

**a blinding,
an awakening,
and a journey through civil rights history**

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Judge Richard Gergel's quest to learn more about his courtroom predecessor uncovered the story of how a shocking tragedy of the civil rights era changed the minds of a president and a judge — and led to the case that would finally shift the legal landscape on segregation.

INTRO AND INTERVIEW BY AMELIA ASHTON THORN
BOOK EXCERPTS BY RICHARD GERGEL

Sergeant Isaac Woodard had just completed a three-year tour in a segregated unit of the United States Army. He boarded a Greyhound bus in Augusta, Ga., that would take him home. But following a heated exchange with the bus driver, Woodard was forcibly removed at a stop in Batesburg, S.C., and later, beaten blind by the town's police chief Lynwood Shull.

It was 1946. Civil rights prosecutions were nearly unheard of. But President Harry S. Truman insisted that his attorney general bring criminal charges. The police chief was tried before an all-white jury in the courtroom of United States District Judge J. Waties Waring; the evidence left little doubt of his guilt, but he was acquitted.

Judge Waring had taken for granted the segregated South, but the blinding of Woodard forced him to see clearly. He reexamined his assumptions, delved into texts, and was awakened to the vast system of inequality that surrounded him. He penned several landmark civil rights decisions in the years that followed, including a 1951 dissent in *Briggs v. Elliott* that declared segregation per se unconstitutional. That case would become a model for the Supreme Court's opinion in *Brown v. Board of Education*.

Judge Richard Gergel assumed his seat on the same court in 2010, more than 60 years later. He soon realized that few knew of Judge Waring's legacy — or of his journey into the civil rights movement. Judge Gergel's new book, *Unexampled Courage: The*

Blinding of Sgt. Isaac Woodard and the Awakening of President Harry S. Truman and Judge J. Waties Waring, uncovers just that.

Here, Gergel talks about writing the book and his lasting impressions of Judge Waring. Following the interview are two excerpts from *Unexampled Courage* that explore Judge Waring's experience as a civil rights-era judge in the South.

What kind of story did you set out to tell when you first started writing the book?

Well, that suggests that I actually had this really broad game plan — and I really did not. I was aware from the great book, *Simple Justice*, by Richard Kluger, that there had been this heroic ►

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civil rights judge in Charleston named Waties Waring who was largely forgotten and unknown in South Carolina history. I was aware of that.

But the details of his life were kind of vague. There had been a biography in the 1980s that had come out that really didn't give you much of a feel for him. So he was a kind of an enigma. He was an improbable candidate to be a visionary southern civil rights judge. So the natural question was, "What caused him to change?" There were later judges who came from the South who had been Republican appointees by Eisenhower, and they were Republicans of the South because they were not segregationists, or they were not adherent to Jim Crow. So you kind of got why they might have been different. They were kind of against the grain in the one-party South.

Waties Waring did not fit that profile. He had been a party regular, close with the U.S. senators. He was very tied into all this. He seemed to be an improbable candidate for the role he assumed.

I've got to say that as I reread *Simple Justice*, which I did as I was awaiting confirmation, I continued to wonder what had caused this guy to change, and there was little insight into that. At my investiture ceremony, I referred to the legacy of Judge Waring. I noticed my audience seemed surprised that there was such a person. These were lawyers. But they were like, "What? What's he talking about?" I could tell that people were quizzically looking at each other. Later people said to me,

"Who was this guy you were talking about?"

I decided to organize a conference around Judge Waring and his legacy sponsored by the South Carolina Supreme Court Historical Society, a group I had been involved in for years. The program was held in Judge Waring's historic courtroom and was titled "Judge J. Waties Waring and the Dissent that Changed America." A number of prominent historians participated in the program, and our keynote speaker was Charles Ogletree, the renowned Harvard Law professor. We had overflowing crowds for every talk.

My plan was to publish a book following the conference and to have our speakers each contribute a chapter. I had followed this plan in several previous Supreme Court Historical Society conferences, and the books were published by the University of South Carolina Press. Well, no one else seemed interested in contributing chapters to the effort. So I decided to write the book myself. I thought this was a story worth telling.

The original focus of my research was on what changed Judge Waring. I was able to find literally hundreds of news articles on him. He was a national figure at the time, in the late 1940s and early 1950s. A lot of reporters back then were also asking the question, "What changed him?" The same thing that I wanted to know! He would answer by saying, "While on the bench, I developed a passion for justice." So that was his stock answer, but that told

me nothing. It was surely true, that he had changed while on the bench, but what changed him still remained unclear. My initial mission was just trying to figure that out.

I had accessed information on his docket, and I saw this very unusual case involving the blinded African American sergeant, Isaac Woodard, and the police chief that was prosecuted. Civil rights prosecutions at that time were very unusual. And Waring never had another civil rights prosecution — he had just this one. As I dug more into this story, I realized how much there was to it. Though there wasn't anything significant written on Isaac Woodard, I discovered hundreds of news articles out there on the case from across the nation, particularly in the African American press. Then I spoke to a friend of mine, Dr. Patricia Sullivan, who has written a definitive history of the NAACP (*Lift Every Voice: The NAACP and the Making of the Civil Rights Movement*). She said, "There are a lot of documents in the Library of Congress on Isaac Woodard." That's where the NAACP papers are.

I discovered there were 4,000 documents. That was pretty amazing, and the story was just nothing but fascinating. Then as I researched, I became more and more persuaded that my hypothesis — that the Woodard case was the case that most significantly changed Waties Waring's thinking and trajectory — was correct.

I then asked myself, "How did this case even get brought?" Because a

Once you recognize this whole system of disenfranchisement, and once you start questioning it, there's no backstop. You just sort of say, "This whole thing is wrong." That's really where he ended up. There was no way to split the difference.

prosecution of a white officer involving a black victim in 1946 was very rare. That then led me to another discovery: that Harry Truman ordered it. It was from Harry Truman, himself!

I raised with one of the archivists at the Truman Library the President's role in initiating the prosecution of Lynwood Shull for the blinding of Isaac Woodard, and he told me "you're on to something here. Someone needs to do some work on the impact of this case on President Truman." He sent me some letters that the President had written about Isaac Woodard, which I mentioned in my book.

Now I had two stories: Truman and Waring. And it would be untrue of me if I said I had a plan. I literally followed the stream where it took me and that's where I ended up.

I mean, I kept thinking, "This is an unbelievable story; nobody's going to believe this."

Judge Waring likely witnessed in his everyday life the kinds of racial inequalities that ultimately gave rise to these cases. Why do you think seeing it in a courtroom versus seeing it out on the street changed his mind?

Well, Waring viewed this way of life to be baked into Southern culture. He'd always grown up in it; he never questioned it. Few white Southerners questioned it. His wife had come from Michigan, and she didn't question it, either. It was just the way things were.

I've now read a fair amount about white Southerners who had awakenings about racial inequality. Virginia Durr, the great stalwart civil rights leader from Alabama, talks in her autobiography about this. One day you have this epiphany. It just knocks you down that you've lived this life and you've

not questioned a shocking reality that you've just unquestionably accepted.

You're absolutely right, he lived in the South, in Charleston, which was probably among the most segregated cities in America. He never questioned it. But then he observed this manifest injustice in the Woodard case. He started doubting and questioning this world he lived in.

He began reading. He has publicly recognized and referenced the books he had read. I read every one of them. And I can see that, if you're reading this stuff as you are having an awakening, it would be powerful. Once you recognize this whole system of disenfranchisement, and once you start questioning it, there's no backstop. You just sort of say, "This whole thing is wrong." That's really where he ended up. There was no way to split the difference.

You discuss at some length Judge Waring's activities off the bench, including his extensive reading, that may have influenced his thinking. Can you talk more about that?

Some states have what they call "circuit riding judges," which they can use when they don't want the judge to live in the community where he practiced law — the aim there is to keep him where he doesn't have ties to the community and loyalties and so forth.

The federal district courts are really very different. They're designed so that you sit where you live. The idea is that you have a certain knowledge and awareness of the world you live in that gives you special insight as a judge.

And all of my colleagues read books. I mean, everybody reads books all the time. A lot of them, fortunately, are reading my book! That's just what we do. For example, there are all these

books out now on sentencing reform. I bet you half of the federal judges in America have read Bryan Stevenson's book [*Just Mercy: A Story of Justice and Redemption*]. That is just really part of being an informed citizen — you do this kind of stuff.

I would say that part of the genius of the system is that we judges are not separate. We don't live like a monk away from the people; we live among the people and we see the world. So, no, I think what he did was exactly right and what judges do every day.

We attend theater, we read books, and we live among the culture. As you observe, you walk around and you see — "Why are African Americans sitting on only one side of the courthouse, under a sign that says 'for colored only'?" So Judge Waring took the sign down.

Did Gunnar Myrdal influence him? Sure he did. Judge Waring read his 1,400-page book, *An American Dilemma: The Negro Problem and Modern Democracy*. It clearly influenced him. As it should have.

What do you think Judge Waring's strengths were analytically?

He was a brilliant guy. He became quite a free thinker. It was necessary if we were going to escape *Plessy v. Ferguson* and Jim Crow. You had to think outside the box. You just could not just accept it and say, "Well, this is the precedent, and that's the way it is. You can't do anything about it. It's not the court's role to get involved." That was not his approach to things. Being really smart helped. Reading a great deal helped him envision a different world.

I don't have any doubt that the experience of the Holocaust was something that influenced that whole generation. Judge John J. Parker, who I write ►



Judge Richard Gergel of South Carolina, with a portrait of Judge J. Waties Waring behind him. PHOTO BY KATE THORNTON/THE NEW YORK TIMES/REDUX

about, also had a very interesting history. He never went as far as Waring, but he certainly grew in office. He took a leave while on the Fourth Circuit to serve as a judge at the Nuremberg trials of accused Nazi war criminals. This was an important thing.

Even the things that might not seem very important today mattered at the time. Like when Jackie Robinson broke the color barrier in major league baseball — it was huge at the time. He was this exciting African American player, a fine young man, and a veteran lieutenant in the military. It just hit America at the right moment.

What was it like to take on a book project of this magnitude?

It took me seven years. I'm slow. I did have this day job.

Once I started going, I was very methodical. I generally didn't write during the week. I came into my office on Saturday morning, about 7 o'clock, and I worked basically every weekend, all weekend. I would take holidays. My wife and I would go to the mountains or the beach for 10 days, over two weekends, and I would write straight. One of my clerks called them my "writing holidays." My wife recently joked with somebody that we did our vacations at the Library of Congress.

Narratively it's a complex story. You have to explain the lives of three men — Truman, Waring, and Woodard — and then weave them all together. How did you go about that?

I started my research with Judge Waring, and soon realized the influence the Woodard blinding had on Judge Waring and the failure of the court system to hold the obviously culpable police officer accountable. I then discovered the personal role of President Truman in initiating the prosecution of the police officer who blinded Woodard. As I traced the story forward, I realized the Woodard incident had inspired both Judge Waring and President Truman to do remarkable and courageous things.

Once I pieced together the chronology of events, the story simply told itself. After realizing the significant influence the Woodard blinding had on Waring and Truman, I then discovered that the two met in the Oval Office in December 1948, a month after Truman's stunning reelection victory. Waring had issued his courageous voting rights decisions and was probably the most reviled man in the white South. Truman had ordered the immediate desegregation of the armed forces and had survived a third party challenge from the Dixiecrats. So what did these two men talk about? They began their discussion with Truman asking Waring whether he knew the story of the blinded black sergeant from South Carolina. Waring told the President, "I tried that case." This was a great story that needed to be told.

Do you think you've changed the way you do your job since writing this book?

I can't say that I have in any way that I find perceptible. When I wrote this book, I read not just about Waring,

but also about a lot of other judges, including the nine justices of the U.S. Supreme Court who decided *Brown v. Board of Education*.

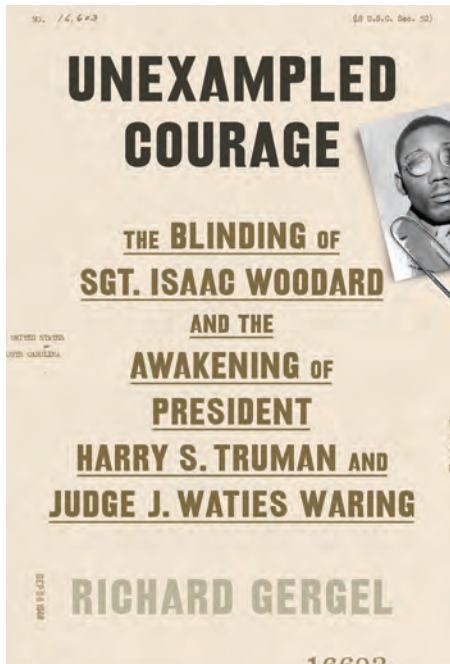
I certainly admired their devotion to the rule of law and to the importance of treating the Constitution as a living document. I can't say that was a new concept to me, but it certainly is an inspiring model. I speak to groups of judges all the time and they love the story for the same reason. It's the highest calling of what we do.

A large portion of our readers are judges. What can they take away from Judge Waring's experience?

I could answer that question a variety of different ways. What I've discovered is that this book is used by different people in very different ways. They take lessons from it, some I would've never even thought of, frankly. I just simply say, "I'm going to leave it to everybody to get their own lessons from the book." Because it is amazing the different responses I have gotten to the question of what the book teaches people.

In some ways, Judge Waring asks all of us for our better angels, right? That we would show "unexampled courage," which is the term he used to refer to some of his civil rights plaintiffs. When the time and the person meet and the times demand you to do something that is against your personal interest but for a higher good — that you would step up. All of us hope we would do that. We don't ever really know until that moment arrives. ▶

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Excerpts from

UNEXAMPLED COURAGE: The Blinding of Sgt. Isaac Woodard and the Awakening of President Harry S. Truman and Judge J. Waties Waring

BY RICHARD GERGEL

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A “baptism of fire”

The acquittal of Police Chief Lynwood Shull set in motion a kind of “awakening” for Judge Waring and his wife, who were forced to confront the reality of systemic racism that had long surrounded them. The passage below explores this process and the Warings’ self-education on the issues of race and equality.

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The Warings returned to Charleston following the Shull trial profoundly disturbed by the “viciousness” of the assault on Isaac Woodard and the judicial system’s failure to hold the officer accountable. Elizabeth called it one of the “great shocks” of her life to “have

sat in a courtroom in Columbia and see[n] a jury set free a man who beat out the eyes of Isaac Woodard.” Judge Waring viewed the trial as his personal “baptism of fire.” Both Warings struggled to find some effective response to this experience.

The Warings had certainly long been aware that they lived in a Jim Crow world. Blacks were physically segregated in all public spaces and were deprived of their right to vote and struggled at the very bottom of the economic ladder. The Warings accepted these practices as built into the fabric of southern life and did not question them. What they had not recognized, or at least acknowledged to themselves, was that this entire discriminatory system was enforced by coercion, intimidation, and, where necessary, violence. The trial of Lynwood Shull forced them to acknowledge this basic truth.

Another basic truth of Jim Crow was that no dissent or questioning of the discriminatory practices was tolerated. The random iconoclast who questioned the morality or fairness of the racial status quo immediately felt the wrath of the segregationists, who essentially treated every voice of white dissent as an existential threat to white supremacy. Judge Waring would later describe southern life of that era as akin to living behind the Iron Curtain.

Because race and justice were not topics white South Carolinians of this era openly discussed, the Warings resolved to undertake their own private study of race in America. Each evening after dinner, Elizabeth Waring would read out loud from a selected text, which allowed her husband to rest his eyes after a hard day at the office performing his judicial duties. After reading for a while, the Warings would take a drive around Charleston,

one of their favorite evening activities, and discuss the text they had just read. Night after night, over many months, they undertook this ritual of reading, discussion, and reflection.

The Warings began their studies with W. J. Cash's *Mind of the South*, a widely read and important book of the period. Published in 1941, the book conducted a sort of mass psychoanalysis of the white South, with a special focus on what Cash referred to as the "common white." Cash, who died at age forty-one shortly before the book was published, had worked as a newspaper reporter for *The Charlotte News*. He observed that some of the "best" traits of the "common white" southerner were pride, bravery, personal generosity, and courteousness. But, he noted, there was a "darker side" of the "common white" that included "the tendency toward violence" and "mob action," evidenced by "Negro lynching" and a murder rate in the South that greatly exceeded that of the rest of the country. In Cash's view, the "common white" was also characterized by intolerance ("greatly absorbed . . . by fears and hates"), an incapacity of analysis, an exaggerated individualism, an attachment to fictions and false values, and a "tendency toward unreality." These traits, Cash argued, made the "common white" unusually receptive to racial demagogues "of the more brutal sort."

Cash characterized slavery as an "inescapably brutal and ugly" practice that placed African Americans in a "position of a mere domestic animal." This clearly deviated from the existing popular lore that slavery was a benign and civilizing institution for African slaves. Cash argued that the absolute power of whites bred "a savage and ignoble hate for the Negro." This hatred, he argued, produced

exaggerated claims of sexual dangerousness of black men and made them "the obviously appointed scapegoat." Cash's candid discussion of racism and the portrayal of whites as victimizers of African Americans generated great criticism across the white South. Judge Waring, however, found *The Mind of the South* a liberating revelation. Cash, he observed, disclosed "the perverted and wrong method of thought of those who have carried out the persecution of the Negro." Waring initially found the book difficult to read because it challenged so many of his unquestioned premises about southern life, but he ultimately concluded it was "medicine to do it."

Having studied Cash's harsh critique of southern racial customs, the Warings next tackled Gunnar Myrdal's fourteen-hundred-page study of race

The study clinically analyzed some of America's most delicate and often undiscussed racial practices and customs, including black disenfranchisement, racial mob violence, failures of the justice system, racial segregation, and the fear of interracial sexual relations and marriage. Myrdal asserted that the purpose of these racial practices was "to isolate the Negro and to assign them to a lower social status." In one of the most insightful sections of the study, Myrdal compared the "ranked order of discriminations" held by whites and blacks, which listed the most important aspects of Jim Crow practices to whites and the most critical issues of concern to blacks. For whites, the most important or "first rank" areas of concern regarding race relations were interracial sex and marriage. This was followed by concerns

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in America, *An American Dilemma: The Negro Problem and Modern Democracy*, published in 1944. This work, funded by the Carnegie Foundation, was a "comprehensive study of the Negro in the United States, to be undertaken in a wholly objective and dispassionate way as a social phenomenon." Myrdal, a Swedish economist and social scientist, was selected to conduct the study because of his renowned scholarship and his emotional distance from the American racial question. Eventually, forty researchers, including Ralph Bunche and Dr. Kenneth Clark, assisted in the preparation of *An American Dilemma*.

regarding direct social contact with blacks, such as eating and drinking together or using the same restrooms. Less important to whites were political disenfranchisement and discrimination in employment, credit, and public relief. For blacks, as victims of racial discrimination, the "ranked order of discriminations" was the same, but *in reverse*. Fair access to employment, credit, and public relief was at the top of concerns for blacks, followed by the right to vote. The areas of least concern for blacks were interracial sex and marriage.

Myrdal, a future Nobel laureate with a deep faith in American democ- ►

racy, observed that Americans were defined by a set of values he called the “American Creed.” These included the essential dignity of each individual, the equality of all men, and the right to freedom, justice, and fair opportunity. Myrdal contrasted this American Creed with the treatment of southern blacks, which he described as a “moral lag in the development of the nation.” He viewed America’s racial difficulties as essentially the white man’s problem that existed “in the heart of America,” and the gap between the American Creed and the nation’s treatment of its black citizens was the “American Dilemma.” He called on America to courageously confront its racial practices because, after two world wars, “mankind needed . . . the youthful moralistic optimism of America.” America’s civil rights struggle, Myrdal maintained, was a great opportunity to perfect the nation and to give it “a spiritual power many times stronger than all of her financial and military resources.”

Myrdal had a dim view of southern liberals, whom he characterized as “inclined to stress the need for patience and to exalt the cautious approach, the slow change, the organic nature of social growth.” Southern liberals, in Myrdal’s view, excessively emphasized their “local and regional patriotism” and seemed desperate to “keep respectability” by treading “most cautiously around the negro problem.” According to Myrdal, the southern liberal greatly feared “the deadly blow of being called a ‘nigger lover,’” which produced a form of paralyzing timidity that left southern racial customs effectively unchallenged.

Waring studied *An American Dilemma* with the same rigor and intensity with which he had first read law as an aspiring attorney more than forty years earlier. The book, which he

described as “a great and monumental study,” provided him with a historical and sociological lens through which to view his native South. He was particularly moved by Myrdal’s concept of the American Creed, which soon found its way into his opinions and public statements. Waring shared Myrdal’s view that the South’s racial problems were a stain on America’s international reputation in its battle against world communism. He also adopted Myrdal’s skeptical view of southern liberals. Waring, who just years earlier proudly advocated southern gradualism, now disparaged “gradualists” as a major obstacle to meaningful social change.

The Warings followed their study of Cash and Myrdal with additional evening readings in American history, anthropology, and sociology. A reporter for *The Christian Science Monitor* observed that the books in the Warings’ library showed evidence of much use. Another reporter described Judge Waring’s intense study of race as producing “a long night of soul searching” that resulted in “a new sense of meaning of the judge’s function in a democratic order.”

Paving the way for *Brown v. Board of Education*

The question of the constitutionality of segregated public schools came to Charleston in 1951, via the Briggs v. Elliott trial. Judge Waring heard the case on a three-judge panel, alongside

*Judge George B. Timmerman, Jr., a segregationist, and Judge John J. Parker, widely considered to be the swing vote. The following passage recounts closing arguments in the case between Thurgood Marshall and defense attorney Robert Figg, as well as Judge Waring’s landmark dissent, which would come to influence the Supreme Court in *Brown v. Board of Education* three years later.*

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The panel then heard two and a half hours of closing argument. Predictably, Marshall and Figg took fundamentally different views regarding the federal court’s role and authority concerning public school segregation. Marshall argued that the segregated school system in Clarendon County created “psychological roadblocks” to the personal development of black students, thereby violating the rights of the district’s children to equal protection of the laws. He argued that the district violated the rights of those children “every single day” and they were entitled to rights “that must be given now,” not at some undetermined time in the future. Figg argued that racial segregation of the schools was the “normal” consequence of the region’s history. He dismissed plaintiffs’ evidence, arguing that the state had no obligation to accept the scientific opinions of out-of-state experts or to adapt its educational programs for the “personality development” of any students. Figg noted that the same Congress that had adopted the Fourteenth Amendment maintained segregated schools in the District of Columbia. Figg finished by asking the court for a “reasonable time” to address the district’s inequities, which would be performed under the panel’s continuing supervision.

The three judges adjourned to Waring’s chambers to discuss their

decision in the case. The judges were essentially a microcosm of the debate roiling the courts and the public on the role and responsibility of the federal courts to address government-mandated racial segregation in the nation's public schools. Judge Timmerman voiced the widely held view in the South that the State of South Carolina had every right to segregate its school-children by race "and the United States Constitution had nothing to do with it." Waring asserted that racial segregation under the order and direction of a state government violated the Fourteenth Amendment's guarantee of equal protection of the laws. He further argued that the Supreme Court's decisions of the prior summer in *Sweatt [v. Painter]* and *McLaurin [v. Oklahoma State Regents for Higher Education]* "pointed the way" to the unavoidable conclusion that "segregation in education was unconstitutional." Parker took the middle ground, insisting that the separate but equal doctrine be enforced. He urged his colleagues to give Byrnes time to fix the inequalities in the district, expressing confidence in the governor's capacity to equalize school facilities. Clearly, Figg had read Parker correctly, and his costly defense of public school segregation won him the one vote he absolutely had to have to prevail before the *Briggs* panel.

After protracted discussions, Parker proposed that he prepare an order finding that the facilities and resources provided to the district's black children were not substantially equal to those provided to white children, violating the plaintiffs' rights under the Fourteenth Amendment. He further proposed that the order recognize that *Plessy v. Ferguson* remained the law of the land and that the school district be given a reasonable time to equalize the presently unequal schools through the

The dissent opened with his declaring that the time had now arrived for the federal judiciary to "face, without evasion or equivocation, the question as to whether segregation in education in our schools is legal."

state's new school bonds. Timmerman agreed to join Parker's proposed order. Parker attempted to persuade Waring to join the order as well, but Waring made it clear he was not willing to travel that path. The judges then adjourned, with Parker and Waring planning to prepare orders setting forth their respective positions.

Waring returned home that evening exhausted and dejected. Despite his anticipation of this very result, a 2-1 split in the panel, he had privately held out some small hope that he could move Parker to his position. But Parker and Waring's formerly close relationship had been strained in recent months, likely caused by Waring's outspoken advocacy on the speaker's circuit and Elizabeth's public pronouncements. Further, it was clear from the judges' discussion in conference that Parker would not abandon the separate but equal doctrine until the Supreme Court explicitly overruled *Plessy*.

The panel issued its majority opinion and Judge Waring's dissent on June 23, 1951. Parker, writing for the majority, found that Clarendon School District Number 22 had violated the constitutional rights of its black students by providing them with inferior educational services and opportunities and directed the district to remediate these constitutional violations. The majority's decision rejected the plaintiffs' argument that the Fourteenth Amendment prohibited government-

mandated segregated school systems, noting that *Plessy* continued to control the question and the decision to maintain racially segregated schools was a matter reserved to state policy makers, with "which the federal courts are powerless to interfere."

Waring appreciated the significance of his dissent, which he had thought about, researched, and brooded over for years. He knew this was his moment. The dissent opened with his declaring that the time had now arrived for the federal judiciary to "face, without evasion or equivocation, the question as to whether segregation in education in our schools is legal." He praised the "unexampled courage" of the plaintiffs in bringing the suit and recognized the right of their children to relief now, not at some unstated time in the future. He turned to the "real rock" on which the defendants rested, *Plessy v. Ferguson*. He analyzed the expert testimony offered at trial, particularly Clark's studies demonstrating that segregation "had a deleterious and warping effect upon the minds of children." Waring stated that Clark's studies clearly showed that "the humiliation and disgrace of being set aside and segregated as unfit to associate with others of a different color had an evil . . . effect upon the mental processes of our young." Based on this evidence, Waring concluded it was "clearly apparent . . . that segregation in education can never produce equality and it is an evil that

must be eradicated . . . The system of segregation in education adopted and practiced in the state of South Carolina must go and must go now. Segregation is per se inequality.” Noting that his colleagues viewed the matter otherwise, Waring concluded that he could not join their opinion and, therefore, “this opinion is filed as a dissent.”

Waring’s dissent presented a new and far different equal protection analysis. In prior separate but equal cases, the Supreme Court and lower courts carefully analyzed the facilities or services provided to African American citizens and then compared them with those provided to white citizens. If the comparison demonstrated inequality, then the disparity was unconstitutional. This approach invited protracted and costly litigation, allowing any change in southern racial practices through litigation to be slow and incremental. Waring’s dissent reasoned that the separate but equal analysis was fundamentally flawed, burdensome, and wholly unnecessary because “segregation is per se inequality.” Under

first instance where the per se analysis was fully developed in a decision issued by a federal judge. Moreover, Waring had encapsulated this new approach with his own memorable phrase, “Segregation is per se inequality.” His per se analysis would appear once again and be the defining holding of the most important case in American history, *Brown v. Board of Education*.

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The news of Waring’s historic dissent spread rapidly through the civil rights community, and he received tributes from across the country.

Judge Hubert Delany, then one of the nation’s few sitting African American judges, wrote to Waring on June 26, 1951, stating that his dissent “will go down in the history of jurisprudence . . . as a document comparable to nothing that has heretofore been said with such clarity, wisdom and courage.” The Charleston NAACP president, A. J. Clement, wrote to Waring the same day, declaring, “Your dissent today will be the assent in an early tomorrow.”

Waring responded to these tributes with candor about his purpose in filing the dissent. He told Judge Delany that the Supreme Court cases of the prior summer “almost cross the threshold but do not quite do so. I have great hopes that the Briggs case may shove them across.” To Aubrey Williams, he wrote, “I can only hope that I have spoken sufficiently clear and strong enough to force the Supreme Court of the United States to . . . make a full declaration of the meaning of the American Constitution . . . I hardly dare to hope that I may have had a small part in bringing these vital issues to the attention of the top court.” Responding to a telegram from [civil rights leader] James Dombrowski, Waring shared his disappointment in not getting “a majority of the court to see the light but after all perhaps it is better. It gave me an opportunity to show the two pictures of the South.”

But the clearest statement of Waring’s intent can be found in an enthusiastic entry in Elizabeth’s diary on the date the dissent was filed: “I feel now that it is done that this is our last act, that we have driven the last nail in the coffin of segregation . . . We may rest assured we have done all we can do.” The importance of Elizabeth’s partnership was encapsulated in the copy of the dissent the judge inscribed and gave to her: “To my precious Elizabeth. This could not have been done without her love and encouragement and support.”

Despite the widespread enthusiasm in the civil rights community over Waring’s dissent, there was an undercurrent of criticism among some activists about Marshall’s decision to bring a direct challenge to public school segregation at this time, rather than proceed more cautiously. The most notable of these criticisms was

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Waring’s per se analysis, the day of tedious comparisons by the courts of black and white services and facilities would be a thing of the past, because racial segregation, standing alone, would be unlawful. Some variety of Waring’s per se approach had been presented to the Supreme Court from time to time by the NAACP and in amicus briefs, but his dissent in *Briggs* was the

He went on to state, “The people of my group have thanked God for you in the past. America will thank God for you in the future and at some later date the South will raise a monument to you.” [Activist] Aubrey Williams wrote to Waring on June 29, 1951, stating that he had “done an enduring and permanent chapter in the history of man’s long struggle for justice.”

published in *The Pittsburgh Courier* in a column by Margaret McKenzie, a prominent African American attorney. McKenzie accused the “NAACP high command” of injecting “new vigor in the moribund *Plessy v. Ferguson* doctrine” by directly challenging the precedent in *Briggs*, arguing that it would have been “wiser simply to let the ancient *Plessy* doctrine fade away.” Other black publications ran their own articles second-guessing the NAACP’s litigation strategy. Marshall and his team organized a vigorous counter-offensive, accusing their critics of supporting a gradualist approach and proposing a legal strategy based on fear and timidity. These criticisms never really disappeared until the Supreme Court’s decision in *Brown*.

Charleston’s *News and Courier* addressed the Waring dissent in a hyperbolic editorial titled “Contention for Miscegenation.” The editors argued that the establishment of “mixed race schools,” as supported by Waring, would lead to the “extermination of the white race in the United States and supplant it with a mixed race, Negro and Caucasian,” through the “forced association in school of little boys and girls, white and colored.” South Carolina would not tolerate such a result, the editors insisted, and would give up “public or tax supported schools” rather than allow black and white children to be “educated together.” The paper published in full Waring’s dissent and urged its readers to “examine with care the dissenting opinion of Federal Judge J. W. Waring in the Clarendon case.”

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On January 26, 1952, some six months after issuing the *Briggs* dissent, Judge Waring, now seventy-one years old, advised President Truman that he

intended to retire. Truman addressed Waring’s retirement a few days later at a presidential press conference, calling him “a very great judge.”

Friends and allies from around the nation wrote to Waring to thank him for his service and to praise his courage and vision. Waring announced that he and Elizabeth had sold their Charleston home and would be moving to New York City.

Among his many well-wishers was the *Minneapolis Tribune* reporter Carl Rowan. In a private note, Rowan informed Waring that he received the news of his retirement with “a great deal of sadness” because “. . . think of you there, eternally, on Meeting Street, a symbol of a man who dared to stand for justice.” Waring responded, telling Rowan, “I have done all the judicial work that has been brought before me and cannot see where anything more important will come in the future.” He explained that the Clarendon County case was then in the hands of the U.S. Supreme Court and should the plaintiffs not succeed, “I would not be interested . . . in passing upon separate but equal issues.”

Waring explained his retirement to a disappointed [Morehouse College president] Dr. Benjamin Mays: “I feel there is nothing more in South Carolina for me to do. I have raised the constitutionality of segregation . . . It is now up to the Supreme Court to declare the law.” He stated that he believed “there is a wider field of endeavor for me [in New York] living as a retired judge and no longer muzzled by cases pending or expected to be brought before me.”

The New York Times, in an editorial titled “A Judge Worthy of Honor,” praised Waring’s service on the bench as reflecting “courage, integrity and intelligence” and observed that his alienation from the white citizens of Charleston

was the consequence of his devotion to two documents, the Declaration of Independence and the U.S. Constitution. Even his old nemesis, the editorial page of the *News and Courier*, acknowledged that but for his “crusading on the Negro question,” Waring had achieved “an excellent record on the bench,” showing “judicial dignity, intelligence and ability as a lawyer.”

The Warings left Charleston and moved into a small Upper East Side apartment in New York. Judge Waring became actively involved with various civil rights and civil liberties organizations, serving on the national boards of the ACLU and the National Urban League. In retirement, he reviewed drafts of the briefs submitted by the Legal Defense Fund in the various *Brown*-related cases before the Supreme Court and gave Thurgood Marshall editorial suggestions. He was honored by numerous religious, service, and legal organizations and was treated in his adopted city as an icon of the civil rights movement.

Waring closely monitored the Supreme Court’s handling of *Briggs v. Elliott*, as well as other cases raising the constitutionality of public school segregation from Delaware, Virginia, the District of Columbia, and Kansas. The first school segregation case filed after *Briggs* was from Topeka, Kansas, *Brown v. Board of Education*, and was presided over by a three-judge federal panel. That panel ruled unanimously a few months after the *Briggs* decision that *Plessy* remained good law and that the facilities and educational resources provided to black children within the district were substantially equal to those provided to white students.

Another suit arose out of Prince Edward County, Virginia, where students protested that the county’s segregated school system deprived ►

them of equal educational opportunities. The Virginia case, *Davis v. County School Board of Prince Edward County*, was also assigned to a three-judge panel. That panel, following the *Briggs* decision, found that the separate schools in the county were unequal and gave the State of Virginia time to equalize the facilities.

Plaintiffs in Delaware brought a state court suit challenging school segregation, arguing that *Plessy's* separate but equal doctrine was no longer good law. The Delaware Supreme Court, in *Gebhart v. Belton*, rejected the plaintiffs' argument that *Plessy* had been overruled, but found that educational facilities within the state were not equal. Rather than allow the state time to correct this inequality, as was permitted in the South Carolina and Virginia cases, the Delaware Supreme Court ordered the immediate integration of [the] state's public schools. The Delaware Supreme Court held that if the state's educational inequality problems were resolved, the defendants could petition the court to modify its integration order and, presumably, return to a segregated school system.

The final school segregation case pending before the U.S. Supreme Court, *Bolling v. Sharpe*, challenged segregation in the District of Columbia public schools. Because the District of Columbia is not part of any state and not subject to the Fourteenth Amendment, *Bolling* presented the issue of whether segregation was lawful under the Fifth Amendment's due process clause.

Eventually, all of the school segregation cases, except the one from the District of Columbia, were consolidated by the U.S. Supreme Court under the name *Brown v. Board of Education*. Some have observed that because *Briggs* was the first case filed, tried,

and appealed to the Supreme Court, it should have been the lead case, rather than the Topeka, Kansas, case. The original appeal in *Briggs* was remanded to the three-judge panel to make updated findings regarding the new school construction funding, and it could perhaps be argued that the Kansas case then became the most senior case. A more plausible explanation for the consolidation of the cases under the *Brown v. Board of Education* name was that with a Kansas case as the lead, the South could not claim that the Supreme Court had unfairly targeted the region.

When the dust finally settled on the various school segregation appeals that were docketed by the Supreme Court, Judge Waring's dissent was the clear outlier. In all of the other cases, involving at some level the participation of fourteen different judges, only Waring had ruled that public school segregation violated the Fourteenth Amendment, regardless of whether the facilities and educational resources were equal. In this, Waties Waring stood alone.

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RICHARD

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