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L.O. de Boer
3389200
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Supervisor: prof. Rutgers

The agency of legal form: a contextualizing approach to the law of adoption in Athens and Rome

Contents

I. Introduction

'Out of the darkness, Funes's voice went on talking to me.

He told me that in 1886 he had invented an original system of numbering and that in a very few days he had gone beyond the twenty-four-thousand mark. He had not written it down, since anything he thought of once would never be lost to him. His first stimulus was, I think, his discomfort at the fact that the famous thirty-three gauchos of Uruguayan history should require two signs and two words, in place of a single word and a single sign. He then applied this absurd principle to the other numbers. In place of seven thousand thirteen, he would say (for example) *Máximo Pérez*; in place of seven thousand fourteen, *The Railroad*; other numbers were *Luis Melián Lafinur*, *Olimar*, *Sulphur*, *the reins*, *the whale*, *the gas*, *the cauldron*, *Napoleon*, *Agustín de Vedia*. In place of five hundred, he would say nine. Each word had a particular sign, a kind of mark; the last in the series were very complicated… I tried to explain to him that this rhapsody of incoherent terms was precisely the opposite of a system of numbers. I told him that saying 365 meant saying three hundreds, six tens, five ones, an analysis which is not found in the 'number' *The Negro Timoteo* or *meat blanket*. Funes did not understand me or refused to understand me. […]

The two projects I have indicated (an infinite vocabulary for the natural series of numbers, a useless mental catalogue of all the images of his memory) are senseless, but they betray a certain stammering grandeur. They permit us to glimpse or infer the nature of Funes's vertiginous world. He was, let us not forget, almost incapable of ideas of a general, Platonic sort. Not only was it difficult for him to comprehend that the generic symbol *dog* embraces so many unlike individuals of diverse size and form; it bothered him that the dog at three fourteen (seen from the side) should have the same name as the dog at three fifteen (seen from the front). […]

With no effort, he had learned English, French, Portuguese and Latin. I suspect, however, that he was not very capable of thought. To think is to forget differences, generalize, make abstractions. In the teeming world of Funes, there were only details, almost immediate in their presence.'[1]

[11] J.G. Borges, 'Funes the Memorious', transl. by J.E. Irby, in: *Labyrinth: selected stories and other writings*, 87-95 (London 2000)

It is not unusual in the realm of 'comparative legal studies' to start with quoting a celebrated novelist.[2] What is a little bit more unusual is to follow these comparatist footsteps when discussing Greek and Roman law. And there is a host of issues one needs to come to terms with when pursuing this avenue of research. First and foremost, perhaps, is to explain what is meant by a 'comparative analysis'. For now it is important to stress that this is *not* a comparison of two legal systems that float somewhere in space, unconnected to one another. It is precisely the absence of a 'location' in time and space that I will argue against here – in fact, the term 'comparative approach' presupposes the kind of independence of these legal systems that I argue against here. Rather, I 'contextualize' both systems: I discuss the Roman and Greek legal system together because they are part of an area in which a host of legal systems operated, and because it is my conviction that these legal systems interacted. If that is true, we cannot fully understand them without viewing them in light of other legal systems. As so many other topics in Greek and Roman history already show, Greek and Roman society was not 'hermetic'. The aim of this thesis, then, is to break a lance for a comparative or contextualizing approach to Greek as well as Roman law in *that* sense. Both are areas still seen as essentially 'closed' and 'impermeable', they do not interact with other legal systems. Greek law is perhaps no longer seen as an autonomous system, *outside of society*, but it is still seen as an autonomous system in relation to *other legal systems*. The very same principles hold true for Roman law, which too is hardly approached from this comparative point of view – save for the familiar narrative of its European reception.

And this is all somewhat surprising: the discipline of ancient history has been adopting and adapting the paradigms of colonialism and post-colonialism over the past decades, resulting in fruitful endeavors down the roads of 'romanisation' and 'hellenisation'. Acculturation, negotiation, creolization – whatever the terms one wants to use, the intercultural exchanges and mutual influences that took place in Greece and Rome are now almost universally accepted, and with that acquired the status of near-platitudes. The study of law, as I will argue, still predominantly takes shape within a conceptual framework a legal system is viewed as uninfluenced or unengaged with other systems, and the study of Greek and Roman law has yet to be influenced by the 'spatial turn' in this particular sense.

[2] Compare P. Legrand's contribution in: P. Legrand, R. Munday (eds.) *Comparative Legal Studies: Traditions and Transitions* (Cambridge 2003)

I will try to get rid of this conceptual framework by returning to the substantive law, to the technical dimensions of the law, to the 'mundane and inherently uninteresting dimension of the law'[3] – but not by again adopting the 'formalistic' and 'positivistic' method that neglects connections with society. This doctrinal method has been rightfully rejected in our approach to Roman and Greek law, but this rejection encompassed the rejection of substantive law, the rejection of the technical dimensions. Here I will argue that these technical legal doctrines have their own agency: working according to their own, peculiar, logic, they go on to shape society itself. But these legal doctrines – as I will illustrate by way of example – are not exclusive to single legal systems. In fact, the legal logic underlying these doctrines works in a similar fashion across the legal systems in the Ancient Mediterranean.

It is this return to the substantive law that opens up new possibilities for the studying law from a cultural, or social, perspective, whilst also opening up the possibility for a fruitful comparative approach to legal systems in the Mediterranean. But to strike a blow for 'comparative legal history' also means that a substantial amount of theoretical ground needs to be covered first. The intersections, overlap, and at times clear separations of the many disciplines involved make for quite a minefield. Not only do we need to come to terms with the scholarship in Greek and Roman law, the distinctly 'theoretical' or 'methodological' approach advanced here also forces us to delve into the disciplines of legal theory, of legal anthropology, and of the very recent disciplines of comparative law and comparative legal history. Many problems, 'shifts', and new directions are the same across the board – but it is the connection of these disciplines that will lead to a new understanding of 'a cultural approach' and 'space', if you wish, in Roman and Greek law. The first chapters of this thesis will try to cross that minefield: it tries to come to terms with the idea that for the study of ancient legal systems the product of historiography is inextricably linked to methodological understanding, and, more importantly, *assumption*.

With the embracement of legal anthropology and socio-legal studies as disciplines that can help advance our understanding of Greek and Roman law, we have also come to embrace their approach and understanding of law itself. With the intense debates in the fifties of the 20th century, legal anthropology has drawn away from ideas of 'law as such' (as the Westerner would understand

[3] A. Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities', 53 *Buffalo Law Review* 973-1033 (2005), 974.

it, in any case), towards 'methods of handling disputes'.[4] We can actually trace this 'switch' in the literature on Greek law.[5] Legal anthropology came to adopt the 'lenses' of Legal Realism, decisively put forward with Karl Llewellyn and *The Cheyenne Way*.[6] But there are obvious limits, or perhaps flaws, to such an approach: as Snyder puts it, everything 'becomes subordinated to the analysis of procedures, strategies and processes',[7] the study of substantive rules and concepts really just provides the *framework* in which the actual important issues take place – they become a *pretext*. But reducing substantive law to merely a picture-frame is again to neglect an important part of 'law' in a society that has these procedural rules and (perhaps) substantive law, such as the Greek or the Roman society – and so the boomerang, in a sense, comes back. Here I will argue that legal institutions themselves create social realities and social facts. Modern scholars have often overlooked this dimension in their departure from the 'traditional' domains of law.

There is another problem with modern scholarship. Though the fields of Greek and Roman law are no longer viewed as autonomous qua unconnectedness to society, they are still understood as 'autonomous' in quite a different sense: instead of unconnected to society, it is essentially portrayed as free from *'foreign' influence*. The Romans, of course, prided themselves in having developed their elaborate legal system – it is frequently recognized to be one of the only Roman social institutions that was *not* Greek. But the 'common mistake' of many legal historians, and this hold true for ancient historians too, is the 'undue willingness to treat the law of a given time or place or country as a unity, and therefore an independent object of study.'[8] The idea that the search for universals will always collapse into ethnocentrism, has itself resulted in too much emphasis on the particular – in the Mediterranean, an area that in antiquity so clearly transcended 'national' borders, legal interaction and mutual influence was bound to be important.

The dualism of universality and particularity is misguided in leaving just two options open. The disciplines of comparative law and comparative legal history provide more insightful methodological frameworks: the discipline of comparative law has grappled with the exact same problems that have played a decisive role in legal anthropology and ancient law (universalism,

[4] M, Freeman, M., D. Napier, *Law and Anthropology: Current Legal Issues vol. 12* (Oxford 2009) 15.
[5] First and foremost in the work of David Cohen: D. Cohen, *Law, Violence and Community in Classical Athens* (Cambridge 1995) and *Law, sexuality, and society* (Cambridge 1991).
[6] K. N. Llwellyn and E.A. Hoebel. *The Cheyenne Way* (Oklahoma 1942)
[7] F. Snyder, 'Anthropology, Dispute Processes and Law: A Critical Introduction', (1981) 8 *British Journal of Law and Society* 141-80, 145.
[8] J. Gordley, 'Comparative Law and Legal History', in: M. Reimann, R. Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford 2006) , 753 – 773, 772.

functionalism, the problem of 'translation', and ideas about 'the same and the different') but not all scholars have resorted to an holistic idea of 'culture' and the 'particular'. Some comparatists now champion the idea of 'comparison' without reverting to functionalism, evolutionism, universalism and ethnocentrism. The neglect of this discipline by classicists, seen in this light, is somewhat surprising.

In this thesis I will set out to combine both ideas: it is precisely the return to the technicalities of law that enables a culturalist comparative perspective. It sets out to show how an idea of law as a 'shaper of social realities' can provide a nuanced account of legal interaction in the Mediterranean, an account that incorporates the importance of context and culture, but that does not at the same time reject that extraneous legal influence is possible.

The first part of this thesis discuss these theoretical issues – I will briefly discuss the scholarship on Greek and Roman law to show how they fail to incorporate the two points I outlined in the above. I then return to the 'meta-level' in an attempt to find methodological starting points that can be fruitfully adopted to the study of Greek and Roman law. With the issues of theory cleared, I will, in an attempt to do away with the 'universal vs. particularistic'-paradigm in Greek and Roman law, and in an attempt to reemphasize the role of 'the technical rules' in ancient societies, illustrate my theoretical endeavors by way of a case study. Here I will take up the 'law' of adoption in Greece, Rome – illustrating how the legal fictions underlying a doctrine of adoption came to have an important force of its own, and by drawing upon its own logic it departed from its 'original purposes' and autonomously constituted its own realities. Legitimate filiation provided the means to circumvent legal limitations in transferring rights and duties elsewhere. But, of course, as soon as the epiphenomenal effects of adoption stopped being epiphenomenal, and instead became the very core of adoption, the fiction of adoption itself went on to create a new fiction: the *family relationship* embedded in adoption became nothing more than a functional fabrication. It was no longer about adopting a son, but about making sure the rights and duties it entailed could be successfully employed to one's advantage.

But that was only *possible* because of the way in which the law of adoption *worked*. I argue that these new social realities, these usages, cannot be made to come into view without the law of adoption. These legal innovations, these new social realities 'are not simply the product of persons, or even of their social or epistemic contexts. Rather, some agency must be attributed to the machine

or the model itself'[9] – that is, some agency must be attributed to the technical legal rules that make possible this kind of usage, that evidently flies in the face of the functions it was supposed to fulfill. And the law works autonomous, then, not because the jurists were unaware of social reality: 'of course they were; almost all were socially prominent and some were top imperial bureaucrats. But they had a style of interpretation that was inward-looking and not too geared to social engineering.'[10] The law of adoption was quickly disconnected from its social purposes and went on to function in very different ways because it reflected on *itself*, on its *own technicalities*.

Now, this institutional fiction is present in all legal systems of the Ancient Near East. Ideas about adoption differ between these societies on very fundamental points, but the trick itself, the way in which adoption works and plays out, that is an integral part of all these systems. Perhaps, in the words of Raymond Westbrook, there is some kind of a shared 'legal ontology' underlying all these legal systems, the product of the intense exchanges that have gone on for millennia.[11] The kind of exchange that is almost universally recognized by ancient historians in other fields.

The contextualisation serves as a case study that supplements and supports the more theoretical approach advanced in the first part. It will show that a comparison of ancient law is possible without necessarily descending into 'universalist' and eventually 'eurocentrist' ideas of law. A picture of difference, similarity, and influence will emerge that treats the legal systems of the Mediterranean both in *time* and in *space* as interactive and permeable vis-à-vis other legal systems, by showing how the doctrinal issues of the law 'shape social realities' according to a very similar logic across the board.

I come back to Ireneo Funes. He was, of course, not a legal anthropologist or socio-legalist. But perhaps, in some sense, he suffered from similar problems. It is my conviction that the emphasis on the dichotomy between 'the universal' and 'the particular', and the clear answer in favor of the latter, goes a long way in explaining the supposed 'autonomy' of Greek and Roman law as unconnected or uninfluenced *by other legal systems*, as well as the turning away from 'the technicalities of law'. This thesis should not be understood as a 'plea' for a return to the old functionalist, positivist, and universalist approach to law. It will not compare 'solutions' to 'similar' problems, solutions that can simply be looked up in the rules of a legal system. What it does claim, is that the dichotomy of 'universal' vs. 'particular' is suffocating, that it neglects interconnections which, in other domains of

[9] Riles, 'A New Agenda for the Cultural Study of Law', 987-8.
[10] Watson, 'Law and Society', 23.
[11] R. Westbrook, 'Introduction', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One* 1 – 92, 2.

Greek and Roman society, have been emphasized repeatedly. It is this retreat into the particular that has caused the drawing away from the very thing that is comparable: legal logic in legal doctrines. In a world with only the particular, Ireneo Funes can no longer think – Funes fails to see differences altogether, because *everything* is incomparable. But in the very same sense as there is a certain logic in our system of numbers, there is a certain logic at work in the legal institutions of the Ancient Mediterranean.

II. Traditionalists and modernists: Greek law

As I discussed briefly in the introduction, the disciplines of Greek and Roman law have witnessed very similar shifts – the fields witnessed the rejection of a doctrinal and formalistic approach to law. But they did so in two distinct ways: Greek law chose the path of legal anthropology[12], and Roman law sought recourse to the 'law and society'-movement[13]. Why? Modernists in Greek law identified a second problem: not only was Greek law studied doctrinally, it was also studied by Roman lawyers. What these lawyers did was come to the field with preconceptions about what law 'was' – it was a system in the Roman sense. But modernists could not disagree more: Athenian law was fundamentally different. And legal anthropology gave the Greek lawyer the methodology and the vocabulary to express that difference, and that also explains the emphasis on anthropological problems one comes across in Greek law: evolutionist ideas and functionalist ideas are more readily criticized when compared to its Roman counterpart.[14] The modernist in Roman law was of course less worried about lawyers studying Roman law through Roman glasses. For these modernists, then, it was mainly about recognizing the embeddedness of Roman law in society – and it is no coincidence that the first book of its kind, Crook's *Law and life of Rome* was published a few years after the 'Law and Society'-movement was institutionalized.

What I would like to do in this chapter, is to discuss the approaches to Greek law that have played an important role to date. I adopt here the terminology of 'traditionalists' and 'modernists' to describe the two dominant approaches, and will discuss both consecutively. I agree with the rejection of studying Greek law as isolated from its societal surroundings by the modernists, but I will also tease out here (in the final part) some contributions in the field that seem to subvert some of the methodological presumptions that are in turn championed by modernists. Those contributions do not revert to a traditionalist conception of law and with that seem to pave the way for a new approach to Greek law though they do not develop their implicit methodological starting points. It is in these contributions, on both the agency of law as well as legal rules ability to function in other legal systems, that one can already see how a strictly modernist approach to Greek law

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[12] See, above all, the work of David Cohen: *Law, Violence and Community in Classical Athens*, and *Law, sexuality, and society* but note too the contribution of L. Foxhall (Foxhall, 'Introduction', in: L. Foxhall, A.D.E. Lewis *Greek Law in its Political Setting*) and the anthropological framework used by Todd in his handbook,*The Shape of Athenian Law*.

[13] Beginning with J.A. Crook, *The Law and Life of Rome* (New York, reissued in 2012) but also note the explicit adoption of the movement in P.J. Du Plessis (ed.) *New Frontiers: Law and Society in the Roman World* (Edinburgh 2013), J.J. Aubert, B. Sirks, *Speculum iuris: Roman law as a reflection of social and economic life in antiquity* (Ann Arbor 2002), J.W. Cairns, P.J. du Plessis, *Beyond dogmatics* (Edinburg 2007) and less explicitly so: B. Frier, *The rise of the Roman jurists* (Princeton, NJ 1985).

[13] J.W. Cairns, P.J. du Plessis, *Beyond Dogmatics* (Edinburg 2007)

[14] Again, see first and foremost David Cohen's work.

misses relevant aspects of what law is – and that we should perhaps look at other ways of studying the law alongside traditionalist or modernists perspectives. The chapter on Roman law will advance a similar line of thought, and both chapters pave the way for a different way of looking at Greek and Roman law that I take from the disciplines of comparative law, socio-legal studies and legal anthropology, which will be discussed in chapter four.

In the introduction to *the Cambridge Companion to Greek Law* (2005) David Cohen reflects on the history of the field, and with that can be understood to express the ideas held more widely by scholars of Greek law.[15] In his reflections he embraces what he calls 'the demise of the orthodox paradigms' – the study of Greek law, Cohen claims, was previously focused on technical doctrinal questions, 'following the model of civil (and Roman) law jurisprudence'.[16] The reader will recognize the first of these paradigms as the eschewed 'formalist' or 'positivist' approach to law. Problematic is how it draws inspiration from models of Roman law jurisprudence – which, for these scholars, was fundamentally different from its Greek counterpart. 'Traditionalists' – we should mention Harrison, Hansen, MacDowell and Thür, but it was also dominant in earlier generations of continental scholars[17] – looked at the technical exposition of legal norms and procedures. What it did was 'confine itself to the study of doctrinal and procedural questions as if they were independent of larger social and cultural contexts'[18], and questions were soon raised about this autonomy of Greek law. Foxhall, for instance, claims that 'what is largely absent in Greece is any sense of law as an autonomous discipline, divorced in practice from all political, religious, or social considerations. The autonomy of law is an idea […] first found amongst the Romans.'[19] Their training in Roman law shaped their preconceptions about what law is, and traditional scholars went on to study Greek law projecting these ideas onto their material. But that approach was quickly rejected as unsatisfying, or perhaps simply as false.

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[15] See also: Todd, *The Shape of Athenian Law*, first five chapters, Foxhall, 'Introduction', in: L. Foxhall, A.D.E. Lewis *Greek Law in its Political Setting*, and Cohen, *Law, Violence and Community in Classical Athens* chapters 1 to 3, and *Law, sexuality, and society* again chapters 1 to 3.

[16] Cohen, 'Introduction', in: D. Cohen, M. Gagarin (eds.) *The Cambridge Companion to Ancient Greek Law* (Cambridge 2005) 1 – 26, 3.

[17] A.R.W. Harrison, *The Law of Athens, I, The Family and Property* (Oxford 1968); A.R.W. Harrison, *The Law of Athens, II, Procedure* (Oxford 1968); M.H. Hansen, *Eisangelia: The Sovereignty of the People's Court in Athens in the Fourth Century B.C. and the Impeachment of Generals and Politicians* (Odense 1975); H.M. Hansen, *Apagoge, Endeixis and Ephegesis against Kakourgoi, Atimoi and Pheugontes: A Study in the Athenian Administration of Justice in the Fourth Century B.C.* (Odense 1976); D.M. MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester 1963); D.M. MacDowell, *The Law in Classical Athens* (London 1978)

[18] Cohen, 'Introduction', 16.

[19] Foxhall, 'Introduction', 6.

In a reaction to the traditional paradigm, 'Anglo-American methodologies have largely evolved in the direction of looking at legal process in its social and cultural historical context, informed by comparative evidence drawn from social history, anthropology, and the practices of other historical and contemporary legal systems'.[20] Time and again that different methodology has emphasized how legal institutions are 'embedded' in a 'democratic political culture defined by participatory institutions on the one hand and the recognition of the power of persuasive speech (rhetoric) on the other.'[21] What replaced the 'traditional' paradigm, then, is a paradigm containing a 'variety of approaches', that appeared on the scene as a result of the recognition that Greek law is 'vital for an understanding of a whole range of political and social institutions in ancient Greece' and as well as for an understanding of Greek orators.[22] By now disputes in scholarship of Greek law are, according to the modernists, no longer about 'narrow doctrinal questions' or 'stale controversies' but about 'fundamental questions of Greek legal practice and institutions and their relation to broader political and social frameworks.'[23] The overarching idea is to *locate* the study of Greek law in a political and social context. Cohen remarks that 'this [relocation] may seem evident to some, but to legal historians used to thinking of the legal system as having an autonomous life of its own, this point is anything but obvious.'[24] Greek social and cultural history has produced 'nothing less than a minor revolution in the study of Greek legal history'.[25]

But in the very same *Companion* in which Cohen applauds the rejection of the traditionalist paradigm, and the replacement of it with a modern one, we find two contributions that implicitly subvert this idea of Greek law – two contributions that presuppose some sort of *autonomous* working of Greek law, even though Cohen himself claims that Greek law did not have this kind 'autonomous life of its own'. I will discuss these two examples briefly – an article on legal transplants by Hans-Albert Rupprecht, and one on the active engendering role of the law in Athens by Eva Cantarella.

Hans-Albert Rupprecht introduces the case of Egypt in the Hellenistic period. From the perspective of Greek law the Egyptian system is a 'legal transplant' ('the moving of a rule or a system of law from one country to another, or from one people to another'[26]): Egypt's procedural and

[20] Cohen, 'Introduction', 14.
[21] Ibidem.
[22] Cohen, 'Introduction', 2.
[23] Idem, 3.
[24] Idem, 5.
[25] Idem, 6.
[26] A. Watson, *Legal Transplants: An Approach to Comparative Law* (Athens, GA, 1993) 21.

substantive law is that of Athens. For an approach that reduces law to culture, or in any case sees the law of a give society as inextricably linked to that society itself, legal transplantation is difficult to account for – and it is for this reason that the debate on legal transplants has taken center stage in the discipline of comparative law in recent years. One would expect, after all, that apparently law has *necessarily* some kind of *autonomy* if legal rules can be 'transplanted' as can existed independent of their context. This is precisely what Pierre Legrand, a leading comparatist, denies in his famous encounters with Alan Watson, who defends the possibility of legal transplants.

What Rupprecht in the end concludes is that the basic structure of Greek law continued to exist up until Roman times. This continuity did not 'stand in opposition to further development in response to the demands of changing economic and social life; rather, the newly developed legal institutions and forms fit smoothly into the previously founded legal system while the basic structure remained intact.'[27] This is a serious challenge to the idea of absence of the autonomy of law, an idea championed by the 'modern' scholars – such as Foxhall, Cohen and Todd – and it is therefore somewhat disappointing that the issue is nowhere faced by Cohen in his discussion of the article. Telling, perhaps, is Cohen's remark regarding Rupprecht's contribution that 'one of the great unanswered methodological questions of our discipline' is how the Egyptian example can be brought to bear for other times and places in the Greek world. It is an argument often voiced about Egypt's papyri, but in this case it shows that Cohen has not taken comparative legal history serious other than comparison qua *cultural difference*. In a framework in which law is essentially culture, in a framework where cultures are essentially different and incomparable, it is impossible indeed to come up with a sensible answer.

But reducing law to culture is equally 'reductionist' as a formalist account of Athenian law, that neglects its societal and political context, is reductionist. Eva Cantarella, in the very same *Companion* volume, shows how 'the law is gendered, and at the same time engenders society: on the one hand it reflects the social construction of sexual roles, on the other it reinforces this construction'.[28] She ascribes to the system of Greek law some 'shaping force' itself, and does not *merely* view it as some institution just mirrors societal concerns, values and ideas but as an institution that goes on to shape or strengthen these ideas. The laws of Draco, for instance, incorporated social stereotypes of women (the Homeric division of women into 'seduced' and 'seductresses'),

[27] H.A. Rupprecht, 'Greek Law in Foreign Surroundings: Continuity and Development', in: D. Cohen, M. Gagarin (eds.) *The Cambridge Companion to Ancient Greek Law* (Cambridge 2005)328 – 342, 338.
[28] E. Cantarella, 'Gender, Sexuality and Law', in: D. Cohen, M. Gagarin (eds.) *The Cambridge Companion to Ancient Greek Law* (Cambridge 2005) 236 – 253, 237.

transforming them 'into a legal classification which had fundamental legal consequences on women's life' as only those with good sexual behavior (the seduced) were protected.[29] Unfortunately, she only gives us an example of the law incorporating and strengthening existing social stereotypes, and not an example of the law changing these stereotypes, but she claims that this is surely a possibility.[30] If we take serious that claim, Cantarella implicitly challenges the idea that law is *not* an autonomous agent – law is not merely a reflection of society, but can also work to subvert, deconstruct and change societal ideas and stereotypes. Again this is a serious, albeit implicit, challenge of the methodological starting points championed by the 'modernists'.

Modernists deny all autonomy of the institution of law itself, and advocate an understanding of 'culture' as essential in coming to terms with the law. It is no surprise that most of the contributions to the *Companion* – which I take to represent ideas of current scholarship on Greek law – deal extensively with 'non-legal' issues: the volume also includes chapters on 'law and political theory', 'law and nature in Greek thought', 'Greek tragedy and law', 'Law, Attic Comedy and the Regulation of Comic Speech' and many more. It shows how the traditional approach to law is increasingly neglected – in line with anthropology and related disciplines, studying law and emphasizing its societal embeddedness is much more *en vogue*. Moreover, scholars of Greek law have increasingly emphasized the role of disputes, of process, and moved away from the intricacies of law itself. Or, to again quote Snyder, everything 'becomes subordinated to the analysis of procedures, strategies and processes',[31] and we start neglecting the substantial rules themselves. The negation of law's autonomy coincides (and has to coincide) with an approach to law that draws away from what separates law from other societal phenomena: its technicalities. It is to these technicalities that I will return in this thesis.

These ideas also have important ramifications for a comparative approach to legal history. The idea that legal institutions have no autonomy, that law should be understood by taking recourse to a specific culture, makes it very difficult to compare legal systems in any other way than just emphasizing *differences*. If we draw away from the legal rules that could be transplanted, if we understand law as a product of a given culture, we will not find many similarities or mutual influences. Going back to the substantive legal rules enables us to see how many of the juridical

[29] Cantarella, 'Gender, Sexuality and Law', 237.
[30] Ibidem.
[31] Snyder, 'Anthropology, Dispute Processes and Law: A Critical Introduction', 145.

concepts employed in the Mediterranean share striking similarities, and I will discuss that of adoption in greater detail in the following chapters.

III. Traditionalists and modernists: Roman law

We see very similar movements and debates in the case of Roman law, though (as I mentioned earlier) Roman law took a slightly different path. Crook's *Law and Life of Rome* written in the 1960s was the first of its kind: 'not quite a book about Roman law, on which there already exist any number of excellent treatises' nor 'quite a book about Roman social and economic life; that subject, too, is already illuminated by massive works of scholarship.'[32] Rather it is a book about 'Roman law in its social context, an attempt to strengthen the bridge between two spheres of discourse about ancient Rome by using the institutions of the law to enlarge understanding of the society and bringing the evidence of the social and economic facts to bear on the rules of law.'[33] The first to adopt this 'law and society'-approach in the study of Roman law, he is still cited in modern works that pay allegiance to him.[34] The approach has witnessed an impressive surge over the last decades, with many new books being published.[35]

This chapter's structure is similar to that of the previous one. First off, I will discuss the approaches to Roman law that have played an important role to date. I adopt here the terminology of 'traditionalists' and 'modernists' to describe the two dominant approaches, and will discuss both consecutively. I agree with the rejection of studying Roman law as completely detached from its societal surroundings (which is an even more dominant method in the study of Roman law), but I will also tease out here (in the final part) some contributions in the field that seem to subvert some of the methodological presumptions that are in turn championed by modernists. Those contributions do not again embrace the doctrinal approach to Roman law, but discuss Roman appropriation of Greek legal treaties (Emiliano Buis' article) as well as the autonomy of Roman law (Yan Thomas' articles). It follows that we should perhaps look at other ways of studying the law alongside traditionalist or modernists perspectives.

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[32] Crook, *Law and Life of Rome*, 7.
[33] Ibidem.
[34] P.J. Du Plessis, 'Introduction', in : P.J. Du Plessis (ed.) *New Frontiers: Law and Society in the Roman World* (Edinburgh 2013) 1 – 5, 1.
[35] R. Bauman, *Lawyers in Roman Republican politics: a study of the Roman jurists in their political setting, 316-82 BC* (Munich 1983); B. Frier, *The rise of the Roman jurists* (Princeton, NJ 1985); E. Champlin, *Final Judgments. Duty and Emotion in Roman Wills, 200 B.C. to A.D. 250* (Berkeley 1991); R.P. Saller, *Patriarchy, Property, and Death in the Roman Family* (Cambridge 1994); J.-U. Krause, *Gefängnisse des römischen Rechts* (Stuttgart 1996); E. Metzger, *A new outline of the Roman civil trial* (Oxford 1997); J.J. Aubert, B. Sirks, *Speculum iuris: Roman law as a reflection of social and economic life in antiquity* (Ann Arbor 2002); Y. Rivière, *Le cachot et les fers. Détention et coercition à Rome* (Paris 2004); E. Metzger, *Litigation in Roman law* (Oxford 2005); J.W. Cairns, P.J. du Plessis, *Beyond dogmatics* (Edinburg 2007); L. Bablitz, *Actors and audience in the Roman courtroom* (New York 2007); F. De Angelis (ed.), *Spaces of Justice in the Roman World* (Leiden 2010); J.A. Crook, *The Law and Life of Rome* (New York 2012); P.J. du Plessis (ed.) *New Frontiers: Law and Society in the Roman World* (Edinburgh 2013).

Alan Watson should be understood as *the* defender of the traditional approach, and his views can be illustrated by three of his theses listed below:

'1. There is no necessary correlation between law and the society in which it operates. Of course, there is some connection but precisely what that is is not inevitable, and may often be tenuous. Law is very much the culture of the lawmakers.
2. Law once created lives on even in very different circumstances, also for a very long time, even for centuries.
3. Law transplants easily, even to very different societies. I would add that governments are usually little interested in making law, especially private law, and leave this task to subordinate lawmakers, such as judges and lawbook writers, to whom they do not give the power to make law.'[36]

Watson then goes on to gives examples at length, and I cannot discuss all of them here in detail. Concerning the first thesis, he gives us the example of the distinction of *furtum manifestum* and *furtum nec manifestum*, dating back to the Twelve Tables. Very surprisingly, jurists were in the dark as to the exact difference between the two in classical times, and still in the time of Justinian – the different had implications for the value of the action. The importance of the difference was completely *legal*: as thieves had no money (or so Watson claims) the issue will not have mattered 'socially'. Legally, however, the question would usually settle whether the owner of a slave who committed theft would pay the amount of deliver the slave in noxal surrender.[37]

On law living on for a long time he provides us with the example of Roman partnership. He shows how the early Republican legal idea of *ercto non cito* (inheritance not divided) came to guide ideas about partnership in the 3rd century B.C. (there were no separate formulae for partnership of business or transaction), but also ideas about equality in the first century B.C., where Quintus Mucius defends an unrealistic doctrine of equality that draws on this old idea of *ercto non cito*.

His third example traces the *actio aquae pluviae arcendae*, and Watson shows how this legal action is essentially transplanted to the French legal system, with the draftsmen of the French Code going as far as citing the relevant Roman jurists on this subject-matter.

[36] Watson, 'Law and Society', in: *Beyond Dogmatics*, 9-35, 22.
[37] Idem, 10.

Against these ideas proponed by Watson, we have witnessed an incredible surge in literature emphasizing the 'socio-embeddedness' of Roman law.[38] The positions of these modernists (one could also call them culturalists), are largely similar to the positions of modernists in Greek law. They (rightfully) emphasize law's connection to society and many books are explicitly devoted to this idea.[39] The upshot, however, is that without exception, these scholars have thus far ignored potential legal borrowing, transplantation, and mutual influences. Many scholars now focus on 'the law in action', as opposed from the 'law in the books' (or: the substantive rules) which is treated as synonymous with a doctrinal approach. A large part of *New Frontiers*, for instance, is devoted to legal practice and the archives of Babatha, Murecine and Puteoli (amongst others) have made possible to this focus on the law in action.[40] The technicalities of law or law's ability to transplant are not really topics that can be discussed without departing from that framework. As I emphasized repeatedly, this approach subordinates everything 'to the analysis of procedures, strategies and processes',[41] and with that the study of substantive rules and concepts really just provide the *framework* in which the actual important issues take place – they become a *pretext*. But the alternative, returning to the doctrinal approach, is equally unappealing.

There are some scholars on Roman law that presented what I think is a way out of this gridlock, by emphasizing law's autonomy, as well as the interaction of legal systems, without neglecting law's connection to society. But, as in the case of Cantarella, these ideas are never properly thought through so as to apply over and above the case-studies they are used in. None of these authors develop their assumptions into methodological starting points.

In an exciting essay Emiliano Buis draws attention to an important question, which captures what the study of ancient legal systems should emulate: 'The influence of Greek culture in Rome has been widely accepted in almost every single aspect of social life. Nevertheless, from a traditional legal point of view there seems to be very little contact between the two civilizations. In fact, legal historians have been reluctant to find possible interactions and have rather suggested that it was only with the Romans that a strong and systematic legal corpus could be built, something which had been unknown to the Greek spirit. I have always been amazed by this conviction, which blatantly contradicts what I consider to be one of the most outstanding features of the growing power of

[38] See footnote 33.
[39] See, for instance, the recent Du Plessis *New Frontiers: Law and Society in the Roman World* or Cairns, *Beyond dogmatics*.
[40] Chapter 5 to 8.
[41] Snyder, 'Anthropology, Dispute Processes and Law: A Critical Introduction', 145.

Rome: the permanent Roman intention to rely on Greek precedents in almost every social aspect of life and civic organization (architecture, sculpture, literature, religion, politics, inter alia multa), in order to "*translate*" and *adapt new forms and structures in accordance with their own Weltanschauung and their own interest*s.'[42]

It is this last sentence that exposes the fundamental flaw in both approaches: in so many other disciplines of Greek and Roman history we see exactly that kind of translation and adaption happening. The Romans were always keen to transform, or to speak with Geertz anthropological terminology, to 'translate' Greek ideas – and others too. Instead Buis proposes to study law by using the concept of "narrative transculturation", a concept he borrows from anthropologist Cubano Ortiz. The term, Buis claims, is useful because it 'implies a hybridization of two identities, a creation of a single and complex society based on the adaptation of colliding (or complementary) perspectives.'[43] To the historian of Rome and Greece, this kind of terminology should be quite familiar. It is all the more surprising, then, that it has not (as Buis rightly recognizes) been used in the study of law. In employing this perspective Buis then goes to show how 'Rome adapted the Greek tradition of treaties and used them to its own advantage'.[44]

But I think Buis does not cast his net as wide as he could. Of course, the narrative of *translatio, imitatio et aemulatio* is one traditionally associated with the Romans, but there are ample examples of the Greek culture being influenced in turn by Near Eastern or Egyptian ideas – Persia, Phoenicia and Egypt are very much regions that have exercised substantial influence on the Greeks in a variety of regions. Just as it 'blatantly conflicts' ordinary understanding to find the possible influences of Greek law commonly neglected, it is in turn very strange indeed to see that Greek law itself is never connected to other legal systems. What is so refreshing about Buis' approach is how he combines both paradigms: he returns to the law, and very much emphasizes how the law of a foreign legal system is 'translated' – he shows how 'by employing the traditional Greek treaty schemes (well-known to them since classical times) with a new intention, Rome absorbed the model with the aim of achieving its own political goals […] Profiting from the experience of its adversaries, Roman treaties create a space of political tension and struggle which is hidden behind the cultural appearance of friendship, alliance, peace and respect for Greek habits in diplomatic affairs […]

[42] E.J. Buis, 'Ancient Entanglements: The Influence of Greek Treaties in Roman 'International Law' under the Framework of Narrative Transculturation', in: T. Duve (ed.), *Entanglements in Legal History: Conceptual Approaches* (Frankfurt am Main 2014) 151- 185, 151, my italics.
[43] Idem, 154.
[44] Idem, 152.

Roman legal 'reception' of Greek treaties provides us with an interesting example of a narrative that enforces the fiction of equality to justify expansion, a narrative that reproduces the cultural pre-text to find an adequate *pretext*.'[45]

Yan Thomas on the other hand, in his work on Roman law, makes a compelling case for the autonomy of legal institutions. In his work, he tries to come to terms with one central question: how do legal categories relate to the world 'outside' the institution? This question of institutional reference returns to the technicalities, to the doctrinal issues of law, to Watson's law in the books, but with a fundamentally different outlook. It does not reduce law to culture, it does not view law as a mirror of society – rather it asks how exactly the interaction between law and society *works*. With that, it presupposes two things: 1) law has a certain force of itself and 2) law is related to society. By now we realize that the first premise is usually part of the doctrinal approach to law, and the second is part of the societal approach to law. But as Thomas beautifully demonstrates, the paradigms are never incompatible.

In his work about legal fictions of the Roman law, Thomas takes the example of the *lex Cornelia* (81 B.C.) which, contrary to the general rule that Roman citizens lost their testamentary capacity when taken captive, held that they were *deemed* not to have been captured at all. Their will, then, remained valid through the use of a fiction. Thomas' argument is, and here things get a little bit difficult, that the fiction is used to invalidate the prior rule as to testamentary capacity, but does so by *referring to external facts*: by referring to the 'fact' of having been captured. But these very facts are themselves *negated*: the captured people are understood as not having been captured at all. What the *facts* are – whether someone is captured or not – is not determined by the real facts, but by the *law*. As Thomas puts it: 'the difference between law and fact is not a difference of *fact* but one of *law*, and this is what defines the essence of the institution, and what makes fictions so revelatory of the artificiality of the institution.'[46] And even though it might have been much easier to simply validate the wills of those who died in captivity, or even to change the prior rule, Roman law '*preferred* fictions'.[47] These fictions 'preserved the notion of external reference, but only as a resource for an ever more involuted process of institutional self-reference', and with that 'the law became

[45] Buis, 'Ancient Entanglements', 175-7.
[46] Y. Thomas, '*Fictio legis* : L'empire de la fiction romaine et ses limites médiévales', *Droits, no 21,* 1995, 17-63, 20.
[47] A. Pottage, 'Introduction', 14.

increasingly isolated by these ever more complex constructions [of the fiction], always widening the gap between itself and reality [le réel]'.[48]

The way in which law is here clearly connected to societal issues – it addresses the question of inheritance in the case of capture in battle – but *at the same time* functions according to its *own institutional logic*, shows that it would be too simply to ignore the *agency* of these legal fictions, which in turn of course themselves have important ramifications in the 'real world'. His account, as Pottage recognizes, 'insists on the 'cold, technical' character of legal rationality.'[49]

Thomas' discussion of the 'tomb' in Roman law advances a similar line of argument. Thomas explains how a tomb, as a *res religosae*, was fundamentally different from mere monuments or buildings that were part of the *lieu de memoire*, but not of the tomb proper. The tomb contained the *body* itself, and *therefore* it was protected by the law. The law, as Thomas aptly puts it, 'protected that which protected'.[50] He shows how that body itself only acquired a protective status with the advent of Christianity (*violatio sepulchri* does not concern the body itself) – and how this mode of protecting, 'prohibition of access to a thing through which one gained access to another thing',[51] is essentially the one employed for sacrilege too: 'the gods themselves were defended by a perimeter drawn by the objects and places that were consecrated to them'.[52] Now one would expect that this special status of the tomb, that prohibited alienation in all possible forms, was closely tied up with notions of purity and impurity: the tombs were impure because polluted by the bodies it contained. But Thomas shows that these notions were not 'immediate and intuitive observations of religious consciousness […] the law designated a plot as *purus* not because it was free of the polluting presence of some corpse, but because there was no funerary dedication that prevented it from being freely alienated.'[53] It was a strictly defined *legal category*, employing the kind of logic that sometimes seems so alien to non-lawyers. What it amounts to, is that 'in Rome, law and legal rules were not the expression of [religious] taboos. Rather, they were instruments by which taboos were transformed into a set of techniques for the management of inheritance funds'.[54]

[48] Ibidem. Thomas, '*Fictio legis*', 35.
[49] Pottage, 'Introduction', 16.
[50] Thomas, '*Fictio legis*', 66.
[51] Ibidem.
[52] Ibidem.
[53] Idem, 68.
[54] Idem, 72.

Thomas' work is important because it warns us for the dangers of reductionist approaches: 'it is true that such notions of impurity were very widespread, and gave rise to a number of ritual and religious precepts which required the avoidance of contact and the undertaking of rites of purification. However, this realm of beliefs and mental attitudes was *not directly* transposed into law; quite the contrary, the law distanced itself from them […] the categories of religious anthropology, and especially the distinction between pure and impure, are not the best way into the most durable and the most historically adaptable form of intelligence produced by the Roman world – namely, its law.'[55] I do not argue here that Greek law is subject to the same kind of logic that for Thomas characterizes Roman law. What I do argue is that law cannot simply be understood as a 'mirror': it is an instrument – it shapes, distorts, reinterprets. Nor should we forget how law is still clearly linked to society in Thomas' analysis, the link is neither absent nor straightforward. It works according to its own logic: legal forms too have agency.

[55] Thomas, '*Fictio legis*', 72.

IV. Traditionalists and modernists: the meta-level

The same debates that characterize scholarship on Roman and Greek law can be retraced to the more overarching disciplines of legal sociology, comparative law, comparative legal history and legal anthropology. I tease out some of the implications that the debates have had here, precisely because they provide methodological starting points that in turn can be used for our study of Greek and Roman law. I will therefore discuss briefly the two methodological points that underlie my approach to Greek and Roman law: a contextualising method of legal systems and the return to the substantive rules of the law.

I start my discussion of the comparative approach to law with a brief excursus on the nationalist heritage of comparative law, a heritage that to date has precluded the kind of comparative approach that I defend. The point is more explanatory and I discuss both the 'standard' approach (approaching legal systems as having 'their own law') as well as the problems with such an approach and develop an argument where I try to justify a comparative approach to Roman and Greek law – I believe that it is very difficult to study the law of a given time and place whilst ignoring how the law developed elsewhere, whether one adopts a nation-state framework or not. In any case, I think it is very much the case that legal history and comparative law exist in the *mental* framework of the nation-state: 'students still study, and academics write, about German law, French law, Italian law, and so forth as though each were an independent object of study'[56] – and thus, 'if each nation had its own law, the job of comparative lawyers was to compare the law of one nation with another'.[57] My comparative approach then, is distinctly *not* the comparison of 'the law of one nation with another', but rather it tries to show how the *same legal concepts* underlie multiple legal systems, showing that they probably interacted with one another. That is also why I abstain from using the word 'comparative' and why I opt for the word 'contextualizing' instead: a comparison is too much connected to the idea of a comparison of two legal systems independent of one another.

This is very different from what is normally supposed or assumed, namely that 'each law constitutes in fact a system: it employs a certain vocabulary, corresponding to certain legal concepts; it uses certain methods to interpret them; it is tied to a certain conception of social order which determines the means of application and the function of law'[58] But as Patrick Glenn rightly recognizes this '*synchronic* and *particularist* view of the relations between national and extra-national

[56] Gordley, 'Comparative Law and Legal History', 760.
[57] Ibidem.
[58] David, *Major Legal Systems*, 20.

law may not capture past or future relations between local and distant law, nor for that matter the experience of other jurisdictions in the world' but it has been the dominant understanding of law over centuries.[59] And in that dominance, I believe, it has also guided the understanding of scholars of Roman and Greek law. I know of no recent contributions in Roman or Greek law (save for that of Buis) that try to understand these legal systems in a wider context, as interacting with other legal systems. But not adopting that approach is to miss important aspects of what the study of law should entail. We cannot simply neglect interaction that is there: 'a persistent problem in legal history has been to try to understand the law of a time or place or nation as an *independent* object of study'.[60] Much of the law, simply put, is unlikely to be wholly 'national'. What is crucial is to understand how 'one cannot accept the premise from which comparative law began: *that one is comparing a domestic law contained in domestic sources with foreign law*'.[61]

Annelise Riles, in a reflection on the debates about the comparative approach in the related disciplines of comparative law, socio-legal studies and legal anthropology, concludes that there is a 'limited range of methodological options on the table', and that scholars always think in black and white-terms: 'either one is a culturalist, a doctrinalist, or a rationalist.'[62] Rises convincingly argues that we need to opt for more nuanced accounts, producing more 'sophisticated and fine-grained accounts of the social dimensions of legal transnationalism and also of the impact of transnational legal influences on the character of local cultural and social life': the division of the world in 'law' and 'society', as Riles claims eloquently, has 'outlived its utility'.[63]

My methodological starting-point, then, is that legal systems that are close in time and space cannot be studied independently of one another – we cannot think of these systems as closed systems, that have not interacted, and then go on to compare them with each other. Of course, my chapters on the law of adoption in Greece and Rome (and other ancient legal systems) have yet to prove this, but if this is generally true, then we at once have a justification for adopting a contextualizing approach. We cannot fully understand the law of any given system (be it the Roman or the Greek) without appreciating how these systems themselves drew upon existing examples of other legal systems.

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[59] Patrick Glenn, 'The Nationalist Heritage', 76.
[60] Gordley, 'Comparative Law and Legal History', 759. My italics.
[61] Idem, 761. My italics.
[62] Riles, 'Comparative Law and Socio-legal Studies', 799.
[63] Idem, 796.

But it is important to note what *kind* of contextualization this is – it is not simply the comparison of legal rules in Rome with those in Greece with those of other legal systems. It is contextualizing in the sense that it looks out for common features, for underlying juridical concepts. Here I follow Raymond Westbrook, who claims that the many important juridical features shared by ancient legal systems could be understood as them belonging 'in varying degrees to a common legal culture, one very different from any that obtains today. At the very least they shared a legal *ontology*'.[64] Apart from the implications this approach has for our understanding of Greek and Roman law itself, then, it also affects our understanding of Greek and Roman society as interacting with other societies in the Mediterranean, and with each other. But that is, considering the developments in the field of Roman and Greek history, hardly surprising. I think the study of law is falling a little bit behind in this regard, and this thesis is in part an attempt to close the gap.

Now this specific *kind* of contextualization also guides the level at which we are working: of course the doctrines of adoption (in my example), and of other doctrines more generally, can differ vastly in their details. The point is rather that they will prove to be structurally similar: adoption is the conferral of certain rights of duties unconnected to biological status, and in many systems cases were quickly solely about these legal rights and duties and not about any social purpose whatsoever. Of course neglecting these differences in detail is problematic, and I do not envisage this comparative method to completely replace other approaches now in use. It can serve as a helpful method to make clear some interconnections and origins of legal rules and doctrines that would have been less well understood without it. I will come back to these issues in chapter seven, but for now it suffices to emphasize that I presuppose an interaction between legal systems that exist(ed) closely to one another in time and space, and therefore certain structural similarities in the technical rules of certain legal doctrines. I will try to show this in chapter seven, but also note similarities in the earlier chapters on Greek and Roman adoption.

So much for the comparative approach to the study of Greek and Roman law. I now turn to a justification of the return to the substantive rules. As I mentioned above, it is on this level (of substantive rules and juridical concepts) that I will try to compare the legal systems. The two points, of the comparative approach and the return to the technicalities, then, are closely connected. In this part of the chapter I will argue for a return to the substantive rules without reverting to a doctrinal or traditionalist approach to the law, and that makes space for an analysis of the agency of law.

[64] R. Westbrook, 'Introduction', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 1 – 92, 4.

As I illustrated above, scholars of Greek and Roman law turned away from what is traditionally considered 'the legal realm', and towards 'the law in action' or (following anthropology) by understanding law as procedures, strategies and processes.[65] Comparative lawyers too turned away from 'rules and legal cases: the key questions became not so much content of legal rules and their functions, but the relative significance of legal rules and institutions vis-à-vis other institutions for resolving disputes or expressing social norms'.[66] This is precisely the reorientation that scholarship of Greek and Roman law has witnessed in the last decades.

But that reorientation was also fundamentally a neglect of the shaping qualities that legal institutions themselves have. I propose to focus sharply on 'law itself', again drawing on the recent work of Annelise Riles – who calls her approach an endeavor into the 'technicalities' of law.[67] Riles insightfully argues that 'one way of thinking about this is to suggest that legal knowledge, far from just working 'on' social, political, or economic phenomena, or being shaped by them, actually serves to *constitute* these phenomena by providing the cognitive frames through which social actors apprehend social realities. In this respect, one particularly interesting conversation is emerging […] around the question of *agency of legal form*: this work draws attention to the way legal categories function as constraints that shape actors' choices and even enable certain kinds of legal subjectivity. In this respect, we can speak of legal categories and techniques as *generative* of certain kinds of social, political, and epistemological realities'.[68] Riles is inspired by the equally inspiring book by Alain Pottage and Martha Mundy, as well as the exciting, though hardly read, essays of Yan Thomas on Roman law.[69] Pottage, for instance, shows how what we see as a very 'natural' divide between persons and things, is actually a consequence of 'the mundane and technical workings of such *doctrines* as property law', something Thomas sees as having its genealogy in the Roman legal distinction of *res* and *personae*.[70] Legal institutions have constituted 'social realities'; and this idea, that social facts are constituted through legal form, is at the same time a return to 'the legal rules' and a departure from the suffocating dualism that underlies so much of the debates in Greek and Roman law.

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[65] See the previous chapters.
[66] Riles, 'Comparative Law and Socio-legal Studies', 785.
[67] Idem, 808.
[68] Riles, 'Comparative Law and Socio-legal Studies', 808.
[69] A. Pottage, M. Mundy (eds.), *Law, Anthropology, and the Constitution of the Social: Making Persons and Things* (London 2004); for example: Y. Thomas, '*Fictio legis* : L'empire de la fiction romaine et ses limites médiévales ', *Droits, no 21,* 1995, 17-63.
[70] Riles, 'Comparative Law and Socio-legal Studies', 810.

This approach, as Riles recognizes, would finally and definitively move 'beyond functions and systems, beyond law and society, beyond culture and transplants to a new set of concerns'.[71] Drawing on Weber she shows how this account is one that does not reduce 'legal knowledge to elements outside the law such a society, politics, or culture', but instead remains 'internal to the legal culture itself'.[72] With this it is possible to adopt a cultural or social framework whilst maintaining that legal activity is a 'social and cultural practice in its own right'.[73] It does away with the crude oppositions that I think lie at the heart of current scholarship in Greek and Roman law: its choice for a 'cultural' or 'social' framework is reductionist in the very same way that the 'doctrinal' or 'positivist' framework was reductionist. An account that emphasizes cultural context, but does not deny the constitutive force of law opens up exciting avenues of research.

A very insightful way of doing this can perhaps by found in the work of Geoffrey Samuel. His essay about 'Epistemology and Comparative Law' contains an interesting argument about the autonomy of legal institutions against the backdrop of society, for which he draws on the epistemology of science.[74] In a rereading of the French epistemologist Gilles-Gaston Granger Samuel claims that, just like lawyers, natural scientists to not work *directly* with actual facts. In fact, natural scientists 'construct abstract schemes or models based on a reaction to these facts and it is these models that act as the object of science', and not the facts themselves. Granger calls these facts 'virtual facts' because it is really the *conceptual model* that is the object of scientific enquiry, and not the actual fact – 'the object consists of an abstract model or scheme of this reality and it is the abstract relations and elements that make up this model, rather than the empirical phenomenon, which acts as the basis of knowledge'.[75] These observations come to bear when considering law: just as objects of science are always abstract objects that are more or less indirectly connected to empirical phenomena, legal facts are really factual *models* that transcend factual *reality*. The concept of 'homicide' in Draco's homicide laws consisted of legal propositions – crucial terms such as 'intentional', and 'unintentional' – and these propositions are abstracted 'from particular circumstances to transcend any single set of *actual facts*.'[76] The legal approach to slavery in Roman law, for instance, insisted that the slave was a *res*, a thing, and with that drastically opposed virtual

[71] Riles, 'Comparative Law and Socio-legal Studies', 811.
[72] Idem, 805.
[73] Ibidem.
[74] G.Samuel, 'Epistemology and Comparative Law: Contributions from The Sciences and Social Sciences', in: M. van Hoeke (ed.), *Epistemology and Methodology of Comparative Law* (Oxford 2004) 35 -77.
[75] Idem, 43.
[76] Idem, 46.

legal fact and actual reality. It leads Simpson to an interesting conclusion: 'the idea that legal science is a discourse that has as its object actual factual situations is to misunderstand, fundamentally, legal thought. […] Lawyers, like scientists, do not work directly on reality but construct rationalized models of this reality; and it is these models that become the 'objects' of legal discourse'.[77] As an idea, law has a role as much in the world of fact as it has a role in the world of the law itself.

One could argue here that such a view might capture Roman law, but fundamentally misunderstands Greek law. I disagree: categories might have been conceptualized in a radically different way, but the Athenians too distinguished homicide, theft and other crimes. The categories Simpson provides as an example – the person, 'damage', 'thing', 'fault' – these categories are treated by the law as if they are 'facts', 'by social actors as social categories', but they are actually legal *categories*, *virtual* facts, i.e. abstractions of reality. These categories can then go on to have a life of their own – as Eva Cantarella has shown in her work on gender in Greek law: she shows how social stereotypes of women were 'translated' into legal categories that in turn transformed the status of these stereotypes to actual categories.

Annelise Riles adopts a similar approach, and she develops a methodology for 'the agency of legal form' in her *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*.[78] She starts with dividing the legal academy in two: Culturalists and Instrumentalists. Culturalists seek to provide an account 'of the [real] *content* of legal norms, the meaning of legal texts, or the place of law in culture'.[79] The instrumentalists, on the other hand, evaluate law according to its usefulness in solving legal problems and Riles includes formalists here – legal scholarship to formalists is to understand how internal doctrinal problems are solved by the legal arguments depending on that very same doctrine. With that they are somewhat different from, say, economists, political scientists or corporate lawyers because they ignore connections to society, but both share their instrumental understanding of the law as a 'problem-solving tool'.

Central to the account of Riles is an observation that is equally central to this thesis – at the core of these different methodologies 'is a surprising fact': 'both groups have quite impoverished understanding of the very thing that defines our field, of what makes law as opposed to literature or

[77] Samuel, 'Epistemology and Comparative Law', 74.
[78] A. Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities', 53 *Buffalo Law Review* 973-1033 (2005).
[79] Riles, 'A New Agenda for the Cultural Study of Law', 973.

economics or cognitive science: the technicalities of legal thought'.[80] To the Culturalist, and this is something we notice throughout in the scholarship on Greek and Roman law, the technical dimensions of law 'are a mundane and inherently uninteresting dimension of the law'[81], whereas the Functionalist fails to subject the law itself 'to any deeper or more critical enquiry'.[82]

Instead Riles argues to reconcile both approaches, and goes on to present a culturalist interpretation of legal technicalities – making the theories, the models, the arguments and the techniques 'the protagonist of its own account.'[83] Like Samuel, she turns towards the epistemology of the natural sciences for inspiration. She mentions Science and Technology Studies' (STS) fundamental insight that the *character* of the *tools* matter: scientific tools have *agency*. 'Truth, in this view, is an artifact of networks of material and non-material, human and non-human "actants." Concrete material tools such as a microscope or a cyclotron enable humans to know certain things – microbes only come into being for the scientist with the invention of the microscope. These tools also guide and limit how humans will go about their work: although microbes are at the center of the scientific inquiry in the eighteenth century metropolis, those same microbes do not "*exist*" in quite the same way – they cannot be made to come into view – in an environment where the microscope cannot be made to function correctly […] The radical insight is that theoretical innovations are not simply the product of *persons*, or even of their *social or epistemic contexts*. Rather, some agency must be attributed to the *machine* or the *model* itself.'[84]

This very powerful idea goes a long way in rejecting the gridlock that comes with the two conflicting paradigms. Just as microscopes make microbes come into view, make them *exist* for scientists, in that very same way law *creates* social realities in its own distinct fashion by the application of legal 'technicalities'. Legal instruments, then, work in a very similar way as scientific instruments do: they too have agency, they too *create* their own realities. It is this kind of approach that I seek to develop in my discussion of the Greek and Roman law of adoption. It not only returns to the legal rules that have been neglected by Culturalists (and with that they have neglected an important part of Greek and Roman law, I argue), but it also puts us in a position to understand legal transplantation and legal exchange without taking recourse to the 'superficial' and 'positivistic' discussion of rules, precisely because both the legal rules as well as their societal consequences are

[80] Riles, 'A New Agenda for the Cultural Study of Law', 974.
[81] Ibidem.
[82] Idem, 975.
[83] Idem, 985.
[84] Idem, 987-8.

embraced. Geoffrey Samuel, Annelise Riles as well as Emiliano Buis, Eva Cantarella and Yan Thomas all show that both paradigms *can* be combined and I will draw on their work in my chapters on the Athenian and Roman law of adoption in an attempt to make sense of the agency of law.

V. Adoption in Athens

Before starting with the chapters on the Greek and Roman law of adoption, it is perhaps useful to explain what exactly I mean by the *agency of the law of adoption*. Let's start with what I do not mean by that. I do not mean that the law suddenly goes on to work completely independent from society – the law of adoption is always 'done' by people. It is always people who use and abuse existing rules of adoption – the point is that those dealing with the law of adoption had, in the words of Alan Watson, 'a style that was inward-looking'.[85] I do not mean that the law of adoption goes on to lead its own life, or actually comes to shape societal ideas or morality; in fact, a great many of the usages of the law of adoption were condemned by society. The law of adoption, if it is used to play out family feuds or to play the game of family favourites, is used as an instrument or a justification for that practice in the hands of persons – it is not an agent in this sense.

My point is rather that these new social realities, these usages, cannot be made to come into view without the law of adoption. Here I draw on Annelise Riles in my claim that these legal innovations 'are not simply the product of *persons*, or even of their *social or epistemic contexts*. Rather, some agency must be attributed to the *machine* or the *model* itself' – that is, some agency must be attributed to the technical legal rules that make possible this kind of usage, that evidently flies in the face of the functions it was supposed to fulfill. I want to stress the agency of the law of adoption *in this sense*, and show that this particular kind of agency is present in both Athens and Rome, as well as in other ancient legal systems.

To rephrase the point in other words, again by Riles, is that the law, 'far from just working 'on' social, political, or economic phenomena, or being shaped by them, actually serves to *constitute* these phenomena by providing the cognitive frames through which social actors apprehend social realities.'[86] I would argue that the technical rules of adoption are precisely these cognitive frames through which the social actors – the people doing law – apprehend, and even shape, social realities. Thomas, in his essay on the Roman tomb, again puts the point slightly differently: 'law and legal rules were not the expression of taboos [or societal concerns]. Rather, they were instruments by which taboos were transformed into a set of techniques for the management of inheritance funds'.[87] Although adoption might be envisaged to alleviate certain societal issues, the legal rules of adoption were quickly transformed (by people doing law) into a set of techniques for playing out family feuds,

[85] Watson, 'Law and Society', in: *Beyond Dogmatics*, 23.
[86] Riles, 'Comparative Law and Socio-legal Studies', 808.
[87] Thomas, '*Fictio legis*', 72.

temporary adoption, Roman 'familia-scaping', the practice of adopting one's own grandson and so forth. The rules provided the means for the people doing law to do so, and these sets of techniques, then, were created as much by the persons doing law as they were by the peculiar legal logic underlying the rules that made these techniques possible.

This chapter deals with the Greek (or rather: Athenian) law of adoption. It is not an extremely popular topic: the law of adoption is usually discussed in a few pages in handbooks on Greek law, and as far as I am concerned there is just one monograph completely devoted the subject – Lene Rubinstein's *Adoption in IV. Century Athens*.[88] Other books and articles deal with adoption more indirectly, in the context of the *oikos* and the *polis*, for instance. The argument advanced here is not, then, that adoption is a radically neglected topic – just that it is radically neglected in a specific sense, and here adoption serves as an example of a subject-wide lacuna. The attention is either on the *description* of the legal procedures of adoption, or on the social explanations of adoption, and in good books on both. But attention is never drawn to the social or cultural study of these very rules of substantive and procedural law.

These legal rules, it is all too often presupposed, can simply be described, and as they contain nothing of interest for those who come to the subject with cultural or societal questions they provide the picture frame in which the *exciting* questions can be dealt with. Most authors discuss the legal rules briefly (or, as lawyers do, solely) and, presupposing that the rules are simply applied to adopt people and have no force of their own, they then go on discussing what is 'actually interesting': the adoption *itself*. Why did people adopt? Who adopted? How did adoption impact family structures? How was adoption abused for political purposes? In such cultural and social projects the rules themselves are somewhat beside the point – 'a mere pretext for telling the story of persons, practices, economic incentives or power politics'.[89]

But these very rules have agency – they produce their own realities, and are therefore interesting from a cultural of societal point of view. Here I would like to return to these technicalities of the law of adoption; I would like to discuss the ways in which legal knowledge is produced, to discuss the logographers and court parties that are 'doing law' and are constructing arguments (the kind of source-material we have makes the study of Athenian law so unique), and to discuss the form of technical legal doctrine and argumentation. If we look at these aspects, we come

[88] L. Rubinstein, *Adoption in IV. Century Athens* (Copenhagen 1993)
[89] Riles, 'A New Agenda for the Cultural Study of Law', 980.

to appreciate that law can be studied as a 'culture' in its own right; a 'culture', moreover, that is not just the product of the society it is part of, but that is a distinct culture within society, a culture that has agency itself. The legal logic and method that serves as the foundation for ideas of adoption, in turn generates 'certain kinds of social, political, and epistemological realities' as the law opens up space for use, misuse and abuse. This analysis, and here I depart from most approaches, has as its starting point the idea that law does *not* function instrumentally in society but works, to a significant degree, autonomously in society.

I will start out with an overview of the law of adoption. The more introductory paragraphs pave the way for a discussion of some examples of the doctrine of adoption as it actually played out, how adoption was used, misused and abused. These considerations will then merge into a broader argument about the 'agency of law', about how, by creating a *legal* idea of 'legitimacy', the law of adoption actually came to *constitute* phenomena. As I try to emphasize the 'technical dimension of legal knowledge, as a cultural practice of its own', I will, more than usual, cite source-material at length, as this is one of the ways into the kind of method and reasoning that is so peculiar to the Athenian *law*: all we have are *arguments*, made in the context of actual legal conflicts as we try to understand the speeches that have come to us. It is only very rarely that the logographers or legal actors produce actual laws – they were usually left out of the speeches subsequently published.

The technical workings of adoption in Athens

Only adult males had the right to adopt[90], but only if they were not themselves adopted (as the Solonic law on wills, which applied to adoptions too[91], testifies[92]), if they had no legitimate (γνήσιος) sons (but not daughters)[93], and if they were not 'deranged because of madness, old age, drugs, illness or a woman's persuasion, or compelled by force or imprisonment.'[94] The adoptee, on the other hand, could be of any age and sex – three female adoptees are mentioned in our source-material – nor did (s)he need to be related in any way: (s)he could be anyone.[95] The only qualification is that

[90] Isaeus, 10.10: ὁ γὰρ νόμος διαρρήδην κωλύει παιδὶ μὴ ἐξεῖναι συμβάλλειν μηδὲ γυναικὶ πέρα μεδίμνου κριθῶν.
[91] Isaeus 2.1, 2.9, 2.25, 2.38.
[92] Demosthenes, 46.14: ὅσοι μὴ ἐπεποίηντο, ὥστε μήτε ἀπειπεῖν μήτ᾽ ἐπιδικάσασθαι, ὅτε Σόλων εἰσήει τὴν ἀρχήν, τὰ ἑαυτοῦ διαθέσθαι εἶναι ὅπως ἂν ἐθέλῃ, ἂν μὴ παῖδες ὦσι γνήσιοι ἄρρενες, ἂν μὴ μανιῶν ἢ γήρως ἢ φαρμάκων ἢ νόσου ἕνεκα, ἢ γυναικὶ πειθόμενος, ὑπὸ τούτων του παρανοῶν, ἢ ὑπ᾽ ἀνάγκης ἢ ὑπὸ δεσμοῦ καταληφθείς. Also: Dem. 44.68: ὡς τοῖς γε ποιηθεῖσιν οὐκ ἐξὸν διαθέσθαι, ἀλλὰ ζῶντας ἐγκαταλιπόντας υἱὸν γνήσιον ἐπανιέναι, ἢ τελευτήσαντας ἀποδιδόναι τὴν κληρονομίαν τοῖς ἐξ ἀρχῆς οἰκείοις οὖσι τοῦ ποιησαμένου.
[93] Idem.
[94] Idem.
[95] Isaeus 7.9; 11.8; 11.41.

after the passage of Pericles' citizenship law just children of two Athenian parents were eligible for adoption. Importantly, a legally adopted child 'lost all legal relationship to his or her biological father and became the *legitimate* child of the adopter'.[96] As such he would be enrolled in his adoptive father's phratry and deme[97], and was only allowed to annul the adoption and leave the *oikos* if he left behind a *natural* son of his own (as he was not allowed to adopt).[98]

There were probably three main reasons for the adopter to adopt someone, though additional reasons of course could have played a role: support in his old age, proper burial rites, and attendance of his tomb-cult (the annual commemorative rites, dependent on the continuation of the *oikos*) and perhaps we should add the prevention of the *oikos* becoming *eremos*.[99] Isaeus, once again, illustrates: 'Some time after this Menecles began to consider how he could put an end to his childless condition and have someone to tend his old age and bury him when he died and thereafter carry out the customary rites over him.'[100]

Three forms of adoption existed in Athens: adoption while the adopter himself was still alive (adoption *inter vivos*), a nomination of an adopted heir in a will (testamentary adoption), and an adoption carried out on his behalf after death at the instance of a family member (posthumous adoption). The forms, as Stephen Todd recognizes, 'are not always readily distinguishable in specific cases, because there was no distinction of terminology'[101]: *eispoioumai* or *poioumai* – verbs used to denote adoption – were used interchangeably (as were some additional variants), but the legal consequences between the three types differed vastly.

Adoption *inter vivos* had one serious advantage: the adoptee acquired the status of direct heir – which meant he could immediately enter into his inheritance (*embateuein*) upon death of his adoptive father, and could prevent other claimants from instigating *epidikasia* by stating formally that the deceased has left a γνήσιος υιός, a legitimate son – adoption *inter vivos* made sure he was on par with a direct natural heir.[102] But it also came with a hazard: once adopted it could not be made

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[96] D.D. Philips, *The Law of Ancient Athens* (Michigan 2013) 177.
[97] Isaeus 2.14: διδόντων οὖν τῶν νόμων αὐτῷ ποιεῖσθαι διὰ τὸ εἶναι ἄπαιδα, ἐμὲ ποιεῖται, οὐκ ἐν διαθήκαις, ὦ ἄνδρες, γράψας, μέλλων ἀποθνήσκειν, ὥσπερ ἄλλοι τινὲς τῶν πολιτῶν, οὐδ᾽ ἀσθενῶν: ἀλλ᾽ ὑγιαίνων, εὖ φρονῶν, εὖ νοῶν, ποιησάμενος εἰσάγει με εἰς τοὺς φράτορας παρόντων τούτων, καὶ εἰς τοὺς δημότας με ἐγγράφει καὶ εἰς τοὺς ὀργεῶνας.
[98] Harpocration, Ὅτι οἱ ποιητοὶ, transl. by Philips in: *The Law of Ancient Athens*, 194.
[99] See Isaeus 7.30 and Dem. 43.77.
[100] Isaeus 2 10: μετὰ δὲ ταῦτα χρόνου διαγενομένου ἐσκόπει ὁ Μενεκλῆς ὅπως μὴ ἔσοιτο ἄπαις, ἀλλ᾽ ἔσοιτο αὐτῷ ὅς τις ζῶντά γηροτροφήσοι καὶ τελευτήσαντα θάψοι αὐτὸν καὶ εἰς τὸν ἔπειτα χρόνον τὰ νομιζόμενα αὐτῷ ποιήσοι.
[101] Todd, *Shape of Athenian Law*, 223.
[102] Demosthenes, 44.29; 44.42; 44.53.

undone, and the subsequently produced natural son had to share his inheritance with the adopted son, as is illustrated by Isaeus quotation of the law in *On the Estate of Philoctemon*: 'How, then, was Philoctemon childless, when he left behind his own nephew as his adopted son, and the law gives him his inheritance on equal terms with the sons born from Philoctemon? In fact, it is explicitly written in the law that if sons are born to a man who has already adopted, each takes his share (τὸ μέρος ἑκάτερον' of the estate and both groups inherit equally (ὁμοίως ἀμφοτέρους)'.[103] The adopted son *inter vivos* was indeed on par with the natural son. This type of adoption was, therefore, mostly used by the old man incapable of producing legitimate heirs, in which case he himself had to see to the timely completion of formalities – something that evidently went wrong in Isaeus 2 and 7.[104]

Testamentary adoption, as Thompson shows, was much more flexible, but also more insecure.[105] It was used in cases of imminent danger, such as sudden military duties (as in Isaeus 7), and could provide a way for the younger man to see to his inheritance in the case of an unforeseen death. Unsurprisingly, these wills were very often conditional – in Isaeus 6, for instance, we read καὶ ἔγραψεν οὕτως ἐν διαθήκῃ, εἰ μὴ γένοιτο αὐτῷ παιδίον ἐκ τῆς γυναικός, τοῦτον κληρονομεῖν τῶν ἑαυτοῦ ('under the terms of his will, if he had no child by his wife, Chaerestratus inherited his estate')[106], and Demosthenes 46.24 provides another example: σκέψασθε δὴ καὶ τονδὶ τὸν νόμον, ὃς κελεύει τὴν διαθήκην, ἣν ἂν παίδων ὄντων γνησίων ὁ πατὴρ διαθῆται ἐὰν ἀποθάνωσιν οἱ παῖδες πρὶν ἡβῆσαι, κυρίαν εἶναι ('Note, too, the following law, that a will shall be valid which a father makes, even though he has sons lawfully born, provided the sons die before they reach the age of manhood').[107] The upshot of this flexibility was that the testamentary heir could not enter immediately (*embateusis*) as a direct heir, but had to claim by *epidikasia* (a claim to the estate of dead man) just as all other claimants to the inheritance that were collaterals. Flexibility came with more uncertainty. As Rubinstein, I think, convincingly postulates, the position of a son adopted by will was (procedurally) different as he had not yet been enrolled in the phratry and the deme of the testator.[108]

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[103] Isaeus 6 63: καὶ διαρρήδην ἐν τῷ νόμῳ γέγραπται, ἐὰν ποιησαμένῳ παῖδες ἐπιγένωνται, τὸ μέρος ἑκάτερον ἔχειν τῆς οὐσίας καὶ κληρονομεῖν ὁμοίως ἀμφοτέρους.
[104] See about this: W.E. Thompson, 'Athenian Attitudes to Wills', *Prudentia 13*, 13-23, 16.
[105] Ibidem.
[106] Isaeus, 6.7.
[107] Dem. 46.24.
[108] Rubinstein, *Adoption in IV. Century Athens*, 41.

Posthumous adoption is somewhat more mysterious in its exact workings, but attested quite clearly, at least as a legal form, nevertheless[109], and it should be closely linked to the desire of the continuation of the *oikos* (to which we will come to in a moment). Todd claims that its function appears, as with testamentary adoption, 'to have been flexibility, in particular because it allowed the dead man's family to construct a mutually acceptable settlement especially in the face of situations which the dead man might not have been able to foresee.'[110]

Legal effects of adoption

Most importantly, a legally adopted child lost *all* 'legal relationship to his or her biological father and became the legitimate child of the adopter'[111] instead – that is, 'the most important effect of adoption was to make the adopted son the heir of his adoptive father'.[112] This meant that – just like in Roman law – all legal ties with the natural family were severed; the adoptee lost all claims on the inheritance of his natural father, as is illustrated by Isaeus in his *On the Estate of Astyphilus*: 'There is little likelihood, however, gentlemen, of your paying any attention to his claim of kinship (τῷ τοὔτου γένει); for no one, after passing by adoption (ἐκποίητος) into another family, has ever inherited from the family out of which he was adopted, unless he re-entered it in the proper legal manner [by leaving a natural son of his own in the adoptive family].'[113] The legal rule is repeated once more in Isaeus' *On The Estate Of Aristarchus*: 'Cyronides, the father of my opponent and of the other party who illegally kept possession of this estate, was adopted into another family (ἐξεποιήθη εἰς ἕτερον οἶκον), so that he had no further claim to the property.'[114] All legal ties with the father, then, were cut off on the transferral from the natural *oikos* to the adoptive *oikos*.

And not just the ties with the father, but all rights to inherit from his natural father's relatives were conceded. Again Isaeus illustrates, this time in his *On the Estate of Astyphilus*: 'Cleon, my adversary, is first cousin to Astyphilus on his father's side, and his son, whom he pretends that Astyphilus adopted, is his first cousin once removed. Cleon's father, however, passed by adoption

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[109] Isaeus 6.3: Φιλοκτήμων γὰρ ὁ Κηφισιεὺς φίλος ἦν Χαιρεστράτῳ τουτῳὶ δοὺς δὲ τὰ ἑαυτοῦ καὶ υὸν αὐτὸν ποιησάμενος ἐτελεύτησε. λαχόντος δὲ τοῦ Χαιρεστράτου κατὰ τὸν νόμον τοῦ κλήρου, Philoctemon of Cephisia was a friend of Chaerestratus here, and died, having bequeathed to him his property and having adopted him as his son. Chaerestratus in accordance with the law1 claimed the estate. Also: Dem. 43.11 and 44.19.

[110] Todd, *Shape of Athenian Law*, 225.

[111] Philips, *The Law of Ancient Athens*, 177.

[112] Rubinstein, *Adoption in IV. Century Athens*, 45.

[113] Isaeus 9.33: ὑμᾶς δέ, ὦ ἄνδρες, οὐκ εἰκὸς ἐστι τῷ τοὔτου γένει προσέχειν τὸν νοῦν: οὐδεὶς γὰρ πώποτε ἐκποίητος γενόμενος ἐκληρονόμησε τοῦ οἴκου ὅθεν ἐξεποιήθη, ἐὰν μὴ ἐπανέλθῃ κατὰ τὸν νόμον; Dem. 58.30-2.

[114] Isaeus 10.4: Κυρωνίδης μὲν οὖν ὁ τοῦδε πατὴρ καὶ θατέρου τοῦ τόνδε τὸν κλῆρον ἀδίκως ἔχοντος ἐξεποιήθη εἰς ἕτερον οἶκον, ὥστε αὐτῷ τῶν χρημάτων οὐδὲν ἔτι προσῆκεν

into another family, and they still belong to that family, so that in law (διὰ τὸν νόμον) they have no sort of relationship (γένει) with Astyphilus. Seeing that they had no claim on these grounds, gentlemen, they concocted a will, which, as I think I shall be able to prove, is a forgery, and are trying to deprive me of my brother's estate.'[115]

What we see here is the making of a distinction between *legal fact and reality*: the adopted son has, legally speaking (διὰ τὸν νόμον), no relationship whatsoever with the male relatives of his natural father. In reality, however, things might very well be different – but *for the law*, *for the rules of inheritance* that really does not matter. Quite clearly, the law does not *reflect* society in any unambiguous sense: here Cleon evidently still has a relationship with Astyphilus, and it could very well be that these feelings underlie many of his complaints. But the law cannot account for this relationship in that sense – the law of adoption creates the *fiction of sonship*, and that requires the cutting off of ties: the speaker in Isaeus 2 claims that there is no point in adjudicating 'the estate of Menecles, since he had a *son* (**υἱοῦ**), namely, myself (ὁ Μενεκλέους ὄντος ἐμοῦ υἱοῦ ἐκείνου)', and the speaker sets out to show why his adoption was both legal and appropriate.[116]

The legal rule, that all rights to inherit from his natural father's relatives were to be conceded, is brought up once more in Isaeus' *On The Estate of Apollodorus*: 'Such being the provisions of the law [i.e. there are no inheritance rights for an adopted son to inherit from his natural father's relatives], Thrasybulus, a male relative, has not claimed even a portion of the estate, but those who are acting for this woman, a female relative, have claimed the whole of it; so persuaded are they that loss of honor is no loss. With this object, to prove that the whole estate ought to be awarded to them, they will have the impudence to use the argument that Thrasybulus has been adopted out of his own family into that of Hippolochides.'[117]

Again the argument draws in particular *on what the legal rules do*: 'such being the provisions of law' (ταῦτα τῶν νόμων κελευόντων). There is an apparent conflict of law and common sense (or as it is called here: honour) and that is precisely what creates space for an argument: the claimants try to

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[115] Isaeus 9.2: ἔστι γὰρ [ὁ] Κλέων οὑτοσὶ ἀνεψιὸς Ἀστυφίλῳ πρὸς πατρός, ὁ δὲ υἱὸς ὁ τούτου, ὃν εἰσποιεῖ ἐκείνῳ, ἀνεψιαδοῦς. εἰσποίητος δ᾽ ἦν ὁ πατὴρ ὁ Κλέωνος εἰς ἄλλον οἶκον, καὶ οὗτοι ἔτι εἰσὶν ἐν ἐκείνῳ τῷ οἴκῳ, ὥστε γένει μὲν διὰ τὸν νόμον οὐδὲν προσήκουσιν Ἀστυφίλῳ. ἐπειδὴ δὲ κατὰ ταῦτα οὐκ ἦν ἀμφισβήτησις, διαθήκας, ὦ ἄνδρες, ψευδεῖς (ὡς ἐγὼ οἶμαι ἐπιδείξειν) κατεσκεύασαν καὶ ζητοῦσιν ἀποστερῆσαί με τῶν τἀδελφοῦ

[116] Isaeus 2.2: διδάξω οὖν ὑμᾶς ἐξ ἀρχῆς ὡς προσηκόντως τε καὶ κατὰ τοὺς νόμους ἐγένετο ἡ ποίησις, καὶ οὐκ ἔστιν ἐπίδικος ὁ κλῆρος ὁ Μενεκλέους ὄντος ἐμοῦ υἱοῦ ἐκείνου, ἀλλ᾽ ὁ μάρτυς διεμαρτύρησε τἀληθῆ. δέομαι δ᾽ ὑμῶν ἁπάντων καὶ ἀντιβολῶ καὶ ἱκετεύω μετ᾽ εὐνοίας ἀποδέχεσθαί μου τοὺς λόγους.

[117] Isaeus 7.23: ταῦτα τῶν νόμων κελευόντων ὁ μὲν ἀνὴρ ὢν οὐδὲ μέρους1 εἴληχεν, οἱ δ᾽ ὑπὲρ ταύτης, τῆς γυναικός, ἁπάντων: οὕτω τὴν ἀναίδειαν οὐδεμίαν ζημίαν εἶναι νομίζουσι. καὶ ὑπὲρ τούτων τολμήσουσι καὶ τοῖς λόγοις χρῆσθαι2 τοιούτοις, ὡς αὐτοῖς ὅλου τοῦ κλήρου ληκτέον, ὅτι Θρασύβουλος ἐκποίητος εἰς τὸν οἶκον τὸν Ἱπολοχίδου γέγονε

inherit the full estate through the female line, deviating from the normal standards of male priority upon inheritance. The male relative has – from a legal point of view – no chance to inherit, as he gave up his inheritance rights in that family on accepting the adoption into a different *oikos*. What is left is an argument that serves to slander the claimants by dramatically opposing 'male relative' with 'female relative', as precedence in succession is always given to males (even if further removed in generations), before turning to the *legal* argument that probably made real sense. That he had a right to inherit via his natural mother, and that this connection was not severed upon adoption: 'the act of adoption into another family does not detach a son from his mother; she is his mother just the same, whether he remains in his father's house or is adopted out of it.'[118]

There is a strong tension, then, between societal ideas about a 'family relationship', and a legal idea of 'family relationship' that the law of adoption, of necessity, embraces – and it precisely that tension that gives legal actors ammunition as they, depending on their interests, construct arguments based on ideas of equity (and therefore appeal to societal notions) or based on the law (claiming that these are simply the rules).

The law, then, modifies and reinterprets the idea of a family relationship, the law turns the 'family relationship' into a *legal category* with ramifications for inheritance rights. Recalling the work of epistemologist Granger and Samuel's application of his ideas onto the law, we would do well to call these *legal facts* 'virtual facts', these *legal categories* 'virtual categories', because it is really the *conceptual model* that is the object of legal enquiry, the *legal understanding of a family relationship*, and not the actual fact, the social unit of the family – 'the object consists of an abstract model or scheme of this reality and it is the abstract relations and elements that make up this model, rather than the empirical phenomenon, which acts as the basis of knowledge.'[119] These observations come to bear when considering the idea of the family and the way in which 'legal categories relate to the world 'outside' the institution'. As Samuel illustrates ingenuously, 'the idea that legal science is a discourse that has as its object actual factual situations is to misunderstand, fundamentally, legal thought. […] Lawyers, like scientists, do not work directly on reality but construct rationalized models of this reality; and it is these models that become the 'objects' of legal discourse'.[120] As an idea, law has a role as much in the world of fact as it has a role in the world of the law itself; these 'objects' of legal discourse are

[118] Isaeus 7.25: μητρὸς δ᾽ οὐδείς ἐστιν ἐκποίητος, ἀλλ᾽ ὁμοίως ὑπάρχει τὴν αὐτὴν εἶναι μητέρα, κἂν ἐν τῷ πατρῴῳ μένῃ τις οἴκῳ κἂν ἐκποιηθῇ.
[119] Samuel, 'Epistemology and Comparative Law', 43.
[120] Idem, 74.

revisited endlessly by logographers and others interested, and it is this process of involution, of inward reflection on the legal rules in attempt to solve *real* issues, that creates this idea of law's autonomy.

The idea of adoption – of *becoming* a son of someone else, required that one seized being a son in the natural family, and to do everything a son should do in his adoptive family, even if that was counterintuitive. These technical workings of the doctrine of adoption at times clash fundamentally with common sense – and there is a certain uneasiness that accompanies this clash. Here Humphreys' observation that 'there is a noticeable tendency for family law cases to turn on a contrast between natural feelings and legal regulations'[121] ties in neatly, and this complaint is echoed in Isaeus 3, where it is said that 'all blood-relations think they have the right to dispute a bequest to an adopted son'.[122] Roman law too, as we will see in due course, responded to these exact same issues. It is precisely this clash that leads us, in a sense, to the autonomy of law – to the idea that it is generative of certain social and political realities: 'the law that an adopted child severs completely his relationship to his natural father is one example of the type of technical legal rule which disputants often tried to circumvent', says Humphreys.[123] The technical rules, to formulate it differently, often ran contrary 'to patterns of affection and association within the family.'[124] More generally, Douglas MacDowell has tried to show how Menander's *Aspis* creates an opposition between law and love.[125] What the *law* did, then, the law demanding an adopted son to be cut off from his natural family, was to create a social reality that was ambiguously received at best. The apparent rift it created between law and 'natural feelings' provided opportunities for both sides: for those who wished to criticize its workings and appeal to equity (Isaeus 10 and 3 and Dem. 44), as well as for those who wished to employ the rule to their own benefit (Dem. 58) and have the law on their side. There seems to be a more or less rigid separation between these technical legal rules and 'societal reality' – and it is precisely this separation that in turn generates further legal opportunities as the opposition is played out in cases of inheritance law. The opposition, of course, is created by the mundane and technical rules that encompass a doctrine of adoption. These consequences, these corollaries of legal form, were no doubt unforeseen at the start – but once the rules were in place they went on to (re)shape

[121] S.C. Humphreys, *The Family, Women and Death* (Ann Arbor 1993) 7.
[122] Isaeus 3.61: πρὸς δὲ τοὺς εἰσποιήτους ἅπαντες οἱ κατὰ γένος προσήκοντες ἀμφισβητεῖν ἀξιοῦσιν.
[123] Humphreys, *The Family, Women and Death*, 7.
[124] S.C. Humphreys, *The Family, Women and Death* (Ann Arbor 1983) 7.
[125] D.M. MacDowell, 'Love versus the Law: An Essay on Menander's *Aspis*', *Greece & Rome*, 29.1, 42-52.

real conflicts. The legal forms themselves have agency: the legal forms make possible certain social realities.

Greek law too (like Roman law) has 'responded' to the perceived gap between the law and the 'natural' state of things, though to use the verb response is perhaps too suppose a non-retraceable chronology: an adopted son, as I mentioned, was not allowed to return (*epanienai*) to the *oikos* of his natural father, except on *one* condition. Harpocration, quoting Antiphon's *Against Callistratus*, illustrates:

Ὅτι οἱ ποιητοὶ παῖδες ἐπανελθεῖν εἰς τὸν πατρῷον οἶκον οὐκ ἦσαν κύριοι, εἰ μὴ παῖδας γνησίους καταλίποιεν ἐν τῷ οἴκῳ τοῦ ποιησαμένου, Ἀντιφῶν ἐπιτροπικῷ κατὰ Καλλιστράτου καὶ Σόλων ἐν κα Νόμων.

'That adopted sons did not have the power to return to their ancestral household [*oikon*] unless they left behind legitimate [*gnesious*] sons in the household of the adopter [is stated by] Antiphon in his speech *Against Callistratus Concerning a Guardianship* and Solon on the twenty-first [axon] of his laws.[126] This law is attested in other speeches too.[127] Demosthenes 44 provides a rather extreme example of this rule of return for the adopted son: here Leocrates I was adopted by Archiades through will (or posthumously) and Leocrates I later returned to his natal household, leaving behind his son Leostratus II, who in turn left his son Leocrates II in Archiades *oikos*:

'Let us, then, inquire if there are any, or if the defendant has sworn to what is false. The aforesaid Archiades, whose estate is in question, adopted as his son the grandfather of the one who has now sworn this affidavit; he, leaving a lawfully born son (υἱὸν γνήσιον), Leostratus, the father of the defendant, returned to the Eleusinians (ἐπανῆλθεν εἰς τοὺς Ἐλευσινίους). After this, Leostratus here himself returned to the house of his fathers (εἰς τὸν πατρῷον οἶκον), leaving a son (ἐγκαταλιπὼν υἱὸν) [in the adoptive house]; and the son whom he left, and who was the last of all the adopted children, has died without issue, so that the house thereby becomes extinct (ἔρημος) and the inheritance (κληρονομία) has reverted again to those originally nearest of kin (εἰς τοὺς ἐξ ἀρχῆς

[126] Harpocration, Ὅτι οἱ ποιητοὶ, transl by Philips in: *The Law of Ancient Athens*, 194.

[127] Isaeus X.11: οὐ τοίνυν, ὦ ἄνδρες, οὐδὲ Κυρωνίδην οἷόν τε ἦν υὸν Ἀριστάρχῳ εἰσποιῆσαι, ἀλλ᾽ αὐτῷ μὲν ἐπανελθεῖν εἰς τὸν πατρῷον οἶκον ἐξῆν, υὸν ἐγκαταλιπόντα ἐν τῷ Θεναινέτου οἴκῳ, ἐξ αὐτοῦ δὲ ἀντεισαγαγεῖν1 οὐκ ἔστι νόμος: ἢ ἐὰν φῶσι, ψεύσονται. ὥστε οὐδ᾽ ἂν φάσκωσιν ὑπ᾽ ἐκείνου <εἰς>ποιηθῆναι, νόμον ἔξουσι δεῖξαι καθ᾽ ὃν ἐξῆν αὐτῷ ταῦτα πρᾶξαι, ἀλλ᾽ ἐξ ὧν αὐτοὶ λέγουσιν ἔτι φανερώτερον ὑμῖν γενήσεται τοῦτο, ὅτι παρανόμως καὶ ἀσελγῶς ἔχουσι τὰ τῆς μητρὸς χρήματα. See also: Isaeus 6 44, Dem. 44, Dem 43 78.

ἐγγύτατα γένους ὄντας).'[128] In these cases, where there is a problem of conflicting loyalties on the part of the adoptee the Athenian law of adoption solved the issue by allowing the adoptee to return; but at the same time 'the provisions of the law ensured that the family-line of the adopter would also be continued in that it compelled the adoptee to leave a legitimate son behind who was to take his place'.[129] Adoption, ultimately, is a legal *fiction*: what the facts are, whether someone is a son or not, is determined not by the real world, but by the law itself. And the Athenians were aware of a gap between law and reality: 'men do not hold their foster parents so dear as their own fathers'[130] – but legally, there was no difference.

On the other hand, that very same severing of family ties, these technical workings of the law that the exception seems to modify, was taken quite seriously indeed by the Athenians – and at times even deepened the severing beyond what we would still call the legal realm proper, in the same fashion as the relation of the adoptive father and son as mirroring the natural extended far beyond the strictly legal relationship. In Demosthenes 58, paragraphs 30-32, we read that the father of the speaker had proposed a decree granting to Charidemus, son of the general Ischomachus, maintenance in the Prytaneum in recognition of the services rendered to the state by his *natural* father. Charidemus had, however, been *adopted* by Aeschylus, and Charidemus was therefore not entitled to receive honours because of his natural father. If he was entitled to these honours, so the argument runs, the adoption must have been, *a contrario*, invalid, and hence Charidemus should concede all claims to the estate of his adoptive father. The jury found against the father of the speaker, against the proposer of the decree, and he was fined ten talents – a hefty sum, and he incurred *atimia*. This implies that the claims made by the prosecutors – that there was quite a bit wrong with bestowing an adopted son with honours because of his *natural* father – had some degree of validity. The case serves to show how the rule of the complete severing of family ties had quite some persuasiveness – even though it might run contrary to ordinary patterns of affection and association, as it obviously did here.

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[128] Dem. 44. 46-7: ὁ γὰρ Ἀρχιάδης ἐκεῖνος, οὗ ἐστιν ὁ κλῆρος, ἐποιήσατο υἱὸν τὸν τοῦ διαμεμαρτυρηκότος νυνὶ πάππον: ἐκεῖνος δ' ἐγκαταλιπὼν υἱὸν γνήσιον τὸν τούτου πατέρα Λεώστρατον ἐπανῆλθεν εἰς τοὺς Ἐλευσινίους. μετὰ δὲ ταῦτα αὐτὸς οὑτοσὶ Λεώστρατος πάλιν ἐγκαταλιπὼν υἱὸν ᾤχετο ἀπιὼν εἰς τὸν πατρῷον οἶκον: ὁ δ' ἐγκαταλειφθεὶς ὑπὸ τούτου τελευταῖος ἁπάντων τῶν εἰσποιηθέντων τετελεύτηκεν ἄπαις, ὥστε γίγνεται ἔρημος ὁ οἶκος, καὶ ἐπανελήλυθεν ἡ κληρονομία πάλιν εἰς τοὺς ἐξ ἀρχῆς ἐγγύτατα γένους ὄντας.

[129] Rubinstein, *Adoption in IV. Century Athens*, 60.

[130] Lycurgus, *Leocrates* 48: ὥσπερ γὰρ πρὸς τοὺς φύσει γεννήσαντας καὶ τοὺς ποιητοὺς τῶν πατέρων οὐχ ὁμοίως ἔχουσιν ἅπαντες ταῖς εὐνοίαις. Also Menander's *Samia*, 345-7: 'I do not find it credible at all that one who's well-behaved and self-controlled with every stranger's treated me like this – not though he were ten times adopted, not my son by birth.'

The example also shows that the legal rules had ramifications far beyond the realm of the law: 'All through the life of a male Athenian, his privileged position as a citizen was determined by the fact that his parents were Athenian citizens and that he was a member of his father's deme. By the adoption the adopted son was given a new political identity, in that his rights to citizenship were determined by the fact that he was now considered the son of his adoptive father, and he would exercise his rights as a member of his adoptive father's deme.'[131] And not just his political, but his social identity too: in Menander's *Samia* we read about the adopted son, Moschion, who was given an extremely affluent upbringing (verses 7-18), culminating in the fact that his adoptive father Demeas made him a man: δι᾽ ἐκεῖνον ἦν ἄνθρωπος[132] – Moschion owes Demeas his new social status.[133]

Adoption constituted, legally, an intervention in the order of succession. When a man died without a will the disposition of his property was regulated by the Solonian law of intestate succession, dated probably to 594/3 except for the last sentence. It is probably cited in full by Demosthenes, though that is of little help for our purposes: legitimate sons and their descendants were so obviously first in line that they were omitted altogether.[134] Important for our purposes was that adopted sons and their descendants had the same inheritance rights as natural sons, as becomes clear in Isaeus 6:

'Why did Euctemon need to get married, Androcles, if in fact these children had been born from him and a citizen wife, as you have testified? For if they were legitimate, who could have prevented them from being introduced [into the family]? Or why did he introduce him on specified terms, when the law commands that *all legitimate sons* (ἅπαντας τοὺς γνησίους) get an equal share (ἰσομοίρους) of their father's property?'[135] And again the previously mentioned quotation of the law in *On the Estate of Philoctemon*: 'How, then, was Philoctemon childless, when he left behind his own nephew as his adopted son, and the law gives him his inheritance on equal terms with the sons born

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131 Rubinstein, *Adoption in IV. Century Athens*, 48.
132 Menander, *Samia*, 17.
133 A.H. Sommerstein, *Menander: Samia (The Woman from Samos)* (Cambridge 2014) 16.
134 Dem. 43 51: ὅστις ἂν μὴ διαθέμενος ἀποθάνῃ, ἐὰν μὲν παῖδας καταλίπῃ θηλείας, σὺν ταύτῃσιν, ἐὰν δὲ μή, τούσδε κυρίους εἶναι τῶν χρημάτων. ἐὰν μὲν ἀδελφοὶ ὦσιν ὁμοπάτορες: καὶ ἐὰν παῖδες ἐξ ἀδελφῶν γνήσιοι, τὴν τοῦ πατρὸς μοῖραν λαγχάνειν: ἐὰν δὲ μὴ ἀδελφοὶ ὦσιν ἢ ἀδελφῶν παῖδες, * * * ἐξ αὐτῶν κατὰ ταὐτὰ λαγχάνειν: κρατεῖν δὲ τοὺς ἄρρενας καὶ τοὺς ἐκ τῶν ἀρρένων, ἐὰν ἐκ τῶν αὐτῶν ὦσι, καὶ ἐὰν γένει ἀπωτέρω. ἐὰν δὲ μὴ ὦσι πρὸς πατρὸς μέχρι ἀνεψιῶν παίδων, τοὺς πρὸς μητρὸς τοῦ ἀνδρὸς κατὰ ταὐτὰ κυρίους εἶναι. ἐὰν δὲ μηδετέρωθεν ᾖ ἐντὸς τούτων, τὸν πρὸς πατρὸς ἐγγυτάτω κύριον εἶναι. νόθῳ δὲ μηδὲ νόθῃ μὴ εἶναι ἀγχιστείαν μήθ᾽ ἱερῶν μήθ᾽ ὁσίων ἀπ᾽ Εὐκλείδου ἄρχοντος.
135 Isaeus 6.25: τί γὰρ ἔδει αὐτὸν γαμεῖν, ὦ Ἀνδρόκλεις, εἴ περ οἵδε ἦσαν ἐξ αὐτοῦ1 καὶ γυναικὸς ἀστῆς, ὡς σὺ μεμαρτύρηκας; τίς γὰρ ἂν γνησίους ὄντας οἷός τε ἦν κωλῦσαι εἰσαγαγεῖν; ἢ διὰ τί ἐπὶ ῥητοῖς αὐτὸν εἰσήγαγε, τοῦ νόμου κελεύοντος ἅπαντας τοὺς γνησίους ἰσομοίρους εἶναι τῶν πατρῴων;

from Philoctemon? In fact, it is explicitly written in the law that if sons are born to a man who has already adopted, each takes his share (τὸ μέρος ἑκάτερον) of the estate and both groups inherit equally (ὁμοίως ἀμφοτέρους)'.[136]

From a legal point of view, adoption was primarily about the destination of the property, though with adoption *inter vivos* the adoptee was probably under legal obligation to take care of his parents[137], and with all adoptions there was a legal duty to see to the annual commemorative rites of the adopted father.[138] Adoption, just like the will (which, of course, often included an adoption), gave the father the freedom to determine *who* was to have access to that property – that was perhaps adoption's main attraction, as well as a way to misuse the institution.

Adoption was, I believe, the transfer of a person from his *natal oikos* to a new *oikos*: he was adopted into another family (ἐξεποιήθη εἰς ἕτερον οἶκον[139] or εἰσαγαγεῖν εἰς τὸν οἶκον[140]), in an attempt to create *legitimate* (γνήσιος) heirs where these failed through natural means. He was, then, adopted *as a son*. Perhaps the clearest testimony to that is the same passage in Isaeus 6 quoted above:

'Why did Euctemon need to get married, Androcles, if in fact these children had been born from him and a citizen wife, as you have testified? For if they were legitimate, who could have prevented them from being introduced [into the family]? Or why did he introduce him on specified terms, when the law commands that *all legitimate sons* (ἅπαντας τοὺς γνησίους) get an equal share (ἰσομοίρους) of their father's property?'[141] Isaeus 7.27-8 once more repeats what happens with a change of father, a change of *oikos*: the adoptive father told his fellow demesmen that he 'adopted me as his *son*'[142] (πεποιημένος εἴη με ***υὸν***) and he asked them 'to enroll me on the public register as Thrasyllus *the son of Apollodorus*' **(Ἀπολλοδώρου**)[143]. Menander too, in his Dyskolos, illustrates the legal fiction: ποοῦμαί σ᾽ ὑόν, I adopt you as my son.[144]

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[136] Isaeus 6 63: καὶ διαρρήδην ἐν τῷ νόμῳ γέγραπται, ἐὰν ποιησαμένῳ παῖδες ἐπιγένωνται, τὸ μέρος ἑκάτερον ἔχειν τῆς οὐσίας καὶ κληρονομεῖν ὁμοίως ἀμφοτέρους.
[137] Isaeus 1.74; Dem. 24.60 and 103-7.
[138] Lycurgus, *Leocr.* 147, Dem. 24.107
[139] Isaeus 10.4.
[140] Dem. 43.77: ὥστε γενομένου αὐτῷ υἱέος τοῦ μὲν εἰσαγαγεῖν εἰς τὸν οἶκον τὸν Ἀγνίου υἱὸν τῷ Ἀγνίᾳ ἐπελάθετο
[141] Isaeus 6.25: τί γὰρ ἔδει αὐτὸν γαμεῖν, ὦ Ἀνδρόκλεις, εἴ περ οἵδε ἦσαν ἐξ αὐτοῦ1 καὶ γυναικὸς ἀστῆς, ὡς σὺ μεμαρτύρηκας; τίς γὰρ ἂν γνησίους ὄντας οἷός τε ἦν κωλῦσαι εἰσαγαγεῖν; ἢ διὰ τί ἐπὶ ῥητοῖς αὐτὸν εἰσήγαγε, τοῦ νόμου κελεύοντος ἅπαντας τοὺς γνησίους ἰσομοίρους εἶναι τῶν πατρῴων;
[142] Isaeus 7.27: πεποιημένος εἴη με ὑὸν
[143] Isaeus 7 27: ἐγγράψουσί με εἰς τὸ ληξιαρχικὸν γραμματεῖον Θράσυλλον Ἀπολλοδώρου
[144] Menander, *Dyskolos*, 731.

So again, adoption was the transfer – from a legal point of view – of a person from one *oikos* to another. On first sight, there is nothing particularly exciting about these rules; they are mere 'technologies', technical rules that see to the transferral of *personae* from one *oikos* to another. But that is not the complete story: these legal rules make possible certain realities. The adoptee became the son of someone else, and with that (as we have seen) acquired a new political and social *identity* – 'the adopted son was given a new political identity, in that his rights to citizenship were determined by the fact that he was now considered the son of his adoptive father, and he would exercise his rights as a member of his adoptive father's deme', and his social status too was 'new', as it now derived from his new adoptive father: δι᾽ ἐκεῖνον ἦν ἄνθρωπος.[145] The switch was complete – he has all legal obligations of a son: the adoptee was under a legal obligation to take care of his adoptive parents[146], as well as a legal duty to see to the annual commemorative rites of the adopted father.[147]

But ideally the fiction of adoption was not just a legal one: the adopted son was really to act *as if* he were a son. The speaker of Isaeus 2, in his attempts to portray his own adoption as an archetypal adoption, for instance, emphasizes repeatedly how the relationship between adoptive father and adoptive son mirrored that of the natural relationship (though of course the argument is necessarily restricted to adoption *inter vivos*): 'After this, Menecles began to look about for a wife for me, and said I ought to marry. So I married the daughter of Philonides. Menecles exercised the forethought on my behalf which a father *would* (ὥσπερ) naturally exercise for his son (περὶ υἱέος), and I tended him and respected him *as though* (ὥσπερ) he were my true father (ὄντα πατέρα ἐμαυτοῦ), as also did my wife, so that he praised us to all his fellow-demesmen.'[148] Sons adopted by will or posthumously too had to reproduce the 'ceremonies of affiliation in phratry and deme', and with that mirrored the procedures that the natural son underwent, even though the emotional and personal dimension was necessarily absent.[149]

But there is something more going on with the legal doctrine of adoption: it introduces a legal definition for what was at first a natural phenomenon. It is not just 'nature' that creates *sonship*, but

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145 Rubinstein, *Adoption in IV. Century Athens*, 48.
146 Isaeus 1.74; Dem. 24.60 and 103-7.
147 Lycurgus, *Leocr.* 147, Dem. 24.107
148 Isaeus 2.18: πραχθέντων δὲ τούτων ἐσκόπει ὁ Μενεκλῆς γυναῖκά μοι, καὶ ἔφη με χρῆναι γῆμαι: καὶ ἐγὼ λαμβάνω τὴν τοῦ Φιλωνίδου θυγατέρα. κἀκεῖνός τε τὴν πρόνοιαν εἶχεν ὥσπερ εἰκός ἐστι πατέρα περὶ υἱέος ἔχειν, καὶ ἐγὼ τὸν αὐτὸν τρόπον ὥσπερ γόνῳ ὄντα πατέρα ἐμαυτοῦ ἐθεράπευόν τε καὶ ᾐσχυνόμην, καὶ ἐγὼ καὶ ἡ γυνὴ ἡ ἐμή, ὥστε ἐκεῖνον πρὸς τοὺς δημότας ἐπαινεῖν ἅπαντας.
149 Rubinstein, *Adoption in IV. Century Athens*, 67.

adoption too. The adoptee was, once enrolled in the phratry and the deme, in no way different from a 'natural' child – *for the law*, strictly concerned with legal consequences, on completion of adoption, the distinction dissolved: τὸ μέρος ἑκάτερον ἔχειν τῆς οὐσίας καὶ κληρονομεῖν ὁμοίως ἀμφοτέρους.[150] That the law here employed a fiction was clear to all. The adoptive father exercised, for example 'the forethought on my behalf which a father *would* (ὥσπερ) naturally exercise for his son (περὶ υἱος)', and the adopted son in turn 'tended him and respected him *as though* (ὥσπερ) he were my true father (ὄντα πατέρα ἐμαυτοῦ)'.[151] But the law did not care about the fiction, in fact it employed this fiction to construct this reality – adoptees were son in the very same way as natural sons were son. The adoptee simply stopped being a son in his old *oikos*, and instead became a *son* in his new *oikos*. All adoption did was simply transferring someone – and it ignored, at times even subverted, the natural ties that existed. They were 'just' technical rules. Sonship, then, was no longer a 'natural' concept in Athenian *law*: there were two ways to become a son.

That observation is further corroborated by the fact that *anyone* could be adopted as long as he was a child of two Athenian citizens – even though in reality, adoptees were very likely to be related through familial ties, and, more exceptionally, by friendship. But the legal forms are only in place to *make someone a son* – not to make sure that there are motives of affection and love in play. It is precisely this retreat into the legal – into the technical rules, as Humphreys calls it, that opens up space for *manoevering*, and at times even space for 'love', to tie in with MacDowell: we find several legal tricks that are structurally equivalent to the forbidden half-sibling marriage, for instance, such as the adoption of the half-sister's son in Isaeus 7, as well as the alleged posthumous adoption to her second husband of a woman's son by her first marriage in Isaeus 8, paragraphs 40-2. Adoption was also practiced by parents who were *atimos*, so as to prevent their children from sharing in their loss of civic rights.[152]

Crucially, then, Athenian law separates the legal realm from the social – it moves away from natural, biological notions of sonship, it moves away from what we could call 'real facts' by creating *legal* sonship. And legal sonship is no longer the simple corollary of biological sonship: one can be a

[150] Isaeus 6.63

[151] Isaeus 2.18: πραχθέντων δὲ τούτων ἐσκόπει ὁ Μενεκλῆς γυναῖκά μοι, καὶ ἔφη με χρῆναι γῆμαι: καὶ ἐγὼ λαμβάνω τὴν τοῦ Φιλωνίδου θυγατέρα. κἀκεῖνός τε τὴν πρόνοιαν εἶχεν ὥσπερ εἰκός ἐστι πατέρα περὶ υἱος ἔχειν, καὶ ἐγὼ τὸν αὐτὸν τρόπον ὥσπερ γόνῳ ὄντα πατέρα ἐμαυτοῦ ἐθεράπευόν τε καὶ ἠσχυνόμην, καὶ ἐγὼ καὶ ἡ γυνὴ ἡ ἐμή, ὥστε ἐκεῖνον πρὸς τοὺς δημότας ἐπαινεῖν ἅπαντας.

[152] Isaeus 10.17: ἢ ἕτεροι μέν, ὅταν περὶ χρημάτων δυστυχῶσι, τοὺς σφετέρους αὐτῶν παῖδας εἰς ἑτέρους οἴκους εἰσποιοῦσιν, ἵνα μὴ μετάσχωσι τῆς τοῦ πατρὸς ἀτιμίας.

legitimate son *through adoption* as much as through *natural* sonship. Without the legal institution of adoption all additional terminology – the distinction between legal and natural sonship – would have been completely redundant. Crucially, we can understand the idea of the natural son as a *construction*, as a category *fabricated by the law* to deal with this rigid and sudden separation between nature and law. It is here, one could argue, that the idea of the natural *comes into existence* because it is forced to do so by the law.

The law, adoption in this case, poses itself as a radical alternative to the 'natural' way of things – but, of course, to realize that something is natural in the first place, it *needs* to be contrasted with the *unnatural*: the legal, the adoption. The law of adoption here is *generative* of a certain *epistemological reality*. In a similar fashion to Alain Pottage's claim, that the divide between persons and things has its genealogy in the Roman legal distinction of *res* and *personae*[153], we could argue here that the idea of the natural (at the very least in this specific context) is generated by the technical workings of the law, generated by the legal methodology of adoption. The 'social' need for support in old age, for proper burial rites, for attendance of his tomb-cult and the prevention of the *oikos* becoming *eremos* may have resulted in a legal doctrine of adoption; but that legal doctrine in turn had to rethink sonship, and came to see it as something *non-natural*, as something *legal*. That idea was contrasted with the *natural idea of sonship* which was of course recognized, as we saw above, but left without legal consequences.

If we return to Yan Thomas' central question, 'how do legal categories relate to the world 'outside' the institution?', we see the compelling case for the autonomy of legal institutions repeated here. Here too, what the *facts* are – whether someone is a *son* or not – is not determined by the real facts, but by the *law*. It is the law that decides whether someone is a son or not, not the real world; and that makes adoption, as a legal institution, *possible* in the first place. As Thomas puts it: 'the difference between law and fact is not a difference of *fact* but one of *law*, and this is what defines the essence of the institution, and what makes fictions so revelatory of the artificiality of the institution.'[154] This is what Thomas calls 'the 'cold, technical' character of legal rationality[155] that sometimes flies in the face of common sense. But I do not believe that this logic was restricted to the Romans – in Athens too nature or blood, reality, plays no decisive role in *legal* sonship, nor is the legal doctrine of adoption concerned at all with the purposes it was constructed for. The legal rights and duties that encompassed an adoption were quickly recognized as beneficial, and hence adoption

[153] Riles, 'Comparative Law and Socio-legal Studies', 810.
[154] Thomas, 'Fictio legis', 20.
[155] Pottage, 'Introduction', 16.

was very often about these legal advantages, and not about the continuation of the *oikos*, burial rights or *gerotrophia*.

Abuse of adoption: disrupting the order of intestate succession

Whoever reads these speeches concerning Athenian adoption cases will sooner or later get the feeling that something more is going on – that adoption is not just employed for its social purposes, not just employed for support in old age, for proper burial rites, for attendance of his tomb-cult, or the preservation of the *oikos*. In Roman law, we have a series of cases that are sometimes dubbed '*familia*-scaping', or playing the game of 'family favourites' – where adoption becomes a legal instrument proper, serving the goals of its users in ways that subvert and go against its original social purposes. We witness adoption *within the same family*, to make sure the lion's share of the estate will be awarded to the *pater familias*' favourite branch of the family. Here more than anywhere else do we see how law generates its own realities as technical rules themselves offer solutions – solutions found with the help of lawyers – to problems in the real world. As questions are persistently asked – how can my hatred or favouritism for a certain family member be materialized? – people, with the help of logographers perhaps, turn to the law for answers. The law, working autonomously, creates spaces to answer those very questions.

I think something similar is going on in many of the Athenian adoption cases, where (testamentary) adoption was very often primarily used to disrupt the order of intestate succession. Demosthenes, for instance, states bluntly: 'For you see that most people who adopt children do so through being cajoled by flattery [compare the Roman practice of inheritance hunting] and often in a spirit of contentiousness caused by family quarrels.'[156] Isaeus in *On The Estate of Cleonymus* ('for he could not bear to think of leaving his bitterest enemy as the guardian of his relatives and in control of his property, and of the customary rites being performed over him, until we grew up, by one with whom he had been at variance in his lifetime'[157]) and in *On the Estate of Nicostratus* ('for before now testators, being ill-disposed towards their kinsmen, have preferred strangers who were their friends to their nearest relatives by blood'[158]) voices similar concerns: evidently, strife, or reversely, favouritism, was often what prompted adoption; not just the concern for an heir when natural sons

[156] Dem. 44.63: ὁρᾶτε γὰρ ὅτι ταῖς κολακείαις οἱ πλεῖστοι ψυχαγωγούμενοι καὶ ταῖς πρὸς τοὺς οἰκείους διαφοραῖς πολλάκις φιλονικοῦντες ποιητοὺς υἱεῖς ποιοῦνται

[157] Isaeus 1.10: ἡγεῖτο γὰρ δεινὸν εἶναι τὸν ἔχθιστον τῶν οἰκείων ἐπίτροπον καὶ κύριον τῶν αὑτοῦ καταλιπεῖν, καὶ ποιεῖν αὑτῷ τὰ νομιζόμενα τοῦτον, ἕως ἡμεῖς ἠβήσαιμεν, ᾧ ζῶν διάφορος ἦν:

[158] Isaeus 4 18: ἤδη γάρ τινες οὐκ εὖ διακείμενοι τοῖς συγγενέσιν ὀθνείους φίλους τῶν πάνυ σφόδρα προσηκόντων περὶ πλείονος ἐποιήσαντο

failed. In Isaeus 7, moreover, we read about this motive in a case that was delivered *on behalf* of the adoptee (we would rather expect this motive in speeches of the opposite side, seeking to challenge the adoption): 'It was before all these witnesses, gentlemen, that my adoption took place, at a time when an inveterate enmity existed between Apollodorus and my opponent, and a close friendship as well as kinship between Apollodorus and us.'[159]

As Rubinstein, I think rightly, argues we should take serious the possibility that the concern for a continuation of the *oikos*, the argument so often proponed the extant speeches, was used to mask actual family strife – strife that could be damaging to the cause in front of the jury, should one be open about it. Adoptions were very likely carried out with the main or sole aim 'of depriving disliked relatives of their share in the inheritance and/or conferring the inheritance on a favoured person who was not an intestate heir' and a concern for the continuation of the *oikos* may have played 'only a minor part'.[160] Isaeus 3.61, cited above, corroborates that claim: 'but all relatives by blood do not hesitate to advance their claims, bidding defiance to the adopted sons'.[161] The kind of general statement the speaker makes here, seems to imply that the disruption of the order of inheritance through adoption was very common, and indeed many of the adoption cases we can actually retrace are concerned with wills that disrupt the order of intestate succession.

In Isaeus 1, for instance, the nephews of deceased would have been intestate heirs as descendants of a brother by the same father – as there were no sons or daughters with direct descendants. The deceased, Cleonymus, made a will, however, adopting a certain Pherenicus, who – for the law – was now viewed as first in order of succession: he became a legitimate son. The nephews questioned the validity of the will – as it was allegedly made when he was angry at his guardian, a point quoted above. The (surprisingly modern sounding) Solonian law on wills gave the nephews legal ammunition: a will was valid only 'if not affected by madness, senility, or persuaded by a woman'.[162] The nephews pursued precisely that line of argument. A disruption in the order of inheritance, especially when natural family gave way to outsiders – as is the case in Isaeus 1 – would, I believe, require some additional explanation by the adopter; an explanation that he could never give: he was dead. The original intestate heirs could always, and very frequently did, claim 'madness, senility or persuasion by a woman' and challenge the validity of the will in an attempt to restore their

[159] Isaeus 7.29: ἐπὶ μὲν τοσούτων μαρτύρων, ὦ ἄνδρες, γέγονεν ἡ ποίησις, ἔχθρας μὲν παλαιᾶς αὐτῷ πρὸς τούτους οὔσης, φιλίας δὲ πρὸς ἡμᾶς καὶ συγγενείας οὐ μικρᾶς ὑπαρχούσης.
[160] Rubinstein, *Adoption in IV. Century Athens*, 78.
[161] Isaeus 3.61: πρὸς δὲ τοὺς εἰσποιήτους ἅπαντες οἱ κατὰ γένος προσήκοντες ἀμφισβητεῖν ἀξιοῦσιν.
[162] Ath. Pol. 35.2: οἷον τὸν περὶ τοῦ δοῦναι τὰ ἑαυτοῦ ᾧ ἂν ἐθέλῃ κύριον ποιήσαντες καθάπαξ: τὰς δὲ προσούσας δυσκολίας, ἐὰν μὴ μανιῶν ἢ γηρῶν ἢ γυναικὶ πιθόμενος,"" ἀφεῖλον ὅπως μὴ ᾖ τοῖς συκοφάνταις ἔφοδος:

position as intestate heirs. The statement in Isaeus 3.61 – that relatives by blood do not hesitate to advance their claims against adopted sons (though Isaeus 4 indicates that testamentary adoptions were also often feigned by bounty hunters) – seems to hint at that very practice. The claim is, moreover, supported by the temporary abolition (due to alleged abuse) of precisely the clause that gave the intestate heirs their argument: the Solonian clause (a will was valid only 'if not affected by madness, senility, or persuaded by a woman') was temporarily done away with by the Thirty Tyrants, we read in *Ath. Pol.*, to diminish the abuse of the Athenian law courts.[163] And the revision was favourably received.[164] Testamentary adoption, it seems, was very frequently used to play the game of favourites – and the Athenian courts were used as a stage to fight out family strife.[165]

What we see in all these examples is the radical departure from the 'social' purposes of adoption. Advantage has been taken by *both* parties: the adoptive father used the legal institution of adoption to materialize his preferences; the intestate heirs abuse, with help of the Solonian law on wills, the idea that these adoptions often ran contrary to 'patterns of affection and association within the family.'[166] But the very fact that one can take 'advantage of the legal rules', that one can 'use them for a different purpose', illustrates how at the same time the connection between the law of adoption *as it played out*, and societal notions of adoption and the family (perhaps: *how it should be*) was problematic – the adoptive father sought recourse to lawyers, it seems, to find ways in which he could reshape the order of inheritance on intestacy. The lawyers turned to the rules themselves, and reinterpreted them in ways that were probably unforeseen at the very start – but there was nothing in the law itself that prohibited these interpretations, and that was what mattered. By asking new questions the lawyers opened up new spaces, new explanations, and with that ultimately new *social realities* as their legal hairsplitting turned out to have extensive ramifications for, surely, not just inheritance but social relationships within the family too. The simple claim that law provides the 'stage' for (family) conflicts to be played out – an analysis that mirrors the arguments voiced by Cohen in his work on Athenian law – neglects how the rules themselves have a very important role in *shaping that conflict*.

[163] Ath. Pol. 35.2.
[164] Ibidem.
[165] See: D. Cohen, *Law, Violence and Community in Classical Athens* (Cambridge 1995)
[166] S.C. Humphreys, *The Family, Women and Death* (Ann Arbor 1983) 7.

Abuse of adoption: adoption within the same family

The examples I have put forward in the section above, about the disruption of the order of inheritance, were examples where outsiders were brought into the *oikos*. In this section I will draw attention to a series of examples of adoption within the same family – examples in which a grandfather adopted the son of his daughter, examples in which the grandfather adopted his own grandson *as his son*. How should we account for a situation that is this counterintuitive – where a genuine transferral from one *oikos* to another was non-existent?

Again, I want to stress the 'cold, technical' character of the law that makes these loopholes (as I would call them) possible – it is that cold and technical character that allows for a usage completely opposite to its own *social* rationale. But at the same time, it is a set of questions coming out of 'real life' that gives rise to this kind of legal trickery. This particular practice of adopting a grandson probably came into being because the position of a grandson born in a marriage facing relatives of his grandfather was somewhat insecure.[167] Even though legally his claim would be better, his grandfather might want to anticipate difficulties – and especially the legal rights of an adopted son *inter vivos* (immediate entrance, *embateuein* and the prevention of an *epidikasia* by stating formally that the deceased has left a γνήσιος υιός, a legitimate son) significantly strengthened his position. Again we see how the legal doctrine of adoption, and the procedural advantages attached to a certain *legal status*, are used for completely different purposes – simply to make sure that the hassles and dangers of legal proceedings were prevented as much as possible. But of course these moves came to have consequences for the legal fiction of adoption itself – the fiction of *sonship* is itself fictionalized by these legal tricks. And that must have been clear to all: a grandson was now, legally, treated in all ways as if he were his grandfather's *son*. Demosthenes, in his Against Macartatus, juxtaposes the natural with the legal in just nine words: μαρτυρεῖ πάππον εἶναι ἑαυτοῦ Ἀρχίμαχον καὶ ποιήσασθαι ἑαυτὸν υἱόν. 'The deposition proves that Archimachus was his grandfather (πάππος) and adopted him as his *son* (ποιήσασθαι ἑαυτὸν υἱόν)'.[168]

Adoption, as I tried to show before, was about the continuation of the agnatic line – it provided the means to do so when there were no natural heirs around. Grandfathers here began to use the legal doctrine of adoption to redesign family structures, to guarantee their designated heir procedural advantages. Of course this evidently went against the rationale for which adoption was

[167] His second concern could have been the importance attached to the artificial continuation of his family-line, which would have merged with that of the daughter's husband without adoption. See also: Rubinstein, *Adoption in IV. Century Athens*, 104.
[168] Dem. 43 37.

devised in the first place, as adoption is here being treated as just another legal device – all *connection* there was with societal ideas of family-structures proves to be deeply contingent now that legal participants are untying the links between the societal and the legal to solve 'real' problems through the law. But the legal constructions that are contrived here in turn create real situations, in real families.

So we need not be surprised to find as many as five examples of grandfathers adopting the grandson of their daughter in our source-material out of a total of 36 adoptions.[169] Nor should we be surprised when the speaker in Isaeus 8, in paragraph 36, feels obliged to explain in some detail why has maternal grandfather had not adopted him:

'It was to obtain this property that Diocles [a nephew of the grandfather], together with his sister [wife of the grandfather], carried on his plots for a long time, ever since the death of Ciron's sons [Ciron is the grandfather, his sons apparently died without issue, hence there is no direct descendant]. For he did not try to find another husband for her, although she was still capable of bearing children to another man; for he feared that, if she were separated from Ciron, the latter would resolve to dispose of his estate in the proper manner; but he [Diocles] kept on urging her to remain with him [Ciron], and to allege that she thought she was with child by him and then pretend that she had an accidental miscarriage, in order that he might be always hoping that a child would be born to him, and *might not, therefore, adopt myself or my brother* [adoption of one of his grandsons]. Diocles also continually calumniated my father [the husband of his mother, not a son of the grandfather], alleging that he was intriguing against Ciron's property.'[170]

These examples of a grandfather adopting his own grandson – a practice that was, as is illustrated in the example quoted above, evidently commonplace – shows that law does not function instrumentally in society in any direct sense. Of course, as I maintained, it still solves 'real' problems – but those were not the problems it was *supposed* to solve. The law of adoption has a role as much in the world of fact – the real results of the real question asked by the grandfather – as it has a role in the world of the law itself – lawyers turn to the *law* for answers on the questions asked; these

[169] Dem 42.21 ff. and 42.27; Dem 43.37 and 43.45; Plut. *Mora.* 843A; Plut. *Them.*32; Isaeus 10.4, 10.7 and 10.8.

[170] Isaeus 8 36: τούτοις Διοκλῆς μετὰ τῆς ἀδελφῆς πάλαι ἐπεβούλευεν, ἐπειδὴ τάχιστα οἱ παῖδες οἱ Κίρωνος ἐτελεύτησαν. ἐκείνην μὲν γὰρ οὐκ ἐξεδίδου δυναμένην ἔτι τεκεῖν παῖδας ἐξ ἑτέρου ἀνδρός, ἵνα μὴ χωρισθείσης περὶ τῶν αὑτοῦ βουλεύσαιτο καθάπερ προσῆκεν, ἔπειθε δὲ μένειν φάσκουσαν ἐξ αὐτοῦ κυεῖν οἴεσθαι, προσποιουμένην δὲ διαφθείρειν ἄκουσαν, ἵν᾽ ἐλπίζων ἀεὶ γενήσεσθαι παῖδας αὐτῷ μηδέτερον ἡμῶν εἰσποιήσαιτο υἱόν: καὶ τὸν πατέρα διέβαλλεν ἀεί, φάσκων αὐτὸν ἐπιβουλεύειν τοῖς ἐκείνου.

'objects' of legal discourse are revisited endlessly by legal participants, by lawyers and others interested, and it is this process of involution, of inward reflection on the legal rules in attempt to solve *real* issues, that creates this idea of law's autonomy. And here more than anywhere else, do we find that the fiction of adoption – the fiction of a family relationship – was itself fictionalized: the *family relationship* became nothing more than a functional fabrication as natural family members were re-inserted in their own *oikos*, but in a non-natural place. The imitation of nature, that adoption purportedly was, disappeared completely. As soon as the epiphenomenal effects of adoption stopped being epiphenomenal, and instead became the very core of adoption, that is, as soon as it was more about the legal rights and duties that encompassed an adoption and not about the social purposes an adoption was intended to fulfill, the fiction of adoption itself went on to create a new fiction: the *family relationship* became nothing more than a veil.

The agency of adoption's technicalities

If we now reconsider the 'technical rules' of adoption – the rules that were devised for a set of social purposes, the rules that were supposedly simply applied without force of their own – we can see that the legal rules themselves play a very active part in constructing realities in their own ways, in ways that were evidently unforeseen at the start. The legal logic and method that underlies the law of adoption, in turn generates 'certain kinds of social, political, and epistemological realities' as the law opens up space for use, misuse and abuse.

Adoption was supposed to be about support in old age, about proper burial rites, and about attendance of a tomb-cult and perhaps the prevention of the *oikos* becoming *eremos*. But the legal rights and duties that were transferred on the adoptee – the rights and duties that were necessary for the institution to work – were quickly detached from its social purposes by people engaging with the law: these social purposes themselves became fictionalized as legal actors used the doctrine of adoption to secure for themselves procedural advantages, for the battling out of family conflicts and so on.

What I tried to show in this chapter, then, was how the technicalities of the law of adoption – the legal rules – are themselves interesting. They generate their own 'realities' and cannot simply be reduced to society, but have their own agency (or autonomy). The key is, I think, that lawyers and jurists always turn to the legal rules in an attempt to solve real problems – and as they try to bend their ordinary meaning, or approach the same rules with different questions in mind, they come to new discoveries, new interpretations and eventually to solutions that can have a profound impact in

the real world. But the examples I gave were not restrained to use, misuse and abuse. One of the most important arguments I made here was perhaps that the legal domain might also have an impact on our conceptual approach to issues, an impact on the way we think. Adoption, I believe, forced lawyers to define legal sonship vis-à-vis natural sonship and constructed an opposition between the natural and the unnatural that has helped guiding the way sonship was approached. The very same argument could perhaps be made concerning legal definitions of the *familia* that in turn influenced the way Romans thought about the family – as I will illustrate in the next chapter.

This chapter, then, was very much about the ways in which legal 'knowledge' is produced, about legal participants trying to deal with the intricate web of rules as they seek to answer legal questions over and over again.[171] In a sense, Greek adoption was presented as a case study that served to illustrate how legal discourse, how the law, can be studied as a 'culture' in its own right; a 'culture', moreover, that is not just the product of the society it is part of, but a culture that has as a profound impact on that society itself. The law becomes, in a sense, autonomous by its observing and commenting on itself – and those observations and commentaries in turn create realities that can have a profound *social*, *political* and perhaps even *epistemological* impact.

With the risk of repetition, I do not mean that the law suddenly goes on to work completely independent from society – the law of adoption is always 'done' by people. The point is that those dealing with the law of adoption had, in the words of Alan Watson, 'a style that was inward-looking'.[172] With the agency of the law of adoption, then, I do not mean that the law of adoption goes on to lead its own life, or actually comes to shape societal ideas or morality; rather I argue that these new social realities, these usages, *cannot be made to come into view* without the law of adoption. Here I draw on Annelise Riles in my claim that these legal innovations 'are not simply the product of *persons*, or even of their *social or epistemic contexts*. Rather, some agency must be attributed to the *machine* or the *model* itself' – that is, some agency must be attributed to the technical legal rules that make possible this kind of usage, that evidently flies in the face of the functions it was supposed to fulfill.

[171] Riles, 'A New Agenda for the Cultural Study of Law', 976.
[172] Watson, 'Law and Society', in: *Beyond Dogmatics*, 23.

VI. Roman law of adoption

This chapter deals with the Roman law of adoption and it is very similar in structure and argument to the previous one. Again the story is similar: there are plenty of good books on adoption, and again I will not argue that adoption hasn't received its attention – just that the attention is either on the legal procedure of adoption, or on the social explanations of adoption, and in good books on both.[173] But it is never about the technicalities of the law of adoption; about the ways in which legal knowledge is produced, about the jurists who see themselves as 'devoted technicians', about the problem-solving paradigm underlying so much of the legal texts, nor is it about the *form* of technical legal doctrine and argumentation.[174] But if we do look at these aspects, as we have witnessed in the chapter about Greek adoption, we come to appreciate that law can be studied as a 'culture' in its own right; a 'culture' that has agency itself. Here too, the distinctly legal logic and method that serves as the foundation for ideas of adoption in turn generates 'certain kinds of social, political, and epistemological realities' as the law opens up space for use, misuse and abuse.[175]

These processes are very much visible in the case of adoption in Roman law, and I will try to show these two issues: through the ways in which legal knowledge is constructed, how it operates, we can understand how the law itself generates these social realities through inward reflection. That is, the law itself, through the continuous labour of jurists – whether we study their texts directly or see their work through that of others –, generates these realities by painstakingly reconstructing possible legal situations, answering questions (hypothetical or real) and by continuously looking for loopholes. The law becomes, in a sense, autonomous by its observing and commenting on itself – and those observations and commentaries in turn create realities that can have a profound *social*, *political* and perhaps even *epistemological* impact.

The legal doctrine of adoption gradually departed from its original *social* 'goals' and purposes – working, as it were, autonomously in society. Adoption was used, abused and misused for purposes other than those intended; as soon as it was out there, it acquired a life of its own, and with that increasingly created an opposition between the radical *legal* concept of 'legitimacy' – who was heir? –, a concept solely concerned with property entitlement, and the more *natural* obligations within the

[173] See for one of those good books: J.F. Gardner, *Family and Familia in Roman Law and Life* (Oxford 1998) or R.C. Ruggeri, *La Datio in Adoptionem I*, (Milan 1990) and, more concerning the social side of things: C. Kunst, *Römische Adoption: Zur Strategie einer Familienorganisation* (Hennef 2005); recently also: H. Lindsay, *Adoption in the Roman World* (Cambridge 2009).
[174] Riles, 'A New Agenda for the Cultural Study of Law', 976.
[175] Riles, 'Comparative Law and Socio-legal Studies', 808.

family, embodied in the idea of *pietas*. A choice was quickly made as praetorian legal rules took over the system of inheritance, and put the civil law aside. These praetorian rules, from the 1st century B.C. onwards increasingly favoured cognate heirs instead of the agnate line, making adoption as an instrument for inheritance less and less necessary. But the law and lawyers found new loopholes, new ways to frustrate original purposes, and new ways to create tensions.

I will start out with a short overview of the law of adoption, and a discussion of the 'original purposes' of adoption will follow, though there is only a little that we can discuss in this regard. I then move on to discuss some the relationship between legal and societal ideas of the Roman family.[176] These more introductory paragraphs will again pave the way for a discussion of some examples of the doctrine of adoption as it actually played out, how adoption was used, misused and abused – though of course here we do find significant differences compared to its Greek counterpart. These considerations will then merge into a broader argument about the 'agency of law', about how, by creating this legal idea of 'legitimacy', the law of adoption actually came to constitute social phenomena. As I try to emphasize the 'technical dimension of legal knowledge, as a cultural practice of its own'[177], I will, more than usual, cite source-material at length, as this is one of the ways to give insight into the kind of method and reasoning that is so peculiar to the jurists.

This discussion of the Roman law of adoption is necessarily somewhat tentative: I cannot here give a technical, detailed legal exposé of the law, a full-blown discussion of its social ramifications, and discuss all relevant source-material, without writing a book. I will have to settle for painting with a broader brush.

The technical rules of adoption: the natural and the legal

In Roman family law, doctrines usually revolve around the *patria potestas* – the, from a legal perspective at least, unlimited power of the father to do as he pleases[178] – and adoption is no exception. Approached from that perspective, adoption was one of two options to fall under someone's *patria potestas*; the other being birth out of a legitimate marriage (i.e. a marriage of Roman civilians). From the Roman legal point of view, then, adoption was a way of transferring a person from one *patria potestas* to a new one. Falling under someone's *patria potestas* had ramifications, above

[176] R. Saller, *Patriarchy, property and death in the Roman family* (Cambridge 1994)
[177] Riles, 'A New Agenda for the Cultural Study of Law', 976.
[178] Gaius, *Institutes*, 1.117: Omnes igitur liberorum personae, sive masculini sivi feminini sexus, quae in potestate parentis sunt, mancipari ab hoc eodem modo pussunt, quo etiam servi mancipari possunt. Gaius, *Institutes*, 1,55: item in potestate nostra sunt liberi nostri, quos iustis nuptiis proceavimus, quod ius proprium civium Romanorum est. fere enim nulli alii sunt hominess, qui talem in filios suos habent potestatem, qualem nos habemus.

everything, for inheritance on intestacy – the adoptee became a *suus heres*. Since, as both Richard Saller and Jane Gardner rightly emphasize, intestacy was fairly common (a testament was considered null and void upon failure to comply with all formalities attached to will-making[179], and that happened all too often) the father usually took care to arrange his inheritance in the case of intestacy and could use the instrument of adoption to do so.[180]

Adoption itself is a generic term for both adoption and adrogation, two separate legal forms of that generic idea. Modestinus clarifies: 'Sons-in-power can be made such not only by *nature* but also by forms of adoption. The term 'adoption' denotes a genus, which is divided into two species, of which one is called by the same word 'adoption', the other *adrogatio*. Sons-in-power are subject to adoption; people who are *sui juris*, to *adrogatio*'.[181] Adoption, then, is used for those that were still in someone's *patria potestas*, these adoptee's were not 'of their own right', but of the father's (*alieni iuris*). With adrogation, someone who was of his own right (*sui iuris*) reverted to someone else's and became *alieni iuris*. Adrogation destroyed a complete *familia*: the adrogatee not only conceded his *potestas* to the new *pater*, but also his assets and own family: *si pater familias adoptatus sit, omnia quae eius fuerunt et adquiri possunt tacito iure ad eum transeunt qui adoptavit*.[182] He conceded *everything*. Straight away, we see legal formalization at work: the law does not care about 'motives', 'actors', or 'social consequences': it cares about legal ramifications. On first sight, there is nothing particularly exciting about these rules; they are mere 'technologies', technical rules that see to the transferral of *legal personae* from one *legal familia* to another.

These rules contain nothing of interest for those who come to the subject with cultural or societal questions – they are simply applied to adopt people and that adoption *itself* is what interests most of us: why did people adopt? How did adoption impact family structures? How was adoption abused for political purposes? In such cultural and social projects the rules themselves are somewhat beside the point – 'a mere pretext for telling the story of persons, practices, economic incentives or power politics'.[183] One need only look at recent books on adoption to see that idea confirmed – the authors are not *really* interested in what they feel is a 'mundane and inherently uninteresting

[179] D. 38.16.1: intestati proprie appellantur, qui, cum possent testamentum facere, testati non sunt. Sed et is, qui testamentum fecit, si eius hereditas adita non est vel ruptum vel irritum est testamentum, intestatus non improrie dicetur decessisse.
[180] Gardner, *Family and Familia*, 203; Saller, *Patriarchy, property and death in the Roman family*, 164-6.
[181] D. 1, 7, 1 Modestinus *libro secundo regularum*: filios familias non solum natura, verum et adoptions faciunt. Quod adoptionis nomen est quidem generale, in duas autem species dividitur, quarum altera adoptio similiter dicitur, altera adrogatio. Adoptantur filii familias, adrogantur qui sui iuris sunt
[182] D. 1, 7, 15 pr. Ulpianus libro vicensimo sexto ad Sabinum.
[183] Riles, 'A New Agenda for the Cultural Study of Law', 980.

dimension of the law', namely its technical rules.[184] But these very rules have agency – they produce their own realities, and are therefore themselves interesting from a cultural of societal point of view.

As Modestinus makes clear, these legal rules make possible certain realities: it is not just 'nature' that creates *sonship*, but adoption too. The adoptee was in no way different from a 'natural' child – for the law, on adoption, the distinction dissolved. But it did so by way of a fiction, so much was clear to all. The adoptive son was considered '*as if* he had been born of that father and the mother of his family'[185], since adoption was, after all, an imitation of nature: *adoptio enim naturam imitatur*.[186] For the law there was no difference – adoptees were *sui heredes* (his heirs) of the *pater familias* in the very same way as natural sons. The son stopped being a son in his old *familia*, and instead became a son in his new *familia*: 'vom Rechtsstand gesehen war das Band mit seiner Urpsrungsfamilie zerrissen'.[187] The law is not concerned with whether ties with the old family *actually* existed: adoption as a doctrine had its function with a *system* of family law, and to make the system work it drew upon an abstract concept of the family, the *familia*, that hardly conformed to the social realities of the roman family. All adoption did was simply transferring someone from one *familia* to another. They were 'just' technical rules. But that is not the whole story.

Sonship, then, was no longer a 'natural' concept in Roman *law*: there were two ways to become a son. Paul, on marriage, once more illustrates this radical *legal* equality of adopted and natural sons: 'where an adopted son has been emancipated [i.e. released from the *patria potestas*], he cannot marry his adoptive father's wife, since she is in the position of a stepmother. Similarly, if someone adopts a son, he will not be able to marry his wife, who is in the position of a daughter-in-law, even after the son is emancipated, because she was once his daughter-in-law.'[188] As Volterra rightly argues, this continued ban was a consequence of the legal equation of adoptive child and biological descendant, which explains why, even when the adoptee had ceased to be part of the family, he was still not allowed to marry his former daughter-in-law or stepmother.[189]

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[184] Kunst, *Römische Adoption*; Lindsay, *Adoption in the Roman World*
[185] Aulus Gellius, 5.19.15-6 : quam si ex eo patre matreque familias eius natus esset
[186] Gaius, *Institutes*, 1, 11, 4.
[187] Kunst, *Römische Adoption,* 21.
[188] D.23.2.14: adoptiuus filius si emancipetur, eam quae patris adoptive uxor fuit ducere non potest, quia novercae locum habet. Item si quis filium adopauerit, uxorem eiusdem quae nurus loco est ne quidem post emancipationem filii ducere poterit, quoniam aliquando nurus ei fuit. See also: Gaius 1. 59/63 and D. 17.2.
[189] E. Volterra, 'La nozione dell'adoptio e dell'arrogatio secondo i giuristi romani del II e del III secolo d.C', *Bullettino dell' Istituto di Diritto Romano* 69, 109-53, 140-3.

Crucially, Roman law introduces a *legal* 'layer', so to speak – it detaches itself from reality and the real facts by creating *legal* sonship. Legal sonship consists of either sonship *through adoption*, or of *natural* sonship. As was the case with Athenian adoption: were there no legal institution of adoption, of course, natural sonship would have been synonymous with legal sonship, without any need for additional terminology. In fact, and this is crucial, the whole term 'natural' can be understood as a *construct*, fabricated to deal with this rigid and sudden separation between nature and law. It is here, one could argue, that the idea of the natural *comes into existence* because it is forced to do so by the law.

The law, adoption in this case, poses itself as a radical alternative to the 'natural' way of things – but, of course, to realize that something is natural in the first place, it *needs* to be contrasted with the *unnatural*: the legal, the adoption. The law of adoption here is *generative* of a certain *epistemological reality*. In a similar fashion to Alain Pottage's claim, that the divide between persons and things has its genealogy in the Roman legal distinction of *res* and *personae*[190], we could argue here that the idea of the natural (at the very least in this specific context) is generated by the technical workings of the law, generated by the legal methodology of adoption. The 'social' need to continue the agnatic line of the Roman families resulted in a legal doctrine of adoption; but that legal doctrine in turn had to rethink sonship, and came to see it as something *non-natural*, as something *legal*. That idea was contrasted with the *natural idea of sonship* which was of course recognized, but left without legal consequences.

A longer except, again by Modestinian, should clarify:

'Cognate relatives are thought to be so called on the ground that they have been, as it were, born together at one and the same time, or have their origins in, and spring from, the same person. The substance of *cognatio* is understood in a dual sense by the Romans; for some cognate relationships are bound together by civil law (*iure ciuili*), and some by natural law (*iure naturali*), and sometimes, when both laws coincide, the relationship is cemented by both natural and civil law. And indeed, the cognate relationship, which descends through the female line which has produced illegitimate children is understood purely as a natural relation without civil ties. *But a purely civil relationship which is also called a legal relationship apart from natural law, exists through adoption*. A cognate relationship reflecting both types of law exists when forged by a legally contracted marriage. But a natural tie of *cognatio* is

[190] Riles, 'Comparative Law and Socio-legal Studies', 810.

known as such. But civil *cognatio*, although it too may of itself in the fullest sense be called by this term, is nevertheless properly termed *agnatio*, because it takes effect through males.'[191]

Here we see this very separation of law and nature at work, and the (civil) *law* begins to disentangle what was once both natural and legal[192], and introduces an important distinction that can hardly be overestimated. Adoption is 'civilis autem per se', it is a purely civil relationship; natural sonship is 'cemented by both natural and civil law'. But for the civil law itself, for the law of adoption itself, both 'types' of sons were identical – both were *suis heredes* in the very same manner. Natural sonship was simply one of two ways in which one could attain a certain 'civil law status', and once that status had been obtained, it no longer mattered how. The distinction between the legal trick and nature was recognized, but left without any legal ramifications because it was covered up by an additional legal layer of *legitimate* sonship.

But of course it remains a somewhat uncomfortable approach to the family, or to the concept of a 'son', as is illustrated by Pauls remark: 'If I have emancipated my natural son [i.e. released from the *patria potestas*] and adopted another [i.e. brought into the *patria potestas*], [Paul says that] they are not brothers. If I have adopted Titius on the death of my son, Arrian says he appears to have been a brother of the deceased.'[193] The distinction here is blurred, and the jurists start to ask questions. The problem is this: an adopted son is on par with the natural brothers in his new *familia*, and in the case of intestacy he was treated as one. But once a natural son left that *familia*, he ceased to be a brother in this *civil law* sense. He was still a natural brother to other natural brothers, and could probably from c. 65 B.C. onwards claim inheritance similar to that of the adopted son due to a change in praetorian law, the addition of the clause *unde liberi*. In terms of inheritance rights, then, he was a equal at best, but never a brother to the adopted brother, as his 'brothership' was purely civil, and that civil relationship was terminated upon emancipation.

In the advent of death of a brother, things were somewhat different: both brothers are still in the same *familia*, and thus are connected by civil law through the legal concept of the *familia*, but

[191] D. 38. 10.4: Cognati ab eo dici putantur, quod quasi una communiterue nati vel ab eodem orti progenitiue sint. Cognationis substantia bifariam apud Romanos intellegitur: nam quaedam cognationes iure ciuili, quaedam naturali conectuntur, nonnumquam utroque iure concurrente et naturali et ciuli copulatur cognatio. Et quidem naturalis cognatio per se sine viuili cognatione intellegitur quae per feminas descendit, quae volgo liberos peperit. Ciuilis autem per se, quae etiam legitima dicitur, sine iure naturali cognatio consistit per adoptionem. Utroque iure consistit cognatio, cum iustis nuptiis contractis copulatur. Sed naturalis quidem cognatio hoc ipso nomine appellatur : ciuilis autem cognatio licet ipsa quoque per se plenissime hoc nomine vocetur, proprie tamen adgnatio uocatur, uidelicet quae per mares contingit.
[192] Save, of course, for the illegitimate children who were never legal.
[193] D. 38. 10.5 Paulus libro sexto ad Plautium: si filium naturalem emancipauero et alium adoptauero, non ese eos fratres: si filio meo mortuo Titium adoptauero, uideri eum defuncti fratrem fuissi Arrianus ait.

the death of one makes things tricky. Hence, Arrian says he *appears* (*videri*) to be a brother, and Arrian is not quite sure – the exact connection between the natural and legal is obscure, though one would expect the civil law relationship to be terminated upon death.

The counterintuitive separation of law and reality was quickly recognized by both lawyers and lawmakers, as adoption was practiced for goals other than continuation of the *familia* and the family. As we will see in due course, it is precisely this 'cold and technical' distinction that the law makes, which in turn opens up space to maneuver, a space for the jurists to look for loopholes, to ask questions, and ultimately, to become *technical*.

Jane Gardner, in her discussion of the *social* purpose (not the legal) 'for which the Romans devised adoption in the first place' locates it as a device 'securing the continuance of the *familia*, its property and its *sacra*'.[194] Here she mirrors much of what Cicero claimed to be the purpose of adoption in his *De Domo*, where he stated it to be a continuation of the family in three respects: *nomen*, *pecunia* and *sacra*.[195] That is, 'the onward passage, from one generation to the next, of the family name, the family property, and the family religious rites'.[196] Its precise origins are somewhat misty, as are so many of our ideas of Roman law at the time of the Twelve Tables. It seems though, to have been intended, like will-making, to allow those without heirs (*sui heredes*) to 'acquire' or 'get' someone to inherit their patrimony, and of both legal procedures *adrogatio* predated *adoptio*; the close connection between wills and adoption is not restricted to Roman law alone. It is precisely this connection between wills and adoption that can be retraced, or 'located' in Greek law too. Adoption was about the continuation of the family, and therefore about the perpetuation of the *agnatic* line (the male line). As Gardner illustrated beautifully, the Roman system of civil law was used 'to secure the economic well-being of successive generations of families by tightly controlling the possibilities of dispersal of their property', assuming succession by children or siblings in the agnatic line.[197] Adoption was a fiction to arrange that very succession through the agnatic line if natural children failed.

However, *from a legal point of view*, adoption was primarily about 'the destination of the property'.[198] And as wills could, and did, fail very often, inheritance rights were almost always the more secure option, and in any case something taken care of should the will fail; adoption, just like

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[194] Gardner, *Family and Familia*, 202.
[195] Cicero, *De Domo*, 35
[196] B. Frier, Review of: 'Hugh Lindsay, Adoption in the Roman World', in: *Bryn Mawr Classical Review* 2010.07.21
[197] Garnder, *Family and Familia*, 277.
[198] Gardner, *Family and Familia*, 203.

the will, gave the father the freedom to determine *who* was to have access to that property – that was adoption's main attraction.[199] For the Roman *law* the actual effect of membership of a *familia* (including a switch of *familia* through adoption) is entirely unconcerned with the *nomen* and the *sacra* – all it cares about, and surely the verb 'care' is somewhat misplaced here, is *pecunia*. The *legal* consequences of membership of the *familia* were always entirely *material*: so that essentially 'Roman adoption is about property entitlement'.[200] Of course, at the outset adoption was not envisaged to be about this – it was to be about the continuation of the agnatic line; but once the legal concept left the hands of its creators, it started to live its own life. Adoption could, even though in reality it probably did not all too often (the picture is difficult to reconstruct[201]), be used as an legal instrument in an exchange of desired goods by parties: as a temporary labour agreement[202], adoption instantaneously followed by manumission for political purposes[203], adoption within the same family[204], adoption whilst in possession of natural children[205], and so on.

Again, as with the idea of 'sonship', we can see how the realm of beliefs and mental attitudes to 'the son' and the 'family' – attitudes that I equate here with the idea of 'natural law' (*ius naturale*) put forward in our source material – were *not directly* transposed into law; quite the contrary, the law distanced itself from them; and to paraphrase Yan Thomas, the categories of social anthropology, and especially the concepts of the family and the son, 'are not the best way into the most durable and the most historically adaptable form of intelligence produced by the Roman world – namely, its law.'[206] The law of adoption had its own 'agenda'; with the help of the jurists the law was continuously explored and reconsidered, used for 'social' and 'political' purposes other than those it was intended to fulfill.

If we again return to Yan Thomas' central question, 'how do legal categories relate to the world 'outside' the institution?', we see the compelling case for the autonomy of legal institutions repeated in a remarkably similar fashion compared to its Greek counterpart. Here too, what the *facts* are – whether someone is a *son* or not – is not determined by the real facts, but by the *law*. It is the law that decides whether someone is a son or not, not the 'real world'; and that makes adoption, as a

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[199] Ibidem.
[200] Idem, 116.
[201] See Gardner, *Family and Familia*, 133-45 for actual examples, and problems in discerning them, and 139 in particular.
[202] D. 1.7.34 Paul, xi questionum: 'quaesitum est, si tibi filius in adoptionem hac lege sit datus, ut post triennium puta eundem mihi in adoptionem des, an action ulla sit. Et Labeo putat nullam esse actionem: nec enim moribbus nostris convenit filium temproalem habere.', Tacitus, *Annales*, 15.19.
[203] See Tacitus, *Annales*, 15.19, and under header temporary adoptions.
[204] See under header family favourites and D. 38.8.
[205] Ibidem.
[206] Thomas, 'Fictio legis', 20.

legal institution, *possible* in the first place. As Thomas puts it: 'the difference between law and fact is not a difference of *fact* but one of *law*, and this is what defines the essence of the institution, and what makes fictions so revelatory of the artificiality of the institution.'[207] Again we should emphasize 'the 'cold, technical' character of legal rationality[208] – nature or blood, reality, plays no decisive role in *legal* sonship, nor is the legal doctrine of adoption concerned at all with the purposes it was constructed for. It is through the reflective character of the legal discipline that law creates its own spaces – ideas that are never 'reflections' of society, nor are they unconnected to them. The link to society is intricate.

The family and the *familia*: the legal and the societal

That very same artificiality is evident when we consider the definition of a 'family', a 'household'. Here too we see a radical legal definition – embodied in the word *familia* – that has implications for property and inheritance law, occurring alongside 'societal' notions of the family. It is this very separation that Jane Gardner has sought to explain in her *Family and Familia in Roman law and life*.[209] Saller too emphasizes how the meaning of family in 'common parlance' deviated from strictly legal meaning, since the latter excluded cognatic relatives.[210] Many of the arguments here draw on a passage by Ulpian, in which he deals with some of the 'notions' of the Roman *familiae* and separates between strictly legal and more societal usages of the word:

'The designation of households relates also to any kind of body which is covered by a legal status peculiar to its members or common to an entire related group. We talk of several persons as a household under a peculiar legal status if they are naturally or legally subjected to the power of a single person [*patria potestas*] as in the case of a head of the household, the wife of a head of a household, a son-in-power [*alieni iuris*, natural or adopted son], a daughter-in-power, and those who thereafter follow them in turn, as, for instance, grandsons and granddaughters, and so on. Someone is called the head of a household [*paterfamilias*] if he holds sway in a house, and he is rightly called by this name even if he does not have a son; for we do not only mean his person but also a legal status; indeed, we can even call a *pupillus* a head of a household. And when the head of a household dies, all the individuals who were subjected to him begin to hold their own households for as individuals

[207] Thomas, 'Fictio legis', 20.
[208] Pottage, 'Introduction', 16.
[209] Gardner, *Family and Familia in Roman law and life*
[210] Saller, *Patriarchy, property and death in the Roman family*, 74 – 101.

they enter into the category of heads of households. And the same will occur in the case of someone who is emancipated; for when he has been made independent he has his own household.'[211]

Clearly, we are dealing here with a legal definition – and its significance lay more in the legal realm than anywhere else, as is clear from Ulpian's remark that even a *pupillus* (orphaned boy) could constitute a *familia*. This is the kind of definition employed in the *law*, the kind of definition that applied to the law of adoption too. It is a definition that is radically disconnected from society – in no way can it be understood as a reflection of societal notions of the family, but at the same time one cannot understand it as something 'unrelated' to society. It is a *legal category*, and if we recall the work of epistemologist Granger, we can call these *legal facts* 'virtual facts', because it is really the *conceptual model* that is the object of legal enquiry, the *familia*, and not the actual fact, the social unit of the family – 'the object consists of an abstract model or scheme of this reality and it is the abstract relations and elements that make up this model, rather than the empirical phenomenon, which acts as the basis of knowledge.'[212] These observations come to bear when considering the idea of the family and the way in which 'legal categories relate to the world 'outside' the institution'. As Samuel illustrates ingenuously, 'the idea that legal science is a discourse that has as its object actual factual situations is to misunderstand, fundamentally, legal thought. […] Lawyers, like scientists, do not work directly on reality but construct rationalized models of this reality; and it is these models that become the 'objects' of legal discourse'.[213] As an idea, law has a role as much in the world of fact as it has a role in the world of the law itself; these 'objects' of legal discourse are revisited endlessly by the jurists, by lawyers and others interested, and it is this process of involution, of inward reflection on the legal rules in attempt to solve *real* issues, that creates this idea of law's autonomy: 'the law became increasingly isolated by these ever more complex constructions, always widening the gap between itself and reality [le réel]'.[214] Paradoxically, the lawyers turned to the *legal rules* and not to the lawgiver, to seek solutions for real problems – they tried to bend the rules, because (as Alan Watson

[211] D 50.16.196.2, Ulpian, Edict, book 46: Familiae appellatio refertur et ad corporis cuiusdam significationem, quod aut iure proprio ipsorum aut communi universae cognationis continetur. Iure proprio familiam dicimus plures personas, quae sunt sub unius potestate aut natura aut iure subiectae, ut puta patrem familias, matrem familias, filium familias, filiam familias quique deinceps vicem eorum sequuntur, ut puta nepotes et neptes et deinceps. Pater autem familias appellatur, qui in domo dominium habet, recteque hoc nomine appellatur, quamvis filium non habeat: non enim solam personam eius, sed et ius demonstramus: denique et pupillum patrem familias appellamus. Et cum pater familias moritur, quotquot capita ei subiecta fuerint, singulas familias incipiunt habere: singuli enim patrum familiarum nomen subeunt. Idemque eveniet et in eo qui emancipatus est: nam et hic sui iuris effectus propriam familiam habet.
[212] Samuel, 'Epistemology and Comparative Law', 43.
[213] Idem, 74.
[214] Thomas, '*Fictio legis*', 35.

has emphasized) rulers did not seem to care about private law too much.[215] But with that, the fiction of adoption – the fiction of a family relationship – was itself fictionalized: here too we see that as soon as the epiphenomenal effects of adoption stopped being epiphenomenal, and instead became the very core of adoption, the fiction of adoption itself went on to create a new fiction, and one with graver consequences: the *family relationship* became nothing more than a functional fabrication.

As we said, this definition of the *familia* was 'essentially archaic to the extent that it did not coincide with the way Romans of the classical period regularly used the word outside the legal context.'[216] But the jurists were always aware of the gap between the law and *le réel*, as Ulpian illustrates:

'We describe a household consisting of all the agnates under a single legal rule for even if all of them have their own families after the head of the household has died, nonetheless, all of them who were under the power of single person will rightly be described as belonging to the same household, since they belong to the same house and family.'[217]

Here emphasis is not solely on those being under the sway of the *patria potestas*, but on all *agnati*: even if they were *sui iuris*, their originating from the same house, and their relation by blood through males made them part of the same *familia*. According to Saller, this agnatic idea of the *familia* can be viewed as underlying many of the passages in Latin literature on the *familia* and it seems, therefore, that the concept of *familia* did not seem to include cognate relatives. Saller, of course, is first and foremost concerned with the variety of 'context-specific meanings', and we need not worry too much about the semantic range of *familia* here. As Gardner repeatedly emphasizes, the concept of the *familia* was legal, and should be distinguished sharply from that of the concept of family, a concept caught by a variety of ideas, and ultimately that is what Saller argues too.

The point is rather that this legal idea of *familia* should be contrasted with more societal ideas of the family, and that the subtle differences between the two came to bear in the case of adoption. The idea of cognate family relations (almost wholly alien to Roman law until praetorian law came about in the first century B.C.), for instance, ties in with the evidence we have about adoption, where adoptees were almost always relatives through females.[218] It shows how adoption was used to construct a legal *familia*, by using members of the *family*. But that was not *necessarily* the case –

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[215] Watson, 'Law and Society', in: *Beyond Dogmatics*, 22.
[216] Saller, *Patriarchy, property and death in the Roman family*, 76.
[217] D 50.16.196, 2 Ulpian, Edict, book 46: communi iure familiam dicimus omnium adgnatorum: nam etsi patre familias mortuo singuli singulas familias habent, tamen omnes, qui sub unius potestate fuerunt, recte eiusdem familiae appellabuntur, qui ex eadem domo et gente proditi sunt.'
[218] Gardner, *Family and Familia in Roman law and life*, 139.

adoption could be constructed quite differently, so as to depart radically from common ideas of the family, precisely because the law 'did not care'. Ulpian, for instance, discusses the popular association between heirship and burial of the deceased, mirroring Greek practices seen above.[219] Although Ulpian emphasizes the *legal* incorrectness of the view, as 'the burial itself does not create a presumption that they are behaving as heir or accepting the inheritance'[220], his comment exemplifies the idea of familial duties between deceased and heir: the heir 'behaves' as heir when burying, and should declare to act out of *pietas* if they do not accept the inheritance.[221] The reciprocal notions of *pietas*, stemming from common ideas about the family, here mapped onto legal ideas – and from the perspective of society, that evidently mattered. For the law, it did not. Law, through its focus on formalities, through its focus solely on property entitlement, provided the means to ignore these reciprocal notions – it provided the means for abuse, or even the means to subvert societal notions of the family.

Again, what we see is not that Roman law simply reflects societal notions of the family. It cannot simply be understood as a 'mirror': it shapes, it distorts, and it reinterprets. As some went on to test the boundaries of the law, the natural could come into conflict with the legal: there was a 'Konfliktpotential' between legal legitimacy and *pietas*, a potentiality that aligns with these two definitions of the family, that aligns law's quality as an *agent*.[222]

Quite a bit of these societal ideas of the family, then, are embodied in the concept of *pietas*, which was the 'reciprocal devotion to family members that was broader than the notion of filial obedience'.[223] It was as much a reciprocal virtue in ordinary Roman life as it was recognized by Roman law, as Papinian illustrates: 'for although the estate of children is not owed to parents on account of parents' desire and natural concern for children: yet if the order of death is upset, it is owed *pietas* no less to parents than to children.'[224] Ps. Quintilian, for instance, (although stressing a more unilateral idea here) emphasizes the continued obligations of a the child of their flesh and

[219] Dig. 11.7.14.8, Ulpian: plerique filii cum parentes suos funerant, vel alii qui heredes fieri possunt, licet ex hoc ipso neque pro herede gestio neque aditio praesumitur, tamen ne vel miscuisse se necessarii vel ceteri pro herede gessisse videantur, solent testari pietatis gratia facere se sepulturam. Quod si supervacuo fuerit factum, ad illud se munire videntur, ne miscuisse se credantur, ad illud non, ut sumptum consequantur: quippe protestantur pietatis gratia id se facere. Plenius igitur eos testari oportet, ut et sumptum possint servare.
[220] Ibidem.
[221] Saller, *Patriarchy, property and death in the Roman family*, 98.
[222] Kunst, *Römische Adoption*, 285.
[223] Saller, *Patriarchy, property and death in the Roman family*, 110.
[224] Digest 5.2.15 pr, Papinian.

blood, to help his natural parents in an attempt to pay back the gift of life.[225] That same Ps. Quintilian relates the story of an adopted son, who had his natural father assigned as tutor on the deathbed of his adoptive father. Once released from tutelage, he claimed his father had not treated him justly, and the father responded by having recourse to all he had done for his son: would the son deny that it was him 'qui genuerim, qui educaverim' – would he deny that it was who raised him?[226] The implication was of course that he was entitled to *pietas* in return. But as I said, *pietas* was both legal and natural[227] – it continued to exist for an *emancipated* son in his relationship to his parents (the non-legal, but natural situation), but it also came into being for the *adoptee* (the legal, but non-natural situation). The adopted son too was under an obligation to display respect and affection towards his adoptive parents and family.

But of course, the fiction of adoption had its consequences here – and since *pietas* was natural, and not purely legal, we *do* see a difference between the natural son and the adopted son: natural sons were not allowed to sue their *parentes* (including grandparents, it seems), whereas an adoptive son could bring a lawsuit against the parents of his adoptive father 'cum his tantum cognatus fiat quibus et adgnatus' (which should be understood as: because they were not his relatives).[228] And if, after having been adopted, the adoptee was emancipated, he could even sue the adoptive father himself, 'since emancipation cancelled the agnatic as well as the cognatic relationship.'[229] The adopted child was also expected to show pietas towards his natural father on will-making, with the father being able to bring a *querela* (complaint of unduteous will).[230] Whether this duty was reciprocal is somewhat unclear, with affirmative precedent in 50 BC but disagreeing jurists in the third century AD.[231]

Christiane Kunst paints a very stark contrast between the legal and societal family: 'Legitimität wurde verkörpert durch das juristisch definierte und auf *agnatio* beruhende Familienkonzept, das sich vornehmlich im Recht darstellte. Pietas auf der anderen Seite brachte ein Familienbild zum

[225] Ps. Quintilian, *Declamationes Maiores*, 6.14: hoc voluisse legum latorem putamus, ut natus ex nobismet ipsis in rebus adversis praesidium parenti labore atque praestantia solveret lucis usuram ubicumque, nisi forte non sumus parentes nisi palam.
[226] Ps. Quint. *Declamationes Minores*, 346: atqui ne de eo quidem dubtari poterit, quin pater sim. An hoc negas me esse qui genuerim, qui educaverim, et, ut aliquod argumentum ex eo ipso quod contra me ponitur ducam, me esse qui dederim in adoptionem.
[227] Saller, *Patriarchy, property and death in the Roman family*, 112.
[228] D. 2. 4. 8.
[229] D. 1. 7. 13; 2.4.4; 6; 7; 8.
[230] D.5.2.30, Marcianus: adversus testamentum filii in adoptionem dati pater naturalis recte de inofficioso testamento agere potest.
[231] Val. Max. 7.7.2; D. 5.2.30; Cod Ius. 8.47(48); see page 66.

Ausdruck, dessen Loyalitäten durch Erziehung und Fürsorge, gelegentlich auch Blutsbindung konstituiert wurde.'[232] The legal and agnatic concept of the family, as just discussed, is contrasted by non-legal ideas that included cognate notions, as illustrated by Cicero: 'the blood of one's father and mother has great power, great obligation, is a most holy thing'.[233] And Kunst argues that 'in keinem anderen Fall als in der *adoptio* gerieten diese beiden Paradigmen so grundsätzlich in Konflikt.'[234] Through praetorian law and the doctrine of *bonorum possessio*, at least by the time of the second century A.D., 'natural children' had their rights at the cost of civil law doctrine, as Paul explains: 'Children who have suffered a change of civil status are also called to *bonorum possessio* of their parents' property by the praetor's Edict, unless they have been adopted; for these last also lose the title of children after emancipation. But if natural children have been emancipated and [subsequently] adopted and have [then] been emancipated a second time, they keep the natural right of children.'[235] This rule evidently came about to protect the adopted son, who left his own *familia* (and thus lost all rights to inheritance there) but had no means whatsoever to prevent emancipation (in which case he also lost his rights to inheritance in his new family). In the situation where he was not emancipated out of his new family, however, he does not seem to be entitled to a claim of *bonorum possessio*.

There are some cases that illustrate the priority of the natural over civil law, illustrating the tension between the two conceptions – and we should mention the trial of Marcus Anneius Carseolanus' son, who was given in adoption, as well as Gaius Tettius' case in 70 B.C. Both stories can be found in Valerius Maximus' work, and concerning Marcus Anneius Carseolanus' son there is not much more than the simple note that he was successful in bringing a *querela* (unduteous will) against his natural *father*, who omitted him from his will. As I discussed above there was disagreement about the legality of this action in the 3rd century A.D.: Papinian claims that the son given away in adoption could never bring the *querela*, Paul seems to agree; Marcian on the other hand allows the action if the adopted son would otherwise lose out on *both* inheritances (of his natural and his adoptive father), an argument similar to that of Paul concerning the *bonorum possessio*.[236] Of Gaius Tettius' case we know a bit more, and his case is against his own *son*: Terentius made complaint that

[232] Kunst, *Römische Adoption*, 285.
[233] Cicero, *Pro Sextus Roscius*, 66: magnam vim, magnam necessitate, magnam possidet religionem paternus maternusque sanguis.
[234] Kunst, *Römische Adoption*, 286.
[235] Digest, 38,6,4, Paul: Liberi et capite minuti per edictum praetoris ad bonorum possessionem vocantur parentium, nisi si adoptivi fuerint: hi enim et liberorum nomen amittunt post emancipationem. Sed si naturales emancipati et adoptati iterum emancipati sint, habent ius naturale liberorum.
[236] Codex Iustinianus, 8.47 (48).

one of his eight sons, the one he had given in adoption, had disinherited him. Since the son was still in his adoptive family, civil law provided no way out, and Tettius had to go to the praetor.[237] In his decision to grant the estate to Tettius, City Praetor C. Calpurnius Piso was no doubt 'influenced by paternal majesty, the gift of life, the benefaction of an upbringing, but also the number of the surrounding children' who were all impiously (*impie*) disinherited.[238] As mentioned, this right to bring action was later taken up in praetorian law.

This potential for conflict between 'natural' and 'legal' conceptions was quickly taken away by praetorian law, that was called upon when civil law – with its much more rigid system – provided no equitable answers. Praetorian law, after all, was there 'to aid, to supplement, and to correct the civil law in the public interest'.[239] And it was particularly important in the area of inheritance, and here *bonorum possessio* plays a pivotal role. As Gaius explains in his Institutes, *bonorum possessio* was introduced to improve the civil law.[240] The praetorian system 'subverted' the civil law system: alongside 'civil heirs' (*heredes*) existed 'praetorian heirs' (*bonorum possessores*), and they existed on par: '*bonorum possessores* are heir in every way'.[241] Though formally alike the system of civil law, praetorian law, by its very nature, is closely connected to ideas of law mirroring society. It can be compared with modern-day doctrines of equity – a way to mitigate the rigorous technical results of the civil legal system. But once the changes of the praetor were in place, were crystallized, the process started over again – and the legal technicians looked to the rules themselves for solutions to actual problems.

The praetorian rules for succession were codified by Julian, on the instruction of Hadrian. There were three principal grades of succession in praetorian law: 1) *unde liberi*[242] – *liberi* were first in order, and 'children' included not only the *sui heredes*, and thus also adopted children, but also those emancipated, and, importantly, those given into adoption and subsequently emancipated by their adoptive fathers. Not just members of the *familia*, but also of the *family*, were given primacy here. 2)

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[237] Val. Max. 7.7.5: egregia C. quoque Calpurnii Pisonis praetoris urbani constitutio: cum enim ad eum Terentius ex octo filiis, quos in adulescentiam perduxerat, ab uno in adoptionem dato exheredatum se querellam detulisset, bonorum adulescentis possessionem ei dedit, heredesque lege agere passus non est. Movit profecto Pisonem patria maiestas, donum vitae, beneficium educationis, sed aliquid etiam flexit circumstantium liberorum numerus, quia cum patre septem fratres impie exheredatos videbat. Loeb, 2000 transl. D.R. Shackleton Bailey

[238] Val. Max. 7.7.5.

[239] D. 1.1.7.1, Papinian: Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam.

[240] Institutes, 3,9: Ius bonorum possessionis introductum est a praetore emandandi verteris iuris

[241] D. 37, 1, 2, Ulpian: in omnibus enim vice heredum bonorum possessors habentur

[242] D. 38.6.

unde legitimi[243] - second in order were the heirs at law, the *heredes legitimi*, covering all agnates and not just children; 3) *unde cognati*[244] - this category contained all blood relations within six degrees: 'under this head [of the edict] the proconsul, urged by natural equity, promises *bonorum possessio* to all cognate relatives called by reason of ties of blood to an estate, even though they fail at civil law.[245]

These changes, to be dated in the late Republic (first century B.C.), had important consequences for the usage of the doctrine of adoption in *reality*: 'its importance, for would-be adopters, as a means of creating direct (and, secondarily, agnatic) heirs to family property necessarily diminished with developments in inheritance law which established property claims for relatives even in the absence of agnatic links.'[246] These changes show how claims of legal kinship, *familia*, 'were subordinated to those of natural relationships'.[247] The civil law system of inheritance was replaced by the praetorian system in practice, and rendered adoption almost obsolete – one would expect. But not quite: the formal rules of adoption were still there, the system was still in place. The questions, however, the questions persistently asked by those seeking legal advice, had now changed. Other possibilities for use, misuse and abuse opened up, as the lawyers continued to look inwards to the law itself for answers on real problems – even when, as we saw here with praetorian law, it was an act of law-giving (that, one could argue, stemmed from discomfort with the legal system) that switched the system round. It is to these new uses of the doctrine of adoption that we now turn.

Abuse: family favourites

That 'cold, technical' character of the law accounts for the possibility of abuse, as I will illustrate now. Adoption, as I tried to show before, was about the continuation of the agnatic line – it provided the means to do so when there were no natural heirs around. It is all the more surprising, therefore, to encounter a set of striking examples in the Digest, proponed by Ulpian (and thus in the time of the Severi), concerning adoptions within the very *same* family – the examples that Bruce Frier calls '*familia*-scaping' and Jane Gardner 'family favourites'. Fathers with living children began to use the legal doctrine of adoption to redesign family structures, to guarantee their 'favorites' a large share on intestacy, should their will fail. Of course this evidently went against the purposes for which adoption was devised in the first place, but it also had grave consequences for the idea of the *familia*,

[243] D. 38.7.
[244] D. 38.8.
[245] D.38.8.2, Gaius: hac parte proconsul naturali aequitate motus omnibus cognatis promittit bonorum possessionem, quos sanguinis ratio vocat ad hereditatem, licet iure civili deficient;
[246] Gardner, *Family and Familia*, 278.
[247] Idem, 274.

which was now 'being treated as just another legal device'[248] – all *connection* there was with societal ideas of the family proves to be deeply contingent as the lawyers are asked to untie the connections between societal and legal ideas to solve problems through the law. The legal constructions that are contrived here in turn create real situations, in real families.

Because what we have here are real problems – a desire by the *pater familias* to restructure the order of inheritance upon intestacy –, if we are right in presupposing that the jurists here reflected on actual practices, that are resolved by lawyers that reflect on the legal rules. The pater familias, as Gardner puts it, 'perhaps with the aid of good legal advice, has very successfully exploited the rules of *familia* to play the game of family favourites'.[249] And that is, I think, precisely what is happening here – and what Gardner is perhaps underemphasizing. The law of adoption has a role as much in the world of fact – the question asked by the *pater familias* – as it has a role in the world of the law itself – as lawyers turn to the law for answers on the questions asked; these 'objects' of legal discourse are revisited endlessly by the jurists, by lawyers and others interested, and it is this process of involution, of inward reflection on the legal rules in attempt to solve *real* issues, that creates this idea of law's autonomy. And here more than anywhere else, do we find that the fiction of adoption – the fiction of a family relationship – was itself fictionalized: the *family relationship* became nothing more than a functional fabrication as natural family members were emancipated and consequently adopted again in their own natural family. And the imitation of nature, that adoption purportedly was (*adoptio enim naturam imitatur*[250]) disappeared completely.

There were multiple ways in which this happened. One way was for the grandfather, who was the *patria familias* of the *familia*, to adopt the children of his emancipated son that the son had after his emancipation – the *patria familias* adopted his 'own' grandchildren, who were nevertheless not in his *familia* because the father had been emancipated. In this way, these grandchildren could claim *bonorum possessio* of the grandfather's estate of twice as much. Ulpian covers the situation: 'if a man after emancipation has acquired a son, and has permitted his father to adopt him as his son, it is most equitable that the rights pertaining to any son adopted by *adrogatio* should be observed in his case, and for that reason he is [not] to be joined with his father. But if it is supposed that the grandson in question has been emancipated after his adoption, it will be most equitable for him to

[248] Gardner, *Family and Familia* 204.
[249] Idem, 196.
[250] Gaius, *Institutes*, 1, 11, 4.

withdraw (for he recovers his own position), and he should not be joined with his father.'[251] The trick here is that the grandchild is no longer a natural grandson to the *pater familias*, but his adopted son – and hence a *legitimate son*. The grandson now has an independent claim on the estate of the grandfather as a legitimate heir, whereas his natural father still has a claim for *bonorum possessio* as an emancipated son. This 'branch' of the family just doubled their claim, and that was evidently what the grandfather had wanted in the first place – it was the point of this legal trickery. In the following paragraphs, Ulpian provides variations of that same motive.[252]

The downside of this was of course that the grandson would miss out on the inheritance of his natural father should the father die before the grandfather. Of course, as soon as the father's death was a real possibility, the grandfather could always emancipate his adopted son, in which case the emancipated son recovered his right to inherit as a child of the natural father.[253] And as a *liberi* of a deceased emancipated son he could still, as an agnate relative, inherit from his natural grandfather.

A different way of '*familia*-scaping' involved the adoption of a grandson within the same *familia*. These moves alter the relative order of priority in inheritance, and again it seems to be employed to show favoritism.[254] An example by Ulpian: 'if a man who has two sons and has a grandson by each of them wishes to adopt one of the grandsons on the fiction that he is the son of the other son, he can do this by emancipating the grandson and then adopting him on the fiction that he is the son of the other son. *For he does this as anyone at all, not as grandfather, and since the rationale is that he can adopt the child as though he were born of anyone at all, so also he can adopt the child as if born of the other son*.[255] What we see is the emancipation and subsequent adoption (through adrogatio) of a grandson by the grandfather, making him the son not of his natural father, but of the natural father's brother. And there are some other uncomfortable examples: the trick was also employed so that the grandson became a legitimate son alongside his own natural father (so that he acquired inheritance rights

[251] D.37.4.3.4 : si quis post emancipationem quaesitum sibi filium patri suo in adoptinem dederit in locum filii, aequissimum est ei praestari quod cuivis adrogato filio, idcircoque patri suo iungendus est. Sed si emancipatus hic nepos post adoptionem proponatur, aequissimum erit eum abstinere (recipit enim locum suum) nec debet patri suo iungi.
[252] D. 37.4.3.7; D. 37.4.3.8; D. 37.4.3.9.
[253] Gaius, Institutes, 2. 136-7.
[254] Gardner, *Family and Familia*, 195.
[255] D.1.7.15.1, Ulpian: Qui duos filios et ex altero eorum nepotem habet, si vult nepotem quasi ex altero natum sic adoptare, potest hoc efficere, si eum emancipaverit et sic adoptaverit quasi ex altero natum. Facit enim hoc quasi quilibet, non quasi avus et qua ratione quasi ex quolibet natum potest adoptare, ita potest et quasi ex altero filio ; se also : D. 37.4.3.1 and 3 as well as D. 37.8.1.9.

separately from his father), or, on adoption as a son, as the father of another grandson (i.e. his own brother), and there are a good deal more.[256]

Perhaps the most striking example is this: 'a father had two sons in power; he emancipated one and adopted the grandson, of whom the latter was the father, as a son and died, having passed over his emancipated son in his will. Julian says that aid should be given to the grandson adopted as a son, so that as a son he may take the share which he would have had even if he had been adopted as a stranger to the family. Thus, it will come about, he says, that the son who was in power [takes] a third, the grandson adopted as a son a second third, while the emancipated son shares the final third with the other grandson who had been kept in power. *For the grandson adopted as a son should not take less than if he had been adopted by a stranger to the family*.'[257] There is some disagreement as to the proper explanation of this fragment, but if we accept that both grandsons are of a single father, the grandfather (the *pater familias*) has succeeded in making sure that the childless son comes in for a third of the inheritance, and the 'branch' of the son with two grandsons for two-thirds.

What we see in all these examples is the radical departure from the 'social' purposes of both the civil and praetorian rules. Advantage has been taken of both 'the *familia*-oriented civil law rules of inheritance, and of modifications to the civil law rules originally introduced to protect 'family' interests, i.e. those both of emancipated sons and of their children left behind in their grandfather's *potestas*, for quite a different purpose – namely in order to make as certain as possible that grandfather's particular pets will be the lion's share of the inheritance, even if his will should be upset.'[258]

But taking 'advantage' of the legal rules, and using them for a different purpose, shows at the same time that the connection between the law of adoption as it played out and societal notions of adoption and the family was problematic – the *pater familias* sought recourse to lawyers to find ways in which he could reshape the order of inheritance on intestacy. The lawyers turned to the rules themselves, and reinterpreted them in ways that were probably unforeseen at the very start, but there was nothing in the law itself that prohibited these interpretations, and that was what mattered. By

[256] D. 37.4.21.7, D.1.7.41 and D.38.6.1.7.
[257] D. 37.8.1.9 Ulpian: si pater ex duobus filiis, quos in potestate habuit, alterum emancipaverit et nepotem ex eo in locum filii adoptaverit et praeterito emancipato decesserit : Iulianus ait nepoti in locum filii adoptato succurri oportere, ut quasi filius portionem habeat, quam haberet et si extraneus adoptatus esset. Sic fiet, inquit, ut filius, qui in potestate fuit, tertiam partem, nepos in locum filii adoptatus aliam tertiam emancipatus filius cum nepote altero retento in potestate partiatur : nec enim minus debet ferre nepos in locum filii adoptatus, quam si ab extraneo esset adoptatus.
[258] Gardner, *Family and Familia*, 196.

asking new questions the lawyers opened up new spaces, new explanations, and with that ultimately new *social realities* as their legal hairsplitting turned out to have extensive ramifications for, surely, not just inheritance but social relationships within the family too.

Misuse: temporary adoptions

Tacitus, writing about events in 62 A.D. is quick to recognize the fictionalization of the fiction itself by abuse when he writes about the 'fictitious' adoption of children for attainment of political office. Children, by this time, were acquired *fictis adoptionibus*, by pretended adoptions, and immediately emancipated as soon as they had fulfilled their purpose. The purpose was political, as having children was a prerequisite for certain political positions, and these simulations of adoption (*simulata adoptio*) were forbidden hereafter:

'A very demoralizing custom had at this time become rife, of fictitious adoptions of children, on the eve of the elections or of the assignment of the provinces, by a number of childless persons, who, after obtaining along with real fathers prætorships and provinces, forthwith dismissed from paternal control the sons whom they had adopted. An appeal was made to the Senate under a keen sense of wrong. They drew up the balance sheet – natural law, and the effort of rearing children, set against deceit and wiles and short-term adoption. It was a good bargain for the childless: completely carefree, with no burdens, they had favour, honours, everything ready to hand and presented to them. They themselves, on the other hand, found the long-awaited benefits, promised to them by the laws, turned to a mockery, when anyone could become a parent without anxiety, be childless without suffering, and in a moment attain the ambitions of fathers.' On this, a decree of the Senate was passed that a fictitious adoption should be of no avail in any department of the public service, or even hold good for acquiring an inheritance'.[259]

To make sure, the adoptions were legally valid – and certainly not fictitious in that sense. What made them fictitious was rather, I would argue, that the 'benefits incidental to filiation became the essence of the relationship between adopter and adoptee', and with that the family relationship

[259] Tacitus, *Annales*, 15.19 : Percrebuerat ea tempestate pravus mos, cum propinquis comitiis aut sorte provinciarum plerique orbi fictis adoptionibus adsciscerent filios, praeturasque et provincias inter patres sortiti statim emitterent manu quos adoptaverant ... magna cum invidia senatum adeunt, ius naturae, labores educandi adversus fraudem et artes et brevitatem adoptionis enumerant. satis pretii esse orbis quod multa securitate, nullis oneribus gratiam honores cuncta prompta et obvia haberent. sibi promissa legum diu expectata in ludibrium verti, quando quis sine sollicitudine parens, sine luctu orbus longa patrum vota repente adaequaret. factum ex eo senatus consultum ne simulata adoptio in ulla parte muneris publici iuvaret ac ne usurpandis quidem hereditatibus prodesset, transl. by Jane Gardner.

was itself reduced to a mere fiction.[260] As we can see, in its most commercial form (viewed as a mere exchange of goods), adoption became a legal fiction upon a legal fiction – even the façade of the family relationship was let go of. Adoption was developed by lawyers as an instrument of Roman jurisprudence: it provide a way to answer questions asked for other social and political purposes than intended, and that was not always warmly welcomed – as we can clearly see here. The Roman law, of course, was solely concerned with the technical operation of the rules – and once those permitted this kind of misuse, there was no real problem from a legal perspective. The loophole, as we can read, was quickly fixed and these temporary adoptions to evade Augustan family laws were forbidden.

Sometime earlier jurist Labeo (d. c. 10 A.D.) had taken up precisely the issue of temporary adoption, and claimed it was not in accordance 'with our ways' (*moribus nostris*) and therefore it *should be* impermissible:

'It has been asked whether there is a basis for an action, if you are given a son in adoption on the condition that after, say, three years you give the same person to me in adoption. Labeo thinks (*putat*) that there is no basis for action, for it is not in accordance with our ways to have a son on a temporary basis.'[261]

But here he expressed a legal *opinion* (*putat*), and one – as is clear from Tacitus' writing – that was not embraced by all. In an attempt to explain why Labeo would be of this opinion Jane Gardner immediately resorts to 'societal values' – values that of course make up the core of these moral arguments about the law. Gardner claims that 'because of the social importance of paternal authority, too much tampering, for inappropriate purposes, with the *familia*-based structure of society, was dangerous, and not to be encouraged.[262] But the legal rules themselves did not preclude a temporary adoption per se, at least not until 62 A.D., and possibilities therefore opened to abuse and misuse adoption and create new social and political realities in the course of doing so.

Again, just as Tacitus did, the argument that Labeo advances deals with the fictionalization of the fiction that underlies doctrine of adoption: the adoptive son was considered '*as if* he had been born of that father and the mother of his family'[263], and a temporary adoption built a fiction upon

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[260] R. Westbrook, 'Introduction', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 1 – 92, 53.
[261] D. 1.7.34 Paul, xi questionum: 'quaesitum est, si tibi filius in adoptionem hac lege sit datus, ut post triennium puta eundem mihi in adoptionem des, an action ulla sit. Et Labeo putat nullam esse actionem: nec enim moribus nostris convenit filium temproalem habere.'
[262] Gardner, *Family and Familia*, 206.
[263] Aulus Gellius, 5.19.15-6: quam si ex eo patre matreque familias eius natus esset

what was already a fiction. Sonship, even if fictional, can never be temporary *from a social point of view*. For the law, this kind of 'misuse' of the purpose for which adoption was intended was allowed, it was not concerned with societal or moral questions: temporary adoption, as a form of labour-hire, mirroring the old and abolished institution of *mancipium*, for instance, might have been used as such without any legal problems whatsoever.

The technical workings of the Roman law of adoption

What I tried to show in this chapter, was how the technicalities of the law of adoption – the legal rules – are themselves interesting. They generate their own 'realities' and cannot simply be reduced to society, but have their own agency. The argument is very similar to that of Athenian adoption: here too do we see that lawyers and jurists always turn to the legal rules, to the legal forms themselves, in an attempt to solve real problems. Again: as they try to bend their ordinary meaning, or approach the same rules with different questions in mind, they come to new discoveries, new interpretations and eventually to solutions that can have a profound impact in the real world.

The argument about the epistemological agency of the law was repeated here once more, concerning 'the natural', but also created afresh concerning the idea of the 'family'. The law, it seems, has an impact on our conceptual approach to issues, an impact on the way we think. Adoption, I believe, forced lawyers to define legal sonship vis-à-vis natural sonship and constructed an opposition between the natural and the unnatural that has helped guiding the way sonship was approached. The very same argument could perhaps be made concerning legal definitions of the *familia* that in turn influenced the way Romans thought about the family.

This chapter, then, was very much about the ways in which legal 'knowledge' is produced, about the jurists who see themselves as 'devoted technicians' trying to deal with the intricate web of rules, about the problem-solving paradigm underlying so much of the legal texts as they seek to answer legal questions over and over again, as well as about the *form* of technical legal doctrine and argumentation.[264] In a sense, adoption was presented as a case study that served to illustrate how legal discourse, how the law can be studied as a 'culture' in its own right; a 'culture', moreover, that is not just the product of the society it is part of, but a culture that has as a profound impact on that society itself, as the law opens up space for use, misuse and abuse. I would argue that the law of adoption in Rome works, to a significant extent, autonomously in society, precisely because is structured and shaped 'by processes that were initiated and unfolded within the frame of the [law]

[264] Riles, 'A New Agenda for the Cultural Study of Law', 976.

itself, not by some *external* social process of instance' – there is, in that sense, 'nothing social about the agency or instrumentality of legal technique'.[265] But in turn, these non-social legal techniques, these observations and commentaries of lawyers, in turn create realities that can have a profound *social*, *political* and perhaps even *epistemological* impact.

Again with the risk of repetition, I do not mean that the law suddenly goes on to work completely independent from society – the law of adoption is always 'done' by people. The law of adoption is autonomous, it is an *agens*, in a different sense. I argue that these new social realities, these usages, cannot be made to come into view without the law of adoption. These legal innovations, these new social realities 'are not simply the product of persons, or even of their social or epistemic contexts. Rather, some agency must be attributed to the machine or the model itself' – that is, some agency must be attributed to the technical legal rules that make possible this kind of usage, that evidently flies in the face of the functions it was supposed to fulfill. And the law works autonomous, then, not because the jurists were unaware of social reality: 'of course they were; almost all were socially prominent and some were top imperial bureaucrats. But they had a style of interpretation that was inward-looking and not too geared to social engineering.'[266] The law of adoption was quickly disconnected from its social purposes and went on to function in very different ways because it reflected on *itself*, on its *own technicalities*.

[265] A. Pottage, 'Law after Anthropology: Object and Technique in Roman Law', *Theory, Culture & Society 31*, 147- 166, 147, 155.
[266] Watson, 'Law and Society', 23.

VII. An ancient law of adoption

Thus far we have been concerned with theoretical excursions about a comparative, or rather, contextualizing, approach to Greek and Roman law (in chapter four), as well as with two individual chapters that still largely treated both doctrines as if they could be studied *independently* from one another (chapters five and six), with some similarities addressed in the passing. This chapter tries to draw more explicit attention to this kind of contextualization I have been talking about before. I discuss the doctrine of adoption in other ancient legal systems and will note the (sometimes) surprising similarities with the Greek and Roman doctrines we have discussed before. Perhaps before we start, it is useful to tease out some of the underlying structural similarities that exist in the case of the Athenian and Roman law of adoption – that will help the reader recognize these very same juridical concepts at work in other legal systems.

Importantly, the fiction of adoption creates *actual sonship*: from a legal point of view, both in Athens and Rome, the adoptee was treated *as a son*. The fiction was always recognized by the actors, but for the law this was left without consequences. Now the way in which adoption came to copy natural sonship enabled legal participants to detach the law of adoption from its purported social uses. Upon completion of the adoption the adoptee had the same legal rights and duties that a son had; these legal rights and duties, first and foremost concerning inheritance upon intestacy, could not be transferred *in any other way*. The *legal form* of adoption, then, provided the means to acquire legal advantages that could not be acquired in any other way. In both Greece and Rome, that situation was very quickly recognized and taken advantage of: I have discussed the examples in which adoption no longer served its original social purposes, but was solely used as a means to acquire these legal advantages, which in turn enabled family conflicts, family favouritism, political advantages and so on, to be played out. It was this legal form, these legal technicalities, which made possible these social realities – law, in that sense, has agency because these realities could not otherwise be made to come into view.

This agency of legal form, where the fiction of adoption creates *actual sonship* and goes on to transfer legal rights and duties to the adoptee that could not otherwise be transferred, is not restricted to Athens and Rome. In fact, we see the 'abuse' – because the legal technicalities permit 'abuse' – in many other ancient legal systems. I will discuss these doctrines of adoption here, and will try to show how we can see the same agency of legal form at work throughout all these disparate legal systems; I do not believe that it is mere coincidence that these doctrines all work in such a similar fashion. This is the kind of comparison or contextualization that I envisage: I would argue

that a more complete understanding of the law of adoption requires that we understand how the Roman law of adoption draws upon a tradition of millennia, and the same thing goes for the Greek counterpart. Who was influenced by whom, and when these processes took place is impossible to pinpoint – but the striking similarity of legal structure, of the legal form of adoption, is something that I want to bring to the fore here. We should understand the Roman or the Greek law of adoption in the context of the law of adoption of other legal systems.

Raymond Westbrook, in his (brilliant) introduction to *A History of Ancient Near Eastern Law* starts with the question that all readers want to see answered: 'is it possible to speak of 'ancient Near Eastern law' in any meaningful sense?'[267] His answer betrays an attempt of coming to terms with the difficulties of a course that tries to steer right through the middle of the extremes of radical universalism and radical particularism. Westbrook claims that we *can* speak of ancient Near Eastern law: 'notwithstanding the autonomous nature of the different systems, they demonstrate a remarkable continuity in fundamental juridical concepts over the course of three millennia. Without wishing to press too far more recent historical models, such as the spread of Roman law or of the English Common Law, I would argue that all the ancient Near Eastern systems belonged in varying degrees to a common legal culture, one very different from any that obtains today. At the very least they shared a legal *ontology*'.[268] He discerns that there is a common culture on the level of structures and concepts; the use of the judicial oath being one of the many examples, and inheritance another one: 'the structure of inheritance is essentially the same, despite a wide variety of local customs on matters of detail.'[269] The two volumes of *A History of Ancient Near Eastern Law* omit Roman and Greek law – for practical reasons perhaps, but there are good reasons for locating that legal ontology in these legal systems too.

For if we consider the doctrine of adoption, we see remarkable similarities not just in legal structure but concerning its social purposes as well. Both Rubinstein and Gardner, for instance, start their discussion of adoption with contrasting it to modern usage: 'Athenian adoption differed fundamentally from the institution of adoption in a modern, western society. We tend to think of adoption as an institution primarily intended for the benefit of the adoptee, that is, usually a child in need of parental care. […] Not so in Athens. There, the institution was primarily construed as

[267] R. Westbrook, 'Introduction', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 1 – 92, 4.
[268] Ibidem, my italics.
[269] Idem, 24.

benefitting the adopter, providing for his need of a descendant'[270] for reasons we have seen – support in his old age, proper burial rites, and attendance of his tomb-cult (the annual commemorative rites, dependent on the continuation of the *oikos*) and the prevention of the *oikos* becoming *eremos*. Gardner's comparison to modern English practice is stresses the same differences: it was a device 'securing the continuance of the *familia*, its property and its *sacra*'[271] and with that differed radically from modern uses of adoption. As I will show in this chapter, the social purposes of adoption in other ancient legal systems were not fundamentally different from those of their Greek and Roman counterparts. Most, if not all, enabled a childless person to maintain the family line, but it also ensured care and support in one's old age, a fundamental filial duty (though in Rome it is not as explicitly connected to adoption as in other systems, including the Athenian) and burial rites.

But the same goes for the structure of the technical rules and workings of adoption – the primary topic of this thesis. I discuss and compare here, the legal doctrines of adoption as they are found in many other ancient legal systems. What we see are remarkable similarities in juridical concepts and structures of adoption. Of course, the argument remains a difficult one, but the similar characteristics of all these doctrines of adoption seem to hint at legal interaction and transplantation. What is even more surprising is that the doctrine of adoption is abused in the very same way: the legal rights and duties that encompassed adoption were very quickly the sole purpose of an adoption. As I discussed at length above, the social purposes of adoption were never *directly transposed* into law – that is, the institution of adoption was perhaps meant to solve a set of societal issues, but it went on to do completely different things. The law of adoption created its own space, it works to a large degree autonomously, and this very same process is visible in other legal systems of the ancient Mediterranean too. In the end, just as in Greece and Rome, the fiction of adoption itself becomes fictionalized: 'the most extreme example is from Nuzi, where apparently it was impossible to purchase land in the conventional way. Instead the seller had to adopt the buyer and transfer to him the land (with immediate possession) as an inheritance share. Instead of payment, he received a "gift" from the buyer. There is little attempt to maintain the pretense: the contract also contains standard clauses from a contract of sale, and the same purchaser is adopted hundreds of times'.[272] I will discuss here some of the doctrines of adoption in these legal systems, though the scarcity of the

[270] Rubinstein, *Adoption in IV. Century Athens*, 13.
[271] Gardner, *Family and Familia*, 202.
[272] Westbrook, 'Introduction', 53.

law's 'archeological remains' precludes the kind of in-depth and technical analysis advanced in the chapters on Greek and Roman law.

The legal trick of adoption is present in all these legal systems – in a way that is fundamentally different from, say, modern usage of adoption. That in itself is already important to notice. What I will do in this chapter is discuss a host of legal systems, including legal systems that are not part of the Mediterranean as such. The argument is admittedly tentative at times, but what I will try to illustrate, is how a certain legal structure of adoption stayed relatively similar through the course of millennia and in different regions, including that of Athens and Rome. Adoption was envisaged for similar social issues, and the way the law tried to solve these social issues is strikingly similar: the adoptee takes up the legal rights and duties of a natural son, and *becomes* his son. As in the case of Athens and Rome, very quickly advantage was taken of these legal rights and duties that encompassed an adoption.

One could ask whether these doctrines of adoption in these legal systems, that sometimes are millennia and thousands of miles apart, are really about similar things. I believe they are: both the social purposes that can be reconstructed from the sources as well as the legal technique employed to establish an adoption and the way in which the legal rules were then abused are largely the same. That is not to say that there were no differences, but merely that the doctrines were structurally very equivalent.

Our first sources concerning adoption stem from cities under the control of the Third Dynasty of Ur (Ur III), dating as far back as the third millennium B.C, and it is the only set of examples extant for that millennium. All we have are some isolated examples of adoption, all of them not 'straightforward cases of adoption of children but special arrangements also found in other periods'.[273] Wilcke, is his article on the 'Care of the Elderly in Mesopotamia in the Third Millennium B.C.', describes three examples[274] – in the first one a man 'causes another "to enter into his heirship" as part of a strictly commercial arrangement. The adoptee pays off the adopter's debt and contracts to pay him a pension, in return for the adopter's estate, of which he acquires immediate possession'.[275] In our second example 'a "father" frees his slave for heirship. Probably the slave was

[273] B. Lafont, R. Westbrook, 'Neo-Sumerian Period (Ur III)', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 183 – 227, 204.
[274] C. Wilcke, 'Care of the Elderly in Meopotamia in the Third Millennium B.C.', in: M. Stol, S. Vleeming (eds.), *The Care of the Elderly in the Ancient Near East* (Leiden 1998) 23 – 57.
[275] Lafont, 'Neo-Sumerian Period (Ur III)', 204.

his natural son by a slave concubine, whom he adopts in the absence of legitimate sons.'[276] And finally, an example where 'a debtor [appears to be] selling his daughter to his creditor and disinheriting his own son in favor of the latter.'[277]

Adoption, at least as far as we can understand by these few examples, is not just a legal tool to secure continuation of the family in the absence of legitimate sons (as the second example seems to imply). It is also used for strictly commercial purposes – the man in need feels obliged to sell his daughter and disinherit his own son to pay off his debts, or, in our first example, the adopter secures himself a certain measure of care in his old age, in return for his estate. Straight away the examples show how the restrictions on selling land were circumvented by means of adoption – the legal rights and duties that encompassed adoption (most importantly the immediate possession of the land, as we saw in example two) came to be the essence of the adoption, and the sole purpose of the transaction.

In Egypt, during the New Kingdom (c. 1550 BC – c. 1077 BC) we find very similar examples of commercial adoptions. There is the so-called 'Adoption Papyrus', a text which comprises of several documents, in which a woman declares that *her husband*, 'having prepared "a writing for her", "made me a daughter of his" and his sole heir'.[278] A second document 'is a joint statement by the husband and wife that they together bought a slave girl who has given birth to one boy and two girls.'[279] The wife then declares that she has brought up and adopted the children, but she also adopts her younger *brother* as a son, and he (the younger brother) marries the eldest of the two girls.[280] The estate, on the death of the wife, is to be divided among all four adoptees.

Another document, P. Turin 2012, is interpreted again as an adoption that does not quite follow our expectations: the man discussed in the papyrus, the argument runs, desires to guarantee his second wife 'a greater share of his property; he wishes to assign to her, "in addition to her legal one-third, the two-third share belonging to him". He thus renders the relevant sentence so: "[And I] made her as a daughter just like the children of my first wife who was in my house.". So, in order to make sure that his wife receives more than she was strictly entitled to, he had to adopt her'.[281]

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[276] Lafont, 'Neo-Sumerian Period (Ur III)', 204.
[277] Ibidem.
[278] R. Jasnow, 'Egypt: New Kingdom', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 289 – 361, 327.
[279] Ibidem.
[280] Ibidem.
[281] Idem, 328.

Both examples raise interesting points: we witness the adoption by a husband *of his wife* as his daughter twice, and also the adoption by the wife of *her own brother* as a son. The reason for adoption, at least in the second example, was to guarantee the wife a greater share – he used the law of adoption to circumvent limitations in inheritance law. The adoptions, moreover, again seem to run contrary to ordinary notions of the family – the adoption of a wife, of a brother – so that one can again claim, without too much difficulty, that the fiction of adoption – becoming a *son* or a *daughter* – was to a large extent fictionalized.

The Old Babylonian Period (early second millennium) provides further examples. Westbrook explains that adoptions were expressed by the phrase "to take for sonship/daughtership", and were performed by the adopter making a formal declaration "(You are) my son/daughter!".[282] Dissolution of the adoption could be achieved by the reverse of the formation formula: "You are not my son," or "You are not my father." Unsurprisingly, the contracts 'attempted to deter exercise of this right by imposing penalties on both sides'.[283]

Like in Athens and Rome, then, do we find that the adoption is not merely the assignment of legal rights and duties that were normally reserved for natural sons – no: the law *preferred* the fiction. They became *actual sons and daughters*. These fictions 'preserved the notion of external reference', you *are* my son, 'but only as a resource for an ever more involuted process of institutional self-reference', and with that the law increasingly isolates itself by these ever more complex constructions. The fictions themselves are fictionalized, and thus the law widens 'the gap between itself and reality [le réel]'.[284]

Similar to the Roman law of adoption, the adoptee under the authority of his parents, could not be adopted without his parents first relinquishing their authority. If he was an independent adult, compare the emancipated son, or the *pater familias* who is adrogated in Rome, he himself would be a party to the contract, as well as its object. The contract for adoption in this period, as Westbrook describes, 'noted either that the adopted was "with his consent" or that the adopters adopted him "from himself".'[285]

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[282] R. Westbrook, 'Mesopotamia: Old Babylonian Period', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One* 361 – 430, 391.
[283] Westbrook, 'Mesopotamia: Old Babylonian Period', 393.
[284] Thomas, '*Fictio legis*', 35.
[285] Westbrook, 'Mesopotamia: Old Babylonian Period', 391.

As Westbrook makes clear, adoption was 'by no means confined to childless couples or the sphere of family affection' – adoption provided a way of ensuring support in old age for the adopter (the traditional duty of a son), and for the adoptee a way to acquire an inheritance share. Westbrook claims that 'the two could be combined in a business arrangement: an elderly person adopted an adult who would support him in return for a share in his inheritance, sometimes even with immediate assignment of the share. The level of support was often specified as quantities of rations – grain, wool and oil, the three staples.'[286] Adoption was very clearly a commercial exchange of commodities: where childless parents 'adopted a child, the contract sometimes also protected the adoptee's privileged position as the "first-born": "Even if A and B (adopters) have ten sons, C (adoptee) is their eldest heir".'[287]

For the Old Assyrian period (again early 2nd millennium) our sources are more scarce. We do have a (presumably) childless couple that manumits and adopts a slave. The contract stipulates that the slave, 'having served his parents respectfully all their life, will inherit their property. The penalty clauses provide that if the father reclaims him as a slave, he will pay a heavy fine; if the son offends and rejects his parents, he will be expelled and sold into slavery.'[288] Also, in another late Old Assyrian adoption contract the adoptive son, 'as eldest heir, is promised a double share in the inheritance.'[289] A final contract, probably of Anatolian descent, stipulates that the adoptive son works for his parents' household, 'shares with them "anything there is," acquires part of the house, and ultimately will "obtain their possessions. If "he hides anything" (of his earnings) or decides to live separately, he is fined and will be killed. The birth of a natural son of his parents has only financial consequences, and his own son will "obtain" the whole household'[290] – though what that exactly implies remains unclear.

The examples offered here are perhaps somewhat less illuminating – still, however, we can clearly discern how the slave is offered inheritance in exchange for taking care of his 'parents' for the rest of their life, and the last example seems to hint at a very similar practice: inheritance in exchange for care. The other example, in which the adoptee is guaranteed a double share, again shows that in some systems the adopted son could take precedence over and above natural sons born before or

[286] Westbrook, 'Mesopotamia: Old Babylonian Period', 392.
[287] Idem, 393.
[288] K. Veenhof, 'Mesopotamia: Old Assyrian Period', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One* 431 – 484, 456.
[289] Ibidem.
[290] Ibidem.

after the adoption (as was impossible in Athens and Rome – they were on par), though this has more connected to the rules on intestacy (with a larger share assigned to the eldest son) than with adoption in a strict sense.

In the Middle Babylonian Period, sixteenth through the eleventh centuries, we find repeated the phrase than an adoption could be dissolved by saying "you are not my father" or "you are not my mother", but the penalty is 'unusually harsh'.[291] Karen Slanski explains that 'the adopting couple already has a (presumably biological) son who will follow the adopted son in rank, and because the penalty for breaking the contract includes a payment in silver, it would seem that, as in many contemporary Nuzi adoptions, the function of this adoption was to enable the transfer of family property to an adopted son in exchange for future financial support.'[292] We see repeated, then, the usage of the law of adoption to circumvent limitations in inheritance law, as adoption is simply used as a (the only possible) mode of property transfer.

Contrary to the Middle Babylonian Period, the period usually called Middle Assyrian can boast with quite some evidence of adoption, with the documents dated to the fourteenth century. Generally, as we witnessed in the Old Babylonian Period too, the adoptee still under his father's authority, had to make sure his natural father forewent his rights in favor of the adopter, but were the adoptee an independent adult, he could give himself in adoption.[293] Again we see many of the formulae that we witnessed elsewhere: 'the document [of adoption] established the new status of the parties by an express provision of the type "A is her mother; B is her daughter".'[294] And in turn, severance of the adoptive tie was formalized by a solemn declaration of the type "you are not my mother/daughter" and bore a pecuniary penalty.'[295]

In a reflection on the purposes or strategies employed in adoption Sophie Lafont mentions elements that sound all too familiar: 'adoption is a family strategy designed principally to supply the adopter with an heir and to ensure that he is supported in old age, that funerary rites are maintained, and that his line is continued. It is in this light that an uncle adopts his nephew, or a woman adopts a foundling. It explains the clause that appears in some documents imposing a duty on the adoptee to

[291] K. Slanski, 'Mesopotamia: Middle Babylonian Period', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 485 – 520, 505.
[292] Ibidem, 505.
[293] S. Lafont, 'Mesopotamia: Middle Assyrian Period', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 521 – 564, 539.
[294] Ibidem.
[295] Ibidem.

honor and support the adopter, failing which he will be sold as a slave.'[296] If we briefly recall Athenian social motives for adoption, there is a striking similarity: in Athens too adoption was frequently employed (or at least said to be employed) for support in old age, for proper burial rites, and the prevention of the *oikos* becoming *eremos*. In Rome too, with the exception of *gerotrofia* – which is nowhere mentioned – the preservation of the *familia* is an important factor, and – as we witnessed with Ulpian[297] – burial rites were also closely connected to heirship, and possible expected of an adoptee.

Even if there were certain social motives underlying a great many adoptions, adoption was also practiced, as we saw in Athens, not for its social purposes, but to take advantage of the legal benefits it comprised. As mentioned above, the most extreme example of a completely fictionalized fiction of adoption was the practice in Nuzi (northern Mesopotamia, c. 15th century B.C.), clearly more concerned with the circumvention of limitations in property sale than anything else. In Nuzi, 'the formal adoption into sonship of male adults represents the typical Nuzian legal device for recording outright sales of real estate'[298] – it represented a way of sidestepping legal limitations in other legal spheres (such as contract and property).

That does not mean, that 'real' adoption did not occur at the same time – just as in Athens adoption was used for its social purposes but *also* solely for the legal advantages it entailed (thereby fictionalizing the fiction of adoption). In fact, Carlo Zaccagnini makes it very clear that boys 'were very often adopted by men in their legal capacity of head of the family' (again, not very different from its Roman and Greek counterparts), whenever these heads wanted to procure 'a(nother) son for themselves'.[299] Here too, as we have seen before, 'many adoption contracts envisage the possible future birth of a natural son.'[300] Zaccagnini traces the widespread practice of adoption in Nuzi back to 'Old Babylonian traditions and find[s] significant parallels in late second millennium Syrian documentation'.[301]

It is not surprising, therefore, to find the social purpose of these adoptions in Nuzi again very similar: adoption was employed 'to secure service and support for the adopter in his old age.

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[296] Lafont, 'Mesopotamia: Middle Assyrian Period', 540.
[297] Dig. 11.7.14.8.
[298] C. Zaccagnini, 'Mesopotamia: Nuzi', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 565 – 618, 595.
[299] Zaccagnini, 'Mesopotamia: Nuzi', 595.
[300] Ibidem.
[301] Idem, 594.

The entrance of an outsider into the family was prompted either by lack of natural sons or because it was more convenient to impose filial duties on the adoptee rather than on one or more of the father's existing natural sons. The basic obligation of the adoptee was to serve the adopter for the rest of his life. A number of texts specify that service consists in providing the adopter with food and clothing and further state that when the adopter dies, the adoptee would mourn him and bury him.'[302] It is hardly necessary here to repeat once more the parallels between all these legal systems themselves, nor with those of Rome and Athens.

Emar, located in northern Syria, is another source of ancient law on adoption. All texts date to the thirteenth and twelfth centuries. Again, adoption was created by very similar formulae: 'he is my son".[303] And similarly for dissolution: "you are not my son/daughter," or "You are not my father/mother" – again with the usual penalties in the case of unilateral dissolution.[304] At times, when parties took no effort to disguise the commercial character of the adoption 'the declaration is solely a refusal to support or be supported'.[305] In Emar too, adoption was essentially a contractual arrangement that stipulated the exchange of commodities: the contracts 'were basically intended to secure support in old age in return for various benefits – a wife immediately, release from debts, an inheritance, or manumission on the adopters death.'[306] In most cases, and here we see significant differences with Rome and Greece, 'the adoptee was an apparent stranger' who received an 'inheritance share among the adopter's other children'.[307] As Westbrook again illuminates beautifully, adoption was essentially a double fiction: 'the commercial nature of the transaction is clearest where the adoptee also pays the adopter's debts. Where a financier is involved, the adoption is reduced to the barest of fictions.'[308] Sometimes, adoption terminology is not even used, and the fiction is almost completely neglected: 'there is a straight exchange between support and paying off debts on the one hand and acquisition of the debtor's estate on the other.'[309]

Not too far away from Emar we find Alalakh, a city in modern day Turkey. Its source-material (dated to ca. 1500) pertaining to adoption is again what we would expect: the only

[302] Zaccagnini, 'Mesopotamia: Nuzi', 596.
[303] R. Westbrook, 'Anatolia and the Levant: Emar and Vicinity', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 657 – 692, 672.
[304] Idem, 673.
[305] Ibidem.
[306] Ibidem.
[307] Ibidem.
[308] Idem, 672.
[309] Ibidem.

document we have states that 'he took PN as his father' – a formula we are by now all too familiar with.[310] According to Ignacio Rowe 'this formulation may actually disclose, quite openly, the purpose and nature of the contract, namely the acquisition of real property by the "son" through inheritance (a well-known strategy of adoption at Nuzi), which may in turn be supported by the identity of the adoptive son, the noble Ilimilimma'.[311] An adoption was dissolved in the case of the son if he fails 'to fulfill his duty of support and in the case of the father maltreatment of his son in some way. The penalty in either case is loss of the property in question, supporting the view that this is a sale-adoption on the Nuzi model.'[312]

Again, we are witnessing how adoption is used as a legal tool to transfer property. To my knowledge, adoption has not been used in this particular way in Greece or Rome. But the ways in which adoption, as a legal instrument, makes space for a detachment of its social purposes and the legal duties and rights it confers, is very similar indeed: it is precisely because the fiction of adoption, the *becoming* of a son, could be fictionalized itself, that one could use adoption to circumvent limitations in other spheres – to use adoption to sell property, to redesign family structures, to play out family feuds, or to adopt temporarily for political purposes.

These ideas are further corroborated by evidence from Ugarit, again dated to the second half of the second millennium, the flourishing capital of a North Syrian kingdom, close to the Mediterranean coast.[313] The structure of its law of adoption is very similar to those we have seen thus far. There are a few exciting cases attested though, cases that Rowe dubs 'examples of special or fictional adoption', in which certain commercial transactions are evidently covered up: 'In RS 16.295, it masks a gift or an otherwise irregular succession (the donor/adopter is the adopted son's maternal grandfather [a construction often seen in Athens]) and, in RS 16.200, an estate sale (the adopted son is said to acquire the adoptive mother's estate after contributing 500 shekels of silver to the household).'[314]

Here we again see how adoption is used to acquire certain legal rights that could not otherwise be acquired: in this case the adoptee really just buys the estate, and the adoption serves as an ordinary contract of sale. The adoption by the maternal grandfather of his grandson is again

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310 I. Rowe, 'Anatolia and the Levant: Alalakh', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 693 – 717, 711.
311 Ibidem.
312 Ibidem.
313 I. Rowe, 'Anatolia and the Levant: Ugarit', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 719 – 736.
314 Idem, 728.

something we would not expect in light of the ordinary social purposes of adoption, and it could hint at practices similar to those we witnessed in Athens, though the evidence precludes in-depth analysis.

Concerning the legal systems in the first millennium, and coming closer in time to Athens and Rome, we have demotic law as an example, albeit without too much information – its system of law should be dated to the latter half of the first century B.C. Here too 'adoption of children is attested, as is the self-sale "to act as eldest son," on the model of self-sales into slavery. It is presumed that in both cases the practice fulfilled the need to establish a line of succession to property, as well as to secure burial and maintain a private mortuary endowment.'[315] Again, then, a familiar narrative: the social purposes of adoption were really the same across the board. Whether adoption was abused in similar ways is beyond our knowledge.

We know a bit more about the Neo-Assyrian Period – 911 – 609 B.C.[316] As Karen Radner explains, adoptions are well attested, both of boys and girls. Here an explicit commercial nature again comes to the fore: 'all adoptions of girls and most adoptions of boys are straightforward sale transactions, and the adopting parents pay a sum of money for the child.'[317] As Radner notes, the adoption contracts contained *sales formulae* that one would ordinarily find in contract stipulations, though sometimes the payment is euphemistically described as a 'gift'.[318]

Finally, I come to adoption in the Neo-Babylonian Period (626-539 B.C).[319] Adoption documents are not plentiful, but, according to Joachim Oelsner, Bruce Wells and Cornelia Wunsch, 'there are sufficient references to adoption to show that it was an important and flexible juridical tool, as in earlier periods'.[320] In one document, for instance, we read that a man gives his son in adoption to his current wife, strangely enough, and in another, we read about a childless man who 'wishes to adopt his wife's son by a previous marriage but is denied permission by his own father. He is ordered instead to adopt his *brother*.'[321] These adoptions seem somewhat out of the ordinary, as

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315 J. Manning, 'Egypt: Demotic Law', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 819 – 862, 838.
316 K. Radner, 'Mesopotamia: Neo-Assyrian Period', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 883 – 910.
317 Idem, 897.
318 Ibidem.
319 J. Oelsner, B. Wells, C. Wunsch, 'Mesopotamia: Neo-Babylonian Period', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 911 – 974.
320 Idem, 936.
321 Ibidem, my italics.

are the attested examples of adoption of a grandson as well as a brother.[322] As in Greece and Rome, here 'most attested adoptions were of relatives, the purpose being to ensure orderly succession of family property, especially where prebends [inheritances of land] were concerned.'[323] Aside from the examples of a grandson and brother, we also read about a nephew and an unspecified relative.'[324]

The cases in which strangers were adopted directly betray a more commercial arrangement – inheritance in return for services, again with care and support of the elderly as the most imperative one. As Westbrook notices, these arrangements 'led to unconventional forms of adoption – in two instances, a man adopts a father and son together. A unique arrangement is recorded in YOS 6 2, where a man gives two-thirds of his Egyptian slave in adoption to his own slave (who is also an oblate). The share apparently refers to profit from the adoptee's earnings.'[325] Here too, then, adoption was used for commercial purposes: it became a tool in the hands of its users; but it could only become a tool because it provided the users the opportunity to make into a tool. The legal form of adoption guided the users as much as these users themselves created new realities through adoption.

Here one should ask whether this is enough to claim that there was in fact an 'ancient law of adoption'? That there was in fact, to an extent, a common legal culture, despite obvious differences made apparent here? Did these legal systems really share a legal *ontology*? In the end, it seems that the widespread practice of adoption (at least when compared to our societies) was guided by juridical concerns (the acquirement of certain legal rights) – *internal to the law* – as much as it was by social ones (burial rites, continuation of the family and so on). As Westbrook observes, it is generally true that childlessness was common, as were children orphans, 'with adoption as the obvious cure'.[326] But as this chapter has shown, what the chapters on Greek and Roman adoption have shown, adoption was 'by no means confined to childless couples or to the sphere of family affection'.[327] Westbrook, though he is not speaking about Greek and Roman adoption, claims that the doctrine 'developed into one of the most powerful tools of ancient jurisprudence, a flexible juridical instrument that was

[322] Oelsner, 'Mesopotamia: Neo-Babylonian Period', in: R. Westbrook, *A History of Ancient Near Eastern Law Volume One*, 911 – 974, 936.
[323] Ibidem.
[324] Ibidem.
[325] Idem, 937.
[326] Westbrook, 'Introduction', 51.
[327] Ibidem.

used to facilitate matrimonial, property, and even commercial arrangements'.[328] I would argue that this argument can be defended not only for these ancient legal doctrines of adoption, but for the law of adoption in Greece and Rome too.

How could adoption turn into an instrument of this kind? As I illustrated above, the relationship between parent and child is natural and biological. That biological relationship had legal consequences: 'a legitimate son or daughter is a person with certain recognized rights and duties in law – a legal status. Only the qualifications for that status are biological.'[329] What adoption does, then, is create a legal fiction that creates the same legal status for persons who lack the biological qualification. This is the 'additional legal layer' that I discussed above. What is so important about adoption in Athens, in Rome, and in other systems of ancient law, is that adoption did not create filiation as an imitation of the natural and biological relationship, but that it also imitated the legal consequences of sonship. In other words, the law 'created *legitimate* sonship or daughtership.'[330] We have seen the formula over and over again – "X adopts Y as a son", or 'to take for sonship/daughtership Z", or the formal declaration "(you are) my son/daughter!".

The assignment of rights and duties to the adoptee was necessary for the institution of adoption to work – it was necessary to fulfill the social goals that it set out to serve. But those very rights and duties made adoption a very attractive institution to sidestep restrictions in other legal domains, and it was quickly used for different purposes – I have discussed the examples in Greek and Roman law: '*familia*-scaping' to change the order on intestacy, to secure procedural advantages, to continue family feuds and so on. In the examples we have seen in this chapter, we often witnessed adoption being transformed into an ordinary contract – the transfer of property in exchange for commodities, or sometimes care in old age and burial rites.

For Westbrook, and I subscribe to this idea, 'legitimate filiation was a conduit for such rights and duties. *Adoption was therefore used as a mode of transferring rights and duties, employing family law to circumvent limitations in other legal spheres*', such as inheritance, but also contract and property.[331] And as soon as the rights and duties that *encompassed* the adoption became the very thing for which adoption was practiced, the adoption – and I have emphasized this repeatedly, was itself fictionalized: 'in its most extreme commercial forms, adoption became a legal fiction upon a legal fiction'.[332] Legal

[328] Westbrook, 'Introduction', 51.
[329] Ibidem.
[330] Ibidem.
[331] Ibidem, my italics.
[332] Idem, 52.

technique in the case of adoption, then, seems to work very similar across the board indeed – the legal fiction of adoption was often used for the social purposes it was probably devised for in the first place, but frequently it was solely about the legal consequences that encompassed adoption – it was solely about arguments internal to the legal realm, it was solely about the law. That explains why can come across the seemingly counterintuitive adoptions of grandchildren, brothers, wives and so on.

Aside from these considerations on the agency of legal form, we also see remarkable similarities in the social motives and purposes underlying the practice of adoption (in those cases that did not pertain to the legal consequences sec). Here there is quite the contrast between our modern understanding of the practice of adoption, a contrast readily noticed by authors writing about adoption in Athens and Rome. But the social motives in Athens and Rome were not only themselves very comparable, but they also align with those of other legal systems: 'adoption is a family strategy designed principally to supply the adopter with an heir and to ensure that he is supported in old age, that funerary rites are maintained, and that his line is continued.'[333] This also explains why, contrary to modern intuitions, adoptees are more often than not related to the adopter. It also explains why, whenever a complete stranger is adopted, 'the commercial nature of the transaction is clearest' – and it is more about the legal benefits than social motives.

[333] Lafont, 'Mesopotamia: Middle Assyrian Period', 540.

VIII. Conclusion

Alain Pottage, in his 'Law after Anthropology: Object and Technique in Roman Law', claims that 'anthropological scholarship after Marilyn Strathern does something that might surprise lawyers schooled in the tradition of 'law and society', or 'law in context'. Instead of construing law as an instrument of social forces, or as an expression of processes by which society maintains and reproduces itself, a new mode of anthropological enquiry focuses sharply on 'law itself'.'[334] That is precisely the kind of enquiry that I have tried to take up in this thesis about the ancient law of adoption – it draws away from the modernist's assumption 'that law's production and efficacy are mutually derived and, similarly, bound up in (indeed, binding) social circumstances over time'.[335] Pottage claims the project of analyzing 'law in context' or 'law and society' was 'once-innovative' but is now increasingly being 'eclipsed by projects that do not expect law to function instrumentally (in society)'.[336] This thesis should be understood as one of those projects. I returned to the law's own archeological remains – to use Yan Thomas' terminology– for a reflection on legal technique; the radical conclusion that one could draw from this, a conclusion that Yan Thomas in particular has drawn, is that law 'is not a vehicle for instances or agencies other than itself'.[337]

Now that is surely too austere for some tastes, and particularly for adoption that position is difficult to maintain. But without overdrawing these ideas, however, we can still contend that the law of adoption 'was structured by processes that were initiated and unfolded within the frame of the [law] *itself*, not by some *external* social process of instance' – there is, in that sense, 'nothing social about the agency or instrumentality of legal technique'.[338] Legal knowledge generates and sustains itself, and it is clearly 'practicable and intelligible without reference to its possible actions upon a social context'.'[339] The actors turned to the law for solutions: 'they had a style of interpretation that was inward-looking.'[340]

What I tried to do in this thesis, then, was to move away from the 'modernist' social framework in which legal knowledge is studied as a function of social relations – and I tried to do so without reverting to the 'traditional' point of view, the strictly legal one. This thesis was an attempt to

[334] Pottage, 'Law after Anthropology' , 147.
[335] C. Greenhouse, 'Comment', in: *Current Anthropology* 51(6): 806-7.
[336] Pottage, 'Law after Anthropology', 149.
[337] Idem, 150.
[338] Idem, 155.
[339] Idem, 162.
[340] Watson, 'Law and Society', 23.

approach legal knowledge, an attempt to approach the law, without reverting to either the strictly legal or strictly social point of view. At this point, of course, one could and should ask whether it is possible at all to develop a kind of scholarship that does not begin from the traditional premises of either two approaches, but that 'truly makes its home at the juncture of the two'.[341] I leave this to the reader.

In any case, I tried to do just that. And not just because the study of the technical dimension of legal knowledge as a cultural practice of its own, merits attention (which it does) – but also because this cultural focus on law's technicalities draws attention to the ways in which legal knowledge is shaped, it draws attention to legal 'modes of thinking'. And that allowed me to take a somewhat broader perspective on ancient law than is usually taken up: it is precisely in this 'mode of thinking' that a shared legal ontology of the Mediterranean systems seems to unfold. A similar way of approaching questions of law, or at the very least a similar way of approaching the legal topic of adoption, can be – although the argument remains very difficult – discerned.

But such a shared 'mode of thinking' is only visible on resisting the reduction of legal form to 'an artifact of its historical, political or social context, and to foreground instead the form itself' – to make legal form, or legal logic, a protagonist in its own right.[342] The interconnections appear when attention is drawn to the instruments of legal reasoning, to the 'intellectual tools of the lawyer', 'the inner workings of syllogisms, the way premises were constructed and then applied, the sleights entailed in the mere 'application' of rules'.[343]

Adoption served as a case-study to illustrate these two different but at the same time related methodological ideas. The very core of the Mediterranean legal doctrine of adoption, I think, is captured by a quote that is here used completely out of context: subjects, if you allow me to put it somewhat crudely and pedantically, 'are born twice over; once as beings of flesh and blood, and then again as legal *personae*.'[344] It is this double nativity that opens up space for the doctrine of adoption as it developed; sons (as we have been predominantly concerned with sons here) were not only 'born' naturally, but also 'legally'. Their legal birth came with certain legal rights and duties, but a natural birth was not required for 'legal sonship'. The legal rights and duties (especially those concerning inheritance on intestacy) that a legitimate son acquired, then, were not restricted to biological sons.

[341] Riles, 'Comparative Law and Socio-legal Studies', 808.
[342] Riles, 'A New Agenda for the Cultural Study of Law', 1032.
[343] Ibidem.
[344] Pottage, 'Law after Anthropology', 158.

Now of course, the transferral of these rights and duties were necessary for the legal institution to fulfill its social purposes – necessary, for instance, for the continuation of the family. But the law of adoption was, as I have tried to illustrate, not solely concerned with the social purposes it sought to transpose, it was also concerned with the legal benefits that encompassed an adoption. And, fundamentally, it is here that we see how law is evidently not functioning instrumentally in society in any meaningful sense. Rather, it creates its own social and political realities – we have witnessed temporary adoption, Roman 'familia-scaping', adoption to play out family feuds, the Athenian practice of adopting one's own grandson, and so on. Here the law, as I have argued, works autonomously in society – the law, or perhaps rather the legal discipline, turns to its own rules with new questions in attempts to find answers for questions.

I cannot help but stress what I mean by this 'agency of law', or this 'autonomy of law': I do *not* that the law of adoption goes on to lead its own life, or actually comes to shape societal ideas or morality. What I mean instead, is that just like material tools in science, *legal rules* enable humans to know certain things – they work as tools in this sense. The social realities produced, then, cannot be made to come into view without these rules. All the examples provided here, then, 'are not simply the product of *persons*, or even of their *social or epistemic contexts*. Rather, some agency must be attributed' *to the legal rules themselves*.[345]

On a more structural level too do we see that the law is generative of certain realities. An important argument advanced here was my claim that the law, adoption in this case, poses itself as a radical alternative to the 'natural' way of things – the idea of natural sonship is generated by the technical workings of the law, generated by the legal methodology of adoption. Legal doctrine had to rethink sonship, and came to see it as something *non-natural*, as something *legal*.

Importantly, the fiction of adoption creates *actual sonship*: from a legal point of view, the adoptee was treated *as a son*. The fiction was always recognized by the actors, but for the law this was left without consequences. Now the way in which adoption came to copy natural sonship enabled legal participants to detach the law of adoption from its purported social uses. Upon completion of the adoption the adoptee had the same legal rights and duties that a son had; these legal rights and duties, first and foremost concerning inheritance upon intestacy, could not be transferred *in any other way*. The *legal form* of adoption, then, provided the means to acquire legal advantages that could not

[345] Riles, 'Comparative Law and Socio-legal Studies', 987-8.

be acquired in any other way. It was this legal form, these legal technicalities, which made possible these unintended social realities.

This agency of legal form, where the fiction of adoption creates *actual sonship* and goes on to transfer legal rights and duties to the adoptee that could not otherwise be transferred, is not restricted to Athens and Rome. In fact, we see the 'abuse' – because the legal technicalities permit 'abuse' – in many other ancient legal systems. I would argue that a more complete understanding of the law of adoption requires that we understand how the Roman law of adoption draws upon a tradition of millennia, and the same thing goes for the Greek counterpart. The striking similarity of legal structure, of the legal form of adoption, is something that I wanted to bring to the fore here. We should understand the Roman or the Greek law of adoption in the context of the law of adoption of other legal systems.

Allow me to return to Ireneo Funes one last time. Funes found it difficult 'to comprehend that the generic symbol *dog* embraces so many unlike individuals of diverse size and form; it bothered him that the dog at three fourteen (seen from the side) should have the same name as the dog at three fifteen (seen from the front)'.[346] I have tried to show here that all legal systems discussed here have a doctrine of adoption that can be compared in a meaningful sense: I tried to show that they are all 'dogs' – of course they differ vastly in their details. But the additional legal layer that the law of adoption introduces is the same across the board, and its consequences are strikingly similar: the law detaches itself from reality and the real facts by creating *legal* sonship. We can clearly see how the realm of beliefs and mental attitudes to 'the son' and the 'family' were *not directly* transposed into law; quite the contrary, the law of adoption distanced itself from them, and always detached itself from the social purposes for which it was devised.

[346] J.G. Borges, 'Funes the Memorious', 95.

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