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SYMPOSIUM: RADICAL NEMESIS: RE-ENVISIONING IVAN ILLICH'S THEORIES ON SOCIAL INSTITUTIONS: FOREWORD

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SYMPOSIUM:
RADICAL NEMESIS: RE-ENVI-
SIONING IVAN ILLICH'S THEO-
RIES ON SOCIAL INSTITUTIONS

FOREWORD

JENNIFER L. LEVI*

My dear friend and colleague, Shannon Minter,¹ first introduced me to Ivan Illich's works. In conversation after conversation, I found myself engaged with Shannon trying to deeply understand the political (and sometimes religious) right wing's objection to equal marriage rights for same-sex couples.² At the same time,

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1. Shannon Minter is the Legal Director of the National Center for Lesbian Rights (NCLR), one of the nation's leading advocacy organizations for lesbian, gay, bisexual, and transgender people. Shannon was lead counsel for same-sex couples in the landmark California marriage equality case, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), which held that same-sex couples have the fundamental right to marry and that laws that discriminate based on sexual orientation are inherently discriminatory and subject to the highest level of constitutional scrutiny. Shannon was also NCLR's lead attorney on Sharon Smith's groundbreaking wrongful death suit and has litigated many other impact cases in California and across the country. Shannon serves on the boards of Faith in America and the Transgender Law & Policy Institute. The Western New England University School of Law was honored to welcome Shannon to speak at the April 2011 Symposium, *Radical Nemesis: Re-Envisioning Ivan Illich's Theories on Social Institutions*. For more information about Shannon Minter see *Shannon Price Minter*, NAT'L CENTER FOR LESBIAN RTS., http://www.nclrights.org/site/PageServer?pagename=About_Staff_ShannonMinter (last visited May 24, 2012).

2. See e.g., G. Sidney Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. DAYTON L. REV. 541, 565-72 (1985) (relying on a sectarian vision of general family values to denounce same sex marriage, stating that "[t]he majority [of society] . . . may

both Shannon and I often found ourselves in the cross-hairs of the transgender community's critique of essentialist views of gender, often pitting transsexual transgender people, of which I am not, against transgender people, of which I am.³ That the critique came

reasonably believe that legal recognition of same-sex marriage . . . would impair the ability of opposite-sex marriage to advance the individual and community values that it has traditionally promoted"); Teresa Stanton Collett, *Constitutional Confusion: The Case for the Minnesota Marriage Amendment*, 33 WM. MITCHELL L. REV. 1029, 1048 (2007) ("Civil marriage should be recognized as only the union of one man and one woman. Only the union of a man and a woman may involve the unique physical act from which children are created, and children best flourish when raised by their biological mother and father who are united in marriage.") (citations omitted); George W. Dent, Jr., *Straight is Better: Why Law and Society May Justly Prefer Heterosexuality*, 15 TEX. REV. L. & POL. 359, 436 (2011) ("Homosexuals—and all people—should be treated with decency and civility, but not all behavior merits equal respect."). Professor Dent also relies on a societal justification in his opposition to same-sex marriage, stating: "Traditional marriage and the biological family . . . benefit society by making adults better and more productive citizens and by providing the best upbringing for their children. When a husband and wife bear and raise children they are not merely effecting [sic] their personal lifestyle preference; they are helping to ensure the future of our society." *Id.* at 435-36. Sherif Girgis et al., *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 276 (2011) ("Public institutions shape our ideas, and ideas have consequences; so removing the rational basis for a norm will erode adherence to that norm—if not immediately, then over time."); Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1377 (2007) ("When same-sex marriage is legalized, the moral qualities and characteristics of homosexual relations and lifestyles will become part of the institution of marriage, and will have some transformative effect upon the qualities and characteristics of the institution of conjugal marriage. Modification of marriage to make it more like gay-relations will cause serious harm to society, families, and individuals.").

3. Members of the transgender community frequently critique the medicalization of trans identity, criticizing the reliance on arbitrary, subjective criteria and the gatekeeping role of the medical providers. For example, Dean Spade challenges reliance on the DSM (The Diagnostic and Statistical Manual of Mental Disorders) as a measure for supposed "expert" physicians to provide or deny a GID (Gender Identity Disorder) diagnosis and gender confirming medical treatment. Dean Spade, *Law as Tactics*, 21 COLUM. J. GENDER & L. 442, 450 (2011) [hereinafter Spade, *Law as Tactics*]. According to Spade, the structure of the "arrangement[] result[s] in the enforcement of rigid gender norms on trans bodies" as doctors often require performance of these expected norms. *Id.* at 451. Ultimately, "[t]hose who fail to meet the arbitrary, subjective criteria of their medical providers are frequently denied access to care." *Id.*; see also Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 25 (2003) [hereinafter Spade, *Resisting Medicine*] (criticizing the medical model of transsexuality, noting that it "separat[es] . . . gender from cultural forces"). To demonstrate the "immediate error and danger" the medical model creates, Spade explains:

The diagnostic criteria for GID [Gender Identity Disorder] produces a fiction of natural gender in which normal, non-transsexual people grow up with minimal to no gender trouble or exploration, do not cross-dress as children, do not play with the wrong gendered kids, and do not like the wrong kinds of toys or characters. This story is not believable. Yet, it survives because medicine pro-

from within the transgender community and served to divide natural allies, was all the more striking and, in my view, needless. Oddly, the criticism of my work relevant to the fabricated divide has often focused on my support for medical care and medical access for transgender people, a position and a perspective that have become essential to serving the most basic medical needs of transgender people.⁴ Because of embracing that so-called medicalization of identity, I have found myself sometimes criticized for that approach's perceived rejection of a completely fluid, socio-contextual understanding of gender.

Perhaps because I do think that gender has meaning beyond its socio-cultural significance,⁵ meaning that infuses individual behav-

duces it not through a description of the norm, but through a generalized account of the norm's transgression by gender deviants.

Id. See generally Pooja S. Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People*, 4 SEXUALITY RES. & SOC. POL'Y 7 (2007) (considering Medicaid policies that exclude and/or limit coverage for transition-related health care for transgender people and demonstrating that these disproportionate policies reproduce hierarchies of race and class).

4. Dean Spade has observed that

[m]any advocates on both sides of the debate engage both a critical disability studies framework, understanding disability as constructed by societal barriers to participation rather than stemming naturally from impairment, and also generally engage a feminist theorization of trans identity that problematizes individualizing the 'disorder' to trans people rather than troubling the systems of gender assignment and enforced performance.

Spade, *Law as Tactics*, *supra* note 3, at 452. Implicit, however, in referencing this current debate is the common belief that transgender people need medical care. *Id.* at 449-56. See generally Judith Butler, *Doing Justice to Someone: Sex Reassignment and Allegories of Transsexuality*, in UNDOING GENDER 58 (2004); Jeannie J. Chung, *Identity or Condition? The Theory and Practice of Applying State Disability Laws to Transgender Individuals*, 21 COLUM. J. GENDER & L. 1 (2011); Nick Gorton, *Toward a Resolution of GID, the Model of Disease, and the Transgender Community*, <http://makezine.enoughenough.org/giddiseasec.htm> (last visited May 24, 2012); Alvin Lee, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J.L. & GENDER 447 (2008); Spade, *Resisting Medicine*, *supra* note 3.

5. Cf. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 25 (1990) (stating that all of gender is culturally determined). Recognizing gender as "performative," Butler explains, "there is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results." *Id.*; JUDITH BUTLER, BODIES THAT MATTER 232 (1993) ("Femininity is thus not the product of a choice, but the forcible citation of a norm, one whose complex historicity is indissociable from relations of discipline, regulation, punishment."). See generally Julie A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in TRANSGENDER RIGHTS 51, 52 (Paisley Currah et al. eds., 2006) (considering how gender has been legally defined, and the view of gender as a social construct).

ior as well as identity—adopting, in the most polarized terms, an essentialist view of gender—I can at some deep level imagine a world in which marriage and family could or should be defined in a restrictive way that is oriented around gendered roles and that its transformation from that more restrictive definition could centrally stretch or challenge its broad meaning. At the same time, as a staunch defender of marriage equality, I really do not understand the right’s critique that conceives marriage as a zero-sum game diminished by the inclusion of committed, loving albeit same-sex couples. Yet, because I also think gender (here meaning one’s internalized sense of who one is as male or female, often referred to as gender identity) is, for many people including myself, one of the most important, persistent and unchangeable elements of human identity, I also understand how the disruption of a gender-exclusive definition of marriage could be culturally and socially unsettling.

It was in the midst of one of many of these conversations that Shannon and I had about these ideas that Shannon urged me to read Ivan Illich’s work, *Gender*.⁶ *Gender*, it turns out was not one of Illich’s more prominent works and, given its hostile reception by the feminist scholars⁷ in whose midst he was working at the time he

6. IVAN ILLICH, *GENDER* (1982) [hereinafter ILLICH, *GENDER*].

7. In the summer of 1982, in the midst of a series of lectures, Ivan Illich spoke at Berkeley as a Regents Lecturer. Following his lecture, feminist scholars from Berkeley and abroad organized a symposium to demonstrate what they called the “feminist perspective” to Illich’s controversial assertions. See Symposium, *Beyond the Backlash: A Feminist Critique of Ivan Illich’s Theory of Gender*, 3 FEMINIST ISSUES 1 (Spring 1983). The scholars presented to nearly 500 onlookers, and although each presenter took a unique perspective in their critique, the “overall agreement” was noticed, particularly the “underlying feminist critique” which each participant shared. Gloria Bowles, *Introduction: The Context*, 3 FEMINIST ISSUES 1, 6 (Spring 1983). In one critique, presenter Arlie Hochschild stated:

He [Illich] is advocating a moral predisposition toward the world we live in; he is soliciting the female moral votes for ‘negative economic growth,’ for a return to the spirit of the seventeenth century, if not the eleventh. To make this voyage backward seem desirable, he paints a bleak and sterile picture of modern life: we’re interchangeable units who suffer from a scarcity of the life-giving experiences that everyone enjoyed in the good old days of Vernacular Gender – things like savoring the smell of apple pie being baked in the Dalmatian kitchen of Illich’s own mother. Scarcity, of course, like envy, came into the world when we abandoned the gender divide. So [according to Illich] if we want fulfillment, we must give up our ‘vain’ pursuit of equality between the sexes.

Arlie Hochschild, *Illich: The Ideologue in Scientist’s Clothing*, 3 FEMINIST ISSUES 6, 9-10 (Spring 1983). In response to Illich’s beliefs “decry[ing] discrimination against women as sexist,” yet, in the same turn, “disdain[ing] the notion of equality,” Lillian Rubin exclaims, “you confuse us, Mr. Illich.” Lillian B. Rubin, *On Gurus and Easy Solutions*, 3 FEMINIST ISSUES 11, 14 (Spring 1983). Building on this clear frustration, Robin Lakoff

wrote the work, ought not to principally define his contributions. Given the breadth of his work, and the range of ideas that he has addressed it surely will not. However, *Gender* bears mention in this foreword, if for no other reason than it led me to Illich which led Illich to the center of this Symposium which drew a wide range of scholars from across many different disciplines.

The reason finding my way to *Gender* was so personally satisfying was because in it Illich offers an account of vernacular gender that retains what one might conventionally refer to as social and cultural gendered stereotypes that are, at the same time, deeply connected to personal identity and, perhaps more importantly, equally valued regardless of whether contributed by men or women. In other words, the critiques of contemporary concepts of gender (in contrast to Illich's description of gender prior to the rise of class-based economies) largely reveal that a central problem with gender is that it by definition values male gender and devalues female gender.⁸ Given that there is nothing inherently (meaning biologically) superior about male gender, in contrast to female gender (to the contrary each is fully dependent on the other for its existence), contemporary academic accounts of socially constructed gender are near uniformly critical of it as any kind of organizing principle. And yet, few would doubt that it remains a powerful one.

For me, the beauty of Illich's work is that it suggests the possibility of gender as a benign organizing structure for culture and

calls Illich a "propagandist" and criticizes *Gender* as being "intentionally unintelligible." Robin Lakoff, *Illich as Text*, 3 FEMINIST ISSUES 15, 15 (Spring 1983) ("[A]ll the salient features of modern propaganda, as exemplified in classics of the genre, like *Mein Kampf*, are to be found in *Gender* – and are absent from scientific, or scholarly, texts."). In her conclusion, Gloria Bowles notes "there is something unclean about this modern age [for Illich]; he has absolutely no grasp of how exciting it is to be a woman in the modern age." Gloria Bowles, *Conclusion: The Centrality of Women's Studies*, 3 FEMINIST ISSUES 37, 40 (Spring 1983).

8. See e.g., Mary Anne C. Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man In The Law And Feminist Jurisprudence*, 105 YALE L.J. 1,18 (1995) (Among these "central themes that emerge from [an] interdisciplinary look at gender are . . . that gendered characteristics are often bundled; that what is seen as masculine is more highly valued than what is seen as feminine, at least in part because the latter is associated with women; that, in addition to being generally devalued, the feminine is viewed as completely unacceptable in males; and that a woman exhibiting masculine characteristics is today viewed, both descriptively and normatively, quite differently from a man who exhibits feminine ones."); Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 3 (1995) ("In many cases, biology operates as the excuse or cover for social practices that hierarchize individual members of the social category 'man' over individual members of the social category 'woman.' In the end, biology or anatomy serve as metaphors for a kind of inferiority that characterizes society's view of women.").

community—one that places equal value on the contribution of masculine and feminine people.⁹ Indeed, the absence of either would centrally dissolve the societal organizing structures.¹⁰ To be sure, in Illich's view, the world in which gender matters rests on organizing structures that are eroded by and unsustainable with the rise of capitalism. Notwithstanding, his historical and normative descriptions present the possibility of a world that appreciates and values gender—indeed is unsustainable without it—but that does not devolve into sexism run amok by intrinsically undermining the equally valued participation of women within its structure.

But, alas, perhaps I digress. The point being that one of Illich's least-known and most hostilely received works, *Gender*, was my entry point to his ideas and writing. That introduction quickly reminded me, however, that I was familiar already with some of his more widely known works including, for example, *Deschooling Society*,¹¹ and *Medical Nemesis*.¹² Having been entranced by *Gender*, I was enticed to revisit the works with which I had already been

9. In *Gender*, Illich argues that much of the unpaid shadow work is thrust onto women, noting “[t]o a greater extent and in a different manner from men, women were drafted into the economy. They were—and are—deprived of equal access to wage labor only to be bound with even greater inequality to work that did not exist before wage labor came into being.” ILLICH, *GENDER*, *supra* note 6, at 46. By way of example, Illich demonstrates the ways in which shadow work came into being:

By introducing the term “shadow work,” I distinguish the procedure for cooking eggs today from that followed in the past. When a modern housewife goes to the market, picks up the eggs, drives them home in her car, takes the elevator to the seventh floor, turns on the stove, takes butter from the refrigerator, and fries the eggs, she adds value to the commodity with each one of these steps. This is not what her grandmother did. The latter looked for eggs in the chicken coop, cut a piece from the lard she had rendered, lit some wood her kids had gathered on the commons, and added the salt she had bought. Although this example might sound romantic, it should make the economic difference clear. Both women prepare fried eggs, but only one uses a marketed commodity and highly capitalized production goods: car, elevator, electric appliances.

Id. at 49. Illich concludes, “[s]hadow work could not have come into existence before the household was turned into an apartment set up for the economic function of upgrading value-deficient commodities.” *Id.* at 50.

10. In Illich's view, the contributions of men and women are essential precisely because only men can make the kind of contributions that males make and only women can make the kind of contributions that females make. Unlike in the contemporary feminist world situated on capitalist designed money-based economies where men and women are equally competent to contribute to society (making one or the other fungible), in Illich's view, neither the contributions of men nor women are fungible making each essential for survival. By implication, female contributions become as essential as male contributions and vice versa. *Id.* at 67-68, 81.

11. IVAN ILLICH, *DESCHOOLING SOCIETY* (Ruth Nanda Anshen ed., Harper & Row 1971) [hereinafter ILLICH, *DESCHOOLING*].

familiar. Like many an Illich follower, I dove in headlong. For a time, I could scarcely have a conversation in which I did not refer in some way to Illich or his works. Fortunately for me, most of my colleagues decided—for which I am grateful—not to abandon conversation with me but rather to start to engage Illich's world of ideas as well. Illich's world of ideas is where this Symposium began and, like Illich's life work, it drew in a range of academics and non-academics alike all of whom thirst for the exchange of ideas unrestricted by the kind of formal and informal trappings that typically narrow the engagement.

The eight submissions to this publication of the Law Review reflect the divergent topics that Illich managed to reflect upon in his life's works. The topics include discussion of prisons,¹³ education,¹⁴ family law structures,¹⁵ privatization of welfare services¹⁶ and its impact on labor consciousness,¹⁷ media,¹⁸ and the rule of law.¹⁹ The pieces speak for themselves and need no elaboration here. What may require some elaboration is the magic of the day enhanced by the presence in the audience of many Illich students and students of Illich students. It was their presence and contributions to the discussion that brought to life the power of the message brought by Ivan Illich.

While there are many unifying themes among Illich's works, one that entranced me was the idea that the very institutions created to secure a range of outcome (schools created for education);²⁰

12. IVAN ILLICH, *LIMITS TO MEDICINE: MEDICAL NEMESIS: THE EXPROPRIATION OF HEALTH* (Marion Boyars 2002) (1975) [hereinafter ILLICH, *MEDICAL NEMESIS*].

13. Giovanna Shay, *Illich (via Cayley) on Prisons*, 34 W. NEW. ENG. L. REV. 351 (2012).

14. Erin E. Buzuvis, *Illich, Education, and The Wire*, 34 W. NEW. ENG. L. REV. 363 (2012); Jared Gibbs, "For Tomorrow Will Worry About Itself": *Ivan Illich's Deschooling Society and the Rediscovery of Hope*, 34 W. NEW. ENG. L. REV. 381 (2012).

15. Martha M. Ertman, *Exchange as a Cornerstone of Families*, 34 W. NEW. ENG. L. REV. 405 (2012).

16. Bridgette Baldwin, *Shadow Works and Shadow Markets: How Privatization of Welfare Services Produces an Alternative Market*, 34 W. NEW. ENG. L. REV. 445 (2012).

17. Davarian L. Baldwin, *From Wisconsin to Egypt and Back Again: A Comment on Bridgette Baldwin's Analysis of the Shadow Work Thesis*, 34 W. NEW. ENG. L. REV. 475 (2012).

18. Akilah N. Folami, *Deschooling the News Media – Democratizing Civic Discourse*, 34 W. NEW. ENG. L. REV. 489 (2012).

19. Bruce Miller, *The Place of Law in Ivan Illich's View of Social Transformation*, 34 W. NEW. ENG. L. REV. 507 (2012).

20. ILLICH, *DESCHOOLING*, *supra* note 11.

medical systems for maintaining health;²¹ and technology designed to maintain communication and connection²²), turn out to be the precise mechanisms for undermining the goals sought to be achieved. Re-empowering the individuals to make personal choices and create genuine societal engagement in the problems is among the solutions to the dilemma created by the societal problems Illich highlights. So, for example, in *Deschooling Society*, Illich writes that schools disempower students and destroy their ability to learn.²³ Illich's critique also extends to the academy's exclusive aggrandizement of its own abilities diminishing the capacity of faculty within them to generate ideas.²⁴

In Illich's critique of schools and vast educational institutions, he presages the invention of the Internet. Consider the following description whereby Illich explains how those with knowledge can be matched with those who seek it as a proposal for the substitution of schools with "learning webs."

A student who has picked up Greek before her vacation would like to discuss in Greek Cretan politics when she returns. A Mexican in New York wants to find other readers of the paper *Siempre*—or of "*Los Agachados*," the most popular comic book. Somebody else wants to meet peers who, like himself, would like to increase their interest in the work of James Baldwin or of Bolivar.

The operation of a peer-matching network would be simple. The user would identify himself by name and address and describe the activity for which he sought a peer. A computer would

21. ILLICH, *MEDICAL NEMESIS*, *supra* note 12.

22. IVAN ILLICH, *TOOLS FOR CONVIVIALITY* (Harper & Row 1973).

23. In his criticism of institutional schooling, Illich states:

Many students, especially those who are poor, intuitively know what the schools do for them. They school them to confuse process and substance. Once these become blurred, a new logic is assumed: the more treatment there is, the better the results; or, escalation leads to success. The pupil is thereby "schooled" to confuse teaching with learning, grade advancement with education, a diploma with competence, and fluency with the ability to say something new. His imagination is "schooled" to accept service in place of value. Medical treatment is mistaken for health care, social work for the improvement of community life, police protection for safety, military poise for national security, the rat race for productive work. Health, learning, dignity, independence, and creative endeavor are defined as little more than the performance of the institutions which claim to serve those ends, and their improvement is made to depend on allocating more resources to the management of hospitals, schools, and other agencies in question.

ILLICH, *DESCHOOLING*, *supra* note 11, at 1.

24. *See generally id.* at 51-71.

send him back the names and addresses of all those who had inserted the same description. It is amazing that such a simple utility has never been used on a broad scale for publicly valued activity.

In its most rudimentary form, communication between client and computer could be established by return mail. In big cities typewriter terminals could provide instantaneous responses. The only way to retrieve a name and address from the computer would be to list an activity for which a peer was sought. People using the system would become known only to their potential peers.

A complement to the computer could be a network of bulletin boards and classified newspaper ads, listing the activities for which the computer could not produce a match. No names would have to be given. Interested readers would then introduce their names into the system. A publicly supported peer-match network might be the only way to guarantee the right of free assembly and to train people in the exercise of this most fundamental civic activity.²⁵

If such a learning web sounds familiar, it should. The learning web, described by Illich in 1971, sounds remarkably similar to many websites currently accessible on the Internet where anyone may use just the kind of “typewriter terminal” that Illich describes to make the peer match he envisions.

Illich’s learning webs seem, at the same time, to stand in stark contrast to an academic conference that, in Illich’s framework, potentially threatens to undermine the education and engagement in ideas that it seeks to create in part because of the passiveness that the event potentially develops in the listener. As Illich explains:

[t]o deschool means to abolish the power of one person to oblige another person to attend a meeting. It also means recognizing the right of any person, of any age or sex, to call a meeting. This right has been drastically diminished by the institutionalization of meetings. “Meeting” originally referred to the result of an individual’s act of gathering. Now it refers to the institutional product of some agency.²⁶

As it turns out, the organizers of the Illich Symposium unwittingly created a conference in the spirit of Ivan Illich that left unrestricted the topics we addressed and, as importantly, left unrestricted the persons who could attend and participate in the

25. *Id.* at 93.

26. *Id.* at 94.

engagement of Illich's ideas. What resulted was a daylong conference of ideas that invited the engagement of those who joined. The students of Illich and students of students of Illich shared with those of us who had not studied at his side, his passion for ideas, his insights, and his invitation for anyone with or without formal education and training to challenge the existing social structures that diminish the sense of agency each of us have within it. The lunchtime discussions reacting to the papers and riffing off of the topics discussed were as rich and rewarding as the presentation of the papers itself.

The Symposium began as a day focused on the works of Illich. It ended up being one that celebrated Ivan. For those of us whose only introduction to him was his books and the critiques of his life work, it was eye opening to engage with those who studied with him and traveled with him on his life's journey. Hopefully, this Symposium Issue gives some glimpse into the magic of that day.