ity of Madīnan ^{c}*amal* but that Mālik, in his letter to al-Laith, does not concede to the validity of the ^{c}*amal* of regions outside Madīnah which were settled by the Companions during the days of the early caliphs.[1]

There is general agreement in modern literature in Western languages, as pointed out earlier, that Madīnan ^{c}*amal* constituted Mālik's most authoritative legal argument, although Goldziher, Schacht, and others noted that Mālik's legal reasoning had two fundamental components: ^{c}*amal* and *ra'y*.[2] I will attempt to analyze Mālik's conceptualization and use of ^{c}*amal* in greater detail in this chapter. As mentioned elsewhere, Mālik's use of *ra'y* can also be approached more comprehensively when analyzed in terms of the Mālikī conceptions of *qiyās*, *sadd adh-dharā'i^{c}*, *istiḥsān*, and *al-maṣāliḥ al-mursalah*, of which I have given a prefatory treatment.[3] Nevertheless, I believe that this identification of ^{c}*amal* and *ra'y* as the two most fundamental components of Mālik's legal reasoning is basically sound. For, although Mālik subscribes to textual sources of law like the Qur'ān, *musnad* and *mursal* *ḥadīth*, and *āthār*, these sources are, as it were, dependent or ancillary sources in that they are evaluated against the semantic context of ^{c}*amal*.[4] Mālik's conception of '*ijmā^{c}*, which also

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[1]See above, pp. 313-314. [2]See above, pp. 302-304.

[3]See above, pp. 209-279.

[4]For treatment of these textual sources, see above, pp. 146-194.

constitutes an important source of law for him, is that of Madīnan local consensus, which is such a distinctive part of his terminology in the _Muwaṭṭa'_. Madīnan local consensus or _ijtimā_[c] is always part of Madīnan [c]_amal_, although--as is clear from analysis of the _Muwaṭṭa'_--there were also types of Madīnan [c]_amal_ which were not supported by Madīnan local consensus.[1]

As suggested before, [c]_amal_ and _ra'y_ have different functions in Mālik's legal reasoning. Mālik uses _ra'y_, for example, when he reasons directly or by analogy from the well-established legal precepts of the Madīnan school. The validity, content, scope and purpose of those precepts, however, are set forth in the _Muwaṭṭa'_ and elsewhere on the basis of the non-textual source of Madīnan [c]_amal_. In such cases, therefore, [c]_amal_ is the referent of Mālik's _ra'y_. Similarly, principles like _istiḥsān_ and _sadd adh-dharā'i_[c], which draw exceptions to general precepts because of special circumstances, imply that the ultimate purposes of such general precepts have been understood; these legal principles mark off, as it were, the intended scope of those general precepts. Here again, it is by reference to the [c]_amal_ of Madīnah that Mālik determines what the legal intent is behind the general precepts of the Madīnan school. Occasionally, however, Mālik uses _ra'y_ not merely as a vehicle for doing _ijtihād_ in applying the law but for determining which Madīnan precepts he regards to be

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[1]See below, pp. 427-431.

preferable in those matters regarding which there have been differences of opinion among the Madīnan fuqahā', as, for example, in some of the AN [al-'amr ᶜindanā] precepts.[1]

The Authority of Madīnan ᶜAmal for Mālik

There can be little doubt that Mālik regarded Madīnan ᶜamal to be authoritative for himself. That much is indicated by his extensive reliance upon it. Another question which arises, however, is that of to what extent Mālik regarded Madīnan ᶜamal to be authoritative for others, such as, for example, non-Madīnans, and to what extent he regarded it as binding upon them to follow the ᶜamal of Madīnah instead of other contrary sources of law.

ᶜAlāl al-Fāsī has suggested that Mālik looked upon the ᶜamal of Madīnah as a sure criterion to follow in those matters of law upon which there had been differences of opinion among the fuqahā'.[2] This hypothesis appears to be supported by my analysis of Mālik's terminology in the Muwaṭṭa', which shows that Mālik tended to cite his terms in matters regarding which there had been significant differences of opinion among the fuqahā'. In the majority of cases, Mālik cites these terms in matters upon which the Madīnans and the Kūfans have disagreed, although in a number of instances the

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[1]See above, pp. 209-279, and below, pp. 731-760.

[2]See below, pp. 534-535.

disagreements come instead from prominent Syrian, Makkan, Yamanī, and Egyptian fuqahā'.[1]

Mālik's reliance upon Madīnan ᶜamal in matters upon which there had been disagreements among the fuqahā' is a clear indication of how authoritative Mālik must have regarded Madīnan ᶜamal to be. For it follows that if Mālik regarded the ᶜamal of Madīnah to be authoritative in matters upon which there had been disagreements, he must have regarded it to be a fundamental reference in all matters of law, since there would be no question about the validity of Madīnan ᶜamal in matters of law upon which there had been general agreement.

Mālik's conception of the authoritativeness of Madīnan ᶜamal and his belief that it took precedence over the contrary ᶜamal of other regions which were settled by the Companions during the days of the early caliphate is unmistakably clear in Mālik's short letter to al-Laith ibn Saᶜd. Mālik describes Madīnan ᶜamal as that criterion which is sure to bring one salvation and success [an-najāh], if one adheres to it, and he warns al-Laith that he should fear God because of having departed from it in some matters.[2] One cannot but note how different Mālik is from ash-Shāfiᶜī in this regard. In championing the authority of isolated ḥadīth as an independent, textual source of Islamic law, ash-Shāfiᶜī acknowledges that

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[1]See below, pp. 530-538.

[2]See above, p. 315.

isolated ḥadīth often do not produce definitive knowledge [ᶜilm al-'iḥāṭah]. But ash-Shāfiᶜī reasons in a manner which is almost the opposite of Mālik's reasoning that following isolated ḥadīth in the absence of stronger and more explicit textual sources of law is essentially a religious duty and part of man's obedience to God. To reach a legal decision on the basis of something other than an explicit legal text or analogical reasoning based on a text, ash-Shāfiᶜī contends, is much closer to sinfulness ["'aqrab 'ilā 'l-'ithm"] than erring on the basis of following conjectural texts.[1] Mālik has argued to al-Laith in contrast, however, that one is more sure of winning the favor of God by adhering to the ᶜamal of Madīnah.

Mālik emphasizes that all people are dependent [tabᶜ] upon the people of Madīnah in matters of religious knowledge by virtue of the unique relationship of the Madīnans with the Prophet and the extent to which they adhered to his teachings. Mālik insists, furthermore, that the cumulative legacy of the people of Madīnah is one that cannot be claimed by the residents of any other city, and he concludes in his letter to al-Laith:

> Whenever a matter [of Islamic law] is predominant [ẓāhir] in Madīnah and followed in the ᶜamal, I do not believe that anyone has the prerogative to go against it on the basis of the limited part of this same legacy which they possess, this legacy which none may take for

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[1]See above, pp. 219-220.

> himself or lay claim to. If the inhabitants of the various regions [of the Islamic empire] ['ahl al-'amṣār] should begin to say, "But this is the ᶜamal of our city" or "This is what those who preceded us had always been doing", they would not in doing that be following the surest and most reliable course, nor would they be doing that which is permissible for them.[1]

As I have pointed out, the distinctive point of difference between the letters of Mālik and al-Laith ibn Saᶜd is that al-Laith, while acknowledging the priority of Madīnan ᶜamal and local consensus over the ᶜamal of other regions, argues that those types of ᶜamal which were instituted by the Companions in Syria, Iraq, and Egypt during the days of the early caliphate are also legitimate. He contends that no one has the right to alter them today and holds that it is legitimate for him to disagree with Madīnan ᶜamal and to follow the contrary ᶜamal of other regions in those matters regarding which the prominent Madīnan fuqahā' have themselves disagreed.[2]

Since we do not know what Mālik's response to al-Laith's letter was, it is difficult to determine whether or not Mālik continued to adhere to the position he is reported to have set forth in his letter. Nevertheless, if the reports are authentic that the ᶜAbbāsid caliph al-Manṣūr offered to make Mālik's Muwaṭṭa' the standard law code of his empire and force the people of all regions to follow it, they might indicate that Mālik came to hold a position much closer to that of

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[1]See above, pp. 315-318. [2]See above, pp. 322-326.

al-Laith ibn Saᶜd.[1] According to these reports, Mālik refused al-Manṣūr's request. Some indicate that Mālik's main consideration was that of maṣlaḥah and that Mālik held it would be too difficult to force the people of different regions to give up practices which they believed to be correct and which were supported by the ḥadīth and legal opinions that had reached them. According to other reports, Mālik is said to have held--almost identically to al-Laith ibn Saᶜd--that the divergent practices of the Islamic regions were valid by virtue of the fact that they reflected similar divergences in the practices of the Companions, from whom the peoples of those regions had learned their practices.[2]

As I will indicate shortly, some later Mālikī legal theorists such as al-Qāḍī ᶜAbd-al-Wahhāb held that Mālik had not regarded all parts of Madīnan ᶜamal to be equally binding and that he had regarded it to be permissible that one disagree with those types of ᶜamal which were of lesser authority, such as, for example, those types of Madīnan ᶜamal which had originated with the ijtihād of the Companions.[3] However this may be, Mālik's terminology in the Muwaṭṭa' argues that Mālik did not regard all parts of Madīnan ᶜamal to be equally authoritative, even though, according to my analysis of his terminology, it does not correspond to the categories of ᶜamal set forth by al-Qāḍī ᶜAbd-al-Wahhāb, ᶜIyāḍ, and others. One

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[1] See discussion of these reports below, pp. 388-393.

[2] See above, pp. 99-100. [3] Below, pp. 409-419.

of the very distinctive features of Mālik's terminology is that it indicates which parts of Madīnan ᶜamal were supported by local consensus and which were not. Mālik's sunnah terms seem to be used exclusively for those types of ᶜamal which Mālik regards as having originated with the sunnah of the Prophet. The term AMN [al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā], while standing for Madīnan ijtimāᶜ and often including precepts that must have originated in the sunnah of the Prophet, seems always to contain at least some element of ijtihād as well. It is also quite possible, as I have indicated in my analysis of AMN that it stands for a preponderant or a majority consensus of the Madīnan fuqahā', while other terms which specifically deny any disagreement on their precepts--such as AMN-X, A-XN, S-XN, and so forth--appear to stand for total consensus of the Madīnan fuqahā'.[1] It appears to me that these distinctions in Mālik's terminology indicate that he regarded some types of Madīnan ᶜamal to be more authoritative than others. Had he regarded all types of Madīnan ᶜamal to be equally authoritative regardless of whether or not they were supported by local consensus or whether they had originated exclusively in the sunnah or contained some element of ijtihād, there would have been no need for such distinctions. Rather, Mālik would have probably deemed it sufficient to indicate that a precept was part of Madīnan ᶜamal and leave it at that.

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[1]See below, pp. 409-419.

The Authority of ^c^Amal as a Unified Legal Code

Thus, it appears difficult to form a comprehensive picture of Mālik's conception of the authoritativeness of Madīnan ^c^amal. Some evidence indicates that he regarded all aspects of Madīnan ^c^amal to be authoritative and that he disapproved strongly of people not following it. Other evidence carries the implication that Mālik drew distinctions between the authoritativeness of some ^c^amal precepts as opposed to others and, hence, that he would have objected more strongly to people failing to follow the more authoritative parts of ^c^amal than the less authoritative parts.

Before being able to determine how authoritative Mālik regarded Madīnan ^c^amal to be, one must, of course, first attempt to determine what Mālik regarded the basis of authoritativeness in legal matters to be. It seems to be generally the case that later legal theorists determined the authoritativeness of precepts of Islamic law solely in terms of their historical authenticity. They were concerned with the ultimate truth of whether or not the Prophet did lay down such a precept, what he actually meant by such and such a statement, whether a certain instance of ijtihād was more in keeping with his legislation than another, and so forth. According to my understanding of Mālik's terminology, it would appear that the distinctions he draws between various precepts

indicates his concern for such considerations of ultimate authenticity. Would concern for authenticity, however, have been the only consideration which Mālik took into account in assessing the authoritativeness of ᶜamal precepts? If, for example, two contrary opinions on an identical precept of law involved virtually the same amount of conjecture and speculation without decisive proof, would Mālik have regarded both of those opinions to be equally authoritative? In the case of an AN precept regarding the authenticity of which the Madīnan fuqahā' were divided, would Mālik have regarded the opinion supported by ᶜamal--i.e., the AN--to be no more authoritative than the opinion not supported by ᶜamal, assuming again that both opinions involved signficant amounts of conjecture?

'Abū Zahrah holds that concern for maṣlaḥah is one of the most central concerns in Mālik's legal reasoning and accounts for his positions on legal matters as diverse as his attitude toward the transmission of ḥadīth, the high regard he had for local customs, not to mention the authority he granted to the principles of istiḥsān, sadd adh-dharā'iᶜ, and al-maṣāliḥ al-mursalah.[1] If, indeed, concern for maṣlaḥah did constitute such a central part of Mālik's reasoning, might not this concern also have informed Mālik's attitude regarding

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[1]See above, pp. 60, 83, 204-206, 245-279 ; and see below, pp. 474-481, in which I consider the possible connection in Mālik's thought between concern for maṣlaḥah and the concept of normative ᶜamal.

the importance of adhering to Madīnan ᶜ*amal*--both its more conjectural and its more definitive precepts?

One hypothesis which comes to mind in this regard and which I believe deserves consideration is that Mālik may have regarded it to be important that one adhere to Madīnan ᶜ*amal* even in its more conjectural aspects because of the practical social need for an established and unified legal code. At some point in the development of a legal system codification of the law becomes necessary in order to unify it and make it well-known to the people who are going to be bound by it and to the judges and other authorities who will be responsible for administering it. Without such codification administration of the law would be very chaotic and in some situations virtually impossible. Thus, the *maṣlaḥah* of establishing such a unified code is very great, and at some time the academic debate among the *fuqahā'* over the greater authenticity of this opinion as opposed to that would have to be placed in proper perspective so that it not stand in the way of the constitution of such a code. It might also be pointed out in this regard that the need for a code would be greatest in those matters of law which were the most conjectural. For it is those matters exactly--because of the greater element of conjecture which pertains to them--about which the debates of the *fuqahā'* could go on endlessly. One can imagine the chaos which would result if laws pertaining to evidence, property rights, inheritance, marriage, and divorce were continu-

ously altered according to the vicissitudes of scholarly debate concerning them.[1]

Thus, in addition to considerations of authenticity, Mālik may also have evaluated the authority of Madīnan ᶜamal precepts in terms of the maṣlaḥah which accrued from following them systematically and the mafsadah which would result from altering them whenever the sentiment of scholarly debate tended to favor one conjectural opinion instead of another. Hence, all elements of Madīnan ᶜamal would have had an additional degree of authority in Mālik's eyes by virtue of the fact that they had come to be part of an established legal practice, which--no doubt--Mālik believed to be based on authentic foundations. For, even though the authenticity of some ᶜamal precepts was more conjectural than others--for example, those precepts upon which there was no local consensus among the Madīnan fuqahā'--they were precepts which had now come to be incorporated into the lives of the people; they had become the procedure of the judiciary, and, in Mālik's words according to the report of Ibn 'Abī 'Uwais, they were well-known among the knowledgeable and ignorant alike.[2]

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[1]It might be noted that the function of legal schools [madhāhib] in Islamic law is essentially one of setting down a normative ᶜamal in conjectural matters, because of the practical necessity that a procedure, a course of action--a "madhhab"--be set down in such areas. Similarly, the practical value of a madhhab is greatest in those areas which are the most conjectural, since there is little cause for lack of unanimity regarding more definitive issues.

[2]See below, pp. 539-543.

The need for legal codification
and Mālik's refusal of al-Manṣūr

The question which naturally arises is that, if Mālik did regard Madīnan ᶜ<u>amal</u> as being authoritative even in its conjectural areas because of the need for a codified system of law which had sufficient permanence, why would Mālik have refused al-Manṣūr's request to make the <u>Muwaṭṭa'</u> the legal standard of his empire?[1]

Of course, the first question in this regard is that of whether or not al-Manṣūr actually did make such a request and Mālik actually refused it. In light of the extensive support which the ᶜAbbāsids came to give the Ḥanafī school, for example, it is plausible that these reports about al-Manṣūr were fabricated to show that al-Manṣūr--the paternal ancestor of all the ᶜAbbāsid caliphs[2]--had himself acknowledged the superiority of the Madīnan over the Kūfan school.

Assuming, however, that these reports are authentic, I can conceive of two interpretations of them which would be in keeping with the hypothesis that Mālik was concerned with standard codification of law. The first of these is that Mālik may not have been sympathetic with the ᶜAbbāsid state. I mentioned earlier the possibility that Mālik had supported or sympathized with the anti-ᶜAbbāsid revolt of an-Nafs az-Zakīyah and that it may have been for that reason that the ᶜAbbāsids had Mālik publicly flogged and his arms stretched

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[1]See above, pp. 99-100. [2]See above, p. 51, n. 2.

until his shoulders were dislocated.[1] In such a case, Mālik may have refused al-Manṣūr's offer because he did not want to lend support to the newly established ᶜAbbāsid regime by encouraging them to adopt the Madīnan school. It may also have been the case that, at the time the offer was made, the future of the ᶜAbbāsid regime was not certain, and Mālik might have feared that the future of the Madīnan school would be endangered if the ᶜAbbāsids adopted and espoused it officially, constrained the people of other regions to adhere to it--which is according to the reports what al-Manṣūr had in mind--and then were thrown out of power by another change in events.

One can also deduce from these reports that Mālik felt that standardized codes of legal practice were necessary at the local and regional levels but need not be insisted upon at the national level throughout the empire. Mālik is reported to have observed that there was no need for al-Manṣūr to constrain the people to follow one universal code because Mālik's school had come to predominate in the Ḥijāz and the Muslim West, al-Laith ibn Saᶜd's in Egypt, al-'Awzāᶜī's in Syria, and so forth. Thus, Mālik apparently held that there had come to be sufficient uniformity of ᶜ<u>amal</u> at the regional level and that it would be inadvisable to constrain the inhabitants of those regions to follow another code instead because of the intensity with which they adhered to their

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[1]See above, pp. 121-123.

local practices and regarded them to be authentic.

Mālik's Conceptualization of the Madīnan Community

Mālik's letter to al-Laith ibn Sacd, as already mentioned, sets forth very clearly his conception of the Madīnan community and his belief that all other communities were dependent [tabc] upon them in matters of religious knowledge, a view which al-Laith is also in general agreement with. Mālik regards the camal of the people of Madīnah to be superior to that of other regions because of the closeness of the Madīnans to the Prophet, their faithfulness in following what they learned from him, and the fact that they continued to adhere closely to the teachings and injunctions of the Prophet over the preceding three generations until the time of Mālik. He stresses the importance of the Madīnans having been the direct recipients of the Prophetic message and that they witnessed everything which transpired during the Prophet's career in their city. Similarly, Mālik believes that the Madīnan caliphs, whom he describes as the best of the 'ummah, continued to follow the sunnah of the Prophet closely. Mālik indicates, furthermore, that he regards the ijtihād of the Madīnan caliphs to have been excellent, by virtue of their extensive knowledge of the sunnah, their access to other Companions from whom they could inquire about matters of which they had no knowledge, and their recent experience [ḥadāthat cahdihim] of having been with the Prophet and having learned

Islam from him at first hand. Thus, Mālik believes that they were capable of discerning those opinions which were strongest and most worthy of being followed and made into ᶜamal. Finally, Mālik holds in this letter that the legacy of the Companions in Madīnah was passed on to the Madīnan Successors--the generation of his teachers--and that they had continued to adhere to that legacy with the same attachment and integrity.[1]

As pointed out at the beginning of this dissertation, it is not my purpose in it to determine the historical verity of Mālik's conceptualization of the Madīnan community but rather to determine what it was and, in so far as possible, how Mālik attempted to account for it. Al-Laith ibn Saᶜd, of course, is in general agreement with Mālik's conception. Mālik's contemporary 'Abū Yūsuf and his much younger contemporaries ash-Shaibānī and ash-Shāfiᶜī very clearly were not. None of them would question the excellence of the early Madīnan community. Each of them, however, doubts that there is a continuity between the ᶜamal of that early community and the ᶜamal of Madīnah in Mālik's day. They insist upon textual verification of ᶜamal and refuse to accept as valid any Madīnan claims that are unsupported by such proof. Denial of the superior position of Madīnah in religious knowledge is clear in each of their arguments, although 'Abū Yūsuf's, as has been pointed out, is directed specifically against Syrian ᶜamal, which, as I have suggested, 'Abū Yūsuf--the ᶜAb-

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[1]See above, pp. 319-321, 325.

bāsid chief qāḍī--may have desired to dislodge as a preliminary step to a general policy of instituting a more uniform ᶜamal in the ᶜAbbāsid realms in accordance with the Ḥanafī school.[1]

Ash-Shaibānī makes it quite clear that, in the absence of explicit textual support, he does not regard claims based solely on Madīnan ᶜamal to take any priority over contrary claims based on the ᶜamal of Baṣrah, Syria, or other cities:

> And how can it be permissible for the people of Madīnah to be arbitrary in this matter and select these four stipulations from [other possible] stipulations. How do you think you would be able to refute the people of Baṣrah, were they to say, "We want to adhere to two different stipulations;" or the people of Syria, were they to say, "We want three different stipulations."? Hence, it is proper that people do what is right and not be arbitrary . . . . I will not follow any opinion unless the people of Madīnah bring me a text ['athar] supporting what they say, so that I might follow that. But they have no text in this matter . . . .[2]

Ash-Shāfiᶜī, whose arguments are strikingly similar to ash-Shaibānī's, pushes the claim of arbitrariness even further in his rejection of the Mālikī reliance upon ᶜamal not only in the absence of texts but in opposition to texts. Because of their failure to follow the apparent [ẓāhir] implications of texts which they transmit and deem to be authentic, the Mālikīs, according to ash-Shāfiᶜī's view, are the most culpable of people in failing to follow the Prophet and their own Madīnan traditions. He makes the charge that they are incom-

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[1]See above, pp. 336-337. [2]See above, p. 339.

petent and should not be permitted to give legal opinions.[1]

How, then, must Mālik have accounted for his belief in the continuity of Madīnan ᶜ*amal*, by virtue of which he regarded Madīnan ᶜ*amal* to be such a fundamental non-textual source of Islamic law? There are in the *Muwaṭṭa'*, first of all, numerous instances of Mālik's indicating the source and continuity of given types of ᶜ*amal* by reference to *ḥadīth*, *āthār*, or Qur'ānic verses which contain the injunctions behind those types of ᶜ*amal* or reflect them having been put into practice in an earlier age.[2] One of the best examples of that in the instances of ᶜ*amal* precepts in the *Muwaṭṭa'* which I have studied are the precepts in conjunction with which Mālik uses the term -zĀIb ["wa hādhā 'l-'amr al-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm bi-baladinā"]. Rarely, in those examples does ᶜ*amal* provide information which is not already contained in the texts which Mālik cites in conjunction with the term. The function of the term -zĀIb seems to be in such cases that it makes explicit that the actions or injunctions in those texts are a normative part of Madīnan ᶜ*amal* and that they have always been part of Madīnan local consensus.[3]

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[1]See above, pp. 348-350.

[2]See, for example, below, pp. 560-564, 571-576, 623-626, 629-632, 656-658, 661-665, 703-723, 734-743.

[3]See below, pp. 585-596.

Of the ^{c}*amal* precepts in the *Muwaṭṭa'* which I have studied, however, the -zAIb precepts are exceptional in that so little additional information is provided from the non-textual source of ^{c}*amal*. Often when Mālik cites supporting texts in conjunction with ^{c}*amal* precepts he provides additional information from the non-textual source of ^{c}*amal* which is not contained in those texts or is indicated in them only with a degree of ambiguity. I have referred several times to the precept regarding making legal judgments on the basis of the oath of the plaintiff supported by a single witness; Mālik cites *ḥadīth* and *āthār* to support the continuity of this precept. None of these texts, however, provides such fundamental information as the limitation that this procedure is only to be applied to money matters and not cases of libel, criminal punishments, and so forth. Furthermore, none of the texts sets forth the procedure which is to be followed, all of which Mālik provides from Madīnan ^{c}*amal*.[1] Similarly, Mālik cites *ḥadīth* which report that the Prophet implemented annulment of marriage by *li^{c}ān* in the case of one of his Companions who had discovered his wife committing adultery but did not have sufficient proof to prove it, and, as mentioned, the procedure of *li^{c}ān* is also supported by Qur'ānic texts. None of these textual sources, however, provides the additional information that a couple whose marriage is annulled by *li^{c}ān* may not remarry, which Mālik provides from the source of Madīnan

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[1]See below, p. 514.

^{c}amal.[1] Mālik cites texts which report that the Prophet and his Companions performed masḥ occasionally when performing ritual ablutions. None of these texts, however, describes how masḥ was performed, which information Mālik provides from ^{c}amal.[2]

In cases such as these the function of Mālik's citing texts appears to be essentially one of indicating the source and continuity of the ^{c}amal in question. Such texts are, however, ancillaries to ^{c}amal, because ^{c}amal itself constitutes the fundamental source of information. Furthermore, it is the non-textual source of ^{c}amal which has the greater authority. For, as indicated by the quotation of Ibn al-Qāsim in the Mudawwanah, whenever there are discrepancies between the content of such texts and the content of Madīnan ^{c}amal, it is ^{c}amal which is followed. The idea of the continuity of Madīnan ^{c}amal is quite clear in Ibn al-Qāsim's statement, and he reasons that if the legal implications of such texts were not put into ^{c}amal by the Companions and, hence, were not part of the ^{c}amal of the Madīnan Successors, who received their practices from the Companions, it would not be legitimate to put them into ^{c}amal now.[3]

'Abū Yūsuf, ash-Shaibānī, and ash-Shāfi^{c}ī, as I have indicated, insist upon textual sources of law to support all

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[1]See below, p. 562. [2]See below, pp. 655-656.

[3]See above, pp. 179-180.

precepts of Madīnan ᶜamal. Nevertheless, as shown in my analysis of Mālik's terminology, there were no sound texts in either the pre- or post-Shāfiᶜī period for many of the most fundamental precepts of Madīnan ᶜamal.[1] Since Mālik could not rely in such cases upon textual ancillaries to indicate the source and continuity of Madīnan ᶜamal, on what basis would he have argued for the authenticity of such types of ᶜamal?

In addition to citing texts to indicate the source and authenticity of some types of ᶜamal, Mālik occasionally uses legal reasoning to defend or explain some ᶜamal precepts. Mālik reasons, for example, that the absence of ᶜamal restricting the disposal of properties designated by bequests is an indication that the Prophet permitted bequests to be altered after they had been made and set down in writing--which the Prophet had enjoined people to do--except in the exceptional case of tadbīr.[2] Similarly, Mālik defends an AMN precept regarding bequests to manumit jointly owned slaves by indicating that it is the necessary consequence of the laws of bequests, inheritance, and the manumission of slaves.[3]

In several examples Mālik draws analogies as a means of defending or explaining ᶜamal precepts. Mālik supports the AMN precept about the permissibility of using the hunting

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[1]See below, pp. 553, 556, 570-571, 604-605, 599-600, 606-608, 618, 622, 660, 750, 753-754; cf., 655-656.

[2]Below, pp. 705-706. [3]Below, pp. 711-713.

dogs of a Magian by reference to analogy.[1] He points out that the contract of mukātabah is not analogous to indebtedness and that those have erred who regarded it as such; he then sets forth what he believes to be the correct analogy supporting an AN precept pertaining to mukātabah.[2] Similarly, Mālik defends an AMN precept regarding the inheritance of an illegitimate son by reference to analogy.[3]

As I have indicated in my analysis of Mālik's terminology, the analogical precepts discussed above may have been the result of ijtihād, and it may be for that reason that Mālik defends them by analogy. For, if they were the results of ijtihād, they would not have been supported by explicit texts in the Qur'ān or in ḥadīth. Nevertheless, Mālik also supports precepts by means of legal reasoning which appear to be of the category of what later theorists termed "ᶜamal naqlī", types of ᶜamal that had been instituted during the Prophetic era.[4] The precept about the permissibility of altering bequests, which I referred to earlier, would be such an example. Similarly, Mālik states in his presentation of the ᶜamal regarding the custom of ᶜaqīqah that the same stipulations that pertain to sacrificial animals in ritual sacrifices, like those of pilgrimage, pertain to the animals sacrificed in ᶜaqīqah, and he indicates that ᶜaqīqah is analo-

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[1]See below, p. 693. [2]Below, p. 744. [3]Below, p. 703.
[4]See below, pp. 410-415.

gous to ritual sacrifices.[1] Similarly, Mālik explains that women who continue to bleed for excessively long periods after childbed are analogous to women who suffer from continuous bleeding in addition to normal menstrual bleeding.[2] Although Mālik cites a *ḥadīth* supporting Madīnan ᶜ*amal* regarding the amount of indemnity to be paid for backteeth which are knocked out, he also cites the analogy of Ibn ᶜAbbās whereby he sought to convince Marwān ibn al-Ḥakam that the indemnities for backteeth were indeed the same as those for frontal teeth.[3]

In most of these instances there are no directly pertinent legal texts to support the validity of ᶜ*amal*, with the possible exception of the example referred to above regarding indemnities for backteeth, which is supported by the *ẓāhir* [apparent] meaning of a *ḥadīth* Mālik cites. Although Mālik cites *ḥadīth* and *āthār* supporting the validity and continuity of the precept pertaining to making judgments on the basis of the oath of the plaintiff supported by the testimony of a single witness, Mālik defends and further explains that precept by some of the most extensive legal reasoning that he sets forth anywhere in the *Muwaṭṭa'*.[4] Similarly, although Mālik cites *ḥadīth* to indicate the origin of the controversial precept of *qasāmah* and cites the longest series of terms

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[1]See below, p. 673. [2]Below, pp.750-751.

[3]Below, p. 740. [4]See below, pp. 571-575.

in the *Muwaṭṭa'* to indicate that it is a well-established part of Madīnan ᶜ*amal*, Mālik defends the distinctively Madīnan interpretations of the precept of *qasāmah* on the basis of the principle of *maṣlaḥah*.[1]

Mālik's Conception of the Legacy of the Madīnan ᶜUlamā'

The citation of supporting texts or the use of supporting legal reasoning are, however, only ancillary supports of Madīnan ᶜ*amal* for Mālik. Madīnan ᶜ*amal* is primary, and they are secondary. Mālik does not question the validity of precepts established through Madīnan ᶜ*amal*, and I know of no example of his rejecting a precept established through Madīnan ᶜ*amal* because of a well-established contrary text or because of contrary legal reasoning. Rather Mālik appears to use texts and legal reasoning, when they corroborate ᶜ*amal*, as additional proof of the validity of an ᶜ*amal* which Mālik himself already regards as being well-established.

The validity of Madīnan ᶜ*amal* for Mālik is essentially a function of the reputation of the Madīnan community and especially that tradition of superior Madīnan ᶜ*ulamā'* from whom Mālik and his teachers received their instruction. Mālik's conception of the Madīnan community is quite clearly set forth in his letter to al-Laith ibn Saᶜd. His conception of the status of the Madīnan ᶜ*ulamā'* from whom he received

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[1]See below, pp. 717-718.

his instruction is, perhaps, even more explicit in the report attributed to Mālik and transmitted by ᶜIyāḍ from Ibn 'Abī 'Uwais. In that report, Mālik again refers to Madīnan ᶜ<u>amal</u> as "a legacy which one generation has handed down to another until our own time." It would appear from that same report, however, that in Mālik's mind the heirs and preservers of that legacy were the Madīnan ᶜ<u>ulamā</u>' who were in the tradition of his teachers. Mālik describes these ᶜ<u>ulamā</u>' as "the people of learning and excellence and the '<u>imām</u>'s whose examples are worthy of being followed from whom I received my learning," and he describes them further as those who were heedful of God. As in his letter to al-Laith ibn Saᶜd, Mālik stresses in this report the continuity of the teaching and practice of these ᶜ<u>ulamā</u>' through the generation of the Successors back to that of the Companions.[1]

It is not likely that Mālik would have regarded all of the Madīnan ᶜ<u>ulamā</u>' as heirs, guardians, and transmitters of ᶜ<u>amal</u>. On the contrary, one would expect him to have been as selective in this regard as he is reported to have been in determining which of the Madīnan ᶜ<u>ulamā</u>' he would receive his learning from. In the quotation above, Mālik speaks of "people of learning and excellence" and "'<u>imām</u>'s whose examples are worthy of being followed" from whom he had received his instruction. He probably would not have included in this

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[1]See below, p. 539.

category those people of learning in Madīnah whom Mālik is reported to have rejected as teachers because of their incompetence, their holding to heresies or heretical innovations, their lack of integrity, or their naivete and lack of good judgment despite much devotion and worship. Mālik took great pride in his having kept apart from such persons in his education, and he is reported to have described them as being persons without worth or benefit. If he regarded them as unworthy sources for transmitting _ḥadīth_ and _āthār_, which are secondary legal sources for Mālik, it is very unlikely that he would have looked to them as carriers of Madīnan ᶜ_amal_, which constituted for Mālik a primary source of law.[1]

The _āthār_ of the _Muwaṭṭa'_ give a good indication, I believe, of the calibre of Madīnan ᶜ_ulamā'_ whom Mālik looked to as the carriers of the tradition of Madīnan ᶜ_amal_. In the ᶜ_amal_ chapters which I have studied in my analysis of Mālik's terminology, for example, Mālik relies very heavily on the example and the sayings of ᶜAbd-Allāh ibn ᶜUmar as the prototype for many types of Madīnan ᶜ_amal_, and he looks to other prominent Madīnan ᶜ_ulamā'_ as well, such as the Successors ᶜUrwah ibn az-Zubair, al-Qāsim ibn Muḥammad, and his teacher Ibn Shihāb az-Zuhrī.[2]

Probably another reason why Mālik felt confident that he had learned the proper content of Madīnan ᶜ_amal_ from his

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[1]See above, pp. 72-76. [2]See below, pp. 688-689.

teachers was because of the proximity of their generation to that of the Prophet and his Companions. Mālik's primary teachers--az-Zuhrī, Rabīᶜah, Yaḥyā ibn Saᶜīd, and so forth[1]--were of the second generation of the Successors. They had received their learning primarily from older Successors--such as Saᶜīd ibn al-Musayyab, ᶜUrwah ibn az-Zubair, Sulaimān ibn Yasār, al-Qāsim ibn Muḥammad, and the other Seven Fuqahā'--and from a few of the Companions of the Prophet who had lived to old ages. Thus, the generation of Mālik's teachers was only decades removed from the period when significant numbers of both the older and younger Companions had still been alive, and they received their learning from older Successors, who had grown up and received their learning during that period. No doubt, Mālik must have regarded this 'isnād between himself, his teachers, their teachers, and the Companions to have been a reliable vehicle through which to verify the content of Madīnan ᶜamal.

One can gather from the āthār of the Muwaṭṭa' a picture of prominent Madīnan ᶜulamā' and 'imām's as transmitters and guardians of Madīnan ᶜamal in large things and small. Mālik cites an 'athar, for example, which reports that coupons [ṣukūk] were distributed among the people during the early 'Umayyad period to be redeemed for food which was scheduled to be delivered at a harbor on the Red Sea not far from Madī-

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[1]See above, pp. 62-72.

nah. The people of Madīnah, however, began to speculate on the coupons before the food was delivered. Zaid ibn Thābit[1] and another Companion of the Prophet, who is not named, are reported to have gone to Marwān ibn al-Ḥakam, who was then governor of Madīnah, and asked him if he was trying to make riba [the Islamic concept of usury] permissible by permitting the people to engage in such speculation. Marwān, according to the report, called out his guard [al-ḥaras] and sent them among the people with the order to put an end to the speculation and return the coupons to their rightful owners.[2]

I have pointed out in my analysis of the ᶜamal chapters in the Muwaṭṭa' how ᶜAbd-Allāh ibn ᶜUmar is portrayed in some of the āthār of those chapters as a transmitter and guardian of Madīnan ᶜamal.[3] Mālik cites other āthār in the Muwaṭṭa' which portray Ibn ᶜUmar in this capacity of enjoining right and forbidding wrong, instructing the people, and insuring that they understand what the correct ᶜamal for various matters should be.[4] Similarly, Mālik transmits āthār which portray Ibn ᶜUmar's father, ᶜUmar ibn al-Khaṭṭāb, as instructing the Madīnans from the minbar [pulpit] about various aspects of ᶜamal. I have mentioned in my analysis of the terminology of the Muwaṭṭa' the example of ᶜUmar ibn al-

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[1]See above, p. 166, n. 4. [2]Muwaṭṭa', 2:641.

[3]See below, pp. 658, 688-689.

[4]See, for example, Muwaṭṭa', 1:168, 169,217.

Khaṭṭāb's teaching the Madīnans from the minbar at Friday community prayers that it is not required of them to prostrate themselves after reciting certain verses of the Qur'ān after the reading of which it is customary that one prostrate oneself.[1] Mālik transmits another 'athar according to which ᶜUmar ibn al-Khaṭṭāb, while on the minbar during Friday prayers, made an example of a latecomer to the prayer in order that the people not forget that they should come early to Friday prayers and that they should bathe themselves prior to coming.[2] According to another 'athar which Mālik transmits, ᶜUmar ibn al-Khaṭṭāb also instructed the people from the minbar on the wording of the tashahhud--an invocation which is made during the course of ṣalāh.[3]

Āthār such as these, which Mālik has transmitted in his Muwaṭṭa', give a good indication of how Mālik probably conceived of that legacy of the Madīnan ᶜulamā' which, according to the reports attributed to him, he believed had been handed down from one generation of Madīnan ᶜulamā' to another until his own time. In so far as those types of ᶜamal were concerned which were part of the customary practices of the Madīnan people or which had been instituted by the executive authority of the Madīnan judiciary, Mālik probably held that

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[1]See below, pp. 629-632, and above, pp. 194-195.

[2]Muwaṭṭa', 1:101-102. [3]Ibid., 1:90-91.

the explicit or tacit support of them by the Madīnan ᶜulamā' was sufficient indication of their validity even if the ultimate source of the ᶜamal was not certain. Mālik's assumption in such cases, I believe, would have been that the Madīnan ᶜulamā' would not have condoned such types of ᶜamal or have watched them grow up or be instituted erroneously without having made their objections to them known. Such an assumption would, of course, lend particular authority to matters supported by local consensus. As for those types of ᶜamal about which the Madīnan ᶜulamā' were divided, the ultimate validity of the ᶜamal would have been more conjectural, depending on the nature and extent of the disagreement among the ᶜulamā'. As I have suggested, it is quite possible that Mālik did not regard such types of ᶜamal to be as authoritative as those which were supported by local consensus and that, for this reason, he makes the distinction in his terminology between those types of ᶜamal upon which there had been local consensus and those upon which there had been disagreement.

The Different Categories of Madīnan ᶜAmal

Classifications of Later Theorists

In his letter to al-Laith ibn Saᶜd, Mālik identifies two sources of Madīnan ᶜamal: 1) the sunnah of the Prophet and 2) the ijtihād of those who came into authority after

the Prophet and the prominent Madīnan Companions and Successors.[1] Similarly, the important Mālikī legal theorist al-Qāḍī ᶜAbd-al-Wahhāb al-Baghdādī[2], al-Qāḍī ᶜIyāḍ, and the two Ḥanbalī legal theorists Ibn Taimīyah and his student Ibn Qayyim al-Jawzīyah divide Madīnan ᶜamal into two basic categories, those which go back to the era of the Prophet and his sunnah and those types of ᶜamal which go back to the ijtihād of Madīnans in the post-Prophetic period.

ᶜAmal derived from the sunnah

These four theorists refer to ᶜamal which goes back to the era of the Prophet as "ᶜamal naqlī"--an ᶜamal which transmits, as it were, precepts of law from the Prophet to later generations.[3] Al-Qāḍī ᶜAbd-al-Wahhāb and ᶜIyāḍ identify four sources of ᶜamal naqlī, each of which they regard as constituting part of the sunnah of the Prophet. They hold that ᶜamal naqlī originates in either 1) express statements ['aqwāl], injunctions, or directives of the Prophet, 2) examples of behavior ['afᶜāl] which the Prophet set, 3) tacit permission ['iqrār, taqrīr] which the Prophet gave to actions which transpired around him, or 4) the Prophet's tark, i.e.,

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[1]See above, pp. 319-320. Al-Laith ibn Saᶜd also indicates his awareness that some parts of Madīnan ᶜamal originated in the ijtihād of Companions and Successors; see above, pp. 323-324.

[2]For data, see above, pp. 116-117 , n. 3.

[3]ᶜIyāḍ uses the expression "al-'ijmāᶜ an-naqlī"; ᶜIyāḍ, 1:68-69.

his having intentionally omitted the requiring of certain things which would have become commonplace requirements, if he had obligated the Madīnans to do them.[1]

As examples of the first two types of ᶜamal naqlī, ᶜIyāḍ refers to the wording of the call to prayer ['adhān] and the 'iqāmah, which is given just prior to congregational prayers to indicate to the people that they should arise and prepare to pray. He also cites the ᶜamal of what times during the day the various five daily, congregational prayers are to be held, the ᶜamal of omitting the recitation of the basmalah[2] during congregational prayers, the ᶜamal of using certain traditional Madīnan weights and measures [the Madīnan ṣāᶜ and mudd] for the collection of zakāh, and the institution of waqf properties. From generation to generation, ᶜIyāḍ holds, the people of Madīnah have handed down ᶜamal in matters such as these with the same degree of certainty with which they have handed down knowledge of the site of the Prophet's grave, his mosque and minbar, and even the site of his city, and they are also, ᶜIyāḍ contends, matters that the people of Madīnah must have learned from the Prophet, even though there may not be specific texts to indicate that.[3]

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[1] ᶜIyāḍ, 1:68-69; the citations from al-Qāḍī ᶜAbd-al-Wahhāb are given in Āl Taimīyah, Al-Musawwadah, pp. 331-333.

[2] Basmalah: The Qur'ānic formulaic saying, "In the name of God, the most gracious, most merciful."

[3] ᶜIyāḍ, 1:68.

ᶜIyāḍ does not give an example of the third type of ᶜamal naqlī according to his definition, i.e., those types which go back to the tacit approval of the Prophet. Some of the ᶜamal precepts which I have analyzed in the analysis of Mālik's terminology would appear to fall in this category.[1] ᶜIyāḍ points out, however, that he regards the Prophet's tacit approval for matters of this nature to be verified by the fact that no disapprovals ['inkār] of the Madīnan ᶜulamā' have been transmitted regarding such types of ᶜamal.[2] ᶜIyāḍ's reasoning would be based on the assumption which I believe Mālik held regarding the relationship of the Madīnan ᶜulamā' to the transmission and preservation of Madīnan ᶜamal, namely, that the quality and status of the Madīnan ᶜulamā' was such that they would not have condoned such types of ᶜamal if they had not regarded them to be legitimate and had known that the Prophet had objected to them.[3] As an example of the fourth type of ᶜamal naqlī, ᶜIyāḍ cites the precept of Madīnan ᶜamal that no zakāh is collected on fruit, provender, and green vegetables, which I have included in my analysis of Mālik's sunnah terms.[4] I also encountered other ᶜamal

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[1]See below, pp. 588, 617. Also the Madīnan ᶜamal that it is permissible to make contracts of musāqāh on lands that contain some open [baiḍā'] areas and the ᶜamal precept that it is permissible to sell swords, copies of the Qur'ān, and so forth for gold or silver, although they contain certain minimal amounts of gold or silver would appear to be of this category. See below, pp. 618-622.

[2]ᶜIyāḍ, 1:68. [3]Above, pp. 408-409.

[4]ᶜIyāḍ, 1:68; see below, p. 555.

precepts in my analysis of the terminology of the Muwaṭṭa' which appear to go back to the tark of the Prophet and to be of this fourth category of ᶜamal naqlī.[1]

Ibn Qayyim defines ᶜamal naqlī quite similarly to ᶜAbd-al-Wahhāb and ᶜIyāḍ. He gives the examples of the ᶜamal precepts of waqf properties, various agricultural customs, the tradition of calling the 'adhān from high places, the ᶜamal of repeating the words of the 'adhān twice and the words of the 'iqāmah once. Ibn Qayyim also includes in the category of ᶜamal naqlī the transmitted knowledge among the Madīnans of the locations of places and the sizes of various traditional weights and measures.[2] Ibn Taimīyah's definition of ᶜamal naqlī is essentially that of ᶜAbd-al-Wahhāb and ᶜIyāḍ also. He speaks of another separate category of Madīnan ᶜamal, however, which he defines as ᶜamal regarding which there are two contrary ḥadīth or two contrary conclusions of qiyās in a given matter and Madīnan ᶜamal supports one of them and not the other. According to the definitions of ᶜAbd-al-Wahhāb and ᶜIyāḍ, however, this type of ᶜamal in the case of contrary ḥadīth would be regarded to be of the category of ᶜamal naqlī, if the ḥadīth were authentic. For in that case, the ḥadīth in conformity with Madīnan ᶜamal would be textual evidence that the ᶜamal in question went back to the era of the Prophet.[3]

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[1]See below, pp. 706-707, 736-737.

[2]Cited from 'Iᶜlām by 'Abū Zahrah, Mālik, pp. 335-336.

[3]Ibn Taimīyah, Ṣiḥḥat al-'Uṣūl, p. 27. He is of the opin-

All four of these legal theorists state that ᶜamal naqlī is an authoritative legal argument [ḥujjah].[1] Ibn Taimīyah even claims that each of the four primary sunnī 'imām's, including 'Abū Ḥanīfah, regarded this type of ᶜamal to be authoritative, which at least in the case of 'Abū Ḥanīfah appears to be clearly mistaken in light of the fact that 'Abū Ḥanīfah as well as several other prominent early fuqahā' disagree with Madīnan ᶜamal precepts which are of this category of ᶜamal naqlī.[2] ᶜIyāḍ refers to Madīnan 'ijmāᶜ which is of the category of ᶜamal naqlī as a definitively conclusive legal argument [ḥujjah qaṭᶜīyah], which takes priority over all contrary isolated legal texts or contrary types of legal reasoning. Both ᶜIyāḍ and ᶜAbd-al-Wahhāb state, furthermore, that all Mālikīs agree on the authoritativeness of such types of ᶜamal naqlī.[3] Nevertheless, there are numerous instances

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ion that ash-Shāfiᶜī followed Madīnan ᶜamal in cases in which there were two contrary ḥadīth and one was supported by Madīnan ᶜamal. Ibn Taimīyah is not sure what the position of Ibn Ḥanbal was in this matter but cites a report according to which Ibn Ḥanbal said, "If the people of Madīnah hold to the validity of a ḥadīth and have an ᶜamal in accordance with it, then it is the ultimate [al-ghāyah]." He states that Ibn Ḥanbal is also reported to have preferred to follow Madīnan fatwā's and gave them priority over the opinions of the fuqahā' of Iraq.

[1] ᶜIyāḍ, 1:68-69; Āl Taimīyah, Musawwadah, pp. 331-333; Ibn Taimīyah, Ṣiḥḥat 'Uṣūl, p. 23; Ibn Qayyim, 'Iᶜlām, cited by 'Abū Zahrah, Mālik, pp. 335-336.

[2] See, for example, below, pp. 556, 562, 565, 572-573, 586, 592; cf. 552, 558, 590, 597-598.

[3] ᶜIyāḍ, 1:68-69; Āl Taimīyah, Musawwadah, pp. 331-333.

of precepts in the Muwaṭṭa' which would be of the category of ᶜamal naqlī but which were not supported by Madīnan local consensus.[1] None of these theorists seems to take this category of ᶜamal naqlī into consideration, and, since there were prominent Madīnan fuqahā' who differed regarding the validity of such precepts, it is doubtful that Mālik would have regarded them to be as authoritative as those ᶜamal precepts which, as indicated by his terminology, were supported by Madīnan local consensus.

ᶜAmal derived from ijtihād

ᶜIyāḍ speaks of only one general category of Madīnan ᶜamal in addition to ᶜamal naqlī, namely, those types of Madīnan ᶜamal which were the result of inference [istidlāl] or ijtihād by the Madīnan fuqahā' in the post-Prophetic period. As in his treatment of ᶜamal naqlī, ᶜIyāḍ considers only those types of ᶜamal in this category that were supported by Madīnan local consensus, and he draws no distinction between types of ᶜamal which were supported by local consensus and types of ᶜamal which were not. Furthermore, ᶜIyāḍ draws no distinction between types of ᶜamal that resulted from earlier or later instances of ijtihād.[2]

Al-Qāḍī ᶜAbd-al-Wahhāb, according to the information

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[1]See, for example, below, pp. 572-573 (MdS), 665-667 (S), 669 (AN), and the following examples from the AN chapter, pp. 754-755, 734-736, 737-739, 741-742, 746-748, 749-750, 752-754.

[2]ᶜIyāḍ, 1:69-70.

cited by Ibn Taimīyah, Ibn Taimīyah, and Ibn Qayyim draw the distinction, however, between types of Madīnan ^{c}amal which resulted from ijtihād in the days of the Madīnan caliphate and ijtihād which resulted in ^{c}amal after that time. Ibn Taimīyah refers to ^{c}amal that resulted from ijtihād during the first three caliphates until the death of ^{c}Uthmān as "^{c}amal qadīm" [ancient ^{c}amal]. As mentioned earlier, Ibn Taimīyah holds that no center of Islamic learning in the early period vied with Madīnah in matters of religious learning until after the death of ^{c}Uthmān.[1] Furthermore, the Madīnan caliphate, as such, may be said to have ended with ^{c}Uthmān, since the fourth caliph, ^{c}Alī ibn 'Abī Ṭālib, moved his capital to Kūfah, although--as mentioned earlier--some modern historians have claimed that his shift in capital was only a matter of strategy.[2] Finally, Ibn Taimīyah refers to types of Madīnan ^{c}amal which resulted from ijtihād in the period after the Madīnan caliphate and in the age of the Successors as "^{c}amal muta'akhkhir" [later ^{c}amal].[3]

^{c}Iyāḍ states that most Mālikīs have held that types of Madīnan ^{c}amal which resulted from ijtihād--and, again, ^{c}Iyāḍ makes no distinction between earlier and later ijtihād--are not binding. Some of them--especially the Mālikīs of

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[1]See above, p. 52. [2]See above, p. 49.

[3]Ibn Taimīyah, Ṣiḥḥat 'Uṣūl, pp. 26-28; cf. Āl Taimīyah, Musawwadah, pp. 331-332; Ibn Qayyim, 'I^{c}lām, cited by 'Abū Zahrah, Mālik, pp. 335-336.

Baghdād--[c]Iyāḍ states, even held that types of Madīnan [c]*amal* which had resulted from *ijtihād* were not a valid basis upon which to establish the preponderance [*tarjīḥ*] of one legal opinion that had resulted from *ijtihād* over another. Other Mālikīs, [c]Iyāḍ continues, held that Madīnan local consensus which resulted from *ijtihād* was not authoritatively binding but that it was, nevertheless, a sound basis upon which to establish the preponderance of one legal opinion over another. Finally, [c]Iyāḍ states that some of the Mālikīs of the Muslim West [*al-maghrib*] have held that such types of [c]*amal* were of binding authority and that they should always take precedence over contrary isolated *ḥadīth* or contrary types of legal reasoning. Other Mālikīs, he concludes, have disagreed with them greatly on this matter.[1]

According to the information cited by Ibn Taimīyah, [c]Abd-al-Wahhāb regarded none of the instances of Madīnan [c]*amal* which resulted from *ijtihād* to be authoritative. Ibn Taimīyah adds, however, that some Mālikīs regarded the category of [c]*amal* which he defines as [c]*amal qadīm* to be a valid legal argument when supported by local consensus. In such cases, they regarded it as a legitimate type of '*ijmā*[c], although distinctive from the '*ijmā*[c] of the '*ummah* and not as authoritative.[2] According to Ibn Taimīyah, [c]Abd-al-Wahhāb held that the category of [c]*amal* which Ibn Taimīyah refers to as "[c]amal

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[1][c]Iyāḍ, 1:69-70. [2]Al Taimīyah, *Musawwadah*, pp. 331-332.

muta'akhkhir" was not regarded as authoritative by meticulous Mālikī scholars [al-muḥaqqiqīn],[1] which would imply apparently that there were those Mālikī scholars who regarded it to be authoritative but whom al-Qāḍī ᶜAbd-al-Wahhāb did not regard as being meticulous.

Both Ibn Taimīyah and Ibn Qayyim hold Madīnan ᶜamal qadīm in high regard. Ibn Qayyim holds that Madīnan ᶜamal which was instituted under the Madīnan caliphs is of the category of sunnah, and both he and Ibn Taimīyah draw a sharp distinction between ᶜamal qadīm and later ᶜamal, which Ibn Qayyim insists must not be confused with each other. Neither of them regards ᶜamal muta'akhkhir to be authoritative, and Ibn Qayyim insists that it must never be given priority over contrary isolated legal texts. It should be noted, however, that neither Ibn Taimīyah or Ibn Qayyim draws a distinction between instances of Madīnan ᶜamal qadīm or ᶜamal muta'akhkhir which were supported by Madīnan local consensus and instances of them which were not.[2]

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[1]Ibn Taimīyah, Ṣiḥḥat 'Uṣūl, pp. 27-28.

[2]Ibid; Ibn Qayyim, 'Iᶜlām, cited by 'Abū Zahrah, Mālik, pp. 335-336. Ibn Taimīyah states that ash-Shāfiᶜī, according to one transmission from him, regarded ᶜamal qadīm to be authoritative. Similarly, Ibn Taimīyah reasons that 'Aḥmad ibn Ḥanbal would have held ᶜamal qadīm to be authoritative because of the fact that he regarded the ijtihād of the first four caliphs to be authoritative. In so far as Ibn Qayyim's position is concerned, namely, that the ᶜamal of the Madīnan caliphs is of the category of sunnah, it is in keeping with the position in legal theory that the āthār and fatwā's of the Companions can be used as a source of sunnah; cf. above, pp. 161-169.

Mālik's Terminology and the Classifications of Later Theorists

The preceding classifications of Madīnan ᶜamal by later legal theorists focus primarily on the source of ᶜamal precepts in their categorization of them. They are primarily concerned with whether or not an ᶜamal precept originated in the sunnah of the Prophet or was authorized by the Prophet's tacit approval or whether it originated from the ijtihād of the Madīnan ᶜulamā' in the post-Prophetic period. Ibn Taimīyah and Ibn Qayyim, of course, also divide those types of ᶜamal which resulted from ijtihād into those which originated during the years of the Madīnan caliphate and those which originated afterward. None of these classifications, however, draws a distinction between types of Madīnan ᶜamal which were supported by Madīnan local consensus and types of Madīnan ᶜamal which were not. ᶜIyāḍ refers to each of the categories of ᶜamal which he defines as a type of Madīnan 'ijmāᶜ. Ibn Taimīyah and Ibn Qayyim, on the other hand, refer to each of the categories of Madīnan ᶜamal which they define simply as ᶜamal without specifying what the relationship of those precepts to Madīnan local consensus was. Probably, these theorists did not hold that there was any distinction between Madīnan 'ijmāᶜ and Madīnan ᶜamal.

Mālik, as I have stated earlier, indicates in his letter to al-Laith ibn Saᶜd that he recognizes two ultimate sources of Madīnan ᶜamal: the sunnah of the Prophet and the ijtihād

of Madīnans in the post-Prophetic period.[1] Furthermore, the concept of ᶜamal naqlī as set forth by later theorists is also clear at various points in the Muwaṭṭa' and in some of the reports and statements attributed to Mālik. Mālik states, for example, that the S-XN precept ["as-sunnah al-latī lā 'khtilāf fīhā ᶜindanā"] that there is no call to prayer or 'iqāmah in ᶜĪd prayers is a matter which has been part of the continuous ᶜamal of Madīnah from the time of the Prophet until the present.[2] Similarly, the concept of ᶜamal naqlī is reflected in some of Mālik's terms in the Muwaṭṭa', such as -zĀIb ["wa hādhā 'l-'amr al-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm bi-baladinā;" the people of knowledge in our city have always held to the validity of this matter][3] or Mālik's statement that a certain matter has always been part of the ᶜamal of the people.[4]

According to a report transmitted by ᶜIyāḍ, 'Abū Yūsuf, while in the retinue of the ᶜAbbāsid caliph,who was visiting Madīnah, once contended in Mālik's presence that the Madīnans transmitted no ḥadīth to support the manner in which they called the 'adhān, which differed somewhat from the Kūfan customary practice. Mālik is reported to have replied to 'Abū Yūsuf:

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[1]See above, p. 319. [2]See below, p. 660.

[3]For discussion of the -zĀIb precepts, see below, pp. 583-599.

[4]See below, pp. 618-622.

> Glory be to God! I have never seen anything more strange than this. Every day, five times a day the call to prayer is made over the heads of witnesses. [It is something] which the sons have inherited from their fathers from the time of the Messenger of God, upon whom be peace, until the present time. In such matters do you need "so and so transmitting on the authority of so and so"? On the contrary, we regard this to be sounder than *ḥadīth*.[1]

Similarly, ʿIyāḍ reports that 'Abū Yūsuf inquired about what proof the Madīnans had regarding their definition of certain traditional weights and measures. Mālik's students are reported to have produced several of the merchants of Madīnah, who brought with them the weights and measures which they had inherited from their fathers, who had inherited them from their fathers, who had been Companions of the Prophet. According to this report, Mālik is said to have told 'Abū Yūsuf that he regarded such evidence to be much stronger than *ḥadīth*.[2]

Nevertheless, although Mālik seems to have held to a concept essentially the same as what later theorists termed "ʿamal naqlī" and although he seems to have been aware that not all Madīnan *ʿamal* came from this source but that some of it came instead from *ijtihād*, the terminology which Mālik uses in the *Muwaṭṭa'* reflects concerns which are not present in

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[1] ʿIyāḍ, 1:224.

[2] Ibid. I mentioned earlier the statement attributed to Mālik's teacher Rabīʿah, which also reflects the concept of *ʿamal naqlī* and indicates Rabīʿah's strong preference of it over contrary isolated *ḥadīth*: "One thousand [transmitting] from one thousand is preferable to me than one [transmitting] from one. For 'one [transmitting] from one' would tear the *sunnah* right out of our hands." See above, p.174.

the classifications of the later theorists whom I have mentioned. Furthermore, even in terms of its concern for the source of Madīnan ᶜamal precepts, Mālik's terminology does not correspond exactly with the classifications of these theorists.

Mālik's terminology, as I have suggested in my analysis of it, is not strictly systematic. It is apparently not made up of rigorously defined terms which never overlap with each other. On the contrary, at least some of the terms which Mālik uses seem to fluctuate between assigned terminological usages and their customary semantic range. The term "'amr", for example, has a wide range of usages in Mālik's terminology. I have suggested, therefore, that it is more accurate to conceive of Mālik's terminology in the sense of its consisting of inclusive and exclusive categories of terms. That is, it consists of terms which share some common ground with each other--which constitutes the points at which these terms overlap--but which also contain certain distinctive qualities which make them exclusive and different.[1]

It must be noted to begin with that the sources of the ᶜamal precepts with which Mālik cites his terms are not always indicated clearly in the Muwaṭṭa'. This may indicate that Mālik was not greatly concerned about identifying the source of such precepts or of communicating to others what he be-

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[1]See below, pp. 523-529.

lieved the sources of them to be. In such cases one can only estimate what the source of ᶜamal was, and that estimation sometimes involves considerable speculation. Nevertheless, it appears from my analysis of Mālik's terminology, that each of the terms and expressions which I studied can include the category of ᶜamal naqlī.[1] The sunnah terms, however, seem quite consistently to exclude any category of Madīnan ᶜamal but ᶜamal naqlī and are distinctively different in that regard from terms like AMN and AN, which include elements of ijtihād as well as elements of sunnah.[2] Similarly, each of the instances of -zĀIb which I analyzed would fall in the category of ᶜamal naqlī, although there are many other -zĀIb precepts in the Muwaṭṭa' which I did not study and of which this may not be true. Most of Mālik's ᶜamal terms fall in the category of ᶜamal naqlī, and the contents of each of the ᶜamal chapters, with the possible exception of one, would fall within that category as well.[3] Another consistent and distinctive feature of Mālik's sunnah terms which I observed is that they are contrary to analogy with related precepts of law. Furthermore, differences of opinion about these sunnah precepts have resulted from the extension of those analogies to include the sunnah precepts.[4]

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[1]See below, pp. 576-578, 611-612, 678, 686, 725-727, 757-758.

[2]See below, pp. 576-578, 725-727, 757-758.

[3]Below, pp. 611-612, 678, 686.

[4]Below, pp. 581-582, 660-661, 667, 716-718.

The term AMN, on the other hand, while clearly including ^c^amal naqlī in some examples,[1] also includes types of Madīnan ^c^amal which resulted from ijtihād. Indeed, it may be argued that each example of AMN which I have analyzed, even those which clearly contain elements of ^c^amal naqlī, also contains at least some element of ijtihād, and, as I have pointed out in the analysis of Mālik's terminology, Mālik is reported to have indicated in a report attributed to him and transmitted by his nephew Ibn 'Abī 'Uwais that AMN consisted of the legal opinions of the Madīnan fuqahā'.[2] AMN, therefore, would appear to be a broadly inclusive term. I have cited examples in which it includes the scope of the sunnah term S-XN, while in those same examples S-XN appears to exclude some of the material referred to by AMN, namely, those aspects of the precepts in question which resulted from ijtihād.[3] Similarly, I have cited an example in which AMN appears to include the range of A-XN ["al-'amr al-ladhī lā 'khtilāf fīhi ^c^indanā"], while A-XN in that same example appears to exclude certain parts of the precept included in AMN.[4]

The most distinctive feature of Mālik's AMN appears to be that it indicates that the precept to which it refers is supported by Madīnan consensus [ijtimā^c^]. The question

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[1]See below, pp. 719-720. [2]Below, pp. 725-726.

[3]Below, pp. 719-720, 726-727. [4]Below, pp. 707, 727.

that arises in the case of AMN, however, is that of whether or not the *ijtimā^c* referred to by AMN is qualitatively the same as that Madīnan local consensus referred to in terms like S-XN, AMN-X, and A-XN, which explicitly indicate a total consensus of the Madīnan *fuqahā'* by stating that there are no differences of opinion among them regarding the precepts to which these terms refer. It appears to me that the type of consensus referred to by AMN is that of a preponderant but not total consensus of the Madīnan *fuqahā'*. As indicated earlier, it is quite possible that the earliest conceptualization of '*ijmā^c* in the Muslim community was that of a preponderant, majority consensus and that the idea that the only type of '*ijmā^c* which deserved the name was one which consisted of the total consensus of the '*ummah* or of the *fuqahā'* of the '*ummah* was a later development.[1] The example referred to earlier in which AMN includes A-XN--which stands for a total consensus of the Madīnan *fuqahā'*--while A-XN excludes parts of the AMN which had constituted points of difference among some of the prominent early *fuqahā'* supports my hypothesis that AMN does not stand for the same quality of local consensus as indicated by A-XN and similar terms which stand for total consensus.[2] Similarly, I have found evidence in my analysis of Mālik's AMN precepts, although not always conclusive, which indicates that there had been some

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[1]See above, pp. 195-204. [2]See below, pp. 707, 727.

differences among Madīnan fuqahā' regarding AMN precepts.[1] Ash-Shāfiᶜī singles out the terms AMN and AN as not actually indicating a consensus of the Madīnan ᶜulamā', and, as I have pointed out, it is a total consensus which ash-Shāfiᶜī has in mind.[2] It must also be pointed out, however, that the hypothesis that AMN does not stand for a total consensus of the Madīnan fuqahā' is contrary to the definition of AMN attributed to Mālik in the report of Ibn 'Abī 'Uwais.[3]

One of the most distinctive characteristics of Mālik's terminology, according to my analysis of it, is the indication it gives of whether or not precepts were supported by Madīnan local consensus and--as in the case of the term AMN--the indication it gives of the quality of that consensus, i.e., whether it was preponderant or total. This purpose of indicating the relationship of ᶜamal precepts with Madīnan local consensus is clearly one of the primary concerns of Mālik's terminology and distinguishes it, as I have indicated, from the classifications of ᶜamal of the later legal theorists whom I have studied. One of the conclusions I have reached as a result of my analysis of Mālik's terminology is that there was a difference between Madīnan ᶜamal and Madīnan local consensus. Madīnan ᶜamal is the broadly inclusive cat-

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[1]See below, pp. 723-725.

[2]See above, pp. 195-196, 201-202, 343-347.

[3]See below, pp. 540-541, 543.

egory in this regard, for it includes both precepts which were supported by local consensus and precepts which were not. On the other hand, while every instance of Madīnan local consensus was also an instance of Madīnan ^c^amal, many ^c^amal precepts were not supported by local consensus.

As indicated in my analysis of the letter of al-Laith ibn Sa^c^d to Mālik, al-Laith appears to draw this distinction between Madīnan ^c^amal, generally speaking, and Madīnan local consensus. Al-Laith describes himself in that letter as the most adamant person he knows in following Madīnan local consensus and as one who is very averse to following irregular [shādhdh] legal opinions. At the same time, al-Laith feels at liberty to disagree with those types of ^c^amal regarding which Madīnan fuqahā' themselves have disagreed, and he feels justified in such cases, furthermore, to follow the contrary ^c^amal of his own country or of other regions, as long as that ^c^amal was instituted by the Companions and during the days of the Madīnan caliphate.[1] Al-Laith obviously draws a distinction, then, between Madīnan consensus and Madīnan ^c^amal not supported by consensus. Indeed, Mālik has written to him because of his disagreement with certain types of Madīnan ^c^amal, and among those types of ^c^amal with which al-Laith has disagreed is the precept regarding handing down legal judgments on the basis of the oath of the plaintiff support-

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[1]See above, pp. 312-313, 322-323.

ed by the testimony of a single witness. Mālik refers to this precept in the Muwaṭṭa' as a MḍS ["maḍat as-sunnah"; the sunnah (which) has been put into practice], a term which--like AN, SN ["as-sunnah ᶜindanā"], and S ["as-sunnah"]--gives no specific indication of Madīnan local consensus. Furthermore, as I have indicated in my analysis of this precept, there is evidence that the prominent Madīnan fuqahā' ᶜUrwah ibn az-Zubair and az-Zuhrī had taken issue with it.[1]

The term AN ["al-'amr ᶜindanā"] appears to fall in the category of those ᶜamal precepts that did not have the support of local consensus. This difference between AN and AMN is quite explicit in the first example of AN in the AN chapter. In that example, Mālik cites his opinion and the opinion of az-Zuhrī, which are identical to the AN, and he cites the contrary opinion of Saᶜīd ibn al-Musayyab, who was probably the most significant Madīnan faqīh in the generation of the older Successors. Mālik states further that there is no AMN in the matter.[2] I have found evidence of significant differences of opinion among the Madīnan fuqahā' for each of the AN's I analyzed except for one, for which I could not find pertinent information.[3] Similarly, I found evidence of such differences regarding two AN's mentioned elsewhere in my analysis.[4] I did not undertake a systematic analysis of other terms like MḍS, SN, and S, which like AN give no

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[1]See above, p. 329, and below, pp. 572-573.

[2]Below, pp. 734-735. [3]Below, p. 756.

[4]Below, pp. 668-669, 720.

explicit indication of Madīnan local consensus. As mentioned earlier, however, there is evidence of significant differences of opinion in Madīnah regarding a MdS precept which I analyzed, and I also found evidence of a difference of opinion from Sa^cīd ibn al-Musayyab regarding a S precept which Mālik sets forth in one of the ^camal chapters.[1]

In the report attributed to Mālik and transmitted by Ibn 'Abī 'Uwais, AN is defined as being Madīnan ^camal. The report states further that AN precepts constitute the precepts in terms of which the rulings of the Madīnan judiciary are handed down. It states further that such precepts are known by the ignorant and knowledgeable alike, and no indication is given in the report that AN precepts were supported by Madīnan local consensus.[2] According to a report in the Mudawwanah, az-Zuhrī refers to an AN precept pertaining to the rights of the wife in marriage as that in accordance with which the judges of Madīnah hand down their rulings, which he repeats twice.[3] Similarly, many of the AN precepts in the Muwaṭṭa' which I analyzed are of such nature that they would have come directly under the jurisdiction of the Madīnan judiciary or some other form of executive authority--such as that of the 'amīr or muḥtasib.[4]

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[1]See below, pp. 665-666, and pp. 572-573.

[2]See below, p. 732. [3]See below, p. 733.

[4]See below, pp. 732-733, 666-667, 676-677, 737, 740-741, 742, 745.

This relationship between AN and executive authority--be it that of the judiciary, the office of the '*amīr*, or other executive functions in the city--is significant, I believe, because it accounts for how there could have been uniform ᶜ*amal* in Madīnah regarding matters about which the prominent Madīnan *fuqahā*' were divided. Whenever supported by executive authority, AN precepts would become widespread and well-known to the ignorant and knowledgeable alike, despite the fact that there were dissenting opinions.

Nevertheless, there are many AN precepts in the *Muwaṭṭa*' which would not have come under the jurisdiction of the judiciary or other forms of executive authority, for that matter. Illustrations of such types of AN's are those, for example, which pertain to voluntary acts of worship. In such cases, whatever uniformity of ᶜ*amal* there was in Madīnah despite the dissenting opinions of prominent Madīnan *fuqahā*' would have had to have come about through some other means. Hence, I believe, that uniformity of ᶜ*amal* in such AN precepts--if it existed at all--would have been the result of such factors as the social prestige of those prominent Madīnan *fuqahā*' who subscribed to the AN, practiced it themselves, and taught it to others. Otherwise, it can be expected that there would have been some diversity in the ᶜ*amal* of the people of Madīnah regarding such matters. Some of them would have been likely to follow the opinions and practices of one of the groups of *fuqahā*', while others would have been likely

to follow the opinions and practices of other Madīnan fuqahā'. I have referred to such types of ᶜamal as "mixed ᶜamal", and I believe there are examples of it in the Muwaṭṭa'.[1] It is possible that in some cases--as, perhaps, in the case of the ᶜamal regarding how masḥ is done[2]--both varieties of the mixed ᶜamal were widespread, and it might have been difficult to determine which, if any, of them was predominant. In other cases, however, it is probable that one variety of a mixed ᶜamal was predominant in Madīnah, while the other variety was not--as, perhaps, was the case in the instance of the ᶜamal regarding whether or not one should recite anything when making ṣalāh behind the 'imām.[3] As some examples of AN in the Muwaṭṭa' have indicated, however, variety in Madīnan ᶜamal was also possible within the judicial tradition itself; thus the phenomenon of mixed ᶜamal quite conceivably pertained to some AN precepts, as well, which came under executive authority.[4]

Finally, in so far as the distinction between ᶜamal qadīm and ᶜamal muta'akhkhir in later legal theory is concerned, I have found evidence of no such distinction in Mālik's terminology. As mentioned before, it is often difficult to determine the source of Mālik's ᶜamal precepts, and in several

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[1]See below, pp. 654-655, 746-748; cf., 676-677, 738-739, 742.

[2]Below, pp. 654-655. [3]Below, pp. 746-748.

[4]See below, pp. 676-677, cf. pp. 738-739, 742.

examples the distinction drawn between ᶜamal naqlī and ᶜamal that resulted from ijtihād in the post-Prophetic period contains a considerable element of conjecture. Nevertheless, in those ᶜamal precepts which appear to have resulted from ijtihād, it has not generally been possible for me to date them and place them in either the category of ᶜamal qadīm or ᶜamal muta'akhkhir. The AMN precept about the permissibility of using the hunting dog of a Magian is a good example. Mālik supports its validity by setting forth an analogy; he does not, however, give any indication of who first drew that analogy or who was responsible for the ijtihād. I have found evidence to show that the Madīnan Companion Jābir ibn ᶜAbd-Allāh disagreed with this AMN. Nevertheless, one could not determine on that basis whether the precept was ᶜamal qadīm or later ᶜamal, for Jābir lived until the year 78/697, i.e. within two decades of Mālik's own birth, and, hence, one cannot date this AMN by reference to him.[1]

Similarly, Mālik reports in one of the ᶜamal chapters the amounts at which ᶜUmar ibn al-Khaṭṭāb set the indemnities in gold and silver for loss of life. Mālik states toward the end of that short chapter that it is the AMN that those who make use of camels in their livelihood are not given indemnities in gold and silver; those who make use of gold and silver in their livelihoods are not given indemnities in cam-

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[1]See below, pp. 694-695. For data on Jābir ibn ᶜAbd-Allāh, see below, p. 693, n. 3.

els; those who make use of silver in their livelihoods are not given indemnities in gold; and those who make use of gold are not given indemnities in silver. Again, the source of this stipulation is not clear. For, although Mālik makes it quite explicit that ᶜUmar ibn al-Khaṭṭāb set the amounts of the indemnities in gold and silver, there is no specific indication that he also stipulated this AMN.[1]

The x̄dIb precept ["wa ᶜalā hādhā 'adraktu 'ahl al-ᶜilm bi-baladinā"] that a wife may be separated from her husband if the husband fails to support her is another example of an ᶜamal precept which may have resulted from ijtihād but the source of which is difficult to identify. Mālik states in the Muwaṭṭa' that Saᶜīd ibn al-Musayyab held this opinion. If the precept had resulted from ijtihād, therefore, it would be possible that it had originated with the ijtihād of Ibn al-Musayyab. Reports in the Mudawwanah, however, indicate the ᶜUmar ibn ᶜAbd-al-ᶜAzīz implemented the precept, and, when he inquired about its validity, Saᶜīd ibn al-Musayyab sent word to him that it was the sunnah. There is some question, however, as I have indicated in my analysis of this precept, as to whether or not it actually went back to the Prophet. If, however, it did not, it would not be possible on the basis of the material I have found to determine whether it was an early or late Madīnan ᶜamal.[2]

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[1]See below, pp. 673-675.

[2]See below, pp. 604-605; cf., 700-702, 740.

The Difference between Madīnan ᶜAmal and Local Customs

In the context of the preceding classifications of Madīnan ᶜamal it is also appropriate to consider what the difference would have been in Mālik's mind between Madīnan ᶜamal and local customs [al-ᶜurf wa 'l-ᶜādah]. As indicated earlier, sound local customs have a high priority for Mālik and for the Mālikī school in general. According to 'Abū Zahrah, Mālik gives higher priority to local customs, in fact, than the 'imām's of any of the other major sunnī schools. The reason for this, 'Abū Zahrah believes, is because the concern for maṣlaḥah takes such a high priority in Mālik's thought, and--as ash-Shāṭibī suggests--there is generally a strong connection between sound local customs and the maṣāliḥ of the people of that locality.[1] In the preceding section, I also gave some examples of Mālik's application of local customs and suggested that he regarded them to be more authoritative than qiyās, as indicated by the fact that Mālik does istiḥsān on the basis of local customs, by means of which he overrules the strict dictates of qiyās.[2]

Ash-Shāṭibī holds that this priority which Mālik gives local customs is supported by the example of the Prophet, who took over many of the pre-Islamic customs of the Arabs. The policy of the Prophet, according to ash-Shāṭibī, was to abolish only those customs which were detrimental and to keep

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[1]See above, pp. 204-206. [2]See above, pp. 206-209.

and perfect those which were beneficial. For the beneficial customs of the pre-Islamic Arabs, ash-Shāṭibī believes, were especially well-suited for the environment and circumstances in which they were living.[1] It should be noted in addition to this, however, that in so far as Madīnan ᶜamal is concerned, it was primarily in the city of Madīnah that the Prophet accomplished this task of determining between which of the pre-Islamic customs of the Arabs he felt should be kept and which of them he felt should be abolished.

Thus, those pre-Islamic customs that remained part of the ᶜamal of the people of Madīnah in the Islamic era--such as customary methods of buying and selling, customary agricultural contracts, the custom of ᶜaqīqah, or the precept of qasāmah[2]--would have been regarded as legitimate types of ᶜamal by virtue of the Prophet's acceptance of them. Such types of ᶜamal, according to the classifications of later theorists, would not be regarded merely as local customs but rather as authorized parts of Madīnan ᶜamal naqlī. For, although they had not originated with the Prophet, they would be regarded as coming under the aegis of his sunnah by virtue of his having given them explicit or tacit approval ['iqrār].[3]

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[1]See above, pp. 205-206.

[2]See below, pp. 615-618, 618-623, 668-673, 713-723.

[3]See above, pp. 410, 412.

Therefore, although sound local customs are regarded to have considerable priority in Mālikī fiqh, those pre-Islamic customs of the Arabs which had come to be incorporated into the ᶜamal of Madīnah would have been regarded to have even greater authority. For if the assessments of 'Abū Zahrah and ash-Shāṭibī are accurate, the priority of non-Madīnan local customs (or for that matter Madīnan local customs which might have grown up in the post-Prophetic period) was a function of the maṣlaḥah which they contained for the people, and determining the extent of that maṣlaḥah would necessarily require personal judgment on the part of the fuqahā'. In the case of those pre-Islamic customs which had become part of Madīnan ᶜamal naqlī, however, such personal judgments would not have played a role, for such types of ᶜamal, from the standpoint of Mālikī legal theory, stood by virtue of Prophetic authority.

Theoretical Uses and Implications of Madīnan ᶜAmal

ᶜAmal As Normative Standard

ᶜAmal is the description of a society's behavior, not that of an individual. Thus, normativeness is at the very root of ᶜamal. A matter which is the ᶜamal of a people is also something which is normative for that people. In his treatment of ᶜamal in Al-Muwāfaqāt, ash-Shāṭibī focuses upon this normativeness of Madīnan ᶜamal, which he believes to be its most important characteristic as a source of Islamic law.

For Madīnan ^c^amal from the standpoint of Mālikī legal theory represents the ideal standard for the normative behavior of an Islamic society, on the premise that the Prophet authorized and instituted the ^c^amal of Madīnah and that its spirit and content were faithfully preserved, expanded upon, and handed down from father to son until the lifetime of Mālik.

This normative Madīnan ^c^amal which the Prophet established was, according to the Mālikī point of view, an ^c^amal which was properly balanced. It was not too harsh and demanding, so as to create a repugnance in the people toward the basic demands which it made upon them, and it was not too lax, such that the people might incline toward moral laxity and social decadence. It made all of the fundamental requirements of Islam upon the Madīnan society but with as little formality and with as much simplicity and ease as possible.[1] According to ash-Shāṭibī, as the following discussion will show, the ideal behavior which the Prophet set down for the Islamic community, as a community, is reflected in the widespread, predominant ^c^amal of Madīnah in the early generations but is not always reflected clearly in ḥadīth and other textual sources of law, which often do not draw the distinction clearly between the Prophet's normative and non-normative behavior.

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[1]For ash-Shāṭibī's development of these concepts and his citation of examples from the ḥadīth of the Prophet and āthār of the Companions, see Al-Muwāfaqāt, 3:60-76, 4:233-243.

One of the most prominent elements in pre-Islamic Arab culture, according to ash-Shāṭibī, was that of mimesis--the attribute of imitating one's elders and forefathers and adhering closely to their example--which the Prophet was able to use to the benefit of his religion by making himself the new standard of mimesis for his followers.[1] Because the Prophet was the model of behavior for those around him who were his followers, ash-Shāṭibī holds, he was careful to set an example in his public behavior which he felt would constitute a good norm for the people as a whole to live by. Therefore, there was a marked difference in some regards between the Prophet's public and private examples. His public example was intended to be normative, i.e., to become the ᶜ<u>amal</u> of the people, while his private example was exceptional in some

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[1]Ash-Shāṭibī holds that this element of mimesis in Arab culture constituted initially one of the major obstacles which the Prophet faced in spreading Islam. For many of those whom he called to Islam justified their rejection of it, as the Qur'ān makes very clear, on the grounds that they could not forsake the way of their forefathers. This same element of mimesis, however, was reversed and brought into the service of Islam. To begin with, the Prophet Abraham was identified as the true forefather of the Arabs whose example they should imitate. It was made very clear that the polytheistic ways of the Arabs were a departure from the tradition of their father Abraham, while the newly emerging Islamic community, on the other hand, was identified as the embodiment of the Abrahamic tradition. Secondly, Islam emphasized greatly those pre-Islamic values which it regarded to be good and which the pre-Islamic Arabs also regarded highly and practiced following. Finally, the Prophet himself exemplified those traditional values as well as the new Islamic values he was teaching, which encouraged his followers to take him as their standard of imitation in accordance with Qur'ānic injunctions to that effect. Thus, ash-Shāṭibī concludes, the new standard of mimesis became the chief vehicle for removing the Arabs from their old standard. Ash-Shāṭibī, <u>Al-Muwāfaqāt</u>, 4:249.

ways. In matters of worship, for example, ash-Shāṭibī holds that the Prophet set two distinct examples. When he worshipped in public in the view of the people as their leader and exemplar, the Prophet set a moderate standard which was simple and easy to follow. But in his private life, when out of the view of the general public, the Prophet's worship was much more rigorous and time consuming. The Prophet, ash-Shāṭibī continues, was able to conduct such rigorous private worship and still meet the social obligations required of him. He intended, however, that his private example in worship not become the norm for Islamic society, because it would constitute a standard which would be too difficult for the average person to follow. Such a standard of worship would be beyond the interest and capacity of the common man or woman; hence, it would create a standard of religiosity which only a few could realize. Furthermore, few of those who could realize that standard would also be able to meet the social obligations normally required of them, in the manner which the Prophet had done.[1] 'Abū Zahrah, as mentioned earlier,

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[1]See ash-Shāṭibī, Al-Muwāfaqāt, 3:56-76; 4:239-243. It is on the basis of this concept of normative moderation in ᶜamal that ash-Shāṭibī makes a critique of some of the historical developments in ṣūfism. The extensive worship and asceticism which characterized some ṣūfīs, ash-Shāṭibī holds, should always remain informal, spontaneous, and essentially within the domain of private life and purely voluntary observance. He regards the public expression of ṣūfism in formally organized and structured movements as having endangered Islamic society by breaking down the distinction between moderate, normative worship, as exemplified in the Prophet's public example, and the rigorous and time consum-

holds that concern for the maṣāliḥ of society is one of the foremost concerns in Mālik's thought and Mālikī legal theory.[1] According to the preceding Mālikī interpretation of the nature and inception of Madīnan ᶜamal, the creation and maintenance of a properly balanced Islamic ᶜamal is clearly a vital maṣlaḥah in the life of the Muslim community and, hence, one of the primary goals in the ultimate purposes of the sharīᶜah [maqāṣid ash-sharīᶜah].

Thus, although the Prophet encouraged his followers to pray additional prayers [an-nawāfil] in conjunction with the required daily prayers, he directed that such optional prayers not be prayed in congregation after the manner of required prayers, for fear that they would become customary and cease to be optional. The Prophet also indicated to the people that it was better for them to pray supererogatory prayers in their homes rather than in the mosque. Nevertheless, ash-Shāṭibī points out, the Prophet, according to some ḥadīth, is reported to have prayed some nawāfil prayers in small congregations in the privacy of the homes of some of his close Companions. In this case, according to ash-Shāṭibī, the Proph-

spiritual exercises of the Prophet, some of his Companions, and the early generations of Muslims, which were intentionally restricted to the seclusion of their private lives. It also obscured the concept which the Prophet had made quite explicit in his teachings, namely, that extensive worship was praiseworthy only as long as it did not stand in the way of one's meeting normal social obligations. See ibid., 4:239-243.

[1]See above, pp. 269, 205; 83.

et's directives that nawāfil prayers are not to be prayed in congregation and that such prayers are preferably prayed at home constitute the desired norm. Ash-Shāṭibī, who regards the contrary reports about the Prophet's having prayed in small congregations in the homes of some of his close Companions to be authentic, does not regard these reports as contradicting the above precepts but rather as reflecting non-normative private behavior, which was intended not to become ᶜamal. In this particular case, therefore, it was not the purpose of the above directives, according to ash-Shāṭibī, which the Prophet intended to be normative for the community that they prohibit the praying of nawāfil prayers in congregation absolutely, for that act is not evil in itself. Rather, the prohibition in that instance was an example of sadd adh-dharāiᶜ,[1] as it were, which banned the praying of nawāfil prayers in public or in large groups because of the danger that such practices would become normative for the community, i.e., become their ᶜamal. Thus, there would be no harm in praying nawāfil prayers in small congregations privately, as the Prophet is reported to have done. This, ash-Shāṭibī continues, was Mālik's understanding of the matter. Mālik is reported to have said that it is permissible to pray nawāfil prayers in congregations of around two or three persons in private or wherever there is no danger of notoriety [ishtihār]. Mālik

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[1]See above, pp. 262-267.

regards it as reprehensible [makrūh], however, that nawāfil prayers be prayed in congregations under circumstances that would be likely to create notoriety.[1]

In addition to this distinction between the normative public example and the private example of the Prophet which, in some matters, was not intended to be normative for the community, ash-Shāṭibī indicates that there are also numerous public acts of the Prophet which were non-normative for various reasons. Here again, as shall be discussed in greater detail later, ḥadīth often make no clear distinction in such cases between reports of normative or exceptional behavior.[2]

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:62-63. Ash-Shāṭibī cites other examples to support this distinction between normative public behavior and private behavior not intended to be normative for the community. He points out, for example, that in a ḥadīth transmitted by Muslim and al-Bukhārī, ᶜĀ'ishah reports that the Prophet used not to pray ṣalāt aḍ-ḍuḥā [a supererogatory prayer prayed in the early morning after sunrise] despite the fact that he had a great desire to do so, because he feared that the people would make it their ᶜamal also if he did so. (It might be noted that in desert society the early morning was a time of much activity and public exposure for the Prophet before the heat of the midday.) Similarly, the Prophet is reported to have directed the people not to continue fasting for more than one day in a row without breaking fast and eating and drinking in between [i.e., he prohibited al-wiṣāl]. He continued to perform wiṣāl himself, however, because, as he is reported to have said, God gave him the strength to fast in that manner and still have the energy to perform normal activities. Some of the Companions, ash-Shāṭibī states, who also had the strength to pursue normal activities while performing wiṣāl continued to perform it, because they understood that the Prophet's prohibition of wiṣāl did not apply to themselves but to the generality of the people upon whom wiṣāl was too demanding. See ash-Shāṭibī, Al-Muwāfaqāt, 3:60-63.

[2]It might be pointed out that the ḥadīth that most frequently fail to make such distinctions clearly are those which report isolated actions. As mentioned earlier, such reports are regarded to be ambiguous in Mālikī legal theory until they

And again it is the [c]amal of Madīnah during the first generations which is regarded to be the proper reference in Mālikī legal theory to determine which of such reports are normative and which of them are not.

As an illustration of such a non-normative public act of the Prophet, ash-Shāṭibī cites reports--again the authenticity of which he does not question--which state that the Prophet once stood up to meet his cousin Ja[c]far ibn 'Abī Ṭālib[1] and, according to another report, that he once stood up for Sa[c]d ibn Mu[c]ādh.[2] These reports are contrary to the

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are placed in the context of ancillary legal references; see above, pp. 188-195. In the cases of so many reports of isolated actions and incidents, one cannot determine on the basis of the material cited in the text whether what happened was normative or exceptional, common or irregular, whether it happened only once or a thousand times.

[1]JA[C]FAR ibn 'Abī Ṭālib ibn [c]Abd-al-Muṭṭalib ibn Hāshim (d. 8/629) was the older brother of [c]Alī by about ten years, and, like [c]Alī, Ja[c]far became a Muslim very early. He played an important role in the first hijrah [emigration], which was to Ethiopia. For most of those who went were the poor and socially dispossessed who could find no protection in the tribal system of Makkah because of their low social status and who could take refuge in Ethiopia; Ja[c]far was one of the prominent members of Quraish who, like [c]Uthmān ibn [c]Affān, accompanied them to Ethiopia as leaders and spokesmen in the new land. Ja[c]far remained in Ethiopia several years after the hijrah to Madīnah and is reported to have come to Madīnah in the year 7/628, at about the time of the siege of Khaibar. Ja[c]far died during the next year while fighting on a battlefield in one of the Syrian campaigns; hence, he died during the Prophet's lifetime. Ziriklī, 2:118.

[2]SA[C]D IBN MU[C]ĀDH ibn an-Nu[c]mān ibn Imri' al-Qais (d. 5/626) was one of the most prominent Companions from the 'Anṣār and was a leader of the Madīnan tribe al-'Aws. Sa[c]d is reported to have been unusually large, tall, and strong. He became renowned for his courageous feats on the battlefields of Badr and 'Uḥud. He was wounded by an arrow during the siege of the Trench [al-Khandaq] and died from the wound days

ᶜamal that one does not stand up to honor another, which was an explicit teaching of the Prophet and something which he prohibited his Companions from doing in his presence in honor of him. The acts reported in these ḥadīth are, however, not negations of that ᶜamal or principle, even though they might appear to be so when isolated from their historical context. They can be accounted for in several ways; in the case of Jaᶜfar, for example, ash-Shāṭibī states that Jaᶜfar was arriving in Madīnah after years of absence from the Prophet during the Ethiopian emigration. Under such circumstances it would have been unusual if the Prophet had not stood up for him and come forward to embrace him--which is also part of the report and was contrary to ᶜamal.[1]

Similarly, ash-Shāṭibī reasons, it is sometimes misleading to generalize on the basis of isolated instances of the Prophet's not having objected to certain mistaken or objectional types of behavior which took place around him or were brought to his attention and to conclude that the Prophet had

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afterward. Saᶜd is said to have been thirty-seven at the time of his death; according to one report, the Prophet told his Companions after Saᶜd's death that the throne of God had shaken at the death of Saᶜd ibn Muᶜādh. Ziriklī, 3:139.

[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:64. Ash-Shāṭibī gives other instances of contrary, non-normative reports of public behavior or statements, such as the Prophet's having reportedly wiped over his turban once while performing wuḍū', which may have been because he was sick. Similarly, ash-Shāṭibī cites the example of the Prophet's having given the people the command one ᶜĪd that they not store away the meat of the sacrificial animals but distribute it to the poor, which, as the Prophet later explained, was because of an impoverished clan that was passing through Madīnah at that time; see ibid., 3:64-67.

given those acts his tacit approval ['iqrār] merely because he did not say anything. It may have been the case in some such instances that the Prophet felt it more appropriate not to correct the person immediately, if, for example, the person's behavior had simply been an oversight or a lapse into error which that person would correct on his own. In some cases of mistaken behavior, ash-Shāṭibī continues, the person may not have known it was mistaken at the time he did it but have come to realize that later, and, since the person did not repeat it, the occasion did not arise again for the Prophet to correct it.[1] Although ash-Shāṭibī does not make the point himself, it might be pointed out here that, in terms of legal theory, the presumption of explicit or tacit approval ['iqrār] in the third category of ᶜamal naqlī[2] is qualitatively different from the presumption of tacit approval in isolated instances, such as ash-Shāṭibī has referred to here. For in the case of ᶜamal naqlī, such customs of the people are normative and of the nature of ᶜumūm al-balwā.[3] Hence, it is not probable that such acts would have escaped the Prophet's attention during his more than a decade in Madīnah, nor would the occasions of such acts have recurred so infrequently that the Prophet would not have found it appropriate to object to them if he had felt they were wrong.

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:67-68.

[2]See above, pp. 410-415.

[3]See above, pp. 184-188; below, pp. 481-484.

As mentioned earlier in the discussion on the ambiguity of isolated actions, ash-Shāṭibī holds that certain types of statements--such as isolated parts of conversation, situational dialogue, and so forth--are potentially just as ambiguous when isolated from other references as reports of isolated actions. In fact, ash-Shāṭibī holds that ambiguous statements of this nature should be classified with reports of isolated actions.[1] Similarly, ash-Shāṭibī points out, there are reports of statements of the Prophet that were not intended to be the basis of normative legal precepts and which may appear to contradict other statements of the Prophet that pertain to ᶜamal precepts. Ash-Shāṭibī cites the example of the Prophet's statement, "Pray the dawn prayer at the break of dawn" ["'asfirū bi-'l-fajr"], which reflects the ᶜamal of the people of Madīnah, namely, of performing the dawn prayer in the early dawn while it is still dark.[2] According to another ḥadīth, however, which ash-Shāṭibī believes to be authentic, the Prophet said, "Whoever prays one rakᶜah [prayer unit] of the dawn prayer before the sun rises has made the dawn prayer," which might appear to be contradictory to ᶜamal.[3]

This second ḥadīth, according to ash-Shāṭibī, is not normative, in the sense that no legal implications were intend-

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[1]See above, pp. 189-190. [2]Cf. Mudawwanah, 1:61 (5).

[3]Ash-Shāṭibī, Al-Muwāfaqāt, 3:58-59.

ed by it which would negate the normative ᶜ<u>amal</u> of praying the dawn prayer early. Rather, ash-Shāṭibī states, this ḥadīth had the purpose only of designating the limits of the period during which the dawn prayer could be prayed and still be valid. It was not, however, intended to reflect a desired norm of praying the dawn prayer late.[1] Perhaps, ash-Shāṭibī's thinking can be made clearer by reference to a contemporary similitude. A teacher, for example, would urge his students to make A's or B's, while at the same time informing them that whoever makes a D will have passed. He desires to see the normative achievement of his students, however, in the direction of A's and B's, not D's, and the teacher's statement that D is a passing mark is not intended to indicate to the students that it would be desirable for them to make D's or that it would even be acceptable if their normative achievement were in the direction of D's.

In the preceding texts which ash-Shāṭibī has cited as examples one is able to discern the difference between what was intended to be normative and what was not, on the basis of the indications contained in the texts. Ash-Shāṭibī has chosen these examples, in fact, because they help to make clear that there was a distinction between normative and non-normative behavior in early Islamic society--as, for that matter, in each society in its own way. But in many le-

[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:58-59.

gal texts the determination of whether what is reflected in the text is normative or not cannot be made on the basis of the information contained in the text alone. Therefore, ash-Shāṭibī concludes, in accordance with Mālikī legal theory, that the normative ᶜamal of Madīnah is a standard reference upon which the faqīh can rely in attempting to make that and similar determinations about legal texts:

> . . . For whenever a mujtahid contemplates a legal statement pertaining to a matter, he is required to look into many things, without which it would be unsound to put that statement into practice. Consideration of the types of ᶜamal of the early generations removes these ambiguities from the statement decisively. It renders distinct that which is abrogating from that which has been abrogated; it provides a clarification for that which is ambiguous, and so forth. Thus, it is an immense help in the process of doing ijtihād. It is for that reason that Mālik ibn 'Anas and those who hold to his opinion have relied upon it.[1]

The Obligations of the ᶜUlamā' with Regard to Normative ᶜAmal

The Prophet's concern for the maintenance of a moderate, properly balanced ᶜamal which would accomodate the society as a whole--men and women, the weak and the strong, the young and the old--while directing the people to set more rigorous standards for themselves in their private lives, if they desired, is reflected in the following ḥadīth, which Mālik cites in the Muwaṭṭa':

> When any of you leads the people in prayer, let him go easy ["fa-l-yukhaffif"]. For there are among them

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:76; for earlier reference to this quote, see above, p.178.

> the weak and the sick and the old. But when anyone of you prays alone, let him lengthen his prayer as long as he desires.[1]

According to ash-Shāṭibī, the Prophet was careful to set such a normative example for the people, which his Companions learned to do from him likewise. Because of the importance of establishing and preserving a properly balanced, normative ᶜamal, ash-Shāṭibī holds that it has become obligatory upon the ᶜulamā' and others whose examples are imitated by the people to do likewise. On the other hand, for such prominent persons in society to set non-normative examples is impermissible by virtue of the principle of sadd adh-dharā'iᶜ,[2] since it is possible that setting such a non-normative example for the public will lead to the distortion of ᶜamal:

> For it is likely that the ignorant, when they see an ᶜālim persistently doing a thing, will conclude that it is obligatory, and sadd adh-dharā'iᶜ is something which the law demands [in such cases] and is one of the definitive [qaṭᶜīyah] principles of [Islamic] law.[3]

The ᶜālim, ash-Shāṭibī holds, must pattern the example he sets according to the ᶜamal of the first generations of Islam, and he must take great care not to make normative those types of behavior which the first generations persistently left as private, exceptional, or otherwise non-normative.[4]

In the following 'athar, which Mālik cites in the Mu-

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[1]Muwaṭṭa', 1:134. [2]See above, pp. 262-267.

[3]Ash-Shāṭibī, Al-Muwāfaqāt, 3:61-62. [4]Ibid., 3:70-71.

<u>waṭṭa'</u>, ᶜUmar ibn al-Khaṭṭāb is shown as having endeavored to set a normative example which would be within the capacity of the people to follow. According to this report, ᶜUmar ibn al-Khaṭṭāb once rode out at the head of a party of horsemen [<u>rakb</u>] which included ᶜAmr ibn al-ᶜĀṣ.[1] That night they set up camp not far from an oasis. ᶜUmar ibn al-Khaṭṭāb awoke before the break of dawn and found that he had had an erotic dream and that the seminal emission had soiled his clothing, which (according to Islamic law) he would have to clean before being able to pray the dawn prayer in them. There was not enough water in the camp, however, for ᶜUmar to wash his clothing. He aroused the men, and they moved on to the oasis. Once there ᶜUmar ibn al-Khaṭṭāb set about washing his clothing in the dark, but he was still washing by the time the first light of dawn appeared and the time for prayer came. ᶜAmr ibn al-ᶜĀṣ said to him, "Dawn has overtaken you; we have other garments with us, so put yours aside and let them be washed." According to the <u>'athar</u>, ᶜUmar replied, "How strange of you, ᶜAmr ibn al-ᶜĀṣ! Even if you can find other garments, will all the people be able to?

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[1]ᶜAMR IBN AL-ᶜĀṢ ibn Wā'il as-Sahmī (50 bh-43/574-664) later became renowned as the conqueror of Egypt. He was among the opponents of Islam until after the Treaty of al-Ḥudaibīyah, when he and Khālid ibn al-Walīd, another great conqueror, became Muslims and joined the Muslim forces. The Prophet made ᶜAmr ibn al-ᶜĀṣ one of his military commanders, and the caliphs 'Abū Bakr and ᶜUmar kept him in that position. Prior to the conquest of Egypt, ᶜAmr played an important role in the conquest of Greater Syria and Palestine. He ruled as governor of Palestine for a time and then Egypt, but was removed by the caliph ᶜUthmān. Ziriklī, 5:248-249.

By God, if I were to do [as you suggest], it would become a sunnah. I will wash what I can see instead, and sprinkle water over what I cannot see."[1]

In his commentary on this 'athar, Ibn cAbd-al-Barr states that, because cUmar ibn al-Khaṭṭāb was aware of how closely the people imitated his example, he wanted to set for them an example which they could follow easily and without undue difficulty.[2] Thus, although for him it would have been much easier just to change his clothes, he chose to wash them instead as best as he could under the circumstances, since most of the people did not possess extra clothing into which they could change. It might also be pointed out that this 'athar indicates how people looked to the examples of Companions of the stature of cUmar ibn al-Khaṭṭāb as indications of the content of sunnah, which is the same principle which is used in the Mālikī, Ḥanafī, and Ḥanbalī schools.[3] According to this report, cUmar was well aware that they did so and acted accordingly.

Ash-Shāṭibī praises Mālik for having been careful to set a normative example in his own public life, (to be a carrier of camal as it were[4]). He cites a report according to

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[1]Muwaṭṭa', 1:50. [2]Ibn cAbd-al-Barr, Istidhkār, 1:361.

[3]See above, pp. 161-169.

[4]See above, pp.403-409.

which Mālik used to say that one is not truly an ᶜ*ālim* until one requires of oneself in private matters and acts of voluntary worship what one would not recommend the people in general to do and in which there would be no harm if one did not do it oneself.[1] If such reports about Mālik are authentic they would be a further indication, as I suggested earlier, that Mālik probably looked to the prominent Madīnan ᶜ*ulamā'* as the carriers of ᶜ*amal* and that he regarded it as a legacy and duty of them to maintain and protect the content of Madīnan ᶜ*amal*.[2] Similarly, Ibn al-Qāsim gives examples in the *Mudawwanah* of various optional matters of worship which Mālik preferred to do in his private life ["fī khāṣṣat nafsihī"] but which Mālik would not direct the people to do.[3]

Elsewhere, ash-Shāṭibī emphasizes again the obligations of the ᶜ*ulamā'* to establish and preserve a properly balanced ᶜ*amal* for the people, which will not be so tedious or demanding as to make religious observance and compliance repulsive to them nor so lax as to bring about decay and social decadence. This standard of moderation, because it is such a fundamental *maṣlaḥah*, must be continually in the mind of the *mujtahid* or *muftī* [one who gives legal opinions] as he attempts to apply the law to new and changing circumstances:

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[1]Ash-Shāṭibī, *Al-Muwāfaqāt*, 4:242.

[2]See above, pp. 403-409. [3]*Mudawwanah*, 1:120 (4);1:121(11).

> The muftī who has attained the highest calibre is he who takes the people along the well-known path of moderation [al-maᶜhūd al-wasaṭ] in those matters which pertain to the general public [al-jumhūr]. He neither constrains them to follow a policy that is severe [madhhab ash-shiddah] nor does he let them incline toward the direction of dissolution [al-inḥilāl].[1]

The Historical Concern of the ᶜUlamā' about Irregular Opinions

In conjunction with ash-Shāṭibī's concept of the normativeness of ᶜamal, one should note by way of comparison the concern of many of the prominent fuqahā' of Mālik's generation and earlier about erratic and irregular [shādhdh] deductions, opinions, and rulings. As mentioned earlier, the very notion of irregularity, to which these fuqahā' have directed their attention, implies that they possessed normative standards which served for them as a criterion by which to distinguish between that which is regular or normative and that which is non-normative and irregular.[2]

In his response to the letter of Mālik, for example, al-Laith ibn Saᶜd emphasizes how averse he is to following that which is erratic and irregular [shādhdh]. One must bear in mind, furthermore, that al-Laith emphasizes this point in the context of justifying to Mālik the fact that al-Laith has departed from certain Madīnan ᶜamal precepts not supported by local consensus and that he has chosen to follow instead

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 4:239.

[2]See above, p. 179.

the well-established ^{c}*amal* of other regions in those cases. Thus, it appears to me that al-Laith recognizes the fact that Mālik will perceive his departures from Madīnan ^{c}*amal* as *shādhdh*; al-Laith wants to defend himself against such an allegation and assure Mālik that what he has done is not to be regarded as *shādhdh*. One can infer from this that both Mālik and al-Laith ibn Sa^{c}d regarded departures from the normative to the irregular and non-normative to be unsound and blameworthy.

One of the main themes of *Siyar al-'Awzā^{c}ī*, of course, is this same aversion to that which is *shādhdh*. 'Abū Yūsuf warns repeatedly in that work that it is unsound to follow non-normative *ḥadīth*. As pointed out earlier, 'Abū Yūsuf accounts for the irregularity of many *ḥadīth* by questioning their authenticity; at the same time, however, he acknowledges that there are *ḥadīth* which are authentic yet irregular in their implications, nevertheless:

> . . . But the *ḥadīth* of God's Messenger have [diverse] meanings, implications, and interpretations, which only one whom God helps to that end can understand and perceive.[2]

'Abū Yūsuf, of course, does not recognize the ^{c}*amal* of Madīnah as an acceptable normative standard by which to evaluate *ḥadīth*. Nevertheless, he has a normative standard of his own which clearly serves for him a function cognate to that which Madīnan ^{c}*amal* serves for Mālik:

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[1]See above, p. 322. [2]See above, pp. 176, 175.

> Make the Qur'ān and the well-known sunnah [as-sunnah al-ma^crūfah] your directing guide. Follow that and judge on the basis of it ["wa qis ^calaihi;" lit., "do qiyās on the basis of it"] whatever presents itself to you that has not been clarified in the Qur'ān and sunnah.[1]

And elsewhere:

> Beware of irregular [shādhdh] ḥadīth and take care to follow those ḥadīth which the community [al-jamā^cah] is following, which the fuqahā' recognize [as valid], and which are in accordance with the Book [i.e., the Qur'ān] and the sunnah. Judge [qis] matters on that basis. . . .[2]

The parallel between 'Abū Yūsuf's reference to the community in this quotation and Mālik's reliance upon the ^camal of the Madīnan community is unmistakable, although 'Abū Yūsuf, of course, probably had the Kūfan community in mind and certainly not the Madīnan. It is also interesting to note how 'Abū Yūsuf directs one to look also to the fuqahā' as a reference for establishing the validity of the ^camal of the community; as discussed earlier, I believe that Mālik looked to the prominent Madīnan fuqahā' as the true carriers and guardians of Madīnan ^camal.[3]

As discussed earlier, the distinction between sunnah--which for 'Abū Yūsuf is clearly a normative concept--and ḥadīth is quite evident in these citations. Such a distinction seems to have been common in the early period, just as the rejection of isolated ḥadīth as an independent source of law was so frequently tied to the defense of the normative sunnah.

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[1]See above, p.174. [2]See above, p. 175.

[3]See above, pp.403-409; cf., pp. 448-453.

Ash-Shāfiʿī, one of the most distinctive characteristics of whose legal theory was the acceptance of isolated ḥadīth with sound 'isnād's as an authoritative, independent source of law, notes in "Ikhtilāf Mālik" how averse the Madīnans were in general to following the implications of isolated ḥadīth [khabar al-infirād].[1] I cited earlier reports attributed to Madīnan fuqahā' prior to the generation of Mālik which demonstrate their caution about isolated ḥadīth and the priority which they gave to Madīnan ʿamal instead. One of the most explicit of these statements is that of Rabīʿah, one of Mālik's primary teachers:

> "One thousand [transmitting] from one thousand" is preferable to me than "one [transmitting] from one", for "one [transmitting] from one" would tear the sunnah right out of our hands.[2]

The highly regarded second/eighth century muḥaddith ʿAbd-ar-Raḥmān ibn Mahdī, who, according to one of the reports attributed to him, was aware of this distinction between ḥadīth and sunnah, praised Mālik more highly than either Sufyān ath-Thawrī or al-'Awzāʿī because he regarded Mālik to be an 'imām in both ḥadīth and sunnah, while he regarded the other two as excelling in only one of those fields of knowledge respectively.[3] And for Mālik it is quite clear that

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[1]See above, p. 354.

[2]See above, p.174; cf., pp.171-174 . Cf. also the statement of Ibn al-Qāsim in the Mudawwanah about ḥadīth which are contrary to ʿamal; above, pp. 179-181.

[3]See above, pp. 79-80 ; cf., pp. 76-79. For data on Ibn Mahdī, see p. 77, n. 4.

the concept of Prophetic sunnah--a concept which he sets forth, for example, in his letter to al-Laith ibn Sa^cd[1]--is not equivalent to the content and implications of isolated ḥadīth. Isolated ḥadīth for Mālik are strictly a dependent source of law, which, as made clear in the citation from Ibn al-Qāsim, are regarded as having valid legal implications when they are in conformity with the normative ^camal of Madīnah and as being invalid when contrary to ^camal--even though, as pointed out earlier--the Madīnans often do not question the authenticity of such ḥadīth.[2] Madīnan ^camal is the primary source of normative sunnah for Mālik, and, since Mālik studies ḥadīth against the criterion of ^camal, one might also say that he judges ḥadīth by reference to the sunnah, while he regards it as unsound to attempt to constitute the sunnah solely by reference to the textual source of ḥadīth.[3]

Mālik's attitude toward ḥadīth is reflected clearly in his biography, as I have indicated. He exercised great care, first of all, in selecting those from whom he received his ḥadīth. But even in so far as those ḥadīth are concerned which Mālik received from his teachers, Mālik, as ash-Shāfi^cī is reported to have said and as is supported by the reports of the numerous ḥadīth which Mālik refused to transmit, would put even them aside if he found something about them to be

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[1]See above, p. 320. [2]See above, pp. 179-181, 200-201.
[3]See above, pp. 79-80, 300, 339; below, pp. 578-579.

questionable or if he felt transmission of them would be detrimental. Such an attitude toward ḥadīth, which would be unthinkable to those who, like ash-Shāfiᶜī, came to regard even isolated ḥadīth as, perhaps, the most consequential source of law, indicates that the Madīnan tradition upon which Mālik relied was something which he regarded to be a more than sufficient source of knowledge of the sunnah and a much surer source, at that, than ḥadīth. Ḥadīth for Mālik were clearly secondary; hence, as 'Abū Zahrah suggests, when it came to the transmission of ḥadīth Mālik also relied upon the principle of maṣlaḥah, and not simply considerations of formal authenticity, in determining what should and should not be transmitted.[1] Indeed, Mālik looked upon the business of transmitting ḥadīth as something so serious that he is reported to have had muḥaddith's in Madīnah put in jail, as long as they refused to abide by similar standards.[2]

The Muwaṭṭa', as I have pointed out, is essentially an ᶜamal book, codifying and setting forth the basic precepts of law of the Madīnan school as reflected in their ᶜamal. The title of the work itself--"the much-trodden path"--is apparently a figurative reference to Madīnan ᶜamal, and that figure of speech carries in it the implications of normativeness, simplicity, and ease which seem to be basic to the con-

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[1]See above, p. 83 ; for Mālik's attitude toward ḥadīth, see pp. 76-85.

[2]See above, pp. 84-85.

cept of Madīnan ᶜamal and place it in opposition to that which is shādhdh, erratic and irregular or otherwise non-normative.[1]

The Concept of ᶜAmal and the Legal Status of Habitual vs. Isolated Acts

Early in Al-Muwāfaqāt,[2] ash-Shāṭibī discusses the difference between the legal status of habitual and isolated acts, and this discussion is pertinent to Mālik's concept of ᶜamal, since it accounts, I believe, for why Mālik is reported to have regarded certain acts of the Prophet, 'Abū Bakr, and ᶜUmar to have been makrūh [undesirable; reprehensible]. There is a qualitative difference, ash-Shāṭibī holds, between an identical act when it is done once or only rarely and when it is done repeatedly or as a matter of habit. That is, there is a qualitative difference between an act in terms of whether or not it is normative or non-normative behavior. For whatever the property of an act may be as an isolated act, that property becomes magnified, enrichened or exaggerated and distorted when the same act is repeated frequently. Smoking a single cigarette, for example, is relatively insignificant, while the habit of cigarette smoking places one's health and life in danger.

Although legal theorists speak of acts as falling in-

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[1]See above, pp. 104-106.

[2]Unless indicated otherwise, the main ideas of the following discussion come from ash-Shāṭibī, Al-Muwāfaqāt, 1:132-142.

to five main categories--wājib [obligatory], mandūb [recommended], mubāḥ [indifferent], makrūh [reprehensible], and ḥarām [prohibited]--any given act, according to ash-Shāṭibī, has in essence only one of three legal statuses from the standpoint of Islamic law. Either it is desirable that one do it [maṭlūb al-fiᶜl], it is desirable that one not do it [maṭlūb at-tark], or it is an indifferent matter regarding which one is at liberty to choose to do it or not to do it [mukhayyar fīhi].

Those acts which are described in Islamic legal theory as "wājib" and "mandūb" are, according to ash-Shāṭibī, maṭlūb al-fiᶜl in essence. Similarly, those acts which are described as "ḥarām" and "makrūh" are maṭlūb at-tark in essence. Yet, although wājib and mandūb acts are identical in essence, they differ in terms of their attendant consequences, i.e., in terms of the social and individual benefits which they bring. According to ash-Shāṭibī, the maṣlaḥah behind an act which has been designated as wājib is an absolute maṣlaḥah, which pertains to the absolute necessities [aḍ-ḍarūrīyāt] of man's well-being in this life and the next. The maṣlaḥah of those acts which are designated as mandūb, on the other hand, is of lesser consequence.

Therefore, ash-Shāṭibī continues, the legal consequences of failing to perform a wājib act are different than those of failing to perform a mandūb act. Failure to perform a wājib act a single time is considered a serious breech of

moral obligation, in Islamic law, and punishable by God, with possible legal consequences in society. Failure to perform a mandūb act a single time or from time to time, however, is not regarded to be a serious breech of moral obligation, because of the lesser maṣlaḥah contained in the mandūb act. Single or isolated failures to perform what is mandūb, therefore, are pardonable [ma^{c}fūw ^{c}anhu] in the eyes of Islamic law. Thus, ash-Shāṭibī continues, although wājib and mandūb acts are identical in essence before the fact, they have different legal consequences after the fact, and this is the fundamental difference between them.

Similarly, in the case of acts which are designated as ḥarām and makrūh, which are both maṭlūb at-tark in essence, according to ash-Shāṭibī, their legal consequences differ by virtue of the fact that commission of that which is ḥarām leads to absolute mafāsid [individual and social detriments] which destroy man's well-being in this life and the next. The mafsadah involved in the makrūh act, however, is of a lesser degree. Therefore, commission of that which is ḥarām, even a single time, is regarded to be transgression against God in the eyes of Islamic law and is punishable by God, with possible legal consequences in society. Single or isolated commissions of makrūh acts, however, are overlooked because of the significantly different degree of mafsadah which they contain.

Single or isolated commissions of makrūh acts and sin-

gle or isolated failures to perform mandūb acts are pardonable in Islamic law, according to ash-Shāṭibī, by virtue of the principle of raf^c al-ḥaraj--the principle of making things reasonably easy for the people by not placing excessive demands upon them.[1] For ash-Shāṭibī, implementation of the principle of raf^c al-ḥaraj involves one of the most essential maṣāliḥ of Islamic society, namely, that of not making such excessive or troublesome demands upon society as to make religion loathsome to them, while also not being so lax as to bring about moral decay and social decadence. (By comparison with ash-Shāṭibī's concept of the normative balance of ^camal, it is clear that he would have conceived of a moderate, properly balanced ^camal as being the concrete manifestation of the principle of raf^c al-ḥaraj.) Therefore, because the maṣlaḥah which comes from implementation of the principle of raf^c al-ḥaraj is so much greater than any maṣlaḥah which might be attained by obligating the people to perform mandūb acts or to put aside makrūh acts without exception, it follows quite logically that implementation of the principle of raf^c al-ḥaraj takes priority. Furthermore, violation of the principle of raf^c al-ḥaraj would bring about a mafsadah which would threaten the existence of the Islamic society, and, as indicated earlier, ash-Shāṭibī holds it to be a definitive

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[1]For further treatment of the principles of raf^c al-ḥaraj, which underlies Mālik's conception of istiḥsān, see above, pp. 245-261.

principle of Islamic law that whenever the mafsadah which results from a matter becomes greater than the maṣlaḥah which results from that matter, that matter must be prohibited.[1]

Nevertheless, ash-Shāṭibī continues, because mandūb acts embody maṣāliḥ for the well-being of the Islamic society in this life and the next they must not be abandoned altogether. Just as it is pardonable that they be omitted from time to time, it is also required that they be performed from time to time, and--because of the qualitatively different value of habitual acts--persistent, systematic failure to perform that which is mandūb is similar to failure to perform that which is wājib. Similarly, on the other hand, because makrūh acts contain mafāsid, they come to be of essentially the same quality as ḥarām acts when makrūh acts become persistent and habitual. Therefore, whereas it is pardonable that one do that which is makrūh in isolated cases, it is prohibited that makrūh acts be done habitually, i.e., that they become part of the normative ᶜamal of the individual or society.

This same pattern holds, according to ash-Shāṭibī, in evaluating the legal status of indifferent [mubāḥ] acts, which ash-Shāṭibī regards as being in essence within the category of al-mukhayyar fīhi, those acts concerning which one is at liberty to choose to do them or not to do them.

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[1]See above, pp. 262-263.

The status of being mubāḥ generally pertains, according to ash-Shāṭibī, only to the single or isolated act and is almost never absolute. For rarely does an act which is mubāḥ, i.e., mukhayyar fīhi, as a single or infrequent act remain neutral when it becomes a frequently, habitually, or persistently repeated act. On the contrary, as the isolated mubāḥ act ceases to be isolated and becomes more frequent it gravitates in the direction of its particular properties, and from the standpoint of Islamic law its legal status is determined in terms of the ultimate ends which that act serves. If, as a frequently repeated act, an individual mubāḥ act leads to a maṣlaḥah--such as the development of intellect, health, or general well-being--then that act has the legal status of a mandūb act when it becomes frequent or habitual. That is, it becomes something which it is desirable that one do , maṭlūb al-fi^{c}l, and the degree of that desirability depends on the extent of the maṣlaḥah which the frequently repeated mubāḥ act contains, such that if that maṣlaḥah were especially great persistent performance of the mubāḥ act could have the value of the performance of a wājib act.

On the other hand, if the isolated mubāḥ act will lead to a mafsadah as a frequently repeated act--such as wasting time, dulling the intellect, jeopardizing one's health, or destroying one's general well-being--it becomes maṭlūb at-tark--i.e., of the same status of makrūh and ḥarām acts--when it becomes frequently repeated or habitual. Ultimate eval-

uation of the detrimental mubāḥ act under such circumstances would depend on such considerations as those of how great the mafsadah is to which it leads and how persistently the act is performed, i.e., how quickly it is moving toward that mafsadah. Thus, under some circumstances an act which would be mubāḥ as a single or isolated act would come to be of the same status as a ḥarām act, if it were repeated persistently. It might also be pointed out that, from the standpoint of ash-Shāṭibī's legal theory, it is even more important to the ultimate interests of society to preserve it from mafāsid--which is the chief function of the concept of sadd adh-dharā'iᶜ[1]--than it is to secure maṣāliḥ, although both matters are essential to the life of society and should be pursued simultaneously. Therefore, the priority of discouraging the frequent or persistent performance of detrimental mubāḥ acts would have a higher priority than the cultivation of healthy mubāḥ acts, although, of course, both should be done simultaneously.

Reports of isolated acts and Mālik's concept of karāhiyah

As mentioned earlier ash-Shāfiᶜī in "Ikhtilāf Mālik" takes issue with the Mālikīs because they have classified some reported actions of the Prophet and the caliphs 'Abū Bakr and ᶜUmar ibn al-Khaṭṭāb as neutral or as reprehensible [mak-

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[1]See above, pp. 188-195; 351-352.

rūh]. I also noted that in these instances the ḥadīth or āthār in question are reports of isolated actions, which, of course, are regarded to be ambiguous in Mālikī legal theory when they are taken out of context.[1] As mentioned at the beginning of the preceding discussion of ash-Shāṭibī's concept of the qualitative difference between habitual and isolated acts, I believe that this concept accounts for the Mālikī classification of these isolated acts of the Prophet and 'Abū Bakr and ᶜUmar as makrūh--to which ash-Shāfiᶜī has objected--and that there is a connection between the concept of the normativeness of ᶜamal and Mālik's concept of karāhiyah [reprehensibility], as reflected in these classifications.

The Mālikīs report that the Prophet once recited certain sūrah's [chapters of the Qur'ān] at ᶜĪd prayers, but they regard the Prophet's selection of these sūrah's as a neutral matter, in the sense that the 'imām who leads ᶜĪd prayers is at liberty to choose for himself which verses or sūrah's of the Qur'ān he deems it appropriate to recite. Ash-Shāfiᶜī disagrees, however, and states in "Ikhtilāf Mālik," "You ought to regard things that the Prophet has done as preferable [mustaḥabb] in all cases."[2]

Both the Mālikī and Shāfiᶜī positions regarding this reported action of the Prophet imply presumptions about the intent of the Prophet behind the act of selecting the partic-

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[1]See above, pp. 191-192. [2]See above, pp. 351-352.

ular sūrah's which he chose to recite that day. For as Ibn al-Ḥājib indicates in his treatment of the ambiguity of isolated actions, the determination that it is desirable to imitate an act which the Prophet is reported to have done involves assumptions about the Prophet's intention and purpose in originally performing that act, and until one has determined by reference to other sources of law what the Prophet's intent behind the act was--i.e., did he intend that it be imitated, did he regard it as recommended but not necessary that one imitate it, or did he do it with no intention of being imitated in it at all?--one cannot actually claim to be imitating the Prophet merely by virtue of doing the same act.[1]

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[1]See above, pp. 191-192. Al-Qarāfī develops a concept very cognate to this. He states that one must determine the social capacity [taṣarruf] in which the Prophet did things or made individual statements before one can draw legal conclusions from those statements and actions. Some of the capacities in which the Prophet functioned which al-Qarāfī identifies are the capacity of political leader ['imām], the capacity of universal lawgiver, the capacity of judge, and so forth. Depending on what the social capacity of the Prophet was in which he did a given act or made a given statement, that matter will often take on quite different legal implications. Al-Qarāfī gives illustrations: For example, the Prophet is reported to have said: "Whoever kills an enemy on the battlefield has a right to his armor." If one understands the Prophet as having made this statement in his historical capacity as the military leader of a given battle or campaign, it does not take on universal implications. Rather, it becomes a matter of policy or strategy which he took regarding that particular engagement, which, however, has been isolated from its historical context by a manner of transmission which did not report such essential details. If, however, one understands the Prophet as having made this statement in his capacity of universal lawgiver--out of the context of specific historical circumstances, as it were--the ḥadīth takes on much different implications. For it would then imply that for all times, under all circumstances the soldier in Islamic law should have

Imitation in this sense requires harmony between the outward form of the act [aẓ-ẓāhir] and the meaning or purpose which that act was originally intended to have. Performance of the outward form of the act in a context or manner contrary to what was originally intended by the act would not constitute imitation but could even amount under certain circumstances to being a parody or caricature of the original act.

The quality and meaning of an act do not consist merely in the outward form [aẓ-ẓāhir] of the act but, rather, in how that outward form was intended to relate to the context of circumstances in which it was performed. Thus, it may be that the Prophet selected the sūrah's which he recited that day because he deemed that selection to be superior to other selections in all future times and places, in which case it would clearly be mustaḥabb from the standpoint of Islamic law that future 'imām's at ᶜĪd prayers make the same selection. It may also be, however, that some other motivation

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this and analogical rights. Al-Qarāfī mentions also the ḥadīth according to which the Prophet said that any person who brought lands under cultivation which had lain uncultivated and neglected had a right to that land. Again, one must determine whether or not this statement reflects administrative policy of the Prophet--i.e., his functioning in the capacity of head of state--which he saw fit to take in view of the historical circumstances of the time or whether he made the statement in his capacity of universal lawgiver and, therefore, out of the context of history, as it were. If the Prophet made this statement as part of his administrative policy, it would not carry universal implications. If, on the other hand, the Prophet made the statement in his capacity as universal lawgiver the statement would constitute a precept of Islamic law in all times and places. Cited from Shihāb-ad-Dīn al-Qarāfī, Al-'Iḥkām fī-'l-Farq bain al-Fatwā wa-'l-'Aḥkām, pp. 22 ff., by ᶜAlāl al-Fāsī, pp. 110-112.

was involved. He might, for example, have selected those sūrah's that day simply as a matter of personal preference or because he felt that they were most appropriate for the occasion, given the immediate needs and concerns of the Madīnan community on that day, in which case it is conceivable that he would have selected other sūrah's and verses from the Qur'ān had the circumstances of the community that day been different, or if, perhaps, he might have chosen to speak on a different topic.

When one states that an act is mustaḥabb [recommended; desirable] one has made a recommendation that that act be repeated frequently and, hence, that it be made a part of ᶜamal, for it is something the doing of which is praiseworthy. Thus, ash-Shāfiᶜī's categorical statement in this example that every reported action of the Prophet must be regarded as being mustaḥabb--without making the reservation that one must first determine the special properties of that act and the circumstances in which it was done--runs contrary to the distinction between the normative and non-normative which, according to ash-Shāṭibī, it is one of the purposes of a well-balanced, normative ᶜamal to maintain. Such a categorical principle does not take sufficient account of the fact that, as a person acting in history, the Prophet's behavior would have had both exceptional, non-normative, and normative aspects and that it would be a distortion of the example he set to recommend that those of his acts be taken as desired norms which were

originally not normative.

Ash-Shāfi^cī states in "Ikhtilāf Mālik" that the Mālikīs have transmitted a report which states that the Prophet once recited two very long sūrah's while leading the evening [maghrib] prayer. He states also that they have reported that 'Abū Bakr and ^cUmar ibn al-Khaṭṭāb are reported to have recited on separate occasions during their caliphates some of the longest sūrah's in the Qur'ān, while leading the people in the dawn [fajr] prayer. In the case of 'Abū Bakr, for example, it is reported that on that occasion they began the dawn prayer very early when it was still quite dark and that the recitation was not completed until just shortly before sunrise. The Mālikīs classify each of these reported actions as makrūh, which provokes some of ash-Shāfi^cī's strongest condemnations in "Ikhtilāf Mālik". He states that he cannot conceive of how one could consider anything the Prophet did as being makrūh and states that this position which the Mālikīs have taken is a clear indication of the weakness of their school [madhhab] in all matters. With regard to the reported actions of 'Abū Bakr and ^cUmar, ash-Shāfi^cī contends that the Mālikīs have gone against the ^camal of their own 'imām's, which he takes to be an indication of the overall weakness of their school. He concludes that they are so heedless and negligent that they should not even be permitted to give fatwā's much less to consider themselves superior to others in the knowledge which they possess. Later, in a similar instance ash-Shāfi^cī con-

cludes that the Mālikīs are simply arbitrary and that they make offhanded decisions on the basis of their whims and fancies without any reflection [tabaṣṣur] or sound deliberation [ḥusn rawīyah].[1]

The behavior reflected in each of these reports is contrary to normative ᶜamal regarding the manner in which the five daily community prayers are to be prayed; that ᶜamal, on the contrary, is in accordance with the ḥadīth mentioned earlier which Mālik transmits in the Muwaṭṭa':

> When any of you leads the people in prayer, let him go easy. For there are among them the weak and the sick and the old. But when anyone of you prays alone, let him lengthen his prayer as long as he desires.[2]

It might be pointed out, furthermore, that the recitation in the evening prayer is normatively the shortest of all, while the normative recitation in the dawn prayer is generally the longest. Nevertheless, the exceedingly long recitations which 'Abū Bakr and ᶜUmar are reported to have made on two different occasions are far in excess of the norm and would make praying the dawn prayer unbearable for the generality of the people if they were made the desired norm.

These actions which the Prophet, 'Abū Bakr, and ᶜUmar are reported to have done, therefore, are makrūh from the standpoint of normative conditions and behavior, i.e., they are makrūh from the standpoint of the moderate norm of ᶜamal as regards the performance of the daily prayers--a norm which

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[1]See above, pp. 262-267. [2]See above, pp. 442-444.

the Prophet himself established. And the acts which the Prophet, 'Abū Bakr, and ᶜUmar are reported to have done in these isolated instances would have been exceptional behavior even for themselves. Mālik's designation of these isolated acts as <u>makrūh</u> appears to me to be an instance of the application of <u>sadd adh-dharā'iᶜ</u> with the purpose of keeping those persons who hear these reports but who are unable to discern that they reflect exceptional behavior from attempting to put them into practice and make them normative, thinking in so doing that they are adhering to the examples of the Prophet and the first two caliphs.[1]

According to the analysis made earlier of different types of non-normative behavior, these reports are examples of exceptional public behavior.[2] The transmissions which report these acts do not give dates or contextual circumstances; nevertheless, one can imagine a variety of exceptional, even emergency, conditions in which the exceptional behavior of the Prophet, 'Abū Bakr, and ᶜUmar as reported in these texts might have taken place and in which that behavior would have been appropriate--such as during times of unusual communal anxiety as, for instance, during some of the wars, famines, and plagues that the community faced during the days of the Prophet and the early caliphate.

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[1]For <u>sadd adh-dharā'iᶜ</u>, see above, pp. 262-267.

[2]See above, pp. 442-444.

Nevertheless, as appropriate as these actions may have been for the unreported historical circumstances in which they occurred, the isolated properties of the acts themselves are such that they could be very detrimental to the community if they were made normative procedure under normal circumstances. As mentioned in the preceding discussion, the value, quality, and even the meaning of outwardly identical acts may change radically in terms of whether those acts are frequent or infrequent and also in terms of the circumstances under which they are done. Whatever properties an act has in isolation, those properties become magnified or exaggerated once the act ceases to be isolated and becomes more frequent, habitual, or persistent. And, according to ash-Shāṭibī's assessment of the nature of isolated and habitual actions, once an act becomes frequently repeated it must be evaluated and classified in terms of the ends which it serves, if they are beneficial then frequent repetition of the act becomes desirable but if they are detrimental then frequent repetition becomes strictly discouraged. Making a normative community practice out of reciting the Qur'ān for hours on end during the dawn prayer, while the congregation stands shoulder to shoulder, silent and motionless behind the reciter--some of the people being sick, weak, old, or preoccupied with other legitimate concerns--would soon become unbearable and intolerable for the community and threaten to make religious observance for them something odious. Therefore, although not

prohibited as an isolated act and conceivably quite appropriate under certain exceptional circumstances, the permissibility of this manner of recitation in communal prayer--like the permissibility of many mubāḥ acts in general, according to ash-Shāṭibī's analysis of them--is not absolute and would not extend beyond isolated circumstances and exceptional conditions.[1]

The Normativeness of ᶜAmal and Mālik's Concern for Maṣlaḥah

In the light of the preceding theoretical discussions about the relationship between the normativeness of ᶜamal and the general well-being of Muslim society, it is clear that there is a correlation--in terms of that conception--between the maintenance of and adherence to a properly balanced, normative ᶜamal and the concern for maṣlaḥah, which has been described as the ultimate concern in Mālik's thought and in the legal theory of the Mālikī school. For, as pointed out earlier, a moderate and properly balanced ᶜamal, which is neither too demanding nor too lax, would constitute a concrete embodiment of such principles as rafᶜ al-ḥaraj, which takes a very high priority in Mālik's legal method and is one of the primary bases upon which he applies the principle of istiḥsān.[2]

Mālik's concern for maṣlaḥah is particularly manifest

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[1]See above, pp. 463-465. [2]See above, pp. 462-463, 245-261

in the conception and application of _istiḥsān_, _sadd adh-dharā'i^c_, and _al-maṣāliḥ al-mursalah_, which have been treated earlier.[1] The question arises, therefore, as to whether or not in the structure of Mālik's legal thought and Mālikī legal reasoning there might have been any connection between the concept and application of these three legal principles and the concept of normative _^camal_.

As indicated earlier in the prefatory treatment of these three principles, one of the fundamental characteristics of them is that of drawing exception to general precepts of law under special circumstances, because in the context of those circumstances literal application of the general precept would no longer be appropriate--indeed, under certain special circumstances literal application of the general precept would be contrary to the legal purpose of the precept.

Istiḥsān functions, for example, by making certain matters permissible which would appear to be prohibited in the light of pertinent general precepts of law. In terms of legal theory, _istiḥsān_ draws exception in such cases on the grounds that it is contrary to the purpose of the pertinent general precepts to be applied to the unusual or otherwise special circumstances of the case. _Sadd adh-dharā'i^c_ functions in essentially the opposite manner, by prohibit-

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[1]See above, pp. 245-279.

ing certain matters which ostensibly would appear to be permissible in the light of pertinent general precepts of law; sadd adh-dharā'i^{c} draws exception to such general permissibility, however, because under the special circumstances of the case there is sufficient reason to believe that such permissibility is being used as a license to accomplish goals which are detrimental to society and have been prohibited by Islamic law, i.e., detrimental legal fictions. Al-Maṣāliḥ al-mursalah, after the manner of istiḥsān and sadd adh-dharā'i^{c}, has both attributes of making special permissions and special prohibitions, and in that regard al-maṣāliḥ al-mursalah can be regarded as a broadly inclusive concept of maṣlaḥah of which istiḥsān and sadd adh-dharā'i^{c} are limited branches. Nevertheless, as indicated earlier, the principle of al-maṣāliḥ al-mursalah also contains properties which are not contained in either of the other two principles. For there is a sense of normativeness and simple contrariness, but not contradiction, in the exceptions which are drawn to general precepts of law by istiḥsān and sadd adh-dharā'i^{c}, while there may often be a sense of emergency and true contradiction in the exceptions drawn by way of al-maṣāliḥ al-mursalah. Furthermore, al-maṣāliḥ al-mursalah also includes the additional property of providing the sanction of Islamic law for new legal rulings, instruments, and institutions which are without precedent but compatible with the ultimate purposes of

Islamic law.[1]

It is unmistakably clear, therefore, that each of these three legal principles is oriented towards Islamic society as a whole. The initial purpose of istiḥsān, for example, is to protect fundamental social and individual maṣāliḥ in individual cases and special circumstances--maṣāliḥ which would be obliterated by blind application of the letter of general precepts without a view to the ultimate purposes which those general precepts were intended to accomplish. As a result, istiḥsān has the attendant purpose of protecting Islamic society from the mafāsid which would come about by faulty application of the general precepts. The initial purpose of sadd adh-dharā'iᶜ, on the other hand, is to protect society from the mafāsid which would come about as the result of using outward observance of permissible forms of Islamic legal conduct as means to secure and justify aberrations which are contrary to Islamic law and which it was not the purpose of those forms of conduct to permit. And, as a result, sadd adh-dharā'iᶜ has the attendant purpose, by not allowing the law to be circumvented, of securing those maṣāliḥ for which the general precepts were originally intended.

Al-Maṣāliḥ al-mursalah, while having the properties of these two, involves--for example, in the case of emergency measures--the designation of priorities among the various

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[1]See the comparative discussion of these principles, above, pp. 275-279.

maṣāliḥ which it is the purpose of Islamic law to attain in order to determine which of them are the most essential and which of them, in emergency situations, can be sacrificed at the expense of others. In so far as al-maṣāliḥ al-mursalah involves the creation of new legislation which is consistent with the law but without precedent, it is the purpose of this dimension of al-maṣāliḥ al-mursalah to insure that the same ultimate purposes which the forms, instruments, and institutions of Islamic law were intended to acquire in the old society under former conditions will be acquired in the new society under different circumstances.

Thus, istiḥsān, sadd adh-dharā'i^c, and al-maṣāliḥ al-mursalah may be conceived of as tools of ijtihād especially designed for preserving the normative and moderate equilibrium of an Islamic ^camal which is neither too exacting so as to create general disaffection nor too permissive so as to bring about social decadence. Furthermore, they are the vehicles by which such a normative ^camal is passed along to succeeding generations and changing societies or for creating such a normative ^camal in the midst of non-normative circumstances.

Istiḥsān, for example, is a mechanism of lenience, which prevents ^camal from becoming too rigorous and austere. Sadd adh-dharā'i^c, on the other hand, is a mechanism of strictness, which prevents ^camal from becoming too lax and which keeps the letter of the law from becoming meaningless. In

this regard, istiḥsān and sadd adh-dharā'i^c are essential to the internal workings of a living, Islamic ^camal under normal circumstances, irrespective of whether or not that society is undergoing social transformation.[1] Istiḥsān, for example, often pertains to some of the most common types of social behavior--such as the manner in which people buy, sell, and rent out their property, agricultural agreements, and so forth. Attempts to find ambiguities in the law to circumvent its purpose--such as finding ostensibly legal methods to defraud creditors, as in the example given in the treatment of sadd adh-dharā'i^c above--are also naturally to be expected in human societies, regardless of whether or not those societies are in the process of social change.

The nature of the principles of istiḥsān and sadd adh-dharā'i^c is such, however, that they are also well-suited for responding to growth and social change and creating an appropriate normative ^camal for the new situation, although this element of responding to social change and unusual challenges to society is more prominent in the principle of al-maṣāliḥ al-mursalah. Theoretically, according to al-Qarāfī,

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[1]Because istiḥsān and sadd adh-dharā'i^c are very common even in normal societies, while striking examples of al-maṣāliḥ al-mursalah are more common in societies undergoing change, unstable societies, or societies threatened from the outside--one finds more examples of istiḥsān and sadd adh-dharā'i^c than striking examples of al-maṣāliḥ al-mursalah in Mālikī law works that were compiled in relatively stable Islamic societies. Ash-Shāṭibī, for example, takes many of his illustrations of al-maṣāliḥ al-mursalah from the early caliphate,one of the purposes of which was to lay the foundations