

Essay

Wrong Again

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I

Before turning to Ronald Dworkin's response to my critique, I would like to disavow in advance one form of argument to which he has frequent recourse. That argument surfaces as an expression of dismay at what Dworkin takes to be my willful misreading of his original essay. He could not, he complains, be assuming the availability, at some level, of a brute or uninterpreted fact because he nowhere announces such an assumption and indeed asserts its contrary in the very pages under discussion. The general line of reasoning behind this complaint is as follows: "I could not possibly hold that position you attribute to me because I repeatedly say I do not."

I find this line of reasoning less than compelling, first, because it is nothing more than an assertion, and, second, because it begs the question, which is whether or not one's general claims or self-descriptions are consistent with one's particular assertions and arguments. I, for example, would be begging the question in the same way were I to respond to Dworkin's charge that I and my (unnamed) colleagues are skeptics by pointing to the many places where I declare that I am not a skeptic and to argue (very much as Dworkin does in Section III of his essay) that skepticism of a certain kind is incoherent. I will not so respond because what is at issue are not my declarations but the extent to which my repudiation of skepticism squares with the account I give of the interpretive process. Dworkin, therefore, is quite right to put to me questions of the form, "how can you maintain X and yet say Y," and it is that form which I will myself employ in what follows.

Let me begin by returning to the case of Agatha Christie, whose books, whatever they may have been, are now a fair way to becoming

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contested texts in contemporary interpretative theory. Christie enters Dworkin's argument in the context of an effort to shore up his "aesthetic hypothesis": "an interpretation of a piece of literature attempts to show which way of reading . . . the text reveals it as the best work of art."¹ Dworkin is concerned lest this hypothesis be understood as legitimating any interpretation whatsoever, since, as he points out, there exist "different normative theories about what literature is and what it is for and about what makes one work of literature better than another."² He therefore amends the hypothesis by declaring that no interpretation can be legitimate if it *changes* rather than *explains* the work, and he identifies the text itself as the constraint that enforces the distinction between changing and explaining: "The text provides one severe constraint in the name of identity: all the words must be taken account of and none may be changed to make 'it' a putatively better work of art."³

To illustrate the constraint Dworkin offers two examples. Perhaps, he speculates, Shakespeare might have written a better *Hamlet* if he made the hero "a more forceful man of action." But it does not follow, he continues, that one should substitute the play one might have preferred for the play Shakespeare wrote; one should refrain, that is, from acting as if the *Hamlet* we actually have "really is like that after all."⁴ Now, it is not clear which of two possible arguments Dworkin is making here. He might be saying that someone who is convinced that Hamlet is not a man of forceful action, but who also thinks that the play would be better if he were, would not be justified in setting aside the play he believes Shakespeare to have written in favor of the play he would have liked him to write. Or, alternatively, he might be saying that given the *Hamlet* Shakespeare *really* wrote, no one could responsibly offer a reading in which the hero was a man of forceful action, and that anyone who did would not be *explaining* the work, but *changing* it.

The two arguments are very different, even though they are both concerned with constraints and texts. In the first argument, the constraint is the interpreter's belief about what the text means, and what he is constrained from doing (at least from the perspective of a certain morality) is attributing to the text a meaning he doesn't believe it to have. In the second argument, the constraint is the text as it is, in-

1. Dworkin, *Law as Interpretation*, 60 TEXAS L. REV. 527, 531 (1982).

2. *Id.*

3. *Id.*

4. *Id.*

dependent of anyone's belief, and what it constrains are the beliefs one might legitimately have about it. The first argument is directed against those who, for whatever reason, fail to tell what they take to be the truth about a text. The second argument is directed against those who tell a truth that the text—irrespective of what anyone takes it to be—simply does not allow. The first argument has nothing to say about the ontological status of texts and seeks only to prescribe the moral behavior of believing agents. The second argument is precisely a claim about the ontological status of texts, and the claim is that texts constrain their own interpretations.

Any doubt as to which argument Dworkin is making is resolved by his discussion of Agatha Christie. Again, the intention is to ward off an understanding of the "aesthetic hypothesis" that would allow absurd or impossible readings,⁵ and the example (again hypothetical) is an interpretation of an Agatha Christie novel in which it is read as a philosophical treatise on death. "This interpretation fails," says Dworkin,

not only because an Agatha Christie novel, taken to be a treatise on death, is a poor treatise less valuable than a good mystery, but because the interpretation makes the novel a shambles. All but one or two sentences would be irrelevant to the supposed theme; and the organization, style, and figures would be appropriate not to a philosophical novel but to an entirely different genre.⁶

Here it is clear, it seems to me, that Dworkin is saying that there is something about an Agatha Christie novel that renders inappropriate certain interpretations, and it was and is my contention that in saying this he makes the positivist assumption that at some level the novel is available in an uninterpreted shape; that is, in a shape that determines which interpretations of it will be appropriate. He does this in several ways. Most obviously, he assumes that the "organization, style and figures" are "givens," specifiable apart from a theme that they will or will not support.⁷ He assumes, in other words (and here I repeat a phrase that much offended him),⁸ that organization, style, and figure announce themselves, are self-identifying, and therefore stand as a measure or check against which a proposed reading can be assessed either as an explanation or a change. Indeed, the distinction between

5. *See id.* at 532.

6. *Id.*

7. *See id.*

8. *See Dworkin, My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk about Objectivity Anymore*, in *THE POLITICS OF INTERPRETATION* 287, 288-89 (W. Mitchell ed. 1983).

explaining and changing, at least in the form Dworkin would have it, requires some such assumption, and it is not at all surprising that he makes it.

This assumption will not hold up, however, because organization, style, and figure are interpretive facts—facts which, rather than setting limits to the elaboration of a reading, emerge and become established in the course of that very elaboration. In short, that which is to be the measure of change is itself subject to change and is, therefore, not sufficiently stable to underwrite the distinction between changing and explaining.

Perhaps an example from literary history will make the point clearer. For a long time it was thought that Milton's *Paradise Lost*, in the words of Bernard Bergonzi, did not "possess the kind of coherence and psychological plausibility that we have come to expect from the novel."⁹ This judgment was supported by the standard characterization of what was universally known as Milton's "grand style," a style appropriate to the scope and sweep of an epic, but inappropriate to the subtleties and nuances of lived psychological experience. Within four years of Bergonzi's pronouncement, however, the situation had entirely changed, in part as the result of the publication of Christopher Ricks' *Milton's Grand Style*,¹⁰ in which passage after passage of *Paradise Lost* was read in a way that turned the verse into just the flexible instrument everyone had always known that it wasn't. Once this was done, and done in a way that many in the Milton community found persuasive, at least one bar to claiming for the poem "the kind of coherence and psychological plausibility that we have come to expect from the novel" was removed; in the years that followed, Milton was more and more celebrated as a penetrating psychologist and as a precursor of Henry James and other novelists who told their stories by masterfully varying point of view.

What is nice about the example is that it demonstrates the interdependence, and indeed the *interpretive* interdependence, of everything that Dworkin must keep separate. Thus, the generic identification of *Paradise Lost*, the specification of its theme, and the description of its organization, style, and figure are not separate acts, but acts that support and subtend one another within assumed interpretive conditions. When those conditions change, when the shape of one "given" is altered, the way is open to altering the shape of others, and in some cases,

9. THE LIVING MILTON 174 (F. Kermode ed. 1960).

10. C. RICKS, MILTON'S GRAND STYLE (1963).

over a number of years, the genre, theme, and style of a work may come to wear a completely different face.

My point is that what *has* happened to *Paradise Lost* *could* happen to Agatha Christie, and that if it did, if in the course of criticism and commentary, not only the theme, but the style, organization, and even genre of her novel were recharacterized, then it could not be said that interpretation will have made the novel a "shambles" because interpretation will have remade the novel. And my further point is that, once this is recognized as a possibility, the firm distinction between *changing* and *explaining* is undermined and cannot be invoked to shore up the "aesthetic hypothesis," and that someone who invokes the distinction can do so only by embracing the positivism Dworkin claims to reject.

This does not mean that the distinction has no force whatsoever, only that its force is felt from *within* interpretive conditions that give certain objects and shapes a real but constructed—and therefore unsettled—stability. The reason that the example of Hamlet as a forceful-man-of-action seems such a good one to Dworkin is that Hamlet's indecisiveness has been part of the interpretive tradition for so long that it is almost proverbial. For most, if not all, readers and viewers (and certainly, directors) of the play, it is a "given" and, to say the least, the burden of proof would be on anyone who thought to deny it or to offer a reading with which it was incompatible. In fact, no one does think to deny it. Therefore, Hamlet's indecisiveness often functions in readings as a piece of evidence in relation to which other, less settled, interpretive issues are posed. All of which is to say that one, at the present time, cannot describe Hamlet as a forceful man of action without provoking a charge that the text, rather than being explained, has been changed.

Of course, exactly the same situation once obtained with respect to *Paradise Lost* and with it, the plausibility of attributing to it a novelistic subtlety. That situation has now changed, and it is not impossible (although neither is it inevitable) that there could come a time when because of an argument successfully prosecuted—perhaps one in which Hamlet is from the very first executing a predetermined plan—the hero of Shakespeare's play will be regarded as the very type of decisiveness. (It goes without saying that such an argument would not be made in isolation, but would involve a simultaneous recharacterization of many other of the "givens" that now make up our sense of what *Hamlet* is.)

If Hamlet were recharacterized in this way or if Agatha Christie's novels were routinely regarded as "philosophical," it would no longer be the case that to call Hamlet a forceful man of action or reading a

Christie novel as a treatise on death would be instances of "changing" rather than "explaining," but it would still be the case that there would be many readings of both works that would legitimately provoke such a charge. In short, while the text of *Hamlet* or of a Christie novel will always have a generally accepted shape (in the sense that when one looks at it or thinks of it one will already have categorized and described it), that shape will itself be subject to change. Moreover, when that change occurs, a corresponding change in the content of the still relevant distinction between "changing" and "explaining" will have occurred. (Dworkin says repeatedly that I deny this distinction and thereby make all acts of interpretation the same;¹¹ but my point is only that "explaining" and "changing" are acts of interpretation and therefore that neither can serve—as Dworkin wants "explaining" to serve—as the noninterpretive pole of a binary opposition.)

Exactly the same argument holds for the distinction between "finding" and "inventing" (or as Dworkin sometimes puts it, between "continuing" or "beginning anew"¹²). In Dworkin's argument, this is a distinction between two different forms of judicial activity, and he illustrates it, as he did in the earlier essay, with the literary example of a novel written serially by different authors, each of whom accepts the obligation to continue what his predecessors have done as opposed to striking out in a new direction of his own.¹³ Dworkin asks us to imagine that *A Christmas Carol* was written not by Dickens but by a chain of novelists. "Most chain novelists," he says, "would think that certain interpretations of Scrooge's character would be incompatible with the text of *A Christmas Carol* towards the end of that book, but not after the opening pages alone,"¹⁴ and consequently, he asserts, "a novelist at the end of the *Christmas Carol* chain will have more difficulty seeing Scrooge as inherently evil than a novelist second in line."¹⁵

In essence, this is an argument about context. Dworkin is contending, for example, that a novelist who is provided with, say, seven-eighths of *A Christmas Carol* is constrained by that context in such a way as to make unavailable to him (assuming that he is operating in good faith) a characterization of Scrooge that would have seemed plausible, and perhaps even inevitable, to a novelist who had read only the first chapter. But while it is certainly true that context constrains inter-

11. See Dworkin, *supra* note 8, at 292, 304-06.

12. Dworkin, *supra* note 1, at 543-44.

13. See *id.* at 541.

14. Dworkin, *supra* note 8, at 304.

15. *Id.*

pretation, it is also true, as Dworkin fails to see, that context is a product of interpretation and as such is itself variable as a constraint. That is, what a later novelist does or does not have difficulty in seeing will depend on what he has already seen; but since what he has already seen will itself be a matter of interpretation, one can make no general or predictive statements about what a novelist who has been given seven-eighths of *A Christmas Carol* will think about Scrooge.

Thus, two novelists or readers who are both given seven-eighths of *A Christmas Carol* might still disagree about Scrooge's moral character because they disagreed about the configuration and facts of what they had already read. "Don't you see," one might reiterate, "that Scrooge is already changed when he feels compassion for Tiny Tim?" "That's not real compassion at all," the other might reply, "but a calculated strategy in response to a precarious situation." Of course, both could then go on to cite even earlier sections of the novel in support of their respective positions. Yet, the same pattern of disagreement, rooted in different convictions as to what the interpreted object was, might very well repeat itself at every point, even if the inquiry were pushed all the way back to the opening words of chapter one or to the title. (Think of all the disagreements that occur in situations, domestic and otherwise, in which no more than a sentence or two has been spoken; brevity no more guarantees agreement than prolixity guarantees difficulty.) Or, to reverse the scenario, two later novelists who are given different assignments—one to continue, the other to strike out in a new direction—might then come up with the *same* characterization of Scrooge because they are operating within diametrically opposed understandings of what they are supposed to maintain or abandon.

I say all this not to deny the distinction between continuing and inventing, but to point out that, as in the case of explaining versus changing, the distinction is interpretive and that because it is interpretive, one cannot determine whether a particular piece of behavior is one or the other by checking it against the text; for it is always possible (and indeed likely) that someone characterized as "inventing" will reply that his accuser is mistaken as to the nature of that which is to be continued. This holds true too when the distinction becomes a judicial one and marks the difference, according to Dworkin, between a judge who feels constrained in his actions by the "past record of statutes and decisions" and a judge who ignores legal history and decisions "to decide cases 'on a clean state' instead."¹⁶ Here the legal history is in the

16. *Id.* at 305.

position of *A Christmas Carol* (or *Hamlet*, or any other literary work) and the judge is in the position of the novelist who is asked to continue the chain and enjoined from breaking it, and the point made in relation to the novelists applies *mutatis mutandis* to the judge: the question of whether the legal history is being ignored or consulted depends upon a prior decision as to what the legal history is, and that decision will be an interpretive one. Therefore, insofar as the distinction is a mechanism for distinguishing between two forms of judicial activity (and if it is not for that then it is hard to see what it is for) it won't work because there is no *independent* way of determining whether or not a particular judge is acting in one way as opposed to the other.

There is also a deeper point that relates to both the literary and the legal examples. Suppose that a later novelist in Dworkin's hypothetical chain were told not to continue the chain, but to strike out in a new direction. How would he go about it? First of all, he could only hear the assignment as an imperative of the following form: "Depart from this" where "this" is the shape of what already has been written by his predecessors. That is, in order to depart from the chain, however, he must first determine what it would mean to continue the chain by determining what patterns, themes, principles, and so forth, the chain displays. In other words, he is as constrained by the chain in the act of departing from it as he would be in the act of continuing it (although one must remember that in both instances the constraint—that is, the chain—is interpreted). Thus, paradoxically, but only in terms of the assumptions underlying the distinction, departing from the chain is one way of continuing it, and even more paradoxically, an agent cannot depart from the chain even if he wants to and believes that he is doing so. Thus, the judge in Dworkin's example who resolves to "ignore precedent or the statute" in favor of what he feels "would make the community better off on the whole,"¹⁷ is not in fact ignoring precedent but is deciding, by a judicial mechanism Dworkin explicates in his original essay,¹⁸ that precedent is mistaken. Moreover, he arrives at his sense of what would make the community better off on the whole by rejecting the vision of community needs he finds (interpretively, of course) in the legal history. In short, Dworkin's judge is in exactly the position of the later novelist who departs from his predecessors' work, constrained by the very chain he supposedly breaks and striking out not in a "new direction of his own," but in a direction already implicit in the practice in which he continues to be engaged.

17. *Id.*

18. Dworkin, *supra* note 1, at 544.

To this Dworkin would reply (and does reply) that I have simply redefined words like “finding” and “inventing” and given them meanings “wholly alien”¹⁹ to those they have in practice. In other words, by pitching my argument at so general and abstract a level that nothing could possibly count as “beginning anew” or “striking out in a direction of one’s own,” I elide and finesse the “crucial” and “critical difference between two assignments a judge might accept.”²⁰ But it is only if the difference can be invoked at that level that it will be “crucial” in the sense that it will do the work Dworkin wants it to do—characterize judicial activity in a decisive and illuminating way. That at least was Dworkin’s original claim, although he now seems to have modified it to an extent that leaves him with virtually nothing to say. In the essay that occasioned the present exchange, he was saying something like this: what judges do is operate as members of a chain enterprise (an enterprise in which their actions are constrained by a previous history), which means that they don’t do something else like striking out in a new direction. But now Dworkin is saying that striking out in a new direction is just another “way of continuing the ‘practice of judging.’”²¹ He doesn’t see that he can’t say that and *also* say, as he does in the very same sentence, that continuing and striking out in a new direction “are radically different ways.”²² They can only be “radically” different if the difference they mark is between judging and something wholly apart from judging. But a difference *that* radical could tell us nothing about judging except that there is something it isn’t, and it certainly could not tell a judge what it is that he ought to do.

Dworkin seems to have realized this, and he now has moved to relocate the difference *within* the practice of judging rather than *between* it and something else; but that won’t work either because, by his own admission, continuing the chain and deciding “on a clean slate” are both names for “continuing.” They are *not* names for obviously distinguishable forms of judicial practice, but are possible characterizations of a practice that is, with respect to the opposition chain/nonchain, uniform. To put it another way, there are no decisions that are on their face one or the other, but there are strategies for presenting or attacking a decision that amount to claiming or complaining that it is one or the other. Thus, while there is, at the level of practice, a distinction between continuing the legal history and striking

19. Dworkin, *supra* note 8, at 306.

20. *Id.* at 305.

21. *Id.*

22. *Id.*

out in a new direction, it is a distinction between methods of justifying arguments and not between actions whose difference is perspicuous apart from any argument whatsoever. The difference, in short, is interpretive, and because it is interpretive, it can't be used to settle anything, for it is itself what is continually being settled. Dworkin is thus in a perfect bind: he can stick with the original or "hard" (chain versus nonchain) form of his distinction, in which case he fails to distinguish *meaningfully* (in a way that can be consulted or used) between judicial activity and anything else; or he can invoke it as a distinction within chain-practice, in which case it has no prescriptive or normative force because it is a distinction between contestable modes of self-description or accusation.

II

Rather than saying that Dworkin is in a bind, one might say instead that he is running two arguments at once and that the two arguments, at least with respect to the issues in dispute between us, are incompatible. I said as much at the conclusion of my first critique,²³ but the point deserves more elaboration than it received there. It gets to the heart of what has been characterized as the vague and slippery nature of Dworkin's writing and thought,²⁴ the feeling, as one reads him, that the terms of the discussion and the levels on which it is proceeding are continually shifting, although no shift is ever announced.

Sometimes this happens in the course of a single sentence, as when Dworkin declares that to interpret a Christie mystery as "a novel about the meaning of death would be a mistake, because it would make the novel a shambles, and that is not because all novels announce their own genre but because her novels become wrecks if we try to read them in that particular way."²⁵ This is a nice sentence because the basic Dworkin move is performed twice. As I observed earlier, one can only claim that a particular reading would make a novel a shambles if the novel is assumed to have a core which, because it is independent of any reading whatsoever, can serve as a bench mark or reference point in relation to which the distorting or "shamble-making" potential of a reading can be measured. That is a "brute fact" or a positivist assumption, but it is also one that Dworkin doesn't want to make or doesn't

23. See Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEXAS L. REV. 551, 565-67 (1982).

24. See Levinson, *Taking Law Seriously: Reflections on "Thinking Like a Lawyer"* (Book Review), 30 STAN. L. REV. 1071, 1077, 1099 (1978).

25. Dworkin, *supra* note 8, at 308.

want to think he makes. He, therefore, immediately disclaims it or thinks he disclaims it by denying that he believes that "novels announce their own genre." But then he immediately proceeds to demonstrate that he believes exactly that when he ends the sentence by simply reasserting its beginning with only the slight and inconsequential substitution of "wrecks" for "shambles." Thus, in the same sentence we have a positivist assertion followed by a repudiation of positivism followed by another—virtually identical—positivist assertion.

Dworkin thinks that he escapes this characterization of his position when he disavows the belief "that everyone who sets out to interpret any particular work of literature will reach the same conclusion about its genre."²⁶ In his view, it is only because I attribute to him such a belief that I am able to make his theory "seem ridiculous."²⁷ In fact, he declares, all he believes (and said) is that while Christie can be "interpreted in very different ways,"²⁸ a "certain way of reading [her] would be wrong."²⁹ But I do not have to saddle Dworkin with the thesis that a text demands a single reading or assignment of genre in order to convict him of textual positivism. So long as he believes that there are some ways, some generic identifications, that a work rules out—and he must believe that in order to declare that the style and figure of a Christie novel do not allow a philosophical reading because they are "appropriate . . . to an entirely different genre"³⁰—then he is as much a positivist as anyone would want him or not want him to be, since he has once again (re)assumed the existence in the text of an uninterpreted core. To be sure, the core in this revised formulation acts liberally rather than tyrannically: it allows some readings instead of just one. But that just makes Dworkin a positivist of the pluralist variety, one who doesn't believe that a text constrains a single interpretation, but believes that the text constrains the range of interpretations it will receive without becoming a shambles. The important point, however, is that he assumes the constraint (however it operates) and that he assumes it to be in the text.³¹

26. *Id.* at 307-08.

27. *Id.* at 307.

28. *Id.* at 308.

29. *Id.*

30. Dworkin, *supra* note 1, at 532.

31. In part he makes such assumptions because the only alternative he can imagine is the one he mistakenly attributes to me—the "extravagant claim" that "any text allows any interpretation whatsoever." Dworkin, *supra* note 8, at 302. However extravagant, the claim is certainly not mine, and the reason I disown it is not because it is too obviously and wildly subjective, but because it is through and through positivist. It assumes first that there is a text, specifiable in some preinterpretive form, and second, that someone might say of that text, independently identified, that "it" allows any interpretation whatsoever. Of course in the position I do hold, as opposed to

I have lingered so long over this small moment in Dworkin's discourse because it illustrates so concisely the way in which he shifts back and forth between lines of argument that are finally contradictory. In this particular sequence, the contradiction fairly leaps off the page (one might almost say that it announces itself). In other places it is less obvious and amounts to allowing two different understandings of what is being asserted to co-exist in a manner that forces neither the author nor the reader to choose. We have already seen an example in the discussion of *Hamlet*.³² Is Dworkin saying that the text of *Hamlet* constrains the beliefs one can hold about it, in which case he would be strongly asserting a positivist or "brute fact" position? Or is he merely saying that one's belief about *Hamlet* ought to constrain what one says about it, in which case he is promulgating an unexceptionable moral dictum that has no bearing on the status of the text whatsoever? Since it remains unclear which of these assertions Dworkin is making, he gets credit for both, and when he feels himself pressed on the one, he can always avail himself of the vocabulary (and therefore of the presuppositions) of the other.

This is not to suggest a conscious strategy on Dworkin's part. He does not embrace contradictory positions because he wants to gain an advantage over his readers (although that may be in fact what happens) but because he is confused. Nowhere is his confusion more spectacular and more revealing than in his lengthy discussion of "the actual practice of interpretation"³³ in section II.³⁴ At several points he articulates a view of that practice with which I have no quarrel whatsoever. Here is a particularly felicitous formulation from the beginning of his discussion of theory dependence:

Any interpreter's beliefs about, for example, the genre and characterizations of a novel will reflect a great network of his aes-

the position Dworkin *needs* to believe that I hold, the text, while always there, is always an interpreted object; and when the conditions of interpretation change, the text is not merely recharacterized but changed too. It makes no sense, therefore, either to affirm or deny the proposition that a text allows any interpretation whatsoever, because the text as an identity does not survive the sea of changes that a succession of interpretations brings. To be sure, this position gives rise to its own problems, including the problem of explaining the process by which one interpreted object gives way to another (the solution lies in the mechanisms of persuasion as they are operating in a profession at a given time), but it is not open to the objection of making this particular extravagant and absurd claim. The absurdity of the claim, of course, depends precisely on its positivist presupposition (that there is an uninterpreted text), and the fact that Dworkin attributes it to me is another indication of the hold positivism has on him, despite his frequent protestations to the contrary. So strong is the hold that he can only imagine the position he opposes in a positivist form.

32. See *supra* text accompanying note 4.

33. Dworkin, *supra* note 8, at 289.

34. See *id.* at 289-97.

thetic beliefs and attitudes These other beliefs will furnish, for him, whatever grounds he has for thinking his interpretation better than others. No feature of an interpretation is exempt from this description, not even the threshold question of what counts as the physical text—the canonical set of marks on paper—that identifies the work to be interpreted.³⁵

However, just before he delivers this pronouncement Dworkin declares that the first question any theory of interpretation must answer is how people make the discriminations necessary to “think one interpretation . . . better than another.”³⁶ But if an interpretation is grounded, as Dworkin is about to say, in the interpreter’s beliefs, then it goes (or should go) without saying that the interpreter believes in his interpretation. If he believes in his interpretation, then he necessarily believes it to be better (for if he thought some other interpretation better he would believe in *it*). And if he believes it to be better, then one need seek no explanation of how it is possible for him to think this, for it is flatly impossible for him to think anything else.

How does Dworkin miss this? How can he at once identify interpretive judgment with belief and think that we require an account of how the interpreter comes to believe his interpretation? The answer is that despite having embedded the interpreter in a “network of beliefs,” he repeatedly imagines him in a position outside that network, a position from which he must look for independent support for what he believes. And where will he find that support? Why, in some noninterpretive distinction between explaining and changing or (it amounts to the same thing) in some textual fact or configuration that establishes limits to what can be believed about it. Here the two facts of Dworkin’s positivism meet, as they necessarily must. In my original critique, I said that “[r]ather than avoiding the Scylla of legal realism (‘making it up wholesale’) and the Charybdis of strict constructionism (finding the law just ‘there’), [Dworkin] commits himself to both,”³⁷ and we can now see that the two commitments are inextricable. If one conceives of the interpreter as free to choose his beliefs and therefore to choose his interpretations, then one must always imagine a constraint on that choice so that it won’t be irresponsible or whimsical. And, of course, the reverse holds: anyone who is in search of constraints, or thinks it crucial to identify them, must at the same time imagine an interpreter who needs the constraint because he stands apart from any tethering structure or gestalt. In the positivist picture of things, the

35. *Id.* at 292-93.

36. *Id.* at 292.

37. Fish, *supra* note 23, at 555.

uninterpreted text (or rule or distinction) and the unsituated (or weakly situated) subject are constitutive of one another and of the questions theory must supposedly answer, such as: "How *do* we decide that one interpretation or one argument for an interpretation is better than another?";³⁸ "[H]ow [do] people who think one interpretation can be better than another make the discriminations necessary to hold on to that second-order belief?";³⁹ "[What must] an interpreter . . . believe in order to believe in his own interpretation?";⁴⁰ "What must an interpreter believe to believe that his interpretation of these rules is better than alternate interpretations of them?";⁴¹ and, "[H]ow [can] an interpreter . . . come to think that his interpretation is superior to others[?]"⁴²

These are the questions that Dworkin says I cannot answer, but it is my contention that they require no answer. They seem urgent only in the context of the very odd assumption that one can believe an interpretation and not be convinced of it. That is, Dworkin imagines a two-stage process in which one first has a belief and then must determine whether or not to believe it. To put it that way is immediately to see the dilemma: either that which will make the determination is itself a belief (a position Dworkin seems sometimes to hold), in which case the two-stage process is really a succession in which one belief gives way to another; or that which will make the determination is not a belief, but an independent piece of the world, in which case belief has become just another name for error. (This is the position of the positivist Dworkin.)

But the dilemma evaporates once one sees that to have a belief (or an interpretation) is to believe it, to believe it is to think that it is correct, and to think it correct is to prefer it to someone else's belief. In short, everything that Dworkin would secure in the name of the "right-wrong" picture—a ground for assuming "that interpretations may be sound or unsound, better or worse, more or less accurate"⁴³—already is secured by the fact that the interpreter is embedded in a structure of beliefs of which his judgments are an extension. The entire project of explaining how "ordinary interpreters think" as they do—think that they are right and others are wrong and that what they believe is true—is unnecessary because they could not possibly think anything else. For the same reason, it is equally unnecessary to answer the questions that Dworkin rehearses so often and so urgently.

38. Dworkin, *supra* note 8, at 289.

39. *Id.* at 292.

40. *Id.* at 296.

41. *Id.*

42. *Id.* at 297.

43. *Id.* at 289.

Of course, questions remain to be answered: How do beliefs about what is right and wrong change? How are beliefs acquired? What is the relationship between belief and the world? How do disputes between believing agents get adjudicated? This is not the place to consider these questions, but a full consideration (which I have attempted elsewhere⁴⁴) would involve the specification (insofar as it is possible) of the conventions of description, argument, judgment, and persuasion as they operate in this or that profession or discipline or community. Dworkin several times dismisses these conventions as the "weak" constraints of practice.⁴⁵ The dismissal is revealing and characteristic, for if one rejects as "pale" and "wholly subjective"⁴⁶ the constraints "imposed by practice,"⁴⁷ one does so in the name of constraints that are independent of any practice whatsoever. Those independent constraints can only be of the abstract and preinterpretive kind that are perspicuous to anyone no matter what his situation. Once again Dworkin maneuvers himself into the familiar bind: either he acknowledges that the constraints imposed by practice are as strong as anyone could want or he commits himself to the existence of constraints so strongly trans-contextual that they can only be positivist.

There remains only the matter of intention, a vexed topic that usually brings out the worst in everyone. Dworkin correctly reports my position when he says that I think that to report "an author's intention is just another way of reporting an interpretation of that author's work,"⁴⁸ but Dworkin then shows that he misunderstands what he has reported. He thinks that I am making a recommendation (*i.e.*, let's call interpretations intentions), when in fact I am asserting an epistemological necessity. The argument is not one about what people should or should not do, but about what they cannot help doing: they cannot help positing an intention for an utterance if they are in the act of regarding it as meaningful. If this seems counterintuitive, you need only try to think of a meaningful utterance (even a one word imperative like "go!") without *already* having imagined the circumstances (including an intending agent) in which it has the meaning you're thinking of. You will find that the experiment is impossible to perform, or (and it amounts to the same thing) you will find that if you succeed you will have succeeded in transforming what once was a stretch of language into a sequence of marks.

44. See S. FISH, *IS THERE A TEXT IN THIS CLASS?* (1980).

45. See Dworkin, *supra* note 8, at 295.

46. *Id.* at 292.

47. *Id.* at 295.

48. *Id.* at 308.

Now as Dworkin rightly observes, this account of intention renders it methodologically useless. One cannot use it (as some intentionalist critics want to) as a constraint on or key to interpretation because it is not distinguishable from that which it would constrain. But that does not mean, as Dworkin contends, that in my argument intention "is simply a phrase used to report interpretations already established in some other way,"⁴⁹ for "in some other way" can only mean in a way independent of intention. But it is precisely my thesis (with which of course one might quarrel) that in whatever way one establishes an interpretation, one will at the same time be assigning an intention.

Dworkin simply turns that thesis around and has me asserting an arbitrary relationship between actions whose inseparability is my entire point. He does this again when he says of the intention I attribute to Agatha Christie that "[Fishi] offers no evidence for the intention he assumes beyond the evidence he says he has for the interpretation he favors."⁵⁰ Again, it is the very heart of my account that to offer evidence for the one is to offer evidence for the other. It goes without saying that this is not Dworkin's thesis. He believes that to specify intention and to interpret are different. Moreover, he shares this belief with the intentionalists, while disagreeing only with their methodological prescription that one should look to intention when doing interpretation. *His* prescription is that intention should be set aside. I, on the other hand, have no prescription whatsoever (at least not on this point), not because there is a fatal weakness in my position, but because that *is* my position.

Of that position (insofar as he understands it), Dworkin complains that it "cannot discriminate between assigning someone a literary intention and asking whether the text he has created succeeds in expressing that intention."⁵¹ But the complaint would have force only if the text "he has created" can first be looked at and *then* compared with one or more assignments of its intention. If, as I maintain, to look at the text (in the sense of regarding it as meaningful) is already to have posited for it an intention (by assuming the intentional circumstances of its production), then what one would be doing is comparing one assignment of intention with another. Does this mean that we cannot say of an author that he failed to execute a declared intention? Not at all. It is just that when we say so we are not opposing a specification of intention to something else—to a text whose meaning has been determined

49. *Id.* at 309.

50. *Id.* at 308.

51. *Id.* at 309.

independently of intention—but opposing one specification of intention—of what is meant by these words—to another. The fact that the first specification may have been made by the author only indicates that authors, like anyone else, must construe intention even when it is “their own.” It also indicates that their construing can be disputed and that on occasion they can be persuaded that their intention was not what they had assumed it to be.

In his original essay, Dworkin contrives to turn this commonplace occurrence into an aesthetic mystery when he moves from the observation that an author can change his mind about what he means to the conclusion that his new understanding has been produced by “detaching what he has written from his earlier intentions.”⁵² He then moves to the further conclusion that an author writing a work of art writes with the very particular intention of producing a work “capable of being treated that way,” that is, as an “object in itself.”⁵³ But Dworkin is simply confusing a fact about interpretation in general—that the construing of intention can always begin anew even when the intention is one’s own—with a supposedly special fact about aesthetic intention—that it leads to the creation of texts that live untethered to any intention whatsoever. (It is interesting, but not at all surprising, that this account of artistic creation and of the properties peculiar to works of art simply reaffirms the New Critical doctrine of aesthetic autonomy, which is one more positivist assumption to which Dworkin is firmly, if unknowingly, committed.) The matter, however, is at once more simple and more complex. Neither artists nor anyone else can produce texts capable of being detached from intention; but since intention is an interpretive fact, there is nothing to prevent the intention of a text, including one you have yourself written, from being interpreted again.

To all of this Dworkin still might reply that I have still failed to explain how “[w]e can read *Hamlet* in a psychodynamic way without supposing that Shakespeare either did or could have intended that we do so.”⁵⁴ He thinks that this ability (which we certainly have) proves the independence of meaning from intention, but it proves nothing of the kind. If we are convinced that the meaning of *Hamlet* is psychodynamic but that Shakespeare intended no such meaning, then we are attributing the meaning to an intentional agent other than Shakespeare, perhaps to the spirit of the age, to some trans-historical truth about human nature, or to the intentional structure of language. And if we

52. Dworkin, *supra* note 1, at 539.

53. *Id.*

54. Dworkin, *supra* note 8, at 310.

are convinced both that Shakespeare intended no psychodynamic meaning and that the play displays no such meaning, but decide nevertheless to read it psychodynamically, then we have simply set aside what we know to be the play's meaning and Shakespeare's intention for something else. In neither case, however, will we have sundered meaning or interpretation from intention; we just will have demonstrated, first, that one can conceive of intention as something other than the possession of a "particular historical person,"⁵⁵ and, second, that there are things one can do with texts that are not interpretations of them.

That, I think, about covers it, and I will only add that in deference to Professor Dworkin's request,⁵⁶ I have not once used the word "objectivity," although I have now mentioned it.

55. *Id.* at 309.

56. *See id.* at 287.