

1999

On Generalizations I: a Preliminary Exploration

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Terence J. Anderson, *On Generalizations I: a Preliminary Exploration*, 40 *S. Tex. L. Rev.* 455 (1999).

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ON GENERALIZATIONS I: A PRELIMINARY EXPLORATION

TERENCE J. ANDERSON*

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Every inference is dependent upon a generalization. The inductive form of an inference can be converted to a quasi-deductive form by identifying and articulating the generalization upon which it depends. Thus, classically, Descartes', "I think; therefore I am" depends upon the generalization that might be formally stated as "all persons who think are persons who exist" and converted to a syllogistic form:

All persons who think are persons who exist.

I am a person who thinks.

Therefore, I am a person who exists.¹

* Professor, University of Miami School of Law. This essay is a part of a larger work in progress. The year that I spent as a Fellow at the Netherlands Institute for Advanced Study (1994/95) afforded me the time to begin my work on generalizations in legal and non-legal contexts. The ideas developed here were first presented at the Seventy-Fifth Anniversary Symposium on The Science of Proof hosted and sponsored by the South Texas College of Law. I am indebted to those who attended and participated in that symposium. I am specially indebted to William Twining and David Schum, who have provoked and critiqued my thinking about evidential and inferential issues for almost two decades, and to Carolyn Bugh and Erica Beecher-Monas whose detailed critiques of earlier drafts significantly contributed to the final project. I am also indebted to a generation of students who suffered through my course on Analysis of Evidence and have done detailed analyses of complex masses of evidence that have reinforced my view that the kind of analysis suggested here can generate important and useful insights.

1. Or, to parallel Descartes' elegant simplicity: All who think are; I think; therefore, I am.

In most contexts, inductive reasoning operates intuitively. The reasoner does not consciously identify the generalizations upon which her inferences depend, unless she is required to justify her conclusions. Even then, she will often find it hard, probably impossible, to articulate the precise generalization upon which an inference relied, as opposed to articulating an after-the-fact generalization that she believes justifies her conclusion. For example, I might assert, "Dave Schum spoke with William Twining last Tuesday." If asked how I knew that, I might respond, "Because Twining told me so." Unless challenged, I would not think about or explain my reason for thinking that Twining's statement justified my conclusion. If challenged, I might have difficulty specifying the generalization that motivated my conclusion, but I might suggest my conclusion was justified because, "Based upon my experience with Twining, I believe Twining's reports of past events are almost always accurate."²

The relationships between generalizations and proof and generalizations and ethnocentricity have been developed and debated by others.³ Those analyses have, for the most part, worked from the top down; that is, they have developed concepts at various levels of theorizing,⁴ using generalized, rather than context-specific, illustrations, such as gatecrashers at the rodeo,⁵ blue buses,⁶ and prisoners in the yard.⁷ A few

2. I have not had as much experience with Peter Murphy, so if my report was that Peter Murphy told me that Twining had spoken with Schum on Tuesday, I might justify my conclusion in two steps by saying: (1) "Based upon my experience, law professors are responsible adults. Peter Murphy is a law professor. Therefore, Peter Murphy is a responsible adult." (2) "In almost all circumstances, responsible adults report events accurately and truthfully. Peter Murphy is a responsible adult. Therefore, Peter Murphy's report was almost certainly accurate and truthful."

3. The focus upon the relationship between generalizations and proof has been explicit in the "probabilities debate." See generally Symposium, *Decision and Inference in Litigation*, 13 CARDOZO L. REV. 253-1079 (1991) [hereinafter *Decision and Inference*] (including contributions from many of the principals in debate); see also DAVID A. SCHUM, *PROBABILISTIC FOUNDATIONS OF EVIDENTIAL REASONING* (1994) (comprehensive summary and analysis). The focus in other areas has ordinarily been implicit. See, e.g., MARY FIELD BELENKY, ET AL., *WOMEN'S WAYS OF KNOWING* (1986); SUSAN J. HEKMAN, *GENDER AND KNOWLEDGE* (1990) (developing claims that there are ways of knowing unique to women); compare SUSAN HAACK, *MANIFESTO OF A PASSIONATE MODERATE* (1998) (rejecting claims).

4. WILLIAM TWINING, *RETHINKING EVIDENCE* 343-45 (1990) [hereinafter *RETHINKING*] (on levels of theorizing).

5. L. JONATHAN COHEN, *THE PROBABLE AND THE PROVABLE* 74-76 (1977) [hereinafter *COHEN*] (paradox of gatecrashers); cf. *RETHINKING*, *supra* note 4, at 362-63 (critique).

6. The "blue bus" hypothetical was adapted from *Smith v. Rapid Transit, Inc.*, 58 N.E.2d 754 (Mass. 1945) and has been accepted as a "probabilities chestnut" since Professor Tribe first posed it in 1971. See Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1340-41 (1971). See, e.g., TERENCE ANDERSON

theorists have combined “top-down” and “bottom-up” analysis in detailed analyses that use a complex, defined body of evidentiary material as the basis for illustrating and analyzing problems at a theoretical level.⁸ Those efforts have necessarily identified synthetic-intuitive generalizations of the kind described here and analyzed the roles they played or may have played in the context of the specific case.⁹

This essay is a preliminary exploration and the first in a planned series of explorations of the roles generalizations play in different contexts, legal and other.¹⁰ The present essay defines two kinds of generalizations—“synthetic-intuitive” generalizations and “context-specific” generalizations—and discusses the relationships between the two in reasoning and justification. It also describes and illustrates a method of analysis, a “generalization” method of analysis. A central thesis of the essay is that identifying, classifying, and articulating the generalizations offered as justifying or necessary to justify specific inferences are useful devices for understanding, constructing, clarifying, and criticizing arguments. This is a device that provides a lens for analyzing problems of proof and justification and a method of analysis that generates insights that are not otherwise apparent.¹¹

& WILLIAM TWINING, *ANALYSIS OF EVIDENCE* 436 (1991) [hereinafter *ANALYSIS*] (variant posed); *RETHINKING*, *supra* note 4, at 209, 363, 365 (critique).

7. Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 *HARV. L. REV.* 1187, 1192–94 (1979).

8. See, e.g., JOSEPH B. KADANE & DAVID A. SCHUM, *A PROBABALISTIC ANALYSIS OF THE SACCO AND VANZETTI EVIDENCE* (1996). See also *Anatomy of a Cause Célèbre: The Case of Edith Thompson in RETHINKING*, *supra* note 4, at 262–307; *Thompson and Wigmore: Fresh Evidence and New Perspectives in RETHINKING*, *supra* note 4, at 308–31 (analyzing the evidence from *THE TRIAL OF FREDERICK BYWATERS AND EDITH THOMPSON* (Filson Young ed., reprint 1951) (1923) and discussing other analyses).

9. See, e.g., *RETHINKING*, *supra* note 4, at 282–88 (generalizations and arguments in *Rex v. Bywaters*, 17 *Crim. App.* 66 (U.K. 1922) about the inferences to be drawn from the fact that Frederick Bywaters, a defendant, was carrying a knife at the time he encountered and stabbed Percy Thompson, the victim and the husband of Edith Thompson, the co-defendant).

10. I use “generalization” to denote any proposition that can be framed as a premise and used in a logical argument to show that a claim of any kind is justified or warranted to some degree, be it a claim of fact, a claim of value, a claim of policy, or a hybrid claim. Although the present essay focuses upon uses of generalizations in justifying inferences from factual data, it is the broader definition that makes it possible to apply the method of analysis described here in other, non-factual contexts.

11. This essay focuses upon the uses and limitations of generalization-analysis as an heuristic device, as an aid to analysis, and the roles that the two classes of generalizations may play in reasoning about factual propositions and in justifying arguments and conclusions. The present essay does not attempt to present a comprehensive theory of generalizations, nor does it seek to revisit or revise the extended analyses of generalizations that have been developed in the probabilities debates that gave rise to what has been called the “New Evidence Scholarship.” See generally *Decision and Inference*, *supra* note 3 (for examples); see also, *RETHINKING*, *supra* note 4, at 341–42, 349–52 (describing and critiquing the debates). The

Part I sets the framework: I discuss the nature and functions of generalizations, as I define the term, to establish a foundation. As part of that foundation, I define and describe the two overlapping categories of generalizations—"synthetic-intuitive" generalizations and "context-specific" generalizations—that are central to my thesis. Against that background, I describe a method of generalization-analysis and suggest a four-step protocol for its use. In Part II, I apply the method and illustrate the roles of the two kinds of generalizations in the context of a decided case, the Supreme Court's decision in *Huddleston v. United States*,¹² to illustrate the kinds of not-otherwise-apparent issues the method can reveal. In a concluding note, I set this essay in the context of my broader project.

I. GENERALIZATION-ANALYSIS: SOME CONCEPTS AND A PROTOCOL

A. *Some Concepts*

In one view, all knowledge is based upon the ability to generalize and upon generalizations. Children, for example, learn language by generalizing from specific instances—e.g., from hearing different objects that they see classified as a "chair," they generalize a concept of the characteristics of objects that fall within the class described by the word "chair," or from repetitive usage of more abstract terms, such as "good" and "bad," they generalize a concept defining an open-ended class. Adults learn by generalizing from experience, by assimilating the ethnocentric values and prejudices that define the groups of which they are a part, by generalizing from controlled observations, and by generalizing from third-party sources such as books.¹³

Generalizations can be categorized in different ways for different purposes. In the context of arguments about questions of fact,¹⁴ it is useful to categorize them in terms of source and reliability. For most purposes, five overlapping categories are adequate to classify generalizations by source—scientific generalizations, expert generalizations,

method presented here does, however, provide a lens for analyzing problems of proof and justification and a framework that may make it possible to refocus those debates.

12. 485 U.S. 681 (1988).

13. See, e.g., WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* (1960) (developing the foundation for this view).

14. I have also concluded that generalization-analysis can be applied to arguments about other kinds of questions. The development of that conclusion is, however, beyond the scope of this essay.

general knowledge generalizations, experience-based generalizations, and belief generalizations.¹⁵ Generalizations can also be classified on a spectrum of reliability ranging from well-tested and generally accepted propositions, such as those associated with the law of gravity, to largely untested and sometimes untestable intuitions, such as the generalizations upon which the view that flight from the scene of a crime is evidence of guilt is based, to unfounded biases based upon prejudice or false stereotypes, such as the generalization that women cannot be effective lawyers that was widely accepted in prior generations.¹⁶

Many generalizations in any of these categories can be usefully categorized as “synthetic-intuitive” generalizations and as “context-specific” generalizations. “Synthetic-intuitive” generalizations, as I define the class, are generalizations that a person synthesizes or intuits from her stock of knowledge and beliefs. Sometimes an individual can explain the sources from which she synthesized the generalization. Frequently, however, the intuitive predominates—the individual cannot identify the source of the generalization or explain why she believes that it is sound.¹⁷

The generalizations necessary to support the inferences that flight from the scene of a crime is evidence of guilt are examples of “synthetic-intuitive” generalizations. I am unaware of any tests that claim to have verified these generalizations. Nonetheless, the generalization “persons who have committed a crime often flee from the scene of that crime” seems intuitively right. In its weakest form,¹⁸ I would accept the trans-

15. The five categories are defined and their roles are discussed in ANALYSIS, *supra* note 6, at 368–69. The Supreme Court’s decision in *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999), may require some further amplification on the distinctions and similarities between scientific and expert generalizations.

16. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130 (1872) (affirming decision by Illinois Supreme Court that women could not be admitted to the bar), especially 141–42 (“The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.”) (Bradley, J., concurring).

17. The nature of a claim that a generalization is “sound” or “well-founded” or “grounded” is itself a complex subject. See generally William Twining, *Narrative and Generalizations in Argumentation About Questions of Fact*, 40 S. TEX. L. REV. 351 (1999) (for a discussion); see also WILLEM A. WAGENAAR, PETER J. VAN KOPPEN, AND HANS F.M. CROMBAG, *ANCHORED NARRATIVES* (1993) (perspective and theory developed by Dutch psychologists examining Netherlands criminal justice system).

18. There are different senses in which the term “weakest” can be applied to synthetic-intuitive generalizations (and to context-specific generalizations). A generalization may be weak in the sense that it supplies only weak support for an inference in that the quantifier is weak. A generalization may also be weak in the sense that the individual applying it may doubt its soundness or may doubt the validity of her own intuition.

posed generalization upon which flight inferences depend, “persons who flee from the scene of a crime are *sometimes* persons who are guilty of that crime.” The generalization thus framed could provide only weak support for an inference that the person seen fleeing from the scene of a specific crime was the person who committed that crime: that person *may be* the person who committed the crime.¹⁹ I can think of no basis for my acceptance of these generalizations, apart from a synthesis or an intuition based upon my personal “stock of knowledge” or my “common sense.”

“Context-specific” generalizations,²⁰ as I define the class, are generalizations made as specific to the precise inference in question as is necessary to make the argument explicit a way in which it can be analyzed and appraised.²¹ For example, a synthetic-intuitive flight generalization might be converted into a context-specific generalization by asking: Was the fact that this particular accused left this particular crime scene hurriedly and went to that particular place evidence that this accused had a guilty state of mind about the particular crime charged?

By way of further illustration, I would also accept, intuitively, the abstract generalization that “goods supplied by someone who has supplied stolen goods on other occasions are probably/frequently/ some-

19. If the formulation I suggest is accepted, the use of this generalization raises an issue similar to one of the issues raised by the justification the Supreme Court used in *Huddleston*. See *infra* Part II. In what circumstances should evidence offered as support for an inference be admitted or excluded when the quantifying term in the generalization necessary to justify the inference is indeterminate or insufficient to support a finding that the inference is “more probable than not?” For example, should flight be admitted as evidence of guilt in cases in which a rational fact-finder could not declare that: “It is *more probable than not* that persons fleeing from a crime scene of the kind and in the circumstances similar to those established by the evidence in this case are persons who are guilty of the crime committed at that scene?” The argument can be made that, if the quantifier in the generalization necessary to justify such an inference is not at least “more probable than not,” the alternative explanations for the evidential data offered must, in the aggregate, be more probable than the specific inference proffered, giving rise to a claim that the risk of confusion, misuse, or misvaluation outweighs any legitimate probative value. Cf. ANALYSIS, *supra* note 6 at 358–63 (illustrating an example and discussion).

20. I chose the term “context-specific,” rather than “case-specific” or “situation-specific,” because it better suggests the range of situation-types in which generalization-analysis can be usefully employed.

21. The synthetic-intuitive generalization supporting the proffered inference may be one of demonstrable validity, such as a proven scientific generalization, or it may be a generalization based primarily upon the articulator’s intention. In the latter case, the context-specific generalization may be one derived from an identified synthetic-intuitive generalization or the synthetic-intuitive generalization may discovered abductively in the search for a rational basis to support a context-specific generalization that is necessary to establish a justifying relationship between the proposition to be justified, the “probandum,” and the proposition offered as support, the “probans.” See ANALYSIS, *supra* note 6, at 54–57, 61–62 (quoting JOHN HENRY WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* (1937) [hereinafter *THE SCIENCE*]).

times also stolen goods.” In the analyzing a case such as *Huddleston*, I might convert the abstract generalization into a generalization specific to the context of that case:

In all/most/many/some instances, a substantial quantity of goods supplied by a person, who had on two subsequent occasions within a three-month period supplied substantial quantities of other kinds of goods that were in fact stolen goods, is a quantity of goods that was stolen.²²

These concepts provide a backdrop for the method of analysis described below.

B. *The Protocol*

There are four steps that facilitate an analysis of the role of generalizations in specific kinds of reasoning: clarification of standpoint, specification of the proposition to be justified, specification of the proposition or propositions offered as the basis for its justification, and identification and articulation of the generalization or generalizations upon which the justification depends. The first step should be completed before the analysis begins. The other steps are often reflexive.

1. Clarification of Standpoint. The analyst must answer three questions to order to define her standpoint for any particular analysis. What is her role in this analysis? At what stage of what process is the analysis being done? What precisely are the purposes and objectives of the analysis? In legal contexts, for example, the role may be that of a participant in a legal process (e.g., client, counselor, negotiator, advocate, judge, juror, etc.), or it may be that of an observer of that process (academic lawyer, historian, philosopher, probabilist, etc.). In other contexts, the possible roles will vary with the process for which the analysis is being done. In legal and some other contexts, there are defined processes which go through specified stages. For example, a litigation process may begin with an initial client interview and proceed through pre-trial, trial, and post-trial stages, or a scientific investigation may move from a hypothesis formulation stage through testing, revision, and verification stages. The objectives may be varied, but in most instances the possibilities are defined and limited by role and process. For example, an advocate preparing for appeal is largely confined to data contained in the record developed at the trial and pre-trial stages of the litigation process.

2. Specification of the Proposition to Be Justified. The analysis re-

22. The *Huddleston* illustration is developed below. See *infra* Part II.

quires that the proposition or propositions to be justified be identified and articulated with precision, but the articulation may have to be made and revised to express the proposition or propositions that can be justified in light of the available evidence and plausible generalizations.

3. Specification of the Justifying Proposition or Propositions. Wigmore defined a proposition to be justified or proved as a “probandum” and a proposition offered as support as a “probans.”²³ It is important to recognize that a proposition may be both a probandum and a probans in a catenated argument. For example, evidential propositions, propositions expressing evidential data—a testimonial assertion or an item of physical evidence—may be offered to support an inferred proposition, a probandum. That probandum ordinarily then becomes a probans, a proposition offered as support, by itself or in combination with other propositions, for a further inferred proposition, another probandum. Both the articulation and the function of the justifying proposition must be identified with as much precision as possible.

4. Identification and Articulation of the Generalization[s] Involved. The processes involved in identifying and articulating synthetic-intuitive and context-specific generalizations are discussed and illustrated above and below.²⁴ Standpoint is critical at this stage. The analyst must understand her standpoint in order to effectively analyze the relationship between the proposition to be justified and the propositions offered as justification. In the analysis, is the proponent an advocate seeking to justify the conclusion? Is she a decision-maker who has to decide whether the conclusion has been established to the required degree of certainty? Is she a reviewer called upon to decide whether the conclusion should be confirmed, revised, or reversed? Is she a critic concerned with the validity or structure of the argument or the nature and significance of the generalizations used? The articulation or articulations may vary with role and objective.

For an analysis of arguments and justifications in specific contexts, it is necessary to identify and articulate the abstract synthetic-intuitive generalizations and the related context-specific generalizations necessary to demonstrate the logical relationships between the probans and the probanda. The process of identification is normally reflexive. Sometimes, the analyst sees the abstract at the outset and struggle to make it fit the context. Other times, particularly when the role is that of an advocate, she formulates the context-specific generalization and then “searches her mind” for an abstract, synthetic-intuitive generalization

23. See THE SCIENCE, *supra* note 21, at §3, quoted in ANALYSIS, *supra* note 6, at 54–55.

24. See text accompanying notes 18–22 *supra* and 45–50 *infra*.

upon which the context-specific generalization can be defended as plausible.

These steps are necessary, but hardly sufficient. They provide the foundation from which the analysis may proceed in light of the analyst's standpoint. The procedure for completing the analysis varies with standpoint and with context—points illustrated in the example that follows.

II. GENERALIZATION-ANALYSIS: THE METHOD ILLUSTRATED

A. *The Decided Case: Huddleston*

A federal grand jury indicted Gary Rufus Huddleston, charging that, in April 1985, he had sold (count one) and had possessed (count two) Memorex videocassette tapes (the "tapes") that had been stolen in interstate commerce.²⁵ The tapes had been stolen, and Huddleston had sold and had possessed quantities of the tapes.²⁶ The only issue in dispute was whether Huddleston knew that the tapes had been stolen at the time he had sold or possessed them. The issue was apparently a close one: After two days of deliberations, the jury acquitted Huddleston on the charge that he had knowingly sold stolen tapes, but convicted him on the charge that he had knowingly possessed stolen tapes.²⁷

According to Huddleston, Leroy Wesby had a large quantity of the tapes, had invited Huddleston to sell them on a commission basis, and had assured Huddleston that the tapes were legitimate.²⁸ Huddleston offered and sold quantities of the tapes at prices that were below the cost of manufacturing the tapes.²⁹ Huddleston acknowledged that he had possessed and sold substantial quantities of the tapes, but claimed that he had no knowledge that they were stolen.³⁰ The government sought to introduce "similar acts" evidence concerning two other lots of goods to support an inference that Huddleston knew that the tapes were stolen.³¹

The challenged similar-act evidence that became the focus of the Court's decision showed that, in February 1985, Huddleston had arranged a sale of thirty-eight new 12" black and white television sets (the "TV sets"), also supplied by Wesby, to a retailer for \$28 per set. Over

25. See *Huddleston v. United States*, 485 U.S. 681, 682–84 (1988).

26. See *id.* at 682–84.

27. See *id.* at 684.

28. See *id.*

29. See *id.*

30. See *id.*

31. See *id.* at 683–84.

Huddleston's objection, the trial court admitted this evidence.³² According to the Court, the "direct evidence" that these TV sets had been stolen was that they had been sold at a low price; that Huddleston did not produce a bill of sale at trial; and that, according to a witness who had purchased thirty-eight of the TV sets, Huddleston had indicated he could obtain several thousand more.³³

The government also offered evidence that in May 1985, Huddleston had offered to sell to an FBI undercover agent a large quantity of Amana appliances that also had been supplied by Wesby.³⁴ It was undisputed that these appliances had been stolen.³⁵ Huddleston testified that he had asked and Wesby had also assured him that the TV sets and

32. *See id.* at 683.

33. *See id.* The Court asserted that, "According to Toney [the buyer of the 38 TV sets], petitioner indicated that he could obtain several thousand of these televisions." *Id.* A claim that the Court believed that this was merely a statement of the evidence viewed most favorably to the government illustrates another context in which generalization-analysis could be useful.

Neither the government, in its brief, nor the court of appeals, in any of its published opinions, identified the quantity of TV sets that Huddleston could obtain as evidence that the TV sets were stolen. *See* Brief for the Government at 37, *Huddleston v. United States*, 485 U.S. 681 (1988); *United States v. Huddleston*, 802 F.2d 874, 876, n.5 (1986) (initial panel decision), *vacated on reh'g.*, 811 F.2d 974 (1987). The only evidence in the record before the Court upon which it could have based that assertion is Toney's testimony that:

Q. And did Mr. Huddleston say how many of these T.V.'s he or his group had to sell?

A. Somehow or another, I got the impression and I could be wrong on the fact that they were about 3000, you know. But I think upon it later there might have been something like seven or eight hundred.

I don't know. Somehow it stands in my mind about the 3000, but I really don't remember how that came about.

Joint Appendix at 25, *Huddleston v. United States*, 485 U.S. 681 (1988) (No. 87-6). Further evidence made it clear that there were other sources from whom Toney could have acquired information that informed his "impression." Toney had, in fact, purchased the TV sets from a retail store to whose owner, an attorney named Alphonse Lewis, Leroy Wesby had sold several hundred of the TV sets, with Huddleston acting as an agent or broker in both transactions. *See id.* at 24-29 (Toney), 43-45 (Huddleston), 71-76 (Lewis).

The relationships between the evidence, Toney's testimony, and the Chief Justice's claim, that the petitioner indicated he could obtain several thousand more might be subjected to generalization-analysis by someone interested in determining the standards the Court observes in stating "facts" based upon the record before it. Here, the proposition to be justified, the probandum, would be "petitioner indicated he could obtain several thousand of these televisions." The propositions and the intermediate inferences upon which the probandum is based would have to be articulated from Toney's testimony. An articulation of the generalizations necessary to justify those inferences and that probandum would enable an analyst to frame hypotheses about the standards the Court observes in stating facts to fit its conclusions that could be tested and refined by analyzing statements of "fact" in other opinions. *See also infra* notes 38 and 55.

34. *See Huddleston*, 485 U.S. at 684.

35. *See id.*

the appliances were legitimate.³⁶

The government based its theory of relevance upon a generalization, which according to the Supreme Court, was:

[T]he televisions were stolen, and proof that petitioner [Huddleston] had engaged in a series of sales of stolen merchandise from the same suspicious source would be strong evidence that he was aware that each of the items, including the Memorex tapes, was stolen.³⁷

The Court granted review to determine the standard that a trial judge should use to determine whether the evidence that the accused had committed a proffered other crime or act was sufficient to justify the other crimes or act's admission under Rule 404(b).³⁸ The Court rejected the view that the evidence had to satisfy either a "clear and convincing" standard or even the lower "preponderance of the evidence" standard.³⁹ The Court ruled that the appropriate standard was the standard specified in Rule 104(b)—whether there was "sufficient evidence to support a finding by the jury" that the accused had committed the other crime or

36. *See id.*

37. *Id.* at 686.

38. *See* FED. R. EVID. 404(b); *Huddleston*, 485 U.S. at 685. Here, as elsewhere, the Court appears to have selected a case to resolve a conflict among the circuits in which the issue it chose to address was not raised by the parties and did not need to be decided in order to resolve the actual question presented. The court of appeals had, on rehearing, affirmed Huddleston's conviction, ruling that the "preponderance of the evidence" standard was the standard to be applied to similar acts evidence and that the trial judge had not abused his discretion in finding that the evidence that the TV sets were stolen had satisfied that standard. *U.S. v. Huddleston*, 811 F.2d 974, 975-76 (6th Cir. 1987). Huddleston did not challenge that decision; he petitioned for review, asking the Court to determine whether the court of appeals had erred in not applying a "clear and convincing" standard as the test for whether evidence that the accused had committed an uncharged crime was admissible under Rule 404(b). *See* Petition for Writ of Certiorari at i, *Huddleston v. United States*, 485 U.S. 681 (1988) (No. 87-6). The government's brief identified only one Question Presented: "Whether, before admitting 'similar acts' evidence under Fed. R. Evid. 404(b), a district court must find that the 'similar acts' have been proved by clear and convincing evidence." Brief for the United States at I, *Huddleston v. United States*, 485 U.S. 681 (1988) (No. 87-6).

The Court used the case as a vehicle to decide a question that was not raised or briefed by the parties and that was not necessary to a decision in the particular case—whether it is permissible to admit "similar act" evidence where there is only evidence "sufficient to support a finding" that the act was similar. This is not the only evidence case in which the Court has granted review to answer a question that was not necessary to its decision in the particular case. *See, e.g., Bourjaily v. United States*, 483 U.S. 171 (1987).

Apart from being inconsistent with the Court's announced standards, decisions such as these have a deceptive effect. By choosing cases that do not squarely present the issue that the Court intends to resolve, the Court is able to marshal the facts to make the cases appear to be "easy cases" and thus to camouflage the real problems and avoid the hard issues. The problem identified in note 33 above compounds the problem noted here.

39. *Huddleston*, 485 U.S. at 687 n.5.

act.⁴⁰ The Court concluded that the evidence was sufficient under that standard to support a finding that the TV sets had been stolen because:

In assessing whether the evidence was sufficient to support a finding that the televisions were stolen, the court here was required to consider not only the direct evidence on that point—the low price of the televisions, the large quantity offered for sale, and petitioner's inability to produce a bill of sale—but *also the evidence concerning petitioner's involvement in the sales of other stolen merchandise obtained from Wesby, such as the Memorex tapes and the Amana appliances*. Given this evidence, the jury reasonably could have concluded that the televisions were stolen, and the trial court therefore properly allowed the evidence to go to the jury.⁴¹

B. *The Method Applied*

I want to focus upon two aspects of the Court's reasoning here: its determination that the fact that the tapes and the appliances had in fact been stolen supported an inference that the TV sets had also been stolen, and its determination that the fact that the appliances Huddleston offered for sale in May had been stolen was evidence that he knew in April that the tapes had been stolen. An analysis of the generalizations underlying these determinations illustrates the use of generalization-analysis in a decided case to focus upon reasoning about the relationships between specific propositions and the kinds of issues that can be clarified by such an analysis.

First, the question of standpoint: For purposes of this analysis, my standpoint is that of an academic evidence theorist examining a decided case to identify the generalizations available or necessary to justify the Court's conclusions (a) that the fact that the tapes and the appliances were stolen goods supported an inference that the TV sets were also stolen goods, and (b) that the fact that Huddleston had sold or offered to sell the TV sets in February and the appliances in May supported an inference that Huddleston knew in April that the tapes were stolen. My objective is to identify and articulate what I see as the generalizations necessary to justify these inferences and to identify the kinds of issues that such an articulation makes it possible to address.⁴²

40. FED. R. EVID. 104(b); *Huddleston*, 485 U.S. at 685.

41. *Huddleston*, 485 U.S. at 691 (emphasis added).

42. It is not my intention to provide a comprehensive analysis and critique of the decision or its significance. Given the standpoint that I have adopted, I have not included other evidence that might support an inference that Huddleston knew the tapes were stolen, such as the fact that they were offered for sale at a price that was less than their manufacturing cost, or

Second, specification of the propositions to be justified: Based upon the standpoint adopted, the case, as the Supreme Court viewed it, can be reduced to thirty-six propositions. A list of those propositions is set out in Appendix A.⁴³ Only two of those propositions are propositions to be justified in this analysis—propositions 4 and 7. However, an understanding of the analysis of those propositions will be facilitated by specifying the ultimate and penultimate probanda for the offense for which Huddleston was convicted—propositions 1 through 4:

1. In April 1985, Guy Rufus Huddleston (“GRH”) possessed a large quantity of Memorex videocassette tapes (the “tapes”) that had been supplied by Leroy Wesley (“LW”) and that had been stolen in interstate commerce, and GRH knew that the tapes had been stolen.⁴⁴
2. In April 1985, GRH possessed a large quantity of tapes that had been supplied by LW. [Undisputed (“U”)]
3. The tapes that LW had supplied to GRH in April 1985 had been stolen in interstate commerce. [U]
4. In April 1985, GRH knew that the tapes supplied by LW had been stolen.

Third, specification of the justifying propositions: For purposes of this analysis, only three of the propositions that the Court thought provided justification for proposition 4 are important—proposition 3 (set out above) and propositions 7 and 8:

7. The 12” black and white television sets (the “TV sets”) that LW supplied to GRH in February 1985 had been stolen.
8. The Amana appliances (the “appliances”) that LW supplied to GRH in May 1985 had been stolen. [U]

The claimed inductive relationships among these propositions upon which the Court’s analysis relied are depicted in charted form in the

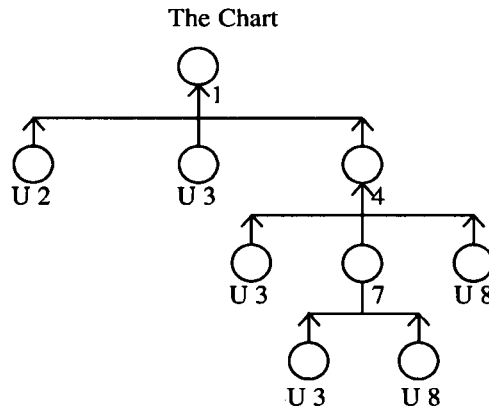
that the Court thought supported the inference that the TV sets were stolen, such as the price at which they were sold. For a more comprehensive analysis and critique of the decision, see Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447, 498–505 (1990).

43. Throughout the text that follows, I use the number assigned to each proposition in the key list that appears in Appendix A.

44. The opinions in the court of appeals and the testimony included in the Joint Appendix in the Supreme Court make it clear that Wesby was a truck driver. See *United States v. Huddleston*, 802 F.2d 874, 878 (6th Cir. 1986) (Nelson, J., dissenting); Joint Appendix at 48–49, 75–76, *Huddleston v. United States*, 485 U.S. 681 (1988) (No. 87-6). Because the Supreme Court did not report this fact, I do not consider its significance in the text. In the notes that follow I do, however, identify and discuss some different synthetic-intuitive and context-specific generalizations that would be significant if additional reported facts, such as this, were considered. See *infra* notes 46, 48, and 59.

chart and keylist set out as Figure 1 below.

HUDDLESTON: AN INDUCTIVE CHART



The Keylist

1. In April 1985, Guy Rufus Huddleston ("GRH") possessed a large quantity of Memorex videocassette tapes (the "tapes") that had been supplied by Leroy Wesby ("LW") and that had been stolen in interstate commerce, and GRH knew that the tapes had been stolen.
2. In April 1985, GRH possessed a large quantity of tapes that had been supplied by LW. [Undisputed ("U")]
3. The tapes that LW had supplied to GRH in April 1985 had been stolen in interstate commerce. [U]
4. In April 1985, GRH knew that the tapes supplied by LW had been stolen.
7. The 12" black and white television sets (the "TV sets") that LW supplied to GRH in February 1985 had been stolen.
8. The Amana appliances (the "appliances") that LW supplied to GRH in May 1985 had been stolen. [U]

FIGURE 1

Fourth, an identification and articulation of the generalizations involved: The analysis requires the identification of two sets of generalizations—those necessary to show that proposition 6 and proposition 8 converge to support proposition 7 and those necessary to show that propositions 6, 7 and 8 converge to support proposition 4.⁴⁵ Appendix A also contains a keylist formulating the generalizations, with some variant articulations, of the kind necessary for the justification of those inferences. Specific generalizations from that list are introduced in text that follows as they become material.

The claim that the fact that the tapes supplied by Wesby were stolen (P_5 and P_6) and the fact that the Amana appliances supplied Wesby were stolen (P_8) support an inference that the TV sets supplied Wesby were stolen (P_7) invokes a synthetic-intuitive generalization:

45. See ANALYSIS, *supra* note 6, at 88–89 (for amplification and illustration).

37. Goods supplied by a supplier of stolen goods are almost certainly/probably stolen goods.

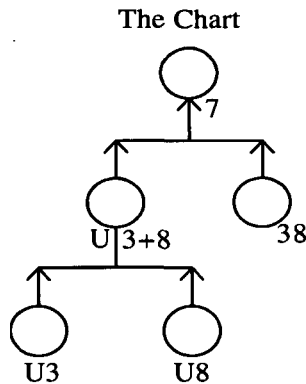
I have never, to my knowledge, dealt with a supplier of stolen goods, and my knowledge of how such suppliers act is, at best, anecdotal. Nonetheless, based upon such anecdotal knowledge and my view of “the way things are,” proposition 37 seems intuitively correct, although I can think no basis for deciding which quantifier would be appropriate.

In order to appraise my view of the specific arguments made in *Huddleston*, the abstract must be converted into a context-specific generalization, such as:

38. In all/most/many/some instances a quantity of goods [such as the TV sets], which was supplied by a person who had on two subsequent occasions within a three-month period supplied other kinds of goods [such as the tapes and the appliances] that were in fact stolen goods, is a quantity of goods that was stolen.

The logical relationship of the generalization in the argument that the TV sets were stolen is depicted in Figure 2 below.

THE TV SETS WERE STOLEN: A DEDUCTIVE CHART



The Keylist

- 7. *The 12" black and white television ("TV sets") sets that LW supplied to GRH in February 1985 had been stolen. [U]*
- 3+8. *The tapes that LW supplied in April 1985 and the appliances that LW supplied in May 1985 were goods supplied by person who was not in the business of supplying such goods an*
- 3. *The tapes that LW had supplied to GRH in April 1985 had been stolen in interstate commerce. [U]*
- 8. *The Amana appliances (the "appliances") that LW supplied to GRH in May 1985 had been stolen. [U]*
- 38. In all/most/many/some instances a quantity of goods [such as the TV sets], which was supplied by a person who had on two subsequent occasions within a three-month period supplied other kinds of goods [such as the tapes and the appliances] that were in fact stolen goods, is a quantity of goods that was stolen.

FIGURE 2

In considering the context-specific version, however, I am not able to synthesize an intuition that would enable me to decide whether “many” or “most” or “some” would be the most appropriate quantifier. If a court took the view that this uncertainty was likely to be shared among the jurors, then there would be a further improper prejudice, the risk of confusion or misvaluation, that would need to be considered before propositions 6 and 8 could be accepted as support for proposition 7. But that risk is not obvious without an identification and analysis of the generalization upon which the argument depends.⁴⁶

The argument that the facts that Wesby supplied Huddleston with stolen TV sets in February (P₇) and stolen appliances in May (P₈) support an inference that Huddleston knew that the tapes supplied in April were stolen finds initial support in a synthetic-intuitive generalization that might be framed:

39. A person who has, on more than one occasion, offered for sale large quantities of stolen goods obtained from the same source is a person who knew/almost certainly knew/probably knew [or should have known] that the goods obtained from that source were stolen goods, notwithstanding any contrary assurances to the contrary that the source may have given him.⁴⁷

Even in this intuitive form, one improper prejudicial effect is apparent: there is a risk that the decision-maker will convert a moral judgement, “should have known,” into a factual determination, “did know.”

The problems multiply when the synthetic-intuitive generalization necessary to justify the analysis that the Supreme Court adopted is converted into a context-specific generalization because, in the Court’s

46. Adding the fact that Wesby was a truck driver would compound the problem for me. My intuition suggests to me, on the one hand, that interstate truck drivers have more opportunities than most to acquire and dispose of goods stolen in interstate commerce. On the other hand, my intuition also suggests to me that truck drivers are likely to have more opportunities than most to acquire bulk quantities of goods of different kinds at liquidation prices from firms in distress. Were I a juror, I am uncertain how I would resolve this. Were I an advocate in the case (for the prosecution or the defense), I would be reluctant to permit a truck driver to sit as a juror unless I had additional information about truck drivers and their opportunities and about the specific nature of Wesby’s work and experience.

47. The judge in the court of appeals who dissented from the initial decision quoted a different synthetic-intuitive generalization authored by Judge Learned Hand, “thieves are unlikely to risk repeated transactions with innocent buyers,” as support for an inference that a repeat buyer is likely to know the goods are stolen. *Huddleston*, 802 F.2d at 881 (quoting *United States v. Brand*, 79 F.2d 605, 606 (2d Cir. 1935)). That formulation has intuitive appeal, but, in the context of this case, it raises more problems than it solves. The application of the generalization to a specific accused buyer unfairly focuses upon the knowledge of the perhaps unconvicted and probably uncross-examinable “thief.” In the context of *Huddleston*, it would require an assumption that Wesby was the “thief” and that truck driver suppliers of stolen goods would forego dealing with a gullible, but innocent, proven outlet for his goods.

analysis, the relationships between propositions 6 and 4; 7 and 4; and 8 and 4 were convergent. That is, proposition 6 standing alone would provide some support for proposition 4, and proposition 7 standing alone would provide some support for proposition 4, and proposition 8 standing alone would provide some support for proposition 4. The support provided by a prior supplying of stolen goods (P_7) for an inference of subsequent knowledge (P_4) seems different in kind than the support that the subsequent supplying of stolen goods (P_8) could provide for an inference of knowledge at a prior time (P_4). For that reason the identification and articulation of four context-specific generalizations becomes necessary to the analysis.

The first sets the stage. It is the context-specific generalization that would have applied without reference to the other lots of stolen goods, a generalization providing colorable support for proposition 4 based upon proposition 6 alone:

40. A person [such as GRH⁴⁸] who sells or offers to sell a significant quantity of goods [such as the tapes] that were in fact stolen goods on behalf of another [such as LW] is a person who knew/almost certainly knew/probably knew [or should have known] that the goods were stolen, notwithstanding any representations to the contrary his supplier may have made.

The second formulation makes it possible to consider the support that the TV sets alone (P_7) might provide for an inference that Huddleston knew the tapes were stolen (P_4):

41. A person [such as GRH] who sells or offers to sell a significant quantity of goods [such as the tapes] that were in fact stolen goods on behalf of another person [such as LW] who had *previously* supplied goods of a different kind [such as the TV sets] that were in fact stolen goods is a person who knew/almost certainly knew/probably knew [or should have known] that the offered goods were stolen, notwithstanding any representations to the contrary his supplier may have made.

48. The court of appeals reported that Huddleston was, by trade, a contractor. *See Huddleston*, 802 F.2d at 875, n.4 (first decision) and 879 (Nelson, J., dissenting). This is another fact that might have been included in specifying the context-specific generalizations necessary to support the proposed inference if my adopted standpoint did not limit the material for analysis to the Supreme Court's opinion, such as:

A person who is not a merchant [such as GRH] who sells or offers to sell at low prices a significant quantity of goods that were in fact stolen goods on behalf of a person who is not in the business of supplying goods of that kind [such as LW] is a person who certainly/almost certainly/probably knows (or should know) that the goods were stolen, notwithstanding any representations to the contrary his supplier may have made.

The third formulation isolates the support that the subsequent supplying of Amana appliances in May (P₂) might provide for an inference that Huddleston had the necessary knowledge when he possessed the tapes in April:

42. A person [such as GRH] who sells or offers to sell a significant quantity of goods [such as the tapes] that were in fact stolen goods on behalf of another person [such as LW] who *subsequently* supplied goods of a different kind [such as the appliances] that were in fact stolen goods is a person who knew/almost certainly knew/probably knew [or should have known] that the offered goods were stolen, notwithstanding any representations to the contrary his supplier may have made.

And finally, a formulation that enables us to consider the combined effect of propositions 7 and 8 as support for proposition 4:

43. A person [such as GRH] who sells or offers to sell a significant quantity of goods [such as the tapes] that were in fact stolen goods on behalf of another person [such as LW] who had *previously* supplied and who subsequently supplied goods of different kinds that were in fact stolen goods is a person who knew/almost certainly knew/probably knew [or should have known] that the offered goods were stolen, notwithstanding any representations to the contrary his supplier may have made.

My objective here has been to illustrate a method of analysis by applying it to two particular claims made by the Supreme Court in *Huddleston* to demonstrate its uses (and limitations). The analysis might be extended or broadened, if my standpoint were different. But the foregoing should suffice to lay a foundation for developing some additional not so apparent issues the method can bring into focus.

C. *Some Conclusions Suggested*

Using this method of analyzing generalizations in legal contexts has an obvious advantage. It requires and enables the analyzer to take facts more seriously than is possible if the analysis ignores the generalizations involved in a case or is limited to the generalizations involved in only their more abstract synthetic-intuitive formulations. For the advocate, it facilitates the identification and development of arguments challenging or supporting the specific use to which evidence has been or might be put. For the academic commentator, the method makes it easier to identify and appraise issues raised by a decision that are not apparent from the text. Here I shall content myself with a few illustrations and qualifications.

The claim that the facts that the tapes Wesby supplied in April and

that the appliances he supplied in May were stolen support an inference that the TV sets he had supplied in February were stolen raises several interesting problems. Given the context, the fact that the government could not offer persuasive independent evidence that the TV sets were stolen supports a rival inference. Evidence necessary to establish the manufacturing costs and the wholesale and liquidation prices for 12" black and white TV sets in 1985 should have been readily available. The government was able to trace the tapes and the appliances to their sources and prove that these goods had been stolen in interstate commerce. The fact that the government could not or did not present comparable evidence with respect to the TV sets would provide support for an inference that the TV sets were not stolen.

Two synthetic-intuitive generalization supporting that conclusion spring to mind:

45. Almost all/most instances in which the government has access to suspect goods and knows the source who supplied them are instances in which the government can reliably determine whether the goods were stolen.

46. Almost all/most instances in which the government fails to present, without explanation, evidence that should be readily available are instances in which the government has determined the evidence if presented would not support the position that it seeks to establish.⁴⁹

In that context, the Court's conclusion that the facts that the tapes and appliances were stolen could properly be used to support an inference that the TV sets were stolen seems to provide an incentive to the government to avoid the best evidence principle, when observing that principle is inconvenient.⁵⁰

The double-counting problem was apparent without resort to generalization analysis of the kind undertaken here. Nonetheless, a focus upon the quantifiers that are appropriate for the applicable context-specific generalization (P_{37}) should facilitate a discussion of whether the Court's decision reflects an understanding of the "transivity of doubt" problem that is inherent in the standard it prescribes. If the tapes and

49. The analysis in the text is confined to the evidence disclosed in the Supreme Court's opinion, supplemented by notes reporting additional evidence disclosed in the court of appeals' opinions. There is nothing in any of the opinions that suggests that the government was called upon to justify its failure or inability to present what should have been the best available evidence.

50. See generally Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988) (developing the best evidence principle and the rationale for its application and consequences).

appliances are necessary (or would themselves be sufficient) to establish a foundation from which a jury might find that it is more probable than not the TV sets were stolen, what, if any, additional support can that conclusion provide for an inference that it is beyond reasonable doubt that Huddleston knew the tapes were stolen?

The context-specific generalization necessary to justify an inference that the fact that the appliances supplied in May were stolen increases the likelihood that Huddleston was aware in April that the tapes were stolen (P_{42}) forces into prominence a temporal issue that is not apparent from the synthetic-intuitive formulation (P_{38}). The justification for inferring that the prior transaction supports an inference in the subsequent transaction (i.e., $P_7 \rightarrow P_4$) seems intuitively sound. The soundness of a justification for reasoning that the subsequent transaction supports an inference concerning the former transaction (i.e., $P_8 \rightarrow P_4$) is not apparent.⁵¹

One significant benefit from the application of generalization-analysis to evidence decisions such as *Huddleston* is that it creates a different lens through which to examine a part of the Supreme Court's evidence jurisprudence that has not received the attention it merits. The clear thrust of the Supreme Court's decisions under the Federal Rules of Evidence has been to expand the discretion of the trial judge and to limit the possibility of meaningful review of the exercise of that discretion. In *Huddleston*, for example, the trial judge was required to decide whether the claimed evidence of similar acts had a legitimate, non-propensity, probative value with respect to Huddleston's knowledge, whether the evidence was sufficient to establish the necessary similarity of one of those acts (i.e., that the TV sets were stolen), and whether the improper prejudicial effects (propensity and other) likely to follow from admitting the evidence substantially outweighed its legitimate probative value with respect to the state of Huddleston's knowledge when he dealt with the tapes. After *Huddleston*, a trial judge's decision to admit such evidence could be reversed only if she abused her discretion and if the reviewing court found that abuse prejudiced a substantial right of the defendant. Only once has the Supreme Court ruled that a trial judge had abused his discretion in determining that the improper prejudice did not substantially outweigh the probative value of an item of proffered evidence, and the practical significance of that decision is not yet apparent.⁵²

51. The justification might seem more apparent if Judge Hand's formulation of the synthetic-intuitive generalization were accepted. The proposition justified would, however, be a different and almost irrelevant proposition—i.e., that Wesby believed that Huddleston knew the goods were stolen. See *supra* note 47.

52. See generally *Old Chief v. United States*, 519 U.S. 172 (1997) (5-4 decision) (holding

The kind of analysis that this new lens facilitates can be illustrated by examining the potential improper prejudice and the legitimate probative value of the similar acts evidence admitted in *Huddleston* in light of the generalization-analysis presented above. In my view, such analysis makes it possible to develop a more rigorous calculus for use in deciding whether or to what extent the improper prejudicial effects of proffered evidence outweigh its legitimate probative value.⁵³

For example, the fact that the government did not present any direct evidence, as that term is customarily used, that the TV sets were stolen or any explanation for its failure to do so could be marshaled to support and inference that the TV sets were not stolen, if the generalizations expressed in propositions 45 and 46 were accepted.⁵⁴

45. Almost all/most instances in which the government has access to suspect goods and knows the source who supplied them are instances in which the government can reliably determine whether the goods were stolen.

46. Almost all/most instances in which the government fails to present, without explanation, evidence that should be readily available are instances in which the government has determined the evidence if presented would not support the position that it seeks to establish.

In that analysis, what the Supreme Court characterized as “direct evi-

that the trial judge abused his discretion in rejecting defendant’s offer to stipulate to prior conviction element of offense and admitting full record of prior judgment of conviction, when purpose of evidence was solely to prove prior felony conviction element of offense of possession of firearm by a felon).

53. The feasibility and utility of conducting an analysis using such a calculus is a function of standpoint. No advocate could afford to devote the kind of time that would be necessary to conduct the analysis and apply the calculus described here on every aspect of a case to be tried. An advocate could, however, perform this kind of analysis on specific evidentiary aspects crucial to her theory of the case. No judge would or should devote the time necessary for such an analysis, nor would or should a jury. Each would and should, in appropriate circumstances, consider the arguments that the lawyer could develop through such an analysis. See Terence J. Anderson, *Refocusing the New Evidence Scholarship*, 13 *CARDOZO L. REV.* 783, 783–87 (1991) (developing the role of atomistic analysis in litigation contexts). The time and effort necessary to conduct such an analysis can and should be invested, again in appropriate circumstances, such as those present in *Huddleston*, by appellate advocates and courts and by academic theorists commenting on the resulting decisions.

54. An inference that the TV sets were not stolen would converge with *Huddleston*’s testimony (P_{23}) to provide additional support for his claim that he believed the tapes were legitimate ($P_{26} \rightarrow P_{27}$). Such inference finds further support in the testimony of Alphonse Lewis, the attorney/store-owner who actually purchased the TV sets from Wesby. See *Jt. App.* at 71–76. That evidence, if believed, would also support an inference that *Huddleston* had good reason, based upon the TV set transaction, to believe that Wesby was not a supplier of stolen goods, providing still further support for $P_{26} \rightarrow P_{27}$.

dence"—the low price, the large quantity, and the lack of a bill of sale⁵⁵—could have diminished the inference that the TV sets were not stolen, but was hardly sufficient to support an inference that they were stolen. There was no reported evidentiary foundation to establish that \$28 was “low” as a wholesale or liquidation price for 12” black and white TV sets in 1985; apparently, this was a fact that the courts assumed a jury could consider without evidence. The force of an inference based upon Huddleston’s failure to produce a bill of sale also seems weak.⁵⁶ If that analysis is accepted, then the facts that the tapes and the appliances were stolen were necessary predicates for the Court’s conclusion that the evidence was sufficient to support a finding by the trial judge that the jury could find that it was more probable than not that the TV sets had been stolen.

That analysis also makes it possible to develop a more rigorous analysis of evidence that Huddleston had offered to sell stolen appliances that were supplied Wesby. The improper prejudice from this evidence is clear. An FBI agent testified that Huddleston, in May, had offered to sell appliances that were demonstrably stolen in interstate commerce.⁵⁷ This evidence has an improper propensity effect and creates a serious improper potential for a non-unanimous verdict; i.e., that jurors who were uncertain about the tapes would vote to convict because they either believed that Huddleston was a dealer in stolen goods or concluded he must have known by May that the appliances were stolen and thus deserved to be punished in any event.

Moreover, the likelihood that jurors would use the undisputed fact that the tapes Huddleston possessed in April were stolen to support an inference that he must have known by May that Wesby was a supplier of stolen goods seems far higher than the likelihood that they would view the fact that the May appliances were stolen as evidence that Huddleston knew that the tapes he possessed in April were stolen. This apparent risk of confusion and misvaluation is compounded by suggesting that jurors should be able to use the fact that the May appliances were stolen as evidence that the February TV sets were stolen so that they could use the likelihood that the February TV sets were stolen as evi-

55. See *Huddleston v. United States*, 485 U.S. 681, 691 (1988); see also notes 33 above and 56 below.

56. The Court’s assertion does not reflect the context established by the record before it. Lewis testified that he had in fact obtained a bill of sale. Although Lewis’ credibility was surely a matter for the jury, it appears clear that Huddleston was only a broker or agent and not a principal in Lewis’ purchase of TV sets from Wesby. See *supra* note 33 and references to Joint Appendix reported there.

57. See *Huddleston*, 485 U.S. at 684.

dence that Huddleston knew the April tapes were stolen.

This kind of more detailed analysis poses at least two questions that merit study. First, is it possible to establish meaningful standards to guide or regulate a trial judge's exercise of discretion in deciding whether and to what degree the improper prejudicial effects outweigh the legitimate probative value of proffered evidence? The second is less obvious. Decisions by a trial judge about the relevance, legitimate probative value, and improper effects of challenged evidence will necessarily be affected and often governed by the synthetic-intuitive generalizations of that judge and her translation and application of those generalizations in the context of the particular case. In that view, it is fair to ask whether and to what extent does the largely unreviewable discretion conferred on the trial judge undermine the right of a citizen to have a jury of her peers apply their generalizations, in theory a cross-section of prevalent generalizations held by the community, in deciding and resolving the disputed facts in her case. It was not my purpose here to develop the arguments that bear upon issues such as these; instead, my goal has been to demonstrate that generalization-analysis is a useful vehicle for identifying and clarifying issues such as these and for developing and critiquing arguments that bear upon their resolution.

III. CONCLUDING NOTES

This essay is the first in a planned series of explorations of the uses and limitations of generalizations and generalization-analysis in different contexts. Here, I have attempted to establish a definitional foundation and an analytic protocol with an illustration of how and to what effect the foundation and protocol might be employed in a particular context, the context of analyzing and critiquing the reasoning in an evidence opinion issued by the United States Supreme Court. My primary purpose has been to illustrate the method of analysis and its application, rather than to apply the method and develop the results. It should be clear that, had I applied the method to *Huddleston* to develop fully the arguments suggested above, the structure of this essay would have been different. I would have developed the arguments and used specific generalizations and evidential and inferential propositions only as they illustrated or amplified the argument being presented.

In future essays, I expect to explore the application of the method in other contexts and from other standpoints. For example, in my view the verdict in the O.J. Simpson case⁵⁸ can be rationally justified by iden-

58. *People v. Simpson*, No. BA0987211, 1995 WL 704381 (unreported, Los Angeles Sup.

tifying generalizations about police conduct that the jurors in that case were likely to have held and applying those generalizations to the context established by the evidence in that case. The application of those synthetic-intuitive generalizations has, in my view, significance for other cases and contexts that has not been adequately recognized. So, too, I believe that the method makes it possible to identify the roles that factors such as ethnicity, gender, community, etc. may play in decision making by identifying differences in the experience-based and belief generalizations produced by those factors. I hope that these further explorations will facilitate the development of a more general theory of generalizations and more refined methods of generalization-analysis.

APPENDIX A

HUDDLESTON KEYLIST

1. In April 1985, Guy Rufus Huddleston ("GRH") possessed a large quantity of Memorex videocassette tapes (the "tapes") that had been supplied by Leroy Wesby ("LW") and that had been stolen in interstate commerce, and GRH knew that the tapes had been stolen.

2. In April 1985, GRH possessed a large quantity of tapes that had been supplied by LW. [Undisputed ("U")]

3. The tapes that LW had supplied to GRH April 1985 had been stolen in interstate commerce. [U]

4. In April 1985, GRH knew that the tapes supplied by LW had been stolen.

5. The tapes that GRH possessed had been supplied by Leroy Wesby ("LW") in April 1985. [U]

6. The tapes that LW supplied to GRH in April 1985 had been stolen.

7. The 12" black and white television sets (the "TV sets") that LW supplied to GRH in February 1985 had been stolen. [U]

8. The Amana appliances (the "appliances") that LW supplied to GRH in May 1985 had been stolen. [U]

9. GRH did not know that the tapes supplied by LW had been stolen.

10. GRH believed, at the time he possessed the tapes, that LW was supplying him with lawfully obtained goods.

11. In February 1985, LW possessed a large quantity of the TV sets. [U]

12. GRH sold 38 of the TV sets to a retailer for \$28 per set. [U]
13. GRH did not produce a bill of sale for the TV sets he sold. [U]
14. GRH testified that LW told him that the TV sets were legitimate. [U]
15. LW told GRH that the TV sets were legitimate.
16. GRH testified that he believe LW when he told GRH that the TV sets were legitimate. [U]
17. GRH believed that the TV sets were legitimate.
18. GRH did not know that the TV sets had been stolen.
19. In April 1985, LW possessed a truckload of the tapes. [U]
20. The tapes had, in fact, been stolen. [U]
21. LW offered to pay GRH a commission on any of the tapes that GRH sold. [U]
22. GRH sold 5000 of the tapes. [U]
23. GRH testified that LW told him that the tapes were legitimate. [U]
24. LW told GRH that the tapes were legitimate.
25. GRH testified that he believe LW when he told GRH that the tapes were legitimate. [U]
26. GRH believed that the tapes were legitimate.
27. GRH did not know that the tapes had been stolen.
28. In May 1985, LW possessed a substantial quantity of the appliances. [U]
29. The appliances had, in fact, been stolen. [U]
30. LW offered to pay GRH a commission on any of the appliances that he sold. [U]
31. GRH agreed to sell and Robert Nelson, an FBI undercover agent, agreed to buy a large quantity of the appliances for \$8000. [U]
32. GRH testified that LW told him that the appliances were legitimate. [U]
33. LW told GRH that the appliances were legitimate.
34. GRH testified that he believed LW when he told GRH that the appliances were legitimate. [U]
35. GRH believed that the appliances were legitimate.
36. GRH did not know that the appliances had been stolen.

GENERALIZATIONS

37. Goods supplied by a supplier of stolen goods are almost certainly/probably stolen goods.
38. In all/most/many/some instances a quantity of goods [such the TV sets], which was supplied by a person who had on two subsequent occasions within a three-month period supplied other kinds of goods

[such as the tapes and the Amana appliances] that were in fact stolen goods, is a quantity of goods that was stolen.⁵⁹

39. A person who has, on more than one occasion, offered for sale large quantities of stolen goods obtained from the same source is a person who knew/almost certainly knew/probably knew [or should have known] that the goods obtained from that source were stolen goods, notwithstanding any assurances to the contrary the source may have made.

40. A person [such as GRH] who sells or offers to sell a significant quantity of goods [such as the tapes] that were in fact stolen goods on behalf of another person [such as LW] is a person who knew/almost certainly knew/probably knew [or should have known] that the goods were stolen, notwithstanding any assurances to the contrary his supplier may have made.

41. A person [such as GRH] who sells or offers to sell at low prices a significant quantity of goods [such as the tapes] that were in fact stolen goods on behalf of another person [such as LW] who had *previously* supplied goods of a different kind [such as the TV sets] that were in fact stolen goods is a person who knew/almost certainly knew/probably knew [or should have known] that the offered goods were stolen, notwithstanding any assurances to the contrary his supplier may have made.

42. A person [such as GRH] who sells or offers to sell at low prices a significant quantity of goods [such as the tapes] that were in fact stolen goods on behalf of another person [such as LW] who *subsequently* supplied goods of a different kind [such as the appliances] that were in fact stolen goods is a person who knew/almost certainly knew/probably knew [or should have known] that the offered goods were stolen, notwithstanding any assurances to the contrary his supplier may have made.

43. A person [such as GRH] who sells or offers to sell at low prices a significant quantity of goods [such as the tapes] that were in fact stolen goods on behalf of another person [such as LW] who had *previously* supplied and who *subsequently* supplied goods of a different kind that were in fact stolen goods is a person who certainly/almost certainly/probably knew [or should have known] that the offered goods were stolen, notwithstanding any assurances to the contrary his supplier may have made.

59. Context-specific generalizations 38 through 43 would each be more contextually specific if the standpoint of the analyst were the decisions of the court of appeals. For example, these propositions could be formulated to take account of the fact LW was a truck driver and was not a person in the business of supplying goods such as TV sets, tapes, or appliances and that GRH was a local contractor and was not a merchant with respect to goods of the LW supplied.

44. A person who has once/twice/thrice received stolen goods from the same source is a person knew/almost certainly knew/probably knew [or should have known] that the goods received were stolen goods, notwithstanding any assurances the supplier may have given him.

45. Almost all/most instances in which the government has access to suspect goods and knows the source who supplied them are instances in which the government can reliably determine whether the goods were stolen.

46. Almost all/most instances in which the government fails to present, without explanation, evidence that should be readily available are instances in which the government has determined the evidence if presented would not support the position that it seeks to establish.