Critical Legal History (CLH) is currently being subjected to sustained critique and re-examination by some legal historians. This review essay looks at this debate in the context of two recent books on American legal history: Christopher Tomlin's Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865 (2010) and Laura Edwards's The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South (2009). In keeping with the thrust of CLH scholarship, both books problematize the connection between law and narratives of freedom and equality in American history, and both show law as a significant force for non-freedom and inequality. Yet, in a recent symposium on Robert Gordon's classic article 'Critical Legal Histories' (1984), both authors chose to distance themselves from CLH. After explaining what is significant and important about each book, this review essay describes the debate in that symposium. Notwithstanding the extensive disagreement between the contributors over the use of so-called 'mandarin' legal materials in historical research (sources like legal treatises that reflect elite perspectives), the review essay makes the point that this disagreement is much less important than the challenge raised about the long-term tendencies and preoccupations of CLH and asks what difference it might make to take the postmodern turn advocated by these authors.

Keywords: legal history, United States, nineteenth century, slavery, freedom, equality, labour, women

When anyone in the last few years has asked me what exciting things are going on in the field of American legal history, I do not hesitate to tell them about the two books under review here, Laura Edwards's The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South (2009) and Chris Tomlin's Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865 (2010). Tomlin's book in particular has won much praise, winning among other prizes the prestigious Bancroft Prize for American History in 2011. Much of the research for the book was undertaken when Tomlin was a research professor at the American Bar Foundation in Chicago, and he now teaches at the (still new, I think we can say) law school at the

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University of California, Irvine. Edwards is a historian at Duke University, who specializes in legal history, women's history, race, and labour in the southern United States. *The People and Their Peace* is her third book. It won the Littleton-Griswold Prize, awarded by the American Historical Association for the best book in American Law and Society in 2009. Edwards's and Tomlins's books have much in common in the way that they approach historical understandings of freedom and equality; hence the desirability of a joint review despite the very different scope and theses of the two works.

In the spring of 2010, Tomlins helped organize a conference called 'Law as . . .': Theory and Method in Legal History, in which speakers (Edwards among them) presented papers challenging the decades-old interdisciplinary approach of 'law and society,' which has tended to look at law from the outside, by asking what difference it would make to think of law as history, culture, economy, sovereignty, and so forth. Morton J Horwitz, who was in attendance (and whose important book *Transformation of American Law, 1780–1860* [1977] also won the Bancroft Prize), was reported to have said that he thought that this new generation of legal historians were 'chaos kids,' who made him and others of his generation in attendance feel old but also, as I understood it, admiring of the range of styles and approaches on display. I must say that I find nothing chaotic about either Tomlins's or Edwards's books, both of which are meticulously researched and wonderfully and clearly written. Each of these authors, though, might well be seen as some kind of *enfant terrible* due to the sort of challenges their books raise, calling into question the key, base-line assumptions that are so often made in American history and American legal history, less often stated than simply proceeded upon. My aim in this review is to explain the challenges both authors pose to older historical assumptions in order to appreciate just what is challenging and important about each of the books.

*Freedom Bound* is a book that says what needs to be said about the role that law played in the 'manning,' 'planting,' and 'keeping' of North America from the seventeenth century to the Civil War (20). What Tomlins describes is something one sees bits and pieces of all the time without ever stopping: the importance of law was not pre-planned, opposed of built into a society. It emerged under the radar of the legal process. Tomlins's work is a tour de force.

As a technological and infrastructural capacity, the organized production of law would seem to be outside, to the exclusion, keeping what was.

The picture painted by this near-impossible enterprise puts it, 'Natural' law is not natural at all, as it surely should shake us free of our fictions. The references in the foreword to the *Constitution of Freedom* is delightful and engaging. Edward, in particular, says that 'it is important that lawyers think of this young and vacant legal space. The *Constitution of Freedom* and the *Constitution* of Enlightenment and the *Constitution* of Empire and the *Constitution* of Freedom and the *Constitution* of Empowerment are all in the same space. The *Constitution* of the Enlightenment is a metaphor as much in the working of the 'natural' as it is in the working of the 'natural.'

*Freedom Bound* is a book that says what needs to be said reaching for a new way of thinking about law as something more than a black box. It is as much a book about the law as a book about labour but it is also about knowledge, and newest and newest of much of which we don't even know the editor of.
without ever really putting it all together to appreciate just how important law was to the colonization project, which we often think of as composed of brute force rather than an aggressive but orderly expansionism under the rule of law. For Tomlins, historically, law was a means in this process. Tomlins writes,

As a technology, a means of doing and making do, law could furnish the institutional capacities to establish migration and settlement overseas as legitimate, organized processes. As a discourse, a means of knowing and making known, law would supply the arguments that enabled colonizers to justify – to themselves, to their rivals, to those they displaced – taking what they could keep and keeping what they had taken (5).

The picture is not pretty. The evidence that Tomlins amasses makes it near-impossible to refute. Much of that evidence is empirical – as he puts it, 'Numbers are a good place to begin, if only because they help shake us free of certain misunderstandings' (31). There are a lot of numbers in the book and systematic presentations region by region, very reminiscent of David Hackett Fischer’s Albion’s Seed (1989). However, the feel of Freedom Bound is less empirical than elegant. So, for instance, in a most engaging discussion of colonial charters and patents, Tomlins writes that ‘it is important to recognize that English settlement did not occur in vacant legal-conceptual space, any more than it did in vacant physical space. The Crown’s charters were license and blueprint, declarations of intent and maps of desire. Collectively, they established a “legal cartology” of English colonizing’ (185). Hence the rigorous presentation – one of the things that make this such a big, long book – always contains much in the way of theoretical sophistication and genuine challenge to stock-in-trade knowledge. Indeed, Tomlins is in conversation with so many other historians, it is a bit dizzying – Fischer, Bernard Bailyn, John Demos, Edmund Morgan, E P Thompson, Willard Hurst, and a boatload of labour historians. The footnotes demonstrate a near-encyclopaedic knowledge, both of older work, much of which Tomlins is challenging, and newer more critical literature that has appeared since the 1990s, much of which he has played a key role in cultivating through his work as the editor of Law and History Review for many years and the co-editor of

3 Canadians will particularly appreciate Tomlins’s inclusion (170–3) of descriptions and analyses of the Avalon patent given to Lord Baltimore in Ferryland, Newfoundland (before he was sent to Baltimore, Maryland); see also Wayne Johnson, Baltimore’s Mansion: A Memoir (Toronto: Knopf, 1999). For a discussion of connections between Shakespeare’s The Tempest and English colonization in Virginia, see Tomlins, Freedom Bound, 544–63.
numerous collections of essays, including three volumes of *The Cambridge History of Law in America.*

Labour was the way in which land was kept and transformed and the law would decide who kept what (12). So, very important to the book and consistent with Tomlins's long-time interest in this field is a description of the transformations in the status of those who worked and the way that rule was exercised over and by them (7). Here, Tomlins poses a number of challenges to received wisdom. First, there is the point that migrant servitude in the early colonization of North America was actually less common than scholars have generally supposed. Where it is generally said that those in indentured servitude were one half to two thirds of the population, Tomlins finds a significant Creole population with mixed free and unfree labour (50–64). Second, beyond numbers, Tomlins questions using single young men in bonded servitude to form one's basic picture of what work was, as it does the variety of work women and children did in the household and proto-industrial economy (53). Third, conditions of freedom here (bound and unbound) were various and do not map neatly onto what Henry Sumner Maine called in his famous work *Ancient Law* (1861), 'a movement from Status to Contract.' Tomlins explains the way that this imagined trajectory has long misled us, including, in his view, present-day progressive historians who continue to operate in its shadow by, for instance, pointing out places where 'status' persisted in the nineteenth century when labour was supposed to be free (e.g. the persistence of slavery and the criminalization of breaches of employment contracts). However, I think that Tomlins's most significant challenge is to the long-standing assumption American historians make about the centrality of the American Revolution to the nation's histories of freedom and non-freedom.

When Edmund Morgan wrote his book *American Slavery, American Freedom* (1975), he showed in an unforgettable way how the rhetoric of freedom was bound up with that of slavery, and he hypothesized that it was intimate knowledge of and proximity to slavery that made white, elite, eighteenth-century Virginian men so sensitive to any sense that the English were treating them like slaves. Tomlins has clearly been influenced by this book (for references, see 276, 307). Tomlins makes the important claim that the line, then the law, then the labor remnant, described here, has not yet been crossed. Revolutionary rhetoric and the way that was not meant to fill us that in 1776 every free republic by a legal instrumented slavery's accomplished enslaved them. The number of blacks were 4,395,000 in 1860 (506). I held no surprise to find that the took place on a scale connected to the justice of the decree of the ultimate industrial took place in the revolution. I would ask Why is there a we tells me that: 'those who [the] the beginning of the twentieth of seventy six [it would not be decided and the the eighteenth century is fundamentally different, it does, which is the law, gave the reason. (188). Because of the description of the argument allows the passage that includes things in competition, the exception. However, Grotius's idea to the first taken element was subjected to qualifications for

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5 Henry Sumner Maine, *Ancient Law,* 1st ed, introduction and notes by Frederick Pollock (London: J Murray, 1906) at 174 [emphasis in the original].


7 See Angel.
important claim that, if you use the Revolution as your principal dividing line, then slavery looks like a nineteenth-century exception—a vestige, a remnant, destined to disappear in something called the Civil War that has not yet been imagined. Instead, Tomlins insists, slavery in the post-Revolutionary period was actually super-important and ramped up in a way that was not at all specific to the South. So, for instance, Tomlins tells us that in 1788, New York ‘prepared itself for the coming of the new republic by adopting a new revised comprehensive slave law that guaranteed slavery’s maintenance and perpetuation’ and 10,000 blacks remained enslaved there in 1820 (505). In the United States as a whole, 89 per cent of blacks were enslaved in 1800 and the same percentage were enslaved in 1860 (506). This is meaningful to me, as one of the things I was most surprised to find in my research on the famous fox case, Pierson v Post, which took place on Long Island in New York in 1802, was just how many people connected to the case were slave owners—the families of the parties, the justice of the peace who heard the case, the local lawyer who represented the ultimate winner, even the person who owned the premises where the trial took place.7 I thought I was in the North and I was after the Revolution. I would expect to see it in New York City, yes, but the countryside? Why is there still so much slave-holding here? My own primary research tells me that Tomlins is correct to say, as he does in this book, that ‘[t]hose who celebrate the American Revolution and its aftermath as the beginning of American slavery’s end do history no favours’ (504). They are downright misleading. ‘If one were to identify a transformative moment [it would not be the Revolution] it would necessarily be the massive and decisive and widespread turn to African slavery that began in the later seventeenth century and continued for nearly two centuries’ (65).

I must also point out here another important thing Tomlins’s book does, which is that he shows how, as he puts it, ‘Roman law, not common law, gave the activity of colonizing much of its juridical cosmogony’ (188). Because of my work on Pierson v Post, I found fascinating here a description of how Grotius fudged Justinian in order to generate an argument about occupying land by capture. In pretty much the same passage that was at issue in the fox case, Justinian discussed air, water, things in common, wild beasts that could escape, but not land (with the exception of the rare occurrence of an island arising in a sea). However, Grotius added land to the list of things in Justinian that were open to first takers (115–20, 145–8). The idea that land was ‘wasteland’ until it was subjected to English-style husbandry was, of course, key to the justifications for dispossessing Native Indians. Yet legal purchase was the
method most often chosen, as Stuart Banner has shown (153). The animal trope is important, however, as Aboriginal people were themselves likened to wild animals that roamed the land (154). Justinian was also used to justify slavery, as those captured in war became the captor’s property – their having been spared from being killed, social death was ‘death postponed,’ a variation on physical death (420–2). This meant living in the condition of a beast rather than that of a person (422).

‘English common law was merely a local vernacular legal language,’ Tomlins writes; the ‘medieval reception of Roman law had furnished Europe’s ius commune’ (114). That English law and the (convenient and if necessary distorted) Roman law it was based on was relentlessly aggressive. Law was ‘the English mode of warfare’ (68). It was not like some innocuous china Englishmen packed in their luggage, the impression one often gets when other law and culture English colonists brought to North America. And Roman law, which is usually presented as evidence of a kind of superfluous elegance or refinement among famous eighteenth- and nineteenth-century American lawyers like John Adams or Alexander Hamilton, assumes a significance in Tomlins’s account that better explains why early Americans were attracted to it. The kind of slave-owning described in the Institutes and the subject of so much of Justinian’s text – the slave as a conquered foe who, but for the vicissitudes of the battlefield, would have been an equal or even a brother – would have been a lot more attractive than the kind of slavery Americans actually found themselves living with, premised as it was on notions of profound and inherent racial inequality.9

When American slave-owners gave their slaves names like Caesar, Nero, Pompey, or Cato, were they imagining that they were participating in a more noble form of slavery, the ‘pedigree’ of which helped justify what they were doing in their own eyes? Or was it some kind of cruel joke? I have often wondered. The classical and Roman allusions clearly echo ideologically in empire.

Edwards’s book also seems to me to have been influenced very much by Edmund Morgan (for a reference, see 224). And it is also concerned to describe the way in which the status and equal individual that we think of as an achievement of the American Revolution was, in actual fact, only for some and not all. Edwards describes in vivid detail


9 See Alan Watson, *Slave Law in the Americas* (Athens: University of Georgia Press, 1989) at 23–4, explaining how, in contrast to slavery in the American South, Roman slaves were often highly educated and they might be of any racial or national type; so there was no sense that they ‘were of an inherently inferior racial stock’.

the way in which the standard narratives of the slave trade were rewritten in the post–Civil War period, as the former slaves as owners of slave property were transformed. As one historian puts it, “[T]he transformation was a period from a slave to a property level’ (3) and one that was premised on the notion of ancestry possessed, the legality of law – local and national – had to be localized to the black family at the state and local level. In California, the modern state that had nothing to do with the former slave states, this was not the case (14–5).

In her book, Edwards describes the shift from the thirteen professionalized states to the modern states that we see today to the present and the matter of icons.10 While it is true that this was not a complete break with the past, a shift that occurred at least gradually within the South. They ‘write’ a history of progress, with slavery being a mark that should be overcome by the customs of the South. Edwards also points out the exceptional nature of these usages of the Native American as central tropes for the narratives. In
The anti-slavery movement had themselves identified. The abolitionist was also subordinated in the sense that the captor's property was subordinated in the sense of legal death was subordinated (2). This meant a lack of recognition of person (422).

The term 'legal language,' as he had furnished for 'natural language,' is not like some sort of primary linguistic impression that automatically informs a law and culture in any manner, it is a law, which is necessarily approximate in its elegance or expression. Hence, the century American legal history assumes a significant part of the early Americans in the Institutes and so on as a conquered people. They will have been an instrument of power and not of the power of the thinking with, predominantly, social inequality, like Caesar, Nero, and the like. The lack of participating in a leadership role creates a lack of justification. They have been cruel joke? they have been derision clearly echo

In her book, Edwards makes at least three important arguments about the shift from localized law to a scientific state law created by legal professionals. First, despite the fact that many lawyers and legal scholars today tend to see the triumph of professionalism over lay justice as a matter of inevitability, Edwards’s argument is that it was not at all clear that this was the case. It was a struggle, and the reason why the historical sources do not tend to reflect this is that the records were created by the same men who had committed themselves to building the new system, which they were apt to trumpet and present as if it were already there or at least getting there. They were not likely to report setbacks and losses. They wrapped the discussion of these “reforms” in the rhetoric of progress, with strong Whiggish undertones of inevitability (5). However, we should know better than to take them at face value. Second, the local customary world that got squeezed out was not some quaint, folksy exception to a formalized, rational body of state law (5). ‘Local decisions officially shared space with legislation and appellate decisions as central components of state law, precisely because state governments were relatively weak and delegated so much authority to local jurisdictions. In fact, the state level was largely dependent on local jurisdictions’
(5–6). 'Legal localism represented a different logic for resolving disputes and determining justice; it did not connote ignorance' (15). Third, the importance of localism is not something that was specific to the South. Just as slavery was alive and well in post-Revolutionary rural New York, as my Person v Post research showed, the localism Edwards describes 'characterized both the theory and practice of law and government throughout the United States, even at the national level, in the post-Revolutionary period' (6).

Edwards worked with thousands of unreported cases of localized law on the ground. A white woman yielded considerable authority in the system, coming to the aid, for example, of a neighbour whose husband was not providing adequate support and often providing the kind of character information that was determinative in these cases (for one such case, see 100-2, 123-4). A white man’s ‘credit’ consisted to a large extent in what those around him said about him; white women, free blacks, and male and female slaves were important in a dispute’s determination of where that credit stood. In the case of a wife unprovided for, who was forced to make ‘bread from chaff’ it was

[0]ther women [who] saw her situation, made their own judgments, and testified accordingly at the trial. In this legal culture, wives, slaves, free blacks, and other subordinates were not abstract extensions of their husbands and masters or faceless members of categorical groups, as they were defined in ‘the law’ – statutes, appellate decisions, and legal texts that eventually codified the law at the state level . . . [T]hey were distinct individuals, whose subordination took the form of relationships on which the credit of white men – and the legitimacy of localized law – were based. (102)

It was the women who visited the neglected wife: 'They knew what the family ate, how much, and how regularly . . . These women’s voices shaped the entire case' (123). 'Women, both white and black, enslaved and free, often witnessed, were victimized by, or committed violent acts' that triggered the local system (86). Slaves could not bring forward complaints, but they played crucial roles in cases about other slaves (87) and even cases against whites (128). Reputation was key, and dependents themselves fell along a spectrum on that score, where race and gender made a difference in predictable ways (128–9). However, 'in some instances, domestic dependents and other subordinates emerged from the process as believable witnesses' (129). Thus, for example, Edwards describes the case of an assault in which the testimony of a wife and her child, the only witnesses to the assault, was preferred over that of the male defendant’s witnesses to his character (129). This was a system that was less about rights than about restoring harmony to the social order and bringing about a resolution that would restore the peace. This

process of giving and receiving did not directly do with the classifying of people as men or women, as, without exception, the outcomes of these cases were about rights, abstracted from particular instances of everyday life.

If Edwards is correct about this, then in this book, he has foregrounded legal same-sex marriages arguing from the standpoint of local forms of reasoning, the inalienable rights, the inability to reason over the transformation, character and the transformation, characterizing a social text, it was difficult to content that it was a localized system that was not untrustworthy, for instance, if someone was not white, or property owners in a household gone against a husband, the challenge to lawyer’s fee unproven as they proceeded as such. For instance, Black men, and all the concern for the married wife separately, as a means to a refutation of a rebuttal on that point, was the counter-narrative.

Both Freedmen and the Civil War, I argue, meant that slavery perhaps. It is what says about the history, that we should...

10 See Angela P. Stovall, Federalists over Statesmen: The Background of the Constitution (Cambridge, MA 1987).
process of giving satisfaction and resolving specific disputes had little to do with the elaboration of ‘a uniform body of law that would hold everywhere, without attention to context’ (51). In localized law, ‘[c]onsistency of outcome was not the point. Nor was the protection of individuals’ rights, abstracted from the larger community. Every case arose from a particular incident’ (62). ‘Because localized law grew out of the patterns of everyday life, it was difficult to uproot’ (63).

If Edwards is correct about the pervasiveness of what she has described in this book, how can lawyers and legal historians continue to justify privileging the formal account of the law, especially when it was premised on exclusion in the way that it was? As Edwards explains it, limitations arising from race and gender were certainly there in localized law, but they ‘matter[ed] less’ (284). ‘In a system of governance based primarily in rights, the inability to claim rights resulted in a new kind of subordination, characterized by exclusion instead of inclusion’ (284–5). Hence, the transformation of inequality in the book’s title. If that is true, it is difficult to content ourselves with what elites who set out to dismantle the localized system said the law was in their treatises and cases. What they said was not untrue, but there was also a parallel truth according to which, for instance, it was possible for slaves to own property even when they were property (143) and for married women to be treated as owners of household goods even if they could not have stood on those rights against a husband (154). What Edwards shows us poses a powerful challenge to lawyers, historians, and legal historians, many of whom have proceeded as if there was only one world, only one legal truth. So, for instance, Blackstone said that husband and wife were one person in law; and all the counter-evidence that courts did actually treat husband and wife separately somehow never seems to amount to enough to constitute a refutation of that maxim.10 Edwards resurrects Mary Beard’s challenge on that point, and it remains a powerful one in the context of the counter-narrative Edwards has provided here.11

Both Freedom Bound and The People and Their Peace end with the Civil War. Histories must perceive choose a beginning and an end, and the Civil War makes sense for each of these books, given the central role that slavery plays in both. However, we might ask whether what Tomlins says about the Revolution might well be said about the Civil War; namely, that we should be careful about reading too much significance into what


is bound to be, in many respects, an arbitrary delineation. Slavery ended, but so much stayed the same for freed slaves in the South, many of whom were forced to reproduce the conditions of slavery in the contracts they had little choice but to sign.12 How central is the law to the way that new forms of outward-oriented colonization and imperialism went on to work in the twentieth century? Similarly, Edwards's scientific kind of law really triumphed in the late nineteenth and early twentieth centuries with the rise of academic law schools, organizations like the American Law Institute, and the case-book form of legal literature. How much localized law got left in place, operating as a parallel world, offering parallel truths, in small claims courts and administrative agencies, where written reasons, lawyering, and a precedent-like system do not really operate or are at least significantly attenuated? Different books would be needed in order to investigate those questions and they are not the books these authors chose to write. However, a person cannot help wondering how far the accounts Tomlins and Edwards have given would still be valid if we went beyond the Civil War. Tomlins certainly treats the Civil War as a watershed moment; and no one would doubt that it was. Yet, how much actually stayed the same? Certainly, the law continued to play an important role in colonization, and the academic push to delineate a scientific conception of law far removed from ordinary people continued apace. As Tomlins notes, quoting historian of western expansion, Patricia Nelson Limerick, there are times when the 'continuities in American history almost bowl one over' (539, n 84). One must be wary of the way in which, as he puts it, 'American history [presents itself as] an eternal succession of beginnings - each a primal enactment of foundation in a moment of purity and human invention that fills the void beyond civility with legality' (543). The post-Civil War world may not have been a new beginning but, in many important respects, more of the same.

There is 'chaos' in both of these books in the sense that what we are presented with is the dark side of the law, its role in colonization and its manifestation in an elite, professionalized version that stamped out a more inclusive (although by no means equal) localized legal system. Both books - in their empiricism, attention to social injustice, emphasis on argument and interdisciplinary openness - signal that they are descendants of the 'new' social history of the 1960s. However, they also can be seen as responding to developments in the practice of legal history in the 1980s, specifically Edwards's seminal 1988 book. Indeed, both Edwards and Tomlins' work concerns responses to the same problem: the law's role in the expansion of the U.S. or popular ways of understanding the law. Edwards's work is more historically specific, at least partly because of his discipline of history, from which he borrows both purposes, loses the broader perspective of the internalization process (and is itself trying to understand its role where) about the importance of contingency, diachronic, or causal explanations (see Tomlins' text endless discussions of, e.g., 'family history').

16 Edwards, supra note 12.
17 See Tomlins, supra note 12.
the 1980s, specifically the ‘critical’ turn ushered in by Robert Gordon’s seminal 1984 article, ‘Critical Legal Histories’.13

Indeed, both Tomlins and Edwards recently participated in a symposium issue on Gordon’s famous article.14 Interestingly, both expressed concerns relating to what they perceived as an emphasis in the original piece on the use of ‘mandarin’ legal materials. Tomlins responded specifically to the ‘guess’ Gordon made at that time – that so-called vulgar or popular legal consciousness, on the one hand, and elite law, on the other, would ultimately be not that different – by pointing out that Edwards’s work in People and Their Peace had shown that guess to have been at least partially wrong.15 Edwards herself wrote that ‘[w]ithin the discipline of history, the emphasis on mandarin doctrine, which Gordon proposes, loses its radical edge. It ends up looking more like a return to the internal, institutional legal studies that the sociolegal approach was itself trying to escape.’16 Tomlins wrote in his piece (and has written elsewhere) about the paralysis that he thinks has resulted from the turn to contingency and indeterminacy in critical legal history (CLH), producing an emphasis on plurality that is not critical enough, has given up on causal explanations, and leaves us trapped in modernity, fetishizing context endlessly.17 Susanna Blumenthal responded (in her piece in the symposium) to the mandarin-material criticism by pointing out that Gordon’s original point had been to say that it would be “a serious mistake to ignore studies of elites,” which was noticeably not to say that their intellectualized distillations of doctrine were the key to a society’s legal consciousness.18 And Gordon himself responded by stating in his abstract

15 Tomlins, ‘What Is Left,’ ibid at 162–5. See Gordon, ‘Critical Legal Histories,’ supra note 13 at 121: ‘My guess is that field-level studies [of lower-order officials, practitioners, etc] would reveal a lot of trickle-down effects – a lot of mandarin ideology reproduced in somewhat vulgarized forms, and doubtless also mixed up with a lot of foreign elements.’
16 Edwards, ‘History,’ supra note 14 at 189.
17 See Tomlins, ‘What Is Left,’ supra note 14; Christopher Tomlins, ‘After Critical Legal History: Scope, Scale, Structure’ 8 Annual Review of Law and Social Science [forthcoming in 2012]. Tomlins presented this paper at the University of Toronto, Faculty of Law, Faculty Workshop on 5 March 2012.
that ‘CLH has been misinterpreted as calling for a return to internal histories of “mandarin” doctrine: all it said was that some doctrinal histories were valuable, without privileging them.’ Gordon wrote that one of the reasons why the views of elites are important, although not all-important, is that ‘[m]andarin law sometimes represents a turn away from, an imagination of an ideal social order’ and it can be ‘a powerful fantasy, one that moves people to try to conform reality to it.’

Citing a collection of essays on the history of the legal treatise edited by myself and my colleague Markus Dubber and called legal treatises ‘the history of the quintessential mandarin art form,’ Gordon wrote that the collection ‘shows treatises being written for a multitude of purposes besides the high-flown attempt to demonstrate that law is a science of principles.’ And, indeed, Tomlins was an important contributor to this collection and was an enthusiastic participant in the project.

There are elites in both the Tomlins and Edwards books under review here and they include elite intellectual perspectives. Tomlins, for instance, uses Richard Hakluyt, the elder and the younger, propagandists for colonization, describing places they had never seen and never would, as a kind of trope throughout the book. Tomlins also parses out how Grotius distorted Justinian. There are many references to treatise writers, compilers of state law, and case-law reporters in Edwards’s book. It is noteworthy though, I suppose, that those elite perspectives hardly ever appear in a positive light. So, for instance, the ‘rah rah’ that usually accompanies biographical accounts of great lawyers and their accomplishments (a kind of ‘great man history’), which is very common in (especially older) legal history, is utterly absent in Edwards. If the older approach was antiquarian and internal, then the ‘new’ history of the 1960s from which socio-legal studies was born was totally external. Cultural history, the big tent that encapsulates what most people do today, is supposed to be both internal and external. As Fischer puts it, cultural history ‘is about both elites and ordinary people, about individual choices and collective narratives, about how society and the law make sense of one another.’


20 Ibid at 209.
21 Ibid.
and collective experiences, about exceptional events and normative patterns, about vernacular culture and high culture, about the problem of society and the problem of the state.\textsuperscript{28} It is also perfectly consistent with the call, usually traced in American legal history to J Willard Hurst, to the turn away from ‘internal’ lawyers’ legal history to an external and more critical perspective.\textsuperscript{24} However, Gordon’s rejection of Hurst’s style of legal history grew out of a concern that legal history in the law-and-society paradigm or ‘Wisconsin School’ had become too functional, too instrumental, too dismissive of law and its potentially consciousness-structuring effects.\textsuperscript{25}

Gordon, Tomlins, and Edwards are all in agreement that the way in which the law-and-society movement belittled the importance of law was problematic. As Dirk Hartog writes in his introduction to the symposium on ‘Critical Legal Histories,’ Gordon spoke up at an important moment for a claim that ‘no longer carries much sense of surprise for students of legal history. It just seems true’: namely, that ‘law matters.’\textsuperscript{26} Edwards, in The People and Their Peace, and Tomlins, in Freedom Bound, are both arguing for the importance of law, no question. And some of this does have to do with the way in which law books themselves are (often uncritically) used by historians. However, I am not sure how much of the thrust of the disagreement is captured by the skirmish over the status of mandarin materials described above. It comes to a head for me when Tomlins (effectively) says to legal historians housed in law schools (like myself) that what we have been doing under the banner of CLH does not challenge ruling power deeply enough when we live and work in environments indirectly supported by that power. Using the ‘law as . . .’ rubric, we might say that both books show ‘law as a force for the worse,’ and we all must ask ourselves about the role we play in that.

Yet, I think these authors would be disappointed to see their books characterized as merely offering narratives of ‘law as a force for the worse.’ Edwards certainly would identify this as a typical ‘declension narrative’ that exists alongside the progressive narrative as yin does to yang in historical studies. She writes in her symposium piece that, in the
discipline of history, ‘declension narratives have tended to reinforce, even naturalize, progress narratives . . . in which the issue in question works itself out over time in a manner that represents movement toward modernity in ways that improve the human condition.’\textsuperscript{27} Tomlins would say, I think, that it is the modern condition itself that traps us in these binary ways of thinking and we should be trying to formulate ways of moving beyond them by taking on board the philosophical insights of someone like Walter Benjamin, who saw clearly and described almost poetically our impossible situation. Interestingly, Gordon’s response to Tomlins’s charge that the emphasis on complexity in CLH has led to a kind of paralysis is a quintessentially modernist one, as he quotes the great English legal historian Frederic William Maitland, who wrote to A V Dicey in 1896 that the study of legal history was likely to have a liberating effect on its students.\textsuperscript{28} I suppose this was Gordon’s (scrupulously polite) way of saying, ‘I take the point, I respect it, but I am not going there.’ I am inclined to say here that historiographical disagreement (to take or not take the postmodern turn) is one thing and, indeed, such debate is a good thing, a sure sign of a healthy and thriving discipline. The history itself is another, and Gordon would be the first, I know, to applaud these books for being the tremendous accomplishments that they are (and he does appear on the jacket cover of Edwards’s book giving it high praise).

\textsuperscript{27} Edwards, ‘History,’ supra note 14 at 191.
\textsuperscript{28} Gordon, ‘Response,’ supra note 19 at 212.