

# **CAPTATIO IN LAW, LIFE AND LITERATURE**

## **A STUDY OF THE TOPOS OF INHERITANCE-HUNTING IN THE CONTEXT OF ROMAN TESTAMENTARY LEGISLATION AND SOCIAL PRACTICE**

by

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## ABSTRACT

"*Captatio* and the *captator* are stock elements of literature and undoubtedly existed in life, but as actual practice and figure in Roman society they are nearly impossible to identify" (Champlin 1989: 212). *Captatio* (inheritance-hunting), as it appears in Latin literature, can be defined as the systematic courtship of elderly, preferably sickly or dying, childless wealthy people by social adventurers known as *captatores*, with the aim of gaining inheritances from these people by will. The methods by which this is shown to be achieved include gift-giving, *salutatio*, sexual favours, flattery etc. Roman literature suggests that this practice often took place within the exchange network of *amicitia*. This thesis examines *captatio*, as presented in the Latin literature of the early Empire, in the context of definable legal and social structures. It is not so much the purpose of this study to decide whether *captatio* existed or was a purely literary conceit, as to examine this literary topos in its broader context.

In chapter I, I examine *captatio* in the context of property devolution and "heirship strategies"; I explore the types of property devolution practised by Roman society. In the second chapter, I examine *captatio* in the context of the Roman law of succession: the purpose of this chapter is to determine the extent to which the literary portrayal of *captatio* has distorted legal "realities", and whether *captatio* as presented in literature would in fact have been viable in terms of the restrictions placed on property ownership and acquisition through succession under classical Roman law. In chapter III, I investigate *captatio*, and specifically *orbitas* (childlessness), one of the attributes prescribed for suitable objects of *captatio* (*captandi*), against the backdrop of the Augustan laws, the *lex Iulia de maritandis ordinibus* (18 B.C.) and the *lex Papia Poppaea* (A.D. 9), which prevented unmarried and childless people from taking up inheritances and legacies partially or in their entirety; at the end of this chapter, I investigate the possibility that in Roman society of this period *orbitas* may have been voluntary: I evaluate recent theories concerning "natural fertility populations", as well as the more traditional views on the likelihood that the Roman elite of this period had access to voluntary fertility inhibition and whether they would have used this knowledge. The fourth chapter studies the manner in which *captatio* operated within the informal structures of contemporary Roman society, namely the social network of *amicitia* and the conventions governing exchange and concepts of social debt. At the end of this chapter, I compare *captatio* as presented in Roman literature to types of *captatio* identified by

later legal sources as illegal, i.e. *captatio* affected by *dolus* or *vis*; I also consider the possibility that the agreements made by *captatores* and potential testators, as presented in Roman literature, comprised *pacta successoria* (legally invalid agreements attempting to regulate succession by means of a contract). The Roman reluctance to accept *pacta successoria* is shown to be linked to their concern with *captatio*, as reflected in their literature.

Throughout the thesis I explore the importance to the Romans of inheritance and wills: one explanation for this significance is the fact that in a pre-industrial society, the means for transferring wealth between individuals is limited when compared with modern societies, and consequently in pre-industrial societies, succession assumes a much more prominent profile than in those societies in which the economy provides numerous other ways for the individual to gain access to wealth. In pre-industrial societies the dependence of offspring on inheritance of parental wealth is also far greater than in the modern post-industrial world. The informal structures of Roman society as well as its demographic profile appear to have provided the opportunities for courtship of inheritances. The literary portrayal of *captatio*, an exploitation of the peculiarities of the Roman inheritance system, should be seen in this light.

## PREFACE

As presented in satire and other genres which focus on contemporary Roman society *captatio* could be viewed from two fundamental perspectives: one would be a study of the literary topoi in the context of related genres and the literary stock figures from which the *captatores* of satire etc. are descended (e.g. the parasites of New Comedy); the other approach is a study of the topos in its social and legal contexts. I began my study of *captatio* with the former approach, but found that the latter could better provide some answers to the questions that I was asking myself: was *captatio* as portrayed in Latin literature a real social phenomenon? How much do the literary commonplaces reflect the concerns of Roman society of this period? Was *captatio* possible and viable in terms of Roman law? It soon became apparent that human greed, like electrical current, flows along the path of least resistance offered by social, legal and economic structures. This is a study of the interaction between the law, life and literature of Roman society of the early Empire as it relates to *captatio*.

In the interests of brevity, much of my initial research into many of the literary portrayals of inheritance-hunting had to be pruned or omitted: a survey of the possible references to *captatio* in Lucilius and Varro was omitted; eliminating my investigation of Lucian's presentation of inheritance-hunting from a contemporary Greek (second Sophistic) perspective was particularly frustrating, but I have referred to his work where its topoi coincide with those found in the Roman presentation.

I have used the Oxford Classical Texts as my primary sources wherever possible; all translations of primary texts (unless otherwise stated) are my own. For some of the more obscure texts which I was unable to locate (e.g. the *Fragmenta de iure fisci*), I have used Csillag's citations (Csillag 1976). Because of the legal nature of much of the thesis I have made use of legal terminology and adopted the conventions of legal historians in citing sources in Roman law.

All references to modern works are cited by author's name and date. The key to these references is supplied in the bibliography. So as to streamline the main flow of the argument, I have relegated supplementary evidence, enlargements and explanations to footnotes which are, necessarily therefore, extensive. To facilitate cross-referencing, all sections in the body of the thesis are numbered and listed in the table of contents.

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## TABLE OF CONTENTS

INTRODUCTION: PUTTING ON DEAD MEN'S SHOES.....	1
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### CHAPTER I: *PRAESTO EST MIHI MANIUS HERES: CAPTATIO* IN THE CONTEXT OF PROPERTY DEVOLUTION AND "HEIRSHIP STRATEGIES"

1.1.:	Introduction.....	6
1.2.:	Inheritance and devolution.....	7
1.3.:	Strategies of heirship. ....	10
1.3.1.:	Types of devolution.....	10
1.3.2.:	Adoption: an heirship strategy.....	14
1.3.3.:	Outsiders as heirs: an heirship strategy .....	17
1.3.4.:	Lineal intrafamilial vs. lateral extrafamilial property devolution in Roman society .....	19

### CHAPTER II: *CAPTES UBIQUE TESTAMENTA SENUM: CAPTATIO* AND THE ROMAN LAW OF SUCCESSION

2.1.:	Introduction.....	21
2.2.:	Succession and the Roman family .....	22
2.2.1.:	<i>Patria potestas</i> .....	22
2.2.2.:	The rules of disinheritance.....	26
2.2.3.:	The <i>querela inofficiosi testamenti</i> .....	26
2.3.:	Origins of the Roman will.....	29
2.3.1.:	Formalism and the Roman will.....	29
2.3.2.:	The <i>testamentum comitiis calatis</i> .....	30
2.3.3.:	The <i>testamentum in procinctu</i> .....	30
2.3.4.:	The <i>testamentum per aes et libram</i> .....	31
2.4.:	The content and functions of the Roman will. ....	32
2.4.1.:	The institution of the heir.....	32
2.4.1.1.:	The proportional division of the estate.....	34
2.4.2.:	Legacies .....	36
2.4.2.1.:	Legacy-hunters or inheritance-hunters? .....	37

2.4.2.1.(i):	The Furian, Voconian & Falcidian restrictions on legacies. .....	38
2.4.2.1.(ii,a):	Evidence of inheritance-hunters.....	41
2.4.2.1.(ii,b):	Evidence of legacy-hunters.....	42
2.4.2.1.(ii,c):	Arguments for inheritance-hunting and conclusions. ....	44
2.4.3.:	<i>Fideicommissa</i> and codicils.....	47
2.4.3.1.:	<i>Fideicommissa</i> .....	47
2.4.3.2.:	Codicils. ....	47
2.4.4.:	Other effects of the will. ....	48
2.4.4.1.:	Conditions. ....	49
2.4.4.2.:	Appointment of guardians.....	51
2.4.4.3.:	<i>Substitutio pupillaris</i> . ....	53
2.5.1.:	<i>Testamenti factio (activa)</i> .....	55
2.5.1.1.:	Women as will-makers.....	56
2.5.2.:	<i>Testamenti factio (passiva)</i> and the <i>ius capiendi</i> . ....	57
2.5.2.1.:	Women as beneficiaries of wills. ....	58
2.5.2.2.:	<i>Ius capiendi</i> .....	58
2.6.:	The <i>testamentum militis</i> .....	59

### CHAPTER III: *VIVET UTER LOCUPLES SINE GNATIS: ORBITAS AND CAPTATIO* IN THE CONTEXT OF THE AUGUSTAN FAMILY LAWS

3.1.:	Introduction. ....	63
3.2.:	The link between <i>orbitas</i> , <i>captatio</i> and the Augustan laws..... .....	64
3.2.1.:	Why is it essential that <i>captandi</i> be <i>orbi</i> ? .....	64
3.2.2.:	How and why might the incidence of <i>orbitas</i> have fostered <i>captatio</i> ? .....	65
3.2.3.:	Is there any evidence that the laws were aimed at the childless and wealthy? .....	68
3.3.:	The <i>lex Iulia de maritandis ordinibus</i> and the <i>lex Papia Poppaea</i> . ....	70
3.3.1.:	The legal sanctions of the <i>lex Iulia de maritandis ordinibus</i> and the <i>lex Papia Poppaea</i> .....	71
3.3.1.1.:	The <i>Caelibes</i> .....	71
3.3.1.2.:	The <i>Orbi</i> .....	72
3.3.2.:	The Augustan system of rewards to successful parents. ...	74
3.3.2.1.:	The <i>iura parentis</i> .....	74

3.3.2.2.:	The <i>ius trium liberorum</i> . .....	74
3.3.3.:	The policy of mitigation. ....	76
3.3.3.1.:	<i>Exceptae personae</i> . ....	76
3.3.3.2.:	Persons exempted through <i>ius trium liberorum</i> . ....	78
3.3.4.:	Reasons for the policy of mitigation. ....	79
3.4.:	The Augustan family laws in their political, social and economic contexts. ....	80
3.4.1.:	The political context of the family laws. ....	81
3.4.2.:	The social and economic context of the family laws. ....	82
3.5.:	The Augustan family laws and literary <i>captatio</i> . ....	83
3.5.1.:	<i>Captatio</i> and the policy of mitigation. ....	87
3.6.:	The success of the Augustan family legislation. ....	88
3.7.:	<i>Orbitas</i> and fertility. ....	91
3.7.1.:	Involuntary/natural fertility inhibitors. ....	91
3.7.2.:	Voluntary fertility inhibition. ....	97
3.7.2.(i):	Infanticide. ....	99
3.7.2.(ii):	Abortion. ....	100
3.7.2.(iii):	Contraception. ....	100
3.7.3.:	Conclusion. ....	103

CHAPTER IV: *AMICO ALIQUIS AEGRO ADSIDET: CAPTATIO* IN ITS SOCIAL CONTEXT OF *AMICITIA* AND ITS BROADER LEGAL CONTEXT

4.1.:	Introduction. ....	104
4.2.:	<i>Amicitia</i> : .....	104
4.2.1.:	Patronage and <i>amicitia</i> . ....	105
4.2.2.:	Friendship and <i>amicitia</i> . ....	109
4.3.:	The exchange relationship: <i>amicitia</i> and <i>captatio</i> . ....	111
4.3.1.:	Types of services exchanged: <i>amicitia</i> and <i>captatio</i> . ....	113
4.3.1.(i):	<i>Salutatio</i> .....	113
4.3.1.(ii):	Gift-giving. ....	115
4.3.1.(iii):	Moral support/flattery. ....	117
4.3.1.(iv):	Legal aid. ....	117
4.3.1.(v):	<i>Hospitium</i> . ....	120
4.3.1.(vi):	Sexual favours. ....	121
4.3.1.(vii):	Services during illness. ....	123
4.3.1.(vii,a):	Attendance at sick-bed. ....	123

4.3.1.(vii,b):	<i>Vota</i> on behalf of sick <i>amici</i> .....	125
4.3.1.(viii):	<i>Officia</i> on behalf of deceased <i>amici</i> .....	130
4.3.1.(viii,a):	Organisation of funeral and burial.....	131
4.3.1.(viii,b):	Grief as a manifestation of <i>gratia</i> .....	131
4.3.2.:	<i>Captatio</i> in the context of reciprocity within <i>amicitia</i> : ...	132
4.4.:	<i>Captatio</i> in its broader legal context. ....	137
4.4.1.:	<i>Captatio</i> and <i>crimen</i> .....	137
4.4.2.:	<i>Captatio</i> and the <i>pactum successorium</i> . ....	143
<b>CONCLUSION</b> .....		146
<b>LIST OF ABBREVIATIONS</b> .....		155
<b>BIBLIOGRAPHY</b> .....		157

## INTRODUCTION

### PUTTING ON DEAD MEN'S SHOES

While writing this thesis, I met someone who was studying local gangs for a degree in Oral History. Part of his *modus operandi* involved having to ply the gang members with alcohol and other inducements in order to persuade them to be interviewed. I reflected on the different nature of our types of research: both focus on human behaviour within network relations, but differ greatly in their type and period; his involved interviews with the real thing, as it were, whereas mine involved delving into ancient texts and reading modern scholars' views on the subject of *captatio*. I was at once envious of the immediacy and originality of his subject, yet at the same time thankful that I did not have to interview any *captatores* in the flesh.

This reflection brought up an important question which I had grappled with since beginning my study of *captatio*: was *captatio* as presented in Roman literature a "real" social phenomenon, or purely a topos of literature?<sup>1</sup> Were there really groups of social parasites in Rome during the late Republic and early Empire, courting inheritances from the childless wealthy and "fore-measuring of dead men's shoes"?<sup>2</sup> Is this simply the imagination of the satirists? Or is the literary portrayal of *captatio* an exaggeration of a social phenomenon?

If I were suddenly to be transported back to ancient Rome, would I be able to find any *captatores* or *captatrices* to interview? And what approach would I use? If I were to take the literary portrayal of *captatio* seriously, would I go in search of an "expert" on the subject like Horace's mock-epic version of Tiresias at *Sat.* 2. 5? Or should I attempt to pose as a *captanda* and exploit the situation, as Eumolpus and company do in the *Satyrice*? Or, as the interlocutors do at Lucian *Dial. Mort.*, should I interview *captatores* with an axe to grind against *captandi* who have tricked them, or should I rather interview the smug objects who feel that they can outwit the inheritance-hunters after having enjoyed their favours? Or would I simply find it difficult

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<sup>1</sup> Champlin (1989: 211): "Captation, or inheritance-hunting, is such a commonplace among ancient writers that it is important first to remember that it is precisely that, a literary commonplace".

<sup>2</sup> Magnus' amusing translation of Friedländer (1907: 213).

to locate any *captatores* (or *captandi*) at all, or at least not any who admitted to inheritance-hunting?

No doubt I would find numerous people who were familiar with the literary topos of *captatio*, but would their knowledge stop there? I might even find people (like Pliny the Younger) who would assure me that *captatio* was real enough and point out individuals (like Regulus) who, he would maintain, were *captatores*; yet he would also proudly tell me of all the inheritances and legacies that he himself had received from his friends as a recognition of his loyalty and service. I might also have met a philosopher (like Seneca) who would tell me that *captatio* was a question of intent: someone might behave like a true friend to a dying *amicus*, but if his mind strayed even for a moment to the possibility of an inheritance, he was a *captator*.

While some modern scholars have taken the existence of *captatio* in Roman society for granted (mostly by taking the literary treatment at face value), others like Champlin have pointed out that *captatio* and *captatores* would be virtually impossible to identify in Roman society.<sup>3</sup> If it is not really helpful to maintain that pursuit of inheritances is something that goes on in all societies practising testate succession, it is striking how little explanation is necessary for non-Classicists to grasp what *captatio* is. They will not have a grounding in all the topoi, but their response indicates that they recognise it.<sup>4</sup>

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<sup>3</sup> Friedländer (1907: 213-6) is an entertaining and comprehensive introduction to the topoi associated with *captatio*, but, in the manner of early scholars (and some modern ones), he appears to take its existence for granted. Champlin (1989: 212) notes that "there are distressingly few historical instances [of *captatio*]" and those that do exist are distorted by literary commonplaces and personal motives. He points out that it is misleading to conceive of a "tribe of inheritance-hunters...as an identifiable group in society, mercenary social adventurers". He suggests that *captatio* is the Roman social network of *amicitia* viewed in a negative light (I examine the operation of *captatio* within this complex network in chapter IV). Although he notes that the stock elements of *captatio* "undoubtedly existed in life", he suggests that they would be almost impossible to identify.

<sup>4</sup> Apparently a similar practice in modern society has been labelled "granny-farming" (perhaps an allusion to the fact that women tend to outlive men in first-world countries nowadays and thus, widowed and deprived of friends, they can be suitable *captandae*; the use of the metaphor of "-farming" interestingly parallels the use of the hunting metaphor in the word *captatio*); although one would have difficulty finding anyone who admitted to being a "granny-farmer" (just as one would probably have had difficulty finding a Roman - except perhaps a *furiosus* - who admitted to being a *captator*), this does not mean that it does not happen. Perhaps one can adopt Seneca's philosophic stance and suggest that those who care for the elderly and the cold-blooded granny-farmer are virtually indistinguishable: it is the intention behind the actions and the way in which they are done that count.

Part of their response may indeed be a cultural one, since *captatio* has occasionally been reproduced in Western literature since appearing in Roman satire and other genres: e.g. Ben Jonson made inheritance-hunting the theme of his *Volpone*, and he has used many of the commonplaces associated with *captatio* in classical literature to enhance his satire. Legal considerations and hearsay may also have conditioned the listener to "recognise" *captatio*: cases in which people are accused of murdering their spouse/parents/grandparents, and where the motive cited is an inheritance, are not unheard of. Our legal systems also recognise that certain testators may be vulnerable to undue influence in making their wills (or failing to make them, or altering them), either by intimidation or even force.<sup>5</sup> The possibility that people might be motivated to forge wills in their own or others' interests is also recognised.<sup>6</sup>

While the *captatio* portrayed in Roman literature is not generally of this nature, it is interesting that modern law and society suspect people of the active pursuit of inheritances by the means (legal or illegal) available to them: to presume that this never happens would be naïve. At the same time one can be over-suspicious of people's motives: although outsiders may cultivate the friendship of the wealthy elderly, this does not necessarily mean that they are aiming for an inheritance. A host of other motives, including religious ones, may motivate them. Pursuit of potential testators, unless completely bereft of family, is also not often successful: succession in modern society, as in Rome, is usually restricted to the testator's family, and friends and acquaintances do not often receive more than a token bequest.<sup>7</sup> Even if the testator has no family or friends, modern law gives him other alternatives which Roman law did not provide during the classical period:<sup>8</sup> he may leave his estates to organisations, e.g. charities, bursary funds, animal welfare, etc, and in this way ensure that he will be commemorated, even if only by name. If pursuit of inheritance takes place within families, then it is

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<sup>5</sup> This goes back to the *Digest* and the *Codex*, cf. D. 29. 6 and C. 6. 34; see Tellegen 1979: 387ff.

<sup>6</sup> Much of the Roman legal literature on the legal brakes on *captatio* links it with forgery: e.g. the *sc. Neronianum* is said to have been aimed against forgers, *adversus falsarios* (Suet. *Nero* 18, *cit.* Tellegen 1982: 53); Pliny *Ep.* 6. 31 and 7. 6 deal with cases where wills have been forged, which would have brought the forgers into trouble with the *lex Cornelia de falsis*; Tellegen 1979: 387.

<sup>7</sup> In literature, Roman *captatores* appear to have aimed first and foremost for inheritances (cf. 2.4.2.1.(ii,c)), but they may in actual fact have received legacies more frequently.

<sup>8</sup> In classical Roman law the concept of heir (*heres*) (see 2.4.1.) did not extend to organisations until the Christian period, when for the first time testators could leave their estates to the Church.

usually only an extremely drastic action on the part of the testator that prompts notice, or if foul play on the part of the beneficiaries is suspected.

Whether it is because we have inherited this suspicion from the Romans or whether because the nature of human greed has not changed much, inheritance-hunting is clearly recognisable to the modern reader, even if in a somewhat different form from that of Latin literature. But although human greed remains constant over the centuries, it is important to realise that what does change are the circumstances in which this greed operates: the structure of society and of the family changes, as does their economic profile, ideologies alter, legal restrictions and loopholes change, etc. Therefore it must be pointed out that although the modern reader thinks that he or she recognises *captatio*, he or she does not and cannot perceive this topic in the same way that a Roman audience would.

Undoubtedly *captatio* or something very like it occurred in Roman society, if only on a limited scale, facilitated by aspects of the legal and social superstructure, not least the conventions of the exchange relationship of *amicitia*. Many of the aspects of the literary portrayal are, however, clearly not a true reflection of law or society, nor are they intended to be. Distortions and exaggerations are common and this is true for much of the literary presentation of *captatio*. For example, the impression left by the satirists, that there were groups (or "tribes") of people generally identified as *captatores*, is plainly misplaced: the satirists' negative view of *amicitia* and their motives for these views should be taken into account. Satire is a Modigliani rather than a Classical or Cubist work of art: it is not an exact replication of life, but neither is it so obscure that life is unrecognisable in it. It will be one of the purposes of this thesis to determine how much alteration has occurred at the hands of the artist.

The nature of this thesis assumes that although literature has its own conventions and internal influences, it is not entirely immune to external "realities", nor is it completely divorced from the concerns of its readers. It is my argument that the legal, social, economic and political climate does have some effect on the portrayal of a literary topos like *captatio*: not least, these factors determine the importance to the audience of such a topic. Authors who purport to treat topical concerns of their day (e.g. satire, letter-writers) can never be entirely unconnected to the contemporary society they encapsulate and/or satirise, whatever the literary conventions in which they

choose to clothe their observations. Yet these conventions must be borne in mind when attempting the almost impossible task of delineating life from literature.

It is not so much the purpose of this thesis to decide which theory (i.e. *captatio* as a "real" social phenomenon or *captatio* as merely a topos) is right, as to place *captatio* in its broader legal and social contexts. The literary topos of *captatio* should not be viewed in isolation: the type of property transmission practised by Roman society, the rules of testamentary succession, the social structure of the society, and the Romans' attitudes to wills should all be taken into account. It is my intention to examine in this thesis those aspects of literary *captatio* which overlap with definable legal and social structures. In this study, I shall attempt "to put on dead men's shoes" in the sense that I shall be investigating the practical reasons for a mindset in which both inheritance and *captatio* loom large.

## CHAPTER I

### *PRAESTO EST MIHI MANIUS HERES: CAPTATIO* IN THE CONTEXT OF PROPERTY DEVOLUTION AND "HEIRSHIP STRATEGIES"

1.1: Introduction: The definition of *captatio*, based on its presentation in Roman literature, is one of systematic, usually planned (but sometimes spontaneous) behaviour on the part of an individual towards a potential testator, aimed at gaining his (or her) favour, with the intention of obtaining property from that person in the form of an inheritance or a bequest in terms of his (or her) will. The methods by which this is achieved may vary: in most of the literary presentations which I shall be examining in this thesis, the *captatores* (inheritance-hunters) attempt to gain inheritances by winning the favour of the *captandi* (objects of inheritance-hunting), usually through beguiling behaviour such as gift-giving, sexual favours, flattery, companionship, etc. Roman law, however, and particularly the literature of the later Roman legal writers recognised *captatio* of a different variety: that perpetrated by trickery (*dolus*) or force (*vis*).<sup>1</sup>

The *captator*, by his behaviour, may have aimed at being instituted heir (*heres*). However, on account of the tremendous obligations,<sup>2</sup> often without substantial remuneration,<sup>3</sup> that the heir had to perform, it may often have

<sup>1</sup> Tellegen 1979: 387; cf. 4.4.1.

<sup>2</sup> In the late Republic, the heir was liable to perform the *sacra privata* of the deceased. This was notoriously onerous: two Plautine texts, *Captivi* 775 and *Trinummus* 484, celebrate the taking of a *hereditas* without the *sacra*: Watson 1971: 4-6. The *heres* was also additionally responsible for any debts that the testator might have accumulated during his lifetime: Jolowicz 1972: 123. While extraneous heirs were able to refuse a heavily indebted estate, *sui heredes* were not.

<sup>3</sup> In the last two centuries of the Republic, the testator's freedom to leave legacies charged on the estate was limited by a number of statutes: e.g., the *lex Furia testamentaria* limited the rights of most people to receive a legacy of more than 1,000 *asses*. Gaius (II. 224) gives as the reason for this the protection of the heir, whose position might be (and, we can presume, frequently was) worthless if the legacies left on an estate were too large. The statute failed in its aim, he says, as there was no restriction on the number of the legacies: Watson 1971: 163. The *lex Voconia* of 169 B.C. also addressed this problem, since, apart from the provision that applied to women, it provided that no one could take a legacy which exceeded the amount that the heirs took (*id.*: 167). The *lex Falcidia* in 40 B.C. went further in providing that at least one quarter of an estate should go to the heir(s), and prescribed that, where less was left, the legacies should be cut down *pro rata*: Watson 1971: 173; Kaser 1984: 381. Nevertheless, the need for this legislation would imply that there existed a tendency to leave a large proportion of the estate away from the heir, and, even with these provisions, a quarter of an estate would sometimes not be worth the trouble that the obligations of the heir caused. Crook (1967: 124) notes that a

the heirs, belonging to the testator's own family, who would automatically take the inheritance if the testator were to die intestate.<sup>6</sup> Therefore, in order for the *captatores* to inherit, it is necessary that the testator should be able to write a will or testament instituting or bequeathing property to someone other than his *sui heredes*.

It is plain that a practice such as *captatio* could take place only in a society in which private ownership of property and the right of the individual owner to dispose of this property, especially at death, is recognised. Before the 5th century B.C. it is probable that early Roman society had some form of joint familial ownership and an inheritance system based on the assumption of the land by the children of the deceased, who would have been working the land together with their parents.<sup>7</sup> The property would have remained in the undivided ownership of all the family members from generation to generation. Bonfante<sup>8</sup> suggested that the joint family would have had an administrative head. The theories put forward by Bonfante and others<sup>9</sup> to explain the absence of primogeniture (cf. 1.3.1.) and the peculiarities of the successory rights of the *sui heredes* in Roman law were called into question by the discovery in 1933 of fragments of Gaius, which show that in early Roman society there existed a type of partnership between the *sui heredes*, whereby they remained in undivided ownership of the property which they had inherited. As Jolowicz (1972: 126) points out, this partnership was very different from the joint family as there was no administrative headship, which is essential if the joint family is to survive as a stable unit. Nevertheless, there seems to be agreement that devolution was originally between groups, not between individuals. *Captatio*, as an exercise in favour of an individual, would therefore not have been possible during this period.

Scholars are also in agreement that testate succession developed comparatively early in Rome's legal history.<sup>10</sup> Maine (1916: 207ff) noted that most other ancient peoples had not yet invented wills at a parallel stage in their legal development. Crook (1967: 118f) stresses the fact that not only did the Romans develop testamentary succession at an early stage in their

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<sup>6</sup> Noteworthy exceptions are Regulus, who courts his emancipated son at Pliny *Ep.* 4.2, and the soldier's father, who courts his son at Juv. *Sat.* 16.51ff.

<sup>7</sup> Hopkins 1983: 236.

<sup>8</sup> Bonfante 1926: 48-9, 60; Jolowicz 1972: 126ff.

<sup>9</sup> Westrup 1944 vol.1-3 makes the patriarchal joint family a central theme.

<sup>10</sup> Maine 1916: 208; Jolowicz 1972: 127; Hopkins 1983: 235, 245f, etc.

legal history, but they developed will-making for the entire estate.<sup>11</sup> Many other societies, he points out, either had no will-making procedures or else had testate succession for only certain parts of the estate. This early development of testate succession, which tends to enable and thus encourage the individual testator to leave property away from the family, depended, as Hopkins (1983: 245f) points out, on a developed concept of property. It should be remembered that, because of the Roman model on which the modern will is based, we are so familiar with this concept that it can blind us to the revolutionary nature of an instrument which allows an individual to exert power over his property extending beyond his lifetime, and which allows him to divert the property from those to whom the law would give it (Jolowicz 1972: 127).

Vinogradoff and others<sup>12</sup> related the development of testate succession in Rome to systems of agriculture based upon the plough and the cultivation of grapes and olives. This type of agriculture, they maintained, favoured the development of individual property in small farms. Agriculture of this kind may have encouraged greater accumulation of wealth than is found in hunter-gatherer societies. In many of the latter, there are no individual property rights or systems by which property may be transferred to others. Individuals may have a few personal belongings, e.g. hunting spears, which they would need for their livelihood, but such equipment tends to be either destroyed at the death of the owner, or else buried with him, with the result that there is little inherited property (Goody 1976: 12).

Goody (1976: 10) notes that it is the transmission of the major items of property that are predictably of greater significance for most relationships and institutions. This is especially so with the transmission of productive resources, such as land, and, I suppose, wealth that was originally based on land, as in the case of wealthy Romans on whom *captatio* would have been practised. Thus the extent to which the individual is able to accumulate wealth is as significant as the right to dispose of it, and indeed may be also responsible for the development of this right.<sup>13</sup> Goody also very significantly

<sup>11</sup> The legal maxim *nemo pro parte testatus pro parte intestatus decedere potest* (see, e.g., Jolowicz 1972: 124; Buckland 1966: 282) that prohibited any testator from making a will for only part of his estate, leaving the remainder to devolve according to the rules of intestacy, underlines the fact that Roman testation not only could but had to include the entire estate.

<sup>12</sup> Vinogradoff 1920: 292; cf. Weber 1891: 80ff; Mommsen 1901: 194.

<sup>13</sup> It has often been suggested that testamentary inheritance is something which was developed primarily to divert property from a man's agnates (relatives in the male line),

remarks (1962: 5; 1976: 9) that, where the rites on death serve to redistribute the deceased's property, they tend to be far more extensive and often incorporate a far more elaborate mourning display than where a holder divests himself of his property during his lifetime.<sup>14</sup> This idea echoes a literary commonplace in the presentation of issues surrounding *captatio* in satire and other genres, namely that a display of mourning takes place where a large inheritance is expected or has just been received.<sup>15</sup>

1.3: Strategies of heirship: Succession is not just concerned with the devolution of property, but with the vesting of this property in an heir or heirs. Maine (1916: 206) noted that a will was originally "not a mode of distributing a dead man's goods, but one among several ways of transferring the representation of the household to a new chief". *Captatio* must be viewed in the wider context of the general type of inheritance that the Romans practised, including the manner in which heirs were sought. Where the owner of property is given freedom to dispose of his property *mortis causa* by means of a will, there is also *a priori* the implication that he will have some measure of choice in the distribution of this property. However, economic and cultural norms, in other words considerations as to the viability of his estate, as well as the expectations of his community and family, will also play a part in influencing his choice. The type of devolution which is practised in his society, although he may not be aware of this, will also influence him.

1.3.1: Types of devolution: Generally, inheritance may be of two broad types: it may be lateral or lineal (also called vertical). According to lateral systems of inheritance, an heir is sought among the testator's siblings (i.e. contemporaries) rather than his (or her) offspring or siblings' offspring

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who were the residual heirs. This is understandable because of negative cultural attitudes to agnate succession (see n. 29 below:), and also because of the type of devolution practised by Roman society, which being typical of a Eurasian society (see 1.3.1. below), generally resisted inheritance by distant male relatives, even where they were of the same patriarchal descent group. This may however have been caused by the breakdown of the joint family: people are often reluctant to leave their wealth to those whom they do not know well (such people are less likely to commemorate them than those who do, even when not of the same family). Thus while the joint family was intact, distant agnates may have been more welcome as (joint) heirs than when it broke down.

14 Goody generally calls the process of divesting oneself of one's property during one's lifetime in return for one's bed and board by its Czech name of *vymenék*, but notes that it was also found in Cambridgeshire and the Midlands in the pre-industrial era. This type of devolution of parental property is an alternative to inheritance *mortis causa* (Goody *et al.* 1976: 6).

15 See Lucil. 691 Marx "nullo honore, heredis fletu nullo, nullo funere"; Pub. *Sent.* H19 "heredis fletus sub persona risus est"; Hor. *Sat.* 2. 5. 103f; Mart. 5. 37. 23-4; 1. 33; Stat. *Silv.* 4. 7. 37-40.

(Goody 1973: 5). Lineal or vertical inheritance, by contrast, comprises those inheritance systems that first seek an heir in the next descending generation, i.e. primarily among one's children (*id.*: 6). These heirs are preferably of the testator's own family, but processes such as adoption may be resorted to if there are no suitable kin.<sup>16</sup> In Eurasian societies, the system of vertical inheritance is the norm. Eurasian societies also tend to differ markedly from African societies in that diverging or "bilateral" inheritance, whereby the parental property goes to children of both sexes, whether by dowry or inheritance, is common (Goody 1976: 6): women tend to be residual heiresses to brothers, in addition to which they usually receive a dowry on marriage. In general, the testators are more ready to bequeath property to close female relatives than to distant males.<sup>17</sup> The principle of diverging vertical devolution in Roman society can be seen in the rules of intestate succession, whereby children of both sexes were made the immediate heirs (*sui heredes*).<sup>18</sup>

The phenomenon of diverging devolution was partly due to the nature and distribution of productive resources in the large-state Eurasian communities, of which Rome was one.<sup>19</sup> The advanced agriculture that these states practised tends to result in a surplus of production, which leads to the division of labour and the stratification of society based on different styles of life. As Vinogradoff noted,<sup>20</sup> intensive agriculture also leads to the development of individual property in small farms, and to the movement away from the joint family as the essential productive unit. In addition, with the development away from subsistence farming, the question of maintaining the style of life becomes important. Offspring of both sexes must have a share in the parental wealth, either by inheritance or by dowry, if the family's social standing is to be maintained (Goody 1976: 20).

Goody has suggested that the more intensively the productive resources are used, and the scarcer they become, the greater the tendency to retain them within the basic productive and reproductive unit. Where the family's social

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<sup>16</sup> Goody 1969: 16ff.

<sup>17</sup> In the main Eurasian societies, close female relatives are the preferred residual heirs, even where there is a distant male potential heir of the same patriarchal descent group: Goody 1976: 10. Cf. n. 13 above.

<sup>18</sup> See G. III. 1ff.

<sup>19</sup> Other literate "large-state" Eurasian communities which practised diverging devolution include the Babylonians, Hebrews, Greeks, Chinese, Hindus and Buddhists: Goody 1976: 21.

<sup>20</sup> See n. 12 above.

standing is of importance, and thus diverging devolution is necessary, there may also be a tendency for the parental wealth (especially where it is in the form of land) to become subdivided and thus eventually worthless. This is a problem that has faced particularly those societies which, like Rome, practise a type of diverging devolution known as a partible inheritance system, i.e. in which the parental wealth is divided among all offspring, whether male or female, whether first-born or not. This results in the need for an "heirship strategy" to ensure both a successor to the parental estate and the maintenance of the family's wealth. Traditional scholarship has reflected on the likelihood that Roman testators who wanted to preserve both their families and the family's estate may have been caught in a dilemma: if there were more than one or two children at the death of the *paterfamilias*, the wealth of a household would be dissipated, while in an age of exceptionally high child and especially infant mortality, if only one or two children were produced the testator might easily be left childless.<sup>21</sup>

One way of ensuring an heir without having to curtail the number of one's offspring to such an extent that there is risk of being left without any heirs at all, particularly where the rate of mortality is high, is to practise the system of primogeniture. According to this "strategy of heirship", preference is given to the first-born son, who will inherit the family's major productive resources, while the younger sons and daughters will receive token inheritances (daughters, however, generally do receive dowries). This system was practised extensively by the aristocracies in feudal Europe during the Middle Ages (and is still to some extent evident, e.g. in the succession rules of the British royal family). In Rome, however, this system does not appear to have been practised either by a particular class or by the society as a whole. The rules of intestate succession suggest that partible inheritance was the expected norm (G. II.152; III.1ff). Although the right of testate succession made primogeniture possible in theory (provided the immediate heirs were disinherited by name), in practice it does not appear to have been used (see Crook 1967: 132; Hopkins 1983: 9-10, 76, etc). Certain legal mechanisms (see e.g. 2.2.3. below) would in any have worked against this "strategy of heirship". In addition, Hopkins (1983: 77-8) notes that there are no stories or commonplaces in Latin literature presenting the younger son as especially hard done by or the eldest son as particularly fortunate, as one would expect

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<sup>21</sup> See *inter alios*, Crook 1967: 132; Hopkins 1983: 78; Wiedemann 1989: 34, etc.

from a society in which primogeniture<sup>22</sup> was common, and as one does find in European folk tales and fairy stories.<sup>23</sup>

Without a preferential system of devolution like primogeniture, another way in which testators can attempt to maintain the family's wealth is to limit their number of offspring. Crook (1967: 132) notes that the desire not to partition estates into too many fragments may have been a motivating factor behind "the notorious infertility of the Roman upper class". As I shall note in a later section,<sup>24</sup> there is evidence for both abortion and infanticide in Roman society, and it appears that contraception (often indistinguishable from abortion in Roman eyes)<sup>25</sup> was within the reach of suitably educated and motivated people (i.e. those of the upper classes). However, whether the demographic profile of the Roman upper class would have motivated its members to limit their families is another question. Infanticide of female infants, or at least preferential treatment of male offspring over females, may have occurred (Pomeroy 1975: 164-5), but the extent to which this occurred is difficult to prove (Gardner 1986: 6).<sup>26</sup> Fathers may have been loath to raise more than one daughter because of the need to provide each with a dowry. Limiting the number of female offspring would also limit the rate of

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<sup>22</sup> It should be noted that primogeniture has never been the norm in Eurasian societies, which, as we have seen, tend to practise diverging vertical devolution (i.e. partible inheritance systems). The western European background of many of the scholars who have examined the possibility of and viability for primogeniture at Rome should also be taken into account. Rome, with its partible system of inheritance, was thus more typically Eurasian in its devolution than medieval Europe: perhaps the reason for the development of primogeniture in medieval Europe, was the fact that the availability of productive resources may have greatly decreased after the "fall" of the Roman empire, cf. also Goody's note that the scarcer the productive resources become, the greater the tendency to retain them within the basic productive and reproductive unit (1976: 20). This is what primogeniture attempts to do.

<sup>23</sup> I am reminded here of the tale *Puss in Boots* (*Le Chat botté*), in which a father at his death leaves his elder two sons productive resources, and the third and youngest son is left the family cat. Fortunately for him, it turns out to be a magical cat. A variation of this story is recounted at Carriere 1937: 158f. Another example of primogeniture occurring in European folk-tales is the Swedish tale *The Inheritance* (Bodker *et al.* 1963: 26-8): according to this tale, a poor Lapp sends his three sons away because he can no longer support them, giving them their inheritances *inter vivos*; the eldest son receives the family fiddle, the second a millstone, and the youngest only a bundle of flax.

<sup>24</sup> See 3.7.2. below.

<sup>25</sup> See 3.7.2., 3.7.2.(ii) & (iii) below.

<sup>26</sup> On infanticide, see 3.7.2.(i) below. We do know that there were proportionately far fewer women than men in upper class Roman society: this can be readily seen in the fact that virtually all Roman upper class women were able to find husbands, and the never-married woman was a rare phenomenon. In addition, in the late Republic, many men of the upper classes were marrying women of the lower classes. Although countless women of all classes between the ages of 15 and 30 died in childbirth, this still does not explain the great disproportion between the sexes (see, e.g., Pomeroy 1975: 164ff).

population growth, as the population of a given group has potential to expand only in proportion to the number of females of child-bearing age that are in that group. This is something that Augustus should have realised when implementing his social legislation. Furthermore, extensive infanticide of females would mean that there were fewer residual heirs if all a testator's male offspring were to die.

Where limiting one's family size coincides with a high rate of mortality, particularly infant and childhood mortality, as is common in all pre-industrial societies,<sup>27</sup> the results will be a general decline in the fertility of the group and a high probability of childlessness for the individual testator. It may be that Roman parents had such great difficulty ensuring that barely two or three children survived to adulthood, that any need for family limitation was unnecessary.<sup>28</sup> Augustus' legislation in favour of marriage and the production of children does suggest nevertheless that not producing children was to some extent a conscious choice: otherwise there would have been no point in offering incentives (e.g. the *ius trium liberorum*) to potential parents.

Where a testator has failed to produce a surviving heir, there are at least two possibilities open to him: on the one hand, he can allow his estate to devolve upon his relatives, usually his agnates (i.e. his relations on his father's side)<sup>29</sup>; on the other hand, he can provide an heir for himself by means of adoption.

1.3.2: Adoption: an heirship strategy: Adoption can be defined as taking someone into a relationship not previously occupied, especially as one's own child (*OED*, quoted at Goody 1976: 69). It involves, in modern western

<sup>27</sup> I discuss the question of mortality rates and life expectancy in Roman society in greater depth at 3.7.1. below.

<sup>28</sup> Our knowledge of abortion is largely derived from writers (e.g. Ovid, Juvenal; cf. 3.7.2.(ii) below) whose subjects involved prostitutes and adulterous liaisons as opposed to respectable family planning, and where the need for contraception and abortion may have been to avoid ruin to business or reputation respectively rather than to evolve an "heirship strategy".

<sup>29</sup> In this case, making a will would be unnecessary for the Roman estate owner as his agnates would normally inherit in the event of his dying intestate: for the legal regulations concerning agnatic intestate succession, see G. III. 9ff. Failing the agnates, the estate went to the clan (*gens*), see G. III. 17. Cf. Catull. 68. 119ff, esp. 123-4, which suggests that gentile inheritance in the event of childlessness was not always greeted enthusiastically by the estate-owners - here the delighted gentile heir is portrayed in a similar manner to the way in which *captatores* are often portrayed, since he is compared to a vulture: "*impia derisi gentilis gaudia tollens/suscitat a cano volturnum capiti*" (for *captatores* as vultures, see e.g. Mart. 6. 62. 4: "*cuius vulturis hoc erit cadaver?*"; Seneca *Ep.* 95. 43: "*vultur est, cadaver expectat*").

societies as it did in Rome, the transfer of an individual from one filial relationship to another, from a natural one to a "fictional" one, which is given legal status equivalent to that of the natural relationship (*id.*: 68-9).

Goody (1969) traced the custom of adoption in ancient Eurasian societies to the rise of vertical inheritance. As we have noted, vertical inheritance is that which first seeks an heir in the next descending generation, preferably from the testator's own offspring.<sup>30</sup> One of the motivations for vertical inheritance as opposed to a system of lateral inheritance is the desire on the part of the testator for the heir to care for his property, ancestral rites (the Roman *sacra*), and his memory. The desire for one's memory to be perpetuated characterised Greek and Roman culture from Homeric times (see e.g. Tyrtaeus fr. 12. 23ff). The strong desire to be remembered is crucial to the understanding of why the Romans made wills (Champlin 1989: 213-5). If these are the main aims of the testator then, logically, vertical transmission of property will be advantageous, since an heir of a younger generation is more likely to survive for a significant period after the death of the testator and to supervise these concerns than is someone of the same generation as the testator.<sup>31</sup> Consequently, in those societies in which vertical inheritance is the norm and where a testator has failed to produce surviving offspring, he will

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<sup>30</sup> Dio Cassius (56. 3) records a speech, attributed to Augustus, which attempted to persuade wealthy Romans to raise children. The emphasis is on the assurance that the testator, in leaving his property and the continued responsibility for his family to a biological heir, will in some way live on through his successor: "Is it not a blessing, when we leave this life, to leave behind as our successor and heir [διάδοχον καὶ κληρονόμον] both to our family and to our property, one that is our own, born of our essence, so that only the mortal part of us passes away, while we live on in the child who succeeds us?" (Wiedemann 1989: 25).

So also Simone de Beauvoir (1953: 82) connects the testator's desire to see his property transmitted to his biological descendants with the human longing for immortality: "the owner transfers, alienates, his existence into his property...it overflows the narrow limits of his mortal lifetime, and continues to exist beyond the body's dissolution - the earthly and material incorporation of the immortal soul. But this survival can only come about if the property remains in the hands of its owner; it can be his beyond death only if it belongs to individuals in whom he sees himself projected, who are *his*."

Adopted heirs are resorted to generally only when there are no offspring: but clearly, adoptive parents, in modern society, and presumably also in ancient society, see their adoptive children as extensions of themselves, as *theirs*, as much as natural children, often because it was a conscious choice to adopt them.

<sup>31</sup> The possibility that an adoptee, like an extraneous heir, would not look after the testator's concerns (e.g. his *sacra*) as well as someone of the same agnatic group is unfounded: in Rome, adoptees usually assumed the *nomen* (gentile name) of the testator, and to all intents and purposes became his offspring. Roman testators, it should be noted, were equally ready to leave the care of their *sacra* to their freedmen who had taken their *nomen* on manumission, if no one else from the *familia* survived. In addition, the Roman testator also had the option of allowing his property to devolve on his friends (see 1.3.3.& 4. below).

tend to look for potential heirs of about the same age as a surviving natural child (or grandchild) of his would have reached. Psychological as well as practical needs motivate this action.

In Western Europe today, according to Goody (1976: 66ff), adoption has three main functions: first, to provide homes for orphans, bastards, foundlings, and the children of impaired families; second, to provide childless couples with social progeny; third, to provide an individual or couple with an heir to their property. The main difference between modern and ancient conceptions of the functions of adoption is that, while modern authorities stress the first function, emphasising the welfare of the adoptees, the ancient world stressed the latter two functions, especially the third one (Goody 1976: 68), emphasising the needs of the adopters.<sup>32</sup> In contrast to modern conceptions of adoption, Roman adoptions were often politically motivated, and the adoptees were frequently adults when adoption took place (Crook 1967: 111). Although Roman adoptees undoubtedly usually benefited greatly from their adoptions and adrogations (see below) by wealthy citizens, the adopters' interests were placed first: an heir was necessary for the continuation of the testator's *familia* and *nomen*, and wills effecting an adoption often included a *condicio nominis ferendi* (i.e. a condition that the adoptee should take the adopter's name).

Adrogation, a variant of adoption, was used where the person to be "adopted" was *sui iuris* (see 2.2.1. & 2.5.1.) and thus was taken into the adopter's family together with his entire *familia* (i.e. all those in his *potestas*), even if his *familia* as it stood comprised only the adrogee himself (i.e. if he had no dependants). Special permission was needed for adrogation, whereas adoption did not require this: the reason for this is that adrogation would involve the demise of the adrogee's own family, since this would be submerged in the family and name of the *adrogator*.<sup>33</sup> The practice of adrogation therefore indicates that it (as well as adoption) was largely to the

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<sup>32</sup> Goody (1976: 68) wittily notes that a modern book on fostering entitled *In Place of Parents* (Trasler 1960), might, in pre-industrial societies, more appropriately have been entitled "In place of children", since the focus of the latter's concerns with regard to adoption were on parental deprivation rather than the welfare of deprived children. Modern would-be adoptive parents who were to give the third of Goody's listed functions of adoption (i.e. the need for an heir) as their primary motivation for wanting to adopt a child, would not gain favour with social workers.

<sup>33</sup> For details, see Jolowicz 1972: 119-120.

advantage of the adopter rather than that of the adoptee: the primary concern is for the survival of the adrogator's *familia* and *nomen*, rather than for the survival of those of the adrogee, or for his welfare. There can be no doubt, however, that in many cases adoption (and adrogation) must have played a psychologically significant as well as practical role for the adoptive parent(s) in providing them with social progeny and with an heir. The psychological aspect of having offspring or, failing this, young(er) people to take the place of one's children and heirs, is highly significant in the practice of *captatio*. But at the same time in Roman society, as in most cultures, succession within the biological family was considered desirable, and sometimes a testator might feel compelled to retain intrafamilial succession at all costs.<sup>34</sup>

1.3.3: Outsiders as heirs: an heirship strategy: In a pre-industrial society such as Rome, children and heirs were not merely of importance for parental psychological well-being, but were a vital necessity, as an insurance against illness or the incapacity of old age. There were no insurance schemes or old age pensions in Roman society, and parents tended to view their children as security for their old age (Wiedemann 1989: 26). However, those in the upper classes of Roman society who were wealthy tended to see their *property* as an investment and a security for their old age. Wiedemann (*ibid.*) notes that wealthy Romans were able to buy security for their old age with their wealth; they consequently had less need for offspring to perform this function. This may be a factor in the explanation of the "notorious infertility" of the Roman upper class.

But how did these wealthy, childless Romans buy their security in old age, and who sold it to them? According to one theory (i.e. one that assumes that the literary topos of inheritance-hunting is a reflection of a "real" social practice), the manner in which the elderly childless wealthy bought security (and companionship) was by means of *captatio*. They allowed themselves to

<sup>34</sup> Pers. *Sat.* 6. 52ff presents the interesting case of a childless testator, who is also without close family to act as residual heirs, going in search of a supposed distant relative and making this dubious person his heir: "...age, si mihi nulla/iam reliqua ex amitis, patruelis nulla, proneptis/nulla manet patruis, sterilis matertera vixit/deque avia nihilum superest, accedo Bovillas/clivumque ad Virbi, praesto est mihi Manius heres" (52-6). This passage underlines the overriding need (psychological and practical) that some *orbi* might have for heirs, as well as the (perhaps deluded) satisfaction felt by one of these people when he eventually finds, tucked away at Bovillae, a small but ancient town about 12 miles from Rome (Lewis & Short: s. v.), an heir whom he can pretend is a distant relative. This passage also underlines the general preference for intra- rather than extra-familial succession.

be courted by somewhat younger Romans, but also contemporaries of similar social status, in exchange for the promise of a reward in their wills.

The concept of leaving wealth to outsiders was not new in Roman society: despite scattered evidence, it appears that from a relatively early date in the Republic Romans were leaving a substantial proportion of their wealth to outsiders. The Furian, Voconian, and Falcidian legislation of the late Republic,<sup>35</sup> all of which attempted, with varying degrees of success, to restrict legacies charged on the estate, are testimony to the fact that legacies made up a substantial part of the average will (see Hopkins 1983: 237). Hopkins (*id.*: 239) remarks that the *captatores* had "hit upon a transmission fault in the passage of wealth from one generation to the next. They had found a weak spot in the Roman system of social reproduction," and were criticized for their success in exploiting this.

If one assumes with Hopkins that *captatio* was a reality in Roman society, one possible reason for the inheritance-hunters' success in exploiting this "transmission fault" in the devolution of property may be that the psychological comforts provided by adoption can to some extent be reproduced by *captatio*. Adoption provides the testator with the enjoyment of social progeny (one of the three purposes of adoption outlined by Goody 1976: 66ff, see 1.3.2. above), and with the security of heirs that can be considered *his own* because of their "fictional" filial relationship with him, both in his own eyes and in those of his community. *Captatio*, while not providing the testator with literal progeny, provides him with reasonable social facsimiles. In literature treating the topic of inheritance-hunting, the *captatores* are generally<sup>36</sup> presented as being younger than their objects (or, rather, the objects are presented as very old, cf. Mart. 11. 44). In Rome, admittedly, adoptees were not always younger than their adopters. However,

<sup>35</sup> See n. 3 above; cf. 2.4.2.1.(i) below.

<sup>36</sup> The aged father of the soldier, who courts his own son, at Juv. *Sat.* 16.51ff, is an exception. But here the extraordinary nature of the military will (discussed at 2.6.), and the son's dangerous profession account for this unusual situation. Old age is one of the requisites for a suitable object of *captatio* in the literary presentation, partly because older people are more likely to die sooner, but also because a man had to be *sui iuris* (i.e. his *paterfamilias* had to be dead, or else he had to have been emancipated) before he had *testamenti factio*, i.e. the capacity to make a will. We are not certain to what extent emancipation took place, and it is probable that very many Romans were *in patria potestate* (see 2.2.1.) for a large part of their adult lives. Elderly Roman citizens were thus more likely to be *sui iuris* than younger ones. A childless old person is also more likely to remain so than a younger childless person (childlessness is another prerequisite for *captandi*).

the fact that the *captatores* were mostly younger than the *captandi* may have meant that, on a psychological and emotional level, they were to be seen by the *captandi* as substitute children, just as adoptees were. The companionship provided by the young(er) *captatores* could also be said to replicate the social function of adoptive children.

1.3.4.: Lineal intrafamilial vs. lateral extrafamilial inheritance in Roman society: The relationship between the *captator* and the *captandus* is not to be confused or even identified with adoption or adrogation (although the testator might require these before instituting an extraneous heir), as it is in many respects different from these institutions. The focus of *captatio*, unlike adoption, was not the family, but the wider Roman social relations which made up the network of *amicitia*.<sup>37</sup> As shall become clearer in the course of this study, there were two types of "pull" on the Roman testator, and each pulled in a different direction and with differing degrees of strength: the first "pull" was that of his family, particularly his children, whom, according to the traditional *mores* of Roman society, he had a duty (*pietas*) to institute; the second "pull" was that of his obligations (*fides, gratia*) to his friends (*amici*), whom custom and the conventions of reciprocity within the exchange relationship dictated were to be rewarded for their services to him. Thus the first "pull" was one towards a *lineal* (or *vertical*) *intrafamilial* type of property devolution, the second one towards a *lateral, extrafamilial* type of property devolution within a formally *lineal* system.

These two "pulls" were not equally weighted: law and the conventional expectations of Roman society sanctioned foremost lineal intrafamilial devolution of property on death, but custom and social practice encouraged the lateral extrafamilial system of devolution. The resultant vector of these two forces was that the first duty of the Roman testator was to his family; only where the viability of lineal intrafamilial inheritance broke down (i.e. where childlessness meant that the testator had no strong obligations to a family), did society allow lateral extrafamilial property devolution to take precedence. Where a Roman testator had responsibilities to children, wife or family, he would have been able to bequeath only part of his property to an *amicus* (e.g. by granting him a legacy, cf. 2.4.1.), but in the event of

<sup>37</sup> The operation of *captatio* within the context of *amicitia* is examined at 4.3.1.ff below.

childlessness (*orbitas*) he could have devolved his entire estate on an *amicus* (i.e. by making him heir, cf. 2.4.1.). *Captatio*, as portrayed in Roman literature, can be defined as the conscious pursuit of inheritance in the lateral extrafamilial context. The conflict between these two types of property devolution, the support that each enjoyed from society, and the place of *captatio* within the Roman system of property devolution as a whole will be investigated more closely in the following chapters.

The conflicting "pulls" exerted on the testator by his family on the one hand and *amicitia* on the other should however not be seen as completely in opposition, since they were merely alternate means according to which the testator could devolve his property *mortis causa*, and were not mutually exclusive. Also, the *amici* whom a testator chose to institute or leave legacies to could be said to be playing a role similar to that of adoptees, in that they were providing him with an "heirship strategy" according to which he could devolve his property in a manner that fulfilled both his practical and psychological needs.

## CHAPTER II

### *CAPTES UBIQUE TESTAMENTA SENUM:*

### *CAPTATIO* AND THE ROMAN LAW OF SUCCESSION

2.1: Introduction: In the previous chapter I investigated the concept of *captatio* as a system of intervention in the devolution of property. Because literary *captatio* takes place in the context of lateral extrafamilial property transmission (see 1.3.4.), this property must be transmitted through testate succession, i.e. by means of a will.<sup>1</sup> *Captatio* must therefore be seen in the context in which it would have operated if it was a "real" phenomenon in Roman society, the context of the Roman will, and the broader rules and norms by which will-making was bound.<sup>2</sup>

Succession is arguably one of the most complex areas of Roman law:<sup>3</sup> examining this area in the detail necessary for a full understanding of it is unfortunately beyond the scope of this thesis. Nevertheless, the following chapter treats those aspects of the law of succession which pertain to the presentation of *captatio* in Roman literature. By placing literary *captatio* in its legal and social contexts it is my intention to advance our knowledge of the extent to which the literary topos of inheritance-hunting reflects a real social phenomenon in Roman society of the late Republic and early Empire,

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<sup>1</sup> See 1.2 above.

<sup>2</sup> The question of the extent to which law is a reflection of society should be raised here: Crook (1967: 7) notes that law is usually a reflection of society's more conservative aspects; he suggests that it may be an influence, usually a brake, but sometimes an accelerator for social change; see also Gardner (1986: 3), who maintains that "law...is about what people may or may not do, not what they actually do". She notes, in addition, that the law of a society tends to reflect the interests of its wealthier members, and that most of the legal system, especially the Roman legal system, is connected to the ownership (and, I would add, the acquisition and transmission) of property.

<sup>3</sup> The later legal writer Gaius (A.D.110-179), one of the main sources on Roman law, in his *Institutes* treats the rules of succession at II. 100-III. 87; out of the fifty books of the *Digest* eleven are occupied with the law of succession. Crook (1987: 118) remarks that "in will-making the idiosyncracies of humanity are at their most abundant and generate a lot of law". According to a study by Kelly (1976: 71-92, *cit.* Champlin 1989: 199 n. 4), 60-70% of all Roman civil litigation arose over problems and disputes related to succession. It appears that succession was a matter of great importance to the Romans (reasons for this will become plain, see n. 7 below; cf. e.g. 3.4.2.).

or whether it is purely a literary commonplace, an invention of the satirists and others.

First, a note of caution is necessary: recent research (see esp. Cloud 1989(a): 49-67) has shown that Roman satire (one of our main literary sources on *captatio*) is generally not very reliable as far as legal details are concerned, and that where legal references do occur, accuracy is always secondary to the satirical point of the passage. This raises the question as to whether it is at all helpful to study the legal details of something that is foremost a topos of the Roman satirists (Horace, Persius, Juvenal) and writers of closely related genres (e.g. Martial, Petronius, etc) in order to determine the extent to which it reflects (or distorts) social phenomena. Indeed, can literature ever be said to reflect external "reality"? Many of the difficulties caused by the nature of the literary portrayal may, I believe, be tackled by approaching the problem from another direction: rather than by starting with satire and other literary presentations of *captatio* and then examining these in the context of the law of succession, it may be useful to begin by investigating the legal background and then to apply this to the literary portrayal of *captatio*, bearing in mind the authors' literary purposes for using legal terminology and/or references. This approach may act as a litmus test for distortion and exaggeration, indicating those areas in which the legal conventions have been stretched to accommodate literary ones.

2.2: Succession and the Roman family: The Roman law of succession, as an area of private law, was part of the law of the family, and therefore it is essential to examine first the nature and structure of the Roman family. In the late Republic and early Empire, the basic Roman family unit was a "nuclear family", as in the modern post-industrial world. However, the word *familia* had a different application from that of the English *family*: it not only referred to the biological family and relatives, but also meant the household itself, including the household slaves (Ulp. D. 50. 16. 195. *ff. cit. TLL* 6. 1. 237; Crook 1967: 98; Dixon 1988: 13).

2.2.1: Patria potestas: An important aspect of the Roman *familia* which is particularly difficult for us to grasp is that the head of the Roman family, the

*paterfamilias* (lit. "father of the family", i.e. the oldest living male from whom the members of the family were descended) retained full control over the members of the family, not only until they reached adulthood and formed conjugal units of their own, but until the day of his death (Crook 1967: 98-9).<sup>4</sup> In practical terms, for adult males *in potestate*, *patria potestas* meant financial control.<sup>5</sup> The son *in potestate* was incapable of ownership, since everything that he possessed or might acquire, technically (and legally) belonged to his *paterfamilias*. Only once his *paterfamilias* had died and he himself became head of a family was he able to own things himself (Hopkins 1983: 244). The son *in potestate*, however, was (like a slave) allowed *peculium*, i.e. a fund which, although belonging officially to the *pater*, was his to manage. There

<sup>4</sup> The control exercised by a Roman *paterfamilias* over his family was called *patria potestas* (lit. "a father's control/power"), and those in his control were said to be *in potestate*. Those *in potestate* included not only descendants, but women married to him and to his male descendants *in manu* (i.e. under a type of marital control), and any female descendants married to other men *sine manu* (i.e. without passing into the marital control of their husbands), cf. G. I. 108ff; Crook 1967: 103. *Patria potestas* did not, by the same token, extend to a woman married to the head of the family *sine manu*, or to those married to his sons (and grandsons) in this manner. These women remained under the *potestas* of their own respective *patresfamilias*, the logic behind this being that no woman could belong to two families, or be under the control of two men, at once. On the death of the *paterfamilias* the custody of daughters, unmarried and married *sine manu*, wives married *in manu*, and prepubertal sons etc. passed to the next oldest male agnate (Pomeroy 1975: 151).

Pomeroy (*id.*: 150) remarks that assumptions of female light-mindedness (*levitas animi*) and the weakness of their sex (*infirmitas sexus*), were the underlying principles of the Roman legal theory that mandated that women should be under some form of masculine control throughout their lives. However, it seems that this was linked to the concern to keep control of the family property, as this control extended to women's ability to dispose of wealth. Extensive control of women would prevent them from leaving wealth to outsiders. "Outsiders" (*extranei*) often meant the woman's own children, if she was married *sine manu*, the type of marriage that appears to have been almost universal in the classical period. (Gardner (1986: 13) & Crook (1967: 103) suggest that *sine manu* marriage was to all intents the only form by this period). A woman's children would belong to her husband's family, and would be under the *potestas* of her husband or his *paterfamilias*, if alive, no matter which type of marriage was entered. However, if a woman was married *in manu*, she ranked, in terms of succession rights, as a daughter to her husband and as a sibling to her children (Pomeroy 1975: 152; Gardner 1986: 11). But if she were married *sine manu*, she would belong to her family of birth and have succession rights (as a *sua heres*) in this family rather than in her husband's family. Her rights of testation would also be controlled by her family of birth, either by her *paterfamilias*, if alive, or by her oldest male agnate, or by a *tutor* appointed by her *paterfamilias* in his will (Pomeroy: 151). In the classical period, children could inherit on intestacy from their mother, but in practice this would have been rare, as it would only have taken place in the event of virtually all the mother's agnates having died out. It was not until the passing of the *scta. Tertullianum & Orphitianum* (the latter in A.D. 178), that mothers and children acquired mutual intestate rights to their estates (Gardner 1986: 9).

<sup>5</sup> *Patria potestas* did not extend to public law, and it did not include political control: a son *in potestate* could vote and hold a magistracy as freely as a *paterfamilias* could (Jolowicz 1972: 119). Cf. Lacey (1986: 127): in public life a *filiusfamilias* was classed as if he were a property-owner.

was nevertheless nothing to prevent the *pater* from withdrawing this fund at any time, and of significance for our purposes was the fact that the *peculium* was considered part of the estate of the head of the family when he died (Crook 1967: 110; Hopkins 1983: 244).

Theoretically,<sup>6</sup> according to the principle of freedom of testation, the *paterfamilias* could, in his will, dispose of not only his own funds and personal belongings, but also those of his sons *in potestate*. Therefore, if a Roman testator had left his entire estate away from his children and grandchildren, the consequences would have been much more disastrous than if the same thing were to happen today. Only with this understanding of the Roman family can we even slightly appreciate the horror experienced by the children of the senile testator at *Juv. Sat.* 10. 232-9, who has left his entire estate<sup>7</sup> to Phiale, a lowly prostitute who has won him over by her skilful *fellatio*. As a *persona turpis*, Phiale would not have been able to take (*capere*, see 2.5.2.2.) or keep (Cloud 1989(a): 57; cf. 2.2.3. below) her inheritance, so she will not have posed a real threat to the testator's family. This points to an ambiguity in the formal legal structure of Roman society: although freedom of testation was upheld, it was not allowed at the expense of the testator's family. The scenario presented here, however, underlines a universal Roman fear, that a *paterfamilias* might abuse his powers and go against the lineal intrafamilial succession upheld by society by forgetting his duty to his family and disinheriting them in favour of an extraneous heir who has won him over by, e.g., sexual favours (for *captatores* offering their objects sexual favours, cf. 4.3.1.(vi) below).

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<sup>6</sup> The right of the *paterfamilias* to alienate the family property became subject to certain restrictions, see 2.2.2 & 2.2.3 below.

<sup>7</sup> The modern reader should also bear in mind the extent to which adult children in pre-industrial communities, including Rome, were dependent on the use and ultimately the inheritance of parental wealth: modern offspring tend to derive most of their means of support from jobs and are comparatively less dependent on parental wealth. Roman *filiifamilias* of the upper class were usually, except where emancipation had taken place, debarred from engaging in commercial enterprises, and even where they were enabled to do so, any earnings they amassed would accrue to their father's estate (Jolowicz 1972: 119; Gardner 1986: 9). This explains why certain mechanisms (see 2.2.2 & esp. 2.2.3 below) were necessary to ensure that the testator's children received at least their intestate portions in a system of testatory succession which allowed bequests to outsiders to be a common feature of wills.

The Roman *paterfamilias* was the only member of the family who had the capacity for testation (*testamenti factio*),<sup>8</sup> as he was the only one capable of ownership as well as the only one who was *sui iuris* (i.e. not in the *potestas* of someone else, a state known as *alieni iuris*). A father could make a son *sui iuris* through emancipation, and thus give him the capacity to make a will, but the extent to which this procedure was utilised is unknown (Hopkins 1983: 244).

Veyne<sup>9</sup> has wittily remarked that the Romans were divided into two groups, the fortunate and the unfortunate: the fortunate were those whose fathers died when they were still young, leaving them masters of their estates (and of themselves); the unfortunate were those who remained under their fathers' thumbs. Hopkins (1983: 245) suggests that the reciprocal of paternal power was filial hostility,<sup>10</sup> and adds that this may have caused some sons to greet their father's death with ambivalence. It seems that, because of the repressive nature of patriarchal control in Roman society,<sup>11</sup> there must have been a good many frustrated *filiifamilias* around, who would have resented their father's power over not only themselves, but also their children and wives *in manu*. It is possible that universal frustration towards *patresfamilias* may have encouraged a pervasive attitude of negativity towards the older generation in Roman society, running counter to the tradition of *mos maiorum*, and this in turn may have helped justify the exploitation and attempted deception of elderly people that operated in *captatio*.<sup>12</sup>

<sup>8</sup> For regulations as to the capacity to make a will (*testamenti factio*), see 2.5.1. below.

<sup>9</sup> Veyne 1978: 36; Hopkins 1983: 245.

<sup>10</sup> Plešcia (1976: 143f) notes that the theories of Freud and Fromm to explain the universal, innate conflict between fathers and sons presuppose an authoritarian, patriarchal society, such as Rome was. He proposes that this generational conflict, which under normal circumstances is a private concern between parents and sons, in times of economic crisis and upheaval becomes a "national" generational one.

<sup>11</sup> Hallett (1984: 330) notes that Rome was always a gerontocratic as well as a patriarchal society.

<sup>12</sup> We should nevertheless remember that we are examining the structure of the Roman family from a very distant modern perspective: the average Roman *filiusfamilias* may well have accepted his lot unquestioningly; or it may have been that *patria potestas* was much more tolerable in practice, and that emancipation was common. Carcopino (1941: 91) suggested that emancipation was popular, and that relationships between *patres-* and *filiifamilias* were generally good. Barry Baldwin (1976: 221-33) points out that the modern concept of a "generation gap" is not applicable to ancient Roman society, because a limited life expectancy reduced the numbers of the older generation (see 224), and because the young were encumbered with adult responsibilities (e.g. marriage, particularly in the case of girls) from an early age. Thus "differences in years rarely involved a mutual incomprehension of life styles" (see 228). However, a statement by Gaius (I. 55) suggests that the Romans were well aware that the extent of paternal

2.2.2: The rules of disinherison: Although *Juv. Sat.* 10. 232-9 should not be taken at face value, it may be useful for the study of *captatio* to investigate the possibility that a *paterfamilias* with children was able to disinherit his offspring successfully. If his freedom to do so was hampered in some way, this may explain why the criterion of childlessness is prescribed for *captandi* in literature. Although the senile *paterfamilias* at 232f would technically have been able to disinherit all his children, his will was subject to certain formal restrictions with which in his forgetful state he may not have been able to comply: first, the *sui heredes* could not be passed over in silence. Sons *in potestate* had to be instituted or else disinherited by name (*nominatim*), otherwise the will was void; daughters and more distant *sui* were sufficiently disinherited by a general clause of disinherison - if they were not, the will remained valid, but they were entitled to a share of the inheritance.<sup>13</sup> It is probable that a senile testator like the one at *Juv. Sat.* 10. 232f, who is said to have forgotten the names of his slaves ("nec/nomina servorum...agnoscit", 233-4), and who certainly does not recognise his children (cf. 235-6), would also have forgotten his sons' names,<sup>14</sup> with the result that his attempted disinherison of them would have upset the will. However, the tone of *Sat.* 10. 232f implies that the testator, overcome by Phiale's charms, completely forgot that he had children: he thus appears to have omitted rather than attempted to disinherit them.<sup>15</sup>

2.2.3: The *querela inofficiosi testamenti*: In addition, from the middle of the first century B.C., the *sui*, even if disinherited according to the rules of

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control in their society was extraordinary: "...quod ius proprium civium Romanorum est (fere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus)" (This right is one which only Roman citizens have; there are virtually no other peoples who have such power over their sons as we have over ours).

<sup>13</sup> G. II. 123ff; Crook 1967: 122; Watson 1971: 41; Jolowicz 1972: 124, 246; Hopkins 1983: 237 n. 47.

<sup>14</sup> Although we are not told specifically that the testator had sons, the use of the masculine (accusative plural) relative pronoun *quos* at 236 and antecedent *illos* at 235 indicates that at least one of the testator's children was male: "nec [agnoscit] illos/quos genuit, quos eduxit" (235-6). Even if the testator had only had daughters as his *sui* (cf. 2.4.1. n. 40 below), they would still have come in for a share in the inheritance.

<sup>15</sup> We should nevertheless bear in mind that the rules of disinherison were merely restrictions of *form*, and that the testator had the freedom to leave his estate to whomsoever he wished, provided he followed the necessary steps (Crook 1967: 122; Hopkins 1983: 237 n. 47). While the rules of disinherison could act as a restriction in the case of the senile or careless testator, they would not impede the testator who, intent on disinheriting his *sui heredes*, went about this carefully and lawfully. But see 2.2.3.

disinherison outlined above (Watson 1971: 62-3), had recourse to the *querela*<sup>16</sup> *inofficiosi testamenti* (lit. "complaint about an unduteous will"). This was a device aimed at redressing cases where a testator had failed to make provision for someone whom he had a moral duty to include in his will (Watson 1971: 62; Gardner 1983: 183f). This measure was available against the wills of both men and women,<sup>17</sup> and was limited to *sui heredes* (Gardner: *ibid.*). In classical law, these cases were heard before the *centumviri* at Rome (Crook 1967: 122; Watson 1971: 63).

The grounds for breaking a will in terms of the *querela* were not technical, such as the failure to disinherit sons *in potestate* by name (see above), but moral. Prominent in the proceedings of the *querela* was the *color insaniae*, the argument that the testator was insane when he made the will (Watson 1971: 63). It is uncertain whether the *color insaniae* was instrumental in declaring the will void, or whether it was the conclusion drawn only after the *centumviri* had determined the will unduteous, or whether it was merely an argument of the orators and had no direct influence on the jurists' decision (Watson 1971: 63). Watson notes that "if the social climate was hostile to the passing over of near relatives, as it obviously was, the *centumviri* would not find it too difficult to declare that the testator was insane" (*ibid.*). He points out that the *centumviri* saw fit to declare the will of a known lunatic valid because they approved of its provisions (cf. V. Max. 7. 8. 1). Clearly, the label of insanity can be modified according to the norms and expectations of a society.<sup>18</sup>

But can disinherison of children be said to be against the norms of a society that allowed for testate succession, and thus created the possibility to dispose

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<sup>16</sup> The *querela inofficiosi testamenti* is alluded to at V. Max. 7. 7. 2. Watson 1971: 62ff gives its spelling as *querella*, but as all other scholars that I have consulted use the spelling *querela*, I have chosen to adopt this spelling. *Querela* and *querella* seem virtually interchangeable; I have been unable to find any distinction in usage of the two variants (see e. g. Ernout & Meillet: 799; OLD: 1546-7; Lewis & Short: s.v.).

<sup>17</sup> For women as heirs and testators, see 2.5.1.1. & 2.5.2.1. below.

<sup>18</sup> Of interest with regard to the *color insaniae* is the term *dementia*, applied to the senile testator's state at Juv. *Sat.* 10. 233. However, the testator's disinherison of his children and the neglect of the affairs of his estate are the result of the failing of the mind due to advanced age rather than a clinical mental illness, which can strike at any age. Yet in so far as he has ignored or forgotten the expectations of society, his behaviour could be labelled "insane".

of wealth by will? Most sources on Roman testation do give the impression that social feeling was against disinherison of children, unless they were extremely undutiful and unfilial (Crook 1967: 122).<sup>19</sup> Furthermore, there is evidence of overwhelming social approval of the actions of testators who, sometimes unexpectedly, instituted their kin rather than outsiders.<sup>20</sup> The superstructure of Roman society upheld intrafamilial before extrafamilial succession. Nevertheless, the very existence of the *querela inofficiosi testamenti* suggests that a significant minority of Roman testators would have been tempted to leave a substantial part of their estates to extraneous beneficiaries.

But how effective was the *querela* as a mechanism to remedy "undutiful" testation? Although suits against undutiful wills were common, and were probably frequently successful, particularly if brought by the testator's own children,<sup>21</sup> what the successful plaintiff received was merely his (or her)

<sup>19</sup> In addition, the rules of intestacy (cf. G. III. 1ff), which acted in place of a will if none existed, indicate that the testator's own family were not only the preferred heirs, but the people the testator was assumed to have intended to institute. The underlying assumption in the rules of intestacy was that a *paterfamilias* should treat each child fairly (Hopkins 1983: 77).

<sup>20</sup> Pliny at *Ep.* 8. 18. 7 greatly praises the contents of the will of Domitius Tullus, which bequeathed property to all his relatives, including his wife (apparently at the expense of *captatores*, or at least, outsiders who had expected a substantial share in his estate): "Quo laudabilius testamentum est, quod pietas fides pudor scripsit, in quo denique omnibus adfinitatibus pro cuiusque officio gratia relata est, relata et uxori" (The will is all the more praiseworthy because a sense of family duty, loyalty and moral responsibility dictated it, and all relatives, including his wife, received a share in return for their devotion to him). The will was remarkable because during his lifetime Domitius Tullus' behaviour had been most corrupt and undutiful towards his family: he had made his fortune through gaining inheritances, often by exploiting loopholes in the wording of wills, cf. 8. 18. 4, where he had gained an inheritance by evading the conditional emancipation of his brother's daughter in terms of her grandfather Curtilius Mancius's will (Tellegen 1982: 155-6). Pliny comments at the beginning of this letter that the popular saying that a man's character is reflected in his will (*testamenta hominum speculum esse morum*) must therefore be unfounded (see Tellegen 1982: 155, 163).

<sup>21</sup> As close immediate heirs of the testator, the disinherited *liberi* at *Juv. Sat.* 10. 232f would have had an excellent chance of overturning their father's will by means of the *querela*. Ulpian comments that it would be a waste of time for cognates remoter than brothers to claim (D. 5. 2. 1; cf. C. 3. 28. 21). Van Woess (1911: 84-7, quoted at Gardner 1986: 183) suggested that daughters had less chance of success than sons. However, there are a number of recorded cases where daughters were successful with pleas against unduteous wills, and the operation of the *lex Voconia* did not exclude the *querela* (Gardner: *ibid.*). Pliny (*Ep.* 6. 33) pleaded before the *centumviri* on behalf of Attia Viriola, who had been disinherited in favour of a stepmother by her eighty-year-old father, who had died only ten days after remarrying (Gardner 1986: 55, 184-5). The case attracted great attention: according to Pliny, people were hanging over the galleries to follow the proceedings, which were easy to see but difficult to hear ("...etiam ex superiore basilicae parte qua feminae qua viri et audiendi (quod difficile) et (quod facile) visendi studio imminebant");

intestate portion (Crook 1967: 122-3). In addition, if the plaintiff had been given even a quarter of the intestate portion (the Falcidian fourth)<sup>22</sup> in terms of the will, he (or she) was unable to bring a suit of unduteous will (Crook: *ibid.*; Gardner 1986: 184). A *paterfamilias* could therefore evade a suit for disinheritance by granting each of his offspring a quarter of their intestate portions (cf. Ulpian: D. 5. 2. 8. 6; Hopkins 1983: 77). Our senile testator at Juv. *Sat.* 10. 232f, however, is in his condition unlikely to have managed to effect such a technicality.

2.3.: Origins of the Roman will: Before continuing to investigate the place of *captatio* in the context of the law of succession, it may be useful to examine briefly the origin and nature of the will itself.

2.3.1.: Formalism and the Roman will: The Roman will is in origin an aspect of legal formalism, which can be explained as the conviction that legal obligations can be created only by acting in a formal or ritualistic manner. Early Roman law, together with other early legal systems, shared this conviction: the early will was exclusively oral, with specific solemn *formulae*<sup>23</sup> that had to be spoken in order for the will to be legally valid. It appears that at Rome there were originally two types of will, one the *testamentum comitiis calatis*, the other the *testamentum in procinctu* (G. II. 101; Jolowicz 1972: 127).

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fathers, daughters, and even stepmothers were all greatly interested in the outcome ("Magna expectatio patrum, magna filiarum, magna etiam novercarum"). This indicates the great interest accorded to wills and disputes concerning succession in Roman society (cf. n. 3 above): fathers, daughters and step-mothers take especial note because it is a case that has relevance to their own positions in society and in succession and the outcome would have created a precedent for such cases. Although the jury was evenly divided, Attia won. Pliny does not tell us exactly how the decision in Attia's favour was reached, but presumably this was a result of the centumviral procedure that operated when there was an even split among the jury.

<sup>22</sup> See 2.4.2.1. on the *lex Falcidia*.

<sup>23</sup> Kaser (1984: 43) notes that in primitive times the administration of the law was in the hands of the priests, who also supervised religious ritual. He remarks that, like prayers, legal *formulae*, solemnly uttered, were conceived of as magic bonds (i.e. oral charms). This may also account for the significance attached to symbolic behaviour in early Roman law: the *formulae* were accompanied by acts such as the touching with a hand or a wand (*festuca*). Sometimes the *formulae* were emphasised by acts which symbolised the whole transaction (in the manner of *pars pro toto*): e.g. the handing over of a piece of copper in *mancipatio* in place of the entire price.

2.3.2.: The *testamentum comitiis calatis*: This type of will, as its name suggests, was made at a meeting of the *comitia (curiata) calata*, an assembly of Roman citizens, held twice a year for this purpose, under the presidency of a pontiff<sup>24</sup> (Buckland 1966: 283; Gardner 1986: 164). The *testamentum comitiis calatis* was most probably originally created to provide an heir for someone who had no *sui heredes*, and did so by allowing the testator to adopt or adrogate a person (Kaser 1984: 344; Gardner 1986: 164).<sup>25</sup> Hopkins (1983: 236) concludes, from the fact that the *testamentum comitiis calatis* had to be approved<sup>26</sup> by the public assembly, that wills were the exception in early Roman society.<sup>27</sup>

2.3.3.: The *testamentum in procinctu*: This type of will was executed in front of the mobilised troops before they set out to battle (*in procinctu* = "on the battle line"). It was in origin probably an imitation of the *testamentum comitiis calatis*, i.e. an emergency form of the same procedure when no biannual meeting of the *comitia* was imminent.<sup>28</sup> Watson (1971: 10) points out that the *testamentum in procinctu* is historically unrelated to the later *testamentum militis* (soldier's will).<sup>29</sup>

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24 Buckland stresses the religious aspects of the *testamentum comitiis calatis*: the close connection between the Roman *familia* and religious law meant that the transfer of rights and duties to a successor was a matter of public interest. If there was a variation in the established order, i.e. if the *testamentum comitiis calatis* was used to leave property away from the testator's *sui heredes*, as it seems to have been, this act would have to be supervised by public authority.

25 According to this theory, the Roman will would originally have been a mechanism by which adoption could provide heirless people with an "heirship strategy" (see 1.3.2. above).

26 Whether the public assembly voted on the will or merely gave its solemn attestation is disputed: for details, see Buckland 1966: 283.

27 For the question of intestacy vs. testate succession as the norm in later Roman society, see 3.2.3. n. 26.

28 Buckland 1966: 283-4; Kaser 1984: 344; Gardner 1986: 164.

29 See 2.6. below. The language of Aulus Gellius describing the *testamentum in procinctu* (cf. Gel. 15. 27. 3: "viri ad proelium faciendum in aciem vocabantur"; Buckland 1966: 283-4), as well as Cicero's assertion that auspices had been necessary (*N.D.* 2. 3. 9), suggest a formal assembly rather than an informal declaration by a soldier before his comrades. The later *testamentum militis* was, unlike the *testamentum in procinctu*, entirely free from formalities (cf. *Juv. Sat.* 16. 51ff). In addition, while the *testamentum in procinctu* had to be made prior to going off to war, the later soldier's will could be made in the field. Both, however, were invented in response to a situation in which a large group of Roman adult males were about to risk their lives, and for which an emergency type of testation was therefore necessary.

Both early forms of testation however did not meet the needs of the Roman populace: the *testamentum comitiis calatis* could only be made on two occasions in the year, and the *testamentum in procinctu* did not cover civilian emergencies (Buckland 1966: 284; Gardner 1986: 164). Both forms excluded women (Gardner 1986: 165). It is therefore hardly surprising that both these public forms of will were obsolete at least by the end of the Republic, and that they were superseded by a third, private form of will, the *testamentum per aes et libram* (G. II. 102ff; Buckland 1966: 284; Jolowicz 1972: 127).<sup>30</sup>

2.3.4.: The *testamentum per aes et libram*: The *testamentum per aes et libram* (lit. "will by means of copper and scale"), or mancipatory will, originally consisted of a testator on the point of death (G. II. 102: *si subita morte urgebatur*) mancipating<sup>31</sup> his entire *familia* (i.e. his property) to a trusted friend with instructions on how to distribute it after his death. This friend was called the *familiae emptor* ("purchaser of the property"), and originally he held the position of heir (G. II. 103: *heredis locum obtinebat*). The character of the will *per aes et libram* gradually changed: the role of the *familiae emptor* became a formality,<sup>32</sup> and there was a distinction made between him and the heir. The *testamentum per aes et libram* came to be a written<sup>33</sup> will rather than purely a spoken transaction,<sup>34</sup> thus assuring greater secrecy. In

<sup>30</sup> The emergence of the *testamentum per aes et libram* suggests that a large percentage of the Roman people, including women, came to require the opportunity to dispose of wealth; it thus implies that the need for testation had become common in Roman society at an early stage.

<sup>31</sup> *Mancipatio* was the main mode of transfer of ownership (*dominium*) in terms of civil law (*iure civili*): it consisted of a ritual, and originally cash, sale (Thomas 1976: 151-2). It was also a formal mode of conveyance, in that the ceremony itself demonstrated the parties' resolve upon the transfer of ownership (153). Where *mancipatio* was used in the will in classical times, however, this did not constitute a real conveyance (Jolowicz 1972: 243), merely a symbolic one. The *familiae emptor* took no rights and came under no duties by the transaction.

<sup>32</sup> See G. II. 103: the *familiae emptor* was now brought in for form's sake (*dicis gratia*) in imitation of the ancient law (*propter veteris iuris imitationem*).

<sup>33</sup> The use of writing for the recording of private juristic acts was originally foreign to the Romans; the introduction of writing for these acts can be traced to models taken from Greek-Hellenistic culture (Kaser 1984: 51). The Twelve Tables (c. 450 B.C.) prove that there existed at a very early stage legally constituted written acts; the use of writing in legal transactions became more intensive only from the period of the late Republic onwards. In classical law, the form of writing (rather than an oral form) was seldom required: one of the private juristic acts for which it was required was the will, although the oral will still occurred.

<sup>34</sup> The oral procedure of the *testamentum per aes et libram* was still performed, although many testators may have dispensed with this in the classical period. The *formula* to be spoken by the *familiae emptor* was as follows: "Familiam pecuniamque tuam endo mandatela tua (*Seckel & Kuebler: tuam codd.*) custodelaque mea esse aio, eaque quo tu

addition, with the advent of the written will, the contents of the document, rather than the instructions given to the *familiae emptor*, came to be the true will and took effect of their own accord (Buckland 1966: 284).

All three early forms of the will appear to have been originally invented and used to leave wealth away from the agnates where the testator had no offspring, possibly achieving this through adoption or adrogation: in later times, the *testamentum per aes et libram*, the sole surviving form, was also used within the family, even where the testator had *sui heredes*. But, as I shall note, the will did more than appoint an heir (or heirs), and it may have been because of these additional effects, such as the ability to leave legacies to outsiders, that testamentary succession grew.

#### 2.4.: The content and functions of the Roman will:

2.4.1: The institution of the heir: The primary purpose of the Roman will was the appointment of the heir (*heres*) or heirs (*heredes*), a successor (or successors) on whom the rights and liabilities of the deceased should rest as a whole (Buckland 1966: 282; Kaser 1984: 330). This appointment of the heir(s) (*institutio heredis*) was the essence of the will.<sup>35</sup> The heir(s) were either instituted by will or designated by the rules of intestacy,<sup>36</sup> but without an heir no succession took place (Jolowicz 1972: 123; Crook 1967: 120).

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iure testamentum facere possis secundum legem publicam hoc aere esto mihi empta" (I say that your *familia* and *pecunia* are at your orders and in my custody, and be they bought to me with this piece of bronze so that you may make a will in accordance with the *lex publica*). The testator then takes the prepared tablets in hand and says: "Haec ita ut in his tabulis cerisque scripta sunt, ita do ita lego ita testor, itaque vos, Quirites, testimonium mihi perhibetote" (As these things are written in these tablets and wax, so I give, bequeath and attest, and so do you, Roman citizens, bear me witness). This speech by the testator, Gaius tells us, is called the *nuncupatio*; by this the testator confirms generally the specific directions of the will (see G. II. 104; Jolowicz 1972: 242-3).

35 Gaius (II. 229) notes that *testamenta vim ex institutione heredis accipiunt* (wills acquire their effectiveness through the institution of the heir); cf. Thomas 1976: 490 n. 57. Gaius adds that therefore the institution of the heir is understood as the will's cornerstone and foundation: *ob id velut caput et fundamentum intellegitur totius testamenti heredis institutio*. Thus a legacy (see below) that is mentioned before the institution of the heir is ineffective.

36 From the time of the XII Tables, if someone died intestate (i.e. without a will or if his will had failed) the estate was automatically given to his *sui heredes* (for *sui*, see n. 40 below), see G. III. 1: "Intestatorum hereditates ex lege XII tabularum primum ad suos heredes pertinet"; if an estate owner died intestate and without offspring or other *sui heredes*, the agnates automatically inherited, see G. III. 9ff: "Si nullus sit suorum heredum, tunc hereditas pertinet ex...lege XII tabularum ad agnatos"; if there were no agnates, the inheritance went to the clan (*gens*), see G. III. 17: "Si nullus agnatus sit, eadem lex XII

Succession in Roman law was universal succession (*per universitatem*: G. II. 97),<sup>37</sup> a concept which the Romans illustrated with the expression that the heir(s) "stepped into the place of the deceased" (*succedere in locum defuncti*) (Kaser 1984: 330). The Roman concept of an heir was different from the modern one, in that the *heres* assumed the social persona of the deceased, not just his property. Crook (1967: 120) explains: "[the heirs] were not just people to whom you left particular bits of property; the heir was the "universal successor", stepping into almost the entire role of the deceased...".<sup>38</sup>

The heir(s) were also responsible for the liabilities of the estate as well as the care of the family *sacra* (Thomas 1976: 480; Crook 1967: 120; Gardner 1986: 169).<sup>39</sup> Although debts were not strictly part of the inheritance, the liability for them came to be connected with succession at an early stage (Kaser 1984: 331). The heirs' responsibility for the testator's debts sometimes resulted in heirs refusing inheritances. Although *sui heredes*<sup>40</sup> were not technically

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tabularum gentiles ad hereditatem vocat"; for negative attitudes to gentile succession, see Catull. 68. 119f; cf. 1.3.1. n. 29.

37 Kaser (1984: 330) defines succession as the *universal succession* of one or more persons, as heirs, to the sum total of the transmissible rights of a deceased person.

38 In the light of this concept of the heir as universal successor, the reason for the successory rule *nemo pro parte testatus pro parte intestatus decedere potest* (no one can die partly testate, partly intestate), becomes clear: in theory, it would be illogical for an inheritance to be split, just as the universal successor himself could not be split in two. In practice, however, the estate could be divided, and not all of it left to the heir(s) (see 2.4.1.1. & 2.4.2. below).

39 Some scholars (e.g. Thomas 1976: 479) have suggested that the original main purpose of the Roman will may have been not so much to transmit property, but to appoint a successor to continue the *sacra*. However, it should be noted that the transmission of property is always a very significant event in those societies that allow for the accumulation of wealth by the individual (see 1.2). The preservation of familial wealth is as important as, and may be responsible for, the preservation of a family name.

40 A *sui heres* was any person in the *potestas* or *manus* of the deceased who became *sui iuris* at his death. All other *heredes* were *extranei* (Jolowicz 1972: 124). Wives *in manu*, however, usually passed into the guardianship of the deceased's nearest agnate, so in practice did not become independent at the death of the head of the family. The *sui*, including women *in manu*, were also heirs on intestacy. The *sui* were also different from the *extranei heredes* in that, on the death of the testator (their *paterfamilias*) who had instituted them, they automatically became heirs, without having to make an act of entry. Extraneous heirs, by contrast, had to make an act of entry (*aditio*) signifying that they were accepting the inheritance. The *sui* could become heirs without their knowledge and against their will, since they were *sui et necessarii heredes* (G. II. 157): these heirs were called immediate (*sui*) because they were from within the testator's family and were in a sense considered owners even while their father was still alive (*quia domestici heredes sunt et vivo parente quodam modo domini existimantur*); they were called compulsory

capable of refusing the inheritance, because they were in any case automatically heirs on intestacy, even they were allowed the "privilege of abstaining" (*ius abstinendi*) when faced with a *damnosa hereditas* (see e.g. G. II. 158; Gardner 1986: 169). This meant that the liability of the estate was limited to the actual assets, which would be sold (Gardner: *ibid.*).<sup>41</sup>

2.4.1.1.: The proportional division of the estate: Despite the concept of universal succession (see above), the testator could institute as many heirs as he liked, with varying shares in the total estate. It was the traditional practice, borrowed from the system of weights, to regard the whole inheritance as an *as*, of which one or more *unciae* (twelfths) were assigned to each heir. The *unciae* might even be subdivided, the smallest recorded share being the *scriptula*, the twenty-fourth part of an *uncia* (Buckland 1966: 299-300).<sup>42</sup> The division need not be into twelve.<sup>43</sup> the testator might divide his

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(*necessarii*) because they had no choice in the matter (*sive velint sive nolint*) and because they would equally be the heirs on intestacy (*tam ab intestato quam ex testamento heredes fiunt*) (Jolowicz 1972: 124).

41 The problem of an estate that was in debt could also be solved by instituting a slave as heir. Gaius (II. 154) tells us that someone who doubts his solvency (*qui facultates suas susceptas habet*) can institute one of his slaves with a grant of freedom. This slave would be a compulsory (*necessarius*) heir, because the testator's death would make him free whether he liked it or not (see G. II. 153). If the creditor's claims could not be met, it would then be the slave's property and not the testator's (or his family's) which would be sold up, and thus the associated ignominy would fall on the slave rather than the testator or his *sui*. A loyal son and daughter would for the same reason presumably be reluctant to accept the heirship of their father's bankrupt estate (Gardner 1986: 169). One wonders if the same trick might be played on a *captator*: given the common deception of *captatores* by *captandi* in literature, and the frequent mention of inheritances not worth the trouble that pursuing them involved (e.g. Mart. 7.66), might a *captandus* have chosen to institute a *captator* to his bankrupt estate to avoid bringing the embarrassment on his *sui heredes*? Although there is no direct mention of this, it would have been an apt revenge for *captandi*. At Mart. 7. 66. 1-2, the *captator* complains that although he has been instituted heir to his object's entire estate, he feels that he deserved more: "Herodem Fabius Labienum ex asse reliquit/plus meruisse tamen se Labienus ait" (Fabius left Labienus his heir down to the last cent; Labienus however says that he deserved more). Something which might have prevented *captandi* from doing this was the fact that, as *captatores* were usually extraneous heirs, they would have been able to refuse the inheritance (presumably they would check the estate's accounts first), and the estate would then devolve on the testator's *sui*, something which was ideally to be avoided because of the ignominy that would then fall on the family name.

42 The traditional division of the estate as if it were an *as* divided into *unciae* (twelfths) was known as *solemnis assis distributio* (Watson 1971: 47). The various portions of the estate had specific names (Buckland 1966: 299-300); in this chapter the reader will meet a *quadrans* (=3 *unciae*, 1/4 of an *as*), a *quicunx* (=5 *unciae*, 5/12), a *bes* (=8 *unciae*, 2/3), a *dodrans* (=9 *unciae*, 3/4), a *deunx* (11/12), and an *as*. Thus at Mart. 7. 66.1 (see n. 41 above), where the *captator* is said to have been instituted heir *ex asse*, this is probably a reference to the system of *solemnis assis distributio*, meaning that he has received the *as* (i.e. the entire estate) rather than the estate "down to the last cent" (the *as* was the

estate into as many *unciae* as he wished. But as he could not be partly testate, if he gave less than twelve shares the estate would still be divided into as many as he gave; if there was no mention of the shares that the *heredes* were to take, the inheritance was divided equally among them (Buckland 1966: 300; Watson 1971: 47).

Determining the extent to which each heir would share in the inheritance was left to the testator to decide, in accordance with the principle of freedom of testation,<sup>44</sup> and any criteria could be used. The testatrix at *Juv. Sat.* 1. 37-41, who had been courted by *captatores* offering her sexual favours, is imagined as having rather unorthodox, but apt criteria for *solemnis assis distributio*: each of her lovers receives his portion of the estate in proportion to the size of his penis (*partes quisque suas ad mensuram inguinis heres*, 41). Thus Proculeius has an *unciolam* ("a little twelfth"), but the obviously much more generously endowed Gillo has eleven twelfths (*sed Gillo deuncem*, 40). The full flavour of the sexual joke is brought out in the context of the solemn, technical legal conventions of *assis distributio*.

At *Martial* 9. 48 there is another example of *assis distributio* used as the basis of a joke that illustrates a point in the context of *captatio*. The *captator* moans that he is unlikely to receive the quarter of his object's estate that he had been hoping for: "*De quadrante tuo quid sperem, Garrice?*" (Am I to have any hope for a quarter of your estate, Garricus?), 11. The reason for

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smallest Roman coin). The interpretation which takes *ex asse* to refer to the entire estate (i.e. the *as*) rather than to the money that comprised it allows for the possibility that the estate was in debt, since even a *damnosa hereditas* would be divided up into *unciae*, and each of the heirs would be responsible for the portion of the indebted estate that he had been allocated. (Loeb edition translates *heredem ex asse* neutrally as "heir to all his property"; cf. Pott and Wright *ad loc.*, who display a lack of discernment as to the meanings of legacy and *hereditas* by translating *heredem ex asse* as "sole legatee").

43 Tellegen (1982: 166-7) notes that the method of dividing the estate into twelfths is unlikely to have been still in use in Pliny's day; juridical literature, however, continued to speak of shares in an estate as *unciae*, and in a number of letters Pliny expresses *heredis institutiones* in a manner that suggests *unciae* (cf. n. 42 above): see e.g., 2. 16 (*me ex parte instituit heredem*), 6. 33 (where Attia Viriola's stepmother received a sixth part of the estate: *noverca ipsa heres ex parte sexta*), 7. 11 (where Pliny speaks of having received "five-twelfths" of an estate: *quincunce*) and 7. 24 (where Ummidia Quadratilla is said to have left two thirds of her estate to her grandson and the rest (i.e. a third) to her granddaughter: *reliquit heredes ex besse nepotem, ex tertia parte neptem*).

44 There were however, certain restrictions: e.g. close *sui heredes* such as the testator's children had to be given a quarter of their intestate portions in order to prevent them from bringing a *querela inofficiosi testamenti* against the estate (see 2.2.3. above).

the inheritance-hunter's doubt is that he has not had a twelfth (i.e. a morsel) of a boar which he gave the object as a gift.<sup>45</sup> "Nulla/de nostro nobis *uncia* venit apro", 11-12. The use of the terminology of *assis distributio* to compare pieces of boar to portions of an estate results in an immediate and witty analogy of the status of the *captator* in the eyes of his object.

**2.4.2: Legacies:** In Roman law there was a crucial distinction between the institution of the heir (*heres*) and the granting of legacies (*legata*) in the will,<sup>46</sup> although legacies and other effects of the will were dependent ultimately on success of the *heredis institutio*.<sup>47</sup> In general terms, legacy was the leaving of specific things to people, "what testators of every age spend most of their time doing" (Crook 1967: 123).<sup>48</sup> However, under the term *legatum* were included various types of transaction: apart from the leaving of specific possessions to individuals, legal advantages<sup>49</sup> could also be bestowed

<sup>45</sup> Gift-giving (see 4.3.1.(ii)) is one of the *beneficia* of *amicitia* which is commonly used as a method of courtship by the *captatores* of literature, e.g. Juv. *Sat.* 4. 18-21, 5. 97-8, 6. 38-40 etc.

<sup>46</sup> Gaius (II. 191; cf. *Inst.* 2. 20) initially notes that legacies are beyond the scope of his theme ("quae pars iuris extra propositam quidem materiam videtur") which he defines as the rules on the acquisition of entire estates ("...de his iuris figuris, quibus per universitatem res nobis adquiruntur"). He says he will nevertheless go on to discuss legacies because like inheritances which he has previously been discussing, they are made in terms of wills. Gaius' remarks indicate that legacies were regarded in a very different light from *heredis institutio*, i.e. as separate from the will's main purpose.

<sup>47</sup> See e.g. Crook 1967: 120; Jolowicz 1972: 123; Hopkins 1983: 236 n. 46.

<sup>48</sup> *Inst.* 2. 20. 1 says that a legacy is a gift from someone who has died ("Legatum itaque est donatio quaedam a defuncto relicta").

<sup>49</sup> Legacy was already known to compilers of the XII Tables: in the agricultural age, legacy had the important function of making provision for the testator's wife *in manu* and any remaining children excluded from the will (Kaser 1984: 376). From this period onwards legacy was used as a mechanism to give particularly the family of the deceased the *ususfructus* (usufruct: lit. "use and fruits"; cf. Osborn 1983: *s.v.*) of the estate (Kaser: *ibid.*). For example, legacies were often left to the testator's widow, allowing her the right (known as *habitatio*) to occupy the testator's house after his death (Crook 1967: 123). She would also be given a share in the things necessary to maintain her standard of living after her husband's death: the two legacies traditionally granted to widows of the deceased were those of *suppellex* (household goods, e.g. furniture) and *penus* (provisions), the latter being either a fixed amount or a annual allowance (Gardner 1986: 70).

At Lucilius 519f Marx we hear of someone who has left his wife all her ornaments (*omne mundum*) and all her provisions (*penus*): "Legavit quidam uxori mundum omne et penus". Again at Lucilius 1350 Marx we find: "uxori legata penus", although it is uncertain whether this is connected to 519-20 (Marx: *ad loc.*). At 520 Marx Lucilius' narrator asks what is included under the headings of *mundus* and *penus* and what is not: "Quid "mundum" atque "penus", quid non?". Thus it appears to be the narrator's concern to determine what exactly was meant by the testator's terms. This fragment may have occurred in the context of a satire on the obscurities in the expression of a will's terms. The existence of this fragment indicates that Lucilius' subject matter included the

(Kaser 1984: 376). The *Digest* (30. 116) defines legacy as a lessening (*delibatio*) of the inheritance, i.e. as something which decreases the amount that the heir(s) would otherwise take (Jolowicz 1972: 246). The heir(s) singly or jointly inherited the total estate, including the obligation to pay debts and legacies. Legacies were deductions from the heirs' portions payable to outsiders, either immediately or on demand, according to the type of legacy (see G. II. 192-223; Watson 1971: 122-9).<sup>50</sup>

2.4.2.1.: Legacy-hunters or inheritance-hunters? An important question must be asked: was it the aim of the *captatores* of Roman literature to be made heirs or to receive legacies in terms of their objects' wills? To determine this is important for the following reasons: first, it would isolate the goals of *captatio* as it appears in Roman literature, and thus broaden our understanding of its nature; second, it would clarify how the term *captator* is to be translated in English.<sup>51</sup>

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question of legacies and wills, and thus, we can conjecture, possibly contained references to *captatio* as well.

<sup>50</sup> Jolowicz (1972: 246-7) notes that two types of legacy were known to classical law: those *per vindicationem* and those *per damnationem*; Gaius (II. 192ff), however, includes two others called (*legata*) *per praeceptionem* and *sinendi modo*. Briefly, the legacy *per vindicationem* was one which became the property of the legatee *ex iure Quiritium* (by quiritary right) immediately after acceptance of the inheritance (i.e. once the heir accepted his institution). Only the property belonging to the testator himself could be granted by this type of legacy. A legacy *per damnationem* (obligatory legacy) was one according to which the heir(s) were obliged to give property to the legatee (sometimes this could even be the property which at the time of testation or of the testator's death belonged to a third party, in which case the heir(s) would have to purchase the property left with their own funds). This type of legacy was not the property of the legatee when the inheritance was accepted, but still belonged to the heir(s). The legatee then had to bring a suit against the heir(s) in order to acquire the legacy. The *captatores* of our period would have been eligible both for the legacy *per vindicationem* and that *per damnationem*. The two non-classical types of legacy would not have been applicable to our *captatores*, but are nevertheless worth examining briefly: a legacy *sinendi modo*, Gaius tells us (II. 210), is more than a *legatum per vindicationem* but less than one *per damnationem*: a testator could use this type of legacy to bequeath not only his own property, but also that of his heir, whereas by *legatum per vindicationem* he could bequeath only his own property and by the *legatum per damnationem* he could give away the property of any third party (G. II. 210). The legacy *per praeceptionem* apparently (see G. II. 217) only applied to those who had already been instituted heir for some share of the will (this meant that in the post-classical period a beneficiary could sometimes have enjoyed both an inheritance and legacy of the same will, but this would not have been an option for the *captatores* of the early Empire, cf. n. 51 below).

<sup>51</sup> Champlin, at his address (entitled *Captatio*) of the Oxford Philological Society on 30 January 1990, suggested that the term *captator* is to be translated preferably as *inheritance-hunter* rather than as *legacy-hunter* (cf. Champlin 1989: 212), as it has usually been rendered by English-speaking scholars. The term *legacy* has a broader application in English (see *OED* vol. 8. 803) than does *legatum* in Latin: *legacy* is loosely applied by modern English-speakers to any type of inheritance, and can also be used metaphorically

A common assumption made by scholars is that *captatores* were legacy-hunters. It is certainly true that legacies were traditionally granted by testators to outsiders to express gratitude. Gaius (II. 224) relates that at one time testators were permitted to commit their entire estates to legacies and manumissions, with the result that the heir would be left with nothing but "the empty name of heir" (*inane nomen heredis*). On several occasions during the Republic it was found necessary to legislate in order to limit the proportion of legacies charged on an estate.

2.4.2.1.(i): The Furian, Voconian & Falcidian restrictions on legacies: The first law to attempt to restrict the testator's right<sup>52</sup> to leave a large proportion

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and in a non-legal sense, to approximate *heritage*, e.g. "a legacy of the past". In legal Latin, *legatum* has the specific meaning of a bequest charged on the estate (see *TLL* 7,2. 8. 1121. 80 - 1122. 72: *technice in sermone iuris*; only later was it used in a metaphoric sense by Christian writers: 1122. 73ff). *Legare* (*TLL* 7,2. 7. 1116-7) also appears to have meant specifically a legacy charged to the heir(s) either by the will itself or in a codicil, and does not appear to be confused with *heredis institutio*: Cic. *Caec.* 11; Julian. *D.* 35. 2. 87. 4; Quint. *Inst.* 7. 9. 5.; Javol. *D.* 29. 4. 11; Labeo *D.* 18. 4. 24. *Hereditas* technically means the heir's portion of the whole estate and strictly does not include legacies, according to Cicero's definition (*Top.* 6. 29; *TLL* 6,3. 14. 2630ff; cf. Watson 1971: 1): "Hereditas est pecunia quae morte alicuius ad quempiam pervenit iure...nec ea aut legata testamento aut possessione retenta...". But as Watson (*ibid.*; cf. *TLL* 6,3. 14. 2639: *in usu vulgari vel familiari*) concedes, this definition contrasts with the way in which the term *hereditas* is used in a number of sources. e.g. in the wording of the *lex Falcidia*, cf. G. II. 227: "ut heres quartam partem hereditatis habeat" (here *hereditatis* as partitive genitive obviously refers to the entire estate left, including that absorbed by legacies, rather than just the heir's portion). *Hereditas* (its closest English equivalent being *inheritance*: see *OED* vol.7: 970) has thus a broader application than *legatum* (*legacy*), both in a technical legal sense and a transferred one (cf. *TLL* 6,3. 14. 2640: *sensu translato...i.q. lucrum, commodum, insperata fortuna* etc.; 2642: *metonymico*: i.q. *heredes, posteritas* etc.).

Unless it can be proved that *captatores* aimed primarily and almost exclusively at legacies rather than at institutions as heir, the term *inheritance-hunter* is the preferable translation of *captator*. The term *captator* itself (lit. someone who catches at, hunts after something) is frustratingly general as it does not tell us what is hunted. But again the term's imprecise nature may indicate that *captatio* was not restricted only to either legacies or *heredis institutio*: in different circumstances different *captatores* may have aimed for either (cf. Gaius *D.* 30. 64: "captatoriae scripturae...neque in hereditatibus neque in legatis valent") or would aim for an inheritance but be content to receive a legacy if it were offered. *Captatores* may not have been only legacy- or inheritance-hunters; in some cases they may have sought bequests by means of *fideicommissa* (trusts) or codicils (see 2.4.3.ff). Again, many *captatores* may not have been too choosy about the exact technical nature of the bequests they received, as long as they received something for their pains, the more the better. For alternate views, e.g. Tellegen's, see 2.4.2.1.(ii,b) below.

<sup>52</sup> Gaius tells us (II. 224) that the original right of the testator to use up his entire estate in legacies and manumissions was based on the freedom of testation thought to have been laid down in the Twelve tables: "idque lex XII tabularum permittere videbatur, qua

of legacies was the *lex Furia* (c. 204-169 B.C.: Kaser 1984: 381). This law prohibited beneficiaries of a will, apart from certain *exceptae personae*, to accept (*capere*, G. II. 225) legacies of more than 1,000 *asses* (Watson 1971: 163; Kaser 1984: 381). However, the intention of the *lex Furia* appears to have been frustrated, as it did not stop a testator from leaving numerous legacies none worth more than 1,000 *asses* (G. II. 225; Watson 1971: 164).<sup>53</sup>

In 169 B.C. the *lex Voconia* was passed.<sup>54</sup> Although its most important provision was arguably the restriction on women as heirs,<sup>55</sup> it also provided that no one was to take by legacy more than the heir(s) took (G. II. 226; Watson 1971: 167; Kaser 1984: 381). A substantial body of modern legal scholars (e.g. Steinwenter *RE* 12. 2423; Kaser 1984: 381) have held that the latter provision of the *lex Voconia* applied, like the main provision, to the estates of citizens of the first census class (Watson 1971: 167).<sup>56</sup> Gaius suggests that the *lex Voconia*, like the *lex Furia*, failed in its purpose because of an almost identical fault.<sup>57</sup> By distributing his estate among many

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cavetur, ut quod quisque de re sua testatus esset, id ratum haberetur, his verbis: VTI LEGASSIT (*Seckel & Kuebler*: legasset *Veronensis*) SVAE REI (*Seckel & Kuebler*: res *Veronensis*), ITA IUS ESTO" (This was believed to have been permitted in the Twelve tables, which provide that whatever a man has laid down in his will regarding his estate should be ratified, as follows: As a man bequeaths his own, so let the law be).

53 Gaius (II. 225) explains that the *lex Furia* failed to achieve its intent ("..sed [et] haec lex non perfecit, quod voluit"), by giving the example that someone who had an estate worth 5,000 *asses* could still, without falling foul of the *lex Furia*, use up his whole estate by leaving five legacies of 1,000 each.

54 Gaius' wording at II. 226: "*Ideo* postea lata est *lex Voconia*..." (And so later the Voconian act was passed...), straight after he has related the failure of the *lex Furia* (II. 225) suggests that the *lex Voconia* was passed as a result of the failure of the Furian act (Watson 1971: 168-9).

55 According to the *lex Voconia*, women could not be appointed heirs to testators who had been registered in the first census class (i.e. those possessing estates worth more than either 100,000 *asses* or sesterces - it is not clear which; Watson 1971: 167); see 2.5.2.1. below.

56 The authority for this view is apparently Cicero *Ver.* 2. 1. 43/110 (see Watson 1971: 167ff): Cicero has already criticised Verres (who approved of the *lex Voconia*) for extending the scope of the Voconian act (*Ver.* 2. 1. 42/107). He now taunts the opposition by asking why Verres does not extend protection to the heirs when more is given by legacy than they receive, a state of affairs permitted by the *lex Voconia* when the testator is not registered at the census: "Quid, si plus legarit quam ad heredem heredesve perveniat? quod per legem Voconiam ei qui census non sit licet...". Watson (1971: 168), examining the points in favour of this argument, concedes that the text seems to support the view held by Kaser *et al.*, that the provision on legacies in the Voconian act applied only to those testators in the first census group. But he notes that Gaius is hostile to this interpretation, since his wording closely links the failure of the *lex Furia* with the Voconian provision concerning legacies: "*Ideo*..." (II. 226).

57 "...sed tamen fere vitium simile nascebatur" (*Seckel & Kuebler*: nascebantur *Veronensis*). This again indicates that Gaius sees the purpose of the *lex Voconia* as being virtually the

individual legatees a testator could leave very little for the heir, so that it would not be worth the heir's while to take on the burdens of the estate.<sup>58</sup>

The third act to attempt to restrict legacies in wills was the *lex Falcidia* of 40 B.C., according to which it was unlawful for the testator to dispose of more than nine-twelfths (*ne plus...quam dodrantem*)<sup>59</sup> of the estate in legacies: thus in effect the heir was assured of at least a quarter of the estate (the *quarta Falcidia*). Where less was left to the heir, all legacies were cut down *pro rata* (G. II. 227; Watson 1971: 170; Kaser 1984: 381).<sup>60</sup>

Whatever the motives<sup>61</sup> of the Republican restrictions on legacies, that they were passed at all must suggest that in this period already a significant proportion of testators were leaving substantial sums away from their heirs by way of legacy. Most legatees would have been extraneous,<sup>62</sup> possibly the

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same as the *lex Furia*. However, I disagree with Watson (1971: 168-9) who thinks that as Gaius used an example of an estate worth 5,000 *asses* at II. 225 with regard to the failure of the *lex Furia*, this class of estate is also meant by Gaius to be relevant to the *lex Voconia*. At II. 225 Gaius makes it clear that he is discussing an estate of 5,000 *asses* by way of example (*verbi gratia*). He does not give any concrete example when discussing the failure on similar grounds of the *lex Voconia* at II. 226. Gaius neither proves nor disproves the application of the *lex Voconia* to the first census class only. Possibly all these laws which attempted to restrict legacies were only really applicable to the large estates, where the use and abuse of testatory freedom is likely to have been more widespread. Also, the extent of testacy in Roman society, particularly among those outside the first census class has been hotly debated in recent years: e.g. Daube (1965: 253ff) has suggested that only the wealthiest sectors tended to make wills (for the Crook vs. Daube debate on intestacy in Roman society, see 3.2.3. n. 26).

58 G. II. 226: "nam in multas legatariorum personas distributo patrimonio poterat testator adeo heredi minimum relinquere, ut non expediret heredi huius lucri gratia totius hereditatis onera sustinere".

59 For the *dodrans* (= 9 *unciae*), see n. 42 above.

60 G. II. 227: "Lata est itaque lex Falcidia, qua cautum est, ne plus ei legare liceat quam dodrantem: itaque necesse est, ut heres quartam partem hereditatis habeat".

61 Watson (1971: 171) notes that in the past scholars have suggested a political motive for the *lex Falcidia*, i.e. to raise funds for the war being waged by Antony and Octavian against Pompey: Appian *BC* 5. 8. 67 mentions an unpopular act, eventually expunged by the people, that was passed in 40 B.C. which imposed taxes on wills. We must assume that this plebiscite was not the Falcidian act, if we accept Seckel and Kuebler's emendation of a corrupt text of Gaius (II. 227): "et hoc nunc (*Seckel & Kuebler: nec Veronensis*) iure utimur." But even were there a political motive, for our purposes the fact that the funds were to be raised (presumably) by taxing legacies indicates that legacies must have taken up a large proportion of wills in this period.

62 Extraneous heirs were more likely to receive legacies than institutions as heir which, because of the social, religious and family responsibilities involved in assuming the persona of the deceased, would usually devolve on the testator's *sui heredes*. The very term *sui heredes* indicates the expectation that members of the testator's family would be

testators' *amici*,<sup>63</sup> whom they felt obliged to remember in their wills. Some of the extraneous beneficiaries may actively have courted the legacies: a large sum of money without any of the obligations of an heir was an attractive prospect. However, after the *lex Falcidia* had effectively restricted the proportions of legacies, it might in some instances have been more beneficial for *extranei* to become heirs to people who were without immediate heirs (i.e. the *orbi*). But if, as has been suggested,<sup>64</sup> the provision of the *Lex Furia* limiting legacies to 1,000 *asses* was overruled by subsequent legislation, at least for the large estates, then legacies would remain a prospect for *captatores*.

2.4.2.1.(ii.a): Evidence of inheritance-hunters: Evidence from the literary portrayal of *captatio* supplements and even seems to contradict the clues provided by the legal sources: e.g. as I have shown,<sup>65</sup> the person who was instituted heir had to bear the responsibilities of the estate, which were often burdensome and financially taxing.<sup>66</sup> As a result it might be expected that becoming heir would not have been as desirable as receiving property without any obligations;<sup>67</sup> yet frequently in satire we read that the *captator* is looking forward to being or has been made heir (*heres*) to the object's estate.<sup>68</sup>

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63 instituted heirs. Although it was technically possible for a *paterfamilias* to disinherit his offspring (for the rules of disinheritance, see 2.2.2. above), this was not approved by society. On *amicitia* in Roman society and its relation to *captatio*, see 4.3. below.

64 Watson (1971: 169) concedes that it is likely that the rigid system of the *lex Furia* which limited the amount of legacies to 1,000 *asses* each was superseded by the more flexible *lex Voconia*: the limit of 1,000 *asses*, he suggests, might also have been made unacceptable due to the debasement of the *as* (*ibid.*: n. 3).

65 See 2.4.1. above on the *heres institutus* and his obligations.

66 Even the provision of the *lex Falcidia*, that the heir had to receive at least a quarter of the estate (see 2.4.2.1.(i) above), could not always ensure that the *heres* would find taking up the inheritance worth his while; a quarter of some estates could not have been very much.

67 See 1.1. n. 2 above.

68 See, e.g., Hor. *Sat.* 2. 5. 54, where the *captator* is to take a peek at the will to see whether he has been instituted sole heir or co-heir with many: "...solus multisne coheres"; cf. 48-9: "secundus/heres"; cf. 106-7: "si quis/coheredum...". Likewise Martial's frequently disappointed *captatores* are mostly disappointed in their quests for *heredis institutio*, or so it seems from the use of the term *heres*: see Mart. 7. 66: "*Heredem Fabius Labienum ex asse reliquit*"; cf. 12. 73: "*Heredem tibi me, Catulle, dicis*"; 12. 48: "...heres/vis scribi propter quinque Lucrina...", etc. It appears that Juvenal's *captatores* also aim at being made heirs, e.g. *Sat.* 1. 41: "ad mensuram inguinis heres". Thus unless the term *heres* is a legal term that is used loosely, something which educated Latin authors (whose education was largely rhetorical and legal) would have been less susceptible to than their modern counterparts, in spite of the former's literary motivations for using legal terminology, it appears from these texts that *heredis institutiones* were the goal of the *captatores* as presented in literature.

2.4.2.1.(ii.b): Evidence of legacy-hunters: Yet legacies also are mentioned as a goal in the literary presentation of *captatio*, albeit less frequently than becoming heir.<sup>69</sup> Legacies were also traditionally given to outsiders whom the testator felt obligated to remember in his will, public sanction decreeing that the institution of heir should go to a member of his own family, particularly his children.<sup>70</sup> Since most of the *captatores* that we meet in Roman literature are *extranei*,<sup>71</sup> it would seem likely that they stood a better chance of gaining legacies from the wills of wealthy Romans than institutions as heir. As we have seen, the Furian, Voconian and Falcidian laws, which attempted to restrict the proportion of legacies that consumed estates,<sup>72</sup>

<sup>69</sup> For the specific use of *legare* to apply to legacies, cf. *TLL* 7,2. 7. 1116-7; cf n. 51 above. For examples of its use in literature, see e.g. Hor. *Sat.* 2. 5. 69: "nil sibi *legatum* praeter plorare suisque"; Mart. 9. 9. 1: "Nil tibi *legavit* Fabius, Bithynice..." - here *legare* is used in such a negative context that this could be interpreted as: "Fabius left you nothing in his will, Bithynicus, not even a legacy...", implying that heirship would have been preferable. However, at the end of the poem the narrator consoles Bithynicus with the thought that, despite leaving nothing, in real terms the testator has left him more than anyone because from now on he would be saving the annual sums that he previously spent on this object. Here the term *legavit* is used again (4): "Annuā *legavit* milia sena tibi...". That *legavit* is again used here in a positive sense, without any mention of an heirship being enviable or necessarily more lucrative, suggests that a legacy could be a financially rewarding draw-card in an estate, and may have been what Bithynicus was originally aiming for. Also at Petronius *Satyrice* 141 legacies are the reward promised to the *captatores* in a will (probably Eumolpus') if they can stomach the bizarre condition prescribed by the testator (cf. 2.4.4.1. below): "Omnes, qui in testamento meo *legata* habent..."

<sup>70</sup> Pliny *Ep.* 7. 24 rejoices in the will of Ummidia Quadratilla, the theatrical and eccentric grandmother of Pliny's relatively conservative friend Ummidius Quadratus: Pliny tells us that she left a most honourable will (*decessit honestissimo testamento*), explaining that she instituted her grandson heir to two-thirds of her estate and left her granddaughter the remaining third (*reliquit heredes ex besse nepotem, ex tertia parte neptem*; for proportional division of the estate, see 2.4.1.1.). Pliny seems equally delighted that Quadratilla left only very small legacies to a number of *claqueurs* who used to flatter her whenever her troupe of pantomime *artistes* had appeared in the theatre, 7. 24. 7: "qui nunc exiguissima *legata*, theatralis operae corollarium, accipient ab herede, qui non spectabat" (But now they will receive very small legacies, as payment for their services in the theatre, from an heir who never watched the shows). Ummidius Quadratus is the heir *qui non spectabat* (7. 24. 7). For legacies charged on the estate and payable by the heir(s) to the legatees after the heirs' acceptance of the inheritance (*legatum per damnationem*), see n. 50 above. The case of Ummidia Quadratilla indicates not only that institution of family members as one's heirs and leaving of legacies to outsiders was the standard (and expected) practice, but also that small legacies could be a means of acknowledging obligations for *opera* but at the same time not using up too much of the estate on (sometimes rather irritating) clients.

<sup>71</sup> See 1.2. n. 6.

<sup>72</sup> Possibly the Republican legislation which attempted to restrict legacies was not merely ensuring that a substantial portion of estates was not left away from the testator's *sui heredes*, but was also attempting to ensure that wills did not fail, which would happen if the heir thought it not worth his while to accept his institution. What may have precipitated the legislation was the increase in the number of heirs refusing to accept the responsibilities of an *inane nomen heredis* and thus causing wills to fail, rather than

suggest that by the time of the late Republic large portions of a substantial number of wills had been going to outside beneficiaries in the form of legacies.<sup>73</sup> But were legacies still as beneficial to outsiders after this legislation had restricted them?

Tellegen (1982: 57f), commenting on Pliny's presentation of *captatio*, suggests that *captatores* were intent on gaining the easiest possible advantage from a will: thus, he points out, becoming heir was not their aim because of the obligations (often including debts)<sup>74</sup> involved. He suggests that *captatores* were aiming for legacies rather than *heredis institutiones*. Tellegen explains that this is why Roman testators went to great lengths to hide the middle section of the written will,<sup>75</sup> which contained the instructions on the distribution of legacies, but were happy to allow the first two pages, which

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concern about extraneous beneficiaries (see G. II. 224, who also states rather simplistically that as a result many people died intestate: "qui scripti heredes erant, ab hereditate se abstinebant, et idcirco plerique intestati moriebantur"). The *quarta Falcidia* (see 2.4.2.1.(i) above) seems to have stemmed this tide by assuring the heir of at least a quarter of the entire estate. This suggests that the *lex Falcidia* may also have been applicable only to the large estates, as a quarter of a large estate, but probably not of a smaller one, would have been enough to ensure the heir's acceptance, see n. 66.

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See 2.4.2.1.(i) above; see also Hopkins 1983: 237.

74

See 2.4.1.

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Tellegen (1982: 56-7) supports his argument with reference to the way in which the extant will of one Antonius Silvanus was closed (c. 142 A.D.: *FIRA* III. 129ff): it consisted of five wax tablets which were joined at the back by copper hinges (enabling the document to be open and closed like the pages of a book); there were holes pierced through all the tablets and a cord was drawn through the holes; the ends of the cord were sealed by witnesses; there were other holes which passed through the three inner tablets only and passed halfway through the two outer tablets (Tellegen notes that the holes were probably for wooden pegs to keep the tablets from sliding over one another and erasing the text). This meant that the innermost tablets could be closed off with the wooden pegs after they had been inscribed; the outer tablets could be opened as long as the cord with the seals had not been inserted. Tellegen (54) says that this is the sole extant example of a will in its original form, consisting of tablets fixed together.

contained the testator's name and according to some sources<sup>76</sup> the name(s) of the heir(s) as well, to be viewed by witnesses and others.<sup>77</sup>

2.4.2.1 (ii,c): Arguments for inheritance-hunting & conclusions: Although Tellegen's arguments are convincing, it is my belief that the *captatores* as presented in Roman literature aimed primarily at becoming heir, ideally heir to the entire estate,<sup>78</sup> with no co-heirs and no legatees to diminish the *hereditas*. I do not mean that the *captatores* were averse to receiving legacies; on the contrary, they welcomed them and in some circumstances may specifically have courted them.<sup>79</sup> I am considering here not what most *captatores* may actually have received, but what their goal was: as they appear in Roman literature, *captatores* are first and foremost courting *heredis institutio*.

<sup>76</sup> From Suet. *Nero* 17, we learn that the *senatusconsultum Neronianum* which was devised "against forgers" (*adversus falsarios...repertum*), provided in its second clause (which together with the third dealt specifically with wills) that the first two tablets of a written testament, after only the name of the testator had been inscribed but which were otherwise left empty, could be shown to witnesses (*cautum ut testamentis primae duae cerae testatorum modo nomine inscripto vacuae signaturis obstenderentur*), see Tellegen 1982: 53. Tellegen (*id.*: 55) suggests that it was customary not only to put the testator's name on the first two pages, but also the beginning of the will's content, i.e. the institution of the heir. According to Tellegen, Antonius Silvanus' will (see above) is surprising in that it complies with the rules of Roman succession in every respect, except one: on the first two pages one finds not only the name of the testator but also the *institutio heredis*, whereas the *sc. Neronianum* would suggest a different format.

<sup>77</sup> Tellegen (1982: 56) refers to Hor. *Sat.* 2. 5. 53-5, which confirms that the institution of heirs was able to be seen in the second line of the first page: "sic tamen ut limis rapias quid prima secundo/cera velit versu; solus multisne coheres,/veloci percurre oculo". We should nevertheless bear in mind that Horace was writing during the early Principate, before the *sc. Neronianum*, so that the scenario which he imagines here might have not have been so common after Nero's time. It is true that the will of Antonius Silvanus is post-Neronian and yet still has the *heredis institutio* in view, but it is possible that it was an exception in this respect. In addition, it may have been that the provisions of the *sc. Neronianum* (like the provisions for the protection of *impuberes sui*, see 2.4.4.3. below) were not strict rules, but were merely options for the testator who wanted to keep his will as secret as possible. The testator was *obliged* (cf. Tellegen 1982: 55) to show the first two tablets to the witnesses, but presumably he could show them the whole will if he so wished by exercising his right of testamentary freedom.

<sup>78</sup> See e.g. Mart. 7. 66: "Heredem ex asse..."; Juv. *Sat.* 12. 124-5: "omnia soli/forsan Pacuvio breviter dabit". After the Falcidian legislation, which provided that the heir was to take at least one quarter of the estate, one would have to be heir in order to inherit an entire estate.

<sup>79</sup> E.g. if they were *captatrices* rather than *captatores*, as women in terms of the *lex Voconia* they would have been barred from being instituted heirs to the wealthiest citizens but would still have been eligible for legacies (see G. II. 274; Kaser 1984: 352).

The reasons for this opinion are as follows: first, it is a commonplace of the portrayal of *captatio* in Roman satirical works that the *captatores* specifically court objects that are old, wealthy, sickly and, most significantly, childless (*orbi*).<sup>80</sup> The *captatores* of literature are wary of all those who have children as their *sui heredes*, even when these people seem to have disinherited their children.<sup>81</sup> Why was it so important to the *captatores* that their objects should have no children? The obvious explanation is that children were their parents' immediate (*sui*) and expected heirs.<sup>82</sup> As such, they constituted a threat to all outsiders who had a claim to the testator's wealth through the links of the social network of *amicitia*, but especially to those who aimed to become the heirs of the testators. Offspring would at most limit the amount

80 See e.g. Hor. *Sat.* 2. 5. 28f, where the would-be *captator* Ulysses is strongly advised to confine his attentions to wealthy people without children: "vivet uter locuples sine gnatis..."; and is warned to avoid someone who has a son or a fertile wife: "sperne, domi si gnatus erit fecundave coniunx", 31; Petronius *Satyrica* 116ff, where people with children are said to be social pariahs in the *captatio*-mad society of Croton: "...quisquis suos heredes habet...omnibus prohibetur commodis, inter ignominios latitat" (note the reference to the fact that children comprise a man's *sui heredes*); Juv. *Sat.* 5. 137ff, where the man who wishes to advance socially is advised not to have a "little Aeneas" (a witty parody of Verg. *Aen.* 4. 328-9) playing in his halls, nor a little daughter sweeter than him: "dominus tamen et domini rex/si vis tunc fieri, nullus tibi parvulus aula/luserit Aeneas nec filia dulcior illo", 137-9; *Sat.* 6. 38f, where Ursidius, who plans to get married and raise an heir ("tollere dulcem/cogitat heredem", 38-9) is teased that he will from now on have to forgo the gifts of the *captatores*; likewise, at *Sat.* 12. 93-5, the narrator assures his addressee, Corvinus, that in setting up altars for his friend Catullus who has just escaped a shipwreck he is not practising *captatio*, because Catullus has three children, i.e. "three little heirs": "neu suspecta tibi sint haec, Corvine, Catullus,/pro cuius reditu tot pono altaria, parvos/tres habet heredes".

81 At Seneca *Marc.* 19. 2 we hear that childlessness could be so advantageous in Roman society that people actually pretended to disown their children in order to benefit from the advantages of *orbitas*: "in civitate nostra plus gratiae orbitas confert quam eripit, adeoque senectutem solitudo, quae solebat destruere, ad potentiam ducit, ut quidam odia filiorum simulent et liberos eiurent, orbitatem manu faciant" (in this city of ours childlessness bestows more influence than it takes away, to the extent where the loneliness that used to destroy the old now leads to power, with the result that some people pretend to hate their sons and disown their children, and (so) manufacture *orbitas*). Similar scenarios are to be found in the presentation of *captatio* in the works of Lucian, a Greek writer of the Second Sophistic, who regards *captatio* as a Roman phenomenon (see e.g. *Nigrinus* 17), but nevertheless portrays it in a Greek context (all his protagonists in the presentation of inheritance-hunting in e.g. *Dial. Mort.* have Greek names): at *Dial. Mort.* 351 [or 16 (6)] we learn that parents who wish to benefit from the sexual attentions of the inheritance-hunters pretend to hate their children: "ἦν καὶ τύχῳσι παῖδας ἔχοντες μισεῖν αὐτοὺς πλάττονται, ὡς καὶ αὐτοὶ ἔραστὰς ἔχουσιν". However, when it comes to the reading of the will, the children and the natural course of succession "as is only right" prevail over all the *captatores*: "... ὁ δὲ παῖς καὶ ἡ φύσις ὡσπερ ἔστι δίκαιον κρατοῦσι πάντων". This could serve as a lesson to *captatores*: even where the objects appear to have disowned their offspring, it was still highly likely that they would re-institute them in the end, cf. Lucian *Abdicatus* 5.

82 See G. II. 156: "Sui autem et (*Seckel & Kuebler*: ut *Veronensis*) necessarii heredes sunt velut filius filiae...qui...in potestate morientis fuerunt".

that legatees could expect from the estate, but as *sui heredes* children would eclipse any outsiders who intended to be instituted heir (cf. 3.2.1.).

Second, it is important to consider what could be gained by people who were instituted heir or granted legacies in the wills of others. This question may at first sight seem redundant: naturally they stood to gain money or property or both. These are assumed to have been the main aims of the *captatores* as we find them in Latin literature. But it appears that gaining inheritances may also have been a means of social-climbing in Roman society.<sup>83</sup> Being instituted heir to the estate of another was a great honour, an honour which would be noted by one's contemporaries.<sup>84</sup> There can be no doubt that, despite the accompanying obligations,<sup>85</sup> an institution as heir would be a greater honour than receiving a legacy, although that too would be a desirable honour.<sup>86</sup>

But although the *captatores* of literature should therefore be called inheritance-hunters rather than legacy-hunters, the peculiarities of Roman society, especially the conventions of *amicitia* (see 4.3.2.), may have meant that in "reality" most *extranei*, including *captatores*, were recipients of legacies more frequently than they were instituted heir to an *amicus*. This may have been one of the chief ways in which the literary portrayal of *captatio* distorts the "realities" of Roman society. The exceptions would have occurred where the *amicus* was childless and preferred to institute outsiders rather than have

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83 See Juv. *Sat.* 1. 37ff, esp. 38-9: "...in caelum quos evehit optima summi/nunc via processus...", where *captatio* is grudgingly acknowledged by the narrator as the road to success.

84 Champlin (1989: 198-215) emphasises the obsession of propertied and educated Romans with will-making. Great significance was attached to the will as the final revelation of the testator's true feelings (1989: 202). For both heirs and legatees honour rested "on the simple theory that merit was being publicly rewarded" (1989: 204). Romans, with their great interest in wills, inevitably talked about them (1989: 207f). Wills were public documents (1989: 198). Therefore if someone was instituted heir to another, especially if he were an extraneous *heres*, knowledge of this would not have eluded his fellows.

85 An heir could however avoid an insolvent inheritance by refusing it if he were an *extraneus heres* and by abstaining from it if he were a *suus heres* (Kaser 1984: 371). Legatees were also not completely absolved from the responsibility for debts: if the creditors were unsatisfied by the heir or if he became insolvent, they had recourse to the legatees (Kaser 1984: 372).

86 Champlin also notes (1989: 203) that the greatest honour (*honor*) as well as the greatest burden for the beneficiaries lay in being instituted heir, particularly if the *institutus* was not a *suus heres*.

the inheritance devolve on his agnates. Therefore the existence of *captatio*, as portrayed in literature, as a social phenomenon is dependent on *inter alia* the existence of a substantial population of childless testators in Roman society (see 3.2.ff).

2.4.3: Fideicommissa and codicils:

2.4.3.1.: Fideicommissa: Institutions as heir and legacies were not the only means by which property could be left: another way of transmitting property was by way of *fideicommissa* (trusts). *Fideicommissa* were informal requests made by a property-owner to his heir(s) whom he had instituted or who would become his heir(s) on intestacy, or to legatees in his will, asking them to transfer what they had received to a third party.<sup>87</sup> Trusts could be made for whole estates (see G. II. 247f) or for specific things (G. II. 260). Scholars seem to agree that the original purpose of *fideicommissa* was probably to evade the restrictions placed on legacies.<sup>88</sup> As such, *fideicommissa* may have been an option for those *captatores* or *captatrices* who were otherwise barred from *heredis institutio* and legacies.

2.4.3.2: Codicils: Like *fideicommissa*, codicils (*codicilli*) were another means of distributing property; before Augustus' time however, they had no legal effect.<sup>89</sup> Codicils, defined (Kaser 1984: 353) as unilateral dispositions by last

<sup>87</sup> Crook 1967: 125; Thomas 1976: 511; Kaser 1984: 381ff.

<sup>88</sup> See e.g. Kaser (1984: 382): this would give the testator the opportunity to confer benefits which he could not give as legacies, e.g. such as would violate the *lex Furia* or *Voconia* etc.; cf. Thomas 1976: 511; Watson (1971: 35) notes that testators must have left bequests in the form of *fideicommissa*, even though until the time of Augustus these were not legally binding, because the intended beneficiaries were legally unable to receive an *hereditas* or a *legatum*: *fideicommissa* were therefore an attempt to circumvent or evade the law. But, as Watson (*ibid.*) observes, the person who seeks to evade the law, even if he is not doing anything strictly illegal, normally tries to avoid publicity. Why then did the testator put the *fideicommissum* in a document as public as a will, and not just give separate instructions to the heir(s) or legatees? Watson (*ibid.*) suggests that the only logical reason for this must be that the testator did not trust the heir to act morally and so required the public nature of the will in order to bring social pressure to bear on the heir or legatee. The Romans were realistic at predicting what otherwise trustworthy people might do when faced with the prospect of a large sum of money within their reach, as we shall see with regard to the rules of *substitutio pupillaris* (see 2.4.4.3. below).

<sup>89</sup> *Inst.* 2. 25: "Ante Augusti tempora constat ius codicillorum non fuisse..."; Augustus was apparently (*ibid.*) urged by the jurist Trebatius to make codicils valid on the grounds that they would be useful to people on long and far-flung journeys: "utilissimum et necessarium hoc civibus esse propter magnas et longas peregrinationes". *Inst.* 2. 25 goes on to relate that, since even the famous jurist Labeo made codicils, from that time on no one doubted their legal effect.

will other than by the institution of heirs, developed from letters in which a testator requested his heir(s) or other beneficiaries under the will to perform a *fideicommissum* (Kaser: *ibid.*). Thomas (1976: 514) points out that while in modern English law a codicil is an addition to a will and thus part of an existing will, in Roman law codicils could exist independently of a will, in which case they were called unconfirmed.<sup>90</sup> Codicils would have been useful for *captatores* because they allowed the testator to make additions to the will at any time without performing another complete testamentary procedure. *Captatores*, like the infamous Regulus at Pliny *Ep.* 2. 20 are presented as courting their objects on their death-beds (cf. Seneca *Ep.* 95.43, *Ben.* 4.20. 3), as Verania was when she added a codicil to her will granting Regulus a legacy: "Illa ut in periculo credula poscit codicillos, legatum Regulo scripsit".<sup>91</sup>

2.4.4: Other effects of the will: Apart from transmitting wealth the Roman will could also include provisos on the appointment of heirs or legatees (e.g. *condiciones*, *substitutio*) or effect other changes (e.g. appointment of guardians). These other effects of the will are relevant to the literary presentation of *captatio*: some of them (e.g. conditions on *heredis institutio*

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<sup>90</sup> If codicils were announced in a prior will (i.e. a will made before the codicil was written) or confirmed in a subsequent will they were termed *codicilli testamento confirmati*; if not they were unconfirmed (Kaser 1984: 353-4). Confirmed codicils were held to be part of the will, and could do everything that a will could do except institute heirs or disinherit *sui* (Kaser: *ibid.*; cf. *Inst.* 2. 25. 2: "Codicillus autem hereditas neque dari neque adimi potest...et ideo nec exhereditatio scribi"). Thus if the *codice saevo* at Juv. *Sat.* 10. 236 by which the *paterfamilias* attempts to disinherit his children in favour of Phiale comprised a codicil (the similarity of *codex*, lit. "a wax-tablet", to *codicillus* and the fact that disinherison was attempted on this wax-tablet suggests a codicil), it would have been invalid, even if confirmed by the rest of the will. That the validity of these was to some extent dependent on the beneficiaries' choice is demonstrated by Pliny at *Ep.* 2. 16, where he decides to treat the unconfirmed codicil in Acilianus' will as if legally valid.

<sup>91</sup> *Codicillos* here refers to a codicil which Verania added to her will in Regulus' presence. She is unable to have made an entirely new will in her condition (cf. *graviter iacebat*), and even had she wanted to, it is unlikely that her *tutor* would have approved Regulus as a legatee (on women as testators, see 2.5.1.1. below); she is also unlikely to have been able to summon the *praetor* to get an interdict against her *tutor* should he have not approved the notorious Regulus as a beneficiary. Note that Regulus is made legatee (rather than heir, which would have been his ideal had it been legally viable under these circumstances: see Tellegen 1982: e.g. 63-7, for his insistence that Regulus always keeps within the law), as codicils were incapable of instituting or disinheriting heirs (see *Inst.* 2. 25. 2).

and legacies) may often have determined the success of *captatio*,<sup>92</sup> and others (e.g. *substitutio*) provided alternatives in the *modus operandi* of *captatio*.<sup>93</sup>

2.4.4.1: Conditions: Although testators were unable to appoint heirs according to time limits (*dies*)<sup>94</sup> they were allowed to impose conditions (*condiciones*) on their institutions.<sup>95</sup> Conditions on legacies also occurred and may indeed have pre-dated conditions on *institutiones*.<sup>96</sup> In both Roman and modern law a condition is technically a future uncertain event on the occurrence of which some legal consequence is made to depend (Watson 1971: 101; cf. Kaser 1984: 63).<sup>97</sup> A condition on the institution of heir that was clearly impossible, e.g. *si digito caelum tetigerit* (if he touches the sky with his finger, G. III. 98; Kaser 1984: 64), was treated as *pro non scripto* and the institution remained valid (Watson 1971: 112); however, jurists disputed whether an impossible condition on a legacy was valid or not (G. III. 98).<sup>98</sup> It is fairly certain that immoral or illegal conditions were also struck out (see e.g. Buckland 1966: 297; Thomas 1976: 238, 490; Kaser 1984: 65).<sup>99</sup>

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92 This depended on whether the *captatores* could have fulfilled the conditions or not; but see 2.4.4.1. below.

93 See 2.4.4.3. below on *substitutio pupillaris*.

94 Heirs could not be appointed from a certain day or to a certain day nor could different heirs be instituted in succession because this infringed on the principle expressed as *semel heres semper heres* ("once the heir, always the heir", an expression of post-classical origin): see e.g. Buckland 1966: 297; Kaser 1984: 334, 350.

95 *Inst.* 2. 14. 9: "Heres et pure et sub condicione institui potest, ex certo tempore aut ad certum tempus non potest..." (An heir can be appointed either unconditionally or conditionally, but not from a certain time or to a certain time...), cf. n. 94 above.

96 Buckland (1966: 297) suggested that conditional institutions were relatively late, the first appearing not long before the end of the Republic. Watson, who disagrees with Buckland's thesis, remarks that it has received little attention (1971: 112). He nevertheless concedes (113) that more texts are concerned with conditions on legacies than those on institutions of heirs.

97 Testators could appoint heirs and legatees on conditions such as, e.g. "if Balbus becomes consul" (*si Balbus consul fuerit*) or "if the ship comes from Asia" (*si navis ex Asia venerit*), see Thomas 1976: 235.

98 *Inst.* 2. 14. 10 claims that an impossible condition attached to an appointment of heir, a legacy, a *fideicommissum* or a manumission was treated as *pro non scripto*: "Impossibilis condicio in institutionibus et legatis nec non in fideicommissis et libertatibus pro non scripto habetur".

99 Thomas (1976: 490): the explanation for treating immoral or illegal conditions as *pro non scripto* "would appear to be that the testator, no longer able...to speak for himself, clearly wished the person he designated to benefit and must be presumed not to have been aware that the condition he imposed infringed the law".

At Petronius *Satyrice* 141 we find a most unusual condition on the legacies left in terms of a will:<sup>100</sup> "Omnes, qui in testamento meo legata habent, praeter libertos meos hac condicione percipient, quae dedi, si corpus meum in partes considerunt et astante populo comederint" (All those who have legacies in my will, apart from my freedmen, will receive what I have given them on the following condition, that they cut my body into pieces and eat it in the sight of the crowd).<sup>101</sup> Petronius' account is of course largely imaginary; in Roman law a testamentary condition demanding that a will's beneficiaries indulge in cannibalism would undoubtedly have been regarded

<sup>100</sup> Although the fragmentary nature of our extant text of *Satyrice* 140-1 obscures the context in which this *condicio* occurs, we can be fairly sure that the will belongs to Eumolpus, who has been posing as a *captandus* from *Satyrice* 117 onwards and has been courted by *captatores* from 124 onwards when his ruse starts to prove successful ("Certatim omnes hereditariae muneribus gratiam Eumolpi sollicitant..."). We do not know whether Eumolpus has died or whether he and his companions have devised another ruse and merely convinced the *captatores* that Eumolpus has died. Yet neither he nor his companions (who initially pose as his slaves from 117 onwards and are thus presumably the *liberti* exempted from the gruesome *condicio* at 141) possess the wealth that Eumolpus lets the *captatores* believe he has. Therefore it seems likely that the bizarre condition is an attempt to cause the *captatores* not to qualify for their legacies (or so its architects think), and thus enable the companions (and Eumolpus too if he isn't really dead) to escape the demands of the *captatores*.

<sup>101</sup> The *captatores*, notorious in satire for being able to "stomach" anything (e.g. the old man at *Juv. Sat.* 10. 201-2 is so disgusting that he revolts even the *captator* Cossus: "ut captatori moveat fastidia Cossus", 202), are faced with a challenge at *Satyrice* 141 when (or so they think) they are compelled to eat Eumolpus' body in order to qualify for their legacies. They are cheered on by yet another of the *Satyrice*'s many rhetorical speeches, probably spoken by Gorgias (cf. "Gorgias paratus erat exsequi...", 141), citing three historical *exempla* in defence of cannibalism all involving situations of war or famine or both: first, the people of Saguntum, when besieged by Hannibal (219 B.C.), ate human flesh "without an inheritance in prospect" (*nec hereditatem expectabant*); second, the people of Petelia (an Italian town subdued by Rome in the 3rd century B.C.) did likewise in a famine "hunting for nothing by this diet except that they were no longer hungry" (*nec quicquam aliud in hac epulatione captabant, nisi tantum ne esuriant*); third, when Numantia was stormed by Scipio (Lucius Cornelius Scipio Aemilianus in 133 B.C.), some mothers were found carrying the half-eaten (*semesa*) remains of their children (here the text breaks off). The emphasis of the first two *exempla* in this tricolon is on the fact that the people in the historical precedents ate human flesh without any hope of material gain, but only to ward off starvation; by contrast, the *captatores* are planning to eat human flesh for the opposite motivation: unlike those suffering from hunger, they are doing so expressly so that they will qualify by this means (so they think) for their legacies. The idea implicit in the speech is not, as one might have expected, that the *captatores* are therefore morally worse than those who turned to cannibalism *in extremis*, but how much easier it will be for them, who at least have something to gain and to look forward to by this action. *Captatores* are often compared to scavengers (e.g. crows, cf. *Satyrice* 116; vultures, cf. Seneca *Ep.* 95. 43), which feed on cadavers of animals. Therefore it seems that a request that they indulge in cannibalism is a literal transposition of this topos and thus apt revenge for a literary *captandus* (for revenge by a testator on an heir by means of a pun practically translated, cf. *Hor. Sat.* 2. 5. 84-8, cf. 4.3.1.(viii,a)).

as immoral, if not also illegal.<sup>102</sup> It would have been treated as *pro non scripto* and the *captatores* would probably have been awarded their legacies anyway (cf. above: G. III. 98).

2.4.4.2.: Appointment of guardians: Where a testator was likely to be survived by an *impubes* in his *potestas*, who would thus become *sui iuris* at his death,<sup>103</sup> he could appoint a guardian (*tutor testamentarius*) for the child in

<sup>102</sup> One of our sources on the possible attitudes of the Romans to cannibalism is Juv. *Sat.* 15: here Juvenal relates a shocking account of how in relatively recent times (cf. 15. 27: *consule Iunco*, i.e. A.D. 127) people from a remote village in Egypt killed and ate a man from their neighbouring rival village during a minor skirmish. Juvenal clearly views cannibalism as a form of barbarism (*dira ferocitas*, 32) and wishes to shock his audience with the thought that this barbaric act occurred in their own times (see *nostro/aevo*, 31-2). He comments on the irony that in Egypt on the one hand strict vegetarianism is prescribed ("lanatis animalibus abstinet omnis/mensa, nefas illic fetum iugulare capellum", 11-12) while on the other cannibalism is permitted ("carnibus humanis vesci licet", 13). The implied contrast is that while at Rome not everyone adheres to strict vegetarianism, at the same time cannibalism is not allowed.

It appears that the rule that immoral conditions would be excised from a will was taken seriously in Roman law: e.g. even before Augustus' legislation (see chapter III) conditions in restraint of marriage were held immoral and thus void (Watson 1971: 112). We can thus conclude that the same would have happened to a condition advocating cannibalism, if only on moral grounds. Whether cannibalism was illegal in Roman law is debatable: aggravating factors such as whether the victim was killed or died of natural causes and mitigating ones such as whether or not the deed was committed where starvation was the only alternative, were considered. Juvenal (*Sat.* 15. 93ff), like Petronius' orator at *Satyrica* 141, resorts to the traditional defence of those who commit cannibalism in dire need, and even imagines those who turned to cannibalism when faced with starvation being forgiven by the *manes* of those they consumed (105-6). For cannibalism as *contra bonos mores*, see Voet *Commentarius ad Pandectas* 14. 2; Zimmermann 1990: 411 n. 167; for the issues raised by cannibalism in terms of English common law in relatively recent times, see the case of *Regina v Dudley and Stephens* (1884) 14 QBD 273, discussed in Simpson 1986 (*Cannibalism and the Common Law*).  
<sup>103</sup> Infants might often by the death of their *paterfamilias* become *sui iuris*, and as Crook (1967: 114) notes, this threw considerable weight on the institution of *tutela*. *Tutela* (see Thomas 1976: 453; Kaser 1984: 316) is defined as follows by Justinian (*Inst.* I. 13 = D. 26. 1. 1f) following the Republican jurist Servius: "Est autem tutela, ut Servius definivit, ius ac potestas in capite libero ad tuendum eum qui propter aetatem se defendere nequit, iure civili data ac permissa" (Guardianship, as Servius defined it, is a right and power over a free person given and allowed by the civil law, for the protection of one who by reason of his age cannot look after himself). Throughout Roman legal history a child under the age of puberty (i.e. 14 for males and 12 for females) and all women *sui iuris* needed a guardian (see e.g. Jolowicz 1972: 121). Whereas males were released from *tutela* on reaching puberty, women remained in *tutela* all their lives (see e.g. Crook 1967: 114), as the name *tutela perpetua mulierum* implies. There was also another type of guardianship (called *cura*) according to which a *curator* took charge of the affairs of the mentally ill (*furiosi*) and "spendthrifts" (*prodigi*). All kinds of guardianship only applied to those *sui iuris* (see e.g. Jolowicz 1972: 121). It is understandable that *furiosi*, *prodigi* and *impuberes* should need supervision of their affairs, as Thomas (1976: 453) puts it: "the two years old orphan and the madman of mature years might be *paterfamilias* but could obviously not conduct their own affairs." However, Gaius (I. 190) expresses his dissatisfaction with

his will. This effect of the Roman will existed from the time of the Twelve tables.<sup>104</sup> Testamentary guardianship (*tutela testamentaria*) of the *impubes* was however not the oldest type of *tutela*: the legal tutelage (*tutela legitima*) of the child's nearest male agnate (*proximus agnatus*) pre-dated it, and in classical law still took effect on intestacy.<sup>105</sup>

It is perhaps significant that the agnates, the very people who were next in line as the testator's *sui heredes* and who would benefit if the child were to die before reaching puberty, were those automatically selected as the child's guardians if the *paterfamilias* died intestate or if his will failed.<sup>106</sup> This reveals that originally the law protected the interests of the *impubes* only so far as they coincided with the interests of the agnatic family.<sup>107</sup> We may therefore anticipate that an agnatic *tutor* would have been in a position that was at once tempting and trying: on the one hand, he would have been looking after an estate to which he himself was entitled in the event of the death of the ward (*pupillus*), so while he would have taken good care of the estate he may also have felt tempted to hope for the death of the *pupillus*, if not to engineer it; on the other hand, the advantages of being an agnatic guardian were largely outweighed by the intensive administration that the estates of *impueres* heirs involved.<sup>108</sup>

Also, when guardianship came to an end there had to be an accounting, after which from the time of the later Republic the now *pubes* ex-ward had an action (*actio tutelae*) against the guardian if the administration had been negligent or fraudulent; previously the *tutor* would only have been liable if he had actually embezzled the estate of the ward.<sup>109</sup> Crook (1967: 116) notes that the *actio tutelae* was one of those actions which, if resulting in a

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*tutela perpetua mulierum*, since many adult women *sui iuris*, unlike the *impueres*, *furiosi* and *prodigi* who were obviously incapable of managing their own affairs, were more than capable of doing so.

<sup>104</sup> Ulp. 11. 14.; cf. e.g. Crook 1967: 114.

<sup>105</sup> See e.g. Crook 1967: 114; Jolowicz 1972: 122; Thomas 1976: 455; Kaser 1984: 317f.

<sup>106</sup> A will could fail for a number of reasons, including the birth of posthumous children or grandchildren to those who had been in the testator's *potestas*, see G. II. 130ff.

<sup>107</sup> See Crook 1967: 113-114; Jolowicz 1972: 122, etc.

<sup>108</sup> See e.g. Crook 1967: 115; cf. Jonkers 1933: 21ff. Apart from the financial responsibilities there were also social ones, e.g. ensuring that the estate would pay for the ward's education (Crook: *ibid.*).

<sup>109</sup> Crook 1967: 115-116; Jolowicz 1972: 239.

conviction, carried the stigma of infamy. Such were the deterrents to guardians who were tempted to abuse their position. However, it is noteworthy that the accusations of the *actio tutela* were of maladministration and not of danger to the ward's life.<sup>110</sup> By contrast the attitudes of traditional Eurasian folklore towards avuncular guardians suggest that they were often suspected of attempting to harm their wards in order to get their hands on the family wealth to which they too had a claim.<sup>111</sup> Is it possible that Roman *tutores* may have been tempted to indulge in some intrafamilial *captatio*?<sup>112</sup>

Persius *Sat.* 2. 12ff presents a *proximus agnatus* (*proximus heres*, 12; cf. Cloud 1989(a): 51) who is also guardian praying that he should be able to "bump off" his ward: "...pupillumve utinam, quem proximus heres/inpello, expungam!". He explains that the ward is sickly in appearance: "nam est scabiosus et acri bile tumet", by which he must mean that the ward's death would not be entirely unexpected, thus deflecting suspicion from himself.<sup>113</sup>

2.4.4.3: *Substitutio pupillaris*: Even more promising as far as *captatio* is concerned, is the practice of instituting one's offspring as heir, but appointing another as substitute heir should the *suus impubes* die before reaching puberty (*substitutio pupillaris*, see G. II. 179ff).<sup>114</sup> Gaius (I. 180) explains that

<sup>110</sup> Crook 1967: 116 n. 83; Jolowicz (1947: 82ff, at 88) notes that concern for the child's safety had little to do with legal regulation of *tutela* by e.g. the *actio tutelae*.

<sup>111</sup> See Jolowicz (1947: 82ff), who notes that the wicked uncle of the fairy tale was probably the guardian: "for uncles are the commonest guardians in all ages, and their perfidy is a typical example of human wickedness", 82. He also refers to a somewhat spurious law attributed to Solon (*Diog. Laert.* 1. 56) providing that a guardian must not marry the mother of his ward, and that the person who is to inherit from the ward must not be his guardian. The orphan's fortune had to be administered by his mother's kin, who would not have had a claim to the estate and therefore would not have plotted against the ward. The belief that such a law existed (even if it was only a myth) reveals a universal fear that agnatic guardians would exploit or even murder their wards.

<sup>112</sup> *Captatores* are usually would-be extraneous heirs rather than members of the testator's family, but see 1.2.n.6 for exceptions.

<sup>113</sup> Cf. Hor. *Sat.* 2. 5. 45-6: "si cui praeterea validus filius in re/praeclara sublatus aletur...", see 2.4.4.3. below.

<sup>114</sup> In the other type of substitution, *substitutio vulgaris*, the testator after instituting his heir appointed another to be heir if the *institutus* did not become heir (Watson 1971: 52). Both types of *substitutio* were safeguards against intestacy (Buckland 1966: 300).

if the son succeeds but dies in childhood, the *substitutus* becomes heir. Heirs could be appointed in two or more ranks (or grades) in this way.<sup>115</sup>

Of interest here is Hor. *Sat.* 2. 5. 45ff, where so as not to reveal himself as a *captator* by typical devotion to the childless ("ne manifestum/caelibis obsequium nudet te", 46-7) Ulysses is advised to court a man with a sickly son, with the aim of being made second heir: "adripe officiosus, ut et scribare secundus/heres", 48-9. Then if some mischance should send the boy to the Underworld, Ulysses would become heir in his place: "si quis casus puerum egerit Orco/in vacuum venias", 49-50. There is a very subtle hint, almost undetectable, in the phrasing here that suggests that the *captator* will act as the *casus* which sends the heir to Hades: "perraro haec alea fallit" (very rarely does this gamble fail), 50. The *captator* will make sure that his gamble pays off by murdering the son.

The fear that the opportunities provided by *substitutio pupillaris* could tempt the second heir to wish for the child's death or even bring it about is likewise reflected in the legal sources: Gaius (II. 181) suggests precautions for the testator to follow should he suspect that his son would be exposed to foul play after his own death.<sup>116</sup> The testator could make the ordinary substitution (*substitutio vulgaris*) openly, appointing his son heir and a substitute to take his place if he died while his father was still alive, in which case, says Gaius, we cannot suspect any malpractice on the part of the substitute because the will's contents are still unknown;<sup>117</sup> however, the *substitutio pupillaris*, which would take effect if the son became heir but died in childhood, was to be made secretly at the back of the will, sewn up and sealed separately, to remain closed as long as the son lived.<sup>118</sup> But it is far

<sup>115</sup> In the simplest form of substitution the wording of the written will was as follows: "T. heres esto, si heres non erit, C. heres esto"; T. was then said to be *heres* in the first grade (*primo...gradu*) and C. *heres* in the second (*secundo...gradu*), etc. (G. II. 174ff; *Inst.* 2. 15ff; Buckland 1966: 300). *Secundus/heres* at Hor. *Sat.* 2. 5. 48-9 is therefore probably a syncopated form of *heres...secundo gradu*.

<sup>116</sup> "ne post obitum parentis periculo insidiarum subiectus videretur (*Seckel & Kuebler: videatur Goeschen*) pupillus"; cf. *Inst.* 2. 16. 3: "ne filius eius pupillus adhuc ex eo...post obitum eius periculo insidiarum subiceretur".

<sup>117</sup> G. II. 181: "quod accidit, cum vivo parente moritur, quo casu nullum substituti maleficium suspicari possumus, cum scilicet vivo testatore omnia, quae in testamento scripta sunt, ignorentur".

<sup>118</sup> G. II. 181: "illam autem substitutionem, per quam, etiamsi heres extiterit pupillus et intra pubertatem decesserit, substitutum vocamus, separatim in inferioribus tabulis scribimus

safer, Gaius suggests, to seal both substitutions separately at the back of the will, since if sealed as was suggested above it would still be possible to conclude from the *substitutio vulgaris* the probable content of the *substitutio pupillaris*.<sup>119</sup>

These laborious precautions prescribed for the protection of the *pupillus* reveal a cynical but realistic cultural mindset, which assumes that no one, however trustworthy, can resist an opportunity for gaining wealth that circumstances have placed within his or her reach; this is the type of mindset which also suspects that someone who performs services on behalf of the elderly, childless wealthy is not doing so purely for the sake of friendship or for any altruistic reasons but for the purposes of the material gain and social climbing accessible through inheritances. The awareness that the *captandi* of literature are shown to have concerning *captatio* is not just common sense, but is also a product of the culture shared by the authors and their readers.

2.5.1: Testamenti factio (activa): By now I have investigated most of the functions of the Roman will and their application to the portrayal of *captatio* in Roman literature. Equally important is the question of who was able to make a will: only those possessing the legal capacity of testation, i.e. *testamenti factio (activa)*,<sup>120</sup> would have been able to institute the *captatores* or bequeath them legacies and thus only they would have been suitable *captandi*. Generally, a potential testator had to be a Roman citizen, *pubes* and *sui iuris*.<sup>121</sup> The average Roman *filiusfamilias* had to wait until his *pater* died in order to possess property and thus be capable of testation.<sup>122</sup> The

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easque tabulas proprio lino propriaque cera consignamus et in prioribus tabulis cavemus, ne inferiores tabulae vivo filio et adhuc impubere aperiantur".

119 G. II. 181: "sed longe tutius est utrumque genus substitutionis separatim in inferioribus tabulis consignari, quia si ita consignatae vel separatae fuerint substitutiones, ut diximus, ex priore potest intellegi in altera quoque idem esse substitutus".

120 The capacity to make a will or to take part in will-making (e.g. as a witness) or to be a beneficiary under a will (i.e. as an heir, legatee etc.) was known as *testamenti factio*, although this expression was primarily used with reference to the testator (Kaser 1984: 351). The distinction between the terms *testamenti factio activa* (on the part of the testator) and *testamenti factio passiva* (on the part of the beneficiaries) was only made later by Continental common law (Kaser: *ibid.*), but are useful distinguishing terms; hence my use of them here.

121 See G. II. 113; *Inst.* II. 12; *Ulp.* 20. 12; Buckland 1966: 288; Watson 1971: 22.

122 Even if permitted to make a will by his *pater*, the son *in potestate* was incapable of testation, cf. *Inst.* II. 12: "...enim hi qui alieno iuri subiecti sunt testamenti faciendi ius non

only exception were soldiers who were allowed to bequeath money earned on military service in a *testamentum militis*<sup>123</sup> while their fathers lived.<sup>124</sup> It is therefore not surprising that most of the *captandi* appearing in literature are old: not only was an elderly person more likely to die soon, but he was also more likely to be *sui iuris* and thus capable of testation.<sup>125</sup>

2.5.1.1.: Women as will-makers: Women were originally barred from testation: they were able to make neither the *testamentum in procinctu*, which was carried out on the battle-field, nor the *testamentum comitiis calatis*, since they were unable to attend the *comitia*. The only form accessible to them was the later-developing *testamentum per aes et libram*.<sup>126</sup> Gaius (I. 115a) tells us that formerly (*olim*) women had to undergo *coemptio*<sup>127</sup> in order to be able to make a will, but that this was remitted under Hadrian. In our period, that of the late Republic to the early Empire, *coemptio* was thus still necessary. Where a woman was *sui iuris*, she had to undergo *capitis deminutio* so as to qualify for testation.<sup>128</sup> But even where a woman had undergone these changes of legal personality, she still required the consent of her *tutor* in order to exercise her capacity for testation.<sup>129</sup> This was due to the restrictions of *tutela perpetua mulierum*, according to which women remained under male guardianship throughout their lives.<sup>130</sup> But either by

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habent, adeo quidem ut, quamvis parentes eis permiserint, nihilo magis iure testari possint".

123 See 2.6. below.

124 *Juv. Sat.* 16. 51-2: "Solis praeterea testandi militibus ius/vivo patre datur..."; cf. *Inst.* 2. 12: "exceptis his...praecipue militibus qui in potestate parentum sunt, quibus de eo quod in castris adquisierint permissum est...testamentum facere".

125 See e.g. *Hor. Sat.* 2. 5. 23-4: "captēs astutus ubique/testamenta senum"; *Juv. Sat.* 4. 19: "senis...orbi"; in a society with relatively low life-expectancy at birth (see 3.7.1.) it would be extremely unlikely for an elderly person to be still *in potestate* of his own father or paternal grandfather.

126 See Buckland 1966: 288; Watson 1971: 23; cf. 2.3.4. above.

127 *Coemptio* was, like *mancipatio* (of which it was a derivative; cf. n. 31 above), a contrived sale and the regular mode by which husbands acquired *manus* over their wives (Kaser 1984: 292).

128 Watson 1971: 22-3.

129 See e.g. *G. II.* 112; Buckland 1966: 288; Hopkins 1983: 88 n. 74.

130 Crook (1967: 114) notes that women *sui iuris* were never released from guardianship, because even if they were married (except *in manu*, a type of marriage rare in the time of the Principate) their husband was not automatically their guardian. On the question of *tutela mulierum*, he cautions: "Astonishment at this fact would be misplaced; subjection of women's legal acts to some male authority was virtually universal in antiquity". However, we have noted that Gaius himself criticises this institution at I. 190. He suggests that the common belief that women need *tutores* because they are scatter-brained and thus gullible (*quia levitate animi plerumque decipiuntur*) is unfounded. He also points out on the one hand that the tutor's authorization was by this stage often a formality (*dicis*

reaching an understanding with their tutors or, failing that, by appealing to the *praetor* for intervention (see G. I. 190), many Roman women must have ensured that they were able to make wills and make them as they wished. This would explain the frequency with which *captandae* appear in the literary portrayal of *captatio*.<sup>131</sup> Leaving wealth to outsiders (as it seems *captatores* usually were) must have required especial control of their tutors by Roman women, since preventing the alienation of wealth from the agnatic family is arguably the primary purpose of *tutela*.<sup>132</sup>

2.5.2: Testamenti factio (passiva) and the ius capiendi: Testamenti factio (passiva) was the capacity to be appointed heir or legatee etc. in terms of a will.<sup>133</sup> Generally a Roman citizen or anyone possessing *commercium* was capable of being instituted heir or being granted a legacy;<sup>134</sup> slaves could also be instituted, provided they were manumitted (G. II. 185ff), as could those in the *potestas* of another, although they could accept the inheritance only with the permission of their *paterfamilias*, to whom anything they acquired accrued (G. II. 87). Thus it appears that only those *sui iuris* or at least emancipated would have made potentially successful *captatores*. This also means that while *captatores* would normally have been younger than their elderly objects, they are unlikely to have been very young, since they would have had to wait for their *pater* to die or for emancipation in order to qualify for independent possession of property.<sup>135</sup> Unless emancipation was almost universal, these restrictions would have meant that comparatively few Romans could have been effective *captatores*: therefore the impression derived from literature of hordes or "tribes" of *captatores* at Rome is misleading.

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*gratia*), and on the other that tutors could be compelled by the *praetor* to give authorization, even against their wills: "saepe etiam invitus auctor fieri a praetore cogitur". Gaius' feeling seems to be that *tutela* had become an unnecessary formality, and his criticism is based on practical considerations rather than an early pro-feminist stance.

131 See e.g. Hor. *Sat.* 2. 5. 84f; Mart. 1. 10; 2. 32.6: *anus, vidua*; 4. 56. 1: *senibus viduisque*; 9. 80; 10. 8; Juv. *Sat.* 1. 37-41; *Sat.* 3. 128-30 (Albina & Modia); *Sat.* 5. 97-8 (Aurelia); Pliny *Ep.* 2. 20 (Aurelia & Verania); *Ep.* 7. 24 (Ummidia Quadratilla, cf. n. 70 above), etc.

132 See e.g. Jolowicz 1972: 122.

133 See e.g. Thomas 1976: 487; Kaser 1984: 351

134 See e.g. Thomas: *ibid.*; Kaser 1984: 352.

135 For *emancipatio*, see Kaser 1984: 313; for lack of proprietary capacity of those *in potestate*, see Kaser 1984: 307f.

2.5.2.1: Women as beneficiaries of wills: *Captatrices* would have been even more restricted in their capacity to inherit than their male counterparts, which may explain why one meets comparatively few independent female inheritance-hunters in literature.<sup>136</sup> The *lex Voconia* (169 B.C.) barred women from being instituted heirs by those testators registered in the wealthiest census group.<sup>137</sup> Although innovative testators who were intent on bequeathing property to women found ways to evade the *lex Voconia*,<sup>138</sup> it placed great impediments in the path of women as heirs and legatees<sup>139</sup> for some time.<sup>140</sup> In the case of female inheritance-hunters, the literary portrayal supports what we know of social realities; this however may be pure coincidence, as women's restrictions in Roman society generally <sup>are</sup> reflected by their limited or auxiliary appearances in Latin literature on the whole.

2.5.2.2.: *Ius capiendi*: Some people, while enjoying the right to be instituted heir or to be granted a legacy (*testamenti factio passiva*), were not allowed to take under a will because they lacked the capacity to acquire (*capacitas* or *ius capiendi*). This restriction applied specifically to those who were unmarried (*caelibes*) or childless (*orbi*) in terms of the Augustan social legislation (see 3.3.1. below). The *caelibes* were forbidden the right to take an inheritance at

<sup>136</sup> Philomela (*Satyrice* 140) who by exploiting the advantages her youth had often extorted many inheritances ("quae multas saepe hereditates officio aetatis extorserat...") is an exception. However, part of her success may be due to the imaginary and fanciful nature of the text in which she appears. Most *captatrices* of Roman satire work in close alliance with male *captatores*, usually their husbands, often providing sexual favours to the *captandus* as a means of gaining his favour and thus securing the promise of an inheritance, see e.g. Penelope at *Hor. Sat.* 2. 5. 75ff, esp. 81-3; cf. *Juv. Sat.* 1. 55-7.

<sup>137</sup> G. II. 274; for the restrictions of the *lex Voconia* on legacies, see 2.4.2.1.(i) above.

<sup>138</sup> It was possible to evade the *lex Voconia* if one had failed to register at the census: see e.g. *Cic. Ver.* 2. 1. 104/41, where Cicero relates that a certain P. Annius Asellus (who died c. 75 B.C.: *C. Sacerdote praetore*) had failed to register at the census (*neque census esset*) and thus he could legally (*lex nulla prohibebat*) institute his daughter as his heir (*fecit ut filiam bonis suis heredem institueret. Heres erat filia*); his example was copied by others, including one Annaea (*Ver.* 2. 1. 111/43), a wealthy woman (*pecuniosa mulier*) who was able to institute her daughter as heir because she (*Annaea*) was not registered at the census (*quod censa non erat*).

<sup>139</sup> According to the other provision of the *lex Voconia* which restricted legacies, no one was allowed to receive by way of legacy more than went to the heir(s), see G. II. 226.

<sup>140</sup> Although Gaius (II. 174) speaks of the *lex Voconia* in the present tense, it has been suggested that it was obsolete by the time of the Flavians (see e.g. Gardner 1986: 170-1). It seems to have been regarded as an ancient long-forgotten law by the time of the mid-second century A.D. (see *Gel.* 20. 1. 23: "quid utilius [visum est] plebiscito Voconio de coercendis mulierum hereditatibus?", cf. 22: "...nec ideo contempnas legum istarum antiquitates"). The law may have fallen into disuse when the census came to be carried out less frequently from the late Republic onwards (Gardner 1986: 170; Hopkins 1983: 92).

all; those *orbi* (but not *caelibes*) could take up to a half of an inheritance or legacy.<sup>141</sup>

Scholars<sup>142</sup> have suggested that the Augustan legislation may have been a reason for the lack of *ius capiendi* enjoyed by the wife of the *leno* husband at *Juv. Sat.* 1. 55f.<sup>143</sup> But given the restrictions of the Augustan legislation, and even if the wife were *orba*, because she was married (i.e. not *caelebs*) she would have been entitled to take (*capere*) up to half of her lover's estate. Even had the *lex Voconia* not met its demise from the later Republic onwards,<sup>144</sup> the wife could still have taken at least a half-share of his estate by legacy, provided that the principal heir received his *quarta Falcidia*.<sup>145</sup> Another possibility is that the wife was a convicted adulteress and lost her *ius capiendi* because of Domitian's law against *probrosae*.<sup>146</sup>

2.6.: The *testamentum militis*: Until now I have examined the rules and restrictions of the Roman law of succession; now I shall briefly examine a most unusual will, exempt from virtually all of the regulations that restrained the average testator. This will, known as the *testamentum militis*, was, as its name suggests, available to those on military service.<sup>147</sup>

First, there was no restriction on the form that the *testamentum militis* should take: a soldier could make his will in any form he chose, either written or oral, but *bonorum possessio* was awarded only on more evidence than the

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<sup>141</sup> See Kaser 1984: 363; Thomas 1967: 488.

<sup>142</sup> See e.g. Courtney, *ad loc.*: "if the husband had children by a previous marriage and the wife had none"

<sup>143</sup> "Cum leno accipiat moechi bona, si *capiendi/ius nullum uxori*".

<sup>144</sup> See 2.4.2.1.(i) above on the Voconian law.

<sup>145</sup> See 2.4.2.1.(i) above on the *lex Falcidia*; for the likelihood that the restrictions of the *lex Furia* on the amount that could be bequeathed by legacy were superseded by the later laws, see n. 64 above.

<sup>146</sup> For a detailed discussion of the laws on *adulterium*, *stuprum* and *lenocinium*, see e.g. Gardner 1986: 179.

<sup>147</sup> G. II. 109: "Sed haec diligens observatio in ordinandis testamentis militibus propter nimiam inperitiam constitutionibus (*Seckel & Kuebler*: *menstitutionibus Veronensis*) principum remissa est" (But this strict method for making wills has been relaxed by imperial decree in the case of soldiers because of their inadequate experience in these matters).

word of one claimant.<sup>148</sup> Second, the *testamenta militum* were valid despite non-compliance with formal testamentary procedure: e.g. the wrong number of witnesses, absence of a sale of the *familia*, and lack of a *nuncupatio* were all excused.<sup>149</sup> Third, the soldier in making his will could ignore most of the usual technical restrictions on its content: he could be partly testate, partly intestate,<sup>150</sup> could disregard restrictions on the sizes of legacies and trusts,<sup>151</sup> and could even institute those denied *ius capiendi* by the Augustan social laws, the *orbi* and *caelibes*.<sup>152</sup> The military will also excluded the use of the *querela inofficiosi testamenti*.<sup>153</sup>

Significant was the fact that soldiers could make the *testamentum militis* while their *paterfamilias* was still alive and thus while they were still *in potestate*.<sup>154</sup> Unlike the average Roman *filiusfamilias*, who technically owned nothing while *alieni iuris* and thus could bequeath nothing to others,<sup>155</sup> soldiers were allowed formal ownership of money and property gained during military service.<sup>156</sup> Thus they were able to bequeath it.<sup>157</sup> This extraordinary concession of the military will is presented by *Juv. Sat.* 16. 51ff as the reason behind an equally extraordinary example of intrafamilial *captatio*: Coranus, a soldier, is imagined as being courted for an inheritance by his elderly

<sup>148</sup> See G. II. 114: "quomodo velint vel quomodo possint, permittitur testamentum facere"; cf. e.g. Buckland 1966: 361; Thomas 1976: 486; Kaser 1984: 345.

<sup>149</sup> See G. II. 109; see 2.3.4. n. 34 above.

<sup>150</sup> Thus he could overstep the rule *nemo pro parte testatus pro parte intestatus decedere potest* (see e.g. Kaser 1984: 334).

<sup>151</sup> I.e. he could ignore the Furian, Voconian and even Falcidian restrictions on legacies, see 2.4.2.1.(i) above.

<sup>152</sup> See G. II. 111; Kaser 1984: 345-6.

<sup>153</sup> Kaser 1984: 346; see 2.3.2.above.

<sup>154</sup> See *Inst.* II. 12; see 2.2.1. & 2.5.1. above: most Roman citizens had to wait for their *pater* to die in order to gain *testamenti factio (activa)*.

<sup>155</sup> See 2.2.1. above.

<sup>156</sup> See *Juv. Sat.* 16. 52-4: "nam quae sunt parta labore/militiae placuit non esse in corpore census,/omne tenet cuius regimen pater" (for the law has decreed that money earned in military service is not to be registered with the property, all of which a *pater* has under his control).

<sup>157</sup> In spite of Gaius' twice-iterated (see II. 109 and 114) insistence that the *testamentum militis* was free from restrictions because of soldiers' "inadequate knowledge of these matters" (*propter nimiam imperitiam*), such leeway was probably an encouragement for enlistment: see e.g. Crook 1967: 129; Campbell 1984: 226-9 concludes after a detailed discussion that the military will was probably aimed at avoiding discontent in the army and ensuring personal loyalty to the emperor. He points out (229) that it would have been seen by the troops themselves as a professional perk. (This would test Daube's theory (cf. 3.2.3. n. 26) that testacy was limited to the upper echelons of Roman society). It is significant that Juvenal includes the mention of the *testamentum militis* (*Sat.* 16. 51ff) in the context of a discussion on the advantages that soldiers enjoy.

father.<sup>158</sup> Ironically, the aged father would in normal circumstances have made the more suitable *captandus* (see *tremulus*).<sup>159</sup> However, the soldier's often dangerous and sometimes fatal profession makes him likely to die sooner than would a civilian son.<sup>160</sup> The situation presented at *Sat.* 16. 51ff comprises a subversion not only of the Roman family, but also of the way in which Roman satire portrays *captatio* as operating: usually Roman parents do not hope for or gamble on the death of their children during their own lifetimes,<sup>161</sup> as the *captator/pater* here obviously does;<sup>162</sup> normally it is the young who expect inheritances from the old, and not *vice versa*.

But it remains the extraordinary nature of the *testamentum militis* which creates the legal loophole that is essential but not responsible for this unusually subversive example of *captatio*. (Responsibility lies with the corruption of contemporary Roman society that Juvenal makes it his business to attack and ridicule.)<sup>163</sup> Even if only in Juvenal's imagination, this unusual

<sup>158</sup> "ergo Coranum/signorum comitem castrorumque aera merentem/quamvis iam tremulus captat pater" (Therefore daddy, despite his doddering age, is courting an inheritance from his son Coranus who accompanies the standards and earns a soldier's pay), 54-6. *Coranus* is ironically a typical name for a *captator* and other greedy people: see Hor. *Sat.* 2. 5. 57, 64; cf. Mart. 4. 37. 1, 9. 98. 3. It is appropriately related to the word for crow (*corvus*), since *captatores* are often likened to scavenging crows in literature, e.g. *Satyrica* 116; thus Coranus and his *tremulus* (see n. 159 below for its significance) father have reversed roles.

<sup>159</sup> Age and sickliness, particularly combined, are important attributes for *captandi* in Roman literature. Illness is often identified by its victim's coughing: see e.g. Hor. *Sat.* 2. 5. 106-7: "si quis/forte coheredum senior male tussiet"; cf. *Satyrica* 117, where Eumolpus who is planning to pose as a suitable *captandus* is told to cough frequently and complain about stomach-upsets, indicating thereby his supposedly sickly state: "imperamus Eumolpo, ut plurimum tussiat, ut sit modo solutioris stomachi cibosque omnes palam damnet"; cf. Mart. 1. 10. *Tremulus* can mean "trembling, shaking (from illness, weakness); (masc. as sb.) a sufferer from palsy or sim. disease..." (*OLD*: 1970), and thus also identifies illness; for the link between old age, sickliness and trembling, see e.g. Ov. *Met.* 14. 143: "tremuloque gradu venit aegra senectus".

<sup>160</sup> See Burn 1953: 1-31; *cit.* Watson 1969: 151-2, 219. Burn drew up a comparative table of life-expectancy for soldiers and civilians in Roman Africa and the Danubian provinces during the Flavian era: at Lambaesis (Africa) of those alive at 17, 55.2% of soldiers reached age 42, 19.6% reached age 62, and only 2% reached age 82; of civilians, 56.1% reached 42, 33.9% reached 62, and as many as 8% reached 82. In the Danubian provinces the corresponding figures for soldiers are 45.4%, 13.7% and 2.5%; for civilians, they are 53.4%, 21.7% and 4.2%. The Danubian figures are lower than those for Lambaesis, except, surprisingly, in the case of veterans reaching their eighties. In both cases the figures of civilian survivors are higher than for their military counterparts.

<sup>161</sup> Regulus, who courts his emancipated son at Pliny *Ep.* 4. 2, is the obvious exception. We know from *Ep.* 2. 20. 6 that Regulus had previously sworn a false oath on the head of his son. Regulus' notorious courtship of his own child may have been an inspiration for Juv. *Sat.* 16. 51ff.

<sup>162</sup> Cf. Courtney *ad loc.*

<sup>163</sup> See e.g. Juv. *Sat.* 1. esp. 30: "difficile est saturam non scribere".

example of *captatio*, arising out of the legal freedom of the *testamentum militis*, reveals by contrast the degree to which *captatio* as presented in literature was normally both dependent on and restricted by the Roman law of succession.

## CHAPTER III

### VIVET UTER LOCUPLES SINE GNATIS: ORBITAS AND CAPTATIO IN THE CONTEXT OF THE AUGUSTAN FAMILY LAWS

**3.1: Introduction:** In the presentation of *captatio* in Roman literature an outstanding feature of the objects of *captatio* is their *orbitas* (childlessness).<sup>1</sup> While it is true that *captandi* are also necessarily old, sickly and wealthy, it is *orbitas* that is their most striking characteristic: in most societies there are people who are relatively wealthy; a proportion of these people will grow to be old,<sup>2</sup> and sickly (often as a result of their age); but it is an unusual society in which a large proportion of the elderly, sickly and wealthy are completely without immediate heirs. It is this trait that renders them suitable objects of *captatio* (*captandi*).

In this chapter, I shall examine the Augustan social legislation encouraging marriage and child-rearing or, more to the point, punishing the unmarried and childless and intending to offer rewards to successful parents. The significant laws in this regard were the *lex Iulia de maritandis ordinibus* (18 B.C.) and the *lex Papia Poppaea* (A.D. 9).<sup>3</sup>

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<sup>1</sup> See e.g. Hor. *Sat.* 2. 5. 28: "vivet uter locuples sine gnatis..." (*orbitas* and wealth), cf. 46-7; Petronius *Satyrica* 116ff; Mart. 2. 32. 4: "Orba est, dives, anus, vidua" (*orbitas*, wealth, old age, widowhood); 6. 62; 11. 44. 1: "Orbus es et locuples et Bruto consule natus" (*orbitas*, wealth and advanced age); Juv. *Sat.* 3. 128-30; 5. 137ff; 6. 38-40; 12. 93ff, esp. 99ff: "locuples Gallita et Pacius orbi...", etc.

<sup>2</sup> Certainly a larger proportion of the wealthy than of the poor will have lived long enough to grow old: on life expectancy in Roman society, see 3.7.1. below.

<sup>3</sup> Augustus also passed legislation against what can broadly (and unsatisfactorily) be labelled as "sexual immorality", generally any type of sexual activity that was felt to undermine his attempts at upgrading the morals of upper class Roman society. The important law relating to this was the *lex Iulia de adulteriis coercendis* (18 B.C.). On the Augustan policy towards adultery, see e.g. Last 1934: 446-7; Richlin 1981: 379-404; Gardner 1986: 179. This law is of relevance to *captatio* in that the *captatores* of satire are often shown attempting to win their objects' favour by means of adulterous liaisons, e.g. Juv. *Sat.* 1. 55-7, where a husband acts as a *leno* (pimp) so that he and his wife may earn an inheritance (on the *leno-maritus*, see Tracy 1976: 62ff). Sexual liaisons involving *stuprum* are shown to encourage the alienation of wealth from the family (even if the beneficiary did not set out specifically to court inheritances but received one as a result of a relationship with the testator), see e.g. Juv. *Sat.* 10. 232-9 (cf. 2.2.1.); *Sat.* 2. 58f (cf. 4.3.1.(vi) below). Although those involved in *captatio* would often have been guilty of crimes of *adulterium*, *lenocinium* and *stuprum*, because of their collusion with the testator (the testator had a vested interest in the continuation of these practices), their crimes would have gone unreported.

I shall examine first the relationship between *orbitas*, literary *captatio* and the Augustan laws. Then I shall examine the nature of the Augustan family laws, their sanctions on the unmarried (*caelibes*) and the childless (*orbi*), their system of rewards for successful parents, the policy of mitigation of the harsh letter of the laws in the post-Augustan era, and their political, social and economic contexts. Next, considering the way in which the laws operated and the policy of mitigation, I shall investigate the extent to which the Augustan family laws may have influenced the operation of *captatio* as found in Roman literature. Thereafter, I shall consider the success of the laws in suppressing *orbitas* in upper class Roman society. Evidence of *orbitas* in the Roman elite will not necessarily indicate that *captatio* was a reality in Roman society: it will merely show that the social milieu of the times was ripe for a practice such as inheritance-hunting.<sup>4</sup> Evidence of continuing *orbitas* in the wealthy sectors of Roman society will show that the conditions conducive to *captatio* continued to exist. At the end of this chapter, I shall consider the possibilities that *orbitas* was voluntary or involuntary.

3.2.: The link between *orbitas*, *captatio* and the Augustan laws: Before examining the Augustan laws relating to *orbitas* and their application to literary *captatio*, I should clarify the link between *captatio*, *orbitas* and the Augustan laws: why is it essential for the *captatores* of Roman literature that their objects be *orbi*? How and why might an incidence of *orbitas* have fostered a practice like *captatio* in Roman society? Is there evidence that the laws were aimed specifically at the childless and wealthy?

3.2.1.: Why is it essential that *captandi* be *orbi*? The first question has been partially answered in chapter II:<sup>5</sup> in literature only the *orbi* make suitable and reliable objects of *captatio* because those with children, even when they appear to have disinherited them,<sup>6</sup> are ultimately likely to bequeath their property to their offspring rather than to outsiders, which *captatores* tend to be.<sup>7</sup> In Roman law, disinheriton of children was possible but subject to a number of restrictions, including the fact that disinherited offspring had recourse to the *querela inofficiosi testamenti*.<sup>8</sup> Furthermore, the rules of

<sup>4</sup> Likewise, evidence of *orbitas* on only a limited scale or restricted to certain groups will not rule out the possibility of *captatio*. It will merely narrow the field in which *captatio*, as found in Roman literature, could have operated.

<sup>5</sup> See 2.4.2.1.(ii,c).

<sup>6</sup> See e.g. Seneca *Marc.* 19. 2; Lucian *Dial. Mort.* 351 [or 16(6)]; *Abdicatus* 5: cf. 2.4.2.1.(ii,c) n. 81.

<sup>7</sup> Cf. 1.2. n. 6.

<sup>8</sup> See 2.2.3.

intestacy provided that where someone died intestate or where his will failed, the *sui heredes* (immediate heirs),<sup>9</sup> which meant foremost the estate-owner's children, were the automatic heirs (*necessarii heredes*, see G. II. 157).

Evidence from the literary portrayal of *captatio* and the legal background is supported by what we know of social attitudes to wills: despite a strong tradition in Roman society for leaving substantial proportions of property to outsiders by will,<sup>10</sup> where a testator had children, stronger social and familial pressures would have ensured that he instituted them as his heirs or risked extensive if not unanimous disapproval by society once his will was read.<sup>11</sup>

I have suggested that *captatores* aimed first and foremost at institutions as heir rather than legacies, because of the greater honour attached to heirship, particularly extraneous heirship.<sup>12</sup> But because a testator with children would have placed their interests first, and thus would have instituted them as heirs, the chances of outsiders becoming heirs (*extranei heredes*) would be virtually negated. Even where *captatores* possibly aimed for or received legacies,<sup>13</sup> the stronger claim of a testator's children to the familial property would have meant proportionately less wealth for the legatees. Offspring therefore threatened the interests of all outsiders who were potential beneficiaries of the will, but particularly those of potential extraneous heirs. This explains the great concern, expressed by *captatores* in Roman literature, that their objects be childless.

### 3.2.2.: How and why might the incidence of *orbitas* have fostered *captatio*?

This question has been answered partly in chapter I: where there is childlessness, whether on an individual or a societal scale, there will be a need for alternative "heirship strategies".<sup>14</sup> The individual heirless estate-

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<sup>9</sup> See e.g. 2.4.1. n. 40.

<sup>10</sup> For a discussion of the Furian, Voconian and Falcidian legislation restricting legacies, see 2.4.2.1.(i).

<sup>11</sup> See Champlin 1989: 198-215, at 201, where he points out that the Roman will was "in essence a vehicle for moderated deviance from the rules of intestacy, deviance moderated both by law and by custom". He goes on to note that most wills tended to institute either children or close agnates as heirs; but see the divided opinions of society regarding the will of Domitius Tullus (Pliny *Ep.* 8. 18), where the whole city was divided into those who criticised Domitius Tullus for encouraging the attentions of *captatores* in the first place, while eventually failing to recognise their devoted service in his will, and those who praised him for instituting his family (cf. 2.2.3. n. 20).

<sup>12</sup> See 2.4.2.1.(ii,c).

<sup>13</sup> For literary evidence that *captatores* may have courted legacies, see 2.4.2.1.(ii,b).

<sup>14</sup> See Goody 1976: 86ff, on "Strategies of Heirship", esp. in the case of childlessness; cf. 1.3.ff.

owner in a society with a generally stable population growth-rate has a number of alternatives open to him: one (and in some societies the only)<sup>15</sup> alternative is simply to allow his property to devolve on the agnatic family.<sup>16</sup> But in order to fulfil both the practical and psychological needs usually provided by offspring, childless estate-owners have often found adoption to be the answer.<sup>17</sup> Where the society allows for alienation of property, the childless estate-owner will also have the option of bequeathing wealth to outsiders.<sup>18</sup> However, where childlessness has become widespread and the fertility rate of the society as a whole or of the relevant sections of society has fallen, there will be fewer options for the testator:<sup>19</sup> not only do the opportunities for suitable adoption become limited, but in such a society there is also an increasing possibility that the agnatic family itself may have become depleted, ruling out the option of allowing the wealth to devolve on them.

Nevertheless, the wealthy childless estate-owner is usually at an advantage, as in all societies wealth is a desirable commodity. In a society like the Roman senatorial elite, where social and political climbing had become increasingly expensive,<sup>20</sup> a childless estate-owner would have been in a seller's market. Roman society not only allowed for the alienation of property by means of testation, but placed great importance on wills and inheritance, and had social networks (i.e. *amicitia*) which encouraged close semi-professional extra-familial relationships. Thus the institutions of Roman society provided both the motivation and the opportunities for courtship of a childless testator. Intense competition for the inheritance may have been a possible outcome. This explains why the incidence of *orbitas* in Roman society may have encouraged a practice such as *captatio*.

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15 See Goody (1976: 82 esp. n. 35): in non-literate societies inheritance has to be fairly automatic and the whole descent group can consist of automatic intestate family heirs.

16 For agnates as heirs on intestacy (in the absence of *sui heredes*), see 2.4.1. n. 36.

17 See 1.3.2.

18 For the capacity to alienate wealth, see 1.2.

19 This is not to imply that this was the case in Roman society, either as a whole or in a sector of that society, e.g. the senatorial and equestrian classes. Population depletion does not necessarily take place in a short period of time, but may be a gradual process: thus the options available to the childless estate-owner will be gradually reduced.

20 Hopkins (1983: 33ff, esp. 40) notes that the lower echelons of the senate saw a rapid turnover rate in the late Republic, and ascribes this *inter alia* to the lack of funds available. The impoverishment and demise of the senatorial families continued in the Principate: Augustus raised the minimum property requirement for entry to the senate to 1 million HS. That many senatorial families could not have afforded this is shown by the fact that in A.D. 4 Augustus granted 80 senators enough money to enable them to reach the required minimum (Hopkins 1983: 75).

One should however consider the possibility that increasing *orbitas* in Roman society would have reduced the rarity of the childless testator, and potential heirs including *captatores* would have been in greater demand than the childless *captandi*. If that were the case, surely we should expect to find childless estate-owners courting potential heirs rather than vice versa? That is not the usual scenario suggested by the literary presentation of *captatio*:<sup>21</sup> while it is true that the *captandi* sometimes go out of their way to attract the attentions of *captatores* and are supposed to maintain their interest once they have been "won over" by them,<sup>22</sup> the motive for this behaviour seems to be the assured enjoyment of the pleasures provided by the courtship, rather than the need for an heir. The impression that there is generally more than one *captator* for every *captandus* is borne out by the way in which in the literary portrayal the *captandi* are shown to treat those courting them for an inheritance: we often hear of a *captandus* who purposely deceives *captatores* into thinking that they will receive inheritances, while secretly having no intention of instituting them. Sometimes the inheritance-hunters are shown to discover the deceit in time, sometimes only after a lengthy and expensive courtship.<sup>23</sup> The *captandi* appear willing to alienate those courting their

<sup>21</sup> But cf. Seneca *Ep.* 19. 4, which portrays a *salutator/captandus* migrating to another object when *captandi* alter their wills.

<sup>22</sup> There are a number of ways in which the *captandi* of literature maintain the interest of their *captatores*. The way to keep the *captatores* plying one with gifts and favours was to keep them in doubt as to whether or not they would be successful at gaining an inheritance. Re-signing the will continuously was one option: see esp. Mart. 5. 39, where a *captator* claims to have bankrupted himself by having had to buy his object gifts every time he remade his will thirty times a year, cf. 1-2: "Supremas tibi tricies in anno/signanti tabulas..." (note the ironic contrast between *supremas* and *tricies in anno*); cf. Petronius *Satyrica* 117, where Eumolpus, who is planning to pose as a *captandus*, is told to revise the tablets of his will once a month: "...tabulasque testamenti omnibus [mensibus] (*Buecheler*) renovet". At Mart. 9. 88, there is an example of a *captator* who rests on his laurels once it seems that the object has been won over (and who is chided by the object for doing so): "Cum me captares, mittebas munera nobis/postquam cepisti, das mihi, Rufe, nihil", (While you were courting my favour, you gave me gifts; now that you've caught me, you give me nothing, Rufus), 1-2. The narrator/*captandus* then compares himself to a boar which has been hunted and caught, and is being kept in a pen by the hunter (i.e. the *captator*). (The basic meaning of *capto* (I hunt) makes *captatio* a natural subject for hunting imagery, cf. e.g. 4. 56. 4). A boar that had been hunted would usually have been kept in a pen if its captors had intended to fatten it up for the table; however, the opposite is the case here: "Ut captum teneas, capto quoque munera mitte,/de cavea fugiat ne male pastus aper" (In order to keep your captive, give him gifts in his captive state too, so that the malnourished boar does not escape through a hole in the pen), 3-4.

<sup>23</sup> Martial is the source of numerous examples of *captatores* being tricked by their objects. This trickery assumes various shades: as I have noted (cf. 2.4.2.1.(ii,b) n. 69), at Mart. 9. 9 the *captator* Bithynicus is left nothing in terms of his object's will, although, as the narrator suggests, he will now save the sums that he used to spend courting his object, so in effect he has been left more than the estate was worth; on the other hand, an indirect form of trickery may involve the *captator* being made sole heir but finding that the

favours without any fear of not being able to replace them, both as heirs and as providers of pleasures. (The objects of *captatio* are far from being the victims of the exercise: they are constantly shown to be ungraciously opportunistic, getting all the enjoyment and material gain they can from the courtship).

Thus the literary presentation of *captatio* suggests that while elderly childless testators may have been a common phenomenon in Roman society, the numbers of people who needed their wealth for social advancement and were prepared to court it were far greater. This, together with our knowledge of Roman society, suggests that *orbitas* among the wealthy may have created the conditions necessary for *captatio*.

3.2.3.: Is there any evidence that the laws were aimed at the childless and wealthy? The passing of Augustan family legislation alone suggests that *orbitas* was to some extent a real problem in Roman society. How much of a problem and a problem for whom, is the question. Were the Augustan laws aimed at Roman society as a whole or merely at the propertied classes?

The problems of lack of marriage and childlessness were nothing new in Roman society: in 131 B.C. the censor Metellus Macedonius had made a speech entitled *De prole augenda* (on increasing the birth-rate), which Augustus read to the senate (Suet. *Aug.* 2. 89). Appian (*BC* 1. 7-9) records the concerned response of Tiberius Gracchus to the demise of the free-born population of Italy in about 130 B.C. The idea that the state should intervene was not new either: Livy tells us that the censor Q. Caecilius Metellus Numidicus suggested that everyone should be compelled to marry in order to raise children and thus increase the birth-rate;<sup>24</sup> in 46 B.C. Cicero (*Marc.* 23; *Leg.* 3. 3. 7, 3. 33) called on Julius Caesar and the censors to remedy contemporary evils and prevent the extinction of families by suppressing celibacy (i.e. failure to marry) by law. While it is true that Caesar penalized

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courtship has cost him more than the inheritance is worth, see 7. 66. 1-2 (cf. 2.4.1f, nn. 41 & 42): "Heredem Fabius Labienum ex asse reliquit: / plus meruisse tamen se Labienus ait" (Fabius made Labienus heir to his entire estate: however Labienus says that he has earned more). This topos of trickery of the *captator* by the object should dispel any ideas of the *captandi* of satire and related genres being presented as the "victims" of inheritance-hunting. Another related commonplace resulting from this trickery is the expression of mistrust of the object on the part of the *captatores*: see e.g. Mart. 9. 48; 12. 73: "Heredem tibi me, Catulle, dicis. / non credam nisi legero, Catulle" (You say that I am your heir, Catullus. I won't believe it unless I read it, Catullus), cf. Hor. *Sat.* 2. 5. 50-7. See Livy *Per.* 59: "ut cogere tur omnes ducere uxores liberorum creandorum causa" (cit. Csillag 1976: 53).

celibacy on a limited scale,<sup>25</sup> Augustus was the first political leader to respond with a comprehensive policy prejudicing the position of the unmarried and childless by law.

But were the aims of the Augustan family laws purely demographic? I shall examine later the moral content and political motivation of the Augustan family legislation: for now, it will suffice to note that the laws do not appear to be aimed purely at increasing the birth-rate, but apparently intended to upgrade the morals of the society and strengthen the standing of the family. Laws tend to serve the interests of the wealthier members of society: they are often a reaction of the more conservative elements to trends that they regard as being problematic and which they envisage spreading. Although *orbitas* may have been widespread in Roman society as a whole, legislation attempting to counteract it need only have affected those sectors of society with whose interests the legislators believed they sympathised. The fact that the family laws, with their punishments and rewards, operated in the area of succession, indicates that these laws were aimed at those sectors of society that habitually made wills and were the beneficiaries of them,<sup>26</sup> i.e. the upper classes. They were also the group which may have been motivated to adopt the "heirship strategy" of limiting the numbers of their children to ensure that their estates were not continually subdivided and thus eventually rendered

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<sup>25</sup> In 59 B.C., for example, Caesar had sought to encourage child-rearing by offering grants of land to fathers of three or more children (Rawson 1986: 9).

<sup>26</sup> The Roman upper class is the only group about whom there is consensus in the great debate over the extent of intestacy in Roman society: the elite, a minority, comprises the group that David Daube (1965: 253ff) terms the "haves" (as opposed to the "have-nots") and which he sees as being the only group which would have practised testate succession. The story of the debate on intestacy at Rome begins with rather exaggerated comments by Sir Henry Maine (1861, 1916) to the effect that the Romans were a people with a "horror of Intestacy" (1916: 233) and a "passion for Testacy" (1916: 237). This thesis was generally accepted by scholars until Daube attacked it in 1965, with an argument that, briefly stated, suggests that not all Romans would have had sufficient resources to have warranted making a will. He suggests that even among the "haves" not everyone was as obsessed with will-making and so horror-stricken at the thought of intestacy as the Maine tradition implied (253ff). Scholars including Watson (1971: 175-6) and Brunt (1971: 141) adopted Daube's theory. J.A. Crook (1973: 38-44) countered Daube's thesis, basically arguing that there were those in Roman society who were "neither vastly rich nor grindingly poor but had a bit of this and that to leave. They are the "little people and they are making wills" (39). More recently, Champlin (1989: 198-215, esp. at 208ff) has emphasised the strong interest in wills taken by Roman society, and thus follows the belief of Maine and Crook that will-making was of importance to the Romans. His arguments are nevertheless based on different considerations, e.g. the sense of duty felt by the testator and the desire to recognise the loyalty of one's friends and family. Instead of the old-fashioned "horror of intestacy", he suggests that what they felt was a "deep distaste" towards intestacy (1989: 209).

worthless.<sup>27</sup> Because they operated through succession, the *lex Iulia de maritandis ordinibus* and the *lex Papia Poppaea* appear to have responded specifically to the problems of celibacy and childlessness in the Roman elite. Let us now turn to the Augustan laws themselves.<sup>28</sup>

3.3.: The *lex Iulia de maritandis ordinibus* and the *lex Papia Poppaea*: Csillag (1976: 77) follows the legal tradition in calling the laws by their contracted title *lex Iulia et Papia Poppaea*.<sup>29</sup> Gaius, however, one of the earliest legal sources,<sup>30</sup> separates these laws both in terms of their identity and their specific areas of application: he suggests (II. 111) that the *lex Iulia* applied to the unmarried. Although the remainder of this sentence in the Verona manuscript of Gaius' *Institutes* is missing, it appears that Gaius went on to speak about a law (*lex*), probably the *lex Papia Poppaea*, which he tells us applied to *orbi*.<sup>31</sup> That Gaius distinguishes between the laws and their purposes is confirmed by II. 286 and 286a.<sup>32</sup> A substantial body of legal

<sup>27</sup> This theory is supported by literary evidence: the stoic Musonius Rufus (c. A.D. 30-101) is said to have reproached the wealthy of his age for exposing their children in order to keep their families small and maintain their fortunes (*cit.* Csillag 1976: 44). For the possibility that infanticide or other forms of voluntary fertility inhibition were used by upper class Romans, see 3.7.2. below.

<sup>28</sup> The Augustan laws relating to marriage and procreation of children within those marriages are very complicated: the 2nd century jurist Terentius Clemens covered the subject (thoroughly no doubt) in no less than twenty books (Csillag 1976: 87). I cannot hope to cover all the aspects that are relevant to the study of the relationship between these laws and the presentation of *captatio* in Roman literature in this brief section; nevertheless I hope to point out the most significant elements. I am indebted to the work of the Hungarian scholar Pál Csillag (1976). He is repetitive, and I find him not as discerning as Western scholars (e.g. Syme, Galinsky) in isolating Augustus' possible real aims in introducing the legislation, but his legal knowledge is extensive. The English translation leaves much to be desired, however.

<sup>29</sup> Csillag (1976: 77) admits that it is unusual practice in Roman law to quote two different enactments under one protracted heading, but points out that this is well-precedented: past legal scholars have noted that in the course of time the two laws became merged, e.g. Gothofredus (*Fontes* p.12): "Lata dictaque haec lex Papia Poppaea. Dicta et lex Iulia a C. Iulio Caesare Augusto, quius [sic] auctoritate perlata fuit"; Heineccius (*Ad leg. Iul.* 1. 1. 4): "...quia lex Iulia de maritandis ordinibus quamvis a Papia Poppaea diversa, maximam tamen partem in hanc migravit", *cit.* Csillag: *ibid.*

<sup>30</sup> c. A.D. 110-179: Gordon & Robinson 1988: 9 (intro.).

<sup>31</sup> G. II. 111 (on some of the exemptions allowed in military wills, cf. 2.6.): "Caelibes quoque, qui lege Iulia hereditates legataque capere vetantur, item orbi, id est qui liberos non habent, quos lex [Papia plus quam dimidias partes hereditatis legatorumque capere vetat, ex militis testamento solidum capiunt] (*Huschke*)" (Again the unmarried who are forbidden by the *lex Iulia* from taking inheritances and legacies, and likewise the childless, that is those who have no children, whom the *lex Papia Poppaea* bars from taking more than the half of an inheritance or legacy, are able to take in full those granted in terms of a soldier's will). *Huschke* seems to have reconstructed II. 111 from II. 286 & 286a, which clearly refers to the same laws (see below).

<sup>32</sup> G. II. 286: "caelibes quoque, qui per legem Iuliam hereditates legataque capere prohibentur...", cf. 286a: "Item orbi, qui per legem Papiam ob id, quod liberos non habent, dimidias partes hereditatum legatorumque perdunt...".

scholars have followed Gaius in separating the functions of the two laws, e.g. Cuiacius (1522-1590), who explains succinctly at *Ad Ulp.* 16. 3 (*Opera*): "Iulia est de contrahendo matrimonio, Papia de procreandis liberis".<sup>33</sup> For practical purposes however, the provisions of the laws worked together.

3.3.1.: The legal sanctions of the *lex Iulia de maritandis ordinibus* and the *lex Papia Poppaea*:

3.3.1.1.: The *Caelibes*: First, those who were unmarried or unmarried as defined by the family laws (*caelibes*)<sup>34</sup> were not able to succeed to an inheritance or a legacy (G. II. 111; Csillag 1976: 85), i.e. they were *incapaces*.<sup>35</sup> Even initially there were a number of exceptions to this rule. The law automatically exempted those outside certain age limits: thus men younger than 25 and older than 60 years, and women younger than 20 and older than 50 were not compelled to contract a marriage in order to escape these sanctions.<sup>36</sup> Even unmarried people within the prescribed age limits who had been instituted heir or granted a legacy under a will were allowed a period of grace: they had a hundred days in which to contract a marriage in

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<sup>33</sup> Cf. *Opera* 9. 1359. D: "...lex Papia voluit suscipi liberos...lex Iulia voluerit matrimonium contrahi". The Christian writer Tertullian also reveals that he assumed that the *lex Iulia* dealt with failure to marry and that the *lex Papia Poppaea* dealt with *orbitas*, when he criticises the laws and praises the emperor Severus' renouncement of them (*Apol.* 4. 8; cf. n. 45): "Nonne vanissimas Papias leges, quae ante liberos suscipi cogunt quam Iuliae matrimonium contrahi post tantae auctoritatis senectutem heri Severus constantissimus principum exclusit?"

<sup>34</sup> The law demanded that the marriage be one of the kind recognised by the Augustan laws as valid (*matrimonium secundum legem Iuliam Papiamve Poppaeam contractam*) and, for the purposes of exemption from these laws, did not recognise, e.g. the marriage of a senator to a freedwoman (Csillag 1976: 82). The idea that marriage laws had aimed to prohibit marriage and cohabitation between people of different classes is perhaps borne out by Propertius' mysterious reference to a law (2. 7. 1-3), at the apparent repeal of which Cynthia rejoices. We learn that she and Propertius had formerly (*quondam*) wept about this law because it would have separated them: "Gavisa est certe sublatam Cynthia legem/qua quondam edicta flemus uterque diu/nē nos divideret". It seems that such a law may have compelled Propertius to marry. Badian (1985: 82-98) examines the various possible explanations for this "phantom marriage law" and appears to conclude (1985: 95), with Ferrero, that this is a reference to the five years delay (cf. 3.3.4. below) in the implementation of the *lex Papia Poppaea* (which, he notes, did not actually repeal the law, but merely gave people more time to comply with it).

<sup>35</sup> The Augustan laws relied on a developed concept of *incapacitas* in the Roman law of succession (Csillag 1976: 85). G. II. 111 confirms that it was in fact in the area of incapacity that the sanctions operated: cf. *capere vetantur*. *Incapacitas* (the lack of *ius capiendi*) was the absence of the right to take an inheritance or legacy: this is different from *testamenti factio (passiva)*, which was the right to be instituted heir or to be granted a legacy in terms of a will. Therefore presumably the *caelibes* were able to be instituted heir or granted a legacy in the will itself, but were barred from actually taking it up. On *incapacitas* and its application according to the Augustan laws, see Kaser 1984: 363; Thomas 1976: 488; see 2.5.2.2.

<sup>36</sup> *Ulp.* 16. 1; Jörs-Kunkel-Wenger 1949: 275; Kaser 1984: 290f; Csillag 1976: 81-2.

accordance with the Augustan laws before all the property bequeathed to them became a *caducum* (lapsed share).<sup>37</sup> In that event, the property would then devolve on the state treasury (*ad populum*).<sup>38</sup> According to other sources,<sup>39</sup> relatives of the testator with children were allowed to claim the inheritance before it devolved on the treasury. The newly widowed and divorced were also generally given a period of grace, but thereafter they had to contract a new marriage, with a vow that they did so for the purpose of producing children.<sup>40</sup>

**3.3.1.2.: The *Orbi*:** Those who had contracted marriage in accordance with the Augustan laws,<sup>41</sup> but had failed to produce children, i.e. the *orbi* (childless),<sup>42</sup> were also in a prejudicial position when it came to inheritances,

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<sup>37</sup> Csillag 1976: 86.

<sup>38</sup> See G. II. 150. According to Gordon & Robinson (1988: 197), the paragraph begins with an illegible passage in the Verona manuscript, which contained some reference to the *lex Iulia*. Gordon & Robinson (1988: 11) note that the Verona manuscript is generally difficult to read because it is a palimpsest, i.e. it was written on paper which had been scraped clean of the previous layer of writing; it was also damaged in the 1920's by chemicals intended to improve its legibility: "...ea lege bona caduca fiunt et ad populum deferri iubentur si defuncto nemo [heres vel bonorum possessor] (*Huschke*)". For De Zulueta's defence of the *Institutiones* as "the work of a single author, who can only be Gaius", see Schiller 1978: 45.

<sup>39</sup> See *Fr. de iure fisci*. 3 (*cit.* Csillag 1976: 87): "...si post diem centesimum patres caducum vindicent omnio fisco locus non est".

<sup>40</sup> See Kaser 1984: 290; but cf. *Ulp.* 14, *cit.* Csillag (1976: 82): newly widowed and divorced women were given a period of remission before they had to remarry: this may have been to avoid *conturbatio sanguinis* (lit. "mixture of blood"), which the Romans believed would happen to the foetus if a widow or divorcee who was already pregnant had sexual intercourse with another man (see e.g. Gardner 1986: 52). Widows were in any case expected to mourn their husbands for 10 months (see e.g. Paul. *Sent.* 21. 13; Gardner 1986: 51). Surprisingly though, widows could nevertheless usually contract a new marriage or become engaged within the mourning period without penalty (Gardner: *ibid.*). However, due to cultural concepts of the *univira* (see 3.7.1. below), and the responsibilities of children (and possibly because their husbands' wills may have demanded it in the interests of the children, see Gardner 1986: 54-5), it appears that many women would have chosen to remain widows. Thus according to the Augustan legislation widows had to undertake to contract a new marriage within a given time (probably slightly longer than the mourning period) and had to vow that they did so *procreandae subolis causa* (Csillag 1976: 88). Augustus also declared invalid all conditions (see 2.4.4.1. above) in wills restricting marriage and the raising of children and this was upheld by his successors (see D. 35. 1. 62 (Terentius Clemens *libro quarto ad leg. Iu. et Pap.*); *cit.* Csillag 1976: 87).

<sup>41</sup> If *orbi* had been unmarried in addition to childless they would have faced the full restrictions of the sanctions on *caelibatus* (failure to marry in accordance with the Augustan laws), which meant not being able to take (*capere*, see G. II. 111) an inheritance or legacy. Even if they had children but were unsatisfactorily married in terms of the laws (e.g. in the case of the *liberta senatori nupta*), they would still face the prejudices of *caelibatus*, which were far more extensive than those of *orbitas* within a recognised marriage (Csillag 1976: 82).

<sup>42</sup> *Orbi* seem to have been defined as those who had produced no children at all, cf. G. II. 111: "...orbi, id est, qui liberos non habent". What, on the other hand, of someone who

although not in as restricted a position as the *caelibes* (Csillag 1976: 82). *Orbi* were allowed to take only half of what was bequeathed to them whether by inheritance or a legacy (see G. II. 111).<sup>43</sup> As in the case of the sanctions on *caelibatus*, there were exemptions to the restrictions on *orbitas*:<sup>44</sup> again those below certain age limits appear not to have been classified as *orbi* for the purposes of the laws.<sup>45</sup> Later, the restrictions on *orbitas* (and *caelibatus*) could be made good by grants of *ius liberorum* (lit. the right of children).<sup>46</sup>

The remaining halves of the inheritances and legacies which the *orbi* were barred from taking also became *caduca*.<sup>47</sup> These *caduca* were instead awarded first to heirs of the will with children, failing them to legatees of the will with children, and failing these they went to the *aerarium*.<sup>48</sup> The family

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had produced children who had died? This must have been quite normal in the pre-industrial society that Rome was (see 3.7.1. below on the high infant and child mortality rate). According to *P. Gnomon* (6089: 56ff, *ILS* vol. 2. 1. 521; cf. Csillag 1976: 123) a scale could be worked out to determine whether someone was *orbis* or not: a child that died before being given a name did not count; a child that died before the age of puberty (12 years for girls, 14 for boys: see e.g. G. II. 112-3) counted for half (i.e. two children who had died after being named but before puberty counted as one *pubes* or adult offspring); offspring that died after the age of puberty counted as adults: "...ut bini liberi post nomen inpositum aut singuli puberes amissi virive potentes amissae pro singulis sospitibus numerentur".

43 On the loss of half of an inheritance or legacy by *orbi*, see 3.3. above; see esp. G. II. 111: "...item orbi...plus quam dimidias partes hereditatis legatorumque capere vetat"; cf. II. 286a: "Item orbi...dimidias partes hereditatum legatorumque perdunt...".

44 Here a period of grace of 100 days, as applied in the case of *caelibatus*, would have been obviously less effective for instantly remedying *orbitas*. However, it appears that some people resorted to fictitious adoptions in order to escape the penalties of *orbitas*: the *sc. Memmonianum* (A.D. 63) contained a provision preventing adoptions specifically to evade the prejudices owing to *orbitas* (Csillag 1976: 83 n. 198).

45 *Ulp.* 16. 1. seems to imply that the lower age limits for exemptions to the legal stigma of *orbitas* in terms of the Augustan laws were the same as those for *caelibatus*: "eius aetatis, a qua lex liberos exigit, id est si vir minor annorum XXV sit, aut uxor annorum XX [minor]". The Christian writer Tertullian however, criticises the Augustan laws for having encouraged illegitimacy (see *Apol.* 4. 8; cf. n. 33 above: "quae ante liberos suscipi cogunt quam Iuliae matrimonium contrahi"). He is thus at odds with Ulpian (see above). His generally critical attitude towards this pagan legislation should, however, be taken into account. Csillag (1976: 83) points out that if it was a precondition of the demand for children in terms of the Augustan laws that the parents be married in accordance with the laws, then logically the *lex Papia* (if indeed the purposes of the laws were distinguishable, see 3.3. above) would have maintained the measures of the earlier *lex Iulia*. The laws would certainly not have aimed at encouraging procreation of children out of wedlock: the family focus is a strong factor running through the entire body of the Augustan social legislation. Possibly discrepancies (like this one) that arose out of the original Augustan laws were later ironed out by subsequent revision.

46 Jörs 1882: 59ff; Jörs-Kunkel-Wenger 1949: 275; see 3.3.2.2. & 3.3.3.2. below.

47 G. II. 206, 286; C. 6. 51ff; Buckland 1966: 319ff; Csillag 1976: 85.

48 See G. II. 207: "Et quamvis prima causa sit in caducis vindicandis heredum liberos habentium, deinde si heredes liberos non habeant, legatorum liberos habentium..."; cf. II. 286 (trusts as well as inheritances and legacies bequeathed to *orbi* became *caduca*): "eaque [i.e. *fideicommissa*] translata sunt ad eos, qui in eo (in eo *add. Potenaar ex II.* 206)

of the testator also had a claim: ascendants and descendants to three generations were entitled to take up the *caducum* before it devolved on the treasury whether they had children or not, according to some sources.<sup>49</sup>

3.3.2.: The Augustan system of rewards to successful parents: I have pointed out (3.1.) that the Augustan family laws operated not only by means of a system of punitive measures restricting the unmarried and childless from receiving inheritances and legacies in their entirety, but also by means of a system of benefits as incentives to potentially successful parents. *Caduca* were one such benefit to which parents could look forward: another was the *ius trium liberorum*.

3.3.2.1.: The *iura parentis*: By granting them the *iura parentis*, a single surviving child enabled its parents to escape most of the disadvantages that the Augustan laws attempted to place on *orbitas*.<sup>50</sup> It appears that parents of only one child were able to receive an inheritance or legacy in full: cf. *Juv. Sat.* 9. 86ff, where the adulterer who has impregnated his addressee's wife is imagined telling the husband that he should be grateful for this, since now he will be able to receive bequests in full: "iam pater es.../iura parentis habes, propter me scriberis heres,/legatum omne capis..." (86-88), and will be eligible to receive a *caducum*: "...nec non et dulce caducum", 88.

3.3.2.2.: The *ius trium liberorum*: This was a special concession to the laws which went further than the *iura parentis*, and was initially conferred on those

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testamento liberos habent, aut si nulli (nulli *Savigny, Polenaar: nullos Veronensis*) liberos habebunt (*Seckel & Kuebler: habebint Veronensis*), ad populum, sicuti iuris est in legatis et in hereditatibus, quae eadem aut simili (*Seckel & Kuebler: simile Veronensis*) ex cau[sa] *caduca* fiunt...] (*restituit Polenaar*); cf. *Buckland* 1966: 319-20.

<sup>49</sup> See *Ulp.* 17. 2; 18. 1; *Buckland* 1966: 319-20; but cf. *Fr. de iure fisci.* 3; *cit. Csillag* 1976: 87: relatives who were parents would have had a *vindicatio* to an inheritance or legacy that lapsed through *caelibatus*. This may have meant that in the case of one that lapsed through *orbitas* relatives of the testator who were parents would have had the stronger claim to the *caducum* than those who were not. Relatives who were not parents may have been granted their right to receive *caduca* through the mitigations offered to close relatives in terms of the policy of mitigation applied later to the Augustan laws (see 3.3.3. below).

<sup>50</sup> *Csillag* (1976: 122) suggests that the number of children necessary to escape the sanctions of *orbitas* is a matter of dispute; for the definition of *orbitas* as excluding those with only one child (even though an *orbis* is technically defined as one "sine liberis" - "without children" pl.), see *D.* 50. 16. 148: "Non est sine liberis, cui vel unus filius unave filia est: haec enim enumeratio "habet liberos"; "non habet liberos" semper plurativo numero profertur, sicut et pugillares et codicilli"; 149: "Nam quem sine liberis esse dicere non possumus, hunc necesse est dicamus liberos habere".

who had managed to produce three surviving children.<sup>51</sup> Apart from being able to receive bequests in full, those possessed of *ius trium liberorum* were granted a host of other benefits: thus Juvenal's adulterer at *Sat.* 9. 86ff, who tells the cuckolded husband that he should be grateful for the children resulting from his adulterous liaison with the latter's wife, because of the advantages that children brought in terms of the Augustan laws (see above), is also imagined enticing the cuckold with the promise of many more advantages if he increases the number of the offspring to three:<sup>52</sup> "commoda praeterea iugentur multa caducis, / si numerum, si tres implevero", 88-9.<sup>53</sup> Parents of three children were for example relieved of the necessity to marry again after the death of their spouse.<sup>54</sup> The *ius trium liberorum* also granted husbands and wives the right to inherit from one another (*inter virum et uxorem capacitas*). Before the Augustan laws, the ability of married couples to inherit from one another had been severely restricted.<sup>55</sup> For free-born

<sup>51</sup> For the ages that children possibly had to reach in order to count in determining whether their parents were *orbi* or not, see n. 42 above; according to other sources one male child gave one the right to receive the entire portion of a bequest (see Csillag 1976: 123). Free-born women had to have three children and freedwomen had to have produced four children each to escape the restrictions of the Augustan laws entirely (and also to escape *tutela*, see below). In terms of the *sc. Tertullianum*, which granted mothers full successory rights to their children, and the *sc. Orfitianum*, which gave children the right to inherit from their mother (thus excluding her agnates; cf. Kaser 1984: 341), these restrictions were removed. Cf. Paul. *Sent.* 4. 9; *Inst.* 3. 3. 4: "ideoque impium esse credidimus casum fortuitum in eius admitti detrimentum: si enim ingenua ter vel libertina quater non peperit (*Parisiensis, Krueger: pepererit Bambergensis, Taurinensis*), immerito defraudabatur successione suorum liberorum: quid enim peccavit, si non plures, sed paucos peperit? et dedimus ius legitimum plenum matribus sive ingenuis sive libertinis, etsi non ter enixae vel quater, sed eum tantum vel eam, qui quaeve morte intercepti sunt, ut et sic vocentur in liberorum suorum legitimam successionem" (We concluded that it was wicked to allow her [a mother] to be prejudiced by chance events: if a free-born woman did not bear three children and a freedwoman did not bear four, she was undeservedly cheated of her right of succession of her children. How could she be blamed for not having many, but few children? We therefore granted all mothers the full statutory right of succession to their children, whether free-born or freed and whether having three or four children or perhaps only one, whose death has raised the question). Nevertheless, this passage illustrates that, particularly before Hadrian's time, women were in a much more prejudicial position than men when it came to the question of inheritance in terms of the Augustan laws, and this possibly meant that for them the *ius trium* (or *quattuor*) *liberorum* was one of the few (if not the only) ways to escape this prejudicial position.

<sup>52</sup> This of course gives the clever adulterer an excuse to continue his adultery with the addressee's wife: here the narrator seems to be pointing out that, ironically, even legislation supposedly aimed at improving standards of morality and the return to traditional values can be evaded by being superficially satisfied by behaviour that is its natural opponent.

<sup>53</sup> For the other *commoda* that those with the *ius trium liberorum* could expect to receive, see below.

<sup>54</sup> Jörs 1882: 33-5; Csillag 1976: 161.

<sup>55</sup> Dio Cassius 56. 10; Csillag 1976: 153ff. The reason behind these restrictions was that the wife and husband were technically of different families, and unless marriage had taken

women with three children and freedwomen with four, the *ius liberorum* provided an escape from *tutela*.<sup>56</sup> Apart from succession, the *ius liberorum* also brought political privileges (e.g. seniority in magistracies)<sup>57</sup> and thus would have helped to advance the careers of its beneficiaries.

3.3.3.: The policy of mitigation: Initially the *ius liberorum* was awarded very rarely and only to the families who qualified for it,<sup>58</sup> but later (see below) it appears to have been used as a political privilege, awarded even to the unmarried and childless. This occurred in the context of a system of mitigations to the family laws that were put into effect by Augustus' successors: some of them, however, date as far back as the period when the laws were made. Included in the system of mitigations were the categories of *exceptae personae*, persons exempted from the restrictions for various reasons.

3.3.3.1.: Exceptae personae: I have already noted some of the categories of persons exempted from the restrictions of the Augustan family laws: for example, the restrictions on the ability of *caelibes* and *orbi* to take inheritances and legacies only applied to those within certain age limits.<sup>59</sup> I have also noted that periods of grace were allowed, both for the newly widowed and divorced, and even for those within the ages specified who were

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place *in manu*, a type of marriage very rare in the late Republic and early principate, they were not the immediate heirs (*sui heredes*) of each other (2.4.1. n. 40). In 9 B.C., before the passing of the *lex Iulia de maritandis ordinibus*, husband and wife were able to inherit only one-tenth of their respective estates (*capacitas* was only recognised for portions over one-tenth): Csillag 1976: 153-5; Gardner 1986: 178.

56 G. I. 194; Kaser 1984: 325; Pomeroy 1975: 151; Csillag 1976: 125; Gardner 1986: 20; Rawson 1986: 19; Crook 1986: 67. Pomeroy however (1975: 197f) speculates that not many women would have been able to produce sufficient children to have benefited from the *ius trium liberorum* (cf. Treggiari (1969: 214): freedmen's families tended to consist of two children or fewer; cf. Pomeroy: *ibid.*: similar trends observed in the upper class). Pomeroy's conclusions are supported by the wording of *Inst.* 3. 3. 4 (see n. 51 above).

57 Dio Cassius (53. 13) suggests that senators' appointments to provinces were usually chosen by lot, except where candidates enjoyed the *ius trium liberorum*, in which case they would be given preference. See also Csillag 1976: 124; Courtney 1980: 437.

58 Suet. *Gal.* 14: "...iura trium liberorum vix uni atque alteri, ac ne his quidem, nisi ad certum praefinitumque tempus".

59 See 3.3.1.1. & 3.3.1.2. above: men under 25 and over 60 and women under 20 and over 50 escaped the limitations; however, it was not sufficient to wait until just before the end of the age limitations to get married in order to escape the prejudices of the laws (Csillag 1976: 123; Gardner 1986: 78). The age limitations do not coincide exactly with the periods of fertility (e.g. menarche began around 14 in Roman girls and it appears that many were married or at least engaged by that age, see 3.7.1. below), although the ages of 20 onwards for females to marry may actually have coincided (perhaps by chance) with the ages at which the mother is better equipped to have healthier pregnancies and offspring, and may encourage optimum-sized instead of maximum-sized families (see Sallares 1991: 129ff; see 3.7.1. below).

still unmarried but who had been instituted heir or granted a legacy in terms of a will. Other obvious exceptions were made, e.g. *spadones* (eunuchs) were for obvious reasons under no obligation to marry, whether they were within the prescribed age range or not.<sup>60</sup>

It is difficult to distinguish between those categories of *exceptae personae* who were naturally and automatically exempted from the Augustan restrictions (see above), and those whose exemption was treated as a special concession. The development of a large category of persons exempted because they were related to the testator perhaps falls between these two categories:<sup>61</sup> on the one hand the family of the testator were traditionally in Roman law his heirs on intestacy, close relatives being his *sui heredes* (immediate heirs)<sup>62</sup> and more distant agnatic relatives the residual heirs, so it was natural that an exception should have been made entitling them to inherit;<sup>63</sup> on the other hand it appears that the exemption of family members may not have been in force when the laws were passed, but was later granted as a concession. Also, not only the agnates but also cognates<sup>64</sup> (and even perhaps step-

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<sup>60</sup> See Csillag 1976: 122; *spadones* were naturally exempted from the prejudices resulting from failure to marry because they were incapable of begetting children; this stresses the already obvious link between the legislation on marriage and that on child-rearing, even if were they passed separately (for the question of whether the *lex Iulia* dealt with *caelibatus* and the *lex Papia* with *orbitas*, see 3.3. above).

<sup>61</sup> Although Gaius is silent on the question of familial *exceptae personae* (see II. 111, 144, 286), the 4th century A.D. Vatican fragments are useful sources (Csillag 1976: 120). It should be noted that many of the exemptions to the restrictions of the Augustan legislation came about only in the time of Augustus' later successors. Nevertheless the policy followed by later regimes, of continual mitigation to the harsh measures of the laws, may reflect the extent of popular disapproval of the Augustan family laws. Csillag (1976: 120) notes that the continual policy of mitigation over a long period may have been what has led to the provisions of the original Augustan laws being obscured; this, he suggests, is also the reason for the number of discrepancies that occur in the texts, e.g. regarding the sphere of the family exemptions: *Fr. Vat.* 216 (see Mommsen & Krueger 1890: 68) mentions a large cross-section of relatives, but *Ulp.* 18. 1 (cf. 17. 2) mentions only ascendants and descendants to the third degree.

<sup>62</sup> G. III. 1ff.

<sup>63</sup> G. III. 9ff (the agnates); 17ff (the *gentiles*).

<sup>64</sup> See *Fr. Vat.* 214: "Sed nec cognati vel adfines possunt nominare potiores; prohibentur vero, ut oratione expressum est, hi soli qui lege Iulia Papiave excepti sunt"; cf. 216f: "Excipiuntur autem lege quidem Iulia cognatorum sex gradus..."; for the difference between agnates and cognates, see e.g. G. I. 155ff: agnates are defined as relations through the male sex, usually one's father's relations (see I. 156: "Sunt autem agnati per virilis sexus personas cognatione iuncti, quasi a patre cognati..."), whereas cognates are technically all those related to one, including those related to one through the female line; in practical terms, cognates would have been one's mother's relatives (I. 156: "...at hi, qui per femini sexus personas cognatione coniunguntur, non sunt agnati, sed alias naturali iure cognati").

relations),<sup>65</sup> who were not classified as heirs on intestacy, came to qualify as *exceptae personae*.

3.3.3.2.: Persons exempted through the *ius trium liberorum*: A special category of the *exceptae personae* comprised those who were awarded the *ius trium liberorum*.<sup>66</sup> From Augustus' time already the *ius liberorum* was used to safeguard the positions of privileged groups who could not comply with the Augustan laws, e.g. the Vestal Virgins.<sup>67</sup> In time the *ius liberorum* came to be granted entirely independently of the Augustan laws as special premium.<sup>68</sup> The poet Martial, if we are to believe two of his epigrams, applied for and received the *ius trium liberorum*, despite the fact that he was neither married nor had children.<sup>69</sup> Pliny managed to obtain this privilege from the emperor Trajan not only for himself but also for a number of his friends, including Suetonius.<sup>70</sup> The right was also extended to certain professions, e.g. soldiers and the constructors of merchant vessels.<sup>71</sup>

Csillag comments rather angrily (1976: 124) that "in the course of time, the *ius liberorum*, from its beginnings of an incentive [for] the procreation of more children, eventually became a sham right for the award of privileges". Many of Rome's moral watchdogs may have felt the same way, unless of course they themselves had received an honorary grant of *ius liberorum*. The

<sup>65</sup> See *Fr. Vat.* 218-9: "Lege autem Papia ii adfines excipiuntur; qui vir et uxor et gener et nurus et socer et socrus umquam fuerunt; item [qui] vitricus noverca privignus privigna vel ipsorum vel eorum, qui in eorum potestate matrimoniove sunt quive fuerunt".

<sup>66</sup> Csillag 1976: 122-3.

<sup>67</sup> Dio Cassius 56. 10. 2; Csillag 1976: 83. The Vestals were a group who, as in the case of the newly widowed (see above), custom dictated were not to marry and were therefore automatically exempted from the laws. Beard (1981: 17) points out that Augustus' granting of the rights of women who had borne children to the Vestals meant that their status was legally assimilated to that of the Roman matron (in this article, Beard explores the Vestals' complex and ambiguous sexual status in Roman society; she recognises that the Vestals were seen as both virgins and matrons, and adds that they were also seen as men (18ff), and develops the idea that this ambiguity gave them their sacredness and privilege).

<sup>68</sup> Csillag 1976: 83.

<sup>69</sup> Martial portrays himself begging the emperor for this privilege at 2. 91. 5-6: "Quod fortuna vetat fieri, permitte videri, / natorum genitor credar ut esse trium"; cf. 3. 95. 5-6 (where he mentions the receipt of the *ius trium liberorum*): "Praemia laudato tribuit mihi Caesar uterque / natorumque dedit iura paterna trium".

<sup>70</sup> Pliny *Ep.* 10. 94. It is interesting that Pliny, when asking for the *ius trium liberorum* on Suetonius' behalf, gives as motivation the need for Suetonius "to be able to merit the judgements of his friends" (*iudicia amicorum promeretur* - obviously referring to the custom in *amicitia* according to which *amici* recognised their friends' loyalty by granting them bequests in their wills: see e.g. 4.3.2. below) and points out that Suetonius was married, but the marriage had proven unfruitful (*parum felix matrimonium expertus est*).

<sup>71</sup> Suet. *Cl.* 18, 19 (*naves mercaturae causa fabricantibus*); Dio Cassius 60. 24. 3 (on soldiers being awarded the *ius trium liberorum*); Csillag 1976: 83 n. 199, 124.

*ius liberorum* had become so entrenched in Roman life, that when in A.D. 320 Constantine abolished all sanctions prescribed by the Augustan legislation,<sup>72</sup> it remained.<sup>73</sup> Eventually in A.D. 410 Theodosius and Honorius rendered the right meaningless by bestowing it on all their subjects.<sup>74</sup>

3.3.4.: Reasons for the policy of mitigation: One motivation for this policy of mitigation must have been the large-scale public outcries that the laws caused, both when they were first passed and subsequently: according to Dio Cassius (56. 7. 3), popular resistance resulted in the enforcement of the provisions on inheritances and legacies being postponed for first three, then for two more years after the laws were passed.<sup>75</sup>

Augustus' personal case of *orbitas* must have been greatly embarrassing under these circumstances;<sup>76</sup> equally embarrassing (and widely commented on at the time) was the fact that the two consuls of the year A.D. 9, Marcus Papius Mutilus and Aurelius Poppaeus Secundus, who accordingly gave their names to the *lex Papia Poppaea*, were both unmarried and childless.<sup>77</sup> Among Augustus' intimate friends were childless wealthy people like Maecenas.<sup>78</sup> This bad example set by Augustus and his close friends and family may have given rise to a demand for reasonable concessions to the family laws, and probably also provided fuel for Augustus' unpopularity because of the harsh measures.<sup>79</sup> Galinsky (1981: 128-9) however asserts

<sup>72</sup> See e.g. Buckland (1966: 320): once the state had adopted Christianity, in terms of which celibacy was valued, it was impossible to maintain penalties on the unmarried and childless state (see C. 8. 57. 1). For scriptural advocacy of celibacy over marriage, see 1 Cor. 7. 8, where St. Paul dissuades his fellow *caelibes* from marrying: "Dico autem non nuptis, et viduis: bonum est illis si sic permaneant, sicut et ego"; cf. 9 (marriage is presented as the second-best option, for those who are unable to restrain themselves): "Quod si non se continent, nubant. Melius est enim nubere, quam uri", *Biblia Sacra Latina (ex Biblia Sacra Vulgatae Editionis)*.

<sup>73</sup> That the *ius trium liberorum* could remain when the Augustan laws, from which it had arisen, had been repealed, indicates again the extent to which it operated independently of the legislation.

<sup>74</sup> C. 8. 58/9: "nemo post haec a nobis *ius liberorum* petat, quod simul hac lege omnibus concedimus", *cit.* Csillag 1976: 124.

<sup>75</sup> Tacitus too expresses the popular resentment of the laws when he criticises them at *Ann.* 3. 25 & 28. He maintained that they fostered *delatio*, cf. 25: "ceterum multitudo periclitantium gliscebant, cum omnis domus delatorum interpretationibus subverteretur." Augustus nevertheless bestowed the *ius liberorum* on his wife Livia, although she had not borne him any children (Csillag 1976: 124).

<sup>77</sup> Which explained the necessity for the law, says Dio Cassius brightly (56. 10. 3); cf. e.g. Syme 1960: 452; Csillag 1976: 73, 152; Galinsky 1981: 127.

<sup>78</sup> Syme 1960: 452.

<sup>79</sup> Dio Cassius (54. 12. 3) relates that because of his unpopular policies Augustus was compelled to appear in public wearing under his toga a cuirass, the ancient equivalent of

that Augustus displayed little caution in steaming ahead with his reforms, despite the risk of alienating influential segments of the populace. Nevertheless, the official and personal embarrassments of Augustus' regime may indirectly have paved the way for the policy of mitigation in the post-Augustan era. Undoubtedly later emperors found it useful to be able to remove the harsher measures of the Augustan family laws to win the loyalty of their subjects: rulers seem beneficent when they restore to individuals the rights that their predecessors have taken away.

3.4.: The Augustan family laws in their political, social and economic contexts: Before investigating the degree of success that the Augustan family laws enjoyed, it is prudent to question their purpose: one cannot decide how successful something is until one knows what it set out to do.<sup>80</sup> Identifying the laws' purpose will also indicate whether or not the restrictions on inheritance were aimed specifically at *captatio*. The Augustan family laws that I have examined in detail here were undeniably aimed, superficially anyway, at increasing the rate of marriage and the birth of legitimate children in that sector of society which was making wills and receiving property from them, i.e. the propertied class. But as social regulations the laws were part of a broader political purpose, which I shall now investigate. It should be noted that modern scholars have warned against the exaggeration of the demographic purpose of the Augustan family laws.<sup>81</sup> The fact that, as I have noted,<sup>82</sup> the restrictions on the unmarried were far worse than those on the *orbi* also indicates that the purpose of the

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a bullet-proof vest, for fear of assassination. Even if unfounded, this story nevertheless illustrates the point that there was extensive popular resistance to the laws: see also Syme 1960: 444.

<sup>80</sup> Last (1934: 443) suggested that the "success of Augustus must be judged by his attempts to restore respect for marriage", and adds that "because artificial aids to the birth-rate were a mere supplementary undertaking" the possible failure of these aspects of the laws "cannot pass for proof that [Augustus] failed in his main endeavour". However, for the purposes of investigating the possible existence or continued existence of *captatio* in the Roman elite, the question of whether the laws failed in their demographic aims is highly significant (cf. 3.6. below).

<sup>81</sup> There are serious questions about a purely demographic purpose for the laws: cf. Last 1934: 452; Csillag 1968: 131; Brunt 1971: 561; Galinsky 1981: 127. Galinsky notes (1981: 127 n. 10) that Biondi (1939: 199) speaks cautiously of "*leggi matrimoniali*" rather than "*demografiche*". Last (1934: 448) writes that "whatever its effects on the size of families, the attempt of Augustus to restore the dignity of marriage was his boldest project in the social sphere". In the ancient mind, however, demographic and moral concerns were possibly linked (Galinsky 1981: 131).

<sup>82</sup> Cf. 3.3.1.1. & 3.3.1.2. above.

restrictions was moral rather than purely demographic, and was focussed on the family.<sup>83</sup>

3.4.1.: The political context of the family laws: The family laws as moral legislation are part of the policy of the early years of the Principate, when Octavian (now Augustus) was striving to create a new social order and improve the image of himself and his new regime after his victory at Actium. Syme (1960: 440) suggests that once peace had been restored after the civil wars the state looked to Augustus for "spiritual regeneration as well as material reform".<sup>84</sup> The new order that Augustus strove to create was in a sense an old order because its attitudes enshrined the values (or the imagined values) of Rome's past: he advocated a return to the ideals of duty, piety, chastity and frugality instead of the wealth, greed and corruption that conquest had brought.<sup>85</sup> *Captatio* would have been seen as one aspect of the general corruption of society, but it would be mistaken to think that Augustus' reforms were aimed specifically at *captatio*. What the reforms meant was a return to the nuclear family as the basic social unit.<sup>86</sup> This is reflected in both the legislation on marriage and child-rearing and in that prohibiting adultery and other sexual offences detrimental to the stability of the upper class family.<sup>87</sup> In a speech to the *equites* with families, Augustus is reported to have emphasised the link between demographic concerns (Dio

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<sup>83</sup> Galinsky (1981: 129) points out that even on a purely quantitative level, the demographic rationale does not suffice for the complexity of the legislation. Also, because they operated in the arena of inheritance the legal restrictions on *caelibatus* and *orbitas* would only have affected the upper classes (on the question of the extent of intestacy in Roman society, see 3.2.3. n. 26 above).

<sup>84</sup> Cf. Syme (1960: 440): "It is not enough to acquire power and wealth: men wish to appear virtuous and feel virtuous".

<sup>85</sup> See e.g. Livy *Praef.* 12: "nuper divitiae avaritiam et abundantes voluptates desiderium per luxum atque libidinem pereundi perpendique omnia invexere"; Syme 1960: 442 n. 4.

<sup>86</sup> By intervening in the alienation of property from the family through the conventions of Roman will-making, Augustus may have been trying to strengthen the bonds of the family and at the same time break the formidable strength of the social network of *amicitia* (see 4.2.ff below), in the context of which much of the alienation of wealth from the family took place (Wallace-Hadrill 1981: 58-80, at 68). Also, the grateful family man (whose loyalty would have been ensured by the privileges initially reserved for parents, e.g. the *iura parentis, ius liberorum*) would have been less of a threat to Augustus' political autonomy than the potentially dangerous network of *amicitia*.

<sup>87</sup> The link between concerns about the moral upliftment of Roman society, and those of demography and the survival of the family, is demonstrated by an appeal of Cicero (*Marc.* 23) to Julius Caesar to institute a programme improving the morals and encouraging the raising of children in Roman society: "omnia sunt excitanda tibi, C. Caesar...: constituenda iudicia, revocanda fides, comprimendae libidines, propaganda suboles, omnia quae dilapsa iam diffluxerunt severis legibus vincienda sunt".

Cassius 56. 2. 2) and morality in marriage, both of which were a concern to the state (Dio Cassius 56. 3. 3.).<sup>88</sup>

3.4.2.: The social and economic context of the family laws: Whatever the political motivation, it is nevertheless by no means unprecedented for states to discourage celibacy and reward the production of children. However, as Wallace-Hadrill points out, what sets the Augustan family laws apart is the fact that they operated primarily by intervening in the pattern of inheritance.<sup>89</sup> There are a number of reasons why this would have been particularly effective: not only was inheritance a subject that appears to have been of great interest and emotional importance to the Roman people,<sup>90</sup> but in a pre-industrial society, where commercial endeavours were substantially limited in comparison to modern industrialised countries, inheritance was one of the main ways in which large amounts of wealth were transmitted between individuals.

The economic weight carried by inheritance might explain its emotional importance in upper class Roman society, and thus the extensive resistance to Augustus' family reforms in this sphere. Ironically, it may also explain Augustus' choice of the area in which to have his family laws operate: lapsed shares (*caduca*) which no-one had been able to claim went to the treasury (*aerarium*),<sup>91</sup> thus increasing the state revenue.<sup>92</sup> Hopkins suggests that this

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<sup>88</sup> Galinsky 1981: 132. He also suggests (1981: 133ff) that one of the motives for Augustus' programme to upgrade the morals of Roman society (by improving the standing of the family) was his imperialist foreign policy: contrary to the traditional belief of scholars, Galinsky points out (133), Augustus was not the "prince of peace" (*pax* and peace are not the same things), but engaged in an expansionist frontier policy and had imperialist ambitions (archaeological evidence from Roman military bases in Germany indicates an offensive rather than a defensive strategy). Therefore a strong moral base, ensured by the moral legislation, was necessary to support Roman nationalism (see also Syme 1960: 440), which would be the grounding of the imperialist policy; likewise, the expansionist policy would also foster an increase in Roman nationalism and in loyalty to the princeps. See Galinsky (1981: 141): "Some manifestation of ethical superiority in general, and not merely increased progeny, was called for..."; he emphasises the fact that the moral legislation, although it has for a long time been "singled out for its apparent conceptual simplemindedness" by scholars, was, like most of Augustus' policies, a complex interaction of several components" (1981: 139).

<sup>89</sup> See Wallace-Hadrill (1981: 60): in Sparta failure to marry (*'αγαμία*) was an offence, as was late marriage (*'οψιγαμία*) and marriage with social inferiors (*κακογαμία*). Fathers of three of four sons were also exempted from military service, cf. the *ius trium liberorum*, 3.3.2.2. above.

<sup>90</sup> Champlin 1989: 198ff; for the emotional significance of the Roman will, see 1989: 200ff.

<sup>91</sup> See G. II. 150, 286a; cf. 3.3.1.1. & 3.3.1.2. above.

<sup>92</sup> Hence Tacitus' comment (*Ann.* 3. 25) that Augustus introduced this legislation *incitandis caelibum poenis et augendo aerario*.

potentially lucrative source of state revenue was the reason behind the maintenance and elaboration of the laws over the next three centuries.<sup>93</sup>

3.5.: The Augustan family laws and literary *captatio*: But does the fact that the Augustan laws intervened in the pattern of inheritance have any relevance to *captatio* as we find it in Roman literature? This depends largely on whether *captatio* was a phenomenon in society and would thus respond to changes in the laws, or whether it was purely a topos of literature which remained unresponsive to legal pressures and social change. Even if *captatio* was a phenomenon in Roman society of this period and not merely a literary conceit, there may have been a great discrepancy between the way in which pursuit of inheritances operated in reality and the stylised way in which it is presented in literature. Again, the topoi associated with literary *captatio* may be derived from the period prior to the passing of the Augustan laws or before the laws were put into effect.<sup>94</sup>

If *captatio* were a social phenomenon, how would it have responded to the Augustan restrictions on inheritance? The effect that the Augustan laws would have had or would not have had on *captatio* depends as much on what the laws did not do as on what they did do. What the Augustan laws did not do was to prejudice the capacity of the unmarried and childless to make wills (*testamenti factio activa*).<sup>95</sup> Neither did the laws deny the right of a testator to institute or leave a legacy to whomsoever he wished.<sup>96</sup> Nor did they technically forbid the unmarried and childless to be instituted or granted a legacy formally in the will (*testamenti factio passiva*).<sup>97</sup> The Augustan laws intervened in the system of succession only at the point where the potential beneficiary was to take (*capere*)<sup>98</sup> the inheritance or legacy. Thus while an *orbis* or *caelebs* was restricted in his ability to take the inheritance or legacy, he still could be instituted or granted a legacy in a will without making that

<sup>93</sup> In Roman Egypt officials were instructed to confiscate inheritances left to unmarried and childless Roman women who possessed property worth 50,000 HS (*Regulations of the office of the Idiologos* 30; *BGU* 5.1.; Meyer, *Jur. Pap.* 93; *cit.* Johnson 1936: 713; cf. Hopkins 1983: 242 n. 54).

<sup>94</sup> For the 5-year delay before the laws were effected, see Dio Cassius 56. 7. 3; cf. 3.3.4. above.

<sup>95</sup> See 2.5.1.

<sup>96</sup> To impede the right of a Roman citizen to make a will and his right to institute or bequeath property in that will to whomsoever he chose would have been to infringe the legal principle of *libera testamenti factio* (freedom of testation).

<sup>97</sup> See 2.5.2.

<sup>98</sup> See e.g. G. II. 111; 286, 286a; Kaser 1984: 363. Cf. 2.5.2.2. & 3.3.1.1. above: the Augustan laws relied on the developed concept of *incapacitas* in the Roman law of succession (Csillag 1976: 85).

will void. An unmarried heir would however have made the will ineffective (but not void) and thus would have caused the testator to die intestate.<sup>99</sup> However, an heir who was married but childless and who could thus take half of the bequeathed portion (*dimidias partes*, see G. II. 111) would not have caused the will to be ineffective, neither would an unmarried or childless legatee. In effect, the Augustan laws interfered with the testator's will (intent) but appear to have avoided invalidating his will (testament).<sup>100</sup>

What the Augustan family legislation did do was to introduce legal prejudices against unmarried and childless potential beneficiaries of wills, by restricting their capacity to take inheritances and legacies.<sup>101</sup> Thus it appears to have been *caelibatus* and *orbitas* in the beneficiaries, rather than in the makers of wills, that the Augustan family laws set out to attack. By contrast, in the literary portrayal of *captatio* it is traditionally the *captandus*, the party courted for inheritances and thus the potential testator, who is *orbis*.<sup>102</sup> The *captatores*, i.e. the potential beneficiaries of the will, are not strictly presented as either *caelibes* or *orbi*. When we do hear that *captatores* are married or have children, it is often to illustrate a point about the way in which *captatio* operates and the character of the *captatores* themselves,<sup>103</sup> rather than to

<sup>99</sup> See G. II. 144: a will properly made but instituting someone excluded from the inheritance because of an unmarried state would nullify a previous will, i.e. the latter will itself would be valid, but it would be ineffective (*nullas vires habet*) because it would produce no heir. Therefore the testator would die intestate.

<sup>100</sup> Because they intervened at the point where the beneficiaries of the will were to take (*capere*) their bequests, and did not interfere with the procedure of will-making, the prejudices of the Augustan laws restricted the beneficiaries rather than the testator: i.e. *libera testamenti factio* was still theoretically assured. However, the laws did in effect tamper with testator's intentions, since the testator's intended beneficiaries could be denied their bequests, through *incapacitas*, if they failed to comply with the laws. Because lapsed shares (*caduca*) would be taken away from their originally intended beneficiaries and were offered instead to those beneficiaries of the will with children, the testator's intended proportional distribution of his estate (on *solemnis assis distributio*, see 2.4.1.1. above) was also tampered with. However, the fact that these *caduca* went first to those heirs or, failing them, to legatees of the same will (*in eo testamento*, G. II. 206, 286a), and only thereafter to the treasury or (later) members of the testator's family, means that some concessions to the testator's intentions were made.

<sup>101</sup> See 3.3.1.1. & 3.3.1.2. above.

<sup>102</sup> *Orbitas* is an essential attribute of the *captandus* (suitable object for successful *captatio*). I have examined the reasons for this at 3.2.1. above.

<sup>103</sup> At Pliny *Ep.* 4. 2, where it transpires that the *captator* Regulus (see also Pliny *Ep.* 2. 20) had been married and had had a son, both the wife and the son (although both were dead by this stage) play important parts in the story which illustrates Regulus' character: Pliny describes how Regulus courted his own son for an inheritance (cf. *foeda et insolita parentibus indulgentiae simulatione captabat*), after the son had been made heir to his mother's estate (by means of a *condicio emancipationis*, with which Regulus seems to have complied, although he certainly would have ensured that he emerged as *parens manumissor*, see Tellegen 1982: 65-8). It is however interesting that after both his wife and his son have died, Regulus retires from active *captatio* and instead finds himself (now

emphasise their states of marriage and parenthood. We sometimes hear that they have wives and children whom they cleverly employ to provide their objects with sexual favours.<sup>104</sup> Here the emphasis is on this immoral type of *modus operandi* rather on the fact that the *captatores* have wives and children to exploit in this way.

It would seem that the classic operation of *captatio*, as presented, e.g. at Hor. *Sat.* 2. 5, would not have been much affected by the Augustan restrictions on inheritance: the elderly childless wealthy could have continued to bequeath property to those courting them for inheritances (or to fail to do so, as they chose). Those fortunate *captatores* who were instituted heir or granted a legacy in terms of a will would have been able to take up the whole or half of their bequests, or would have had to forgo them entirely, according to their varying statuses of marriage and parenthood. However, being married in accordance with the Augustan laws and having children would have been especially advantageous to *captatores*: those with children would have been qualified to take the lapsed shares (*caduca*) that their fellow beneficiaries without wives and children would have had to forgo. Thus the Augustan laws would, initially at least, have given *captatores* who were husbands and fathers the edge over their competitors.<sup>105</sup> If the Augustan laws had been put into effect strictly (although the policy of mitigation suggests that they were not),<sup>106</sup> the *orbi* and *caelibes* (particularly the former) could not have acted as *captatores*.

Theoretically, therefore, it seems that the Augustan laws would not have had much effect on the operation of the type of *captatio* that appears in Roman satire and other genres.<sup>107</sup> Yet the paradigm of marriage and children

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suitably *orbus*) an object of *captatio* at the hands of numerous people seeking to follow his former example, *Ep.* 4. 2.: "Convenitur ad eum mira celebritate...in Regulo demerendo Regulum imitantur".

<sup>104</sup> For wives employed to do the object sexual favours see e.g. Hor. *Sat.* 2. 5. 75-6 (Penelope); cf. Mart. 4. 5. 5 (Fabianus does not fit in at Rome because he is unwilling to allow his wife to sleep with his *amicus*): "Nec potes uxorem cari corrumpere amico"; Juv. *Sat.* 1. 55-7; for children used to provide sexual favours for *captandi*, see Petronius *Satyrica* 141 (Philomela sends her children to Eumolpus).

<sup>105</sup> In its literary portrayal, *captatio* is presented as a very competitive business, see e.g. Mart. 6. 62. 1-4, where the implication is that someone who has recently become *orbus* would normally at once become the target of voracious and competitive *captatio*: "Amisit pater unicum Salanus/...cuius vultur hoc erit cadaver?".

<sup>106</sup> See 3.3.3. & 3.3.4. above.

<sup>107</sup> How the laws strove to remedy the circumstances (e.g. *orbitas* in the wealthy class) that made *captatio* possible is another matter. Wallace-Hadrill (1981: 68) advances a theory that Augustus was trying to break the power of *amicitia* (see n. 86 above; on *amicitia*, cf. 4.2.ff), in the context of which *captatio* may have been occurring. Briefly, he suggests

advocated by the Augustan moral laws was in direct opposition to the world of *captatio*, particularly that of its social context, i.e. *amicitia*, in which *orbitas* appears to have been highly prized.<sup>108</sup> The effects of this paradigm clash may have been to polarize those operative in *captatio* into *captatores* and *captandi*,<sup>109</sup> instead of promoting the potentially mutual courtship for inheritances which appears to have taken place in the context of *amicitia*.<sup>110</sup> The dilemma of someone caught between these two powerful paradigms is illustrated at *Juv. Sat.* 6. 38-40, where a certain Ursidius, who is planning to get married and have children, is teased by the narrator that he will from now on have to do without the delicacies that *captatores* give their objects as part of their courtship.<sup>111</sup> Although the narrator's comment on Ursidius'

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(e.g. 1981: 58ff, esp. at 64, 71) that the Augustan laws were attempting to break a spiralling process: although the Roman upper class traditionally left a portion of their property to outsiders, where there was extensive *orbitas*, large amounts of property were being continually left by these childless testators to outsiders, who themselves being probably also without children, would consequently in turn leave this property to other outsiders. Wallace-Hadrill asserts that the Augustan laws countered social pressures of Roman society by making it increasingly difficult for people to leave property to outsiders unless these outsiders had families. He concludes that Augustus was attempting to stabilise the transmission of wealth, and to keep it within families wherever possible (this would also explain the later exemption of the testator's family from the restrictions on *caelibatus* and *orbitas*). It is probably going too far to surmise that there would have been indirect or tacit approval of *captatio*, where it resulted in property passing to other elite families with children. But then the attitude of Roman society to practices like *captatio* was ambiguous: it was a paradox of *amicitia* that it was considered an honour to receive wealth from another's will, especially as an extraneous heir (see Champlin 1989: 203), although it was definitely taboo to be seen to have actively courted that inheritance (Saller 1982: 125).

- 108 See e.g. *Juv. Sat.* 5. 137ff (parodying *Verg. Aen.* 4. 328 at 138-9, cf. Courtney: *ad loc.*): "dominus tamen et domini rex/si vis tunc fieri, nullus tibi parvulus aula/luserit Aeneas nec filia dulcior illo./[iucundum et carum sterilis facit uxor amicum.] (*del. Jahn*)". Cf. Seneca *Marc.* 19. 2, where the narrator asserts that at Rome childlessness bestows more influence than it takes away: "...in civitate nostra plus gratiae orbitas confert quam eripit, adeoque senectutem solitudo, quae solebat destruere, ad potentiam ducit...". *Amicitia* could be termed "*orbitas*-friendly", but it was even more probably *orbitas*-dependent, if it was as riddled with *captatio* as the satirists suggest it was.
- 109 An illustration, in a fantastical setting, of the polarization of the roles of *captator* and *captandus* is found at Petronius *Satyrica* 116, where the bailiff informs Eumolpus, Encolpius & co., that in the city of Croton, to which they are headed, the whole populace is divided into either *captandi* or *captatores*: "...quoscunque homines in hac urbe videritis, scitote in duas partes esse divisos. Nam aut captantur aut captant".
- 110 For the idea that the *captator* is indistinguishable from the *amicus* (and thus the roles of courter and courtee are potentially interchangeable between *amici*), see e.g. Sen. *Ep.* 95. 43: "Amico aliquis aegro adsidet: probamus. At hoc hereditatis causa facit: vultur est, cadaver expectat"; cf. *Ben.* 20. 3, where an *amicus* who, while sitting at the bedside of a sick friend, allows himself to dwell on the possibility of an inheritance, is described in terms of the fishing imagery commonly applied to *captatio*: "...si animo eius observatur spes lucri, captator est et hamum iacit" (i.e. he is dropping the bait into the water in order to catch his object).
- 111 *Sat.* 6. 38-40: "sed placet Ursidio lex Iulia: tollere dulcem/cogitat heredem, cariturus tuture magno/mullorumque iubis et captatore macello" (But Ursidius likes the Julian law. He is thinking about having a sweet little heir, although he will have to do without

intentions is typical of the teasing that in all societies those about to marry have to endure,<sup>112</sup> it nevertheless acknowledges that to be successful in *amicitia* (possibly as a *captandus*) and at the same time conform to the Augustan social and moral ideal was, at this stage, virtually impossible.<sup>113</sup>

3.5.1.: *Captatio* and the policy of mitigation: Nevertheless, there were, both initially and subsequently, a number of legal loopholes in the Augustan system, which would have enabled *captatio*, as we know it from Roman satire, to have continued. First, Gaius (II. 286, 286a) tells us that prior to the *sc. Pegasianum*, in the reign of Vespasian,<sup>114</sup> the unmarried and childless were able to take trusts (*fideicommissa*), even where they were barred and restricted from taking inheritances and legacies. Thus in the period prior to the *sc. Pegasianum*, *fideicommissa* would have been an alternative goal for those *captatores* restricted by the Augustan family laws.

Second, the post-Augustan policy of mitigation to the letter of the laws would have made life easier for those involved in *captatio*. The exemptions allowed for family members would have meant that childless *captandi* would have been able to inherit wealth from their families, and thus maintain the standard of wealth that was, after all, a prerequisite for objects of inheritance-hunting. Likewise, an honorary grant of the *ius trium liberorum* (see above), would have enabled otherwise childless unmarried people to engage successfully in *captatio*: as *captatores* they would have been able to receive an inheritance or legacy in full; as *captandi* they would have escaped the prejudices of the Augustan restrictions (which again would have enabled

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the large turtle-doves, the bearded mullets, and all the delicacies of the meat-market beloved by inheritance-hunters). For details about the costly and luxurious nature of the delicacies mentioned here (e.g. the bearded red mullet was apparently the best kind), see Courtney, *ad loc.* The mention of luxurious gifts given to *captandi* indicates that the *captatores* as presented in Roman literature are seen as wealthy.

112 The narrator's disbelief that Ursidius is planning to get married must also be seen in the context of the general theme of *Sat. 6*: a satire on the moral laxity of contemporary elite Roman women.

113 Someone who has conformed to the expectations of the Augustan laws and who can therefore not be considered a *captandus*, is one Catullus at *Juv. Sat. 12. 93f*. The narrator assures his addressee, Corvinus (who has, ironically, a name typical of *captatores*, being based on the word for crow (*corvus*), see 2.6. n. 158), that by celebrating his friend Catullus' safe return, he is not courting him for an inheritance - Catullus already has three little heirs (which would also have qualified him for the *ius trium liberorum*, see 3.3.2.2.).

114 See Kaser 1984: 383, 385; in terms of the *sc. Pegasianum*, the Augustan restrictions on *caelibes* and *orbi* concerning the receipt of inheritances and legacies were extended to *fideicommissa*.

them to gain the wealth in the first place), without necessarily relinquishing the state of *orbitas* so essential for *captatio*.<sup>115</sup>

The scarcity of references to the Augustan laws in the presentation of *captatio* in Roman satire and other genres (Juv. *Sat.* 6. 38ff is one of the few examples) would suggest that *captatio*, if a real social phenomenon, would not have been much hindered by the restrictions of these laws. I must reiterate (cf. 3.4.1. above) that it would be misguided to assume that the laws were aimed specifically at *captatio* (the practice of inheritance-hunting, real or imagined, would however have been seen as part of the general moral laxity that the laws aimed to counter); yet had *captatio* been a "real" social phenomenon, one might have expected the Augustan laws to have had a greater impact on the literary presentation (assuming that literary texts reflect external "realities" at all). This impact, as we have seen, would not have affected the *captandi* so much as the *captatores*, who would thereafter have had to have been married and with children in order to be successful. The lack of interaction between the laws and literary *captatio* may suggest that inheritance-hunting as it appears in, e.g., satire was merely a literary conceit, or that certain aspects of the literary portrayal (e.g. prescribed *orbitas* for *captandi*) are purely literary; on the other hand, it may indicate that *captatio* operated largely outside the bounds of the law (cf. 4.1. & 4.4ff below). Or it may have been that the laws were entirely unsuccessful and ineffective.

3.6.: The success of the Augustan family legislation: The laws' degree of success and the extent to which they were taken seriously by society must also be considered: the law's degree of success would also determine their degree of influence on *captatio* and the conditions conducive to it. How successful the laws were at checking *orbitas* or improving the standing of the family in the Roman upper class is debatable. I am reluctant to believe Augustus' own claims that he single-handedly improved the birth-rate by means of his social

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<sup>115</sup> It is impossible to quantify how extensively the honorary grant of *ius liberorum* was handed out; possibly it was bestowed especially on those who had served the emperor in some way (this might account for the grant of it to writers and administrators, e.g. the poet Martial, the younger Pliny). Both these authors treat *captatio*, and Pliny, we know, received a good many bequests. While I am not calling Pliny a *captator* (although it is possible that to do so was a type of insult rather than a statement of fact, see 4.3.2. ff below), it is not impossible that someone in a similar social position to Pliny (and we do know that *captatores* as presented in literature must have been fairly wealthy; see n. 111 above, on Juv. *Sat.* 6. 38ff) may have received the *ius trium liberorum* and used this to assist his attempts at successful *captatio*.

laws.<sup>116</sup> It is true that statistics from censuses, although their accuracy is doubtful, do show an increase in the Roman citizen population over the period of Augustus' rule and afterwards.<sup>117</sup> However, these statistics, which show the total citizen population increase, are not much use in gauging the effects of the legislation on its specific target, the Roman upper class. Also, such statistics do not measure the degree to which the laws' moral purposes met their mark.<sup>118</sup>

In addition, the evidence of independent literary sources, although perhaps exaggerated and biased, does not support Augustus' boasts at having stemmed the tide of *exolescentia*. Tacitus (*Ann.* 3. 25) claimed that the laws did not succeed at encouraging marriage and child-rearing in the face of the prevailing fashion for *orbitas*: "Nec ideo coniugia et educationes liberum frequentabantur praevalida orbitate". Dio Cassius (56. 1ff) berated the laws for their lack of success; he often mentions that when in A.D. 9, the *lex Papia Poppaea* followed the provisions of the previous *lex Iulia*, a large minority of the equestrian order was still unmarried (Csillag 1976: 43). The emperor Marcus Aurelius, a century and a half after Augustus' death, comments on the large number of upper class families which had become extinct (*Medit.* 8. 31). Polybius too (36. 17) complained of widespread contemporary childlessness.

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116 "Legibus novis me auctore latis multa exempla maiorum exolescentia iam ex nostro saeculo reduxi et ipse multarum rerum exempla imitanda posteris tradidi" (*Res Gestae* 8. 5). The emphasis on following traditional values and precedents on the one hand (*exempla maiorum*), and setting new precedents for future generations to imitate on the other (*exempla imitanda posteris tradidi*) underlines the traditionalist and moral undertones of Augustus' laws (see above).

117 According to Hammond (1933: 90ff; cf. Frank 1940: 1; Csillag 1976: 83), the census of 28 B.C. showed a population of 4,063,000, that of 8 B.C. one of 4,233,000, that of A.D. 14 one of 4,937,000. According to Tacitus (*Ann.* 11. 25. 8) the census under Claudius showed a population of 5,984,072 citizens. It should however be noted that the accuracy of the data is questionable; also, Csillag (1976: 83) notes that it has been disputed whether this data included women and children or not: Beloch (1886: 370-8, 436) thought that these figures included women and children, whereas Frank (1940: 1) suggested that Beloch was mistaken in thinking that these figures included women and children (Frank's opinion seems to be based on practical considerations: men would have been more accessible to the census than women, because of the public nature of their roles in society and because they were generally better educated; the census was also often based on poll-tax forms). Other factors, such as grants of citizenship, and (see Brunt 1971: 131f) the assimilation of former slaves into the free population (and after two or three generations, into the citizen population) may have also played a role.

118 See 3.4. above: the laws' purpose does not appear to have been demographic so much as social and moral.

Perhaps the only area in which the laws were truly successful was in bringing in funds, derived from the confiscated lapsed shares that the unmarried and childless had to forgo, to the state treasury.<sup>119</sup> As Brunt notes,<sup>120</sup> this alone indicates the extent to which the sanctions failed to promote marriage and fertility. It also explains, as I have noted, why these laws continued to be kept in the statute book even when it had become plain that they were not achieving their social and moral aims.<sup>121</sup>

In summary, it seems that the operation of *captatio*, if as a social phenomenon it is reflected in the topoi of literature, could have evaded the sanctions of the Augustan family laws, both because of the technical way in which the laws operated (on the principle of *incapacitas*, rather than at the point of *testamenti factio*: see 3.5. above), and possibly because of the later system of mitigations. At most the laws would have polarized those involved in *captatio* into *captatores* and *captandi*: the laws necessitated that generally recipients of inheritances should be married and have children, preferably three, while successful *captatio* demanded that its objects be *orbi*. Therefore *captatio* as presented in literature could have continued successfully, provided that a substantial portion of potential objects remained *orbi* and provided that the *captatores* were at least married and preferably parents.

Some potential *captandi* (e.g. Ursidius at Juv. *Sat.* 6. 38ff) would have been tempted to get married and have children. However, the failure of the Augustan family laws in their moral and demographic aims, or rather, their uncanny success at raising funds for the *aerarium* from confiscated bequests, demonstrates that a substantial portion of the wealthy were in fact remaining unmarried and childless in spite of the Augustan laws; this means that there would have been a continued existence of the social conditions conducive to *captatio*.

The laws' lack of success at reducing the incidence of *orbitas* in the upper class introduces an important question: does their lack of response to the Augustan laws imply that childlessness was beyond their control, or was their low rate of fertility a result of conscious choice? Did some people plan to be *orbi* (and hence possibly successful *amici* or even *captandi*)? Did others plan

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<sup>119</sup> Brunt 1971: 566; Csillag 1976: 70; on the possible quantities of property that were confiscated in Egypt alone, see n. 93 above.

<sup>120</sup> Brunt: *ibid.*

<sup>121</sup> Brunt: *ibid.*; cf. 3.4. above.

small families but end up childless? Or does the laws' lack of success indicate that, despite the Augustan measures, it was more profitable for Romans to have few children or none?

The idea that *orbitas* could be socially prestigious is a commonplace of Roman literature: e.g. Seneca *Marc.* 19. 2 records that childlessness had become so advantageous in Roman society (*ad potentiam ducit*) that some parents actually pretended to disown their children in order to benefit from the social prestige enjoyed by the *orbi*. At *Sat.* 5. 137ff, Juvenal explores the idea that the *amicus inferior* can only advance socially if he is childless and wealthy. The most outstanding development of this topos is Petronius *Satyrica* 116ff, where we learn that in the fantastical <sup>treatment of the</sup> town of Croton (arguably a parody of contemporary Roman society) no one bothers to bring up children because of the social ostracism and lack of advantage that those with children have to endure. While most of the other references to would-be *captandi* show them disowning already existing children (cf. *Marc.* 19. 2 above), Petronius' satirical account suggests that prevention would have been better than cure, and that social climbers would do well to avoid raising children entirely, as Polybius (36. 17) accused the rich of his day of doing.

The topos of childlessness as a social asset is inextricably linked to the significance of *orbitas* in the context of inheritance and inheritance-hunting (see 3.2.1.), and underlines how *amicitia* was corrupted by practices like *captatio*. But to what extent is this topos a reflection of the realities of Roman society? Is Petronius echoing a real trend? Did people have a choice in having children or not, and, more importantly, would they have exercised such a choice? Was the population of the Roman upper class in the early Empire a population of natural fertility, or was family limitation practised?

3.7.: *Orbitas* and fertility: In order to determine whether the low rate of fertility in the Roman elite during the period of the late Republic and early Principate was voluntary or involuntary, it may be of use to examine briefly factors which may have influenced this fertility.

3.7.1.: Involuntary/natural fertility inhibitors: The question of "natural fertility" and "natural fertility populations" in antiquity has been raised in a recent work by Robert Sallares.<sup>122</sup> He defines "natural fertility" as the

<sup>122</sup> Sallares 1991: although his focus is Greece rather than Rome, many of the questions that he raises about fertility in the ancient world in general is applicable to this study.

fertility that results when there is no deliberate attempt on the part of individuals or of couples to limit the number of births; natural fertility requires no thought on the part of the members of the "natural fertility population".<sup>123</sup> However, Sallares cautions, knowing that a particular population was a "natural fertility population" does not tell us anything about the actual levels of fertility at any particular time, because natural fertility populations exhibit enormous variations in family size (1991: 137).

Apparently innumerable factors may conspire to produce a very low total fertility rate in a natural population, a few of which Sallares lists (1991: 137ff). Let us for the moment imagine that the Roman upper class of the late Republic and early Empire was a natural fertility population: I shall now examine some of the factors that Sallares and others have suggested can cause a natural fertility population to experience low actual levels of fertility, and apply these to upper class Roman society of this period.

Sallares asserts that prolonged lactation, which tends to space pregnancies even in the complete absence of voluntary family limitation, because it inhibits the resumption of the menstrual cycle (i.e. causing amenorrhea), is the single most important factor in reducing the actual fertility of a natural fertility population.<sup>124</sup> It is unlikely however that the women of the Roman elite during the late Republic and early Empire would have breast-fed their

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123 Another very useful earlier investigation of "natural" or involuntary (and voluntary) checks on the population growth of Rome is that of Brunt 1971: 132ff. Sallares 1991: 134; the concept of "natural fertility" is based on the research of Louis Henry: apparently historical demographers verify its existence in a population by means of statistical techniques applied to reconstituted families, which show that reproductive behaviour is not altered by each subsequent birth. Sallares thinks that the merit of this approach is that it does not depend on any historical literary sources, which he scorns as "methodologically the wrong way to investigate a problem of this kind, when the subject of interest is the aggregate behaviour of a whole population, not the behaviour of individuals who may be atypical" (1991: 135). He compares the literary approach to using Shakespeare's *Romeo and Juliet* as serious evidence for the marriage pattern of Tudor England. However, it must be noted that it is the misuse of sources such as brief quotes from, e.g. Greek tragedy to prove extensive infanticide in Athenian society, that he is largely against; he actually does advise using other genres, e.g. forensic speeches, to provide statistics for family reconstitution. He does suggest, though, that the findings be substantiated by archaeological evidence. For the failings of the statistical method see below.

124 However, a reduction in the length of average lactation, while permitting a potentially larger average completed family size, also means an increase in infant mortality, because of the loss to the infant of the immunological properties of breast-milk (1991: 140). Ironically, the fact that the infants of the Roman elite were breast-fed by wet-nurses (see below) may have prejudiced their chances of survival if this meant that the period for which breast-feeding took place was shortened.

offspring for long periods: this was the job of hired or servile wet-nurses.<sup>125</sup> Plutarch (*Cato the Elder* 20. 3) relates that Cato's wife Licinia breast-fed her own son, although his remark would imply that this was an unusual feat. The Romans seem to have been aware of the contraceptive side-effects of lactation: Plutarch again (*de liberis educandis* 5) gives as a reason for the use of a professional wet-nurse the mother's desire to have more children.

Another important factor determining the actual fertility of a natural fertility population is the age of marriage in comparison to the age of puberty in women.<sup>126</sup> The age of puberty is largely dependent on nutritional status: where nutrition is poor the age of puberty will be higher. Thus Sallares suggests that the usual ages quoted by classical sources for the age of male and female puberty at 14 and 12 respectively would have been higher in the general population. However, we can assume that, if anything, these figures probably indicate the ages of puberty among the offspring of the Roman elite during the classical period.

However, Sallares points out that the age of menarche has only a minor effect on fertility:<sup>127</sup> more significant is the age of marriage. A delay in the average age of marriage for women will undoubtedly cause a generally lower average fertility; by contrast, adolescent marriage ages for women may potentially result in high levels of average fertility.<sup>128</sup> If the Roman girls of the upper class practised late marriage, their low levels of actual fertility (assuming a natural fertility population) would be understandable. On the contrary, however, the traditional view is that they did not.<sup>129</sup>

From the beginning of the Principate the legal minimum age of marriage was 12 for girls and 14 for boys (although engagement could take place earlier),<sup>130</sup> but epigraphic evidence has been used to suggest that the most

<sup>125</sup> Bradley (1986: 201ff) suggests that professional wet-nurses were resorted to not only by the elite, but also at lower social levels in Roman society of the empire. (It is certainly true that poorer classes often aspire to the practices of those with greater economic and social standing.)

<sup>126</sup> Sallares (1991: 144): "Above all fertility is a function, first, of the duration of the phase in a person's life when reproduction is possible, and, secondly, of the duration of that phase during which the person is admitted to the breeding population".

<sup>127</sup> 1991: 144; Sallares also notes that the onset of menarche is usually followed by a brief period of adolescent sterility in most women. Even if women of the Roman elite were married at adolescence (see below), their fecundity may therefore have been temporarily impaired for a brief period after their marriage.

<sup>128</sup> Brunt 1971: 136; Sallares 1991: 145.

<sup>129</sup> Brunt 1971: 137.

<sup>130</sup> Hopkins 1964-5: 309-27, at 313.

common age for marriage of Roman upper class girls was 12-15.<sup>131</sup> Hopkins suggested that pre-pubertal marriages did occur, but considered the general age to have been 13+.<sup>132</sup> More recently, Brent Shaw has suggested that the average age for marriage of Roman girls was closer to 18;<sup>133</sup> he concedes, however, that the upper-class pattern of marriage was very different from the average mode, and that the average age of marriage for elite girls was much lower than that of the general populace.<sup>134</sup> The Augustan legislation required that women should be married and having children by the age of 20 at the latest.<sup>135</sup>

The low age of marriage for women of the Roman elite would imply a potentially high fertility rate. However, other factors, such as the comparative ages of marriage for men, would have worked against this. The age required by the Augustan laws for men to be married was 25;<sup>136</sup> in practice the average age may have been 30 or over. Shaw and Hopkins appear to agree that Roman upper class marriage would have been characterised by a wide age gap between husband and wife.<sup>137</sup> Evidence from inscriptions, which tends to represent mainly wealthier classes of society, and is therefore appropriate for this study, shows an average age difference between husband and wife of 9 years.<sup>138</sup> The large age gap between spouses would have had a considerable effect on the actual fertility of the Roman upper class: the age difference would have shortened the period for which the peak fertility of both the husband and wife coincided;<sup>139</sup>

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131 Brunt 1971: 137.

132 Hopkins 1964-5: 315ff; 326.

133 Shaw 1987: 30-46.

134 Shaw 1987: 33, 43-4.

135 See 3.3.1.1. & 3.3.1.2. above.

136 See 3.3.1.1. above; cf. Brunt 1971: 137; Csillag 1976: 70.

137 Shaw 1987: 43-4; cf. Hopkins 1964-5: 327.

138 Brunt 1971: 137; Csillag 1976: 70.

139 Sallares (1991: 149) considers the demographic consequences for societies in which the ages of marriage are typically between 15-20 for women and 30 for men (a pattern similar to that of the Roman elite during the period under study here): "Such a pattern does not maximise fertility, but rather inherently tends to reduce it, because women approaching the peak of their reproductive powers are joined to men whose reproductive powers, expressed in terms of coital frequency, are already waning". Why do these societies, in which fertility is often highly regarded, persist in such marriage arrangements, one might ask? Certainly habit plays a role, but so do economic considerations: unfortunately men tend to wane in their reproductive capacity just when they are at an age where they are economically secure. The modern reader may understandably feel that the effects on fertility of marriage age discrepancy is exaggerated: men are recorded as fathering children well into their eighties. But it is important to remember that we are not dealing with a 20th century "first world" population here, which has the benefits of modern medicine and in which the processes of ovulation and conception are understood. Sallares (1991: 149-50) places the restrictions on fertility in marriage with a large age gap

also, this type of marriage arrangement increases the likelihood of early widowhood<sup>140</sup> which, even where followed by subsequent marriages,<sup>141</sup> often means an interruption in the widow's potentially reproductive years.<sup>142</sup> It is perhaps no coincidence that the elderly childless widow is a common object of *captatio* in Roman literature.<sup>143</sup>

The level of mortality in Roman society, particularly infant and child mortality, would also have had an effect on the actual fertility of the population. Life-tables for the ancient world, which have tended to be based on the ages of individuals recorded on tombstones, are at best extremely faulty: not only do certain privileged groups tend to be over-represented<sup>144</sup> but, as Hopkins has demonstrated, of these privileged groups, commemoration is biased in favour of certain age groups and corresponding marital relationships;<sup>145</sup> it appears too that age-awareness was faulty even

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in the context of the misunderstanding of the menstrual cycle in antiquity, and suggests, rather incredibly, that as many as 200 or 300 acts of intercourse may be necessary to ensure successful conception under these circumstances (he concedes, however, that more recent research has reduced this number).

140 See Hopkins 1964-5: 327; Shaw 1987: 44.

141 Although the Augustan legislation demanded that widows married again and rendered void all conditions in wills requiring no remarriage (see e.g. Last 1934: 449-50), various cultural beliefs and custom would have mitigated against this: perhaps the most powerful of these was the concept of the *univira*, the woman who had only one husband during her entire lifetime. The cultural and religious approval reserved for *univirae* was associated with the oldest traditions of Rome, and the concept continued to be cherished (although slightly altered) well into the Christian era (see Lightman 1977: 19-32). Cornelia, the mother of the Gracchi and the paradigm of the Roman *matrona*, remained faithful to her dead husband and did not remarry (cf. Prop. 4. 11. 67-8: "filia.../fac teneas unum nos imitata virum"; Plut. *Tib. Gracchus*. 1. 4 & *G. Gracchus* 4. 4.; see Pomeroy 1975: 161; Lightman 1977: 21f); numerous epitaphs praise other women who were *univirae* (Pomeroy: *ibid.*). It has been noted that in Vergil's *Aeneid*, Dido's fall is in some way linked to her failure to remain loyal to the memory of her dead husband by engaging in a relationship with Aeneas (Pomeroy: *ibid.*). Some exclusively female religious cults were restricted to *univirae* (*id.*: 207).

142 The Augustan marriage legislation, by prescribing the ages of marriage for men and women at 25 and 20 respectively, could, if followed, have helped increase the potential fertility of the Roman upper class: if men thereafter married at  $\pm 25$  and women at  $\pm 20$ , the average ages of husband and wife would have been brought closer together, and thus the levels of fertility would have been raised more effectively than if a lower age of marriage were prescribed for women.

143 See e.g. Mart. 2. 32. 4: "Orba est, dives, anus, vidua".

144 See e.g. Wiedemann (1989: 14): a tombstone is relatively expensive to set up, and those commemorated thereby were from the wealthier households. Thus "while the statistical evidence may not have been slanted away from children towards adults, or away from slaves towards richer citizens, it is slanted away from the slaves and children of the poor, and towards those children and slaves who belonged to the households of the rich".

145 Hopkins (1966-7: 245-264) called into question the use of life-tables reconstructed from epigraphic evidence, which had been used by scholars for the population of classical antiquity since the 19th century (cf. Wiedemann 1989: 14). Comparing these tables with U.N. model life-tables for those countries with a high rate of mortality, Hopkins

among the literate and educated.<sup>146</sup> For what they are worth, attempts to establish the average life-expectancy at birth of the Roman populace have typically resulted in figures between the ages of 20 and 30. Hopkins suggests that while life-expectancy must have been under 30, the lower limit must have been over 20, because otherwise the population would have not have had much success at reproducing itself;<sup>147</sup> Brunt suggested that because it appears that the free population of Italy did indeed fail to reproduce itself adequately, Hopkins' lower limit need not stand.<sup>148</sup> The average life expectancy of the elite would probably have been slightly higher than that of the general populace, but not much, since they were also victims of high levels of infant mortality.

Hopkins placed the infant mortality rate at 200 per 1,000 live births,<sup>149</sup> while Frier's comparative tables calculated the rate at 350 per 1,000.<sup>150</sup> Frier has also calculated that only 49% of children saw their fifth birthday, and just 40% of the population survived to 20. This would have meant that every couple would have had to produce 5 children if two of them were to have

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demonstrated the internal incoherence of these figures, e.g. they are too high in the 5-25 age group. This can however be explained by biases in the habits of commemoration: parents were more likely to record the ages of deceased children than were children likely to record the ages of deceased parents; husbands were more likely to record the deaths of their wives than were wives likely to record those of their husbands (this may have had some economic foundation: a widow with young children to support after the loss of the family's main source of economic power would have had to be careful with her funds; Hopkins suggests that as husbands were typically 9 years older than their wives, the wife who died young had a better chance of being commemorated): see Brunt 1971: 133.

<sup>146</sup> Wiedemann 1989: 14f; Duncan-Jones 1990: 79ff: age-reporting in many different cultures at many different dates shows a preference for ages ending in 0 or 5 (Duncan-Jones 1989: 79). The Romans tended to record their ages according to the *lustra*, periods of usually (but not always exactly) 5 years, which had their origins in the Republican censuses (Ov. *Fast.* 4. 702; Mart. 4. 45. 3; Wiedemann 1989: 14 n. 17; cf. Duncan-Jones 1991: 83). They were also guilty of age-rounding, which is obvious from many official records, and only disappears on official poll-tax forms. Moreover, there are recorded cases of inherent confusion and discrepancies concerning exactly how old a certain individual was. Evidence indicates that even individuals of relatively high social standing had no idea of their own ages. Duncan-Jones (1991: 80, Table 20) cites the example of a certain Aurelius Isidorus whose own age-claims vary by as much as 9 years; another (1990: 81, Table 21) claimed to be 36 on the 25 October 107 B.C., 30 on 16 August 104, 35 on 12 April 101, and 40 on 18 November 99. It also appears that the older a person became, the greater the tendency to exaggerate their age (they also had more opportunity to lose count, and older relatives who would have been able to substantiate their dates of birth, had this really been desirable).

<sup>147</sup> Hopkins 1966-7: 263.

<sup>148</sup> Brunt 1971: 133.

<sup>149</sup> Hopkins 1966-7: 263.

<sup>150</sup> Frier 1982: 213ff; Wiedemann 1989: 15-16.

reached the age where they would have had children themselves.<sup>151</sup> Thus, even were the Roman upper class of our period a natural fertility population, given the comparative ages of marriage for women and men, and the high rate of infant and child mortality which occurred at all levels in the society, the chances for a substantial population increase or even for maintaining a stable population look exceedingly slim.<sup>152</sup>

Was there room or need, in a population with such a demographic profile, for voluntary family limitation? Maybe not, but we should remember that the concept of a "natural fertility population" is a constructed one, like the scientific concept of an ideal gas. The traditional view, prior to the recent theories of natural fertility, has been that in all societies and at all times, some members of the society will have practised or attempted to practise fertility inhibition (even if they did not understand the nature of conception), as often as other members of that society will have attempted to promote fertility.<sup>153</sup> This is of course dependent on the motives for having children or for limiting them. One should also remember that decisions to limit or increase fertility are generally not taken by the society as a whole, but by individuals and couples: often the demographic interests of the society and the personal or economic interests of the individual or couple differ.

3.7.2.: Voluntary fertility inhibition: In most pre-industrial societies, children are seen primarily as an investment in future security:<sup>154</sup> in peasant communities child labour can be a useful asset to the family's income;<sup>155</sup> there is often also the expectation that children will look after their parents

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<sup>151</sup> Wiedemann 1989: 16.

<sup>152</sup> The maximum possible reproductive capacity of the individual human female is vastly greater than the average size of the populations with the fastest growth rate (Sallares 1991: 133-4). However, the maximum capacity is hardly ever reached even where all other circumstances are favourable: the average family size tends to fall well below the maximum. It should be noted, however, that literary sources often tend to record levels of fertility that are remarkable or above the average: so, when we read that Cornelija had twelve children and the elder Agrippina nine, we should bear in mind that these examples are mentioned for their rarity value; Agrippina's children were also remarkable in that they were alternately male and female (Wiedemann 1989: 13-14).

<sup>153</sup> Sallares (1991: 154) criticises Himes (1936), the author of the standard book on contraception in the ancient world, whose thesis is that in antiquity the desire to prevent conception was common but the knowledge of how to do so effectively was restricted. Sallares points out that in view of the recent work done on natural fertility, Himes' work should be regarded as unsatisfactory. However, I shall examine a few of Himes' suggestions below (see 3.7.2.3. below) in order to represent the traditional view as well as Sallares'.

<sup>154</sup> Wiedemann 1989: 39; Sallares 1991: 140ff.

<sup>155</sup> Sallares 1991: 141ff.

in their old age, which, in the absence of old-age pensions and social security, makes them an important investment.<sup>156</sup> In these societies, it is advantageous to have as many children as is reasonably possible to ensure that some will survive. Such considerations will surely have concerned the poor in ancient Rome. By contrast the wealthy in antiquity would have been less dependent on children for economic security in their old age;<sup>157</sup> the traditional view is that while the wealthy certainly would have wanted to be survived by their own offspring and would have required at least one heir, preferably but not necessarily male, their problem, as the traditional viewpoint has it, was to prevent there being too many heirs all having a claim to the same estate.<sup>158</sup>

In chapter I, I examined this phenomenon, which is common to those societies in which vertical partible diverging devolution is the normal pattern of property transmission:<sup>159</sup> in such societies, unless there are limitless resources, there will be the need for an "heirship strategy" to ensure that wealth is not subdivided to such an extent that it is rendered worthless. I have noted that medieval Europe solved this problem by means of the system of primogeniture. Although primogeniture was theoretically possible according to the rules of Roman succession,<sup>160</sup> it does not appear to have been practised at Rome either by the society as a whole or by the upper class.<sup>161</sup>

The alternative "heirship strategy" is of course voluntary fertility limitation. Voluntary fertility inhibition can take place at three stages: prior to conception (e.g. contraception), after conception but before parturition (e.g. abortion), and after parturition (e.g. exposure, infanticide).<sup>162</sup> Having made these three neat distinctions, I should nevertheless add that antiquity did not distinguish clearly between contraception and abortion, partly because they misunderstood the menstrual cycle and the way in which conception

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<sup>156</sup> Sallares 1991: 140.

<sup>157</sup> See e.g. Wiedemann 1989: 31.

<sup>158</sup> See e.g. Polybius 36. 17; Crook 1967: 111f, 132; Brunt 1971: 140ff; Hopkins 1983: 73 n. 53, 78; cf. Sallares 1991: 158-9 (on Polybius).

<sup>159</sup> For the definitions of vertical inheritance systems, diverging devolution and partible inheritance, see 1.3.1. above.

<sup>160</sup> Crook 1967: 132; Hopkins 1983: 76; see 1.3.1. & 2.2.2. above: the conventions of Roman society and law, which upheld partible diverging devolution, mitigated against primogeniture as an "heirship strategy".

<sup>161</sup> On primogeniture and the unlikelihood that it was used at Rome, see 1.3.1. above.

<sup>162</sup> I shall explore the possibilities that the Roman elite used these mechanisms for family limitation in regressive order.

occurred, and partly because some contraceptives and abortifacients were virtually indistinguishable.<sup>163</sup>

3.7.2.(i): Infanticide: More ink has been split over the question of infanticide by exposure in Roman society than over any other question concerning voluntary fertility inhibition (and presumably many more bytes will be consumed on this question in future).<sup>164</sup> Polybius (36. 17), as I have noted, accused the rich of his day of resorting to this method of family limitation in order to preserve their riches: more evidence than Polybius' emotive account is however necessary to substantiate the existence of extensive infanticide in ancient Roman society.<sup>165</sup>

Harris has shown that extensive infanticide in the Graeco-Roman world was theoretically possible, but emphasises the fact that infanticide alone will not have had a significant effect on the fertility of a society and must be seen in relation to other factors and practices limiting fertility.<sup>166</sup> Sallares (1991: 151ff) points out that in many societies infanticide is used where the infant is deformed or weak, or in order to space offspring where the mother cannot produce enough milk for two infants or where the family cannot support another child. However, such considerations would hardly have troubled the parents of the Roman elite who were wealthy enough to support more than one child and where professional wet-nurses were employed.<sup>167</sup> Thus although the possibility of infanticide in Roman society cannot be ruled out, it is the type of measure that may have been characteristic of those poorer classes who were unable to afford the services of doctors (who may have provided advice on contraception and given abortions)<sup>168</sup> and wet-nurses.

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<sup>163</sup> Many of the drugs used for what technically would have been contraception and abortion were the same (Pomeroy 1975: 168). However, the best-known writer on contraception in the ancient world, the Greek doctor Soranus (A.D. 98-138) distinguishes between a contraceptive ('ατθκλον) and an abortive (φθθριλον) (Himes 1936: 88f; Hopkins 1965-6: 124-151, at 134).

<sup>164</sup> Those who support the theory that infanticide was widespread have included: Brunt 1971: 148-54; Pomeroy 1975: 140, 164-5, 228; see esp. Harris 1982: 114-116. Harris' article was in response to an attack on this view by Engels (1980: 112-20), who stated that the exposure of children in classical antiquity was "of negligible importance".

<sup>165</sup> Polybius is also writing from a Greek rather than a Roman perspective.

<sup>166</sup> Harris 1982: 115.

<sup>167</sup> See n. 125 above.

<sup>168</sup> See 3.7.2.(ii) & (iii) below.

**3.7.2.(ii): Abortion:** According to Sallares (1991: 154ff), abortion should not be underrated as a means of family limitation.<sup>169</sup> Traditional scholarship has assumed that abortion was practised by upper class Romans on a large scale.<sup>170</sup> Literary accounts, though scorned by Sallares and others as proof of anything, mention abortion as a means of fertility inhibition among the wealthy.<sup>171</sup> In classical law, abortion appears to have been legal provided it was performed with the approval of the woman's husband.<sup>172</sup> While the literary sources, Ovid and Juvenal, may seem to suggest that abortion would have been resorted to by prostitutes or courtesans, whose professional interests may have been temporarily impeded by pregnancy and child-birth, and perhaps also in the context of an adulterous liaison,<sup>173</sup> the legal precautions suggest that it also may have occurred, although somewhat more unusually, in the context of marriage. Because it was not completely banned, abortion would have been an option for those who may have wanted to limit the numbers of their offspring and who could afford to pay the *merces abortionis*.<sup>174</sup>

**3.7.2.(iii): Contraception:** The Greek medical writer Soranus, who was practising during the time of Trajan and Hadrian, instructs his readers in a number of contraceptive methods,<sup>175</sup> some of which would have been effective if followed faithfully. Among the more effective methods suggested by Soranus are the use of occlusive pessaries and vaginal plugs, with wool as a base and filled with gummy substances such as oil, honey or cedar-gum.<sup>176</sup>

<sup>169</sup> Sallares points out that although abortion would have been a relatively dangerous means of family limitation, human beings often tend to do dangerous things without a second thought. He refers to an example in the Hippocratic corpus which speaks of a woman who had abortions one after another as a means of family limitation (1991: 155).

<sup>170</sup> Hopkins 1965-6: 124-51.

<sup>171</sup> Cf. Juv. *Sat.* 6. 592-601: "...sed iacet aurato vix ulla puerpera lecto/tantum artes huius, tantum medicamina possunt,/quae steriles facit atque homines in ventre necandos/conducit..." (594-7). It appears that here Juvenal is thinking of orally administered abortifacients: "bibendum/...quidquid erit" (597-8); abortion would also appear to have been effected by instruments, if we are to believe Ovid, whose narrator upbraids Corinna at *Am.* 2. 14. 27-8: "vestra quid effoditis subiectis viscera telis/ et nondum natis dira venena datis?".

<sup>172</sup> See e.g. Cicero *Clu.* 32-4; Tacitus *Ann.* 14. 63; D. 48. 19. 39; 47. 11. 4; Brunt 1971: 147: abortion without the father's consent would have been seen as an infringement of his paternal rights, and would probably have entitled him to divorce his wife while retaining a portion of her dowry.

<sup>173</sup> But see Juv. *Sat.* 9. 86ff, where it appears that the adulterer's progeny is to be passed off as that of the cuckolded husband.

<sup>174</sup> Brunt 1971: 148.

<sup>175</sup> Soranus *Gynaecia* 1. 36, 60; Himes 1936: 88f; Hopkins 1965-6: 134.

<sup>176</sup> Himes (1936: 91, cf. Pomeroy 1975: 167) points out that any gum-like or oily substance will not only occlude the mouth of the uterus, but will also tend to reduce the motility of the spermatozoa; strongly alkaline or acidic conditions will also provide a hostile

However, for every potentially effective contraceptive measure known to antiquity there were numerous other ineffective or even dangerous measures.<sup>177</sup> Because the menstrual cycle and the way in which conception takes place were not understood,<sup>178</sup> many myths concerning conception and contraception were believed.<sup>179</sup> Even some of the methods suggested by medical writers were of a "magical" nature.<sup>180</sup>

There is no mention in any of the sources of coitus interruptus, and one can probably assume that it was not practised:<sup>181</sup> if it had been, one might have expected at least one joke about it in the extant corpus of Latin literature. Because they misunderstood the nature of the menstrual cycle (menstruation was thought to coincide with ovulation), the Romans were prevented from using the "rhythm method" effectively although they entertained the idea of one.<sup>182</sup> Nor is there any proof of either a male or female condom being used at Rome.<sup>183</sup> We have noted (see 3.7.1. above) that the Romans appear to have been aware of the contraceptive effects of prolonged lactation and used

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environment for sperm. The earliest mention of this type of contraceptive in antiquity was by Aristotle (*Historia Animalium (Opera)* 7. 3. 1 [583a]), who advises anointing the mouth of the womb with cedar-oil, lead-ointment or frankincense, mixed with olive-oil; see Himes 1936: 80.

<sup>177</sup> Potions, which could be either contraceptive or abortifacient, were also often dangerous or even poisonous: Soranus warns against the damage that could be done by drinking potions (Himes 1936: 91).

<sup>178</sup> For theoretical advances in the understanding of the nature of conception (although not of the menstrual cycle), see Blayney 1986: 230-6. The Presocratic philosophers were the first to suggest that both male and female parents contributed to the process of conception; both Lucretius and Galen seem to have believed that there was a male as well as a female "seed" which contributed to conception, although the degree to which they each contributed was disputed.

<sup>179</sup> Lucr. 4. 1264-6 shows that it was wrongly believed that a woman conceived more easily in a quadruped position during intercourse (in the usual position the woman was on top); he also speaks of *molles...motus*, movements apparently used by prostitutes to avoid conception (1268f).

<sup>180</sup> E.g. Aëtius 16. 17; *cit.* Hopkins 1965-6: 135: "Wear the liver of a cat in a tube on the left foot...or else wear part of the womb of a lioness in a tube of ivory. This is very effective", Aëtius assures us, having prescribed what would for most have been a passion-killer rather than an effective contraceptive.

<sup>181</sup> The question of the use of coitus interruptus by the Romans was raised by Hopkins (1965-6; 148ff); Pomeroy (1975: 167) suggests that the lack of literary mention of coitus interruptus may mean one of two things: either it was not practised at all, or it was so common as not to warrant mention.

<sup>182</sup> Pomeroy 1975: 167; Gardner 1986: 40.

<sup>183</sup> Antoninus Liberalis (*Metamorphoses* 41; *cit.* Himes 1936: 187f) tells, in the context of the myth of Minos and Pasiphae, of a type of female condom made out of a goat's bladder; however, here the use of the condom is prophylactic rather than contraceptive and is ultimately used to ensure, not prevent, pregnancy (ironically, the primary use of the condom today is also largely prophylactic, because of the threat of AIDS, and because other more sophisticated and effective methods have assumed the contraceptive role).

this knowledge to promote fertility: they may equally have used this to prevent conception.

Heterosexual anal intercourse within marriage is another alternative method of family limitation which does not require extensive knowledge of conception but which would have been effective. This method appears to have been known in ancient Greece,<sup>184</sup> and was used for centuries in medieval Europe, but is not suggested by Himes, Hopkins, Pomeroy or Gardner as a possibility for Rome. At Rome it was apparently the custom for bridegrooms to sodomize their brides on their wedding nights instead of deflowering them.<sup>185</sup> Martial gives the impression that anal intercourse with women was common practice at Rome.<sup>186</sup> There is no reason why it may not have been used for contraceptive purposes had the need arisen.

Although knowledge of effective contraceptive measures would, as Himes cautions,<sup>187</sup> have been restricted largely to the heads of the medical encyclopaedists and physicians, the information would have been available to someone with the education, the leisure and the motivation to research the subject, for example, a member of the Roman elite who wanted to limit his family. Failing this, there was always the possibility of abstention, at least from intercourse with his wife. If the Augustan family laws are any indication of the social dilemmas of the time, a large section of the elite population may simply have avoided marriage.<sup>188</sup>

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184 See Herodotus 1. 61: Pisistratus who has married Megacles' daughter but wants to prevent offspring therefore sleeps with her in an unusual fashion: 'εμίσητό οἱ οὐ κατὰ νόμον; this of course could refer to any number of unusual sexual practices, but the fact that the girls' parents are so angered by it and take it as an insult (cf.

'ατιμάζεσθαι) suggests anal intercourse; Athenaeus 13. 602D-E relates that it was customary in Sparta to treat girls before marriage "like boys", which must refer to anal intercourse: ὡς παιδικοῖς νόμος.

185 Mart. 11. 78. 5; Kay (*ad loc.*) comments that anal intercourse would usually have had a contraceptive purpose; see also Veyne 1987: 34-5.

186 See Mart. 11. 104. 17-8 (see also 11. 78 & 43; Kay *ad loc.*): "pedicare negas: dabat hoc Cornelia Graccho, / Iulia Pompeio, Porcia, Brute, tibi...". Martial here claims that anal intercourse had a long and distinguished history at Rome; the mention of Rome's distinguished forefathers engaging in this practice may nevertheless be humorous and ironic. The woman whom Martial addresses in this poem is presented as prudish: it is difficult to determine whether her negative attitude towards anal intercourse was typical of Roman society as a whole, or only of its more conservative elements.

187 Himes 1936: 100.

188 The measures of the Augustan laws were much harsher on the unmarried than on the *orbi* within marriage (cf. 3.3.1.1. & 3.3.1.2. above), which suggests that celibacy was a more serious problem than childlessness within marriage. The existence of punitive measures at all, although there is the possibility that they were unreasonable, indicates that Augustus thought that the situation was capable of being improved.

**3.7.3.: Conclusion:** More important than the question of accessibility of contraceptive methods is that of motivation. I have discussed (see 3.7.2. above) the necessity of a limited selection of heirs in a partible vertical inheritance system to avoid excessive estate division: however, in a society with an extremely high infant and child mortality rate, the problem may have been not maintaining the value of the estate but ensuring an heir to whom to leave this estate. Where every couple would have to produce about 4 or 5 children within a limited period of fertility compatibility to ensure at least one heir, the need for contraception, except perhaps in extra-marital relationships, may have been superfluous.

This is not however to say that fertility-limiting measures were not used, particularly where a family of offspring was felt to have been sufficiently completed. It is just possible that Romans of the elite class may have gambled with family limitation, preferring to take the chance that their family of two offspring might easily become one or none than risk devaluation of their family wealth. It should be noted that the purpose of fertility inhibition is usually not childlessness but family limitation. In Roman society, in spite or perhaps partly because of the high infant and child mortality rate, children were prized and sentimentalised.<sup>189</sup> It is thus with irony that, for example, Seneca (*Marc.* 19. 2) asserts that at Rome childlessness bestows more influence than it takes away:<sup>190</sup> traditionally *orbitas* was a sorry and pitiful state. Its high esteem in the context of *captatio* is one of the chief ways in which the world of the inheritance-hunter, as presented in literature, subverts the traditional values of Rome. One can probably assume that, given the conditions of fertility in Roman society, even if it were a "natural fertility population", notwithstanding voluntary family limitation, *orbitas* would generally have provided the market for *captatio* rather than vice versa. This does not of course rule out the possibility that, with the growing *potentia* enjoyed by the childless in the context of *amicitia*, there may have been some whose *orbitas* was "accidentally" ensured or deliberately effected.

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<sup>189</sup> See e.g. Martial's lament for the death of the slave-girl Erotion at 5. 37.

<sup>190</sup> *Marc.* 19. 2: "...in civitate nostra plus gratiae orbitas confert quam eripit, adeoque senectutem solitudo, quae solebat destruere, ad potentiam ducit...". The traditional idea was that a lonely old age was an unattractive prospect which had to be avoided at all costs - this attitude ironically provides the need for the attentions of the *captatores* on the part of the *captandus* (*captatores* seem to act as substitute children to their objects); cf. *Satyrica* 117, where Eumolpus is to pretend to bewail his childless state in traditional terms, all the while waiting for the reactions of the inheritance-hunters.

## CHAPTER IV

### *AMICO ALIQUIS AEGRO ADSIDET: CAPTATIO* IN ITS SOCIAL CONTEXT OF *AMICITIA* AND IN ITS BROADER LEGAL CONTEXT

**4.1: Introduction:** I have hinted (3.5.1. above) that *captatio*, if indeed a social phenomenon rather than purely a literary topos, could have operated in a manner that was outside the bounds of the law. *Captatio* is however not so much a phenomenon as a process of interaction between the *captator* and *captandus*, and as such it should best be studied in action, or as close to action as the modern reader of the literary portrayal can come. In this chapter, I shall attempt to investigate the nature of the relationship between the parties involved in *captatio*, and the way in which *captatio* is shown to have operated. One of the main contexts in which *captatio* appears to have operated and which I shall be examining in this thesis, is that of *amicitia*. I shall also be investigating the question of whether the operation of *captatio* as presented in literature was technically illegal or not. The extent to which *captatio* infringed on the law (or did not), and the comparison of literary *captatio* with those types of inheritance-hunting that did, may show the extent to which the literary portrayal reflected (or failed to reflect) real social practices.

**4.2.: *Amicitia*:** It has long been recognised that *captatio*, if indeed a social reality, would have taken place in the context of the Roman social network of *amicitia*.<sup>1</sup> This was clearly suggested by the literary portrayal of *captatio*, which often shows *amici* courting inheritances from each other.<sup>2</sup> But what

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<sup>1</sup> See e.g. A.N. Sherwin-White 1966: 203, *cit.* Tellegen 1982: 50.

<sup>2</sup> See esp. Sen. *Ep.* 95. 43: "*Amico aliquis aegro adsidet: probamus. At hoc hereditatis causa facit: vultur est, cadaver expectat*" (Someone sits at the bedside of his sick friend: we approve. But he does this for the sake of an inheritance: he is a vulture, waiting for the carcass"); see also Mart. 11. 44, where an ideal object of *captatio*, a childless, wealthy and very elderly man is asked if he really believes he has any true friendships (implying that everyone who becomes friendly with this fellow can only be after an inheritance): "*orbis es et locuples et Bruto consule natus: esse tibi veras credis amicitias?*" (*Bruto consule* is a comic exaggeration, referring to L. Junius Brutus, consul in 509 B.C.; see Kay *ad loc.* and 10. 39. 1f); cf. Juv. *Sat.* 5. 133-4, where sudden wealth results in instant courtship for *amicitia*: "*quantus ex nihilo, quantus fieres Virronis amicus*"; cf. also 140 (where *orbitas* is said to assure one of success in *amicitia*): "*iucundum et carum sterilis facit uxor amicum*" (although Jahn believed this line to be spurious, other scholars, e.g. Courtney, have defended it); cf. by contrast *Sat.* 12. 96-7, where a man with children is described as a *sterilis* (unrewarding) *amicus*.

was *amicitia*? Although the word can be translated as "friendship",<sup>3</sup> it can also mean "patronage",<sup>4</sup> and appears also to have had a political meaning.<sup>5</sup> The applied meaning in Roman literature and society was probably somewhere between the meanings of "friendship" and "patronage": what *amicitia* was will become clearer after investigating both the nature of patronage and that of friendship.

**4.2.1: Patronage and *amicitia*:** What is patronage, and was *amicitia* as found in Roman society of the early Empire strictly a patronage relationship? Does *captatio* that operates in the context of *amicitia* take place in what is a patronage relationship? There has been extensive sociological and anthropological research in this area in recent times, particularly in Mediterranean societies. However, it is difficult to find a definition of patronage which is broad enough to encompass all social networks which may exhibit patronage relations, but not so broad as to be useless.<sup>6</sup> Boissevain's definition, however, provides a useful starting point: "Patronage is founded on the reciprocal relations between patrons and clients. By patron I mean a person who uses his influence to assist and protect some other person, who becomes his "client", and in return provides certain services to his patron. The relationship is asymmetrical, though the nature of

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<sup>3</sup> See *TLL* 1. 1892f (*de privata singulorum hominum consuetudine et coniunctione*), where the numerous philosophical definitions of *amicitia* (as "friendship") are given: e.g. Cic. *Inv.* 2. 166: "amicitia est voluntas erga aliquem rerum bonarum illius ipsius causa, quem diligit, cum eius pari voluntate..." (*Amicitia* is the desire for good things for the sake of someone, whom one loves, when there is equal desire on his part); cf. Porph. *Hor. carn.* 2. 17. 5: "ex illa amicitiae definitione, qua[m] dicunt amicitiam animam unam esse et (in *codd.*) duo corpora" (From this we get the definition of *amicitia*, which they say is one mind in two bodies); *Amicitia* is also supposed to be permanent, see Aug. *Ep.* 130. 6. 13: "amicitia non angustis finibus terminanda est: omnes enim, quibus amor et dilectio debetur, amplectitur" (*Amicitia* is not to be confined to narrow definitions: it embraces all those to whom love and affection is owed). The idea of obligation here is interesting because of its general application to *amicitia* as far as it affects the operation of *captatio*, see below.

<sup>4</sup> See *TLL* 1. 1893f (*de potentia...clientela sim.*): see e.g. Q. Cic. *Pet.* 19: "eo genere amicitiarum petitio tua maxime munita est"; Mart. 3. 36. 8: "hoc...merui...ut sim tiro tuae semper amicitiae?"; cf. 5. 19. 8: "qui colit ingratas pauper amicitias". For definitions of patronage based on recent research of Mediterranean societies, see below.

<sup>5</sup> A political translation of *amicitia* is also possible: Lily Ross Taylor wrote that "the old Roman substitute for party is *amicitia*" and that "*amicitia* was the good old word for party relations" (1949: 7-8; *cit.* Brunt 1965: 1-20, at 1); Syme too (1960: 157; *cit.* Brunt: *ibid.*) claimed that "*amicitia* was a weapon of politics, not a sentiment based on congeniality"; he speaks of Roman political factions being welded together by ties of mutual interest: "on a favourable estimate the bond was called *amicitia*, otherwise *factio*". Brunt (1965: 20) demonstrated that the range of *amicitia* was "vast", and that it had a far wider range than just a political one, covering "every degree of genuinely or overtly amicable relation" (1965: *ibid.*).

<sup>6</sup> See e.g. Gellner 1977: 1-6; cf. Saller 1982: 1.

the services exchanged may differ considerably".<sup>7</sup> Saller (1982: 1) points out that there are three important criteria in Boissevain's definition of a patronage relationship: first, it involves reciprocal exchange; second, to distinguish it from a purely commercial relationship (which also involves reciprocal exchange), patronage is defined as a personal relationship of some duration; third, patronage is asymmetrical, which, Saller suggests, distinguishes it from friendship between equals.

The concept of asymmetry must be seen in the context of theories of social networks in general:<sup>8</sup> not only did Boissevain uphold a view of a "shifting environment of social relations",<sup>9</sup> but he also maintained that asymmetry may very easily creep into network relations even where the parties are of equal status:<sup>10</sup> person A might provide more socially valued services to person B than the latter is able to reciprocate. Factors apart from social status, such as the available time,<sup>11</sup> the individual's age,<sup>12</sup> marital status,<sup>13</sup> and even

<sup>7</sup> Boissevain 1966: 18; *cit.* Saller 1982: 1.

<sup>8</sup> The theory of social networks has come a long way since its beginnings in British social anthropology: structural analysis, as it is known, now comprises a substantial branch of sociology. For an overview of the history of structural analysis, see Wellman 1988: 19ff. What structural analysis attempts to do is to understand society in terms of concrete links between individuals, i.e. networks, rather than by using relatively static constructs such as "class", as traditional sociology has done (i.e. the structural-functional model of society, see below). Social class is instead often seen as a "network of networks" (*id.*: 16). Network relations may actually generate and operate within cleavages in social systems (*id.*: 7, 17): for this reason this approach is useful for understanding social relations which may cut across social class, e.g. *amicitia* in Roman society and the operation of *captatio* within it.

<sup>9</sup> Boissevain frequently criticises "the structural-functional model of society", see 1974: 4: "...I have encountered a shifting environment of social relations which individuals construct and which cannot be described in terms of norms. Many interactions were transactions, which are not the same as the morally sanctioned reciprocal exchange of rights and obligations about which structural-functionalists write. Role relations seemed in perpetual flux, the expectations of each actor varying according to the situation and the other relationships he maintained". Many of Boissevain's theories are useful in understanding the operation of *captatio* in the context of *amicitia*, a network relationship, as I shall note.

<sup>10</sup> See Boissevain 1974: 26-7; he does however concede that although asymmetry can result from differences of power arising out of the transactional relationship itself and "not only from the prior status of the actors or the resources they control", these aspects are often linked.

<sup>11</sup> Boissevain (1974: 93-4) suggests that every person has what may be termed a "network management problem" because the "time, energy and emotional resources that a person can invest in personal relations are limited" (*ibid.*), cf. Wellman (1988: 42), who suggests that "there are finite limits to the number and intensity of ties that an individual can maintain".

<sup>12</sup> Boissevain 1974: 69-70.

<sup>13</sup> *Id.*: 94; the question of marriage and especially children encroaching on the amount of available time and resources that a person has to devote to network relations would perhaps have been less crucial to *amicitia* and the operation of *captatio* within it than it is to 20th century parents: childlessness appears to have been highly sought after by

personality,<sup>14</sup> may mean that one person in the exchange relationship has more to offer the other than vice versa. Thus even a relationship between two "friends" of more or less equal status, while not necessarily being strictly patronage, may at least be asymmetrical. Or a relationship might be asymmetrical because the nature of services exchanged differ. Literary *captatores* and *captandi* are shown to provide each other with different services: the inheritance-hunters provide the objects with extensive social services while the *captandi* are alive, and the latter ideally reciprocate by granting the inheritance-hunters bequests in their wills. Asymmetry may also be a question of power in social relationships. This is usually but not necessarily always in favour of the party of greater social power: those of lesser power and status in the exchange relationship often attempt to place a more powerful person in a position of obligation by voluntarily performing numerous services on his behalf.<sup>15</sup> In the operation of *captatio* in literature it is the *captator* who by performing numerous services, attempts to manoeuvre the object into a position where he will feel obligated to remember the *captator* in his will. The *captatio* relationship, as presented in literature, is specifically asymmetrical because of the power wielded by the crafty *captandi*, who continuously outsmart the *captatores* by encouraging their courtship without intending to reciprocate in their wills. This, it should be stressed, is a literary topos: in practice, promising friends rewards in one's will appears to have been a mutual exercise, and was part of the conventions of *amicitia*. As will become plain in the course of this chapter, *captatores* and *captandi* were not distinct groups in society: anyone in the exchange relationship could probably be either.

But was *amicitia* itself asymmetrical? Saller (1982: 7) points out that men of varying social statuses could be called *amici* without implying that all

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*captatores*, because of the fact that a testator with offspring would have been more than likely to have instituted them as his heirs rather than outsiders (cf. e.g. 2.4.2.1.(ii,c) & 3.2.1. above).

<sup>14</sup> Boissevain 1974: 65-70.

<sup>15</sup> Boissevain (1974: 85f) suggests that people with lower social power and status try "to transform a single-stranded instrumental relationship" with a powerful person (i.e. one that is based on a single role relation; multiplex social relations exist when people are in touch with each other in many different roles, as often happens in small communities, see *ibid.*: 30) "into a multi-stranded moral one...by voluntarily performing many services" in order to get the stronger party into "a sort of debt relation". Boissevain (*id.*: 86) notes that in many Catholic countries it is the practice to invite powerful people in the community to become godparents or wedding witnesses in order to attempt to create a sense of obligation in the more powerful party. The idea that the more powerful person should feel some moral obligation to help those of less power is interesting, and applicable to the relationship in which *captatio* takes place.

*amicitiae* fall into "a single category of social relations with a single code of behaviour" (Saller: *ibid.*). His word study (*id.*: 8ff) of the various terms applied to *amicitia* indicates that the terms *patronus* and *cliens* are not commonly used in Latin literature to describe *amicitia*.<sup>16</sup> By contrast, this terminology is widely employed in epigraphy (*id.*: 10).<sup>17</sup> To explain the avoidance of the terminology of patronage in literature, Saller points out that the majority of authors would have been men of relative social superiority, who would technically have been in the position of *patronus* rather than *cliens*: in that case, to use the language of "social superordination" would have been tactless and arrogant (*ibid.*). On the other hand, inscriptions were usually set up by those who were technically *clientes*, who were dutifully advertising the receipt of a favour from their *patroni*: in this case, the use of the terms *patronus* and *cliens* served "to exalt the benefactor by emphasizing his superiority" (*ibid.*). Saller (*ibid.*) therefore cautions that the absence or presence of the terms *patronus* and *cliens* cannot be correlated with the absence or presence of patronage itself, but reflect the circumstances in which it was described. In contrast to the terminology of patronage, the term *amicus* could apply to persons of either social superiority or inferiority (*id.*: 11). But its use was not egalitarian: relationships with people of lesser social status were labelled *amicitiae inferiores* or *minores*, those with people of higher social status *amicitiae superiores* or *amicitiae regum*,<sup>18</sup> those with one's

<sup>16</sup> Saller (1982: 9): the use of the term *patronus* was restricted to legal advocates, patrons of communities and ex-masters of freedmen; in none of the post-Augustan authors (Seneca, Tacitus, Pliny, etc) is *patronus* used in the sense of "influential protector"; in Cicero's works, the term is used 23 times: in 21 of these, the usage is clearly technical; in only two can it be said to have the general meaning of "influential protector" (*Fam.* 7. 29. 2 and *Att.* 1. 16. 10 - however, in neither of these passages does Cicero use the term to apply to himself, and in both cases the connotations of social subordination and degradation are clear); Saller 1982: 9 esp. n. 6; White (1978: 74ff, at 79) notes that the modern colouring of the word "patron" (i.e. "influential benefactor") owes more to medieval developments than to Roman institutions: first, *patronus* was used of saints who looked after the interests of particular parties; later, it came to be associated with the founding and endowment of churches. White points out that *patronus* is not used of literary relationships in classical Latin.

<sup>17</sup> See Saller (1982: 10; cf. Appendix 5: 194ff): *patronus* appears in 27 of the inscriptions quoted in Saller's Table III (1982: 195-9): variations of the dedication *patrono* (see e.g. *AE* (1946), 64 (Thamugadi); (1911), 99 (Lambaesis); *CIL* VIII. 12065 (Muzuc), 7030 (Cirta), etc) include: *patrono amantissimo*, *AE* (1915), 23 (Thurburbo Maius); *patrono optimo*, *AE* (1934), 26 (Diana Veteranorum); *patrono dignissimo*, *CIL* VIII. 20995 and 20996 (Caesarea); *patrono benignissimo*, *CIL* VIII. 2394 (Thamugadi), etc. *Amicus* is however also used, e.g. *amico rarissimi exempli*, *AE* (1955), 151 (Hippo Regius); *amico ob merita*, *CIL* VIII. 21452 (Gunugu, Mauret. Caes.); *amico optimo et merenti*, *ILAlg.* II. i. 690 (Cirta); *amico simplicissimo*, *CIL* VIII. 2408 (Thamugadi), etc.

<sup>18</sup> Cf. *Juv. Sat.* 5. 137f: "...dominus tamen et domini rex/si vis tunc fieri...", where the term *rex* indicates someone in a powerful position in *amicitia*. The historically negative connotations of the word *rex* in Latin may suggest a negative portrayal of *amici superiores*, particularly if they abused their powerful positions and were arrogant and supercilious

social equals were called *amicitiae pares*.<sup>19</sup> This reveals that the term *amicitia* could encompass relations that were both asymmetrical and symmetrical in terms of power and social standing.<sup>20</sup>

In terms of a/symmetry therefore, *amicitia* may have included both what was technically a patronage relationship and what was actually what we would term "friendship". Was *amicitia* a mixture between patronage relations and friendship, or were there two types of *amicitia*?

4.2.2.: Friendship and *amicitia*: Despite the concepts of categories of friends and differing precepts as to how they were to be treated, there was a core of ideals prescribing attitudes to all *amicitiae* (Saller 1982: 12). The philosophical ideals of *amicitia* changed very little from the Republic to the empire. Under the Republic Cicero had set out the ideals of friendship in his philosophical tract *De Amicitia*. Seneca is a good source for the continuation of these ideals under the Principate: his work *De Beneficiis* focusses on the exchange aspects of personal relationships (he is also a good source of information about *captatio* within *amicitia*).<sup>21</sup> According to these ideals, friendship was to be based on affection and virtue rather than utility.<sup>22</sup> One of the most significant virtues for *amicitia* was *fides* (loyalty, faithfulness,

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towards their lesser clients (Juvenal often seems to imply that this was the case: cf. *Sat.* 5); cf. Seneca *Ben.* 6. 33. 3, where he says that it is an old custom of kings and those who imitate kings to divide their friends into groups: "Consuetudo ista vetus et regibus regesque simulantibus populum amicorum describere...": here his disapproval is directed not only at the kings but at those who are arrogant enough to fancy themselves in a monarchical role and behave unfairly towards their *amici* of lesser social status.

19 Seneca (see *Ep.* 7. 3. 2; 2. 6. 2) disapproves (philosophically) of the classification of *amici* into categories dependent on social status (which included the custom of serving different grades of food at dinners, cf. also *Juv. Sat.* 5. 92ff); but cf. *Ep.* 94. 14, where Seneca reveals that he takes this classification of *amici* for granted: here he suggests that different approaches are necessary depending on whether someone was seeking *amicitiae regum, pares amicitiae* or *amicitiae inferiores*.

20 Even relations between two people of equal social standing may easily become asymmetrical due to various factors.

21 See 4.3.1.(vii,a) & 4.3.2. below.

22 See Cicero *ND* 1. 122, where he berates *amicitia* for the sake of *utilitas* as "non amicitia sed mercatura quaedam utilitatum suarum"; cf. *Amic.* 27: "Quapropter a natura mihi videtur potius quam indigentia orta amicitia, applicatione magis animi cum quodam sensu amandi, quam cogitatione quantum illa res utilitatis esset habitura" (Therefore it seems to me that (true) friendship springs from nature rather than from need, and from an inclination of the mind together with a feeling of affection rather than from calculation of how much profit the friendship would have). Cicero's thesis (*Amic.* 19-32) is generally that true friendship arises "not from our consciousness of our own deficiencies or from our need for reciprocal services: it springs rather from natural affection and benevolence from which in turn reciprocal services result"; see Brunt 1965: 1-20; for the idea that friendship should not be based on *utilitas*, cf. also Seneca: *Ep.* 9. 8f; 48. 2-4; Pliny *Ep.* 9. 30. 1; Saller 1982: 12-3.

steadfastness): true friends were not to be fickle.<sup>23</sup> In order to ensure *fides* it was thought that friends should be like-minded.<sup>24</sup> Friendship was to be cemented by similarity of character (*mores*) and pursuits (*studia*).<sup>25</sup> Friends were meant to be frank with one another, but courteous;<sup>26</sup> they also should not be suspicious of each other.<sup>27</sup> In short, the true friend was like an image of oneself,<sup>28</sup> or a second self: *tamquam alter idem*.<sup>29</sup> Utility as an aspect of friendship was not completely ruled out: however, it was thought that this should arise out of friendship, rather than that friendship should arise for the sake of utility.<sup>30</sup> Brunt (1965: 4) points out that whenever utility is mentioned by Cicero and others, the emphasis is not so much on the services rendered as the constant readiness to render them.

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23 Cicero *Amic.* 18-20, esp. 19: "Qui ita gerunt, ita vivunt, ut eorum probetur *fides* integritas aequitas liberalitas"; 65: "Firmamentum autem stabilitatis constantiaeque est eius quam (*MSS*: quem *Reid*) in amicitia quaerimus *fides* est; nihil est enim stabile, quod infidum est"; cf. 64, where Cicero quotes Ennius to illustrate *fides* and *constantia*: "amicus certus in re incerta cernitur" (= "A friend in need is a friend indeed"); Arist. *EN* 1156b 6ff; *cit.* Brunt 1965: 1; cf. Saller 1982: 12-3.

24 See Cicero *Inv.* 2. 166: "amicitia est voluntas erga aliquem ...cum eius pari voluntate"; *Amic.* 82: "Par est autem primum ipsum esse virum bonum, tum alterum similem sui quaerere. In talibus ea, quam iam dudum tractamus, stabilitas amicitiae confirmari potest..."; cf. Porph. *Hor. carm.* 2. 17. 5: "...dicunt amicitiam animam unam esse et (in *codd.*) duo corpora" (*TLL* 1. 1892f); cf. n. 4 above.

25 *Amic.* 27: "...cum similis sensus exstitit amoris, si aliquem nacti sumus, cuius cum moribus et natura congruamus"; cf. *Id.* 74: "Disparis enim mores disparia studia sequuntur, quorum dissimilitudo dissociat amicitias"; Brunt 1965: 1; cf. also Pliny *Ep.* 4. 15; 5. 14; Seneca *Prov.* 1. 5; *Ep.* 6. 3; Saller 1982: 12-3.

26 I shall show (cf. 4.3.1.(iii) below) how the operation of *captatio* in *amicitia* conforms to the latter but not the former of these precepts: *captatores* are not frank with their objects, but constantly flatter them, see e.g. *Hor. Sat.* 2. 5. 74-5; cf. *Mart.* 12. 40.

27 *Amic.* 65: "Simplicem praeterea et communem et consentientem...elegi par est...quae omnia pertinent ad fidelitatem" (the right course is to choose for a friend one who is frank, sociable and sympathetic...all of which are conducive to loyalty); cf. 66 (frankness is an attribute of the wise friend): "primum, ne quid fictum sit neve simulatum; aperte enim vel odisse magis ingenui est quam fronte occultare sententiam" (first, may there be no feigning or pretending; for it is more fitting for an honest person to hate openly than to hide his opinion by his expression). For pleasant speech and affability, see *Amic.* 66: "Accedat huc suavitas quaedam oportet sermonum atque morum, haudquaquam mediocre condimentum amicitiae" (To this should be added a pleasantness of speech and manner, which lends no small flavour to friendship); see also 65 (suspicion of friends must be avoided): "...ne ipsum quidem esse suspiciosum, semper aliquid existimantem ab amico esse violatum" (...let him not be suspicious, always thinking that his friend has done something wrong); cf. Brunt 1965: 1-2.

28 *Amic.* 23: "Verum etiam amicum qui intuetur, tamquam exemplar aliquod intuetur sui" (He who looks upon a true friend, looks upon an image of himself); Brunt: *ibid.*

29 *Amic.* 80: "Ipse enim se quisque diligit, non ut aliquam a se ipse mercedem exigit caritatis suae, sed quod per se quisque carus est; quod nisi idem in amicitiam transferetur, verus amicus numquam reperietur: est enim is qui est tamquam alter idem" (For everyone loves himself, not with a view to acquiring anything from himself but from self-love; unless this sentiment is transferred to friendship the true friend will never be found; for he is, as it were, another self); cf. 92; Brunt: *ibid.*

30 See Cicero *Amic.* 50: "Non igitur utilitatem amicitia, sed utilitas amicitiam secuta est".

But the ideals of philosophers should be distinguished from the day to day practice of *amicitia*: according to Saller (1982: 15) the Romans could not conceive of friendship without reciprocal exchange. In many societies there is a paradox in the way in which friendship is viewed: although friendship is ideally a mutually affectionate relationship without ulterior motives, in practice an essential part of friendship is the mutual exchange of goods and services. It is this contrast between the philosophical and the practical views of friendship that has an interesting implication for the operation of *captatio* within *amicitia*: on the one hand *captatio* is a perversion of the philosophical ideals of friendship; on the other it is a natural extension of the exchange relationship which is characteristic of friendship in practice.

4.3.: The exchange relationship: *amicitia* and *captatio* The ideals which I have examined above comprised the idealized philosophical view of *amicitia*.<sup>31</sup> In everyday life, however, exchange played a significant part in the operation of *amicitia* in Roman society. In practice *amicitia* seems to have had a great deal in common with Boissevain's definition of patronage (see 4.2.1. above): not only was *amicitia* an exchange relationship, but since it was defined as "friendship" it could also be called a personal relationship of some duration; it was also potentially (although not always) asymmetrical. According to Boissevain's definition, exchange meant the reciprocal rendering of services, which could differ considerably in their nature. At Rome these services were called, among other things, *officia* or *beneficia*.<sup>32</sup> It was considered

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<sup>31</sup> The very existence of these standards suggests that the reality did not measure up to them: if it had it would have been unnecessary to emphasise them in the first place; Brunt (1965: 6) notes that the rarity of true, disinterested friendship was not unique to the Roman world, but is probably true of virtually all societies. Nevertheless, it is also probably true that friendship assumed a much wider role in ancient society than it does in modern society. Hands (1968: 32ff) suggests that friendship in Roman society, even in a monetary economy, provided economic and social services "essential to comfort and security which could not be bought for money ..." "friends" supplied services analogous to those provided by bankers, lawyers, hotel owners, insurers and others today", *cit.* Saller 1982: 14; he also notes (*Id.*: 13-14) that the instrumental nature of Roman friendship was a corollary of the underdevelopment of "rational, impersonal institutions for the provision of services".

<sup>32</sup> Saller (1982: 15ff) examines the contexts in which the terms *officium*, *beneficium*, *meritum* and *gratia* are used in Latin literature to describe the operation of *amicitia*, and concludes (1982: 21-2) that these terms were not related to specific, mutually exclusive categories of social relationships, just as *amicitia* does not represent a single category: "In sum, the Latin words describing favors and their return are no more susceptible of precise definitions or delimitations of appropriate social contexts than is *amicus*" (1982: 21). It has been suggested in the past that a *beneficium* was the initial favour which set the exchange relationship in motion, which would create the obligation for the recipient to perform an *officium* in return (cf. Hellegouarc'h 1963: 165; cf. Saller 1982: 18). Saller

obligatory for *amici* to repay *officia* and *beneficia*: someone who failed to do so was disapprovingly labelled an *ingratus amicus*.<sup>33</sup>

There were thus strong societal pressures on *amici* to repay what they were said to owe (*debere*) to others who had performed services on their behalf. This may explain in part the way in which *captatio* operated in the context of *amicitia*: the services (see below) that the *captator* rendered to his object/*amicus* were intended to create a debt situation, which would encourage the object to include the *captator* in his will.<sup>34</sup> Testators also had obligations to the members of their families, however, which may have competed with their obligations to their friends, perhaps sometimes resulting in a tug-of-war: thus Domitius Tullus (Pliny *Ep.* 8. 18) was praised by some of his fellow citizens for instituting members of his family, while being condemned as *ingratus* by others for having encouraged *captatores*, but having failed to realise his debts to them.<sup>35</sup>

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demonstrates the inadequacy of this theory by referring to e.g. Cic. *Off.* 1. 48, where he suggests that a man might initiate a relationship by performing an *officium* in the hope of receiving a *beneficium* in return. It should also be noted that this terminology is used to describe favours from both *amici superiores* and *inferiores*; therefore the terms cannot be associated with a particular social class (cf. Saller 1982: 20).

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Seneca *Ben.* 7. 31. 1; Saller 1982: 14 n. 33.

See Mart. 6. 63, where the narrator addresses a certain Marianus who is aware that he is being courted for an inheritance, but has nevertheless decided to award the *captator* for his generosity: "Munera magna tamen misit", 5. The narrator implies that Marianus need not feel obligated to reward the *amicus* who has been courting him, since this fellow obviously wants Marianus to die so that he can receive his inheritance (see "scis qui captat, quid...velit"; for the topos that the *captator* longs for the object's death, cf. e.g. Mart. 5. 39. 5-6; 8. 27. 1-2; 11. 44. 4). This epigram suggests that some may have taken their obligations to *amici* (even those whose intentions were far from pure) seriously; not all *captandi* are as dutiful in rewarding those courting them for inheritances.

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Pliny *Ep.* 8. 18. 2 (cf. e.g. 2.2.3. n. 20): "Nam cum se captandum praebuisset, reliquit filiam heredem, quae illi cum fratre communis, quia genitam fratre adoptaverat. Prosecutus est nepotes plurimis iucundissimisque legatis, prosecutus etiam proneptem. In summa omnia pietate plenissima ac tanto magis inexpectata sunt". For the reaction of those opposed to his action, see 3ff: "alii fictum ingratum immemorem loquuntur..."; for those in favour of his action: "alii contra hoc ipsum laudibus ferunt, quod sit frustratus improbas spes hominum, quos sic decipi pro moribus temporum est". Note that on the one hand, the *captatores* are shown to have been cheated out of the reciprocal *officium* which they might have expected from Domitius Tullus, while on the other they are revealed as deceiving Tullus (see *decipi*), and thus not deserving their reward because they are not playing by the rules of *amicitia*. Their deception of Tullus and their failure to uphold the ideals of *amicitia* is expressed in the clause: "quod sit frustratus improbas spes hominum" (because (they said) he had frustrated the dishonest hopes of these people). Note also that Pliny ironically uses the language of *amicitia* to emphasise the familial dutifulness of Tullus' will: "Quo laudabilius testamentum est, quod pietas *fides* pudor scripsit, in quo omnibus adfinitatibus pro cuiusque *officio gratia* relata est, relata et uxori". The idea here is that each of his relatives received their portions in accordance with the *officia* that they had paid him during his lifetime: see Saller 1982: 24. This passage from Pliny illustrates the problem outlined at 1.3.4. above, that in Roman society, two types of inheritance system competed: on the one hand, the testator had a duty to

4.3.1.: Types of services exchanged: *amicitia* and *captatio* What type of services were exchanged between *amici*? I shall examine only those that are relevant to the presentation of *captatio* in literature.

4.3.1.(i): *Salutatio*: First, it was the duty of the *amici inferiores* to go to the house of their *amicus superior* each morning to greet him: this was the practice known as *salutatio*. The obligatory greeting applied particularly to those *clientes* of the humblest status who had to wait in line to greet their *patronus* and who were sometimes refused entry by the *nomenculatores*, slaves whose duty it was to screen, identify and announce the callers to their master.<sup>36</sup> The client's morning greeting was a public sign of respect and honour towards the *patronus*.<sup>37</sup> Saller notes that most discussions of the morning *salutatio* have focussed on the lower-class *clientes*.<sup>38</sup> However, Martial and Juvenal write of senators competing for prestige by means of *salutatio*:<sup>39</sup> it seems that *salutatio* could be resorted to by anyone who

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institute and bequeath property to the members of his family (the intrafamilial, vertical/lineal system); on the other, he also had obligations to his *amici* (the extrafamilial, lateral system). These two systems of devolution were inevitably in competition with one another, and in most cases (except where the testator was *orbis*) the former had the stronger pull.

36 Sen. (*Ben.* 6. 33. 3ff) claimed that C. Gracchus and Livius Drusus divided their friends into three groups: the first comprised peers who were received in private; the second lesser *amici* who were admitted into the atrium in groups for the morning *salutatio*; the third were the poor *clientes* who were either admitted *en masse* or were humiliated by being kept outside by the *nomenculatores*: "Istos tu libros, quos vix nomenclatorum complectitur aut memoria aut manus, amicorum exitimas esse? Non sunt isti amici, qui agmine magno ianuam pulsant, qui in primas et secundas admissiones digeruntur" (Do you think that those lists, which a *nomenculator* can scarcely hold in his head or in his hand, are the lists of your friends? Your friends are not those who in a long line knock at your door, whom you divide into two classes, those to be admitted first, those to be admitted second); see also 6. 34: "consuetudo ista vetus et regibus regesque simulantibus populum amicorum describere ...Apud nos primi omnium C. (*addidit Muretus*) Gracchus et mox Livius Drusus instituerunt segregare turbam suam et alios in secretum recipere, alios cum pluribus, alios universos. Habuerunt itaque isti amicos primos, habuerunt secundos, numquam veros" (It is an old custom of kings and of those who imitate kings to divide their friends up into classes...With us, it was first Gaius Gracchus and a little later Livius Drusus who set the fashion of classifying their followers, and of receiving some in private, others with groups of others, others *en masse*. They had friends of the first order, friends of the second, but never true friends); cf. Saller 1982: 11.

37 Saller 1982: 128: it appears that some *salutandi* paid their *salutatores* for their services by means of the *sportula* (the *sportula* was apparently not paid after the *salutatio* but, as a substitute for the evening meal with the patron, was probably distributed in the late afternoon: see Cloud 1989(b): 212f); Martial (3. 7, 8. 42) records the going rate in his day as 100 *quadrantes*.

38 E.g. Friedländer 1907: vol. 1, 195f.

39 See Mart. 12. 26, where he writes of a senator who is out at dawn engaging in *salutatio* in the hope of a consulship; 10. 10; cf. Juv. *Sat.* 1. 117, where he complains of the unfair competition created by senators engaging in *salutatio*.

wanted something badly enough. It may have been that *salutatio* was usually associated with the lower classes, but could be adopted by those of higher social standing in order to flatter their objects.

*Salutatio* also appears to have been one of the services of *amicitia* that was used as a *modus operandi* of *captatio*: Juvenal portrays the two praetors vying to reach the houses of *captandae* as early as possible.<sup>40</sup> Juvenal seems to suggest here that the praetors are cornering the market and usurping the domain of the poorer *amici* by presenting themselves as *salutatores*. That *salutatio* was a technique for courting inheritances is also suggested by Seneca *Ep.* 19. 4, where *salutatores* are said to change their loyalties whenever a suitable *captandus* changes his will: "mutabunt testamenta destituti senes, migrabit ad aliud limen saluator".<sup>41</sup> This move also of course demonstrates an utter lack of *fides* toward the *amicus superior/salutandus* which was supposed to be characteristic of *amicitia*. In the Greek writer Lucian's portrayal of inheritance-hunting (which he sees as a particularly Roman vice, cf. *Nigrinus* 17), the *captandus* Polystratus is also made to boast that he was courted every morning by people waiting at his doors, a practice which must reflect *salutatio*.<sup>42</sup>

*Salutatio* was part of an exchange relationship: while the poorer *amici* might have hoped for the *sportula* (see n. 37 above) or an invitation to dinner as a reward for their troubles, the wealthier clients performing *salutatio* would have expected more in exchange for their loyalty. They would have performed many other services in addition to *salutatio* in order to place their *amicus* in a debt situation: one of their hopes would be that he would recognise his obligations towards them by granting them an inheritance or legacy in his will.

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<sup>40</sup> Juv. *Sat.* 3. 126-30: "quod porro officium, ne nobis blandiar, aut quod/pauperis hic meritum, si curet nocte togatus/currere, cum praetor lictorem inpellat et ire/praecipitem iubeat dudum vigilantibus orbis,/ne prior Albinam et Modiam collega salutet?" (What *officium* is there, lest we flatter ourselves, or what *meritum* is there for the poor man to perform, if he takes the trouble to hurry out during the night dressed in his toga, when the *praetor* is urging on his lictor and ordering him to go full-speed ahead to the houses of the childless, who have already for a long time been awake, so that his colleague does not greet Albina and Modia first?); why have Albina and Modia been awake for so long already? Possibly because they look forward to the *salutatio*, which may have frequently have included gifts or other favours.

<sup>41</sup> For *destitutus* as an equivalent for *orbis*, cf. *TLL* 5. 766.

<sup>42</sup> "καὶ ἔωθεν μὲν ἔυθὺς ἐπὶ θύρας ἑφοῖτων μάλα πολλοῖ" (*Dial. Mort.* 360 [19(9)]).

4.3.1.(ii): Gift-giving: Some of the services rendered involved material goods: gifts were one type of exchange transaction that took place in the social network of *amicitia*.<sup>43</sup> Saller cautions that gift-giving is so pervasive in human societies that its existence cannot give us any specific information about Roman society; however, what is significant is that the living standard of many people depended on substantial gifts from *amici* (Saller 1982: 123).<sup>44</sup> Other gifts, such as foodstuffs, were tokens of appreciation and thanks rather than of real value. We often find the *captatores* of literature giving their objects foodstuffs as a means of courtship.<sup>45</sup> There were also certain times of

<sup>43</sup> See Saller 1982: 122ff.

<sup>44</sup> Pliny's letters record his many large gifts to friends, e.g. *Ep.* 1. 19: he gave 300,000 HS to his friend Romatius Firmus, in so doing boosting the value of Romatius Firmus' estate and thus granting him equestrian status.

<sup>45</sup> See e.g. Hor. *Sat.* 2. 5. 10ff, where the *captandus* is to be offered a thrush ("turdus", 10), sweet apples ("dulcia poma", 12) and any other type of farm produce ("et quoscumque feret cultus tibi fundus honores", 13); cf. Mart. 5. 39, where the object Charinus, who is continually re-making his will, is said to have been given cakes dipped in Hyblaeian thyme-based honey ("misi/Hyblaeis madidas thymis placentas", 2-3); Hyblaea was a mountain in Sicily, famed for its bees. See also 9. 48, where the narrator/*captator* claims to have sent his object a huge boar, so big, he tells us, that you would think it came from Aetolian Calydon ("Aetola de Calydone putes", 6), i.e. a boar of epic proportions; however, as we have seen (2.4.1.1. above), the *captator* saw none of this boar, not even a rib or a tail ("...nec costa data est caudave missa mihi", 10). This last comment would suggest that when an *amicus inferior* gave his *amicus superior* a large gift, like a boar, he would have expected to partake of it at a dinner-party (cf. 7-8) together with other *amici*, and even have a place of honour at the table. In this case his *officium* has not been reciprocated: the narrator therefore makes the reasonable assumption that this also means that he will not be made the recipient's heir, as he had hoped - i.e. the testator will not honour any of his *officia* aimed at an inheritance (see 2.4.1.1.; for heirs having to receive at least a quarter of the estate (the Falcidian fourth), see 2.4.2.1.(i); for *captatores* aiming at heirship, see 2.4.2.1.(ii,a & c) above); cf. 12. 48, where the narrator, offering general criticism of a dinner he has been to, tells his addressee curtly that he will not succeed in getting an inheritance for five Lucrine oysters: "Si...heres/vis scribi propter quinque Lucrina, vale", 3-4. Juvenal's *captatores* specialize in gifts of fish (fish and birds appear to have been common Roman dishes), cf. *Sat.* 6. 39-40 (see 3.5. above), where there is also a turtle-dove: "...turture magno/mullorumque iubis et captatore macello"; for the turtle-dove and the bearded mullet as delicacies, see Courtney, *ad loc.*; note the close link between the *captator* and the meat-market in "captatore macello" (*captatore* is used adjectively here, see Kühner-Stegmann 1. 232; Courtney: *ad loc.*; cf. his note on 4. 62): it seems that *captatores* and the gift-giving of dainties had become closely associated by this stage; Juvenal may equally be implying that much of the gift-giving that goes on in *amicitia* is for the purposes of *captatio*; cf. *Sat.* 4. 18-21 (Crispinus had bought an enormous fish, which he ate himself; the narrator suggests that it could have been better put to use had it been sent to suitable *captandi*): "consilium laudo artificis, si munere tanto/praeicipuam in tabulis ceram senis abstulit orbi,/est ratio ulterior, magnae si misit amicae,/quae vehitur clauso latis specularibus antro" (note that the *captanda* is called *amicae*; this may also have a sexual connotation: for sexual favours as a *modus operandi* of *captatio*, see 4.3.1.(vi) below). See also 5. 97-8, where the *captator* Laenas buys the *captanda* Aurelia a fish, which she then sells again, probably out of greed, but definitely in so doing she is violating the bonds of *amicitia* (for women as *amicae superiores*, see an inscription to a *patrona*, *AE* (1964), 179 (Utica); Saller 1982: 199: Tab. III). On food in Roman satire, see Hudson 1989: 69-87.

the year (e.g. the Saturnalia) when gift-giving between *amici* took place on a large scale: it appears that those with vested interests in their *amicus'* favour may have used the excuse of this festive season to intensify their courtship.<sup>46</sup>

The idea that gifts are not merely gifts but deceptive tools for gaining greater wealth or favour is repeatedly emphasised in the portrayal of *captatio*: at Martial 4. 56, for example, the narrator suggests that a certain Gargilianus, who sends gifts to old men and widows (i.e. favourite objects of *captatio*), cannot be called generous because his gifts are really snares.<sup>47</sup> The idea is that gifts and other favours are not given or performed for the sake of the recipient but for the purpose of what can be gained in return. Thus Seneca suggests that giving gifts to suitable *captandi* was not true generosity but an investment towards an inheritance.<sup>48</sup> The instrumental nature of the exchange relationship undermines true generosity: the gift-giver knows that the recipient will be obliged to return the service so that his *officium* is an investment in a future return.

Not only hunting imagery as used at Mart. 4. 56. 4 (cf. *insidias*), but fishing imagery too, is commonly used to describe the operation of *captatio*, particularly when gift-giving is the *modus operandi*: in these analogies the *captator* is presented as the hunter/fisher, the object as the prey; gifts (i.e. the *modus operandi*) are frequently portrayed, in the fishing imagery, as the bait or the fish-hook (*hamus*),<sup>49</sup> in the hunting imagery, as the ambush (*insidiae*)

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<sup>46</sup> Cf. Mart. 5. 18, where he speaks of the gifts that are commonly exchanged in the month of December, i.e. at the festival of Saturnalia (cf. *Decembri mense*): "Odi dolosas munerum et malas artes:/Imitantur hamos dona: namque quis nescit,/Avarum vorata decipi scarum musca?/Quotiens amico diviti nihil donat,/O Quintiane, liberalis est pauper" (I hate the deceptive and wicked arts of gifts: gifts imitate fish-hooks: for who does not know how a greedy *scarus* [apparently a salt-water fish] is taken in by the fly he has eaten? Therefore whenever he gives his wealthy *amicus* nothing, Quintianus, the poor man is generous), 6-10. This passage seems to acknowledge the exchange relationship of which gifts were part; by illustrating the way in which gifts are used to bind the recipient in obligation to the giver, the narrator shows the manner in which gifts are deceptive; in so doing, he uses the fish imagery so often used to describe the relationship between *captator* and *captandus*.

<sup>47</sup> 1-2: "Munera quod senibus viduisque ingentia mittis,/vis te munificum, Gargiliane, vocem?" (Because you send huge gifts to old men and widows do you want me to call you generous, Gargilianus?); cf. 3-4: "sordidius nihil est, nihil est te spurcius uno,/qui potes insidias dona vocare tuas" (There is nothing more disgusting, nothing more base than your unsurpassed self, who can call your snares gifts).

<sup>48</sup> *Ben.* 1. 14. 3: "Ille accepit, sed facile redditurus, sed cuius senectus et libera orbitas magna promittebat".

<sup>49</sup> Cf. Mart. 6. 63, where the *captandus* concedes that the *captator* has been generous with his gifts: "Munera magna tamen misit...", 5; this is countered by the narrator's caution: "...sed misit in hamo" (But he sent them on a fish-hook).

used to catch the prey. The use of this imagery underlines the way in which the instrumental nature of *amicitia* is used for the purposes of *captatio*: *amici* aim to gain what they can from their fellows, even if by deceit, and they use the conventions of the exchange relationship to do so.

4.3.1.(iii): Moral support/flattery: I have already noted (see 4.2.2. n. 26 above) that *captatores* overstep the traditional philosophical expectations of friendship by flattering their objects excessively. Public or professional flattery, e.g. in the form of testimonials (*commendationes*), was acceptable.<sup>50</sup> However, on a personal level, friends were meant to be frank with one another;<sup>51</sup> the *captatores* of literature on the other hand are shown to be obsequious, as Tiresias advises his trainee *captator* Ulysses to be (cf. Hor. *Sat.* 2. 5. 93: *obsequio grassare*); a *captator* is also liable to flatter the *captandus* until he himself asks him to stop (cf. *Sat.* 2. 5. 96ff).<sup>52</sup> Tiresias advises his trainee *captator* to bolster his object's artistic illusions: cf. *Sat.* 2. 5. 74-5: "scribet mala carmina vecors:/laudato" (If the crazy man *will* write bad verse, praise it); cf. Mart. 12. 40 1: "recitas mala carmina, laudo" (If you recite bad verse, I praise it). This particular epigram also shows the *captator* engaged in other types of behaviour flattering to his object: e.g. believing his lies (cf. "Mentiris, credo", 1), singing along with the object when he decides to sing ("Cantas, canto", 2), providing drinking companionship ("bibis, Pontiliane, bibo", 2), ignoring the object when he breaks wind ("Pedis, dissimulo", 3), etc. This epigram portrays the extent to which *amici* could be trapped in the conventions of the exchange relationship in which inheritances were held out as a reward for loyal service: as a result the *amicus* is imagined claiming he wants nothing from the object but that he should die: "Nil volo: sed morere", 6.

4.3.1.(iv): Legal aid: Another *officium* which was commonly bestowed in the practice of *amicitia* in Roman society was that of legal services.<sup>53</sup> Unlike the custom of *salutatio*, which was traditionally an obligation owed by the poorest

<sup>50</sup> *Commendationes* were a conventional service owed by *amici* to each other, particularly by *amici* who were socially established to those who were advancing socially, and by older *amici* to younger on behalf of some of his *amici* to others (Saller 1982: 108-10).

<sup>51</sup> See 4.2.2. above.

<sup>52</sup> *Sat.* 2. 5. 96-8: "importunus amat laudari: donec ohe! iam/ad caelum manibus sublatis dixerit, urge,/crescentem tumidis infla sermonibus utrem" (An improper man loves to be praised: until he holds up his hands to the sky and cries "enough!", carry on and blow up the billowing balloon with swelling praises).

<sup>53</sup> Saller (1982: 29) describes legal services performed in the context of *amicitia* as one of the major examples of a social role which straddled the private and public sectors. He notes that in the Principate as well as the Republic the advocate was called *patronus*.

clients to their wealthy benefactors and which appears to have been taken over by *amici* of higher social standing, legal services would have required an education and the ability to plead a case in court, and as a result this *officium* would have been restricted to those who were familiar with the *ius anceps*. Thus someone who like the *captator* at Hor. *Sat.* 2. 5. 28ff pleads the case of a wealthy childless party rather than that of a man with children (even though the latter is in the right) would have been well-educated<sup>54</sup> and of relatively high social status so as to qualify to plead the case in court.<sup>55</sup>

This suggests that *captatores* may often have been technically of higher social status than their objects; *captatio*, if a social phenomenon, would therefore have taken place not only in the context of *amicitia* between friends of more or less equal social status<sup>56</sup> (even so, they could differ in age, power, wealth, and other resources such as the time available to them),<sup>57</sup> but also in a type of patronage relationship, where one party would have used the power granted by his higher social status to assist someone who, although of lesser social status, was wealthy enough to repay him by means of an inheritance or legacy. Wallace-Hadrill, however, goes too far in maintaining that the *captandus* is the *cliens* of the *captator*:<sup>58</sup> this oversimplifies the complex network in which *captatio* operated.

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- <sup>54</sup> Cf. *Sat.* 2. 5. 34, where he reassures his object: "ius anceps novi, causas defendere possum" (I am well-versed in the ambiguities of the law and am able to plead cases).
- <sup>55</sup> For the implication that the object is of lower social status than the *captator*, see *Sat.* 2. 5. 18-19: "utne tegam spurco Damae latus? haud ita Troiae/me gessi certans semper melioribus" (What? Must I escort a dirty Dama? At Troy I was always matched against my betters); for an indictment of the values of contemporary Roman society, which disregards birth and virtue unless they are accompanied by wealth, see 8: "et genus et virtus nisi cum re vilior alga est" (Both high birth and virtue, unless accompanied by wealth, are cheaper than sea-weed). Since in contemporary Roman society social standing does not count as much as money does, it follows that if someone does not have a respectable background, but has wealth, that person will be courted for his wealth (perhaps in the form of an inheritance) by those of technically higher social standing but less wealth. One of the services that those of higher social status but less wealth could have provided for their wealthier clients was that of legal services: they would then hope to be repaid in the form of an inheritance or legacy.
- <sup>56</sup> See e.g. *Sen. Ep.* 95. 43; *Ben.* 4. 20. 3, 6. 38. 4, etc.
- <sup>57</sup> Cf. nn. 11-14 above.
- <sup>58</sup> Wallace-Hadrill (1981: 68): "To see them [the *captator* and *captandus*] in context, it must be appreciated that they belong to the system of *clientela* and *amicitia*, the nexus of exchange services and bequests. The social paradox is that the *orbis*, though so much courted, is in traditional terms the *cliens* of his *captatores*". I agree with Wallace-Hadrill up to a point: it is true that technical social superiors courted those who were technically of lesser social status, but, as far as we can tell from authors like Seneca (cf. *Ep.* 95. 43 and *Ben.* 4. 20), *captatio* was so insidious (to use a derivative of an image often applied to it in satire: *insidiae*) that it knew no bounds and crept into the idealistic friendships between equals that philosophy extolled. Apart from *amicitiae pares* and *impares*, it also is shown to take place within families (although *captatio* as presented in literature is

The concept of the advocate as patron-friend recurs throughout Latin literature, e.g. Tacitus *Dial.* 9. 4.<sup>59</sup> As Quintilian points out,<sup>60</sup> it was not honourable for the advocate to charge his clients for his services: instead, he depended on the custom of reciprocity for remuneration. The *gratus* client could repay him in a number of ways, including granting him an inheritance or legacy in his will.<sup>61</sup> It follows therefore that *captandi* would have been desirable clients for those acting as advocates. At Mart. 2. 32, the narrator complains that his *patronus*, a certain Ponticus, is reluctant to plead cases on his behalf when his adversaries are powerful people, e.g. one of Caesar's freedmen ("Contra libertum Caesaris ire times", 4), or a suitable *captanda*, as in the case of Laronia who is childless, wealthy, old and a widow, and who appears to have wronged the narrator by stealing his slave: "Abnegat et retinet nostrum Laronia servum/Respondes 'Orba est, dives, anus, vidua'", 5-6. Laronia must have been another of Ponticus' potential clients, whom he understandably did not want to offend since she was likely to pay him by means of an inheritance; on the other hand, it may merely show that *captandi* were in an extremely powerful position in Roman society. It also shows that considerations other than mere loyalty to clients would have influenced those acting as advocates; the narrator sees fit to criticise the effectiveness of patronage in this instance because of his patron's unassertive attitude: "Non bene, crede mihi, servo servitur amico..." (Believe me, a servile friend is not well served), 7.

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mostly shown to take place in the extrafamilial context): here mothers and step-mothers are often said to be the guilty parties: for mothers "quae patrimonia filiorum et exhauriunt et captant", see Sen. *Helv.* 14. 2; for stepmothers and mothers as possible interfamilial *captatrices*, see Juv. *Sat.* 6. 627ff: here he suggests that although the traditional idea was that stepmothers murdered their stepsons, nowadays *pupilli* who have inherited wealthy estates should be suspicious of the food their mothers give them; *captatio* may also take place in the context of sexual relationships: see e.g. Mart. 9. 80, 10. 8, etc.

<sup>59</sup> Saller 1982: 29.

<sup>60</sup> *Inst.* 12. 7. 12: "Nihil ergo acquirere volet orator ultra quam satis erit; ac ne pauper quidem tamquam mercedem accipiet, sed mutua benivolentia utetur, cum sciat se tanto plus praestitisse...Denique ut gratus sit ad eum magis pertinet qui debet" (The orator (i.e. advocate) will not wish to acquire more than is sufficient for him. And not even a poor advocate will accept remuneration as though it were pay, but he will benefit from a mutual generosity since he knows that his generosity has exceeded his remuneration ...Finally, the man indebted to him is foremost obligated to display his gratitude); Saller 1982: 29.

<sup>61</sup> Inheritances and legacies from childless clients seem to have been a chief source of the advocate's income: cf. Tac. *Dial.* 5ff, where childless clients are mentioned at the head of the list of important clients; Saller 1982: 29.

4.3.1.(v): *Hospitium*: The fundamentally instrumental nature of Roman friendship was partly a result of the underdevelopment of impersonal institutions for the provision of services. Legal services in the context of *amicitia* were one aspect of the patronage relationship that filled a role which in industrialised societies today is performed by professional lawyers.<sup>62</sup> The conventions of *hospitium* (reciprocal hospitality) was another aspect of the exchange relationship that today is assumed largely by the hotel industry. *Hospitium* involved allowing those to whom one was bound in *amicitia* to stay in one's house and entertaining them. Reciprocal hospitality between *amici* was based on the concept of loyalty (*fides*) within the exchange relationship (Schulz 1936: 232). *Hospitium* would be depended on if an *amicus* from another town or from the provinces visited Rome: the service would be reciprocated and the roles reversed on a return-visit.<sup>63</sup> Governors of provinces relied on the *hospitium* of local notables when they were touring the provinces on the assize court circuit.<sup>64</sup> A relationship of mutual *hospitium* could grow up between families and last for many generations.

The conventions of hospitality within the *amicitia* relationship could be exploited for the purposes of *captatio*, cf. Mart. 11. 83, where a certain Sosibianus is said to welcome only suitable *captandi* to stay at his house: "Nemo habitat gratis nisi dives et orbis apud te./Nemo domum pluris, Sosibiane, locat" (No one stays at your house for free except the wealthy and childless man: no one rents his accommodation at a higher rate than he, Sosibianus). Sosibianus has failed to uphold the social code of *amicitia* by encouraging only childless wealthy *amici* to stay at his house: he is treating them as he should in fact be treating all his *amici*. Although unequal treatment of *amici* happened in practice, it was at variance with the ideals of *amicitia* (see 4.2.2. above). In return for his hospitality Sosibianus expects an inheritance or a legacy from these suitable *captandi*. However, as the narrator points out, an inheritance is a very high price for hospitality. Thus Sosibianus appears to be exploiting the exchange relationship.

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<sup>62</sup> Hands 1968: 32ff; Saller 1982: 14; see n. 32 above.

<sup>63</sup> The reversibility of the relationship of guest-friendship is also suggested by the fact that the same Latin word (*hospes*) applies to both host and guest, cf. *TLL* 6,3. 16. 3020.

<sup>64</sup> Saller 1982: 160.

By now I have examined a number of the *officia* of the exchange relationship, which, according to the literary portrayal of *captatio*, were used in the courtship for inheritances: *salutatio*, gift-giving, legal services and hospitality. I have also noted that the conventions of mutual support in *amicitia* could be exploited for *captatio* in the form of flattery. Another service which was allegedly used as a means of courtship for inheritances and which may have been part of the seamier side of *amicitia* was that of sexual favours.

4.3.1.(vi): Sexual favours: In the literary presentation of *captatio* there are numerous examples of the *captator* offering his wife or children to the *captandus* as sexual objects; the *captatores* themselves are also frequently shown to provide elderly *captandae* with sexual favours.<sup>65</sup> One example of the former occurs at Hor. *Sat.* 2. 5. 75-6, where Ulysses is advised to hand over his wife Penelope to the *captandus* to provide him with sexual pleasures: "scortator erit: cave te roget; ultro/Penelopam facilis potiori trade" (He wants to be a womaniser: do not let him have to ask you; of your own accord obligingly hand over Penelope to your better). The implication in *potiori* (76) is that the *captandus* whom Ulysses is to win over by having his wife perform these services is an *amicus superior*.

Another example of a husband tolerating his wife's adultery in the interests of *captatio* occurs at Juv. *Sat.* 1. 55-7,<sup>66</sup> where a husband is portrayed as conniving at his wife's flagrant adultery and actually himself taking up the inheritance that she earns from her lover, which on account of her

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<sup>65</sup> It is interesting that in the Roman presentation of *captatio*, virtually all the sexual favours offered by *captatores* to their objects are heterosexual (exceptions are Juv. *Sat.* 2. 58f, where a *libertus* is instituted heir because of his homosexual affair with the testator; see also Petr. *Satyrica* 140, where Philomela cleverly sends both her son and daughter to Eumolpus - but cf. the Greek flavour of the *Satyrica* and the theme of the homosexual romantic triangle between Encolpius-Giton-Eumolpus); by contrast, Lucian's *captandi* enjoy the favours of both boys and women: e.g. at *Dial. Mort.* 360 [19(9)], the *captandus* Polystratus boasts of always having had youthful boys and the prettiest women at his disposal (he eventually makes a Phrygian boy his heir to spite the *captatores*): "ΕΤΙ ΚΑΙ ΠΑΙΔΕΣ ΩΡΑΙΟΙ ΗΣΑΝ ΠΟΛΛΟΙ ΚΑΙ ΓΥΝΑΙΚΕΣ ΑΒΡΟΤΑΤΑΙ. The difference is probably largely cultural: Greek literary sources present women and boys as the two traditional types of sexual objects enjoyed by men: cf. e.g. Mimnerm. fr. 1, describing someone who is too old for love (a fate not shared by Lucian's lucky *captandi* - their wealth subverts this traditional idea): 'αλλ' εχθρος μεν παισιν, ατιμαστος δε γυναιξιν; for the Romans, however, this idea was probably largely a Hellenistic import.

<sup>66</sup> "cum leno accipiat moechi bona, si capiendi/ius nullum uxori, doctus spectare lacunar,/doctus et ad calicem vigilantī stertere naso" (When a pimp of a husband, who is well-versed at staring at the ceiling, well-versed at snoring into his cup with wakeful nose, receives the estate of the adulterer, because the wife has no *ius capiendi*).

*incapacitas* she is barred from taking.<sup>67</sup> Martial (4. 5) suggests that someone like his addressee Fabianus, who was reluctant to prostitute his wife to his friend ("Nec potes uxorem cari corrumpere amici", 5), and to court elderly women with sexual favours ("Nec potes argentes arrigere ad vetulas", 6) would have been an outcast in contemporary Roman society. Examples of *captatores* themselves using sexual means to win over elderly *captandae* can be found at e.g. Hor. *Sat.* 2. 5. 84ff; Juv. *Sat.* 1. 37-41, etc. Children are employed to win over a *captandus* by sexual favours at Petronius *Satyrica* 140, where Philomela sends her son (described as an *epehebus*) and her daughter (said to be very beautiful: cf. *speciosissimam*) to Eumolpus.

One might have expected that *amici* would have exchanged slaves as gifts to be used as sexual objects. But did voluntary prostitution of wives, children and the *amici* themselves really take place in the context of *amicitia*? The alleged use of sexual favours to win over *captandi* seems to reflect a universal Roman fear, that a disreputable person might intercept an inheritance by such means and in so doing deprive of their reward those family and friends who had truly deserved it. The idea that someone's position in *amicitia* could be advanced by providing sexual objects (possibly members of his family) for the patron may have been an invention or at least an exaggeration of the satirists. As a recent article by Duncan Cloud has shown,<sup>68</sup> all satirists are to be treated as suspect when describing social norms, because their genre demanded that they adopt a *persona* critical of the society of their day: however, Cloud acknowledges that Martial is more reliable than Juvenal for social details, so it is possible that by describing wife-swapping in the context of *amicitia* he is to some extent reflecting a trend of his time. It is also interesting that Plutarch (*Cato the Younger* 25. 5) records that Cato actually gave his second wife Marcia in marriage to his friend Quintus Hortensius,<sup>69</sup> when he asked for her (although he had originally asked for Cato's daughter,

<sup>67</sup> For questions of *incapacitas* (*ius capiendi nullum*), see 2.5.2.2. & 3.3.1.1. above.

<sup>68</sup> Duncan Cloud 1989(b): 205-218.

<sup>69</sup> Plutarch (25. 2) tells us that Quintus Hortensius was motivated by a desire to be more than a mere associate and companion to Cato: "ἐπιθυμῶν οὖν τῷ Κάτωνι μὴ συνήθης εἶναι μηδὲ ἐταῖρος μόνον", but wanted to join their families together; Cato's daughter, whose hand Hortensius had asked for, was already married to one Bibulus; as a result Cato refused to give his daughter to him; Hortensius then dropped his facade, Plutarch relates, and asked for Cato's wife: Cato, Plutarch tells us (25. 5), seeing that Hortensius was sincere, did not refuse him ("ὁ δ' οὖν Κάτων ὄρων τὴν τοῦ Ὀρτησίου σπουδὴν καὶ προθυμίαν οὐκ ἀντεῖπεν"), but merely cautioned that Marcia's father Philippus also gave his consent. Philippus consented, provided that Cato was to give the bride away. This passage suggests that marriage alliances to strengthen the bonds of *amicitia* could take precedence over the marital bond.

who happened to be already happily married). This action on Cato's part would support the suggestions of the satirists Martial and Juvenal that the obligations felt by *amici* to each other sometimes surpassed considerations of marital fidelity.

4.3.1.(vii): Services during illness: Since successful *captatio* depended not only on the winning of the object's favour and being named heir or granted a legacy in terms of his will, but also on the death of the *captandus*, it follows that courtship for inheritances should intensify whenever the object shows signs of possibly dying, i.e. when he is ill.

4.3.1.(vii.a): Attendance at sick-bed: According to the conventions of *amicitia* it was the duty of friends to attend to a fellow *amicus* when he was ill.<sup>70</sup>

Seneca suggests that this convention was open to exploitation: those who were attending their sick *amici* could be tempted to use their influential position to gain an inheritance or legacy from their dying friend. At *Ben.* 4. 20. 3, Seneca terms "ungrateful" (*ingratus*) someone who sits at the bed-side of a dying *amicus* who is about to make his will and who allows himself to think about an inheritance or legacy: "Ingratum voco, qui aegro adsidet, quia testamentum facturus est, cui de hereditate aut de legato vacat cogitare".

Clearly, Seneca sees this as an exploitation of the exchange relationship of *amicitia*. He criticises the *amicus*, who thinks about an inheritance when his friend is ill, because he is seeking an additional source of gain when he is in the process of repaying other favours (i.e. while he is expressing his *gratia* towards his sick *amicus*). Thus the greedy *amicus* is *ingratus*: "Ingratus est, qui in referenda gratia secundum datum videt, qui sperat, cum reddit" (He is ungrateful, who in returning a favour sees the chance for a second one, who has hopes (for more) when he is repaying what he has received). Seneca also

<sup>70</sup> See e.g. Pliny *Ep.* 1. 12. 7f, where he describes his visit to his friend Corellius Rufus at his country-house when he was ill with gout; see also Tac. *Ann.* 2. 71, where Germanicus is surrounded by his *amici* when he is on his death-bed: "...adsistentis amicis in hunc modum adloquitur"; cf. *Ann.* 15. 62, where the dying Seneca addresses his friends who are gathered at his bed-side, telling them that although he cannot reward their services properly in his will (*quando meritis eorum referre gratiam prohiberetur*: note his use of the language of *amicitia*), he is leaving with them his sole and best possession "the image of his life" (*imaginem suae vitae*); cf. Sen. *Ep.* 78. 4, where he relates how he was cheered and encouraged by the encouragement, presence and conversation of his *amici* when he was ill, asserting that this contributed much to his recovery: "Multum mihi contulerunt ad bonam valetudinem amici, quorum adhortationibus, vigiliis, sermonibus adlevabar"; cf. *Ep.* 85. 29, where he suggests that the proper attitude to have when undergoing suffering is that of friends who are encouraging their sick *amicus*: "Quaeris quis tunc animus illi est? Qui aegrum amicum adhortantibus"; Saller 1982: 13.

makes the point here that the *ingratus amicus* may do everything that a dutiful friend ought to do (i.e. he may perform all the *officia* of the exchange relationship correctly), yet still be *ingratus* if he is thinking about material gain while attending his friend.<sup>71</sup> He uses the term *captator* to describe such an *amicus*.

At *Ep.* 95. 43 Seneca reiterates this idea, i.e. that all the duties of *amicitia* may be duly performed, yet still the *amicus* may be termed a *captator* if his mind is on an inheritance while he attending his sick friend: "Amico aliquis aegro adsidet: probamus. At hoc hereditatis causa facit: Vultur est, cadaver expectat".<sup>72</sup> He stresses that the same action is variously approved or disapproved, depending on the intention of the doer:<sup>73</sup> thus he points out that the operation of *captatio* may go on completely within the exchange relationship of *amicitia*. In this case the *captator* is indistinguishable from the ordinarily dutiful *amicus* who was merely repaying his *officia* and expressing his *gratia* to the sick *amicus* for his past services by sitting at his sick-bed.

This has interesting implications for our understanding of the way in which *captatio* operated within *amicitia*. In the presentation of *captatio* in satire (e.g. *Hor. Sat.* 2. 5, *Martial*, *Juvenal* etc), the *captatores* and *captandi* are portrayed as though distinct groups in society. Seneca's presentation suggests that *captatio* arose out of the conventions of the exchange relationship: *amici* did not set out specifically to court inheritances and legacies, but were tempted to do so by the opportunities that the exchange relationship provided. Because the conventions of *amicitia* were designed not only to win the favour of fellow *amici*, but also to create a relationship depending on the ethic of reciprocity, performing the duties of an *amicus* alone would have

<sup>71</sup> "Faciatur licet omnia, quae facere bonus amicus et memor officii debet: si animo eius observantur spes lucri, captator est et hamum iacit" (He may do everything that a good *amicus* and one mindful of his duty ought to do: but if his mind is haunted by the hope of gain, he is a fisher of inheritances and is dropping his bait). Note the use of the language of *amicitia*: *officium*, *debere*, etc.; note also the use of the fishing imagery often associated with *captatio*, e.g. *Mart.* 4. 56. 5-6.

<sup>72</sup> "Someone sits at the bed-side of his sick friend: we approve. But he does so for the purposes of an inheritance: he is a vulture, waiting for a corpse". Note the scavenger imagery frequently associated with *captatio*: *captatores* are often compared to scavenging birds like crows (cf. *Hor. Sat.* 2. 5. 56: "corvum...hiantem"; *Petr. Satyrica* 116, where the whole of the town of Croton is divided into *captandi* and *captatores*, i.e. carcasses and crows: "cadavera quae lacerantur aut corvi qui lacerant" - corpses which are being torn apart and crows which are tearing them apart) and vultures (*Mart.* 6. 62: "Cuius vulturis hoc erit cadaver?").

<sup>73</sup> *Ben.* 4. 20. 3: "Eadem aut turpia sunt aut honesta; refert, quare aut quemadmodum fiant" (The same things are disgraceful or honourable; it depends why or in what manner they are done).

been equivalent to the elaborate *modus operandi* advised for *captatores* to follow by, e.g. Hor. *Sat.* 2. 5. This suggests that there were no specific groups or "tribes" of *captatores*: any *amicus* could be one. *Captatio* may therefore have been an accusation which could be hurled at anyone who was in a position to sway testators because of his influential role in *amicitia*. *Captatio* was also therefore not necessarily planned: the chance for it arose.

The chance for courtship of inheritances arose particularly temptingly when one of the *amici* was ill and likely to die. Under these circumstances even the most loyal *amici* may have found it difficult to keep the thought of an inheritance or legacy from their minds. Inheritances and legacies were, after all, the final gifts in the exchange relationship,<sup>74</sup> and as such they were deemed indications of a man's appreciation of his friends; they were also his final opportunity to repay the *officia* he owed them.<sup>75</sup> This last point should not be overlooked: the fact that someone was about to die would have filled him with the desire to square his debts, and a Roman would have wanted to avoid dying while still owing his friends a return for their services - i.e. to be seen as *ingratus*.<sup>76</sup> These sentiments partly explain the potential success that conscious pursuit of inheritances would have enjoyed: *captatio* operated in the context of (and preyed on) an ideology that was deemed important by the Romans.

4.3.1.(vii.b): *Vota* on behalf of sick *amici*: Another type of *officium* that could be performed for someone who was ill was the offering of vows and sacrifices on his behalf: *vota* were also traditionally offered on the birthdays of *amici*.<sup>77</sup> Where they are used as a technique of *captatio*, however, they are usually performed on behalf of a sick *amicus*: an exception is Martial 11. 55, where the *captator* Lupus is said to have made a wish that his object Urbicus should become a parent, an epigram which reveals a great deal about the way in which *captatores* used *vota*. The narrator warns Urbicus that this is the last thing that a *captator* (who traditionally has the childless as his objects) would

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<sup>74</sup> Saller 1982: 124.

<sup>75</sup> See Champlin 1982: 207-8.

<sup>76</sup> Cf. the case of Domitius Tullus (Pliny *Ep.* 8. 18; cf. 2.2.3. n. 20; 4.3. n. 35 above), who was thought *ingratus* by some for failing to institute any of the number of *amici* who had performed *officia* on his behalf. However, others praised him for not realising the vile expectations (*improbas spes*) of these men (implying that they were *captatores*). This suggests that the distinction between the genuinely loyal *amicus* and the *captator* was a matter of opinion. Pliny's mention of the expectations (*spes*) of those disappointed by Tullus' will echoes the reference to expectations at Sen. *Ben.* 4. 20: *qui sperat*.

<sup>77</sup> Saller 1982: 13.

want: "Hortatur fieri quod te Lupus, Urbice, patrem,/Ne credas; nihil est quod minus ille velit", 1-2. He also warns him that it is an artifice of *captatio* to pretend to wish for the very things that one does *not* want: "Ars est captandi quod nolis velle videri", 3.<sup>78</sup>

The artifice of wishes in the context of *captatio* is again explored at Martial 12. 90, where a *captator* finds himself in the unfortunate position of having his *votum* on behalf of a sick *amicus* fulfilled: Maro had made a public vow that should his elderly *amicus* recover from his serious illness, he would make a sacrifice to Jupiter.<sup>79</sup> Unexpectedly, the friend recovers: now Maro has to make additional vows to undo the one that unexpectedly was fulfilled and to avoid breaking his previous one (i.e. he now prays for what he originally secretly hoped, that his friend should die, which would thus absolve him of having to make the sacrifice and which would also fulfill his true wish): "Ne votum solvat, nunc Maro vota facit", 6.

What *captatores* really wish for is that their objects should die.<sup>80</sup> At Pers. *Sat.* 2. 9ff, where the narrator exposes what people really pray for, there are two examples of people praying that those whose survival stands in the way of

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<sup>78</sup> Martial adds that if Urbicus' wife were really to become pregnant, Lupus would grow paler than a woman in labour: "pallidior fiet iam pariente Lupus", 6. Note also that Lupus' name is entirely appropriate for a *captator*.

<sup>79</sup> "Pro sene, sed clare, votum Maro fecit amico,/Cui gravis et fervens hemitritaeos erat,/Si Stygias aeger non esset missus ad umbras,/Ut caderet magno victima grata Iovi" (Maro made a vow aloud on behalf of his elderly friend, who was ill with a burning semi-tertian fever, that if the sick man was not sent to Hades, there would fall a victim pleasing to great Jupiter), 1-4.

<sup>80</sup> See e.g. Martial 5. 39. 5-6: "...fac illud,/mentitur tua quod subinde tussis" (do that which your perpetual cough falsely suggests - i.e. die) - coughing is frequently mentioned in the literary portrayal of *captatio* as a sign of the object's sickness and thus the possibility of his dying, cf. Hor. *Sat.* 2. 5. 106-7: "...si quis/forte coheredum senior male tussiet"; cf. *Satyrica* 117, where Eumolpus is told to cough as part of his impersonation of a suitable *captandus*: "ut plurimum tussiat"; cf. Mart. 6. 63. 1-2 (where the narrator reminds the *captandus* Marianus of the true wishes of his *captator*): "Et scis qui captat, quid, Mariane, velit"; cf. 8. 27: "Munera qui tibi dat locupletis, Gaure, senique,/Si sapis et sentis, hoc tibi ait 'Morere'" (Someone who sends gifts to you, Gaurus, who are wealthy and an old man, if you keep your wits about you, you will realize, is saying to you: "die"); cf. 11. 44 (where an ancient *captandus* is warned that none of his new friends can be genuine ones: "Qui novus est, mortem diligit ille tuam" (The friend who is new delights in your death), 4; cf. 11. 67 (where a *captator* is imagined explaining his intentions to his *captandus*): "Nil mihi das vivus; dicis post fata daturum./Si non es stultus, scis, Maro, quid cupiam" (You do not give me anything while you live; you say that you will give me property *mortis causa*. If you are not stupid, Maro, you know what I wish for); cf. 12. 40. 5-6 (where a disgruntled *captator* tired out by his courtship of his object is imagined begging him to die): "'Mortuus', inquis/'Accipiam bene te.' Nil volo: sed morere" ("After my death I will look after you well", you say; I do not want anything: just die).

their receiving an inheritance should die.<sup>81</sup> Seneca *Ben.* 6. 38 also explores this topos: here, as in Persius' passage, people's real prayers are revealed. At 6. 38. 3, the narrator points out that making prayers to the detriment of others is a universal human trait; at 6. 38. 4, he focusses on *captatores* and notes that they pray for the same things that undertakers do (i.e. that people should die).<sup>82</sup> But there is an important difference: undertakers want some people to die so that their businesses will profit, but their prayers are not specifically aimed at particular people and they are certainly not aimed at their closest *amici*;<sup>83</sup> *captatores* on the other hand are praying for the deaths of their most intimate friends,<sup>84</sup> from whom on account of their friendship (*propter amicitiam*) they have most hope of an inheritance. This confirms the suggestion that the opportunity for *captatio* arose in the context of friendship, and that it had the best chance of success in intimate friendship.

According to Juvenal, *vota* were made most enthusiastically on behalf of people who were childless (who happened to be the most suitable objects of *captatio*). No quail ever falls on behalf of someone who has children, he tells us (*Sat.* 12. 95ff), but if the childless wealthy are even mildly ill, extravagant sacrifices are made on their behalf.<sup>85</sup> The sacrifices on behalf of *captandi*

- 81 At Pers. *Sat.* 2. 9-10, someone wishes that his paternal uncle would die and adds that he will provide him with a splendid funeral (à paternal uncle was an agnate, so it is possible that the speaker, who would in turn have been an agnatic relation of the *patruus*, stood to inherit from him - for the rules governing intestate inheritance of agnates, see 2.4. & 2.4.4.2.): "o si/ebulliat patruus, praeclarum funus"; for the heir's obligation to organise the funeral of the deceased, see 4.3.1.(viii,a) below; at *Sat.* 2. 12ff, the speaker is shown to wish that he could kill his ward who was just in front of him in line for an inheritance (the implication is that the speaker is *proximus agnatus*, cf. Cloud 1989(a): 51; see 2.4.4.2. above): "pupillumve utinam, quem proximus heres/inpello, expungam...".
- 82 "An tu Arruntium et Haterium et ceteros, qui captandorum testamentorum artem professi sunt, non putas eadem habere quae dissignatores et libituarios vota?" (Do you not think that the prayers that have possession of Arruntius and Haterius and all the others who profess the art of courting inheritances are the same as those of the funeral directors and undertakers?).
- 83 "Illi tamen, quorum mortes optent, nesciunt..." (The funeral directors however do not know personally the people for whose deaths they wish).
- 84 "...hi familiarissimum quemque, ex quo propter amicitiam spei plurimum est, mori cupiunt" (But the *captatores* wish for the deaths of all their most intimate friends, from whom on account of their friendship they have most hope of success).
- 85 *Sat.* 12. 95-8: "libet expectare quis aegram/et claudentem oculos gallinam inpendat amico/tam sterili; verum haec nimia est inpensa, coturnix/nulla umquam pro patre cadet" (One could wait a long time for someone to sacrifice a sickly hen just closing its eyes for such an ~~unadvantageous~~<sup>useless</sup> friend [i.e. a friend with children, cf. 93ff]; indeed a hen would be too expensive: no quail will ever fall on behalf of someone who is a father). Courtney (*ad loc.*) notes that normally *sterilis* would apply to one without children, who would have attracted *captatores* because of his heirless state: here *sterilis* is used in the sense of unrewarding, since attentions given by *captatores* to such an *amicus* would not be reciprocated in the way that they would like (i.e. by means of an inheritance). Hence the *captatores* do not bother to perform expensive sacrifices on behalf of an *amicus* with

are not merely extravagant but excessive: the narrator suggests that the only reason why the *captatores* do not sacrifice elephants on their objects' behalf is because elephants are not readily available at Rome. In a long ecphrasis on the elephant (101-114),<sup>86</sup> the narrator emphasises its rarity value (it could not be bought at Rome: 102; it was an imported animal and apparently was not bred at Rome: 103-5), its exclusivity value (since the only herd at Rome belonged to Caesar: 106-7), its association with Rome's past (107-8), and its distinguished history as a fighting animal (107-110). He concludes that the elephant would be considered the only sacrificial victim deemed worthy of their objects by the *captatores* (111-114).<sup>87</sup>

The above passage suggests the snobbishness of the *captatores*, the competitive nature of *captatio* (in which exaggerated gestures and outlandish sacrifices would have been welcome had they been practicable). The narrator compares the *captandi* to gods (*tantis...deis*, 114),<sup>88</sup> which gives some idea of the inequality between *amici* that resulted when their relationship was overrun by *captatio*.

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children. For the quail as "a cheap and disliked bird", see Courtney: *ad loc.* By contrast, the *captatores* are more than willing to perform elaborate sacrifices on behalf of the childless even when they are only slightly ill: "...sentire calorem/si coepit locuples Gallitta et Pacius orbi,/legitime fixis vestitur tota libellis/porticus " (But if the wealthy and childless Gallitta and Pacius begin to feel a fever their whole colonnades are decked out with votive tablets fastened to them in the proper way...), 98-101.

86 "...existunt qui promittant hecatomben,/quatenus hic non sunt nec venales elephanti,/nec Latio aut usquam sub nostro sidere talis/belua concipitur, sed furva gente petita/ arboribus Rutulis et Turni pascitur agro,/Caesaris armentum nulli servire paratum/privato, siquidem Tyrio parere solebant/Hannibali et nostris ducibus regique Molosso/horum maiores ac dorso ferre cohortis,/partem aliquam belli, et euntem in proelia turrem./nulla igitur mora per Novium, mora nulla per Histrum/Pacuvium, quin illud ebur ducatur ad aras/et cadat ante Lares Gallittae victima sola/tantis digna deis et captatoribus horum" (There are those who make promises of hecatombs, only because there are no elephants for sale here, and nowhere in Latium or anywhere under our skies is the beast bred, but is imported from the dark people's land and is grazed on the Rutulian vegetation and in Turnus' field; they are Caesar's herd which is not prepared to serve any private citizen, even although these elephants' ancestors were accustomed to obey Carthaginian Hannibal and our generals and the Molossian king and to carry cohorts on their backs, comprising an important war-machine, a tower going into battle. Therefore Novius will not delay, Hister Pacuvius will not delay to lead this ivoryed leviathan to the altar and to sacrifice before Gallitta's Lares as the only victim worthy of such great gods and those who are pursuing them for inheritances), 101-114.

87 The suggestion by Ramage (1978: 233) that Juvenal is emphasising the "unnatural aspects" of these animals and their foreignness, is somewhat misplaced: the underlying idea in the elephants' hugeness is that "bigger is better" when it comes to impressing the *captandi* (cf. esp. 114); their exoticism and exclusivity value is also used to this effect.

88 Cf. Hor. *Sat.* 2. 5. 14, where Tiresias advises Ulysses to treat the *captandus* with more honour than his own Lar: "ante Larem gustet venerabilior Lare dives"; it is significant here that it is wealth (cf. *dives*) that makes the *captandus* more venerable than the household gods, to whom reverence was traditionally owed.

After the hypothetical passage suggesting that the *captatores* would have liked to have sacrificed elephants on their objects' behalf had this been possible, the narrator goes on to suggest that Pacuvius, the latter (*alter enim*, 115) of the two *captatores* who were mentioned, would not hesitate to sacrifice the best-looking of his slaves or slave-girls, or even his own daughter (described as a *nubilis...Iphigenia*, 118-9) for the sake of an inheritance. The manner in which these imagined "human sacrifices" are described<sup>89</sup> suggests that Juvenal is not thinking of a literal sacrifice but rather of the idea of offering the slaves and the daughter as sexual objects to the *captandi*. I have already (see 4.3.1.(vi) above) noted that wives and daughters are often depicted being offered to the *captandi* as sexual objects as part of the *modus operandi* of the *captatores*. Ramage (1978: 234), however, seems to think that Juvenal is referring to a literal sacrifice.

Although one must be aware of exaggeration and distortion in Juvenal, it is interesting that here he has superimposed two types of technique that according to the literary portrayal of *captatio* were used to win the favours of *captandi*: in describing the *officium* of offering vows and sacrifices on behalf of sickly *amici*, he also alludes to the shadier alleged technique of prostituting members of one's *familia* to win over the favour of an *amicus* who had property to leave one. In this way he demonstrates how considerations of material gain and social advancement through *amicitia* could supersede considerations of the well-being of the *familia*. Juvenal seems to be suggesting that in order to be successful, both in *amicitia* and in *captatio*, some sacrifice, probably a socially disreputable one, is necessary:<sup>90</sup> when imagining that through his action Pacuvius has been made sole heir to all his object's possessions ("omnia soli/forsan Pacuvio dabit...", 124-5), he

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<sup>89</sup> The physical attractiveness of the slaves chosen to be "sacrificed" is emphasised: "de grege servorum magna et pulcherrima quaeque/corpora...", 116-117 (stature was regarded by the Romans as a mark of beauty, hence *magna...corpora*, see e.g. Courtney *ad loc.*); the description of the daughter as an Iphigenia of marriageable age (*nubilis .../Iphigenia*, 118-119) refers to the legend of Agamemnon's sacrifice of his daughter Iphigenia in order to appease the wrath of Artemis and thus to obtain a wind to enable the Greek fleet to sail to Troy: at that time Iphigenia was supposedly betrothed to Achilles (Lucr. 1. 98: "nubendi tempore in ipso"), so that the epithet *nubilis*, meaning "of marriageable age", and hence also young and attractive (cf. Verg. *Aen.* 7. 52-3 (applied to Lavinia): "filia.../iam matura viro, iam plenis nubilis annis"; OLD 5. 1198) is appropriate.

<sup>90</sup> As Duncan Cloud has shown (1989(b): 205ff), we should be wary of relying on Juvenal for social information about Roman society; however, Juvenal's analysis of the way in which *amicitia* could be exploited for the purposes of material gain (i.e. for *captatio*) is significant, if exaggerated, and I assume that his contemporaries would have recognised a grain of truth in it.

concludes that the sacrifice of Pacuvius' "Iphigenia" (i.e. his daughter) was well worth it: "ergo vides quam/grande operae pretium faciat iugulata Mycenis", 126-7.

4.3.1.(viii): Officia on behalf of deceased amici: If it was conventional for friends to attend their fellow *amici* in various ways when they were ill, it was also assumed that friends would look after each other's interests after death.<sup>91</sup> This would not only mean the man's reputation but also the interests of his family;<sup>92</sup> it may also have meant organising his funeral and burial, particularly if one was made heir.<sup>93</sup> By organising the funeral of the testator, his friends would repay him for his last *officium* of leaving them a portion of his wealth. Edward Champlin has pointed out that wills brought to the testator "a sense of future security, security both before and after death".<sup>94</sup> Contributing to this feeling of security was the assurance that one would be remembered after one's death: in the absence of a well-formulated and widespread belief in the afterlife, for the average Roman testator personal immortality consisted of survival in the memory of others.<sup>95</sup> This would of course largely depend on the dutiful action of one's family and friends in organising one's funeral and burial. Thus Trimalchio at *Satyrica* 71, while reading his will to his *familia* and *amici*, gives them instructions to build him a monument and appeals to them in the language of *amicitia*: "ut

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<sup>91</sup> See e.g. Pliny *Ep.* 1. 17. 2, where he rejoices that some friends are still upholding the memory of their *amici* after their deaths: he cites the recent example of Titinius Capito who was setting up a statue in the forum in memory of his friend Silanus (the implication is that in the present age these values of *amicitia* are falling away): "Est adhuc curae hominibus fides et officium; sunt qui defunctorum quoque amicos agant. Titinius Capito ab imperatore nostro impetravit, ut sibi liceret statuam L. Silani in foro ponere. Pulchrum et magna laude dignum amicitia principis in hoc uti, quantumque gratia valeas, aliorum honoribus experiri"; note the extensive use of the language of *amicitia* to express Pliny's approval of this action: *fides*, *officium*, *gratia*, etc.; cf. *Ep.* 2. 10. 5, where Octavius, who is being encouraged by Pliny to publish his verses, is imagined as wanting to leave the responsibility for their publication up to his friends: "Dices, ut soles: 'Amici mei viderint'" (You say, as you always do, "My friends will see to it"); this suggests the extent of the responsibility that friends had to the memories of their dead *amici* (or were meant to have had: Pliny suggests that Octavius should not depend on the *officia* of his friends); cf. *Ep.* 3. 5. 3, where Pliny records that his uncle (Pliny the Elder) had written a life of Pomponius Secundus, one of his *amici*, for whom he had had very great affection and whose memory he had felt he ought to preserve in a book (the idea of a *debitum* confirms the strong reciprocity ethic of *amicitia*: Pliny's uncle's *debitum* was probably more genuine than most, however - this indicates that both true friendship and a more professional type of friendship could co-exist within the same ideology): "...a quo singulariter amatus hoc memoriae amici quasi debitum munus exsolvit"; Saller 1982: 13.

<sup>92</sup> Saller: *ibid.*

<sup>93</sup> Champlin 1989: 213.

<sup>94</sup> Champlin 1989: 209.

<sup>95</sup> Champlin 1989: 213ff.

mihi contingat tuo beneficio post mortem vivere" (so that I will live on after death through your *beneficium*).

4.3.1.(viii,a): Organisation of funeral and burial: As heirs, successful *captatores* are shown to be obliged to commemorate their *ex-captandi* by means of lavish funerals and burials; they had to keep up the pretence of being sorry that their object was dead. Thus at Hor. *Sat.* 2. 5. 104-6, the prospective successful heir is warned that he must spare no expense in building a monument to the testator: "sepulcrum/permisum arbitrio sine sordibus extrue..." (104-5), and that he must organise a splendid funeral so that the whole neighbourhood praises it: "funus/egregie factum laudet vicinia", 105-6. There is perhaps the underlying idea that those praising the funeral will also want him to manage their own funerals when the time comes, or at least so that they will not suspect him of practising *captatio* - part of the reason for this attention to detail is to keep up the facade so that he can continue to practise *captatio* on his co-heirs, cf. 106ff: "si quis/forte coheredum senior male tussiet...". At *Sat.* 2. 5. 85ff, there is another example of an heir involved in the funeral of his object, an elderly woman - he is actually carrying the testatrix to her burial, although his task has been made more difficult by the fact that, through the vehicle of a practical joke-cum-literal pun, she has demanded to be covered in oil so that she could "slip away" from him in death (a feat she did not manage during her lifetime).<sup>96</sup> Here the *anus improba* has taken the opportunity provided by the conventional expectation that her heir will organise her funeral to play a *post mortem* practical joke on him.

4.3.1.(viii,b): Grief as a manifestation of *gratia*: More difficult than organising the funeral and burial was to manage to cry a few tears at the grave-side, as Tiresias strongly advises the *captator* to do at Hor. *Sat.* 2. 5. 103: "...si paulum potes, illacrimare".<sup>97</sup> Crying over the death of an *amicus* could be considered an emotional manifestation of the gratitude owed to the deceased by the beneficiaries of his past *officia*, particularly his heir(s): it was in the inheritance-hunter's interests to appear a true *amicus* in the philosophical

<sup>96</sup> "...anus improba Thebis/ex testamento sic est elata: cadaver/unctum oleo largo nudis umeris tulit heres,/scilicet elabi si posset mortua; credo,/quod nimium institerat viventi", 84-8. The heir appears to have been an extremely enthusiastic participant in sexual favours, see 88; cf. 4.3.1.(vi) above.

<sup>97</sup> I have noted (see 1.2.) Goody's theory that in those societies in which productive resources are distributed at the estate-owner's death there is a tendency to have more extensive mourning displays than in other societies where the property is destroyed at the death of its owner.

sense and genuinely sorry for the death of his friend rather than a dry-eyed *captator* bent on material gain, against which Cicero and Seneca warn in their treatises on *amicitia*. Crocodile tears are a common topos in the literary portrayal of *captatio*:<sup>98</sup> this is based on the idea that no one is truly upset at the death of someone from whom he has received riches (thus no heir truly mourns at the death of the testator). By contrast, *captatores* are said to cry genuine tears when they are deprived of wealth by being left nothing by their objects.<sup>99</sup> Juvenal comments characteristically cynically at *Sat.* 13. 130ff, that there is always greater and more genuine mourning over the loss of wealth than over a death.<sup>100</sup>

4.3.2.: *Captatio* in the context of reciprocity within *amicitia*: By now I have examined a number of services which were ordinarily performed in the context of the exchange network of *amicitia*, but which many authors suggest were used for the purposes of *captatio*. In fact, as I have noted at e.g. Seneca *Ben.* 6. 38. 4 and *Ep.* 95. 43, not only did the opportunity for *captatio* arise in

<sup>98</sup> Crocodile tears appear at e.g. Pub. *Sent.* H19 (cf. 1.2. above): "heredis fletu sub persona risus est" (the weeping of an heir is laughter under his mask); cf. Mart. 1. 33, where a certain Gellia is said to cry over her dead father only when she has an audience: "Amisum non flet cum sola est Gellia patrem,/Si quis adest, iussae prosiliunt lacrimae" (Gellia does not weep for her dead father when she is alone; but if anyone is present, the tears spring forth on cue), 1-2: *iussae* emphasises the staged nature of the tears; cf. 5. 37. 18-24, where the poet sarcastically implies that a certain Paetus is not really mourning his wife, because he received 2,000 sesterces from her ("Ducenties accepit, et tamen vivit", 24). Paetus had criticized Martial for mourning the death of the slave-girl Erotion ("Deflere non te vernulae pudet mortem?" - "aren't you ashamed of mourning the death of a house-born slave-girl?", asks Paetus, 20); Martial contrasts his own genuine grief with Paetus' pride in his absence of grief: Erotion had no money or property to leave Martial, is the idea, and so his grief is genuine.

<sup>99</sup> See e.g. Hor. *Sat.* 2. 5. 68-9 (where a *captator* reads his object's will and finds that nothing is left for him except to cry for himself and his family): "accipiet tandem et tacitus leget, invenietque/nil sibi legatum praeter plorare suisque". In Martial's portrayal of *captatio*, the *captandi* are frequently given advice by the narrators to leave those courting them for inheritances nothing: see e.g. 6. 63. 7-8, where the narrator advises Marianus, who is aware that he is being pursued for an inheritance but wants to reward the *captator* for his generosity, to leave him nothing if he wants the *captator* to mourn genuinely at his death: "hicine deflebit vero tua fata dolore?/Si cupis, ut ploret, des, Mariane, nihil" (Do you think that this fellow will mourn your death with true grief? If you want him to cry, then leave him nothing, Marianus), 7-8.

<sup>100</sup> "et maiore domus gemitu, maiore tumultu/planguntur nummi quam funera; nemo dolorem/fingit in hoc casu, vestem diducere summam/contentus, vexare oculos umore coacto:/ploratur lacrimis amissa pecunia veris" (A household mourns money with louder groans and greater lamentations than a death; in this instance no one is feigning, being content to rend the top of his clothing and to irritate his eyes by wringing tears from them: the loss of money is mourned with true tears), 130-4. One can assume that successful *captatores* regularly had to resort to rending their garments and wringing their eyes in order to appear to be mourning their objects' deaths.

the context of *amicitia*, but the *beneficia* which were an integral part of the exchange relationship actually provided the *modus operandi* for *captatio*.

Because of the "multiplexity"<sup>101</sup> of the exchanges taking place within *amicitia*, it would not be surprising if someone failed to repay all the *debita* he had acquired in the context of *amicitia* during his lifetime. Reciprocity in *amicitia* was also generalized rather than specific:<sup>102</sup> *amicitia* consisted of a whole relationship of *debita*, rather than a one-for-one exchange.<sup>103</sup> This may have made it difficult for *amici* to be certain that they would have repaid during their lifetimes all their debts to fellow *amici* who had performed *beneficia* on their behalf. Because of the importance attached to the question of reciprocity, and the desire to avoid the label of *ingratus*, it was considered important to square one's debts in terms of one's will. One could repay one's *amici* for their favours and influence by awarding them an inheritance or legacy in one's will, as an expression of one's gratitude towards them. Thus inheritances and legacies comprised the final gifts in the exchange relationship.<sup>104</sup>

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<sup>101</sup> As an *amicus*, one would ordinarily have performed a number of services and duties on behalf of one's fellow *amici*; these services would have created the need for other *amici* to repay one for them by means of similar or of other equivalent *beneficia*; at the same time other *amici* would perform other services on one's behalf; one would then also owe *beneficia* to these other *amici*, etc. This would have created what network analysts might term a multiplexity (or multistrandedness) of network ties (Wellman & Berkowitz 1988: 102, 165f): at any particular time A might be obligated to B and C, B to C and D, C to A, B and D etc. The result would be a criss-crossing of network ties and obligations. Multiplex social relations also exist when people are in touch with one another in many different ways; single-stranded relations are ones that are based on a single role relation (Boissevain 1974: 30). It is obvious that the *amicitia* under study here would have been a multiplex relationship, both in terms of the number of interlinking ties between *amici*, and in terms of the number of role relations or services that bound the *amici*.

<sup>102</sup> See Wellman *et al* 1988: 167 (on types reciprocity in network relationships): "Whatever is given ought to be repaid, if only to ensure that more is available when needed. Repayment might be in the form of *specific exchange*, in which the same kind of aid is returned by the recipient to the person who originally helped out; *generalized reciprocity*, in which the aid given is returned by the recipient giving the original helper other kinds of aid; or *network balancing*, in which aid given by one network member is balanced by the recipient providing aid for other network members, not necessarily the person who originally helped or the same kind of help...".

<sup>103</sup> In the Roman exchange relationship of *amicitia*, repayment for past services was not immediate, direct, or aimed specifically at one particular *beneficium*: Sen. (*Vit. Beat.* 24. 2) advises the storing up of *beneficia* owed to one by *amici*, as though one would bury a treasure (*thesaurus*), to be dug up only when it is essential, rather than immediately demanding reciprocity: "*beneficium conlocetur, quemadmodum thesaurus alte obrutus, quem non eruas, nisi fuerit necesse*"; Saller 1982: 25.

<sup>104</sup> Saller 1982: 124. The exchange of inheritances and legacies in wills must also be viewed from an economic perspective: bequests, together with loans and gifts, are grouped by Saller (1982: 120ff) under what he terms the financial aspect of *amicitia*. One must not lose sight of the fact that inheritance was one of the chief ways in which money and property was transmitted from one individual to another in Roman society, and hence it

As Champlin has pointed out, gratitude expressed in the will was seen as very significant by Roman society: it was a man's final opportunity to repay his *amici* and express his affection towards them.<sup>105</sup> Part of the problem in isolating *captatio* from *amicitia* is the attitude of double standards towards the status of wills as an instrument of exchange in Roman society. Saller (1982: 125) noted that while it was considered base to be seen to be actively courting inheritances, it was an honour (and a mark of great respect and affection from one's friends) to receive them: thus many of the authors who treat *captatio*, e.g. Seneca and Pliny, frequently boast of having received inheritances and legacies from their friends.

An *amicus* who had served his fellows loyally could expect a number of inheritances and legacies from *amici* who died before him (he would likewise probably have instituted them or granted them bequests in his own will: who turned out to be the testator and who the heir or legatee would depend on who died first). Such an *amicus* would have courted his friends in the sense that he performed the duties that were expected of him in terms of *amicitia*. Even if he was repaid for these services by means of an inheritance or legacy, could such an *amicus* be said to be a *captator*? Could Seneca and Pliny, the very authors who criticize *captatio*, be termed *captatores*? How is a *captator* defined, and how does he differ from an *amicus*?

As Seneca suggests at *Ben.* 4. 20. 3 and *Ep.* 95. 43, it was difficult to distinguish the true *amicus* who was performing his duties from the person who was specifically after material gain.<sup>106</sup> The same act may be disgraceful or honourable: it is the intention behind the action and the manner in which it is done that makes the difference. *Captatio* and *amicitia* are difficult to distinguish because the reciprocal services of which they are comprised are identical, and because the distinction depends on the person's intention, which can often be impossible to discern. Champlin (1989: 212) has pointed out that *captatio* is only *amicitia* viewed in a negative light. In a sense, *captatio* is *amicitia* in its bare bones as an exchange relationship, stripped of

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assumed a much larger economic role than it does in most modern economies. Thus inheritances and legacies, together with loans and gifts, constituted important aspects of economic exchange between *amici*.

<sup>105</sup> Champlin 1989: 202ff.

<sup>106</sup> If one could faithfully perform the duties of an *amicus* but still be a *captator*, then equally could one perform all the services that were considered characteristic of *captatores* but still be a true *amicus* and not after material gain in the form of an inheritance? There is no reason why this should not be so.

all the higher, philosophical goals and ideals of "friendship". *Captatio*, as presented in literature in the context of the exchange relationship, is largely a cynical view of the conventions of *amicitia*, according to which it is seen as conducive to realising the aspirations of human greed rather than fostering true friendship and affection.

If *captatio* operated largely within the confines of the exchange relationship of *amicitia*, and was in many respects indistinguishable from *amicitia*, can *captatio* be seen as a separate social phenomenon? Was it indeed a social phenomenon at all, and not merely a literary conceit?<sup>107</sup> This question is particularly difficult to answer, not least because the chief sources of our knowledge of this topic are the Roman satirists and other literary sources. As I have already noted, satire is a particularly unreliable source of social information because its conventional role as a tool for social criticism that is also entertaining (its aim is *delectare* as well as *docere*), is frequently taken to extremes by Roman satirists, particularly Juvenal, one of the main sources on *captatio*. Even sources in which there is less possibility for distortion than satire, such as the letter-writers Pliny and Fronto, cannot be said to be objective about the existence of *captatio* in Roman society: personal grievances may result in an author (e.g. Pliny) labelling one of his subjects (e.g. Regulus) a *captator*.<sup>108</sup>

In order to determine whether *captatio* was a real social phenomenon or not, I shall start from what we do know. First, we at least know that *captatio* exists as a topos of Roman literature. Second, this in itself implies that the readers of Horace, Martial, Juvenal etc recognised the concept of *captatio*, even if only in its literary tradition, cf. the many instances in the satirists' presentations where it is clear that it is *captatio* that is the subject of discussion but where little else is mentioned other than that someone is giving gifts to the childless elderly.<sup>109</sup> Third, the fact that the Romans had a

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<sup>107</sup> Champlin (1989: 211f) suggests that *captatio* was merely a literary commonplace: "Captation, or inheritance-hunting, is such a commonplace among ancient writers that it is important first to remember that it is precisely that, a literary commonplace"; on the following page (212), however, he concedes that the stock figures of *captator* and *captandus* "undoubtedly existed in life", although he notes that they are almost impossible to identify in practice.

<sup>108</sup> Luce (1982: 1040-1) has shown that Pliny's attacks on Regulus depend on a distortion of Regulus' words and deeds, and suggests that Pliny's negativity towards this alleged inheritance-hunter was motivated by professional rivalry.

<sup>109</sup> A reader of e.g. Horace *Sat.* 2. 5. must know what *captatio* is and be familiar with its conventions in order to fully appreciate the beginning of this satire, where it is plain that *captatio* is the means by which Tiresias advises Ulysses to attempt to enrich himself long

simple set of terms (*captare, captator, ars captandi*, etc) to describe a complex set of social relations aimed at the winning of inheritances and legacies,<sup>110</sup> suggests that the concept was something familiar to them, something which was discussed by people more frequently than "legacy-hunting" is mentioned in modern western society.

While it can be argued that *captatio* has been and is presently practised to a limited extent in all societies exhibiting testate succession,<sup>111</sup> even if it is not recognised as such, it is certainly true that the Romans appear to have been inordinately suspicious of this virtually to the point of a national obsession. There are two important and closely related factors to be considered here: the first concerns the degree of importance that inheritance assumed in the economy of ancient Rome - I have noted previously that in the absence of the plethora of different jobs and commercial ventures that are open to people in modern first-world countries, inheritance was one of the chief ways in which large amounts of wealth were transmitted between individuals; second, possibly partly because of this importance, inheritance and wills would appear to have been a consuming passion of the Roman people.<sup>112</sup> If the Romans were as preoccupied with wills and succession as suggested by their literature and legal background,<sup>113</sup> then it is not surprising that they also worried about things, such as *captatio*, that could possibly sabotage the

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- before this is spelled out: the *modus operandi* of *captatio* (gift-giving) and a suitable *captandus* ("res ubi magna nitet domino sene", 12) are both suggested at 10ff, whereas only at 23-4 ("captes astutus ubique/testamenta senum") is *captatio* directly explained.
- 110 In English generally as well as Greek the simple Latin terms for *captatio* have to be rendered by awkward composite terms of more than one word, e.g. inheritance-hunting, legacy-hunting (the term *captatio* is a direct transliteration from the Latin: legacy-hunting is the conventional English term to describe this practice); cf. *διαθηκῶν προσδοκίᾱς*, lit. "expectations from wills" (Lucian *Nigrinus* 17).
- 111 The techniques of the pursuers of these inheritances vary, and may include winning the object's favour by means of services in the name of friendship, as the *amici* of Rome did; other more dubious techniques, such as using force or undue influence to compel the object to make a new will or to prevent him or her from making a new will, will be investigated below; murder for the sake of inheritance (be this to prevent the testator from making a new will or to ensure that he dies intestate or merely to ensure that he dies more quickly) is recognised and has traditionally (if detected and proven) resulted in legal penalties, as expressed by the maxim *De bloedige hand erft niet* ("The bloody hand inherits nothing": murdering the testator deprives the guilty beneficiary of his inheritance), see Isakow 1985: 64.
- 112 As Champlin (1989: 200ff) has pointed out, this was due to the important roles assigned to wills in Roman culture, such as the licence to say what one really thinks in one's will, and the significance attached to wills for revealing a man's true feelings and gritudes towards his friends.
- 113 See 2.1. n. 3: most of Roman civil litigation arose over problems and disputes related to succession (Kelly 1976: 71-92; cf. Champlin 1989: 199 n. 4).

testator's true intentions (which could deprive other *amici*, i.e. themselves, of their deserved share in a will).

I thus conclude that in Roman society not only the greater extent of people's economic dependence on inheritance, but also the existence (and especially the conventions) of the social network of *amicitia* would have made inheritance-hunting more tempting, and easier to effect than in modern societies. Possibly, too, more attention was paid to *captatio* (where it was suspected) by the Romans than by modern society, in which there are many other quasi-respectable ways to become rich.

4.4.: *Captatio* in its broader legal context: In the following section, I shall compare the way in which *captatio* is shown to operate in Latin literature with other types of *captatio* or interference in wills identified by legal sources. In this way the bounds within which literary *captatio* is presented will be clarified; whether literary *captatio* was technically illegal or not will also become clear.

4.4.1.: *Captatio* and *crimen*: Tellegen<sup>114</sup> has considered the question of whether *captatio* was illegal or not and I am largely indebted to his work in the following section. He points out at the start of his article on this question (1979: 387f) that in most of the cases of *captatio* described in literature, the authors are describing action which is improper rather than illegal: flattering someone and offering him favours and services in the hope of an inheritance is not decent, but it is not strictly punishable by law. But the legal sources recognised another type of *captatio*, with which I shall have to compare the *captatio* of the Roman satirists, philosophers and letter-writers: this was *captatio* effected by means of *dolus* (trickery) or *vis* (force), which would come about if someone tricked, threatened or compelled another into making or altering a will, or prevented him or her from making a new will.<sup>115</sup> Such forms of *captatio* required legal redress, as I will show.

This subject is dealt with in the *Digest* and the *Codex* at D. 29. 6 and C. 6. 30 respectively under the heading: "Si quis aliquem testari prohibuerunt vel coegerit".<sup>116</sup> D. 29. 6. 1ff (Ulpian in the 48th book of his commentary on the

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<sup>114</sup> *RIDA*<sup>3</sup> 26 1979: 387-97.

<sup>115</sup> Tellegen 1979: 388.

<sup>116</sup> Both these titles are brief: D. 29. 6 contains three texts by Ulpian, Paul and Papinian; C. 6. 34 contains one constitution of Alexander Severus, two of Diocletian and one of Zeno.

edict) explains that, according to the emperor Hadrian's decree, anyone who while engaged in *captatio* either by intestacy or by will (*hereditatem legitimam vel ex testamento*) prevents the testator from making a new will or changing his will, should be denied the legal actions and that legal action should be taken by the *fiscus* (i.e. the inheritance would be confiscated).<sup>117</sup> As Tellegen (1979: 389) points out, this is one of the few texts that employs the literary terminology of *captatio* (cf. "dum *captat*...").

This punishable offence also appears to have been alluded to at C. 6. 34. 1, where it is suggested that *crimen* may arise out of a civil law suit in the case where a testator had made a will, not on the basis of his personal wishes but compelled by the person who was then instituted heir, or if he has included in his will others whom he had not wanted to include.<sup>118</sup> Such examples of *captatio* were not apparently illegal within the context of marriage: at D. 29. 6. 3 it is noted that a husband who prevents his wife from changing her will by persuasion (but not by *dolus* or *vis*) is not guilty of having committed a *crimen*,<sup>119</sup> likewise, at C. 6. 34. 3, the emperors Diocletian and Maximian are recorded as having declared that making a wife write a will in favour of her husband because of a conversation in the marital context was not *criminosum*.<sup>120</sup> In the fourth constitution at C. 6. 34, that of Zeno, *captatio* by means of force or trickery is declared *criminosus* (i.e. a punishable offence); the punishment prescribed is the confiscation of the whole property and exile. Tellegen (1979: 390-1) concludes that this heading<sup>title</sup> is not applicable to the classical period.

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117 "*Ulpianus libro quadragesimo octavo ad edictum: Qui dum captat hereditatem legitimam vel ex testamento, prohibuit testamentarium introire volente eo facere testamentum vel mutare, divus Hadrianus constituit denegari ei debere actiones denegatisque ei actionibus fisco locum fore*".

118 "*Imp. Alexander A. Severae: Civili disceptationi crimen adiungitur si testator non sua sponte testamentum fecit, sed compulsus ab eo qui heres est institutus vel quoslibet alios quos noluerit scripserit*".

119 "*Papianus libro quinto decimo responsorum: Virum, qui non per vim nec dolum, quo minus uxor, contra eum mutata voluntate, codicillos faceret, intercesserat, sed ut fieri adsolet, offensam aegrae mulieris maritali sermone placaverat, in crimen non incidisse respondi, nec ei quod testamento fuerat datum auferendum*" (Papinian in the 15th book of his *Responsa*: With regard to the man who prevented his wife, but not by means of force or trickery, from making a codicil because of her changed attitude to him, but who (as is common) had calmed the offensive attitude of the sick woman by means of a marital conversation, my response was that he has not committed a *crimen* and that that which was given to him by the will should not be taken away from him").

120 "*Imp. Diocletianus et Maximianus AA. et CC. Eutychedi: Iudicium uxoris postremum in se provocare maritali sermone non est criminosum*".

Do any of the *captatores* of satire and related genres use *dolus* or *vis* to achieve their aims of an inheritance? Do any of them attempt to prevent their objects from changing their wills or making a new will? Comparing the types of *captatio* outlined in the legal sources and outlawed by Hadrian with that of the literary portrayal of the early Empire is justifiable: Hadrian is later than most of the literary sources (except Fronto<sup>121</sup>), but the legal responses of his time may well have been prompted by a perception of *captatio* as a social problem during the period leading up to his time.

Modern law derived from Roman law also identifies other factors, besides straightforward *dolus* or *vis*,<sup>122</sup> which may result in a will that does not reflect the testator's true wishes but those of someone who has exerted undue influence upon him: not only the mental state of the testator but also his or her relationship with the person concerned is taken into account (which may have resulted in a *metus reverentialis* on the part of the potential testator towards the person concerned);<sup>123</sup> the *metus reverentialis* alone however cannot be assumed to have given rise to the substitution of the will of another.<sup>124</sup> It must be proven that this was the case, even where the testator was under the authority or power of the person accused of influencing him.<sup>125</sup>

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<sup>121</sup> c. 95-167: cf. Champlin 1980: 137-42.

<sup>122</sup> See the case of *Spies NO v Smith* in the South African law reports: (South African law, which is based on Roman-Dutch law, provides interesting illustrations of the development of the various principles of Roman law in a modern context): "A last will can be declared invalid where the testator is moved by artifices of a nature such as to justify their being equated, by reason of their effect, to the exercise of coercion or fraud, to make a bequest which he would otherwise not have made and which, therefore, would express another person's will rather than his own. In such a case we are dealing, not with the genuine wishes of the testator, but with the wishes of another person, and the will is not maintainable".

<sup>123</sup> *Spies NO v Smith*: 539-40; *metus reverentialis* (lit. "respectful fear", i.e. respect tinged with fear) refers to a type of intimidation that is brought about by the nature of the relationship between the testator and the person who allegedly influenced him: a potential testator may well be swayed by the orders or advice of someone who has power or authority over him and whom he thus respects and/or fears. The question is whether the person with the power or authority exploited his position or not.

<sup>124</sup> *Spies NO v Smith*: 539-40: a fraudulent substitution of wishes by means of "*artes captatoriae*" is not presumed.

<sup>125</sup> Here the maxim *cum sola potentia metum non arguat* applies: the existence of a relationship of authority or power alone does not mean that the potential testator was intimidated by the person who allegedly influenced him (many people under the authority of others neither fear nor respect those with some degree of control over them). Also, after the will was drawn up, whether a period of time elapsed before the death of the testator or not has to be taken into consideration: that the will remained unchanged for a long period after the alleged intimidation could indicate that the will was not really made against the wishes of the testator or that he subsequently voluntarily or tacitly confirmed it (*Spies NO v Smith*: 540).

Are there any examples of *captatores* who achieve their aims by intimidating their objects? Even though considerations such as the testator's mental state and the possibility of intimidation on the part of another due to his relationship of power over the testator (i.e. the *metus reverentialis*) are much later developments in the question of undue influence on the testator, it is interesting to apply these considerations to the *artes captatoriae* as presented in the Latin literature of the Empire. As I have noted, most of the *captatores* of literature win their objects' favour by means of the services of *amicitia*: it is true that the methods used by our literary *captatores* are frequently described as trickery,<sup>126</sup> but the objects are equally often shown to be aware of this.<sup>127</sup> Indeed, as Lucian's fishing/hunting imagery reflects, the party who benefits most from the relationship between *captator* and *captandus* is often the latter.<sup>128</sup> I have not found any examples in satire of *captatores* preventing a *captandus* from altering his will: there are certainly suggestions that

<sup>126</sup> The idea of a *dolus* being used to ensnare the *captandus* is often used in relation to the fishing and hunting imagery that is so often applied to *captatio* in satire (particularly where gift-giving is focussed on as the *modus operandi*): see e.g. Mart. 5. 18. 6: "Odi *dolosas* munerum et malas artes"; often the idea of deception comes across strongly: see e.g. 5. 18. 7-8: "Imitantur hamos dona: namque quis nescit,/Avidum vorata *decipi* scarum musca?" (Gifts imitate fish-hooks: for who does not know how the greedy *scarus* is deceived by the fly he has eaten?); cf. 4. 56. 5-6, where gifts given to *captandi* are again compared to fish-hooks and bait: "Sic avidis *fallax* indulget piscibus hamus,/Callida sic stultas *decipit* esca feras" (In this way the treacherous fish-hook indulges greedy fish; in this way the clever bait deceive the simple wild beasts).

<sup>127</sup> See e.g. Mart. 6. 63. 1ff: "Scis te captari..."; some of the objects are also shown as escaping the snares and bait set up for them by the *captatores* (once again using the fishing/hunting imagery): see e.g. Hor. *Sat.* 2. 5. 24-5: "si vafer unus et alter/insidiatorem praeroso fugerit hamo...".

<sup>128</sup> Lucian's fishing/hunting imagery applied to his presentation of inheritance-hunting at *Dial. Mort.* 344-63 [15(5)ff] mostly shows the object outwitting the inheritance-hunter (in keeping with the plot of his five dialogues dealing with inheritance-hunting, according to which the gods have decided to cause havoc within the operation of *captatio* by making the *captatores* die before their object - this amusing plot reveals however a view of *captatio* which does not strictly conform to the idea that it operated within the conventions of *amicitia*, since it depends on the polarization of *captatores* and *captandi*): at 354 [16(6)] Terpsion, an inheritance-hunter who has been physically and financially exhausted by his courtship of his object Thoucritos, compares the latter to a fish which has swallowed all the bait (and, by implication, still has not been caught): ὁ δὲ τοσοῦτόν μοι δέλεαρ καταπιῶν (indeed, he adds that Thoucritos had turned up at his funeral laughing with approval: ἐφειστήκει θάπτομένῳ πρῶην ἐπιγεῶν); at 359 [18(8)], Cnemon, another *captator*, who has died unexpectedly leaving his wealthy object Hermolaos his heir, complains that the *captandus*, compared to a sea-fish, possibly the bass, has gulped down both the hook and bait together (the idea is that the inheritance-hunter has lost the fish that he was attempting to catch as well as the resources by which he was attempting to catch it - in fact, he has lost his life as well: see the reply of Damnippus below): ὡσπερ τις λάβραξ καὶ τὸ ἀγίστρον τῷ δελέατι συγκατασπάσας; the reply of Cnemon's interlocutor Damnippus is interesting: he comments that the fish (i.e. the *captandus*) has also swallowed the fisher: Οὐ μόνον, ἀλλὰ καὶ αὐτόν σε τὸν ἀλιέα.

*captatores* intensified their courtship of their objects when they were re-signing their wills, and we have seen that at Mart. 5. 39 the *captator* is imagined begging his object Charinus to stop re-making his will so frequently.<sup>129</sup>

Pliny (*Ep.* 2. 20) shows Regulus courting three objects who are either about to make or alter their wills, or are on their death-beds, or both.<sup>130</sup> In the first example (*Ep.* 2. 20. 1-6), where Regulus captates Verania, he uses augury to deceive her into believing that she will recover:<sup>131</sup> she discovers the deceit too late ("Mox ingravescit, clamat moriens hominem nequam perfidum ac plus etiam quam periurum...", 5), after she had already added a codicil to her will granting Regulus a legacy. Pliny makes it clear that the woman's sickly state made her more susceptible to intimidation ("Illa ut in periculo credula...", 5), but as Tellegen has pointed out (1982: 52-3) the means Regulus uses were not unlawful, and he thinks that Verania could in fact have put up a resistance. It is uncertain whether she had time before her death to change her will: Pliny seems to suggest that Verania was so credulous that she did not realise until the last minute that Regulus was wrong and that she would die ("clamat moriens..."). In modern Roman-derived law, Regulus might well have been accused of having exerted a *metus reverentialis* but, as Tellegen emphasises, Regulus ensures that he is well within the bounds of the law of his day (i.e. classical Roman law).

In the second example (*Ep.* 2. 20. 7-8), the wealthy ex-consul Velleius Blaesus is about to die ("ille locuples consularis novissima valetudine conflictebatur", 7) and wishes to alter his will ("cupiebat mutare testamentum", 7). Regulus has just begun to court him and thus expects a bequest from the new will ("Regulus...speraret aliquid ex novis tabulis, quia nuper captare eum

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<sup>129</sup> "Signa rarius...", 5f; it seems that *captatores* used the excuse of having to re-sign their wills to benefit from the intensified courtships of the *captatores*, cf. *Satyrica* 117; Seneca *Ben.* 4. 20, 3. imagines that the *amicus/captator* had been called to the bed-side of his sick friend because the friend was planning to make his will: "quia testamentum facturus est" (the idea is probably that the *amicus* who is tempted to captate his sick friend was called to be a witness to the will).

<sup>130</sup> In the first example the object is on her death-bed, and is persuaded by Regulus to alter her will in his favour; in the second, the object is on his death-bed and intends to change his will; in the third, the object is about to sign her will, but is not about to die (although Regulus unnervingly treats her as if she were).

<sup>131</sup> Tellegen (1982: 50, 53) notes that Regulus cleverly uses augury, which was legal, rather than astrologists, who were banned under the Empire, in order to court Verania's favour by predicting her recovery: in this way he ensures that his *modus operandi* is in no way illegal.

cooperat..."). Believing himself to be heir or a legatee of the new will,<sup>132</sup> Regulus tries to persuade the doctors to ensure that Blaesus would not survive to change his new will (Tellegen 1982: 53). In a sense, this would have meant that he was technically guilty of attempting to prevent a testator from altering his will, which would have been illegal<sup>133</sup> (not to mention the fact that he attempted to arrange Blaesus' murder under the guise of euthanasia). However, Regulus was not granted anything in terms of Blaesus' will, so that the occasion for legal action on the part of the *fiscus* would not have arisen.

The third case (2. 20. 9ff) involves Regulus' compelling the testatrix Aurelia, who was about to sign her will, to put him down for a legacy (consisting of the clothes she was wearing).<sup>134</sup> Tellegen (1982: 53) points out that there is the suggestion that Regulus frightened Aurelia into complying with his wishes, but that there is no suggestion that his behaviour was unlawful. I would suggest that Regulus' behaviour is dangerously close to the boundary between lawful and unlawful here, since he superimposed his own will onto that of the testatrix. Pliny's use of words signifying compulsion (cf. "ille serio *instabat*", 7; "*coegit* mulierem aperire tabulas...", 8) indicates that he intended to imply that Regulus had used a type of coercion to ensure that Aurelia changed her will. Pliny is actually anticipating the modern idea of the *metus reverentialis*, by suggesting that Regulus used intimidation to realise his aims.

It should be stressed that in most of our literary examples of *captatio*, as I have noted in the course of this examination of its operation within *amicitia*, the *modus operandi* is not *dolus* or *vis* or the use of intimidation, but flattery, service and friendship: the *captatores* strive to win the object's approval by performing *beneficia*, and are virtually indistinguishable from the loyal *amici* whose *amicitia* will be rewarded by their friends in their wills in accordance with the conventions of the exchange relationship. In fact, *captatores* are these *amici*: the distinction between an *amicus* who is a *captator* and one who is not is a subtle, philosophical one, probably largely a question of opinion on

<sup>132</sup> Regulus is first shown asking the doctors to prolong Blaesus' life (his intention here was so that he would have enough time to make a new will instituting Regulus); after the will has been signed, however, Regulus changes his approach and criticizes the doctors for prolonging Blaesus' suffering (obviously, by this stage Regulus, assuming that he has been instituted in the new will, wants Blaesus to die before he changes his mind): unfortunately for Regulus, Blaesus saw the real purpose of Regulus' *officia* and failed to institute him.

<sup>133</sup> See D. 29. 6. 1ff.

<sup>134</sup> "Aurelia ornata femina signatura testamentum sumpserat pulcherrimas tunicas. Regulus cum venisset ad signandum, 'Rogo' inquit 'has mihi leges'". This seems a very strange request, and apparently Aurelia thought so too: "Aurelia ludere hominem putabat" (Aurelia thought that the man was joking).

the part of others rather than a definite fact, insofar as another person's true intentions can only be speculated upon. There are a few texts which suggest that there were certain people who were widely suspected of *captatio*;<sup>135</sup> Seneca speaks of people who are even said to admit to being engaged in this practice.<sup>136</sup> Nevertheless, the *modus operandi* of these *capatores* is not presented in literature in such a way as to suggest that it infringed on the laws.

Thus it appears that the *captatio* of literature and that with which the legal writers were concerned differed. However, the general legal concern with issues relating to possible *captatio* resulted in various cautionary measures to which testators were expected to adhere: as already seen (2.4.4.3.: the rules of *substitutio pupillaris*), special precautions were advised for a testator who was making a minor his heir; I have also noted (2.4.2.1.(ii,b) above) that the *sc. Neronianum* set out provisions for the way in which the will was to be made, supposedly to prevent forging of wills, but clearly there is the awareness of *captatio* as another possibility.

4.4.2.: *Captatio* and the *pactum successorium*: The way in which literary *captatio* is shown to operate did not (generally) impinge on the provisions of D. 29. 6 and C. 6. 30. However, something else may also be considered: did the arrangement between the *captator* and the *captandus* comprise a type of agreement as to the manner in which the testator would distribute his wealth after death? If it did, then the arrangement made between these two parties would comprise a *pactum successorium*.

According to the principles of Roman law, succession may take place in one of two ways: either by will or on intestacy.<sup>137</sup> Roman law recognised however that individuals might desire or attempt to have succession operate

<sup>135</sup> While it is true that Pliny was probably motivated by personal and professional grievances in Regulus' case (see n. 41 above), there is no doubt that his reputation was not the purest: before allegedly engaging in *captatio*, he was notorious for having been an informer (*delator*) under Nero; he is also said to have engaged in cannibalism (for cannibalism as *contra bonos mores*, cf. 2.4.4.1. above): when Verania's late husband Piso was murdered by Otho's soldiers in 69 A.D., Regulus apparently fell upon Piso's corpse and gnawed his head. It seems certain that Pliny's correspondents (e.g. C. Cavius Rufus, the addressee of *Ep.* 2. 20) on the subject of Regulus' alleged *captatio* believed him to be capable of this; for details about Regulus' life, see *RE* 2. 331 (v. Rohden); Tellegen 1982: 50.

<sup>136</sup> See *Ben.* 6. 38. 4: "An tu Arruntium et Haterium et ceteros, qui captandorum testamentorum artem professi sunt..."; it is difficult to determine whether Seneca is serious here or just being facetious.

<sup>137</sup> See Joubert 1961: 18.

in a third manner: by means of a contract or agreement. Such an agreement, termed a *pactum successorium*, was seen as *contra bonos mores*.<sup>138</sup> the fact that such an agreement was invalid meant that there was no obligation arising out of this and so there was no contract (*contractus*), only an agreement (*pactum*) which would not be upheld by law.<sup>139</sup>

That the Romans themselves sought to legislate against succession by agreement is reflected at D. 45. 1. 61 and C. 8. 38. 4.<sup>140</sup> Dale Hutchison notes that the reasons for the label of *contra bonos mores* on such agreements were the fear that this might motivate the agreed heir to murder the testator and the fact that this interfered with freedom of testation.<sup>141</sup> I would suggest that one of the reasons for the Roman refusal to uphold such agreements has to do with the problem of (and their obsession with) *captatio*: they feared that an agreement between the testator and someone interested in becoming his heir could encourage a particularly dangerous type of *captatio*, in which the *captator* might be tempted to murder the *captandus* once the inheritance was assured. Also, by attempting to bind the testator to an irrevocable contract, the *pactum successorium*, if upheld by law, would have infringed the freedom of testation (*libera testamenti factio*): in classical Roman law (as in some modern legal systems)<sup>142</sup> a testator's freedom of testation is said to be

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<sup>138</sup> See Zimmermann 1990: 712 & nn. 247 & 248.

<sup>139</sup> Joubert 1987: 142-3 (on the invalidity of *pacta successoria*); 21ff (on contract as a concept); 24ff (on the Roman "law of contracts" and the four *causae: re, verbis, litteris* and *consensu*); 26 (on the ordinary *pactum* as opposed to a *contractus*): "Because only four consensual contracts were recognised, it is clear that Roman law did not consider that every agreement was also a contract...The ordinary *pactum*...was not a contract and did not give rise to an obligation, as is evident from the well-known rule *ex nudo pacto non oritur actio*; Joubert stresses (22f) that the expression "void contract" is a contradiction in terms: either an agreement is a contract (i.e. if some legally enforceable obligation arises from it), or it is merely an agreement (*pactum*) and not a contract of any description. Because the *pactum successorium* was *contra bonos mores* it was not legally enforceable and no obligation arose from it, so that it was not called a "*contractus successorius*", only a *pactum successorium*.

<sup>140</sup> D. 45. 1. 61 (where someone attempts to make an agreement that he should receive monetary compensation if he is not instituted): "*Iulianus libro secundo ad Urseium Ferocem*. Stipulatio hoc modo conceptum:...'si heredem me non feceris tantum dare spondes?' inutilis est, quia contra bonos mores est haec stipulatio"; cf. C. 3. 38. 4<sup>(34)</sup> (forbidding *pacta successoria*): "*Idem AA. et CC. Domnae*: "Ex eo instrumento nullam vos habere actionem, quia contra bonos mores de successione futura interposita fuit stipulatio, manifestum est, cum omnia, quae contra bonos mores vel in pacto vel in stipulatione deducuntur, nullius momenti sint".

<sup>141</sup> Hutchison 1983: 221.

<sup>142</sup> Hutchison 1983: 224. In some modern legal systems based on Roman law, e.g. South African law, freedom of testation is upheld to such an extent that *pacta successoria* are unthinkable. But see *American Jurisprudence* 2d 79 1975: 327ff, where it is suggested that succession according to contract could be useful "as compensation for services rendered

"ambulatory", i.e. he has the freedom to alter or re-make his will until the end of his life. A valid agreement regarding succession would rob the testator of his right to unilateral revocability of any testamentary agreement.

Do the *captatores* and *captandi* of literature make *pacta successoria*? We often hear (e.g. Mart. 12. 40)<sup>143</sup> that the object has promised the inheritance-hunter that he will be heir. However, the objects of literature do not take their promises seriously and frequently fail to institute the inheritance-hunters even though they have enjoyed their favours.<sup>144</sup> The objects would not have been legally obliged to institute their *captatores*, even if a *pactum successorium* had been entered into (since a will must be ambulatory, they could change it as often as they liked until their deaths, as Charinus at Mart. 5. 39 did); of course, there was nothing stopping them from instituting the *captatores*, but they were not compelled to do so. Thus the *captandi* appear to be aware that their right to make, alter or re-make their wills continues until they die, and they use this awareness for their own benefit and to control the *captatores*, who can never (like the one at Mart. 9. 88; cf. 3.2.2. above) rest on their laurels.

But because *captatio* took place in the ambit of *amicitia*, the assurance of an inheritance need not have been spoken so much as understood. Although the *captandi* were not legally bound to recognise their promises to the inheritance-hunters, they were expected to reciprocate in terms of the conventions of *amicitia* or be labelled *ingrati*. The conflicting views of society towards someone who failed to pay his dues to *amici*, who were also recognisably *captatores*, can be seen at Pliny *Ep.* 8. 18. 3, in the case of Domitius Tullus.<sup>145</sup> This also reveals the ambiguous position of *captatio* in a society which simultaneously encouraged and shunned the courtship of inheritance within the context of *amicitia*.

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to serve a useful purpose", e.g. to ensure the care of the elderly (which they otherwise could not have afforded to pay for during their life-times).

<sup>143</sup> Here the object assures the inheritance-hunter: "Mortuus...accipiam bene te"; cf. also 9. 48. 1-2 (where an inheritance-hunter reminds his object of his promise): "Heredem cum me partis tibi, Garrice, quartae/per tua iurares sacra caputque tuum"; cf. 11. 67. 1: "Nil mihi das vivus, dicis post fata daturum"; cf. 12. 73. 1: "Heredem tibi me, Catulle, dicis".

<sup>144</sup> See e.g. Hor. *Sat.* 2. 5. 62-9; Mart. 9.9, 6. 63. 8.

<sup>145</sup> "Ergo varii tota civitate sermones: alii fictum ingratum immemorem loquuntur...alii contra hoc ipsum laudibus ferunt...".

## CONCLUSION

Does the literary presentation of *captatio* reflect a "real" social phenomenon in the society of the early Roman Empire, or should it be seen purely as a literary topos? To what extent is the literary presentation a distortion and/or exaggeration of the possible social and legal realities? I shall first set out the specific conclusions that I arrived at in each of the four chapters; thereafter I shall examine general conclusions about Roman life and society that this thesis has highlighted.

My investigation of *captatio* in the context of property devolution and heirship strategies (chapter I) has led me to the following conclusions: *captatio* can be seen as replicating to some extent the functions assumed by the heirship strategy of adoption, which was used to fulfil both psychological and practical needs of the adopters: *captatio* strives to provide childless testators with an alternative means of devolving their property (i.e. it provides them with heirs). While not granting them substitute children *per se*, the type of relationship that exists between the *captatores* and their often much older *captandi* does provide the objects with reasonable facsimiles of social progeny.

An investigation of the types of devolution commonly practised in various societies (i.e. lateral and lineal devolution strategies) reveals the following about Roman society of the late Republic and early Empire: as in most Eurasian societies, at Rome lineal/vertical intrafamilial inheritance was the preferred norm and was upheld by law and the conventions of society; but there was also an alternative type of property devolution, that tended to compete with the lineal intrafamilial variety sanctioned by the superstructure of the society: this was a lateral extrafamilial system of devolution, that encouraged the testator to leave property to his friends. Whereas Roman society traditionally encouraged lineal intrafamilial succession, the conventions of the exchange relationship encouraged the lateral extrafamilial system. In most cases, the intrafamilial "pull" will have proved stronger. Only where childlessness meant that the strength of the lineal intrafamilial "pull" on the testator was depleted could the lateral extrafamilial type of devolution take precedence: thus *orbitas* clearly qualifies as an important prerequisite for lateral extrafamilial inheritance. The conflict between these

types of devolution and its relevance to *captatio* is best illustrated by Roman society's mixed reactions to the will of Domitius Tullus, who had supposedly encouraged the attentions of *amici* (who consequently had expected to be recognised in his will), but unexpectedly instituted his family instead. The reactions of society indicate the conflicting expectations regarding succession entertained by the testator's family on the one hand, and his friends on the other. *Captatio*, as presented in literature, is mostly a system of intervention in the lateral extrafamilial context of inheritance. The position that *captatio* occupied within these systems may therefore be shown to have been somewhat ambiguous: since literary *captatio* focussed on the childless testator, it would to some extent have been tolerated by the "pecking order" of types of devolution in Roman society; it was not supported, however, by the superstructure (particularly the law) as intrafamilial succession was, and it was also not openly acknowledged.

In the second chapter I examined *captatio* as presented in Latin literature in the context of the rules of Roman succession and testamentary legislation. Recently scholars have become aware of the inaccuracies in the use of legal terminology in literature, particularly in satire. Even where the authors may have used legal references accurately, this does not necessarily support a thesis that *captatio* was therefore a social reality: it may merely reflect the author's familiarity with (and therefore his confidence at manipulating) the nuances of the Roman law of succession. I have suggested that these problems may be solved by starting with a close examination of the legal background, and *then* determining the extent to which this is reflected (accurately or not) in the literary presentation. The use of legal references in the literary presentation does indicate that *captatio* is to some degree inextricable from its legal context, that the literary presentation of *captatio* is not bound purely by commonplaces, and that it must be understood in terms of what was possible according to Roman law. That there is an attempt by satirists and other authors to place *captatio* in some type of legal context, however inaccurate, must suggest that they recognised it as an aspect of succession.

My investigation of the Roman law of succession as applicable to *captatio* has also brought me to a number of conclusions: a close examination of the rules of disinheritance and the *querela inofficiosi testamenti* confirmed that in Rome succession within the family was upheld before extrafamilial succession; public opinion, supported by these legal mechanisms, decreed that the

Roman testator should disinherit his *sui heredes*, particularly his sons, only if they were extremely undutiful and unfilial, and the rules of intestate succession reveal that the *sui* were his expected heirs. Testators would therefore have been unlikely to disinherit their offspring in favour of *captatores*: this implies that only those property-owners without children could have made suitable objects of *captatio*, just as the literary portrayal suggests.

In chapter II, I also attempted to answer the question whether *captatores*, as presented in Latin literature, are strictly inheritance- or legacy-hunters. In the literary presentation, *captatores* are mentioned as hunters of inheritances more frequently than they are mentioned as hunters of legacies, although legacies are also acknowledged as a goal, albeit less frequently and often in a context in which they are suggested as less desirable than being made heir to an entire estate. Although the Latin term *hereditas* could have included inheritances as well as legacies, *legare/legatum* does not appear to have been confused with or to have included *heredis institutio*; therefore it is unlikely that an author with a legal background (as most educated men tended to be) would have confused them and written about a *legatum* when he meant *heredis institutio*. He may of course have done so for satirical effect, but it is difficult to see what purpose this would serve. It is generally the satirists' aim to show how greedy the *captatores* were, and therefore it is logical that the *captatores* should be shown to desire the greatest portion of the testator's estate available to them: after the restrictions of the *lex Falcidia* decreed that at least one quarter (the *quarta Falcidia*) of an estate should go to the heir(s), gaining an inheritance *ex asse* would have necessarily meant becoming heir. Because *hereditas* may refer to an inheritance as well as a legacy, it would be best to call *captatores* inheritance-hunters rather than legacy-hunters, in default of evidence that they mostly aimed for legacies.

Also, the fact that *orbitas* is shown to be so essential an attribute of the objects of *captatio* in Latin literature would suggest that it is specifically institution as heir that the *captatores* are intent upon, since offspring would block their avenues to this far more effectively than to the receipt of legacies. The purpose of *captatio* should also be reconsidered: although *captatores* are usually shown to be intent on gaining wealth, another consideration is the honour that receiving bequests from *amici* granted. Emphasis may have been on the honour implicit in the testator's desire to bequeath property to the beneficiaries, rather than on the exact technical way in which he effected

this. In practice, it seems likely that, given the conventions of the exchange relationship of *amicitia*, extraneous heirs would have received legacies: so although literary *captatores* may have been ideally inheritance-hunters, in reality those accused of successfully practising this vice are likely to have been recipients of legacies.

Another conclusion suggested by my investigation in chapter II of the legal context of *captatio*, specifically the question of who was able to own and thus inherit property in his/her own right, is that unless emancipation of children was very widespread, the numbers of people who could have been successful *captatores* would have been severely limited. Only those *sui iuris* would have made successful *captatores*. This indicates that the impression derived from satire of hordes or "tribes" of *captatores* can only be a literary conceit.

In the third chapter, I examined the Augustan laws which appear to have been aimed at the suppression of *orbitas* and *caelibatus* in upper class Roman society. The important question for this study is whether these laws would have had much of an effect on *captatio* if the literary presentation were a true reflection of Roman society. The laws' very existence proves that *orbitas* was a real problem in Roman society, and that the Augustan regime felt that some action was necessary to remedy this situation. However, the purpose of the laws was not purely demographic, and although *captatio* may have been part of the general corruption of society that Augustus' policy set out to attack, it would be mistaken to assume that the laws were specifically aimed at *captatio*. Because the laws operated within the context of inheritance and the rules governing succession, they were clearly aimed at the Roman elite (the only group among whom we are fairly certain that testacy was common). It is therefore plain that the Augustan measures, although not aimed specifically at *captatio*, had potential to influence the milieu in which *captatio* would have taken place, and thus *captatio* itself. Large estates would have been the ones to have attracted *captatores*: *captatio*, which could be expensive and required an entrée into the world of the wealthy, was undeniably a pursuit of the privileged.

What is troubling, however, as far as the question of *captatio* as a real social phenomenon is concerned, is the fact that the topoi associated with *captatio* in literature do not customarily include a treatment of the effect that the Augustan measures may have had on *captatio* (Juv. *Sat.* 6. 38-40 is an exception). There are a number of possible explanations for this. First,

*captatio* as conventionally presented in Latin literature could have escaped the Augustan restrictions for two reasons: the laws intervened in succession only at the point where the beneficiary came to take the inheritance or legacy; they were also not aimed at childless or unmarried testators (such as the objects of *captatio* in literature tend to be) but at beneficiaries of wills who had failed to marry or produce children, and particularly at those who were unmarried. Because *captatio* as presented in literature depends on the existence of childless testators rather than childless beneficiaries, it would seem that this type of *captatio* could have continued provided there was a degree of polarization of those involved into childless and unmarried *captandi* on the one hand and *captatores* with wives and children on the other.

The policy of mitigation to the Augustan laws, and the failure of the laws to be put into effect until five years had elapsed, would have meant that those involved in *captatio* were not immediately or perhaps even at all affected by these laws. The laws' lack of success (cf. 3.6) at discouraging *caelibatus* and *orbitas* will also have meant that the conditions necessary for the successful practice of *captatio* as we know it from Roman literature will have continued to exist. In summary, it seems that the lack of interaction between the Augustan laws and literary *captatio* may mean one of two things: on the one hand it may mean that the Augustan laws were so unsuccessfully put into effect, and that the policy of mitigation (including grants of *ius liberorum* to the unmarried and childless) was so extensive that many people were able to escape the restrictions without conforming to the Augustan ideals, which were hostile to the type of subculture in which *captatio* could exist; on the other, it may mean that the literary portrayal of *captatio* was not a true reflection of social changes and realities.

One reason for this may have been that the topoi of *captatio*, derived from e.g. the portrayal of parasites in New Comedy, may have stabilised, i.e. reached their conventional form before the Augustan laws, or even the threat of them, had made an impact on Roman society; another reason may be that certain aspects of the literary portrayal are exaggerated and distorted: e.g. the topos of *orbitas*, which is continuously emphasised in literature as being absolutely essential for objects of *captatio*, may be an idea reproduced by literary convention rather than perpetuated by social reality. Sometimes the *captatores* are said to have courted (usually unsuccessfully) those who have children but who, in order to enjoy the attentions of the *captatores*, have

claimed to have disowned or disinherited them: these too seem to have been literary stock figures of opportunistic *captandi* rather than true reflections of contemporary Romans. However, the conventions of *amicitia*, which included the mutual expectation of legacies and inheritance between *amici*, would necessarily have relied on both parties being at least married and with children or possessed of the *ius trium liberorum*, whether or not they actually had children, in order for such testamentary arrangements to have been at all viable and not merely empty compliments. Therefore in "reality" *orbitas* may not have been such a stringent prerequisite for *captatio* as the satirists pretend it was. Also, as I have suggested, in "reality" most extraneous heirs may have received legacies from their friends' estates rather than institutions as heir (except where the testator was genuinely childless). Thus although the high incidence of childlessness in Roman society may have encouraged extrafamilial succession on a grand scale, not all the potential objects for *captatio* (in the sense of legacy- rather than specifically inheritance-hunting) may necessarily have been *orbi*.

In contrast to this, my investigation of the factors which may have influenced levels of fertility in the Roman upper class has revealed that a large gap of (typically) 9 years in the ages of marriage for men and women coexisted with a very high infant and child mortality rate; this meant that in order for a stable population growth to be maintained, each married couple would have had to produce at least five children within a limited period of reproductive compatibility. This would have made *orbitas* a common feature of this society, whether voluntary fertility limitation was used or not. It also reveals that an increase in marriage among the Roman elite would not have significantly raised the birth-rate. Although the restrictions on the ages for marriage may have meant that the comparative ages of husband and wife were brought closer together, perhaps slightly improving fertility levels, this would not have eliminated the high infant mortality rate; also, elite women continued to be married in their teens to men of 25+. *Orbitas* would therefore seem to have provided the market for *captatio*, rather than vice versa. It is also possible that methods of family limitation (possibly including contraception), as well as the options of abstention from intercourse with wives, were available to and used by educated Romans of the upper class, so that the possibility that there were some who might have planned to be *orbi* cannot be ruled out. Many Romans may have been married but without children, which would have enabled them, even without the benefit of the *ius trium liberorum*, to have accepted half of the inheritances and legacies that

were bequeathed to them by *amici*; with the *ius trium liberorum*, which seems to have been fairly generously distributed by later emperors, they could have taken up entire inheritances and legacies while still being enticingly *orbi* themselves.

My fourth chapter concentrates on the way in which *captatio* is shown to have operated in literature, and specifically the nature of the relationship between the *captator* and *captandus* in the context of the social network of *amicitia*. Although *amicitia* cannot be seen purely as a friendship or a patronage relationship, it appears to have exhibited features of both: while *amicitia* was a personal relationship of some duration and was expected to conform to many of the philosophic ideals of friendship (e.g. *fides*), it also depended on the mutual exchange of goods and services (*officia, beneficia*) between the parties involved in it; it could also often (even temporarily) be asymmetrical in terms of power wielded by each of the parties, the types of service exchanged and concepts of indebtedness. This duality apparent in *amicitia* may partially explain the ambiguous position of *captatio* itself in Roman society: on the one hand *captatio* is a perversion of the philosophic ideals of friendship, while on the other it is part of a natural extension of the exchange relationship.

In this chapter, I pointed to a number of services (e.g. *salutatio*, gift-giving, legal services, etc) which were expected to be performed in terms of the exchange relationship, but which, according to the authors who treat *captatio*, were used to ensure the receipt of inheritances and legacies from *amici*. *Captatio* was aided by the conventions of *amicitia*. It was often difficult to distinguish between a genuinely loyal *amicus* and one intent upon material gain: it was the person's intentions that made the difference. This also means that the impression often given by literature, that there were specific groups of people in Roman society who were identified as *captatores* and others who were their *captandi*, is misplaced. Anyone who was able to exploit his position in *amicitia* in order to secure bequests from an *amicus* on his death-bed could therefore be a *captator*. *Amicitia* both provided the opportunity for inheritance-hunting and the ideology that was conducive to it. The double standards in Roman attitudes towards extrafamilial succession also appear to have helped: while it was considered an honour to receive bequests in terms of a friend's will, it was taboo to be *seen* to be courting them. Ultimately, because another person's intentions can only be speculated upon, the accusation of *captatio*, if it was conducted as suggested

by Latin satire and other genres, would have been largely a matter of opinion.

At the end of this chapter, I drew a comparison between *captatio* as presented in the literature of the early Empire with another type of *captatio* identified by our legal sources, that perpetrated by means of *dolus* or *vis*. I came to the conclusion that most of the examples of literary *captatio* do not compare with those <sup>defined as illegal</sup> outlawed in the *Digest* or the *Codex*. As a system of exploitation of the exchange relationship, literary *captatio* consists of attempts to win the testator's favour rather than to coerce him into instituting the *captator*. Therefore it seems that the legal sources are concerned with what must have been the most extreme examples of this type of practice. This suggests that not only satirists, letter-writers and philosophers, but society as a whole was concerned about attempts by individuals to divert inheritances towards themselves by whatever means available to them, legal or illegal.

In the final section of this chapter, I examined the likelihood that *captatores* and *captandi* entered into agreements attempting to regulate succession: these would have been legally invalid, but they may have been used to encourage objects to bequeath their wealth to those with whom they had made such an agreement. Not only would *pacta successoria*, if legally valid (i.e. if regarded as contracts), have infringed the testator's right to change his will as often as he liked until the time of his death, but the reluctance of Roman law to accept the validity of these agreements points to what would seem to have been a deep-seated Roman fear, that the agreed heir would be tempted to murder or to engineer the death of the testator once the desired arrangements had been made. This reflects a commonplace of Latin literature, that the *captator* longs for the death of the object from whom he expects an inheritance. It is therefore apparent that the Roman taboo on any type of arrangement that would bind the testator to an irrevocable agreement concerning the *post mortem* devolution of his property should be viewed in the same light as the concept of *captatio*.

But do the *captatores* of satire and other genres make *pacta successoria*? Although in literature we often hear of *captandi* who have promised to institute certain *captatores*, it is a commonplace that the objects frequently manage to outwit those courting them for inheritances by failing to recognise their services in the will: it appears that the *captandi* of literature are well

aware of their rights as testators. In terms of the conventions of *amicitia*, however, arrangements concerning succession would have been unspoken and understood by those who were part of the network rather than strictly and formally agreed upon. This would have worked in the inheritance-hunter's favour, making *captatio* as it operated in the context of *amicitia* harder to discern than in cases where a formal agreement had been made.

This thesis has also resulted in general conclusions about Roman society during the late Republic and early to later Empire. Wills and inheritance were subjects of great importance and interest in this society, and the Romans' interest in (or even obsession with) *captatio* must be seen in this light. The fact that in a pre-industrial society inheritance is one of the few ways in which wealth can be transferred between individuals means that it will have carried far greater economic weight in a society like Rome than it does in modern capitalist societies, in which there are numerous other ways to acquire wealth. The prominence given to succession and wills in Roman society can also be appreciated by considering that some 60-70% of all Roman civil litigation arose over succession. When it came to succession and wills, the Romans were suspicious: this is revealed by the precautions concerning *substitutio pupillaris* set out by Gaius, and in the *sc. Neronianum*, which prescribed a number of precautions for the writing and sealing of wills, and in the reluctance of Roman law to accept succession according to contract. They seem to have presumed that anyone, however honest and otherwise trustworthy, could not withstand the temptation of a great amount of money within their grasp. This reveals a cultural mindset in which the spectre of *captatio* as interference in what were perceived as the testator's foremost moral duties looms large. *Captatio* as presented in literature may be largely circumscribed by *topoi*; yet to the Romans *captatio* was undeniably a reality, and to some of them the spectre of "hordes" or "tribes" of inheritance-hunters was possibly also a reality, even if these hordes were only reflections of themselves and their *amici*.

## LIST OF ABBREVIATIONS

The following is a list of the abbreviations of journals and other works used in this thesis and in the bibliography. Primary texts in Latin have mostly been abbreviated according to the system set out in the *OLD* "Aids to the Reader", ix-xxi (exceptions are noted below). Please note that for legal documents and journals I have preferred to use the conventional legal abbreviations rather than those of the *OLD* or other classical sources:

<i>AE</i>	<i>Année Epigraphique</i>
<i>BGU</i>	Ägyptische Urkunden aus den Museen zu Berlin. Griechische Urkunden, I-V, 1895-1919; VII, 1926 (Johnson 1936: 720).
<i>C.</i>	<i>Codex Iustinianus.</i>
<i>CAH</i>	<i>Cambridge Ancient History.</i>
<i>CIL</i>	1863- , <i>Corpus Inscriptionum Latinarum</i> .
<i>CJ</i>	<i>Classical Journal.</i>
<i>CPh</i>	<i>Classical Philology.</i>
<i>CQ</i>	<i>Classical Quarterly.</i>
<i>CSSH</i>	<i>Comparative Studies in Society and History.</i>
<i>D.</i>	<i>Digesta Iustiniani.</i>
<i>FIRA</i>	<i>Fontes Iuris Romani Antejustiniani</i> 1968 Salvator Riccobono (ed.) vol. I ( <i>Leges</i> ); Johannes Baviere & J. Furlani (edd.) vol. II ( <i>Auctores</i> ); Vincent Arangio-Ruiz (ed.) vol. III ( <i>Negotia</i> ) Florence: S.A.G. Barbèra.
<i>Fr. de iure fisci.</i>	<i>Fragmenta de iure fisci.</i>
<i>Fr. Vat.</i>	Theodor Mommsen & Paul Krueger (edd.) 1890 <i>Fragmenta Vaticana: Mosaicarum et Romanarum Legum Collatio</i> Berlin: Weidmann.
<i>G.</i>	E. Seckel & B. Kuebler 1903 (edd.) <i>Gaii Institutiones.</i>
<i>Hor. Sat.</i>	Horace <i>Sermones.</i>
<i>HSCPh</i>	<i>Harvard Studies in Classical Philology.</i>
<i>ICS</i>	<i>Illinois Classical Studies.</i>

<i>ILAlg.</i>	S. Gsell & H.-G. Pflaum 1922, 1957- , <i>Inscriptions latines de l'Algérie</i>
<i>ILS</i>	Hermannus Dessau (ed.) 1902 <i>Inscriptiones Latinae Selectae</i> Berlin: Weidmann.
<i>Inst.</i>	Paul Krueger (ed.) <i>Iustiniani Institutiones</i> .
<i>JRS</i>	<i>The Journal of Roman Studies</i> .
<i>Juv. Sat.</i>	D. Iunius Iuvenalis <i>Saturae</i> .
<i>LCM</i>	<i>Liverpool Classical Monthly</i> .
<i>OLD</i>	<i>Oxford Latin Dictionary</i> 1968, 1971 Oxford: Clarendon Press.
<i>PCPhS</i>	<i>Proceedings of the Cambridge Philological Society</i> .
<i>QBD</i>	Queen's Bench Division.
<i>RE</i>	Georg Wissowa & Wilhelm Kroll 1894- , <i>Paulys Real-Encyclopädie der Classischen Altertumswissenschaft</i> Stuttgart: J.B. Metzlerscher Verlag.
<i>RIDA</i> <sup>3</sup>	1954- , <i>Revue internationale des droits de l'antiquité</i> (3rd series, Tome 1).
<i>SA</i>	South African Law Reports.
<i>SALJ</i>	<i>South African Law Journal</i> .
<i>THRHR</i>	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg.</i>
<i>TLL</i>	1900- , <i>Thesaurus Linguae Latinae</i> Leipzig: Teubner.
<i>Ulp.</i>	Ulpianus, <i>Regularum Epitome</i> .

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