

Law as a Social Kind

Muhammad Ali KHALIDI^{a,1}

^a*York University, Toronto, Canada*

Abstract. In this paper, I defend the view that *law* is a social kind, which is to say that it is a natural kind in the social domain (compare: *tiger* is a natural kind in the biological domain). I will base my argument on a naturalist conception of natural kind that I have defended in earlier work. According to this “simple causal theory” of natural kinds, a natural kind is a node in a causal network and such causal networks are attested in the social domain as well as in the natural domain. Having defended the claim that law is a social kind, I will go on to make two sets of distinctions among social kinds. The first distinguishes kinds based on whether they are causal, etiological (or historical), and copied. I will argue that *law* is an etiological kind, but not a copied kind (though other legal kinds would seem to be copied kinds). The second distinction has to do with the ways in which social kinds can be mind-dependent, namely whether they are merely mind-dependent, or whether they are additionally concept-dependent. I will argue that *law* (like many other legal kinds) is such that it is not only mind-dependent but also concept-dependent.

Keywords. natural kind, social kind, law, legal kind, etiological kind, social ontology

1. Introduction

What would it take for law to be a social kind? I will defend the view that a social kind is nothing but a natural kind in the social domain (just as, say, a biological kind is a natural kind in the biological domain). Then, armed with a particular conception of natural kinds, I will go on to set forth the conditions that law and other legal kinds would have to meet to be social kinds. While some legal kinds may not be social kinds in this sense, I will put forward some defeasible reasons for thinking that law itself is a social kind. I will then go on to make two sets of distinctions among social kinds. The first distinguishes kinds based on whether they are causal, etiological (or historical), and copied. I will argue that law is an etiological kind, but not a copied kind (though other legal kinds would seem to be copied kinds). The second distinction has to do with the ways in which social kinds can be mind-dependent, namely whether they are merely mind-dependent, or whether they are additionally concept-dependent. Law and many other legal kinds are such that they are not only mind-dependent but also concept-dependent. I will also ask whether law and other legal kinds are such that each token is concept-dependent or whether only the type is concept-dependent. I will conclude by considering the implications that these features of law and legal kinds have for their standing as social kinds.

2. Who Wants to Be a Millian Heir?

Although it may sound oxymoronic to talk about natural kinds in the social domain, I believe that this is a misconception for two reasons. The first is that according to the originators of the expression, “natural kind” was not supposed to apply exclusively to the domain of the natural sciences. John Venn, who seems to have been the first to use the term “natural kind” (cf. [1]), was committed to the existence of natural kinds in the social realm and was as concerned to identify natural classes of human beings as of other types of entity. Moreover, Venn intended to continue the usage of John Stuart Mill (who never used the expression “natural kind”, but “kind” simpliciter, or occasionally, “real kind” or “true kind”), and Mill was also interested in social categories, entertaining the idea that some of them could be genuine kinds:

Note here, that it is by no means intended to imply that there may not be different Kinds, or logical species, of man. The various races and temperaments, the two sexes, and even the various ages, may be

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differences of kind, within our meaning of the term. I do not say that they are so. [2]

For this reason, and to avoid the whiff of contradiction in talking about natural kinds in the social domain, it might be better to use the term “real kind” rather than “natural kind”, but the latter term is so entrenched in contemporary philosophical discourse that it is hard to resist. I will therefore defer to what has become the standard usage and talk about “social kinds”, bearing in mind that I take social kinds to be just a subcategory of natural kinds (like chemical kinds or biological kinds).

The second, and more substantive, reason that it is justified to posit natural kinds in the social domain relates to the particular account of natural kinds that I will defend in this paper. According to that account, as I will explain in the following section, natural kinds are nodes in causal networks, and I will argue that those networks can be found in the social domain just as much as in other domains. Before doing so, it is worth elaborating in a little more detail Mill’s view of kinds since it serves as the starting point for so many others.

Mill’s own account of kinds is not always easy to decipher and presents problems of interpretation. I will begin by explaining the more straightforward aspects of his view, then progress to those that are more contentious. Mill thinks that chemical elements, chemical compounds, and biological species (as well as some higher taxa) are paradigmatic examples of real kinds. Furthermore, he holds that they are distinguished by the fact that members of these kinds share an inexhaustible number of properties in common.

Some classes have little or nothing in common to characterize them by, except precisely what is connoted by the name: white things, for example, are not distinguished by any common properties except whiteness; or if they are, it is only by such as are in some way dependent on, or connected with, whiteness. But a hundred generations have not exhausted the common properties of animals or of plants, of sulphur or of phosphorus; nor do we suppose them to be exhaustible, but proceed to new observations and experiments, in the full confidence of discovering new properties which were by no means implied in those we previously knew. [2]

As this quotation implies, and as a number of other passages indicate, Mill held that the number of properties associated with a kind was inexhaustible. That is, he thought that kinds were associated with an indefinite number of properties, not just a large number of them. However, most theorists, even those who owe a great debt to Mill did not follow him on this point. Neither Venn [3] nor C. S. Peirce [4] endorsed this aspect of Mill’s view. Venn links natural kinds to the uniformity of nature, and he defines the uniformity of nature as follows: “wherever any two or more attributes are repeatedly found to be connected together, closely or remotely, in time or in space, there we have a uniformity” [3].

Another puzzling feature of Mill’s account is that he sometimes indicates that the properties of real kinds should not be linked as causes to effects. Rather, it seems that in his view, the inexhaustible number of properties associated with each natural kind should simply be unrelated, whether causally or logically. For instance, he claims that if a property (e.g. blackness in crows) is not the “effect of causation” (presumably of other properties of crows), then it is a property of the kind crow, but if not then it would not seem to be a distinguishing property of the kind [2]. Similarly, he seems to think that the properties of chemical elements are largely unrelated to one another. This may be a reflection of the fact that Mill was writing at a time of greater ignorance of the causal mechanisms involved in chemistry and biology. Meanwhile, in other passages, Mill seems to entertain the possibility that some properties of kinds are indeed causal effects of other properties, which he calls derivative.

In some cases, a Kind is sufficiently identified by some one remarkable property: but most commonly several are required; each property considered singly, being a joint property of that and of other Kinds. The color and brightness of the diamond are common to it with the paste from which false diamonds are made; its octohedral form is common to it with

alum, and magnetic iron ore; but the color and brightness and the form together, identify its Kind: that is, are a mark to us that it is combustible; that when burned it produces carbonic acid; that it can not be cut with any known substance; together with many other ascertained properties, and the fact that there exist an indefinite number still unascertained. [2]

A similar situation obtains when it comes to the social domain, thus paving the way for social kinds. Since Mill's seminal discussion, a number of other philosophers have seriously entertained the possibility of kinds in the social realm. As already mentioned, Venn took up some of Mill's ideas, agreeing with him on some points and disagreeing on others. One point on which Venn agreed with Mill is the possible existence of kinds in the social domain.

3. Ontology Naturalized

There is a growing tendency to do metaphysics, and ontology in particular, by taking our cue from science. I would argue that this tendency is, in fact, more in line with the attitude of the nineteenth century authors mentioned in the previous section, who were effectively providing an ontological basis for science. Accordingly, if we are interested in identifying natural kinds, we should pay attention to the way in which the scientific enterprise determines which categories correspond to genuine groupings in nature. This attitude applies (or should apply) to the social sciences no less than the natural sciences. Thus, the naturalist project in metaphysics advises us to pursue social ontology by paying attention to the deliverances of the social sciences (see e.g. [5]). The social sciences are generally regarded to be less mature than their natural counterparts and differ from them in various ways. Still, without minimizing the considerable differences among the social and natural sciences (some of which will be touched on in due course), our best guide to the ontological structure of the social world should be based on the established deliverances of the social sciences.

There are various implications of this attitude for social ontology. One such implication is that in talking about putative candidates for social kinds we should restrict ourselves to ones that could conceivably play a role in social scientific theorizing, as we do when we talk about natural kinds. In the natural domain, we don't usually focus on categories such as *bushes*, *clouds*, and *sand*, but rather such categories as *gold*, *water*, and *tiger*. Similarly, in discussing social ontology we should avoid categories such as *professor*, *basketball team*, and *book club*, and instead direct our attention to such categories as: *consumer*, *corporation*, and *political party*. From this perspective, law and other legal kinds can be considered as social phenomena that interact with other social phenomena, such as systems of government and economic markets.² The laws that a society passes obviously influence the kinds of political structures and activities that emerge, as well as the economic transactions and institutions that take place. The influences here are broadly causal in nature, as when we say that a carbon tax law encouraged companies to reduce carbon emissions, or the absence of corporations in Islamic law hindered economic development in the Islamic world, or that a strong democratic system of government requires the rule of law. Law and other legal phenomena are here considered as causal structures in the social world that causally influence, and are influenced by, other social phenomena. These causal structures consist of various types of social phenomena: individuals, institutions, events, processes, and others, interacting causally with one another. Like many other social phenomena, law and particular laws (e.g. laws governing contracts, or freedom of expression) play a causal role in the social domain. In this respect, they are analogous to entities and other phenomena in the biological, geological, meteorological, or epidemiological realms.

Which of these phenomena correspond to real or natural kinds? According to several recent naturalist account of natural kinds, which are supposed to apply to the social and natural domains alike, kinds are grounded in causality (e.g. [6], [7], [8]). Whenever one property, or a number of regularly co-occurring properties, reliably causes one or more other properties, we have a good candidate for a natural kind. Natural kinds are grounded in causal processes and these processes can be modelled using directed causal graphs. In

²Among social phenomena, I would include kinds of individuals (e.g. *prime minister*), institutions (e.g. *parliament*), events (e.g. *revolution*), processes (e.g. *industrialization*), among others.

such graphs, a property can be represented by a vertex, and a direct causal relationship between two properties can be represented by an arrow linking them. Hence, natural kinds can be represented by highly connected vertices in directed causal graphs. On this conception, natural kinds are thought of as “nodes in causal networks” (cf. [8], [9]). These causal networks are clearly evident not just in the natural world, in the domains studied by physics and chemistry, but further afield, in biology, psychology, and the social sciences. Despite important differences between the natural and social sciences, there are kinds in both domains, at least when kinds are understood along causal lines.

4. Causal, Etiological, and Historical Kinds

When it comes to both natural and social kinds, one can make an important distinction between those that are individuated intrinsically, or according to their synchronic causal powers, and those that are individuated etiological, or according to their diachronic causal history. Both synchronic and diachronic kinds may be natural kinds, according to the causal conception of natural kinds outlined in the previous section. One can think of synchronic natural kinds as initial nodes in causal networks, causal properties that generate a number of other causal properties in turn. Meanwhile, diachronic natural kinds can be conceived of as terminal nodes in causal networks, properties that are the regular effects of a chain of other causal properties. One way of characterizing etiological kinds in general terms is as follows:

An etiological kind is one whose members share a (token or type) origin, history, or causal trajectory.

This characterization immediately gives rise to a distinction between those kinds whose members share a token history and those whose members share the same type of origin, history, or causal trajectory.

Token-etiological kinds have members that all originate in the very same event, or have followed the same token causal trajectory, or share the selfsame history. One of the most extensively discussed cases of this type is that of biological species. According to a widely accepted view of the nature of species, members of a biological species are classified together because they are all descended from the same set of common ancestors. Consequently, they have the same token origin and share the same token history. A common history is, of course, not the only thing that members of a species typically share, since for many species, the ability to interbreed and produce fertile offspring is widely held to be criterial for species membership. Members of a given species also often have many intrinsic features in common, so biological species are what might be called “impure” or “hybrid” etiological kinds, since they share more than just a history. This observation gives rise to another distinction, that between pure etiological kinds, whose members share nothing but an origin or history, and hybrid etiological kinds, whose members may share intrinsic features too, and may be classified into kinds based on both etiological and intrinsic features.

As for type-etiological kinds, they do not share the very same token origin or history but rather the same type of origin or history. Their members do not originate in the same event or follow the very same causal pathway, but their origins or histories are tokens of the same type. For example, in geology, igneous rocks do not all originate from the same source but they are created by the same type of process, namely the solidification and crystallization of hot magma or lava. This is a repeatable process in the history of the earth (and perhaps other planets) and has occurred a multitude of times, each time producing rocks with the same type of origin and causal history. Igneous rocks are classified as such on the basis of the process that led to their formation rather than their intrinsic or synchronic properties.

So far, I have contrasted etiological kinds with kinds that are individuated on the basis of intrinsic properties. But it is worth pointing out that etiological kinds are not the only extrinsic kinds, since functional kinds are also extrinsically or relationally individuated but synchronically rather than diachronically. Hence, etiological kinds are individuated both extrinsically and diachronically, by contrast with many paradigmatic natural kinds, which are individuated on the basis of intrinsic and synchronic features.

To gain further insight into the nature of etiological kinds, it will be useful to look briefly at a couple of preceding discussions. Perhaps one of the earliest attempts to discuss classification on historical grounds, can be found in William Whewell's *Philosophy of the Inductive Sciences* [10]. Whewell delimited a class of historical sciences, as follows: "...the class of Sciences which I designate as Palaetiological are those in which the object is to ascend from the present state of things to a more ancient condition from which the present is derived by intelligible causes" [10]. He explains that he dubs them "palaetiological" on the grounds that they are concerned with ancient or historical (paleo-) matters and with causation (etiological), in that they classify on the basis of causal history. Whewell elaborates that these sciences include geology, philology, archaeology, and astronomy, though he recognizes that these sciences may not be exclusively historical, since (for example) astronomy is concerned not just with etiology but with synchronic causal processes as well. Nevertheless, he holds that classification in these sciences is at least sometimes based on shared history.

Since Whewell's seminal treatment, philosophers do not appear to have paid the topic of etiological kinds in general much heed, though there has been renewed interest in recent years in the historical sciences and historical explanation. Perhaps the most explicit treatment of etiological kinds in the recent philosophical literature occurs in Millikan ([11], [12]), who appears to have coined the term "historical kind." Millikan [12] associates three features with what she calls "historical kinds" or "copied kinds" (she seems to use the terms interchangeably). First, reproduction (or copying): all members have been produced from one another or from the same models. Second, environment: members have been produced by, in, or in response to, the same ongoing historical environment, including other copied kinds. Third, function: some "function" is served by members of the kind, where "function" is roughly an effect raising the probability that its cause will be reproduced. For instance, if organisms perform their function effectively, they survive and reproduce, thus raising the probability of the creation of another token of that type. Similarly, for artifacts, if a specific model of automobile does its job effectively it raises the probability that new instances of that model will be created. According to Millikan, members of these kinds are copied or reproduced precisely because they share certain synchronic features, so her "historical kinds" or "copied kinds" are impure etiological kinds (in my terminology). She also characterizes them as follows: "The members of these kinds are like one another because of certain historical relations they bear to one another... rather than by having an eternal essence in common" [11]. Biological species are the most obvious example of Millikan's copied kinds, but she also includes some artifacts (e.g. 1969 Plymouth Valiant) and social professions (e.g. doctor) in the class of copied kinds. In addition to being impure etiological kinds, I would argue that copied kinds are a distinct subset of etiological kinds since they are the result of a particular type of causal process, copying. As some of the examples mentioned in this section (e.g. igneous rocks) and the following section show, not all etiological kinds are copied kinds. Are all copied kinds token-etiological as opposed to type-etiological kinds? It would seem so, since Millikan thinks of the members of copied kinds as all being copied from one another or a common blueprint, indicating a token historical process.

It is instructive to look at law and other legal kinds through the lens of this distinction. It seems safe to say that law is an etiological kind, since whether something is a law has a great deal to do with its origin. Law as an institution and individual laws must arise in the right way in a society and have a certain provenance. A rule, norm, or custom could not be considered a law unless it had the right causal history. Having said that, it may be hard to say what exactly that provenance has to be; in particular, it might not have to be a result of explicit legislation by a representative body. However, it would seem as though there are clear focal instances, as when a piece of legislation is enacted by an elected body of representatives or adopted as a result of a popular referendum. There are also clear non-instances, as when a certain society has prevalent rules of behavior or etiquette that are enforced by what Mill calls the "magical influence of custom." The former are typically regarded as laws, while the latter would not ordinarily be regarded as laws. But law is likely to be a hybrid etiological kind, like species, since it does not appear sufficient for it to have arisen in the right way. It also needs to have the right synchronic functional properties. For example, unless there are some mechanisms of adjudication and enforcement, a law or system of laws is unlikely to be regarded as such. Since law has clearly arisen numerous times independently in various human societies,

it is a type- rather than a token-etiological kind. Some legal kinds, however, may be token-etiological kinds. Certain legal doctrines, such as *habeas corpus*, and institutions, such as *parliament*, may have this character. That is because they may not be considered instances of the relevant kind unless they are descended from the very same origin. Moreover, these token-etiological legal kinds can also be considered copied kinds, in Millikan's sense, since they are all copied from each other or from a common template.³

5. Mind-Dependent and Concept-Dependent Kinds

Another useful distinction to be made among natural kinds is one between mind-dependent and mind-independent kinds. It would seem as though most, if not all, social kinds are mind-dependent since they depend for their existence on the existence of minds and mental activity. Among mind-dependent kinds, one can also distinguish those that are concept-dependent from those that are not. This gives rise to a three-fold distinction, as I will try to explain. First, there are social kinds whose nature is such that human beings need not have any propositional attitudes towards them for them to exist (e.g. *recession*, *racism*). The existence of these kinds clearly depends on the existence of human beings and depends on those humans having certain propositional attitudes. There can only be racism in a society if some members of that society are prejudiced against others or harbor attitudes of superiority or contempt towards them insofar as they are members of a different group. But members of that society need not have any propositional attitudes that involve the concept *racism* itself. They may never have consciously formulated such a category or concept; indeed, the racists may be in denial that they have such attitudes and the victims of racism may never have articulated the concept. Nevertheless, certain human propositional attitudes must clearly be in place for racism to exist. Therefore, such kinds are *mind-dependent* but they are not *concept-dependent*.

The second kind of social kind includes those whose existence is at least partly dependent on specific attitudes that human beings have towards them. In other words, some members of society need to have the concept of the kind in order for the kind itself to exist. This would seem to be true of social kinds like *money* or *war*. In these cases, at least some members of society need to have propositional attitudes involving these categories themselves for those kinds to exist. For money to exist, we need to have a practice and attitudes that incorporate the category *money*. Where there is currency in various denominations, there is surely a set of rules or conventions, whether explicit or implicit, and the introduction of such conventions requires having thoughts involving the category itself.

The third kind of social kind includes those whose existence and that of their instances are both dependent on attitudes that human beings have towards them. These kinds are not just concept-dependent; every instance of the kind is itself concept-dependent. In this case, not only must some members of a society have attitudes towards the kind itself, each individual token of the kind can only be such if it has been considered to be such by some members of society. To illustrate, no one could be a permanent resident of a certain jurisdiction without being recognized as such by at least one government official. In other words, the concept must be applied to each individual member of the kind. Similarly, a corporation could not be a corporation without being explicitly conceptualized as one, at least by the owners or shareholders. In these cases, not only does the kind as a whole need to be recognized under the relevant concept, each instance of the kind needs to be so recognized.

With this three-fold distinction in mind, what should we say about *law* and other legal kinds?⁴ It would seem as though *law* belongs to the second kind of social kind. It is both mind-dependent and concept-dependent, but instances of it may not be concept-dependent, or so I will argue (see Figure 1). Some philosophers of law have claimed that

³The claim that some legal kinds such as *habeas corpus* or *parliament* are token-etiological and copied kinds admittedly depends on how we understand these kinds. On one understanding of what a parliament is, it is a type of legal institution that can be traced back to the Magna Carta, and nothing can be a parliament unless it can trace its origin to that particular historical document. But in a looser sense, we could describe the ancient Athenian assembly as a parliament even though it does not have the same token etiology. On the former understanding, parliament is a token-etiological and copied kind, whereas on the latter, it is not.

⁴The claims and arguments in this paragraph derive in part from work-in-progress with Liam Murphy.

law is not concept-dependent, that a society could have law without having a concept of law (see [13]). But on most conceptions of law, there is a need for a criterion to distinguish laws from non-laws, such as a rule of recognition in the positivist tradition. Moreover, possession of criteria that distinguish instances from non-instances, is on many accounts of concept, is at least part of what it takes to possess a concept. This does not mean that everyone in a community with law needs to possess the concept of law, nor that those who do possess the concept always agree on its application; all that is required is that *some people* must possess it and to some extent converge in their judgments of application. Without this much, it is hard to see how a distinct normative order of law, as opposed to conventional morality or etiquette, could emerge. Could *law* be such that every instance of it is concept-dependent? It may be thought that since each law must be enacted by a legislature or similar authority, something cannot be a law unless it is explicitly recognized as such. But mistakes by some officials about all of law, or by some or all officials about some of law, are certainly possible. This means that something can be a law (or against the law) without anyone recognizing it, which implies that it is not the case that every token of the kind *law* is concept-dependent. For example, it may be argued that same-sex marriages were legal in Canada in the nineteenth century, since nothing in the law prevented them, though no one realized that that was the case. Even though each piece of legislation or statute may need to be conceived as such, that does not mean that each legal proposition needs to be recognized as law. That is why *law* seems to be concept-dependent but not token-concept-dependent. However, even though *law* itself is not token-concept-dependent, other legal kinds do seem to be such that each instance is concept-dependent. For example, as suggested above, in many legal systems, a *felon* cannot be such unless convicted in court. Similarly, a particular *jury* must be recognized as such to be a jury. Thus, *law* and other legal kinds are all concept-dependent, while some legal kinds are such that their instances are also concept-dependent.

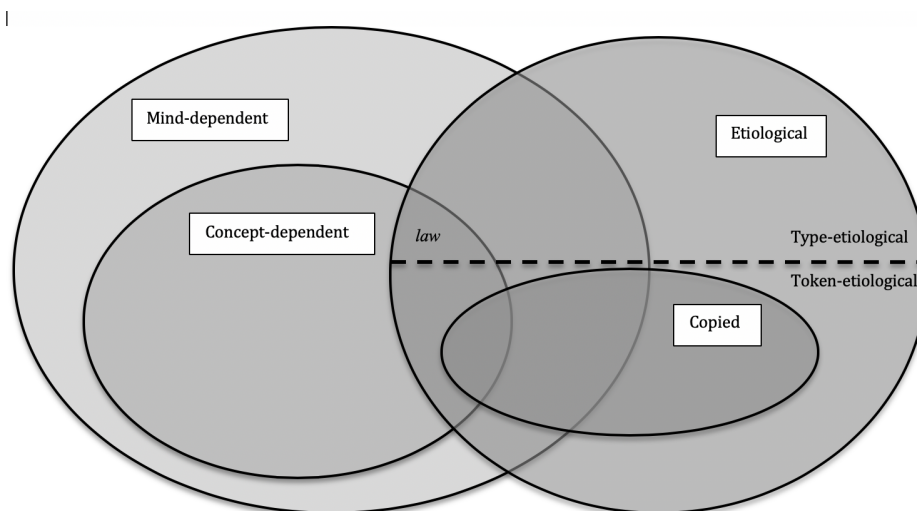


Figure 1. This Venn diagram shows that the kind *law* lies in the intersection of concept-dependent and type-etiological kinds. The diagram omits the class of token-concept-dependent kinds (which is a subset of concept-dependent kinds) for simplicity.

6. Conclusion

In this paper, I have defended the view that *law* and other legal kinds are social kinds. Moreover, I have argued that *law* is an etiological social kind but that it is not a copied kind (in Millikan's sense). Meanwhile, other legal kinds may be copied kinds, namely those that are descended from a certain origin and have the same provenance, such as some of the legal kinds that pertain to the common law tradition (e.g. *jury*, *habeas corpus*). In addition, I have tried to show that *law* is plausibly regarded not just as a mind-dependent kind, but a concept-dependent social kind, since it is implausible that

there can be an institution of law without a concept of law. Laws need to be recognized as such. I have also argued that not every instance of law is a concept-dependent social kind, since there can be individual legal propositions that are not recognized as such. But other legal kinds, such as *felon* or *jury*, are likely to be concept-dependent when it comes to their tokens as well as the type.

Is there an ontological difference between legal kinds that are etiological and those that are not? Are the copied legal kinds different in nature from those that are not copied? Not necessarily—consider a legal kind like *jury*. We might take (at least) two attitudes when it comes to what qualifies as a jury. On one view, an institution is only a jury if it descends in the right way from certain historical precedents. On another, more comparative, view of law, an institution is a jury if it plays roughly the same causal-functional role in a legal system as juries do in the common law tradition. Thus, the very same category is sometimes ambiguous between an etiological and a non-etiological interpretation. Is there an ontological difference between legal kinds that are merely mind-dependent and those that are additionally concept-dependent? Does the additional concept-dependence have any ontological implications? Although mind-independence is often thought to be criterial for realism, I have argued elsewhere [14] that this is a mistake. The dependence of social kinds on the minds of human agents does not affect their ontological status. Their additional dependence on concepts does not appear to do so either. But kinds whose tokens are concept-dependent seem to be among the most institutional of social kinds.

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