the substance of Islamic law may be divided into two categories: 1) those matters which constitute ultimate ends in themselves [maqāṣid] and 2) those matters which constitute means [wasā'il] to those ends. It is the ultimate purposes of the law which have intrinsic value, as it were, and, hence, it is the ultimate purposes of the law which are permanent and unchanging. Those aspects of the law which are means to ends do not possess intrinsic value; on the contrary, they are instrumental values which are subordinate to the ultimate purposes of the law. Hence, they remain legally valid only as long as they continue to be effective means for securing the ends for which they were intended. Those principles like istiḥsān, sadd adh-dharā'i^{c}, and al-maṣāliḥ al-mursalah which are means of securing basic maṣāliḥ and averting mafāsid are such instrumental values. Therefore, legal rulings, procedures, or institutions which grow out of them have no permanence but, as al-Qarāfī indicates, remain legitimate only as long as they continue to be effective means of attaining the ultimate purposes for which they were originally designed.[1]

From a theoretical standpoint, therefore, the principles of istiḥsān, sadd adh-dharā'i^{c}, and al-maṣāliḥ al-mur-

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for a stable Islamic society in the midst of complex and unprecedented challenges. Similarly, he takes examples from later societies, such as perhaps that of his own late Andalusian Granada, which were faced with unusual domestic and foreign problems.

[1]See above, pp. 272-273.

salah would also require the alteration of types of ᶜamal which were no longer operable and the development of appropriate counterparts to take their place. In order to maintain the equilibrium in ᶜamal for which they were intended, the principles of istiḥsān and sadd adh-dharā'iᶜ would require alteration of those earlier products of istiḥsān and sadd adh-dharā'iᶜ which no longer accomplished that end. The principle of al-maṣāliḥ al-mursalah would provide the specific legislation, instruments, and institutions necessary for building a normative ᶜamal under unprecedented or extraordinary conditions and to provide the mechanism for creating internal stability and social cohesion, and in those situationsin which the existence of the society itself is at stake, al-maṣāliḥ al-mursalah would provide the resources to take whatever steps and make whatever sacrifices were necessary to preserve the community, which itself is the matrix without which a normative ᶜamal cannot develop.

The Use of ᶜAmal in Conjunction with Legal Texts

ᶜAmal and ᶜUmūm al-Balwā[1]

As mentioned earlier 'Abū Ḥanīfah is said to have rejected the implications of isolated ḥadīth whenever they pertained to matters of the nature of ᶜumūm al-balwā and were not supported by well-established sources of law or recognized

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[1]For treatment of the concept of ᶜumūm al-balwā, see above, pp. 184-188.

as valid by the [Kūfan] fuqahā'.[1] I also cited a report earlier which is attributed to Mālik and which, if authentic, would indicate quite clearly his consciousness of the concept of ᶜumūm al-balwā, although there is no evidence that I know of of Mālik's having used the term itself.[2] In Bidāyat al-Mujtahid, Ibn Rushd compares Mālik's use of ᶜamal in interpreting ḥadīth to 'Abū Ḥanīfah's application of the concept of ᶜumūm al-balwā and draws the conclusion that both methods are very cognate.[3]

ᶜAmal by virtue of the fact that it is the normative behavior of a society and not an individual has the same attribute of generality with which 'Abū Ḥanīfah is concerned in the conception of ᶜumūm al-balwā. Indeed, one could say that ᶜamal is the concrete manifestation of ᶜumūm al-balwā, although, of course, certain aspects of ᶜamal would be more general and more frequently repeated than others. The occasions ['asbāb] of precepts embodied in ᶜamal are often so common and recur so frequently, according to Ibn Rushd, that he does not regard it to be reasonable [lā yajūz] that the

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[1]See above, pp. 184-185, and appendix 1, below.

[2]See above, pp. 186-187.

[3]As pointed out earlier, 'Abū Zahrah holds that there is consensus among Mālikī legal theorists that the legal implications of isolated ḥadīth will be rejected whenever they pertain to matters of ᶜumūm al-balwā and are not supported by other sources of law--of which, of course, Madīnan ᶜamal would be a primary source. He cites illustrations of such types of precepts and also believes that Mālik's refusal to transmit ḥadīth that no one else was known to have transmitted and which had unusual implications reflects a parallel concern; see above, pp. 185-186.

people of Madīnah should have forgotten, distorted, or intentionally have put them aside during the generations prior to Mālik. In general, therefore, Ibn Rushd regards Mālik's reliance upon ᶜamal as legitimate and is also of the opinion that Madīnan ᶜamal constituted a surer criterion by which to interpret ḥadīth than the Kūfan tradition upon which 'Abū Ḥanīfah relied, primarily because Ibn Rushd has greater confidence in the integrity of the Madīnan community and the liklihood that they would have preserved their ᶜamal intact.[1]

When the legal implications of a ḥadīth are in conformity with Madīnan ᶜamal, Ibn Rushd continues, there is a high probability [ghalabat ẓann] that that implication is valid. On the other hand, when the legal implications of a ḥadīth are contrary to ᶜamal it is much less likely [i.e., there is ḍaᶜf ẓann] that those implications are a valid part of Islamic law. Thus, when the implications of a ḥadīth are contrary to ᶜamal, Ibn Rushd generally regards that to be an indication that the ḥadīth was abrogated, that there has been something wrong with the transmission of the ḥadīth, or that for some other reasons the legal implications of the ḥadīth are not legally binding. Nevertheless, Ibn Rushd does not believe that it is categorically valid to reject the implications of well-established isolated ḥadīth in all cases in which they are contrary to Madīnan ᶜamal. He holds, rather,

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[1]See Ibn Rushd, 1:102 (7); cf., 1:140 (29).

that the reliability of ᶜamal in such cases depends on to what extent the matter in question is of the nature of ᶜumūm al-balwā. He concludes that ᶜamal is a sufficiently conclusive criterion in terms of which to reject contrary, well-established ḥadīth when they pertain to matters that are clearly of the nature of ᶜumūm al-balwā, while he believes that ᶜamal is not a sufficiently conclusive reference in matters that are of a rarer and more unusual nature and, hence, do not pertain directly to ᶜumūm al-balwā.[1]

ᶜAmal in Conjunction with Supporting Legal Texts

ᶜAmal supported by authentic corroborating ḥadīth is of the category of what later theorists termed to be ᶜamal naqlī, which they deemed to be the most authoritative type of Madīnan ᶜamal because of its direct connection with Prophetic authority. The most conclusive type of ᶜamal naqlī, according to the opinions of Ibn Rushd, ᶜIyāḍ, and ash-Shāṭibī, is that which is supported by conforming ḥadīth--as opposed to those types of ᶜamal naqlī for which there were no ḥadīth, regarding which there were contrary ḥadīth, and so on. Ibn Rushd has referred to this type of ᶜamal in the preceding discussion on ᶜamal and ᶜumūm al-balwā and states that he holds that there is very high probability that such types of ᶜamal are valid. Ash-Shāṭibī refers to those types

[1]Ibn Rushd, 1:102 (15).

of ᶜamal which are confirmed by authentic ḥadīth as "as-sunnah al-muttabaᶜah wa 'ṣ-ṣirāṭ al-mustaqīm" [that sunnah which has been followed (adhered to; complied with) and the straight way]. Ash-Shāṭibī identifies this type of ᶜamal in his discussion of the implications of the normativeness of ᶜamal in connection with the non-normativeness of certain aspects of the Prophet's reported behavior. The term as-sunnah al-muttabaᶜah--which reminds one of 'Abū Yūsuf's as-sunnah al-maᶜrūfah [the well-known sunnah] and similar expressions he uses[1]--indicates how, according to ash-Shāṭibī's conception of ᶜamal, the conformity of ᶜamal and ḥadīth is a sure demonstration that the legal implications of those ḥadīth were intended to be normative. Hence, ash-Shāṭibī regards the authority of this type of ᶜamal to be very great and holds that it is incumbent upon the Islamic community as a whole to follow it.[2]

Mālik often cites ḥadīth and āthār in the Muwaṭṭa' which are in conformity with Madīnan ᶜamal and indicate the continuity of the precept in question. As pointed out earlier, precepts in conjunction with which Mālik uses the term -zĀIb ["wa hādhā 'l-'amr al-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm bi-baladinā"] are often accompanied by such corroborating ḥadīth.[3] 'Abū Zahrah points out, furthermore, that when iso-

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[1]See above, pp. 202-204.

[2]Ash-Shāṭibī, Al-Muwāfaqāt, 3:56; for ᶜIyāḍ on the conformity of ᶜamal and ḥadīth, see, ᶜIyāḍ, 1:70-71.

[3]See above, pp. 397-398.

lated ḥadīth are in conformity with Madīnan ᶜamal, they are no longer regarded to be of the category of isolated ḥadīth in Mālikī legal theory,[1] about which I will say more shortly in the discussion of Madīnan ᶜamal as the semantic context for ḥadīth and the criterion by which early muḥaddith's may have determined what it was necessary to transmit and what it was not.

One of the most explicit statements I have found pertaining to Mālik's use of ᶜamal as a criterion against which to evaluate ḥadīth is the citation I have taken from Ibn al-Qāsim in the Mudawwanah. In this citation, Ibn al-Qāsim makes very clear how authoritative the reference of ᶜamal was deemed to be and how important it was that ḥadīth be in conformity with ᶜamal in order to be regarded as valid sources of law:

> This has come down [to us], and if this ḥadīth had been accompanied by ᶜamal such that that [practice] would have reached those whom we met during our lifetimes and from whom we received [our learning] and those whom they had met during their lifetimes, it would indeed be correct to follow it. . . .
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> . . . Rather, ᶜamal is set down in accordance with those [ḥadīth] which have been accompanied by the practices ['aᶜmāl] [of the earlier generations] and which had been followed by the Companions of the Prophet, who were his followers; and similarly the Successors followed them in like manner without regarding that which had come down and been transmitted to have been fabricated or rejecting them outright.
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> Thus, that is passed over which has been passed over in ᶜamal, and it is not regarded to have been fabricated. But ᶜamal is put into practice in accordance with

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[1] See 'Abū Zahrah, Mālik, p. 305, and above, p. 179.

that which has [long] been practiced as ᶜamal, and it is regarded to be certainly authentic.[1]

ᶜAmal in Conjunction with Contrary Legal Texts

The preceding citation from Ibn al-Qāsim indicates explicitly that ḥadīth that were contrary to Madīnan ᶜamal were not regarded to be valid sources of law in the Madīnan school; it is important to note, however, that such ḥadīth are not necessarily regarded as having been fabricated, a point which Ibn al-Qāsim stresses repeatedly. I have given other citations as well to indicate that Mālik and Ibn al-Qāsim did not necessarily question the authenticity of ḥadīth which were contrary to ᶜamal.[2] According to Ibn ᶜAbd-al-Barr, as pointed out earlier, the majority of the Mālikīs reject musnad and mursal ḥadīth whenever they are contrary to ᶜamal.[3] Al-Qāḍī ᶜIyāḍ draws a distinction, however, between whether or not the ᶜamal which is contrary to a given ḥadīth is ᶜamal naqlī or ᶜamal which resulted from ijtihād, and he states that the majority of the Mālikīs have held that authentic isolated ḥadīth take precedence over Madīnan ᶜamal, whenever the ᶜamal to which they are contrary is one which resulted from ijtihād.[4] Ash-Shāṭibī, however, would not agree with ᶜIyāḍ, according to my understanding of ash-Shāṭibī's treatment of ᶜamal, for--as will be seen later in this chap-

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[1]See above, pp. 180-181. [2]See above, p. 173.

[3]See above, p.160. [4]ᶜIyāḍ, 1:71.

ter in the discussion of ḥadīth for which there is no corresponding ᶜamal--ash-Shāṭibī holds that it is not valid to put the legal implications of such ḥadīth into practice in the absence of supporting ᶜamal, which is essentially Ibn al-Qāsim's position as well.[1]

ᶜAmal indicates abrogation

When there is true contradiction between the legal implications of a ḥadīth of accepted authenticity and the ᶜamal of Madīnah, that contradiction is generally taken to be an indication that the legal content of the ḥadīth had been abrogated and that the corresponding abrogating precept is that which is embodied in ᶜamal. Theoretically speaking, abrogating types of ᶜamal would have to be of the category of ᶜamal naqlī, since the abrogation of established precepts rests on Prophetic authority.

Ibn Taimīyah refers to this usage of ᶜamal as a basis by which to determine between abrogated precepts of law and their abrogating counterparts,[2] and a few of the ᶜamal precepts which I have studied in my analysis of Mālik's terminology are apparently examples of ᶜamal being used to indicate abrogation. Ash-Shāṭibī cites examples of ḥadīth in Al-Muwāfaqāt which the Madīnans have held to be abrogated by reference to ᶜamal. He points out that just as there are Qur'ānic verses which clearly abrogate others so there were ḥa-

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[1]See above, pp. 509-514. [2]See above, p. 366.

dīth which abrogated the precepts contained in other ḥadīth. It is, of course, necessary for the mujtahid to distinguish between these two categories; nevertheless, ash-Shāṭibī continues, it is often very difficult on the basis of textual evidence alone to determine conclusively which ḥadīth was abrogating and which abrogated. He cites a statement attributed to Mālik's teacher Ibn Shihāb az-Zuhrī, according to which he states that the fuqahā' have often been incapable of determining which of the Prophet's ḥadīth fell in each of these two categories. Ash-Shāṭibī continues to say, however, that Mālik's reliance upon ᶜamal made the matter of distinguishing between abrogated and abrogating ḥadīth relatively easy for him.[1]

Athār [reports about the Companions], it should be pointed out, can be used to indicate abrogation in a manner very similar to the use of ᶜamal for that purpose. The use of āthār as a reference against which to interpret ḥadīth and as an independent source of Islamic law--which is part of the legal theory of the Mālikī, Ḥanafī, and Ḥanbalī schools[2]--is, in fact, only slightly different than using ᶜamal for the same purposes. By looking to the āthār of the early community, one sees the remnants of the ᶜamal of the generation in which the Companions lived. By studying the legal behav-

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:69-70.

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

ior of the Companions in the post-Prophetic period, therefore, one can get a clear picture of which precepts they regarded to still be binding upon themselves and which they did not. Mālik makes frequent use of āthār throughout the Muwaṭṭa'; I have noted, however, that the use to which Mālik puts āthār is especially prominent in some of the ᶜamal chapters. In the ᶜamal chapter on the ceremony of ᶜaqīqah, for example, Mālik's use of āthār is interesting in light of the fact that some Kūfans had claimed, contrary to Madīnan ᶜamal, that the practice of ᶜaqīqah was one of the pre-Islamic customs which had been abrogated. Mālik makes it quite explicit, however, that the custom of ᶜaqīqah is part of the continuous ᶜamal of Madīnah since the days of the Prophet; as if to confirm this further, he cites āthār in that chapter which indicate that ᶜaqīqah was performed for each of the Prophet's grandchildren, that the Companion Ibn ᶜUmar saw to it that ᶜaqīqah was performed for the newly born children of his extended family, and that the prominent Madīnan Successor ᶜUrwah ibn az-Zubair also saw to it that ᶜaqīqah was habitually performed. Thus, for Mālik, there can be no question of ᶜaqīqah's having been abrogated.[1]

ᶜAmal distinguishes between desired norms and exceptional behavior

As indicated in the initial discussion on the norma-

[1]See below, pp. 687, 560; cf., 646.

tiveness of ᶜamal, it is possible for reported texts to be contrary to ᶜamal without that contrariness being proof of the lack of authenticity of either. Indeed, when placed in their proper historical context from which they have sometimes been isolated by the process of transmission, such contrary reports may not contradict the normative ᶜamal at all. As I have indicated, ash-Shāṭibī gives considerable attention to the nature of ambiguity in authentically reported texts. He states, for example, that it is in the nature of ẓāhir statements--statements which have certain obvious implications but also contain some element of ambiguity--to lead to apparent contradiction when taken out of context; he holds, in fact, that one of the most fundamental characteristics of literalist [ẓāhirī] and esoteric [bāṭinī] heresies has been that they set forth their teachings on the basis of reports and statements which have been taken out of context.[1]

Thus, one of the primary functions of ᶜamal with legal texts, according to ash-Shāṭibī, is that it serves as a criterion by which to remove the implicit ambiguities of texts and to distinguish between the normative and the exceptional.[2] The method of using ᶜamal in this manner is, again, very clear in the citation from Ibn al-Qāsim in the Mudawwanah. For although Ibn al-Qāsim is not sure how to account for

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[1]See ash-Shāṭibī, Al-Muwāfaqāt, 3:76, 90-91, 352, 408-409; and above, pp. 176-178, 189, 223-224, 436-448.

[2]See above, pp. 178, 448.

the ambiguities in some of the texts he refers to--the authenticity of which he does not doubt--there is no question in his mind that it is ᶜamal and not those contrary implications which is to be followed.

Although ᶜamal and āthār serve essentially the same function in distinguishing between abrogated and unabrogated legal texts, i.e., texts in which there is true contradiction--I do not believe that this is exactly the case with regard to the use of ᶜamal as a criterion by which to distinguish between normative and non-normative ḥadīth. On the contrary, normative and exceptional matters can be confused with each other in āthār just as they can be in ḥadīth. For the ambiguities of ḥadīth in this regard are ambiguities which are implicit in the nature of reported texts--regardless of whom they pertain to--when they are removed from their historical contexts.

Thus, the non-normative behavior of a Companion can be reported along with reports of his normative behavior, just as a statement that Companion made, which was originally quite clear, may be rendered ambiguous by a process of transmission which fails to report sufficient additional information so that the context and scope of the statement are clear.

In my analysis of Mālik's terminology in the Muwaṭṭa' I have found examples in which it appears that Mālik has relied upon the non-textual source of Madīnan ᶜamal to distinguish between normative and non-normative ḥadīth and āthār

which it would be difficult to distinguish between on the basis of textual information alone.[1] In the case of ᶜaqīqah, for example, Mālik places normative āthār--i.e., āthār which report normative behavior with regard to the performance of ᶜaqīqah--in the ᶜamal chapter, while placing the non-normative āthār which report the custom of Fāṭimah of shaving off the hair of her children during the ceremony of ᶜaqīqah, weighing it, and giving that weight in silver as charity outside the ᶜamal chapter. On the basis of the texts of these āthār alone, however, one would not be able to determine which of the actions reported in them were normative and which of them were not.[2]

The following are examples of āthār taken from the Muwaṭṭa' which are contrary to normative ᶜamal and illustrate well, I believe, how the ambiguities between normativeness and non-normativeness can pertain to āthār just as they pertain to ḥadīth. Mālik cites an 'athar which reports how Ibn ᶜUmar used to perform ghusl [a bath which removes the state of ritual impurity]; in general, the actions reported in this 'athar reflect the normative manner in which ghusl is to be performed. The 'athar also reports, however, that it was Ibn ᶜUmar's habit to sprinkle water in his eyes while performing ghusl.[3] In most transmissions of the Muwaṭṭa', according

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[1]See below, pp. 588, 630-631, 661, 665, 672, 674, 752; cf., 591.

[2]See below, pp. 671-672. [3]Muwaṭṭa', 1:44-45.

to Ibn ᶜAbd-al-Barr, except for the transmission of Yaḥyā ibn Yaḥyā Mālik adds the clarification after this 'athar that Ibn ᶜUmar's habit of sprinkling water in his eyes while performing ghusl is an exception to ᶜamal. Ibn ᶜAbd-al-Barr comments further that Ibn ᶜUmar's habit of doing this is an instance of one of his eccentricities [shadhā'idh] which he did because of his piety [waraᶜ] and which no one else is known to have imitated him in doing.[1] Ash-Shaibānī affirms that the people of Madīnah did not regard Ibn ᶜUmar's habit as being a part of their ᶜamal but merely as a personal habit of his; he points out that 'Abū Ḥanīfah and the majority of fuqahā' are in agreement with the Madīnans on this matter.[2]

On the basis of the material presented in the text alone, however, one would not be able to isolate this habit of Ibn ᶜUmar as personal and non-normative from the other actions reported in the 'athar which are normative in accordance with Madīnan ᶜamal. Such a distinction, however, can be easily made when the content of the report is examined against the normative, non-textual tradition of ᶜamal. It might also be noted that this 'athar--although it gives no explicit indication to that effect--is reporting Ibn ᶜUmar's private behavior and not his public example. For it is to be presumed that he generally bathed himself in private and not in pub-

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[1]Cited by az-Zurqānī, 1:134.

[2]Ash-Shaibānī, Ḥujjah, 1:58, and idem, Muwaṭṭa', p. 45.

lic. Thus, Ibn ᶜUmar's eccentricity of sprinkling water in his eyes was not done repeatedly in the view of the public, such that it would have been likely that those of them who knew no better would begin to assume that one must sprinkle water in one's eyes while performing ghusl.[1] Nevertheless, such a distinction between private and public behavior which Ibn ᶜUmar would have been able to observe in his own manner of living can be lost, as it is in this example, once his private behavior is transmitted in the form of a report. At that time, something which he himself may have consciously kept as private is made public, while--as again in the case of this 'athar--no explicit indication is given that the report pertains to private behavior and, hence, may include aspects which were not intended to be normative.

Mālik cites another 'athar according to which a certain early Successor, 'Abū ᶜAbd-Allāh aṣ-Ṣanābiḥī,[2] who mentions in the report that he first came to Madīnah during the caliphate of 'Abū Bakr, states that he once prayed the even-

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[1]Cf., above, pp. 188-195.

[2]'ABŪ ᶜABD-ALLĀH ᶜAbd-ar-Raḥmān ibn ᶜUsailah ibn ᶜAsl ibn ᶜAssāl AṢ-ṢANĀBIḤĪ (d. between 70 and 80/689 and 699) came to Madīnah to see the Prophet but arrived, according to reports, five to six days after the Prophet had died. He transmits reports from and about 'Abū Bakr, ᶜUmar ibn al-Khaṭṭāb, Muᶜādh ibn Jabal, and other prominent Companions and also transmits ḥadīth from them. Aṣ-Ṣanābiḥī was regarded among the muḥaddith's as having been a reliable [thiqah] transmitter. He later settled in Syria and also partook in the conquest of Egypt. It is also reported that aṣ-Ṣanābiḥī became a close friend of the 'Umayyad caliph ᶜAbd-al-Malik ibn Marwān. Ibn Ḥajar, Tahdhīb, 6:229-230.

ing [maghrib] prayer directly behind the caliph 'Abū Bakr, [who was leading the prayer]. He mentions what 'Abū Bakr recited during the first two rakᶜah's of the prayer, which are recited aloud, and then says:

> . . . When he stood up for the third [rakᶜah], [which is recited silently,] I came up from behind him and got so close that my cloak almost touched his. I heard him recite 'Umm al-Qur'ān [the opening sūrah, which is recited in each rakᶜah] and then this verse, "Our Lord, let our hearts not go astray after You have granted us guidance, but bestow upon us mercy from Your Own presence: Verily, You are the One Who bestows benefaction [al-Wahhāb]."[1]

Mālik states in a report in the Mudawwanah that he does not regard it to be a part of ᶜamal that one recite the verse which aṣ-Ṣanābiḥī mentions in this 'athar during the third rakᶜah of the evening prayer after recitation of 'Umm al-Qur'ān.[2]

This 'athar illustrates how through the process of transmission types of behavior which are essentially private or isolated are made public and may even be given the appearance of being normative. This 'athar is perhaps somewhat exceptional, however, in that aṣ-Ṣanābiḥī gives enough circumstantial detail that one can place the 'athar in context, which might not be done so easily if, for example, he would have simply reported, "'Abū Bakr did such and such or would do such and such," which is so frequently the style of such reports.

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[1] Muwaṭṭa', 1:79; the verse is Qur'ān, 3:7.

[2] Mudawwanah, 1:68 (10).

Much about the behavior reported in the 'athar is irregular. 'Abū Bakr had been reciting the verse to himself; thus, it was not expected that others would perceive that he was doing it and imitate him themselves, possibly making it part of their ᶜamal for praying the evening prayer. Aṣ-Ṣanābiḥī's act of coming up behind 'Abū Bakr during the prayer and getting so close to him that he could hear what 'Abū Bakr was reciting to himself is also irregular behavior. In this report, therefore, aṣ-Ṣanābiḥī almost by stealth, as it were, has learned information pertaining to the private dimension of 'Abū Bakr's behavior as opposed to his normative public example--information, at that, which 'Abū Bakr had made no effort to disclose. By the process of transmission, 'Abū Bakr's act takes on a notoriety which he probably did not intend it to have; it is apparently for this reason that Mālik indicates that it constitutes exceptional behavior and not a desired norm, attempting thereby to keep that which should be normative, according to Mālik, from being confused with that which should not be.

ᶜAmal naqlī in the absence of ḥadīth

At several instances during my analysis of Mālik's terminology in the Muwaṭṭa', I have found ᶜamal precepts which were probably of the category of ᶜamal naqlī--ᶜamal which went back to the Prophetic period and was regarded as hav-

ing had the tacit or explicit support of the Prophet--yet regarding which I found evidence of very few if any ḥadīth having been transmitted and which were not supported by other textual sources of Islamic law. In several other instances of ᶜamal naqlī the pertinent ḥadīth or other texts which support the precept are general and do not provide the full scope of the precept in question or the elaborate details of how it is implemented--information which Mālik provides by reference to the non-textual tradition of Madīnan ᶜamal.[1] The use of the term ᶜamal naqlī--literally, a type of ᶜamal which "transmits" precepts, etc.--is appropriate for such types of ᶜamal in view of the scarcity or complete lack of supporting or contrary ḥadīth in the pre- or post-Shāfiᶜī periods, since it is, indeed, the legal source of ᶜamal in such cases which is the vehicle of transmission and the primary source of law.

I have also referred at several points to the criticisms of 'Abū Yūsuf, ash-Shaibānī, and ash-Shāfiᶜī who insisted that there be corroborating texts to verify the content of Madīnan ᶜamal precepts before they would regard them to be authoritative. It is clear from some of these citations that the Madīnans, in fact, did not possess such texts, and--in the words of ash-Shaibānī--for the Madīnans to follow their

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[1]See below, pp. 553, 556, 604-605, 599-600, 606-608, 618, 622, 660, 750, 753-754, 562, 574, 655-656.

ᶜamal in the absence of texts is tantamount to following ẓann [conjecture]. Similarly, although ash-Shāfiᶜī acknowledges the presence of conjecture in isolated legal texts, he reasons that it is much more sinful to err by virtue of following no texts at all than it is to err by virtue of the conjecture in texts.[1]

Such insistence upon explicit supporting texts stands in contrast to the attitudes of Mālik and al-Laith ibn Saᶜd toward ᶜamal, who are confident of its continuity and the integrity of its tradition. It is also contrary to the attitude of circumspection which Mālik exercised toward ḥadīth, according to which he took more into consideration than merely the authenticity of the transmission. Although he took pride in having received his ḥadīth only from the best qualified and most reputable Madīnan ᶜulamā', Mālik is reported to have said that he would be a fool if he transmitted to the people everything which had been transmitted to him. He is said to have regretted having transmitted much of which he had already transmitted and to have been willing to discard a ḥadīth altogether whenever he felt it would be unwise to transmit it.[2] I have referred earlier to the caution the Madīnans exercised toward isolated ḥadīth in particular, which is exemplified by the statement attributed to Rabīᶜah, accord-

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[1]See above, pp. 339, 218-219, 300, 332, 341-355; cf., below, pp. 578-579.

[2]See above, pp. 76-85, 311-331.

ing to which Rabīᶜah indicates how much more authoritative than isolated ḥadīth he regards Madīnan ᶜamal to be and in which he expresses his conviction that to follow such isolated ḥadīth instead of ᶜamal would distort the sunnah.[1]

Mālik's position regarding the authority of ᶜamal in matters regarding which there were no supporting ḥadīth is set forth explicitly in some of the reports attributed to him which I have cited. He acknowledges the absence of ḥadīth regarding certain types of ᶜamal but also asserts that he does not regard ḥadīth as being necessary in such matters because of the conclusiveness of ᶜamal. Mālik then insists that he regards Madīnan ᶜamal to be more authoritative than ḥadīth in such matters.[2] Such an attitude regarding the authority of ᶜamal in the absence of legal texts is consistent with the number of times in the Muwaṭṭa', which I have just referred to above, in which Mālik relies exclusively on ᶜamal to set forth and elaborate legal precepts. Thus, the positions of Mālik and 'Abū Yūsuf, ash-Shaibānī, and ash-Shāfiᶜī regarding the role of legal texts as sources of law constitute very fundamentally different positions in legal theory.

The possible effects of ᶜamal on the transmission of ḥadīth

In his work "Jimāᶜ al-ᶜIlm" ash-Shāfiᶜī indicates that all ᶜulamā' agree that God has made it obligatory upon them

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[1] See above, pp.173-174, 341-343.

[2] See above, pp. 420-421.

and upon all Muslims to follow the sunnah of the Prophet. Ash-Shāfiʿī's point of difference is not that he regards the Prophet's sunnah to be authoritative while other fuqahā' of his generation and earlier did not; rather, it is a point of difference regarding the means by which one should determine what the content of the sunnah was. Ash-Shāfiʿī's distinctive contention in this regard is that explicit legal texts ["al-khabar ʿan Rasūl-Allāh"] are the only legitimate means by which to determine the content of the sunnah, and such legal texts include for ash-Shāfiʿī, of course, formally authentic, isolated ḥadīth [khabar al-infirād].[1] Insistence upon exclusive reliance upon textual references as the only legitimate sources of Islamic law implies certain assumptions about the nature and quality of the transmission of ḥadīth and whatever other textual sources one restricts oneself to. The most central of these assumptions in the case of ash-Shāfiʿī's reasoning, I believe, is the assumption that the authentic, legal texts upon which he relies constitute a sufficiently clear and comprehensive representation of the content, scope, and purpose of all Prophetic legislation.

This premise that ḥadīth convey a comprehensive picture of the Prophetic sunnah is clearly set forth, for example, in ash-Shāfiʿī's Risālah. Early in that work, ash-Shāfiʿī contends that one may determine the entire, authentic

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[1]See ash-Shāfiʿī, "Jimāʿ al-ʿIlm," pp. 250-251, and see above, pp. 341-356, 170-178, 216-226.

content of the Prophet's sunnah by collecting the ḥadīth of all of the qualified ᶜulamā'. Ash-Shāfiᶜī contends that none of them has knowledge of all aspects of the sunnah himself but that what one of them does not have knowledge of, another of them will. He compares the knowledge which the ᶜulamā' have of the sunnah to the knowledge which the Arabs as a people have of the Arabic language. There are no Arabs, he holds, who have mastered the Arabic language in its entirety and understand, for example, all of its vocabulary. Nevertheless, the knowledge which some of them possess compensates for what others of them are ignorant of and vice versa. Ash-Shāfiᶜī claims that knowledge of the Arabic language is much greater, however, among the generality of Arabs than the knowledge of the sunnah is among the generality of the ᶜulamā'. He concludes that the only means by which one can come to know the entirety of the sunnah is by collecting the ḥadīth of all of the qualified ᶜulamā'.[1]

For ash-Shāfiᶜī, therefore, the content of the sunnah is something which is not yet completely known and the full scope of which remains to be discovered--almost two centuries after the Prophet's life. Yet, although he believes that none of the ᶜulamā' possesses complete knowledge of the sunnah in terms of the ḥadīth which they transmit, he is confident that there are no parts of the sunnah which have escaped

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[1]Ash-Shāfiᶜī, Ar-Risālah, pp. 42-44.

documentation in ḥadīth entirely. Ash-Shāfiᶜī does not reach the conclusion that no parts of the sunnah have escaped documentation in ḥadīth on the basis of empirical investigation, which would be impossible without possessing a criterion of sunnah independent of ḥadīth with which one could compare what is contained in ḥadīth, but by deduction from Qur'ānic verses and the like which indicate that God has not left man at liberty to follow his whims, that God will protect the guidance He has sent and not allow it to be lost, and so forth.[1] Such deductions, however, assume that ḥadīth constitute the sole vehicle by which the sunnah was transmitted, in which case preservation of the sunnah becomes tantamount to the preservation of ḥadīth.

It might be pointed out, furthermore, that ash-Shāfiᶜī does not address himself in the above discussion to differences between a normative sunnah of the Prophet and the minute details of the Prophet's reported behavior and statements, which included normative and non-normative aspects. There are only certain aspects of the Arabic language, for example, which no Arabs in ash-Shāfiᶜī's time would have mastered completely, and those would have been exceptional parts of the language--rare words, unusual expressions, and the like. As for the normative aspects of the language, the basic core of poetic language, and so forth--it is to be expected that

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[1]Cf., for example, ash-Shāfiᶜī, Ar-Risālah, pp. 152-158, 32, 109, 88-89; and idem, "'Ibṭāl al-Istiḥsān," pp. 270-271.

many Arabs, especially those who were knowledgeable of the language and its poetic traditon, would have been completely conversant with them. The details and rarities which such persons would not have known would have been relatively insignificant in comparison with what they did know. Furthermore, they would have been able to identify those details of the language with which they were not acquainted as being unusual and non-normative by comparison with the broad tradition of Arabic with which they were familiar.

Similarly, when one conceives of the sunnah as an essentially normative type of behavior which the Prophet--himself an easily accessible public person who cultivated close ties between himself and his followers--set over a period of many years, one would expect that there were Companions of his who became fully conversant with his sunnah and were able to distinguish between what aspects of the Prophet's behavior were customary and which were not. Indeed, the notion that the Prophet was successful in transmitting the full scope of his sunnah to the community of his immediate followers is one of the key presumptions underlying Mālik's conception of the Madīnan community and its normative ᶜamal. According to this conception, those aspects of the Prophet's teaching and behavior which he intended to be desired norms for his followers became their desired norms and, hence, what 'Abū Yūsuf refers to as the well-known sunnah: that criterion by which one who was familiar with it could distinguish

between what was standard and what was exceptional regarding the reports attributed to the Prophet.

In addition to this, however, ash-Shāfiᶜī's conviction that all aspects of the Prophet's sunnah and legislative activity had been documented in ḥadīth implies that the first generations of Muslims recognized it to be a necessity that they document all aspects of the sunnah in textual form, which would imply in turn that there were not other methods by which knowledge of the sunnah could be transmitted and preserved. In the report attributed to Mālik which I cited earlier and according to which Mālik defended his reliance upon ᶜamal regarding how the 'adhān is supposed to be called, Mālik is reported to have said, "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] The historical question which arises in conjunction with statements of this nature and the fact that there was a scarcity or complete lack of ḥadīth on various fundamental parts of Madīnan ᶜamal naqlī is the question of to what extent others before Mālik who were responsible for the selection and transmission of ḥadīth also shared the attitude of, "In such matters do you need 'so and so transmitting on the authority of so and so'?"

In other words, fundamental and well-established parts of ᶜamal may in some cases have been regarded to be so well-

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[1]See above, pp. 420-421.

known that to transmit ḥadīth about them would be redundant. The Prophet's Companions, for example, did not learn Islam through textual materials; on the contrary, they learned by direct experience, by witnessing the events which transpired around them and by taking part in informal or semi-formal instruction. In the case of some of the prominent Companions this experience of Islam in the presence of the Prophet lasted more than two decades. It was this first generation which decided which of the authentic ḥadīth that have come down to us should be transmitted and which of the thousands of things they must have seen the Prophet do or heard him say need not be transmitted. The few hundred ḥadīth attributed to Companions like ᶜUmar ibn al-Khaṭṭāb, 'Abū Bakr, Zaid ibn Thābit, Muᶜādh ibn Jabal, and the likes of them, even if authentic, would reflect a very small amount of the knowledge these persons would have had.[1] Consciously or unconsciously, Companions such as these who did not transmit extensive amounts of ḥadīth must have had some criterion by which they decided what was most important for them to transmit. Thus, for such persons the well-known and well-established ᶜamal which they saw around them may have served as such a criterion, and they may have felt little need to transmit ḥadīth about what was already commonly known and practiced, especially regarding matters about which there may have been no significant disagreements in the early period.

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[1]See above, pp. 166-168.

Use of ᶜamal in the early period as a criterion by which to determine what needed to be transmitted is one possible hypothesis for accounting for the scarcity of ḥadīth regarding several fundamental precepts of Madīnan ᶜamal naqlī. If correct, such a hypothesis might also imply that those ḥadīth which were transmitted tended to pertain more commonly to matters that were not well-known in ᶜamal than they did to matters that were well-known. Much of the content of ḥadīth, therefore, might not have been of a normative nature or to have pertained to ᶜumūm al-balwā.

Secondly, I pointed out earlier that many of the ḥadīth which have been transmitted seem to be predicated on ᶜamal in that knowledge of the ᶜamal to which the ḥadīth pertains constitutes an important part of the semantic context or general reference of the ḥadīth. The semantics of many ḥadīth would appear very ambiguous to persons not already acquainted with the ᶜamal about which those ḥadīth are speaking. A person who had no idea of how to make wuḍū' or perform ṣalāh might draw any number of conclusions about how to perform them, if ḥadīth were the only references that person had.[1] Similarly, the references of many ḥadīth would be quite unintelligible and open to conjecture if isolated from the tradition in which they were transmitted, which keeps them in context, so to speak. Mālik cites the following ḥadīth, for example, which he places in the ᶜamal chapter pertaining

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[1]See above, pp. 298-299.

to what one is supposed to do at the close of one's prayer to compensate for errors made while praying because of negligence or forgetfulness [as-sahw]:

> . . . The Messenger of God said, may God bless him and give him peace, "I forget (or, 'I am made to forget') in order that I set down a sunnah ["'innī la-'ansā ('aw 'unassā) li-'asunna"].[1]

Without reference to something outside this text, however, such as the tradition of the Madīnan ᶜulamā' who transmitted it, one would not know what context to put these words in, and they might be given a wide variety of interpretations.

The hypothesis that ᶜamal constituted the original semantic context of ḥadīth offers an explanation for the apparent ambiguity which characterizes the wording of some ḥadīth, when they are interpreted in isolation from ᶜamal. According to this hypothesis, much of the information essential to the understanding of such texts would have been sufficiently well-known and practiced at the time when the wording of the ḥadīth was framed. Such ḥadīth, because of the general familiarity of their original audience with the subject matter to which they pertained, would not have been as ambigous initially, and because of this familiarity of the audience there was no immediate need to include details in the text of the ḥadīth without which those who lacked a similar degree of familiarity would have difficulty discovering the ḥadīth's intended meaning.

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[1]Muwaṭṭa', 1:100.

As I have pointed out, many of the ḥadīth Mālik cites which pertain to ᶜamal naqlī precepts do not convey all of the legal details that are a part of those precepts. Mālik usually elaborates such precepts by reference to the non-textual source of Madīnan ᶜamal. Assuming that the ᶜamal naqlī is authentic in such cases and that the additional details which Mālik provides were actually part of the original ᶜamal of such precepts, the ḥadīth in these examples have the appearance of being comments about ᶜamal, so to speak, and do not have the effect of actually transmitting the precepts themselves. In the case of the ᶜamal regarding making rulings on the basis of the oath of the plaintiff supported by the testimony of a single witness--a precept to which I have referred several times--the ḥadīth which Mālik cites certainly does not transmit the precept but only provides the comment that the Prophet implemented it during his life.[1] In ḥadīth such as these, therefore, it appears that ᶜamal constituted the primary frame of reference. The ḥadīth, on the other hand, does not embody the ᶜamal precept to which it pertains but only corroborates or adds points of information regarding it.

Ḥadīth in the Absence of Corresponding Types of ᶜAmal

In his discussion of the relationship between ᶜamal and ḥadīth, ash-Shāṭibī also discusses types of ḥadīth which

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[1]See below, pp. 571-576.

appear to have certain legal implications yet regarding which there was no corresponding ᶜamal which either supported or explicitly contradicted those implications. He also places in this category ḥadīth which have certain implications but regarding which only isolated persons are known to have put those implications into practice in the first generations but for which there was no widespread ᶜamal. Ash-Shāṭibī's position, which I will discuss in more detail shortly, is that such apparent legal implications in authentically transmitted ḥadīth cannot generally be made a part of ᶜamal in later generations if they were not a part of the widespread ᶜamal in the first generations.[1]

Al-Qāḍī ᶜIyāḍ holds a different position than ash-Shāṭibī on this matter. He holds that whenever a ḥadīth is authentic--even if it is an isolated ḥadīth and regardless of whether it was transmitted by Madīnan or non-Madīnan muḥaddith's--and there is no corresponding ᶜamal either supporting it or contradicting it, then one is obliged to follow the legal implications of that ḥadīth. ᶜIyāḍ defends the Mālikī school against the criticisms of those who, according to ᶜIyāḍ, have held that Mālik and his school refused to follow the implications of ḥadīth unless there was clear support for those implications in the ᶜamal of Madīnah. ᶜIyāḍ contends that, on the contrary, the Mālikī school only rejects ḥadīth when they are contradictory to ᶜamal but not when

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 3:64-76.

there is simply no corresponding ᶜamal at all.[1]

Ash-Shāṭibī contends, on the other hand, that the mere absence of ᶜamal regarding the apparent legal implications of ḥadīth constitutes itself a contradictory ᶜamal to those implications. Ash-Shāṭibī bases this position on the premise that the first generations of Islam--with whom the establishment and perpetuation of ᶜamal began--had comprehensive knowledge of the practical demands which Islamic law made of them and that they were faithful in putting these demands into practice, i.e., making them ᶜamal. The Prophet and the Qur'ān had addressed them in their own idiom and in the context of the circumstances in which they were living; hence, they understood clearly, according to ash-Shāṭibī, the semantic implications of the directives and teachings they were given. Therefore, ash-Shāṭibī continues, when an authentic legal texts appears to be implying a certain practice which the Companions and the first generations would have been likely to have put into practice had they understood it to be demanded of them and, yet, they did not put those implications into practice, it follows that something else was intended by the semantics of that text and it would not be sound to make an ᶜamal of those implications at a later time.[2] Ash-Shāṭibī's use of ᶜamal in this manner is in keeping with the

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[1]ᶜIyāḍ, 1:71-72.

[2]Ash-Shāṭibī, Al-Muwāfaqāt, 3:73.

position of Ibn al-Qāsim in the Mudawwanah in which he stresses not just that ḥadīth not be contrary to ᶜamal but, in fact, that they be accompanied by ᶜamal.[1]

Ash-Shāṭibī continues to point out, however, that this restriction of the legal implications of texts to the ᶜamal of the first generations of Muslims applies only to those types of behavior which the first generations would have been able or likely to perform in the context of the circumstances in which they were living. Thus, he divides the types of behavior which the Companions and the first generations of Muslims did not do into two categories. There were, first of all, those sorts of things that were maẓinnat ᶜamal--i.e., the sorts of things which the first generations would have been expected to have put into ᶜamal had they regarded them to be valid parts of Islamic law and something which Islam intended that they do. It is only legal implications in texts which fall into this category which one does not put into practice in a later age if they had not been part of the ᶜamal of the first generations. The second category is that of types of behavior, legal procedures, and so forth that were not maẓinnat ᶜamal--things which were likely to have been done--within the context of the circumstances of the age in which these first generations were living. Matters which fall into this category, according to ash-Shāṭibī, must be evaluated in terms of the legal principle of al-maṣāliḥ al-

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

mursalah.[1] If they are found to be in keeping with the dictates and ultimate purposes of Islamic law, they are desirable, and, if they are found to be contrary to the dictates and ultimate purposes of Islamic law, they are unacceptable.[2]

I referred earlier to a statement attributed to Mālik according to which he rejected the practice of performing prostrations of gratitude [to God] [sajdat ash-shukr] when one meets with some particular good fortune. The observation was made to Mālik that it had been said that 'Abū Bakr performed this sajdat ash-shukr after his armies achieved a great victory. Mālik denies the authenticity of the report and is reported to have replied:

> It is a type of misguidance that one hear something and then say, "This is something regarding which we have heard nothing to the contrary." . . . Many victories came to the Messenger of God, may God bless him and give him peace, and to the Muslims after him. Did you ever hear of a single one of them prostrating himself?
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> When something like this comes down to you that has been part of the experience of the people and took place right in their midst and yet you have heard nothing about it from them, then let that be a sufficient indication for you. For if it had taken place, it would have been mentioned, because it is part of the common experience of the people ['amr an-nās] which took place among them. So have you heard that anyone prostrated himself? Well, then, that is the 'ijmā'. When something comes down to you that you do not recognize, put it aside.[3]

Ash-Shāṭibī comments after citing this report that it indicates that one should rely upon the general 'amal of the many and

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[1] See above, pp. 268-275.

[2] Ash-Shāṭibī, Al-Muwāfaqāt, 3:74.

[3] See above, pp. 186-187.

not follow the implications of reports of rarities and unusual actions which have been transmitted ["qalā'il mā nuqila wa nawādir al-'afᶜāl"] when the general and widespread ᶜamal is contrary to them.[1]

Ash-Shāṭibī cites and discusses several examples of ḥadīth and āthār with legal implications that he regards to be invalid because of the absence of a significantly widespread ᶜamal among the first generations of Muslims in keeping with those implications. Among these examples, he refers to ḥadīth which speak of the excellence of ᶜAlī ibn 'Abī Ṭālib, the mutual affection between him and the Prophet, and so forth and are among the proofs which the shīᶜah have used to indicate that the Prophet intended the political leadership [al-'imāmah] of the community to fall to his nephew ᶜAlī and the descendants of ᶜAlī and Fāṭimah, the Prophet's daughter, in succeeding generations. Ash-Shāṭibī holds that the absence of ᶜamal among the Companions in keeping with such implications and the general consensus of them regarding the caliphates of 'Abū Bakr and ᶜUmar are sufficient indications that, even if such texts are authentic, they did not have such political implications.[2]

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[1]See above, p. 187.

[2]Ash-Shāṭibī, Al-Muwāfaqāt, 3:71, 64-76.

THE UNIVERSITY OF CHICAGO

MĀLIK'S CONCEPT OF ᶜAMAL IN THE LIGHT OF MĀLIKĪ LEGAL THEORY

VOLUME TWO

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PART THREE

ᶜAMAL IN THE MUWAṬṬA':
AN EXAMINATION OF THE RELATIONSHIP BETWEEN ᶜAMAL AND MĀLIK'S TERMINOLOGY IN THE MUWAṬṬA'

CHAPTER VI

GENERAL COMMENTS ABOUT MĀLIK'S TERMINOLOGY

Introduction

The terminology of the Muwaṭṭa' is one of the distinctive and very interesting characteristics of that book. It would be of considerable value to the intellectual history of Islamic law and legal theory if the meaning of Mālik's terminological usages could be disclosed, especially the relationship between them and Madīnan ᶜamal. The Muwaṭṭa', as I have indicated elsewhere, is essentially a source book of Madīnan ᶜamal, which makes up for Mālik a primary source of Islamic law.[1] Mālik's terminology in the Muwaṭṭa' constitutes the most extensive and systematic statement we have from Mālik, which I know of, regarding his conception and evaluation of Madīnan ᶜamal.

By disclosing what Mālik meant to convey to others by his terminology in the Muwaṭṭa', one gains insight into an important part of Mālik's conscious, analytical awareness of his legal reasoning. As I pointed out earlier, it is possible for a person to think in a systematic fashion without that person's being conscious of the system in his think-

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[1] See above, pp.97-107, 304-305.

ing or being able to articulate it to others. I concluded from this that in the study of intellectual history there are two main considerations: 1) the question of whether or not a thinker was systematic in his thinking and whether or not that system was consistent and highly developed and 2) the question of whether or not the thinker was conscious of the system in his thinking and able to articulate it to others. Furthermore, I concluded that the consideration of whether or not a thinker was conscious of any system in his thinking is irrelevant to historical study except in so far as it was communicated to others. For without such communication the thinker's articulate consciousness remains subjective and is not the proper object of objective historical study.[1] Mālik's terminological usages in the Muwaṭṭa'--regardless of whether or not they constitute a technically fully developed terminology--reflect not only Mālik's consciousness but also his attempt to communicate it to others.

Some of the Difficulties in Studying Mālik's Terminology

Mālik's terminology in the Muwaṭṭa' has not received much attention in modern studies on Mālik or Islamic law. Goldziher and Schacht treat Mālik's terms very briefly; Fazlur Rahman, Ahmad Hasan, Ansari, and Guraya treat them somewhat more extensively, although not going into detail, and conclude, as I mentioned earlier, that the various terms

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[1]See above, pp. 11-20.

Mālik uses are equivalent in meaning.[1] I have found surprisingly few discussions of Mālik's terms in the traditional Mālikī works to which I had access. The commentaries of al-Bājī and az-Zurqānī on the Muwaṭṭa', for example, often pass over Mālik's terms without commenting upon them, their primary concerns being generally to explain and support the precepts Mālik sets forth. Thus, in working with Mālik's terms I have not had much to rely on in either modern or traditional works.

In attempting to determine what Mālik's terms mean, one must first understand the legal precepts with which they are used. Furthermore, one needs to have knowledge of the background of those precepts--especially such considerations as whether or not they were points of difference between the Madīnan and Kūfan schools. One must determine the source of the precepts, for example, whether they are part of pre-Islamic Madīnan customs, whether they were instituted by the Prophet, or whether they resulted from later ijtihād and, if so, from whose. It is important to know whether or not the precepts to which Mālik subscribes are supported by or contrary to textual sources of law which Mālik would have been likely to have known, whether or not they are cited in the Muwaṭṭa'. Furthermore, it is important to attempt to determine how these precepts relate to other Madīnan precepts,

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[1]See above, pp. 308-309.

for example, whether they are analogous to or contrary to analogy with other precepts to which Mālik subscribes.

Trying to discover this background is time-consuming and sometimes frustrating. For example, Mālik is often reticent, setting forth his opinions and the precepts to which he subscribes with little or no explanation or discussion. He differs in this regard from ash-Shāfiᶜī, who usually sets forth his reasoning quite clearly, and to some extent from 'Abū Ḥanīfah as reflected in early Ḥanafī legal texts, which tend to classify legal opinions according to the analogies from which they were deduced or give other indications of the reasoning behind them.[1] Even when Mālik explains or discusses precepts, the modern researcher, despite having knowledge of Classical Arabic, may have great difficulty in following the discussion or in identifying what the significant points of it are, because the modern researcher is divorced from the semantic context of Mālik's discussion. This semantic context, which Mālik shared with those to whom he transmitted the Muwaṭṭa', is constituted by such things as the culture in which Mālik lived, recent historical experiences, and--perhaps most importantly--the familiarity that he and those specialists for whom the Muwaṭṭa' was compiled had with Islamic law and the discussions and controversies of the times. Even the Madīnan ᶜamal, which Mālik

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[1]See 'Abū Zahrah, Mālik, pp. 19, 438-439; and see above, pp. 107-111.

sets forth in the Muwaṭṭa', was part of the experience of many of those to whom his book was transmitted and could be witnessed by others who came to Madīnah. Thus, Mālik's reticence is far more silent and ambiguous to the modern researcher than it is likely to have been for Mālik's contemporaries, unless the modern researcher can develop a comparable understanding of the Muwaṭṭa's semantic context.

Furthermore, with regard to the question of whether or not the precepts to which Mālik subscribes were supported by or were contrary to other textual sources of law--such as ḥadīth and āthār--which Mālik would have been likely to have known, it is very difficult to answer that question unless Mālik cites those texts himself in the Muwaṭṭa'. The soundest procedure methodologically would probably be to gather such information by carefully sifting through the data contained in the earliest legal sources available, Mālikī and non-Mālikī. Such a procedure, however, would call for massive research and would be especially exhausting in light of the fact that few of the early works now available in print have been properly indexed.

Later works, on the other hand, such as Ibn Rushd's Bidāyat al-Mujtahid, offer a tempting alternative to such exhausting research, and I have often drawn conclusions about the backgrounds of the precepts of the Muwaṭṭa' from what I could find in such later works. Conclusions based on such evidence, however, are only tentative. For there is a fun-

damental difference between taking rational hypotheses from later works and taking historical reports from them or summaries and evaluations about what is contained in the historical sources. Rational hypotheses about objective historical data, as I mentioned earlier, can come from any source. The validity of such hypotheses is determined solely by how predictably and comprehensively they account for the data. To reject such hypotheses merely by considering the sources from which they came would be argumentum ad hominem.[1] But this is not the case when establishing the authenticity of the objective, historical data about which one's hypotheses are made. In such cases, consideration of the nature or character of the source of the report is a fundamental part of evaluating the degree of the report's authenticity.

Thus, even though one may not doubt Ibn Rushd's honesty or that of any other later writer, for that matter, it is impossible to determine the authenticity of the information he reports without knowing the source oneself or the nature of its transmission to Ibn Rushd. Furthermore, there is the question of how comprehensive Ibn Rushd's sources were and how well he knew their contents. His summaries and evaluations about such sources--such as whether or not there are any ḥadīth in a given matter or whether or not the ḥadīth transmitted about it are authentic--can only be

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[1]See above, pp. 8-9.

accepted on faith or rejected on the basis of misgivings until one has access to objective data similar to that from which Ibn Rushd or any other writer drew his conclusions. Furthermore, considerations such as whether or not later traditional writers or modern writers regard various textual reports to be historically or formally authentic which Mālik probably had access to do not tell us whether or not Mālik regarded them as such.

Another important consideration in studying Mālik's terminology in the Muwaṭṭa' is that of how faithfully later transmissions and editions of the Muwaṭṭa' have handed down Mālik's terms. It is possible, for example, that some apparent inconsistencies in his terminology may have resulted from inaccurate transmission of the terms he uses. This danger would be greatest probably in the case of those transmitters and editors who were not aware of any distinctive differences between the terms Mālik uses. I found one example in ᶜAbd-al-Bāqī's edition of the Muwaṭṭa', for instance, in which he presents a precept as an AN [al-'amr ᶜindanā] on one occasion and as an AMN [al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā] a few pages later. Az-Zurqānī, however, says in both instances that the precept is an AN.[1] An exhaustive study of Mālik's terminology in the Muwaṭṭa' would involve collating the best manuscripts of the Muwaṭṭa' together.

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[1]See Muwaṭṭa', 2:837, 841, and az-Zurqānī, 5:115, 122.

Furthermore, until such collation is done it must be borne in mind that individual discrepancies in Mālik's terminology may come from Mālik's transmitters and editors and not from Mālik himself.

Does Mālik Actually Have a Systematic Terminology?

I approached Mālik's terminology in the Muwaṭṭa' with the hypothesis that his terminological usages in it had different values, as indicated by their conspicuously different wordings and the fact that they fall into several common classifications. Some of them--like AN [al-'amr ᶜindanā] and AMN [al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā]--occur repeatedly in the same form, while some of the more unusual usages may occur only once or twice. Furthermore, other than the instance to which I referred above, which I regard to be an editorial error, I could find no instance of Mālik's repeating the same precept twice in the Muwaṭṭa' and using different terms for it.[1] It is also true, however, that Mālik does not cite precepts in the Muwaṭṭa' more than once, as a rule.

One must keep in mind, however, while studying Mālik's terminology in the Muwaṭṭa' that it is possible for individual terms and usages in it to indicate meanings and even to have different values without being part of a systematic terminology. By a "systematic terminology" I have

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[1]See above, p. 522, n. 1.

in mind a system of nomenclature in which each usage is assigned one, restricted value--which distinguishes it from other terms in the system--and in which each usage is used systematically in accordance with its assigned value. Thus, in a systematic terminology there should not be any overlapping of meanings between terms. But usages in a terminology may indicate different meanings and still not be used systematically because of the important difference between the manner in which words are used in a systematic terminology and the manner in which they are used in customary speech. Words in customary speech, especially common words, often have a wide semantic range. In a systematic terminology, however, the semantic range of a word is limited to one meaning precisely. This new, assigned meaning need not even be within the word's old semantic range. For, as I pointed out earlier, the relationship between the literal meaning of a term and the concept which it signifies can be purely arbitrary. Nevertheless, in linguistic--as opposed to purely symbolic--terminologies, one may expect there to be a significant relationship between the word's new, assigned meaning and the word's former semantic range. For there is probably something very telling in the word's former semantic range which made that word appeal to the fashioner of the terminology.[1]

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[1]See above, pp. 11-20.

It appears to me from my study of Mālik's terminology in the Muwaṭṭa' that there is some overlapping between terms. The term sunnah [S], for example, seems to be used only for al-ᶜamal an-naqlī and not for types of ᶜamal that are the result of later ijtihād.[1] However, other usages are commonly applied to precepts that pertain to al-ᶜamal an-naqlī, such as the terms -zĀIb ["wa hādhā 'l-'amr al-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm bi-baladinā"], ANs ["'amr an-nās"], the affirmative ᶜamal terms, and the contents of most of the so-called ᶜAmal Chapters.[2] Similarly, although the term 'amr [A] is used most commonly in connection with precepts that resulted from ijtihād or have been deduced from Qur'ānic verses or from isolated ḥadīth, the term 'amr is also used in some instances--such as above in -zĀIb and ANs--when there appears to be no distinction between it and the term sunnah.

Before one can conclude that there is real overlapping between the terms in Mālik's terminology, however, one must understand the content and background of the Muwaṭṭa's precepts and have been able to discern what the correct relationship is between those precepts and the terms that pertain to them. In order to do this, one must exhaust the possible hypotheses which account for Mālik's terms. It may

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[1]For discussion of the different types of ᶜamal, see above, pp. 409-433.

[2]See below, pp. 583-598, 614-690.

be, for example, that the meanings of the terms seem to overlap with each other because one has not identified the distinctive properties of each term. Furthermore, as I mentioned above, some discrepancies in Mālik's terminology may be the result of faulty transmission of the text of the Muwaṭṭa', although I doubt that such discrepancies should be very many or very great.

Nevertheless--beyond these considerations of whether or not one has identified the correct meaning of Mālik's terms or whether or not the text of the Muwaṭṭa' has been transmitted accurately--it seems to me to be expected that there should be some real overlapping between terms in Mālik's terminology. The reason for this, I believe, is that Mālik's terminology is not a systematic terminology according to the definition I have given above. Some of the words and usages Mālik employs in it are not systematic terms, properly speaking, because their semantic range has not been restricted to precise meanings. Rather, some terms in Mālik's terminology seem to fluctuate between restricted meanings which they tend to have in the context of his terminology and their old, customary semantic meanings. Thus, a word like 'amr, for example, has a very wide customary semantic range; in terms of its customary semantic range it could apply to the directive, ruling, or opinion of anyone--be it the Prophet, a judge, all the Madīnan fuqahā', or just a group of them. According to my analysis of Mālik's termi-

nology, the term 'amr is used most commonly for legal deductions that resulted from different types of ijtihād, and in certain contexts--as, for example, in the term AMN--it seems to be restricted to that meaning. Nevertheless, the word 'amr occurs in Mālik's terminology in a wide variety of contexts and takes on meanings in some of those contexts which, although within the word's customary semantic range, are contrary to its usage in other contexts. Thus, for example, the word 'amr is sometimes used in the Muwaṭṭa' for matters which probably originated in the Prophet's sunnah, as in some of the examples cited above, which are al-ʿamal an-naqlī.

One might describe Mālik's terminology in the Muwaṭṭa', therefore, as an "emerging terminology" because of this tendency of some of the words in it to fluctuate between restricted terminological meanings and the more diverse meanings of their customary semantic range. The concept of an "emerging terminology", however, might only reflect a Western cultural bias that the proper standard of a terminology is that of a terminology which is one hundred percent systematic. Even if the notion of a completely systematic terminology had occurred to Mālik, he might have regarded it as takalluf, an unnecessarily bothersome nuisance.

In working with Mālik's terminology, therefore, one must keep in mind both the hypothetical terminological meanings that Mālik's usages may have as well as the customary

semantic meanings which they also convey. Theoretically, at least, Mālik's terms may fluctuate between these two poles. This does not mean that Mālik's terms are devoid of meaning or are equivalent in meaning; for neither the terminological or customary semantic ranges of all of his terms are identical and those same terms do not appear to be used interchangeably. For example, the sunnah terms in the Muwaṭṭa' and the term AMN seem to have distinct usages, even though other usages may overlap with them. It appears to me that Mālik's terminology is not made up of mutually exclusive terms but rather of terms that fall into inclusive and exclusive categories. For example, some of the less specific terms may include a variety of more highly qualified terms in their semantic range, while the semantic range of the more highly qualified term excludes part of the semantic range of the less specific terms. Terms in the Muwaṭṭa' are qualified by adjectives, adverbs, and other modifiers that are used with them; the more qualified a term is, the clearer and more restricted its semantic range becomes. Thus, the most exclusive and unambiguous terms in the Muwaṭṭa', I believe, are those that contain negations--like S-XN, AMN-X, and A-XN--because they explicitly exclude whatever is negated from their semantic range.

In conclusion, therefore, one must allow for some leeway in working with Mālik's terminology. To conclude that the terms he uses are interchangeable because there

is some overlapping between them would probably not be correct. But, on the other hand, it might prove to be Procrustean to attempt to fit Mālik's terms into neatly systematic and mutually exclusive categories.

General Observations about Mālik's Terms

The Use of Symbols

To begin with, I have found it practical to devise symbols for working with Mālik's terminology in the Muwaṭṭa'. These symbols make it considerably easier to manipulate Mālik's terms, which sometimes amount to being long sentences; furthermore, the symbols make the concepts and meanings in Mālik's terms stand out more clearly. Thus, they are much easier to identify, and one can determine more readily the essential semantic differences between terms. I have provided a Key to the symbols in appendix 2.

My analysis of Mālik's terminology is based on a list of the terms in the Muwaṭṭa' in appendix 1 of Nūr-Saif's thesis.[1] I have assigned each of the terms in Nūr-Saif's list a symbol and worked them into a systematic index, which is also in appendix 2. Although Nūr-Saif's list is very useful, it is not always complete or accurate. I have made emendations where I found mistakes and additions whenever I came across them. But a more thorough study of Mālik's

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[1] Nūr-Saif, pp. 264-293.

terminology would require a more accurate and comprehensive index of terms. Nūr-Saif, for example, did not collect many of Mālik's usages in the Muwaṭṭa' which are quite common and which, I believe, also make up an important part of his terminology, such as: "hādhā ra'yī" [this is my opinion]; "'urā hādhā" [I am led to conclude this]; "hādhā 'aḥabb mā sami^{c}tu 'ilayya fī dhālika" [this is what I prefer of that which I have heard regarding this matter]; and "hādhā 'aḥsan mā sami^{c}tu 'ilayya fī dhālika" [this is what I regard to be best of that which I have heard regarding this matter].

Why Does Mālik Use Terms in the Muwaṭṭa'?

Although there are several hundred terms in the Muwaṭṭa' and Mālik's terminology is a conspicuous part of the book, it must also be noted that most of the precepts in the Muwaṭṭa' by far occur without any terms being used in connection with them. This brings up the question, naturally, of why Mālik uses terms in some cases and not in others.

One would assume, to begin with, that there is probably an important difference between the nature of those precepts in connection with which terms are used and those precepts with which they are not. Although I do not yet have sufficient evidence to make a conclusion, it appears that there was general agreement in and outside of Madīnah on the validity of many of those precepts for which no terms are cited. Those precepts in connection with which Mālik

uses terms, on the other hand, are generally points of difference between the Madīnan and Kūfan schools, as will be seen in the discussions of the following chapters.

The following precepts, for example, occur in the Muwaṭṭa' without any terms being used in connection with them, and, according to Ibn Rushd, they are matters of consensus among all fuqahā': Zakāh is taken on gold and silver;[1] zakāh is taken on wheat, barley, dried dates, raisins, and olives;[2] bequests [waṣāyā] may never exceed one third the value of one's entire estate.[3] Similarly, there was general consensus about what the amount of zakāh should be on camels and other livestock because of letters [kitāb aṣ-ṣadaqah] from the Prophet and later from the caliphs 'Abū Bakr and ᶜUmar on that matter. Mālik gives the text of ᶜUmar's letter in the Muwaṭṭa' and makes no comments about it.[4] According to Ibn Rushd there were differences of opinion among the Companions and Successors regarding the question of whether or not eating food that had been roasted in the open flame broke the state of ritual purity [wuḍū'], and there were contrary ḥadīth in the matter. But by Mālik's generation consensus had been reached, Ibn Rushd states, that wuḍū' was not broken in such cases and that the ḥa-

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[1] Muwaṭṭa', 1:245; Ibn Rushd, 1:147 (31).

[2] Muwaṭṭa', 1:244-245; Ibn Rushd, 1:147-148 (31).

[3] Muwaṭṭa', 2:763-764; Ibn Rushd, 2:202 (18).

[4] Muwaṭṭa', 2:257-259; Ibn Rushd, 1:152 (24).

dīth to the contrary had been abrogated. Mālik cites the position in the Muwaṭṭa' that wuḍū' is not broken in such cases but cites no terms in connection with that position.[1] Similarly, there had been disagreement among some of the early fuqahā' about whether or not it was permissible for a man who married a slave woman to also own her as personal property. Later fuqahā', according to az-Zurqānī, however, reached consensus that it was not permissible. Mālik cites that precept in the Muwaṭṭa' without any term.[2] It is interesting by way of comparison, however, that Mālik's teacher 'Abū 'z-Zinād of the generation before had referred to that same precept as "the sunnah which he had found the people following" [as-sunnah al-latī 'adraktu 'n-nās ᶜalaihā].[3]

If the hypothesis is correct that Mālik uses his terms in the Muwaṭṭa' primarily in connection with precepts regarding which there were significant differences of opinion in or outside Madīnah and that he tended not to use them in matters upon which there had been general agreement among the fuqahā', it would indicate that Mālik kept abreast of the opinions of non-Madīnan as well as Madīnan fuqahā'.[4]

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[1]Muwaṭṭa', 1:25-28; Ibn Rushd, 1:24 (19); see also ar-Rasīnī, p. 217.

[2]Zurqānī, 4:37; Muwaṭṭa', 2:537-538. [3]Mudawwanah, 2:188(20).

[4]It is worthy of note in this regard that al-Laith ibn Saᶜd in his letter to Mālik speaks of Mālik as having excellent knowledge of the points of difference between the Companions, which--according to al-Laith's view--underlie

It would not have been difficult for Mālik to learn such material since, as I pointed out in the section on his biography, Muslims visited Mālik in sizeable delegations from the different regions of the Muslim realm.[1] What would be significant about Mālik's having such knowledge, however, would be that it indicates that Mālik had taken an interest in learning the points of agreement and disagreement of non-Madīnan as well as Madīnan fuqahā' and in keeping abreast of them. It is interesting to note in this regard, furthermore, that Ibn Taimīyah holds that Mālik composed the Muwaṭṭa' with the divergent legal opinions of the Kūfans in mind and that this can be seen in the manner in which the material in the Muwaṭṭa' is presented.[2]

It would appear, therefore, that the chief purpose of Mālik's terminology in the Muwaṭṭa' is to indicate what the status of Madīnan ᶜamal is in those matters regarding which there had been differences of opinion among the fuqahā'. Thus, for example, if there has been no difference of opinion among the Madīnan fuqahā' on such a precept, Mālik states that explicitly by the expression "lā 'khtilāf fīhi" [-X; there is no difference of opinion in it], as in the terms S-XN, AMN-X, A-XN, and so forth. (I believe it likely that even in these cases Mālik did not have all of

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the differences between the ᶜamal of the various regions of the Muslim realm; see above, pp.323-331.

[1]See above, pp. 46-62. [2]Ibn Taimīyah, Ṣiḥḥat 'Uṣūl, p. 79.

the ᶜulamā' of Madīnah in mind; it is not probable, as I mentioned earlier, that he would regard some of the Madīnan ᶜulamā' as so incompetent or unreliable that he refused to even listen to their ḥadīth and described them as persons from whom no benefit could be derived and that he would then regard those same persons as legitimate constituents of 'ijmāᶜ.[1]) If there has been ijtimāᶜ on a matter in Madīnah, he indicates that by terms like AMN, which, as I suggested earlier, may signify only a majority consensus and not a total consensus of the Madīnan fuqahā' whose opinions Mālik deems to be authoritative.[2] On those matters regarding which there had been significant differences of opinion in Madīnah, Mālik cites the term AN, which, I believe, probably stands for Madīnan ᶜamal as followed by the Madīnan judiciary in those matters that came under its jurisdiction or as followed by prominent Madīnan fuqahā' like Mālik in those matters that lay beyond the jurisdiction of the judiciary.[3] Significant differences of opinion in Madīnah are even more explicit in terms, like those cited above, in which Mālik states that something is his opinion or that which he prefers or regards as best of that which he has heard.[4]

It would appear, therefore, as ᶜAlāl al-Fāsī has sug-

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[1]See above, pp. 72-76. [2]See above, pp. 424-428.

[3]See above, pp. 428-431, and below, pp. 732-734.

[4]See above, p. 530.

gested, that Mālik regarded Madīnan ᶜamal as the proper criterion to be followed in those matters of law that were derived from contrary or ambiguous sources of law and the like and regarding which there had been differences of opinion among the fuqahā'.[1] Nevertheless, it follows that if Mālik regarded Madīnan ᶜamal to be authoritative in matters of difference, he must also 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 priority over the contrary ᶜamal of all other regions of the Muslim realm is explicit in his letter to al-Laith ibn Saᶜd, while al-Laith, on the other hand, adheres closely to those types of Madīnan ᶜamal which are supported by local consensus, while feeling at liberty to disagree with Madīnan ᶜamal in those matters upon which the Madīnans themselves have disagreed.[2]

Mālik sets forth in the Muwaṭṭa', as mentioned earlier, the fundamental precepts of law [al-qawāᶜid al-fiqhīyah][3] of the Madīnan school, and the work, as Goldziher has observed, is, properly speaking, a compendium of law and a book of sunnah and not a collection of ḥadīth and āthār.[4] By

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[1]ᶜAlāl al-Fāsī, pp. 147, 150-151. [2]See above, pp. 304-305.

[3]For the definition of "legal precepts", see above, p. 227.

[4]See above, p. 305.

setting forth these precepts, Mālik's purpose, I believe, is to make the Muwaṭṭa' a source book of Madīnan ᶜamal that can serve as the reference of those who apply the law and perform ijtihād. Although the work contains numerous instances of Mālik's own ijtihād, other works--like the Mudawwanah, "Al-Mawwāzīyah," "Al-Wāḍiḥah," and "Al-ᶜUtbīyah"--contain the main body of Mālik's personal legal reasoning regarding unprecedented and unusual circumstances, and in these works Mālik performs his ijtihād on the basis of the precepts of the Muwaṭṭa'.[1] The main purpose of Mālik's legal reasoning in the Muwaṭṭa', in contrast, is that of either defending the validity of those precepts generally accepted in Madīnah or of supporting his selection of the opinions of some of the Madīnan fuqahā' as opposed to others, in those matters upon which they have disagreed.

Just as Mālik defends the precepts of the Muwaṭṭa' by legal argument whenever he feels it necessary to do so, he seems to employ his terminology whenever he feels it is necessary because of significant differences of opinion on the precepts in connection with which those terms are used. It is noteworthy in this regard that some of Mālik's most elaborate legal arguments in the Muwaṭṭa' occur in the context of precepts for which terms are cited.[2] Mālik's use of terms primarily in matters upon which there had been dif-

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[1] See above, pp. 97-107.

[2] See below, pp. 571-575, 713-723.

ferences of opinion among the fuqahā' would seem to be in keeping with the character of Mālik's reticence. For clarification of the status of Madīnan ᶜamal in such matters would be meaningful information, so to speak, while to clarify the status of Madīnan ᶜamal in those matters upon which there had been general agreement would be somewhat redundant.

In conclusion, other prominent Madīnan fuqahā' before Mālik seem to have regarded the local consensus of Madīnah to be the criterion one should follow in matters upon which there had been differences of opinion among other fuqahā'. It is reported that the famous Madīnan qāḍī and later governor of Madīnah 'Abū Bakr ibn Ḥazm,[1] who died when Mālik was approaching thirty years of age, was once asked what one should do regarding those matters of law about which there had been differences of opinion. He replied: ". . . if you find that the people of Madīnah have reached consensus in a matter, have no doubt that it is correct [al-ḥaqq]."[2]

No doubt, Mālik must have shared this opinion regarding Madīnan ijtimāᶜ. The question, however, is what his opinion was regarding the authority of those parts of Madīnan ᶜamal that were not supported by local consensus. Mālik seems to have followed such precepts himself, and he probably regarded them--despite signficant differences of opinion about them in Madīnah--to be the best products of

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[1]For data, see above, p. 57, n. 1. [2]Wakīᶜ, 1:143-144.

Madīnan ijtihād. His letter to al-Laith ibn Sa^{c}d would indicate that Mālik felt that others should follow this type of ^{c}amal as well. Nevertheless, we do not know what Mālik's response was when he received al-Laith's justification of his having disagreed with types of Madīnan ^{c}amal that were not supported by local consensus. Furthermore, one must keep in mind the reports that Mālik opposed al-Manṣūr's suggestion that he force the people of his empire to follow the Muwaṭṭa' as a standard code of law.[1] Furthermore, one wonders why, if indeed Mālik did regard all parts of Madīnan ^{c}amal to be equally authoritative, he should have made the distinction in his terminology--which, I believe, is quite clear--between those parts of Madīnan ^{c}amal that are supported by local consensus and those that are not. Perhaps, as ^{c}Iyāḍ and al-Qāḍī ^{c}Abd-al-Wahhāb hold, these were types of ^{c}amal which Mālik himself regarded as authoritative but which he did not regard it as obligatory for others to follow.[2]

What Mālik Is Reported to Have Said about His Terms

The fullest statement which I found on Mālik's terminology in the Muwaṭṭa' was a report that ^{c}Iyāḍ transmits from a nephew of Mālik named Ibn 'Abī 'Uwais.[3] In this re-

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[1]See above, pp. 99-102, 392-394. [2]See above, pp. 409-419.

[3]^{c}Iyāḍ, 1:194.
'Ismā^{c}īl ibn ^{c}Abd-Allāh ibn 'Uwais ibn Mālik al-'Aṣbaḥī (d. 226/840), known as IBN 'ABĪ 'UWAIS, outlived Mālik by about forty-seven years and may have been of about the

port Ibn 'Abī 'Uwais states that Mālik was asked once what he meant in the Muwaṭṭa' by the expressions AMN [al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā], "bi-baladinā" [in our city], "ad-raktu 'ahl al-ᶜilm" [I found the people of knowledge (following this)], and "samiᶜtu baᶜḍ 'ahl al-ᶜilm" [I heard some of the people of knowledge transmit . . .]. Mālik is said to have replied:

> As for most of that in the book [i.e., the Muwaṭṭa'] which is ra'y, upon my life, it is not my ra'y ["'ammā 'akthar mā fī 'l-kitāb fa-ra'y, fa-la-ᶜamrī, mā huwa ra'yī"] but rather [it is] that which I have heard transmitted from several [ghair wāḥid] of the people of learning and excellence and the 'imām's whose examples are worthy of being followed, from whom I received my learning: They were people who were heedful of God. But it became burdensome for me [to mention their names] so I said, "ra'yī" [(this is) my opinion], and [I said] that whenever their ra'y was like the ra'y which they had found the Companions following and which I later found [my teachers] following. It is a legacy which one generation has handed down to another until our own time.
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> That for which [I have used] "'urā" [I am led to conclude] is the ra'y of a grouping [jamāᶜah] of the 'imām's of earlier times.
>
> That for which [I have used] "al-'amr al-mujtamaᶜ ᶜalaihi" [that matter upon which there is ijtimāᶜ] constitutes opinions of the people of learning in fiqh and knowledge upon which ijtimāᶜ has been reached without their having differed in them ["mā 'jtumiᶜa ᶜalaihi min qawl 'ahl al-fiqh wa 'l-ᶜilm, lam yakhtalifū fīhi"].
>
> That for which I have said "al-'amr ᶜindanā" [AN] is the ᶜamal which the people among us here [an-nās

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same age as ash-Shāfiᶜī or Saḥnūn. He transmitted from his father, a brother named 'Abū Bakr, and Mālik ibn 'Anas, his paternal uncle. Al-Bukhārī and Muslim are said to have transmitted some ḥadīth from Ibn 'Abī 'Uwais, although there were muḥaddith's who regarded him as a weak transmitter. It is said, for example, that Ibn 'Abī 'Uwais used to have to rely upon his books while transmitting ḥadīth or, in other words, did not have a reliable memory. Ibn Ḥajar, 1:310-312.

ᶜindanā] have been following. Rulings are handed down in accordance with it ["jarat bihī 'l-'aḥkām"], and both those who are ignorant and knowledgeable know what it is.

Similarly, that for which I have said "bi-baladinā" [in our city] or for which I have said "baᶜḍ 'ahl al-ᶜilm" [some of the people of knowledge] is what I regarded to be preferable of the opinions of the ᶜulamā' ["fa-huwa shai' istaḥsantuhū fī qawl al-ᶜulamā'"].

As for that which I did not hear transmitted from the ᶜulamā', I performed ijtihād and took into consideration the madhhab [school; tradition] of those I had known, until [my conclusion] came to the point of being correct ["ḥattā waqaᶜa dhālika mawḍiᶜ al-ḥaqq"] or near to it; [I did this] so that there be no departure from the madhhab and the legal opinions [ārā'] of the people of Madīnah, even if I had not heard [the matter] transmitted specifically. Thus, I attributed the ra'y to myself after having performed ijtihād on the basis of the sunnah and that which had been closely followed [maḍā ᶜalaihi] by the people of knowledge whose examples are worthy of being followed and on the basis of those matters which are part of the ᶜamal here ["wa 'l-'amr al-maᶜmūl bihī ᶜindanā"] from the time of the Messenger of God--may God bless him and give him peace--the rightly guided 'imām's [al-'a'immah ar-rāshidīn], and those whom I knew. So even it is their ra'y, and I did not turn to the ra'y of others.[1]

If accurate, this report would disprove the hypothesis I suggested earlier that AMN might not have stood for a total Madīnan consensus but rather for a majority consensus, while terms like AMN-X, A-XN, S-XN, and so forth, which explicitly negate the existence of differences of opinion, would stand for total consensus.[2] Mālik states in this report that he uses AMN for matters upon which there had been no differences of opinion among the people of learning in fiqh and knowledge [ᶜilm]. As I mentioned earlier, I know of no evidence in the Muwaṭṭa' for differences of opinion among the Madīnan fuqahā' on precepts in connection with

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[1]ᶜIyāḍ, 1:194. [2]See above, pp. 424-428.

which Mālik uses the term AMN. There is often textual evidence in the Muwaṭṭa', on the other hand, for differences of opinion on AN precepts. I had suggested this hypothesis because of ash-Shāfiᶜī's contentions that there had often been differences of opinion among the Madīnan fuqahā' on precepts for which Mālik used the terms AMN and AN and because of the positions of ᶜAlāl al-Fāsī and Muṣṭafā az-Zarqā that the original conception of 'ijmāᶜ had probably been that of a majority and not a total consensus.[1] If this report is authentic, however, it would seem probable to me that the differences of opinion which ash-Shāfiᶜī has in mind with regard to AMN are those of persons whom Mālik did not regard to be worthy of being constituents of 'ijmāᶜ, since ash-Shāfiᶜī conceives of 'ijmāᶜ as a total consensus of the people such that you find no one disagreeing.[2] To answer the question more conclusively, one would have to know who the persons were who disagreed with the AMN's that ash-Shāfiᶜī has in mind; one could then determine whether they were persons whose legal opinions Mālik regarded as worthy of being considered and, hence, whether or not they would have constituted constituents of 'ijmāᶜ for him.

One of the interesting indications of this report is that it indicates that AMN pertained to opinions [qawl] of the Madīnan fuqahā'. In that regard, it supports my hy-

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[1]See above, pp. 195-204, 343-348.

[2]See above, pp. 195-204.

pothesis that AMN pertains to precepts that were derived from the ijtihād of the fuqahā' or taken from Qur'ānic texts directly but that were not part of the Prophetic sunnah as reflected in the sunnah terms of the Muwaṭṭa'.[1]

It is also noteworthy that the report identifies AN as standing for precepts that constitute Madīnan ᶜamal and which constitute the judicial custom of the Madīnan judiciary. They are also precepts which are well-known to all, both the ignorant and the learned, which one would expect of judicial policies. Mālik does not indicate that there had been differences of opinion among the Madīnan ᶜulamā' on AN precepts; however, as already mentioned, there is evidence of that in the Muwaṭṭa' itself just as there is other evidence that AN precepts constituted the judicial policy of the Madīnan judiciary.[2] It is possible for the learned people of Madīnah to know these AN precepts well and yet not have consensus on their validity because, as policy of the judiciary, they are supported by executive authority. Thus, they become ᶜamal for all, even for those who disagree. Because of this relationship between AN precepts and the Madīnan judiciary, I have suggested that AN precepts which did not come under its jurisdiction would be likely in some cases to have a mixed ᶜamal in Madīnah, that is, an ᶜamal in which some people follow the AN and others follow the

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[1]See below, pp. 576-582, 723-731; above, 419-433.

[2]See above, pp. 428-431; below, pp. 732-734.

contrary opinions of the dissenting Madīnan fuqahā'.[1]

One should also take note of Mālik's claim in this report that in doing ijtihād regarding unprecedented matters he has adhered as closely as possible to the well-established sunnah and the precepts of law to which the Madīnans have traditionally subscribed and which make up their ᶜamal. Indeed, one of the most conspicuous characteristics of the report is Mālik's emphasis in it that his legal opinions are neither original nor have they been taken from non-Madīnan sources but rather that invariably they are either rooted in the Madīnan tradition--in that they were also the opinions of earlier Madīnan fuqahā' from whom Mālik received his learning--or that they were modelled after that tradition in the case of ijtihād. If there is any reason to suspect the authenticity of the report on the basis of its content, I would think it would be Mālik's insistence upon this point. For it is plausible that a later Mālikī fabricated the report in order to lend greater authoritativeness to statements of Mālik in the Muwaṭṭa' like "hādhā ra'yī" and "'urā hādhā" which would not otherwise appear so authoritative. (Similarly, one might suspect that the statement that AMN constitutes a total consensus of the Madīnan fuqahā' was fabricated to lend greater authoritativeness to AMN than it would have if it were understood to stand for a majority consensus.)

Nevertheless, it is also plausible that these state-

ments in the report are authentic. What Mālik is reported to have said about his ra'y statements in the Muwaṭṭa' is not essentially different from my analysis of the significance of his term AN. For with regard to these statements about ra'y, Mālik has stated that his personal ra'y in most cases is in keeping with the ra'y of several [lit., more than one] of the prominent Madīnan fuqahā' before him. He indicates by this that these matters constituted points of difference among the Madīnan fuqahā', namely, that there were others of them from whom he heard opinions to the contrary. (Similarly, Mālik's statement later in the report about his following those opinions of the fuqahā' which he regarded to be preferable also indicate such differences of opinion; there must have been contrary opinions which he regarded as not preferable.)

If terms in the Muwaṭṭa' like hādhā ra'yī and 'urā hādhā refer to opinions of Mālik that are in keeping with the opinions of some of the prominent Madīnan fuqahā' before him as opposed to others, this brings up the question of what the distinction, if any, is between these terms and Mālik's AN. As I mentioned earlier, I have not been able to undertake a systematic study of the ra'y terms of the Muwaṭṭa' and the terms expressing Mālik's personal preferences. Occasionally, Mālik speaks of something being his personal preference in the case of an AN,[1] however, as a

[1]See, for example, Muwaṭṭa', 2:502, 661.

rule the ra'y terms and the terms expressing personal preference seem to occur in isolation from the sunnah and 'amr terms.

If--as Mālik states in this report and as is supported by my analysis of Mālik's terminology--AN terms refer to the ᶜamal of the Madīnan judiciary in matters that come under its jurisdiction, the question arises as to whether or not the precepts of Mālik's ra'y terms also represent that same ᶜamal. One hypothesis that comes to mind is that Mālik may have used the AN terms for those precepts with which he agreed that were part of Madīnan ᶜamal yet upon which there had been differences of opinion among the Madīnan fuqahā', while he used his ra'y terms to designate precepts which he regarded to be valid or preferable and upon which there had been differences among the Madīnan fuqahā' that were not supported by Madīnan ᶜamal.

A Few Words about Terms in the Mudawwanah

Legal terms similar to those which Mālik uses in the Muwaṭṭa' are also to be found in the Mudawwanah. In the Mudawwanah, however, these terms come from a wide variety of sources and through various channels of transmission--often, for example, they make up part of the additional information which Saḥnūn himself has added to the original text of Ibn al-Furāt and Ibn al-Qāsim.[1] The terms in the Muwaṭṭa', on

[1]See above, pp. 107-113.

the other hand, come from one source--Mālik--and through one channel of transmission--that of Yaḥyā ibn Yaḥyā al-Laithī.[1] Although most of the terms which I found in the Mudawwanah come from Mālik,[2] there are also terms from teachers of Mālik like az-Zuhrī, Yaḥyā ibn Sa^{c}īd, Rabī^{c}ah, 'Abū 'z-Zinād,[3] and Ibn Qusaiṭ.[4] I have also found a few terms attributed to 'Ashhab and Ibn al-Qāsim.[5]

Because of the several persons from whom these terms come, it is probably not proper to speak of a terminology of the Mudawwanah but rather of the terminologies of the

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[1]See above, pp. 97-107.

[2]See, for example, Mudawwanah, 1:24 (2), 40 (8), 68 (2, 5, 10, 13), 70 (9), 96 (12), 99 (23), 102 (14), 103 (7), 112 (12), 119 (1, 5), 125-126 (21), 141 (9), 142 (3), 146 (2), 152 (24), 157 (9, 15), 194 (10), 195 (12, 15), 209 (3), 231 (3), 242 (10), 257 (13), 281 (29), 282 (16), 289 (9), 293-294 (30), 296 (25); 2:142 (9), 149 (10), 160 (9), 210 (8), 397 (2); 3:113 (17), 215-216 (19); 4:70 (18), 70-71 (32), 77 (22), 106 (3), 412 (15).

[3]For az-Zuhrī, see ibid., 1:150 (17), 287 (7); 2:386 (5), 395 (24); 4:84 (10), 120 (4), 121 (26). For Yaḥyā ibn Sa^{c}īd, see ibid., 1:287 (7), 2:194 (15), 395 (24); 3:84 (22), 96 (30), 129 (17); for Rabī^{c}ah, see ibid., 1:194 (16), 3:96 (30), 129 (17); for 'Abū 'z-Zinād, see ibid., 2:188 (20).

For data on these persons, see above, p. 55, n. 4 [az-Zuhrī], p. 63, n.2 [Yaḥyā ibn Sa^{c}īd, Rabī^{c}ah, 'Abū 'z-Zinād].

[4]Ibid., 1:110 (13); 2:188 (20).

Yazīd ibn ^{c}Abd-Allāh IBN QUSAIṬ (32-122/652-739) was one of Mālik's teachers and also instructed al-Laith ibn Sa^{c}d. He transmitted from Ibn ^{c}Umar and Sa^{c}īd ibn al-Musayyab, Khārijah ibn Zaid, and ^{c}Urwah ibn az-Zubair of the Seven Fuqahā'. Mālik cites Ibn Qusaiṭ occasionally in the Muwaṭṭa'. Ibn Qusaiṭ was also regarded as being a faqīh and is said to have been very genial and helpful. See Ibn Ḥajar, 11:342-343.

[5]Mudawwanah, 1:241 (16) and 2:197 (22), 369 (23). For data on 'Ashhab, see above, p. 108, n. 2; for Ibn al-Qāsim, see above, p. 42, n. 2.

Mudawwanah. It would be interesting to study the terminologies of these different persons in the Mudawwanah as well as Mālik's terminology in that work and compare them with his terminology in the Muwaṭṭa'. That would require first, however, that these terms be collected and classified; until this time, unfortunately, the Mudawwanah, like most early Arabic works, has not been properly indexed.[1] I recorded the terms of the Mudawwanah whenever I encountered them in my readings, and--not having been able to go through the entirety of the Mudawwanah--I read selectively in each of its volumes, with the hope that the information I gathered would be random enough to give a fair sampling of the work's contents. Although I have not attempted to analyze the terminologies of the Mudawwanah, I make occasional references to terms in it in the context of the following discussion of the terminology of the Muwaṭṭa', especially when there are noteworthy discrepancies between terms used in both books for the same or similar precepts.

ᶜAmal terms--which are not very common in the Muwaṭṭa',compared to the 'amr and sunnah terms it contains--are

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[1]The best attempt at indexing the Mudawwanah which I know of to date is that of G.-H. Bousquet, who has prepared a general subject index of the work. As he admits himself, however, even this index is still very general. See G.-H. Bousquet, "La Mudawwana: Index avec la table générale des matières," Arabica, 17:113-150. Bousquet's index is based on the following edition: Saḥnūn ibn Saᶜīd, Al-Mudawwanah al-Kubrā li-'Imām Dār al-Hijrah, al-'Imām Mālik ibn 'Anas al-'Aṣbaḥī, 16 vols. in 8 (Egypt: Maṭbaᶜat as-Saᶜādah, 1323/1905); I refer to this edition as: Mudawwanah (Saᶜādah) to distinguish it from the Khairīyah edition.

more frequent in the Mudawwanah; most of them seem to be of the category of what I call "negative ᶜamal terms" [Al-x̄], which, in contrast to the "affirmative ᶜamal terms", state that ᶜamal is not in accordance with the procedure or precept in question.[1] There are also many sunnah and 'amr terms in the Mudawwanah. I found a higher incidence of sunnah terms in the Mudawwanah than 'amr terms, while in the Muwaṭṭa' the majority of terms by far are 'amr terms. Of the 'amr terms in the Mudawwanah, AN is the most common of those which I found, which is also the case in the Muwaṭṭa'. I found an example of Mālik's term A-XN but no examples of the term AMN, which is the second most common term in the Muwaṭṭa'.[2]

I found some terms which are worthy of note that occur in the Mudawwanah and are sometimes used by Mālik but which do not occur in the Muwaṭṭa': al-'amr al-qadīm [the ancient 'amr],[3] 'amr an-nās al-qadīm [the ancient 'amr of the people],[4] 'amr an-nabī [the 'amr of the Prophet],[5] and ash-sha'n, which is a synonym for 'amr.[6] 'Amr an-nabī illustrates how, as I mentioned earlier, the semantic scope of 'amr can take in the Prophet as well as others.[7]

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[1]For discussion of the ᶜamal terms, see below, pp. 614-690.

[2]Mudawwanah, 4:106 (3); Mālik is the source of the term.

[3]Ibid., 1:193 (23); 4:76 (8). [4]Ibid., 1:146; 4:77 (22).

[5]Ibid., 1:293 (30).

[6]Ibid., 1:24, 68, 102 (14), 194 (14), 195 (15), 281 (29).

[7]See above, pp. 526-527.

CHAPTER VII

THE SUNNAH TERMS

General Observations about the Sunnah Terms

According to my analysis, there are forty sunnah terms in the Muwaṭṭa', and I have divided them into five main classifications.[1] The first and numerically largest of these classifications is that of the sunnah terms like S-XN [as-sunnah al-latī lā 'khtilāf fīhā ᶜindanā; the sunnah regarding which there are no differences of opinion among us] and its variations, which indicate that they were supported by Madīnan 'ijmāᶜ, by explicitly denying any differences of opinion among the Madīnans on them. I have recorded thirteen sunnah terms which fall into this classification. The second of these classifications is that of MḍS [maḍat as-sunnah; the sunnah (which) has been executed, put into practice] and variations of it which include the verb "maḍā" or its derivatives. I have placed eight sunnah terms in this classification; there is a ninth instance of it--MḍS-XN [maḍat as-sunnah al-latī lā 'khtilāf fīhā ᶜindanā; the sunnah (which) has been put into practice and upon which there

[1] See below, pp. 778-779 of appendix 2 for the index of these five classifications.

are no differences of opinion among us]--which, however, I have classified with the S-XN terms because of its explicit indication of 'ijmāᶜ.

The third classification is that of SMs [sunnat al-muslimīn; the sunnah of the Muslims] and its variations. I have recorded five instances of this expression in the Muwaṭṭa'; in one of these instances--SMs-X [sunnat al-muslimīn al-latī lā 'khtilāf fīhā; the sunnah of the Muslims upon which there are no differences of opinion]--I have classified it with the S-XN terms; in another instance--MḍSMs [maḍat sunnat al-muslimīn; the sunnah of the Muslims (which) has been put into practice]--I have classified it with the MḍS terms. The fourth classification is that of SN [as-sunnah ᶜindanā; the sunnah among us], which occurs nine times without variation. A variation of it--SN: x̄dIb [as-sunnah ᶜindanā wa 'l-ladhī 'adraktu ᶜalaihi 'ahl al-ᶜilm bi-baladinā; the sunnah among us and that which I found the people of knowledge in our city following]--occurs only once, according to my analysis. The fifth classification is that of S [as-sunnah], which occurs six times.

The highest percentage of sunnah terms occurs in the chapter on zakāh. In general, however, the forty sunnah terms are distributed throughout the Muwaṭṭa', occurring both in chapters that pertain to acts of worship and to social transactions. MḍS and SMs, however, occur only in chapters pertaining to social transactions. Conclusions about

the significance of the sunnah terms are given at the end of this chapter.[1]

The expression "sunnat Rasūl Allāh" [the sunnah of the Messenger of God] never occurs among Mālik's sunnah terms in the Muwaṭṭa'. That expression occurs twice in the āthār of the Muwaṭṭa', however, and the variation sunnat an-Nabī [the sunnah of the Prophet] occurs in a ḥadīth. The caliph 'Abū Bakr states that he knows of no stipulated share of inheritance for grandmothers in the sunnah of the Messenger of God.[2] ᶜAbd-Allāh ibn ᶜUmar writes to the 'Umayyad ruler ᶜAbd-al-Malik ibn Marwān, informing him that he will hear and obey him in a manner consistent with the sunnah of God and the sunnah of God's Messenger.[3] Mālik narrates a ḥadīth, according to which the Prophet says, "I have left two things with you which, if you follow them, you will never go astray: the Book of God and the sunnah of His Prophet."[4]

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[1] See below, pp. 576-582. [2] Muwaṭṭa', 2:513.

[3] Ibid., 2:983.

[4] Ibid., 2:899.

Six other reports in the Muwaṭṭa' contain the word sunnah or derivative verbs. In one ḥadīth the Prophet errs while leading the community in prayer and institutes the sunnah of making two additional prostrations to compensate for inattention while praying; the Prophet says, "I am made to forget ['unassā or 'ansā] in order that I establish a [new] sunnah ['asunna]" (ibid., 1:100). In an 'athar ᶜĀ'ishah, the Prophet's wife, says that three sunnah's were established in the case of a certain woman named Barīrah; she then ennumerates them (ibid., 2:562). ᶜUmar ibn al-Khaṭṭāb, while speaking to the people, tells them that the sunnah's have been clearly set down for them and that they have been left on the clear path [al-wāḍiḥah] (ibid., 2:824). The Companion ᶜAbd-

Examples

1. S-XN: Zakāh on Gold and Silver

> Mālik states that it is the S-XN that zakāh is required on twenty pieces of gold [dīnār] and on two hundred pieces of silver [dirham].[1]

There was extensive agreement among fuqahā' in Madīnah, Kūfah, and elsewhere on the validity of this precept. Al-Ḥasan al-Baṣrī, however, disagreed on part of it, holding instead that the minimum amount [niṣāb] of gold coin upon which zakāh was due was forty pieces, and a small party held that view with him, according to Ibn Rushd, although al-Bājī states that after al-Ḥasan total consensus was reached on the validity of the above precept.[2]

According to Ibn Rushd, Mālik has derived this precept from the ᶜamal of Madīnah, which he believes to be in-

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ar-Raḥmān ibn ᶜAwf reports that he heard the Prophet say that the sunnah pertaining to the People of the Book [i.e., Jews and Christians] should be followed in the case of Magians (ibid., 1:278). ᶜUmar ibn al-Khaṭṭāb refuses to wash the garment he is wearing after it has been somewhat defiled and decides instead to clean the defiled part with water while still wearing it, for he fears that if he changed garments in order to have the defiled one washed people would regard it to be required by sunnah (ibid., 1:50). Az-Zuhrī states that people are mistaken about the sunnah when they think it is sunnah to walk behind funeral processions (ibid., 1:226). See A. J. Wensinck, Concordance et indices de la tradition musulmane: les six livres, le Musnad d'al-Dārimī, le Muwaṭṭa' de Mālik, le Musnad de Aḥmad ibn Ḥanbal, 7 vols. (Leiden: E. J. Brill, 1937-1943), 11:552-558.

See also, pp. 11-20, above on the discussion of the difference between concepts and terms.

[1] Muwaṭṭa', 1:246. [2] Al-Bājī, 2:95; Ibn Rushd, 1:150 (20).

dicated by Mālik's term S-XN.[1] The type of ᶜamal represented by this precept is what is called in Mālikī legal theory "al-ᶜamal an-naqlī", i.e., ᶜamal that was either instituted by the Prophet directly or which had his approval.[2] For the Prophet directed his regional governors to collect zakāh and must have indicated to them what the minimum quantities of gold and silver coin were upon which it was to be collected. Ibn al-Qāsim states in the Mudawwanah that this precept is "sunnah māḍiyah" [a sunnah which was executed and put into practice].[3]

This is an example also of a very authoritative type of Madīnan ᶜamal for which there are few if any ḥadīth that are regarded to be sound. Mālik cites no ḥadīth or āthār to support it. Ibn Rushd states that the niṣāb of silver coins is established in authentic ḥadīth but that there is no sound ḥadīth supporting the niṣāb on gold coin. Al-Bājī indicates the same thing. He cites the unsound ḥadīth in question--which is in conformity with Mālik's precept--but adds that its 'isnād is not sound.[4]

It should also be noted that, according to the Madīnan point of view, there is no analogy between the amount of gold upon which zakāh is paid and the amount of silver. For, although the ratio between gold and silver according to this precept would be one to ten, the Madīnans hold that

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[1]Ibn Rushd, 1:150 (20). [2]See above, pp. 410-415.

[3]Mudawwanah, 1:209 (3). [4]Ibn Rushd, 1:150 (20); al-Bājī, 2:95.

the true ratio between gold and silver currencies is one to twelve. Ash-Shāfiᶜī states that when debating with ash-Shaibānī about this and related matters; for ash-Shaibānī holds that the true ratio between gold and silver is one to ten, as reflected in this precept, and he believes that the Madīnans are contradictory in establishing a one to twelve ratio between gold and silver in indemnities [diyāt]. Ash-Shāfiᶜī explains that, for the Madīnans, the one to twelve ratio is the norm,and they follow it in pertinent matters of law, while they regard the one to ten ratio in zakāh to be contrary to analogy, just as they do not believe there to be any analogy between the monetary value of the numbers of cattle, sheep, camels, and other livestock upon which zakāh is collected.[1]

In the discussion which follows this precept, Mālik makes it clear that for purposes of zakāh gold and silver currencies are to be regarded independently and not in terms of their values with respect to each other. Thus, he states that if a person possesses 160 pieces of silver in a city where the rate of exchange between gold and silver coins is one to eight--thereby making that person's 160 silver coins worth twenty pieces of gold--that person, nevertheless, shall only be required to pay zakāh on his silver when it reaches the number of 200 coins.[2] He emphasizes, however, that the

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[1]Ash-Shāfiᶜī, "Radd," pp. 277-279; for examples, see Muwaṭṭa', 2:833, 850.

[2]Muwaṭṭa', 1:247.

size of the coins must be standard; zakāh would not be required, for example, on twenty pieces of gold of deficient weight or 200 pieces of silver of deficient weight.[1]

2. S-XN . . . : No Zakāh on Fruit, Provender, and Greens[2]

> Mālik cites the term and states the precept that zakāh is not levied on any types of fruit [fawākih], such as pomegranates, peaches, figs, and so forth.
>
> He continues to say that zakāh is also not levied on freshly mown provender [al-qaḍb] or any types of edible greens [buqūl] nor on the money earned from selling them until that money has been in one's possession for a full year [ḥawl].[3]

This precept is an instance of what Mālikī legal theorists refer to as al-ᶜamal an-naqlī, which, in this case, is believed to have come about by virtue of the Prophet's tark, that is, his not having required something which, had he required it, would have become well-known to the people of Madīnah. ᶜIyāḍ cites it as an illustration of that type of ᶜamal naqlī.[4] Ibn ᶜAbd-al-Barr and al-Bājī also hold this view, pointing out, like ᶜIyāḍ, that Madīnah was an agricultural oasis in which these types of produce constituted common crops; thus, it would have been well-known to the Madīnans if the Prophet had levied zakāh on such crops.[5]

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[1] Muwaṭṭa', 1:246-247.

[2] The term in full is S-XN: stx]I [as-sunnah al-latī lā 'khtilāf fīhā ᶜindanā wa 'l-ladhī samiᶜtu min 'ahl al-ᶜilm; the sunnah upon which there are no differences of opinion among us and that which I have heard transmitted from the people of knowledge].

[3] Muwaṭṭa', 1:276. [4] See above, pp. 410-415.

[5] Yūsuf IBN ᶜABD-AL-BARR, Al-Istidhkār, ed. ᶜAlī an-

Although Mālik states in the full term which he uses for this precept that he has heard it from the people of knowledge in Madīnah, he cites no textual sources of law, such as ḥadīth or āthār to support its validity. Ash-Shawkānī[1] states that very little textual information has been transmitted about this precept; he adds that at-Tirmidhī,[2] the famous third/ninth century muḥaddith held that no sound ḥadīth had been transmitted regarding this precept.[3] Thus, it is another very fundamental part of Madīnan ᶜamal naqlī about which few if any ḥadīth had been transmitted.

This precept is also a point of difference between the Madīnans and 'Abū Ḥanīfah, who holds that zakāh is required on the produce of all fruit trees--whether or not the fruit is storable--and that zakāh is required on edible greens [buqūl].[4] According to Ibn Rushd, 'Abū Ḥanīfah bases

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Najdī Nāṣif, 2 vols. [incomplete] (Cairo: Al-Majlis al-'Aᶜlā li-'sh-Shū'ūn al-'Islāmīyah, 1391-/1971-), 1:154; Al-Bājī, 2:170.

[1]Muḥammad ibn ᶜAlī ASH-SHAWKĀNĪ (1173-1250/1760-1834) was an important Yamanī Muslim scholar from Ṣanᶜā', where he became qāḍī in 1229/1813. He wrote at least 114 books and was much concerned with the revival of Islamic learning and practice; he was an adamant opponent of taqlīd [the unthinking imitation of tradition]. Ziriklī, 7:190-191.

[2]Muḥammad ibn ᶜĪsā AT-TIRMIDHĪ (205-279/825-892) was a famous Central Asian muḥaddith and student of al-Bukhārī. His compilation--Al-Jāmiᶜ--is highly regarded among sunnī's. He is especially important because of his method of criticizing 'isnād's and because of the terminology he used in classifying them. Sezgin, 1:154.

[3]Muḥammad ibn ᶜAlī ASH-SHAWKĀNĪ, Nail al-'Awṭār min Ḥadīth Sayyid al-'Akhyār: Sharḥ Muntaqā 'l-'Akhbār, 9 vols. (Beirut: Dār al-Jīl, 1973), 4:203-204.

[4]Al-Bājī, 2:170.

his position on the generality [ᶜumūm] of a ḥadīth--which Mālik also transmits in the Muwaṭṭa'[1]--namely, "[Take] ten percent of that which is watered by the sky, springs, and ground water [al-baᶜl]; five percent from that which is irrigated;" for, according to the generality of this statement, zakāh would be required on all agricultural produce.[2] Thus, Mālik's precept is an exception to this general statement and is contrary to analogy with other types of agricultural produce upon which Mālik holds that zakāh is required.

3. SthN-X:[3] Regarding Bequests to One's Heirs

> Yaḥyā ibn Yaḥyā begins by stating that he has heard Mālik say that the Qur'ānic verse, ". . . if one leaves wealth behind [him after death], [let him make] bequests [waṣīyah] to parents and relatives . . ."[4] was abrogated upon the revelation of the other verses in the Qur'ān which established the shares of inheritance which parents and relatives must receive.[5] Yaḥyā then continues to say that he has heard Mālik say that it is the SthN-X that it is not permissible for a person to make a bequest to an heir of his unless his other heirs permit him to do so. If some of them permit it and others refuse to, the bequest will be taken from the shares of inheritance of those who permitted it but not from the shares of those who did not.[6]

This precept is believed to be another instance of ᶜamal naqlī which was instituted by the Prophet and had been part of Madīnan ᶜamal since the days of the Prophet's Com-

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[1]Muwaṭṭa', 1:270. [2]Ibn Rushd, 1:149 (14).

[3]This symbol stands for the expression, "as-sunnah ath-thābitah ᶜindanā 'l-latī lā 'khtilāf fīhā" [the well-established sunnah among us, concerning which there are no differences of opinion].

[4]Qur'ān, 2:180. [5]Ibid., 4:7, 11-12, 176.

[6]Muwaṭṭa', 2:765.

panions, as indicated by Ibn Rushd, al-Bājī, and az-Zurqānī.[1] There was wide-spread agreement among the sunnī fuqahā' regarding the first part of Mālik's precept about bequests not being made to heirs and that the Qur'ānic verse to that effect had been abrogated. According to az-Zurqānī, however, the Yamanī faqīh Ṭāwūs[2] and others held that the verse had not been abrogated but rendered specific [makhṣūṣ] upon the revelation of the verses setting forth the shares of inheritance and that it pertained to giving bequests to those relatives who were not heirs.[3] (Not all relatives receive shares of inheritance.) Furthermore, according to al-Bājī, Ibn Rushd, and az-Zurqānī, there was some disagreement about the validity the the provision at the end of this precept, namely, that bequests could be made to heirs from the shares of other heirs who were willing to permit it. Al-Bājī does not state who disagreed on this point; Ibn Rushd and az-Zurqānī, on the other hand, mention Dāwūd aẓ-Ẓāhirī and al-Muzanī,[4] who reached manhood sometime after Mālik's death. I

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[1]Ibn Rushd, 2:201 (30); al-Bājī, 6:179; az-Zurqānī, 4:482.

[2]ṬĀWŪS ibn Kaisān al-Khawlānī (33-106/653-724) was a highly regarded older Successor and was renowned for his knowledge of ḥadīth and fiqh. He was of Persian ancestry but was born in Yaman and grew up there. He was known for his piety and his aversion to the patronage of the 'Umayyads, whom he is reported to have often admonished. Ziriklī, 3:322.

[3]Az-Zurqānī, 4:482; see al-Bājī, 6:179; Ibn Rushd, 2:201 (30).

[4]For data on al-Muzanī, see above, p. 210, n. 1. DĀWŪD ibn ᶜAlī ibn Khalaf AẒ-ẒĀHIRĪ (200 or 202-270/

do not know whether this difference of opinion began with Dāwūd aẓ-Ẓāhirī and al-Muzanī or went back before them.

There is a ḥadīth supporting the first part of the precept, namely, that bequests are not to be made to heirs, and it has been transmitted through several channels, although, according to al-Bājī and az-Zurqānī, there has been some question about the soundness of these channels of transmission. Al-Bājī states that despite differences of opinion over the validity of this supporting ḥadīth the fuqahā' have always been in wide-spread agreement about this ᶜamal. Az-Zurqānī mentions a ḥadīth supporting the last part of the precept about the permissibility of making such bequests from the shares of those heirs who permit it, but he adds again that there is doubt about the soundness of that ḥadīth's transmission.[1] There is no mention in these works of contrary ḥadīth; it would seem,then, that this is another example of a well-established ᶜamal regarding which few ḥadīth were transmitted.[2]

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815 or 817-884) was the founder of the so-called "Ẓāhirī" or literalist school of law; he was born in Kūfah, studied in Baṣrah and Baghdād and Nīsāpūr, and settled in Baghdād. One of the notable features of his school was the rejection of qiyās and all other types of ra'y. Sezgin, 1:521.

[1]Al-Bājī, 6:179; az-Zurqānī, 4:482.

[2]In so far as the contrary opinions of Dāwūd aẓ-Ẓāhirī and al-Muzanī are concerned, they are not, according to Ibn Rushd, based on contrary ḥadīth but rather on the literal interpretation of the ḥadīth referred to above that "bequests shall not be made to heirs." The reasoning of Mālik and those who uphold the precept, according to Ibn Rushd, al-

Laws pertaining to bequests are contrary to analogy with other rights that one has in Islamic law over the disposal of one's property. Ordinarily one is free to dispose of one's property as one sees fit and to make gifts of it to whomever one wants. This is clearly not the case in the laws of bequests.

Finally, it would appear that Mālik has relied upon the Madīnan ᶜamal that supports this precept as a means of establishing that the Qur'ānic verse pertaining to making bequests to parents and relatives had indeed been abrogated upon the revelation of the verses that set down the shares of inheritance. For there is nothing in those verses that explicitly indicatesthat the procedure of making bequests to parents and relatives had been abrogated.

4. SN: SNx̄-shkx&-X:[1] The Annulment of Marriage by Liᶜān[2]

Mālik cites a lengthy ḥadīth,which reports how the Prophet administered liᶜān; he adds the comment from az-Zuhrī after the ḥadīth that this procedure which the Prophet

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Bājī, and az-Zurqānī, is that the purpose of the prohibition is to keep the maker of the bequest from violating the rights of his heirs; Thus,if they consent to his making a bequest to another heir at their expense, it is permissible. Ibn Rushd states that the contrary opinion regards the prohibition as having no purpose which intellect can discern; thus, they adhere to it strictly as a matter of religious obedience. (See the citations above from Ibn Rushd, al-Bājī, and az-Zurqānī.)

[1]This symbol stands for as-sunnah ᶜindanā . . . . Wa ᶜalā hādhā as-sunnah ᶜindanā 'l-latī lā shakk fīhā wa lā 'khtilāf [SN . . . . The SN in which there is no doubt and upon which there are no differences of opinion is in accordance with this].

[2]Liᶜān [mutual cursing] is a type of annulment in the

> instituted with regard to the couple mentioned in the ḥadīth became thereafter the sunnah regarding those who do liᶜān. Mālik then transmits a shorter ḥadīth, which reports that the Prophet administered liᶜān once, divided between the husband and wife afterward, and joined the wife's child with her. Mālik then cites the Qur'ānic verses which contain the wording of the oaths which are to be taken by the husband and wife when performing liᶜān.[1]
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> Mālik states that the SN is that a husband and wife who do liᶜān may never remarry. If the husband later claims that he was lying, he shall be flogged the punishment of one who slanders women. In that case, he will be permitted to claim the child [if there is one] as his own, but he shall not be permitted to remarry his former wife. Mālik concludes by stating that the SN in which there is no doubt and upon which there are no differences of opinion is in accordance with this.[2]

Although Mālik first refers to this precept as a SN, he makes it clear by his statement at the end of the precept that it is a SN regarding which there were no differences of opinion; thus, I would classify this precept with the other S-XN precepts.

This precept, like the other sunnah precepts discussed so far, would be classified as ᶜamal naqlī because of the explicit indication in the text of the Muwaṭṭa' that it had been instituted by the Prophet. Az-Zuhrī comments on the first ḥadīth, "And so this became thereafter the sunnah regarding those who do liᶜān." Thus, the concept of sunnah which az-Zuhrī has in mind here would be that of the sunnah of the Prophet.

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case of a husband's accusing his wife of adultery but not having sufficient evidence to prove it. He takes four oaths before the qāḍī that he is speaking the truth, and he invokes the curse of God upon himself if he is lying. The wife may exempt herself from punishment by taking four contrary oaths that her husband is lying and invoking the wrath of God upon herself if he is speaking the truth.

[1]Qur'ān, 24:6. [2]Muwaṭṭa', 2:566-568.

Unlike the preceding examples, this example is supported by two ḥadīth which Mālik cites; nevertheless, the sunnah precept provides information which is not contained in Mālik's textual sources. The sunnah precept provides the additional information that a couple whose marriage has been annulled through liᶜān may never again, under any circumstances, remarry--which, according to Ibn Rushd, is a point of difference between Mālik and 'Abū Ḥanīfah. 'Abū Ḥanīfah agrees with the additional information in the precept that the husband should be given the punishment of one who slanders women, if he admits that he was lying, and he agrees, furthermore, that the child, if any, will then be regarded as that of the former husband. 'Abū Ḥanīfah contends, however, that just as the father may reclaim his child, so may he remarry his former wife. Ibn Rushd adds that others--whom he does not specify--held, not like 'Abū Ḥanīfah that he may remarry his former wife, but that she would immediately become his wife again, if he admitted to having lied and took the appropriate punishment.[1]

From Mālik's standpoint, the precept of liᶜān is contrary to analogy with the general precepts of divorce [ṭalāq], according to which there may be a period of waiting [ᶜiddah], during which the husband may decide to take his wife back in

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[1]Muḥammad ibn 'Aḥmad IBN RUSHD, Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid, 2 vols. in 1 (Cairo: Maṭbaᶜat al-Istiqāmah, 1371/1952), 2:120. This edition is cited henceforth as: Ibn Rushd, (Istiqāmah), to distinguish it from the Dār al-Kutub al-ᶜArabīyah edition.

marriage, and after which the husband may remarry his former wife again, if she consents and if it is not the third divorce. Al-Bājī notes this anomalous nature of li^{c}ān and adds that because of it there have been some fuqahā' who classified li^{c}ān as a type of annulment [faskh] and not a type of divorce; he disagrees with that classification, however, because even in the case of numerous types of annulments remarriage is permissible in Islamic law.[1] 'Abū Ḥanīfah and others who regard it as permissible for a former husband and wife to remarry after li^{c}ān would regard li^{c}ān, at least in that respect, to be analogous with divorce [ṭalāq]. It might also be noted that the precept of li^{c}ān is contrary to analogy with the precept regarding testimony for establishing sexual infidelity, which requires a minimum of four witnesses of reputable character who actually saw the act of adultery or fornication being performed. In this case, there is only a single witness, and the wife, furthermore, may avoid punishment by taking a contrary oath. Nevertheless, as far as I know, there were no differences of opinion among the fuqahā' on this aspect of the precept of li^{c}ān.

It should also be noted that after this sunnah precept Mālik cites two AN precepts that are connected to it and are apparently derivatives of ijtihād regarding the application of li^{c}ān. The first of these pertains to a man's

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[1] Al-Bājī, 4:78.

performing li^{c}ān after he has divorced his wife a third and final time and learns that she is pregnant but claims that he is not the father of the child.[1] The second AN precept states that the precept of li^{c}ān pertains to wives who are Muslim slaves or free Christians or Jews just as it pertains to free Muslim wives.[2]

5. S-XN: Regarding Zakāh on Inheritance

> Mālik states that it is the S-XN that when heirs inherit commercial goods, houses, or slaves or the right to collect on debts due to the one from whom they are inheriting, they are not required to pay zakāh on the money they earn by selling such goods or on the sum of the debt when it is collected until they have had that money in their possession for a full year [ḥawl].
>
> Mālik then continues to say that it is the SN that heirs are not required to pay zakāh on money they receive as inheritance until they have had that money in their possession for a full year [ḥawl].[3]

These two precepts, the first of which is a S-XN and the second of which is a SN, are very similar, but they are not identical. The first pertains to the inheritance of types of property or the right to collect debts upon which zakāh is not due according to Mālik. The second pertains to the inheritance of types of property--gold and silver or livestock and the like--upon which zakāh is required. It is not the goods themselves or the debt upon which one pays zakāh in the first precept but rather on the money that one earns by selling the goods or by collecting the debt. Nevertheless, the two precepts are so close that it is diffi-

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[1] Muwaṭṭa', 2:568. [2] Ibid., 2:568-569.

[3] Ibid., 1:252; note: Ibn al-Qāsim refers to this S-XN as an SN. See Mudawwanah, 1:231 (3).

cult to conceive of how there could be consensus on the first--which would seem to presume the precept of the second--and not also be consensus on the second. In the absence of any evidence about differences of opinion in Madīnah on either precept, it would appear to me that S-XN and SN are used as equivalents in this example. It would be within the customary semantic range of SN to include precepts upon which there had been consensus, but it would not be within the semantic range of S-XN to stand for precepts upon which there had been no consensus among those whom Mālik regards as being the constituents of Madīnan 'ijmā^{c}.[1]

These precepts constitute a point of difference between Mālik and the Kūfans 'Abū Ḥanīfah and Sufyān ath-Thawrī,[2] according to Ibn Rushd. This difference goes back to a fundamental difference between the manner in which Mālik defines the wealth [māl] upon which zakāh is levied and the manner in which the Kūfans define it. The Kūfans define a person's wealth as a single unit regardless of whether or not it is made up of profits ['arbāḥ] from one's base capital [al-'aṣl] or from accretions [fawā'id]--such as inheritance, as mentioned in this example, gifts, wages, and so forth--which do not come from one's base capital. Mālik holds, on the contrary, that for purposes of zakāh a distinc-

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[1]For discussion of the overlapping between Mālik's terms and their classification into inclusive and exclusive categories, see above, pp. 419-434, 523-529.

[2]For data on ath-Thawrī, see above, p. 77, n. 1.

tion must be drawn between base capital and profits that result from utilization of it, on the one hand, and between accretions, on the other.[1]

Thus, according to the Kūfans, whenever the amount of a person's wealth reaches nisāb [the minimum amount upon which zakāh is due] that person will pay zakāh one full year [ḥawl] later on the entirety of his wealth--including recent profits or accretions--if, at that time, the entirety of one's wealth is still at the level of nisāb or above it.[2] From this point of view, the Kūfans would hold contrary to Mālik's S-XN and SN precepts in this example that the accretions one receives by way of inheritance shall simply be calculated as part of that person's base capital, and he will be required to pay zakāh on those accretions whenever the zakāh on the base capital becomes due, whether it is a full year [ḥawl] after the accretions were received or a single day.

Mālik's position, which according to his commentators is reflected in these precepts, is that it is only the profits which one receives through utilization of one's base capital which will have the same due date as the base capital, regardless of whether those profits were received a full year before the due date or only a single day. Like the Kūfans, Mālik holds similarly that the natural increase

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[1]See Ibn Rushd, 1:159-161; cf. al-Bājī, 2:112; az-Zurqānī, 2:327.

[2]See Ibn Rushd, 1:160 (9).

of herds of livestock--sheep, cattle, camels, and the like--is calculated to be part of the entire herd at the time when zakāh is due on the herd, whether those animals were born a full year prior to the due date or only a single day before. Accretions, however, which do not accrue from one's base capital are only added to one's base capital if the base capital is below the level of niṣāb. In such cases, the accretions, if sufficiently large, will bring the base capital up to the level of niṣāb, and zakāh will become due on that new base capital one full year [ḥawl] later, if, at that time, the base capital is still at the level of niṣāb or above it. But, according to Mālik, once one's base capital has reached the level of niṣāb, further accretions are kept separate from it for purposes of paying zakāh. Each additional accretion which does not accrue from the base capital will have its own due date which, as reflected in the S-XN and SN precepts above, falls due one full year [ḥawl] after one receives that accretion or, as in the S-XN precept, after one receives the money that comes from selling the property or receiving payment on a debt the right to which one has received as inheritance.[1] In all cases, however, even when accretions are added to the base capital in order to bring it to niṣāb, payment of zakāh on accretions will not fall due until at least one full year after the accretion has been received.

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[1]See Ibn Rushd, 1:159-162; al-Bājī, 2:112; az-Zurqānī, 2:327.

Furthermore, the reasoning behind the Madīnan position, according to Mālik's commentators, is that zakāh is only due on property which is at the level of niṣāb after one has had the opportunity for a full year to increase the size of that capital by investment and other utilization of it. They refer to this as the "right of growth" [ḥaqq at-tanmiyah].[1] Thus, if accretions which do not accrue from one's base capital were added to the base capital when zakāh became due on the base capital, one would not have had the right for a full year to augment those accretions by investment and other means. This notion of the right to augment one's wealth before having to pay zakāh on it appears from the Muwaṭṭa' to be a very fundamental part of the Madīnan conception of zakāh. Mālik states, for example, that it is the A-XN that one who loans money to others is not required to pay zakāh on the money that is loaned out until it is repaid, unless it is repaid before a full year transpires. But even if the money is loaned out for several years, the one who loaned it out will be required to pay zakāh upon it only once at the time it is repaid. Mālik reports in the Muwaṭṭa' prior to this precept that ᶜUmar ibn ᶜAbd-al-ᶜAzīz required governors of his to return properties which they had expropriated wrongfully to their rightful owners, but he required that zakāh for only one year be levied on those properites because they had been uncollectible [ḍimār] dur-

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[1]Ibn Rushd, (Istiqāmah), 1:263; al-Bājī, 2:112; az-Zurqānī, 2:327.

ing the years they had been in the governors' possession.[1] Al-Bājī and az-Zurqānī explain both of these matters in terms of the precept that the owners of the property did not have the ability to augment their wealth during the period that it was loaned out or wrongfully expropriated.[2]

According to Ibn Rushd, there are two legal texts of generally accepted authenticity which apply to the S-XN and SN precepts in question; neither of these texts, however, upholds Mālik's precepts explicitly. The first is a ḥadīth according to which the Prophet is reported to have said that no zakāh is required on wealth [fī māl] until a full year [ḥawl] has transpired upon it. The second text is an 'athar according to which the caliph ᶜUmar ibn al-Khaṭṭāb, when collecting zakāh on livestock, included the newly born livestock as part of the total herd upon which the zakāh was levied. According to Ibn Rushd, there were no differences of opinion among the fuqahā' regarding the authenticity of these texts.[3] Both the Kūfans and Madīnans, as I indicated above, are agreed on the validity of ᶜUmar's practice regarding how zakāh is to be calculated on herds of livestock.

The Madīnans and Kūfans disagree, however, in that the Kūfans define all types of wealth upon which zakāh is due after the expiration of a full year to be analogous to

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[1] Muwaṭṭa', 1:253. [2] Al-Bājī, 2:113-114; az-Zurqānī, 2:328-330.

[3] Ibn Rushd, 1:159-160 (28), 161 (26); idem, (Istiqāmah), 1:263.

the procedure which ᶜUmar ibn al-Khaṭṭāb is reported to have followed in collecting zakāh on herds of livestock. Thus, they group the entirety of one's wealth into a single unit upon the due date of one's base capital, regardless of whether or not that wealth had been augmented by profits or accretions. From the Mālikī point of view, on the other hand, ᶜUmar's procedure is only analogous to the grouping of the profits which accrue from one's base capital into a single unit, but it is contrary to analogy with the procedure which is to be followed regarding the levying of zakāh upon accretions that do not result from one's base capital.[1] Thus, it would appear in this example that Mālik is again using his sunnah terms to indicate that he regards an analogy which others have drawn--in this case the Kūfans--to be mistaken.

Since the Prophet instituted zakāh and, according to the evidence cited by Ibn Rushd, is reported to have stipulated that zakāh not be paid on certain types of wealth until one had had them in his possession for a full year, Mālik probably would have regarded this ᶜamal to have gone back to the Prophet, whose collectors of zakāh would have had to collect zakāh on profits as well as accretions. But since, according to the sources I have consulted, there is no textual evidence supporting Mālik's precept, it would be another example of a very fundamental type of Madīnan ᶜamal regard-

[1]See Ibn Rushd, 1:159-162.

ing which nothing explicit had been transmitted, either for or against it. Furthermore, although there were legal texts that pertained to this ᶜamal precept, the precept itself provides essential information not contained in those texts. The ḥadīth in question states that zakāh is not required upon wealth until after the transpiration of a full year upon that wealth. Nevertheless, that ḥadīth can be used to support either the Madīnan or Kūfan position depending on how one defines wealth, i.e. as including both profits and accretions or as including profits but not accretions.

6. MḲS: Regarding a Plaintiff with One Supporting Witness

> Mālik begins the chapter by citing a ḥadīth which states that the Prophet gave a verdict on the basis of the oath of the plaintiff supported by the testimony of a single witness. He then cites an 'athar which reports that ᶜUmar ibn ᶜAbd-al-ᶜAzīz wrote to his governor in Kūfah directing him to hand down verdicts on the basis of the oath of the plaintiff supported by the testimony of a single witness. Mālik cites an 'athar which reports that 'Abū Salamah--a highly regarded Madīnan judge during the first/seventh century[1]--and Sulaimān ibn Yasār[2] were asked about the validity of giving verdicts on this basis and replied that it was valid.
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> Mālik states that the sunnah has been long put into practice [MḲS] regarding the matter of handing down verdicts on the basis of the oath of the plaintiff supported by the testimony of a single witness. He adds that, if the plaintiff refuses to take an oath, the defendant will

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[1] 'ABŪ SALAMAH ibn ᶜAbd-ar-Raḥmān ibn ᶜAwf (d. 94/712) was the son of one of the most famous Companions, ᶜAbd-ar-Raḥmān ibn ᶜAwf and was himself a very highly regarded Madīnan Successor, who presided over the Madīnan judiciary from 49/669 to 53/672 or 54/673. He was compared to Ibn ᶜUmar for his extensive knowledge; Wakīᶜ also reports that he ruled on the basis of the above precept. Wakīᶜ, 1:116-118.

[2] For data, see above pp. 67-68 , n. 3; he was one of the Seven Fuqahā'.

> then be asked to take an oath absolving himself. If the defendant takes such an oath, the plaintiff will forfeit his claim. But if the defendant also refuses to take an oath absolving himself, the plaintiff's claim shall stand. Mālik adds that this procedure is only to be followed in money matters [al-'amwāl] and is never valid in legal matters pertaining to the administration of punishments [al-ḥudūd], the verification of marriage, divorce, or emancipation, or the proof of slander or theft. Mālik supports these contentions by a relatively lengthy legal argument.[1]

This precept was a major point of contention between Madīnans and non-Madīnans, and, according to ash-Shāfiᶜī, there was significant disagreement about its validity among the prominent Madīnan fuqahā' Ibn Shihāb az-Zuhrī and ᶜUrwah ibn az-Zubair.[2] Other reports, however, claim that there was agreement among the Seven Fuqahā' on this matter--of whom ᶜUrwah ibn az-Zubair was one of the prominent members.[3] Saḥnūn cites a text from Ibn Wahb in the Mudawwanah, according to which az-Zuhrī is reported to have said that it was MḌS from the days of the Prophet and the first caliphs that this procedure is never to be followed in verifying marriage and divorce. Saḥnūn adds another text which states that Saᶜīd ibn al-Musayyab and Rabīᶜah also held that view.[4] Ash-Shāfiᶜī indicates that Rabīᶜah clearly supported the validity of this precept.[5]

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[1] Muwaṭṭa', 2:721-725.

[2] Ash-Shāfiᶜī, "Ikhtilāf Mālik," pp. 196-197.

[3] See Ibn Rushd, 2:282 (4), and ar-Rasīnī, p. 195.

[4] Mudawwanah, 4:84 (10). [5] Ash-Shāfiᶜī, "Ikhtilāf Mālik, p. 197.

As for the fuqahā' outside Madīnah, Ibn Rushd states that neither al-'Awzā^{c}ī in Syria or al-Laith ibn Sa^{c}d in Egypt or the majority of the people of Iraq held that this precept was valid.[1] Al-Laith disagrees with it in his letter to Mālik, referred to above.[2] He contends that this precept was never part of the ^{c}amal of the regions outside Madīnah; the Companions never instituted it in those regions, nor did the first four caliphs ever enjoin the peoples of those regions to institute it. Although Mālik cites an 'athar prior to this precept stating that the 'Umayyad caliph ^{c}Umar ibn ^{c}Abd-al-^{c}Azīz wrote to his governor in Kūfah directing him to institute this precept there, al-Laith reports to the contrary that ^{c}Umar ibn ^{c}Abd-al-^{c}Azīz later retracted that position.[3] It might also be pointed out that even though al-Laith, unlike ash-Shāfi^{c}ī mentions no explicit differences of opinion among the Madīnan fuqahā', there is, nevertheless, some indication in his letter that there had not been complete agreement on this matter in Madīnah, since al-Laith describes himself as among the most rigorous of people in adhering to that upon which the people of Madīnah had reached agreement.[4]

Mālik surely considered this precept, however, as being what later theorists called ^{c}amal naqlī; in this case the ^{c}amal is in keeping with the ḥadīth with which Mālik be-

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[1]Ibn Rushd, 2:282 (4). [2]See above, pp. 321-331.

[3]See Ibn Qayyim, (Sa^{c}ādah), 3:97.

[4]See above, pp. 311-314, 321-331.

gins the chapter. Here again, however, the ᶜamal itself adds details of the most fundamental importance to this precept, which are not indicated at all by the legal texts which Mālik cites.[1]

Like the other sunnah precepts discussed so far, this precept is contrary to analogy with other closely related precepts in Islamic law. Generally, for example, the plaintiff is required to substantiate claims by the supporting testimony of at least two male witnesses of good character or the testimony of one male and two women of good character. This contrary procedure is supported by the Qur'ān.[2] Mālik, however, as indicated in the text of the Muwaṭṭa', regards this precept to be a special exception, applicable only in the case of money matters. There is a second procedure, however, which is also followed in money matters exclusively and upon which there was general consensus among the fuqahā' in and outside Madīnah, as Mālik states in the Muwaṭṭa' at the close of his argument defending the validity of this precept.[3] This second procedure pertains to cases in which the plaintiff has no witness. According to this procedure, however, the defendant is asked to take the first oath--which is the opposite of the procedure set forth in this precept--and if he takes an oath absolving himself, the plaintiff's claim will not stand. If, however, the defendant refuses to

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[1]For earlier discussion of this, see above, pp.141-143.

[2]Ibn Rushd, 2:282 (4); Qur'ān, 2:282.

[3]Muwaṭṭa', 2:724-725.

absolve himself by taking an oath, the plaintiff may then lay claim to his right by taking an oath on the validity of his claim.

Mālik's sunnah precept is also contrary to analogy with this second procedure which is to be followed in money matters when the plaintiff has no witness. For in that case, the defendant is given the chance to absolve himself at the outset by taking an oath contrary to the plaintiff's claim. According to Mālik's sunnah precept, however, the plaintiff's claim is sufficiently strong when supported by a single witness, that his oath is taken first and the defendant is not permitted to absolve himself at the outset by taking a contrary oath.

According to Ibn Rushd, those who oppose Mālik's sunnah precept do so on the basis that it is contrary to the procedure set forth in the Qur'ān and is supported only by isolated ḥadīth.[1] Ash-Shāfiᶜī also indicates that that is the reasoning of those who oppose this precept.[2] Mālik indicates that he is aware of the reasoning of his opponents, for he points out that the second procedure discussed above is, like the procedure to which he subscribes in his sunnah precept, contrary to the Qur'ānic text. He states, therefore, that if they can accept this other procedure for which there is no Qur'ānic authority, they should regard the well-

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[1]Ibn Rushd, 2:282 (4).

[2]Ash-Shāfiᶜī, "Ikhtilāf Mālik," p. 196.

established sunnah [MḌS] to be sufficient to establish the validity of this other precept, despite the fact that it is contrary to the Qur'ān.[1] Ash-Shāfiᶜī subscribes to this sunnah precept because of the isolated ḥadīth which Mālik transmits supporting it. But with Mālik, on the other hand, this isolated ḥadīth which he transmits would appear to be only an ancillary to ᶜamal, indicating, for example, that the ᶜamal is in conformity with something the Prophet did and must go back to him. The vital details of the precept, however, come not from Mālik's legal texts but from the non-textual source of Madīnan ᶜamal. This would seem to be an example of how an isolated ḥadīth, which according to Mālik's legal reasoning would otherwise not be authoritative, takes on authority by virtue of its being in conformity with Madīnan ᶜamal.[2]

Conclusions

In my analysis of Mālik's sunnah terms I have concentrated upon those of them which indicate Madīnan consensus, i.e., those which fall in the category of S-XN. The sunnah terms which I have investigated here seem to pertain to what later legal theorists called al-ᶜamal an-naqlī, ᶜamal which transmitted, as it were, precepts of law from the Prophet which he had either instituted directly, tolerated, confirmed,

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[1] Muwaṭṭa', 2:724-725. [2] See above, pp. 179-184; cf., 484-487.

or simply left to be.[1] This seems to hold true for the remainder of Mālik's sunnah terms, although I have not analyzed them in detail. In some instances Mālik indicates the connection of his sunnah precepts with the Prophet by citing ḥadīth; sometimes he also cites āthār as if to indicate by that the continuity of the ᶜamal in question. But often in these examples there are no supporting texts at all for Mālik's sunnah precepts. Without more explicit evidence such precepts can only be deemed to be ᶜamal naqlī on the basis of presumption, such as, for example, that they pertain to fundamental aspects of law--like the precepts of zakāh--which the Prophet is known to have instituted and, hence, are of such nature as to be likely to go back to him. The question of whether or not such precepts are actually ᶜamal naqlī cannot be proven conclusively in the absence of explicit, authentic texts; rather it is a question of probability.

The scarcity of legal texts either for or against the sunnah precepts in these examples is very significant, beyond the consideration of being able to establish that something is ᶜamal naqlī. For, although there are no texts for some of the precepts, even those precepts which are supported by texts provide, nevertheless, essential information which is not to be found in the texts themselves. In fact, those texts when available seem to have essentially the func-

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

tion of indicating the source or continuity of the ᶜamal in question; they are ancillaries to ᶜamal, so to speak. The transmission of the content of the precept, however, comes from ᶜamal. Thus, from the Mālikī point of view, it is indeed an ᶜamal naqlī, an ᶜamal which is like transmission [an-naql].

The paucity of texts to support these precepts made possible the criticisms of those like 'Abū Yūsuf and ash-Shaibānī who held that the source and continuity of Madīnan ᶜamal were questionable and not verifiable and who refused to subscribe to any precept of Madīnah unless there was textual support for it. This insistence upon texts is a notable characteristic of the writings of 'Abū Yūsuf, ash-Shaibānī, and ash-Shāfiᶜī--not to mention later writers like Ibn Ḥazm.[1] It distinguishes their writings, as I have mentioned, from the letter of al-Laith ibn Saᶜd, who does not question the priority of Madīnah over other cities in matters of knowledge and continues to adhere to Madīnan local consensus.[2] But this paucity of texts to support Madīnan ᶜamal made it difficult for Madīnans to uphold the validity of their ᶜamal precepts among those for whom insistence upon legal texts as the only source of law had become the ground rules of debate. For the validity of the Madīnan precepts rested upon the authority of the non-textual source of Ma-

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[1]See above, pp.321-356.

[2]See above, pp. 321-331.