This paper argues that certain core elements in Protestant theology are incongruent with human rights as they were understood by the 18th-century declarations. These declarations expressed a liberal understanding of society that would leave the individual a rather extensive sphere protected from government intervention. Protestant theology exacerbates the sinful nature of man and in order to do this it sets a very high standard for morality which eliminates the classical distinction between command and counsel (strict and loose duties). Such a distinction was the basis for limiting the intervention of government into the individuals' private life. The absence of such a distinction does not oblige the state to intervene, but there is no generalized guarantee against such intervention. We are not arguing that Protestants cannot be liberals, but that they are not liberals in virtue of their religion and by moral principle.

First, we will give an outline of the discussion on the Protestant origin of human rights starting from Georg Jellinek going all the way to a recent defender of the theory in the person of John Witte. Many arguments have been compounded against the theory, but it is surprisingly tenacious. We will try to challenge the theory, as explained above, from a theoretical rather than a historical point of view, in order to show its incongruity. To do this we will discuss Luther's conception of command and counsel and how this position reverberates in Protestant political philosophy and notably in such thinkers as Hugo Grotius and Samuel von Pufendorf. We will conclude with some consideration on the role of John Locke in establishing the liberal position of the 18th century declarations.

Protestant Origins of Human Rights

The idea that 18th century human rights could somehow originate in Protestantism was launched by Georg Jellinek in 1895. His dissertation, *Die Erklärung der Menschen- und Bürgerrechte, Ein Beitrag zur modernen Verfassungsgeschichte*, argued that Rousseau's *Contrat social* could not be the source of *The Declaration of the Rights of Man and of the Citizen* adopted in France in 1789. He insisted that the model for this declaration was the American declarations and notably the Virginia Declaration adopted a decade or so before

the French declaration. He argued further that freedom of religion in the American colonies was responsible for the idea to state universal human rights in a declaration. (Jellinek, 1895)

Jellinek is reacting to a view put forward by Paul Janet in his *Histoire de la science politique* (1887). Janet presents the declaration of rights as the very terms of Rousseau's social contract. (Janet, 1887: 457) Jellinek argues that this could not be so, since Rousseau knows nothing about rights which individuals have before and independently of the state. In Rousseau's state, individuals ony have those rights, which emerge from the general will. (Jellinek, 1895: 5) Jellinek concludes that the declaration must have another source and he finds it in the American declarations. He notes that such a declaration was demanded in the *Cahiers de doléance* and the first one was proposed by Lafayette, a war hero from the American War of Independence. He notably points to the Virginia Declaration (1776) as model for the French declaration, but he compares the French declaration carefully with several American declaration and concludes that both ideas and form derives from the American declarations. (Jellinek, 1895: 7-22). Emile Boutmy responds vigorously in the *Annales des sciences politiques* (1902 – Georges Fardis translated Jellinek's dissertation into French that year, see Jellinek, 1902). These two points have, however, been conceded by scholars by now. (Rials, 1988: 352, 357; Gauchet, 1989: 14; see also Joas, 2003: 258-260)

He then asks how such ideas about declaring universal human rights came to the Americans and notes that they could not come from England, where only English rights were proclaimed. He also excludes natural law which, he says, had no problem approving slavery and such things. (Jellinek, 1895: 30-31) His own solution is to find the origin of such rights in the assertion of universal religious tolerance and freedom of thought. The first Protestant settlers refused ecclesiastical hierarchy and considered the church as a community of believers. Jellinek sees herein the seeds for a democratic polity. Since the individual believer had to relate directly to God without any hierarchical middle ways, Protestantism also emphasized individualism, and from this, he thinks, unlimited freedom of thought followed, which in its turn had to be proclaimed as a universal right. (Jellinek, 1895: 31-41) From this initial right several political rights came along. (Jellinek, 1895: 43) This relation between freedom of thought and political freedom was already noticed by Madame de Staël in her posthumous work on the French Revolution. (de Staël, 1871: 61)

It is not clear, however, neither in Jellinek nor in de Staël, how we get from the one to the others. Considering that Frederick II of Prussia, reportedly, could say, ”Argue as much as you will and about whatever you will, but obey!” (Kant, 1996: 18) without any apparent contradiction, the relation must be a rather loose one. For de Staël it is the free enquiry which leads to representative government. (de Staël, 1871: 61) It supposes that free enquiry in one area would lead to free enquiry in all areas and this would somehow make people think that they should have a say in political affairs. Jellinek emphasizes the absence of ecclesiastical hierarchy and religious individualism as decisive, and he seems to assume something similar, since specialization of other freedoms would somehow crystallize themselves around freedom of thought. (Jellinek, 1895: 43) Joas states frankly that the other rights do not emerge organically from freedom of religion, but he still wants to give it some preeminence as the foundation of the entire constitution. (Joas, 2003: 263)

Whatever the relationship might be between freedom of thought and religion and the other rights of man, it will lose much of its significance if Protestants showed little interest in religious freedom and tolerance. On this point Jellinek receives criticism from Ernst Troeltsch, who argues that Protestants churches had little such interest, while certain Protestant sects were more serious about religious freedom. Calvinism, which was the dominant Protestant denomination in the Colonies at this time, did only accept a limited kind of tolerance. According to Troeltsch, full acceptance of other religions was only embraced by spiritualists like the Quakers, Baptists and Roger Williams. They were the only one who could conceive freedom of thought and religion as an inborn human right. (Troeltsch, 1923: 758 ff.) Jellinek takes account of this in the second edition of his work, but insufficiently, Troeltsch suggests. He would attribute a much larger importance to Enlightenment thinkers. (Troeltsch, 1923: 764-765 see the note.)

In fact, religious toleration was rather limited in the American colonies. Troeltsch notes that the New England Puritans wanted free religious communities and forced no one to enter the church, but they did not tolerate any other church or denomination and important citizen’s rights was conditioned on membership of the church. (Troeltsch, 1923: 759) Ralph E. Pyle and James D. Davidson present a schematic overview regarding toleration of dissent and restrictions on citizens’ rights in 17th and 18th century colonial America. In most cases

there is no toleration of Catholics. In some cases nonconformist, Quakers and Baptists are not tolerated. Office-holding and voting rights was nearly always denied Catholics and often reserved for a particular denomination or more generally for Protestants. (Pyle & Davidson, 2003: 66-68) More colourfully, Kenneth C. Davis denounce what he calls the myth about religious tolerance in colonial America. The Puritan fathers did not tolerate opposing views. Dissidents such as Roger Williams and Anne Hutchinson had to leave. Catholics and other non-Puritans had to leave as well. He recounts the misfortune of four Quakers who were hanged in Boston in 1659-1661 for insistingly returning to the city. Catholics were discriminated against regarding property and voting rights. As late as 1834 a Catholic convent was burned to the ground by an anti-Catholic mob. In the 1844 Bible Riots in Philadelphia two Catholic churches were destroyed and two people died. In the same period Mormons were also victims of persecution and massacre. (Davis, 2010)

Some states, however, did exercise a rather general tolerance; like Rhode Island, founded by Roger Williams, and Pennsylvania, founded by William Penn, a Quaker. In the first everybody was tolerated, but voting and office-holding was reserved for Protestants. In second all monotheists were tolerated, though Catholics were not tolerated for a short period. They were nonetheless excluded from office until 1776. (Pyle & Davidson, 2003: 66-68) These were the communities which according to Troeltsch and later on Jellinek saw as the champions of a human right to freedom of thought and religion. To this Gerhard Ritter answers that it is not possible to trace the human rights declaration of 1776 in Virginia to the demand for religious tolerance in the American colonies. The 17th-century charters from the founding of the colonies do not show any general human rights. They are about royal privileges and traditional English freedoms. They suppose the colonies to be essentially Christian communities. He adds that the article on freedom of thought was a latecomer to the Virginia Declaration and not without resistance from the tenants of state churches. (Ritter, 1949: 240) To this, Hans Joas adds that a staunch defender of religious freedom such as Thomas Jefferson was a Deist and no direct heir to Puritan thought. (Joas, 2003: 262; see also Davis, 2010) As Troeltsch suggests, Enlightenment thought is probably a more likely source of Jefferson’s commitment to this cause.

At this point one would say that this discussion is by now long dead and buried, but

somehow phantoms are still hanging around refusing to disappear. Valentine Zuber gives a useful outline of how Jellinek's ideas were received by French Protestants. (Zuber, 2014) The commemoration of the 400 years of the birth of Jean Calvin in 1909 was a great occasion to link the rights of man and the citizen directly to Calvin. Emile Doumergue proclaims that the Declaration of the Rights of Man and the Citizen comes neither from America nor England, but, first of all, from Calvin's French disciples and Calvin himself. (Doumergue, 1910: 22-23) The position is argued in more detail by Jules Emile Roberty. He believes that ideas about human rights should be traced back to the Huguenot disciples of Calvin generally referred to as the Monarchomachs. They defended, according to him, the rights of the people against absolute rulers. They were defeated in France, but their ideas poured into Puritan thought in England and travelled with them to America, and they travelled back to France at the time of the American Revolution. (Roberty, 1910: 33-39) This connection between Calvin and human rights is greatly nuanced by Roger Mehl writing in 1978. He admits that neither Luther nor Calvin took any special interest in human rights. On the level of discourse such a connection is not discernable, but he thinks it can be made at the level of events. The fact that the Reformation broke the unity of faith that had hitherto existed, leads, according to him, to freedom of thought and therefrom to the other rights. (Mehl, 1978)

Mehl is not prepared to admit that Protestantism had no special relation to human rights. We are left with the idea that freedom of thought and religion, which was caused accidentally by the Reformation, is some kind of paradigmatic right from which the other rights are created by analogy. John Witte, writing in 1998, take up the same idea and go as far as to describe the Reformation as a human rights movement. (Witte, 1998) He pursues the same program in more nuanced ways in his 2007 book on *The Reformation of Rights, Law, Religion, and Human Rights in Early Modern Calvinism*. (Witte, 2007) We will try to dispel these phantoms of a long-deceased theory with a different kind of argument, which, in our view, grips the problem by its roots. Approaching the matter from the concept of rights itself, instead of emphasizing particular rights which might have had more or less prominence in various Protestant writers, will make clear that core tenets of Protestant theology is incongruent with the concept of rights deployed in the 18th century declaration of rights.

The Concept of Rights in the 18th-Century Human Rights Declarations

However important Huguenot writers were for developments in England and later on in America, the notion of rights had been developed to a much higher technical level in earlier scholastic tradition, and thinkers on both sides of the Channel could draw on this tradition. William of Ockham and Conciliarist thinkers like Pierre d'Ailly, Jean Gerson, John Mair and Jacques Almain employed a permissive notion of rights developed by the canon lawyers of the 12th century. (Jacobsen, 2011: 169-176, 189-199, 125-128) The permissive conception of rights equal rights with permissions, such that permissions presuppose duties. We are permitted, in the strict sense, to do everything which is not commanded or forbidden. If no duty commands us to take a walk in the park at this particular moment and there is no duty forbidding us to do so, then we are free to do it. We can do it or not as we like. This is permission which is also called a right. Upon this basis the above mentioned writers construct a consensus theory of government. Since there are no duties concerning property and government (at least after the Fall) these matters must belong to the area of permissions and people would then have to agree about how to settle these matters. They agree to share up the common property and to institute judges and governors. This scheme probably had as its purpose to bolster up the secular power against the Church. Having an independent legitimization in consent and its own area of competence, the secular power could avoid being a subsidiary of the Church. What Huguenot writers did as something rather new was to turn the very same scheme against the secular power (although John Mair had already done something similar in a Scottish context). However, the Huguenots did this opportunistically, and as soon they got one of their own on the French throne in the person of Henry IV they returned to the principle of authority.

Ockham and the Conciliarist writers had the idea, common in theological thought at the time that one should distinguish between mortal and venial sin. Only mortal sin should be enforced by the secular power. To mortal sin corresponded a limited number of duties such as not to kill, rob, etc. The result was that the secular state had limited functions, and seen from the perspective of the secular power the individual had a very extensive liberty. Everything not within the sphere of the secular power was left to the individual or the discipline of the Church. The Church had a huge social power, of course, but at the time it

was exercised rather leniently. The secular power therefore left the individual with a large free space in the form of permissions. This is exactly what the18th century declarations of rights do as well. They are centred on freedom. They limit the functions of the state and create a space of liberty where the individual is free to do as he pleases. The right to publish one's opinions (freedom of the press) limits the way the state can intervene in this kind of activity and permits the individual to exercise the very same activity. He is not obliged to do so; it is an option he has to be used in case he wishes to do so. (Jacobsen, 2011: 271-278, 281-286)

In order to delimit the sphere of the secular power, we would need a way to distinguish between duties which are enforceable by the state and other kinds of duties. Augustine of Hippo spoke about command and counsel, while modern philosophers would speak about strict and loose duty. More elaborate distinctions between duties were also possible, Gerson thus distinguished between the prescriptions of justice with strong obligation incurring mortal guilt and eternal death, lesser prescriptions with little obligation such as to honour one's parents, slight obligation such as to observe good manners and the smallest obligation concerning perfection. (Gerson, 1706a: l. 5, c. 61-63) Only the duties of justice were enforceable by the state, while the others were considered too difficult to ascertain precisely or too demanding for ordinary man. Gerson, and his fellow theologians of the Sorbonne, had a rather forbearing attitude to human frailty. This would change radically with Martin Luther, and at the same time he renders useless the distinction which made it possible to establish for the individual a guaranteed sphere of freedom.

Martin Luther[1]

Luther does not as such abolish the distinction between command and counsel, but he only acknowledges one counsel, namely celibacy. According to the ordinary understanding of the distinction, counsels are about these things Christ teaches in Matthew 5: not to take revenge, not to return evil with evil, not to be litigious, giving one's coat when one's tunic is taken, turning the other cheek, going another mile with the person who obliges you to go

one mile, not to resist evil persons and to be benevolent towards your enemies. In Luther's view all this was not counsels, but commands. (Luther, 1889: 580-581) Among the counsels the ordinary view also adds poverty, obedience and celibacy. Luther reinterprets poverty spiritually as detachment from worldly things and saps the basis for monastic life. Obedience is evangelical obedience and incumbent on everyone. Only celibacy survives, since both Christ and Paul expressly praise celibacy. Celibacy, however, does not make anybody perfect, but can be advised for other reasons. (Luther, 1889: 583-644)

What Luther is saying is that the limits imposed as sufficient for salvation has been set too low, for what is in reality commands has been interpreted as counsels. The traditional view considered only the transgression of the duties of justice as a mortal sin barring one's way to heaven. This is clearly expressed in the censure of Luther's work by the theologians of the Sorbonne. If the duty not to revenge oneself was not just a counsel, but a command the Christian law would become too burdensome. (Luther, 1889: 592-593) This is uninteresting for Luther for he is not concerned with the accomplishment of the commands, but they should instead reveal our impotence and drive us into the arms of Christ. Only faith can save us and faith is a free gift from God. The utter impossibility of the commands should disclose for us how profoundly sinful we are and make clear for us that only God's grace can save us. (Luther, 1889: 208-209, 211; Cristiani, 1946: 74)

This stress on human sinfulness and our inability to overcome it by our own means is a key feature of Protestant theology and this feature has some interesting consequences for political philosophy. Luther is not saying that the commands should not be accomplished, but any attempts to do that will fail if it is not guided by faith. Those who have faith will have no need of the law; they will accomplish the law spontaneously. There are, however, few such people, so the law has two functions. It should show us how incapable we are to fulfil the law perfectly thus making us humble and receptive to God's message. The other function is restraining keeping all those who are not true Christians, that is the majority, from doing evil deeds. This second function belongs to the secular power, and it should preserve peace, punish sin and restrain evildoers. (Luther, 1889: 606-608; 1888: 213-214; 1900: 253-268) We must assume that sin is here understood as the external breach of the commandments, since the secular power only rules over the external affairs in this life such

as the life and property of persons. This power cannot command us to believe something in particular, since people's beliefs are out of its reach. (Luther, 1900: 262-268)

This would suppose a distinction between those prescriptions which can be enforced and those which cannot, such as believing or being generous. The enforcement of the secular power should preserve peace and repress sin. In some sense this is not very different from what the Parisian doctors would say, but in between the notion of sin has changed. Luther renders the notion of counsel utterly useless and eliminates at the same time the distinction between mortal and venial sin. (Holl, 1932: 211) There being no distinction between mortal and venial sin, all sins, at least in their external expression becomes punishable by the state. Before, sin, that is mortal sin, was a minimal standard for salvation. Now, sin is a much more demanding notion. We would then expect the Protestant state to be much more invasive, while the Sorbonne theologians would be much more lenient and indulgent towards human frailty. Luther actually castigates in this spirit the existing Church for laxity. They do not preach, teach, forbid or punish anything. He insists that the spiritual power should punish and correct adultery, indecency, usury, greed, worldly luxury, unnecessary dress and the like with excommunication and legal measures. (Luther, 1888: 255) Max Weber notes something similar when he says that the Reformation did not do away with ecclesiastical power. It replaced a formal, but in fact barely sensible domination, with an extensive domination penetrating into both the domestic and public domains in order to regulate the whole conduct of life. (Weber, 1999: 20) According to Troeltsch, Lutheranism left it to the secular power to exercise this control, while the Calvinist congregations exercised this control themselves. (Troeltsch, 1923: 629)

Protestant Political Philosophy

This more invasive state is also recognizable in Protestant political philosophy. Even though the distinction between command and counsel returned to prominence it was considerably reworked. A distinguished Protestant political philosopher is Hugo Grotius. He adhered to Arminianism, an outgrowth from Dutch Calvinism. Arminians maintained that only faith could save, but allowed man some freedom to accept or reject God's grace. However, this

does not save man from total depravity. The difference from orthodox Calvinism lies only in the remedy for this depravity. In spite of this slightly more lenient position, Grotius maintains the overall position outlined by Luther. All in all Grotius presents a political philosophy compatible with a rather illiberal society.

Grotius adopts a permissive conception of rights. These rights are permissions seen from the perspective of a range of duties. (Grotius, 1646: I.1, 3-4 II.2-3, 20, III.4, 10) These duties can have different origins. Some originates in natural law as inherent in man's social nature. Others depend on divine will and originate in divine positive law. (Grotius, 1646: Prol. § 6-9) Other again stems from human or civil law established by the social contract. Just as they can enter the social contract they can also oblige themselves further by particular contracts. (Grotius, 1646: Prol. § 16-17, 40; II.15 vi.1 p. 265) These different origins of human obligations relate to each other a bit like Russian dolls. The innermost duties of the natural law leave a certain space of freedom to individual man, but divine positive law can restrict this freedom further (without contradicting the duties of the first law). The remaining space of liberty can, however, be further restricted by human law and particular contracts. What is important to notice here is that there is no limit to how this freedom can be restricted.

Grotius does distinguish between different kinds of duties, but this does not lead to any important limits on state power. He does exclude people's beliefs and virtues such as generosity, gratitude and compassion from public enforcement as far as they are inner states. (Grotius, 1646: II.20 xx.1 p. 329) He does distinguish between justice, strictly speaking, which can be exercised between equals in the natural state and duties which can only be enforced by a superior in a state. These duties are self-regarding virtues and charity and both of them can be enforced by the state. (Grotius, 1646: II.25 iii.2-4; I.2 i.3 p. 16) He emphasizes that the state could use amendatory punishments in order to make people better, and he mentions an example from the Locrian Code where someone was punished for drinking wine against the prescriptions of the doctor. (Grotius, 1646: I.1 ix.1 p. 3-4) He is not saying that they should always do this, but there is clearly no general limit that would bar the state from doing it.[2]

This position does not change very much when we consider a Lutheran political philosopher such as Samuel von Pufendorf. He espouses the same permissive rights. He explains that some things are lawful or indifferent things, and as such they are a medium between commands and prohibitions, but he specifies that they are not like lukewarm water, which partakes in both hot and cold. The indifferent should be distinguished from good and bad and does not partake in any of them. Indifferent actions are optional and can be performed as one pleases. The laws permit what is neither commanded nor prohibited, and in this way it defines a general liberty modifiable by new laws. (Pufendorf, 1716: I.2.9; I.4.7-8; I.3.14; I.7.2; I.6.15)

He distinguishes between perfect and imperfect obligation. The first kind of duties is necessary for the very existence of society, while the others only contribute to its well-being. The first can be asserted by force, while the second cannot, and he mentions piety, reverence, gratitude, humanity and beneficence. (Pufendorf, 1716: III.6.10; I.1.19; I.7.7-8) It seems like the first kind of duties is enforceable in their own right even outside the state, while other kinds of duties like assisting people in need, which is only obliging imperfectly, can be enforced by the state and then turned into a perfect obligation. (Pufendorf, 1716: II.6.5-6) He explains that law is not only about strict justice incurring perfect obligation, but also concerns the self-regarding virtues, and that is the reason why laws are often made against drunkenness, sumptuousness and the like. In this way many duties imposing only imperfect obligation are strengthened by laws. (Pufendorf, 1716: I.6.4; III.3.8) [3]

We have here the same general scheme as with Grotius. We are obliged to all virtues by universal justice and everything outside the mind is in principle enforceable by the state. Some duties suppose a particular attitude, such as generosity, and cannot as such be enforced, but the external part of it, namely helping the needy can very well be enforced by the state. However, some duties are such that they can be upheld in the state of nature, and they are inherently perfect, while other (external) duties can only be perfect in virtue of the state. The distinction between enforceable and non-enforceable duties now turns only on the external and internal side of the duties, such that only the attitude is inherently out of reach of the state. The distinction we found with the Sorbonne theologians did not operate uniquely on this count, but delimited materially the proper functions of the state, such that a

large amount of external behaviour was out of reach of the state.

John Locke subscribed to this view as a young man (Locke, 1967) but later he made an important move which somehow returned the situation to the time of the Sorbonne theologians. Locke reintroduced the distinction between strict and loose duties such that the functions of the state were limited materially. (Locke, 2006: 140-144, 283, 235, ; 1870: 14, 29; King, 1830: I p. 206-215) The context was, of course, different now. The huge social power of a unitary Church had disappeared, and this added a new dimension to freedom. It was the life, property and freedom, religious freedom included (to some extent) that should be protected against the state, and not the state against the ecclesiastical power. Like many of his contemporaries he had moved away from salvation from faith alone and embraced some version of work righteousness. (Baker, 1985: 129-130, 133) We are not suggesting that work righteousness was the cause of this move, but Locke did no more have a theology which would impede such a move. The reason probably has to be found in the political context of the time.

Conclusion

In order to highlight human sinfulness Luther set the bar much higher. The prescription of the Sermon of the Mount (Matthew 5) is not taken as two levels of obligation, one for ordinary people, and one for the perfect. We should never take revenge, never return evil with evil, never be litigious, always give one’s coat when one’s tunic is taken, always turn the other cheek, always go another mile with the person who obliges you to go one mile, never resist evil persons and always be benevolent towards your enemies. In fact, we should not even think about doing evil things. Clearly, no one is able to do this, and this is exactly Luther’s point. However, in setting the bar at such a high level, he also abandons the individual to the secular power which is entrusted with the task to ensure the external compliance with this ideal. We no longer have any other criteria for limiting the extent of the secular power. This is the price to pay for exacerbating human sinfulness. This appears as a core element in Protestant theology, and this would bar Lutheranism, Calvinism,

Arminianism, most Baptists and other Protestant denominations subscribing to the total depravity of man, from establishing general material limits to the secular power. The only distinction they could make was one between belief as something of the mind and other matters, and this could lay the foundation for freedom of religion, as it did with Roger Williams, but this would still leave the high moral standards to be enforced, thus making a more invasive state possible. It is difficult to see how the other freedoms could be produced by some kind of gemmation from religious freedom. We are here far from the liberalism of the 18th century declarations. They left moral matters out of the realm of the state.

One might object that the Quakers were a special case, challenging the notion of total depravity, but they are, on the other hand, notoriously uninterested in theoretical questions, and therefore an unlikely candidate for having developed the theoretical language of universal rights. Even though they are an outgrowth of Calvinism it is disputable to which extent they are Protestants. What we have tried to argue here is that core Protestantism is an unlikely originator of universal human rights in the 18th century sense. It does not caution an extensive space of liberty as they do.

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Endnotes

[1] This and following sections reproduces ideas presented in chapter 8 of Jacobsen, 2011.

[2] For a more detailed interpretation, see Jacobsen, 2011: 216-225.

[3] For a more detailed interpretation, see Jacobsen, 2011: 225-233.