Elisha

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BACKGROUND

Elisha Scott

We live in the eye of a whirlwind. When we step out from its circumference we are battered by sharp objects, ugly images, strange ideas and ideologies. In the beginning, life was simple. Nature was the foe. Equality held sway. Man was given a chance to do something to sustain life. Over time inequality crept onto the scene. Dominant and subordinate relationships sprouted across the landscape. Many, if not most relationships, were held in place with muscle, violence and law. Dominant parties lived lives of promise. Subordinate parties lived lives of drudgery. Religion and superstition drowned sorrow. Death erased pain. Dominant parties stooped to pathos, animal analogies, low intelligence, and stereotypes to explain away cruelties heaped upon subordinated men.

For a time Southern culture was fashionable. It coursed through much of American life. The South gave us politicians, poets, generals and broken men—leaving black women with the unenviable task of assuming male and female roles to raise children. Jack Johnson (a boxing phenom and a heavyweight champion) was a hero to some and an anathema to others. Elisha Scott was born into this world.

Mr. Scott attended school in Topeka, Kansas. He completed his course work at Washburn College and graduated from Washburn Law School in 1916.[1] He was granted a license to practice law. He handled criminal defense, Indian claims, oil and gas leases, and military justice cases. He used intelligence, ethics, theatricality, and comedy to win. He sent two sons to Washburn Law School. They practiced law with their father. They were lead counsel in *Brown v. Board of Education of Topeka*.[2]

EARLY CASES

In the early part of the twentieth century the elder Scott fought two bouts over education. In *Watts v. Board of Education of Coffeyville*,[3] the school board used a

[1] Hall Smith, "The Unforgettable Elisha Scott," 42 *Bull. Shawnee Co. Historical Soc.* 21 (1965).
[2] *Brown v. Board of Education of Topeka*, 98 F. Supp. 797 (D. Kan. 1951); rev'd, 347 U.S. 483 (1954).
[3] *Thurman-Watts v. Board of Education of Coffeyville*, 222 P. 123 (Kan. 1924).

regulation, and the board's option to insert some of the high school curriculum into an intermediate school situation, to evade a duty to provide all students with an integrated high school experience. In *Webb v. School District No. 90, Johnson County*,[4] the board dumped a building that was unfit for occupation, teaching, and learning on black students to avoid integration of an elementary school. The board's action was lawless. It had no authority to do this to black children. The county's sages built a new school for white students and gerrymandered the attendance zones to avoid race mixing.[5] County officials accommodated violence, intimidation, and customary ways of doing things to sustain the school board's actions. In both cases Scott used mandamus to void the scams. He got favorable rulings in the courts.

In these noteworthy cases, many inferences can be drawn from the facts. Here is the short list. Complainants used conservative implements (e.g., reason, law and equity) to get results. Parents wanted officials to meet standards. Plaintiffs wanted officialdom to apply the law to the facts. The students wanted art, knowledge, and an integrated education. Scott wanted to wrest concessions from white folks. The plaintiffs wanted and inevitably got Kansas to establish a higher mark for racial tolerance.

BROWN

The *Brown* case was different. Parents were silenced and children were harmed. At the school board level politics drowned out parental protest against segregation. Adults were denied a venue to challenge the assumption that "black children were unfit to associate with whites."[6] Children had to spend more energy to get to school. Law, custom and practice cheapened a child's option to mingle with friends in school. State law stigmatized children. Local practice heightened the safety risks shouldered by some youngsters to get to school. Law, custom and practice perpetuated segregation and slowed the development of democratic sentiments in Topeka.

Elisha Scott did not appear in this case. John Scott, Charles Scott, Robert Carter, Jack Greenberg, and Charles Bledsoe made appearances for the plaintiffs. They used the Federal Anti Injunction Act to get both a three judge district court panel and an expedited appeal to the Supreme Court. They filed a class action. The lawyers sought a declaratory judgment and injunctive relief. They claimed the schools were separate and unequal. They wanted the district court to say that segregation was per se unconstitutional.

In the end the court acknowledged the psychic harm ascribed to school segregation but felt that it could do nothing about it.[7] Its powers in this case were circumscribed by pronouncements in *Plessy v. Ferguson*[8] and *Gong Lum v. Rice*.[9] In 1951, the national policy on race mixing was segregation. In the public sphere, states had

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[4] *Webb v. School District No. 90, Johnson County*, 206 P.2d 1066 (Kan. 1949).
[5] *Id.* at 1069-70.
[6] "To Secure these Rights," Report of the President's Committee on Civil Rights 79 (1947); Note, "The Fall of an Unconstitutional Fiction---The 'Separate but Equal' Doctrine," 30 *Neb. L. Rev.* 69, 79 (1950).
[7] *Brown v. Board of Education of Topeka*, 347 U.S. at 494; 98 F.Supp. at 798.
[8] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[9] *Gong Lum v. Rice*, 275 U.S. 78 (1927).

to furnish separate and equal facilities to both races. In the maintenance and operation of the Topeka school system the court found no evidence for the claim of invidious discrimination. The panel found that the physical facilities, the curricula, courses of study, qualification and quality of teachers were equal.

The plaintiffs appealed the case. The Supreme Court had several questions dumped on them. It turned a blind eye to some, discarded the separate but equal doctrine,[10] and, in the end, abandoned the legislative history ascribed to the Civil War Amendments to answer one question: Whether the state could bar the plaintiffs from mingling with white students in an educational setting.

If civic values were rooted in education, the Supreme Court's answer was no. Justice Warren noted the cold war climate, the civic, social and cultural values rooted in education, and the premium Americans placed on them.[11] If segregation distorted these values and poisoned the minds of youngsters in ways that could not be undone, segregation had to go.[12] Separate but equal was inherently unequal.[13] The time had come to end the practice of having African-Americans live under the shadow of white men.

CIVIC VALUES

In the pre-*Brown* era Scott fought for parity between citizens without regard for race. The elder Scott wanted to remove rubbish from a sphere of life in Kansas where the law had created a climate for difference, tolerance, fairness, equality, democracy and pluralism. His tools were reason, equity, law, and extraordinary writs. In *Kern v. City Commissioners of the City of Newton,*[14] the court parsed what parents and taxpayers could get in equity.

This was a declaratory judgment and mandamus action. The city built a municipal pool with taxpayer funds and leased it to an entrepreneur who excluded some patrons because of race. Petitioner wanted to use the pool. Entrepreneur barred admission because the petitioner was black. Race mixing was the issue. Parity between citizens was the deeper concern before the court. The court reviewed the pertinent equity cases in Kansas, labeled the petitioners who might bring suit, and eliminated the petitioners who lacked standing to sue, to write a bold statement about the law on the subject.

If the public suffered a little in a case like this, and the petitioner was harmed too, the court would (indeed should) grant the pool patron standing to sue.[15] The petitioner might be a mere taxpayer seeking a remedy against an entrepreneur. If the entrepreneur had put the city on a collision course with the separate but equal doctrine, a scheme that

[10] *Brown v. Board of Education of Topeka*, 347 U.S. at 494.
[11] *Id.* at 493.
[12] *Id.* at 494-95.
[13] *Id.* at 495.
[14] *Kern v. City Commissioners of the City of Newton*, 77 P.2d 954 (Kan. 1938).
[15] *Id.* at 960.

governed race relations in the state, the Attorney General and District Attorneys were granted legal authority to do something to avoid the coming calamity.[16]

The *Kern* case would not go away. The City and the entrepreneur (Hunt) used every maneuver imaginable to avoid race mixing. In 1940, Elisha Scott fought another round against the respondents. In this case, *Kern v. City Commissioners*,[17] a city ordinance established a pool facility for blacks. Regrettably, no money was appropriated under the ordinance for construction. Against this backdrop Hunt barred the petitioner's admission to the white pool. Race mixing, privileges and immunities of federal citizenship, and parity between citizens were the court's concerns. The court ducked the privileges and immunities question, labeled *Cummings v. Richmond County Board of Education*[18] irrelevant and discarded the Supreme Court's holding on public schools as the law for this case.[19] Thereafter, it said that respondents could not use freedom from contract and the faint hope that a facility would be built for blacks to deny parity between citizens. Petitioner merited admission to the pool.

There was a final skirmish in the *Kern* case.[20] In the end the respondents won. The court said that Hunt was responsible for pool decorum. The lessee (Hunt) had the authority to vet Newton patrons to determine who was suitable. If a patron was unsuitable Hunt could bar the patron's use of the pool. The court said that "this was a playground". Mothers bought their youngsters to the site to play. Hunt was empowered to remove people with a quarrelsome disposition, big boys known to be bullies, and men and women known to be immoral. Since there was evidence that petitioner was a shady human being (in this case respondent put a commissioned report into evidence about the petitioner's moral character), the court let Hunt's decision stand.[21]

COMMUNITY

Segregation gripped Kansas.[22] Residents knew that black folks carried a stigma.[23] Social privileges were subject to local regulations. Integration was a patchwork undertaking and, in too many places, a sometime social experiment tried by folks across the state. Everybody wanted communities that produced skilled people that preserved everything---individuals, groups, institutions, and a way of life. Some wanted an arrangement that promoted civility, equality, written justifications for inequality and last, but not least, constraints placed upon the arbitrary exercise of power.

Old fogies wanted a scheme that acceded to claims based upon prevailing law, customs, and practices. A few like Scott wanted a system that acceded to people's needs and, in the right cases, tipped power to their demand for the rectification of some wrong.

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[16] *Id.* at 957.
[17] *Kern v. City Commissioners of the City of Newton*, 100 P.2d 709 (Kan. 1940).
[18] *Cummings v. Richmond County Board of Education*, 175 U.S. 528 (1899).
[19] *Kern v. City Commissioners for the City of Newton*, 100 P.2d at 713.
[20] *Kern v. City Commissioners of the City of Newton*, 122 P.2d 728 (Kan. 1942).
[21] *Id.* at 730.
[22] Nell Irvin Painter, *Exodusters: Black Migration to Kansas after Reconstruction* 259 (1976).
[23] *Id.*

There was a legal and a pre-legal order in Kansas. The former used institutions like the courts to identify claims and obligations that merited validation and enforcement. The latter used men bearing informal and unofficial norms to settle day-to-day disputes. Under the legal order litigants needed couplings between principles or rules and facts. Justice came after that. Under the pre-legal order reason and experience determined the outcome of cases.

Scott used the legal order. He appealed to shared premises about Kansas and justice to make the law work for everybody. He wanted authorities to use the law to promote behavior that approximated the behavior of men operating under the golden rule. Under the right circumstances he could bring himself around to act like a legal positivist if it guaranteed a win. His strong suit was his appeal to justice. In the *Kern* case, that meant abandoning a petition in equity for respondent's promises to fund an ordinance to build a separate pool and admit petitioner, and people like him, to the white pool until a separate pool was built.[24] In *Kern* it meant abandoning the impulse to pander to the fears of a small and influential group and doing something to restore a child's right to play with everyone.[25] In education it meant finding ways for children to attend the same schools, mingle with white children, play with each other, learn from one another, and restore to all parents the authority to do what's in the best interest of their children.

In the Twentieth Century Scott could have been affected by the life, teachings, and works of Booker T. Washington.[26] He wanted a separate society with elites (e.g., doctors, lawyer, and academics) profiting from educated businessmen, thriving farmers, prosperous tradesmen, and healthy children.[27] Being amusing, careful, kind, smart, ethical, friendly, lawyerly, and legally astute was a way to get there. He wanted to send a message to future generations that somebody back there did something positive to help black folks become healthy adults.

MILITARY JUSTICE

Scott made an appearance in a military justice case. In *Shuttles, Beverly and Riggins v. Davis*,[28] he used habeas corpus to determine whether military authorities gave fair consideration to the accused's constitutional claims. The petitioners were found guilty of premeditated murder and robbery. Each was given a death sentence. The sentences were upheld by the Board of Military Review; affirmed by the United States Court of Military Appeals; and confirmed by the President of the United States. Scott

[24] Where there is a legal conflict that neither party can avoid the court's holding should track with a bargain the parties might have struck between them. Ronald Dworkin, *Law's Empire* 287-89 (1986).
[25] Americans invested with the lion's share of the nation's wealth, William Ryan, *Equality* 14 (1981), should be denied the option to use numerical majorities in representative bodies to impose their unconstitutional views upon everybody. See Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* 455 (1992).
[26] Booker T. Washington, *The Negro in Business* (1907).
[27] *Id.* at 19, 320.
[28] *Suttles v. Davis*, 215 F.2d 760 (10th Cir. 1954). See Dwight H. Sullivan, "The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases," 144 *Mil. L. Rev.* 1, 17 n.75 (1994).

claimed that defense counsel did not object to some of the evidence at trial, and failed to consult with their clients after sentencing, and apprise them of their rights to appeal.

He said that the lawyers had breached their duties of loyalty and good faith to their clients. He asserted that petitioners were denied affective assistance of counsel. He claimed officialdom didn't evaluate and write a sound decision about the petitioners' constitutional claims. After a hearing the United States District Court for the District of Kansas dismissed the petition.[29] Scott filed an appeal with the United States Court of Appeals for the Tenth Circuit.[30]

The question was whether the military courts had proper jurisdiction over the case; adhered to their procedures; avoided fundamental errors resulting in a miscarriage of justice and last, but not least, reviewed, evaluated and wrote a sound decision about the accused's constitutional claims. With regard to the first question the court had proper jurisdiction.[31] As regards the other questions there was no evidence that military authority had fumbled something that caused a miscarriage of justice.

The petitioners' legal representatives were seasoned lawyers.[32] There was no evidence that they had broken fealty with their clients.[33] Neither trial nor appellate defense counsel had reason to advise petitioners of their right to file a petition for a new trial absent new evidence (and there was none) favorable to the petitioners or evidence indicating a fraud practiced upon the court.[34] Due process guaranteed military defendants one trial.[35] The court said that habeas corpus was the wrong instrument to raise inadequacy of counsel for the first time.[36] Finally, when military judges evaluate a confession and label it uncoerced, civilian trial courts are powerless to evaluate the evaluators under a habeas corpus petition.[37] The scope of inquiry when acting upon an application for habeas corpus from a soldier confined by sentence of a military court is narrower than in civil cases.[38]

CONCLUSION

Scott was an amusing, smart and enigmatic man. He forced officialdom to meet legal standards. He changed the law of equity in Kansas. He retrieved a child's option to play with everybody in a playground environment; restored a child's right to mingle with white students in an educational setting; and reclaimed sovereignty for all parents to act in the best interest of their child.

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[29] *Suttles v. Davis*, 215 F.2d at 761.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 761-62.
[33] *Id.* at 762.
[34] *Id.*
[35] *Id.* at 763.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 761.