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The Right to Self-Defense as the Grundnorm for Human Rights: A Response to David Little

John Witte, Jr.

Abstract

This Article analyzes the integrative theory of human rights developed by Calvinist theologian and political theorist David Little. Little argues that the founding principle or Grundnorm *of all modern human rights is the rights to self-defense enjoyed by the individual and the group. This right to self-defense was separately enumerated in earlier drafts of the 1948 Universal Declaration of Human Rights but was then shifted to the preamble of the Declaration. Little argues that this shift underscored the more foundational status of the right to self-defense in the Universal Declaration and in later instruments like the 1966 Covenants on civil, political, social, cultural, and economic rights. This argument rests on an impressive and innovative reading of the text and the* travaux préparatoires *of the Declaration and the Covenants. It also adduces earlier formulations of rights by Calvinist and liberal writers. While questioning the historical warrants for Little's argument in the Calvinist tradition, this Article applauds his efforts to integrate modern human rights norms. Jacques Maritain famously said that the diverse world of 1948 could agree on the diverse provisions of the Universal Declaration of Human Rights "so long as we did not ask why." David Little wants to show why and how a universal consensus on human rights was and is possible*.

Keywords: David Little; human rights; Universal Declaration of Human Rights; right to self-defense; Calvinist rights tradition; resistance; democratic revolution; civil and political rights; economic, social, and cultural rights

David Little has pioneered the study of religion, human rights, and religious freedom during 60 years of distinguished scholarly work at Yale, Harvard, Virginia, Georgetown, and the United States Institute of Peace. He has traced cardinal human rights principles from antiquity until today – with a special focus on the prescient contributions of Protestants like his heroes John Calvin and Roger Williams to modern ideas of human rights. He has written astutely on the many vexed questions arising under the First

Amendment religion clauses. And he has charted 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 the rights to religious and cultural self-determination. These four pithy *Canopy Forum* essays reflect and distill a lifetime of deep lore.

The Right to Self-Defense as *Grundnorm*

These four essays also introduce Little's newest efforts to ground and integrate modern human rights norms using the foundational principle or *Grundnorm* of the right of self-defense. His effort goes beyond rehearsing the familiar mantra that modern human rights are "interrelated," "indivisible," and "interdependent." His argument is that "the organic unity" of modern human rights has to be proved by a universally cogent logic lest certain unfashionable human rights like religious freedom get pruned away as dispensable, or the human rights paradigm altogether gets discarded as an neo-colonialist imposition of Western values or an inconvenient roadblock to authoritarianism. Jacques Maritain famously said that the diverse world of 1948 could agree on the diverse provisions of the Universal Declaration of Human Rights "so long as we did not ask why." David Little wants to know why and to show how a universal consensus on human rights was and is possible.

Little builds his unified moral theory of human rights on the idea that all humans have moral intuitions and conscientious aversions against arbitrary human actions or omissions that are utterly evil (*malum in se*). These include 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. Every rational person is morally averse to such evil actions -- even if a person, religion, tradition, or group has its own particular way of formulating these aversions and its own distinct safeguards against such moral evils.

Modern human rights instruments, beginning with the Universal Declaration of Human Rights in 1948, have helped to codify these collective moral intuitions and conscientious aversions against *malum in se* inflictions. These instruments set out the moral conditions of what it takes to live together as persons and peoples, and they set absolute limits to belligerent actions that "outrage the moral conscience." Two world wars together with Hitler's Holocaust and Stalin's gulags had just given the world a grim litany of shocking examples of the moral evils that had to be avoided. The Universal Declaration and its progeny thus put in place a series of "non-derogable" or "fundamental" rights to safeguard against further such moral evils. Included were fundamental rights and freedoms 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 "atrocity crimes" defined by the international laws of just

war. For an individual, group, or nation-state for no "very good reason" to violate these non-derogable rights constitutes "arbitrary force." And for them to fail to uphold, enforce, or vindicate such non-derogable rights, "where feasible, would constitute *arbitrary neglect*, a close relative of arbitrary force." [1]

What holds all these fundamental rights together, and what makes them more than mere paper protections against moral evil, Little further argues, is the foundational and universal right of self-defense for individuals and groups. A separately enumerated right to self-defense and rebellion against tyranny and oppression was included in preliminary drafts of the Universal Declaration in 1947. But this provision was dropped from the final text of the Declaration -- in part because of Eleanor Roosevelt's clinching argument that enumerating such a right would "be tantamount to encouraging sedition … [and] conferring a legal character on uprisings against a Government which was in no way tyrannical."[2] The fragile nation-states of the post-World War II era, many still without sufficient and stable constitutional safeguards and procedures, could not afford such risks of anarchy.

But, Little argues, the drafters of the Universal Declaration in effect moved reference to this universal right of self-defense to the preamble, thereby underscoring its status as a foundational human rights principle. The preamble opens with the familiar words: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" – lifting up the principles of dignity, equality, fraternity, sorority, justice, and peace. The next paragraph of the preamble identifies the even deeper principle of self-defense, Little argues: "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind … it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

This second preambular provision makes clear that the "rule of law" administered by a justly constituted nation-state is the first and ideal protector of fundamental human rights. Ideally, each nation-state would enact or reform its laws as needed to articulate and elaborate these fundamental rights, to punish those who violate them, and to recompense their victims. But if the nation-state fails; if the rule of law gives way to "barbarous acts"; if fundamental rights are destroyed without redress or reparation; if persons are left without recourse to any resources but their own--if these conditions obtain, each person and each group is "compelled" by their "conscience," by their very nature and instinct for self-preservation, to exercise their most foundational and fundamental rights of self-defense and "rebellion against tyranny and oppression."

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[1] See elaboration in David Little, *Essays on Religion and Human Rights: Ground to Stand On.* (Cambridge: Cambridge University Press, 2015); David Little, "The Right of Self-Defense and the Organic Unity of Human Rights" (forthcoming).

[2] William Schabas, *The Universal Declaration of Human Rights: The* Travaux Préparatoires, 3 vols. (Cambridge: Cambridge University Press, 2013), 2873, 2895.

For Little, this makes the universal right of self-defense the moral lynch pin of modern human rights protections – the "the supreme right," "the greatest of rights," "the fulcrum of all other rights," "the fountain through which other rights flow," as he variously puts it, quoting others.[3] "All fundamental rights are uniquely and 'intrinsically tied' to this most foundational right of self-defense"[4] for their protection, especially when there is no other law or authority to value or vindicate them. That is what makes the right to self-defense, the ultimate foundation, the *Grundnorm* for all other human rights. It is the right of last resort that every person and group can claim when all other fundamental rights are abridged or threatened. It is the threat that a person or group will be "compelled" to exercise this foundational right of self-defense that gives other fundamental rights their power; that gives would-be assailants pause before attacking; that gives rights victims standing to get remedies; and that gives nation-states incentive to protect and vindicate fundamental rights in a rule of law framework lest anarchy ensue. This is a much thicker account of the organic unity of human rights than, say, Hannah Arendt's thinner view that each person "has the right to have rights" or John Rawls' abstract enumeration of "basic human rights" that any rational liberal would confirm from within the veil of ignorance.

To be sure, the right of self-defense must be exercised with ample procedural safeguards, lest it become cause for anarchy and antinomianism. Building on traditional Western teachings going back to classical Roman and biblical law, Little argues that the modern right of self-defense must be used as a defensive last resort, not as a preemptive first move against an assailant or oppressor. And it must always be exercised in accordance with principles of necessity, imminence, proportionality, and right intention. Moreover, today, individuals or small groups must first use the "softer" force often available within a rule of law framework – by calling the police, filing for an injunction, pressing a law suit, lobbying for legal or political change, issuing petitions and grievances, mobilizing shame or action through media exposures, demonstrating or disobeying peaceably, and more. Whole peoples or communities, too – whether political, ethnic, racial, religious, or otherwise defined – must first use comparable "soft force" to exercise their collective right to rebellion against pervasive and systemic rights violations. The world is seeing that today in the massive and mostly peaceable demonstrations against gross racism, economic inequality, and police brutality. But the right to use "harder force" is at the root, and this right can be called in by persons and peoples when unduly pressed or repressed. An individual who has no other legal recourse can, in an emergency, resist and rejoin, even with mortal violence, someone or some group who threatens or violates their life, faith, family, work, property, loved ones, and more. Similarly, when all soft force fails, when the rule of law breaks, when oppression and tyranny continue unabated, a group can resort to the "harder force" of revolt, rebellion, and even revolution.

Textual Footholds

[3] Quoting from Jan Arno Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (New York: Oxford University Press, 2017), 103 (although referring there to the "right to life").
[4] Letter to me of July 2, 2019.

This is an impressive and innovative reading of the text and the *travaux préparatoires* of the Universal Declaration of Human Rights. Most human rights theorists focus on the first paragraph of the preamble, and set out their theories based on the principles of dignity, equality, fraternity, justice, and peace in that opening stanza. Others have praised or lamented the omission of an enumerated right of self-defense in the final Declaration. Others have noted the Cold War politics that contributed to the rejection of this right, which was advocated by the USSR, Cuba, Chile, and others. But nobody, so far as I know, has squeezed the foundational right of self-defense out of the second paragraph of the preamble, nor tied it so skillfully to the stated concern about moral outrages against the conscience of humankind.

Little reads the individual and collective right of self-defense and rebellion into the ambiguous language of the preamble: "… if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression." On its face, this seems like a speculative reading. But if that language is read against the dozens of earlier explicit statements about the right of self-defense in the drafting process of the Declaration, this reading makes more sense. Earlier drafts of the Declaration had clearer language. One Working Committee draft in 1947, for example, reads thus: "When a government, group or individual seriously or systematically tramples the fundamental human rights and freedoms, individuals and peoples have the right to resist oppression and tyranny."[5] During the final decisive debate on the preamble in 1948, Belgian representative Count Carton de Wiart said explicitly "that the right to resist oppression should be regarded as similar to the right to act in legitimate defence. It was a natural and sacred right which was exercised whenever the security of the individual was threatened."[6] In the end, this understanding of the right of self-defense was accepted, but in language that was purposely "disguised" or "submerged" in the preamble to avoid the danger of encouraging rebellion against legitimate regimes. This is a clever and, to my mind, cogent interpretation of notably ambiguous language.

Little further reads the second paragraph's phrase that "disregard and contempt for human rights *have resulted in* barbarous acts which *have outraged* the conscience of mankind" as both descriptive and normative. That language as italicized is clearly a *description* of the various atrocities of World War II that outrageously violated fundamental rights of all persons which the Declaration was now confirming and enumerating anew. As such, this language is akin to the American Declaration of Independence that described "the repeated injuries and usurpations … of an absolute tyranny" whereby the British mother country violated the people's "unalienable rights of … life, liberty, and pursuit of happiness." The American Declaration, however, was also normative. It made the moral case that the American states and peoples were thus justified in exercising their right to rebellion and revolution in support of these unalienable rights on the strength of the "laws of nature and nature's God." And it moved the several states to enumerate and elaborate the fundamental rights and liberties that gave further expression to these "unalienable rights of … life, liberty, and pursuit of happiness."

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[5] Schabas, *The Universal Declaration,* 1332.
[6] Ibid., 2875.

Little reads the second paragraph of the Declaration's preamble prospectively and normatively too. This language is not a call for revolution, of course – quite the opposite given the fragile politics of the day. But it is a clear statement that the right to self-defense rests on the moral ground of conscience, and that this right can and will be exercised when "barbarous acts" "outrage[] the conscience of [hu]mankind." If those barbarous actions are not prevented and not punished, a person and group will "be compelled to have recourse, as a last resort, to rebellion." The rest of the Declaration spells out the fundamental rights whose violations by arbitrary force constitute barbarous acts that outrage the conscience sufficiently to trigger this last resort right to self-defense and rebellion. Little then shows at some length in these essays how each of these enumerated rights is integrated and grounded this founding principle.

Little's argument is bolstered by the reality that the individual right of self-defense has been a staple of Western jurisprudence since biblical and Roman law times, and that the collective right to rebellion against tyranny has been the guiding mantra of early modern democratic revolutionaries ad modern decolonizers and anti-authoritarians alike. His argument is also bolstered by the fact that several modern international law documents before and after the Declaration have recognized the right of self-defense and rebellion, as did vaunted constitutional texts like the 1789 French Declaration of the Rights of Man and Citizen and a few early American state constitutions. Even so, this "originalist" method of mining of the Declaration's text and *travaux préparatoires* is a new and effective move in Little's new quest for a unified moral theory of human rights. So is his argument about how to interlink the Declaration's references to moral outrage, fundamental rights, and the rights of self-defense. There is a big mind and elegant pen at work here, and readers will do well to watch this great human rights scholar work out his theory in full.

Traditional Prototypes

David Little's unified moral theory of human rights is based not only on an impressive and innovative reading of the text and history of the Universal Declaration of Human Rights. It is also based on a novel rereading of the Calvinist tradition of resistance, revolution, and even regicide against any tyrant who persistently and pervasively violated the people's fundamental rights.

The idea of resistance and revolution against tyranny, of course, was no Calvinist invention. This idea had ancient Biblical, Greek, and Roman roots which had grown into whole forests of Catholic, Protestant, and Republican thought by early modern times. Drawing on this tradition in 1517, Martin Luther (1483-1546), the first Protestant reformer, led a revolution against what he called "the spiritual tyranny" of the pope and the "Babylonian captivity of the church" by Rome. Through false doctrines and abusive canon laws, Luther charged, the pope and his clerical retinue had destroyed the liberty of the Gospel, tyrannized the Christian conscience, and deceived the German people on the pretext of controlling their salvation. Relying on the authority of scripture and

individual conscience, Luther called on various magistrates to stand up and throw off this spiritual tyrant for the sake of “the freedom of the Christian.”

After 1550, some Protestants expanded on this argument to justify their revolts against political tyrants whose inquisitions and genocides were killing their coreligionists by the tens of thousands. In particular, Lutherans in the German town of Magdeburg and Calvinists in early modern France, the Netherlands, Scotland, and England went from turning cheeks to swinging swords against their tyrannical oppressors. And they used their writing desks and pulpits to work out a general logic of rights, resistance, and revolution that became a Western commonplace by the time of the American and French Revolutions of 1776 and 1789.

This Protestant logic of revolution built in part on the familiar legal doctrine of legitimate self-defense. Defense of oneself and of third parties against attack, using proportionate even deadly force and violence when necessary was an ancient legal teaching. When a person is unjustly attacked by another, the victim has the right to defend himself or herself, to resist – passively, by running away, or actively, by staying to fight with proportionate force. Other parties, particularly relatives, guardians, or caretakers of the victim, also have the right to intervene to help the victim – again passively by assisting escape, or actively by repelling the assailant with force. Magistrates who exceed their authority, early modern Calvinists argued by analogy, forfeit their political office, and becomes simply like any private persons. If magistrates and their agents use force to implement their excessive authority, their victims may rise up in passive or active resistance, using mortal force when necessary. The right to communal revolt was thus, in part, the individual right of self-defense writ large.

Early modern Calvinists also drew in the biblical idea of covenant, which they cast into a form of Christian social and government contract theory. The political government of each community, they argued, is formed by a three-way covenant between God, the rulers, and the people, modeled in part on ancient biblical covenants. By this covenant, God agreed to protect and bless the rulers and the people in return for their proper obedience to the laws of God and nature. The rulers agreed to honor these higher laws and protect the people’s essential rights, particularly those rights rooted in the Bible. The people agreed to exercise God’s political will for the community by electing and petitioning their rulers and by honoring and obeying them so long as the rulers honored God’s law and protected the people’s rights. If any of the people violated the terms of this political covenant and became criminals, the ruler could properly prosecute and punish them—and sentence them to death in extreme cases. In turn, if any of the rulers violated the terms of the political covenant and became tyrants, they could be properly resisted and removed from office—and sentenced to death in extreme cases if convicted. The remarkable trial and execution of King Charles I of England in 1649 was a textbook example of this stern Calvinist resistance logic in action. But if the tyrant could not be found or tried, or refused to leave or stay away the lower magistrates were to organize procedurally and direct strategically the people in revolt, including all-out revolution if needed to unseat this tyrant.

Early-modern Protestants initially accepted the enumerated lists of rights and liberties (*iura et libertates*) set out in classical Roman law and expanded in sundry medieval codes, statutes, and charters, Magna Carta of 1215 only the most famous of hundreds of such charters. But these Protestants also rearranged, prioritized, and expanded this inherited roll of rights, in part, on the basis of the Bible. The most important rights, they reasoned, were the religious rights of "liberty of conscience" and "free exercise of religion" that allowed them to discharge their spiritual duties. After all, persons were created first and foremost as subjects and ambassadors of God and called to honor God above all else. The Ten Commandments enjoined them to worship God, to observe the Sabbath, and to avoid blasphemy and idolatry. The New Testament ordered them to "obey God rather than men" (Acts 5:29). If these most foundational rights were abridged, nothing could be sound or sacred any longer.

In practice, it became clear that protecting religious rights and duties required the protection of several other correlative rights, especially in contexts where Protestants were persecuted minorities. An individual's right to religious freedom, for example, required attendant rights to assemble, speak, worship, evangelize, educate, marry, parent, travel, and more. The rights of the religious group to worship and govern itself as an ecclesiastical polity required attendant rights to legal personality, corporate property, collective worship, organized charity, parochial education, freedom of the press, freedom of contract, freedom of association, and more. And both individuals and groups had to live by many other biblical commandments that set out the rights and duties of life, liberty, property, marriage, family, household, sanctuary, relief for the poor, charity, education, and more. By the 1560s, Calvinist writers like Christopher Goodman (1520-1603) and Theodore Beza (1519-1605) began calling all these rights "essential," "unalienable," and "fundamental." The chronic and pervasive breach of these rights by a tyrant, they reasoned, triggered the basic right and duty of the people, through appropriate means and channels, to resist and, if necessary, revolt.

This Protestant logic had driven French, Dutch, Scottish, and English revolutionaries in the sixteenth and seventeenth centuries to throw off their tyrannical oppressors in protection of their fundamental rights. It was in part to that same tradition that early American revolutionaries appealed when they called their countrymen to arms against British tyranny. Modern British kings were systematically breaking the laws of nature and nature's God and breaching the fundamental rights and liberties of God's people in America. The new American colonies thus had the right and duty to break these bonds of political tyranny so that they could exercise their rights and duties in service of God, neighbor, and self. "Rebellion to tyrants is obedience to God," the American revolutionaries argued.

David Little's unified moral theory of human rights builds on these and many similar statements by his Calvinist forebearers and various early modern Liberals. But while earlier Calvinists defined "fundamental rights" based on the Bible, natural law, divine covenants, ancient charters, or self-evident truths, Little roots them in universal facts of human nature -- most basically every person's natural and moral aversion to arbitrary pain and harm. While earlier Calvinists saw the right to self-defense as instrumental, a

means to protect their fundamental rights – beginning with the most fundamental rights to religion -- Little variously calls the right of self-defense itself “foundational,” “supreme,” “the greatest,” “the fulcrum of all other rights… the fountain through which other rights flow.” While earlier thinkers were focused on justifying their own 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, Little argues in these four essays and in several other recent writings, 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.