

The Purported Moral Deficiency of Borders? A Tribute to Professor Barbara Hudson* †

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ABSTRACT

In her final work, Professor Hudson writes a provocative and timely essay addressing the tension between the right Western sovereigns bestow on their members and the purported threshold or floor of basic rights held by all according to ethical norms codified in international agreements. Her central query of whether “borders are necessary” seems to be a valid theoretical question the West must come to terms with if in fact it is going to give teeth to international, or ethics-based norms as perhaps she would put it.

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In her final work, Professor Hudson writes a provocative and timely essay addressing the tension between the right Western sovereigns bestow on their members and the purported threshold or floor of basic rights held by all according to ethical norms codified in international agreements. In a time when Western countries such as the United States, with President Donald Trump focusing on anti-immigrant rhetoric and proposals, such as building the so-called “wall” at the Mexican border, which arguably propelled him to the most unlikely of presidential victories, and Germany and France, among other Western states, struggling with what to do with the influx of Syrian refugees, Professor Hudson’s challenge to the virtue and value of sovereignty seems politically unlikely to be accepted anytime soon. The force of her argument however does not seem to be aimed at political expediency, instead, she appears to highlight the inconsistency between basic human rights purportedly held by all, and the use of sovereignty as a basis to limit the applicability of said rights in particular circumstances or by certain nation-states. Her central query of whether “borders are necessary” seems to be a valid

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theoretical question the West must come to terms with if in fact it is going to give teeth to international, or ethics-based norms as perhaps she would put it.

At its core, Hudson's essay poses a politically vexing challenge to the West if in fact these countries are to actually live by universal minimum norms held by all. Hudson focuses on border protection efforts to prove her central thesis: borders are in fact unnecessarily and useless. Hudson questions the value and virtue of sovereignty in a world increasingly recognizing minimum rights associated entry and exit to and from nation-states. One of Hudson's primary arguments concerning border control efforts is:

[...] international borders – as supported by the current policies of the most powerful nations and groups of nations – are expensive to maintain; do not achieve the objectives of migration control specified in policy and legislation; and, most importantly for the concerns of this chapter, do not respect the rights or protect the lives and security of migrants who approach them. (HAYTER, 2004; AAS, 2011; BELL 2012).¹

Further bolstering her critique, Hudson observes:

Maintaining borders leads to arbitrary detention, leaves people to perish while attempting to cross borders and denies rights to food and shelter at borders; it has been claimed that these derelictions of the duty to uphold universal human rights amount to state crimes. (GREWCOCK, 2007).²

As a result of the above and related arguments, Professor Hudson concludes: “It is not difficult, therefore, to argue for the dismantling of international borders”.³ From a theoretical standpoint, particularly focusing on the universality of international law goals, it is difficult to challenge Professor Hudson's conclusion. Professor Hudson goes on to make a forceful point when she argues borders and the very notion of the nation-state not only creates structures for inclusion, it necessarily creates lines of exclusion.⁴

Professor Hudson consequently creates a powerful argument for a re-envisioning rights and the very notion of membership, which is not linked to territoriality, but instead should be focused on universal ethically-based principles of equality of all. She uses the importance of basic human rights as the predicate rationale for such a vision. Throughout the essay, Hudson uses numerous examples of human rights abuses reoccurring within the framework of the

¹ HUDSON, Barbara. Moral communities across the border: the particularism of law meets the universalism of ethics. In: WEBER, Leanne (Ed.) **Rethinking Control for a Globalized World – A Preferred Future**. London and New York: Routledge, Taylor & Francis Group, 2015, p. 118.

² HUDSON, loc. cit.

³ HUDSON, loc. cit.

⁴ “While the border defines and delimits the community *inside*, and thus also establishes the boundaries of its law and its power (that is, sovereignty), it is also thereby the signifier of where the *outside* begins.” (Ibidem, p. 120).

nation-state. Her use of refugee problems in Africa and Asia are particularly persuasive, and certainly highlight the limits of the existing human rights framework. Using the writings of theorists like Immanuel Kant, Hudson envisions an arguably preferable framework: a cosmopolitan ethics-based framework for universal rights, particularly associated with the right to enter and leave a land.⁵ Put another way, this ethics-based framework would create a duty of hospitality to strangers.⁶

Despite the shortcomings of the border framework, in the end, Professor Hudson remains a realist and concludes borders, and thus the nation-state framework used to determine what peoples may enter and leave a land, will likely not be abandoned.⁷ In many respects, Hudson's criticisms of borders and thus the use of the nation-state to determine membership resembles the critiques of legal scholar Linda Bosniak in her book *The Citizen and the Alien*.⁸ Much like Hudson, Bosniak questions Western commitment to equality and international norms, observing:

The Quest for unmitigated inclusion within the community can therefore serve as a regulative ideal, but in actuality, such inclusion is a fantasy. [...] However ostensibly committed we are to norms of universality, we liberal national subjects are chronically divided over the proper location of boundaries—boundaries of responsibility and boundaries of belonging.⁹

It is because of these shortcomings, Bosniak advocates for a rejection of borders and thus the nation-state as the basis for determining the rights of those seeking to migrate. In my own book on the subject of Western norms of membership, *Citizenship and Its Exclusions: A Classical, Constitutional, and Critical Race Critique*,¹⁰ I took issue with the pragmatic aspects, or lack thereof, of Bosniak's proposal for the elimination of the nation-state.¹¹ Indeed, the rejection of the nation-state as the basis for facilitating migrant rights more closely resembled the iconic *Star Trek's* vision of a worldwide federation of states.¹² It is for these pragmatic reasons this author previously rejected calls for the abandonment of the nation-state, and thus borders, as a means to protect migrant rights.

⁵ Ibidem, p. 126-127.

⁶ Loc. cit.

⁷ Ibidem, p. 128.

⁸ BOSNIAK, Linda. **The Citizen and the Alien: Dilemmas of Contemporary Membership**. Princeton: Princeton University Press, 2006.

⁹ Ibidem, p. 140.

¹⁰ ROMAN, Ediberto. **Citizenship and Its Exclusions: A Classical, Constitutional, and Critical Race Critique**. New York: New York University Press, 2010.

¹¹ Loc. cit.

¹² Ibidem, p. 153.

Professor Hudson, for her part ultimately takes somewhat of a middle ground, recognizing the shortcomings of, and abuses associated with, borders, but in the end recognizes said borders are not likely to be abandoned. It is here perhaps where the reader will be left a bit wanting of further guidance. Ultimately, Professor Hudson recognizes the shortcomings of international borders, but does not believe they will be abandoned. Ultimately, Hudson argues:

[...] as Agamben (1998) says, the refugee, the stateless person, the person outside their state but not effectively inside another should be the focus of rights: the stranger at the border should embody the regime of rights.¹³

This is obviously where the untimely passing of a brilliant thinker leaves us all wanting for more analysis, thought, and education from Professor Hudson. Her important work addressing not only the shortcomings of the current structure of rights and limits of the nation-state as well as international law rights regimes, but also the need to re-envision a rights regime based on equality will unquestionably provoke further discussion and debate. As many realist, critical legal theory, and critical race theory scholars have introduced in recent decades, important legal and theoretical contributions examining current political norms and legal regimes do not always come with unassailable answers or conclusions. At times, the exposing or further examination of shortcomings leads, as Professor Hudson recognized within this very essay, to further examination and exploration. It for this reason, as well as her important contribution of reminding us that the limits of the border is not only an issue of migrating from a land, it is also an issue of those seeking to migrate away from a land due to among other reasons, discrimination or other forms of persecution. In the end, Professor Hudson provided the academy and policy-makers important issues to ponder and hopefully resolve in a fashion that few if any have thus far found. And while I certainly pray she rests in peace, I am confident her important work will continue to motivate scholars to explore these issues for decades to come.

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¹³ HUDSON, 2015, p. 130.