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Book Review



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## Book Review: The Liberty of Non-citizens: Indefinite Detention in Commonwealth Countries, by Rayner Thwaites

### **Abstract**

This is a book review of *The Liberty of Non-citizens: Indefinite Detention in Commonwealth Countries* by Rayner Thwaites.

## Book Review

***The Liberty of Non-citizens: Indefinite Detention in Commonwealth Countries,***  
by Rayner Thwaites<sup>1</sup>

COLIN GREY<sup>2</sup>

**MOST MIGRANTS ARE NOT FUGITIVES.** Nor are they dangerous or deranged. Yet in the past two decades they have been likelier to end up in detention, lasting a few days to many years.<sup>3</sup> Rayner Thwaites's *The Liberty of Non-Citizens* is a work of comparative legal scholarship that should be read by anyone interested in the laws and jurisprudence that have enabled this trend.

Thwaites's book traces the history and impact of three crucially important decisions on immigration detention: the 2004 *Al-Kateb* decision by the High Court of Australia, the 2004 *Belmarsh* decision from the House of Lords, and

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1. (Oxford: Hart, 2014). In the interest of transparency, I disclose that Professor Thwaites invited me to review his book.
  2. Professeur régulier, Département des sciences juridiques, Université du Québec à Montréal. Many thanks go to Rayner Thwaites and Richard Haigh for comments. Errors and infelicities are my own.
  3. The growing use of immigration detention is now much studied. For a recent survey of the phenomenon, see Amy Nethery & Stephanie J Silverman, *Immigration Detention: The Migration of a Policy and Its Human Impact* (Abingdon, UK: Routledge, 2015); for a disturbing report about the practice of immigration detention in Canada, see Hanna Gros & Paloma van Groll, "*We Have No Rights*": *Arbitrary Imprisonment and Cruel Treatment of Migrants with Mental Health Issues in Canada* (Toronto: International Human Rights Program, University of Toronto Faculty of Law, 2015).

the 2007 *Charkaoui* decision by the Supreme Court of Canada.<sup>4</sup> The three cases led to strikingly different conclusions on the legality of detention, and Thwaites's animating question asks how we might explain this disparity, given the respective countries' common legal heritage and the proximity in time of the decisions. He answers by suggesting that the judges who wrote them hold "fundamentally different understandings of the rights of non-citizens."<sup>5</sup> Some judges are "rights-protecting" and conceive that migrants have an equal right to liberty (equal, that is, to citizens) notwithstanding their immigration status. As a result, they find detention impermissible unless removal is reasonably foreseeable. Other judges are "rights-precluding" and affirm the power to detain without inquiring into the actual foreseeability of removal.<sup>6</sup> On Thwaites's accounting, *Belmarsh* lands on the rights-protecting side of the ledger, *Al-Kateb* and *Charkaoui* on the rights-precluding side.

Unfortunately, Thwaites scatters his discussion of the rights-protecting and rights-precluding models throughout the book, making it hard to assess the models' interpretive power and the normative justification for the rights-protecting model.<sup>7</sup> In what follows, I will try to clarify Thwaites's models as a means of understanding his classification of the Canadian case *Charkaoui* as rights-precluding. The focus is on *Charkaoui* because it is by far the most difficult of the three cases to place. In its decision, the Court struck down aspects of the existing regime for the detention of non-citizens certified as security threats and expressly disavowed prolonged and indefinite detention. However, the Court also left in place a case-by-case approach to detention review that in practice has allowed prolonged detention to continue. As will be seen, I believe it is hard to say definitively that *Charkaoui* is rights-precluding; this difficulty is partly a product of the decision and partly a product of Thwaites's typology.

## I. BELMARSH, AL-KATEB, AND CHARKAOU

The starting point in understanding Thwaites's two models is to recognize that the "right" either precluded or protected in the three decisions studied is "the

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4. *Al-Kateb v Godwin*, [2004] HCA 37, 219 CLR 562 [*Al-Kateb*]; *A v Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 AC 68 [*Belmarsh*]; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui*]. Thwaites also discusses the subsequent *Charkaoui* case, which does not address detention. See *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 SCR 326.

5. Thwaites, *supra* note 1 at 307.

6. *Ibid* at 15-16.

7. For the most extended discussion, see *ibid* at 15-20.

right to liberty”<sup>8</sup> (in this context, the potentially protean right to liberty equates to a Hohfeldian “immunity from detention”). At times Thwaites also writes as though the right at stake should be deemed the “equal right to liberty,” since the yardstick for whether non-citizens’ rights have been protected or precluded is said to be the treatment of citizens. Thus the *Belmarsh* decision, in which the House of Lords held invalid a government order permitting the indefinite detention of non-nationals certified to be security risks,<sup>9</sup> is rights-protecting because it accords to non-citizens immunity from detention on par with the immunity accorded to citizens. *Al-Kateb*<sup>10</sup> is rights-precluding because it does not. In it, a majority of the High Court of Australia found that the Australian *Migration Act*<sup>11</sup> authorizes the indefinite detention of migrants (because one could never deem removal impossible) and, further, upheld the Act’s constitutionality. Whereas the *Belmarsh* decision has been “hailed as a historic beacon in the judicial defence of liberty,”<sup>12</sup> *Al-Kateb* is seen as a restrictionist high-water mark, on par with the United States Supreme Court’s Cold War-era decision in *Mezei*, a case that authorized indefinite “harborage” on Ellis Island in even starker terms.<sup>13</sup>

Less clear-cut than either of these is *Charkaoui*, in which the appellants were detained under a regime for the certification of non-citizen security threats<sup>14</sup> contained in Canada’s *Immigration and Refugee Protection Act* (IRPA).<sup>15</sup> Under aspects of this regime that continue today, the Minister of Immigration, Refugees, and Citizenship (formerly the Minister of Citizenship and Immigration) and the Minister of Public Safety and Emergency Preparedness may jointly certify that

8. *Ibid* at 15.

9. *Supra* note 4. The order in issue purported to derogate from the European *Convention on Human Rights. Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, Eur TS 5 (entered into force 3 September 1953) [*ECHR*]. Article 5(1)(f) of the *ECHR* provides:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

f. the lawful arrest or detention of ... a person against whom action is being taken with a view to deportation ... (*ibid*).

10. *Supra* note 4.

11. *Ibid*. See *Migration Act 1958* (Cth), s 196.

12. Thwaites, *supra* note 1 at 124.

13. *Shaughnessy v United States ex rel Mezei*, 345 US 206 (1953) (“Whatever our individual estimate of [the] policy and the fears on which it rests, respondent’s right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate” at 216).

14. *Supra* note 4.

15. SC 2001, c 27 [*IRPA*].

a foreign national or permanent resident is inadmissible to Canada on various security- or criminality-related grounds. If this assessment is found reasonable by a judge of the Federal Court, the certificate constitutes an order for removal from Canada.<sup>16</sup> Further, certified persons may be detained pending the Federal Court's decision and then, if the certificate is found reasonable, pending removal.<sup>17</sup> In *Charkaoui*, the Court concluded that the lack of timely detention reviews for certified foreign nationals (as opposed to permanent residents, who had access to timely review) unjustifiably violated sections 9 and 10(c) of the *Charter*,<sup>18</sup> which respectively provide a guarantee against arbitrary detention and a right to *habeas corpus*.<sup>19</sup> In response to this ruling, the government amended the IRPA so that initial detention reviews are now held within forty-eight hours for all certified persons,<sup>20</sup> in line with most immigration detention reviews outside the security certificate context.<sup>21</sup>

Because it resulted in a win for the non-citizen appellants, the Court's decision at first seems like it might be placed alongside *Belmarsh* as a rights-protecting decision. After all, the decision did protect rights.<sup>22</sup> Yet Thwaites classes *Charkaoui* alongside *Al-Kateb* as rights-precluding, largely because of the Court's response to another constitutional argument. In addition to the challenge based on the lack of timely review, one of the appellants challenged the detention regime because it allowed for prolonged or indefinite detention. The Court rejected this challenge, saying that the constitutional concern about lengthy detention was met by the

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16. *Ibid*, ss 77-80.

17. *Ibid*, ss 81-82.4.

18. *Charkaoui*, *supra* note 4 at paras 93-94.

19. *Canadian Charter of Rights and Freedoms*, s 9, 10(c), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

20. *IRPA*, *supra* note 15, s 82(1).

21. See *ibid*, s 57 (governing detention reviews outside the security certificate regime). The accompanying text refers to "most" (as opposed to all) detention reviews because certain foreign nationals—whose arrival is designated as "irregular" by the Minister of Public Safety and Emergency Preparedness—do not have access to a first detention review for fourteen days. See *ibid*, ss 20.1(1)(a), 57.1.

22. Further tending in a rights-protecting direction, but less directly relevant to the discussion here, the Court also found that the then-existing procedures for reviewing the reasonableness of a security certificate unjustifiably violated s 7 of the *Charter*. *Charkaoui*, *supra* note 4 at paras 65, 87 (the ground for invalidating the reasonableness review of security certificates was that too much evidence was withheld from both the certified person and the reviewing judge). In response to the Court's decision, Parliament enacted a system under which secret information can be challenged on behalf of a certified person by a special advocate. Certified persons themselves, however, receive only a summary of the government's secret information. See the *IRPA*, *ibid* ss 83, 85-85.6.

Act's scheme of regular detention reviews.<sup>23</sup> Thwaites's main complaint against *Charkaoui* is that the Court failed either to establish a presumptive time limit on detention or even to say that, in all cases, at a certain point in time, prolonged detention will pass into unlawfulness. Instead, the Court "put its faith in a case-by-case review of each detainee's individual circumstances"<sup>24</sup> in accordance with factors established earlier by the Federal Court-Trial Division in a case called *Sabin*<sup>25</sup> and later codified in section 248 of the *Immigration and Refugee Protection Regulations*.<sup>26</sup>

Thwaites argues that this reliance on the case-by-case application of regulatory factors means that indefinite detention is allowed in practice. Here Thwaites is indisputably correct: It is simply a non sequitur to claim that regular detention reviews prevent indefinite detention; at best, all they allow for is the regular possibility of release but no guarantee such release will happen. Subsequent cases of lengthy detention have borne out this concern.<sup>27</sup>

Still, the Supreme Court did not seem to see its decision in rights-precluding terms. To begin with, the Court stated clearly that the IRPA "does not authorize indefinite detention and ... provides an effective review process that meets the requirements of Canadian law."<sup>28</sup> The Court also said that "length

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23. *Charkaoui*, *supra* note 4 at paras 107-110.

24. Thwaites, *supra* note 1 at 259.

25. *Sabin v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 214 at paras 30-32, [1994] FCJ No 1534 [*Sabin*].

26. SOR/2002-227, s 248. For the approval of the factors set out in *Sabin* and the factors in section 248, see *Charkaoui*, *supra* note 4 at paras 108-117.

27. In one of the worst cases, a man apparently named Michael Mvogo was detained for over eight years because of difficulties establishing his identity. For discussion, see Gros and van Groll, *supra* note 3 at 91. The case of Mr. Mvogo and three other cases of prolonged detention are discussed in *Chaudhary v Canada. Chaudhary v Canada (Public Safety and Emergency Preparedness)*, 2015 ONCA 700, 127 OR (3d) 401. For a particularly vertiginous example of seemingly indefinite detention, see *Warsama v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1311, [2015] FCJ No 1356 [*Warsama*]. *Warsama* involves a Somali national subject to removal due to his criminal record. In practice, however, Mr. Warsama could not be removed because he would not sign a form agreeing to "cooperate" (*ibid* at para 10). This form is necessary because removal to Somalia involves turning the foreign national, unescorted, to an African airline for a flight from Nairobi to Mogadishu; Canadian pilots and authorities do not travel to Somalia because it is considered unsafe (*ibid* at paras 11-12). At the time of the decision, on 24 November 2015, Mr. Warsama had spent fifty-seven months in detention because "[t]he authorities ha[d] every reason to believe that if Mr. Warsama were to be released into the population at large he would not voluntarily appear for his removal": not, notably, because he was considered a danger to the public or a security risk (*ibid* at paras 2, 34).

28. *Charkaoui*, *supra* note 4 at para 127.

of the detention to date is an important factor” and that “[i]f there will be a lengthy detention before deportation or if the future detention time cannot be ascertained, this is a factor that weighs in favour of release.”<sup>29</sup> And it added that its pronouncements were consistent with holdings in *Belmarsh*,<sup>30</sup> as well as in two other cases that Thwaites deems rights-protecting, *Zadvydas* and *Hardial Singh*.<sup>31</sup> These two cases pronounced indefinite detention unlawful insofar as “detention in this context can be used only during the period where it is reasonably necessary for deportation purposes.”<sup>32</sup> Notably *Zadvydas*, from the US Court, imposed a presumptive time limit of six months<sup>33</sup> on detention, and *Hardial Singh*, a key British precedent from the Queen’s Bench Division, held that detention was limited to a period “reasonably necessary” for the purpose of removal.<sup>34</sup> Barring disingenuousness on the Supreme Court’s part, its declaration of consistency in principle with these foreign authorities seems to indicate that it considered that it held a compatible conception of non-citizens’ liberty rights. In the face of these aspects of the decision, whether we should accept the classification of *Charkaoui* as rights-precluding depends on getting a better grasp of just what it means for a decision to be either rights-protecting or rights-precluding.

## II. PRECLUDING AND PROTECTING RIGHTS

This task is complicated because, as Thwaites recognizes, there really are two variants, not one, of the rights-precluding model. The task is made harder by the fact that the second rights-precluding model and the rights-protecting model are in fact quite similar in conception.

A first, uncompromising version of rights-preclusion denies that non-citizens have any liberty right independent of the permission of the political branches of a receiving state to be in that state’s territory. Absent such permission, a non-citizen has no right to be at liberty in the state’s territory and no court can order his or

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29. *Ibid* at para 115.

30. *Ibid* at para 127.

31. *Ibid* at para 124.

32. *Ibid*.

33. *Zadvydas v Davis*, 533 US 678 at 701 (2001), 121 S Ct 2491 (per Breyer J) [*Zadvydas*]; see Thwaites, *supra* note 1 at 4-7.

34. *R v Governor of Durham Prison, ex parte Singh*, [1984] 1 All ER 983 at 985, [1983] EWHC 1 (QB); see Thwaites, *supra* note 1 at 126-28.

her release.<sup>35</sup> Thwaites attributes such reasoning to the majority opinion of Justice Hayne of the High Court of Australia in *Al-Kateb*, who wrote in his opinion that there was no “judgment made against a person otherwise entitled to be at liberty in the Australian community. The premise for the debate is that the non-citizen does not have permission to be at liberty in the community.”<sup>36</sup> In a concurring opinion, Justice McHugh further opined that release of non-removal migrants into the community would lead to “*de facto* Australian citizen[ship].”<sup>37</sup> This version of the rights-precluding model thus seems shaped by a concern that release would equate to admission, even admission to citizenship, which have been ruled out by statute and executive decision. Crudely, detention is justified because admission is disallowed. Or, as Justice McHugh apparently asked in oral argument: “How can you claim a right of release into the country when you have no legal right to be here?”<sup>38</sup>

Thwaites says the difficulty with this line of reasoning lies in a problematic slide from “exclusion at the border and removal from Australian territory, to exclusion and removal from the Australian community.”<sup>39</sup> What the courts have overlooked is the “alien’s continuing vulnerability to deportation,”<sup>40</sup> which eliminates concerns about *de facto* citizenship. I think, however, it is a mistake to dismiss this view as based on a problematic elision. If removal really is impossible, it surely follows that a migrant who would have been indefinitely detained would,

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35. Thwaites characterizes this as allowing immigration detention for the purpose of “segregation from the community,” which he deems “a new type of non-punitive detention.” Thwaites, *supra* note 1 at 74-75.

36. *Al-Kateb*, *supra* note 4 at para 254, cited in Thwaites, *supra* note 1 at 74. As Thwaites notes (*ibid*), Hayne J’s reasoning is “reminiscent” of the dissenting opinion of Scalia J in *Zadvydas*. See *Zadvydas*, *supra* note 33 at 702-703. Scalia J writes:

A criminal alien under final order of removal who allegedly will not be accepted by any other country in the reasonably foreseeable future claims a constitutional right of supervised release into the United States. This claim can be repackaged as freedom from “physical restraint” or freedom from “indefinite detention,” ... but it is at bottom a claimed right of release into this country by an individual who *concededly* has no legal right to be here. There is no such constitutional right [emphasis in original].

For Thwaites’s discussion of *Zadvydas*, see *ibid* at 4-10.

37. *Al-Kateb*, *supra* note 4 at para 46. Another clear statement comes in the way Thwaites contrasts the majority decision with the unanimously decided *Offshore Processing Case*. See Thwaites, *supra* note 1 at 106-108, citing *Plaintiff M61/2010E v Commonwealth*, [2010] HCA 41, (2011) 243 CLR 319.

38. Thwaites, *supra* note 1 at 114.

39. *Ibid* at 75.

40. *Ibid* at 76.

upon release, indefinitely reside. What is more, the natural result of indefinite residence—as social ties are formed and a life is slowly built—is that, at a certain point, citizenship, or some proxy thereof, would become required as a matter of substantive justice. At that point removal, once possible, might no longer be morally or legally acceptable. Thus, citizenship, or at least a stronger case against eventual removal and various rights and obligations attaching to long-term residence, may well follow in cases such as these.

Regardless of how one analyses this first rights-precluding model, it seems clear that it does not capture the Supreme Court's reasoning in *Charkaoui*. In *Charkaoui*, the Court clearly contemplated the possibility of release at some point, notwithstanding the decision by the executive branch that the non-citizen appellants were not permitted to be in Canada. So if *Charkaoui* is rights-precluding, it must be so under a second version. This version accepts that migrants may have an interest in release despite their lack of permission from the political branches to be in the territory of the detaining country. Presumably, this interest is both an interest in avoiding the suffering that attends detention as well as a more affirmative interest in living freely and all that that involves, such as being together with one's family, building a career, developing a broader network of social ties, and participating in political life. However, on this version, such interests are assessed somehow differently in the case of migrants than are the corresponding interests of citizens. We might say, metaphorically, that they are given less weight. Or we might say that countervailing considerations have decisive importance that they would not have in the case of citizens. Thus John Finnis, whom Thwaites treats as a scholarly exemplar of rights-preclusion, writes that "the presence in the community of an alien who, individually considered, can fairly be said to present some genuine *risk*, even relatively slight, ... *need not be accepted*."<sup>41</sup> The key difference is that, before contemplating preventative detention of citizens, we would demand more than a "relatively slight" risk.<sup>42</sup>

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41. John Finnis, "Nationality, Alienage and Constitutional Principle" (2007) 123 LQR 417 at 423 [emphasis in original]. For discussion of this passage, see Thwaites, *supra* note 1 at 21-22. See also *Zadvydas*, *supra* note 33 at 717. Kennedy J, the author of the other dissenting opinion in *Zadvydas*, writes: "The reason detention is permitted ... is that a removable alien does not have the same liberty interest as a citizen does."

42. This is in contrast to the use of indefinite detention in the criminal context which, in Canada, requires a prior conviction for a personal injury offence. See *R v Lyons*, [1987] 2 SCR 309, 44 DLR (4th) 193. See also *Charkaoui*, *supra* note 4 at para 107: The Court states that "[t]he principles underlying *Lyons* must be adapted in the case at bar to the immigration context, which requires a period of time for review of the named person's right to remain in Canada."

Finnis's discussion understandably focused specifically on risk, since he was attacking the result in *Belmarsh*. However, in general, this second rights-precluding model discounts the liberty interest of non-citizens regardless of the reason for removal, so long as the government is making "good faith" efforts at removal.<sup>43</sup> Nonetheless, however high it sets the bar, this second rights-precluding model at least contemplates release, unlike the first. In so doing, it seems to have more in common with Thwaites's conception of the rights-protecting model, which (as I explain immediately below) also engages in a balancing of interests, than it does with the first rights-precluding model, which does not.

Under the rights-protecting model, according to Thwaites, "[d]etention is lawful if it is proportionate to the infringement of the detainee's liberty interest, as judged against the purpose of facilitating the non-citizen's removal."<sup>44</sup> What this amounts to, he argues, is that detention will not be proportionate when not "reasonably necessary" to achieve removal.<sup>45</sup> Note further that, in its proportionality analysis, the rights-protecting model satisfies itself with the necessity of facilitating removal, whatever the basis for the initial reason to detain.<sup>46</sup> This is important because the initial reason for detention will often reflect the reasons for removal, as well as more general concerns about immigration control (leading to detention of those non-citizens who cannot be identified or who are considered flight risks). Thus the rights-protecting approach accepts that any given reason for removal can justify detention for some period of time, as can immigration control in general. By accepting as much, the rights-protecting approach arguably discounts the liberty interest of non-citizens significantly. If a non-citizen were detained even for a few days in order to be removed, say, because that non-citizen worked in contravention of the terms of a student visa, it would be hard to see how that

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43. Thwaites, *supra* note 1 at 16. This seems to be in contrast with the first rights-precluding model, which requires only that the government have the "purpose" of removal. See *ibid* at 68, 75.

44. *Ibid* at 11. Or, in another statement:

Under a rights-protecting approach, a commitment to the non-citizen's liberty right is evident at two points in the legal reasoning. It serves to define the permissible purposes of detention, and it informs a proportionality analysis of detention for that purpose. The two elements go together because a permissible immigration purpose will always be amenable to proportionality analysis (*ibid* at 299).

45. *Ibid* at 13.

46. *Ibid* at 14, n 68. This is consistent with the approach of the European Court of Human Rights in *Chahal*. See *Chahal v United Kingdom*, [1996] ECHR 54, 23 EHRR 413.

liberty right might in any way be construed as on par with that of citizens.<sup>47</sup> There is simply no analogue case in which a citizen might be detained for performing work that is not criminal in nature.

So there are important similarities between the rights-protecting model and the second rights-precluding model. Both are underwritten by a kind of proportionality analysis. Moreover, in both cases, this proportionality analysis does not look at the reason for removal and, by demurring on this point, concedes a great deal to the imperative of immigration control. The major difference between them, it seems, is that a rights-protecting judge (or a rights-protecting legal scholar) will always claim that the proportionality analysis favours release after a shorter period of time. What this suggests is that what is in play here is not so much a “fundamentally different understanding of the rights of non-citizens”<sup>48</sup> as a difference of judgment.<sup>49</sup>

All this makes it hard to classify *Charkaoui* according to the models Thwaites has established. The classification is yet more challenging because of a further aspect of the rights-protection model. As I have said, Thwaites’s main difficulty with the Court’s decision is that it failed to establish a presumptive time limit on indefinite detention. But if it is a non sequitur for the Court to claim that regular detention reviews prevent indefinite detention, it is an equal but opposite non sequitur to say that a proportionality analysis will invariably lead to release after a certain amount of time. A proportionality analysis simply weighs competing values to arrive at an all-things-considered judgment. In the present context, the key values in opposition are, on the one hand, the imperative of immigration control and, on the other, the non-citizen’s interest in being free from detention. Unless one is willing to call into question the imperative of immigration control—as neither the rights-protection model nor the Court in *Charkaoui* seems to be—then it seems implausible to claim that a proportionality analysis will always lead to the requirement that removal must be reasonably foreseeable

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47. Here it might be pointed out that a citizen of country A could be detained on such grounds in country B, and vice versa, so that a kind of equality is at work. However, this observation does not address the question as to why, within each country, detention of non-citizens is considered justified for the purpose of removal. Why, that is, we consider that non-citizen status justifies this symmetrical inequality.

48. Thwaites, *supra* note 1 at 307. See also *supra* note 5 and accompanying text.

49. That what is at stake is a difference in the judgment of what proportionality requires may explain how the Court in *Charkaoui*, in Thwaites’s words, “arrived at a criterion for limiting detention that proved capable of accommodating not only the positions adopted in *Hardial Singh* and *Zadvydas*, but their opposite, the competing position against which the ratio of these decisions was defined.” Thwaites, *supra* note 1 at 265.

for detention to be justified. The plausibility of such a claim increases, though I will not say it is categorically established, once one brings the reasons for removal into the mix, to be weighed against the adverse psychological and other impacts of detention.<sup>50</sup> And to bring the reasons for removal into the mix, one must be willing to question the imperative of immigration control at the pleasure of the political branches. All talk of “reasonableness” or “proportionality” that does not address the justifiability of immigration control only modestly advances the protection of non-citizens’ rights.

Though I have argued that the rights-precluding and rights-protecting models are not entirely convincing as interpretive tools, and that the rights-protecting model is not normatively satisfying on its own terms as a claim to vindicate non-citizens’ right to liberty, Thwaites has made a worthy contribution to the growing scholarship on immigration detention by examining *Belmarsh*, *Al-Kateb*, and *Charkaoui* together. He has advanced our understanding considerably, and readers will gain much from engaging with his book, as I have.

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50. Thwaites discusses these impacts but not in the context of setting out the proportionality analysis under the rights-protection model. See Thwaites, *supra* note 1 at 102-103. Thwaites also discusses the psychological impact of “control orders”—essentially a form of conditional release—in the United Kingdom. *Ibid* at 193, 196-98. For a discussion of the psychological consequences of detention in the Canadian context, see Janet Cleveland and Cécile Rousseau, “Psychiatric Symptoms Associated With Brief Detention of Adult Asylum Seekers in Canada” (2013) 58 *Can J Psychiatry* 409. For other factors that might be considered in a proportionality analysis considering immigration detention, see Michael Flynn, “Who must be Detained? Proportionality as a Tool for Critiquing Immigration Detention Policy” (2012) 31 *Refugee Survey Quarterly* 40 at 55-67.