“This ‘order’ must be ANNIHILATED”: How Benjamin Austin’s Call to Abolish Lawyers Shaped Early Understandings of Access to Justice, 1786-1819

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Introduction

In 1786, Massachusetts citizen Benjamin Austin, Jr. launched an attack on the American legal profession. Pen in hand, Austin drafted thirteen essays that called for the complete annihilation of what he referred to as the legal "order."[1] Disguised as "Honestus," Austin released his writings for print in Boston newspaper the *Independent Chronicle*. From March until June of 1786, Austin published a series of essays that outlined why the legal "order" should be abolished and provided a plan to quash the elite group. He warned that if no one stopped the useless and dangerous body from becoming an "incorporated 'order,'" the profession would rise above even governmental restraints and subject the people to slavery.[2]

Immediately, Austin's virulent works caught the attention of the public. Dozens of articles appeared in local papers responding to Austin's attack. Some writers hailed him as "the friend of the community," the chosen one whose "pen has been guided by some superior intelligence."[3] These supporters designated Austin as the leader of what would soon become a widespread anti-lawyer movement and issued scathing editorials against the profession. Austin provoked an equally strong response from anonymous critics who vehemently opposed his ideas. They tore apart Austin's claim to abolish the legal profession and launched a malicious attack on his character. One critic dismissed him as "Ben," a "parrot-like boy"; another condemned him for being an anti-republican seeking to "overthrow the civil liberty of the country"; and one other

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[1] The term "order" is in quotation marks to capture how Austin referred to the legal profession. He repeatedly used the term "order" to describe the legal elite, and he consistently did so in a derogatory way. At the time, the term "order" referred to referred to the honor or esteem accorded to particular social and economic roles, but Austin always used it in quotation marks, suggesting his skepticism in viewing the profession with honor. *See* Keith Wrightson, "Class," in *The British Atlantic World, 1500-1800*, ed. David Armitage and Michael J. Braddick (New York: Palgrave Macmillan, 2002), 133-4, quoted in Carli Conklin, "Lost Options for Mutual Gain: The Lawyer, the Layperson, and Dispute Resolution in Early America," *Ohio State Journal on Dispute Resolution* 28, no. 3 (2013): 600.

[2] "Honestus" [Benjamin Austin], *Observations on the Pernicious Practice of the Law* (Boston: Adams and Nourse, 1786), 6.

[3] "Jus," *Massachusetts Centinel*, April 22, 1786; "Perseverance," *Massachusetts Centinel*, June 16, 1786.

suggested that Austin's conduct bore a "striking similarity [to that] of Satan."[4] Undoubtedly, Austin's ideas piqued the people's interest. As one writer keenly observed, "Since the settlement of this county, *Independence not excepted*, there never was a more popular question agitated than this by *Honestus*."[5]

What was it about Austin's remarks that sparked such a fervent response from the public? Perhaps it was his simple, yet powerful claim to abolish the legal profession that resonated with his audience. During the post-war economic depression, lawyers played an integral role in commencing lawsuits against debtors and began to emerge as an exclusive class in American society, posing a threat to republican ideals.[6] In light of the economy and spirit of the times, Austin inspired a hope and a fear: a hope that ridding society of lawyers would alleviate debtors' financial and legal woes and a fear that the movement could actually succeed. While this explanation is certainly plausible, it faces a fatal problem. Why did Austin's remarks sustain its popularity into even the early nineteenth century, when it became clear that the profession would not be eradicated?[7]

Although Austin framed his 1786 campaign as an attack on the legal profession, it was more than a mere outburst against the legal elite; rather, it was a call for increased access to justice. Access to justice describes the ability of any person to seek and obtain remedies for their legal matters through formal or informal legal institutions. Although in the modern-day access to justice is often understood as having access to a lawyer, in 1786, Austin understood access to

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[4] "A Mechanick," *Massachusetts Centinel,* April 22, 1786; "Markwell," *Massachusetts Centinel,* September 9, 1786; "Brief," *Massachusetts* Centinel, January 20, 1787.
[5] "Jus," *Massachusetts Centinel,* April 22, 1786.
[6] Gerard W. Gawalt, "Sources of Anti-Lawyer Sentiment in Massachusetts, 1740-1840," *The American Journal of Legal History* 14, no. 4 (Oct., 1970): 291.
[7] Between 1780 and 1820, the legal profession in Massachusetts grew from thirty-four lawyers to over seven hundred. Relative to the growth of the total Massachusetts population, in 1780 there was one lawyer for every 9,349 residents and in 1820, there was one lawyer for every 1,159 residents. *See* Gawalt, "Sources of Anti-Lawyer Sentiment," 285.

justice as access to the law itself.[8] He envisioned a justice system in which the people themselves could understand and apply the law to protect their interests without hindrance.

The post-Revolutionary era was a critical time for access to justice, as the nature of disputes and how citizens addressed them began to evolve. Community members had ordinarily relied on a local, informal law and settled their disputes at town meetings or church congregations. But in the 1780s, they began to take their differences to court. In Massachusetts this shift occurred as the spread of commerce and rise of political conflict and religious dissent threatened the cohesion of communities.[9] And as residents began to resolve their disputes in legal institutions, there emerged a heightened importance of the law and of lawyers, both of which had critical implications for the ordinary person's ability to use the justice system.

Austin shared his concerns during this transitory period. What seemed to be a call for the "TOTAL ABOLITION of the 'order' of lawyers," was really an extensive proposal for a more accessible legal system. Austin's initial essays in the *Independent Chronicle* criticizing the legal "order" sparked a public discourse about lawyers, but the essay series proceeded with not just Austin's responses to interlocutors; they also contained his plans for broader legal reform. His attack on the legal profession brought attention to his goal of ensuring that, despite the changing legal institutions and practices, the people would still be able to fairly defend their legal matters. Shortly after publishing his weekly series in the *Independent Chronicle*, Austin collated ten of the thirteen essays in a 1786 pamphlet titled *Observations on the Pernicious Practice of the Law*.

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[8] Access to justice in the modern-day is not limited to access to an attorney. It can also refer to access to the court system via court costs, filing fees, and procedural issues, such as when and where to file a lawsuit and what rights a litigant has.

[9] William E. Nelson, *Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725-1825* (Chapel Hill: The University of North Carolina Press, 1981), 77, 152.

In *Observations,* Austin presented his vision for the justice system and a bundle of reforms aimed at materializing this goal. Austin hoped for the "Courts [to] become places of justice," where even the "weak and simple man" may be on a par with the "artful and cunning"[10] and for "every individual [to] receive equal benefit from the laws, without tedious delays."[11] Essentially, Austin advocated for a conception of justice that revolved around the people's ability to access both the legal system and the law. And to ensure that the people could access justice, Austin proposed plans to: abolish the legal profession, simplify legal codes, encourage self- and lay representation, and replace litigation with arbitration.

Yet scholars have overlooked the link between Austin and access to justice. Rather than recognize Austin as an advocate for a more accessible legal system, historians have remembered Austin for what he opposed.[12] Historian Maxwell Bloomfield frames Austin as the influential anti-lawyer leader in New England who obtained a "short-lived victory of sorts" in Massachusetts with legislative reform, but whose efforts were only a blip in the establishment of the American lawyer as an "oracular force."[13] Charles McKirdy acknowledges that "unlike other critics of the bar whose forays were as brief as they were violent, Austin sustained a calculated attack on his opponent."[14] Nonetheless, he maintains that Austin only temporarily thwarted the unity of the Massachusetts bar. By confining Austin to the losing side of history, scholars have neglected to focus on his contributions.

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[10] "Honestus," *Observations* (1786)*,* 19, 22.
[11] "Honestus," *Observations* (1786)*,* 19.
[12] For Austin as anti-lawyer, *see* Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776-1876* (Cambridge: Harvard University Press, 1976), Ellis, *The Jeffersonian Crisis*, Charles R. McKirdy, "Lawyers in Crisis: The Massachusetts Legal Profession, 1760-1790" (PhD diss., Northwestern University, 1969). For Austin as anti-elitist, *see* Gerard W. Gawalt, *The Promise of Power: The Emergence of the Legal Profession in Massachusetts, 1760-1780* (Westport, CT: Greenwood Press, 1979). For Austin as anti-law, *see* Aaron T. Knapp, "Law's Revolution: Benjamin Austin and the Spirit of '86," *Yale Journal of Law & the Humanities* 25, no. 2 (Jan. 2013).
[13] Bloomfield, *American Lawyers*), 58.
[14] McKirdy, "Lawyers in Crisis," 116.

More recently, legal historian Aaron Knapp has challenged the prevailing perception of Austin as the radical opposition leader of an ill-fated movement. Knapp frames Austin's 1786 outbursts as a product of the "American Revolution [that] produced deep hostilities to law, lawyers, and legal institutions."[15] Knapp identifies the source of Austin's anti-law ideology as a desire for self-rule and highlights the importance of Austin's contributions in the Founding Era: Austin's revolution against the law helped provoke the movement for a new national Constitution.

But understanding Austin solely as an anti-lawyer or anti-law advocate fails to account for Austin's drastic about-face one year prior to his death. Previously a foe of the legal "order," Austin publicly became their friend in 1819: he republished his 1786 pamphlet *Observations*, retracted his remarks that the legal "order" deserved abolition, and lauded the vocation for promoting the public good. Only historian Carli Conklin has grappled with Austin's discourse in a way that accounts for this change. Conklin posits that Austin went so far as to applaud the rise of the legal profession of 1819 because though he once sought its abolition, he did so only as a means to an end. Ultimately, Conklin writes, Austin endeavored to "secure cheap and speedy access to justice for the layperson."[16] Conklin frames Austin as an access to justice advocate, yet her discussion narrowly focuses on only one of the reforms that Austin had proposed to achieve his goal: arbitration. In doing so, Conklin omits examining the spectrum of reforms that Austin had proposed and how his efforts shaped understandings of access to justice.

My paper uses Austin as a vehicle to examine early conceptions of access to justice in Massachusetts during the post-Revolutionary era. Austin, indeed, was a critic of the legal

[15] Knapp, "Law's Revolution," 275.
[16] Carli Conklin, "Lost Options for Mutual Gain: The Lawyer, the Layperson, and Dispute Resolution in Early America," *Ohio State Journal on Dispute Resolution* 28, no. 3 (2013): 581.

profession, but he was later able to accept – and embrace – the "order" because his understanding of access to justice transformed between 1786 and 1819. Underlying Austin's revised edition of *Observations* was his shifted view in access to justice: whereas Austin once deemed lawyers as barriers for the people to access the law, he now viewed them as assets. Both the legal profession and access to justice flourished, as law and justice became synonymous. Through Austin's public writings, responses by his interlocutors, and legislative reforms, I trace how Austin's personal understanding evolved and how he shaped broader understandings of access to justice.

Part I contextualizes the time period during which Austin filled papers with his call to abolish lawyers. Part II provides a close reading of Austin's 1786 pamphlet, examining what Austin conceived of as the barriers to justice and the policies he proposed to eliminate them. Part III explores the legal reforms that the Massachusetts General Court passed from the 1780s until the 1810s. Part IV bridges the gap between Austin's remarks from 1786 to those of 1819 by presenting Austin's transformed understanding of the relationship between the law, lawyers, and justice. Concluding remarks will suggest how Austin's revolution – and his personal evolution – can help us understand modern-day conceptions of access to justice, which have been understood as access to a lawyer. Despite claims that the impression that access to justice as access to counsel arose in the nineteenth century through the call for direct access to the law, I argue that Austin espoused these notions as early as 1786.[17]

I. A Timely Attack on the "Order": How Austin Appealed to the Spirit of the Times

Austin released his 1786 attack on the legal "order" against the backdrop of a post-war depression that had already placed lawyers in an unpopular position. In Massachusetts in 1785,

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[17] Norman W. Spaulding, "The Luxury of the Law: The Codification Movement and the Right to Counsel," *Fordham Law Review* 73, no. 3 (December 2004): 985.

there existed a near-universal chain of debts among residents. Almost everybody owed money to somebody: If a debtor was sued, he sued his debtor, who then sued his debtor, and so on, leading to an expanding debtor population and an increasing number of lawsuits.[18] In Worcester County, there was one lawsuit for the head of every family between 1784-85.[19] With the increased lawsuits, debtors had to pay not only dues to creditors, but also the costs of litigation. If they were unable to produce the requisite sums, officers seized everything of value, from the bed on which the debtors slept to the last potato in the cellar, sparing only the clothes on the debtors' backs. And if payments still fell short, they went to jail.[20]

Lawyers served as the perfect targets for the people to direct their frustrations. While debtors across the state struggled to gather sums for repayment, attorneys ran a thriving business. Prospective clients lined up to seek advice from dusk until dawn at the handful of lawyers' offices that existed at the time.[21] Naturally, as legal professionals flourished at the expense of many borrowers, they became targets of criticism. The *Massachusetts Centinel* published an anonymous essay that labeled lawyers as "mean and mercenary souls who [made] a TRADE of eloquence, and [thought] of nothing but sordid gain."[22] The writer rebuked lawyers for using their oratorical skills to make a living and criticized them for charging clients "in proportion to the nature of the cause, and the risqué they [ran]," a kind of "traffick fitter for a PIRATE, than an ORATOR."[23] Though it made sense why a service provider would charge higher fees for more complex cases, the writer denied lawyers the privilege of making those distinctions.

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[18] Ellis, *The Jeffersonian Crisis*, 112.
[19] Jonathan Smith, "The Depression of 1785 and Daniel Shays' Rebellion," *The William and Mary Quarterly* 5, no. 1 (Jan., 1958): 81.
[20] Smith, "The Depression of 1785," 82.
[21] Part of the high demand for lawyers at the times could also be explained by the fact that between 1776 and 1786, there were seventy lawyers across the state. *See* Smith, "The Depression of 1785," 83.
[22] *Massachusetts Centinel*, January 18, 1786.
[23] *Massachusetts Centinel*, January 18, 1786.

Austin capitalized on the notion that lawyers were villains during the economic crisis to appeal to his audience. He blamed the legal "order" for the debtor class' financial struggles. Rather than attempt to settle monetary disputes out of court, lawyers, Austin claimed, compelled their clients to engage in "a long tedious Court process" that only increased the costs of litigation and therefore the sum of money owed.[24] According to Austin, the root cause of the debtors' financial woes stemmed not from the original balances owed to an opposing party, but from the "debts enormously swelled by tedious *lawsuits*."[25] Although lawyers often became involved in debt disputes after one party borrowed money from another, Austin named lawyers as the main agents responsible for the debtors' misfortunes. Instead of help alleviate the people's financial woes, he argued, lawyers exacerbated them. But Austin further fed into frustrations about lawyers by urging readers to "look around and see the rapid fortunes accumulated by many of this 'order.'"[26] Although the legal profession was not the only group that flourished during the economic depression, it was a group that visibly succeeded, and often at the expense of those struggling.[27] Austin appealed to the Massachusetts residents suffering during the depression and offered a target for them to channel their discontent.

Austin also aligned his attack on the legal profession with the spirit of the Revolution. Austin initiated his campaign during the post-war era and conjured up sentiments from the War of Independence to appeal to his audience. He reminded readers that the nation fought against the British "to establish a government upon the basis of '*peace, liberty, and safety*.'"[28] Because the British threatened the prospects of enjoying these conditions, the colonists had to break free from

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[24] "Honestus," *Observations* (1786), 5.
[25] "Honestus," *Observations* (1786), 5.
[26] "Honestus," *Observations* (1786), 11.
[27] Gawalt, "Sources of Anti-Lawyer Sentiment," 288.
[28] "Honestus," *Observations* (1786), 8.

British rule. And yet, even after the war, Austin warned that there was another group – the legal "order" – that pressured the people to "relinquish every privilege of freedom, and subject [themselves] to continual animosities, impositions and distresses."[29] Austin alluded to the spirit of the Revolution to inspire the people to respond to the lawyers as they had reacted towards the British. And if Americans neglected to defend themselves against the "aristocratical tyranny" of the "order" of the legal profession, Austin warned that "all the *boasted acquisitions* of our independence [would be] '*sounds and nothing else*.'"[30] In a nation that prided itself on fighting for the causes of liberty and independence, Austin noted the hypocrisy of a failure to defend these ideals in the face of similar threats.

Lawyers were not just dangerous because they figuratively represented the British; Austin argued that they were direct pawns for sustained British control. Though the colonists had formally broken ties with their former mother country, Austin cautioned that some channels of British influence were still open. The "order" of lawyers, Austin claimed, "introduced the whole body of English laws into our Courts."[31] After the War of Independence, American law students continued to refer to English treatises to educate themselves on the law.[32] But Austin believed that a break from British rule should also mean a break from English laws and rebuked lawyers for continuing to bring precedents from "*Old English Authorities*" into American courts.[33] Austin appealed to the fact that America had just emerged from a war against the British and linked the legal profession to the young republic's enemy. Importing English precedents into American

[29] "Honestus," *Observations* (1786), 8.
[30] "Honestus," *Observations* (1786), 8.
[31] "Honestus," *Observations* (1786), 12.
[32] American law students continued to educate themselves in this manner until the War of 1812. *See* Hugh C. MacGill and R. Kent Newmyer, "Legal Education and Legal thoughts, 1790-1920," in *The Cambridge History of Law in America,* vol. 2: *The Long Nineteenth Century (1789-1920),* ed. Michael Grossberg and Christopher Tomlins (Cambridge: Cambridge University Press, 2008), 40.
[33] "Honestus," *Observations* (1786), 12.

courts was dangerous not only because they were English, but also because they threatened the foundation of the American government. Unlike England, which had monarchial institutions, Austin maintained that America was founded on "republican principles."[34] Austin gave readers more reasons to single out lawyers based on the economic and political conditions present in 1786.

However, Austin did not just broadcast issues with the legal profession; he also presented a solution: to annihilate the "order" of men.[35] Austin was not targeting all people who studied the law, such as those who read it for leisure or used it to defend themselves or their neighbors. Rather, he directed his remarks to a concentrated group of men who studied the law formally, charged clients exorbitant amounts for their services, and made it harder for commoners to defend their interests in court. This exclusive class of men posed a barrier to what Austin believed ought to belong to the people: the law. And before members of the bar could monopolize the law, Austin called for their complete annihilation.

Austin portrayed those of the legal "order" as villains who represented principles antithetical to the spirit of the times. They were greedy elites during the post-Revolutionary depression, threats to republican ideology, and allies of the British. Austin appealed to the context of 1786 to frame his argument, and underlying his proposal to abolish the "order" of lawyers was his broader vision of not only a law without lawyers, but also a justice without barriers.

II. "The Cure Must be Radical": Austin's Plan to Increase Access to Justice

Austin's ideal justice system was one in which ordinary people could freely apply the law – whether through formal or informal institutions – to defend their interests and seek redress

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[34] "Honestus," *Observations* (1786), 12.
[35] "Honestus," *Observations* (1786), 5.

without hindrance. The court was supposed to be "the most equitable and judicious place," where all persons involved in a cause would adhere to the "general principles of law" and "relate only plain matters of fact."[36] Accessible laws and procedures would allow for ordinary people to plead their own cases and have "a fair, equitable enquiry into the subject."[37] Even if the two parties in a dispute came from divergent economic backgrounds, Austin believed that if they had direct access to the law and to the legal system, there would be an equality between the "the *rich* and *poor*… [when] they are appealing to the JUSTICE of their country."[38] Austin envisioned a legal system founded on access and fairness, but he instead observed a justice system clouded by tedious delays, intricate laws, and exorbitant fees.[39]

Austin identified lawyers as one of the reasons why justice was delayed, confusing, and costly. Even if not all lawyers acted in ways that fortified the barriers, Austin insisted that the vocation was set up to promote perverse incentives. He compared the men to "mercenary troops," spineless and who can "be hired to support any cause for the consideration of a large reward."[40] Rather than adhere to the general principles of law, Austin argued that the rhetoricians perverted them and sometimes even "[warped] the laws to answer [their] own particular purposes."[41] Not only did they obstruct the laws, but also confused the people's understanding of the rules and used "the greatest art in order to delay every process."[42] Such complex legal jargon and delayed proceedings made lawsuits dilatory and burdensome, as longer trials meant higher costs. Because of these factors, Austin viewed lawyers as blockades to justice.

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[36] "Honestus," *Observations* (1786), 18.
[37] "Honestus," *Observations* (1786), 19.
[38] "Honestus," *Observations* (1786), 24.
[39] "Honestus," *Observations* (1786), 18-19.
[40] "Honestus," *Observations* (1786), 18.
[41] "Honestus," *Observations* (1786), 18.
[42] "Honestus," *Observations* (1786), 4.

Austin was aware that he presented a radical cure when he had proposed to abolish the "order," but eliminating lawyers was not Austin's only remedy.[43] While lawyers were the primary targets of Austin's campaign, Austin did not limit his reforms exclusively to obliterating the legal profession. He also advocated for substantive and procedural legal reforms in efforts to increase access.

Law as a Science v. Law as a Plain Language

The most radical change that Austin sought was a substantive change in the law itself. Austin proposed to repeal the then-existing legal codes and replace them with simpler laws founded on the principle of the law as a plain language. Arguing legal cases in Massachusetts in 1786 entailed looking to "numerous volumes, brought into our Courts, and arranged in a formidable order, as the grand artillery to batter down every plain, rational principle of law."[44] Laws were inherently inaccessible for those unable to obtain the legal volumes, so Austin proposed a system built on the notion of the law as a plain language: laws would be "dictated by the genuine principles of Republicanism, & made easy to [understand] by every individual in the community."[45] Austin suggested that officials simplify the arcane language of laws and rewrite them with the general public – not the legal elite – in mind. Austin sought to "destroy the wonderful mistery [*sic*] of *law craft*," and when that happened, he assured that "the whole science would be adapted to the most simple understanding."[46] Once laws were made simpler in terms of both language and principle, the people would be able to more directly use them.

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[43] Austin acknowledged that "the annihilation of the 'order' is thought, by a few, to be carrying out reform rather farther than is necessary" but insisted that if the people seek to "to destroy the *pernicious tendency of the practice,* I cannot suppose any measure short of a *total abolition… The cure must be radical*." *See* "Honestus," *Observations* (1786), 17.
[44] "Honestus," *Observations* (1786), 12.
[45] "Honestus, *Observations* (1786), 12.
[46] "Honestus," *Observations* (1786), 12.

Despite Austin's call to overhaul and simplify legal codes, critics maintained that the law had to be a science because of its function in responding to specific disputes that arose. One of Austin's critics, "Zenas," contended in the *Independent Chronicle* that laws had to be written with a specificity to not only capture the nuances of conflicts that arose, but also ensure that people could understand the rules with accuracy. If a litigant had a dispute and looked to the laws for guidance, the legal codes had to be complicated and specific. For example, in the case of property, "Zenas" explained that laws had to be detailed because of the variety of ways that people at the time understood property. The term could refer to property used to pay debts and raise revenues, "moveable property in commercial countries," and "immovable estate in all countries."[47] On top of that, there were different rules regulating each type of property. Therefore, to minimize confusion about ambiguous terms, "Zenas" maintained that codes had to affix "appropriate meanings to certain expressions" so that the people could "render the laws as intelligible and technically certain as may be."[48] Even if legal rules were founded on basic principles, because people applied laws to specific situations, "Zenas" insisted that laws had to be as detailed as possible.

Complex laws also served to protect individual rights in a free republic. "Zenas" also claimed that because America granted freedom to its people, intricate government systems with elaborate laws were inevitable. He theorized that there was a direct relationship between individual freedoms and complex codes: as people enjoyed more freedoms, the complexity of laws increased in "exact proportion to the quantity of freedom enjoyed by the subject."[49] In a government that entrusted its people with certain liberties, laws served as "[grants] of power to

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[47] "Zenas," [Boston] *Independent Chronicle,* April 27, 1786.
[48] "Zenas," [Boston] *Independent Chronicle,* April 27, 1786.
[49] "Zenas," [Boston] *Independent Chronicle,* April 27, 1786.

certain persons to compel men to do justice comfortably to [the laws]."[50] They were checks on the government's power. Detailed legal codes ensured that "modes of doing justice at public tribunals" were "clear, precise and uniform."[51] Even if precise codes were inherently more inaccessible, they were a necessary safeguard to protect the people from acts of unbounded discretion. Without such guidelines, "Zenas" feared that "the judge and the officer would be the law makers and deciders… and the *legislative authority and judicial authority would be no longer* separate."[52] Legal systems had to be elaborate to outline exact procedures and guide uniform outcomes to protect liberties. The people could not risk subjecting themselves and their rights to the whims of government officials. For the Revolutionary generation, who knew all too well what an unchecked governmental authority could mean for individual liberties, intricate laws protected the people from such abuses of power.

In a more practical sense, another critic opposed the idea of simplifying laws because doing so would only complicate proceedings. "A Lawyer" who wrote for the *Massachusetts Centinel* claimed that if Austin's reform of enacting a plain system of laws became a reality, it would radically alter the form and substance of disputes because all legal conflicts relied on the rules. He predicted that during the interim transition between changing legal systems, creditors would be in trouble because if a debtor refused to pay someone back, there would be "no law authorizing a recovery."[53] But even if Austin attempted to repeal and replace the complex codes with simpler laws, the critic maintained that Austin would be unable to "adopt a system *better* or more *concise*" because every case in a free republic must be "regulated by a *fixed law*, suited to

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[50] "Zenas," [Boston] *Independent Chronicle,* April 27, 1786.
[51] "Zenas," [Boston] *Independent Chronicle,* April 27, 1786.
[52] "Zenas," [Boston] *Independent Chronicle,* April 27, 1786.
[53] "A Lawyer," *Massachusetts Centinel,* April 29, 1786.

the circumstances of it."[54] Detailed laws encouraged a legal system of uniform outcomes. To maintain this feature, Austin's critic asserted that the laws, as they stood, could not have been simpler.

Nonetheless, Austin affirmed his view that the law should be a plain language, as simple laws allowed for commoners to represent their own legal interests. With such a "plain, rational principle of law," lawyers would not be necessary because the ordinary people would be able to understand and apply the laws.[55] Whereas those in the "law as a science" camp argued that legal codes had to be technical to maintain the peace and protect the people from government abuse, Austin held that residents had to first be able to comprehend the laws. If they were so technical as to prevent even the average citizen from understanding them, then who did the laws aim to protect? Austin urged that the people should have direct access to the law, and by simplifying legal principles, the justice system could live up to the right established by the Massachusetts Constitution: "That every person shall be heard by himself, or by his council."[56] Austin contended that the law should be crafted in such way as to make self-representation a reality and not an aspiration. Austin hoped that ordinary people would fill the halls of justice, when "men of leisure" would be able to study the laws and even "qualify themselves for the important station of JUDGES."[57] Under Austin's vision, lay laws would allow for lay people to represent themselves in court and possibly even administer justice, all without a formal legal education.

No Lawyers, No Problem: Representation Without the "Order"

Austin encouraged self-representation in courts by presenting a procedural reform that codified the ability of litigants to proceed without lawyers. Austin proposed that in "all civil

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[54] "A Lawyer," *Massachusetts Centinel,* April 29, 1786.
[55] "Honestus," *Observations* (1786), 12.
[56] "Honestus," *Observations* (1786), 21.
[57] "Honestus," *Observations* (1786), 13.

cases brought to Court, the parties should offer their pleas *personally,* or in *writing*, without the intervention of the 'order' of lawyers."[58] Rather than have lawyers present legal matters to judges, litigants would personally submit their defenses. After the parties presented their evidence to the court, "the JUDGES [would] recite the whole to the *jury*, with every *explanation* of law, necessary to regulate them in their decision."[59] Austin understood the judges to be unbiased authorities who oversaw and guided proceedings, not as professionals hired to represent the interests of a certain litigant. Because judges would explain the law for both parties, in theory, the jury would not award victories based on oratorical skills, but on principles of justice. But even though Austin maintained that judges need not have a formal legal training – only an understanding of the "the fundamental principles" of the law – the success of Austin's self-representation proposal would depend on the competence of the judges who oversaw the proceedings.[60]

Critics argued that self-representation would inherently disadvantage the more vulnerable members of society. If people represented themselves in court, "Zenas" wondered, "How would the poor man, the weak man, the widow, and orphan be upon an equality in their demand of right with the opulent, the cunning, and the strong?"[61] People inherently have different skills and levels of competency. Even if all the laws were simple, the ability of each person to understand and apply those laws would not be equal. Another one of Austin's challengers, "Old Honesty," added that it was not just about the disparity between the poor and rich. Even among ordinary people, it was inevitable for one man to "understand his cause, the principles upon which it is

[58] "Honestus," *Observations* (1786), 23.
[59] "Honestus," *Observations* (1786), 23.
[60] "Honestus," *Observations* (1786), 20.
[61] "Zenas," [Boston] *Independent Chronicle,* April 27, 1786.

founded, and the best manner of defending it, much better than his neighbor."[62] Due to the differing talents and educational levels of the citizenry, eliminating attorneys from legal proceedings would not automatically make proceedings equal and fair. Critics maintained that self-representation only furthered societal inequalities and insisted that lawyers in fact helped balance out the playing field between litigants of different abilities.

Austin was well aware of the drawbacks of self-representation and presented a solution: for those unable to adequately represent themselves, they could receive assistance from lay advocates. Austin, citing the Massachusetts Constitution's right to self-representation, acknowledged that "every man has the privilege of being heard by his council."[63] But for the litigants who declined to make their personal pleas, Austin suggested that they "should be heard by any friend they choose to employ."[64] Thus, a litigant with a legal matter could receive assistance from virtually anyone. There were no baseline requirements for the "friend" to be able to represent the litigant: they did not need to be a skilled orator, own legal treatises, or possess certain educational qualifications. When the selected representative arrived in court, he only needed to swear that he would not be "biassed [*sic*] to *mislead* the Court or Jury" and "*that he had not received, and… did not expect to receive any reward from the parties for his services*."[65] Rather than require the lay advocates to prove their abilities to perform the functions of a lawyer, Austin prioritized their commitment to upholding the principles of justice.

What distinguished lay representatives from men of the legal "order" was that the laymen would not be tempted to pervert justice when faced with the prospect of increased profits. Austin did not eliminate all the financial rewards for those who helped their neighbors by representing

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[62] "Old Honesty," *Massachusetts Centinel,* April 8, 1786.
[63] "Honestus," *Observations* (1786), 23.
[64] "Honestus," *Observations* (1786), 23.
[65] "Honestus," *Observations* (1786), 23-4.

them in court; he allowed for the advocates to receive a marginal fee. This payment would come from the government, but would be "so small as not to encourage an 'order' of men to pursue this business merely *for the profit*."[66] The representatives would receive compensation for their good will, but not to the point where their desire to make money would prevail over their duty to help a litigant in need and advance justice. While Austin provided an alternative for those unable to effectively represent themselves, he still maintained that the priority was to "encourage every person (who has no particular hinderance) to give his plea in *person* or *writing*."[67] Austin created an option for litigants to have representation, but the establishment of advocates would be "very different from the present 'order' of lawyers," as they lacked the pecuniary incentives that tainted the legal "order."[68]

In response to Austin's call to regulate attorney's fees, opponents challenged his assumption that limiting fees would drastically change legal practices. "A Twig of the Branch" clarified in the *Independent Chronicle* that lengthy proceedings and technical legal interpretations existed not because lawyers intentionally sought to confuse the court, but because of human nature. Even if lawyers did not charge fees and represented people purely out of good will, "Twig" retorted that "the multiplicity of the laws would always afford room for sophistry and refinement," as the abilities of people to think and speak for themselves inevitably invited differences of opinion.[69] Therefore, when lawyers spoke with prolixity, they did so not because of "the influence of any pecuniary stimulus," but because of the "human constitution."[70] While Austin may have had the right intention in eliminating delays in proceedings and confusion about

[66] "Honestus," *Observations* (1786), 24.
[67] "Honestus," *Observations* (1786), 24.
[68] "Honestus," *Observations* (1786), 24.
[69] "A Twig of the Branch," [Boston] *Independent Chronicle*, May 4, 1786.
[70] "A Twig of the Branch," [Boston] *Independent Chronicle*, May 4, 1786.

laws, the critic maintained that removing prospects of financial gain would not produce Austin's desired changes.

The Panacea for All Barriers to Justice

Austin's proposals to simplify laws, encourage self- and lay representation, and regulate fees preserved the courts as the main forum for dispute resolution, but he suggested another plan that would shift this structure. Austin pushed for arbitration – a process to settle disputes out of court prior to the start of litigation – to become the principal mode of addressing civil legal matters. In this informal means of conflict resolution, the parties involved would mutually select a panel of arbitrators who would oversee the conflict and issue the decision. Colonial merchants relied on arbitration procedures to avoid lawyers and dilatory court procedures and often submitted to the arbiters' binding decision as a matter of good faith.[71] But during the post-Revolutionary period, arbitration practices among merchants were becoming replaced by formal litigation. Austin challenged the shift by asking, "How many disputed [mercantile] accounts, which are now in our Courts, could have been settled by three merchants who are acquainted with mercantile concerns?"[72] Austin suggested a process of dispute resolution in which arguments would be presided over by peers, rather than by formal judges. It suggested a return to the informal modes of conflict resolution in which parties could settle their differences before those familiar with the nature of the causes.[73]

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[71] Charles Kerr, "The Origin and Development of the Law Merchant," *Virginia Law Review* 15, no. 4 (1929): 355, cited in Aaron T. Knapp, "Law's Revolution: Benjamin Austin and the Spirit of '86," *Yale Journal of Law & the Humanities* 25, no. 2 (Jan. 2013): 312.

[72] "Honestus," *Observations* (1786), 9.

[73] William Nelson found that in the pre-Revolutionary period in Plymouth County, Massachusetts, community members resolved conflicts using informal procedures in their town and church meetings, but that this changed after the Revolution, as parties began to turn to courts to resolve disputes (*See* Nelson, *Dispute and Conflict Resolution*, 77).

Although arbitration as a form of dispute resolution existed in 1786, it suffered from enforcement problems, and Austin preemptively addressed this issue in his proposal. In the post-Revolutionary period, many parties who used arbitration to resolve their legal matters did not uphold good faith practices to abide by the arbiter's decision.[74] Even if two opponents settled a debt dispute before mutually selected referees, there was little guarantee that the parties would abide by the decision.[75] This lack of enforcement deterred litigants from using arbitration as opposed to litigation, so Austin suggested a plan to formalize the decisions of arbiters. Rather than rely on parties' good faith to abide by the outcomes of arbitration proceedings, Austin proposed "that whenever parties *agree* to leave their disputes to reference, the decision of the referees (if *unanimous*) [would] become binding on them…"[76] Disputes settled outside of formal legal settings, without a jury and without lawyers arguing over the law, would now have a contractual effect, making arbitration a legitimate substitute for litigation.

The plan to encourage arbitration by making the decisions binding subverted the barriers that Austin believed prevented the people from accessing the law. Arbitration proceedings were understood as taking less time than typical legal proceedings because they did not involve the formal procedures of law: litigants did not have to pontificate about interpretations of the law and perform for a panel of jurors. Rather, this more informal proceeding required the parties to make their statements before one another and the arbitrators, who would then mete out the decision. Arbitration was also cheaper than litigation. Compared to the various costs involved in formal legal proceedings – charges for writs, service costs, attorney's and witness fees, and

[74] Conklin, "Lost Options for Mutual Gain," 583.
[75] Kerr, "The Origin and Development of the Law Merchant," 355.
[76] "Honestus," *Observations* (1786), 23. "Reference" described the act of submitting a dispute to arbitration even after litigation had commenced. Early Americans frequently used the terms "arbitration" and "reference" synonymously. In this paper, I use the term "arbitration." *See* Conklin, "Lost Options for Mutual Gain," 583.

travel expenses – arbitration fees were nominal.[77] Finally, litigants using arbitration would not need to possess a formal technical knowledge of the law nor have the means to hire an attorney. Arbitration was a system that allowed for the most direct access to the law, with minimal hindrance by procedural and substantive barriers.

If arbitration became the dominant system that litigants relied on for their civil legal matters, it would entail drastic changes to the legal system.[78] It had implications not only for where people would resolve their legal disputes, but also in who they employed to do so.[79] Because people would resolve conflicts informally, it would have decreased the need for lawyers. Replacing litigation with arbitration had the potential to substantially stunt the growth of the developing legal "order."

But Austin's opponents fought back, arguing that by discouraging the use of formal legal proceedings, arbitration deprived the people of their constitutional right to a trial by jury. Critic "A Twig of the Branch" maintained that one of the emblematic fundamental rights that Americans enjoyed was the right to a jury trial, the right to have peers of the accused listen to a dispute, evaluate the evidence, and make a decision in accordance with the law. But when people used arbitration they neglected to preserve the "invaluable birth-right" of a jury trial, a "palladium of [the people's] freedom."[80] "Twig" worried that extending arbitration to "a greater latitude would be dangerous to the liberties of our country."[81] If arbitration became more widespread, one of Austin's challengers feared that it would not only discard the fundamental right to a jury trial, but also endanger other essential liberties.

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[77] Smith, "The Depression of 1785," 81.
[78] According to William Nelson, residents of Plymouth County, Massachusetts began to use courts as the main institution to resolve conflicts after the year 1781. *See* Nelson, *Dispute and Conflict Resolution*, 77.
[79] McKirdy, "Lawyers in Crisis," 181.
[80] "A Twig of the Branch," [Boston] *Independent Chronicle*, May 4, 1786.
[81] "A Twig of the Branch," [Boston] *Independent Chronicle*, May 4, 1786.

Austin proposed a variety of reforms aimed at breaking down the barriers that hindered ordinary people's prospects of using the law to access justice. Along the spectrum of his reforms were solutions to abolish the legal "order," simplify legal codes, encourage self- and lay representation, and replace litigation with arbitration. While the goal was to facilitate a legal system in which ordinary people could use the law to seek redress or defend themselves, underlying Austin's reforms was his fundamental understanding of access to justice as direct access to the law itself. In the reforms that followed, lawmakers found a way to pass measures that satisfied Austin's goal of increased access to justice, without eliminating all barriers to the law.

III. Playing it Safe: How the Legislature Appeased Austin and Promoted the "Order"

On June 1, 1786, Austin published one of the final essays of his series in the *Independent Chronicle* and called for direct legislative action from the Massachusetts General Court. He asked politely, clarifying that he "would not presume to dictate to the Honourable Legislature," but wondered "whether it [was] not in their power to regulate the practice in our Judicial Courts…?"[82] He reviewed his proposed reforms that simplified laws, encouraged self- and lay representation, and legitimized arbitration, before promising that the measures would not only "render our processes more easy and less expensive," but also allow for the people "to appeal to the laws of their country with safety and confidence, and no longer be subject to the impositions they now experience from the 'order' of lawyers."[83] His reforms aimed to address what he deemed were the biggest failures of the legal system: its inability to provide litigants with speedy, cheap, and accessible justice. By simplifying the law and amending legal procedures

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[82] "Honestus," *Observations* (1786), 50. Austin published the final installment in his essay series assailing the Massachusetts legal system on June 15, 1786. Knapp, "Law's Revolution," 315.
[83] "Honestus," *Observations* (1786), 50

with the average person in mind, the republic would fulfill Austin's vision of a justice system made for the people.

A (Failed) Attempt at Arbitration

Arbitration was no foreign concept to the Massachusetts General Court. In 1743, the legislature empowered justices of the peace to summon witnesses in arbitration proceedings, and in 1764, it outlined how parties to debt disputes would choose their referees.[84] But it had never formally addressed arbitration's main drawback: enforcement.

This changed on July 7, 1786, when the Massachusetts General Court passed a law that made arbitration binding. In an "Act for Rendering the Decision of Civil Causes, as Speedy, and as Little Expensive as Possible," the legislature legitimized arbitration to promote it as a more cost-efficient means of settling conflicts. To ensure that the court recognized parties' decisions to settle their disputes via arbitration, the measure required the plaintiff to write a statement of notice and "to lodge the same with some one Justice of the Peace of the County."[85] Once the court had record of this decision, the justice of the peace would produce a receipt for the parties that authorized the referees to oversee the dispute. But this document also served as check on the parties: if they attempted, during or after the arbitration proceedings, to adjudicate their case before a justice of the peace, the court would, after viewing to their record, deny the parties the ability to simultaneously use both forms of dispute resolution. Once the referees made their decisions, the indebted could pay their dues and have the case discharged, or further processes would ensue. By enacting reforms that kept the courts informed about decisions made during

[84] For the law that empowered justices of the peace to summon witnesses in arbitration proceedings, see "An Act to Empower Justices of the Peace to Summon Witnesses," 1743 *Mass. Acts* 24 (March 22, 1743); for the law that outlined how parties in debt disputes would choose their referees, see "An Act for Preventing Fraud in Debtors, and for Securing the Effects of Insolvent Debtors for the Benefit of Their Creditors," 1764 *Mass. Acts* 35.
[85] "An Act for Rendering the Decision of Civil Causes, as Speedy, and as Little Expensive as Possible," 1786 *Mass. Acts* 21 (July 7, 1786).

arbitration, the legislature, for the first time, recognized arbitration as an alternative form of dispute resolution.

Four months later, the Massachusetts General Court went further and encouraged informal arbitration practices over even formal legal proceedings. In "An Act for Rendering Processes in Law Less Expensive," the legislature declared that for nearly all civil matters valued at more than four pounds – with the exception of cases concerning real estate titles – litigants had to first appear before a justice of the peace. When parties appeared before a justice, the justice was instructed to "use his best endeavors, to induce the parties to a referrence [*sic*] of such dispute or demand."[86] Whereas parties once had the option of bringing disputes directly to the Courts of Common Pleas, where they would have a trial before a jury, most litigants with civil legal disputes now had to first appear before a justice of the peace.[87] Although the plaintiff could still take his suit to the Court of Common Pleas, the party first had to undergo an additional procedural step and appear before a justice of the peace who would stress the use of arbitration.

Notably, the legislature's plan to further encourage arbitration expanded the jurisdiction and the authority of the justices of the peace. Prior to the passage of the 1786 law, Massachusetts justices of the peace oversaw smaller cases valued at under four pounds. The nature of such cases allowed them to handle disputes in a more informal, flexible manner responsive to popular needs and expectations.[88] But when the 1786 law removed the four-pound limitation and gave them cognizance of all suits concerning matters greater than four pounds, it drastically expanded not only the justices' caseload, but also their import, as they wielded authority over cases with

[86] "An Act for Rendering Processes in Law Less Expensive," 1786 *Mass. Acts* 43 (Nov. 15, 1786).
[87] McKirdy, "Lawyers in Crisis," 180.
[88] Sung Yup Kim, "Justices of the Peace, Lawyers, and the People: Local Courts and the Contested Professionalization of Law in Late Colonial New York" (PhD Diss. Stony Brook, 2016), 6.

higher monetary stakes.[89] Whether that would work hinged on the abilities of justices to meet the needs and expectations of the litigants.

Ultimately, the justices of the peace could not live up to the responsibilities set out by the 1786 proposal, causing the legislature to repeal the arbitration mandate. In theory, the legislature's 1786 proposal seemed to facilitate more access to justice; in practice, litigants faced further delays, attributing this to the incompetence of justices of the peace and of arbiters.[90] On February 15, 1789, the Massachusetts legislature repealed its 1786 "An Act for Rendering Processes in Law Less Expensive" and passed a new act of the same name that removed the burdensome provision requiring nearly all civil litigants to first appear before a justice of the peace. In doing so, it restored parties' direct access to all inferior state courts.[91] But for the litigants who still appeared before justices of the peace, they could expect no procedural change: justices of the peace would continue to encourage them to use arbitration to settle their disputes. As for Austin, even though the legislature had reneged on its effort to formally encourage the use of arbitration, it still made arbitration binding, satisfying his original demand.

Come One, Come All, With or Without Lawyers

Austin seemed to achieve more success with his other reforms that encouraged litigants to go to court without a lawyer. Across the two laws – the repealed 1786 version and its 1789 iteration – for "Rendering Processes in Law Less Expensive," the legislature included various provisions to make it easier for litigants to represent themselves in court. The 1786 version of the act outlined the process for plaintiffs to begin cases against defendants. Upon an application "made by any person or persons, who shall exhibit his, her, or their debt or demand," the justice

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[89] McKirdy, "Lawyers in Crisis," 180.
[90] McKirdy, "Lawyers in Crisis," 181.
[91] "An Act for Rendering Processes in Law Less Expensive," 1788 *Mass. Acts* 67 (Feb. 14, 1789).

of the peace would issue a writ and summons to an officer in the county to serve the proper papers to the defendant. The legislature specified that any person, even a woman, could issue a writ to the justice, suggesting that parties did not need lawyers to begin a legal proceeding. Though the 1789 act ultimately repealed this provision, it replaced it with a clause that more explicitly encouraged self-representation. Under the new provision, defendants in civil suits could cross-examine any witness, provide all or any proof to counter the plaintiff's evidence, answer any of the plaintiff's arguments, and make any observations, "either by himself or his attorney."[92] Such actions as cross-examining witnesses, offering evidence, and making claims were ordinarily the attorneys' tasks during legal proceedings, but the new law made sure to clarify that the defendant him or herself could directly perform these roles. Through these statutes, the legislature assured litigants that they could access the law without lawyers.

For those cases that still arrived at the Courts of Common Pleas, the 1786 and 1789 acts limited how many men of the "order" could appear in the proceedings. The 1786 law stated that only "one Attorney be allowed to plead on either side, in any cause before the Court Common Pleas."[93] And even though the 1786 act was repealed and replaced, the new statute, too, included the exact provision.[94] Through this restriction, the legislature attempted to equalize the playing field between litigants who engaged in formal legal proceedings. If the legislature prevented litigants from hiring any member of the bar to represent their causes in a court, they would have effectively annihilated the legal "order." While the legislature did not go so far as to abolish the profession, it still attempted to regulate parties' uses of members of the bar.

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[92] "An Act for Rendering Processes in Law Less Expensive," 1788 *Mass. Acts* 67 (Feb. 14, 1789).
[93] "An Act for Rendering Processes in Law Less Expensive," 1786 *Mass. Acts* 43 (Nov. 15, 1786).
[94] "An Act for Rendering Processes in Law Less Expensive," 1788 *Mass. Acts* 67 (Feb. 14, 1789).

Some litigants, however, lacked both the ability to effectively self-represent and the financial means to hire legal representation. Austin had previously anticipated such circumstance when he suggested a measure to allow for "friends" of the litigants to be able to appear on their behalf. The legislature clarified who could qualify as one such "friend." On March 6, 1790, it passed "An Act Authorizing Particular Persons in Certain Cases, to Prosecute & Defend Suits at Law."[95] In this measure, the legislature acknowledged that every citizen could "prosecute and defend his suit or action, by himself or by any person of a decent and good moral character..."[96] The provision did not say that only those admitted to practice the law could represent parties in cases; rather, it allowed for virtually anyone – so long as they had a "decent and good moral character" – to serve as an advocate in the halls of justice. Upon proof that the litigant authorized the advocate to represent them, the advocate would have "full authority" to "plead, implead or manage" the case, "as fully as if such person so authorized was an Attorney of such Court…"[97] The legislature did not require lay advocates to possess a technical legal knowledge, only that they were individuals of good character. This flexible requirement ensured that community members could turn to a plethora of people – a friend, a neighbor, a member of their church – for help.

Facilitating Access Beyond Austin's Demands

In the years following Austin's 1786 essay campaign, the legislature did not ultimately pass measures that abolished the legal "order" or simplified the legal code. Nonetheless, it

[95] "An Act Authorizing Particular Persons in Certain Cases, to Prosecute & Defend Suits at Law," 1789 *Mass. Acts* 58 (March 6, 1790).
[96] "An Act Authorizing Particular Persons in Certain Cases, to Prosecute & Defend Suits at Law," 1789 *Mass. Acts* 58 (March 6, 1790).
[97] "An Act Authorizing Particular Persons in Certain Cases, to Prosecute & Defend Suits at Law," 1789 *Mass. Acts* 58 (March 6, 1790).

enacted reforms – some of which Austin proposed and some of which he had omitted – aimed at increasing access to justice. In doing so, the legislature acted conservatively, enhancing the ability of the legal system to deliver justice, while still preserving its overall structure.

Austin called for the regulation of attorneys' fees to control the costs of litigation, but the legislature instead regulated judicial fees. For every step in a proceeding that required a member of the court or a local official to act, litigants, often the plaintiff, had to pay certain fees. In 1789, the legislature listed the fees that justices of the peace would receive in civil disputes.[98] This measure articulated the exact action – such as entering a cause, filing papers for writs to examining bills, swearing in witnesses, and recording judgments – and followed each item with an exact fee – ranging from one penny to two shillings (twenty-four pence). By outlining the costs of legal fees in a public bill, the legislature facilitated a transparency in legal practices that served to protect parties from being overcharged. Furthermore, the law stated that if any justice "shall demand any other or other greater fees for any of the services that shall be performed… he shall forfeit & pay for every such offence, the sum of *ten pounds* [twenty-four hundred pence]."[99] Even though the legislature did not eliminate or regulate attorneys' fees, it attempted to protect litigants from extraneous judicial fees.

Another way in which the legislature facilitated access to justice was by ensuring that people had physical access to the courts. In 1789, the legislature defined when justices could schedule court proceedings for litigants. A justice could not "appoint a Court at an earlier time in the day than nine o'clock in the forenoon, nor later than four o'clock in the afternoon…".[100] While this measure could have been for the aid of many in the court, such as jury members,

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[98] "An Act for Rendering Processes in Law Less Expensive," 1788 *Mass. Acts* 67 (Feb. 14, 1789).
[99] "An Act for Rendering Processes in Law Less Expensive," 1788 *Mass. Acts* 67 (Feb. 14, 1789).
[100] "An Act for Rendering Processes in Law Less Expensive," 1788 *Mass. Acts* 67 (Feb. 14, 1789).

jurists, and lawyers, further clarification by the legislature suggested that this time restriction was intended for the benefit of the parties. After listing the time constraints, the law continued that "no default shall be entered, until the expiration of one hour from the time set for confession."[101] Confession referred to the time at which the defendant would appear in court and either admit to or deny the civil claim in dispute. If a defendant neglected to appear, the court would enter a default judgment, which often favored the plaintiff. By regulating what times justices could schedule court appearances, the legislature served to protect defendants against such judgments. This measure helped ensure that parties would be able to access justice at the most basic level: showing up to court for their hearing.

In addition to regulating what times justices could schedule court appearances, the legislature also determined when and where court would be held. In the late-eighteenth and early-nineteenth centuries, many Massachusetts justices travelled from court to court. The legislature determined the schedules of these justices, but sometimes they miscalculated the time it took to travel from one town to the next. On October 4, 1796, the Court of Common Pleas for the County of Essex was, by law, supposed to have been held at Newbury Port.[102] For the Court to begin proceedings, the law required that there be at least two justices present, but on October 4, the Court was unable to satisfy that requirement and hearings for the County of Essex were not held. To "prevent a failure of justice" in Essex, the legislature immediately passed a law that moved the Court date to the following January and directed the Secretary to "cause this Act forthwith to be published in the *Mercury*, printed at Boston, and in the several Newspapers

[101] "An Act for Rendering Processes in Law Less Expensive," 1788 *Mass. Acts* 67 (Feb. 14, 1789).
[102] "An Act Providing for the Holding of a Court of Common Pleas, within and for the County of Essex, to Prevent a Failure of Justice in that County," 1796 *Mass. Acts* 26 (Nov. 22, 1796).

printed in the County of Essex."[103] This information was directed not only towards lawyers, but also to all Essex residents. The next time the legislature changed the time and location of holding court in Essex County, it again ordered that the Act "be published forthwith in the *New England Palladium*, and in the several Newspapers printed in the County of Essex."[104] The legislature upheld its duty to ensure that as many people of Essex as possible could attend court proceedings.

Even though the legislature did not go through with all of the reforms that Austin had desired, it still shattered some of the barriers to justice that Austin had identified. Arbitration allowed for litigants to settle their legal matters in informal settings, relying on arguments rooted in principles and not in legal technicalities. For the litigants who still proceeded with formal litigation, expanded options for representation made it easier for one to go to court without a lawyer: litigants could represent themselves or receive aid from a lay advocate and avoid costly attorneys' fees. Finally, the legislature passed measures to protect litigants from a potential abuse of judicial authority in the form of extraneous judicial fees and unreasonable times for court hearings.

By choosing to enact procedural, rather than substantive, legal reforms, the legislature affirmed that it was not going to "annihilate" the "order" of lawyers. If the legislature promoted Austin's view that the law should be a plain language, they would have threatened the longevity of the legal profession. And they almost did. If arbitration, as outlined in the later repealed 1786 law, completely replaced court trials, lawyers would have been reduced to handling criminal

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[103] "An Act Providing for the Holding of a Court of Common Pleas, within and for the County of Essex, to Prevent a Failure of Justice in that County," 1796 *Mass. Acts* 26 (Nov. 22, 1796).
[104] "An Act to Alter the Time of Holding the Courts of Common Pleas and General Sessions of the Peace, within and for the County of Essex in the Month of March," 1803 *Mass. Acts* 140 (March 9, 1804).

actions and real estate transactions.[105] But the act failed, in part, due to complaints about justices of the peace and arbiters, and the legislature neglected to pursue further efforts to replace litigation with arbitration, relying instead on other means to increase access to justice.

This "Order" Must be ESTABLISHED

In the years that followed, the legislature not only refused to "annihilate" the legal profession, but also became more congenial to the "order." The 1789 "Act for Rending Processes in Law Less Expensive" ceased to take effect after June 1, 1799.[106] In the 1789 law, the legislature regulated how many attorneys a litigant could hire, but after the act expired in 1799, the legislature did not renew the attorney restriction. In the years between when the legislature first limited the number of attorneys in court in 1786 to when such measures ceased to take effect in 1799, the legal profession in Massachusetts developed a larger presence. There were thirty-four attorneys in Massachusetts in 1780 and two hundred in 1800, a three-fold increase accounting for population growth.[107]

During this time span, the legislature seemed less hostile towards the profession; they even supported it. In 1799, esquires Joseph Story, Edward St. Loe Livermore, and Holden Slocum passed a resolution to authorize the publication and dissemination of "one thousand copies of the public and general laws of the late Colony and Province in Massachusetts Bay, or such parts thereof as they may deem proper, in a volume or volumes."[108] This resolution affirmed that the law would be a science, rejecting the notion that it ought to be an art rooted in plain principles. If people turned to the law to address their legal disputes, the state recognized that its

[105] McKirdy, "Lawyers in Crisis," 181.
[106] "An Act for Rendering Processes in Law Less Expensive," 1788 *Mass. Acts* 67 (Feb. 14, 1789).
[107] In 1780, the ratio of lawyers to total population was 1 to 9,349. In 1800, the ratio was 1 to 2,872 and continued to increase with every decade: in 1810 it was 1 to 1,424 and in 1840 it was 1 to 1,153. Gawalt, "Sources of Anti-Lawyer Sentiment," 285.
[108] "Resolve for Printing Laws," 1807 *Mass. Acts* 9 (Jan. 19, 1807).

official statutes lie in codified volumes, not in common conceptions of justice. Furthermore, though this act of producing more copies of the laws could have made the laws more accessible for the entire public, it is more likely that it served the legal elite. That the lawyers reserved for themselves the discretion to select what codes to include suggests that the measure intended to serve the legal professionals, not the ordinary people.

The legislature later even supported the establishment of local law libraries, which were made by and for men of the "order." Beginning in 1796, for prospective lawyers who wanted to practice in any Massachusetts county, they had to pay the county treasurer twenty dollars for admission in that county. In 1815, lawyers still had to pay twenty dollars for admission to practice, but that money would instead go towards more directly supporting the growth of the legal profession.[109] In counties with five or more attorneys, any five of them could apply to their justice of the peace for a warrant to meet and organize the establishment of a law library. The twenty dollars admission fee would no longer go to the county's treasurer, but to that of the local law library association. The legislature's measure supported the growth of the legal profession because it funneled funds that would have ordinarily gone to the county as a whole to the local bar. This enactment furthered the exclusivity and specialized knowledge of the legal profession; rather than use the dues to support the dissemination of legal knowledge to the public, it supported the growth of a library for lawyers.

It became apparent that the "order" was not going to be eradicated and in fact, was only becoming more established. But that did not mean that all efforts to increase access to justice were nullified. When the legislature made it clear that it was not going to overhaul existing legal codes and make them plainer for the average person to understand and apply, professional legal

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[109] "An Act Authorizing the Establishment of Law Libraries," 1814 *Mass. Acts* 178 (March 2, 1815).

assistance became an even greater benefit. By supporting the growth of the profession through the encouragement of local law libraries, the legislature increased the numerical strength of the "order" and decreased lawyers' costs, which, in some ways, made lawyers more accessible and justice more obtainable.

IV. *Observations on the Pernicious Practice of the Law*, 1819: A Revised Edition, a Revised Ideology

Back by Popular Demand

Despite the continued growth of the legal "order," the public continued to discuss and debate Austin's writings. Shortly after Austin's 1786 essay campaign, Shays' Rebellion broke out in western Massachusetts, with thousands of rebels protesting against economic injustices amidst the ongoing debt crisis. Immediately, commentators accused Austin of being one of the "authors of the present rebellion."[110] Though Austin targeted his attack against the legal "order," defamers argued that there were "mobish" tendencies underlying Austin's attack that resulted in the uprising against tax collection.[111] This association with the rebellion continued to tarnish Austin's reputation even long after the insurrection. Over two decades later, in 1809, one of Austin's opponents described the language Austin used in his essays as that which "excited the *Shays* insurrection."[112]

Nonetheless, Austin's writings retained a peculiar popularity among the Massachusetts public. Just as anonymous writers had either vilified or praised Austin immediately after Austin published his original essays in 1786, a similar line was being drawn once again. In the 1790s and 1800s, various editorials continued to classify Austin's 1786 works as libel and celebrated

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[110] "Suffolk," [Boston] *Independent Chronicle*, Feb. 1, 1787.
[111] "Suffolk," [Boston] *Independent Chronicle*, Feb. 1, 1787.
[112] [Boston] *The Repertory*, Nov. 3, 1809.

the superiority of Austin's opponents.[113] On the other side, fans came to his defense and urged a republication of his original works. Since Austin's enemies seemed to "misstate principles inculcated in those publications," one of Austin's supporters recommended that "*in justice to the author*, the numbers ought again to appear before the public."[114] People called for Austin's works to be resurrected, with one spectator noting to the *Independent Chronicle* that in light of the renewed commentary that had "excited the curiosity of many of your readers," it would "be very pleasing if those publications were re-printed in a *Pamphlet*."[115]

Austin's Changed Views on Lawyers, the Law, and Justice

On September 27, 1819, a revised edition of *Observations* appeared in booksellers across Massachusetts. At the request of "frequent solicitations of many respectable citizens, and to remove those objections which have sometimes been made to the original publication," the author of the polemical essays himself decided to republish his 1786 pamphlet.[116] Even though 1819 lacked the same crisis of 1786 "when the [legal] practice was attended with many distressing consequences in several western Counties," Austin nonetheless reissued his writings to meet popular demand. Except instead push for specific legislative reforms, Austin intended for the pamphlet to be read as a "candid perusal, without the least intention of promoting any object, but the public good."[117] While Austin republished, in full, the same essays included in his 1786

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[113] *Massachusetts Mercury,* November 1, 1798; *Independent Chronicle*, December 27, 1798.
[114] The writer also mentioned that even George Washington one of Austin's "disciples." "Bar Call," [Boston] *Independent Chronicle*, August 5, 1802.
[115] "Bar Call," [Boston] *Independent Chronicle*, August 5, 1802.
[116] [Boston] *Columbian Centinel*, September 25, 1819. This was not the first time that *Observations* was republished. Austin reproduced it in 1814, as well, with his same prefatory address. The 1819 edition was his last edition of the pamphlet. *See* "Honestus" [Benjamin Austin], *Observations on the Pernicious Practice of the Law* (Boston: True & Weston, 1819) in Erwin C. Surrency, "The Pernicious Practice of Law—A Comment" *The American Journal of Legal History* 13, no. 3 (Jul. 1969): 245.
[117] [Boston] *Columbian Centinel*, September 25, 1819.

pamphlet, he included a new essay as well: a prefatory address. In the remarks, Austin expressed his transformed views on the legal "order," the law, and access to justice.

The Austin of 1819 no longer held that the legal "order" was useless, dangerous, and had to be abolished; rather, he lauded the men as critical assets for society. Whereas he had once argued for the "complete annihilation" of lawyers, he now insisted that "the practice within the bar has become more congenial to the happiness of society."[118] He replaced the negative diction that he had once used to describe the men with positive descriptors, suggesting the extent to which Austin had changed his mind. Austin even refrained from describing the vocation as an "order," which he had previously used in a fashion of mockery, and in his only mention of the term "order" in his prefatory address, he used it to confer honor to the profession: he sought to place "the 'order' in that rank of society, which the most respectable and learned men, of all ages have been zealous to consider them."[119] The profession had since gained the respect of not only Austin, but also of society. To make his earlier 1786 essays compatible with his altered views, Austin requested that when readers peruse the articles, "the word *regulation* should be substituted in the place of 'abolition.'"[120] Austin acknowledged that the legal profession was not perfect and should be regulated, but clarified that they were not so dangerous as to be eradicated.

Austin's 1819 pamphlet also reflected his renewed understanding of the law. Whereas he had once urged the creation of a legal code written in a plain, and simple language, Austin succumbed to the view that the law was a science. He remarked, "[The law] is a science, on which the permanent interest of the community essentially depends."[121] Austin maintained that the laws had to be complex to protect the people, even if it meant that not all people would be

[118] "Honestus," *Observations* (1819), 245.
[119] "Honestus," *Observations* (1819), 245.
[120] "Honestus," *Observations* (1819), 245.
[121] "Honestus," *Observations* (1819), 245.

able to understand and apply them. As his critics had argued in the past, legal principles in a free republic were inevitably complex to safeguard the freedoms of the people, from one another and from the government. Austin abandoned his belief in a plain language legal system and accepted the view that the American legal system needed to be complex.

Austin espoused the principle of a legal science, arguing that it would lead to more consistent results. If the principle of the law as a plain language prevailed, decisions would be dispensed based on common principles, which would grant judicial authorities with considerable discretion. Rather than belong to the people, justice would belong to the judges, who ranged in skill from those learned in the law to those who could neither read nor write. Relying on a system founded on a common-sense law would result in inconsistent decisions. By replacing this system with codified legal principles, there would be more uniformity and less judicial discretion. Thus, Austin supported a legal system comprised of complex laws and legal elites who translated those principles. This system, Austin urged, would allow for an "impartial distribution of justice" in which "the poor and rich stand on an equality."[122] This equality was founded on the fact that "the rights of the citizens [were] founded on one uniform system of jurisprudence."[123] Austin's conception of an equality between litigants of different means no longer relied on mere access to the law, but on outcomes. Even though the system inherently favored those with the means to hire legal representation, Austin maintained that it was nonetheless fair because "no local partialities [would be] admitted within the system."[124] If justices had a set of detailed, codified laws to refer to and interpret when making their decisions, then it was the law – and not the justices – that determined the victors in court.

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[122] "Honestus," *Observations* (1819), 245.
[123] "Honestus," *Observations* (1819), 245.
[124] "Honestus," *Observations* (1819), 246.

Underlying Austin's drastic evolution of his conception of the legal profession and of the law was his reformed understanding of access to justice. Austin had once deemed the lawyers a threat to justice because his view of justice was that the people should have direct access to the law. His expectation of direct access to the law itself also shaped his view that the law should be a plain language, understood by all and applicable by all. But when Austin came to realize that the law could, and would, not be a plain language, justice came to mean access to a lawyer who could assist the litigant in using the complex law to protect individual interests. Though Austin once deemed attorneys a threat to the people's abilities to access justice, he now saw them as a means of helping them obtain justice. He no longer advocated for direct access to the law itself, but for access to a lawyer.

Austin expressed his confidence that the bar would facilitate access to justice, so long as its members acted in the interest of the people. Because the law was not a simple principle that all could understand, Austin accepted the necessity and utility of the profession. If the lawyers promised to not expose the client to "unreasonable delays and illegal charges—that the citizens of *all classes* can appeal to the laws with a full assurance," Austin concluded that "law and justice [would be] synonymous."[125] He retained his view that the people should be able to tend to their legal matter in a timely manner and at a reasonable cost. With these expectations in place, Austin believed that people would be able to afford lawyers and therefore effectively seek justice. He perceived the situation in 1819 to be such that every community member could "find a remedy for his grievance, without suffering more from the man whom he styles his 'Counsel,' than from the person against whom he complains."[126] Though obtaining justice required obtaining a lawyer, Austin believed that if lawyers themselves remained accessible – that they

[125] "Honestus," *Observations* (1819), 246.
[126] "Honestus," *Observations* (1819), 246.

charged reasonable fees and avoided using deceitful tactics – then the ordinary people would still be able to access the justice system.

That Austin was able to recant on his extreme remarks of 1786 suggests that his original pamphlet campaign touched on more than the question of whether the "order" of lawyers should be abolished. In the thirty-three years that had passed since Austin first published *Observations*, the legal profession grew in size and in influence. And yet instead of viewing them as more susceptible to depriving the people of their rights, Austin deemed them as essential for the operations of justice. He was able to share his modified view without "making a relinquishment of his original sentiments" because his goal was never to abolish lawyers; it was to increase access to justice. In the 1780s, ridding society of the "order" of lawyers seemed to be a suitable means to that end. But in the end, one of the staunchest anti-lawyer advocates accepted the "order" of lawyers because he understood its vitality in promoting access to justice for the ordinary people.

Conclusion

On May 5, 1820, the day of Austin's death, the *Independent Chronicle* shared an obituary of Austin. The memorial did not mention Austin's views on the legal profession or his supposed connection to Shays' Rebellion. Instead, it described him as a patriot whose philanthropy has not only led him "to espouse *the cause of the people*," but also to experience more severely "the bitterness of federal and aristocratic persecution" than any other man in the United States.[127] The editorial lauded Austin's bravery for speaking up on behalf of the people, even if it meant that he had to withstand public attacks. The tribute closed by stating that Austin's "public usefulness and private worth [will] long be remembered..."[128]

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[127] [Boston] *Independent Chronicle,* May 6, 1820.
[128] [Boston] *Independent Chronicle,* May 6, 1820.

Indeed, Austin's legacy has been remembered. Despite the urge to label and disregard Austin as a radical anti-lawyer, or even pro-lawyer, advocate, he was much more. Austin was a visionary who used his voice to express his concerns about the direction of justice in America in 1786 and shared his plan for a fairer and more accessible legal system. He dedicated his efforts to advance this goal, but when he realized that legal codes would not be written to ensure direct access to the law, he adjusted his view and emerged with a new conception of lawyers and of access to justice. He conceded that the laws could not be reduced to a plain language, but had to be a science. In this view, those men whom he had once reproached for obstructing justice were not blockades, but channels, to the legal system. And with the legal profession becoming more established in the early-nineteenth century, lawyers were becoming more accessible. By 1819, Austin no longer called for direct access to the laws themselves; rather, he redefined his conception of access to justice to mean access to lawyers.

Ironically, one of Massachusetts' most steadfast opponents of the American legal profession ultimately helped facilitate their entrenchment in early America. Near the end of his life, Austin supported the development of the bar, as he deemed it a necessity for justice. But in the centuries since, the American bar has not just established itself as the gatekeeper of the law, legal procedures, and the justice system; it has also become less accessible, leaving the people with little access to justice in the modern-day.

Yet despite the unintended consequences of Austin's efforts, his writings and the debates and reforms that followed suggest that at the core of the American legal system is the principle of access. A dispute between two parties can only be considered just if both parties can adequately defend and represent their interests. To facilitate increased access for those unable to afford lawyers, contemporary legal reformers have been pursuing various reforms, such as

simplifying legal codes and permitting lay advocates. Austin's prescient remarks about the dangers of the legal "order" and proposed solutions were not limited to only the spirit of the times. Contemporary legal reformers, whether aware of it or not, are echoing Austin's call for justice for all and are continuing his efforts to create a more perfect legal system.

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