

# Privacy as Sphere Autonomy

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## I. Introduction

In United States employment law, employee “privacy” encompasses two seemingly distinct ideas:<sup>1</sup> first, an employee’s right to be unwitnessed by or undisclosed to her employer, and, second, an employee’s right to personal autonomy – or, better, sovereignty – over certain life decisions.<sup>2</sup> In many important respects, these two forms of privacy are quite different from one another.<sup>3</sup> But this paper will argue that, within the realm of U.S. employment law, the right to be unwitnessed and undisclosed and the right to personal sovereignty are united conceptually by a commitment to what the paper will call “sphere autonomy.”<sup>4</sup> In brief, sphere autonomy suggests that an employer’s authority both to know about her employees and to control what her employees do is derived from the employment relationship, and, as a result, that authority should be deployed *only* within the sphere of employment. When an employer attempts to use her authority beyond the confines of the employment relationship – by inquiring into an employee’s private life or attempting to control that private life – we have a violation of the principle of sphere autonomy and thus an impermissible exercise of employer authority. Employee privacy rights in U.S. employment law can thus usefully be understood as an attempt to police sphere boundaries and ensure sphere autonomy.

The paper will proceed as follows. Part II will identify several areas of U.S. employment law that display a commitment to employee privacy as a right to be unwitnessed and undisclosed vis-à-vis the employer, what the paper will call privacy as confidentiality. Part III will then identify a few areas of U.S. employment law that manifest commitment to employee privacy as a right to personal sovereignty: the employee’s right to control certain aspects of her life unimpeded by the demands of employer and firm, what

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<sup>1</sup> See generally Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 Chi-Kent L. Rev. 221 (1996).

<sup>2</sup> Cf. Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 Notre Dame L. Rev. 445 (1983). Feinberg usefully speaks of “autonomy as sovereignty” and I will follow him here in part to distinguish “personal sovereignty” from the “sphere autonomy” that will be my focus. See *infra*. He also describes another version of privacy as “the right to be unintruded upon, unwitnessed, and undisclosed in one’s solitude.” *Id.* at 486.

<sup>3</sup> Compare Elizabeth L. Beardsley, *Privacy: Autonomy and Selective Disclosure*, NOMOS XIII: PRIVACY 56 (1971) with Hyman Gross, *Privacy and Autonomy*, NOMOS XIII: PRIVACY 169 (1971), cited in Feinberg, *supra* n.X at 446 n.2.

<sup>4</sup> See generally Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 26 (1983); see also Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. Rev. 1047, 1081 (1994) (discussing the role that “sphere autonomy” plays in Walzer’s theory of justice).

the paper will call, following Joel Feinberg, privacy as personal sovereignty.<sup>5</sup> Then, Part IV will review Michael Walzer's argument that power derived in one sphere of social life ought only be deployed within the sphere where it was obtained and not exported from one sphere to another. Part V will show how both aspects of privacy in U.S. employment law can be understood as manifesting a commitment to sphere autonomy. The paper concludes in Part VI.

Two important caveats before beginning. First, the intent of the discussion here is *not* to capture the predominant or majority view among U.S. jurisdictions on the law of employee privacy.<sup>6</sup> Instead, the paper aims only to show that, within U.S. employment law, there exist strands of doctrine motivated by two seemingly distinct types of privacy and that these strands can helpfully be understood as unified by a commitment to sphere autonomy.

Second, to understand employee privacy rights as a commitment to sphere autonomy is not to answer the important, and vexing, question of how we ought to delineate the relevant spheres. Where, for example, does the "employment sphere" – as the paper will call it – end and other spheres of social life begin? To take an example that will recur in the paper: when an employer attempts to control an employee's romantic partnerships, the employee might understand that as interference in a sphere of the employee's life quite distinct from the employment relationship. But the employer, for her part, might view the partnership as a problem for the firm and thus very much a matter within the employment sphere.<sup>7</sup>

Delineating sphere boundaries is, however, beyond the scope of what this paper hopes to do. The point of this paper is to argue, more simply, that these two seemingly distinct strands of employee privacy rights both make sense as expressions of a commitment to sphere autonomy. The precise boundaries of the employment sphere – and the other spheres of social life that employees inhabit – remain undefined in the cases and statutes that protect employee privacy. What is apparent in these legal regimes, however, is a commitment to the principle that there are distinct spheres, and that an employer's authority ought to be cabined to the employment sphere where it was derived.

## II. Privacy as Confidentiality

The first, and in some senses most intuitive type of employee privacy that U.S. employment law protects is the employee's right to keep certain things *private* – or confidential – from her employer.<sup>8</sup> The range of cases and statutes that protect this type of privacy is broad,<sup>9</sup> and this Part will discuss only a few.

Perhaps the classic example of privacy as a right to confidentiality comes in cases involving an employer's physical search of an employee's body. *Bodewig v. K-Mart*,

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<sup>5</sup> See Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 Notre Dame L. Rev. 445 (1983).

<sup>6</sup> Indeed, at times the paper will invoke cases that have remained relative outliers within employment law doctrine.

<sup>7</sup> For a helpful discussion of these points, see Stephen D. Sugarman, "Lifestyle" Discrimination in Employment, 24 Berkeley J. Empt & Lab. L. 377, 384-95 (2003).

<sup>8</sup> Feinberg calls this type of privacy the "familiar pre-technical sense" of privacy and that seems accurate. Feinberg, *supra* n.X at 486.

<sup>9</sup> See, e.g., Finkin, *supra* n.X at 225-35; see also MATTHEW W. FINKIN, PRIVACY IN EMPLOYMENT LAW (2003).

*Inc.*,<sup>10</sup> for example, involved a check-out clerk at a Kmart in Oregon. A disgruntled customer named Golden alleged that she left \$20 in Bodewig's check-out line, and that Bodewig stole the money. When Bodewig, the customer, and the store manager were unable to find the customer's \$20, the store manager told Bodewig to go with a supervisor – and the disgruntled customer – to the women's bathroom “for the purpose of disrobing in order to prove to Golden that [Bodewig] did not have the money.”

In the bathroom, Bodewig took off all her clothes except her underwear while the customer and the supervisor watched. In the court's words, “[w]hen plaintiff asked Golden if she needed to take off more, Golden replied that it was not necessary because she could see through plaintiff's underwear anyway.”

Bodewig quit the next day and sued the employer for outrageous conduct. The Oregon court held that there was sufficient evidence in the record for the case to go to a jury. As the court put it, a jury could find that the K-Mart manager, “put [Bodewig] through the degrading and humiliating experience of submitting to a strip search in order to satisfy the customer . . . [and] that the manager's conduct exceeded the bounds of social toleration and was in reckless disregard of its predictable effects on plaintiff.” Thus, *Bodewig* grants legal protection for an employee's right to be unwitnessed and undisclosed.

Similar examples exist in the context of employer searches, not of an employee's body, but of an employee's personal effects. In *K-Mart Corp. Store No. 741 v. Trotti*,<sup>11</sup> for example, K-Mart provided employees with a locker to store their personal items during work hours. Trotti, an employee of K-Mart, placed her purse in her locker when she arrived at work, and locked the locker. But when Trotti returned to her locker during an afternoon break, she found the lock hanging open and the “personal items in her purse in considerable disorder.” A store manager ultimately testifies that he had searched the lockers that afternoon because K-Mart's security guards had a suspicion that some employee – not Trotti – had stolen a watch.

Trotti sued K-Mart for invasion of privacy and the Texas court of appeals again held that there was sufficient evidence in the record upon which a jury could find for the plaintiff-employee. As the Texas court wrote, the employer “disregarded [Trotti's] demonstration of her expectation of privacy, operant and searched the locker, and probably opened and searched her purse as well. . . . It is sufficient that an employee in this situation, by having placed a lock on the locker at the employee's own expense and with the [employer's] consent, has demonstrated a legitimate expectation to a right of privacy in both the locker itself and those personal effects within it.”<sup>12</sup>

If searches of the *Bodewig* and *Trotti* variety are classic iterations of privacy as confidentiality, two more contemporary versions of this type of employee privacy right can be found in statutory law governing an employee's genetic makeup and an employee's social networking activities. These statutory regimes respond, in different ways, to technological developments that – without new privacy protections – would expose a great deal of personal information to employer view.

<sup>10</sup> 635 P.2d 657 (Ct. App. Or. 1981).

<sup>11</sup> 677 S.W.2d 632 (Ct. App. Tex. 1984).

<sup>12</sup> Again, with respect to both strip searches of the type at issue in *Bodewig* and personal-effects searches of the type at issue in *Trotti*, judicial treatment is far from uniform and many employee claims are rejected by courts. See, e.g., *Finkin*, *supra* n. X at 225. The point here is simply that, given adequate facts, this is a type of privacy right that is recognized by U.S. employment law.

In 2008, the United States Congress passed the Genetic Information Non-Disclosure Act (GINA).<sup>13</sup> Title II of GINA prohibits employers from accessing information about an employee's genetic make-up. Thus, the law makes it an unlawful employment practice for an employer to "request, require, or purchase genetic information with respect to an employee or a family member of the employee."<sup>14</sup>

That is, under GINA, employees in the United States have a federal statutory right to keep their genetic information confidential from their employers. The law, moreover, forbids employers not only from accessing employees' genetic information but also from making employment decisions based on such information. Thus, the law makes it an unlawful employment practice for an employer:

- (1) to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee; or
- (2) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.<sup>15</sup>

As in many areas of U.S. employment law, moreover, the federal statute leaves room for state and local interventions as well. GINA therefore sets a national floor for employee privacy protection, but it allows state laws to do even more to protect the confidentiality of employee genetic information. In fact, by the time of GINA's enactment, more than thirty states had laws prohibiting genetic discrimination in employment.<sup>16</sup>

While GINA and its state-law analogues protect the confidentiality of employee genetic information, a second set of state laws safeguard employees' online – or "social media" – information from employer access. At least twelve states now prohibit employers – to some extent and in some range of circumstances – from requiring employees, or applicants for employment, to provide employers with access to the employees' social media networks. California's law, enacted in 2012, is illustrative.<sup>17</sup>

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<sup>13</sup> Genetic Information Nondiscrimination Act of 2008, P.L. 110-233, tit. II (codified at 42 U.S.C. 2000ff-1).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Louise Slaughter, *Genetic Information Non-Discrimination Act*, 50 HARV. J. LEG. 41, 47 (2013), citing Susannah Baruch & Kathy Hudson, *Civilian and Military Genetics: Nondiscrimination Policy in a Post-GINA World*, 83 AM. J. HUMAN GENETICS 435, 437 (2008).

<sup>17</sup> 2012 Cal. Legis. Serv. Ch. 619 (West). In addition to California, eleven other states have statutes regulating social networking privacy in the workplace. See Ark. Code Ann. §11-2-124 (West 2013) (employers may not request employees' social media passwords); Colo. Rev. Stat. Ann. § 8-2-127 (West 2013) (employers may not cause employees to disclose means of accessing personal electronic or social networking accounts); 820 Ill. Comp. Stat. 55/10 (2014) (employers may not request access to employees' social networking profiles); Md. Code Ann., Lab. & Empl. § 3-712 (West 2013) (prohibits employers from requesting access to employees' personal accounts through an electronic communications device); Mich. Comp. Laws Ann. § 37.271 – 37.278 (West 2012) (forbids employers from accessing or taking adverse employment action against an employee because of observing the employee's personal internet account); 2013 Nev. Legis. Serv. 548 (West) (employers may not cause employees to provide access to social media accounts); 2013 N.J. Sess. Law Serv. Ch. 155 (West) (employers may not request access to a personal account through an electronic communications device); N.M. Stat. Ann. § 50-4-34 (West 2013) (forbids employers from asking for access to a prospective employee's account or profile on a social networking site); 2013 Or. Legis. Serv. 204 (2013) (employers may not request that employees provide access to personal

According to the legislature's official analysis of the bill, the law was enacted based, *inter alia*, on the legislature's conclusion that allowing employers access to employees' social media accounts would result in an unacceptable intrusion, by employer, into employee's private lives. Thus, the California statute begins by defining "social media" very broadly and as extending to an "electronic service or account, or electronic content, including but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations."<sup>18</sup> The statute then goes on to prohibit employers from requiring or requesting that an employee, or applicant for employment:

(1) disclose a username or password for the purpose of accessing personal social media; (2) access personal social media in the presence of the employer; (3) divulge any personal social media."<sup>19</sup>

It is important to note the *type* of confidentiality that social media laws like California's protect. That is, when an employee posts information on a social media network, the employee clearly intends to disclose that information to some set of other people – quite often, that set can be very large depending on the number of other users who have access to the employees' page. What laws like California's ensure, therefore, is a *selective confidentiality* that applies *only* to employers. As the official Analysis of the California bill stated:

According to proponents, in this age of electronic correspondence and social media, more and more of a person's personal life is online. However, they argue, when it comes to an employer – employee relationship, it has never been an acceptable request for an employer to ask to see personal correspondence or personal photos of current or prospective employees. They argue that just because these items are now appearing and being stored online does not make it any more germane to determining an employee or prospective employee's work ethic than it was in the past. Proponents further argue that asking for access to a worker's social media account is a major intrusion into a person's personal life by an employer.<sup>20</sup>

Thus, under these state statutes, employees can disseminate personal information broadly while at the same time maintaining protection against their employers having access to that information. An employee's life can remain private – that is, confidential – vis-à-vis the employer while being public vis-à-vis others to whom the employee wishes to disclose.

Finally, although not yet law in the United States, a newly proposed Senate bill merits mention. In December of 2013, Senator Elizabeth Warren of Massachusetts

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social media accounts, compel employees to add them to contact lists, ask employees to access social media accounts in their presence, etc); Utah Code Ann. §34-48 (West 2013) (employers may not request information related to personal internet accounts); 2013 Wash. Legis. Serv. Ch. 330 (West) (forbids employers from coercing an employee to reveal login information for a social networking account, add an employer to a list of contacts, access the account in the employer's presence, etc); *See also* S.007, 2013 Sess., at 1-2 (Vt. 2013) (creating a Social Networking Privacy Study Committee to issue recommendations for proposed legislation by January, 2014).

<sup>18</sup> Cal. AB 1822 (2012).

<sup>19</sup> *Id.*

<sup>20</sup> Cal. Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill. No 1844 (2011-2012 Reg. Sess.)

introduced a bill titled the Equal Employment for All Act that would make it illegal for employers to require current or prospective employees to disclose their credit histories.<sup>21</sup> More particularly, §2(b)(1) of the bill would make it illegal for an employer to “request a consumer credit report, require or cause consumers to provide them a consumer credit report, or use the information contained in credit reports for employment purposes or adverse action.”<sup>22</sup> There are similar laws already in place in ten states that also prohibit employers from requiring disclosure of credit history. Thus, as GINA enables employees to keep their genetic information confidential from employers and the social media laws allow employees to shield their internet activity from employers, Warren’s bill would similarly protect the privacy – as confidentiality – of employee financial information.

### III. Privacy as Personal Sovereignty

As such, the first sense of privacy protected by U.S. employment law is privacy as confidentiality: a range of protections exist under which employees have legal rights to keep certain things confidential from their employers. But employment law in the United States also protects a second, and quite distinct, form of employee privacy. This second form of privacy, sometimes called “autonomy,”<sup>23</sup> protects employees’ ability to make decisions over important matters in their lives without employer interference. Because of the helpful analogy to political sovereignty, Joel Feinberg suggests that the interests ensured by “privacy” of this sort are better described as “personal sovereignty” rather than “autonomy.”<sup>24</sup> I will borrow Feinberg’s term here, in part because the right to “govern oneself” seems apt in the employment privacy context, and in part to avoid confusing personal autonomy from the kind of sphere autonomy I will describe below. But, whatever term we use, the important point is that U.S employment law’s privacy protections go well beyond confidentiality and extend to ensuring employees some freedom to exercise control over a set of important life decisions.

Again, there are classic forms of this type of privacy protection and then some more modern iterations. One of the classic forms involves an employee’s right to select for him or herself the romantic and marital partners s/he desires and a concomitant prohibition on employer interference with these choices. For example, in *Rulon-Miller v. International Business Machine Corp.*,<sup>25</sup> an employee, Rulon-Miller, was fired because she was dating a former IBM employee, Matt Blum, who had left IBM and joined a competitor firm.<sup>26</sup> Rulon-Miller sued, bringing claims of both wrongful discharge and intentional infliction of emotional distress. The jury found for Rulon-Miller on both claims, and the court of appeals upheld the verdict. The court’s decision was predicated, at least in part, on the existence of an internal employer memo that provided employees this kind of privacy as sovereignty right. The “Watson Memo” as it was called stated:

The line that separates an individual’s on-the-job business life from his other life as a private citizen is at times well-defined and at other times indistinct. But the line does exist, and you and I, as managers in IBM, must

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<sup>21</sup> See Equal Employment for All Act of 2013, S. 1837, 113<sup>th</sup> Cong. (2013).

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., *Finkin*, *supra* n.X at 235.

<sup>24</sup> *Feiberg*, *supra* n. X at 446-57.

<sup>25</sup> 208 Cal. Rptr. 524 (Ct. App. 1984).

<sup>26</sup> See 208 Cal. Rptr. 524 (Ct. App. 1984).

be able to recognize that line. . . . When on-the-job performance is acceptable, I can think of few situations in which outside activities could result in disciplinary action or dismissal. . . . IBM's first basic belief is respect for the individual, and the essence of this belief is a strict regard for his right to personal privacy.

Based in part on the Watson memo, and in part on California's duty of fair dealing, the court of appeals held that the jury was entitled to find that Rulon-Miller's discharge was wrongful. The court, moreover, held that the discharge constituted an intentional infliction of emotional distress. That tort requires a finding that the discharge was extreme, outrageous, or atrocious. The court thought that this discharge fit the bill. Why? The court lists several factors as necessary to its conclusion, but among them was the fact that the IBM manager who fired Rulon-Miller deprived her of the *choice* between pursuing her romantic relationship and keeping her job. It was, *inter alia*, the manager's statement to Rulon-Miller that he was "making the decision for [her]" that the court found sufficiently extreme to justify the jury verdict.

Here again, it is important to notice the kind of "privacy" interest at stake in *Rulon-Miller* and to notice the privacy interest that is not at stake. Rulon-Miller did not desire to keep her relationship with Blum confidential from her employer. Indeed, the court repeatedly makes it clear that the relationship was *public* throughout IBM. Thus, for example, the court tells us: "[t]hat they were dating was widely known within the organization." Thus Rulon-Miller has no claim to privacy as confidentiality. Instead, her claim to privacy is a claim to personal sovereignty: a right to decide about intimate personal matters, like romantic relationship, free of interference by the employer. In *Rulon-Miller*, the court enforces exactly this type of privacy as sovereignty.

A related example of this type of employee privacy concerns not romantic relationships but political beliefs and political action. In *Novosel v. Nationwide Insurance Co.*,<sup>27</sup> employees were instructed to engage in political canvassing and signature gathering in support of a piece of legislation that the employer wanted enacted: the "No-Fault-Reform Act." Novosel, an employee of Nationwide, objected to the Act and refused to participate in the political activity that the employer directed. As a result, Novosel was fired. He sued on a tort theory of wrongful discharge and the U.S. Court of Appeals held for Novosel finding that a jury could find his termination to constitute wrongful discharge in violation of public policy. The basis for this tort, the court tells us, is the same type of privacy concern implicated in *Rulon-Miller*. The court quotes from an earlier decision on the subject:

It may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened.

What is the public policy threatened by Novosel's discharge? Into what area of the employee's life has the employer unjustifiably intruded? The court tells us that the public policy at stake here is the "employee's freedom of political expression." Thus, "an

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<sup>27</sup> 721 F.2d 894 (3d Cir. 1983).

important public policy is . . . implicated wherever the power to hire and fire is utilized to dictate the terms of employee political activities.”

Again, notice the kind of privacy at issue here. There is no claim to confidentiality; no claim that Novosel should be able to keep his political views secret from his employer. Novosel made his political views quite plain to the employer. Instead, the claim is that political belief and expression – like romantic relationship – is a domain of an employee’s life over which the employee ought to have sovereignty. In other words, whether Novosel lobbied for the No-Fault Reform Act should be Novosel’s decision, not the employer’s.<sup>28</sup>

If *Rulon-Miller* and *Novosel* capture older iterations of privacy as sovereignty in U.S. employment law, more modern instances of this form of privacy can be found in so-called “lifestyle discrimination” statutes. In the United States today, twenty-nine states and the District of Columbia have some form of a lifestyle discrimination statute.<sup>29</sup> Generally,

<sup>28</sup> Both *Rulon-Miller* and *Novosel* are important cases in the U.S. employment law cannon and both are featured in prominent textbook treatments of employee privacy. For example, *Novosel* and *Rulon-Miller* both appear in “Part III (Employee Privacy)” of Steven L. Willborn, et al., *Employment Law Cases and Materials*, Fifth Edition (2012). But neither *Rulon-Miller* nor *Novosel* expresses the majority rule in the U.S. law of employee privacy, and there are many cases that reach contrary holdings with respect to both romantic relationships and rights of political expression. See, e.g., *Finkin*, *supra* n.X at 237-38 (“fraternization” and “association”); *Brunner v. Al Attar*, 786 S.W.2d 784 (Texas 1990)(political expression). Thus, for example, Matthew Finkin concludes that although “California’s commitment to privacy has arguably been extended to limit employer prohibitions on sexual relationships with employees of competitors,” in “most jurisdictions employers are free to restrict employees in their off-duty sexual behavior.” *Finkin*, *supra* n.X at 237. The point here, again, is not to establish the majority view but only to identify a strand of privacy protection in U.S. employment law in which privacy is best understood as personal sovereignty.

<sup>29</sup> Cal. Lab. Code. §95 (West 2000) (employers may not discriminate against employees because of conduct that is lawful and occurs during nonworking hours); Colo. Rev. Stat. Ann. § 24-34-402.5 (West 2007) (employers may not require employees to refrain from lawful activities during nonworking hours unless the restriction is a bone fide occupational requirement or is necessary to avoid a conflict of interest); Con. Gen. Stat. Ann. §31-40s (West 2003) (employers may not require employees to refrain from smoking or using tobacco products unless the employer’s primary purpose is discourage use of tobacco products); D.C. Code § 7-1703.03 (1993) (employers may not discriminate against employee or applicants based on their use of tobacco products); 820 Ill. Comp. Stat. 55/5 (1992) (employers may not discriminate against employees or applicants based on use of lawful products during nonworking hours); Ind. Code Ann. § 22-5-4-1 (West 1991) (an employer may not discriminate against an employee or prospective employee based on use of tobacco products); Ky. Rev. Stat. Ann. § 344.040 (West 2010) (it is unlawful for an employer to discriminate against an individual for smoking or not smoking); La. Rev. Stat. Ann. § 23:966 (1991) (prohibits an employer from discriminating against a person because they are a smoker or nonsmoker); Me. Rev. Stat. tit. 26, § 597 (1991) (employers may not require employees or prospective employees to refrain from using tobacco products outside the course of employment); Minn. Stat. Ann. § 181.938 (West 1992) (employers may not refuse to hire, discharge, or discipline an individual because that person uses lawful consumable products during non working hours, unless the action relates to a bona fide occupational requirement or is necessary to avoid a conflict of interest); Miss. Code. Ann. § 71-7-33 (West 1994) (employers may not require employees or applicants to refrain from using tobacco products during nonworking hours); Mo. Ann. Stat. § 290.145 (West 1992) (employers may not discriminate against an individual because of their use of lawful alcohol and tobacco products during nonworking hours, unless the use interferes with the duties and performance of the employee, coworkers or the employer’s business); Mont. Code Ann. § 39-2-313 (1993) (with specific exemptions, an employer may not discriminate against an individual because of the use of a lawful product during nonworking hours); Nev. Rev. Stat. Ann. § 613.333 (West 1991) (an employer cannot discriminate against an employee or applicant because of the lawful use of a product during nonworking hours, unless it affects the employee’s ability to do the job or the safety of other employees); N.H. Rev. Stat. Ann. § 275:37-a (1992) (no employer shall require an employee or applicant to abstain from using tobacco products outside the course of employment); N.J. Stat. Ann. § 34:6B-1 (West 1991) (an employer may not discriminate against an individual because of use of tobacco products unless the employer has a rational basis

these statutes protect employees' ability to consume "lawful products" or engage in "lawful conduct" when they are not at work. That is, the statutes make it illegal for an employer to take employment actions based on an employees' lawful off-duty behavior. Many of these statutes – the majority, in fact – apply only to off-duty smoking and alcohol consumption. They accordingly reflect the considerable political influence of the tobacco and alcohol lobbies on American policymaking. But these statutes, and particularly the four broadest, also work to protect employees' privacy interest in personal sovereignty. As Stephen Sugarman puts it, the lifestyle discrimination statutes address the question of "how much should employers be able to intrude into the privacy of workers' off-work, lifestyle choices."<sup>30</sup>

One of the broadest of these statutes is Colorado's, enacted in 1995. The law prohibits employers from requiring employees to refrain from *any lawful activity* during off-work hours and thus protects against employer retaliation "any lawful activity off the premises of the employer during nonworking hours."<sup>31</sup> As one academic account of the statute has concluded, although the case law is still sparse, it may "offer protection based on sexual orientation, employee dating, political or social affiliation, smoking, dangerous sports, and sexual propriety."<sup>32</sup> California's lifestyle statute similarly dictates that

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for doing so reasonably related to employment); N.M. Stat. Ann. § 50-11-3 (West 1991) (it is unlawful for an employer to discriminate against an employee or applicant because that person is a smoker or nonsmoker unless there is a conflict of interest or a bona fide occupational requirement); N.Y. Lab. Law § 201-d (McKinney 1992) (employers may not discriminate against individuals because of their political activities, legal use of consumable products, legal recreational activities, or membership in a union); N.C. Gen. Stat. Ann. § 95-28.2 (West 1991) (it is unlawful for an employer to discriminate against an employee because of lawful use of products during nonworking hours unless it affects job performance or the safety of other employees); N.D. Cent. Code Ann. § 14-02.4-01 (1993) (employers may not discriminate against individuals because of participation in lawful activity during nonworking hours which is not in conflict with essential business-related interests); Okla. Stat. Ann. tit. 40, § 500 (West 1991) (employers may not discriminate against employees because of their use or nonuse of tobacco products); Or. Rev. Stat. Ann. § 659A.315 (West 2005) (employers may not require employees or prospective employees to refrain from using tobacco during nonworking hours, unless there is a bona fide occupational requirement); R.I. Gen. Laws Ann. § 23-20.10-14 (West 2004) (employers may not discriminate against employees who use tobacco products unless the employer is a nonprofit organization which has as a primary purpose discouraging the use of tobacco products); S.C. Code Ann. § 41-1-85 (1990) (employers may not take personnel actions based on the use of tobacco outside the workplace); S.D. Codified Laws § 60-4-11 (1991) (employers may not fire employees for their use of tobacco products during nonworking hours unless a restriction relates to a bona fide occupational requirement or is necessary to avoid a conflict of interest); Tenn. Code Ann. § 50-1-304 (West 1990) (no employee may be fired solely for using agricultural products not regulated by the alcoholic beverage commission that is not proscribed by law); Va. Code Ann. § 2.2-2902 (2001) (no Commonwealth employee or applicant for employment is shall be required to use or abstain from using tobacco products); W. Va. Code Ann. § 21-3-19 (West 1992) (employers may not discriminate against individuals because of their use or non-use of tobacco unless the employer is a nonprofit with the primary purpose of discouraging use of tobacco products); Wis. Stat. Ann. § 111.31 (West 2010) (employers may not discriminate against individuals because of their use or nonuse of lawful products during nonworking hours); Wyo. Stat. Ann. § 27-9-105 (West) (it is unlawful for employers to discriminate because of use of tobacco products unless there is a bona fide occupational qualification).

<sup>30</sup> Stephen D. Sugarman, "Lifestyle" Discrimination in Employment, 24 Berkeley J. Empt & Lab. L. 377, 379 (2003).

<sup>31</sup> See Colo. Rev. Stat. Ann. §24-34-402.5 (West)(1990).

<sup>32</sup> Jean M. Roche, *Why Can't We be Friends?: Why California Needs a Lifestyle Discrimination Statute to Protect Employees From Employment Actions Based on their Off-Duty Behavior*, 7 HASTINGS BUS. L. J.187, 200 (2011), quoting Jessica Jackson, *Colorado's Lifestyle Discrimination Statute: A Vast and Muddled Expansion of Traditional Employment Law*, 67 U. COLO. L. REV. 143 n.5 (1996).

employers may not discriminate because of employees' lawful conduct that occurs during non-working time and off the employer's premises,<sup>33</sup> while New York's law prohibits employer discrimination based on political activities and "recreational activities."<sup>34</sup>

These statutes are fairly new and the precise scope of their protections has not yet been fully determined. But it is clear that they intend to protect against employer interference some fairly broad of employee decisions regarding off-work behavior. Whether it is simply the decision to smoke or drink alcohol, or more broadly the decisions about which "lawful activities" to engage in, lifestyle statutes protect a form of employee privacy best understood as personal sovereignty.

#### IV. Privacy as Sphere Autonomy

On some accounts, confidentiality and personal sovereignty are distinct concepts and ought not be classified as two subtypes of any single principle. On these accounts, "confidentiality" is one thing and "personal sovereignty" is another, and "privacy" is simply a confounding add-on. For example, in his article *Privacy and Autonomy*, Louis Henken argues that using the term "privacy" to encompass autonomy interests is "misleading, if not mistaken."<sup>35</sup> Ken Gormley writes that "privacy consists of four or five different species of legal rights which are quite distinct from each other and thus incapable of a single definition,"<sup>36</sup> while William Prosser argued that the law of privacy encompasses protection against several distinct harms "which are tied together by the common name, but otherwise have nothing in common."<sup>37</sup>

But, within the bounds of U.S. employment law, privacy as confidentiality and privacy as personal sovereignty share a conceptual core. That core is the idea of sphere separation or sphere autonomy.

The importance of sphere autonomy finds clearest articulation in the work of Michael Walzer. Walzer argues that society is comprised of distinct spheres. For example, the market is one sphere, politics is another, and kinship and family is a third.<sup>38</sup> Most important for our purposes, Walzer does not understand a just society as requiring as requiring an equal distribution of goods within any particular sphere. He calls this conception of justice "simple equality" and he rejects it as both implausible and inconsistent with the distributive logic of many social spheres: a market economy, for instance, depends on some measure of economic concentration to enable investment, while government requires some concentration of political power to enable representation. Thus, for Walzer, concentration of goods – including power – within spheres is often consistent with the distributive criteria of that sphere: "within the distributive frame of the market, concentrated economic power is not necessarily unjust; nor is concentrated political power considered inappropriate in the political arena."<sup>39</sup>

<sup>33</sup> Cal. Lab. Code § 96 (West) (2005).

<sup>34</sup> N.Y. Lab. Law § 201-d (McKinney) (1992).

<sup>35</sup> Louis Henkin, *Privacy as Autonomy*, 74 Colum. L. Rev. 1410,1410 (1974).

<sup>36</sup> Ken Gormley, *One Hundred Years of Privacy*, 1992 Wis. L. Rev. 1335, 1339, *quoted in* Daniel J. Solove, *Conceptualizing Privacy*, 90 Cal. L. Rev. 1087, 1089 n.8 (2002).

<sup>37</sup> William L Prosser, *Privacy [A Legal Analysis]*, in *Philosophical Dimensions of Privacy* 104, 107 (Ferdinand David Shoeman, ed., 1984), *quoted in* Solove, *supra* n.X at 1089 n.8.

<sup>38</sup> Walzer, *supra* n.X at 235.

<sup>39</sup> Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* 44 (2006), *citing* Walzer, *supra* n.X.

While a just society, for Walzer, does not require simple equality – it does not require the equal distribution of goods and power *within* any particular sphere – it does require what he calls “complex equality.” And the key to complex equality is that the goods or power derived in one sphere must be deployed within the sphere where they were obtained and not exported or “converted” from one sphere to another.<sup>40</sup> Thus, for Walzer, justice requires sphere *autonomy*. When sphere autonomy breaks down – when power derived in one sphere is deployed in another sphere – we have what Walzer calls dominance, or tyranny.

Quoting Pascal, Walzer writes that “[t]he nature of tyranny is to desire power . . . outside its own sphere.”<sup>41</sup> And, in Walzer’s own words, allowing sphere convergence – allowing the power derived in one sphere to be exercised in another – is tantamount to *injustice*:

To convert one good into another, when there is no intrinsic connection between the two, is to invade the sphere where another company of men and women properly rules. Monopoly is not inappropriate within the spheres. There is nothing wrong, for example, with the grip that persuasive and helpful men and women (politicians) establish on political power. But the use of political power to gain access to other goods is a tyrannical use.<sup>42</sup>

One the other hand, if sphere autonomy can be ensured – if we can ensure that the power and resources derived in one sphere are exercised only within that sphere – we can ensure complex equality:

In formal terms, complex equality means that no citizen’s standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good. Thus, citizen X may be chosen over citizen Y for political office, and then the two of them will be unequal in the sphere of politics. But they will not be unequal generally so long as X’s office gives him no advantages over Y in any other sphere – superior medical care, access to better schools for his children, entrepreneurial opportunities, and so on.<sup>43</sup>

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<sup>40</sup> *Walzer, supra* n.X at 19.

<sup>41</sup> *Id.* at 18.

<sup>42</sup> *Id.* at 19.

<sup>43</sup> *Id.* Although Walzer did not himself consider the question of employee privacy, he makes a particular observation that is relevant to our analysis of employee privacy rights. In his discussion of the market sphere, Walzer worries about the threat that wealth and what he calls “powerful entrepreneurs” pose to the “integrity of other distributive spheres.” One of his concerns relates specifically to the ability of employers to exert power over employees outside the employment relationship. Thus, Walzer argues:

It would be a mistake to imagine . . . that money has political effects only when it ‘talks’ to candidates and officials, only when it is discreetly displayed or openly flaunted in the corridors of power. It also has political effects closer to home, in the market itself and in its firms and enterprises. . . . Even within the adversary relation of owners and workers, with unions and grievance procedures in place, owners may still exercise an illegitimate kind of power. They make all sorts of decisions that severely constrain and shape the lives of their employees . . . . Beyond a certain scale, the means of production are not properly called commodities . . . . for they generate a kind of power that lifts them out of the economic sphere.

*Id.* at 121-22.

Employment law's two conceptions of privacy are united by such a commitment to sphere autonomy. Both understandings of privacy reflect the view that social life consists of multiple spheres: one of these spheres is defined by the employment relationship, while beyond the boundaries of the employment relationship lie other spheres of social life that individuals populate as parents, spouses, patients, political activists, consumers, and so on. Within the employment sphere – where individuals stand in the relation of employer and employee – employers have substantial discretion to control employee behavior and to access information about employees' characteristics, qualifications, and performance. But an employer's exercise of control over employee behavior and an employer's access to employee information are legitimate *only* within the sphere of the employment relationship, from which the employer's power derives. *Outside* the employment sphere, an employer's attempt to control employee behavior or access employee information is illegitimate.

Employment law polices the boundaries between spheres with privacy rights. Privacy as confidentiality cabins employer authority, with respect to employee information, to the employment sphere. Privacy as sovereignty cabins employer authority, with respect to employee conduct, to the employment sphere. Taken together then, both types of employee privacy rights can be understood as an attempt to ensure that the spheres of social life remain autonomous and that the employer's authority is not exported beyond the bounds of the sphere of employment.

## V. Sphere Autonomy and U.S. Employment Law

A commitment to the principle of sphere autonomy explains both U.S. employment law's protection of privacy-as-sovereignty and privacy-as-confidentiality. Starting with sovereignty, the sphere autonomy commitment is clearly at work in *Rulon-Miller*. Again, in that case, the employer attempted to intervene in Rulon-Miller's kinship choices – her decisions about her romantic relationships. The employer's action is problematic, because it amounts to a violation of sphere autonomy: the employer's power, derived in the employment sphere is legitimately deployed in that sphere; but when, as in the *Rulon-Miller* case, the employer's power extends into the sphere of “kinship and love,” it becomes illegitimate. Indeed, Walzer argues that the boundaries of the kinship-and-love sphere are “highly vulnerable” and that they “often have to be defended . . . against . . . tyrannical intrusion.”<sup>44</sup> Walzer, in fact, contends that “[t]he deepest understanding of tyranny probably lies here: it is the dominance of power over kinship.”<sup>45</sup>

So too with *Novosel*. There, the employer attempts to control Novosel's political activities. In Walzer's framework, the employer is using its economic power to exert control over the employee's activities in the sphere of politics, and is thus engaging in a conversion of economic into political power. The employer's actions thus constitute a form of dominance, or tyranny, because they violate sphere autonomy. Indeed, the *Novosel* court grounded its holding in this very principle. Again, from the court's opinion: “there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action.”

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<sup>44</sup> *Id.* at 227.

<sup>45</sup> *Id.*

And the lifestyle discrimination statutes discussed above are easily understood through the frame of sphere autonomy. Those statutes enact the idea that an employee's off-duty, off-premises life takes place in social domains distinct from the employment sphere. When the employee acts legally in these social domains, these statutes dictate that the employer must not interfere with the employee's lifestyle choices. Again, such interference would be problematic because it would amount to the conversion of an employer's power, derived through the employment relationship, into distinct social spheres.

Just as the privacy-as-sovereignty protections are cognizable as applications of the sphere autonomy principle, so are privacy-as-confidentiality protections. *Bodewig*, for example, can be understood as a case involving the employer's intrusion into the most private of all spheres, the sphere of the body.<sup>46</sup> The strip search in that case is impermissible because it amounts to the employer's use of its economic power in a sphere where such economic power ought not have sway. GINA, too, makes sense on the same grounds. Genetic information *is* the body; it is a way of describing the most intimate details of an employee's body. As such, the information that GINA covers resides within the sphere of the body and outside the sphere of employment where an employer's power to know is legitimate. *Trotti* makes sense on similar grounds. Although the search there is not of the Trotti's body, it is of her personal effects. Such personal property can surely be understood as within a domain – or sphere – distinct from the one in which employers legitimately govern.

Both the social media laws and Senator Warren's bill on credit histories, discussed above, also make clear sense as protections for sphere autonomy. As we've seen, the social media laws enact state legislatures' commitment to the idea that if an employer accesses an employee's social media accounts, the employer is intruding into the employee's private life. Which particular non-employment sphere such employer action violates depends on the nature of the information contained in the social media account: perhaps it is "kinship and love"; perhaps it is political. But what matters is that the employer's action is illegitimate because it is an exercise of power "outside its sphere."<sup>47</sup> The same is true of Warren's credit history bill: the employer ought not have access to information about an employee's financial standing and credit rating because to allow such access is to allow the employer's power to extend beyond the appropriate boundaries of the employment sphere.

## VI. Conclusion

There are two primary forms of employee privacy protection in U.S. employment law: privacy as confidentiality, and privacy as personal sovereignty. At first blush, these different conceptions of privacy appear quite distinct: one concerns information and the right to keep such information undisclosed; the other, a right to act in accordance with personal preferences free of employer interference.

But both conceptions of privacy are united by a commitment to sphere autonomy. Sphere autonomy dictates that an employer may legitimately use its authority, derived through the employment relationship, in the employment sphere. Within that sphere, the

<sup>46</sup> Cf. *Feinberg*, *supra* n.X at 452 (noting that, in the most basic sense, "the personal domain is . . . defined by its spatial dimension").

<sup>47</sup> *Walzer*, *supra* n.X at 18.

employer has broad discretion to tell employees what work to do, how to do it, and when it must be done. Within the employment sphere, the employer also has a right to know what work employees have done, how well they have done it, and what they have failed to do. But when the employer takes the authority it derives within the employment sphere and exercises that authority outside the employment sphere – either by attempting to control employee behavior in other spheres or by trying to access information about employee’s life in other spheres – then the exercise of employer power violates the principle of sphere autonomy. Both forms of employee privacy protections can be understood as attempts to prevent violations of this principle.