

By Frederic Grant, Jr.

AN ELEMENT of political life in the early days of the Republic was heated controversy over proposals to abolish or regulate the "order" of lawyers. These ideas, discussed with varying degrees of intensity in the states, found their fullest expression in a letter debate in the Boston newspapers in 1786. Under the pseudonym "Honestus," the Boston Republican leader, Benjamin Austin, Jr., contributed a number of letters charging that lawyers had combined as an "order" that exerted an evil influence in the community. He maintained that this "order" complicated legal proceedings, prevented citizens from representing themselves in court, and controlled admission to practice for their own ends. In his view, lawyers charged excessive fees, acted as a divisive force in society, and as "hireling tongues" stood ready to support absolutely any cause for enough money.

Austin went considerably further than most modern proponents of these ideas when he demanded the "annihilation" of this body, "who by their influence . . . render every appeal to the laws ruinous to those who employ them." The resulting debate on "the pernicious practice of the law," including approximately 150 letters in the newspapers, is remarkable both for its modern tone and for the depth and vigor with which it examines the state of the practice of law in hard-pressed, postrevolutionary Massachusetts. It was a prelude to Shays' Rebellion, an uprising of agrarian debtors in western Massachusetts, the recent memory of which hung over the men who drafted the United States Constitution in Philadelphia the following summer.

Austin was the younger son in a Boston merchant family politically allied with Samuel Adams. His father, who had been described by a Tory as "very officious in politicks," was a successful ropemaker and local political figure. The son who achieved prominence as a political writer under "Honestus" and other signatures and as a Republican political leader was born in 1752. He achieved early note for his writings on trade, as "Friend to Commerce," and attacks on the Tories, as "Brutus."

Observations on the Pernicious Practice of the Law

The younger Austin had traveled to Europe in 1783 at the age of 31 and returned to Boston that year to go into business with his older brother. Together they bought and operated a ropewalk on Beacon Hill, near the present site of Suffolk University Law School, and they maintained a store on Long Wharf in the center of town. Samuel Eliot Morison writes that Austin "succeeded Sam Adams as favorite of the Boston mob," which can be read less stridently as a statement of his prominence as a Republican leader. He was elected to the Massachusetts Senate in 1787, the year after his efforts as "Honestus," and again from 1789 to 1794. Continued and frequent contributions to the *Independent Chronicle* in following years, notably under the names "Old South" and "The Examiner," lend credence to the suggestion that he was an editor of that newspaper.

Harsh criticism of lawyers, a feature of life in the old world, was heard almost from the beginning in the English settlements in the new world. It had been part of the agitation during the

American Revolution against the wealth and privilege of a favored class, but it was tempered by the presence of dedicated lawyers among the revolutionaries. These old hostilities were rekindled by difficult times after the war.

The first decade of the existence of the nation was a time of war debt and want, of irritations over opulence and the immoderate importation of British and continental luxuries, and of poverty for much of the working and veteran population. Both in the city and in the country the lawyer appeared as the sharp edge of hard times, irritating creditors with the amount of his fees and angering debtors by his representation of creditors. A writer in the *Massachusetts Centinel* commented in 1786, "The profession of Law in this state is very much crowded; one fourth part of the number of attorneys now in practice, would be amply sufficient for all the business there is done. Still young gentlemen are crowding into the profession, as though they thought the whole community, would live by practising Law."

Benjamin Austin, Jr., was the leading proponent of a movement to abolish lawyers in postrevolutionary Massachusetts.

Tensions between the mercantile, laboring, farming, and professional classes in Massachusetts were running high in 1785 and 1786. Trade was poor, and the citizens of the state found themselves burdened by public debt and taxes. Suits to collect private debts had risen markedly since 1782 and at crest level provided a great deal of unpopular work for the lawyers. In 1784 in Hampshire County every fourth man faced a suit for debt, and from that year through 1786 the Massachusetts Supreme Judicial Court handled 3,800 cases for the recognizance of debts that had been upheld by the courts of common pleas.

Notices and anecdotes critical of law and lawyers were common in Boston newspapers in late 1785, but they were outnumbered by letters on steps for economic and commercial reform. "Commerce" in November criticized the lawyers as "a certain set of men, that we can very well do without. They are already too numerous, and rapidly increase in numbers, wealth and impudence. It would puzzle the d-v-l himself to tell what good these creatures ever did, or what mischief within their power to do, that they ever left undone."

He portrayed one:

When R—pleads, amazed spectators gape,
Not at his eloquence, but at the ape;
Well may they gape, for who before ere
saw,

So great a clown try to explain the—?

Some measure of reaction was doubtless expected by the *Free Republican*, when in January, 1786, he closed the ninth letter in a series of ten on governmental reform with words of approval for the lawyers. "Wherefore, as the science of the law is intricate and perplexing, and cannot be obtained but by long and steady application, professors and practisers of it, seem a necessary order in a free republic."

It took Austin about one month to frame his reply. He proposed as "a subject of serious enquiry, whether this body of men in a free republic, are a 'NECESSARY' or a USELESS 'order,' and whether the profession ought to be supported or abolished?" Austin as "Honestus," with considerable popular support and the advice of the law reformer John Gardiner, hammered home the contrary view. He boldly, if ungrammatically, stated the charge:

"But when any number of men under sanction of this character are endeavoring to perplex and embarrass every judicial proceeding,—who are rendering

intricate even the most evident principles of law,—who are involving every individual who applies for advice into the most distressing difficulties,—who are practising the greatest art in order to delay every process,—who are studying every method to entrap those who are acting upon the unguarded sentiments of honour and equity,—who are taking the advantage of every accidental circumstance which an unprincipled person might have, by the lenity and indulgence of an honest creditor,—who stand ready to strike up a bargain (after rendering the property in a precarious state) to throw an honest man out of three quarters of his property."

Recognizing that among the lawyers there "are gentlemen of high esteem and confidence," Austin yet declared that the mode of the "general practice" warranted a radical solution. For "the welfare and security of the Commonwealth, . . . this 'order' of men should be ANNIHILATED." The reform measures put forth by Austin, which he asked the people to instruct their representatives to vote for in the next legislative session, became a subject of heated argument through the outburst of Shays' Rebellion in the summer.

A voice for the poor and laboring classes against lawyers

Austin, as "Honestus," advanced his case against the lawyers in 13 letters published between March 9 and June 22, 1786. The first ten were reprinted in June as a pamphlet, *Observations on the Pernicious Practice of the Law*, probably with the intention of placing Austin's arguments in the hands of legislators and the public in a convenient form. The tone of the pamphlet was softened considerably in its famous later editions. A remarkable exclusion from the known body of "Honestus" writings are three letters published in the Boston newspapers early the following year, at the time of the crushing of the rebellion, in which he defends himself against charges of responsibility for the uprising. "Honestus" insisted that his charges had been responsibly stated and that he was not the sort of person who recanted freely. He held to his basic line: "I wish ever to make a distinction between Law and Lawyers; the former is a blessing to a free people; but the latter according to the present prevailing practice, are a CURSE."

Austin's fundamental position was projudiciary and antilawyer. He believed that there ought to be an American law, freed of British precedents and comprehensible to the citizen, so that no intermediaries would be required when disputes went to court. He viewed law as a science that ought to be studied at the university in Cambridge, Massachusetts. The one career in law he would leave open for the aspiring student was "the important station of JUDGES." Austin sought legislation so that parties who put their disputes to reference would be bound by the referee's decision. Parties would plead their own cases, without the "intervention" of lawyers, "and the JUDGES to recite the whole to the jury, with every explanation of law, necessary to regulate them in their decision."

Austin recognized a right to counsel under the Massachusetts Constitution (the United States Constitution was drafted the following year) and said he would permit pleading by friends of the parties, who would receive a small set fee from the government, and not a cent from the interested parties. "The fees should be so small as not to encourage an 'order' of men to pursue this business merely for the profit; as we should rather encourage every person (who has no particular hinderance) to give his plea in person or writing." For the defense of criminal prosecutions brought by the government, the state would appoint an advocate general, "whose business should be to appear in behalf of all prisoners indicted by the State's Attorney."

Austin found himself torn between constituencies as the debate developed, especially when his harder words bore fruit in rebellion after calls for legislative action had failed. As a merchant he was greatly concerned with the interests of a creditor class in economic hard times. His initial call to arms speaks directly of "the lenity and indulgence of an honest creditor," which through the agency of a crafty lawyer might cost that "honest man" some "three quarters of his property." On the other hand, as a Republican spokesman for the poor and the laboring classes, he voiced their interests as against the lawyers.

In his role as advocate for the poor, Austin raised questions still repeated today. "Can the poor man (who cannot pay any of this 'order') receive equal advantage with the rich, while such a body of men exist, who stand ready to speak on any subject, and like mercenary troops, can be hired to support any

cause for the consideration of a large reward? Will not the rich opponent overpower the poor man, by the greatness of his gifts to the lawyers?" This service of two separate interests, which does not explicitly clash in the suggestion of the elimination of the "middlemen" in their mutual disputes, became a serious problem for Austin with the outbreak of the rebellion of the debtors in western Massachusetts. He distanced himself from the rebels, and in his newspaper defense the following year adopted a more moderate tone, which was softened further in later years, when in new editions of his fiery pamphlet he transformed the call for "annihilation" to one for "regulation."

His claims and proposals were promptly challenged. His letters were met with waves of pseudonymous letters in support and in opposition, many written with the familiarity to be expected of a town of 18,000 population, where individual opinions and styles of speech were well known. The debate also was carried on with the heat and anger only to be expected, given the harsh measure sought and the alleged direct result of the advocacy. Letters in opposition both from lawyers and one who signed himself "Mechanic" (laborer) indicated that they knew the identity of "Honestus." They addressed him as "Ben," suggested a political motive for his cause, and alluded to his trade as ropemaker and to a more profitable use for his product.

"A Lawyer" advanced defenses of his profession, including the great record of lawyers who had served the public in the legislature in the past, "though none of us in the present day may be equally meritorious with the characters . . . mentioned." He met the great question of the utility of lawyers in a free republic, and the proposal for their abolition, by analogy: "The orders of Rope-Makers and Sugar-Bakers for instance are necessary in a commercial country, and of course in ours. But they are now fattening on the hard earnings of others. . . . This is generally thought to be gross imposition and abuse. And suppose it is, shall we abolish the Rope-Makers? By no means—Let us retain the employment, but destroy the evils of it."

The defense by the lawyers took a number of courses. Several writers addressed Austin's insistence that he attacked the "general practice" of the "order" only, his recognition that there had been and were lawyers "of high esteem and confidence," and maintained

that Austin's remedy was out of proportion to conceded limited abuses. An early letter in response characterized "Honestus" as "a charming reformer. He lays the axe boldly at the root of the tree, that all the branches may perish with the corrupt trunk." Other writers pressed attacks on specific points. There was a mighty clash over his contentions about excessive fees.

As to self-pleading, "A Lawyer" said that this would cause no problem, so long as the party "conducted the suit with learning and propriety." He added: "But if a person should behave with awkwardness and foolishly attempt a business to which he should prove to be totally lost, who would blame us if we chanced to smile? We are, I presume in the constitution of our natures very similar to our fellow men. Mirthful scenes very naturally excite a mirthful countenance."

Total abolition of lawyers was unsuccessful

It was asserted that much law was necessary "in a commercial state" and that the adoption of a code of law would not decrease the amount of law in existence. "If you should make statutes regulating every case that has hitherto happened the laws would not be less prolix, and the only difference would then be, that what is now the common would then become a statute law; you would therefore only change folios of precedents and reports, for folios of statutes."

Republican confidence in the judiciary, a foundation of Austin's design for the elimination of lawyers, was strongly challenged, notably by a young lawyer who signed himself "A Twig of the Branch." "Not to lay much stress upon their liability to bribes," the "Twig" rather chose to stress liability to error, motives to mislead the jury, and the problem that an enlarged body of judges would entail "all the inconveniences of a professional order."

While agitation in 1786 for a total abolition of lawyers was unsuccessful, the ideas that were advanced have lived on and had a continuing influence. Late that year Massachusetts enacted "An Act for Rendering Processes at Law Less Expensive," and in following years there were continued efforts at law reform. A measure of the strength of Austin and his ideas, in the face of the defeat of the boldest of his plans,

was his political popularity. He was elected for the first time to the Massachusetts Senate by Suffolk County just months after he published three letters defending his newspaper attack on the lawyers against charges of fostering rebellion. He returned a number of times to the state senate and remained a popular politician, speaker, newspaper writer, and determined foe of the organized Federalist bar in eastern Massachusetts until his death in May, 1820.

Probably the greatest lesson of the tumult of 1786 for all involved was the need for lawyers in a busy, imperfect, commercial nation. The events of the year threw into high relief the opposed interests of those caught in disagreements in a complex and competitive society. They also reflect the sincere desires of many for the simplification of a society that was growing and rapidly becoming modern and complicated. A species of a Utopian vision, of a world of honesty and accuracy, in which all parties would behave honorably, is unmistakable in the calls of 1786 and in Austin's "motto," which would have "each to each be neighbour, father, friend." That vision, and a blunt condemnation of the abuses that made hard arguments persuasive, is plain in a letter signed "Crack-Brain-Tree," which criticized New Braintree's instructions to their representatives:

"For my part, I am neither a lawyer, nor a lawyer's cousin, nor a lawyer's client; I am therefore willing to prescribe a method, which I think will effectually lessen their number, destroy their power, and cause their opulence to dwindle away, and that is this; let every man be strictly honest and cautious in his engagements, punctual in his payments, mind his own business, and employ no attorney. This, I think, will effectually do the work for them; for all dishonesty, carelessly promising and never performing; all cheating, knavery, fraud and deceit; is food for lawyers. And where there is no carrion, there is no crows. But if a hungry pettifogger should presume to solicit you for business, give him a hoe, a spade, a scythe, a sickle or a pick-axe; and tell him to use that; or set him to turn your grindstone, and I will warrant you he will leave you as quick as the d — I would leave a minister at his opening the bible."

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