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APOSTASY?

JENNIFER GERARDA BROWN*

In 1999, I published an essay proposing that “a women’s law school is precisely what some women need to reach their full potential as law students and as lawyers.”¹ The point of the essay was to consider the value of single-sex education at the professional school level as a remedy for the alienation, underachievement, and silencing that women are said to experience in law school. As I revisit the question of how best to educate women in the law for this *Symposium on Unfinished Feminist Business*, however, I find that I am suffering a crisis of conviction.

Two questions haunt me. First, as a growing body of empiricism in some ways supports but in other ways undermines my earlier claims that sex is the operative characteristic determining experience in law school, I wonder whether a remedy based on sex will yield the benefits I touted. Second, and perhaps more importantly, I worry about the costs of a women’s law school for those outside of its walls—will men who are dissatisfied with law school feel excluded from a remedy that might have helped them? I have come to question the wisdom of my own proposal as I have experienced in a personal way the pain that can come from sex segregation.

I have a five-year-old son. At his preschool, there are a couple of girls who are quite charismatic, imaginative, and fun. They are the “in crowd,” and lots of kids want to play with them. My son wants to play with them much of the time, too. Sometimes they include him. Often they exclude him. Or they permit him to play, but only if he will assume an undesirable role in the dramatic play.² This is effective

* Thanks to Ian Ayres, Anita Bernstein, and Vicki Schultz for helpful comments and conversations.

1. Jennifer Gerarda Brown, “*To Give Them Countenance*”: *The Case for a Women’s Law School*, 22 HARV. WOMEN’S L.J. 1, 2 (1999).

2. Most of the time my son wants to be a princess, the big sister, or a good witch who is helpful, kind, and beautiful (the costuming is much better for such roles, by the way). But these charismatic girls often become the “bosses” of the game and pull a classic “bait and switch”; they lure my son into the game with promises that he’ll play the character he desires, but then assign him the role of the terrible monster, the mean king, or the ugly giant once the game is underway.

exclusion, because it either causes my son to leave the game or surrender so much of himself that the boy who asked for inclusion is no longer present.

These small cruelties are commonplace and the drama is undoubtedly played out daily in countless places by countless children (and adults). My son's pain and frustration with it have touched me deeply, as they would any parent. The aspect of the drama that has caused me professional concern is this—the girls sometimes exclude my son on the basis of gender. They say that the game is for girls only or that he cannot be a princess (or sister or good witch) because he is a boy.

I tell my son that these girls are wrong to exclude him from play on the basis of gender (although I do not say it, I believe they are particularly wrong to exclude him when to include him would subvert rather than reinforce gender stereotypes). I have encouraged my son's teachers to enforce a rule of inclusion called "You Can't Say You Can't Play," a rule Vivian Paley eloquently and movingly writes about in her book by the same title.³ In Paley's work with very young children, she has observed that "exclusion is written into the game of play. And play, as we know, will soon be the game of life."⁴ The notion here is that children should be challenged to abandon property-based models of play (where a "boss" of the game effectively owns it, grants or denies admission, and assigns roles). Instead, a "you can't say you can't play" model encourages kids to find ways of weaving all interested children into the narrative, doing so, as much as possible, on the terms desired by the potential participants.

As I advocate this inclusive model for the very youngest of students, I am challenged to explain why "you can't say you can't play" shouldn't apply to my women's law school as well. And as I assure my son that his classmates are wrong to exclude him on the basis of gender, how do I explain to him that I have advocated the creation of a law school that would someday reject him on the very same basis?

In my work proposing a women's law school, I have drawn repeatedly from a growing body of empirical work that documents women's experiences in legal education. Studies of women law students have revealed that many are unhappy, and a sense of

3. VIVIAN GUSSIN PALEY, *YOU CAN'T SAY YOU CAN'T PLAY* (1992).

4. *Id.* at 20.

alienation⁵—a lack of belonging or integration in the institution—lies at the core of their discontent. When women feel that they are not legitimate members of the law school community, they lose confidence, they are silent in the classroom,⁶ and their performance on exams may be suppressed.⁷ I have argued that these are gendered problems, falling more heavily upon women than men. A remedy based upon gender is therefore appropriate.

A women's law school could address the problem of alienation by creating safe space for women. It could also provide a structure for mentoring, as first year students would find ready access to senior students, faculty, and alumnae with whom they could identify as women. Some research suggests that women may need this sort of encouragement and support more than men do.⁸ Currently at coed schools, women faculty seem to be perceived as more caring or more accessible, and women students particularly prize these characteristics.⁹ A women's law school could encourage professors to mentor students by making one-on-one or small group student contact more explicitly a part of the job.¹⁰ At a law school run for and

5. See Brown, *supra* note 1, at 6-10.

6. See *id.* at 11-16.

7. See *id.* at 16-24.

8. See OHIO SUP. CT. & OHIO STATE BAR ASS'N JOINT TASK FORCE ON GENDER FAIRNESS IN THE PROFESSION, THE ELEPHANT IN OHIO LAW SCHOOLS: A STUDY OF PERCEPTIONS, EXECUTIVE SUMMARY 6 (1993) [hereinafter OHIO EXECUTIVE SUMMARY] (summarizing psychological studies finding that when women enter a male-dominated profession, "if neither male nor female students are encouraged, the effect actually discriminates against the women"); Lani Guinier et al., *Becoming a Gentleman: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 77-78 (1994) (Being able to approach faculty is "as critical to students' self-perception of their role in the institution as it is to the substantive learning that takes place in these informal settings."); cf. LINDA F. WIGHTMAN, WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN 73 (1996). When asked how many of their professors exhibited concern about the problems of minorities and disadvantaged students, women students identified a smaller group of such professors than men did. See *id.*; see also Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1329 (1988) ("When we experienced competitiveness, hostility, and hurt in the law school, we retreated, forming our own community. From it, we derived strength, enabling us to return and to participate.").

9. See Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1239 (1988) (A greater percentage of female graduates (76.9%) than male graduates (66.3%) admired professors "who demonstrated an openness to questions outside of class."); Guinier et al., *supra* note 8, at 77-79 (Women students "need faculty and student mentors, meaning teachers, guides, or more accomplished peers who share their knowledge or experience within the context of an interpersonal relationship.").

10. This could be done by making out-of-class contact with students a factor in evaluations of faculty each year. Granted, many coed law schools do this now, but deans are free to give very little weight to this information.

mostly by women, female students could begin their legal careers with a greater sense of integration and identification with the law. In this way, a women's law school would use sex segregation to create an environment centered simultaneously on law *and women*, ameliorating the sense of separation from law and legal process that women in coed schools have described.¹¹

Some of the alienation women experience in legal education stems from the dominant pedagogy in law school, the so-called "Socratic" method of questioning students in class. This sometimes aggressive approach to leading class discussion leaves many women feeling silenced, devalued, and deadened, both intellectually and emotionally. As a result, they rarely participate in class. As academics and various organizations study the impact of gender on the law school experience, one of the most persistent observations is that women speak in class less frequently¹² and more briefly¹³ than men do. This silence contributes to a destructive cycle—if women are disproportionately silent in the classroom, they reinforce their own feelings of exclusion and incompetence. And silence in the classroom may affect not only the students' feelings about law school; it may impair their performance on exams as well. To the extent that discussion and Socratic dialogue in the classroom enable students to practice skills of legal reasoning and argument, women's disproportionate silence could mean that they are getting fewer or more abbreviated opportunities to hone their skills.¹⁴ Some women might benefit from a single-sex law school, where every student's

11. We might ask whether this identification is necessarily a good thing. Perhaps the alienation women feel in law school ultimately makes them better lawyers, because their sense of detachment helps them read and analyze the law more critically.

12. See OHIO EXECUTIVE SUMMARY, *supra* note 8, at 5; Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 139 (1988); Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1, 29 (1989-1990); Guinier et al., *supra* note 8, at 33 n.86; Taber et al., *supra* note 9, at 1239; Weiss & Mellinger, *supra* note 8, at 1333 n.101.

13. Cf. Catherine Krupnick, *Meadows College Prepares for Men*, in GENDER & PUB. POLICY 137, 137 (Kenneth Winston & Mary Jo Bane eds., 1993) [hereinafter Krupnick, *Meadows College Prepares for Men*] (Even when women far out-numbered men in the classroom, male students consumed disproportionate amounts of airtime with comments and questions.); Catherine G. Krupnick, *Sex Differences in College Teachers' Classroom Talk* (1984) (unpublished Ph.D. dissertation, Dept. of Educ., Harvard University) (on file with author) (Although men consistently speak more frequently and for longer periods of time than women do, the gender of the professor and the composition of the class may mitigate or exacerbate this dynamic).

14. See Taber et al., *supra* note 9, at 1256 ("Most legal academics will agree that what happens in the classroom is important to the total law school experience, and that a diminution in one's ability to partake in and benefit from classroom discussions limits one's ability to benefit from law school instruction.").

voice would be a woman's voice.¹⁵

The composition of the student body may influence women's willingness to take risks, speak up, and be heard. Even the traditional Socratic method might lack the silencing or alienating quality observed at some schools if employed in a class comprised of women students.¹⁶ I have proposed an approach for one law school—creating classrooms where all of the students are women and thus enjoy greater equality¹⁷ with each other as they pass through the law school's formative processes.

To create this equality, it may be important that the school admits no male students at all.¹⁸ The concept of "critical mass" works in two directions: when women integrate historically male institutions, they may require larger percentages than might at first be assumed in order to participate fully;¹⁹ conversely, when men integrate institutions that have been all-female, even very small numbers may be enough to dominate.²⁰ The critical mass of men required to throw

15. The remarks of one student in testimony to the ABA Commission on Women in the Profession suggested how vital it is for women to hear their own voices: "I look forward to graduating, to practicing law, and to bringing my own values to the law. I realize it will be difficult, if not impossible, to be accepted with a voice and not be silenced. It seems that the only way women will truly be respected is by using our voices loudly enough to make our point of view not only heard, but valued." AMERICAN BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, *ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION* 62 (1996).

16. See Guinier et al., *supra* note 8, at 4 n.13 ("[O]ur research suggests that women's alienation is not exclusively derivative of an intimidating classroom pedagogy, but is also related to the hostility that female students perceive the methodology generates or encourages in their male peers.") (emphasis added).

17. The equality will not be complete, of course, because differences in the race, socioeconomic class, and economic background of the students will affect expected status.

18. Catherine Krupnick found that, at the undergraduate level, even a few men in predominantly female classes may skew participation rates. In one of Krupnick's studies, even when vastly outnumbered by women, the average man consumed greater amounts of classroom airtime than the average woman, and in some cases two or three men virtually dominated classes of fifteen or sixteen students. Krupnick, *Meadows College Prepares for Men*, *supra* note 13, at 141-47 (observing freshman seminars at Meadows College in its first year of coeducation after more than 100 years as a women's college). Though the circumstances at Meadows may be special, Krupnick's findings might help predict the result any time men find themselves vastly outnumbered by women in an institution.

19. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S* 246 (1983) ("[D]uring a ten-year period women moved from less than 10 percent of law students to more than one-third of the total. Such an increase was important because there was evidence that, as was the case with other minorities, women needed a critical mass to perform well."). But see Guinier et al., *supra* note 8, at 77 n.206 ("[W]omen now represent more than 40% of the law student population—a critical mass of law students . . . [but] women at Penn Law are still relatively scarce in high-status positions, the positions which set and maintain the Law School agenda As a result, women students—despite their numbers—remain a somewhat marginalized 'outgroup' who are expected to succeed, to the extent they can, within the male-dominated hierarchy.").

20. The Meadows College experience is especially troubling because the faculty "prepared

off the balance of discussion may be even smaller when the discussion concerns matters traditionally dominated by men, such as law.

But sex is an imperfect proxy for alienation and silence.²¹ Many women feel comfortable and well-integrated in law school. Many men share a sense of discomfort with the Socratic method. Perhaps men's sense of alienation from law school is more widespread than recent literature has suggested. Consider the following critique:

Socratic teaching has been attacked as infantilizing, demeaning, dehumanizing, sadistic, a tactic for promoting hostility and competition among students, self-serving, and destructive of positive ideological values.²²

Of even greater personal import to the majority of students is the effect the Socratic method has upon interpersonal relations. Indeed, perhaps the most impressive aspect of the law school milieu is the unpleasant quality of interpersonal relations among students.²³

This summary of the views of one group of law students sounds pretty current, yet it appeared almost thirty years ago, describing law schools that were filled almost exclusively with white men. In 1971, "activist" students felt a profound dissatisfaction with prevailing norms in legal education, and they expressed their discontent in terms strikingly similar to their female counterparts of recent years.²⁴ Alienation, therefore, is not the exclusive province of women, but has been experienced over the years by various individuals and groups of people.²⁵

If a substantial group of men feel alienated from the dominant modes of legal education, this poses problems for a women's law school. First, it calls into question the extent to which alienation is a

for the arrival of men with concerns for their women students firmly in mind." Krupnick, *Meadows College Prepares for Men*, *supra* note 13, at 140.

21. See generally Mary Anne C. Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. (forthcoming July 2000).

22. Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 407 (1971).

23. *Id.* at 415.

24. See Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION, Spring 1970, at 71 (critique of Yale Law School); Paul Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 444-45 n.4 (1970) ("Almost all of us come to regard law school only as an ordeal—something to be survived.").

25. See Stone, *supra* note 22, at 397 (Students seek "self-actualization," the "fulfillment of the whole person" desiring "openness and emotional sensitivity as a part of one's professional as well as private life"; such students reject "the paternalistic, the exploitative, and even the detached professionalism of the lawyer," desiring instead "the intimate and emotional quality of human relationships." Thus, "the impersonal, highly verbal and rational atmosphere of traditional legal education" becomes suspect).

women's problem. If the problem is not a gender-based one, how effective will a gender-based remedy be? To put it more precisely, alienation may actually be gender-based (striking women and men who are in some ways "gendered" female), but the *remedy* I've proposed would be based on *sex*, excluding men who are also suffering. Thus, a women's law school could leave behind a significant number of "fellow travelers," men who in one way or another are gender non-conforming. Is it fair to exclude these men who could potentially be a part of the solution?²⁶

Rather than completely excluding men, a feminist law school could screen students carefully to admit only the male students who are unlikely to dominate class or harass female students. This would arguably be a more narrowly tailored approach to selecting students. Instead of relying upon gender as a proxy for certain characteristics, this approach would actually try to discern the existence of those characteristics in specific applicants.²⁷

A feminist law school could also incorporate traditionally "feminine" values and skills into its conception of the "ideal lawyer," as Professor Carrie Menkel-Meadow has advocated.²⁸ If a law school emphasized collaboration, listening skills, and empathy (qualities or skills traditionally associated with women) and based measures of merit at least in part upon these qualities, women might feel more affirmed by the institution. Women would also be able to succeed at

26. The question is all the more pointed because, as Nancy Levit argues, the liberation of men may be the next wave of feminism. Indeed, a major item of unfinished feminist business is the legitimization and validation of traditionally "feminine" characteristics and behaviors *in men*. See Nancy LEVIT, *THE GENDER LINE: MEN, WOMEN, AND THE LAW* (1998) (In order to increase the range of choices available to men and women, feminist theory should pay more attention to men and activists should invite men to join in changing society.); see also Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

27. It is not clear that such screening would be successful, however. Catherine Krupnick's study of Meadows College showed that even men who chose to be the first to integrate a formerly all female institution (and presumably self-selected as being more comfortable with women and mostly-female spaces) dominated class discussion and consumed far more airtime than their female classmates. See generally Krupnick, *Meadows College Prepares for Men*, *supra* note 13.

28. See generally Carrie Menkel-Meadow, *Women as Law Teachers: Toward the "Feminization" of Legal Education*, in *HUMANISTIC EDUCATION IN LAW: ESSAYS ON THE APPLICATION OF A HUMANISTIC PERSPECTIVE TO LAW TEACHING* 18 (1981); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

those skills or tasks alongside men, so that the underlying values would be reinforced in both women and men. Men would thus be rewarded for their departures from traditionally “masculine” modes of behavior (for a change) and they would see women excelling at things valued in the curriculum—upsetting assumptions of male superiority and privilege.²⁹

Of course, multiple remedies for the problems in legal education can proceed along parallel tracks—a women’s law school could exist even as we simultaneously work for reform in coed schools. These are not mutually exclusive remedies. A single women’s law school would enroll relatively few students in the grand scheme, certainly not enough to alter the demographics or atmosphere at coed schools in a significant way.³⁰ But if a women’s law school were to “skim the cream” of the activist feminists (among both students and faculty), we could inadvertently slow the rate of change at coed schools.

Despite all of these dangers in single sex education³¹ and the continuing promise of reform in coed schools, I retain my belief that a women’s law school is a good idea. Explaining the exclusion to my son is difficult,³² but worth the effort. As he grows, I expect that his sensitivity to history and context will increase accordingly. We must pay attention to the identity, experience, and reasoning of the excluding group. Who is doing the excluding, and why? Sometimes, people who have been historically oppressed need to create a safe environment free from the heirs of their historical oppressors. Although sex is not a perfect proxy for the characteristics a women’s law school might want to attract (or, on the flip-side, exclude), the correlation may be close enough. This empirical question remains

29. See LINDA HIRSHMAN, *A WOMAN’S GUIDE TO LAW SCHOOL* 27 (1999) (When a law school is able to integrate values such as “listening, mediating, community building, and collective problem solving,” the integration can reduce the impact of negative stereotypes about women).

30. The American Bar Association has approved approximately 180 law schools. OFFICIAL ABA GUIDE TO APPROVED LAW SCHOOLS 450 (Rick L. Morgan & Kurt Snyder eds., 2000). If a women’s law school enrolled an entering class of 180 students, it would take only one woman on average from each of the other law schools in the United States. If the school were able to attract women who would not otherwise choose to attend law school, the impact on coed schools would be even smaller.

31. For additional concerns presented thoroughly and thoughtfully, see Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451 (1999). Like me, Professor Levit has a young son, and his experience seems to inform some of her response to sex segregation. See *id.* at 451.

32. I know this first hand: since I began writing this Essay, I have had to explain to him why my alma mater, Bryn Mawr College, accepts only women in the undergraduate programs. His face registered confusion and some pain when he first heard the news. I don’t know whether my story of discrimination and remedy satisfied him. Time will tell, I suppose.

open, but at this point much of the data suggests that sex does play a strong role in determining experiences in law school.

In my son's preschool, it may make a difference that the girls who reject him from play are the power brokers. When they exclude him, they concentrate and preserve power they already possess in abundance. I think my son understands this: in order to play freely, some children might need to create a game apart from the usual "bosses." Perhaps, from time to time, they may need to exclude the excluders.

In my son's preschool, I could imagine a pair of shy, relatively young, inarticulate kids starting a game from which they sought to exclude one of the power brokers. They might fear that she would be so used to playing "boss" that she'd bring that role to their game. They might fear that her advantages (in age, maturity, or mastery of that mode of play) would prevent them from developing their skills fully. They might fear that she would grab all the juicy roles and speeches, leaving little for them to perform. I've encouraged my son's teachers to enforce "you can't say you can't play," but the rule loses some of its appeal if it would force the disempowered to include the "boss" or the "bully."

"You can't say you can't play" might be a good rule. All of the children may learn more when play groups are inclusive. But to make a rule of inclusion work, teachers must monitor the play closely for fairness and equal participation. It may be next to impossible to police the play closely enough to insure that the shy and compliant do not fall into old habits of obeying the articulate and strong-willed.³³ "You can't say can't play" should be qualified by an anti-subordination norm.

An anti-subordination norm could justify limited, short-term strategies of exclusion, if necessary to even the long-term playing field.³⁴ Younger children might need freedom from the "bosses" in

33. My spouse and I joke that if the teachers were to give powerful children free rein to construct their own narratives and dictate the roles other children would play, it would be a bit like prison guards making the most troublesome inmates into "trustees." Law professors may do something similar when they further empower the most talkative or confident of their students. Perhaps professors extend their own voices in this way by giving airtime to students who sound the most like them. Even if the students don't mirror the professor's voice, the professor may give airtime just to coopt troublemakers (the trustee idea again). Certainly, many professors implicitly give students permission to belittle their classmates, especially if the professors themselves are prone to sharp, sarcastic remarks in class. Professors model appropriate behavior for their students, and the students will quickly pick up on the professor's habits, whether good or bad.

34. See generally Claudia Center, *"Boys Keep Out!": Historical and Legal Perspectives on*

order to cultivate their own stories. But finding and expressing their stories should not be the final goal. Once these less powerful children find their voices, they should be encouraged to reintegrate with the former "bosses." This integration is for the good of all, because the bosses also need to learn how to listen to and cooperate with others.³⁵

Recognizing the importance of such integration, I have argued that students at a women's law school could interact and at times compete with men through work on law journals, moot court and mock trial teams, and student bar associate activities. If the women's law school cooperated with a coed law school, students might gradually move into the coed law school, perhaps spending as few as two or three semesters in exclusively female classrooms.³⁶ In these ways, women could use the single-sex environment not as an escape from a coed world, but as a base of strength and encouragement from which they could operate even more effectively in the outside world.³⁷

the Contributions of All-Female Organizations to Sex Equality, 8 WIS. WOMEN'S L.J. 1 (1992-1993) (Women's clubs of the late 19th and early 20th century contributed to the movement for women's equality in part by adopting a strategy of sex-exclusivity.).

35. Nancy Levit makes a similar point about the dangers of sex segregation: "One of the most disturbing elements of the single-sex education debate is the acceptance of boys' behaviors of domination. The debate generally views the dominating behaviors of boys as somehow innate or unchangeable Separation flatly ignores the problem of how males and females are going to learn how to behave among one another." Levit, *supra* note 31, at 525. While I am sympathetic to the argument that separating the oppressed does little to show oppressors the error of their ways, I worry about continuing to put women at risk in law school in order to teach men yet another lesson. To put it more bluntly, a women's law school would allow some women to opt out of the task of teaching men to respect women—without opting out of legal education altogether.

36. Similar structures seem to work well when women's colleges cooperate with coed colleges; in some cases, students from the women's college actually major in a department at the coed school. Nonetheless, the foundational affiliation with the women's college seems to be beneficial even to the students who spend increasing amounts of time off campus.

37. See Brown, *supra* note 1, at 34-35.