A THEORY OF GENETIC INTERESTS

Yaniv Heled[*]
Liza Vertinsky[**]

For several decades now, jurists have struggled to adapt the law to questions raised by genetic science. They have done so primarily by seeking to fit these new questions into existing legal categories. These efforts have intensified as uses of genetics have expanded in areas such as criminal law enforcement, genealogy, genetic testing and screening (including prenatally), and the development of genetics-based biomedical technologies such as gene therapies, immunotherapies, and stem cell lines. But the multi-dimensional nature of genetics creates challenges for legal categorization and makes the search for adequate legal analogies illusive. This is because genetic phenomena fit poorly into existing legal frames. They are at the same time chemical, functional, and informational entities. They are widely shared and intimately individual, fixed and ever-changing, and they are rife with meanings that continue to evolve as our knowledge and understanding of genetic science broadens and deepens. Efforts to capture some aspects of genetic materials under one legal category inevitably leave out other aspects, and legal approaches taken in one area are often inconsistent with approaches taken in others. In short, we argue that genetic materials and the information they encompass are uniquely multifaceted in ways that cannot be adequately captured under existing bodies of law.

In this article we identify the shortcomings of recent efforts to capture genetic phenomena, which we conceptualize as "genetic objects," within the law and suggest an alternative approach that is grounded in the multifaceted nature of these objects. We begin by illustrating why existing legal constructs developed under property law, privacy law, tort law, patent law, criminal law, and even constitutional law fail to adequately capture the full range of interests that individuals, families, and society at large have in genetic objects. We then systematically explore and categorize the varied aspects of genetic objects. We suggest that the multidimensional nature of genetics will likely make a search for a single holistic legal approach to these objects difficult, and perhaps futile, at least for now. Instead, we offer a framework for mapping the different aspects of genetic objects into genetic interests that can inform legal decision-making within the varied contexts in which genetics intersects with the law.

[*] Associate Professor, Georgia State University College of Law; JS.D. 2011 Columbia Law School; LL.M. 2004 Columbia Law School; LL.B. 2000 Tel Aviv University; Undergraduate Diploma in Biology 2000 Tel Aviv University. Email: yheled@gsu.edu.

[**] Associate Professor, Emory Law School; Ph.D. (econ.) 1997, J.D. 1997 Harvard University; M.A. (econ.) 1992 University of British Columbia; B.A. 1991 Oxford University. Email: lvertin@emory.edu.