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THE INHERITANCE RIGHTS OF WOMEN UNDER JEWISH AND ISLAMIC LAW

MARY F. RADFORD*

Abstract: The inheritance rights of women in the Anglo-American system have evolved from a system whose primary purpose was the support of women to one in which women enjoy the same rights to inherit and own property as their male counterparts. The laws of Judaism and Islam contain elements of these two Anglo-American approaches, with a focus on support under Jewish law and on ownership (although not equal ownership) under Islamic law. In this article Professor Radford gives a brief overview of the legal systems of Judaism and Islam and of the place of women in these systems. She then provides a detailed description of the ways in which the laws of Judaism and Islam govern the rights of wives, mothers, daughters, and other female relatives to inherit property.

In the Western tradition, women generally, and married women in particular, had little or no place in the order of intestate succession. Until the end of the sixteenth century, women were basically denied the right to inherit property. Modern times have seen a dra-

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1 Alina Semo Kofsky, A Comparative Analysis of Women's Property Rights in Jewish Law and Anglo-American Law, 6 J. Law & REL. 317, 342 (1988). Marriage deprived a woman of her legal identity and brought her property under the control of her husband. See generally KATHERINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW: THEORY, DOCTRINE, & COMMENTARY 9-12 (2d ed. 1988). As early as the 15th century, a widow was entitled to "dower" when the husband died. However, dower consisted only of a life estate in one-third of the husband's property. Kofsky, supra, at 339. The first Married Women's Property Acts were not enacted in the United States until the early 1800s. See id. at 342. For a summary of the enactment of these state laws and how they affected married women's legal status, see JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN app. One, 377-82 (1991).

2 The laws of intestate succession, which are sometimes referred to as the "laws of descent and distribution," are basically used to determine those persons to whom a decedent's property will be distributed if the decedent dies without a valid will. JESSE DUKEMINIER & STANLEY JOHANSON, WILLS, TRUSTS, AND ESTATES 67-68 (5th ed. 1995); see, e.g., GA. CODE ANN. § 53-2-1(b) (1) (1997) ("When a decedent dies without a will, the following rules shall determine such decedent's heirs . . . .").

3 See Kofsky, supra note 1, at 338-39. Perhaps the best-known example of the exclusion of women from inheritance was the rule of primogeniture, which caused a decedent's real property to pass to his first-born son. This rule became prominent in England after the
matic reversal of this trend. Not only can women now inherit property equally with their male counterparts, but married women (and spouses generally) are favored in their ability to share the property formerly owned by the deceased spouse or by the couple during their marriage.

This reversal is illustrated by the current structure of inheritance laws in the United States. If a deceased spouse dies without a will, state intestacy laws guarantee that a portion of the estate will pass to the surviving spouse. Communal property jurisdictions give both spouses equal ownership of the property that is acquired by the married couple during the course of the marriage and, at death, the surviving spouse retains her one-half ownership in the property of the marriage. In most separate property jurisdictions, the surviving spouse is allowed to elect to take a specified portion of the deceased spouse’s estate in lieu of taking under the decedent’s will. Through­out the United States, the surviving spouse is allowed to take from the estate amounts needed for his or her maintenance for a period following the death of the first spouse. Thus, these laws guarantee a woman both the ability to inherit property and, in some circum-


See Dukeminier & Johanson, supra note 2, at 473–74. “Community property is based on the idea that husband and wife are a marital partnership, that they decide together how to use the time of each so as to maximize their income, and that they should share their earnings equally.” Id. at 476.

Id. at 474. However, it is only within the last half of this century that this right has been equalized between husbands and wives. Prior to that time, some of the state community property laws provided that a husband who survived his wife would end up owning all of the community property after her death, while a wife who survived her husband would retain only her one-half interest. See Hoff, supra note 1, at 286–87.

Dukeminier & Johanson, supra note 2, at 483–84. “The underlying policy (at least in a long marriage) is that the surviving spouse contributed to the decedent’s acquisition of wealth and deserves to have a portion of it.” Id. at 484. For a description of elective share statutes, which generally reflect the provisions of the Uniform Probate Code, see Mary F. Radford & F. Skip Sugarman, Georgia’s New Probate Code, 13 Ga. St. U. L. Rev. 605, 652–56 (1997).

See Dukeminier & Johanson, supra note 2, at 480–81. For a description of the forms these support statutes take, see Radford & Sugarman, supra note 7, at 656–58.
stances, the right to be supported after the death of a male upon whom she may have been dependent.

The advancements in women's inheritance rights in modern Western law were presaged centuries earlier by the laws of Judaism and Islam. Long before women were given the right to inherit property in Western jurisdictions, the laws of these two religions had established a limited form of inheritance and support rights for the surviving wife and female relatives of a decedent. This article describes and compares the inheritance rights of women under the two religions. Part I is an overview of the sources of law for the two religions. Part II briefly describes the place women hold in Judaism and Islam. Part III summarizes the concept of marriage in the two religions and the nature of a wife's rights to hold property within the marriage, as these rules reflect the philosophy behind women's general rights to inherit property. Part IV outlines the basic structure of inheritance law in both religions and then describes in detail the inheritance rights of surviving wives and other female relatives of the decedent. Part V concludes with a brief discussion of the way in which the inheritance rights of women that were established by the laws of these two religions are played out in modern societies whose laws and customs are based on the legal precepts of Judaism and Islam.

I. SOURCES OF LAW

At the outset, it is necessary to explain the terms "Jewish" and "Islamic" law. The Jewish law described in this article is not to be confused with the law of the State of Israel. In 1965, Israel passed a comprehensive Succession Law that embodies theories from a variety of Western countries and that does not concur in every respect with traditional Jewish law. Nor is Islamic law to be confused with the law that is followed today in many Islamic countries. These countries in many cases have adopted, either officially or unofficially, legal systems that vary in substantial ways from traditional Islamic law. Rather, the terms "Jewish law" and "Islamic law" refer to the body of law in each

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9 "A comparison of the property rights afforded Jewish women in Halachah (Jewish law) and Anglo-American women at common law reveals that Jewish women had a greater ability to own and dispose of property free from her husband's influence, and was able to do so at an earlier time in history than her Anglo-American counterpart." Kofsky, supra note 1, at 346. See also the description of women's intestate shares in Islamic law, infra at text accompanying notes 204–05.

10 Women's rights under this law are discussed in Part V, infra.

11 These laws are discussed in Part V, infra.
religion that stems from divinely revealed sources and the interpretation and expansion of these revelations by scholars, community members, and local custom.

The structure of the law of Judaism and of Islam is similar in that the basic written source of each is believed to have been revealed to mankind by God. The divine revelations in both of these religions were made exclusively to one man—Moses, in the case of Jewish law, and Mohammed, the Prophet, in the case of Islamic law. In each religion, the precepts of the divine source have been and continue to be interpreted and expanded over time by the combination of community practice and scholarly debate. In addition, the law of both religions was affected by the existing legal systems of the societies within which these religious laws developed.


13 Unlike Christianity, however, the individuals to whom the law of Judaism and Islam was revealed were not themselves considered divine.

14 See Rabbi Rodney J. Mariner, Introduction, to The Torah 9 (Henry Holt and Company, Inc. 1996). “To speak of the origins of the Torah is, for Orthodox Jews, to speak of the moment on Sinai when Moses received not only the two tablets of stone, but the written Torah dictated to him by the God of the Exodus, and all the oral interpretations that were to be the substance of Rabbinic teaching in subsequent generations.” Id.


17 One source of Jewish law is the “legal systems of Israel’s contemporary and earliest neighbours. . . .” There emerges from the cuneiform record [discovered by archeologists in the last decade] evidence of a common legal tradition that stretched across the whole of the ancient Near East. That tradition is reflected especially in a form of jurisprudence that was developed in Mesopotamia as part of a wider intellectual system and transmitted beyond its boundaries through the medium of cuneiform scribal schools.” An Introduction to the History and Sources of Jewish Law 7 (N.S. Hecht et al. ed., 1996). For Islam, around 750 c.e., as trading with Byzantium and Persia increased, “inevitably, Byzantine and Persian legal concepts infiltrated into the Muslim legal philosophy.” David Pearl, A Textbook on Muslim Law 6 (1979).
A. Sources of Jewish Law

The Jewish law, referred to as a whole as the *Halakhah*, is based in the Torah. The written component of the Torah (referred to also as the Pentateuch) is the five Books of Moses: Genesis, Exodus, Leviticus, Numbers, and Deuteronomy. The text of these books was conveyed to Moses on Mount Sinai, along with a large body of "oral law" that was not reduced to writing for several centuries. Where gaps or inconsistencies appeared in the written law, the process of *midrash* (interpretation and construction) was used for clarification and for filling out the skeletal structure. In approximately 200 c.e.,

18 See Mariner, supra note 14, at 9. "Halakah is the Hebrew-Aramaic name assigned to the newly formed Jewish law during [the Tannaitic period, approximately 70 c.e.—3rd century c.e.]. It was both a general term referring to the whole corpus of Jewish Law from that time onwards, and a specific term ascribed to a particular law regarding any specific matter." An Introduction to the History and Sources of Jewish Law, supra note 17, at 101-02.

19 "Torah" also has a broader meaning: "it describes ... the entire body of Jewish learning that is continuing and expanding in our present time." Mariner, supra note 14, at 7.

20 "[The Torah] is also called the Pentateuch, from the Greek meaning 'five scrolls' and the Chumash, from the Hebrew meaning a 'five-fold entity.'" Id. at 7.

21 These books and other books of the Bible will be cited by name with an accompanying reference to the chapter and verse, e.g. "27 Numbers 1-3" refers to verses 1-3 of chapter 27 of the Book of Numbers.

22 See Mariner, supra note 14, at 7. "Scholars have detected four major strands which together form the five books of the Torah, variously labeled as the tenth-century BCE 'J text' (from the singular use of Yaweh/Jaweh for the name of God), the eighth-century BCE 'E text' (from the use of Elohim for God), the sixth-century 'D text' (derived from the book of Deuteronomy, which was found during the reign of King Josiah, and is imbued with the teachings of the Prophets), and the fifth-century BCE 'P text' (which contains the major priestly codes incorporated after the Babylonian exile). Each of these texts has been interwoven one with another, sometimes providing parallel and even contradictory information." Mariner, supra note 14, at 9-10. In addition to the Pentateuch, the books of the Prophets and the Hagiographa are important sources of Jewish law. See Principles of Jewish Law, supra note 12, at 12.


24 See An Introduction to the History and Sources of Jewish Law, supra note 17, at 108.

Midrash is directly based upon the scriptures. It is an activity best described as the interpretation and exposition of the scriptures in that it is founded on two principal presumptions; on the one hand, it is accepted that the biblical text is to be interpreted (by the Sages and Rabbis) in order to resolve legal
Rabbi Judah the Prince produced a codex of laws that was recognized as an authoritative statement of the oral law. This Mishnah consists of six orders, the third of which is devoted primarily to women and the family. Baba Bathra, which is the third tractate of the fourth order, deals with inheritance. Over time, as the Torah and the Mishnah became the subject of increasingly sophisticated scholarly debate, the scholarly commentary was itself written down to serve as a further source for clarification of the law. The Talmud is the collection of this discursive commentary and is noteworthy in that the dissenting as well as the consensus opinions are recorded for use in future debate.

problems and create new legal material. On the other, it is supposed that any new legal construct arising out of midrash, or any solution to a legal problem, is a mere exposition of a newly discovered aspect of biblical law.

Id. at 108–09.

25 See id. at 116. “Subsequent to his [the Rabbi’s] compilation of the Mishnah, it was no longer possible to determine a law without taking the Mishnah into account, even though it was still possible to argue and disagree, just as argument and difference had been legitimate in the days of the Rabbi himself.” Id. at 117.

The Mishnah may be defined as a deposit of four centuries of Jewish religious and cultural activity in Palestine, beginning at some uncertain date (possibly during the earlier half of the second century B.C.) and ending with the close of the second century A.D. The object of this activity was the preservation, cultivation, and application to life of ‘the Law’ (Torah), in the form in which many generations of like-minded Jewish religious leaders had learnt to understand this Law.

Introduction to THE MISHNAH, supra note 23, at xiii.

26 See AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW, supra note 17, at 117–18.

27 Each order of the Mishnah is divided into tractates, each tractate into chapters, and each chapter into numbered paragraphs. Each numbered paragraph is a mishnah. A mishnah may be referenced in two ways. First, the citation may be to the tractate, including the numbers of the chapter and mishnah, as it appears in the Mishnah (e.g., Baba Bathra 8:1). Alternatively, the mishnah cite may refer to the location of the mishnah in a portion of the Talmud (e.g., Baba Bathra 108a). See NAHUM RAKOVER, A GUIDE TO THE SOURCES OF JEWISH LAW 33 (1994). See infra text accompanying notes 29–30 for a description of the Talmud.

28 AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW, supra note 17, at 117–18.

29 “[T]he Babylonian Talmud is often referred to colloquially as the Gemara.” Id. at 175.

30 See AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW, supra note 17, at 169.

The great halakhic works, which constitute the basis for all later halakhic literature, were created during the three centuries following the redaction of the Mishnah by R. Judah the Patriarch (220 C.E.). These works are the Jerusalem (Palestinian) Talmud created in the Land of Israel (and completed—insofar as it is complete—in the fifth century C.E.) and the Babylonian Talmud
After the compilation of the Talmud, scholars continued to develop the Jewish law and to record it in the form of Responsa and Commentaries, which was edited and redacted in Babylonia, and completed there in the sixth century C.E. Their primary aim was the clarification and interpretation of the Mishnah of R. Judah the Patriarch. The term Talmud means “teaching” or “study”; the two Talmudim were compiled through the process of teaching and study of the earlier halakhic literature, particularly the Mishnah. Whereas the form of the Mishnah is that of an organised collection of concisely-stated rules, the form of the Talmudim is that of a discursive scholarly commentary on the Mishnah.

Id. “[T]he most characteristic feature of the Talmud is the disputation . . . .” HAIM H. COHN, JEWISH LAW IN ANCIENT AND MODERN ISRAEL x (1971). “The Talmud (Gemara), which includes deliberations of the sages, halakhic commentaries of the early tannaim and amoraim, decisions, epistles, responsa, and decisory rules, has been accepted in the halakhic world as authentic and binding material constituting the starting point for the deliberation of any halakhic subject whatsoever.” PRINCIPLES OF JEWISH LAW, supra note 12, at 124. The Babylonian Talmud “became the most extensively studied standard reference work for halakhic scholars, who elucidated it with notes and commentaries; the relatively obscure Jerusalem Talmud, lacking supporting literature, has remained more difficult to master.” AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW, supra note 17, at 179.

References in this article to the Talmud will be references to the Babylonian Talmud. See discussion, supra note 30. The citations will include the name of the tractate, the folio number and the letter “a” or “b,” which indicates a reference to the front or back side of the folio. RAKOVER, supra note 27, at 44.

More often than not [Responsa] are . . . not judicial decisions in the proper sense, but rather legal opinions of renowned scholars which were given to local courts or judges before whom a controversy had arisen: instead of deciding novel or complex questions of law on their own responsibility, they would address themselves to the leading spiritual and legal authority of their day or of their country and ask for guidance and instruction . . . . A good many of the Responsa given before the completion of the great codes were incorporated in them . . . .”

COHN, supra note 30, at xiii. “This body of literature [the Responsa] is the case law of the Jewish legal system, estimated to include a total of approximately 300,000 judgments and decisions.” PRINCIPLES OF JEWISH LAW, supra note 12, at 13.
mentaries. Perhaps the best known of the Commentaries is that of Maimonides.

Scholars were not the only ones who contributed to the development of Jewish law. Consistently followed courses of conduct became recognized as minhag or legal norms. Sometimes these courses of conduct were codified in local enactments, known as takkanot. The takkanot were sometimes initiated in reaction to changes in social conditions that proved inconsistent with previously recorded law.

One scholar describes the complexity of Jewish law as follows:

Jewish law, then is the sum total of the law laid down in Scripture with interpretations and amplifications thereof in Talmud and Midrash, and the reforms and innovations superadded by Talmudical law, the post-Talmudic codes, the Commentaries and the Responsa, the customary laws and the takkanot of the various communities, and last—but not least—the rational and ethical principles deduced from them.

33 COHN, supra note 30, at xiii. "In addition to the codes and to the Responsa, there is a third important written source of Jewish law, and that is the Commentaries." Id.

[W]hile the authority accorded to the various commentators may vary according to their respective individual standing and stature, just as the authority accorded to the various Responsa may so vary—from the point of view of legal theory, all these commentaries, no less than the Responsa, are legitimate and authoritative sources of law.

34 This Commentary "is printed at the back of each volume in all standard editions of the Talmud . . . ." RAKOVER, supra note 27, at 35.

35 See AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW, supra note 17, at 111.  
36 See id. at 112. Most of the takkanot appeared in 13th and 14th century Spain and were limited primarily to monetary matters. See id. at 284. Professor Elon distinguishes two types of takkanot: those handed down by the Sages and communal enactments. See MENACHEM ELON ET AL., JEWISH LAW (MISHPAT IVRI): CASES AND MATERIALS 71, 77 (1999). In addition to minhag and takkanot, Professor Elon describes other legal sources of Jewish law: "ma'aseh, representing the legal norms derived from judicial decision or the conduct of a halakhic scholar in a particular concrete case . . . [and] sevarah, representing [sic] the legal norms originating directly from the legal-human logic of the halakhic scholars." PRINCIPLES OF JEWISH LAW, supra note 12, at 14.

37 See AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW, supra note 17, at 112.

38 COHN, supra note 30, at xxx.
B. Sources of Islamic Law

The body of Islamic law is referred to as Shari'a or "the clear path." This body of law emanates primarily from four sources: the Qur'an, Sunna, Qiyas, and Ijma. The Qur'an is the word of God as recited by Mohammed, His Messenger (hereinafter the Prophet), beginning about 610 C.E. The Qur'an was revealed to the Prophet over a period of 23 years, during which time he resided in both Mecca and Medina. The Qur'an consists of 6219 verses. About five hundred of these verses are legalistic in tone and some eighty verses deal exclusively with legal topics.

The second source of Islamic law, the Sunna, is described as the practice of the Prophet. Essentially, the Sunna is comprised of the

39 The term "Islam," which appears in the Qur'an, is the term used by Muslims to designate their faith. See Wilfred Cantwell Smith, The Meaning and End of Religion 80-82 (1991). "Islam, by definition in Arabic, means 'submission to the will of God,' and a Muslim is one who adopts the faith of Islam." Nayer Honarvar, Behind the Veil: Women's Rights in Islamic Societies, 6 J.L. & REL 355, 360 (1988).

40 See Chaudhry, supra note 12, at 517.

41 See id. at 517-19. These four sources were systematized by Muhammed ibn Idris al-Shaf'i in the eighth century C.E. See Muslim Women's League, Intellectual Background: Islamic Sources of Information and their Development in Islamic Law 2 (visited Jan. 14, 2000) <http://www.mwlusa.org/pub_book_sources.shtml> [hereinafter Intellectual Background]. See also Kathryn J. Webber, The Economic Future of Afghan Women: The Interaction between Islamic Law and Muslim Culture, 18 U. PA. J. INT'L. ECON. 1049, 1060 (1997). One commentator distinguishes these sources as follows: "Those sources from which the law may be derived are the Qur'an and the Sunna or example of the Prophet. . . . [T]hose sources through which the law may be derived represent either methods of legal reasoning and interpretation or the sanctioning instrument of consensus . . . ." Wael B. Hallaq, A History of Islamic Legal Theories 1 (1997). Some rank ijmā ahead of qiyas as a source of law. See, e.g., Honarvar, supra note 39; at 361, Chaudhry, supra note 12, at 518-19.


43 See Intellectual Background, supra note 41, at 3.

44 See Tove Stang Dahl, The Muslim Family: A Study of Women's Rights in Islam 35 (1997). The Qur'an is divided into 114 sura and each sura is divided into verses. Citations to the Qur'an will be citations to the sura and then the verse: e.g., Sura IV, verse 34.

45 See id. at 36.

46 See Honarvar, supra note 39, at 361. "The Sunnah are the sayings and practices of the Messenger Muhammad (P.B.U.H.), revealed to him by God in meaning, not exact text, as
"sayings of the Prophet; his deeds; and his silent or tacit approval of certain acts which he had knowledge of."47 The Sunna reaffirm the customary law that was prevalent in Arabia at the time of the Prophet's life, to the degree that that law was not contradicted by him.48 The Hadith, which is the written record of the Sunna,49 was not compiled until many years after the death of the Prophet.50 Those who transcribed the Hadith did so by collecting the first-hand testimony of those who had lived with and observed the Prophet (his "Companions") and the second-hand testimony of the second and third generation followers of the original Companions.51 Some controversy exists as to whether the human element involved in narrating and interpreting the Prophet's words and actions may have compromised the accuracy of the Hadith.52 Traditionalists, however, look

preserved in a written record called the Hadith. These authenticated traditions explain and illustrate some of the Qur'anic generalities and are a model of exemplary behavior for Muslims." Chaudhry, supra note 12, at 519. "In the Islamic tradition, after the name of the Messenger Muhammed is spoken or written, Muslims pray for God's peace and blessings to be upon him. The English abbreviation (P.B.U.H.) stands for the words 'Peace Be Upon Him.'" Id. at 512 n.5.

47 Intellectual Background, supra note 41, at 3.
48 See Pearl, supra note 17, at 4.

Literally, Sunna means the "trodden path" and it is used to express the customary law prevalent in Arabia before the advent of Islam. After the revelation, the 'trodden path' continued to be accepted law for the Muslim community; but only so far as it had not been abrogated by Mohammed. The classical theory is that, on the advent of Islam the concept of Sunna became, for the Muslim, the model or normative behavior of the Prophet.

Id.


50 See Intellectual Background, supra note 41, at 3. "The Hadith is seen as evidence of the Sunna, or practice of the community. . . It is self-evident that, for the classical jurist as for the religious Muslim today, Sunna and Hadith are consubstantial" (although some Western scholars think that the Sunna is anterior to the Hadith rather than being the reverse or consubstantial). Pearl, supra note 17, at 4.

51 THE MALE ELITE, supra note 42, at 35. The transcribers also include with the Hadith the isnad, which is the list of the chain of narrators. See id.

52 See id. at 35-37; Intellectual Background, supra note 41, at 6-8. Muslim feminists use this argument to explain Hadith that appear sexist. See THE MALE ELITE, supra note 42, at 35-37.
solely to the Qur’an and the Sunna as the source of Islamic law and deny “[t]he possibility of error, bias or evil intent” in the Hadith.

Qiyas and Ijma, the third and fourth sources of the law, are based in human analysis rather than divine revelation. Qiyas involves an expansion of the law through analogical reasoning, or the application of a textual rule from one situation to a different situation. Qiyas can be accomplished only if the underlying purpose of the rule itself is clear. A common example of the use of Qiyas is the expansion of the express prohibition against the use of alcohol to include a prohibition against the use of drugs which, like alcohol, impair the user’s control of his actions.

Ijma is the consensus reached by scholars and jurists as to a rule of law. As with Qiyas, Ijma involves the application of human reasoning to the Qur’an and Sunna. Consequently, although the Ijma may have represented the unanimous opinion of a certain age, “ijma is not simply the consensus of all past jurists.”

There are several distinct movements and schools of Islamic law. For purposes of this article, it is important to note that two schools—the Sunni and the Shi‘i—developed soon after the death of the Prophet and their origin was basically political in nature. The Sunni school is that followed by the vast majority of Muslims today and is the school of thought that is described in this article, unless indicated otherwise. The Shi‘i school is practiced by a significant minority of

53 See Intellectual Background, supra note 41, at 2.
54 Id. at 6. In actuality, after it became apparent that some false hadith were being fabricated for political purposes, a science developed by which the accuracy of a hadith could be gauged. See Verma, supra note 15, at 10. Thus, the traditionalists rely not on all hadith but only on the ones that have been proved to be authentic. See id.
55 See Chaudhry, supra note 12, at 519.
56 See id.; Intellectual Background, supra note 41, at 3.
57 See Intellectual Background, supra note 41, at 3.
58 See Honarvar, supra note 39, at 361; Pearl, supra note 17, at 11; Chaudhry, supra note 12, at 519; Intellectual Background, supra note 41, at 4.
59 Intellectual Background, supra note 41, at 4.
60 Pearl, supra note 17, at 18. The schism resulted from a struggle for leadership following the death of the Prophet. Id. Civil war broke out during reign of the fourth Caliph and victory went to the Mulawuya—Umayyad dynasty. Id. The Shi‘i remained allied with the Caliph and his descendants because he was married to the Prophet’s daughter. Id.
Muslims and contains certain critical distinctions relating to inheritance rights that will be described as appropriate.

II. WOMEN'S PLACE IN THE TWO RELIGIONS

The status of women under both Judaism and Islam is the subject of continuing debate. In both arenas, there are those who praise the religion for the dignified status to which it elevates women and those who criticize the religion for its sexist and discriminatory treatment of women. As will be noted, a modern resurgence of fundamentalism in both religions reinforces and emphasizes to women's detriment religious rules and historical traditions that relegate women to an inferior status. 62

A. Women in Judaism

Dissonant attitudes about the status of women in Judaism appear as early as the creation accounts in the Book of Genesis. 63 In Genesis 1:27, God created man “in his own image, in the image of God He created him, male and female he created them.” This passage would seem to give equal dignity to the two genders. 64 Yet later in the same book, God is said to have created man first, from the “dust of the ground,” 65 and then later created woman from Adam’s rib, 66 because “it is not good that the man should be alone; I will make him a help meet for him.” 67 Thus, woman appears in the creation story both as man’s equal and as secondary to him.

The Book of Genesis also lays the groundwork for the focal point that marriage plays in Jewish life. 68 The creation chapter states that

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63 See Kofsky, supra note 1, at 318–19.
64 See Denise L. Carmody, Judaism, in WOMEN IN WORLD RELIGIONS 185 (Arvind Sharma ed., 1987). Kofsky speaks of the “Lilith myth,” a story in which God created Lilith, a wife who deserted Adam because he insisted that she obey him. See Kofsky, supra note 1, at 319.
67 Genesis 2:18. One view is that the passages in the second chapter of Genesis are not separate from the passage in the first book but rather only “a sequel to the preceding chapter.” THE SONCINO EDITION OF THE PENTATEUCH AND HAFTORAH 6 n.3(a) (J.H. Hertz ed., 2d ed. 1965) [hereinafter THE PENTATEUCH AND HAFTORAHS].
68 “Marriage is one of the most important milestones for Jewish men and women. It is considered the natural state of Jewish life, and necessary for personal fulfillment.” Marc S.
the bond of marriage between husband and wife overrides the parent-child relationship. This chapter arguably allots an elevated status to a wife, for whom “a man shall leave his father and his mother.” However, this passage, which speaks of the married couple as becoming “one flesh,” may also have been a portent of the English common law concept that a woman’s legal existence was subsumed into that of her husband at marriage.

The Book of Leviticus contains a series of rules relating to bodily impurity that apply both to men and to women. This book is the origin of the ostracization of a woman while she is menstruating (niddah). The Book of Leviticus also describes unequal periods of impurity that follows a woman giving birth to a child. The period of impurity for a woman who has given birth to a female child is double that of a woman who has given birth to a male child.

Several women appear throughout the Bible who are powerful in their own right. Yet Biblical references to women in general indicate that a woman’s highest honor is to be found in her role as wife and mother. The Mishnah order that deals with women concentrates on

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69 Genesis 2:24.

70 Id.

71 I William Blackstone, Commentaries *442. Carmody notes that “in the traditional [Jewish] wedding ceremony, the bride is totally silent, projecting an image of effacement or nonpersonhood.” Carmody, supra note 64, at 204.

72 Leviticus 15:1-33. These rules are discussed at length in Rachel Biale, *Women and Jewish Law* 146–74 (1984). Carmody notes that, although the impurity rules applied equally to men and women originally, “[h]istorically, however, menstruation became a cardinal focus of the rabbis’ fears and sexism.” Carmody, supra note 64, at 204.

73 Leviticus 12:1-5. Biale notes that the reason for the doubling of the impure period after the birth of a girl is unclear. Perhaps it reflects, as has been suggested by some, the disappointment with the birth of a girl, but this would necessitate seeing the state of impurity as partially punitive, which does not seem to fit the intentions of Leviticus. One conjecture is that underlying this legislation is the sense that the birth of a female, who will one day herself menstruate and give birth, is seen as ‘doubly bloody’ and doubly impure.

Biale, supra note 73, at 152.

74 Id.

75 See Carmody, supra note 64, at 186. “Deborah is a mighty prophetess, Ruth is a noble daughter-in-law, and Esther is the saviour of her people.” Id.; see also Kofsky, supra note 1, at 321.

76 See Grunfeld, supra note 23, at 11–12, quoting Biblical passages such as Genesis 3:20, in which Adam named his wife Eve “because she was the mother of all living.”
marriage and divorce. The Talmud emphasizes further “the husbands’ and fathers’ duties with regard to the maintenance and care for his wife and daughters.” The Talmud also adds to the role of the woman/wife/mother the important task of freeing her husband from mundane household tasks so that he will be free to study the Torah. Generally, women did not study the Torah, although history records the story of one woman scholar, Beruriah, who was purportedly able to “absorb over three hundred laws each day, . . . some of her legal decisions were accepted as Halachah, despite the opposing views of some Rabbis.”

The status of Jewish women in modern times varies in Reform, Conservative, and Orthodox Judaism. For example, Orthodox Jews continue to restrict women from participating in religious rituals even though Reform Jews now admit women to the rabbinate. Jewish feminists continue to fight for the equalization of women’s status in the religion against the traditionalist view that this equalization is contrary to talmudic legislation.

Jewish women, particularly in Israel, remain threatened by the political influence that may be wielded by Jewish “Ultra-Orthodox fundamentalists.” Like Islamic fundamentalism, Jewish fundamentalism dictates an inferior and submissive status for women. Jewish fundamentalism “does not explicitly declare that a wife must be submissive and obedient to her husband [but] the overall structure of marriage and divorce laws delegates such a degree of authority and power to the husband as to allow him effectively to coerce his wife’s obedience.” Additionally, Jewish fundamentalists, in the name of “guarding” women’s chastity [and] prevent[ing] women from

78 The topics covered in this order are: “Sisters-in-law (Yebamoth, Yeb.); Marriage Deeds (Ketuboth, Ket.); Vows (Nedarim, Ned.); Nazirite-vow (Nazir, Naz.); Suspected Adulteress (Sotah, Sot.); Bills of Divorce (Gittin, Gitt.); Betrothals (Kiddushin, Kidd.)” An INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW, supra note 17, at 119.
80 See Carmody, supra note 1, at 197; Kofsky, supra note 1, at 321.
81 Kofsky, supra note 1, at 322; see also Carmody, supra note 64, at 199.
82 See generally Carmody, supra note 64, at 200-06.
83 See Carmody, supra note 64, at 202. The first woman was admitted to the rabbinate in 1972. See id.
84 See Carmody, supra note 64, at 203.
85 See Howland, supra note 62, at 322. “Jewish fundamentalists are politically active in Israel.” Id.
86 Islamic fundamentalism is discussed infra at text accompanying notes 133-36.
87 Howland, supra note 62, at 271. Howland calls the subordination of women a “core feature” of fundamentalism in Buddhism, Christianity, Hinduism, Islam, and Judaism. Id.
88 Id. at 318.
‘tempting’ men into adultery,”89 segregate the sexes, relegate women to the home, and restrict women’s public dress.90

B. Women in Islam

One scholar has noted that “[t]o attempt to talk about women in Islam is of course to venture into an area fraught with the perils of overgeneralization, oversimplification, and the almost unavoidable limitations of a Western bias.”91 Islam is criticized by some as having created a “male-dominated society”92 and praised by others as having “elevated the status of women, providing them with an independent legal and spiritual identity.”93 The Prophet’s legislation is praised by some as having declared “a new equal status for women in society,”94 yet criticized by others as setting forth a set of rules on family life with “almost all of them favoring men.”95 A brief examination of the status of women in pre-Islamic Arabia reveals that, while Islam generally improved the status of women in that society, it may also have resulted in imposing severe restrictions on the rights that some pre-Islamic women enjoyed.96

The primary governmental unit of pre-Islamic Arabia was the tribe.97 The tribes were either settled tribes or nomads (the latter often referred to as “Bedouin”).98 Children were viewed as children of the tribe,99 and the members of the tribe were bound to one another by blood ties,100 through either a patrilineal or a matrilineal

89 Id. at 321.
90 Id. at 321–22.
91 Smith, supra note 61, at 235. The same sentiment is clearly also applicable to a study of the status of women in Judaism. The author concedes that, as a Western feminist, who is neither Muslim nor Jewish, her “outsider’s” view of these issues may well be imbued with a number of biases.
92 Honarvar, supra note 39, at 365.
93 Chaudhry, supra note 12, at 513.
94 Id.
95 Honarvar, supra note 39, at 365.
96 Islamic feminist Fatima Mernissi finds “fascinating” the degree to which modern Islamic scholars refuse to believe that any customs that favored “female sexual self-determination” existed prior to the advent of Islam. FATIMA MERNISSI, BEYOND THE VEIL: MALE-FEMALE DYNAMICS IN MODERN MUSLIM SOCIETY 66 (1987) [hereinafter BEYOND THE VEIL].
98 See Honarvar, supra note 39, at 356.
99 See BEYOND THE VEIL, supra note 96, at 73–74; Honarvar, supra note 39, at 358; Pre-Islamic Arabia, supra note 97, at 3.
100 See Pre-Islamic Arabia, supra note 97, at 3.
system. Marriage was a "flexible, loose institution with no strict, uniformed rules" and a woman's role within a marriage ranged from that of property to "free agent." Infanticide, primarily female infanticide, was a common practice. Polygamy was also prevalent. In those systems in which a wife was regarded as property, women had no property or inheritance rights and could be divorced at will by their husbands. In the matrilineal systems, however, some rights of inheritance in women most likely existed. In Mecca, the Prophet's first wife was a successful businesswoman "who had inherited a large fortune from her late husband."

The Prophet replaced the tribe with the family as the primary social unit. He adopted the patrilineal system as the framework for

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101 Honarvar, supra note 39, at 357. "Of the two systems of kinship, the matrilineal was practiced among the settled communities and the patrilineal system was used by the nomads." Id. In a matrilineal system, the children of the mother stayed with the mother's tribe while in a patrilineal system, the identity of the child's father determined the child's tribe. Beyond the Veil, supra note 96, at 74.

102 Pre-Islamic Arabia, supra note 97, at 5.

103 In a "marriage by capture," the woman was basically a slave of her husband. Pre-Islamic Arabia, supra note 97, at 6.

104 "In some other tribes, it was customary that the woman did not leave her own tribe but either married someone within the tribe or married a stranger who agreed to stay with her family . . . . The women of these tribes enjoyed more freedom and had the right to dismiss their husbands at will." Pre-Islamic Arabia, supra note 97, at 6. The Prophet's mother was the member of such a tribe. His father died when his mother was seven months pregnant with him. The Prophet stayed with his mother's tribe until she died when he was six years old. See Beyond the Veil, supra note 96, at 69-70.

105 See Pre-Islamic Arabia, supra note 97, at 4. Infanticide of female children occurred primarily among poor communities where "girls . . . were viewed as less productive than boys." Id. Female children were also sometimes killed because their fathers were afraid that, if captured during tribal warfare, the girls might shame the father by refusing to return to him after the war ended. See id. at 4.

106 See id. at 7. "It is reported that a man could have as many as 100 wives." Id. The term "polygamy" is used here to refer both to "polygyny," (the practice of having more than one wife) and "polyandry" (the practice of having more than one husband). Both polygyny and polyandry seem to have been practiced in pre-Islamic Arabia. See Pre-Islamic Arabia, supra note 97, at 7. However, polygamy does not seem to have been practiced in either Mecca or Medina. See Beyond the Veil, supra note 96, at 68.

107 See Chaudhry, supra note 12, at 513.

108 See Pre-Islamic Arabia, supra note 97, at 8. Bedouin customs probably did not favor women, but "one should be wary of assuming that customs among pastoralists were uniform in this respect . . . . [I]t should at least be noted that among the Rwala lords of the desert . . . not inconsiderable rights of inheritance for women [have been found to have existed]." Martha Mundy, The Family, Inheritance and Islam: A Re-examination of the Sociology of Fara'id Law, in Islamic Law: Social and Historical Contexts 30 (1988).

109 The Male Elite, supra note 42, at 27; see also Honarvar, supra note 39, at 382; Pre-Islamic Arabia, supra note 97, at 8.

110 See Pearl, supra note 17, at 122; Beyond the Veil, supra note 96, at 82.
his scheme of inheritance, but he established explicit inheritance rights for women. The Prophet restricted to four the number of wives that a man could have and forbade a woman from having more than one husband. He abolished the practice of female infanticide.

Strong women played an important role in the life of the Prophet and the foundation of the religion. The Prophet’s first wife, Khadija, supported his cause and became known as “the Mother of all believers.” Another of his wives, A’isha, is portrayed as a powerful influence, both on the Prophet and on his followers. The Prophet’s daughter, Fatima, stood by him during his life and played a political

In the tribal society of pre-Islamic Arabia the system of inheritance was designed to keep property within the individual tribe and maintain its strength as a fighting force. The tribe was patriarchal and patrilineal. Women occupied a subordinate and subjugated position within the group whose bond of allegiance was that of ‘asabiyya—descent through male links from a common ancestor. A woman who married into another tribe belonged henceforth, along with her children, to the tribe of the husband. The maternal or uterine relationship, therefore, lay outside the structure of tribal ties and responsibilities. In these circumstances the proper exploitation and preservation of the tribal patrimony meant, inter alia, the exclusion of females and non-agnate relatives from inheritance and the enjoyment of a monopoly of rights of succession by the male agnate relatives.

Under Islam, however, the political and social scheme which had supported this customary system of succession was transformed. Politically, the bond of a common religious faith, with allegiance to the Prophet as the head of the community, transcended tribal ties and within the brotherhood of Muslims there was no place, in theory at any rate, for inter-tribal hostility or warfare. Socially, Islam emphasized the more immediate family tie existing between a husband, his wife, and their children, and aimed at elevating the status of the female within this group. These changes are mirrored in the novel rules of succession introduced by Islam.

N.J. Coulson, Succession in the Muslim Family 29 (1971) [hereinafter Succession in the Muslim Family].

See Aharon Layish, Women and Islamic Law in a Non-Muslim State: A Study Based on Decisions of the Shari’ah Courts in Israel 279 (1975); Honarvar, supra note 39, at 382. As will be examined later in this Article, the Shi’a approach to inheritance does not use the patrilineal base as its foundation. See infra text accompanying note 208.

See infra text accompanying notes 204–05.

See Honarvar, supra note 39, at 369.

See Pre-Islamic Arabia, supra note 97, at 9.


See Jan Goodwin, Price of Honor: Muslim Women Lift the Veil of Silence on the Islamic World 42 (1994); Bhutto, supra note 115, at 111.
role after his death.\textsuperscript{117} Despite these forceful feminine influences, some believe that women as a class do not fare particularly well in those segments of the Qur’an and the \textit{Shari’a} that deal with topics other than inheritance and property rights. This belief is summarized as follows:

The purpose of women, according to the Koran, is to compliment men. Women’s rights to employment and participation in public life, freedom of movement and freedom of organization, are severely restricted through a combination of the \textit{Shari’a} principles of qawam (men’s guardianship over women),\textsuperscript{[118]} hijab (the veil) and segregation between men and women. Examples of women’s inequality can be found in the administration of justice and in certain aspects of family law. A woman’s judicial testimony is deemed to be of half the value of that of a man, in civil cases, and is not accepted at all in serious criminal cases.\textsuperscript{[119]} In certain types of wrongful homicide, monetary compensation paid to the heirs of a female victim is less than that paid to the heirs of a male victim and a woman’s share in inheritance is half that of a man’s. Additionally, no woman may hold any public office which involves exercising authority over men.\textsuperscript{120}

In addition, one verse of the Qur’an seemed not only to confirm the inferior role of women but also to sanction wife-beating. This verse states:

Men are the maintainers of women because Allah has made some of them to excel others and because they spend out their property; the good women are therefore obedient,

\textsuperscript{117} See Bhutto, \textit{supra} note 115, at 111. As noted \textit{supra} note 60, the split between the Sunni and Shi’a schools related to the fact that the leader of the Shi’i was married to Fatima.


\textsuperscript{119} An alternative version of this rule states that the rule applies only in debtor-creditor transactions, that it is an exception to the general rule that women can serve as witnesses equally with men, and that its original purpose (to secure accurate testimony as women usually did not engage in commercial transactions and thus might be more likely to make a mistake) may have disappeared in modern times when women are actively involved in the commercial world. Muslim Women’s League, \textit{Women in Society: Legal Rights} (visited Jan. 19, 2000) <www.mwlusa.org/pub_book_legalrights.shtml>.

guarding the unseen as Allah has guarded, and (as to) those on whose part you fear desertion, admonish them, and leave them alone in the sleeping-places and beat them; then if they obey you, do not seek a way against them; surely Allah is High, Great.\textsuperscript{121}

Finally, proponents of the practice of female circumcision cite this "tradition as 'a duty on every Muslim woman.'"\textsuperscript{122}

The status of women in Islam is complicated by the fact that scholarly interpretation of the Qur'an may have been subject to the biases of those who stood to benefit by a society that favored their gender.\textsuperscript{123} Women played no part in interpretation of the Qur'an, and their absence "has been mistakenly equated with voicelessness in the text itself."\textsuperscript{124} Furthermore, social norms in many male-dominated countries may have obscured many of the original purposes of the Qur'anic legislation.\textsuperscript{125} Former Prime Minister of Pakistan, Benazir Bhutto, claims that the subjugation of women in Islam "has got nothing to do with the religion, but it has got very much to do with material or man-made considerations."\textsuperscript{126} She concludes, "It is not Islam which is averse to women rulers, I think—it is men."\textsuperscript{127}

An example of the effect of male interpretation and social norms appears in the development of the concept of "the veil." The required covering of a woman's face and body when she ventures out in public is seen by many as a symbol of the Islamic subordination of women.\textsuperscript{128}

\textsuperscript{121} Sura IV, verse 34, \textit{The Holy Qur'an} 51 (Shakir transl.).
\textsuperscript{122} John Tochukwu Okwubanego, \textit{Female Circumcision and the Girl-Child in Africa and the Middle East: The Eyes of the World are Blind to the Conquered}, 33 \textit{Int'l Law.} 159, 167 (1999). It is estimated that one hundred million women have undergone some form of female circumcision. \textit{See Goodwin, supra} note 116, at 334.
\textsuperscript{123} See discussion of \textit{hadith, supra} at text accompanying notes 49-54.
\textsuperscript{125} "This understanding [that social norms may be the major obstruction to women's rights in Islamic countries] supports the claim of many Islamic feminists that a rejection of the oppression of women does not necessarily involve a rejection of Islam." Webber, \textit{supra} note 41, at 1052-53. It is beyond the scope of this article to attempt to further a debate whose intensity dominates both modern scholarly texts and the political and social life of many Muslim societies.
\textsuperscript{126} Bhutto, \textit{supra} note 115, at 111.
\textsuperscript{127} \textit{Id.}
However, this practice does not seem to have been mandated in the Qur’an. The Qur’an does state that, if a man is to ask anything of the wives of the Prophet, “ask it of them from behind a curtain.”

Muslim feminist Fatima Mernissi describes the origin of this requirement as an event in which the Prophet, who was eager to be with his newly married wife, yet unwilling to be impolite to wedding guests who had lingered too long, eventually let fall a curtain between himself and the last-remaining of his Companions. She then goes on, however, to describe how recent books by Muslim fundamentalists emphasize the importance of women wearing the veil. As Mernissi notes, the “relatively minor incident” in the Prophet’s life, which originally was prompted by a need to separate public from private space, “was to turn into a segregation of the sexes.”

In addition to a history of male interpretation and legislation, the resurgence of Muslim fundamentalism in recent decades has had a profound impact on the status of women in affected societies. In general, countries in which fundamentalist rule has taken hold have adopted laws that severely restrict the rights of women to work outside the home, to appear unveiled in public, and to protect their rights in the context of marriage and divorce. Thus, the rights of women (1994). “The veiling of women has become virtually emblematic of Muslim extremism throughout the world.” Id.

See Sura XXXIII, verse 59, The Holy Qur’an 281. Verse 59 of sura XXXIII arguably alludes to the veiling of women when it states: “say to your wives and daughters and the women of the believers that they let down upon them their overgarments, this will be more proper, that they may be known, and that they will not be given trouble . . . .” In verse 31 of sura XXIV, “believing women” are admonished to “cast down their looks and guard their private parts and do not display their ornaments except what appears thereof, and let them wear their head-coverings over their bosoms . . . .” Sura XXXIII, verse 59, The Holy Qur’an 281. Men also were told to “cast down their looks and guard their private parts, that is purer for them.” Sura XXIV, verse 30, The Holy Qur’an 230. There is some controversy as to whether the veiling and seclusion of wealthy Arabian women for the purpose of protection was common at the time the Qur’an was revealed. Compare Wadud-Muhsin, supra note 123, at 132 (stating that such was the case) with Anwar Hekmat, Women and the Koran: The Status of Women in Islam 199 (1997) (stating that Arabian women wore only a headdress, and “[c]omplete concealment as it is practiced today did not exist”).

See generally Goodwin, supra note 116.


See Howland, supra note 62, at 306–16.
in these male-dominated cultures have become virtually non-existent. Yet, ironically, even these fundamentalist regimes illustrate a grudging recognition of women's innate power, as their motivating theory seems to be "that women harbor the seeds of destruction of all society and that to avoid this they and their sexuality must be carefully controlled."137

III. MARRIAGE AS THE CONTEXT FOR SUCCESSION RIGHTS

Marriage is considered a cornerstone of both Judaism and Islam.138 The succession rights of women under Jewish and Islamic law cannot be understood fully unless they are examined in the larger context of the property rights of women within a marriage. Marriage as an institution in pre-Islamic Arabia bore many similarities to marriage in early Biblical times. In both cultures, marriage was a business transaction between the family of the groom and the family of the bride.139 The bride was a productive piece of property who was bought by the groom from her family.140

In both of these cultures, polygyny was permitted.141 In the Jewish tradition, the number of wives a man could have was limited only by his ability to fulfill his marital and sexual duties to each of them.142 The only man for whom the number of wives was limited was the king, and he was limited to 18.143 When asked how many wives a man should have, the rabbis speculated that the number four was realistic in that the husband could serve (or service) each one for one week in the month.144 It was not until somewhere between 960 and 1028 that a definitive Jewish order against polygyny was entered.145

137 Id. at 307.
138 See Cwik, supra note 68, at 109; see also Honarvar, supra note 39, at 365. The Prophet is reputed to have said that "marriage is half the religion." GOODWIN, supra note 116, at 36.
139 See An Introduction to the History and Sources of Jewish Law, supra note 17, at 136; Honarvar, supra note 39, at 368; Kofsky, supra note 1, at 323.
140 See id. The Arabic term that is still sometimes used to describe an unmarried girl translates as "another's wealth." GOODWIN, supra note 116, at 44.
141 RUTH LINK-SALINGER, JEWISH LAW IN OUR TIME 68-69 (1982); PEARL, supra note 17, at 69; PRINCIPLES OF JEWISH LAW, supra note 12, at 367. The Torah speaks of a man having two wives. Deuteronomy 21:5-17. The Mishnah refers to "co-wives." Yebamoth 1, THE MISHNAH 218-21 (Danby transl.).
142 See BIALE, supra note 73, at 49.
143 See id.
144 See id.
145 See id. at 50. One commentator notes that monogamy was prompted by social and economic concerns rather than religious ones:
As noted above, the Prophet did not object to polygyny but limited the number of wives that a man could have to as many as the man could care for, up to four. The Prophet himself was married to several women through the course of his life. Some commentators note that, at the time the Prophet recited the Qur'an, it would have been an unrealistic burden on women to abolish polygyny because tribal warfare had depleted the number of men in the communities and a woman needed the support of a marriage for her own financial well-being.

In pre-Islamic Arabia, as well as in both religions, the husband could divorce the wife without the wife's consent. Later Jewish law required the consent of the wife, although the husband technically is the only one who can deliver the get. Islamic law allows a man to divorce his wife unilaterally but gives the wife only a limited right to seek a divorce, either upon her husband's consent or through the judicial system, unless the right to seek divorce on other grounds was reserved by the wife in the marriage contract.

When we find [Cairo] Geniza society being essentially monogamous, the reason was not a new moral, legal, or religious concept of marriage, but the historical fact that the Jewish people had become completely urbanized, with the "bourgeoisie" setting the tone. Parents, after having toiled all their lives to scrape together a sumptuous dowry for their daughter, saw to it that she should not suffer in marriage. They stipulated in the marriage contract that the husband was not permitted to take a second wife. In case he did, he had to pay the late installment to the marriage gift in full—a most efficient deterrent—and to set his wife free at her demand, even if he did not wish to do so. Costly fines were also stipulated.

\textsuperscript{146} See Honarvar, supra note 39, at 369. Verse 3 of sura IV provides: "And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two and three and four, but if you fear that you will not do justice between them, then (marry) only one . . . ." Sura IV, verse 3, \textit{The Holy Qur'an} 69.

\textsuperscript{147} See \textit{Beyond the Veil}, supra note 96, at 70. Yet during the life of his first wife, Khadija, the Prophet did not marry any additional wives. Bhutto, supra note 115, at 110. It is also reported that the Prophet opposed his son-in-law when he sought to marry a woman in addition to the Prophet's beloved daughter, Fatima. See \textit{Beyond the Veil}, supra note 96, at 70.

\textsuperscript{148} See Pearl, supra note 17, at 1; William Montgomery Watt, \textit{A Short History of Islam} 92–93 (1996).

\textsuperscript{149} See \textit{Principles of Jewish Law}, supra note 12, at 414. The get is the "bill of divorce." \textit{Id.} If a woman does not receive the get, she is destined to live life as an agunah, a "woman chained to a dead marriage." Cwik, supra note 68, at 110.

\textsuperscript{150} See Honarvar, supra note 39, at 372–73. For a discussion of the reservation of rights in the marriage contract, see generally John L. Esposito, \textit{Women in Muslim Family Law} 23–24 (1982).
A. Marriage in Jewish Law

Marriage as an institution is similar under current Jewish and Islamic law in that it is in both cases based on a marriage contract between the spouses. This contract evolved from the earlier contract under which the groom would pay the marriage price, the *mohr*, to purchase the bride. The *ketubah* developed into a contract between the husband and wife that outlined both the husband’s and the wife’s obligations. The *ketubah* amount was no longer payable to the bride’s family but to the bride herself. One important purpose of the *ketubah* is to provide for the wife in the event of divorce or her husband’s death. Thus, the *ketubah* speaks of an amount of property that is available to the wife in the event of either of these occurrences. The *ketubah* amount is minimal, but the husband is free to add to that amount. The *ketubah* amount is a lien on the husband’s property. At the husband’s death or upon divorce, the wife is also entitled to a return of this amount and of her dowry. This property is sometimes referred to as “iron sheep” or “iron flock” assets. The assets are merged into the husband’s estate during the course of the marriage and, as with assets such as sheep, he is free to enjoy the fruits of the property during that time. However, the property resembles iron in that, at death or divorce, the value of the property when the marriage began must be returned to the wife (even if the property itself has gone down in value).

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152 See Biale, *supra* note 73, at 80.


154 See Biale, *supra* note 73, at 80.

155 See id.

156 See Capell, *supra* note 150, at 335; Kofsky, *supra* note 1, at 326.

157 See Kofsky, *supra* note 1, at 326.


160 See An Introduction to the History and Sources of Jewish Law, *supra* note 17, at 13; Kofsky, *supra* note 1, at 330.


The husband has the duty to maintain the wife during the marriage.¹⁶³ This duty exists even if the husband is in financial difficulty and the wife has the independent means to support herself.¹⁶⁴

B. Marriage in Islamic Law

The Islamic marriage contract calls similarly for a payment (the *mehr* or *mahr*) to be made to the bride by the groom. The institution of this payment was seen as an elevation of the woman from her previous status as an “object of sale”¹⁶⁵ to that of “a contracting party in her own right.”¹⁶⁶ The *mehr* is not a purchase price paid for the wife to the wife’s family; rather, like the *ketubah* amount, it is a free gift given into the sole possession of the woman upon the making of the marriage contract.¹⁶⁷ The *mehr* may be specified¹⁶⁸ or unspecified¹⁶⁹ and a specified *mehr* may be paid in two parts—prompt and deferred.¹⁷⁰ The prompt *mehr* is to be paid immediately upon the marriage.¹⁷¹ The deferred *mehr* is an unsecured debt from the husband to the wife.¹⁷² The wife is free to demand the deferred *mehr* at any time during the marriage and, if the husband does not pay it, she can “refuse herself to

¹⁶³ See id. at 394.
¹⁶⁴ See id. at 395.
¹⁶⁵ One verse of the Qur’an implies that, in pre-Islamic law, wives were subject to being inherited as part of their husband’s estate. Sura IV, verse 19 provides in part: “O you who believe! It is not lawful for you that you should take women as heritage against (their) will.” THE HOLY QUR’AN 50. See POWERS, supra note 49, at 55.
¹⁶⁶ PEARL, supra note 17, at 2–3.
¹⁶⁷ Sura IV, verse 4 of the Qur’an states: “And give women their dowries as a free gift, but if they of themselves be pleased to give up to you a portion of it, then eat it with enjoyment and with wholesome result.” THE HOLY QUR’AN 69. Webber notes that studies have shown that the *mehr* is often given to the woman’s family rather than to her. See Webber, supra note 41, at 1073–74.
¹⁶⁸ See PEARL, supra note 17, at 58–59.
¹⁶⁹ The amount of unspecified *mehr* is based on the *mehr* paid to similarly situated women. See id. at 61.
¹⁷⁰ See id. at 58.
¹⁷¹ See id. at 63.
¹⁷² See PEARL, supra note 17, at 62; Honarvar, supra note 39, at 368.
The deferred *mehr* is typically not paid until the death of the husband or divorce. If due at death, the *mehr* "must be paid before any other estate distribution takes place."

In addition to paying the *mehr*, the Muslim husband is required to provide support for his wife during the marriage in the form of food, shelter, clothing, and medical care. However, this support is based on the wife's willingness to submit to her husband and his refusal to provide maintenance may not be sufficient grounds for her to sue for divorce. The wife's male relatives also are responsible for supporting her.

**IV. INHERITANCE UNDER JEWISH AND ISLAMIC LAW**

Despite the similarity of their approaches to marriage and divorce, the Jewish and Islamic legal systems differ dramatically in their approach to women's rights to inheritance and succession. In general, the Islamic law offers an intricately specified system of inheritance rights in contrast to the vague outlines that comprise Jewish inheritance law. In particular, the two laws differ in that Islamic law provides specific shares of property for women in their spouses' and relatives' estates, while Jewish law allows women to inherit only in very limited circumstances. In any event, in both legal systems, women's inheritance rights are generally not equal to those of men.

**A. Jewish Inheritance Law**

As noted, the Biblical inheritance laws are vague, derived more from Biblical references and illustrations than from explicit direc-

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173 See Honarvar, *supra* note 39, at 368. "It should be pointed out that although *mehr* (dower) is an actionable claim, in real life, it is not common practice for the wife to make such demand." *Id.*

174 See id. "The issue generally comes up at the dissolution of marriage. Even then, the wife, under intense pressure from the husband, is likely to forego her claim in exchange for a divorce." *Id.*

175 Chaudhry, *supra* note 12, at 548.

176 See Webber, *supra* note 41, at 1064.

177 See id. In the Hanafi school, lack of support may constitute sufficient grounds for annulment of the marriage. See Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* 82–83 (1998).

178 See Chaudhry, *supra* note 12, at 541–42; Webber, *supra* note 41, at 1069. However, although "[a] woman is always guaranteed sufficient care, and she has no legal obligation to support anyone," her support is often the leverage by which her male family members persuade her to give up her rights of inheritance. Chaudhry, *supra* note 12, at 541–42; Webber, *supra* note 41, at 1069.
tions. The Biblical passages focus often on the necessity of retaining the stability of the tribes of Israel by maintaining property within the tribe via the patrilineal line.

The text of Numbers 27:8–11, which is cited as the seminal Biblical source of the laws of succession, provides as follows:

If a man die, and have no son, then ye shall cause his inheritance to pass unto his daughter. And if he have no daughter, then ye shall give his inheritance unto his brethren. And if he have no brethren, then ye shall give his inheritance unto his father's brethren. And if his father have no brethren, then ye shall give his inheritance unto his kinsman that is next to him of his family and he shall possess it.

This passage contains a number of clear rules. First, at the father's death, the sons, if any, received his estate. If there were no sons, the property passed to his daughters. If there were no daughters, the property passed to the decedent's brothers and, if none, to his uncles. The passage seems to exclude female heirs (other than daughters), the mother's family, and even the male ancestors of the decedent.

179 Rabbi Grunfeld, however, states that the inheritance laws flow from the concept of unity of the family. The family as a religious, moral, and sociological unit is concerned not only with the relationship of husband and wife, parents and children, and the latter's education, but with the acquisition of financial means to create the where-withal for life's physical sustenance which is necessary for the achievement of life's spiritual aims. When the father and bread-winner dies, it is therefore essential and considered a natural law that the worldly goods he has acquired in his lifetime should be passed on to members of the family who continue his life's purpose. The concept of the family, however, is taken in a wider sense, comprising not only direct descendants, but also ascendants and their offspring.

180 Moses explained that daughters who inherit must stay with the tribe: "So shall no inheritance into the family of the children of Israel remove from tribe to tribe; for the children of Israel shall cleave every one to the inheritance of the tribe of his fathers. And every daughter, that possesseth an inheritance in any tribe of the children of Israel, shall be wife unto one of the family of the tribe of her father, that the children of Israel may possess every man the inheritance of his fathers." Numbers 36:7–9. Later Sages limited the duty to marry within the tribe to the Biblical generation only. Principles of Jewish Law, supra note 12, at 446.

181 Numbers 27:8–11.

182 The Torah indicates that the eldest son would receive a double share. Deuteronomy 21:17; Principles of Jewish Law, supra note 12, at 434. However, Hiers points out that this portion of Deuteronomy is illustrative of a practice that is never expressly directed and rarely even referred to in any other Biblical text. See Richard H. Hiers, Transfer of Property by Inheritance and Bequest in Biblical Law and Tradition, 10 J. L. & REL. 121, 142–43 (1993–94).
The passage also does not explicitly include the issue of the de­
cedent’s children or the issue of the decedent’s brethren.

This Biblical passage is the subject of the eighth and ninth chap­
ters of Baba Bathra, the tractate of the Mishnah that deals with the
ownership of property. The Baba Bathra interprets the passage so as to
include issue and to fill in certain other gaps in the order of succes­
sion. It provides in part as follows:

  the son precedes the daughter, and all the son’s offspring
  precede the daughter; the daughter precedes the brothers
  and the daughter’s offspring precede the brothers; brothers
  precede the father’s brothers and the brothers’ offspring
  precede the father’s brothers. This is the general rule: who­
soever has precedence in inheritance, his offspring have also
  precedence. The father has precedence over all his off­
spring.183

Thus, the descendants of the decedent’s sons, daughters, brothers,
and uncles hold a place in the order of inheritance,184 as does the de­
cedent’s father.185

Even the elucidation in the Mishnah did not satisfactorily answer
all questions about the order of inheritance. One disputed issue was
that of who should inherit if the decedent was survived by a daughter
and the daughter of a deceased son. The Talmud includes discussions
of this issue and states definitively that, contrary to the teachings of
the Sadducees,186 the son’s daughter would inherit and the decedent’s
daughter would take nothing.187

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183 Baba Bathra 8:2, The Mishnah 376. A footnote indicates that the last sentence re­
ers to the offspring of the father who are not also the direct descendants of the decedent. See id.
184 Commentary in the Babylonian Talmud explains that the spelling used in the To­
rah for the phrase “he have no [son] or [daughter]” indicates that the verse requires an
examination not only of whether the decedent had a son (or daughter) but also of
whether there was someone who could stand in the son’s (or daughter’s) place—that is, a
descendant of the son or daughter. Talmud Bavli, Bava Basra 115a. (Schottenstein ed. 1994) (In this edition, the Baba Bathra is referred to as the Bava Basra.)
185 The Babylonian Talmud contains an extensive discussion of the bases for deter­
mining that the sons and daughters of the decedent precede the decedent’s father in the
order of succession. Talmud Bavli, Bava Basra 108a-b.
186 The Sadducees, who are often the dissenters in discussions in the Talmud, adhered
strictly to the written law. Cohn, supra note 30, at viii.
187 Talmud Bavli, Bava Basra 115b. “If the deceased’s sole survivors should be a
daughter and a son’s daughter, the latter will inherit the whole estate since she takes the
place of her father to the exclusion of her sister: the Sadducees, however, held the opinion
Another question on which modern scholars still seem to disagree is whether the priority of males over females continues throughout the entire order of succession. For example, Rabbi Shmuel Shilo\(^\text{188}\) describes the order of succession as "a parentelic system, conferring the right of inheritance on all kin of the deceased in the agnate (paternal) line of descendancy."\(^\text{189}\) Thus, descendants would inherit first. If there were no descendants, the father and his descendants (presumably both male and female descendants) would inherit next. In the absence of a surviving father, siblings, or descendants of siblings, the grandfather and his descendants would inherit, and so on.\(^\text{190}\) Rabbi Dayan Grunfeld,\(^\text{191}\) on the other hand, offers a more explicit set of rules, which clearly favor males over females throughout. He describes "the order of succession in the Jewish Law of Inheritance, based on the interpretation of the Oral Law,"\(^\text{192}\) as follows: “1) the sons 2) their descendants 3) the daughters 4) their descendants 5) the father 6) the brothers 7) their descendants 8) the sisters 9) their descendants 10) the grandfather 11) the brothers of the father 12) their descendants 13) the sisters of the father 14) their descendants, etc., etc."\(^\text{193}\) Rabbi Grunfeld’s interpretation gives the father a place of priority, which means that the father takes to the exclusion of the decedent’s brothers. Also, Rabbi Grunfeld retains the priority of males over females (i.e., brothers over sisters) throughout the parentelic system. Thus, the disputation that has been so instrumental in the development of Jewish law continues into modern times.

As will be illustrated more fully below, the Jewish laws of inheritance favor men over women in three ways. First, a decedent’s daughter is precluded from taking any portion of her father’s estate if he is survived by sons or descendants of sons.\(^\text{194}\) Second, the mother and

\(^{188}\) Lecturer in Jewish Law, Hebrew University of Jerusalem. PRINCIPLES OF JEWISH LAW, supra note 12, at 447.

\(^{189}\) Id. at 446.

\(^{190}\) See id.

\(^{191}\) Rabbinical Judge and member of the London Beth Din (Court of the Chief Rabbi). GRUNFELD, supra note 23, at xvii.

\(^{192}\) Id. at 10.

\(^{193}\) Id. A similar system is described as the "Order of Inheritance as developed by later Jewish law" in THE PENTATEUCH AND HALTORAHS, supra note 67, at 692 n.11.

\(^{194}\) Under Rabbi Grunfeld's interpretation, not only do sons and sons’ descendants preclude daughters, but all male relatives and their descendants take priority over females of equal relationship and their descendants. GRUNFELD, supra note 23, at 10.
the mother's family are not heirs of a decedent.\textsuperscript{195} Third, a husband inherits from his wife, but a wife does not inherit from her husband.\textsuperscript{196}

In modern times, many Jews have mitigated this discriminatory effect through the use of testamentary bequests and devises.\textsuperscript{197} Yet this process, too, remains subject to scholarly dissension. References to wills are basically non-existent in the Bible.\textsuperscript{198} The \textit{Baba Bathra} prohibits a man from making a testamentary disposition of his property that abrogates the required order of succession.\textsuperscript{199} However, the same tractate allows a man to give away his property during his life.\textsuperscript{200} These inter vivos gifts can take the form of an irrevocable gift of property in which the donor may retain the right to a usufruct during life,\textsuperscript{201} a deathbed gift,\textsuperscript{202} or a gift made in contemplation of death.\textsuperscript{203} The gifting of property to one who is not an heir is not expressly prohibited. However, the more orthodox view is that a pious man should not do so.\textsuperscript{204}

\textbf{B. Islamic Inheritance Law}

Unlike the vague Biblical law, the Qur’anic laws of inheritance are extraordinarily specific. An Islamic maxim is “Learn the laws of inheritance, and teach them to the people; for they are one half of useful knowledge.”\textsuperscript{205}

\begin{itemize}
  \item \textsuperscript{195}See id.
  \item \textsuperscript{196}See id. at 11.
  \item \textsuperscript{197}Rabbi Grunfeld notes that even orthodox Jews are making wills, with the help of orthodox solicitors. \textsc{Grunfeld}, \textit{supra} note 23, at 100.
  \item \textsuperscript{198}See Hiers, \textit{supra} note 182, at 147.
  \item \textsuperscript{199}See \textit{Baba Bathra} 8:5, The \textit{Mishnah} 377 (Danby transl.).
  \item \textsuperscript{200}\textit{Baba Bathra}, 8:6 provides in part: “If a man died and a testament was found bound to his thigh, this counts as nothing. But if he [had delivered it and] through it granted title to another, whether of his heirs or of such as were not his heirs, his words remain valid.” \textit{Baba Bathra} 8:6, The \textit{Mishnah} 377.
  \item \textsuperscript{201}See \textit{Principles of Jewish Law}, \textit{supra} note 12, at 453. This gift is called a \textit{mattenat bari}. See id.
  \item \textsuperscript{202}See id. This gift is called a \textit{mattenat shekhiv me-ra}. See id.
  \item \textsuperscript{203}See id. at 455. This gift, called a \textit{mezavveh mehamt mitah}, is one made when a person is seriously ill (though not dying), about to face execution, or about to set out on a caravan or sea voyage. See id.
  \item \textsuperscript{204}See \textsc{Grunfeld}, \textit{supra} note 23, at 16. \textit{Baba Bathra} 8:5 provides: “If a man assigned his goods to others and passed over his sons, what he has done is done, but the Sages have no pleasure in him.” \textit{Baba Bathra} 8:5, The \textit{Mishnah} 377.
  \item \textsuperscript{205}\textsc{Powers}, \textit{supra} note 49, at 8; \textsc{Honarvar}, \textit{supra} note 39, at 380.
\end{itemize}
The Qur'an contains an explicit system for the distribution of a decedent's estate among family members. The Qur'an specifies certain fractional shares of the estate for named heirs of the decedent, who include both male and female relatives. The Shi'a school declares that these specified takers are to be the only takers of the decedent's intestate estate (that is, the entire estate is to be shared by these named heirs). The majority Sunni view, however, is that this new framework is to be superimposed upon the framework that already existed in pre-Islamic Arabia. The existing framework was

206 "The estate available for the legal heirs consists of all the assets of the deceased that remain after the satisfaction of funeral expenses, debts and valid bequests." Succession in the Muslim Family, supra note 110, at 40.

207 This system is spelled out in Sura IV, verses 7, 11, and 12. The Holy Qur'an 70–71.

208 Sura IV, verse 7 states: "Men shall have a portion of what the parents and the near relatives leave, and women shall have a portion of what the parents and the near relatives leave, whether there is little or much of it: a stated portion." The Holy Qur'an 70. "Female heirs suffer from no disability, at least in Sunni law, to succeed to land or real estate. Each heir's entitlement is simply expressed in terms of a fractional share and attaches in specie to the various properties which make up the inheritance." Succession in the Muslim Family, supra note 110, at 40. Tradition teaches that the Prophet delivered this verse and other inheritance verses after the wife of a deceased man and her daughters complained to the Prophet that the decedent's executors refused to deliver any of his property to her. Powers, supra note 49, at 11–12, 53–54. Powers notes, however, that "the historical accuracy of this representation is highly suspect." Id. at 54.

209 See Pearl, supra note 17, at 145. Some of the specified takers in the Shi'a system are given prescribed shares, while others take the residue. See Verma, supra note 15, at 483.

210 See Succession in the Muslim Family, supra note 110, at 33.

The system of priorities rests basically upon the principles of agnatic succession recognised by the customary tribal law in pre-Islamic Arabia. . . . [The Qur'an] merely modified the existing customary law by adding thereto as supernumerary heirs a number of relatives who would normally have had no rights of succession under the customary law. As a result of this approach the essential character of the developed Sunni law of inheritance is that of an agnatic system of succession mitigated by the Qur'anic provisions. Male agnate relatives generally remain in a dominant position, and the consolidated system of priorities covering the members of the inner family as a whole was achieved by absorbing the new Qur'anic heirs within the framework of the customary rules of priority operating among male agnates.

Id. Powers takes issue with this theory (which he admits represents "the general consensus of western scholars on the subject"). Powers, supra note 49, at 90. Powers hypothesizes that the succession law introduced by the Prophet was designed not to complement but rather to replace completely the pre-Islamic laws. See id. at 106. Thus Powers articulates the Shi'a approach. The Shi'i jurists rejected "the notion of continuing validity of pre-Islamic practice. There are, of course, political reasons for the differences [between the Shi'a and the Sunni approaches], not the least in giving priority to daughter's children, but the major reason for the disparity must be sought in the continuity of the tribal aristocracy of the Sunnis as compared with the limited family grouping of the Shi'i." Pearl, supra note 17, at 147.
based on a patrilineal system that excluded females.211 Under the Sunni approach, any amounts that are not distributed to the specified takers according to the Qur'anic formulae will pass to the male agnatic relatives as residuary takers.213 The named takers and the male agnates take under the rule that "one nearer in degree to the [decedent] excludes one more remote in degree."214 If there are no surviving blood relatives among the named takers or the decedent's male agnatic relatives, all other blood relatives (male and female), known as "distant kindred," are allowed to take.215 In this case, because a husband or wife is not considered a blood relative, the husband or wife, if surviving, will take his or her prescribed share and the distant kindred will take the rest.216

In the Sunni school, the named takers217 are: the decedent's husband; wife; siblings of the decedent who share the same mother as the decedent;218 the decedent's mother; father; daughter; sisters who have the same parents as the decedent;219 sisters who share the same fa-

212 See Makdisi, supra note 61, at 271. "The term ‘agnatic’ characterizes the relationship through male descent or ascent. The agnatic granddaughter is the daughter of a son or of a son’s son or of a son’s son’s son, etc.; the agnatic grandfather is the father of the father or of the father’s father or of the father’s father’s father, etc." Id. at 271 n.6.
213 See Neil S. Coulson, A Comparison of the Law of Succession in the Islamic and British Legal Systems, 26 AM. J. COMP. LAW 227, 227-28 (1978); Makdisi, supra note 61, at 279. For example, if a decedent is survived only by his mother and his agnatic uncle, his mother will take her prescribed one-third share, and the uncle will take the rest as a residuary taker. "Besides guaranteeing the surviving spouse a just inheritance, the essential purpose of the Islamic law of succession is to preserve the decedent’s property within the extended patriarchal family or tribal group, within which the rights of the male members are dominant." Coulson, supra at 228. Verma offers a slightly different description of the residuary takers in that he includes male and female descendants of the decedent, the decedent’s male descendants and the decedent’s father’s male descendants. See Verma, supra note 15, at 142.
214 Coulson, supra note 213, at 231. Coulson believes this to be a strict rule of universal application, although he notes that this strict rule is being abandoned in some countries in favor of a rule that would allow those of more remote degree to take their parent’s share by representation. See id. at 231. Verma, on the other hand, believes that this rule does not allow a named sharer who is nearer in blood to exclude a residuary taker. Thus, a daughter (a named taker) excludes a sister (also a named taker) because the daughter is a closer relation. However, a daughter does not exclude a deceased son’s daughter (a residuary taker) so the daughter would share the estate with the son’s daughter. See Verma, supra note 15, at 427-28.
215 Verma, supra note 15, at 416. See Makdisi, supra note 61, at 282-88 for a thorough discussion of this class of takers.
216 See Makdisi, supra note 61, at 282.
217 See Pearl, supra note 17, at 123-24; Succession in the Muslim Family, supra note 109, at 35; Makdisi, supra note 61, at 274.
218 These are referred to as "uterine" siblings. Makdisi, supra note 61, at 274 n.14.
219 These are referred to as "germane" sisters. Id. at 274 n.15.
ther;220 agnatic grandfather;221 grandmother;222 and agnatic granddaughter223 of the decedent.224 Each of these takers has a prescribed share of the estate.225 The prescribed share of each of these takers is in turn modified (and may, for some takers, even be reduced to zero)226 if the decedent is also survived by an agnatic descendant or, in some cases, an agnatic ancestor.227 For example, a surviving husband’s Qur’anic share is one-half of the estate if there is no agnatic descendant and one-fourth of the estate if there is an agnatic descendant.228 Also, the share of a brother or sister of the decedent is zero if the decedent is survived by an agnatic descendant or a male agnatic ancestor.229

220 These are referred to as “consanguine” sisters. Id. at 274 n.16.
221 This is the father’s father or “father’s father how high soever.” SUCCESSION IN THE MUSLIM FAMILY, supra note 110, at 35. Thus the category may include a great-grandfather or a great-great-grandfather, etc.
222 According to Pearl, the grandmother named in this list must be a “true” grandmother—that is, a grandmother whose connection with the decedent does not occur through a female relative. PEARL, supra note 17, at 123–24. Coulson speaks of the “grandmother (maternal and paternal (however high soever)),” which indicates that this category may include great-grandmothers and great-great-grandmothers, etc. SUCCESSION IN THE MUSLIM FAMILY, supra note 110, at 35. See infra at text accompanying notes 325–30 (discussion of grandmothers’ inheritance rights).
223 This would be the daughter, grand-daughter, great-granddaughter, etc. of a son of the decedent. See PEARL, supra note 17, at 123–24.
224 See Makdisi, supra note 61, at 274. “Three of these relatives—the granddaughter, grandfather and grandmother—were not in fact specifically designated by the Qur’an as legal heirs but Sunni jurisprudence added them to the list . . . through the doctrine of analogy (qiyas).” SUCCESSION IN THE MUSLIM FAMILY, supra note 110, at 35. Powers notes that these three heirs were added “by analogy to the daughter, father, and mother.” POWERS, supra note 49, at 9 n.24.
225 See id. at tbl. 1.
226 See VERMA, supra note 15, at 426. The share may also be reduced if the combination of prescribed shares is greater than one. “To obtain the necessary unity all the basic Qur’anic portions are reduced pro rata.” SUCCESSION IN THE MUSLIM FAMILY, supra note 110, at 47. “The estate of a deceased Muslim may be over-subscribed, in the sense that the sum of the fractional portions therein to which surviving Qur’anic heirs are entitled may exceed unity. Equally, an estate may be undersubscribed when the sum of fractional portions of Qur’anic heirs fall short of unity and there is no residuary heir to take the surplus.” SUCCESSION IN THE MUSLIM FAMILY, supra note 110, at 46–47.
227 See VERMA, supra note 15, at 426; Makdisi, supra note 61, at 274, tbl. 1.
228 See Makdisi, supra note 61, at 274, tbl. 1. If the descendant is a child, it does not matter whether the child is the child of the surviving spouse, so long as the child is the child of the deceased spouse. See SUCCESSION IN THE MUSLIM FAMILY, supra note 110, at 41.
229 See VERMA, supra note 15, at 426; Makdisi, supra note 61, at 274, tbl. 1.
Each of the named takers takes his or her prescribed fractional interest as an undivided interest in each asset of the estate. Some of these named takers—the father, daughter, agnatic grandfather, agnatic granddaughter, and sisters—may be converted into residuary takers by the survival of another relative. For example, a daughter is entitled to one-half of the estate if there is no son, but she shares in the residue as a residuary taker if the decedent is survived by a son. When the rules pertaining to named takers and residuary heirs are combined, five heirs of the decedent emerge as heirs “who are never excluded from succession by any other relative of the [decedent].” These are the decedent’s father, mother, son, daughter, and spouse.

The Shi’a takers appear in three categories:

Category 1: Parents and lineal descendants;
Category 2: Ascendants and siblings and siblings’ issue;
Category 3: Uncles and aunts and their descendants.

The takers share the estate with the surviving spouse. Some of these named takers—specifically, the father, mother, daughter, daughter’s descendants, sisters and their descendants, and brothers by the same mother and their descendants—are given shares in prescribed amounts. The rest of the takers are residuary takers. If there are survivors in the first category, they share the estate to the exclusion of those in categories 2 and 3, and survivors in the second category preempt the takers named in category 3. Within each category, the closer relatives exclude the more distant ones.

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230 “The right of a legal heir . . . is a defined quota share in each and every item of property that comprises the estate. Settlement or composition between the heirs, of whom there will normally be a considerable number, may result in the distribution of various properties among them in accordance with the value of their quantitative entitlement.” Succession in the Muslim Family, supra note 110, at 2.

231 See Verma, supra note 15, at 429. Makdisi’s Table indicates that the mother will take the residue if there is neither a surviving agnatic descendant or two or more brothers or sisters. See Makdisi, supra note 61 at 275, tbl. 1. However, as will be noted (infra at text accompanying notes 244-47), the daughter’s share is always one-half of the son’s share.

232 Succession in the Muslim Family, supra note 110, at 38.

233 See id.

234 See Pearl, supra note 17, at 146, tbl. 39.


236 See Verma, supra note 15, at 482-84.

237 See id. at 483.

238 See Mulla, supra note 235, at 98.

239 See id.
ries, there is little or no distinction between males and females.\textsuperscript{240} Also, the survival of an agnatic descendant or ancestor has no affect on the prescribed share of a named taker. Thus, the Shi’a system may result in a greater amount being inherited by female relatives. For example, if a decedent is survived by a grandfather (father’s father), his wife and his daughter, the Sunni system would divide the estate as follows: three-eighths to the grandfather, one-eighth to the wife, and one-half to the daughter. Under the Shi’a system, the wife and daughter, as the closer relatives, would share the estate equally to the exclusion of the grandfather.\textsuperscript{241}

Under Islamic law, an individual is allowed to bequeath up to one-third of his estate.\textsuperscript{242} The Sunni system prohibits this one-third from being bequeathed to any family member who is named in the Qur’anic framework.\textsuperscript{243} The Shi‘i, on the other hand, allow this amount to be distributed to family members, thus potentially increasing the share that will pass to female relatives.\textsuperscript{244}

In certain circumstances, under the Sunni system, a female is restricted to one-half of what her male counterpart will take.\textsuperscript{245} A son’s

\begin{itemize}
  \item \textsuperscript{240} \textit{Pearl}, supra note 17, at 146. “The [Shi’a] solution to heirship is to concentrate the estate in the hands of the nearest relative of either sex, whereas the Sunni solution is to introduce into the succession an almost infinitely extensible definition of the agnatic group.” \textit{Mundy}, supra note 108, at 41.
  \item \textsuperscript{241} See \textit{id.} at 40.
  \item \textsuperscript{242} Islamic law also allows gifts during life and the establishment of gifts in trust. See \textit{Chaudhry}, supra note 12, at 548.
  \item \textsuperscript{243} See \textit{Layish}, supra note 111, at 280. The prohibition against bequeathing more than one-third of the estate to a legal heir is extended to cover transfers made by the decedent during the last year of life. See \textit{Coulson}, supra note 213, at 228. “At the point in time when the propitius enters his ‘death sickness’ the personal debts and the claims of the compulsory heirs attach to the property. The propitius, therefore, cannot defeat the expectancies of the claimants by donating, or selling below value, parts of the estate which amount to more than one-third of the net estate. Such a donation, like the bequests [above one-third], is ultra vires and depends for its efficacy on the consent of the heirs. The limitations imposed upon bequests are thus extended to cover gifts made by dying persons.” \textit{Pearl}, supra note 17, at 120. The prohibition does not appear in the Qur’an but is reputed to have been uttered by the Prophet during his life. The rule took shape as a legal maxim probably during the eighth-ninth centuries c.e. \textit{Powers}, supra note 49, at 158–59.
  \item \textsuperscript{244} Coulson notes that some countries have abandoned the Sunni rule in favor of the Shi’a rule. See \textit{Coulson}, supra note 213, at 229.
  \item \textsuperscript{245} Scholars disagree as to exactly what those circumstances are. \textit{Chaudhry} writes of the “common misperception, by Muslims and non-Muslims alike, that a woman will only receive one-half the share that a man receives precisely because she is a woman, thereby demonstrating the inherent inferiority of Muslim women in Islam.” \textit{Chaudhry}, supra note 12, at 516. “It is only the daughter or the full sister who receive half of what males of equal status receive, a son or full brother, respectively, if they are inheriting jointly as Residuaries.” \textit{Id.} at 537. Coulson, on the other hand, speaks of the “double share to the male” rule
A sister's share will be half that of her brother. One theory provides that this is not gender discrimination per se, but rather a tangible recognition of the more substantial male responsibility of supporting his own wife and children. The question in Islamic inheritance law of whether a male always inherits a share that is twice that of a female of equal class presents an interesting case in which male interpreters of the Qur'an may have been willing to stretch even the words of the Qur'an itself to favor their gender. The Qur'anic verse states that "[t]he male shall have the equal of the portion of two females . . . ." Yet a literal reading of the separate verse that specifies heirs' fractional shares is not consistent in some cases with the double share requirement. For example, if a decedent is survived by his wife and parents, the wife should receive one-fourth of his estate, the mother one-third and the father the remaining five-twelfths. Worrying that the father does not receive double of what the mother receives, the legal scholars determined that the mother was not to receive one-third of the estate but rather one-third of what remains in the estate after the wife receives her share. Under this interpretation, then, the wife would take one-fourth, the mother would take one-fourth also (one-third of the remaining three-fourths), and the father would take the remaining one-half of the estate, thus securing his double portion.

as a more expansive rule that is "fundamental to Islamic succession and is emphatically asserted in the Qur'an itself. It even applies to Qur'anic entitlement, so that a surviving husband takes a portion twice as large as that which a surviving wife would take under similar circumstances." Coulson, supra note 213, at 228.

246 See Chaudhry, supra note 12, at 516.
247 See id.
248 See Chaudhry, supra note 12, at 540, 543. Former Prime Minister of Pakistan, Benazir Bhutto, urges that the double share given to a son be viewed "in the whole aspect, because it is made abundantly clear that the woman's share is for the use of the woman alone. A man gets two-thirds. One third—the equivalent of the woman's is for his own use. The additional one-third that a man gets is to provide for his wife and children. This is the obligation on the man. He gets that extra share so the he can provide for the family, the wife, and the children." Bhutto, supra note 115, at 108.
249 Sura IV, verse 11, THE HOLY QUR'AN 48–49.
250 See infra text accompanying notes 316–21 for a description of how these shares are calculated.
251 The drafting of this resolution is described in Powers, supra note 49, at 57–62.
252 Powers hypothesizes that the original verses should not have been read to extend the right of inheritance to spouses, but rather to have limited it to blood kindred of the decedent. With this interpretation, the tortured reading of verses to ensure the male double portion would not have been necessary. See Powers, supra note 49, at 74–78.
The provision for double shares for males is often pointed to as a source for the proposition that Islamic law generally favors men over women. It should be noted, however, that the Qur'anic system may at times result in situations in which female family members (although not of the same rank) may end up with equal or greater shares of decedent's estate. For example, if a wife dies survived by her husband, her daughter and her (the wife's) brother, the estate will be distributed as follows: one-fourth to the husband, one-half to the daughter, one-fourth to her brother. Thus, the spouse and male relative of the wife each receive half of the amount allocated to the daughter. 253

C. Specific Rules of Inheritance

It is difficult to make the blanket statement that women are better protected under one of these religious succession systems rather than the other. Both systems clearly favor men over women. However, as will be seen in the descriptions that follow, the Islamic approach of guaranteeing intestate shares to certain named female heirs results often in these women having greater rights than they would have under Jewish law.

1. Husband and Wife

a. Husband's Right to Wife's Estate

Jewish Law: Under Jewish law, the traditional rule was that if the wife died before her husband died, the husband was entitled to receive the wife's entire estate. 254 This included any amount that she had brought into the estate as dowry. 255 However, a father was obliged to ensure that his sons by this deceased wife would inherit her ketubah, 256 along with their other rightful share of his estate. 257 The unfairness of this broad rule of total inheritance by the husband, particularly in cases where the spouses had been married only a brief time, was mitigated over time by several communities. 258 Takkanot 259

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253 See infra text accompanying notes 263, 305–09.
254 See Principles of Jewish Law, supra note 12, at 379.
256 See supra text accompanying notes 152–62 for a definition of the ketubah.
257 See Principles of Jewish Law, supra note 12, at 380.
258 See Mielziner, supra note 255, at 106; Principles of Jewish Law, supra note 12, at 448.
259 See supra text accompanying notes 36–37 for a definition of takkanot.
were enacted that called for the return of the entire dowry to the wife’s family if the wife died childless within one year of marriage and one-half of the dowry if the wife died childless within two years.\textsuperscript{260}

**Islamic Law:** Unlike Jewish law, Islamic law provides both the husband and the wife with a definite portion of each other’s estates and then divides the rest of the estate among other relatives of the deceased spouse. The husband’s share in the wife’s estate is expressly delineated in the Qur’\textsuperscript{'}an.\textsuperscript{261} Under the Sunni system,\textsuperscript{262} if the wife is survived by one or more agnatic lineal descendants, the husband is entitled to one-fourth of her estate.\textsuperscript{263} If the wife is not survived by any children or agnatic lineal descendants, the husband takes one-half of her estate.\textsuperscript{264} The remaining estate is then divided, under the Sunni approach, among her agnatic lineal descendants or, if none, the wife’s other relatives.\textsuperscript{265} (Her husband is not deemed to be her “relative.”)\textsuperscript{266} It is important to note, however, that the husband’s share of the estate is specifically limited by the Qur’\textsuperscript{‘}an to his prescribed portion after payment of any legacies or debts.\textsuperscript{267}

b. **Wife’s Right to Husband’s Estate**

**Jewish Law:** The inheritance rights of widows are not described in the Bible.\textsuperscript{268} Under the Jewish law of marriage, the wife is entitled to receive her *ketubah*\textsuperscript{269} amount from the husband’s estate.\textsuperscript{270} (Some


\textsuperscript{261} Sura IV, verse 12 provides in part as follows: “And you shall have half of what your wives leave if they have no child, but if they have a child, then you shall have a fourth of what they leave after (payment of) any bequest that may have bequeathed or a debt . . . .” The Holy Qur’\textsuperscript{‘}an 49.

\textsuperscript{262} The Shi’a system provides a similar share for the husband. See Verma, *supra* note 15, at 484.

\textsuperscript{263} See id. If the estate is oversubscribed, the surviving spouse’s share may be subject to reduction. However, if the estate is undersubscribed, the surviving spouse is not allowed to enjoy an increased share. See Succession in the Muslim Family, *supra* note 110, at 50.

\textsuperscript{264} Under the Shi’a approach, the remaining portion of the estate is divided among the appropriate named takers. See Verma, *supra* note 15, at 478.

\textsuperscript{265} Makdisi, *supra* note 61, at 282.

\textsuperscript{266} Sura IV, verse 12, The Holy Qur’\textsuperscript{‘}an 49.

\textsuperscript{267} Hiers, *supra* note 182, at 130. However, Hiers points out that some Biblical reference (e.g., the Book of Ruth, 4:3) indicate some inheritance by wives of their husbands’ property. See id.

\textsuperscript{268} See *supra* text accompanying notes 152–62 for a definition of the *ketubah*.

later *takkanot*\(^{271}\) limited her right to one-half of the husband’s estate, even if more was due her.)\(^{272}\) Until the *ketubah* amount is paid to her, the wife is entitled to maintenance and support from her husband’s heirs.\(^{273}\) Eventually, the law allowed the husband’s heirs to pay out the wife’s *ketubah* amount and thus terminate their obligation to support her.\(^{274}\)

**Islamic Law:** Under Islamic law, the widow has a right to her deferred *mehr*\(^{275}\) and also to her Qur’anic share of her husband’s estate. The prescribed amount is basically one-half of the amount to which the husband is entitled if the wife were to die first.\(^{276}\) If the husband left agnatic lineal descendants, the widow’s share is one-eighth of his estate.\(^{277}\) Her share is one-fourth of the estate in the absence of lineal descendants.\(^{278}\) If there is more than one widow, however, the widows must share that amount equally among themselves.\(^{279}\) The wife, like the husband, will never take more than the prescribed share.\(^{280}\) Also, as with husbands, the Qur’an specifically states that the surviving wife’s share is a share only of the net estate.\(^{281}\) Thus, while the Jewish wife’s support right is not a property right per se, she may fare better than her Islamic counterpart if the husband’s estate is subject to extensive debts.

2. Daughters

**Jewish Law:** Under Jewish law, the daughter of a deceased male is entitled to support from her father’s estate until the earlier of her marriage or her attainment of the age of majority.\(^{282}\) This is a lien

\(^{271}\) See *supra* text accompanying notes 37–38 for a definition of *takkanot*.

\(^{272}\) See *AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW*, *supra* note 17, at 295; *PRINCIPLES OF JEWISH LAW*, *supra* note 12, at 449.

\(^{273}\) See Kofsky, *supra* note 1, at 333.

\(^{274}\) See id.

\(^{275}\) See *supra* text accompanying notes 172–75.

\(^{276}\) See *SUCCESSION IN THE MUSLIM FAMILY*, *supra* note 110, at 41. Sura IV, verse 12 provides in part as follows: “and they [wives] shall have a fourth of what you leave if you have no child, but if you have a child, then they shall have the eighth of what you leave after (payment of) a bequest you may have bequeathed or a debt . . . .” *THE HOLY QUR’AN* 49.

\(^{277}\) See Makdisi, *supra* note 61, at 274, tbl. 1.

\(^{278}\) See id. The Shi’a share for the wife is the same. See *VERMA*, *supra* note 15, at 484.

\(^{279}\) See Pearl, *supra* note 17, at 124; *SUCCESSION IN THE MUSLIM FAMILY*, *supra* note 110, at 41.

\(^{280}\) See *supra* note 214.

\(^{281}\) See *supra* text accompanying note 267.

\(^{282}\) See *PRINCIPLES OF JEWISH LAW*, *supra* note 12, at 379. Kofsky reports the age of majority as age 12. See Kofsky, *supra* note 1, at 334.
against her father's estate, subject only to the priority of the widow's ketubah. While this rule does not necessarily result in the daughter receiving a share equal to that of her brothers, in the case of an insolvent estate, it may result in an unmarried minor daughter receiving something while her brothers receive nothing. The daughter's right to maintenance is based in the ketubah of her parents and thus her father cannot make any deathbed instruction that she not receive it.

The sons who inherit their father's estate are also obligated to give their sisters a dowry from the estate. However, the father is allowed to give a deathbed or testamentary instruction that would deprive the daughter of her dowry. The ketubah and the father's obligations of support for the widow and the daughters take precedence over the daughter's dowry.

Direct Biblical references to inheritance by daughters indicate that a daughter may inherit from her father's estate, but only if the father is not survived by any sons. As noted above, the Mishnah explained that the Biblical reference to "sons" included not just sons, but the children of sons. Thus, if a decedent is survived by a daughter and by a son's daughter, the son's daughter will take the entire estate to the exclusion of the daughter. In Chapter 27 of the Book of Numbers, the daughters of Zelophehad asked to share in their father's estate since he had died without sons. The Lord told Moses

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283 See Kofsky, supra note 1, at 335. See supra text accompanying notes 152--62 for a definition of the ketubah.

284 "If a man died and left sons and daughters, and the property was great, the sons inherit and the daughters receive maintenance; but if the property was small, the daughters receive maintenance and the sons go a-begging." Baba Bathra 9:1, THE MISHNAH 378.

285 See PRINCIPLES OF JEWISH LAW, supra note 12, at 449.

286 "According to some scholars, a daughter is also entitled to receive a dowry out of her deceased mother's estate, but this is disputed by other scholars." PRINCIPLES OF JEWISH LAW, supra note 12, at 450.

287 See id.

288 See id.

289 As noted supra at text accompanying notes 186--87, a disagreement developed among scholars as to what happens under the Biblical instruction if a father is survived by a daughter and the daughter of a son.

290 See supra text accompanying notes 186--87.

291 Hiers points out that, in Chapter 31 of the Book of Genesis, Rachel and Leah seemed to expect that they would inherit from their father's estate even though he did have sons. He posits the following explanation: "Possibly daughters did inherit under Syrian law, at least if they were older than their brothers. It has been suggested that pursuant to practices attested at Nuzi, Laban had adopted Jacob, and that this relationship is in the background of their property transactions and other dealings. The women's complaint that their father, Laban, had been 'using up the money given for us' (31:15) could refer to
to communicate the following to the children of Israel: "If a man die, and have no son, then ye shall cause his inheritance to pass unto his daughter."\(^{292}\) The daughter’s inheritance, however, did not come without a substantial restriction on her freedom to marry. In a later chapter in the Book of Numbers, the heads of one of the tribes complained that Zelophehad’s daughters might marry outside the tribe and "so will their inheritance be taken away from the inheritance of the tribe of our fathers."\(^{293}\) Moses allayed their concerns when he conveyed the Lord’s decree that "every daughter, that possesseth an inheritance in any tribe of the children of Israel, shall be wife unto one of the family of the tribe of her father, that the children of Israel may possess every man the inheritance of his fathers."\(^{294}\) As noted above, later sages determined that this restriction "was applicable only to the particular generation to whom the enjoinder was directed."\(^{295}\)

First-born daughters who inherit their father’s estate do not have the same entitlement to a double share as do first-born sons.\(^{296}\) Also, daughters who inherit from the father’s estate are not entitled to maintenance from their father’s estate.\(^{297}\)

Fathers in Ashkenazi\(^{298}\) communities developed a method by which they could circumvent the inheritance rules and allot a portion of their estates to their daughters. This was accomplished through a deed given by the father to the daughter when she married in which the father agreed to pay her a large sum of money, to be due the hour before he died. The father would also provide that his estate could

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\(^{292}\) Numbers 27:8.  
\(^{293}\) Numbers 36:4.  
\(^{294}\) Numbers 36:8. One explanation for this requirement is that the daughter’s inheritance was in fact regarded as a dowry. See An Introduction to the History and Sources of Jewish Law, supra note 17, at 5. Hiers questions whether the rule was that “only unmarried daughters of sonless fathers inherited from their fathers” and refers to the Book of Tobit 14:12–13, in which Tobias, rather than his wife, inherited from his wife’s parents. Hiers, supra note 182, at 129.  
\(^{295}\) Principles of Jewish Law, supra note 12, at 446. Grunfeld finds the unequal treatment of daughters difficult to reconcile with what he views as the Torah’s insistence on the “dignity of Jewish womanhood.” Grunfeld, supra note 23, at 11. However, he concludes that this apparent anomaly is “one of the mysteries of the divine law that transcends human understanding.” Id. at 14.  
\(^{296}\) See Principles of Jewish Law, supra note 12, at 447.  
\(^{297}\) See id. at 449.  
\(^{298}\) The term “Ashkenazi” refers to “Jewish life and settlements in Northwest, Central, and eventually Eastern Europe.” An Introduction to the History and Sources of Jewish Law, supra note 17, at 241.
satisfy this debt by providing the daughter instead with one-half of a son’s share in the estate.²⁹⁹

Inheritance by children of their mother’s estate is not directly addressed in the Torah, thus leaving the pertinent rules to be derived by the scholars. The rules that were derived resulted from a tortured reading of Numbers 36:8. This verse provides that “[a]ny daughter who inherits a legacy of the tribes of the Children of Israel” shall marry someone in her father’s tribe. The sages noted that the use of “tribes” in the plural form indicated that a daughter could inherit from her mother as well as from her father.³⁰⁰ From this, the sages extrapolated, first, that the son (as well as the daughter) is also an heir of the mother, and, second, that the son takes precedence over the daughter, just as he does in inheriting his father’s estate.³⁰¹ Dissenting views were raised, which advocated equal inheritance by the sons and daughters of their mother’s estate.³⁰² However, these dissents were quickly silenced, with accompanying threats of excommunication for those who advocated them.³⁰³ A mishnah clearly states that daughters “receive maintenance from the father’s property but not from the mother’s property.”³⁰⁴

Islamic Law: Both the Sunni and the Shi’a systems list the daughter as a named taker with a prescribed share of the estate.³⁰⁵ Thus, a daughter will never be excluded from sharing in the parent’s estate. The amount of the Qur’anic share of a daughter depends upon whether the deceased parent is survived by sons or other daughters.³⁰⁶ If the decedent is survived by sons as well as one or more daughters, the daughters and sons share the residue of the estate but each daughter takes one-half of a son’s share.³⁰⁷ If there is no son and the decedent is survived by only one daughter, she takes one-half of the

²⁹⁹ See Principles of Jewish Law, supra note 12, at 450.
³⁰⁰ Talmud Bavli, Bava Basra 111a.
³⁰¹ See id.
³⁰² See id.
³⁰³ See id.
³⁰⁴ Baba Bathra 8:4, The Mishnah 377.
³⁰⁵ See Verma, supra note 15, at 482; Makdisi, supra note 61, at 274–75, tbl. 1. Sometimes, the daughter may take as a residuary taker rather than as a taker of a prescribed share. See id.
³⁰⁶ Sura IV, verse 11 provides in part as follows: “Allah enjoins you concerning your children: The male shall have the equal of the portion of two females; then, if they are more than two females, they shall have two-thirds of what the deceased has left, and if there is one, she shall have the half . . . .” The Holy Qur’an 49.
estate.\textsuperscript{308} If there are no sons but more than one daughter, the surviving daughters share two-thirds of the estate equally among themselves.\textsuperscript{309}

The Islamic law treats daughters better than the Jewish law under some circumstances and worse under others. Under the Jewish system, a daughter is completely excluded from sharing in her deceased parent's estate if the parent is also survived by a son or the descendant of a son. On the other hand, if there is no surviving son or son's descendant, the daughter takes the entire estate. Under the Islamic system, the daughter is always guaranteed a portion of her parent's estate. The survival of a son will not preempt her, but it will reduce her prescribed share. The survival of a son's descendant will not even reduce the daughter's share. These comparisons are illustrated in the following table.

<table>
<thead>
<tr>
<th>Decedent survived by daughter (D) and by the relative(s) listed</th>
<th>Jewish</th>
<th>Islamic</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Son (S)</td>
<td>S takes all</td>
<td>D–1/3; S–2/3</td>
</tr>
<tr>
<td>2. Son's Daughter (SD)</td>
<td>SD takes all</td>
<td>D–1/2; SD–1/6 (rest to male relatives)</td>
</tr>
<tr>
<td>3. Son, Mother, and Father</td>
<td>S takes all</td>
<td>D–8/36; S–16/36; M–1/6; F–1/6</td>
</tr>
<tr>
<td>4. No Son, Son's Descendants' Parents</td>
<td>D takes all</td>
<td>D–1/2 (rest to male relatives)</td>
</tr>
<tr>
<td>5. Mother, Father</td>
<td>D takes all</td>
<td>D–1/2; F–1/3; M–1/6</td>
</tr>
<tr>
<td>6. Wife, Father</td>
<td>D takes all</td>
<td>D–1/2; W–1/8; F–9/24</td>
</tr>
</tbody>
</table>

3. Mothers

\textit{Jewish Law}: Under Jewish law, neither the mother nor the mother's family are heirs of her deceased child.\textsuperscript{310} Thus, if a decedent dies survived by both parents and not by issue, the father inherits the decedent's entire estate. The only circumstance under which a mother may take from a deceased child's estate would be if the deceased child were a daughter who had died childless after less than one year of marriage and the community \textit{takkanah} provided that the daughter's dowry was to be returned to her family.\textsuperscript{311} This circumstance presupposes also that the daughter's father is no longer alive.

\textsuperscript{308} See id.  
\textsuperscript{309} See Verma, supra note 15, at 487.  
\textsuperscript{310} See Grunfeld, supra note 23, at 10.  
\textsuperscript{311} See supra text accompanying notes 259–60.
Islamic Law: Mothers are among those takers who are specified in the Qur’an. If the decedent dies and is not survived by any children or son’s children, and is survived by only one sibling, if any, the decedent’s mother’s share is one-third of the estate. If the decedent in this case is survived by two or more siblings, the mother’s share is one-sixth. If the decedent is survived by one or more children or son’s children, the mother also takes one-sixth of the estate.

The Qur’anic share of the decedent’s father is one-sixth of the estate. However, the father is also a residuary taker, so he ends up taking a greater portion of the estate than the decedent’s mother. For example, if a decedent is survived by both mother and father and there are no surviving children, agnatic descendants, or siblings of the decedent, the mother takes her one-third and the father takes his one-sixth share plus the rest of the estate, for a total share of two-thirds. If a decedent is survived by a spouse as well as the mother and father, the mother’s share is reduced in that the mother’s one-third share is one-third of the remainder after the spouse has taken his or her share. This results in the mother receiving one-fourth of the estate if the decedent is survived by a wife and parents and one-sixth of the estate if the decedent is survived by a husband and parents. In these cases, the father receives one-half and one-third of the estate respectively. The reduction of the mother’s share in these circumstances ensures that she will always take less than the father.

312 Sura IV, verse 11 provides in part as follows:

and as for his parents, each of them shall have the sixth of what he has left if he has a child, but if he has no child and (only) his two parents inherit him, then his mother shall have the third; but if he has brothers, then his mother shall have the sixth after (the payment of) a bequest you may have bequeathed or a debt . . . .

The Holy Qur’an 49.

313 See Succession in the Muslim Family, supra note 110, at 43–44.
315 See Succession in the Muslim Family, supra note 110, at 43–44.
317 See id.
318 See Makdisi, supra note 61, at 275 n.20.
321 See Succession in the Muslim Family, supra note 110, at 45–46. If the mother’s share was not reduced to being a share of the residue and the decedent was survived by a husband and parents, the mother would take one-third of the estate and the father would only take one-sixth. See id.
4. Other Female Relatives

_Jewish Law:_ Jewish law does not provide specific succession rights for most female relatives of the decedent. As noted above, the seminal verse in the Book of Numbers establishes a parentelic system of inheritance. This system does not expressly name female relatives but it may result in the distribution of portions of the estate to them. Under this system, sons and sons’ issue are the primary heirs. The issue of the son may be male or female. Even if female, the fact that a child is a child of the son may cause that child to preempt the rights of a daughter of the decedent.\(^{322}\) The father and the father’s issue are next in line after descendants.\(^{323}\) If there are no surviving issue, father, siblings or siblings’ issue, the next group includes the grandfather and the grandfather’s issue. There seems to be no distinction between male or female “issue” in these groups. Thus, if the decedent is survived by a nephew and a niece, both the children of the decedent’s only (predeceased) brother, the nephew and niece would share the estate equally. On the other hand, there may remain an inequality between takers of the same rank, such as the decedent’s siblings or the decedent’s aunts and uncles. As noted above, the more conservative interpretation of the parentelic system would still place brothers and their issue ahead of sisters and their issue, and uncles and their issue ahead of aunts and their issue.\(^{324}\) Thus, if the decedent were survived by a sister and by two nieces, one of which was the daughter of a predeceased brother and the other the daughter of a predeceased sister, the daughter of the brother would take the entire estate to the exclusion of the surviving sister and the predeceased sister’s daughter. Also, if a decedent were survived only by the decedent’s father’s brother (an uncle) and the decedent’s father’s sister (an aunt), the uncle would take the estate to the exclusion of the aunt.

It should also be recalled that the decedent’s mother’s family has no place in the scheme of succession. Thus, if the decedent were survived by the decedent’s father’s sister and the decedent’s mother’s sister, the father’s sister would take the entire estate. The Jewish succession system does not include any reference to grandmothers.

\(^{322}\) See _supra_ text accompanying notes 186–87.

\(^{323}\) As noted _supra_ at text accompanying notes 191–93, Rabbi Grunfeld’s approach places the decedent’s brothers and brothers’ issue ahead of sisters and sisters’ issue.

\(^{324}\) See _supra_ text accompanying notes 191–93.
*Islamic Law:* In Islamic law, express provision is made for sisters and grandmothers of the decedent and for the decedent's agnatic granddaughters (that is, the female issue of a son of the decedent).

A grandmother is allotted a one-sixth share as a substitute for the decedent's mother. A "grandmother" may in fact be a great-grandmother or an even higher ancestor. However, a grandmother who is closer in relationship to the decedent will exclude a great-grandmother or other more remote grandmother from taking. If there is more than one grandmother of the same degree of relationship, they share the allotted amount. In the Sunni system, on the maternal side, the mother of the mother of the decedent is the "grandmother." Among the various schools of thought in the Sunni system, there is a divergence of opinion as to whether, on the decedent's paternal side, the "grandmother" is determined to be only those in the line stemming from the father (that is, the father's mother, the father's mother's mother, etc.) or may also include those in the line stemming from the father's father.

Sisters of the decedent are allocated fractional shares that depend upon whether their relationship to the decedent is due to them having the same mother ("uterine"), the same father ("consanguine"), or both parents in common ("germane"). A uterine sib-

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325 *Succession in the Muslim Family, supra* note 110, at 60.
326 See id.
327 See id. at 61–62.
328 See id. at 60.
329 See supra note 61.
330 See *Succession in the Muslim Family, supra* note 110, at 61; Makdisi, *supra* note 61, at 277 n.32.
331 There is some debate as to what exact amount sisters inherit. Sura IV, verse 12 provides in part as follows:

and if a man or a woman leaves property to be inherited by neither parents nor offspring, and he (or she) has a brother or a sister, then each of them two shall have the sixth, but if they are more than that, they shall be sharers in the third (after payment of) any bequest that may have been bequeathed or a debt that does not harm (others) ....

Sura IV, verse 176, on the other hand, provides in part:

if a man dies (and) he has no son and he has a sister, she shall have half of what he leaves, and he shall be her heir if she has no son; but if there be two (sisters), they shall have two-thirds of what he leaves; and if there are brethren, men and women, then the male shall have the like portion of two females ....

Professor Makdisi explains that the "consensus reached in Islam" was that that "verse IV, 12 refers to uterines and verse IV, 176 refers to germanes and consanguines." Makdisi, *supra*
ling, either brother or sister, takes a one-sixth share (or they share one-third, if more than one), if the decedent is not survived by a child, agnatic grandchild, or male agnatic ancestor. Germane and consanguine sisters of the decedent are entitled to one-half of the estate if the decedent is not survived by a child, agnatic grandchild, father, male agnatic ancestor, or full brother. Germane sisters are given precedence over consanguine sisters. Also, the survival of a consanguine brother will reduce a consanguine sister’s share.

The term “agnatic granddaughter” includes not just the daughters of the decedent’s sons, but rather any female issue of the decedent’s son (great-granddaughters, etc.). An agnatic granddaughter may take a share of the decedent’s estate either as a named taker or as a residuary taker. As a named taker, she will take one-half of the estate (or, if more than one granddaughter, two-thirds) if the decedent is not survived by any children or closer agnatic issue or by an agnatic grandson of the same generation. The agnatic granddaughter is entitled to one-sixth of the estate if the decedent is survived by a daughter, but no son or grandson. The agnatic granddaughter will take as a residuary taker in two circumstances. First, she will take as a residuary taker if the decedent is survived by a son’s male issue who is

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332 See VERMA, supra note 15, at 433; Makdisi, supra note 61, at 274, tbl. 1. The siblings take nothing if any of the named relatives survive. See id.

333 See VERMA, supra note 15, at 432.

334 See SUCCESSION IN THE MUSLIM FAMILY, supra note 110, at 68.

335 See Makdisi, supra note 61, at 276, tbl. 1.

336 See SUCCESSION IN THE MUSLIM FAMILY, supra note 110, at 55.

337 See VERMA, supra note 15, at 472.

338 See id.

339 See id. The one-sixth share is derived from the collective two-thirds share that would be allotted had there been more than one daughter. If the decedent is survived by one daughter, she takes one-half of the estate and the agnatic granddaughter takes the remaining portion of the two-thirds collective share (four-sixths minus the daughter’s three-sixths equals one-sixth). See SUCCESSION IN THE MUSLIM FAMILY, supra note 110, at 55.
of the same generation as the granddaughter. Second, she will take as a residuary taker if the decedent is survived by a son’s male issue who is one or more generations below the granddaughter.340

V. JEWISH AND ISLAMIC WOMEN’S RIGHTS OF INHERITANCE IN MODERN TIMES

As the foregoing text illustrates, strict adherence to religious law in many cases grants Islamic women greater inheritance rights than Jewish women (and, in both religions, grants lesser inheritance rights to women than to men). Modern times and customs, however, have seen a reversal of the advantage that Islamic women had over Jewish women.

In Israel, modern laws and custom have changed the all-encompassing role that religion plays in the inheritance rights of women. In Israel, the secular Succession Law of 1965341 governs the distribution of property at death.342 This system protects surviving spouses (whether male or female) in four ways. First, the Succession Law includes the surviving spouse as a taker of a portion of the decedent’s estate.343 Second, the surviving spouse is entitled to ownership of a portion of the deceased spouse’s property based on the assumption that the spouses acquired property as a community rather than as individuals.344 Third, the surviving spouse may be entitled to continue residing in or even to inherit absolutely (regardless of a contrary testamentary disposition) the couple’s home.345 Fourth, the surviving spouse remains entitled to any property that was due to pass to him or her under the marriage contract.346 In addition, the Succession Law of Israel makes no distinction between male and female heirs.347

340 See VERMA, supra note 15, at 472.
341 See generally Rosen-Zvi & Maoz, supra note 270.
342 See id. at 288–89.
343 See id. at 324. The spouse’s portion of the deceased spouse’s estate varies depending upon what other heirs survive. See id. at 324–25.
344 See id. at 302–03. For spouses who were married before January 1, 1974, the presumption resulted in a 50/50 split of the marital assets. The surviving spouse’s share belonged to her absolutely and was not subject to the debts of the estate of the deceased spouse. For spouses married after 1973, a “balancing of resources” approach is taken. This results in the surviving spouse’s share of the communal property being viewed as a debt of the estate. See Rosen-Zvi & Maoz, supra note 270, at 304.
345 See id. at 308–16.
346 See INTRODUCTION TO THE LAW OF ISRAEL 107 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995). However, these amounts are deducted from any other amount to which the spouse is entitled under the succession laws. See id.
347 See Rosen-Zvi & Maoz, supra note 270, at 323.
Even for orthodox Jews who remain faithful to the restrictions of the Book of Numbers rather than to secular law, the unfairness to women that is inherent in these Biblical restrictions has been recognized in modern times, and mechanisms for mitigating this inequality have been devised. Those orthodox Jews (including orthodox lawyers) who have chosen not to write wills that override the laws of the Torah have sought guidance from Biblical scholars as to how to protect the interests of their wives and daughters. As noted above, a strict adherence to the Biblical text would give priority to sons over daughters and would preclude a surviving widow from inheriting from her deceased spouse. Furthermore, the orthodox Jew is cautioned that any attempt to override these proscriptions by will is invalid. Yet Jewish law does include the mechanism of an inter vivos deed of gift that, if properly drafted and witnessed, may help to equalize inheritance among (for example) a father’s sons and daughters. This mechanism is recommended and a draft deed of gift provided by the prominent rabbi and scholar Dayan I. Grunfeld, who offers this mechanism as “a way out of the predicament for those who want to provide for their wives and daughters without infringing the Jewish Law of Inheritance.”

On the other hand, in modern Islamic countries, the reality of women’s lives often does not reflect their rights to own and inherit property under religious law. Recent years have seen an upsurge in political domination by groups that are identified as Islamic extremists. In the name of faithfulness to the religion of the Prophet, these fundamentalist groups transform government and practice in a way that subordinates women and often results in rendering them vulnerable and powerless in these societies.

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348 See GRUNFELD, supra note 23, at 100.
349 See id. at 6.
350 See id. at 108–11.
351 Id. at 101. The deed of gift that he suggests divides the donor’s property equally among his sons and daughters and provides his wife with an income interest for her life. See id. at 109. The gift remains revocable “until one hour before my demise.” GRUNFELD, supra note 23, at 109.
352 See GOODWIN, supra note 116, at 7–8, 46; Howland, supra note 62, at 306–07; Tele­setsky, supra note 135, at 295.
353 One theory is that these extremists are “emphasiz[ing] Koranic passages that reinforce Islam’s patriarchal aspects, while deemphasizing its clear injunctions giving women equality, justice, and education.” GOODWIN, supra note 116, at 9.
354 See Howland, supra note 62, at 305–17. An example of this political/religious sub­ordination occurred in Afghanistan in the mid-1990s, when the Taliban, a military group whose members were trained in Islamic fundamentalists schools, achieved a position of
Perhaps the primary source of women's economic vulnerability in these countries is the dependency of women upon men for their support and maintenance. Islamic law decrees that a woman's male relatives remain financially responsible for her even when she is married.\(^{355}\) In countries that are dominated by Islamic fundamentalists, women are precluded from establishing any financial independence because they are forbidden to work and are often excluded from public life altogether.\(^{356}\) Thus, women are easily coerced by their male relatives, such as fathers and brothers, into turning over to them any inherited wealth in return for a guarantee of their continued support. This practice has been documented in recent years in Egypt and on the West Bank and has been described as a phenomenon that occurs "frequently" among Muslim women in Israel.\(^{357}\) The studies also show that a woman may be discouraged from retaining wealth inherited from her spouse by the threat of her remaining family members to marry her to another relative in order to keep the inheritance within the family.\(^{358}\) The widow's dower rights have proved also to be compromised in these countries in that fathers, rather than wives, are repeatedly reported as keeping part of their daughters' dowries and mothers are often disclaiming these rights in order to strengthen their relationship with the sons upon whom they became dependent.\(^{359}\)

**CONCLUSION**

The laws of Judaism and Islam both established inheritance rights for women long before these rights were established in most Western countries. These rights took the form of support rights (particularly for widows and daughters of the decedent) and of specified property rights. For married women, the inheritance rights were an extension of the property rights they gained as a result of the marriage.

The granting of these rights to women by Jewish and Islamic law presaged the rights of modern Western women to inherit property...
and, in some cases, demand support from a decedent’s estate. In an ironic twist of fate, however, the Western cultures that historically denied women their rights have come close in modern times to achieving sex equality in this crucial area of the law while, at the same time, a resurgence of fundamentalism in both of the religions, particularly in Islam, threatens to visit new and even greater inequities on women. The fundamentalists emphasize (and, some argue, exaggerate) those provisions of each religion that subjugate women. Lost in this modern political process is the historic role that these religions played in supporting and protecting women’s property and inheritance rights. Thus, the challenge for women in these religions today is to ensure that this historic role is not forgotten and that it is accurately played out in the continuing evolution of debate that characterizes the formation of law in both Judaism and Islam.