

SHIELDS, SWORDS, AND FULFILLING THE EXCLUSIONARY RULE’S DETERRENT FUNCTION

James L. Kainen*

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INTRODUCTION

When the exclusionary rule prevents the prosecution from using evidence necessary to bring a case to trial, the rule deters illegality while raising no issue about how it might interfere with usual factfinding processes. However, when a case proceeds to trial although a court has suppressed some prosecution evidence, courts need to decide the extent to which the defendant may benefit from the absence of the proof without opening the door to its admission. The exclusion of *any* relevant evidence raises similar questions, and courts often say the exclusionary rule is a shield from suppressed evidence, but not a sword with which the defendant can inflict damage on the prosecution’s remaining case.¹ Nonetheless, this Article argues courts err when they analyze whether the defendant “opened the door” to suppressed evidence with a metaphor appropriate for rules excluding evidence for different—and less weighty—reasons than encouraging respect for individual constitutional rights. Employing usual evidentiary tests for opening the door unduly diminishes the effectiveness of exclusion as a deterrent of police misconduct when investigators expect the potential evidentiary payoff will not be necessary to bring the case to trial, but will nonetheless be useful to obtain a conviction.

Whether the defendant has opened the door to suppressed evidence is a related,

* Professor of Law and Brendan Moore Chair in Advocacy, Fordham University School of Law. Thanks to participants in the Fordham Law School Faculty Colloquium (especially Dan Capra) for comments and to Joshua Mitts and Katherine Rudish for research assistance. © 2013, James L. Kainen.

1. See *People v. Johnson*, 107 Cal. Rptr. 3d 228, 246 (Cal. Ct. App. 2010).

though distinct question from what the boundaries of the exclusionary rule should be. The Supreme Court has defined the scope of the exclusionary rule to the extent of holding suppressed evidence can be used to impeach a testifying defendant, but not to establish the prosecution's case-in-chief or to impeach other defense witnesses.² Besides the direct questions of scope are questions about how defendants may exploit the absence of suppressed evidence before a court will hold that the defendant opened the door to its admission. This Article criticizes recent decisions finding a defendant opens the door to suppressed evidence merely by highlighting the absence of that evidence or by offering other evidence to which the suppressed proof is relevant rebuttal.³ It argues those decisions erroneously assume relevance, probative value, and unfair prejudice are the only factors that should influence this decision. While this is true enough for evidence originally excluded to promote accurate factfinding, it is not true for evidence excluded to promote other policy objectives or to respect other principles.

Whether and how a party can take advantage of the exclusion of suppressed evidence is a question whose answer depends upon a contextual analysis of how "opening the door" decisions affect the deterrence promoted by exclusion in the first instance, not upon whether they divert the factfinder in its quest for truth. Thus, courts contravene the prohibition against impeaching defense witnesses when they invoke Rule 403 of the Federal Rules of Evidence to preclude the defendant from admitting evidence that contradicts suppressed proof, because preclusion has the same effect as rebuttal. Similarly, courts improperly extend the prosecution's use of illegally-obtained evidence when they allow it to discourage counsel from arguing inferences the suppressed proof contradicts by permitting its admission if he does. In either case, the prosecution quickly learns obtaining evidence illegally has a payoff in excess of that contemplated by the Supreme Court. Prosecutors routinely find the suppressed evidence useful to deter or rebut defenses even when not introduced in the prosecution's case-in-chief or to impeach a testifying defendant.⁴ This is precisely the result rejected by the Court in *James v. Illinois* because of the increased incentive to obtain the evidence illegally.⁵

2. See *James v. Illinois*, 493 U.S. 307, 313 (1990); *Walder v. United States*, 347 U.S. 62, 65 (1954); James L. Kainen, *The Impeachment Exception to the Exclusionary Rules: Policies, Principles and Politics*, 44 STAN. L. REV. 1301 (1992) (discussing the scope of the impeachment exception). The Court has yet to decide whether prosecutors may use suppressed evidence to impeach defendants' hearsay declarations. See generally James L. Kainen, *Truth, Deterrence, and the Impeachment Exception*, 86 OR. L. REV. 1017 (2007) (analyzing consequences of allowing suppressed evidence to impeach nontestifying defendants' hearsay declarations).

3. See generally *Johnson*, 107 Cal. Rptr. 3d 228; *People v. Fregoso*, No. F050895, 2008 WL 1850973 (Cal. Ct. App. Apr. 28, 2008).

4. See *James v. Illinois*, 493 U.S. 307, 318 ("The United States argues that this result is constitutionally acceptable because excluding illegally-obtained evidence solely from the prosecution's case in chief would still provide a quantum of deterrence sufficient to protect the privacy interests underlying the exclusionary rule. We disagree.").

5. See *id.* at 313.

It may seem obvious that factfinding accuracy or completeness is not itself sufficient reason to admit evidence whose exclusion was mandated in the first instance *despite* interference with—rather than in pursuit of—those goals. However, courts too frequently forget the point when they hold fairness or the integrity of the trial process justifies holding a defendant has taken improper advantage of evidence’s suppression and thus invited its admission.⁶ Using muscle memory to rule, they interpret fairness as adversarial fairness, which always counsels in favor of admitting relevant rebuttal. Similarly, they interpret the integrity of the trial process to require advocates to refrain from using evidence’s exclusion to (mis)lead the factfinder to a conclusion inconsonant with the excluded evidence. That approach, too, always counsels in favor of admitting as rebuttal the evidence that was excluded in the first instance. Lost in the analysis is the effect holding the door opened has on the goal promoted by the exclusionary rule. Courts apparently assume no damage will be done if they allow the defendant to use exclusion only as a shield from illegally-obtained evidence, but not as a sword to advance an inference or elicit proof contradicted by the excluded evidence.⁷

This Article shows the question is more complex than the sword and shield metaphor suggests. Discouraging the defendant from arguing inferences from the proof’s absence, or from presenting his own evidence that excluded evidence may contradict, imposes a cost on the defendant and creates a benefit for the prosecution that can interfere as unacceptably with the goals advanced by exclusion as allowing the evidence in the first instance. That is the lesson of ordinary evidence rules that, like the constitutional exclusionary rule, justify exclusion for reasons besides factfinding accuracy. They prohibit uses of evidence that interfere with goals besides accurate factfinding even when the protected party advances claims that make the excluded evidence particularly probative. As those rules show, there can be no general “opening the door” standard because the issue depends on the contextual effect on exclusion’s goal. Questions about whether the door has been opened require courts to consider the same kind of factors that enter into framing exclusionary rules in the first place, not general notions of fairness and integrity or the metaphoric difference between using exclusion as a shield, not as a sword.

Part I shows how a court recently used a finding that counsel opened the door to weaken—indeed, effectively to ignore—a holding by the Supreme Court that specifically prohibits the use of suppressed evidence, even as impeachment or rebuttal. By failing to recognize how suppressed evidence is useful to deter as well as rebut defenses, courts fail to appreciate how ruling that a defendant opens the door to suppressed evidence by capitalizing on its absence can give the prosecution much, if not all, of the benefit that exclusion was meant to prevent.

6. See, e.g., *Johnson*, 107 Cal. Rptr. 3d at 246; *Fregoso*, 2008 WL 1850973, at *38–42.

7. See *Johnson*, 107 Cal. Rptr. 3d at 246 (“The *Miranda* holding was designed to protect the defendant. It was not intended to give him a sword to go after the other side.”).

Part II shows how courts apply an improperly broad view of what it takes to open the door to suppressed evidence when they treat such evidence as if it was excluded for reasons of factfinding accuracy. Instead, such decisions need to be made specifically to avoid undermining the goal of exclusion that has already been placed ahead of factfinding accuracy, even as some limited circumstances support finding defendants waived their protection against illegally-obtained evidence. The idea of taking *unfair* advantage of exclusion must respect the compromise to factfinding that the Court holds necessary to deter illegal investigative actions. Even just a few cases improperly holding counsel opened the door have a dramatic effect unless explicitly repudiated. The threat of forfeiting the defendant's immunity from suppressed evidence encourages defense counsel to avoid taking any advantage of the absence of the proof a court might possibly interpret as opening the door. Therefore, the prosecution will always benefit from foreclosing potential defenses unless courts reverse course to make clear how defendants can exploit the absence of the suppressed evidence without risking the evidence's admission.

Part III shows that a narrower view of opening the door in this circumstance is not at odds with the integrity of our factfinding process nor with the advocate's accepted ethical role within it. The integrity of that process is relative to the limited task of jurors: considering only the universe of evidence admitted at trial, rather than pursuing a self-directed quest for truth. Restrictions on the evidence juries hear reflect the systematic pursuit of justice of which accurate factfinding is not the exclusive component. Jurors, lawyers and judges fulfill critical yet limited roles in this pursuit even when they reach, advocate, or countenance verdicts that deviate from accurate factfinding in pursuit of other goals. Allowing the defense to emphasize the absence of suppressed evidence, therefore, can be a necessary part of the integrity of the factfinding process, not its antithesis.

I. THE FLIGHT OF THE EXCLUSIONARY RULE

The assumption that defendants open the door to suppressed evidence when they increase its probativity by capitalizing on its absence to offer contrary evidence, or to argue a contrary inference, can effectively eviscerate the deterrent effect of exclusion. As a practical matter, the "opening the door" policy has its largest impact on incentives to conduct improper custodial interrogations, which are typically undertaken after the prosecution concludes it has or will have sufficient evidence besides that obtained from the interrogation to take the defendant to trial.⁸ Still, the courts' approach informs law enforcement's calculus to take other improper investigatory measures whenever suppressing their fruits

8. The Court's primary justification for the exclusionary rule is the deterrence of illegal police conduct. *See, e.g.,* *United States et al. v. Janis*, 428 U.S. 433, 446 (1976) (citing *United States v. Peltier*, 422 U.S. 531, 536-39 (1975)) ("The Court, however, has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.'"); *Tirado v. Comm'r*, 689 F.2d 307, 310 (2d Cir. 1982) (citing *Janis*, 428 U.S. at 453-54 ("[A]ny extension of the rule beyond its core application . . . must be justified by balancing the 'additional

does not eliminate any expected payoff at trial.⁹ By defining what opens the door to admission of the suppressed proof, the courts decide what steps defendants must forego at trial to avoid the suppressed evidence. By requiring the defendant to forego those steps or invite the evidence, the courts define the prosecution's payoff for having undertaken the unlawful investigatory measure even if the defendant refrains from opening the door to the evidence. Acquisition of the unlawfully-obtained evidence benefits the prosecution whether introduced to rebut or brandished to deter the defense case. So its possession is always potentially useful at trial unless the prosecution cannot survive a motion for judgment of acquittal without it.

The perception, however, that defendants taking advantage of the absence of suppressed evidence justify its admission is powerful. It has led courts to deny that suppressed evidence is illegally used when they rely on it to prevent defendants from introducing contrary proof as misleading, even though the Supreme Court has specifically prohibited introducing the suppressed evidence as impeachment or rebuttal. Although those courts deny the prosecution benefits from illegally-obtained evidence it has not introduced, its utility to deter a defense case is manifest. As a matter of logic and now well-accepted economic theory, a foregone opportunity to gain a specified amount represents a cost potentially as significant as payment of that amount.¹⁰ Economists often concretize this concept of an opportunity cost by comparing a decision maker's decision to reject an offer to not engage in an activity with a decision to pay the specified amount to engage in the activity.¹¹ In either case, the decision is costly, potentially equally so. By the same token, the defendant suffers a cost at trial (and the prosecution receives a benefit) from the prosecution's possession of illegal evidence whether he avoids its admission by foregoing otherwise advantageous defenses or suffers its admission in response to opening the door by presenting those defenses. That the defendant will presumably choose the strategy that minimizes the impact of the illegally-obtained proof does not prevent the prosecution from realizing its benefit—to deter or rebut defenses—despite the defendant's choice.

The substantial value of unlawfully-obtained evidence to deter defense evidence

marginal deterrence' of the extension against the cost to the public interest of further impairing the pursuit of truth.”).

9. For example, the decision to conduct a search in an ongoing investigation may reflect a belief that its fruits will be useful even if the prosecution cannot use them in its case-in-chief. Current case law encourages that belief by teaching investigators that, routinely, suppressed evidence, inadmissible on the prosecution's case-in-chief, will nonetheless be useful to rebut or deter defenses.

10. The concept of opportunity cost in economic theory dates to the nineteenth century. *See generally* David I. Green, *Pain-Cost and Opportunity-Cost*, 8 Q. J. ECON. 218, 224 (1894) (“[W]hen we once recognize the sacrifice of opportunity as an element in the cost of production, we find that the principle has a very wide application.”).

11. *See generally* T. W. McRae, *Opportunity and Incremental Cost: An Attempt to Define in Systems Terms*, 45 ACCT. REV. 315, 316 (1970) (quoting L.M. FRASER, *ECONOMIC THOUGHT AND LANGUAGE* 103–04 (1937) (“The cost of a thing is simply the amount of other things which has to be given up for its sake Cost value is . . . merely exchange value seen from the side of the buyer, rather than the seller.”) (internal quotation marks omitted)).

was made glaringly obvious in the recent case of *People v. Johnson*¹² in which the court, relying on suppressed evidence, undertook *itself* to prohibit a defendant from offering evidence whose rebuttal the exclusionary rule prohibits. There, prosecutors sought to exclude defense evidence suggesting the crime for which they charged Johnson was committed by a darker-skinned, similar-looking man, perhaps Johnson's cousin, Thaddeus.¹³ Prosecutors originally charged Johnson and an accomplice with a string of five gas station robberies including one involving an attendant named Claussen.¹⁴ They asserted all the robberies were committed with a "mode of operation" that was "virtually the same."¹⁵ After Claussen failed to identify Johnson in a lineup, instead noting his robber was darker-skinned, prosecutors dropped the Claussen robbery from the case against Johnson while retaining it in the case against Johnson's accomplice.¹⁶ Johnson now sought to call Claussen to testify to the exculpatory non-identification.¹⁷ The prosecution objected, noting Johnson's statement, suppressed because of a *Miranda* violation, included Johnson's confession to the Claussen robbery.¹⁸

Had the defense called Claussen, *James v. Illinois*¹⁹ would have prevented admission of Johnson's suppressed statement to contradict Claussen's testimony.²⁰ Prosecutors sought to exclude Claussen's testimony pursuant to § 352 of the California Evidence Code,²¹ which essentially mirrors Rule 403 of the Federal Rules of Evidence.²² They argued the court should consider the suppressed confession when deciding whether the probative value of Claussen's uncontradicted testimony was substantially outweighed by its tendency to mislead the jury. Although conceding the only reason not to allow Johnson to call Claussen was its knowledge of inadmissible proof contradicting Claussen's anticipated testimony,²³ the court granted the prosecutor's motion.²⁴ It reasoned the confession was not

12. 107 Cal. Rptr. 3d 228 (Cal. Ct. App. 2010).

13. *Id.* at 245.

14. *Id.* at 234, 237.

15. *Id.* at 234.

16. *Id.* at 237, 244.

17. *Id.* at 245.

18. *Id.*

19. 493 U.S. 307 (1990).

20. *James* prevents impeachment of a witness other than the defendant with suppressed evidence. *See id.* at 308–09.

21. CAL. EVID. CODE § 352 (West 2011) ("The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.").

22. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

23. In addition to Johnson's suppressed confession, the court also knew his confederate had implicated him in the Claussen robbery in a confession to police that was inadmissible against Johnson pursuant to the hearsay rule and the Confrontation Clause. *See People v. Johnson*, 107 Cal. Rptr. 3d 228, 246 (Cal. Ct. App. 2010).

24. *Id.* at 246.

“used” in violation of *James* when the court relied on it to prevent the defendant from introducing defense evidence misleading in its absence, while nonetheless conceding that, had the defendant elicited Claussen’s testimony without objection, *James* would preclude admitting the confession.²⁵

The court’s reasons for distinguishing between using suppressed evidence to exclude exculpatory evidence the suppressed proof contradicts, and allowing its admission after the defendant introduced the exculpatory evidence, belies its claim that the suppressed evidence is only “used” in the latter circumstance. To begin with, the court noted the jury did not use the confession to decide Johnson’s guilt because the jury did not hear it.²⁶ But by virtue of the prosecution’s possession of the suppressed evidence and motion to exclude, the jury was not permitted to hear Claussen’s testimony either. So the suppressed confession surely determined the evidence the court allowed the jury to hear, potentially influencing its decision about Johnson’s guilt. Indeed, the *Johnson* court conceded as much when it next attempted to show the evidence’s undoubted influence on the jury’s deliberation was somehow consistent with *James*’ holding that the balance between truthseeking at trial and deterrence of police misconduct does not justify allowing impeachment of defense witnesses besides defendants.²⁷ Yet it was no more successful on this score.

First, the court tried to argue, in contrast to *James*, truthseeking supported precluding Claussen’s testimony because “it prevents false or misleading argument from being made to the jury,” and “[t]he only defense chilled . . . was a false defense.”²⁸ But this does not distinguish *James* at all. The question in *James* was whether the jury should consider the defense witness’s testimony that James looked different on the night of the murder than prosecution witnesses described him, without considering his suppressed admission that, in fact, he appeared as the prosecution’s witnesses described.²⁹ The argument for admitting the inculpatory statement the Supreme Court rejected was exactly the same as that accepted by the *Johnson* court: It would prevent the jury from relying on false or misleading argument while potentially chilling only a false defense.³⁰ At most, the *James* Court held the truthseeking value of testimony offered by defense witnesses *as a class* would generally exceed that of defendants; it hardly claimed truthseeking itself could ever justify excluding evidence *in a particular case* that would be admissible rebuttal evidence had it been legally obtained. Precluding defense evidence in the name of truthseeking whose rebuttal *James* disallows *despite* its acknowledged contribution to truthseeking in the particular case is to take a trip

25. *See id.* at 255.

26. *Id.* at 250–51.

27. *Id.* at 251–52.

28. *Id.* at 251.

29. *James v. Illinois*, 493 U.S. 307, 309–10 (1990).

30. *See id.* at 330 (Kennedy, J., dissenting) (*James* allows un rebutted perjury-by-proxy).

down the rabbit hole into the world of *Alice in Wonderland*. To prevent James' witness from testifying because his testimony contradicts James' confession accomplishes exactly what the *James* Court rejected when it disallowed the witness's rebuttal with James' confession. Had the Court allowed the rebuttal, James undoubtedly would not have called the witness, yielding the same outcome as in *Johnson*. The *James* court did not suggest its holding could be circumvented by excluding defense evidence whose rebuttal it prohibited.

The same fundamental error undermined the *Johnson* court's analysis of deterrence when it held precluding a defense witness's testimony—unlike allowing its rebuttal as the *James* Court prohibited—would not “weaken the exclusionary rule's deterrent effect.”³¹ It asserted no decrease in deterrence would result because precluding defense witnesses whose testimony was contracted by suppressed evidence “did not increase the number of witnesses against which the confession could be used, nor did it significantly increase the occasions on which the confession could be used.”³² But this claim rests upon the same erroneously crabbed conception of what it means to “use” the evidence. The court's own analysis conceded its ruling would prevent any “false and misleading argument” and ultimately deter any “false defense,” not just those put forth by a defendant's testimony.³³

That was exactly the extension of the impeachment exception that the *James* Court *rejected* when it held allowing impeachment of defense witnesses besides defendants with illegally-obtained evidence would unjustifiably diminish deterrence of police misconduct. The *Johnson* court called it “too speculative and tenuous” to envision a scenario wherein a law enforcement officer would see a benefit in obtaining evidence useful to preclude a defense witness from testifying, but it is clearly no less likely to influence prosecutorial behavior than the prospect of using the same evidence to rebut or deter the defense witness's testimony.³⁴ The incentive to unlawful conduct created by the *Johnson* court is no more “speculative and tenuous” than that rejected as intolerable in *James*. In fact, since the likely result if *James* allowed rebuttal would be to deter the defense witness from testifying, *Johnson* not only reduces deterrence in exactly the manner that *James* rejected, it approves the same outcome *James* rejected.

Finally, the *Johnson* court even seemed to concede the equivalence of precluding defense testimony and allowing its rebuttal when it analogized its facts to that of *People v. Payne*.³⁵ In *Payne*, the Illinois Supreme Court allowed admission of a suppressed handgun after defense counsel asked the seizing officer on cross-

31. See *People v. Johnson*, 107 Cal. Rptr. 3d 228, 252 (Cal. Ct. App. 2010).

32. *Id.*

33. *Id.* at 251.

34. *Id.* at 250.

35. 456 N.E.2d 44 (Ill. 1983).

examination whether he had searched the defendant's apartment.³⁶ After the officer replied that he had indeed searched the premises, counsel asked no further questions. The court allowed the prosecution to introduce the weapon seized in the illegal search "to rebut the false impression created by the cross-examination that nothing was recovered from the apartment."³⁷ Calling *Payne* similar to *Johnson*, the *Johnson* court said it reached the "same result" when it precluded the witness contradicted by the suppressed evidence, although the *Payne* court had admitted the evidence after the witness testified.³⁸ At the end of the day, what mattered to the *Johnson* court—and what led it to find precedent in *Payne* rather than *James*—was not whether defense evidence was excluded in the first instance, deterred by the prospect of rebuttal, or actually rebutted. Using the motion to exclude as an opportunity to evade *James*' holding, the *Johnson* Court acted on its perception that *Johnson*, like *Payne*, would "open the door" to use of the suppressed proof by "affirmatively misrepresent[ing] or falsely imply[ing]" the facts of the case.³⁹ Whether the remedy was allowing the prosecution to use the suppressed proof to prohibit, deter, or rebut the defense evidence, the point was to forestall the "defendant's attempt to use *Miranda* as a sword to force the jury to consider a false and misleading argument," even if extrapolated from truthful testimony.⁴⁰

The essence of the court's argument, therefore, was not about whether the suppressed evidence had been "used" in a prohibited sense; it clearly had. Instead, it relied on the view—similar to that expressed by the *Payne* court—that the prohibition must yield in appropriate circumstances because "allowing the defense . . . to misrepresent to the jury the actual facts of the case is . . . [in]consistent with the proper functioning and continued integrity of the judicial system."⁴¹ In fact, that view influenced the *Johnson* court strongly enough to construe "use" of suppressed evidence in a fashion clearly inconsistent with *James*, but consistent with *Payne*'s allowance of suppressed evidence absent an applicable exception to the exclusionary rule if the door has been opened. The appellate court in *Johnson* quoted approvingly from the trial judge's analysis as follows:

But . . . contrary to the Court's responsibility to the integrity of the judicial system and of the trial itself, the integrity of the system has to stand for something, and if the Court were to consider what's before me and affirmatively conclude that the uncharged offense which the Court makes a factual finding is something that the defendant and not Mr. Taylor did based upon the defendant's own statement and the statement of Ms. Holmes, the Court would

36. *Id.* at 49.

37. *People v. Johnson*, 107 Cal. Rptr. 3d 228, 252 (Cal. Ct. App. 2010) (citing *Payne*, 456 N.E.2d at 46).

38. *Id.*

39. *Id.* (citation omitted).

40. *Id.* at 251.

41. *Id.* at 252 (citing *Payne*, 456 N.E.2d at 46–47).

be complicitous in putting inaccurate, confusing and misleading information before the jury.⁴²

Crediting the suppressed evidence rather than the proposed defense witness's testimony,⁴³ the court concluded admitting the latter without rebuttal—*James* notwithstanding—would undermine the integrity of the courts and of the trial itself.⁴⁴ If *James* precluded it from allowing the prosecution to rebut the defense witness, the court would prevent him from testifying at all.

The *Johnson* case illustrates how a court's finding that a defendant justified the use of suppressed evidence by offering contrary proof can undermine even an application of the exclusionary rule the Supreme Court has explicitly approved. It therefore provides an important occasion to consider if courts should find defendants opened the door to suppressed evidence by taking improper advantage of its absence at trial, even if no established exception to the exclusionary rule permitting its use applies. *Johnson* shows how the effectiveness of exclusion as a deterrent depends as importantly on case-by-case determinations about whether defendants opened the door to suppressed evidence as it does on the scope of rule-based exceptions to the exclusionary rule.⁴⁵

Besides defining those exceptions, and taking a broad view of evidence allowed

42. *Id.* at 246.

43. *Id.* That the court was willing to base its decision on the version of the facts it credited shows the length to which it was willing to go to prevent admission of what it believed to be inaccurate information. Ordinarily, courts balance the probative value of evidence against its capacity to mislead on the assumption that the jury may choose to credit the challenged evidence. See RONALD J. ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES 143 (5th ed. 2011) (citing *United States v. Wallace*, 124 F. App'x 165, 167 (4th Cir. 2005) (“[T]he credibility of a witness has *nothing to do with* whether or not his testimony is probative with respect to the fact which it seeks to prove.”); 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5214 (2012) (noting when balancing probative value against prejudice and capacity to mislead the jury, “courts do not count the witness’s credibility,” but rather “[t]he prevailing view is that evaluating the credibility of witnesses is a matter uniquely within the competence of the jury, and that the judge’s role is to estimate the probative value of testimony *if believed.*”) (emphasis added).

44. See *People v. Johnson*, 107 Cal. Rptr. 3d 228, 251–52 (Cal. Ct. App. 2010).

45. Moreover, even if defendants are able to obtain an advance ruling from the court about what evidence or argument opens the door to suppressed evidence, they may waive their right to appeal by refraining from taking the steps to invite the proof, making opening the door decisions as unreviewable as they may be unpredictable. See *Luce v. United States*, 469 U.S. 38, 43 (1984) (a criminal defendant must testify to appeal a decision to admit the defendant’s prior conviction for impeachment); *United States v. Hall*, 312 F.3d 1250, 1258 (11th Cir. 2002) (defendant must elicit the adverse evidence that was deemed admissible under Rule 404(b) on defendant’s pretrial motion in order to preserve appellate review); *United States v. Wilson*, 307 F.3d 596, 601 (7th Cir. 2002) (defendant’s claim that the district court violated his right to remain silent in allowing the government to introduce evidence from defendant’s “selective silence” if defendant were to bring up issue of an associate held to be unreviewable on appeal since defendant never introduced issue “and cannot . . . attack a potential introduction of evidence by the government in response to his potential testimony”); *United States v. Bond*, 87 F.3d 695, 700–01 (5th Cir. 1996) (defendant must testify to appeal *in limine* ruling that his testimony would waive his Fifth Amendment privilege); *United States v. Goldman*, 41 F.3d 785, 788 (1st Cir. 1994) (defendant must testify to appeal Rule 403 and 404 rulings regarding his potential testimony); *United States v. Ortiz*, 857 F.2d 900, 905–06 (2d Cir. 1988) (defendant must actually pursue defense at trial to appeal ruling that unchanged misconduct is admissible if the defendant pursues that defense); *United States v. DiMatteo*, 759 F.2d 831, 833 (11th Cir. 1985) (a

to impeach a testifying defendant,⁴⁶ the Supreme Court has yet to provide guidance on how courts are to approach questions about opening the door in the context of suppressed proof when the defendant does not testify. Consequently, the question depends on what the courts see as the appropriate, analogous evidentiary test, borrowed from other contexts. Much of the vitality of the exclusionary rule at trial hangs in the balance; by deciding what constitutes taking *improper* advantage of suppression, courts decide the extent of the benefit derived from obtaining evidence illegally when it is inevitably used to rebut or deter potential defenses.

II. ACCURATE FACTFINDING AND SUPPRESSED EVIDENCE

Left to evidentiary analogies, courts apply an improperly broad view of what it takes to open the door to suppressed evidence when they treat it as if it were excluded for factfinding reasons. Decisions about whether the door has been opened to evidence excluded to promote factfinding focus exclusively on the balance between the evidence's probative value and its capacity for distracting or prejudicing the jury. Once counsel highlights the absence of the evidence or elicits proof it contradicts, she increases the probative value of the suppressed evidence in a way likely, if not certain, to justify admission. Consequently, the appropriate analogy to deciding whether the door has been opened is provided by rules excluding evidence for reasons other than factfinding accuracy. Only if courts model their decisions on those rules will they assure the constitutional goals of exclusion consistently take precedence over factfinding accuracy to the extent that existing doctrine requires. Using that approach, courts should find defendants open the door to suppressed evidence only when they waive constitutional protection by seeking to benefit from evidence enabled by the illegality about which they complain, not when they merely take advantage of the evidence's absence.

Section A uses a recent case to illustrate the importance of finding the proper metric to decide whether a defendant takes unfair advantage of the absence of suppressed evidence and thus opens the door. Section B shows employing a standard derived from factfinding accuracy improperly diminishes the deterrent effect of exclusion by routinely admitting suppressed evidence to contradict exculpatory proof and inferences. To sustain deterrence, courts must model their decisions on evidence rules that prohibit the use of contradicting evidence in pursuit of other goals. Section C shows how prohibiting contradicting evidence is

defendant's witness must testify to appeal a decision allowing his impeachment with evidence offered under Rule 608).

46. See *United States v. Havens*, 446 U.S. 620, 626–27 (1980) (any questions “suggested to a reasonably competent cross-examiner” by defendant’s direct testimony are permissible, allowing the prosecutor to use suppressed evidence to impeach statements made in response to cross-examination “reasonably suggested” by the direct examination along with the direct testimony itself); see also *id.* at 631 (Brennan, J., dissenting) (the limit on the scope of contradiction of a defendant’s testimony amounts to “nothing more than a constitutional reflection of the common-law evidentiary rule of relevance”).