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By the Honorable Richard Gergel
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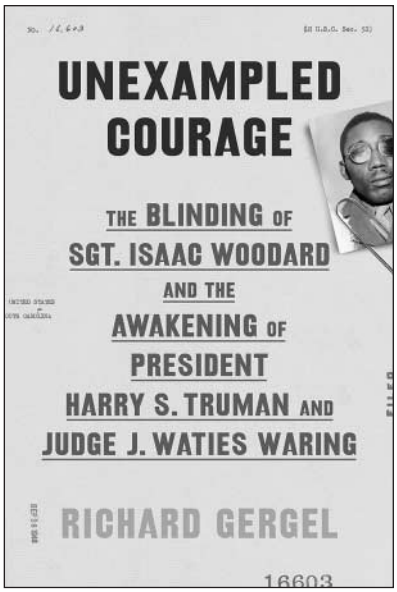
The Honorable Richard Gergel currently presides in the United States District Court for the Eastern District of South Carolina. In his recent book, *Unexampled Courage*, Judge Gergel pays tribute to the essential and sometimes controversial role that one of his predecessor jurists, the Honorable J. Waites Garing, played in ending the legal segregation of America's schools. In doing so, Gergel reminds us of our recent history and challenges us to think critically about our proper role as judicial officers.



Gergel's telling begins with the tragic events of February 12, 1946, when Sgt. Isaac Woodard, a returning World War II Veteran wearing his army uniform, was travelling from Augusta, Georgia on his way across South Carolina to his family home in Winnsboro. Some witnesses alleged Woodard had been drinking and made numerous requests for the bus driver to stop for a restroom break. Whatever the cause, there was tension between Woodward and the driver. Woodard, like many of the nearly one million Black Americans who served in World War II, felt his service had earned him a measure of respect. In the Jim Crow South, that view was not shared by the powers that be. When Woodard demanded the White bus driver speak to him with decency, the table of conflict was set.

The police were called at the next stop in Batesburg, South Carolina. Woodard was removed from the bus and arrested by Constable Lynwood Shull. On the way to the local jail, Shull beat Woodard with his nightstick. The beating was so severe, Woodard was blinded in both eyes. Woodard's plight was eventually discovered by the NAACP, which helped to publicize the incident in an effort to expose the brutality faced by Black citizens. The story was soon picked up by the mass media where it received attention from a number of reporters, including a young Orson Wells.

President Truman eventually heard Woodard's story. Shocked by the brutality of the incident, Truman pressured the Justice Department to pursue a civil-rights action against Constable Shull. After the initially assigned judge recused, the case was transferred to the book's subject, Judge J. Waites Waring. Judge Waring had been appointed to the United States District Court for the Eastern District of South Carolina in 1941. Although the *Shull* case was eventually tried in Columbia, Waring presided principally in Charleston. His family was long established in Charleston and politically connected. As a federal judge with a lifetime appointment, Waring was an accepted member of the highest ranks of Charlestonian society. He had lived a privileged life. Waring shocked his wife of thirty years, and Charleston high society, when in 1945 he filed for a divorce and went on to marry Elizabeth Hoffman, who herself had enjoyed a privileged life in Michigan and Connecticut. There divorces and subsequent marriage created a foundation that would have far-reaching impacts on the norms of Charlestonian culture.

The case of *People v. Shull* proceeded to trial in 1946 before an all-White male jury. Gergel provides the reader with the social setting and trial details in a vivid account that brings the historic case to life. The effort made by the prosecution in pursuing the case against Constable Shull can charitably be characterized as lackluster. In closing arguments, prosecutor Claude Sapp informed the jury that "whatever verdict you gentleman bring in, the government will be satisfied with." Defense counsel urged Southern independence, arguing that "if a decision against the government means seceding, then let South Carolina secede again." That championed independence was grounded in unapologetic bigotry, with defense counsel arguing that Woodward's admission that he spoke back to the white bus driver demonstrated he was intoxicated because "that's not the talk of a sober nigga in South Carolina." Constable Shull was acquitted.

Judge Waring was deeply troubled by the verdict in favor of Shull. Although his legal career before the *Shull* trial did not involve civil-rights claims, Gergel explains that Waring had demonstrated a sensitivity to racial issues in managing his courtroom. He did away with segregated seating and hired a Black bailiff. Thus, it seems he understood at a personal level the inherent costs of segregation and discrimination. But we learn that the *Shull* decision marked a turning point in Waring's judicial career. There is little doubt this turn was facilitated by his new wife, Elizabeth, who had also attended the trial. Elizabeth was shocked by the rigidity and bluntness of the enforced racial order. After attending the trial and hearing the verdict, she told her husband she had never seen such a terrible thing. When she shared her concerns with a Charleston friend, he reported "that sort of thing happens all the time. It's dreadful but what are we going to do about it."

Gergel explains that the Warings decided there was something

they could do. The couple began by immersing themselves in the sociological research regarding racial relations in the United States. They were significantly influenced by W.J. Cash's ***Mind of the South***. Cash opined that the "common [W]hite" possessed admirable traits of pride, bravery, personal generosity, and courteousness, but also tended toward darker traits of intolerance, fear, hate, exaggerated individualism, and a tendency toward unreality that left them susceptible to racial demagogues. The Warings were also influenced by Gunnar Mydal's opus, ***An American Dilemma: The Negro Problem and Modern Democracy***. Mydal had conducted a study in which Whites and Blacks ranked the importance of various racial barriers. Whites identified the most important of these barriers to be interracial sex and marriage, followed by concerns regarding direct social contact with Blacks, such as sharing the same eating places and restrooms. Less important to Whites were issues surrounding political disenfranchisement and discrimination in employment, lending, and public assistance. In contrast, Blacks ranked fair access to employment, credit, and public relief as their top concerns, followed by the right to vote. Blacks placed little importance on issues related to interracial marriage and sex.

From the perspective of White society, perpetuation of the existing economic and social order—and the corresponding subjugation of Blacks—mandated legal segregation of the races. The obsession with social order and maintenance of the ***status quo*** created an environment where isolation, brutality, and dehumanization were an accepted norm. Thousands of Black Americans were lynched in the period between 1857 and 1945. These killings were intended to terrorize Blacks and instill in them a fear of resistance and dissipating hope. Remarkably, numerous anti-lynching bills were introduced in Congress over the years, and yet even measures to end such barbarism went down to political defeat. The social order was also enforced with a myriad of other techniques, from disenfranchisement, to discriminatory lending practices, and segregation of public facilities. Although there were many working to change this system, the ***status quo*** continued for decades. Was it the rabid resistance of a minority of legislators or the apathy of the citizenry that stood in the way of reform? It seems both were necessary components in the perpetuation of these practices.

Gergel gently reminds us that the judicial system was also complicit in maintaining the ***status quo***. Indeed, the racial segregation of our schools was enabled by the Supreme Court's 1896 decision in ***Plessy v. Ferguson***, which upheld the concept of "separate but equal" public accommodations for the races as consistent with the Fourteenth Amendment of the United States Constitution. In practice, of course, the separate accommodations had never been equal. Whether a product of intentional subjugation or the human inclination to favor's one own tribe, the dominant White society had never provided public services and assets for Black Americans on a par with those that were provided to Whites.

By the middle of the twentieth century, however, a substantial number of intellectual, spiritual, and political leaders began to speak out against the inherent indecency of the separate-but-equal myth. But the call for change was vigorously contested because the preservation of school segregation was essential to the perpetuation of the racial hierarchy. Its import became even more pronounced in the face of the integration of the armed forces. The presence of nearly one million Black soldiers during the World War II effort demonstrated that the races could work, to a degree, side by side without chaos ensuing. The White establishment could tolerate such a result in the isolated and distant setting of military service. But if school desegregation came to neighborhoods and towns across the county, it would dispel the argument that our domestic peace could not be secured unless the races were socially separated. Thus, school desegregation was viewed as the bulkhead for preserving the racial ***status quo***.

With the injustice of the ***Shull*** trial as an impetus, and informed by the analytical framework he and Elizabeth chose to digest, Gergel tells us, Judge Waring made a very conscious choice that he would use his position as a federal district court judge to do something about segregation. In 1944, the Supreme Court had decided ***Smith v. Allbright***, which struck down Texas statutes that prohibited Blacks from participating in the Texas Democratic Primary. Many southern states had similar statutes but began moving toward voluntary compliance with ***Smith***. South Carolina chose a different course. Governor Olin Johnston called a special session of the General Assembly, with a proclamation announcing "White Supremacy will be maintained in our primaries." The General Assembly thereafter repealed all statutory references to the primary, effectively delegating operation of the primary process to the Democratic Party, thereby hoping to avoid the State action which triggered the ***Smith*** ruling. The NAACP then challenged the legislative repeal. The case landed before Judge Waring, who ultimately ruled in favor of the Black plaintiff who had challenged the process. In reaching his conclusion, Waring stated he could either "be entirely governed by the doctrine of [W]hite supremacy" or be "a federal judge and decide the law." Waring was heavily criticized for the opinion. But he proclaimed it "time that we South Carolinians who have been fortunate enough to get our heads a little above the fog do what we can to bring our people out of it."

Gergel provides insight into the price paid for Judge Waring's progressive jurisprudence. The Warings were bombarded with public criticism, letters, and threatening calls after the ***Smith*** decision was announced. Elizabeth was confronted in public. They were ostracized by White society and lost nearly all their friends. But Judge Waring did receive the support of several intellectuals, including Clifford Durr, former president of the National Lawyers Guild. Praising Waring's ruling, Durr wrote:

> A courage of a greater and rarer kind is required to face the disapproval of society in defense of a basic democratic principle. It hurts to be shut off from one's own people. It hurts even more when they are good people—friendly, basically decent and kindly, and the only barrier is an idea. Loneliness can be more painful then wounds of battle, and few are willing to risk it. It takes real courage for a judge, in opposition to the deep seated folk-ways of those with whom he lives and will continue to live to say, "This is the law. It is my duty to enforce it and I will do my duty."

Although South Carolina continued to lag behind, Waring could sense the country was turning a corner. In its 1950 term, the Supreme Court decided a trio of cases that challenged the disparate treatment of Whites and Blacks as it related to public education and travel. Waring saw these cases as a signal that the

Supreme Court was moving towards a reconsideration of the *Plessy* doctrine. The Court ultimately decided these cases in favor of the Plaintiffs but did not expressly overrule *Plessy*. Instead, the Court focused on the factual reality that the separate accommodations were simply nowhere near equal, with the White-only facilities being far better funded and supported than the Black facilities. Thus, the Court ruled in the Plaintiff's favor because the compared facilities were not equal, but the Court did not disavow the separate but equal doctrine.

Waring was nonetheless persuaded the Court was trending toward the abolition of separate but equal. Sensing the changing political and legal climate, Waring embarked upon a campaign that would be viewed as ethically suspect in today's judicial culture. First, he began to encourage those in his supportive intellectual circles to file a case to address head-on the constitutionality of *Plessy v. Ferguson*. But no case had been filed which directly challenged the continuing propriety of the separate-but-equal doctrine. Waring learned, however, of a pending case captioned *Biggs v. Elliott*, which was filed as a typical challenge to the unequal distribution of assets between White and Black schools. The Plaintiffs were represented by Thurgood Marshall of the NAACP. When Marshall arrived at the courthouse for a pretrial hearing, Waring requested to see him in chambers. In this *ex parte* discussion, Waring informed Marshall he had no desire to hear another case focused on the issue of whether the separate facilities were in fact equal. Instead, he directed Marshall to pursue a frontal challenge against the constitutionality of the separate-but-equal doctrine. Marshall obliged.

Because the case now involved a challenge to the constitutionality of statutes mandating segregated facilities, the applicable court rules required the case be heard by a panel of three federal court judges. Since the case had originally been assigned to him, Waring was confident he would be one of the three judges on the panel. He was also confident the other two judges would rule to uphold the constitutionality of segregated schools. But Waring recognized he would be provided the opportunity to write a dissent that would provide an intellectual foundation for the conclusion that separate-but-equal facilities was in theory and in practice a perpetuation of state-sanctioned inequality, which could not be reconciled with the Fourteenth Amendment's guarantee of equal protection to all citizens.

Understanding the societal and legal trends, and the resulting threat the *Biggs* case posed to segregation, the State of South Carolina embarked upon an interesting defense strategy. The State concluded it was inevitable that a court would find the Black and White schools at issue were dramatically unequal. Thus, the State committed to fund seventy-five million dollars to improve the condition of the Black schools. With this funding secured, the State would endeavor to focus the case on the question of whether the separate schools could be made equal, rather than whether the concept of separate but equal was inherently discriminatory. To make this strategy even more alluring, the State decided to confess that the existing Black schools were far inferior to the counterpart White schools. The State held this strategy close to the vest, ultimately springing it on the Plaintiff's on the morning of trial. As a consequence, the Plaintiffs were cut short in their effort to present the compelling inequities and injustices in the respective schools, which had been allowed to exist under the separate-but-equal doctrine.

Whether due to the financial commitment made by the State, or the established reluctance of a South Carolinian jurist to strike down segregation laws, the State was able to persuade two of the three judges to uphold the constitutionality of segregated schools. But they could not persuade Judge Waring. The majority decision and Judge Waring's dissent were announced on June 23, 1951.

Waring recognized and expressly articulated that the time had come for the federal government to squarely address whether segregation in our school's systems could withstand constitution scrutiny. He began his assessment by praising the "Unexampled Courage" of the Black citizens who brought the suit, with many of them suffering persecution and financial retribution. This is the origin of the phrase that Judge Gergel uses in the title of this book to refer to both the Plaintiffs and Judge Waring. Waring proceeded to address the inherent flaws of the separate but equal doctrine. Waring emphasized the damage that the separation of races does to children's view of themselves. He also pointed to the overwhelming evidence that the doctrine had consistently resulted in the construction and support of White facilities, that were far superior to the facilities for Black citizens. This evidence, Waring argued, illustrated the fundamental flaw with the separate-but-equal doctrine.

> From their testimony, it was clearly apparent, as it should be to any thoughtful person, irrespective of having such expert testimony, that segregation in education can never produce equality, and that it is an evil that must be eradicated. This case presents the matter clearly for adjudication and I am of the opinion that all of the legal guideposts, expert testimony, common sense and reason point unerringly to the conclusion that the system of segregation in education adopted by the State of South Carolina must go and must go now.

In words that would provide the intellectual foundation for abolishing the separate but equal doctrine, Waring declared "Segregation is *per se* inequality."

When the convulsions of history and the appellate process finally played their hand, it was *Brown v Topeka Board of Education* rather than *Biggs v. Elliott* which provided the case by which the United States Supreme Court struck down segregation in America's schools. But Waring's dissent in *Biggs* was clearly a precursor to the Supreme Court's 1953 *Brown* decision.

Gergel has done his predecessor, the profession, and the country a great service by highlighting the intellectual courage of Judge Waring, and the perseverance, pride, and sacrifice of the Black Americans who had the courage to stand for what was right in the face of institutional persecution. Waring's judicial role in this story is not without controversy. As Gergel points out, the open solicitation of cases and the *ex parte* strategizing with lead counsel for one of the parties would not be tolerated under today's ethical precepts. And one can argue that the long-term acceptance of desegregation by White citizens may have been better facilitated had it come through legislative action rather than the courts. On the other hand, history has shown the legislative branch has too often been willing to sacrifice the rights of minorities at the altar of reelection.

Waties Waring made a conscious choice to end a practice that

was unjust and unconstitutional. The words of the Fourteenth Amendment had not changed in the half century since *Plessy* was decided. Yet Waring educated himself—culturally, sociologically, legally, and morally—to recognize and declare the inherent falsehood of separate but equal. He had the courage to make a decision that ran counter to the tidal pull of his social circle. And he seems to have made this conscious choice relatively late in his legal career. Certainly, he was shaped by the savage beating of Woodward and the acquittal of Shull. Perhaps it awakened him to the omnipresent oppression that had always surrounded him but which he had never truly seen. Perhaps he was inspired by the different vision and intellectual support of a new spouse. Perhaps he had simply evolved as a jurist. Whatever the cause, Waring made a conscious choice to advocate for the abolition of an unjust system.

In a recent article in ***The Bencher***, the national publication of the American Inns of Court, Judge William C. Koch, Jr. wrote:

> All of us have and will encounter what Pogo the Possum, the title character of Walt Kelly's now out-of-print comic strip once called "insurmountable opportunities." These are the defining moments of our lives and careers. Our challenge is to remain alert for these moments, particularly the non-traditional ones. When they arrive, we must trust our heart and common sense to make the right decision. Until they arrive, our task is to prepare for them by mastering our craft and by adhering to the highest standards of professionalism, civility and excellence.

Judge Gergel has blessed us with the story of Judge Waring's embrace of his insurmountable opportunities. What are yours?

Timothy J. Schutz is a trial judge in Colorado and has been recognized for excellence by the Colorado Judicial Institute. He was a commercial and intellectual property litigator before taking the bench. Judge Schutz considers service on the bench an honor and makes his goal to bring equal measures of humanity, diligence, and scholarship to his judicial calling.