

242 RHR

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Law, Religion, and Human Rights in David Little's Thought

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Abstract

This Essay traces David Little's pioneering work on religion, human rights, and religious freedom over the past half century, and its distillation in a recent collection of his essays and a Festschrift in his honor.

Keywords: David Little; human rights; religious freedom; conscience; free exercise of religion; Roger Williams; John Calvin; Calvinism; malum in se; religious skepticism; natural law; natural rights; self-evidence; harm principle; gratuitous pain; two-tiered rights theory

David Little, *Essays on Religion and Human Rights: Ground to Stand On*. Cambridge: Cambridge University Press, 2015. Pp. xvi + 403. \$99.00 (cloth). ISBN: 97811070722626

Religion and Public Policy: Human Rights, Conflict and Ethics – A Festschrift in Honor of David Little. Edited by Sumner B. Twiss, Marian Gh. Simion, and Rodney L. Petersen. Cambridge: Cambridge University Press, 2015. Pp. xl + 372, \$99.00 (cloth). ISBN: 9781107090361

David Little has pioneered the study of religion, human rights, and religious freedom during 55 years of distinguished scholarly work at Yale, Harvard, Virginia, Georgetown, and the United States Institute of Peace. Starting with his first major book, *Religion, Order, and Law: A Study in Pre-Revolutionary England* (1969), he has traced cardinal principles like freedom of conscience and free exercise of religion from their earliest formulations in Stoic philosophy and Roman law, through the writings of Augustine, Aquinas, the medieval canonists and scholastics, and their many early modern heirs. Among the latter, he has explored most deeply the contributions of Protestants to the Western understanding of human rights and religious freedom, with special focus on John Calvin, John Locke, Roger Williams, and Reinhold Niebuhr, all of

whose ideas he connects to each other and to the broader Western tradition in fresh and inventive ways. He has written astutely on the vexed questions arising under the First Amendment's guarantees of no government establishments of religion and no prohibitions on its free exercise. And he has charted many of the religious sources and dimensions of modern human rights, particularly the fundamental international protections of freedom of thought, conscience, and belief, freedom from religious hatred, incitement, and discrimination, and freedom for religious and cultural self-determination.

Little has also worked extensively on broader questions of religion, public policy, and peacebuilding. He has offered insightful and incisive treatments of violence and terrorism, nationalism and foreign policy, just war and just peace-making in such places as Vietnam, Ukraine, Sri Lanka, Tibet, and Iraq – and recently coedited the *Oxford Handbook on Religion, Conflict, and Peacebuilding* (2015). He has engaged deeply with scholars of Islam, Judaism, Buddhism, and other faiths in developing the field of interreligious ethics, publishing a classic text, *Comparative Religious Ethics* (1978), with his longstanding coworkers, John Kelsay and Sumner Twiss. Little has earnestly defended a form of liberalism that leaves ample room for religion in all forms and forums of public life. And he has issued devastating criticisms of both secularists and religionists who are critical of human rights as a core feature of democratic government and international diplomacy – from Jeremy Bentham and David Hume to Richard Rorty and Alasdair MacIntyre. All of his work is marked by clear, candid, and concise prose, close exegesis, analytical precision, trenchant criticism, engaging synthesis, and historical, theological, and philosophical gravitas.

The two books under review illustrate, evaluate, and elaborate Professor Little's prodigious contributions to these fields. First, *Essays on Religion and Human Rights* collects a dozen of Little's new and updated studies, with a bracing foreword by John Kelsay. Second, *Religion and Public Policy* places Little's life work under the critical review of seventeen former students and colleagues, with a strong Introduction by Sumner Twiss, and an engaging Afterword by Little himself.

In several of the *Essays*, Little extends his attack on rights critics, now including Samuel Moyn, Talal Asad, Brian Leiter, Winnifred Sullivan, and others who, in his view, trade in badly distorted histories, gleefully abstracted idealism, and cynical deconstructions of human rights that leave the world with too few resources for political order or lasting peace. Other chapters offer respectful but probing engagement with major Islamic scholars of human rights like Abdullahi An-Na'im and Abdulaziz Sachedina, and with various liberal defenders of human rights from John Locke and Thomas Jefferson to John Rawls and Ronald Dworkin. David Little's hero, Roger Williams -- the founder of seventeenth-century Rhode Island and an exemplary liberal Calvinist, in Little's judgment -- gets a full and learned chapter explicating his prescient theory of religious and civil freedom, and its eventual influence on American constitutionalism. Throughout the *Essays*, Little offers insightful histories of and commentaries on American, European, and international human rights and religious freedom norms on the books and in action. He also makes memorable contributions to

our understanding of the history, logic, and institutional forms of international peace studies. Notable is a major new chapter on “Terrorism, Public Emergency, and International Order” that shows how the systematic violation of fundamental human rights triggers the duties and demands of revolution and just warfare, historically and today. Two other chapters call for academics to play constructive, critical, and prophetic roles in times of war, with Reinhold Niebuhr held up as an exemplar. “In times of war, laws and rights [*iura*] are silent,” the Roman Stoic Cicero once said; in a modern democracy, Little argues, it is the special task of scholars to give laws and rights their full voice and valence.

In a moving “Personal Testament,” first published in 2002 and reproduced in the *Essays*, Little makes clear that his devotion to the field of human rights and religious freedom is not merely a dispassionate academic pursuit. For him it is a profoundly Christian commitment and calling. Little was born into a Presbyterian family with roots that go back to the New England Puritans who gave America its first comprehensive “Body of Liberties” in 1641 written by Calvinist theologian and jurist, Nathaniel Ward. His father and five generations of Littles before that were all Presbyterian ministers. Little describes himself as a “liberal” Presbyterian layman, with an iron firm grip not only on the particularities of Calvinist theology but also on certain “substantive necessary truths” as he calls them, echoing Judith Jarvis Thomson.

Among these “substantive necessary truths,” Little focuses on the idea that all humans have moral intuitions that are shaped by moral laws and protected by natural rights that are endemic to human nature. These moral intuitions condemn as utterly evil (*malum in se*) the cruel logic of pain that supports grave and gratuitous assaults on the body through genocide, torture, mayhem, starvation, rape, and enslavement, or on the mind through brutal coercion, pervasive mind controls, or hallucinogenic enslavement. For Little, these moral intuitions and natural aversions are foundational to any real regime of human rights. They are part and product of the Western Christian tradition, which uncovered and articulated them only after centuries of hard and cruel experience, he shows in this book and several earlier writings.

But these are not merely Christian or Western intuitions, Little insists. Cast more generically and generously, these moral intuitions are the cardinal axioms of human civilization -- of what it means and takes to live together as persons and peoples. Other major traditions and cultures of thought, conscience, and belief have their own way of formulating them and their own means of implementing them through personal habits, institutional structures, and legal systems. But, “it is important to remember,” Little insists, “that behind or beneath all the many differences among human beings in culture, religion, outlook, and knowledge, these are indubitable and unifying features that are accessible and applicable to ‘all peoples and all nations’.”

Little expands on these “indubitable and unifying features” of human nature and human society in a brilliant and lengthy new essay entitled “Ground to Stand On,” the themes of which pervade several other *Essays* as well as Little’s Afterword to *Religion and Public Policy*. Here Little defends what he calls a “two tiered” theory of rights: (1) a

first tier theory of rights that is objective and secular, and universally accessible, acceptable, and sufficient to ground a legal and political order; and (2) various second tier theories that are more particularly religious and by definition more subjective, metaphysical, pluralistic, and restricted to distinctive communities of thought and belief. The first tier formulations of rights as universals of human nature and society are enforceable – even by force. The second tier formulations of rights (as particular claims of certain beliefs and communities) are only voluntary and cannot be compelled or forced upon any one.

Little's main focus is the first tier, "secular" arguments for human rights that the modern world has come to see as a moral minimum for civilization and justice. He focuses on protecting all persons against the infliction of arbitrary force in violation of their "non-derogable," "nonabridgeable," or "fundamental" rights as the international human rights instruments call them. Included are rights to freedom from "extrajudicial killing; torture, 'cruel, inhuman, or degrading treatment or punishment'; freedom from mutilation; enslavement;" deliberate starvation and gratuitous denials of other basic goods and benefits to survive; "denials of certain forms of due process; and violations of freedom of conscience, religion, or belief"; discrimination "solely on the grounds of race, colour, sex, language, religion, or social origin"; and freedom from "atrocities crimes" defined by the international laws of just war. For an individual, group, or nation for no "very good reason" to violate these non-derogable rights constitutes "arbitrary force," Little argues. And to fail to uphold, enforce, or vindicate such non-derogable rights, "where feasible, would constitute *arbitrary neglect*, a close relative of arbitrary force."

In one sense, Little's argument about arbitrary force, neglect, and harm is continuous with earlier Christian and later liberal arguments that a tyrant's pervasive and persistent violation of the people's fundamental rights triggers the foundational right to resistance, revolution, and even regicide. Modern democracies were built on this premise, as various declarations of independence attest. But while earlier thinkers defined "fundamental rights" based on the Bible, natural law, ancient charters, or self-evident truths, Little wants to root them in universal facts of human nature -- most basically every person's natural aversion to arbitrary pain and harm. While earlier thinkers were focused on justifying their revolts against tyrants oppressing their own people, Little wants to broaden the logic to help define just wars and necessary humanitarian interventions on behalf of other peoples as well. And while earlier thinkers coupled natural law and natural rights with natural duties, virtues, and prescriptions for the good life and good society -- often grounding and interweaving them in elaborate theological and philosophical systems of religion and belief -- Little wants to limit natural law and rights talk to this minimum set of protections, without a metaphysical foundation.

Freedom from arbitrary force, neglect, and abuse is an entirely "secular" or "natural" foundation of human rights that any conscious and conscientious person or people can embrace, regardless of whatever particular forms of thought, conscience, religion, or belief they may hold. In support of this claim, Little works hard to ground his argument in theories of common sense, practical reason, and moral intuition. He draws

on accounts of conscience, custom, and ethical objectivity. He points to evidence of his views in the cardinal teachings and practices of all major religious and cultural traditions today if not historically. And he begins to sort out the inevitable hard questions and rationales of how, when, and why “non-arbitrary” force may, should, and sometimes must be used by an individual, group, or nation, to prevent, stop, or punish someone else’s exercise of arbitrary force and neglect. Though a full ventilation of these topics will take several more books, indeed libraries, what we have here is the bold and bright outline of an integrative theory of human rights, just war, humanitarian intervention, and international peace.

This argument is directed partly against the growing number of scholars who deny the existence of human rights or the universal validity of rights talk. It is also directed against the growing number of religious scholars, who insist that a theory of rights cannot be sustained without a necessary religious or metaphysical foundation or rationale. Little argues that his position was a feature of “liberal Protestant” thought from the beginning – even in the foundational works of John Calvin and Martin Luther. It can be embraced, he insists, by any religious tradition that operates with a two kingdoms ontology, or that draws basic epistemological distinctions between nature and grace, reason and faith, the external forum and internal forum. Little is all for the protection of religious freedom, and for the articulation of religious rights theories, practices, and platforms. And he recognizes that protection of religious freedom often correlates with protection of many other “non-derogable” rights in nation-states. But he wants human rights to have a deeper and more universal foundation in human nature, and a compelling logic that will convince even those who today reject religion altogether.

Religion and Public Policy devotes several chapters to the expansion and evaluation of these major themes. The lead editor, Sumner Twiss, has a brilliant chapter on Roger Williams’s theory of religious freedom and human rights, vindicating Little’s longstanding praise for this early American prophet of liberty, and lifting up several provocative texts from Williams that have not been part of the standard histories. Marian Simion opens up the riches of the Orthodox Christian tradition on the right to life, and its implications for just war and human rights thinking along lines congenial to David Little. Rodney Petersen shows how diplomats can operationalize Little’s “arbitrary force” and “arbitrary neglect” ethics in political diplomacy. Leading Catholic scholars Bryan Hehir and Scott Appleby defend Little’s insistence that policies of just war making and peace building must include humanitarian intervention and negotiation with diverse religious bodies at home and abroad. While the dominant political and media narrative continues to depict religion as the source of violence and oppression, and while un-nuanced “separation of church and state” arguments continue to feed the idea that “peace studies” should be “religion free,” the chapters by Appleby, Susan Hayward, Atalia Omer, Scott Hibbard, Natalie Sherman and David Gergen all demonstrate the vital role of “religious peacebuilders” in many parts of the world, and the need for such peaceable and peacemaking groups to have the rights, resources, and respect they need to do their work effectively. But separating just and unjust, magnanimous and malevolent religious actors in the protection of human rights for all

remains a major challenge, especially in times of tumult and transition and new constitutional formation.

While all the chapters express admiration and appreciation for Little's remarkable accomplishments, they offer a few challenges, too. Gene Outka and the undersigned, for example, question how much Little's theory can be grounded in John Calvin or the broader Calvinist tradition, which tied religion and human rights more closely together in a way that makes Roger Williams look like more of an outlier than exemplar of the Calvinist tradition. John Reeder queries some of the philosophical assumptions and moves at work in Little's intuitionist theory of arbitrary force and harm. Grace Kao wonders whether this argument against arbitrary pain could and should be extended to protect the rights of animals and proto-sentient nature. Abdulaziz Sachedina and Ronald Swearer question how compatible a "two-tiered" theory of rights can be for many schools of Islam and Buddhism. The Afterword is vintage David Little: candid and forceful engagement with his interlocutors, with careful and insightful distinctions and sage and soaring prose designed to push the conversation forward. May it long continue.