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**A FRONTIER JUSTINIAN:
AN INTRODUCTION TO THE LIFE AND
WRITINGS OF HARRY TOULMIN,
TERRITORIAL JUDGE OF MISSISSIPPI AND
ALABAMA***

Paul M. Pruitt, Jr.**

Introduction:

Harry Toulmin was neither the first nor the only territorial judge to hold court in the future state of Alabama, but his was the most significant record. Toulmin was appointed in 1804 by President Thomas Jefferson to preside over courts in Washington County, Mississippi Territory, a sprawling district of settlements north of Spanish-held Mobile along the Tombigbee and Alabama rivers. Surrounded by the tribal lands of Creek and Choctaw Indians, this eastern province of Mississippi was isolated and undeveloped; its few officials were hampered by the distances they had to cover. Toulmin continued in his office after the Alabama Territory was carved out (in all, 1804-1819). As late as 1815, he complained that his authority extended over an area that, by his generous estimation, was 340 miles long and 330 miles wide.¹

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¹ Malcolm C. McMillan, *Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism* (reprint of 1955 edition; Spartanburg, South Carolina: The Reprint Company, 1978), 6-9. Created in 1800, Washington County was given its own judgeship in 1804. For Jefferson's first choice, who died before he could hold more than one term of court, see Thomas M. Owen, "Ephraim Kirby, First Superior Court Judge in What Is Now Alabama," in *Proceedings of the Twenty-Fourth Annual Meeting of the Alabama State Bar Association* (Montgomery: Brown Printing, 1901), 167-179. A judgeship for Madison County (Huntsville), was approved in 1810, and was filled by Obadiah Jones, formerly of Georgia. For further information see Clarence E. Carter, editor, *Territorial Papers of the United States, Volume V: The Territory of Mississippi* (Washington, D.C.: Government Printing Office, 1937), 320-321, 353-356, 370, 413-414; and Carter, *Territorial Papers, Volume VI*, 51-52. For

From the English Enlightenment to the Bluegrass State:

Toulmin's early life had prepared him for vicissitudes. Born in 1766 at Taunton, England, he was the son of Joshua Toulmin, a Unitarian minister and a friend of the famous scientist and dissenting clergyman Joseph Priestley. Though he received little formal education, Harry Toulmin drew both information and an inquiring love of knowledge from the men of his father's circle—even more, perhaps, from the works he read in a bookstore operated by his mother Jane Toulmin. Like his father, the young Toulmin became a Unitarian minister, serving two congregations in Lancashire from 1786 to 1793.²

The times were dangerous for Englishmen who were either religious or political nonconformists, and Priestley and the Toulmins were both. Indeed they were supporters of the French Revolution, men who applauded the fall of the Bastille and hoped that humanity would, in future, be guided by reason toward a state of republican equality and freedom of thought. The English government and the Church of England viewed such ideas as a serious threat to the status quo, if not treason; as a result the authorities did little to prevent violence against Unitarians and republicans. On the second anniversary of Bastille Day (July 14, 1791) a Birmingham mob burned down Priestley's house, destroying his library, laboratory, and personal papers. Priestley began to plan a move to America, as did Harry Toulmin after "a burning effigy of the radical spokesman Thomas Paine disturbed the Joshua Toulmin family doorstep." Toulmin's investigations led him to believe that the newly created state of Kentucky was an ideal destination—in fact Toulmin began to write works promoting immigra-

general territorial coverage, see Paul M. Pruitt, Jr. and David I. Durham, "Sources of Law in the Alabama Territory and the State of Alabama, 1798-1832: A Narrative Bibliography"; and Kris Gilliland, "Mississippi, 1699-1817," in Michael Chiorazzi and Marguerite Most, editors, *Prestatehood Legal Materials: A Fifty-State Research Guide* (Binghamton, N.Y.: Haworth Information Press, 2005), I: 1-29, 603-630. For short biographies of Toulmin, see Thomas M. Owen, *History of Alabama and Dictionary of Alabama Biography* (Chicago: S.J. Clarke, 1921), IV: 1676-1677; John Garaty and Mark C. Carnes, editors, *American National Biography* (New York: Oxford University Press, 1999), 21: 768 [Kristy Armstrong article]; and Dumas Malone, editor, *Dictionary of American Biography* (New York: Charles Scribner's Sons, 1936), IX Pt. 2: 601-602 [Isaac J. Cox article].

² Leland L. Lengel, "Keeper of the Peace: Harry Toulmin in the West Florida Controversy, 1805-1813" (M.A. Thesis, Duke University, 1962), 3-4.

tion there before he ever took ship. In the end, and with financial support from his congregation, he sailed to America in the summer of 1793.³

Arriving in Virginia, he won the good will of James Madison and Thomas Jefferson (who was a great admirer of Priestley). The Virginians were pleased with Toulmin's republican enthusiasm; Jefferson would describe him as a "person of understanding, of science, and of great worth," adding that the young Englishman was "a pure and zealous republican." Armed with encouragement and letters of recommendation Toulmin and his family (he had sailed with his wife Ann and four children) traveled to Kentucky. There he made what one scholar calls a "complete redirection," deciding to exchange the life of a clergyman for that of a scholar and teacher.⁴ He may have been concerned that a preacher's salary would not bring in enough money. Or perhaps—now that he was away from the presence and expectations of his parents—he may have caught something of the ambitious, worldly spirit of the West.

In February 1794 Toulmin was elected president of Transylvania Seminary in Lexington, Kentucky. There he established a demanding curriculum of languages, science, mathematics, philosophy and political studies, which he taught to a growing student body. In these years Lexington presented a scene of intellectual and political ferment, with ongoing discussions of

³ *Ibid*, 5-7; and Marion Tinling and Godfrey Armstrong, editors, *The Western Country in 1793: Reports on Kentucky and Virginia by Harry Toulmin* (San Marino, California: Henry E. Huntington Library, 1948), v-viii. For Kentucky's early image as a paradise on earth, see Craig Thompson Friend, "Inheriting Eden: The Creation of Society and Community in Early Kentucky, 1792-1812" (Ph.D. dissertation, University of Kentucky, 1995), 10-56, *passim*.

⁴ Lengel, "Keeper of the Peace," 8; and Tinling and Davies, *The Western Country in 1793*, viii-x (Jefferson quotation on ix). Toulmin maintained his connection with Priestley, who emigrated in 1794 and settled in Philadelphia, continuing his occupations as scientist and clergyman. For Priestley's activities, and for the difficulties attending the formation of Unitarian congregations in America, see John Allen Macaulay, *Unitarianism in the Antebellum South: The Other Invisible Institution* (Tuscaloosa: University of Alabama Press, 2001, 21-27. As to Toulmin's family, he had married his first wife, Ann Tremlett, in England; they would have eight children. Toulmin's second wife was Martha Johnson, likewise an English woman. They were married in Washington County; together they would have two children. See Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1677.

republicanism and deism. Thomas Paine's anticlerical Age of Reason was available in bookstores and was the object both of attack and defense. It was an atmosphere in which Toulmin might have flourished—might have become a patriarch of Kentucky educators. Yet from his first days at Transylvania he was closely watched by a Presbyterian faction of the school's board of trustees, who viewed him as a heretic and had opposed his election, and likewise by Federalists in the Kentucky legislature. The continuing intervention of these groups in Transylvania's affairs finally drove Toulmin to resign in April 1796.⁵

Law and Politics in the West:

As the academic door closed, a political door opened. Shortly after his resignation, Toulmin accepted appointment as Kentucky's Secretary of State. He would hold this post for eight years during the administration of Governor James Garrard, a Jeffersonian Republican. One of the Secretary's duties was to certify acts of the legislature, and as such Toulmin signed Kentucky's Resolutions of November 1798—by which Kentucky nullified the Federalist-inspired Alien and Sedition Acts.⁶ In the intervals of his official work he studied law and sold sets of Blackstone's Commentaries. The knowledge he thus gained stood him in good stead in 1801-1802, when the legislature provided for the appointment of two "revisors" of Kentucky's criminal law. The latter was derived from Virginia law, which in turn was an offshoot of English law—all modified by the statutes and case law of the new state. Toulmin (with attorney James Blair) was appointed to perform the revision and to "collect from the English reporters and from all such other writers on the criminal law as they think proper." The result, a minor classic of arrangement and codification, was the

⁵ Lengel, "Keeper of the Peace," 8-10; Tinling and Davies, *The Western Country in 1793*, x-xiv; and Friend, "Inheriting Eden," 229-232, 233-238. A complicating factor for cerebral theologians, deists and Presbyterians alike, was the growing popularity of emotional, revivalistic religion. Friend, "Inheriting Eden," 238, quotes Toulmin to the effect that Kentucky was home both to "unbelievers, who freely express their opinions" and "enthusiasts" "who assemble in thousands in the woods, and continue night and day."

⁶ Lengel, "Keeper of the Peace," 10-11, noting that "many supposed the young English liberal instrumental in the agitation which generated them"; and Julian P. Boyd, *et al.*, editors, *The Papers of Thomas Jefferson* (Princeton: Princeton University Press, 1950-1997), 30: 550-556.

three-volume Review of the Criminal Law of the Commonwealth of Kentucky, published 1804-1806. These books represent Toulmin's first steps as a scholarly lawgiver or (as he would later be called) "frontier Justinian."⁷

Toulmin and Blair laid out the criminal law in a manner similar to but not slavishly dependent on Blackstone. They moved from crimes against individuals (their "persons," their "characters") to those against property, subsequently taking up offenses against public safety, the "public peace," the justice system, religion and morality, and the "public trade" (i.e., usury and related crimes). They provided disquisitions on trial procedure, evidence, and indictments—the latter containing diverse examples intended to serve as forms. Unlike Blackstone, they stocked their volumes with lengthy verbatim excerpts from English reporters. It seems reasonable to assume that Toulmin had access to a more than adequate law library, and that he used its resources to provide other lawyers with more than statutory arguments.⁸ On the whole, like Blackstone's work, *A Review of the Criminal Law* is written in clear, even conversational prose.

The latter consideration was more than an academic matter to Toulmin, who was a Jeffersonian Republican and no partisan of "technical or cant" terminology. In a sense he and Blair had no choice, for the legislature had instructed them to use "no abbreviations, nor any Latin or French phrases." This was bound to cause some difficulties in dealing with long-established names of actions; but Toulmin met the difficulty by using language designed to provide a "general conception of the nature of the writ alluded to." He and Blair claimed to offer no opinion on the question of simplified language. But while Toulmin claimed "the same latitude as is usually given to our professional men," he admitted "that the obvious meaning of some of the provisions of our constitutions and laws is very different to a plain man, from that which

⁷ Harry Toulmin and James Blair, *A Review of the Criminal Law of the Commonwealth of Kentucky* (Frankfort, Kentucky: W. Hunter, 1804-1806), I: ix, and (for Blair's subordinate role) xii. For the Justinian quote, see Benjamin Buford Williams, *A Literary History of Alabama: The Nineteenth Century* (Rutherford, New Jersey: Fairleigh Dickinson University Press, 1979), 24.

⁸ Compare the tables of contents in Toulmin and Blair, *Review of the Criminal Law*, I: [iii]-viii, II: [iii]-ix, and III: [v]-x, with that in William Blackstone, *Commentaries on the Law of England* (reprint of 1765 edition; Chicago: University of Chicago Press, 1979), 4: "Contents" [unnumbered pages].

may be placed upon them through the artificial reasoning and subtle refinement of technical men.”⁹

Two goals—to state the law plainly and to make it accessible in a new country lacking a well-established legal profession—would provide the justification for most of Toulmin’s subsequent writing. In the meantime he dreamed of making money through such works, and it was doubtless with such thoughts in mind that he began to compile a self-help lawbook, which he published in 1806 through Mathew Carey of Philadelphia, one of America’s first mass-distribution publishing houses. This pocket-sized book was the ambitiously titled *Clerk’s Magazine and American Conveyancer’s Assistant: Being a Collection Adapted to the United States of the Most Approved Precedents*. The book lived up to its title; in just over three hundred pages it delivered 286 forms patterned on those used in England, New York, Massachusetts, Connecticut, New Hampshire, Rhode Island, Pennsylvania, Virginia, Maryland, and (of course) Kentucky. Americans needed guidance, Toulmin wrote, in carrying out simple transactions, for they lived in “a country where property is in a state of incessant fluctuation” and where ordinary citizens carry on more “mercantile intercourse” than anywhere else on earth—with the sad result that “law-suits are multiplied to a most astonishing extent.”¹⁰

If Toulmin seemed to have frontier on his mind it is not surprising. Prior to the publication of the *Clerk’s Magazine* he had moved to a neighborhood far more isolated than Kentucky. In May 1804 he had written to James Madison, asking for appointment to the recently created “Tombigbee” judgeship in Washington County of the Mississippi Territory.¹¹ While waiting he deli-

⁹ Toulmin and Blair, *Review of the Criminal Law*, I: x, xi, xii (quoted passages).

¹⁰ Harry Toulmin, *Clerk’s Magazine and American Conveyancer’s Assistant: Being a Collection Adapted to the United States of the Most Approved Precedents* (Philadelphia: Mathew Carey, 1806), [i]-v (quoted passages on i), [xi]-xxi; see iv-v for Toulmin’s sources, chiefly Blackstone, Frederic C. Jones’ *Precedents in Conveying* (1794), and the statutes of the states listed above. Toulmin’s book was issued in duodecimo; the title page declares that he was “Secretary of the State of Kentucky,” which invites the inference that the book was begun before his appointment as a Mississippi territorial judge. The wily Carey also issued the volume as *The American Attorney’s Pocket Book*.

¹¹ Lengel, “Keeper of the Peace,” 11-13; Toulmin declared that he planned to settle in the territories in any case. One of his motives for moving was a change of administration in Kentucky, where the newly elected Governor Greenup would soon (Lengel,

vered a July 4th address at Frankfort, defending Jefferson's acquisition of Louisiana and portraying in darkest terms the ruin that might have followed had the French or English aggressively colonized the new territory. Fortunately a "republican" administration had carried the day though well-informed diplomacy, a method preferable to either force or guile—both of which, Toulmin implies, were favored by partisans of Federalism. Thus Toulmin laid out the pacific principles he would apply as a federal official serving on an unstable borderland. He was optimistic about the future of republican institutions (he was after all speaking on Independence Day); yet he understood the turbulence of frontier politics. Of the limits of republicanism he noted: "Some opposition to the will of the majority may be necessary for the purpose of keeping them within the bounds of reason, of justice, and of constituency."¹²

Toulmin's appointment came through in November. By the summer of 1805 he had brought his family down the Mississippi River by flatboat, then taken them by sailing ship from New Orleans to Mobile. From that Spanish-held port they journeyed upriver to Fort Stoddart, an American military post near the confluence of the Tombigbee and Alabama rivers. There they were just above the thirty-first parallel, the northern border of Spanish

12) have "unhorsed him in favor of some political associate of the new regime."

¹² Harry Toulmin, *An Oration Delivered at the Celebration of American Independence at Frankfort, (K.) on the 4th of July, 1804* (Lexington: Thomas Anderson, 1804), 1-8 (quoted passage on 6). As to the results of European colonization, Toulmin argued that "in the course of a few years, that Territory would have been deluged with slaves from the coast of Africa." For the likely consequences, he advised listeners to consider "the dark & terrific scenes which have been exhibited in St. Domingo." Though Toulmin's attitude toward slavery is not a major concern of this study, the *Oration* leaves no doubt that he viewed the institution with horror, congratulating Americans for their (past and future) roles in suppressing the international slave trade. Like many Jeffersonians he believed that slavery was doomed to fade before the advance of reason and enlightenment. Thus with unconscious irony he wrote that by the transfer of Louisiana to the United States, "instead of a new grave being opened for the children of captivity, there is a wide area thrown open to the sons of freedom." See *ibid.*, 4. For the terror that slave revolts in Haiti and San Domingo inspired among southerners, see Michael Olain 'Brien, *Conjectures of Order: Intellectual Life in the American South* (Chapel Hill: University of North Carolina Press, 2004), I: 207-209. See also below, especially Note 47.

West Florida.¹³ There at the nerve center of controversy he would soon learn, if he hadn't known it already, that his new territory was large, populated sparsely if diversely by Native Americans, white settlers (of Spanish, French, British, and American descent) and African Americans. Toulmin's immediate predecessor described the population in less than enthusiastic tones as "illiterate, wild and savage, of depraved morals, unworthy of public confidence or private esteem." At least one faction of white settlers—led by one John Caller, member of an obstreperous frontier family, had unsuccessfully proposed their own candidate for the judgeship.¹⁴

Law and Diplomacy: Flush Times¹⁵ in the Old Southwest:

Toulmin's responsibilities in the Mississippi and Alabama territories were varied, and several had little to do with holding court. From 1806 to 1810 he "contracted to operate a mail route

¹³ See Isaac Joslin Cox, *The West Florida Controversy, 1799-1813: A Study in American Diplomacy* (Baltimore, Maryland: Johns Hopkins Press, 1918), 177, for Toulmin's activities in July 1805. The seat of government in Washington County was St. Stephens, upstream on the Tombigbee from Ft. Stoddart; as early as 1803 St. Stephens was the location of a U.S. government "factory" for trade with Native Americans. See William H. Brantley, *Three Capitals: A Book About the First Three Capitals of Alabama: St. Stephens, Huntsville, & Cahawba* (1947; University, Alabama: University of Alabama Press, 1976), 5-6.

¹⁴ Lengel, "Keeper of the Peace," 15-21. As explained below, the Mississippi Territory was eventually divided into the present-day states of Alabama and Mississippi. Concerning the early population of Washington County, Rowland, *Mississippi*, II: 937 reports estimates (c. 1802) that place the combined white and African American population between 750 and 1200. For Ephraim Kirby's opinion (the quoted passage) see Aaron Welborn, "A Traitor in the Wilderness: The Arrest of Aaron Burr," *Alabama Heritage*, 83 (Winter 2007), 14; for similar remarks made in 1803 by famous frontier preacher Lorenzo Dow, see Brantley, *Three Capitals*, 4-5. For an especially good summary of the Caller family, see Philip D. Beidler, *First Books: The Printed Word and Cultural Formation in Early Alabama* (Tuscaloosa: University of Alabama Press, 1999), 16-17.

¹⁵ The reference, of course, is to a classic work that covers the same geography, revealing the same human failings that Toulmin would encounter. See Joseph Glover Baldwin, *The Flush Times of Alabama and Mississippi: A Series of Sketches* (New York: D. Appleton and Company, 1854).

from Fort Stoddert to Natchez." At intervals prior to the long and intemperately-awaited American military occupation of Mobile in 1813, he represented American citizens in their disputes with Spanish officials. The latter controlled the mouth of the district's extensive river system, routinely charging fees as high as 12 per cent of the value of crops and goods, and sometimes shutting off trade altogether.¹⁶ As the highest-ranking civilian in his jurisdiction he also presided over public functions and entertained dignitaries. In 1817 he would welcome French settlers, the beneficiaries of a federal land grant who came with the intention of establishing a "Vine and Olive Colony."¹⁷ Year after year he worked at routine judicial tasks: presiding over criminal cases, addressing grand juries, administering oaths, and taking depositions. Certainly he heard many cases involving disputed titles to land, a type of litigation prevalent in frontier communities. Occasionally he referred to his colleagues in the Natchez district such points of law as "whether a writ of error could stop an execut[i]o[n] upon property."¹⁸

¹⁶ David Lightner, "Private Land Claims in Alabama," XX *Alabama Review*, 197 (1967); and see *American National Biography*, 21: 768. For Toulmin's involvement in diplomatic matters as early as 1805, see *Debates and Proceedings of the Congress of the United States*, (Washington, D.C.: Gales and Seaton, 1852), 15 (9th Congress, 1st Session), 1186-1187, *et sec.* For Spanish fees, see Lengel, "Keeper of the Peace," 31-32, giving the "tariff" at 6 per cent; and Welborn, "Traitor in the Wilderness," 14, giving the figure as 12 per cent on goods going upstream or downstream. For more information, see below. For a view from the perspective of Washington, D.C., see Frank Lawrence Owsley, Jr. and Gene A. Smith, *Filibusters and Expansionists: Jeffersonian Manifest Destiny, 1800-1821* (Tuscaloosa: University of Alabama Press, 1997), 16-31.

¹⁷ Brewer, *Alabama: Her History*, 575; Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1677; and Winston Smith, *Days of Exile: The Story of the Vine and Olive Colony in Alabama* (reprint edition; Demopolis, Alabama: Marengo County Historical Society, 1978), 36. Toulmin's duties also involved arduous travel; for mention of an 1811 journey into the Territory of Orleans to swear in a group of public officials, see Dunbar Rowland, editor, *Official Letterbooks of W.C.C. Claiborne, 1801-1816* (Jackson: State Department of Archives and History, 1917), V: 390-391.

¹⁸ On the prevalence of land disputes, see John D.W. Guice, "The Cement of Society: Law in the Mississippi Territory," *Gulf Coast Historical Review*, 1 (Spring 1986), 77. For the possibility that Toulmin was improperly involved in one potentially rich

Toulmin's commissions from Natchez included one task common to every phase of his mature career: namely, that he compile the young territory's laws. The product of this assignment, his 1807 Statutes of the Mississippi Territory, revealed a great deal about both Toulmin's understanding of his work and the varieties of legal business on the borderlands. Clearly, the judge was determined to blaze a clear path for judges in the future state(s), for within his topical arrangement he devoted more than 200 pages to laws and statutes pertaining to judicial proceedings, including such detail-oriented subject headings as "Demurrers, when frivolous" as well as an interesting section on the licensing and conduct of attorneys.¹⁹ The work is otherwise marked by its attention to land laws and criminal laws, especially the latter. Toulmin devoted more than eighty pages to territorial laws on "Crimes and the Public Police" and another forty to crimes punishable by the United States. Of the numerous federal offenses which he singled out for attention, several quasi-military offenses stand out—such as treason, manslaughter in a fort, violating a safe conduct or assaulting a foreign minister, accepting a commission from a foreign power, launching either a military expedition or a ship against a foreign government, confederacy to become pirates, burning a ship at sea, or participating in the international slave trade.²⁰

claim, see David Lightner, "Private Land Claims in Alabama," *Alabama Review*, 20 (1967), 196-198; for other claims against Toulmin and evidence of lengthy litigation over land, see Edwin Lewis to Governor William Wyatt Bibb, August 19, 1818, in Carter, editor, *Territorial Papers: Volume XVIII*, 401-405. For the quoted passage see William Baskerville Hamilton, *Anglo-American Law on the Frontier: Thomas Rodney and His Territorial Cases* (Durham, North Carolina: Duke University Press, 1953), 212-213.

¹⁹ Harry Toulmin, compiler, *The Statutes of the Mississippi Territory, Revised and Digested By the Authority of the General Assembly* (Natchez: Samuel Terrell, 1807), 84-304, (frivolous demurrers, 170-171; attorney regulations 226-229). It seems noteworthy that Toulmin reprinted the Northwest Ordinance, *ibid.*, 467-477, though that famous federal enactment did not control the legislature of Mississippi. However the ordinance includes (on 473) an article that guarantees "judicial proceedings according to the course of the common law."

²⁰ *Ibid.*, 305-386 (territorial criminal law), 486-546 (federal land laws), and 547-587 (federal criminal law). For criticism and publication information on Toulmin's *Statutes of Mississippi*, and his justice of the peace manual (see below), For a summary of Toulmin as codifier, see Dunbar Rowland, *Mississippi: Comprising Sketches of Counties, Towns, Events, Institutions, and Persons* (re-

After completing the Statutes of Mississippi, Toulmin agreed to write a manual for use by the Territory's justices of the peace, elected officials who in the far-flung communities of the Old Southwest were often the local personification of law. Justice manuals based on earlier English works were common in federal-era America. Most of them were notable for a commonsense blending of English and American traditions, so much so that one scholar has called them "the first text-books on Anglo-American law."²¹ Toulmin's contribution to the genre was titled *The Magistrate's Assistant: Being an Alphabetical Illustration of Sundry Legal Principles and Usages, Accompanied with a Variety of Necessary Forms*.²² Like other manuals it contained many references to classical Common Law authorities (Coke, Matthew Hale) with few or no concessions to Spanish, French, or Native American practices.²³ And like Toulmin's Mississippi Statutes, his *Magistrate's Assistant* was preoccupied with strategies to put down crimes. Consider the "A" list, consisting of the following topics: Accessories, Affray, Arrest, Assault and Battery, and Assize. Under "Arrest" there was a separate section, as in the Statutes, for federal offenses. A portion of the latter discussed the use of military force "to prevent expeditions from the United States against nations at peace with them."²⁴

In spite of—more probably because of—the reality of backwardness, violence and insurrection, the world as prescribed by the justice manuals was orderly and procedurally sophisticated. After all, these books were intended to serve as models for com-

print edition; Spartanburg, South Carolina: The Reprint Company, 1976), II: 794-795.

²¹ James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown and Company, 1950), 147-149; and John A. Conley, "Doing It By the Book: Justice of the Peace Manuals and English Law in Eighteenth-Century America," *Journal of Legal History*, 6 (1985:3), 257-298, quoted passage on 272.

²² Harry Toulmin, *The Magistrate's Assistant: Being an Alphabetical Illustration of Sundry Legal Principles and Usages, Accompanied with a Variety of Necessary Forms, Compiled for the Use of the Justices of the Peace in the Mississippi Territory* (Natchez: Samuel Terrell, 1807).

²³ Conley, "Doing It By the Book," 262. See Toulmin, *Magistrate's Assistant*, 5, 15, 17, 90, 126 (for cites to the English legal gods,) 31-32 (for an historical treatment of assize, "general gaol delivery,"oyer and terminer, nisi prius, and "commission of the peace"), and 102-103 (definition and proposed etymology of the term "felony").

²⁴ *Ibid.*, 3-5 (Accessories), 5-7 (Affray), 7-29 (Arrest, quoted passage 25), 29-30 (Assault and Battery), and Assize (31-32).

munities suffering through civic adolescence—places where passions and acquisitiveness were unembarrassed by established churches, schools, or hierarchies of business or planting. A number of Toulmin's neighbors were inclined to resent any authority, whether the Spanish in Mobile or U.S. officials at Ft. Stoddart.²⁵ Yet when Toulmin, good republican that he was, wrote: "It may be laid down as an invariable rule, that the law favors liberty," he did not equate liberty with freedom from restraint. Rather, he was laying down a regime of choices and gradations for the justices, a group that he may well have viewed as a republican squirearchy. For their use and the public good use he provided rich circumstantial details, citing (for example) the occasions when officers could break down doors or the types of hearings a coroner could convene; teaching how to interpret the varieties of evidence; providing the (thirty-two) rules of statutory interpretation.²⁶

Toulmin's life in the concrete world required that he strike a nice balance between serving citizens of the Territory and enforcing the will of his federal superiors. Territorial judges had been given broad federal powers by a congressional act of March 1805,²⁷ and Toulmin was quite willing to style himself "one of the U.S. Judges for the Mississippi Territory." As such he heard admiralty cases²⁸ and sought both to prevent and to punish federal

²⁵ Further study of Toulmin's frontier judgeship might cast light on the celebrated (and controversial) "Turner Thesis," by which American democracy is said to have grown organically from the restless energy, self-reliance and egalitarian social outlook that marked frontier settlers. See Frederick Jackson Turner, *The Frontier in American History* (New York: Henry Holt, 1947), 1-38, *passim*.

²⁶ Toulmin, *Magistrate's Assistant*, 14-18 (breaking down doors), 67-74 (coroners), 79-96 (evidence), 186-192 (statutory construction), and 189 (quoted passage).

²⁷ Hamilton, *Anglo-American Law on the Frontier*, 94-95, citing *2 Statutes at Large* 338. See also Erwin C. Surrency, *History of the Federal Courts* (New York: Oceana Publications, Inc., 1987), 352. For more on the state and status of territorial judges, see Kermit L. Hall, "Hacks and Derelicts Revisited: America's Territorial Judiciary, 1789-1959," *Western Historical Quarterly*, 12 (3: 1981), 273-289.

²⁸ For quoted passage see Toulmin, *Magistrate's Assistant*, title page. For another example of Toulmin as agent of the federal government, see H.S. Halbert and T.H. Ball, *The Creek War of 1813 and 1815* (reprint edition; Tuscaloosa: University of Alabama Press, 1995), Frank L. Owsley, Jr., editor, 212-213. These pages show for Toulmin taking a deposition on the incidents of

crimes, especially those criminal activities likely to have international implications. Toulmin's role in one such case—perhaps the most dramatic, wide-ranging, and ultimately confusing federal prosecution of the era—began in February 1807, when territorial judges at Natchez heard evidence in the matter of the recently surrendered fugitive Aaron Burr. Toulmin was present (as a spectator) as judges and grand jurors struggled to understand Burr's alleged conspiracies against the United States and/or the Spanish Empire. Toulmin, very much the loyal Jeffersonian, viewed Burr as a traitor. Traitor or not, there was every reason to see him as a threat to the peace.

When to Toulmin's distress the Natchez authorities released Burr (who promptly fled eastward), Toulmin issued arrest warrants against the former vice president and his principal allies. Toulmin examined several of the latter and bound them over to grand juries. Burr was eventually captured and briefly confined at Fort Stoddart, Toulmin's home base. There the charismatic adventurer played chess with Toulmin's daughter Frances (the wife of fort commander Edmund Pendleton Gaines) and pursued his schemes before being sent off in March to face trial in Richmond. There is no doubt that many residents of the Tombigbee district would have followed Burr in an expedition against the Spanish in Mobile. Burr had been in contact with territorial legislator James Caller, whose brother John had planned a filibustering raid against Mobile a year earlier. Toulmin had talked John Caller out of that project. Now Toulmin's quick action—plus John's decision to seek a reward for his nonexistent role in Burr's capture—had deflected another warlike preparation.²⁹

the Ft. Mims Massacre of 1813. For admiralty, see Hamilton, *Anglo-American Law on the Frontier*, 98 n.27.

²⁹ For the clearest account of Toulmin's role in these hopelessly murky affairs, see Lengel, "Keeper of the Peace," 33-47; and see Hamilton, *Anglo-American Law on the Frontier*, 78-83. For Burr's capture, see Albert James Pickett, *History of Alabama and Incidentally of Georgia and Mississippi, from the Earliest Period* (reprint edition; Birmingham: Birmingham Book and Magazine Company, 1962), 488-502. See also Thomas Perkins Abernethy, *The Burr Conspiracy* (New York: Oxford University Press, 1954), 198-226, especially 223-225. For a recent summary of the case, see Welborn, "Traitor in the Wilderness," 10-19. In justice to Burr and Mississippi adventurers in general, it should be pointed out that the U.S. Congress had in February 1804 passed the Mobile Act, asserting American "annexation of all navigable rivers and streams . . . that flowed into the Gulf of Mexico"; see Owsley and Smith, *Filibusters and Expansionists*, 23, 62. It was the practice of the Jefferson and Madison administrations to assert rights they

However the root causes of friction between American settlers and Spanish colonials remained unsettled, with the result that Toulmin remained a de facto diplomat. In 1810 he interceded when residents of his district joined the Mobile Society—a group in sympathy with an interesting and under-studied revolutionary organization, the Convention of Baton Rouge, whose leaders had recently wrested authority over several “Florida Parishes” (as they are known in Louisiana) from the Spanish. Though he was determined to keep the peace and avoid international incidents, Toulmin understood his neighbors’ frustration with Spanish control over down-river trade. Even as he took every step to discourage lawbreakers, he put out feelers to see if Spanish authorities might relinquish control of Mobile voluntarily.³⁰

In the long run Toulmin could not prevent violations of the Spanish boundary, the most annoying of which was a November 1810 expedition under the command of Convention agent Reuben Kemper. The latter and his inebriated followers failed to capture Mobile. Indeed in December Toulmin was able to arrest several of the filibusterers’ ringleaders, including Kemper, the ubiquitous James Caller, and Joseph Pulaski Kennedy—the judge’s long-time enemy. These men were acquitted (March 1811) of all charges against them; such was the state of Tombigbee public opinion or the filibusterers’ powers of intimidation. In fact a segment of Mississippians, some of them county and militia officials, considered that Toulmin had been overzealous or even pro-Spanish. But he excused himself by explaining that a judge in a frontier community “must perpetually take a more active part in the early stages of prosecutions than is customary in societies more established, and composed of better materials.”³¹ Life in the borderlands—six years

had little intention of enforcing immediately—but that might come in handy later.

³⁰ Lengel, “Keeper of the Peace,” 57-93, especially 74-77 (Convention activities) and 84-88, 92-93 (Toulmin and Edmund Pendleton Gaines attempting to negotiate with Spanish officials, especially Governor Vicente Folch). See also Isaac Joslin Cox, *The West Florida Controversy, 1798-1813: A Study in American Diplomacy* (Baltimore: Johns Hopkins Press, 1918), *passim*, and passages cited below.

³¹ Lengel, “Keeper of the Peace,” 91-125.; see also Pickett, *History of Alabama*, 481-487, 505-509. December 1810 was a chaotic month. During this time Toulmin effected his captures (December 9), and Governor Folch attacked the Filibusterers’ camp (December 10), killing, wounding and capturing several of them; these two events effectively crippled the Kemper expedition. And on December 13 there arrived a copy of President Madison’s October 27 proclamation annexing West Florida to the United

of judicial diplomacy, meting out “unequal laws unto a savage race”—had somewhat eroded his Jeffersonian enthusiasms.³²

If Toulmin’s prosecutions had angered his filibustrian neighbors, they were even angrier when he was instrumental in preventing a clash between United States troops sent to secure the annexed territory and Spanish forces occupying Mobile. Toulmin and others feared that the Spanish might burn down Mobile if attacked. On reflection, official Washington agreed; so early in February, federal officials were ordered (February 1811) to leave the port in Spanish hands for the moment.³³ For all such activities Toulmin—though he never lost the support of a core of official and legal friends—became a target for abuse and threats throughout the borderlands. Influenced by his enemies, a Baldwin County grand jury brought a nine-count indictment against him—chiefly accusing him of high-handedness on the bench but also implying that he was carrying on treasonable negotiations with the Spanish.³⁴

In November 1811 the territorial legislature forwarded the charges to the U.S. House of Representatives, which referred them to a committee whose members included territorial delegate

States; this document rendered much of the ongoing turbulence theoretically (but not actually) moot. See Lengel, “Keeper of the Peace,” 108-109; Cox, *West Florida Controversy*, 482-485. And see letters on the situation in J.C.A. Stagg, editor, *The Papers of James Madison: Presidential Series* (Charlottesville, Virginia: University Press of Virginia, 1984-1999), 2: 447-453, 606-609; 3:3-4, 22-24, 36-39, 56-57, 68-70 (quoted passage).

³² The quote is from Alfred Tennyson’s 1842 poem “Ulysses,” lines 3-4.

³³ Madison had assigned the present-day “Florida Parishes” of Louisiana to the Territory of Orleans as far east as the Perdido River; he would have been happy see the Spanish surrender Mobile and the remainder of West Florida (and East Florida, for that matter) but was unwilling to seize them by force, unprovoked. See Pruitt and Durham, “Sources of law in the Alabama Territory,” 3; McMillan, *Constitutional Development*, 17-18; Cox, *West Florida Controversy*, 487-516, especially, 490, 514-516; Lengel, “Keeper of the Peace,” 111-119; and Owsley and Smith, *Filibusters and Expansionists*, 62-66 and (for East Florida), 67-81. The federal troops in question were supported by militia units packed with Kemper’s men.

³⁴ Stagg, *Papers of James Madison: Presidential Series*, 4: 190-191; Toulmin thought that plots against his reputation, even his life, had been planned as early as 1807. See Cox, *West Florida Controversy*, 515-517; and Lengel, “Keeper of the Peace,” 54-55, 80, 98, 114-117, 125-133.

George Poindexter. Toulmin wrote letters defending his conduct at great length, evidently to the satisfaction of President Madison and the investigating committee, for in May 1812 Poindexter closed the investigation with a report commending Toulmin's "vigilant attention to the duties of his station."³⁵

A Frustrated Founding Father: Toulmin and the Transition to Statehood:

Even as Toulmin suffered for damming up the restless acquisitiveness of his neighbors, demographic currents were shifting in his favor. The second decade of the nineteenth century saw river-borne waves of settlement washing over eastern Mississippi. Land sales boomed along the Tombigbee, Alabama, and Tennessee rivers, bringing slave-worked cotton planting to the district that would be known as Alabama's Black Belt, and to the Tennessee Valley. These developments led to the growth of several towns, including Huntsville, Selma, Cahawba, and Montgomery, and Tuscaloosa. The new communities (like St. Stephens, close to Toulmin's base) began to show such appurtenances of civilization as municipal governments, schools, churches, taverns, and dry-goods stores.³⁶

³⁵ For events surrounding Toulmin's impeachment see Stagg, *Papers of James Madison: Presidential Series*, 3: 110-116, 129-131, 153-154, 192-193, 201-204, 221, 302-304; 4: 28-29, 180-186, 190-191, 220-222; and *American State Papers: Miscellaneous* (Washington, D.C. Gales and Seaton, 1834), II: 162, 184 (quoted passage), and 443 (for evidence of further charges filed as late as 1817). See also Lengel, "Keeper of the Peace," 128-141.

³⁶ Brantley, *Three Capitals*, 8, 11; and see 21 for an 1816 estimate of a territory-wide population of 45,000 free people and 30,000 slaves. By 1819, the combined population of Alabama alone would grow to approximately 125,000; see Pruitt and Durham, "Sources of Law in the Alabama Territory," 17. For the origins of the various towns see Owen, *History of Alabama and Dictionary of Alabama Biography*, I: 186-188, 718-719, II: 1037-1038, 1237, 1333; see also Nancy M. Rohr, editor, *Incidents of the War: The Civil War Journal of Mary Jane Chadick* (Huntsville, Alabama: Huntsville Madison County Historical Society, 2005), 4.; and H.S. Halbert and T.H. Ball, *The Creek War of 1813 and 1814*, edited by Frank L. Owsley, Jr. (Tuscaloosa: University of Alabama Press, 1995), 307-312.

Toulmin surely realized that the advance of “normal American” society³⁷ would lessen the influence of rascals like Kemper or the Callers. Yet ironically the pressure of white settlement disrupted the peace—the fragile peace that Toulmin had been at such pains to preserve. A Native American war movement promoted by the charismatic orator Tecumseh found sympathizers among the Creeks of eastern Mississippi; indeed he had addressed their councils as early as the fall of 1811.³⁸ When the United States declared war against Great Britain in June 1812 and followed that up by seizing Mobile in April 1813, Tecumseh’s disciples believed (with good reason) that both the English and Spanish would support their fight against the Americans.³⁹

Toulmin observed the outbreak of war in the summer of 1813, and put pen to paper—assessing the situation for his official contacts, noting the panic that caused white settlers, their slaves, and their Indian allies to cluster in forts (“the people have been fleeing all night,” he wrote on July 23), and reporting on the massacre of August 30 of soldiers and refugees at Fort Mims.⁴⁰ Unlike the filibustering exercises that he had formerly opposed, the Creek War was no comic opera affair; and it was prosecuted with all the force of national authority. Pretenders like James Caller (who had led militia forces to an embarrassing defeat at Burnt Corn Creek) were shoved aside by abler frontiersmen, including the epoch-making Andrew Jackson. Following Jackson’s crushing March 1814 defeat of Native American forces at Horseshoe Bend, the Creeks ceded huge tracts of land in the south and east of the future state of Alabama.⁴¹ From that point the onrush of settlement resumed.

³⁷ This phrase was used in the mid-twentieth century by Harry E. Rogers of Greenville, Alabama, to describe the life of south Alabama—a society based on agriculture and small towns.

³⁸ Halbert and Ball, *Creek War of 1813 and 1814*, 93; see 94-97 for divisions among the Creeks.

³⁹ *Ibid.*, 85, 87; for a survey see Owsley, *Filibusters and Expansionists*, 82-102.

⁴⁰ Halbert and Ball, *Creek War of 1813 and 1814*, 88-90, 91-93, 129 (quoted passage), 143-176 (Ft Mims), 296-300. Owsley, *Filibusters and Expansionists*, 95, places the Ft Mims dead at 250 or more.

⁴¹ Halbert and Ball, *Creek War of 1813 and 1814*, 125-142 (Burnt Corn), 141-142 (Caller’s disgrace), 241-278 (battles of Holy Ground and Horseshoe Bend). Of course Caller did not cease plotting and scheming prior to his death in 1819, but he was handicapped by the circulation of a mock-heroic poem satirizing his modest military accomplishments; see Beidler, *First Books*, 14-22.

Antebellum judges were typically stretched very thin, forced to cover long distances via primitive transportation; Toulmin was no exception. After the American takeover of Mobile he recommended the establishment of a separate federal court there and volunteered to be its judge.⁴² He wanted to think of himself (as noted above) as a federal official. Indeed his conduct of office had always been informed by his study of national and international laws. But he was painfully aware that however clear his duties might seem in theory, his authority was ambiguous in practice. This was so because territorial legislatures could pass acts restructuring the staffing and jurisdictions of their courts; the Mississippi assembly did so three times.⁴³ Another problem, the result of federal stinginess, was that the Mississippi Territory lacked a United States marshal or attorney until 1813. When necessary, territorial attorneys-general represented the United States. But county-level officers were reluctant to act in federal matters (since the latter often transcended county boundaries).⁴⁴ By the end of 1815, Toulmin's situation was unchanged. He was performing the judicial duties, federal and territorial, in a thriving, litigious, and expanding jurisdiction. Yet in his discouragement he had scaled down his pretensions; he now viewed his court as "merely a territorial court authorized like the state courts to entertain certain suits also belonging to the federal jurisdiction."⁴⁵

As Congress began to entertain petitions for Mississippi statehood, Toulmin was firmly identified with the eastern half of the Territory, an area chronically underrepresented in territorial affairs. As early as December 1815, citizens east of the Pearl River had complained to Congress that their counties were more populous than those of the western district but sent "only eight members of the Territorial Legislature, while the Mississippi River Sec-

⁴² Toulmin to President James Madison, June 2, 1813, Carter, editor, , *Territorial Papers, Volume VI*, 371-372.

⁴³ Pruitt and Durham, "Sources of Law in the Alabama territory and the State of Alabama," 6-7; Guice, "The Cement of Society," 78-80.

⁴⁴ Hamilton, *Anglo-American Law on the Frontier*, 94-95, 98-99.

⁴⁵ Toulmin to William Lattimore, December 18, 1815, Carter, editor, *Territorial Papers: Volume VI*, 618-622; and "Decision by Judge Toulmin" (Superior Court of Mobile County, April term 1815), *ibid.*, 516-525, quoted passage on 525. For analogous information on judicial matters in the territory of Florida, see Kermit L. Hall and Eric W. Rise, *From Local Courts to National Tribunals: The Federal District Courts of Florida, 1821-1990* (Brooklyn: Carlson Publishing, Inc., 1991), 5-20.

tion had sixteen.” Though the Tombigbee and Tennessee River settlers had hoped at times to escape from the political clutches of the Natchez group, the rapid growth of the Mobile and Huntsville trading areas convinced them that they would dominate an undivided Mississippi. In October 1816 a convention at John Ford’s house on the Pearl River petitioned for the admission of Mississippi as a single state, and sent Toulmin to Washington to represent them. Toulmin appeared before congressional committees, prepared statements, and lobbied as best he could. Still he found that powerful interests had taken the side of the Natchez men. As for the Western Mississippians, they now hoped to escape from their formerly downtrodden neighbors; and in the looming sectional conflict over slavery, four U.S. senators were thought to be better than two.⁴⁶

In two acts of March 1817, Congress prepared for Mississippi statehood and established the Territory of Alabama. In the latter, the lawmakers provided three judgeships. The judges, who were to be (as before) presidential appointees, were expected to ride circuit to preside over “superior courts” in the counties and were required to meet twice yearly at St. Stephens (the capital) to hear appeals and to exercise exclusive federal jurisdiction within the territory. For the remainder of the territorial period, Toulmin shared these duties with John W. Walker of Madison County, a rising politician who would serve as one of Alabama’s first United States Senators, and Henry Y. Webb of Perry and Greene counties in the Black Belt, who would serve as a state circuit court judge.⁴⁷

⁴⁶ Brantley, *Three Capitals*, 17-24 (quoted passage on 18).

⁴⁷ Carter, *Territorial Papers: Volume XVIII*, 54-55, 238-239, 570-571, 666-668; Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1716-1717, 1738. For indications that later territorial courts continued to handle federal matters, see Carter, *Territorial Papers, Volume XVIII*, 563, 575-576 (for a suit against a federal officer tried first in Mobile), and 637-638 (for a case involving the importation of slaves). For cases of various kinds over which Toulmin presided in the late Mississippi or Alabama territorial years, see Records Group 21, Records of the District Courts of the United States, U.S. District and Other Courts in Alabama, National Archives and Records Administration, Southeastern Region (Atlanta), Cases 54, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68, 70, *et al.* Of these, No. 59, *U.S. v. Negro Slave, Ben* is of interest because it shows the practical application of laws against the international slave trade. One of the documents excerpts an (arguably) anti-slavery jury charge made by Toulmin in October 1816.

Congress passed an Alabama enabling act in March 1819. Toulmin was elected as a delegate to the constitutional convention that met in July.⁴⁸ The membership was distinguished; its 44 delegates included former congressmen, legislators and other officials, several of whom would subsequently hold high office in Alabama.⁴⁹ Toulmin was not chosen for of the Committee of Fifteen that drafted the constitution.⁵⁰ Yet it may be significant that its suffrage provisions (white manhood suffrage with no property, militia-service, or taxpaying limitations) were similar to Kentucky's and thereby more liberal than those of other southern states.⁵¹ Toulmin was most likely pleased, too, with the convention's relatively liberal approach to slavery.⁵² Otherwise, he played a modest role, attempting without success "to make more definite the provision guaranteeing religious freedom" and arguing unsuccessfully for the federal (three-fifths) ratio as a basis for apportioning state senate districts. In addition he supported (this time

⁴⁸ Between 1808 and 1819, Toulmin's old judicial territory had been subdivided into twenty-two counties. He was elected as the delegate of Baldwin County, created from Washington County in 1809. For the 1819 convention members and their counties, see Brantley, *Three Capitals*, 44; for county dates, see McMillan, *Constitutional Development*, 22, 25 n. 42.

⁴⁹ McMillan, *Constitutional Development*, 31-32, sees in this convention a division between north and south Alabama; north Alabama, he said, had 28 votes to 16 for south Alabama.

⁵⁰ Brantley, *Three Capitals*, 44-45, indicates that the chief architects of the 1819 constitution were Committee of Fifteen chairman Clement Comer Clay of Madison County, committee members Henry Hitchcock of Washington County and William R. King of Dallas County, and territorial governor William Wyatt Bibb. The latter (also the first governor of the state) was not a member of the convention. Hitchcock, a youthful attorney who was (relatively) Toulmin's neighbor, may have been the conduit (if any) for Toulmin's influence upon the document as drafted. For Hitchcock's role in seeing Toulmin's final statutory compilation published, see below.

⁵¹ Alabama's constitution similarly lacked such restrictions on office-holding. See McMillan, *Constitutional Development*, 35-36. For the 1819 constitution's tendency to confer power on the legislative branch see *ibid.*, 38-39; and in general see Pruitt and Durham, "Sources of Law in the Alabama Territory," 14-16.

⁵² Under the 1819 constitution, the right to own slaves was guaranteed. However, it gave slaves basic legal protections and trial rights, and empowered the legislature to ban the slave trade, require humane treatment of slaves, and provide for manumissions. See McMillan, *Constitutional Development*, 42-43.

on the winning side) popular election of sheriffs, but failed to sway the convention against the popular election of clerks of court.⁵³

Toulmin had acted as a founding father to a state still undergoing its Jacksonian adolescence.⁵⁴ Politically he was outdated, superfluous, as the 1819 legislature demonstrated when it failed to elect him to a circuit judgeship. Instead they gave the office (by a vote of 63 to 5) to former territorial legislator Abner Lipscomb.⁵⁵ Unemployed, fatigued by duties that had expanded dramatically during the recent land boom years—"attending seven circuit courts twice a year and discharging the duties not only of a Territorial but of a Federal Judge"—Toulmin welcomed an offer from the 1821 legislature to examine, correct, and digest the state's statute law. Even this labor was arduous for a man whose health was probably failing. He was obliged to attend the 1821 and 1822 sessions of the legislature, to "bring a wagon for the purpose of conveying the digest and original acts of the Legislature," and to hire a clerk.⁵⁶ He could base some of the work on his 1807 Mississippi statutes; but he was also forced to deal with a digest published in 1816 by Edward Turner.⁵⁷ Toulmin did not admire Turner's work, which he described as "mangling and murdering the laws." Of his own work, *A Digest of the Laws of the State of Alabama*, he declared that it "has brought them to life again."⁵⁸

⁵³ *Ibid.*, 35 (quoted passage), 36-37 (for the "white basis" of apportionment), 39 (election of sheriffs), 40 (election of clerks). The Committee of Fifteen had proposed that Alabama follow the U.S. Constitution in counting each slave as a three-fifths person for apportionment purposes; but this was struck down in a vote that pitted the more generally slave-owning south Alabamians against spokesmen of the small-scale farmers of north Alabama.

⁵⁴ See Thomas Perkins Abernethy, *The Formative Period in Alabama, 1815-1828*, reprint introduced by David T. Morgan (Tuscaloosa: University of Alabama Press, 1990), *passim.*, but especially 120-151.

⁵⁵ Brantley, *Three Capitals*, 57; For Lipscomb's long history as a judge, see Brewer, *Alabama, Her History*, 405-406.

⁵⁶ Brantley, *Three Capitals*, 100-101, 100 n. 2, and 118--119 (quoted passages).

⁵⁷ Edward Turner, *Statutes of the Mississippi Territory: The Constitution of the United States, . . . and Such Acts of Congress as relate to the Mississippi Territory* (Natchez: P. Isler, 1816).

⁵⁸ Brantley, *Three Capitals*, 119 (quoted passages). And see Harry Toulmin, *A Digest of the Laws of the State of Alabama: Containing the Statutes and Resolutions in Force at the End of the General Assembly in January, 1823* (Catawba: Ginn and Curtis, 1823 [J. and J. Harper Printers, New York]).

Toulmin's Digest is one of the most impressive works of its kind. Weighing in at nearly a thousand pages of text, it is divided into sixty-seven alphabetical Titles that are in turn subdivided into Chapters. The latter present major acts pertaining to the topic at hand, arranged in chronological order. Since the Digest encompasses statutes of the Mississippi and Alabama territories as well as the acts of the Alabama state legislature, it is unmatched as an historical document of the Old Southwest. Toulmin assured the Alabama legislators, moreover, that he had taken pains to place components of multi-purpose acts under their proper subject headings.⁵⁹ The result, almost as much a code as a digest, is yet another instance of Toulmin, Jefferson's disciple, shaping the public institutions of the wild frontier. Thus we see that laws enacted against dueling receive their own title, and that instead of a title on slavery per se, Toulmin offers a title on "Negroes and Mulattoes, Bond & Free," with considerable attention devoted to emancipations.⁶⁰ On the other hand, Toulmin devoted his considerable intelligence to title groupings that would provide lawyers, politicians, and citizens with information useful in a rapidly growing republic—such as his lengthy title on "Highways, Bridges, and Ferries."⁶¹

Conclusion:

Toulmin may not have lived to see his final work in print, though he did survive long enough to wrangle a promise of \$1500 from the 1822 legislature—no mean feat for a sick old man.⁶² What he left behind, apart from printed pages, was a legacy pointing toward the supremacy of law. It could be justly said of him that neither distance, hardship, danger, intrigue, politics nor po-

⁵⁹ Toulmin, *Digest of the laws of the State of Alabama*, iii-xxxiv (contents pages). See Brantley, *Three Capitals*, 118, for Toulmin's editing; see *ibid.*, 120 n. 2, for information that the *Digest's* index was produced by Henry Hitchcock after Toulmin's death.

⁶⁰ Toulmin, *Digest of the Laws of the State of Alabama*, 261-266 (Dueling), 627-646 (Negroes and Mulattoes, Bond & Free). Readers should not imagine that early Alabama racial statutes were lenient. Emancipated slaves were commonly required to leave the state, and the state's January 1823 act "to carry into effect" federal laws against the international slave trade provided that contraband slaves should labor for the state (*ibid.*, 643-644).

⁶¹ *Ibid.*, 387-442.

⁶² Brantley, *Three Capitals*, 119 (for Toulmin's argument that circuit judges made \$1750 per year), 120. Isaac J. Cox says that Toulmin died on November 11, 1823; see Malone, editor, *Dictionary of American Biography*, IX, Pt. 2, 601.

litical persecution could shake his faith in the rule of law.⁶³ Likewise (and marvelously so for a man whose life had been disrupted by mobs and mob mentality from England to Mississippi) he apparently retained his Unitarian, Jeffersonian faith that popular government was the only legitimate foundation for freedom. He continued, too, to hope that reason could inform republican decision-making, and so promote freedom under law. A judge and legal scholar, Toulmin could not suppress the anarchic features of frontier life. But he could help to determine the structures that would stand when chaos had run its course.

⁶³ Readers who detect a respectful parody (of Romans 8: 38-39) are quite right.