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Roscoe Pound, Melvin Belli, and the Personal-Injury Bar: The Tale of an Odd Coupling

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26 T.M. Cooley L. Rev. 637-679 (2009)

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ROSCOE POUND, MELVIN BELLI, AND THE PERSONAL-INJURY BAR: THE TALE OF AN ODD COUPLING

JOSEPH A. PAGE*

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I. INTRODUCTION

In the fourth chapter of *Patriots and Cosmopolitans: Hidden Histories of American Law*,¹ legal historian John Fabian Witt tells the story of a collaboration between storied scholar Roscoe Pound and trial virtuoso Melvin M. Belli, which he calls “among the most startling and yet unremarked-upon relationships in the annals of American law.”² Witt argues that it both shaped and energized the efforts of personal-injury lawyers to oppose proposals that would shift to the administrative branch of government responsibility for compensating auto-accident victims.³ Entitled “The King and the Dean,” in reference to the media’s coronation of Belli as the “King of Torts”⁴ and Pound’s lengthy term (1916-1936) at the helm of the Harvard Law School,⁵ the chapter advances the claim that the two men came together synergistically in the early 1950s and mobilized a campaign by personal-injury lawyers to resist the enactment of automobile no-fault plans and other proposals that would have replaced common-law tort suits with alternative compensation mechanisms.⁶

Witt goes on to make the case for viewing the current system of settling accident claims in the United States as a privatized version of the type of public administration that trial lawyers have long and vigorously opposed.⁷

1. JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* 211-78 (2007). The book’s theme is how five individuals contributed to the legal and constitutional developments that helped shape the United States as a Nation. In addition to the two personalities who are under consideration here, the author’s cast includes James Wilson, a Founding Father from Pennsylvania; Elias Hill, a freed slave from South Carolina; and Crystal Eastman, a civil libertarian and worker-safety advocate from Greenwich Village. The author describes how the contributions of Wilson, Hill, and Eastman reflected a cosmopolitan perspective, while those of Pound and Belli derived from a peculiarly American outlook.

2. *Id.* at 211.

3. *See id.* at 254-57.

4. For the origin of Belli’s royal provenance, see Robert Wallace, *The King of Torts*, LIFE MAG., Oct. 18, 1954, at 71.

5. *See* PAUL SAYRE, *THE LIFE OF ROSCOE POUND* 208-46 (1948). The author of this early and admiring biography refers to Pound’s deanship (1916-1936) as “the Golden Age of the Harvard Law School.” *Id.* at 208. For an insider’s appreciation of Pound’s Harvard deanship, see Arthur E. Sutherland, Jr., *One Man in His Time*, 78 HARV. L. REV. 7, 18-20 (1964). For a critical assessment, see G. Edward White, *Biographical Essay*, in AMERICAN COUNCIL OF LEARNED SOCIETIES, *DICTIONARY OF AMERICAN BIOGRAPHY* 624, 626-27 (John A. Garraty ed., 1964 & Supp. VII 1981).

6. *See* WITT, *supra* note 1, at 253-56.

7. *See id.* at 216-17, 274.

His development of this point makes an original and useful contribution to an understanding of the evolution of the torts process, and this Article will not address it.⁸ Instead, this Article will take issue with aspects of his historical narrative, and with some of the interpretations he fashions from it, and offer an alternative account.

A major part of Witt's chapter explores the Pound-Belli tie, but he misses the mark. Pound did indeed form a part of what he terms one of "the most startling and yet unremarked-upon relationships in the annals of American law,"⁹ but this consociation did not involve Belli. The real "odd couple" of American law arose from the as-yet-unappreciated link between Pound and Samuel B. Horovitz, the co-founder of the trial lawyers' organization originally known as the National Association of Claimants Compensation Attorneys ("NACCA" or "Association").¹⁰ The influence Horovitz exerted over Pound, not Pound's altogether cursory acquaintanceship with Belli, is what gave a singular twist to the final chapter of Pound's long and distinguished career.

Out of the fabric of an exaggerated Pound-Belli nexus, Witt spins the saga of the pair's grand crusade against the delegation of social-welfare functions to federal or state administrative bodies, with Pound supplying the brain power and prestige and Belli providing high-octane energy and influence over the plaintiffs' trial bar.¹¹

Although Pound had been an early supporter of what has come to be known as the administrative state, a broad term that encompasses delegations of both legislative and adjudicative functions to administrative bodies,¹² Witt correctly points out that the Dean subsequently became

8. For further exploration of this theme, see John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261 (2007) and Robert L. Rabin, *Poking Holes in the Fabric of Torts: A Comment*, 56 DEPAUL L. REV. 293 (2007).

9. WITT, *supra* note 1, at 211.

10. The other founder was Benjamin Marcus, a Michigan attorney who also served as NACCA's first president. For a history of the organization, see RICHARD S. JACOBSON & JEFFREY R. WHITE, *DAVID V. GOLIATH: ATLA AND THE FIGHT FOR EVERYDAY JUSTICE* (2004). NACCA has undergone various name changes. In 1960 it became the National Association of Claimants' Counsel of America; in 1964, the American Trial Lawyers Association (ATLA); in 1972, the Association of Trial Lawyers of America; and in 2006, the acronymically challenged American Association for Justice (AAJ). For a somewhat peevish criticism of the latest of the re-baptisms, see John Fabian Witt, *First, Rename All the Lawyers*, N.Y. TIMES, Oct. 24, 2006, at A29.

11. See generally WITT, *supra* note 1, at 211-17, 246-75.

12. For an expression of Pound's view that the expansion of administrative adjudication was a natural result of economic and social change, see Roscoe Pound,

convinced that the administrative state, in many instances, was exercising broad and uncontrolled discretion in ways that ran not only counter to the rule of law but also in the direction of authoritarian or even totalitarian rule; he spoke out forcefully against those delegations that he deemed unwarranted and against aspects of the administrative process that he found lawless.¹³ It is also true, as Witt asserts, that Pound viewed lawyers as an important bulwark against the concentration of power that he feared would result from the unchecked growth of the administrative state; thus, he admired Belli and practitioners like him because he felt that their sense of professionalism would put them in opposition to a phenomenon he feared would increasingly marginalize the judicial system.¹⁴

However, to deduce from this the existence of a cooperative effort on the part of Pound and Belli to draw NACCA into a struggle against the expansion and proliferation of federal and state administrative agencies simply does not correspond to what the King, the Dean, and the plaintiffs' trial bar were actually seeking to accomplish at this time.

This Article will argue that, during this period, Belli was simply being Belli, basking in whatever spotlight suited his whims and needs at the moment. NACCA, on the other hand, saw as its principal task the education and training of its members and the enhancement and protection of their professional interests. The Association did denounce proposals that might subject accident victims to compensation plans designed to replace tort law. But its resistance did not become a top-priority matter until the mid-1960s, after the Dean's death, and never rested on principled opposition to excessive statutory delegations of authority to agencies. Instead, it reflected, at best, an honest conviction that consigning auto-accident compensation to the administrative state would short-change claimants and, at worst, hostility to any change that might limit, as Belli himself did not hesitate to point out, the contingently calculated legal fees of NACCA members.¹⁵

The Growth of Administrative Justice, 2 WIS. L. REV. 321, 331-32 (1924) [hereinafter Pound, *Administrative Justice*]. On the growth of the administrative state, see Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) and see also *Administrative Procedure in Government Agencies*, S. REP. NO 77-8, at 7-24 (1941).

13. For Witt's summary of Pound's objections, see WITT, *supra* note 1, at 232; see also EDWARD B. MCLEAN, *LAW AND CIVILIZATION: THE LEGAL THOUGHT OF ROSCOE POUND* 249-80 (1992); and DAVID WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* 266-71 (1974).

14. See WITT, *supra* note 1, at 252-53.

15. See *id.* at 264.

This Article will first take issue with Witt's story of the Pound-Belli relationship and then offer a different version of the interaction between the Dean and the plaintiffs' trial bar.

II. POUND AND BELLI

Given Pound's status as a seminal figure in the history of U.S. jurisprudence¹⁶ and the larger-than-life persona of Belli,¹⁷ it is easy to understand the powerful temptation that pushed Witt toward treating them as partners in the development of a unique feature of the U.S. legal culture. Both men have completely vanished from contemporary radar screens and merit a fresh reconsideration. Moreover, the discovery of a previously unappreciated bond between them would make for both a startling revelation and a fascinating read.

The personalities of the King and the Dean could not have been more contrasting. Belli was creative and quick-witted, blessed with a mellifluous and quasi-hypnotic voice, and dapper in appearance; he possessed an in-your-face style, ceaselessly self-promoted his cultivation of celebrity status, and was totally committed to an uninhibited *joie de vivre* in his professional as well as personal life; he had six wives, chummed with Errol Flynn, once passed gangster Mickey Cohen off as a tax expert at a seminar he organized, and tried out unsuccessfully for the part of Don Vito Corleone in *The Godfather*.¹⁸ Pound brought to the table a hulking physical presence hardened by years of boxing, wrestling, and hiking in the British

16. For biographies of Pound, see SAYRE, *supra* note 5; WIGDOR, *supra* note 13; see also White, *supra* note 5; N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE (1997); MCLEAN, *supra* note 13; Sutherland, *supra* note 5; Arthur L. Goodhart, *Roscoe Pound*, 78 HARV. L. REV. 23 (1964); and Albert Kocourek, *Roscoe Pound As a Former Colleague Knew Him*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES: ESSAYS IN HONOR OF ROSCOE POUND 419 (Paul Sayre ed., 1947).

17. For a recent Belli biography that provides much colorful detail, see MARK SHAW, MELVIN BELLI: KING OF THE COURTROOM (2007); see also MELVIN M. BELLI, MY LIFE ON TRIAL (1977); and ROBERT WALLACE, LIFE AND LIMB: THE FABULOUS CAREER OF MELVIN M. BELLI, ACE PERSONAL-INJURY TRIAL LAWYER (1955). For an informative obituary of Belli, see Richard Severo, *Melvin Belli Dies at 88: Flamboyant Lawyer Relished His Role as King of Torts*, N.Y. TIMES, July 11, 1996, at B13, available at <http://www.nytimes.com/1996/07/10/us/melvin-belli-dies-at-88-flamboyant-lawyer-relished-his-role-as-kingof-torts.html>. For an illuminating post-mortem profile, see Krysten Crawford, *Melvin Belli (1907-1995): Tortious Maximus*, AM. LAW., Dec. 1999, at 36, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005514038>.

18. See generally SHAW, *supra* note 17 (discussing Belli).

Isles and France;¹⁹ the life-long appetite of a trencherman;²⁰ an improbable impishness;²¹ twinkling eyes weakened by a childhood attack of measles that made it necessary for him to wear the green eyeshade that became his trademark;²² a Puritanical approach to life and work;²³ a prodigious mind capable of absorbing a limitless amount of information and incapable of forgetting anything;²⁴ and worldwide respect, as evidenced by the numerous honorary degrees he received from universities in the U.S. and abroad.²⁵

Moreover, it would have been extremely difficult for any writer to resist the appeal of an anecdote about one of their encounters, in which Pound, in pajamas and a bathrobe, spent a night with a strawberry blonde in

19. See Arthur Train, Jr. & Ralph Nader, *Grand Old Man of the Law*, READER'S DIGEST, Feb. 1961, at 163, 168. For Pound's own account of a physical confrontation he had with a thief in the process of breaking into a student locker while dean at Harvard Law, see ROSCOE POUND, THREESCORE AND TEN YEARS OF THE HARVARD LAW SCHOOL 14 (1961) ("[H]e and I had a little wrestling match. As a result, I took him into custody . . ."). According to one friend, Pound could run a mile in under five minutes until he was almost fifty. See SAYRE, *supra* note 5, at 61; see also Goodhart, *supra* note 16, at 29 (reporting he had heard that "Pound had run a mile in five minutes on his fiftieth birthday"). Until late in his life he would regularly walk the six miles between his home and Harvard Square. See SAYRE, *supra* note 5, at 61.

20. See SAYRE, *supra* note 5, at 392; see also Jerry J. Phillips, *A Verray Parfit, Gentil Knight*, 28 SUFFOLK U. L. REV. 949, 985 (1994) (quoting eyewitness testimony about the elderly Pound's enthusiasm for eating).

21. One of his earliest legal publications was a tongue-in-cheek article musing about the need for a legal treatise on the rights and liabilities of dogs. Roscoe Pound, *Dogs and the Law*, 8 GREEN BAG 172 (1896). On his fondness for singing on public occasions, see Sutherland, *supra* note 5, at 19-20.

22. See Erwin N. Griswold, *Roscoe Pound—1870-1964*, 78 HARV. L. REV. 4, 5 (1964-1965).

23. See Goodhart, *supra* note 16, at 26.

24. The title of a magazine profile on Pound commemorated his amazingly retentive memory. See *Education: Fly-Paper Dean*, TIME, Oct. 7, 1935, at 64. Justice Oliver Wendell Holmes, Jr., on the other hand, once wrote of him: "The number of things that chap knows drives me silly." Letter from Justice Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Mar. 10, 1923) in 2 HOLMES-POLLOCK LETTERS, at 115 (Mark D. Howe ed., 1941).

25. See Nebraska State Historical Society, *Roscoe Pound, 1870-1964*, Official Nebraska Gov't Website, <http://www.nebraskahistory.org/lib-arch/research/manuscripts/family/poundroscoe.htm> (last visited May 25, 2010). An unlocked trunk in the master bedroom of his home in Watertown, Massachusetts, where the author worked for three years, contained the most colorful of his collection of academic robes and headgear.

Belli's Telegraph Hill residence, where she sat on the floor at his bedside and he held forth, according to Belli, "on Henry VIII and the laws of Edward II and the Boston Red Sox's chances of winning the pennant."²⁶

A. *The Prairie Prodigy*

The early part of Pound's life is a uniquely American saga: born in Lincoln, Nebraska, five years after General Robert E. Lee surrendered to General Ulysses S. Grant at Appomattox and three years after the founding of the city; home-schooling by a doting mother who recognized his uncommonly capacious memory and cultivated it by teaching him subjects such as German and Latin; matriculation at the tender age of fourteen at the University of Nebraska, where he majored in botany; pressure from his father, an attorney and a judge, leading to the study of the law both on his own and during one year in residence at the Harvard Law School; the continuation of his botanical research, culminating in a Ph.D.,²⁷ the discovery of a hitherto unknown lichen that his scientific peers named after him; contemporaneous legal practice and service on the Nebraska Supreme Court Commission²⁸ (as well as regular Saturday-afternoon cheerleading for his alma mater's football team);²⁹ and entry into legal academia, immediately followed by an appointment as dean of the University's new law school.³⁰

During this period, Pound benefited enormously from the intellectual atmosphere at the University of Nebraska. Though a fledgling institution with only twelve professors and seventeen instructors when Pound graduated,³¹ it nonetheless had become "a rare haven for dissent," in the

26. For Witt's use of the anecdote, see WITT, *supra* note 1, at 212-13. His source is BELLI, *supra* note 17, at 220. An eyewitness remembers the incident in the residence somewhat differently: a fully dressed, highly voluble Pound kept a pair of Flying Tiger Airline stewardesses (named Grace and Vi) in thrall throughout the evening. Telephone interview with Paul Horovitz (May 30, 2007).

27. His was the first Ph.D. in botany ever granted by the University of Nebraska and only the second doctorate ever awarded by the University. See HULL, *supra* note 16, at 48.

28. The Commission was a legislatively created body that decided appeals referred to it by the state supreme court. See Richard E. Shugrue, *Roscoe Pound, Commissioner*, THE NEB. LAW., Aug. 2000, at 18.

29. *Roscoe Pound, Nebraska's First Fanatic*, http://netnebraska.org/extras/husker_century/hc_mvvp/hc_fans/hc_fans2.html (last visited May 25, 2010).

30. See Sutherland, *supra* note 5, at 14-15.

31. *Id.* at 8.

words of one of his biographers.³² Of considerable influence on his thinking was the progressive sociologist Edward A. Ross, who viewed law as both a product of social forces and an instrument for social control.³³

It was at this early point in his career that Pound burst onto the national legal scene. At a 1906 meeting of the American Bar Association (ABA), the Dean assumed the role of people's tribune, laying out an indictment of "The Causes of Popular Dissatisfaction with the Administration of Justice," as he styled his speech.³⁴ Some of these sources of discontent he found inherent in any system of laws, while others arose from shortcomings peculiar to the U.S.³⁵ The latter included excessive procedural formalism, an archaic and inefficient court structure, and an excessively adversarial legal system.³⁶ His criticisms led him to one of the major themes that he pursued throughout his career—an abiding concern with improving the administration of justice in the U.S.³⁷

During this same period, Pound turned to two other areas that would attract his sustained attention. The first, for which he would gain worldwide and lasting renown, was in the realm of theory: drawing on the work of Ross and others, he worked out his own version of an abstraction of sociological jurisprudence, which regarded the legal system as an instrument for achieving societal goals and called for the use of social-science methodologies to achieve an appreciation of the actual effects that law had on the real world.³⁸ The second involved the increasing delegations of authority to administrative agencies, a phenomenon that drew an ambivalent response from him: on the one hand, he decried what he saw as a trend to assign agencies increasing responsibility for various kinds of dispute resolution, but, on the other hand, he recognized the important role they could play in a complex society undergoing the strain

32. WIGDOR, *supra* note 13, at 111.

33. *Id.* at 110-14; WITT, *supra* note 1, at 220. Ross was especially concerned with the pernicious effects of big business's excessive influence over the mechanisms of government; his seminal monograph dealing with corporate crime might have been written yesterday. See EDWARD A. ROSS, *SIN AND SOCIETY* (1907).

34. For a text of the speech, see Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906).

35. *Id.* at 729-31.

36. *Id.* at 738 (referring to the U.S. judicial system as "the sporting theory of justice").

37. See WIGDOR, *supra* note 13, at 147-59 (describing Pound's crusade for procedural reform).

38. See *id.* at 183-205; G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1004-05 (1972).

of economic growth.³⁹ With respect to the latter, he viewed the use of administrative bodies as an attractive alternative to common-law litigation in some specialized areas because they might more readily apply social science in resolving the larger issues that came before them.⁴⁰

The attention that he attracted fueled the ascent of his academic career, and he moved rapidly up the ranks of academia—from Northwestern to Chicago to Harvard, where he became dean at the age of forty-six.⁴¹ At the same time, he developed an extraordinary capacity for networking with the younger scholars who were challenging the accepted order and working out fresh approaches to jurisprudential theory.⁴²

Both philosophically and politically, however, he was actually deeply conservative at heart.⁴³ His commitment to a belief in the virtues of the common law, limited government, and individual freedom, as well as his cautious Republicanism and opposition to emerging populist movements,⁴⁴ soon turned him against not only the new wave of thinkers who saw sociological jurisprudence as a springboard for the development of what had become known as legal realism but also against many of the reforms undertaken by President Franklin D. Roosevelt.⁴⁵ His abhorrence of the realists was derived from their rejection of general principles and their advocacy of legal decision-making based primarily on policy.⁴⁶ What especially vexed him about the New Deal was its expansive delegation of legal authority to administrative bodies, which, in his view, were exercising unchecked discretion in performing quasi-judicial and quasi-legislative functions.⁴⁷ In addition, his fondness for things German made him slow to appreciate the perniciousness of Nazism.⁴⁸

39. For an early article setting out his views of adjudication by administrative bodies, see Roscoe Pound, *Executive Justice*, 55 AM. L. REG. 137 (1907).

40. See WITT, *supra* note 1, at 226-27.

41. See HULL, *supra* note 16, at 7.

42. See *id.* at 5-8.

43. See White, *supra* note 5, at 627-28.

44. On Pound's politics, see *id.* at 625.

45. See WITT, *supra* note 1, at 232.

46. See White, *supra* note 5, at 626-27.

47. See *id.* at 627.

48. See WITT, *supra* note 1, at 231. In 1934, he accepted a medal from the German government in a ceremony at the Harvard Law School. See HULL, *supra* note 16, at 238. Regarding his "Germanophilia," the English political scientist Harold J. Laski once observed that Pound "believes in the natural right of every German to be quoted." Letter from Harold J. Laski to Justice Oliver W. Holmes (Jan. 26, 1920) in 1 HOLMES-LASKI LETTERS, 1916-1935, at 236 (Mark DeWolfe Howe ed., 1953).

Harvard appointed him as its first University Professor at the end of his deanship in 1936, and he remained in that capacity until his formal retirement in 1947.⁴⁹ He spent much of the period between 1946 and 1948 in China, where he served as an advisor to the Ministry of Justice and drafted legal codes for the Chiang Kai-shek government.⁵⁰ When he returned, he became a vocal supporter of the Nationalists and deplored the 1949 Communist seizure of power in China.⁵¹

B. *The Founding Father*

It was in the postwar period that Pound entered into a close and unlikely relationship with one of his former students, a Boston attorney who specialized in workers-compensation law and had written a treatise on the subject.⁵² Tall, angular, and hyper-energetic,⁵³ Samuel B. Horovitz had somehow managed to survive a personal tragedy that would have destroyed most other men—the simultaneous deaths of his mother, wife, and five-year-old son in 1936 as a result of the up-to-then worst disaster in the history of commercial aviation in the U.S.⁵⁴ Ten years later, he co-founded an organization for lawyers who brought compensation claims on behalf of

49. White, *supra* note 5, at 627.

50. See HULL, *supra* note 16, at 311-13; WIGDOR, *supra* note 13, at 277-78.

51. See WITT, *supra* note 1, at 233. One writer has speculated that the Nationalist Chinese may not really have wanted Pound to reform anything: "Pound was an American jurist, whose status and connections provided a perfect cover for their propaganda." HULL, *supra* note 16, at 312.

52. SAMUEL B. HOROVITZ, *INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS* (1944). Workers compensation replaced tort law as the exclusive remedy that employees could assert against employers for injuries arising out of and in the course of employment. Claimants did not have to prove fault, and employers could not raise common-law defenses such as contributory fault. The statutes limited benefits, and injured workers could not recover for pain and suffering. Administrative tribunals resolved disputes. See generally DAN B. DOBBS, *THE LAW OF TORTS* §§ 392-95 (2000).

53. Belli described Horovitz as "a lean, Lincolnesque figure who looked something like Pope Pius XII: prominent nose, deepset eyes, very expressive hands." BELLI, *supra* note 17, at 152.

54. Horovitz, a restless, inveterate traveler, had been touring the Orient and had contracted influenza. On his return, he sent for his family so they could vacation in southern California while he recuperated. They were crossing the country on an American Airlines twin-engine transport when it crashed in an Arkansas bog. All fourteen passengers and the three-member crew perished. See *Wakefield Trio in Plane Killed*, BOSTON GLOBE, Jan. 15, 1936, at 1; *Into Arkansas Loblolly*, TIME, Jan. 27, 1936, available at <http://www.time.com/time/magazine/article/0,9171,847643,00.html>.

injured workers.⁵⁵ NACCA had education and skills training as its principal mission, so that workers would enjoy the same quality legal services that employers (and their insurers) received from their lawyers.⁵⁶ NACCA would also undertake an important advocacy function by urging expansive judicial interpretations of state compensation statutes and publicizing the need for legislative reforms.⁵⁷

Horovitz was NACCA's driving force, a messianic proselytizer who used his own funds to travel around the country and spread his gospel to prospective recruits.⁵⁸ Republican and Jewish, he used the sheer force of his personality to attract Southerners who were overwhelmingly Democrat and Protestant.⁵⁹ He also lost no time in expanding NACCA to include lawyers who represented injured railroad and maritime workers.⁶⁰ He never formally headed the Association, but there was no doubt that NACCA was his baby.⁶¹ Its presidents would come and go, but he remained a formidable force, commanding substantial loyalty among the membership and influencing policy.⁶² He made himself Editor-in-Chief of the *NACCA Law Journal*, the organization's official publication, which he founded in 1948 (and for a while personally underwrote) and served each year as a member of NACCA's executive committee.⁶³

Since his days as Pound's student, Horovitz had kept in contact with the Dean,⁶⁴ who from the time of his retirement had become an increasingly marginalized figure within the faculty he once led—a 75-year-old professor-emeritus stashed away in the basement of the law library in Langdell Hall. Aware of Pound's interest in administrative law, Horovitz had approached Pound when he wrote his treatise on workers

55. WITT, *supra* note 1, at 241.

56. *Id.* at 240-41.

57. The extent to which NACCA as an organization should engage in efforts to influence the legislative process was a bone of contention within the Association for a number of years. Horovitz was a principal protagonist; he felt that hiring professional lobbyists and contributing to political campaigns was unprofessional and might jeopardize NACCA's tax-exempt status. See JACOBSON & WHITE, *supra* note 10, at 15, 65.

58. For a description of Horovitz's recruiting tour through the south and southwest, see *id.* at 16-18 and WITT, *supra* note 1, at 241.

59. WITT, *supra* note 1, at 241.

60. See JACOBSON & WHITE, *supra* note 10, at 13-14.

61. *Id.* at 67.

62. *Id.*

63. See *id.* at 68-69.

64. Telephone Interview with Paul Horovitz (May 30, 2007).

compensation,⁶⁵ and in it he made two flattering references to the Dean.⁶⁶ Later, he persuaded Pound to write a report on one part of his Chinese project, the drafting of a government-administered workers-compensation act, for the *NACCA Law Journal*.⁶⁷ When the sixth issue of the *NACCA Law Journal* appeared, he sent a copy to Pound, who was then teaching at the University of California at Los Angeles School of Law, and the Dean acknowledged receipt of it with words of praise.⁶⁸ Taking advantage of what he viewed as an important endorsement, Horovitz quickly reproduced Pound's encomium in the next issue of his publication.⁶⁹

As Pound grew older and less able to care for himself, both physically and financially, Horovitz became an increasingly important figure in his life. In 1953, he utilized his growing influence over the 83-year-old Pound

65. Letter from Samuel B. Horovitz to Roscoe Pound (Sept. 9, 1944), in *microform on Roscoe Pound Papers*, Reel 35, Frame 95 (Univ. Pub'n of Am.) [hereinafter *Pound Papers*] (thanking Pound for his comments on the book); Letter from Samuel B. Horovitz to Roscoe Pound (Oct. 30, 1951), *id.* at Reel 35, Frame 85 (expressing his gratitude for the "wonderful send-off" the Dean gave his book when it appeared).

66. See HOROVITZ, *supra* note 52, at 388 n.12, 394 n.28 (using Pound's opposition to administrative absolutism to support the author's criticism of the unreviewability of decisions by the U.S. Compensation Commission, which adjudicated claims brought by federal employees against the government). Pound quickly cited Horovitz's insistence that decisions by administrative tribunals be subject to judicial review as supportive of his own position of the issue, but he failed to reveal that Horovitz had cited him as authority for the argument. See Letter from Roscoe Pound to Carl McFarland (Oct. 24, 1944), in *Pound Papers*, *supra* note 65, at Reel 20, Part 3, Frame 1,037.

67. See Roscoe Pound, *Memorandum as to Chinese Workmen's Compensation Law*, 2 *NACCA L.J.* 78, 78-79 (1948). The piece reads as though Pound had written it hastily on the back of an envelope, perhaps during the flight back. Its terse conclusion, reflecting a Jovian empiricism, was, "On inquiry I find that the law is operating satisfactorily. I have heard no complaints." *Id.* at 79. One imagines Pound seated on a chair and listening carefully as an endless procession of Chinese workers filed by him.

68. Letter from Roscoe Pound to Samuel B. Horovitz (Dec. 4, 1951), in *Pound Papers*, *supra* note 65, at Reel 35, Frame 84 (praising the utility of the *NACCA Law Journal*); see Letter from Roscoe Pound to Samuel B. Horovitz (Dec. 23, 1951), in *Pound Papers* *supra* note 65, at Reel 35, Frame 87 (granting Horovitz permission to use the letter).

69. See *Matters of General Interest: Reports and Notes from Everywhere*, 7 *NACCA L.J.* 244, 244 (1951).

to persuade him to take over as full-time Editor-in-Chief of the *Journal*.⁷⁰ The Dean also made speeches at various events sponsored by NACCA.⁷¹

Pound worked in editorial offices located in downtown Boston, in the same building that quartered Horovitz's law firm.⁷² On most Saturdays, Horovitz would drive him from his home in Watertown to a Viennese pastry shop in Harvard Square where they would have lunch.⁷³ The personal bond between the two men grew stronger as the Dean aged. In 1959, Pound's second wife passed away, the water pipes in his mansion burst during a particularly cold winter, and he became unable to live there by himself.⁷⁴ Horovitz then personally bought the property from him and gave it to a foundation that had been set up in Pound's name.⁷⁵ The staff of the *NACCA Law Journal* moved to the house and used the second floor as its headquarters.⁷⁶ Pound, meanwhile, relocated to a hotel near Harvard Square and resumed work in his basement office at the Harvard Law School.⁷⁷ Whatever the weather, he would walk between the two venues and back and forth to have lunch in Harvard Square.⁷⁸

Although Witt does mention Pound's relationship to Horovitz,⁷⁹ he puts a good deal more significance on the Dean's link to Belli, who served as

70. See Samuel B. Horovitz, *Our New Editor-in-Chief, Dean Roscoe Pound*, 12 NACCA L.J. 19 (1953); see also WITT, *supra* note 1, at 247 (stating that Pound needed the job because of the inadequacy of his Harvard pension).

71. See WITT, *supra* note 1, at 249-50; see also Ernst W. Bogusch, *NACCA Convention, Branches, and Meetings*, 13 NACCA L.J. 295, 298-99 (1954) (stating that Horovitz and Pound addressed eight NACCA branch meetings in the Midwest during a three-week lecture trip).

72. See generally telephone interview with Paul Horovitz (May 30, 2007) (stating that, at some point, Horovitz purchased a Chrysler Imperial with the front passenger seat on a swivel to make it easier for the elderly and bulky Pound to enter and exit the vehicle).

73. See generally *id.*

74. See WITT, *supra* note 1, at 251.

75. Horovitz purchased the mansion and all its contents (including Pound's extensive library, which contained both law-related volumes and books reflecting the ex-dean's wide-ranging, non-legal interests). He then donated them to the Roscoe Pound NACCA Foundation. A report documented these transfers. Information concerning the report is from the Author's personal observation.

76. See WITT, *supra* note 1, at 251.

77. See *id.* at 249-51.

78. See Sutherland, *supra* note 5, at 22; Erwin N. Griswold, *Roscoe Pound—1870-1964*, 78 HARV. L. REV. 4, 5 (1964). "He never wore a coat, no matter how cold the weather. His only concession was a pair of gloves, and, rarely, a raincoat . . . He fell into snowdrifts when he was over ninety but never had pneumonia." *Id.*

79. WITT, *supra* note 1, at 248-49.

NACCA's president in 1950-1951.⁸⁰ An inquiry into the nature of this link requires, first, a look at Belli and his role within the Association.

C. *The "Bad Boy" and "Babe Ruth" of the Bar*⁸¹

In the decade following World War II, Belli became one of the best known and most controversial personal-injury practitioners in the U.S.⁸² A 1933 graduate of the University of California School of Law in Berkeley (where he received a grade of "C" in torts⁸³), Belli entered the practice of law in San Francisco and soon made his mark by winning substantial jury verdicts for accident victims in personal-injury suits against corporate defendants and insurance companies.⁸⁴ His showmanship soon became the stuff of legend and tested the limits of courtroom propriety.⁸⁵ It fueled his meteoric rise and inspired the admiration of many of his peers in the personal-injury field, as well as the tongue-clucking disapproval of the more conservative members of the profession.⁸⁶ Indeed, he seemed to take great delight in his running feuds with the State Bar of California and the ABA.⁸⁷

Belli's more substantive contributions included tireless advocacy on behalf of the *adequate award*, his term for damages that would fairly and fully compensate tort victims,⁸⁸ and on behalf of the expansive use of demonstrative evidence or visual aids that would convey to a jury how an accident occurred and the scope of a plaintiff's injuries.⁸⁹ His *magnum*

80. *See id.*

81. Compare JOHN G. FLEMING, *THE AMERICAN TORT PROCESS* 149 (1988) (describing Belli as the "bad boy of the trial bar"), with Crawford, *supra* note 17, at 36 (citing Ralph Nader as dubbing Belli the "Babe Ruth of the plaintiffs bar").

82. *See Severo, supra* note 17.

83. SHAW, *supra* note 17, at 4.

84. *See id.* at 21, 22.

85. For the most famous examples, see WITT, *supra* note 1, at 236-37; for detailed accounts, see WALLACE, *supra* note 17.

86. *See* WALLACE, *supra* note 17, at 148.

87. BELL, *supra* note 17, at 185-206.

88. *See, e.g.,* Melvin M. Belli, *The Adequate Award*, 39 CAL. L. REV. 1 (1951).

89. On Belli's use of demonstrative evidence, see WALLACE, *supra* note 17, at 145-63. He pioneered the use of films that conveyed to juries what seriously injured plaintiffs experienced in surmounting the ordinary activities of their daily existence. One of the most touching and effective films (which he twice lent the Author for use in his torts class) was "A Day in the Life of Brian May," featuring a 12-year-old boy who had contracted polio from the injection of a contaminated vaccine and had to live in an iron lung. *See* SHAW, *supra* note 17, at 69.

opus, a three-volume handbook entitled *Modern Trials*,⁹⁰ became a virtual bible for plaintiffs' attorneys⁹¹ and drew strong reactions from reviewers.⁹²

Belli and NACCA would be a perfect fit. The "King of Torts" needed a national platform, and the fledgling organization needed an outsized celebrity who could attract new blood.⁹³ Belli phoned Horovitz and asked that the organization admit all plaintiffs' personal-injury lawyers.⁹⁴ Although reluctant at first,⁹⁵ Horovitz invited him to the 1949 NACCA Convention, where the King made a spell-binding speech that convinced the assemblage to expand its membership.⁹⁶ A year later, he won the presidency.⁹⁷

Belli's arrival, along with the tort lawyers who followed him, would change NACCA profoundly.⁹⁸ From a boutique-like association with a relatively narrow focus (the representation of injured workers), it became a broad-based entity embracing the entire field of personal-injury law.⁹⁹ This expanded NACCA's educational mission as well as the scope of practical, doctrinal, and policy issues of interest to its members. Of lasting significance, jury-trial advocacy became a major element of the Association's training programs, and preserving the jury system became

90. MELVIN M. BELLI, 1 *MODERN TRIALS* (Allen P. Wilkinson ed., West Publ'g Co. 2d ed., 1982) (1954).

91. SHAW, *supra* note 17, at 53 (noting that *Modern Trials* eventually produced more than \$1 million in royalties for its author).

92. Compare William L. Prosser, *Book Review*, 43 CAL. L. REV. 556 (1955) (wherein William L. Prosser, Dean of the University of California School of Law at Berkeley and a preeminent authority on tort law, wrote that "[t]his book frightens me"), with Warren A. Seavey, *Book Review*, 69 HARV. L. REV. 394 (1955) (wherein Professor Warren A. Seavey of the Harvard Law School declared it to be a "masterpiece," at least "[f]or the purposes for which it [was] written").

93. See Rita Jameson, *ATLA*, 16 TRIAL 56, July 1980, available at <http://www.atla.org/cps/rde/xchg/justice/hs.xsl/2079.htm>.

94. *Id.* at 57.

95. See *id.* (stating that Horovitz's response to Belli's request was that NACCA did not "want the tort lawyers. The only ones we want are lawyers who represent injured 'workers.'").

96. See JACOBSON & WHITE, *supra* note 10, at 18-19, 21-22. The *NACCA Law Journal* reported that Belli's speech "electrified his audience." Laurence L. Locke, *NACCA Convention and Officers*, 4 NACCA L.J. 311, 313 (1949). Belli actually ran for NACCA president at the 1949 Convention but lost because, in the words of one attendee, he "was a little too flamboyant." JACOBSON & WHITE, *supra* note 10, at 21.

97. JACOBSON & WHITE, *supra* note 10, at 21-22.

98. See *id.* at 22 ("Melvin Belli became a pied piper who attracted a noisy parade of tort lawyers into NACCA.").

99. See *id.* at 51-53.

one of its overriding concerns in the political arena.¹⁰⁰ Moreover, this transformation allowed NACCA to be more freewheeling. In its advocacy on behalf of the interests of injured workers, the Association had to deal with organized labor, which had its own set of broader concerns and priorities.¹⁰¹ There were no similar advocacy groups representing nonwork accident victims, so NACCA was filling a void.¹⁰² Finally, the mass entry of personal-injury lawyers would change the nature of the organization's membership and eventually shift the balance of power within NACCA away from Horovitz and his original cohorts.¹⁰³

D. *The King and the Dean*

According to Witt, in the 1950s, Belli and Pound developed a friendship that fused the Dean's opposition to the spread of the administrative state and the King's opposition to alternative compensation schemes that would eliminate jury trials and place limits on the amounts that injured claimants could recover.¹⁰⁴ In Witt's view, Belli found the Dean to be the perfect spokesman for NACCA: "[F]or over a decade [they] worked together to mobilize a powerful . . . campaign on behalf of the long-standing legal institutions . . . for which the trial lawyers had become a chief constituency—the jury trial, the common law, and the courts chief among them."¹⁰⁵ He further asserts that "from the early 1950s until Pound's death in 1964, Melvin Belli and NACCA founder Samuel Horovitz came to figure as perhaps the most significant connections in Pound's life."¹⁰⁶

To support his thesis, Witt cites correspondence between Pound and Belli, regular visits by Belli to Pound when the attorney came to Boston on business, Pound's stays at Belli's apartment in San Francisco, and the

100. See WITT, *supra* note 1, at 264-65.

101. See JACOBSON & WHITE, *supra* note 10, at 8-11.

102. Cf. Jameson, *supra* note 93 at 57 ("Up to this point, all NACCA members represented injured workers. In 1949 San Francisco attorney Melvin Belli moved for admission of tort lawyers. Horvitz [sic] responded that NACCA did not 'want the tort lawyers. The only ones we want are lawyers who represent injured "workers." You represent injured person [sic], not workers.' Belli countered: 'Isn't it [just] as bad for a "person" who may well be a worker to lose a leg in a taxicab as a shop?' Belli presented his case to the Cleveland convention that year, and NACCA granted admittance to tort lawyers.").

103. See *id.* at 22-23.

104. See WITT, *supra* note 1, at 213-14.

105. *Id.* at 214-15.

106. *Id.* at 248.

introduction Pound wrote to Belli's *Modern Trials*.¹⁰⁷ In addition, he draws an inference of collaboration from both men's opposition to automobile no-fault plans and from the high esteem in which Pound held trial lawyers.¹⁰⁸

The available evidence, however, does not establish that Belli and Pound ever worked together, at least in the sense of active and systematic cooperation, in a grand campaign of any sort, or that Belli even approximated being a significant figure in Pound's life during the ex-dean's twilight years. Indeed, Pound had only a slight connection with NACCA while Belli served as its President beginning in 1951, a period during which the King assumed the role of the Association's spokesperson and Horovitz was earnestly wooing Pound.¹⁰⁹ Moreover, during the Dean's tenure as an NACCA employee from 1953-1955, Belli was no longer an influential figure within the organization. The King's major contacts with the Dean came later and were for the purpose of furthering the San Francisco attorney's personal agenda.

Pound, the great networker, maintained copious correspondence with a great many people throughout his long life.¹¹⁰ The mere fact that he was in touch with Belli places the King in Pound's network but does not prove the existence of any sort of joint venture. Moreover, one would expect that if they were working together, as Witt alleges, their epistles would at some point, and to some degree, refer to their joint effort or, at the very least, suggest an exchange of ideas about their project. They do not.

What the correspondence does reveal, however, is a persistent Belli making every effort to exploit Pound. Witt does mention Belli's efforts to obtain Pound's opinions on briefs that Belli was submitting to courts on behalf of clients,¹¹¹ but there was much more. Belli convinced Pound to serve on a Selection Advisory Board for an annual *Tort and Medical Yearbook* he was co-editing.¹¹² He tried, unsuccessfully, to secure Pound's presence at his famous Seminars, which were nonstop, around-the-clock educational programs staged prior to NACCA's annual conventions—precursors to 1960's anti-war teach-ins—over which the San Francisco attorney presided like a ringmaster.¹¹³ He requested that Pound give him

107. See BELL, 1 MODERN TRIALS, *supra* note 90, at XI-XVII.

108. See WITT, *supra* note 1, at 252-53, 258-59.

109. See WITT, *supra* note 1, at 242-47.

110. See *supra* note 42 and accompanying text.

111. See WITT, *supra* note 1, at 250.

112. 1 TORT AND MEDICAL YEARBOOK vii (Albert Averbach & Melvin M. Belli eds., 1961).

113. See SHAW, *supra* note 17, at 51-52. The proceedings of the Belli Seminars were published in annual volumes. See, e.g., TRIAL AND TORT TRENDS: 1962 BELLI SEMINAR (Melvin M. Belli ed., 1963). On the testy relationship between the Belli Seminars and NACCA, see JACOBSON & WHITE, *supra* note 10, at 74 (showing

contacts that he might use during trips abroad.¹¹⁴ He even went so far as to ask Pound whether he could write the Dean's biography—Pound demurred.¹¹⁵

Belli's greatest success with Pound came when the latter agreed not only to read and comment on the proofs of Belli's *Modern Trials* but also to write an introduction to the multivolume set.¹¹⁶ Witt unaccountably elevates this into a partnership.¹¹⁷ The Dean's generous introduction to the book delighted Belli,¹¹⁸ but what Pound wrote was as much an indication of a working alliance with the King as the introduction that actor Errol Flynn wrote for *Belli Looks at Life and Law in Japan*.¹¹⁹

Indeed, in a sense Belli treated Pound as a jewel in the necklace of famous people whose acquaintances he cultivated. He was an unabashed celebrity hound, who eagerly surrounded himself with notable, as well as notorious, figures to promote his own importance and uniqueness.¹²⁰ The ability to boast of his association with Pound provided merely a heaping portion of the fodder that his ego required.¹²¹ A telling argument against a

concern that the seminars were a "showcase for Belli's huge ego" and damaging to the reputation of the plaintiffs' bar).

114. Letter from Melvin M. Belli to Roscoe Pound (July 27, 1955), Pound Papers, *supra* note 65, at Reel 48, Frame 628.

115. Letter from Melvin M. Belli to Roscoe Pound (June 27, 1957), Pound Papers, *supra* note 65, at Reel 48, Frame 620-21; Letter from Roscoe Pound to Melvin M. Belli (July 3, 1957), Pound Papers, *supra* note 65, at Reel 48, Frame 618-19.

116. See BELLI, 1 MODERN TRIALS, *supra* note 90, at IX.

117. WITT, *supra* note 1, at 263.

118. See BELLI, *supra* note 17, at 150.

119. MELVIN M. BELLI & DANNY R. JONES, BELLI LOOKS AT LIFE AND LAW IN JAPAN 8 (1960). Belli claimed that Supreme Court Justice William O. Douglas had agreed to write an introduction to the second edition of *Modern Trials*, but ill health prevented him from doing it. BELLI, 1 MODERN TRIALS, *supra* note 90, at IX.

120. Belli counted among his clients and acquaintances the author Alex Haley; mobster Mickey Cohen; Hollywood stars Errol Flynn, Mae West, and Lana Turner; topless-dance pioneer Carol Doda; the Rolling Stones; comedian Lenny Bruce; and stuntman Evel Knievel. See SHAW, *supra* note 17, at xiii, xiv.

121. See BELLI, *supra* note 17, at 133, 182 (mentioning twice that Pound liked him). The following epistolary passage gives a taste of the Belli ego: "[W]e're thrashing about for a writer for my biography, Erskine Caldwell may do it, Tony Curtis will do the picture, etc. so there should be enough glamour and incidentally food in the closet to keep me fatter than a blubberized seal." Letter from Melvin M. Belli to Author (June 13, 1963) (on file with author).

Pound-Belli collaboration is the absence of any mention of it by Belli.¹²² One would expect that if the King truly had been working with the Dean to preserve the integrity of the tort system against encroachment by administrative agencies, he would have trumpeted this to the world.

Belli's own published description of his interaction with Pound is surprisingly cursory. In his autobiography he wrote,

We'd met through NACCA, I'd spoken to his students at Harvard (including Ralph Nader) and he liked me so much that when he came to San Francisco for a meeting of the American Bar Association he didn't want to stay in the convention hotel, he wanted to remain with me, so he could meet some real people.¹²³

In fact, Belli first came into contact with Pound in 1951,¹²⁴ the stay at Belli's apartment happened in 1962,¹²⁵ when Belli's relationship with NACCA had to some degree soured;¹²⁶ and he gave the speech at Harvard Law School in 1957.¹²⁷

A look at the available evidence compels the conclusion that Belli and Pound never worked together to defend the tort system against incursions

122. The only mention of Pound in an admiring 1955 biography of Belli is a reference to the introduction he wrote for *Modern Trials*. WALLACE, *supra* note 17, at 80.

123. See BELLI, *supra* note 17, at 182.

124. See *id.* at 133.

125. See *id.* at 181, 182. Despite Witt's veiled suggestion to the contrary ("Belli loved to regale visitors with stories of how Pound . . . preferred to stay at . . . Belli's baroquely adorned apartments on Telegraph Hill rather than at San Francisco hotels . . ."), this seems to have been the only time Pound set foot in Belli's residence. WITT, *supra* note 1, at 212.

126. Belli describes various encounters with Pound in Boston and one visit he made to Pound's home in Cambridge, after the incident in the bedroom in San Francisco. See BELLI, *supra* note 17, at 182-83. Pound's home was in Watertown, not Cambridge, and the San Francisco incident occurred in 1962, not long before Pound's death. *Id.* This undermines the accuracy of Belli's chronology and casts doubt on the details he furnished about his personal contacts with Pound.

127. See Letter from Melvin M. Belli to Mr. and Mrs. Roscoe Pound (Nov. 13, 1957), Pound Papers, *supra* note 65, at Reel 48, Frame 625 (being ever-provocative, Belli entitled his talk, which Pound did not attend, "The Genteel Art of Ambulance Chasing—as Practiced by Insurance Companies"). A reporter for the *Harvard Law Record*, the student newspaper of which the Author was serving as president at the time, covered the talk. Apparently the story he wrote displeased Belli, who mailed him a small package with a tubular container inside. When its top was unscrewed, the rubber replica of a middle finger popped out. Nader, in attendance at Harvard Law from 1955 to 1958, was never a student of Pound's.

by the administrative state. However, this does not necessarily mean that they did not independently pursue that end.

There is nothing to suggest that during Belli's term as president of NACCA opposition to alternative compensation schemes for auto accidents was a priority item for him. Clearly, his major concern was to attract attention to NACCA so that the Association might increase its size. He constantly spread his message about the *adequate award* and the need for the plaintiffs' trial bar to educate its members and provide them with skills training.¹²⁸ But, most importantly, his leadership served to keep him in the spotlight at center stage.

Thus, the relationship between Belli and Pound, for the most part, involved attempts by the King to take advantage of the Dean and occasional efforts by the Dean to resist. In context, Belli's contacts with Pound were but minor episodes in the trial lawyer's colorful career. The available evidence establishes beyond cavil that the Dean and the King did not engage in any kind of collaboration. There remains for consideration whether Pound and the tort-plaintiffs' trial bar worked together against the spread of administrative governance once the Dean began his association with NACCA.

III. POUND AND NACCA

This Article will argue next that NACCA never shared Pound's fierce opposition to bureaucracy unchecked by the rule of law. During the period of the NACCA-Pound relationship, the organization did take a stand against the adoption of alternative compensation plans for traffic-accident victims, and occasionally Pound added his criticisms,¹²⁹ but he was contributing to a relatively minor item on the NACCA agenda at this point in time, mostly because these no-fault initiatives were more in the nature of general ideas than specific legislative proposals carrying realistic possibilities of enactment. What the Dean and the Association did derive from their decade-long dalliance was mainly psychological and inspirational, with NACCA benefiting from the prestige enjoyed by the iconic jurist (and possibly from the progressive aspects of sociological jurisprudence) and Pound gaining a measure of adulation in the waning years of his lengthy, extraordinary life.

128. See MELVIN M. BELLI, "READY FOR THE PLAINTIFF!" A STORY OF PERSONAL INJURY LAW 64 (1956) [hereinafter BELLI, "READY FOR THE PLAINTIFF!"].

129. See TRIAL AND TORT TRENDS THROUGH 1954 (1954 NACCA BOSTON CONVENTION PROCEEDINGS) 364 (Melvin M. Belli ed., 1955).

A. *The Dean and the Plaintiffs' Trial Bar at Mid-Century*

This section begins with a look at four aspects of Pound's thought in the period just before NACCA hired him: (1) his increasingly conservative political outlook; (2) his intransigent antipathy toward the administrative state; (3) his rejection of the spread of tort liability not based on fault; and (4) his view of the legal profession as a bulwark against attacks on the rule of law. This section compares each of them with the corresponding policies promoted and positions taken by the plaintiffs' trial bar to demonstrate that they were far from a perfect match.

1. Resisting the "Red Menace"

In 1950, marshalling his mastery of legal history and jurisprudence as well as his skill at turning a phrase, Pound fulminated forcefully and frequently against the excesses of what he called the *service state*—the expression he coined for what others commonly referred to as the welfare state.¹³⁰ The *service state*, according to his definition, rejected the notion that the only legitimate role of government was to provide physical security for its citizens and settle disputes between or among them by applying norms of justice.¹³¹ Instead, it took as its mission the recognition and enforcement of the rights of its citizens to economic security as well as to improvements in the quality of their lives.¹³²

Speaking on the topic before various audiences and publishing his talks in articles and a book that made essentially the same points over and over again, he insisted that he was not against a government's provision of some public services.¹³³ Instead, Pound was warning against the danger that once

130. For Pound's explanation of why he used the term *service state* instead of *welfare state*, see ROSCOE POUND, *NEW PATHS OF THE LAW* 52 (1950) [hereinafter POUND, *NEW PATHS*] ("The term welfare state seems to me a boast. Governments have always held that they were set up to promote and conserve public welfare. . . . But when it comes to the question how the . . . general welfare is to be achieved, they have differed and do differ profoundly.").

131. *Id.*

132. See, e.g., Roscoe Pound, *Law in the Service State: Freedom versus Equality*, 36 A.B.A. J. 977, 977-78 (1950) [hereinafter Pound, *Service State*].

133. Pound first presented these views in a series of lectures he delivered in Calcutta in 1948, but not published in book form in the U.S. for a decade. See ROSCOE POUND, *THE IDEAL ELEMENT IN LAW* (2002) [hereinafter POUND, *IDEAL ELEMENT*]. He incorporated them in a lecture he gave at the New York County Lawyers Association on Feb. 7, 1950. See *Pound Denounces a Welfare State*, N.Y. TIMES, Feb. 8, 1950, at 29. For the text of his talk, see Roscoe Pound, *New Theories of Liability—Part I*, 7 B. BULL. N.Y. COUNTY LAW. ASS'N 5 (1950) [hereinafter Pound, *Liability—Part I*] and Roscoe Pound, *New Theories of*

a state had embarked on this type of humanitarian path, even with the best of intentions, unless held in check it would inevitably end up going to the extreme of trying to "abate all economic and social ills and alleviate all individual distress through its administrative activities."¹³⁴ This path would inevitably lead to an insistence that only the government could and should perform all public services, which in turn would necessitate an embrace of some form of totalitarianism, with the Soviet Union representing the service state at its logical extreme.¹³⁵

This was not the first time that Pound had invoked the threat of Communism to support positions he had taken. His distaste for legal realism and his mounting opposition to the New Deal had led him to engage in unseemly "red-baiting" in 1938, when he chaired an ABA committee charged with proposing reforms in administrative procedure.¹³⁶ This is where he wrote a report that, *inter alia*, accused certain unidentified elements within the legal academy of promoting the Marxian idea of "administrative absolutism"—a notion that tracked the Soviet concept of law.¹³⁷

Thus, it is not surprising that in the early years of the postwar era, Pound's political views swiftly segued into a particularly virulent strain of anti-Communism that surfaced in his lectures and writings. The defeat of the Chinese Nationalist regime by the forces of Mao Zedong left him severely troubled, and he would develop links to an organization that had close ties to the ultra-right-wing John Birch Society.¹³⁸ In addition, he

Liability—Part II, 8 B. BULL. N.Y. COUNTY LAW. ASS'N 32 (1950) [hereinafter Pound *Liability—Part II*]. He spoke on the same subject at a luncheon of the Los Angeles Bar Association on March 16, 1952. See *Pound Criticizes Opinion on Public Paying Losses*, L.A. TIMES, Mar. 17, 1950, at A2. In September, he gave basically the same talk at a meeting of the Section of Insurance Law of the American Bar Association in Washington, D.C. See Pound, *Service State*, *supra* note 132.

134. See Pound, *Service State*, *supra* note 132, at 977.

135. See POUND, *NEW PATHS*, *supra* note 130, at 54 ("The service state has Marxian Socialism and absolute government in its pedigree and has grown up along with the totalitarian state in other parts of the world."). The French were well on their way toward it. See Pound, *Service State*, *supra* note 132, at 1051-52. Idealistic proponents of a world constitution were embracing it. See *id.* at 979.

136. See *Report of the Special Committee on Administrative Law*, 63 A.B.A. ANN. REP. 331, 339-40, 343 (1938).

137. Pound's intemperance encouraged others similarly situated on the political spectrum to resort to inflammatory language in their attacks on the New Deal. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1590-93 (1996).

138. See WIGDOR, *supra* note 13, at 277-78; WITT, *supra* note 1, at 233.

firmly supported loyalty-oath requirements for teachers.¹³⁹ His attitude reflected one side of the deep political divide that existed in the U.S. at this time: the Cold War was heating up, a climate of fear and recrimination was intensifying, and internal security issues were dominating the national discourse.¹⁴⁰

NACCA, though strictly nonpartisan in outlook, could not escape the political turmoil of the day, and its membership, to a certain extent, mirrored the country's ideological divide.¹⁴¹ Trial lawyers from the North and the West tended to be liberal, while prominent members of the southern contingent within the Association held extremely conservative views.¹⁴² At NACCA's 1952 convention, the latter tried to secure the enactment of a membership requirement that would have mandated the swearing of a loyalty oath to the U.S., a move designed to purge the organization of liberal and left-wing individuals.¹⁴³ The narrow defeat of the motion prevented a rupture that probably would have destroyed NACCA.¹⁴⁴ Pound's political views tracked those of the unsuccessful purgers.¹⁴⁵

2. Resisting the Administrative State

Pound's newly developed negative attitude toward administrative regulation fit snugly into his broadside against the service state because, to exercise the responsibilities that the latter imposed, the government would need to utilize agencies that would carry out their work with broad

139. See WIGDOR, *supra* note 13, at 278. Following Pound's logic, the requirement should also have applied to teachers of law, as it did in the State of Colorado, where the Author taught from 1964-1968. See generally JEROLD AUERBACH, *UNEQUAL JUSTICE* 238-40 (1976) (providing more on the loyalty-oath controversy that raged within the organized bar at this time).

140. See WITT, *supra* note 1, at 232-33.

141. JACOBSON & WHITE, *supra* note 10, at 65-66.

142. Indeed, several of the attorneys that Horovitz recruited in the process of founding NACCA had ties to the far left. See JACOBSON & WHITE, *supra* note 10, at 8-9. One individual represented the radical International Workers of the World, while another served as chairman on the Progressive Party. *Id.* at 8. The co-founder, Benjamin Marcus, solicited attorneys belonging to the Workmen's Compensation Committee of the leftwing National Lawyers Guild for NACCA membership. *Id.* Civil-rights advocates within the Association would later be subjected to "red-baiting" by the conservative southern members of the organization. *Id.* at 65-66, 168-69.

143. *Id.* at 65-66.

144. *Id.* at 66.

145. See White, *supra* note 5, at 626-27.

discretionary authority.¹⁴⁶ Yet he did not always clearly distinguish between agencies as rule makers and agencies as adjudicators, with the latter performing judicial functions and the former exercising de facto legislative authority.¹⁴⁷ Moreover, there was a certain ambivalence to his thinking: he seemed to accept the need, in principle, for the so-called fourth branch of government as an institution that could perform some adjudicative and rulemaking functions that had formerly fallen within the province of the judiciary and the legislature.¹⁴⁸ Yet his insistence on strict procedural safeguards and judicial oversight threatened the viability of the administrative process.¹⁴⁹

Pound made his most direct and acerbic assault on the administrative state when he authored an ABA report¹⁵⁰ that targeted shortcomings in administrative regulation and adjudication.¹⁵¹ His vast prestige provided an authoritative air to the document; however, its substance, as well as the intemperate language he used, drew sharp criticism from leading scholars¹⁵² to the detriment of his academic standing.¹⁵³

146. See Pound, *Service State*, *supra* note 132, at 979 (stating that the *service state* would operate “through bureaus with wide powers and little practical restriction on their powers”). The *service state* differed from the administrative state in that the latter would not necessarily incorporate the goal of satisfying the wants and needs of every citizen. *Id.*

147. As a contemporary illustration that demonstrates the distinction, the Occupational Safety and Health Administration (OSHA), which is part of the Department of Labor, has authority to set safety and health standards that have the force of law, while the independent Occupational Safety and Health Review Commission has authority to adjudicate disputed claims that an employer violated an OSHA standard. See generally MARK A. ROTHSTEIN, *OCCUPATIONAL SAFETY AND HEALTH LAW* §§ 14.1-14.37, 16.1-18.14 (2009).

148. See ROSCOE POUND, *ADMINISTRATIVE LAW: ITS GROWTH PROCEDURE AND SIGNIFICANCE* 26 (1942) [hereinafter POUND, *ADMINISTRATIVE LAW*].

149. See WIGDOR, *supra* note 13, at 268-69.

150. Roscoe Pound et al., *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331 (1938).

151. See *supra* note 138 and accompanying text. One scholar attributed the ABA’s attitude to (1) ideological or political resistance to the New Deal; (2) a desire on the part of “establishment” lawyers to protect the interests of corporate clients whose interests were being threatened; or (3) a reluctance of attorneys accustomed to working within the judicial process to change the way they practiced law. See Shepherd, *supra* note 137, at 1571-72. It is also conceivable that, to a certain extent, some, including Pound, may have harbored principled objections to what they sincerely believed were excesses that had begun to taint the administrative process.

152. See Kenneth Culp Davis, *Dean Pound and Administrative Law*, 42 COLUM. L. REV. 89 (1942) (presenting a withering attack on Pound’s reasoning in the 1938

Pound's criticisms in the past had focused on aspects such as the holding of hearings without adequate notice to interested parties, the tendency of agencies to make rulings of law that favored their own parochial interests, and the susceptibility of administrators to political pressure.¹⁵⁴ But by mid-century, he appeared to stress the point that the removal of restraints on the exercise of administrative discretion formed a necessary and inevitable element of the service state in its extreme form.¹⁵⁵ This put him in firm opposition to the spread of delegations of legal authority to administrators.

NACCA, on the other hand, operated on a purely practical level. The organization had come into being as a bar association of attorneys who represented injured workers and their families in claims before administrative tribunals and hence had been participating in a process that had been part of the administrative state for decades.¹⁵⁶ The criticisms they now raised were against flaws in the system, not against the system itself.¹⁵⁷ There was a marked disconnect between (1) Pound's opposition to bureaucratic rulemaking and adjudication insufficiently checked by the rule of law and (2) NACCA's movement against workers compensation: the latter focused more on judicial interpretations of the language of the compensation statutes, and on flaws in the statutory structure of the system, rather than on shortcomings in the administration of compensation

ABA report); see also Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 221-23 (1986); Louis Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1232-36 (1939). Pound never deigned to respond to the specific criticisms leveled against him.

153. The author of a biographical note on Pound claims that the Dean had already lost his scholarly standing by 1936. See White, *supra* note 5, at 627.

154. For a summary of criticisms he made in 1938, see WITT, *supra* note 1, at 232 (discussing administrative hearings often held without notice to interested parties; agencies made legal determinations in favor of their own interests; they at times yielded to political pressures). For a point-by-point refutation of these criticisms, see Davis, *supra* note 152.

155. See WITT, *supra* note 1, at 232-33. See generally Pound, *Service State*, *supra* note 132.

156. See JACOBSON & WHITE, *supra* note 10, at 10, 23. At the beginning of the twentieth century, when the common law was providing inadequate relief for losses due to on-the-job injuries, workers compensation had begun to replace tort law by becoming the exclusive remedy of employees against employers for harms attributable to work-connected accidents. For an excellent account of the rise of workers compensation in the U.S., see JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC* (2004).

157. See, e.g., JACOBSON & WHITE, *supra* note 10, at 15.

claims.¹⁵⁸ For example, NACCA stalwarts often took to task judges in whose minds the notion of fault as the basis for legal liability in accident law had been deeply ingrained for often interpreting the statutes through an outmoded prism.¹⁵⁹ Statutory benefit schedules were faulted for lagging behind increases in the cost of living.¹⁶⁰

NACCA's response, therefore, was unabashedly reformist. Horovitz and his allies sought to fix what needed repair.¹⁶¹ They did not call for the repeal of workers-compensation laws, which would have reinstated the tort system as the sole provider of legal remedies for work-accident claims on the basis of fault with common-law defenses available to employers and full damages recoverable by injured workers or their families.¹⁶² Instead, the furthest they would venture was to propose that workers compensation no longer be the exclusive remedy and that workers enjoy the best of both worlds—the right to collect fixed benefits under the workers-compensation statutes without having to prove fault and the right to sue employers for full tort damages.¹⁶³

158. Compare Pound, *Service State*, *supra* note 132, at 981 (Pound being concerned with upholding the law), with JACOBSON & WHITE, *supra* note 10, at 15 (NACCA striving to change the statutes and interpretations). Some NACCA members did criticize the way administrative tribunals were deciding workers-compensation cases. For example, former U.S. Congressman Maury Maverick of Texas advocated jury trials *de novo* as part of the appeals process in compensation cases and called nonjudicial adjudicators “administrative Hitlers.” See Fontaine Maury Maverick, *Matters of General Interest*, 2 NACCA L.J. 171, 215 (1948).

159. See, e.g., Samuel B. Horovitz, *The Litigious Phrase: “Arising out of” Employment*, 3 NACCA L.J. 15, 29-30 (1949) (“Care must be exercised lest long judicial habits in tort cases allow judicial thought and opinion in compensation cases be too much influenced by outmoded or modified factors of decision.”).

160. See, e.g., National Association of Claimants Compensation Attorneys, *Legislation*, 1 NACCA L.J. 114, 114 (1948) (urging Association members to strive to increase “weekly [compensation] payments to subsistence levels”). For other legislative changes advocated by NACCA, see *id.* at 115 (discussing the extension of workers-compensation coverage to include agricultural workers) and W. E. Brobston et al., *Reports from Across the Nation*, 1 NACCA L.J. 83, 87 (advocating an increase in the number of workers-compensation administrative adjudicators in the State of Indiana).

161. See Samuel B. Horovitz, *The Am. Bar Ass'n Resolution to Abolish the F.E.L.A. and the Jones Act*, 5 NACCA L.J. 11 (1950).

162. *Id.* at 16.

163. *Id.* at 16-17. See Benjamin Marcus, *Advocating the Rights of the Injured*, in OCCUPATIONAL DISABILITY AND PUBLIC POLICY 77, 86-90 (Earl F. Cheit & Margaret S. Gordon eds., 1963) (arguing for eliminating exclusivity clauses in workers-compensation statutes so that workers might maintain their tort remedy against employers).

3. Resisting Strict Tort Liability

Pound's conservatism produced more than an intensified attack on the administrative state. In the same series of speeches and writings, he also took aim at the notion that the imposition of enterprise liability rather than the rendering of fault-based judgments should be the goal of tort law.¹⁶⁴ In so doing, he seemed to express views that ran counter to the interests of the constituency of his employers-to-be at NACCA.

As an example of how tort law might be contributing to forces that were pushing the Country toward totalitarianism, Pound reached into the past and rallied against California Supreme Court Justice Roger Traynor's 1944 concurring opinion in *Escola v. Coca Cola Bottling Co.*,¹⁶⁵ which urged the judicial imposition of absolute liability on manufacturers in tort suits by consumers injured by defective products.¹⁶⁶

In *Escola*, the court had applied the doctrine of *res ipsa loquitur* in an exploding-bottle case and allowed a jury to infer the defendant's negligence from the mere happening of the accident.¹⁶⁷ Justice Traynor's concurrence argued that it would make more sense and reflect a more sound policy to make the seller of a defective product liable without proof of fault, and thereby force the cost of accidents caused by flawed products to become a business expense.¹⁶⁸ One of his reasons was that sellers could more easily distribute losses among purchasers as a group by adjusting prices to reflect potential liability.¹⁶⁹

Pound found the notion of loss-spreading to be abhorrent in principle (he called it the "involuntary Good Samaritan theory"¹⁷⁰ and "Marxian"¹⁷¹)

164. See POUND, IDEAL ELEMENT, *supra* note 133, at 328-29.

165. 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring).

166. *Id.* at 440. Justice Traynor used the term *absolute liability*, but because liability in his view should extend only to harm caused by defective products, what he really meant was strict liability. *Id.* at 440-44.

167. *Id.* at 437-40 (majority opinion). There might have been a defect in the bottle when it came into the defendant's possession. *Id.* at 440. If the exercise of due care by the defendant could not have discovered the flaw, the doctrine of *res ipsa loquitur* would not apply. *Id.* at 438-39. The majority circumvented this difficulty by accepting testimony that the defendant had at its disposal a test that would have detected virtually any defect. *Id.* at 440. *But see* Mark Geistfeld, *Escola v. Coca Cola Bottling Co.: Strict Products Liability Unbound*, in TORT STORIES 229, 233-34 (Robert L. Rabin & Stephen D. Sugarman eds., 2003) (criticizing the *Escola* court's reasoning).

168. *Escola*, 150 P.2d at 441 (Traynor, J., concurring).

169. *Id.*

170. POUND, IDEAL ELEMENT, *supra* note 133, at 323-24.

and unworkable as a practical matter. He argued that in the full-blown service state, competing administrative agencies would be setting wages and prices and would not be able to work together to make the cost of products properly absorb accident costs inflicted by defective goods.¹⁷² The latter was a very curious and weak argument because it did not take into account the possibility that effective and efficient loss distribution through the mechanism of strict liability might not require pervasive wage and price controls but instead might flow from market incentives created by strict liability.

Pound's strictures against product-seller liability without fault created a problem for him because they might equally apply to the workers-compensation system, which also imposed liability without proof of negligence.¹⁷³ In attempting to explain away this contradiction, Pound

171. Pound, *Liability—Part II*, *supra* note 133, at 35; see Pound, *Service State*, *supra* note 132, at 1050; POUND, *IDEAL ELEMENT*, *supra* note 133, at 334 (comparing the holding in *Escola* to section 406 of the Soviet Civil Code).

172. Pound, *Service State*, *supra* note 132, at 981.

173. Indeed, he would soon suggest that workers compensation derived from legislation based on a version of his "involuntary Good Samaritan" theory. See Roscoe Pound, *The Rule of Law and the Modern Social Welfare State*, 7 VAND. L. REV. 1, 14 (1953).

Pound had never paid much attention to workers compensation. But when the New York Court of Appeals declared the unconstitutionality of a newly enacted state workers-compensation law (*Ives v. South Buffalo Ry. Co.*, 94 N.E. 431, 448 (N.Y. 1911)), he had criticized the opinion as based on reasoning that treated judicial doctrine as immutable dogma. See Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence (III)*, 25 HARV. L. REV. 489, 511-12 n.89 (1912); see also Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence (I)*, 24 HARV. L. REV. 591, 602-03 n.42 (1911) (calling contemporary judicial approach "a formidable obstacle to both social legislation and law reform" when referencing the unnamed decision of the New York Court of Appeals dealing with the state Employer's Liability Act).

Pound was wearing his "sociological-jurisprudence hat" when he voiced his disapproval of the *Ives* opinion. As he began to examine the administrative process with a critical eye, he used the example of an unnamed and unsourced New York commission decision granting a compensation claim based on a worker's allegation that a block of ice had fallen on him, despite evidence that he had spent the entire day in a saloon. See Pound, *Administrative Justice*, *supra* note 12, at 336. His point was that even though the New York Court of Appeals had overturned the decision of the Commission, its opinion actually facilitated the awarding of dubious claims because it seemed to endorse income redistribution as a goal of workers compensation. *Id.* at 336-37. He offered no citations or elaboration. *Id.* In fact, the court of appeals made no mention of decedent's supposed day in the saloon. See *Carroll v. Knickerbocker Ice Co.*, 113 N.E. 507 (N.Y. 1916). The decision

made a dubious analogy to the common law's imposition of strict liability on persons who brought on their land instrumentalities likely to cause harm if they escaped.¹⁷⁴ He was not, however, suggesting that courts should (or might) create a common-law form of strict liability that might be imposed on employers for the benefit of injured workers.¹⁷⁵ Moreover, he seemed to think that victims hurt by product flaws could recover from negligent manufacturers under *res ipsa loquitur* and attributed all other harm caused by products to the vicissitudes of life, an assumption that ignored the possibility that victims might not be able to prove negligence in every situation where a manufacturer's lack of due care put a defective product into the stream of commerce and that manufacturers might be profiting from the sale of goods whose price did not internalize accident costs.¹⁷⁶ Then, in a curious paragraph, he noted that workers compensation was much more limited than strict products liability because it covered only work-related injuries; but he offered what appeared to be a cautionary observation that administrative agencies and courts had begun to award workers-compensation recoveries in cases where employee fault was the sole cause of the accident.¹⁷⁷ Likewise, in a disapproving tone, he observed that "projects are now being urged to turn over the whole subject of traffic accidents in [sic] the highways to an administrative board to be dealt with on the analogy to workmen's compensation."¹⁷⁸

While Pound was expressing his dislike of enterprise liability, NACCA was ignoring it. Attorneys who represented injured workers still predominated its membership rolls.¹⁷⁹ Their concerns focused on preserving tort-like statutory remedies for railroad employees and seamen,

turned on a point of evidence, and a fair reading of the majority opinion gives no indication of a hidden agenda to redistribute income. *See id.* at 508-09.

174. *See* POUND, *NEW PATHS*, *supra* note 130, at 33. The control exerted by the importer of dangerous instrumentalities, like the control exercised by an employer over a workplace, was sufficient in Pound's eyes to satisfy an attenuated concept of fault and would provide a moral justification for imposing strict liability. *Id.* But he was not able to offer an adequate explanation why a manufacturer's control over the process of production could not similarly justify holding the latter strictly liable for harm caused by defects in his goods.

175. *See id.*

176. Moreover, he also seemed to ignore the fact that loss distribution was an accepted rationale for workers compensation. *See* DOBBS, *supra* note 52, § 392, at 1098 ("Workers' compensation plans reflect the clearest expression of the enterprise liability ideas—that enterprise should bear the costs it systematically produces, including the costs of injur[ies].").

177. Pound, *Liability—Part II*, *supra* note 133, at 35.

178. *Id.* at 35-36.

179. *See* Jameson, *supra* note 93, at 57.

who could recover full compensatory damages on proof of negligence on the part of their employers, and on improving workers-compensation statutes in ways that benefited injured workers.¹⁸⁰ The personal-injury lawyers whom Belli had begun to attract into the organization were mainly interested in learning about and developing practical skills that would enable them to establish negligence on the part of defendants and to maximize the damage awards that they might recover. Indeed, Belli himself had argued *Escola* on the plaintiff's behalf, and in so doing, he never raised the issue of strict liability as a possible theory of recovery.¹⁸¹ Nor does it appear that Pound's denunciations of Justice Traynor's concurrence ever seemed to bother Belli.

Thus, on the dawn of his association with NACCA, Pound was extremely conservative in his political outlook, which would have put him at odds with some of the organization's members. He was opposed to the spread of strict liability in tort, a doctrine that promoted the interests of the accident victims represented by NACCA attorneys. His views on workers compensation were somewhat inconclusive. And he was alarmed about proposals to deal with highway accidents under administrative plans similar to the existing system for handling workplace accidents and illnesses.

None of his divergences with positions espoused by NACCA gave the Association even momentary pause when the opportunity to hire him arose. Indeed, one year before his hiring, the *NACCA Law Journal* had published the text of a lecture that Pound had delivered at the previous NACCA Convention and that reiterated his attack on the service state, a critique that included his firm rejection of strict tort liability.¹⁸² Perhaps the substance of his thinking, to the extent that it was known or appreciated, was totally

180. See Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (2006) (stating remedies that railroad workers could assert against employers for negligently inflicted injuries). Maritime workers had a substantially similar remedy under the Jones Act, 46 U.S.C. § 688 (1982) (current version at 46 U.S.C. § 30104 (2006)). NACCA resisted efforts to make these statutes similar to workers-compensation laws. See Abraham E. Freedman, *Recent Trends in the Controversy over the Extension of Workmen's Compensation into Maritime and Railroad Fields*, 4 NACCA L.J. 229 (1949).

181. See Geistfeld, *supra* note 167, at 230.

182. See Roscoe Pound, *The Development of Legal Liability*, 10 NACCA L.J. 186, 201-03 (1952) [hereinafter Pound, *Legal Liability*]. This was part of a series of lectures delivered by academics and sponsored by NACCA and its Journal. See *Lectureships*, 15 NACCA L.J. 20 (1955). In addition to Pound, participants included Professor Mark DeWolfe Howe of the Harvard Law School, Professor Fleming James, Jr., of the Yale Law School, Professor Stefan A. Riesenfeld of the University of Minnesota Law School, and Professor Arthur Larson of the Cornell Law School. *Id.*

irrelevant to the decision of the tort-plaintiffs' trial bar to appoint him Editor-in-Chief of its journal. Indeed, the *NACCA Law Journal* announcing the Dean's appointment contained the text of another of his lectures that he had delivered to an NACCA group and that repeated his disapproval of strict tort liability in products cases, but in somewhat toned-down language.¹⁸³

4. The Legal Profession as an Ally

There was, however, a particular aspect of Pound's attack on the *service state* that served one of NACCA's foundational interests. He often expressed the hope that the professional ethics obliging lawyers to serve both the legal system and the general public would line them up in opposition to the trend toward an all-encompassing *service state* because the latter would eventually deprive them of their professional status. He postulated a lofty view of the bar as a body that "does not seek to advance the money-making feature of professional activity. It seeks rather to make as effective as possible its primary character of a public service."¹⁸⁴ This reinforced a view that was evolving within NACCA: that attorneys representing accident victims were providing an essential service to members of the public who had heretofore been at the mercy of rapacious insurance companies as well as unsympathetic courts and administrative agencies.¹⁸⁵ It also motivated Pound to defend the legal profession, including the plaintiffs' trial bar, against attacks by critics.¹⁸⁶

B. NACCA and its Celebrity Editor-in-Chief

During Pound's association with the plaintiffs' trial bar, Harvard's ex-dean spoke out from time to time against the replacement of the tort system with alternative compensation plans, wrote extensively on aspects of personal-injury law, and defended both the civil justice system and plaintiffs' attorneys from harsh attacks.¹⁸⁷ However, this section argues

183. See Roscoe Pound, *Reparation and Prevention in the Law of Today*, 12 NACCA L.J. 197 (1953) (suggesting that a balanced version of strict liability that maintained full compensation for accident victims might be appropriate, although legislation might be needed to bring this about, and reiterating a strong distaste for the notion of loss spreading through price adjustments).

184. POUND, *NEW PATHS*, *supra* note 130, at 63.

185. For an editorial on the subject by Samuel Horovitz, see *NACCA and the Spirit of Public Service*, 9 NACCA L.J. 17 (1952) (citing, with approval, supportive language in a speech that Pound had delivered before an NACCA meeting).

186. See *infra* Part III.B.

187. See *infra* Part III.B.1-5.

that from NACCA's perspective, the most important contribution that Pound made was associational, in that by lending his vast prestige to the fledgling organization he helped it attain a much-needed measure of respectability. Moreover, some of his sociological jurisprudence may have rubbed off and provided inspiration for plaintiffs' lawyers in their efforts to reform tort doctrines judicially.

1. Pound, NACCA, and No-Fault

Serious proposals for automobile no-fault plans to replace the tort system as a mechanism for dealing with the human toll of traffic accidents date back to the so-called Columbia Plan, published in 1932, which would have abolished the need for victims to prove fault to recover damages against motorists who caused highway accidents.¹⁸⁸ The Plan took as its model the workers-compensation system: it would have provided limited benefits based on percentages of medical expenses and wage losses, eliminated awards for pain and suffering, and relied on an administrative tribunal rather than juries to resolve disputes between the parties.¹⁸⁹ The main argument in favor of the Plan was that it would achieve savings in transaction costs, in part by relieving the courts of the administrative burden of handling auto-accident claims, and would thereby result in substantial savings to the public through lower insurance costs.

The Columbia Plan was never able to transform itself into legislative reality, and World War II brought a temporary halt to talk of alternative systems for compensating victims of traffic accidents. But as the postwar era dawned, the concept soon resurfaced, and NACCA unsurprisingly opposed it. The program of the 1960 annual convention was "designed to resist the creation of compensation schemes for automobile injuries,"¹⁹⁰ and Pound was among the speakers who took issue with the idea.¹⁹¹

For Pound, the no-fault system exemplified the expansionist tendencies of the administrative state, an unwarranted intrusion into the realm of judicial adjudication. He saw no-fault as an effort to resolve controversies according to rules rather than principles of law, much as the workers-compensation system operated, and noted that the administration of the latter was a very simple matter.¹⁹² He ignored the possibility that the rules

188. See Young B. Smith, *Compensation for Automobile Accidents: A Symposium*, 32 COLUM. L. REV. 785 (1932).

189. See *id.* at 797, 802.

190. See WITT, *supra* note 1, at 256.

191. See Roscoe Pound, *The Proposal of an Automobile Accident Commission*, NACCA, FOURTEENTH ANNUAL CONVENTION at 34, reprinted in 25 NACCA L.J. 415 (1960) [hereinafter Pound, *Proposal*].

192. See HOROVITZ, *supra* note 52, at 72.

for operating an automobile no-fault plan might actually be simpler than the rules spelled out under workers compensation, and that one of the major criticisms of the latter (by Horovitz and others) stemmed from the legal controversies generated by the designated compensable event as defined by most compensation acts ("personal injury by accident arising out of and in the course of employment").¹⁹³ Moreover, he made no mention of what would be one of NACCA's rally cries against no-fault—the need to preserve trial by jury.¹⁹⁴

For NACCA, workers compensation had proven to be a highly flawed system, and hence furnished a poor model for the compensation of auto-accident victims. Moreover, any limitations on damage awards and the abolition of jury trials in personal-injury cases would have had a substantial impact on the lawyers whom the organization was now recruiting. Hence, NACCA's opposition to proposals for change was not surprising.

Witt claims that "from as early as 1952 at the NACCA's Houston convention, Pound was the organization's leading spokesman on the [no-fault] issue."¹⁹⁵ The Dean, indeed, was the most prestigious figure NACCA could count on in the fight against no-fault. But in terms of the amount of effort he put in and the substance of his contributions, Witt's assertion seems overstated.

First of all, during this period, opposition to no-fault was a relatively minor item on NACCA's agenda; education and information-sharing still took up the major portion of the Association's activities. Horovitz, ever committed to the cause of the injured worker, and still a powerful force within NACCA and maintaining a strong influence over Pound's NACCA-related activity, never embraced resistance to automobile-compensation plans as a high priority for the Association.¹⁹⁶ Moreover, other policy issues besides no-fault consumed NACCA's attention in the 1950s; they involved matters such as proposals to limit the amount of damages recoverable against airlines by the families of victims in international aviation accidents¹⁹⁷ and to regulate contingency fees that personal-injury

193. Much of Horovitz's treatise devotes itself to judicial opinions construing these words. *See id.*

194. Pound once had harsh words for civil juries, which he claimed decided cases "upon emotional and other irrelevant considerations," and he deemed them unsuitable tribunals for commercial cases. POUND, *ADMINISTRATIVE LAW*, *supra* note 148, at 95. This could not have been a judgment that Belli and other plaintiffs' attorneys would have shared.

195. WITT, *supra* note 1, at 255.

196. The subject remained untouched by the *NACCA Law Journal* during his terms as Executive Editor.

197. *See* JACOBSON & WHITE, *supra* note 10, at 52, 143-44.

lawyers could charge their clients.¹⁹⁸ Finally, in his 1952 NACCA Convention speech, Pound made a passing and mildly disapproving reference to proposals for no-fault compensation plans,¹⁹⁹ hardly what one would expect from a leading spokesman. Moreover, at the 1954 Convention, which honored Pound, neither the Dean nor anyone else mentioned no-fault, at least in the public record of the proceedings.²⁰⁰

In addition, the Dean's opposition to proposed automobile-accident compensation plans likely derived, in large part, from his antipathy to the assignment of adjudicative authority to administrative tribunals, which meant expanding the administrative state. But in the 1960s, a new version of auto no-fault had emerged from the work of Professors Robert E. Keeton and Jeffrey O'Connell,²⁰¹ and state no-fault bills based on their plan became a serious possibility. No longer modeled after workers compensation, the Keeton-O'Connell plan utilized compulsory insurance on motor vehicles as a mechanism to provide traffic-accident victims with compensation for medical expenses and wage loss, and the courts rather than administrative bodies would resolve disputes over coverage.²⁰² In addition, the plan applied only to claims up to a maximum limit, with serious injuries remaining within the tort system.²⁰³ Thus, Pound's arguments had little relevance to the new formulation, which completely bypassed the administrative state.

NACCA had to change its strategy against the Keeton-O'Connell plan because its authors also had the foresight to draft legislation ready for introduction into state legislatures. The organization's previous hesitancy to engage in lobbying fell by the wayside, and the trial lawyers adopted a more practical approach that stressed political activism.²⁰⁴ For NACCA, which soon became the American Trial Lawyers Association (ATLA),²⁰⁵ abstract ideas about the administrative state were no longer effective

198. See Ernst W. Bogusch, *Reports and Notes from Everywhere*, 16 NACCA L.J. 460, 479 (1955) (stating that an NACCA official submitted a brief to the Supreme Court of New Jersey in opposition to a proposal to amend the ethics canons to put a maximum limit on contingent fees).

199. See Pound, *Legal Liability*, *supra* note 182, at 197.

200. See TRIAL AND TORT TRENDS (THE 1954 NACCA BOSTON CONVENTION PROCEEDINGS) (Melvin M. Belli ed., 1955).

201. See ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUE PRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

202. See *id.* at 299-340 (incorporating the elements of the plan in the text of a draft bill).

203. *Id.*

204. See FLEMING, *supra* note 81, at 153-54.

205. See JACOBSON & WHITE, *supra* note 10.

weapons (if they ever had been). Its members went to work on the legislative front, first at the state and then at the federal level, in an effort to block automobile no-fault bills.²⁰⁶

Moreover, while Pound set himself against the growth of the administrative state in all its aspects, NACCA's opposition stemmed only from dissatisfaction with the worker-compensation experience, which involved administrative claims resolution and demonstrably inadequate statutory benefits.²⁰⁷ But other aspects of the administrative process did not trouble the Association. In the exercise of standard-setting functions, for example, agencies might promulgate rules whose violations might amount to negligence per se or inferences of negligence and thereby help plaintiffs' attorneys establish breaches of duty in personal-injury cases.²⁰⁸ Hence, the president of ATLA testified in favor of legislation to authorize federal regulation of the design of motor vehicles,²⁰⁹ an initiative that gave rise to the enactment of the National Highway Traffic and Motor Vehicle Safety Act.²¹⁰ A prominent ATLA member served as chairman of the National Commission on Product Safety,²¹¹ an entity created by President Lyndon B. Johnson.²¹² Moreover, in one notable instance, the plaintiffs' trial bar lent

206. *Id.* at 185-201 (discussing ATLA's struggle against proposed no-fault legislation).

207. See Rabin, *supra* note 8, at 298.

208. See generally DOBBS, *supra* note 52, §§ 133-40 (2000).

209. See *Traffic Safety: Hearings Before the Sen. Comm. on Commerce*, 89th Cong., 2d Sess. 359-63 (1966).

210. National Traffic Safety and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563 (1966).

211. See JACOBSON & WHITE, *supra* note 10, at 94 (discussing the appointment of ATLA official Arnold Elkind to chair the Commission).

212. See Pub. L. No. 90-146 (Nov. 17, 1967) (establishing the Commission). The Commission issued a report critical of federal efforts to reduce the frequency and severity of product-related injuries and illnesses and recommended the establishment of an independent Consumer Product Safety Commission with authority to set and enforce mandatory standards. See National Commission on Product Safety, Final Report (June 1970). A representative of ATLA presented the Association's views in support of the proposal at a congressional hearing. See *Consumer Product Safety Act (Part 3), Hearings Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st & 2d Sess. 1310 (1971-72). In 1972, Congress did create such an agency. Pub. L. No. 92-573 § 4 (Oct. 27, 1972). For a comprehensive description of the authority of the new agency, see Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899 (1973).

Curiously, on one occasion the Association remained on the sidelines during the legislative struggle to create an agency that could regulate the risks of

support to legislation that created a new area of administrative adjudication—the enactment of an alternative compensation system giving a single bureaucrat vast and unreviewable authority to award monetary damages to victims of the terrorist attacks on September 11, 2001.²¹³ These steps marked substantial expansions of the administrative state.²¹⁴

Pound's opposition to automobile no-fault did enable him to return to one of his early interests, which the trial lawyers shared with him. In countering the criticism that the civil-justice system was incapable of handling traffic-accident claims, he argued that the solution was not the transfer of adjudicative responsibilities to the administrative branch but rather court reform.²¹⁵ This provided support for efforts to deal with a problem with which members of the plaintiffs' trial bar were fully familiar and could address in a positive way; it became a major issue that the Roscoe Pound-NACCA Foundation would explore in conferences and research projects.²¹⁶

2. Pound and the *NACCA Law Journal*

Upon assuming the post of Editor-in-Chief of the *NACCA Law Journal*, the Dean contributed short essays, editorials, and case comments for three volumes of the publication.²¹⁷ He used the stilted format Horovitz had

occupational accidents and illnesses in a meaningful way, despite the fact that some of its members might have brought considerable expertise to bear on the issue. See JOSEPH A. PAGE & MARY-WIN O'BRIEN, *BITTER WAGES* 154-55 (1972).

213. See David S. Casey, "When the Call Comes, We Answer," *TRIAL*, Oct. 2004, at 66, 68. One wonders what Pound would have thought of this extraordinary delegation. See generally Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 *CLEV. ST. L. REV.* 573 (2001) (discussing the September 11 Victim Compensation Fund).

214. Federal safety standards may prove to be a mixed blessing for both accident victims and the plaintiffs' trial bar, in light of what appears to be a current judicial trend to rule in favor of federal preemption of tort suits so that a defendant's compliance with a federal standard becomes a complete defense to claims that a defendant should have provided a higher level of safety than that mandated by a federal standards. See generally DAVID G. OWEN, *PRODUCTS LIABILITY LAW* § 14.4 (2d ed. 2008).

215. See Pound, *Proposal*, *supra* note 191, at 34, 37-40.

216. See Janet Reilly Hewitt, *The Roscoe Pound-American Trial Lawyers Foundation*, *TRIAL*, July 1980, at 52-54. Like its parent organization, the Foundation has undergone various name changes. It most recently is known as the Pound Civil Justice Institute. See <http://www.poundinstitute.org/>.

217. See, e.g., Roscoe Pound, *Comparative Negligence*, 13 *NACCA L.J.* 195 (1954); Roscoe Pound, *Courts and Legislation*, 14 *NACCA L.J.* 19 (1954); Roscoe Pound, *Comments on Recent Important Workmen's Compensation Cases*, 15

imposed on the *Journal*, which was an extraordinary limitation for a mind with the breadth and depth of Pound's. It is not clear how much editing Pound actually did on parts of the *Journal* that he did not write. A history of the Association claims that he "was no mere figurehead."²¹⁸ However, Horovitz had assumed the post of Executive Editor and continued to exercise substantial control over the publication.²¹⁹ Given the fact that Pound's writings often omitted citations to authority, the inclusion of constant references to the *NACCA Law Journal* in the Dean's case notes suggests the hand of Horovitz at work.

3. Pound As a Champion of the Plaintiffs' Bar

During the Dean's NACCA years, the mass media occasionally published attacks on the civil-justice system in general and plaintiffs' attorneys in particular.²²⁰ Pound came to their defense, most notably in an editorial suggesting that a highly critical *Reader's Digest* article²²¹ be consigned to "its historical setting in the rubbish heaps of libels upon law and lawyers which have been from antiquity."²²²

Given the disparity between the circulations of the *Reader's Digest* and the *NACCA Law Journal*, it is unlikely that the Dean's fulminations had any impact on public opinion. But the mere fact that the legendary Pound had spoken up in favor of the plaintiffs' bar gave the Association and its members something of inestimable value—a psychological boost that shaped the essence of the Dean's relationship with NACCA.

4. What NACCA Took from Pound

When Pound entered into his relationship with the plaintiffs' trial bar, he brought with him the celebrity status he had acquired as a legal scholar, teacher, and dean. Some of it could not help but rub off on his new associates; his mere presence at NACCA events assured the attendance of state supreme court justices and other legal luminaries who had received

NACCA L.J. 450 (1955). In his farewell editorial as Editor-in-Chief, he even repeated his opposition to loss-spreading as a basis for the imposition of strict tort liability. See Roscoe Pound, *Modern Trends in Tort Law*, 16 NACCA L.J. 21, 35-36 (1955).

218. JACOBSON & WHITE, *supra* note 10, at 85.

219. For an account of the political difficulties this eventually produced within the organization, see *id.* at 87-88.

220. See *id.* at 53-56.

221. William L. White, *The Personal Injury Racket*, READER'S DIG., Jan. 1955, at 105.

222. Roscoe Pound, *The Reader's Digest Article*, 15 NACCA L.J. 21 (1955).

invitations to attend.²²³ His name on the masthead of the *NACCA Law Journal* invested it with a gravitas it had never enjoyed. But, more importantly, he made NACCA members feel good about themselves. The majority of them in this period were self-made men (and a handful of intrepid women²²⁴) who had graduated from lower-rung law schools, which many of them had attended in the evening on a part-time basis.²²⁵ They may not have fully understood, nor cared much about, the intricacies of Pound's jurisprudential theories, his encyclopedic references to global legal history, or his concerns about the administrative state, but they (like the Nationalist Chinese before them²²⁶) surely understood the full value of having him on their side.²²⁷

Pound's contributions to NACCA may well have gone beyond the psychological boost that the Association and its rank-and-file gained from his presence within the organization.²²⁸ The Dean's term as Editor-in-Chief preceded a period during which NACCA-affiliated lawyers were in the forefront of a movement that this Author has termed *old tort reform*, which brought about the judicial rejection of pro-defendant doctrines and the adoption of doctrines that favored injured plaintiffs.²²⁹ How much the Dean contributed to this is difficult to determine or measure. For example, an aphorism that he first coined in 1923—"law must be stable but it cannot stand still"²³⁰—animated an editorial he wrote in the *NACCA Law*

223. It also gave members the opportunity to be photographed with him, a practice the author witnessed at the 1960 NACCA Convention.

224. See JACOBSON & WHITE, *supra* note 10, at 174-76 (discussing the pioneering female members of NACCA).

225. Cf. WITT, *supra* note 1, at 249 (characterizing plaintiffs' lawyers as "a traditionally low-status segment of the bar"). The fact that Horovitz had graduated from the Harvard Law School undoubtedly gave him a certain cachet within the organization that he co-founded. See *id.*

226. HULL, *supra* note 16, at 312.

227. BELL, "READY FOR THE PLAINTIFF!," *supra* note 128, 174 (Belli put it well. "As for [NACCA's] respectability, it's about as shady and unsavory as—the Harvard Law School. Indeed, Roscoe Pound, dean emeritus of the Harvard Law School and one of the world's greatest lawyers, is the editor emeritus of the *NACCA Law Journal*.").

228. See WITT, *supra* note 1, at 249 (noting that Pound "barnstormed across the country" where he and the NACCA speakers were met by larger and more prestigious audiences).

229. See Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 654 (1990). For a detailed account of the participation of NACCA/ATLA attorneys in the movement, see JACOBSON & WHITE, *supra* note 10, at 133-162.

230. ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY 1* (Harold D. Hazeltine ed., WM. W. Gaunt & Sons, Inc., 1986) (1923).

Journal on stare decisis.²³¹ It would become a rallying cry for NACCA efforts to convince courts to overrule precedents that prevented injured plaintiffs from prevailing or from recovering adequate awards.²³² The speech he delivered at the 1954 NACCA Boston Convention was a clarion call for progressive change in tort doctrine, as well as in the administration of civil justice, legislative drafting, and statutory interpretation.²³³

Pound's sociological jurisprudence was clearly congenial to the notion that the judiciary should be willing to test tort doctrines against contemporary needs and realities and, if necessary, reshape them through the careful and prudent application of traditional reasoning processes.²³⁴ Consciously or unconsciously, the trial lawyers followed the path that Pound had first cleared.²³⁵ His presence among them may have set a mood or provided inspiration. If so, this would have been a more significant legacy than his dubious contributions to their campaign against automobile no-fault plans.

5. What Pound Took from NACCA

One can only speculate about the reasons for Pound's dalliance with NACCA because he never indicated why he entered into the relationship. Witt's chapter suggests a number of causative factors, all of which seem plausible: they include the Dean's search for allies in his crusade against the growth of the administrative state,²³⁶ his need for an approving audience,²³⁷ and the inadequacy of his academic pension.²³⁸ As this Article has argued, NACCA never really went to the barricades with him in a political effort to resist the growth of the administrative state. During his lifetime, the Association did oppose proposals to substitute a workers-compensation-type model for the existing system of resolving traffic-accident disputes, but this did not reach the level of a real crusade until after the Dean's death, when the contours of an alternative compensation system for auto-accident victims had changed and no longer included administrative adjudication. The need for psychic gratification and

231. See Roscoe Pound, *Some Thoughts About Stare Decisis*, 13 NACCA L.J. 19-20 (1954).

232. See WITT, *supra* note 1, at 245.

233. See Roscoe Pound, *The Task of NACCA*, in TRIAL AND TORT TRENDS, Aug. 1954, at 353. Pound also expressed his reservations about strict tort liability. See *id.* at 361.

234. See *id.* at 357.

235. See JACOBSON & WHITE, *supra* note 10, at 133.

236. See WITT, *supra* note 1, at 252.

237. See *id.* at 248.

238. See *id.* at 247.

financial stability may well have contributed to the Dean's decision to cast his lot with the trial lawyers, and, if so, he surely had these hopes realized.

Several other factors might have contributed to his decision to join forces with NACCA: even though he was remarkably healthy throughout his old age, he found daily life an increasingly difficult struggle and came to depend more and more on Horovitz's constant attention to his needs. The latter's influence over the elderly Pound was surely a critical factor in the odd marriage between the young organization and the elderly Dean. Harvard Law School never lionized Pound, despite his physical presence on its premises both before and after his employment with NACCA, and it is conceivable that, to some extent, his decision to involve himself with the trial lawyers may have been a conscious or unconscious form of payback.

It is difficult to know what Pound really thought about NACCA because he never wrote his memoirs. He occasionally resisted efforts by Horovitz to use him,²³⁹ which suggests that he was not unaware of the exploitation potential that arose from his relationship with the trial lawyers. In his preface to a major treatise on jurisprudence published five years before his death, he wrote that he "was compelled to find remunerative editorial work" until he received a series of foundation grants in 1955, but he refrained from mentioning NACCA by name.²⁴⁰ Nor did his entries in *Who's Who in America* list his NACCA service.²⁴¹

In a demonstration of gratitude, ego, or irony (or some combination thereof), and bringing things full circle, Pound's treatise did make a

239. See Letter from Roscoe Pound to Samuel B. Horovitz (Mar. 11, 1957), Pound Papers, *supra* note 65, at Reel 42, Frame 491 (insisting that Horovitz not use Pound's name to solicit Harvard Law graduates for NACCA membership).

240. ROSCOE POUND, 1 JURISPRUDENCE XII (1959) [hereinafter POUND, 1 JURISPRUDENCE]. An introduction supplied by the publisher included in Pound's curriculum vitae his three-year stint as Editor-in-Chief of the *NACCA Law Journal*. *Id.* at IV. The front-page *New York Times* article reporting on his death says nothing about his years with NACCA. See *Roscoe Pound of Harvard Dies; Headed Law School 20 Years*, N.Y. TIMES, July 2, 1964, at A1. The only Pound biography to appear since his passing takes no notice of the Dean's connection to NACCA. See WIGDOR, *supra* note 13. Melvin Belli, for one, was aware of this tendency to ignore Pound's work with the trial lawyers. In a letter to the Dean, Belli complained about the fact that a magazine profile of Pound said nothing about Pound's NACCA tie. See Letter from Melvin M. Belli to Roscoe Pound (Feb. 17, 1961), Pound Papers, *supra* note 65, at Reel 48, Frame 583.

241. For the edition published while NACCA employed him, see 28 WHO'S WHO IN AMERICA 2154 (1954-1955); for the volume published just prior to his death, see 32 WHO'S WHO IN AMERICA 2501 (1962-1963) and see also IV WHO WAS WHO IN AMERICA 762 (1968). Pound undoubtedly approved these biographical sketches of himself.

reference to Horovitz's 1944 book on workers compensation.²⁴² It included a footnote that cited, approvingly, Horovitz's footnotes praising Pound (without pointing out that Horovitz's laudatory words were referring to him).²⁴³

IV. AFTERWORD AND CONCLUSION

This Article seeks to clarify the story of Roscoe Pound's relationships with Melvin Belli, Samuel Horovitz, and NACCA. The linkages were peculiar, not at all so large in the grand scheme of things as Witt would have us believe but not so insignificant as to merit consignment to historical oblivion. What remains to be told is the subsequent fate of the protagonists.

Pound devoted the last years of his life to an extraordinary project—the preparation of a five-volume treatise on jurisprudence.²⁴⁴ It featured a remarkable display of erudition but was out of touch with contemporary developments.²⁴⁵ He also published a law-review article on tort liability in exploding-bottle cases.²⁴⁶ In it, he praised Justice Traynor for his concurring opinion in *Escola* and had positive words for the loss-spreading justification for strict tort liability, with nary a mention of involuntary Good Samaritans or Marxist theory.²⁴⁷ What possessed him to address this subject at this point in time and to change his mind about it remains a mystery. Old age inevitably took his measure, and, after a long illness, he passed away in the Harvard University infirmary on July 1, 1964, at the age of ninety-three.²⁴⁸ At the Harvard Law School, a building, a professorship, and a student society bear his name.²⁴⁹

242. See POUND, 1 JURISPRUDENCE, *supra* note 240, 437 n.93 (citing HOROWITZ, *supra* note 52, at 387-88 n.12, 394 n.28).

243. *Id.*

244. See POUND, 1 JURISPRUDENCE, *supra* note 240.

245. In the period from 1938 to 1959, a group of young scholars engaged in the development of a new approach to jurisprudence called legal-process theory. See William N. Eskridge, Jr. & Philip P. Frickey, *Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* li, lxviii-xcvi (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Much, if not most, of the intellectual ferment that produced legal-process theory occurred at the Harvard Law School, at a time when Pound was often physically present. He did not participate.

246. Roscoe Pound, *The Problem of the Exploding Bottle*, 40 B.U. L. REV. 167 (1960).

247. *Id.* at 172-73, 185-86.

248. See *Roscoe Pound of Harvard Dies*, *supra* note 240, at A1.

249. See Harvard Law School, <http://www.law.harvard.edu/about/tour/pound.php> (last visited May 25, 2010);

Melvin Belli's career began a long downward slide after his unsuccessful defense of Jack Ruby, whom a Texas jury convicted of the murder of Lee Harvey Oswald, the accused assassin of President John F. Kennedy.²⁵⁰ Becoming increasingly attracted to the entertainment business, he appeared in an episode of the television series *Star Trek* and was on stage during the infamous Rolling Stones concert at Altamont when a member of a motorcycle gang, hired to provide security, killed a spectator.²⁵¹ In the last years of his life his conduct became increasingly eccentric, often crossing the line into tawdriness, and involved both professional and personal difficulties, such as bankruptcy and family conflicts.²⁵² He passed away in his home in San Francisco on July 9, 1996, at the age of eighty-eight.²⁵³

Samuel Horowitz's frugality and insistence that NACCA stay out of politics eventually put him on a collision course with those who wanted the Association to lobby aggressively and make its presence felt in both Congress and the state legislatures and who chafed at his refusal to release what they viewed as a stifling grip on the organization. In 1963, they finally succeeded in stripping him of his power and bestowing on him a purely honorary position within the organization.²⁵⁴ His legacy remains the Association that he founded and nurtured through its formative years. His enlistment of Roscoe Pound was undoubtedly a major boost in NACCA's drive for respectability. He passed away in Florida on July 11, 1985, at the age of eighty-eight.²⁵⁵

NACCA, in its current incarnation as the American Association for Justice, has become a formidable political force in both Washington, D.C.

<http://www.law.harvard.edu/academics/handbook/handbook-faculty/faculty.html> (last visited May 25, 2010); <http://www.law.harvard.edu/students/orgs/roscoe/> (last visited May 25, 2010).

250. See generally JOHN KAPLAN & JON R. WALTZ, *THE TRIAL OF JACK RUBY* (1965). For Belli's account of the proceedings, see MELVIN M. BELL, *DALLAS JUSTICE: THE REAL STORY OF JACK RUBY AND HIS TRIAL* (1964).

251. See SHAW, *supra* note 17, at 150-53.

252. See, e.g., Ellen Joan Pollock, *Clients Beware*, AM. LAW., Mar. 1985, at 102; Anton Rupert, *Melvin Belli's Bait and Switch*, AM. LAW., May 1981, at 35; David Margolick, *Melvin Belli: Court Lion Fighting in His Own Lair*, N.Y. TIMES, Apr. 2, 1993, at B7; Richard B. Schmitt, *Lawyer Melvin Belli, Ever More Eccentric, Is Now a Defendant Too*, WALL ST. J., Nov. 23, 1988, at A1. For an account of Belli's final years, see SHAW, *supra* note 17, at chs. 19-21.

253. SHAW, *supra* note 17, at 227.

254. See JACOBSON & WHITE, *supra* note 10, at 67-69.

255. *Id.* at 69.

(where it relocated in 1977) and the states.²⁵⁶ It has continued to fight against no-fault legislation, as well as tort and product-liability reforms that would adversely affect the rights enjoyed by and remedies available to accident victims.²⁵⁷ And it keeps its hold on the name of Harvard's ex-dean through the operation of the Pound Civil Justice Institute.²⁵⁸

256. *See generally* American Association for Justice, <http://www.justice.org> (last visited May 25, 2010).

257. American Association for Justice; Mission & History, <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/418.htm> (last visited May 25, 2010).

258. *See* American Association for Justice, <http://www.justice.org> (last visited May 25, 2010).