 Forgery was a crime which, for the Romans, covered a wide range of offences. The forging of wills and other documents, as also the suppression of valid wills, is the kind of thing that is criminal in any legal system. There has been considerable discussion about whether what Sulla established (probably in 81 BC) was one crime with one quaestio perpetua or two offences, those of the lex Cornelia testamentaria and the lex Cornelia nummaria, but using the same court. The weight of opinion seems to favour one statute and one court from the beginning. Certainly the jurists of the Principate talked of one offence – de falsis – with its one court. The element of the crime dealing with coining and false monies aroused considerable legislative interest in the Later Empire, but we do not hear so much about it earlier; this more intense interest was presumably linked with the financial crisis of the third century on. The development, however, of the so-called lex Cornelia testamentaria to cover all kinds of documentary forgery, often through resolutions of the Senate, was largely the work of the classical jurists.

There is a particular aspect of forgery related to wills that I should like to look at in the light of its dependence on a peculiarly Roman habit: the dictation of one's will. This area of the criminal law was governed either by the statute itself, the lex Cornelia, which applied when the scribe acted with the testator invitō aut
ignorante as Matthaeus puts it, or (and more the subject of juristic interest) by the supplementary senatusconsultum Libonianum when, at the dictation, wish or command of the testator, the scribe wrote in himself as heir (or wrote in someone in his power, or his pater/dominus, or someone in the same power). The SCL was itself also supplemented by an edict of Claudius (which may have extended the crime from the institution of an heir to writing in legacies). The title Digest 48.10 concerns the statute, together with the SCL, which straightforwardly forbade a scribe to benefit from what he wrote, and also nullified any such benefit. Nevertheless, there are a number of texts where, although criminal liability is imputed, it is at least possible that there was no dishonesty — and in view of other texts it is tempting but not entirely convincing to talk about strict liability. The whole area is treated rather oddly for an offence carrying a capital penalty.

This article will therefore consider the range of cases in the Digest where the act of taking dictation of a will is the act establishing liability under the statute (and its extensions) whether on grounds of benefit or of bad faith, and discuss how far this sheds light upon Roman notions of criminal responsibility.

The habit of dictation may be due to the originally oral nature of the testamentum per aes et libram, by which the testator gave instructions publicly to the familia emptor on the distribution of his estate after his death, even though, by Cicero’s time and maybe well before, the contents of the written document had become the true will. Gaius implies that the testator normally wrote his own will: ‘after writing out his will — postquam tabulas testamenti scripsisset — he mancipates his property to someone in name only’. There must, of course, apart from any convention of dictation, have been occasions when it was not physically possible for the testator himself to write, from blindness, perhaps — in an age before glasses had been invented — or the frailty of old age, or maybe even sometimes illiteracy. And these same circumstances might explain why a testator would not read over a will that had been written for

5. A. Matthaeus, Commentarius ad Lib. XLVII et XLVIII Dig. de Criminiibus (Basel 1715), tit. vii.1.4; here there was deceit in anyone’s language.
6. Archi (op. cit. at p. 1488) long ago pointed out the juristic concentration on the nullity and criminality of sibi adscripta; CJ. 9.23 is specifically on this field.
7. Albanese, op. cit.
8. D’Ors, op. cit. p. 531f. It is not clear whether the SCL or Nero — whether by edict or by another SC — regulated documents sine consignatione. Cf D. 48.10,1,4; h.t. 14,2; h.t. 15pr.; h.t. 16,2.
9. As was suggested to me by Eric Pool.
12. W.V. Harris, Literacy and epigraphy, I, ZS für Pap. und Ep. 52 (1983), p. 87–111, is very cautious about the extent of literacy in antiquity; he probably underestimates the technical difficulty of writing as opposed to reading (cf M.T. Clanchy, From Memory to Written Record (London 1979) at p. 88) — the ability to write on wax or on parchment being more akin to typing skills than writing on good paper with a fountain or ball-point pen. It seems unlikely that many free urban Romans of the classical period were illiterate; laws were posted, as were prohibitory notices, and ignorance of the law was no excuse. The lower orders may well have moved their lips when they read, but the will-making classes, the classes of concern to Roman jurists, were educated, men or women, and I believe that the vast majority of them could read even if they could not write fluently.