Signposts In The Road:
The Lawyer's Ethical Obligation to Promote Diversity In the Legal Profession

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I. INTRODUCTION

The legal profession has long espoused increasing diversity in the profession but in making the case for taking affirmative steps to promote diversity has proven to be an enduring challenge. A moral case has been made: "It's the right thing to do." A business case has been made, "Our clients or customers are demanding it."

Undeniably, the business case for diversity has measurably and indeed profoundly advanced the cause. This is understandable because corporations and law firms are businesses and it is easy to develop consensus around a business imperative. The business case for diversity is compelling because it bypasses differences of opinion about both the means for achieving diversity and, candidly, whether diversity is an end worth pursuing. To the question, "Why should we promote diversity in our organizations?" the answer is, "Because our clients and customers want it and, if we don't meet the demand our competitors will."

Yet, in this paper we argue there is another value around which there is consensus that holds the same transformative power for advancing diversity in the profession as the business case for diversity. It is the ethical case for diversity. We contend that there is a clear and compelling ethical duty to promote diversity in the legal profession. Before proceeding to make that case however we need to understand what ethics are and, importantly, how they differ from morals.

> Ethics and morals relate to "right" and "wrong" conduct. While they are sometimes used interchangeably, they are different: ethics refer to rules provided by an external source, e.g., codes of conduct in workplaces or principles in religions. Morals refer to an individual's own principles regarding right and wrong.[2]

Thus, morals are subjectively held beliefs or a belief system. Ethics, by contrast, are externally imposed, binding and enforceable rules that govern conduct to achieve a

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[2] http://www.diffen.com/difference/Ethics_vs_Morals (last viewed September 21, 2017).

shared belief as to what is right. When it comes to diversity and lawyers' duties, the distinction is critical because as The Reverend Dr. Martin Luther King famously said, "Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless." An ethical call to act is an imperative in a way that a moral call is not.

Why does this matter? Because recognizing a lawyer's ethical obligation requires and empowers us to act even in the absence of a business case. It bridges the gap between the moral case for diversity and the business case for diversity. It says that we as lawyers have an obligation and agency to pursue liberty and justice for all, within and outside our commercial practices. It compels us to use our skills, voice and station independent of our clients' interests. Requiring lawyers to act to promote diversity in the profession, has the potential to be at least as impactful as making pro bono an ethical responsibility. We all know it's the right thing to do but in legal parlance, codifying the long-recognized ethical obligation to promote equality gives us jurisdiction to address existing inequality. But, what is the basis for an ethical obligation to promote diversity?

II. THE FOUNDATIONS OF LEGAL ETHICS

The concept of law as a system of rules (ethics) that regulate and constrain the affairs of individuals emerged from and is inextricably linked to the concept of Justice (morality). Cicero said:

> It is agreed, of course, that laws were invented for the safety of citizens, the preservation of States, and the tranquility and happiness of human life, and that those who first put statutes of this kind in force convinced their people that it was their intention to write down and put into effect such rules as, once accepted and adopted, would make possible for them an honourable and happy life; and when such rules were drawn up and put in force, it is clear that men called them "laws." From this point of view, it can be readily understood that those who formulated wicked and unjust statutes for nations, thereby breaking their promises and agreements put into effect anything but "laws." It may thus be clear that in the very definition of the term "law" there inheres the idea and principle of choosing what is just and true.[3]

And what is our conception of the "just and true?" For Americans it is defined in the Preamble to the Constitution.

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the

[3] LAW A TREASURY OF ART AND LITERATURE, (Sarah Robbins, ed). (Hugh Lauter Levin Associates, Inc., 1990)

> common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Thus, we are a nation of laws because we are a nation born of contract, drafted, interpreted and made real by, in the main, lawyers. The elevation of the role of law finds its ultimate expression in Thomas Paine's COMMON SENSE:

> But where, says some, is the King of America? I'll tell you. Friend, he reigns above, and doth not make havoc of mankind like the Royal Brute of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, **that so far we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other.** But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony, be demolished, and scattered among the people whose right it is.[4]

(Emphasis supplied)

If law is king, then lawyers are its knights. Lawyers by virtue of social status and training, were seen as serving the law. "The original account of the American Lawyer's role was that of America's governing class. The core of this approach was that lawyers—in contrast to business people—are above self-interest, and accordingly, they are uniquely able to discern and pursue the common good. As America's governing class, lawyers manage society in the interest of promoting the rule of law."[5] This notion, "can be found in Alexis De Tocqueville's description of lawyers as the American aristocracy,[6] The republican understanding of lawyers was as "providing the enlightened political leadership that protected 'life, liberty, and property…"[7] (In fact, the commercial practice of law representing individuals was uncommon and viewed with disdain).

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[4] Thomas Paine, THE WRITINGS OF THOMAS PAINE, 99 (available at (http://calhum.org/files/uploads/program_related/TD-Thomas-Paine-Common-Sense.pdf) (last viewed 9/26/17) (emphasis added).

[5] Pearce, The Lawyer and Public Service 9 Journal of Gender, Social Policy & The Law, 171 (2001)

[6] Citing Alexis De Tocqueville, DEMOCRACY IN AMERICA, 266-70 (J.P. Mayer ed. & George Lawrence trans., 1969)

[7] Id. at 172.

At the time of this nation's founding, the idea of a representative government based on the consent of the governed was, with a few insignificant exceptions, virtually unprecedented.[8] Thus, it fell to lawyers to make real the rights conferred in our founding documents. Lawyers and the judiciary debated but ultimately defined and enforced these rights. *Marbury v. Madison*, which established the doctrine of Judicial Review legitimized and endorsed the legal profession's right and obligation to enforce our social contract. The Court has continued to perform this mission for the entire course of our Nation's existence, through cases such as *Gideon v. Wainright*, (Sixth Amendment right to counsel), *Brown v. Board of Education* (declaring separate but equal unconstitutional), *Roe v. Wade*, (woman's right to privacy) and, most recently, *Obergefell v. Hodges*[9] (equal protection for same-sex marriage). In each of these cases, The Supreme Court enforced fundamental protections enshrined in the constitution, sometimes before widespread public acceptance; sometimes after.

Yet, while the first role of lawyers in society was selfless pursuit of the common good.[10], the second became lawyering on behalf of individual clients.[11] It was in this phase, as discussed below, that Rules of Professional Responsibility emerged to regulate the inherent tensions between the interests of society and individuals.

III. THE EMERGENCE OF RULES OF ETHICS.

The emergence of rules of ethics followed the increase in lawyers representing private clients. Because lawyers were previously considered an exalted class who were obligated to serve the social good, the notion of representing private citizens for pecuniary gain was frowned upon. As private practice on behalf of clients became more common, there arose a corresponding need for rules to regulate the competing interests and obligations of the lawyer viz-a-viz his client, opposing counsel, the court and the public.

The history of codified legal ethics standards dates back to 1836 when David Hoffman, considered the grandfather of American legal ethics[12], published *50 Resolutions in Regard to Professional Deportment* in "A Course of Legal Study."[13] Then, in 1854 a series of lectures given by Judge George Sharswood, a Pennsylvania

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[8] See Joseph Ellis, Founding Brothers: The Revolutionary Generation, at 6.

[9] 576 U.S. __ (2015)

[10] Cite to Pearce

[11] [For larger paper insert interesting side note observation to Jefferson's letter. (Jefferson personified lawyers struggle to balance serving the public good and private clients. Letter re payment.]

[12] Shaffer, Inaugural Howard Lichtenstein Lecture on Legal Ethics: Lawyer Professionalism as Moral Argument26 Gonzaga Law Review 393 1989

[13] Peter Geraghty, History of Us. Legal ethics standards, December 2016 EYE ON ETHICS , available at https://www.americanbar.org/publications/youraba/2016/december-2016/a-brief-history-of-the-development-of-legal-ethics-standards-in-.html (last viewed September 22, 2017). Interestingly,

jurist and chief justice of the Pennsylvania Supreme court, were combined and published as Professional Ethics.[14] These works in turn became the basis for the first formal code of ethics for lawyers adopted in the United States, the Alabama Code of Ethics, in 1887.[15]

The tension between lawyer as servant for the common good and lawyer as private advocate is reflected in Hoffman's 50 Rules. Rule 15, for example, provided:

> When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavors to arrest or to impede the course of justice, by special resorts to ingenuity, to the artifices of eloquence, to appeals to the morbid and fleeting sympathies of weak juries, or of temporizing courts, to my own personal weight of character–nor finally, to any of the overweening influences I may possess from popular manners, eminent talents, exalted learning, etc. Persons of atrocious character, who have violated the laws of God and man, are entitled to no such special exertions from any member of our pure and honorable profession; and, indeed, to no intervention beyond securing to them a fair and dispassionate investigation of the facts of their cause, and the due application of the law. All that goes beyond this, either in manner or substance, is unprofessional, and proceeds, either from a mistaken view of the relation of client and counsel, or from some unworthy and selfish motive which sets a higher value on professional display and success than on truth and justice, and the substantial interests of the community. Such an inordinate ambition I shall ever regard as a most dangerous perversion of talents, and a shameful abuse of an exalted station. The parricide, the gratuitous murderer, or their perpetrator of like revolting crimes, has surely no such claim on the commanding talents of a profession whose object and pride should be the suppression of all vice by the vindication and enforcement of the laws. Those, therefore, who wrest their proud knowledge from its legitimate purposes to pollute the streams of justice and to screen such foul offenders from merited penalties, should be regarded by all (and certainly shall by me) as ministers at a holy altar full of high pretension and apparent sanctity, but inwardly base, unworthy, and hypocritical–dangerous in the precise ratio of their commanding talents and exalted learning.[16]

[14] Id.

[15] Id.

[16] Fifty Resolutions in Regard to Professional Deportment, id.

In other words, if the lawyer adjudged the accused to be guilty, by legal or *moral* standards, of a serious crime, such as murder, the lawyer should not use all his skills or talents to acquit his client because "Persons of atrocious character, who have violated the laws of God and man, are entitled to no such special exertions from any member of our pure and honorable profession." Today, the notion that a lawyer might give his criminal client a less than zealous defense because the lawyer believed the client guilty would be considered unethical, demonstrating that ethical standards evolve with society.

Rule 15 reflects the recognition that the lawyer is torn between two clients, the individual and society. What should a lawyer do when asked to represent an individual he believes to be a murderer? Hoffman's answer was, do the bare minimum. Our answer today would be different.

IV. THE ETHICAL CASE FOR DIVERSITY: IT'S TIME

In *Allegheny College v. Mary Y. Johnston*, 246 N.Y. 369 (1927), Chief Judge Cardozo outlined the standards of promissory estoppel, a doctrine that, at that time, had yet to be fully developed in New York. In his opinion, Cardozo acknowledged that, "[w]hether [promissory estoppel] has made its way in this state to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not attempt to say." Still, Cardozo supported his opinion – and in the process, introduced the doctrine of promissory estoppel into New York courts – by using earlier, and similar, jurisprudence as "signposts in the road" that the doctrine would be adopted in future cases. In the case of lawyers' ethical obligations, certain "signposts in the road' serve as indicators that the notion of diversity as an ethical obligation continues to move toward an absolute, unwavering standard of equality, inclusion, and diversity in the legal profession.

One important signpost is the growing prevalence of corporations (and general counsel) demanding equality and diversity, not only from their legal counsel, but from the U.S. Government and public institutions. In a number of major Supreme Court cases, such as *Trump v. Hawaii*[17] (U.S. travel restrictions); *Obergefell v. Hodges*[18] (equal protection for same-sex marriage); *Fisher v. University of Texas*[19] (affirmative action in university application processes); and *Gloucester County School Board v. G.G.*[20] (transgender student issues), major corporations have submitted amicus briefs in support of the underrepresented and underserved. For example, in *Obergefell v.*

[17] Nos. 16-1436 & 16-1540

[18] 576 U.S. __ (2015)

[19] 570 U.S. ___ (2013)

[20] 579 U.S. ____ (2016)

Hodges, 379 companies, from Amazon to Starbucks, filed an amicus brief in which they argued that their businesses benefit from diversity and inclusion.

Recently, Brad Smith, President and Chief Legal Officer of Microsoft, has committed his company to supporting legislation giving formal legal status to Dreamers, individuals brought to America by family members as minors and who have lived most of their lives here. Smith issued an official statement on behalf of the corporation stating that Microsoft "As an employer, we appreciate that Dreamers add to the competitiveness and economic success of our company and the entire nation's business community. In short, urgent DACA legislation is both an economic imperative and a humanitarian necessity." Other corporations, such as Apple and IBM, issued similar statements.

Smith went even further. In a headline making statement, Smith Declared that legalizing the status of Dreamers is a higher priority for Microsoft than Tax Reform:

> There is nothing that we will be pushing on more strongly for Congress to act on." We put a stake in the ground. We care about a tax reform bill. The entire business community cares about a tax reform. And yet it is very clear today a tax reform bill needs to be set aside until the Dreamers are taken care of. They have a deadline that expires in six months. Tax reform can wait."[21]

V. THE ABA SHOULD REVISE ITS MODEL RULES TO ENDORSE AN AFFIRMATIVE OBLIGATION TO PROMOTE DIVERSITY IN THE LEGAL PROFESSION.

The ABA first adopted its Canons of Professional Ethics in 1908 These were revised and became the ABA Model Code of Professional Responsibility, which were revised and became the Model Rules of Professional conduct in 1983. The ABA Rules, their various incarnations, are certainly a source of ethical obligations and no doubt the one with which most practitioners are most familiar. First adopted in 1983, they have been adopted by every state (except California), the District of Columbia and the Virgin Islands.[22]

Neither the Model Rules nor state rules are a comprehensive compendium of a lawyer's ethical obligations, however. Rather, they provide, with a few exceptions, rules of decision for lawyers' obligations to their clients, their adversaries, their colleagues, and the court. Indeed, model rules emerged as the profession wrestled with the tension between lawyers as individuals who served the public good and, as

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[21] **[Cite].**

[22] Puerto Rico is the only U.S. jurisdiction besides California to not adopt the ABA Model Rules. https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html.

such, above self-interest, and the emergence of lawyers of as representing clients for remuneration. Viewed from the vantage point of the legal profession's obligation to advance the common good, Rules of Professional Responsibility are revealed to be rules for allocating duties within that overall responsibility. Lawyers, whether prosecutor or defense attorney, advocate zealously (within the bounds of the Rules); judges decide impartially (subject to Rules of Judicial Conduct). Collectively the profession fulfills its duty to society.

Thomas Schaffer, Robert and Marion Short Professor of Law at Notre Dame once argued, "Somewhere between Hoffman's day (he died in 1854) and our own, professionalism stopped meaning that lawyers are responsible for justice."[23] We argue that Schaffer's disheartened view is wrong. While the codified rules of professional conduct focus on representing individual clients, they have not dispensed with the pre-existing common law of ethics. We would further argue, it is the undue focus on codified Rules to the exclusion of the common law of legal ethics that leads to frustration with and, arguably even disdain, for the profession and for lawyers. For example, one scholar argued, "[T]he adversary system is justified only by the very weakest of reasons, namely, that it is not demonstrably worse than other systems."[24] This view fails to recognize the allocative character of the adversary system, discussed above, by which the interests of society and the individual are both advanced and balanced. The individual lawyer representing an individual client is not obligated to balance his client's interests against the numerous competing interests she has been retained to fight because she is not alone in the fight. She acts in community with the profession, which collectively bears the burden of ensuring that each interest has an equally zealous advocate. But, of course, if the profession does not zealously discharge its duty to ensure that all voices are represented, then it fails to honor its heritage or perform its role in society and, as important, it will deserve the disdain society casts upon it.

Model and state rules of professional conduct are evolving, however, toward closing the gap between the common law of ethics and codified rules of ethics recognizing that a lawyers' ethical obligations extend beyond the commercial practice of law. If the legal profession's first role in society was to serve the public good and the second was commercial, private practice, Pearce, *supra* at fn. __, argues that the recognition of pro bono lawyers represents the third-phase of lawyers' role in society.

The Canons made no mention of pro bono service. They were replaced by the Model Code of Professional Responsibility in 1969. It simply encouraged lawyers to donate their services on behalf of those unable to pay:

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[23] Shaffer, Inaugural Howard Lichtenstein Lecture on Legal Ethics: Lawyer Professionalism as Moral Argument, 26 Gonzaga Law Review 393 1989.

[24] David Luban, Lawyers And Justice And Ethical Study, Introduction, at xxiii (Princeton University Press 1988)

> Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. [footnote omitted] Thus it has been necessary for the profession to institute additional programs to provide legal services. [footnote omitted] Accordingly, legal aid offices, [footnote omitted] lawyer referral services, and other related programs have been developed, and others will be developed, by the profession.https://www.law.cornell.edu/ethics/aba/mcpr/NOTES.HTM - note_2-43 [footnote omitted] Every lawyer should support all proper efforts to meet this need for legal services.https://www.law.cornell.edu/ethics/aba/mcpr/NOTES.HTM - note_2-44 [footnote omitted][25]

The Model Code of Conduct was replaced by the Model Rules of Professional Conduct (the "Model Rules") in 1983. Model Rule 6.1, Voluntary Pro Bono Publico Services provided:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

The Rule was amended in 1993 and now provides:

> Rule 6.1 (Voluntary Pro Bono Publico Service): Every lawyer has a professional responsibility to provide legal services to those unable to pay. *A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.* In fulfilling this responsibility, the lawyer should: provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational

[25] Model Code of Professional Conduct, EC2-25 available at https://www.law.cornell.edu/ethics/aba/mcpr/MCPR.HTM.

> organizations in matters that are designed primarily to address the needs of persons of limited means; and provide any additional services through: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; (2) delivery of legal services at a substantially reduced fee to persons of limited means; or (3) participation in activities for improving the law, the legal system or the legal profession.
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> In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.[26]

Thus, since 1908 the ABA's ethic rules, in the various incarnations, evolved from no mention of pro bono service to encouraging it generally to making it a responsibility and establishing a 50 hour aspirational standard. Although aspirational, the 50 hour standard has affected the profession. Numerous law firms have adopted the goal of having each lawyer perform 50 hours of *pro bono* services.[27]

Similarly, the ABA Rules did not address discrimination until 1988 when it adopted Comment 2 to Rule 8.4(d), which provided that discriminatory conduct in the course of representing a client violates Rule 8.4(d), conduct prejudicial to the administration of justice. Comments, however, are mere guidance, not rules, and thus unenforceable.

The Model rules of Professional Conduct did not raise declare discrimination misconduct until the adoption of Rule 8.4(g), in 2016, which provides:

> Rule 8.4 (Misconduct): It is professional misconduct for a lawyer to: engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Thus, the ABA's rules governing attorney conduct are not static. Rather, they evolve in both form, as in from Canons to a Code to Professional Rules, and in substance, as

[26] Model Rule 6.1 (emphasis added)

[27] Our firm has adopted this goal.

with respect to pro bono services and discrimination. Critically, however, this evolution with respect to pro bono services and discrimination is toward closing the gap between the focus of codified rules on commercial, private practice and toward recognizing a lawyer's common law ethical duty to serve the public good.

It is clear, however, that Rule 8.4(g) does not go far enough. First it does not adequately address discriminatory conduct. In recent years, science has revealed that all of us—regardless of race, creed, ethnicity, gender identification or sexual orientation—harbor and act on implicit biases against disfavor groups in society.[28]-- The ABA has recognized the problem of implicit bias and has urged action to remedy it. [29] Importantly, because implicit bias is subconscious, we cannot sense it. Thus, we cannot eliminate it. Consequently, we are all in violation of Rule 8.4. We can, however, remediate it. Because it is unfeasible for the ABA to discipline all its members for their continuing violation of Rule 8.4(g), it is incumbent upon the ABA to require its members to take action to remediate implicit bias.

Beyond remediating discrimination, however, the Model Rules should be amended to impose an affirmative obligation to promote diversity and inclusion in the profession in recognition of a lawyers duty to fulfill his or her obligation to enforce and advance the our founding principles of equality for all. The Preamble to the ABA Model Rules states:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.

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[28] See Douglass, The Scientific Basis For The Ethical Obligation To Require Action To Eliminate Bias And Promote Diversity In The Legal Profession, IILP Review 2017: The State of Diversity and Inclusion in the Legal Profession, 66 (2017_ available at http://theiilp.com/resources/Pictures/IILP_2016_Final_LowRes.pdf.

[29] See Id. See also, https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html; https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox.html; http://www.abajournal.com/magazine/article/inclusion_exclusion_understanding_implicit_bias_is_key_to_ensuring .

> *Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.*[30]

The Preamble, in referencing lawyers as members of a learned profession and the lawyer's duty to seek improvement of the law, access to the legal system, the administration of justice evokes the concept of lawyer as champion of the public good that first characterized the role of lawyers in society. New York's Rules of Professional Conduct are similar but explicitly acknowledge, "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."[31] Interestingly, California, which has not adopted the Model Rules, contains no comparable call to do justice.[32]

But, reviewing the sources of legal ethics and the history of the profession, it is clear that the source of a lawyer's obligation to promote diversity is broader than non-discrimination. It is in fact, to do justice and to make real our founding values, for which wars have been fought and lives sacrificed.

VI. CONCLUSION

Lawyers have a long-established and deeply rooted ethical obligation to advance the law as a means of achieving justice as expressed in this Nation's founding documents. The codification of rules of professional conduct do not supersede those obligations. Rather, in the main they have addressed the ethical responsibilities of lawyers representing individuals in commercial practice. Nevertheless, rules of professional conduct are undeniably evolving toward recognizing and regulating the profession's obligation to promote the public good. It is time for the ABA to take the next step in this evolution, what Pearce might call the fourth phase, and revise its Model Rules to require lawyers to take affirmative steps to promote diversity and inclusion in the legal profession as a means of promoting equal justice for all.[33] It should do so not only in recognition of the historic role of the legal profession in America, or because it is the right thing to do but because in a society and profession that is becoming

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[30] ABA Model Rules of Professional conduct, Preamble. (emphasis added)

[31] New York Rules of Professional Conduct, Preamble, ¶ 8.

[32] A chart comparing relevant provisions of the Model Rules, the New York rules, California rules and Virginia rules is attached as Appendix A.

[33] While the appropriate means of promoting equality may be debatable, equality as a right is not. That debate was settled by the 13th and 14th Amendments.

increasingly diverse, failure to do so will cause the ABA to cede its role as leader of the profession and risk relegating it to an anachronistic irrelevancy.