

1978-10-18: [METHODOLOGY] Fictions (pro & con) A propos of Geny, Sci. et tech., III, 408ff]

Those who oppose the idea of legal fictions in modern times can appeal to a notion of the force of legislation that was not acceptable in times past. So, if modern legislators do not need fictions in order to express their will in declaring the law, this is because positive law today constitutes the full scope of law (everything not prohibited is permitted) whereas in older times all those who gave force to the law, be they legislators or judges, presumed the natural ordering of all things which had to be heeded even when it was contradicted. Legal fictions explicitly contradict nature—dead seize the living, continuation of personality of the deceased—which means that the natural condition of things is clear by being denied in the wording, while the social end served by the fiction is left to be imagined. The trouble with fictions in their old and viable use is that the application is dangerously vague while the "natural order" being contradicted is clear; modern opponents would have the legal situation be explicit & limited no matter what troubles the law might have in the realm of moral philosophy. It has to be assumed that the force of law lies in the mind of the legislator, as fulfilling the will of society, rather than in some preexistent metaphysical order.