9-1-1984

Fixed Shares in Intestate Distribution: A Comparative Analysis of Islamic and American Law

John Makdisi

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Fixed Shares in Intestate Distribution: A Comparative Analysis of Islamic and American Law

*John Makdisi*

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* Assistant Professor of Law, Cleveland State University. Mr. Makdisi would like to thank the American Research Center in Cairo and the International Communication Agency for funding part of this project and Iden Martyn, J.D. Candidate, Cleveland State University, for his contribution to the American law section of this article.
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I. INTRODUCTION

A well-established characteristic of intestate succession laws in most American jurisdictions is that only the spouse of the decedent is required to share the inheritance with other classes of heirs, usually the issue, parents, or brothers and sisters of the decedent.¹ A recent study sponsored by the American Bar Association (ABA study) has suggested that this characteristic of intestate succession fails to adequately reflect the distributive preferences of the decedent.² The ABA study proposes revision

¹ See infra text accompanying notes 87-101. Only nine of the fifty states depart from the general rule and in those states the sharing among classes is on a very limited basis. See infra text accompanying notes 102-03.

² Fellows, Simon & Rau, Public Attitudes about Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Found. Research J. 319. The authors conclude that the distributive preferences of a decedent should be reflected in the intestate succession law:

Testamentary freedom should include the right not to have to execute a will in order to have accumulated wealth pass to natural objects of the decedent's bounty. Moreover, unless the statutory scheme invoked in the absence of a will conforms to the likely wishes of a person who dies without having executed a valid will, it creates a trap for the ignorant or misinformed. The alternative defensible rationale for adoption of a particular distributive pattern in an intestacy statute is that it serves society's interests. There are four identifiable community aims: (1) to protect the financially dependent family; (2) to avoid complicating property titles and excessive subdivision of property; (3) to promote and encourage the nuclear family; and (4) to encourage the accumulation of property by individuals. If society's well-being requires a distributive pattern different from the determined wishes of intestate descendants, the decedents' wishes should be subordinated. But our society places high value on testamentary freedom. Thus, the preferred distributive pattern of intestate decedents should be given full effect and should be deviated from only if necessary to satisfy an overriding societal interest. To do otherwise would be contrary to our concept of testamentary freedom.

Id. at 323-24 (footnotes omitted).
of American statutes to include a scheme of proportional sharing in the decedent's estate among heirs belonging to different classes.

The principal proposal of the ABA study was that "siblings share in the estate with parents." This proposal was based on responses to a telephone survey in which respondents were asked: "Indicate the percentage of your estate that you would want to give to each survivor if you are survived by your father, your mother, and an adult brother and sister." The distribution pattern of preferences by respondents for these relatives was split with about forty percent favoring distribution to one or both parents and about forty percent favoring distribution to all four. If we assume a general preference (based on a weighted average of the preference patterns in the study) to distribute to the father-mother-brother-sister combination in fixed proportions of 2.5:2.1:1, then it may be assumed that a decedent survived by the heirs listed in the survey question would want his or her estate of $13,000 distributed in the following way: $5,000

---

3. Id. at 386. It is interesting to note that the Statute of Distribution 22 & 23 Car. 2, ch. 10 (1670), on which American statutes are generally based, provides for joint sharing between the widow and a class of heirs, but it was thought to be unsatisfactory. In 1685 Parliament provided for joint sharing between a mother and brothers and sisters when the praepositus died without wife, father, or children. 1 Jac. 2, ch. 17, § 7 (1685). See T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 47 (2d ed. 1953).


5. The distribution patterns found in the study were as follows:

<table>
<thead>
<tr>
<th>Distribution Pattern by Percent of Estate to:</th>
<th>Percent of Respondents in Pattern</th>
<th>No. of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Father</td>
<td>Mother</td>
<td>Brother</td>
</tr>
<tr>
<td>100</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>0</td>
<td>100</td>
<td>0</td>
</tr>
<tr>
<td>50</td>
<td>50</td>
<td>0</td>
</tr>
<tr>
<td>25</td>
<td>25</td>
<td>25</td>
</tr>
<tr>
<td>0</td>
<td>0</td>
<td>50</td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*1 missing case.

Id. at 346. Weighting each pattern by the percent of respondents in the pattern produces a weighted average distribution pattern as follows:

<table>
<thead>
<tr>
<th>Father</th>
<th>Mother</th>
<th>Brother</th>
<th>Sister</th>
</tr>
</thead>
<tbody>
<tr>
<td>33.325</td>
<td>27.625</td>
<td>13.625</td>
<td>13.625</td>
</tr>
</tbody>
</table>
to the father, $4,000 to the mother and $2,000 each to the brother and sister. Intestate succession laws presently existing in thirty-nine states would ignore such preferences and distribute the entire estate to the parents.

The ABA study did not investigate the preferences of respondents concerning shared inheritances among other classes, such as between issue and siblings or between issue and parents. However, it is evident that the totally exclusive inheritance by one class of heirs contains certain inadequacies and may require amendment in the direction of proportional shares to be distributed among two or more classes of heirs.

The purpose of this article is not to study further the distributive preferences of decedents—for which there is certainly a need. Rather, it is to present some of the problems which arise when proportional shares are incorporated in a scheme of intestate succession and to propose various techniques for dealing with these problems suggested by a study of the Islamic legal system, which has incorporated the idea of proportional shares in its intestate succession law. Therefore, the article begins with a description of the Islamic system followed by a survey of existing American intestate succession laws. It then discusses the various techniques used in the Islamic system to accommodate a scheme of fixed proportional shares and suggests how they may be used in an American scheme. The conclusions of this article will be confined to problems arising in the construction of a scheme of proportional shares. There is no attempt to expand on the substantive conclusions of the ABA study concerning the proportions which should be allocated among the different classes of heirs.

II. Islamic Law

The Islamic law of intestate succession proved a viable method for distributing decedents’ estates for over a thousand years in the Islamic world and continues to influence, if not regulate, the distribution of intestate estates there today. Islamic law—which is based on scholarly interpretations of the Qur'an and the traditions ascribed to Muhammad, as well as customs of the local culture—divided the heirs of an intestate decedent into three major classes: those who possess a right to inherit fixed shares (Sharers); those who take the remainder after distribu-
tion of the fixed shares by virtue of their agnatic\textsuperscript{6} relationship to the decedent (Agnates); and those who take a remainder portion only in the absence of living blood relatives among the first two classes (Blood Relatives). Minor variations exist among the different schools of Islamic law\textsuperscript{7} and, within schools, among different legal scholars.\textsuperscript{8} However, in its finally evolved form, the Islamic scheme constitutes a fairly unified, albeit complex body of rules, the knowledge of which has been said (in a famous dictum attributed to the Prophet) to “equal one half the sum total of human knowledge!”\textsuperscript{9} Despite its complexity, the essence of the Islamic scheme of shared inheritance among different classes of heirs may be summarized in a few pages.\textsuperscript{10}

\textsuperscript{6} 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.

\textsuperscript{7} The four sunni schools of Islamic law are the Hanafi, Shafi’i, Maliki and Hanbali. The law of intestate succession will be described for these four schools based on a Hanbali treatise of the 13th century, Ibn Qudama, \textit{Kitab al-Fara’id} (Book of Distributive Shares), in 6 \textit{Kitab al-Mughni} (1367 H., i.e., 1948 A.D.) [hereinafter cited as \textit{Mughni}]. This treatise was chosen as a reference for Islamic law because of its importance, not only as a source of Hanbali law (still used in Saudi Arabia today), but also as a comparative work. Professor Noel Coulson has written a comprehensive book on the Islamic law of intestate succession, \textit{N. Coulson, Succession in the Muslim Family} (1971). Although Professor Coulson does not cite any authoritative sources as a general basis for his work, a careful comparison of his work with the \textit{Mughni} reveals that both expound essentially the same law. I have chosen to digest the \textit{Mughni} in order to provide a more summarized account of the law, as well as to provide references to an original Arabic source in this area of the law. All translations from original Arabic are the author’s. Arabic terms have been transliterated both in the text and the footnotes with a minimum of diacritical marks.

\textsuperscript{8} Different Islamic legal scholars mentioned in this article include: Abu Hanifa (died 150 H./767 A.D.), the eponym of the Hanifa school of Islamic law; Abu Yusuf (died 182 H./798 A.D.) and Shaybani (died 189 H./804 A.D.), two disciples of Abu Hanifa; Malik (died 179 H./795 A.D.), the eponym of the Maliki school of Islamic law; and Shafi’i (died 204 H./820 A.D.), the eponym of the Shafi’i school of Islamic law. Some of the greatest disagreements concerning the law occurred between Abu Yusuf and Shaybani, both of whom belonged to the Hanafi school.


\textsuperscript{10} This description of the Islamic scheme is concerned solely with the distribution of the net estate of an intestate decedent to regular heirs and does not examine the individual’s freedom to distribute his property by testamentary disposition, or impediments to or conditions of inheritance, death-sickness, advancements, bequests, or the effect of slavery, illegitimacy, or guardianship on intestate succession. For a discussion of these subjects, as well as a more detailed description of the scheme of intestate succession, see \textit{N. Coulson, Succession in the Muslim Family} (1971).
A. The Sharers (dhawu al-furud)

In pre-Islamic times the intestate’s wealth was inherited by his closest male agnatic relative; women were not considered useful in combat or in the defense of tribal territory and, therefore, did not enjoy the same rights of inheritance as men. An important reform introduced by Islam was the assignment of fixed shares to certain female relatives of the decedent. The Prophet was determined to give females a share in intestates’ wealth, and to this end he included three verses in the Qur’an:


IV, 11

God (thus) directs you
As regards your children’s
(Inheritance): to the male,
A portion equal to that
Of two females: if only
Daughters, two or more
Their share is two-thirds
Of the inheritance;
If only one, her share
Is a half.

For parents, a sixth share
Of the inheritance to each,
If the deceased left children;
If no children, and the parents
Are the (only) heirs, the mother
Has a third; if the deceased
Left brothers (or sisters)
The mother has a sixth.
(The distribution in all cases
Is) after the payment
Of legacies and debts.
Ye know not whether
Your parents or your children
Are nearest to you
In benefit. These are
Settled portions ordained
By God; and God is
All-knowing, All-wise.

IV, 12

In what your wives leave,
Your share is a half,
If they leave no child;
But if they leave a child,
Ye get a fourth; after payment
Of legacies and debts.
In what ye leave,
which ensured women a share in the estates of close family

Their share is a fourth,
If ye leave no child;
But if ye leave a child,
They get an eighth; after payment
Of legacies and debts.
   If the man or woman
Whose inheritance is in question,
Has left neither ascendants nor descendants,
But has left a brother
Or a sister, each one of the two
Gets a sixth; but if more
Than two, they share in a third;
After payment of legacies
And debts; so that no loss
Is caused (to any one).
Thus is it ordained by God;
And God is All-knowing,
Most Forbearing.

IV, 176

They ask thee
For a legal decision.
Say: God directs (thus)
About those who leave
No descendants or ascendants
As heirs. If it is a man
That dies, leaving a sister
But no child, she shall
Have half the inheritance:
If (such a deceased was)
A woman, who left no child,
Her brother takes her inheritance:
If there are two sisters,
They shall have two-thirds
Of the inheritance
(Between them); if there are
Brothers and sisters, (they share),
The male having twice
The share of the female
Thus doth God make clear
To you (His law), lest
Ye err. And God
Hath knowledge of all things.

Verse IV, 12 appears to contradict verse IV, 176 by giving the brother and sister each a one-sixth share as opposed to giving a two-thirds share to two sisters, and if there be a brother, a double share to him over the sister. The consensus reached in Islam to explain this apparent contradiction is that verse IV, 12 refers to uterines and verse IV, 176 refers to germanes and consanguines. A recent study has suggested that, contrary to this explanation, both verses refer to germanes and consanguines, but the first deals with testate succession and the second with intestate succession. See Powers, *The Islamic Law of Inheritance Reconsidered: A New Reading of Q. 4:12B, 55 Studia Islamica 61* (1982).
members in conjunction with the inheritance of the male agnates. These verses create a class of Sharers consisting of the husband, wife, uterine brother and sister, mother, father, daughter, germane sister, consanguine sister, agnatic grandfather, grandmother, and agnatic granddaughter of the decedent who inherit according to a fixed share scheme.

The fixed share of an intestate’s estate allotted to each heir of the Sharer class is summarized in Table 1. The fixed share varies as shown in Table 1, depending on the existence or nonexistence of certain specified heirs.

<table>
<thead>
<tr>
<th>TABLE 1</th>
<th>FIXED SHARES OF THE SHARER CLASS</th>
</tr>
</thead>
<tbody>
<tr>
<td>HEIR</td>
<td>WITH</td>
</tr>
<tr>
<td>(1) Husband &amp; Agnatic descendant</td>
<td>—</td>
</tr>
<tr>
<td>(2)</td>
<td>—</td>
</tr>
<tr>
<td>(3) Wife &amp; Agnatic descendant</td>
<td>—</td>
</tr>
<tr>
<td>(4)</td>
<td>—</td>
</tr>
<tr>
<td>(5) Uterine Brother or Sister &amp; Agnatic descendant or male agnatic ascend</td>
<td>—</td>
</tr>
<tr>
<td>(6)</td>
<td>—</td>
</tr>
</tbody>
</table>

13. It is possible that women did have a right of intestate succession in Mecca before the Qur’anic reforms. See F. Pelletier & G.H. Bousquet, supra note 11, at 99-102.

14. A germane brother or sister has the same mother as the decedent but a different father.

15. A germane brother or sister has the same parents as the decedent.

16. A consanguine brother or sister has the same father as the decedent but a different mother.

17. Mughni, supra note 7, at 178(3)-178(6); Qur’an IV, 12.

18. Mughni, supra note 7, at 178(4)-178(8); Qur’an IV, 12. There may be one or more wives who share in the wife’s share.

19. Mughni, supra note 7, at 180(17)-181(17).
<table>
<thead>
<tr>
<th>HEIR</th>
<th>WITH</th>
<th>WITHOUT</th>
<th>SHARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>(7) Mother</td>
<td>Agnatic descendant</td>
<td>—</td>
<td>1/6</td>
</tr>
<tr>
<td>(8)</td>
<td>Two or more brothers or sisters</td>
<td>Agnatic descendant</td>
<td>1/6</td>
</tr>
<tr>
<td>(9)</td>
<td>Father</td>
<td>Agnatic descendant or two or more brothers or sisters</td>
<td>Residue</td>
</tr>
<tr>
<td>(10)</td>
<td>—</td>
<td>Agnatic descendant, more than one brother or sister, or father</td>
<td>1/3</td>
</tr>
<tr>
<td>(11) Father</td>
<td>Male agnatic descendant</td>
<td>—</td>
<td>1/6</td>
</tr>
<tr>
<td>(12)</td>
<td>Female agnatic descendant</td>
<td>Male agnatic descendant</td>
<td>1/6 plus residue</td>
</tr>
<tr>
<td>(13)</td>
<td>—</td>
<td>Agnatic descendant</td>
<td>Residue</td>
</tr>
<tr>
<td>(14) Daughter</td>
<td>Son</td>
<td>—</td>
<td>Residue</td>
</tr>
<tr>
<td>(15)</td>
<td>Son</td>
<td>Son</td>
<td>1/2 or, if more than one, 2/3 collectively</td>
</tr>
<tr>
<td>(16) Germane Sister</td>
<td>Male agnatic descendant or father (or, according to Abu Hanifa, agnatic grandfather)</td>
<td>—</td>
<td>0</td>
</tr>
</tbody>
</table>

The published edition of MUGHNI indicates that the share of one-third is divided among the uterine brothers and sisters “equally, to the male the equivalent of the portion of two females” (bi as-sawiya li adh-dhakar mithl hazz al-‘unthayayn). MUGHNI, supra note 7, at 181(10). But two manuscripts of the work at Dar al-Kutub, the main library in Cairo, show that “two females” is an error in the text and should read “the female” (al-‘untha). IBN QUDAMA, MSS 18(7) and 23(7) Fiqh Hanbal [classification of the two manuscripts] AL-MUGHNI.

20. MUGHNI, supra note 7, at 176(4)-176(5), 177(11)-177(12), 179(20)-179(22); QUR’AN IV, 11. With the father alone the mother receives her Qur’anic share of one-third, but with the spouse and the father she inherits one-third of the remainder after the spouse. This results effectively in her being a residuary with the father and sharing in one-third of the residue.

21. MUGHNI, supra note 7, at 177(3)-177(11), 177(15)-177(17); QUR’AN IV, 11.

22. QUR’AN IV, 11.

23. MUGHNI, supra note 7, at 166(6)-166(7), 168(12)-168(13), 168(16), 169(17); QUR’AN IV, 176. For inheritance with uterines, see supra note 19.

24. MUGHNI, supra note 7, at 215(10)-215(11), 215(15).
<table>
<thead>
<tr>
<th>HEIR</th>
<th>WITH</th>
<th>WITHOUT</th>
<th>SHARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>(17) Germane Sister</td>
<td>Germane brother, female agnatic descendant, or agnatic grandfather (also according to Abu Yusuf, Shaybani, Malik, and Shafi'i)</td>
<td>Male agnatic descendant or father (or, according to Abu Hanifa, agnatic grandfather)</td>
<td>Residue</td>
</tr>
<tr>
<td>(18) &quot; &quot;</td>
<td></td>
<td>Agnatic descendant, germane brother, or male agnatic ascendant</td>
<td>1/2 or, if more than one, 2/3 collectively</td>
</tr>
<tr>
<td>(19) Consanguine Sister</td>
<td>Male agnatic descendant, germane brother, or father (or, according to Abu Hanifa, agnatic grandfather)</td>
<td>—</td>
<td>0</td>
</tr>
<tr>
<td>(20) &quot; &quot;</td>
<td>Two germane sisters</td>
<td>Consanguine brother</td>
<td>0</td>
</tr>
<tr>
<td>(21) &quot; &quot;</td>
<td>Consanguine brother, female agnatic descendant, or agnatic grandfather (also according to Abu Yusuf, Shaybani, Malik, and Shafi'i)</td>
<td>Male agnatic descendant, germane brother, or father (or, according to Abu Hanifa, agnatic grandfather)</td>
<td>Residue</td>
</tr>
<tr>
<td>(22) &quot; &quot;</td>
<td>One germane sister</td>
<td>Agnatic descendant, male agnatic ascendant, germane brother, or consanguine brother</td>
<td>1/6</td>
</tr>
</tbody>
</table>

25. *Id.* at 217(22)-218(21). For identification of these jurists, see *supra* note 8.
27. *Id.* at 166(6)-166(7), 166(15)-166(16), 168(12)-168(13), 168(16), 169(17), 174(3)-174(9), 175(11)-175(12); *Qur'An IV*, 176.
29. *Id.* at 217(22)-218(21).
30. *Id.* at 215(10)-215(11), 215(15).
<table>
<thead>
<tr>
<th>HEIR</th>
<th>WITH</th>
<th>WITHOUT</th>
<th>SHARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>(23) Consanguine Sister</td>
<td>Agnatic descendant, male agnatic ascendant, germane brother, consanguine brother, or germane sister</td>
<td>1/2 or, if more than one, 2/3 collectively</td>
<td></td>
</tr>
<tr>
<td>(24) Agnatic Grandfather</td>
<td>Father or nearer agnatic grandfather</td>
<td>—</td>
<td>0</td>
</tr>
<tr>
<td>(25) &quot; &quot;</td>
<td>Male agnatic descendant</td>
<td>Father or nearer agnatic grandfather</td>
<td>1/6</td>
</tr>
<tr>
<td>(26) &quot; &quot;</td>
<td>Female agnatic descendant</td>
<td>Father, nearer agnatic grandfather, or male agnatic descendant</td>
<td>1/6 or residue, whichever is greater</td>
</tr>
<tr>
<td>(27) &quot; &quot;</td>
<td>—</td>
<td>Father, nearer agnatic grandfather, or agnatic descendant</td>
<td>Residue</td>
</tr>
<tr>
<td>(28) Grandmother</td>
<td>Mother or nearer grandmother (with modifications according to Abu Hanifa, Malik, and Shafi'i)</td>
<td>—</td>
<td>0</td>
</tr>
</tbody>
</table>

31. *Id.* at 177(3)-178(1). The grandfather differs from the father by inheriting as a residuary with germane and consanguine brothers and sisters. (Abu Yusuf, Shaybani, Malik and Shafi'i are in accordance, but Abu Hanifa maintains the exclusion of these collaterals by the grandfather). *Id.* at 215(10)-215(11), 215(15), 217(22)-218(21). If the grandfather's share in the residue in the presence of these collaterals is greater than one-sixth of the total inheritance, it is computed without taking the one-sixth share into account (as will be more fully explained in the text accompanying notes 43-44 infra). See also examples in MUGHNI, *supra* note 7, at 227(9)-227(10), 227(19)-227(20). Therefore, his share becomes "1/6 or residue, whichever is greater" rather than "1/6 plus residue" as in the case of the father's inheritance with a female agnatic descendant and without a male agnatic descendant. See *supra* Table 1, pp. 274-77.

32. MUGHNI, *supra* note 7, at 206(1), 206(14)-206(15), 206(20), 209(9)-210(5). The Prophet gave the grandmother a one-sixth share. See *id.* at 214(4). Not all grandmothers are entitled to inherit as Sharers. On the maternal side only one line of grandmothers—the mother of the mother and of the mother's mother and of the mother's mother, etc.—participates in the inheritance. On the paternal side, the two lines of grandmothers stemming from the father and the father's father are admitted. Malik and his followers admit only the maternal line of grandmothers and the paternal line stemming from the father. Abu Hanifa and his followers and Shafi'i (according to one report) admit the maternal line of grandmothers and the paternal lines of grandmothers stemming from the father and every agnatic grandfather. MUGHNI, *supra* note 7, at 208(3)-209(8).

33. Malik and Shafi'i (according to Shafi'i's second statement on the matter) main-
<table>
<thead>
<tr>
<th>HEIR</th>
<th>WITH</th>
<th>WITHOUT</th>
<th>SHARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>(29) Grandmother</td>
<td>—</td>
<td>Mother or nearer grandmother (with modifications according to Abu Hanifa, Malik, and Shafi'is)</td>
<td>1/6</td>
</tr>
<tr>
<td>(30) Agnatic Granddaughter</td>
<td>Higher male agnatic descendant</td>
<td>—</td>
<td>0</td>
</tr>
<tr>
<td>(31) &quot; &quot;</td>
<td>Equal male agnatic descendant</td>
<td>Higher male agnatic descendant</td>
<td>Residue</td>
</tr>
<tr>
<td>(32) &quot; &quot;</td>
<td>Higher female agnatic descendant</td>
<td>Higher or equal male agnatic descendant</td>
<td>1/6</td>
</tr>
<tr>
<td>(33) &quot; &quot;</td>
<td>Lower male agnatic descendant in the presence of two or more higher female agnatic descendants</td>
<td>Higher or equal male agnatic descendant</td>
<td>Residue</td>
</tr>
<tr>
<td>(34) &quot; &quot;</td>
<td>Two or more higher female agnatic descendants</td>
<td>Male agnatic descendant</td>
<td>0</td>
</tr>
<tr>
<td>(35) &quot; &quot;</td>
<td>—</td>
<td>Higher or equal male agnatic descendant or higher female agnatic descendant</td>
<td>1/2 or, if more than one, 2/3 collectively</td>
</tr>
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</table>

If the sum of the fractional fixed shares of the Sharers equals unity (i.e. = 1.0), the inheritance is divided in accordance with those fixed shares. If the sum is greater than unity, the share of each is proportionately decreased ('awul). Thus, in the case of a decedent who leaves a father, mother, two daughters,

tain that a nearer paternal grandmother does not exclude a further maternal grandmother, while Abu Hanifa and his followers and Shafi'i (according to Shafi'i's first statement) maintain the contrary in accordance with Ibn Qudama. *Mughni*, *supra* note 7, at 209(16)-210(1). Furthermore, Malik, Shafi'i and the *ashab ar-ra'ay* (i.e., the Hanafis) maintain that a paternal grandmother is excluded by a male agnatic ascendant through whom she is connected to the praepositus. *Id.* at 211(4)-212(3). With this approach a controversy is raised over whether the other grandmothers take the whole of the grandmother's share (one-sixth) as if the paternal grandmother were nonexistent, or only the share they would have taken had the paternal grandmother not been excluded. *Id.* at 211(20)-212(10).

34. *Id.*
35. *Id.* at 169(15)-174(2).
36. I.e., nearer in degree to the praepositus.
37. *Mughni*, *supra* note 7, at 184(7)-184(9).
and a wife to inherit a $13,500 estate, the mother takes a share of one-sixth (first category under Mother in Table I), the father takes a share of one-sixth plus residue (second category under Father), the two daughters each take one-third (second category under Daughter), and the wife takes one-eighth (first category under Wife). Since these shares total one and one-eighth ($1/6 + 1/6 + 2/3 + 1/8$), the share of each is proportionately decreased, so that the father actually takes 4/27, the mother 4/27, the daughters 8/27 each, and the wife 3/27. Their shares in the $13,500 estate are $2,000 (father), $2,000 (mother), $4,000 (each daughter), and $1,500 (wife). If the sum of the fixed shares is less than unity, the remainder of the inheritance after distribution to those with fixed shares goes the Sharers who have been made residuaries and the Agnates. In the absence of fixed shares, the residuaries take the whole inheritance.38

B. Residuaries

In addition to the sharers who may be entitled to a residuary interest, there are two classes of potential heirs to the residue of a decedent’s estate after distribution of fixed shares to the Sharer class: Agnates (‘asaba) and Blood Relatives (dhawu al-arham).

1. Agnates (‘asaba)

The Agnates are the male heirs listed below among whom the first existing heirs in order of priority inherit the remainder of an estate to the exclusion of other Agnates:39

(1) sons;
(2) nearest in degree of agnatic grandsons;
(3) father;
(4) nearest in degree of agnatic grandfathers, germane brothers, and consanguine brothers, with germane brothers excluding consanguine brothers;40

38. Id. at 168(14)-168(15). But see infra text accompanying notes 43-44 (exception when the grandfather and one germane or consanguine sister are in competition with the husband and mother).

39. MUGHNI, supra note 7, at 178(19)-179(19).

40. Germane and consanguine brothers are not excluded by the agnatic grandfather. Id. at 215(16)-215(17), 217(22)-218(21). Abu Yusuf, Shaybani, Malik and Shafi’i are in accordance on this point. Id. at 215(18), 218(2). Abu Hanifa maintains that they are excluded by the agnatic grandfather. Id. at 215(10)-215(11), 215(15). One situation exists in which germane brothers are considered as uterines. See supra note 19.
(5) nearest in degree of male agnatic descendants of germane and consanguine brothers, with the germane's descendants excluding the consanguine's descendants of equal degree;
(6) father's germane brothers;
(7) father's consanguine brothers;
(8) nearest in degree of male agnatic descendants of the father's germane and consanguine brothers, with the germane's descendants excluding the consanguine's descendants of equal degree;
(9) relatives of the nearest in degree of agnatic grandfathers who inherit in the following order of exclusive priority:
   (a) germane brothers,
   (b) consanguine brothers,
   (c) nearest in degree of male agnatic descendants of germane and consanguine brothers, with the germane's descendants excluding the consanguine's descendants of equal degree.

Thus, for example, when a decedent leaves only an uncle, one son, and two grandsons, the son will take the whole estate. If the decedent also leaves heirs belonging to the Sharer class then the son will take a residuary interest after the distribution has been made to the Sharers.

When two or more heirs are entitled to take the residue, it is distributed generally in accordance with the priorities established for the Agnates. Consequently, when residuaries among the Sharers are Agnates or female Sharers inheriting in conjunction with Agnates, the Agnates exclude all Agnates following them in order of priority. When a germane or consanguine sister inherits as a residuary with a female agnatic descendant, she takes an inheritance like that which her brother would have taken, and appears to exclude all Agnates who rank after her brother in order of priority. This would include the exclusion of the consanguine sister by the germane sister when a female agnatic descendant survives the decedent.

Determining the share of a grandfather can become quite involved. For example, when germane or consanguine brothers or sisters inherit with the grandfather, the share of the grandfather is determined by taking the maximum share of the following:

41. Mughni, supra note 7, at 169(6).
42. See, e.g., id. at 222(10)-222(11).
(1) one-sixth of the total estate as a fixed share;
(2) one-third of the estate remaining after deduction of fixed shares not going to germane or consanguine brothers or sisters or himself;
(3) a male's share of such remaining estate after a nominal division is made among the brothers and sisters and himself with males receiving double the portion of females; or
(4) if the grandfather is in competition with the husband, the mother, and one germane or consanguine sister, an initial distribution of fixed shares is made to all, the shares are decreased proportionately (by 'awl), and then the grandfather takes two-thirds of the collective entitlement of himself and the sister (8/27 of the total estate).43

Once the grandfather has taken his allowable share, the shares of the germane and consanguine brothers and sisters in any residue remaining are determined as follows: (1) germanes exclude consanguines (except when the germane is only one sister, in which case she takes a share to the extent of one-half of the total inheritance, if the remaining residue is that large, after which any remaining residue goes to the consanguines); and (2) as between a germane brother and sister or between a consanguine brother and sister, the male receives double the share of the female.44

Except for the case of the grandfather in competition with the germane or consanguine brothers or sisters, the residuaries who inherit share equally, but with the male taking double the portion of the female.46 If there are no residuaries who take and the sum of the fixed shares does not add to unity, each fixed share is increased proportionately (radd), except for the spouse's share which remains constant.46 However, according to Malik and Shafi'i, when there are no other residuaries there is no proportionate increase and the remainder escheats to the public treasury (bayt al-mal).47

Thus, in the case of a decedent who leaves a father, mother, brother, and sister to inherit a $13,500 estate, the father is first

43. Id. at 218(4)-220(2), 223(13)-223(18).
44. Id. at 218(12)-218(14), and examples at 220(3)-223(12).
45. QUR'AN IV, 11 (son and daughter); MUGHNI, supra note 7, at 171(5)-171(7) (granddaughter and grandson); id. at 175(15)-175(17) (germane brother and sister; consanguine brother and sister). For the mother and father, see supra note 20.
46. MUGHNI, supra note 7, at 201(9)-202(3). Abu Hanifa and his followers are in accordance. Id. at 201(14)-201(15).
47. Id. at 202(3)-202(5).
in order of priority and takes to the exclusion of the brother. The father also excludes the sister (first category under Germane Sister in Table 1) and then takes a two-thirds share as residue after the mother takes her one-third (third category under Mother and third category under Father in Table 1). Their shares in the $13,500 estate are $9,000 (father) and $4,500 (mother).

2. Blood Relatives (dhawu al-arham)\(^48\)

If there are no blood relatives among the Sharers or Agnates surviving the decedent, the Blood Relatives of the deceased are entitled to share in the inheritance.\(^49\) The spouse is not a blood relative and will inherit his or her maximum fixed share. The Blood Relatives will inherit that part of the estate not going to the spouse, and if there is no spouse, they will take the whole inheritance.\(^50\)

Among the Blood Relatives, shares in the inheritance are generally determined according to the doctrine of tanzil, whereby each relative is put in the position (manzila) of the Sharer or Agnate (known generally as "ordinary heirs") with whom he is connected.\(^61\) However, in the Hanafi school, the shares of Blood Relatives are determined according to the doctrine of relationship (qaraba), whereby each Blood Relative is considered in his direct relationship to the decedent and according to the ranking of the Agnates.

a. Tanzil. Under the doctrine of tanzil the ordinary heir with whom a Blood Relative is connected for purposes of inheritance is determined as follows:

(1) for descendants of the decedent, by tracing the line of ascent to the first ordinary heir;\(^62\)

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48. The term *dhawu al-arham* may be used generally to refer to all blood relatives but is used here to refer only to blood relatives other than Sharers and Agnates. See id. at 202(1)-202(2), 202(8)-202(10), 229(3)-229(4); Qu’ran VIII, 75. Therefore, “Blood Relatives” is capitalized when used in this restricted sense. For a list of these relatives, see MUGHNI, supra note 7, at 229(4)-229(8). Malik and Shafi’i do not recognize this group of heirs. Id. at 229(11)-229(12).

49. Id. at 229(8)-229(9), 229(20)-229(21). Abu Hanifa is in accordance. Id. at 232(15)-232(16). Malik and Shafi’i do not recognize this group of heirs and give the inheritance to the public treasury (bayt al-mal). Id. at 229(11)-229(12).

50. Id. at 231(14)-231(20), 237(4)-237(5).

51. Id. at 231(10)-231(16). The doctrine of tanzil elaborated in this study is that of Ibn Qudama, who differs in some particulars with others who espouse the doctrine.

52. See, e.g., id. at 233(1)-233(4).
INTESTATE DISTRIBUTION

(2) for descendants of brothers or sisters of the decedent, by tracing the line of ascent to the first ordinary heir.  
(3) for ascendants of the decedent, by tracing the line of descent to the first ordinary heir;  
(4) for brothers and sisters of ascendants of the decedent, by tracing the collateral line to their brother or sister who is an ascendant of the decedent and, if that ascendant is not an ordinary heir, by tracing the line of descent from that ascendant to the first ordinary heir; and  
(5) for descendants of brothers and sisters of ascendants of the decedent, by tracing the line of ascent to the brother or sister of an ascendant of the decedent, then the collateral line to that ascendant, then the line of descent from that ascendant until the first ordinary heir is reached.

A single existing relative from the Blood Relatives takes the entire inheritance. If more than one Blood Relative exists, the right of each to inherit is determined initially by the proximity of his relationship to the ordinary heir he represents. If relatives representing the same ordinary heir are in varying degrees of proximity to that ordinary heir, the nearer in degree exclude the more remote. If relatives representing different ordinary heirs are in varying degrees of proximity to their ordinary heirs, the nearer in degree exclude the more remote, but only if they are in the same class of relatives. For this purpose the Blood Relatives are divided into four classes—descendants, fraternal relatives, maternal relatives, and paternal relatives.

53. See, e.g., id. at 232(12)-232(13), 233(1)-233(5), 245(12)-245(16).
54. See, e.g., id. at 251(22)-252(4).
55. See id. at 232(7)-232(15), and examples at 251(9)-251(19).
56. See, e.g., id. at 233(20)-233(22), 234(2), 246(10)-247(13), 251(20)-251(21).
57. Id. at 233(9)-233(10).
58. Id. at 233(10)-233(13).
59. Id. at 234(5)-234(7).
60. Ibn Qudama knows of no one who has counted the classes and explained them, except for Abu al-Khattab, whose count of five leads to results which no one supports. Id. at 234(15)-234(18). From Khiraqi (a tenth-century scholar whose Mukhtasar serves as the basis for Ibn Qudama’s commentary in Mughni) Ibn Qudama deduces that the classes are four. Id. at 234(19)-235(2). Ibn Qudama mentions that it is possible that the classes are three and that one is best, but later examples confirm his recognition of four classes. Id at 236(3)-236(7), and examples at 246(2)-246(6), 248(15)-249(5).

The relatives constituting each of the four classes respectively are the descendants of the decedent, the descendants of brothers and sisters of the decedent, the other relatives stemming from the mother, and the other relatives stemming from the father. See, e.g., id. at 235(2)-236(2). However, it appears that the paternal grandmother is considered a maternal relative, for the purpose of this classification, when her relatives exist.
The inheritance is then divided among the ordinary heirs represented by Blood Relatives who have not been excluded. Each ordinary heir represented takes the share he would have received in competition with the other ordinary heirs represented, and that share devolves on the relatives representing him. The share of the ordinary heir is distributed to his relatives as if he were the decedent and they his heirs, with certain exceptions:

(1) Descendants of the decedent or of a brother or sister of the decedent inherit per stirpes the share of their ordinary heir, with two schools of thought on the manner in which the shares are divided. One school equalizes (man sawwa) between male and female and gives the male an equal share with the female. The other school gives preference (man faddala) to the male and gives the male double the share of the female, unless the ordinary heir is a uterine brother or sister in which case the male takes an equal share with the female.

(2) The father and mother of the mother's father, inheriting alone, take shares of two-thirds and one-third respectively. (The distribution to higher ascendants related to the same ordinary heir remains unclear.)

(3) A brother and sister of an ascendant of the decedent, with relatives of the mother or maternal grandmother. See, e.g., id. at 251(19)-252(4). Whether she is considered a maternal relative with other relatives is not clear from MUGHNI.

61. Id. at 234(3)-234(7). The presence of the spouse does not affect the determination of these shares, except according to one view not espoused by Ibn Qudama, whereby the existing spouse is considered initially in competition with the ordinary heirs for the purpose of determining the ratio of their shares. After the ratio is determined, the spouse takes his or her maximum fixed share and each group of relatives representing the ordinary heirs takes its share of the remaining portion in proportion to the predetermined ratio. Id. at 237(4)-237(10).

62. See id. at 233(10)-233(13).

63. Inheritance per stirpes is the taking of the share one's parent would have taken had he been alive, and that parent's share is the one his parent would have taken and so forth on up the line. In the case here described, where two or more children are descended from the same parent, they take equally except where it is indicated that a male takes double the share of a female.

64. See MUGHNI, supra note 7, at 238(15)-239(10), 243(6)-243(7), and examples at 239(14)-239(22), 240(14)-240(17), 240(18)-241(2) (example of per stirpes devolution where the ordinary heir is a descendant of the decedent), 241(8)-241(12) (example of per stirpes devolution where the ordinary heir is a sister of the decedent), 241(17)-241(18), 242(3)-242(5), 243(8)-243(10), 245(1)-245(5), 245(19)-246(4).

65. Id. at 252(2).

66. E.g., when the parents of the mother's paternal grandfather are in competition with the mother of her paternal grandmother.
who are not ordinary heirs and are either germane or consanguine, take their shares equally according to those who equalize between the male and female. According to those who give a preference to the male, the brother takes double the share of the sister.67

(4) Descendants of a brother or sister of an ascendant of the decedent inherit per stirpes the share of their ordinary heir, or, if their ordinary heir is an ascendant of the decedent, they inherit per stirpes the share which would have been taken by their own ascendant who is the brother or sister of an ascendant of the decedent. According to those who equalize, the male shares equally with the female. Those who give a preference to the male give the male double the share of the female unless the ordinary heir is uterine, in which case the male takes an equal share with the female.68

Thus, in the case of a decedent who leaves two paternal aunts and a cousin who is the daughter of his mother's sister to inherit a $13,500 estate, the paternal aunts are put in the position of the father, and the cousin is put in the position of the mother. Neither excludes the other because the aunts are paternal relatives and the cousin is a maternal relative. Since the mother would have received one-third and the father two-thirds, the aunts each take one-third and the cousin takes one-third. Their shares in the $13,500 estate are $4,500 each.

67. See MUGHNI, supra note 7, at 238(15)-239(10), and examples at 249(12)-249(17) (for maternal aunt and uncle).
68. See id. at 238(15)-239(10), 244(1)-244(6), 244(21)-244(22), and examples at 239(14)-240(2), 245(1)-245(5), 246(2)-246(11), 247(9)-247(13), 249(8)-249(12), 251(5)-251(21). Per stirpes devolution, while not explicitly mentioned for this group of heirs, appears to be implied.

When the ordinary heir is an ascendant of the decedent, it is not clear from Ibn Qudama what share the descendants of a brother or sister of an ascendant of the decedent take in competition with a relative who is an ascendant of that ordinary heir, e.g., when the sons of the mother's germane, consanguine, and uterine brothers are in competition with the mother's paternal grandfather. The general rule is that the paternal grandfather excludes nephews, which would argue for the grandfather taking the whole inheritance. But in the absence of the grandfather, the general rule is that the germane brother's son takes to the exclusion of the consanguine and uterine brother's sons. This is not the case for the sons of the mother's brothers in the absence of her paternal grandfather. The sons are represented by their fathers for purposes of the rules of exclusion: the consanguine brother is excluded, the uterine brother is allocated one-sixth and the germane brother five-sixths of the inheritance, which then devolves to the sons of the uterine and germane brothers respectively. Id. at 245(3)-245(5). Query whether the sons of the mother's brothers are represented by their fathers for purposes of the rules of exclusion when in the presence of the mother's paternal grandfather, and if so, whether the paternal grandfather of the mother is represented by her father.
b. Qaraba. Under the doctrine of *qaraba* followed by the Hanafi school in lieu of *tanzil*, a Blood Relative inherits an interest in the intestate’s estate according to his direct relationship to the decedent and according to the Agnate rankings. Thus, descendants exclude descendants of the decedent’s parents, and the descendants of nearer ascendants exclude the descendants of further ascendants.\(^69\) Within each of the classes of descendants, the relatives who are nearer in degree to the decedent exclude the more remote.\(^70\) Where relatives of the same class are all equal in degree to the deceased, relatives who are closest in degree to ordinary heirs, who are their ascendants but not ascendants of the decedent, exclude the others.\(^71\) A division exists between the followers of Abu Yusuf and Shaybani\(^72\) concerning the rules of priority and apportionment among the relatives not excluded in the application of the doctrine of *qaraba*.

(1) Abu Yusuf. Abu Yusuf directs that distribution be made per capita\(^73\) with the male taking double the share of the female.\(^74\) When the class consists of descendants of the decedent’s parents or higher ascendants, germanes exclude consanguines, consanguines exclude uterines, the issue of germanes exclude the issue of consanguines, and the issue of consanguines exclude the issue of uterines.\(^75\) If the relatives remaining after this exclusion are from both the maternal and paternal sides, the relatives on the maternal side take one-third and the relatives on the paternal side take two-thirds of the inheritance collectively.\(^76\) In this regard, descendants of great grandparents on either the maternal or paternal side are further subdivided into maternal and

\(^69\) Id. at 232(15)-232(20). Ibn Qudama does not explain the position of the ascendants within this order except to say that Abu Hanifa himself gave precedence to the father’s mother, the father’s mother’s mother, etc., over the children of the daughters. Id. at 232(19).

70. See, e.g., id. at 241(21)-241(22), 245(12)-245(13), 247(5)-247(7), 249(6)-249(8), 249(18)-249(19).

71. See, e.g., id. at 241(23)-243(2) (descendants), 245(13)-245(14) (descendants of parents), 246(10)-246(12), 247(8)-247(9) (descendants of paternal aunts and uncles), 251(8)-251(9).

72. See supra note 8.

73. I.e., according to their number (‘ala ‘adadihim).

74. *Mughni*, supra note 7, at 240(7)-240(9), and examples at 240(14)-241(7) (descendants), 241(8)-241(20) (descendants of parents).

75. Id. at 244(6)-244(7), and examples at 245(14)-245(16), 246(10)-246(12), 248(5)-248(6), 249(21)-249(23).

76. See, e.g., id. at 248(5)-248(6), 249(21)-249(23), 251(15)-251(16).
paternal relatives and given a collective share of one-third and two-thirds respectively of the collective share of their side.\textsuperscript{77}

(2) Shaybani. Shaybani's approach differs from that of Abu Yusuf. For the class of descendants he directs that the estate be divided initially between the male and female ascendants of the heirs at the first generation under the decedent differing in sex. The females are allocated a share for each heir claiming through them and the males are allocated a double share for each heir claiming through them. The collective shares of the males and females are then further subdivided among the males and females of the next lower generation under each of them differing in sex, and the subdivision continues in like manner until the heirs take their shares, the male taking double the share of each female under each subdivision. If there are no generations between the heirs and the decedent which differ in sex, distribution is made per capita with the male taking double the share of the female.\textsuperscript{78}

For the class of descendants of the decedent's parents, Shaybani directs that the estate be divided initially among the brothers and sisters of the decedent, who have heirs claiming through them, according to the normal principles of distribution to these relatives but with each brother and sister counting as however many heirs claiming through him or her. The subsequent distribution of the share of each brother and sister to their descendants is made in the same way as the decedent's estate is distributed to his descendants, except that male and female issue of uterines are allocated equal shares.\textsuperscript{79}

Within the class of descendants of the decedent's grandparents or higher ascendants, germanes exclude consanguines, consanguines exclude uterines, the issue of germanes exclude the issue of consanguines, and the issue of consanguines exclude the issue of uterines.\textsuperscript{80} If the relatives remaining after this exclusion are from both the maternal and paternal sides, the relatives on

\textsuperscript{77} See, e.g., id. at 251(8)-251(9). Further subdivision for descendants of higher ascendants is implied.

\textsuperscript{78} Id. at 240(10)-240(13), and examples at 240(14)-241(8). The text does not refer to more than one division among males and females at a generation between the heirs and the decedent, but implies a successive subdivision for each generation differing in sex.

\textsuperscript{79} Id. at 243(5)-243(7), 244(6)-244(9), and examples at 241(8)-241(19), 243(4)-243(5), 243(11)-243(18), 245(7)-245(8).

\textsuperscript{80} Id. at 244(6)-244(9), and examples at 246(10)-246(12), 248(5)-248(6), 249(21)-249(23).
the maternal side take one-third and the relatives on the paternal side take two-thirds of the inheritance collectively. In this regard, descendants of great-grandparents on either the maternal or paternal side are further subdivided into maternal and paternal relatives and given a collective share of one-third and two-thirds respectively of the collective share of their side. The subsequent distribution of the estate is not described explicitly by Ibn Qudama but appears to be the same as for the class of descendants of the decedent's parents.

Thus, for example, in the case of a decedent who leaves two paternal aunts and a cousin who is the daughter of his mother's sister to inherit a $13,500 estate, all three are descendants of grandparents, but the aunts are nearer in degree to the decedent and therefore exclude the cousin. Each aunt takes one-half the $13,500 estate.

Finally, if the decedent dies with no blood relative, the public treasury (bayt al-mal) takes the share of the inheritance not going to a surviving spouse.

The particular fixed shares which were ordained in the Qur'an are unimportant to U.S. intestate succession laws since they depend on social and historical factors peculiar to Islam and are not suited to American culture. However, some of the techniques used to distribute shares to various heirs in the Islamic system may shed some light on how to approach problems of refining the American system of intestate succession. Before examining these techniques, the intestate succession laws presently existing in the United States will be examined to determine the extent to which they use the concept of fixed shares.

81. See supra note 76.
82. See supra note 77.
83. But see supra note 49 (exceptions of Malik and Shafi'i). It should be noted that an heir who has a dual relationship with the decedent inherits as a separate individual under each title. MUGHNI, supra note 7, at 252(5)-252(7), and examples at 186(7)-186(19), 252(9)-252(20). According the Shafi'i, Abu Yusuf, and reasoning by analogy from the word of Malik, there is an exception for the case of a grandmother who is two grandmothers to the decedent. They claim she will inherit only as one grandmother. Id. at 210(11)-210(17).
84. The distribution of a double share to the male over the female is not only counter to our ideas of propriety but actually contradicts fundamental notions of fairness expressed in the Equal Protection Clause of the 14th Amendment. Nevertheless, in Islam the duty of the husband to provide for the support of his family without any set-off from the wife's earnings, as well as other duties, justifies the unequal division of wealth. See Fellows, Simon & Rau, supra note 2, at 386 for the finding that the surviving spouse should inherit the entire estate in preference to the decedent's family of orientation.
III. AMERICAN LAW

Each state in the United States has enacted a statute that lists the persons who are or who may be heirs to part of an intestate decedent's estate and the amounts each inherits. Although the list of heirs who may be entitled to some portion of the decedent's estate is relatively similar from state to state, there are significant differences in the portions of the estate the heirs receive when certain individuals survive the decedent and others do not. Each state has adopted some form of fixed share distribution to determine the respective shares of each class of heirs entitled to participate in the estate.

Under existing intestate statutes there are two patterns of sharing among classes. The first pattern, which exists in all states, involves sharing among a surviving spouse and other classes of heirs according to various fixed share schemes. The second pattern involves sharing among other classes of heirs when there is no surviving spouse. Sharing according to the second pattern occurs only in nine states.

A. Sharing Among Surviving Spouse and Other Heirs

The differences among the state intestate inheritance laws primarily involve the existence of a spouse who may receive a

85. All states list the following persons who may be entitled to part of the decedent's estate: 1) the spouse, 2) the decedent's issue, 3) the decedent's parents, and 4) the decedent's brothers and sisters. In virtually all states these heirs take in order of priority to the exclusion of all others. If none of these heirs exists, differences begin to appear among the states concerning the next persons to inherit: (1) eight states (Arizona, Hawaii, Kansas, New Hampshire, New Mexico, Ohio, Tennessee, and Wisconsin) name the decedent's grandparents (Hawaii adds great-grandparents; Ohio adds next of kin and step-children; Wisconsin adds nieces and nephews and next of kin); (2) sixteen states (Alabama, Alaska, Colorado, Florida, Idaho, Illinois, Indiana, Nebraska, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Texas, Washington, and Wyoming) name grandparents, aunts and uncles (Pennsylvania adds children and grandchildren of aunts and uncles; Illinois adds great-grandparents and next of kin; Utah adds next of kin); (3) seven states (Arkansas, Iowa, Kentucky, Maryland, New York, Rhode Island, and Virginia) name grandparents, aunts and uncles, great-grandparents, and great-aunts and great-uncles, and in some cases further kindred; (4) eleven states (California, Connecticut, Delaware, Massachusetts, Michigan, Minnesota, Montana, Nevada, Oklahoma, South Dakota, and Vermont) merely add "next of kin" to the list (Massachusetts, Michigan, and Minnesota also add nieces and nephews); (5) seven states (Georgia, Maine, Mississippi, Missouri, South Carolina, Utah, and West Virginia) and the District of Columbia add some combination of all these heirs (in Utah, issue of parents and grandparents take by right of representation; in the District of Columbia, great-grandparents, great-uncles, and great-aunts are not included; West Virginia includes the spouse's kindred).

86. See infra note 102 and accompanying text.
statutory fixed sum or a statutory share in conjunction with other heirs. The spouse's treatment in the different state statutes directly affects when and how much the other heirs will receive. In the following discussion, the states will be divided into three categories depending on the classes of heirs with which the spouse shares the inheritance.\textsuperscript{87}

1. \textit{States in which spouse shares only with surviving issue}

In seventeen states the spouse inherits the entire estate to the exclusion of all other heirs when the decedent dies without issue.\textsuperscript{88} Among these seventeen states there are three basic patterns of distribution when both a spouse and issue survive the decedent. In two states, Arizona and Montana, the spouse inherits the entire estate even if there are surviving issue.\textsuperscript{89} In four other states—Colorado, Florida, Ohio and Wisconsin—the spouse inherits a fixed dollar amount from the estate and the remainder is divided between the spouse and issue according to a designated fraction.\textsuperscript{90} In several cases the practical effect of

\textsuperscript{87} The discussion in this section focuses primarily on the shares that particular heirs inherit through intestate succession, including the effect of the existence or nonexistence of an heir on the distributive share of another. When distinctions affect the distribution scheme, this discussion will distinguish between different types of heirs within a particular class, such as between issue who are issue of the surviving spouse and those who are not. Community property variation, illegitimacy, and similar distinctions have all been omitted in order to simplify and help clarify this description.


\textsuperscript{89} \textit{Ariz Rev Stat Ann} § 14-2102 (1975); \textit{Mont Code Ann} § 72-2-202 (1983). Both states require that the surviving issue be the issue of the surviving spouse in order for the spouse to receive the entire estate. If this requirement is not met, then in Arizona the spouse receives one-half the estate and the surviving issue receives the other half. In Montana, if there is only one surviving issue who is not the issue of the surviving spouse, then the spouse receives one-half the estate and the issue receives the other half. If there is more than one surviving issue who is not issue of the surviving spouse, then the spouse receives one-third of the estate and the issue receives two-thirds.

\textsuperscript{90} \textit{Colo Rev Stat} § 15-11-102 (1973); \textit{Fla Stat Ann} § 732.102 (West 1976); \textit{Ohio Rev Code Ann} § 2105.06 (Page 1976); \textit{Wis Stat Ann} § 852.01 (West 1971). These
this scheme is to give the entire estate to the spouse when the statutory dollar amount exceeds the net worth of the estate, because persons who die with wills tend to be wealthier than people who die without.\textsuperscript{91} In the final eleven states in this group—Arkansas, Georgia, Illinois, Kansas, Minnesota, Mississippi, New Mexico, Oregon, Tennessee, Virginia, and West Virginia—the spouse receives a designated fraction of the total estate, but no fixed sum.\textsuperscript{92}

2. States in which spouse shares with issue or parents of decedent

In eighteen states the surviving spouse inherits the entire estate only when no issue and no parents survive.\textsuperscript{93} The spouse

states list certain restrictions on the actual amount to be received. In Ohio, the spouse receives the first $30,000 if one or more of the surviving issue are issue of the surviving spouse. If none of the issue is issue of the surviving spouse, then the spouse receives only the first $10,000 of the estate. As for the designated share, Ohio gives the spouse one-half the remainder if there is only one surviving issue; if there are more, then the spouse receives one-third. In Florida, the spouse receives the first $20,000 plus one-half of the remainder of the estate unless one or more issue are not issue of the surviving spouse. In such a situation, the spouse receives only one-half the estate. Both Colorado and Wisconsin give the spouse the first $25,000 plus one-half of the balance of the estate. As in the other states, Wisconsin and Colorado give the surviving spouse less if there are issue of the decedent who are not issue of the spouse. Colorado gives the spouse one-half the estate, while Wisconsin gives the spouse one-half if there is only one surviving issue (not the issue of the surviving spouse) and one-third if there are more than one such issue surviving.


92. ARK. STAT. ANN. §§ 61-149, -201 to -302 (1971); GA. CODE ANN. §§ 113-902, -903 (1982); ILL. REV. STAT. ch. 110½, § 2-1 (Smith-Hurd 1983) (Probate Act of 1975, § 2-1); KAN. STAT. ANN. § 59-504 (1983); MINN. STAT. § 525.16 (1975); MISS. CODE ANN. § 91-1-7 (1972); N.M. STAT. ANN. § 45-2-102 (1978); OR. REV. STAT. § 112.035 (1983); TENN. CODE ANN. § 31-203 (Supp. 1983); VA. CODE § 64.1-19 (Supp. 1983); W. VA. CODE §§ 42-2-1, 43-1-1 (1982). Illinois, Kansas, and Oregon give the spouse one-half of the estate if there are surviving issue. Georgia, Minnesota, and Tennessee make distinctions based upon how many issue survive. Minnesota and Tennessee give the spouse one-third of the estate or an issue’s share, whichever is greater. Georgia gives the spouse one-fifth or an issue’s share, whichever is greater. Arkansas, Virginia, and West Virginia all give the spouse her elective dower or curtesy share when there are surviving issue.

Arkansas’ distribution scheme is unique because it requires the spouse to be married continuously for more than the three years preceding the intestate’s death to be entitled to the entire estate. If married for this three-year period, the spouse receives the entire estate, provided that there are no surviving issue. ARK. STAT. ANN. § 61-149 (1971). In Mississippi, the spouse shares equally with the surviving issue. New Mexico gives the surviving spouse one-fourth of the estate and the surviving issue the other three-fourths.

shares the estate with either issue or parents, but issue take to the exclusion of parents. The distinction between this group and the first is that parents have a greater likelihood of receiving a share in the decedent's estate because they can inherit a portion of the estate along with the spouse. As in the first group, three basic patterns exist. In fourteen states—Alabama, Alaska, Connecticut, Idaho, Maine, Maryland, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, and Utah—the spouse receives a fixed dollar amount and also shares in a fixed proportion of the remainder as designated by statute. Two other states—Delaware and North Carolina—follow a similar fixed amount scheme but draw distinctions between real and personal property. In the final two


94. Ala. Code § 43-8-41 (1982); Alaska Stat. § 13.11.010 (1972); Conn. Gen. Stat. Ann. § 45-273a(b) (West 1981); Idaho Code § 15-2-102 (1979); Me. Rev. Stat. Ann. tit. 18-A, § 2-102 (1964); Md. Est. & Trusts Code Ann. § 3-102 (Supp. 1983); Mo. Ann. Stat. § 474.010 (Vernon Supp. 1984); Neb. Rev. Stat. § 30-2302 (1979); N.H. Rev. Stat. Ann. § 561:1 (1974); N.J. Stat. Ann. § 3B:5-3 (West 1983); N.Y. Est. Powers & Trusts Law § 4-1.1 (McKinney 1981); N.D. Cent. Code § 30.1-04-02 (1976); Pa. Cons. Stat. Ann. tit. 20, § 2102 (Purdon Supp. 1983); and Utah Code Ann. § 75-2-102 (1978). The fixed dollar amount varies from state to state as follows: Alaska, Idaho, Maine, New Hampshire, New Jersey, and North Dakota give the spouse the first $50,000 of the estate; in Nebraska the fixed amount is $35,000; in Pennsylvania the amount is $30,000; in Missouri $20,000; and in Maryland $15,000. In each of these states the surviving spouse also receives one-half the remainder of the estate with the other half going to surviving issue or parents. However, if there are issue surviving and one or more are not issue of the surviving spouse, the spouse inherits only a half fixed share of the estate and the issue receive the other half. Alabama, Connecticut, New York, and Utah also give the spouse a specific dollar amount, but it varies, depending on whether the spouse shares with issue or parents. In Alabama and Utah, the spouse receives the first $50,000, plus one-half the remainder of the estate if sharing with issue, but receives the first $100,000 plus one-half the remainder if sharing with parents. In Connecticut, the spouse receives the first $50,000 plus one-half of the estate if sharing with issue, but receives the first $50,000 plus three-fourths of the estate if sharing with parents. All four states also have statutes providing that, if one or more of the surviving issue are not issue of the surviving spouse, the spouse takes one-half and the issue take the other half. In New York, the spouse receives the first $4,000 plus one-half the remainder of the estate if sharing with one issue, $4,000 plus one-third of the remainder of the estate if sharing with more than one issue, and $25,000 plus one-half the remainder of the estate if sharing with one or both parents.

states in this group—Hawaii and Indiana—the spouse inherits only a fixed share in conjunction with either the issue or parents.96

3. States in which spouse shares with surviving issue, parents, or brothers and sisters of decedent

The last major group includes ten states and the District of Columbia.97 These states give the surviving spouse the entire estate only if there are no surviving issue, no surviving parents, and no surviving brothers and sisters of the decedent. There are two basic subcategories in this group. In five states—South Dakota, Texas, Vermont, Washington, and Wyoming—the spouse receives a larger fixed share when sharing with parents or brothers and sisters than when sharing with issue.98 In the other five

and a life estate in the real property, whether the spouse shares with issue or parents. (The fixed amount is omitted if one or more of the issue are not issue of the surviving spouse.) North Carolina gives the spouse the first $15,000 plus a child's share of the remainder of personal property or one-third, whichever is greater, and an identical share of real property. If the spouse is sharing with parents, the spouse receives the first $25,000 plus one-half the remainder of personal and real property.

96. HAWAII REV. STAT. § 560:2-102 (Supp. 1982); IND. CODE ANN. § 29-1-2-1 (Burns 1972). Hawaii gives the spouse one-half of the estate whether sharing with issue or with parents. In Indiana, a spouse sharing with issue receives an issue's share or one-third, whichever is greater. If any of the issue are not issue of the surviving spouse, then the spouse's share in the real estate is only a life estate in one-third. If the spouse shares the estate with parents, then the spouse receives three-fourths of the estate.


98. S.D. CODIFIED LAWS ANN. §§ 29-1-5, -6 (1976); TEX. PROB. CODE ANN. § 38 (Vernon 1980); VT. STAT. ANN. tit. 14, §§ 461, 474, 551 (1974); WASH. REV. CODE ANN. § 11.04.015 (Supp. 1983); Wyo. STAT. § 2-4-101 (1980). South Dakota, Vermont, and Wyoming give the spouse only a fixed share when sharing with issue, but when sharing with parents or brothers and sisters, the spouse also receives a fixed sum. South Dakota gives the spouse one-third or an issue's share, whichever is greater when the issue survive. When sharing with parents or brothers and sisters, the spouse receives the first $100,000 plus one-half the balance of the estate. Vermont gives the spouse an elective share of one-third of the value of all the real estate of which the decedent died seised (one-half when sharing with only one of the surviving spouse's issue). When sharing with parents or brothers and sisters, the spouse receives the first $25,000 plus one-half the balance of the estate. Wyoming gives the spouse the first $20,000 plus three-fourths of the balance of the estate when sharing with parents or brothers and sisters. The spouse receives only
states—California, Kentucky, Michigan, Nevada, and Oklahoma—and in the District of Columbia the spouse receives the same share regardless of the existence of any other class inheriting in conjunction with the spouse.

4. Extended sharing with spouse

In five other states—Iowa, Louisiana, Massachusetts, Rhode Island, and South Carolina—the pattern of intestate succession does not fit into any of the three preceding groups. In each of these states except Louisiana, a spouse may be required to share the intestate estate with uncles or aunts, grandparents, great-grandparents, great-aunts and great-uncles, or even the “lineal ancestors” or “surviving kindred” of the decedent. In Louisiana, the spouse takes only if there are no descendants, parents, or brothers or sisters (or their descendants).

99. CAL. PROB. CODE §§ 221, 223 (West 1956); KY. REV. STAT. ANN. § 392.020 (Baldwin 1978); MICH COMP. LAWS ANN. § 700.105 (West 1980); NEV. REV. STAT. §§ 134.040, .050 (1981); OKLA. STAT. ANN. tit. 84, § 213 (West 1970); D.C. CODE ANN. §§ 19-303, -304 (1981). Kentucky gives the spouse a fixed dower/curtesy share. California, Michigan, Nevada, and Oklahoma each give the spouse one-third or an issue’s share, whichever is greater, when sharing with issue, and one-half the estate when sharing with parents or brothers and sisters. Texas gives the spouse one-third of the personal estate and a one-third life estate in real property when sharing with issue, and all the personal property and one-half the real property in fee simple when sharing with parents or brothers and sisters.

100. In South Carolina, the spouse shares the estate either with issue (one-third or an issue’s share, whichever is greater), with parents or brothers and sisters (one-half the estate), or with lineal ancestors (one-half the estate). S.C. CODE ANN. § 21-3-20 (Law. Co-op. 1976). Massachusetts gives the spouse one-half the estate when sharing with issue, and the first $50,000 plus one-half the remainder of the estate when sharing with surviving kindred. MASS. GEN. LAWS ANN. ch. 190, § 1 (West Supp. 1983). Rhode Island gives the surviving spouse a dower/curtesy share of personal property and a life estate in real property. The remainder interest in the real property, and a portion of any remaining personal property, then go to the first surviving class of heirs from the following list: issue, parents, brothers and sisters, grandparents, uncles and aunts, great-grandparents, great-uncles and great-aunts, and nearest lineal ancestors. R.I. GEN. LAWS §§ 33-1-1 to -2-10 (1969). Iowa gives the spouse $50,000 or one-third of the estate, whichever is greater, if there are issue and $50,000 plus one-half if there are no issue. IOWA CODE ANN. §§ 633.211–212 (West 1964 & Supp. 1983).

B. Sharing Among Classes of Heirs Other than Surviving Spouse

Only nine states—Georgia, Illinois, Indiana, Louisiana, Mississippi, Missouri, South Carolina, Texas, and Wyoming—require sharing among classes of heirs when no spouse survives the decedent. The remaining forty-one states and the District of Columbia do not require sharing among classes in the absence of a surviving spouse. Rather, the estate is distributed to the class of heirs with the greatest statutory priority, beginning with issue of the decedent, to the exclusion of all other classes of heirs. Even in the nine states that provide for sharing among classes in the absence of a surviving spouse, the surviving issue of the decedent take the entire estate. Sharing among classes occurs only among the parents and siblings of the decedent when neither issue nor spouse survive. The respective shares of the siblings and parents vary according to individual state law.

The preceding discussion indicates the very limited use American states make of fixed share distributions and sharing among different classes of heirs. The following section of this article discusses the problems that arise when joint sharing is incorporated into a scheme of intestate succession and delineates some of the techniques suggested by the Islamic system for dealing with these problems. However, because of differences between American and Islamic history and social circumstances, many of the substantive aspects of the Islamic system are inappropriate for transfer to the American system. Nevertheless, the experience of the Islamic system in dealing with the problems of


103. In Georgia, Mississippi, Missouri, South Carolina, and Wyoming, the father and mother share equally with brothers and sisters in the estate. In Mississippi, Missouri, and Wyoming, if the parents and siblings do not survive, the grandparents and uncles and aunts share equally. In Indiana, the father and mother share equally with brothers and sisters, except that a parent takes no less than one-fourth of the estate. In Louisiana, brothers and sisters take subject to a usufruct in favor of the parents. In Texas, the father and mother receive equal portions in the whole estate, but a sole surviving parent takes one-half and the other half goes to the brothers and sisters. In Illinois, the father and mother share equally with brothers and sisters, but a sole surviving parent takes a double portion.
fixed shares may provide some insight into how we can incorporate such a scheme into our own system.

IV. TECHNIQUES

In American law there is generally an order of exclusive priority by which heirs take the estate of the decedent: (1) the spouse, (2) the decedent's issue, (3) the decedent's parents, (4) the decedent's brothers and sisters, and (5) others. At present the American scheme incorporates a system of fixed shares almost exclusively between the spouse and children. The ABA study suggests that the distributive preferences of the testator would best be served by also permitting the following heirs to inherit with each other: the spouse with the mother, the spouse with the issue, the parent(s) with the siblings, and the son with the issue of other, deceased sons. However, much work remains to be done in this area. The ABA study does not present results concerning the sharing of the inheritance between the following heirs who do inherit together in the Islamic scheme: parents with children, siblings with children, grandparents with children, the spouse with grandchildren, the spouse with grandparents, the spouse with siblings, grandchildren with parents, grandchildren with grandparents, grandparents with siblings, parents with grandparents, and grandparents with siblings. Furthermore, this list mentions only combinations of two different heirs and does not refer to combinations of three or more heirs who might inherit together.

Jurisdictions seeking to reform their intestate succession laws to provide a larger group of heirs who share concurrently in an inheritance will face two major problems: (1) the fear of disturbing a time proven system that has provided a simple and satisfactory method of distributing an intestate decedent's estate; and (2) the difficulties of apportioning the estate among members of various classes of heirs. The techniques used in the Islamic law of inheritance may be helpful in dealing with both of these problems.

A. Reform of a Time Proven Scheme Through Amendment

One problem that hinders reform of intestate succession

104. See supra note 85.
105. See generally Fellows, Simon & Rau, supra note 2.
106. See generally supra Table 1, pp. 274-78.
laws is the uncertainty concerning the changes to be made and the fear of disturbing a system having the advantages of a simple scheme and a long history. This fear might be mitigated by dismissing the idea of reform in favor of the idea of amendment. The scheme of intestate succession among the pre-Islamic tribes favored the Agnates’ inheritance in a simple order of exclusive priority. Later, Islamic law amended this scheme to include fixed shares for certain designated individuals. The system of fixed shares, promulgated initially through three verses in the Qur'an, was simply grafted into the Agnatic succession scheme. As a result, it was possible to make certain changes in Islamic inheritance law without reconsidering the whole scheme of intestate succession.

If the goal were to further the usual intent of the testator and allow certain heirs to inherit with others under American intestate laws, a scheme of fixed shares that more closely reflected the testator’s intent could be adopted by way of amendment to existing statutes without destroying the existing scheme of intestate succession.

The uncertainty concerning the changes that should be made will remain until further surveys such as those contained in the ABA study have been conducted. The ABA study was not meant to be complete. However, as the need for certain changes becomes apparent, it should be possible to implement them through successive amendments to the intestate succession laws without waiting for a total picture of sweeping reform. Gradual change in this matter will allow greater flexibility for experimentation and should diminish the problem of uncertainty.

B. Apportionment Through Designated Fixed Shares

Some of the problems in apportioning an estate among various classes of heirs include: (1) how a fixed share will be designated for a specific heir; (2) how the proportionate share of each class of inheriting heirs will be determined; (3) what adjustments will be made when the total of the fixed shares is either greater or less than unity; and (4) how an inheritance will be apportioned when only remote heirs survive the decedent.

Islamic law has developed a systematic method of answering or dealing with each of these problems. This method provides tested solutions that draftsmen of intestate laws may wish to consider in adopting inheritance reforms.
1. Designation of fixed shares

Once the combination of heirs who will inherit together has been determined, Islamic law provides several different ways in which a fixed share may be designated for a specific heir:

(1) A fixed share may be designated only if certain persons survive the decedent with the fixed sharer. For example, the husband and wife in the Islamic system receive a designated share of one-fourth and one-eighth respectively if they survive with an agnatic descendant.\(^\text{107}\) Likewise, the mother receives a fixed share of one-sixth if she survives with an agnatic descendant,\(^\text{108}\) and the father receives a fixed share of one-sixth if he survives with a male agnatic descendant.\(^\text{109}\)

(2) A fixed share may be designated only if certain persons survive the decedent and other persons do not. For example, in the Islamic system, the mother surviving with two or more brothers or sisters but without an agnatic descendant receives a fixed share of one-sixth.\(^\text{110}\) The consanguine sister who survives with one germane sister but without an agnatic descendant or a male agnatic ascendant or a germane brother or a consanguine brother receives a fixed share of one-sixth.\(^\text{111}\) An agnatic grandfather who survives with a male agnatic descendant but without a father or a nearer agnatic grandfather receives a fixed share of one-sixth.\(^\text{112}\) An agnatic granddaughter who survives with a higher female agnatic descendant but without a higher or an equal male agnatic descendant receives a fixed share of one-sixth.\(^\text{113}\)

(3) It is also possible for a fixed share to be designated only if certain persons do not survive the decedent with the fixed sharer. For example, in the Islamic system, the husband and wife are entitled to receive respective shares of one-half and one-fourth only if they survive the decedent without an agnatic descendant.\(^\text{114}\) A uterine brother or sister is entitled to a fixed share of one-sixth if he or she survives the decedent without an

\(^{107}\) See supra Table 1, lines 1 & 3, p. 274.
\(^{108}\) See supra Table 1, line 7, p. 275.
\(^{109}\) See supra Table 1, line 11, p. 275.
\(^{110}\) See supra Table 1, line 8, p. 275.
\(^{111}\) See supra Table 1, line 22, p. 276.
\(^{112}\) See supra Table 1, line 25, p. 277.
\(^{113}\) See supra Table 1, line 32, p. 278.
\(^{114}\) See supra Table 1, lines 2 & 4, p. 274.
Agnatic descendant or a male agnatic ascendant. A mother who survives without an agnatic descendant or two or more brothers or sisters or a father is entitled to a fixed share of one-third. A daughter who survives without a son is entitled to a fixed share of one-half. Likewise, a germane sister who survives without an agnatic descendant or a germane brother or a male agnatic ascendant is entitled to a fixed share of one-half. A consanguine sister is entitled to the same share in similar, although not identical, circumstances. Other heirs who fall within this category are the grandmother and the agnatic granddaughter.

These three methods of determining the designated share for a specified heir under Islamic law should be of particular concern to those seeking intestate law reform. These methods require critical focus on whether an heir should always inherit the same fixed share or whether the presence or absence of other objects of the intestate's bounty should affect the fixed share of any or all other heirs. Although the fixed shares under the Islamic system may not prove workable in modern American society, they nevertheless may serve as a model upon which the framework of American reform may be based.

2. Allocating shares among classes

The fixed share described in Islamic law applies to a class of heirs and requires that the proportion of the estate which that class receives be fixed regardless of whether another class of heirs is added to or dropped from the list of sharers.

The ABA study indicates that following the Islamic concept of allocating a fixed portion to each class would produce desirable results for American jurisdictions. If the decedent leaves a father, mother, and brother and sister, the ABA study concluded that preferences for distribution among the surviving father, mother, and brother and sister of the decedent was 2.5-2-2. Does this mean that the father should always inherit 5/4 of the

115. See supra Table 1, line 6, p. 274.
116. See supra Table 1, line 10, p. 275.
117. See supra Table 1, line 15, p. 275.
118. See supra Table 1, line 18, p. 276.
119. See supra Table 1, line 23, p. 277.
120. See supra Table 1, line 29, p. 278.
121. See supra Table 1, line 35, p. 278.
122. See supra text accompanying note 5.
siblings' share in order to reflect distributive preferences? Suppose the decedent is survived only by the father and the brother and sister. This hypothesized set of survivors was presented to the respondents in the telephone survey of the ABA study. A weighted average of the patterns for these three relatives inheriting without the mother indicates that the distributive preferences would still be 2.5-2. 123

However, what would happen if there were only one brother surviving with the father, or five brothers, or even fifteen brothers? The fixed proportion allocated to the class of siblings ultimately would require that the absolute share of each sibling decrease as the number of siblings increase. The problem is not solved by allocating a fixed proportion to each heir, rather than to each class, because ultimately the father's absolute share would become an insignificant amount in combination with an increasing number of shares to brothers and sisters. One solution to this problem would be to vary the fixed share given to a class depending on the number of persons in the class. Islamic law uses this approach in the case of sisters, daughters, and granddaughters inheriting in conjunction with other heirs. A sister, daughter, or granddaughter will ordinarily be entitled to inherit one-half, but two or more sisters, daughters, or granddaughters would collectively inherit two-thirds of the estate. 124

123. The distribution patterns found in the study were as follows:

<table>
<thead>
<tr>
<th>Distribution Pattern by Percentage of Estate to:</th>
<th>Percent of Respondents in Pattern</th>
<th>No. of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Father  Brother  Sister</td>
<td></td>
<td></td>
</tr>
<tr>
<td>100 0 0 29.2 219</td>
<td></td>
<td></td>
</tr>
<tr>
<td>50 25 25 15.4 115</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33 33 33 36.4 273</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0 50 50 7.6 57</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>11.3</td>
<td>85</td>
</tr>
<tr>
<td>Total</td>
<td>99.9</td>
<td>749</td>
</tr>
</tbody>
</table>

*1 missing case.

Fellows, Simon & Rau, supra note 2, at 346. Weighing each pattern by the percentage of respondents in the pattern produces a weighted average distribution pattern as follows:

<table>
<thead>
<tr>
<th>Father</th>
<th>Brother</th>
<th>Sister</th>
</tr>
</thead>
<tbody>
<tr>
<td>49.033</td>
<td>19.783</td>
<td>19.783</td>
</tr>
</tbody>
</table>

124. See supra Table 1, lines 15, 18, 23, 35, pp. 275-78.
Distributive preferences in the United States might be analyzed to determine not only if siblings should inherit with parents, but also how much the proportionate share of siblings should be increased when there is an increase in surviving membership of that class. It may be determined that two siblings should take a larger share than one and ten siblings should take a larger share than two. A maximum fixed share should also be contemplated in order to avoid minimizing the shares of heirs in other classes.

3. Adjustment to fixed shares to provide for total distribution

An additional problem that has not confronted American intestate succession systems is designating certain fixed shares to individuals and finding that the total of these shares in a particular case adds to greater than or less than unity. At present, a spouse is entitled to inherit a designated share with surviving issue or, in some states, with surviving parents or surviving siblings. The spouse is given a fixed share and the remainder is divided among the class that inherits with the spouse. There are some states that alter the proportion of the estate going to the spouse depending upon the number of issue surviving. However, there is never a problem of the shares totalling to other than unity because the shares are specified for each combination.

In an intestate scheme which includes several combinations of heirs inheriting in conjunction with one another, the specification of shares for each combination might well become unwieldy. The Islamic solution to this problem has been to designate fixed shares for joint sharers with and without certain other persons surviving the decedent but not for every combination of heirs. When these fixed shares do not add to unity, the shares are proportionately increased or decreased until unity results. In Islamic law this process is called ‘awl (decrease) and radd (increase).

Care should be taken in constructing a scheme of fixed shares to minimize the possibility of a situation in which the proportionate decrease of fixed shares may be necessary to bring the total to unity. When fixed shares are grafted upon an already existing system in which heirs inherit in an order of exclusive priority, the class that would otherwise inherit the whole estate will usually take as residuaries. A system of fixed shares that is too generous in shares allocated to the sharing class may
totally exclude or drastically reduce the share of a residuary who once had an exclusive right to the inheritance.

One way in which the Islamic scheme protects the interest of the residuary is to include him in the class that receives a fixed share. In the case of the father who inherits with a female agnatic descendant but without a male, agnatic descendant, the father is entitled to a fixed share of one-sixth plus any remaining residue. If the father survives the decedent with two daughters and the husband of the decedent, the two daughters would be entitled to a two-thirds share (8/12), the husband would be entitled to a one-fourth share (3/12), and the father would be left with the remaining residue of one-twelfth. However, because the father is entitled to a one-sixth fixed share plus any remaining residue, he is entitled to a minimum share of one-sixth (2/12). Through the process of radd, the two daughters are then entitled to split an 8/13 share, the husband is entitled to a 3/13 share, and the father is entitled to a 2/13 share.126 A similar combination of fixed share with residue is given to the agnatic grandfather when he inherits with a female agnatic descendant but without a father or a nearer agnatic grandfather or a male agnatic descendant.126

Islamic law further protects members of the residuary class by varying the fixed share of one class of heirs as the class of residuary heirs increases in number. In the Islamic system the mother who survives the decedent without an agnatic descendant or a father is entitled to a fixed share of one-third if she survives with one brother of the decedent, but she is entitled to a fixed share of only one-sixth if she survives with two or more brothers of the decedent.127 This variation in the fixed share of the mother permits the brothers to have greater shares as their number increases from one to two.

4. Apportionment of the estate among remote heirs

As the heirs designated to take from the decedent become further removed and less important as objects of the decedent's bounty, distributive preferences may indicate that they be totally excluded from the inheritance by the survival of any heir existing in a closer degree to the decedent. There is no reason to

125. See supra Table 1, line 12, p. 275.
126. See supra Table 1, line 26, p. 277.
127. See supra Table 1, lines 8 & 10, p. 275.
distinguish this set of heirs from those who inherit presently in classes according to an order of exclusive priority, except insofar as the fixed shares of certain heirs are grafted upon the closer set of heirs and not those further removed. If there are no heirs who inherit as residuaries in the first set, it may be determined that the testator's distributive preferences are to give the entire estate to the fixed sharers and to increase their shares proportionately if they do not total to unity when first determined. For simplicity of presentation in an intestate succession law, a division could be made between the primary heirs who inherit with fixed sharers and the secondary heirs who inherit only if there are no primary heirs or fixed sharers. This distinction has been made in the Islamic system between the Agnates and the Blood Relatives.

Most American states do not provide for the inheritance by heirs beyond a certain degree removed from the decedent. There is an interest in limiting the number of potential takers in order to avoid the “laughing heir” (one who is so loosely linked to his benefactor as to suffer no sense of bereavement at his loss). On the other hand, a laughing heir may be preferred to the state taking by escheat.

If a preference is found to give to the secondary heirs, it may be difficult to determine the distributive preferences of the testator concerning the inheritance of each of those relatives. With the assumption that the testator would prefer a distribution pattern analogous to that of the distribution to the first two classes of heirs, Islamic law provides two different methods for implementing such a preference: *tanzil* and *qaraba*. Either of these methods could be adapted to meet the needs of American intestate reform.

According to the doctrine of *tanzil*, each secondary heir is put in the position of one of the primary heirs with whom he is connected. The connection with the primary heir is determined in a particular way, and the right of each heir to inherit is determined initially by the proximity of his relationship to the primary heir he represents. If he is entitled to inherit, he will take the share which would have devolved on the primary heir in conjunction with the other primary heirs represented. *Tanzil* recognizes that the testator may want to benefit the nearest relative

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to a deceased relative of the first two classes in the same way that he would have benefitted the latter. Therefore, each Blood Relative stands in the shoes of the ordinary heir with whom he is connected.

According to the doctrine of qaraba, each secondary heir is considered in his direct relationship to the decedent. Mutually exclusive classes of heirs are determined, and within the class that is to inherit, relatives who are nearer in degree to the decedent exclude the more remote. When the relatives are all in equal degree to the decedent, the relatives who are closest in degree to primary heirs may exclude others. This latter doctrine provides for classes of heirs that resemble the mutually exclusive categories of the American system, but within the class that inherits, the heirs are determined by degree of relationship.

V. Conclusion

The problems accompanying the incorporation of fixed shares in an intestate succession law are manifold. The remarks made here only begin to touch on them. I hope, however, that this presentation of the manner in which the Islamic system has already dealt with problem areas will help to illuminate solutions to some of the obstacles that accompany intestate law reform. I also hope that the detailed discussion of the American system will indicate the severe lack of experimentation in the several states for intestate succession reform. The ABA study indicates possible areas in which substantive reform is needed. This article's comparative analysis suggests techniques for implementing potential reforms. Further study in both areas is needed, but it rests with the states to provide a forum for the testing of such reforms.