Chapter 3
Contradictions in the Moral Economy of Migrant Irregularity

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3.1 Introduction

Irregular immigration ranks high on Europe's political agenda (Triandafyllidou 2016). Southern and eastern European countries have intensified controls at the external European borders. This has resulted in higher and more sophisticated fences, more border patrols, and more detentions and immediate repatriations. Border control has also intensified at European seaports and airports, where more control has implied distinguishing tourists from potential immigrants before departure, making airlines and travel agencies responsible for checking passenger identities and identifying foreigners by new technological means and a European network of immigration databases. The awareness that borders do not halt irregular migration has also led to heightened internal controls. These have included more surveillance by the police, increased incarceration and deportation of irregular immigrants and their gradual exclusion from the labour and housing markets as well as from public services. Exclusion is meant to frustrate daily life to such a degree that immigrants who could not be stopped at the border or detained and subsequently deported would be forced to leave anyway.

Despite the gradual securitization of Europe's borders, most recent estimates put the number of irregular migrants between 1.9 and 3.8 million in 2008 (see Chap. 2). They may be detained and deported at any moment, are not allowed to work, may face serious difficulties in finding housing, and may have restricted access to health care. At the same time, most irregular immigrants are in employment and are entitled to some basic social services. More generally, unauthorized residents live,

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work, shop, walk, and drive among the rest of the population. This chapter explores the implications of that tension between exclusion and inclusion beyond dichotomous understandings of citizenship based on binary oppositions such as citizens vs non-citizens, formal vs informal, national vs local or legal exclusion vs performative acts of inclusion (Chauvin and Garcés-Mascareñas 2014). Against unilaterally repressive theories, we argue that simultaneous exclusion and inclusion does not primarily result from the distinction between law in the books and law in practice or from external constraints imposed on the state, but rather follows from the contradictory imperatives the state faces when confronted with immigration.

3.2   Beyond Methodological Dualism

Analyses of the civic condition of illegal migrants across Europe and North America have tended to rest on a dichotomy between formal exclusion on the one hand and informal incorporation on the other. The assumption has been that irregular residents mainly receive access to the latter. From this perspective, several studies have provided rich descriptions of the ways undocumented migrants integrate into mostly local environments, benefit from the support of non-governmental organizations, and participate in a host of institutions such as schools, churches, community groups, art collectives, and political associations (among many others, Chavez 1991; Pincetl 1994; Coutin 2000, 2005; Van der Leun and Bouter 2015; Engbersen et al. 2006; Menjívar 2006; Kalir 2010).

The informal incorporation of undocumented immigrants has been explained by highlighting the agency of three different sets of actors. A first strand of research has pointed out how undocumented immigrants acquire some features commonly associated with citizenship through their daily informal practices. What Sassen has labelled "informal citizenship" (2002) includes those dimensions of citizenship that are enacted through undocumented migrants' practices and produce at least partial recognition of them as members of society. According to Isin (2008), these practices constitute "acts of citizenship" as they involve transforming oneself from subject into claimant, from non-citizen into part of a constituency. These approaches understand undocumented immigrants' inclusion as the result of migrants' agency and resistance to the state in ways evoking James Scott's "weapons of the weak" (1985). Moreover, as noted by Bosniak (2003), they expand conceptions of active citizenship to new domains, such as the workplace, the marketplace, the neighbourhood, social movements and even the family, which have traditionally been excluded as sites of citizenship by conventional understandings of the political.

A second strand of the literature has explained irregular immigrants' incorporation as a consequence of the individual practices of "street-level bureaucrats" (Lipsky 1980). From that perspective, it is the agency of different actors at various administrative levels, rather than that of immigrants themselves, that would account for these "loopholes" of inclusion despite exclusionary policies. As migration control

does increasingly take place within the institutions of the welfare state, individual actors in local health agencies, schools, and social service departments have gradually been asked to fulfil important control and gatekeeping functions. However, several studies (van der Leun 2006; Schweitzer 2018) show that doctors, teachers, social workers or administrative personnel have their own interests, rationales, and constraints that may lead to reproducing, adjusting, or frontally contesting particular exclusionary measures (Chimienti and Solomos 2016; Geeraert 2018). In a seminal study of implementation practices in the Netherlands, Van der Leun (2006) showed that the higher the level of professionalism among street-level bureaucrats and practitioners is, the higher is their tendency to include irregular immigrants even if this contradicts immigration laws. In comparison with health care professionals and teachers, workers in the domains of social assistance and housing seem to display a much more legalistic attitude, thus validating the exclusion of irregular immigrants (*Ibid.*). This seems to suggest that humanitarian concerns for inclusion only become determinant when professionalism is also present. Yet, like most culturalist accounts, explanations of bureaucratic behaviour by "professional culture" leave open the question of why certain categories of public service providers develop a culture more favourable to migrants and not others (even within the same service), thus warranting complementary explanations in terms of more structural state-related factors on the one hand (Chauvin and Garcés-Mascareñas 2012) and individual trajectories on the other (Spire 2008; Alpes and Spire 2014).

A third line of research puts the emphasis on social and migrant organisations as key actors in the informal incorporation of irregular immigrants. Studies of southern Europe have shown that when governmental integration policies are absent, civil society actors such as trade unions, NGOs, charities, and civil movement associations may become key in providing various services and offering political support for immigrants' rights claims (Campomori and Caponio 2014). Research on Europe and North America has also shown that when and where the state excludes, social and migrant organisations may provide legal assistance, access to medical care and housing, and language and vocational courses (Bruquetas-Callejo et al. 2011). However, in this case, the informal incorporation of undocumented migrants does not result only from the agency of these organisations and their resistance vis-à-vis the state. The state itself, particularly at the local level, does often draw upon them in order to ensure basic services formally forbidden to irregular migrants. By financing these programmes, public administrations seek to respond to the need to assist those residing in the country without opposing national laws directly and without bringing this need to broader attention or giving rise to political concerns (Spencer 2018a).

While these developments have helped underline these other sources and arenas of citizenship, the focus on "informal practices" by migrants, street level bureaucrats, and social and migrant organisations risks reifying dichotomies such as those between structure and agency or repression and resistance, thereby insufficiently challenging the division between formal and informal citizenship by relying on an overly homogenous picture of the state. Some studies have aptly formulated this

dualistic model by declaring that, although formally "illegal," undocumented migrants were nevertheless considered "licit" by society at large. While such an opposition between "illegal" and "licit" works well for contraband practices or certain illegitimate businesses in developing economies (Van Schendel and Abraham 2005), we believe it misses some aspects of the contradictory citizenship rights experienced by undocumented migrants in many Western countries. Whereas at times their residence can indeed be described as "legally banned but socially sanctioned and protected" (*Ibid*:19), it often turns out to be *both* legally banned and legally recognized. Rather than revolving around a conflict between the state and civil society, many contradictions in the civic status of undocumented migrants lie at the core of the very formal mechanisms of exclusion and incorporation that the state aims at them (Chauvin and Garcés-Mascareñas 2012).

Furthermore, inattention to formal incorporative features is encouraged by *legitimist representations* of the social and economic world, among experts and the broader public alike, who may ostensibly be pro-migrant but still believe that the law is coherent. By "representations" we thus refer to unexamined epistemologies and mental topographies rather than explicit normative political positions. We call "legitimism" the positivist belief in the self-coherence and non-contradictory nature of law, here resulting in the conceptual conflation of "legal" with "formal". Epistemological legitimism implies confidence in the convergence of formality with legality, and faith that an increase in illegality automatically translates into a surplus of "informality." Examples of legitimism can be found in descriptions of the economic integration of illegal residents. In Europe, policy documents frequently equate illegal migrants' employment with informal and undeclared work when in fact many—and in some countries like the United States, most—undocumented foreign workers happen to occupy formal jobs in the legal economy, even when such access implies committing infractions, including borrowing, renting, or falsifying formal documents (Vasta 2011; Horton 2015; Andrikopoulos 2017). Similarly, the current hardening of controls is not mechanically pushing migrants into the informal economy: in many cases it is merely forcing them to breach more and more rules and thus make themselves "more illegal" in order to reach previously more accessible levels of formal economic and civic membership.

In this chapter we go beyond methodological dualism and argue that inclusion and exclusion are located within the law itself. Irregular immigrants become integrated into key formal institutions not only as a result of inclusion promoted by regional and local administrations or informal or illegal practices but also because the law excludes and includes at the same time. Only by analysing these inherent tensions can one understand the complex and multidimensional nature of citizenship in contemporary societies and deepen our grasp of state rationalities behind migration policies.

3.3 Formal Incorporation (and Exclusion)

Irregular migrants are most often *not* "legally non-existent" (Coutin 2000). Their legal existence or formal incorporation has been explained as a result of tensions between distinct geographic levels of government. In contrast to restrictive immigration policies and highly charged debates at the national level, local policies have commonly been characterised by a bottom-up, place-sensitive approach and a pragmatic logic of problem solving (Garcés-Mascareñas and Chauvin 2016). Whereas this may lead to inclusion in some instances and exclusion in others, several scholars have argued that local policies are more likely to provide immigrants with equitable opportunities, accommodate ethnic diversity and work with immigrant organisations, which in turn facilitates a greater degree of immigrant political participation (Scholten and Penninx 2016). In the field of health care, the tension between the national and local levels is particularly evident. While several national governments have gradually excluded irregular immigrants from health care services (Spencer and Hughes 2015), local authorities tend to be more concerned with the implications that effective exclusion could have on public health. This has led many European cities to introduce specific measures to cover irregular immigrants or 'uninsured people' in general.

In her seminal work, Manon Pluymen (2008) argued that, compared to the national government, local authorities in the Netherlands tend to have a greater interest in providing a safety net for destitute migrants. This was justified by local authorities on the basis of three arguments. The first is humanitarian: moral arguments calling for the inclusion of those residing in the municipality prevail over national regulations aimed at exclusion. The second is in terms of public health, public order and safety. In this case, imperatives to prevent the spread of particular diseases, overcrowded housing, or urban decay may be a higher priority for local authorities than those related to immigration control. The third argument is in response to national policies: feeling burdened with the practical implications of the shortcomings of national migration policy, local authorities protest and try to persuade the government to reverse certain aspects of its policy.

This strand of the literature thus highlights that municipalities tend to be more concerned with knowing who resides in the city, incorporating any person into the health care system or avoiding irregular housing. However, it would be too simplistic to conclude that national policies exclude while local policies include. Although national-level policies are often presented as those most coherently directed toward the exclusion of unauthorized migrants, they have been shown to allow for the inclusion of these residents as well. National law or national-level court decisions usually prevent the exclusion of minors from primary and secondary educational institutions on the sole ground of their unauthorized migration status. Other provisions guarantee access to some form of health services, as entitlements are either explicitly provided for by law or regulations or ensured implicitly in a universal provision from which irregular migrants are not excluded. Sweden extended greater health care and education to undocumented migrants at the national level in 2013,

while in 2015 the UK government made the decision to allow them free access to HIV treatment (Spencer and Hughes 2015). Spain is an interesting case regarding formal incorporation at the national level: while not recognizing undocumented migrants as legal residents, national law requires them to register in municipalities (the so-called *padrón*). "Documented" unauthorized migrants can then legally access health and education facilities. In other instances, irregular migrants are included in national welfare systems through special programs that grant comparable benefits through alternative procedures. Even in cases when unauthorized migrants are excluded from general health insurance schemes, some costs such as emergency care are still factored in yearly budgetary planning of hospitals and other service organizations: when analysing migrant bureaucratic incorporation, budgets clearly speak louder than words.

Labour law is another example of the extension of common entitlements to irregular migrants. In most European countries, labour law protects all workers irrespective of their legal status (Fodor 2001; Inghammar 2010). In France, the Code du Travail specifically states that illegally employed workers, regardless of their legal status, are entitled to the same guarantees as the regularly employed, including the calculation of seniority pay, even though these rights have eroded in the 2010s. Workers on strike are traditionally protected from police intrusion (Barron et al. 2016). Although the 2009 EU directive on "employer sanctions" (2009/52/CE) aims chiefly at coordinating the repression of illegal migrant employment among member states, it also lists a number of labour rights applicable to illegally-employed foreigners. Formal inclusion, however, does not necessarily translate into practical inclusion. Even when irregular migrants' labour rights are protected, difficulties in proving informal employment or abuses by employers — together with the lack of firewalls protecting irregular migrants from detention and removal—mean that they often do not have access to these rights in practice. In some cases, they may also be led to renounce exerting those rights in exchange for employer sponsorship in legalization.

Finally, national-level membership is not limited to official and legal pathways: in fact, undocumented immigrants do attain some crucial dimensions of citizenship that cannot be reached legally, precisely through illegal access. This is a key point as many studies tend to describe the recent hardening of civic boundaries in overly legalist terms, confusing legal prohibition with practical impossibility. For example, it has often been stated in Dutch immigration scholarship that since a 1993 restrictive law, undocumented migrants can no longer be given a social security (BSN) number (see e.g. van der Leun 2006), when the correct observation is that undocumented migrants can no longer *legally* be granted such numbers (there have remained ways for them to make use of BSN numbers in practice). Considered diachronically, legally-precarious migrants' documentary trajectories may follow a virtuous chain of "bureaucratic incorporation" during which a first element of citizenship, obtained through falsification (like a registered job) or not (like a tax number or a local identity card) becomes the condition of growing civic inclusion, made of increasingly formal and increasingly "genuine"—although often illegitimately acquired—papers (Vasta 2011; Reeves 2013; Chauvin 2014; Horton 2015). In those

cases, illegality mostly pertains to the "last instance" and only becomes relevant in the most official moments of civic life, when the "last instance" is the only possible definition of the situation (Bourdieu 1990).

3.4 Why Incorporation?

Faced with the riddle of the continuing incorporation of undocumented migrants into societies of residence, whether through tolerance for durable illegality or through various legalization mechanisms, scholars have advanced a series of complementary, and at times competing, explanations. Among them: the need of capitalism for cheap labour and international and domestic legal limits to withdrawing basic human rights. In this section, we review these explanations and add two more, one referring to material and civic constraints and the other to the dynamics of governmentality.

3.4.1 Labour

The benefits of foreign labour in capitalist economies have been extensively analysed by Marxist and globalisation theorists. Portes (1978: 471–482) and Sassen (Sassen-Koob 1978: 516–518) noted already in the 1970s that the demands for foreign labour do not only result from absolute labour shortages. Employers have also welcomed immigrants as a way of reducing the unitary cost of labour (by lowering wages) and increasing its flexibility. This explains why the demand for foreign labour does not necessarily drop in contexts of large-scale unemployment. However, this premise does not explain why states have often chosen to restrict labour mobility. In Zolberg's words (1989: 409), "given the advantages of an 'unlimited supply of labour', why don't capitalists deploy their clout to import many, many more, or even to obtain completely open borders?"

Again, Marxist social scientists have argued that closed borders do not necessarily go against easy access to foreign labour. Instead, restrictive migration policies serve the needs of capitalists and capitalism as they place migrants in a more exploitable position (as undocumented labour). From this perspective, criminalising while tolerating irregular migrants functions as a means of constructing and preserving the legal otherness on which immigrants' condition as a cheap, flexible labour force rests (among many others, Bach 1978; Portes and Bach 1985; De Genova 2002; Calavita 2005). In the case of Italy, Maurizio Ambrosini (2013) has convincingly shown how tolerance for undocumented migration was tightly connected to the deficiencies of the care system, especially for the elderly, so that undocumented labour has come to function as informal welfare.

Although these effects are undeniable, such explanations again fail to account for the complexity of migration policies and states' rationalities behind them. If both

states and employers are interested in producing and reproducing migrants' legal and labour precariousness, why have governments then launched periodic regularisation programmes? In earlier publications, we have provided some answers. First, employers do not necessarily display a preference for undocumented migration. While favouring guest workers and circular migration systems, they have nevertheless supported regularisation programmes, even in countries where penalties for employing irregular migrants were minimal (Chauvin et al. 2013). For instance, in Spain employers have participated in the design and implementation of several regularisation programmes to the extent that the biggest and most recent one (2005) was considered a "normalisation of employers" (Garcés-Mascareñas 2012). Interestingly, trade unions accepted collaborating with employers by selecting and filtering applications in the name of both workers and employers (Bruquetas-Callejo et al. 2011). Second, progress in formalisation or access to legal status do not necessarily mean higher wages. Many foreign workers—regardless of their legal status— tend to work in sectors where wages are lower, whether they are undocumented or not. Thus, regularisation will most often keep a migrant's salary unchanged unless it is accompanied by a shift in sectors. True, undocumented migrant workers show more flexibility and willingness to work overtime, thus proving cheaper in practice than legal workers even with similar hourly wages on paper (Jounin 2008; Le Courant 2015). But recently-regularised migrants typically display comparable flexibility when they still hold temporary residence permits whose renewal depends on active participation in the formal labour market, thus indirectly on their employers.

3.4.2 Rights

Many scholars have signalled the extent to which human rights constrain state sovereignty and particularly its right to decide who enters and who does not, or who is an insider and who is not. Studies vary in the ways they define the source of these rights. Authors such as Soysal (1994) and Sassen (1996) have explained rights constraints on state sovereignty by the rise of an international human rights regime based on international agreements and conventions enshrining the rights of migrant workers or the status of refugees. Other scholars such as Hollifield (1992), Joppke (1998) and Guiraudon (1998) have understood rights limitations as being internally rather than externally produced. They emphasise how all Western constitutions enshrine a catalogue of elementary human rights that, together with strong and independent judiciaries, would hamper government capacity to restrict immigration.

Discussions on the limits of migration control in liberal democracies continue to be central in most political analyses of migration policies. Recently, a new strand of research has pointed to the morals of policymakers rather than the legal system or the political process as the main explanatory factor for the inclusion of immigrants.

In her study on the making of family migration policies between 1995 and 2005, Bonjour (2011) argues that the influence of court decisions on policymaking was much less significant than assumed by the literature to date. As conditions for entry and stay of foreign family members were entirely in the hands of Dutch politicians and civil servants, she claims that the making of family migration policies was not externally constrained by courts but rather shaped by immaterial norms such as family unity, equal treatment, and individual responsibility. In their study of undocumented children's access to accommodation and welfare support in the United Kingdom, Jonathan Price and Sarah Spencer (2015: 48) similarly showed that deservingness is mostly "not a legal concept that local authorities can apply in their assessments, but rather a value-based conception of families that inform assessment." Kawar (2015) and Bonjour (2016) recently concluded that, if courts influence migration policies, it may be indirectly by reshaping how political actors frame migration issues.

In a study to explain changes in immigrant rights over the period 1980–2008 in ten western European countries, Koopmans et al. (2012) point towards the importance of electoral factors: countries where a significant share of the electorate had immigrant roots were more likely to see subsequent liberalisations of immigrant rights which in turn, if they led to easier naturalisation and more immigration, expanded the immigrant electorate. In a more recent study of 29 countries worldwide, Koopmans and Michalowski (2017) argue that a colonial past and subsequent experience with cultural difference is what seems to account for a more open position towards immigrants. The final reason is electoral politics again: it is thanks to democracy, through voting, that openness towards immigrants is ultimately expressed. But how to reconcile this electoral explanation of generous migration policies with increasingly negative public opinion towards immigrants both in traditional countries of immigration and in former colonies of settlement?

More generally, accounts based on rights constraints in liberal democracies can hardly explain change and, more particularly, the increasing illiberalness of democracies in some respects. Indeed, the securitization of immigration has translated into a "quasi-military border control approach" (Spijkerboer 2007) that has systematically led to prioritise receiving states' perceived interests over immigrants' rights. Internal borders are being erected as well, from the proliferation of internment spaces and "states of exception" for irregular immigrants to the use of progressive liberal ideals as boundary-markers between those having "the right to have rights" and those who don't, even when legally resident or nationals (Mepschen et al. 2010). More importantly for our argument, explanations based on rights constraints or policymakers' morals in liberal democracies—such as those referring to the professionalism of street level bureaucrats—present inclusiveness as external to state concerns, which continue to be imagined as uniformly exclusionary. In contrast, we will argue that inclusiveness is also part and parcel of government's *raison d'être*.

3.4.3   Material and Civil Constraints

Moreover, exclusion can only be exerted within certain limits. Control and repression are thwarted not only by rights constraints but also by technical and internal limitations (Van der Leun and Kloosterman 2006; Broeders and Engbersen 2007). The stiffening of restrictions in many countries in the past two decades has made it indisputably more difficult for unauthorized residents to legally access basic elements of formal membership such as declared employment and the use of social services. But making such access more illegal does not make it disappear: it generates new coping strategies. Since 2007, in France all employers have had an obligation to check new foreign workers' residence cards for authenticity with the local branch of the national government (*préfecture*). Some employers then told their workers they could no longer work with a forged residence permit. The latter had to either borrow other people's authentic permits or forge French national identity cards. As French nationals are not submitted to the new compulsory checks, employers have no liability as to their authenticity (Barron et al. 2011).

A generalization of controls to the whole population may prevent this type of circumvention. But it would face two massive obstacles. The first one is economic: the cost of such generalization would likely be unsustainable and, in any case, greater than the supposed benefits believed to be gained from controls and the consequent removal of unauthorized migrants from the labour force. For example, forcing employers to check the authenticity of all employees (foreign or not) would, on the one hand, significantly obstruct economic activity and, on the other, tremendously inflate state bureaucracy, especially in an era of labour-market contingency and short-term contracts when such universal checks would have to be repeated often, if not daily or even several times a day in some sectors (De Lange 2011: 191). The second one is political. In other historical instances, the state's eagerness to control certain stigmatized groups contributed to "rationalizing" the whole national identification system in a more restrictive direction. In the case of France, Alexis Spire showed how the instauration of a single French national identity card in 1955 was generated by a governmental pursuit of more control over the movements of "French Algerian Muslims" (2003: 58–9). But the extension of controls to the most legitimate members of a society is likely to generate protests and resistance since irregular migrants' unauthorized access to at least some elements of formal membership cannot be effectively suppressed without infringing on the rights of citizens themselves.

As the generalization of labour-market controls is not viable and its limitation to self-declared foreigners is inefficient, a cheaper and more sustainable alternative would be to focus employment surveillance on those workers who "look" foreign, especially in ethno-racial terms. However, such alternative would prove equally untenable. Especially in multicultural societies, deciding on people's "foreign" appearance is a highly subjective operation that cannot be controlled in any unambiguous way. Of course, informal ethnic profiling by police forces has been widespread for a long time in continental Europe (Jobard et al. 2011), but it may only remain informally tolerated rather than positively enforced. Indeed, evidence of its

non-implementation would prove almost impossible to gather and would be unlikely to hold merit in court. Moreover, even if ethno-racial profiling may be legal and even culturally acceptable in certain countries (Vogel 2001:334; Castañeda 2010), in the case of the labour market, it would depend on the unlikely cooperation of employers, who—both judges and parties—can always claim good faith if investigated.[1] Finally, such focus would very likely be found discriminatory by courts and public agencies committed to the protection of ethnic minorities given that they have generally rejected mere ethnicity as a sufficient "probable cause" for checking immigration status. These material, juridical and political constraints account for the existence of a durable space for migrant life, work, and even 'careers' within illegality (Chauvin 2014).

3.4.4 Governmentality

Beyond labour needs, rights, and material and civic constraints, the state's rationality behind incorporation is also that of expansive governmentality. Here inclusion is not externally produced: it is not a question of markets and employers' demands; it has little to do with rights constraints imposed by liberal constitutions, independent judiciaries, policymakers' moral principles or, more informally, street-level bureaucrats' professionalism. As we have argued elsewhere (Chauvin and Garcés-Mascareñas 2012), the formal incorporation of irregular immigrants is inseparable from states' need to regulate. Foucault (1991) referred to "governmentality" as a regulatory logic by which state actors are not as interested in the law-abiding conformity of individual behaviour as in the predictability of collective conduct, a mode of government based less on controlling particular subjects than on ensuring overall governability. When states seek to produce a "legible", assessable, permanently identifiable population, "easily administered" from the centre (Scott 1998: 31–5), prediction and registration become more important than deportation, while on the other hand taxation becomes more urgent than formal authorization. States thus have a greater stake in regulating the actual population than in tracing boundaries between members and non-members.

There are multiple examples of how states often give priority to regulation over exclusion based on distinct concerns over public health, crime rates (rather than individual infraction) and crime reporting, economic regulation, and population management. In these cases, inclusion becomes an imperative not just for local administrations but also for regional and national governments. For instance, access to education may be framed as a human and social right, but incorporation in the

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[1] In 2010, French employers rebuffed attempts by the French government to increase their liability in controlling the use of fraudulent immigration documents by responding that they could not reasonably hire professional 'physiognomists'—the official term for nightclub bouncers in charge of filtering entries on aesthetic criteria—to check if employees resemble the photographs on their identity papers (Barron et al. 2011).

school system is primarily based on the "public education" principle that the population must be educated and that a society cannot afford not to educate the next generation. The same could be said about public health. Access to health care can again be framed as an individual social right. While Western liberal democracies are increasingly limiting this right to nationals and legally-residing foreigners and/or contributing individuals, public health can only be ensured by covering the whole population, e.g. vaccinations have to be extended to all in order to be effective. Budgetary and political interests may also play a role. In the United States, for example, individual states insist on counting all their population in the national census (including unauthorized noncitizens) so as to increase the federal funds for which they are eligible and, even more importantly, their number of seats in the House of Representatives (Roberts 2009). Of course, these pro-inclusion rationales compete with other constraints. In their study on how British municipalities implement their duty to safeguard children "in need" under the s17 Children Act 1989, Sarah Spencer and Jonathan Price have shown how local authorities' discretion may lead in practice to more restrictive outcomes than stated by national laws; in this case, rather than giving priority to the needs of the child, local authorities seem to respond to other drivers, such as budget cuts and a negative opinion climate about both regular and irregular migrants (Price and Spencer 2015; Spencer 2018b).

At a broader level, inclusive governmentality faces the contradictory forces of sovereignty, which is more exclusively concerned with regulating the boundary between members and non-members. Indeed, against most political theories framing governmentality simply as a means to an end, that of exclusionary sovereignty, we argue that the two logics can be abstracted from each other in a way that shines the spotlight on their mutual tensions. While one often thinks of the "monopoly over legitimate means of movement" as a condition for the state's "embracement" of its population (Torpey 1998), when these two requirements enter in conflict the state may favour embracement at the expense of the monopoly (Chauvin and Garcés-Mascareñas 2012). A moderate loss of sovereign "control" may be the price to pay for more efficient "embracement." The recognition of people and processes seemingly located beyond state supervision can thus be construed as "the expression of an increasingly complex system of migration governance" (Kraler 2009: 21) by states having to reconcile conflicting demands in the field of migration policy (Boswell 2007: 92).

Not that sovereignty cannot win eventually—as the "internalization" of border control has evidenced in the past two decades. But, following our theoretical argument, privileging sovereignty means going against the inclusive tendencies of governmentality, rather than being supported by governmentality as a mere servant of sovereignty. As a consequence of this contradictory dynamic, the form of inclusive citizenship that regulates the inside of nation-states is very much unequal, hierarchical, and differentiated (Geeraert 2018). We argue that such stratification is not a product of the dynamics of governmentality but of sovereignty and its external assertion of membership principles: a product governmentality has to do *with* because it takes the population "as it is", including the inequalities generated by these exclusionary boundary-making processes.

3.5 Conclusion

This chapter sought to overcome dichotomous understandings of the law-society nexus by examining the inclusion and exclusion dynamics that shape the subordinated incorporation of undocumented migrants in western democracies, in ways that cannot be fully grasped through the formal vs. informal binary. We reviewed a host of existing rationales for inclusion. Although we recognize the weight of these rationales operating at different levels, in this chapter we eventually insisted on regulatory logics commonly associated with governmentality, which we argue favour inclusion. Determining whether governmentality concerns trump all others, compete with them, or lay in the background of most other arguments for inclusion, would require further analysis. Nevertheless, one can advance the hypothesis that the structural nature of governmentality constraints may account for the relative stability of forms of incorporation over time while moral and legal justifications for it come and go in a more fluctuating way. Indeed, these structural concerns—public education, public health, public order, road safety, economic and urban planning, and so on—could turn out to be acting at a deeper level than perhaps more superficial or "ideological" justifications for inclusion such as human rights or humanitarian concerns.

Our analysis has led us to argue that governmentality and sovereignty may be going in different directions. Such reasoning obviously requires an effort of abstraction, not one that opposes an "ideal" repressive government to the "reality" of inclusive practices, but one that learns to distinguish between the different ideals of government that can be found in reality. Interestingly, while the tension between sovereignty and governmentality principles creates a messy, multidimensional, and continuous citizenship regime *inside* countries, nation-states' external projections turn out to be more exclusively regulated by sovereignty and its strict binary between "citizens abroad" and non-citizens (Lafleur 2015). Ironically, the only space where nation-state sovereignty translates into a relatively pure form of citizenship binary may thus very well be located outside the nation-state itself.

Finally, identifying tensions between governmentality and sovereignty does not mean that governmentality is not itself traversed by contradictions. Indeed, one would go too fast attributing the current hardening of borders to the mere dynamics of sovereignty. True, we showed that there is a de-nationalized logic to governmentality although that logic does not necessarily point to a global or transnational imaginary (Sassen 2006). Yet, theorizing governmentality as primarily *not* being about membership uncovers a conundrum as to the relationship between governmentality, borders, and border policing.

Contrary to the oft-repeated idea drawn from Foucault's (2007) Collège de France lectures that sovereignty is tied to "territory" (thus borders) while governmentality deals primarily with the problem of "population," upon reflection it is quite clear that one needs a territory to define a population. While a *people* can lose its territory or become diasporic yet remain a people and even a nation, a population is more inherently defined by borders. Space—and bounded space—may thus turn out to be intrinsic to the de-nationalized imaginary of governmentality. The

resulting paradox that governmentality may "require" borders precisely because it is *not* about membership might perhaps help account for the contemporary coexistence of heightened border controls with the more inclusive dynamics of incorporation inside borders that we have described in this chapter.

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