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Historical Journal of Massachusetts Volume 20, No 2 (Summer 1992).

Published by: Institute for Massachusetts Studies and Westfield State University

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Controversy over the Legal Profession in Post-Revolutionary Boston

Myron F. Wehtje

Animosities and tensions produced or accentuated in Boston during the 1760s and 1770s did not suddenly disappear with the coming of peace at the end of the Revolutionary War. Moreover, as a result of independence and the Bostonians' thinking about the implications of republicanism, new animosities and tensions emerged. Those postwar tensions resulted from various concerns, expressions of opinion, and activities, including fears of an aristocratic revival, opposition to the return of loyalist refugees, attempts to intimidate British traders, criticism of the Society of the Cincinnati, apprehension about military influence generally, and verbal attacks on the legal profession. This article explores the furious debate in Boston over the activities and influence of lawyers in the Commonwealth of Massachusetts between 1783 and 1787.

Like opposition to aristocracy and to the influence of loyalists, British residents, and military men, the outcry in Boston against lawyers was "only part of a wide movement sweeping postwar America." Gerard W. Gawalt has found that lawyers in Massachusetts encountered "ever increasing hostility" during the Confederation period. He attributes that hostility in part to the "complexity of the entire legal system." Many laymen found that system incomprehensible and incompatible with the simplicity that should characterize a democratic republic. Rising nationalism also helps to explain the antipathy toward lawyers in the Commonwealth and in the town of Boston after the war. Because lawyers "faithfully adhered to English legal techniques, utilized English law and law books, . . . modeled their profession along English lines," and sometimes represented loyalists and Englishmen in court, they were extremely vulnerable to criticism. High legal fees during the hard times of the mid-decade supplied yet another grievance. As depression gripped the commonwealth and the town, as bankruptcies, foreclosures, property seizures, and

imprisonments for debt multiplied, lawyers seemed to some people to be the "most obvious agents of doom."¹

One of the earliest intimations of serious resentment against the legal profession came in the spring of 1783. A few days before the election of representatives to the General Court, "Honestus," writing in a Boston paper, urged the "greatest care and caution" in choosing lawyers to serve in that capacity. He questioned their ability to act on principle, to serve the public interest. Then a sweeping postscript raised the question, "Is it not manifest that there are by far too great a proportion or number of lawyers in Congress and in every Senate, Council, and Assembly of these United States?" The writer hoped that Americans would learn from the experience of the British House of Commons, which, it was alleged, had been corrupted by lawyers. This letter proved to be a prelude to a sustained attack that "Honestus" made three years later.

In the late winter and the spring of 1786 a long series of his articles attacking the lawyers of Massachusetts appeared in the *Independent Chronicle*. Subsequently, ten of these articles, dated March 9 through June 1, were published in pamphlet form under the title of *Observations on the Practice of the Law*. There is every reason to believe that the same man used the signature of "Honestus" in both 1783 and 1786. In any event, both his contemporaries and later historians have identified the "Honestus" of 1786 as Benjamin Austin, Jr. Then in his mid-thirties, Austin was the son of a merchant and rope manufacturer of some prominence in Boston during the Confederation period. Jonathan Loring Austin, young Benjamin's brother, who was also quite well-known in town, gave the Independence Day oration in 1786. Although Benjamin Austin, Jr., was the principal writer against the legal profession, he had support. John S. J. Gardiner, just past twenty and himself the son of a lawyer, published a long response in verse to the "noxious viper" who was Austin's leading

1. See chapter two, "They 'Swarm and Multiply,'" in Garard W. Gawalt, The Promise of Power: The Emergence of the Legal Profession in Massachusetts, 1760-1840 (Westport, Conn., 1979), especially p. 63. Also see Gawalt, "Massachusetts Lawyers: A Historical Analysis of the Process of Professionalization, 1760-1840," Ph. D. dissertation, Clark University, 1969, pp. 33, 44, 45, and 48.

antagonist in print. Others expressed their support in the town's papers, although always behind impenetrable pseudonyms.²

"Among the multiplicity of evils which we at present suffer," Austin wrote on March 9, 1786, "there are none more justly complained of than those we labor under by the many pernicious practices in the profession of the law." He went on to warn that unless something were done to check the lawyers, "the ruin of the Commonwealth" would be "inevitable." Another writer agreed that that most of the "distress we now suffer is owing to their conduct." Some Bostonians were convinced that lawyers threatened the liberty that the nation had just won at a great price. "Legal impositions are the worst species of tyranny," wrote Austin. One of his readers, "Root and Branch," agreed that lawyers were "dangerous and alarming to society." Another reader hoped that the writings of "Honestus" would help in "razing to the very foundation the over-bearing power of oppressive lawyers." Austin and others were concerned over the numbers of lawyers — approximately eighty in Massachusetts, almost twenty of whom were in Boston. Such numbers, Austin said, increased the "danger of their becoming formidable as a combined body." The final result might be their establishment of an "absolute aristocratical jurisdiction."³

Austin and several other writers objected to the fact that lawyers complicated the legal process. According to Austin, they were guilty of "rendering intricate even the most evident principles of law." In a court, of all places, a "weak and simple" man ought to be able to receive justice. Another writer concurred, stating that in a free country an individual ought to be able to obtain justice without the aid of a lawyer. Austin complained that the lawyers entangled their clients in "distressing

2. "Honestus," The Independent Ledger and the American Advertiser, April 28, 1783; [Benjamin Austin, Jr.], Observations on the Pernicious Practice of the law. As Published Occasionally in the Independent Chronicle (Boston, 1786). One of the contemporaries who identified "Honestus" was Henry Jackson. See Henry Jackson to Henry Knox, May 31, 1787, in Knox Papers, microfilm in Massachusetts Historical Society, Boston. Also see Oscar and Mary Flug Handlin, Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861, (revised edition, Cambridge, 1969), p. 41. The work by Gardiner is An Epistle to Zenas (Boston, 1786).

3. Austin, Observations, pp. 3, 25, 28, 31, and 33; "H. H.," Massachusetts Gazette, March 1786; "Root and Branch," The Independent Chronicle and the Universal Advertiser, May 11, 1786; "Perseverance," Massachusetts Centinel, June 17, 1786.

difficulties." He and others also commented on unreasonable delays. The very worst offenders in the perversion of justice were alleged to be the lawyers who represented British merchants and factors.⁴

Excessive fees were another object of attack. "A Mechanick" charged that there were "many instances of legal plunder." Austin took note of lawyers charging "extravagant" fees for "trifling" advice. He said that the "fee-table" agreed to by the lawyers was "treated like an old almanac." Another writer thought that legal fees should be only about one-third of what they were. The high fees led Austin to exclaim: "Is it not a disgrace to a free republic that the citizens should dread appealing to the laws of their country?" He also contended that many lawyers were accumulating "rapid fortunes."⁵

Among Austin's greatest concerns were the number and influence of lawyers in the state legislature. "Is it not contrary to every principle of propriety to admit men to *make laws*, who are living upon the practice of them?" He wanted lawyers to be barred from service in the legislature. While Austin was in the midst of his series for the *Independent Chronicle*, the 1786 legislative elections were held. Following the election of representatives to serve in the lower house, Austin was pleased to report that no lawyer was among those chosen to represent Boston. The following spring, when Bostonians were preoccupied with the contest between James Bowdoin and John Hancock for governor, another writer hoped that regardless of whom they favored for governor they would remember not to vote for lawyers for any other positions.⁶

In the course of his long indictment of the lawyers of Massachusetts, Austin proposed a number of reforms. In his first article he argued that lawyers were unnecessary, that the legal profession must be "annihilated." As his various articles appeared, it became evident that he would "annihilate" them by altering the "judiciary mode" so that lawyers would become superfluous.

4. Austin, Observations, pp. 4-5 and 22; "Cousin German," Independent Chronicle, March 30, 1786; "A. B.," Massachusetts Gazette, May 1, 1786.

5. "A Mechanick," in Massachusetts Centinel, April 22, 1786; Austin, Observations, pp. 5, 11, 27, and 31; "Z. A.," in Independent Chronicle, Sept. 28, 1786.

6. Austin, Observations, pp. 8 and 42; "Thousands," in Boston Gazette, and the Country Journal, April 2, 1787.

Austin called for the appointment of an advocate general to balance the Commonwealth's attorney general, and so to ensure that all citizens, regardless of economic station, would be "on an equality while they are appealing to the justice for their country." The attorney general and the advocate general would present the evidence in a case. The judge, after hearing the evidence, would present it to the jury, along with his "opinion on any controverted points of view." Then the jury would decide the law and the facts of the case. According to Austin's proposal, private lawyers would be excluded from the court during all of these proceedings.⁷

Several writers gave more attention to changes in the laws than to the elimination of lawyers from the legal system. "Cousin German" advocated doing away with the common law. Two years before the controversy ignited by "Honestus," a writer in the *American Herald* had concluded that English law, with its "intricacies" and "contradictions," was almost useless. He thought that Americans should complete their "happiness with the invaluable addition of concise, intelligible, and rational laws." Austin agreed that Americans should make their own, republican laws to replace the body of English law then in use. It was considered especially important that the new laws be simple. "Happy the government," wrote "Lycurgus," "where all its members can understand the laws by which they are governed." If the laws could not be understood, some believed, republicanism could hardly succeed.⁸

"A general ferment of opinion prevails," wrote a Bostonian in the early summer of 1786. Indeed, few public questions during the Confederation period provoked more discussion than did the controversy over the legal profession. Writing from a county to the west, "Mentor" described a general outcry against lawyers. He reported that the "violent and verbose" writings of "Honestus" were read with "surprising avidity" and were a source of conversation in "private circles of company" as well as in taverns. It was their style, he thought, that made the writings "enormously popular" with people "who never pretend to reason." North of Boston, where he was "reading law," in preparation for a career as an

7. Austin, *Observations*, pp. 3, 5-6, and 24.

8. "Cousin German to Honestus," in *Independent Chronicle*, March 30, 1786; "C. R.," in *American Herald*, May 15, 1786.

attorney, John Quincy Adams was still worrying over the resentment against lawyers as late as December of 1787. "The popular odium which has been excited against the practitioner in this Commonwealth prevails to so great a degree," he wrote to his mother, "that the most innocent and irreproachable life cannot guard a lawyer against the hatred of his fellow citizens." Young Adams feared that the "very despicable writings of Honestus were just calculated to kindle a flame which will subsist long after they are forgotten." There was much less support for Benjamin Austin's sentiments in his own town of Boston than in other parts of the state. The town meetings of May 9 and May 17, 1786, voted not to instruct the town's newly-elected representatives to the General Court.⁹ Critics of the legal profession had hoped to use the instructions as a weapon for their purposes, but only a handful of people out of approximately five hundred at the May 17 meeting supported their efforts.¹⁰ Lack of support from Samuel Adams may have doomed the attempt; a contemporary reported that Adams disapproved of the writings of "Honestus" and of his proposal for the abolition of the legal profession.¹¹ The Boston newspapers of the late winter, spring, and early summer of 1786 also reflected strong opposition by other townsmen to Austin's ideas. Many of the letters criticizing him and his writings appeared in the same paper that was publishing his articles. However, there was so much interest in the subject that many letters were also printed in the town's other newspapers.

Several writers suggested that "Honestus" was unfairly singling out the lawyers for blame. "The lawyer is set up as a scapegoat nowadays, to bear the iniquities of us all," wrote "Richard Freeborn." He blamed the government, not the lawyers, for the problems of the legal system. Both he and "Clericus" wanted more attention to be given to the abuses associated with

9. Massachusetts Centinel, June 28, 1786; "Mentor," in Independent Chronicle, Jan. 25, 1787; John Quincy Adams to Abigail Adams, December 23, 1787, in Writings of John Quincy Adams, ed. by Worthington Chauncy Ford (New York, 1913), I: 36-37; A Volume of Records Relating to the Early History of Boston, Containing Boston Town Records, 1784 to 1796, vol. XXXI of the Reports of the Record Commissioners of Boston (Boston, 1903), pp. 115 and 118.

10. Independent Chronicle, May 13, 1786; Exchange Advertiser, May 18, 1786; Austin, Observations, p. 41.

11. "Barebones," in American Herald, June 26, 1786.

other aspects of the legal system. They questioned the fees of clerks, judges, and sheriffs, for example. "Seneca" took a larger perspective. While the trade of Massachusetts was "in chains" at home and "insulted in every instance abroad," people were "quarreling about a lawyer's fee." He could not comprehend why people "surrounded by tigers" should be concerned with the "catching of flies."¹²

Others charged "Honestus" with having ulterior motives for his crusade against lawyers. "A Mechanick" thought that "Honestus" was writing to "advance his own private interest." The attacks on lawyers were regarded as a way of clearing a path for young Austin to enter the lower house of the legislature and for his father to move from the lower house to the senate. Shortly before the election of the representatives to the lower house, another writer described the articles by "Honestus" as the result of "electioneering motives." And "A Lawyer" made a cutting reference to men in Boston "with the stern manners of republicanism and high pretensions to the love of liberty [who] are but little better than daring missionaries of faction."¹³

Other critics of "Honestus" accused him of recklessness, unfairness, or relying upon falsehoods. One thought that while "Honestus" was appearing to correct "accidental abuses," he was actually striking at "whole establishments connected with the constitution of the country." "Veritas" challenged "Honestus" to substantiate his charges, to refer to specific cases, give names, and make specific allegations. He reported finding wholesale insinuations and even falsehoods in the series on lawyers. One of the earliest critics of Austin's series wanted him to name the bad lawyers, so that they could be distinguished from the good men in the legal profession. It did not seem right to him that all lawyers should be tarred by the brush of "Honestus."¹⁴

There were Bostonians who took the writings of "Honestus" seriously, and who dealt with their substance. Several of these critics conceded that reforms were needed. "Solon" was willing to

12. "Richard Freeborn," in Massachusetts Centinel, June 28, 1786; "Clericus," in *Ibid*; "Seneca," in Independent Chronicle, June 29, 1786.

13. "A Mechanick," in Massachusetts Centinel, April 12, 1786; "Ichabod Ironside," in *ibid.*, April 26, 1786; "A Lawyer," in *ibid.*, May 3, 1786.

14. "Suffolk," in Independent Chronicle, January 18, 1787; "Veritas," in *ibid.*, June 15, 1786; "A Merchant," in *ibid.*, March 16, 1786.

admit that "there is much room for reform in the present practice of the law." Probably the most important — and thoughtful — of these critics was James Sullivan, who replied to Austin over the signatures of "Zenas" and "Tully." Although at one point Sullivan dismissed the attacks on lawyers as the "mere ebullitions of electioneering rage," the length of his responses and the care that he took in responding show that he took the attacks on his profession seriously. Sullivan maintained that lawyers were "necessary to that impartial justice constantly administered in this free Commonwealth." In his view, "The systems of government become complex, and increase in their intricacy in an exact proportion to the quantity of freedom enjoyed by the subject." Therefore, in a democratic republic lawyers were needed to inform the people of their rights and then to aid them in protecting those rights. He wondered how, without the services of lawyers, "the poor man, the weak man, the widow, and orphan" could be "upon an equality in their demand of right, with the opulent, the cunning, and the strong." With the aid of lawyers, Sullivan contended, all were "equally within the reach of right."¹⁵

"Solon" concurred that the "very existence of a free republican government requires the existence of such an order of men as lawyers." To lawyers such as Sullivan, one of the most objectionable features of the reform plan proposed by "Honestus" was, of course, the exclusion of lawyers from court proceedings. Sullivan regarded that idea as especially abhorrent, because "the right to advocacy naturally and necessarily exists in every free government." Another lawyer described that and other parts of Austin's plan as "romantic." He thought that most people would find it very inconvenient and disruptive of their work to attend to court cases. Other writers also remarked on what they saw as the impracticality of the proposals made by "Honestus." "A Merchant" wondered where "Honestus" would find men to serve as judges if there were no lawyers. It also seemed curious to some that "Honestus" wished to eliminate lawyers, and yet he was prepared to see judges wield immense powers. To the charge that lawyers needlessly created delays, one writer suggested that such delays

15. "Solon," in Massachusetts Centinel, May 3, 1786. The identification of "Zenas" and "Tully" is based on materials in the James Sullivan Papers, Massachusetts Historical Society. The quotations in this and the following paragraphs are from articles signed by "Zenas" which appeared in the April 27 and May 4 and 11, 1786, issues of the Independent Chronicle.

were in the public interest. Delays in justice were said to be the "price a subject in a free state pays for his liberty." Debtors were pointed out as being prominent among those who benefitted from delays. "Richard Freeborn" defended lawyers against the charge that they were growing wealthy while the majority of the people were experiencing hard times. He estimated that seventy of the eighty lawyers in Massachusetts would fall into four classes, with annual incomes of £400, £300, £200, and £100. And "Agrippa" wrote that so many young men had decided to enter the profession that many "cannot now gain subsistence." He thought that they certainly could not be the cause of the "general distress" in Massachusetts.¹⁶

One of the most alarming aspects of the writings of "Honestus" and his supporters, from the standpoint of their critics, was that they seemed to raise the spectre of lawlessness. One writer saw the abolition of the legal profession as but "one step towards abolishing the law *likewise*." Others were quick to defend the common law against the assaults of men like "Honestus." "Pro Bono" argued that it would be "utterly impossible" to abolish all British law used in American courts. A lawyer writing in the *Centinel* was confident that the "collection of laws we have selected from the English code is a good and perhaps better than [any that] has ever been exhibited to the sons of men." Among other things, he said, the common law was the means by which "every individual in the community holds and enjoys his estate."¹⁷

Perhaps the most serious charge brought against "Honestus" and his sympathizers was that their attacks on lawyers contributed to the civil unrest that gripped Massachusetts in late 1786 and early 1787. As early as April of 1786, one writer feared that the writings of "Honestus" would so "mislead and inflame the public mind" as to "disturb our political tranquility, and thus weaken and unnerve our government." In mid-May, another writer in the same paper thought that "Honestus" was on a road leading to

16. "Solon," in Massachusetts Centinel, May 3, 1786; "Zenas," in Independent Chronicle, May 11, 1786; "A Lawyer," in Massachusetts Centinel, May 3, 1786; "A Merchant," in Independent Chronicle, April 7, 1786; "A Twig of the Branch," in Independent Chronicle, April 27 and May 4, 1786; "Richard Freeborn," in Massachusetts Centinel, June 28, 1786; "Agrippa," in Boston Gazette, June 19, 1786. On the wealth of lawyers, see Gawalt, "Massachusetts Lawyers," p. 219.

17. "A Spectator," in Massachusetts Centinel, May 10, 1786; "Pro Bono," in American Herald, April 24, 1786; "A Lawyer," in Massachusetts Centinel, April 29, 1786.

"anarchy and confusion." In late summer, when there was widespread unrest in the central and western parts of the state, representing the beginning of Shays' Rebellion, "Markwell" called "Honestus" the "high and mighty promoter" of those disorders. "The mobs of Worcester and Northampton shall be lasting monuments of your memory," he sneered. As the insurrection reached its climax and then subsided in early 1787, several writers reflected on its causes. More than one agreed with "Suffolk," who wrote that "Honestus" had "enkindled the fire of sedition, helped raise the mobs, and stabbed the peace of government."¹⁸

Of course, Austin and his sympathizers denied that his writings were responsible for Shays' Rebellion. As one of the defenders of "Honestus" wrote in September of 1786, there were real grievances driving men to the "present alarming extremities." In January of 1787, Austin wrote a long letter on the rebellion. Denying that his writings helped to "produce the unjustifiable proceedings of the insurgents," he said that he too found the rebellion to be alarming. He wanted the disaffected people to turn away from their "riotous proceedings." Grievances must be redressed peacefully and legally, he insisted.¹⁹

Many Bostonians perceived republicanism as a peculiarly vulnerable system of government. It could be destroyed simply by the loss of public virtue among the citizenry. It could fall prey to the rivalry of political factions. And it could also be shattered by the unchecked activities of "aristocrats," British sympathizers, military men, and even, in the opinion of some, lawyers. Because the law was unusually important to the new republicans of Boston, many of them were worried about the activities and the influence of those who must be its interpreters and mediators. That is one of the important reasons why the writings, the sermons, and the speeches of many Bostonians of the Confederation period had a persistently anxious tone that served as a counterpoint to the exuberant confidence of those who anticipated a long and glorious future for the new nation.

18. "A Lawyer," in Massachusetts Centinel, April 26, 1786; "A Spectator," in *ibid.*, May 10, 1786; "Democraticus," in *ibid.*, June 14, 1786; "Markwell," in *ibid.*, September 9, 1786; "Suffolk," in Independent Chronicle, Feb. 1, 1787; "Tully," in *ibid.*, January 18, 1787; "Massachusettensis," in *ibid.*, February 8, 1787.

19. "A Citizen," in American Herald, September 11, 1786; "Honestus," in Independent Chronicle, January 11, 1787.