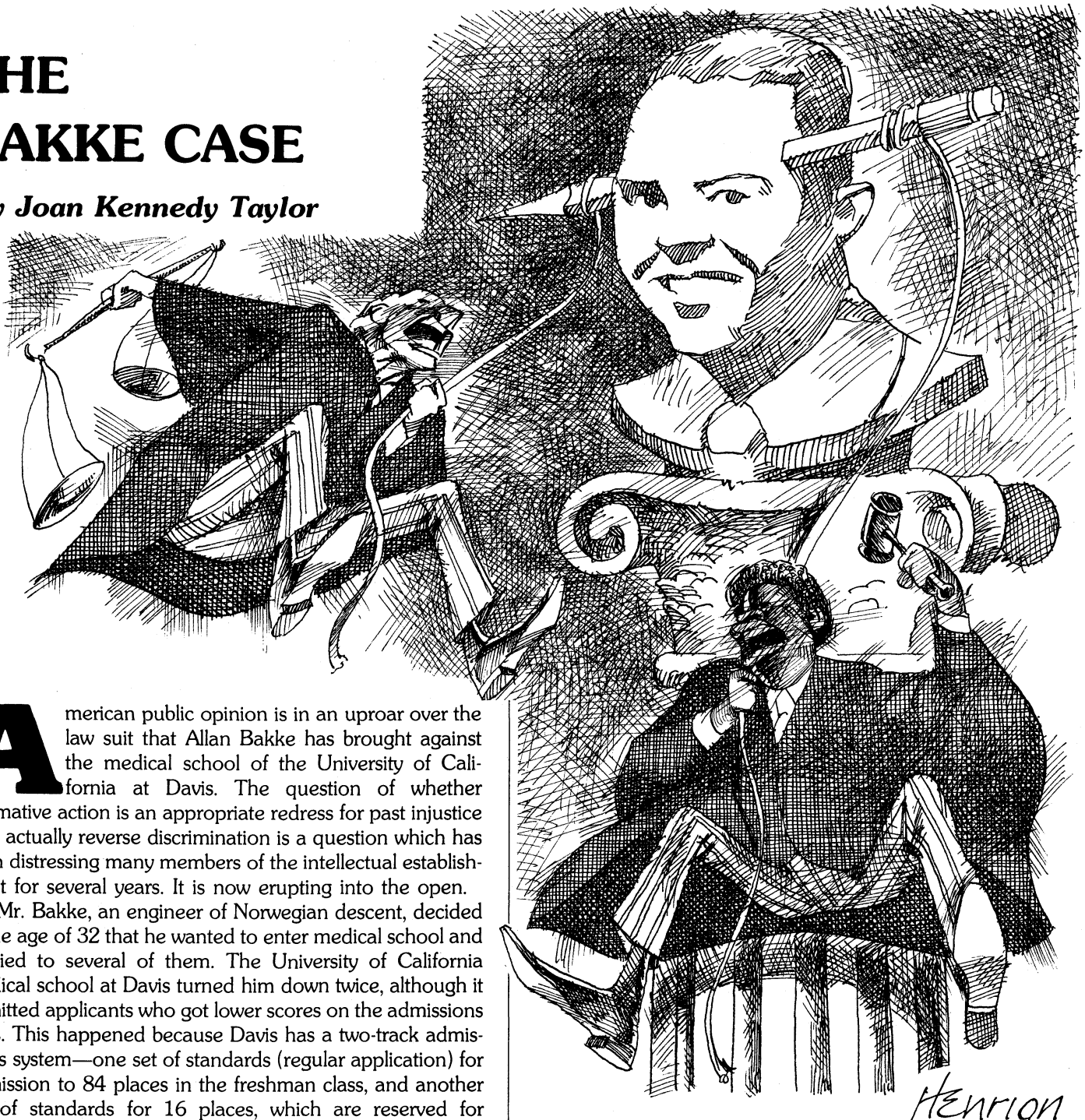
THE BAKKE CASE

By Joan Kennedy Taylor



American public opinion is in an uproar over the law suit that Allan Bakke has brought against the medical school of the University of California at Davis. The question of whether affirmative action is an appropriate redress for past injustice or is actually reverse discrimination is a question which has been distressing many members of the intellectual establishment for several years. It is now erupting into the open.

Mr. Bakke, an engineer of Norwegian descent, decided at the age of 32 that he wanted to enter medical school and applied to several of them. The University of California medical school at Davis turned him down twice, although it admitted applicants who got lower scores on the admissions tests. This happened because Davis has a two-track admissions system—one set of standards (regular application) for admission to 84 places in the freshman class, and another set of standards for 16 places, which are reserved for 'disadvantaged, minority students,' none of whom are white. As a matter of fact, 272 whites applied for these special places between 1971 and 1974, and none were admitted. At the same time, according to an article by Nathan Lewin in the October 1 issue of *The New Republic*, "Case records show that of 500 students admitted over five years, 49 'minority persons' entered through the 'regular applicants' process." In other words, members of certain minority groups (black, Asian and Hispanic) were admitted to the regular program if they qualified, and were considered again under the special program if they did not, thus in effect giving them a double chance to be admitted.

Bakke took the University of California to court for this practice, claiming that his right to equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution, had been violated. The Supreme Court of California agreed with him, and the University of California appealed to the U.S. Supreme Court.

In his article on the Bakke case in the *Village Voice* (on October 17) Nat Hentoff tells us that "Some 10 civil rights groups . . . strongly urged the University of California not to

appeal. When the university insisted on going ahead, 22 civil-rights organizations petitioned the Supreme Court not to grant an appeal. The case was weak, the record was weak, the university's intentions were suspect. The Supreme Court said it would hear the case.

" 'At that point, we had not choice but to support the university, says an ACLU official. 'Since then, we've had to fight as hard as we can with what little we have.' "

One hundred and forty-six groups have filed friend-of-the-court briefs in the Bakke case. This is the largest number in history. Everyone agrees that it is not a strong case, but its decision may affect countless numbers of Americans. A *Newsweek* article of September 26 said: "Federally enforced equal-opportunity regulations touch the livelihood of at least 25 million American workers from steel mills to corporate boardrooms. They affect admissions procedures for hundreds of colleges and professional schools." The government has submitted a brief signed not by the Solicitor General, which is customary, but by Attorney General Griffin Bell, underscoring its importance to the Carter Administration. An appendix to the Government's brief lists fifteen major government programs which might have to be changed if Bakke wins his case. On the other hand, says an article in the *New York Times* of October 16, "if the university wins the case, it could mean an expansion of the government's efforts to improve the lot of blacks and others by requiring businesses, colleges and other institutions to accept fixed standards for employment and admissions." *Fixed standards*, of course, means numerical quotas.

BEFORE THE COURT

On October 12, the Supreme Court heard arguments from Archibald Cox, representing the University of California, Reynold H. Colvin, representing Allan Bakke, and Solictor General Wade H. McCree, Jr., representing the United States as a friend of the court. Each of the opposing lawyers was given 45 minutes to speak, and the Solicitor General had 15 minutes. Mr. Cox argued first, saying that although he felt there was a danger that numerically based programs to help minorities "will give rise to some notion of group entitlement to numbers, regardless either of the ability of the individual or of ... [his or her] potential contribution to society," the important reality for the Court to consider is that "there is no racially blind method of selection which will enroll today more than a trickle of minority students in the nation's colleges and professions."

The Solicitor General presented oral arguments in favor of a brief which has been the subject of a great deal of controversy, as it has been widely reported that a great deal of political pressure had been put on him by officials in the Carter administration to write a "political" statement strongly supporting affirmative action. Mr. McCree, who is himself black, presented arguments in favor of using race as one criterion for admission to government programs, but criticized numerical quotas and separate admissions procedures. The written brief urges the Supreme Court to send the case back to California for reconsideration, but in his oral arguments the Solicitor General "did not press this request," according to the *New York Times*.

Which side exerted the most pressure on the government depends on who you read: Stephen Arons in *Saturday Review* says: "A glimpse into the politics of Carter's decision comes from the experience of one cabinet member who attempted to get the administration to support the university's position. On March 18 of this year, Secretary of Health, Education and Welfare Joseph Califano told a *New York Times* interviewer that his personal experience indicated that affirmative action was a successful tool for bringing qualified minority persons and women into government, private employment, and the schools that qualify people for such work. The following week, President Carter was barraged with letters from 44 nationally known educators, including Sidney Hook, Nathan Glazer, and Bruno Bettelheim. On April 1 Califano recanted, claiming error in advocating the use of quotas."

But according to articles in *Newsweek* and the *Village Voice*, the "well-orchestrated attack" on the Justice Department came from leaders of the Congressional Black Caucus, the NAACP, and administration officials committed to affirmative action.

ODD POLITICAL ALIGNMENTS

It is clear that there are some powerful guns on both sides. Such periodicals as *The New Republic*, *Saturday Review*, *The Nation*, *The New York Review of Books*, *National Review*, *The Atlantic*, *The Village Voice* and *Newsweek* have all had cover articles about the case. The AFL-CIO is split down the middle about it; the American Federation of Teachers has a brief supporting Allan Bakke and five other unions have signed a brief supporting the University of California. Huey Newton, the former Black Panther Party leader, has come out strongly on the side of Allan Bakke; the NAACP is on the opposite side. The American Civil Liberties Union supports the University; the Anti-Defamation League of B'nai Brith has filed a brief on the other side. *The New Republic* calls the government brief "a shoddy political document," and ran an article calling "race Certification" the logical next step." The November *Atlantic*, on the other hand, has McGeorge Bundy, president of the Ford Foundation, saying "the question presented is whether any educational institution whose admissions are selective may consider the race of any person as an affirmative element in qualification for entry. What is directly threatened is the nationwide effort to open our most selective educational institutions to more than token numbers of those who are not white."

Although opposition to affirmative action has been considered a conservative position, the liberal *New Republic*

and *Village Voice* are strongly opposing "reverse discrimination" with cogent arguments, while the conservative *National Review* ran on October 28 a favorable review of a 1975 book by Archibald Cox, the University of California attorney, called *The Courts vs. Self-Government.* The reviewer, Paul Connolly, says the book analyzes the only previous case in which reverse discrimination was charged, the 1974 DeFunis case, in terms of judicial restraint, suggesting that the constitutional principle was unclear and so "the people, not the courts, should debate and legislate a decision." He quotes Cox as saying that it is better for the Supreme Court to "permit the state educational authorities to form their several individual judgments concerning the balance of educational and social advantage than to deny them freedom to attempt conscious remedies for past racial discrimination by the dominant whites." This, says Connolly, is an incisive definition of "the problems and concerns which will likely be expressed in the Bakke hearing."

Meanwhile, Marco DeFunis (whose suit against the separate admissions policy for whites and minorities at the University of Washington Law School was declared moot by the Supreme Court because a state court had ordered that he be admitted, and by the time the case reached the Court he was about to graduate) is the author of the brief supporting Bakke filed by Young Americans for Freedom. The conservatives seem to be as split over the issues in the case as are the liberals.

JEWISH INTELLECTUALS AND QUOTAS

The split among liberals seems to result in large part from the uneasiness that many liberal Jewish intellectuals have always felt about quotas, and the conflict which they feel between this and their role as leaders of the civil rights movement. In an article in *The New Republic* of October 15th called "The War Inside the Jews," Leonard Fein writes:

> American Jews have been worrying about affirmative action ever since its inception, for fear that somewhere in the inundation of news that was sure to follow, the dread word "quota" would appear . . . .
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> When Lyndon Johnson said, back in 1965, that "we seek not just . . . equality as a right and a theory but equality as a fact and equality as a result," organized Jewish response was enthusiastic in its endorsement. Back then, the enemy was still Bull Connor and the redneck bigots. Those few Jews who hesitated, who were inclined to wonder how an open society committed to the merit system could insure "equality as a result," were drowned out by the massed chorus singing "We Shall Overcome," and hoping. Now, a dozen years later, any Jew who sides with the University of California in *Bakke* can find himself quite isolated from his coreligionists. Every Jewish organization that has filed an *amicus* brief in *Bakke* has come down on Allan Bakke's side, against the University of California, against the 'use of race in the decision-making process of governmental agencies.' The American Jewish Congress and American Jewish Committee (together with others) have filed a joint *amicus* brief asserting that the introduction of racial quotas into public policies is "factually, educationally and psychologically unsound, legally and constitutionally erroneous and profoundly damaging to the fabric of American society."
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> In short, a clear and uninhibited consensus apparently has emerged among American Jews, and it is a consensus quite contrary to the spirit of inspiring alliance between Jews and other excluded minorities that came so sadly unglued in the late 1960's. Jews, like blacks, have come to see the *Bakke* case as absolutely critical to the future of their groups and of the nation. But they see it very differently.

What are seen to be the issues? There is a strong argument in favor of individual rights to be made on Bakke's side, and it is being made by many of the liberals in the case. It is argued that rights belong to the individual, not the group; that the Constitution requires that state action be color-blind; that preferring disadvantaged members of minority groups for admission to professional schools is of dubious value to them as well as to everyone else, because it casts doubt on the value of the degree that they may earn. Most strongly it is argued that we cannot make up for past discrimination against one group by discriminating in the present against another. Probably lurking in the back of many people's minds is the fact that affirmative action is pressed on behalf of women as well as of blacks—if any sort of vaguely representative numerical quota is upheld by the Supreme Court, what argument can be given against future proposals to have *women* represented in various professions according to *their* presence in the population? Are law schools and medical schools to be required to enroll a majority of female students? Will there be a call for 53 percent of Congress to be women, in order to accurately reflect their population distribution?

On the other hand, it is argued that we *must* do something to recruit into professional schools qualified and highly motivated members of minorities that have been discriminated against, even if they do not do as well as others on tests. Such tests, it is argued, are very poor predictors of future success or failure in any event; studies such as Banesh Hoffman's *The Tyranny of Testing* show us that they penalize the exceptionally brilliant as much or more than the dull or uninformed. Why not have flexible standards for admission to professional schools which include many factors, including race?

This seems to be one of the cases in which the federal government is determined to expand its power no matter what. If Mr. Bakke wins his case, not only will state-run universities no longer be able to implement this kind of affirmative action program but, it is feared, neither will private universities.

PRIVATE UNIVERSITIES AND GOVERNMENT POWER

Columbia, Harvard, and Stanford Universities have all filed briefs supporting the University of California's program, presumably feeling that their own affirmative action programs are threatened. The brief of the Association of American Law Schools says if professional schools "must forgo any

consideration of race in making admissions decision," it will lead to "substantially all-white law schools."

A possible rebuttal to this line of reasoning is contained in a *New York Times* article of October 25. It points out that problems have arisen when minority students with poor records have been admitted to law schools under a double-standard admissions policy, and says: "One result of this double standard is that black graduates tend to fail the bar examinations at much higher rates than whites." It quotes a young black lawyer as saying, "if you graduated from certain universities in certain years, your degree is suspect."

In any case, the Fourteenth Amendment guarantees equal protection in cases of action by the *state*. Why are private universities running scared? The answer is implied in a statement by Mr. Lawrence, who says in his article, "Medical students are among the most highly subsidized students in the nation, and the present economies of medical education make it impossible to provide an opportunity to everyone who is qualified. *The real issue, then, is how this scarce resource should be allocated.*" (emphasis added)

The real issue, in short, is that so much federal money seems to be going into higher education that it is all, public and private, becoming an arm of the state. The Office for Civil Rights (an agency of HEW) is already forcing the New York City school system to require black and Hispanic teachers to pick their new school assignments from one box, and white teachers, from another, under the threat of withholding millions of dollars of federal aid. Programs for university funding can be similarly affected.

THE CIVIL RIGHTS ACT

And the Supreme Court seems to be leaning in the direction of deciding the Bakke case in terms of the Civil Rights Act, rather than on the constitutional issue. This is called a "narrow" decision, because the Civil Rights Act affects everyone who engages in interstate commerce, while the Fourteenth Amendment restricts the actions of those who can be shown to be acting as agents of government. Bakke's attorney listed three grounds for the suit: the Equal Protection Clause of the Fourteenth Amendment, the "privileges and immunities" section of the California Constitution, and Title VI, 42 U.S. Code 2000(d), which is the Civil Rights Act of 1964. On October 17th the Court ordered: "Each party to this cause is directed to file within 30 days a supplemental brief discussing Title VI of the Civil Rights Act of 1964 as it applies to this case."

The Supreme Court of California affirmed a lower court decision that found the University of California had violated both Title VI *and* the Fourteenth Amendment . . . but in affirming the decision, it ruled only on the constitutional question.

Title VI says, "No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." Now that the U.S. Supreme Court has indicated an interest in deciding the case on the basis of this legislation, we can perhaps look forward to additional government programs to police the way in which federal funds are used to implement federally mandated affirmative action. As Professor Herbert J. Gans of Columbia University said to *U. S. News and World Report*, "A more egalitarian society inevitably requires more government regulation."

Albert Shanker, President of the United Federation of Teachers, has put it even more pessimistically. "The goal of the Washington bureaucrats," he wrote, "is not an integrated society but a totalitarian one."

It looks as if whoever wins the Bakke case, it is the individual American citizen, whatever his or her group, who is going to be the loser. But there may be a glimmer of hope on the horizon.

FEDERAL FUNDS AND AFFIRMATIVE ACTION

In sharp contrast to the attention being paid by the media to the Bakke case is the routine journalistic speculation that has greeted the announcement by medical school after medical school that it will give up federal funds rather than allow government dictation of admissions policy in another area. At stake is a different kind of quota: "department regulations that would set quotas for admission of American-born transfer students from medical schools outside the United States," as it was put in a brief account in the *New York Times*.

In a television news interview in late October, a spokesman for Northwestern University announced that it was the *thirty-sixth* medical school to turn down HEW's tuition assistance funds rather than allow "a federal bureaucracy (to) select our students for us."

"It is time," he said, "to get off the wagon."

A late November *New York Times* story said that it is only fourteen medical schools that are resisting and $11 million that is at stake. No one seems to be taking notice of the connection: that social policy as perceived in Washington is being forced as a standard on more and more American institutions. This trend is of course not limited to medical schools.

The Bakke issue seems clouded to many because it is a perfectly reasonable goal that we have more minority doctors, and no private institution should be barred from instituting any program it wishes to achieve such a goal. As was brought out in the questioning of Mr. Colvin by the Supreme Court, there is no "right of admission" to a medical school. Similarly, it may seem desirable to some medical school's faculty to encourage transfers from medical schools abroad. This does not imply that it is equally

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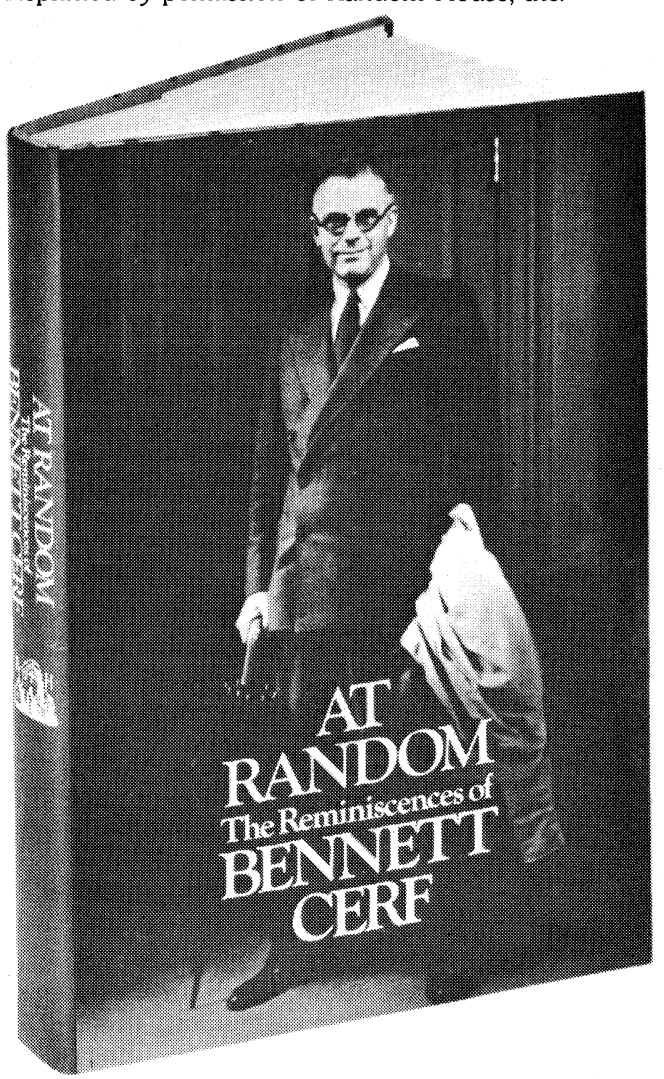
AYN RAND AT RANDOM

By Bennett Cerf



Generally, editors find a publishing firm with which they and their authors are comfortable, and stay with it for the rest of their working lives. Hiram Haydn was an exception. At the beginning of 1955 Hiram came to Random House as editor in chief. He had been at Crown Publishers before becoming the New York editor of Bobbs-Merrill, the Indianapolis firm, and I began hearing about his professional skill. I knew he was the editor of *The American Scholar*, the Phi Beta Kappa magazine, was teaching a writing course at the New School, and had under his wing a number of coming new writers, including William Styron. He had also written several books himself. When I heard that he was unhappy at Bobbs-Merrill, we got in touch with him and signed him up.

I admired Hiram—a wonderful fellow, although very exasperating in some ways. He had a great passion for first novels that other people thought were terrible. There was no way to convince him he was wrong, because he loved to help young writers—especially girls. The time he wasted with young women whose books were obviously destined to sell 918 copies! There was nothing we could do about it. He truly had us buffaloed!

Hiram had been with us for about four years when we negotiated a new employment contract with him—something unusual for use, but he insisted on having one. At about that time I went to Jamaica in February, 1959, with Moss and Kitty Hart for vacation. When I came back Donald told me that Hiram wanted us to tear up his contract. I said, "What are you talking about?" He said, "Pat Knopf has had a fight with his father, and Pat and Mike Bessie and Hiram want to start a new publishing house." When Hiram came in to discuss the matter, he said, quite logically, "You can understand this, Bennett. It's not that I'm leaving you to go to some other publisher, but that I want to go in for myself. You did it. *You* wanted to have your own firm." We had no alternative, so we tore up the contract—reluctantly, because during the four years he was at Random House he brought us a number of authors we were very happy to have and who remained with us after he left.

AYN RAND

The first of these was Ayn Rand, whose *The Fountainhead* had been published by Bobbs-Merrill while Hiram was there. I had never met Ayn Rand, but I had heard of her philosophy, which I found absolutely horrifying. *The Fountainhead* is an absorbing story, nonetheless. She was very dubious about coming to Random House, she told Hiram, because her sycophants had told her that we were way over on the left and that she didn't belong with us. But this rather intrigued her—being published by a liberal house rather than one where she would ordinarily be expected to go. Furthermore, she had heard about me—one of the extra