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After Ahmaud Arbery, work will remain

In his seminal work about the rise and fall of black reconstruction, W.E.B. Du Bois described in chilling detail the use of lynching two decades after the Civil War's conclusion to control black citizenship. Black people could expect to be subjected to lynching because "they were radical; they had attempted to hold elections; [and] they were carrying arms," but also just because, in the mind of Southern whites, "they were 'damn ni--ers.' " In other words, for any reason a white supremacist could fathom.

The Feb. 23 killing of 25-year-old Ahmaud Arbery demonstrates that the use of deadly violence to control black citizenship continues. Arbery was running in a neighborhood where white residents deemed he didn't belong. A 911 caller simply described Arbery as "a black male running down the street." Within minutes, he was hunted by white men in a pickup truck, who shot and killed him. A police investigation apparently identified more than a dozen witnesses. Nevertheless, neither the shooter, Travis Mcmichael, nor any of his accomplices — his father, George Mcmichael, and apparently one other man — were arrested until a video of the shooting was released two months later, sparking outrage and demands for justice.

Many are skeptical that justice will be served, with good reason. Because in the present-day version of Du Bois's postReconstruction lynching nightmare, the law itself has been hijacked, and it plays a central role in aiding and abetting white people's ability to kill black people with impunity.

We already know the defense the Mcmichaels will offer. They will contend they were acting under Georgia's citizen's arrest statute — that Travis Mcmichael was entitled under Georgia's opencarry law to brandish his weapon and that his conduct was permissible by Georgia's stand-your-ground law.

Upon examination of these statutes, it is clear that what the Mcmichaels did falls far outside the bounds of Georgia law, even if Arbery had entered the site of a neighborhood house under construction, as recently released video appears to show. But the Mcmichaels will count on another important, intangible element to bolster their defense — the connective tissue of pernicious racial narratives about the criminality and dangerousness of black men; the value of property over black life; and the benefit of the doubt given to every white man who accuses a black man of wrongdoing. The question of the reasonableness of the Mcmichaels' conduct will be filtered through the prism of race, even if race is never mentioned in court.

This is why it is critical that we confront the fundamental flaws in our legal system that routinely allow innocent black lives to be taken with impunity. The insistence that our laws are colorblind, despite every indication to the contrary, makes our legal system complicit in condoning this reality. This includes the judge in George Zimmerman's trial who ruled that the prosecution could talk about profiling, but could not use the words "racial profiling" to describe Zimmerman's stalking of teenager Trayvon Martin. And it includes the countless prosecutors and judges who acquiesce to the fiction that, in an encounter between a white police officer and a black person, race is irrelevant in determining whether a hypothetical "reasonable" person would feel free to leave an encounter with a police officer (a key inquiry under the Fourth Amendment) or in deciding how to treat the "reasonableness" of killing another person purportedly in self-defense.

Who really gets to "stand their ground" in an encounter between a white person and a black person?

The pretense that these "neutral" laws and defenses have not been weaponized and, in some instances, enacted with the full knowledge of those who are entitled to use them implicates everyone who has sworn to uphold the rule of law. And it will require the entire legal profession — lawyers, judges, academics, the American Law Institute and the American Bar Association — to find ways to transform the fundamental legal structures that consistently produce injustice. From the demand that racial impact studies accompany attempts to enact open-carry and standyour-ground laws, to the requirement that judges accept expert testimony and instruct juries on how to weigh racism in evaluating "reasonable" conduct, to a fundamental overhaul of qualified immunity — our profession must work to end the cynical embrace of colorblind justice that allows race to determine who receives justice and who does not.

Lawyers approaching the Supreme Court building often remark on the significance of the words "equal justice under law" engraved above its entrance. But "equal justice under law" is not the inevitable byproduct of a functioning legal system. Obtaining equal justice requires an intentional assessment of our legal system and recognition of its flaws — and a commitment to righting laws that consistently produce inequality and injustice. The phrase facing us from atop our highest court is not a statement, but a command directed at our entire profession.

Like many, I will remain resolute in demanding justice in Ahmaud Arbery's killing. Obtaining justice will require the intention of the prosecution, the judge and the jury to actually do justice, and hold to account those who wantonly killed this man. But, even then, the work will remain.

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