

Natural Affection: Natural Law or Natural Selection, and Does It Matter? Louis W. Hensler III ©2017

Natural Affection's Historical Significance

A. In the Bible

1. *Storge* ("natural affection") is one of several Greek words for "love," but it is never used at all in the protestant Bible (either the Septuagint or the New Testament). It refers to the natural love that members of the same family have for each other.
2. Apocrypha
 - a. Two minor occurrences in 2 Maccabees (6:20 and 9:21), which is part of the *Deuterocanonical*.
 - b. Several significant occurrences in 3 and 4 Maccabees (3 Maccabees 5:32; 4 Maccabees 14:13-14,17; 15:6,9,13), which have not been accepted into any Scriptural canon.
3. Two occurrences of *astorgos* of in the New Testament:
 - a. "Without understanding, covenant breakers, without natural affection, implacable, unmerciful" (Romans 1:31) (KJV).
 - b. "In the last days . . . men shall be . . . without natural affection . . ." (II Timothy 3:1-3)(KJV).
4. Solomon's chain of inference in 1 Kings 3:16-28.

B. Speeches of Cicero

1. "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 the speeches is that between parent and child." Treggiari, Susan. Putting the family across: Cicero on natural affection. na, 2005 at 16.
2. "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.

C. In Modern Law

1. "The affection which a husband, a father, a brother, or other near relative, naturally feels towards those who are so nearly allied to him . . ." Bouvier's Law Dictionary (1856).
2. Child Custody (with Constitutional dimensions)

- a. "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." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).
 - b. Many jurisdictions apply a custodial preference for a fit natural parent over a party lacking this biological link. *Cf. Smith v. Organization of Foster Families For Equality & Reform*, 431 U.S. 816, 845 (1977) (distinguishing a natural parent's "liberty interest in family privacy," which has its source "in intrinsic human rights," from a foster parent's parallel interest in his or her relationship with a child, which has its "origins in an arrangement in which the State has been a partner from the outset").
 - c. "[H]istorically [the law] has recognized that natural bonds of affection [will] lead parents" to promote their child's well-being. *Parham v. J. R.*, 442 U.S. 584, 602 (1979).
 - d. "[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Santosky v. Kramer*, 455 U.S. 745, 760-61 (1982).
 - e. U.S. Supreme Court Justice Sonia Sotomayor, in dissent, recently noted the "principle, recognized in our cases, that the biological bond between parent and child is meaningful." *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013).
 - f. This preference is founded in the "presumption that fit parents act in the best interests of their children." *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion).
 - g. This preference for natural parents so far persists despite attempts to erode it.
 - i. *Beyond the Best Interests of the Child*, by Joseph Goldstein, Anna Freud, and Albert J. Solnit. New York: The Free Press (MacMillan Publishing Co.) 1973.
 - ii. Note, *Alternatives to "Parental Right" in Child Custody Disputes Including Third Parties*, 73 Yale L.J. 151 (1963).
3. "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents." Convention on the Rights of the Child, Article 7, UN Doc. E/CN.4/1989/48, para. 93.
 4. Wills and Intestacy
 - a. Testamentary capacity requires that decedent knew "the persons who are the natural objects of his bounty . . ." Jesse Dukeminier & Stanley M. Johanson, *Wills, Trusts & Estates*, Third Edition, Aspen Publishers, 1984.

- b. Intestacy statutes favor near relatives, and “unnatural” dispositions in wills tend to be subject to challenge.
5. Parental Privilege in Tort (distinguishing parents from those acting *in loco parentis*).
- a. “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.” *Lovell v. House of Good Shepherd*, 37 P. 660, 661 (Wash. 1894).
 - b. “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.” *Lander v. Seaver*, 32 Vt. 114, 122 (1959).

Natural Law or Natural Selection?

- A. In 1711 the Earl of Shaftesbury famously wrote of “natural affection and the care and nurture of the offspring” being “natural.” Anthony Earl of Shaftesbury, *Characteristics of Men, Manners, Opinions, Times*, ed. John M. Robertson, in two volumes, vol. 2 (Gloucester, Mass.: Peter Smith, 1963).
- B. “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.” Adam Smith, *The Theory of Moral Sentiments* 3 (E.G. West ed. 1969).
- C. Richard Posner attributes this altruism among kin to sociobiology, according to which people favor their own offspring because natural selection has developed that characteristic within the human race to promote survival of the species. Richard A. Posner, *Sex and Reason* 189 (1992).

Does it Matter?

- A. Spiritual v. Material
- B. If natural affection is spiritual, is there a material element?
- C. Implications of the spiritual or material nature of natural affection.