Chapter 9
The Hidden Acts of Definition in Law: Statutory Definitions and Burden of Persuasion

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Abstract The concept of "definition" refers both to a propositional structure, namely a type of convertible relation between the *definiens* and the *definiendum*, and a speech act that can have various definitional purposes. On the one hand, definitions can have different subject matter. For instance, it is possible to define a concept (essential definitions), the meaning of its linguistic expression (etymological definition), its possible extension (definition by enumeration), an illustration of its possible denotations (definition by example), or the operation that can be used to classify the entities falling under it (operational definition). On the other hand, definitions are the propositional content of acts aimed at producing specific effects. Definitions can impose a new meaning, or remind or inform the interlocutors of criteria of classification. However, from an argumentative perspective the acts of stipulating, reminding or informing of, or committing to a definition are not as dangerous as the implicit acts of omitting a definition and implicitly defining and redefining a concept. Sometimes crucial concepts, especially the ones concerning problematic ethical or political issues, are ill described or are left (intentionally or unintentionally) undefined. This gap can become the ground of extremely effective strategies based on tacit (re)definitions. These uses of definition can shed light on the definitional activity of the lawmakers. Statutory definitions become in this sense a limitation of the interpreters' freedom of redefining strategically a concept. For this reason, the choice of leaving a concept undefined or underdefined can be regarded as a delegation of powers to the bodies in charge of interpreting the statutes.

Keywords Definition • Redefinition • Interpretation • Argumentation schemes • Analogy • Rhetorical strategies

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9.1 Introduction

Definitions can be thought of as premises in complex patterns of reasoning (Aarnio 1977; Lindahl 2004; Moore 1980). In law they are of crucial importance, as they constitute the fundamental premise of arguments from classification (Walton, Reed and Macagno 2008), namely patterns of inference in which a legal predicate is attributed to an entity on the basis of the set of semantic features that constitutes the definition (Schiappa 2003; Zarefsky 2006, 404). Legal definitions are fundamental instruments that the lawmaker uses to try to reduce the interpretative freedom of the interpreter and forge a technical language through the re-use of terms belonging to ordinary language (Mortara Garavelli 2001, 11). Definitions can limit the interpretative discretion that constitutes the passage from a normative sentence to a legal norm (Tarello 1980, 337–339). However, in matter of legal definitions, the boundaries between the lawmaker and the interpreter are often blurred. Tarello noticed that legal definitions, inasmuch as normative sentences, need to be interpreted, namely they need to go through a process of meaning attribution (Tarello 1980, 155). Therefore, both the use of the definitions existing in legal texts and the activity of redefinition carried out by the interpreter can be considered as interpretative activities, as both the defined terms and the definitions need to be interpreted (Tarello 1980, 156). For this reason, legal definitions can fulfill their role of limiting the interpretative freedom only after, in turn, being interpreted. Such definitions are, therefore, only contingently effective: they are effective only when the terms constituting the *definiens* are less controversial than the *definiendum*.

In order to account for the different types of acts of definition and redefinition in legal interpretation, it is useful to draw a distinction between two types of definitional acts, namely the descriptive or "explicative" definitions, and the stipulative or "statutory" definitions. Both acts commit both the legislator and the people subject to the law to the definition. However, the first ones fix univocally and precisely the meaning of a potentially ambiguous or vague *definiendum* by taking it from its previous uses (Scarpelli 1985, 65). In this sense, they do not impose a new commitment; they only remind it to the addressees or specify it. Stipulative definitions introduce a new meaning of a word in order to build an artificial and unambiguous lexicon with a view to prevent potential ambiguities (Hall 1966, 15; Aarnio 1987, 57; Belvedere 1998, 88). In this sense, they create a new commitment.

Both types of definitional acts are aimed virtually at addressing and limiting two fundamental problems, ambiguity and vagueness. However, this may result in generating interpretative controversies due to the vague terms used in the definitions. Legal texts are worded in a natural language, which is clearly characterized by polysemy (different definitions related to a common core meaning) and controversial and unclear definitions. Redefinitions are used to specify one of the possible meanings that a word can have, or set the boundaries of a concept characterized by a "grey area" or borderline cases (Burgess-Jackson 1995). In this fashion, a specific,

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technical lexicon is produced, so that potential risks of conflicting interpretations are ideally prevented. However, the creation of a technical and unambiguous language is virtually impossible. On the one hand, in order to be understood by citizens, legal texts need to be expressed in ordinary language: "legal language is itself ordinary language, and for this reason, in a way, there is a "burden of proof" that any deviation from ordinary language usage [...] must be justified" (Aarnio 1987, 101). For this reason, the ambiguity and the vagueness of ordinary language can be only limited, not eliminated, and the absence of legal definitions of particularly vague terms (such as "torture") leaves room for the strategic uses of redefinition. On the other hand, legal language is also a technical language, as it is based also on a specific lexicon different from the ordinary one, which can lead to three risks. First, some technical terms can be introduced without being explicitly defined (see for instance the term "enemy combatant" in the US code), which can allow the interpreter to introduce *ad hoc* definitions for the purpose of justifying a classification. Second, legal definitions are texts that need to be interpreted (Tarello 1980, 155) as they are based on ordinary words, which can be interpreted in different fashions. Finally, legal definitions, can introduce ambiguity when different definitions are provided for the same *definiendum* by the legislator and the judge (the interpreter).

These areas of ambiguity and vagueness can be used strategically. The interpreter can use or introduce specific definitions to justify a classification of a case. For this reason, the vagueness of a concept becomes a strategic resource to be exploited. This practice has been called "rhetorical definition" (Lausberg 1998; Mortara Garavelli 1988), that is, a "figure of speech" based on the selection of the semantic features that can be persuasive, disregarding others that, even though equally important, are potentially self-defeating. In some cases, this definitional move can become a "persuasive definition" (Stevenson 1944). These term refers to an argumentative strategy consisting in changing the denotative meaning of an "ethical" word in order to make it possible to predicate it of an object or a state of affairs that otherwise would not be included in the extension of the term (Macagno and Walton 2008). An extremely powerful type of redefinition is the so-called implicit or pragmatically "spurious" definition (Mortara Garavelli 2001, 15–16). This type of definition, at the basis of the so-called argument by definition (Zarefsky 2006, 404), is not provided explicitly, but it is rather presupposed by the act of classifying an entity by means of a definition that is not commonly shared. In law, such definitions are presupposed by the use of a specific term with a technical meaning that cannot be derived from other legislative texts or based on previous legal interpretations or a commonly accepted legal definition (Lausberg 1981, 165). In this case, a word belonging to the ordinary language is used by the interpreter with a technical, specific meaning different from the commonly shared one. For instance, a defendant who was growing cannabis in vases can be acquitted from the accusation of having a "plantation" of cannabis as falling outside the art 26 of the Italian Consolidated Drugs Act (Cassazione Penale, XXXVII, 1997, n. 3, p. 570).

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The purpose of this paper is to analyze the strategic uses of definitions, and in particular the uses of the implicit redefinitions, showing the different types and the distinct effects of these interpretative strategies.

9.2 Redefinitions and Vagueness: Omitting Definitions

In law, like in ordinary dialogical and dialectical (in the sense of adversarial) contexts, terms can be and sometimes are redefined. The speaker, in performing a redefinitional act, can advance a new meaning that conflicts with the one that is commonly shared, and for this reason he has a dialectical burden, which we can call "burden of proof" in a broad sense (see Bix 1995, 471). He has the burden of providing reasons in support of his new definition, as it is presumed not to be the accepted one. Redefinitions are presumptively not accepted. Clearly, the possibility of countering the accepted meaning lies in proving that the new definition is more acceptable, or clearer, or more appropriate than the other.

This process of justification can be easier and more effective when the commonly accepted meaning is not clearly defined, when it is controversial, or when there are borderline cases that are not covered by the shared definition. In these cases, the burden of the speaker is reduced, as the contrary definitional viewpoint is already weakly defendable. Vague (Burgess-Jackson 1995) concepts, which can be characterized by unclear, too broad, or contested definitions (Gallie 1956), allow the speaker to advance a redefinition that is much harder to attack. Clearly, this is possible when the term is not defined by law, or when the statutory definition is vague because it includes vague or undefined concepts. This relationship between legal definitions and legal redefinitions can be analysed by taking into account how potential vagueness can be exploited in the act of redefining, and how vagueness can be introduced as a specific redefinitional move, namely the act of omitting a definition.

Omissions can be considered as implicit actions, in which the agent brings about a specific effect intentionally by not performing a required action. As Thomas Aquinas put it, we can consider an omission to be decision of not doing what an agent should do when such a not doing is caused by an intrinsic voluntary cause (Thomas Aquinas, Q.2 A1, 93). For instance, the code of silence is a specific decision not to report a crime, so that the person who breached the law could not be prosecuted. In law, an omission can be generally considered as a breach of an affirmative duty to perform the omitted action (Walton 1980; Fusco 2008, 86). From a pragmatic perspective, omissions can be considered as a kind of act, in which the agent decides not to perform an action that was sufficient for the occurrence of a specific consequence at a later time (Aqvist 1974; Chisholm 1976; Walton 1980, 317). When the agent is the lawmaker and decides intentionally not to define a term whose definition is explicitly requested (for instance by super-national organizations), we can claim that this agent is performing a specific

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speech act, aimed at leaving open the interpretative ambiguity that results from the absence of that specific definition.[1]

The problem of the meaning of "torture" provides a clear case of omission of a definition. Before 2003, Russian criminal law contained no definition of "torture" (CAT/C/34/Add.15, 15 October 2001, art. 1 (4), p. 3) despite UN recommendations. The absence the definition of such a concept made it lawful to detain of suspects for up to 30 days, even without sufficient reasons (CAT, 28th session, 13 May 2002[2]). The police and the military in general could avoid serious criminal sentencing and only incur minor punishments for charges of "exceeding of power"[3]:

Case 1: Omission of definition – Torture

> Oleg Fedorov had been detained by two high-ranking, drunk ROVD officials on the street in Arkhangelsk. He had been interrogated by the two officials for two hours and during questioning had allegedly been severely beaten by them. Oleg Fedorov, reportedly, asked to go to the toilet and threw himself out through the window. After the incident a criminal investigation was opened against the two law enforcement officials and they were charged under Article 171(2) of the Criminal Code for "exceeding of power." In March 1996 the Department of Internal Affairs (UVD) reportedly announced publicly the dismissal of the two officers for "serious violations of the professional discipline".

The omission of this definition led to specific effects. On the one hand, according to the *nullum crimen sine lege* principle, if "torture" is not defined, there is no principle governing the application of any laws punishing this kind of behaviour. For this reason, nobody can be prosecuted for this type of crime. In this fashion, in Russia the crimes committed by police and soldiers were not prosecuted accordingly. On the other hand, the lack of a specific description of "torture" allowed the use of inhuman treatment in interrogations and a wide range of violations of humanitarian rights, as humanitarian organizations such as Amnesty International denounced.[4]

The Russian case concerning the omission of the definition of "torture" shows how the choice of not performing a required definitional act can result in a specific

[1]Clearly the strategic omission of a definition needs to be distinguished from the ordinary practice of law-making, in which the ambiguity of a sentence is needed to reach an agreement on a specific normative sentence, delegating to the interpreter the ultimate decision on the meaning. Especially when the lawmaker, which ultimately constitutes a collective agent, deals with conflicting interests or complex issues, an agreement can be reached on the abstract level of the normative sentence, without committing to the meaning thereof, i.e. to the legal norm (Sunstein 2007, 4; Tarello 1980, 365).

[2]Committee against Torture Takes up Report of the Russian Federation, CAT 28th session, 13 May 2002: http://www.reliefweb.int/rw/rwb.nsf/db900SID/ACOS-64CSAN?OpenDocument (accessed on 5th September 2011).

[3]Torture in Russia: "This man-made hell". AI Index: EUR 46/04/97. Amnesty International April 1997 (pp. 28–29). (retrieved from http://www.amnesty.org/en/library/info/EUR46/004/1997/en on 21 September 2011).

[4]Russian Federation: Denial of justice. AI Index: EUR 46/027/2002. Amnesty International October 2002 (Chap. 3). (retrieved from http://www.amnesty.org/en/library/info/EUR46/027/2002/en on 21 September 2011).

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strategic and legal outcome. The absence of a definition of a concept can result in the impossibility of motivating a classification of certain behaviour as falling under such an undefined category. From a legal point of view, the decision not to define, in this sense, can correspond to the decision not to consider a crime (or certain conducts in general) as legally relevant. Omission, in this sense, is the choice of allowing the non-classification of a state of affairs.

The omission of a definition can be an instrument for opening the possibility of redefining a term. Redefinitions can be considered as dialectical strategies that are possible and effective when they are hard to reject. In particular, they are extremely effective in cases of definitional gaps, which can be used to pursue specific goals. In this sense, by omitting definitions the lawmaker can create an ambiguity that can be used strategically by the interpreter.

9.3 Introducing Ambiguity: Definitions Redefined

A crucial condition for the effectiveness of a strategic redefinition is the actual or potential vagueness of the *definiendum*, which can also be a component of another definition. In actual vagueness, the effect of the move relies on the absence of a definition, which is strategically exploited. For instance, the absence of a definition of "enemy combatant," never defined by the U.S. government (*Hamdi v. Rumsfeld*, 542 U.S. 507, 516, 2004[5]), was used to charge the defendant of a crime that would not allow him to have any rights of protection. Potential vagueness is more complex, as the speaker needs to show that the legal or accepted definition is in fact vague, by challenging and redefining one or more terms of the *definiens*. The proponent of a new definition introduces ambiguity by redefining commonly accepted but not statutorily defined words, shifting the burden of proof onto the interlocutor. Two cases are particularly illustrative of this latter tactic, the redefinition of the concepts underlying the definitions of "torture" and "targeted killing."

During the George W. Bush administration, in order to show the constitutionality of the interrogation techniques of al Qaeda operatives (relative to the U.N. *Convention Against Torture*[6] and 18 U.S.C. section 2340[7]), Jay Bybee, then Assistant U.S. Attorney General in 2002, drafted a memorandum providing his opinion on which the Department of Justice (DOJ) based its further interpretations of "torture." The crucial strategic move was the analysis of the definition provided in the US Code, which reads as follows (18 U.S.C.A. §2340(1))[8]:

[5]Retrieved from http://www.law.cornell.edu/supct/html/03-6696.ZS.html on 7 March 2014.

[6]Retrieved from http://legal.un.org/avl/ha/catcidtp/catcidtp.html on 6 March 2014.

[7]Retrieved from http://www.law.cornell.edu/uscode/text/18/2340 on 6 March 2014.

[8]Retrieved from http://www.law.cornell.edu/uscode/text/18/2340 on 6 March 2014.

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Case 2: Definition – Torture

> [torture is an] act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.

The elements of this definition that were considered as vague were the concept of *intention* ("intended to inflict") and being severe ("severe physical or mental pain or suffering") (*Memorandum for Alberto R. Gonzales Counsel to the President* August 1, 2002, 4; hereinafter "*The Bybee Memo*"). On the one hand, "intent" was claimed to be ambiguous, as it could be interpreted as both "general intent" and "specific intent." In the first case, the defendant needed to be found guilty by showing that he possessed knowledge with respect to the actus reus of the crime. In the second case, which corresponded to the definition adopted in the memorandum, "torture" could result only if the defendant "acted with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control." (*The Bybee Memo*, 3) On the other hand, the concept of "severe pain and suffering" was considered as vague, as left undefined by the statute, and was thus redefined. Its accepted dictionary meaning ("hard to sustain or endure"[9]) was narrowed and limited to one of the possible cases, namely when it can cause death. This redefinition was justified by previous uses of the term when referred to medical conditions (*The Bybee Memo*, 5–6):

Case 3: Redefinition – Severe Pain

> These statutes define an emergency condition as one "manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent lay person, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in placing the health of the individual . . . (i) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part." Id. §1395w-22(d)(3)(B) [. . .] These statutes suggest that "severe pain," as used in Section 2340, must rise to a similarly high level the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions in order to constitute torture.

The definition of "torture" was modified by relying on the ambiguity and potential vagueness of two of the terms used in the *definiendum*, namely "intent" and "severe pain." In particular, the absence of a statutory definition of "severe pain" led to the possibility of narrowing its meaning to one of the possible cases in which the pain is "hard to endure." In this fashion "torture" was limited to cases in which the life of the victim is seriously jeopardized, and excluding many other types of practices aimed at inflicting a type of pain that would be normally classified as "severe." The restriction of the concept of "intent" to "specific intent" narrows further the concept of torture to cases in which the torturer acts with the intent of causing the death of the victim, or the failure of his organs, or the serious impairment of his body functions.

[9]Definition taken from The Oxford English Dictionary 572 (1978). See *The Bybee Memo*, 5.

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The other famous case in which the vagueness of the *definiens* is exploited for redefinitional purposes concerns the redefinition of "targeted killing," which involves the potential vagueness of some elements of the shared definition. Targeted killing is a practice adopted especially by the United States and Israel in the so-called war on terror, in which actual or alleged terrorists are killed without any due process of law. This type of behaviour is explicitly prohibited by international provisions. Under the law of armed conflict (LOAC) it is "especially forbidden [...] b) to kill or wound treacherously individuals belonging to the hostile nation or army [...] d) to declare that no quarter will be given."[10] Killing suspected terrorists without any trial or proof of guilt instead is considered as an execution,[11] which is incompatible with international law, "categorically prohibiting extra-judicial executions" (Proulx 2005, 873; Sandoz et al. 1987, 476). The prohibition on targeting noncombatant civilians is considered to be customary law.[12] Such provisions can be implemented by a shared definition. Despite the absence of a definition under international law, "targeted killing" has been defined by a UN Report as a "the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator."[13]

Given these prohibitions, under what conditions a "targeted killing" can be considered as lawful, and when does it become an unlawful assassination? The boundaries of this kind of action have become extremely problematic since the idea of war on terror blurred the concepts of "conflict" and "combatants" (and the "participation" of non-combatants in a conflict) (Solis 2007, 133). In Israel and the United States the components of the definition of targeted killing have been carefully redefined in order to include the killing of suspected terrorists within the lawful kind of assassination (Ben-Naftali and Michaeli 2003).

A clear example of this redefinition is the Israeli case. Both in Israel and the United States, the targeted killing of individuals associated with terroristic organizations was initially justified on the basis of the right of self-defence (Solis 2007), under article 51 of the United Nations Charter (Printer 2003, 359–60; Kasher and Yadlin 2005, 45). However, the main problem in considering targeted killing as an act of self-defence has to do with the controversial concepts of "imminence" of the

[10]Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations [hereafter HR IV], 18 October 1907, Annex 1, 36 Stat. 2277, TS 539 (26 January 1910), art. 23(b).

[11]Anthony Dworkin, "The Killing of Sheikh Yassin: Murder or Lawful Act of War?" Crimes of War Project, 30 March 2004, available at www.crimesofwar.org/onnews/news-yassin.html

[12]*Prosecutor v. Pavle Strugar & Others* (ICTY Case IT-01-42-AR72), Appeals Chamber decision of 22 November 2002, paras. 9–10 on interlocutory appeal. Quoted in Solis (2007, 131).

[13]Alston 2010: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston Addendum study on targeted killings. http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf

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threat, and “direct participation”[14] in hostilities.[15] The 1977 Additional Protocol I[16] specifies that “civilians shall enjoy the protection afforded by this Section [General Protection against Effects of Hostilities], unless and for such time as they take a direct part in hostilities” (see Solis 2010, 202). The lawfulness of a “targeted killing” rests, ultimately, on the definition of “direct participation” in hostilities. Indeed, the “direct participation” makes the difference between “non-combatant” and “combatant” civilians. And the second ones may be lawfully targeted, since the IHL applicable to internal armed conflict (as in international armed conflict) permits the targeting of civilians who “take a direct part in hostilities.” This idea was the ground of the fundamental ruling of the Israeli High Court of Justice 769/02,[17] which introduced a legal definition of targeted killing as a killing against “civilians who directly carry out a hostile act.” However, this definition is vague, as there is no agreement on the kind of conduct that makes an hostile act “directly” carried out (including the problems of determining whether the membership in an organized armed group may be used as an indicator of direct participation, and the length of the participation) (Alston Targeted Killings Report §59).

The vagueness of the concepts underlying the definition left open the possibility of redefining “targeted killing,” based on a more restrictive and a broader definition of “direct participation in hostilities.” In the first case, direct participation in hostilities is equated with actual combat operations, requiring a “direct causal link” between the civilian conduct and “the ensuing harm for the adversary” (Melzer 2008, 335; 337), thus excluding support activities, which do not directly cause harm to the adversary. According to the broader definition, “direct participation” encompasses “all conduct that functionally corresponds to that of governmental armed forces,” including “not only actual conduct of hostilities, but also activities such as planning, organizing, recruiting and assuming logistical functions” (Melzer 2008, 338). This latter definition can be strategically exploited to include civilians who do not participate in actual combat operations, but, for instance, merely develop and operate “funding channels that are crucial to acts or activities of terror” (Kasher and Yadlin 2005, 1948). The absence of a commonly accepted definition of “direct participation in hostilities” makes the definition of “targeted killing” vague and open to the interpretation of the governmental authorities.

In the United States the problem of defining (and redefining) “targeted killing” is related to establishing its lawfulness pursuant to the War Crimes Act (18 U.S.C.

[14]Deborah Sontag, “Israelis Track Down and Kill a Fatah Commander,” New York Times, 10 November 2000, p. A1. Quoted in Solis (2007, 132).

[15]1977 Additional Protocol I [hereafter AP I], art. 43.2. AP I is one of two treaties that update and supplement the familiar 1949 Geneva Conventions.

[16]1977 Additional Protocol I art. 51.3. Retrieved from http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=4BEBD9920AE0AEAEC12563CD0051DC9E on 7 March 2014.

[17]HCJ 769/02, “The Public Committee against Torture in Israel et al. vs. The Government of Israel et al.”.

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§2441, 2006) and the Fifth Amendmentin cases in which the target is an American citizen. In the first case, a war crime is defined as a grave breach to the 3rd article of the Geneva Convention, which includes murder when the person killed (or to be killed) is taking no active part in the hostilities (*Department of Justice White Paper*, 15–16).[18] In order to justify the targeted killings in general, the U.S. Department of Justice decided to focus on the definition of "taking active part in the hostilities," which was interpreted by negation as follows: "members of such armed forces [of both the state and non-state parties to the conflict]... are considered as "taking no active part in the hostilities" only once they have disengaged from their fighting function ("have laid down their arms") or are placed hors de combat; mere suspension of combat is insufficient."[19] For this reason, operations against leaders or forces of terroristic organizations posing an "imminent threat of violent attack against the United States" cannot be considered as taking "an active part in hostilities", and, therefore, are excluded from the category of unlawful killings (*Department of Justice White Paper*, 7). This reasoning presupposes that imminent threats are considered as forms of fighting. However, the most strategic definitional move consists in providing a definition of "imminent" that could justify the killing of individuals that are only planning or are merely suspected of planning terroristic attacks against the United States. For this reason, "imminence" was redefined as follows (*Department of Justice White Paper*, 7):

Case 4: Redefinition – Imminence

> By its nature, therefore, the threat posed by al-Qa'ida and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making the use of force appropriate. [...] With this understanding, a high-level official could conclude, for example, that an individual poses an "imminent threat" of violent attack against the United States where he is an operational leader of al-Qa'ida or an associated force and is personally and continually involved in planning terrorist attacks against the United States. Moreover, where the al-Qa'ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities, that member's involvement in al-Qa'ida's continuing terrorist campaign against the United States would support the conclusion that the member poses an imminent threat.

This definition of "imminence" allowed the classification of mere suspects as "imminent threats," making their killing lawful. This redefinition allowed the Government also to justify the apparent breach of the due process clause of the Fifth Amendment. In this case, the citizen's right to due process needs to be determined by weighing "the private interest that will be affected by the official action" against the

[18]Department of Justice. White paper. *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force*. Retrieved from http://msnbcmedia.msn.com/i/msnbc/sections/news/020413-DOJ-White-Paper.pdf on 20 December 2013.

[19]International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law 28 (2009).

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Government's asserted interest, "including the function involved and the burden that the Government would face in providing greater process" (*Hamdi v. Rumsfeld*, 529). In particular, when the targeted individual poses an imminent threat of violent attack against the United States and his capture would be infeasible, the Constitution would not require the government to provide further process (*Hamdi v. Rumsfeld*, 535). By redefining the vague and undefined concept of "imminence," the Government managed to show the lawfulness of targeted killings and justify lethal operations against American citizens without due process.

The rhetorical effectiveness of a redefinition consists in the difficulty of its being rejected. An explicit statutory definition cannot be argued against by appealing to the ordinary meaning of the *definiendum* or to other arguments. On the contrary, its absence leaves room for redefinitional moves. In the cases above, the undefined concepts of "severe pain," "direct participation," and "imminent threat" led to the possibility of redefining "torture," "murder," and "active participation," even though such redefinitions conflicted with the ordinary understanding of such terms. In these cases, the Governments found possible definitional gaps, and introduced ambiguities that did not exist.

9.4 Implicit Redefinitions

One of the most powerful acts of definition is the implicit redefinition (Macagno and Walton 2014, 142–145). The speaker, instead of proposing a new definition of a concept based on specific reasons, takes it for granted. This implicit move modifies the dialogical situation of the interlocutor, who is left with the burden of reconstructing the move, assessing the redefinition, and rebutting it. This complex mechanism can be considered as an implicit act of defining. It is a kind of definitional act, as it alters the dialectical situation by imposing to the interlocutor specific possibilities (accepting the move and the definition or rejecting it by providing contrary arguments). It is also a specific type of act, more precisely a directive, through which the speaker imposes a new definition, committing also the hearer to it without providing any reasons. However, at the same time the implicit redefinition is a non-action, as it is a presupposition, a requirement of another act performed by the speaker.

The act of taking for granted a redefinition is strictly bound to the controversial issue of presupposition. Implicit redefinitions can be analyzed as pragmatic presuppositions (Stalnaker 1970, 1998), types of directives in which the speaker displays a possible world (Stalnaker 1970, 280), which can be interpreted as a set of conditions (in case of implicit definitions, the meaning of the redefined word). Stalnaker treated this "taking a proposition for granted" as a propositional attitude, a kind of directive act (Stalnaker 2002, 701):

> Speaker presupposition is a propositional attitude of the speaker, but I and others who have emphasized the role of speaker presupposition in the explanation of linguistic phenomena have been vague and equivocal about exactly what propositional attitude it is. To presuppose

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Essential Condition	Speaker (*S*) sets the presupposed proposition (*pp*) as a condition of the felicity of his speech act (*SA*); if Hearer (*H*) does not accept *pp*, *SA* will be void.
Propositional Condition	*pp* is a proposition that can be reconstructed and evaluated by *H*.
Preparatory Condition	*S* can presume that *H* can evaluate and accept *pp.*
Sincerity Condition	*S* believes that *pp*; *S* believes that *H* can evaluate and know or accept *pp*.

Fig. 9.1 Conditions of the act of presupposing

something is to take it for granted, or at least to act as if one takes it for granted, as background information – as *common ground* among the participants in the conversation.

The speaker can presuppose a shared world (or in this case a commonly known meaning), or a new one as it were part of the common ground (Stalnaker 1970, 279). In this latter case he is actually imposing some conditions. He is performing a specific implicit act (Ducrot 1972; Hopper 1981).

The implicit act of presupposing can be described according to its felicity conditions (Macagno 2012), that can be reconstructed based on the structure of an explicit act (Austin 1962, 14–15; Searle and Vanderveken 1985, 13–19; Searle and Vanderveken 2005;Holtgraves 2008, 13; Macagno and Walton 2014, 179) (Fig. 9.1).

This speech act has a direction of fit from World (of the Hearer) to Words (of the Speaker), and its purpose is to establish the conditions of the dialogue, namely the propositions that the Hearer needs to be committed to. Clearly, the Hearer needs to be in condition of reconstructing such presuppositions from the context, namely shared knowledge and dialogical situation, and the co-text, (the relevant portion of the text in which the speech act occurs) (propositional condition). For instance, the presuppositions of the sentence "I have met Bob at the library" uttered to an interlocutor that does not know Bob nor the library, could not be retrieved. The preparatory and sincerity conditions govern the acceptability of a presupposition. The Speaker can *presume* that the Hearer can accept the presuppositions. In this case the presuppositions cannot to be unacceptable by the Hearer, or known to him to be false. For instance, it is possible to presume that the interlocutor accepts that "war" means "active fighting by ground troops," but not that it refers to "peaceful diplomacy." In this sense, the presumptions bridge the gap between the speaker's and hearer's knowledge from an epistemic and argumentative perspective. The process of "thinking" (Soames 1982, 486) that the hearer accepts a presupposition can be analysed in this way as a pattern of reasoning that can be assessed. Implicit redefinitions can be conceived as the conclusion of presumptive reasoning, as the speaker presupposes a proposition based on a form of reasoning in lack of evidence. The speaker acts on the basis of rules of presumptions that are commonly accepted, such as "Speakers belonging to a specific speech community usually know the

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meaning of the most important words of the language used therein." For this reason, presupposing a redefinition amounts to advancing a prima facie case that the interlocutor needs to challenge and disprove (Macagno and Damele 2013).

This type of definitional act is extremely effective from a dialectical perspective. The speaker shifts the burden of supporting the new definition onto the interlocutor. The other party needs to reject the redefinition by making the new meaning explicit first, and then providing evidence that the new description of meaning is neither accepted nor acceptable. He then needs to support the commonly accepted one. This implicit move has the clear effect of inverting the dialectical roles. On the one hand, the speaker (the party introducing a new definition) does not need to provide arguments in support of the new meaning unless the interlocutor challenges it by advancing contrary arguments. On the other hand, the hearer needs to attack a definition that has never been supported by arguments, but only treated as shared. The implicit redefinition alters also the burdens of the parties. The hearer has the difficult tasks of proving that a definition is not accepted, and of defending the shared one. The speaker can act in defense, simply attacking the interlocutor's arguments.

The possibility of performing this move lies in the potential ambiguity of a concept, or rather in the possible existence of a definition different from the shared one. In this sense, the possibility of supporting a new definition by means of arguments presupposes that a new definition can be acceptable somehow (Bix 1995, 471). The interlocutor needs to be presumed to be able to accept the new meaning, which is impossible in cases in which the definition is already explicitly stated by law. In other words, it is possible to redefine implicitly a term when it is not unreasonable to attribute to it different meanings that are incompatible to the purpose of warranting the attribution of a legal predicate. Usually the implicitly redefined terms are the ones that have not been defined by law. They are the ones that have not a specific statutory definition and for this reason should be presumed to have their ordinary meaning, determined on the basis of a dictionary (Barney 2003, 9–10, and the cases cited therein). In law, the individuals are not simply presumed to know the law, but also the ordinary meaning of the words used (*McDermott Int'l, Inc. v. Wilander*, 342[20]). The problem with the "ordinary meaning" is that sometimes certain words can be polysemic, vague, or their definition controversial (Gallie 1956). Terms such as "war" can be defined in general, but they admit of borderline cases that cannot be easily determined based on a definition unless such a definition is narrowed and specified.

Implicit redefinitions are possible when they can be considered not to be simply wrong classifications, namely when they can shift the burden of proving the contrary definition. This strategy is usually not effective when the redefined concept is defined by law (the move can be easily classified as an improper or erroneous classification). In this case, the concept cannot be potentially ambiguous, nor can the speaker treat the new definition as the shared one. On the contrary, when the *definiendum* has not been statutorily defined, it is less easy for the interlocutor to reject an implicit redefinition.

[20]Retrieved from http://www.law.cornell.edu/supct/html/89-1474.ZS.html on 7 March 2014.

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The reasonableness (the possibility) of an implicit redefinition needs to be distinguished from its effectiveness. As seen above, the possibility of redefining a term stems from the reasonableness of the new definition, which amounts to the possibility of being accepted, or rather of not being rejected. The effectiveness of the strategic use of a redefinition consists in the difficulty of refuting it, or at least the possibility of leading the other party to disproving it, shifting the burden of proof. The tactics of implicit redefinition are aimed at increasing the pragmatic and semantic ambiguity of the redefinitional move, making it difficult for the interlocutor to detect and reconstruct the redefinition and easier for the speaker to defend it.

9.5 Redefinitions by Classification

The simplest strategy of implicit redefinition is the so-called argument by definition (Zarefsky 1998; Schiappa 2003, 111–112; 130). Instead of stating or advancing a new definition, the speaker takes it for granted by classifying a fragment of reality, treating it as part of the interlocutors' common ground.

A clear implicit redefinition by classification is the one concerning the concept of "persecution" in *Sahi v. Gonzales* (416 F.3d 587, 589, 7th Cir. 2005).[21] Sahi was an alien member of the Ahmadi religious sect discriminated by Muslims in Pakistan. He had been beaten by orthodox Muslims, and had his property destroyed, before leaving his country. The Board of Immigration Appeals denied his application for asylum, because they classified him not as a victim of "persecution," based on the following argument (*Sahi v. Gonzales*, 416):

Case 5: Implicit redefinition – Persecution

> While this Court [namely, the immigration judge] fully recognizes that Ahmadis are discriminated against and face harassment in Pakistan because of their religious beliefs, I do not find that this fact, coupled with the general risk of random violence singles the respondent out or establishes a pattern and practice of persecution of all Ahmadis.

Instead of using the ordinary definition of "persecution" (the Board never defined this term), or advancing a new one and supporting it, the judge simply took for granted that it meant "systematic violence directed against a group." As a matter of fact, he denied the classification because it was not characterized by "a pattern and practice" and was not directed against "all Ahmadis." By means of the implicit redefinition presupposed by his classification, the judge evaded the burden of providing reasons for adopting a new interpretation of the concept. The Court of Appeals reversed the judgment, requesting the Board to provide an explicit definition.

Redefinition by classification has been the strategy at the basis of a controversial recent case between the Electronic Privacy Information Center and the Federal

[21] Retrieved from https://law.resource.org/pub/us/case/reporter/F3/416/416.F3d.587.04-2828.html on 7 March 2014.

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Bureau of Investigation (*In Re: EPIC*, No. 13–58). The dispute arose from an Order in which Foreign Intelligence Surveillance Court compelled Verizon Business Network Services (of which EPIC is a customer) to produce to the National Security Agency, on an ongoing basis, all of the call detail records of Verizon customers. The crucial problem at issue was the violation of the privacy interests of all customers of the provider of communication services (*In Re: EPIC*. Jul 8 2013,[22] 18):

Case 6: Implicit redefinition – Relevant

> Specifically, the statute requires that production orders be supported by "reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation. . . ." 50 U.S.C. §1861(b)(2)(A). It is simply unreasonable to conclude that all telephone records *for all Verizon customers in the United States* could be relevant to an investigation. Thus, the FISC simply "ha[d] no judicial power to do what it purport[ed] to do." *De Beers*, 325 U.S. at 217.

The FBI requested all telephone records for all Verizon customers by classifying them as "relevant to an authorized investigation." However, this classification clearly conflicts with the commonly accepted meaning of "relevant," which according to the *Merriam-Webster's Collegiate Dictionary* (2004, 1051) means "having significant and demonstrable bearing on the matter at hand" (relevant to an issue) or "affording evidence tending to prove or disprove the matter at issue or under discussion" (relevant testimony) (*In Re: EPIC*, Aug 9, 2013, 11–12[23]). In both definitions, the central characteristic is "being related to a subject in an appropriate way." The FBI, in order to classify all telephone records as relevant, used a different, implicit definition of "relevant" conflicting with the ordinary one: information that "could lead to other material that could bear on an issue in the investigation" or "facilitate the government's use of investigative tools" (*In Re: EPIC*. Oct 11, 2013, 28–29[24]). This broader definition, which potentially included everything, was made explicit and defended only after being challenged and argued against by the Petitioner. This move, however, resulted in shifting the burden of defending it. The Petitioner had to reject it, by providing evidence of a different shared meaning (dictionary definition) and an economic argument (the definition used would make the word "relevant" meaningless) (*In Re: EPIC*. Aug 9, 2013, 20–21). These arguments allowed the respondent to adopt a twofold defensive strategy, on the one hand aimed at supporting the redefinition based on the interpretation of past cases, and on the other hand directed to undermining the petitioner's argument, supporting its own

[22]Retrieved from http://epic.org/EPIC-FISC-Mandamus-Petition.pdf on 4 November 2013.

[23]Retrieved from http://www.law.indiana.edu/front/etc/section-215-amicus-8.pdf on 7 March 2014.

[24]Retrieved from https://epic.org/privacy/nsa/in-re-epic/13-58-SG-Brief.pdf on 7 March 2014.

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by negation of the contrary. In particular, the economic argument was attacked by *a contrario* one, supporting the interpretation by showing that it was not excluded (*In Re: EPIC*. Oct 11, 2013, 30).

The burden of disproving a redefinition and the possibility of defending it can be increased by another strategic move, the omission of a definition. A term can be introduced without a statutory definition, thus allowing the possibility of implicitly interpreting it, namely implicitly defining it, or redefining it differently from its shared non-technical definition. One of the most famous cases concerns the concept of "enemy combatant." This term was never defined (*Hamdi v. Rumsfeld*, 516), but it was used by the Bush administration to denote a specific class of combatants, falling outside the boundaries of the Geneva Convention. The problems arose when, after the attacks on September 11, the government arrested and detained two American citizens, Hamdi and Padilla, with the charge of being "enemy combatants." The case went to court, and the problem of the implicit definition of this term came to light. Padilla was detained as an enemy combatant based on an order of President Bush (see President Bush order (June 9, 2002)[25] to hold Padilla as an enemy combatant), where the reasons for the classification were that he was "closely associated with al Qaeda," engaged in "hostile and war-like acts" including "preparation for acts of international terrorism" directed at the U.S. (June 9 Order, 2–5; *Padilla Ex Rel. Newman v. Bush*, 233 F. Supp. 2d 564, 568 S.D.N.Y. 2002[26]). Hamdi was considered as an enemy combatant because "[b]ased upon his interviews and in light of his association with the Taliban," a series of tests that determined that Hamdi met "the criteria for enemy combatants (*Hamdi v. Rumsfeld*, 513). These classifications did not provide any explicit definitions. For this reason, the implicit act forced the Court to first reconstruct a possible definition by relying on previous similar cases, the ones concerning the definition of "unlawful combatant." The interpretative controversies were solved only in 2004, when the meaning of this concept was made explicit by the Supreme Court and only then the classification could be denied (*Hamdi v. Rumsfeld*, 516). This case illustrates the force of an implicit definition. In absence of a shared or an existing definition, the burden of disproving the classification falls onto the other party, who first needs to prove a contrary definition and then, if the latter is not rejected, deny the classification. This burden can be strongly increased when the concept has never been defined and is not of common use, as in this case to the other party needs to reject a definition without relying on any alternative one.

[25]Retrived from http://www.google.pt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http3A2F2Fnews.findlaw.com2Fcnn2Fdocs2Fterrorism2Fpadillabush60902det.pdf&ei=trsZU6CqLsm07QbNlYCQCg&usg=AFQjCNFarnYjxBWBBaupDTBu9Xtd8BNrJQ&bvm=bv.62578216,d.ZGU&cad=rja (accessed on 9 September 2011).

[26]Retrived from http://www.docstoc.com/docs/92087484/Padilla-v-Bush-233-F-Supp-2d-564-SDNY-2002 on 7 March 2014.

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9.6 Redefinitions by Analogy

One of the most powerful strategies of implicit redefinition is definition by analogy. Analogy can be considered as a process of re-classification of a predicate, in which the two terms of the analogy (the Analogue and the Primary Subject) are included within a new semantic generic property (a semantic genus), which does not correspond to the original definitional characteristics of the Analogue. Analogy has three crucial dimensions: the essential difference between Analogy and Primary subject; the relevance relation; and the creation of a functional genus (Macagno and Walton 2009).

Analogy consists in the comparison between two entities or states of affairs that do not belong to the same semantic genus, namely that are essentially different (Glucksberg and Keysar 1990, 7; Macagno and Walton 2009). For instance, it would be unreasonable to draw an analogy between two kinds of apples, such as a *Golden Delicious* and a *Granny Smith*, aimed at concluding that they share essential characteristics. Rather, two species can be compared taking into account some non-essential feature, such as sweetness or taste. Analogies are extremely powerful redefinitional tools when the two terms of the comparison are essentially different (when they belong to distinct genera from a semantic point of view). For instance, an inn is essentially different from a boat, as dwellings cannot be included in the same category of vehicles. Similarly, motorhomes are essentially not vehicles, as they have not an engine and they are primarily shelters. In this sense, analogies are used when the law cannot be applied to a specific case, when the entity does not fall within the category subject to the provision of law.

Analogy is strictly bound to communicative intention. The two terms of the analogy are not regarded from the point of view of their meaning, but rather from a specific perspective, which becomes the principle of redefinition. In law this perspective or communicative intention is the application of the law, which presupposes its reconstruction through a process of interpretation. For example, in *California v. Carney* (471 U.S. 386 1985)[27] a motorhome was compared to a car for the purpose of the application of the warrant exception to the Fourth Amendment. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by requiring that searches be conducted pursuant to a warrant issued by an independent judicial officer. However, in some cases, one of which is the "automobile exception" (later included within the category of "special needs"), warrants are not necessary. The crucial problem is to establish why the exception applied to cars, by reconstructing the justificatory (or relevance) relation. According to the standard interpretation (grounded on the leading case *Carroll v. United States*, 267 U.S. 132, 1925),[28] the ground for such an exception was the mobility of the

[27]Retrieved from http://supreme.justia.com/cases/federal/us/471/386/ on 7 March 2014.

[28]Retrieved from http://supreme.justia.com/cases/federal/us/267/132/case.html on 7 March 2014.

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car, which makes it impracticable to secure a warrant. The analogy between a motorhome (searched without warrant) and a car, aimed at applying the exception, was based on a reinterpretation of the purpose of the law. The "lesser degree of protection of the privacy interests" was justified based not only on the mobility of the vehicle (practicability of securing a warrant), but also on the "lower expectation of privacy" (lower privacy interests). This new relevance relation was used to construct the analogical relation.

The third dimension of analogy is the creation of a functional genus. Analogy includes both terms of comparison under a new genus, different from the originally shared, semantic one. This new generic characteristic is an *ad hoc* (Glucksberg and Keysar 1990), functional genus (Macagno and Walton 2009), namely a genus that is created for fulfilling the relevance relation. In legal analogies, the genus is created for the purpose of justifying the application of the law. For instance, by means of analogy an inn and a boat can be redefined as species of the same genus "providers of accommodation to guests reposing in them extraordinary confidence" (*Adams v. New Jersey Steamboat Co.*, 151 N.Y. 163, 1896).[29] Continuing the analysis of the automobile exception, the analogy between a car and a motorhome resulted in the abstraction of a new superordinate semantic category, "property subject to a reduced expectation of privacy." This functional genus corresponds to the abstract characteristic that at the same time can include both the terms of the comparison and justifies the application of the exception. Clearly for the purpose of the law a car (or automobile) was no longer "a self-propelled vehicle," but a specific kind of "piece of property characterized by lower expectations of privacy." For this reason, analogy implicitly redefines a concept. The structure of the redefinition by analogy can be represented as follows (see Ashley 1991, 758; Guastini 2011; Macagno 2014) (Fig. 9.2).

As shown in the table above, the predicate is redefined (Sorensen 2003) by highlighting the factors that are considered as essential for the legal qualification to apply.

The redefinition by analogy played a crucial role in the controversial cases stemming from the Foreign Intelligence Surveillance Act and the Protect America Act (In Re: Sealed, 310 f.3d 717, 2002[30]; In Re: Directives 51 F.3d 1004, FISA Ct Rev 2008[31]), involving the warrantless acquisition from communication service providers of foreign intelligence concerning third person reasonably believed to be located outside the United States. This provision, called the "foreign intelligence exception," clearly breaches the aforementioned Fourth Amendment and the need of a warrant to conduct searches. In (*In Re: Directives*, 14) the Court needed to justify the exception, which they did by reasoning by drawing an analogy with the special needs doctrine (Hirsch Ballin 2012, 501–502). As mentioned above, the exception to the warrant clause (the so-called "special needs doctrine") has been traditionally

[29]Retrieved from http://www.wneclaw.com/internet/earlyanalogycases.pdf on 7 March 2014.

[30]Retrieved from https://www.fas.org/irp/agency/doj/fisa/fiscr111802.html on 7 March 2014.

[31]Retrieved from http://www.fas.org/irp/agency/doj/fisa/fiscr082208.pdf on 7 March 2014.

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Premise 1 (rule)	If x is P, the x has the right/is A.
Premise 2 (borderline)	It is not clear whether a (a borderline case) is P.
Similarity premise	a is similar to b.
Premise 3 (principle of classification)	b was classified as P because of the factors $f_1, f_2, ..., f_n$.
Redefinition premise	If x has the factors $f_1, f_2, ..., f_n$, the x is P.
Premise 4 (factors)	a has $f_1, f_2, ..., f_n$.
Conclusion	Therefore, a is P.

Fig. 9.2 Scheme from definition by analogy

justified based on special needs, "beyond the normal need for law enforcement" in cases of diminished privacy expectations"[32] (see *Vernonia School Dist.* 47J *v. Acton*, 515 U.S. 646, 653, 1995[33]). In such cases, a court may balance private and public interests to determine whether the search meets the constitutional requirement of reasonableness. The crucial problem is that surveillance with foreign intelligence purpose is primarily aimed at apprehending terrorism suspects[34] (a law-enforcement purpose). The analogy was drawn by introducing an almost new concept of "special needs," based on a redefinition of the idea of "beyond the normal need for law enforcement," and the deletion of the requirement of diminished privacy expectations. Automobile searches or drug testing inspections in schools were placed under the same functional genus of being activities with "a programmatic purpose involving some legitimate objective beyond ordinary crime control" (*In Re: Directives*, 14; *In Re: Sealed*, 745–46). In this sense, the analogy reinterpreted the purpose of the law, extending its boundaries by redefining the crucial concepts on which it is based.

In this case the analogy did not simply redefine a legal predicate, but introduced a new nameless genus created by modifying the meaning of existing concepts. The precedent cases classified as "special needs" and the new one fall within a new original category, "searches or violations of privacy with some legitimate

[32]Criminal Law. Fourth Amendment. Second Circuit Holds New York City Subway Searches Constitutional under Special Needs Doctrine. MacWade v. Kelly, 460 F.3d 260 (2d Cir. 2006). *Harvard Law Review* 120 (2), 2006, 635.

[33]Retrieved from http://www.law.cornell.edu/supct/html/94-590.ZO.html on 7 March 2014.

[34]An "agent of a foreign power" is defined in terms of criminal activity (In Re: Sealed). More specifically, they are US persons engaged in activities that "involve" or "may involve" a violation of criminal statutes of the United States (50 U.S.C. §1801(b)(2)(A)).

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Premise 1 (target)	No law provides for the *x*'s that are *Q*.
Premise 2 (property)	If *x* is *P*, then *x* has the right/is *A*.
Definitional premise	*P* and *Q* belong to the same functional genus *G* characterized by properties f_1, f_2, f_3 ... f_n.
Species – Genus premise	If *x* is *G*, then *x* has the right/is *A*.
Conclusion	If *x* is *Q*, then *x* has the right/is *A*.

Fig. 9.3 Scheme from redefinition by analogy

objective beyond crime control." The structure of this (re)definitional strategy can be illustrated as follows (Macagno and Walton 2009, 173; Guastini 2011, 280–281) (Fig. 9.3).

The new genus represents a new concept, which includes the two terms of the comparison and allows the application of the legal qualification.

9.7 Redefinition by Contrary and Dichotomies

A concept can be defined or redefined by distinguishing it from its contrary, whose definition is supposed to be shared or at least not to be as such controversial. For instance, a classic case of definition "*per privantiam contrarii*" is the definition of "good" as "what is not evil" (Victorinus 1997, 23, 9–11). Definition by negation actually does not describe what the concept is; rather, it shifts the burden of providing a different and incompatible definition, and defending it, onto the interlocutor. The other party needs first to identify the dichotomy and the cause of its unacceptability; he then needs to show that it is false, and prove it. From a dialectical perspective, definitions by negation of the contrary trigger only one type of reasoning, grounded on the exclusion of the alternative within a semantic paradigm (Macagno and Walton 2011):

Disjunctive Syllogism
Either A or B.
Not B.
Therefore A.

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Clearly, this type of reasoning applies to a dichotomy drawn from a specific point of view, namely the application of a legal qualification, which often results in modifying the definition of an existing concept by shifting the burden of proving the contrary onto the interlocutor. For instance, in *Adams et al. v. United States* (Case 1:90-cv-00162 2008)[35] the defendant (the Department of Health and Human Services or HHS) wanted to prove that the plaintiffs (working as investigators) were not entitled to overtime pay, as their duties were administrative, and therefore not exempt from overtime pay. The defendant advanced the following reasoning (*Adams et al. v. United States*, 9–10):

Case 7: Redefinition by dichotomy – Administrative work

> Defendant sees the production work of HHS as the sponsoring of federally-funded health care and benefit programs, not the investigation of abuses in the delivery of those programs. [...] Defendant argues that performing criminal investigations cannot be part of the production work of HHS. [...] Defendant concludes that plaintiffs were exempt administrative employees of HHS during the relevant time period.

The defendant's argument was grounded on an existing but not specifically defined dichotomy between administrative and production work. By providing a description of one of the terms of the dichotomy and defining the other by negation ("work that is not productive"), the party managed to classify investigation work as administrative, even though it did not involve managerial tasks. In this fashion, "administrative work" was implicitly redefined as work not resulting in sponsoring health care and benefit programs. The reasoning can be represented as follows (partially adapted from Macagno and Walton 2010, 251) (Fig. 9.4).

The negative definition allowed the defendant to shift the burden of providing a different definition of "administration work" and supporting a contrary classification onto the other party.

A crucial case in which the strategy of definition by dichotomy was used is the aforementioned *In Re: Sealed*, in which the problem of the limits and the consequences of collecting without a warrant private data for the purpose of obtaining foreign intelligence information arose. The crucial problems consisted in defining the type of information that the government (through the Attorney General) can collect, and how to use it (minimization procedures). The issue of defining and redefining "foreign intelligence information" hinged on a dichotomy drawn for the purpose of the Fourth Amendment. According to this provision, the individual is protected against unreasonable searches and seizures aimed at law enforcement. However, as mentioned above, the Patriot Act, Section 215[36] allowed for a specific exception: collecting evidence for the purpose of obtaining foreign intelligence information. This purpose was clearly opposed to the one protected by

[35]Retrieved from http://www.findforms.com/single-form.php/form/296181/Cross-Motion-Dispositive-District-Court-of-Federal-Claims-District-federal on 7 March 2007.

[36]USA PATRIOT Act. Pub. L. 107–56, Oct. 26, 2001. Section 215. Retrieved from http://epic.org/privacy/terrorism/hr3162.html on 7 March 2014.

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Reasoning from oppositions in classification	
SHARED PREMISES	POTENTIALLY CONTROVERSIAL PREMISES
0. Either a work is administrative or it is production.	
	1. Production work is the sponsoring of federally-funded health care and benefit programs.
2. The plaintiffs' duty was criminal investigations.	
	3. Criminal investigations does not fall within "sponsoring of federally-funded health care and benefit programs".
Preliminary conclusion Therefore plaintiffs' work was not production. (from 1 and 3)	
CONCLUSION Therefore plaintiffs' work was administrative. (from prel. concl. and 0)	

Fig. 9.4 Redefinition by dichotomies

the Fourth Amendment. According to the provisions of law, warrantless electronic surveillance is allowed in specific circumstances, the most important of which is that "a significant purpose of the surveillance is to obtain foreign intelligence information" (50 USC §1804, (6)(b)). "Foreign intelligence information" is defined in its relevant part as (50 USC §1801 (e)) (emphasis added):

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against
   (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
   (B) **sabotage, international terrorism**, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or
   (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; [. . .]

This purpose introduces an exception, which the definition of "electronic surveillance" brings to light by contrasting it with the purpose of law enforcement (50 USC §1801 (f)) (emphasis added):

Case 8: Redefinition by dichotomy – Foreign intelligence

"Electronic surveillance" means

(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and **a warrant would be required for law enforcement purposes.**

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The dichotomy between law enforcement and foreign intelligence (*In Re: Sealed*, 34[37]) implicitly specifies what "foreign intelligence" is for the purpose of the Fourth Amendment, namely a purpose that is *not* prosecution of ordinary crimes, or rather law enforcement. One of the redefinitional problems stems from the use of the collected data, as the minimisation procedures at the same time allow "the retention and dissemination of nonforeign intelligence information which is evidence of *ordinary crimes* for preventative or prosecutorial purposes" (50 U.S.C. §1801(h)(3)). In order to defend the constitutionality of the provision, the FISC Court reinterpreted the dichotomy. Instead of regarding the opposition as between crimes *related to national security* (espionage, sabotage or terrorism, see *In Re: Sealed*, 11) and the other *ordinary crimes*, the Court broadened the concept of "foreign intelligence" by contrasting it with the *"sole* purpose of criminal prosecution" " (*In Re: Sealed*, 34) (emphasis added):

Case 9: Redefinition by dichotomy – Foreign intelligence

> The better reading, it seems to us, excludes from the purpose of gaining foreign intelligence information **a sole objective of criminal prosecution**. Because, as the government points out, when it commences an electronic surveillance of a foreign agent, typically it will not have decided whether to prosecute the agent (whatever may be the subjective intent of the investigators or lawyers who initiate an investigation). So long as the government **entertains a realistic option of dealing with the agent other than through criminal prosecution**, it satisfies the significant purpose test.

This redefinition of the dichotomy modified the concept of foreign intelligence. Instead of referring to an activity including evidence of *certain* crimes (*In Re: Sealed*, 12), the term was broadened to include evidence of crimes *in general*, in addition to information concerning attacks, hostile acts, terrorism, espionage, and sabotage.

9.8 Conclusion

Rhetorical definitions (or strategic redefinitions) can be considered as argumentative strategies consisting in selecting or modifying the meaning of the *definiendum* in order to pursue a specific persuasive or dialectical goal. In law, the goal is usually to support the attribution or the non-attribution of a legal predicate to a state of affairs, leading to a consequence according to the legal norm. The purpose of this paper was to show why and how the strategic use of definition can be extremely effective in legal discourse, illustrating the various tactics of redefining a term "rhetorically." Strategic redefinitions can be considered as complex moves,

[37] *In Re: Sealed, Supplemental brief for the United States*, Case No. 02-001, Foreign Intelligence Surveillance Court, 2002.

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which can be theoretically analysed by taking into account different interrelated dimensions, namely the type and the nature of the *definiendum*, the acts of definition, and the strategies or types of implicit redefinition.

The dialectical force, or effectiveness, of a redefinition consists in the effects that it produces, or rather in the difficulty of being rejected. Its force depends on the extent in which it successfully shifts the dialectical "burden of proof" onto the other party, which in this case consists in disproving the definition. For this purpose, redefinitions are aimed at selecting or altering the meaning of vague terms, or words whose definition is not shared or explicitly stated in a legal text. In this sense, also the choice of leaving a crucial term undefined (such as in the case of "torture") becomes a strategic move, a specific negative act that opens up the possibility of redefining the legal concept almost arbitrarily. The impossibility or difficulty of countering a redefinition explains also the choice of redefining the elements of a statutory definition that are taken from the ordinary use. In this sense, the redefinitional activity is aimed at introducing an ambiguity that did not exist before the definitional act, such as in the case of "imminence" or "severe pain."

The analysis of the target of rhetorical definitions and the reason thereof needs to be integrated with the investigation of the instruments used to carry out this move, and in particular the speech acts and the types of strategic redefinition. A term can be redefined through explicit and implicit speech acts, and relying on different types of redefinitional arguments, such as analogy or opposition. The most dangerous definitional acts are the implicit ones, as the interlocutor is left with the burden of reconstructing the implicit and unshared definition, and of challenging it. This act is often carried out effectively through two types of reasoning, the analogical argument and reasoning by opposition. In both cases the pattern of reasoning hides the introduction of a new semantic genus, which implicitly redefines the concepts placed under it. In this sense, the analysis of strategic redefinitions becomes essentially an investigation on the tactics used to hide a redefinition, on the hidden acts of altering the meaning of a word.

The strategies and the dangers of redefinition in interpretation can shed light on the burden, the effects, and the risks of the legislative definitional activity. Strategic redefinitions can be used when some terms are left undefined or underdefined in a legislative text, or when statutory definitions are in turn ambiguous or consisting of undefined concepts. The legislative choice of leaving terms undefined or underdefined can be considered as an instrument for reaching an incompletely theorized agreement, as Sunstein pointed out. A legislative deadlock can be avoided by agreeing upon an unspecified or underspecified text, leaving up to the interpretative bodies the burden of defining it properly. The legislator, instead of curbing or limiting the interpretative freedom setting out boundaries to the passage from the legal statement to the norms, decides to delegate his powers to the interpretative bodies. This decision, however, has the argumentative effect of reducing or even removing the burden of persuasion associated with the proposal of a redefinition. The interpreter, instead of incurring the burden of challenging and rejecting an existing definition, is allowed to advance a redefinition without fulfilling a burden of persuasion, or by meeting only a low one (deriving from one of the ordinary uses of the *definiendum*).

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In this perspective, statutory definitions in legislative texts can be considered as meta-norms (Guastini 2011, 168), as they govern the interpretation of the legal statements containing the *definiendum*. In most cases, statutory definitions are impose boundaries to the interpretation of terms or phrases drawn from ordinary language. The lawmaking activity can reduce the inevitable vagueness of legal language (resulting in the interpreter's possibility of strategically redefining a term) through statutory definitions and redefinitions (Guastini 2011, 26; 56). In turn, such definitional statements, become second-order rules, governing the legal statements containing the term defined.

The relationship between strategic interpretative redefinitions and statutory (re)-definitions can be conceived in terms of burden of persuasion. A statutory definition selects some meanings of the *definiendum* and restricts its vagueness, limiting the possibility of strategically redefining it. However, every word drawn from ordinary language, including the terms used to define statutorily a term, is subject to being strategically redefined. The lawmaker's definitional activity becomes in this respect a dialectical move. The reduction of the interpretative freedom can be regarded as a move aimed at placing on to the interpreter of a higher burden of justifying a redefinition, should the latter decide to use a statutorily defined term with a different or potentially controversial meaning. The reduction of the redefinitional possibilities corresponds to a higher burden of providing arguments supporting a strategic redefinition. On the contrary, the absence or the vagueness of a definition can be conceived as a dialectical choice of allowing the interpreter to redefine a legal term without fulfilling a burden of persuasion, or fulfilling a lower one.

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