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BRINGING THE "OPENING THE DOOR" THEORY TO A CLOSE: THE TENDENCY TO OVERLOOK THE SPECIFIC CONTRADICTION DOCTRINE IN EVIDENCE LAW

Francis A. Gilligan* & Edward J. Imwinkelried**

"I believe that truth has only one face: that of... contradiction."

–George Bataille, French novelist¹

The United States is committed to the adversary mode of litigation.² In this system, each party possesses the right to present favorable evidence supporting his position as well as the right to rebut or attack unfavorable evidence adduced by the opponent.³ At the heart of the adversary system is a Hegelian dialectic.⁴ It is true that Hegel developed his dialectic as a conception of the historical process, but apologists for the adversary system have converted it into a model for dispute resolution. If the party's opponent has the burden on an issue, the opponent presents his or her thesis, the party then submits the antithesis, and the truth—a synthesis—emerges from the clash between the thesis and

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2. See generally MONROE FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM (1975); STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION (1988).
3. See LANDSMAN, supra note 2, at 3-5.
antithesis. To prevent the trier of fact from accepting false or misleading unfavorable evidence, a party must have the right to expose the weakness of the opponent's evidence. On several occasions, the U.S. Supreme Court has recognized the constitutional dimension of the right to present favorable evidence. Moreover, the Supreme Court has held that the constitutional entitlement includes a party's right to present testimony attacking unfavorable evidence. In *Crane v. Kentucky*, the Court found constitutional error when a trial judge excluded relevant evidence proffered by the accused to attack the prosecution's testimony about the accused's alleged confession.

Given the adversarial nature of litigation, it should come as no surprise that our evidence law has long recognized specific contradiction as a method of impeachment. If an opposing party calls a witness who testifies to fact A that the traffic light was red, a party may impeach the former witness by calling another witness to give contradictory testimony about non-A that the light was green. If the jury believes the second witness, they have inferred that the opponent's witness "has erred about or falsified [the] facts." Understood in this sense, recognizing the entitlement to specific contradiction impeachment is essential to the proper functioning of an effective adversary system of litigation. In the final analysis, the entitlement is a corollary of the party's fundamental right in an adversary system to attack false or misleading unfavorable evidence presented by the opponent.

Despite the importance of specific contradiction impeachment, the courts have overlooked the application of the doctrine in a growing number of cases. To some extent that tendency is understandable. Article VI of the Federal Rules of Evidence expressly codifies some impeachment

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8. See United States v. Perez-Perez, 72 F.3d 224, 227 (1st Cir. 1995) ("Impeachment by contradiction is a recognized mode of impeachment.").
10. Id.
techniques, such as proof of a witness's character trait for untruthfulness or prior inconsistent statement, but makes no mention of the specific contradiction doctrine. Since the courts do not see any mention of specific contradiction in the statutory text of Article VI, the operative psychological dynamic may be "out of sight, out of mind," leading the courts to lose sight of the doctrine when they analyze rebuttal and impeachment problems.

While understandable, forgetting the specific contradiction doctrine is dangerous. As we shall see, in a number of cases in which the courts have overlooked specific contradiction, the courts have articulated a vague "opening the door" theory rather than relying upon the specific contradiction doctrine. Other opinions equate the expression, "opening the door," with the curative admissibility doctrine, while still other opinions use the expression to describe both specific contradiction and curative admissibility.

Specific contradiction and curative admissibility differ radically. Curative admissibility is triggered only when the opponent first breaches an evidentiary rule by introducing inadmissible evidence. No such limitation curbs the party's right to resort to the specific contradiction doctrine. It is critical that the courts do not confuse curative admissibility and specific contradiction impeachment if these doctrines are to serve their distinct purposes. For instance, if a court confuses the doctrines and mistakenly applies the requirement that the opponent must first breach an evidentiary rule in a specific contradiction case, the party could be denied a fair right to rebuttal.

12. See id. at 613.
13. See id. at art. VI.
14. See Ryan v. Board of Police Comm'rs, 96 F.3d 1076, 1082 n.1 (8th Cir. 1996) (stating "a court may permit the opponent to introduce similarly inadmissible evidence in rebuttal . . . ."); United States v. Forrester, 60 F.3d 52, 60 (2d Cir. 1995) (stating that one condition of the curative admissibility doctrine is that the opponent has already introduced inadmissible evidence on the issue); Government of the Virgin Islands v. Archibald, 987 F.2d 180, 187 (3d Cir. 1993) (the trial judge erred in permitting the prosecution to rely on the curative admissibility doctrine; the defense had not introduced any inadmissible evidence); United States v. Rea, 958 F.2d 1206, 1225 (2d Cir. 1992) ("The concept of 'opening the door,' or 'curative admissibility,' gives the trial court discretion to permit a party to introduce otherwise inadmissible evidence on an issue . . . when the opposing party has introduced inadmissible evidence on the same issue.").
The thesis of this article is that the tendency to confuse the doctrines should be arrested by recognizing a clear boundary between specific contradiction and several related doctrines. Section I describes the specific contradiction doctrine under common law and the Federal Rules of Evidence. Section II critiques a number of recent federal and state decisions. In these decisions, the courts relied on colorfully entitled, vague theories such as "opening the door" instead of invoking the specific contradiction doctrine. Section III details the dangers posed by the mounting confusion in the recent cases. Section III outlines the key differences between the specific contradiction doctrine and related doctrines, notably curative admissibility. This article argues that the courts should: (1) abandon such vague terminology as "opening the door" and (2) enforce the distinctions between specific contradiction and curative admissibility.

I. THE SPECIFIC CONTRADICTION DOCTRINE

A. At Common Law

At common law, it is well settled that a party may attack an opposing witness's credibility by offering testimony contradicting the witness's testimony. Specific contradiction has a twofold impeachment value. If the second witness's testimony is accurate, the first witness is necessarily either mistaken or lying in that respect. Moreover, "[t]hat showing should be considered negatively in weighing other statement[s] by" the first witness. In some jurisdictions, the pattern jury instructions explicitly state that "[a] witness false in one part of his or her testimony is to be distrusted in others." Hence, the second witness's testimony impeaches both the first witness's contradictory testimony and the prior

15. See infra Part I.
16. See infra Part II.
17. See infra Part III.
18. See infra Part III.
20. See 1 MCCORMICK ON EVIDENCE, supra note 9.
21. Id.
22. CALIFORNIA JURY INSTRUCTIONS CIVIL BOOK OF APPROVED JURY INSTRUCTIONS § 2.22 (8th ed. 1994).
witness's testimony about other disputed issues in the case.

Despite the probative value of specific contradiction evidence, the common law courts have imposed restrictions on such evidence. The foremost restriction is the collateral fact rule. Returning to our example of a trial involving a traffic accident as a key event, suppose that while testifying about the critical fact of the color of the traffic light, the opponent's witness mentions in passing what he was wearing the day of the accident. The party discovers a second witness prepared to testify that the witness was dressed differently that day. On the one hand, the second witness's testimony has some minimal impeachment value: if the first witness is mistaken about the clothing he was wearing at the time, there is some reason to question the caliber of his memory. On the other hand, "to allow a prolonged dispute about such extraneous, 'collateral' facts as... the witness's clothing by allowing the attacker to call other witnesses to disprove them, is impractical. Dangers of confusion of the jury[] and waste of time are apparent." To reduce these dangers, the restriction emerged that the party could not call a second witness to contradict the prior witness on a collateral fact. If relevant to the merits of the case, extrinsic, contradicting testimony is admissible; but if the contradicting testimony is relevant solely to the witness's credibility, extrinsic contradiction is barred.

B. Under the Federal Rules of Evidence

Although the specific contradiction doctrine is a fixture in the common law of impeachment, the Federal Rules of Evidence fail to even mention the doctrine. The question thus arises as to whether a party may employ specific contradiction impeachment under the Federal Rules.

This question has been answered in the affirmative. Article VI says nothing about specific contradiction impeachment or about the propriety of bias impeachment.

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23. 1 MCCORMICK ON EVIDENCE, supra note 9.
24. In this context, "extrinsic" denotes evidence presented after the witness to be impeached has left the stand. Thus, the extrinsic evidence limitation would bar either later contradictory testimony by another witness or the subsequent introduction of a contradictory writing prepared by another person.
25. See 1 MCCORMICK ON EVIDENCE, supra note 9.
26. But see FED. R. EVID. 411 advisory committee's note 4 (referring to the "bias or prejudice of a witness"). There is no mention of this rule in United
The Supreme Court confronted the question of whether a party may utilize bias impeachment in federal practice in *United States v. Abel.* The *Abel* Court ruled that as at common law, proof of a witness's bias remains a viable impeachment technique. The Court reasoned that it was unnecessary to find an express statutory authorization for bias impeachment in Article VI. Instead, the Court looked to Article IV dealing with relevance. Writing for the Court, Chief Justice Rehnquist declared:

Rule 401 defines as "relevant evidence" evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 402 provides that all relevant evidence is admissible, except as otherwise provided by the United States Constitution, by Act of Congress, or by applicable rule. A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony.

In other words, since bias evidence is relevant, Rule 402 was the only statutory authorization needed to justify the continued recognition of the bias impeachment technique.

The Court's holding was sound. The inclusion of Article VI, touching on impeachment, in the Federal Rules indicates that a witness's credibility is a fact of consequence. Common sense and logic suggest that a witness's bias is relevant to the question of the witness's credibility. A bias might prompt a witness to lie and could operate at a subconscious level, distorting "every bit" of a witness's testimony.

If bias impeachment is still permissible under the Federal Rules even absent an express statutory authorization, *a fortiori* specific contradiction impeachment is allowable. Like proof of a witness's bias, testimony

27. 469 U.S. 45.
28. *See id.* at 51.
29. *See id.* at 50.
30. *See id.*
31. *Id.* at 50-51.
specifically contradicting the witness's version of the facts calls into question the witness's credibility.\textsuperscript{34} Although the Supreme Court has never squarely held that the specific contradiction doctrine survived the enactment of the Federal Rules of Evidence, with \textit{Abel} as the benchmark, the lower courts have uniformly concluded that the doctrine remains good law.\textsuperscript{35} Hence, if the party's testimony contradicts evidence already introduced by the opponent, under Rule 402 the party has a presumptive right to present the contradictory testimony. In this regard, the party's rights under the Federal Rules are similar to his or her entitlement at common law. However, the conclusion that the specific contradiction doctrine survived the enactment of the Federal Rules does not end the analysis.

Like the specific contradiction doctrine, did the collateral fact limitation on the doctrine survive?\textsuperscript{36} Without using the term "collateral," Federal Rule of Evidence 608(b) codifies one aspect of the common-law limitation. Rule 608(b) authorizes a cross-examiner to question the witness about untruthful or deceitful acts even when they have not as yet resulted in a conviction.\textsuperscript{37} Yet, if the witness denies the act, the statute forbids the cross-examiner from later introducing extrinsic evidence to contradict the denial. In the words of Rule 608(b), the witness's commission of the act "may not be proved by extrinsic evidence."\textsuperscript{38} The party must "take the answer" the witness gives on cross-examination.\textsuperscript{39}

With the exception of Rule 608(b) and a passing reference to "collateral" in Article X of the Federal Rules of Evidence, devoted to the best evidence rule,\textsuperscript{40} the Federal Rules do not

\textsuperscript{34} See 1 \textsc{McCormick on Evidence}, \textit{supra} note 9.


\textsuperscript{36} See United States v. Lambert, 463 F.2d 552, 557 (7th Cir. 1972) ("[T]he general rule is that a witness may not be impeached by contradiction as to collateral or irrelevant matters elicited on cross-examination.").

\textsuperscript{37} See \textsc{Fed. R. Evid.} 608(b).

\textsuperscript{38} Id.

\textsuperscript{39} See 1 \textsc{McCormick on Evidence}, \textit{supra} note 9, \S 49.

\textsuperscript{40} \textsc{Fed. R. Evid.} 1004(4) (referring to the subdivision entitled "Collateral Matters"). The provision has nothing to do with impeachment or rebuttal. The provision relates to a situation in which there is no need to comply with the best evidence rule. Under this provision, a party may introduce otherwise
refer to the collateral fact rule. That silence effectively abolishes the common law collateral fact doctrine as a rigid limitation on the specific contradiction doctrine. As previously stated, Federal Rule of Evidence 402 states that logically relevant evidence is admissible unless it may be excluded under the Constitution, Act of Congress, the Federal Rules of Evidence, or other court rules adopted pursuant to statutory authority such as the Federal Rules of Civil Procedure. The common law collateral fact doctrine is a creature of case law. The statutory scheme of the Federal Rules abolishes uncodified exclusionary rules of evidence.

What remains is Rule 403, allowing the trial judge discretion to exclude relevant evidence when he concludes that the incidental probative dangers, such as the risk of confusion or time consumption, substantially outweigh the probative worth of the evidence. Thus, the Federal Rules yield the same outcome as the California Evidence Code. In the official comment to section 780 of the California Evidence Code, the California Law Revision Commission stated that:

The effect of [that statutory scheme] is to eliminate this inflexible rule of exclusion. This is not to say that all evidence of a collateral nature offered to attack the credibility of a witness would be admissible. Under Section 352 [the California analogue to Federal Rule 403], the court has substantial discretion to exclude collateral evidence. The effect of [these statutes], therefore, is to change the present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge.

Thus, while there is no hard and fast rule barring

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inadmissible secondary evidence of a writing's contents when "[t]he writing, recording, or photograph is not closely related to a controlling issue." Id.

41. See id. at 402.

42. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); United States v. Abel, 469 U.S. 45 (1993). In both cases, the Court approvingly quoted an article by the late Professor Edward Cleary who had served as the Reporter for the Advisory Committee which drafted the Federal Rules. In the article, Professor Cleary stated that after the enactment of the Rules, "[n]o principle, under the Federal Rules no common law of evidence remains." See also Edward J. Imwinkelried, Federal Rule of Evidence 402: The Second Revolution, 6 REV. LITIG. 129 (1987).

43. FED. R. EVID. 403.


impeachment on collateral facts, in an extreme case the trial judge retains a residual discretion to exclude extrinsic evidence proffered for that purpose.

The federal trial judge enjoys similar discretion. However, his or her discretion under Rule 403 is limited in two respects. First, the Rule specifies the factors which the judge may consider in making his or her discretionary determination: "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The accompanying Advisory Committee Note indicates that the list of factors is exhaustive. The Note asserts that while some common law cases suggested that a trial judge could exercise the discretion to exclude evidence on the basis of unfair surprise, the omission of any mention of that basis in the text of Rule 403 deprives federal trial judges of the power to exclude for that reason.

Second, Rule 403 favors the admission of relevant evidence. The wording and legislative history set the burden of persuasion on the party opposing the admission of logically relevant evidence. Once the proponent of the evidence demonstrates its logical relevance, the opponent bears the burden of persuading the trial judge that by a wide margin, the attendant probative dangers outstrip the probative value of the evidence. The cases teach that trial judges ought to use Rule 403 sparingly. Judges should rarely exclude evidence with substantial probative value. The judge's discretion is a narrow, circumscribed authority, not a broad license to bar relevant evidence. Thus, although the trial judge may sometimes invoke Rule 403 to override a party's presumptive right to introduce specific contradiction

46. FED. R. EVID. 403.
47. See id. advisory committee's note.
48. See United States v. Rivera, 83 F.3d 542, 545 (1st Cir. 1996).
51. See United States v. Bartelho, 71 F.3d 436, 444 (1st Cir. 1995).
evidence, the exclusion of such evidence should not be a common occurrence.

II. THE GROWING CONFUSION IN THE CASES

Although the specific contradiction doctrine survived the enactment of the Federal Rules of Evidence, there has been a disturbing judicial tendency to blur the doctrine. The confusion has manifested itself in two ways. First, the courts have disregarded the specific contradiction doctrine. Second, the courts have exacerbated the situation by using the expression "opening the door" as a synonym for specific contradiction or curative admissibility, or a general umbrella covering both specific contradiction and curative admissibility.

A. Negatively Overlooking Specific Contradiction

In the 1990s, a clear and disturbing trend to overlook the specific contradiction doctrine became evident in both federal and state decisions.

Consider the decision by the United States Court of Military Appeals in United States v. Turner in 1994. The accused, Turner, was a Technical Sergeant on active duty with the United States Air Force. Turner was convicted of larceny of oscilloscopes from his place of work.

During the opening statement, the defense counsel stated that Turner had voluntarily turned over the oscilloscope in question:

So Sergeant Turner just put the item on a shelf at his home and waited for the OSI [Office of Special Investigations] to contact him. Although the OSI waited several months to contact Sergeant Turner, he did, voluntarily, surrender the item and make a written statement to Special Agent Gardner as to what happened; and you will have his written statement before you as to what happened.

The defense counsel's statement clearly implied that Turner had cooperated with the O.S.I. agent and voluntarily

52. The court has been renamed the United States Court of Appeals for the Armed Forces. One of the authors, Mr. Gilligan, currently serves as a clerk to the court.
54. Id. at 260.
surrendered the item. In effect, the defense offered "consciousness of innocence" evidence and argued that Turner had acted as if he had nothing to hide. To rebut the implication, the prosecution attempted to introduce the agent’s testimony that when the agent requested Turner's permission to search his house, Turner balked.

The majority of the court ruled that the agent’s testimony was inadmissible. The majority noted that the defense counsel’s statement was "nothing more than a single passing comment during defense counsel's opening statement." The majority added that technically, statements in opening do not constitute evidence.

However, neither the majority nor the concurring judge were content to rest their analysis solely on the formal non-evidentiary status of statements during opening. Assuming that the statements should be treated in the same manner as evidence, both the majority and the concurring judge felt compelled to discuss the admissibility of the prosecution evidence. The majority insisted that the defense counsel’s statement did not "open the door" to the prosecution evidence. The majority reasoned that Turner’s refusal to authorize a search of his house had "no arguable relevance at all to whether his return of the property was voluntary."

Although the concurrence disputed the majority’s conclusion that the prosecution evidence lacked relevance, the concurrence also invoked the "opening the door" doctrine. Unlike the majority, however, the concurrence acknowledged the applicability of the specific contradiction doctrine. The concurrence stated that it would promote "the proper functioning of the adversary system" to admit the prosecution evidence, since it tended to "squarely contradict" the implication from the defense statement. The concurrence faulted the majority for overlooking "the common law rule of contradiction."
The judicial tendency to ignore the specific contradiction doctrine is evident in federal civilian decisions as well as federal military opinions. One of the most recent cases in point is a 2000 decision rendered by the Court of Appeals for the Eighth Circuit, *United States v. Beason*. In *Beason*, the defense sought to take advantage of the *Bruton* rule. Under the *Bruton* rule, in a joint trial of co-defendants A and B, A's confession implicating B is inadmissible if: (1) A's confession does not qualify as a vicarious admission against B, and (2) A elects not to testify at the trial. To be sure, the confession would otherwise qualify as a personal admission against A. Typically, when evidence is admissible against one co-defendant but not another, the trial judge admits the evidence with a limiting instruction. However, a limiting instruction forbidding the jury from using A's confession as evidence against B would be inadequate. Since the passage inculpating B is directly relevant to a key issue in the case and A was in a position to have personal knowledge, at least at a subconscious level the jurors would be tempted to disregard the instruction and treat the passage as evidence against B. That treatment makes A a functional accuser of B. If A is one of B's accusers, B has the right to confront and cross-examine A. However, since A elects against testifying, co-defendant B cannot cross-examine A to test the statements incriminating B.

In *Beason*, the Government introduced evidence that Beason was a drug kingpin selling from his truck and hiding hundreds of thousands of dollars in its inside compartments. Like most drug kingpins, he used runners, one of whom was named Washington. Washington did not testify at Beason's trial. During the trial, the defense cross-examined an F.B.I. agent who had taken a statement from Washington. When the defense asked whether the information concerning money

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64. 220 F.3d 964 (8th Cir. 2000).
65. For example, A might have made the statement after his or her arrest. If so, in most cases, A would not be considered an active member of the conspiracy. See *United States v. Sandoval-Curiel*, 50 F.3d 1389 (7th Cir. 1995).
68. See *id.* at 105.
70. See *id.* at 965.
71. See *id.* at 967.
72. See *id.*
hidden in Beason's truck had come from Beason directly, the agent admitted that it had not.\textsuperscript{73} The defense then asked whether Washington, who had a prior drug arrest, supplied the information.\textsuperscript{74} The trial judge accepted the Government's argument that the latter question opened the door for the agent to testify about Washington's statement identifying Beason as the source of the money hidden in the truck.\textsuperscript{75}

On appeal, the accused argued that admitting Washington's statement was a \textit{Bruton} error.\textsuperscript{76} "The government concede[d] that because Washington did not testify at trial, such testimony would ordinarily be inadmissible under \textit{Bruton}.\textsuperscript{77} Despite the government's concession, the appellate court upheld the introduction of the statement.\textsuperscript{78} The court reasoned:

Beason's theory of defense at trial was that Washington orchestrated the events in question, while Beason was an unknowing bystander. We find defense counsel's questioning, stressing not only that information regarding the hidden currency did not come from Beason, but also that it came from Washington, an individual with a prior drug record, did more than simply dispel an assumption that Beason provided the information. It could have created a misleading impression that Washington was the "bad guy".\textsuperscript{79}

Like the majority opinion in \textit{Turner}, the Eighth Circuit's decision in \textit{Beason} disregarded the specific contradiction doctrine. In \textit{Beason}, the court also resorted to colorful, vague language, using the "opened the door" expression.\textsuperscript{80} The expression appears six times in the course of a relatively short opinion.\textsuperscript{81} To support its decision, the court cited 1970s, 1980s, and 1990s opinions relying on the "opening the door" rubric.\textsuperscript{82} The court never mentions the specific contradiction doctrine.

The failure to invoke the specific contradiction doctrine is

\textsuperscript{73} See id. at 968.
\textsuperscript{74} See id.
\textsuperscript{75} See \textit{Beason}, 220 F.3d at 968.
\textsuperscript{76} See id. at 966.
\textsuperscript{77} Id. at 967.
\textsuperscript{78} See id. at 968.
\textsuperscript{79} Id.
\textsuperscript{80} See id. at 967.
\textsuperscript{81} See \textit{Beason}, 220 F.3d at 967-68.
\textsuperscript{82} See id. at 968.
particularly troubling in these cases because they are specific contradiction fact situations rather than curative admissibility problems. In *Turner*, the defense informed the jury that the accused had cooperated by voluntarily returning an oscilloscope. In *Beason*, the defense introduced evidence about Washington’s arrest to raise doubts about his bias and the trustworthiness of the information he provided to the police. In both cases, the defense “evidence” was admissible. Evidence of the accused’s cooperation with the police is admissible as proof of his or her “consciousness of innocence.” Likewise, under *Abel*, the defense has a right to introduce evidence establishing a relevant bias. The defense information may have been misleading or even false, but it was not inadmissible. The federal courts should have applied the specific contradiction doctrine to these fact patterns.

In *Jackson v. State*, the state court held that the trial judge did not abuse his discretion in permitting the prosecutor to ask the accused whether he loved his wife every day of the marriage. Jackson testified that he had loved his wife every day throughout their twenty-one years of marriage, including the day she was shot. Jackson contended that the killing of his wife was an accident. Over a defense objection, the trial judge allowed the prosecution to introduce evidence of his assault and battery against his wife two years prior to the shooting.

The court acknowledged that given the defense claim of accident, the evidence could have been admitted to show “absence of mistake or accident” consistent with the terms of the Indiana version of Federal Rule 404(b). However, the court added an alternative basis for its decision: the accused had “opened the door” to the prosecution evidence. The

84. 728 N.E.2d 147 (Ind. 2000).
85. See id. at 155.
86. See id. at 151.
87. See id. at 150.
88. See id. at 151.
89. See id. at 151-52. The court quoted the statutory language that, “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith . . . [but] may, however, be admissible [to prove] motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”
90. See Jackson, 728 N.E.2d at 152.
court used the expression three times in its opinion, but never alluded to the specific contradiction theory. Just as in the federal cases, the court failed to turn to the specific contradiction doctrine. The record does not indicate that the defense overreached the character evidence rules by offering a sweeping denial by the accused that he had never struck or attacked his wife. Simply stated, the prosecution had a right to specifically contradict the accused's testimony to correct a false or misleading impression created by the testimony. Reliance on the vague "opening the door" theory was wholly unnecessary.

B. Affirmatively Using the Vague "Opening the Door" Theory as a Synonym for Curative Admissibility or a General Umbrella

The previous section analyzed a number of judicial opinions which previously would have analyzed the facts under the specific contradiction doctrine. Unfortunately, the opinions do not mention the specific contradiction doctrine but instead refer to an "opening the door" theory. If these cases merely renamed the specific contradiction doctrine, they would be relatively unobjectionable. In several respects, evidentiary terminology under the Federal Rules differs from the common law evidentiary lexicon. For instance, at common law, if the opponent offers evidence probative of a fact not within the range of issues framed by the pleadings, the party may object that the evidence is "immaterial." Under Federal Rule of Evidence 401, the objection would be "irrelevant." Another change in nomenclature occurs in the hearsay doctrine. At common law, admissions of a party-opponent were deemed to fall within a hearsay exception. Under Federal Rule of Evidence 801(d)(2), admissions are

91. See id. at 152 n.3.
92. See, e.g., United States v. Scarpa, 897 F.2d 63, 70 (2d Cir. 1990); United States v. Gambino, 838 F. Supp. 744, 748 (S.D.N.Y. 1993) (quoting United States v. Scarpa, 913 F.2d 993, 1011 (2d Cir. 1990), where the Second Circuit court held that "a defendant may not seek to establish his innocence . . . through proof of the absence of criminal acts on specific occasions.").
93. See Jackson, 728 N.E.2d at 152.
94. See supra Part II.A.
95. 1 EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE §§ 303-304 (3d ed. 1998) [hereinafter COURTROOM CRIMINAL EVIDENCE].
96. FED. R. EVID. 401 advisory committee's note.
97. See 2 MCCORMICK ON EVIDENCE, supra note 9, § 254.
classified as nonhearsay.\textsuperscript{98}

However, it does not appear that these opinions reflect a conscious judicial decision to simply change the name of an evidentiary doctrine. The courts are not merely treating “opening the door” as a new designation for the traditional specific contradiction doctrine. Quite to the contrary, in one federal case, \textit{United States v. Whitworth},\textsuperscript{99} the court equated “opening the door” with curative admissibility. The court referred to “the rule of curative admissibility, or the ‘opening the door’ doctrine.”\textsuperscript{100} Similarly, \textit{United States v. Rea}\textsuperscript{101} alluded to “[t]he concept of ‘opening the door,’ or ‘curative admissibility.’” One commentator has suggested that a party may invoke curative admissibility precisely because the opponent has “opened the door.”\textsuperscript{102}

To complicate matters further, rather than equating “opening the door” with either curative admissibility or specific contradiction, other courts treat “opening the door” as a broader theory encompassing both specific contradiction and curative admissibility. In \textit{Lala v. Peoples Bank & Trust Co.},\textsuperscript{103} an Iowa court used the phrase, “opening the door,” to subsume both specific contradiction and curative admissibility. Lala brought suit against a bank for the unauthorized removal of certain stamps from a safety deposit box.\textsuperscript{104} The bank claimed that Lala did not own the stamps and contended that the true owner was a gentleman named Sels.\textsuperscript{105} Lala testified during the plaintiff's case-in-chief but was forced to admit on cross-examination that he had sued Sels over an unrelated land contract transaction.\textsuperscript{106} During the plaintiff's rebuttal case, Lala “introduced evidence, over the Bank's objection that the separate law suit had been dismissed and Lala had been paid $75,000 in settlement.”\textsuperscript{107} The appellate court sustained the trial judge's decision to

\textsuperscript{98} See \textit{FED. R. EVID. 801(d)(2)}. The doctrine is therefore an exemption from the hearsay definition rather than an exception to the hearsay rule.
\textsuperscript{99} 856 F.2d 1268, 1285 (9th Cir. 1988).
\textsuperscript{100} \textit{Id.} at 1285.
\textsuperscript{101} 958 F.2d 1206, 1225 (2d Cir. 1992).
\textsuperscript{102} See Comment, \textit{Evidence–Curative Admissibility in Missouri}, 32 MO. L. REV. 505, 505-08 (1967).
\textsuperscript{103} 420 N.W.2d 804 (Iowa 1988).
\textsuperscript{104} \textit{See id.} at 806.
\textsuperscript{105} \textit{See id.}
\textsuperscript{106} \textit{See id.} at 807.
\textsuperscript{107} \textit{Id.}
overrule the objection.  

The court relied on the curative admissibility doctrine in part. The court characterized the “evidence of the unrelated lawsuit” as “irrelevant” and consequently inadmissible.  

Expressly citing the curative admissibility doctrine, the court remarked that its holding “illustrate[d] the risks involved when a party offers evidence of questionable relevancy.”

If the court had confined its comments to curative admissibility, the opinion would be an unexceptional application of that doctrine. However, the court did not stop there. The court also accepted Lala’s contention that “the Bank had opened the door by offering evidence of the separate lawsuit.” Since the court mentioned “opening the door” as an alternative to curative admissibility, the court cannot be said to have been specifically equating the “opening the door” theory with the curative admissibility doctrine. Since the trigger in Lala was the opponent’s introduction of inadmissible evidence, the court could also not have been treating the theory as another title for specific contradiction. The Lala court appeared to treat “opening the door” as a more general theory, encompassing both curative admissibility and specific contradiction. That treatment of the theory invites further confusion over the boundary between specific contradiction and curative admissibility.

III. THE DANGER POSED BY THE GROWING CONFUSION

We have seen that in several cases the courts could have relied on the specific contradiction doctrine but either intentionally or inadvertently overlooked that doctrine. Instead, they resorted to the vague expression “opening the door,” sometimes equated with the curative admissibility doctrine or with specific contradiction. Although the use of such vague and colorful expressions as “opening the door” and “fighting fire with fire” adds more flavor to judicial opinions, the unnecessary reliance on those expressions risks confusing

108. See id. at 808.
109. Lala, 420 N.W.2d at 807-08.
110. See id.
111. Id. at 808.
112. Id. at 807.
113. See 1 MCCORMICK ON EVIDENCE, supra note 9, § 57.
the specific contradiction and curative admissibility doctrines. The courts ought to eschew such expressions and draw a sharp boundary between specific contradiction and curative admissibility. This boundary should include at least six distinctions between the doctrines. Three of these distinctions relate to the prima facie case for invoking the doctrine while the remaining three distinctions concern the nature and extent of the discretion which the trial judge wields in applying the doctrine.

A. Distinctions Relating to the Prima Facie Case for Invoking the Doctrine

1. The Trigger for Curative Admissibility: The Opponent's Presentation of Inadmissible Evidence

A party may resort to specific contradiction impeachment so long as his or her testimony contradicts evidence introduced earlier by the opponent. This impeachment technique is not confined to situations in which, in retrospect, it is clear that the evidence introduced by the opponent was inadmissible. Although a party may contend that an opponent's evidence is false or misleading, even false or potentially misleading evidence can satisfy the rules governing the admissibility of evidence.

In contrast, the prevailing view is that a party may invoke curative admissibility only when earlier in the same trial the opponent succeeded in introducing inadmissible evidence. The courts have explicitly noted this limitation on the scope of the curative admissibility doctrine. In Lala v.

115. See James W. McElhaney, Opening the Door, 12 LITIG. 48 (1985) ("Scholars talk about curative admissibility when illegal evidence triggers the admissibility of other illegal evidence. But the law is filled with situations where perfectly legal evidence opens the door to a rebuttal that would otherwise not be available.").
116. Indeed, requiring the judge to pass on the truth of testimony as part of the admissibility analysis would undermine the jurors' role as triers of fact. According to Coke's famous maxim, "Ad questionem facti non respondent judices" (judges do not decide questions of fact). See J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 185-87 (1898); 9 WIGMORE, supra note 19, § 2549, at 639-40.
117. See United States v. Nardi, 633 F.2d 972 (1st Cir. 1980); Comment, supra note 102, at 505-08.
Peoples Bank & Trust Co., the state court declared:

We recognized the doctrine of curative admissibility. This doctrine provides that when one party introduces inadmissible evidence, with or without objection, the trial court may allow the adverse party to offer otherwise inadmissible evidence on the same subject if it is responsive to the evidence in question.

Federal decisions are in accord with the state decisions. In a 1999 federal decision, a court refused to permit the prosecution to rely on the curative admissibility doctrine because the defense had not introduced any inadmissible evidence.

2. The Necessity of Showing the Inadequacy of an Objection or Motion to Strike as a Remedy for the Opponent’s Presentation of Inadmissible Evidence

In true curative admissibility cases the evidence introduced earlier by the opponent was inadmissible. Unless the ground for objection was not apparent at the time, the party had an option other than later offering contrary evidence: objecting or moving to strike when the opponent proffers inadmissible evidence. If the opponent attempts to inject the inadmissible evidence during the direct examination of one of his or her witnesses, the party can object. If the opposing witness gratuitously mentions the evidence during the party’s cross-examination, the party may move to strike. Before permitting the party to later introduce other inadmissible evidence on a curative admissibility theory, the court should inquire whether a contemporaneous objection or motion would have been a sufficient remedy. Would a timely objection or motion have adequately protected the party’s interests?

The courts have acknowledged the pertinence of the party’s opportunity to object as a consideration in analyzing

118. 420 N.W.2d 804 (Iowa 1988).
119. Id. at 807-08.
120. See, e.g., Government of the Virgin Islands v. Archibald, 987 F.2d 180, 187 (3d Cir. 1993); Nardi, 633 F.2d 972.
121. See United States v. Davis, 183 F.3d 231, 256 (3d Cir. 1999), amended by 197 F.3d 662 (3d Cir. 1999) (The doctrine applies when “a party has introduced inadmissible evidence that may create false impression. . . . But the government does not argue that Davis’s direct testimony was inadmissible. . . . Therefore, this is not a case of curative admissibility.”).
non-evidentiary problems. During the closing argument in *United States v. Robinson*, the defense counsel told the jury that the government had not allowed the accused to explain his side of the story and had breached its duty to be fair. The judge held a hearing outside the jury's presence on the prosecution's objection to the argument. At the hearing, the prosecutor contended that the defense had opened the door.

The trial court agreed, stating:

I will tell you what, the Fifth Amendment ties the government's hands in terms of commenting upon the defendant's failure to testify. But that tying of hands is not putting you into a boxing match with your hands tied behind your back and allowing him to punch you in the face.

That is not what it was intended for and not fair. I will let you say that the defendants had every opportunity, if they wanted to, to explain this to the ladies and gentlemen of the jury.

The respondent did not object.

Following a short recess, the prosecutor gave his rebuttal summation. He began by stating that the Government had an obligation to "play fair" and had complied with that obligation in this case. Specifically, he stated:

[Defense counsel] has made comments to the extent the Government has not allowed the defendants an opportunity to explain. It is totally unacceptable.

He explained himself away on tape right into an indictment. He explained himself to the insurance investigator, to the extent that he wanted to.

He could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain.

Defense counsel did not object to this closing and did not request a cautionary instruction. Nonetheless, the court included in the jury instruction the admonition that "no

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123. Id. at 27.
124. See id. at 28.
125. See id.
126. Id.
127. See id.
inference whatever may be drawn from the election of a defendant not to testify.\textsuperscript{129}

On review, the United States Court of Appeals for the Sixth Circuit overturned Robinson's conviction.\textsuperscript{130} Before the Supreme Court, Robinson pressed the same theory upon which the Sixth Circuit had relied; he argued that the prosecutor's rebuttal summation amounted to plain error violative of the prohibition against comment on an accused's invocation of the Fifth Amendment privilege, announced in \textit{Griffin v. California}.\textsuperscript{131} The majority of the Court rejected Robinson's argument. Both Chief Justice Rehnquist in the lead opinion\textsuperscript{132} and Justice Blackmun in his partial concurrence\textsuperscript{133} voted to reverse the Sixth Circuit's judgment. The lead opinion "decline[d] to expand Griffin to preclude a fair response by the prosecutor in situations such as the present one."\textsuperscript{134} In his separate opinion, Justice Blackmun favored remanding to clarify the application of the plain error doctrine to the facts of the case.\textsuperscript{135} Both Chief Justice Rehnquist\textsuperscript{136} and Justice Blackmun\textsuperscript{137} relied on the Supreme Court's 1985 decision in \textit{United States v. Young}.\textsuperscript{138} In Young, Chief Justice Burger emphasized that the better remedy is for the trial judge:

to deal with the improper argument of the defense counsel promptly and thus blunt the need for the prosecutor to respond. Arguably defense counsel's misconduct could have warranted the judge to interrupt the argument and admonish him,... thereby rendering the prosecutor's response unnecessary.... "Invited responses" can effectively be discouraged by prompt action from the bench in the form of corrective instructions to the jury and, when necessary, in admonition to the errant advocate.\textsuperscript{139}

In another closing argument case, \textit{United States v.}

\textsuperscript{129} \textit{Id.} at 28-29.
\textsuperscript{130} \textit{United States v. Robinson}, 716 F.2d 1095 (6th Cir. 1983).
\textsuperscript{131} 380 U.S. 609 (1965).
\textsuperscript{132} \textit{See Robinson}, 485 U.S. at 34.
\textsuperscript{133} \textit{See id.} (Blackmun, J., concurring in part and dissenting in part).
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{See id.} at 37.
\textsuperscript{136} \textit{See id.} at 29.
\textsuperscript{137} \textit{See id.} at 34 (Blackmun, J., concurring in part and dissenting in part).
\textsuperscript{138} 470 U.S. 1 (1985).
\textsuperscript{139} \textit{Id.} at 13.
Grady, the court indicated that regardless of who initiated the argument as to command policies, the judge has a sua sponte duty to issue a curative instruction. When a curative instruction would be an effective antidote, the party should move for such an instruction and be content with the instruction as relief. In some situations, however, the party might deliberately forego the instruction and seize on the opponent's error as a pretext for the party's own violation of closing argument restrictions.

An analysis similar to the one applied in these closing argument cases has been extended to evidentiary problems under the curative admissibility doctrine. Since the opponent's evidence is inadmissible, the party could have objected or moved to strike. If the court finds that a sustained objection or granted motion would sufficiently protect the party's legitimate interests, the court may conclude that the party's only remedy was "to object when" the inadmissible evidence is proffered. The party may not exploit the opponent's violation as "an excuse for further inquiry" into inadmissible matter. The party "needs no other protection" than a fair opportunity to voice an effective objection.

Of course, the adequacy of a contemporaneous objection as a remedy depends in large part on the question of whether the judge believes that realistically, a curative instruction to the jury to disregard the improper argument would be effective. Furthermore, the likely effectiveness of instructing the jury to disregard an opposing party's inadmissible evidence depends upon how probative the jury is likely to find the evidence. The 1999 edition of the McCormick treatise argues:

Consider, for example, a case in which one party improperly injects evidence of the good character of his distant relatives who played a minor role in the litigated event. That type of evidence is unlikely to change the outcome of the trial; and it would hardly be an abuse of discretion for the judge to exclude the [party's] evidence attacking the relative's character. [However, a]ssume that [the opponent] succeeds in introducing inadmissible

140. 15 M.J. 275 (C.M.A. 1983).
141. See United States v. Duran, 886 F.2d 167, 169 (8th Cir. 1989).
evidence of his own good character. That evidence is much more likely to impact the verdict than testimony about a distant relative's character.\footnote{143}{1 MCCORMICK ON EVIDENCE, supra note 9, § 57, at 254-55. The treatise cites Fortner v. Bruhn, 31 Cal. Rptr. 503 (1963) (involving a relative's character), and People v. Matlock, 89 Cal. Rptr. 862 (1970) (involving the accused's own character).}

The strongest case for invoking curative admissibility exists when the curative instruction would probably have been ineffective. However, if the judge concludes that the jury could have complied with the instruction, that conclusion cuts strongly against applying curative admissibility.

3. \textit{The Trigger for Specific Contradiction: A Flat Contradiction between the Testimony Previously Introduced by the Opponent and the Evidence Proffered by the Party}

As Section III.A noted, in one respect the foundation for invoking the curative admissibility doctrine is more demanding than the predicate for specific contradiction. The former doctrine comes into play only when, in retrospect, the judge concludes that the evidence previously introduced by the opponent was inadmissible.

In another regard, though, the foundation for specific contradiction is more rigorous. Review the \textit{Lala} court's statement of the curative admissibility doctrine: the court explained that after the opponent has introduced inadmissible evidence, the trial judge has discretion to allow the party to present otherwise inadmissible evidence "on the same subject"\footnote{144}{Lala v. Peoples Bank & Trust Co., 420 N.W.2d 804, 807-08 (Iowa 1988). \textit{See also} State v. Tyler, 676 S.W.2d 922, 925 (Mo. Ct. App. 1984) ("about the same document").} or "on the same issue."\footnote{145}{See United States v. Forrester, 60 F.3d 52 (2d Cir. 1995); United States v. Brown, 958 F.2d 1206, 1225 (2d Cir. 1992).} To be sure, the curative admissibility cases permit the party to introduce only as much otherwise inadmissible evidence as needed to counteract the opponent's inadmissible evidence.\footnote{146}{See United States v. Forrester, 60 F.3d at 52; Rea, 958 F.2d at 1225 (finding that the trial judge should admit only the party's evidence "needed to rebut a false impression that}}
the curative admissibility cases stop short of announcing a
categorical requirement that the party's rebuttal evidence
expressly "contradict" the testimony previously introduced by
the opponent.

In contrast, specific contradiction applies only when a
flat contradiction between the testimony previously
introduced by the opponent and the rebuttal evidence
proffered by the party exists. In the case of prior inconsistent
statement, another impeachment technique, it is sufficient if
the witness's prior statement is "inconsistent" with the
witness's trial testimony. The earlier statement need "only
bend in a different direction" than the trial testimony.
However, when the party resorts to the instant impeachment
technique, the party's evidence must "squarely" "contradict"
the opponent's testimony. In contrast to curative
admissibility, it is not enough that the party's evidence
touches on the same subject or issue. The party's evidence
must possess a certain type of relevance to that subject or
issue, namely, outright contradiction of the opponent's
testimony on that subject or issue.

When the party's evidence is so highly relevant that it
flatly contradicts the opponent's testimony, the courts are
highly receptive to the admission of the contradictory

may have resulted from the opposing party's evidence); United States v. Doe,
656 F.2d 411 (9th Cir. 1981) (finding that the evidence proffered by the
prosecution would not have served to correct any misleading impression created
by the defense questioning); Tyler, 676 S.W.2d at 925 ("[T]he state exceeded the
limited application of the doctrine [of curative admissibility] and went into
uninvited areas.").

In the closing argument context, the invited error doctrine is the
counterpart to curative admissibility. See W. FORTUNE ET AL., MODERN
LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK § 13.8, at 485 (2d
ed. 2000). Like curative admissibility, invited response permits only a limited
response by the party: "The doctrine is confined to 'defensive, as opposed to
offensive, conduct.' If the opposing party has made an earlier improper
statement in summation, the injured lawyer has a limited right to make
otherwise improper arguments necessary to 'neutralize' the earlier statement." Id.
See also Dortch v. O'Leary, 863 F.2d 1337 (7th Cir. 1988); People v.

147. 1 MCCORMICK ON EVIDENCE, supra note 9, § 127.
148. J. MCNAUGHT & H. FLANNERY, MASSACHUSETTS EVIDENCE: A
concurring).
150. 1 MCCORMICK ON EVIDENCE, supra note 9, §§ 45, 49.
specific contradiction doctrine

In decisions such as United States v. Havens, the Supreme Court held that the contradictory evidence is admissible even though it was obtained in violation of the Fourth Amendment. Thus, the probative worth of truly contradictory evidence is so great that it can lift the bar of even a constitutional exclusionary rule. The case for invoking specific contradiction to lift the bar is strongest when the accused gives the testimony (to be contradicted) on direct examination by his or her own attorney. However, as Havens ruled, the doctrine also comes into play when the accused gives the testimony on cross-examination so long as the subject-matter of the question posed on cross-examination was "reasonably suggested by the defendant's direct examination."

B. The Nature and Extent of the Trial Judge's Discretion in Applying the Doctrine

1. The Existence of Judicial Discretion to Exclude the Party's Responsive Evidence

Federal Rule 402 entitles a party to introduce logically relevant evidence unless the trial judge is authorized to exclude the evidence under the Constitution, a federal statute, the Federal Rules of Evidence, or other rules adopted pursuant to statutory authority such as the Federal Rules of Civil Procedure. If the party offers evidence which specifically contradicts earlier testimony introduced by the opponent, the party's evidence is logically relevant. Article VI of the Federal Rules of Evidence reflects that the credibility of a witness is a fact of consequence, and evidence specifically contradicting a witness's testimony calls into question the witness's credibility. The upshot is that by virtue of the reasoning in United States v. Abel, the party has a presumptive right to introduce the evidence. If the evidence did not run afool of a statutory exclusionary rule such as hearsay, the only qualification to the party's right

151. 446 U.S. 620 (1980).
153. Havens, 446 U.S. at 627.
154. See FED. R. EVID. 402.
would be the judge's discretionary power under Rule 403.\textsuperscript{156} Since specific contradiction evidence is subject to discretionary exclusion under Rule 403, the party's right is less than absolute. However, with the exception of convictions admissible under Rule 609(a)(2),\textsuperscript{157} every right to introduce evidence, recognized under the Federal Rules, is qualified by Rule 403.\textsuperscript{158}

Does a party relying on curative admissibility have as strong a claim to a right to introduce the responsive evidence? That question should be answered in the affirmative at least in one exceptional situation. If the trial judge received the opponent's inadmissible evidence over the party's objection, the McCormick treatise argues that the party ought to have a right to rebut.\textsuperscript{159} The treatise reasons:

By objecting [the party] did his best to save the court from mistake. His remedy of assigning appellate error to the ruling is inadequate. He needs a fair opportunity to win his case at the trial level by refuting the damaging evidence. In many cases, the adversary simply cannot afford the expense of a second trial after an appeal.\textsuperscript{160}

Of course, in this situation, given the right facts the trial judge could still exercise his or her discretion to exclude under Rule 403. However, even the party's presumptive right

\textsuperscript{156} See FED. R. EVID. 403.

\textsuperscript{157} See id. at 609(a)(2) ("For the purpose of attacking the credibility of a witness, . . . evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment."). The legislature's use of "shall" ordinarily signals a mandatory intent. Lexecon v. Milberg Weiss Berghad Hynes & Lerach, 523 U.S. 26 (1998); Keith v. Rizzuto, 212 F.3d 1190 (10th Cir. 2000), cert. denied, 121 S.Ct. 387 (2000); In re Barbieri, 199 F.3d 616 (2d Cir. 1999); United States v. Maria, 186 F.3d 65 (2d Cir. 1999); United States v. Myers, 106 F.3d 936 (10th Cir. 1997); Cook v. United States, 104 F.3d 886 (6th Cir. 1997); Association of Civilian Technicians, Mont. Air Chapter Number 29 v. Federal Labor Relations Auth., 22 F.3d 1150 (D.C. Cir. 1994); Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 151 (4th Cir. 1993); Mallory v. Mortgage Am., Inc., 67 F. Supp. 2d 601 (S.D. W. Va. 1999); United States v. Davis, 801 F. Supp. 581 (M.D. Ala. 1992); United States v. McKenna, 791 F. Supp. 1101, 1109 (E.D. La. 1992); Forster v. Superior Court, 14 Cal. Rptr. 2d 258 (1992); Horsemen's Benevolent & Protective Ass'n v. Valley Racing Ass'n, 6 Cal. Rptr. 2d 698, 709 (1992); People v. Heisler, 237 Cal. Rptr. 452 (1987); People v. Stephen, 227 Cal. Rptr. 380 (1986); see also Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1999).


\textsuperscript{159} See 1 MCCORMICK ON EVIDENCE, supra note 9, § 57, at 255.

\textsuperscript{160} Id.
to introduce relevant specific contradiction evidence is subject to Rule 403.

Outside of this exceptional situation, under the curative admissibility doctrine the party does not have a full-fledged right to introduce the rebuttal evidence. Instead, the decision is entrusted to the judge's discretion. Again, when the *Lala* court stated its conception of curative admissibility, the court asserted that "when [the opponent] introduces inadmissible evidence... the trial court may allow the adverse party to offer otherwise inadmissible evidence on the same subject."\(^{161}\) The courts typically describe the doctrine as a conferral of discretion on the trial judge rather than the grant of a right to the party.\(^{162}\) In short, while a party's entitlement to resort to specific contradiction is not absolute, that entitlement is a stronger claim than the party's right to urge the trial judge to invoke curative admissibility. The entitlement to specifically contradict the opponent's evidence is a presumptive right subject only to Rule 403 balancing. In the final analysis, the "entitlement" to invoke curative admissibility is merely an opportunity to appeal to the judge's discretion.

2. *The Nature of the Trial Judge's Discretion*

The preceding subsection suggests an even more fundamental difference between the very nature of the judicial discretion exercised under the specific contradiction and curative admissibility doctrines. The judge's power under specific contradiction is narrow and negative while his or her power under curative admissibility is broader and affirmative in character.

Specific contradiction impeachment is subject only to the trial judge's discretion under Rule 403. That discretion is a limited power to exclude otherwise relevant and admissible evidence.\(^{163}\) If the party's evidence satisfies the foundational requirements for specific contradiction, the party has a

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163. *See* Fed. R. Evid. 403 advisory committee's note; 1 COURTROOM CRIMINAL EVIDENCE, supra note 95, § 313, at 89 n.48.
presumptive right to introduce the evidence. At the first step of analysis, the judge's narrow role is to determine whether the party has laid a proper foundation for specific contradiction.\textsuperscript{164} If so, the only other constraint is the judge's negative power to exclude on the ground of one of the policy considerations enumerated in Rule 403.

Under the curative admissibility doctrine, the trial judge enjoys a much broader type of discretion. The discretion is affirmative in nature. In this setting the party has neither an absolute nor a presumptive right to introduce otherwise inadmissible evidence. Rather, the trial judge has a discretion to decide whether to permit the party to do so.\textsuperscript{165}

3. The Factors Informing the Exercise of the Trial Judge's Discretion

A party's right to specifically contradict is qualified by a trial judge's discretionary power to exclude under Federal Rule of Evidence 403. That power, though, is limited. Rule 403 specifies the types of probative dangers which the judge may weigh as considerations countervailing against the probative worth of the evidence: "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."\textsuperscript{166} The common denominator of the specified dangers is that they pose the risk that the trier of fact will fall into inferential error.\textsuperscript{167} As the Advisory Committee Note to Rule 403 explains, in the text of the rule "prejudicial" denotes the realistic tendency of a technically relevant item of evidence to tempt the jury to decide the case on an improper, usually emotional, basis.\textsuperscript{168} Similarly, when the judge's realistic assessment is that the evidence would tend to confuse or mislead the jury, the admission of the evidence could cause erroneous fact-finding. In short, the judge may exercise the discretion qualifying the

\textsuperscript{165} See \textit{Ryan}, 96 F.3d at 1082 n.1 ("a court may permit"); \textit{Rea}, 958 F.2d at 1225 ("The concept . . . gives the trial court discretion."); \textit{Nardi}, 633 F.2d at 972; \textit{Grist}, 168 N.W.2d at 389; \textit{Franklin Fire Ins. Co.}, 87 S.W.2d at 537.
\textsuperscript{166} \textit{Fed. R. Evid.} 403.
\textsuperscript{168} \textit{Fed. R. Evid.} 403 advisory committee's note.
party's right to specifically contradict only for the limited purpose of preventing the jury from committing a cognitive or reasoning error.\textsuperscript{169}

Contrast the discretion wielded by the trial judge under the curative admissibility doctrine with the judge's discretion under specific contradiction. The most salient distinction between curative admissibility and specific contradiction fact patterns is that in the former, at least in retrospect, the trial judge realizes that the evidence previously introduced by the opponent was inadmissible. In some cases, there may be a strong inference that the opponent introduced the evidence with the knowledge or the strong suspicion that the evidence was inadmissible. For instance, suppose that the party moved \textit{in limine} to bar the evidence. Even if the trial judge elected not to reach the merits of the motion before trial, the filing of the motion would place the opponent on notice that there was a serious question about the admissibility of the evidence. In such a case, the opponent could hardly complain later that he or she did not realize that the party objected to the introduction of the evidence. In such circumstances, when the other party requests permission to resort to the curative admissibility doctrine, the request gives the trial judge an opportunity to employ the ruling for a prophylactic reason and exercise discretion in the party's favor to deter the opponent from deliberately violating the evidentiary rules again.

The deterrence factor does not come into play under Rule 403 and is not one of the policy considerations listed in the text of Rule 403. Arguably, that factor should play a role in the judge's discretionary analysis under the curative admissibility doctrine. Suppose, for example, that the judge found that one party deliberately flaunted an evidentiary rule, such as the hearsay doctrine, to gain an unfair advantage at trial. In the pending case, a discretionary ruling permitting the other party to rebut with otherwise inadmissible hearsay may discourage the adversary from further misconduct during the same trial. Thus, the mix of factors informing the exercise of discretion under curative admissibility differs significantly from the set of factors governing the discretion conferred by Rule 403.

\textsuperscript{169} See Gold, \textit{supra} note 167.
IV. CONCLUSION

It is a common complaint that the prose in most judicial opinions is legalistic and boring. It is therefore understandable that judges are tempted to resort to lively language such as “opening the door” and “fighting fire with fire”\(^{170}\) to make an opinion more enjoyable to read. However, there is a downside to the use of such vague expressions. They certainly do not conduce to precise analysis. As we have seen, their use can generate confusion. Some courts treat the expressions as synonyms for specific contradiction, others equate the expressions with curative admissibility, and still others employ the expressions as overarching umbrellas covering both specific contradiction and curative admissibility.

It would be best to altogether abandon these ambiguous expressions and return to the terms of art, that is, specific contradiction and curative admissibility. However, even the abandonment of these expressions is not enough. Damage has already been done: The boundaries between specific contradiction and curative admissibility have been blurred. Hopefully, this article will help reestablish those boundaries. It is especially critical to sharply demarcate the specific contradiction doctrine. The right to specifically contradict the opponent’s testimony is an essential entitlement in an adversary mode of trial. The confusion in the cases does far more than pose linguistic problems for judges and attorneys. Worse still, the confusion imperils the adversary process. To preserve the integrity of the Hegelian dialectic at the heart of the adversary system,\(^{171}\) the courts must protect the party’s right to attack the opponent’s thesis by forcefully presenting the antithesis. To maintain that integrity, we should bring a close to the “opening the door” theory.

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170. Maguire, supra note 114, at 2321.
171. See 3 THE ENCYCLOPEDIA OF PHILOSOPHY, supra note 5, at 443-46; DURANT, supra note 4.