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Foundlings in the Greco-Roman world: Status and the (im)possibility of adoption

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Summary

The present article offers a commentary on two passages from the *Gnomon of idios logos*: § 41 (*BGU* V 1210, ll. 115-116), which pertains to a quarter of the inheritance left by an Egyptian who adopted a child picked up from a dump-hill, and § 107 (*BGU* V 1210, ll. 238-239), which repeats the same rule with regard to everyone, regardless of their civic status. The following problems are subject to our investigation: 1) Which specific type of adoption was expressed by the verb *υἱοποιέομαι* in § 41? 2) Why does the adoption of foundlings not appear in documentary sources? 3) What was the scope of the cited provisions? The article offers a survey of the legal status of exposed children and (im) possibilities of their adoption in law and legal practices in Roman, Greek and Egyptian sources.

Keywords

adoption – exposure – foundlings – Roman law – Greek law – Egyptian law – Graeco-Roman Egypt

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1 Introduction

The present article offers a commentary on two passages from the *Gnomon of idios logos*:

> *BGU* V 1210, ll. 115-116:
> *μ̄α̅ ἐὰν Αἰγυπτιόο* (l. *Αἰγύπτιος*) *ἐκ κοπρίας* [*ἀν*]*έλῃται παῖδα καὶ τοῦτον υἱοποιήσηται, μετὰ θάνατον τεταρτολ̣*[*γεῖτ*]*αι.*
>
> 41. If an Egyptian picks a child up from the dump-hill and makes it his child, a quarter [is due] after his death.

> *BGU* V 1210, ll. 238-239:
> *τ̣ῷ̣ᵧ̣ ἀναιρουμένων ἀπὸ κοπρ*[*ίας ἀρσ*]*ε̣ν̣ι̣κ̣ὰ μετὰ θάνατο̣*[*ν τὸ*] *τ̣έ̣τ̣α̣ρ*[*τ*]*ον ἀναλαμβάνεται.*
>
> 107. After death of those taking up male children from the dump-hill a quarter will be taken.

§ 41 of the *Gnomon of idios logos*, which states that a quarter of the assets of an Egyptian who picked up a child from a dump-hill and made him or her his own child would be taken away after his death, has provoked considerable scholarly interest. The discussion has concerned almost exclusively the function of the above provisions, precisely the question of whether its scope was to penalise the adoption of foundlings and, if so, then why; or was it simply meant to protect the interests of the fisc?[1].

In order to resolve this problem, however, it is important to answer two preliminary questions: 1) why does the adoption of foundlings not appear in the documentary sources? 2) which specific type of adoption was expressed by the verb *υἱοποιέομαι* in § 41?

If one follows the principle of personality of law, one might suggest that the type of adoption in § 41 belongs to the laws of *chora*, *νόμοι τῶν Αἰγυπτίων*[2]. This approach, however, would be misleading for several reasons. First, the rule that appears in § 41 is repeated in § 107 (ll. 238-239), although here it applies to everyone, not only Egyptians. Second, the principle of personality of law has not

1 The discussion summarised in the last section, p. 39-41.

2 See J. Mélèze Modrzejewski, *Loi et coutume dans l'Égypte grecque et romaine*, [The Journal of Juristic Papyrology, Supplement Series, 23], Warsaw 2014, p. 241-298; J.L. Alonso, *The Status of Peregrine Law in Egypt*, '*Customary Law*' *and Legal Pluralism in the Roman Empire*, The Journal of Juristic Papyrology, 43 (2013), p. 351-404.

been followed strictly by the Romans[3], even in the *Gnomon* itself; therefore the discussion cannot be limited to papyrological evidence.

Moreover, from the correspondence of Trajan and Pliny the Younger (*infra*), we know that the Romans did intervene in matters concerning the exposure of children in other provinces; whether they applied local or Roman rules is debatable. On the other hand, even if the adopter was an Egyptian, the civil status of the foundling would still have been unknown: the different legal orders would have overlapped if the child was a Greek or a Roman. Assuming that the exposure of children was not practiced by the Egyptians, but rather by Greeks and by Romans – as maintained by the majority of scholars[4] – such an intersection of legal orders becomes even more likely. Furthermore, the hypothesis of the penal character of the provision held by some scholars also suggests that the Roman or Ptolemaic point of view (depending on to whom one ascribes the authorship of the provisions in question) is relevant to its understanding. We have decided therefore to take into account, as far as the available sources allow, all legal orders that could be relevant to the problem, and attempt to assess the legal possibility of the adoption of foundlings in Egyptian, Greek, Roman and 'peregrine' laws.

2 Foundlings in Graeco-Roman Egypt

As we mentioned in the introduction, instances of foundlings being adopted in the manner described in the *Gnomon* are, to the best of our knowledge, absent from the papyri: foundlings explicitly described this way in the papyri seem to have been raised only as slaves[5]. The sole (and dubious) piece of evidence that

3 On the principle of personality of law and the exceptions thereto see: J.L. Alonso, *Juristic Papyrology and Roman Law*, in: The Oxford Handbook of Roman Law and Society, ed. P.J. du Plessis, C. Ando and K. Tuori, Oxford 2016, p. 56-69, p. 60-66 with further literature.

4 See A. Cameron, *The Exposure of Children and Greek Ethics*, The Classical Review, 46 (1932), p. 105-114; O. Montevecchi, *I paragrafi 41 e 107 dello Gnomon dell'idios logos*, in: Atti del XVII Congresso internazionale di papirologia, III, Napoli 1984, p. 965-975, p. 967-968.

5 The evidence is mostly documents pertaining to wet-nursing contracts. Lists are provided in: *Corpus Papyrorum Graecarum*, I: *Contratti di baliatico*, ed. M.M. Masciadri and O. Montevecchi, Milano 1984 (*C. Pap. Gr.* I): texts, translations and commentary; A. Ricciardetto – D. Gourevitch, *Entre Rome et l'Égypte romaine*, *Pour une étude de la nourrice entre littérature médicale et contrats de travail*, in: En marge du Serment hippocratique, Contrats et serments dans le monde gréco-romain, ed. H.M. Marganne and A. Ricciardetto, Liège 2017, p. 67-117: on p. 89-117, the authors added an appendix containing a list of documents relating to wet-nursing contracts (8002-8057); each entry includes an abstract, list of editions, provenance, date, physical

might refer to a foundling raised as a free person is the case Sareus *vs* Pesouris. The case is known from two documents: *P. Oxy.* I 37 (= *M. Chr.* 79 = *Sel. Pap.* 257 = *C. Pap. Gr.* 19: Oxyrhynchos, 49 CE) and 38 (= *M. Chr.* 58 = *C. Pap. Gr.* 19; duplicate = *P. Oxy*. LXXVIII 5175: Oxyrhynchos, 49 CE). The former text is the register of legal proceedings before a *strategos*, Tiberius Claudius Pasion[6], consisting of the litigation between Pesouris and the wet-nurse Sareus. Pesouris contracted Sareus as a wet-nurse for two years to feed a child found in the dump-hill. Sareus was paid for the first year of her service and then for the second one; in the course of the second year, however, Pesouris observed that the child was not being fed properly and took it away. Sareus then sneaked into Pesouris' house and stole the baby in order to keep it as her own freeborn child. Sareus claimed that the foundling had died and that the child she took from Pesouris was her own. The *strategos* decided in favour of the wet-nurse, as it looked like Sareus: the child should remain with her as her son, but she was to pay back the salary she received for wet-nursing.

The dubious section of this document is found as lines 6-8: *ἀνείλεν | ἀπὸ κοπρίας ἀρρενικὸν σωμάτιον <ᾧ> ὄνομα Ἥρα|κ[λᾶν]. τοῦτο ἐνεχείρισεν τῆι ἀντιδίκωι· ἐγένε|το ἐνθάδε ἡ τροφ<ε>ῖτις εἰς υἱὸν τοῦ Πεσούριος*. The uncertainty concerns how the phrase *εἰς υἱὸν τοῦ Πεσούριος* should be interpreted.

According to Orsolina Montevecchi, the contract was made for the son of Pesouris – i.e. the foundling[7] – whom Pesouris intended to adopt; this at least was the argument used by the attorney to strengthen his client's position and appeal to the compassion of the *strategos*[8]. Yet, as Peter Van Minnen has rightly observed, the phrase '*εἴς* + accusative' in the documents usually refers to one of the parties with whom the contract was made, not to its object. The use of this phrase referring to a child, who was the object of the nursing contract, would thus be unusual. Van Minnen proposed another interpretation, which we find more convincing: the son of Pesouris mentioned in the contract was not, in fact, the foundling, but rather another son of Pesouris who subscribed

description, bibliography and TM number: *C. Pap. Gr.* 46; 11; 14-15; 19; 21-24; 26; *P. Oxy*. LXXVIII 5168; P. Heliporn / K. Worp, *A Wet Nurse Contract with an Unusual Provenance*, Chronique d'Égypte, 82 (2007), p. 218-226. See also. R. Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri, 332 BC-640 A.D.*, Warsaw 1955, p. 55; I. Bieżuńska-Małowist, *Die Expositio von Kindern als Quelle der Sklavenbeschaffung im griechisch-römischen Ägypten*, Jahrbuch für Wirtschaftsgeschichte, 2 (1971), p. 129-133.

6 The *strategos* acting as *iudex datus* of the prefect: B. Kelly, *Petitions, Litigation, and Social Control in Roman Egypt*, Oxford 2011, p. 114 n. 127.

7 A similar interpretation was given in *Sel. Pap.* II 257: 'This he entrusted to the defendant, and the nurse's contract which was made here referred to is as a son of Pesouris'.

8 *C. Pap. Gr.* 19, p. 118.

to the contract with the wet-nurse in place of Pesouris himself[9]. This interpretation is more consistent with the use of '*εἴς* + accusative' in documentary papyri. Van Minnen further identified this son as Theon, who appears in col. 2, ll. 1-2[10].

There are other arguments which support the contention that *υἱὸς τοῦ Πεσούριος* cannot be identified with Heraklas, the foundling. The first concerns the terminology applied to Heraklas: he is referred to as *σωμάτιον* – a term which, in papyri, usually refers to slaves[11] – while another child, Apion, is described as *παίδιον*, *τέκνον*[12]. Furthermore, a petition to the prefect from several months later (*P. Oxy*. I 38), in which the husband of Sareus complains that Pesouris (here described as Syros son of Syros) did not comply with the decision given in *P. Oxy*. I 37, supports the assumption of the servile status of Heraklas. Describing the case, the husband claims that Syros took the child in order to enslave him, ll. 9-10: *ἀποσπάσαι | εἰς δουλαγωγία[ν] τὸν ἀφήλικά μου υἱὸν Ἀπίωνα*[13]. These two points suggest that the case of Heraklas was not different from that of other foundlings who appear in contracts with wet-nurses: he was taken from the dump-hill to be raised as a slave[14].

If we discount *P. Oxy.* I 37 we find no other cases in papyri regarding the adoption of foundlings, as described in § 41 of the *Gnomon*. Does this mean

9 Accepted by J. Rowlandson in *Women and Society in Greek and Roman Egypt, A Sourcebook*, Cambridge 1998, no 91: 'He turned the baby over to the defendant, and a nursing contract was handed over here (in Oxyrhynchos) to Pesouris' son'.

10 P. van Minnen, *Notes on Texts from Graeco-Roman Egypt*, Zeitschrift für Papyrologie und Epigraphik, 96 (1993), p. 117-122, p. 119.

11 *LSJ*, *WB s.v. σωμάτιον*.

12 Perhaps the terminology is not fully credible as the indicator of the status: children picked up from the dump-hill whose fate was usually slavery could have been simply called *σωμάτια* (their original personal status remained unknown) no matter whether they were later raised free or as slaves.

13 Bieżuńska-Małowist, *Die Expositio* (*supra*, n. 5), p. 130.

14 Perdrizet introduced the hypothesis that people bearing copronyms were in fact foundlings (*Copria*, Revue des études anciennes, 23 [1921], p. 85-94). If this observation were correct, studies on the status of exposed children would be much easier. Unfortunately, as demonstrated by Sarah Pomeroy, the evidence does not allow for such conclusions. *Inter alia*, she noticed that people bearing copronyms had patronyms and even metronyms, while none of children who are the object of wet-nursing contracts is described in such a way, etc. See S. Pomeroy, *Copronyms and the Exposure of Infants in Egypt*, in: Studies in Roman Law in Memory of A. Arthur Schiller, ed. R.S. Bagnall and W.V. Harris, Leiden 1986, p. 147-162. W.V. Harris, *Child-Exposure in the Roman Empire*, The Journal of Roman Studies, 84 (1994), p. 1-22, p. 8-9, suggests, however, that persons of relatively high social standing bearing copronyms might have been adopted foundlings and / or their offspring.

that the adoption of foundlings did not occur in Egypt? Such an hypothesis seems highly unlikely. The passage in § 41 of the *Gnomon* has been repeated in chronologically distant versions, which indicates that it must have been of a practical application (*BGU* V 1210, ll. 115-116, *P. Oxy.* XLII 3014, l. 20). Otherwise, the paragraph would have been omitted in the later version of the *Gnomon*, in the same way as other paragraphs turned obsolete[15]. The mysterious discrepancy between the paragraphs of the *Gnomon* and the practice as evidenced in the documents therefore demands further investigation.

3 Greek Law

Considering that the exposure of children was a social phenomenon not specific to Egypt but practiced widely in the ancient world, we have decided to make a survey of evidence from other parts of the Roman Empire which could influence the discussed paragraphs of the *Gnomon of idios logos* in order to determine whether the situation discussed in the discussed paragraphs is attested elsewhere in the Graeco-Roman world.

Since in the legal practice of Graeco-Roman Egypt elements of legal traditions of Greek cities (*poleis*) and regions (*ethne*) could be traced[16], it is necessary to see whether adoption of foundlings was possible in classical Greece. It is commonly acknowledged that the exposure of newborn babies was practiced in ancient Greece, and was already an established social practice in the classical period[17]. However, our knowledge of the impact which the exposure

15 It is quite certain that the text of the *Gnomon* known to us through *BGU* V 1210 and *P. Oxy.* XLII 3014 is only a thoroughly modified version of the original *Gnomon* from the reign of Augustus. Some regulations issued after the Augustan *Gnomon* were added to the text, and some obsolete rules were removed. The additional rules found in the *Gnomon* derived from imperial constitutions, *senatus consulta*, edicts of prefects of Egypt, and decisions of former *idioi logoi*. The *Gnomon* changed over time because of its purpose, which was to facilitate the work of the *idios logos*; it served as a private guide or a handbook: Th. Kruse, *Der Gnomon des Idios Logos im Lichte der Terminologie für Verwaltungsrichtlinien im Imperium Romanum*, in: Wiener Kolloquien zur Antiken Rechtsgeschichte, 3 (forthcoming).

16 See the overview and summary of the discussion in Mélèze Modrzejewski, *Loi et coutume* (*supra*, n. 2), p. 120-150.

17 See: Cameron, *The Exposure* (*supra*, n. 4), p. 106-108; Harris, *Child-Exposure* (*supra*, n. 14), p. 4; C. Patterson, '*Not Worth the Rearing*', *The Causes of Infant Exposure in Ancient Greece*, Transactions of the American Philological Association, 115 (1985), p. 103-123, p. 113-123 discussing and classifying situations in which the exposure was practiced and the alternatives thereof. L.R.F. Germain, *Aspects du droit d'exposition en Grèce*, Revue historique de

might have had on the legal status of an exposed child in Greece, if it happened to survive, consists of assumptions based on a very small number of literary sources, combined with conclusions drawn from the nature of paternal power in Greek – primarily Athenian – law. It is commonly assumed that exposure did not change either the civil or familial status of the exposed child[18]; as a consequence, even if foundlings had been raised as slaves, they would automatically regain their freedom and citizen's rights, as well as their position in the family of origin (including inheritance rights), once recognised by their father. If the child was not accepted by the father, but able to prove that it had been born of a free mother, its position was that of *νόθος:* not entitled to inheritance and not a citizen, but still a free person[19]. A father could also claim an exposed child back from the rescuer[20]. Moreover, the literary sources – Menander's *Epitrepontes* (T. Kock, *CAF* III 183 [ed. 1888]) provides a good example – imply that rescuers were conscious of the risk that the child, if recognised, would return to its family of origin. (In Menander's play the child is actually recognised thanks to the ring he was given by his mother during the exposure). Whether or not the rescuer could claim expenses for raising a foundling from a father who wanted to regain the child is debatable[21].

The adoption of a foundling seems inconceivable under Athenian law; sadly, our knowledge of adoption in the laws of other Greek cities is too scarce to make any further claims[22]. Insofar as adoption conferred hereditary rights on

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droit français et étranger, 47 (1969), p. 177-197, claimed that the practice in question became common in Greece only in Hellenistic era.

18 L. Beauchet, *Histoire du droit privé de la république athénienne*, II, Paris 1897, p. 88; Germain, *Aspects du droit d'exposition* (*supra*, n. 17), p. 193; E. Volterra, *L'efficacia delle costituzioni imperiali emanate per le provincie e l'istituto dell'expositio*, in: E. Volterra, Scritti giuridici, IV, Napoli 1993, p. 449-477, p. 463.

19 Germain, *Aspects du droit d'exposition* (*supra*, n. 17), p. 195-196.

20 Beauchet, *Histoire* (*supra*, n. 18), p. 88; Germain, *Aspects du droit d'exposition* (*supra*, n. 17), p. 193: 'L'exposition n'entraîne nullement l'extinction de la puissance paternelle'; Volterra, *L'efficacia* (*supra*, n. 18), p. 463.

21 Germain, *Aspects du droit d'exposition* (*supra*, n. 17), p. 184 sustains that the right to claim compensation for bringing up an exposed child existed at least in Thebes. According to E. Weiss, *Kinderaussetzung*, in: Paulys Real-Encyclopedie der classischen Altertumswissenschaft, XI.1 (1921), p. 468-471, p. 468, it was a general rule valid in all the Greek cities. Volterra, *L'efficacia* (*supra*, n. 18), p. 462, argued, on the other hand, that the right to alimonies was a specific Roman rule, unknown to the Greek law (p. 463): 'l'esposizione non fa perdere affatto i diritti al padre espositore: questi può sempre rivendicare il figlio in libertà senza, si noti bene, alcun obbligo al risarcimento di spese od altro'.

22 Regarding adoption in Gortyn – the only city apart from Athens about which we do have some information – cf. L. Gernet, *La loi de Solon sur le 'testament', Droit et société dans la*

the adopted individual, it was conceived as a way of disposing of one's property, and was thus subject to the law of Solon, requiring that whoever makes such a disposition must be of sound mind and free from any pressure[23]. As a consequence, adoptions were often contested by relatives claiming the inheritance, on the grounds that the adoptive father did not meet these requirements and that he was not in sound mind while making the decision. The adoption of a foundling would have been easy to discredit on similar grounds. Indeed, Athenians tended to choose adoptees from among their family members[24], as such adoptions were probably more difficult to contest.

We know of three forms of adoption practiced in Athens in the fourth century BCE: adoption *inter vivos* by virtue of a bilateral deed between the adopting father and either the adoptee himself (if he was already an adult, which seems to have been the rule), or his *kyrios*[25]; testamentary adoption, by the unilateral act of the adopting father[26]; and the somewhat mysterious 'posthumous adoption' which, by definition, occurred without the participation of the

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Grèce ancienne, [Publications de l'Institut de Droit romain de l'Université de Paris, 13], Paris 1955, p. 121-149, p. 138-141. Adoption in Gortyn took place before the People's Assembly and could be revoked. Our knowledge concerning Athenian adoption in Hellenistic period is even lesser. See L. Rubinstein / M.H. Hansen / T.H. Nielsen / T. Vestergaard / L. Bjertrup, *Adoption in Hellenistic and Roman Athens*, Classica et Mediaevalia, 42 (1991), p. 139-151: the authors have convincingly connected the epigraphic evidence with changes in the Athenian laws on status and citizenship and argued that, in the absence of evidence to the contrary, one should not conclude a change in adoption structure. Thus, the Hellenistic Athenian adoption would have remained unchanged (or slightly changed) in respect to classical one. See, however, A. Wentzel, *Studien über die Adoption in Griechenland*, Hermes, 65 (1930), p. 167-176, who suggested that adoption in Athens would have approximated to Roman adoption.

23 L. Rubinstein, *Adoption in IV. Century Athens*, Copenhagen 1993, p. 16-17.

24 Gernet, *La loi de Solon* (*supra*, n. 22), p. 130; Rubinstein, *Adoption* (*supra*, n. 23), p. 22. As far as testamentary adoptions are concerned, in 6 cases out of 12 adoptees are blood relatives of the adopters, and only 2 are certainly from outside of the family (p. 23). In adoptions *inter vivos* (only 5 attested), the proportion is different, since 3 adoptees are outsiders and 2 are relatives of the adopters; according to Rubinstein, this may be a pure coincidence, due to the nature of the sources (p. 22). In posthumous adoptions all but one of the adoptees are relatives of the adopters (p. 26).

25 Rubinstein, *Adoption* (*supra*, n. 23), p. 33-34.

26 It is generally agreed that testamentary adoption at the moment of the testator's death was considered incomplete, and because of this the adoptee could encounter some procedural disadvantages as far as inheritance was concerned (his hereditary rights had to be confirmed by the Peoples Court). Some authors regard the unilateral character as the main reason for the incompleteness of testamentary adoption. Rubinstein argues, however, that unilaterality was not an obstacle; rather the problem lay in the fact that enrollment to the phratry and deme, which was made during the adopter's lifetime in *inter vivos*

adoptive father[27], i.e. by the sole inscription of the adopted individual into the *phratry* of the adoptive father[28]. Testamentary adoption, in order to be complete, had to be accepted by the People's Court on the request of the adoptee himself. Whether the decision of the Court was a formality, or they could in fact refuse on material grounds is debatable; however, it is fairly certain that the inscription into the *phratry* of the adopting father was necessary[29]. This inscription also took place in the case of adoption *inter vivos*. This suggests that it was an important part of the adoptive procedure, regardless of its form[30].

Most importantly, in order to be enrolled into the *phratry* it had to be demonstrated that the adoptee was born from the lawful marriage of Athenian citizens, thus fulfilling the requirements for Athenian citizenship[31]. This alone must have made it difficult to adopt a foundling[32], as it was common knowledge that the majority of exposed children were those born out of wedlock[33]. As Volterra rightly points out, the permanence of paternal rights would have also been an obstacle to such an adoption[34]. We may thus conclude that the adoption of a foundling would have been effectively impossible under Athenian law[35].

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adoption, could be undertaken only after his death, cf. Rubinstein, *Adoption* (*supra*, n. 23), p. 35.

27 This type of adoption was possible only with regard to legitimate heirs of the adoptive father. As to its procedure, cf. Rubinstein, *Adoption* (*supra*, n. 23), p. 41-44.

28 Rubinstein, *Adoption* (*supra*, n. 23), p. 42-43.

29 Rubinstein, *Adoption* (*supra*, n. 23), p. 38.

30 In the earlier literature, it was maintained that the adoption in Athens was composed of the two phases: the first was private and consisted of a contract between the adoptive father and the adoptee (or his *kyrios*), whereas the second phase was public and consisted of the enrollment of the adoptee into the *phratry* and *deme.* Rubinstein has convincingly argued, mainly on the basis of the posthumous adoption (consisting of the enrollment in the *phratry* and *deme* only), that it was the inscription in the *phratry* and *deme* that made the adoption legally binding and was the very essence of the whole procedure, regardless of what private act (contract or testament), if any, preceded it (in posthumous adoption there was actually no previous private act). Rubinstein, *Adoption* (*supra*, n. 23), p. 34 and 44, and the literature she discusses.

31 Rubinstein, *Adoption* (*supra*, n. 23), p. 36, argues that the procedure of enrollment into the *phratry* was exactly the same for one's own children and for adopted ones.

32 Based on Menander's *Perikeiromene* (121-123) Ogden holds the opinion that a foundling could be raised as an Athenian citizen only fraudulently: D. Ogden, *Greek Bastardy in the Classical and the Hellenistic Periods*, Oxford 1996, p. 108.

33 Rubinstein, *Adoption* (*supra*, n. 23), p. 19

34 Volterra, *L'efficacia* (*supra*, n. 18), p. 463, following Beauchet, *Histoire* (*supra*, n. 18), p. 88.

35 Germain, *Aspects du droit d'exposition* (*supra*, n. 17), p. 195, Volterra, *L'efficacia* (*supra*, n. 18), p. 19.

4 Roman Law

In Roman society, the exposure of children seems to have been practiced widely, at least from the second century CE onwards[36]. A variety of juridical sources, dated to the second century CE and later, discuss problems such as the personal status of exposed children brought up by another person, the permanence of *patria potestas* over those children, and their hereditary rights in the *familia* of their origin (see *infra*).

4.1 *Status and paternal power*

In Rome, it appears that exposed children brought up by persons other than their parents were usually kept and raised as slaves[37]. Indeed, Roman sources do not mention the adoption of such children at least until the time of Constantine. One of Constantine's constitutions (C.Th. 5.9.1: 331 CE) deprived an exposing father or master of their right to claim back an *expositus*, which amounted to the extinction of their paternal rights or, in the case of slaves, of ownership. Consequently, the rescuer was given a right to freely decide whether to keep a foundling as his slave or own child[38]. According to Volterra and followed by Lanfranchi, the rescuer's decision to keep the child as one's own had the same legal consequences as the adoption proper. Thus, Constantine

36 W.V. Harris, *Child-Exposure* (*supra*, n. 14), p. 5-6, claims that it must already have been practiced in the early Republican era, as the sources from that time, even if few and indirect, show social concern with the phenomenon in question. For the high Roman Empire we already have an array of sources confirming this practice. F. Lanfranchi, *Ius exponendi e obbligo alimentare nel diritto romano classico*, Studia et documenta historiae et iuris, 6 (1940), p. 5-69, p. 5-6, on the contrary, proposes that we can be certain of the practice only since the beginning of the 2nd century CE, as our sources from earlier times are too few to allow for conclusions.

37 J. Evans Grubbs, *Infant Exposure and Infanticide*, in: The Oxford Handbook of Childhood and Education in the Classical World, ed. J. Evans Grubbs and T. Parkin, Oxford 2013, p. 83-107, p. 94; V.W. Harris, *Child-Exposure* (*supra*, n. 14), p. 9: 'The enslavement was much the commonest fate of foundlings'.

38 C.Th. 5.9.1: 'Quicumque puerum vel puellam, proiectam de domo patris vel domini voluntate scientiaque, collegerit ac suis alimentis ad robur provexerit, eundem retineat sub eodem statu, quem apud se collectum voluerit agitare, hoc est sive filium sive servum eum esse maluerit: omni repetitionis inquietudine penitus submovenda eorum, qui servos aut liberos scientes propria voluntate domo recens natos abiecerint. Dat. XV Kal. Mai. Constantinopoli Basso et Ablavio conss.'

would have introduced a new type of adoption, an adoption *per facta concludentia* so to speak, especially for the sake of foundlings[39].

The only earlier attestation of the adoption of a foundling is found in Ps-Quintilian's declamation 278. Interestingly, this text is chronologically close to the *Gnomon* itself. However, if such an adoption was conceivable according to Roman law and if so, by what means it could have taken place, is problematic (see *infra*).

One possible explanation for why adoptions of foundlings do not appear in juridical sources before Constantine is that the exposed child remained under paternal power, and no adoption could take place without the consent of the original father (see *infra*). In other words, neither *status libertatis* nor *civitatis* nor *familiae* of a foundling could be changed by a unilateral decision of a rescuer.

Juridical sources corroborate the view that neither the exposure itself nor the upbringing of an *expositus* as a slave affected their status as a freeborn person (if they had been born free; slaves could have also been exposed by their masters)[40]. As Paulus states, an individual who is serving erroneously as a slave because he does not know the identity of his parents (*expositus* is given as an example), errs regarding the facts rather than the law. This implies that the individual remained free from a legal perspective, even if he believed himself to be a slave due to ignorance of his real descent:

> D. 22,6,1,2 (Paulus 44 *ad ed.*):
> Si quis nesciat se cognatum esse, interdum in iure, interdum in facto errat. Nam et si liberum se esse et ex quibus natus sit sciat, iura autem cognationis habere se nesciat, in iure errat. At si quis (forte expositus) quorum parentium esset ignoret, fortasse et serviat alicui putans se servum esse, in facto magis quam in iure errat.
>
> If someone does not know that he is a blood relative, sometimes he errs about the law, sometimes about facts; for if he knows that he is free and of what parents he was born, but he does not know that he is related by the law of blood relation, he errs about the law. And if someone (e.g.

39 Lanfranchi, *Ius exponendi* (*supra*, n. 36), p. 41; Volterra, *L'efficacia* (*supra*, n. 18), p. 472-447. Lanfranchi even holds that the possibility of adopting a foundling, introduced in Roman law by this very constitution, was inspired by the Egyptian practice.

40 C. 8,51,1 (*Imp. Alexander A. Claudio*) corroborates the right of an owner of a slave-woman to reclaim the child she had exposed without his knowledge from the child's *nutritor*. Cf. Volterra, *L'efficacia* (*supra*, n. 18), p. 458, 461.

> foundling) is unaware who his parents are, perhaps he serves another believing to be a slave, he errs rather about facts than about the law.

As Lanfranchi rightly observed, the fact that the majority of exposed children brought up as slaves would have remained slaves for their whole lives was due to the practical difficulty of proving their freeborn status. This difficulty, however, does not imply that their legal status had changed: if they were freeborn they remained free even if they lived as slaves[41].

A constitution of Trajan concerning the province of Bithynia – which predates the source discussed above – confirms that the free status of an exposed child was not affected by having been brought up as a slave. Trajan decided that an exposed individual could prove their freeborn status and that this should not depend on their paying the costs of their upbringing. This decision was apparently consistent with the previous resolutions of Domitian concerning other provinces, which suggests that the rule had already been applied in the Roman world:

> Plin., *Ep*. 10.66.2:
> Epistulae sane sunt Domitiani ad Avidium Nigrinum et Armenium Brocchum, quae fortasse debeant observari: sed inter eas provincias, de quibus rescripsit, non est Bithynia; et ideo nec adsertionem denegandam iis qui ex eius modi causa in libertatem vindicabuntur puto, neque ipsam libertatem redimendam pretio alimentorum.
>
> Truly, there are letters of Domitian to Avidius Nigrinus and Armenius Brocchus, which should be perhaps observed: but Bithynia is not among those provinces to which the rescripts applies; I think that those who became subjects to *vindicatio in libertatem* should neither be refused *assertio* (recognition as a free person) on this ground nor forced to buy their own freedom back for the price of the maintenance.

It has been suggested in the literature that Trajan in his constitution exempted fathers who attempted to recover their exposed children from the duty to pay costs of their upbringing to their educators. The duty of the exposing father to pay alimonies to the educator would have been the rule in Roman law from republican times onwards and would have been applied in the constitutions of Domitian, mentioned in the letter. The possibility of recovering an exposed child without needing to pay alimonies, on the other hand, would have reflect-

41 Lanfranchi, *Ius exponendi* (*supra*, n. 36), p. 35.

ed the Athenian rules concerning exposure, and this very rule would have been maintained by Trajan in the province of Bithynia[42].

It has to be stressed, however, that the case to which Trajan refers is particular, in that it concerns *vindicatio in libertatem* – the process for liberty – rather than an attempt by the exposing father to recover paternal rights[43]. It is therefore probable that exemption from the costs of upbringing was specific to this case: indeed, Trajan insists that the *expositus* should not be forced to buy his freedom by paying alimonies, which seems to support our interpretation. If so, this does not affect the possibility that the exposing father remained obliged to pay the costs if he wanted to recover his *potestas* over the child. These two rules – the obligation of the father to pay alimonies, and the ability of the *expositus* to prove their freedom without being obliged to pay the costs – do not contradict one another and could very well have coexisted. Moreover, both seem to be Roman. What regulations exactly Domitian's constitution contained and if it concerned the same type of cases, is difficult to establish. They may have been the very same rules, which Trajan has subsequently extended to the province of Bithynia.

Both the constitutions of Domitian and that of Trajan are directed at the inhabitants of provinces, which may imply that they concerned local rather than Roman practice. It is significant, however, that Roman emperors reacted to the problem, and imposed solutions that reflected Roman legal principles, in this case the ability of a free person to demonstrate and defend their status. The description of the process as *vindicatio in libertatem*, leading to an official recognition of status (*assertio*), seems to refer to the Roman legal procedure applied in cases concerning personal status.

It is also important to note that the examples discussed above were not the only Roman interventions concerning exposed children. In a letter to the

42 Volterra, *L'efficacia* (*supra*, n. 18), p. 392-395, 402-403. The view that Trajan's response applied to fathers claiming their exposed children, has been accepted by Reinach and Montevecchi: Th. Reinach, *Un code fiscal de l'Égypte romaine, le Gnomon de l'Idiologue*, Nouvelle revue historique de droit français et étranger, 44 (1920), p. 5-136, p. 39; Germain, *Aspects du droit d'exposition* (*supra*, n. 17), p. 184; Montevecchi, *I paragrafi* (*supra*, n. 4), p. 972. Boswell, on the contrary, was of the opinion shared by us: J.J. Boswell, *The Kindness of Strangers, The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance*, Chicago 1988, p. 63.

43 That *expositi* were sometimes reclaimed in liberty by persons other than their fathers is corroborated by Suet., *de gramm*. 21, discussing the case of Melissus, whose mother attempted to reclaim him in liberty (*infra*), as well as by D. 40,4,29 by Scaevola, in which an exposed son was recognised by his grandmother (both of these sources are discussed later in the present study).

Emperor, Pliny, who was the governor of Bithynia, mentions an edict of Augustus for Andania, as well as *epistulae* of Vespasian and Titus to the Lacedaemonians and Acheans[44]. Unfortunately, we know nothing about the content of these constitutions. The correspondence of Trajan and Pliny confirms that, in the Roman period, both the practice of exposing children and the variety of related legal problems were well known not only in Rome and Egypt, but also in other provinces of the Empire, notably those with a Hellenic past. It is also important to stress that Romans did intervene in order to regulate this practice.

The question whether foundlings raised as slaves really remained free from the legal point of view appears somewhat complicated by two testimonies in the *de grammaticis* of Suetonius: here we find two descriptions of freeborn men, exposed by their parents, brought up as slaves and then formally manumitted. The fact that they were manumitted may suggest that they had become slaves after their exposure.

The first is the case of Marcus Antonius Gnipho, the first-century rhetor, who was exposed as a child in Gaul, rescued and raised as a slave, then manumitted and appointed as heir in his educator's will; *de gramm*. 7:'[7] *M. Antonius. Gnipho*, *ingenuus in Gallia natus sed expositus*, *a nutritore suo manumissus institutusque*' (M. Antonius Gnipho, born as free in Gaul but exposed, was manumitted by his *nutritor* and instituted)[45].

The fact that Gnipho was manumitted – even though he had been born free, and would thus have been free according to the principle described above – may seem surprising. It may, however, be explained by the difficulty of proving one's freeborn status in the legal procedure[46]: a supposed slave was not allowed to bring the case before the praetor himself, but needed the help of a free Roman citizen who would claim his freedom; proofs that he had been

44 Plin., *Ep*. 10.65: 'Magna, domine, et ad totam provinciam pertinens quaestio est de condicione et alimentis eorum, quos vocant 'threptous'. [2] In qua ego auditis constitutionibus principum, quia nihil inveniebam aut proprium aut universale, quod ad Bithynos referretur, consulendum te existimavi, quid observari velles; neque putavi posse me in eo, quod auctoritatem tuam posceret, exemplis esse contentum. [3] Recitabatur autem apud me edictum, quod dicebatur divi Augusti, ad Andaniam pertinens; recitatae et epistulae divi Vespasiani ad Lacedaemonios et divi Titi ad eosdem et Achaeos et Domitiani ad Avidium Tigrinum et Armenium Brocchum proconsules, item ad Lacedaemonios'.

45 According to Boswell, Gnipho was adopted by his rescuer, but this interpretation is unsupported by the Latin text saying *manumissus institutusque.* The latter participle clearly refers to *heredis institutio*, whereas the first is a technical term denoting the formal act of freeing a slave. Boswell, *The Kindness of Strangers* (*supra*, n. 42), p. 116.

46 Cf. Lanfranchi, *Ius exponendi* (*supra*, n. 36), p. 35.

born free would have been required, which may have been difficult for a foundling to produce. Consequently, it may have been easier simply to manumit a supposed slave rather than go through the process of demonstrating his free birth. Moreover, in Gnipho's case we cannot be certain whether he was born as a Roman – if not, the manumission might have been preferable, in so far as it granted him the Roman citizenship, which he would not obtained, had he won the process for liberty.

The second case described by Suetonius is even more telling, as the freeborn status of the foundling was not only known but apparently demonstrable (*de gramm.* 21). Melissus, later a famous grammarian, was exposed by his mother after some quarrel with her husband (we do not know the cause of the quarrel, especially whether it had anything to do with the legitimacy of Melissus). Melissus was brought up as a slave and sold to Maecenas. When his mother attempted to claim him back – she probably wanted to claim his freedom since, as a woman, she could not have *potestas* over her son – he refused and accepted *manumissio* from Maecenas instead. Both cases demonstrate that individuals who were brought up and lived as slaves – which was the fate of most foundlings – even if *de iure* still free, were treated in practice as slaves and sometimes even manumitted.

Not only the freeborn status of the *expositi*, but also their *status familiae* – that is, their bonds to their original family, the rights of the *paterfamilias* towards them, and their right of inheritance[47] – was not affected.

47 Volterra, *L'efficacia* (*supra*, n. 18), p. 458-459. To support this view, Volterra cites D. 40,4,29 (Scaevola). It should be noted, however, that in the case discussed by Scaevola the son had been exposed by the mother without the father's knowledge. That such an exposure would not have extinguished the *patriapotestas* (nor, as a consequence, the son's rights to inheritance) seems obvious. However, this should not automatically suggest that exposure effectuated by the father – and as such manifesting his own wish to expel the child from the family – would have cancelled his *patriapotestas* and, as a consequence, the hereditary rights of the son. Furthermore, other sources discussed in our present study confirm the opinion that the exposure did not break *patriapotestas*, even when effectuated by a legitimate father. As a consequence, it would not have deprived an exposed child of hereditary rights in his *familia* of origin either. Therefore, notwithstanding the above objection to the interpretation of Scaevola's text, we adhere to the view that both *patriapotestas* over *expositus* and his hereditary rights persisted regardless of exposure. As to the interpretation of Scaevola's text, cfr: Lanfranchi, *Ius exponendi* (*supra*, n. 36); H. Ankum, *D. 40,4,29 Scaevola l. 23 digestorum*: *un drame matrimonial romain ayant des coséquences juridiques complexes*, in: Marriage, Ideal – Law – Practice, in Proceedings of a Conference Held in Memory of Henryk Kupiszewski in Warsaw on the 24th of April 2004, ed. Z. Służewska / J. Urbanik, Warsaw 2004, p. 1-5; O. Tellegen-Couperus, *Father and Foundling in Classical Roman Law*, Journal of Legal History, 34 (2013), p. 129-138.

A constitution of Diocletian and Maximian requires the consent of a *paterfamilias* for the marriage of his exposed daughter, and allows him to prevent the marriage provided he pays the alimonies for her upbringing to her rescuer[48]:

> C. 5,4,16:
> Diocl. et Maxim. AA. et CC. Rhodoni. Patrem, qui filiam exposuit, at nunc adultam sumptibus et labore tuo factam matrimonio coniungi filio desiderantis favere voto convenit. Qui si renitatur, alimentorum solutioni in hoc solummodo casu[49] parere debet.
>
> Diocletian and Maximian Augusti and Caesares to Rhodo. It is required that a father, who exposed a daughter having been now raised at your expense and trouble, accepts your wish to marry her to your son. Only if he resists, he should provide you with a payment of the maintenance.

The fact that the decision of a father who had exposed his daughter was considered relevant to her marriage demonstrates that the father's paternal rights remained unchanged despite the exposure. This seems not to have been the result of the imperial decision reported in the discussed constitution, but rather its presupposition: had the exposure of a child extinguished paternal power, the question of whether the exposing father could prevent the daughter's marriage to the rescuer's son, would not have arisen. The scope of the imperial decision concerned precisely the limitation of paternal power, in so far as it made his right to prevent the marriage dependent on the payment of alimonies. It follows that continuation of the *patria potestas* after exposure was the general rule, to which emperors could introduce certain limitations. Since there is no indication that a contrary rule had once existed and was subsequently changed, we may suppose that the rule had always been valid in

48 See A. Lovato, Vindicatio puerorum *e* status *degli esposti nel tardoantico*, in: Ravenna capitale, Giudizi, giudici e norme processuali in Occidente nei secoli IV-VIII, ed. G. Bassanelli, Ravenna 2015, p. 239-254, p. 248-250 commenting also on the proprietary rights of an exposing master.

49 According to Volterra, *L'efficacia* (*supra*, n. 18), p. 460, the expression: *in hoc solum modo casu*, in the sense that exclusively in this case (i.e. in order to oppose the exposed daughter's marriage) is the father obliged to pay alimonies, is interpolated, because the Roman rule would require the payment of alimonies in every case in which the father attempts to make valid his rights to the exposed child. However, the expression in question may also be understood as underlining the fact that *paterfamilias* who does give his consent, thus respecting the decision of the educator (i.e. the one that does not try to oppose the latter his rights), is not obliged to pay.

Roman law. Certainly, this would seem to conform to the Roman concept of *patria potestas* as a strong power, unlimited in time. As Lanfranchi rightly observed[50], the removal of paternal power required a strictly formalised act of emancipation which, in the case of sons, involved a triple fictive sale.

4.2 *Status*

Another aspect of the above constitution that deserves our attention concerns the status of the exposed girl in her rescuer's family. In so far as she was capable to marry the son of her rescuer, she must have been free herself. For the same reason, she could not have had the position of adoptive daughter in the family; indeed, had she been adopted, she could not be given into marriage to her adoptive brother. Moreover, the consent of her original father for her marriage would not have been required, as she would no longer be under his *patria potestas*[51]. It follows that bringing up a foundling in one's family was not sufficient to alter his family status and cannot thus be considered a form of adoption.

The practice of raising foundlings as free persons rather than slaves was not unknown in Roman society. However, their position in the family of their rescuers was that of children *de facto* but not *de iure*. Unlike adopted children, they did not belong to the rescuer's agnatic family, and would not thus have been under the rescuer's paternal power, nor would they have been his legitimate heir.

5 Adoption – Deed

We suggest that the absence of evidence in the Roman sources regarding the adoption of foundlings was due to legal obstacles that would have made such an adoption legally impossible. The primary obstacle, as discussed above, was the permanence of the *patria potestas*. If the exposed child was legitimate, it would have remained under the *patria potestas* of its natural father, regardless of the exposure. The appropriate course for a rescuer would have involved

50 Lanfranchi, *Ius exponendi* (*supra*, n. 36), p. 34; cf. also Volterra, *L'efficacia* (*supra*, n. 18), p. 457: 'I rapporti fondati sulla *patriapotestas* non cessano con l'expositio … il che e' logico quando si pensi che il paterfamilias non puo' far uscire il filius dalla propria potestas, se non ricorrendo ai tassativi e complicati modi formali stabiliti per l'emancipazione, o per la cessione della manus della filiafamilias'.

51 According to Judith Evans Grubbs the girl was an adoptive daughter: Evans Grubbs, *Infant Exposure* (*supra*, n. 37), p. 95. As we have argued in the text, however, the girl could not be an adoptive daughter of her rescuer.

adoptio, which required not only the identity of the father to be known, but also a willingness on the part of the father to cooperate.

The second form of adoption, *adrogatio*, did not require a cooperation of the original father, but it was possible only if the adoptee was a Roman citizen and was not under paternal power of another person (the adoptee had to be *sui iuris*). In the case of foundlings, this deed would hardly be plausible, as the original father, who had never legally lost his rights to the child, could later recognise it. In such a case *adrogatio* had to be declared invalid[52]; yet to declare a formal act such as *adrogatio* invalid would seem to contradict the Roman legal mentality. Rather, the Romans – be it a *collegium* of *lictores* in the early Principate, or the emperor himself, since Diocletian – would have been reluctant to accept *adrogatio* for a person known to be a foundling and therefore of an uncertain status regarding both their freedom (*status libertatis*) and their being *sui* or *alieni iuris* (*status familiae*)[53]. Considering the far-reaching effects of *adrogatio*, it is unlikely that an analogy with *manumissio* – which, as we have seen, would have been admissible, despite an uncertainty as to whether an individual was freeborn or a slave – can be drawn.

The above objection concerning the permanence of *patria potestas* might be ruled out on the grounds that cases in which an abandoned child was found and recognised by their father must have been extremely rare in practice. Yet, the number of imperial constitutions regarding the problem is striking (see *supra*). In the literature it was suggested, quite plausibly in fact, that exposure of children in practice must have often consisted in abandoning them in a house of a person known to their parents, a neighbour perhaps, and who could be expected to take care of a child. This would explain both the possibility to recognise the child afterwards and attempts to regain the child, e.g. if the material situation of parents improved[54].

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52 Henryk Kupiszewski claimed that it was indeed the *adrogatio* which served as a means of adopting a foundling. He argued that it must have been possible through accepting the *fictio* that the *expositus* was a person *sui iuris.* If a legitimate father or an owner claimed a foundling adopted in this way back, *patriapotestas* of an adoptive father would have been automatically dissolved. Yet, Kupiszewski did not present any sources supporting his hypothesi:. H. Kupiszewski, *Porzucenie dziecka w prawach antycznych* (Exposure of children in ancient laws), Meander, 11.1-2 (1956), p. 56-67.

53 It has to be stressed, however, that the requirements of *adrogatio* were loosen from the time of Diocletian.

54 Evans Grubbs, *Infant Exposure* (*supra*, n. 37), p. 94. Carcopino claimed that children were exposed to public dump-hills, so everyone knew where to find *expositi*. See J. Carcopino, *Le droit romain d'exposition des enfants et le Gnomen de l'idiologue*, Mémoires de la Société nationale des antiquaires de France, 77 (1928), p. 59-86, passim. The hypothesis seems

The second obstacle stems from the bilateral character of both forms of adoption known in Roman law. *Adoptio* proper involved the cooperation of the father of the child, and *adrogatio* required the agreement of the adrogated individual. In order for such an agreement to be valid, the adrogated individual had to be adult: in the Republic and early Principate the adrogation of anyone under-age was excluded (*N.A.* 5.19.10). The possibility of adrogating an *impubes* with the consent of his guardian was first introduced by Antoninus Pius, who specified that *pontifices* must determine if there was a just cause for adrogation (G. 1.102). A more flexible form of *adrogatio* based on imperial rescript was introduced in the provinces under Hadrian (G. 1.55, G. 1.93, G. 1.94), and was gradually implemented in the *Urbs*. Although somewhat looser than *adrogatio per populum*, it continued to be an official act, requiring careful investigation of the causes, and subject to certain limitations, such as those concerning freedmen. Needless to say, it was available only to Roman citizens. It is unlikely, therefore that the *collegium* of *lictores* or the imperial chancellery would have allowed for the *adrogatio* of a foundling whose status was unknown. As the letters between Pliny and Trajan illustrate, problems concerning the status of exposed children were of high importance to the Romans, who seem to have been well aware that not only Roman fathers but also Greek ones might wish to recover their exposed children. The *adrogatio* of a foundling would thus have been as inconceivable for the Romans as *adoptio*.

In Roman juridical sources, however, we do have traces of an adoption in which neither the adoptee himself nor their father could take part: the adoption of a slave by his master. Accordingly, it could not have been either *adoptio* proper or *adrogatio.* Adoption of a slave was still possible in the Republic. From the beginning of the Principate, however, it was no longer possible under Roman law[55]. It was excluded most probably due to the change of *status libertatis* caused by such an adoption. Although the adoption (*adrogatio*) of a freedman was still possible in the Empire, the jurists decided that it did not elevate his status to that of a freeborn person: he would remain a freedman. *A fortiori*, adoption of a slave could not elevate his status to that of a free person, and since the slave could not be a member of the agnatic family of a free per-

rather probable, as the number of foundlings raised for slaves attested in documents from Roman Egypt is high, see *supra,* n. 4. The practice claimed by Carcopino should facilitate recognition of exposed children by their natural parents, especially if a child was exposed in the same neighborhood where its parents lived.

55 A. Watson, *The Law of Persons in the Later Roman Republic*, Oxford 1967, p. 90: Gellius says it explicitely, Gell., *NA* 5.19.13-14: 'Alioquin, inquit, si iuris ista antiquitas servetur, etiam servus a domino per praetorem dari in adoptionem potest'; and it is also clear from I. 1,11,12 which refers to Cato, not to classical jurisprudence.

son, it had to be excluded[56]. The adoption of a slave by his master is analogous to that of a foundling, in so far as neither the adoptee himself nor their father or master could act on their part, i.e. as a person giving in adoption, which makes both *adoptio sensu stricto* and *adrogatio* hardly conceivable[57].

Only one source mentions a foundling who seems to have been adopted not only *de facto* but also *de iure*, since he obtained the position of legitimate heir (*suus heres*) in the educator's family. This adoption seems to have been completed by unilateral act and it is described in *declamatio minor* no. 278 by Pseudo-Quintilian. The declamation regards the controversy between the educator of the foundling and his original father concerning the prize conferred by the State to the young man; the prize was given to the educator who had raised the boy as his own. As many commentators have rightly pointed out, the fact that the original father attempts to claim the prize by arguing that he retained the rights of a *pater familias*, seems to confirm the rule that exposure did not extinguish *patria potestas*, which would rule out adoption by another individual without the father's consent. The position of the foundling in the family of his educator should thus be interpreted as that of his son only *de facto*, but not *de iure*.

The declamation is mostly consistent with what we find both in other declamations and in the juridical sources. There is, however, one circumstance, which appears to have escaped the attention of previous commentators, and which complicates our image of the foundling's position in the educator's family. The educator claims – and his argument is uncontested by his opponent

56 E.J. Gardner, *The Adoption of Roman Freedmen*, Phoenix, 43.3 (1989), p. 236-257, p. 240.

57 The adoption of slaves is referred by two sources: Gell., *NA* 5.19.11-14 and I. 1,11,12. The latter clearly refers to the situation in which an owner was an adopter: 'Apud Catonem bene scriptum refert antiquitas, servi, si a domino adoptati sint, ex hoc ipso posse liberari. Unde et nos eruditi in nostra constitutione etiam eum servum quem dominus actis intervenientibus filium suum nominaverit, liberum esse constituimus, licet hoc ad ius filii accipiendum non sufficit'. The procedure is, however, difficult to reconstruct, as sources do not describe it. Yet, a few interprtations were offered so far. *E.g*. Wlassak claimed that the adopter played the role of *adsertor liberatatis* and that the the procedure consisted of *adoptatio* and *manumissio vindicta* joined together: M. Wlassak, *Die prätorischen Freilassungen*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung, 26 (1905), p. 367-431. This is the interpretation accepted by Kaser in his Handbook of Roman Private Law (M. Kaser, *Das römische Privatrecht*, Erster Abschnitt: *Das altrömische, das vorklassische und das klassische Recht*, Munich 1971). Yet, Watson proposed another interpretation: manumission would be tacit and, thus, the *adoptio* could be used for manumission – *ex hoc ipso posse liberari*: A. Watson, The Law of Persons (*supra*, n. 55), p. 90-98. Both interpretations would recquire a fictitional father *fiduciae causa.*

– that the foundling would have inherited from him *ab intestato*, if he had not been recognised by the original father (278.6.1-2: *Num dubium est quin, si intestatus decessissem antequam tu agnosceres, aditurus ille hereditatem quasi filius fuerit*?: Then is it doubtful that he would have taken this inheritance as (my) son, had I died intestate before you recognised him?). Such a claim presupposes that the educator considered the foundling to be not merely a *de facto* son, but a fully legal member of his own agnatic family. Moreover, it is also mentioned that the boy had been inscribed in the census as the educator's son (278.7.4-5: *infra*), which would have acted as an official attestation that he belonged to the educator's agnatic family and, as a consequence, had right to inherit from the educator *ab intestato*.

Considering that *Declamationes minores* are often based on Greek models, one might argue that the declamation we are considering reflects rather Greek than Roman legal practice. Yet, it seems improbable for a couple of reasons. As we have argued above, in the Greek (or at least Athenian) context the possibility to adopt a foundling was even less plausible than in Rome both in legal and social terms. The fact that in the declamation the enrollment in the census list is mentioned also suggests the Roman context rather than the Greek one. In the recent literature on the subject, it has also been convincingly argued that the *Declamationes minores* do reflect Roman legal awareness, even if they may deform, for the sake of dramatic effect, Roman legal institutions[58]. It seems to us therefor plausible, that the story described in the declamation does reflect a social or legal practice at least conceivable from the point of view of the Roman public.

On this assumption, can we consider the passage in question as an evidence for a third form of adoption, distinct from *adrogatio* and *adoptio* that would have taken place solely by virtue of inscription in the census? It is technically possible: indeed, this hypothetical form of adoption is strikingly similar to *manumissio censu*, by which a slave is freed by being inscribed in the census list as a free citizen. Moreover, it seems likely that this would have been the form applied in the adoption of one's own slave, which had been possible in the Republic but was prohibited in the imperial period (see *supra*).

It is striking, however, that this form is never mentioned by the jurists. Moreover, both *adrogatio* and *adoptio* were subject to certain restrictions and limitation – for example the impossibility of adopting one's own freedman, except

58 For the discussion concerning relevance of school controversies for the study of Roman law, cf. D. Mantovani, *I giuristi, il retore e le api, Ius controversum e natura nella Declamatio maior XIII*, in: Testi e problemi del giusnaturalismo romano, ed. D. Mantovani and A. Schiavone, Pavia 2007, p. 323-385, p. 325-327, with the cited literature.

in situations in which the adopting father had no children of his own – which could have been easily circumvented by recourse to the sole census inscription. The strongest objection, however, derives from the fact that, in the case described above – the only example of this supposed form of adoption – its effects are apparently reversible: they are cancelled as soon as the foundling is recognised by the original father. Moreover the father seems to retain his rights over the son even before the recognition: it is on these grounds that he claims the restitution of the prize which had been granted to his son before he recognised him.

We, therefore, propose another interpretation: what we find in the declamation is an alternative practice, applied in irregular cases – such as those of foundlings – consisting simply of inscribing an individual in the census list as one's own child, probably without revealing the circumstances of its birth[59]. Such an inscription would have created the presumption that the person in question did belong to the family, although it could still be overruled by the proof to the contrary (as in our case, by being recognised, *adgnitus*, by his natural father)[60]. From the fragmentary response of Papinian (*Fragmenta Parisiana* 1.1-3, ed. Girard and Senn, no. 6), we know that still in the third century CE Roman citizens who avoided registration were punished. Moreover, Roman citizens are also attested in census in provinces[61]. This implies that in Ps.-Quintilian's time inscription of a foundling in the census list was at least

59 The passage from Juvenal's satire (*Sat*. 6.602-9), in which the poet accuses rich Roman women of not begetting children in order to avoid the burdens of pregnancy and instead presenting foundlings as their own, seems telling in this context. Such foundlings, whether with the knowledge of their declared fathers or not, must have been simply declared as their own natural children.

60 It is difficult to say if there was a penalty for such a false entry into the census. We know of a prescription, according to which not presenting oneself to the census – i.e. not participating in it at all – was penalised with the loss of citizenship and the sell into the slavery. It is not plausible, however, that the same penalty would apply to false inscription of the family members. In *Pro Caecina* 99, Cicero explains that he who did not inscribe himself in the census as a citizen thereby resigned from his citizen rights. As a matter of fact, such an explanation seems to preclude the application of this provision in cases of false declarations concerning either one's property or one's family members.

61 For attestations of census in Roman law sources in the classical period and detailed analysis of the penalties for noncompliance see: A. Tarwacka, *Prawne aspekty urzędu cenzora w starożytnym Rzymie* (Legal Aspects of the Office of Censor in Roman Law), Warszawa 2012, p. 175-191. Cf. also A. Tarwacka, *The Consequences of Avoiding 'census' in Roman Law*, Revista General de Derecho Romano, 21 (2013), p. 1-16. The evidence from Roman Egypt suggests that Romans had to fill census returns also in the provinces: R.S. Bagnall / B.W. Frier, *The Demography of Roman Egypt*, Cambridge 2006, p. 11-12.

theoretically possible and understandable for the Roman public, so as *manumissio censu* was.

Moreover, in the Principate birth returns were filled for Roman children[62]. From juridical sources, it follows that false registrations happened. In D. 22,3,29,1, Scaevola describes a case of a divorced woman who, in order to punish her ex-husband, registered their legitimate child as a *spurius*. It is easy to imagine therefore, that a foundling could have been registered as a legitimate child of his or her *nutritor.* Hence, he or she would have passed as a *nutritor*'s own child until a proof to the contrary was provided. Both Scaevola's text and a Diocletian's constitution (C. 7,16,15) confirm, that a proof to the contrary was admitted[63]. The question of potential responsibility for false registration remains open[64].

It has to be stressed, however, that the above described practice was not a type of adoption, but rather a simplified practice intended to avoid the formalities of adoption, especially when adoption was not possible due to legal obstacles. For this reason it would not have been recognised by the jurists as a form of adoption and consequently is not mentioned in juridical sources. The

62 It is, however, debatable whether they were compulsory for Roman citizens and whether illegitimate children could be registered only from the time of Marcus Aurelius. This is the theory elaborated by Schulz (*Roman Registers of Births*, The Journal of Roman Studies, 32.1-2 (1942), p. 78-91) and widely accepted for a few decades. Yet, see the contrary and rather convincing interpretation of C. Sánchez-Moreno Ellart, *Notes on Some New Issues Concerning the Birth Certificates of Roman Citizens*, The Journal of Juristic Papyrology, 34 (2004), p. 107-119 (summarizing discussion and listing documentary attestations of *professiones*). Not only Romans filled birth returns for their children, but also other civic groups inhabiting Roman Egypt, and perhaps the entire Roman Empire (yet, the evidence comes from Egypt). See C. Sánchez-Moreno Ellart, '*ὑπομνήματα ἐπιγεννήσεως*, *The Greco-Egyptian Birth Returns in Roman Egypt and the Case of P. Petaus 1-2*, Archiv für Papyrusforschung und verwandte Gebiete, 56.1 (2010), p. 91-129.

63 cf. Schulz, *Roman Registers* (*supra*, *n.* 62), p. 87.

64 Falsification of private and official documents other than testaments had been subsumed under the *lex Cornelia de falsis* on the basis of different *senatus consulta* and juristic interpretations in course of the first century CE. The widening in question was, however, gradual and casuistic, and none of the sources mentions the case of false declaration in either private or official documents as punishable under the *lex Cornelia*: Schulz (*Roman Registers* (*supra*, *n.* 62), p. 87) notes D. 48,10,13*pr*. by Papinian – '*Falsi nominis vel cognominis adseveratio poena falsi coercetur*' – as the proof of responsibility for false declaration of a child in the birth register, such as the one described in D. 22,3,29,1 (Scaevola). Even if he was right, we are already in the second half of the third century CE, considerably later than the *lex Cornelia.*

social aim of this practice was similar to that which would have been achieved in normal circumstances by adoption proper.

Our knowledge of Roman adoption, with its exclusive forms of *adoptio* and *adrogatio*, as well as the reluctance of Roman jurists to accept a change of personal status by virtue of adoption, would seem to negate the possibility of adopting a foundling under Roman law.

6 Foster children – an alternative to adoption?

The lack of formal adoption does not imply that foundlings would have always been raised as slaves. As the constitution of Diocletian (*supra*) and the declamations illustrate, foundlings could be brought up as free persons, and even enjoyed paternal affection of their rescuers, although they did not belong to their rescuers' agnatic family. Those foundlings belonged to the wider category of *alumni*[65]. As Hanne Sigismund Nielsen has observed, *alumni* could be either free individuals or slaves; both, however, were considered foster children in the families which raised them[66]. The category of free *alumni* – raised in a similar manner to the agnatic children, is especially relevant to our discussion, and of the 27 attestations of the term *alumnus* in the Roman juridical sources collected by Nielsen, those pertaining to this category are of special interest[67].

There are several passages which illustrate the position of such children within Roman families: they were raised as their fosterers' own children and consequently appointed as their heirs (D. 33,2,34,1: *alumnus* appointed to 80% of the inheritance; D. 31,88,6: *alumna* appointed a co-heir with freedmen; D. 32,41,12: a woman substituted her *alumna* for her husband and charged him with a *fideicommissum* so that he appointed the *alumna* as his heir; D. 34,9,16,1: *alumna filia vulgo quaesita* appointed co-heir with a grandchild of a testator) or bequeathed with legacies (D. 32,78,3; D. 32,102,2; D. 33,1,21,4; D. 33,7,20,2; D. 34,1,15; D. 34,2,18*pr*.-1; D. 34,4,30). The strategy of raising *alumni* and appointing them as heirs is attested also in literary sources, notably Suetonius' *de gramm.* 7: [7] (*supra*).

A group of sources points to the difference between *alumni* and adoptive children. Ulpian, commenting on *sc Silanianum* – which ordered that all the slaves living in a house should be killed in the event that their master or any of

65 H.S. Nielsen, '*Alumnus*', *A Term of Relation Denoting Quasi-Adoption*, Classica et Mediaevalia, 38 (1987), p. 141-188, p. 142-143; 159-160; Volterra, *L'efficacia* (*supra*, n. 18), p. 455-456.

66 Nielsen, *Alumnus* (*supra*, n. 65), p. 142-143.

67 Nielsen, *Alumnus* (*supra*, n. 65), p. 148-157.

his family members were murdered – decides that this provision did not apply to an *alumnus*: if an *alumnus* were killed, the slaves of the house should not be killed:

> D. 29,5,1,9-10:
> 9. In eo, qui est in adoptionem datus, non putamus locum habere senatus consultum, quamvis in adoptato locum habet. 10. Sed nec in alumno occiso locus est senatus consulto.
>
> We do not believe that the *senatus consultum* applies to a person given into adoption, although it applies to an adoptive child. But to an *alumnus* killed the *senatus consulum* does not apply.

On one hand, this passage suggests that the *alumnus* did not possess the status of an adopted child in his *de facto* family; on the other hand, it shows that raising an *alumnus* was close to adoption in social terms. If this was not the case, the explanation that *senatus consultum* did not apply to such children would not have been necessary[68].

Another passage suggesting the affinity between an *alumnus* and an agnatic child is a fragment from Scaevola's *digesta*, D. 33,2,34,1[69]. In this passage, a testator names two wet-nurses as heirs to 10% of his inheritance each and leaves the rest to his *alumnus*; the testator also appoints a curator for the *alumnus* – erroneously believing that he had the right to do so (*curatorem alumno dedit, cum iure facere putaret*) – and orders this curator, by way of *fideicomissum*, to prevent the *alumnus* from selling a farm so that its revenue would provide for all the three co-heirs (*ususfructus*).

The question arose of whether or not the two nurses could claim their part of *ususfructus fundi* on the basis of the above *fideicommissum*, and the objection stemmed from the fact that the individual nominated as curator could not have been considered as such, since it was impossible to appoint a curator for an *alumnus* (*quamvis curator ei receptus sit, quem iure dare non poterit*

68 Rightly described by Nielsen as quasi-adoption: Nielsen, *Alumnus* (*supra*, n. 65), p. 154.

69 'Qui Semproniam ex parte decima et Maeviam ex parte decima, alumnum ex reliquis partibus instituerat heredes, curatorem alumno dedit, cum iure facere putaret: et curatoris fidei commisit, ne pateretur fundum venire, sed cum Sempronia et Maevia nutricibus suis frueretur reditu eius: et ima parte testamenti ita adiecit: 'omnem voluntatem meam fidei heredum meorum committo'. Quaesitum est, an tertias partes usus fructus fundi nutrices ex fideicomisso petere possint, quamvis curator ei receptus sit, quem iure dare non poterit alumno. Respondit secundum ea quae proponerentur utiliter fideicommisso voluntatem suam confirmasse: id igitur dedisse, ut et nutrices una cum alumno reditu fundi uterentur'.

alumno). It follows that an individual so appointed had no right to administer the estate of the *alumnus* and could not provide for the realization of the *fidei-commissum.* Indeed, a curator could be appointed only by a magistrate to an adult individual *sui iuris*, and only on the personal request of the said adult. As a consequence, the appointment in the testament was void. As was rightly observed in the literature, the testator probably wanted to appoint a tutor to his (still under-age) *alumnus*, but erroneously denoted him as curator[70]. Yet even this would not have been possible in our case: a tutor could only be appointed in a testament to a child under *patria potestas* of the testator[71], and an *alumnus* would not have belonged to this category. Scaevola thus specifies that an *alumnus* was a person for whom it was impossible to appoint a guardian:– '*curator* (…) *iure dare non poterit alumno*'. The case may have been as follows: the testator acted as a father toward his *alumnus*, despite not being his father *de iure*; yet he believed that he was entitled to appoint a guardian for him (as a father would), albeit not in form of a tutor, but rather that of a curator. He was wrong on both counts – his relationship to the *alumnus* did not entitle him to appoint a tutor, and a curator could not have been appointed in a testament or to an under-age individual. It is important to note, however, that the testator clearly treated the *alumnus* as his son, and provided him with an inheritance.

Another example of an *alumnus* being treated as a quasi-child is visible in a constitution of Justinan (C. 5,4,26). The constitution discusses whether or not a man could marry his own freedwoman and *alumna*. It is important for us that the constitution refers to earlier discussions referred to in *principium* of the text: '*Si quis alumnam suam libertate donaverit et in matrimonio suo collocaverit, dubitabatur apud antiquos, utrumne huiusmodi nuptiae legitimae esse videantur, an non*' (It was deliberated by the ancient jurists, whether, if anyone had given freedom to his *alumna* and married her, the marriage was considered to be legitimate or not). The reference to 'ancient jurists' suggests that the problem had been discussed under classical jurisprudence; the hesitation of these jurists may have resulted from the position occupied by the *alumni* with-

70 L. Dessanti, *De confirmando tutore vel curatore*, Milano 1995, p. 40, n. 51. An analogous error, consisting in nominating a curator instead of a tutor for an *impubes* child, is attested in Papinian's responses: D. 26,3,6: 'Si filio puberi pater tutorem aut impuberi curatorem dederit, citra inquisitionem praetor eos confirmari debebit'. For the discussion and other sources, see Dessanti, *De confirmando* (*supra*), p. 99-105. The discussion of Scaevola's text on p. 105-106.

71 The exception is a natural father who made a bequests in favour of his illegitimate son: D. 26,3,7*pr*.

in some Roman families, and the parent-child relationship which could exist between them and their fosterers[72].

The epigraphic material provides a picture similar to that of the legal sources. In the sixth volume of the *Corpus Inscriptionum Latinarum* there are cases in which *alumni* are commemorated in the same way as the commemorators' own children[73], or even together with their own children and their spouses[74]. The epithets used to describe *alumni* were often similar to those by which a Roman might commemorate their legitimate children[75].

Raising a foundling as one's own child, providing it with all or part of one's inheritance, and even letting it use the family name, would have conferred on the foundling a position similar to that of an adopted child – at least in so far as the private law was concerned – without the necessity of a formal adoption.

7 Adoption in Egypt: Local Law and Practice

Adoption in Egypt – both before Alexander the Great and under the Ptolemies – seems less rigid that either Athenian or Roman practices. This makes the adoption of a foundling easier to imagine than it would have been under Greek or Roman laws.

7.1 *Adoption in Egypt before Alexander the Great*

In our Egyptian sources, neither the unilaterality of the deed nor the change in the status of the adoptee seems to have been obstacles to adoption. Among the documents which bear witness to adoption practices on the Nile, the famous Adoption Papyrus is of high importance[76]. The papyrus records a few deeds

72 The solution proposed by Justinian is in line with the picture arising from the sources discussed so far (C. 5,4,26,1). He decided that such a marriage was lawful explaining that no man should be so impious to marry a girl whom he had raised as his own daughter from the beginning, therefore his decision applied to opposite situations in which a girl had not been raised as a daughter and her master decided after some time that she was worthy to marry. Therefore, the constitution illustrates that *alumni* were not a coherent group also in the late Empire.

73 See Nielsen, *Alumnus* (*supra*, n. 65), p. 173-175.

74 See Nielsen, *Alumnus* (*supra*, n. 65), p. 169-172.

75 H.S. Nielsen, *Interpreting Epithets in Roman Epitaphs*, in: The Roman Family in Italy, Status, Sentiment, Space, ed. B. Rawson and P. Weaver, Oxford 1997, p. 169-204, p. 183.

76 *P. Ashmolean Museum* I 945.96; A.H. Gardiner, *Adoption Extraordinary*, The Journal of Egyptian Archaeology, 26 (1941), p. 23-29 (with F. De Zulueta's commentary on p. 26-29); A. Théodoridès, *Le papyrus des adoptions*, Revue internationale des droits de l'Antiquité,

undertaken by a stable master, Nebnefe, and his wife, Renefer. The first deed recorded on the papyrus is dated to the enthronement day of Ramesses XI. The first step involved the husband naming his wife as his daughter (i.e. adopting her)[77]. He next bequeathed[78] his entire property to her, excluding (disinheriting?) his relatives[79]. The aim of both deeds was to provide an heir to Nebnefe's estate, as the couple was childless. Interestingly, the adoption and the bequest seem to be two separate deeds, which suggests, that adoption did not necessarily provide proprietary effects[80]: if the adoption itself did not result in making the wife the husband's heir, it may have been necessary to grant the property separately.

The second part of the papyrus records events which took place several years later (it is dated to the 18th year of Ramesses XI). The couple declared that they had bought a slave-woman who bore three children, perhaps fathered by Nebnefe[81]; the declaration then switches into the first person singular[82]. Renefer, the wife, declared that she had nourished and raised those children up to the present day (possibly the 18th year of Ramesses XI)[83], having no other children; her younger brother Padiu entered her house and married the

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12 (1965), p. 79-142; S. Allam, *Hieratische Ostraka und Papyri aus der Ramessidenzeit*, Tübingen 1973, p. 258-267, no. 261; E. Cruz-Uribe, *A New Look at the Adoption Papyrus*, The Journal of Egyptian Archaeology, 74 (1988), p. 220-223; S. Allam, *A New Look at the Adoption Papyrus* (*Reconsidered*), The Journal of Egyptian Archaeology, 76 (1990), p. 189-191. For detailed and complete interpretation of this text, see C.J. Eyre, *The Adoption Papyrus in Social Context*, The Journal of Egyptian Archaeology, 78 (1992), p. 207-221.

77 Théodoridès claimed that the deed was not an adoption, but *une cession à cause de mort*: Théodoridès, *Le papyrus* (*supra*, n. 76), p. 100-109. Eyre suggested that those agreements would have taken place on the occasion of marriage, which seems, however, unlikely. This supposition requires the further one: the couple must have known that their marriage would be childless. Eyre, *The Adoption Papyrus* (*supra*, n. 76), p. 209-210.

78 See A. Théodoridès, *Le papyrus* (*supra*, n. 76), p. 82 n. 11.

79 Nebnefe's sister was present when the deed was produced and therefore, she agreed with its legal content. Théodoridès, *Le papyrus* (*supra*, n. 76), p. 84 n. 23.

80 De Zulueta in: Gardiner, *Adoption Extraordinary* (*supra*, n. 76), p. 27.

81 The practice is well-attested in ancient Near East, see Eyre, *The Adoption Papyrus* (*supra*, n. 76), p. 210-211.

82 For explanations why and whether the second deed was undertaken by Renefer or by both spouses, see: Théodoridès, *Le papyrus* (*supra*, n. 76), p. 85 n. 27; Cruz-Uribe, *A New Look* (*supra*, n. 76); Allam, *A New Look at the Adoption Papyrus* (*Reconsidered*) (*supra*, n. 76); Eyre, *The Adoption Papyrus* (*supra*, n. 76), p. 217. Cruz-Uribe's interpretation of this change of the person speaking gravely influences the entire interpretation of the document.

83 Eyre, *The Adoption Papyrus* (*supra*, n. 76), p. 208 n. 8.

slave-woman's eldest daughter, of which Renefer approved. It should be noted that the status of the daughter – born of a slave-woman and later freed – is not considered an obstacle to her marrying a free person, as it would have been in Roman law.

At this point, the family history becomes complicated. After freeing her brother's newly wedded wife (as well as any future offspring belonging to the couple) and making Padiu head of her household, Renefer made her own brother Padiu her son. The next (or perhaps concurrent) step was to free the other two children of the slave-woman and make them siblings of her brother-son Padiu, thus effectively making them her own children. It is possible that the three children of the slave-woman were raised as Renefer's own offspring and would thus have been prepared for this social function[84]. The final deed recorded on the papyrus was a bequest *mortis causa*[85] of Renefer's property to all four of her children, which also named Padiu as the eldest son[86]. As in the first part of the text, adoption and succession appear to be two separate problems.

The model of adoption presented in this text is disturbing. The most important elements are as follows: the adoption is unilateral and shaped by the intention of the adopting party. Renefer simply declared her intention that both the slave-woman's children and her brother would be counted as her children. It is likely that the brother could have prevented such an adoption by his lack of his consent, but this alternative may not have existed in the case of slaves. Furthermore, the adoption itself did not necessarily grant proprietary effects.

Other documents provide similar information regarding the deed of adoption in Egyptian *chora* and the flexibility of both personal and familial status. A Demotic document from Thebes, dated to 539 BCE (*P. Louvre* E 7832 = Menu, no. 13), belongs to Lot Eisenlohr and the archive of Djekhy and his son Iturech, two Theban choachytes[87]. In this document, a certain Hor declares to Iturech that his heart was satisfied with the sum of money given by Iturech and for this reason he became his son. At the beginning Hor declares that not only himself, but also his future children and entire property (both existing and to be acquired) were under the power of Iturech. There follows a statement that no

84 De Zulueta in: Gardiner, *Adoption Extraordinary* (*supra*, n. 76), p. 28: *de facto* adoption confirmed later.

85 Eyre, *The Adoption Papyrus* (*supra*, n. 76), p. 213.

86 On the position and role of the eldest son in Egyptian succession, see: Eyre, *The Adoption Papyrus* (*supra*, n. 76), p. 215-217.

87 On this archive see: K. Donker van Heel, *Djekhy & Son, Doing Business in Ancient Egypt*, Cairo 2013.

one except Iturech could exercise power over him, including a list of those who were not entitled to any part of him (father, mother, brother, sister, son, daughter, master, mistress and anyone requiring any damage, and him himself). He added that his children were Iturech's children forever; this was followed by a penal clause.

A few elements from this deed should be underlined. The adoption performed here had a bilateral form: becoming a son was the consequence of some payment from the adoptive father; the document does not provide us with information regarding the position that this new son would take in his new family nor, more importantly, about any hereditary rights he may have acquired. Furthermore, the adoptive son used his old filiation; he placed his own (future) children in the power of the adoptive father; he declared that members of his former family had no rights over him (was he denying legal bonds with them?). Interestingly, the deed resembles another document containing the self-sale of an Egyptian named Pefchaw-awi-khonsou (569-563 BCE)[88], as well as the temporal contract of servitude / self-enslavement for

88 *P. Rylands* 3-7 known to us in French translation of Bernadette Menu, *Cessions de services et engagements pour dette sous les rois kouchites et saïtes*, Revue d'Égyptologie, 36 (1985), p. 73-87, no. 8-12. In the first piece belonging to this series and dated to 569 BCE (*P. Rylands* 3 = Menu, no. 8), Pefchaw-awi-khonsou declared himself servant / slave of Djebastefonkh forever. A part of the declaration was that he could not consider himself a private independent person towards Djebastefonkh and that the effects of this 'enslavement' applied not only to Pefchaw-awi-khonsou, but also to his property and children both already born and future. The final clause is that no one except Djebastefonkh was to have any authority over them (Pefchaw-awi-khonsou and his children ?). Importantly, no remuneration is specified. Chronologically later *P. Rylands* 4 = Menu, no. 9 is a transfer of mastership over Pefchaw-awi-khonsou from Djebastefonkh to Nessematawy: Djebastefonkh renunciated his authority on Pefchaw-awi-khonsou arising from the above-discussed contract and handed over this very document (*P. Rylands* 3 = Menu, no. 8) to Nessematawy so that he could use it as a proof of his rights in future (A.F. Botta, *The Aramaic and Egyptian Legal Traditions at Elephantine, An Egyptological Approach*, [The Library of Second Temple Studies], New York 2009, p. 147-148). The following *P. Rylands* 5 = Menu, no. 10 again dated to 569 BCE is a declaration by Pefchaw-awi-khonsou to Nessematawy similar to the one from *P. Rylands* 3 = Menu, no. 8, but with the remuneration. Pefchaw-awi-khonsou became Nessematawy's slave / servant, for the latter provided him with some medication while Pefchaw-awi-khonsou was still in service of Djebastefonkh. The confirmation (or renewal) of the services is repeated. In 568 BCE Pefchaw-awi-khonsou declared that he was satisfied with a sum of money which he received from Nessematawy (*P. Rylands* 6 = Menu, no. 11) and that he was his servant forever, etc. Interestingly, this document was countersigned by Djebastefonkh known to us from the first two documents as a master of Pefchaw-awi-khonsou. The last document belonging to this group dated to 563 BCE

debts known in Graeco-Roman Egypt as *paranome*[89]. The self-sale of Hor repeats clauses from the documents pertaining to Pefchaw-awi-khonsou and resembles the model of giving oneself into the power of someone else as a servant[90]. This could suggest that the adoption was informal and rather unwritten and as such it did not have ready-forms[91].

Among the Aramaic papyri from Elephantine belonging to the Ananiah Archive, we find a series of documents attesting the marriage of the archive's owner to a slave-girl, Tamet, and its legal consequences. At the time when the marriage contract for Ananiah and Tamet (who belonged to Meshullam) was prepared, the couple already had a son, Pilti, who was a slave like his mother. If Ananiah should ever divorce Tamet, Meshullam was entitled to claim Pilti. Tamet had some small dowry and was, to some extent, protected in the event of a divorce (*Pap. Eleph. Eng.* B36).

Twenty two years after the marriage contract, Meshullam manumitted both Tamet and her daughter Jehoishma on his death. The consequence of these manumissions was that both women were to serve Meshullam as a son or daughter supports his father and, after his death, they were to support

(*P. Rylands* 7 = Menu, no. 12) is a declaration by Pefchaw-awi-khonsou that he was to stay again with Nessematawy; the remuneration is specified.

89 E. Cruz-Uribe, *Slavery in Egypt during the Saite and Persian Periods*, Revue internationale des droits de l'Antiquité, 29 (1982), p. 47-71. Diodoros of Sicily informs us that Bocchoris forbade enslavement for debts (Diod. Sic. 1.79.3), but as Cruz-Uribe noticed (p. 52) it must have not been the case in the period to which the discussed documents belong. On the other hand, the law to which Diodoros referred did not have to encompass every kind of self-sale as a slave, as the historian mentioned only the situation in which the debtor is enslaved by the creditor for not fulfilling his obligation. According to Bernadette Menu, *Cessions de services* (*supra*, n. 88), p. 86, the documents represent a kind of contract for temporal service which excluded offering work to someone else than the party being a master. This is perhaps the right opinion, but one needs to notice that the deeds go far with acquiring power over Pefchaw-awi-khonsou by his two consecutive masters: Djebastefonkh, the former master, first had to cede services of Pefchaw-awi-khonsou to Nessematawy, second, he countersigned one of his former slave's / servant's agreements with the new master (*P. Rylands* 6 = Menu, no. 11). See: Montevecchi, *I paragrafi* (*supra*, n. 4), p. 973.

90 Bernadette Menu proposed the following interpretation of this document: Hor pledged himself and his children to secure a debt. If he had not been able to pay it back, he would have been obliged to stay in his creditor's service to discharge the obligation with his service. Therefore, Hor's adoption was honorary and its aim was to discharge his own or paternal debt: Menu, *Cessions de services* (*supra*, n. 88), p. 87.

91 This would explain using the pattern for a different legal deed, as suggested to us by Sandra Lippert to whom we are grateful for commenting on these documents.

Meshullam's son Zaccur. If they failed in this obligation, a high monetary penalty would be imposed on both women (*Pap. Eleph. Eng.* B39). Perhaps, as in the case of Hor, this deed should not be interpreted as reflecting an actual adoption[92]. It is obvious that the women did not take the position of full daughters, nor did they acquire succession rights to the inheritance after Meshullam's death, but rather were obliged to life-time service to their patron-relatives. It is important to note that, even after the 'adoption' took place, Ananiah still played the role of father to Jehoishma – he was a party of her wifehood contract – although she was described as Zaccur's sister as well (*Pap. Eleph. Eng.* B41).

A further document from this archive contributes to our knowledge of adoption practices in Egypt before Alexander the Great (*Pap. Eleph. Eng.* B42). It is an agreement between Uriach and Zaccur (Jehoishma's brother-patron) concerning a slave, Jedaniach. Zaccur gave Jedaniach to Uriach so that he would become his son, and Uriach declared that neither he nor his successors would enslave Jedaniach. Again, the proprietary effects of the adoption appear to be absent from the document and, unlike in Greek and Roman law, the slave status of the adoptive son presents no obstacle to his becoming a son of a free person. Although both examples are drawn from the corpus of Aramaic texts and cannot be a decisive factor in our argument, they were nonetheless drafted in Egypt and repeat elements found in both the Adoption Papyrus and self-sale as a son of Hor; as such, they contribute to a rather coherent model of the Egyptian adoption characterised by the flexibility of the deed – which could be both uni- and bilateral – and the possibility of a change in freedom status. Although these aspects would appear to fit with the supposed model of the adoption referred to in the *Gnomon*, they do not allow for a decisive reconstruction.

7.2 *Adoption in Ptolemaic Egypt*

Papyrological evidence for adoption in Ptolemaic Egypt is scarce[93]. It is fairly certain that adoption could take the form of a private contract (*P. Col.* III 58, ll. 7-9), but no such contract has survived. There exist, however, a few contracts dated to a much later period, no earlier than the fourth century CE (*P. Oxy.* IX 1206; *P. Lips.* I 28; *P. Oxy.* XVI 1895 and *P. Köln* VII 321). These examples, as observed by Marek Kuryłowicz, have very little in common with Roman adoption, and may thus reflect local legal customs which would have been developed

92 See M.L. Satlow, *Jewish Marriage in Antiquity*, Princeton 2001, p. 96.

93 M. Kuryłowicz, *Adoption on the Evidence of the Papyri*, The Journal of Juristic Papyrology, 19 (1983), p. 61-75, p. 62.

long before the surviving examples were written, perhaps in the Ptolemaic period[94].

Among the Ptolemaic papyri we find one intriguing case. The archive of Ptolemaios – son of Glaukias and *katochos*[95] of the great temple of Sarapis in Memphis – provides us with two petitions concerning a young girl, Herakleia. In *UPZ* I 3 (= *C. P. S.* 83 a = *P. Paris* 24), one of the variants of the petition, Ptolemaios recounts the following narrative: a certain girl, Herakleia, fled to the temple where the petitioner lived as *katochos* of Sarapis. As he had no children of his own (due to his services to the temple), he made the girl his daughter, l. 5: *ποησαμένου* (leg. *ποιησαμένου*) *μου* [*α*]*ὐ*[*τ*]*ήν*. This, however, was interrupted by Zoilos, one of the *rhabdychoi* of the temple, who brought some money in order to distract Ptolemaios, the girl was kidnapped from the Sarapeum and taken to a soldier stationed in Memphis. Ptolemaios petitioned the Kings Ptolemies for help:

> *C. P. S.* 83 a, ll. 10-14:
> *διὸ | δέομαι οὖ<ν> ὑμῶν τῶν μεγ*[*ίστων θεῶν Σωτήρων Εὐεργε*]|*τῶν μὴ περιιδεῖν κα̣τα̣δ*[*ουλουμένην τὴν δηλουμένην*] | *Ἡράκλεια<ν>, ἔτι δὲ καὶ π̣*[*α*]*ρὰ* [*τὸ καθῆκον ἀποσπασθεῖσαν*] | *ἐκ τοῦ ἱερο<ῦ>, ἀλλ' ἐὰν ἡμεῖν* (*ὑμῖν*) *φ*[*αίνηται* -ca.?-]
>
> So for this I beg You, the Greatest Gods *Soteroi* and *Euergetoi*, to not miss that this enslaved mentioned above Herakleia was by force dragged away from the temple against (her decision) to come here, if this seems good to You ...

The second text is longer, but more fragmentary (*UPZ* I 4 = *C. P. S.* 83 b = *P. Paris* p. 270 no. 24 Vo *descr.*). It does, however, provide us with the verb *τεκνοποιήσασθαι* describing the action which Ptolemaios undertook towards Herakleia; the papyrus also mentions asylum, although the context seems unclear[96]. In the document, Ptolemaios openly petitioned the Kings to recover the girl so that he could take her back to the temple:

94 See Kuryłowicz, Adoption (*supra*, n. 93); J. Beaucamp, *Le statut de la femme à Byzance* (*4e-7e siècle*), II: *Les pratiques sociales*, [Travaux et mémoires du Centre de recherche d'histoire et civilisation de Byzance], Paris 1992, p. 163-171.

95 On *katochoi*, see: B. Legras, *Les reclus grecs du Sarapieion de Memphis, Une enquête sur l'hellénisme égyptien*, [= Studia Hellenistica, 9], Leuven 2011.

96 See the reconstruction proposed in *C.P.S.* 83.

C. P. S. 83 b, ll. 16-20:
ἀ[ξιῶ] ὑμ[ᾶς οὐκ ἔ]χων ἄλλ[ην] β[οή]θειαν ἀλλ' ἢ | τ[ὴν] ἐφ' ὑμᾶ[ς καταφυ]γὴν, ἐάν φ[αίνητ]αι, προστάξα[ι] | ο[ἷς] κ[αθ]ήκε[ι], εἰ οὕ[τ]ως ἔχ[ει], ἀπ[ο] κατασταθῆ|ναί μ[ο]ι τὸ κορά[σιον] εἰς τὸ ἱερ[ὸ]ν, [κα]ὶ αὐτὸς τὰς χρί|ας παρεχόμ[ενος ἐν τῷ ἱερ]ῷ ...[97].

As I have no other help except for refuge with You, I ask You, if it seems best, to order to whom it concerns, if it is so, to return the girl to me (so that we return) to the temple, as I perform services in the temple ... .

In these two texts, we find a significant similarity between the supposed adoption of Herakleia and the 'adoption of foundlings'. The girl in question, whether free[98] or slave[99], fled to the temple seeking refuge; in order to make her living she served Ptolemaios son of Glaukias who, being childless, decided to keep her as his daughter (or something similar)[100]. The 'adoption' performed by Ptolemaios must have been a unilateral deed. If there had been a contract involved in the adoption of Herakleia (either oral, or in writing), he would have mentioned it in his petition. Furthermore, it seems that contractual adoption would have been impossible in this case: the girl being under-age and possibly a slave could not have been a party to any agreement. If she had fled from her parents or owners in order to escape their parental or proprietary power, they could not contract such a deed; and even if they could, the circumstances presented in the two petitions suggest that they would not have done so. It is also possible that no legal and / or formal unilateral act was performed by Ptolemaios, and that he simply kept the girl as his daughter hoping she would support him in his old age. Although the adoption may not have been strictly formal, it could have had some legal effect. At least this is what Ptolemaios hoped: he petitioned the Kings to help him to restore the girl so that he could bring her back to the temple. In his opinion the girl belonged to him.

8 Quasi-Children

Although the assumption of parental power over a child by the simple act of treating a slave, servant or orphan as a legitimate child was in contrast with

97 The text after *C.P.S.* 83 editors.

98 According to Delekat in UPZ I 3-4 the girl was freeborn and her kidnapping from the temple was arranged by her parents: Ptolemaios would petition the Kings to take the girl from her parents and return her to him.

99 This is the opinion of the editors of *C.P.S.* 83, p. 292-293.

100 The interpretation proposed in commentary to *C.P.S.* 83, p. 292.

both the Roman and Athenian concepts of formal adoption (*supra*), it continued into Roman times. This flexibility of familial and personal status is illustrated in *P. Oxy.* L 3555, a first- / second-century petition to a strategos by Thermoutharion daughter of Plutarchos.

In the document, the woman complains that a girl whom she raised and cared about was knocked down by a slave driving a donkey. It is important to note how Thermoutharion describes the girl and their relationship:

> *P. Oxy.* L 3555, ll. 4-10:
> *θεραπαινίδιόν μου οἰκογενέ*[*ς*],| *οὗ ἔστιν ὄνομα Πεῖνα, ἠγάπη*|*σα καὶ ἐτημέλησα ὡς θυγάτριο*(*ν*) | *ἐπ' ἐλπίδι τοῦ ἡλικίας γενόμε*|*νον ἔχειν με γηροβοσκόν,* | *γυναῖκα ἀβοήθητον οὖσαν* | *καὶ μόνην.*
>
> I loved and cared for a little maidservant of mine, a slave by birth, whose name is Peina, as a little daughter, in the hope that when she came of age I should have her to tend my old age, for I am a woman helpless and alone (tr. in *P. Oxy.* L).

A few lines later Thermoutarion explains her reasons for petitioning the *strategos*, saying, ll. 32-38 : *οἰομένη παροδικὸν* | *εἶναι τὸ ἕλκος, ἀνίατον δὲ* | *ὂν καὶ μὴ φέρουσα τὴν περὶ* | *τῆς θεραπαίνης ὀδύνην, τῷ* | *αὐτὴν μὲν κινδυνεύειν τῷ* | *ζῆν, ἐμὲ δὲ δυσθυμίᾳ τοῦ* | *ζῆν περιεχομένην*: But since it (the wound) is incurable and I cannot bear (my ?) distress about the maidservant, because she on the one hand is in danger of her life and I on the other am beset with despair of her life (tr. in *P. Oxy*. L).

The document illustrates the situation as follows: a childless woman raises a slave girl and provides her with some education (ll. 13-17), possibly with the aim of obtaining support in the old age. However, we can be certain that some maternal affection was also involved. The problem, of course, is the legal and social status of Peina. As far as we can tell from the petition itself, the girl was a slave. But what was her status in practical terms? Was it the same as that of a common slave? Perhaps not. We could easily imagine that, in the will of Thermoutarion, Peina would appear as a freedwoman to whom Thermoutarion made a bequeath; such wills were not uncommon in Graeco-Roman Egypt[101].

101 Eg. *P. Oxy.* II 379 descr. = T. Derda / M. Nowak, *Will of* [–––]*is daughter of Pachois from Oxyrhynchos. P. Oxy. II 379 descr.*, in: Mater familias., Scritti romanistici per Maria Zabłocka, ed. Z. Benincasa and J. Urbanik, Warsaw 2016, p. 135-143 (Oxyrhynchos, AD 87/91/95): a testatrix made a general bequest in favour of her three siblings, but also bequeathed a small sum of money to Demetrous, her freedwoman and adoptive daughter, ll. 19-20: *τῇ ἀπε*|[*λευ*]*θ*[*έρ*]*ᾳν μου καὶ θ*[*έσ*]*ει θυγατρὶ Δημητροῦτι*. In *P. Oxy*. III 490 (Oxyrhynchos, AD 94) a testatrix bequeathed her entire property to a boy Dionysios son of

The information, however, is insufficient to allow us to define the situation in formal terms. In a Roman scenario, a slave would be raised by their master, manumitted, then adopted or / and instituted in a will (see *supra*). Yet, this is not the only possible scenario in Egyptian environment: a slave could simply have been considered a son or a daughter, and later instituted in a will, or been manumitted through adoption. As in the case of Ptolemaios and Herakleia or earlier Egyptian evidence, discussed above, the adoption may have reflected only the intention of the 'adoptive' parent.

This Oxyrhynchite papyrus has parallels in other Greek sources. In the Eastern provinces, there existed the category of *θρεπτοί*, children raised by someone other than their own parents[102]. Among the *θρεπτοί*, a description with no formal or legal meaning[103], there were people of different status: slaves, freedmen and freeborn children. At least some held the position of foster-children. As Marijana Rilc has demonstrated, the affection towards these children is visible in the epitaphs left by their *nutritores*, regardless of whether the children were free or slaves[104]. Rilc also identifies two cases in which θρεπτοί were raised as

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Panechotes and Ammonous, freedman of Petosiris. She explained her decision with mutual affection, l. 4: [*κατ*]*ὰ φιλοστοργίαν*. One could easily imagine that the boy was her foster-son or -grandson, no matter whether the relation was formalised by the adoption (perhaps it was not). Yet another example is *P. Oxy.* III 504 (Oxyrhynchos, AD 101-125), a cession of catoecic land. The party of the contract is Aphroditous also called Demarous, a freedwoman of Epikrates being also his and his wife's adoptive daughter, ll. 38-41: *Ἀφροδιτοῦς ἡ κ*(*αὶ*) *Δημ*[*αροῦς*] | *ἀπελευθέρα*{*ς*} *Ἐπικράτους τοῦ κ*(*αὶ*) *Ἀπίωνος Ἐπικρά*[*τους*] | *καὶ θές*<*ε*>*ι θυγάτηρ αὐτοῦ καὶ τῆς γυναικὸς αὐτο*[*ῦ*] | *Θαήσιος τῆς κ*(*αὶ*) *Θαισοῦτος*. It seems that Aphroditous held the land from her adoptive parents: the father was already dead at the time, but the mother being still alive had some rights over the land being sold, for she appeared in the contract giving her consent to the sale. One could easily imagine that Epikrates made a will bequeathing his property to Aphroditous, but safe-guarded the rights of his spouse to use and take profits of this property. Such a solution was well-known and practiced in Graeco-Roman Egypt, see U. Yiftach-Firanko, *Marriage and Marital Arrangements*, *A History of the Greek Marriage Document in Egypt. 4th century* BCE*-4th century* CE., [Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte, 93], Munic 2003.

102 M. Rilc, *Legal and Social Status of Threptoi and Related Categories in Narrative and Documentary Sources*, in: From Hellenism to Islam, Cultural and Linguistic Change in the Roman Near East, ed. H. Cotton *et* alii, Cambridge 2012, p. 93-114, p. 94. Classical positions on *θρεπτοί*: A. Cameron, *ΘΡΕΠΤΟΣ and Related Terms in the Inscriptions of Asia Minor*, in: Anatolian Studies presented to William Hepburn Buckler, ed. W.M. Calder / J. Keil, Manchester 1939, p. 27-62; T.G. Nani, *ΘΡΕΠΤΟΙ*, Epigraphica, 5/6 (1943-1944), p. 45-84.

103 Rilc, *Legal and Social Status of Threptoi* (*supra*, n. 102), p. 101-102.

104 A. Conze / C. Schuchhardt, *Die Arbeiten zu Pergamon*, *1886-1898*, Athens 1899, p. 206, no. 16; B. Takmer / N. Tüner, *Epigraphische Mitteilungen aus Antalya* VIII, *Four Epigrams from the*

the children of childless couples and freed[105], and refers to cases in which θρεπτοί either bear the names of their *nutritores* or use their personal names as a pseudo patronymic[106], suggesting that either an adoption or quasi-adoption would have taken place. The parallel between *θρεπτοί* and the Latin category of *alumni* (cfr. *supra*), is also noteworthy.

9 Adoption of Foundlings – Reconstruction

Although the adoption of foundlings is not attested in the sources except for the one *oratio* ascribed to Quintilian (*supra*), there can be no doubt that such children were sometimes raised and treated by their fosterers' as their own. This most probably would have also been the case for foundlings raised as a proper child in the city of Rome; although no formal act of adoption would have been applicable, the foundling would have been treated as a *de facto* child by his educator and provided with a share of inheritance, either appointed as an heir or co-heir, or granted a bequest, as was often the case with other categories of *alumni*.

It remains for us only to explain why cases in which foundlings are raised as free persons and proper children rather than as slaves – the situation to which the passage of the *Gnomon* refers – are not attested in the papyri. If such cases did not occur in practice, the passage from the *Gnomon* would be difficult to understand; assuming that they did occur, the striking lack of attestations needs to be explained.

An answer may be deduced by examining what we know regarding how children were presented in papyri. As Sabine Huebner has noted, the fact that an individual was an adoptive child is never mentioned in the census related documents[107]; this led her to the conclusion that adoptive status was not revealed in the census[108]. A similar observation can be made regarding children

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Periphery of Nicaia, Epigraphica Anatolica, Zeitschrift für Epigraphik und historische Geographie Anatoliens, 33 (2001), p. 179-183, p. 179-80 no. 1; *TAM* V 1, 815 after Rilc, *Legal and Social Status of Threptoi* (*supra*, n. 102), p. 98.

105 *TAM* II 431; *CIG* 2664 = *GIBM* 918 after Rilc, *Legal and Social Status of Threptoi* (*supra*, n. 102), p. 102.

106 Rilc, *Legal and Social Status of Threptoi* (*supra*, n. 102), p. 101-102.

107 'Among the roughly 1 450 individuals recorded in the Roman census lists, not one declared that he adopted a child or that he had himself been adopted. Nevertheless, almost every man above 50 had a living male heir, a proportion is virtually impossible to achieve under the ancient mortality regime: S. Huebner, *The Family in Roman Egypt, A Comparative Approach to Intergenerational Solidarity and Conflict*, Cambridge 2013, p. 176.

108 Huebner, *The Family in Roman Egypt* (*supra*, n. 107), p. 177.

born out of wedlock: children were declared as fatherless, *ἀπάτορες* only in cases where they would have been socially illegitimate, raised by a single mother or another relative who did not belong to the father's household. If they were raised in the paternal household they were listed as the declarant's children or slaves, but not as 'fatherless'[109].

The same reasoning may apply to foundlings: those raised as free persons would have been declared as sons or daughters or free members of the household. Declaring a child as one's own must have had an effect similar to that of proper adoption. Such declarations may have be illegal – especially where metropolitan status and admission to the gymnasium was concerned[110] – and it is possible that the declarant could have been punished, if such an adoption involved status usurpation; but there may have been little interest in tracing or challenging such cases. An investigation would only have been necessary, if a foundling was promoted to the higher status, thus it would require further knowledge of the child's origins, or perhaps if a natural father claimed a child back. Unfortunately, no evidence concerning the question of whether non-Roman natural parents could reclaim a free foundling has survived.

As described above, a similar method of *quasi* adoption is preserved in the 278 *oratio minor* of Ps.-Quintilian. The *expositus* in question was inscribed in the census as his educator's son and bearing his *nomen*, Ps-Quint., *decl. min.* 278.7.4-5: '*Iam illa profecto citra interrogationem sunt, cuius tulerit nomen, in cuius censum delatus sit*' (Now these below are certainly out of question: whose name has he borne, in whose census has he been recorded?). The census inscription attested that the child belonged to the educator's agnatic family and, consequently, was able to inherit from the educator *ab intestato* (Ps-Quint.,

109 See M. Nowak, *The Fatherless and Family Structure in Roman Egypt*, in: Symposion 2015, Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Coimbra 1-4 Setembro 2015), ed. D. Lao and G. Thür, Vienna 2016, p. 99-114.

110 In the requisites for gymnasial status the applicant's ancestry had to be traceable: in *epikrisis* documents all male ancestors were listed both on paternal and on maternal side, with their date of *epikrisis* and the *ἄμφοδον* in which they were registered, Y. Broux, *Creating a New Local Elite, The Establishment of the Metropolitan Orders of Roman Egypt*, Archiv für Papyrusforschung und verwandte Gebiete, 59.1 (2013), p. 143-153, p. 147. In *epikrisis* to the gymnasial status the fact of being the natural not the adoptive child is openly sworn by the father, as in *P. Oxy.* X 1266, ll. 32-37 (Oxyrhynchos, AD 98): *εἶναι δ' ἐμοῦ καὶ τῆς | Θερμουθίου φύσ[ει υἱὸν τὸ]ν Ἱλου|τίωνα καὶ μὴ θέ[σει μηδὲ ὑπ]όβλη|τον μηδ' ἀλλοτρίαις* [ἀσφαλ] *ε̣ίαις ἢ | ὁμωνυμίᾳ κεχρῆ[σθαι], ἢ ἔνοχος | εἴην τῷ ὅρκῳ*. Other documents attesting this clause: *P. Oxy.* II 257, ll. 40-44 (Oxyrhynchos, 94-95); *SB* XIV 11271, ll. 6-8 (Oxyrhynchos, AD 117); *P. Oxy.* XVIII 2186, l. 10 (Oxyrhynchos, AD 260); *PSI* V 457, ll. 19-21 (Oxyrhynchos, AD 268); *P. Mich.* XIV 676, ll. 20-22 (Oxyrhynchos, AD 272). It does not, however, seem possible that in the case of the registration of the foundling (or another person) as one's own child, the true status was easily revealed.

decl. min. 278.6.1-2). This scenario would have worked had the *paterfamilias* not claimed the boy back. Therefore, it seems that the practice of presenting an exposed (or otherwise acquired) child as the rescuer's own was not unique to Egypt. Moreover, this type of adoption would have entailed all desired legal effects, so long as the original father did not intervene.

The quasi-adoption described above – a unilateral deed depending on the intention of the adopting party, which ignored the risk of personal status change for the adoptive child – was known both to Roman and non-Roman inhabitants of the Empire. Under Roman and Athenian laws, the results of such adoption could be revoked through the intervention of the natural father. We are less certain regarding this type adoption under local law in Egypt, however, the documents discussed above suggest that adoption could be concluded by the sole intention of the adopting party, requiring no legal deed, and that the change of status did not seem to present any obstacle.

This brings us to paragraphs 41 and 107 of the *Gnomon*. Paragraph 41 applied to situations in which an Egyptian raised a foundling in order to achieve something close to adoption, while paragraph 107 should be interpreted as the extension thereof. Both paragraphs address situations of the same type, but applied to two different groups of people: Egyptians (§ 41) and others (§ 107). Such an interpretation of the latter paragraph is well-supported by the sources discussed in this article; quasi-adoption, the act of assuming a foundling as one's own child, was performed not only by Egyptians, but also by other categories of people subject to Roman authority. One striking point remains: why did paragraph 41 apply exclusively to boys? It may have been that boys were rescued more often for the purpose of making them heirs to an inheritance which would have otherwise remained heirless.

The problem we must now address is why one-fourth of the inheritance was taken by the fisc in such cases. A few explanations have been proposed in the scholarly literature. Théodore Reinach interpreted paragraphs 41 and 107 in penal terms[111]. He classified the adoption in the paragraph 41 as Egyptian adoption and compared it to Justinian's *adoption minus plena.* He even ascribed the origin of *adoptio minus plena* to this Egyptian adoption, although he did not reconstruct the adoption itself. According to Reinach, the confiscation of one-fourth of the inheritance of the adoptive father (in paragraph 41) was due to the protection of the *sacrosanctitas* of status burdens: a child belonging to Greek or Roman family rescued by an Egyptian would suffer from a deterioration of personal status, *capitis deminutio media*[112].

111 Reinach, *Un code fiscal* (*supra*, n. 42), p. 38.

112 Reinach, *Un code fiscal* (*supra*, n. 42), p. 39-40.

Jérôme Carcopino further developed Reinach's interpretation. He agreed to the interpretation of paragraph 41 as sustaining the status barriers between Romans, Greeks and Egyptians[113], but noted that this could not be applied to paragraph 107 which, according to him, refers to all ethnic groups. Carcopino claimed that the latter provision applied not only to Egypt, but to the whole of the Roman Empire. It may have arisen from the Roman fear of weakening their own *gens* by admitting people of lesser blood, and would thus have served as a kind of protection for *Romanitas*[114]. Carcopino developed his argument using mostly Latin sources, concluding that the rule preserved in the paragraph 107 was intended for foundlings raised as *nutritores*' children and inheriting from their fosterers; 'la taxe (...) était à la fois une confiscation posthume et une averissement pour les survivants'[115].

Fulvio Maroi proposed an alternative interpretation, rejecting the penal character of the confiscation and explaining it in fiscal terms[116]. He connected the confiscation of one-fourth to the ἀπαρχή, the Ptolemaic tax on succession[117]. The normal rate of the ἀπαρχή was perhaps one-tenth, but Maroi suggested that adoptive children inheriting from their adoptive fathers would have paid more. Although he does not present any conclusive sources in support, his reasoning seems very convincing: if the foundling had not been appointed, the fisc would have acquired the entire inheritance. Maroi also noted that the paragraph should not be interpreted as having a penal character, as the confiscation was imposed after the death of the rescuer[118].

Maroi's subsequent argument is less convincing. He ascribed the paragraphs to the spread of Christianity in Egypt and dated them to the second half of the second century[119]. He assumed that the exposure of children was unknown in Egypt before the Greeks brought it to Alexandria[120], and that it later spread throughout Egypt becoming an accepted practice in Roman times. The fate of

113 Carcopino, *Le droit romain d'exposition* (*supra*, n. 54), p. 71.

114 Carcopino, *Le droit romain d'exposition* (*supra*, n. 54), p. 72-73, 86.

115 Carcopino, *Le droit romain d'exposition* (*supra*, n. 54), p. 85. The interpretation on the penal character of these provisions directed to protect the *sacrosanctitas* of status burdens was accepted by S. Riccobono, *Il gnomon dell'idios logos*, Palermo 1959, p. 178-180; 247.

116 Similarly according to Volterra, *L'efficacia* (*supra*, n. 18), p. 406, the norm in question does not have penal character, but was rather a normal succession tax.

117 F. Maroi, *Intorno all'adozione degli esposiiti nell'Egitto romano*, in: Raccolta di scritti in onore di Giacomo Lumbroso (1844-1925), Milano 1925, p. 377-406, p. 381.

118 Maroi, *Intorno all'adozione degli esposiiti* (*supra*, n. 117), p. 382-384.

119 Maroi, *Intorno all'adozione degli esposiiti* (*supra*, n. 117), p. 384, 405.

120 See, however, Cameron, *The Exposure* (*supra*, n. 4), p. 112-113.

these children was almost never freedom, but slavery[121]. However, the situation changed with the new Christian approach: exposed children were rescued and raised as free Christians[122]. The paragraphs of the *Gnomon* should thus be interpreted as measures against Christianity, despite their fiscal and Ptolemaic origins. According to Maroi, Christian adoption was less formal than Roman adoption – it involved no imposition of parental power – and was influenced by Greek law[123].

Orsollina Montevecchi dated paragraph 41 to the Hellenistic period and ascribed it to Alexandrian political laws: its aim would have been to discourage Egyptians (understood as an ethnic, not a legal category)[124] from rescuing children exposed by Greeks. She also maintains that the exposure of children was unknown in Egypt before it was introduced by the Greeks. Moreover, even after Alexander, it was not performed by the indigenous population, but quite the opposite: Egyptians collected exposed Greek children[125]. The Egyptian population was far more numerous than the Greeks inhabiting Egypt[126]. Furthermore, a Greek child brought up by an Egyptian became Egyptian in a cultural sense. This would have had two consequences. First, the Egyptian population would have increased at the expense of Greeks. Second, if a natural father changed his mind and wanted to reclaim an exposed, it would have been difficult, as the child would have been raised as an Egyptian[127]. The Roman rulers accepted this Alexandrine regulation, as it was profitable for the fisc, and even extended it in the paragraph 107. Raising a foundling as a slave was profitable as it cost very little: Montevecchi thus interprets paragraph 107 as relating to the profits due to the fisc[128]. She proposed AD 111 as a *terminus post quem* for the paragraph, the year in which the last wet-nurse contract containing an explicit reference to a child taken from a dump-hill is dated; after the introduction of the *post mortem* tax on foundlings, rescuers would have started hiding them in contracts[129].

121 Maroi, *Intorno all'adozione degli esposiiti* (*supra*, n. 117), p. 385-397.

122 Maroi, *Intorno all'adozione degli esposiiti* (*supra*, n. 117), p. 398.

123 Maroi, *Intorno all'adozione degli esposiiti* (*supra*, n. 117), p. 403.

124 Montevechi, *I paragrafi* (*supra*, n. 4), p. 970-971

125 Montevechi, *I paragrafi* (*supra*, n. 4), p. 967-968.

126 Montevechi, *I paragrafi* (*supra*, n. 4), p. 969.

127 Montevechi, *I paragrafi* (*supra*, n. 4), p. 970-971.

128 Montevechi, *I paragrafi* (*supra*, n. 4), p. 974; after E. Seidl, *Rechtsgeschichte Ägyptens als römischer Provinz*, *Die Behauptung des ägyptischen Rechts neben dem römischen*, Sankt Augustin 1973, p. 25.

129 Montevechi, *I paragrafi* (*supra*, n. 4), p. 974-975. Yet, there are later documents attesting to this practice, e.g.: *PSI* XII 1230 (Oxyrhynchos, AD 203), *P.Kellis* 8 (Kellis, AD 362).

In our opinion the provisions of the *Gnomon* should not be interpreted as a penalty imposed on either the educator (who was already dead) or the *expositus*, but rather as a special tax; the fiscal character of the paragraphs seems more convincing. The discussed quarter was due, only if a foundling became either testamentary or intestate heir, which is suggested by *μετὰ θάνατον* in both paragraphs. Therefore, had the educator other heirs, the quarter was not taken by the fisc. If the discussed paragraphs referred to penalty, the confiscation should take place before the educator's death and/or immediately after he picked up the foundling or it became known.

On one hand, the Roman rulers were not only aware of the practice, but also accepted it, and even encouraged the idea of saving exposed children by imposing on fathers wishing to reclaim them an obligation to restore the costs of maintenance and education to the *nutritores*. This attitude contradicts the idea that they would be willing to punish either *nutritores* or rescued children. On the other hand, they imposed a high tax on such heirs, or perhaps only maintained it, if we accept the view on the Ptolemaic origin of the provision in question. This can be explained both with the interests of the fisc and with the fact that adoptions in question were highly irregular from the Roman point of view and could potentially infringe paternal rights of original fathers. The paragraphs in the *Gnomon* could be interpreted even as favouring the adoption of foundlings, as they allowed adoptive parents to circumvent the usual rules of adoption and succession in naming an heir, at a cost of one quarter of the inheritance which would have otherwise been acquired by the fisc entirely.