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A Bronx Tale: Disposable People, the Legacy of Slavery, and the Social Death of Kalief Browder

D. Marvin Jones*

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I. INTRODUCTION

It is early morning May 15, 2010 in the Belmont section of the Bronx. Kalief Browder and his friend are on their way home from a party.¹ He is sixteen. Walking home along Arthur Avenue, “Little Italy’s” main street, they pass familiar stores, delis, and bakeries, their corrugated aluminum shutters pulled down and pad locked tight.

* © Donald Jones, all rights reserved. D. Marvin Jones is Professor of Law at the University of Miami. His most recent book is DANGEROUS SPACES: BEYOND THE RACIAL PROFILE (Praeger 2016).

¹ The facts of the story are based on the following articles about the incredible case of Kalief Browder. Jennifer Gonnerman, *Before the Law: A boy was accused of taking a backpack. The court took three years of his life.* THE NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law> (hereinafter *Before the Law*); Jennifer Gonnerman, *Kalief Browder, 1993–2015*, THE NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>; Michael Schwartz & Michael Winrip, *Kalief Browder, Held at Riker’s Island for 3 years Without Trial*, N.Y. TIMES (June 8, 2015), http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html?_r=0.

Suddenly a police car speeds toward them and careens to a stop.² More police cars arrive in rapid succession.³ As they stare into the police headlights an officer informs them that they are suspects in a robbery.⁴ Kalief maintains his innocence as he would unwaveringly for the next few years. “I did not rob anyone,” Kalief says.⁵ “You can check my pockets.” The officers conduct the search but come up with nothing.⁶ An officer goes back to talk to the witness in the squad car. Now apparently the man in the squad car changes his story. The policeman says the man claimed the two youths had robbed him “two weeks ago.”⁷

The police arrest Kalief and his friend on the spot.⁸ Based on the uncorroborated allegation of a man in the squad car about a two week old robbery, police take Kalief and his friend to the police station and charge him with robbery, grand larceny, and assault. His bail was set at \$3000.00.⁹ Kalief’s mother cannot raise that amount. It is completely out of reach.¹⁰

Browder found himself aboard a Department of Correction bus. “Staring through the grating on the bus window, he watched the Bronx disappear. Soon, there was water on either side as the bus made its way across a long, narrow bridge to Rikers Island.”¹¹

The court system in the Bronx is broken. “Defense lawyers are notorious for dilatory tactics, prosecutors are often unprepared.”¹² The majority of criminal cases are disposed of by plea. Browder steadfastly refuse to plead guilty, insisting he was innocent. Browder stayed at Rikers for three years.¹³ He spent two of those years in solitary confinement.¹⁴ During this period, he claims he endured constant beatings at the hands of both inmates and guards.¹⁵

In the film *12 Years a Slave*, Solomon Northup, a successful musician and free man living in Saratoga, is kidnapped by white men and

² *Before the Law*, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Before the Law*, *supra* note 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Schwartz & Winerip, *supra* note 1.

¹⁴ *Id.*

¹⁵ Gonnerman, *supra* note 1.

clandestinely transported to the slaveholding antebellum south.¹⁶ To his family and friends Solomon had simply disappeared.

In a real sense so did Kalief Browder. He became a member of a dangerous population whose incarceration defines a boundary between the criminal and the respectable, between us and the dangerous threats. The fact that Kalief could remain incarcerated at Rikers for three years without a trial shows the studied indifference, disregard, and disrespect of society for him. It is symptomatic of the studied indifference, disregard, and disrespect society has for poor people of color who suffer daily the brutal conditions at the jail-prison system at Rikers.

Northup for the twelve years he was gone would have seemed to “disappear.” Browder to his family and friends, out of sight at Rikers, may have seemed to disappear as well, a disappearance associated only with those who are actually dead and those convicted and imprisoned for a felony.

But Browder was never convicted of anything. There were no hearings in any court in which evidence was presented against him. There was only the uncorroborated allegation by “a man in squad car” that Kalief and his friend had robbed him “two weeks ago” at the time of his arrest. And even that story was inconsistent with the police officer’s original accusation.

On this flimsy basis, Browder had been incarcerated and imprisoned, invisible apparently to a system which hypocritically holds that justice delayed is justice denied. Justice never showed up at all for Browder. Justice, like Browder, disappeared for three years. Browder spent two years of the three years he was incarcerated—without trial—in solitary confinement. He was forced to accept conditions of hyper-isolation, which were particularly inhumane, for two years of his life. And he had to accept that this was happening without ever having a day in court, without ever having an opportunity to confront witnesses, without ever being treated as a citizen with rights. The injustice of something like this happening to anyone seems unbelievable, fantastic. In *Birth of a Nation’hood: Gaze, Script and Spectacle in The O.J. Simpson Case*,¹⁷ Toni Morrison talks about the “sudden transformation of the unbelievable into belief.”¹⁸ Browder would have to believe, that the unbelievable thing had happened, and that it had happened to him

The shock of this transition would have been maddening to anyone.

¹⁶ 12 YEARS A SLAVE (Fox Searchlight 2013).

¹⁷ TONI MORRISON, *BIRTH OF A NATION’HOOD: GAZE, SCRIPT, AND SPECTACLE IN THE O.J. SIMPSON CASE* (2010).

¹⁸ *Id.*

After his release Kalief became “afraid of being attacked on the subway and that his TV was watching him.”¹⁹ He was afraid to go out of the house for fear of being attacked.

He did make halting steps to create a future for himself. While in college he writes an essay in which he details the dehumanizing and psychologically destructive effects of solitary confinement. It was prophetic. “On June 6, 2015 about 12:15 p.m. “[Browder] went into another bedroom, pulled out the air conditioner, and pushed himself out through the hole in the wall, feet first, with a cord wrapped around his neck.”²⁰

Browder’s mother was the only other person home at the time. After hearing a loud thump, she went upstairs to look for her son but he wasn’t there. When she went outside she saw that he had hanged himself.²¹

Officially Browder’s death was listed as a suicide. But I question that. I argue his death was a homicide.

Fully situated members of the community have rights, and if they were incarcerated, they would not wait three years to get a trial. But those who are black, poor, and in urban spaces live in a kind of social limbo where they are not considered worthy of the same level of recognition, social protection, or rights. They are always and already depersonalized. They are disposable in the sense that when they are falsely arrested or incarcerated for years without trial or killed, there is routinely no accountability—their lives don’t matter. Said another way, what made Kalief’s treatment possible is that the Kalief Browders are invisible to the legal system and effectively right-less persons. They are socially dead.

My essay will unfold in three parts. First I explore the meaning of social death. The concept of social death is borrowed from Orlando Patterson’s work *Slavery and Social Death*.²² In effect I argue that Browder experienced a status which was both the legacy of slavery and comparable to it: he was socially dead. To appreciate this analogy, we will explore social death as it applies to the status of the slave. Second, we will discuss how the conditions and treatment Browder received reproduced phenomenologically the conditions of slavery. Finally, I will argue that these conditions led directly to his death.

¹⁹ Nisha, *Kalief Browder Hangs Himself After Spending Three Years on Riker’s Island Without Trial*, THE SOURCE (June 9, 2015), <http://thesource.com/2015/06/09/kalief-browder-hangs-himself-after-spending-three-years-on-rikers-island-without-trial/>.

²⁰ Schwirtz & Winerip, *supra* note 1.

²¹ *Id.*

²² ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* (Harvard Univ. Press 1985).

II. WHAT WAS SLAVERY?

Positioned at the edge of social life, neither included nor expelled, the slave is “in a permanent condition of liminality” and must forever mourn his own social death.²³

A. *Powerlessness*

Slavery was first of all a relation of total domination of man by man. “The slave was a dominated thing, an animated instrument, a body with natural movements, but without its own reason, an existence entirely absorbed in another.”²⁴ The power of the master was absolute:

the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits . . . such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else that can operate to produce the effect.²⁵

More specifically what does the absolute power of the master mean from the perspective of the slave? The slave was first of all powerless to control his own body. The master could command the slave to stand, or sit, or walk, or work, for how long. The master decided if he wanted to use the slave’s body for sexual purposes or for any other purpose.

I was called up on one of her [Miss Ada’s] birthdays, and Marster [sic] Bob sorta looked out of de corner of his eyes, first at me and then at Miss Ada, and then he make a little speech. He took my hand, put it in Miss Ada’s hand, and say: “Dis your birthday present, darlin” I make a curtsy and Miss Ada’s eyes twinkle like a star and she take me in her room and took on powerful over me.²⁶

Ultimately the master controlled the slave’s mind as well as his body, “such methods make the psyche of the oppressed the focus of

²³ *Id.*

²⁴ *Id.*

²⁵ State v. Mann, 13 N. C. 263 (1 Dev.) (1829) (per curiam).

²⁶ PATTERSON, *supra* note 22, at 12.

control and domination.”²⁷ Thus, Ruffin says flatly, “the slave has no will of his own . . . the slave surrenders his will in implicit obedience to another.”²⁸ The slave was a machine of flesh and blood controlled by the master’s commands, “in a perfect state of slavery they could become if guided by the master’s rational will, something like machines or prosthetic devices.”²⁹ Thus in the motion picture *Twelve Years a Slave* the master at various times rapes, whips, works, or commands Patsy (Lupita Nyong’O) to dance for his amusement.³⁰ This power of absolute control over the body of the slave emanated from several sources, the most important of which was the threat of violence against the slave.

To effectuate this power, the law placed no constraints on the how much force the master could use or how to use it. As Judge Ruffin wrote, “The power of the master must be absolute to render the submission of the slave perfect.”³¹ Similarly, Patterson writes, “The master’s absolute power and the slave’s total powerlessness rested on the use and threat of violence.”³² All societies come into being through violence. For fully situated members of the community, violence crystallizes into law, which are rules backed by threats—symbolic violence. For the slave direct violence created the status of slavery:

“the slave’s powerlessness originated or was conceived of as having originated as a substitute for death usually violence death. . . The condition of slavery did not . . . erase the prospect of death . . . it was a conditional commutation. The execution was suspended only as long as the slave acquiesced in his powerlessness. The master was essentially a ransomer. What he bought or acquired was the slave’s life.”³³

From moment to moment the slave was forced to choose between their slave status—powerlessness—and death.

Violence also maintained the slave relationship. Given the inhuman conditions of slave life, it was necessary to continually to repeat the

²⁷ *Id.*

²⁸ *Supra* note 25.

²⁹ BENJAMIN REISS, *THE SHOWMAN AND THE SLAVE: RACE, DEATH AND MEMORY IN BARNUM’S AMERICA* 121 (2001).

³⁰ *12 YEARS A SLAVE* (Fox Searchlight 2013).

³¹ *State v. Mann*, 13 N. C. at 266; *See also* D. MARVIN JONES, *RACE, SEX AND SUSPICION: THE MYTH OF THE BLACK MALE* 154 (Praeger 2005).

³² HUSSEIN ABDILAH BULHAN, *FRANTZ FANON AND THE PSYCHOLOGY OF OPPRESSION* 122 (1985); PATTERSON, *supra* note 22.

³³ PATTERSON, *supra* note 22, at 5.

original, violent act of transforming a free man into slave.”³⁴ As George P. Rawick writes, “whipping was not only a method of punishment. It was a conscious device to impress upon the slaves that they were slaves; it was a crucial form of social control particularly if we remember it was difficult for slaves to run away peacefully.”³⁵

B. *Rightlessness*

In *12 Years a Slave* Northup was imprisoned in a cellar about twelve-feet-square. Steps led up from the cellar into a yard surrounded by a brick wall ten or twelve feet high immediately in the rear of a building of the same width as itself.³⁶ Hidden behind a building which appeared to be a residence, and behind a ten to twelve foot wall, is the underground slave pen where Northup was held. This pen is physically invisible to the larger society. This is a metaphor for the fact that the slave was invisible to the law, behind a kind of iron curtain belonging to no community and having no rights. This rightlessness is the concomitant to the powerlessness of the slave at the hands of the master under the law of slavery. Thus Chief Justice Taney could say, “They had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect.”³⁷

This was conceptualized by the notion that the slave was property. “The slave-code . . . of the Southern States is designed to keep millions of human beings in the condition of chattels personal; to keep them in a condition in which the master may sell them dispose of their time, person, and labour . . .”³⁸ A corollary here the slave had no right to his body, his labor, or himself. Thus William Gödel could say, “Having no right to himself, to his bones, muscles, and intellect (being all of them property of his “owner”), [the slave] has no right to his own industry . . .”³⁹

But property was a metaphor. The key aspect of the relation is that the slave was objectified or thingified in order to create the relation of absolute domination. “Not being accounted a person but thing [the slave]

³⁴ PATTERSON, *supra* note 22, at 3; see also KELLY L. WHREHAVEN, RECONSTRUCTING THE SLAVE: THE IMAGE OF THE SLAVE IN ANCIENT GREECE 70 (2012).

³⁵ *Id.* at 70.

³⁶ *Id.* at 38.

³⁷ *Dred Scott v. Sanford*, 60 U.S. 393, 407 (1857). See also D. Marvin Jones, *Darkness Made Visible: Law Metaphor and the Racial Self*, 82 GEO. L. J. 437, 453 (1993).

³⁸ 2 HARRIET BEECHER STOWE, THE WRITINGS OF HARRIET BEECHER STOWE WITH BIOGRAPHICAL INTRODUCTIONS 309 (Cambridge, Houghton, Mifflin & Co., vol. II 1896).

³⁹ ANDREW FEDE, PEOPLE WITHOUT RIGHTS 4 (Garland Publishing, Inc. 1992).

can have no personal rights to be protected.” Andrew Fede in his book thus concludes slaves were people but people without rights. Fede thus quotes George Stroud to say, [T]he cardinal principle of slavery was the notion that “the slave is to be regarded as a thing—an article of property—a chattel personal . . . ”⁴⁰

C. *Invisibility*

Thirdly, the psychological implications of being defined as and treated as an object was a sense of invisibility. By that I mean the sense of wandering through life as a ghost, living an existence in which you are not only unseen by courts and the law but unseen and invisible to your family, friends, and community. It is of course not just being physically unseen—as Solomon was in William’s slave pen and on the plantation in the south- but a matter of being so erased by one’s lack of social status that no one takes notice. Patterson calls it the loss of honor. John Adams writes:

He feels himself out of sight of others, groping in the dark. Mankind takes no notice of him. He rambles and wanders unheeded. In the midst of a crowd, at church, in the market he is as much in obscurity as he would be in a garret or a cellar. He is not disapproved, censured, or reproached, he is only not seen.⁴¹

While Adams was writing about the “unseen” status of the poor, this applies even more powerfully with the slave. The significance of this “invisibility” is that the slave is a ghost for social purposes—someone existing but not really living. The slave, as a ghost, experienced his invisibility as a total negation of any sense of “self-hood.” Henry Louis Gates tells a story about a slave who was asked about his “self.” The slave replied, “I ain’t got no self.”⁴²

D. *Social Death*

Powerlessness, rightlessness, and invisibility all merged in this notion that the slave was socially dead. Social death means that the slave was perceived by society and the law as a non-being.

⁴⁰ *Id.*

⁴¹ 6 JOHN ADAMS, *THE WOKS OF THE SECOND PRESIDENT OF THE UNITED STATES, WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS* 239 (Little Brown and Co. 1851).

⁴² HENRY LOUIS GATES, JR., *BEARING WITNESS: SELECTIONS FROM AFRICAN AMERICAN AUTOBIOGRAPHY IN THE TWENTIETH CENTURY* 7 (Pantheon Books 1991); *see also* JONES, *supra* note 31, at 55.

The captive always appears therefore as marked by an original, indelible defect which weighs endlessly upon his destiny.” This is [marked] in Izard’s words, a kind of “social death.” He can never be brought to life again as such since, in spite of some specious examples . . . the slave will remain forever an unborn being (non-né).⁴³ Thus Burch changed Solomon’s name.

When Solomon is first drugged and kidnapped he is turned over to Burch who runs the slave depot in Washington. While Solomon was asleep, Burch removes Solomon’s clothes, outward traces of his old identity, and dresses him up in rags and chains. When Solomon wakes up he desperately clings to his identity as a free man:

I asserted, aloud and boldly, that I was a free man—a resident of Saratoga, where I had a wife and children, who were also free, and that my name was Northup. I complained bitterly of the strange treatment I had received, and threatened, upon my liberation, to have satisfaction for the wrong.⁴⁴

Burch incensed responds by silencing Northup with insults and a brutal whipping.

With blasphemous oaths he called me a black liar, a runaway from Georgia . . . Burch ordered the paddle and cat-o-nine tails brought in . . . With the paddle Burch commenced beating me. Blow after blow was inflicted on my naked body. He stopped and asked if I still insisted I was a free man. I did insist upon it and then the blows were renewed.⁴⁵

A man’s name is of course more than simply a way of calling him. It is the verbal sign of his whole identity, his being in the world as a distinct person. By changing his name, Solomon—the free person—ceased to exist. He was dead to society as a socially dead thing. Solomon was no longer entitled to that identity, to his past, to make decisions for himself, to rights, to recognition by others as a human being

⁴³ Patterson, *supra* note 22, at 38.

⁴⁴ SOLOMON NORTHUP, TWELVE YEARS A SLAVE: NARRATIVE OF SOLOMON NORTHUP, A CITIZEN OF NEW-YORK, KIDNAPPED IN WASHINGTON CITY IN 1841, AND RESCUED IN 1853, FROM A COTTON PLANTATION NEAR THE RED RIVER, IN LOUISIANA 43 (David Wilson ed., Miller, Orton & Mulligan 1855).

⁴⁵ *Id.*

In slave society the social death of the slave was rationalized in one of two ways. Patterson refers to these rationalizations as intrusive or extrusive. In the intrusive conception the slave was generally a captured enemy. “He stood . . . as a living affront to local gods, an intruder in a sacred space.”⁴⁶ Patterson also states that in this intrusive or intruder conception, “a slave was a stranger in a strange land.”⁴⁷ There is a linkage between being an outsider and an enemy. Thus Patterson states, “The slave in the city of man remained the archetypical outsider, the eternal enemy within in a formalized state of marginality.”⁴⁸

The other conception was that the slave was an insider, a member of the community “who had fallen.” This later image Patterson calls the extrusive conception.⁴⁹ Here the dominant image of the slave was that of an insider who had fallen: One who ceased to belong and had been expelled from normal participation in the community because of a failure to meet certain minimal legal or socio-economic norms of behavior.⁵⁰ This latter notion of social death applies in the case of prisoners. Historically prisoners suffered something called civil death. This forfeiture of rights, formal rightlessness, was a function of a forfeiture of personhood—social death—in the eyes of society.

There is close connection between being an outsider-intruder-enemy and being a member of society who is exposed as a criminal. Both become the enemies within and forfeit their social lives. They are both socially dead—without freedom—they must always be under control, without rights, and without honor or social recognition.

We think of violence as the act of whipping, or beating, or physical abuse. But the great violence of slavery was treating living human beings as non-beings, as socially dead. As human beings we need and are defined by our freedom to make choices, to have dignity, to have relationships with others. I would compare denying a person all these things the violent equivalent of trapping someone in a space where there is no air to breathe—something akin to being walled up in cave or buried alive.

While Patterson focuses on social death as a function of how society saw the slave, there is another dimension which is critical here. The slave internalizes the violence of being pronounced socially dead. This means being doomed to no freedom, no rights, and no dignity. Thus in the film *12 Years a Slave*, when Solomon is finally rescued and is about to go

⁴⁶ PATTERSON, *supra* note 22.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

free, Patsy in the end asks him not to leave her in bondage but to take her to the river and kill her.

III. THE SOCIAL DEATH OF KALIEF BROWDER

Now here's a little truth, open up your eyes

While you're checking out the boom-bap, check the exercise

Take the word "overseer," like a sample

Repeat it very quickly in a crude voice sample

Overseer, overseer, overseer, overseer

Officer, officer, officer, officer

Yeah, officer from overseer

You need a little clarity, check the similarity

The overseer rode around the plantation

The officer is off, patrolling all the nation

The overseer could stop you what you're doing

The officer will pull you over just when he's pursuing

The overseer had the right to get ill

And if you fought back, the overseer had the right to kill

The officer has the right to arrest

And if you fight back they put a hole in your chest (Woop)⁵¹

The lyrics of KRS-One one draw a continuous line between the depredations of modern day police and the practices of the overseers of the Antebellum South.

⁵¹ KRS-ONE, *Sound of Da Police*, on RETURN OF THE BOOM BAP (Jive Records 1993).

The lyrics resonate in the critique of Lisa Marie Cacho who argues that African Americans in the inner city suffer from slavery like status—social death—even before they are formally criminalized by arrest:

African Americans in the inner city are not eligible for civil rights not only because racism is defined in law as personal prejudice but also because inner-city spaces are criminalized. Criminalization . . . not only forecloses empathy but also does so through producing people and places always already subject to a form of discrimination believed to be both legitimate and deserved “Their plight is not that they are not equal before the law, but that no law exists for them.”⁵²

The criminalization of urban areas—the post-industrial ghetto—is the result of forces which transformed inner city areas from once thriving communities to the post-industrial ghettos of today. The Bronx is a classic case. Blacks who moved up from the South and from the Caribbean were relegated to areas like the Bronx.⁵³ Other ethnic groups had an industrialized New York to take up their labor and time to get an education and assimilate.⁵⁴ But as Blacks and Hispanics moved in, the jobs moved out.⁵⁵ Whites did as well.⁵⁶ The Bronx lost half of its population in the sixties and seventies.⁵⁷ The housing in these areas was already in a state of decay. By the time poor populations inhabited these neighborhoods, decay was no longer incipient. “Like a heavy plank society collapsed and the people left behind suffered the consequences.”⁵⁸ The Bronx is over 90% black and Hispanic.⁵⁹ Over 30% of the residents of the Bronx are below poverty level.⁶⁰

Rather than respond with structural reform, society responded with a drug war in the 1980s and war on crime beginning in the 1990s. These so-called wars were not waged against drugs or crime, but were waged

⁵² LISA MARIE CACHO, *SOCIAL DEATH: RACIALIZED RIGHTLESSNESS AND CRIMINALIZATION OF THE UNPROTECTED* 82 (NYU Press 2012).

⁵³ H. V. SAVITCH, *POST-INDUSTRIAL CITIES: POLITICS AND PLANNING IN NEW YORK, PARIS, AND LONDON* 42–43 (photo. reprint 2014) (1988). See also MICHAEL N. DANIELSON & JAMESON W. DOIG, *NEW YORK: THE POLITICS OF URBAN REGIONAL DEVELOPMENT* 53 (1982).

⁵⁴ SAVITCH, *supra* note 53.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Quick Facts: Bronx County (Bronx Borough), New York*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/RHI225215/36005,00> (last visited July 23, 2016).

⁶⁰ *Id.*

against people of color in communities like the Bronx.⁶¹ This military mindset led to an “us vs. them” narrative which reflected popular culture where once one steps across the line that separates the inner city from the suburbs, one steps into a no man’s land populated by car-jackers, gangbangers, robbers and thugs.

This stereotyping is reflected also in the astonishingly disproportionate way criminal laws are administered. The NYACLU found in their review of New York’s stop-and-frisk that in neighborhoods populated by people of color, blacks were three to five times more likely to be stopped by police.⁶² This is true despite the fact whites were almost twice as likely to possess guns.⁶³

It is against this background we must understand Kalief’s stop, arrest, and three years of incarceration without hearing or trial. It is not merely that the legal system treated Kalief like someone who was socially dead—with no recognition of his right to a speedy trial or due process at all—he was always and already depersonalized as a member of a working poor family living in a racialized and criminalized community in the inner city, more specifically the Bronx. To understand what I mean by a “racialized community” one need look no further than the stop-and-frisk policy of New York. In conversation with a state legislator, then-NYPD Police Commissioner Raymond Kelly responded to a question from Senator Eric Adams about the clearly disproportionate targeting of African American and Latino men. According to Adams, Kelly said, that “he targeted and focused on that group because he wanted to instill fear in them that every time they left their homes they could be targeted by police.”⁶⁴ The statement takes on meaning in context: the NYPD stop-and-frisk campaign in the Bronx was specifically ruled unconstitutional on the basis of racial discrimination.⁶⁵

The social death of Browder began, in this context, when he was stopped by police walking down Arthur Avenue. Sometime in May 2010 someone allegedly robbed a Mexican immigrant named Robert

⁶¹ See JONES, *supra* note 31.

⁶² *Stop-and-Frisk Data*, NEW YORK CIVIL LIBERTIES UNION, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited June 23, 2014).

⁶³ Kristen Butler, *NYPD Report: Whites More likely to carry drugs than minorities*, UNITED PRESS INT’L (May 22, 2013), <http://www.upi.com/blog/2013/05/22/NYPD-report-Whites-more-likely-to-carry-drugs-and-guns-than-minorities/8601369249255/>.

⁶⁴ Bruce Golding, *Ray Kelly admitted cops target blacks, Hispanics in ‘stop-frisk,’ state lawmaker testifies*, NEW YORK POST (April 1, 2013), <http://nypost.com/2013/04/01/ray-kelly-admitted-cops-target-blacks-hispanics-in-stop-frisk-state-lawmaker-testifies/>.

⁶⁵ Natasha Lennard, *Stop-and-Frisk program in Bronx Ruled Unconstitutional*, SALON (Jan. 9, 2013, 8:39 AM), http://www.salon.com/2013/01/09/stop_and_frisk_program_in_bronx_ruled_unconstitutional/.

Bautista.⁶⁶ Bautista says they pursued him, pushed him against a fence, and took his backpack.⁶⁷ According to Bautista, “his backpack contained a credit card, a debit card, a digital camera and seven hundred dollars.”⁶⁸

We will never know what the actual facts were because no evidentiary hearing ever took place, much less a trial. However, we do know that the police version of events was inconsistent with statements made by the complaining witness. The original report said that the robbery occurred “on or about May 2” but Bautista would later say that the events happened on May 8.⁶⁹

Why did the police stop Browder? Did he fit a description? Did the immigrant actually point him out? This raises two issues.

When the police came up to Browder to confront him with allegations about “a two-week old robbery,” he was seized. He was deprived of his freedom of locomotion. Under *Terry v. Ohio*,⁷⁰ this seizure is called a stop. All searches and seizures are presumptively illegal.⁷¹ To overcome the presumption, police need individualized facts that a crime was committed.⁷² Moreover, Browder and his friend following the stop were actually arrested. Once they were handcuffed and placed into the patrol car the stop became a full blown arrest.⁷³ This required probable cause.⁷⁴ For probable cause to exist in this situation, generally the complaining witness would have to have a track record of proving reliable tips, or he would have had to provide the police with a detailed description of the people who robbed him, or at least some unique identifying behavior or feature.⁷⁵ Failing that, the police would need corroboration. Underlying this web of Fourth Amendment constraints is a basic rule: the police need individualized suspicion to justify a seizure or a search.⁷⁶ In a just system, whenever a citizen is arrested, there would be a tribunal which would promptly, in matter of hours, make sure there was this articulable suspicion was present.

⁶⁶ Gonnerman, *supra* note 1.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

⁷¹ *Katz v. United States*, 389 U.S. 347, 357 (1967).

⁷² *Id.*

⁷³ *See Rhode Island v. Innis*, 421 U.S. 291 (1980).

⁷⁴ *See Brinegar v. United States*, 338 U.S. 160 (1949).

⁷⁵ *Illinois v. Gates*, 462 U.S. 213, 269 (1983).

⁷⁶ *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

Such a determination was particularly important in Kalief's case because misidentification is very common.⁷⁷ This is especially true when the witness is attempting to identify a stranger of another race.⁷⁸ But the constitution requires only that there be a "speedy trial."⁷⁹ In New York State the speedy trial right has been codified.⁸⁰ Prosecutors have six months in the case of felony to bring the case to trial.⁸¹

However, actually calculating the time is not merely a matter of counting days on a calendar. The United States Supreme Court has held a balancing test must take place.⁸² The equitable factors the court must consider issues of waiver on the part of the defendant. There are many other factors. In the Bronx the judges also do not count time caused by court suggestion. It is only the prosecutor's lack of readiness that counts toward delay. Once the prosecutor files a notice of readiness the clock stops.

the prosecution may also choose to announce "ready" at the very first appearance, the arraignment. This stops the speedy trial clock before it even begins, although the district attorney knows there is no chance of a trial actually taking place that day. The backlog of cases in the New York criminal courts means that the case will be put off, at least for a low level misdemeanor, for an average of 120 days, not a single day of which is charged against the speedy trial clock.⁸³

⁷⁷ Eyewitness identification is incorrect approximately one third of the time in criminal investigations. Taki V. Flevaris & Ellie F. Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 U. SEATTLE L. REV. 861 (2015). Flevaris and Chapman also write, "5,000–10,000 felony convictions involve eyewitness misidentification." In addition, "eyewitnesses attempting to identify strangers are 50% more likely to make a misidentification when the witness and the stranger are different races." *Id.* Yet, "jurors, attorneys and police remain unaware of the nature and extent of the problem and give undue weight to eyewitness evidence." *Id.* See also EDWIN BOCHARD, *CONVICTING THE INNOCENT* (Yale Univ. Press 1932); HUGO MUNSTERBERG, *ON THE WITNESS STAND* (AMS Press 1976).

⁷⁸ See Flevaris & Chapman, *supra* note 77.

⁷⁹ The right to a speedy trial goes back to the Magna Carta at the very least. In the U.S., the right to a speedy trial is expressly guaranteed by the Sixth Amendment to the Constitution. The speedy trial right was incorporated into the due process clause by *Klopfer v. State of North Carolina*, 386 U.S. 213, 226 (1967).

⁸⁰ N.Y. CRIM. PROC. LAW § 30.30(1)(a).

⁸¹ *Id.*

⁸² *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

⁸³ Daniel Hamburg, *A Broken Clock: Fixing New York's Speedy Trial Statute*, 48 COLUM. J. L. & SOC. PROBS. 223, 249–50 (2015).

Also, if the prosecution says it is not ready and requests a week, only the week request is counted toward the delay. However, because of a broken system the court delays the trial for many weeks. “Every time a prosecutor stood before a judge in Browder’s case, requested a one-week adjournment, and got six weeks instead, this counted as only one week against the six-month deadline. Meanwhile, Browder remained on Rikers, where six weeks still felt like six weeks—and often much longer.”⁸⁴

The injustice of Browder’s case is the sheer incongruity of his being incarcerated for three years on nothing more than an unsubstantiated accusation. Browder had been arrested and indicted for a felony. But an indictment is only an accusation. The rationale was that the delays which occurred were not the fault of the prosecution—but they weren’t Browder’s fault, either. Why was he not released? The single explanation that exists is that Browder was, at least tacitly, presumed guilty. And he was treated for all intents and purposes as if he was a guilty man.

What happened to Browder was inconsistent with his status as a citizen of the United States. For him to be held at Rikers Island for three years without a trial, much less a conviction, sounds like something that could only happen in a failed state—in the third world perhaps—or in a totalitarian regime.

Slavery was a totalitarian regime. It was a place where people were incarcerated without evidence and without trial. What made this system operate was the presumption that blacks were slaves, people without rights.

Thus in *Twelve Years a Slave*, it is not clear that Burch actually knew that Solomon had been kidnapped. Burch claimed that Solomon was a slave “from Georgia.”⁸⁵ It is possible that Burch believed this. The system of recovering fugitive slaves operated without due process. Under the Fugitive Slave Act, slave catchers were authorized to arrest so-called fugitive slaves without a warrant, take them to a federal magistrate, and in a “summary” proceeding get a certificate from the magistrate to take the slave away.⁸⁶ Pennsylvania passed a law to require slave catchers to get a warrant from a Pennsylvania court before arresting black residents without due process. The law was challenged in a case called *Prigg v. Pennsylvania*.⁸⁷ The Supreme Court held that Pennsylvania’s legislation was unconstitutional: states had no power to interfere with the recapture of “slaves.” This is true because only Congress could legislate in this

⁸⁴ Gonnerman, *supra* note 1.

⁸⁵ SOLOMON NORTHUP, *TWELVE YEARS A SLAVE* 43 (Applewood Books 2008) (1853).

⁸⁶ *See, e.g., Prigg v. Pennsylvania*, 41 U.S. 539, 568 (1842).

⁸⁷ *Id.*

area.⁸⁸ This framework operated tacitly only on the basis of presumption that all black people were presumed to be slaves.

Browder was not presumed to be a slave. He was presumed to be a criminal. The presumption in context had a similar effect. He was treated as someone with no right to a trial or evidentiary hearing. The presumption of guilt in context relegated him to the status of a rightless person.

Most people are surprised that Browder was in jail for three years. But his case was not unique. As Daniel Hamburg writes, “In January 2013, seventy-three percent of all felony cases in the Bronx exceeded New York’s 180-day speedy trial limit, including more than 800 felonies still open at two years or more.”⁸⁹ According to the New York Times, prosecutors routinely tell defense lawyers handling two and three year old cases that they are “too new to be dealt with.”⁹⁰ Some cases are pending for more than five years.

Why do the authorities allow this to go on year after year? The source of the problem is that the defendants in the Bronx have been collectively stereotyped, marked, long before any arrest takes place. In conventional terms they are collectively presumed guilty. But at a deeper level the problem is that their guilt or innocence does not matter. The goal of a criminal justice system is to adjudicate guilt or innocence and to punish the guilty.

But the system in the Bronx is not worthy of that name. It is a police regime.

The goal of the police regime seems to be one of control, intimidation, and lockdown of dangerous populations in the Bronx. Its concerns in a functional sense are efficiency and the reduction of threats— not individualized justice. Individuals like Kalief Browder— marked as members of this dangerous class—are invisible to the system. What makes them invisible is fear. We warehouse them because it assuages our fear.

In *12 Years A Slave*, the slaves were hidden from view by the exterior elevation of a building, which made the slave pen from the outside appear to be a residence. A similar façade covers the Bronx criminal justice system. It is a façade of formal equality in which we assume that when a person is arrested there is probable cause, that there is a presumption of innocence, and that the suspect has a right to a trial. Behind that façade is a brutal reality of mass criminalization and racialized social death.

⁸⁸ *Id.*

⁸⁹ Hamburg, *supra* note 83, at 227.

⁹⁰ *Id.*

Solitary

The deeper sense in which the slave was socially dead was internal. The slave was not only cut off from his family, denied all dignity by society—unseen; the slave lacked the ability to make choices for himself. These elements, connection with family, connection with society, ability to make choices for oneself, define our sense of being human. All those elements are lost in solitary confinement. Accordingly, those who have experienced it refer to it in terms which suggest a sense of being physically alive yet dead.

Harry Hawser, a poet and inmate at Eastern State Penitentiary in the 1840s, called his cell “a living tomb.”⁹¹ Angela Tucker, an African American woman held at California’s Valley State Prison for Women in the 1980s, said, “It’s like living in a black hole.”⁹²

Lisa Guenther argues that this sense of being dead is enforced largely through the denial of physical interaction with others. How could I lose myself by being confined to myself? For this to be possible there must be more to selfhood than individuality. Prisoners in a super-max unit may have everything that individual human beings need in order to survive; they may even have access to “extras” such as television or closed-circuit television (CCTV) video conferencing with visitors. And yet there is something about the absence of regular bodily contact with others, the absence of even the possibility of touching or being touched, which threatens to unhinge the subject.⁹³

And even if the people in one’s life are not particularly sympathetic or supportive, it becomes difficult to bear the weight of existence in isolation from others. In this sense, solitary confinement makes even solitude impossible; isolated from social life, even one’s sense of individuated personhood threatens to dissolve. As a woman who experienced pretrial solitary confinement in Denmark explained, “The person subjected to solitary confinement risks losing herself and disappearing into a non-existence.”⁹⁴

What is relevant here is that hyper-isolation is torture. It is not merely sensory deprivation, it is violence. Slavery depended on violence to maintain the master—slave relationship—to enforce a sense of powerlessness. The extreme violence involved in depriving someone of everything they need to be human functions in the Rikers Island context to instill in the inmate the sense that the guards and the administration

⁹¹ LISA GUENTHER, *SOLITARY CONFINEMENT: SOCIAL DEATH AND ITS AFTERLIVES* xii (UNIV. OF MINN. PRESS 2013).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

have absolute power over him. Hyper-isolation is the moral and psychological equivalent of the overseer's whip.

IV. CONCLUSION

As of 2013, 4,446 inmates in local jails or state prisons died in custody.⁹⁵ People of color were disproportionately represented. Perhaps the most famous is Freddie Gray, who died in custody after he was placed in a police van with no seat belt.⁹⁶ I would argue Kalief Browder is like Freddie Gray: Kalief died as a result of police custody as well. In the case of Freddie Gray, the violence was direct, as he was thrown into a van, without a seat belt, and died from injuries recklessly inflicted on the ride to the jail. The violence which caused the death of Kalief was indirect, it was, in the framework of John Galtung, structural violence.⁹⁷ The concept of structural violence is “violence built into social and world spaces which is unintended.”⁹⁸

Structural violence here includes poverty, as well as institutional practices on the part of police who have militarized, over-policed, and engaged in systemic denials of civil rights for decades during the drug war and subsequently, in New York's war against guns which targeted neighborhoods like the Bronx. It includes a criminal justice system which warehouses defendants, holding them for years without trial, without hope. It includes the studied indifference of the criminal justice system in its refusal to either see or address institutional barbarism of keeping an inmate never convicted of a crime, in solitary confinement for two of the three years he was incarcerated without trial. Structural violence here includes treating Kalief Browder as someone who was invisible, because of his intersectional status which includes at different times the intersection of race, class, gender, space and the fact that he was incarcerated at Rikers. Structural violence here includes the social death of Kalief Browder.

The structural violence that Kalief Browder experienced occurred largely because we as a society do not see it.

⁹⁵ MARGARET NOONAN, ET AL, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STAT., NCJ 248756, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2013 - STATISTICAL TABLES 1 (2015), <http://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf>.

⁹⁶ David A Graham, *The Mysterious Death of Freddie Gray*, THE ATLANTIC (Apr. 22, 2015) <http://www.theatlantic.com/politics/archive/2015/04/the-mysterious-death-of-freddie-gray/391119/>.

⁹⁷ JOHAN GALTUNG, PEACE BY PEACEFUL MEANS: PEACE AND CONFLICT, DEVELOPMENT AND CIVILIZATION (Sage et al. eds., 1996).

⁹⁸ *Id.*

The structural violence occurs sometimes behind the walls of jails like Riker's Island, and sometimes in plain sight, as when Kalief was, I suspect, profiled and arrested.

The structural violence occurs because the process of racialization—a legacy of slavery—has so erased the status of people like Kalief Browder that they are not important- disposable people who do not matter to us. They are in a profound sense invisibilized. We do not see them.

