VEGANISM AND SINCERELY HELD "RELIGIOUS" BELIEFS IN THE WORKPLACE: NO PROTECTION WITHOUT DEFINITION

Donna D. Page†

I. INTRODUCTION .................................................................................................................. 364

II. BACKGROUND ON RELIGIOUS DISCRIMINATION IN THE WORKPLACE ................................................................. 366
   A. Title VII .......................................................................................................................... 366
   B. State Religious Discrimination Statutes ....................................................................... 369

III. DEFINING RELIGION ........................................................................................................... 370
   A. Supreme Court Decisions Defining Religion ................................................................. 371
      1. Early Cases .................................................................................................................... 371
      2. Modern Supreme Court Cases .................................................................................... 372
         a. Torcaso v. Watkins .................................................................................................... 372
         b. United States v. Seeger ............................................................................................ 373
         c. Welsh v. United States ............................................................................................. 375
         d. Wisconsin v. Yoder ................................................................................................. 377
   B. Lower Court Approaches .............................................................................................. 379
      1. Judge Adams's Concurrence in Malnak v. Yogi ......................................................... 379
      2. United States v. Meyers ............................................................................................ 382
   C. The Equal Employment Opportunity Commission's Definition of Religion ................. 383

IV. FRIEDMAN V. SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP ........................................................................... 387
   A. Background and Factual History .................................................................................. 387
   B. Brief Procedural History ............................................................................................. 389
   C. Friedman's Arguments on Appeal ................................................................................. 390
   D. Kaiser's Arguments on Appeal .................................................................................... 391
   E. The Appellate Court Decision .................................................................................... 392

† J.D. Candidate 2005, University of Pennsylvania Law School; B.A., 2002, summa cum laude, The College of New Jersey. Many thanks to Eric Tilles for his helpful comments and suggestions and to Sarah Gordon for her inspiration.
F. Criticism of the Court's Decision ...........................................397

V. RECOMMENDATIONS ........................................................................400
   A. Judge Adams's Test Is Not Appropriate in the Employment
      Discrimination Setting...............................................................400
   B. A Move Back to Seeger/Welsh and the EEOC Definition ..........402
   C. Veganism as a Religion...............................................................404

VI. CONCLUSION ......................................................................................408

"Religion, for all the various definitions that have been given of it,
must surely mean the devotion of man to the highest ideal that he can
conceive." 1

I. INTRODUCTION

An employer can no more refuse to hire a woman because she is
Muslim than because she is African-American. Religious discrimination,
like discrimination because of race, sex, or national origin, is prohibited in
the workplace. 2 A major problem with religious discrimination, that is
largely nonexistent with other protected classes is deciding who belongs to
the protected class. In the religious discrimination context, this involves
determining what constitutes a "religion" or a "religious belief." Employers know they cannot refuse to hire a prospective employee solely
because the person is Jewish or Roman Catholic. However, can an
employer refuse to hire a person because it thinks the individual’s belief
that Halloween is the holiest day of the year is, well, frightening? 3 The
answer is unclear, and depends largely upon the particular definition of
religion that is used.

In religious discrimination cases, a court must initially determine
whether the plaintiff has a "religion" that is protected by the applicable
anti-discrimination statute. Therefore, the definition of religion is
especially crucial in determining the rights of workers who hold
nontraditional religious beliefs, such as the belief in Halloween belief
described above. There is not one unitary definition of religion used by
courts in this country. In fact, the Supreme Court has never attempted to
articulate a precise definition of "religion." 4

1. DAVID SAVILLE MUZZEY, ETHICS AS A RELIGION 95 (1951).
   (7th Cir. Feb. 6, 1998) (discussing the plaintiff’s belief in the Wiccan religion, which
   includes the belief that Halloween is a holy day).
This Comment explores the definition of religion as a necessary component for deciding state and federal cases dealing with religious discrimination in the workplace. The two major theses of this Comment are: (1) that the word “religion,” as used in employment discrimination statutes, should be interpreted broadly to include moral and ethical beliefs that are sincerely held with the strength of traditional religious beliefs, and (2) that vegan beliefs can be protected as religious beliefs under this definition.

Part II provides background on religious discrimination statutes. Part III outlines the main definitions of religion in the law today. First, the major Supreme Court cases attempting to define religion are discussed. Next, several appellate court decisions interpreting the Supreme Court standards and setting forth various tests for defining religious beliefs are analyzed. Finally, the Equal Employment Opportunity Commission’s (EEOC or the Commission) definition of religion is discussed.

Part IV focuses on a recent California appellate court case, *Friedman v. Southern California Permanente Medical Group,* as an example of how courts deal with defining religious belief in nontraditional religious discrimination cases. *Friedman* has been chosen for special consideration for three primary reasons. First, it deals with the important and novel question of whether vegan beliefs can be considered “religious” under an employment discrimination statute. In addition, the opinion is superbly well-drafted, it provides a comprehensive analysis of the past and current law with respect to definitions of and tests for religion. Finally, while the case holds that veganism is not a religious belief protected under California’s Fair Employment and Housing Act, it lends support to the argument that veganism, in certain circumstances, should be considered a religious belief under federal law. This part also criticizes both the *Friedman* court’s chosen analysis for how to define religion in an employment discrimination context and the court’s ultimate conclusion in the case.

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5. A “vegan” is “a strict vegetarian who consumes no animal food or dairy products” and “who abstains from using animal products.” Merriam-Webster Online Dictionary, at http://www.m-w.com.


7. CAL. GOV’T. CODE § 12900 (West 2004).
As a final point, Part V offers recommendations for defining what constitutes a "religion" under religious discrimination laws. This section recommends that the most prominent test used by courts today to define religion should not be used for purposes of defining religion vis-à-vis employment discrimination statutes. Instead, courts should use the broad definition of religion promulgated by the EEOC. This part also argues that certain vegetarian and vegan beliefs should be protected as religious beliefs under state and federal religious discrimination statutes.

II. BACKGROUND ON RELIGIOUS DISCRIMINATION IN THE WORKPLACE

The First Amendment to the United States Constitution protects religious freedom. The federal government, as well as the states through the Fourteenth Amendment, "shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof ...." While the Constitution protects individuals from governmental intrusion into religion, Title VII of the Civil Rights Act of 1964 (Title VII) protects employees from religious discrimination in the employment context. In addition, most states have statutes similar to Title VII that also prohibit religious discrimination in the workplace. Title VII and state employment discrimination statutes will be discussed in turn.

A. Title VII

Title VII makes it an unlawful employment practice for an employer to discriminate against an employee or prospective employee on the basis of religion. Specifically,

It shall be an unlawful employment practice for an employer —
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

Under Title VII, an employer must "reasonably accommodate... an
VEGANISM IN THE WORKPLACE

employee’s or prospective employee’s religious observance or practice” unless the employer can demonstrate that it is unable to do so because of “undue hardship on the conduct of the employer’s business.”

There are two main ways that an employer can discriminate against an individual because of the individual’s religion. The first way is called “disparate treatment” discrimination, which occurs when an employer literally discriminates against a prospective or current employee because of the person’s religious beliefs, observances, or practices. An example of disparate treatment discrimination is when an employer refuses to hire a prospective employee, or takes adverse action against a current employee, because of the employee’s religious adherence or nonadherence. The second major way an employer may religiously discriminate against an employee under Title VII is by refusing to accommodate the employee’s or prospective employee’s religious observance or practice. However, if the accommodation would cause the employer undue hardship, it is not required. An example of an unlawful employment practice for failure to

14. Title VII proscribes two different types of religious discrimination—discrimination on the basis of a religious observance or practice and discrimination on the basis of pure belief. These two types of discrimination are analyzed differently. When an employee shows that her employer took an adverse employment action against her on the basis of a religious observance or practice, the employer can avoid liability by showing either that it reasonably accommodated the employee’s observance or practice, or that accommodation of the observance or practice would result in an undue hardship for the employer. However, when an employee shows that her employer took an adverse action against her on the basis of her religious beliefs, and not because of an observance or practice, the employer is liable.


16. See, e.g., Campos v. City of Blue Springs, 289 F.3d 546, 549–51 (8th Cir. 2002) (holding that a youth crisis counselor stated a claim for religious discrimination when, after disclosing to her supervisor that “she observed tenets of Native American spirituality,” she was, inter alia, passed over for promotion, denied extra compensation she had been promised, treated poorly, and told to find a “good Christian boyfriend to teach her to be submissive”); Weiss v. Parker Hannifan Corp., 747 F. Supp. 1118, 1122, 1127 (D.N.J. 1990) (holding that an otherwise qualified Jewish employee who was denied a promotion established a prima facie case of discrimination when his supervisor told another employee that “‘[a]s long as I’m the warehouse manager, no Jew will run the warehouse for me’”).

17. See HAUCK, supra note 11, at 113–14 (“EEOC Guidelines recommend that employers make reasonable accommodation by considering changes in work schedules, changes in job assignment, or by following some system of voluntary worker exchange, flexible scheduling, or lateral transfer. Whenever cost is de minimis and the effect on seniority slight, the employer must make reasonable accommodation for religious preference and practice.”).
18. 42 U.S.C. 2000e(j) (2000); id. at 116–19. For the Supreme Court’s analysis of
accommodate an employee's religious observance is when an employer refuses to accommodate an employee by giving the employee a certain day of the week off for religious observance.\(^9\)

Comparatively few of Title VII's employment discrimination claims are based on religion.\(^2\) Yet, when claims are brought on religious discrimination grounds, most of the litigation is centered on the issues of what is a "reasonable accommodation" and what constitutes "undue hardship."\(^2\)

What constitutes religious belief, observance, or practice is not heavily litigated because in most instances, the religious nature of the claim is obvious\(^2\)\(^2\) (e.g., a Seventh Day Adventist is fired for refusing to work on Saturdays, or a White Supremist\(^2\)\(^3\) refuses to hire an otherwise qualified accommodation and undue hardship in Title VII cases, see generally *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (holding that an employer does not need to incur more than minimal costs in order to accommodate an employee's religious practices). For a critique of the Supreme Court's interpretation of § 701(j) of Title VII, see Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 585-96 (2000) (arguing that Congress intended Title VII to guarantee a higher level of accommodation than the courts require of employers today).

19. See, e.g., EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989). In *Hacienda*, a Seventh Day Adventist was fired for refusing to work on Saturdays. *Id.* at 1507. Before termination, she reminded her employer that she needed Saturdays off in order to observe her Sabbath. *Id.* The Ninth Circuit upheld the district court's finding that the employer failed to reasonably accommodate the plaintiff's religious practice, finding especially important the fact that the employer "did nothing to solve the problem." *Id.* at 1513.

20. See MICHAEL D. LEVIN-EPSTEIN, BUREAU OF NAT'L AFFAIRS, PRIMER OF EQUAL EMPLOYMENT OPPORTUNITY 39 (3d ed. 1984) ("Religious discrimination is a far less frequent topic of litigation than race, sex, age, or national origin discrimination.").


21. LEVIN-EPSTEIN, supra note 20, at 39. ("When religious discrimination cases arise, they usually center on two related issues—(1) did the employer make 'reasonable accommodation' to the religious needs of employees and (2) was the employer excused from accommodating its employees on the grounds of 'undue hardship'? ")

22. See 29 C.F.R. § 1605.1 (2004) ("In most cases whether or not a practice or belief is religious is not at issue.").

23. Notably, White Supremist beliefs have been deemed "religious" under Title VII. See generally Peterson v. Wilmur Communications, Inc., 205 F. Supp. 2d 1014, 1023-24 (E.D. Wis. 2002) (holding that the plaintiff's belief in Creativity, which "teaches that followers should live their lives according to what will best foster the advancement of white people and the denigration of all others," functions as a religion in the plaintiff's life and is
Jewish manager). However, an employer does not need to accommodate a person whose beliefs, observances, or practices are nonreligious in nature (e.g., a devout Republican who wants Election Day off to campaign). Therefore, the preliminary question of whether the individual is being discriminated against "because of" religion must always be answered.\(^2\) In the case of an individual who has nontraditional religious beliefs or practices, it is especially important for the courts to first determine whether the person’s beliefs constitute a "religion" protected by Title VII.\(^2\) If the question is answered in the affirmative, the disparate treatment or "reasonable accommodation" and "undue burden" analyses will begin. However, if the court finds the individual does not have a protected religion, the case will be dismissed. Therefore, the definition of religion is especially crucial in determining the rights of workers who have nontraditional religious beliefs, practices, or observances.

In 1972, Congress enacted section 701(j) of Title VII, which defines religion to include "all aspects of religious observance and practice, as well as belief."\(^2\) This broad definition is fundamentally flawed because it uses the word "religious" to define "religion."\(^2\) Because Title VII’s definition of "religion" is deficient, the EEOC, charged with administering Title VII, has formulated its own definition of religion.\(^2\)

**B. State Religious Discrimination Statutes**

Title VII extends only to employers with fifteen or more employees,\(^2\) but, for the most part, this does not mean that employees in small businesses are left unprotected. Most states and many local governments have fair employment practices (FEP) statutes that cover employers with therefore a protected religion under Title VII). *Peterson* is discussed at length infra Part III.D.

24. Tiano v. Dillard Dep’t Stores, Inc., 139 F.3d 679, 681 (9th Cir. 1998) (noting that in order to make out a prima facie case of religious discrimination, a plaintiff must show that "(1) she had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) she informed her employer of the belief and conflict; and (3) the employer threatened her or subjected her to discriminatory treatment . . . because of her inability to fulfill the job requirements.") (emphasis added).

25. See Brown v. Pena, 441 F. Supp. 1382, 1384 (S.D. Fla. 1977) ("[I]t must be determined *ab initio* whether plaintiff’s beliefs qualify for protection as a religion.").


27. Title VII’s substandard definition of “religion” has not gone unnoticed by the courts. *See Brown*, 441 F. Supp. at 1384 (referring to the statutory definition as "unenlightening"); see also Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 Hofstra L. Rev. 309, 377 (1994) ("Congress’s definition was circular and question-begging in Title VII . . . .") (footnote omitted).

28. See discussion *infra* Part III.D.

fewer than fifteen employees. The number of employees required for an employer to fall within a given state’s FEP law ranges from one to fifteen.30

Even before Title VII was enacted, states began enacting FEP laws.31 When Title VII was enacted in 1964, half the states had already enacted laws in this area.32 State FEP laws are often modeled after the federal legislation, but their coverage and substantive provisions vary greatly.33 While Title VII is limited to discrimination because of sex, religion, national origin, color, or race, many state FEP laws provide protection on a much broader scale. For example, state and local FEP statutes may provide coverage for employees who are discriminated against because of their sexual orientation.34

III. DEFINING RELIGION

The United States is the world’s most religiously diverse country.35 Therefore, it is not surprising that the problem of defining religion in this diverse country is not limited to the realm of employment discrimination claims. Professor Steven Gey notes that “[t]he problems associated with defining religion for First Amendment purposes have multiplied in modern times due to the increasingly diverse ethnic and religious character of the population and the equally diverse nature of religious beliefs.”36 Noting a problem that is central to the focus of this Comment, he continues: “To complicate matters further, the lines between ethical and religious doctrines have become very indistinct.”37

31. For example, in 1945 New York enacted the first FEP law in the country. LEVIN-EPSTEIN, supra note 20, at 8.
32. Id.
33. Id. at 8–9.
34. See, e.g., CAL. GOV’T CODE § 12940(a) (West 2004) (“It shall be an unlawful employment practice . . . [f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person . . . or to discriminate against the person . . . .”) (emphasis added).

Other categories that are protected in certain jurisdictions include “height, weight, personal appearance, family responsibilities, political affiliation, arrest or even convictions records, unrelated to job duties.” Peter M. Panken et al., Litigating Claims of Discrimination in Employee Benefits, in EMPLOYEE BENEFITS LITIGATION 2003, at 437, 450 (A.L.I.-A.B.A., Course of Study Materials, vol. 2, 2003).
35. Knechtle, supra note 4, at 522 (“Today the religious landscape in the United States is the most diverse of any country in the world.”); see also United States v. Seeger, 380 U.S. 163, 174 (1965) (referring to “the richness and variety of spiritual life in our country” and noting that “[o]ver 250 sects inhabit our land”).
37. Id.
The definition of "religion" used in employment discrimination cases is crucial because, as noted supra, it determines who is protected and who is not. Therefore, defining religion "is more often than not a difficult and delicate task." There is currently no consensus on how to define religion in this context. Accordingly, this section will explore the various definitions of religion promulgated by the Supreme Court, the federal courts, and the EEOC.

A. Supreme Court Decisions Defining Religion

1. Early Cases

The Framers of the Constitution defined religion according to belief in a "Supreme Being" or "Creator." James Madison, for example, called religion "the duty which we owe to our Creator and the Manner of discharging it." Similarly, in his Letter to the Danbury Baptists, Thomas Jefferson once described religion as "a matter which lies solely between Man & his God." In the nineteenth and early twentieth centuries, the Supreme Court adopted this theistic, or substantive, definition of religion. In Davis v. Beason, the Court announced that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." The theistic characterization continued well into the twentieth century. In 1931, Chief Justice Hughes stated in a dissenting opinion that "[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation... One cannot speak of religious liberty... without assuming the existence of a belief in supreme allegiance to the will of God."  

39. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in GYE, supra note 36, at 4.
41. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1179 (2d ed. 1988) ("At least through the nineteenth century, courts defined 'religion' narrowly, in terms of theistic notions respecting divinity, morality, and worship. In order to be considered legitimate, religions had to be viewed as 'civilized' by Western Standards.").
42. 133 U.S. 333, 342 (1890).
2. Modern Supreme Court Cases

a. Torcaso v. Watkins

In the middle of the twentieth century, America's growing religiously diverse populous led to the demise of the theistic conception of religion. It simply could no longer be ignored that many recognized religions, such as Buddhism,

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were not based on a belief in a Supreme Being. In fact, Justice Black, delivering the opinion of the Court in Torcaso v. Watkins,

45
recognized this exact contention. In Torcaso, a unanimous Court struck down a Maryland test for public office that required inductees to declare belief in the existence of God.

46

The reasoning of the Court sheds light on a new formulation of "religion":

[N]either a State nor the Federal Government can constitutionally force a person “to profess a belief or disbelief in any religion.” Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

47

Professor John Knechtle explains that “[t]his ruling targeted the fact that the government could not aid a religion based upon the fact that they believed in a ‘God’ as opposed to other religions that did not.”

48

Critical to the Court’s evolution in defining religion is footnote 11, which explains what is meant by “those religions founded on different beliefs”: “Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism

49
and others.”

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44. See generally United States v. Seeger, 380 U.S. 163, 188–93 (1965) (Douglas, J., concurring) for a discussion of Buddhism, including whether or not Buddhists believe in a “Supreme Being” and a short history of Buddhism in this country.


46. Id. at 496 (“This Maryland religious test for public office unconstitutionally invades the appellant’s freedom of belief and religion and therefore cannot be enforced against him.”).

47. Id. at 495 (emphasis added) (footnote omitted).

48. Knechtle, supra note 4, at 525.

49. Notwithstanding the Court’s reference to Secular Humanism as a religion, some lower courts have been reluctant to extend the definition of religion to humanists in all circumstances. For a discussion of footnote 11 and Secular Humanism as a religion, see Gey, supra note 36, at 104.

50. Torcaso, 367 U.S. at 495 n.11.
b. United States v. Seeger

In the 1960s and early 1970s, the Supreme Court had the opportunity to redefine religion in the context of the exemption of conscientious objectors from combatant training and service in the armed forces. In United States v. Seeger, the Court formulated a new test for defining religion that broadly opened the door for many new sets of beliefs to be deemed “religious.”

In Seeger, the Court had to interpret section 6(j) of the Universal Military Training and Service Act. The Act “exempts from combatant training and service in the armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form.” At issue was the constitutionality of section 6(j), which defined the term “religious training and belief” as “‘an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.’” In short, the Court had to interpret Congress’s intention in using the words “in a relation to a Supreme Being.” Congress put the Court in a precarious position because the statute could easily be read as unconstitutionally discriminating against different forms of religious belief.

The Court was quick to find that Congress did not intend “Supreme Being” to be interpreted narrowly as the orthodox, or traditional, God. The Court concluded that “Congress, in using the expression ‘Supreme Being’ rather than the designation ‘God,’ was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views.” In imputing to Congress a broad interpretation of “Supreme Being,” the Court formulated a test for whether a person’s religious beliefs fell under section 6(j): “[T]he test of belief ‘in a relation to a Supreme Being’ is

52. Id. at 164.
53. Id. at 164–65 (emphasis added).
54. Id. at 165 (quoting 50 U.S.C. app. § 456(j) (1958)) (alteration in original).
55. Id. at 174 (“Our question, therefore, is the narrow one: Does the term ‘Supreme Being’ as used in § 6(j) mean the orthodox God or the broader concept of a power or being, or a faith, ‘to which all else is subordinate or upon which all else is ultimately dependent?’”) (quoting WEBSTER’S NEW INT’L DICTIONARY (2d ed.).)
56. Id. at 178.
57. Id. at 165. It is interesting to note that the Court leaves out “or a merely personal moral code” here. The Court discusses the meaning of a personal moral code later in its opinion. See infra Part III.A.2.b.
58. The Seeger Court’s test has come to be known as “the parallel belief test.” Feofanov, supra note 27, at 368.
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 God
of one who clearly qualifies for the exemption. The Court based its test,
in part, on "the ever-broadening understanding of the modern religious
community."

According to the Court, the parallel belief test "is simple of
application" and is "essentially an objective one." The Court advised that
"[i]n such an intensely personal area... the claim of the registrant that his
belief is an essential part of a religious faith must be given great weight....
The validity of what he believes cannot be questioned." Courts, therefore,
are not permitted to question the truth of the beliefs, only whether they are
sincerely held: "Their task is to decide whether the beliefs professed by a
registrant are sincerely held and whether they are, in his own scheme of
things, religious."

Along with essentially political, sociological, or philosophical views,
the statutory definition of "religious training and belief" excludes
registrants whose beliefs are based on a "merely personal moral code." The meaning of a "merely personal moral code" in the statute is uncertain.
Once again, the Court interpreted Congress’s intention:

The use by Congress of the words "merely personal" seems to us
to restrict the exception to a moral code which is not only
personal but which is the sole basis for the registrant’s belief and
is in no way related to a Supreme Being. It follows, therefore,
that if the claimed religious beliefs of the respective
registrants... meet the test that we lay down then their
objections cannot be based on a "merely personal" moral code.

The Court, in limiting the moral code exception to a personal moral code

60. Id. at 180. As framed by Dmitry Feofanov, “[i]n creating this standard, the Court
was influenced by modern liberal theological thought...” Feofanov, supra note 27, at
368. The Court looked to the writings of Dr. Paul Tillich, a Protestant theologian. Tillich
views God as not "'out there' or beyond the skies but as the ground of our very being.”
Seeger, 380 U.S. at 180. Tillich equates God with “depth”: “[T]he depths of your life, the
source of your being, of your ultimate concern" in life. Id. at 187 (quoting Paul Tillich,
The Shaking of the Foundations 57 (1948). For a critique of Tillich’s writings and,
therefore, the Court’s reliance on them, see Feofanov, supra note 27, at 370 (“Tillich...
through verbal acrobatics attempted to erase the difference between religious belief and non-
belief.”).
61. Seeger, 380 U.S. at 184.
62. Id.
63. Id. at 185.
65. Seeger, 380 U.S. at 186.
that is the sole basis for the registrant’s belief, continued to formulate a broad definition of religion.

Analyzing Seeger’s beliefs shows how broad the Court’s definition stretches. In Seeger’s own words, his beliefs seem to be primarily philosophical or ethical. On his Selective Service form, Seeger declared his was a “‘belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.’”66 The Court noted that “he cited ... Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity ‘without belief in God, except in the remotest sense.’”67 Nonetheless, the Court found that Seeger’s beliefs satisfied the religion test, and that he qualified for an exemption from combatant duty.68

c. Welsh v. United States

Five years later, in Welsh v. United States,69 the Court confronted another conscientious objector case and used the opportunity to expand the definition of religion even further, denoting the high water mark for a liberal definition of religion. Unlike Seeger, who claimed his beliefs were “religious,” Welsh struck the word “religious” from his application.70 While Seeger and Welsh differed in this respect, the Court found many similarities between the two men. Both men declared on their applications that they “held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice.”71 Also, the Court never doubted that Welsh, like Seeger, was sincere in his beliefs.72

Despite their similarities, the fact remains that Welsh did not claim to be “religious.” According to Welsh, his views were formed from readings in history and sociology.73 While in actuality broadening its scope, the Court explained what was required under the Seeger test:

What is necessary under Seeger for a registrant’s conscientious objection to all war to be “religious” within the meaning of § 6(j) is that this opposition to war stem from the registrant’s moral, ethical, or religious beliefs about what is right and wrong and

66. Id. at 166.
67. Id.
68. Id. at 187–88.
70. Id. at 341.
71. Id. at 337.
72. Id.
73. Id. at 341.
that these beliefs be held with the strength of traditional religious convictions.\textsuperscript{74}

As for section 6(j)'s exclusion of objectors with "essentially political, sociological, or philosophical views, or a merely personal moral code,"\textsuperscript{75} the Court stated that this language only served to exclude those objectors whose beliefs were not deeply held, or whose beliefs were not based at all on moral, ethical, or religious principles, but instead were based "solely upon considerations of policy, pragmatism, or expediency."\textsuperscript{76} Since Welsh's beliefs rested on deeply held ethical principles, he was "clearly" permitted a conscientious objector exemption.\textsuperscript{77}

It is an understatement to say that all members of the Welsh Court were comfortable with the plurality's\textsuperscript{78} new Seeger/Welsh standard. In his concurrence, Justice Harlan vehemently argued that the plurality's new standard went against the explicit language of the statute, as well as the explicit intention of Congress to exempt "religious" conscientious objectors.\textsuperscript{79} The new standard exempted conscientious objectors who did not hold "religious" beliefs. According to Justice Harlan, the Court could not get around the constitutional issue raised by section 6(j)\textsuperscript{80} by distorting the meaning of the statute in an effort to include all conscientious objectors.\textsuperscript{81} Harlan's concurrence squarely addressed this constitutional question and quickly concluded that the distinction between religious and nonreligious conscientious beliefs was patently unconstitutional.\textsuperscript{82} Justice Harlan believed that "[i]f the exemption is to be given application, it must encompass the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source. The common denominator must be the intensity of moral conviction with which

\textsuperscript{74} Id. at 339–40 (emphasis added).
\textsuperscript{76} Welsh, 398 U.S. at 342–43.
\textsuperscript{77} Id. at 343.
\textsuperscript{78} Justice Black announced the judgment of the Court and delivered the plurality opinion in which Justice Douglas, Justice Brennan, and Justice Marshall joined. Id. at 335. Justice Blackmun did not participate in the consideration or decision of the case, and Justice Harlan concurred in the result. Id. at 344. Justice White, joined by the Chief Justice and Justice Stewart, dissented. Id. at 367.
\textsuperscript{79} Id. at 351 (Harlan, J., concurring) ("The prevailing opinion today . . . has performed a lobotomy and completely transformed the statute by reading out of it any distinction between religiously acquired beliefs and those deriving from 'essentially political, sociological, or philosophical views or a merely personal moral code.'").
\textsuperscript{80} That is, whether Congress had violated the Establishment Clause by exempting religious conscientious objectors but not nonreligious conscientious objectors, therefore favoring religion over non-religion.
\textsuperscript{81} Welsh, 398 U.S. at 354 (Harlan, J., concurring) ("I cannot subscribe to a wholly emasculated construction of a statute to avoid facing a latent constitutional question . . . .").
\textsuperscript{82} Id. at 356–60.
Justice Harlan concurred in *Welsh* because he did not want the exemption to be struck entirely. He recognized the importance of the deeply rooted policy of exempting conscientious objectors, and so he decided to “accept the prevailing opinion’s conscientious objector test, not as a reflection of congressional statutory intent but as patchwork of judicial making that cures the defect of underinclusion in § 6(j).”

Justice Harlan’s concurrence is examined here because it is important to the *Welsh* opinion as a whole, and because it explains the criticism the Court has encountered with respect to the *Seeger/Welsh* standard. While the *Seeger/Welsh* standard has been criticized (and rightly so) for usurping a congressional statute in an attempt to evade an important constitutional issue, it is important to realize that the test has applications outside the conscientious objector realm.

The statutory interpretation and First Amendment infirmities with section 6(j) largely disappear when the standard is used to define religion in other contexts, including in employment discrimination cases. If the *Seeger/Welsh* standard is disassociated from the conscientious objector framework and thought of simply as the Supreme Court’s definition of “religion,” then the test can be used whenever courts and local employment boards need guidance in determining whether a person’s beliefs are “religious.” Although the *Seeger/Welsh* standard has been criticized for what it was designed to accomplish, that does not mean that the standard is without significant value in other areas, including employment discrimination laws. This is especially true because Congress defined the word “religion” in Title VII by referring to “religious observance and practice, as well as belief,” “religious” needs to be defined.

*d. Wisconsin v. Yoder*

Two years after *Welsh*, the Supreme Court—though only in dictum—seemed to retreat from the broad definitional standard for religion that it had so recently developed. In *Wisconsin v. Yoder*, the Court held that Wisconsin’s compulsory education laws violated the Amish’s free exercise of religious beliefs. To come to this conclusion, the Court first had to determine that the Amish’s reasons for not wanting to send their children to public school beyond the eighth grade were rooted in religion, and not purely secular or personal preferences. The Court gave an example of the

83. *Id.* at 358 (footnote omitted).
84. *Id.* at 366–67.
87. *Id.* at 207.
88. *Id.* at 215.
distinction: "[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis." \(^8\) The Court concluded (in seemingly direct contrast to Seeger/Welsh): "Thoreau’s choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses." \(^9\) However, this exactly contradicts the Court’s language in Welsh. \(^9\) In Welsh, the only way a person’s beliefs would be excluded from the test was if they were either (1) not deeply held or (2) based “solely upon considerations of policy, pragmatism, or expediency.” \(^9\) Thoreau’s beliefs do not fit into either of these categories, and therefore would have been found to be “religious” under Seeger/Welsh. Interestingly, there is no mention of or citation to either the Seeger or Welsh definition of religion in the majority opinion. \(^9\)

The majority’s possible definitional retreat did not escape the attention of Justice Douglas in his Yoder dissent. Justice Douglas, criticizing the majority, argued: "[T]he Court retreats when in reference to Henry Thoreau it says his ‘choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.’ That is contrary to what we held in United States v. Seeger . . . ." \(^9\) Douglas went on to quote the Seeger test, and he also quoted the words Welsh used to describe his beliefs—"the essence of Welsh’s philosophy"—which had

89. Id. at 216.
90. Id.
91. See Feofanov, supra note 27, at 374 ("In Wisconsin v. Yoder, the Court noted in dictum that philosophical and personal beliefs, as opposed to religious beliefs, are not to be protected by the First Amendment. In the Court’s view, the philosophy of Thoreau, as opposed to the religion of the Amish, would not be protected, even though the standards of Seeger and Welsh seem to demand at least this much.") (footnotes omitted).
93. It is the author’s opinion that the Thoreau analogy is an example of how the Court was doing its best to limit Yoder’s holding. The Court did not want other groups to be able to evade compulsory education laws. Therefore, it served the Court’s purpose in Yoder to narrow the definition of religion. The Court went into great detail describing the history, culture, and faith of the Amish. Yoder, 406 U.S. at 216–17. The Court noted that few recognized religions in the United States today could match the Amish’s “300 years of consistent practice” and their “sustained faith pervading and regulating [their] entire mode of life.” Id. at 219. Yoder as a whole has been highly criticized by academics. For example, Professor Marci Hamilton, arguing Yoder was wrongly decided, referred to the case as “a love letter to the Amish.” Professor Marci Hamilton, Guest Lecturer in Professor Sarah Gordon’s Church & State class at the University of Pennsylvania Law School (Nov. 2003). For the foregoing reasons, this Comment does not give any possible Supreme Court reformulation of the definition of religion in Yoder any substantial weight.
qualified as a religion. He concluded, “I adhere to these exalted views of 'religion' and see no acceptable alternative to them now that we have become a Nation of many religions and sects, representing all the diversities of the human race.”

B. Lower Court Approaches

1. Judge Adams’s Concurrence in *Malnak v. Yogi*

After *Torcaso*, *Seeger*, *Welsh*, and *Yoder*, the lower courts were understandably in a state of confusion over how to define religion, or religious beliefs. In a comprehensive concurring opinion in *Malnak v. Yogi*, Judge Arlin Adams of the Third Circuit Court of Appeals canvassed the state of the law with respect to the modern definition of religion. Judge Adams wrote separately to explain what he thought was a “newer, more expansive reading of ‘religion’” that had been developed in the 1960s and 1970s, which formed the basis of the majority’s result in the case. After discussing *Seeger* and *Welsh*, Judge Adams concluded that the broad definition of religion developed in the conscientious objector context was most likely applicable to constitutional inquiries. Judge Adams described the modern definition of religion as “not confined to the relationship of man with his Creator.”

He noted that while the old definition had been renounced, the new definition was not fully developed. The definition was by analogy: “Presumably beliefs holding the same important position for members of one of the new religions as the traditional faith holds for more orthodox believers are entitled to the same treatment as the traditional beliefs.” The problem with the analogy, however, was that the Supreme Court had not issued any objective guidelines in comparing the new with the old. Judge Adams, in response, proposed “three useful indicia that are basic to our traditional religions and that are themselves related to the values that undergird the first amendment” to be used in making the

95. *Id.* at 248–49.
96. *Id.* at 249.
97. 592 F.2d 197 (3d Cir. 1979). *Malnak* held that the teaching of an elective course called the Science of Creative Intelligence—Transcendental Meditation in a New Jersey public high school was a religious activity and constituted an establishment of religion in violation of the First Amendment. *Id.* at 198.
98. *Id.* at 200 (Adams, J., concurring).
99. See *id.* at 204 (“If the Court is willing to read ‘religious belief’ so as to comprehend beliefs based upon pantheistic and ethical views, it might be presumed to favor a similar inclusive definition of ‘religion’ as that term appears in the first amendment.”).
100. *Id.* at 207.
101. *Id.*
102. *Id.*
Judge Adams’s three indicia for determining whether a given set of beliefs is “religious” were (1) the nature of the ideas in question, (2) comprehensiveness, and (3) formal signs. The meaning and importance of each indicium will be examined in turn.

When a court examines the nature of the ideas in question, it is to examine the content of the asserted religion, not for its truth, but for the “ultimate” nature of the ideas presented. Judge Adams explained the nature and the importance of “ultimate” ideas as follows:

One’s views, be they orthodox or novel, on the deeper and more imponderable questions—the meaning of life and death, man’s role in the Universe, the proper moral code of right and wrong—are those likely to be the most “intensely personal” and important to the believer. They are his ultimate concerns. As such, they are to be carefully guarded from governmental interference.

According to Adams, the “ultimate” nature of the ideas in question is the most crucial and convincing evidence that they should be regarded as religious.

Not every belief that deals with an “ultimate” idea will be deemed religious, however, due to the second indicium: comprehensiveness. Comprehensiveness is an important element because “[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.’” Hence, while the “Big Bang” theory is an interpretation of the creation of the Universe—an answer to an “ultimate” question—it is not, without more, a “religious” idea. Likewise, moral or patriotic views are not by themselves ‘religious,’ but if they are pressed as divine law or a part of a comprehensive belief-system that presents them as ‘truth,’ they might well rise to the religious level.

The third indicium for analyzing a set of ideas—“any formal, external, or surface signs that may be analogized to accepted religions”—is probably the most objective and easiest to apply. Examples of these formal signs include “formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of

103. Id. at 207–08.
104. Id. at 208–209.
105. Id. at 208.
106. Id. (quoting United States v. Seeger, 380 U.S. 163, 184 (1965)).
107. Id.
108. Id. at 209.
109. Id.
110. Id.
111. Id.
holidays and other similar manifestations associated with the traditional
religions."112

Judge Adams's three indicia for defining religious beliefs by analogy
was subsequently adopted by the Third Circuit two years after Malnak, in
Africa v. Pennsylvania,113 an opinion written by Adams. The influence of
Judge Adams's test spread well beyond the Third Circuit: the test has been
adopted by several circuit courts of appeals, and has been used in opinions
from various district and state courts.114

In Malnak, Judge Adams warned against rigid application of the
indicia: "Although these indicia will be helpful, they should not be thought
of as a final 'test' for religion. Defining religion is a sensitive and

112. Id.
113. 662 F.2d 1025 (3d Cir. 1981). In Africa, the court applied the three indicia to hold
that the MOVE organization, as described by the petitioner, an inmate in a Pennsylvania
state prison, was not a religion. The appellant, Frank Africa, alleged he was a 'Naturalist
Minister' for the MOVE organization, which he testified was a religious organization, and
that he was required by his religion to eat a diet consisting entirely of raw foods. Id. at
1026. The court emphasized that its holding in the case was limited to the description of
MOVE made available to the district court by Africa, and that MOVE was not forever
barred from being classified as a religious organization. Id. at 1036 n.22. Unfortunately for
Africa, he acted pro se at the district court trial. Id. at 1026.

While the court held that because MOVE was not a religion the prison was not
constitutionally required to provide Africa with his raw food diet, Judge Adams sent a stern
message to the prison officials:

We do not mean to suggest, however, that the requirements of the first
amendment also define the proper scope of prudent state penological policy.
Especially in light of the apparent willingness of Graterford officials to accede
to the dietary requirements of other prisoners, both for religious and for medical
reasons, it is not clear from the record why special accommodations cannot be
made in this instance for a prisoner who obviously cares deeply about what food
he eats. Id. at 1037. While Africa lost his legal battle, he ultimately won the war with the prison
officials. According to Judge Adams's answer to a law student's query at the University of
Pennsylvania Law School, Graterford eventually did provide Africa with his raw food diet.
Judge Arlin Adams, Guest Lecturer in Professor Sarah Gordon's Church & State class at the
University of Pennsylvania Law School (Sept. 18, 2003).

For an interesting and detailed description of the MOVE organization, see the
Religious Movements Homepage Project at the University of Virginia at

"Religion": A Theoretical and Historical Analysis of First Amendment Definitions of
Religion, 6 TEX. F. ON C.L. & C.R. 117, 143-44 (discussing cases applying the Adams test);
cf. Feofanov, supra note 27, at 376 ("The Adams test gained international acceptance in
1983 when the Australian equivalent of the Supreme Court, relying on Malnak v. Yogi,
came up with a two-fold definition of religion in a tax context . . . "). Adams's three-part
test was relied on by the court in Friedman. See discussion infra Part IV.E.
important legal duty. Flexibility and careful consideration of each belief system are needed.\textsuperscript{115} Despite Adams's warning, rigid application of the indicia seems to have become the norm. Judge Adams may not have intended to invent a "test" for defining religion, but that is what was produced.\textsuperscript{116} The use of Judge Adams's indicia for defining religious practices or beliefs in employment discrimination cases is criticized \textit{infra}.\textsuperscript{117}

2. \textit{United States v. Meyers}

In \textit{United States v. Meyers},\textsuperscript{118} the Tenth Circuit developed an approach for defining religion similar to Judge Adams's three-indicia approach.\textsuperscript{119} After a jury trial, David Meyers was found guilty of federal crimes prohibiting the possession with intent to distribute marijuana.\textsuperscript{120} Before the trial, Meyers filed motions to dismiss based on religious freedom under the First Amendment and the Religious Freedom Restoration Act.\textsuperscript{121} He testified that "he is the founder and Reverend of the Church of Marijuana and that it is his sincere belief that his religion commands him to use, possess, grow and distribute marijuana for the good of mankind and the planet earth."\textsuperscript{122}

In reviewing the district court's denial of Meyers's religious freedom defense, the Tenth Circuit adopted a list of factors to determine if Meyers's beliefs concerning marijuana qualified as a religion.\textsuperscript{123} The court considered the following factors: (1) ultimate ideas, (2) metaphysical beliefs, (3) moral or ethical system, (4) comprehensiveness, and (5) accoutrements of religion.\textsuperscript{124} The "accoutrements of religion" factor is similar to Judge Adams's formal or external signs indicium, and includes (a) founder, prophet, or teacher, (b) important writings, (c) gathering places, (d) keepers of knowledge, (e) ceremonies and rituals, (f) structure

\begin{itemize}
\item \textsuperscript{115} \textit{Malnak}, 592 F.2d at 210 (Adams, J., concurring) (footnote omitted).
\item \textsuperscript{116} For example, Judge Adams's own opinion in \textit{Africa} has been criticized for too rigidly applying the test. \textit{E.g.}, T. Mark Mosely, Comment, \textit{Intelligent Design: A Unique Perspective to the Origins Debate}, 15 \textit{REGENT U. L. REV.} 327, 346 n.128 (2003) ("Although the court pointed out [in \textit{Africa}] that the indicia were not to be seen as a rigid, all-encompassing 'test,' it did, in effect, apply the definition as a test.") (citations omitted).
\item \textsuperscript{117} \textit{See infra} Part V.A.
\item \textsuperscript{118} 95 F.3d 1475 (10th Cir. 1996).
\item \textsuperscript{119} The \textit{Meyers} test, though it is similar to Judge Adams's three-part test, is discussed here because the defendant in \textit{Friedman} argued for its use in determining whether Friedman's beliefs constituted a religion under California law. \textit{See infra} Part IV.D.
\item \textsuperscript{120} \textit{Id.} at 1479.
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.} at 1482–84.
\item \textsuperscript{124} \textit{Id.} at 1483.
\end{itemize}
or organization, (g) holidays, (h) diet or fasting, (i) appearance and clothing, and (j) propagation.\textsuperscript{125}

These factors, like Judge Adams's indicia, are not to be applied rigidly. No one factor is dispositive: "[T]he factors should be seen as criteria that, if minimally satisfied, counsel the inclusion of beliefs within the term 'religion.'"\textsuperscript{126} However, in a nod to \textit{Yoder}, the court cautioned that "[p]urely personal, political, ideological, or secular beliefs probably would not satisfy enough criteria for inclusion."\textsuperscript{127} The Tenth Circuit held that "Meyers' beliefs more accurately espouse a philosophy and/or way of life rather than a 'religion.'"\textsuperscript{128}

\section{The Equal Employment Opportunity Commission's Definition of Religion}

As discussed \textit{supra}, Title VII defines religion to include "all aspects of religious observance and practice, as well as belief."\textsuperscript{129} As this definition is at best vague and circular, the EEOC codified its own definition of religion.\textsuperscript{130} The EEOC's broad definition relied upon the standard developed in \textit{Seeger} and \textit{Welsh}.\textsuperscript{131} The EEOC regulation defines religious practices and observances to "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."\textsuperscript{132} Furthermore, "[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee."\textsuperscript{133}

Thus, the EEOC advises broad religious protection under Title VII.\textsuperscript{134} The definition is not limited to traditional or theistic beliefs, but includes sincerely held moral and ethical beliefs. Importantly, a belief may be

\begin{itemize}
  \item \textsuperscript{125} \textit{Id.} at 1483–84.
  \item \textsuperscript{126} \textit{Id.} at 1484 (quoting United States v. Meyers, 906 F. Supp. 1494, 1503 (D. Wyo. 1995)).
  \item \textsuperscript{127} \textit{Id.} (quoting \textit{Meyers}, 906 F. Supp. at 1504) (alteration in original).
  \item \textsuperscript{128} \textit{Id.}
  \item \textsuperscript{129} 42 U.S.C. § 2000e(j) (2000).
  \item \textsuperscript{130} 29 C.F.R. § 1605.1 (2004).
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} \textit{Id.}
  \item \textsuperscript{133} \textit{Id.}
  \item \textsuperscript{134} As an example of the breadth of coverage, some courts have held the belief in atheism to be protected under the statute. \textit{See, e.g.}, Young v. Southwestern Sav. \& Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975) (holding that an atheistic employee made out a prima facie case of religious discrimination when she was constructively discharged for failure to attend staff meetings that began with a short religious talk and prayer led by a local minister).
"religious" even if held by only a single person. Equally important is the fact that a person's beliefs may be religious even when that person is part of a religious group that does not share the beliefs at issue.\footnote{135}

\textit{Peterson v. Wilmur Communications, Inc.},\footnote{136} is a good example of how a federal district court applied the \textit{Seeger/Welsh/EEOC} guidelines definition of "religion" in a nontraditional religious discrimination case. In \textit{Peterson}, Christopher Lee Peterson was a "follower of the World Church of the Creator, an organization that preaches a system of beliefs called Creativity,\footnote{137} the central tenet of which is white supremacy." The court observed that "Creativity considers itself to be a religion, but it does not espouse a belief in a God, afterlife or any sort of supreme being."\footnote{139} Creativity "teaches that Creators should live their lives according to the principle that what is good for white people is the ultimate good and what is bad for white people is the ultimate sin."\footnote{140} Peterson was a supervisor of eight employees at Wilmur Communications, three of whom were not white.\footnote{141} The day after a local newspaper ran a story about the World Church of the Creator in which Peterson was interviewed about the Church and his beliefs, he was suspended and ultimately demoted to a non-supervisory position.\footnote{142} Everyone in the office knew about the article, and according to his employer, the company no longer had confidence in his ability to be an objective supervisor.\footnote{143} Peterson brought suit against his employer for religious discrimination in violation of Title VII.\footnote{144}

The \textit{Peterson} court followed the \textit{Seeger/Welsh/EEOC} definition of religion to determine if Peterson's belief in the World Church of the Creator constituted a religion for Title VII purposes.\footnote{145} The court found that Peterson's beliefs were "sincerely held" and "religious in his own..."
scheme of things.” The court also gave “great weight” to the fact that Peterson considered his beliefs to be religious and regarded Creativity as his religion. Noting that Peterson had been a minister in the Church for three years, the court also found that Creativity played a central role in Peterson’s life. The court concluded that Peterson’s beliefs in Creativity occupy “a place in his life parallel to that held by a belief in God for believers in more mainstream theistic religions.” Thus, the court held that Creativity “functions as” religion for Peterson, and that he had “met his initial burden of showing that his beliefs constitute a ‘religion’ for purposes of Title VII.”

While the EEOC definition is broad, it is not all-encompassing. Beliefs solely grounded on political, economic, or social ideology are not protected. For example, membership in the Ku Klux Klan (KKK) is not a protected religious belief under Title VII according to the EEOC and some lower courts. Title VII, moreover, specifically excludes membership in a Communist party organization from protection.

Purely personal preferences, therefore, are not protected under the EEOC definitions of religion or religious beliefs. The most famous personal preference case, Brown v. Pena, illuminates the difference between purely personal preferences and protected religious beliefs. The plaintiff in Brown alleged that he had been discriminated against because of his religion. The charges were based on Brown’s “personal religious creed” that ‘Kozy Kitten People/Cat Food... [was] contributing significantly to [his] state of well being... [and therefore] to [his] overall work performance’ by increasing his energy.” The district court

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146. Id. at 1021–22 (citing Redmond v. GAF Corp., 574 F.2d 897, 901 n.12 (7th Cir. 1978)).
147. Id. at 1022 (quoting United States v. Seeger, 380 U.S. 163, 184 (1965)).
148. Id.
149. Id.
150. Id.
151. See Slater v. King Soopers, Inc., 809 F. Supp. 809, 810 (D. Colo. 1992) (holding that the KKK is a political and social organization, and is therefore not a religion under Title VII); Bellamy v. Mason’s Stores, Inc., 368 F. Supp. 1025, 1026 (E.D. Va. 1973) (mem.) (“[T]he proclaimed racist and anti-semitic [sic] ideology of the [KKK]... takes on, as advanced by that organization, a narrow, temporal and political character inconsistent with the meaning of “religion” as used in [Title VII].”), aff’d 508 F.2d 504 (4th Cir. 1974); EEOC Dec. No. 79-6, 26 Fair Empl. Prac. Cas. (BNA) 1758, 1758–60 (Oct. 18, 1978) (discussing the history and purpose of the KKK and finding that the organization considered itself to be fraternal and political in nature, and therefore is not a religion). But cf. Peterson, 205 F. Supp. 2d at 1022 (“[T]he courts in Bellamy and Slater provide little discussion as to how they reach their conclusions.”).
154. Id. at 1383.
155. Id. at 1384 (final three alterations in original).
discussed several definitions of religion and noted that each excludes "unique personal moral preferences." The *Brown* court held that "[p]laintiff's 'personal religious creed' concerning Kozy Kitten Cat Food can only be described as such a mere personal preference and, therefore, is beyond the parameters of the concept of religion as protected by ... [Title VII]."

Perhaps because the outcome of this case was clear from a common sense perspective, the *Brown* court provided only conclusory analysis on why Brown's "personal religious creed" concerning Kozy Kitten Cat Food was a mere personal preference. However, using the broadest legal definition of religion, i.e., the Seeger/Welsh/EEOC guidelines, the outcome is not at first glance unequivocal. Brown's belief seems to meet several of the necessary criteria. First, (at least there is no evidence to the contrary in the opinion) his belief in Kozy Kitten Cat Food was sincerely held. Second, Brown classified his belief as "religious," which furthers his claim in two respects: (1) the belief is "religious" in "his own scheme of things," and (2) his claim that his belief is religious "must be given great weight." Third, while a belief in Kozy Kitten Cat Food might seem irrational, a court is not free to judge the validity of beliefs it deems "incomprehensible." Finally, it is of no importance that Brown's beliefs are not related to a Supreme Being or that no organized group shares Brown's beliefs.

Nevertheless, the district court's holding was sound. The crux of the matter is that to be regarded as a religion, the belief must at least be moral or ethical in nature. A "religion" under Title VII encompasses "belief systems which espouse notions of morality and ethics and supply a means
from distinguishing right from wrong."\(^{166}\) While Kozy Kitten Cat Food may contribute to Brown's well-being, work performance, and energy level,\(^{167}\) it does not provide him with principles for how to live his life. In sum, Brown's belief in Kozy Kitten Cat Food is not a religious belief because it is not based on moral or ethical beliefs, and not because it is irrational, noninstitutional, and nontheistic.

IV. **Friedman v. Southern California Permanente Medical Group**

Against the foregoing backdrop of the definition of religion in varying contexts, a California appellate court was faced with the delicate question of defining religion for purposes of the California Fair Employment and Housing Act (FEHA)\(^ {168}\) in 2002. At issue was whether an employee was discriminated against on the basis of religion when he lost a job offer because his deeply held vegan beliefs prohibited him from being inoculated with a mumps vaccine. His story, the appellate court decision, and a critique follow.

A. Background and Factual History

In March 1998, Jerold Friedman had been working as a temporary worker for Kaiser Foundation Hospitals (Kaiser)\(^ {169}\) for almost one year.\(^ {170}\) Friedman was a computer technician, and the location of his work premises was a non-public, non-health care facility warehouse.\(^ {171}\) As such, Friedman had absolutely no contact with any of Kaiser's patients.\(^ {172}\) At this time, Kaiser decided it wanted to hire Friedman permanently for the same computer technician position.\(^ {173}\) He would be working in the same location

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167. Many things might contribute to well-being, energy, and work performance that no one would seriously consider "religious." Examples include eating a nutritious diet, getting adequate sleep, and exercising. *Contra* Rebecca Redwood French, From Yoder to Yoda: *Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law*, 41 *Ariz. L. Rev.* 49, 87 (1999) ("Bike magazine ran an issue on bicycling obsession as a 'religion,' with a cover depicting the Madonna encircled by a bicycle gear."). Some activities that may contribute to well-being, energy, and work performance, however, are clearly religious, such as prayer. See *Engel v. Vitale*, 370 U.S. 421, 425–35 (1962) (discussing the history of prayer as a religious activity in the United States).
170. Appellant's Opening Brief at 2, *Friedman* (No. B150017) (hereinafter "Friedman's Brief").
171. *Id.* at 1–2.
172. *Id.* at 2.
173. *Id.*
and would continue to have no patient contact. Kaiser gave Friedman an offer of employment with a salary of about $48,800 per year. On March 28, 1998, Kaiser informed Friedman that as a requirement for employment, he would have to be immunized for mumps.

At the time Friedman filed his complaint, he had been a strict Ethical Vegan for nine years. An Ethical Vegan "believes that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals, even for food, clothing and the testing of product safety for humans." As an Ethical Vegan, Friedman could not and did not "eat any animal based substances, such as meat, milk products, eggs, honey, or any other food which contains ingredients derived from or tested on animals." Furthermore, Friedman could not "use products which have been tested for human safety on animals or which derive any of their ingredients from animals such as cleaners, soap or toothpaste." Friedman described his beliefs as being "spiritual in nature." He strongly adhered to his beliefs, and had even been arrested for civil disobedience at animal rights demonstrations.

When Friedman discovered that Kaiser would require a mumps vaccination, he called the Center for Disease Control and learned that the mumps vaccine was grown in chicken embryos. According to Friedman's "Ethical Vegan belief system, egg-laying hens suffer greatly in chicken factory farms, and the use of unborn chickens to culture the mumps vaccine causes further unnecessary deaths of chickens." Being inoculated with the mumps vaccine was therefore in violation of Friedman's Ethical Vegan beliefs. Friedman told his would-be employer that he could not take the vaccine because doing so would violate his Ethical Vegan beliefs. However, Friedman advised Kaiser that he was "willing to comply with the spirit of the immunization requirement by some means other than subjecting himself to inoculation... including being check [sic] periodically for mumps symptoms, following any other regimen not involving the suffering or death of an animal, and even

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174. Id.
175. Id. at 6.
176. Id.
177. Id. at 5.
178. Id.
179. Id.
180. Id. at 5–6.
181. Id. at 6.
182. Id.
183. Id.
184. Id. at 2–3.
185. Id. at 6.
186. Id.
agreeing to work off-site." While Friedman’s direct supervisor was amenable to an accommodation, upper management and the human resources department were not. On April 10, 1998, Friedman was told not to come back to work.

B. Brief Procedural History

Friedman filed a charge of religious discrimination with the EEOC on January 25, 1999. The charge alleged that his “termination discriminated against him on the basis of his religious views in violation of Title VII.” The EEOC issued a dismissal and right-to-sue notice to Friedman on June 2, 1999. Thus, Friedman was free to bring an action against Kaiser in federal court under Title VII within ninety days.

Friedman chose not to file a complaint under Title VII in federal court. Instead, Friedman filed a complaint in the Los Angeles Superior Court for religious creed discrimination under California’s FEHA. In his complaint, Friedman alleged he is a strict vegan and that:

As a strict Vegan, [plaintiff] fervently believes that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals, even for food, clothing and the testing of product safety for humans, and that such use is a violation of natural law and the personal religious tenets on which [plaintiff] bases his foundational creeds. He lives each aspect of his life in accordance with this system of spiritual beliefs. As a Vegan, and his beliefs [sic], [plaintiff] cannot eat meat, dairy, eggs, honey or any other food which contains ingredients derived from animals. Additionally, [plaintiff] cannot wear leather, silk or any other material which comes from

187. Id.
188. Id.
189. Id. at 6–7.
191. Id. at 3.
193. Once the EEOC dismisses a charge, or issues a right-to-sue notice, the employee has ninety days to bring suit in a federal district court. 29 C.F.R. § 1601.19(a) (2002). Each United States district court has jurisdiction over actions brought under Title VII. Id.
194. Friedman’s reason for not pursuing his claim under Title VII is unknown to the author. To speculate, perhaps the ninety day time period to file a claim under Title VII had expired before he could file a complaint, or perhaps damages under state law were more attractive. Unfortunately, as discussed infra Part V.C. and note 285, Friedman may have been more successful under federal law.
animals, and cannot use any products such as household cleansers, soap or toothpaste which have been tested for human safety on animals or derive any of their ingredients from animals. This belief system[] guides the way that he lives his life. [Plaintiff's] beliefs are spiritual in nature and set a course for his entire way of life; he would disregard elementary self-interest in preference to transgressing these tenets. [Plaintiff] holds these beliefs with the strength of traditional religious views, and has lived in accordance with his beliefs for over nine (9) years. As an example of the religious conviction that [plaintiff] holds in his Vegan beliefs, [plaintiff] has even been arrested for civil disobedience actions at animal rights demonstrations. This Vegan belief system guides the way that [plaintiff] lives his life. These are sincere and meaningful beliefs which occupy a place in [plaintiff's] life parallel to that filled by God in traditionally religious individuals adhering to the Christian, Jewish or Muslim Faiths.195

The trial court sustained the defendants' demurrers without leave to amend to Friedman's causes of action for religious creed discrimination in violation of the FEHA.196 The trial court held that veganism "was not a religious creed within the meaning of the FEHA."197 Friedman then appealed to the California Court of Appeal, Second District, Division 5.

C. Friedman's Arguments on Appeal

On appeal, Friedman argued that "'Ethical Veganism' is the functional equivalent of a religion and/or religious belief under the California [FEHA]."198 He argued that even if Ethical Veganism was not found to be per se protected by the FEHA, his beliefs should still be viewed subjectively, in accordance with the facts in the complaint.199 Friedman argued that non-institutional religions are covered under the FEHA.200 He proposed that the definition of religion in the employment discrimination context should be broader than the definition of religion in the constitutional setting "in order to serve the differing public policy purpose of eliminating discrimination in the workplace."201 Friedman's main

196. Id. at 665.
197. Id.
198. Friedman's Brief at 15.
199. Id. at 18–19.
200. Id. at 20.
201. Id. at 21.
arguments for treating Ethical Veganism as a moral and ethical equivalent of a religion are encapsulated in his distinguishing of Brown v. Pena. Ethical Veganism extends beyond trivial dietary preferences [i.e. Brown’s belief in Kozy Kitten Cat Food]. 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 “lense” [sic] 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. . . . [B]eing vegetarian is only one small part of being an Ethical Vegan. . . . A recent poll estimates there are a half million Vegans in the continental United States. There is a common ethical principle shared by all Vegans which is a reverence for life and desire to live with, as opposed to depend upon, the others [sic] species of the planet. Veganism is therefore not some bizarre trivial personal belief, but is a sincerely held set of moral and ethical values that rise to the level [sic] religious beliefs, and should be afforded religious protections as such.

To further his argument that Ethical Veganism beliefs should be treated as religious, Friedman cited an EEOC determination. In the determination, the EEOC found that the plaintiff, a “strict vegetarian due to moral and ethical beliefs as to what is right and wrong,” was protected by Title VII. The EEOC determined that the plaintiff held his vegetarian beliefs with the “strength of traditional religious views.”

Notably, Friedman did not propose a test for the court to use in defining religion under the FEHA. He simply cited the definition of religion promulgated by a regulation to the FEHA, and argued that he met the standard.

D. Kaiser’s Arguments on Appeal

Kaiser argued on appeal that the trial court had correctly ruled that

203. Friedman’s Brief at 22–23.
204. Id. at 26. This EEOC determination is discussed infra Part V.C.
205. Id. (internal quotations omitted).
206. Id. (internal quotations omitted).
207. See id. at 24–25 (citing CAL. CODE REGS. tit. 2, § 7293.1 (2002)). Under § 7293.1, 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 that of traditionally recognized religions.”
Friedman’s vegan beliefs were not protected under the FEHA.\textsuperscript{208} Kaiser noted that there was “no published California case setting forth a test for courts to follow in determining whether certain beliefs qualify as a ‘religion’ under the [FEHA].”\textsuperscript{209} As such, Kaiser argued the court should use the test developed by the Tenth Circuit Court of Appeals in \textit{United States v. Meyers}.\textsuperscript{210} The \textit{Meyers} court set forth a number of factors\textsuperscript{211} to determine whether a set of beliefs is religious in nature. Kaiser argued that Friedman’s belief in veganism (which, according to Kaiser, is “confined to one basic issue or moral teaching – namely, avoiding cruelty to any living animal creature”)\textsuperscript{212} did not satisfy enough of the criteria to be considered a religion under \textit{Meyers}, and that it was instead a “personal, political, ideological or social belief.”\textsuperscript{213} Furthermore, Kaiser argued, Friedman’s belief was comparable to the beliefs at issue in \textit{Brown v. Pena}, the KKK cases, and \textit{Meyers} itself:

\begin{quote}
If Plaintiff’s beliefs are entitled to protection as a “religion,” then so are the beliefs of the KKK, worshipers of the Church of Marijuana, prisoners who believe in the spiritual powers of cat food, and anyone else with any passionately held belief. All they would need to do to claim protection is tell their employer that their belief is “sincere,” and it “holds a place parallel to that of traditionally recognized religions” in their life. It simply cannot be the law that California employers must accommodate any such claim. There must be a more objective standard for employers and courts to follow.\textsuperscript{214}
\end{quote}

Finally, Kaiser argued that the EEOC Determination cited by Friedman, being non-adjudicative in nature, was without legal effect and was not persuasive authority for any court.\textsuperscript{215}

\textbf{E. The Appellate Court Decision}

The court of appeals, in an opinion written by Presiding Justice Turner, devoted nearly twenty-one pages to answering “the question of whether veganism is a ‘religious creed’ within the meaning of the

\begin{footnotesize}
\begin{enumerate}
\item See Respondent’s Brief at 12, \textit{Friedman} (No. B150017) (hereinafter Kaiser’s Brief).
\item \textit{Id.}
\item Id. at 12–19.
\item Meyers is discussed supra Part III.B.2.
\item Kaiser’s Brief at 17.
\item Id. at 18.
\item Id. at 20–21.
\item Id. at 21.
\end{enumerate}
\end{footnotesize}
California Fair Employment and Housing Act.” The scope of California’s FEHA is quite similar to Title VII. The EEOC’s California equivalent, the Fair Employment and Housing Commission (FEHC), enacted regulation 7293.1, which states that “[r]eligious 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 that of traditionally recognized religions.” The court noted that this definition originated from Seeger and Welsh. While the EEOC regulation defining religion also originated from Seeger and Welsh, the court later explained what it perceived to be differences between the EEOC and FEHC definitions of religion.

The court began its analysis by examining California decisional authority. The court noted, as had Kaiser, that there was no California case construing the definition of religious creed under the FEHA, and proceeded to look at the question of what is a religion in other contexts. After looking to several California decisions, the court came to a few conclusions. The court found that while “[a] belief in a Supreme Being is not required . . . something more than a philosophy or way of life is required.” The court noted further that “[a]mong the factors to be considered are whether the belief system occupies in a person’s life a place parallel to that of God in recognized religions and whether it addresses ultimate concerns thereby filling a void in the individual’s life.”

The court next examined United States Supreme Court cases, discussing Seeger, Welsh, and Yoder at length. The court’s discussion of Seeger and Welsh is substantially the same as the discussion of these cases earlier in this comment. With respect to Yoder, however, the court gave more weight to the plurality’s conception of religion than is given in this comment. Important for the court was that “the Yoder plurality distinguished those beliefs which are entitled to constitutional Free Exercise Clause protection from viewpoints ‘based on purely secular considerations’ or a ‘subjective evaluation and rejection of the contemporary secular values . . . .’”

218. Friedman, 125 Cal. Rptr. 2d at 667.
219. Id. at 682–84.
220. Id. at 667–70.
221. Id. at 669.
222. Id. at 670.
223. Id. at 670–74.
224. See discussion supra Part III.A.2.b–c.
225. See supra note 93.
226. Friedman, 125 Cal. Rptr. 2d at 674 (quoting Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972)).
The court subsequently looked to Title VII and the EEOC's definition of religion.\textsuperscript{227} Peterson \textit{v. Wilmur Communications, Inc.}\textsuperscript{228} was examined as an example of how Title VII has been applied to a nontraditional religious organization (i.e. the World Church of the Creator and its teachings of Creativity).\textsuperscript{229}

The court devoted an extensive discussion to Judge Adams's concurring opinion in \textit{Malnak v. Yogi}. The court noted, “[w]e have found no court which has explicitly or implicitly rejected Judge Adams’s views expressed ... in \textit{Malnak}. Commentators have recognized Judge Adams’s opinion as the most influential judicial opinion in the past several decades in terms of defining religion.”\textsuperscript{230} The court also looked to other circuit court opinions that had adopted Judge Adams’s test including, inter alia, \textit{Africa} and \textit{Meyers}. The court concluded “[i]n contexts other than employment, in the last 23 years, the federal courts have articulated a less expansive definition of religion or religious creed than that in title 29 Code of Federal Regulations section 1605.1 as administratively construed.”\textsuperscript{231}

Before applying the law to Friedman’s beliefs, the court briefly discussed the one case it had found dealing with veganism and religion, \textit{Spies v. Voinovich}.\textsuperscript{232} In \textit{Spies}, “the court of appeals considered an inmate’s claim that as a Zen Buddhist he was required to maintain a vegan diet. The Sixth Circuit disagreed, holding that Zen Buddhism did not require a vegan diet and the vegetarian diet provided sufficed.”\textsuperscript{233} Importantly, however, the \textit{Spies} court observed, “in pointing out that veganism is not required of Zen Buddhists, we are not stating that Spies’s

\textsuperscript{227} Id. at 674–75.
\textsuperscript{228} 205 F. Supp. 2d 1014 (E.D. Wis. 2002). Peterson is discussed supra note 23 and Part III.D.
\textsuperscript{229} Friedman, 125 Cal. Rptr. 2d at 676–77.
\textsuperscript{230} Id. at 679. For this proposition, the court cited, inter alia, Feofanov, supra note 27, at 375–77. While not noted by the court, it should be remembered that the Adams test has not escaped its fair share of criticism. In discussing the Adams test Feofanov himself notes that:

Commentators, however, identified a number of problems with the Adams test. First, it excluded less conventional beliefs. Indeed, some anarchic traditions of Christianity eschewed ceremony and hierarchy and thus would not have qualified. Another problem inherent in the Adams test is that it did not provide any guidance for instances when some, but not all, criteria were present. Third, it required a fairly intrusive inquiry by the courts into allegedly religious beliefs—something that appears to be prohibited by the entanglement prong of \textit{Lemon v. Kurtzman}. Overall, the Adams test was inventive, but not quite successful.

\textsuperscript{231} Friedman, 125 Cal. Rptr. 2d at 677.
\textsuperscript{232} 173 F.3d 398 (6th Cir. 1999).
\textsuperscript{233} Friedman, 125 Cal. Rptr. 2d at 682.
Veganism is not a sincerely-held religious belief.234

After this extensive treatment of the law addressing the definition of religion in varying contexts and jurisdictions, the court decided to apply Judge Adams’s test from his concurring opinion in Malnak.235 According to the court, it decided to apply Judge Adams’s test because it “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.”236 The court also found that the test was consistent with regulation 7293.1, as the regulation “adopts by its terms a less expansive definition of religion than that promulgated by the EEOC.”237 Important in the court’s decision to use Judge Adams’s test was its finding that “[t]here is a significant difference between the EEOC’s administrative construction of the term ‘religion’ and the definition of ‘religious creed’ in regulation 7293.1.”238 The difference between the two definitions is explained by the court as follows:

The EEOC definition includes “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” Regulation 7293.1, on the other hand, defines “religious creed” 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.” Under regulation 7293.1, purely moral or ethical beliefs that are held with the strength of religious convictions may not qualify for protection under the FEHA. . . . The “importance parallel to that of traditionally recognized religions” requirement is not contained in title 29 Code of Federal Regulations section 1605.1.239

Furthermore, according to the court, the EEOC definition expands religion even further than the Seeger/Welsh test.240 Seeger and Welsh held that the belief must “occupy a place in the life of its possessor ‘parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.’”241 But according to the court:

234. 173 F.3d at 407.
235. Friedman, 125 Cal. Rptr. 2d at 682. Curiously, neither Friedman nor Kaiser briefed the issue of whether Friedman’s vegan beliefs were “religious” under the Adams test. See discussion of Friedman’s and Kaiser’s briefs on appeal, supra Part IV.C–D.
236. Id.
237. Id. at 682–83.
238. Id. at 683.
239. Id. at 683 (citations omitted).
240. Id.
241. Id. (quoting United States v. Seeger, 380 U.S. 163, 166 (1965)) (alteration in original).
The EEOC regulation, as administratively construed, appears to dispense with the requirement that religion is predicated on something more comprehensive than a personal moral or ethical code, however strongly held. It extends, by its terms, to “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” Under the EEOC definition, as construed administratively, a strongly held moral or ethical view may qualify as a religious belief, even though the view is essentially political, sociological, or economic and is in “no way related to a Supreme Being.” Seeger and Welsh are more restrictive than the EEOC’s administrative construction.\textsuperscript{242}

Finally, the court applied Judge Adams’s three indicia to Friedman’s beliefs. Applying the first indicium—that “a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters”\textsuperscript{243}—the court found:

There is no allegation or judicially noticeable evidence plaintiff's belief system addresses fundamental or ultimate questions. There is no claim that veganism speaks to: the meaning of human existence; the purpose of life; theories of humankind's nature or its place in the universe; matters of human life and death; or the exercise of faith. There is no apparent spiritual or otherworldly component to plaintiff's beliefs. Rather, plaintiff alleges a moral and ethical creed limited to the single subject of highly valuing animal life and ordering one's life based on that perspective. While veganism compels plaintiff to live in accord with strict dictates of behavior, it reflects a moral and secular, rather than religious, philosophy.\textsuperscript{244}

The second indicium is comprehensiveness: “a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching.”\textsuperscript{245} As for this indicium, the court found that:

\textit{[W]hile plaintiff's belief system governs his behavior in wide-
ranging respects, including the food he eats, the clothes he wears, and the products he uses, it is not sufficiently comprehensive in nature to fall within the provisions of regulation 7293.1. Plaintiff does not assert that his belief system derives from a power or being or faith to which all else is subordinate or upon which all else depends.  

The third indicium is the presence of formal or external signs. While the court noted that this indicium is not determinative, it found that "no formal or external signs of a religion are present." In particular, the court found no "teachers or leaders; services or ceremonies; structure or organization; orders of worship or articles of faith; or holidays." After concluding that Friedman's beliefs were not in accordance with any of the three indicia, the court held:

Absent a broader, more comprehensive scope, extending to ultimate questions, it cannot be said that plaintiff's veganism falls within the scope of regulation 7293.1. Rather, plaintiff's veganism is a personal philosophy, albeit shared by many others, and a way of life. ... Therefore, plaintiff's veganism is not a religious creed within the meaning of the FEHA.

While the court held that Friedman's beliefs did not qualify for protection under the FEHA, it did not shut the door to protection from discrimination for all religiously-inspired vegans. This is because the court did not "resolve the question of whether a vegan lifestyle that results from a religious belief otherwise meeting the standard in regulation 7293.1 is subject to FEHA coverage."

F. Criticism of the Court's Decision

Several aspects of the Friedman court's opinion merit consideration. First, the EEOC regulation defining religion does not, contrary to what is stated by the court, extend the Seeger/Welsh definition of religion. The
court argued that because the EEOC regulation does not require that in order to qualify as religious, a belief must occupy a place in the life of its possessor "'parallel to that filled by the orthodox belief in God'"\(^{253}\) of one who is clearly religious, it has somehow extended the Seeger/Welsh standard. But is not the EEOC’s phrasing, i.e., that the belief must be held "with the strength of traditional religious views,"\(^{254}\) really just another way of making the exact analogy the Court used in Seeger and Welsh? Furthermore, the regulation specifically states that the EEOC standard was developed in Seeger and Welsh.\(^{255}\) An explicit reading of the regulation reveals that it does not extend and does not intend to extend the Seeger/Welsh standard.\(^{256}\)

There is another fault with the court’s argument that the EEOC regulation extends the Seeger/Welsh standard. The court argues that Seeger and Welsh are more restrictive than the EEOC regulation because “[u]nder the EEOC definition, as construed administratively, a strongly held moral or ethical view may qualify as a religious belief, even though the view is essentially political, sociological, or economic and is in ‘no way related to a Supreme Being.’”\(^{257}\) But the Supreme Court has declared that “if the claimed religious beliefs... meet the test that we lay down then [the plaintiffs’] objections cannot be based on a ‘merely personal’ moral code.”\(^{258}\) A strongly held moral or ethical belief, therefore, cannot be essentially political, sociological, or economic as long as it meets the test. Thus, the court’s argument that the EEOC definition expands the Seeger/Welsh standard is unsound.

Along these lines, the court is also splitting hairs by arguing that the FEHA definition of religion is less expansive than the EEOC regulation. Both definitions, by their statutory language, are based on the Seeger/Welsh standard. Therefore, the same arguments for the position that the EEOC definition is not broader than the Seeger/Welsh standard apply to the argument that the FEHA definition is not less expansive than the EEOC definition.

The second criticism of the court’s opinion is that the court focuses too much on “veganism” as a religion and not enough on Friedman’s personal beliefs. The court is correct that the test to define religion is essentially objective, but an individual’s beliefs must be examined subjectively. In the words of Justice Clark, writing for the majority in

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253. Id. at 683 (quoting Seeger, 380 U.S. at 166).
255. Id.
256. Whether or not court opinions can be interpreted to have broadened the EEOC definition is another question, one which is beyond the scope of this comment.
257. Friedman, 125 Cal. Rptr. 2d at 684 (quoting Seeger, 380 U.S. at 186).
258. Seeger, 380 U.S. at 186.
Seeger, "in resolving these... problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the [individual] that his belief is an essential part of a religious faith must be given great weight." In his complaint, Friedman classified his beliefs as his "personal religious tenets." Furthermore, he asserted that "[h]e lives each aspect of his life in accordance with this system of spiritual beliefs. Friedman claimed that his belief was an essential part of a religious faith, but the court did not give his claim "great weight" or, for that matter, any weight. The court should have given more probative value to the fact that Friedman classified his beliefs as religious.

The final criticism of the court's opinion is that even using Judge Adams's test, (which will be criticized below) Friedman's beliefs can satisfy the three elements. The first indicium is the nature of the ideas in question. When listing examples of "ultimate" ideas, the court does not give the following example given by Judge Adams himself: "the proper moral code of right and wrong." Ultimate concerns "are those likely to be the most 'intensely personal' and important to the believer." Friedman lives his life according to the moral code that all living beings—humans and animals alike—must be valued equally. This is his "ultimate concern," and it guides the way he lives his life. The food he eats, the clothing he wears, and the products he buys are all a consequence of his moral and ethical beliefs in the equality of all living beings. For Friedman, the way he lives his life is "right," while killing and exploiting animals is "wrong." His belief system gives him "the proper moral code of right and wrong," and therefore, his beliefs address fundamental questions.

Furthermore, as asserted in his complaint, Friedman's beliefs can be viewed as comprehensive. Friedman "lives each aspect of his life in accordance with this system of spiritual beliefs." He cannot eat a meal, get dressed in the morning, or go shopping without his beliefs affecting his decisions. No court would question the comprehensiveness of a Christian's beliefs, even a Christian whose religious activities consist of going to church twice a year for Christmas and Easter. This is the case for the sole reason that a "Christian" is connected with a recognized religious institution. Non-institutionalized religious beliefs should not be penalized for their lack of establishment. Friedman's belief system is surely more

259. Id. at 184 (emphasis added).
260. Friedman, 125 Cal. Rptr. 2d at 665.
261. Id.
263. Id. (quoting Seeger, 380 U.S. at 184).
264. Friedman, 125 Cal. Rptr. 2d at 665-66.
265. Id.
266. Id. at 665.
comprehensive than that of many individuals who are nominally associated with a religious institution.

In applying any of the three indicia, it must be remembered that Judge Adams developed his standards as a way for courts to have objective criteria to apply the Seeger/Welsh standard. His standard cannot be applied in a way that would overrule the Court's holdings in Seeger and Welsh, i.e., that the beliefs of Seeger and Welsh were religious. Seeger and Welsh believed strongly that killing humans in war was morally wrong, and their consciences forbade them from doing so.\textsuperscript{267} Similarly, Friedman believed that killing \textit{any living being}, for any reason whatsoever, was morally and ethically wrong.\textsuperscript{268} As compared to the beliefs of Seeger and Welsh, Friedman's beliefs are surely at least as "comprehensive."

The third indicium is the presence of formal signs. Friedman's belief system encompasses two formal elements found in many traditional religions: restrictions on diet and dress. Furthermore, the complaint asserts that Friedman had been arrested for civil disobedience at animal rights demonstrations.\textsuperscript{269} This can be viewed as a form of proselytizing, or an attempt at propagation, which courts have recognized as a formal sign of a religion.\textsuperscript{270} In any event, the lack of formal signs cannot and should not be used to deny a set of beliefs religious protection. This argument will be discussed further in Part V.

In summary, the \textit{Friedman} court applied Judge Adams's test because of its erroneous beliefs that the EEOC definition of religion expanded the Seeger/Welsh definition and that the California FEHC definition was more restrictive than the EEOC definition. While Judge Adams's test is inappropriate in the employment context, as will be discussed in Part V, the facts of Friedman's case demonstrate that his vegan beliefs can meet each of the three indicia.

V. RECOMMENDATIONS

A. Judge Adams's Test Is Not Appropriate in the Employment Discrimination Setting

Judge Adams's test should not be used by courts that are faced with the difficult task of defining religion vis-à-vis an employment discrimination statute. The main reason the test is inappropriate in the

\textsuperscript{268} Friedman, 125 Cal. Rptr. 2d at 665.
\textsuperscript{269} Id. at 666.
\textsuperscript{270} See United States v. Meyers, 95 F.3d 1475, 1483-84 (10th Cir. 1996) (listing "propagation" as one of the external signs that "may indicate that a particular set of beliefs is 'religious'").
employment discrimination setting is that it forces courts to make an inappropriate analogy. None of the various definitions for religion examined purport to distinguish between externally and internally derived beliefs. Internally derived beliefs, however, are not typically associated with an established organization. There are very few similarities between a person’s unique system of beliefs and traditional religions, such as Christianity or Judaism, which have hundreds of years of history and memberships in the millions. What can be compared, however, are the strength of the beliefs and the place the beliefs occupy in the life of their possessor. And that is exactly what the Seeger/Welsh/EEOC definitions do. The Seeger test 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 God of one who clearly qualifies for the exemption.” What is important is the belief, not the infrastructure or the institution. Therefore, the indicium of “formal signs” seems to be a completely irrelevant and misleading inquiry.

Another reason the test should be abandoned in this context is because it was developed in a Free Exercise Clause case. There are problems that arise when defining religion for First Amendment purposes that do not plague employment discrimination cases. One of the major problems is that if religion is defined too broadly, it could lead to Establishment Clause problems. For example, if veganism was deemed a religious belief in a First Amendment context and a school taught a course in veganism, there may be an Establishment Clause violation. Also, defining religion too broadly for First Amendment purposes could lead to more groups claiming free exercise rights in attempts to circumvent neutral state laws and policies.

For employment discrimination purposes, however, beliefs are

271. Seeger, 380 U.S. at 166.
272. The phrasing of the Religion Clauses . . . creates a definitional dilemma: If the Free Exercise Clause is intended to protect religious adherents from government action that impinges on their faith, then the term “religion” must be defined very broadly, to encompass all behavior that is motivated by religion. But if the same broad definition is used to limit government action under the Establishment Clause, then many activities of the modern regulatory state would suddenly be vulnerable to constitutional challenge as establishments of religion. Gey, supra note 36, at 97.
273. This was a fear of the district court in United States v. Meyers:

Were the Court to recognize Meyers’ beliefs as religious, it might soon find itself on a slippery slope where anyone who was cured of an ailment by a “medicine” that had pleasant side-effects could claim that they had founded a constitutionally or statutorily protected religion based on the beneficial “medicine.”

examined individually. If the Friedman court had held that Friedman's beliefs were protected by the FEHA, it would not have also been holding that "veganism" is a religion. Not every vegan would have a valid claim of employment discrimination if faced with a mandatory vaccination. First, the employee would have to tell the employer that a job requirement was in contravention of his or her religious beliefs. Second, the employee would have to prove that he or she considers the vegan beliefs to be religious and that the beliefs are held with the strength of traditional religious beliefs. Third, even if the beliefs are found to be religious, a claim will fail if the employer can show that it could not accommodate the employee without undue hardship.

The final reason the Adams test should not be used for employment discrimination purposes is the foundational inconsistency of the test itself. The Adams test was developed as a way for courts to apply the Seeger/Welsh "analogy." However, under the Adams test, it is likely that the belief systems of Seeger and Welsh would not be found to be "religious" at all. Any test that would exclude the belief systems of Seeger and Welsh from classification as religious, while claiming to be based upon the Seeger/Welsh standard, is inherently inconsistent. In fairness, this inconsistency may not be directly attributable to Judge Adams himself, who warned that the indicia "should not be thought of as a final 'test'" and that "[f]lexibility and careful consideration of each belief system are needed." Nonetheless, the standards have been applied as a test with superfluous rigidity. In short, the Adams test is too restrictive to be used for employment discrimination purposes.

B. A Move Back to Seeger/Welsh and the EEOC Definition

Federal and state courts should adhere to the EEOC definition of religion when challenged with defining religion for the purposes of Title VII or state FEP laws. The EEOC is the government agency charged with administering Title VII, and as such, its interpretation is entitled to deference by the courts. Notwithstanding the deference issue, the EEOC has stated the best definition of religion for employment discrimination cases because its definition is broad and is based on Supreme Court

275. Seeger's beliefs are discussed supra at Part III.A.2.b, and Welsh's beliefs are discussed supra Part III.A.2.c.
276. Malnak, 592 F.2d at 210 (Adams, J., concurring).
277. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984) (discussing the weight to be given to an administrative agency's interpretation of federal law); Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 158 n.3 (1981) ("[T]he regulations promulgated by the governmental body responsible for interpreting or administering a statute are entitled to considerable respect . . . .").
"Religion" should be defined as broadly as possible for purposes of employment discrimination laws. The problem of defining religion for First Amendment purposes (i.e., broadly defining religion in Free Exercise Clause cases may create Establishment Clause problems) does not exist in the employment discrimination context. Additionally, defining religion broadly for employment discrimination cases would not open the floodgates to increased litigation. Even if more sets of beliefs are held to be religious, employers will not necessarily be subjected to additional liability. First, an employee or prospective employee cannot make out a prima facie case of employment discrimination because of religion unless the employer had knowledge of the religious belief. Therefore, employers do not need to worry about unintentionally discriminating against a person based on unusual beliefs unless the person has declared those beliefs to be religious. Second, even if an employer knows a person has religious beliefs, accommodation is only necessary if it does not cause undue hardship on the employer's business. Furthermore, the Supreme Court has interpreted the accommodation requirement very narrowly.

Another reason the EEOC definition of religion should be used is because it is based upon the Supreme Court's definition of religion in Seeger and Welsh. While subjected to their share of criticism, Seeger and Welsh are the current Supreme Court precedent for defining religion. The EEOC's definition should be used by the courts because its definition originates from the Supreme Court and is highly protective of workers' rights. The intent of Congress in Title VII was to protect workers from invidious or arbitrary discrimination. The statute protects persons who are discriminated against "because of... religion." To fully realize Congress's intent, "religion" as used in Title VII and in state employment discrimination statutes should be interpreted broadly to include moral and ethical beliefs that are sincerely held with the strength of traditional

278. See supra note 24 (listing the elements of a prima facie case for religious discrimination).
280. See supra note 18 (discussing the Supreme Court's analysis of accommodation and undue hardship in TransWorld Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), which holds that an employer does not need to incur more than minimal costs in order to accommodate an employee's religious practices).
religious beliefs. The fact that an individual asserts that his beliefs are religious "in his own scheme of things" should weigh heavily in favor of protection.

C. Veganism as a Religion

Vegan beliefs should be protected as religious beliefs under Title VII and state FEP laws when a person's choice to adhere to veganism stems from deeply held moral and ethical beliefs and the person holds those beliefs with the strength of traditional religious beliefs. There are many indications in the case law and elsewhere that, under certain circumstances, vegan beliefs can and should be found to be "religious" under Title VII. As a matter of public policy, state FEP laws should provide at least as much protection as Title VII does for employees.

While those with vegan beliefs that are sincerely held with the strength of traditional religious beliefs should be protected under religious discrimination statutes, this Comment does not assert that "veganism" or "Ethical Veganism" is a religion. It is not the case that all vegans should have a cause of action for religious discrimination. People choose not to eat meat for many reasons. A choice to abstain from eating or using animal products based on personal preference, such as taste aversions or health or medical considerations, could not be "religious" under even the broadest definition of religion. It is only when a person's choice to adhere to veganism stems from deeply held moral and ethical beliefs, and the person holds those beliefs with the strength of traditional religious beliefs, that veganism can rise to the level of a protected religious belief or practice.

Many sources, including federal law, state law, and an EEOC determination, lend support to a successful cause of action for religious discrimination because of sincerely held vegan beliefs. If Friedman had brought his case under federal law, he would have had a better chance of not having his case dismissed. In Spies v. Voinovich, the Sixth Circuit

283. There are many different varieties of "veganism" and "vegetarianism." This comment does not distinguish between them in terms of the protection these beliefs should be afforded when they rise to the level of a protected religious belief. "Vegan" and "veganism" are used most frequently, but other terms, including "Ethical veganism" and "strict vegetarianism," can be substituted when appropriate.

284. See Michael J. Zimmerman et al., Cases and Materials on Employment Discrimination 657 (5th ed. 2000) ("Many vegetarians have religious bases for their lifestyle, but many others are vegetarians for health reasons. Still others have what might be called philosophical or moral reasons for not consuming animals.").

285. See Veganism a Religion? It Depends, [2002] 2 Lab. & Empl. Bull. (MB) 1, para. 15 (Nov. 1, 2002) ("Friedman lost his claim, not because it was considered frivolous, but because serious consideration of the specific language of the California law was deemed not to apply in his circumstance. Had Friedman brought his claim under Title VII, there
stated that even though it found that veganism is not required of Zen Buddhists, it was "not stating that Spies’s veganism is not a sincerely-held religious belief." Rather, the prison did not have to provide Spies with a vegan diet because its decision not to do so was "reasonably related to a legitimate penological interest."  

While the majority’s opinion will prove useful to future vegan plaintiffs, the Spies dissent is even more helpful by criticizing the majority for placing too much emphasis on the fact that Spies’s religion did not require him to maintain a vegan diet. According to Judge Moore, "[c]ourts are ill-equipped to act as arbiters of the tenets of religious faith" and should not be determining "whether a particular practice is a 'required' aspect of a religion." A Zen Buddhist, like Friedman, can have a sincerely held religious belief in maintaining a vegan lifestyle without an order from any temple or organization. Purely internally-derived beliefs are protected under anti-discrimination laws: "the First Amendment [like Title VII] does not provide greater protection for centralized religions with established sets of mandatory doctrines than it provides for less established or individual-based religions."  

The Friedman court itself also indicated that veganism may be a sincerely held religious belief. The court consciously left open "the question of whether a vegan lifestyle that results from a religious belief otherwise meeting the standard . . . is subject to FEHA coverage." Here, the court indicated that it is possible for a vegan lifestyle that results from a protected religious belief to be covered under the state FEP statute. An example of a vegan lifestyle that results from a protected religious belief may be a situation where a person’s veganism is derived from tenets of a traditional religion, such as Buddhism.

The Equal Employment Opportunity Commission directly addressed the question of whether vegan beliefs can rise to the level of protected religious beliefs under Title VII, and it answered the question in the affirmative. While the Friedman court noted that it could only find one case dealing with veganism and religion, it did not discuss the EEOC determination Friedman cited in his brief. Although an EEOC determination has no binding legal effect, it is prudent to examine all possible sources when the law on a particular area is as sparse as the law on

probably would have been a different result.") (emphasis added).
286. 173 F.3d 398, 407 (6th Cir. 1999). Spies is discussed supra Part IV.E.
287. Id.
288. Id. at 409 (Moore, J., dissenting).
289. Id.
290. Friedman, 125 Cal. Rptr. 2d at 686.
292. 125 Cal. Rptr. 2d at 682.
veganism and religion.

The compelling story behind the EEOC's determination in Anderson v. Orange County Transit Authority received national attention from the media. In 1996, Bruce Anderson was fired from his position as a bus driver for the Orange County Transportation Authority (OCTA). As a strict vegetarian, he refused to hand out promotional coupons for free hamburgers at a fast food restaurant to bus passengers. Anderson said handing out the coupons "violated his beliefs [as a devout vegetarian] that animals should not be killed or eaten." The coupons were to be handed out one day a week for a month, and Anderson offered to put the coupons in a basket so passengers could help themselves. OCTA apparently was not agreeable to this accommodation and fired Anderson for insubordination. Anderson filed a discrimination complaint with the EEOC, and he also brought suit against OCTA in Orange County Superior Court. The EEOC determined that Anderson had "strongly held moral and ethical beliefs" and that he held his beliefs "with the strength of traditional religious views." The Commission found that OCTA had "failed to reasonably accommodate him, thus violating laws against religious discrimination." Anderson's lawsuit against OCTA ultimately settled, with OCTA agreeing to pay Anderson $50,000 and also agreeing to "amend its employee handbook to explicitly state that it will abide by federal regulations governing religious and personal freedom in the workplace." OCTA, of course, denied any admission of error, citing the cost of a trial as its reason for settling.

While not binding legal authority on any court, the EEOC determination is important because it is the first concrete recognition that strict vegetarian beliefs can rise to the level of protected beliefs under religious discrimination statutes. When a set of beliefs, moral and ethical in nature, is held with the strength of traditional religious beliefs, it is deserving of protection. The Friedmans and Andersons of this country

294. Haldane, supra note 293, at A22.
295. Id.
296. Id.
298. Haldane, supra note 293, at A22.
299. Id.
300. Id.
301. Id. (internal quotations omitted).
302. Id. at A3.
303. Id. at A22.
should be able to maintain their employment without being forced to violate their sincere religious beliefs.\textsuperscript{304}

Another reason vegan beliefs can and should be protected under religious discrimination statutes is to avoid arbitrary results. While a case has yet to come before a court, it is almost certain that a person who has deeply held vegan beliefs—and is associated with an organized religion—will be protected from religious discrimination because of those beliefs. While veganism is not technically “required” under many organized religions, it is associated with many traditional religions.\textsuperscript{305} If a person ties vegan beliefs to one of those traditional religions, even though such beliefs are not technically required by the religion, courts will very likely provide a cause of action for discrimination because of those beliefs.\textsuperscript{306} All sincerely held moral or ethical vegan beliefs should be protected because it is arbitrary to say that a vegan who is affiliated with an organized religion must be given protection while a vegan who holds the same beliefs—though internally derived—does not deserve the law’s protection. Decisions like that rendered by the Friedman court are arbitrary because a person who is a vegan for all the same reasons as Friedman, but who also happens to be a member of an organized religion—whether or not that

\textsuperscript{304} In asserting that his vegan beliefs are religious in nature, Friedman is not unique. Many people do claim veganism as their religion. For example, some people refer to themselves as Spiritual Vegans. See Spiritual Vegans at http://www.geocities.com/spiritual vegans/index2.html (last updated May 21, 2002) (“[T]he added spiritual dimension to veganism fills a need for many vegans who have deeply [sic] spiritual feelings, especially in regard to animals. Unless these vegans belong to one of the main religions, their feelings, until now, have had no recognisable home. Spiritual Veganism may be the answer for them.”); cf. Stanley M. Sapon, Is Veganism a Religion?, VEGNEWS (Dec. 2002), available at http://www.veganvalues.org/veganism_religion.htm (last visited Jan. 28, 2005) (describing the Friedman opinion as an “inflammatory and threatening set of findings” for “Vegans of conscience... whose deep feelings of respect and reverence for all life has acquired the force of conviction, a core of principled moral philosophy that not only characterizes, but shapes and informs their lives.”).

\textsuperscript{305} Veganism is associated with many major recognized religions including, Buddhism, Christianity, Hinduism, Judaism, and Wicca. See Vegan Ethics, at http://www.veganforlife.org/ethics.htm (last updated Aug. 18, 2002) (“The ethics of veganism tie in closely with the ethics of most of the world’s [sic] major religions, and the practice of veganism is complementary to the teachings of many of the world’s [sic] great prophets and religious teachers.”); see generally International Vegetarian Union, Religion and Vegetarianism at http://www.ivu.org/religion/ (last updated Dec. 17, 2004) (providing links to articles and websites about religion and vegetarianism).

\textsuperscript{306} This proposition is based on analogy to other cases where courts have protected religious beliefs or practices even though not “required” by the plaintiff’s organized religion. See, e.g., Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993) (stating that Title VII protects more than beliefs or practices specifically mandated or prohibited by an employee’s religion, because to restrict Title VII to protection of only required practices would require the courts to determine what is or is not required by a certain religion, which the Supreme Court has said should not be done).
religion mandates veganism—would most likely be protected. Furthermore, opinions like Friedman might actually encourage people to join a religion that supports a vegan or vegetarian diet just to get workplace protection.\textsuperscript{307}

VI. CONCLUSION

"[W]e have become a Nation of many religions and sects, representing all the diversities of the human race."\textsuperscript{308} While religion in the United States is ubiquitous, it is not self-defining. A broad and tolerant or, in the words of Justice Douglas, "exalted"\textsuperscript{309} definition of religion must be used under Title VII and state fair employment practice laws to protect American workers from discrimination because of religion. To protect all workers from religious discrimination, "religion" as used in employment discrimination statutes should be interpreted broadly to include moral and ethical beliefs that are sincerely held with the strength of traditional religious beliefs.

Jerry Friedman's religion is veganism. He lost his job rather than transgress his personal religious convictions. While a California appellate court held that Friedman's beliefs are not protected religious beliefs under the California FEHA, Friedman, and many others like him, still adhere to their religion: veganism. Under a broad and tolerant definition of religion for purposes of employment discrimination statutes, veganism—when sincerely held as ethical and moral beliefs that are religious in the worker's own scheme of things—should be a protected religious belief.


Receiving vegetarian or vegan meals in prison is no easy process. Although it may sound crass, the easiest way to receive vegetarian or vegan meals in prison is to join a religion that has vegetarianism or veganism as a tenet of the faith. Although it could be argued that ethical veganism should qualify as a religion under the First Amendment, courts may rule otherwise.

\textit{Id.} (emphasis added).


\textsuperscript{309} \textit{Id.}