

FIFTH EDITION

**COURTROOM
CRIMINAL
EVIDENCE**

VOLUME 2

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Courtroom Criminal Evidence

Fifth Edition

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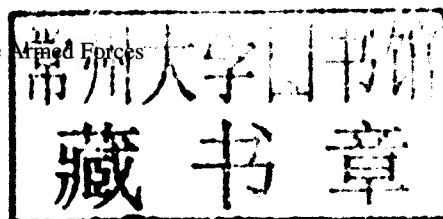
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MATTHEW  BENDER

DEDICATIONS

Professor Imwinkelried dedicates his work on this project to Cindy, Molly, and Kenny; his parents, Enes and the late John Imwinkelried; and his in-laws, the late Mary Jane Clark and Lyman (Brownie) Clark.

Professor Giannelli dedicates his work on this project to Sue.

Mr. Gilligan dedicates his work on this project to Barbara.

Professor Lederer dedicates his work on this project to Blossom Lederer Cass in deep appreciation and with the greatest admiration, love, and friendship.

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PREFACE: HOW TO USE THIS BOOK

We are writing this preface to define and delimit the purposes of this book. This book is not intended as an exhaustive treatise on evidence law. This is not the text that an attorney should use in drafting a formal memorandum of law for the trial court or a brief for the appellate court. If the issue is a question of common law evidence, we recommend that the research attorney consult J. Wigmore, *Evidence in Trials at Common Law* (11 vols.). When the issue is the interpretation of a Federal Rule of Evidence, we have three recommendations. *Weinstein's Federal Evidence* (2d ed. 1997) (6 vols.) and Mueller & Kirkpatrick, *Federal Evidence* (2d ed. 1994) (5 vols.) contain the best collection of cases construing the Federal Rules. However, 21-31 C. Wright, *Federal Practice and Procedure: Evidence* presents the most perceptive analysis of the issues of statutory construction. If the issue is a question of constitutional evidence, that is, the fourth, fifth and sixth amendment exclusionary rules, we suggest W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (2d ed. 1987) (4 vols.), W. LaFave & J. Israel, *Criminal Procedure* (3 vols.), and C. Whitebread & C. Slobogin, *Criminal Procedure* (3d ed. 1993).

In contrast to those scholarly texts, this book is frankly intended for courtroom use by trial attorneys. In general, this text has two purposes. One is to help the proponent of evidence make arguments and offers of proof precise enough to preserve for appeal any erroneous exclusion of evidence. The second is to aid the opposing attorney in making arguments, objections, and motions to strike specific enough to preserve for appeal any erroneous admission of evidence.

Given the intended use of this text, we have attempted to make this book as compact as possible. We have reduced the number of citations to the bare minimum. Moreover, we have added indices to enable a trial attorney to quickly find the relevant passages in the book. Before attempting to use this book in the courtroom, the reader should browse through the entire text cover to cover. The attorney should carefully read the Introduction which explains the organization of the text. We suggest that the attorney read § 3 of the Introduction twice. Having done so, the attorney should have a good sense of the structure of the text. That sense should permit the attorney to use the indices much more effectively and find the relevant law more readily even under the pressure of the courtroom environment. We have placed a skeleton table of contents on the inside cover of each volume of our book. The attorney should open the book to the inside cover and place the open book on the counsel table.

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§ 2000 Introduction.

We now turn to the rules governing the legality of warrantless intrusions. In many cases an arrest or search results from a sequence of events or a chain reaction. A police officer's initial contact with an individual often concerns minor violations, such as parking on the grass or a traffic offense. However, the initial contact can rapidly escalate. After a police officer makes a contact, the response of the individual might lead to a stop and frisk. In turn, the frisk might furnish the basis for an arrest and an incidental search of both the individual and the immediate area. This search might give the officer a reason for a further search, warranted or unwarranted. This chapter is organized roughly along the lines of such a sequence of events, ending with the question of whether any part of the sequence was a pretext. Top of Form

§ 2001 Contacts.

Not all communications between a citizen and the police amount to a "seizure" of the person, i.e., a stop or arrest, within the meaning of the fourth amendment. For example, many times these encounters occur without any indication of criminal activity. The police may assist a drunk by providing shelter, help a disabled person across the street, go to an individual's house to resolve a marital difficulty, and warn individuals of dangerous areas or dangerous conduct.¹ The police officer, like any other citizen, has a right to approach a person and inquire about matters of interest.² These encounters do not amount to seizures under the fourth amendment.

Moreover, a police officer has a right to make a "contact," a face-to-face communication between an officer and an individual involving either criminal conduct or matters wholly unrelated to criminal conduct. The courts, particularly the Supreme Court, have recognized the police officer's right to make a contact even without reasonable suspicion that criminal

¹ For other roles see § 2058, *infra*.

² *Cady v. Dombrowski*, 413 U. S. 433, 441 (1973) (recognizing "police-citizen contacts" involving automobiles); *Terry v. Ohio*, 392 U. S. 1, 19 n.16 (1968); *United States v. Cooper*, 43 F.3d 140, 145 (5th Cir. 1995); *Batts v. Superior Court*, 23 Cal. App. 3d 435, 100 Cal. Rptr. 181 (1972); *State v. Lovegren*, 51 P.3d 471, 473 (Mont. 2002); *State v. Sheffield*, 62 N. J. 441, 303 A.2d 68 (1973); *People v. Martinez*, 80 N.Y.2d 444, 591 N.Y.S.2d 823, 606 N.E.2d 951 (1992); *State v. Evans*, 16 Or. App. 189, 517 P.2d 1225 (1974); *Commonwealth v. Polo*, 759 A.2d 372, 375 (Pa. 2000); *Collins v. State*, 854 P.2d 688 (Wyo. 1993).