other as citizens, as well as the conventional procedural protection. It may be that the term presumption of innocence is used to encompass a variety of aspirations and principles as well as constituting a rule of evidence. Lippke addresses this issue directly throughout, though there is some slippage (on p. 73) as to whether whether it is the person or the conduct that is innocent, bringing another fascinating yet under-explored ingredient into the mix.

Overall, I have much sympathy for the view that the presumption of innocence should be limited to the trial process, and that we need to reframe or re-characterise the principles on which we base any opposition to pre-trial detention or reputational harm, or to overly enthusiastic criminalisation of less harmful behaviours. Indeed, in my own work ((2013) 76 M.L.R. 681) I have sought to determine whether the doctrinal interpretation of the presumption of innocence can be reconciled with its rhetorical use by the European Court of Human Rights, and whether either doctrine or rhetoric is helpful in making sense of the intuitive unease among some at the practices by which a state may suggest someone is guilty. My conclusions as to this, and the interpretation of the presumption of innocence, are more circumspect than Lippke suggests in his book.

Throughout, Lippke defends an account of the presumption of innocence as a purely procedural right. This is described as a "controversial thesis" on the dust jacket and Lippke may be swimming against the academic tide. But his is not a radical claim and in fact is the approach of the US Supreme Court. In the US, the presumption has been described not as a presumption "in the strict sense of the term [but] … simply a rule of evidence which allows the defendant to stand mute at trial and places the burden upon the government to prove the charges against him beyond a reasonable doubt": Mitchell (1969) 55 Va.L.Rev. 1223, at 1231. A more frank acknowledgment of this would not weaken his arguments, in this vital and stimulating book.

Liz Campbell
Durham University

Legal Fictions in Theory and Practice. Edited by Maksymilian Del Mar and William Twining. [Cham: Springer, 2015. xxxvi + 413 pp. Hardback £117.00. ISBN 978-3-319-09231-7.]

The common law has known many critics, but one surely rises above the rest. Jeremy Bentham spared nothing and no one. Of William Blackstone he said that "the welfare of mankind, were inseparably connected with the downfall of his works" (J. Bentham, *Works* (1843), vol. 1, p. 227). And yet one feature of Blackstone's *Commentaries* exasperated Bentham more than all others: Blackstone's tolerance of legal fictions. To these Bentham reserved his shrillest denunciations: "Fiction of use to justice? Exactly as swindling is to trade." Fictions were "conclusive evidence of intellectual weakness, stupidity, and servility"; a "pestilential breath" that "poisons" everything – and so on (*Works*, vol. 7, p. 283; vol. 9, p. 77; vol. 1, p. 235).

When Bentham wrote these words the forms of action still throve and fictions were the bread and butter of English law. Two centuries later, fictions are less common and even less in vogue. Judicial opinion has by and large come round to Bentham's point of view. Lord Nicholls thought we had "outgrown" fictions (*OBG Ltd. v Allan* [2007] UKHL 21; [2008] 1 A.C. 1, at [229]). Toulson L.J., as

he then was, reflected the zeitgeist when he said that the "modern tendency has been to eschew resort to legal fictions" (*Forsyth-Grant v Allen* [2008] EWCA Civ 505; [2008] 2 E.G.L.R. 16, at [45]).

This collection of essays on legal fictions, edited by Maksymilian Del Mar and William Twining, goes against the grain. While the book as a whole does not take a position for or against fictions, the overwhelming tendency of the 18 contributors is to recognise the benefits of fictions, even their necessity, while also decrying their faults (see especially Del Mar, pp. 227, 250). The emerging consensus is a nuanced position: that fictions are neither good nor bad in themselves, but can be well- or ill-used – like any other device.

The publication is notable not only for its unfashionable message. A book on fictions is remarkable as such. Legal fictions are not an area of law, certainly not a pedagogical "subject". Though many books include fictions, few books are *about* fictions. Legal fictions are usually considered in the particular, seldom in the general. But we ignore the bigger picture at our peril. The fiction has been an instrument of legal development since ancient times. Studies of individual fictions no more reveal this big picture than mere descriptions of individual species make a theory of evolution. This serious consideration of legal fictions as a general phenomenon is welcome. Indeed, it is the most extensive treatment in the common-law tradition of the subject since Lon Fuller's 1967 monograph *Legal Fictions*, itself a re-print of a famous trilogy of articles dating from 1930.

Across its 400-odd pages, the book conveniently gathers most of the theoretical literature, in which the recurring names are Bentham, Fuller, Vaihinger, Kelsen, Maine and Ross. Several good literature reviews (e.g. Lind, pp. 85–88; Stern, pp. 158–62; Del Mar, pp. 239–46; Gama, pp. 350–54) and introductions to the big names (e.g. Petroski on Fuller, pp. 132–38; Kletzer on Vaihinger and Kelsen, pp. 23–29; Quinn on Bentham and Fuller, pp. 56–61) smooth out the learning curve of the curious beginner. Of course, the book is also for the specialised reader.

The big difficulty in writing a book about legal fictions is that no one really knows what they are. The definition of legal fiction is hotly contested. It is hard to find two people who have the same understanding of the term – and those understandings pre-determine the results of inquiries into legal fictions. In the case of an edited book, this challenge is all the greater. There is a risk that the debate will not be so much a competition of arguments but of presuppositions. How do the editors confront this problem?

The answer is: head on. The disagreements are openly stated in Del Mar's introduction, which compares the different definitions adopted by the contributors (pp. xx-xxiii). In the chapters themselves, the presuppositions are mostly explicit. The differences of opinion are hard to overstate. Contributors cannot even agree that fictions are "false": Douglas Lind writes that the "emphasis on falsehood is unfortunate" (p. 87) whereas Frederick Schauer assures us that "Fictions are, by definition, false" (p. 126) – as does Moscovitz (p. 327). Del Mar takes the middle position that fictions require an "absence of proof" as opposed to falsity (p. 225). This is not the only point of contention. It becomes apparent that each writer talks about a slightly different creature, though all call their creature a "fiction". The result is a diverse view of the subject. Almost every aspect of the fiction is questioned and given contrasting answers, for the reader to judge. A "consistent" approach would have impoverished the discussion. The problem of definition, for example, is unavoidable. A potential weakness of the book turns out to be its strength.

The diversity is not only of opinion, but also of content. The fictions come from different jurisdictions, eras and areas of law; a richness which the following

selection of chapters will suffice to show: Ando writes on fictions in Roman law; Alldridge on current English criminal law; Schafer and Cornwell on US copyright law; Moscovitz on Jewish law; Sparkes on the fiction of ejectment in English legal history; Lee on recent tort cases in the UK; Gordon on private securities in the US. It would take an indifferent reader to find no interest in this book.

The only thing this reviewer missed was a chapter that was decidedly against fictions. Many of the authors engage with the opponents of fiction (such as Bentham and Maine) but no author argues for an end to fictions (as Bentham and Maine did).

As the essays show, the debate on legal fictions is age-old and has many points of entry and exit. For the sake of simplicity, the controversies may be reduced to three broad questions: (1) what constitutes a fiction; (2) whether fictions are legitimate; and (3) what might be done about them. What do the contributors say?

All of them perforce have a view on question (1). These views can be arrayed along a spectrum between the views of two classic writers. At one end stands Vaihinger, who said that all the law is fictitious because it is artifice. At the opposite end is Kelsen (whose 1919 article is reprinted here), who argued that nothing in the law is fictitious because the law is prescriptive: rules that have no truth value. None of the contributors wholly accepts either of these extreme views. Kletzer is closest to Kelsen (p. 25) and Samuel to Vaihinger (p. 52) – both with interesting reservations. The other writers harbour either the sceptical or credulous tendency, which informs their treatment of the subject.

It is worth asking the sceptics (who say the law is merely prescriptive, hence incapable of falsehood) whether a system designed to regulate human conduct is really separate from the world it regulates. What does the law regulate if not the world of fact? If the law punishes some conduct, it is surely not a matter of indifference whether the conduct occurred. It is no answer to a person punished for a fictitious act that the law is "prescriptive".

Another problem the sceptics face is that judges make findings of fact. Let us take a piquant example. In the eighteenth century, women condemned to death could escape execution by "pleading the belly" – claiming to be with child and being confirmed as such by a "jury of matrons". It was known that many of the pregnancies were bogus. The sceptics, to be consistent, must deny the practice was a legal fiction. But, as the saying goes, one cannot be half pregnant. Arguing that there was no fiction because the women were pregnant "as a matter of law" sounds like sophistry.

Moreover, even if the law is outside the realm of fact, does it not make sense to distinguish between rules that correspond with reality from those that contradict it? Do these latter (call them what you will) not warrant attention?

The credulous also run into difficulties. Law is not something we discover (like chemistry), but something we continually construct. In this sense, the answer to Samuel's title question "Is the Law a Fiction" (p. 31) is "yes". The law is no less man-made, or made-up, than *Alice's Adventures in Wonderland*. Those who see fictions everywhere must somehow distinguish between legal fictions and the general artificiality of the law. Are some things more false than others?

In truth, it all depends on what one means by "fiction". In a penetrating piece, Lind arguably concedes Kelsen's point while re-asserting the existence of fictions: legal fictions should be "understood as *true* legal propositions asserted with conscious recognition that they are inconsistent in meaning … with true propositions asserted within some other linguistic system" (p. 84). Thus, fictions are both true and false depending on the context – on whom you ask. Perhaps it is only apt

that in defining the fiction we should be able to have our cake and eat it too. What is clear is that we can only proceed safely when "fiction" is carefully defined.

Moving now to the second question, as to the legitimacy of fictions, the contributors add nuance to the old ideas. Quinn finds nuance even in Bentham (pp. 56ff.); certainly more than most scholars who cite Bentham's work find. It seems to this reviewer that Bentham, who accepted fictions in science as useful, was not categorically against legal fictions as such. He was against the legal fictions of his day, which were not truly beneficial, but made necessary by a flawed system which Bentham sought to replace.

Del Mar puts forward a vision of fictions not as sinister and primitive, but as an agent of reform by experimentation (pp. 225, 250). Evidence of this constructive role may be seen in other chapters (e.g. Lee, p. 272; Sparkes, pp. 279ff.; Ando, p. 320). Lobban shows the other side of the coin: fictions that start life as explanatory devices "easily turn into roadblocks" (p. 219). Lind distinguishes between good fictions and bad fictions depending whether they "inflict damage" on truths inside or outside the law (Lind, pp. 84–85, 106–07). As an example of a good fiction he holds up *Mostyn v Fabrigas* (1775) 1 Cowp. 161; 98 E.R. 1021, where the King's Bench treated the island of Minorca as being in London – in the parish of St. Mary-le-Bow, to be precise. This fiction did no harm, says Lind, precisely because it was so ludicrous. Lord Mansfield did not "offer it as a rebuff to cartographers" (p. 101). *Terra nullius*, by contrast, was, according to Lind, a bad fiction. The damage it did was to legitimise the dispossession of the Australian Aborigines (pp. 105–06). Lind's account is certainly insightful and refreshingly pragmatic. It does raise, though, the question of how "damage" is to be determined. If we are not careful in choosing clear objective criteria, the damage test will be tautological. Saying that a good fiction is one that causes no damage is very close to saying that a good fiction is one which is not bad.

The academic commentary has focused disproportionately on the first two questions (What is a fiction? Is it legitimate?), neglecting the practical question (What do we do?). It is this last question that has impact on the law. While this volume is likewise mostly addressed to the two theoretical questions, there are some practical recommendations in the form of calls to abolish or retain certain fictions (e.g. Lee, p. 270; Alldridge pp. 380, 382). The next question of how to reform or replace fictions is left to future scholars.

In his dialogues, Plato would pose a question like "What is courage?" or "What is justice?" and have his characters debate it in excellent prose. In the end, there would be no answer to the question – but we would know so much more about the concepts. So too here: the book gives no clear answers to the three questions about fictions; no answer of the type that puts paid to the argument. But we are all the more knowledgeable for the discussion. This book has breathed new life into an old topic. It is a must-read for anyone with an interest in legal fictions – or indeed legal reasoning.

Liron Shmilovits
Downing College