THE TRIALS OF HOWARD ROARK

ALAN D. HORNSTEIN*

I. INTRODUCTION

There are some literary beginnings so well-known as immediately to call to mind the books in which they appear: "Call me Ishmael"; "It was the best of times. It was the worst of times"; and, increasingly, "Howard Roark laughed." So begins the novel, The Fountainhead by Ayn Rand. Published in 1943, The Fountainhead continues to sell 100,000 copies a year. For millions it provides the introduction to a philosophical/social movement known as "Objectivism." It has been suggested that Objectivism provided intellectual grounding for the decline of left-liberalism and the expanding influence of a libertarian shift in American culture.

Yet despite its influence, the book has engendered scant academic attention⁶ and virtually no attention in the legal academy. In *The Fountainhead*, as in all of Rand's mature fictional works, the law—more specifically, one or more trial scenes—figures prominently. Indeed, in all of them trials are essential elements of the plot development.⁷ Although Rand's work is hardly unique in its use of the trial for dramatic purposes,⁸ it is distinctive in its use of the trial as illustrative of moral or philosophical principles.⁹ One would expect, therefore, that

¹ Herman Melville, MOBY DICK 11 (Bantam Books, Charles Child Walcutt ed., 1967) (1851).

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² Charles Dickens, A TALE OF TWO CITIES 3 (Tom Doherty Associates 1989) (1859).

³ Ayn Rand, THE FOUNTAINHEAD 15 (Signet 1993) (1943).

⁴ Roy A. Childs, Jr., Ayn Rand: A Celebration, http://laissezfaire.org/ (June 1986).

⁵ Barbara Branden, THE PASSION OF AYN RAND 407-22 (Doubleday 1986).

⁶ Though that situation appears to be changing. See Ayn Rand Arrives in Academe, Chron. Higher Educ., Apr. 9, 1999, at A17; Scott McLemee, The Heirs of Ayn Rand, Lingua Franca, Sept., 1999, at 45.

⁷ See, e.g., Ayn Rand, ATLAS SHRUGGED 475-82 (Random House 1957); Ayn Rand, NIGHT OF JANUARY 16th (Signet 1968) (1934); cf. Ayn Rand, ANTHEM 75-83 (Signet 1946) (1938).

⁸ See David Ray Papke, Conventional Wisdom: The Courtroom Trial in American Poplar Culture, 82 Marquette L. Rev. 471 (1999).

⁹ Douglas J. Den Uyl, THE FOUNTAINHEAD, AN AMERICAN NOVEL 15 (Twain 1999) ("Roark gives an account of what he stands for within an established institutional setting of a particular culture—that is, from within an American courtroom." *Id.* at 29 ("The Fountainhead is a novel of ideas.")

at least in the philosophical literature of Objectivism, one would find discussion about the role and meaning of law; but one would be disappointed. Apart from occasional bromides about the importance of objective law, there is precious little, even in Objectivist literature, about law.

Leonard Peikoff, Rand's intellectual heir, has written what is perhaps the most systematic exegesis of Rand's philosophy. ¹⁰ The index to his book has no independent listing for "law"; it lists law only as a subhead of government, under the rubric "as requiring objective law." ¹¹ His discussion consumes just a few pages and is devoted almost entirely to criminal law. ¹² The couple of paragraphs on civil law are devoted entirely to the law of contracts. ¹³ Moreover, the treatment is incredibly superficial and seems to equate objectivity to particular concretes, as if abstractions could not be objective—a position one would think Rand would find antithetical to her philosophy, which placed a premium on the conceptual level of awareness. ¹⁴ The other leading book length interpretations of Rand's work also lack so much as an index entry for law. ¹⁵

This essay is an attempt at filling the void in legal scholarship and Objectivist literature at the intersection of law and Objectivism. I do not attempt a comprehensive examination of the Objectivist view of law. I shall leave for another day any exploration of the Objectivist view of the appropriate content or aim of law. Such a project would require far more than this essay undertakes.

Here I wish to explore the reasons legal trials figure so prominently in Rand's fiction. I believe there are two reasons: First, Rand has often advanced the position that ethical and political change follows intellectual change, that it is on the intellectual battlefield that the fight for a culture is waged. The courtroom is the modern day intellectual equivalent of the battlefield or the tournament, and so it is an appropriate setting for the clash of ideas presented in Rand's work. Second, what is necessary to prevail on the courtroom battlefield are certain method-

¹⁰ Leonard Peikoff, OBJECTIVISM: THE PHILOSOPHY OF AYN RAND (Dutton 1991).

¹¹ Id at 485.

¹² Id. at 364-66.

¹³ Id. at 365-66.

¹⁴ See, e.g., Ayn Rand, Introduction to Objectivist Epistemology (Meridian 1979) passim; Ayn Rand, For the New Intellectual 19 (Signet 1961).

¹⁵ Ronald E. Merrill, THE IDEAS OF AYN RAND 189 (Open Court 1991); Chris Matthew Sciabarra, AYN RAND: THE RUSSIAN RADICAL 466 (Pennsylvania State University Press 1995).

¹⁶ See, e.g., Ayn Rand, The Ayn Rand Letter 1, Vol. 1, No. 7 (Jan. 7, 1972).

ologies of persuasion and understanding—methodologies shared by Rand's literary presentations and the working out of the law through judicial opinions.

Because *The Fountainhead* provides for so many the introduction to Rand's thought, it is appropriate to begin with that book. The plot of the novel is quite complex, and so we shall limit our study to those parts of the story—the trials—that most clearly demonstrate the intellectual conflict at the heart of Rand's work and highlight the comparison between Rand's literary method and legal method.

The Fountainhead features two trials. Both are critical to the development of the story. Indeed, the second trial is the climax of the novel. In each, Howard Roark, Rand's hero, is the defendant. He behaves quite differently in the two trials, and this difference may have much to say about the development of his character. In the next section, I summarize the story to the extent necessary to comprehend Roark's character, the nature of the cultural forces arrayed against him and thus the significance of the two trials. The sections following include an analysis of each of the trials, more specifically of Roark's defenses, the differences between them and the importance of those differences. I conclude with a discussion of the role played by legal trials in Rand's fiction and the similarity of Rand's literary method and that of the judicial opinion.

II. THE STORY

The novel opens with Roark's expulsion from architectural school. His conversation with the dean shows us his intransigent commitment to the integrity of his vision of architecture. Rather than following the dictates of his teachers to design buildings in various architectural styles, he submitted designs he was prepared to build: "I did them the way I'll build them." And the way he would build them owed nothing to historical styles. He would build according to his own best judgment.

Contrasted with Roark is Peter Keating. At the opening of the story, Keating is graduating with honors from the school that expelled Roark. Keating personifies the second hand consciousness: a man with no standards of his own, who adopts the standards and values of others. Keating has been successful at school, completing his assignments by adopting various historical styles, originating nothing. When stumped on design issues, he had sought and received Roark's help on assignments, but did not acknowledge it.

¹⁷ Rand, The Fountainhead, supra note 3, at 22.

The story recounts Roark's career, its occasional triumphs and more frequent disappointments as the second hand consciousness that pervades society inevitably fails to recognize the greatness of his work. More specifically, Roark is targeted for destruction through the machinations of Ellsworth Toohey, the villain of the novel. Toohey is the personification of evil, one who resents the good for being the good and whose life's project is the destruction of all values. Toohey works through pawns such as Peter Keating, who cling to him as a substitute for the values they are incapable of achieving, or even recognizing.

As Roark struggles for work, Keating becomes wildly successful and the fashionable architect of the day. At one point Roark is hired by Keating to work as a draftsman and, as at school, when Keating is having difficulty with a design problem, he comes to Roark, who does the work, still without acknowledgment. This pattern continues even when Roark is no longer employed by Keating's firm. Indeed, Keating's greatest architectural achievement, a design that wins a major architectural competition, was the work of Roark.

Unbeknownst to Roark, Toohey arranges for Roark to be given a commission by Hopton Stoddard, another unwitting pawn of Toohey, to design a "Temple of the Human Spirit." In response Roark designs a building that reflects his vision of the heroic in man. Toohey had planned on Roark discharging the commission with precisely the sort of building Roark designed. After a sustained buildup in the press about the Temple, orchestrated by Toohey, Stoddard returns from an extended trip and is persuaded by Toohey that Roark has designed an insult to God that would damn Stoddard if it went unchallenged. He persuades Stoddard to sue Roark and then creates a cause celebre, leading the public attack on Roark through a variety of cultural outlets. His goal is to destroy any man of integrity and independent judgment, qualities personified by Roark.

Stoddard sues Roark for breach of contract and malpractice on the theory that Roark was hired to build a temple and that Roark's design was not a temple "by any known standards." At the trial, Stoddard presents a string of "expert witnesses" to prove that Roark is incompetent or worse. Roark represents himself, having refused to engage counsel. He presents no witnesses and makes no verbal argument, nor does he cross-examine any of the witnesses against him. Instead, his

¹⁸ Id. at 316-17.

¹⁹ Id. at 349.

entire defense consists of presenting the court with photographs of his building; he presents no other evidence.²⁰ He is found liable.

After the fiasco of the Stoddard Temple, Roark's practice goes into a steep decline, as Toohey intended. Yet, over time, commissions start to come in from people who had seen Roark's work and admired it. As Roark's career begins burgeons, Keating's begins to decline. Each year brings fewer commissions, and he must reduce the size of his firm. Keating, of course, does not understand the decline in his fortunes, just as he did not understand the reasons for his success. Keating learns that a public housing project is to be built and that Toohey will be influential in the selection of the architect. Keating believes the commission for Cortland Homes would revive his decaying career, and he pleads with Toohey for the commission. Toohey tells him that no architect can be found to design it with sufficient economy to support the low rentals to be charged the tenants, but that Keating is free to attempt it. After determining that the task is beyond him, Keating does what he has done in the past under similar circumstances: He approaches Roark to solve it for him.

Roark agrees to undertake the design of Cortland, not out of any feeling for Keating or out of any sense of duty to the poor who are to tenant the project, but to see it built just as he designs it. Keating is to get all the credit and all the fees, but Roark is to get the satisfaction of solving a difficult problem and seeing his building plan realized. Keating takes Roark's plan to Toohey, who instantaneously realizes that it is not Keating's design, but Roark's. Seeing a new opportunity to destroy Roark, Toohey guarantees that Keating will get the commission. Keating enters into a contract that purports to guarantee that the project will be built exactly as designed.

During the construction of Cortland, Roark is away (following another important subplot in the novel not relevant to our purpose). When he returns he discovers that his plans for Cortland have been bastardized. Most of the genius ofconomy, but the integrity of the design has been tortured and twisted into an architectural monstrosity. Roark dynamites Cortland, and is arrested and brought to trial. At the trial, it is revealed that Roark, not Keating, designed Cortland. Roark is portrayed by Toohey and his minions, as well as the rabble they stir up, as a heartless monster who chose to destroy a housing project out of pique that his design preferences were not honored, rather than as the creator whose achievement was expropriated by those who could not hope to equal it, but only to steal it—and to claim the theft as virtue.

²⁰ Id. at 356.

This second trial is the climax of the novel, bringing together all of the several subplots (many of which are unexplored here). Roark's testimony and closing argument constitute the dramatic and philosophical centerpiece of the novel. In a long speech Roark justifies his action, defending not just himself, but the creative impulse and the discipline of reason that permits its productive exercise. Roark is acquitted by a jury.

In the coda that follows the verdict in the second trial, we see Roark triumphant, achieving the success that the novel has led us to conclude is his just reward.

III. THE FIRST TRIAL

The Stoddard trial was a civil action apparently tried without a jury. The publicity engendered by Toohey ensured a full courtroom, many of whom were Toohey's intellectual disciples. "There was a feeling of 'our bunch,' 'our boys,' 'our show.' "21 The issue for the court was whether the building Roark had designed met the contractual requirement to erect a "temple." The plaintiff claimed that the building Roark had designed could not be considered a "temple." "22

There was no dispute about the journalistic facts: What happened? Who did what to whom? Instead, the question concerned the meaning to be ascribed to the concept "temple." By centering the trial around the notion of a temple, Rand is able to reveal differences in what is viewed as holy, and thus what sort of souls these differences reveal. Roark's design is described as

scaled to human height in such a manner that it did not dwarf man, but stood as a setting that made his figure the only absolute, the gauge of perfection by which all dimensions were to be judged. When a man entered this temple, he would feel space molded around him, for him, as if it had waited for his entrance, to be completed. It was a joyous place, with the joy of exaltation that must be quiet. It was a place where one would come to feel sinless and strong, to find the peace of spirit never granted save by one's own glory.²³

Toohey led off as the first witness for the plaintiff. After providing an historical overview of religious architecture, "Toohey proved that the Stoddard Temple contradicted every brick, stone and precept of history. '[T]he two essentials of the conception of a temple are a sense of awe

²¹ Id. at 348.

²² Id. at 349.

²³ Id. at 334.

and a sense of man's humility... tend[ing] to impress upon man his essential insignificance, to crush him by sheer magnitude, to imbue him with that sacred terror which leads to the meekness of virtue. The Stoddard Temple is... an insolent 'No' flung in the face of history."²⁴

Peter Keating testified about Roark's background, his expulsion from architectural school, his work in Keating's office and his attitude toward architecture. While belittling Roark's work, it became obvious that Keating was in the midst of great psychological stress, approaching a breakdown. Much of Keating's testimony was irrelevant to the issue before the court, but prejudicial on Roark's character and competence; nevertheless, Roark offered no objection. Keating spoke of Roark as one who regarded architecture as a kind of holy crusade and asserted that he was exactly the wrong sort of man who should be given a commission to build a temple. "Only a very human sort of man should be chosen to do that. A man who understands . . . and forgives. A man who forgives "25"

There followed a parade of expert witnesses in support of the plaintiff's claim; architects and others that the reader had met in various guises earlier in the story. These witnesses were unanimous in the view that what Roark had designed could not reasonably be called a temple. Ralston Holcombe testified, "[T]he architectural style of the Renaissance is the only one appropriate to our age. . . . [R]enaissance is the only permissible style for all churches, temples and cathedrals. What about Sir Christopher Wren? Just laugh that off." Gordon Prescott offered a melange of unintelligible abstractions, claiming, "[I]t is impossible to present a dialectic state by covering it up with an old fig leaf of logic. . . ."²⁷

Finally, Dominque Francon, passionately in love with Roark, but testifying against him, sums up the conflict:

Howard Roark built a temple to the human spirit. He saw man as strong, proud, clean, wise and fearless. He saw man as a heroic being. And he built a temple to that. A temple is a place where man is to experience exaltation. He thought that exaltation comes from the consciousness of being guiltless, of seeing the truth and achieving it, of living up to one's highest possibility, of knowing no shame and having no cause for shame, of being able to stand naked in full sunlight. He thought that exaltation means joy and that joy is man's birthright. He

²⁴ Id. at 349-50.

²⁵ Id. at 352.

²⁶ Id. at 353.

²⁷ Id. at 354.

thought that a place built as a setting for man is a sacred place. That is what Howard Roark thought of man and of exaltation. But Ellsworth Toohey said that this temple was a monument to a profound hatred of humanity. Ellsworth Toohey said that the essence of exaltation was to be scared out of your wits, to fall down and to grovel. Ellsworth Toohey said that man's highest act was to realize his own worthlessness and to beg forgiveness. Ellsworth Toohey said it was depraved not to take for granted that man is something which needs to be forgiven. . . . To glorify man, said Ellsworth Toohey, was to glorify the gross pleasure of the flesh, for the realm of the spirit is beyond the grasp of man. To enter that realm, said Ellsworth Toohey, man must come as a beggar, on his knees. Ellsworth Toohey is a lover of mankind.²⁸

She then goes on to explain why she has chosen to testify for the plaintiff:

I do not condemn Ellsworth Toohey. I condemn Howard Roark. A building, they say, must be part of its site. In what kind of world did Roark build his temple? For what kind of men? Look around you. Can you see a shrine becoming sacred by serving as a setting for Mr. Hopton Stoddard? For Mr. Ralston Holcombe? For Mr. Peter Keating? When you look at them all, do you hate Ellsworth Toohey—or do you damn Howard Roark for the unspeakable indignity which he did commit? Ellsworth Toohey is right, that temple is a sacrilege, though not in the sense he meant. . . . When you see a man casting pearls without getting even a pork chop in return—it is not against the swine that you feel indignation. It is against the man who valued his pearls so little that he was willing to fling them into the muck and to let them become the occasion for a whole concert of grunting, transcribed by the court stenographer.²⁹

During Dominique's testimony, plaintiff's counsel becomes concerned about the contents of her testimony. She is permitted to continue because the judge "had been bored and he liked to watch Dominique's figure. Besides, he knew that the audience was enjoying it...."

Thus, the sense one gets of this proceeding, from the pre-trial publicity, to the witnesses, to the presiding judge who will decide the case, is that it borders on farce, albeit tragic farce. No one seems to be concerned with doing justice. The media frenzy is an intellectual lynch mob. The crowd in the courtroom seems to have come to watch a show. The witnesses are a combination of trained seals and guests on a

²⁸ Id. at 355.

²⁹ Id. at 356.

³⁰ *Id*.

television talk show. The judge is a leering clown. The system of justice portrayed here is a stage set devoid of real substance.

Only Roark (and to some extent Dominique) brings any dignity to the occasion, and Roark does so, essentially, by refusing to participate. Roark does not cross examine any of the plaintiff's witnesses, responding to each invitation to do so with a curt, "No questions." Similarly, Roark offers no witnesses of his own, nor does he present any verbal argument in opposition to the plaintiff's case. Instead, he offers photographs of the Stoddard Temple and declares, "The defense rests." 32

As might be expected, Roark loses the case and is found liable.³³

What are we to make of Roark's refusal to offer a defense, apart from the Temple itself? One possibility is that it suggests Roark's innocence—not in the legal sense, but in the sense of a fundamental inability to comprehend the existence or nature of evil. In this view, all that is required to persuade human beings to behave correctly—in this instance, to bring in a verdict in Roark's favor—is to demonstrate the rightness of one's cause; no argument is necessary.

There is some support in the story for such a view: Roark hires a sculptor, Steven Mallory, for a statue to be erected in the Temple as its only ornament. Mallory, Roark's philosophical soulmate, has been beaten down by the same sort of cultural miasma that Roark has been resisting. In a conversation between them, Roark explains that he sought out Mallory "for a simple selfish reason—the same reason that makes a man choose the cleanest food he can find. It's a law of survival, isn't it? – to seek the best." After thinking about Roark's explanation, Mallory responds:

"The unrecognized genius—that's an old story. Have you ever thought of a much worse one—the genius recognized too well? . . . That a great many men are poor fools who can't see the best—that's nothing. . . . But do you understand about the men who see it and don't want it?"
"No." [responds Roark]

"No, you wouldn't. . . . Do you know what your secret is? It's your terrible innocence.

. . . .

³¹ Id. at 350-57.

³² Id. at 357.

³³ Id.

³⁴ Id. at 328.

It's because of that absolute health of yours. You're so healthy that you can't conceive of disease. You know of it. But you don't really believe it."³⁵

Despite Mallory's view, it is difficult to believe that Roark's innocence is so profound that he doesn't realize the inadequacy—within the culture he finds himself—of simply presenting his work.

A less generous interpretation would suggest that Roark understands that the case is lost before it begins and that nothing is to be gained by participating in a sham trial except to give it a certain legitimacy. (Such an interpretation would be consistent with views Rand would later advance in her magnum opus, Atlas Shrugged. ³⁶) In a variant of this explanation, Roark is essentially indifferent to the outcome of the case. This interpretation, too, has some support in the novel. When one of Roark's friends attempts to persuade him to hire a lawyer to fight the case, arguing that Roark's ignorance of law and courtrooms means that Stoddard will win the case, Roark responds, "Is the case of any importance?" For Roark, what is important is the building, and because Stoddard owns the building, there is nothing Roark can do to prevent its desecration. Thus, it may be of some consequence that this trial, unlike the one to come, is between private parties.

Yet another interpretation would suggest that the question whether what Roark designed and built is indeed a "temple" is one resolvable by a kind of direct perception, not requiring the mediation of verbal argument and therefore not an issue about which one can be persuaded. The question is determined by the nature of the soul of the decision-maker. Put another way, Roark's view may be that the building speaks for itself. Earlier in the story hen one of Roark's friends tries to persuade him of the importance of seeking out new commissions, Roark's response is characteristic: "What can I tell people in order to get commissions? I can only show my work. If they don't hear that, they won't hear anything I say." In short, Roark regards the buildings he designs as living things; they speak for themselves, and there is nothing he can add to what they have to say.

Thus, for Roark, the question to be decided by the trial is not susceptible to logical discourse. Indeed, words, language are irrelevant.

³⁵ Id. at 331.

³⁶ Ayn Rand, ATLAS SHRUGGED 475-84 (Random House 1957).

³⁷ Rand. The Fountainhead, supra note 3, at 343.

³⁸ Id.

³⁹ Id. at 159.

To attempt to defend the value of the Temple would be like trying to persuade someone that a particular color is red; there is nothing one can say but "Look." Questions of this sort are not referable to law. Law is a process in which words are the coin of the realm. Its workings depend upon persuasion, rational discourse. It is simply the wrong medium for defining things ostensively.

IV. THE SECOND TRIAL

In a number of respects the Cortland trial is similar to the Stoddard trial: In both there is a torrent of pre-trial publicity (orchestrated by Toohev): Peter Keating appears as a witness against Roark and is broken by the experience; and Roark refuses a lawyer and appears on his own behalf. The Cortland trial also differs from the Stoddard trial in Cortland is a criminal case in which Roark's liberty is at stake; if convicted, he will go to prison. Also unlike the Stoddard trial, here Roark's case is being tried to a jury, a jury that Roark has participated in selecting. He challenges potential jurors and selects a "tough-looking" group that the prosecutor believes a lawyer would have challenged in favor of gentler souls. 40 The jury appears attentive and emotionless. Similarly, and unlike the judge presiding at the Stoddard trial, who was preoccupied with the appearance of female witnesses but otherwise uninterested, the judge presiding over the Cortland trial is described as "erect on the tall bench. He had grey hair and the stern face of an army officer,"41 a man worthy of respect.

This appears to be a more appropriate forum for Roark. There is little of the carnival atmosphere of the Stoddard trial, and there is a greater concern with facts, with objective reality. Thus, if one of the reasons for Roark's refusal to participate in the Stoddard trial was a notion that it would be futile to do so, there is less reason for such an assessment in the Cortland trial. We might, therefore, expect Roark to be more involved in the trial.

At the Cortland trial, unlike the Stoddard trial, Roark offers a verbal defense,⁴² a long and sophisticated philosophical defense of his actions-indeed, of his way of life. If Roark's decision not to offer evidence at the Stoddard trial is an indication of his innocence, by the time of the Cortland trial, that innocence has been compromised by his

⁴⁰ Id. at 675.

⁴¹ *Id*.

⁴² Id. at 766-85.

experience of the world. He has come to understand the principle behind men like Keating, a principle that had once eluded him.⁴³

It is this principle-selflessness, the absence of a genuine self-that Roark had failed to understand. Those like Keating "live within others. They live second-hand." It is against this way of life and in support of Roark's own commitment to individualism, reason and man's creative capacity on which Roark bases his defense. The trial thus starkly pits two dramatically different philosophies against each other. The climax of the novel is an intellectual as well as a dramatic confrontation. (This integration of the dramatic and the philosophical is one of the characteristics of Rand's fiction. ⁴⁵)

The account of the trial opens with the prosecution's attack less on Roark's act than on his motive. Indeed, the first thing we hear from the prosecutor is that Roark's motive "will appear monstrous and inconceivable." That motive, of course, is egoism or as Roark had earlier put it, "[his] work done [his] way." That it was, of all things, a housing project that Roark had blasted away only served to compound the crime. The prosecutor's opening statement is well received by those in the courtroom. "They agreed with every sentence; they had heard it before, they had always heard it, this was what the world lived by. . . ." Yet it is this way of looking at the world, this conception of morality that Roark, in his turn, will challenge in the courtroom, as he has by the manner in which he has lived his life.

On the first day, as at the Stoddard trial, a parade of witnesses testify against Roark. Unlike the Stoddard trial, however, these are fact witnesses. The subject of their testimony concerns an account of what happened: the police officer's account of Roark's arrest, the night watchman's account of being sent from the scene, the contractor's account of dynamite missing from the site, and so on. On the following day, Keating is called to testify to his arrangement with Roark, presumably to establish Roark's motive. Keating recounts how it was Roark that designed Cortland on the condition that it be built exactly as he designed it, but Keating is a broken man. Testimony that it was thought would create a sensation falls somewhat flat, as if no one is on the witness stand, much less a famous architect confessing his own incompetence.

⁴³ Id. at 605.

⁴⁴ Id.

⁴⁵ See, e.g., Rand, ATLAS SHRUGGED, supra note 36,

⁴⁶ Rand, *supra* note 3, at 674.

⁴⁷ *Id.* at 579.

⁴⁸ Id. at 676.

After Keating's testimony, the prosecution rests. Roark calls no witnesses but combines his own testimony and his closing argument. Roark refers to this as "[his] testimony and [his] summation," and both words are apt. The speech is his testimony as much in the religious as in the legal sense, and the speech is the summation of all that we have learned from reading Roark's story. It is, as well, the dramatized philosophical focus of the novel, and its immediate aftermath—his acquittal—is the book's climax. It is here that Roark, obviously speaking for Rand, justifies a morality of individualism, reason and creative work.

Roark begins, "Thousands of years ago, the first man discovered how to make fire. He was probably burned at the stake he had taught his brothers to light." The relationship between the creator and those lacking the ability and independence to create is the starting point of Roark's testimony. His first several paragraphs are focused upon the unsubmissive creator who, throughout history, contributes enormously to the progress of the human race and is made to pay a high price for his contribution. Yet it was the creator who ultimately prevailed.

The motive of the creator, Roark explains, is not primarily the welfare of others. Instead it is the realization of his own vision: "His truth was his only motive. . . . A symphony, a book, an engine, a philosophy, an airplane or a building—that was his goal and his life. . . . The creation, not its users. The creation, not the benefits others derived from it." And this vision, this creative impulse is, for Roark, a creature of the self. "[O]nly by living for himself was he able to achieve the things which are the glory of mankind." 52

These achievements are the product of man's mind, his means of survival. Every living thing has attributes equipping it for survival. Animals have claws or fangs or horns. Man has his mind. But the process of thought, the exercise of man's mind is not a collective process. "[T]he mind is an attribute of the individual."⁵³

Because man must produce what he requires for his survival, his only choice is to create or to feed off the creation of others. The creator requires independence; his concern is with the conquest of nature. The parasite lives second hand, originating nothing; he requires relationships with others to insure his survival. The creator is not concerned

⁴⁹ I.A

⁵⁰ Id. at 677-78.

⁵¹ Id. at 678.

⁵² *Id*.

⁵³ Id. at 679.

primarily with others. For the second-hander, dependence is a virtue. Thus, the parasite's moral code demands that man live for others. "Men have been taught that the highest virtue is not to achieve, but to give. Yet one cannot give that which has not been created." 54

The only choice offered by the culture, as models of good and evil, is the choice between self sacrifice and the sacrifice of others to one's self—a choice between masochism and sadism. But both are variations of dependence on others. What Roark offers instead is a version of independence, freedom from the claims of others. "The choice is not self-sacrifice or domination. The choice is independence or dependence."

Thus, the measure of a man is not his relation to others, but what he is and has made of himself. "In all proper relationships there is no sacrifice of anyone to anyone."

The proper relationship of one person to another is that of traders to mutual advantage.

Roark concludes by relating these rather abstract notions to the dynamiting of Cortland. He reminds his audience that his price for Cortland was to see it built precisely as designed and that he was not paid.⁵⁷ And though he is charged with destroying a project conceived for the poor, he points out that but for his design the poor could not have had this particular shelter.

I came here to say that I do not recognize anyone's right to one minute of my life. Nor to any part of my energy. Nor to any achievement of mine. No matter who makes the claim, how large their number or how great their need.

I wished to come here and say that I am a man who does not exist for others. . . .

I wished to come here and say that the integrity of a man's creative work is of greater importance than any charitable endeavor.⁵⁸

Even today, this is pretty heady stuff. At the time of the book's publication, in a much more leftward leaning collectivist political climate, it was shocking. What is remarkable, therefore, is how persuasive it was and how influential it remains. It was persuasive to the jury as well. Although there was an expectation that the jury would deliberate for some time, they were barely out of the box—indeed, Roark

⁵⁴ Id. at 680.

⁵⁵ Id. at 681.

⁵⁶ *Id*.

⁵⁷ Id. at 684.

⁵⁸ *Id*.

had not yet left the courtroom—when it was announced that the jury had reached a verdict. Roark is acquitted.

V. THE TWO TRIALS: LITERARY METHOD & LEGAL METHOD

The Cortland trial, then, turns out quite differently from the Stoddard trial. In the Cortland trial Roark does not rely on the direct perception of the decision-maker to render a normative judgment. Indeed, he cannot, for it is a way of life that must be judged. Interestingly, we the readers can make precisely the sort of judgment Roark sought in the Stoddard trial because we have been able to perceive the competing ways of life the novel has laid before us. The novel is for the reader, what the pictures of the Stoddard Temple are within the novel.⁵⁹

But both for the reader and for the jury, we are helped in reaching our decision by an explicit account of the differences between the values of the life of the second-hander and the life of the autonomous, independent individual. In *The Fountainhead*, Roark's speech furnishes that account. And Roark (and Rand) uses the setting of the courtroom and the adversary system of justice as the context in which these two antagonistic ways of life are presented.⁶⁰

These trials, then, tell us little about law. They are a setting for a philosophical battle. Earlier in the history of the United States, Alexis DeTocqueville, perhaps the most acute observer of American ways and mores, declared that all issues of public importance find their way into the courtroom: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." That is no less true in Rand's fiction where trials play so prominent a role. Her novels comprise battles between good and evil. But the confrontations are not the physical contests of pulp fiction. The battles are essentially intellectual. And the modern battlefield for intellectual contests of this sort is the courtroom. The adversarial system of justice

⁵⁹ Indeed, there is a kind of methodological reversal from the Stoddard trial to the Cortland trial. In the former, those within the book are required to make a decision in the absence of a conceptual justification, relying instead on the immediate perception produced by the photographs. As readers, however, we do not get to see the photographs; we have no direct visual perception of the Temple, but are limited to conceptual description. With respect to the Cortland trial, on the other hand, the participants must rely almost entirely on Roark's presentation in the form of abstract, conceptual argument based on principles rather than perceptions. As readers, however, we have seen the concretes that give life to Roark's statement; that is, after all, what the book is all about.

Den Uyul, supra note 9.
 Alexis De Tocqueville, DEMOCRACY IN AMERICA 280 (Knopf 1994) (1835).

provides a near perfect metaphor for the intellectual contest between good and evil.

The differences between the trials, however, suggest that the good is not self-evident and that once identified it does not inevitably prevail. It requires rational argument. But, as the novel itself demonstrates, abstract argument is much more likely to be appreciated in the context of particular events. Unquestionably Rand's position is both more understandable and more persuasive for being explicated not merely through a philosophical treatise, but through the events of a story with the philosophical discourse integrated into that story. In short, the integration of the abstract and the particular is what provides the power of Rand's argument.

But this is precisely what happens in the typical judicial opinion, though typically on a less grand scale involving more mundane matters. The typical opinion tells a story. 62 It recites a narrative of facts relevant to the matter to be decided. As any good lawyer or judge would admit (unless they fear giving away shop secrets), this narrative is not a random or even neutral recitation. It presents the facts in a way most likely to support the decision being rendered. It is only after this narrative statement of the particulars of the case that an opinion goes on to address the legal doctrine applicable to the case. This legal doctrine is necessarily a set of abstract principles. But the abstractions take on color from the particulars to which they are to be applied. Judicial decisions are not mere treatises on the law, seeking to set out general principles and their relationship to each other. The abstractions are connected to the facts, the particulars, to which they are to be applied, just as the abstractions of Roark's closing argument are attached to the particulars of the story. For example, when Roark talks about the selfishness of the creator, we better understand what he means because of an earlier incident in the book in which Roark, at a time when he is destitute, is offered a commission for a major bank building, on the condition that he change the elevation and ornamentation of his design. Although the project could assure his career, he refuses the commission. One of his supporters among the bank's board of directors cries, "We want your building. You need the commission. Do

⁶² See, e.g., David Ray Papke, Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions, 40 J. Legal Educ. 145 (1990). See generally, sources cited in Samuel J. Levine, Halacha and Aggada: Translating Robert Cover's Nomos and Narrative, 1998 Utah L. Rev. 465, 482 n.91.

⁶³ See, e.g., Alan D. Hornstein, APPELLATE ADVOCACY IN A NUTSHELL 211-219 (2d ed. 1998).

you have to be quite so fanatical and selfless about it?"⁶⁴ Roark is incredulous. He smiles, looks down at his drawings and responds, "That was the most selfish thing you've ever seen a man do."⁶⁵

Similarly, when Roark speaks of man's mind as his principle means of survival and distinguishes those who would conquer nature from those who seek to conquer other men, we are reminded of the book's opening paragraphs:

He looked at the granite. To be cut, he thought, and made into walls. He looked at a tree. To be split and made into rafters. He looked at a streak of rust on the stone and thought of iron ore under the ground. To be melted and to emerge as girders against the sky.

These rocks, he thought, are here for me; waiting for the drill, the dynamite and my voice; waiting to be split, ripped, pounded, reborn; waiting for the shape my hands will give them.⁶⁶

When Roark speaks of second hand consciousness, those for whom the views of other men are of greater moment than their own vision of reality, we call to mind all we have been shown of the life of Peter Keating. When he speaks of the those who seek to conquer other men rather than nature, we recall all that we know of Ellsworth Toohey. One could review Roark's speech virtually paragraph by paragraph and find in the plot of the novel particular applications of the abstract principles Roark articulates. Rand makes these connections explicit by having Roark dedicate his actions at the trial to those characters in the novel who personify the qualities he praises. It is these reconnections to the action of the novel that helps make Roark's speech so rhetorically powerful. Abstractions alone are not sufficient, and particulars without articulated conceptual identification are also inadequate to an appropriately human level of awareness.

Judicial opinions also do not end with the factual narrative. Put another way, the judge does not submit photographs of what happened, as Roark submitted photographs of the Stoddard Temple, and announce the judgment. The judgment is not self-evident from the facts. Some explanation, in terms of the abstract principles of law governing the case is essential to an understanding of the result—just as Roark furnishes the abstract principles necessary to a full conceptual understanding of the way of life he embraces. Thus, the judicial method, combining the particulars of the individual case with the more abstract

⁶⁴ Rand, supra note 3, at 197.

⁶⁵ Id.

⁶⁶ Id. at 16.

principles of the law, finds its analogue in the literary method of $\it The Fountainhead$.