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## Exporting American Legal Ethics

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# EXPORTING AMERICAN LEGAL ETHICS

*James E. Moliterno*<sup>1</sup>

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## I. INTRODUCTION

Over the past decade or so, a massive exportation of U.S. lawyer ethics law, primarily to emerging democracies, has been taking place.<sup>2</sup> The exportation has been managed largely, but not exclusively, by ABA Rule of Law programs, funded extensively by grants from USAID.<sup>3</sup> Excellent work is being done by these programs and nothing in this essay should be read to suggest that these projects lack value. But in one respect, the work of these and other such projects is sometimes tinged with cultural imperialism.<sup>4</sup>

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1. James E. Moliterno is the Vincent Bradford Professor of Law at Washington & Lee University. Thanks to Amelia Guckenberg for excellent research assistance and to my many international partners.

2. *See infra* notes 14-31 and text.

3. The Rule of Law Initiative originated in 1990 as the American Bar Association's Central European and Eurasian Law Initiative (CEELI), followed by initiatives in Asia (1998); Africa, Latin America, and the Caribbean (2000); and the Middle East and North Africa (2003). American Bar Ass'n, Brochure, *The ABA Rule of Law Initiative 1, 3* (2007), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=f1b855c4-9a45-47df-8a1b-8058dedf06e6> ("The Rule of Law Initiative is a mission driven, non-profit organization with an annual budget of over \$30 million. Our primary funders are: United States Agency for International Development (USAID) . . . ."). In 2007, the ABA consolidated these initiatives into the Rule of Law Initiative. Press Release, Sandra Day O'Connor, Special Advisor, & Roberta Cooper Ramo, Chair, American Bar Ass'n Rule of Law Initiative (Mar. 6, 2007), available at <http://www.abanet.org/rol/oconnor-rol-announcement.pdf>.

4. *See infra* Part IV.

I learned during my work in Yerevan, Armenia that the main court is now about to begin operating as a common law court.<sup>5</sup> But no one, including the lawyer for the government in the constitutional court, could seem to explain why. In Tbilisi, Georgia, I learned of the manner in which the new judicial ethics law, modeled on the ABA Model Code of Judicial Conduct, is being used as a tool of government control over the judiciary.<sup>6</sup> This is certainly not the result that was desired or anticipated by the advocates of the new code's adoption. But when too little attention is paid to local culture, mere adoption of excellent words in codes can have deleterious results.

The large-scale adoption of U.S. models of lawyer and judge regulation outside the United States is likely to produce unfortunate results. The U.S. lawyer regulation system has much to recommend it, but it has serious flaws, and more importantly for this purpose, it has no real relationship with lawyer culture outside the United States.

## II. THE EXPORTATION

The exportation of U.S. legal ethics models has proceeded on many fronts, but the ABA Rule of Law Initiative (ROLI) has carried much of the load.<sup>7</sup> These projects have had enormous success at establishing ABA-like lawyer associations, proposing and shepherding the adoption of ABA-like lawyer and judge ethics codes, and introducing US-style dispute resolution models that carry lawyer ethics implications.<sup>8</sup>

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5. See Republic of Armenia Judicial Code, § 1, Art. 15, cl. 4 (2007)

The reasoning of a judicial act of the Cassation Court or the European Court of Human Rights in a case with certain factual circumstances (including the construal of the law) is binding on a court in the examination of a case with identical/similar factual circumstances, unless the latter court, by indicating solid arguments, justifies that such reasoning is not applicable to the factual circumstances at hand.

*Id.*

Armenia has a court system of general jurisdiction consisting of sixteen Courts of First Instance and the Court of Cassation. See *The Judiciary of Armenia*, <http://www.court.am/?l=en&mode> (last visited Feb. 5, 2010); Armenia constitution Articles 92, 100; Republic of Armenia Judicial Code, § 1, Art. III. (2007). Decisions by the Court of Cassation are immediately binding and non-appealable. See *id.* Armenia also has specialized administrative, civil, and criminal courts, as well as civil and criminal courts of appeals. *Id.*

6. See discussion *infra* Part V.

7. See *supra* note 3, Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179, 186-89 (1999).

8. *Id.*

The Bangalore Principles of Judicial Conduct are one arguable exception to the U.S. model adoptions.<sup>9</sup> The Bangalore Principles represent a genuinely international amalgam, having been adopted by a diverse group from civil and common law jurisdictions, including justices from Australia, Bangladesh, India, Nepal, Nigeria, Tanzania, and Uganda.<sup>10</sup> It is true that the ABA Model Code of Judicial Conduct and numerous U.S. state codes of judicial conduct figured prominently in the group's design work.<sup>11</sup> It is also true that the Bangalore Principles are also very broad in nature, and they represent less a code of judicial conduct than a statement of the key attributes of a successful judicial system, for example independence, impartiality, and the like.<sup>12</sup> As a broad statement of attributes, the Bangalore document has been advanced by the ABA, and its adoption in a given country would not preclude the adoption of more detailed US-like codes of judicial conduct.<sup>13</sup>

Some of the ABA successes follow:

#### **Albania**

ABA successes in Albania dealt with both lawyer and judge ethics.

As part of its judicial reform efforts in Albania, the ABA worked closely with the National Judicial Conference (NJC) to develop the organization into a self-governing judicial body that promotes the independence and effective functioning of the judiciary. The ABA assisted the NJC in developing draft legislation to better define its role and responsibilities as part of the Albanian judiciary. In May 2005, the Albanian Parliament approved the law, establishing the NJC as a statutorily authorized body and giving it powers of budget and administration.<sup>14</sup>

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9. THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (adopted, Judicial Group on Strengthening Judicial Integrity; revised, Round Table Meeting of Chief Justices 2002), *available at* [http://www.ajs.org/ethics/pdfs/Bangalore\\_principles.pdf](http://www.ajs.org/ethics/pdfs/Bangalore_principles.pdf).

10. *Id.* at 9.

11. *See id.* (including the ABA 1972 Code of Judicial Conduct, the Iowa Code of Judicial Conduct, and the New York Rules Governing Judicial Conduct).

12. *See, e.g., id.* at 3 (discussing Value 1: Judicial Independence, Value 2: Impartiality).

13. *See* United Nations Office on Drugs & Crime, Commentary on the Bangalore Principles of Judicial Conduct (Sept. 2007), [http://www.unodc.org/documents/corruption/publications\\_unodc\\_commentary-e.pdf](http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf).

The Bangalore Principles of Judicial conduct have increasingly been accepted by the different sectors of the global judiciary and by international agencies interested in the integrity of the judicial process. In the result, the Bangalore Principles are seen more and more as a document which all judiciaries and legal systems can accept unreservedly.

*Id.* at 5.

14. American Bar Association, Rule of Law Initiative Programs, Albania, Judicial Reforms, [http://www.abanet.org/rol/europe\\_and\\_eurasia/albania.html](http://www.abanet.org/rol/europe_and_eurasia/albania.html) (last visited June 17, 2009).

Through its legal profession development program in Albania, the ABA sought to create both professional and nongovernmental legal organizations that are programmatically, organizationally and financially sustainable while providing services and programs to their members and clients. . . . The ABA also assisted the NCA with the drafting and adoption of a Code of Professional Conduct and organized continuing legal education trainings focusing on the code and its implementation.<sup>15</sup>

### **Armenia**

“In December 2005, Armenia adopted a new Code of Judicial Conduct. The Code, which is based on the Bangalore Principles of Judicial Conduct, is the culmination of nearly two years of work by the Association of Judges of the Republic of Armenia (AJRA) and ABA ROLI.”<sup>16</sup>

In a striking development, the main Armenian court, the court of cassation, will soon begin functioning as a common law court.<sup>17</sup> The Armenian Parliament was persuaded to adopt a law converting the system.<sup>18</sup> The ABA was at the time working with the court on methods of indexing its opinions for use as precedent.

### **Georgia**

“In 2008, ABA ROLI developed a judicial ethics commentary and training manual in cooperation with the Supreme Court of Georgia.”<sup>19</sup> Under ABA tutelage, Georgia will be introducing a new Criminal Procedure Code based on the adversarial system and featuring jury trials based on the American model.<sup>20</sup>

### **Kazakhstan**

In 2007, the ABA ROLI’s Regional Advocacy Program, in cooperation with the Union of Advocates of Kazakhstan, conducted

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15. *Id.*

16. American Bar Association, Rule of Law Initiative, Armenia, Programs, Judicial Reforms, [http://www.abanet.org/rol/europe\\_and\\_eurasia/armenia.html](http://www.abanet.org/rol/europe_and_eurasia/armenia.html) (last visited June 17, 2009).

17. *See supra* note 5 and text; American Bar Association, Rule of Law Initiative, ABA ROLI Trains all of Armenia’s Trial Court Judges on Case Law (Jan. 2008), [http://www.abanet.org/rol/news/news\\_armenia\\_case\\_law\\_training\\_for\\_judges.shtml](http://www.abanet.org/rol/news/news_armenia_case_law_training_for_judges.shtml) (last visited Feb. 25, 2010).

18. *See* Republic of Armenia Judicial Code, § 1, Art. 15, cl. 4 (2007).

19. American Bar Association, Rule of Law Initiative Programs, Georgia, Judicial Reforms, [http://www.abanet.org/rol/europe\\_and\\_eurasia/georgia\\_programs.html#judicial\\_reform](http://www.abanet.org/rol/europe_and_eurasia/georgia_programs.html#judicial_reform) (last visited June 17, 2009).

20. *See id.* (“Our criminal law reform efforts assist the Georgian government in drafting and implementing a criminal procedure code. When adopted, the new code will facilitate Georgia’s transition to an adversarial system that will include jury trials for the first time.”).

advocacy skills training for twenty lawyers in response to new legislation instituting jury trials in serious murder cases in Kazakhstan.<sup>21</sup>

### **Kosovo**

“ABA ROLI provided legal and technical support to the Kosovo Chamber of Advocates Ethics Committee for a new disciplinary model and ethics code.”<sup>22</sup>

### **Kyrgyzstan**

In January 2009, the ATC (ABA ROLI-sponsored Advocates Training Center) conducted its first jury trial training, which was conducted in anticipation of the passage of Kyrgyz legislation to introduce jury trials.<sup>23</sup>

### **Bulgaria**

The ABA has worked extensively on judicial ethics, including conducting training programs and assisting the BJA with developing a code of ethics.<sup>24</sup>

The ABA worked closely with the Bulgarian Bar Association (BBA) from 1991 until 2006. The ABA and the BBA collaborated on projects such as developing a code of professional ethics, conducting training and CLE workshops, encouraging BBA participation in substantive working groups, and providing support for annual member meetings,

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21. Jury Trial Training as Kazakhstan Conducts First Ever Jury Trials, American Bar Association, Rule of Law Initiative (Apr. 5, 2007), <http://www.abanet.org/rol/news/news-kazak-jury-trial-training.shtml> (last visited Feb. 25, 2010) (“Rule of Law Initiative Legal Specialist Joseph Gmuca conducted a presentation on the U.S. jury selection process and provided a description of the methods that Kazakhstani advocates may lawfully employ to determine potential juror bias during jury selection.”). *See also* Mock Jury Trial Aired in Kazakhstan, American Bar Association, Rule of Law Initiative (Apr. 5, 2007), <http://www.abanet.org/rol/news/news-kazak-mock-jury.shtml> (last visited Feb. 25, 2010).

22. American Bar Association, Rule of Law Initiative Programs—Kosovo, Legal Profession Reform, Revising the KCA’s Code of Ethics, [http://www.abanet.org/rol/europe\\_and\\_eurasia/kosovo\\_programs.html#kosovo\\_ethics](http://www.abanet.org/rol/europe_and_eurasia/kosovo_programs.html#kosovo_ethics) (last visited June 17, 2009).

23. Advocates Training Center Officially Registered in Kyrgyz Republic, American Bar Association, Rule of Law Initiative (Apr. 2009), [http://www.abanet.org/rol/news/news\\_kyrgyzstan\\_atc\\_officially\\_registered\\_0409.shtml](http://www.abanet.org/rol/news/news_kyrgyzstan_atc_officially_registered_0409.shtml) (last accessed Feb. 25, 2010) (“The ATC conducted its first jury trial training in January 2009. The one-day-long training was conducted in anticipation of the passage of a jury trial legislation pending in the Kyrgyz parliament. The legislation was guaranteed by a recent constitutional amendment.”). The Advocates for Training Center (ATC) was officially registered with the Kyrgyz Ministry of Justice in December 2008, and it has been providing training and support for licensed advocates since July 2009. *Id.* *See also* Kyrgyz Legal Professionals Receive Jury Trial Trainings, American Bar Association, Rule of Law Initiative (Nov. 2009), [http://www.abanet.org/rol/news/news\\_kyrgyzstan\\_legal\\_professionals\\_receive\\_trainings\\_1109.shtml](http://www.abanet.org/rol/news/news_kyrgyzstan_legal_professionals_receive_trainings_1109.shtml) (last accessed Feb. 25, 2010).

24. American Bar Association, Rule of Law Initiative Programs—Bulgaria, [http://www.abanet.org/rol/europe\\_and\\_eurasia/bulgaria\\_programs.html#judicial\\_reform](http://www.abanet.org/rol/europe_and_eurasia/bulgaria_programs.html#judicial_reform) (last visited June 17, 2009).

as well as developing a substantive newsletter for bar members. Further, with extensive ABA technical assistance, the BBA drafted a new Attorneys Act that was passed by the Bulgarian Parliament in June 2004.

After the passage of the new Act, the ABA worked to help implement the major new provisions that were included. Specifically, the ABA worked with the Supreme Bar Council (SBC) to draft regulations governing the bar examination, create a comprehensive Code of Ethics

. . .<sup>25</sup>

The ABA also assisted in the establishment of the Bulgarian Judges' Association (BJA) in 1997.<sup>26</sup>

### **Romania**

During the process of adoption of the Romanian code of ethics for judges, "the ABA . . . commented on the draft Judicial Code of Ethics; the majority of the ABA recommendations were incorporated into the final Code."<sup>27</sup>

### **Jordan**

ABA ROLI experts conducted an assessment of judicial independence and integrity in Jordan and identified key challenges in both law and practice. They noted particularly the lack of an official ethics guide for judges. ABA ROLI has since worked closely with a group of judges to develop a clear and viable system of judicial ethics and accountability in Jordan, including a judicial code of conduct. In April 2006, the Judicial Council (JC) approved the formation of the permanent Ethics and Accountability Committee (EAC), a watchdog organization that can continue to address the reform of judicial accountability systems, and named six judges to serve on it. ABA ROLI has conducted ethics training for judges. It has developed an ethics curriculum to be used in the training and continuing education of judges and court employees, and a judicial benchbook on ethics. It has also conducted a national public awareness campaign on judicial ethics.<sup>28</sup>

There are counterexamples in which the U.S. system loses, usually to a Western European NGO competitor. For example, The Republic of Kosovo is currently experiencing a watershed moment in the history of its judicial sector and, under the guidance of numerous American NGOs

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25. *Id.*

26. *Id.*

27. American Bar Association, Rule of Law Initiative, Romania, Programs, Judicial Reform, [http://www.abanet.org/rol/europe\\_and\\_eurasia/romania.html](http://www.abanet.org/rol/europe_and_eurasia/romania.html) (last visited June 17, 2009).

28. American Bar Association, Rule of Law Initiative Jordan, Programs, Judicial Programs <http://www.abanet.org/rol/mena/jordan.shtml> (last visited June 17, 2009).

and attorneys, has adopted many lawyer regulations modeled after the U.S. system.<sup>29</sup> Nevertheless, the Kosovo General Assembly recently established a notary regime based on the European civil law model.<sup>30</sup> Unlike notary publics in the United States, notaries in Kosovo will be government-licensed attorneys responsible for drafting legally enforceable contracts and providing legal advice to private parties, as they are in France and other French code-based civil-law countries.<sup>31</sup>

Counterexamples aside, the U.S. lawyer ethics and regulation model is experiencing enormous success as a model in emerging democracies abroad.

### III. THE NEED FOR HARMONIZATION

Without doubt, there are advantages to having a consistent, worldwide system of lawyer regulation.<sup>32</sup> Imagine a simple situation, some form of which is occurring all the time: A U.S. corporation wants to enter into a business transaction with a Polish corporation, the goal of which would be to operate a manufacturing plant in Croatia. The lawyers for the two entities meet on a warm day in Madrid to negotiate

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29. See Judge John Tunheim, *Rule of Law and the Kosovo Constitution*, 18 MINN. J. INT'L L. 371 (2009) (discussing his involvement in assisting the Kosovar government in drafting its constitution); EULEX Kosovo, *The Strategy*, European Rule of Law Mission (2008), <http://www.eulex-kosovo.eu/?id=27> (last visited Feb. 25, 2010) (discussing the European Union strategy in assisting Kosovo build its legal institutions); see also EULEX Kosovo, *Justice Component*, European Union Rule of Law Mission (2008), <http://www.eulex-kosovo.eu/?id=10> (last visited Feb. 25, 2010) (announcing the signing of a technical agreement between Kosovo Bar Association and the EULEX Judges). Kosovo's government is administered by the United Nations Mission in Kosovo (UNMIK) and the Kosovo-controlled Provisional Institutions of Self Government (PISG), developed under UNMIK and supervised by Special Representative of the Secretary General (SRSG). Daniel Fierstein, *Kosovo's Declaration of Independence: An Incident Analysis of Legality, Policy, and Future Implications*, 26 B. U. INT'L L. J. 417, 423-24 (2008). UNMIK administers Kosovo under United Nations Security Council Resolution 1244, which provides at least five groups with some form of governmental authority over Kosovo: UNMIK, PISG, Serbia, NATO, and other international organizations. *Id.* UNMIK established a Judicial Inspection Unit to monitor judicial performance in 2001, supported legislation that strengthened the powers of the Kosovar judiciary in 2005, introduced a comprehensive vetting process for jurists and prosecutors in 2006, and also in 2006, in partnership with Kosovo Ministry of Justice, established the Kosovo Special Prosecutors Office to train prosecutors to handle the most serious crimes. Susan Rose-Ackerman, *Corruption and Post-Conflict Peace-Building*, 34 OHIO N. U. L. REV. 405, 435-37 (2008).

30. See Law on Notary for the Republic of Kosovo, No. 03/L-10 (adopted 17 October 2008) available at [http://www.assembly-kosova.org/common/docs/ligjet/2008\\_03-L-010\\_en.pdf](http://www.assembly-kosova.org/common/docs/ligjet/2008_03-L-010_en.pdf).

31. *Id.*

32. See, e.g., Lawton P. Cummings, *Globalization and the Evisceration of the Corporate Attorney-Client Privilege: A Re-Examination of the Privilege and a Proposal for Harmonization*, 76 TENN. L. REV. 1 (2008).



some of the legal entanglements that will attend their clients' business arrangement. The U.S. lawyer is licensed to practice law in Pennsylvania; the Polish lawyer, in Poland. They are meeting in another E.U. member state for no reason other than their coincidental travel plans and their mutual appreciation for the Madrid lifestyle. The result of their work and their clients' work, if successful, will be a manufacturing operation in a non-E.U. European state. In making their statements to one another, what lawyer ethics law applies to them? Will they be following the same or different rules governing their candor? What does Polish lawyer ethics law say about choice of law in these circumstances?<sup>33</sup> What does Pennsylvania law say?<sup>34</sup> The E.U.?<sup>35</sup> In the end, does Pennsylvania law control? E.U. law? Polish law? Spanish law? Croatian law? None of the above? In any event, will the lawyer cultures in their home states have more to do with their conduct than the applicable rules?

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33. Poland / The Polish Bar Council - Compendium of Rules on Advocates' Ethics and the Dignity of the Profession (Advocates' Code of Ethics), Chapter 1, General Provisions, § 1.4, available at <http://www.cbbe.eu/index.php?id=107&L=0> ("It is the obligation of each advocate practising his profession abroad to observe the norms of this code, in addition to the norms of the ethical code applying in the host country.")

34. See PA. RULES OF DISCIPLINARY RULES OF PROFESSIONAL CONDUCT 8.5(b) (2006). Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:  
(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits shall be applied, unless the rules of the tribunal provide otherwise; and  
(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

*Id.*

*This language tracks Model Rule 8.5. Model Rules of Professional Conduct, Maintaining The Integrity Of The Profession, Rule 8.5 Disciplinary Authority; Choice Of Law, [http://www.abanet.org/cpr/mrpc/rule\\_8\\_5.html](http://www.abanet.org/cpr/mrpc/rule_8_5.html).*

35. Code of Conduct for European Lawyers § 2.4 (2006), available at <http://www.cbbe.eu/index.php?id=32&L=0>.

When practicing cross-border, a lawyer from another Member State may be bound to comply with the professional rules of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity.

Member organizations of the CCBE are obliged to deposit their codes of conduct at the Secretariat of the CCBE so that any lawyer can get hold of the copy of the current code from the Secretariat.

*Id.*

It would be a good thing if they could be relieved of researching such an issue and be comforted to know that the same candor rule applies to both negotiators. Currently that is not the case and it is no answer to say they can agree to what law will apply, as if it were a contract term. The public interest in lawyer regulation does not permit a lawyer to negotiate away her obligations under the applicable lawyer ethics law.<sup>36</sup>

A uniform set of lawyer ethics rules would no doubt have advantages for the conduct of lawyer business and the free movement of legal services.<sup>37</sup>

Having uniform rules requires more than having uniformity of words in governing rules. There is an illusory harmonization when the words of the governing legal rules are similar, but the underlying legal culture is quite different. Words in rules mean what they mean in the culture and society that adopted those words, and in the case of lawyer ethics rules, the culture of the lawyers to whom the words will apply.

Adoption of U.S. forms of lawyer and judge regulation will not make the world's lawyers more like U.S. lawyers. They do not function in the U.S. culture and are not educated as common law lawyers. The legal systems within which they function are not like U.S. systems.

Imagine planting U.S. lawyer ethics rules in Kosovo. The law and lawyer culture in Kosovo are a remarkably complex mix. Until 2008, Kosovo was a province of Serbia.<sup>38</sup> Now it is a disputed state, recognized by the United States and about sixty other countries, not including Serbia, Russia, and more than one hundred others.<sup>39</sup> From 1918 until 1992, at which point Yugoslavia began to disintegrate, it was a province of the Republic of Serbia within Yugoslavia.<sup>40</sup> From the end

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36. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. e (2000). “Choice of law in lawyer regulation. In general, traditional choice-of-law principles, such as those set out in the Restatement Second of Conflict of Laws, have governed questions of choice of law in *nondisciplinary* litigation involving lawyers.” (emphasis added); See *id.* at § 5 cmt. h (regarding choice of law in disciplinary matters).

37. See General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1125.

38. Encyclopedia Britannica.com, Kosovo, <http://www.britannica.com/EBchecked/topic/322726/Kosovo> (last visited February 18, 2010).

39. John R. Cook, *United States Recognizes Kosovo as an Independent State*, 102 AM. J. INT'L L. 638, 638-39 (2008); Steven Bos, *US, Russia Clash over Kosovo's Independence Move*, Voice of America (Dec. 10, 2009), <http://www1.voanews.com/english/news/europe/US-Russia-Clash-Over-Kosovos-Independence-Move-78986552.html> (last visited Feb. 25, 2010).

40. Robert F. Carolan, *An Examination of the Role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court Systems: The Kosovo Experiment*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 9, 11-12 (2008).

of World War II, Yugoslavia was a communist state.<sup>41</sup> In 1974, the Yugoslav constitution granted Kosovo substantial autonomy from Serbia while maintaining its status as a province.<sup>42</sup> The autonomy was revoked by Serbia in 1989.<sup>43</sup> After NATO bombing effectively removed Serbian troops in 1999, Kosovo came under U.N. control and administration.<sup>44</sup> Now the E.U. is taking the reins from the U.N., even while Kosovo has some of the attributes of an independent state.<sup>45</sup>

The law and court system are complicated. Old Napoleonic Codes exist but slept during the communist half-century. Yugoslav laws remain.<sup>46</sup> The laws of the 1990s exist but are held in low repute, having been adopted by the Serb-controlled government that revoked Kosovar autonomy formerly granted by Yugoslavia.<sup>47</sup> The law from 1999 to 2008 was adopted by U.N. directive and administered by the U.N. High Representative.<sup>48</sup> Now, the fledgling Kosovar parliament adopts laws, many of which are proposed by international NGOs based in the United States and Western Europe.<sup>49</sup> Under all the wrappings, the legal system is based on civil law, but sports a slightly more adversarial dispute resolution system than is usual in civil law systems.<sup>50</sup> Encouraged to adopt the U.S. model of plea bargaining, local parliamentarians fear that it will fuel judicial corruption.

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41. *See id.* at 12.

42. Stephen Kinzer, *Ethnic Conflict is Threatening Yet Another Region of Yugoslavia: Kosovo*, N.Y. TIMES, Nov. 9, 1992, at A8.

43. *Id.*

44. Sherrie Gossett, *Ex-Security Chief Blows Whistle on UN's Kosovo Mission*, CNSNEWS.COM, Sept. 27, 2005, available at <http://www.unwatch.com/cnews92705.html>.

45. Robert C. Austin, *Back to "Plan A" in Kosovo*, SETIMES.COM, Nov. 11, 2007, available at [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/articles/2007/11/26/reportage-01](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/articles/2007/11/26/reportage-01).

46. *See* Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 58-59 (2001). UNMIK initially promulgated regulation 1999/1 under Resolution 1244, stating that laws in effect before the passage of 1244 would apply. *Id.* at 58. This was politically unpopular with Kosovar Albanians, leading UNMIK to release a new regulation stating that laws in effect prior to 1989 (when Kosovo was invaded) would apply. *Id.* at 58-59.

47. *See id.*; Robert J. Delahunty, *The Kosovo Crisis: A Dostoevskian Dialogue on International Law, Statecraft, and Soulcraft*, 42 VAND. J. TRANSNAT'L L. 15, 28-29 (2009); Johnathan S. Haub, *Justice in Kosovo*, 63-MAR OR. ST. B. BULL. 33, 33 (2003).

48. *Id.*

49. *See* Craig Whitlock, *Despite its Troubles, Kosovo Offers a Model for Nation-Builders*, WASH. POST, Dec. 1, 2009, available at [http://www.washingtonpost.com/wp-dyn/content/article/2009/11/30/AR2009113003859\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/11/30/AR2009113003859_pf.html).

50. *See, e.g.*, Jetish Jashari, *U.N. Field Missions in the Context of Legal and Judicial Reform: The Kosovo Case*, 1 Colum. J. E. Eur. L. 76, 89-90 (2007) (discussing how the introduction of criminal procedure into Kosovo's legal system has made it more adversarial).

Older judges and lawyers were educated in communist forms.<sup>51</sup> New ones are being educated by an uncoordinated conglomeration of NGOs in concert with the newly formed Kosovo Bar Association and Kosovo Judicial Counsel.<sup>52</sup> They do not live in a U.S. culture or legal culture. They are not common law lawyers. Yet the adopted lawyer and judicial ethics rules are modeled on the ABA codes.<sup>53</sup> In a tussle between United States and European NGOs and their relative influence, the U.S. style codes stand alongside the recent adoption of the French notary system, creating the common Western European branch of the legal profession that generates official documents, especially regarding property transfers.<sup>54</sup> The U.S. lawyer code, of course, does not contemplate such a lawyer.

#### IV. THE PRICE OF UNIFORMITY

Even assuming that uniformity can exist, uniformity itself assumes that “one size fits all.” And, it seems, that one size is the United States’ size. There is an impression outside the US, ameliorated somewhat in November 2008, that Americans are self-centered, self-interested, pushy, and disinterested in the cultures of others.<sup>55</sup> After my first two trips to Serbia, local people I worked with seemed to be interacting with me in an odd way. I asked what seemed curious to them about me, and they answered, “You do not seem American to us.” I was not sure how to take that exactly. I said I am very proud to be an American, and I am as American as anyone could be. I explained that there are no two Americans who are the same, so whatever they thought an American should be might be a mistaken impression. We talked awhile about the human and cultural mixture that is the United States and that, at its best,

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51. See Strohmeier, *supra* note 46, at 50, 51-53, 56; Jashari, *supra* note 50, at 107.

52. Jashari, *supra* note 50, at 107-08.

53. See American Bar Ass’n, ABA Rule of Law Initiatives Programs – Kosovo, [http://www.abanet.org/rol/europe\\_and\\_eurasia/kosovo\\_programs.html](http://www.abanet.org/rol/europe_and_eurasia/kosovo_programs.html) (last visited Feb. 25, 2010); see also ABA RULE OF LAW INITIATIVE, LEGAL ETHICS HANDBOOK (2008), available at [http://www.abanet.org/rol/publications/kosovo\\_legal\\_ethics\\_handbook\\_2008\\_english.pdf](http://www.abanet.org/rol/publications/kosovo_legal_ethics_handbook_2008_english.pdf).

54. See Law on Notary for the Republic of Kosovo, No. 03/L-10 (adopted 17 October 2008) available at [http://www.assembly-kosova.org/common/docs/ligjet/2008\\_03-L-010\\_en.pdf](http://www.assembly-kosova.org/common/docs/ligjet/2008_03-L-010_en.pdf); see also Kosovo: Technical Background Paper Rule of Law Sector, 11-12 (Working Paper: European Commission, July 1, 2008), <http://ec.europa.eu/enlargement/archives/seerecon/kdc/rol2.pdf> (last accessed Feb. 26, 2010).

55. See, e.g., Harry Rosenfeld, *Pressure on Terrorist Nations Best Way to Free Hostages*, TIMES UNION (Albany), Jan. 11, 1987, at A2; Geraldine Brooks, *Terror’s Aftermath: Rattling Sabers of Bigotry*, L.A. TIMES, Sept. 16, 2001, at 3; *Getting our Attention: World Affairs Gain their Proper Role on America’s Stage*, SARASOTA HERALD-TRIB., Sept. 30, 2001, at F2; David Harsanyi, *What Happened to Hope?*, DENV. POST, Jul. 31, 2009, at B11.

the United States has welcomed and learned from the cultures of its immigrants. So, I said, it was hard for me to imagine why I wouldn't seem American to them. They said they expected that I would tell them what to do and not listen to them and that I would not value their opinions or take the time to hear what they had to say. I said again that I am American and asked them to reconsider their views on what Americans can be. But I understand exactly what they meant about their impressions of Americans. I saw too many who fit their expectations. And their expectations of Americans are far from unique. Americans are regarded, with considerable evidentiary support, to be self-focused and uninterested in world events.<sup>56</sup>

Here is one example among far too many. Charged with responsibility of shepherding a new criminal procedure code through an emerging democracy's parliament and bar and judiciary, an American man I met recently (call him Don), set about analyzing the current code and the proposed replacement, drafted in part by his employment predecessor. Don was working for an ABA project, and as such was presented to the lawyers and judges and legislators of the host country as cloaked with the power and prestige and sensibilities of the American legal profession. I met Don while I was in the country doing an ethics workshop, and he commented repeatedly on the poor quality of the existing criminal code. In disparaging tones and language he criticized the code and its makers. The backward lawyers of this backward country had made the work of fools with shockingly bad provisions and procedures. What did Don criticize about the code? He criticized the very limited evidence rules without noticing that without jury trials, like most of the rest of the world, the justice system of this country had very little use for an elaborate, U.S.-style evidence code.<sup>57</sup> In particular, he mocked the hearsay rule for its very modest exclusion of evidence. He did not know that the rule he was criticizing is the same one as dominates the world's justice systems outside the United States.<sup>58</sup> He harshly criticized the process that allows crime victims to initiate criminal actions. Again, how could such a backward, uneducated system have been conjured by the locals, he wondered. Don did not

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56. *Id.*

57. For a general introduction to comparisons between continental European evidence law and Anglo-American evidence law, see Mirjan R. Damaska, *EVIDENCE LAW ADRIFT* 1-25 (Yale University Press 1997).

58. *Id.*

know that this system reflects the one in place in France<sup>59</sup> and many civil law countries that follow the French codes, which have been in wide use for 200 years.<sup>60</sup> Don was surprised when I did not share his view that the existing code was appalling and the local lawyers an uneducated band of fools whom he needed to save from themselves. Instead, it was Don who was uneducated. He assumed that anything in place in a developing country and different from his accustomed U.S. system must be the product of some unsophisticated local foolishness. He is not alone among American lawyers in his lack of knowledge of justice systems outside the United States.<sup>61</sup> But like others who lack this basic knowledge, he was the representative of the U.S. legal profession, taking positions that would be attributed to you and me, and embarrassing us in their ignorance.

He and his colleagues were succeeding in their effort to reform the existing code. There is a proposed code before the parliament that will slowly introduce jury trials, at first only in the capital city in murder cases, two years later in one other city, and thereafter in more kinds of criminal matters. Lawyers and judges have been trained in U.S.-style trial skills for several years in anticipation of the passage of the new code.<sup>62</sup> At best, it will operate in a dozen matters until at least 2012. In my ethics sessions, I asked participants to give examples of conduct that would be regarded as improper in the local courts. Most of them, Don included, recited example after example regarding jury selection, closing argument, and cross-examination—none of which actually exist in the local courts and will not exist except in a few murder cases until 2012, assuming that the jury trial aspect of the proposed new code is adopted. But trained by the U.S. NGOs, the local lawyers are chomping at the adversarial bit.

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59. See Jacques Borricand, Institut de Sciences Penales et de Criminologie, World Factbook of Criminal Justice Systems in France, Prosecutorial and Judicial Process, section 2, "Procedures", available at <http://www.police.online.fr/lawfr.htm>:

The judiciary stage can be initiated by either the Public Minister or the victim, although the Public Minister studies the legalities involved in the charges and prosecutes the suspect . . . . The victim can also initiate prosecution by bringing a civil suit against the suspect, forcing the public prosecutor to take action.

60. *Id.*

61. See, e.g., Wena Poon, *U.S. Lawyers Dealing with International Clients Shouldn't Pretend It's Just Business as Usual*, RECORDER (San Fran.), Jan. 11, 2006, at 4 ("The chief complaint among foreign lawyers and businessmen is that their American counterparts, despite the globalization of commerce, remain culturally ignorant."); Wena Poon, *Leave the Ugly American at Home: Tips for Working with Counsel and Clients from Other Countries*, TEXAS LAWYER, Feb. 6, 2006, at 33.

62. See *supra* notes 22-23 and text.

Conceding for the sake of argument that the U.S. justice system is best among currently available options (as I actually have come to believe that it is), ignorant advocates for it reveal the stereotypically myopic American views that are problematic for the reputation of the United States abroad.

Even if uniformity were possible, there is a second price of uniformity. To have a uniform rule, some choice must be made among the options. Will some existing rule be best? Or perhaps some amalgamation of the differing rules?

U.S. rules might be the best choice among the models, but this seems unlikely. The U.S. lawyer is actually quite unique in the world.<sup>63</sup> As a common law lawyer, she perceives herself, correctly, as a lawmaker.<sup>64</sup> She makes arguments to courts that become law when agreed with by a judge. Civil law lawyers have a quite different sense of themselves. They are law appliers, not lawmakers (except to the extent that a civil law lawyer might become a member of parliament). The dispute resolution system is quite different, driving substantial differences in lawyer role. In most civil law systems, the lawyers do not present evidence to a court.<sup>65</sup> The judge investigates a matter and forms a dossier of witness statements and other evidentiary material.<sup>66</sup> The lawyers have less, and sometimes no, contact with witnesses and certainly less evidence-related responsibility in hearings.<sup>67</sup>

Rules regarding advertising and solicitation are likely to be framed differently in the United States not because of the bar's preferences, but because of the First Amendment's limitations on the bar's power. Such a robust speech freedom is rare.<sup>68</sup>

The beginning of the lawyer-client relationship is far more formal than in the US. Conflicts discussions focus almost exclusively on multiple-client issues, while other competing interests are discussed more in terms of priorities and lawyer independence.

In short, for the U.S. system to actually fit well in most emerging democracies, enormous changes to the social, cultural and justice

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63. See Katherine R. Kruse, *The Human Dignity of Clients*, 93 CORNELL L. REV. 1343, 1346 (2008).

64. *Id.*

65. See Zhuo Wenzhao, *Review of Civil Litigation in Comparative Context*, 41 N.Y.U. J. INT'L L. & POL. 707, 714 (2009).

66. *See id.*

67. *See id.*

68. See Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377, 377-78 (expressing surprise that foreign audience members felt the United States protections for speech were a uniquely U.S. cultural characteristic).

systems would also have to occur. A lawyer code does not make a legal culture.

#### V. SOME AFFIRMATIVELY BAD RESULTS OF EXPORTING THE U.S. MODEL

Consider, for example, the new judicial conduct code and disciplinary process in Georgia, which looks a great deal like the ABA models and Bangalore approaches.<sup>69</sup> Nice. Perhaps. But not so fast. On each of my project trips, I have asked to meet a few prominent or interesting lawyers and judges, allowing me a small flavor of the legal profession as I try to understand their particular lawyer and legal culture. I met a lawyer in Tbilisi, Georgia who said she had been disbarred for representing a group of judges who were charged with disciplinary violations under the new code. We talked for forty-five minutes, but I left unclear about the story: What were the judges charged with? Were they factually guilty of the violations? And why had the bar then disciplined the judges' lawyer? I asked the Georgian professor and a staff member of the program (a recent Georgian law graduate), both of whom had been with me during the meeting and had been translating for me. It went something like this:

Question: Did her clients (the judges) do what they were charged with doing?

Answer: Yes, absolutely.

Question: Hmmm. So this lawyer represented them. That seems uncontroversial. Do other judges do what these judges did?

Answer: Yes, absolutely. Nearly all judges engage in some form of this same conduct.

Question: Oh, I see. Then why were these judges charged with disciplinary violations and others are not?

Answer: Because these judges were appointed by the prior government. And the current government has charged many officials of the prior government with crimes. And these judges would not convict those defendants. So the new government wanted these judges off the bench.

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69. See Am. Bar Ass'n, American Bar Association Rule of Law Initiative Programs – Georgia, [http://www.abanet.org/rol/europe\\_and\\_eurasia/georgia.html#legal\\_reform](http://www.abanet.org/rol/europe_and_eurasia/georgia.html#legal_reform) (last visited Feb. 26, 2010); Am. Bar Ass'n, *Georgian Bar Association's Ethics Commission Drafts Amendments to Legal Profession Codes*, ABA Rule of Law Initiative (Jun. 11, 2007), <http://www.abanet.org/rol/news/news-georgia-bar-association.html> (last accessed Feb. 26, 2010); Irina Urumova, *The Legal Profession of Georgia* (Organization for Security and Cooperation in Europe: Working paper, Sept. 2008), [http://www.osce.org/documents/odihr/2009/02/36499\\_en.pdf](http://www.osce.org/documents/odihr/2009/02/36499_en.pdf) (last accessed Feb. 26, 2010).



The Georgian bar leaders I met were very proud of their new American-style judicial ethics code. The culture of institutions and the administration of laws matters more than the text of those laws. (Then I thought of the eight U.S. prosecuting attorneys discharged in 2006-07 for their suddenly poor performance.)<sup>70</sup>

## VI. CONCLUSION

With insufficient care and thought and knowledge, the U.S. system of lawyer ethics is being exported. Granting that some global lawyer ethics harmonization would be useful, the U.S. model may be the least likely to fit elsewhere. The reception for the U.S. model has been quite open, especially in emerging democracies that are much-dependant on the United States in many ways. Accompanying the lawyer ethics models have been scattered reforms creating new common law courts and adversarial dispute resolution systems.

The recent financial, banking, and securities crisis may tell a tale.<sup>71</sup> Once, the U.S. system of banking and securities regulation was being “sold” abroad as the gold standard, with unquestioned admiration, passion, and glorification.<sup>72</sup> Now the world wonders about the efficacy of that system.<sup>73</sup> The same crash of confidence could occur in the United States lawyer regulation system as poor fits with legal culture in adopting countries become clear.

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70. Gzedit, *U.S. Attorneys Political Manipulation*, CHARLESTON GAZETTE & DAILY MAIL (WV), Mar. 17, 2007, at 4A; *Gonzalez Should Step Down Now*, CINCINNATI ENQUIRER, Mar. 27, 2007, at B6.

71. See, e.g., Adrian Michaels, *From Wall Street to All Streets*, DAILY TELEGRAPH (London), Feb. 21, 2009, at 17; Ian Bremmer & Nouriel Roubini, *Expect the World Economy to Suffer Through 2009*, WALL ST. J., Jan. 23, 2009, at A15; Helene Cooper, *Obama Faces Defiant World Over Economy on Europe Trip*, N.Y. TIMES, Mar. 29, 2009, at A1; Neil MacFarquhar, *Upheaval On Wall St. Stirs Anger In the U.N.*, N.Y. TIMES, Sept. 24, 2008, at A6.

72. Paul Farrow, *Where are Global Markets Going?*, Telegraph.co.uk (Mar. 20, 2002), <http://www.telegraph.co.uk/finance/personalfinance/investing/2757157/Where-are-global-markets-going.html> (last accessed Feb. 26, 2010) (“[T]he average US unit trust has returned 237 per cent over the past 10 years. The importance of the US to equity performance on a global scale is unparalleled.”).

73. See *supra* note 71 and text.