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Free Speech Zones and Preemptive Detentions

By Daniel Berchenko

Daniel Berchenko reports on recent developments in legal protest in the US and offers a critical analysis of the 'state of inclusion'

The protests at the American national party conventions this summer were met with the deployment of the largest security forces ever assembled in Boston and New York. Combined with the presumed threat of terror attacks, the protests provided local governments with a pretext to parade their ranks of newly trained and outfitted police and to exercise hitherto unseen techniques of biopolitical control on the largely benign crowds gathered. New York City used the occasion of the Republican National Convention to demonstrate that it has, in the words of Kevin Sheekey, an advisor to Mayor Bloomberg, 'the only police force capable of dealing with the modern anarchist threat.' In doing so, its explicit goal was to attract other large events to the city – most notably the 2012 Olympics. These events not only generate capital for the city's coffers but also provide it with opportunities to push through its ruthless development agendas. Given such stakes, the purpose of the new policing tactics in evidence at the conventions was to maintain the fiction of a benevolent democratic state in the teeth of an increasingly unruly opposition.

Prior to the conventions, protests in the United States were principally contained through the use of protest permits. These permits are issued at the discretion of city officials and confine marches and demonstrations within determinate boundaries. By declaring the right to protest to be in force only within those boundaries, protest permits compel demonstrators to occupy sites where direct action and the destruction of private property are difficult, if not impossible, and where representation is the only form of political activity available. Using the obverse of this logic, police in Boston and New York this summer deployed physical barriers to delimit states of exception where the right to protest is suspended and where anyone perceived threatening disruption could be preemptively detained.

In his epoch-making study *Homo Sacer*, Giorgio Agamben defines the state of exception as the condition of that which is taken outside of the normal juridical order. This state is not defined by a simple absence of law. What is excluded from the juridical order is still held in relation to the law in the act of the law's suspension – in limning its own boundaries, the law constitutes situations where it is no longer in force and where anything is possible. Generally the decision that produces the exception is only exercised during declared states of emergency – for example during wartime, when curfews are imposed and violators can be shot on sight. But since September 11th, the United States has increasingly passed into a de facto state of emergency where the production of states of exception has become part of the normal functioning of the state, for instance in the detention and de-nationalisation of presumed terrorists.

The construction of the Free Speech Zone at the Democratic National Convention in Boston marked an intermediary stage between the older logic of protest containment and the more sinister logic of preemptive detainment through exception in evidence in New York. Protestors at the DNC were expected to voluntarily confine themselves to the Free Speech Zone, which was bounded by high fencing and coiled razor wire. The American Civil Liberties Union (ACLU) likened the area to an internment camp – a comparison that a judge in Boston referred to as 'an understatement'. However to understand the Free Speech Zone solely as an effort to physically contain or intern protestors is to overlook its fundamental biopolitical purpose. By creating a state of inclusion in which citizens' rights of representation were in force, the Free Speech Zone implicitly produced an Indiscriminate Arrest Zone outside of it where those rights were withheld.

As a physically present barrier, it dramatised the convergence of objective forms of police control and the techniques of subjectivisation that bind individuals to those forms. Protestors were literally compelled to find themselves on one side of the fence or the other – constituting themselves a priori as lawful or unlawful protestors (prior, that is, to any factual activity that could be judged by the law) – in a decision that seemed to be their own but that subjected them to the immediate exercise of State power.

At the Republican National Convention in New York, this logic of inclusion and exception was taken further. Police deployed orange mesh netting in the midst of the demonstrations, at the discretion of on-site commanders, to delimit mobile states of exception. Once surrounded by the orange netting, anyone could be arrested and detained before presenting even the threat of disruption. The behaviour of individuals trapped in the orange netting was not treated as some external fact to which the law was applied a posteriori. Rather, the exercise of police power in the deployment of the netting produced the situation that it was compelled to judge, resulting in what Agamben has described as a total indistinction between fact and law. Once again, unlawful protesting was not contained by these barriers, it was constituted by them – protesting only became unlawful after it was topographically divided from lawful protesting.

As a result, not only were protestors indiscriminately determined to be engaging in unlawful activity – many bystanders and onlookers were also deemed to be exceeding their (suspended) rights and detained. These included, according to the New York Times, a building superintendent taking out his garbage, a man leaving a sushi restaurant, a businessman returning from work, and a woman leaving her gym, among others. The legal status of these citizens was thrown into such radical ambiguity that the de rigueur references to Kafka seem prosaic here. All are guilty before, or behind, the orange netting. The indistinction produced by these police tactics was noted but fundamentally misinterpreted by civil rights advocates. Christopher Dunn of the ACLU remarked that, ‘in their quest to maintain tight control over protestors, the police too often have lost sight of the difference between lawful and unlawful activity.’ This oversight was no accident however, nor was it the result of an over-extension of police power – it is at the foundation of the juridical functioning of the State in response to these protests.

As was widely reported in the popular press, detainees at the convention in New York were corralled onto buses and deported to a makeshift detention facility at Pier 57 on the Hudson River. Many were held there for several days without access to legal council, medical attention, or adequate food and water. In light of the generally abysmal conditions of the facility, Pier 57 came to be known among detainees as ‘Little Guantanamo on the Hudson’. As a state of exception it was, in its likeness to an internment camp, nearly identical to the state of inclusion produced by the Free Speech Zone. The ultimate coincidence of these spaces where rights were respectively held in abeyance and in force points up the truth of Agamben’s dictum that the camp is the ‘nomos of the modern’. As a localisation of the law’s suspension, the camp brings to light the centrality of the state of exception to the functioning of the modern state. What was once produced only in factual states of emergency is now used purposively by governments to constitute situations where individuals are subject to indiscriminate arrest and detention.

These new tactics should not be taken as sheer audacity on the part of the State. They are an index of the depth of the crises it faces and the lengths it must go to in order to maintain the semblance of normal juridical rule. After the convention, the New York Times congratulated local authorities on their handling of the protests: ‘it appears that the New York Police Department may have successfully redefined the post-Seattle era, by showing that protest tactics designed to create chaos and attract the world’s attention can be effectively countered with intense planning and a well-disciplined use of force.’ As we have seen, the efficacy of intense planning and well-disciplined force here relies on the

hidden premise that protestors can be seized by the State's biopolitical mechanisms and compelled to submit to the logic of a protest situation defined a priori by the police. When the state begins to preemptively constitute its subjects as criminals, with complete disregard to their factual behavior, the legal status of all citizens becomes radically ambiguous. In this light, the effective policing of the protests was a Pyrrhic victory. One must begin to ask to what extent order is truly maintained when the exception becomes the rule.

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