

The Legal Significance of the Natural Affection of Charlie Gard's Parents

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INTRODUCTION

The contemporary British television drama, *Humans*, is part of a now standard television genre: the story of a world including human-made synthetic androids (here called “synths”), which are or have become self-aware. This circumstance gives rise to all sorts of interesting questions about what it means to be alive, what it means to be human, and what are the ethical implications of self-aware, human-made machines. This particular video series self-consciously addresses many such heavy issues. For example, in season 1, episode 2, one of the primary characters, Laura Hawkins, a lawyer, wife, and mother, almost out of the blue asks Joe, her husband and the father of her three children:

Laura: Do you think we love our children because we choose to or because we have to? Are we hard-wired to love them because that's what nature needs to keep it all going?

Joe: Blimey! Where's that coming from?

Laura: I've just been thinking.

Joe: Not everyone loves their kids. I think we choose.

Thus, Laura asks and Joe simply answers one of the weighty questions addressed in this essay. Laura, as a product of the twenty-first century, does not seem to consider the historically dominant Western idea that parents' love for their children is of divine origin, considering instead binary options: either natural selection had “hard-wired” her to love her children or she had chosen to love them on her own. Laura guessed that her love for her children came either from impersonal nature or from her particularly personal self.

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Joe's answer adopts the option that is the farther from the traditional answer. Based on his observation that some people do not love their children, Joe infers and opines to Laura that there is no such thing as natural affection at all. Joe believes Laura and Joe love their children because they choose to love them, not because they are "hard-wired" to love them either by nature or by God. Probably most who watch the television show hardly notice this little colloquy, but its social implications are potentially momentous. It is hard to imagine Western characters asking and answering these questions this way a few hundred years ago, maybe even a few decades ago. But now, perhaps, the old social assumptions are starting to break down.

These questions were very significant for Charlie Gard and his family. Charlie Gard suffered "from a very rare and severe mitochondrial disease called infantile onset encephalomyopathic mitochondrial DNA depletion syndrome."¹ Charlie's parents became embroiled in a legal dispute with the hospital treating Charlie. The hospital determined that it would be in Charlie's best interest to remove the ventilator that was allowing Charlie to breathe.² Charlie's parents disagreed and wanted to take him to the United States for experimental treatment.³ Thus, whether Charlie's parents or someone else should decide what was best for Charlie became potentially a question of life or death.

This is not a case of child abuse. Throughout the lengthy legal process surrounding Charlie Gard's medical treatment, no authority ever questioned the good faith of Charlie's parents. Parental affection usually is unquestioned. The characters in *Humans* similarly never question their own love for their children, which is simply assumed, but Laura wonders out loud whether that affection is natural. And so, still today, despite "Joe's" suggestion to the contrary, the idea that parents naturally love their children seems to be generally accepted. The proposition that the good of humankind depends on the natural affection of parents for children appears to be even less subject to challenge. World renowned economist Ronald Coase commented on humankind's dependence on parental benevolence:

Consider . . . the care and training of the young, largely carried out within the family and sustained by parental devotion. If love were absent and the task of training the young was therefore placed on other institutions, run presumably by people following their own self-interest, it seems likely that this task, on which the successful working

¹ Gard v. U.K., Eur. H.R., App. No. 39793/17, para 4, <http://hudoc.echr.coe.int/eng?i=001-175359> (2017).

² *Id.* at para. 7.

³ *Id.*

of human societies depends, would be worse performed.⁴

And so the solicitude of parents toward their children is famous, perhaps infamous. American television personality Barbara Walters reportedly said once that “Parents of young children should realize that few people, and maybe no one, will find their children as enchanting as they do.” Who has not experienced this phenomenon, either as a parent or as a spectator (or both)? This essay asks, why are all children not universally and uniformly enchanting (or not) to all adults? What is different about the parent/child relationship? One explanation for the commonly observed special solicitude of parents for their own children is the existence of what has been called in the legal field “natural affection.”⁵ Linguistically, the single word that probably best captures the concept conveyed by the English phrase “natural affection” is the Greek word *storge*, popularized in English literature by C.S. Lewis in *The Four Loves*: “My Greek Lexicon defines *storge* as ‘affection, especially of parents to offspring’; but also of offspring to parents. And that, I have no doubt, is the original form of the thing as well as the central meaning of the word.”⁶ Anthropologist Merlin G. Myers has observed that the natural affection within the family helps to define what the word “kind” means: “[T]he German word for child—kind—and kind, kindness, and kin all have the same generic root.”⁷ The modern English adjective “kind” comes from the Old English *gecynde*, which originally meant “natural” or “native.”⁸ The modern English “kin” has the same root.⁹ Thus, the word “kind,” which modern English speakers tend to use very generically, is rooted in the concept of the “biological relative.” “Kindness” means the way humans act toward biological relatives. Thus, the concepts of “affection” and “family” are linguistically linked, and “natural affection” of parents for children means that the affection agrees with the essential makeup of human parenthood.

This essay will survey the importance of the concept of the natural affection of parents for their children in Anglo-American law and explore the significance of the possible ongoing shift in the perceived basis of this natural affection reflected in Joe and Laura’s discussion from an understanding that natural affection is given by God to consideration of the possibility that there is no such thing as natural affection at all, with particular attention to the case of Charlie Gard. The essay will be organized

⁴ R.H. Coase, *Adam Smith’s View of Man*, 19 No.3 J. OF L. & ECON 529, 544 (1976).

⁵ See *infra* note 10 and accompanying text.

⁶ C.S. LEWIS, *The Four Loves*, in THE BELOVED WORKS OF C.S. LEWIS 211, 230 (1960).

⁷ Merlin G. Myers, BYU Devotional Address: Kinship, Religion, and the Transformation of Society, (Apr. 1, 1975).

⁸ H.W. FOWLER & FRANCIS GEORGE FOWLER, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 447 (Oxford at the Clarendon Press, 1926).

⁹ *Id.*

as follows. Section I will survey the various ways that Anglo-American law has relied on the existence of natural affection between parents and children. Having thus established the importance of natural affection to Anglo-American law, Section II will briefly explore some of the religious texts that have helped to define the concept of natural affection. Finally, Section III will explore the shifting conception of natural affection and what significance such a changed understanding might have for Anglo-American law, and especially for Charlie Gard and his family.

I. NATURAL AFFECTION IN ANGLO-AMERICAN LAW

American law has defined “natural affection” as “[t]he affection which a husband, a father, a brother, or other near relative, naturally feels towards those who are so nearly allied to him”¹⁰ This legal concept of natural affection of parents for children has been generally recognized from the beginning of the United States.¹¹ American common law rests upon English common law, particularly the work of Sir William Blackstone.¹² Blackstone argued that “Providence” enforces the parents’ obligation to provide for, protect, and educate their children “more effectually” than any municipal law can because Providence has placed “in the breast of every parent that natural *στόργη* [*storge*], or insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.”¹³ Similarly, James Kent, sometimes called “America’s Blackstone,”¹⁴ wrote that the duties between parent and child are prescribed “by those feelings of parental love . . . which Providence has implanted in the human breast”¹⁵ According to Kent, this “obligation of parental duty is so well secured by the strength of natural affection, that it seldom requires to be enforced by human laws.”¹⁶

¹⁰ JOHN BOUVIER, *LAW DICTIONARY* 199-200 (Philadelphia: Childs & Peterson, 6th ed. 1856).

¹¹ Of course, the recognition of natural affection between parents and children did not begin in America or even in England. Natural affection also appears, for example, in the speeches of Cicero. “Love of one’s own family, *sui*, says Cicero, is demanded by common humanity: we naturally hold them dear, *cari*, and find them agreeable, *iucundi* In general, the relationship most often exploited in [Cicero’s] speeches is that between parent and child.” SUSAN TREGGIARI, *PUTTING THE FAMILY ACROSS: CICERO ON NATURAL AFFECTION* 16 (2005). “Cicero argues that the instinct of a father to love his son is so strong that only serious faults would cause him ‘to manage to conquer nature herself, to cast out from his heart that deeply rooted love, to forget that he is a father.’” TREGGIARI at 21. Likewise, one of the most important Second Temple Jewish authors, Philo of Alexandria, alluded to natural affection: “No one; not even a madman would say that any beings were so closely united as parents and children; for even by the mere untaught instinct of nature the parent always cares for his offspring, and in every case endeavors to provide for its safety and durability.” Philo, *On Drunkenness* in *The Works of Philo* 208, trans. C.D. Yonge (1993).

¹² See JEFFREY A. BRAUCH, *IS HIGHER LAW COMMON LAW* 37 (Rotham & Co. 1999).

¹³ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *550.

¹⁴ HERBERT W. TITUS, *GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES* 236 (1994).

¹⁵ 4 JAMES KENT, *COMMENTARIES ON AMERICAN LAW*, *190 (O.W. Holmes, Jr., 12th ed. 1878).

¹⁶ *Id.*

Kent unequivocally identified the Divine source of this natural affection of parents for children: “In the intensesness, the lively touches, and unsubdued nature of parental affection, we discern the wisdom and goodness of the great Author of our being, and Father of Mercies.”¹⁷ This natural affection between parent and child is a surprisingly important building block of Anglo-American law, playing an explicit role in the fields of property, contracts, wills, torts, and family law.

A. *Natural Affection in Property Law*

Sir William Blackstone wrote that natural affection can provide good (if not valuable) consideration for the enforceability of a deed of conveyance.¹⁸ Around the same time as Blackstone, Lord Bankton stated similarly that “a man” could give land to “his wife, children, [or] brother” out of “natural love and affection,” but a binding transfer of land to a stranger “must be for money, or other valuable consideration.”¹⁹ This rule allowing natural affection to substitute for valuable consideration in conveyances of land is quite ancient.²⁰

B. *Natural Affection and the Law of Wills*

In the field of wills and intestacy, natural affection can come into play in at least three ways. First, natural affection is relevant to determining testamentary capacity. The ability to identify those for whom the testator should have natural affection is a prerequisite to writing a valid will. To make a will, the testator must be of sound mind.²¹ A key requirement for this testamentary capacity is that the testator know “the persons who are the natural objects of his bounty”²² The natural objects of the testator’s bounty include those for whom she would have a natural affection. Thus, absent testamentary capacity, which includes a mind sound enough to identify the natural objects of the putative testator’s bounty, the testator cannot write an enforceable will at all.

A second way that natural affection impacts the law of wills and intestacy is that devises to those for whom the testator should have natural affection sometimes are seen as morally obligatory or at least morally

¹⁷ *Id.*

¹⁸ See BLACKSTONE, *supra* note 13, at 444.

¹⁹ LORD BANKTON, AN INSTITUTE OF THE LAWS OF SCOTLAND IN CIVIL RIGHTS 245 (Edinburgh, 1751).

²⁰ See, e.g., *Sharington v. Strotten* (1565), 1 Plowd. 298, 304-305, 75 E.R. 454, 463-464.

²¹ JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS & ESTATES 137 (Aspen Pub., 3d ed. 1984).

²² *Id.* at 140.

preferred.²³ This moral preference is reflected in the term “inofficious testament” defined as “a will not in accordance with the testator’s natural affection and moral duties.”²⁴ Another related term is “stranger in blood,” defined as “any person not within the consideration of natural love and affection arising from relationship.”²⁵ So an “inofficious testament” is a will for the benefit of a stranger in blood.

Theoretically, a testator is not required to provide for her children in her will.²⁶ But “the law does not favor cutting children out of the distributive plan where the testator leaves no spouse. A number of doctrines have been flexibly used to protect children, with the consequence that disinheritance is almost always a risky affair.”²⁷ When a testator devises property to a stranger in blood, those to whom the testator did bear natural affection often challenge the validity of such transfers by asserting that the will was the product of undue influence²⁸ or by mounting some other challenge to the will’s validity.²⁹ Moreover, courts sometimes will look upon such bequests slightly askance, requiring further justification. Inofficious testaments are not illegal and can be perfectly enforceable, but such wills are inherently subject to challenge and more frequently are challenged and challenged successfully on grounds such as undue influence.³⁰

A third way natural affection impacts wills and intestacy is that intestacy statutes favor near relatives. If a decedent fails to make a will at all, the state decides where the decedent’s property goes according to the state’s “statute of descent and distribution” (intestacy statute).³¹ All American jurisdictions favor those for whom there is a natural affection – “after setting aside the spouse’s share, children and issue of deceased children take the remainder of the property to the exclusion of everyone else.”³² “If the decedent is not survived by a spouse, descendants, or parents, intestate property passes to . . . collateral relatives.”³³ The intestacy statutes of a particular jurisdiction will often contain tables of consanguinity, which apportion the estate

²³ This philosophy certainly has influenced the provision for an elective share, that is, a certain percentage of an estate guaranteed to a spouse under state law. *See generally* DUKEMINIER & JOHANSON, *supra* note 21, at 391-92.

²⁴ *Inofficious Testament*, BLACK’S LAW DICTIONARY; *see* BLACKSTONE, *supra*, note 13 at *551; *See also* JAMES DALRYMPLE, THE INSTITUTIONS OF THE LAW OF SCOTLAND 430 (Edinburgh, 4th ed. 1693) (In the late seventeenth century, James Dalrymple, Viscount of Stair, cited an epistle of St. Paul (1 Timothy 5:8) in support of a natural moral obligation to provide for one’s relatives after death, but Stair distinguished between this moral obligation and the legal power to dispose of one’s property according to one’s wish)).

²⁵ *See Stranger in Blood*, BLACK’S LAW DICTIONARY.

²⁶ *See* DUKEMINIER & JOHANSON, *supra* note 21, at 441.

²⁷ *Id.*

²⁸ *See generally id.* at 151.

²⁹ *See id.* at 441.

³⁰ *See generally id.*

³¹ *See id.* at 89.

³² DUKEMINIER & JOHANSON, *supra* note 21, at 92.

³³ *Id.* at 93.

according to varying degrees of kinship to the decedent.³⁴ Thus, the intestate decedent's property likely will be distributed to the objects of her natural affection that she would have had to know to be competent to write a will and whom she could avoid in her will only at some risk to the efficacy of her bequest.³⁵

C. Natural Affection and Tort Law Parental Privilege

In the field of American tort law, parents are legally privileged to employ reasonable steps in the discipline of a child, even if those steps otherwise would constitute an intentional tort: "The Bible, itself, repeatedly sanctions the use of physical force as a means of controlling wayward children. Thus, it should come as no surprise that the law privileges parents to use reasonable physical force in disciplining their children."³⁶ Consider a parent's decision to punish a child by making him stay in his room. If an unprivileged person were to confine another in this same way, this action would almost surely constitute the tort of false imprisonment.³⁷ Although this privilege has historically extended, at least in the United States, to reasonable corporal punishment as well, even by those acting *in loco parentis*,³⁸ American tort law includes a line of cases that distinguish between the privilege of parents and the privilege of those acting *in loco parentis*.

In the 1925 case of *Steber v. Norris*,³⁹ the plaintiff, an eleven-year-old boy, was sent by his parents to live on a farm for the summer and to work six hours per day.⁴⁰ Plaintiff disobeyed some of the rules of the farm, including rules against lying and rules regulating the boy's work.⁴¹ As punishment for these infractions, the superintendent of the farm beat the

³⁴ See *id.* at 93-95.

³⁵ This connection between succession and natural affection was already explicit in seventeenth century Scotland: "The line of succession created by law was understood to be . . . what society presumed the deceased would have wanted based on his or her expected natural affections." Katie Barclay, *Natural Affection, Children, and Family Inheritance Practices in the Long Eighteenth Century*, in CHILDREN AND YOUTH IN PREMODERN SCOTLAND 140-41 (Janay Nugent & Elizabeth Ewan eds., 2015). Moreover, when an estate gift fails or lapses, the typical anti-lapse statute keeps the gift from failing by passing it to the survivors of a predeceased heir only if that heir is a blood relative. See DUKEMINIER & JOHANSON, *supra*, note 21, at 354.

³⁶ AARON D. TWERSKI & JAMES A. HENDERSON, JR., TORTS: CASES AND MATERIALS 106 (Aspen Publishers, 2d. ed. 2008); accord LOUIS W. HENSLER III, TORTS: CASES, MATERIALS, QUESTIONS, AND COMMENTS FROM A JUDEO-CHRISTIAN PERSPECTIVE 161-162 (Vandeplas Publishing 2015).

³⁷ See generally HENSLER, *supra*, note 36, at 33-40.

³⁸ See TWERSKI & HENDERSON, *supra*, note 36, at 106. This privilege to employ physical discipline on their children has survived constitutional challenge in the United States Supreme Court. See *Ingraham v. Wright*, 430 U.S. 651 (1976).

³⁹ *Steber v. Norris*, 206 N.W. 173 (Wis. 1925).

⁴⁰ *Id.* at 174.

⁴¹ *Id.*

child with a rubber whip.⁴² In the battery suit that followed, the trial court instructed the jury that defendant was acting *in loco parentis*.⁴³ The defendant's idea, apparently, was that when defendant was striking the plaintiff with the rubber whip, he was asserting parental authority over the boy and that defendant was therefore free of liability for what would otherwise constitute a battery.

Both parties and both the trial and appellate courts appeared to agree that defendant had the right to inflict some punishment on the plaintiff, the only question being whether defendant had exceeded that privilege on the facts of the case. It might seem surprising today that the court did not reject defendant's contention out of hand, but the court acknowledged that a privilege does exist, that a parent would be vested with the authority to enact reasonable corporal punishment on a child, and that this privilege even extends, in some fashion, to those acting *in loco parentis*.⁴⁴ However, the court clarified that the privilege of the parent is not precisely the same as the privilege of one acting *in loco parentis*: "It is not to be assumed that, although a teacher or the defendant in this case stands in the relation of a parent, he has the same right to inflict punishment as a parent."⁴⁵ The privilege of the parent is more thorough, and the court explained why that is so -- because the parent is constrained by "natural affection" in a way that those acting *in loco parentis* are not.⁴⁶ Therefore, it makes sense to extend a greater privilege to parents than to those acting *in loco parentis*. While non-parents in charge of children (usually teachers) do possess a privilege, discipline that might be considered "reasonable" if employed by a parent may well not be considered reasonable for a non-parent.

The *Steber* court relied heavily on the antecedent Vermont case *Lander v. Seaver*.⁴⁷ The facts from *Seaver* involved a defendant schoolmaster who encountered the plaintiff, a boy of about eleven and one of defendant's students, after school as the plaintiff was driving his father's cow along the road in front of defendant's house.⁴⁸ The plaintiff student, in the presence of some of his fellow students, called the schoolmaster "Old Jack Seaver," which was adjudged by the trial court to be "contemptuous" and incendiary.⁴⁹ When the plaintiff student attended school the next morning, the schoolmaster whipped the boy with a small rawhide for what the boy had said after school the previous day, and suit was consequently brought against

⁴² *Id.*

⁴³ *Id.* at 175.

⁴⁴ *See id.*

⁴⁵ *Steber v. Norris*, 206 N.W. 173, 75 (Wis. 1925).

⁴⁶ *See id.* (quoting *Lander v. Seavers*, 32 Vt. 114 (Vt. 1859)).

⁴⁷ *Lander v. Seaver*, 32 Vt. 114 (1859).

⁴⁸ *See id.* at 115.

⁴⁹ *Id.* at 120.

the schoolmaster for battery.⁵⁰

“The [trial] court told the jury that the authority of a schoolmaster over his pupils was nearly related to that of a parent over his child, and that its exercise rested in a measure in discretion . . .”⁵¹ At times, parents may acknowledge retrospectively that their punishments were in excess; this is a mistake, however, that parents are privileged by law to make. In much the same way, Seaver contended that he was privileged to make such a mistake. The appellate court was not persuaded by the argument that the privilege of a schoolmaster is coextensive with the privilege of the parent:

The parent, unquestionably, is answerable only for malice or wicked motives or an evil heart in punishing his child. This great and to some extent irresponsible power of control and correction is invested in the parent by nature and necessity. It springs from the natural relation of parent and child. It is felt rather as a duty than a power. From the intimacy and nature of the relation, and the necessary character of family government, the law suffers no intrusion upon the authority of the parent, and the privacy of domestic life, unless in extreme cases of cruelty and injustice. This parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reasoning.

The schoolmaster has no such natural restraint. Hence he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection.⁵²

Thus, the court held that the schoolmaster, unconstrained by a parent's natural affection, cannot be trusted with the “great and to some extent irresponsible”⁵³ power of the parent. Twenty-first century English speakers do not commonly use the English word “irresponsible” in this way anymore, but here “irresponsible” means something like “unchallengeable.”⁵⁴ In other words, there is no human power to whom the parent must answer. The appellate court stated that this unreviewable power of the parent is a natural

⁵⁰ *Id.* at 115.

⁵¹ *Id.* at 118.

⁵² *Lander*, at 122.

⁵³ *Id.*

⁵⁴ More common contemporary terminology for the concept that parents largely do not have to answer for their good faith discipline of their children is that the parent/child relationship falls within a zone of family privacy. See *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) (natural parent's “liberty interest in family privacy” has its source “in intrinsic human rights”); see also *Lander*, 32 Vt. at 122 (the appellate court in *Lander* likewise referred to “the privacy of domestic life”).

power that is restrained by an affection akin to an “instinct.”⁵⁵ Under this line of tort cases, the jury has the power to judge and control the schoolmaster’s discipline of the child, but the parent acting in good faith is to be controlled only by natural affection.

D. Natural Affection and Child Care and Custody

Perhaps the legal field in which natural affection plays the most influential role is family law, particularly with regard to child care and custody, where a general custodial preference for the fit natural parent has been repeatedly affirmed across virtually all American jurisdictions,⁵⁶ including by the Supreme Court of the United States, where the custodial interest of the parents has repeatedly been held to be of constitutional dimension.⁵⁷ In this context, “[t]he law’s concept of the family . . . has recognized that natural bonds of affection lead parents to act in the best interests of their children.”⁵⁸

The special deference that courts have given to natural parents in custody cases is well-illustrated by *Smith v. Organization of Foster Families For Equality & Reform*.⁵⁹ In *Smith*, a group of foster parents argued that they had a constitutional interest in the custody of their foster children comparable to the constitutional interest of natural parents. But the Court

⁵⁵ *Lander*, 32 Vt. at 122.

⁵⁶ See, e.g., *Ex parte Terry*, 494 So. 2d 628, 632 (Ala. 1986); Appeal of H. R. (*In re Baby Boy C.*), 581 A.2d 1141, 1177 (D.C. 1990); *Stuhr v. Stuhr*, 481 N.W.2d 212, 216 (Neb. 1992); *In re Michael B.*, 604 N.E.2d 122, 127 (Ct. App. N.Y. 1992).

⁵⁷ See *Meyer v. Neb.*, 262 U.S. 390, 399, 401 (1923) (“liberty” protected by the Due Process Clause includes parents’ right to “establish a home and bring up children” and “to control the education of their own”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (“liberty of parents and guardians” includes right “to direct the upbringing and education of children under their control”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’” (citation omitted)); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected”); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course . . .”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing “fundamental liberty interest of natural parents in the care, custody, and management of their child”); *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2574 (2013) (alluding to the “principle, recognized in our cases, that the biological bond between parent and child is meaningful”)(Sotomayor, J., dissenting).

⁵⁸ *Parham v. J. R.*, 442 U.S. 584, 602 (1979); see also *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion).

⁵⁹ *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977)

distinguished between the natural parents' "liberty interest in family privacy," which flows from "intrinsic human rights," and the foster parents' parallel interest, which has its "origins in an arrangement in which the State has been a partner from the outset."⁶⁰ Thus, while not rejecting the legitimate custody interest of the foster parents, the court rejected the argument that such interest was on a par with the natural parents' right because the natural parents' right has its source in intrinsic human rights. By contrast, the foster parents' legitimate interest in the custody of the child comes from the State and therefore is more subject to State control. The natural parent has something the foster parent does not. The natural parent's custody interest is intrinsic in what it means to be human. The state did not and cannot create this right. And so, the right of the natural parent and the interest of the foster parent, while both legitimate and both protected at law, are not equal.⁶¹

As the Court in *Smith* distinguished between the legitimate statutory interest of foster parents and the intrinsic interest of natural parents, so the United States Supreme Court in *Parham v. J.R.* distinguished between the natural parent and the state as caregivers for children. With natural parents, "there is a presumed natural affection to guide their action," but in the case of the parallel "presumption that the state will protect a child's general welfare," the presumed fitness of the state as a caregiver "stems from a specific state statute."⁶² As the natural parent can be trusted to discipline a child in the tort law context in a way that the schoolmaster cannot due to natural affection,⁶³ so natural affection makes the fit natural parent trustworthy in a way that the state and even foster parents are not.

Courts' preference for the natural parent is not focused exclusively on the legitimate desires of the parent. The needs of the child also favor the natural parent as recognized by the Court in *Parham v. J. R.*, the "child's interest . . . is inextricably linked with the parents' interest in and obligation for the welfare and health of the child."⁶⁴ Therefore, "the private interest at stake is a combination of the child's and parents' concerns."⁶⁵ In assessing whether children are being properly cared for, the Court has recognized that "natural bonds of affection [will] lead parents" to promote the child's well-being.⁶⁶ Similarly, the Supreme Court in *Santosky v. Kramer* recognized that the "child and his parents share a vital interest in preventing erroneous

⁶⁰ *See id.* at 845.

⁶¹ *See id.*

⁶² *See Parham*, 442 U.S. at 618.

⁶³ *See supra* notes 36-55 and accompanying text.

⁶⁴ *Parham*, 442 U.S. at 600.

⁶⁵ *Id.*

⁶⁶ *Id.* at 602 (Interestingly, the presumption that natural parents can be trusted to care for their children sometimes has been reversed); Barclay, *supra*, note 35, at 145 (Courts also sometimes have presumed "that a parent's loving treatment of their children was evidence of their biological relationship." So, biological relationship has been treated as evidence of likely loving care, and loving care has been treated as evidence of biological relationship).

termination of their natural relationship.”⁶⁷

The relationship between natural affection and the custodial preference for the natural parent is well-illustrated by the Washington Supreme Court’s 1894 decision in *Lovell v. House of Good Shepherd*.⁶⁸ The natural mother of Maggie Lovell, along with her husband, petitioned for a writ of *habeas corpus* to regain custody of Maggie from the House of the Good Shepherd.⁶⁹ Maggie’s mother, who had become a widow, perhaps believing that she could not care for Maggie alone due to the social constraints of the time, had voluntarily left Maggie in the custody and care of the House of the Good Shepherd, a Catholic orphanage.⁷⁰ Maggie’s mother eventually remarried and sought to regain custody of her child, but the orphanage refused.⁷¹ The Supreme Court of Washington awarded custody to the mother and her husband, discounting any danger posed to the child: “The maternal instinct can generally be relied upon to protect the child far better than strangers who act simply from a cold and unsympathetic feeling of duty to society.”⁷² This preference for natural parents in custody cases so far persists despite attempts to erode it.⁷³

Finally, this brief survey would be incomplete without noting that the International Convention on the Rights of the Child, to which the US is not a signatory, provides, among other things, that the “child . . . shall have . . . the right to know and be cared for by his or her parents.”⁷⁴ This passage was added to the Convention at the behest of a group of Muslim majority countries.⁷⁵

⁶⁷ *Santosky v. Kramer*, 455 U.S. 745, 760–61 (1982).

⁶⁸ *Lovell v. House of Good Shepherd*, 37 P. 660, 661 (Wash. 1894).

⁶⁹ *Id.* at 660.

⁷⁰ *See id.* at 660–61.

⁷¹ *Id.*

⁷² *Id.* at 661–62.

⁷³ As illustrated by the cases cited and discussed throughout this section of this essay, courts have routinely rejected this argument. *See* Comment, *Alternatives to ‘Parental Right’ in Child Custody Disputes Including Third Parties*, 73 YALE L.J. 151 (1963) (In 1963, a student Note published in the Yale Law Journal argued that third parties could sometimes acquire custody interests that are more forceful than those of even fit natural parents); *See also* GOLDSTEIN AND FREUD, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) (Likewise, in an influential book published ten years later, Goldstein and Freud contended that children will form a parental bond with pretty much any caregiver, and once a child gets with an adult caretaker for a significant amount of time, that adult becomes a “psychological parent,” and there is no important custodial distinction between the biological parent and any other psychological parent. Goldstein and Freud argued that the psychological parent should always be given preference in custody proceedings).

⁷⁴ Commission of Human Rights on the Work of Its Forty-fifth Session, Report of the Working Group on a Draft Convention on the Rights of the Child, at ¶112, UN Doc. E/CN.4/1989/48 (Mar. 2, 1989).

⁷⁵ On behalf of Algeria, Egypt, Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Morocco, Oman, Pakistan and Tunisia the delegation of Egypt proposed the following amendments contained in paragraph 93:

Paragraph 1 Should be amended to read as follows: “The child shall have the right from his birth to know and belong to his parents, as well as the right to a name and

II. NATURAL AFFECTION IN RELIGIOUS TRADITIONS SUCH AS THE BIBLE

As demonstrated above, the concept of “natural affection” was a significant part of Anglo-American common law from very early on, at least as far back as the sixteenth and seventeenth centuries.⁷⁶ During this time period, the Christian Bible was a ready source of authority for the learned on all topics:

It should be borne in mind that the intellectual and spiritual climate of the 1600's was quite different from our time. . . . In the 17th century they looked to the Bible and theological principles in general. The most learned, the profoundest thinkers, had recourse to the Bible on almost all questions, especially on public law and principles of justice.⁷⁷

But while earlier writers on natural affection frequently alluded to its Divine origin⁷⁸, the Greek word “*storge*,” which was used by Blackstone to describe the natural affection of parents for children⁷⁹ and which most closely captures the concept, never appears in the Protestant Bible, either in the Greek New Testament or in the Septuagint. It appears twice in the Deuterocanonical (part of the Roman Catholic Scriptures) in 2 Maccabees 6:20 and 9:21, but while the word appears there, the concept is not really explained, and the context is not particularly enlightening. The word *storge* appears several other times in apocryphal Jewish literature that has not been accepted in any Scriptural canon, in 3rd and 4th Maccabees.⁸⁰ These uses are somewhat more significant in that they allude to how mother animals care for their young, but these ancient references are not part of any authoritative mainstream Christian tradition and are not all that helpful in any event. Like those in 2 Maccabees, these texts never define or discuss what natural affection (*storge*) is or should be.

The Christian Bible does include some passages that assume the existence of natural affection even though the word *storge* is not used. For example, one of the most famous Old Testament narratives centers on the

to acquire a nationality." 2. Paragraph 2 Should be amended to read as follows:
"The States Parties to the present Convention shall diligently endeavour to grant their nationality, in accordance with their laws, to a child born in their territory if, at the time of the child's birth, he is not granted nationality by any other State.

See id. at para. 93. According to Egypt's delegate, "the purpose of the first amendment was . . . ensuring the psychological stability of the child, . . . in most cases the right to know his parents was quite essential to the child . . ." *id.* at para. 94.

⁷⁶ *See supra* note 20.

⁷⁷ George Horowitz, *The Privilege Against Self-Incrimination—How Did It Originate?*, 31 TEMP. L.Q. 121, 137 (1958).

⁷⁸ *See, e.g.*, KENT, *supra* note 15.

⁷⁹ *See* BLACKSTONE, *supra* note 13 and accompanying text.

⁸⁰ 3 *Maccabees* 5:32; 4 *Maccabees* 14:13-14, 17; 15:6, 9, 13.

concept of natural affection. The account of Israel's King Solomon in 1 Kings 3:16-28⁸¹ was intended to demonstrate, and has been accepted as strong evidence of, Solomon's extraordinary wisdom.

In this account, Solomon was presiding over a custody dispute and famously threatened to cut the disputed baby in half,⁸² but Solomon's gruesome suggestion was merely a ruse designed to help Solomon discern which contestant was the true mother of the child. One was willing to see the baby cut in half, and the other contestant was not.⁸³ Solomon was able to infer from these contrasting reactions which of the contestants was the child's mother, not merely which was the better mother, but which was the real mother.⁸⁴ The biblical text sets out Solomon's observation of the real mother's reaction to Solomon's suggestion that the baby be divided: "her bowels yearned upon her son."⁸⁵

The Scriptural account of Solomon's thought process is scant, but Solomon must have started his chain of inference⁸⁶ with the unstated premise that virtually all people accept from our shared experience, that when one person loves another, the lover seeks to protect the loved one. Solomon then observed the evidentiary fact that one of the putative mothers sought to protect the child.⁸⁷ From this unstated premise and evidence Solomon apparently inferred that the protective woman loved the child, and because

⁸¹ 1 *Kings* 3:16-28 (King James) ("Then came there two women, that were harlots, unto the king, and stood before him. And the one woman said, O my lord, I and this woman dwell in one house; and I was delivered of a child with her in the house. And it came to pass the third day after that I was delivered, that this woman was delivered also: and we were together; there was no stranger with us in the house, save we two in the house. And this woman's child died in the night; because she overlaid it. And she arose at midnight, and took my son from beside me, while thine handmaid slept, and laid it in her bosom, and laid her dead child in my bosom. And when I rose in the morning to give my child suck, behold, it was dead: but when I had considered it in the morning, behold, it was not my son, which I did bear. And the other woman said, Nay; but the living is my son, and the dead is thy son. And this said, No; but the dead is thy son, and the living is my son. Thus they spake before the king. Then said the king, The one saith, This is my son that liveth, and thy son is the dead: and the other saith, Nay; but thy son is the dead, and my son is the living. And the king said, Bring me a sword. And they brought a sword before the king. And the king said, Divide the living child in two, and give half to the one, and half to the other. Then spake the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine, but divide it. Then the king answered and said, Give her the living child, and in no wise slay it: she is the mother thereof. And all Israel heard of the judgment which the king had judged; and they feared the king: for they saw that the wisdom of God was in him, to do judgment.").

⁸² 1 *Kings* 3:25 (King James).

⁸³ 1 *Kings* 3:26 (King James).

⁸⁴ 1 *Kings* 3:27 (King James).

⁸⁵ 1 *Kings*, *supra* note 83.

⁸⁶ Solomon's chain of inference must have looked something like this: Premise #1: People tend to protect those they love. Evidence: One mother sought to protect the child. Inference: The protective mother loved the child. Premise #2: A true mother tends to love her child. Conclusion: The true mother is the one who loved and protected the child.

⁸⁷ 1 *Kings*, *supra* note 83.

the woman loved the child, she objected to dividing him in two.⁸⁸ Solomon then apparently imported into his analysis another unstated premise that the true mother, in this case, the biological mother,⁸⁹ tends to love her child. Solomon never explicitly states this proposition, this is simply an accepted premise that both Solomon and the millions of people who have acknowledged Solomon's wisdom carry around in our minds based on our experience. Solomon therefore inferred from his earlier conclusion and the natural affection premise that the contestant who objected to dividing the child loved the child and was the true mother.⁹⁰ Thus, Solomon employed the natural affection of mother for child as an assumed premise in his chain of inference. Again, none of Solomon's chain of inference is explicitly stated, yet the reader is to understand, and millions have understood, from Solomon's creation of circumstances that gave the true mother the opportunity to demonstrate her natural affection that Solomon was a wise king of Israel.

Another biblical example that assumes the existence of natural affection, this time from the New Testament, is Matthew 7:9-11, where Jesus asks a series of rhetorical questions:

What man is there of you who if his son asks for bread will he give him a stone; or if he asks for fish will he give Him a serpent? If you then, being evil, know how to give good gifts to your children, how much more shall your father who is in heaven give good things to them that ask him?

Here Jesus assumes (and states) that even evil fathers naturally give good things to their children.

While the Greek word for the natural love of family members for each other, *storge*, never appears in the New Testament, its negative, *astorgos* (the alpha privative adversative prefix added to the root word for family love means "without natural affection"⁹¹), occurs twice in the epistles of St. Paul, both times in reference to a corrupt human society worthy of judgment. In II Timothy 3:1-3, Paul prophesies *astorgos* to be a characteristic of end-time pagans: "In the last days men [(people)] shall be . . . without natural affection."⁹² Thus Paul prophesied that a lack of natural family affection (as one in a list of vices) was a sign of the end times. People would lack this natural family love that one would ordinarily expect people to have within their families. This list of vices prophesied by Paul appears to be modeled

⁸⁸ *Id.*

⁸⁹ 1 *Kings* 3:17 (King James).

⁹⁰ 1 *Kings*, *supra* note 84.

⁹¹ See 46 WILLIAM D. MOUNCE, WORLD BIBLICAL COMMENTARY: PASTORAL EPISTLES 545 (2000).

⁹² 2 *Timothy* 3:1-3 (King James).

on a similar list provided by Paul in the first chapter of his epistle to the Romans.⁹³

This vice list in Romans chapter 1 also includes the word *astorgos*. In Romans 1, Paul warns of the dangers of self-deception:

For the wrath of God is revealed from heaven against all ungodliness and unrighteousness of men who hold the truth in unrighteousness because that which may be known of God is manifest in them for God has showed it unto them. For the invisible things of Him from the creation of the world are clearly seen, being understood by the things that are made even His eternal power and Godhead; so that they are without excuse: Because that, when they knew God, they glorified him not as God, neither were thankful; but became vain in their imaginations, and their foolish heart was darkened. Professing themselves to be wise, they became fools And even as they did not like to retain God in their knowledge, God gave them over to a reprobate mind, to do those things which are not convenient; Being filled with all unrighteousness, fornication, wickedness, covetousness, maliciousness; full of envy, murder, debate, deceit, malignity; whisperers, backbiters, haters of God, spiteful, proud, boasters, inventors of evil things, disobedient to parents, without understanding, covenantbreakers, without natural affection, . . .⁹⁴

Paul says here in Romans 1 that some truth is naturally accessible⁹⁵ to humankind both from Creation (from which humankind can observe truth about God and nature)⁹⁶ and, as the apostle says in Romans 2, from “the law written in their hearts,”⁹⁷ by which people intuitively possess some truth.⁹⁸ Paul then warns here in Romans 1 that when people suppress those things that they “can’t not know,” as Jay Budziszewski put it,⁹⁹ those who suppress that truth are vulnerable to a depraved mind,¹⁰⁰ which has a string of negative

⁹³ See MOUNCE, *supra* note 91, at 543.

⁹⁴ *Romans* 1:18-31 (King James).

⁹⁵ See *International Critical Commentary, Romans* INTERNATIONAL CRITICAL COMMENTARY, ROMANS 1-8, at 113 (J.A. Emerton & C.E.B. Cranfield eds. 1975).

⁹⁶ See *id.* at 114; see also ANCIENT CHRISTIAN COMMENTARY ON SCRIPTURE, VI ROMANS at 36.

⁹⁷ *Romans* 2:15 (King James).

⁹⁸ See ANCIENT CHRISTIAN COMMENTARY ON SCRIPTURE, VI ROMANS at 64; accord PHILIP MELANCTHON, COMMENTARY ON ROMANS 89 (Fred Kramer trans., 1992) (“Here Paul is reasoning that the Gentiles have the Law, that is, a natural knowledge about morals.”).

⁹⁹ J. BUDZISZEWSKI, WHAT WE CAN’T NOT KNOW 19 (2003).

¹⁰⁰ See *Romans* 1:21 (King James).

consequences spelled out in a list of vices, including becoming “without natural affection,” in other words, without natural family love. In his Commentary on this passage from Romans, early reformation theologian Philip Melancthon explained that Paul was condemning the loss of the natural affection for family implanted by God in the human breast: “ἄστοργοι [*astorgoi*] are those who cast off natural feelings toward parents, children, brethren, or people who have merited well. For στόργη [*storge*] signifies good affections divinely implanted in the nature of men . . .”¹⁰¹

Of course, the Bible is not the only source of religious tradition relevant to the concept of natural affection. Paragraph 2214 of the Catechism of the Catholic Church provides that children’s respect for their parents “is nourished by the natural affection born of the bond uniting them.”¹⁰² And at least one version of Sharia favors relatives of a child in questions of custody over “someone unrelated to the child, since [the unrelated] person, even if willing, . . . lacks the tenderness for the child that a relative would have.”¹⁰³

III. NATURAL LAW OR NATURAL SELECTION?

A. Conventional or Natural? Spiritual or Biological?

Since Anglo-American law relies so heavily on the existence of natural affection between parents and their children,¹⁰⁴ it seems prudent to think about whether such affection is real and, if so, precisely what is its nature. As will be demonstrated below, relatively few who have written on the subject seem seriously to doubt the existence of natural affection. Most probably have experienced natural affection either as a parent or as a child or, in many cases, as both. But even assuming natural affection exists, as most seem still to assume, is such affection conventional or natural? Is it an inherent aspect of humanness or is it learned? Just what is natural affection?

This section of the essay will argue that, historically, the generally accepted answer to these questions has been that natural affection is intrinsic to humans and not merely a learned behavior.¹⁰⁵ This section will also address whether natural affection is metaphysical, spiritual, or biological.

¹⁰¹ MELANCTHON, *supra* note 98, at 84.

¹⁰² Catechism of the Catholic Church, http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a4.htm (last visited Nov. 18, 2017) http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a4.htm (last visited Nov. 18, 2017).

¹⁰³ AHMAD IBN NAQIB AL-MISRI (d. 769/1368), THE RELIANCE OF THE TRAVELLER: THE CLASSIC MANUAL OF ISLAMIC SACRED LAW 'UMDAT AL-SALIK, IN ARABIC WITH FACING ENGLISH TEXT, COMMENTARY, AND APPENDICES, EDITED AND TRANSLATED BY NUH HA MIM KELLER 552 (Amana Publications, Beltsville, Md) (revised edition 1994).

¹⁰⁴ See *supra* Section I.

¹⁰⁵ See 2 Timothy 3:1-3, *supra* note 92 and accompanying text (To the extent that this traditional understanding of natural affection now is being called into question, perhaps we are seeing St. Paul’s prophecy that people will exhibit a lack of natural affection (as some always have) finally coming to fuller fruition?).

Even assuming reality is not purely materialistic—that there are metaphysical, even spiritual, realities, real non-material facts, that we cannot hear, smell, taste, touch, or see—that does not answer whether natural affection is part of a metaphysical or spiritual reality or perhaps rather a manifestation of a purely material reality or even some mix of the two. That question has not been left entirely to speculation on contemporary television dramas; there has been some historical academic discussion about the source of natural affection.

Until the 19th, or even as recently as the early 20th century, there seems to have been a majority acceptance in the Anglo-American culture that natural affection was a tenet of natural law, even theistic natural law. One historian has described the seventeenth century understanding of natural affection this way: “[T]he growing popularity of natural law theories amongst lawyers and philosophers across Europe reinforced the importance of natural affection within the family. Most argued that this emotional bond between parent and child was a biological or innate response designed to ensure the continuation of the population.”¹⁰⁶ Even the seventeenth century English philosopher Thomas Hobbes, who sometimes is thought to have been a materialist, apparently gave high regard to the “conjugal affection” in families as part of the law of nature (and thus, not merely conventional).¹⁰⁷ In the late seventeenth century, James Dalrymple, Lord Stair, penned his magnum opus, *The Institutions of the Law of Scotland*, which “acted as the foundation of modern Scottish law.”¹⁰⁸ In the opening paragraph of Title V (captioned “Obligations between Parents and Children”), Stair grounded family obligations in “the Obedience Man oweth to his Maker, who hath written this Law in the Hearts of Parents and Children.”¹⁰⁹ No significant hint of dissent from this view can be perceived through the seventeenth century.

In 1711, the Earl of Shaftesbury, writing about the need for humans to live in society, famously wrote of “generation” being “natural” and of “natural affection and the care and nurture of the offspring” being “natural,”¹¹⁰ the word “natural” appearing four times in this very brief passage from Shaftesbury. What did Shaftesbury mean when he wrote of the “affection and the care and nurture of offspring” being “natural”? While Shaftesbury may have been a bit of a transitional figure rejecting some of the seventeenth-century view of natural law, there is no indication in his

¹⁰⁶ Barclay, *supra* note 35, at 136-37.

¹⁰⁷ See DANIEL CERE, *THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS* 281 (Scott FitzGibbon, Lynn D. Wardle, & A. Scott Loveless eds. 2010).

¹⁰⁸ Barclay, *supra* note 35, at 138-39.

¹⁰⁹ JAMES DALRYMPLE, *THE INSTITUTIONS OF THE LAW OF SCOTLAND* 37 (Edinburgh, 1693); *Romans* 2:15, *supra* note 97 and accompanying text.

¹¹⁰ ANTHONY EARL OF SHAFTESBURY, *CHARACTERISTICS OF MEN, MANNERS, OPINIONS, TIMES*, ED. JOHN M. ROBERTSON 264 (London: Grant Richards, 1900).

writings that he rejected the fundamental idea that the entire universe, including human beings, is a teleological creation, designed to good ends, and that this order was the product of divine intelligence.¹¹¹ So when Shaftesbury wrote of the affection of parents for children as “natural,” he likely meant that God designed such affection into humanity.

Similarly, in the late 18th century, Adam Smith wrote about natural family affection in *The Theory of Moral Sentiments*:

Every man feels his own pleasures and his own pains more sensibly than those of other people. . . . After himself, the members of his own family, those who usually live in the same house with him, his parents, his children, his brothers and sisters, are naturally the objects of his warmest affections. . . . This sympathy too, and the affections which are founded on it, are by nature more strongly directed towards his children than toward his parents, and his tenderness for the former seems generally a more active principle, than his reverence and gratitude toward the latter.¹¹²

Some tend to think of Smith as a sort of proto-utilitarian whom one might imagine would push against the by then traditional natural law conception of natural affection¹¹³, but Smith seems to have accepted the idea that natural affection is a tenet of natural law given by a divine intelligence for the good of humankind. Twentieth-century economist Jacob Viner observed that “Smith definitely commits himself to the theism of his time. The harmony and beneficence to be perceived in the matter-of-fact processes of nature are the results of the design and intervention of a benevolent God.”¹¹⁴ Ronald Coase observed that Smith’s attitudes on “the nature of man” were “quite widely shared in the eighteenth century, at any rate, in Scotland, but no doubt elsewhere in eighteenth century Europe.”¹¹⁵ In accord with that generally accepted view of the time, Smith developed “his system of ethics on the basis of a doctrine of a harmonious order in nature guided by God . . .”¹¹⁶

“[T]he essence of Smith’s doctrine is that Providence has so fashioned the constitution of external nature as to make its processes favorable to man, and has implanted *ab initio* in human nature such sentiments as would bring

¹¹¹ *See id.*

¹¹² ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 37-38 (Philadelphia 1817).

¹¹³ *See*, Coase, *supra* note 4, at 529 (“It is sometimes said that Adam Smith assumes that human beings are motivated solely by self-interest.”).

¹¹⁴ Jacob Viner, *Adam Smith and Laissez-Faire*, in ADAM SMITH 1776-1926: LECTURES TO COMMEMORATE THE SESQUICENTENNIAL OF THE PUBLICATION OF “THE WEALTH OF NATIONS” 116, 121 (1928); *but see* Coase, *supra* note 4, at 538.

¹¹⁵ *See* Coase, *supra* note 4, at 529.

¹¹⁶ Viner, *supra* note 114, at 119.

about, through their ordinary working, the happiness and welfare of mankind.”¹¹⁷ Thus, like his predecessors by decades, Shaftesbury and Stair, Smith appears to have accepted humankind’s natural affection for their own children as the result of God’s creative plan and design for humankind.¹¹⁸ Smith also apparently rejected the idea that natural affection is purely biological.¹¹⁹ Smith argued that a blood connection alone, without the addition of sympathy habituated through cohabitation or at least some knowledge of the blood connection, produces no affection.¹²⁰ Smith compared natural affection to the affection among professional colleagues that the Romans called *necessitudo*.¹²¹

Even Smith’s contemporary, David Hume, in his *Treatise of Human Nature* wrote, “We blame a father for neglecting his child. Why? because of justice it [shows] a want of natural affection, which is the duty of every parent.”¹²² And so Hume wrote that parents “are restrain[e]d in the exercise of their authority [in the government of their offspring] by that natural affection, which they bear their children.”¹²³ Thus Hume, sometimes thought to have been an atheist who apparently lacked Smith’s commitment to a teleological view of the universe designed by a divine intelligence toward a good end, nevertheless accepted the existence of natural affection and that parents are restrained by it to the benefit of their children. Hume seemed to grope for a way to avoid the divine implications of Smith’s teleology, but the escape hatch did not appear clearly until Darwin lived and wrote shortly after Hume. As Ronald Coase has explained, back in the mid-to late-eighteenth century,

there was no way of explaining how such a natural harmony [in human propensities] came about unless one believed in a personal God who created it all. Before Darwin, Mendel and perhaps also Crick and Watson, if one observed, as Adam Smith thought he often did, a kind of harmony existing in human nature, no explanation could be given if one were unwilling to accept God the creator.¹²⁴

Thus, with the publication of Darwin’s *Origin of the Species*, it suddenly

¹¹⁷ *Id.* at 121.

¹¹⁸ *See id.*

¹¹⁹ *See* Smith, *supra* note 112, at 40.

¹²⁰ *Id.* at 43.

¹²¹ *Id.* at 45. Thus, Smith’s conception of “natural affection” seems to accord with that of C.S. Lewis, who saw *storge* (natural affection) as a sort of solicitude produced by exposure. Lewis even dropped the word “natural” and translated as simply “affection.” *See* Lewis, *supra* note 6, at 230.

¹²² DAVID HUME, A TREATISE OF HUMAN NATURE 478 (L.A. Selby-Bigge ed., Oxford at the Clarendon Press 1888).

¹²³ *Id.* at 486.

¹²⁴ Coase, *supra* note 4, at 539.

became possible to imagine the existence of the nearly universally observed natural affection between parents and children as a product of natural selection entirely apart from any “God of nature.” So, while even the cold science of economics recognizes the reality of parental altruism toward their children as “important within a family,”¹²⁵ leading thinkers of the 20th and 21st centuries have been less willing to accept the idea, which prevailed in England and America until the time of Darwin, of a harmonious natural law written on the human heart by the Creator. For example, leading law and economics scholar and American federal appellate judge Richard Posner attributes altruism among kin to sociobiology according to which people favor their own offspring because natural selection has developed that characteristic in the human race through the survival of the fittest.¹²⁶ It has been suggested that in species, such as humans,

[w]here the male invests parental care, female choice [in a mate] . . . should [to make the species more fit to survive] . . . involve, perhaps primarily involve, questions of the male's willingness and ability to be a good parent. Will he invest in the offspring? If willing, does he have the ability to contribute much?¹²⁷

Natural selection might even go so far as to instill within the human breast the biological tendency to mate with a sexual partner ideally suited to raise their children together as a matched pair so that substituting another parent for one of the biological parents would be to the detriment of the children: “Again, natural selection may favor female attentiveness to complementarity: do the male's parental abilities complement her own? Can the two parents work together smoothly? Where males invest considerable parental care, most of the same considerations that apply to female choice also apply to male choice.”¹²⁸

Like Posner, Ronald Coase, a father of law and economics in America and Posner's colleague at the University of Chicago, accepted the existence of natural affection but rejected it as a product of the imprint of divine intelligence on human nature. In trying to explain why utility-maximizing parents make sacrificial decisions on behalf of their children, and specifically contrasting his view on that subject with Adam Smith's theistic view, Coase attributed parental altruism to natural selection: “Today we would explain such a harmony in human nature as a result of natural

¹²⁵ GARY S. BECKER, *A TREATISE ON THE FAMILY* 277 (First Harvard Univ. Press paperback ed. 1993).

¹²⁶ RICHARD A. POSNER, *SEX AND REASON* 407 (1992).

¹²⁷ Robert L. Trivers, *Parental Investment and Sexual Selection*, in *SEXUAL SELECTION AND THE DESCENT OF MAN 1871-1971* 136, 167 (Bernard Campbell ed. 1972).

¹²⁸ *Id.*

selection, the particular combination of psychological characteristics being that likely to lead to survival.”¹²⁹ The children of those who, through some genetic accident, tend to love their children, not surprisingly, tend to survive and to pass on that benevolent tendency to their own children.¹³⁰ This genetically inherited trait then is important to the efficient delivery of effective child-rearing services:

The great advantage of the market is that it is able to use the strength of self-interest to offset the weakness and partiality of benevolence, so that those who are unknown, unattractive, or unimportant, will have their wants served. But this should not lead us to ignore the part which benevolence and moral sentiments do play in making possible a market system. Consider, for example, the care and training of the young, largely carried out within the family and sustained by parental devotion. If love were absent and the task of training the young was therefore placed on other institutions, run presumably by people following their own self-interest, it seems likely that this task, on which the successful working of human societies depends, would be worse performed. At least, that was Adam Smith’s opinion¹³¹

Thus, while there has been no effective challenge to the fact of the natural affection of parents for children, a fact upon which so much Anglo-American law is built, the theoretical underpinnings of that affection have come under challenge.

B. Conclusion: Does Any of this Matter? It Mattered to Charlie Gard and His Parents

Clearly, natural affection has been an important concept to Anglo-American law.¹³² Less clear is the importance of the theoretical underpinnings of that natural affection. What are the implications if natural affection is either natural or learned? Does it matter whether natural affection is spiritual, biological, or some combination of the two?

First it should be noted that what I have been calling the teleological view of natural affection as a divinely-ordained aspect of human personality designed toward the end of human flourishing and the natural selection view

¹²⁹ Coase, *supra* note 4, at 539.

¹³⁰ See Becker, *supra* note 125, at 302 (“altruism toward children is likely to be passed on from one generation to the next.”).

¹³¹ Coase, *supra* note 4, at 544.

¹³² See *supra* text accompanying notes 10–75.

of natural affection as a product of biological processes that drive toward human flourishing are not necessarily mutually exclusive. It is theoretically possible that a divine intelligence could use natural selection to write natural affection onto the hearts of humankind. But there is an important division between those views (dominant, not long ago) that place a divine intelligence behind natural affection and some more modern views that see natural affection as the pure product of impersonal natural forces. If natural affection is a divinely decreed part of ordinary human nature, if this is a tenet of theistic natural law that God has used to define what it means to be human, then natural affection is part of the essential make up of humans that is unlikely to change. That view of natural affection as a divinely-conceived essential characteristic of humanity recommends a continued expansive role for natural affection in human law. This view of natural affection as a metaphysical reality suggests a continued expansive role for natural affection because natural affection would then be more permanent and reliable. There might be aberrations, as there always have been, but the rule will not change unless the divine intelligence that instituted natural affection changes it.

If, on the other hand, natural affection is the pure product of biological selection, then natural affection may at some point become no longer necessary to the flourishing of the species, and it may be “unselected.” The human race could evolve past the need for natural affection, and such affection could drop out of the human genome like an obsolete appendage. Biological parents could become secondary, or even completely unnecessary, to the childcare enterprise. Children would need only some “psychological parent,” and any competent adult caretaker would do.

That would be a significant social shift, and perhaps the societal ground work already has been laid in Europe and now is being laid in America for the acceptance of such a shift. Some may already regard natural affection of parents for their children as a mere relic of a bygone era. MSNBC television host Melissa Harris-Perry sparked a bit of a firestorm a few years ago when as part of a network promo she advocated breaking down the old idea that kids and parents belong to each other: “[w]e have to break through our kind of private idea that kids belong to their parents, or kids belong to their families, and recognize that kids belong to whole communities.”¹³³ Of course, Harris-Perry did not invent this idea.¹³⁴ She is not even the most prominent contemporary American proponent of the idea. That distinction belongs to Hillary Rodham Clinton:

¹³³ Hollie McKay, *Critics slam MSNBC host's claim that kids belong to community, not parents*, FOX NEWS (Apr. 9, 2013), <http://www.foxnews.com/entertainment/2013/04/09/critics-slam-msnbc-hosts-claim-that-kids-belong-to-community-not-parents.html>.

¹³⁴ In Plato's Republic, “wives and children must be on common.” PLATO, *THE REPUBLIC OF PLATO* 240, (Benjamin Jowett trans., Willey Book Co. 1901).

Children exist in the world as well as in the family. From the moment they are born, they depend on a host of other “grown-ups” . . . who touch their lives directly and indirectly. . . . Each of us plays a part in every child’s life: It takes a village to raise a child.

. . . [T]hat old African proverb . . . offers a timeless reminder that children will thrive only . . . if the whole of society cares enough to provide for them. Soon after I began writing, a friend sent me the cartoon on this page, which I think about every time I hear someone say that children are not the responsibility of anyone outside their family.¹³⁵

This sort of social argument seems more consonant with a purely biological basis for natural affection under which, as society and technology “advance,” we may no longer need parents to care for the community’s children.¹³⁶

This shift from a view of natural affection that defers to biological parents as the best decision makers for the wellbeing of their children to a view of children as a resource to be cared for by the entire community was felt keenly by the family of Charlie Gard. In a desperate attempt to seek further treatment for their gravely ill son, Charlie’s parents became embroiled in a dispute, first with Charlie’s doctors, and then with the Courts of the U.K. over who should have ultimate responsibility to make decisions for Charlie. Charlie’s parents wanted to pursue experimental treatment in the United States in a desperate attempt to save Charlie’s life, but Charlie’s doctors believed that keeping Charlie alive for such treatment would only prolong his suffering.¹³⁷ To resolve this disagreement, Charlie’s treating physicians applied to the U.K. High Court for an order providing, among other things,

(2) that it is lawful, and in Charlie’s best interests, for

¹³⁵ HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE* 11-12 (First Touchstone ed. 1996).

¹³⁶ Perhaps surprisingly, the contemporary evangelical Christian adoption movement may be contributing to such a diminished sense of the importance of the traditional natural family. David Smolin identified this problem:

[I]nsistence on the centrality of the vertical adoption metaphor as a necessary and primary way of viewing the Christian’s relationship with God may lead to a diminishment of the significance of natural family ties. Placed on the horizontal, human plane, the implication can be that mere biological ties are insignificant: it is only adoption that is redemptive!

David M. Smolin, *Of Orphans and Adoption, Parents and the Poor, Exploitation and Rescue: A Scriptural and Theological Critique of the Evangelical Christian Adoption and Orphan Care Movement*, 8 *REGENT J. INT’L L.* 267, 315 (2012).

¹³⁷ See *Gard v. United Kingdom*, App. No. 39793/17, Eur. Ct. H.R. (2017).

artificial ventilation to be withdrawn;

3) that it is lawful, and in Charlie's best interests, for his treating clinicians to provide him with palliative care only; and

(4) that it is lawful, and in Charlie's best interests, not to undergo nucleoside therapy provided always that the measures and treatments adopted are the most compatible with maintaining Charlie's dignity.¹³⁸

In other words, Charlie's doctors believed that further life-preserving treatment would not be in Charlie's best interest, and so they asked the High Court for permission to allow Charlie to die in a way they believed to be compatible with Charlie's dignity. The High Court agreed with Charlie's doctors and rejected his parents' argument that decisions about Charlie's treatment should be left to them: "A child's parents having parental responsibility have the power to give consent for their child to undergo treatment, but overriding control is vested in the court exercising its independent and objective judgment in the child's best interests."¹³⁹ Ultimately, it was up to the Court, not Charlie's parents, to decide what was best for Charlie.

The scope of the High Court's order is significant. The Court ordered, not only that the hospital could stop treating Charlie, but also that Charlie's parents were not permitted to take Charlie to another reputable physician for treatment.¹⁴⁰ Thus, the Court was not only freeing Charlie's doctors from providing treatment that they believed to be against Charlie's best interest, but the Court was also making the decision that no further treatment was in Charlie's best interest and that Charlie's parents would be prevented from seeking further treatment elsewhere. Not deterred, Charlie's parents appealed, arguing that:

the hospital had no legal standing to interfere with decisions taken by the parents in the exercise of their parental responsibility, and the court, correspondingly, had no jurisdiction to uphold and support the hospital's position in that regard. . . . [T]he court lacked jurisdiction to make any declaration as to [other therapy that the parents might seek], other than to hold that it was lawful, in the circumstances,

¹³⁸ Great Ormond Street Hospital v. Yates and Gard, [2017] EWHC 972 (Fam), at para. 5.

¹³⁹ *Id.* at para. 36.

¹⁴⁰ *See id.*

for the hospital, itself, to refuse to provide that treatment.¹⁴¹

But the Court of Appeals refused to defer to the judgment of Charlie's parents regarding his best interests:

The court evaluates the nitty-gritty detail of each option from the child's perspective. It does not prefer any particular option simply because it is put forward by a parent or by a local authority. The judge decides what is in the best interests of the child by looking at the case entirely through eyes focused on the child's welfare and focused upon the merits and drawbacks of the particular options that are being presented to the court.¹⁴²

Charlie's parents were nothing if not persistent. They appealed again, arguing before the United Kingdom's Supreme Court that

decisions taken by parents who agree with one another are non-justiciable. Parents and parents alone are the judges of their child's best interests. Any other approach would be an unjustifiable interference with their status as parents and their rights under Article 8 of the European Convention on Human Rights.¹⁴³

But the U.K. Supreme Court rejected this argument, holding that "parents are not entitled to insist upon treatment" when the Court and the child's court-appointed guardian believe that the treatment is not in the child's best interest.¹⁴⁴

When assessing the parents' family privacy argument, both the U.K. Supreme Court and the European Court of Human Rights saw a conflict between the interest of Charlie Gard and the interests of his parents.¹⁴⁵ Charlie's parents wanted something that the doctors, the Courts, and the court-appointed guardian believed was not best for Charlie. This approach is quite a contrast with that of the U.S. Supreme Court, which has seen a unity of interest between the child and his parents in having the parents be the ones to make important decisions for the child.¹⁴⁶ The U.K. and European Courts seemed not to conceive of the idea that by depriving Charlie of the

¹⁴¹ In the Matter of Charles Gard, [2017] EWCA Civ 410, at para. 87.

¹⁴² *Id.* at para. 95.

¹⁴³ *In the matter of Charlie Gard, Lady Hale's explanation of the Supreme Court's decision, as delivered in court on 8 June 2017*, SUPREME COURT UK (Jun. 8, 2017), <https://www.supremecourt.uk/news/permission-to-appeal-hearing-in-the-matter-of-charlie-gard.html>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; see *Gard v. United Kingdom*, App. No. 39793/17, Eur. Ct. H.R. (2017).

¹⁴⁶ See *supra* text accompanying notes 64–67.

care of his parents who possessed natural affection for Charlie, they were violating not only the parents' legitimate interests, but also Charlie's.¹⁴⁷

One final distinction between a spiritual view of natural affection and a purely biological view is that a purely biological form of natural affection, or even natural affection that is divinely imparted through a biological mechanism, would suggest that natural affection is at least somewhat more likely to be limited to biological parents because the affection must be a characteristic that is produced through biological mutation and selection.¹⁴⁸ It must spread biologically. It is possible to imagine a non-particularized

¹⁴⁷ Charlie's parents were forced to end their fight to save him when the legal issues were mooted by the facts on the ground. It eventually became obvious, even to Charlie's parents, that the damage done to Charlie had finally become irreversible. They engaged in one more legal fight with the hospital over whether Charlie would be allowed to die at home. They lost that fight, too. Charlie died in hospice under terms dictated by the Court. *See Charlie Gard to be moved to hospice to die after parents 'denied final wish'*, THE TELEGRAPH (Jul. 27, 2017, 5:11PM), <http://www.telegraph.co.uk/news/2017/07/27/charlie-gard-moved-hospice-die-parents-fail-settle-dispute-hospital>.

¹⁴⁸ Since adoption as we know it is a product of modern America, most of the thinkers discussed in this essay almost certainly had in mind only biological parents, and to the extent that the concept of natural affection is built on biblical notions, it may be limited to biological parents. *See* Smolin, *supra* note 136, at 308 ("when something akin to adoption is viewed positively in the Bible, it generally maintains, rather than breaks, the biological lineage"). Smolin alludes to "millennia of teaching about the significance of natural parental ties." *Id.* at 315. This historical emphasis on biological parental ties may stem from the Bible. The biblical significance of the biological union of man and woman centers around five appearances of the biblical phrase "two souls in one flesh." This phrase first appears in Genesis 2:24 as part of the account of God's creation of the first family. The other four biblical appearances of "two souls in one flesh" are allusions to this foundational occurrence in Genesis. There, God determined that "[i]t is not good that man should be alone." Therefore, God determined to make a suitable counterpart to the man. *See* Genesis 2:18. Immediately following Adam's approving response to the introduction of Eve, Adam's specially created counterpart, comes the following gloss by the author of Genesis: "Therefore shall a man leave his father and his mother, and shall cleave unto this wife: and they shall be one flesh." Genesis 2:24. This is the first appearance of "two souls in one flesh" in the Bible.

The second and third biblical occurrences of "two souls in one flesh" appear in St. Matthew's and St. Mark's parallel gospel records of Jesus' response to questions concerning divorce from first-century experts on Jewish law. *See* Mark 10:7-8; Mathew 19:5. In His answer, Jesus quoted the seminal text from Genesis: "For this cause shall a man leave his father and mother, and cleave to his wife; and they twain shall be one flesh." Mark 10:7-8; Matthew 19:5. Jesus then adds His own conclusion: "Wherefore they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder." Matthew 19:6; *accord* Mark 10:8-9.

The final two biblical occurrences of "two souls in one flesh" appear in the writings of St. Paul, once in a passage warning against sexual impurity (1 Corinthians 6:16) and once in Paul's most extensive extant teaching on marriage and the family (Ephesians 5:22-6:4). In the former passage, Paul warns that one who is "joined to" a prostitute is "one body" with the prostitute. In the latter passage, Paul exhorts husbands to "love their wives as their own bodies." Ephesians 5:28. In explaining that "he that loveth his wife loveth himself," Paul quoted the now familiar passage from Genesis. *See* Ephesians 5:28.

The point of this lengthy footnote on the biblical teaching concerning the biological union of husband and wife, which teaching would have been familiar to most of the earlier Christian legal thinkers discussed in this essay (*see* CHRISTOPHER N.L. BROOKE, THE MEDIEVAL IDEA OF MARRIAGE (1989)), might suggest that the biological connection between parents and children should be given greater weight with regard to children that are the production of the physical union between the two biological parents. And, of course, there is a natural selection version of this same argument. *See, supra* note 125 and accompanying text.

natural affection for all children generally that is produced through natural selection, but this is not easy to imagine, and such a non-particularized affection for all children, not only the parent's own children, is not the form of natural affection upon which so much of Anglo-American law has been built for centuries. But if natural affection of parents for children is a characteristic placed in the human breast by humankind's Creator, then it is somewhat easier to imagine a more expansive sort of natural affection that extends more easily beyond the biological parents to adoptive parents and even foster parents, but these possibilities raise a host of new questions beyond the scope of this essay.