Loyola of Los Angeles Law Review

Volume 36
Number 4 *Developments in California Homicide Law*

Article 17

6-1-2003

Vegan Discrimination: An Emerging and Difficult Dilemma

Sarah Soifer

VEGAN DISCRIMINATION: AN EMERGING AND DIFFICULT DILEMMA

I. INTRODUCTION

On Tuesday, September 17, 2002, Division Five of the Second Appellate District of the California Court of Appeal handed down its decision in *Friedman v. Southern California Permanente Medical Group*.[1] According to that decision, Ethical Veganism is not a religious creed within the meaning of the California Fair Employment and Housing Act.[2] The plaintiff, Jerry Friedman, is a strict Ethical Vegan who fervently believes that "'all living beings must be valued equally.'"[3] According to his beliefs, "'it is immoral and unethical for humans to kill or exploit animals, even for food, clothing and the testing of product safety for humans.'"[4] Quite simply, the Ethical Vegan belief system guides the way he lives his entire life.[5]

Friedman was hired for employment as a computer contractor by Kaiser Permanente Medical Group (Kaiser) in a capacity that would never place him in contact with patients.[6] Although a condition of his permanent employment was a vaccination against mumps,[7] Friedman could not be vaccinated because the vaccine "is grown in

1. 102 Cal. App. 4th 39, 125 Cal. Rptr. 2d 663 (2002).

2. *See id.* at 43, 125 Cal. Rptr. 2d at 665; CAL. GOV'T. CODE § 12940 (West Supp. 2003).

3. *Friedman* at 102 Cal. App. 4th at 44, 125 Cal. Rptr. 2d at 665 (quoting from plaintiff's original complaint).

4. *Id.*

5. *See id.* at 44, 125 Cal. Rptr. 2d at 666 (according to plaintiff's original complaint).

6. *See id.*

7. *See id.* The Measles, Mumps and Rubella Virus Vaccine Live (MMR) is manufactured by Merck & Co. It is formed from a sterile preparation of the measles and mumps viruses, grown in cultures of chick embryo cells, and a live strain of rubella virus grown in "human diploid lung fibroblasts." 51 PHYSICIAN'S DESK REFERENCE 2022 (2003).

chicken embryos."[8] The vaccination violated Friedman's system of beliefs and he considered taking it immoral.[9] When Friedman refused to be vaccinated, Kaiser withdrew their offer of employment.[10]

The following are but a few incidents of discrimination against Ethical Vegans,[11] which, admittedly, sound silly at first telling. These stories, however, illustrate how a small segment of society that holds sincere beliefs regarding the ethical and equal treatment for all creatures is often sorely mistreated because of those very beliefs. Discrimination against Ethical Vegans may not be earth-shattering news; it may even seem frivolous and inconsequential compared to current world events. There is value, however, in exploring the capacity of our legal system to marginalize, or protect, those who do not hold orthodox, mainstream beliefs.

---

8. *Friedman*, 102 Cal. App. 4th at 44, 125 Cal. Rptr. 2d at 666.

9. *See id.* (according to plaintiff's complaint).

10. *See id.*

11. Friedman's petition to the California Supreme Court described Ethical Veganism aptly:

> Ethical Veganism extends beyond trivial dietary preferences. Diet is merely a small part of observing a non-exploitive relationship with the people and animals of this world. Ethical Veganism is a relational lens through which to view the world. Ethical Vegans are not "speciesist" and value the sanctity of all life, seeking to exclude from their life, as far as possible and practical, all forms of exploitation of, and cruelty to, animals for food, clothing or any other purpose. Consequently, Ethical Vegans do not eat meat, fish or poultry, and do not use other animal products and by-products including eggs, dairy products, honey, leather, fur, wool, soaps and toothpastes which contain lard, etc., and Ethical Vegans do not participate in the biomedical experimentation on animals and avoid activities or products which encourage it. As can be seen from this "list" of prohibited activities, being vegetarian is only one small part of being an Ethical Vegan. While being a Vegan or Ethical Vegan necessarily implies that one is a vegetarian, the opposite is not true; being a vegetarian does not imply one is an Ethical Vegan, let alone a Vegan. . . . There is a common ethical principle shared by all Vegans which is a reverence for life and desire to live with, as opposed to depending upon, the other species of the planet.

Petition for Review at 17 (Oct. 23, 2002) (No. S110916) Friedman v. S. Cal. Permanente Med. Group, 102 Cal. App. 4th at 39, 125 Cal. Rptr. 2d at 663 (2002) [hereinafter Petition for Review].

Bruce the Vegan Bus Driver is a figure of some renown within the Vegan community.[12] He drove a bus for an Orange County, California, transit authority and was told to distribute hamburger coupons as part of a promotional campaign between the Orange County Transit Authority and a fast food chain.[13] Bruce refused to do so and was fired.[14] He settled the case for an undisclosed amount before filing suit.[15]

Mona Parmar, an Ethical Vegan, was required to take a tuberculosis (TB) test in order to obtain a teaching job in California.[16] The test was a non-Vegan skin test.[17] When she refused the injection, the doctor berated her and refused to give her a chest X-ray.[18] Only when she told the doctor that she was Hindu and expressed identical values to Ethical Veganism, did the doctor permit her to take a chest X-ray.[19] Jerry Friedman, the plaintiff discussed above, was injected with the same kind of TB test, assured by Kaiser that it was Vegan.[20] He learned nine months later that the test contained cow's blood derivatives.[21]

Workplace discrimination against Ethical Vegans is a new and emerging phenomenon. Little case law exists on the subject, and there is no current statutory provision in California to protect against

---

12. *See Good News: Victorious Vegan*, EARTH ISLAND J., *at* http://www.earthisland.org/eijournal/dept.cfm?journalID=50&departmentCatID=11 (Spring 1997); Campaigns Country USA, United States of America: 1996, *at* http://www.mcspotlight.org/campaigns/countries/usa/usahist.html (last visited Feb. 20, 2003) (these two websites represent a small fraction of the Vegan lore on the Internet devoted to Bruce the Vegan Bus Driver).

13. Gloria Allred's Website, Bruce Anderson v. Orange County Transit Auth., *available at* http://www.gloriaallred.com/sig.htm (last visited Feb. 23, 2003).

14. *See id.*

15. *See id.*

16. E-mail from Jerry Friedman, plaintiff, Friedman v. S. Cal. Permanente Med. Group (Sept. 19, 2002) (on file with the author) [hereinafter E-mail of Sept. 19, 2002].

17. The author consulted the PHYSICIAN'S DESK MANUAL (1997) and a medical expert, and could not verify that a standard TB test is a non-Vegan test.

18. *See* Email of Sept. 19, 2002, *supra* note 16.

19. *See id.*

20. *See id.*

21. *See id.*

such discrimination.[22] In Part II, this Article will briefly sketch the beliefs and practices of Ethical Veganism. Part III will address the problematic test the California Court of Appeal used to decide that Ethical Veganism is not a protected religious creed or belief. The contrasting California authority on religion is examined as well. Part IV offers three proposed solutions to the dilemmas facing Ethical Vegans: a more liberal test for what constitutes a religious creed; a statute similar to that currently applicable within the schools for immunization exemptions for religious reasons; and the invocation of Hinduism whenever issues with Vegan needs arise. Part V will conclude the analysis and provide an update on Friedman's case.

II. BACKGROUND ON ETHICAL VEGANISM

There are ten million Americans who consider themselves vegetarians today, and "an additional 20 million have flirted with vegetarianism sometime in their past."[23] Ethical Vegans are a subset of the numerous varieties of vegetarians and are the strictest in their avoidance of meat and animal products.[24] Ethical Vegans, in contrast to many vegetarians, do not consume, use, or wear any animal products, while some who consider themselves to be vegetarians regularly consume fish and chicken.[25]

Ethical Vegans neither eat foods derived from animals, including cheese and milk, nor do they wear wool or leather, or use down bedding.[26] The rock star Moby and Ohio Congressman Dennis Kucinich are among celebrity vegans.[27] Ethical Veganism is a lifestyle, a belief, a moral code, a guiding principle, and to some, a

22. The Author conducted a Lexis search of (1) California statutes and (2) federal and state cases in the Ninth Circuit using the terms and connectors "vegan! and discrim!" on Feb. 7, 2003. No statutes were found, and only five cases were found. Of the cases that were found: one of the cases was Friedman's case, two were cases mentioning a person named "Veganes," one case concerned residents of Las Vegas, and one case concerned a prisoner who complained of discrimination because the prison did not provide him with vegan meals.

23. Richard Corliss, *Should We All Be Vegetarians?*, TIME MAGAZINE, July 15, 2002, at 50.

24. *See id.* at 51–52.

25. *See id.*

26. *See id.* at 51.

27. *See id.*

religion. A typical Ethical Vegan explanation for choosing to follow their beliefs is a desire to "live without contributing to animal suffering."[28]

Interestingly, the Ethical Vegan way of life may not be a "New Age" concept. Princeton ethics professor, Peter Singer, wrote one of the first modern treatises on the subject of animal liberation, in which today's Ethical Veganism has its roots, in 1975.[29] In addition, Apollonius of Tyana, a philosopher-sage whose life and teachings were recorded by the Greek philosopher Philostratus, was perhaps the first "Ethical Vegan."[30] He reportedly consumed no animal products, wore shoes of bark, and refused to partake in sacrificing a horse when he met with the King of Babylon.[31] Furthermore, vegetarianism generally has been in existence for thousands of years. The well-established world religions of Brahmanism, Buddhism, Jainism, and Zoroastrianism all advocate "abstention from flesh foods."[32]

It is estimated that there are now between a half-million and two million Vegans in the United States.[33] These half-million to two million Vegans live to alleviate the suffering of others and are driven by kindness and compassion for life when making their choice about their beliefs and way of life.[34] These beliefs, choices, moral tenets, and guiding principles are no less a religion to Ethical Vegans than are the tenets and principles of a mainstream religion to a strict believer.

---

28. Vegan Outreach, *Why Vegan?*, *at* http://www.veganoutreach.com/whyvegan/index.html (last visited Feb. 23, 2003) [hereinafter *Why Vegan?*].

29. *See* PETER SINGER, ANIMAL LIBERATION (2d ed. 1990).

30. E-mail from Jerry Friedman, Plaintiff, Friedman v. S. Cal. Permanente Med. Group (Oct. 14, 2002) (on file with the author); Magna, *The Life of Apollonius of Tyana by Philostratus*, *at* http://www.magna.com.au/~prfbrown/a_tyana0.html (last visited Feb. 20, 2003).

31. *See id.*

32. European Vegetarian Union News, Bronwen Humphreys & Tinafox, *1847–1997 Vegetarianism: A Cause for Celebration* (1997), http://europeanvegetarian.org/evu/english/news/news972/celebrations.html.

33. Vegan Outreach, Widening the Circle, *at* http://www.veganoutreach.com/whyvegan/compassion.html (last visited Feb. 23, 2003) (the Author could not independently verify the Roper Poll data reported on the web site).

34. *See Why Vegan?*, *supra* note 28.

III. CALIFORNIA COURT OF APPEAL: A CRABBED INTERPRETATION OF A RELIGIOUS CREED

A. The Court's Choice of Definition

As mentioned above, Kaiser rescinded plaintiff Friedman's job offer after Friedman refused to take an MMR vaccination that would violate his vegan beliefs.[35] His job never would have placed him in contact with patients of the health care group.[36] At issue in *Friedman* is the definition used to determine "religious creed" under the California Fair Employment and Housing Act (FEHA) and California Code of Regulations Section 7293.1.[37] Religion under the FEHA is defined both in the statute itself and, in greater detail, in the California Code of Regulations.[38] The judicial interpretation of religion under the FEHA is an issue of first impression for the California courts.[39]

The California Code of Regulations states, "'Religious creed' includes any traditionally recognized religion as well as beliefs, observations, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions."[40] This Article will show that Friedman's beliefs qualify as a religious creed under this broad and inclusive statutory definition.

This definition of a religious creed is based upon a concept of religion that originated in *United States v. Seeger*.[41] In consolidated cases, the Supreme Court dealt with the claims of nonreligious conscientious objectors to the draft.[42] The Court announced:

> We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in

35. *See Friedman*, 102 Cal. App. 4th 39, 44, 125 Cal. Rptr. 2d 663, 666 (2002).
36. *See id.*
37. *Id.* at 45–46, 125 Cal. Rptr. 2d at 666–67.
38. *See id.*
39. *See id.* at 46, 125 Cal. Rptr. 2d at 667.
40. CAL. CODE REGS. tit. 2, § 7293.1 (1995).
41. 380 U.S. 163 (1965).
42. *See id.*

> God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not.[43]

This test is broad and inclusive of non-orthodox beliefs because it does not impose outside evaluative criteria upon the beliefs of the adherent. This test refrains from inquiring into the specifics of the beliefs and looks instead to the place those beliefs occupy in the adherent's life.

The California Court of Appeal in *Friedman* followed neither California state law nor the test announced by the Supreme Court in *Seeger*. This court inexplicably adopted a test for religious creed from a 1979 concurring opinion by Judge Arlin M. Adams of the United States Court of Appeals for the Third Circuit.[44] This test is rooted in a Judeo-Christian view of the world and may not be inclusive enough to lead to a result that would find a religion such as the Bahá'í faith to be a protected religious creed, as will be discussed in Section B.

Judge Adams' opinion developed a three-criteria test for religion.[45] According to Judge Adams:

> The first and most important of these indicia is the nature of the ideas in question. This means that a court must, at least to a degree, examine the content of the supposed religion, not to determine its truth or falsity, or whether it is schismatic or orthodox, but to determine whether the subject matter it comprehends is consistent with the assertion that it is, or is not, a religion.[46]

The first criterion examines the content of the belief to determine if "it is, or is not, a religion,"[47] an examination that directly inquires

---

43. *Id.* at 165–66. *United States v. Seeger* addressed a challenge under the Establishment and Free Exercise Clauses to the "Universal Military Training and Service Act." *Id.* at 164–65.

44. *See Friedman* 102 Cal. App. 4th at 66, 125 Cal. Rptr. 2d at 682. The *Friedman* court explained their selection of the test in Judge Adams' concurrence as the test that "presents the best objective method for answering the question whether a belief plays the role of a religion and functions as such in an individual's life." *Id.*

45. *See* Malnak v.Yogi, 592 F.2d 197, 207–08 (3d Cir. 1979).

46. *Id.* at 208.

47. *Id.*

into the contents of the beliefs of the adherent. This test veers sharply from the *Seeger* approach, which does not look to the contents of the adherent's beliefs.

Judge Adams' second criterion to test for a religion is comprehensiveness.

> [T]he "ultimate" nature of the ideas presented is the most important and convincing evidence that they should be treated as religious. Certain isolated answers to "ultimate" questions, however, are not necessarily "religious" answers, because they lack the element of comprehensiveness, the second of the three indicia. A religion is not generally confined to one question or one moral teaching; it has a broader scope. It lays claim to an ultimate and comprehensive "truth."[48]

Again, Adams' test takes a much narrower view of religion than did *Seeger*. Adams' test is more focused on the content of the belief rather than the place of the belief in the adherent's life. This type of inquiry is contrary to the *Seeger* test articulated by the Supreme Court, which explicitly does not look to the content of the belief. Judge Adams' test requires the court to make value judgments about the content of an individual's belief system instead of examining the place in the life of the adherent that the belief holds.

Adams' third and final criterion to test for religion is:

> [A]ny formal, external, or surface signs that may be analogized to accepted religions. Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions. Of course, a religion may exist without any of these signs, so they are not determinative, at least by their absence, in resolving a question of definition. But they can be helpful in supporting a conclusion of religious status given the important role such ceremonies play in religious life.[49]

48. *Id.* at 208–09 (citations omitted).
49. *Id.* at 209 (citations omitted).

Adams' test is content based and narrow in its scope. It requires the finder of fact to inquire into the tenets and rituals of a given faith in a judgment-laden manner.

B. The Bahá'í Faith and Catholicism Under Judge Adams' Test

The contrast between the fate of the Bahá'í faith under Judge Adams' test and of Catholicism highlights the Judeo-Christian bias of Judge Adams' test. The first criterion of Judge Adams' matrix examines the subject matter of a faith as a religion. The Bahá'í faith views God as the Creator who sends Prophets, including Moses, Christ and Mohammed, to bring the knowledge of God to the world.[50] This view, most likely, would fall within the range of acceptability of the test.

The second part of Judge Adams' test examines the comprehensiveness of the belief and looks for the existence of "an ultimate and comprehensive 'truth.'"[51] The Author's understanding of the Bahá'í faith is that, although the outlook of the faith is global, the religion does not prescribe one particular "truth" for its adherents.[52] Rather, individual spiritual development is emphasized and fanaticism is forbidden.[53] The goal of the Bahá'í faith is "to promote the unity of the human race while accepting and respecting the individuality of each person."[54] Although the Bahá'í faith certainly addresses an "ultimate truth," it does not prescribe that truth for its congregants, which may be problematic under Judge Adams' test.

Judge Adams' third criterion for religion looks to formal, external signs "that may be analogized to accepted religions."[55] The Bahá'í faith does not have clergy, although there are some houses of worship that conduct simple devotional programs.[56] The Bahá'í faith

50. *See* Bahai.org, Welcome to the Bahá'í Faith: A Global Faith, *at* http://www.us.bahai.org/faith/faith3.html (last visited Feb. 23, 2003) [hereinafter The Bahá'í Faith]; A DICTIONARY OF COMPARATIVE RELIGION 125 (S.G.F. Brandon ed., 1975) [hereinafter DICTIONARY].

51. *Malnak*, 592 F.2d at 208–09.

52. *See* The Bahá'í Faith, *supra* note 50; DICTIONARY *supra* note 50.

53. *See id.*

54. The Bahá'í Faith, *supra* note 50.

55. *Malnak*, 592 F.2d at 209.

56. *See* Bahai.org, The Bahá'í World: Bahá'í Houses of Worship, *at* http://www.bahai.org/article-1-2-0-13.html; DICTIONARY, *supra* note 50.

lacks some of the major indicia that Judge Adams deems necessary to find a true religious creed. This example illustrates the narrowness of the definition, such that the Bahá'í faith, a known world religion, could conceivably not qualify as a religious creed.

The Adams test comprehends Judeo-Christian religions much more effectively than it does other faiths. For example, Roman Catholicism, another recognized world religion, fits neatly within Judge Adams' three criteria. First, Catholicism is most certainly a religion in every sense of Judge Adams' criteria. The subject matter it comprehends is global in spiritual matters and, in many ways, global in daily living matters.[57]

Second, Catholicism not only meets the next prong of Judge Adams' test[58] it proclaims itself to the world as the true Church, "as the only legitimate inheritor of the ministry of Jesus, by virtue of an unbroken succession of leaders beginning with St. Peter the Apostle and continuing to the present day."[59] Third and finally, the "formal, external or surface signs"[60] of the Catholic Church are too numerous to list. Suffice it to say that the Church provides for clergy, numerous formal religious services, numerous religious rituals, a vast organizational structure, missionaries, and holidays.[61]

In short, Judge Adams' test provides well for Judeo-Christian based religions, but does not provide very well even for established religions with non-Judeo-Christian structures and beliefs. This result is illustrated by the contrasting cases of the Bahá'í faith and the Roman Catholic Church. There is not much room in this test for emerging or unorthodox religions such as Ethical Veganism.

C. The California Court of Appeal's Odd Approach

Even under Judge Adams' test, Ethical Veganism could qualify as a protected religion if the court of appeal had not chosen to take such a crabbed and restrictive view of the religion. Under Judge

57. *See* THE OXFORD DICTIONARY OF WORLD RELIGIONS 821–22 (John Bowker ed., 1997) [hereinafter THE OXFORD DICTIONARY].

58. *See Malnak*, 592 F.2d at 207–08 (questioning whether the religion "lays claim to an ultimate and comprehensive 'truth'").

59. Yahoo! Reference: The Britannica Concise: Roman Catholicism, *at* http://education.yahoo.com/search/be?lb=t&p=url%Ar/roman_catholicism (last visited Feb. 20, 2003); *see* THE OXFORD DICTIONARY, *supra* note 57.

60. *Malnak*, 592 F.2d at 209.

61. *See* THE OXFORD DICTIONARY, *supra* note 57.

Adams' criteria, Ethical Veganism comprehends a global philosophy and worldview.[62] It provides the answer to the ultimate question of how one is to conduct one's life and how one is to relate to the world, as is required by the second criterion.[63] Finally, the test should be satisfied by nearly endless formal signs of adherence; Ethical Vegans refrain from leather, wool, down, silk, honey, etc., in short, from anything made from or with animal products.[64] Ethical Vegans even ask other Ethical Vegans to perform Ethical Vegan marriage ceremonies.[65] Not only was the adoption of this test from the Third Circuit odd,[66] it was inconsistent with California law. California statutory and regulatory law, as well as case law, provides for the broader, more inclusive *Seeger* definition of a religious creed.[67]

The *Friedman* Court reads the California Code of Regulations section overly narrowly. The Code section provides that, "'Religious creed' includes any traditionally recognized religion *as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to*

62. *See* Petition for Review, *supra* note 11, at 19–20.

63. *See id.*

64. *See id.* at 3–4.

65. *See* Vegetarians in Paradise, *Vegetarians in Paradise Obtains Statement from Jerry Friedman, at* http://www.vegparadise.com/news1.html (last visited Feb. 23, 2003).

66. The *Friedman* court explained that Judge Adams' test has been "adopted by the Third, Eighth, Ninth, and Tenth Circuits." *Friedman v. S. Cal. Permanente Med. Group*, 102 Cal. App. 4th 39, 66, 125 Cal. Rptr. 2d 663, 682 (2002). The *Friedman* court explained that the Ninth Circuit adopted Judge Adams' test in *Alvarado v. City of San Jose*. *Id.* at 64–65, 125 Cal. Rptr. 2d at 681 (citing *Alvarado v. City of San* Jose, 94 F.3d 1223 (9th Cir. 1996)). The *Alvarado* court cited to Judge Adams' test and used it to help evaluate a claim of religious establishment against a municipality. *See Alvarado*, 94 F.3d 1223, 1228–31 (9th Cir. 1996). The claim asserted that the municipality's installation of a sculpture violated the Establishment Clause. *See id.* at 1225. The sculpture was by a renowned Hispanic artist and represented the "Plumed Serpent," a figure in Aztec mythology. *See id.* The application of Judge Adams' test was used in a very different context than that of Friedman. If one may look behind the rationale of the *Alvarado* court, one may see that it is likely that the Ninth Circuit judges would not be inclined to find for the plaintiffs' claim that this sculpture violated the First Amendment of the United States Constitution. Judge Adams' test was very helpful in this regard.

67. *See* CAL. CODE REGS. tit. 2, § 7293.1 (2002).

that of traditionally recognized religions."[68] The court found that "[r]egulation 7293.1 . . . requires something more than a strongly held view of right and wrong."[69] Friedman's beliefs are much more than "a view of right and wrong." They clearly occupy a place in his life akin to a traditional religion and are not, as the court dismissively said, merely "a personal philosophy."[70]

D. The Definition of Religion in California Precedent

The issue in *Friedman* was nominally one of first impression for the *Friedman* court, meaning that there is no precedent in California law. This is true as far as the definition of religious creed under the FEHA or section 7293.1.[71] However, there have been numerous cases in which a definition of religion was at issue. The instant issue simply arose in the context of Ethical Vegan beliefs in the workplace, as governed by the meaning of a religious creed within FEHA.

Smith v. Fair Employment and Housing Commission may be the leading case in California containing a definition of religion, but the Court of Appeal's reliance on that case is misplaced.[72] The test for religious belief the *Smith* court articulated was a statutory test under the now-defunct Religious Freedom Restoration Act (RFRA).[73] That act, passed by Congress in 1993, along with decisions interpreting it, led to a narrow definition of religion specific to the provisions of the RFRA.[74] The RFRA, however, was found to have unconstitutionally exceeded Congress's power in a 1997 Supreme Court decision.[75]

The RFRA prohibited the government from burdening a religious adherent with the applicability of a general law that was contrary to their beliefs.[76] The *Friedman* court, however, failed to

---

68. *Id.* (emphasis added).
69. *Friedman*, 102 Cal. App. 4th at 68, 125 Cal. Rptr. 2d at 684.
70. *Id.* at 70, 125 Cal. Rptr. 2d at 686.
71. *See id.* at 46, 125 Cal. Rptr. 2d at 667.
72. 12 Cal. 4th 1143, 913 P.2d 909, 51 Cal. Rptr. 2d at 700 (1996).
73. *See id.* at 1165–66, 913 P.2d at 922, 51 Cal. Rptr. 2d at 712–13.
74. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1489 [hereinafter Religious Freedom Restoration Act of 1993].
75. *See* Boerne v. Flores, 521 U.S. 507, 536 (1997).
76. *See* Religious Freedom Restoration Act of 1993, *supra* note 74, § 3. The government may burden a person's exercise of religion only if the following criteria are met: compelling government interest and least restrictive means. *See id.* § 3(b).

note that distinction and quoted *Smith*, correctly, as providing that the protected belief must be a "religious belief rather than . . . a philosophy or way of life."[77] The Act protects against the government "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability . . . ."[78] Such a standard is completely understandable if a plaintiff is to be excused from the application of a law to which most others are subject.

The issue in *Friedman*, however, is not the general application of a law that impedes religious practice or belief. At issue in *Friedman* is the meaning of "religious creed" under FEHA. *Smith* is not on point because the issue in that case was applicability of a general rule to private parties when one party was trying to avoid adhering to the requirements of that law.[79]

A California case that is more to the point is *Fellowship of Humanity v. County of Alameda*.[80] On a question of whether the church was able to claim an exemption from city and county property taxes, the *Fellowship* court articulated a broad and inclusive definition of religion. While the court was referring to tax exemption laws, it held that:

> Religion simply includes: (1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of the belief. The content of the belief is of no moment.[81]

This definition of religion, unlike that used by the *Friedman* court, correctly includes moral/ethical belief systems within the broad framework of religion. More importantly, the court of appeal there recognized that the content of the belief is not for the court to examine or assess.

---

77. *Smith*, 12 Cal. 4th at 1166, 913 P.2d at 922, 51 Cal. Rptr. at 713.

78. Religious Freedom Restoration Act of 1993, *supra* note 74, § 3(a).

79. *See Smith*, 12 Cal. 4th at 1152–54, 913 P.2d at 912–14, 51 Cal. Rptr. 2d at 703–05.

80. 153 Cal. App. 2d 673, 315 P.2d 394 (1957).

81. *Id.* at 693, 315 P.2d at 406.

A different court of appeal used the very same test for religious belief in *Saint Germain Foundation v. County of Siskiyou*.[82] This was another tax dispute in which the court had to determine whether the organization was religious in order to qualify for the tax exemption. Significantly, the opinion stated: "The secular State is not equipped to ascertain the truth or error of these theological beliefs, or to distinguish orthodoxy from heresy. Indeed, it is constitutionally prohibited from doing so."[83] This court recognized that it was not to evaluate the content of the belief system, but instead was to determine whether the function of the system meets certain criteria.

E. Further Problems with the Friedman Court's Failure to Accommodate

First, the Third Circuit's test for religion, adopted by the *Friedman* Court, unconstitutionally inquires into the content of the belief of the adherent. As the Supreme Court stated in *Seeger*, "Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these inquiries are foreclosed to the Government."[84] Judge Adams' test does exactly what the Supreme Court said was foreclosed to the Government to do.

The California court asserts that federal courts have moved towards a narrower definition of religion than *Seeger* and the other conscientious objector cases.[85] Although this may be true, the narrower test "compares a belief system to more traditional religions."[86] There are potentially severe problems with that type of comparison, as Friedman's petition to the California Supreme Court points out:

> The court therefore favors traditional religions and disfavors non-traditional religions, a violation of the Establishment Clause which is to give no preference. Indeed, the government can only test sincerity, not reasonableness; otherwise, the court is saying that

82. 212 Cal. App. 2d 911, 28 Cal. Rptr. 393 (1963).
83. *Id.* at 916, 28 Cal. Rptr. at 395.
84. *United States v. Seeger*, 380 U.S. 163, 184 (1965).
85. *See Friedman*, 102 Cal. App. 4th at 67, 125 Cal. Rptr. 2d at 683.
86. *Id.* at 66, 125 Cal. Rptr. 2d at 683.

> traditional religions are reasonable and untraditional religions are reasonable only if they are like traditional religions.[87]

If this is indeed true, then neither the trial court nor the appellate court should have tested Friedman's beliefs under the *Malnak* criteria.[88] At the very least, the issue of whether or not Friedman's beliefs were a "religious creed" within the meaning of the FEHA should have been decided by a trier of fact, not as an issue of law on a demurrer.[89]

Second, the *Friedman* court failed to effectively address this issue under the FEHA. Not only does the FEHA set forth its own regulatory definition of a religious creed, as mentioned above, but the FEHA also creates an affirmative duty on the part of the employer to accommodate the individual's religious beliefs or observances.[90] The FEHA (California Government Code Section 12940) states:

> It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification . . . [f]or an employer or other entity covered by this part to refuse to hire or employ a person . . . or to discharge a person from employment . . . unless the employer . . . demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties to be performed at another time or by another person . . . .[91]

Interestingly, there is no evidence whatsoever that Kaiser made any effort to accommodate Friedman's beliefs. He was willing to comply with Kaiser's needs by virtually any means but those that contributed to cruelty to animals. Friedman was willing to be "check[ed] periodically for mumps symptoms, following any other regimen not involving the suffering or death of an animal, and even agreeing to work off-site."[92] The court should have analyzed

87. Petition for Review, *supra* note 11, at 23.
88. *See id.*
89. *Id.*
90. *See* Petition for Review, *supra* note 11, at 11–12.
91. CAL. GOV'T CODE § 12940 (West 1992 & Supp. 2003).
92. Petition for Review, *supra* note 11, at 5–6.

Friedman's claims in light of the FEHA, the accompanying definition of religion, and the affirmative duty this statute imposes upon employers.

Third, the defendants' Answer to Friedman's Petition for Review to the California Supreme Court avoids addressing the choice of test issue at all.[93] In fact, the defendants strangely assert that the court of appeal "applied the definition of 'religious creed' set forth in the FEHA and the applicable regulation."[94] If that were, in fact, what the court of appeal used to evaluate Friedman's claim, he would have much less to complain of. However, the court of appeal imported the Third Circuit test and used that to evaluate Friedman's claim. The defendants must have been aware of this problem and carefully avoided all mention of it in their Answer.[95]

Furthermore, although there is little case law on whether or not Ethical Veganism constitutes the equivalent of a religion, the Equal Employment Opportunity Commission (EEOC) has addressed this question. The EEOC has made determinations that it considers Ethical Veganism to be the equivalent of a religion.[96] Individuals often choose to become "strict vegetarian due to moral and ethical beliefs as to what is right and wrong, and . . . sincerely hold[] these beliefs with the strength of traditional religious view."[97]

Judge Adams' test simply does not account for less traditional beliefs. There is no evidence in the FEHA, the CCR, California case law, or federal case law that only "institutional religions" are protected.[98] It might be noted that for some time, "the various branches of the Protestant Christian churches, such as Methodist, Baptist, Lutheran, Episcopalian, Presbyterian, etc., were at one time *not* considered 'institutional religions,' with the Roman Catholic Church being the only 'institutional Christian religion, hence the

93. *See* Answer to Petition for Review, (No. S110916) Friedman v. S. Cal. Permanente Med. Group, 102 Cal. App. 4th 39, 125 Cal. Rptr. 2d 663 (2002) [hereinafter Answer to Petition for Review].

94. *Id.* at 3.

95. *See id.*

96. *See* Petition for Review, *supra* note 11, at 9–10; Court TV Library, *U.S. Equal Employment Opportunity Commission, Charge No. 345960598, available at* http://www.courttv.com/legaldocs/misc/veggie.html (last visited Mar. 13, 2003) [hereinafter *EEOC Charge*].

97. *Id.*

98. Petition for Review, *supra* note 11, at 15–16.

term 'Protestant' as in 'protest.'"[99] Clearly religious protections do not extend only to mainstream religions: the FEHA and the CCR, which are the relevant laws here, make no such assertion.

Finally, the defendants assert in their Answer that the California Supreme Court should not review the case, as the question pertains to Friedman only.[100] The question presented is, however, much larger than Friedman's own personal interest. As described above, there is workplace discrimination against Vegans in the State of California. Beyond the issue of discrimination, which should be addressed as there is a statutory mandate in this state to protect workers against workplace discrimination, the court of appeal adopted a strange test for religious creed. The test was not California law, nor did it conform to existing California precedent. This is certainly an issue that should be addressed by the California Supreme Court if the courts are now free to adopt whatever tests for religion they like best, without regard to the law of the state.

In sum, the California courts, or at least this one, have taken a narrow and crabbed view of what constitutes a religious creed or belief. They have ignored the United States Supreme Court, California case law, California statutes and regulations, and the EEOC, and have obstinately used a highly restrictive test. If the California Supreme Court is concerned with the implications of a broader holding, it can rest assured that the plaintiff's beliefs are sincerely held and occupy for him every bit of an important place in his life, as do traditional religions for others.

True, a case-by-case analysis of every religious discrimination case may not be a reality for our over-burdened, under-funded state-court system, but the *Friedman* court dismissed the plaintiff's claim almost casually. Many great world religions have begun as small, fringe groups reviled by the mainstream. Perhaps Ethical Veganism will remain on the fringes, or perhaps it will not. Friedman's case demonstrates that our legal system, based upon stare decisis, and with conservative tendencies, is not equipped to deal with deviations from mainstream religious institutions. The case in which the Orthodox Jew is fired for not working on his Saturday Sabbath is much easier for courts to deal with than is Friedman's case. The

99. *Id.*

100. *See* Answer to Petition for Review, *supra* note 93, at 6.

foregoing analysis has demonstrated that plaintiffs in California, and probably the nation, face an uphill battle in establishing that their very genuine beliefs qualify as a religion under the current legal regime. There is simply not much room for deviation from the "norm."

IV. THREE PROPOSED SOLUTIONS

A. A Measured Approach: Simply Adopt Existing California Definition of Religious Creed

Addressing discrimination against Ethical Vegans in the employment context can be a simple matter. The California Supreme Court should simply look to the language of the FEHA and the California Code of Regulations section 7293.1. Not only does a definition of religion already exist under California law, but it is also sufficiently broad to encompass the beliefs of Ethical Vegans. This approach is the clearest, most efficient, and simplest solution to the narrow approach that the California courts have taken.

Section 7293.1, as previously mentioned, defines religious creeds as, "includ[ing] any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions."[101] This definition is broad, inclusive and encompasses the *Seeger* court's approach to the religion inquiry which forecloses inquiry into the content of the individual's beliefs, and instead looks at the function of those beliefs in the life of the adherent.[102]

The California Court of Appeal asserted that federal courts have been retreating from *Seeger*.[103] That may be indisputable, and there is certainly a great deal of case law to substantiate that assertion.[104] The Fair Employment and Housing Commission promulgated regulations specifically for the housing and employment context that contained the broad language that reflects a *Seeger*-like view of religion. There is no good reason for the California courts to not

101. CAL. CODE REGS. tit. 2, § 7293.1 (2002).

102. *See* United States v. Seeger, 380 U.S. 163, 165–66 (1965).

103. *See Friedman v. S. Cal. Permanente Med. Group*, 102 Cal. App. 4th 39, 66, 125 Cal. Rptr. 2d 663, 682 (2002).

104. *See id.*

follow California law on this question. The court should have simply adopted the most obvious definition of religious creed for this context—that codified in the California Code of Regulations.

B. A Legislative Approach: Adopt Workplace Protections to Protect Ethical Vegans

Another possibility is to adopt workplace protections for Ethical Vegans, or Vegetarians generally. The foregoing stories of discrimination against Ethical Vegans illustrate the misunderstanding and hostility they frequently face in the workplace. Ethical Vegans are commonly considered deviant and strange.

Vegetarians, however, are increasingly common in the United States, numbering about ten million.[105] Additionally, less-than-scientific observations of the Author show that vegetarian dining options are frequently available at banquets, restaurants, on airlines, and in university dining halls. An amendment to the California Health and Safety Code to protect Ethical Vegans and Vegetarians would address the workplace discrimination that Friedman and others have faced.[106]

The California Health and Safety Code currently contains a provision that exempts children from required immunizations based upon beliefs opposed to immunization. Section 120365 states:

> Immunization of a person shall not be required for admission to a school . . . if the parent or guardian or adult who has assumed responsibility for his or her care . . . files with the governing authority a letter or affidavit stating that the immunization is contrary to his or her beliefs. However, whenever there is good cause to believe that the person has been exposed to one of the communicable diseases . . . that person may be temporarily excluded from the school or institution until the local health officer is satisfied that the person is no longer at risk of developing the disease.[107]

---

105. *See* Corliss, *supra* note 23, at 50.

106. *See* E-mail from Robert M. Meyers, attorney (Sept. 20, 2002) (on file with the Author).

107. CAL. HEALTH & SAFETY CODE § 120365 (West 1996).

Not only would such a statute as applied in the employment context solve Friedman's problem, it would also address the needs of Ethical Vegans generally, as well as others whose religion prevents them from obtaining vaccinations.

Clearly, not everyone who wished to be exempted from a vaccine could be—if Friedman's job with Kaiser brought him in contact with patients, it may very well have been reasonable for the employer to require him to have the proper vaccinations. And there will be other employment contexts in which an exemption from a vaccination is a health risk and is impossible.

A simply worded statute modeled after the California Health and Safety Code section 120365 would suffice: "Immunization of a person shall not be required for employment if the person seeking employment files with the governing authority a letter or affidavit and explanation stating that immunization is contrary to his or her beliefs."[108] A statute modeled after the existing one would afford Ethical Vegans a modicum of protection in the employment context.

If such a statute had been in existence at the time of Friedman's maltreatment, his rights most likely would have been protected and his job would have remained intact. Friedman would have simply presented his employer with a letter or affidavit explaining that the immunization was contrary to his beliefs. Kaiser would then have been statutorily required to honor Friedman's beliefs and excuse him from the immunization, while not rescinding his job offer.

C. Invoking Hinduism

Perhaps a more practical, although admittedly less honest, approach might better address Friedman's situation. Mona Parmar was permitted to take a chest X-ray instead of taking a non-Vegan TB test by explaining that she was Hindu and that taking the TB test violated her religious beliefs.[109] Ethical Vegans might say something like, "for religious reasons according to the Hindu belief that X is wrong, I cannot X," whenever a situation arises that presents a conflict with their religious beliefs.

---

108. *See id.*
109. *See* Email of Sept. 19, 2002, *supra* note 16.

Strict adherents to Hinduism refrain from eating all meat, especially that of the cow.[110] "Fundamental to Hinduism is the belief in a cosmic principle of ultimate reality called Brahman, and its identity with the individual soul, or atman. All creatures go through a cycle of rebirth, or samsara . . . . The principle of karma determines a being's status within the cycle of rebirth."[111] Devout Hindus believe that man should not eat any meat, as the slaughter of animals leads to "karmic bondage."[112] Furthermore, the theology of Hinduism even accounts for the capacity of animals to achieve elevated states of spirituality because "that spirituality is not limited to the human form and that ultimately the external body is a temporary housing for the eternal spiritual soul."[113]

When Friedman was asked to submit to the MMR vaccination, he could have simply replied that he was Hindu, that the vaccine contained animal by-products, and that it was contrary to his religion to take it. No doubt, this would have raised a red flag for Kaiser, as employers are well aware that they cannot discriminate against employees for religious reasons. Not only is Hinduism an established, well-known religion, it is well known that its adherents are not permitted to eat or use animal products.

On the upside, this is not a totally dishonest approach, as calling Ethical Veganism "Hinduism" puts the religion in a category that is more accessible to more people. Ethical Veganism may not, in some respects, be terribly far-removed from Hinduism in the sense that all life is viewed as sacred, not just human life.[114] True, this is a vast oversimplification and overlooks the intricacies of the theologies of both sets of beliefs, but for our narrow purpose, perhaps a parallel may be drawn.

On the downside, this is not an honest approach, which may not be acceptable to many, if not all, Ethical Vegans. This approach

110. *See* Paul Turner, *Hinduism and Vegetarianism*, IVU NEWS, March 2000, *at* http://ivu.org/news/march2000/hinduism.html (last visited Feb. 23, 2003); THE DICTIONARY, *supra* note 50, at 214.

111. Yahoo!Reference: The Britannica Concise, *Hinduism*, *at* http://education.yahoo.com/search/be?lb=t&p=url%3Ah/hinduism; *see also* THE OXFORD DICTIONARY, *supra* note 57, at 535 (for a more detailed explanation of Karma).

112. Turner, *supra* note 110.

113. *Id.*

114. *See id.*

most likely would not stand up in court under legal scrutiny. It would quickly become apparent upon deposition by competent counsel that Friedman, like many other Ethical Vegans, was not, in fact, Hindu. But this approach would probably solve many of the day-to-day problems facing Ethical Vegans.

This is not an approach for the long term. It does not address the discrimination that Ethical Vegans will continue to face unless the public becomes more educated about their beliefs and practices. It does not permanently protect Ethical Vegans from discrimination in the workplace and other settings. Placing Ethical Veganism in a context more easily understood by the public may, however, solve some very practical, short term problems until a statute is passed or a more expansive definition of religious creed is adopted by the courts.

V. CONCLUSION

On November 26, 2002, the California Supreme Court denied review of Friedman's petition.[115] Friedman was disappointed, but remains determined to have his day in court.[116] The Supreme Court of the United States shortly thereafter denied Friedman's petition for certiorari. Friedman's mistreatment at the hands of his employer will go unremedied, at least for now.

Friedman's case raises many issues, chief among them is how our legal system addresses the question of religion. Freedom of religion is an elemental part of our Constitution, yet our legal system does not seem able to deal with religion other than the basic, well-known varieties. There may simply be no way to account for any deviation from the established religions of the world without opening the floodgates and raising questions too numerous to answer. These beliefs may be sincerely held, but are by no means a religion in the sense of an organized, established church.

The above is certainly a pessimistic view of the situation, but not much in Friedman's case gives rise to optimism. To borrow a bit from due process and the equal protection doctrine, shouldn't the

115. Friedman v. S. Cal. Permanente Med. Group, 102 Cal. App. 4th 39, 125 Cal. Rptr. 2d 663 (2002), *petition for review denied* (Nov. 26, 2002) (No. S110916).

116. *See* Email from Jerry Friedman, Plaintiff, Friedman v. S. Cal. Permanente Med. Group, (Jan. 6, 2002) (on file with the Author).

"discrete and insular minority"[117] be the group afforded the most protection by the courts, not the least? Such groups are not treated favorably by the majority at the polls, which is precisely why the courts should take a strong position of protecting the rights of the groups like the Ethical Vegans. The courts are designed to remedy wrongs against individuals, the legislatures are designed to address the needs of the majority. If Ethical Vegans are not protected in court, they will most probably not be protected at the polls.

To even suggest that Ethical Vegans should resort to dishonesty in order to gain legal protection is appalling, yet that may be the only realistic solution to their dilemma. The following words of the ancient Vedic scriptures could have been uttered by an Ethical Vegan in California today: "You must not use your God-given body for killing God's creatures, whether they are human, animal or whatever."[118] No matter how sincerely spoken, the Hindu speaker of these words would have been afforded protections in Friedman's situation, protections that Friedman has, thus far, been denied.

Sarah Soifer*

---

117. *United States v. Carolene Products Co.* states in the famous footnote 4:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .
>
> It is unnecessary to consider whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious. . .or national. . .or racial minorities. . .whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

United States v. Carolene Products Co., 304 U.S. 144, 152–53 (1938) (citations omitted).

118. Turner, *supra* note 110.

* J.D. Candidate, May 2004, Loyola Law School. The author would like to thank her editor, Daniel Chang, Professors Jean Boylan and William Araiza, and especially Professor Chris May.