dīnan ᶜamal, the validity of which rested in turn upon the reputation of Madīnah and its people of learning and not upon the fact that there were comprehensive legal texts to support it.

This scarcity of texts to support fundamental precepts of Madīnan ᶜamal may have resulted from the fact that Madīnan ᶜamal lacked continuity with the past and had come from a variety of unidentified sources over the years, which are essentially the contentions of 'Abū Yūsuf and ash-Shaibānī. Investigation into these contentions would require a sound social, economic, political, and cultural history of Madīnah, as I have mentioned.[1] Nevertheless, assuming--as the Madīnans and later Mālikīs did--that fundamental precepts of Madīnan ᶜamal like the sunnah precepts analyzed in this chapter actually went back to the Prophet, the hypothesis arises that muḥaddith's in the early period--especially those in Madīnah--may have relied upon Madīnan ᶜamal as a criterion for determining what matters needed to be transmitted as ḥadīth and which did not. Thus, they may have felt it redundant to transmit ḥadīth about very fundamental precepts of law that were a well-established part of ᶜamal. One would expect that such reliance upon ᶜamal would have been most likely during the first generations, at a time when the validity of Madīnan ᶜamal had not been called into question.

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[1]See above, pp. 1-2.

Furthermore, in keeping with this hypothesis, it may also have been the case that Madīnan ᶜamal in the early period provided the semantic context for those ḥadīth and āthār which the early muḥaddith's did transmit. I mentioned earlier, for example, how ḥadīth about rituals like wuḍū' [ablutions] and ṣalāh [daily prayers] seem to assume a semantic context in which the receptor of the ḥadīth is already familiar with the ᶜamal of wuḍū' and ṣalāh. Similarly, ḥadīth such as the report that the Prophet handed down verdicts on the basis of the oath of the plaintiff supported by the testimony of a single witness are far more ambiguous when divorced from a semantic context in which the ᶜamal of the precept is part of the experience of the receptor than when it is not.[1] Living within the semantic context of Madīnan ᶜamal, transmitters of ḥadīth and āthār may not have realized the ambiguities that their ḥadīth and āthār would entail for those who were not acquainted with the same semantic context; thus, they may have seen no need to explain what they transmitted in greater detail. The texts they transmitted, therefore, would be far more ambiguous and prone to diverse interpretations outside the context of ᶜamal than they would have been within it.

The scarcity of explicit legal texts regarding precepts of Madīnan ᶜamal is also significant in light of

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[1]See above, pp. 298-299; cf., 436-448.

the fact that the precepts discussed in this chapter constituted important points of difference among the fuqahā'--often between Kūfans and Madīnans, sometimes between Madīnans and others, and in the case of the MḌS precept between some of the Madīnans themselves. Thus, although the fabrication of ḥadīth took place during the early period, it must not have been either as systematic or effective as some have held.[1] For had it been that systematic and effective, one would expect to find explicit ḥadīth and āthār supporting these Madīnan precepts as well as the non-Madīnan precepts which were contrary to them. Indeed, those isolated ḥadīth mentioned by Ibn Rushd, al-Bājī, or az-Zurqānī supporting some of these Madīnan precepts may have been fabricated. It is significant, however, that even though they support the Madīnan positions, Ibn Rushd, al-Bājī, and az-Zurqānī do not regard them as being of established authenticity.

It should be noted that each of these sunnah precepts is contrary to analogy with related precepts of law. They are often points of difference, in fact, because those who differ with the Madīnans--especially the Kūfans--have applied the analogies of those related matters of law to these precepts. For example, the Kūfans and others treat liʿān as analogous to divorce, and they treat wealth obtained through accretions [fawā'id] as being analogous for purposes of za-

[1]See above, pp. 292-302.

kāh with wealth accrued from profits on one's base capital.[1] Thus, Mālik's sunnah terms indicate that there is something distinctive about the precepts in connection with which these terms are used which makes them different from related matters of law. The fact that these precepts are ᶜamal naqlī in addition to Mālik's use of the word sunnah would indicate, furthermore, that Mālik regarded the distinctiveness of these sunnah precepts as being upheld by the authority of the Prophet.

Finally, in the examples analyzed in this chapter, Mālik has used his terminology in connection with precepts upon which there had been significant differences of opinion among the fuqahā'. This lends further support to the hypothesis that the primary criterion by which Mālik determined when to use his terminology in the Muwaṭṭa' and when not to, was that of whether or not the precept in question was a point of difference among the fuqahā'.[2] Furthermore, the differences of opinion within Madīnah regarding Mālik's MḌS precept analyzed in this chapter raises the question of to what extent Mālik's sunnah terms which, like MḌS, do not give any explicit indication of local consensus may be similar to the AN and other terms in the Muwaṭṭa' which Mālik uses for precepts regarding which there had been differences of opinion in Madīnah.

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[1]See above, pp. 560-564, 557-560. (These analogies seem to be based on textual sources of law.)

[2]See above, pp. 530-538.

CHAPTER VIII

TERMS REFERRING TO THE PEOPLE OF KNOWLEDGE IN MADĪNAH

General Observations

I have classified forty-three expressions in appendix 2 as falling in the category of references to the people of knowledge of Madīnah. Most of them speak of the people of knowledge of Madīnah in general terms, giving the impression that Mālik is using these expressions as indications of Madīnan ijtimāᶜ. He will say, for example, that the people of his city have always held to the validity of a certain precept ["wa hādhā 'l-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm bi-baladinā;" -zĀIb], or he will say that the people of knowledge whom he encountered during his lifetime held to its validity ["wa hādhā 'l-ladhī 'adraktu ᶜalaihi 'ahl al-ᶜilm bi-baladinā;" x̄dIb]. Some other expressions are more general than these. Mālik will say, for example, "This is what I have heard transmitted from the people of knowledge" ["wa hādhā 'l-ladhī samiᶜtu min 'ahl al-ᶜilm;" stx]I] or simply, "This is what I have heard transmitted" ["wa hādhā 'l-ladhī samiᶜtu;" stx].

There are a few expressions which explicitly refer

to the totality of persons whom Mālik regarded to be "people of knowledge". He states once that all whom he has encountered hold to the validity of a certain precept, at another time that he has heard the contrary from none of the people of knowledge, another time that none of the people of learning doubts the precept in question, and in another example he asks the rhetorical question of whether anyone could doubt the validity of the precept he is discussing.[1]

A few expressions Mālik uses in referring to the people of knowledge appear, however, to designate limited groupings of the Madīnan fuqahā'. The most common expression which I would classify in this category is "man 'arḍā min 'ahl al-ᶜilm" [those of the people of knowledge whom I accept; lit., who are pleasing to me; rḍ]I]. Similarly, Mālik uses the expression once "al-jamāᶜah bi-baladinā" [the group in our city; Jb].[2] Such expressions appear not to be indications of Madīnan ijtimāᶜ but rather of Mālik's preference for the opinions of some of the Madīnan fuqahā' over those of others of them. Indeed, this is the explanation of such usages which Mālik is reported to have given in the text mentioned above.[3] Such a conclusion is, nevertheless, somewhat problematic with regard to expressions like "man 'arḍā min 'ahl al-ᶜilm" because it is possible that such an expression re-

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[1]See Muwaṭṭa', 2:541, 788, 521; 1:386.

[2]Ibid., 2:615. [3]See above, pp. 538-545.

fers simply to the totality of the Madīnan fuqahā' whom Mālik regarded as acceptable and, hence, as legitimate constituents of 'ijmā^{c}. As mentioned earlier, there were many persons of learning in Madīnah whom Mālik did not regard as worthy of transmitting learning and whom he described as people from whom no benefit could be derived.[1] Thus, it may be people such as they whom Mālik is excluding by expressions like "man 'arḍā min 'ahl al-^{c}ilm".

Almost two-thirds of the references to the people of knowledge which I have indexed occur in combinations with other terms. The two expressions which occur most frequently in conjunction with other terms are xdIb ["wa hādhā 'l-ladhī 'adraktu ^{c}alaihi 'ahl al-^{c}ilm bi-baladinā"] and stx]I ["wa hādhā 'l-ladhī sami^{c}tu min 'ahl al-^{c}ilm"]. Furthermore, there does not seem to be any pattern in the terms with which they occur. Rather, they occur in connection with a wide variety of terms: S-XN, MḍS, SN, AMN, AMN-X, A-XN, AN, and so forth.

Examples

1. -zĀIb: Regarding the Talbiyah[2] of Pilgrimage

Mālik begins the chapter with a ḥadīth which indicates that the Prophet permitted his Companions while making the pilgrimage with him to say either the talbiyah or the takbīr [the words, "Allāhu 'akbar"]. Mā-

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[1] See above, pp. 72-76.

[2] Talbiyah: The term given the words which a pilgrim

> lik then cites an 'athar which reports that ᶜAlī ibn 'Abī Ṭālib used to cease saying the talbiyah at sunset on the Day of ᶜArafah [the ninth day of pilgrimage]. After this 'athar, Mālik cites the term -zĀIb [this is the 'amr which the people of knowledge in our city have always held to]. Mālik then cites āthār which report that ᶜĀ'ishah and ᶜAbd-Allāh ibn ᶜUmar would break off the talbiyah at sunset on the Day of ᶜArafah.[1]

The expression Mālik uses in this example, -zĀIb, indicates that he regarded the ᶜamal in question to have unbroken continuity with the past back to the days of the Companions mentioned in the āthār. The expression appears to indicate, furthermore, that there was local consensus among the Madīnan fuqahā' on the validity of that ᶜamal.

According to al-Bājī and az-Zurqānī the ᶜamal in question is a point of difference between the Madīnans and the Kūfans 'Abū Ḥanīfah and Sufyān ath-Thawrī. Later fuqahā' like ash-Shāfiᶜī and 'Aḥmad ibn Ḥanbal also disagreed with the Madīnans over it and took the Kūfan position. The Kūfan position in this matter is supported by a ḥadīth, which is regarded to be authentic and is transmitted in the collections of al-Bukhārī and Muslim. This ḥadīth reports that when the Prophet performed his final pilgrimage he continued to say the talbiyah after the Day of ᶜArafah and into the tenth day of the pilgrimage until he performed the symbolic rite of pilgrimage of casting stones at Satan.[2]

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recites: "Labbaik, Allāhumma,labbaik! Labbaika, lā sharīka laka, labbaik! 'Inna 'l-ḥamda wa 'n-niᶜmata laka wa 'l-mulk; lā sharīka lak" [Here I am, O God, here I am (responding to Your call). Here I am: You have no partner; here I am. All praise and bounty are Yours and all dominion. You have no partner].

[1]Muwaṭṭa', 1:337-338. [2]Al-Bājī, 2:216; az-Zurqānī, 3:56-57.

The texts pertaining to this precept which are cited in the Muwaṭṭa' as well as the ḥadīth reported in al-Bukhārī and Muslim which is said to be the basis of the opinions of 'Abū Ḥanīfah, Sufyān ath-Thawrī, and others*are all reports of actions. As discussed earlier, reports of actions are regarded to be insufficient evidence in themselves, according to Mālikī legal theory, to establish that the act reported is obligatory for others. On the other hand, reports of contrary actions by prominent, knowledgeable Companions and fuqahā'--such as ᶜAlī ibn 'Abī Ṭālib, ᶜĀ'ishah, and Ibn ᶜUmar in this example--are regarded by the same theory to be sufficient evidence that the reported action which they are contrary to is, indeed, not obligatory.[1]

Furthermore, according to Mālikī legal theory as well as Ḥanafī and Ḥanbalī, the āthār of prominent Companions are used as indications of the Prophetic sunnah, on the presumption that those Companions knew the Prophetic sunnah well and adhered to it closely.[2] This seems to be how Mālik is using the āthār he cites in this example, although he does not use the term "sunnah". As the ḥadīth indicates at the beginning of the chapter, the talbiyah and takbīr were used by the Companions of the Prophet in his presence while they were performing pilgrimage. The presumption underlying Mālik's reference to the āthār he cites would probably be that,

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[1]See above, pp. 188-195. [2]See above, pp. 161-170.

had the Prophet regarded it as obligatory or as desired normative behavior for his Companions that they continue to say the talbiyah after the Day of ᶜArafah, he would have made that clear, especially to those of them like his nephew ᶜAlī and his wife ᶜĀ'ishah, who were very close to him and who also would probably have been aware of the Prophet's not having ceased to say the talbiyah himself.

Mālik probably would have regarded the type of ᶜamal represented by this precept to be of the category of what later legal theorists referred to as ᶜamal naqlī. The ᶜamal naqlī, although contrary to the Prophet's own action in this case, would have the authority of his approval ['iqrār].[1] Since the ᶜamal in this case indicates a norm which is contrary to an isolated act the Prophet is reported to have done, this may also be taken as an instance of how ᶜamal, according to ash-Shāṭibī, is used to distinguish non-normative actions from those that were intended to be normative.[2]

Mālik cites several reports in this chapter to support the precept in question. Unlike the manner of presentation in the sunnah precepts discussed in the preceding chapter, Mālik does not cite his precept separately from the reports he gives. Rather the precept is contained in those reports; the term is cited immediately after the first 'athar in order to indicate that the continuous ᶜamal of

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[1]See above, pp. 410-415. [2]See above, pp. 436-480.

the Madīnan people of knowledge is in conformity with the action reported in that 'athar. Furthermore, unlike his manner in the sunnah precepts discussed earlier, Mālik does not add additional information to the precept as reflected in the 'athar, beyond the consideration that he indicates that the action reported in that 'athar is regarded as the norm by the Madīnan people of knowledge.

2. -zĀIb: Regarding the Performance of Ṭawāf[1]

> Mālik begins the chapter with a ḥadīth which reports that the Prophet made the first three circuits around the Kaᶜbah, while performing ṭawāf, at a rapid pace [raml], coming to the black corner stone of the Kaᶜbah at the end of the third circuit. Mālik then cites the term: -zĀIb. In the remainder of the chapter Mālik cites āthār which report that ᶜAbd-Allāh ibn ᶜUmar, ᶜUrwah ibn az-Zubair, and ᶜAbd-Allāh ibn az-Zubair performed the ṭawāf in the same manner. He concludes, however, by citing an 'athar which reports that Ibn ᶜUmar would omit part of the rites of ṭawāf when performing the rite from Makkah and that, in such cases, he would also omit the raml during the first three circuits.[2]

This example is also of the category of ᶜamal naqlī. Mālik cites evidence to indicate that it conforms to an act of the Prophet and prominent Madīnans after him. According to Mālik's commentators, the precept in question originated in a command of the Prophet. Several ḥadīth report that

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[1] Ṭawāf: The act of walking around the Kaᶜbah [the Temple of Abraham in Makkah] seven times in a row in a counterclockwise direction with the Kaᶜbah to one's left. It is regarded to be an act of worship analogous to the performance of prayer [ṣalāh]; hence, it is performed only in the state of ritual purification [ṭahārah].

[2] Muwaṭṭa', 1:364-365.

once when the Prophet came to Makkah with his Companions the idolatrous Makkans are said to have taunted them that they had been so emaciated by the fevers of Madīnah that they would not even be able to perform the ṭawāf around the Kaᶜbah. Thus, when it came time for the Prophet and his Companions to perform the ṭawāf, he commanded them to walk at a rapid pace during the first three circuits in order to show the Makkans that they were still strong and vigorous. According to other ḥadīth the Prophet continued to perform the ṭawāf in that manner even after the conquest of Makkah and after the inhabitants of Makkah had embraced Islam.[1]

The term -zĀIb indicates that the ᶜamal of the Madīnan people of knowledge had remained in direct continuity with the Prophet's action, as reported in the ḥadīth, and the actions of the other prominent Madīnans reported in the remainder of the chapter. The term almost certainly stands for Madīnan local consensus on the precept in question, for it was a matter regarding which, according to Mālik's commentators, there had been extensive agreement among the fuqahā'. Nevertheless, the Companion Ibn ᶜAbbās is reported to have disagreed. He held instead that walking at a rapid pace during the first three circuits of the ṭawāf was not the sunnah of the Prophet; rather, Ibn ᶜAbbās is reported to have held, the Prophet commanded his Companions to per-

[1]Al-Bājī, 2:284; az-Zurqānī, 3:124-126.

form ṭawāf in that manner only to indicate to the idolatrous Makkans that the Muslims in Madīnah were still healthy and strong. It is reported that ᶜUmar ibn al-Khaṭṭāb entertained the same idea as Ibn ᶜAbbās and considered omitting the raml from the first three circuits of ṭawāf. Al-Bājī and az-Zurqānī report, however, that ᶜUmar then gave up that idea because the Prophet had continued to perform ṭawāf according to that manner.[1]

Like the preceding example but in contrast to his manner of presentation in some of the sunnah precepts, Mālik cites his term -zĀIb in connection with a precept regarding which there were ample texts. Furthermore, Mālik does not formulate the precept separately but rather cites the term immediately after the first report and in such a manner as to indicate that the action reported in that text is in conformity with the continuous ᶜamal of the Madīnan people of knowledge. Again, in contrast to the sunnah precepts, Mālik does not provide additional information to the texts from the non-textual source of Madīnan ᶜamal other than the fact that he indicates that the actions reported in the texts he has cited are normative.

The 'athar cited at the close of the chapter, which reports that Ibn ᶜUmar performed the rites of pilgrimage and ṭawāf differently when initiating them from within Makkah,

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[1]See az-Zurqānī, 3:124-126; al-Bājī, 2:284.

reflect the precept of Islamic law that such rites are performed differently by those in Makkah and those who come to Makkah from abroad to perform them.[1] Other distinctions in the rites of pilgrimage between those who are in Makkah and those coming from the outside are mentioned in the Qur'ān.[2]

3. -zĀIb: Regarding Steeping Dates and Raisins

> Mālik cites two ḥadīth at the beginning of the chapter which report that the Prophet forbad [nahā] that busr [dates on the verge of becoming ripe] be steeped in the same container with ruṭab [newly ripened dates] or that tamr [dried dates] be steeped in the same container with raisins. After the second ḥadīth Mālik cites the term -zĀIb, and Mālik adds that steeping these fruits together is regarded as abhorrent [yukrahu] because of the Prophet's order against it [nahī].[3]

Like the preceding examples, this precept would be classified as ᶜamal naqlī, originating in this case with the commands of the Prophet reported in the ḥadīth. Here again the term -zĀIb is used in conjunction with texts and does not provide additional information to what is contained in the texts, although Mālik's interpretation of the practice mentioned in the ḥadīth as being abhorrent [yukrahu] is noteworthy, and I will comment on it further shortly. The texts in this example are reports of statements and not actions, as in the preceding examples.

The point in question is a matter of difference between the Madīnans and 'Abū Ḥanīfah, who held that there was

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[1]Al-Bājī, 2:286; az-Zurqānī, 3:126. [2]Qur'ān, 2:196.
[3]Muwaṭṭa', 2:844.

no harm in the practice mentioned in these ḥadīth. According to Ibn Rushd, the Ḥanafī position is based on the consideration that there are other ḥadīth which permit one to steep the fruits mentioned in the above ḥadīth separately. They reason, therefore, that it is not the steeping itself [al-intibādh] against which the command was issued but rather the production of intoxicating drink from such steeping. Hence, they conclude that it is permissible to steep such fruits together, provided one takes care that they not be left long enough to become intoxicating.[1]

According to Ibn Rushd and az-Zurqānī, the Madīnan view of why the Prophet gave the commands in these ḥadīth was because beverages made from steeping these fruits together turn into intoxicants imperceptibly and much more rapidly than normal.[2] It would appear, then, that, according to the Madīnan view, these ḥadīth are instances of the Prophet's applying the principle underlying sadd adh-dharā'i'.[3] For, although there is no harm in the act of steeping these fruits together itself, it is likely that that act will lead to the production of an intoxicating beverage which the one

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[1]Ibn Rushd, 1:281 (13). According to az-Zurqānī, 'Abū Ḥanīfah held that this order had been given when the Muslims were living under straitened conditions; under such circumstances, the practice of steeping these fruits together was viewed as being extravagant and wasteful; idem, 5:126-127. 'Abū Ḥanīfah's opinion may also be related to his rejection of isolated ḥadīth under certain stipulations; see appendix 1.

[2]Ibn Rushd, 1:281 (13); az-Zurqānī, 5:126-127.

[3]For discussion of this principle, see above, pp. 262-268.

who made it would not be permitted to use.

Az-Zurqānī holds that the Prophet's command against steeping such fruits together does not indicate strict prohibition of that practice but rather that the practice is abhorrent and should not be done. He believes that this is what Mālik means by his explanation that the practice is abhorrent [yukrahu].[1] If az-Zurqānī is correct, it would appear that Mālik has relied upon the continuous ᶜamal of the Madīnan people of knowledge to interpret the wording of a legal text in a manner which is contrary to the obvious [ẓāhir] meaning of the ḥadīth.[2] For the obvious meaning of the ḥadīth would be that the Prophet simply prohibited such practices altogether.

However that may be, it should be kept in mind that the meaning of the expression "abhorrent" [yukrahu, makrūh] was stronger in the early period and much closer to the meaning of prohibition [ḥurmah] than it was in the later period. According to ash-Shāṭibī, the early fuqahā' were careful not to describe a matter as prohibited [ḥarām] unless they had certain knowledge that it was. He quotes a statement attributed to Mālik:

> It was not the custom of the people ['amr an-nās] or the custom ['amr] of our predecessors who have gone before us and whose examples we follow and upon whom is

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[1]Az-Zurqānī, 5:126-127.

[2]According to Mālikī legal theory, ẓāhir statements are of conjectural meaning; for discussion of them, see above, pp. 146-147.

> the utter reliance [mi^{c}wal] of Islam that one say: "This is ḥalāl [permissible],and that is ḥarām." Rather it was [their custom] to say: "I abhor ['akrahu] this, and I am of this opinion ['arā] about that." As for saying "ḥalāl" and "ḥarām", it is a fabrication against God [iftirā' ^{c}alā 'Llāh]. . . . For the ḥalāl is that which God and His Messenger have declared to be ḥalāl,and the ḥarām is that which they have declared to be ḥarām.[1]

Similarly, Ibn al-Qāsim says about a certain question in the Mudawwanah, "In my opinion it is not clearly ḥarām [al-ḥarām al-bayyin] . . . but I abhor ['akrahu] that it be put into practice."[2] In Siyar al-'Awzā^{c}ī, 'Abū Yūsuf claims that this was also the attitude of 'Ibrāhīm an-Nakha^{c}ī[3] and his companions. 'Ibrāhīm is reported to have said that when they would give fatwā's permitting some things or forbidding others, they would say, "This is abhorrent [makrūh], or there is no harm in that [lā ba's bihī]." But they regarded it reprehensible that one say that such matters were ḥalāl or ḥarām.[4]

In light of these quotations, it would appear that, although by "abhorrent" Mālik probably meant something stronger than what later fuqahā' meant by "makrūh", nevertheless, he must not have regarded the Prophet's command [nahī] in the ḥadīth he cites to have constituted strict prohibition

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[1]Ash-Shāṭibī, Al-Muwāfaqāt, 4:286-287.

[2]Mudawwanah, 3:122 (19). Compare his statement elsewhere: "I do not like it at all [lā yu^{c}jibunī]. It is not permissible, rather it is ḥarām." Ibid., 2:379 (9).

[3]For data on 'Ibrāhīm, see above, p. 156, n. 1.

[4]'Abū Yūsuf, p. 73.

[ḥurmah]. Thus, although one could interpret the ḥadīth which Mālik cites as indicating that the practices the Prophet forbad were ḥarām--which would be the obvious [ẓāhir] interpretation--Mālik relies upon the source of Madīnan ᶜamal to give an interpretation to the textual sources to which he subscribes which is not obvious.

4. -zAIN:[1] Regarding the Waiting Period of a Pregnant Woman Whose Husband Dies

> Mālik begins the chapter by citing an 'athar which reports that the Companions ᶜAbd-Allāh ibn ᶜAbbās and 'Abū Hurairah disagreed with each other regarding what the period of waiting [ᶜiddah] should be for a pregnant woman whose husband dies, before it will be permissible for her to remarry. Ibn ᶜAbbās was of the opinion that she must wait either until she delivers the child or until four months and ten days have passed, whichever period is longer. 'Abū Hurairah contended, on the other hand, that once she delivers the child she may remarry. 'Umm Salamah, a wife of the Prophet, informs them that a certain woman--Subaiᶜah al-'Aslamīyah--had delivered a child of her husband shortly after the husband's death. A young suitor and an older suitor offered to marry her after her husband had died. Subaiᶜah inclined toward the younger man, so 'Umm Salamah states that the older man claimed that Subaiᶜah could not yet marry because she had not completed the four months and ten days. 'Umm Salamah explains that some of Subaiᶜah's relatives were abroad at that time and the older suitor was attempting to delay the marriage until they returned, with the hope that he could use his influence upon them to get them to convince Subaiᶜah to marry him. Subaiᶜah brought the matter to the Prophet's attention, and he told her that it was permissible for her to marry immediately.
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> Mālik cites an 'athar which reports that ᶜAbd-Allāh ibn ᶜUmar and his father, ᶜUmar ibn al-Khaṭṭāb, held that the opinion of 'Umm Salamah above was correct. ᶜUmar ibn al-Khaṭṭāb used to say that a pregnant woman whose husband dies may remarry immediately after deliv-

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[1]This symbol stands for, "Wa hādhā 'l-'amr al-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm ᶜindanā" [this is the 'amr which the people of knowledge among us have always held to].

ering the child, even if the deceased husband still is lying in the bed in which he died and has not been buried. Mālik concludes the chapter by citing two shorter versions of the ḥadīth with which he began the chapter. After the last of these, he cites the term -zĀIN.[1]

As in the preceding examples, Mālik is using this -zĀIN term in connection with ample textual information. Again, Mālik adds nothing to the precept from ᶜamal which is not already contained in the texts, except the supporting statement that the precept in those texts is in conformity with the continuous ᶜamal of the Madīnan people of knowledge.

The type of ᶜamal for which the term is used is again of the category of ᶜamal naqlī. It is based on a precedent set by the Prophet and is supported by the statements of the prominent Companions ᶜUmar ibn al-Khaṭṭāb and his son ᶜAbd-Allāh. The precept is also analogous to a Qur'ānic verse which states that the period of waiting of pregnant women who are divorced during their pregnancy is until they deliver;[2] the precept of that verse is not identical, as Ibn Rushd points out, because it was revealed about divorce and not about dissolution of marriage by virtue of the husband's death.[3]

According to Ibn Rushd and Mālik's commentators, there was widespread agreement among the fuqahā' on the validity of this precept. Mālik himself reports, however, that

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[1]Muwaṭṭa', 2:589-590. [2]Qur'ān, 4:65.

[3]Ibn Rushd, (Istiqāmah), 2:95.

Ibn ᶜAbbās--at least initially--had held a contrary opinion. It is reported, however, that Ibn ᶜAbbās later changed his opinion and adopted the view of the majority. Ibn ᶜAbd-al-Barr, according to az-Zurqānī, had held that such reports about Ibn ᶜAbbās changing his opinion are probably correct, since his major students are not known to have held his other opinion. It is also reported, however, that ᶜAlī ibn 'Abī Ṭālib held the same opinion as Ibn ᶜAbbās. Ibn Rushd and Mālik's commentators account for these contrary opinions by stating that Ibn ᶜAbbās and ᶜAlī based them on an interpretation which combines the two pertinent verses of the Qur'ān. The first verse, mentioned above, states that the waiting period of a woman divorced during pregnancy is until she delivers. The second verse[1] pertains explicitly to women whose husbands die--although it specifies nothing about pregnant women--and it states that their period of waiting will be four months and ten days. Thus, Ibn ᶜAbbās and ᶜAlī concluded that the period of waiting of a pregnant woman whose husband dies would be whichever of these periods is longer in her case.[2]

The expression "ᶜindanā" [among us] in this example appears to have the same meaning as "bi-baladinā" [in our city], which is generally used in these references to the

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[1]Qur'ān, 2:234.

[2]See Ibn Rushd, (Istiqāmah), 2:95; al-Bājī, 4:132-133; az-Zurqānī, 4:142-146.

people of knowledge. For, as mentioned above, there was general consensus on the validity of this precept, in and outside Madīnah.

5. x̄dIb: Regarding One Who Joins the Friday Prayer Late

> Mālik reports that az-Zuhrī held that it was the sunnah that a person who comes late to Friday prayers [al-jumuᶜah] but is able to perform at least one rakᶜah [unit of the prayer] with the 'imām has made the Friday prayer and need only make up one rakᶜah after the 'imām has finished praying. Mālik cites the term x̄dIb and adds that the reason for this precept is that the Prophet said that whoever makes at least one rakᶜah of a prayer [with the 'imām] has partaken of that prayer.[1]

This precept could be of the category of ᶜamal naqlī. That is not clear, however, from the information that Mālik provides. Az-Zuhrī states his opinion and regards it to be sunnah. But Mālik's comment that the reason for it is because of the ḥadīth that whoever makes at least one rakᶜah of a prayer has partaken of that prayer, makes it appear that az-Zuhrī's opinion is ijtihād based on his interpretation of that ḥadīth. The term x̄dIb ["wa ᶜalā dhālika 'adraktu 'ahl al-ᶜilm bi-baladinā;" I encountered the people of knowledge in our city holding to this] does not, in the context of the textual evidence which Mālik cites, indicate that the ᶜamal in question goes back to an explicit part of the Prophet's sunnah, since Mālik cites no textual evidence of the precept earlier than az-Zuhrī of the generation

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[1] Muwaṭṭa', 1:105.

before his own. The term he cites does indicate, however, that the precept in question had become part of Madīnan local consensus. The precept, furthermore, is of the nature of ᶜumūm al-balwā',[1] since whenever Friday prayers are performed it is likely that there will be people who come late and will want to know what is required of them under such circumstances. Hence, it could be argued that this precept probably went back before az-Zuhrī even to the time of the Prophet and the institution of Friday prayers. In such a case Mālik's comment supporting az-Zuhrī's opinion would be seen as a type of supportive legal reasoning by which he defends the validity of Madīnan ᶜamal--similar to what he does elsewhere in the Muwaṭṭa'--and not necessarily the sole basis of either az-Zuhrī's opinion or of the Madīnan people of knowledge who agreed with him.

Mālik cites no textual evidence for the precept other than az-Zuhrī's statement. The term follows that statement, and Mālik adds nothing additional to the precept from ᶜamal. For his comment does not add anything to the precept, rather it only supports the validity of the precept.

This precept is a matter upon which there had been differences of opinion among the early fuqahā', although, according to Ibn Rushd and Mālik's commentators, the majority of them,including those outside Madīnah, had held to

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[1]For discussion of this concept, see above, pp. 184-188.

opinions identical or very close to the Madīnans. 'Abū Ḥanīfah and 'Abū Yūsuf, for example, would agree with Mālik and the Madīnan people of knowledge that whoever came late to Friday prayers and made the last rakᶜah with the 'imām had partaken of the prayer. They went further, however, and held that as long as the latecomer joins the prayer before it finishes he has partaken of it and need only pray two rakᶜah to make up what he missed. Mālik and the Madīnans, on the other hand, held that one who came later than the last rakᶜah of the Friday prayer had not partaken of it and must pray four rakᶜah afterward--the number prayed in ordinary noon [ẓuhr] prayers.[1] This point of difference, however, is not specifically discussed in the Muwaṭṭa'.

According to Mālik's commentators, those who disagreed with this precept were the Syrian Makḥūl, Mujāhid and ᶜAṭā' ibn 'Abī Rabāḥ of Makkah, and the Yamanī Ṭāwūs;[2] their opin-

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[1]See al-Bājī, 1:191; az-Zurqānī, 1:323; cf. Ibn Rushd, 1:111 (6).

[2]MAKḤŪL ibn 'Abī Muslim Shuhrab ad-Dimashqī (d. 112 or 119/730 or 737) was one of the important Successors and a prominent Syrian faqīh and muḥaddith. Al-'Awzāᶜī and Muḥammad ibn 'Isḥāq studied under him. Makḥūl is reported in the Fihrist of Ibn an-Nadīm to have compiled works on fiqh; numerous citations from Makḥūl are contained in the Muwaṭṭa' and Mudawwanah. Sezgin, 1:404.

MUJĀHID ibn Jabr al-Makkī (ca. 21-104/642-722) was born in Makkah and was one of the most highly regarded students of Ibn ᶜAbbās. He too was among the most important Successors. He is especially important because of his Qur'ānic commentary but was also a noted faqīh. Ibid., 1:29.

ᶜAṬĀ' IBN 'ABĪ RABĀḤ 'Aslam (27-114/647-732) was born in the Yaman and is said to have known a very large number of Companions. Az-Zuhrī, al-'Awzāᶜī, Ibn Juraij, 'Abū Ḥa-

ion is said to have been that anyone who missed the khuṭbah [sermon] of Friday prayers had not partaken of them, even if that person prayed the entirety of the prayer which follows the khuṭbah. They required such a person to make up for having missed the Friday prayers by praying four additional rakᶜah as is ordinarily done when praying the noon prayer. These fuqahā' based their opinion, according to az-Zurqānī, on the fact that Friday prayers are not regarded to be valid if the 'imām omits the khuṭbah. In that case the 'imām would be required to lead the people in four rakᶜah as for normal noon prayers instead of two, which is the case in Friday prayers. Az-Zurqānī states that there is 'ijmāᶜ on the validity of the precept that the 'imām may not omit the khuṭbah from Friday prayers; hence, these fuqahā' have concluded that the khuṭbah is such an essential part of the Friday prayers that one who comes too late to hear it cannot be said to have partaken of Friday prayers.[1]

6. x̄dIb: Regarding Husbands Who Cannot Support Their Wives

> Mālik states that Saᶜīd ibn al-Musayyab held that a husband and wife should be separated if the husband is unable to support her. Mālik then cites the term x̄dIb.[2]

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nīfah, and others are said to have studied under ᶜAṭā'. He was an important muḥaddith, faqīh, and Qur'ānic commentator and was known as "the muftī of Makkah." Ibid., 1:31.
For data on Ṭāwūs, see above, p. 558, n. 2.

[1] Az-Zurqānī, 1:323; see also al-Bājī, 1:191; Ibn Rushd, 1:111 (6).

[2] Muwaṭṭa', 2:589.

This precept constituted a point of difference between the Madīnans and the Kūfans 'Abū Ḥanīfah and Sufyān ath-Thawrī, who held that the husband's failure or inability to support his wife were not sufficient grounds for separating them. This Kūfan position, according to Ibn Rushd, was based upon the consideration that the inviolability of marriage was supported by 'ijmāᶜ. Hence, they held that only those acts could bring about the dissolution of marriage for which there was evidence in the Qur'ān or the sunnah of the Prophet or upon which there had been 'ijmāᶜ.[1]

The Madīnans are said to have held that the husband's duty to support his wife in a manner customarily acceptable according to his wealth and station was one of the fundamental obligations of marriage. (Al-Bājī has a discussion of several pages on the details of such support taken from the Mudawwanah, "Al-Mawwāzīyah", "Al-ᶜUtbīyah", and other sources.) They held, furthermore, that marriage may be dissolved at the wife's request and she may retain her dowry whenever her husband causes her undue injury [ḍarar]. The husband's failure to support his wife in a manner customarily acceptable according to his wealth and station was regarded to be an instance of such undue injury.[2]

Apparently, however, there were no explicit ḥadīth

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[1]Ibn Rushd, (Istiqāmah), 2:51-52; cf. al-Bājī, 4:131.

[2]See al-Bājī, 4:126-132, 60-69; Muwaṭṭa', 2:564-565; Ibn Rushd, (Istiqāmah), 2:51-52; az-Zurqānī, 4:141.

supporting the Madīnan position. But there is a Qur'ānic verse which requires the father to support his wife in a customarily acceptable fashion [bi-'l-maᶜrūf], which al-Bājī regards to be part of the background of the Madīnan position.[1] Al-Bājī and Ibn Rushd, however, do not support the Madīnan position by an appeal to textual sources of law but rather by rational argumentation pertaining to the legal purposes and requirements of marriage. The Kūfan critique of 'Abū Ḥanīfah and Sufyān ath-Thawrī according to Ibn Rushd that such a position would require explicit texts or 'ijmāᶜ is an indication that there were no such texts or, if so, that they were not mutually regarded to be authentic. Ibn Rushd states, however, that the Madīnan position was also held by the Companion 'Abū Hurairah. As Mālik cites in the above text from the Muwaṭṭa' it was also the opinion of the prominent Madīnan Successor Saᶜīd ibn al-Musayyab.[2]

Saᶜīd ibn al-Musayyab, however, is reported in the Mudawwanah to have regarded this precept to be a part of the sunnah and not just opinion. A woman is reported to have complained to ᶜUmar ibn ᶜAbd-al-ᶜAzīz during the time that he was governor of Madīnah that her husband was not supporting her. ᶜUmar ibn ᶜAbd-al-ᶜAzīz verified the truth of her claim and made the decision that her husband should be given

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[1]Qur'ān, 2:233.

[2]See Ibn Rushd, (Istiqāmah), 2:51-52; al-Bājī, 4:126, 131.

about two months to rectify the situation. If he could not do so within that period, his wife would be separated from him. ᶜUmar ibn ᶜAbd-al-ᶜAzīz is said to have then sent word of his decision to Saᶜīd ibn al-Musayyab to ask his opinion of it, who is reported to have replied that ᶜUmar's decision was correct because it was the sunnah. Saḥnūn adds that Mālik's teachers Yaḥyā ibn Saᶜīd and Rabīᶜah also held to the validity of this precept.[1]

According to this report from the Mudawwanah, one could classify this precept as ᶜamal naqlī; Mālik does not, however, give any clear indication in the Muwaṭṭa' of his having regarded it as such. One cannot determine from the information he gives whether the precept was the product of the sunnah of the Prophet or of later ijtihād. If one regards it to be part of the ᶜamal naqlī, this precept would be another example of such a precept in Madīnan ᶜamal regarding which there were few if any explicit textual references and regarding which there had been differences of opinion among the early fuqahā'. Again, Mālik cites this reference to the people of knowledge of Madīnah--x̄dIb--after a transmitted report, in this case from a Madīnan Successor, and he adds nothing additional to that precept as reported in the text he cites other than to indicate that it was supported by the local consensus of the Madīnan fuqahā'.

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[1]Mudawwanah, 2:194 (15); az-Zurqānī cites a report from Ibn 'Abī Shaibah holding that this precept was sunnah, az-Zurqānī, 4:141.

7. x̄dIb: Regarding the Banishment of Fornicators

> Mālik cites an 'athar which reports that the caliph 'Abū Bakr punished an unmarried man who admitted to having fornicated with a slave girl and then banished him to the town of Fadak about two days journey to the north of Madīnah. Mālik follows this 'athar by a discussion of why one is required to accept later denials of those who admit to having fornicated or having committed adultery. He then states that it is the x̄dIb that there is no banishment in the case of slaves [ᶜabīd] who are found guilty of fornication.[1]

This precept is another point of difference between 'Abū Ḥanīfah and the Madīnans. 'Abū Ḥanīfah held that banishment was not part of the punishment of fornication under any circumstances. Ibn Rushd and az-Zurqānī state that there is an isolated ḥadīth which is regarded to be authentic which states that the Prophet banished a male fornicator from Madīnah who was a freeman for a period of one year after having punished him by flogging. Ibn Rushd holds that 'Abū Ḥanīfah knew of this ḥadīth but did not follow it because of his position regarding isolated ḥadīth that constitute the only evidence for punishments [ḥudūd].[2] Az-Zurqānī states that some later Ḥanafīs also claimed that the ḥadīth in question had been abrogated. Although I have no evidence that the early Ḥanafīs also made such a claim, the claim of abrogation could account for why Mālik cites the 'athar reporting that 'Abū Bakr enforced the precept, since it indicates that 'Abū Bakr, who took this action after the Prophet's death,

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[1] Muwaṭṭa', 2:826.

[2] For these stipulations, see appendix 1.

had not regarded the precept as having been abrogated. Az-Zurqānī cites information from later ḥadīth compilations to indicate that the Prophet had enforced this precept, that both 'Abū Bakr and ᶜUmar ibn al-Khaṭṭāb had enforced it after him, and that it was part of the sunnah of the Prophet.[1]

In the light of the additional information provided by Ibn Rushd and az-Zurqānī this precept would appear to be of the category of ᶜamal naqlī. There is no clear indication of that in the Muwaṭṭa', however, unless one argue that Mālik is using his 'athar from the prominent Companion 'Abū Bakr as an indication of the Prophetic sunnah, which is a fundamental part of Mālikī legal theory.[2] Although there is some question as to the source of this ᶜamal, Mālik's indication that it is part of Madīnan local consensus is clear from his use of the term xdIb.

In this example, Mālik provides information from the consensus of the people of knowledge of Madīnah which clarifies the meaning of the report that he cites about 'Abū Bakr. That text is a report of an action or, more properly speaking, a report of an isolated ruling [qaḍīyat ᶜain] which 'Abū Bakr made.[3] Mālik provides the information that banishment, which 'Abū Bakr required of the young man, does not pertain to slaves. This precept is indicated in the text but is not explicit. For the text mentions that the

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[1]See Ibn Rushd, 2:263 (5); az-Zurqānī, 5:96-98.

[2]See above, pp. 161-170. [3]See above, pp.188-195.

partner in the act of fornication had been a virgin, unmarried slave girl who had become pregnant as a result. Although the text reports that 'Abū Bakr banished the man who confessed to his guilt, it makes no mention of the slave girl. Thus, in this case Mālik relies upon the ᶜamal of Madīnah supported by the consensus of its people of learning to clarify the meaning of a text which in itself is of ambiguous meaning.

According to Ibn Rushd, Mālik's position is that banishment in cases of fornication as an additional part of the punishment pertains only to free men and not to slaves or free women, who would be exposed to even greater harm by virtue of banishment. This was a point of difference between ash-Shāfiᶜī and the Mālikīs, because ash-Shāfiᶜī regarded the texts reporting that the Prophet and the first two caliphs banished free men guilty of fornication to be of general applicability in the absence of textual proof to the contrary.[1] Thus, he held that banishment applied to all fornicators, men, women, and slaves.[2]

Conclusions

The references to the Madīnan people of knowledge which I have surveyed in this chapter are of the categories

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[1]For discussion of this presumption in ash-Shāfiᶜī's reasoning of the generality of texts, see above, pp. 139-140.

[2]Ibn Rushd, 2:263 (5). Ibn Rushd refers to the Mā-

of -zĀIb ["wa hādhā 'l-'amr al-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm bi-baladinā;" this is the 'amr which the people of knowledge in our city have always been following] and x̄dIb ["wa ᶜalā hādhā 'adraktu 'ahl al-ᶜilm bi-baladinā;" I encountered the people of knowledge in our city holding to this matter]. I have analyzed examples of these usages when they occur in isolation from other terms--sunnah and 'amr terms and so forth with which they often occur. References to the Madīnan people of knowledge are contained in some of the examples studied in the remainder of this analysis of Mālik's terminology.[1]

The terms -zĀIb and x̄dIb appear to me to be indications of Madīnan local consensus, and I have found no evidence of differences of opinion among the Madīnans regarding precepts for which Mālik uses these terms. The term -zĀIb, which in the examples I have considered is used in connection with ḥadīth and closely related āthār, indicates a continuity of Madīnan 'ijmāᶜ on the precept in question over the generations. The term x̄dIb does not give the same indication, in terms of its wording, of a continuous Madīnan consensus on the precept in question. Rather, it indicates that, at least by the time of the generation prior to Mālik, local consensus had been reached on the matter.

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likī position regarding not banishing women as "al-qiyās al-maṣlaḥī" [qiyās based on the principle of maṣlaḥah].

[1]See below, p. 616.

It is conceivable that Mālik uses the term x̄dIb for matters upon which consensus had not been reached among the Madīnan people of knowledge until after the first generations, but so far I have no evidence of its being used that way. Furthermore, it is also conceivable that the terms -zĀIb and x̄dIb do not stand for total consensus--such as I believe to be indicated by terms like S-XN, A-XN, AMN-X, and so forth, which negate the presence of differences of opinion--but rather that they stand for majority consensus [ijtimāᶜ], which, as I have suggested, may be what Mālik has in mind by the expression AMN.[1]

The precepts of each of the examples studied in this chapter were points of difference between the Madīnans and important early, non-Madīnan fuqahā'. As in the case of the sunnah precepts studied earlier--two-thirds of which were points of difference with 'Abū Ḥanīfah and sometimes also with Sufyān ath-Thawrī and al-Laith ibn Saᶜd and al-'Awzāᶜī and others[2]--most, but again not all, of the precepts studied in this chapter were points of difference with 'Abū Ḥanīfah. Again in two of these examples both 'Abū Ḥanīfah and Sufyān ath-Thawrī are reported to have disagreed with the Madīnan position.[3] Others of these precepts, however,

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[1]See above, pp. 424-428.

[2]See above, pp. 556-557, 562, 565-566, 573.

[3]See above, pp. 586-587, 592-593, 603, 606.

were points of difference with Ibn ᶜAbbās and, in one case, possibly ᶜAlī ibn 'Abī Ṭālib as well[1] and, in another example, Ṭāwūs, Makḥūl, Mujāhid, and ᶜAṭā' ibn 'Abī Rabāḥ.[2]

The -zĀIb precepts seem clearly to fall in the category of what later legal theorists called ᶜamal naqlī [ᶜamal going back to the Prophet]. Three of the examples are supported by ḥadīth which Mālik cites;[3] another of them is used in association with a ḥadīth, which, however, does not contain the precept but pertains to the same question, and āthār of prominent Companions which Mālik is probably using as indications of the normative sunnah.[4] The sources of the x̄dIb precepts are not as clear, at least within the context of the materials provided in the Muwaṭṭa'. Az-Zuhrī states that the first of these precepts is sunnah, but the ḥadīth which Mālik cites to support az-Zuhrī's position does not contain az-Zuhrī's precept explicitly.[5] I could find no explicit ḥadīth regarding dissolving the marriage of a man who fails to support his wife or the precept of exempting slaves from banishment when they are guilty of fornication. Again, however, Saᶜīd ibn al-Musayyab is said to have regarded the first of these to be sunnah, while the practice of

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[1]See above, pp. 590-591, 597-598.

[2]See above, pp. 601-602. Mālik also disagrees with Ṭāwūs on one of the sunnah precepts; see above, p. 558.

[3]See above, pp. 589, 592, 596. [4]See above, pp. 585-589.

[5]See above, pp. 599-600.

banishing fornicators is reported to go back to the Prophet, and 'Abū Bakr, according to the information Mālik provides in the Muwaṭṭa', would have had to determine whether or not to apply that ruling in the case of a slave.[1] Thus, if one regards these ẍdIb precepts as instances of ᶜamal naqlī, they would be further illustrations of well-established ᶜamal going back to the era of the Prophet for which there were no explicit early texts.[2] Furthermore, from the manner of Mālik's presentation of this material in the Muwaṭṭa'--especially the ẍdIb precepts analyzed in this chapter--the primary information that he seems to want to communicate about them is that they are part of the local consensus of the Madīnan people of knowledge.

Despite the lack of explicit early texts to support many of the precepts of this chapter, the role of texts in these precepts--āthār of Companions or statements of prominent Madīnan Successors--is much more distinctive than in the preceding chapter on the sunnah terms. For most of the precepts studied in that chapter there were no explicit texts at all, and even when there were texts Mālik provided extensive additional information on the precepts in question from the non-textual source of Madīnan ᶜamal. In this chapter, on the contrary, Madīnan ᶜamal supported by the consensus of the Madīnan people of knowledge is used primarily to sup-

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[1] See above, pp. 604-605, 606-608.

[2] Cf. above, pp. 577-581.

port the validity of precepts which are set forth in the texts that Mālik cites or reflected in the actions reported in those texts. In some cases, however, Mālik relies on Madīnan ᶜamal to validate the interpretation which he gives these texts, especially when the texts or interpretations are conjectural. Many of the texts cited in this chapter, for example, are reports of actions, which from the standpoint of Mālikī legal theory are regarded to be of conjectural meaning in themselves.[1] ᶜAmal is used to verify, for instance, that certain actions which prominent Companions are reported to have done are regarded by the Madīnan people of knowledge to constitute the desired norm.[2] Even the precept regarding not banishing slaves may be said to be indicated by the text Mālik cites regarding a ruling 'Abū Bakr handed down regarding a man who had fornicated with a slave girl; nevertheless, that precept is not at all clear in the text which Mālik cites.[3] In the case of two quite explicit statements which Mālik transmits from the Prophet, he supports by reference to the continuous ᶜamal of the Madīnan people of knowledge an interpretation of those texts which is contrary to their obvious [ẓāhir] meaning.[4]

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[1]See above, pp. 188-195. [2]See above, pp. 588-589.

[3]See above, pp. 607-608. [4]See above, pp. 592-596.

CHAPTER IX

REFERENCES TO ᶜAMAL

General Observations

The word ᶜamal does not occur much in the Muwaṭṭa' in comparison with the words 'amr and sunnah or Mālik's references to the people of knowledge of Madīnah. I have indexed only fourteen terminological expressions that contain the word ᶜamal. These expressions fall into two categories: 1) affirmative ᶜamal terms and 2) negative ᶜamal terms. There are seven examples in the Muwaṭṭa' of each of these categories. The affirmative ᶜamal terms are those usages containing the word ᶜamal which affirm that the precept in question is part of the ᶜamal of Madīnah. The expression ᶜamal an-nās [AlNs; the ᶜamal of the people] occurs four times in these seven examples. The seven negative ᶜamal terms are those usages containing the word ᶜamal which state that ᶜamal is not in accordance with the matter in question. The expression "laisa ᶜalaihi 'l-ᶜamal" [Al-x̄; ᶜamal is not in accordance with this] occurs five times. Both the affirmative and negative ᶜamal terms occur in a wide variety of chapters and subject matter, both those which pertain to acts of worship and those which pertain to social transactions.

The most common occurrence of the word ᶜamal in the Muwaṭṭa' is not in terminological expressions such as these, which are used in reference to specific texts which Mālik cites, but rather in the wording of twenty-nine chapter titles entitled "Al-ᶜAmal fī [x]" [Alx; the ᶜamal regarding "x"], in which the symbol "x" stands for the subject matter of the chapter. With a few exceptions, these chapters pertain to fundamental acts of worship and rituals--how to perform ablutions, how to make certain types of prayers, what is required when making voluntary vows [nudhūr], the sacrificing of an animal upon the birth of a child [ᶜaqīqah], and so forth.[1] An index of these ᶜamal chapters is provided in appendix 2. The ᶜamal chapters occur most frequently in the first two books of the Muwaṭṭa', which pertain to ablutions and ritual purification [ṭahārah] and prayer [ṣalāh]. These two books,although among the longest in size in the Muwaṭṭa', contain the least amount of terms.

Affirmative ᶜAmal Terms

1. AlNs:[2] Paying for Animals to Be Delivered at a Later Date

Mālik states that it is permissible to buy animals before they are delivered, if the date of delivery

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[1]The exceptions: "Al-ᶜAmal fī 'd-Diyah" [ᶜamal regarding indemnities (for murder)], which pertains to what the size of such indemnities should be in terms of gold and silver; Muwaṭṭa', 2:850. And, "Al-ᶜAmal fī 'l-'Asnān" [ᶜamal regarding indemnities for teeth]; ibid., 2:862.

[2]The expression in full is: "Wa lam yazal dhālika min ᶜamal an-nās al-jā'iz bainahum wa 'l-ladhī lam yazal ᶜalaihi

> is stipulated, if the animal to be delivered is described, and if the price is paid in full. Mālik then states that this has always been the ᶜamal of the people and that the people of knowledge in Madīnah have always regarded it to be permissible.[1]

This precept is related to a preceding AMN precept--supported by āthār of prominent Companions and a statement from az-Zuhrī--pertaining to trading animals for each other. The precept above differs from this AMN precept in that the above precept pertains to buying animals with money. Furthermore, in the preceding precept it is the animal which is bought that is delivered immediately, while the animals to be traded for it come later. In the above precept, however, it is the price which is paid in advance, and the animal which is purchased is delivered later.[2] The chapter which immediately follows this precept also pertains to it. In that chapter Mālik explains that it is not permissible for the seller to receive the price in advance when he is selling a specific animal to be delivered at a later time, even though the buyer may personally have seen that animal and be satisfied with what he saw. For the condition of that animal may alter or have altered by the time of delivery. Therefore, the animal must be sold by description, and the seller must

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'ahl al-ᶜilm bi-baladinā" [this has always been part of the ᶜamal of the people and regarded to be permissible between them; the people of knowledge in our city have always held to its validity; -zx]AlNs: -zx̄Ib].

[1]Muwaṭṭa', 2:653.

[2]Ibid., 2:652-653. For discussions see al-Bājī, 5:19-21; az-Zurqānī, 4:254-256; Ibn Rushd,(Istiqāmah), 2:124-125, 132-134.

be held to fulfilling the description which he gives.[1]

Al-Bājī states that this precept constitutes a point of difference between the Madīnans and Iraqis, without, however, going into detail on what the nature of the difference was.[2] Thus, this would appear to be another instance of Mālik's citing terms for precepts that were points of difference between Madīnans and non-Madīnans.

Both terms which Mālik uses in speaking of this precept indicate that it is a fundamental type of Madīnan ᶜamal and that it has continuity with the past. The expression -zxIb, like the -zAIb terms studied in the preceding chapter, indicates that the consensus of the people of knowledge of Madīnah on this matter also goes back over the generations. Mālik cites no specific texts containing the precept. Nevertheless, it is of the nature of ᶜumūm al-balwā, since transactions of this kind pertaining to selling animals were surely part of the economic life of Madīnah in both the pre-Islamic and Islamic period. This precept, therefore, would appear to fall in that category of ᶜamal naqlī which al-Qāḍī ᶜAbd-al-Wahhāb and ᶜIyāḍ describe as going back to the tacit approval ['iqrār] of the Prophet.[3] The continuous consensus of the Madīnan people of knowledge on the precept is an indication of such tacit approval, on the presumption that

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[1]Muwaṭṭa', 2:654; see az-Zurqānī, 4:258.

[2]Al-Bājī, 5:21. [3]See above, pp. 410-415.

they would not all have been ignorant of the Prophet's having prohibited such transactions if he had actually done so, and, if they had known them to be prohibited, some objection would have been made to these transactions. Thus, this example would appear to be an instance of how, according to Ibn Rushd, Mālik uses Madīnan ᶜamal in a manner cognate to 'Abū Ḥanīfah's use of the concept of ᶜumūm al-balwā.[1]

Finally, this ᶜamal precept, cited as it is in the absence of explicit supporting textual sources of law, would be another instance of Mālik's reliance upon the non-textual source of Madīnan ᶜamal to provide information for which there were few, if any, texts.

2. AlNs: the Definition of What Lands Are Suitable for Musāqāh[2]

> Mālik concludes a lengthy chapter pertaining to the precept of musāqāh by defining at what point it becomes prohibited to make a contract of musāqāh on lands that contain both 'uṣūl [fruit trees, established grapes, and the like, or standing crops] and baiḍā' [open land upon which no crops have appeared]. Mālik states that the contract of musāqāh may be engaged in for farming such lands as long as the baiḍā' portions make up one-third

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[1] See above, pp. 403-409, 448-453, 184-188.

[2] Musāqāh: A type of contract whereby the owner of a piece of land containing fruit trees, date palms, grapes, and the like or standing crops agrees to let the laborer share in one half the produce of the land or some other share upon which they agree, on the condition that the laborer tend to the watering of the land and necessary maintenance. Mālik forbids such a contract to be made upon baiḍā' lands, i.e., open lands upon which there are no standing crops or established trees or vines. For with baiḍā' lands there is an additional risk that the crop which has been planted will not come forth or will be very small when it does. With baiḍā' lands, the proper contract, according to Mālik, is that of rental [kirā'] or paying wages.

or less of the total land upon which the contract is being made. Mālik upholds the validity of this precept by stating that it has been part of the custom of the people ['amr an-nās] that they do musāqāh on lands that contain some baiḍā' portions. He then draws an analogy between permitting contracts of musāqāh on lands that contain some baiḍā' and types of buying and selling in which one pays in gold or silver coin for copies of the Qur'ān, swords, rings, and the like which are embellished with gold or silver.[1] Such types of transactions, Mālik continues, are permissible and are frequently engaged in by the people. Furthermore, nothing has come down stipulating at exactly what point such transactions should become forbidden. Nevertheless, the AN regarding such matters which has been the ᶜamal of the people [ᶜamal an-nās] is that the gold or silver in such articles must not constitute in terms of its value more than one-third the value of the entire item.[2]

According to Ibn Rushd, this precept constituted a point of difference between Mālik, on the one hand, and 'Abū Yūsuf, ash-Shaibānī, Sufyān ath-Thawrī, Ibn 'Abī Lailā,[3] and al-Laith ibn Saᶜd, on the other. For, although they regarded it to be permissible for contracts of musāqāh to be made

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[1]To understand this analogy it is necessary to know that the general precept of Islamic law regarding transactions involving gold and silver is that gold cannot be exchanged for gold or silver for silver except in equal quantities and in simultaneous transactions. Purchasing copies of the Qur'ān and so forth that are embellished with gold is an instance of exchanging gold for gold, if one makes the purchase with gold coin. The Madīnan custom in the matter, however, is that such transactions are permissible as long as the value of the gold or silver with which the embellishment is done does not exceed one-third the value of the price of the article and as long as no credit is involved in the purchase; Muwaṭṭa', 2:636. Thus, both precepts are exceptions from general precepts--i.e., types of istiḥsān--and in both cases there is the characteristic stipulation of one-third or less.

[2]Muwaṭṭa', 2:708-709.

[3]For data on Ibn 'Abī Lailā, see above, p. 129, n. 1.

on lands that contained baiḍā' portions in addition to 'uṣūl, they did not agree with Mālik's stipulation that the baiḍā' portions must be one-third or less of the total.[1]

Mālik's stipulation of one-third or less may, however, be his own ijtihād or that of other Madīnan fuqahā'. The terms that Mālik uses in this example are not used in such a way as to indicate that the stipulation of one-third or less has itself come down as part of the Madīnan ᶜamal regarding musāqāh. Rather, what Mālik says is that it is the ANs ['amr an-nās] that the people do musāqāh on lands of 'uṣūl which contain some baiḍā' portions. Furthermore, he indicates earlier that these portions of baiḍā' must be a subsidiary [tabᶜ] part of the entire property. Mālik's stipulation of one-third or less of the total is a definition of what he means by "subsidiary".[2] It would appear from the text, however, that this definition of "subsidiary" is the derivative of analogical reasoning based on another established precept of Madīnan ᶜamal--namely, that of selling copies of the Qur'ān, swords, rings, and the like which are embellished with gold or silver for gold or silver coin. Mālik describes this precept of selling items embellished with gold or silver earlier; he describes it as an established

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[1]Ibn Rushd, (Istiqāmah), 2:243. He does not state what portions these fuqahā' regarded to be acceptable.

[2]Muwaṭṭa', 2:707.

part of Madīnan ᶜamal having continuity with the past: "Wa lam yazal dhālika min 'amr an-nās ᶜindanā" [and this has always been part of the custom of the people (ANs) among us].[1] The second part of Mālik's terminological expression in this example on musāqāh provides information about the ANs pertaining to selling items embellished with gold or silver. Mālik explains that such types of contracts of buying and selling have always been permissible and that nothing has come down stating specifically at what point such types of contracts should be forbidden. (Al-Bājī states that Mālik means by this that no texts have come down in the matter.[2]) Nevertheless, the AN which has been the ᶜamal of the people, Mālik states, is that the gold or silver must not exceed in value one-third the total value of the item which it embellishes.[3]

The parts of these precepts to which Mālik's terms refer appear to be parts of Madīnan ᶜamal naqlī--namely, that it is part of the custom of the people to do musāqāh on lands containing subsidiary portions of baiḍā' land and that it is part of the custom of the people to sell items embellished with gold or silver for unequal weights of gold or silver coin, as long as the value of the gold and silver used in the embellishment does not exceed one-third the total price

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[1]Muwaṭṭa', 2:636. [2]Al-Bājī, 5:138.

[3]For an explanation of the analogy itself, see above, p. 619, n. 1, and p. 618, n. 2.

of the item. Both of them constitute matters that are of the nature of ᶜumūm al-balwā. In the case of selling items embellished with gold and silver for gold or silver coin as long as the gold and silver with which they are embellished does not exceed one-third the overall value of the item, Mālik indicates that no texts have come down in the matter stipulating that one-third is the limit beyond which it is impermissible to go. Nevertheless, that stipulation has been taken from Madīnan ᶜamal. Thus, in that precept Mālik has relied upon the non-textual source of Madīnan ᶜamal for details that are not provided in the textual sources of law, and he has apparently transferred that stipulation by analogy to the definition of what kinds of lands the contract of musāqāh may be practiced on.

Finally, both of these precepts are instances of istiḥsān, although in both cases the istiḥsān is an old part of Madīnan ᶜamal. For in both cases exceptions are made to general precepts. The general precept in musāqāh is that it is not permissible on baiḍā' lands, and the general precept in the other case is that gold cannot be exchanged for gold or silver for silver except in equal quantities and in simultaneous transactions, that is, without credit--which is part of the Islamic prohibition of ribā [usury].[1]

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[1]See above, pp. 245-254.

3. AlNs:[1] Regarding the Contract of Mukātabah[2]

> Mālik states that he has heard some of the people of knowledge say regarding the Qur'ānic verse: " . . . and give unto them of the wealth of God which He has given unto you,"[3] that it refers to the usage whereby the master exempts the slave from having to pay part of the remaining portion of the money which the slave had agreed to pay in order to obtain his freedom. Mālik reiterates that this is what he has heard from the people of knowledge and that he found the ᶜamal of the people to be in accordance with it. Mālik then cites an 'athar which reports that ᶜAbd-Allāh ibn ᶜUmar made a contract of mukātabah with a slave of his according to which the slave would pay him 35,000 pieces of silver in order to earn his freedom. When the slave neared completion of the payments, Ibn ᶜUmar exempted him from paying the last 5,000.[4]

According to the information in Ibn Rushd and al-Bājī, this precept constituted a point of difference between some of the early fuqahā', including Madīnans. Some held, as Mālik does in the above precept, that it is the master who is to exempt the slave from paying the remaining portion of his mukātabah, and in that case the master would carry whatever

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[1]The expression in full is: "Wa samiᶜtu baᶜḍ 'ahl al-ᶜilm yaqūl fī . . . Fa-hādhā 'l-ladhī samiᶜtu min 'ahl al-ᶜilm wa 'adraktu ᶜamal an-nās ᶜalā dhālika ᶜindanā" [I have heard some of the people of knowledge say regarding . . . This is what I have heard from (some of) the people of knowledge, and I encountered the ᶜamal of the people among us to be in accordance with it].

[2]Mukātabah: A contract between master and slave according to which the slave agrees to pay the master a certain sum in installments over a set period of time in order for the slave to purchase his freedom. The slave is free to find employment and is freed as soon as he meets the payments, even if that be prior to the deadline agreed upon.

[3]Qur'ān, 24:33. The verse pertains to mukātabah, which is clear from its context.

[4]Muwaṭṭa', 2:788.

financial loss were accrued by the exemption. Others held, however, that this verse meant it was the Muslim community [jamāᶜat al-muslimīn] which was to help the slave pay the final portion of the mukātabah.[1] ᶜUmar ibn al-Khaṭṭāb is reported to have held that this verse meant that the slave was to be given money from zakāh. Similarly, the Madīnan faqīh Zaid ibn 'Aslam[2] is said to have held that this verse meant that the 'amīr [city governor] was to give the slave money from zakāh, while the master need give nothing.[3]

In light of such information, the above example is an instance of Madīnan ᶜamal upon which there were differences of opinion in Madīnah. Mālik gives no indication in his terminological expressions that this precept was part of Madīnan 'ijmāᶜ; rather, he states that he has heard it from some of the Madīnan people of knowledge, indicating thereby that he may have heard the contrary from others, such as, perhaps, his teacher Zaid ibn 'Aslam. Mālik cites the 'athar of Ibn ᶜUmar as a reflection of the precept; it is, however, a report of an action and, hence, would not be regarded as conclusive in itself, according to Mālikī legal theory.[4]

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[1]Ibn Rushd, (Istiqāmah), 2:369.

[2]ZAID IBN 'ASLAM al-ᶜAdawī (d. 136/753) was a famous Madīnan Successor and one of the prominent Madīnan fuqahā' of his generation; he was also known as a Qur'ānic commentator. Part or all of his commentary is contained in aṭ-Ṭabarī. Zaid studied from several prominent Companions, and Mālik was one of his students. Mālik transmits over 51 transmissions from Zaid ibn 'Aslam in the Muwaṭṭa'. Sezgin, 1:406-407.

[3]Al-Bājī, 7:7-8. [4]See above, pp. 188-195.

Mālik apparently regards Ibn ᶜUmar's action, however, to be a reflection of his interpretation of the pertinent Qur'ānic verse, which he cites prior to that. Mālik's chief reliance in interpreting the verse, however, is upon the opinion of some of the Madīnan people of knowledge and the fact that their opinion is also the ᶜamal of the people.

This example is another instance of Mālik's use of the non-textual source of ᶜamal as a reference in the interpretation of a Qur'ānic text of conjectural meaning. The Qur'ānic text makes it quite clear that the slave doing mukātabah should be given some "of the wealth which God has given", but it does not specify who it is who should be responsible for giving that wealth to the slave, although, according to al-Bājī, the obvious [ẓāhir] meaning of the text is that it is the master of the slave.[1]

Mālik probably regarded the Madīnan ᶜamal in this case to go back to the Prophetic era, as reflected in the Qur'ānic verse and the action of Ibn ᶜUmar. Nevertheless, the source of the ᶜamal would be much more conjectural in this instance than in instances of ᶜamal naqlī upon which there had been 'ijmāᶜ in Madīnah, because of the disagreements of such prominent Madīnans as ᶜUmar ibn al-Khaṭṭāb and Zaid ibn 'Aslam.

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[1]Al-Bājī, 7:8.

4. The Inheritance of Heirs Who Perish in Battles or Calamities

> Mālik sets forth the precept that heirs who have mutual rights of inheritance [mutawārithūn] and who perish together in calamities such as shipwrecks, battles, and the like do not receive formally the shares of inheritance which they would have received from each other, as long as it is not known which of them died before the other. Rather, their properties are divided directly among those of their heirs who are still living. Mālik introduces this precept with the expression: "This is the 'amr regarding which there are no differences of opinion and no doubts among any of the people of knowledge in our city, and the ᶜamal is in accordance with it."[1] After citing the precept, Mālik states: "It is not meet that anyone inherit anyone else on the basis of doubt; rather, inheritance is distributed only on the basis of certainty by way of knowledge and testimony."[2]

Mālik indicates quite emphatically that this precept is a part of Madīnan local consensus. According to Ibn Rushd, however, it was a point of difference between the Madīnans and the majority of Kūfan and Baṣran fuqahā'. There are reports that both ᶜAlī ibn 'Abī Ṭālib and ᶜUmar ibn al-Khaṭṭāb held opinions contrary to this precept. Most reports have it that 'Abū Ḥanīfah disagreed with the Madīnans on this issue. But according to the famous Ḥanafī aṭ-Ṭaḥāwī,[3] 'Abū

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[1] "Wa dhālika 'l-'amr al-ladhī lā 'khtilāf fīhi wa lā shakk ᶜinda 'aḥad min 'ahl al-ᶜilm bi-baladinā, wa ka-dhālika 'l-ᶜamal."

[2] Muwaṭṭa', 2:521. This precept has important legal bearing because lots of inheritance are set by Islamic law. The largest proportions go to those who are nearest to the deceased by way of marriage or kinship, and some heirs exclude others from inheriting in their presence. Thus, the sequence in which heirs die can effect greatly the proportions of their properties which the remaining heirs will receive.

[3] 'Aḥmad ibn Muḥammad ibn Salāmah AṬ-ṬAḤĀWĪ (239-321/

Ḥanīfah held the same opinion as the Madīnans. According to the contrary Kūfan and Baṣran points of view, however, the properties of mutual heirs who perish together in battles, calamities, and the like are readjusted by distributing to each of them the portion that he would have received from the property of the others and by distributing his property to them according to what they would have received. The remaining heirs then inherit their shares from the readjusted estates of the deceased according to their nearness to them in kinship or marriage.[1]

The Madīnan ᶜamal in this precept goes back at least as far as the caliphate of ᶜAlī ibn 'Abī Ṭālib. Mālik cites a report prior to it according to which his teacher Rabīᶜah stated that many of the people of knowledge of Madīnah had transmitted to him that this precept was the procedure which the Madīnans followed concerning those of their dead who were killed in the Battle of the Camel (36/656), Ṣiffīn (37/657), al-Ḥarrah (63/683), and Qudaid (72/692).[2] The ᶜamal

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853-933) was born in Upper Egypt and studied first under his maternal uncle, the famous student of ash-Shāfiᶜī, al-Muzanī. Later, however, aṭ-Ṭaḥāwī left the Shāfiᶜī school for the Ḥanafī, studying under famous Egyptian and Syrian Ḥanafīs of the time. He was most famous as a faqīh but was also a renowned muḥaddith. He transmitted the Musnad of ash-Shāfiᶜī from his uncle, al-Muzanī. Sezgin, 1:439.

[1]Ibn Rushd, (Istiqāmah), 2:348-349.

[2]Muwaṭṭa', 2:520. The Battle of the Camel took place between the caliph ᶜAlī and az-Zubair, Ṭalḥah, and ᶜĀ'ishah, whose demand was that the death of ᶜUthmān must be revenged. Az-Zurqānī estimates that almost a thousand Makkans and Ma-

in this instance, according to al-Bājī, goes back to the consensus of the Companions--he makes no mention of reports that ᶜUmar ibn al-Khaṭṭāb and ᶜAlī ibn 'Abī Ṭālib held opinions to the contrary. Rather, al-Bājī states that this was the procedure which was followed upon the death of ᶜAlī's daughter by Fāṭimah, 'Umm Kulthūm, who was the wife of ᶜUmar ibn al-Khaṭṭāb. 'Umm Kulthūm is reported to have died so close to the time of the death of her son Zaid ibn ᶜUmar that it was not known which had died first. Thus, according to al-Bājī, the remaining heirs inherited from them directly.[1]

It appears on the basis of the evidence I have found that the precept in this example is an instance of what later legal theorists referred to as ᶜamal qadīm [ancient ᶜamal], that is, Madīnan ᶜamal that had not originated with the Prophet but went back to the ijtihād of his Companions.[2]

It is also interesting how, in this example, Mālik articulates the general precept of inheritance which he believes to underlie this precept, namely, that inheritance

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dīnans died in that battle. Ṣiffīn took place in Iraq between the armies of ᶜAlī and Muᶜāwiyah; many Madīnans were in the army of ᶜAlī. Al-Ḥarrah was probably the bloodiest of these in so far as the Madīnans were concerned. It resulted after their expulsion of an 'Umayyad governor who had been ruling on behalf of Yazīd ibn Muᶜāwiyah. Al-Ḥarrah was a place just outside Madīnah; thousands of Madīnans were killed, and after the battle the residents of Madīnah were exposed to destruction. Qudaid was the battle in which az-Zubair was killed while fighting the Syrian troops of al-Ḥajjāj. Az-Zurqānī, 3:449-450; see Wakīᶜ, 1:123.

[1]Al-Bājī, 6:253. [2]See above, pp. 415-419.

is only to be distributed on the basis of certain knowledge. As mentioned earlier, Ibn al-Qāsim refers back to this precept at several times in the Mudawwanah to explain his ijtihād or that of Mālik on verious questions pertaining to laws of inheritance.[1]

Negative ᶜAmal Terms

1. Al-ẍ: Regarding Sujūd al-Qur'ān[2]

> Mālik cites a report according to which ᶜUmar ibn al-Khaṭṭāb once recited a verse of the Qur'ān which contained a sajdah [prostration] while he was speaking to the people from the minbar [pulpit] during the Friday prayers. After reciting the verse, ᶜUmar descended from the minbar, prostrated himself, and the people prostrated themselves with him. But the next Friday--the report continues--ᶜUmar recited the same verse from the minbar. The people began to prepare themselves for prostration. ᶜUmar told them, however: "'ᶜAlā rislikum' [take it easy], God has not made it binding upon us to do it, unless we desire to." ᶜUmar did not prostrate himself, and he prohibited the people from doing so. Mālik follows this report by saying that it is not in accordance with the ᶜamal that the 'imām come down from the minbar, after reciting a sajdah verse, and prostrate himself.[3]

According to al-Bājī this precept constituted a point of difference between the Madīnans and 'Abū Ḥanīfah, who held that it was obligatory [wājib] for one to prostrate oneself after reciting any of the sajdah verses of the Qur'ān.[4]

Al-Bājī, Ibn ᶜAbd-al-Barr, and az-Zurqānī hold that

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[1] See Mudawwanah, 3:81 (12), 84 (22), 85 (10).

[2] Sujūd al-Qur'ān [the prostrations of the Qur'ān]: The name given to those verses of the Qur'ān after reading which one is supposed to prostrate oneself to God.

[3] Muwaṭṭa', 1:206. [4] Al-Bājī, 1:351.

ᶜUmar ibn al-Khaṭṭāb undertook the actions reported in this example in order to make clear to the people--many of whom would have been attending the obligatory Friday prayers--that it was not obligatory for them to prostrate themselves after reciting those verses of the Qur'ān that contained commands or other directions that one prostrate oneself. Ibn ᶜAbd-al-Barr is reported to have held that ᶜUmar probably did this because of fear that differences of opinion might arise over the issue. Al-Bājī and az-Zurqānī hold that ᶜUmar's teaching in this example constitutes part of the '_ijmāᶜ_ of the Companions because none of them is reported to have objected to what ᶜUmar said or did on this occasion.[1]

By stating what the ᶜ_amal_ is not, Mālik indicates that the ᶜ_amal_ of Madīnah in this matter is that the '_imām_ remain upon the _minbar_ after reciting a _sajdah_ verse and that he not prostrate himself. Thus, Mālik has indicated by reference to Madīnan ᶜ_amal_ which of the two actions of ᶜUmar ibn al-Khaṭṭāb which are reported in this '_athar_ is normative and which of them is not. ᶜUmar's action the first Friday of reciting the verse, descending from the _minbar_, and prostrating himself is not normative, according to Mālik. ᶜUmar's action the second Friday, however, of reciting the verse and then not prostrating himself is normative.

This is an illustration, therefore, of how Mālik re-

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[1]See al-Bājī, 1:350-351; az-Zurqānī, 2:196-197.

lies upon the non-textual source of Madīnan ᶜamal to interpret the textual sources of law to which he subscribes, for it is not completely clear from the text itself which of ᶜUmar's two actions should be regarded as normative. The fact that ᶜUmar states that it is not required for them to prostrate themselves after reciting sajdah verses might be interpreted as an indication that it should not become normative behavior for the 'imām to descend from the minbar and prostrate himself after reciting one. Nevertheless, there is no reason why something less than obligatory--for example, something highly recommended--should not be normative. It might also be observed that Mālik has relied upon ᶜamal in this instance to give the full interpretation of the meaning of actions which ᶜUmar is reported to have done.

The source of the ᶜamal in this instance is not completely clear. In terms of Mālikī legal theory, one would regard the precept that underlies the ᶜamal, namely, the precept that one is not required to prostrate oneself after reciting a sajdah verse, to go back to the Prophet, despite the fact that their is no explicit indication of it. ᶜUmar is reported to have said, "God has not made it binding upon us to do it . . .", and, according to Mālikī legal theory, statements such as these from prominent Companions are regarded as indications of the Prophetic sunnah, on the presumption that such Companions would not have made claims of this sort about God without having had knowledge from

the Prophet or the Qur'ān.[1]

Nevertheless, as just pointed out, it does not necessarily follow from this precept that the norm should be that the 'imām not descend from the minbar and prostrate himself after reciting a sajdah verse of the Qur'ān. Such an ᶜamal could have been instituted by the Prophet. That would seem unlikely, however, on the basis of the information which Mālik provides. There is no mention of the Prophet's having done it, and if, as al-Bājī, Ibn ᶜAbd-al-Barr, and az-Zurqānī suggest, ᶜUmar ibn al-Khaṭṭāb undertook his actions to make this precept clear to the people, it is all the more unlikely that the Prophet had established such an ᶜamal earlier. It would appear,rather, that the ᶜamal in this instance is the result of ᶜUmar's ijtihād based on his understanding of the implications of the precept that it is not obligatory for one to prostrate oneself after reading a sajdah verse of the Qur'ān. In that case, this example would appear to be of the category of what later legal theorists regarded as ᶜamal qadīm, instead of ᶜamal naqlī.[2]

2. Al-x̄: ᶜUmar's Letter to an Army Commander

Mālik cites a report according to which ᶜUmar ibn al-Khaṭṭāb sent a letter to a commander of one of his armies, telling him that word had reached him that some of the commander's soldiers had been tracking the enemy to their mountain hideaways. Finding them too well fortified, the Muslim soldiers would lure out the enemy by

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[1]See above, pp. 161-170. [2]See above, pp.410-419.

telling them in Persian, "Have no fear." But when the enemy would come out, these soldiers would put them to death. ᶜUmar concludes the letter by saying that if he knew the whereabouts of soldiers such as these, he would put them to death. Yaḥyā ibn Yaḥyā states after this 'athar that he heard Mālik state that there was no consensus on the ḥadīth and that ᶜamal was not in accordance with it.[1]

According to al-Bājī, this precept constituted a point of difference between Mālik and 'Abū Yūsuf, who held the opinion of ᶜUmar ibn al-Khaṭṭāb as expressed in the letter, namely, that the Muslim soldiers should be put to death. 'Abū Ḥanīfah, however, is said to have held the same opinion on the matter as Mālik.[2]

This 'athar occurs in a short chapter in the Book of Jihād pertaining to fulfilling covenants of security ['amān] which one grants to the enemy. The precept itself pertains, as al-Bājī and az-Zurqānī point out, to the laws of ta'mīn, the process whereby Muslims grant security of life and property to non-Muslims within Muslim territory. The Muslim soldiers whom ᶜUmar ibn al-Khaṭṭāb has condemned have granted such ta'mīn to their Persian enemies by telling them the words, "Have no fear". But they have broken that covenant by killing the Persians after their surrender. All agree that what the Muslim soldiers have done is forbidden [ḥarām]; the point of difference, however, according to Mālik's commentators, is whether the Muslim soldiers should be punished with death for their crime.[3] The fact that Mālik regarded

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[1]Muwaṭṭa', 2:448-449. [2]Al-Bājī, 3:174.

[3]Ibid., 3:172-174; az-Zurqānī, 3:292-293.

what these Muslim soldiers had done to be wrong is indicated by the content of the remainder of the chapter. He indicates first that even a gesture of the hand is sufficient to indicate ta'mīn and that no words need be said at all. Thus, it stands to reason that Mālik would have regarded the statement of these Muslim soldiers to have been an even stronger indication of ta'mīn. After that, Mālik cites a statement of Ibn ᶜAbbās according to which he said that God will grant power to the enemy over any people that breaks the covenants that it makes treacherously.[1]

The 'athar which Mālik cites in this example is a Kūfan and not a Madīnan transmission. Mālik transmits it from "a man of the people of Kūfah," without stating specifically who he was. Az-Zurqānī also notes that the 'isnād is not complete; it does not mention the intermediary through whom this Kūfan received the report from ᶜUmar. Reports with 'isnād's of this type are, of course, very common in the Muwaṭṭa', and, as pointed out earlier, both Mālikī and Ḥanafī legal theory regard such transmissions to be valid as long as the persons mentioned in the 'isnād are acceptable.[2] Nevertheless, Mālik's statement that there is no consensus on this 'athar may be an indication that there was no general consensus among the Madīnans on its authenticity.[3]

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[1]Muwaṭṭa', 2:449. [2]See above, pp. 155-161.

[3]See az-Zurqānī, 3:292-293. Az-Zurqānī holds that this Kūfan is probably Sufyān ath-Thawrī; he also points out that an 'athar almost identical to this one has been transmitted in the

Az-Zurqānī states, furthermore, that some Mālikī fuqahā' held that the obvious [ẓāhir] meaning of ᶜUmar's letter is misleading. They held that ᶜUmar made the statement that he would put such soldiers to death as a threat to intimidate them from breaking covenants of security in the future. Thus, these fuqahā' claimed that ᶜUmar had not intended his statement to be taken literally and to be put into law.[1]

Whatever Mālik's reasons for rejecting the obvious implications of this 'athar may have been, it is clear that he rejects it by reference to ᶜamal. Ash-Shāfiᶜī agrees with Mālik's position, but he objects strongly to the fact that Mālik has rejected the implications of ᶜUmar's 'athar by reference to ᶜamal and without citing any legal texts to support his position. Ash-Shāfiᶜī holds, on the contrary, that the Muslim soldiers should not be put to death because of the precept mentioned in a ḥadīth that a Muslim is not to be put to death over a non-Muslim.[2] Mālik, however, does not subscribe to that precept completely, for he states in the Muwaṭṭa' that it is the AN that a Muslim will not be put to death over a non-Muslim, unless it is premeditated murder ["yaqtuluhū ghīlatan"].[3] According to this precept

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collection of al-Bukhārī from ᶜUmar ibn al-Khaṭṭāb.

[1]Az-Zurqānī, 3:293. As pointed out earlier, ẓāhir statements are regarded to be conjectural in Mālikī legal theory. See above, pp. 146-147.

[2]Ash-Shāfiᶜī, "Ikhtilāf Mālik," p. 241.

[3]Muwaṭṭa', 2:864.

of Mālik, therefore, it could be argued that the Muslim soldiers should have been put to death.

The ᶜamal to which Mālik appeals in this instance is clearly more authoritative than the text at hand, even though Mālik cites no other legal texts to support the ᶜamal. It is not clear, furthermore, what the source of this ᶜamal was.

3. Al-x: ᶜĀ'ishah on an Abrogated Qur'ānic Verse

> Mālik cites an 'athar from ᶜĀ'ishah according to which she said that there had been a verse in the Qur'ān stating that prohibition of marriage to the kin of one's wetnurse [i.e. by riḍāᶜah] became effective after ten nursings. This verse was then abrogated to five, and that verse was still being recited as part of the Qur'ān at the time of the Prophet's death. Yaḥyā ibn Yaḥyā states that he heard Mālik say regarding this report that ᶜamal was not in accordance with it.[1]

The position of Mālik on this matter of law was that prohibition in marriage by riḍāᶜah became effective by a single nursing, which is also said to have been the opinion of 'Abū Ḥanīfah, Sufyān ath-Thawrī, al-'Awzāᶜī, and others. In fact, Ibn ᶜAbd-al-Barr is said to have reported that, according to al-Laith ibn Saᶜd, there was consensus upon this matter among the Companions and the early fuqahā'.[2] Nevertheless, this position is contrary to the obvious [ẓāhir] meaning of ᶜĀ'ishah's text, and it may have been for that reason that Mālik states after this report that ᶜamal

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[1] Muwaṭṭa', 2:608.

[2] Az-Zurqānī, 4:184-185; Ibn Rushd, (Istiqāmah), 2:35.

is not in accordance with it.

Differences of opinion did develop among the fuqahā' on this precept. Ash-Shāfiᶜī, for example, followed the obvious meaning of ᶜĀ'ishah's statement and held that prohibition in marriage by riḍāᶜah became effective by five nursings and not less. Others held that one or two nursings were not sufficient to prohibit marriage by riḍāᶜah but three were; their argument was based on another isolated ḥadīth according to which the Prophet said that there is no harm in one or two nursings. A third opinion held that there was no prohibition by riḍāᶜah until after ten nursings. According to the information in Ibn Rushd and az-Zurqānī, however, none of these differences of opinion goes back prior to ash-Shāfiᶜī.[1]

Commentators seem to be in general agreement that what ᶜĀ'ishah is indicating by her report is that the Qur'ānic verse she is referring to had been completely abrogated during the last part of the Prophet's lifetime, such that it was not to be included in the recitation, but that knowledge of this abrogation did not reach some of the Prophet's Companions until after his death.[2] Al-Bājī and az-Zurqānī hold that, in any case, the verse ᶜĀ'ishah is referring to could not

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[1]Ibn Rushd, (Istiqāmah), 2:35-36; az-Zurqānī, 4:184.

[2]Az-Zurqānī, 4:184-185; al-Bājī, 4:156-157; and Yaḥyā ibn Sharaf AN-NAWAWI, Sharḥ Muslim bi-Sharḥ an-Nawawī, ed. ᶜAbd-Allāh 'Aḥmad 'Abū Zīnah, 5 vols. (Cairo: Dār ash-Shaᶜb, n.d.), 3:631-632.

be regarded to be a legitimate part of the Qur'ān, since Qur'ānic verses by definition have to have been established by mutawātir [abundant] transmission, whereas this report is an isolated transmission.[1]

According to Ibn Rushd and Mālik's commentators, Mālik's position is based on the generality [ᶜumūm] of the pertinent Qur'ānic verse, which states simply that marriage is prohibited by riḍāᶜah without specifying what amount of nursings constitutes riḍāᶜah.[2] Thus, Mālik and those of his opinion hold that this prohibition goes into effect with a single nursing, since a single nursing is the minimum amount for which the word riḍāᶜah can be used. According to Ibn Rushd and 'Abū Zahrah, Mālik's rejection of the obvious [ẓāhir] meaning of ᶜĀ'ishah's report is an example of his granting priority to the generality [ᶜumūm] of the Qur'ānic text over the contrary implications of isolated ḥadīth which are not supported by the ᶜamal of Madīnah.[3]

Al-Bājī holds, however, that ᶜĀ'ishah's report is not really contradictory to Madīnan ᶜamal; he holds, rather, that it is only the obvious [ẓāhir] implication of her report which is contradictory. The implication generally drawn from ᶜĀ'ishah's statement, as mentioned earlier, is that the verse speaking

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[1]Al-Bājī, 4:156; az-Zurqānī, 4:184-185.

[2]Qur'ān, 4:23.

[3]Ibn Rushd, (Istiqāmah), 2:35; 'Abū Zahrah, Mālik, p. 301. See above, pp. 147-148.

of the five nursings was also abrogated from the recitation of the Qur'ān but that knowledge of its abrogation did not reach some of the Companions until after the Prophet's death. Thus, ᶜĀ'ishah's report may be interpreted to mean that the ruling that prohibition by riḍāᶜah does not become effective until after the fifth nursing was also abrogated, for it is unlikely that recitation of the verse would have been abrogated without the ruling also having been abrogated.[1] (In fact, the Shāfiᶜī position is said to be that recitation of the verse was abrogated but the ruling contained in the verse was not.[2])

Al-Bājī holds that Mālik uses the expression that ᶜamal is not in accordance with ᶜĀ'ishah's report not because he or other Madīnan fuqahā' regarded her report to be contradictory to ᶜamal but because most people are incapable of understanding interpretations of reports that are contrary to their obvious [ẓāhir] meanings. Many people, al-Bājī holds, are not capable of understanding how a report can have a valid interpretation contrary to its obvious [ẓāhir] meaning even if such interpretations are repeated to them over and over again. Indeed, such persons often become only more confused by such interpretations. (Al-Bājī adds that the problem of not being able to understand anything but the ẓāhir meaning of texts had become especially great in his

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[1]See al-Bājī, 4:156. [2]An-Nawawī, 3:631.

own times.) Thus, according to al-Bājī, Mālik uses the expression Al-x̄ as a means of dispensing with the problem of having to rely upon the capability of people to understand an interpretation of the text which is not obvious.[1] One could apply this same opinion of al-Bājī to the preceding example, in which the statement of ᶜUmar ibn al-Khaṭṭāb--as some Mālikī *fuqahā'* have observed--can be interpreted in such a manner as not to be contrary to Madīnan ᶜ*amal*.[2]

Again, it is difficult to determine the source of the Madīnan ᶜ*amal* that Mālik has in mind except with reference to textual evidence--such as the Qur'ānic verse on *riḍāᶜah*--which he does not cite. Presumably, the type of ᶜ*amal* he has in mind in this example would be of the category of ᶜ*amal naqlī*, going back to the revelation or abrogation of the relevant Qur'ānic verses.

4. Transactions of Buying and Selling and Baiᶜ al-Khiyār[3]

> Mālik cites a *ḥadīth* according to which the Prophet said that the buyer and seller [*al-mutabāyiᶜān*] have the option to choose [*al-khiyār*] [whether or not they want to conclude or forgo a transaction between themselves] as long as they have not parted company ["mā lam yatafarraqā"], except in the case of *baiᶜ al-khiyār*. After this *ḥadīth* Mālik states that there is no well-

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[1] Al-Bājī, 4:156-157. [2] See above, p. 635.

[3] *Baiᶜ al-Khiyār*: A special type of sales transaction whereby the purchaser is given a stipulated period of time to make his choice [*khiyār*] as to whether or not he desires to keep the item purchased or return it to the seller. As mentioned above, there were differences of opinion among the *fuqahā'* regarding the definition and legitimacy of *baiᶜ al-khiyār*.

known limit for this among us nor is there any 'amr [custom; precept] in it that has been put into practice.[1]

ᶜIyāḍ states that Mālik's position on this ḥadīth constitutes one of the sharpest points of contention between Mālikīs and some non-Mālikīs. For Mālik transmits the above ḥadīth with what is regarded to be the soundest Madīnan 'isnād--Mālik from Nāfiᶜ from ᶜAbd-Allāh ibn ᶜUmar--and yet, according to these opponents, Mālik rejects this ḥadīth in favor of the ᶜamal of the people of Madīnah.[2]

There are essentially two points of law in this ḥadīth, and each of them constituted a point of difference between the fuqahā', Madīnan and non-Madīnan alike. The first point of law is the definition of what constitutes a binding sales agreement. Is such an agreement constituted merely by the verbal or written contract [ᶜaqd] between a buyer and seller that they agree to make such a transaction,

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[1]Muwaṭṭa', 2:671. The expression Mālik uses is: "Wa laisa li-hādhā ᶜindanā ḥadd maᶜrūf wa lā 'amr maᶜmūl bihī fīhi."

[2]ᶜIyāḍ, 1:72. Al-Qarāfī also discusses briefly the contentions that developed around this ḥadīth. After stating that Mālik regards the ᶜamal of the people of Madīnah to be a stronger argument than this isolated ḥadīth, al-Qarāfī adds that it is fitting to discuss in this context ash-Shāfiᶜī's statement, "If a ḥadīth is authentic, then it is my madhhab," or his statement, "If a ḥadīth is authentic, then take my madhhab and dash it against the wall." Al-Qarāfī states that, if by this, ash-Shāfiᶜī means that he will follow the implications of authentic ḥadīth whenever there are no other legal arguments that contradict those implications, then he is no different from any other of the fuqahā' in that regard. But, if by these statements, he means that he will always follow the implications of a ḥadīth despite the

or is such an agreement made binding only after the buyer and seller have parted company after their having made an agreement? The second point of law in this ḥadīth is what is meant by baiᶜ al-khiyār, whether or not such a type of transaction is permissible at all and, if so, for how long?

There have also been some disagreements among Mālikīs about which of these two points of law Mālik's comment at the end of the ḥadīth is addressed to. Most of them held that it was addressed to the second point and that Mālik meant by this comment that there was no well-known limit or established custom regarding the length of the period during which the purchaser of an item has the option of choice [khiyār] when purchasing according to the contract of baiᶜ al-khiyār.[1] Some others, however, understood Mālik's comment as indicating his rejection of the first part of the ḥadīth, namely, that any limit constituted by the buyer and seller parting company has not been accepted among the Madīnans and that there is no ᶜamal consistent with that part of the ḥadīth.[2]

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presence of strong, contrary legal arguments to those implications, then--al-Qarāfī states--ash-Shāfiᶜī has gone against the consensus of the other fuqahā'. Al-Qarāfī, 1:146.

[1]See ᶜIyāḍ, 1:72; Ibn Rushd, (Istiqāmah), 2:207-208; al-Bājī, 5:55-57; az-Zurqānī, 4:282-284.

[2]Cf. ᶜIyāḍ, 1:72; he objects to this interpretation. Ash-Shāṭibī follows this interpretation, however, and cites Mālik's comment regarding this ḥadīth as one of several examples of Mālik's rejecting ḥadīth of conjectural meanings or questionable implications when they are contrary to well-es-

In so far as the first point of law is concerned, Mālik's position is that transactions of buying and selling become immediately binding once an agreement is made--except in the case of bai^{c} al-khiyār--and that it makes no difference whether the buyer and seller part company after that agreement or not. Mālik's position is said to be based on the precept of Islamic law that contracts and covenants are binding, which is supported by several verses of the Qur'ān.[1] This is also said to have been the opinion of Rabī^{c}ah, 'Ibrāhīm an-Nakha^{c}ī, 'Abū Ḥanīfah, 'Abū Yūsuf, ash-Shaibānī, Sufyān ath-Thawrī, and others. The Madīnans ^{c}Abd-Allāh ibn ^{c}Umar--the transmitter of the ḥadīth--and Sa^{c}īd ibn al-Musayyab are said to have disagreed as did al-Ḥasan al-Baṣrī, al-'Awzā^{c}ī, and al-Laith ibn Sa^{c}d. They held that agreements of buying and selling were not binding until the buyer and seller had parted company or, according to al-Laith, until one of them got up to leave.[2] Their contrary opinions are

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tablished precepts or principles of Islamic law. See ash-Shāṭibī, Al-Muwāfaqāt, 3:20-21.

[1]Ibn Rushd, (Istiqāmah), 2:207; az-Zurqānī, 4:282-284; al-Bājī, 5:55-56. For such verses, see Qur'ān, 5:1; 2:177; 3:72; cf. 5:89, 6:152; 16:91; 17:34; 33:15, 23; 13:20; 48:10.
It is also argued that an allowance of not making agreements of buying and selling binding until after the indefinite period of time before the buyer and seller part company could place either party in undue jeopardy [gharar], and it is a precept of Islamic law that such undue jeopardy is to be avoided. See Ibn Rushd, (Istiqāmah), 2:207; ash-Shāṭibī, Al-Muwāfaqāt, 3:21.

[2]See citations above in note 1.

in keeping with the ẓāhir [obvious] meaning of the ḥadīth.[1]

In so far as the second point of law is concerned, Mālik held that the length of the option periods in baiᶜ al-khiyār depended on the type of item purchased and the amount of time customarily required to determine the worth and defects of the item. Al-Bājī sets forth several recommended option periods that Mālik speaks of in the Mudawwanah, the "Wāḍiḥah", and the "Mawwāzīyah". For example, he recommended about a month for buying a house, so that one can check the walls and foundations, come to know the neighbors,and so forth. For items like clothing, however, Mālik felt that from one to two days should be sufficient.[2] Sufyān ath-Thawrī and some others, however, are said to have held that such option periods are permissible under no circumstances, since contracts of buying and selling become immediately binding.[3] 'Abū Ḥanīfah and some other Kūfans are said to have held that such option periods must never exceed three days--which was the position that ash-Shāfiᶜī took. 'Abū Ḥanīfah's reasoning

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[1]I say "the ẓāhir meaning" because some fuqahā'--'Abū Bakr ibn al-ᶜArabī, ᶜIyāḍ, etc.--have argued that the verb, "tafarraqa" need not mean "to part company", although that is a common meaning. They cite instances in the Qur'ān--e.g., 98:4; cf. 3:105, 42:14, 3:103; 42:13, etc.--when it is used to refer to holding different opinions. They conclude by what appears to be a far-fetched interpretation that the ḥadīth means that the buyer and seller have the option to choose as long as an agreement has not been reached, except in the case of baiᶜ al-khiyār. 'Abū Ḥanīfah is also reported to have said that the ẓāhir of this ḥadīth is misleading. See ᶜIyāḍ, 1:72; al-Bājī, 5:55; az-Zurqānī, 4:283.

[2]Al-Bājī, 5:56; Ibn Rushd, (Istiqāmah), 2:207.

[3]Ibn Rushd, (Istiqāmah), 2:207.

is said to have been that the basic precept of Islamic law is that all contracts are binding. Therefore, an exception to this general precept may not be extended beyond the limits stipulated by textual authority. According to one ḥadīth--generally regarded to be authentic--the Prophet told a certain Companion--Ḥabbān ibn Munqidh[1]--that he could have an option period of three days on items that he purchased. Thus, 'Abū Ḥanīfah limits the option period to three days.[2] (Drawing exceptions to general precepts of law in this manner on the basis of isolated ḥadīth is what later Ḥanafī legal theorists referred to as "istiḥsān as-sunnah".[3])

'Abū Yūsuf and ash-Shaibānī, however, are reported to have disagreed with 'Abū Ḥanīfah on this matter. They held that there are no stipulated option periods at all in bai^{c} al-khiyār and that any period is valid upon which the buyer and seller agree.[4]

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[1]ḤABBĀN IBN MUNQIDH ibn ^{c}Amr ibn ^{c}Aṭīyah al-Khazrajī was a man of very weak intelligence and poor judgment. He had suffered a serious head injury [ma'mūmah] earlier in his life and could only speak slowly and with difficulty. Some reports also have it that he was blind. When Ḥabbān complained to the Prophet that he was often taken in the market place, the Prophet gave him an option period of three days on whatever he purchased and told him to say, "Lā khilābah" [do not cheat (me)], before buying anything. It is reported that Ḥabbān, who could not pronounce these words, would be heard saying instead, "Lā khiyābah, lā khiyābah." 'Aḥmad ibn ^{c}Alī IBN ḤAJAR, Al-'Iṣābah fī Tamyīz aṣ-Ṣaḥābah, with Al-Istī^{c}āb fī Ma^{c}rifat al-'Aṣḥāb by Yūsuf IBN ^{c}ABD-AL-BARR, 4 vols. (Egypt: Maktabat as-Sa^{c}adah, 1328/[1910]; reprint ed., Baghdād: Maktabat al-Muthannā, [1970]), 1:303.

[2]Ibn Rushd, (Istiqāmah), 2:207; al-Bājī, 5:56; az-Zurqānī, 4:283.

[3]See above, pp. 255-257. [4]Ibn Rushd, (Istiqāmah), 2:207.

Mālik follows the ḥadīth on bai^{c} al-khiyār with another ḥadīth according to which the Prophet said that whenever a buyer and seller [bayyi^{c}ain] disagree [over the terms of their agreement] while carrying on a transaction, it is the word of the seller which is to be followed, and, if they do not agree to that, then each returns to the other what he has taken from him.[1] According to az-Zurqānī, Ibn ^{c}Abd-al-Barr held that Mālik had placed this ḥadīth after the ḥadīth on bai^{c} al-khiyār as an indication that the ḥadīth on bai^{c} al-khiyār had been abrogated. The implication of this second ḥadīth, according to Ibn ^{c}Abd-al-Barr, is that the agreement of buying and selling has already been finalized prior to the buyer and seller parting company. The buyer has paid the price, and the seller has handed over the item he was trying to sell. They have then disagreed on the terms of their agreement, and either the word of the seller will be followed or the agreement will be broken, with each party returning to the other what it had taken.[2]

Ibn ^{c}Abd-al-Barr is reported to have said that Mālik remarked regarding the ḥadīth on bai^{c} al-khiyār that the precept in it had been put aside [turika] and had never been put into practice.[3] This statement of Mālik, if authentic, reminds one of the statement of Ibn al-Qāsim in the Mudawwanah

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[1] Muwaṭṭa', 2:671. [2] Az-Zurqānī, 4:284-285; ^{c}Iyāḍ, 1:72.

[3] Cited by az-Zurqānī, 4:285.

referred to earlier where Ibn al-Qāsim speaks of those ḥadīth, the authenticity of which is not questioned, which have come down from the past but have not been accompanied by ᶜamal. Such ḥadīth are not to be put into practice after having been put aside by the first generations. Rather, only those ḥadīth are put into practice which have been accompanied by practice, and those ḥadīth are passed over which have been passed over in ᶜamal.[1] This position of Ibn al-Qāsim, which appears to be also Mālik's position in this example and in other instances where he uses the expression Al-x̄, seems to be what ash-Shāṭibī has in mind when he reasons that it is not legitimate to put ḥadīth into practice for which there was no ᶜamal among the first generations or to draw legal implications from the texts of ḥadīth and āthār which the first generations did not draw from them. For, according to ash-Shāṭibī, the first generations, who were addressed by the Prophet and his Companions, understood what the ᶜamal was which the texts of the sharīᶜah desired from them. Thus, if a text carries a legal implication which they would have been likely to have put into practice had they known of it, it is apparent that either that implication was abrogated or not actually intended, if there is nothing in the ᶜamal of the first generations that corresponds to it.[2]

In this example, however, the prominent Madīnan Com-

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[1]See above, pp. 180-181. [2]See above, pp. 509-514.

panion ᶜAbd-Allāh ibn ᶜUmar and the prominent Madīnan Successor Saᶜīd ibn al-Musayyab are said to have followed the obvious interpretation of the ḥadīth.[1] Al-Bukhārī transmits an 'athar, for example, according to which it is reported that whenever Ibn ᶜUmar wanted to buy an item very much, he would get up and part company with the seller so as to make the agreement binding.[2] The ᶜamal of Madīnah, however, as indicated by information in other Mālikī sources and, according to some interpretations, by Mālik's statement after citing the ḥadīth,[3] was contrary to both Ibn ᶜUmar and Saᶜīd ibn al-Musayyab in this matter. This would be, then, another instance of Madīnan ᶜamal not supported by Madīnan 'ijmāᶜ. The precept of this ᶜamal, furthermore, is of the nature of ᶜumūm al-balwā, since contracts of buying and selling are an inescapable part of daily life. It is the type of matter, therefore, that should have been widely known and should have constituted widespread ᶜamal. Furthermore, it is the type of ᶜamal which came directly under the jurisdiction of the Madīnan judiciary, which would have had the responsibility of settling disputes that arose over contracts of buying and selling. Finally, this example would seem to be an example of what ash-Shāṭibī describes as following the widespread

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[1]See above, p. 643. [2]See az-Zurqānī, 4:284.

[3]See ᶜIyāḍ, 1:72; al-Qarāfī, 1:146; Ibn Rushd, (Istiqāmah), 2:207-208; al-Bājī, 5:55-57; az-Zurqānī, 4:282-285; see above, p. 642.

ᶜamal of the many instead of the contrary ᶜamal of the few.[1]

5. AlN-x̄:[2] ᶜUmar and the Slaves Who Stole a Camel

> Mālik transmits an 'athar according to which the slaves of a man named Ḥāṭib stole a camel from a man of the tribe of Muzainah and slaughtered and ate it. The matter was brought to the attention of ᶜUmar ibn al-Khaṭṭāb, who first commanded that the hands of the slaves be cut off but then changed his mind, saying to Ḥāṭib, "I believe that you have been starving them . . . . By God, I am going to impose a fine upon you that will be hard for you to bear." ᶜUmar then asked the man from Muzainah how much his camel was worth, and the man replied that he used to be unwilling to sell it for four hundred pieces of silver. ᶜUmar then commands Ḥāṭib to pay the man of Muzainah eight hundred pieces of silver. Mālik adds after this 'athar that the ᶜamal among us is not in accordance with doubling the indemnity [for what is stolen] in this manner; rather, the 'amr of the people among us has been well-established that a person is only fined the price of the camel or [other] animal on the day he took it.[3]

I could find no evidence of differences of opinion among the early fuqahā' regarding Mālik's opinion in this example. In fact, Ibn ᶜAbd-al-Barr is reported to have said that the ᶜulamā' had reached consensus that the fine which a thief pays in compensation for what he stole should not exceed the value of that item. Furthermore, Ibn ᶜAbd-al-Barr claims that there was consensus among them that the value of the stolen item is not to be established on the basis of

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[1] See above, pp. 509-514.

[2] The expression is: "Wa laisa ᶜalā hādhā 'l-ᶜamal ᶜindanā fī . . . wa lākin maḍā 'amr an-nās ᶜindanā ᶜalā 'annahū . . . "

[3] Muwaṭṭa', 2:748.

the claim of the plaintiff alone.[1] (According to this 'athar, ᶜUmar ibn al-Khaṭṭāb asked the plaintiff what the value of his camel had been, and then ᶜUmar had doubled it.) In this example, therefore, Mālik is apparently using his terminological expression only to indicate that ᶜUmar's ruling regarding Ḥāṭib is contrary to ᶜamal, even though there seem to have been no disagreements on the matter in Mālik's time. Mālik's use of the expression Al-x̄ in this example, then, is similar to his use of that expression after the ḥadīth of ᶜĀ'ishah regarding riḍāᶜah, upon which there were apparently no disagreements in Mālik's time.[2]

This 'athar reports an individual legal ruling [qaḍīyat ᶜain], which--like reports of actions--are considered to be of conjectural import in MālikĪ legal theory and as insufficient evidence in themselves that the ruling or action they report is obligatory or normative.[3] Although ash-Shāfiᶜī does not believe that ᶜUmar's judgment in this matter constitutes the rule which is to be followed, he accuses the MālikĪs of being arbitrary in their stating that ᶜUmar's action is contrary to ᶜamal. He asks them on what basis they can regard ᶜUmar ibn al-Khaṭṭāb's statements to be authoritative in other instances and not regard his legal ruling to be so in this case.[4]

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[1]Cited by az-Zurqānī, 4:438. [2]See above, p. 636.

[3]See above, pp. 188-195.

[4]Ash-Shāfiᶜī, "Ikhtilāf Mālik," p. 231; see above, pp. 353-356.

Mālik's use of the term Al-x̄ indicates that ᶜUmar's ruling in the case of Ḥāṭib was not normative but not necessarily that it was wrong. Al-Bājī states that Ḥāṭib ibn 'Abī Baltaᶜah was a man of great wealth, and ᶜUmar's ijtihād was that by requiring Ḥāṭib only to compensate for the loss of the camel, according to standard procedure, would neither be sufficient to punish Ḥāṭib, with his considerable wealth, or to keep him from starving his slaves in the future. (Al-Bājī also reports, however, that Ibn Wahb was of the opinion that ᶜUmar had doubled the fine in lieu of not having cut off the hands of the slaves; by doubling the fine, furthermore, he made Ḥāṭib carry the full punishment.) Furthermore, al-Bājī continues, ᶜUmar accepted the word of the plaintiff--the man from Muzainah--regarding the value of the camel, because it was not ᶜUmar's intention to impose a fine on Ḥāṭib for the value of the camel anyway but, rather, far in excess of the value of the camel, so that in his words he could impose a fine upon Ḥāṭib that would be difficult for him to bear.[1] The implication of al-Bājī's treatment of ᶜUmar's ruling in the case of Ḥāṭib is that it was suitable for the circumstances and, hence, would be suitable for similar circumstances in the future, but it was an unusual and not a normative ruling such that ᶜamal would be in accordance with it.

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[1]Al-Bājī, 6:64-65; cf. az-Zurqānī, 4:438.

Viewed in this manner, ᶜUmar's ruling in the case of Ḥāṭib--although not standard procedure (ᶜamal) for cases of theft--would have the same validity as other types of exceptional legal decisions in Mālikī fiqh like those made on the basis of the principles of istiḥsān and sadd adh-dharā'iᶜ, which draw exceptions to general rules or procedures because of special circumstances.[1]

ᶜAmal Chapters

1. Alx:[2] How One Wipes over the Shoes in Performing Masḥ

> Mālik cites an 'athar which reports that ᶜUrwah ibn az-Zubair used to wipe over his shoes when performing masḥ by wiping only over the top and not the bottom of the shoe. Mālik then cites another report according to which az-Zuhrī was asked how wiping over the shoes ought to be done; az-Zuhrī demonstrated by wiping over both the top and bottom of the shoe. Mālik states after az-Zuhrī's report that az-Zuhrī's position is the most preferable ['aḥabb] to him of that which he has heard in the matter.[3]

'Abū Ḥanīfah, Sufyān ath-Thawrī, al-Ḥasan al-Baṣrī, and others are said to have disagreed with Mālik regarding the preferability of wiping over both the top and bottom of the shoe when doing this procedure, which is referred to as "al-masḥ ᶜalā 'l-khuffain". They did not regard it as preferable to do as az-Zuhrī is reported to have done and held

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[1] See above, pp. 245-268.

[2] This symbol stands for the expression, "al-ᶜamal fī 'x'" [the ᶜamal regarding "x"] and is used for the twenty-nine chapters of the Muwaṭṭa' that are so-entitled.

[3] Muwaṭṭa', 1:38.

that the proper way to do mash was to wipe only over the top of the shoe, as ᶜUrwah is reported to have done.[1] Ash-Shaibānī contends against the Madīnans on this point and cites what he refers to as "the well-known 'athar of ᶜUmar ibn al-Khaṭṭāb" according to which he said: "If religion were done on the basis of ra'y, there would be more reason for wiping the bottom of the shoe than the top." Ash-Shaibānī interprets this statement as ᶜUmar's objection ['inkār] to wiping over the bottom of the shoe, and he accuses the Madīnans of having departed from it and from the practice of ᶜUrwah ibn al-Zubair, whom he regards as having had greater knowledge of the sunnah and greater knowledge and understanding of knowledge transmitted from the past [ar-riwāyah] than Ibn Shihāb. Furthermore, ash-Shaibānī contends, the Madīnans have transmitted no āthār supporting az-Zuhrī's opinion.[2]

Mālik, however, apparently regarded both procedures to be valid, i.e., that of ᶜUrwah ibn az-Zubair and that of az-Zuhrī, for he includes them both in this Alx chapter. Mālik indicates by his statement of preference not that he regards ᶜUrwah's action to be mistaken but that he regards az-Zuhrī's to be preferable. According to al-Bājī, Saḥnūn and Ibn Ḥabīb, the compiler of the "Wāḍiḥah",[3] have trans-

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[1]See Ibn Rushd, 1:111 (18); ash-Shaibānī, Ḥujjah, 1:35.

[2]Ash-Shaibānī, Ḥujjah, 1:35.

[3]See above, p. 97, n. 3, and p. 117.

mitted reports from Mālik that he regarded it obligatory that one wipe the top of the shoe when performing masḥ, and, whereas he did not regard it to be obligatory that one also wipe the bottom of the shoe, Mālik regarded that, nevertheless, to be preferable.[1] Az-Zuhrī's manner of performing masḥ, therefore, does not constitute rejection of ᶜUrwah's manner of doing it; rather, it includes ᶜUrwah's way of performing masḥ, while adding something additional to it. It might be pointed out, furthermore, that the statement attributed to ᶜUmar ibn al-Khaṭṭāb does not necessarily imply his having objected to one's wiping the bottom of the shoe. It simply supports the position that it is obligatory to wipe the top of the shoe and not the bottom, even though one would think that there is greater reason to wipe the bottom than the top.

Madīnan ᶜamal regarding masḥ would appear to be of the category of what I have referred to as "mixed ᶜamal". In other words, there would have been two types of ᶜamal in Madīnah on this matter; some Madīnans would have performed masḥ according to the manner of ᶜUrwah, while others would have performed it according to the manner exemplified by az-Zuhrī. It should be noted, furthermore, that ᶜamal regarding masḥ does not come under the jurisdiction of the Madīnan judiciary. As I have suggested, it was probably

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[1] Al-Bājī, 1:81.

the authority of the Madīnan judiciary which established uniform Madīnan ᶜamal in matters of law which came under its jurisdiction but regarding which there had been significant differences of opinion among the Madīnan people of knowledge.[1]

ᶜAmal regarding masḥ pertains to a ritual of worship [ᶜibādah], and the majority of Alx chapters pertain to such matters. Mālik precedes the chapter by a chapter containing several ḥadīth and āthār about masḥ. These reports indicate that the Prophet and his Companions performed masḥ, and they indicate such details as the requirement that one's feet be ritually clean [ṭāhir] by way of having wuḍū' before one puts on one's shoes before it is permissible to perform masḥ over the shoes. They do not, however, indicate how masḥ is to be performed, which is indicated only in the Alx chapter. ᶜAmal regarding masḥ, therefore, would be of the category of ᶜamal naqlī. It pertains to ᶜumūm al-balwā and would have been done repeatedly over the generations by a large number of people. It is noteworthy, however, that Mālik regards the examples of ᶜUrwah ibn az-Zubair and az-Zuhrī--prominent Madīnan Successors and persons of knowledge--as valid indications of this ᶜamal. They provide the precept of how masḥ is to be performed from their personal knowledge and experience with the Madīnan tradition. Thus, this is another example of how Madīnan ᶜamal naqlī provides information for which Mālik

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[1]See below, pp. 756-759, and above, pp. 429-431.

does not cite any early supporting legal texts, i.e., ḥadīth or āthār of Companions. Indeed, ash-Shaibānī's critique of Mālik's preferring az-Zuhrī's manner of performing masḥ is that there are ḥadīth and āthār which corroborate ᶜUrwah's manner of performing it, while ash-Shaibānī contends that there are none supporting az-Zuhrī's example.[1]

2. Alχ: How One Is Supposed to Sit While Performing Ṣalāh:

> The chapter contains five reports and no additional comments from Mālik. The first four reports pertain directly to things ᶜAbd-Allāh ibn ᶜUmar said and did about this ᶜamal. A man reports in the first of these that Ibn ᶜUmar once saw him playing with the pebbles on the ground while sitting in his prayer. Afterward Ibn ᶜUmar prohibited him from doing that and enjoined upon him to sit in his prayer as the Prophet had done. The man asked Ibn ᶜUmar how that had been, and so he explained to him. According to the second report, a man once sat next to Ibn ᶜUmar during prayer and crossed his legs under himself while sitting in prayer in an uncustomary fashion. Afterward Ibn ᶜUmar reprimanded this person for praying in that manner; the man rejoined by saying that he had noticed that Ibn ᶜUmar prayed that way himself. Ibn ᶜUmar explains that he does so only because of the pain in his legs. In the third report, a man notices Ibn ᶜUmar sitting in prayer in this uncustomary fashion and asks him afterward about it. Ibn ᶜUmar replies: "It is not the sunnah of ṣalāh; I do it only because of the pain which I feel." Similarly, in the fourth report a boy imitates Ibn ᶜUmar's manner of sitting in his prayer, but Ibn ᶜUmar prohibits him from doing so and tells him what the sunnah of ṣalāh is. The boy asks Ibn ᶜUmar why he prays in the manner he does, and Ibn ᶜUmar responds by saying that his foot is not strong enough to support him. The fifth report relates how al-Qāsim ibn Muḥammad taught the people to sit while performing ṣalāh. Al-Qāsim states that Ibn ᶜUmar had taught it to him and told him that it was the manner in which his father, ᶜUmar ibn al-Khaṭṭāb, used to sit while praying.[2]

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[1]Ash-Shaibānī, Ḥujjah, 1:35. [2]Muwaṭṭa', 1:88-90.

The ᶜamal in the first four reports is a matter of general agreement among the Madīnans and non-Madīnans. It pertains to how one places one's hands on the lap while performing ṣalāh and specifies that one sit with one's weight on the ball of the right foot, which is kept erect. The top of the left foot, on the other hand, is placed against the ground and the foot is turned inward underneath the body.[1] The fifth report, however, contains a point of difference between 'Abū Ḥanīfah and the Madīnans, for al-Qāsim states in it that one should sit on the left hip and not the left foot during the middle and at the end of the prayer [i.e., during at-tashahhud]. 'Abū Ḥanīfah held, on the other hand, that one sits on the left foot throughout the prayer.[2]

The type of ᶜamal treated in this chapter pertains again to acts of ritual and worship. It would be of the category of ᶜamal naqlī, as is indicated by the content of the reports Mālik cites. In the first report, Ibn ᶜUmar enjoins the man to pray after the manner of the Prophet. In the third and fourth Ibn ᶜUmar speaks of the sunnah of ṣalāh, which he is unable to perform because of the pain and weakness in his leg. (Al-Bājī reports that Ibn ᶜUmar's feet had been seriously wounded in the Battle of Khaibar and never healed completely.[3]) Mālik adds no additional

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[1]Ibn ᶜAbd-al-Barr is reported to have said that this was a matter of consensus among the fuqahā'; cited by az-Zurqānī, 1:273.

[2]Al-Bājī, 1:166. [3]Ibid., 1:165.

information to what is contained in the reports he cites, other than to indicate by the title of the chapter that the actions and statements reported are in accordance with Madīnan ᶜamal. It might also be pointed out that the fifth report shows continuity between the ᶜamal of al-Qāsim ibn Muḥammad and the Companions ᶜAbd-Allāh ibn ᶜUmar and his father, ᶜUmar ibn al-Khaṭṭāb.

Another significant part of the reports of this chapter is the picture they give of ᶜAbd-Allāh ibn ᶜUmar--one of the most prominent Madīnan ᶜulamā'--as a guardian of ᶜamal, as it were. As al-Bājī points out, the second, third, and fourth reports indicate how persons of the calibre of Ibn ᶜUmar were regarded by the people as worthy of imitation [al-iqtidā'].[1] Ibn ᶜUmar indicates to the three persons in these reports, however, that his manner of sitting in the prayer is not normative, is not the sunnah of ṣalāh, and should not be imitated by persons who are capable of doing the sunnah of ṣalāh. Ibn ᶜUmar's example in these reports is an illustration of ash-Shāṭibī's concept of the ideal role of the ᶜulamā' in fostering and preserving the content of sound, normative ᶜamal.[2]

3. Alx: S-XN: ᶜAmal Regarding ᶜId Prayers:

> Mālik states that he has heard it transmitted from several of their ᶜulamā' that there has been no call to

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[1] Al-Bājī, 1:165. [2] See above, pp. 403-409, 448-453.

> prayer [nidā'] or 'iqāmah[1] in either of the two ᶜīd[2] prayers since the time of the Messenger of God until the present day. Mālik then says that this is the S-XN. Finally, Mālik adds a report according to which ᶜAbd-Allāh ibn ᶜUmar used to bathe himself before going out to pray the ᶜīd prayers.[3]

Al-Bājī states that he knows of no differences of opinion among the fuqahā' regarding the precept that there is no call to prayer or 'iqāmah in the ᶜīd prayers.[4] Nevertheless, there are reports that some of the 'Umayyad heads of state and their governors sought to institute the call to prayer in ᶜīd prayers. Az-Zurqānī cites reports that Muᶜāwiyah, Marwān ibn al-Ḥakam, Ziyād ibn 'Abīhi, and al-Ḥajjāj ibn Yūsuf attempted to do this.[5] Al-Bājī states that, according to Ibn Ḥabīb in the "Wāḍiḥah", the 'Umayyad ruler Hishām was the first to attempt to do it.[6] Thus, Mālik's use of the term S-XN in this example would appear not to be used in reference to differences of opinion among the fuqahā' but rather in reference to any who would attempt to follow the examples of these 'Umayyad rulers and governors.

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[1] 'Iqāmah: A second call to prayer which follows the first but is addressed to the congregation which is present, directing them to stand and prepare to make the ṣalāh.

[2] ᶜīd Prayers: Two large community prayers held twice annually at the beginning of the two ᶜīd festivals. The first ᶜīd takes place the day after the end of Ramaḍān, the month of fasting. The second ᶜīd takes place upon conclusion of the annual pilgrimage to Makkah.

[3] Muwaṭṭa', 1:177. [4] Al-Bājī, 1:315. [5] Az-Zurqānī, 2:112-113.

[6] Al-Bājī, 1:315.

There were apparently no differences of opinion among the fuqahā' regarding the desirability of bathing oneself before ᶜīd prayers, as ᶜAbd-Allāh ibn ᶜUmar is reported to have done. Ash-Shaibānī states in his commentary on this 'athar that 'Abū Ḥanīfah regarded it as a good thing [ḥasan], although he did not regard it to be obligatory [wājib].[1] Al-Bājī quotes reports from early Mālikī compendia stating that he also did not regard bathing oneself prior to ᶜīd prayers as something obligatory, although he regarded it to be desirable.[2] Mālik gives no indication in the Muwaṭṭa' of whether or not he regarded this matter to be obligatory or desirable; he indicates by placing Ibn ᶜUmar's 'athar in this ᶜAmal Chapter, however, that he held that it should be a part of ᶜamal.

The S-XN precept about there being no call to prayer or 'iqāmah in ᶜīd prayers is one of the most explicit indications of ᶜamal naqlī in the Muwaṭṭa'. Mālik states that this is a matter which has been part of the continuous ᶜamal of Madīnah from the time of the Prophet until the present. Mālik does not support this precept by reference to ḥadīth or similar legal texts but by reference to the well-established ᶜamal of Madīnah in the matter over the generations. It might also be observed that this sunnah precept is contrary to analogy with related precepts pertaining to the

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[1]Shaibānī, Muwaṭṭa', p. 48. [2]Al-Bājī, 1:315-316.

five daily prayers. For the call to prayer and the 'iqāmah are fundamental parts of those types of ṣalāh. It would appear that those 'Umayyads who are reported to have sought to institute the call to prayer and the 'iqāmah in the ᶜĪd prayers did so on the basis of that analogy. Therefore, in this example again Mālik uses a sunnah term for a matter which is contrary to analogy with related precepts of law.[1]

Finally, the report about ᶜAbd-Allāh ibn ᶜUmar is a report of an action, and there is nothing implicit in the text to indicate that it should be normative for others. For example, it could be like numerous other things that Ibn ᶜUmar is reported to have done that were unique parts of his behavior, such as sprinkling water in his eyes when he bathed himself.[2] Therefore, by placing this 'athar in an ᶜamal chapter, Mālik indicates that Ibn ᶜUmar's act reflects a desired norm. Thus, I believe this is another instance of Mālik's making reference to ᶜamal to distinguish normative from non-normative behavior.[3]

4. Al-x: How Sacrificial Camels Are to Be Driven to Pilgrimage:

> Mālik cites seven āthār which tell of how ᶜAbd-Allāh ibn ᶜUmar used to prepare sacrificial camels which he would drive to Makkah to be sacrificed at the conclusion of the pilgrimage. The reports contain some statements he made about these animals, such as, for example, what

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[1] See above, pp. 576-582.

[2] See Muwaṭṭa', 1:44-45; ash-Shaibānī quotes Mālik as having said that Ibn ᶜUmar's putting water in his eyes while bathing is not ᶜamal; ash-Shaibānī, Muwaṭṭa', p. 45.

the minimum age of such animals should be. The reports tell how he would decorate these camels, where he would take them, how he would sacrifice them, and what he would say when doing so. They report how he would decorate the Kaᶜbah with the expensive cloth he had decorated these animals with,or how in other instances he would give that cloth as charity to the poor. They report how he would eat some of the meat from the camels himself and give the remainder to the poor. Mālik concludes the chapter with a report according to which ᶜUrwah ibn az-Zubair enjoined his children never to take such an animal as a sacrificial animal in pilgrimage which they would be ashamed of giving as a gift to one who had been very generous to them. He explains that God is the most generous of all beings and that, therefore, it is most fitting that excellent animals be sacrificed for His sake during the pilgrimage.[1]

There was general agreement among the fuqahā' on most of the ᶜamal set forth in this chapter, with disagreements on only one point, as far as I know. Mālik reports that Ibn ᶜUmar would mark his sacrificial camels by inflicting a cut in the left side of their humps. (This wounding is called "'ishᶜār" [marking]). 'Abū Ḥanīfah is reported to have objected to the practice of 'ishᶜār, because he regarded it as an instance of mutilation and reasoned that the Prophet had forbidden the mutilation of animals. It is also reported that 'Ibrāhīm an-Nakhaᶜī held this opinion.[2] Other fuqahā' argued, however, that 'ishᶜār was part of the sunnah of the Prophet which he had done during the last year of his life, as reported in various ḥadīth. They argued, furthermore, that 'ishᶜār, like branding, is supposed to be done in such a manner as not to injure the animal's health. The

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[1]Muwaṭṭa', 1:379-380. [2]Az-Zurqānī, 3:158-159; al-Bājī, 2:312.

purpose of 'ish^{c}ār, these fuqahā' are said to have reasoned, was that it enabled the poor to identify which animals were bound for sacrifice so that they could follow those animals and be present at the sacrifice in order to receive a share of the animal's meat. They added that by doing 'ish^{c}ār sacrificial animals could be identified if they broke away or got lost; poor people who found them would be able to sacrifice and eat them.[1] It is reported that 'Abū Yūsuf and ash-Shaibānī disagreed with 'Abū Ḥanīfah regarding 'ish^{c}ār, but, although they regarded it to be part of the sunnah, they held, in contrast to Mālik's ^{c}amal, that 'ish^{c}ār was to be done on the right and not the left side of the camel's hump and supported their position by reports to that effect.[2]

This ^{c}amal chapter pertains again characteristically to a ritual of worship. Mālik surely would have regarded it to be of the category of ^{c}amal naqlī, even though he cites no ḥadīth from the Prophet. Az-Zurqānī points out that several of Ibn ^{c}Umar's actions in this chapter are supported by Qur'ānic verses.[3] Az-Zurqānī and al-Bājī also cite several ḥadīth of well-established authenticity supporting the ^{c}amal of this chapter.[4]

Mālik's almost exclusive reliance in this chapter upon

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[1]Az-Zurqānī, 3:159. [2]Ibid., 3:158.

[3]Ibid.; see Qur'ān, 2:196; 22:36, 28.

[4]Az-Zurqānī, 3:158-160; al-Bājī, 2:312-315.

the statements and actions of Ibn ᶜUmar is, I believe, another illustration of his reliance upon prominent Companions to verify the content of Prophetic sunnah.[1] Material cited elsewhere in the Muwaṭṭa'--such as, for example, the āthār in the ᶜamal chapter on how to sit while performing ṣalāh--indicate Ibn ᶜUmar's concern that the sunnah of the Prophet be followed. In that example, Ibn ᶜUmar is himself unable to practice the Prophet's sunnah because of a physical disability, and he enjoins different persons not to follow his example in that case but to follow the sunnah of ṣalāh instead.[2] Mālik's heavy reliance upon Ibn ᶜUmar in this and other examples indicates his high estimation of Ibn ᶜUmar as a close adherent to the sunnah. Mālik must have regarded him to be of the same category in that regard as his father, ᶜUmar ibn al-Khaṭṭāb, and the other early caliphs, whom Mālik alludes to in his letter to al-Laith ibn Saᶜd and whom he describes as having followed the Prophet more closely than anyone else in his community ['ummah]. Mālik states in that letter how these prominent Companions would follow what they had learned from the Prophet, how they would inquire of other Companions about that of which they had no knowledge, and how they would perform ijtihād in other matters on the basis of their knowledge and their recent experience with the Prophet.[3]

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[1]See above, pp. 161-170. [2]See above, pp. 656-658.

[3]See above, pp. 316-317.

It is unlikely, however, that Mālik would have regarded these several āthār of Ibn ᶜUmar's actions to be an indication of ᶜamal if they did not correspond to Madīnan ᶜamal. Although Mālik adds no additional details to the precepts as set forth in these āthār, he indicates by placing them in an ᶜamal chapter that he regards them to reflect a desired norm. There are, of course, other instances where Mālik regards actions of Ibn ᶜUmar, other prominent Companions, or even the Prophet not to reflect normative behavior, and this appears to be another illustration of how ᶜamal is used to differentiate between reports of normative and non-normative behavior.[1] One is reminded in this regard of the quotation of Ibn al-Qāsim in the Mudawwanah in which he makes the Mālikī principle clear that legal texts are not regarded as having any value in practice unless they have been accompanied by ᶜamal.[2] For Mālik it is the non-textual source of Madīnan ᶜamal which is the primary referent in evaluating, interpreting, or setting aside the textual sources of law.

5. Alx: Washing the Bodies of Martyrs before Their Burial

> Mālik cites an 'athar which states that ᶜUmar ibn al-Khaṭṭāb's body was washed, shrouded, prayed upon, and then buried and that he died a martyr [shahīd]. Mālik states after this 'athar that it is the sunnah that martyrs who die on the battlefield before their bodies can be rescued are buried in the clothing in which they died; their bodies are not washed, and fun-

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[1] See above, 465-474.

[2] See above, pp. 180-181.

eral prayers are not said for them. Mālik states that he has heard report of this from the people of knowledge, and he adds that the bodies of martyrs who live for whatever time God wills after the battle are washed, shrouded, and prayed over, as was the ᶜamal in the case of ᶜUmar ibn al-Khaṭṭāb.[1]

Saᶜīd ibn al-Musayyab and al-Ḥasan al-Baṣrī are reported to have disagreed with this precept. They held that the bodies of all martyrs, whether they die on or off the battlefield, are to be washed, shrouded, prayed over, and buried like anyone else. 'Abū Ḥanīfah held, like Mālik, that the bodies of martyrs who died on the battlefield were not to be washed or shrouded; he held, however, that funeral prayers should be conducted for all martyrs.[2] According to al-Bājī there was consensus among the fuqahā' regarding the correctness of the procedure which was followed in the case of ᶜUmar ibn al-Khaṭṭāb, who remained alive for a considerable time after receiving the stab wound from which he died and who had not been wounded in battle.[3]

Mālik's use of the sunnah term is noteworthy. It is used for a matter regarding which there had been significant differences of opinion, even from the prominent Madīnan faqīh Saᶜīd ibn al-Musayyab. Mālik gives no indication of there being local consensus behind this sunnah precept; he states simply that it is the sunnah but not that it is the S-XN, for example. It is a sunnah precept, nevertheless,

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[1]Muwaṭṭa', 2:463. [2]Al-Bājī, 3:210; Ibn Rushd, 1:133 (15).

[3]Al-Bājī, 3:210.

that was also a part of ᶜamal, as indicated by its being included in an ᶜamal chapter. Thus, this would appear to be another example of a type of Madīnan ᶜamal for which there was no local consensus among the people of knowledge in Madīnah. The burial of martyrs on the battlefield, one would assume, would come under the authority of the 'amīr [commander] or some other executive authority. It might also be noted that this sunnah precept is contrary to analogy with related precepts of law, which--as pointed out earlier--appears to be a common characteristic of Mālik's sunnah terms.[1] The bodies of martyrs who die on the battlefield are not, according to Mālik, to be buried in a manner analogous to people who die under other circumstances.

The content of this ᶜamal chapter pertains again to rituals that are connected to worship. Similarly, the precepts in this chapter would appear to be of the category of ᶜamal naqlī. Al-Bājī states that the sunnah precept is in keeping with a ḥadīth, regarded to be authentic, according to which the Prophet did not wash, shroud, or pray over the bodies of the martyrs who were killed at the battle of 'Uḥud.[2] Mālik, however, cites no supporting legal texts but provides the precept instead from a summary of what he has heard from the people of knowledge, which is supported by ᶜamal in turn, and he explains the reason for the difference

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[1]See above, pp. 576-582. [2]Al-Bājī, 3:210.

between the sunnah precept and the procedure which was followed in the case of ᶜUmar ibn al-Khaṭṭāb.

6. Al-ʿAqīqah: Sacrificing a Sheep Upon the Birth of a Child

Mālik begins the chapter by citing four reports and ends by elaborating the precept of ᶜaqīqah, i.e., the rite of sacrificing a sheep upon the birth of a child. The first 'athar reports that ᶜAbd-Allāh ibn ᶜUmar would always provide a sheep for ᶜaqīqah to any member of his family who asked for it; he would sacrifice one sheep for each newly born child, whether it was a boy or a girl. The second report states that 'Ibrāhīm ibn al-Ḥārith[1] used to say that it was preferable that ᶜaqīqah be done, even if with only a small bird. The third report relates that ᶜaqīqah was performed in the case of Ḥasan and Ḥusain, the sons of ᶜAlī ibn 'Abī Ṭālib. The fourth reports that ᶜUrwah ibn az-Zubair used to perform ᶜaqīqah for each of his children and that he would sacrifice one sheep for each boy or girl. Mālik then states the AN regarding ᶜaqīqah. One sheep is sacrificed in ᶜaqīqah for either a boy or a girl. ᶜAqīqah is not obligatory [wājibah], but the ᶜamal of doing it is desirable [yustaḥabbu], and it is one of the customs ['amr] which the people among us have always held to.[2] Mālik continues to say that ᶜaqīqah is analogous to [bi-manzilat] other types of ritual sacrifice; hence, animals that are one-eyed, emaciated, or sick or which have broken bones are not acceptable. Neither the meat or hide of the ᶜaqīqah are to be sold. The bones of the ᶜaqīqah may be broken [when it is being cut up after slaughter]. The family performing the ᶜaqīqah eats part of the meat and gives part of it as charity. None of the blood from the ᶜaqīqah is to be smeared on the head of the child.[3]

Al-Laith ibn Saᶜd and Mālik's teacher 'Abū 'z-Zinād

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[1] IBRĀHĪM IBN AL-ḤĀRITH ibn Khālid at-Taimī al-Qurashī was the father of Muḥammad ibn 'Ibrāhīm ibn al-Ḥārith, who transmitted this 'athar to Rabīᶜah. 'Ibrāhīm made hijrah to Madīnah with his father, who had migrated to Ethiopia and came from there to Madīnah. Some of his brothers and sisters died in Ethiopia on their way to Madīnah after drinking from a stagnant, toxic pool. Ibn Ḥajar, Al-'Iṣābah, 1:15.

[2] Arabic: "Wa hiya min al-'amr al-ladhī lam yazal ᶜalaihi 'n-nās ᶜindanā."

[3] Muwaṭṭa', 2:501-502.

ibn Dhakwān[1] are reported to have held contrary to Mālik's AN that ᶜaqīqah was obligatory [wājibah] and not merely desirable.[2] Mālik's use of the term AN may reflect this difference of opinion in Madīnah. This would be another instance of al-Laith ibn Saᶜd's disagreeing on a matter about which the Madīnans themselves had disagreed, whereas in his letter to Mālik he describes himself as the closest of followers to the Madīnans in those matters upon which they had reached consensus.[3]

Al-Ḥasan al-Baṣrī is reported to have held that ᶜaqīqah is performed in the case of boys but not in the case of girls; according to Ibn Rushd, this opinion was unique to al-Ḥasan. Both al-Ḥasan al-Baṣrī and his student Qatādah[4] are also reported to have held that cotton should be dipped in the blood from the ᶜaqīqah and that it should be daubed on the head of the infant.[5] Mālik holds, of course, that blood from the ᶜaqīqah is not supposed to be put on the head of the child. It is said that smearing the blood of the ᶜaqīqah on the head of the child was part of the pre-Islamic way of doing ᶜaqīqah and was rejected by Islam. Similar-

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[1]See above, pp. 63-64, n. 2. [2]Az-Zurqānī, 3:420.

[3]See above, pp. 321-330.

[4]QATĀDAH ibn Diᶜāmah as-Sadūsī (60-118/679-736) was a younger Successor and student of al-Ḥasan al-Baṣrī and several other older Successors. He was an important faqīh and Qur'ānic commentator. Qatādah was also known for his knowledge of Arabic poetry, genealogy, and history. Sezgin, 1:31.

[5]Ibn Rushd, (Istiqāmah), 1:449-450.

ly, it is said that the permission to break the bones of the ᶜaqīqah after it had been slaughtered constituted a rejection of the pre-Islamic practice of ᶜaqīqah, according to which the meat had to be severed at the joints and no bones could be broken. The reason for this, as az-Zurqānī indicates, was probably because the pre-Islamic Arabs looked upon breaking the bones as an ill omen for the child's health and safety.[1]

Ash-Shaibānī states in his recension of the Muwaṭṭa' that ᶜaqīqah was a pre-Islamic custom which had been practiced during the first part of the Prophet's career but was later abrogated. He then states that the ᶜīd of sacrifice [ᶜīd al-'aḍḥā; the second ᶜīd] abrogated all types of sacrifice that had been before it; the fast of Ramaḍān abrogated all types of fasting that had preceded it; ghusl al-janābah--a type of bath one gives oneself after sexual relations with one's marital partner--abrogated all preceding rites of bathing; and zakāh abrogated the types of charity which had preceded it.[2] Somewhat similarly, 'Abū Ḥanīfah is said to have held that ᶜaqīqah was neither obligatory nor a part of the sunnah. He held, rather, that it is something one is permitted to do voluntarily [taṭawwuᶜ], and, unlike Mālik, he held that one should sacrifice two sheep for a boy and one for a

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[1]Az-Zurqānī, 3:420; al-Bājī, 3:103-104; Ibn Rushd, (Istiqāmah), 1:449-450.

[2]Ash-Shaibānī, Muwaṭṭa', p. 226.

girl, which is supported by certain ḥadīth which report the Prophet having sacrificed two sheep each for Ḥasan and Ḥusain.[1]

Again the precept in this ᶜamal chapter is a matter of ritual, and it is of the category of ᶜamal naqlī. It is a pre-Islamic custom which, as the preceding discussion indicates, had been modified somewhat with the coming of Islam. Furthermore, Mālik cites a ḥadīth just prior to this ᶜamal chapter which indicates that the Prophet permitted ᶜaqīqah, although he apparently disliked its name because of the connection between it and "ᶜuqūq" [disobedience (to God, parents, etc.)] which comes from the same verbal root. He then cites two āthār which give information about how Fāṭimah, the Prophet's daughter, performed ᶜaqīqah in the case of her sons and daughters, Ḥasan, Ḥusain, Zainab, and 'Umm Kulthūm.[2] The expression that Mālik uses at the end of the ᶜamal chapter indicates that ᶜaqīqah is a well-established Madīnan ᶜamal with continuity over the past back to the time of the Prophet: "it is one of the customs ['amr] which the people among us have always been holding to."

Mālik cites several texts in this ᶜamal chapter which give some of the details of the AN precept which comes at the end, such as, for example, the point that ᶜaqīqah consists of one sheep for each child, whether a girl or a boy. Much

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[1]Al-Bājī, 3:102; az-Zurqānī, 3:419; Ibn Rushd, (Istiqāmah), 1:448-449.

[2]Muwaṭṭa', 2:500-501.

of the information in the AN precept, however, is taken directly from ᶜamal without any textual references, such as, for example, the details that the bones of the ᶜaqīqah may be broken when it is being cut up and that none of the blood from the ᶜaqīqah is to be put on the head of the child.

The āthār which Mālik cites just prior to this ᶜamal chapter state that Fāṭimah, the daughter of the Prophet, used to shave off the hair of her children when performing ᶜaqīqah for them and give the weight of their hair in silver as charity. By not including these āthār in the ᶜamal chapter, Mālik is indicating, I believe, that he does not regard this practice of Fāṭimah to be part of the normative ᶜamal of ᶜaqīqah.[1] Mālik has probably drawn this distinction between these actions which Fāṭimah is reported to have done and the actions which ᶜAbd-Allāh ibn ᶜUmar and ᶜUrwah ibn az-Zubair are reported to have done, which are in the ᶜamal chapter, on the basis of his knowledge of the normative ᶜamal of Madīnah. Thus, this would be another example of Mālik's reliance upon the non-textual source of Madīnan ᶜamal to differentiate between legal texts that report normative actions and texts that report non-normative actions.[2]

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[1]Compare, for example, the ᶜamal chapter discussed earlier regarding whether or not having a nosebleed breaks wuḍū'. Mālik cites reports of actions prior to the ᶜamal chapter which he does not regard to be normative, and he includes the reports of actions which he regards to be normative in the ᶜamal chapter. See above, pp. 188-195.

[2]See above, pp. 436-481.

Finally, one should note Mālik's use of analogical reasoning in his discussion of the ᶜamal of ᶜaqīqah. He states that it is analogous to [bi-manzilat; lit., of the same status as] other types of ritual sacrifice. He then states a consequence of that analogy, namely, that animals which are one-eyed, emaciated, sick or which have broken bones are not to be used in ᶜaqīqah just as they are not suitable in other types of ritual sacrifice.

7. Alx: The Size of the Diyah in Gold and Silver

> Mālik cites a report which states that ᶜUmar ibn al-Khaṭṭāb assessed [qawwama] the diyah [indemnity][for manslaughter or murder] at 1000 pieces of gold for people who used gold currency ['ahl adh-dhahab] and 12,000 pieces of silver for people who used silver currency ['ahl al-wariq]. Mālik then explains that the Syrians and Egyptians are users of gold and the Iraqis are users of silver. He states that he has heard it transmitted that the diyah is to be given in installments over three years or four years. He states that the installment period of three years is the preferable period to him regarding what he has heard transmitted in this matter. Finally, Mālik states that it is the AMN that camels are not an acceptable diyah for users of gold and silver, and gold and silver are not acceptable diyah's for people who use camels ['ahl al-ᶜamūd; lit., the tent dwellers; i.e., the bedouins]. Similarly, gold is not an acceptable diyah for users of silver, and silver is not an acceptable diyah for users of gold.[1]

There was a difference of opinion between 'Abū Ḥanīfah and the Madīnans on the size of the silver diyah. 'Abū Ḥanīfah claimed that ᶜUmar had set it at 10,000 pieces of silver instead of 12,000. Ash-Shaibānī, as noted earlier,

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[1]Muwaṭṭa', 2:850.

held that the ratio between gold and silver currencies was 1:10, as in the case of the relationship between the amounts of gold and silver upon which zakāh is taken; the Madīnans held, on the other hand, that the 1:10 relationship between gold and silver in zakāh is contrary to analogy and that the correct ratio between gold and silver currencies was 1:12, as reflected in Mālik's 'athar about ᶜUmar ibn al-Khaṭṭāb.[1] The difference of opinion between the Madīnans and Kūfans in this matter, furthermore, is one in which each side has āthār that contradict the contentions of the other.

In so far as the AMN precept in this example is concerned, namely, that camels do not constitute an acceptable diyah for users of gold and silver, and so forth, I have been unable to find accounts on to what extent it was a matter of agreement or disagreement among the fuqahā'. The source of this AMN precept is not clearly given. It is a precept, however, which would have probably been articulated after ᶜUmar ibn al-Khaṭṭāb had assessed the diyah's for gold and silver. I think it is unlikely that the relationship between diyah's in camels--the diyah in camels is said to be the only diyah which authentic ḥadīth report the Prophet as having set[2]--and diyah's in gold and silver would have been made clear at a time when the diyah's in gold and silver

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[1] See above, pp. 553-554, and al-Bājī, 7:68; az-Zurqānī, 5:137-139; Ibn Rushd, 2:248 (8).

[2] See Muwaṭṭa', 2:849 and above citations.

had not yet been assessed officially. It would appear, therefore, that this AMN precept goes back to the ijtihād of the Madīnan fuqahā'. It may well be that it goes back to the ijtihād of the Companions and was done after the assessment of the gold and silver diyah's. Even that, however, is a matter of speculation and is not clearly indicated in the text.

Unlike the previous ᶜamal chapters, the precept of this chapter does not pertain to a ritual of worship; as mentioned earlier, it is exceptional in that regard.[1] The basis upon which ᶜUmar ibn al-Khaṭṭāb made his assessment of the diyah's of gold and silver is also not clear from the text. Many held that it was the product of ᶜUmar's ijtihād and was based on the value in terms of gold and silver of the diyah of camels, which the Prophet had set at 100 camels. This was to be ash-Shāfiᶜī's opinion also, and he held for that reason, in contrast to 'Abū Ḥanīfah and Mālik, that the diyah's of gold and silver are not fixed amounts but vary with the fluctuation of the value of the 100 camels which make up the camel diyah.[2]

Some held, however, as al-Bājī indicates, that ᶜUmar's assessment of the diyah's of gold and silver had been based on knowledge which he had from the Prophet and not on the

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[1] See above, pp. 673-677.

[2] Al-Bājī, 7:68-69; az-Zurqānī, 5:137-139; Ibn Rushd, 2:248 (8).

basis of the monetary value of the diyah of camels. Al-Bājī adds that there is a ḥadīth which supports this interpretation but that it is not regarded as having well-established authenticity. It would appear likely, however, that both 'Abū Ḥanīfah and Mālik regarded the diyah's which ᶜUmar ibn al-Khaṭṭāb established in gold and silver to have been based on knowledge which he had from the Prophet since neither of them is reported to have held that the amount of these diyah's could fluctuate with the market value of camels. Hence, as al-Bājī indicates, they must have regarded these monetary diyah's to have been established independently.[1] In such a case the ᶜamal regarding the size of the diyah's in gold and silver would be of the category of ᶜamal naqlī. Nevertheless, placing it in that category is a matter of conjecture, and Mālik again does not give any apparent indication of what he regarded the ultimate source of this ᶜamal to have been. He undoubtedly regarded this ᶜamal to be authoritative, however, and one may reflect in that regard on Mālik's comments on the authoritativeness of the early caliphs in his letter to al-Laith ibn Saᶜd.[2]

Finally, Mālik indicates in this chapter that he has heard two opinions from the Madīnan ᶜulamā' regarding the installment periods over which diyah's are to be paid. Some have told him that it should be a three year period, and oth-

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[1]Al-Bājī, 7:68. [2]See above, pp. 314-321.

ers have told him that it should be four. Mālik then states that his preference regarding that which he has heard transmitted in this matter is that it be three years. Since both of these opinions are included in the ᶜamal chapter, this would be another instance of mixed ᶜamal, I believe, as in the ᶜamal chapter on masḥ.[1] In this case, however, the ᶜamal comes under the authority of the judiciary. Thus, this must have been a mixed judicial ᶜamal. Some judges must have handed down rulings stipulating a three years period, while other judges stipulated four, or the judges may have alternated between these stipulated installment periods according to the circumstances of the cases that were brought before them.

Conclusions

The Affirmative ᶜAmal Terms

Most of the precepts which I analyzed in this chapter in connection with which Mālik uses affirmative ᶜamal terms involved differences of opinion between the Madīnans and Kūfans. In the second example of the chapter there was no difference of opinion among them regarding the precept which Mālik describes as continuous ᶜamal, namely, that musāqāh may be done on agricultural lands that contain some open areas, but 'Abū Ḥanīfah, Sufyān ath-Thawrī, Ibn 'Abī Lailā, ash-Shaibānī, and even the Egyptian al-Laith ibn Saᶜd are reported to have disagreed with Mālik's analogical rea-

[1] See above, pp. 652-656.

soning in the matter, by means of which he determined what the maximum amount of the open agricultural land could be on such properties before musāqāh would be prohibited.[1] The fourth example involved a difference of opinion between the Madīnans, on the one hand, and the Kūfans and Baṣrans on the other. The third example involved a difference of opinion in Madīnah and is an example of Madīnan ᶜamal regarding which there was no local consensus but which was ᶜamal nevertheless. In that example I was unable to determine whether or not there was agreement or disagreement on the matter outside Madīnah; one might expect, however, that there was, that is, if ash-Shāfiᶜī's contention is correct that there was never a difference of opinion on a matter in Madīnah but that there were differences regarding it outside Madīnah as well.[2]

The first three affirmative ᶜamal precepts appear to be of the category of ᶜamal naqlī; the first two examples are instances of Mālik's using ᶜamal naqlī to provide legal information which is not to be found in the texts which he cites or for which he cites no legal texts at all. They pertain to the realm of ᶜumūm al-balwā: buying animals and making farming contracts on agricultural lands. In the first example Mālik indicates that the precept in question is supported by Madīnan local consensus and has continuity with past by citing the term -zxIb in connection with the affirma-

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[1]See above, pp. 618-623. [2]See above, pp. 343-348.