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The Contract of Mandatum and The Notion of Amicitia in the Roman Republic

A research paper submitted to the Faculty of Graduate studies and Research in partial fulfilment of the requirements for the Degree of Master of Arts

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ABSTRACT

The contract of *mandatum* in Roman law, unlike its namesake in modern civil law legal systems, was not a contract of representation or agency. It was a contract of gratuitous performance of services for others. According to *Corpus Iuris Civilis* it was a contract which drew its origin from the duties of friendship. This paper examines certain rules of *mandatum* and compares them with a similar legal institution known as *procuratio* and concludes that friendship must indeed have been the origin of the contract. The paper then examines various aspects of friendship in Roman society, and concludes that social custom cannot have been the sole basis for the creation of the contract. The philosophical and ethical views of Cicero and Seneca are then considered. From the works of these two authors two lines of thought regarding friendship are deduced: friendships are to be entered into for their own sake, or friendships are to be entered into for the benefits that will ensue. The former is the 'noble' view of friendship, the latter the 'utilitarian'. The author concludes after a reexamination of the rules of *mandatum* that the 'noble' view provides a better answer to the question of why *mandatum* was created by the Roman jurists.

EXTRAIT

Le contrat de *mandatum* dans le droit romain est différent du contrat portant le même nom dans le droit civil moderne. Le contrat romain n'était point un contrat de représentation, mais s'appliquait aux services gratuits. Selon le *Corpus Iuris Civilis* le contrat a tiré ses origines des devoirs dûs à l'amitié. Dans ce mémoire, les règles de *mandatum* sont examinées et sont comparées à une institution juridique analogue, la *procuratio*. L'auteur conclut que le contrat de *mandatum* a bien tiré ses origines de la notion de l'amitié. Après une étude des différents aspects d'amitié dans la société romaine, l'auteur rejette l'argument qui se base sur les coutumes sociales. Les pensées éthiques et philosophiques de Cicéron et Sénèque sont ensuite étudiées. De ces pensées deux idées principales peuvent être déduites: les relations amicales devraient être envisagées qu'en fonction de leur propre mérite, ou bien les relations amicales ne devraient envisagées qu'en fonction des bénéfices qu'elles peuvent apporter. Le premier prémisse veut que l'amitié soit une notion 'noble', la seconde prémisse qu'elle soit 'utilitaire'. L'auteur conclut, après une seconde étude des règles concernant le *mandatum*, que la prémisse de noblesse 'argument 'noble' peut répondre d'une façon plus efficace la question de savoir pourquoi le *mandatum* a été créé par les juristes romains.

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I. Introduction

The contract of *mandatum* in Roman law differs markedly from the modern civil law contract that shares the same name. Alan Watson states in his study of the contract of *mandatum* that:

> "in modern law mandate [i.e. Roman *mandatum*] has not survived and in most systems modern agency is more akin to *locatio conductio* than to *mandatum* proper ... where one retains the title of mandate as a separate contract, this differs from agency only in that it is gratuitous, and has very few similarities with the Roman contract."[1]

In modern law civil legal systems (e.g. France and Quebec) the contract of mandate occupies roughly the same position as the doctrine of agency does in common law systems. In modern mandate, the mandator empowers the mandatary to act in the former's stead, and (with some exceptions) the mandatary replaces the mandator. The scope of possible actions that the mandatary can perform is usually limited in that they must be for a 'juridical act' (i.e. an act or deed which brings about legal consequences). Thus the essence of modern mandate is 'representation' and 'agency': the mandatary acts for and in the name of the mandator. Any other acts of the mandatary toward the mandator are not within the realm of the contract of mandate.

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1. Watson, Mandate, p. 1

The Roman conception of *mandatum* was entirely different. While in many respects Roman *mandatum* does bring about in fact, if not in law, a form of representation and agency, the contract itself, in law, has nothing to do with agency at all. The *mandatarius* does not bind the *mandator* in any way; the contracts entered into by the *mandator* are always in his own name. Roman law already had several other forms which could fulfil this function: slavery, *filii in potestate, procuratores, tutores, curatores.*[2] Instead, the contract of *mandatum* in Roman law is essentially one of gratuitous hire of services, with a duty to account to the *mandator* for all profits.

Roman *mandatum* was a contract that might not have ever been created. Most, if not all the transactions that could have been performed through a contract of *mandatum* could have also have been accomplished by recourse to the contract of *locatio-conductio*. The principal difference between these two contracts lay in the fee charged: *mandatum* was gratuitous, *locatio-conductio* was always for a fee (*merces*). That this was virtually the sole distinction was even recognized by the jurists themselves: *interveniente enim pecunia res ad locationem et conductionem potius respicit.*[3] This distinction is not, in my view, logically justifiable: why was *locutio-conductio* necessarily always remunerative? why was *mandatum* always gratuitous? The civil law need only

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2. For an account of the possibilities of agency in Roman law see Plescia

3. Dig. 17.1.1.4

have allowed the possibility of gratuitous hire and the *raison d'être* of *mandatum* would have quickly disappeared. This question regarding the 'why' of *mandatum* has been posed by some modern authors. Fritz Schulz states:

> "The genesis of this contract requires explanation. Why was it created at all by the republican lawyers? ... in Rome, and particularly in those social circles to which the lawyers belonged, certain social customs and rules prevailed which suggested this contract.[4]

It is stated clearly in the Digest of Justinian that *mandatum* is a contract which *originem ex officio et amicitia trahit*.[5] Clearly the use of the word "*officium*" in the above extract cannot mean any form of legal obligation. It would be circular argumentation to propose that a legal obligation can give rise itself to another legal obligation. Besides, there is nothing in Roman law which attaches any legal significance to '*officium*'. Therefore, this *officium* must lie outside the realm of law. But what degree of significance is to be attached to this non-legal *officium*? And what of "*amicitia*"? Does this provide a solid basis for the creation of a contract?

For a contract to survive the entire period of mature Roman law there would have to be some basis other than that of the remuneration of the person

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4. Schulz, p. 555

5. Dig. 17.1.1.4. - draws its origin from duty and friendship

charged with performing the mandate. The best reason that can be put forth is, I believe, that *mandatum* was based on social imperative operating strongly within upper class Romans: the duty (*officium*) that is owed through friendship (*amicitia*).

I intend to show in this paper that the rules of the contract of *mandatum* can only be understood by reference to notions of friendship. However, unlike some others, I am not satisfied that social custom be posited as the solution. An examination of the social customs of the Romans through the correspondence of Cicero fails to show that the Romans had a social notion of friendship that differs significantly from our own. However, when we examine the philosophical and ethical sources (especially Cicero, and to a certain degree Seneca) we find that there was a debate in antiquity which may explain the elevation of friendship duties to legal status. In short, Cicero, following the Stoics, held that friendship was an essential social bond, but that it should be entered into only for its own sake, and any attendant benefits were only secondary. This contrats with the view of the Epicureans who held that friendship was primarily a useful relationship, which had as its goal the mutual exchange of services and pleasures.

II. The Contract of *Mandatum*[6]

According to the classical model, established probably by Gaius, *mandatum* was a "consensual" contract, i.e. it arose from the simple consent of the parties involved.[7]

It is impossible to give a precise date for the first recognition of anything resembling *mandatum*; we can only state that recognition of such a contract occurred sometime after the passing of the *lex Aquilia*,[8] and had to have occurred before the Praetorship of Sextus Iulius (123 B.C.). The often ignored second chapter of the lex Aquilia, concerns a principal creditor's right of action against an *adstipulator* who fraudulently releases a debtor. Such an *adstipulator* is necessarily an agent of the principal debtor and, therefore, had an *actio mandati* existed at this time, such a *lex* would have been wholly unnecessary.[9] In 123 B.C. the Praetor Iulius refused to grant an action against the heirs of a *mandatarius*. Ten years later, the Praetor Livius Drusus did grant

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6. The most complete account of *mandatum* in Roman law is Watson, Mandate and Watson, Obligations. Other excellent accounts are given in Buckland, pp. 514ff; Girard, pp. 592ff; Thomas, pp. 304ff. An older, but very useful, account is given in Cuq, pp. 649ff.

7. Dig., 17.1.1; Inst. J., 3.22; Inst. G., 3.136. As is stated by Gaius "*sufficit eos qui negotium gerunt consensisse*", Inst. G., 3.136., See also Dig., 17.1.1.1

8. sometime after 287 B.C., see Jolowicz, p. 289

9. For this argument see Jolowicz, p. 312

such an action.[10] This demonstrates that, despite the refusal to grant the action to the heirs by the Praetor Iulius, it was possible to bring an *actio mandati* in 123 B.C.

The earliest evidence we have for something resembling *mandatum* is from a play of Plautus (which can be dated approximately 200 B.C.):

> TYND:*Haec per dexteram tuam, te dextera retinens manu*
> *Obsecro, infidelior mihi ne fuas, quam ego sum tibi*
> *tu hoc age, tu mihi herus nunc es, tu patronus, tu pater;*
> *tibi commendo spes opesque meas*
> *PH.: Mandasti satis*[11]

While the context of this passage shows that no obligation (moral or legal) was intended, I believe that we can easily see that the parties are emulating proper mandate. In this taking of the hands we can see the literal meaning of the word *manu datum*: not so much a thing entrusted to the hand of another, but rather a thing given to another and sealed by the shaking of right hands.

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10. ad Heren. 2.13; see Jolowicz, at 312

11. Plautus, Captiv. 2.3

1. The Obligations of Mandatum

In the following discussion, I will not attempt to present a full account of the intricacies of *mandatum*. I intend rather to concentrate on those aspects of *mandatum* which, in my opinion, seem to bear on the subject of this thesis.

a. *Bona fides*

The object of the mandate must not be unlawful, illegal, against good morals or good faith.[12] The object must have been able to be lawfully or potentially done by the *mandator* himself.[13] *Mandatum* was one of the so-called *bona fide* contracts.[14] In origin, at least, this did not mean that any higher degree of liability was attached to the contract, but simply that the non-stipulated *contractus mandati* being unknown by the *ius civile* could only be admitted by the praetors under their equitable jurisdiction. The technique through which this was done was to add the words "*ex fide bona*" to the

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12. Inst. J., 3.26.7.; Inst. G.,3.157; (*contra ius*) Dig., 17.1.22.6; (*contra legem*) 17.1.12.13; (*contra bonos mores*) 17.1.6.3 (*contra bonam fidem*) 17.1.12.11;

13. Dig., 17.1.8.5, 17.1.19, 17.1.54

14. The others were *emptio-venditio, locatio-conductio, negotiorum gestio, depostum, societas* as well as the actions for *tutela* and *rei uxoriae*: Inst. G. 4.62, though this list is not exhaustive, see Buckland, p. 678

intentio[15] of the *formula*, so that when the *iudex* would decide the case, he need not consider what the rights of the parties were under the old civil law (*ex iure Quiritium*) but was free to consider what need be done from the point of view of fairness and equity.[16]

The meaning of *bona fides* changed, however, when those actions became accepted into the *ius civile*. While the *formulae* remained the same, they were henceforth interpreted as giving the *iudex* a certain latitude in interpreting the obligations that each party had voluntarily assumed, which, in effect, amounted to a greater range of possible considerations, such as interest, fruits etc.[17] Cicero, however, gives a more solid idea of what the *ex fide bona* clause meant to an outstanding jurist of his time:

> *Q. quidem Scaevola, pontifex maximus, summam vim esse dicebat in omnibus iis arbitriis, in quibus adderetur ex bona fide, fideique bonae nomen existimabat manare latissime, idque versari, idque versari in tutelis, societatibus, fiduciis mandatis, rebus emptis venditis, conductis locatis, quibus societas contineretur;*[18]

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15. For a description of the various parts of the *formula* see Inst. G. 4. 39-68

16. For this reason all of the consensual contracts (sale, hire, mandate and partnership) were necessarily *bona fide* contracts, because the old civil law never gave actions for purely consensual arrangements.

17. Buckland gives an extensive of the possibilities, Buckland, pp. 679ff

18. Cic. de Off. 3.70 - Quintus Scaevola, the pontifex maximus, used to give the strongest interpretation of all those trials which were *bona fide*.

Honoré believes that the *bona fides* clause had a much more important overtone than simply allowing actions which were hitherto unenforceable:

> "Before the end of the republic lawyers had acquired an important moral function which may again be loosely compared with that of the American courts as interpreters of the Bill of Rights. Notions such as those of good faith or decent conduct (*bona fides*) had been incorporated in the formulae of civil actions, and it was an accepted part of the lawyer's duty to spell out in detail and in relation to the facts of a particular dispute the implications of such moral notions."[19]

b. Gratuitous[20]

A contract of *mandatum* must be gratuitous. On this the *Digesta* of Justinian leaves little doubt: *mandatum nisi gratuitum nullum est;*[21] *nec lucrum tibi... debes, cum mandatum gratuitum esse debet.*[22] While Gaius does not favour us with such clear language, we can infer that this was his position too.[23] While the above requirement of the gratuitous nature of *mandatum* is taken from the Digest (and perhaps from Gaius), there is no doubt that this was also the rule during the Republic and early Empire.

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19. Honoré, p. 34

20. This aspect of the contract is treated well by Dumont and Michel.

21. Dig. 17.1.1.4

22. Dig. 17.1.36.1. Also see Inst. J. 3.26.13;

23. Inst. G. 3.162

Up until Justinian the rules of *mandatum* stated that a mandate had to be performed gratuitously. This meant that the *actio mandati contraria* of the *mandatarius* could never be for, or include the amount of any fee charged by the *mandatarius* for his services, even if the *mandator* had agreed in advance, nor could be the subject of an *actio mandati contraria,* nor could it be used to offset the amounts condemned in an *actio mandati directa*.

c. *Honoraria*

By the post-classical period the rule of gratuitousness was much modified by allowing the possibility of an *honorarium* (or sometimes '*salarium*') to be offered to the *mandatarius*.[24] From the reigns of Severus and Antoninus (A.D. 198-217), *honoraria* that were stipulated for could be obtained by a *cognitio extraordinaria*[25] before the provincial magistrate.[26] Such *honoraria*, however, had to be fixed in advance; a promise to pay an amount to be fixed later (*salarium incertae pollicitationis*) was unrecoverable.[27]

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24. Dig., 17.1.7

25. Dig., 1.13.1

26. Cod., 4.35.1

27. Dig., 17.1.56.3. Cod., 4.35.17

Several remarks of Quintilian are on point with regard to the *de facto* nature of *honoraria* in the early Empire.[28] On the question of fees, Quintilian is more flexible than our legal texts might permit at first glance. He explicitly refrains from giving the pat answer that an orator should never accept a fee: *gratisne ei semper agendum sit, tractari potest.*[29] The more honest course, in keeping with the dictates of a liberal education, is that orators should not sell their services nor debase the value of their gift of eloquence - *id longe est honestissimum ac liberalibus disciplinis et illo, quem exigimus, animo dignissimum, non vendere operam nec elevare tanti beneficii auctoritatem.*[30] However, not every orator is blessed with sufficient resources to assure that his needs are satisfied. Therefore, the possibility is left open that if funds are needed (the emphasis is on need, and not opulence) the orator can comfortably accept compensation for his services. After all, there is no shame in gaining one's livelihood through honest means and being of tangible benefit to others. Furthermore, why should the orator be deprived of his own time and energies,

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28. While Quintilian is not concerned directly with the contract of *mandatum*, but rather with the role of an *orator*, the services of the latter was actually was one of the archetypical spheres of *mandatum*, and therefore his remarks are on point.

29. Quint. 12.7.8

30. Quint. 12.7.8: It is by far more honourable, more in keeping with a liberal education and most worthy of that type of mind that we most wish to cultivate that we not sell our labour nor lessen (thereby) the power of such a boon.

which he could otherwise turn to pursuits which would provide him with an income.[31]

What is not acceptable for an orator, however, is to bargain beforehand and negotiate his fees according to the peril of the client. This is nothing short of piracy ("*piraticus mos*"[32]). What behooves an orator is to wait upon the *gratia* of the client, for gratitude is the duty of the debtor. If the client does not feel this *gratia*, then there is nothing that the orator can do. Therefore, Quintilian's position is that if a client is motivated by his feelings of gratitude to offer a sum, *and* the orator is unable to take care of his needs out of his own resources, then the orator need not refuse the offer.[33] Therefore, while one could not sue for *honoraria* during Quintilian's epoch, that did not mean that they were never offered, and never accepted.

d. The Duties of the *Mandatarius*

The principal duty of the *mandatarius* was, of course, to perform the object of the mandate.[34] The basic rule is expressed that while one is free to

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31. Quint. 12.7.9

32. Quint. 12.7.11

33. Quint. 12.7.12

34. *Si [mandatarius] susceptum [mandatum] non impleverit, tenetur*, Dig. 17.1.5.1.; *denique teneatur et si non gessisset*, Dig. 17.1.6.1. Also 17.1.27.2

choose whether to accept a *mandatum*, once accepted, it must be performed.[35] The *mandatarius* was able to give notice at any time that he did not wish to perform the mandate, but he would be fully liable for any damage even if he was, through no fault of his own, unable to perform the mandate, and he failed to give notice, when he could have.[36]

The *mandatarius* had to deliver up the thing he was commissioned to acquire.[37] It is important to note here that in Roman law, unlike its modern counterpart, the *mandatarius* always acquired in his own name. The *mandator* never acquired rights *in rem* until the *mandatarius* transferred title: the principle of personal nature of contracts was always paramount in Roman law, but as we will see below in the discussion on the *procurator* this principle was not absolute and this particular aspect of *mandatum* cannot be explained solely by reference to the Roman notion of privity of contract.

The benefit of the contract must be for the *mandator* or a third party named by him and possibly for the *mandatarius*; the benefit cannot be for the *mandatarius* alone.[38] The *mandatarius* also had to hand over any additional

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35. Dig. 17.1.22.11

36. Dig., 17.1.27.3

37. Dig., 17.1.8.10, 17.1.10

38. Dig. 17.1.6.5

benefits he had received from the execution of the mandate.[39] These "secret profits" could be corporeal things such as the fruits gathered from a piece of land that was acquired in a mandate[40], or slaves unexpectedly acquired.[41] These profits must even be disgorged if they were acquired subsequent to the mandate.[42] Actions available to the *mandatarius* had to be assigned to the *mandator* even if they were not yet available.

Lastly, the *mandatarius* was liable for interest for *mora*, that is any delay that might cause the *mandator* liability.[43]

e. The Standard of Care

While it is clear that the *mandatarius* had to perform the mandate without fraud or fault,[44] and was also held to warrant his act.[45], it is still a matter of some controversy among modern writers as to the exact level of

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39. Dig. 17.1.20; 17.1.10.9
40. Dig. 17.1.10.2
41. Dig. 17.1.22.9
42. Dig. 17.1.17
43. Dig. 17.1.34
44. *dolo malo aut dolo*, Dig. 17.1.8.10.;17.1.60.4
45. Dig. 17.1.9.; 17.1.42

responsibility for a *mandatarius*. This is true not only for the classical period, but also for the Justinianic period. Therefore, while a *mandatarius* will be liable for *dolus*, the question remains whether the *mandatarius* was also responsible for loss or damage due to his *culpa*.

Most authors believe that the *mandatarius*, in both the pre-classical and early classical periods, was liable only for *dolus*, but became responsible for *culpa levis* in the late classical and Justinianic periods.[46] Buckland shares this view.[47] His reason for assigning these levels, and for the change that occurred over time, was that *mandatum* ceased to be truly a gratuitous contract. In the early period the contract was always gratuitous, and therefore it would be unfair to assign a rigid standard of responsibility for someone who had no way to insulate himself from losses for which he may become liable. By the later period the contract was gratuitous in name only; the payment of *honoraria* and *salaria* being the norm. Therefore, as profit was now being extracted, there was no reason that the *mandatarius* not be held accountable: those who make a living by their work should guarantee their work. Thomas is in agreement, though he uses some ambiguous language.[48] Schulz takes the view that liability during the entire classical period was for *dolus* only and

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46. This is the opinion advanced by Arangio-Riuz, p. 188-96

47. Buckland, p. 516

48. Thomas, p. 307

the switch from *dolus* to *culpa* was only made by Justinian.[49] Furthermore, he adds that such shift was an ill-considered innovation since a *mandatarius* could hardly ever have been prepared to undertake such a heavy liability without reward.[50] Some authors, though in the minority, have advanced the notion that the responsibility was for *dolus* only in all periods.[51]

Watson takes a more subtle line. He argues strongly for the position that there was no fixed standard of liability in *mandatum*.[52] He states that this is also the case for *depositum* and all the *bona fide* contracts, and was a natural consequence of the *ex bona fide* clause contained in the *formula*. It would always be a "question of the circumstances, such as the respective interests of the parties, the bonds of friendship and duty that united them, the nature of assignment and so on."[53] He notes that his explanation alone is able to account for the contradictory information contained in the sources.

What the above controversy amounts to is that one can see that the standard of liability of *mandatarius* changes, whether over time, or due to the

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49. Schulz, p. 556

50. Schulz, p. 557

51. e.g. Crook, p. 237

52. Watson, Mandate, pp. 456 ff

53. Watson, Mandate, p. 215

circumstances, depending on whether the *mandatarius* is acting gratuitously or not. Essentially, the contract of *mandatum*, when and if it is gratuitous, only makes the *mandatarius* liable for fraud.

f. The Duties of the *Mandator*

The only obligation of the *mandator* was to pay the reasonable expenses of the *mandatarius* that were expended in course of performing the mandate.[54] While *mandatum* was gratuitous, this did not mean that the *mandatarius* had to suffer financial loss occasioned by his undertaking the mandate; he only expended his labour, not necessarily his capital. Generally, the *mandatarius* could not claim more than he expended,[55] and it was always the rule in all periods that the *mandatarius* could not use the *actio mandati contraria* to indirectly claim any part of an *honorarium* that may have been promised.

The principal difficulty, of course, is determining exactly what expenses the *mandator* was bound to recompense. The general rule being whatever money the *mandatarius* lost in performing the mandate, that is the amount he

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54. Dig. 17.1.10.9; 17.1.12.8-9; 26.5,45.4; 45.5,54.1

55. Dig. 17.1.26.4

can claim.[56] The expenses must have been made in actual fulfilment of the mandate.[57], even if the mandate turned out to be impossible, through no fault of the *mandatarius*.[58] Ultimately, this led to a three part test created probably by Ulpian: expenses were either necessary, useful or extravagant.[59] Obviously the *mandatarius* could claim those expenses that were necessary, usually those that were useful, but generally not those that were only "whimsical".

Expenses that were made while executing the mandate, but not for the execution of the mandate could not be claimed in the *actio mandati contraria*. For example, losses due to shipwreck, thieves or on account of sickness while in execution of the mandate could not be claimed. These were not expended on account of the mandate, but because of the accident.[60] This, however, did not include damage caused by the thing which was the object of the mandate.[61]

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56. Dig. 17.1.26.2, 45.4

57. Dig. 17.1.46.1

58. Dig. 17.1.56.4

59. *inpensarum sunt tres: aut enim necessariae dicuntur, aut utiles, aut voluptuosae*.Ulp., Regulae, 6.14

60. Dig. 17.1.26.6

61. Dig., 17.1.26.7

The expenses must have been reasonably expended.[62] The standard of reasonableness is not necessarily a test of what the *mandator* would have done in the circumstances. The *mandatarius* need not have, for example, used every legal means at his disposal, if some of those means would be "below the standards of honour",[63] even if the legal means were not dishonourable for the *mandator*.[64]

The amount he may recover is the actual quantum of the expenditure. Therefore, if the *mandatarius* must expend through impossibility a greater amount than would be otherwise preferable, he is entitled to claim this higher amount, but only if the mandate allows of it.[65] The loss that the *mandatarius* has suffered may not necessarily be financial.[66]

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62. Dig. 17.1.27.4

63. Dig. 17.1.10.12: *minus honestam*

64. An example was a principal who was intending to deny that money had been advanced by a creditor at interest, when in reality it had been. The surety (the *mandatarius*) could not play a part in this outright fraud and paid the interest due. This amount was held recoverable under an *actio mandati contraria*, Dig. 17.1.48.

65. Dig. 17.1.50

66. Dig. 17.1.35

g. The Termination of *Mandatum*

The contract of *mandatum* might be ended by revocation by the *mandator*.[67] The contract of *mandatum* was consensual, one that the parties created by their volition, and should be revocable by their own volition. The rule provides that the revocation must reach the *mandatarius* before he begins execution. If the mandate has been executed or expenses have been incurred the *mandatarius* will still have an *actio mandati contraria* for the amounts that he has expended to date.[68]

Likewise, the *mandatarius* can unilaterally renounce the *mandatum*. He must however renounce the *mandatum* while it is *re integra* so as not to cause loss or damage to the *mandatarius*.[69] While it is not certain that any excuse had to be given, the Digest nevertheless provides some: ill health,[70] uselessness of the action,[71] or any other ground.[72] The inclusion of these first two grounds is inexplicable considering the presence of the third. One

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67. Dig. 17.1.12.16

68. Dig. 17.1.15

69. Dig. 17.1.22.11

70. Dig. 17.1.23

71. Dig. 17.1.24: *inanes rei actiones*

72. Dig. 17.1.25

detects that there may have once been a rule requiring a just cause, which was finally amended; the authors of the Digest leaving only the vestiges of a doctrinal dispute.

Finally, the mandate may prove to be impossible. It may also come to a premature end if the performance of the mandate might be dishonourable for the *mandatarius*, the expense of performance too great, or there being no *interesse* for the *mandator*.

h. Actions on the Contract of *Mandatum*

Mandate being a bilateral, albeit an imperfectly bilateral,[73] contract there were two *actiones* available[74]: the *actio mandati* for the *mandator*, who was able thereby to force the delivery of the article acquired, transfer of the rights obtained or claim damages for faulty or non-performance. The *actio mandati contraria* gave the *mandatarius* a right to the reimbursement of his outlays.

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73. Buckland, p. 411

74. See Lenel, vol. 2. p. 10

In addition, other actions might also be available. The *actio tutelae* is mentioned if the parties are also *tutores*.[75] An *actio de dolo* might be awarded against an insolvent party.[76] In certain instances, where legal problems would prevent an *actio mandati* from being brought, an *actio negotiorum gestorum* may be used to prevent injustice.[77]

i. *Infamia*

A notable feature of the *actio mandati directa* was that it brought *infamia*.[78] Cicero considered a conviction under the *actio mandati* as the same as an act of theft: *mandati constitutum est iudicium non minus turpe quam furti*.[79]

Certain convictions under civil law actions carried a type of civil disgrace and punishment known as *infamia*. Gaius labels those infaming actions *iudicia*

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75. Dig. 17.1.8.4

76. Dig. 17.1.8.2, 10.7

77. Dig. 17.1.12.6. For example the *mandatarius* may no longer be a full person under the civil law. He would be barred from bringing an *actio mandati*. He can however be given an *actio mandati in factum* or alternatively an *actio negotiorum gestorum*.

78. Dig. 3.2.1.; Cod., 4.35.21. See Greenidge, Kelly and Pommeray, for full accounts of this term on the *mandatarius* found guilty of *dolus:*. Also see Thomas, p. 307.

79. Cic., Rosc Amer., 38

ignominiosa[80], and lists them as *iudicia furti, vi bonorum raptorum, iniuriarum, pro socio, fiduciae, tutelae, depositi* and *mandati*.[81]

By being marked with *infamia*, the *infamis* suffered public opprobrium and the loss of certain civil rights: the ability to appoint an agent[82], to appear in court on behalf of another, to prosecute criminal actions, the right to obtain *honores*, be *iudices* or hold other dignities.[83]

The interesting element here is why these actions were infaming and not others.[84] The appearance of at least three of the delicts is not surprising considering the criminal nature of the activities involved. With respect to the contracts (*societas, depositum mandatum*, and also *fiducia* since it was similar to a contract) and *tutela* the most common feature among them is that all involved a high degree of trust placed in the person charged with the carrying

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80. neither this term, nor *actiones famosae* are Republican, see Schulz, p. 45

81. Inst. G. 4.182. A slightly different list is given in the Digest 3.2.1. However it would seem that neither of these lists is exhaustive. Other condemnations that could result in *infamia* were prosecution by one of the criminal courts, desertion by the army, declaration of bankruptcy, etc. See Greenidge, where roughly forty sources of *infamia* are listed.

82. a *cognitor* for trials or a *procurator* for civil transactions

83. Buckland, p. 92

84. While many attempts have been tried, it is Crook's opinion that no general 'law of infamy' can be deduced, Crook, p. 85

the principal duties. However, some authors have noted that this list may be a bit arbitrary; *commodatum* could easily have been included in this list.[85]

Crook believes that *infamia* is a quintessentially Roman institution, and is related to, and from the same spring as the *nota censoria*.[86] For the moment I think that it is sufficient to note that a successful condemnation in an *actio mandati* brought infamy upon the defendant. At the very least this tends to show that Roman jurists regarded the failure of a *mandatarius* to fulfil his obligations as morally blameworthy as some of the other listed grounds for *infamia*.

2. Conclusions regarding *Mandatum*

From an analysis of the following elements: the *bona fides* required, the gratuitous nature, the standard of care, the action available and the notion of *infamia*, we can see that the *mandatarius* was required to perform an action or series of actions (which may have included the expenditure of large amounts of time, money, energy, reputation and goodwill) entirely without profit (even including incidental profits), while subjecting himself to a burden that required him to live up to a standard of care that may have been somewhat onerous,

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85. Schulz, p. 45

86. Crook, p. 83

and, if condemned in an action, to suffer the civil consequences of *infamia*, with its attendant social stigma as well as the loss of certain civil rights. This was indeed a fairly heavy burden upon the would-be *mandatarius*. All that he acquired in the bargain from the point of view of the civil law was a action for the reimbursement of expenses that he had outlaid, and even then with the proviso that these expenses be 'reasonable'.

The notion of gratuitous performance is one of the most fundamental characteristics of the contract of *mandatum*; it goes far to show that in origin the contract was never intended to be a commercial contract.[87] While we can readily concede that a purely commercial contract such as sale is obviously grounded on the practicalities of daily life, and has its own obvious *raison d'être*, it is hard to extend this logic to *mandatum*. While it was obviously to the advantage of the *mandator* that such a contract existed, it is difficult to see why anyone would readily take on the duties of the *mandatarius*. What was the incentive for the *mandatarius* to undertake such an obligation?

One possible argument is that all of the above mentioned features of *mandatum* were the result of inherent features of a primitive contract of

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87. *Mandatum* is far from unique in this regard; the contracts of *commodatum, mutuum* and *depositum* were also to be performed without a fee. Jacques Michel, however, argues that these contracts too were part of the general duties of friends.

representation or even perhaps of some accident of historical development. This argument is countered by the simultaneous development of a similar legal institution (discussed below) which brought about the same results, but was not attended by most of the above-mentioned features. Thus Roman law developed simultaneously two contracts of services for others (excluding *locatio-conductio*). One was gratuitous, *bona fide*, infaming and brought about imperfect representation (*mandate*). The other presented an entirely different legal regime.

A. *Procuratio*[88]

Procuratio[89] was an arrangement whereby one person, the *procurator*, looked after the interest or interests of another, while the other was away. This gives us essentially the same definition as that of *mandatum*. However,

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88. The best and most complete accounts of *procuratio* are given by Watson in his Mandate, and Obligations. An older, but thorough account is given by Le Bras. Also see Macqueron

89. A preliminary objection may be raised to the use of the abstract noun '*procuratio*'; while the word was in use in the Republican period, and was used by Cicero, the typical use of the word seems to have been limited to sphere of public officials. There is some authority for its use in the realm of private affairs (Cicero, ad Fam. 15.13.3) but there may be no legal notion attached. However, as the following account will show, there did appear to exist an independent legal situation that involved persons known as '*procuratores*', and while the Roman jurists may not have elevated this legal situation to a formal legal concept, we are not constrained by their view.

in Republican and early classical law, up to the time of Julian[90], a clear distinction was made between *procuratio* and *mandatum*. Beginning with Julian, any distinctions between these two obligations begin to disappear, and by late Roman law the two are essentially merged.

Cicero gives a definition of the *procurator* in his speech *in Caecinam*: *is qui legitime procurator dicitur, omnium rerum eius qui in Italia non sit absitve rei publicae causa quasi quidam paene dominus.*[91] This definition yields two results: firstly, the one whose business is being governed must not be in Italia; secondly, the person must act almost as if he were the *dominus*. Cicero's definition has been greatly criticized by modern authorities:[92] Was Cicero giving the proper definition for his time, perhaps quoting a *lex*, or was he deliberately narrowing the definition? Since it was in the interests of his case that the *procurator* be given a narrow scope, it is likely that he is attempting to limit the ambit of a *procurator*. Nevertheless, it seems that the definition may have been good at some time in Roman history (for how could he quote it otherwise?), and therefore one may presume that originally the *procurator* was only allowed if the *dominus* was away on state business.

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90. A.D. 117-180

91. Cic. pro Caec. 20.57

92. See Watson, Obligations, pp. 194-5; Le Bras, pp. 50 ff

The institution of *procuratio* existed from the late Republic to the time of Justinian.[93] *Procuratio* was never listed by the jurists, or in Justinian's Institutes as a contractual form of obligation. As it was a consensual mechanism whereby both parties held themselves to be bound to do reciprocal duties, we would probably call it a contract. Since the Roman jurists did not, it would probably be safer not to do so ourselves.

Unfortunately it is no easy task to study the institution of *procuratio*, owing principally to the scarcity of sources for the earlier periods. For this reason Watson has stated that "the relationship between mandate and *procuratio* is one of the most difficult in Roman law.[94]

1. The Principal Features of *Procuratio*

The following are the principal features of *procuratio* enumerated by Watson.[95] They apply, however, only to the early form or *procuratio omnium bonorum* (see below).

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93. Dig. Book III, Title 3 is devoted exclusively to *procuratio*

94. Watson, Mandate, p. 36

95. Watson, Mandate, p. 7-9

A *procurator* was appointed to look after the whole affairs of the person who appointed him. This feature would stand in marked contrast to the rules of *mandatum*, at least in the Republican period, where a mandate had to be for a limited range of objects. This feature leads us to conclude that it would be impossible for the *procurator* to undertake this commitment gratuitously. The *procurator* thus must have gained his livelihood from the performance of his duties.

Whereas the *mandatarius* had a nominate action for his expenses, the *procurator* only had an *actio negotiorum gestorum*.[96] This is the most important indication that *procuratio* was not a form of *mandatum*, for if it were, it would naturally be accorded the same regime of actions.[97]

Negotiorum gestio is, in classical law, classified as a quasi-contract.[98] This may not have always have been the case. The very conception of a "quasi-contract" presupposes the existence of a scheme of "contracts". The notion of *negotiorum gestio* antedates the creation of the contract/delict

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96. Dig. 17.1.50: *is qui negotia fideiussoris gerebat ... negotiorum gestorum actione fideiussorem habet obligatum*

97. Watson, Mandate, p. 36-51

98. Inst. J., 3.27.1

dichotomy and therefore, we need not assign the action the narrow range it is given in later Roman and modern civil law.[99]

The *procurator* was liable for *culpa* as well as *dolus*, the *mandatarius* it seems was only liable for *dolus*.[100] In other words, the *procurator* had to show *diligentia* in performing his obligations.

Because the *actio* available against the *procurator* was the *actio negotiorum gestorum*, the *procurator* did not suffer *infamia* when he was found liable.

The *procurator* was able to acquire possession for the *dominus*. Here *procuratio* differs markedly from *mandatum*. The *mandatarius* could never directly acquire possession for the *mandator*; the *mandatarius* acted always in his own name, and any property or rights acquired were, in law, his own. He was required however to transfer these acquisitions to the *mandator*. This is

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99. Watson states that the *actio* was available to *cognitor, negotiorum gestor, institor, curator* and *the procurator omnium bonorum*, Watson, Obligations, p. 193.

100. Some opinion exists however that the *procurator* was liable for *dolus* only. Watson believes that this was not so. He cites Dig., 34.3.8.6, where it is stated that an action against the *procurator* will not take away an *actio doli vel ex fraude*. Thus, the action against the *procurator* must have been for another standard of liability.

not the same as allowing the *procurator* to acquire ownership under the civil law directly for the *dominus*.

The *procurator*, unlike the *mandatarius*, did not have a duty to account.

2. The Further Development of *Procuratio*

In classical law there are three types of *procuratio*: *procurator omnium bonorum*, *procurator unius rei*, and *procurator ad litem*.[101] A *procurator* could be appointed to handle a law suit, a range of business affairs, one particular piece of business, or generally administer another's affairs: *Procurator aut ad litem aut ad omne negotium aut ad partem negotii aut ad res administrandas datur*.[102] It is now generally accepted that only the first and last of these possibilities represented the classical point of view: *ad litem* and *ad res administrandas*.[103] The other two, *ad omne negotium* and *ad partem negotii*, are thought to be post classical extensions.

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101. Inst. J., 4.10

102. Paulus, Sententiae, 1.3.2. Paul does not, however, mention another type of *procuratio* known to have existed, the *procurator unius rei*.

103. For this view see Levy, p. 78. Also see Watson, Mandate, p. 6, and other authors therein cited.

It is a subject of great dispute as to the exact periods of introduction of the *procurator ad litem* and the *procuratio unius rei*. It seems certain that the *procurator ad litem* was developed first, the *procurator unius rei* being developed by analogy from the former.[104]

Once this institution of the *procurator unius rei* was admitted into the civil law it became difficult to keep the obligations of *mandatum* and *procuratio* separate; any distinction would have had to have been made solely on a notion of social status since the *procurator unius rei* and the *mandatarius* were performing the same duties.

The net result of this process was the merging of *procuratio* and *mandatum* by the classical period. This, in turn, led to three or possibly four consequences. Firstly, the term *procurator* covers anybody accepting a mandate, for the care of his goods, and is interchangeable with *mandatarius*. Indeed this is the position of Crook, who doubts that there was any real distinction between the *mandatum* and *procuratio*. In his theory, a *procurator* was appointed by a mandate.[105] This position is reinforced by Paulus, an early classical jurist, who states that a *procurator* is "mandated".[106]

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104. Watson, Mandate, p. 6

105. Crook, p. 237

106. Paulus, Sent., 1.3.1

Secondly, the notion that the *procurator* could directly acquire for the principal was brought into line with general contractual principles, which held that this was not possible. Thirdly, all instances of *procuratio* were based on an *actio mandati* or *contraria* and the *actio negotiorum gestorum* took on its now familiar role as an action for a non-consensual intervener.[107] Fourthly, the *procurator* was now also supposed to undertake his responsibilities gratuitously, though this became only a formal barrier, as all *mandatarii* could sue for their *honoraria* in a *cognitio*. A final consequence may have been the assimilation of the standards of liability.

In short, by the classical period we see the two institutions of *procuratio* and *mandatum* merging into one general regime of acting on behalf of another: *mandatum*. The effect is to raise slightly the standard of the *procurator*; he is now governed fully by the contractual regime. At the same time, there is a general diminution of the standards of the old *mandatarius*. He is no longer subject to a special regime confined to persons of intimacy and familiarity. It is possible now that he is a paid agent, acting purely out of commercial concerns. While it was still possible to create obligations that were truly gratuitous and based on friendship this was not the norm. The law of *mandatum* in the Corpus Iuris Civilis is essentially the law of quasi-agency as

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107. These three consequences are those mentioned by Thomas, pp. 306-6

it was developed by the Romans. It drew more from the notions of *procuratio* than the old Republican contract of *mandatum*.

3. *Procurator* and *Mandatarius* - Conclusions

The purpose of this comparison of *mandatum* and *procuratio* is to prove that despite serious problems in the evidence and interpretation, there is enough evidence to show that there were two separate, distinct and simultaneous regimes of performance of services for others in the later Republic and early empire (or three if we include *locatio-conductio*). That two similar regimes grew up contemporaneously during the formative period of a legal system should cause no surprise.[108] It is nevertheless indicative of an underlying distinction present in Roman society that was likely important. Why should one regime thrive on gratuitousness and the other not? Why should one regime require privity of contract and the other not? Why should one guilty agent be subject to *infamia* and the other not?

A standard interpretation of the origins of *procuratio* states that, at first, the *procuratores* were *liberati* (i.e. freed slaves owing duties to their former

108. Roman law developed similar parallel regimes with *fiducia cum amico* and *depositum*.

domini) who looked after the affairs of their patrons/former masters.[109] Crook doubts the validity of the whole argument:

> "The difficulties with which scholars have struggled in trying to sort out *negotiorum gestio* and mandate and their relation to different kinds of procurator perhaps reflect a social fact: that the distinction between the gratuitous services of status-equals and the paid services of status inferiors had partly ceased to be real even in Cicero's day and grew steadily more unreal. The jurisprudents continued to assert flatly that such-and-such a bargain must be gratuitous to constitute such-and-such a contract, because it was their conceptual framework and otherwise they would have been obliged to re-draw the boundaries of the whole system; but make-shifts were found, and the *cognitio extraordinaria*, about which they did not have to make the rules, came to the rescue."[110]

Le Bras[111] too points to several instances in the speeches and correspondence of Cicero that refer to *procuratores* who are neither freedmen nor even lowborn.[112] Therefore if we follow Le Bras, *procuratores* are "friends", and the origin of the obligation is in "friends" undertaking the affairs of one another during absences. This, however, is not conclusive of the origin

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109. This is the opinion of Serrao, p. 1; Arangio-Riuz, p. 9; Kaser, p. 490; Watson, Mandate, p. 6. However Watson, Obligations, p. 193-4 gives a somewhat different view, citing the opinion of Le Bras

110. Crook, p. 240-1

111. Le Bras, pp. 41 ff

112. Those cited by Le Bras are: Caec. 20.57; Quinct. 19.62; 28. 87, Rosc. Am. 7.19, Verr. 2.2.24.59; 2.5.7.15; Phil. 12.7.18; ad Fam 12.24; 13.43. Watson adds ad Fam. 7.32.1

of the concept. The fact that in Cicero's day a *procurator* could well be a Roman *eques,* does not mean that the origin of the obligation lay in the duties of a freedman.

As was noted above, the word Cicero uses to describe the principal party to a *procuratio* is *"dominus"*. The use of this is significant, since *"dominus"* is the word used for the master of a slave, or the owner of property, and is entirely alien to other areas which deal with the law of *mandatum*.

If we accept for the moment the argument that *procuratores* were in origin freedmen or other low-born individuals we could easily explain some of the marked differences between *procuratio* and *mandatum*.

The remunerative nature of *procuratio* is easily explained in that being a freedman, the *procurator* would need be paid, otherwise he would not have the necessary free time to perform his services.

With respect to the question of *infamia*, it is probable that declaring a relatively poor freedman as an *infamis* would be pointless. *Infamia* was intended to be a mild form of punishment, but it only works if the *infamis* actually has the standing and reputation that would suffer by his so being marked.

The possibility that the *procurator* could acquire possession and ownership directly for his patron is probably an outgrowth of the legal effects of master and slave where the latter's ability to acquire direct acquisition was normal. That the jurists allowed this possibility to exist in contravention of the principle of privity of contract only holds for the republican period. It may have been therefore nothing more or less than a legal anomaly that is frequently encountered in customary legal systems that have not undergone a thorough reworking by trained men-of-law. Furthermore, it would have been unlikely that a co-contractant would have been lead into error by confusing the *procurator* with the patron, given the relatively humble nature of the former and his probable former connection to the estate as one of the patron's slaves.

From this discussion I think we can conclude that there is enough evidence to suggest that a *mandatarius* and a *procurator* were in different social groups. A *mandatarius* was in greater personal proximity to the *mandator*; he was an '*amicus*' in the sense of social equal, not simply a 'curator' of one's affairs. The *procurator* was usually (though not always) a freedman, who typically looked after a particular piece of property or business affairs. Whether he was a freedman or not, the *procurator* differed from the *mandatarius* in that he was not a 'friend', and thus, there was no reason why he should have to live up to the high standards (and low return) of the *mandatarius*. On the other hand, the fact that the *mandatarius* had a higher standing, and closer personal

connection to the *mandator* does not explain the high standards of care imposed upon the former. For this we will have to examine closely the surviving evidence with regard to friendship in Rome.

III. *AMICITIA* IN ROMAN SOCIETY AND ROMAN MORAL PHILOSOPHY

In this Part, I will look at the notion of *amicitia* in Roman society and philosophy. While *amicitia* is normally translated as "friendship", this concept can have different connotations in different places and times. I intend to demonstrate here that within Roman society *amicitia* was considered to be a more powerful and important social bond than it is in our society, or in many others. But more importantly, I wish to show that *amicitia* had strong moral and ethical overtones within the Roman ruling elite.

While the notions of friendship and the duties that that notion entailed were, to a certain degree, standard topics in ancient philosophy, only three Roman works (Cicero's Laelius de Amicitia and the de Officiis and Seneca's de Beneficiis) have survived which treat the subject matter in sufficient detail. I have confined most of my analysis to these works. This methodology can be criticised for placing too much attention on the thoughts of two very particular Romans, but I will argue that these works are representative of Roman thought on these issues.

A. Roman Social Relations

Since the work of Gelzer[113] Roman historians tend to view Roman politicians aligning themselves not according to ideologies or large scale agendas, but along very tight personal lines. Ties of family, kinship and marriage were obviously the primary bonds. In second rank, but only narrowly so, were the bonds of *patrocinium*. This theory regards Romans as bound by a complex web, with the patron at the centre, fanning out to friends, with clients occupying the extremities. Each of the parties owed one another mutual loyalty and reciprocal services. These bonds did not operate primarily in the legal sphere, but were principally matters of social custom. The underlying notions are those of *fides*, *dignitas* and *officium*.[114]

Some evidence exists that "friendship" (*amicitia*) was an analogous relationship to patronage. Client-patron was one of inferior to superior. *Amicitia* was the relationship of equal (or at least near-equal) to equal.

B. *Amicitia*[115]

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113. especially Gelzer, The Roman Nobility

114. Good studies for this topic can be found in Carcopino, Raaflaub, Brunt and Saller

115. For various accounts of the different roles that *amicitia* played in Roman society see the accounts given by Earl, Treggiari, Jones, Alföldy, Hellegouarc'h, Saller, Seager, LaFleur, Dixon, White.

'Amicitia' in Latin, unlike words such as *'honor'* and *'dignitas'*, does not convey a meaning that is essentially different from the English "friendship".[116] One can state, without much fear of being contradicted, that friendship is a universal concept. But while the meaning of friendship may be the same in cultures differing in time and space, this does not mean that the social, political and economic import of the concept is necessarily the same. To give an example: the full notion of friendship will be different in a society where high degrees of nepotism exist and are tolerated, or where the distribution of government largesse is highly discretionary upon the official charged with the distribution, than in a society where the social norms require high standards of objectivity when the government selects candidates for employment or benefits.[117]

One of the more illuminating insights into the import of friendship in the last century of the Republic, is given to us by the ancient historian Sallust. He remarks that political parties are called *"amicitia"* by those who are in the party and *"factio"* by those who are not.[118] This simple sentence has become a

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116. Though the derivations are different: *amicitia* has its root in *amor*, while 'friend' is derived from the germanic root for ally.

117. Blok develops a theory whereby societies can be classified on a scale ranging from vassalage, brokerage, friendship to disguised patronage. In a 'friendship' state, most citizens have access to state goods, though the intervention of a well connected person can help 'lubricate' the process somewhat.

118. *sed haec inter bonos amicitia, inter malos factio est.* Sall., B.J. 31.15

linchpin in some very far-ranging commentary by modern historians on the role of friendship in the later Roman republic. L.R. Taylor states that:

> "the old Roman substitute for party is *amicitia*, friendship. *Amicitia* in politics was a responsible relationship. A man expected from his friends not only support at the polls but aid in the perils of public life, the unending prosecutions brought from political motives by his personal enemies, his *inimici*. ... Friendship for the man in politics was a sacred agreement."[119]

Sir Ronald Syme, has stated that:

> "Roman political factions were welded together, less by unity of principle than by mutual interest and by mutual services (*officia*), either between social equals as an alliance, or from inferior to superior, in a traditional and almost feudal form of clientship: on a favourable estimate the bond was called *amicitia*, otherwise *factio*. Such alliances either presupposed or provoked the personal feud - which, to a Roman aristocrat, was a sacred duty or an occasion of just pride."
>
> "... Men of honour obeyed the call of duty and loyalty, even to the extremity of civil war."[120]

In his essay "Amicitia in the Late Roman Republic"[121] Brunt argues against the notions of friendship advocated by Taylor and Syme. After a very

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119. Taylor, pp. 7-8, footnotes omitted

120. R. Syme, The Roman Revolution (Oxford: Clarendon Press, 1939) at 157. Footnotes omitted

121. Brunt, pp. 351-401

detailed argument Brunt concludes that friendship was no doubt a real and deeply felt relationship in Roman society of the time, but there is no ancient evidence (*pace* Sallust) to support the theory that *amicitia* was a euphemism for a political grouping of many individuals with common interests. While the central core of Brunt's argument is of no concern to my argument, his principal theme, that friendship in Roman society was not essentially different from our own, and that no major theories as to the organization of Roman society can be built upon 'friendship', provides one opinion in the spectrum of possible arguments.

These statements regarding the role of *amicitia* are focused primarily on the political sphere. In the opinion of Gelzer, and those that follow him, the notion of *amicitia* was no different than that of patronage: mutual duties arise out of the obligations towards one's friends. There is, however, very little work on what the role of friendship might have been in Roman law. One notable exception is Michel's, which focuses on the various gratuitous contracts in Roman law.

1. *Amicitia* in Roman Literary Sources

A Roman's daily life was filled with various 'obligations' of a social nature: being present at the morning *salutatio*,[122] escorting the friend (*adsectatio*), participating at family ceremonies (*consilium*), assisting in the closing of wills, listening to friends' public lectures and perhaps the duty of maintaining a correspondence by writing letters. Pliny paints a rather exasperated picture of just how much of a Roman's life was taken up by these functions:

> *Nam si quem interroges, 'hodie quid egisti?' respondeat: 'officio togae virilis interfui; sponsalia aut nuptias frequentavi; ille me ad signandum testamentum; ille in advocationem; ille in consilium rogavit'*[123]

It has been argued that letter writing was counted as a duty.[124] While it may be difficult to find any real basis for this statement, the following opening remark to one of Cicero's letters to Atticus seems to confirm this:

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122. While presence at the *salutatio* is often counted as a mark of friendship, Seneca held that anyone waiting in line at a *salutatio* could not count himself a friend, de Ben. 6.34. Cicero was of a similar view, ad Att. 1.18, 14.2.3

123. Pliny, Ep. 1.9. - For if you ask someone "what did you do today?" he would respond, 'I was at a young man's toga ceremony, or I was present for someone's engagement or wedding, or this man asked me to be at his will signing or that one asked me to be his advocate, or that other one asked me to be at his family council.

124. Michel, p. 536

Plane deest, quod scribam; nam, nec quod mandem, habeo (nihil enim praetermissum est), nec quod narrem (novi enim nihil), nec iocandi locus est;)[125], though perhaps Cicero was merely responding to a comment of Atticus similar to this: *Quare, ut id* [sc. scribere], *quoad libebit, id est quoad scies, ubi simus, quam saepissime facias, te vehementer rogo.*[126]

Another service of a friend was to provide goods free of charge. This would include lending money at no interest (*mutua*),[127] and putting their property, especially their houses, *villae* and *diversoria* at the disposal of the friend (*commodata*). Cicero was quite happy to lend his houses to his friends (including his political friends, such as Brutus), or to borrow them from his friends.[128] Indeed, being at the house of a friend was almost like being at one's own home: *ad eandem Leucopetram ... erat enim villa Valeri nostri, ut familiariter essem et libenter.*[129]

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125. ad Att. 5.5 - There is clearly nothing about which I can write. For I have nothing to mandate, since nothing has been left undone, and I have nothing to relate, since there is no news

126. ad Att. 10.4 - Wherefore, I beseech you strongly to write as often as you wish and for as long as you know where I am.

127. See Cic. ad Fam. 5.20.9, 14.1.5; ad Att. 1.13.6: *licere amicorum facultatibus in emendo ad dignitatem aliquam pervenire*, 11.1.2, 5.5.2, 7.3, 8.7.3, 10.4.12

128. Cic. ad Fam. 7.23.3; ad Att. 7.1, 15.3.2, 16.6.1

129. ad Att. 16.7 - at this Leucopetra there was a villa of our friend Valerus, so I was quite happy and comfortable.

Much could be written about these gratuitous loans of *mutua* or *commodata* since these too were essentially gratuitous contracts like *mandatum*. A remark of Cicero may best sum up the Roman attitude for friends lending each other money: *si erunt in officio amici, pecunia non deerit*.[130]

Also included in the normal services of friends was the personal guaranteeing of friends' loans as a *fidepromissor*, *fideiussor* or *sponsor*.[131] Essentially, in Roman law these collateral promises made the promisor a co-debtor of the person on whose behalf he made the promise. Such promises could be the subject of a mandate, and it goes without saying that there was usually a strong link between the promisor and the debtor of the obligation; the promisor got essentially nothing out of the promise, and yet became the co-debtor of a potentially large debt.

An incident in the life of Cicero shows how freely these guaranties were undertaken:

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130. Cic. ad Fam. 14.1.5 - if our friends shall be mindful their duties, money will not be wanting.

131. For the law, see Inst. G. 3.115, Inst. J. 3.20; Dig. 46.1 For examples, see ad Att. 12.17.1, 12.19.2, 13.3.1. These suretyships account for the largest type of mandate mentioned in the Digest.

Quod scribis a Junio te appellatum, omnino Cornificius locuples est; sed tamen scire velim quando dicar spopondisse et pro patre anne pro filio.[132]

Cicero has pledged his personal guaranty on the loan, through the intermediary of Atticus, to guarantee a certain Cornificius. However, Cicero does not know when this transpired or which Cornificius was involved.[133]

However, mandates were not the only deeds that friends performed in the absence of their friends, they also intervened when not asked (*negotiorum gestio*). This letter from Pliny attests to such an event: *Gratias ago, quod agellum, quem nutrici meae donaveram colendum suscepisti.*[134]

Friends were also asked to use their influence on behalf of other friends, or acquaintances of other friends, the *exemple par excellence* being the letter

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132. ad Att. 12.14 - What you wrote about Junius accosting you, in any event Cornificius is solvent; but what I wish to know is when did I undertake to promise on his behalf, and was it for the father or for the son?

133. There was no requirement in law that the guarantor know the identity of the person: *Fideiubere pro alio potest quisque, etiamsi promissor ignorat*, Dig. 46.1.3

134. Pliny, Ep. 6.3.1 - I am grateful to you for having taken care of that little farm that I gave to my wet-nurse

of recommendation which is abundantly attested to in Cicero's correspondence.[135]

The last group of services are those of providing advice (*consilio*), an especially important commodity among the Romans. Essentially, the greater the *dignitas* the greater the value of the advice. Romans were wont to consult their circle of friends on any important matter, and failure to heed the advice so given was considered to be something akin to treachery.[136]

A study of Cicero's correspondence does not clarify when or how frequently mandates were given or accepted. Often it is a question of whether the request is actually a mandate, or simply a wish that something be done, with no particular obligation to do so. We can certainly detect what would amount to legal mandates (in other words, the mandate is what we would call a "juridical act") in the following circumstances: Cicero's undertaking of Atticus' business at Ephesis;[137] Cicero's request that Atticus negotiate a sale of property interests of Cicero;[138] pay some of Cicero's debts;[139] negotiate

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135. The whole of Book XIII of ad Fam. is devoted to such letters, though they are numerous throughout Cicero's correspondence.

136. Cic. ad Fam. 4.9.2

137. ad Att. 5.13.2

138. ad Att. 15.26.4

139. ad Att. 11.11.2, 15.29.1

a loan on behalf of Cicero;[140] that Atticus hand over Tullia's dowry.[141] However, merely listing the range of possible mandates that were actually given does not explain much about why they were given.

Unfortunately, this study of Cicero's correspondence is unable to furnish any answers as to why friends performed services for each other in Roman society. Indeed, the types of services requested and listed do not differ from requests made to friends in our own day. The mere fact that services were requested and performed by friends does not imply that there is any obligation to do so, that Roman social custom was particularly strong in this regard, or that there was an ethical or philosophical imperative underlying their performance.

2. *Amicitia* in Roman Legal Sources

If we turn our attention instead to the legal sources, especially the Corpus Iuris Civilis of Justinian we might be able to determine whether any of the above mentioned duties are given legal sanction. Unfortunately, here we face a different problem: the Roman legal sources scarcely mention friendship,

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140. ad Att. 11.1.2

141. ad Att. 11.2.2

and never (with the sole and notable exception of *mandatum*) mention friendship as the source of any obligation or other legal phenomenon.

The Digest does offer a legal definition of '*amicus*':

> *amicos appellare debemus non levi notitia coniunctos, sed quibus fuerint [in] iura cum patre familias honestis familiaritatis quaesita rationibus.*[142]

Unfortunately, the exact meaning of this passage is in some doubt, due to the probable corruption in the text "in iura". An important part of the definition is still clear: the name of '*amicus*' can only be given to those who are truly close, and does not include what we would call acquaintances. However, while this sentence is given in the definitional section of the Digest (Book L) it is clearly limited to those friends who are able to act as tutors, and therefore we are not allowed to extend it to the entire body of the Corpus Iuris Civilis.

A good example of how Roman social morals had some legal import is provided in one passage of the Digest on the delict of *iniuria* (insult). The passage deals with that particular Roman custom of accompanying or escorting a friend or patron on his daily rounds through the forum (*adsectatio*). A distinction is made between "honest" accompanying and injurious accompanying:

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142. D. 50.16

> *autem oportebit nec omnem qui adsectatus est, nec omnem, qui appellavit, hoc edicto conveniri posse (neque enim si quis colludendi, si quis officii honeste faciendi gratia id [*sc. adsectari*] facit, statim in edictum incidit), sed qui contra bonos mores hoc facit.*[143]

Here, following the customary duties of the client and friend, one could not be held to be in contravention of the laws regarding the delict of *iniuria*.

The importance of friendship and its connection to the law is also reflected in the notion of *manumissio inter amicos*.[144] However, a close examination of this legal concept reveals a problem in that while it may be an obvious indication of social custom entering the law, it tells us very little regarding the relationship between law and friendship.

In the Republican period Roman law admitted of only three forms of manumission: the declaration of free status by a judicial official (*vindicta*), the inscription of the slave upon the citizen list by the censor (*censu*), and

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143. D. 47.10.15.23, Ulpian - However, it will not happen that everyone who follows someone around, or everyone who calls out to someone will be in contravention of this edict (if anyone does this because he is sporting with the person, or because he is doing it honestly out of duty, he will not fall within the terms of the edict); but if he does it against good morals, then he will be caught by the edict.

144. Inst. J. 5.1.1. Several other such examples could also be provided: *depositum*, *mutuum*, *commodatum*, *precarium*, the witnessing of wills, and from the old law we could also add *fiducia cum amico*. Michel canvasses all these options thoroughly in his study on gratuity.

manumission by will (*testamento*).[145] In the early Empire the informal method of *manumissio inter amicos* was legally recognized. It was given formal legal recognition by the *lex Iunia Norabana*, A.D. 19, though the custom of manumitting slaves was certainly practised in the last century of the Republic. In origin (and for most of the classical period of Roman law) *manumissio inter amicos* was not, however, a proper and legal form of manumission.[146] It was not until Justinian that *manumissio inter amicos* was accorded the same legality as the other forms.[147] Until the *lex Iunia*, it was nothing more than Praetorian protection to those slaves whose owners had manifested an intention to manumit them, without using the proper mechanisms. These informally manumitted slaves were not then *legally* free. All that they enjoyed was the protection of the praetor, with the result that the master could not exercise any rights over him. The *lex Iunia* had the effect of normalizing somewhat the legal situation of these slaves protected by the praetors by granting them Latin citizenship.[148]

Fritz Schulz is of the view, however, that the term "*inter amicos*" has nothing to do with friends:

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145. Buckland, pp. 72-77

146. Gaius, 1.16ff shows how this institution worked during his time

147. Inst. J., 1.5.3

148. Buckland, p. 77

> "The term does not mean that the manumission was performed in the presence of friends but rather that it was acted *inter dominum et servum ut inter amicos*, i.e. in an informal manner."[149]

The jurists were protecting informal manumissions out of respect for natural justice, and were not, in fact, elevating the social notion of friendship to the status of law. Justinian too, in abolishing the distinction between regularly manumitted slaves and those informally manumitted, was only clearing away legal cobwebs rather than promoting the notion of friendship. The whole notion of Latin citizenship had itself become redundant after the *Constitutio Antoninia* of 222 A.D.

In several other areas of the Digest one can search in vain for any statements alluding to the possible importance of friendships in Roman law. In one area where one would expect to find friends mentioned often, the law of *fideicommisa*[150], there is not one specific reference to the word "*amicus*" or its cognates.[151] Likewise, Title XVII.1, on the contract of *mandatum*, is

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149. Schulz, p. 85. See also Duff, pp. 210ff

150. as mentioned above, *fidecommisa* provide the single largest type of mandates discussed in Dig. 17.1

151. Michel proposes that the only explanation is that the links of friendship were so profound and necessary in this context that there was no specific reason to mention friends, Michel, p. 565

almost entirely devoid of any references to the role that friendship may have played in this contract.[152]

The Digest and the other legal texts from antiquity provide us with several examples of the jurists specifically recognizing that social customs derived from friendships can lead to specific legal results. What these texts do not provide, however, is any explanation as to the reasons why these duties of friendship should be found among the Roman law texts.

3. *Amicitia* in Roman Moral Treatises

Since a study of the literary and legal sources fails to furnish any conclusive evidence either way as to the importance the notion of friendship, I will next turn my attention to the philosophical sources.

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152. With the notable exception, of course, of the statement that *mandatum "originem ex amiticia et officio trahit"* Dig. 17.1.4.1

a. The Greek Philosophical Background

Friendship (*philia*) was a standard *topos* of Greek philosophy.[153] It was discussed by Plato throughout the Lysis and by Xenophon in the Memorabilia.[154] Aristotle devoted considerable effort to the concept of friendship in books 8 and 9 of the Nicomachean Ethics and book 7 of the Eudemian Ethics.

In Aristotle's philosophy, friendship is distinguished on three bases: the good, the pleasant or the utilitarian. The first is perfect friendship, the second two are imperfect and are distinguished by whether the goal is pleasure or advantage. This three part distinction of Aristotle is taken up by the Stoics.

In contrast, the Epicureans took a more unitary view: all friendships are born from self interest. But from such self interested motives some friendships are able to transform themselves into something more pure.[155]

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153. Much recent work has been devoted to the notions of 'philia', friendship or love, in Greek philosophy. Notable are Friasse, (which also include chapters on Cicero's de Amicitia and Seneca's de Beneficiis) and Price

154. Xen. Mem. 2.4.4 - 2.6

155. Michel, pp. 502-507, and sources cited therein.

Thus in Greek philosophy we have the essential debate of whether friendships can, and should, exist on a higher plane of good and ethical conduct, or whether friendship is purely a matter of utilitarian advantage. This debate worked itself throughout Ciceronian and Senecan philosophy.

b. Cicero

(1) Cicero On Social Relations

Before beginning a specific study of friends in Cicero's works, some attention must be paid, I think, to the general structure of Cicero's arguments on men's relation to each other. Cicero's arguments on the nature and duties of friendship cannot be studied in a vacuum since his views on friendships are never divorced from other, more important arguments.

My argument below draws heavily from two Ciceronian works that were written within the same year. While there have been some recent works which have attempted to portray Cicero's philosophical works as working out a common philosophical theme, this theory has been often criticized.[156] Cicero drew upon many Greek and some Roman sources and each of the works

156. Neal Wood in particular has devoted an entire study to Ciceronian philosophy with this theory in mind. MacKendrick is also of the same view in his study, see his preface.

displays large indebtedness to his sources. Therefore, while the argument that follows draws freely from the Ciceronian *corpus*, it is not necessarily to be taken that I advocate a 'unitary' theory to Ciceronian philosophy.

c. *De Officiis*

I believe Wood correctly attributes to Cicero the following cardinal principles of natural justice: 1) not to injure others, without cause; 2) respect for private and public property; 3) fulfilment of obligations for which one's word is pledged; and 4) to be kind and generous to others, according to their worth and our means.[157] With the exception of the fourth axiom, it is remarkable how this set of principles has remained throughout the law. Justinian sets out substantially these three principles in Institutes.[158] The fourth axiom is, of course the most relevant to our enquiry. It is interesting to note how this was the one "cardinal virtue" that did not survive to be recorded in Justinian's Corpus

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157. Wood, p. 76. This list is compiled from especially de Off. 1.15, 20, 23, 42-45

158. *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*, Inst. J., 1.1.3

Central to Cicero's philosophy, according to Wood, is Cicero's belief in a system of "proportionate equality".[159] The effect of this is that some persons are worth more than others; the promises of gentlemen and nobles, and the promises made to them, are worth more than those given and received from lower persons.

But how are we to measure the worth of a man, and how are we to measure our own capacity to do what is required? The two are obviously interrelated: the more the worth of the man, the more we are willing to exert ourselves for his betterment.

Cicero acknowledges that we also have an obligation toward the world at large, for he states clearly:

> *ut placet Stoicis, quae in terris gignantur, ad usum hominum omnia creari, homines autem hominum causa esse generatos, ut ipsi inter se aliis prodesse possent, in hoc naturam debemus ducem sequi, communes utilitates in medium afferre mutatione officiorum, dando accipiendo, tum artibus, tum opera, tum facultatibus devincere hominum inter homines societatem*[160]

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159. Wood bases this on de Rep. 1. 43, 53, 69; 2.39-40, 56-57; de Leg. 3.24-25, 28, 38-39, Wood, p. 92

160. de Off. 1.22 - As the Stoics hold, whatever is produced from the earth has been created for the use of man, and that men have been born for the sake of men so that they may, as amongst themselves, be useful for each other. In this way we ought to follow nature as our guide - to make everything common and useful to the public benefit by the exchange of duties, by giving and

But he reserves special attention for those closer to us, our country and our friends: *ut praeclare scriptum est a Platone, non nobis solum nati sumus ortusque nostri partem patria vindicat, partem amici.*[161]

While Cicero states that there is a common bond among men, he is at pains to repeat that the closer the relationship between men, the closer the bond:

> *societas est enim ... interior eorum, qui eiusdem gentis sint, propior eorum, qui eiusdem civitatis.*[162]

Thus, Cicero may in theory proclaim that all men share a common humanity, but he was clearly no egalitarian. Indeed absolute equality was for him no equality at all. It may be argued, as Wood argues, that Cicero's "social ideals and values and political outlook are derived from the very stratum that

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receiving, and then by arts, by works and by skills we ought to build a society of men among men.

161. de Off. 1 22 - As was famously written by Plato, we are not born for ourselves alone; our native land claims part, and our friends another part.

162. de Off. 3.69 - A fellowship is more intimate to those who are of the same race, and closer still for those who are of the same city. This argument is stated more clearly in the de Amicitia: *itaque cives potiores quam peregrini, propinqui quam alieni*, de Amic 19. - Therefore fellow-citizens rather than foreigners, neighbours rather than strangers.

he managed to join - a characteristic of many self-made men throughout the ages."[163]

When preferring certain others, we must make use of the three cardinal rules regarding liberalities: that it should not prove harmful to third parties, that it should be within our means, and that it is proportionate to the merit of the recipient.[164] The first two rules are quickly discussed by Cicero and amount to essentially a "don't rob Peter to pay Paul" argument. The last rule is of more interest to Cicero and to ourselves.

Cicero admits that those in the greatest need have the highest claim on our liberality, with the proviso added that *si cetera paria sunt*.[165] That this is not the primary consideration is shown by his discussion of need coming after a discussion on other possible criteria, which are more highly selective:

> *mores eius erunt spectandi, in quem beneficium conferetur, et animus erga nos et communitas ac societas vitae et ad nostras utilitates officia ante collata*.[166]

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163. Wood, p.95

164. de Off. 1.42

165. de Off. 1.49

166. de Off. 1.45 - The morals of the man upon whom a favour is to be conferred should be examined, his intentions toward us, his relations and his connection also, as well as the useful services he has already provided us.

Clearly then, we should measure the value of the man before evaluating whether, and how much, a liberality should be conferred upon him. While Cicero does state that no one who exhibits any trace of virtue should ever be neglected,[167] he continues:

> *de benevolentia autem, quam quisque habeat erga nos, primum illud est in officio, ut ei plurimum tribuamus, a quo plurimum diligamur.*[168]

Ultimately, then, the one who has the greatest claim on our liberality is the one who most deserves, deserving from the point of view of dearness to us, and not simply deserving in an abstract way.

Cicero then identifies those reasons one may become so particularly dear. Essentially there are three reasons: *benevolentia*, *gratia*, and *coniunctio*.[169] While one cannot but be impressed by the careful logic of this taxonomy, one cannot also help but be a little sceptical as to whether Cicero has been honest in reducing his reasoning to separate and distinguishable roots. With regard to *benevolentia*, while Cicero posits two criteria: the *mores* of the recipient, and

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167. de Off. 1.46

168. de Off. 1.47 - We must take into consideration the good-will that someone bears toward us; it is the first of our duties that we allot more to him who loves us the most.

169. de Off. 1.47-50

his disposition and services toward us, we can, I think, ask ourselves whether these do not amount to one and the same thing: a man's character is simply the sum of his goodwill towards us. *Coniunctio* is at least something different. But what of *gratia*?

Gratia is nothing more than returning a favour already given (*gratia referenda*[170]). If one receives a favour, one is morally obliged to return it; the greater the favour, the greater the obligation (*plurimum debeatur*[171]). But Cicero goes on and provides some evidence that beyond his introductory statements there lies some other factor which belies the altruism:

> *in quo tamen in primis, quo quisque animo, studio, benevolentia fecerit, ponderandum est. multi enim faciunt multa temeritate quadam sine iudicio vel morbo in omnes vel repentino quodam quasi vento impetu animi incitati.*[172]

After his discussion on the need for liberality, Cicero then begins a second theme, to whom is a liberality due. Kindness is due to one closer to the giver than to one further away:

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170. de Off. 1.47

171. de Off. 1.49

172. de Off. 1.49 - However, it must be considered with what mind and what eagerness someone bestowed a benefit. For many undertake many things for any and everyone on a whim and without judgment, whether through weakness, or with a certain unexpected rashness of an inflamed soul, as if blown by the wind.

optime autem societas hominum coniunctioque servabitur, si, ut quisque erit coniunctissimus, ita in eum benignitatis plurimum conferetur.[173]

This is grounded upon the *natura principia ... communitatis et societatis humanae,*[174] which states that all human beings are bound together by virtue of their reason, speech, methods of teaching, learning and discussing. Thus man's natural duty is to share with all men. But in the next breath he limits the scope of those things which are to be shared to all so freely. They are those things which are not held to be private property.[175] Therefore, those things that are to be shared in common are those things which nature has declared to be of common use: *omnium rerum, quas ad communem hominium usum natura genuit.*[176] In other words, one may freely give away those things which cost nothing to give: *quicquid sine detrimento commodari posset, id tribuatur vel ignoto.*[177]

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173. de Off. 1.50 - A society and union of men will be best preserved if, as each man is connected with you, that upon him is the greatest amount of benefit bestowed.

174. de Off. 1.50

175. de Off. 1.51

176. de Off. 1.51 -those things which nature has produced for the common benefit of man.

177. de Off. 1.52 - whatever can be handed over without loss should be given even to a stranger.

Cicero is aware that goods and services are always in short supply, and therefore a system must be found that would allow a decision to be made as to who will receive these things. Cicero advocates a three-tiered system of degrees of entitlement, corresponding to the natural degrees found in society: *gradus autem plures sunt societatis hominum.*[178] These degrees are fellow-citizen, kinsman and friend.

In Cicero's scheme the highest and purest love of all is that of *patria* (or, as he styled it, the *res publica*): *omnium societatum nulla est gravior, nulla carior quam ea, quae cum re publica est uni cuique nostrum.*[179] All other loyalties are secondary to this one.

While we might regard love of country as synonymous with love of our fellow countrymen, Cicero does not necessarily mix the two. We are bound to our fellow-citizens by a common *gens, natio* and *lingua*, and by sharing the same forum, temple, laws and customs we create a strong bond.[180] But this bond is not necessarily the strongest since an even stronger connection (*artior colligatio*[181]) exists between kindred. Kindred are either those that exist

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178. de Off. 1.52

179. de Off. 1.57 - of all the bonds, nothing is more weighty, nothing more dear, than that by which we are bound with our native land.

180. de Off., 1.53

181. de Off. 1.53

within the immediate family, between husband and wife (*prima societas in ipso coniugio est*[182]) and then to children and parents. The goal here is "*una domus, communia omnia*".[183] The bonds (*coniunctiones*) then extend to those other blood relations in a strength proportionate to their to the degree of connection. And finally, the bonds extend to those connected by marriage.[184]

The last degree of proximity is perhaps the closest - friends. Unfortunately, Cicero is less than clear as to where he places friends on the list. In one passage the list of allegiances is: *parentes, liberi, propinqui, familiares, patria*.[185] This list follows roughly that of the exposition of the duties owed to these persons set out in de Officiis 1.53-56. But I believe that it would indeed be wrong to attribute the order of this list as the order of obligations; it would be hard to imagine that one's relatives are to be preferred to one's parents. Indeed, in the next passage Cicero provides a *"contentio et comparatio"* of the moral obligations. The *patria* is first on the list,[186] followed (in this order) by parents, children, the family (*domus*) and

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182. de Off. 1.53

183. de Off. 1.53

184. de Off. 1.54

185. de Off. 1.57, This is the order set out by Panaetius, see Brunt, p. 355

186. de Off. 1.57; see also 3.69, de Amic. 19

relatives (*propinqui*). In this passage, however, he leaves friends out of the equation. However, friends are treated in the next passage, where he seems to put them not on a different level, but on an entirely different plane. The duties owed towards parents, children, relatives and country encompass *necessaria praesidia vitae*[187]; friends on the other hand seem to be able to ask more from us than bare necessities. From this arrangement we may conclude that the duties owed to friends may be the highest of all.

Thus far I have attempted to show how Cicero carefully lays out a theory of proportionate equality whereby one judges the duties and obligations toward one's fellow man on the basis of proximity, mutual assistance and need. I will now turn to a more detailed examination of Cicero's thoughts on the notion of *amicitia*.

d. Cicero on Friendship

(1) *de Inventione*

We know from Cicero's de Inventione that *amicitia* occupied his mind from a relatively early age: "*maximum bonum est amicitia; plurimae delectiones*

187. de Off. 1.58

sunt in amicitia" states the young Cicero.[188] It would seem that the *topos* of *amicitia* was a popular one and that other Romans wrote on the topic of friendship, even before Cicero wrote the de Amicitia.[189]

According to the young Cicero, friendships spring from various reasons:

> *amicitiarum autem ratio, quoniam partim sunt religionibus iunctae, partim non sunt, et quia partim veteres sunt, partim novae, partim ab illorum, partim ab nostro beneficio profectae, partim utiliores, partim minus utiles, ex causarum dignitatibus, ex temporum opportunitatibus, ex officiis, ex religionibus, ex vestutatibus habebitur.*[190]

The young Cicero is also aware of the central philosophical problem with friendship:

> *quamquam sunt qui propter utilitatem modo petendam putant amicitiam; sunt qui propter se solum; sunt qui propter se et*

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188. de Invent. 1.95; that the de Inventione is an early work we know from de Orat 1.5

189. ad Fam. 3.7.5, 8.5

190. de Inv. 2.168 - The reasons for friendships are many. Some arise from a common religious feeling, some do not. Some are old, some are new. Some are born from a benefit given by others, some from benefits bestowed by us. Some are quite useful, some are less useful. Some arise from the worthiness of their causes, from the opportunities of the times, from the duties required, from feelings of respect or from long lengths of time.

utilitatem. Quorum quid verissime constituatur, alius locus erit considerandus.[191]

Thus he makes it clear that the debate between "*amicitiam propter utilitatem*" and "*amicitia propter se solum*" was something that occupied the orator from the beginning until the end of his lifetime.

(2) *de Legibus*

Cicero returned to the theme of utility and virtue in his de Legibus:

"ubi illa sancta amicitia, si non ipse amicus per se amatur toto pectore, ut dicitur? qui etiam deserendus et abiciendus est desperatis emolumentis et fructibus; quo quid potest dici immanius? quodsi amicitia per se colenda est, societas quoque hominum et aequalitas et iustitia per se expetenda; quod ni ita est, omnino iustitia nulla est. [192]

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191. de Inv. 2.167 - There are some that think that friendship ought to be pursued on account of its advantages; some that it ought to be pursued for its own sake, and still others that say it should be pursued for both itself and its utility. What is the true position will have to be considered at another time.

192. de Leg. 1.49 - Whence goes sacred friendship, if the friend is not loved for himself with all one's heart, as goes the expression? He is to be deserted and cast aside when the advantages and profits that he brought are gone without hope. What could be said to be more monstrous than that? But if friendship is cultivated for its own sake, then fellowship of men, equality and justice are also to be sought for their own sake. If this is not so then there is no justice at all.

(3) *de Finibus*

In the de Finibus he address particularly the Epicurean arguments. The Epicureans, Cicero notes, have put forth three competing theories for friendship: first, that pleasure is the sole basis for friendship and that we should desire the pleasures of friendship as we desire our own pleasures; second, pleasure is the root cause of forming friendships, but after a time may blossom into actual love for the friend; and third, the love is the sole basis of friendship.[193] Cicero does not reject the first two theories out of hand, and indeed he agrees that the *summum bonum* of pleasure is a necessary ingredient in friendships: *sed sine hoc institutionem omnino amicitiae non posse reperiri.*[194] Thus Cicero accepts that, notwithstanding any higher notions of friendships, all friendships carry a utilitarian thread throughout. However, he still maintains that simple pleasure cannot be the sole ingredient of friendships.

(4) *de Officiis*

In the de Officiis Cicero reserves to friends the highest degree of importance:

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193. de Fin. 1.65-69

194. de Fin. 1.70 - but without this (i.e. pleasure) the foundation of friendship would not be able to found at all.

Sed omnium societatum nulla praestantior est, nulla firmior, quam cum viri boni moribus similes sunt familiaritate conuncti; illud enim honestum, quod saepe dicimus, etiam si in alio cernimus, [tamen] nos movet atque illi, in quo id inesse videtur, amicos facit. Et quamquam omnis virtus nos ad se allicit facitque, ut eos diligamus, in quibus ipsa inesse videatur, tamen iustitia et liberalitas id maxime efficit. nihil autem est amabilius nec copulatius quam morum similitudo bonorum; in quibus enim eadem studia sunt, eaedem voluntates, in iis fit ut aeque quisque altero delectetur ac se ipso, efficiturque id, quod Pythagoras vult in amicitia, ut unus fiat ex pluribus.

Magna etiam illa communitas est, quae conficitur ex beneficiis ultro et citro datis acceptis, quae et mutua et grata dum sunt, inter quos ea sunt, firma devinciuntur societate.[195]

There are several important aspects to note in this passage. Firstly, the strong language in which Cicero couches the bonds of friendship: the ties of friendship are placed on a higher footing than those of the family; the bonds between husband and wife also form a *"societas"* (one which is at the very root of civil society itself):

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195. de Off. 1.55. - Of all the forms of union, nothing is more excellent, nothing is more firm then when good men of similar character are bound together in friendship. For if we are able to find that moral goodness, which I often speak about, even in one other person, then it moves us toward the person in whom this quality is found and makes us friends. And although virtue draws us in and brings it about that we love those in whom that virtue seems to dwell, justice and benevolence bring this about in a greater way. Nothing is more lovable or uniting than the sharing of good morals. For where there is the same eagerness and the same desires then it is that each equally loves the other and himself, and this in turn brings about the thing that Pythagoras wanted most in friendship: that out of many, there arise one.

That too is a great union that is formed by benefits being given and taken by the one and the other. As long as the benefits are mutual and offered thankfully between the parties, then those exchanges can form a lasting fellowship.

prima societas in ipso coniugio est, proxima in liberis, deinde una domus, communia omnia; id autem est principium urbis et quasi seminarium rei publicae.[196]

But friendship is "*praestantior*" and "*firmior*" than all other "*societates*". What are we to make of this? That true and honest friendship is the greatest bond of all?

Secondly, friendship is itself divided into two sub-species. The first form of friendship is that founded on mutual affection, which arises among like-minded individuals: *cum viri boni moribus similes sunt familiaritate conuncti.*[197] This friendship, based on "*similitudo morum*" is a "*iucundissima amicitia*".[198] This of course, implies that a friendship is possible that is not based on mutual like or love. The other form of friendship is a more pragmatic, and involves nothing more than mutual benefit: *communitas ... quae conficitur ex beneficiis ultro et citro datis acceptis.*[199] It is worth noting that Cicero distinguishes in name these two forms of friendship. Rather than a "*familiaritas*", the second type of friendship is either a *"communitas"* or a

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196. de Off. 1.54 - the first fellowship is in marriage, the next in children, then, when there is one household, everything is in common; this is the principle of city life and the 'nursery', as it were, of the civil state

197. de Off. 1.56

198. de Off. 1.58

199. de Off. 1.56

"firma societas". Such friendships are then not real friendships, but a kind of partnership.

Cicero gives recognition to the two types of friendship: the noble and the utilitarian. While he accepts both as valid, the first is singled out for special praise, since through it men become *'honestum'* and every virtue is fostered. The second type of friendship is acceptable, so long as the services are *'mutua et grata'*, but we can presume that Cicero would not approve of friendships where one party sought to achieve a particular purpose. Cicero's acceptance of the second type of friendship seems then to be grounded on the proviso that no particular moral praise is accorded to this friendship.

This ends the discussion of friendship in the de Officiis. The next time he picks up the friendship argument he refers us explicitly to the de Amicitia.[200]

(5) *de Amicitia*

The Laelius de Amicitia is a work devoted entirely to the role of friendship in the life of Roman public figures. This tract was written within the same period of forced retirement during which he wrote the de Officiis.

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200. de Off. 2.31

The debate on whether friendship is good for its own sake or whether it is useful only for its utility is addressed again:

> *saepissime igitur mihi de amicitia cogitanti maxime illud consideratum videri solet, utrum propter inbecillitatem atque inopiam desiderata sit amicitia, ut dandis recuperandisque meritis, quod quisque minus per se ipse posset, id acciperet ab alio vicissimque redderet, an esset hoc quidem proprium amicitiae, sed antiquior et pulchrior et magis a natura ipsa profecta alia causa.*[201]

In the end, and this causes no surprise, Cicero rejects in the de Amicitia the notion that friendship, at least among men of his class, is based on self centred interest:

> *ut enim benefici liberalesque sumus, non ut exigamus gratiam - neque enim beneficium faeneramur, sed natura propensi ad liberalitatem sumus - sic amicitiam non spe mercedis adducti, sed quod omnis eius fructus in ipso amore inest, expetendam putamus.*[202]

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201. de Amic. 26 - The more I think about friendship the more it seems to me is question of whether it is on account of weakness and poverty that friendship is desired, so that by giving and receiving good deeds one is able get from another, and give back in return, what one is not able to produce oneself, or whether this is the proper reason for friendships, or whether there is an older, more beautiful reason that arises from nature herself.

202. de Amic. 31 - For we are generous and giving, and we do not demand returns for our favours- we do not lend our favours, but are prone to generosity by nature- thus we do seek friendship not because of a hope of profit, but because the entire fruit of friendship is love itself, which is what we hope to gain.

Friendship based on utility is indeed flatly rejected:

> *altera sententia est quae definit amicitiam paribus officiis ac voluntatibus. hoc quidem est nimis exigue et exiliter ad calculos vocare amicitiam, ut par sit ratio acceptorum et datorum.*[203]

Again he reiterates his view that true friendship is based on something more:

> *divitior mihi et affluentior videtur esse vera amicitia nec observare restricte ne plus reddat quam acceperit.*[204]

However, before we are entitled to take all these quotations at face value, the dialogue as a whole should be considered. Despite the title, the de Amicitia is not a general discussion on friendship, but a discussion on how a Roman statesman should act when he is called to govern the state. An important part of de Amicitia is taken up by the question of whether one can

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203. de Amic. 58 - the other opinion is that which equates friendship with the giving of favours and pleasantries. This is a very narrow, meagre and calculating way to call friendship, so that its rationale is in giving and receiving.

204. de Amic. 58 - true friendship seems to me to be richer and abundant than to look narrowly so that not more is given than is received.

prefer one's friends to the *patria*.[205] Obviously, for a man of Cicero's metal, the answer is no.[206]

In the de Amicitia Cicero clearly states that he is not dealing with the type of friendships that one encounters in everyday life, but a rather rarefied friendship that is only possible among the best of men:

> *neque ego nunc de vulgari aut de mediocri* [sc. amicitia], *quae tamen ipsa et delectat et prodest, sed de vera et perfecta loquor.*[207]

4. Interpretation of Cicero

As can be seen, Cicero was occupied by the notions of friendship throughout his life; the basic questions were formed while he was still a young man, and he found the time to return to them during the last days of his life. From his first work, de Inventione, to almost his last de Amicitia, Cicero was aware of the argument that friendships were not only delightful and pleasant,

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205. de Amic. 36-37

206. As Michel points out, "ce n'étaient point là des débats purement académiques ou des exercises d'école. Cicéron et ses amis ont dû les poser plus d'une fois et les discuter à l'infini", Michel, p. 510

207. de Amic. 22 - I am not speaking now about low-class and mediocre friendships, though they might be very delightful and productive, but about the true and perfect friendships.

but also extremely useful, from the point of view of social advancement, and also from the point of view of services.

Michel takes the view that Cicero, in his tract de Amicitia, went right to the heart of the problem of whether friendship is based on self-interest. But Michel believes that in coming ultimately to the answer that, no, friendship is not based on utility, Cicero, went against the Roman norms of his time:

> "En s'opposant à la théorie utilitaire de l'amitié, Cicéron prenait le contre-pied non seulement des conceptions qui avaient cours généralement chez ses contemporains, mais aussi de la manière dont ils pratiquaient effectivement l'amitié".[208]

This leads us now to the question on whether Cicero's view was typical of the Romans of his day. It is clear that Cicero was an exceptional Roman for many reasons, not the least because his rise to the consulate as a *novus homo* required him to have more than the usual amount of talent and intelligence. It is also clear that he had a greater than average interest and knowledge of Greek philosophy and devoted more time and energy to these pursuits than was perhaps the norm in his day and class. However, on may levels Cicero was nothing more nor less than the average Roman. Firstly, he himself considered himself to be a Roman like any other. He was proud of both his city, and his

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208. Michel, p. 509

citizenship in it, and he would have done nothing to alter the Rome he left Arpinum for. Secondly, while not being born a noble himself, after he attained the consular rank he became the staunchest proponent of the aristocratic Republic that he thought was the most perfect state in his or any other time. Again, he would have done nothing to alter that status quo.

Therefore, it is possible to conclude that Cicero's intellectual abilities may have been vastly superior to many, if not all, of his contemporaries, but that Cicero was no heretic or revolutionary. He proposed no changes to the current regime and was vehemently opposed to those who did. In other words, it would have been against Cicero's own stated intentions, i.e. to preserve his *res publica*, that he attempt to inject into it anything foreign. The empty vagueness of Greek philosophy had no place when the practical Roman turned his mind to the governance of his state. Therefore, we may, I think, conclude, that while he may have intellectualized on a greater level than any of his contemporaries, he is nevertheless a faithful portrayer of the notions, relationships and bonds that united Romans in his society. For this reason I conclude that Cicero presents an entirely Roman view on the nature and role of friends in his society, or, at the very least, his class (which was, after all the law making class).

As I attempted to show above, Cicero does ultimately reject a theory of the utilitarian nature of friendship. But he does not deny that friendships can be useful, or that by denying that the *basis* of friendship is utilitarian, that there is no utility at all in friendships: *recte Socrates exsecrari eum solebat, qui primus utilitatem a iure seiunxisset.*[209]

For Cicero, society is supported by two pillars: justice (*iustitia*) and benevolence (*beneficentia* or *liberalitas*). Justice is not concerned with some abstract notion of fairness, but with concrete practicalities:

> *Sed iustitiae primum munus est, ut ne cui quis noceat nisi lacessitus iniuria, deinde ut communibus pro communibus utatur, privatis ut suis.*[210]

But once that priority is taken care of, the greatest form of virtue is benevolence. Justice makes man's life possible, benevolence makes mans's life good:

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209. de Leg., 1.34. -Socrates correctly cursed the man who first separated utility from justice.

210. de Off. 1.20 - the first duty of justice is to see to it that no one harms another unless he is harmed himself wrongfully, the second that those things in common ownership are used for the common benefit, and those in private ownership for private benefit.

iustitia, in qua virtutis est splendor maximus, ex qua viri boni nominantur, et huic coniuncta beneficentia, quam eandem vel benignitatem vel liberalitatem appellari licet.[211]

Therefore, for Cicero, it is impossible to separate what is of the daily and practical nature and what has a higher purpose. However, when all is said and done, it is not utility alone which is the basis of true friendship, but benevolence, which is to say charity and generosity.

C. Seneca on Amicitia and Services

While Seneca lived in the early Empire and is thus beyond the proper scope of this thesis his remarks on services and friendship are still worthy of comment. For though he is separated by almost a hundred years from Cicero, he is nevertheless operating within the same moral and ethical atmosphere. Furthermore, he provides a different perspective from Cicero, and the inclusion of such a discussion may provide a more balanced view.

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211. de Off. 1.20 - justice, in which the brightness of virtue is greatest, from which good men are called good men, and joined to justice is benevolence, which can be called charity and generosity.

Seneca's meandering, repetitive and overly long treatise de Beneficiis is, like Cicero's de Officiis,[212] more devoted to the topic of giving services to persons rather than to a discussion of friendship. The de Beneficiis is not solely concerned with favour received from friends, but from any person. It is interesting to note that Seneca actually distinguishes, at least in vocabulary, the services of friends from those of others:

> *omnia itaque, quae falsum beneficii nomen usurpant, ministeria sunt, per quae voluntas amica expiicat.*[213]

As the opening words of the essay reveal, the knowledge of how to give and take services is of primary importance to Seneca:

> *Inter multos ac varios errores temere inconsulteque viventium nihil propemodum indignius, vir optime Liberalis, dixerim, quam quod beneficia nec dare scimus nec accipere*[214]

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212. Despite the differences in terminology the works have essentially the same subject matter; the meaning of the terms *'beneficium'* and *'officium'* are not as far apart as the usual English translations 'benefits' and 'duties'. As Michel notes we should not confuse the Latin *beneficium*" with our own "bienfait" (benefit). The modern term is, according to Michel, a word loaded with the Christian ideal of charity, whereas the Latin simply signifies that it is to "agir bien avec quelqu'un" (*bene facere*), Michel, p. 519

213. de Ben. 1.5.5. - all things that falsely take up the name of benefits are but helping services, through which the amicable goodwill manifests itself.

214. de Ben. 1.1.1 - Among the various and many errors committed by those living rash and unconsidered lives nothing is more disgraceful, my good man Liberalis, than that we do not know how to give and receive favours.

Seneca's account of services to, for and from others differs in many respects from that of Cicero. While Seneca, in other works, is not above praising the concept of friendship in the abstract. In the de Beneficiis, it is always with a practical view that he espouses its creation. Friendship is a bond, between equals: *amicitiam, quae similes iungit*[215] with the reciprocal return of mutual services.

As with Cicero, in Seneca's philosophy all virtues have utility as a result, though not necessarily the intended goal:

> *'Sed inest, inquit, huic bono etiam utilitas aliqua'. Cui enim virtuti non inest? Sed id propter se expeti dicitur, quod, quamvis habeat aliqua extra commoda, sepositis quoque illis ac remotis placet*[216]

Perhaps one of Seneca's major contributions to the subject of duties is his attempt to elaborate a classification system of *beneficia* as to whether they are *necessaria, utilia* or *iucunda.*[217] Another possible alternative offered by

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215. de Ben. 2.21.1

216. de Ben 4.20 - 'But is there some utility to this good,' you say. In what virtue is there no good?. But it is said to be sought for itself alone, which, although it has some extra advantages, is still pleasing when these extras are stripped away and removed.

217. de Ben. 1.11.1-5. This system is "artificial" in Michel's view, Michel, p. 520

Seneca is by type of *beneficium*: whether it is *re, fide, gratia, consilio, adiuva*.[218] However, once this taxonomy is stated. Seneca fails to work it out in any detail, and in my view it hardly sheds any light upon the notion of friendship as it pertains to daily existence. Unfortunately, such classification systems tell us very little about the underlying purposes of the notions they seek to explain.

In essence, the de Beneficiis consists of a series of 'rules' of giving and taking services, or to quote Michel "le de Beneficiis, dans un large mesure, est un code du savoir-vivre entre amis."[219].

One must never solicit a favour: *molestum verbum est, onerosum, demisso vultu dicendum 'rogo'*.[220] Because, to have received a benefit entails the duty to return it: *quid mea interest an recipiam beneficia? etiam cum recepero, danda sunt*[221]

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218. de Ben. 1.2.4

219. Michel, p. 528

220. de Ben. 2.2.1. - it is a bothersome and heavy term "I ask", which has to be said with a lowered head.

221. 4.13.3, - what do I care if I receive a benefit. Even after I have received it, it will have to be given again. See also 2.17.1

One must also be mindful upon whom one is bestowing the *beneficium*. A benefit conferred on someone unknown to the giver does no one any favours: *beneficium si qui quibuslibet dat, nulli gratum est*[222]

Seneca is very occupied with how one renders a *beneficium*. The key is to do it quickly: *ante omnia libenter, cito, sine ulla dubitatione*[223]. However, one should not be too quick to return, since this would tend rather to show that one is more preoccupied with paying the obligation than in accepting the favour:

> *qui festinat utique reddere, non habet animum grati hominis, sed debitoris; et, ut breviter, qui nimis cupit solvere, invitus debet, qui invitus debet, ingratus est.*[224]

To have received a benefit is to have the right to receive another. One cannot simply leave a man helpless after having bestowed a *beneficium* upon him. In one case Seneca remarks that he was bound to take on the case of a man to whom he had already rendered service. He mentions, though, that he

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222. 1.14.1 - He who gives a benefit to whomsoever he pleases earns no gratitude

223. de Ben. 2.1.2 - before all things give freely, quickly and without any hesitation.

224. de Ben. 4.40.5 - he who hurries to return a favour does not have the soul of a grateful man, but of a debtor; and, simply, he who is too desirous to pay back owes unwillingly; he who owes unwillingly is an ingrate.

did not wish to do a second deed, but that he had no choice: *rogat me ut causam suam contra homines gratiosos agam; nolo, sed quid faciam.*[225] Likewise, no one is under any compulsion to refuse a second benefit before he has paid back the first: *nec enim ideo beneficium novum reicere debeo quia nondum prius reddidi.*[226]

The great rationale for this is that one is able to count on the return of favours. Thus even if one is to lose all one's wealth, one can always count on the return of favours, and this is the best way to insure against misfortune: *quaeris quomodo illam tua facias? Dona donando.*[227] And therefore a certain Marcus Antonius, after he had lost all his wealth, was still able to say *'hoc habeo quodcumque dedi'*[228]

This review of Seneca's views demonstrates that these rules actually add up to a system of utility, which is tantamount to an acceptance by Seneca of the utilitarian role of friendship.

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225. de Ben. 4.15.3 - he asked me to take up his case against someone who was in my gratitude. I didn't want to, but what could I do?

226. de Ben. 4.40.2. - nor ought I refuse a new benefit because I have not yet returned the old one. See Cicero ad Fam. 2.6.2: *est animi ingenui, cui multum debeas, eidem plurimum velle debere.*

227. de Ben. 6.3.3 - you ask how to make something your own, give it as a gift. See also Martial, *extra fortunam est quidquid donatur amicis. Quas dederis solas semper habebis opes,* ???Ep. 5.42.7-8

228. de Ben. 6.3.1

Michel finds "la clé des services des amis" in three passages of the de Beneficiis: *demus beneficia, non feneremus;*[229] *ego illud* (sc. *beneficium*) *dedi ut darem. nemo beneficia in calendrio scribit nec avarus exactor ad horam et diem appellat;*[230] and *qui dat beneficia, deos imitatur; qui repetit, feneratores.*[231] For Michel the key to friendship is the "gratuité échangée". Despite the fact that these services are free, voluntary and not, at least from the juridical point of view, obligatory, takes nothing away from the fact that they are reciprocal in nature. The reciprocity is due, according to Michel despite the fact that:

> "(c)haque partenaire ne peut compter que sur la courtoisie de l'autre, et il n'est lui même lié que par le sentiment de l'honneur ou la crainte du discrédit: bonne renommée vaut ceinture dorée.[232]

Therefore, while the services performed by friends were in name gratuitous, this does not mean that there was no reciprocal benefit intended or due.

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229. de Ben. 1.1.9

230. de Ben. 1.2.3 - no one writes down their benefits in their diary nor as a greedy taxman calling them up on the correct hour and day.

231. de Ben. 3.15.4

232. Michel, p.527

However, one could argue, based on the same passages of Seneca cited by Michel, that there is nothing in the non-legal moral thesis of Seneca which requires a return of a service. Seneca's slogans of *demus beneficia, non feneremus*;[233], *dedi ut darem,*[234] and *qui dat beneficia, deos imitatur*[235] carry message of having to return the favour. They are purely and simply expressions of "it is good to give". While it is clear from Seneca's entire work that when he gave he expected something to accrue to him eventually (and if he didn't then the recipient was nothing but a scoundrel), Seneca is at pains to point out that one should not expect a return, and that a return is not the original motive for the gift in the first place.

A thorough reading of the de Beneficiis does, however, leave the strong impression that the author does not bestow his favours without some view to their eventual return someday. In sum, Seneca, though he is notionally a Stoic, is presenting a utilitarian view of services for others. What is accentuated is the giving and receiving, not the friendship that is cemented thereby.

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233. de Ben. 1.1.9

234. de Ben. 1.2.3

235. others passages could be added to this list to prove my point: *qui beneficium ut reciperet dedit, non dedit,* 4.14.1; 1.2.2, see also 5.20.1.; 3.18-19

IV. Conclusions

Modern authorities on Roman law are somewhat divided on the question of why the Romans would have created the contract of *mandatum*. With regard to the role of friendship in *mandatum* Fritz Schulz formed the opinion that:

> "Friendship (*amicitia*) gave rise to serious and substantial duties. Roman friends made claims on each other which would cause a modern 'friend' to break off the relationship without delay. In republican Rome there was no hesitation about asking a friend for help in any situation; a friend might be asked for hospitality, to give recommendations, to execute commissions, and even to lend money. It was part of one's *officium* to support a friend as far as possible. When Cicero was in exile his family in Rome was in pecuniary embarrassment, but, as he wrote reassuringly to his wife, *ad Fam.* 14.1.5., 'si erunt in officio amici, pecunia non deerit'. As this view is generally accepted, a person who undertook a commission at the request of his friend did not expect or demand remuneration, but nevertheless regarded it as a serious business affair. Moreover, freedmen played an important part in Roman social life. A patron liked to entrust his freedmen with business affairs and the freedman felt himself bound by his *officium* to execute his patron's commissions gratuitously. Lastly, not all sorts of services seemed suited to form the subject of a *locatio conductio*. In the case of a contract with a lawyer, an advocate, a doctor, or a teacher, *locatio conductio* did not seem the proper form since, according to the view of aristocratic Romans, such services ought to be rendered gratuitously. Cicero, for example, would have refused to be 'hired' as an advocate though he felt no scruples about accepting remuneration in a less vulgar form. In such cases *mandatum* seemed to be the proper contract.
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> In these circumstances there was ample room and even need for the *contractus mandati* and the republican lawyers were

fully justified in admitting it. They did so with their usual discretion."[236]

Tony Honoré states:

> "There was a felt need for authoritative guidance in many spheres which other societies do not handle in legal terms. Thus the performance of gratuitous services for a friend (*mandatum*) and the making of gratuitous loans (*mutuum, commodatum*) attracted discussions which are in effect attempts to codify the notion of friendship"[237]

However, he places the answer within the realm of religion:

> "It is not enough to point to the legification of social *mores* as a feature of Roman law. What accounts for such a tendency? Two factors may perhaps explain it. One is that lawyers were upper-class Romans, ... The second element which may be significant is concerned with the association of Roman law with Roman religion. ... Roman religion was largely prophylactic. ... Emerging from its pontifical cocoon, the law concentrates on techniques of social harmony, on the appeasement of men rather than gods."[238]

Sandars holds a similar view with respect to role of law within Roman society:

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236. Schulz, pp. 555-6

237. Honoré, p. 34

238. Honoré, p. 34

> "The term *ius*, in its most extended sense, was taken by the Roman jurist to include all the commands laid upon men that they are bound to fulfil, both the commands of morality and of law. The distinction between commands which are only enforced by the sanction of public or private opinion, and those enforced by positive legal sanctions, may seem clear to us; but the Romans jurists, in speaking of the elementary principles and divisions of jurisprudence, did not keep law and morality distinct."[239]

J.A. Crook, however, believes however that such things as *mandatum* were a left-over from an earlier and simpler age of Roman society:

> "One need not deny the likelihood that in early Roman rustic-aristocratic society many things that later became subject to contract were done on the *noblesse oblige* principle, nor the likelihood that this coloured the contractual rules when they arose. ... Nevertheless there are reasons for suspecting that in our period, which begins with the already complex and Ciceronian age, gratuitousness and *noblesse oblige* in contract were an old tradition less and less honcured in the observance, as services became more and more specialized and what had once been amateur became professional.[240]

Jacques Michel, for his part, holds that it was purely social custom and utility that was the driving fc e behind contracts such as *mandatum*:

> "la morale courante avait ratifié purement et simplement les usages reçus." ... "l'amitié romaine n'est pas affaire de sentiments ou, plus exactement, l'accord des caractères, même s'il paraît

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239. Sandars, Thomas, Collet, The Institutes of Justinian, 7th ed., London, 1941, p. 5,

240. Crook, p. 239

souhaitable entre amis, n'est jamais fondamental dans les relations d'amitié telles qui les conçoivent les romaines."[241]

What I have tried to show in Part III is that there are two competing theories on the role of friendship within Roman society. Both of these draw their source, are influenced by or are drawn along the same lines as the debate that existed within Greek philosophy: that friendships have higher goals, or friendships are purely utilitarian affairs.

I believe that *mandatum* cannot be readily comprehended unless one (or perhaps both) of these notions existed within that stratum of society responsible for the promulgation of laws (i.e. that class from which the cadre of praetors and jurists was drawn). In other words, given that Roman *mandatum* no longer exists (the name remains, but the nature of the contract is different), there must have been some sociological imperative that drove it. While pure social custom can be posited as the answer, I believe that this is not sufficient. I do not disagree that Roman social custom placed a high value on the duties of friends and I do not disagree that some social customs were elevated to legal rules (e.g. *manumissio inter amicos*), but I do argue that the particularities of *mandatum* beg for a more solid explanation. Merely positing social custom as the answer is tantamount to accepting a certain amount of

241. Michel, p. 530-1

randomness within cultures and their legal systems (i.e. Romans happened to value friendships, ergo they created rules which reflected that value). The contract of *mandatum*, however, is elaborated too carefully for it to be based solely upon social custom. This argument is, I think, strengthened when we take into account the comments of Quintilian to the effect that many persons undertook mandates of lawyering and expected compensation. From this we can conclude, I think, that the gratuitous nature of *mandatum* was not accepted by all, and perhaps by most. Therefore, if a large amount of people are in disagreement with the so-called 'social-custom', then what we are dealing with is not a custom at all, but an imposed norm.

Lastly, even if social custom were the most probable answer, we are entitled, I think, to go behind the social custom and see if there is any ethical or moral imperative at work.

For these reasons I have attempted to draw the ethical and philosophical debate along the lines as first proposed by Aristotle and taken up by the Stoics and Epicureans: are friendships good for their own sake, or are they purely utilitarian?

Cicero directly addresses this question in his de Inventione, de Officiis and de Amicitia. In all three works he flatly rejects the notion of utilitarian friendships. While he admits to their existence, he does not approve of them,

and does not accord them the same value as proper friendships. Seneca, in his de Beneficiis presents a contrary argument. While paying attention to the notion that friendships can have an ennobling effect, what he stresses constantly is the notion that providing benefits to others is a way to ensure one's eventual receipt of such services. This is a profoundly utilitarian argument.

In truth, it is probably impossible to choose between either of these two arguments. In translating pure philosophy to practical legal forms the ideal of the philosopher is either not understood by the lawyer, or is tempered by the more mundane applications in which the legal form is required to operate. Nevertheless, I believe that with respect to the contract of *mandatum* it was the views put forward by Cicero that prevailed rather than those represented by Seneca. I base this view on an examination of those salient rules of *mandatum* outlined in Part II of this paper.

An argument to be drawn from the standard of care required from the *mandatarius* is inconclusive. As was shown, the standard of care varied over time, and perhaps with the element of remuneration. In essence, the lower standard of care went to the non-remunerated *mandatarius*. The basis for this shift in the standard of care was a natural reaction against imposing heavy

burdens on someone who was in fact a volunteer. Whether utility or ethics was the basis of the contract, this logic applies equally to both.

The requirements of gratuitous performance would be required by both theories. There would be no fostering of friendships if the *mandatarius* were to be remunerated, but there would likewise be no utility if the *mandator* would be legally bound to pay the 'friend'. Indeed, without the element of gratuity, *mandatum* would not involve friendship at all.

With respect to the other requirements that I outlined in Part II, the requirements of *bona fides* and the provisions for *infamia* tend to support the theory of friendships for their own sake. Granted that *bona fides* was in origin nothing more than a way of allowing the consensual contracts into the formulary system, the later interpretation of this term tends to show that this term came to be used to foster a higher level of performance of the contracts. When the contract was admitted into the civil law, the *bona fides* element would no longer have been needed if the simple performance of the mandate would be sufficient to discharge the *mandatarius*.

The notion of *infamia* is perhaps the strongest argument in support of the Ciceronian argument. If utility were the basis for the contract, then why would the grossly negligent debtor be branded an *infamis*? Forcing the debtor to be

liable for his obligation, and forcing him to make restitution for any non-performance would be sufficient, I think, to support a utilitarian foundation of the contract. However, to support a more ethical basis of friendship something more was needed to force friends to live up to the full extent of their promises. This was provided by the provisions on *infamia*.

The argument in favour of the noble notion of *amicitia* within Roman society is strengthened when we examine the legal phenomenon of *procuratio*. *Procuratio* is nothing but a functional institution, which owes its existence to the sheer impossibility for the landed classes to govern their domains while absent. But why, we may ask, would such a separate institution grow up simultaneously if the underlying reason for *mandatum* was utilitarian? If friends' obligations are solely services that the principal cannot perform himself, wherein lies the difference between *mandatum* and *procuratio*? One could argue perhaps that it is not 'absence' that is at the heart of *mandatum* (as it is with *procuratio*) but free services. But the Romans already had a contract for the provision of services - *locatio-conductio*. So I would argue that to duplicate this contract for the sole reason of providing gratuitous services would not be logical if that was all that was wanted.

This tendency increased as the professionalism under the Empire increased. Ultimately, the notions of friendship became less important in the

Empire and many of the rigours of the contract (especially the gratuity of the contract) became effectively obsolete, and with the disappearance of *procuratio* the contract of *mandatum* came more and more to provide a substitute for agency.

In the final analysis, the very existence of *mandatum* in Roman law is somewhat puzzling. There is no commercial necessity for the contract. It co-existed with other legal institutions that provided essentially the same functions. It did not bring about any real form of agency. I therefore conclude that the only way we can reconcile such problems is to accept that the Romans held to a view of friendship that was more than purely utilitarian, and that this ethical position led them to create this contract.

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