2006

When Are Agreements Enforceable? Giving Consideration to Professor Barnett's Consent Theory of Contract

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I. INTRODUCTION

Agreements are at the heart of contract law. In Anglo-American Common Law a persistent problem has been determining which agreements should be enforced. The common law has no difficulty dealing with bargained-for agreements between merchants exchanging goods for money, but has far more difficulty with agreements where there is no clear *quid pro* quo, and therefore "consideration" is doubtful. Most typically these agreements include guaranties, gifts and other gratuitous promises. Why shouldn't my agreement to meet Professor Sellers this evening for dinner be enforceable?

Over twenty years ago Professor Randy E. Barnett first proposed what he calls a "consent theory" of contract that he believes resolves most of these issues in American common law. For the last two decades he has promoted his theory and has gained significant attention from the legal academy. This discussion will consider: why the United States has contracts law theories; the basic elements of Professor Barnett's theory; how these elements are similar to Continental law; American legal insularity in evaluating Barnett's theory without reference to Continental systems; and finally, why this author believes that American example of law harmonization through restate-ment and voluntary adoption of uniform laws is not a good model for a future European civil code.

II. WHY THE UNITED STATES HAS CONTRACT LAW "THEORIES"

The last 30 years have seen a remarkable blossoming of contracts law scholarship in the United States and the development of a variety of contracts law theories such as that of Professor Barnett. Europeans have looked with a certain envy at the "rich literature" of American contracts law and contrast that literature to what they see as the "anti-theoretical nature of Continental Civil Law contracts scholarship.

Law and economics scholarship—which is by no means limited to contracts law—in particular has provoked considerable interest in Europe. American contracts law scholars are proud to point to the "richness" of American contract law and hope, in writing about it, that they will gain the notice of scholars in other legal systems.[1]

Europeans ought not to be envious of American contracts theories: they are indicative of the failure of the American legal system to develop a comprehensive set of contracts rules. A Greek professor, Aristides N. Hatzis, while admiring American contract theory, correctly points out why there are no comparable theories in Continental law: "in Civil Law there is no need for theories since the legislator, mainly through codes, has proclaimed what the law should be and the judge is (supposedly) a mere interpreter, useful only for accommodating trivial twists of facts." Hatzis observes that the lack of codes in Common Law creates a need for theories "in order to provide a sense of security to the contracting parties who did not place any trust in the caprices of individual judges and were looking for a more objective basis for their economic relationships."[2]

We have theory in the United States because our attempts at codes and rules have failed. For most of the nineteenth century the legal community in the United States debated the merits and demerits of codifica-

[1] *See*, in particular, Robert A. Hillman, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW (1997). For a critical review, see Randy E. Barnett, *Book Review*, 97 MICH. L. REV. 1413 (1999).
[2] *HATZIS* at 5.

tion. We had our own debate similar to that in Germany between Savigny and Thibaut. In Germany the code won when the nation unified, but in the United States, the fight took place at the state level and the code lost. The debate began in the early part of the nineteenth century and lasted until the death in 1894 of the most prominent of codification proponents, David Dudley Field. Field, America's Thibaut, one might say, saw rules as essential for predictability in law.[3] His great opponent, James Coolidge Carter, America's Savigny, argued that statutory rules "are rigid and absolute, and cannot be modified and shaped to suit the varying aspects which different cases may exhibit."[4] Politics as much as jurisprudential reasoning accounts for the defeat of the codes. They simply were inconvenient for the practicing bar.

When the codification movement failed at the end of the nineteenth century, alternative steps were taken to unify the law of the several states. The drive for unification of state law led to creation of two institutions which survive to this day: the National Conference of Commissioners on Uniform State Law (Conference), founded in 1892, and the American Law Institute (ALI), founded in 1923.

[3] Stephan N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 340 (1988) ("In Field's world, predictability is more likely to be achieved with relatively inflexible rules and precise definition and by curbing judicial discretion. Field did understand that some unpredictability was unavoidable; a statute could not cover all situations and judges, on occasion, would have to analogize or make new law.")

[4] James Coolidge Carter, THE PROPOSED CODIFICATION OF OUR COMMON LAW (1884), *excerpted in* THE LIFE OF THE LAW, READINGS ON THE GROWTH OF LEGAL INSTITUTIONS 115, 120 (John Honold ed., 1964).

Some Europeans have a rather rosy view of the success of these institutions.[5] Both the National Conference and the ALI depend upon voluntary adoption of their work. The Conference and the ALI have almost no coercive power. Their mandates focus on rationalizing existing law in the form of uniform laws and restatements; law innovation, once almost clearly foreclosed, still does not fit easily in their programs.[6] Few would question that the Conference and the ALI have had salutary effects on the content and uniformity of American law, but those effects have not been nearly as substantial as their founders had hoped. In the first century of its existence, the Conference proposed approximately 200 uniform acts. Only about 10 percent of these Acts have been adopted by as many as forty states; more than half were adopted by fewer than ten states. Since ALI Restatements are not proposed for legislative adoption, their adoption necessarily is piecemeal. Lacking rules, we have theory. This brings us to Professor Barnett's theory.

III. BARNETT'S CONSENT THEORY OF CONTRACT

A central issue of the law of obligations is when agreements should be enforced. In answering this ques-

[5] *See* James R. Maxeiner, *Standard Terms Contracting in the Global Electronic Age: European Alternatives*, 29 YALE J. INT'L L. 109, 141, n. 196 (2003)
[6] *See* James J. White, *One Hundred Years of Uniform State Laws: Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2098-99 (1991).

tion in the Anglo-American common law of contracts the doctrine of consideration plays the central role. Consideration is a "strange notion" for jurists in the Continental tradition. The doctrine's roots are lost in history. Even today it remains "obscure" and "relatively ill-defined and controversial."[7] In present-day America, understanding consideration is a benefit received or a detriment suffered. It must be bargained for.[8]

Although consideration is a mandatory feature of instruction in contracts classes and on the bar examination, there is no consensus in the Common Law world that consideration is a concept worth keeping.[9] Indicative of this ambivalence is the treatment consideration received in the drafting of the Principles of European Contract Law. While drafters were generally disposed toward their own systems as "natural and just," consideration is one example that the Commission Chairman, Professor Ole Lando, gives when drafters found weakness in their own systems. He reports that "[t]here was no enthusiasm in the common law camp for the doctrine," so it was omitted.[10]

Professor Barnett himself long ago reminded his American colleagues that the bargain theory of consideration is "unavoidably plagued by serious defects."[11] It

[7] Denis Tallon, *Introduction*, in HUGH BEAL ET AL., CASES, MATERIALS AND TEXT ON CONTRACT LAW 140 (2002) [hereinafter cited as TALLON].
[8] RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 71.
[9] TALLON.
[10] Ole Lando, *Comparative Law and Lawmaking*, 75 TUL. L. REV. 1015, 1022 (2001).
[11] Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal*

has two principal problems: some agreements are enforced, even though there is *no* bargain, while other agreements are not enforced, even though there *is* a bargain. In most commercial cases there is no problem finding the bargained consideration. But the doctrine of consideration handles other situations less well where there is no bargain or the bargain is elusive, as in the case of gifts, actions taken in reliance upon promises, and binding offers.

Barnett finds the American solution to the question of contract enforceability inadequate. Essentially, it consists of using bargained-for consid-eration as the principal device for determining enforceability and of filling out gaps with various *ad hoc* doctrines such as promissory estoppel.[12] The doctrine of promissory estoppel provides that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee... and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[13]

Barnett would take a different approach. According to Barnett, agreements (or more broadly, promises) should be enforceable when parties "manifest their consent to a legally binding transfer" of preexisting alienable rights.[14] There must be a "manifested intention to create

Philosophy [Book Review of E. ALLAN FARNSWORTH, CONTRACTS] 97 HARV. L. REV. 1223, 1239 (1984) [hereinafter *Contract Scholarship*].

[12] *Contract Scholarship* at 1240.

[13] RESTATEMENT (SECOND) OF CONTRACTS § 90.

[14] *Contract Scholarship* at 1242.

legal relations or (to use another common formulation) a manifested intention to be legally bound."[15] This is "the key to distinguishing enforceable from unenforceable promises."[16] "The basis of contractual obligation is not promising *per se*." It is the manifestation of an intention to be legally bound. "The basis of contract is consent."[17]

Barnett distinguishes his consent theory not only from bargained consideration and reliance theories, but also from other approaches such as a will theory, economic efficiency, substantive fairness and restitution.[18] He offers his theory as a way to negotiate among all of these different theories and not as an "independent principle or core concern of contract." "[I]t seeks to provide a general criterion of contractual enforceability that strikes a reasonable and workable balance among the [other] party-based, substance-based, and process principles...."[19] His theory provides a framework for ordering these concerns to show where each stands in relation to the others.[20]

Barnett grounds his consent theory in something "more fundamental than the concepts of will, reliance,

[15] Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1002, 1027 (1992) [emphasis in original] [hereinafter *Contract as Promise*].
[16] *Id.* at 1029.
[17] Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 305 (1986) [hereinafter *Consent Theory*].
[18] RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINES 588-90 (3rd ed. 2003) [hereinafter CASEBOOK]
[19] CASEBOOK at 589; *see Consent Theory* at 271-91.
[20] *Consent Theory* at 294.

efficiency, fairness or bargain."[21] That something more is a theory of individual rights. Individuals have property rights that entitle them to use and consume resources. For Barnett, "the consent of the rights holder to be legally obligated is the moral component that distinguishes valid from invalid transfers of alienable rights in a system of entitlements. In sum, legal enforcement is morally justified because the promisor voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights."[22]

With painstaking precision Barnett shows how his theory of consent resolves numerous issues and problems of modern American contract law.

Unlike the will theory, the consent theory addresses the conundrum of objective versus subjective wills. The theory of rights requires that those rights be demarcated. Only a manifestation of assent that is accessible to all can fulfill that function.[23] A consent theory is interested in the actual intentions of the parties, but only the objective interpretation of a commitment establishes the clear boundaries required by an entitlements approach.[24] Still the objective interpretation is only the presumptive meaning; it can be rebutted by a special meaning that the parties shared.[25]

[21] *Consent Theory* at 293.
[22] *Consent Theory* at 299.
[23] *Consent Theory* at 302-03.
[24] *Consent Theory* at 307.
[25] *Consent Theory* at 307.

The consent theory explains why in certain unusual circumstances, the Common Law of contracts enforces formal commitments where there is no bargained for consideration. The voluntary use of a recognized formality manifests the intention to be legally bound. Here, Barnett argues, consent provides "the missing theoretical foundation of formal contracts and explains their proper place in a well-crafted law of contract."[26]

Where there is bargaining, in the consent theory, there is little need to provide explicit proof of an intent to be legally bound. The bargaining is itself the evidence of consent.[27] Indeed, Barnett's theory regards consideration as one way of manifesting assent and not as a requirement of a *prima facie* case of contractual obligation.[28]

Barnett sees his consent theory as also explaining those circumstances under which promissory estoppel grants relief. The reasonable reliance that promissory estoppel requires, where the reliance is known or should be known to the promising party, serves as that party's manifestation of an intention to be legally bound.[29]

Barnett uses his consent theory to explain contract defenses as situations where the manifestation of assent does not have its normal moral and therefore, legal sig-

[26] *Consent Theory* at 311.
[27] *Consent Theory* at 313.
[28] *Consent Theory* at 314.
[29] *Consent Theory* at 314.

nificance. One group of defenses—duress, misrepresentation and possibly unconscionability—are all situations in which the manifestation was obtained by the other party's improper action. A second group—incapacity, infancy and intoxication—hold that the promiser did not have the ability to give meaningful assent. Finally a third group—mistake, impracticability and frustration—stem from the inability to fully express in any agreement all possibilities that might affect performance.[30]

Armed with his consent theory, Barnett attacks the persistent problem of form contracts. The problem is, if contract is based on promise, how can someone have promised to do something in a writing she or he has not read and was not expected to read. On the one hand, if the test is objective action, the parties have agreed. If, on the other hand, the test is the subjective view of the parties, then one party to the form contract has not agreed.[31] For Barnett, the solution is clear: "enforcement of private agreements is not about promising, but about manifesting consent to be legally bound." Thus what matters is not the assent to do an act, but the assent to be legally bound to do so. The agreement is to do whatever the other party says. But, according to Barnett, "I agree" really means "I agree to be legally bound to (unread) terms that are not radically unexpected."[32] In other words, I agree to terms "that I am

[30] *Consent Theory* at 318.
[31] Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 628 (2002) [hereinafter *Form Contracts*].
[32] *Form Contracts* at 637.

not likely to have read but that do not exceed some bound of reasonableness."[33]

IV. SIMILARITIES OF BARNETT'S THEORY OF CONTRACT TO CONTRACT LAW IN EUROPE

By now, contracts scholars in the audience from Civil Law countries are suppressing yawns. What is new, they may be thinking, about Professor Barnett's theory? After all, does not Article 2:101 of the Principles of European Contract Law provide explicitly: "A contract is concluded if: a) the parties intend to be legally bound, and b) they reach a sufficient agreement without any further requirement." Of course it does.

Intent to be bound runs throughout Continental legal systems. For example, Article 3.33 of the Dutch Civil Code provides: "A juridical act requires an intention to produce juridical effects, which intention has manifested itself by a declaration."[34] Professor Lando, in writing about the Principles of European Contract Law, observes that "[t]here is consistency among the laws that agreement only becomes a binding contract if the parties have intended to be legally bound." Thus, returning to the example at the beginning, in every European legal system, while I may be morally bound to honor my promise to have dinner with Professor Sell-

[33] *Form Contracts* at 638.

[34] NEW NETHERLANDS CIVIL CODE: PATRIMONIAL LAW (Haanappel, P.P.C. and Mackaay, E., eds. and transl., 1990).

ers, I am not legally bound to, because there is no intent to be legally bound.[35]

Just how far back in European legal history the concept of "intent to be bound" as a means of validating contract enforceability goes, I do not know, but clearly it goes back at least as far the nineteenth century when it found its way into the German Civil Code.

The German Civil Code—or BGB—places the doctrines of declaration of will (*Willenserklärung*) and of juridical act (*Rechtsgeschäft*) at the heart of the code's treatment of obligations.[36] The BGB enforces objectively manifested statements of consent notwithstanding undisclosed subjective intent to the contrary.[37] Yet it provides that the subjective intentions of the parties are to be determined in interpreting their declarations.[38] The BGB imposes no requirement of consideration and validates promises made with intention to be bound notwithstanding the absence of anything that might be deemed consideration.[39] It denies enforceability where the promise is not meant seriously and there is no inten-

[35] Ole Lando, *Salient Features of the Principles of Contract Law: A Comparison with the UCC*, 13 PACE INT'L L. REV. 339, 345 (2001).

[36] *See* BGB §§ 116-144. In a much quoted passage from the legislative history of the first draft of 1882, the drafters said:
[Das Rechtsgeschäft bedeutet] eine Privatwillenserklärung gerichtet auf die Hervorbringung eines rechtlichen Erfolges, der nach der Rechtsordnung deswegen eintritt ist. Das Wesen des Rechtsgeschäfts wird darin gefunden, daß ein auf die Hervorbringung rechtlicher Wirkungen gerichteter Wille bestätigt, und daß der Spruch des Rechtsordnung in Anerkennung dieses Willens die gewollte rechtliche Gestaltung in der Rechtswelt verwirklicht.

[37] BGB § 116 (*Geheimer Vorbehalt*).

[38] BGB § 133 (*Auslegung einer Willenserklärung*).

[39] *See* TALLON at 153.

tion to be bound.[40] For gratuitous promises, German law sometimes has form requirements and the BGB provisions governing *Willenserklärung* implement those.[41] The doctrine of *Willenserklärung* or the still more general provisions regarding juristic act treat the American contract law defenses. The BGB provides that a juristic act that is contrary to law or good morals is void.[42] It makes voidable declarations of will produced by misrepresentation or duress.[43] It provides that in most instances the declaration of will of someone without capacity is void.[44] It makes voidable declarations of will made as a consequent of mistake.[45] All this the German Civil Code accomplishes in about 40 relatively short sections that take about seven pages in a popular edition. In other parts of the Code it addresses impracticability of performance[46] and unfair terms in standard form contracts.[47] The treatment of standard terms contracts is similar to that proposed by Barnett, but far more robust.[48] The philosophical basis of the German Civil Code provisions are an overt manifestation of the view of freedom of contract as it prevailed in the late nineteenth century.

[40] BGB § 117 (*Scheingeschäft*); § 118 (*Mangel der Ernstlichkeit*).
[41] BGB §§ 125-129.
[42] BGB § 134 (*Gesetzliches Verbot*); § 138 (*Sittenwidriges Rechtsgeschätft; Wucher*).
[43] BGB § 123 (*Anfechtbarkeit wegen Täuschung oder Drohung*).
[44] BGB § 145 (*Nichtigkeit der Willenserklärung*). Other provisions in this section, § 104-113, govern limited capacity for minors.
[45] BGB § 119 (*Anfechtbarkeit wegen Irrtums*).
[46] BGB § 119.
[47] BGB §§ 305-309.
[48] *See generally*, James R. Maxeiner, *Standard Terms Contracting in the Global Electronic Age: European Alternatives*, 29 YALE J. INT'L L. 109 (2003).

V. AMERICAN INSULARITY

That Barnett's theory of consent is similar to approaches of European civil law is not remarkable. For centuries Common Law countries have borrowed legal ideas from Civil Law countries to enrich contract law[49] and Civil Law Countries have borrowed from Common Law countries as well.[50] What is remarkable is that Barnett—and apparently American contracts law scholars generally—consider Barnett's theory to be a new one and have not noted its close similarity to European law.

Barnett likens his theory to new scientific theories such as those discussed by Thomas S. Kuhn in that author's famous 1962 book *The Structure of Scientific Revolutions*. Barnett offers his theory as a "potentially valuable approach to explaining contractual obligation" that might permit "the ongoing discussion of contractual obligation to emerge from its longstanding intellectual *cul-de-sac* and begin traveling a more productive course."[51] Barnett counts his theory a controversial one and questions whether it is even suitable reading for first year students.[52]

Controversial it is. A number of writers have taken issue with it. Its central proposition is largely rejected by

[49] *See, e.g.*, James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1847 (2000).
[50] Perhaps less in contract law directly and more in ancillary areas such as product liability and antitrust.
[51] *Consent Theory* at 321.
[52] CASEBOOK at 538.

the Restatement (Second) of Contracts in its section 21, which provides: "Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract."

Yet where is the discovery in Barnett's theory? It astonishes that in the twenty years that Barnett's proposal has been on the table, apparently no American contracts scholar has remarked on the similarities of his theory to the Civil Law.[53] Why do I have the feeling that it is as if someone in the United States announced the discovery of Pasteurization a century after Pasteur introduced it in France? In American patent law, inventors cannot claim a patent if anywhere in the world someone has published the same idea more than a year before the inventor applies for the patent.

Barnett has told me that he was not aware of Continental European law when he proposed his theory. That's too bad. If he had been, he could have made his life a lot easier by studying that law first, and he might have made his proposals even better.

That he was not aware of Continental law is in at least one way comforting. He did not conceal, as Karl Llewellyn once recommended, a foreign origin because of fear of adverse American reaction.[54] Llewellyn, who

[53] Barnett himself, however, has pointed out similarities to English law.

[54] In his *Consent Theory* Barnett thanks Professor George Fletcher for helpful comments. Fletcher later specifically called the attention of American jurists to

was principal drafter of the Uniform Commercial Code, took many of his ideas from German law. Yet he did not disclose, let alone discuss, their origin. He counseled that to disclose the foreign origin of a legal idea in the United States was tantamount to giving it the "kiss of death."[55]

But surely someone, somewhere along the line, has thought the similarity worth mentioning? Barnett's work has been subject to critical consideration. He and other American scholars have discussed his theory at length for over two decades. In all of this literature I have not found so much as a passing reference to Continental theories. I conclude that American scholars simply were unaware of the foreign law.

I know from my own experience that this ignorance of foreign solutions is not limited to Barnett's theory. Contracts scholarship has blossomed in the last thirty years and yet other developments central to contract law, such as the European Union's Unfair Terms Directive and Germany's Standard Terms Law, have gone completely unnoticed in the United States. And that is so even as those very same issues have consumed much of the American debate over new contract law.[56] While

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the importance of the German teachings of *Rechtsgeschäft* and *Willenserklärung*. *See* George P. Fletcher, *Three Nearly Sacred Books in Western Law*, 54 ARK. L. REV. 1 (2001).

[55] Stefan Riesenfeld, *The Impact of German Legal Ideas and Institutions on Legal Thought and Institutions in the United States, in* Mathias Reimann (ed.), THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920, 89, 91 (1993).

[56] *See* James R. Maxeiner, *Standard Terms Contracting in the Global Electronic Age: European Alternatives*: 29 YALE J. INT'L L. 109 (2003).

creating a single European Market has made it a matter of course in Europe to examine foreign solutions—a part of the *Zeitgeist*[57]—it remains extraordinary in the United States.

Why are American jurists so insular? It was not always so. In the nineteenth century Americans were frequently keenly aware of foreign alternatives and anxious to learn from them. One of our most famous Supreme Court Justices, Joseph Story, said: "There is no country on earth which has more to gain than ours by the thorough study of foreign jurisprudence."[58] There is a lively debate right now between present-day Justices Breyer and Scalia, as to whether the United States Supreme Court should take note of foreign punishments in applying the cruel and unusual prohibition of the U.S. Constitution.

While the American University debate is encouraging, the sad fact remains that the vast majority of American jurists lack any first-hand experience with Civil Law systems. Far more Americans enrolled in European universities to study the European Civil Law in the second half of the nineteenth century than did in the second half of the twentieth century. In Civil Law faculties in Europe and Asia, serious foreign study is the rule among faculty members rather than the rare

[57] *See* Abo Junker, *Rechtsvergleichung als Grundlagenfach*, 1994 JURISTENZEITUNG 921.

[58] *Progress of Jurisprudence, Address Delivered Before the Suffolk Bar at their Anniversary September 4, 1821, at Boston, reprinted in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 198, 235 (1852). He added: Let us not vainly imagine that we have unlocked and exhausted all the stores of juridical wisdom and policy." *Id.*

exception that in the United States.[59] Serious study of a foreign system, in the language of that system, is essential to serious comparative law work.

American lack of interest in foreign solutions is not malicious. There are many reasons for the lack of interest. Among the principal reasons for American insularity are American political hegemony—and the lack of language skills that that brings—and American legal methods that anticipate incremental judicial development of law rather than legislation.[60]

In the nineteenth century, the United States did not enjoy world hegemony. In that century, Americans did study foreign legal solutions. But two world wars and the development of American hegemony in the world have led to American neglect of foreign legal solutions. I have to say that European history does not make it easy for those Americans who would like to promote Civil Law solutions. Inevitably, our American listeners object: the Civil Law had Hitler and we did not. Thus, in the twentieth century Americans switched from learning from foreign law to teaching American law to foreigners. American law became "imperial law." If the first five years of the twenty-first century are any guide,

[59] One law EU firm—Freshfields—probably has more jurists who have seriously studied both Civil and Common Law than all American law faculties combined! While American summer law school programs abroad encourage students to learn foreign and comparative law, few observers would count them as serious attempts to learn foreign legal systems.

[60] *See generally* Ernst Stiefel & James R. Maxeiner, *Why are U.S. Lawyers not Learning from Comparative Law?*, in THE INTERNATIONAL PRACTICE OF LAW 213 (Nedim Vogt *et al.* eds., 1997).

Americans in this century are, if anything, going to be more "imperial" in law than in the last.[61]

One consequence of American hegemony and of the resulting dominance of English as the world language is a lack of skills with foreign languages on the part of America's intellectual leadership. Before the First World War, 25 percent of American high school students studied German; since then, the number studying German has never exceeded 4 percent. Even under the best of circumstances, Americans would not normally learn foreign languages at a level sufficient to use them in academic work. The land is huge and there is little need or use for foreign languages for most people. I grew up in St. Louis: the nearest places where foreign languages are spoken are Mexico or Québec, each of which is about 1500 kilometers away. Contrast that to Europe; in Belgium alone, there are three official languages: Flemish, French and German. Moreover, English is inescapable here. The 50 American states have one official language: English. The 25 EU Member States have around two dozen. Finally, in Continental Europe, the first foreign language is automatic: English. In the United States, with which foreign language should a student begin: Spanish, Chinese, French, German, Russian, Italian, Japanese?

Yet without foreign language skills, one cannot learn the Civil Law systems first hand. One must rely on

[61] *Cf.*, Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEG. STUD. 383, 391 (2003).

translations. There is a natural tendency to ignore that which one cannot understand and to regard it as unimportant. Thus, even as American law school faculties have shown a greatly increased interest in scholarship, comparative law has not benefited.

VI. A EUROPEAN CIVIL CODE?

I cannot resist the temptation to consider briefly one of the most interesting projects in the works today, a European Civil Code. As an American comparativist eager to get his colleagues to pay attention to the Civil Law, there is nothing that I should welcome more than a European Civil Code. No doubt that Code, much preparatory work and commentary would be in English. The Civil Law would finally be accessible in English. My colleagues could seize upon this wealth of legal learning. That learning would have behind it the force of the European Union—a political entity larger than our own—and would no longer be the patchwork law of 25 or 27 or 28 European states.

Whether a single European Code would work for Europe, or is even politically tenable, I do not know. Maybe the legal certainty and unity desired would be better obtained by a mixture of conflicts of law rules and of harmonized, not unified laws.

I do feel relatively sure, however, that devices such as the Principles of European Contract Law alone would not be sufficient to bring about the desired legal unity.

American experiences suggest that unless Europeans are willing to accept a level of legal uncertainty much greater than they historically have, voluntary approaches such as legal theory, Restatements and voluntary state laws, are not the answer. Legal unity and certainty should be imposed at the European-level even if that unity allows a great deal of diversity and subsidiarity within it.