THEODORE ROOSEVELT AND THE LAW

With the publication of the final volume of Edmund Morris’ trilogy on the life of Theodore Roosevelt, we now have a complete assessment of our 26th president’s strengths and weaknesses. Examining the life of this non-lawyer, who spent his life operating in and around the law, provides insights and lessons for attorneys of every generation.
INSPIRATION

When I started practicing law 33 years ago, one of my firm’s partners displayed in his office the “Man in the Arena” excerpt from Roosevelt’s 1910 speech at the Sorbonne:

It is not the critic who counts: not the man who points out how the strong man stumbles or where the doer of deeds could have done better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood, who strives valiantly, who err and comes up short again and again, because there is no effort without error or shortcoming, but who knows the great enthusiasms, the great devotions, who spends himself for a worthy cause; who, at the best, knows, in the end, the triumph of high achievement, and who, at the worst, if he fails, at least he fails while daring greatly, so that his place shall never be with those cold and timid souls who knew neither victory nor defeat.

Roosevelt’s words resonated with me during that formative time. They inspired me to make a name for myself in the arena of courtrooms. Yet my goal of fulfilling Roosevelt’s ideal was challenged just a few years later. My mentor, Walter Spradley, offered me the chance to leave the firm, which would have required shifting my practice from litigation to transactional work. When I told Walter I wanted to stay, he said, “I understand your decision, but let me tell you something. My experience in watching lawyers over the last 40 years is that litigators are like pilots. I know a lot of old pilots, and I know a lot of bold pilots, but I don’t know a lot of old, bold pilots.”

Since that conversation, I have enjoyed three decades in the litigation arena. Having seen scores of good lawyers flame out, it occurred to me that exploring Roosevelt, my inspiration as a young lawyer, might be useful for assessing the effects of performing for decades at an intense level. I knew Roosevelt had died young, which seemed to bolster Spradley’s observation that “TR” had not lived to be an old, bold pilot.

Although there are dozens of outstanding Roosevelt biographies, I have focused on three authors: Edmund Morris, who received a Pulitzer Prize for The Rise of Theodore Roosevelt (1979) and followed it with Theodore Rex (2001) and Colonel Roosevelt (2010); Louis Auchincloss, whose concise Theodore Roosevelt (2001) is written from the perspective of an author trained as a lawyer; and Douglas Brinkley, a professor of history at Rice University, whose The Wilderness Warrior: Theodore Roosevelt and the Crusade for America (2009) incorporates the persuasive psychiatric assessments of Kay Redfield Jamison. (Morris and Brinkley will be presenting during the State Bar of Texas Annual Meeting, June 23–24 in San Antonio, as will another esteemed Roosevelt biographer, H.W. Brands.)

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Everything Roosevelt did, he did ferociously. When he wrote, he did so at frenetic pace — whipping out 25 letters in a morning and entire books in just weeks. In the Dakota Territory, according to Morris, Roosevelt earned the respect of fellow cowboys as one who “rode a horse a hundred miles a day, stayed up all night on watch, and was back at work after a hastily gulped 3:00 a.m. breakfast.” When he campaigned for president, he delivered 30 whistle-stop speeches a day, keeping his energy up by shadowboxing in the caboose.

Roosevelt’s exuberance extended to his interactions with the law. Although never licensed as a lawyer, Roosevelt spent his life in the arena of the law.

Law Student

After graduating from Harvard College, Roosevelt attended Columbia Law School, where he was conspicuous for frequently interrupting professors. Roosevelt quickly concluded that lawyers and judges preferred legalese to his notion of justice and quit law school after a single year. Auchincloss notes that Roosevelt was deeply offended by the doctrine of caveat emptor. Morris concludes that Roosevelt lost interest in law school because he was “impatient with logic,” intolerant of corporate lawyers’ “sharp practices,” and had no interest in the law’s arcane “intricacies.”

Lawmaker

Roosevelt planned to use his legal studies as a stepping-stone to politics. After quitting Columbia, he was elected to the New York State Assembly at the age of 23. Roosevelt immersed himself in legislation. To be recognized on the House floor, the 5’8” legislator would jump up and stand on his chair, calling out, “Mr. Speaker! Mr. Speaker!”

Prosecutor

Following three terms in the legislature, Roosevelt was appointed U.S. Civil Service commissioner (1889 to 1895) and then New York City police commissioner (1895 to 1896). In both positions, he acted as an investigator, enforcer of laws, and prosecutor. Unburdened by judges or evidentiary rules, he became known for cross examinations so forceful he often...

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interrupted witnesses with new questions before they could complete their responses. Morris relates Roosevelt’s self-righteous attitude as he remembered it later in life: “Justice was justice because I did it.”

**Conflict Strategist**

At 38, Roosevelt was named assistant secretary of the U.S. Navy. He expanded the fleet of American warships while his superior alternately suffered from illness and took long vacations. Despite aggressive posturing, Roosevelt avoided international altercations during his first year, but soon helped to engineer the start of the Spanish-American War. In situations involving potential conflict, Roosevelt adhered to his famous slogan: “Speak softly and carry a big stick.”

**Combatant**

Roosevelt left the Navy in 1898 to fulfill his greatest ambition — to fight in a war. He led the Rough Riders up San Juan Hill, the turning point in the liberation of Cuba from Spain. The taste for battle would remain with Roosevelt for the rest of his life. He referred to the charge up San Juan Hill as the “greatest day of my life.”

**Client**

Returning home a national hero, Roosevelt ran for governor of New York. His campaign nearly imploded over his having sworn on his tax return that he was a resident of Washington, D.C. Roosevelt retained Wall Street lawyer Elihu Root to take whatever steps were necessary to meet eligibility requirements. Using the law’s “intricacies,” Root’s “sharp practice” in finding a favorable interpretation of the word “resident” won the day. Roosevelt was elected and served two years as governor before President William McKinley selected him as his running mate in 1900.

**Litigation-Instigator and Mediator**

McKinley was assassinated six months into his second term, making Roosevelt the nation’s youngest president. On the domestic front, realizing the value of skilled lawyers when confronting complicated legal issues, Roosevelt relied on Philander Knox as attorney general to bust trusts and destroy monopolies. When a coal workers’ strike in the winter of 1902 threatened lives, Roosevelt jumped into the arena and threatened to use the big stick of military intervention to take over the mines. The strong-armed approach worked, spurring owners and miners to agree to settle through binding arbitration.

Roosevelt’s skill at resolving disputes was extended into the international arena when he used the big stick of U.S. naval power to pressure Germany into backing away from attacking Venezuela. In 1903, Roosevelt provided sufficient resources to enable Panama to gain independence from Colombia, which enabled construction of the Panama Canal and U.S. control over the Canal Zone.

Russia and Japan selected Roosevelt to help bring an end to the Russo-Japanese War. After months of negotiations, Roosevelt succeeded, in Morris’ words, by “imposing his singular charge upon plural power … and using his sheer force of moral purpose, clarity of perception, mastery of detail, and benign manipulation of men.” The president delighted in being center stage — there were no rules, restrictions, lawyers, or judges to inhibit his pursuit of final resolution.

Auchincloss acknowledges Roosevelt’s preference for operating in a mode disconnected from law and lawyers by relating U.S. Supreme Court Justice Oliver Wendell Holmes’ response to criticism leveled at him by Roosevelt after Holmes had dissented in an opinion. When Roosevelt compared the jurist’s backbone to a banana, Holmes said it didn’t bother him because he agreed with an unnamed senator’s quip: “What the boys like about Roosevelt is that he doesn’t give a damn about the law.”

Before leaving the White House, Roosevelt received a rare comeuppance in the law. After Joseph Pulitzer’s newspaper criticized him for making misrepresentations about his policy in Panama, Roosevelt directed Knox to sue Pulitzer for criminal libel. The defendant prevailed easily.

**Party to Lawsuits**

In the decade after Roosevelt left the White House, he was a party to two libel cases, both of which resulted in highly publicized jury trials, and both of which he won. The first trial took place in 1913 in Michigan. George Newett, publisher of a small-town newspaper and lifelong Republican, felt betrayed when Roosevelt left the GOP in 1912 to pursue another presidential bid as head of the Bull Moose ticket. (Roosevelt was disillusioned with his handpicked successor, William Howard Taft.) Newett wrote a scathing editorial in which he claimed Roosevelt “lies and curses in a most disgusting way; he gets drunk, too, and all his intimates know it.” Ultimately, Newett took the witness stand and acknowledged that his statements had been based on unsubstantiated hearsay; that he had no witnesses to support his claims; and that he had written the editorial solely for political purposes. Roosevelt, his name restored, received a favorable verdict of six cents.

Two years later, Roosevelt came to trial as a defendant after being sued for libel by New York Republican Party leader William Barnes, who sought $50,000 in damages. The case stemmed from Roosevelt’s statement in 1914 that Barnes was part of “New York’s alliance between crooked business and crooked politics.” After a five-week trial, the jury deliberated almost two days before finding in favor of the former president. Morris vividly describes the trial and establishes that although Roosevelt’s position was less than airtight, his courtroom presence and personality spellbound the jury, allowing him to prevail because he was “a defendant beyond the reach of ordinary justice.”

**Bull Moose**

Throughout his life, when dealing with laws, lawyers, or lawsuits, Roosevelt was convinced everyone should follow whatever he thought to be the best and most efficient course of action. In Morris’ words, Roosevelt was “congenitally unable to question the rightness of his own decisions.”

In Roosevelt’s post-presidency years, however, his headstrong opinions came into conflict with existing law. In 1910, following a 10-month safari in Africa and a heady tour of Europe in which he was greeted with pomp and ceremony, Roo-
Roosevelt returned to the United States and began advocating for what he called the “New Nationalism,” the primary objective of which was to eliminate big business’ control over politics. Success would require massive federal regulation that would conflict with existing statutes and common law property rights. For Roosevelt, the answer was simple — repeal the statutes and change the common law to favor the rights of individuals over the rights of corporations.

Before a crowd of 30,000 in Kansas in 1910, Roosevelt proclaimed, “If we do not have the right kind of law and the right kind of administration of the law, we cannot go forward as a nation. … Our public men must be genuinely progressive.” In one paragraph, Morris succinctly addresses Roosevelt’s challenge to the American legal system:

In no way did Roosevelt seem more radically threatening than in his moralistic attitude toward justice. If constructionists could believe their ears and eyes, he proposed to subject the Constitution itself to moral review. “When I see you,” [long-time friend] Henry Cabot Lodge wrote on 5 September, “I shall want to have a full talk in regard to this matter of court decisions, about which I admit I am very conservative. … The courts are charged with the duty of saying what the law is, not what it ought to be, and I think to encourage resistance to the decisions of the courts tends to lead to a disregard of law.”

Roosevelt followed this speech with others, all critical of the existing legal framework. Morris suggests the former president’s perspective flowed naturally from his lifetime attitude toward the law:

Shadows over substance, words rather than deeds, precedents hampering change, technical injustice precluding practical justice: Roosevelt had been attacking statutory pedantry since his days as a law student at Columbia University. … As President he insisted that courts, no less than churches, were places where plain morals had to be expounded. Judges should no more sanction an abusive policy, in the name of the Fourteenth Amendment, than priests should cite the Old Testament in favor of child sacrifice. He had gone so far as to suggest, in his eighth [and final] annual message to Congress, that the judicial branch of government was actually a branchlet of the legislative.

Despite criticism from friends Henry Cabot Lodge and Elihu Root, Roosevelt continued with his crusade against American
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jurisprudence. He wrote an article for The Outlook calling for popular referendums to recall and remove from precedent judicial decisions. Roosevelt also began urging that voters be given the right to vote federal and state judges off the bench. Roosevelt expounded on his philosophy in a speech to the Ohio constitutional convention in 1912:

I do not believe in adopting the recall save as a last resort. … But either the recall will have to be adopted or else it will have to be made much easier than it now is to get rid, not merely of a bad judge, but of a judge who, however virtuous, has grown so out of touch with social needs and facts that he is unfit longer to render good service on the bench. It is nonsense to say that impeachment meets the difficulty. … When a judge decides a constitutional question, when he decides what the people as a whole can and cannot do, the people should have the right to recall that decision if they think that it is wrong. We should hold the judiciary in all respect, but it is both absurd and degrading to make a fetish of a judge or of any one else.

When President Taft, a constitutional law scholar who would later become chief justice of the U.S. Supreme Court, learned of the speech, he pulled no punches:

One who so lightly regards constitutional principles, and especially the independence of the judiciary, one who is naturally so impatient of legal restraints, and due legal procedure, and who has so misunderstood what liberty regulated by law is, could not be safely endorsed with successive [sic] presidential terms. I say this sorrowfully, but I say it with the full conviction of the truth.

Auchincloss identifies this period as a turning point in Roosevelt’s life. The former president became increasingly vindictive and intolerant of opposition. He lost his bearings and entered a state of disequilibrium, increasingly seeing himself as the messianic messenger of a semi-religious movement, and a person at war with law, lawyers, the rule of law, and the American legal system.

Roosevelt’s longtime friend and legal adviser, Elihu Root, joined Taft in mourning his former boss’ loss of emotional and intellectual balance. Auchincloss quotes Root’s letter to Roosevelt’s Harvard classmate, former Secretary of State Robert Bacon, to demonstrate his extreme grief over the former president’s demise into the dark side:

Theodore has gone off on a perfectly wild program, most of which he does not really believe in, although at this moment he thinks he does. … Of course, Lodge, George Meyer, Stinson and myself, who cannot possibly go with Roosevelt in his departure, have been feeling very gloomy over the situation. … I wish to fall upon your neck and weep. I wish to curse and swear and say things which I would not have repeated for the world.

As Roosevelt left friendships behind and commenced his campaign as the Bull Moose presidential candidate, his speeches attacking the effectiveness of the American legal system became more radical. Roosevelt advised the public that earlier attempts to control the power of large corporations by means of antitrust lawsuits had been unsuccessful, and past “efforts at prohibiting all combinations had substantially failed. The way out lies, not in attempting to prevent such combinations, but in completely controlling them in the interest of the public welfare.”

UNHAPPY ENDING

Roosevelt’s alarming speeches during his presidential campaign of 1912 comport with Auchincloss’ assessment of mental deterioration: “That is something always to keep in mind in any evaluation of Roosevelt; his reason was constantly at work, however unperceived, to balance the wildness of his words. At least until the last few years of his life.”

Roosevelt’s downward spiral manifested itself in other ways. Morris mentions the following:

• Roosevelt stuffed himself three times a day with huge meals (breakfast alone usually consisted of eating 12 fried eggs and drinking a gallon of coffee) and gained considerable weight;
• After being shot in the chest by an assassin in October 1912, he insisted on giving a speech (lasting 80 minutes) while blood flowed through his shirt and the right side of his body turned black;
• Overweight and out of shape, TR took an extended trip to South America in 1914, where he confronted piranhas, anacondas, blood-sucking bats, and bloodthirsty pium flies before contracting malaria, from which he never fully recovered;
• He repeatedly and publicly called President Woodrow Wilson a “coward” for his delay in injecting American military forces into the battlefront of World War I;
• When Wilson finally committed the United States to war, Roosevelt, though sickly, tired, and old beyond his years, begged the president to allow him to organize a new regiment of Rough Riders to go to the front;
• When Wilson refused Roosevelt’s offer to fight, Roosevelt pulled all his political and military strings in order to get his four sons to the front lines of battle, where two were seriously wounded and the youngest, Quentin, was killed; and
• On the day he learned of Quentin’s death, Roosevelt insisted on fulfilling a commitment to give a speech to the New York State Republican Convention.

After first indentifying his subject’s visible turn for the worse in 1912, Auchincloss gives his perspective on Roosevelt’s enhanced demise, as demonstrated by his obsession with having himself and his sons join the war effort in 1917:

His violent efforts as an ill and elderly man to get to the trenches in World War I and his posting of his sons to battle all seem to stem from a barely rational compulsion. It is one thing for a father to salute his sons as they march off to fight for the right; it seems to me quite another to appeal, as he did, using all of his immense influence and prestige, to military authorities to speed them to the front.
On Christmas Eve, 1918, knowing his days were numbered, Roosevelt told his sister Corinne that he had “kept the promise that I made to myself when I was twenty one — that I would work myself up to the hilt until I was sixty, and I have done it.” Thirteen days later, Roosevelt died. His death certificate stated the cause of his death was “an embolism of the lung, with multiple arthritis as a contributing factor.” Morris suggests that what really killed him was a broken heart caused by six months of grieving over Quentin.

**LIFE LESSONS FOR LAWYERS**

What can lawyers learn from Roosevelt’s life? Although life in the arena can lead to achievement, drama, and exhilaration, it can become so intoxicating that one loses one’s bearings, and so exhausting that one self-destructs mentally and physically. It’s why bold pilots don’t live to be old pilots.

Roosevelt led a remarkable life in the arena — scholar, cowboy, naturalist, hero, president, and international mediator. Arguably, Roosevelt achieved more good things for the country than any other American president. Historians consistently rank him among the nation’s greatest presidents.

Yet after leaving the Oval Office, the glory Roosevelt had accumulated went to his head. His egotistical comment upon leaving the White House became a self-fulfilling prophecy, “No man in American public life has ever reached the crest of the wave as I appear to have done without the waves breaking and engulfing them.” With each successive year, he became more and more out of control. Inevitably, the waves broke and engulfed him. Auchincloss cites an ominous warning from Columbia University President Nicholas Murray Butler: “You will find it harder to be an ex-president than a president.”

Brinkley has endorsed Dr. Kay Redfield Jamison’s psychiatric assessment of Roosevelt in her book *Exuberance: The Passion for Life* (2004). Jamison presents Roosevelt as the poster child for both the bright and the dark sides of an exuberant personality. Yes, his tireless passion for life in the arena made him “the most vital man on the continent,” but “exuberance when indiscriminately apportioned is anarchical” and “mania is exuberance gone amok.”

In *The Wilderness Warrior*, Brinkley does a superb job of summarizing Jamison’s assessment of Roosevelt’s exuberance: Roosevelt is exhibit A for this condition. His set of symptoms — propulsive behavior, deep grief, chronic insomnia, and an all-around hyperactive disposition — demonstrate both the manic and the depressive phases of bipolar disorder. Too often, Dr. Jamison argued, people mistakenly thought manic depression meant despondence and withdrawal from human endeavors. Usually it does. But those afflicted with exuberance go in the opposite direction, behaving as relentless human blowtorchers who are unable to turn down their own flame.

Diagnosing Roosevelt’s medical condition more than eighty years after his death, Jamison claimed that the highs of the exuberance phase brought many wonderful gifts; but she warned there was also a sharp-edged downside. Living by throwing up skyrockets — as P.T. Barnum once put it — wore one down to nothing. No sleep, for example, wasn’t good for the heart or vital organs. Only by exhausting himself in physical activity — like climbing Mount Katahdin or ice skating on the Charles River in a winter storm — could an exuberant manic like Roosevelt turn himself off.

During Roosevelt’s White House years, Irving Fisher, a fitness and nutritional expert, said, “It is clear to me that the president is running his machine too hard. … In another decade or two … I would almost risk my reputation as a prophet in predicting that he will find friction in the machine, which will probably increase to almost the stopping point.”

Morris provides a prophetic observation from Henry James: “A wonderful little machine destined to be overstrained perhaps, but not as yet, truly, betraying the least creak. … It functions astonishingly, and is quite exciting to see.” During Roosevelt’s White House years, Irving Fisher, a fitness and nutritional expert, said, “It is clear to me that the president is running his machine too hard. … In another decade or two … I would almost risk my reputation as a prophet in predicting that he will find friction in the machine, which will probably increase to almost the stopping point.” Roosevelt’s life in the arena can be compared with a fine car being steered by a mad scientist obsessed with keeping the pedal floored. The driver may exhilarate at navigating at dizzying speeds — for a while.

The second lesson for lawyers is that any person, no matter how spectacular his career, no matter how dynamic his personality, who loses respect for the rule of law also loses his moral compass. Roosevelt’s disrespect for the law began with his dropping out of Columbia Law School. In quasi-legal positions where he called the shots without restrictions, Roosevelt operated from the vainglorious perspective that “Justice is justice outside of courtrooms when he expanded efforts to protect wildlife:

Roosevelt asked, “Is there any law that will prevent me from declaring Pelican Island a Federal Bird Reservation?” The answer was a decided “No,” the island, after all was federal property. “Very well then,” Roosevelt said with marvelous quickness. “I so declare it.”

As president, Roosevelt often found himself in unpleasant circumstances, where laws, rules, and statutes were binding and lawyers and judges were in place to make sure he obeyed them. Naturally, Roosevelt favored a judiciary that accorded with his personal views. Auchincloss provides perspective on Roosevelt’s attitude toward federal judges and constitutional law:
He expected any judge he appointed to do his best to carry out the law as interpreted by the party in power. ... His attitude toward constitutional law was that of any progressive chief executive whose primary concern was to see legislation judicially interpreted in ways to foster his social programs. ... When TR observed to a friend that he always wanted a great constitutional lawyer at his side, and the friend pointed out that he had always had the services of William Howard Taft and Elihu Root, both undisputed authorities in the field, he retorted, “Yes, but they don’t always agree with me.”

Like most presidents, Roosevelt wanted federal courts to rule and the Constitution to be interpreted one way — his way. Unlike most presidents, when judges saw issues differently than he did, Roosevelt believed they were purposefully betraying his trust. Small wonder that after leaving the White House, as judgments and appellate opinions were rendered by various courts against his desires, Roosevelt attempted to persuade the American electorate to vote for the repeal of those errant decisions and for the immediate removal from the bench of the judges who had authored them. Fortunately, Americans rejected Roosevelt’s pitch for personal power over the rule of law.

Most Americans, including most lawyers, have an idealized and romanticized view of Theodore Roosevelt as one of the faces atop Mount Rushmore. He was an amazingly compelling and successful public figure, justifiably recognized as one of America’s heroes, whose forceful personality and dramatic achievements still captivate biographers and readers a century after his death.

Yet Roosevelt was more than his noteworthy achievements; he was someone whose full story is both deeply troubling and instructive for the legal profession. Roosevelt never embraced the rule of law. The older he got, and the more burned out his sensibilities became, the more Roosevelt’s manic and self-righteous personality turned dark and the less he respected the American legal system. In the end, “the wonderful little machine” Henry James had so admired crashed and burned in infamy.

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