Rev. 1388 (1992)  
Available at: <http://scholarship.law.cornell.edu/clr/vol77/iss6/5>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# TRANSLATION AS A MODE OF THOUGHT

James Boyd White†

I think that Clark Cunningham's article, *The Lawyer as Translator*,<sup>1</sup> is a wonderful piece of work, full of life and interest and originality. I especially admire: his ability to make vivid to the reader the ways in which languages do truly differ, and differ beyond our efforts to bridge them—as he shows when he imagines an attempt to translate our most common professional terms into Chinese; his recognition of the kind of force that our languages have over our minds, both as we see the world and as we tell stories about it; his sense that what we think of as “events” are really texts calling for interpretation, and his consciousness that interpretation in turn is a mode of thought by which the practices of our own minds can be made the object of critical attention; his development of the idea that the practice of translation entails an ethic of respect for the difference and equality of persons; and his constant awareness that his own use of language, both as a lawyer in the Johnson case and as a scholar-critic writing about it, is an ethical performance, and one at which he—and in our turn, we—not only can, but in some sense certainly will fail. This last is the most important point, for it is this perception that leads him to see that he must not only say what he thinks about the various issues that come before him, as if he were engaged in a purely intellectual exercise; he recognizes that he will perform his meanings in his writing, whether he likes it or not. It is in his own use of language—and in the relation he thus establishes with the habits of his own mind and with both Dujon Johnson and the reader—that his central terms and values acquire their most important meanings.

## I.

My first comment is about this point. The whole paper moves from a single metaphor, that what the lawyer does is a form of trans-

---

† Hart Wright Professor of Law, Professor of English Language and Literature, and Adjunct Professor of Classical Studies, The University of Michigan.

I should say that Clark Cunningham is both a former student and a friend. I have read several earlier drafts of his paper and discussed them with him.

<sup>1</sup> Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992).

lation, to which it gives increasing meaning as it proceeds.<sup>2</sup> I want to direct attention to the way in which this meaning is created. Imagine yourself being asked to define these two terms, “lawyering” and “translation,” and to explain the connection you see between them. Many of us, I think, would have the instinct to do this by defining the terms in propositional form: “by translation I mean . . . .”; “by lawyering I mean . . . .” One would then conclude with a comparison of the features the two practices share. This sort of writing would assume that what is called for is at heart a kind of definition and description, all in a single voice. In slightly fuller form the answer might run like this:

Translation is the replication in one language of what is said in another. The lawyer is like a translator because she represents in legal language what is said in ordinary language. But she is unlike a translator in that her two languages are not mutually self-exclusive, perhaps not “languages” at all; and she is more than a translator because the law is a discourse of power.

In such a form the point is true enough but almost entirely banal; if the voice in which I have thus begun went on to trace out these analogies and disanalogies with greater specificity, whatever it said would tend towards the lifeless and dull. This is a form of writing that assumes its own adequacy.

Cunningham, by contrast, sees the statement of the analogy as defining a writing problem for him: he must give meaning to his terms, both of them, in such a way as to make them live for the reader. He does this, as I say above, both descriptively, as he talks in a variety of ways about translation and lawyering, and, more profoundly, in his own prose, as he enacts the vision of language and life that he wishes to express. In this sense this is what I would call a highly literary piece of work.

See what the consequences are: if he had proceeded in the first mode, he would have claimed to have stated in propositional form an idea that could be used, without change, by others. “Cunningham’s analogy between lawyering and translation” is a phrase that could be repeated without further work, plugged into an analytic scheme, or compared with other metaphors, themselves reproduced in a similarly conclusory way. Instead, what Cunningham is implicitly saying to others is that you too must give these terms meanings

---

<sup>2</sup> I have also used this analogy in my writing, especially in *JUSTICE AS TRANSLATION* (1990). But there I focus more on the activity of judges than lawyers, and more on the reading of legal texts than on clients’ narratives. *THE LEGAL IMAGINATION* (1973), which is primarily about lawyering, depends on the sense that lawyers translate what is said in other languages into the law, but it does not develop the analogy in an explicit way. It gives me great pleasure to see how far beyond what I have done Cunningham has gone.

of your own, in texts of your own making. If you try to reduce either translation or lawyering to a process describable in a conceptual or mechanistic language you will do justice to neither human activity. What kind of language is possible, then? One, like his, that recognizes and makes vivid the experience and meaning of translation on the one hand, lawyering on the other. But each speaker must create this language afresh, or the metaphor will become a dead one. We cannot simply appropriate his text; we must make its terms our own, and give them meanings of our own making.

It is from this point of view that I have some doubts about the long section locating his work in its academic context. This is obviously valuable, but I do wonder whether there is not an unproductive conflict between the voice in which he does all this—talking about methodologies a bit as though they were intellectual technologies, usable in any hands, producing replicable results, and so on—and the voice in which the paper actually lives, when he gets to the story he has to tell. The first voice may invite the reader to look at Cunningham's work in the way he himself looks at the rest of the scholarship, locating it on a grid, as if its merits lay in his "method" rather than in the qualities of his own mind and prose. After all, it would be possible to use ethnomethodology in a mechanistic or close-minded or insensitive way—and it would be equally possible to use the translation metaphor that way too. Perhaps this section of the paper might stand better as a separate piece on method, or as an appendix. For the great merit of Cunningham's work lies not so much in the idea or analogy from which it proceeds as in what he makes of it in working it out, his exemplification of what it can mean to rethink one's experience and one's language. He makes rewriting itself a mode of thought that can move him to new ways of imagining, new ways of being. To imitate him one would have not only to start from his analogy, but to learn to write, in one's own way, as he writes.

## II.

Two other, briefer points. First, it is a great merit of Cunningham's paper that he focuses on the experience and art of the lawyer, and does so as a lawyer himself. In my view far too much writing about "law" proceeds on the premise that both writer and reader are somehow outside of the process, on some remote and presumably superior platform. The issue then becomes a question of policy—"What should the rule be?"—or a question of structure and process—"How should these judgments be made?"—as if we were all social architects, or omnipotent legislators, shaping the world to our ideas. Cunningham, by contrast, focuses on his own experience

as a lawyer situated in a certain context and engaged in a certain activity of mind and language. It is the quality and nature of this activity, in this context, that engages his attention. He tries to make a way of talking about it that will at once capture its ethical and intellectual qualities and provide a method for thinking about how we might learn to do it better. He speaks to us as fellow-lawyers, too, as people whose lives are shaped by the process of lawyering. This is a most welcome change. There are many, after all, who tell us what rules we should make or follow; but all too few who speak well about the meaning and quality of the practices of mind that define our professional lives.

This point is related to a second: that to take Cunningham's article seriously is to consider new ways of teaching law. For if the lawyer is a translator, should we not teach our students how to do what translators do? This would include giving prominence to the process of interviewing clients and witnesses, seen not simply as bureaucratic "intake" or as the occasion for emotionally supportive (or destructive) behavior but as an essential part of all lawyering. More than that, this kind of teaching would insist, across the curriculum, on bringing to the surface of attention some sense of the different ways in which the stories of cases we read could be told in different languages and voices. It would lead us to call upon our students' sense of ordinary language, ordinary life, not just as a matter of intellectual curiosity or political ideology, but with the sense that to do this is an important part of training in the activity of lawyering.

### III.

It is striking that Cunningham's rewritings enable him to engage critically with his own discourse. As he retells the story—partly with Johnson's assistance—he comes to see it, and his own role within it, very differently; the kind of language with which he began, which he used without questioning, becomes inadequate, unusable. This happens not only in ways familiar to the lawyer, for example as he sees the case more sharply in terms of *Robinson*<sup>3</sup> than *Terry*,<sup>4</sup> but also in ways that are not so familiar, as he comes to see the case as being about: the kind of respect human beings are due, both as a general matter and under the Fourth Amendment; why Johnson was denied this respect; the need for Johnson's own voice to be heard; and, most of all, his own role in what he comes to see as a mistranslation. This—the extent to which it becomes an exercise in self-

---

<sup>3</sup> United States v. Robinson, 414 U.S. 218 (1973).

<sup>4</sup> Terry v. Ohio, 392 U.S. 1 (1968).

criticism—is perhaps what is most remarkable about Cunningham's whole performance.

It is one thing to criticize someone else for failing to hear your voice, for failing to accord you respect, and so forth, but is quite another to criticize *oneself* for failing to hear another or accord that person respect. In the first case the objects of complaint are salient and visible—the speaker feels injured by them—while in the second the omissions and erasures and insensitivities are one's own and, however visible they may be to others, they tend in the nature of things to be invisible to oneself. Take racism as an example: as Professor Delgado and his co-author argue in their paper in this symposium,<sup>5</sup> a great deal of racism is simply invisible to most white people, partly because it takes place out of their sight or because they miss, or misunderstand, what they actually see; but, more profoundly and disturbingly, often because it is unwittingly their own. This is a feature not only of racism and sexism, I think, but of cultural power more generally: it tends to be invisible to the person who exercises it.

To try to learn what your conduct looks like from another's point of view, then, is not so easy. The natural first step is to read or try to listen to what others say, but when I, at least, read accounts of the experience of African Americans, today or under slavery or Jim Crow—say in the autobiographies of Frederick Douglass, Malcolm X, Dick Gregory, or Maya Angelou, or in the novels of Alice Walker or Toni Morrison, or in *Black Ice*, Lorene Cary's recent story of her early life—I find that it is easier for me to identify with the person suffering injustice and talking about it than it is to see myself on the other side of things, in the slavemaster or bigot or patronizing white liberal.

This is not surprising, I think, for it arises not only from the desire to avoid painful truths, but from our common understanding of the relation between narrator and audience in such a text, which invites the sharing of the speaker's point of view.<sup>6</sup> In reading *David Copperfield*, for example, one feels with the narrator how horrible the Murdstones are, how lovable Peggotty, without asking how lovable

---

<sup>5</sup> Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).

<sup>6</sup> How can a writer avoid this blunting of her story? If she attacks her audience directly, she risks alienating it entirely. And in some sense the deepest point of much of this writing is to demonstrate the human reality of one's experience, which depends upon the very sympathetic identification I describe. I have no ready answer, but can simply report that James Baldwin's *THE FIRE NEXT TIME* (1963) did seem to persuade many white people of their own implication in the system of race, in part by describing it persuasively as a white invention. Something of the same thing is true of Catharine MacKinnon's work, especially *FEMINISM UNMODIFIED* (1987), I think for the same reason.

or brutal one is oneself. As readers we are always on the right side, except in the greatest works of art: The *Iliad*, which teaches its audience both the equal reality of all human experience and our irresistible need to forget that knowledge; the novels of Jane Austen, which implicate the reader in misreadings that parallel the misreadings the reader makes in life; or *Huckleberry Finn*, which involves the white reader in the impossibility of his language of race.<sup>7</sup> In his own way, modest by comparison with those just mentioned but not with the efforts of most of us, Cunningham has shown us how to engage in a kind of reflection that can bring within the focus of attention our own vices and stupidities. This is a great achievement.

It is related to another point, suggested above, namely that to think of conversation as a kind of translation entails an ethic of fundamental equality. If it is recognized that translation always involves significant gains and losses in meaning, there can be no universal language in which universal truths are uttered. This means that every act of interpretation, every conversation in the world, takes place across differences in language, for none of us speaks exactly the same dialect as anyone else, and these differences cannot be resolved by the imposition of a super-language. We are each entitled to our own meanings and these can never be the same. This point is eloquently made, in somewhat different form, by Mari Matsuda in her recent article on accent discrimination,<sup>8</sup> which maintains, and in a literary way demonstrates, that every American speaks English with an accent. There is no "normal" or "standard" pronunciation, and we should not talk as if there were. The same thing is true of our languages as well: each of us speaks a dialect, or a set of dialects; to see this is to recognize that lines of communication must be established among us, and among our languages, from positions of mutual equality, across whatever lines of power may deny this truth. It is because Cunningham knows this, and tries to hear what Johnson is telling him as something that matters, that he is able to subject his own language, his own ways of constructing the world, to such an impressive kind of self-criticism.

#### IV.

In all of this Cunningham's work is remarkable: in its capacity for self-criticism, its thoughtfulness, its insistence upon a whole-minded way of thought that cannot be reduced to a methodology, its

---

<sup>7</sup> I mean the first sixteen chapters, which in my view stand as a complete text, written several years before the rest of the book and different in quality from it.

<sup>8</sup> Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *YALE L.J.* 1329 (1991). On the general point, see James B. White, *Our Meanings Can Never Be the Same*, 21 *RHETORIC Soc'y* 68 (1991).

sensitivity to the experience of others, and its eagerness to learn. He shows extraordinary resourcefulness and imagination as a lawyer, especially, I thought, when he has the idea of letting Johnson cross-examine the trooper, thus giving him the legal power to demand answers to the very questions the trooper's earlier disregard of which was the essential act of disrespect Johnson wanted redressed. But I do want to raise a question here, not so much by way of criticism of what Cunningham has done as to suggest a line for further thought, for him and for those who may be taken with his way of working: What could be said in a positive way about the process of translation he describes?

Cunningham directs his attention to the way in which Johnson's voice went unheard, and his person unrespected, by the translations that took place, on the unstated but apparent assumption that perfect legal discourse would reflect all that without flaw or distortion, like a perfect plane of glass. But I think the situation is more complicated. The language of the law, with all of its distortions—in fact by means of these distortions—enables us as a society, and as citizens and litigants, to achieve something we could not do through our own unmediated voices. Consider here as one example the finding of Sarat and Felstiner, referred to by Cunningham, that lawyers in divorce cases seem to disregard much of what their clients are really saying to them.<sup>9</sup> In particular, we are told, they do not seem interested in “who did what to whom.”<sup>10</sup>

What might an experienced divorce lawyer say on her own behalf? Perhaps something like this:

Of course it is wrong if we fail to hear and respond to what our clients are telling us, and I am sure I do that all too often. We should listen with special care when they talk about their children, for example, and try to provide a conversational context in which they can discover more fully their own wishes as they come to recognize more fully the reality of their own situation.

But this very phrase suggests that we have a role that cannot be reduced to meeting their wishes, or translating their stories without distortion, even if that were possible, namely to help them to come to see the reality of their situation and to form wishes appropriate to that. It is so common as to be nearly universal that divorcing people think unrealistically about their futures, both in economic terms and in terms of their children's lives. In fact they often deny that they are really getting divorced—they see the future as a continuation of their marriage, which has often by then dissolved into a fight. And an essential part of the fight is blame

---

<sup>9</sup> Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 *LAW & SOC'Y REV.* 737 (1988).

<sup>10</sup> *Id.* at 742.



and retaliation: wanting to retell the story of what the other spouse did wrong and they did right, over and over, as a way of justifying themselves to themselves and others, and indeed as a way of justifying their own present hostility, their refusal to cooperate, their insensitivity to their children's needs, their denial of changes in their economic and social circumstances, and the like. If all goes well, someday they will in fact give up the fight, and the claims of right and wrong by which they carry it on. The question, who did what to whom, will then have meaning only diagnostically, as they try to figure out their own contribution to what was bad about the marriage so that they will not repeat it.

One of our objects as lawyers is to help them move in that direction earlier than they otherwise might: to help them to accept their circumstances and to form appropriate wishes based upon them. As an essential part of doing that, we divert their attention repeatedly from what they wish to tell us to what they are denying. Part of our task, that is, and a good part, is the education of our clients. Two good lawyers, working with such an attitude on opposite sides of a bad divorce, can greatly reduce the amount of misery the divorcing partners inflict on themselves and others, and do so in ways for which they will later often be grateful.

And think of this too: bad as the language of divorce law is, and the institutions through which it works, suppose that we tried to deal with the breakdown of relations solely in the language of the parties themselves. We would have nothing but negotiation, and ill-focused negotiation at that—no way to learn from the past, and no way to reach a collective judgment about important matters, such as the value of work in the home or the way to think about custody and visitation.

The legal process works a translation that entails a loss, but it also entails, or can entail, a gain. The proper duty of the translator is not solely to the language and text out of which she works, but runs as well to the language in which she speaks, and to the demands of the social and cultural context in which she functions.

This explanation has considerable appeal to me, and not only in connection with divorce. Think of the relation between police officer and suspect: here the law of the Fourth Amendment and unlawful arrest provides a language for thought and speech about this relation, and for its regulation as well. It will never reflect without distortion whatever an officer or suspect might say. But it may nonetheless be a good language—one that can make possible thought and argument about the transaction that they share in a way that does more to include the legitimate concerns of both, and of the rest of society too, than either of their own ways of talking, standing alone, would do. I think, then, that we need to give attention not only to the erasures and omissions and misrepresentations that take place in legal discourse but also to what we think to be the

merits and values of this language, or the opposite of these things, and hence of translation into it.<sup>11</sup> A part of our subject, in fact, is the analysis and comparison of different languages, or different versions of the same language, of which we can ask what they enable us—as lawyers, as people, and as a society—to achieve, as well as what they inhibit or prevent.

A great deal of attention has recently been focused on the way the law disadvantages the powerless. Law is indeed sometimes conceived of simply as a disguise or legitimization for the exercise of power, a huge fraud. Of course there is the element of disguised power, but that should not blind us to what else is present, namely that the law also can and does provide protection to the powerless. The cynical and power-hungry Callicles in the *Gorgias* showed that he knew this when he said that all talk about justice should be discarded as pointless sentimentalism; it is only a convention, he said, imposed on the powerful by the weak, and those who are powerful, like him, should deny its force. But for this very reason it is right for those of us who live with the law as its caretakers to assert its possibilities, knowing that it is partly on behalf of the powerless that we do so.

Think of this very case: it is certainly true, from what we are told, that Johnson was treated disrespectfully by the police, abusively by the prosecutor, and (at first) a bit ineptly by Cunningham. But it is also true that it is the law that provides him with a hearing before a judge, with a lawyer paid for by the taxpayer, with a forum in which he could challenge abuse by police officers, and it does this not only for him, but for many people. This is not a small achievement, and would be envied by the powerless in many other countries. This is of course not to deny the abuse, or the effacement, or to say that they do not matter; of course they do and for the reasons Cunningham so eloquently presents. But there is another side: the law is not only a source of violence, it reduces violence; it not only oppresses the weak, it defends them.<sup>12</sup> The conversion of the language of the people into the law, while always an effacement, may also be right, both from their own point of view and from the point of view of the larger world the law is trying to create. There is thus in the law an ineluctably tragic element that the image of translation captures: translation is always imperfect; but it is necessary that it

---

<sup>11</sup> It is important to recognize that the client or witness often has not one single story, which will be translated well or badly, but a variety of possible ways to tell his story, among which choices must be made. The very process of translation may draw attention to this circumstance and help the speaker work out the version of his experience which is most satisfactory to him in this context.

<sup>12</sup> For an eloquent discussion of this dichotomy, see the last chapters of E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* (1975).

be done if we are to listen to each other at all, and certainly if we are to maintain a generally shared language of justice. The question is how—with what skills and what attitude—this is to be done, and in his paper Cunningham offers an admirable example.