

RONALD L. BRANDT*

After graduating from the University of Wisconsin Law School in June 1972, I was hired as an Assistant State Public Defender by James H. McDermott, who had been the State Public Defender for many years. He had manned the office alone until hiring Howard as an Assistant State Public Defender in 1972, following Howard's graduation from UW and his clerkship at the Wisconsin Supreme Court. I had known Howard by reputation only—a brilliant, hard-working law student, who was head and shoulders above everybody else. Quite frankly, I was amazed that Jim hired me, when he could attract lawyers of Howard's caliber. Three days after I started work, Jim informed me that he was resigning to take a position in the Attorney General's office.

I am not sure if my memory is correct, but my recollection is that Howard and I had done nothing but exchange handshakes at that point. I do remember that in those first three days Howard wrote a brief, argued a case before the Wisconsin Supreme Court,¹ and made a trip to the Wisconsin State Prison. My biggest accomplishment in those three days was to find the law library. At that point, I believed my career as an Assistant State Public Defender was waning.

Within a few days, Howard was named "Acting State Public Defender," while the court selected Jim's successor. That afternoon, Howard came into my office and we had our first real conversation. If it is possible to be businesslike and casual at the same time, Howard mastered it. He simply sat down and told me that my job was safe and that he was eager to work with me. He then assigned almost all of Jim's caseload to me, along with my first case to be argued before the supreme court, in the October 1972 session. From that moment, I knew that I would be challenged in ways that I had never conceived. A few weeks later, the court appointed Howard to be the State Public Defender.

It wasn't Howard's assurance of job security that struck me. Rather, it was his confidence that I was up to the task and his genuine desire to

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1. It was the first time I watched Howard give an argument to the supreme court. To say that it was impressive is an understatement. While Howard was an exemplary and prolific writer, his oral arguments made the case come alive. He spoke with authority, yet made the issue simple for the listener.

include me in a new adventure. For the next six months, Howard and I were the only full-time appellate defenders in Wisconsin. And I knew that I was probably the luckiest young lawyer in Wisconsin. I was working one-on-one with a person whom I and everybody else knew to be a brilliant, passionate lawyer who was dedicated to providing the best possible legal representation for every indigent client he represented. And he was prolific, writing brief after brief, many involving complex legal issues, at a speed that boggled my imagination. Howard could read a trial transcript, review the exhibits, and prepare a brief in an afternoon. He would visit a prison, see a half-dozen or more clients in the morning, find time to write a dozen clients (typing the letters himself), and be home for dinner by 6:00 p.m. At first, I could not believe the pace—then I found myself drawn into it. Our work never seemed to end, but the satisfaction from it never diminished. Howard loved his job, which was infectious.²

We often rode to the prisons together, either to Waupun or Green Bay, to see clients. During those long trips, we often talked about why we had become public defenders. Fundamental to Howard was making sure that each client got no less than all the process due and guaranteed by the Fourteenth Amendment. Guilt or innocence, while important, was not our focus. Was the case done right? If not, was the client's case prejudiced? Was the error serious enough to warrant a new trial? What could we do to make the justice system work better? Indeed, if the system fails the poorest, then how can it function effectively at all?

And so we worked. The supreme court appointed us to more and more cases, and by February 1973 Howard hired a second assistant. At about the same time, both the United States Supreme Court and the Wisconsin Supreme Court determined that due process protections attached to probation/parole revocation proceedings. Howard believed that our task as appellate defenders included responsibility for providing

2. Howard did not take himself all that seriously. There is no doubt that he loved his work, but he often saw how absurd it could be. On one occasion, he was appointed on very short notice to represent a defendant in the Dodge County Circuit Court on a probation revocation case. He drove up to Juneau, never having met the client, only to turn around and come back to the office, when the Circuit Judge prohibited him from representing the defendant, because the client was wearing a fur coat that probably cost more than Howard's annual salary. Howard was nearly crying with laughter as he told the story.

Another example of Howard's not taking himself all that seriously occurred the morning after we had had a long trip to Green Bay. He was always bringing baby photos of his children to show off. That morning, he handed me a package of photos without comment. He could be heard laughing when I yelled out upon discovering the grisly photos of a decapitation murder autopsy mixed in with baby photos.

representation in those actions, and, by 1974, our caseload was skyrocketing, which led to expansion of the State Public Defender's office. Howard convinced the Wisconsin Supreme Court to increase our budget to allow hiring five more assistants and to open a branch office in Milwaukee in 1975. For the next two years, I supervised the Milwaukee office, working with two other assistants.

Our experience as appellate defenders led Howard to the conclusion that the lack of statewide resources and of a uniform method of appointing counsel created a wide disparity in the quality of appointed-counsel services throughout the State. Feeling that even well-intentioned judges failed to provide counsel to all who might be eligible, Howard believed that the power to appoint lawyers for indigent defendants should not be in the hands of the court, but rather with an independent public defender, whose responsibility should include devising standards by which eligibility would be determined and matching a client's needs with an experienced lawyer, whether public defender or appointed private counsel. It was a vision that was the culmination of the many conversations we had on so many trips to the prisons from 1972 to 1975.

Quite honestly, I told Howard that his utopian vision would never become reality. Why would the court system give up its power to appoint counsel? The Public Defender's constituency hardly had the lobbying power to persuade the legislature to follow that course. As only Howard could do, he acknowledged my concerns, drafted the legislation, shepherded the bill through the legislature, and obtained Governor Lucey's signature to it. By 1977, the blueprint for a revolution in indigent legal services in Wisconsin was in place. Howard's passion for justice, his ability to bridge the economic issues associated with such an all-encompassing law, and his commitment to the poor were the sole reasons that Wisconsin became the first state to have a completely independent public defender system dedicated to providing the best possible representation. No other person could have persuaded the court, the legislature, and the governor to adopt such a system.

After the legislation passed, Howard asked me to assume responsibility for setting up the Trial Division. From 1977 through 1978, we opened more than thirty offices throughout Wisconsin, took over existing county-funded public defender programs, and established a system with more than one hundred lawyers which handled more than 50,000 cases annually. Looking back, it seems incomprehensible to me that, in six years, Howard took a small, two-person appellate program

and catapulted the State Public Defender's office to a multi-million dollar program dedicated to making certain that the wheels of justice turned properly, and that all who were eligible obtained the best possible legal representation.

Those six years defined what Howard was all about. Despite the crushing burden of creating a vibrant, dedicated agency, Howard carried a full caseload, as did each of the lawyers he selected to assist him in fulfilling this vision. His purpose was not to create another state bureaucracy. Resting upon the laurels of a statewide program did not interest him. Representing the clients, seeking justice—nothing else was as important. Everything that he did in those years fostered that outcome. He developed a better way of providing legal services to the indigent defendant. It was fair, and it leveled the playing field. It is a testament to his character that by the time he was thirty, Howard had redefined the manner in which public defender services were provided in Wisconsin. That this public defender system continues to provide those services throughout the State twenty-five years later demonstrates the wisdom of his vision.

I cannot adequately express what it meant to work so closely with Howard in those years and all that I learned from him. Even though we were the same age, Howard was my mentor. The years passed so quickly, but the experience defined my career and my life. Every employee of the State Public Defender was a member of Howard's extended family. As he did with me, Howard nurtured all who shared his path, leading by example. He wanted us to share that path and to love the challenge as much as he did. He demanded nothing less than one's best effort and a commitment to justice. He challenged by assigning difficult tasks. He never criticized; rather, he taught. He always carried a caseload. And so many are much better for all he did. I know that I am a better person and a better lawyer for sharing his path in those years.

ROBERT J. PAUL*

Howard Eisenberg was a brilliant, optimistic, cheerful, dedicated worker and a wonderful human being. Let me claim to be one (of the

* The writer is Chief Legal Counsel for the Wisconsin Department of Public Instruction and served as Assistant State Public Defender from 1973 to 1978 and Deputy State Public Defender—Appellate from 1978 to 1980.

many) who is a better person than I believe I would have been had I not known him. We first met in 1973 when Howard was Wisconsin's State Public Defender, a time when that office was solely an appellate operation with about eight lawyers and three support staff. Having returned to my home state from law school and a clerkship, I dropped in, no appointment, resume in hand, looking for a job. He had none, having just hired five new people with Law Enforcement Assistance Administration grant funds. But when he heard I was returning from the District of Columbia, he immediately began to engage me about the evolving case law from there on competency to stand trial and the defense of mental disease or defect. He took out a brief, fresh from the printer, which he had just filed,¹ and showed me where he'd cited recent opinions and writings of Chief Judge David L. Bazelon of the United States Court of Appeals for the District of Columbia Circuit in support of his argument in the Wisconsin Supreme Court. I was familiar with the opinions, and we had an animated discussion. Three weeks later, while vacationing overseas, I received a postcard from my family saying Howard Eisenberg had called. One of the lawyers he'd conditionally hired had not passed the bar, and was I still looking . . . ?

Howard had a spirit and fire that lit the way and warmed the path of all those he encountered. And though he was an outstanding lawyer, he was completely unpretentious. In an effort to give breadth to these acknowledgments, I contacted the members of the appellate office from those early days, 1972 to 1978 (whereupon Howard went on to direct the National Legal Aid and Defender Association in Washington, D.C.). These former colleagues included Gary Kavanagh, Ron Brandt, Ruth Downs, Rich Sals, Al Whitaker, Jack Schairer, Mel Greenberg, Steve Weiss, Caroline Elias, Vicki Snell, Glenn Cushing, Steve Phillips, Chuck Vetzner, Bill Tyroler, Frank Butler, Tom Zander, and Penny (Pierce) McDonough. Each spoke of Howard's qualities of leadership, compassion, sense of humor, integrity, commanding intellect, near-photographic memory, generosity, strong faith, commitment to the poor and to community service. One remarked that Howard gave public defenders a good name by combining the zeal of a true advocate with the precision and authority of a legal scholar. Another, giving evidence of this fact, referred to instances of some indigent clients arrested after the new Howard-designed trial office had opened. Under that system staff attorneys handled most cases, but private attorneys were also

¹ See *State ex rel. Haskins v. Dodge County Court*, 62 Wis. 2d 250, 272, 214 N.W.2d 575, 586 (1974).

eligible to provide representation. It was reported that several clients, upon being advised that a private attorney would be representing them, complained that they preferred a public defender staff attorney instead, as, *contra* stereotype, jail scuttlebutt was that that representation was superior. It is an ongoing tribute to Howard's instincts with people that many of the public defender staff continue their work at the appellate office today or in other pursuits related to representing the poor, the mentally ill, or the disabled or in other service-oriented endeavors.

Everyone has at least one "Howard story." It is significant in itself that this is so. Among those mentioned was one that displayed Howard's very keen sense and appreciation for the right of every person accused of a crime to a vigorous defense. He never lost sense of who his client was or how each was entitled to his or her own independent counsel. Prior to 1978, when there was only a public defender appellate unit, Howard carried a caseload of about seventy to eighty open appellate cases in addition to his administrative responsibilities and work with the legislature. At that time, the court of appeals did not exist and all appellate work (except county court appeals to circuit courts) was in the state supreme court. With his caseload, in argument week, Howard might have six cases scheduled for oral argument. One day, as he was midway through his second argument, one of the Justices interrupted him to say, "Mr. Eisenberg, isn't the argument you are making on behalf of this client just the opposite of the argument you made in the last case?" Without skipping a beat Howard rejoined, "Oh, that was the other Howard Eisenberg!"

Doing criminal defense appellate work means losing, a lot. But this never seemed to get Howard down. It was another bright facet of Howard's personality that he leavened his work representing some of society's most dangerous individuals with the light touch of his wit. Occasionally, in talks he gave to various criminal defense, bar, and student groups back then, he would begin by saying, "I'm Howard Eisenberg, State Public Defender, which the Supreme Court thinks is Latin for 'Judgment Affirmed.'"

Someone remembered the celebration of one of Howard's birthdays which featured a "talent" show and everyone's singing the theme song from the Mickey Mouse Club TV show, substituting "Howard Eisenberg" for "Mickey Mouse."

Another vaguely recalled, with at least partial corroboration ("I wouldn't swear to it but I also seem to recall . . ."), that he once heard a voice emanating from Howard's office, arguing, with determination and significant emotion, a remote point of law. But it was not Howard's

usual voice; rather, it was the most unique and clear vocalization of Kermit the Frog.

In this age when accumulation of wealth or power is its own sufficient end, when basic civil rights and the rule of law are officially trammled and political meanness seems even more rampant, Howard Eisenberg provided us all with a different model: one of consuming generosity, self-sacrifice, and devoted public service. He was a man of incredible energy, an acute sense of justice, and while he occasionally preached ("Do well and do good!") and, I'm sure, lectured in class, he mostly led by example, by doing.

Howard, joyful warrior, we miss you. But you and the ideals you embodied live on in those you inspired.

JACK E. SCHAIRER*

Howard Eisenberg was an amazing man. I will remember Howard most warmly for his extraordinary energy, remarkable spirit, and devotion to family, and for his unwavering and tireless commitment to helping those who are among society's most helpless and hopeless: indigent criminal defendants.

Howard's exuberance for the sometimes Sisyphean aspects of public defender work could be both inspiring and intimidating. Howard was a self-described appellate junkie. His legendary work ethic, legal brilliance, and compassionate manner with clients at times left you feeling as though you should be doing a little more, and doing it better. And usually you did. Working with Howard invariably caused you to become not only a better professional, a better lawyer, but also a better person.

Perhaps Howard's greatest legacy as State Public Defender is the agency itself. In 1972, when Howard was appointed State Public Defender at the age of twenty-six, the office existed then as an arm of the Wisconsin Supreme Court, and its three attorneys handled only appellate cases before that court. Howard drafted Chapter 977, creating the independent statewide public defender agency that marked its twenty-fifth year of existence this past July. This was no small accomplishment. Judges resisted giving up control of eligibility and appointing counsel, prosecutors feared that a monolithic defender agency would be too powerful, and some at the state bar opposed an

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agency's setting qualification requirements for its members. Howard prevailed, and his statute, his agency, set a standard that has become a model for defender programs in the United States and throughout the world. It was a proud moment for Howard when the State of Israel modeled its public defender program after Wisconsin's and in 1999 sent Israeli defenders here to train with the current State Public Defender, Nick Chiarkas, and his staff.

It is not unusual for attorneys of Howard's caliber who work in defender agencies to stay for a few years and then move on in pursuit of greater prestige or treasure. Howard did move on to be executive director at the National Legal Aid and Defender Association, director of clinical education at Southern Illinois University School of Law, Dean of the University of Arkansas at Little Rock Law School, and, of course, Dean of Marquette University Law School. But in a very real and tangible way, Howard never stopped being a public defender. While each of these jobs no doubt brought enormous challenges and demands, Howard always maintained a caseload representing indigent criminal defendants, pro bono. By the time Howard returned to Wisconsin in 1995, his State Public Defender statute had been changed, eliminating the agency's authority to litigate prison-conditions issues on behalf of inmates. Howard filled the void with his pro bono work representing individual inmates who asked for his help and by playing a key role in a class-action suit challenging, as cruel and unusual punishment, conditions at Wisconsin's "Supermax" prison in Boscobel.

After Howard's passing, a speech he had given on several occasions titled "What's a Nice Jewish Boy Like Me Doing in a Place Like This?" that addressed his thoughts on spirituality and the legal profession received press attention.¹ In it Howard took the legal profession to task for its general state of incivility and took lawyers to task for trying to win cases by being personally offensive, snide, unreasonable, and unpleasant to deal with. Howard believed lawyers have a higher calling to pursue ultimate good for society. His view of *cura personalis* meant that the Golden Rule is operative even in law offices. He urged students and lawyers, as a start, simply to be nicer, to treat people, all people, better. I can tell you this was not, as is often the case, the product of someone's looking back over his career with perhaps some regret and urging others to learn from his experience and take a better path. Howard was always this way.

Howard, somewhat incongruously for a public defender, particularly

¹ This speech is reproduced as part of this issue. See *infra* p. 336.—ED.

in the early 1970s, seemed as though he were the kind of person who had been born wearing a jacket and tie. His demeanor in the office was generally formal, but he also had a humorous side. One of his secretaries who still works in his old Madison appellate office relates that Howard dictated prodigious amounts of legal work and would often end each document on the tape by signing off with a fictitious name. In one instance the secretary typed exactly what Howard dictated. He signed it and, much to the secretary's horror, put it in the mail for filing, unknowingly, as "State Public Rhinoceros, Howard B. Eisenberg."

Howard's sense of humor was also probably critical in coping with his lifelong affliction as fan of the Chicago Cubs. I imagine that as a public defender and Cubs fan Howard must have had an affinity for St. Jude, the patron saint of hopeless causes. But even at that, Howard once said that, at some point, "You stop being a long-suffering Cubs fan After a while you become content with the little surprises they offer." Howard helped all of us who had the great fortune of knowing and working with him to recognize the little surprises this profession and this life have to offer. His death is a great loss certainly to his family and wide circle of friends and colleagues, but also to the many hundreds of men and women, isolated in prisons, whom Howard represented, providing a voice and hope.

Howard B. Eisenberg—The Foe Who Became My Friend

THOMAS J. HAMMER*

It was the decade of the '70s and he was our dreaded adversary. We had visions of him sitting in his office or in a law library parsing our transcripts to discover that nugget of error that would undo our hard-fought victories. We were the good guys and he was trying to free the bad.

Who was he? Who were we? And why was he our nemesis? "He" was Howard B. Eisenberg, Wisconsin State Public Defender. "We" were young prosecutors working in that legal M*A*S*H unit known as the Milwaukee County District Attorney's Office. We were fighting the war against crime and he was fighting to undo our battlefield victories with his powerful arsenal of appellate skills.

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