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The School Desegregation Cases in Retrospect

Some Reflections on Causes and Effects

Excerpts from a Foreword to Argument: The Complete Oral Argument before the Supreme Court in Brown v. Board of Education (L. Friedman ed. 1969) (Chelsea House).

by Professor Yale Kamisar

Each Lawyer "According to His Own Lights"

As the transcript of the oral arguments amply illustrates, many able lawyers participated in the five school segregation cases. But the principal antagonists were John W. Davis and Thurgood Marshall. Davis, the Democrats' nominee for President in 1924, was a magnificent legal advocate. If he lost the school segregation case, it was only because in 1954 no lawyer could have won it. And although he lost, he left no doubt why he was reputed to be *the* leading advocate of his time. This is a sample:

> [I]t has been accepted that where there is a pronounced dissent from previous opinions in constitutional matter, mere difficulty in amendment leaves the Court to bow to that change of opinion more than it would of matters of purely private rights.
>
> But be that doctrine what it may, somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance.
>
> That is the opinion which we held when we filed our former brief in this case. We relied on the fact that this Court had not once but seven times, I think it is, pronounced in favor of the separate but equal doctrine.
>
> We relied on the fact that the courts of last appeal of some sixteen or eighteen States have passed upon the validity of the separate but equal doctrine vis-a-vis the Fourteenth Amendment.
>
> We relied on the fact that Congress has continuously since 1862 segregated its schools in the District of Columbia.
>
> We relied on the fact that 23 of the ratifying States . . . had by legislative action evinced their conviction that the Fourteenth Amendment was not offended by segregation, and we said in effect that that argument—and I am bold enough to repeat it here now—that in the language of Judge Parker in his opinion below, after that had been consistent history for over three-quarters of a century, it was late indeed in the day to disturb it on any theoretical or sociological basis. We stand on that proposition.
>
> * * *
>
> Let me say this for the State of South Carolina. It does not come here as Thad Stevens would have wished in sack cloth and ashes. It believes that its legislation is not offensive to the Constitution of the United States.
>
> It is confident of its good faith and intention to produce equality for all of its children of whatever race or color. It is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools, and it thinks it a thousand pities that by this controversy there should be urged the return to an experiment which gives no more promise of success today than when it was written into their Constitution during what I call the tragic era.
>
> I am reminded—and I hope it won't be treated as a reflection on anybody—of Aesop's fable of the dog and the meat: The dog, with a fine piece of

meat in his mouth, crossed a bridge and saw the shadow in the stream and plunged for it and lost both substance and shadow.

> Here is equal education, not promised, not prophesied, but present. Shall it be thrown away on some fancied question of racial prestige?
>
> It is not my part to offer advice to the appellants and their supporters or sympathisers, and certainly not to the learned counsel. No doubt they think what they propose is best, and I do not challenge their sincerity in any particular period but I entreat them to remember the age-old motto that the best is often the enemy of the good.

As Justice Harlan noted some years ago in an article on the role of oral argument, "each lawyer must proceed according to his own lights." Although (along with tens of thousands of other lawyers) his organization was not nearly as tight as Davis' nor his presentation nearly as polished, in his own way Marshall, too, was a powerful advocate. This was especially so on rebuttal where, perhaps stimulated by the sting of his opponents' argument, he really seemed to warm to his task. The following is an example of his earthy, homey touch:

> Those same kids in Virginia and South Carolina—and I have seen them do it—they play in the streets together, they play on their farms together, they go down the road together, they separate to go to school, they come out of school and play ball together. They have to be separated in school.
>
> There is some magic to it. You can have them voting together, you can have them not restricted because of law in the houses they live in. You can have them going to the same State university and the same college, but if they go to elementary and high school, the world will fall apart.

Marshall was no less aware than Davis that, particularly in a great case, the advocate must always "go for the jugular vein." If Davis the master craftsman told the Court *how* to write an opinion reaffirming *Plessy,* Marshall, spokesman for an oppressed race, never let the Justices forget *why* they had to overrule it. Nor was he about to let the Justices forget that the Court and the Constitution, as well as his own cause, were on trial. This is a sample:

> They can't take race out of this case. From the day this case was filed until this moment, nobody has in any form or fashion, despite the fact I made it clear in the opening argument that I was relying on it, done anything to distinguish this statute from the Black Codes, which they must admit—because nobody can dispute, say anything anybody wants to say, one way or the other—the Fourteenth Amendment was intended to deprive the States of power to enforce—deprive them of Black Codes or anything else like it.
>
> We charge that [the challenged state laws] are Black Codes. They obviously are Black Codes if you read them. They haven't denied that they are Black Codes, so if the Court wants to very narrowly decide this case, they can decide it on that point.
>
> So whichever way it is done, the only way that this Court can decide this case in opposition to our position, is that there must be some reason which gives the State the right to make a classification that they can make in regard to nobody else but Negroes, and we submit the only way to arrive at this decision is to find that for some reason Negroes are inferior to all other human beings.
>
> Nobody will stand in the Court and urge that, and in order to arrive at the decision that they want us to arrive at, there would have to be some recognition of a reason why of all of the multitudinous groups of people in this country you have to single out Negroes and give them this separate treatment.
>
> It can't be because of slavery in the past, because there are very few groups in this country that haven't had slavery some place back in the history of their groups. It can't be color because there are Negroes as white as the drifted snow, with blue eyes, and they are just as segregated as the colored man.
>
> The only thing it can be is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible, and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for. . . .

"Some Fancied Question of Racial Prestige" or Symbol and Catalyst for a Revolution in Race Relations?

One line of Davis' powerful argument would have been better left unsaid: "Shall ['equal,' albeit separate, education] be thrown away on some fancied question of racial prestige?"

Many a White must have regarded this question quite appropriate. Disrupt long-established customs and life patterns for what? Just to accommodate some status-seeking Blacks? (No, to afford them the minimal dignity and respect to which every American is entitled.) Whites, certainly Northern Whites, are much less conscious of their color than are Blacks of theirs—and the stigma it connotes. The many Whites who more or less take their whiteness and treatment as full human beings for granted—who have never felt, if they have even thought about, what it means always to be confined to the back of the bus—may well have wondered: Why do Blacks get so worked up about mere social amenities? Why do they rave so about their rights? Why are *they* so sensitive?

Marshall's rebuttal was:

> I understand the South's lawyers to say that it is just a little feeling on the part of Negroes—they don't like segregation. As Mr. Davis said yesterday, the only thing the Negroes are trying to get is prestige.
>
> Exactly correct. Ever since the Emancipation Proclamation, the Negro has been trying to get what was recognized in *Strauder* v. *West Virginia* [1880], which is the same status as anybody else regardless of race.

Of course, racial prestige was not the only thing at stake in *Brown*—but it was a great deal. As sociologist Joseph Gusfield has pointed out in his illuminating study of Prohibition and Temperance, the instrumental effects of governmental action may be slight compared to the response which it entails as a symbol. So long as men's regard for status,

respect, honor, and prestige are real and important, symbolic action will be real and important. And, though he treated this aspect flippantly, Davis knew it every bit as well as Marshall. It is because political symbolism may affect the status order—may contribute to a glorification or degradation of one group in opposition to others within the society—that, as Gusfield has pointed out, "the struggle to control the symbolic actions of government is often as bitter and as fateful as the struggle to control its tangible effects."

White Southerners and Black Men, as do *all* men, live by symbols. And in large measure the school segregation cases were so fiercely contested and then so bitterly resisted because school segregation is a special symbol. Indeed, to the Southern Black this racist institution must have seemed the epitome of American hypocricy. Had not Horace Mann called education "the great equalizer of the conditions of men"? Had not Justice Frankfurter called the public school "the symbol of our democracy and the most pervasive means for promoting our common destiny"? Were Blacks supposed to be less aware than other Americans that "education is a fetish of our country; we have believed it somehow to be a magic cure-all." [R. Wilkins, in *What the Negro Wants* (1944)].

The Blacks understood, no less than did White Southerners, that for the latter—or more accurately, for Whites *everywhere*—to treat them as though they were outside the community of man—it was essential to nourish and preserve the stereotype of Blacks, the stereotype, as Professor Louis Lusky has desribed it, that—

> depicts Negroes as relatively unteachable, and therefore ignorant; as insensitive to the demands of abstract ideals, and therefore less troubled by discrimination than the white man; as motivated solely by appetite for the creature comforts, and therefore appeasable with access to fried fish, liquor, and women; as devoid of moral fibre, and therefore predisposed to crime . . . [and] that segregation's significant function is not to deliver an insult but to preserve the group stereotype by minimizing contact between the races in situations where they would necessarily see and deal with each other as individuals, and by putting the official imprimatur on the proposition that Negroes and whites differ in a legally material way.

Similarly, Anthony Lewis has observed:

> That racial separation should carry more emotional weight in schools than elsewhere was understandable: Attendance was compulsory, and in school children of an impressionable age were exposed to a culture. Intermingling of the races could not help but affect their outlook. Putting it another way, any breakdown in school segregation necessarily endangered the perpetuation of the Southern myth that the Negro is by nature culturally distinct and inferior. And there was the fear—surely felt deeply by many in the South, however others regarded it—that school integration was a step toward intermarriage.
>
> It was these reasons that led Holding Carter, one of the most enlightened voices in Mississippi, to write a year before the School decision that a Supreme Court ruling against segregation would be "revolutionary" in character.

"If Davis . . . told the Court **how** to write an opinion reaffirming **Plessy,** Marshall . . . never let the Justices forget **why** they had to overrule it."

"Revolutionary in character"? Has it really turned out that way?

Up through the 1962–63 school year, less than one per cent of Black students attended school with Whites in the eleven states of the old Confederacy. In the 1965–66 school year—in no small measure as a result of the Civil Rights Act of 1964 and guidelines promulgated by the United States Department of Health, Education, and Welfare—the percentage increased to six per cent. Local resistance has occasionally taken the form of spectacular open defiance, but far more effective have been the less flamboyant "guerilla activities" of public officials.

The pace of desegregation, of course, has been most uneven. During the 1966–67 school year, although more than 90 per cent of Black pupils still attended *all-Black* schools in the Deep South states of Alabama, Georgia, Louisiana, Mississippi, and South Carolina, more than 80 per cent attended schools which were less than 95 per cent Black in the Border States of Delaware, Kentucky, and West Virginia. Indeed in Kentucky, a majority of Black children attend schools which are less than 20 per cent Black. Although the rate of desegregation has accelerated almost everywhere in the South in recent years, and the pace has been heartening in some states, the grim facts are that more Black students still attend all-Black schools in Southern and Border states than they did at the time of the first *Brown* decision—and this amounts to more than 75 per cent of all Black students in such states. Is this the stuff of "revolution"?

Even in the North, because of housing segregation, most Blacks, although legally eligible to attend white schools, are still in segregated ones. Indeed, in too many Northern communities, because Whites are moving away or sending their children to private or parochial schools, we are experiencing "resegregation." And most of the relatively few Black students who are no longer "separate" are not yet "equal" or meaningfully "integrated."

The statistical story is disappointing, but it is only a small part of the whole story. The consequences of *Brown* cannot begin to be measured by cold statistics. Nor, although the Supreme Court quickly applied (or extended) the principle of its 1954

ruling to other public facilities, such as public transportation, parks, and beaches, can its consequences be measured by the number of times it has been cited in other judicial opinions. Regardless of its practical, tangible direct effects, and its judicial progeny, the symbolic quality of the decision was immeasurable; as Robert Carter, former NAACP general counsel has observed, "the psychological dimensions of America's race relations problems were completely recast;" the "indirect consequences" "awesome." It stimulated men everywhere—corporate executives, union officials, clergymen, hospital administrators, university executive officers, and faculty members—to rethink and, sometimes at least, to reshape their policies. As Professor John Kaplan has pointed out, the decision's "educative and moral impact in areas other than public education and, in fact, its whole thrust toward equality and opportunity for all men has been of enormous importance." This impact and thrust, for example, contributed mightily to the enactment of the Civil Rights Acts of 1957, 1960, 1964, and 1968 and the Voting Rights Act of 1965—demonstrating once again that constructive political action "flows in no small part from an awareness of basic principles concretely illustrated in court decisions and constantly explained in opinions circulating among a wide audience" [Judge Wyzanski, in *Government under Law* (1956)]. And it greatly accelerated, perhaps even precipitated, the "revolution" in constitutional-criminal procedure. As Dean A. Kenneth Pye has pointed out, "it is hard to conceive of a Court that would accept the challenge of guaranteeing the rights of Negroes and other disadvantaged groups to equality before the law and at the same time do nothing to ameliorate the invidious discrimination between rich and poor which existed in the criminal process."

White America was never to be the same after *Brown*. Nor was Black America. As author Louis Lomax put it:

> It would be impossible for a white person to understand what happened within black breasts on that Monday. An ardent segregationist has called it "Black Monday." He was so right, but for reasons other than the ones he advances: That was the day we won; the day we took the white man's laws and won our case before an all-white Supreme Court with a Negro lawyer, Thurgood Marshall, as our chief counsel. And we were proud.

That the case generated a feeling of hope and momentum is evidenced by such Black responses to a national poll, years later, as: "It started the ball rolling;" "the Supreme Court gave us heart to fight."

Last year, looking back at the School Desegregation cases, in which he played a major role, Robert Carter sadly observed that *"Brown* has promised more than it could give." Yet few commentators have better articulated how much it did give [Carter, *The Warren Court and Desegregation,* 67 Mich. L. Rev. 237, 247 (1968)]:

> Blacks were no longer supplicants seeking, pleading, begging to be treated as full-fledged members of the human race; no longer were they appealing to morality, to conscience, to white America's better instincts. They were entitled to equal treatment as a right under the law; when such treatment was denied, they were being deprived—in fact robbed—of what was legally theirs. As a result, the Negro was propelled into a stance of insistent militancy. Now he was demanding—fighting to secure and possess what was rightfully his. The appeal to morality and to conscience still was valid, of course, but in a nation that was wont to describe itself as a society ruled by law, blacks had now perhaps the country's most formidable claim to fulfillment of their age-old dream of equal status—fulfillment of their desire to become full and equal participants in the mainstream of American life.

Southern conservatives understood perhaps better than Northern liberals that revolution feeds on itself and that the time to stop one is at the beginning, not the end. But they couldn't. That is why *Brown* is a momentous decision.

Southern conservatives knew, too, that one Black success would lead to other Black demands. "They were undoubtedly wrong in thinking that they could hold the line by opposing all Negro demands, but the Northern liberals were probably equally wrong in thinking that they could contain the Negro revolution by legal concessions." [James Reston, in *Sketches in the Sand* (1967)].

I realize that revolutions do not begin at a particular point in time; that revolutions are not made; they come—out of the past. Nor am I unaware that many factors were working for change in American race relations on the eve of *Brown.* "But revolutions require a spark, a catalyst. For the revolution in American race relations, this was the School Segregation case":

> The struggle to carry out the Supreme Court's decision created a climate that encouraged the Negro to protest against segregation on buses, to demand coffee at a lunch counter, to stand in long, patient lines waiting to take a biased test for the right to vote. It was easy to say, as many observers did during the [1954–64] decade, that it would be more logical for Negroes in the South to concentrate on obtaining the ballot because political power would open the way to all other rights. But that was only true in the abstract. In the real world the right to vote was too remote an idea to arouse the Negro of the South from apathy and fear. It took the drama of school desegregation, and then of the protest movements, to make the possibility of freedom come alive; then Negroes began demanding *en masse* the ballot to which the law had said they were entitled.

"... more Black students still attend all-Black schools in southern and border states than they did at the time of the ... **Brown** decision ..."

However discouraged one may be at the continuing reality of discrimination, he should remember that this country is at least on the right course —and that the law put it there. A. Lewis, *Portrait of a Decade: The Second American Revolution* 8–9 (1968).

On Thrusting Black Children "Into Hells Where They are Ridiculed and Hated" and Making the World Better for Those Who Stay in Separate" Schools.

In the course of his spirited defense of the "separate but equal" doctrine, John W. Davis turned for support to Dr. W. E. B. Dubois—

"perhaps the most constant and vocal opponent of Negro oppression of any of his race in the country. Says he:

"'It is difficult to think of anything more important for the development of a people than proper training for their children; and yet I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, made mock of it, neglected or bullied it, and literally rendered its life a living hell. Such parents want their children to 'fight' this thing out,—but, dear God, at what a cost!'"

"He goes on:

"'We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated.'"

The irony of it! For the South to cite one who had been called "the most vital and compelling figure in the Negro world"—one who, a full half-century earlier, had warned Booker T. Washington and other Black leaders that "the way for a people to gain their reasonable rights is not by voluntarily throwing them away and insisting that they do not want them"—for the proposition that Black people did not want desegregation.

If Davis was implying, as he seemed to be, that if the militant DuBois were opposed to school desegregation, then surely so were virtually all other members of the Black race, he was plainly wrong. From the White South's viewpoint, the best that could be said was that Blacks were divided on this issue. Indeed, DuBois himself had pointed out that "in this matter of segregation I was touching an old and bleeding sore in Negro thought. From the eighteenth century down the Negro intelligentsia has regarded segregation as the visible badge of their servitude and as the object of their unceasing attack." [DuBois, *Dusk of Dawn* 305 (1940)].

Why are Blacks more fungible than Jews or Irishmen—or White Protestants? There are *some* prominent members of nonconforming minority religious groups, no doubt, who do not (or pretend not) to mind religious instruction in public school classrooms or the invocation of "official prayers" there, but how can they bind those who do object? How can any Black, however eminent, speak for *the* Black? How can any Black, however renowned, prevent other Blacks from asserting *their* constitutional rights? Did not the Court have to tear down the wall, regardless of the number of Blacks determined to climb over the rubble? It seemed sufficient, therefore, to remind Davis, as Marshall did, that "if all of the people in the State of South Carolina and most of the Negroes still wanted segregated schools . . . any individual Negro has a right, if it is a constitutional right, to assert it."

Inasmuch as many Black activists view DuBois as a "symbol of dedicated, uncompromising militance," however, it may be profitable to dwell for a moment on what his views really were on school segregation—and why.

To begin with, his apparent preference for segregated schools was essentially a product of despair, not choice. In the long run, DuBois, too, wanted all color bars down, but that day would only come when "the majority of Americans were persuaded of the rightness of our course" [*Dusk of Dawn* 304], and, he eventually became convinced, the white world was so resolutely opposed to racial equality that that day was far away—"many years, perhaps many generations." [*Ibid.*] The long run was too long. In the long run, DuBois and his contemporaries would be dead—and their children graduates of segregated schools.

In the meantime, his people had to come to terms with the brutal facts of racism. They had to fight for a fair share of public funds for Black schools—transform them, if possible, from "simply separate schools, forced on us by grim necessity" to "centers of a new and beautiful effort at human education" [DuBois, *Does the Negro Need Separate Schools?*, 4 J. Negro Ed. 328, 334 (1935)]—and otherwise develop their own facilities and resources as best they could. In the meantime, they had to do more than dream the impossible—Davis lived long enough to see the school desegregation case of 1954 and to exclaim: "I have seen the impossible happen."

Once "the present attitude of white America toward Black America" is recognized, insisted DuBois in 1935, "there is no room for argument as to whether the Negro needs separate schools or not. The plain fact faces us, that either he will have separate schools or he will not be educated." [*Id.* at 328–29].

The NAACP, he maintained, "was not, never had been, and never could be an organization that took an absolute stand against race segregation of any sort under all circumstances. This would be a stupid stand in the

"If there was irony . . . in the South drawing on DuBois' writings for support, there was more irony . . . in the Black cause thriving on the visibility of the white racism which DuBois had forseen."

face of clear and incontrovertible facts. . . . What we did say was"—

> no increase in segregation; but even that stand we were unable to maintain. Whenever we found that an increase in segregation was in the interest of the Negro race, naturally we had to advocate it. We had to advocate better teachers for Negro schools and larger appropriation of funds. We had to advocate a segregated camp for the training of Negro officers in the [first] World War. We had to advocate group action of Negro voters in elections. We had to advocate all sorts of organized movement among Negroes to fight oppression and in the long run end segregation.
> . . . So long as we were fighting a color line, we must strive by color organization. We have no choice. [*Dusk of Dawn* 309–11]

In the very article John W. Davis quoted, Dubois made plain that he would "welcome" a time when "racial animosities and class lines will be so obliterated that separate schools will be anachronisms"—twenty years later he was to "rejoice" at the overruling of the "separate but equal" doctrine—for he was well aware that—

> Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.

Lest we too hastily congratulate ourselves on the great distance we have traveled since 1935, the year DuBois made these grim observations, consider the sobering remarks of *New York Times* columnist James Reston, some 30 years later and 10 years *after* the School Desegregation case [*Sketches in the Sand* 165–66]:

> It will not do to wait for total racial integration to make substantial improvement in the schools still predominantly Negro. . . . [A] vast and expensive new effort will probably have to be made to make the predominantly Negro schools "equal" even if they are still largely "separate." This is opposed by some Negro leaders in the belief that making the predominantly separate Negro schools "equal" will weaken the fight against keeping them "separate."
>
> Yet it is fairly clear from the history of the last 10 years that the fight for legal equality is insufficient. Educational equality must go with it, or at the end of another 10 years we shall have a Negro generation with equal rights to jobs but few jobs, free access to restaurants and housing but no means to enjoy them, equal opportunity to vote but little understanding of the purpose of voting.

A Double Irony

Although DuBois never realized how near at hand was the 1954 Supreme Court decision, his estimate of the "living hell" many a Black child would experience on entering a previously all-white school was closer to the mark. But for the South this brutal factor was to backfire badly. Not only did it fail to stay the Court's hand in 1954, it was to strengthen its hand in the grim, tense years which followed. If there was irony—when the principle had not yet been announced—in the South drawing on DuBois' writings for support, there was more irony—when the viability of the principle was still in doubt [as it was in 1956–57, see, e.g. Bickel, *The Least Dangerous Branch* 256–58 (1962)]—in the Black cause thriving on the visibility of the White racism which DuBois had foreseen.

For Southern Black families, two Black psychiatrists have recently told us [Grier & Cobbs, *Black Rage* 124 (1968)], "school . . . was seen in a very special way. Beset on all sides by a cruel enemy, school was often primarily a refuge—a place of safety for those who were to be protected—and in a sense it was a case of women and children first." But after *Brown* little Black boys and girls left their "refuge" to face the "cruel enemy."

The courage of these little "pioneers of school desegregation" inspired Blacks everywhere. And at a time when not a few Northerners must have been growing a bit tired of it all—here as elsewhere people may go to great lengths to gratify reformers "in principle" only to find it rather tedious of them to insist on carrying principle to the point where it really bites—the ridicule, harrassment and hatred of the White adults who confronted these Black children mobilized Northern opinion in support of the Court's decision.

Few Northerners would be misled any longer by "the entirely sincere protestations of many southerners that segregation is 'better' for the Negroes, is not intended to hurt them;" rather, as Professor Charles Black has pointed out, many would now understand "that what is meant is that it is better for the Negroes to accept a position of inferiority, at least for the indefinite future." On seeing the fury of the mobs and hearing "the ugly, spitting curse 'NIGGER!'," the abstraction of racism was "concretized" on millions of television screens and the "moral bankruptcy" and "shame" of the thing finally grasped. [See Bickel supra at 266–67; Lewis, supra 7–12] The North was roused. And an North meant an aroused Federal Government.

Many campaigns of the Black Revolution remain to be won—for example, de facto segregation and massive educational and economical issues. But on the fifteenth anniversary of *Brown,* in large part thanks to those who did not spare us the gory details of "The Southern Way of Life," the outcome of the campaign against legal, formal segregation of schools and other public facilities is no longer in doubt.

There remain, to be sure, pockets of resistance, some discouragingly large, many bitterly defended. Flushing them all out will take not a few years and in the process, no doubt, more hate will be spewed and more blood spilled. Nevertheless, now there remain only pockets of resistance. Now *this* campaign is a mopping-up operation.