ABSTRACT. In this article I take up a conceptual question: What is the distinction between ‘the law’ and the behavior the law regulates, or, as I formulate it, the distinction between what is ‘inside’ the law and what is ‘outside’ it? That conceptual question is in play in (at least) three different doctrinal domains: the constitutional law doctrines regarding the limits on the delegation of legislative powers; the criminal law doctrines regarding mistakes of law; and the constitutional rights doctrines that turn on the distinction between state action and the acts of non-state actors. I argue that legal doctrines should turn solely on normative considerations and should not turn on answers to conceptual questions. However, the doctrines I discuss appear to turn on the conceptual question regarding what is ‘inside’ and ‘outside’ the law. I show how each of these doctrinal areas appears to raise this conceptual issue, and I explain how the doctrines might or might not escape being held hostage to conceptual controversy.

Most jurisprudential literature in the current era is devoted to the question, What is law? What are the necessary and sufficient criteria for a norm’s being a legal norm as opposed to a moral norm, a religious norm, or a norm of a bridge club, the Rotary Club, major league baseball, or the Smith family?

Less attention is paid to a related but separate conceptual question, namely, the distinction between ‘the law’ and the behavior the law regulates, or, as I shall call it, the distinction between what is ‘inside’ the law and what is ‘outside’ it. It has not been entirely neglected. For example, Joseph Raz has written that when the domestic law of conflicts makes a foreign law applicable to domestic disputes, the foreign law is nevertheless not part of the domestic law but is external to it.¹

Raz, however, does not give a convincing reason in support of this claim.²

Now one might wonder whether this conceptual question about the boundary between law and what it regulates has any practical consequence. My answer, which I hope to persuade you of, is that it should not, but that some legal doctrines seem to be parasitic on some such conceptual distinction. One such doctrine or set of doctrines concerns the constitutional limits on the delegability of legislative powers. Another is the distinction within the criminal law of attempts between factual and legal impossibility. And a third is the question of when has an actor violated someone’s constitutional rights when he has also acted contrary to the nonconstitutional law governing his conduct. I shall take up these doctrinal areas in that order to illustrate the conceptual issue each raises and explain how the doctrine might or might not escape being hostage to the conceptual controversy.

I. THE CONSTITUTIONAL PROBLEMS OF LEGISLATIVE DELEGATIONS

In a recent article, Michael Dorf discusses what he calls ‘dynamic delegations’.³ Dynamic delegations are a category within the broader class of laws that incorporate by reference the laws of another sovereign. Most such laws are ‘static delegations’; they incorporate the foreign law as it exists at the time of the incorporation. The foreign law’s incorporation is no more conceptually or doctrinally problematic than using pre-existing boilerplate language in a new law. The foreign law’s content at the time of incorporation is essentially copied into the domestic law.

Dynamic delegations are crucially different. For they incorporate the foreign law, not only as it exists at the time of incorporation, but also as it is changed thereafter by the foreign sovereign. Thus, if at time one, State X passes a law on topic T that says T shall be

² Raz says the same about contracts and other forms of private ordering that the law enforces, namely, that they are external to the law that gives them legal effect. Id. at pp. 193–194. Yet as far as I can see, Raz’s position is nothing more than an ipse dixit. For if the law will enforce the terms of a contract that I write, why am I not a ‘lawmaker’ regarding the matters within the contract’s scope? Just as a legislator in Congress has legal authority to legislate in a very wide – but still limited – domain, I have legal authority to legislate in the narrower domains within which I can contract, admit or deny admittance to my property, etc.