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## Miscellany on the UCC and Its Primary Drafters

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# Miscellany on the UCC and its primary drafters

BY VIRGINIA C. THOMAS

The history of the Uniform Commercial Code (UCC) is well-documented. Compilations of drafts, confidential drafts, proceedings, and commentary have been published.<sup>1</sup> Individual treatises track specific UCC articles.<sup>2</sup> A compiled legislative history records the enactment of the UCC in the District of Columbia.<sup>3</sup> While the enactment of the UCC in Michigan<sup>4</sup> may not be detailed in a legislative history, other sources offer practical guidance and research support.<sup>5</sup>

As essential as these resources are to the evolution of the UCC, they do not interpret the dynamics of the process or characterize the contributions of the individuals whose leadership resulted in this monumental uniform law. Nor should they. That is the stuff scholarship is made of.

According to one author, “[t]he history of the UCC’s drafting can be seen as a conflict pitting the standardizing forces of statutory dictates, administrative regulation, and trade norms against the individualization of private contract ... therefore, [it] is the story of how the drafters attempted to make room for each vision, to choose between the visions, and to come up with devices that would mediate between them.”<sup>6</sup> Two principal drafters of the UCC who shepherded the process were Karl N. Llewellyn and Soia Mentschikoff. In 1942, the American Law Institute designated Llewellyn, then a professor at Columbia University Law School, as the chief reporter for the UCC drafting project.<sup>7</sup> In this role, Llewellyn had general supervision over all other reporters and instructed them with respect to theory, style, and comments.<sup>8</sup> Mentschikoff, then general counsel for a New York-based corporation, was named assistant reporter.<sup>9</sup>

While Mentschikoff’s and Llewellyn’s roles in drafting the UCC have been extensively discussed by scholars and biographers, it

is exciting to note that their respective papers are now housed at the University of Chicago Library. It’s likely that these collections contain materials that have not been accessible before.

## THE LLEWELLYN PAPERS AND MENTSCHIKOFF PAPERS

Llewellyn and Mentschikoff were married in 1946. They left New York to join the law faculty at the University of Chicago in 1951. Llewellyn remained on the faculty until his death in 1962; Mentschikoff left in 1974 to assume the law school deanship at the University of Miami.

Detailed aids for searching the papers of both Llewellyn and Mentschikoff are available on the University of Chicago website.<sup>10</sup> Both collections are extensive and include series related to their work with the UCC.<sup>11</sup> For example, series VI of the Llewellyn collection (uniform state laws) includes minutes of National Conference of Commissioners on Uniform State Laws meetings, drafts of uniform laws other than the UCC, and correspondence, notes, and memoranda. Series X (Uniform Commercial Code) includes Llewellyn’s comments on Uniform Sales Act sections, his memoranda to the Committee on Uniform Commercial Acts, annotated UCC drafts, and a substantial amount of pertinent correspondence.

Similarly, series II (correspondence) of the Mentschikoff papers includes exchanges during the formative years of the UCC as well as correspondence with Llewellyn and his biographer. Series VI (revised Uniform Sales Act) contains drafts and comments. It is no surprise that the substantial series VII (Uniform Commercial Code) contains an expansive amount of documentation on Articles 1-9 of the UCC and correspondence, reports, and testimony from the states. No information regarding Michigan is included in this subseries.

Both collections have promise for researchers whose interests extend beyond the documentary history of the UCC.

### “BUT THE LEARNING IS BY THE DOING.”<sup>12</sup>

Llewellyn was a legal realist who advocated a practice-oriented focus on legal education. Simply reviewing court decisions amounted to a poor learning habit — certainly not the optimal way to study every legal subject. He appreciated the importance of doctrinal legal principles, but suggested that doctrine, unexamined, was “vacuous, an illusion.”<sup>13</sup> Doctrine should be examined and taught in the context of how it is exercised in practice.

Llewellyn’s “theory of crafts” outlined his view that law students should be taught certain selected skills directly and systematically. Among these are advocacy, counseling, judging, lawmaking, and administration; mediation, organization, policing, teaching, and scholarship could be added in as well.

The case method is not the most effective way to teach these skills. Llewellyn provided the following example when he addressed the 1947 Association of American Law Schools conference.

“[I]f you are going to teach statutory construction, I have become convinced that you do not want cases to teach it with. You want problems that are not cases — a problem and a statutory text.”<sup>14</sup>

Llewellyn went on to explain that he and his wife were both teaching statutory construction courses, but she had managed to advance her students almost a month ahead of his. Mentschikoff’s teaching tools were problems and statutory texts. Llewellyn, however, used a casebook to teach the subject. “The ... effect was they tried to read them like cases and kept away from the text of the statute, like the resistant puppy that you drag along by the leash. ... She, on the other hand, operating by pure problems, nothing but the problem and the text, which forced them into the statute because they had nothing else to work with. It is a simple psychological thing that anybody ought to have known. Why it should take me twenty years to find it out, I am sure I don’t know, but I can learn when I see.”<sup>15</sup>

While dean at Miami, Mentschikoff collaborated with Miami professor Irwin P. Stotzky to incorporate Llewellyn’s theory of crafts and practical pedagogy in an introductory textbook “designed to explore the theoretical bases of the law and the technical craftsmanship of the lawyer.”<sup>16</sup> This text has been used to help generations of first-year students understand the relationship between legal theory and craft.

Although legal research was not on Llewellyn’s list of law crafts, he underscored the importance of pleadings as a primary element in educating the court and in understanding the court’s decision

once rendered.<sup>17</sup> He also has commented on the utility of empirical research as applied to the discipline of law — a tool to be used for studying the legal profession itself. The growing popularity of empirical legal research courses today seems consistent with Llewellyn’s perspective.

## CONCLUSION

Mentschikoff and Llewellyn were major influencers in their time. Their contributions to the UCC project, legal education, law school curricula, and the legal profession in general continue to enrich the study and practice of law.

I have the sense that they would be pleased to know that their papers are available to scholars and researchers who seek to learn more about the law.

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## ENDNOTES

1. Kelly, *Uniform Commercial Code: Drafts* (Littleton: F.B. Rothman, 1984) and Kelly & Puckett, *Uniform Commercial Code: Confidential Drafts* (Littleton: F.B. Rothman, 1995).
2. E.g., Dolan, *The Drafting History of UCC Article 5* (Durham: Carolina Academic Press, 2016).
3. *Legislative History of the District of Columbia Uniform Commercial Code P.L. 88-243* (Wash. D.C.: Arnold & Porter, 1963).
4. MCL 440.1101, et seq.
5. E.g., Barton, *The Uniform Commercial Code: Navigating the Links between Acceptance, Rejection, and Revocation of Acceptance*, 82 Mich B J 25 (May 2003) and Kopka, *Uniform Commercial Code Resources*, 88 Mich B J 50 (September 2009).
6. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-49*, 51 SMU L Rev 275 at 283 (1998).
7. *Id.* at 277.
8. Twining, *Karl Llewellyn and the Realist Movement* (London: Wiedenfeld & Nicholson, 1973), p 282.
9. *Uptown Act: A History of the Uniform Commercial Code*, 51 SMU L Rev at 277.
10. *Guide to the Karl N. Llewellyn Papers 1890-1983*, University of Chicago Library <<https://www.lib.uchicago.edu/e/src/findingaids/view.php?eadid=ICU.SPCL.LLEWELLYNK>> [<https://perma.cc/M988-XAAZ>] and *Guide to the Soia Mentschikoff Papers 1913-1987*, University of Chicago Library <<https://www.lib.uchicago.edu/e/src/findingaids/view.php?eadid=ICU.SPCL.MENTSCHIKOFF>> [<https://perma.cc/W9ZS-APZ8>]. All websites cited in this article were accessed June 20, 2023.
11. *Id.* The Llewellyn collection extends 89.25 linear feet and the Mentschikoff collection extends 64 linear feet.
12. *Association of American Law Schools Handbook* (1947), Part One at 70, Address of Karl N. Llewellyn at General Session.
13. *Cases on Mortgages of Real Property*, 40 Harv L Rev 142, 145 (1940).
14. *Association of American Law Schools Handbook* (1947), p 72.
15. *Id.*
16. Mentschikoff & Stotzky, *The Theory and Craft of American Law* (Durham: Carolina Academic Press, 1981). The source of the language quoted here is taken from Carolina Academic Press web page for this book <<https://cap-press.com/books/isbn/9780820562803/The-Theory-and-Craft-of-American-Law>> [<https://perma.cc/KG23-FJLA>].
17. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Oceana, 1951), p 27.