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A "Dynamic" Theory of Natural Law

Hans Kelsen*

I

The intellectual situation of our time, resulting from the shaking experiences of the two world wars, is characterized in the field of social philosophy by a revival of the natural-law doctrine, directed against the relativistic positivism which prevailed during the second part of the nineteenth and the first decade of the twentieth century. The essential element of the doctrine,¹ which claims to deduce principles of justice from nature in general and from the nature of man in particular, is its monistic view of the relation between reality and value (facts and norms, the "is" and the "ought"). It maintains that reality and value are not — as dualistic positivism assumes — two separate spheres, but that value is immanent in reality and that consequently it is not — as positivism assumes — a logical fallacy but a legitimate operation to infer from that what *is* that what *ought* to be or to be done. Since value is immanent in reality, value judgments, that is, judgments referring to these immanent values, are as objective, that is, verifiable by experience, as judgments about reality, and not — as positivism assumes — subjective and hence relative only, because not a description of facts but being in the last analysis the expression of wishes and fears.

The natural-law doctrine stands and falls with the assumption that value is immanent in reality. If it is not possible to prove that an objective analysis of reality, that is, an analysis which does not already *presuppose* a definite value or norm, necessarily leads to the assertion of this value or norm, the natural-law doctrine has no foundation.

To secure this foundation and thus to defend the natural-law doctrine against relativistic positivism is the main purpose of a recently published study by John Wild, *Plato's Modern Enemies*

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1. Cf. Kelsen, *The Natural-Law Doctrine Before the Tribunal of Science*, 2 WESTERN POL. Q. 482 (1949).

*and the Theory of Natural Law.*² By "natural law" Wild understands, in conformity with the traditional doctrine, "a universal pattern of action, applicable to all men everywhere, required by human nature itself for its completion." (p. 64) The theory of natural law is, according to Wild, "a realistic tradition of philosophy, radically empirical in its methodology." It claims "to derive all of its basic concepts from the observation of experienced facts." (p. 73) These facts are "tendencies" inherent in reality or, as Wild puts it, in "existence." "Finite existence is always unfinished. As such, it is essentially characterized by tendencies toward fulfilment and completion." (p. 67) Existence "requires" something for its "completion." It has a "tendential" character. According to the natural-law doctrine as presented by Wild, "the world of nature is in flux towards what is not yet fully possessed." This doctrine holds "that natural entities are in a state of incompleteness or potency, and that they are ever tending further towards something they now lack." It is based on a "dynamic view of existence" which is opposed to what Wild calls "logical atomism" which regards existence "as made up exclusively of units which are fully determinate and actual." (p. 65)

The view that reality or existence is "in flux" cannot be rejected, and is actually not at all rejected by a positivistic philosophy. However, from the point of view of an objective science of nature, the statement that reality is in flux can mean nothing else but that reality is in a state of permanent change. To interpret the change of an entity from one state to another as the realization of a "tendency" is highly problematical. For "tendency" is an ambiguous term. It may mean something like "intention" or "purpose," that is to say, it may imply a teleological or normative view, entirely incompatible with a science whose function is the objective description and explanation of facts. Within such a science, "tendency" can mean only the probable cause of future change in observed phenomena. Wild says: "From observing a kind of action in its measurable effect, the physicist can infer something about the structure of the entity, and from his knowledge of structure he may predict a tendency." (p. 217) If a physicist, on the basis of an objective observation of facts, states the rule that heat has the effect of expanding metallic bodies, he may, in a concrete case, predict with a certain

2. The University of Chicago Press, Chicago, 1953. Pp. xi, 259. \$5.50. Since Wild thinks that Plato is the founder of the natural-law doctrine (p. 73), his defense of Plato is, in the main, a defense of this doctrine.

degree of probability that a heated metallic body will expand. What he is able to predict is a probable change. The expansion of a heated metallic body is the normal, that is, the regular change which can be expected. The situation is exactly the same in the case of the regular development of the blossoms of a certain tree to an eatable fruit, or of the embryo in the womb of a woman to a human being. If the probable expansion of a heated metallic body, or the development of a blossom to a fruit, or of an embryo to a human being, are called "tendencies" of the metallic body to expand, of the blossom to develop to a fruit, of the embryo to develop to a human being, "tendency" means nothing else but a probable effect or a probable change, and then reality can be described without the use of the ambiguous term "tendency." However, the dynamic theory of natural law cannot dispense with the term "tendency" which is its very cornerstone, and as such means much more than a normal and hence predictable change. The "tendencies," from the alleged observation of which this natural-law doctrine derives its basic concepts, "require" something. "No tendency can be clearly understood without some understanding of what it requires." (p. 219) It requires its realization, which means "completion," and "existential completion . . . is good." (p. 65) "If existence is deprived of what it requires for its completion, evil arises." (p. 65) However, a tendency which is nothing but a predictable change of an observed phenomenon does not "require" anything. The predictable expansion of a heated metallic body is not required by the heated body; nor is the development to a fruit required by the blossom, or the development to a human being by the embryo. All these phenomena are nothing but regular and hence predictable changes. The view that a tendency, that is — from the point of view of an objective science of nature—a predictable change of an observed phenomenon, "requires" its realization or completion, amounts to the view that a cause requires its effect. This is, in spite of Wild's assertion to the contrary, a typical teleological or normative interpretation of nature. To call a tendency "requiring" its realization an "existential" tendency (p. 68) is not sufficient to prove that such a tendency "exists" in nature or has to be recognized "in accordance with nature." (p. 218) Neither does the nature of a thing require something from this thing, nor does a scientific observer or a super-nature require something from nature.

If the view that there are immanent in nature tendencies which require their realization is accepted, then each state which is the result of a change must be considered as the realization of a "tendency" requiring this state, and all reality or existence must be interpreted as realization of tendencies. For the only reason to assume that a tendency exists is the fact that a change actually has taken place. If a change expected by the observer does not take place, that is to say, if the entity concerned turns to another state than that expected, this state, too, must be considered as the "realization" of a tendency. From the point of view of an objective science of nature, that is, from the point of view of a science which describes and explains what *is* without presupposing a norm which prescribes what *ought to be*, there is not the slightest reason to evaluate one realization as good and the other as bad or evil. If the blossoms of an apple tree do not develop as the gardener expects, but turn into some uneatable products, the latter are, for a scientific botanist, the necessary effect of certain causes just as are the sweetest apples, and hence the realization of a "tendency" which is as "natural" or "existential" as the one whose realization is the eatable fruit. The fact that the expected change is the normal course of change means only that it is regular, *i.e.*, in conformity with a rule describing the actual behavior of existent entities. To identify the normal course of change with goodness rests on the fallacy of confusing two wholly different meanings of the term "normal": conformity with a rule *describing* the actual behavior of entities, and conformity with a rule *prescribing* a definite behavior of entities, *i.e.*, a norm. It is the confusion, characteristic of all natural-law doctrines, of a law of nature and a moral law. That the normal change is good and the abnormal bad or evil are value judgments which cannot be reached within a science describing and explaining reality. These judgments express the relationship of a thing to the requirements which are not immanent in this thing but raised by men, and which, if they refer to the state or the behavior of men, are presented as norms.

II

The differentiation between good and bad, impossible within a description and explanation of reality, is essential to a natural-law doctrine which aims at norms regulating human behavior. If it tries to found these norms on facts, and — as does the dy-

dynamic doctrine of natural law — on "tendencies" immanent in reality, it must differentiate between good and bad tendencies or qualify the realization of some tendencies as good and their non-realization as bad or evil. It must project the value which it presupposes into reality. This is just what the dynamic theory of natural law is doing. "The most basic thesis involved in this theory is that value and existence are closely intertwined with one another." (p. 64) "There are natural norms embedded in the structure of all material existence." (p. 68) Thereby the fundamental presupposition of the traditional natural-law doctrine is accepted. According to Wild, "those who have responsibly defended this theory have never asserted that value and existence were the same. What has been asserted is that they are distinct, but inseparable." For, "it is by no means obvious and evident that value is totally divorced from fact." (p. 99) If existence or fact cannot be separated from value, how is value connected with existence or fact? Wild says: "If values do not exist in some way, ethical reflection is much ado about nothing." (p. 99) Hence values "exist" in some way; and if there is no other "existence" than that of facts — that something "exists" means, according to the dynamic theory of natural law, the same as that it is a "fact" — values must exist in the same way as facts. Wild says, "it is clear that values and disvalues are facts of *some kind*." If value judgments "are true, they must refer to *some kind* of existent fact." (p. 66) What kind of existence or fact? There is no answer to this question. Even if there are two kinds of "existence" or existent facts, value is one of them, and hence value is — after all — a fact, and even an "existent fact." Hence the objection that the natural law doctrine confuses value and fact is not as unjustified as Wild pretends. The view that values are existent facts or some kind of existent facts is certainly no more obvious and evident than the opposite view.

The main arguments which Wild sets forth for his thesis, that values are facts, are first: that we strive for their "realization." (p. 67) Values may be realized. "Of what real good are the sublimest values if they remain unrealized? This shows that the values really moving us are not separated from existence." (p. 67) The dualistic theory does not at all deny that values may be "realized." But the statement that a value is "realized" means only that a fact has occurred which in the opinion of the observer is in conformity with a value or a norm presupposed

as valid by the observer. It does not mean that the fact is the value or the norm, or that the value or the norm is a fact of any kind. The other argument is the above quoted statement that if values do not "exist" in some way, ethical reflection is much ado about nothing, or, as it is formulated in another connection: the relativistic dualism of existence and value makes "ethics" and "moral justification" impossible; (p. 71) it leads to "moral nihilism"; (p. 81) which means: if values are not facts, there are no values in general and no moral values in particular, and hence no moral order is possible. This argument, too, is untenable even if it were true that there can be no moral values or a moral order if values are not facts. From the truth of this statement it could not follow that values are facts. The lack of a moral order may be very undesirable, but from the fact that a certain state of affairs is undesirable it does not follow that the conditions of the desirable state of affairs exist. However, relativistic and dualistic positivism does not assert that there are no values, or that there is no moral order, but only that the values in which men actually believe are not absolute but relative values, and that there is not *one*, but that there are many different moral orders under whose effective validity men actually live and always have lived; but just because there are so many and so different moral orders, their validity — even if very effective — can be considered only as relative. It is inadmissible to identify value with absolute value; and only by means of such identification can the positivistic value theory be accused of moral nihilism.

There is an essential connection between the concept of "value" and that of "norm." A norm constitutes a value. Since, according to the dynamic theory of natural law, values are immanent in reality and reality is not man-made: "Norms that are not man-made must actually exist in some sense. They must be embedded in the ontological structure of things." (p. 105) The dualistic theory does not deny that norms "exist," just as it does not deny that values exist. But it does not follow from the statement that a norm "exists" that it exists like a fact and hence must be embedded in reality. The statement means only that a norm is valid, that it has been created by a human act, which means that a norm is the specific meaning of a human act. This act exists as a fact and can be described by an "is"-statement; but its meaning that something ought to be or to be done, is not a fact; it can be described only by an "ought"-

statement. The view that norms are embedded as facts in reality rests on the confusion of an act with its meaning. This confusion is the basis of the assumption of norms which are not man-made. If they are not made by human beings they must be made by another being endowed with reason and will. Solely such a being can issue norms to the effect that men ought to behave in a certain way. If it is not a human being it must be a superhuman being, the same who made reality, God. The view that values are immanent in reality or that norms not made by men are embedded in existence is based, consciously or unconsciously, on a theological interpretation of the world.

III

After having asserted as a dogma that value and existence are closely intertwined with one another, and that means that value is immanent in reality, Wild is forced to admit that not only a positive but also a negative value must be considered as having some kind of existence, that not only the good but also the evil "exists" somehow like a fact. "Indubitable empirical evidence shows us that evil in some sense really exists, as well as what is good." (p. 65) Then the problem arises how to distinguish good and evil as existent facts. In order to solve this problem Wild introduces the concept of "completion." Existence requires completion or fulfilment; in other terms, there is a tendency toward completion or fulfilment immanent in existence. If this tendency is realized, if existence "fulfils itself," if existence attains what it requires, if it "attains existential completion," it is good; if the tendency toward completion or fulfilment is not realized, if existence does not fulfil itself, if it "is deprived of what it requires for its completion," it is evil, "evil arises." (p. 65) The statement that something, if it is "completed," is good, and if it is not completed, if it is deprived of something, is evil, is tautological, for in the concept of "completion" the value of good and in that of "privation" the disvalue of evil is already implied. The decisive question is: how to recognize by unprejudiced observation of a fact that it is "completed" or "deprived" of something. From the point of view of a mere description and explanation of reality *all* entities are complete as they are, and if the concrete state, in which an entity in the course of its change exists, is interpreted as a state of incompleteness or deprivation, *all* entities are always

incomplete or "deprived" of something. A child is incomplete because it is not yet a man, and a man incomplete because not yet old, and an old man incomplete because not yet dead. If the change of a child to a man is interpreted as the realization of a "tendency," then the change of a young man to an old man, and the change of an old man to a dead man must also be interpreted as the realization of a tendency. Then there exists not only a tendency toward life but also a tendency toward death; and if — as the dynamic theory of natural law assumes — the realization of a tendency is good, the realization of the tendency toward death is as good as the realization of the tendency toward life. Then it is impossible to found the fundamental norm which — as we shall see later — the dynamic theory of natural law presupposes, that life ought to be preserved and promoted, on tendencies immanent in existence. If value (or dis-value) is immanent in existence, either all existing entities are good or all are evil. Then it is impossible to distinguish *within* existence good and evil, because the one as well as the other coincides with existence. Such a distinction is possible only if a norm is presupposed prescribing what ought to be or what ought to be done. Only then is it possible to judge that an entity is complete, which means that it is as it ought to be; or that it is not complete, deprived of something, which means that it is not as it ought to be.

The dynamic theory of natural law is not able to overcome this difficulty. Referring to its fundamental thesis: that natural entities are in a state of incompleteness and consequently "are ever tending further towards" completion, Wild asks: "What determines the nature of these existential tendencies?" From the answer to this question we should learn how to recognize, by observing facts, tendencies toward completion and the reason why some tendencies are and some are not realized. But from his answer we learn nothing. He simply refers to the term "nature" in his definition of natural law. (p. 65) "This term signifies a certain determinate structure, or form, which is possessed in common by all individuals of a certain kind or species. Thus, all individual human beings share in common human nature. As in the case of other finite entities this determinate structure or nature, when given existence, produces certain determinate tendencies toward fulfilment." (p. 66) The answer to the question as to what determines the nature of existential tendencies, *i.e.*, tendencies toward completion is: that nature produces ten-

dencies towards fulfilment. That "all individual human beings share in a common human nature" is an empty tautology, since the concept of "individual human beings" implies the concept of a common human nature. The statement that an individual is a human being is identical with the statement that it shares human nature. But, what is "human nature"? What are its essential traits? Wild does not answer this question by his statements that "human nature is an ordered set of traits possessed in common by every human individual and essential to his being," and that human reason is capable of apprehending "this essential common structure and the perfective tendencies characteristic of the human species." (p. 66) Until now the dynamic theory of natural law has produced nothing else but the assertion that there are in human nature, just as in all finite entities, tendencies toward completion, fulfilment or perfection, *i.e.*, the fundamental thesis of its dynamic view of the world, which projects the norms presupposed by it into reality. This projection becomes evident by the fact that Wild, on the basis of nothing else but the unfounded assertion that there are in human nature "perfective tendencies," arrives at the conclusion: "When so understood and expressed in universal propositions, these tendencies are norms or moral laws." (p. 66)

Later, Wild makes the attempt to justify the view that values or norms are immanent in reality by referring to the fact that "existent entities are certainly judged, sometimes truly judged, to be in a sound or an unsound condition." (p. 66) He says: "For an entity whatsoever, to realize its essential tendencies and capacities for action is to be in a sound or healthy state." (p. 73) That probably means: the fact that the essential tendencies of an entity are realized shows that it is in a sound state, or: the fact that we judge the state of an existent entity as sound shows that an existential tendency is realized. Applying the distinction between sound and unsound states to human nature, Wild says: "Many things happen to a man, either from external influences or from his own free choice, which are not in accordance with his nature and his natural tendencies. If this were not true, we could not distinguish between the healthy or sound state and that which is unhealthy and unsound." (pp. 76-77) It may be assumed that the "essential" tendencies are the "natural" tendencies. If an entity, and especially a human being, is judged to be in a sound or healthy state, essential or natural tendencies are realized. "The realization of these [essen-

tial] tendencies is always good; their frustration is always evil. Hence, the chasm between fact and value is bridged The world is dynamic and moving towards completion. There are natural norms embedded in the structure of all material existence." (pp. 67-68)

According to the dynamic theory of natural law, the judgment that an entity is in a sound or unsound state is a statement about an experienced, observable fact and at the same time a value judgment. "In the case of subhuman living things, we refer to incipient tendencies by value terms like requirement or need, and to their fulfilment by others like normal, sound, and healthy. When we analyze the structure in this way, we are recognizing the existential category of goodness — realization of imperfect tendency. Furthermore, we sometimes argue back from the realization to what it requires of the incipient tendency and speak of a diseased or warped plant in terms of how it should have grown, or of a maimed animal in terms of what it ought to have done to avoid the injury. There is no implication of any conscious teleology in this. We are merely recognizing existential tendencies requiring further acts for their fitting realization in accordance with nature." (p. 218)

The judgment that a living entity is in a sound or healthy state may, indeed, refer to a mere fact, the fact that the vital functions of this entity are not impeded. If this judgment implies the idea that the sound or healthy state is good, it assumes the character of a value judgment, and such value judgment is possible only if the judging subject presupposes a norm requiring that this sound state ought to be. The sound state of a poisonous snake is good for the snake, if we assume that the snake wants to live; but evil for men who destroy the life of these things in order to save their own life. Men presuppose the norm that human life ought to be preserved, but not — as a rule — that the life of poisonous snakes ought to be preserved. The goodness or badness of a state is not, as its health or sickness is, an experienced, observable fact; it is the conformity or nonconformity with a norm presupposed by the observer. Wild admits that the judgment to the effect that a plant is warped, that it is in an unsound state, implies the idea that it *should* or *ought* to have grown in another way. But this idea does not refer to a fact which can be observed; it refers to a norm presupposed by the observer. We can see that a plant is warped, but we cannot see, we can only require that it ought not to be warped. An

identification of soundness with goodness is especially impossible if goodness means a moral value, and it is a moral value at which a natural-law doctrine is aiming. More values apply only to human behavior; and the terms "sound" and "unsound" refer — in the usual language — to biological states rather than to human actions. If applied to human actions, we may perhaps say that if a man by his behavior preserves and promotes his own life, his behavior is sound. The soundness of his behavior is an observable fact; it is the effect of his behavior. But the answer to the question of whether such sound behavior is morally good or evil depends on the norms we presuppose. It cannot be found by observing and analyzing the behavior. Such behavior may be judged to be morally indifferent. It may, however, under certain circumstances be judged to be morally evil — if the norm is presupposed that a man ought to sacrifice his life if this is necessary to gain victory over the enemy in war. Suicide which is just the contrary of preserving one's own life is, according to some moral systems, forbidden. It is against human nature and as such evil; according to others, it is under certain circumstances justified in accordance with human nature and as such good. The identification of the fact of soundness with the moral value of goodness is, in spite of Wild's assertion to the contrary, the projection of a subjective value in objective reality.

IV

In order to maintain the view that the distinction between a sound and an unsound state proves that the values of good and evil are immanent in reality, the distinction between "essential" and "not essential" or accidental tendencies is introduced. This is not consistent; for in one of its versions the dynamic theory of natural law knows only one type of tendencies: tendencies toward completion. It asserts "that being has an active or tendential character. Such acts or tendencies are at first imperfect or incomplete. They may be either frustrated with a resulting evil, or completed with a resulting good." (p. 65) "That which exists always contains germinal tendencies towards the right, but these tendencies may become twisted or distorted by chance, by tyrannical manipulation, and by mistaken deliberation." (p. 70) Hence: "Many tendencies exist in a privative or unfulfilled state." (p. 217) "That which will complete or activate a tendency is good." (p. 220) From these statement fol-

lows that *all* tendencies immanent in reality are directed toward the right, and that their completion or realization is good. The evil which exists — and that it “exists” is expressly admitted (p. 65) — is not interpreted as the realization or completion of a tendency, “completion” meaning realization of the good. There are no “tendencies” towards the wrong. The evil is the result of the fact that a tendency is “twisted” or “distorted” and hence remains in a privative or unfulfilled state. Consequently only part of existence is the realization of tendencies; part of existence is not of this dynamic nature. This, of course, is hardly compatible with a dynamic view of reality whose essence consists in the assumption that there are tendencies immanent in reality. As pointed out, if evil exists it must be interpreted as the realization of a tendency. It is, however, quite understandable why the dynamic theory of natural law does not recognize the existence of tendencies toward the wrong. Such recognition would annihilate its attempt to found the norm of right behavior on existential tendencies, its fundamental thesis that existential, perfective tendencies are “norms or moral laws.” (p. 66) Referring to the fact that tendencies may be twisted or distorted, Wild says: “Hence, we cannot infer that what is, is right,” (p. 70) which means that we can infer only that right is what is the realization of an untwisted, undistorted tendency. But how can we know that what *is*, is the realization of a tendency which is not twisted or distorted, and as such good, if that what is evil, too, “is,” that is to say, is as much existent as that what is good? Wild’s answer is: “There is a stable universal standard, resting on something firmer than the shifting sands of appetite, to which an appeal can be made even from the maximal agreements of a corrupt society. This standard is the law of nature.” (p. 70) However, as long as this natural-law doctrine does not answer the question how to distinguish, by an unbiased observation of facts, distorted and as such evil from undistorted and as such good tendencies, it does not furnish this “stable, universal standard.”

This standard is not provided by the above mentioned distinction, which plays a decisive part in the dynamic theory of natural law, the distinction between “essential” or “natural” tendencies which “conform to the nature of man” and tendencies which are not essential or natural, but accidental. Only the former constitute, according to the dynamic theory of natural

law, "what is commonly referred to as the moral law" (p. 67) and consequently are called "rights." (p. 218) This distinction is hardly compatible with the view that "that which exists always contains germinal tendencies towards the right" although these tendencies may be prevented from reaching their goal by being twisted or distorted. (p. 70) For according to this view all tendencies inherent in existence are directed towards the right, and, if this direction is decisive for their being essential, all tendencies must be considered as essential. What is the difference between tendencies which are and those which are not essential or natural? "Some tendencies," Wild says, "are peculiar to the individual entity. But other essential tendencies are shared in common by those possessing a similar nature. Such tendencies, when they are rationally understood, constitute what is commonly referred to as the moral law. The realization of these tendencies is always good; their frustration is always evil." (pp. 67-68) Only the realization of *essential* tendencies is good and only the frustration of *these* tendencies is evil. The just quoted statements seem to imply that essential tendencies are inherent in all existent entities. But if these tendencies constitute moral laws, moral laws would apply not only to human beings, but also to animals, plants and inanimate things, which of course would be absurd. As a matter of fact, Wild later characterizes "essential," that is, "natural," tendencies in a different way so that they may be considered to be inherent only in human beings. He says that there are two distinguishing features by which a natural or essential tendency is marked: "first, it is shared in common by all members of the species; second, its realization, at least to some degree, is required for the living of human life. Thus, the need for food is a natural tendency; the desire to torture other men is not. The first is common to the species, and some degree of realization is required for human life. Hence, it is essential. The second lacks this mark. . . . it is unessential or accidental, and also obstructive or evil. The pattern of action which is universally required for the living of human life is essential. This is the standard of natural law." (p. 77) In another connection, he asserts: "Human existence is constituted by diverse tendencies, some shared by every human individual and indispensable to human life, others peculiar to certain individuals or groups, and dispensable." (p. 218) Only the former "must be realized to some degree if human life is to be lived at all — for example, the need for food and the need

for education. When clearly focused by rational insight, they are called *rights*. They have a right to be realized . . . because they are required by human nature itself and the cosmic causes of human nature." (p. 218)

From the second feature it seems to follow that only human beings come into consideration, which is quite understandable from the point of view of a natural-law doctrine which tries to found the norms of the law on tendencies immanent in human nature. Then, the problematical assumption of tendencies in other than human beings seems to be quite superfluous. Tendencies existing in human beings are desires that can hardly be assumed to exist in inanimate things, or in plants, or even in some primitive animals. As a matter of fact, according to the dynamic theory of natural law the tendencies existing in human nature manifest themselves in desires, in "natural desires" which this theory distinguishes from "incidental appetites." (p. 68) The need for food is an essential or natural tendency because it is a natural desire in contradistinction to the desire to torture other men, which is not a natural tendency because — according to the dynamic theory of natural law — it is not shared in common by all members of the species human being. It is true that Wild in another connection (p. 218) characterizes the tendencies "shared by every human individual and indispensable" as "needs" in contradistinction to tendencies "peculiar to certain individuals or groups" which he calls "*desires, interests, or compulsions*." This, however, is incompatible with the distinction presented in the first part of his book. There he says: "The theory of natural law maintains that there is a sharp distinction between raw appetites and deliberate desires elicited with the co-operation of practical reason." (p. 69) This distinction is evidently identical with that between natural desires and incidental appetites. When he proclaims the principle of natural norms grounded in factual tendencies, Wild refers to the "actually felt urges of natural desire." (p. 68) The "urge" of a natural desire in which a natural tendency manifests itself is certainly a compulsion. There would be no "need" for food, if there were no "desire" for it. Only because it is a desire can it be compared with the "desire" to torture other men. The need for food is a natural tendency, its realization is — according to the dynamic theory of natural law — required by human nature, because the desire for food is shared in common by all

human beings. Only the "desire" is a fact. Only as a psychological or physiological fact is it shared in common by all men. Of course there may be a "need" for something, that is to say, something may be according to our knowledge necessary for the preservation of human life, without man feeling a desire for it. But this is something different from an actually felt urge shared in common by all human beings.

If the norms of natural law are to be grounded on natural desires, that is, desires shared in common by all human beings, it is hardly possible to establish a system of natural norms regulating the social life of men. For there is hardly another natural desire shared in common by all men than that for food. The need for education is certainly not based on a desire actually felt by all men and is certainly not necessary to preserve the life of man. It is, by the way, significant, that the dynamic theory of natural law expressly refers only to these two, of which one does not fulfil the conditions of an essential or natural tendency, and the other is evidently not sufficient as basis of a natural social order, even if it were possible to infer from the fact that all men have a desire for food the norm that this desire ought to be satisfied. If the desire for food is a "tendency" then the desire to torture other men, too, is a tendency, although a tendency which is not shared in common by all men. This is in open conflict with the view that there are only tendencies toward the right and that the evil consists in the fact that a tendency — directed to the right — is twisted or distorted. The desire to torture other men cannot be conceived of as a twisted or distorted tendency toward the right. Besides, the tendencies constituting human nature which are desires, are evidently something different from the tendencies immanent in the nature of entities other than human beings, the tendencies a physicist may predict from the knowledge of the structure of these entities. Then the term "tendency" is used in two totally different meanings. If this is not the case, the tendencies, which the dynamic theory of natural law assumes to exist in that part of nature which is not human, must also be desires or something similar to desires; and then its teleological implication cannot be denied.

V

The "standard of natural law" rests, as Wild asserts, "on the possibility of distinguishing between what is essential to

an entity and what is incidental," (p. 77) between "natural" existence and mere existence, (p. 76) between "nature" and "existence," (p. 76) so that tendencies which constitute human existence may be considered as unessential and hence as not natural, or as not in accordance with human nature. However, such a distinction is possible only if by "nature" is to be understood existence, not as it actually *is* but as it *ought* to be in conformity with a presupposed norm.

This is, indeed, the meaning of the second feature by which an "essential" tendency inherent in human nature is marked. It is a tendency whose realization is "required for human life." It must be realized "if human life is to be lived at all." The norm presupposed by the dynamic theory of natural law is the norm that human life ought to be lived, or more precisely formulated, that human life ought to be preserved and promoted. It implies that human life, the life of *every* human being, is the highest value.

Wild asserts that the distinction between what is essential and what is accidental consists in "separating out those traits which are necessarily involved in the existence of the thing or relation from those which are merely extrinsic and accidental." (p. 78) However, if a tendency constituting human existence is essential insofar as its realization is required if human life is to be lived, that is to say, insofar as it conforms to the presupposed norm that human life ought to be preserved and promoted, the term "essential" has another meaning than that of a trait necessarily involved in the existence of a thing. If "essential" means necessarily involved in the existence of a thing, then, from the point of view of an unbiased description and explanation of things, there are no traits involved in the existence of a concrete thing which are not *necessarily* involved. All its traits are "necessarily" involved because all of them are the effect of certain causes. To consider them as "necessarily involved" is the fundamental postulate of an unbiased description and explanation of existence. The statement that a trait involved in the existence of a thing is not essential but merely accidental does not refer to the existence of the concrete thing but refers to the relation of this thing to the definition of the concept under which the concrete thing is subsumed. It does not mean that this trait is not necessarily involved in the existence of the concrete thing but only that this trait is not an

element of the definition, that it is not essential but merely accidental as far as the subsumption of the thing under the definition is concerned. The meaning of a definition is not—as that of a norm—that a thing *ought* to have some traits, but only that if it has not the traits involved in the definition it is not the thing defined. Human behavior may be in conflict with the essential tendency, that is to say, man may violate the norm that human life ought to be preserved and promoted if, *e.g.*, a man commits suicide or murder; but he remains a human being. If, however, a being lacks one of the traits involved in the definition of "human being," it is not a human being. Consequently a tendency constituting human existence is essential or natural only because its realization is in conformity with the presupposed norm that human life ought to be preserved and promoted, and not because it is necessarily involved in the existence of a human being.

VI

This norm is evidently also tacitly presupposed by Wild's theory of moral obligation which claims to ground this "existential category" on "verifiable cognitive judgments that are true or false," that is to say, on facts, especially on the fact of tendency. (pp. 216, 217) "Obligation" is a fundamental concept of any legal or moral theory. That an individual is under the obligation or is obligated to behave in a certain way means that he ought to behave in this way, or, what amounts to the same thing, that a norm prescribes that he ought to behave in this way. The obligation is the norm in its relation to the individual whose behavior is prescribed. The statement that a norm or obligation is "binding" upon the individual means that the individual ought to behave as the norm prescribes how to behave. It is of the greatest importance to distinguish as clearly as possible between obligation in this normative sense of the term and the fact that an individual has the idea of a norm or obligation, that this idea has a certain motivating influence on him, and finally leads to a behavior in conformity with the norm. The difference becomes evident when we assume that an individual is under an obligation even if the idea of the norm has no such effect on his behavior, if he actually behaves not in conformity with the norm; even if he has no idea of the norm at all. The latter assumption is usually expressed by the principle that the ignorance of the law is no excuse. If an individual does not behave as he ought

to behave in conformity with a norm, we say that he violates his obligation. Only if we assume that he is under an obligation to behave in a certain way even if he does not behave in this way, can we say that he violates his obligation.

The distinction between obligation in the normative sense of this term and the fact that an individual has the idea of an obligation is frequently obscured by an equivocal terminology. It is usual to characterize the binding character of an obligation, as well as the motivating effect which the idea of the norm has in the mind of the individual, as a "necessity." The statement that a norm or obligation "necessitates" the individual to behave in a certain way may mean that if an individual is under an obligation he *ought* to behave in conformity with this obligation. It may, however, also mean that the idea of the norm as motive or cause in the mind of the individual has, as its effect, a behavior in conformity with the obligation. The term "necessitate" is used with two totally different meanings. In the first case it expresses a normative, in the second case a causal relation. The same ambiguity is implied in the term "binding." That an obligation is binding upon an individual may not only mean that the individual ought to behave in conformity with the obligation, but also that the idea of the obligation has a motivating effect on him. All attempts at grounding obligation on fact are based on the confusion of obligation in its normative sense with the idea an individual has of an obligation and the motivating effect of this idea.

Wild's theory of obligation is a typical example of this confusion. He is quite aware of the specific normative meaning of the term obligation; he recognizes that this concept expresses "oughtness," that the "ought" is not identical with the "is" and that the one cannot be inferred from the other. Nevertheless he characterizes obligation as a "human feeling" (p. 66) and asserts that "obligation . . . binds or moves us to certain values. This is clearly a factual urge, or tendency, which existentially links us or propels us towards certain values." (p. 67) He says: "[W]e are physically moved or bound by the urge of obligation or oughtness." (p. 68) He expressly defines the "ought," "the basic fact of human nature," as "the actual urge inherent in this nature." (p. 97) That means that he reduces the "ought" to the "is." It is evident that we are "physically moved or bound" only by the idea we have in our mind of an obligation, which may be an

"urge," *i.e.*, a more or less effective motive and as such a psychological fact, a "feeling" that may "move" us in a certain direction, especially to fulfill the obligation of which we have an idea, and thus to realize a value. But it is certainly not the "oughtness" which physically moves or binds us. For this can be only the effect of an existing fact, and oughtness, that is to say, the statement that something ought to be or to be done, is not a statement about an existing fact. Wild says further: "Obligation seems to be some kind of necessity that obliges and binds." (p. 214) He quite correctly rejects the theory which interprets obligation as a type of "psychological law," and asserts: "Obligation does not necessitate in *this sense*, for people often do not fulfil their obligations, knowing that they do not." (p. 214) Nevertheless, his own theory of obligation is nothing but a vain attempt at founding moral obligation on natural tendencies immanent in human nature, (p. 217) and that means on the psychological fact of natural desires.

According to this theory, moral obligation is the result of the "transformation of raw appetite." (p. 218) There are two steps in this transformation. The first step is the "rational recognition of natural needs," that is, needs "required by human nature itself and the cosmic causes of human nature," and their distinction from ephemeral desires. "These needs are felt by the individual as unfinished tendencies in himself and others." (p. 218) "As soon as we recognize a need, we also recognize the universal value that will satisfy the need. The apprehension of such universal values, not relative to the particular interests of this or that individual or group, but tendentially relative to human nature as such is the second step in the complex experience of moral obligation. At this stage, we have the felt urge of existential common tendencies and the rational insight into the nonexistent values required to complete them." (p. 219)

It is not clear whether these two steps of the transformation of raw appetite into moral obligation takes place in the theory of obligation or in the soul of the individual. Since Wild speaks of steps in the "experience" of moral obligation, the latter interpretation is not excluded. However, there can be no doubt that the "rational recognition of natural needs and their distinction from ephemeral desires" is a task of the theory of natural law, and that a man may be under a moral obligation without having the slightest idea of this highly problematical distinction and

without recognizing the universal values which satisfy the natural needs. But let us take into consideration only those statements which expressly refer to psychological phenomena in the mind of the individual supposed to be under a moral obligation. The first stage is characterized by the fact that the individual feels a need as an unfinished tendency in himself and in others. This is hardly possible. An individual can "feel" only what is going on in himself. He can feel only his own need, he cannot feel the need felt by others. He may know that the need he feels is felt also by others, that it is a need shared in common by all human beings and that its realization is necessary for the preservation and promotion of human life, that it is — in the terminology of the dynamic theory of natural law — a natural or essential tendency. He may, in addition, have the felt urge of this need or tendency and the rational insight into the values required to complete this tendency. If it is assumed as the dynamic theory seems to assume, that then, and only then, he is under a moral obligation, obligation is identical with a psychological state of the individual which consists of the feeling of the urge of a need and some knowledge concerning the nature of this need. Now the question arises as to what is the content of the obligation? It can be only the realization of the value required for the satisfaction of the need. From the fact that a man feels the urge of a need which he knows is shared in common by all men and is necessary for the preservation and promotion of human life and that he further knows the value that will satisfy the need, it follows — according to the dynamic theory of natural law — that he is morally obliged, and that means that he ought to realize this value. It is a conclusion from that what is to that what ought to be done.

This fallacy could be avoided if the dynamic theory would assert as the basic norm of natural law that men ought to behave in a certain way if they feel the urge of a need which they know is shared in common by all men and that its satisfaction is necessary for the preservation and promotion of human life and if they know that this behavior constitutes the satisfaction of this need. It is evident that no moral order can be based on such a norm. The fact that a man, due to his ignorance, does not know or actually does not care that the need he feels is shared in common by all men, or the fact that he is in error about the value that will properly satisfy this need, cannot free him from the

moral obligation concerned. What is still more important is that the need for food is the only need that fulfills the requirements of the dynamic theory. The need for education, the other need indicated by this theory, is — as pointed out — neither shared in common by all men nor necessary for the preservation of human life. Applied to the need for food — or the tendency of hunger, as this need in its capacity as "factual foundation" of "moral argument" is also characterized (p. 227) — the dynamic theory leads to the absurd result of a moral obligation to eat and drink. For eating and drinking is the universal value that will satisfy this need.

Eating and drinking may be a natural right, but not an obligation. As a matter of fact, Wild identifies in another connection natural needs or tendencies, such as the need for food, with rights. He emphasizes that these needs or tendencies "have a right to be realized." (pp. 70, 218) There is, however, a fundamental difference between right and obligation, which a legal or moral theory must not ignore. The confusion of these two concepts is a serious defect. There is of course an essential relation between them. The right of one individual to behave in a certain way is conditioned by the obligation of another or all others not to prevent the former from, or to enable him to, exercise his right. A moral theory may assert the obligation not to deprive a man of the means to satisfy his need for food or — as the socialist doctrine does — the obligation to guarantee to everybody a perfect satisfaction of this need. These obligations, however, do not follow from the fact that the need for food is common to all men, but follow only and exclusively from the assumption that the satisfaction of this need is, as Wild formulates it, "required for the living of human life." This, as pointed out, can mean only: from a norm presupposed by the moral theory asserting these obligations, requiring that human life ought to be preserved and promoted.

VII

This norm cannot be founded on experience and observable facts. It cannot be proved that a tendency — in the sense of a predictable change or a desire — toward the preservation and promotion of life in general or human life in particular is immanent in nature in general or in human nature in particular.

Life in general and human life in particular is a phenomenon

whose existence is restricted to an infinitesimally small part of the universe known to us. It is quite possible that cosmic development will lead to a total destruction of life and especially of human life. Then the assumption of a cosmic tendency directed toward the destruction of life is not excluded. As far as human nature is concerned, there is indeed a fact which could be interpreted to be a tendency toward the preservation and promotion of human life. It is the instinct of self-preservation. However, it is a tendency toward the preservation and promotion of one's own life; and the realization, completion, or fulfilment of this tendency is possible only at the expense of the preservation and promotion of the life of other beings. The need for food, recognized by the dynamic theory of natural law as an essential or natural tendency, dictates the destruction of the life of plants and animals; but as a matter of fact, the instinct of self-preservation is satisfied quite frequently at the expense of the preservation and promotion of the life of other human beings, even if such behavior is not necessary in order to preserve or promote one's own life. Besides, there are situations in which the life of one human being can be preserved only by the sacrifice of the life of another human being. If the question arises how the majority of men will act in such a situation — and only from their actual behavior a "tendency" immanent in their nature could be inferred — there can be little doubt that the overwhelming majority of men will sacrifice the life of the other in order to save their own life. The realization of the tendency manifested in their behavior is certainly not required "for the living of human life" but — what is quite a different requirement — for the living of one's own life. If a natural-law doctrine asserts that preserving or promoting one's own life at the expense of the preservation and promotion of the life of other human beings is against the nature of man, it does not refer to human nature as it actually is, but to human nature as it ought to be in accordance with a norm presupposed. It does not infer a norm from real nature, but it infers an ideal nature from a presupposed norm.

The tendency which manifests itself in the instinct of self-preservation exists not without exceptions, so that a norm of natural law, that is, a norm valid always and everywhere, could not be founded on it, as the statistics of suicide — sometimes even a mass phenomenon — clearly show. This, however, is not the most important objection against an attempt at founding the

norms of a social order on the instinct of self-preservation which is the only observable tendency toward the preservation and promotion of human life immanent in human nature. The decisive point is that this tendency is — as pointed out — directed toward the preservation and promotion of one's own life, that it is the expression of man's egotism, whereas all moral, and that means social orders, and especially a moral order which claims to be natural law and hence to be valid always and everywhere, are directed against man's egotism, his tendency to satisfy his own interests even at the expense of the interests of others. They try to restrict this tendency; they are based on the principle of altruism. The need or desire for food — the main example of a natural tendency on which the dynamic theory of natural law pretends to found the norms of this law — is, as such, morally indifferent. What counts is only how this need or desire of one individual is satisfied in relation to the same need or desire of the other individuals; and in this respect this "natural" tendency is no possible basis for natural norms.

If natural norms are "embedded" in existence, as the dynamic theory of natural law asserts, (p. 68) these norms must have found expression in positive moral or legal orders, that is, social orders, which actually exist or have existed in the sense that their norms are or have been effective, that is to say, by and large actually applied and obeyed by men living under these orders. But the fundamental norm presupposed by the dynamic theory of natural law, that human life ought to be lived, or, what amounts to the same thing, that the life of every human being ought to be preserved and promoted, has never been recognized by any positive moral or legal system. The norm implies the idea that human life, the life of every human being, is the highest value. This is certainly not the idea of Christian morality, which considers life, that is, the life of man in this world, as an evil, and only a transcendental existence in another world as good. The moral or legal systems effectively established among many peoples do not and did not consider the life of all human beings as equally valuable. The legal institution of slavery, implying the right of the owner to dispose of the life of his slave, justified by great philosophers as a natural or just institution, is incompatible with the norm requiring the preservation and promotion of human life without any distinction. The moral systems which are at the basis of the positive legal orders of our time recognize war as a

legitimate action and, hence, do not presuppose that the life of human beings belonging to the enemy ought to be preserved and promoted. If all these social orders are or have been actually effective, how could they be considered to be against human nature, if human nature is taken as it actually is and manifests itself in the social life of men; and where else could human nature manifest itself if not in the way the overwhelming majority of men actually behave in their mutual relations, and in the way they morally evaluate their behavior. A "realistic" and "empirical" philosophy, such as the dynamic theory of natural law claims to be, certainly is not in a position to deny that social reality is a manifestation of human nature; and social reality is the positive, not an imaginary natural law.