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For William P. Alford

1. Enduring Challenges to Comparative Law Methods

Comparative law presents high order ontological, causal, and epistemological difficulties. Those difficulties come to a head in the design of comparative methods. Indeed, the spatial, temporal and cultural range of the legal phenomenon in all its elements – such as types of legal thinking and discourse, constitutional essentials, infraconstitutional institutions or the meaning-orientation and attitudes of legal agents – often strain the methods of comparative law to a point of rupture.
William P. Alford makes enduring contributions to comparative methods. In particular, this essay focuses on lessons contained in his early work about the limits and possibilities of theoretical approaches to comparative law, and to him it is my privilege to dedicate it.

Paying homage to earlier ages of comparative law, let us begin with a list; a list of some of the principal challenges to comparative law methods:

1) A distinctive feature of legal orders is that individuals come to be under their authority because they interface with certain enactments by attributing to them the meaning of formal sources of law. Based on this meaning attribution, the formal sources of law acquire the operative meaning attribution power of constituting all sorts of statuses and relationships. In other words, law is an enactment interpreted as law, which attributes include that of being a source of meaning itself. Let us thus stipulate, for this is not the occasion to defend it, that comparative law is an interpretive endeavor. Hence, comparative law requires criteria upon which minimally to sustain agent-focused interpretations of legal phenomena and for sorting out, according to those agents’ viewpoints, the most relevant from the most irrelevant in its selectivity of comparands.

Therefore, comparative law methods need cogently to mobilize interpretive criteria for specific comparative inquiries. However, as much as the comparative approach is interpretive of the viewpoint of members of a legal order, the comparatist is the stipulator of the interpretive criteria and the arbiter of the success of any interpretive explanation. How can this epistemic authority of the comparatist be compatible with the interpretive nature of comparative law that gives preeminence to the viewpoint of individuals subjected to the legal order under study? Call this the challenge of interpretive, agent-orientated comparative law methods.

2) Elsewhere,[1] I proposed that we think of social complexity as a function
of demographic, economic, institutional, cultural, political, geopolitical, cognitive, technological, communicative, and self-referential elements each reaching qualitative and quantitative benchmarks specifiable by a theoretical model of complexity. In high-complexity societies, I argued, these elements of complexification reach their respective specified benchmarks and enter into interrelationships that cause a change in societal type. From that historical point on, the societies in question are no longer adequately explained by adding up the separate elements of complexification, for the product of the addition does not account for the qualitative leap in complexity level caused by their interrelationships.

For most of human history, societies were not of this high-complexity type. In those societies – simpler, to be sure, only by comparison to societies more complex – social stability was a form of social stasis backed by sufficient normative inertia. By contrast, high-complexity societies obtain social stability only through constant functional adaptation and axiological steering that take the form of small quotidian and large occasional changes in the legal order.

A distinction implicit in this conception of social complexity should be clear. While *stability* is a sociological concept, *order* is a normative one. To speak of social order is to speak of social stability that is produced and sustained by norms. Unlike stability, which fully reduces to its sociological footprint, the notion of order invites adjectivization such as just or unjust, legitimate or illegitimate, sacred or profane, or authentic or inauthentic.

I expect these ideas to be uncontroversial. From the perspective informed by them, the clusters of political intuitions, sensibilities, and attitudes that we refer to as conservatism and progressivism in politics emerge as sociologically and normatively naïve. The fact that order is a primary social good necessary for all other social goods tends to remain opaque to progressives. Conservatives, on the other hand, miss the fact that constant progress is what order requires in high-complexity societies. To the extent
that conservatism and progressivism may be part of the outlook of comparists, their sociological and normative blindsides compound the challenges to comparative methods.

The upshot of the argument here is that the normative orders of high-complexity societies are correspondingly so complex as to daunt even the most confident comparists trying to design or deploy a method that does complexity justice. Call this the challenge of social and legal complexity to comparative law methods.

3) A third, related challenge to comparative law methods comes in the form of what we might refer to as normative voracity. Indeed, the more a society complexifies, the more of its extra-legal social normativity is replaced, changed or absorbed into its laws. Furthermore, under conditions of growing complexity, law’s voracity also institutionalizes social repertoires of problem-solving adaptive comportment and knowledge. One explanation for the voracity of law points to the social utility of institutions, which channel selected behavior into transtemporal, reliance-enhancing patterns of comportment and communicable knowledge.

Thus, while comparative law methods are already ontologically directed to formal law and its institutions as comparands, proper ontological apprehension of the comparands fail unless the comparative method delivers what Clifford Geertz referred to as (and Professor Alford has called for) “thick descriptions.” Done well, the robustness of thick descriptions reveal in the form of law the axiology and functional adaptation institutionalized by it. This, of course, requires deep leaning on the part of comparists of the societies they study. Call this the challenge of constant subsumption of extra-legal normativity and functional adaptation under the normativity of law.

4) The final challenge to comparative law methods in this short list is that they must analytically distinguish and pair the relevant types of legal
thinking and discourse (including discourse in the form of legislation, adjudication, administration, and non-professional legal vernacular) as comparands.

For instance, types of professional modern Western legal thinking and discourse are distinguishable along two axes. The first axis captures the viewpoint and scope of legal thinking and discourse. The opposing poles of this axis are occupied respectively by enclosed (adopting, such as legal doctrine does, the viewpoint of agents who positionally enact, interpret, deploy, or expound the law) or enclosing (such as broad theories which seek to explain the origins, internal logic, functions, value, structure, legal agents meaning or the evolution of law) thinking and discourse. The second axis captures the timeframe of legal thinking and discourse, where these appear as synchronic (in which thinking and discourse is about time-undilated features of law, whether the law in question is in the past, present or future of the thinking subject) or diachronic (focusing instead on time-dilated features of law).

There are two connected points to keep in mind in these distinctions: first, that in practice these types constantly interpenetrate; second, that there are dynamic interactions between the enclosed and the enclosing, the synchronic and the diachronic in thinking and discourse. Thus, comparative methods must possess the aptitude to distinguish analytically the relevant types of legal thinking and discourse as well as to capture their interpenetration and relational dynamic. Clearly, indispensable to this required aptitude is again deep and nuanced knowledge of the context of the comparands. Call this the challenge of proper segregation and desegregation of comparands.

Professor Alford’s work and teaching contribute, by example as well as by direct analysis, to addressing these challenges. To some of that work I now turn.
1. Theory in Comparative Law

Professor Alford’s influence is far-reaching in sentencing the old models of exploration of the exotic and catalog of similarities and dissimilarities to the sidelines of scholarly comparative law. Central to that influence is his admonition about the place of “grand theory” in comparative law. Two of his early works are of especial interest in this regard, namely: Inscrutable Occidental[4] and On the Limits of “Grand Theory.”[5] I explore some of their lessons after a brief personal digression.

I attended Harvard Law School in the early 2000s. A principal reason why I wanted to study there was the presence in the faculty of Roberto Mangabeira Unger. While I admired the body of his work, I thought then – as I still do now – that Law in Modern Society was Professor Unger’s best and most generative work.[6] In a tour de force with some of the core questions of classical social theory, the book embarks in comparative-historical analysis of the highest order to solve the problem of explaining the emergence of legal systems in modern Europe.

Professor Unger listed a series of attributes that distinguish “legal order or legal system” from two other types law, namely: “customary or interactional law” and ‘bureaucratic law.” “Law as legal order,” explained Professor Unger, “was committed to being general and autonomous as well as public and positive.”[7]

This list of attributes of legal systems is correct, but incomplete. The addition of the following features is necessary. First, a legal system is systemic in the sense that its formal sources of law observe a reciprocal hierarchical relation, and are subjected to both a reductio ad unum and to criteria of belonging (for instance, constitutional supremacy with law-invalidating judicial review authority). Without the attribute of hierarchy that includes apex sources that allow for control of norm membership in the system, modern western legal system would look very different. Second,
legal systems have autopoietic capabilities. That is, they operate in significantly self-referential, self-reproducing, and self-validating ways. Thirdly, legal systems are autotelic, in the sense that their general purposes and the purpose of any of their parts significantly face inward due to the way systemic formality operates.\[8\]

A chief research agenda for high legal thought as I saw it then – and still do now – was to build on the progress in knowledge achieved by *Law in Modern Society*. It was on that research agenda that *Inscrutable Occidental* and *On the Limits of “Grand Theory”* made their impact.

Certainly, in the wake of reading the early work of Professor Alford, I did not come out thinking that “grand theory” in comparative-historical legal analysis was inviable; nor did Professor Alford say so.\[9\] In order to capture the complexity of the legal phenomenon, one goes up the levels of abstractness and generalization, and the resulting (enclosing and diachronic) theory becomes consequently “grander.” Under the pressure of this movement toward abstraction and time dilatation, initial trade-offs between what is revealed and what is obscured in the process is inevitable. The challenge is to do “grand theory” well, if that kind of work is where one hopes to contribute.

Professor Alford made clearer the stakes in facing these various challenges to comparative law methods. To his teachings I now turn.

The first of Professor Alford’s lessons is that openness to and respect for the meaningdom social agents of normative orders inhabit – an ethics of cultural interpretation – translates, first, into the counsel to be vigilant about the epistemic constructs that comparatists impose on comparands remote from their legal culture. In his words:

“Our very distance from other societies […] imposes upon us an obligation to be vigilant as to the ways in which the constructs that we have
developed for ordering the world reflect assumptions and values that may not be shared by others."[10]

However, openness to and respect for the meaningdom inhabited by others, whether close or afar, translates also into the recognition of the epistemic gifts of cultural distance to comparative analysis. Often, due to this distance from the normative lives of others, what one loses in cultural coziness one stands to gain in insight sometimes not available even to those embedded in their legal cultures, as those who came from abroad to study law in the United States may have experienced. Provided, of course, that the comparatist proceeds with the prescribed ethics of cultural interpretation.

Although “[from the outset of any comparative inquiry [...] we need to approach foreign subjects with an even greater tentativeness of theoretical construct,”[11] there is certainly no fully escaping the meaningdom the comparatist himself inhabits. The paradigm of legal thought of the comparatist unfolds, whether he is conscious or not of that, as a conceptual web that penetrates the comparative method. That is unavoidable, if controllable, and

“we ultimately must invoke such terminology and concepts to make intelligible to ourselves and our compatriots what we have observed abroad. Nor should our concern with being scrupulous preclude us from forming judgments about foreign societies, for the very effort to understand entails the formation of judgments, large and small. [12]

The upshot being that “we cannot escape the perspectives of our own society. Nor is it clear that we necessarily would wish to do so, even if we could. But, in any event, an awareness of the limitations that we face should commence and guide, rather than conclude, our inquiry.”[13]

I take Professor Alford’s overall lesson to be that to reconcile, on one side,
the epistemic authority of the comparatist who approaches his objects of analysis from his own categories with, on the other, the agent-orientation of comparative law, a combination is necessary of extensive learning about other societies and imaginative empathy to comprehend those societies as closely as possible to how their members do.

The requirements of extensive learning and imaginative empathy is a tall order, whatever the normative order under comparative study. However, these requirements become even more demanding when we factor in how the complexity of societies and their normative orders relentlessly increase throughout history. Consequently, the challenge to comparative law methods of relative social and legal complexity simultaneously calls for and imposes checks on typologies and categories in comparative analysis.

Undoubtedly, to apprehend a legal experience, is to apprehend it conceptually. Thus the need for typologies and categories. Nevertheless, as recognized above, the conceptual structure used to grasp the comparands is a manifestation of the authority, with its limitations, of the epistemic viewpoint of the comparatist, which implicates the “vigilance” Professor Alford counsels. If a typology or categorization fails to be at once detailed and capacious enough to fit the complexity of the broader social and normative contexts of comparands, the methods of comparative law invite the risk that “[t]he net effect, ironically, is to portray law far more statically and simplicisticly than is warranted.”[14]

Relatedly, the challenge of constant subsumption of extra-legal normativity and functional adaptation under the normativity of law pushes the comparatist into entering the dense and subtle normative life of others, which nonetheless always appear opaque to outsiders. Faulting Professor Unger’s treatment of the contending normative outlooks in preimperial China, Professor Alford evoked the necessity to be attentive to the broader social normative context that nests the legal experiences of peoples:
“His dismissal of Confucianism as espousing a backward-looking adherence to a rigid hierarchy of social positions, of Legalism as but a pretext for the unbridled and terror-filled exercise of state power, and of premodern Chinese civilization generally as culturally incapable of generating among its populace any serious sense that human beings could remake their social arrangements shields from his view the depth and vitality of that which he seeks to describe.”[15]

The price to be paid by adoption of a comparative method that filters-out of as opposed to integrating into the analysis the density and subtlety of the normative complexity of the society under study goes beyond the soundness of the resulting comparative findings. The theorist also pays a price in the currency of theoretical precariousness. Professor Alford explains:

“Does it matter that Professor Unger appears to have taken a free hand in reconstructing the social organization, consciousness, and normative order of preimperial China? […]

The answer is that it does matter […] not merely because he misconstrues data dear to the heart of area specialists in his effort to theorize broadly. Rather, it matters because in misconstruing so many and such important elements of those data he ultimately conveys a highly misleading picture of the foundations of Chinese civilization. And it also matters because the distorted nature of that picture raises serious questions as to the soundness both of his efforts to understand legal development generally and of his speculations regarding social order, social theory, and human nature.”[16]

In light of all the knowledge, caution and care demanded of comparatists, we ought to ask, is comparative-historical analysis in law at all a viable enterprise? If it is viable, generalizations of necessity must be acceptable, and the question is how to generalize well. Central to the question of what
renders generalizations warranted in comparative law is the challenge of proper segregation and desegregation of comparands in theory building, for “[t]he very manner in which [one] poses the question assumes part of the answer.”[17]

The preeminent comparands in comparative law are the various types of legal thinking and discourse. It is unsurprising that types of legal thinking and discourse vary across cultures, even across similar cultures. Due to their preeminence, typological variation in legal thinking and discourse is not a trivial matter for theory construction. Quite to the contrary, to understand those types and the paradigms of legal thought that render them intelligible to legal agents immersed in their contexts is the ultimate test of the explanatory worth of theories in comparative law. In that respect, in discussing the problems of comparability Professor Alford alerted the field that

“what concerns me is that our efforts at engaging in broad theoretical work may unwittingly lead us to believe that we are considering foreign legal cultures in universal or value-free terms when, in fact, we are examining them through conceptual frameworks that are products of our own values and traditions, and that are often applied merely to see what foreign societies have to tell us about ourselves.”[18]

Even this brief encounter with Professor Alford’s early work on the limits and possibilities of theory in comparative law demonstrates why that work strikes the scholar, sending him on the path of intellectual humility. Professor Alford’s early work raised the bar for comparative law, a bar that his later work far exceeded.

III. Comparative Law as a Way of Life

We, moderns, tend to think of and experience life in fragmented ways, as we constantly enter and leave social spheres governed by different and at times conflicting logics. In contrast, for many of the ancient philosophers,
philosophy was not just an expertise or a mode of inquiry or a sphere that one enters and leaves; philosophy was for them a mode of existence. As the classicist John Cooper once put it, “[o]ver most of the one thousand years of philosophy in ancient Greece and Rome, philosophy was assiduously studied in every generation by many ancient philosophers and their students as the best way to become good people and to live good human lives.” [19] To be a philosopher was then “to be fundamentally committed to the use of one’s own capacity for reasoning in living one’s life: the philosophical life is essentially simply a life led on that basis.” [20]

Those of us who have the good fortune of learning directly from Professor Alford and of being members of institutions shaped by him recognize that the respect, learning, humility, generosity, openness, and imaginative empathy the he teaches to be the virtues par excellence of comparative law are also his way of life. Professor Alford, the scholar, is a comparatist of the highest caliber; Professor Alford, the teacher, the friend, the institutional builder and sustainer, embodies the virtues of comparative law as a way of life.


[2] In previous work, I remarked en passant on how Hayek saw in law’s voracity only its functionalist aspect and its susceptibility to influence by pressure groups. In this way, Hayek missed the independent axiological aspect of law’s voracity. See FRIEDRICH A. HAYEK, LAW, LEGISLATION, AND LIBERTY (1978-81). This oversight has plagued the schools of legal, economic and political thought influenced by him.


[8] Maybe an example of what I mean by the attribute of autotelos is in order. Consider traffic speed limit norms. No sufficient account of those norms can miss the way the purpose of enhancing traffic safety and coordination connects with several other purposes of a legal system, from impacts on insurance and medical care costs to more general impacts of accidents on the economy and social psychology.

[9] “I am not opposed to efforts to speculate broadly across cultures and times. Indeed, what I have to say today could be construed as a form of “grand theory.” Limits of Grand Theory, 946.


Reviewing Carothers’ *Aiding Democracy Abroad* (THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999)), Professor Alford recast the lessons of his earlier work in the context of American foreign policy. The consistency of his lessons magnify their underlying truth and wisdom:

“we need to ask difficult questions about matters such as the relationship between the various “goods” being promoted (that is, democracy, the rule of law, fundamental human rights, markets, economic development, and civil society) and the challenges inherent in discerning and measuring both the intended and unintended consequences of what we advocate. And throughout, we need to be mindful of the ethical implications of seeking to mold others in such basic ways, even as we are alert to the respects in which the experience may be shaping us.

At first blush, asking such questions may seem all too “academic” an exercise that threatens to enmesh those determined to foster democracy in a web of self-absorption and indecision for which they simply do not have time. To the contrary, however, this process has the potential to speak forcefully to problems such as the hubris and inattention to power that Carothers rightly argues have plagued democracy promotion efforts to date. That is not because ready answers loom on the horizon, for in many instances, they are simply not to be had or vary depending on one’s normative outlook, but rather because the exercise itself – with its sober reflection on ends as well as means – underscores the true complexity and gravity of attempting so fundamentally to influence others.” William P.

[17] Inscrutable Occidental, 962.

[18] Limits of Grand Theory, 946.


[20] Idem, 18. Socrates (for Plato and for those of us living in the long shadow he cast) exemplified excellence. Indeed, “the struggles of Socrates made a new and splendid example to form the characters of those who looked on it.” WERNER JAEGER, PAIDEIA: THE IDEALS OF GREEK CULTURE, VOL II. 76.