Summer 2000

Deceit and the Classification of Crimes: Federal Rule of Evidence 609 (A)(2) and the Origins of Crimen Falsi

Stuart P. Green

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Stuart P. Green, Deceit and the Classification of Crimes: Federal Rule of Evidence 609 (A)(2) and the Origins of Crimen Falsi, 90 J. Crim. L. & Criminology 1087 (1999-2000)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

CRIMINAL LAW

DECEIT AND THE CLASSIFICATION OF CRIMES: FEDERAL RULE OF EVIDENCE 609(A)(2) AND THE ORIGINS OF *CRIMEN FALSI*

STUART P. GREEN*

Few conceptual schemes in criminal law are as widely accepted, or as deeply ingrained, as the classification of offenses according to the nature and degree of their harmfulness. Whenever criminal conduct is to be classified, it is necessary to ask who, or what interest, is harmed or sought to be protected.¹ Indeed, if one looks at criminal codes around the world, one is

* Associate Professor of Law, Louisiana State University; Visiting Associate Professor of Law, University of Arizona (Spring 2001). B.A., 1983, Tufts University; J.D., 1988, Yale Law School. I am grateful to Peter Alldridge, Ron Allen, Jim Bowers, Dick Helmholz, David Leonard, M.B.E. Smith, George Thomas, Lloyd Weinreb, and Jim Whitman for their attention to an earlier draft. Thanks also to George Jacobsen, Todd Leitstein, Bob Pascal, and Gabriele Piccoli for their assistance with research and translation. Financial support was provided by the Louisiana Bar Foundation's Scholar-in-Residence Program, whose views are not necessarily reflected herein. An earlier version of this paper was presented at a meeting of the Southeastern Conference of the Association of American Law Schools in Hilton Head, S.C. The *culpa* for any *errata* is entirely *mea*.

¹ See, e.g., GEORGE E. DIX & M. MICHAEL SHARLOT, CRIMINAL LAW: CASES AND MATERIALS 2 (4th ed. 1996) ("Crimes are generally grouped according to the interest protected: security of the person, security of the habitation, security of rights in property, public health, safety, and morals, and public authority"); RONALD N. BOYCE & ROLLIN M. PERKINS, CRIMINAL LAW AND PROCEDURE 10 (7th ed. 1989) ("For a consideration of the specific offenses . . . it is common to have categories dependent upon the particular type of social harm involved, such as (1) offenses against the person, (2) offenses against property, (3) offenses against habitation and occupancy, and so forth").

struck—despite the great variation in, say, the elements of offenses²—by the nearly universal use of harm- or interest-based classificatory terms such as “crimes against the person,” “crimes against the state,” “crimes against property,” “crimes against public order,” and “crimes against public morality.”³ Even in federal criminal law, which has yet to be organized into an integrated code, offenses are categorized according to the kinds of interests protected—whether it is protecting legitimate businesses from infiltration by organized crime (as in RICO),⁴ or protecting native American Indian communities from the commission of a wide range of specific offenses (as in the Indian Crimes Act of 1976).⁵

² See GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 3-4 (1998).

³ All twenty-five of the foreign codes surveyed made use of these or closely analogous offense classifications. See THE AUSTRIAN PENAL ACT (Norbert D. West & Samuel I. Shuman trans., 1966); CANADA CRIMINAL CODE (2000) <<http://canada.justice.gc.ca/STABLE/EN/Laws/Chap/C/C-46.html>>; THE CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA (Chin Kim trans., 1982); THE COLOMBIAN PENAL CODE (Phanor Eder trans., 1967); THE DANISH CRIMINAL CODE (Martin Spencer & Gitte Høyer trans., 1987); THE DUTCH PENAL CODE (Louise Rayor & Stafford Wadsworth trans. 1997); THE PENAL CODE OF FINLAND (Matti Joutsen trans., 1987); CODE PÉNAL (FRANCE) (1999); PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY (Joseph J. Darby trans., 1987); GHANA CRIMINAL CODE (1961); THE GREEK PENAL CODE (Nicholas B. Lolis trans., 1973); THE GREENLAND CRIMINAL CODE (Gerhard O.W. Mueller ed., 1970); THE PENAL LAW OF INDIA (Hari Singh Gour ed., 1990); ISRAEL PENAL LAW (Aryeh Greenfield trans., 1996); THE ITALIAN PENAL CODE (Edward M. Wise trans., 1978); A PREPARATORY DRAFT FOR THE REVISED PENAL CODE OF JAPAN (B.J. George, Jr. ed., 1961); THE KOREAN CRIMINAL CODE (Paul Ryu trans., 1960); LEBANON PENAL CODE (Gabriel M. Bustros trans., 1981); THE NORWEGIAN PENAL CODE (Harald Schjoldager trans., 1961); POLISH PENAL CODE (William S. Kenney & Tadeusz Sadowski trans., 1973); PENAL CODE OF THE ROMANIAN SOCIALIST REPUBLIC (Simone-Marie Vrbiescu Kleckner trans., 1976); A DRAFT CRIMINAL CODE FOR SOUTH AFRICA (1995); SWEDISH PENAL CODE (Norman Bishop trans., 1999) <<http://wings.buffalo.edu/law/bclcl/sweden.pdf>>; THE TURKISH CRIMINAL CODE (Nevzat Gürelli trans., 1965); NEW SOUTH WALES (AUSTRALIA) CRIMES ACT (2000) <http://www.austlii.edu.au/au/legis/sw/consol_act/ca190082/index.html>. See also Part II of THE MODEL PENAL CODE (classifying crimes as Offenses Involving Danger to the Person, Offense Against Property, Offenses Against the Family, Offenses Against Public Administration, or Offenses Against Public Order and Decency).

⁴ See Racketeering Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961(1)(A) (1999) (prohibiting a vast range of disparate conduct—including murder, kidnapping, gambling, arson, robbery, bribery, extortion, obscenity, and drug offenses—all of which are potentially connected to the infiltration of legitimate business by organized crime).

⁵ See 18 U.S.C. §§ 1151-69 (1999) (prohibiting, *inter alia*, the dispensing of intoxicants on Indian reservations, counterfeiting and misrepresenting Indian produced

Such emphasis on harmfulness as a classificatory principle is understandable. Harmfulness is viewed as the "linchpin" of the criminal law, the moral element that justifies punishment and practically defines criminality.⁶ At least since John Stuart Mill, harmfulness has been viewed as the *sine qua non* of criminalization.⁷ Asking what harms are caused or interests affected is thus a natural place to begin the task of classifying.⁸

Despite its prominence, however, harmfulness has never been the sole principle around which crimes have been classified. Common law classifications such as felony, misdemeanor, and major and petty offense, for example, all depend on the idea of seriousness—a concept that is broader than (though it obviously includes) harmfulness.⁹ Other classifications, such as *malum in se* and *malum prohibitum*,¹⁰ and infamous and noninfamous,¹¹ also rely less on a concept of harmfulness than on the

goods, trafficking in Indian human remains and cultural artifacts, illegal hunting and fishing on Indian lands, stealing from Indian tribal organizations, gambling, and failing to report instances of child abuse in Indian communities).

⁶ See, e.g., Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61, 79 (1984) ("The linchpin of the criminal law is harm in the form of bad results or bad conduct."); Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQUESNE L. REV. 345 (1965-66); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

⁷ JOHN STUART MILL, ON LIBERTY (orig. pub. 1859). The classic contemporary treatment of the "harm principle" is JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW (consisting of four separately published volumes, 1984, 1985, 1986, and 1988).

⁸ Beccaria, for example, in his chapter on "the classification of crimes," begins with the proposition that the "true measure of crimes" is "harm to society." He then goes on to offer a brief outline of his own system of classification. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 24-25 (Richard Davies trans., 1995) (1st ed. 1764).

⁹ Murder and manslaughter, for example, both involve the same basic harm, yet the former is a more serious offense. I have previously dealt with the difference between seriousness and harmfulness in Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1552 (1997).

¹⁰ *Malum in se* offenses are those that would be viewed by society as morally wrongful even if they were not prohibited by law. *Malum prohibitum* offenses are those that are viewed as wrong only, or primarily, because they have been proscribed by law. For a detailed discussion of the distinction, see *id.* at 1569-80.

¹¹ At common law, conviction of an infamous offense made a person incompetent to be a witness. Such witnesses were thought to be *ipso facto* untrustworthy. The in-

idea of moral wrongfulness (the degree to which an act violates a moral norm) or culpability (whether an actor intended her act or was mistaken or insane).¹²

How we classify crimes is (as I have suggested elsewhere) important, both doctrinally,¹³ and as a window into the deeper moral and social content of specific offenses.¹⁴ Yet to consider each of these various systems of classification (*i.e.*, felony vs. misdemeanor, *malum in se* vs. *malum prohibitum*, infamous vs. noninfamous) would constitute a vast (and perhaps tedious) undertaking. This article focuses instead on the history of one particularly intriguing form of classification—namely, the concept of *crimen falsi*, the crime of falsehood or deceit.

* * *

To the modern American lawyer, *crimen falsi* is familiar, if at all, as a category of offenses recognized by Rule 609(a)(2) of the Federal Rules of Evidence, which allows for impeachment of a witness who has been convicted of a crime involving “dishonesty or false statement.” The original Conference Report makes the

famous crimes consisted of treason, felony, and the *crimina falsi*, the last of which are discussed at length below. See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 27 (3d ed. 1982); see also WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 29-37 (2d ed. 1986) (discussing different categories by which offenses are classified); CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW §§ 17-22 (15th ed. 1993).

¹² I have previously dealt with the differences among harmfulness, moral wrongfulness, and culpability in Green, *supra* note 9, at 1547-53.

¹³ Whether a crime is classified as an offense “against the person” or an offense “against property,” for example, can determine matters such as whether a police officer is authorized to shoot a fleeing felon, whether a defendant can be extradited, which evidentiary standard a prosecutor should follow in deciding whether to charge a suspect, and whether an attorney has an ethical obligation to disclose a confidence regarding the possible future commission of a crime. Stuart P. Green, *Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part*, 4 BUFF. CRIM. L. REV. (forthcoming, 2000).

¹⁴ For example, the fact that rape is now generally classified as a crime against the person rather than as a morals offense (as was once common) is indicative of the evolution in society's views of that crime. Similarly, the classification of robbery as a crime against property rather than a crime against the person tells us something significant (and perhaps surprising) about how our criminal justice system views the act of theft by force or violence. *Id.* For further discussion of the significance of classification, see Ronald J. Allen, *The Explanatory Value of Analyzing Codifications by Reference to Organizing Principles Other Than Those Employed in the Codification*, 79 NW. U.L.REV. 1080 (1984-85), and sources cited in Green, *supra* note 13, at note 30.

link between Rule 609(a)(2) and the *crimina falsi* explicit, defining the phrase “crimes involving dishonesty or false statement” as “crimes such as perjury, subornation of perjury, false statements, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify truthfully.”¹⁵ Yet the idea of *crimen falsi* did not originate with the Federal Rules, nor indeed with the law of evidence. Long before *crimen falsi* comprised an evidentiary concept, it functioned as a classification in substantive criminal law.

Part I of this article considers several preliminary matters concerning the definition of *deceit*, the role of deceit in both unifying and distinguishing various criminal offenses, and the relationship between deceit and social harmfulness. Part II surveys the history of *crimen falsi* from its origins in the Roman law of the first century B.C.E. to its refinement in the Spanish law of the 1200s. Part III describes the transformation of *crimen falsi* from a substantive criminal law category to an evidentiary category that, initially, allowed for the disqualification of witnesses, and, later, merely their impeachment. Finally, Part IV examines the modern law of *crimen falsi*, suggesting that two of the most intractable problems in the interpretation of Federal Rule of Evidence 609(a)(2) are most properly addressed with an appreciation of the doctrine’s substantive criminal law origins.

I. PRELIMINARY ISSUES

A. WHAT IS “DECEIT”?

Before we can talk about the concept of deceit as a means for classifying crime, it will be helpful to have a definition of the term. As I shall use it here, *deceit* will refer to the communication of a message with which the communicator, in communicating, intends to mislead—that is, the communication of a

¹⁵ H.R. CONF. REP. NO. 93-1037, at 9 (1975).

message intended to cause a person to believe something that is untrue.¹⁶

It is important to note, however, that deceitful conduct that may satisfy the elements of one criminal statute may not satisfy the elements of another. Consider the difference between perjury and mail fraud. As explained by the Supreme Court in *Bronston v. United States*, a non-responsive statement that is literally true is not perjurious, no matter how misleading.¹⁷ (One need only think of President Clinton's supposedly "legalistic" defense to charges that he committed perjury during his deposition in the Paula Jones case.) Yet, as demonstrated by the Ninth Circuit's widely cited opinion in *Lustiger v. United States*, a similarly true but misleading statement can constitute a "scheme to defraud" under the mail fraud statute.¹⁸ The point is simply that deceit in the criminal law, as elsewhere, is an elastic and frequently variable concept.

B. DECEIT AS A UNIFYING, AND DISTINGUISHING, FACTOR

Even if there were a fixed and certain concept of deceit that applied to all crimes, there would remain questions about which offenses should be classified as crimes of deceit. As we shall see when we consider Federal Rule of Evidence 609(a)(2), courts have struggled to determine whether offenses such as embezzlement, larceny, blackmail, and extortion should qualify as crimes "involving dishonesty or false statement."¹⁹

For now, it is enough to note that any grouping of "crimes of deceit" will comprise a range of offenses involving quite different forms of harmfulness. Perjury and false statements, for example, involve injury to the administration of government. Forgery and false pretenses, by contrast, typically involve harms

¹⁶ The dictionary defines "deceive" as "caus[ing] to believe what is not true; mislead." AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1997). For further discussion of the definition of deceit, see sources cited *infra* note 20.

¹⁷ 409 U.S. 352, 358 (1973).

¹⁸ 386 F.2d 132, 138 (9th Cir. 1967) (interpreting 18 U.S.C. § 1341), *cert. denied*, 390 U.S. 951 (1968). The moral and doctrinal differences between perjury and fraud are discussed further in my work-in-progress, "Lying, Deceiving, and Falsely Denying: Some Moral and Legal Lessons of the Clinton Sex-Perjury Scandal and the Demise of the 'Exculpatory No' Doctrine."

¹⁹ See *infra* notes 115-31 and accompanying text.

to business relations. The only plausible basis for grouping together such otherwise disparate offenses is that all involve a common form of moral wrongfulness.

The concept of deceit, moreover, can also serve as a factor that *distinguishes* otherwise similar offenses. Consider the distinction among larceny, embezzlement, and false pretenses. All three offenses involve the same basic harm—the misappropriation of another's property. What distinguishes them is the morally wrongful means by which such property is taken. In contrast to larceny (which requires stealth) and embezzlement (which involves a breach of trust), false pretenses is distinguished by the requirement of deceit.

C. THE RELATIONSHIP BETWEEN DECEIT AND HARMFULNESS

Although harmfulness and the morally wrongful act of deceit constitute distinct criteria for classifying offenses, it should be clear that deceit and harmfulness are not wholly unrelated. Indeed, deceit often *causes* harm. A society in which deceit and dishonesty are rampant will be unstable; personal relations will suffer, commercial transactions will be hindered, government operations will be impeded, uncertainty and cynicism will prevail.²⁰

The significance of harm-causing deceit is particularly evident in the law of theft. Consider again the distinction between larceny and false pretenses. Although both involve the wrongful taking of property, the harms involved in the two crimes are distinguishable. One who has been defrauded of fifty dollars by a confidence man is likely to feel very different from a person who has had fifty dollars stolen by a thief. As Peter Alldridge has noted:

[I]f a victim is going to suffer a particular harm, it is less painful for him or her and less culpable of the person causing it that the harm should be caused without whatever additional unpleasantness comes from the deception of the victim. In the case of frauds there is far more likely to be

²⁰ For a useful discussion of these and related issues, see SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978). For a survey of the academic literature on deceit, see Stuart P. Green, *Deception*, in *READER'S GUIDE TO THE SOCIAL SCIENCES* (Jonathan Michie, ed.) (forthcoming, 2000).

the loss of self-esteem consequent upon feeling responsible by reason of having been duped.²¹

Given its relationship to harmfulness, then, it is not surprising that deceit continues to play a role in various classificatory schemes. A good example is the way in which both the Model Penal Code²² and the English Theft Act of 1968²³ have dealt with deceit in the law of theft. Both statutes consolidate the traditional acquisitive offenses (larceny, embezzlement, false pretenses, extortion, blackmail, fraudulent conversion, and receiving stolen property) in a manner that obviously reflects the similarity in harms caused.²⁴ Yet, within the broad rubric of "theft offenses," each statute retains categories such as Theft by Deception (in the case of the Model Penal Code²⁵) and Obtaining Property by Deception (in the case of the English Theft Act²⁶). In both instances, the principal factor that distinguishes such offenses from other theft offenses is the presence of deceit.

²¹ Peter Alldridge, *Sex, Lies and the Criminal Law*, 44 N. IRELAND LEGAL Q. 250, 251 (1993). Lloyd Weinreb has made a somewhat similar point:

A society in which one is not well protected even from the snatchpurse is different from a society in which one is so protected, even if there is not effective protection against deceptive trade practices. Even the finer distinction between larceny by trick and false pretenses is not self-evidently pointless; someone who expects the return of the property with which she has parted, or who at least still believes that the property is hers, may react differently to its loss than she would to the loss of her part of a bargain by which she gave up that particular property for good. Similarly, the community may feel different moral sentiments about someone who initiates or engages in a transaction for the purpose of depriving another.

LLOYD L. WEINREB, *CRIMINAL LAW: CASES, COMMENT, QUESTIONS* 395-96 (6th ed. 1998).

²² MODEL PENAL CODE § 223.1-2 (1985).

²³ Theft Act, 1968, ch. 60, §§ 1, 7 (Eng.).

²⁴ See, e.g., MODEL PENAL CODE, § 223.1 commentary at 131-32 ("[T]heft by a stranger and . . . theft by a fiduciary represent similar dangers requiring approximately the same treatment and characterization. . . . Prevailing moral standards do not differentiate sharply between the swindler and other 'thieves.' To that extent, at least, consolidation conforms to the common understanding of what is substantially the same kind of undesirable conduct.").

²⁵ MODEL PENAL CODE § 223.3.

²⁶ Theft Act, 1968, ch. 60, § 15 (Eng.).

II. ORIGINS OF *CRIMEN FALSI*A. THE ROMAN *LEX CORNELIA DE FALSIS*

Centuries before *crimen falsi* denominated a concept in the law of evidence, it functioned as a category of Roman substantive criminal law. The term first appeared during the late Republic, in the *lex Cornelia de Falsis* of 81 B.C.E.²⁷ Although the original text of this law has been lost, much of it has been reconstructed through references in Justinian's *Digest*.²⁸

The *lex Cornelia* was part of an important procedural innovation introduced by the Roman dictator and law reformer, Lucius Sulla. Prior to the early first century B.C.E., criminal jurisdiction in Rome had been vested in the *paterfamilias*, *tresviri capitales*, and various assemblies of the people, rather than in any permanent court system.²⁹ Moreover, criminal law and civil law were not clearly distinguished. Many acts that would be regarded as criminal under modern law were regarded as "de-

²⁷ The five-century period known as the Roman Republic (510-27 B.C.E.) saw tremendous growth in Rome's size and influence and political innovations such as the abolition of the monarchy and government by a hierarchy of magistrates headed by two consuls. The Republic ended (and the Empire began) in 27 B.C.E. when Octavian (taking the name Augustus) became *de facto* emperor of the Roman world. For useful general introductions to the study of Roman law, see ANDREW BORKOWSKI, TEXTBOOK ON ROMAN LAW 3-4, 10 (1994); H.F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW (3d ed. 1972); BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW (1962); O.F. ROBINSON, THE SOURCES OF ROMAN LAW: PROBLEMS AND METHODS FOR ANCIENT HISTORIANS (1997); J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW (1976).

²⁸ See Philip Grierson, *The Roman Law of Counterfeiting*, in ESSAYS IN ROMAN COINAGE PRESENTED TO HAROLD MATTINGLY 240-261, 242 (R.A.G. Carson and C.H.V. Sutherland, eds. 1956); J.A. Crook, *Lex Cornelia de Falsis*, 65 ATHENAEUM 163-71 (1987). Justinian (527-65 C.E.) was a Byzantine emperor whose most important achievement was the codification of Roman law, the centerpiece of which was the *Digest*, a legal encyclopedia containing a compilation and summary of juristic literature by the leading academics, practitioners, and government ministers of the day. BORKOWSKI, *supra* note 27, at 50-51. See also Charles Donahue, Jr., *Book Review: On Translating the Digest*, 39 STAN. L. REV. 1057 (1987).

²⁹ O.F. ROBINSON, THE CRIMINAL LAW OF ANCIENT ROME 1 (1995). The *tresviri capitales* were minor magistrates with police functions. One exception was the *Lex Calpurnia* of 149 B.C.E., which established a permanent court of senators, who acted as sworn jurors, to deal with claims of provincial extortion. *Id.*

licts"—civil wrongs for which quasi-penal sanctions could be imposed.³⁰

A breakdown in social norms among the Roman aristocracy in the late Republic created a need for a more standardized system of criminal justice. Sulla responded by enacting a series of statutes establishing *quaestiones perpetuae*, or specialized permanent jury courts, each of which was empowered to hear cases involving one or more specific crimes (known as *publica judicia*), such as murder, treason, and extortion.³¹ (In this sense, Roman criminal law was more like the loose collection of statutes that now comprise federal criminal law than like an integrated code.)

One of these statutes was the *lex Cornelia de Falsis*, which created a permanent court known as the *questio de falsis*. At its inception, the *questio de falsis* was concerned exclusively with the forgery of wills and counterfeiting of coinage.³² The standard penalty for committing a crime of *falsum* was deportation and confiscation; only slaves could be sentenced to death.³³ The power to bring an accusation under the *lex Cornelia* was held by all free men and by free women whose interests were at stake.³⁴

Over time, the jurisdiction of the *questio de falsis* and the scope of the *lex Cornelia de Falsis* grew dramatically. Through resolutions of the Senate and influential juristic commentary, the category of *crimen falsi* was broadened to include numerous offenses not contained in the original statute.³⁵ One scholar has

³⁰ BORKOWSKI, *supra* note 27, at 302-35.

³¹ ROBINSON, *supra* note 29, at 3. The *Publica Judicia* are described in 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 13 (1883).

³² As Olivia Robinson has noted, there is a debate among scholars as to whether what Sulla established was one court having jurisdiction over two separate offenses (forgery of wills and counterfeiting) or whether instead forgery and counterfeiting were seen as two aspects of a single crime. According to Robinson, the weight of scholarly opinion favors the latter understanding. Olivia F. Robinson, *An Aspect of Falsum*, 60 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 29, 29 (1992); ROBINSON, *supra* note 29, at 36.

³³ DIG. 48.10.1.13 (Marcian, Institutes 14), translated in 4 THE DIGEST OF JUSTINIAN 8242 (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., U. Pa. Press 1985).

³⁴ ROBINSON, *supra* note 29, at 36.

³⁵ Some of this early history is described in STEPHEN, *supra* note 31, at 20-22.

described the legal environment that made such expansion possible:

[Development of the *lex Cornelia de Falsis*] came partly through the replies of the emperor or his ministers to requests for decisions in particular cases and partly through the opinions of the great jurists as embodied in such manuals of the law and handbooks for provincial governors as Gaius' *Libri ad edictum provinciale*, Paul's *Sententiae*, and Ulpian's *Libri de officio proconsulis*. The law was never a precise collection of rules and sanctions, with penalties incurred automatically by those found guilty of offences. It was a system of direction for the guidance of those charged with administering the law, who were allowed considerable latitude in their decisions and were free to elaborate the punishments when there were aggravating circumstances and mitigate them when there were extenuating circumstances.³⁶

The early part of the first century C.E. witnessed several significant expansions in the *lex Cornelia de Falsis*. Augustus, who had been Emperor since 31 B.C.E., had begun to allow the Senate a significant role as a lawmaking body through means of Senate resolutions or directives known as *senatusconsulta* ("SC").³⁷ One of these, *SC Libonianum* of 16 C.E., expanded the definition of *falsum* to include the writing of oneself into the text of a will,³⁸ as well as possibly the forgery of documents other than wills.³⁹ A second, and even more significant, expansion of the *lex Cornelia* occurred a few years later. *SC Messalianum* of 20 C.E.⁴⁰ and *SC Geminianum* of 29 C.E.⁴¹ extended the *falsum* to in-

³⁶ Grierson, *supra* note 28, at 243 (citing THEODOR MOMMSEN, *RÖMISCHES STRAFRECHT* 1037-44 (1899)).

³⁷ BORKOWSKI, *supra* note 27, at 35-36.

³⁸ CODE JUST. 9.23.1, translated in 15 *THE CIVIL LAW* (S.P. Scott trans., 1932); see Bernardo Albanese, *Sul Senatconsulto Liboniano*, 36 *ANNALI DEL SEMINARIO GIURIDICO DELLA UNIVERSITA DI PALERMO* 289 (1976).

³⁹ The development of the *lex Cornelia* and other Roman criminal law during this period (known as the Principate) is described in Alvaro D'Ors, *Contribuciones a la Historia del "Crimen Falsi,"* 2 *STUDI IN ONORE DI EDOARDO VOLTERA* 527 (1971); Giovanni Pugliese, *Linee Generali dell'evoluzione del Diritto Penale Pubblico Durante il Principato*, 2 *AUFSTIEG UND NIEDERGANG DER RÖMISCHEN WELT* 722 (1982); Fabio Marino, *Il Falso Testamentario nel Diritto Romano*, *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE* 634 (1988).

⁴⁰ *MOAICARUM ET ROMANARUM LEGUM COLLATIO* 8.7.2 (Ulpian, Proconsulis 8) 101 (M. Hyamson trans., 1913).

⁴¹ *Id.* 8.7.3., at 101.

clude a wide range of trial-related offenses, such as perjury and false testimony (whether oral or written), subornation of perjury, withholding of evidence, bribery and extortion of judges and jurors, and the making of false accusations.⁴²

Probably the greatest expansion in the concept of *crimen falsi* occurred during the reign of the Emperor Hadrian (117-38 C.E.). It was during this period that the criminal sanctions of the *lex Cornelia* were first applied to deceitful conduct involving commercial transactions.⁴³ Under Hadrian, the notion of *falsum* was understood to include both the use of false weights and measures⁴⁴ and the selling of the same thing fraudulently to two people.⁴⁵ The *lex Cornelia* may even have been interpreted to apply to what amounts to the modern offense of false claims.⁴⁶ So expansive was the interpretation of *crimen falsi* that, by the third century, C.E., it was difficult to distinguish between fraudulent business conduct that was subject to the jurisdiction of the *questio de falsis* and that which was to be dealt with under a vague, quasi-criminal residual category known as *stellionatus*, or swindling.⁴⁷ One can only speculate as to why the concept of

⁴² ROBINSON, *supra* note 29, at 37; D'Ors, *supra* note 39, at 553-57; Pugliese, *supra* note 39, at 756-60. So significant was this expansion in jurisdiction that, by the time of the Emperor Nero's reign in the middle of the first century C.E., the caseload associated with the *lex Cornelia* was weighty enough to have ruined the health of Rutilius Gallicus, the judicial officer assigned to deal with cases involving the *crimen falsi*. RICHARD A. BAUMAN, CRIME AND PUNISHMENT IN ANCIENT ROME 103 (1996).

⁴³ BAUMAN, *supra* note 42, at 158; ROBINSON, *supra* note 29, at 37.

⁴⁴ DIG. 48.10.32.1 (Modestinus, Punishments 1), DIGEST OF JUSTINIAN, *supra* note 33, at 829a ("If a seller or a buyer tampers with the publicly approved measures of wine, corn, or any other thing, or commits a deception with malicious intent, he is sentenced to a fine of double the value of the thing concerned; and it was laid down by decree of the deified Hadrian that those who had falsified weights or measures should be relegated to an island."); *id.*, 7.11.6 (Ulpian 8 de off. proconsulis).

⁴⁵ BAUMAN, *supra* note 42, at 158; DIGEST 48.10.21 (Paul, ad Senatus Consultum Turpillianum) ("Anyone who sells the same thing as a complete whole by separate contracts to two persons is punished by the penalty for forgery, as was laid down by the deified Hadrian").

⁴⁶ In the words of Marcellus, "[if any tutor or curator] contrary to this law cheats the prefects or the state treasury he is punished in exactly the same manner as if he had committed forgery." DIG. 48.10.1.9 (Marcian, Institutes 14) in DIGEST OF JUSTINIAN, *supra* note 33, at 823a.

⁴⁷ See D'Ors, *supra* note 39, at 557; ROBINSON, *supra* note 29, at 39. The *stellionatus* is described by Robinson as:

crimen falsi grew to encompass such a seemingly disparate collection of offenses. The Roman jurists themselves, as was their practice, offer no theoretical account of why such offenses should be linked together. The closest we come is a somewhat vague statement from the commentator Paul, who characterized *crimen falsi* as applying to "that which in reality does not exist, but is asserted as true."⁴⁸

Any plausible explanation for such expansion must recognize the procedural context in which the *crimina falsi* developed. Despite its Latinate origins, the Roman principle of *nullum crimen sine lege* ("no crime without law") was considerably weaker than the modern principle of legality.⁴⁹ The complex relationship among the Emperor, the Senate, and the commentators allowed for specialized courts such as the *questio de falsis* to respond to the particular needs of the day by analogizing to existing legislation, effectively creating new offenses. Assigning jurisdiction over specific crimes to specialized courts, moreover, undoubtedly led to a kind of "jurisdiction creep." When social problems involving deceit in court proceedings or commercial transactions arose, it was natural to look for a solution to the *questio de falsis*, which had already been dealing with (what must have been seen as) analogous issues in the context of forgery and counterfeiting. The result, by the third century C.E., was a collection of *crimina falsi* far broader than Sulla could ever have envisioned.

clearly a vague crime, a catch-all for the dishonest, comparable with the delict of *dolus*; Paul described *stellionatus* as a means of persuading someone to hand his property to another. It was as this kind of safety-net against criminals that we find it received into both Scots and French law. Just as the *actio de dolo* was a residuary in private law, so in the criminal field *stellionatus* could be charged wherever there was fraudulent dealing which, nevertheless, did not fall within any other crime, such as forgery or theft. Examples given are pledging the same thing twice, or pledging another's property as though one's own, or imposture, or withholding wages; also classed under *stellionatus* was a case of perjury, where someone swore in a document that something was his own when in fact it was only pledged.

Id. at 32 (footnotes omitted). For further discussion of the *stellionatus*, see *infra* note 62.

⁴⁸ Paul. Coll. 8, 6, 1 (quoted in ADOLF BERGER, *ENCYCLOPEDIA OF ROMAN LAW* (1953)). See also S.P. SCOTT, *THE CIVIL LAW*, at 47 n.1 (1973 ed.) (describing *crimen falsi* as embracing "nearly every species of deceit by whose agency anyone might be prejudiced, or deprived of his rights").

⁴⁹ For a discussion of the Roman origins of this doctrine, see JEROME HALL, *PRINCIPLES OF CRIMINAL LAW* 27-30 (2d ed. 1960). See also T.R.S. ALLAN, *LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM* 33-39 (1993).

B. CRIMES OF DECEIT IN *LAS SIETE PARTIDAS*

Standing approximately midway between Roman law and the enactment of modern civil codes on the Continent, *Las Siete Partidas* (the Seven Books of Law) constitute one of the great landmarks of Spanish law and a crucial step in the development of European law.⁵⁰ Enacted in 1262, the *Partidas* were compiled by lawyers, scholars, and theologians in the court of Alfonso X, known as "the Wise" or "Learned" because of his achievements in science and letters.⁵¹

The purpose of the compilation was to provide a common system of law for all of the inhabitants of Alfonso's realm.⁵² There is some question as to whether *Las Siete Partidas* were ever intended to be a code of enforceable law, or whether instead they were to function as a kind of legal encyclopedia, a guide to future legislation—rather like the Restatements or Model Penal Code of their day.⁵³ Indeed, one of the most interesting aspects of *Las Siete Partidas* is the inclusion, within each *Partida*, of extensive commentaries containing moral advice and practical philosophy.⁵⁴

Although the *Partidas* themselves contain little explicit indication of their sources, the influence of Roman law (as well as canon law) is evident throughout.⁵⁵ Many provisions are drawn almost verbatim from Justinian's *Digest*.⁵⁶ Moreover, the *Partidas* are structured in an obviously "civilian" manner. Reminiscent of Roman law and later civil codes in France and elsewhere, each of the seven books treats a different area of the law—canon law; public law (government and administration of

⁵⁰ *LAS SIETE PARTIDAS* (Samuel Parsons Scott trans., 1931).

⁵¹ Charles Sumner Lobingier, *Introduction to LAS SIETE PARTIDAS* (Samuel Parsons Scott trans., 1931), *supra* note 50, at xlix.

⁵² Marilyn Stone, *Las Siete Partidas in America: Problems of Cultural Transmission in the Translation of Legal Signs*, in *TRANSLATION AND THE LAW* (Marshall Morris ed., 1995).

⁵³ See Lobingier, *supra* note 51, at llii.

⁵⁴ As described by one historian, the *Partidas* provided a "complete body of morality and religion, defining the duties of every citizen, from the highest to the lowest station; assigning the grounds of their duties, and deducing one obligation from another with great precision and with some force of reasoning." 6 SAMUEL ASTLEY DUNHAM, *HISTORY OF SPAIN AND PORTUGAL*, 109, 131-32 (1832) (quoted in Lobingier, *supra* note 51, at lvii).

⁵⁵ PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 65-66 (1999).

⁵⁶ Lobingier, *Introduction*, *supra* note 51, at liv.

law; public law (government and administration of justice); procedure and property; family law; obligations (contracts) and maritime law; successions (inheritance and wills); and crime and punishment.⁵⁷

Criminal law is dealt with in the Seventh *Partida*. As in modern criminal codes, the primary mode of classification is harmfulness.⁵⁸ Title VIII of the Seventh *Partida*, for example, collects various homicide offenses: intentional killings, accidental killings through no fault of the defendant, accidental killings caused by defendant's fault, abortions, infanticide, and deaths caused by physicians or apothecaries. Similarly, Title XV contains a collection of property offenses: damage to houses and ships, property damage caused by domesticated animals, and assorted criminal nuisances.

But, given both the influence of Roman law and the moral cast of *Las Siete Partidas*, it is not surprising that harmfulness is not the only criterion by which crimes are classified. Indeed, the Seventh *Partida* seems as much a guide to proper conduct as a criminal code—a quality that is apparent in its extended discussion of subjects such as what it means to cause a person's dishonor,⁵⁹ and what constitutes proper grounds for the renunciation or repudiation of a friendship.⁶⁰

Of particular interest is Title VII of the Seventh *Partida*, which deals with *Falsedad*, offenses "concerning deceit." The offenses mentioned include "deceit practiced by a wife when she presents the child of another person to her husband as his own"; forging documents or seals; "revealing the secrets of the king"; falsely measuring lands or establishing boundaries; possessing false weights and measures; counterfeiting money; and practicing alchemy (which consists of "deceiving men and making them believe what cannot be according to nature").⁶¹ Also included are the fraudulent alteration, concealment, and de-

⁵⁷ LAS SIETE PARTIDAS, *supra* note 50.

⁵⁸ The Seventh *Partida* also contains procedural provisions involving matters such as double jeopardy, who may be charged with a criminal offense and who may bring such charges, jurisdictional matters, and termination and settlement of criminal proceedings. LAS SIETE PARTIDAS, *supra* note 50, at 1303-1484

⁵⁹ *Id.*, at 1351-62.

⁶⁰ *Id.* at 1371.

⁶¹ *Id.* at 1338-41.

struction of documents; giving false testimony; subornation of perjury; and bribery of, and solicitation by, witnesses and judges.⁶²

There are several aspects of *Las Siete Partidas*' treatment of crimes of deception that need to be noted. First is the remarkable specificity of such offenses, which are considerably more detailed than in the *lex Cornelia de Falsis*. Second is the comprehensiveness of the apparatus surrounding these offenses, including rules about who can be a defendant and who may bring an accusation, as well as penalties upon conviction (ranging from burning at the stake for counterfeiting and death for forgery, to banishment to an island for a period of years for using false weights and measures). Third, and perhaps most significant, is the commentary that goes with codification. Here, for the first time are a definition of deceit ("the alteration of the truth") and a statement of moral values that apparently link these various offenses. Title VII of the Seventh *Partida*, *Falsedad*, begins, "One of the greatest acts of wickedness which a man can be guilty of is to deceive, for many evils and great injuries result to men from this."⁶³ *Las Siete Partidas* thus makes explicit what the Roman law had only implied: that the primary link among these various, apparently disparate offenses is the morally wrongful act of deceit and the particular kinds of harms with which that act is associated.

III. TRANSFORMATIONS IN THE LAW OF *CRIMEN FALSI*

Given its Roman origins and subsequent development in Spain, it is not surprising that the concept of *crimen falsi* has en-

⁶² *Id.* at 1337. Yet, broad as Title VII of the Seventh *Partida* is, it should be noted that it does not contain (what was apparently viewed as the less serious crime of) fraud, which is codified elsewhere (in Title XVI) and defined as deception committed with the intent to cheat. *Id.* at 1406-10. Examples of fraud are knowingly selling something as gold or silver, knowing that it is not so; or representing any good as being of a higher quality than it actually is; using false dice, tricking people into abandoning their property (for example, by throwing a serpent into a crowd at a public market or fair, and frightening people into fleeing and abandoning their merchandise); and convincing credulous people that one has magical powers. In this, *Las Siete Partidas* again seems to have followed the Roman law, which treated the offense of *stellionatus*, or swindling, separately from the *crimina falsi*. See *supra* note 47 and accompanying text.

⁶³ *Id.* at 1337.

joyed particular prominence in civil law jurisdictions. During the eighteenth century, for example, civil law scholars such as Thomas Wood⁶⁴ and Samuel Hallifax⁶⁵ made *crimen falsi* a central element in their schemes of classification. Even today, though the category of *crimen falsi* has virtually disappeared from modern criminal codes, the leading legal encyclopedias in Spain, Italy, Mexico, and Argentina all continue to offer lengthy discussions of the subject.⁶⁶

⁶⁴ Wood's book, *An Institute of the Laws of England; or the Law of England in their Natural Order, According to Common Use* (1720), has been referred to as "the leading work on English law until superseded by Blackstone's *Commentaries* in 1769." DANIEL R. COQUILLETTE, *THE CIVILIAN WRITERS OF DOCTORS' COMMON*, LONDON 199 (1988) (citations omitted). See also 12 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 418-20, 425-28 (1938 ed.); Alan Watson, *Justinian's Institutes and Some English Counterparts*, in *JUSTINIAN'S INSTITUTES IN MEMORY OF J.A.C. THOMAS* 181, 185-86 (1983). Wood's *New Institute of Imperial or Civil Law* (originally published in 1704), one of the major English works on Roman law, contains an especially broad view of the *crimina falsi*. See THOMAS WOOD, *AN INSTITUTE OF THE IMPERIAL OR CIVIL LAW* § III.10.14, at 282-83 (4th ed. 1730). Wood wrote that the *crimina falsi* all involved the "fraudulent suppression or imitation of truth to the prejudice of another." Three things, he said, were required in such crimes: "corruption of truth, deceit and damage to another." *Id.* Wood then went on to list the "various shapes" of falsehood that make up the *crimina falsi*: (1) "when one sells or mortgages the same thing to two persons in two several contracts"; (2) "perjury, when a witness knowingly bears false witness in a court of justice, or is guilty of suborning others"; (3) "By writing, as in forgery, or signing of false instruments and deeds, or knowingly using instruments forged by others; or when a notary writes that which was false, or omits that which is true, or by concealing any writing, or blotting, cutting out what was written or opening, unsealing and altering the wills or private letters of other men"; (4) "By fact, which has no relation to writing, as when a child is fraudulently put in the place of another child; when a false person is represented"; and (5) "False weights and measures made use of; a false coat of arms assumed; the publick money clipped, or false money coined, &c." *Id.*

⁶⁵ Hallifax, another leading eighteenth century English scholar of Roman law, explained that the *lex Cornelia de Falsis* "was enacted to punish the fraudulent suppression or imitation of truth, to the prejudice of another." SAMUEL HALLIFAX, *AN ANALYSIS OF THE ROMAN CIVIL LAW* 134 (2d ed. 1775). Included in this class of offenses, which "might be committed by words, by writing, or by deed," were perjury, subornation of perjury, forgery, counterfeiting, false weights and measures, "selling or mortgaging the same thing to two persons in two several contracts," and "supporting the law suit of another by money, witnesses, or patronage." *Id.*

⁶⁶ See ENCICLOPEDIA JURÍDICA ESPAÑOLA (entry on *falsedad*) (Spain); 16 ENCICLOPEDIA DEL DIRITTO 504 (1967) (entry on *falsità e falso*) (Italy); D-H DICCIONARIO JURÍDICO MEXICANO 1425 (2d ed. 1987) (entry on *falsificación*) (Mexico); 11 ENCICLOPEDIA JURÍDICA OMEBA 849 (1977) (entry on *falsedad*) (Argentina).

A. *CRIMEN FALSI* UNDER THE COMMON LAW

In comparison to the civil law tradition, the path of *crimen falsi* in the common law has been an uneven and circuitous one. The history is marked by two major shifts: first, from a (relatively insignificant) substantive criminal law classification to category in evidence law (described in this section); and second, from an evidentiary category that resulted in the disqualification of witnesses, to one that resulted merely in their impeachment (described in the next section).

Although the concept of *crimen falsi* is mentioned by early common law commentators such as Glanville⁶⁷ and Bracton,⁶⁸ it never played a particularly significant role in their schemes of classification. Both commentators use the term narrowly to refer almost exclusively to forgery and counterfeiting (much as it had been used in Sulla's time).

Why did the early English commentators define *crimen falsi* so narrowly? One explanation is that the moral theory they attached to *crimen falsi* was a narrow one. Unlike Roman law,⁶⁹ early English common law viewed the central *crimen falsi* offenses of counterfeiting and forgery as having more to do with treason than with deceit. Since the issuance of coinage and official documents had always been a prerogative of sovereignty, the theory went, counterfeiting and forgery posed a threat to such sovereignty, and were therefore analogous to treason.⁷⁰

⁶⁷ See RANULF DE GLANVILLE, *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND* XIV:7, at 176-77 (orig. publ. 1187-89; G.D.C. Hall trans. & ed., 1965) (*crimen falsi* offenses include making false charters, false measures, or false money "and other similar offences of which one element is falsifying for which a person ought to be accused and, when convicted, condemned"). This anonymous work, believed to have been written by Glanville, is regarded as the earliest systematic treatise of English law. For further discussion of Glanville's treatment of *crimen falsi*, see 1 STEPHEN, *supra* note 31, at 177-78.

⁶⁸ 2 HENRY DE BRACTON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 337 (Samuel E. Thorne trans. & ed., 1968) (limiting *crimen falsi* offenses to forgery, counterfeiting, and clipping of currency).

⁶⁹ Grierson, *supra* note 28, at 241 ("The view that counterfeiting was no more than a species of fraud was deeply embedded in Roman jurisprudence.").

⁷⁰ As Blackstone explains, counterfeiting was regarded as "a breach of allegiance, [an infringement] of the king's prerogative, [an assumption of] one of the attributes of the sovereign." See 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* *83, 89 (William Draper Lewis ed. 1902). It should be noted, however, that Blackstone attacked this form of reasoning, arguing that "counterfeiting or debasing the

Given this non-deception-based view of *crimen falsi*, it is not then surprising that "convictions for many offenses, clearly belonging to the *crimen falsi* of the civilians" were not viewed as such by the common law.⁷¹ Excluded, for example, were "private cheats, such as the obtaining of goods by false pretences, or the uttering of . . . forged securities."⁷²

Eventually, a shift to a broader, Roman-like, deception-based theory of *crimen falsi* would occur, but not before an earlier shift from substantive criminal law classification to evidentiary category, in the late 1600s.⁷³ It was at this point that *crimen falsi* came to be regarded as one of three categories of "infamous" crimes (the others being treason and felony) that rendered a witness incompetent to testify.⁷⁴

This shift to evidentiary category, in turn, brought with it another shift in theory. Initially, disqualification of witnesses had been viewed as a form of punishment. A person convicted of a crime "lost his law" (*i.e.*, his right to appear in court).⁷⁵ The problem with such punishment-based disqualification, however, was that it tended to penalize innocent defendants who needed

coin [are] usually practiced, rather for the sake of private and unlawful lucre, than out of any disaffection to the sovereign." *Id.* at 89.

⁷¹ See 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 372, at 516 (15th ed. 1892).

⁷² *Ex parte Wilson*, 114 U.S. 417, 423 (1885) (explaining what constituted an infamous crime at common law).

⁷³ A similar shift occurred in the realm of perjury, which, until the fifteenth century, was viewed as having more to do with disobedience to the state (and violating an oath) than with telling a lie. See Michael D. Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts*, 24 AM J. LEG. HIST. 145 (1980). Some modern authorities continue to view perjury in this manner. See, e.g., *United States v. Manfredonia*, 414 F.2d 760, 764 (2d Cir. 1969) ("It is for the wrong done to the courts and the administration of justice that punishment is given" in cases of perjury); Bennet L. Gershman, *The "Perjury Trap"*, 129 U. PA. L. REV. 624, 636 (1981). Cf. James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841, 1866-69 (1996) (describing links between Roman law and the rise of "commercial morality" in 17th century Holland, especially in the context of legal rules regarding counterfeiting and false weights and measures).

⁷⁴ 1 FRANCIS WHARTON, A COMMENTARY ON THE LAW OF EVIDENCE §397, at 354 (1877). Because the latter two categories were punishable by death, it was "very natural that crimes, deemed of so grave a character as to render the offender unworthy to live, should be considered as rendering him unworthy of belief in a court of justice." *Id.* at § 373, at 515.

⁷⁵ 9 HOLDSWORTH, *supra* note 64, at 191.

to rely on the testimony of convicted witnesses. If conviction for *crimen falsi* was to continue as a basis for disqualification, it would need some new theory to support it. The theory that developed was based, in Wigmore's words, on "*actual moral turpitude, i.e., the person is to be excluded because from such a moral nature it is useless to expect the truth.*"⁷⁶ This theory was also consistent with the "social stratification of England, where class degradation was of itself a serious source of untrustworthiness, and where a judicial accusation of crime was in fact a perquisite chiefly of the lower classes."⁷⁷ Under this theory, a person convicted of *crimen falsi* became, as Greenleaf put it, "morally too corrupt to be trusted to testify; so reckless of the distinction between truth and falsehood and insensible to the restraining forces of an oath, as to render it extremely improbable that he will speak the truth at all."⁷⁸

The idea that witnesses convicted of *crimina falsi* were not to be believed also seems to have reflected the emergence of deceit as a significant moral element in English substantive criminal law. Nowhere is this phenomenon clearer than in the developing law of theft.⁷⁹ Although larceny (theft by stealth) had been a crime as early as the thirteenth century, theft by deceit, in its various forms, was not criminalized until much later: common law cheat (typically, the use of false weights and measures) did not become a crime until at least 1541;⁸⁰ forgery in

⁷⁶ 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 725-26 (James H. Chadbourn rev. 1979).

⁷⁷ *Id.*

⁷⁸ See 1 GREENLEAF, *supra* note 71, at 516.

⁷⁹ The common law history of theft law is considered in, among other sources, *Bell v. United States*, 462 U.S. 356, 358 (1983); to MODEL PENAL CODE § 223.1, comment at 128; GEORGE FLETCHER, RETHINKING CRIMINAL LAW 90-122 (1978); JEROME HALL, THEFT, LAW AND SOCIETY (2d ed. 1952); PERKINS & BOYCE, *supra* note 11, at 289-91; LAFAVE & SCOTT, *supra* note 11, at 702-03 & n.2; Kathleen F. Brickey, *The Jurisprudence of Larceny: An Historical Inquiry and Interest Analysis*, 33 VAND. L. REV. 1101 (1980); George P. Fletcher, *Manifest Criminality, Criminal Intent, and the Metamorphosis of Lloyd Weinreb*, 90 YALE L.J. 319 (1980); Lloyd L. Weinreb, *Manifest Criminality, Criminal Intent, and the Metamorphosis of Larceny*, 90 YALE L.J. 294 (1980).

⁸⁰ 33 Hen. VIII, c.1 (1541). On the origins of the law of common law cheat, see HALL, *supra* note 79, at 40; 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW ch. 10, 77-94 (5th ed. 1872).

1562;⁸¹ false pretenses in 1757 (and then only as a misdemeanor)⁸²; and larceny by trick in 1779.⁸³ In the earlier period, the law of theft had been limited by the doctrine of *caveat emptor*. As Perkins and Boyce put it, "a person who deprived another of his property by force or by stealth was regarded by all as a very evil person, but he who got the better of another in a bargain by means of falsehood was more likely to be regarded by his neighbors as clever than as criminal."⁸⁴

By the latter part of the eighteenth century, then, the first transformation in the law of *crimen falsi* was complete. Driven by broader forces that changed the law of evidence and extended the reach of the criminal law, the list of disqualifying *crimen falsi* offenses in England had become nearly as extensive as the substantive criminal law classification of *crimen falsi* under Hadrian.⁸⁵ What remained to occur was the second transformation in the concept of *crimen falsi*—from a category that would cause a witness to be disqualified, to one that would lead merely to his impeachment. To understand how and why this change occurred, we need to look to the influence of Jeremy Bentham.

B. BENTHAM AND *CRIMEN FALSI*

Writing in the latter part of the eighteenth and beginning of the nineteenth centuries, Bentham set out to cure what he perceived as a sickness in the English common law. As James Steintrager has described:

Under the common law men often committed crimes because they did not even know that the activity which they pursued was criminal. Even when they did know, they might still pursue the course of action ei-

⁸¹ On the origins of the English law of forgery, see J.W. Cecil Turner, *Documents in the Law of Forgery*, 32 VA. L. REV. 939 (1946). Initially, forgery was defined very narrowly, being limited to the falsification of royal seals and official documents.

⁸² 30 Geo. II, c.24, § 1 (1757). On the origins of false pretenses law, see Arthur R. Pearce, *Theft by False Promises*, 101 U. PA. L. REV. 967 (1953).

⁸³ *The King v. Pear*, 2 East P.C. 685 (1779).

⁸⁴ PERKINS & BOYCE, *supra* note 11, at 289. Moreover, unlike larceny, theft by deception was regarded as consensual; hence, the potential for violence was considered minimal. *Id.*

⁸⁵ See 2 WIGMORE, *supra* note 76, at 730. For example, included among the crimes that would disqualify a witness from testifying were offenses such as false weights and measures and conspiracy to defraud by spreading false news. *Id.*

ther because the penal sanctions leveled against the crime were insufficient to deter them, or because the application of those sanctions was erratic and uncertain. Heinous crimes went unpunished or were often only lightly punished. Indifferent acts were punished, often with severity. Acts rightly classified as offences were punished without due regard to the nature of the crime or the circumstances in which the crime was committed. Once a case came to trial there were many obstacles to obtaining a speedy and fair conclusion. The rules of evidence were highly technical and unnecessarily complicated. Useful evidence was precluded on obscure or even absurd grounds.⁸⁶

The Rationale of Judicial Evidence, published in 1827, just five years before his death, contains Bentham's most significant attempt to reform the law of evidence.⁸⁷ Bentham sought to craft rules of evidence that, for the first time in English legal history, would reflect a rational system of philosophy and logic—rules similar to those that had been developed on the Continent.⁸⁸

His work on evidence reflects three basic principles. First, that the introduction of inferior or otherwise defective evidence is better than the exclusion of such evidence. Second, that the evaluation of the weight and credibility of evidence is best left to the discretion of the ultimate decision-maker, who should proceed rationally but largely unconfined by formal rules. Third, that the pursuit of truth is more important than most every other value in adjudication.⁸⁹ Bentham's approach, as summarized by William Twining, was to "[h]ear everyone, admit everything unless the evidence is (a) irrelevant or (b) superfluous or (c) its production would involve preponderant vexation, expense or delay."⁹⁰

Of particular concern to Bentham were the burdensome and mostly irrational rules regarding the disqualification of witnesses. Testimony "of the accused, of parties to litigation, of

⁸⁶ JAMES STREINTRAGER, BENTHAM 20-21 (1977).

⁸⁷ JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (1827) [hereinafter *RATIONALE*].

⁸⁸ G.W. KEETON and O.R. MARSHALL, *Bentham's Influence on the Law of Evidence*, in GEORGE W. KEETON & GEORG SCHWARZENBERGER, JEREMY BENTHAM AND THE LAW 79, 83 (1948).

⁸⁹ WILLIAM TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* 42, 108 (1985). See also GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 406 (1986).

⁹⁰ TWINING, *supra* note 89, at 28.

spouses and of almost anyone with any interest in the matter was excluded; Quakers and others who, for reasons of conscience, refused to take the oath in its prescribed form were also unable to testify."⁹¹ Even more problematic, in Bentham's view, was the total exclusion of witnesses who had been convicted of a crime—a rule that, as noted above, had been in effect at least since the end of the seventeenth century.⁹²

The Rationale of Judicial Evidence subjects this practice to withering criticism. Indeed, Bentham says, there is even less reason to disqualify a person with a prior conviction from testifying than there is for disqualifying a person with an interest in the litigation.⁹³ Bentham offers perjury (presumably the crime most directly probative of a witness' veracity) as a type of *a fortiori* example:

When the door of the witness-box is shut against a proposed witness on this score, it is generally on the ground of some single transgression But a single transgression of this sort, what does it prove? The violated ceremony apart . . . the conviction proves no more than this, viz. that on one assignable occasion the convict has been known to fall into that sort of transgression, which every human adult must also have fallen into, more times than one

From a man's having borne false witness in some one instance . . . it is inferred, and with the most peremptory assurance, that he will never bear true witness in the whole course of his life! [To pronounce a man guilty of an intention to commit perjury merely because he has on a prior occasion been convicted of perjury would be the summit of injustice.]⁹⁴

In short, Bentham says, the mere fact that a witness has a prior conviction, even for perjury, says little, if anything, about the likelihood that he will lie in future judicial proceedings.

Given this reasoning, it might seem doubtful that a prior conviction for perjury or some other offense involving deceit

⁹¹ *Id.* at 22.

⁹² 2 WIGMORE, *supra* note 76, at 726.

⁹³ 5 BENTHAM, *RATIONALE*, *supra* note 87, at 81-83.

⁹⁴ *Id.* at 81-83. See also JEREMY BENTHAM, *PRINCIPLES OF PENAL LAW* 486 (absent any interest in the litigation, "the most abandoned criminal that ever was upon the earth" might be trusted to testify "as safely as the man of the most consummate virtue"); CHRISTOPHER ALLEN, *THE LAW OF EVIDENCE IN VICTORIAN ENGLAND* 100 (1997) (describing Bentham's views on disqualification of witnesses convicted of a crime).

should be admissible even to impeach. "So broad, so prominent is the stigma, so conspicuous and impressive is the warning which it gives," says Bentham, "the danger is not that the man thus distinguished should gain too much credence, but that he should not gain enough."⁹⁵ In the end, though, Bentham is too much the pragmatist to pursue his reasoning to what seems its logical conclusion. He makes clear that, though he objects to the *disqualification* of witnesses on account of a prior conviction, he has no objection to using a prior conviction for purposes of *impeachment*.⁹⁶ Ultimately, Bentham says, moral turpitude should be regarded as an objection not to the *competence* of the witness, but rather to the *weight* of his evidence.⁹⁷

Bentham's views on these points proved enormously influential. Says Wigmore: "His lucid exposition of [the shortcomings in the common law theory of moral turpitude] and his determined attack upon its fallacies proved irresistible. The almost complete disappearance of this disqualification from Anglo-American law in the last century has been due to those arguments."⁹⁸ By the mid-nineteenth century, the practice of using prior convictions as a basis for disqualifying witnesses had been transformed completely into a practice of using convictions as a basis merely for impeaching their credibility.⁹⁹

Bentham's views regarding crimes of deceit in the law of evidence are thus well known and widely acknowledged. Less recognized, however, are his views regarding the place of deceit in the substantive classification of offenses. This is somewhat surprising. Bentham, who has a claim to being the greatest of all criminal law codifiers,¹⁰⁰ devoted nearly a third of his most famous work on moral and legal theory to the subject of classifi-

⁹⁵ 5 BENTHAM, *RATIONALE*, *supra* note 87, at 84.

⁹⁶ *Id.* at 84.

⁹⁷ *Id.*

⁹⁸ 2 WIGMORE, *supra* note 76, § 519, at 727. Regarding Bentham's influence on evidence law more generally, see ALLEN, *supra* note 94, at 4-13.

⁹⁹ MCCORMICK ON EVIDENCE §43, at 93 (3d ed. 1984) (Edward W. Cleary, ed.).

¹⁰⁰ See Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521, 522-23 (1988) ("Bentham's thinking on codification of criminal law had a powerful influence on every codification effort in the English-speaking world in the nineteenth and twentieth centuries, not excluding the Model Penal Code.").

cation.¹⁰¹ Indeed, Bentham can justly be regarded as the Linnaeus of the criminal law.¹⁰²

Bentham himself did not use the term *crimen falsi*, and it is now virtually impossible to know the extent, if any, to which he was familiar with the history of that concept.¹⁰³ Nevertheless, it is obvious that he was concerned with the role of deceit in the classification of crime. As William Twining has explained, despite his pragmatism, Bentham's hatred for falsehood and deception was virtually an obsession: "Some of his most virulent prose is directed at hypocrisy, fraud, swindling, quackery, and all forms of falsehood; his polemical vocabulary centres to an extraordinary degree around the themes of mendacity, deception and pretence."¹⁰⁴

Chapter XVI of Bentham's *An Introduction to the Principles of Morals and Legislation* contains his theory of the "Division of Offences."¹⁰⁵ Like virtually every other criminal law codifier, he

¹⁰¹ See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 187-280 (J.H. Burns and H.L.A. Hart, eds., Athlone Press 1970) (1780) [hereinafter BENTHAM, PRINCIPLES]. See also H.L.A. HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY 3 (1982) (noting Bentham's interest in "identifying and classifying hundreds of individual offences according to the human interests which they adversely affected. Bentham put this forward as a universal 'natural' arrangement of those forms of conduct which a code constructed on utilitarian principles would require to be treated as offences, and it was designed to serve both as a critique of existing legal systems and as the basis for the construction of new rational codes of law.").

Bentham later presented a more general theory of classification in his *Essay on Nomenclature and Classification*, in JEREMY BENTHAM, CHRESTOMATHIA, in 8 THE WORKS OF JEREMY BENTHAM, Appendix, No. 4 at 63-128 (orig. publ. 1816, John Bowring, ed. 1962). The history of criminal law codification during this period is dealt with in K.J.M. SMITH, LAWYERS, LEGISLATORS AND THEORISTS: DEVELOPMENTS IN ENGLISH CRIMINAL JURISPRUDENCE 1800-1957, 66-84 (1998). The degree to which Bentham emphasized the importance of classification as a step in the reform of criminal law seems to have been unique.

¹⁰² Thanks to Peter Alldridge and Keith Smith for this characterization.

¹⁰³ Bentham's extraordinarily wide reading undoubtedly included works of Roman and civil law, though I have been unable to find any evidence that Bentham was specifically familiar with the Roman and civil law conception of *crimen falsi*. On Bentham's early education, see CHARLES WARREN EVERETT, THE EDUCATION OF JEREMY BENTHAM (1931); MARY P. MACK, JEREMY BENTHAM: AN ODYSSEY OF IDEAS 1748-1792 (1963).

¹⁰⁴ TWINING, *supra* note 89, at 90.

¹⁰⁵ Gerald Postema has described the background against which Bentham was working:

developed a classificatory scheme based primarily on harmfulness. Bentham's highest level classification distinguishes among Offences Against Individuals, Semi-Public Offences, Self-Regarding Offences, and Public Offences. Yet Bentham's scheme of classification did not end there. Apparently recognizing the traditional role of deceit as a classificatory category, Bentham added a fifth category of offenses, which he called Multiform or Heterogeneous Offences. This category has as one of its subdivisions "Offences by Falsehood," or "Offences Concerning Trust," which consists, in turn, of four subcategories—Simple Falsehoods, Forgery, Personation, and Perjury.¹⁰⁶

Bentham's attitude toward the "Offences by Falsehood" is an ambivalent one. On the one hand, he acknowledges the significance of deceit in the classification of crime: "Offences by Falsehood," he says, "however diversified in other particulars, have this in common, that they consist in some abuse of the faculty of discourse. . . . Falsehoods, of whatever kind they be, agree in this: that they give men to understand that things are otherwise than as in reality they are."¹⁰⁷ On the other hand, Bentham expresses some obvious anxiety about the perpetuation of such categories:

Instead of considering [offences by falsehood and offences against trust] as so many *divisions* of offences, divided into *genera* . . . they may be considered as so many specific differences, respectively applicable to those *genera*. Thus, in the case of a *simple personal injury*, in the operation of which a plan of falsehood has been employed: it seems more simple and more natural, to consider the offence thus committed as a particular *species of modification* of the *genus* of offence termed a *simple personal injury*, than to consider the simple personal injury, when effected by such

[By the middle of the 18th century], the criminal law was a hodge-podge of confusion and inconsistency. English law published a "dreadful catalogue" of capital crimes, including "transgressions which scarcely deserve corporal punishment" while it omitted "enormities of the most atrocious kind." The presumption of knowledge of the criminal law embodied in the maxim "ignorance of the law is no excuse" was a cruel joke for all but a very few who could afford legal advice.

GERALD POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 264 (1986) (citations omitted).

¹⁰⁶ BENTHAM, *PRINCIPLES*, *supra* note 101, at 190-91, 203.

¹⁰⁷ *Id.* at 203.

means, as a modification of the *division* of offences entitled *Offences through falsehood*.¹⁰⁸

What Bentham seems to be saying is that a preferable classification system would identify offenses committed through falsehood as a subcategory of crimes involving injury to the person (e.g., false pretenses as a subset of theft), rather than injury to the person as a subcategory of offenses committed through falsehood (e.g., false pretenses as a subset of *crimen falsi*). As a more general matter, Bentham seems to be acknowledging the traditional significance of deceit as a factor in classification, but yielding ultimately to the demands of harmfulness as the prevailing classificatory principle.

IV. THE MODERN LAW OF *CRIMEN FALSI*

C. FEDERAL RULE OF EVIDENCE 609(A)(2)

By the time Congress enacted the Federal Rules of Evidence in 1975, Bentham's view—that a conviction for *crimen falsi* was proper for impeaching rather than disqualifying witnesses—had long since passed into common practice. The question for Congress was how exactly to formulate the traditional rule of impeachment within the broader framework of the Federal Rules. (The Law Commission for England and Wales, it should be noted, has been dealing with an almost identical problem.)¹⁰⁹

Federal Rule of Evidence 609 was designed to resolve the basic conflict posed by the practice of allowing witnesses to be impeached with prior convictions. As Weinstein and Berger have put it:

Permitting unlimited use of defendant's criminal past for impeachment undoubtedly results in more convictions; it also increases the likelihood that a person will be found guilty merely of being "bad" rather than of having committed the charged crime. Limiting the use of convictions for impeachment provides greater protection for the innocent,

¹⁰⁸ *Id.* at 191 n.g.

¹⁰⁹ The Commission's preliminary report, Law Commission Consultation Paper No. 141 (1996), can be found at:

<<http://www.open.gov.uk/lawcomm/library/lib-crim.htm#libcp141>>.

but may deny a jury information that would be helpful in evaluating the credibility of witnesses.¹¹⁰

Interestingly, though, while there was extensive debate in Congress over the precise shape of Rule 609,¹¹¹ there appears to have been virtually no discussion of the underlying premise that a person who has been convicted of either a crime of deceit or some other serious crime is unworthy of belief.¹¹²

Rule 609 reflects a crucial distinction between impeachment for *crimen falsi* and impeachment for other kinds of offenses. Under subsection (a)(1), evidence that a witness has been convicted of a crime that does not involve dishonesty or false statement is admissible only if the court determines that its probative value is not outweighed by its prejudicial effect.¹¹³

¹¹⁰ 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[01], at 609-25 (1992).

¹¹¹ "The extent of the floor debate in the House over Rule 609(a) far exceeded that relating to any other provision of the Evidence Rules." 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE, § 6131, at 154 (1993). The rule went through numerous revisions before reaching its final form. The legislative history of the rule is discussed in *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989). On the history and theory of the rules surrounding the use of character evidence generally, see David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161 (1998).

¹¹² Richard Uviller has questioned the extent to which the commission of such a crime really is probative of a witness' propensity for falsehood on the stand. H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 791-92 (1993). While I agree with him that this is a legitimate and important question, it nevertheless lies somewhere outside the scope of the inquiry here.

¹¹³ As originally enacted, Rule 609 provided that prosecution witnesses and witnesses in civil cases could be impeached with all felony convictions and any convictions involving *crimen falsi* regardless of possible prejudice to the witness. What was unclear in the original text was whether a felony conviction offered to impeach a witness in a civil case could be inadmissible because of resultant prejudice to a party, and the lower courts were divided on this issue. In *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989), the Court resolved the Circuit split, holding that a trial judge is required to admit prior felony convictions to impeach a witness in a civil case, and that only a criminal defendant is protected by the balancing provisions of the rule. Congress subsequently amended Rule 609, rejecting the holding in *Green*. Under the amendment, when the witness is "other than the accused," prior felony convictions must be subjected to the balancing provisions of Rule 403 (which provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). When the witness is the accused, however, the Rule implicitly requires a determina-

Under subsection (a)(2), however, evidence that a witness has been convicted of such a crime will be admissible regardless of its prejudicial effect. The Rule states that "evidence that any witness has been convicted of a crime shall be admitted [for the purpose of attacking the witness' credibility] if it involved dishonesty or false statement, regardless of punishment." Such convictions are considered so probative of a witness' propensity to lie that, unlike convictions for non-*crimina falsi*, they can be introduced without any balancing of probative value against prejudice. If the crime falls under this provision, the conviction must be admitted; the judge has no discretion to exclude.¹¹⁴ Moreover, under this provision, as at common law, the potential punishment for the crime is of no consequence; misdemeanors involving dishonesty or false statement, as well as felonies, are admissible.

Two basic problems with the language of Rule 609(a)(2) can be identified. The first lies in the use of the term "dishonesty or false statement." An obvious question is whether this term is meant to be coextensive with the traditional notion of *crimen falsi*, or whether it creates a new category of crimes distinct from the common law background. A second problem lies in the uncertain boundaries of the category of *crimen falsi* itself. Assuming that crimes of "dishonesty or false statement" are coextensive with the *crimina falsi*, we want to know which convictions will be covered. As the above history demonstrates, what has counted as a crime of deceit in one era has not necessarily qualified as a crime of deceit in another.

While it may seem obvious that crimes of violence such as murder, arson, and rape do not involve "dishonesty or false statement," a harder issue is raised by crimes of acquisition, such as larceny, extortion, shoplifting, tax evasion, and burglary. Moreover, it is unclear whether the Rule applies only when the *definition* of the crime committed requires dishonesty or false statement, or whether it would also apply in a particular instance in which a crime has, but need not have, been committed

tion that the "probative value" of the conviction "outweighs its prejudicial effect to the accused." It is important to note, however, that neither *Bock Laundry* nor the 1990 amendments to Rule 609 have had any effect on the meaning of the critical term, "crime involv[ing] dishonesty or false statement." See generally 3 WEINSTEIN & BERGER, *supra* note 110, ¶ 609 [08], at 609-71.

¹¹⁴ See, e.g., *United States v. Wong*, 703 F.2d 65, 67 (3d Cir.) (explaining the difference between Rule 609(a)(1) and (a)(2)), *cert. denied*, 464 U.S. 842 (1983).

through dishonesty or false statement (for example, when an accused has committed murder or rape by luring the victim into a back alley through a lie or trick or some other dishonest means).

1. *What Does (or Should) Rule 609(a)(2) Mean by "Dishonesty or False Statement"?*

Although Rule 609(a)(2) was intended to clarify the scope of the common law rule of impeachment, the use of the phrase "dishonesty or false statement" has had the opposite effect. Neither term is defined in the rules of evidence, and their meaning can hardly be described as transparent. The term "crimes involving false statement" presumably refers to crimes such as perjury, making false statements, numerous kindred false statements offenses, and perhaps subornation of perjury.¹¹⁵ The difficult task is in determining which additional crimes, if any, should count as "crimes involving dishonesty."

We can identify four basic approaches adopted by the courts and commentators in interpreting the word "dishonesty" as it appears in Rule 609(a)(2). Under the first approach, virtually any crime would qualify as a crime of "dishonesty." Such a view is based on the premise that "all crimes imply disregard for social obligations, hence a willingness or propensity to lie."¹¹⁶ Obviously, the group of crimes so identified would be far larger than those contained in the traditional category of *crimen falsi*.

This was the position taken by Representative Danielson during the debate on the floor of the House. According to Danielson:

[T]here is no point in using both terms in section 609(a) unless they mean two different things, or at least that the term "dishonesty" is much broader than "false statement."

Who can state that murder does not involve dishonesty? Who can, for instance, say stealing does not involve dishonesty? If stealing does not involve dishonesty, then what does it involve?

¹¹⁵ Of course, while one need not actually make a false statement to commit subornation of perjury, the purpose of such conduct is to further the making of a false statement.

¹¹⁶ CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *MODERN EVIDENCE: DOCTRINE AND PRACTICE* § 6.44, at 837 (1995).

The terms "dishonest" and "false statement" are not synonymous as used in this code section . . . [I]t was and is my intention that the term "dishonesty" is broader than "false statement," and any offense involving moral turpitude such as stealing, robbery, burglary, or what have you, in my opinion is an offense involving dishonesty.¹¹⁷

Although few courts have gone quite as far as Danielson suggests, some have construed Rule 609(a)(2) very broadly, to apply to crimes that have nothing whatsoever to do with deceit, such as heroin possession,¹¹⁸ armed robbery,¹¹⁹ assault,¹²⁰ prostitution,¹²¹ and drunk driving.¹²²

The obvious problem with this view is that it tends to obviate almost any distinction between Section (a)(1) and (a)(2). By qualifying virtually any crime as a crime "involving dishonesty or false statement," prosecutors would almost always be able to avoid the subsection (a)(1) requirement that probative value not be outweighed by prejudicial effect. They would invariably

¹¹⁷ 120 Cong. Rec. 2377-81, quoted in 28 WRIGHT & GOLD, *supra* note 111, § 6131, at 159. Against this view, Congressman Wiggins stated: "The thrust of 'dishonesty' as used in this bill goes to his veracity and his ability to relate the truth. 'Dishonesty' is tested, for example, by perjury convictions and convictions dealing with false statements, but not general criminality. Evidence for a conviction of murder goes to criminality, not to dishonesty." *Id.* at 158-59.

Rule 8.4 of the Model Rules of Professional Conduct presents an analogous interpretive problem. The rule says that it is "professional misconduct for a lawyer to," *inter alia*, "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," or "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Commentary to Rule 8.4 states:

It could be argued that the commission of *any* crime reflects on a lawyer's honesty or his fitness, because honest people do not commit crimes. But this argument does not recognize, as the criminal law does, that even among serious crimes the degree of immorality involved may differ and so may implications about the offender's character.

2 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 8.4:301, at 955 (2d ed.) (1992 supp.).

¹¹⁸ *United States v. Barnes*, 622 F.2d 107 (5th Cir. 1980).

¹¹⁹ *United States v. Krinslow*, 860 F.2d 963, 968 (9th Cir. 1988).

¹²⁰ *United States v. Harvey*, 588 F.2d 1201 (8th Cir. 1978); *United States v. Jackson*, 405 F. Supp. 938 (E.D.N.Y. 1975).

¹²¹ *United States v. Cox*, 536 F.2d 65, 71 (5th Cir. 1976); *United States v. Walker*, 613 F.2d 1349 (5th Cir.), *cert. denied*, 446 U.S. 944 (1980).

¹²² *United States v. Lossiah*, 537 F.2d 1250 (4th Cir. 1976).

seek to rely on the more permissive language of Subsection (a)(2).

A second approach lies at the other extreme. It would essentially read the word "dishonesty" out of the Rule. This is the view suggested by a number of scholars, who have argued that the term "dishonesty" has "little meaning,"¹²³ that it is "superfluous,"¹²⁴ and that it is "virtually swallowed by its partner, 'false statement.'"¹²⁵

Understood literally, this reading of the rule is incorrect as well, since there are a number of traditional *crimen falsi* offenses that do not require a false statement. Fraud and forgery are the most obvious examples.¹²⁶ Although neither crime requires the making of a false statement, both were certainly regarded as *crimina falsi* at common law, and both are at least as probative of a witness' credibility as offenses that do involve false statements, such as perjury and false declarations.¹²⁷

A third possibility is to read the word "dishonesty" broadly enough to include crimes involving wrongful pecuniary gain—such as larceny, bribery, smuggling, and tax evasion—but not so broadly as to refer to crimes of pure violence, like murder and rape. Such an interpretation would obviously exceed the traditional common law scope of *crimen falsi*. This was the view favored by Mason Ladd (writing well before the adoption of the Federal Rules):

¹²³ MCCORMICK, *supra* note 99, § 43, at 95 n.10 ("little meaning attaches to 'dishonesty,' save perhaps for embezzlement, and conflict among courts attempting to reconcile plain meaning with legislative history has resulted").

¹²⁴ John Schmertz, *The First Decade Under Article VI of the Federal Rules of Evidence: Some Suggested Amendments to Fill Gaps and Cure Confusion*, 30 VILL. L. REV. 1367, 1447-48 (1985).

¹²⁵ 28 WRIGHT AND GOLD, *supra* note 111, at 247.

¹²⁶ See, e.g., *Lustiger v. United States*, 386 F.2d 132 (9th Cir. 1967) (in mail fraud case under 18 U.S.C. § 1341, "[T]he fact that there is no misrepresentation of a single existing fact is immaterial. It is only necessary to prove that it is a scheme reasonably calculated to deceive . . ."), *cert. denied*, 390 U.S. 951 (1968).

¹²⁷ In fairness to the authors criticized, it should be noted that all of them seem to favor a construction of Rule 609(a)(2) which would in fact include deception crimes that do not involve false statements. My criticism is based solely on their failure to recognize the difference between crimes of dishonesty and crimes of false statement, and on the logical consequences of this error.

The classification of *crimen falsi* is too narrow . . . to meet the credibility test. . . . [R]obbery, larceny, and burglary, while not showing a propensity to falsify, do disclose a disregard for the rights of others which might reasonably be expected to express itself in giving false testimony whenever it would be to the advantage of the witness.¹²⁸

The problem with this view, however, is that it blurs the moral distinction between stealing and lying. A person who steals is certainly dishonest; she rejects the idea of making an honest living; she cheats; she takes something to which she is not entitled; she disobeys the rules. But there is no particular reason to think that she is deceitful. Indeed, what little empirical evidence there is indicates that a prior conviction for larceny (stealing by stealth) says little or nothing about a witness' propensity to lie.¹²⁹

The final, and, in my view, best, reading of Rule 609(a) (2) is that the phrase "dishonesty or false statement" should be understood as a stand-in for the traditional common law notion of *crimen falsi*. This construction would allow room for offenses like perjury and false statements (which do involve false statements) as well offenses like false pretenses, medicare fraud, mail fraud, securities fraud, welfare fraud, making false claims, knowingly passing bad checks, tampering with measuring devices, and forgery (all of which involve some form of deception, but do not necessarily involve false statements). At the same time, it would exclude pecuniary offenses not traditionally viewed as *crimina falsi*, such as larceny, robbery, receiving stolen property, blackmail, extortion, and bribery. Also excluded would be crimes that require neither dishonesty nor deception, such as rape, murder, assault, battery, public drunkenness, driving while intoxicated, and prostitution and other sex offenses.

Under this construction, then, one would read the phrase "crimes involving dishonesty or false statement" as equivalent to the phrase "crimes involving deceit or false statement," or, more simply, "crimes involving deceit" (since every crime that involves

¹²⁸ Mason Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 180 (1940).

¹²⁹ See A.N. Doob & H.M. Kirshenbaum, *Some Empirical Evidence On the Effect of s.12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88, 89 (1972-73) ("The data indicate that a person who would be likely to steal something in one situation would not be more likely to tell lies in a second situation than would someone who would not steal in the first instance. In other words, the data indicate that these kinds of behaviors are very specific to situations.").

an intentional false statement also involves deceit). In other words, one would allow impeachment under Rule 609(a)(2) only when the prior conviction involved a crime that would fit into the traditional category of *crimen falsi*.¹³⁰

2. *Should Courts Be Permitted (or Required) to Inquire Into Facts Underlying a Conviction in Order to Determine if a Crime Was Committed by Means of Dishonesty or False Statement?*

There remains the question whether, even when the crime for which defendant was convicted does not require a showing of falsity or deceit, a court may look to the manner in which the crime was committed in order to determine whether a prior conviction involves deceit, and therefore falls within the scope of Rule 609(a)(2). According to Mueller and Kirkpatrick, "[o]verwhelmingly . . . the practice is to allow and even encourage inquiry into underlying facts."¹³¹ This is also the position endorsed by Richard Uviller, who argues that expanding the category of "dishonesty or false statement" crimes beyond the traditional list of *crimen falsi* offenses "accords with the govern-

¹³⁰ Even under this approach, however, there remains the question of how to deal with offenses, like embezzlement, in which the presence of deceit is ambiguous. The Conference Committee Report itself has contributed to this confusion by listing embezzlement, along with obvious deceit crimes such as perjury, subornation of perjury, false statement, criminal fraud, and false pretenses, as examples of offenses that are covered by Rule 609(a)(2). Following the Conference Report, most courts have held that embezzlement is covered by the Rule. *See, e.g.,* Gaudin v. Shell Oil Co., 132 F.R.D. 178, 179 (E.D. La. 1990). At the same time, by referring to "embezzlement" and "false pretenses," rather than "theft," the Report seems to imply that not all theft offenses are per se crimes of dishonesty—again, an understanding that has been adopted by most courts. Independent of the Conference Report, however, we need to ask whether embezzlement really should be included in the list of *crimina falsi*. In one sense, embezzlement does seem to involve an element of falsehood or deceit, since it is hard to imagine a case of embezzlement in which the perpetrator has not in some sense deceived his victim (at least into believing that the perpetrator is honest and loyal). But the better view, I think, looking to the formal elements of the offense, is that embezzlement is not a crime of deceit.

¹³¹ 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE*, § 278, at 270 (2d ed. 1994) (listing cases). *See also, e.g.,* United States v. Mejia-Alarcon, 995 F.2d 982, 989-90 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 334 (1994); Altobello v. Borden Confectionary Products, Inc., 872 F.2d 215, 216 (7th Cir. 1989); United States v. Givens, 767 F.2d 574, 579 n.1 (9th Cir. 1985); United States v. Lipscomb, 702 F.2d 1049 (D.C. Cir. 1983); United States v. Grandmont, 680 F.2d 867, 870-72 (1st Cir. 1982). For a contrary view, *see* United States v. Lewis, 626 F.2d 940, 946 (D.C. Cir. 1980).

ing concept of relevance: The behavior of the individual in committing the crime reveals a trait of character from which the inference of testimonial mendacity may be reasonably drawn. If anything, it is the actor's behavior that supports the inference, not the statutory definition of the crime."¹³²

There are, however, compelling reasons to question such a departure from the common law evidentiary approach to *crimen falsi*. The most commonly expressed argument centers on administrative concerns. Allowing courts to inquire into the underlying facts of a prior conviction tends to create confusion and administrative burdens.¹³³

The problem posed by such an inquiry can be understood as analogous to a problem in Double Jeopardy law. The Double Jeopardy Clause prohibits multiple prosecutions for the "same offense." Under the traditional approach to Double Jeopardy expressed in *Blockburger v. United States*,¹³⁴ two offenses are the same for double jeopardy purposes if one set of elements is either identical to or a subset of the other—a rule referred to as the "same elements" test. Under an alternative approach expressed in *Grady v. Corbin*,¹³⁵ even if two criminal statutes do not constitute the "same offense" under *Blockburger*, the Double Jeopardy Clause bars subsequent prosecution if the government, in order to prove an essential element of an offense charged, would have to prove *conduct* that constitutes an offense for which the defendant had already been prosecuted. Requiring courts to look to the underlying facts of the case is known as the "same conduct" test. In overruling *Grady*, the United States Supreme Court in *United States v. Dixon*¹³⁶ reasoned that the

¹³² Uviller, *supra* note 112, at 809.

¹³³ See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 6.48, at 632 (1995):

There is something to be said for a formalistic approach in which a conviction fits [Rule 609(a)(2)] only if dishonesty or false statement is among the elements of the offense: It would simplify administration and spare courts and litigants from spending time on collateral inquiries that could be elaborate. Scrutiny of underlying facts seems vaguely inconsistent with the practice of allowing inquiry only on the essentials of convictions (name of crime, punishment imposed, time and sometimes place) with further details kept off limits.

¹³⁴ 284 U.S. 299 (1932).

¹³⁵ 495 U.S. 508 (1990).

¹³⁶ 509 U.S. 688 (1993).

"same conduct" test was both at odds with the historical approach to the "same offense" determination and was too likely to cause confusion. In determining whether a defendant has already been prosecuted for the "same offense," it is both less burdensome and less confusing to look solely at the elements of the offenses rather than engage in a review of the evidence that was offered in the earlier proceeding.

An analogous argument applies in the context of Rule 609(a)(2). To allow (or require) courts to look to the facts of a prior conviction in determining whether the crime involved dishonesty or false statement is likely to create both administrative burdens and legal uncertainty. As in the Double Jeopardy context, the "formalistic" approach is the preferable one. (Of course, in the Double Jeopardy context, the formalistic approach favors the state; in the context of Rule 609, it can favor either the state or the accused, depending on which side the witness is testifying for.)

A second reason for rejecting the fact-based inquiry approach is that it is at odds with the overall structure of the impeachment rules. By allowing (or requiring) courts to inquire into the underlying facts of the conviction, Rule 609(a)(1) is likely to be swallowed up by Rule 609(a)(2). Rule 609(a)(2) will become the rule, rather than the exception, even though the probative versus prejudicial weighing approach of the former rule is more representative of the Federal Rules' approach generally.¹³⁷

A third (and, I believe, the most compelling) reason for rejecting the majority approach rests on an understanding of criminal law and procedure, rather than the law of evidence. One needs to recognize that criminal offenses are defined by their elements, not by the facts of their commission. To admit conviction evidence is to tell the jury nothing more than that the elements of the crime of which the witness was convicted were proven beyond a reasonable doubt. Undoubtedly, a large majority of criminal acts do involve some form of deception. A rapist or kidnapper may use deception to lure a victim to a remote location.¹³⁸ A perpetrator bent on violating the antitrust

¹³⁷ This point is made in 2 STEPHEN A. SALTZBURG *et al.*, *FEDERAL RULES OF EVIDENCE MANUAL* 893 (6th ed. 1994).

¹³⁸ See Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 *BROOK. L. REV.* 39 (1998).

laws may use duplicity in doing so.¹³⁹ But, in each case, the fact that deception was used will never have been found beyond a reasonable doubt. To allow a court to look to underlying facts in determining whether to admit a prior conviction as a crime of deceit is thus to invite a circumvention of the reasonable doubt standard itself.¹⁴⁰

V. CONCLUSION

The *crimina falsi*, or crimes of deceit, present an intriguing problem in the history of criminal law classification. Across time and legal cultures, the primary concept around which crimes have been classified has been harmfulness. Yet the idea of *crimen falsi*—with a history stretching from the *lex Cornelia de Falsis* of the first century B.C.E. to the American Federal Rules of Evidence—reflects a system of classification that, at times, has transcended mere harmfulness to embrace a distinct notion of moral wrongfulness.

The idea of grouping together crimes involving deceit proved especially useful to the Romans. It allowed them to expand the jurisdiction of the specialized *questio de falsis* well beyond the original crimes of forgery and counterfeiting to deal with economic, social, and juridical problems arising out of conduct constituting the modern offenses of perjury, obstruction of justice, fraud, false weights and measures, and false claims. The classification of offenses under the rubric of deceit was also a common element in subsequent Roman-law influenced criminal codes, as we saw in our discussion of *Las Siete Partidas*.

Although the morally wrongful act of deceit continues to make its presence felt in the classification of crime in a number of subtle ways, it has mostly disappeared as a basic classificatory category. Harmfulness, and the classifications it has spawned, now occupy the field. Even when offenses such as "Theft by Deception" have survived, moreover, such labels seem to reflect the particular kind of harm associated with deceit at least as much as any distinct notion of moral wrongfulness.

¹³⁹ See Mark R. Patterson, *Coercion, Deception, and Other Demand-Increasing Practices in Antitrust Law*, 66 ANTITRUST L.J. 1 (1997).

¹⁴⁰ A similar argument is made in 28 WRIGHT AND GOLD, *supra* note 111, at 253.

Nevertheless, the concept of *crimen falsi* remains pregnant with contemporary significance. Federal Rule of Evidence 609(a)(2) allows for impeachment of witnesses who have been convicted of crimes involving "dishonesty or false statement." This language has led to considerable confusion on the part of courts and commentators. As I have suggested here, much of this confusion could be dispelled if Rule 609 were interpreted with an appreciation of the ancient and common law history of *crimen falsi*.