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**The Morality of Paul, Weiss, Rifkind, Wharton & Garrison LLP to represent ExxonMobil: A Kantian Perspective**

**Summary**

This essay evaluates the morality of the decision made by respected law firm, Paul Weiss, to represent ExxonMobil in a climate-related lawsuit in 2019. Using Kantian ethics, the decision is concluded to be ethical. The essay first shows the decision to be universally willed by demonstrating how a world in which every law firm provides counsel to a fossil fuel company is hypothetically possible and positive. The decision is then found to respect humanity by revealing the work was bound in professional legal code that prevents Paul Weiss from being complicit in ExxonMobil’s human rights violations. The decision is finally determined as hypothetically acceptable to all by being driven by the motive of duty.

As discussions surrounding the role lawyers have in the transition to net zero intensify, Paul Weiss and other firms face increasing criticism for their work with fossil fuel companies. This essay has added to the debate by revealing firms may not be ethically required to stop defending fossil fuel companies. However, it is clear that firms must now walk an ethical tightrope. As such, this essay concludes by setting out three recommendations firms should take to ensure any future work with fossil fuel companies remains ethical.

**Part one: Overview**

**The organisation and decision of focus**

Paul, Weiss, Rifkind, Wharton & Garrison LLP (Paul Weiss) is a global reputable law firm. Established in New York in 1875, the firm is now highly regarded and currently ranked ninth in Vault’s list of top 100 law firms (FIRSTHAND, 2021). Despite this prestige, Paul Weiss has been subject to increasing criticism for its work representing the oil and gas major, ExxonMobil (e.g., Irfan, 2020; LSCA, 2021).

Paul Weiss’ work representing ExxonMobil in a historic civil climate lawsuit is the firm’s most high-profile work with the oil and gas major. In October 2018, ExxonMobil was summoned to trial after New York’s Attorney General filed a legal complaint in the New York Supreme Court against the oil and gas company for allegedly misleading investors about its climate-related risks (Attorney General v. ExxonMobil Corporation, 2018). Following a 12-day hearing in 2019, the judge found no significant evidence that ExxonMobil was guilty of material misrepresentation (Attorney General v. ExxonMobil Corporation, 2019).

**The importance of the topic**

Climate litigation refers to ‘lawsuits brought before judicial bodies and raise an issue of law or fact regarding climate change science, mitigation and/or adaptation policies or efforts as a main or significant issue’ (Setzer and Higham, 2020; p. 9). Climate litigation has recently surged, especially in the United States (figure one). This analysis is therefore a topical intervention, providing analogous results that generate wider recommendations for other law firms representing clients who have been summoned to court in the context of climate litigation.



**Figure one: Total number of lawsuits related to climate change between 2000 and 2021 (Schiermeier, 2021)**

This analysis is also salient. As the number of climate lawsuits increases, firms are facing increasing scrutiny for their work defending fossil fuel companies (e.g., LSCA, 2021), with conversations emerging on the role lawyers may have in the race to net zero emissions (e.g., Wigton, 2020). This analysis complements these discussions by providing a Kantian perspective on the ethical limitations firms exhibit that prevent them from terminating work with fossil fuel companies.

**Part two: Critical evaluation**

Immanuel Kant (1724-1804) believed that morality could be grounded within logic, with actions driven by, and judged on, a collection of *a priori* rules (Crane and Matten, 2016). To provide moral guidance, especially in difficult cases, Kant devised the categorical imperative (CI) (Bowie, 2017). As a deontological normative ethical theory, Kant’s CI disregards the consequences of action and focuses solely on an action’s motive. The CI is composed of three formulations (see Appendix 2) and provides a test to examine whether the maxim on which an action is based is morally permissible; if the maxim guiding the decision passes a formulation of the CI, the decision can be regarded to be ethical (Bowie, 2017).

It is debated whether an organisation can be understood as a moral agent and as a result, whether Kantian ethics can be applied directly to an organisation (e.g., Altman, 2007). However, this criticism is discredited since even Kant (1797) did not consider his theory to only apply to individuals by considering the state as a moral person (Wilkins, 2007). Similarly, MacArthur (2019) argues that if a manager who has the authority to represent a group acts on the basis of a maxim, that maxim is the group’s maxim. In alignment with an approach consistent within the academic literature (e.g. Bowie, 1999; Scharding, 2015; Van de Vijver, 2021), this essay will apply Kant’s CI at the organisational level, examining the maxim underpinning the firm’s decision to represent ExxonMobil rather than the decisions of the individual partners.

**Formulation one: Universal Law**

The first formulation of the CI examines whether the maxim underpinning an action could be hypothetically willed and accepted as universal law by testing whether it is contradictory. To test for this, Kant recognises two notions of contradictions, which Korsgaard (1996) labels as:

* Logical contradiction: the universalised maxim suggests an inconceivable action in which the ends of an action cannot be pursued.
* Pragmatic contradiction: the universalised maxim proposes an action that is inconsistent with your mission if everyone acted on that maxim.

If the universalised maxim is found to be a contradiction and thus not feasible, the action is regarded as morally impermissible (Bowie, 2017).

By examining Paul Weiss’ statement of firm principles (Rifkind, 1963), the maxim capturing the firm’s decision to represent ExxonMobil has been identified as:

*Paul Weiss should represent a fossil fuel company to uphold justice*

In this context, upholding justice implies promoting the rule of law, namely applying uniform treatment to similar cases to ensure impartiality (Carr, 1981). A major tenet of the rule of law is ensuring that every individual is subject to the law, regardless of his/her status, and retains equal access to the courts (Craig, 2007). This tenet is reflected in Article 6 of the Universal Declaration of Human Rights, with it now commonly understood as the right to a fair trial. Having access to counsel is integral to the right to a fair trial. As a result, a lawyer is regarded to be administering justice by providing legal representation to a defendant (UN Crime Congress, 1990).

To determine whether this maxim could be universally willed, one must question whether it would be theoretically possible for every law firm to represent a fossil fuel company. For clarity, it should be noted that when this maxim is universally applied, it is not proposed that law firms act only on behalf of fossil fuel companies, but rather that firms do not exclude fossil fuel companies from their portfolio of clients.

By applying the maxim as a universal law, no unconceivable actions can be identified. If every law firm represented a fossil fuel company, it would showcase industry-wide impartiality and commitment to uphold the rule of law. In turn, this not only naturally upholds justice but would also strengthen public trust and confidence in the legal profession and legal services’ critical role maintaining society’s foundations. A world in which impartiality and the rule of law is upheld universally is indeed conceivable as well as desirable.

Furthermore, greater representation could relate to greater climate litigation and thus wider societal impact; it is suggested that climate litigation can have direct regulatory impact, including changes in formal legal as well as corporate behaviour (Peel and Osofsky, 2015). Climate litigation has also been shown to result in indirect impacts for the parties involved, including increased public awareness (Setzer and Vanhala, 2019), which may aid the prevention of whitewash and facilitate public pressure for emitters to change their practices. As a result, climate litigation is regarded to have the potential to advance effective action on climate change (Setzer and Higham, 2021). With climate change recognised by the United Nations (2021) as an existential challenge for society, greater representation of fossil fuels may therefore be argued to be in the public interest. As a result, it can be argued that there is no logical contradiction preventing every law firm from representing a fossil fuel company.

To examine whether the universal maxim is pragmatically inconsistent, one must now question whether it would prevent Paul Weiss from representing ExxonMobil and upholding justice if everyone acted according to the maxim. Drawing parallels from the economic theory of perfect competition, if every firm represented a fossil fuel company, there would be more firms operating in this market. This would create greater competition, so in order to secure business and maintain its prestige, Paul Weiss may be forced to refine its services. Assuming Paul Weiss was able to do this, universalising this maxim could therefore positively enhance the capabilities of Paul Weiss. Although greater competition in a market can lead to a decrease in the price of a service, this impact is regarded to bear no significant weight since it is assumed that profit is not the underlying motive of Paul Weiss’ maxim. As a result, it can be suggested that no pragmatic contradiction exists.

With the maxim therefore regarded to exhibit no contractions when it is universalised, it can be willed to become universal law; it consequently passes the first formulation of the CI and the decision to represent ExxonMobil can be labelled as ethical. Although only one formulation of the CI is commonly used to determine whether an action is morally permissible (e.g. Corvino, 2021), the next section of this essay will explore the CI’s second formulation to corroborate this analysis.

**Formulation two: Respect for Humanity**

The second formulation of the CI insists that humanity is treated with respect. Kant founded this formulation on the belief that humans are entitled to respect because they exhibit dignity, which is regarded to be beyond worth (Bowie, 2017). Humans acquire dignity by being autonomous and self-governing; humans are therefore responsible for making their own decisions, so are regarded to be moral beings, which Kant argues possess dignity (Bowie, 2017). As a result, it is morally impermissible to treat someone as an object of only instrumental value since each person has an intrinsic value that must be respected (Zinkin, 2016).

Focusing on humanity’s inherent dignity, the second formulation of the CI provides a foundation for the UN Guiding Principles on Business and Human Rights which state that it is a business’ responsibility to respect human rights. Bowie (2017) goes on to suggest that Kantian ethics ultimately shows how respecting human rights is a perfect duty. A perfect duty is a duty that must always be fulfilled, with actions that violate a perfect duty regarded as unethical. As a result, Bowie (2017) argues that a violation of a human right is a violation of the CI. Using this logic, one way to examine whether Paul Weiss’ decision to represent ExxonMobil is a violation of the CI is to determine whether Paul Weiss is guilty of violating human rights. It is important to note that this analysis fits within a deontological perspective since it is recognising the potential ramifications of a decision rather than the consequence in retrospect.

A significant proportion of human rights violations by businesses is committed when a business is acting as an accomplice. In this accomplice role, the business either knowingly contributes to a violation (direct complicity) or enables the perpetrator to carry out the violation (indirect complicity) (Wettstein, 2010). One type of indirect complicity is termed beneficial complicity; in this case, a business knowingly benefits from a human rights violation committed by a third party (Wettstein, 2010). To determine whether Paul Weiss may violate a human right by representing ExxonMobil, one must first explore whether ExxonMobil has committed any human rights violations.

ExxonMobil is considered to be substantially responsible for climate change and its resulting planetary impacts (Ekwurzel et al., 2017). By transforming how the natural environment functions, climate change is adversely, and disproportionately, impacting individuals’ enjoyment of several human rights, such as rights to life, standard of living and property (UNEP, 2015). Since ExxonMobil is responsible for climate change, it can be inferred through causality that the company is therefore responsible for these human rights breaches. This was indeed concluded by the Commission on Human Rights of the Philippines in 2019, with the human rights body stating that ExxonMobil and 46 other privately owned corporations are liable for the human rights violations resulting from climate change (Greenpeace, 2019).

By representing ExxonMobil, Paul Weiss may initially be seen to violate these human rights through indirect complicity and in turn, violate the CI. For instance, although Paul Weiss has not directly participated in ExxonMobil’s high-carbon operations, the firm may benefit from the burning of fossil fuels, and thus the violation of several human rights, through receiving money for its services that was earned by committing human rights breaches. By defending ExxonMobil in the lawsuit, Paul Weiss may also be seen to be working to maintain the firm’s infrastructure and practices that prioritise the burning of fossil fuels. As a result, Paul Weiss could be regarded to be enabling ExxonMobil to continue violating human rights.

However, official guidance for the legal profession from the International Bar Association (2016), prevents Paul Weiss from receiving moral blame if it represented the fossil fuel company by stating that a lawyer cannot be associated with their clients or clients’ causes. Because this complicity was built on the assumption that Paul Weiss can be correlated with ExxonMobil’s activities, Paul Weiss’ work with the fossil fuel company cannot be seen to violate human rights. As a result, the firm’s decision to represent ExxonMobil does not violate the CI on the grounds of human rights abuses.

The final section of part two will now examine the third formulation of Kant’s CI to provide further clarity to why the decision may be regarded to be ethical.

**Formulation three: Kingdom of Ends**

The final formulation of the CI is referred to as the Kingdom of Ends formulation. By encouraging one to act as if one was a member of a perfectly just society where everyone is simultaneously subject and sovereign, the formulation highlights that actions must be hypothetically advocated and accepted by all (Bowie, 2017). This final formulation aims to overcome the issue of subjectivity through questioning whether other rational actors would make the same decision (Crane and Matten, 2016).

One major criticism Paul Weiss has faced for its decision to represent ExxonMobil is that it was driven by a motivation to make profit (e.g. McCordick, 2021). The very presence of this critical claim may infer that Paul Weiss’ decision to represent ExxonMobil fails the third formation of the CI. However, by examining how motives influence the morality of action, Kantian ethics can be used to determine whether, and how, this decision can in fact be advocated by all in a hypothetical world.

Kant believed that the motivation, or reason, behind a maxim of an action is an important determinant of morality. To be a genuine moral action, it must be motivated by duty (Bowie, 2017). However, as inferred through the criticism Paul Weiss has faced, an action may be the result of two motives: to uphold justice and to generate profit. A purist approach to Kantian ethics argues that the only acceptable motive is that driven by goodwill and thus, the mere presence of a second motive would eliminate morality (Bowie, 2017). As a result, despite passing the first and second formulations of the CI, Paul Weiss’ decision to represent ExxonMobil could be regarded to be unethical because of this profit motive.

Kant’s position on moral motives, however, has also been interpreted in a less absolutist way (e.g. Herman, 1992); Kant recognised that humans are propelled by impulses, incentives and inclinations. Non-moral incentives may therefore be present for a moral action, but the action’s moral worth remains if duty guides it (Bowie, 2017). Even if the incentive for Paul Weiss to make profit was present, the decision to represent ExxonMobil remains moral if the motive for the decision is a duty to uphold justice. Kantian ethics therefore highlights the importance a motive of duty has in determining the moral worth of an action; if Paul Weiss’ decision was driven by profit, and only happens to conform with duty, the decision may be regarded to be unethical. Taking this less purist approach, Paul Weiss’ decision to represent ExxonMobil may be accepted by all when truly motivated by duty.

**Part three: Recommendations**

With questions arising on how law firms can help the world decarbonise, this Kantian analysis has added to the debate by concluding that it is ethical for a law firm to defend a fossil fuel company. The final section of this essay sets out three recommendations Paul Weiss and other firms should take to ensure future work with fossil fuel companies remains ethical.

The first recommendation is for firms to be driven by duty in their decisions to represent fossil fuel companies. To ensure morality, the decision to represent a fossil fuel company must always be motivated by duty to do the right thing, which is to act in line with the moral law (the CI). The presence of incentives, including profit, may exist but they must not drive an action. Firms can look to their own principles to help guide such moral actions; from referring to Paul Weiss’ principle of upholding justice, the motive and maxim for Paul Weiss’ decision was deduced, which in turn revealed through the CI that the decision was ethical.

The next recommendation focuses on the role firms may adopt within their work defending fossil fuel companies. With extensive legal experience and resources, Paul Weiss and other major firms have considerable knowledge and therefore authority; with great authority comes great influence (Wettstein, 2010). In an act akin to institutional investors setting climate-related performance targets for fossil fuel companies, firms should make the case to fossil fuel companies to eliminate high-carbon operations. By representing a fossil fuel company and becoming a trusted adviser, law firms are ideally suited to drive this internal change.

The final recommendation addresses work other than litigation. Although the findings from an application of Kant’s CI should not be widely generalised, this analysis has provided wider lessons and recommendations for firms in similar circumstances. Although the maxim guiding Paul Weiss’ decision did not specify the type of work a law firm may choose to do on behalf of a fossil fuel company, the analysis assumed the type of work satisfied a client’s right to counsel. Since an individual only has a right to counsel in prosecutions (LII, ND), the analysis’ conclusion that Paul Weiss’ decision to represent ExxonMobil was ethical may only be used in the case of litigation. It is therefore concerning that several firms have used a right to counsel as a justification for their lobbying and transactional work for fossil fuel companies (McCordick, 2021). This misuse of the principle of a right to legal counsel to justify otherwise motivated actions is regarded to be immoral because one has a perfect duty to not lie (Bowie, 2017). As an additional and final recommendation, firms must stop this deceit.

*Word count = 2992*

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**Appendix**

**APPENDIX 1**

**About the assignment:**

The deliverable for the assignment is a single paper of about 3500-4000 words. This should include three main things.

* **Description of the case** (about 500-1000 words suggested length)

What organization is involved and what happened? Briefly introduce the organization you are focusing on and briefly explain the salient aspects of the decision you want to analyze. Be sure, as far as possible, to focus only one decision or situation, but pay particular attention to the background. In other words, what were the main things that were going on that meant a decision needed to be made? Resist the urge to provide a long list, just talk about the two or three key factors relevant to the decision, and do this briefly!!

* **Critical evaluation of the decision based on theoretical perspective(s) relevant to business ethics** (about 2000-2500 words suggested length)

What do you conclude about the case from a business ethics perspective? The best approach is usually to **choose one (or at most two) theoretical perspectives** and use this/these to analyze the case *in depth* rather than applying several approaches but each very *superficially*. Be sure to focus on why your analysis leads you to conclude that the decision made was ethically right or wrong or was due to a particular factor or set of factors. That is, you need to show convincingly how you have come to this conclusion, using theoretical logic and empirical evidence. This is also where other sources will be useful in providing support for your argument. Your evidence might come from media stories, NGO reports, company reports, academic articles and case studies, etc – but be sure to make clear where your evidence is from and how objective you think it is. You will then need to discuss how you conducted your analysis and why the theory or theories you have chosen are appropriate for making this decision.

* **Explanation of what the company (or other stakeholders) could feasibly do to solve the problem and/or to avoid a similar ethical problem occurring in the future** (about 500-1000 words suggested length).

What recommendations do you suggest to address the problem? Make sure your recommendations follow logically from your analysis, are based on sound logic and evidence, and are feasible within the context of the organization and its sector.

**APPENDIX 2**

**The three formulations of the categorical imperative**

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| --- | --- |
| **Formulation** | **Detail**  |
| 1 | Universal Law | Act only on maxims that you would have everyone act on (Kant, 1785; 4:402).  |
| 2 | Respect for Humanity  | Act so that you treat humanity, whether in your own person or in that of any other, always as an end and never as a means only (Kant, 1785; 4:429).  |
| 3 | Kingdom of Ends | All maxims that proceed that our own making of law ought to harmonise with a possible kingdom of ends (Kant, 1785; 4:433-438).  |