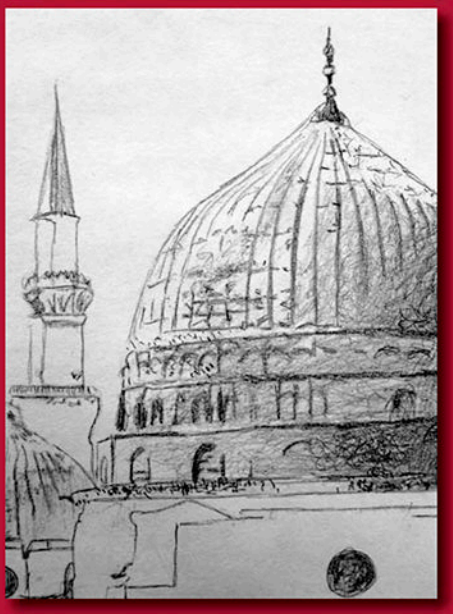
Mālik and Medina

Islamic Legal Reasoning in the Formative Period



BY

UMAR F. ABD-ALLAH WYMANN-LANDGRAF

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Umar F. Abd-Allah Wymann-Landgraf

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The serious reader of the history of other peoples and times must be prepared to think in novel ways. He must be prepared to absorb as readily as possible a whole range of new concepts and terms and attempt to do justice to human reality.

Marshall Hodgson, *The Venture of Islam*

The past is a foreign country; they do things differently there.

Leslie Poles Hartley, *The Go-Between*

CONTENTS

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INTRODUCTION

Mālik and Medina: Islamic Legal Reasoning in the Formative Period is an updated revision of my doctoral dissertation, "Mālik's Concept of *ʿAmal* in the Light of Mālikī Legal Theory,"[1] which I wrote at the University of Chicago in 1978 under the supervision of Fazlur Rahman, Wilferd Madelung, and Jaroslav Stetkevych. Neither the dissertation nor any part of it was ever published, although it was available through University Microfilms from the time of its acceptance. Although it received some attention in academic circles, the dissertation's principal findings and corollaries for modern research have until now remained largely outside the purview of contemporary academic study.

More than three decades have passed since the dissertation was written. The intervening period has witnessed rich and promising proliferation in Islamic studies, especially law and *ḥadīth*. Valuable primary sources have been published, and noteworthy research has appeared in secondary literature. In updating my doctoral research in *Mālik and Medina*, I have reviewed and utilized the academic contributions of the last decades, which has placed the original work on stronger foundations and made it a new book with important supplementary materials, corrections, and new insights. I hope it will constitute a positive addition to the study of Islamic legal origins and stimulate original research in this immensely important field, which, as Ignaz Goldziher recognized over a hundred years ago, is an indispensable part of the general study of Islam.[2]

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[1] Umar Abd-Allah, "Mālik's Concept of *ʿAmal* in the Light of Mālikī Legal Theory," henceforth cited as Abd-Allah, "*ʿAmal*."

[2] Ignaz Goldziher, *The Ẓāhirīs: Their Doctrine and Their History: A Contribution to the History of Islamic Theology*, xiii. Alfred von Kremer looks upon Islamic law as a unique historical achievement. He asserts that no other people of the early Middle Ages developed and scientifically worked out the idea of law into a system of similar magnificence which rivaled the Romans as lawgivers of the world (Alfred von Kremer, *Culturgeschichte des Orients unter den Chalifen*, 1:470). Legal study represents one of the earliest and longest lasting models of intellectual activity in Muslim culture. Traditionally, it lay at the core of all Islamic learning. Because of the centrality of law in the Islamic tradition, Muslim societies and cultures—even today—cannot be fully understood or properly accessed without familiarity with the nature, development, and content of the law.

Overview of the Book

Mālik and Medina is an analytical study of applied legal reasoning in the *Muwaṭṭaʾ* of Mālik ibn Anas (d. 179/795) and the *Mudawwana* of Saḥnūn ʿAbd al-Salām ibn Saʿīd (d. 240/854).[3] Both works stand out as pivotal legal compilations of the formative period and came to constitute the core of the Medinese tradition since the late third/ninth century.[4] I select representative samples of positive law from them with the aim of bringing to light relevant issues of local and regional consensus and dissent, and I attempt to elucidate the reasoning behind these positions as well as Mālik's use of terminology and personal commentary. Mālik's terminology in the *Muwaṭṭaʾ* and *Mudawwana* reflects his nuanced concept of Medinese praxis and other dimensions of his legal reasoning, especially his overriding concern for systematic analogy and non-analogical exceptions to it based on the *sunna*.

For purposes of simplicity and practicality, I devised symbols for Mālik's principal terms such as SN (for the *sunna* among us; *al-sunna ʿindanā*), S-XN (for the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*), AN (for the precept among us; *al-amr ʿindanā*), and AMN (for the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*). I left several other expressions, which I did not deem to be technically terminological, in their original Arabic with translation since I regard them as essentially commentary. S stands for "*sunna*," A for "*amr*" (precept), M signifies "concurred upon" (*mujtamaʿ*); N denotes "among us" (*ʿindanā*); the hyphen (-) stands for "no" (i.e., negation of dissent), and X stands for dissent (*ikhtilāf*). A key to all the symbols and a comprehensive index of Mālik's terms and expressions in the *Muwaṭṭaʾ* recension of Yaḥyā ibn Yaḥyā may be found in my dissertation, Appendix 2.[5]

Although *Mālik and Medina* focuses on Mālik and the Medinese heritage to which he belonged, it also constitutes a comparative study of early Islamic legal reasoning in general. The work provides a broad survey of law in the formative period as reflected in Medina as well as in other centers of early Islamic legal thought such as Kufa, Basra, Mecca, and Syria.

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[3] "Saḥnūn" means "joyful bird." ʿAbd al-Salām ibn Saʿīd was given this epithet because of his vitality and energy (Fuat Sezgin, *Geschichte des arabischen Schrifttums.* Vol. 1: *Qurʾānwissenschaften, Ḥadīṯ, Geschichte, Fiqh, Dogmatik, Mystik bis ca. 430 H*, 1:468).

[4] Miklos Muranyi, *Die Rechtsbücher des Qairawāners Saḥnūn b. Saʿīd: Entstehungsgeschichte und Werküberlieferung*, ix.

[5] Abd-Allah, "*ʿAmal*," 766–88.

In particular, it brings to light the legal reasoning of Mālik and his Kufan contemporary al-Nuʿmān ibn Thābit Abū Ḥanīfa (d. 150/767) as well as that of Muḥammad ibn Idrīs al-Shāfiʿī (d. 204/820) and Aḥmad ibn Ḥanbal (d. 241/855), who both belonged to the next generation.

Mālik and Medina is restricted to the Sunnī tradition of Islamic jurisprudence. I note that there may be a parallel to Shīʿī legal method in Mālik's invocation of the *sunna* in the *Muwaṭṭaʾ* for non-analogical precepts in delimiting the scope of analogical reasoning. Similarly, his use of standard precepts to extend the law into unprecedented areas is possibly akin to the Shīʿī principle of "transference of rulings" (*taʿdiyat al-ḥukm*).[6] Unfortunately, I found it beyond my capacity to expand the original parameters of my research to include adequate treatment of the non-Sunnī traditions of Islamic jurisprudence. Failure to examine the earliest Shīʿī and Khārijī (Ibāḍī) legal sources should not affect the present argument of *Mālik and Medina* in any substantial way. There is no doubt, however, that the historiography of Islamic legal origins will eventually require the broadest scope possible, and Sunnī, Shīʿī, and Khārijī materials must ultimately be studied comparatively.

Mālik and Medina is fundamentally concerned with Medinese praxis (*ʿamal*), a distinctive non-textual source of law which lay at the foundation of Medinese and subsequent Mālikī legal reasoning. The phenomenon of Medinese and non-Medinese praxis in early Islamic jurisprudence has long been a concern of academic study about Islamic legal origins and the growth of *ḥadīth* literature, especially in the influential work of Joseph Schacht. Many of the reigning paradigms and cognitive frames of Islamic law and *ḥadīth* studies in Western historiography are rooted in notions about the nature of praxis in the formative period, most notably as regards the relation between early legal doctrine and relevant bodies of *ḥadīth*.

Mālik and Medina demonstrates what Mālik conceived Medinese praxis to be, how he gauged its authenticity, and the methods by which he applied it in positive law. He consistently relies on Medinese praxis to accept, reject, generalize, delimit, qualify, and otherwise expand upon received legal texts from the Qurʾān, Prophetic *ḥadīth*, and post-Prophetic reports (*āthār*). A fundamental link also existed between Medinese praxis and Mālik's understanding and elaboration of the basic precepts and

[6] See Robert Gleave, "Imāmī Shīʿī Refutations of *Qiyās*," 287, henceforth cited as Gleave, "Refutations."

principles of Islamic law.[7] Even the juristic intuitions that underlie Mālik's distinctive use of considered opinion (*raʾy*)[8] and its chief Medinese composite elements of precept-based analogy (*al-qiyās ʿalā al-qiyās*; *al-qiyās ʿalā al-qawāʿid*), discretion (*istiḥsān*), preclusion (*sadd al-dharāʾiʿ*), and the unstated good (*al-maṣāliḥ al-mursala*) were grounded in standing local praxis.[9]

As noted, *Mālik and Medina* includes an analysis of the distinctive terminology and occasional commentary that Mālik uses in the *Muwaṭṭaʾ* as well as their intermittent parallels in the *Mudawwana*. Mālik's terminology is not rigorous. The terms and expressions he uses sometimes overlap. Nevertheless, they exhibit various distinct meanings and are not randomly interchangeable. Mālik's *sunna*-terms, for example, refer to rulings that

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[7] Throughout this work, I distinguish between "legal precepts" and "legal principles" based on the distinction between *al-qawāʿid al-fiqhiyya* (precepts) and *al-qawāʿid al-uṣūliyya* (principles) in much traditional and neo-traditional Islamic jurisprudential literature. Precepts are general formulations of law that pertain to specific branches of it such as marriage, inheritance, and contracts. Mālik is citing a precept, for example, when he states that "inheritance can only be distributed on the basis of certainty." Principles are broader and pertain to the overall application of the law in general without being limited to a particular branch. They are often expressed in the form of maxims such as "no harm shall be done [to others], nor shall harm be reciprocated [by harm]" (*lā ḍarar wa lā ḍirār*), which Mālik frequently cites and applies. Legal principles also pertain to general objectives of the law such as the removal of unwarranted difficulty (*rafʿ al-ḥaraj*), which underlies Mālik's application of discretion. See Muṣṭafā Saʿīd al-Khinn, *Āthār al-ikhtilāf fī al-qawāʿid al-uṣūliyya fī ikhtilāf al-fuqahāʾ*, 37, note 2; Sobhi Rajab Mahmassani, *Falsafat al-Tashrīʿ fī al-Islām: The Philosophy of Jurisprudence in Islam*, 151; Muḥammad Abū Zahra, *Abū Ḥanīfa: ḥayātuhū wa ʿaṣruhū, ārāʾuhū wa fiqhuhū*, 325, 337–39; Zakī al-Dīn Shaʿbān, *Uṣūl al-fiqh al-islāmī*, 149–53.

[8] Ahmed El Shamsy translates *raʾy* as "juristic reasoning," which he applies to the reasoning Islamic legists use outside the literal scope of the "sacred sources." He distinguishes between *raʾy* and *ijtihād* (legal interpretation), which is broader and may include activities such as a jurist's efforts to authenticate *ḥadīth*s (see Ahmed El Shamsy, "The First Shāfiʿī: The Traditionalist Legal Thought of Abū Yaʿqūb al-Buwayṭī [d. 231/846]," 309). I believe the term "juristic reasoning" is too narrow for *raʾy*, since *raʾy* often applied to the "sacred sources" just as it applied to arriving at legal judgments not specifically set forth in sacred texts. A jurist's determination to follow the overt (*ẓāhir*) implication of a sacred text, for example, is an example of *raʾy* as are the contrary determinations of jurists to follow interpretations contrary to a text's overt indications. I prefer to translate *raʾy* as "considered opinion," since I believe the term expresses the breadth the phenomenon of *raʾy* had in the formative period.

[9] Cf. Yasin Dutton, *The Origins of Islamic Law: The Qurʾān, the Muwaṭṭaʾ, and Madīnan ʿAmal*, 34. Dutton observes that considered opinion (*raʾy*) as used in the formative period was a "composite term." It included various methods of legal reasoning, especially discretion (*istiḥsān*), preclusion (*sadd al-dharāʾiʿ*), and the unstated good (*al-maṣāliḥ al-mursala*). Mālik's use of considered opinion was distinctive in that its foundational referent was the praxis of Medina and the general good (*maṣlaḥa*). These two referents always provide keys to understanding Mālik's legal reasoning.

originated in the Prophetic *sunna*, early caliphal praxis, or pre-Islamic custom, which then continued as Medinese praxis. But the *sunna*-terms are systematically contrary to analogy with related Medinese precepts of law. When Mālik cites terms that are consistent with standard legal analogues, he uses other terms, his *amr*-terms (precept-terms) being the most common. With few exceptions, Mālik's *amr*-terms counterbalance the logic of his *sunna*-terms. The *amr*-terms also tend to be analogical and constitute the basis of Mālik's legal deductions and his standard elaborations of the law.

My analysis of Mālik's terminology indicates that Medinese consensus (*ijmāʿ ahl al-Madīna*) and local praxis were not coextensive, contrary to what has been almost universally assumed in modern and pre-modern scholarship. Mālik's terminology distinguishes between different strata of praxis, some with absolute Medinese juristic consensus, others with preponderant local concurrence, but many of them reflecting noteworthy internal and external dissent. Every instance of Medinese consensus belonged to Medinese praxis, but not every aspect of Medinese praxis enjoyed the consensus of all prominent Medinese legal scholars. Rulings that did not enjoy consensus sometimes seem to have been instituted into local praxis because they fell under the jurisdiction of the city's judiciary or other types of executive authority. In some cases, no given practice predominated, with the result that Medinese praxis was "mixed." One alternative type of local praxis coexisted side-by-side with another.

In his *Origins of Islamic Jurisprudence*, Harald Motzki resolves "to leave aside generalizing preconceptions about the reliability of textual elements, such as *isnād*s and *mutūn*, or the genres of sources, such as Prophetic *ḥadīth* or biographical reports." In the process, he "does not take for granted special characteristics of the transmission process such as stability, creativity, organic growth, and the like."[10] Jonathan Brockopp suggests that scholars of Islamic legal origins "turn away from historical questions of dating [the] components" in available legal texts and concentrate first on fully addressing their contents.[11] My approach in *Mālik and Medina* is based on a similar perspective. I believe that analysis of the content of received texts is fundamental and preliminary. It must logically precede

[10] Harald Motzki, *The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools*, xvii, henceforth cited as Motzki, *Origins*.

[11] Jonathan Brockopp, "Literary Genealogies from the Mosque-Library of Kairouan," 398, henceforth cited as Brockopp, "Genealogies."

secondary generalizations about where those texts belong in the process of historical development and how they should be dated.

I review recent research on the textual history of the *Muwaṭṭaʾ* and *Mudawwana* without, however, attempting to establish authenticity, authorship, or dates. Regarding Norman Calder's attempt to revise and invert the dating of both works,[12] *Mālik and Medina* shows that the *Muwaṭṭaʾ* antedates the *Mudawwana* and serves as the latter's basic frame of reference. Throughout the *Mudawwana*, Saḥnūn gives direct citations from Mālik's *Muwaṭṭaʾ*, transmitting consistently from the early recensions of ʿAbd-Allāh ibn Wahb ibn Muslim (d. 197/812), ʿAbd al-Raḥmān ibn al-Qāsim al-ʿUtaqī (d. 191/806), and ʿAlī ibn Ziyād (d. 183/799), which were the principal editions used in North Africa.[13] The *Mudawwana* even refers explicitly to the *Muwaṭṭaʾ* by name. Ibn al-Qāsim draws Saḥnūn's

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[12] See Norman Calder, *Studies in Early Muslim Jurisprudence*, 24–30.

[13] Miklos Muranyi, "Die frühe Rechtsliteratur zwischen Quellenanalyse und Fiktion," 230–31, henceforth cited as Muranyi, "Frühe Rechtsliteratur;" idem, *Beiträge zur Geschichte der Ḥadīṯ- und Rechtsgelehrsamkeit der Mālikiyya in Nordafrika bis zum 5 Jh. d. H: Biobibliographische Notizen aus der Moscheebibliothek von Qairawān*, 8; idem, *Ein altes Fragment medinensischer Jurizprudenz aus Qairawān aus dem Kitāb al-Ḥaǧǧ des ʿAbd al-ʿAzīz b. ʿAbd Allāh b. Abī Salama al-Māǧišūn (st. 164/780–81)*, 38, henceforth cited as Muranyi, *Fragment*. Ibn Ziyād was one of Saḥnūn's teachers and an important source for the *Mudawwana*. Saḥnūn knew and used his recension of the *Muwaṭṭaʾ* in the *Mudawwana* but did not give it prominence (idem, *Beiträge*, 8). For example, see Saḥnūn ibn Saʿīd, *al-Mudawwana al-kubrā* (1906), 1:157, henceforth cited as *Mud.* Saḥnūn gives here a relatively lengthy citation from the *Muwaṭṭaʾ* of Ibn Ziyād (the passage has been lost in the short and highly fragmentary printed edition of Ibn Ziyād's recension of the *Muwaṭṭaʾ*). The passage cites Mālik's term "the precept among us" (*al-amr ʿindanā*; AN) on the definition of the festive days (*ayyām al-tashrīq*) following the pilgrimage. Ibn Ziyād's text is in general agreement with Mālik's "the precept among us" (*al-amr ʿindanā*; AN) as cited in the recensions of Yaḥyā, Abū Muṣʿab, and Suwayd, although there are differences in wording. Al-Qaʿnabī's recension does not have the chapter. (See *Muwaṭṭaʾ*, 1:404, henceforth cited as *Muw.*; *Muw.* [Dār al-Gharb], 1:540–41; *Muw.* [*Riwāyāt*], 2:576–77; *Muw.* [Abū Muṣʿab], 1:541–42; *Muw.* [Suwayd], 452.) In a second case (*Mud.*, 1:155), Saḥnūn cites Mālik's "the precept among us" (*al-amr ʿindanā*; AN) on the number of proclamations of God's greatness (*takbīrāt*) that are made in the annual festival (*ʿīd*) prayers. Saḥnūn gives essentially the same text as in the recensions of Yaḥyā, Abū Muṣʿab, al-Qaʿnabī, and Suwayd with slight variations in wording. The chapter is missing from the Ibn Ziyād fragment (see *Muw.*, 1:180; *Muw.* [Dār al-Gharb], 1:254; *Muw.* [*Riwāyāt*], 2:92; *Muw.* [Abū Muṣʿab], 1:229–30; *Muw.* [al-Qaʿnabī], 261; *Muw.* [Suwayd], 163–64). In a third example (*Mud.*, 3:6), Saḥnūn cites Mālik's term "the precept among us" (*al-amr ʿindanā*; AN) regarding the permissibility in Medinese law of advancing the deadline of payments for contracts of earned emancipation (*mukātaba*). Saḥnūn's wording differs slightly from the transmission of Yaḥyā and Abū Muṣʿab (see *Muw.*, 2:794–95; *Muw.* [Dār al-Gharb], 2:352–53; *Muw.* [Abū Muṣʿab], 2:439; *Muw.* [*Riwāyāt*], 4:82–83). The chapter is missing from the recensions of both Ibn Ziyād and al-Qaʿnabī, nor is it included in Suwayd's short chapter on the topic. Frequent citations from the *Muwaṭṭaʾ* in the *Mudawwana* are given in Part II of *Mālik and Medina*. For further cross references between the two works, see *Mud.*, 1:24, 40, 68, 70, 96, 99, 102, 103,

attention to "what Mālik said in his book the *Muwaṭṭa'*."[14] Mentioning books by their titles was rare in the literary culture of the time, which generally alluded to works only by citing their authors as transmitters in formal chains of transmission (*isnāds*). Ibn al-Qāsim's citation of the book's title reflects the prominence of the *Muwaṭṭa'*s status and its unique distinction among the legal works of the formative period.

Western study of Islamic law has shown much interest in the theoretical jurisprudence of Islamic legal theory (*uṣūl al-fiqh*). It has paid less attention to the practical application of positive law to specific cases (*furūʿ al-fiqh*) and the reasoning implicitly behind it.[15] *Mālik and Medina* is fundamentally concerned with special cases of substantive law as an empirical criterion for determining the nature of early Islamic legal reasoning. In focusing on formative-period positive law, the study brings to light the complexity and sophistication of early Medinese legal reasoning and its non-Medinese counterparts. It raises important questions about the complex and sometimes problematic relationship between post-formative Islamic legal theory and the earlier collections of positive law. The foundations of Islamic positive law were laid down in the formative period and remained essentially unchanged afterwards.[16] My findings have bearing

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112, 119, 125–26, 141, 142, 146, 152, 157, 194, 195, 209, 231, 242, 257, 281, 282, 289, 293–94, 296; 2:142, 149, 160, 210, 397; 3:113, 215–16; 4:70–71, 77, 106, 412.

[14] *Mud.*, 4:492; *Mud.* (1994), 4:646; *Mud.* (1999), 7:2587; *Mud.* (2002), 11:353.

[15] Stephen Humphreys, *Islamic History: A Framework for Inquiry*, 209.

[16] Kevin Reinhart notes that Western perspectives on Islamic legal reasoning have long been skewed by exclusive focus on Shāfiʿī and Ḥanafī works, while little attention has been given to the Mālikī perspective (Kevin Reinhart, "Like the Difference between Heaven and Earth: Ḥanafī and Shāfiʿī Discusions of *Farḍ* and *Wājib* in Theology and *Uṣūl*," 205, henceforth cited as Reinhart, "Difference"). Much of our conventional wisdom about early Islamic legal reasoning is, in fact, derived from reading polemical literature and later Islamic legal theory without correlating it to specific cases of positive law and the tangible reasoning that underlies them. The notion of "classical" four-source legal theory is rooted not only in generalizing on al-Shāfiʿī's legal theory as a point of reference but also in placing extensive reliance on post-formative readings of jurisprudence without correlating them adequately with positive law and the diverse legal methodologies of the respective Sunnī and non-Sunnī schools. Many of the dominant paradigms and most influential cognitive frames of modern studies on Islamic legal origins derive from Ignaz Goldziher's pioneering study of the rigorously literalist jurisprudence of Dāwūd al-Ẓāhirī as seen through the polemics of ʿAlī ibn Ḥazm (d. 456/1064). Goldziher's work was buttressed and refined by Joseph Schacht's subsequent reading of al-Shāfiʿī and his legal theory, which focused on *ḥadīth*-based legal reasoning. Robert Brunschvig drew attention to the effect of reading Islamic legal origins from an essentially text-based Shāfiʿī perspective and concluded that al-Shāfiʿī's "ingenious synthesis" had long skewed our historical perspective (Robert Brunschvig, "Polémiques médiévales autour du rite de Malik," 413; cf. Dutton, *Origins*, 5). Subsequently, George Makdisi drew attention to the historiographical pitfalls inherent in the interpretations of Goldziher and Schacht as a consequence of taking these quite

on how we understand, define, and date both the formative and post-formative periods, which will be addressed in the Conclusion.

Reconsidering Paradigms

Considered Opinion (Raʾy) *versus* Ḥadīth

Mālik and Medina offers a new historiographical perspective on Islamic legal origins based on the contention that the Medinese legal tradition, which constituted one of the most important branches of Islamic jurisprudence in the formative and post-formative periods, was rooted in a distinctively consistent and systematic pattern of juristic reasoning in which rationalistic considered opinion (*raʾy*) played a crucial role.[17] This assessment of the Medinese tradition challenges the prevalent paradigm that Islamic law in Medina was *ḥadīth*-based while its Kufan counterpart as exemplified in Mālik's contemporary Abū Ḥanīfa was rooted in the exercise of independent personal reasoning and free-ranging considered opinion (*raʾy*).[18]

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distinct but decidedly textualist jurisprudential outlooks as points of reference for understanding Islamic legal origins. (See George Makdisi, *The Rise of Humanism in Classical Islam and the Christian West with Special Reference to Scholasticism*, 2, 12, henceforth cited as Makdisi, *Humanism*.)

[17] Dutton's *Origins* offers a Mālikī perspective for Islamic legal origins. Unlike *Mālik and Medina*, Dutton's work focuses on the role of the Qurʾān in Mālik's legal reasoning and does not provide a comprehensive account of his legal method. Dutton's work is not comparative or concerned with tangential issues such as Mālik's interest in dissent. Dutton does not provide an analysis of the terminology of the *Muwaṭṭaʾ* and the *Mudawwana* but relies on my assessment of Medinese terminology in "*ʿAmal*." My conclusions in *Mālik and Medina* occasionally overlap with those of Dutton but often vary significantly.

[18] From at least the time of Joseph Schacht, academics have occasionally questioned the notion of a regional *raʾy-ḥadīth* dichotomy in the formative period of Islamic law and noted that Medinese jurisprudence constituted one of the primary traditions of considered opinion and bore similarities with the Kufan methodology of legal reasoning (see Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, 21–23, 27, 34; cf. Christopher Melchert, *Formation of the Sunni Schools of Law*, xix, xxvi, henceforth cited as Melchert, *Formation*; Kremer, *Culturgeschichte*, 1:499). Wael Hallaq notes a certain compatibility between the Ḥanafī and Mālikī traditions and the prominence of considered opinion and reflection (*naẓar*) in them both. He even asserts that Mālik "had the lion's share of such practices" (Wael Hallaq, *A History of Islamic Legal Theories: An introduction to Sunnī uṣūl al-fiqh*, 131). Christopher Melchert notes Schacht's awareness of the prominence of considered opinion in Mālik's legal reasoning. Based on his reading of biographical dictionaries, Melchert also questions the paradigm that the early Iraqi jurists (*fuqahāʾ*) were "proponents of considered opinion (*raʾy*)," while their Hijazi counterparts were "proponents of tradition" (*ḥadīth*) (see Christopher Melchert, "How Ḥanafism Came to Originate in Kufa and Traditionalism in Medina," 346, henceforth cited as Melchert, "Ḥanafism;" idem,

Considered opinion is one of the most complex terms of the formative period of Islamic law. It meant one thing in Medina and another in Kufa, although it flourished in both centers. As with all complex terms, "considered opinion" must be handled with care to avoid falling into historical conflations. Considered opinion was a generative concept, and the rationalist jurists (*fuqahāʾ*)[19] of the formative and post-formative periods who used it operated with "sophisticated tool kits."[20] But their reasoning is rarely transparent. Although early polemical attacks often portrayed their methods as arbitrary and baseless, the historian can never take for granted the opponents' point of view. We must be careful not to write off as arbitrary early legal reasoning based on considered opinion in the absence of careful study of its method and content as embedded and reflected in the legacy of positive law.

Considered opinion stood at the heart of the Medinese tradition and was the crowning achievement of Mālik's legal reasoning just as it was paramount in the Kufan jurisprudence of Abū Ḥanīfa. In the period of early Islamic jurisprudence, the term "considered opinion" was often praiseworthy and not derogatory.[21] In Mālik's Medina, both the concept, term, and practice of "considered opinion" were laudable if applied with skill and integrity. Rabīʿat al-Raʾy ("Rabīʿa famed for considered opinion") ibn Abī ʿAbd al-Raḥmān Farrūkh (d. 136/753), one of Mālik's foremost teachers, took his respectful epithet from sophisticated use of the technique.

Formation, xviii). Melchert observes that the common paradigm of a presumed dichotomy between Iraq with a legal methodology rooted in considered opinion and the *ḥadīth*-based Hijaz "makes a puzzle" of the strong *ḥadīth* movement that was rooted in Iraq in the formative period and later exemplified in Aḥmad ibn Ḥanbal. He notes that early testimonies bear witness to flourishing schools of *ḥadīth* in Kufa and Basra as well as in Mecca and Medina (Melchert, "Ḥanafism," 346; cf. Wael Hallaq, "Was al-Shāfiʿī the Master Architect of Islamic Jurisprudence?," 267, henceforth cited as Hallaq, "Master Architect?;" Christopher Melchert, "Traditionist-Jurisprudents in the Framing of Islamic Law," 386, henceforth cited as Melchert, "Traditionist-Jurisprudents").

[19] I use the word "jurist" for *faqīh*, scholar of positive law, and the word jurisprudent for *uṣūlī*, scholar of legal theory.

[20] El Shamsy, "First Shāfiʿī," 305.

[21] George Makdisi notes that the real traditionalist-rationalist antagonism of early Islam was between the proponents of *ḥadīth* and metaphysical (non-juristic) rationalists such as the Muʿtazila. (See George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West*, 7, henceforth cited as Makdisi, *Colleges*. Cf. Wael Hallaq, *The Origins and Evolution of Islamic Law*, 53, 75; idem, *History*, 131; Melchert, "Traditionist-Jurisprudents," 386–87; idem, "Ḥanafism," 329–30; idem, *Formation*, 165; David Sanitillana, *Istituzioni*, 1:36–37; Muranyi, *Fragment*, 36; Mohammad Fadel, "'*Istihsan* Is Nine-Tenths of the Law': The Puzzling Relationship of *Usul* to *Furuʿ* in the Maliki *Madhhab*," 161; Fazlur Rahman, *Islam*, 71–72; cf. Goldziher, *Ẓāhirīs*, 11, 16–18).

As Wael Hallaq observes, scholars known for sound considered opinion were widely regarded as people whose wisdom and judgment were to be both trusted and emulated.[22]

Mālik and Medina demonstrates that there are significant parallels as well as fundamental differences between Mālik's Medinese mode of legal reasoning and that of Kufan jurisprudence. Both the Medinese and Kufan legal methods relied heavily on the cultivation of considered opinion for assessing revealed legal texts or working in the absence of them. The nuanced rationalism of both techniques in working with texts contrasts with the more literal *ḥadīth*-based approaches of al-Shāfiʿī, Aḥmad ibn Ḥanbal, and Dāwūd al-Ẓāhirī (d. 297/910) of the subsequent generations, who differed markedly from each other but all reasoned on the basis of the overt (*ẓāhir*) implications of revealed texts.

Because of the prominence of considered opinion in Medina, *Mālik and Medina* shows that the postulated dichotomy dividing Kufan jurists into the "proponents of considered opinion" (*ahl al-raʾy*) and the Medinese into the "proponents of tradition" (*ahl al-ḥadīth*)—a paradigmatic dualism reaching back at least as far as the third/ninth century and later alluded to even by the great North African historiographer ʿAbd al-Raḥmān ibn Muḥammad ibn Khaldūn (d. 808/1406)[23]—is historically inaccurate and misleading.[24] In challenging this view, *Mālik and Medina* provides insights into the crucial nuances and complexities of the *ḥadīth-raʾy* phenomenon in early Islamic intellectual history.

It must be emphasized that the dichotomy between the proponents of considered opinion and the proponents of tradition remains a pivotal polarity distinguishing jurists from each other in the early period of Islamic law. But it was essentially an interpretative propensity and frame

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[22] See Hallaq, *Origins*, 53.

[23] Ibn Khaldūn was an accomplished judge, historian, and philosopher of history. He is also widely regarded as the forerunner of modern economics and sociology. Arnold Toynbee said of him, "He has conceived and formulated a philosophy of history which is undoubtedly the greatest work of its kind that has ever yet been created by any mind in any time or place" (Arnold Toynbee, *A Study of History*, 3:322; Franz Rosenthal, trans., *The Muqaddima: An Introduction to History*, 1:14; see also ʿAbd al-Raḥman ibn Muḥammad ibn Khaldūn, *Muqaddimat Ibn Khaldūn*; Charles Issawi, trans., *An Arab Philosophy of History: Selections from the Prolegomena of Ibn Khaldūn of Tunis [1332–1406]*). The well-known Scottish philosopher and theologian Robert Flint states about Ibn Khaldūn, "... Plato, Aristotle, and Augustine were not his peers, and all others were unworthy of being even mentioned along with him" (cited in Rosenthal, *Muqaddima*, 1:14).

[24] See Melchert, *Formation*, xviii; idem, "Ḥanafism," 346. The intellectual paradigm of a regionally based *ḥadīth-raʾy* polarity in the formative period of Islamic law is deeply rooted in classical Islamic historiography just as it is in much of modern scholarship.

of mind, which manifested itself at the level of individual jurists in all centers and was never strictly regional. Proper understanding of this phenomenon facilitates the construction of new and broader cognitive frames that allow us to make a more accurate reading of the complex and often seemingly contradictory primary materials of the formative period.

Even after dissociating the expressions "proponents of considered opinion" and "proponents of tradition" from fixed regions, we must exercise caution not to speak of groups of people as we speak of the individuals who make up those groups.[25] Linking the outlooks of individuals to the groups they nominally belong to must rest on sound empirical evidence and cannot be presumed on the basis of broad generalization or shared nomenclatures. Such caution must be applied to the constructs "proponents of considered opinion" and "proponents of tradition" when they are applied accurately and correctly to individual jurists in the formative period. It is a fallacy to presume that all of those identified with a particular group shared a single monolithic outlook. They often differed significantly in their personal approaches to considered opinion and *ḥadīth*, and, in cases such as Mālik and Ibn Rāhawayh, they may readily be associated with both groups.[26] Mālik and Abū Ḥanīfa differed predictably and consistently in their approaches to considered opinion. Likewise, al-Shāfiʿī, Ibn Ḥanbal, and Dāwūd al-Ẓāhirī, who belonged to the proponents of tradition, held distinctly different points of view about what types of *ḥadīth* and post-Prophetic reports (*āthār*) were valid and how they were to be used.

Comparing Mālik and Abū Ḥanīfa

In contrast to prevailing notions, one of the striking differences between the considered opinion of Mālik and Abū Ḥanīfa is that Abū Ḥanīfa was, surprisingly, more textually deferential and *ḥadīth*-oriented than Mālik. Mālik's considered opinion was largely precept- and principle-based, not to mention his characteristic reliance upon non-textual Medinese praxis. His application of considered opinion was consistently rooted in his perception of the general good (*al-maṣlaḥa*). The jurisprudence of Abū Ḥanīfa

[25] Metaphorically, we may speak, for example, of the "will of a nation" as a broad generalization for certain times and places, but it is a fallacy to infer from a "nation's will" that all persons belonging to that nation share its will and agree on the same opinions.

[26] For these two dimensions in Ibn Rāhawayh, see Susan Spectorsky, "*Sunnah* in the Responses of Isḥāq b. Rāhwayh," 51, 55, 68–73.

and his Kufan successors,[27] on the other hand, relied heavily and conspicuously on the principle of the generalization of legal proofs (*taʿmīm al-adilla*),[28] which constitutes one of the most distinctive aspects of Ḥanafī legal reasoning. Abū Ḥanīfa and his followers selected standard textual referents in the Qurʾān and normative *ḥadīth* and granted them the fullest reasonable application, conceding to them sweeping authority and treating them virtually as universal decrees of law. Examples of Abū Ḥanīfa's textually-based legal reasoning and his application of the generalization of proofs appear throughout *Mālik and Medina*.[29] As regards this systematic reliance on texts, the Kufan mode of legal reasoning bears notable similarity to the later jurisprudence of al-Shāfiʿī, whose methodological development may reflect the influence of his friend and sometime patron, Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189/805), one of the principal protagonists of the Kufan method.

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[27] In this work, Successor with a capital "s" refers to one of the *tābiʿīn*, a scholar of the generation following the Companions. When the word occurs with a lower case "s," as in the above example, it refers generically to any person who succeeds another as a scholar or teacher.

[28] Umar Abd-Allah, "Abū Ḥanīfa," 1:300; Abū Zahra, *Abū Ḥanīfa* (1965), 237–58; cf. idem, *al-Imām al-Ṣādiq: ḥayātuhū wa ʿaṣruhū, ārāʾuhū wa fiqhuhū*, 344–50.

[29] To illustrate the Ḥanafī position on the generalization of legal proofs, it was a widely accepted *sunna* to inflict a cut on the left side of the hump of camels (*al-hadī*) designated for sacrifice in the pilgrimage. Abū Ḥanīfa objected to this practice of "marking" (*ishʿār*) on the grounds that it constituted mutilation, and standard proof texts indicate that the Prophet forbade the mutilation of humans and animals alike. Abū Ḥanīfa's rejection of sacrificial marking was based on the generalization of standard prooftexts prohibiting mutilation (see Abd-Allah, "*ʿAmal*," 226–230; Muḥammad ibn ʿAbd al-Bāqī al-Zurqānī, *Sharḥ Muwaṭṭaʾ al-Imām Mālik*, 3:158–59; Sulaymān ibn Khalaf al-Bājī, *[al-Muntaqā]: Sharḥ Muwaṭṭaʾ Imām Dār al-Hijra, Sayyidinā Mālik ibn Anas*, henceforth cited as al-Bājī, *al-Muntaqā*, 2:312). Likewise, Abū Ḥanīfa modified the non-standard *sunna*-based procedure in the collective oath (*qasāma*), which was used as circumstantial evidence in cases of murder and involuntary manslaughter. Instead, he made it conform with standard legal oaths in Islamic law. Based on the generalization of standard oath texts, Abū Ḥanīfa dissented from the Medinese position regarding collective oaths. The Medinese regarded such oaths as valid on the basis of the *sunna* as reflected in Medinese praxis and a sound solitary *ḥadīth* although it was contrary to analogy with other legal oaths. Abū Ḥanīfa rejected the *ḥadīth*'s anomalous implications and insisted on bringing collective oaths into harmony with the general precepts of oaths in Islamic law on the basis of analogy with them (al-Bājī, *al-Muntaqā*, 7:55; Muḥammad ibn Aḥmad ibn Rushd [the Younger/al-Ḥafīd], *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid*, 2:421, henceforth cited as Ibn Rushd, *Bidāya* [Istiqāma]; al-Zurqānī, *Sharḥ*, 5:187). As will be shown, this generalizing aspect of Abū Ḥanīfa's reasoning is extensively attested in Mālik's terminology in the *Muwaṭṭaʾ*, in which Mālik repeatedly invokes *sunna*-terms to invalidate Abū Ḥanīfa's dissenting analogies, which were often based on the generalization of proofs. See Abd-Allah, "*ʿAmal*," 555–556, 571–75, 592–95, 606–07, 640–48, 661–64, 665–67, 696–99, 713–22.

Alfred von Kremer saw al-Shāfiʿī as mediating a compromise between the reasoning of Mālik and Abū Ḥanīfa. This paradigm continues to influence many prevailing interpretations of Islamic legal history. Von Kremer believed that al-Shāfiʿī remained closer to the "traditionalism" of Mālik than to the speculative nature of Abū Ḥanīfa.[30] As indicated, Mālik's legal method was hardly "traditionalist" in this sense. In reality, al-Shāfiʿī bears a stronger resemblance to the Kufan method in his systematic insistence on rooting legal precepts, principles, and applied analogies in cited texts, not in praxis or abstract legal principle. This parallel between the methodic textuality of Kufan legal reasoning and the later text-based methodology of al-Shāfiʿī is crucial for a more accurate understanding of the formation and development of Islamic jurisprudence.

Kufan legal methodology differed primarily from al-Shāfiʿī then—not in the principle of accepting the primacy of *ḥadīth* texts over praxis or abstract pragmatic reasoning—but in the designation of which categories of legal texts should constitute the basis of sound legal reasoning. Al-Shāfiʿī stands out among Sunnī jurists in his emphasis on the exclusive authority of the solitary connected *ḥadīth* (*ḥadīth al-āḥād al-musnad*) as a conclusive legal argument. Al-Shāfiʿī differs from other Sunnī schools, including the textually oriented Ḥanbalīs, in eliminating (as authoritative legal texts) the large body of disconnected *ḥadīth* (*al-ḥadīth al-mursal*) and post-Prophetic reports (*al-āthār*), which continued to stand as sound legal proofs in post-formative Mālikī, Ḥanafī, and Ḥanbalī legal doctrine just as they had earlier in the formative period.

Generally speaking, al-Shāfiʿī's method falls within the parameters of the proponents of tradition. But the proponents of tradition as a whole never fully accepted his approach. As a consequence, al-Shāfiʿī laid the foundations for a new and distinct school, which constituted a unique variation within the diverse *ḥadīth*-based legal methodologies of the early and later periods. It is inaccurate to presume that al-Shāfiʿī forged a middle way acceptable to all jurists which ultimately reconciled the proponents of considered opinion with the proponents of tradition and created a new and comprehensive synthesis of classical Islamic law based on a four-source theory of jurisprudence (Qurʾān, *sunna*, consensus, and analogy). There is profound continuity and internal coherence in legal method between the formative and post-formative periods of Islamic law. In the post-formative period, the Mālikī, Ḥanafī, Shāfiʿī, and Ḥanbalī schools

[30] Kremer, *Culturgeschichte*, 1:499.

continued to follow distinctly different legal methodologies—each of them rooted in their contrasting intellectual backgrounds from the formative period—which systematically account for their strikingly diverse formulations of positive law and their perseverance as classical schools of Islamic law in the post-formative period until the present.

As *Mālik and Medina* will show, Medinese legal reasoning constituted one of the most multiplex of all Sunnī legal methodologies. In terms of the multiplicity of its sources, it can only be compared to the Ḥanbalī school.[31] In addition to the Qurʾān, different gradations of *ḥadīth*, and post-Prophetic reports, Medinese jurists invoked their local praxis and consensus. They made prominent use of analogy, and they applied the inferential techniques of discretion, preclusion, and the unstated good. Surprisingly, analogy is as conspicuous in Mālik's method as in any of the early and later jurists, including Abū Ḥanīfa, who was known for his extensive reliance upon it.[32] Once again, however, Abū Ḥanīfa's concept of analogy was different. It was essentially text-based and rooted in the principle of the generalization of proofs.

Analysis of Mālik's terminology reflects a juristic epistemology in which analogy occupies the center as a powerfully authoritative legal instrument. To overrule its prerogative, Mālik characteristically invokes the *sunna*, which he uses as a special mandate to draw non-analogical exceptions to standard legal analogies.[33] As noted, Mālik's legal reasoning relied heavily on generalized precepts of law and broad abstract legal principles,

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[31] See Abd-Allah, "*ʿAmal*," 129–279, 363–67.

[32] The prominence of analogy in Medinese legal reasoning runs contrary to the standard assumptions of Islamic studies. Ignaz Goldziher regarded analogy as a "newly introduced legal source," which al-Shāfiʿī succeeded in giving disciplined application "without curtailing the prerogatives of scripture and tradition, and to restrict its free arbitrary application by means of methodical laws with respect to its usage" (Goldziher, *Ẓāhirīs*, 20–21). In the Shāfiʿī-based paradigm of four-source classical Islamic legal theory, analogical reasoning is regarded as a "compromise," which the proponents of tradition offered to accommodate the proponents of considered opinion (see Joseph Lowry, "Does Shāfiʿī Have a Theory of 'Four Sources' of Law?," 26, henceforth cited as Lowry, "Four Sources?").

[33] Mālik's *sunna*-terms index significant points of difference with the non-Medinese, precisely because the latter often applied relevant analogies to those same areas of law. For example, the Kufans treated wealth obtained through accretions (*fawāʾid*) such as wages, gifts, and inheritance as analogous for purposes of the alms tax to wealth accrued from profits on base capital. They regarded the mutual cursing (*liʿān*) of spouses due to unproven claims of adultery as analogous to repudiation (*ṭalāq*). Mālik and the Medinese, on the other hand, regarded each of these precepts as contrary to such analogies. In the *Muwaṭṭaʾ*, Mālik flags them all with *sunna*-terms, thereby signalling that there is something distinctive about them which makes them anomalous and excludes them from the typically authoritative domain of reasoned analogy (see Abd-Allah, "*ʿAmal*," 581–82).

which constituted the fulcrum of Medinese considered opinion. Interestingly, Mālik's method of analogy also followed this pattern. His approach differed distinctively from other Sunnī analogical methodologies in that Mālik generally based his analogies on earlier analogies, precepts, and maxims (as opposed to specific textual referents).[34] Post-formative Islamic legal theory referred to this type of distinctively Mālikī reasoning as "analogy based on analogy" (*al-qiyās ʿalā al-qiyās*) and "precept-based analogy" (*al-qiyās ʿalā al-qawāʿid*). It is abundantly evidenced in the *Muwaṭṭaʾ* and *Mudawwana*.[35]

By contrast, Kufan analogical reasoning was strictly and consistently textual. The Kufans established a body of standard legal texts through the generalization of proofs and relied on them for their analogies. Whenever they felt constrained by special circumstances to depart from these strict analogical norms, they followed discretion (*istiḥsān*), a legal principle which the the Medinese shared in name but conceived of and applied differently in practice. When applying the principle of discretion, the Kufans did so by reintegrating into their legal codex non-normative legal texts, which had not met the standards required for generalized proofs and would ordinarily have been left aside. Mālik and the Medinese, on the other hand, based their extensive use of discretion on the principle of the general good (*al-maṣlaḥa*), "removing hardship" (*rafʿ al-ḥaraj*), and broad understanding of the ultimate purposes of the law as embodied in Medinese praxis.[36]

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[34] For example, the right of growth (*ḥaqq al-tanmiya*) regarding acquired wealth constitutes a basic precept for Mālik in his application of the alms tax, and the precept that inheritance must be based on certainty informs many of his analogies regarding inheritance law (see Abd-Allah, "*ʿAmal*," 568–69, 628–29).

[35] See Abd-Allah, "*ʿAmal*," 97–107.

[36] For example, Abū Ḥanīfa regards sales contracts as immediately binding, which generally excluded the option to return purchased goods. He sometimes modifies this principle and allows return options on the basis of discretion based on a solitary *ḥadīth*, which, according to Abū Ḥanīfa's methodology, would not ordinarily be authoritative. This *ḥadīth* reports that the Prophet granted a certain Companion, Ḥabbān ibn Munqidh, who had weak intelligence and poor judgment, a three day option period on all purchases. On this basis, Abū Ḥanīfa allows for three day option periods in exceptional cases. Like Abū Ḥanīfa, Mālik contends unequivocally that sales contracts, once agreed, are immediately binding, but, through discretion based on praxis and the general good (*al-maṣlaḥa*), he allows for a wide variety of option periods differing in length. Mālik accepts the solitary *ḥadīth* about Ḥabbān ibn Munqidh, but he does not regard three day option periods as having universal validity. He asserts that option periods for returning defective purchased goods fluctuate according to the nature of the items purchased. A single day is sufficient for items of clothing, but months may be required for houses and real estate (see Abd-Allah, "*ʿAmal*," 643–49, 254–58).

Inferential juristic techniques such as discretion reflect an implicit juristic conviction that rigid application of precepts may defeat their legal purpose and lead to injustice in exceptional cases. Both the Medinese and the Kufans relied on distinctive legal techniques to provide for exceptions to general rules and set the boundaries of applied legal precepts. Discretion was among the most important of these for both groups, but the jurists of Medina also utilized the principle of preclusion (*sadd al-dharā'iʿ*). In the framework of Medinese legal reasoning, preclusion constituted the diametric opposite of discretion (*istiḥsān*). Both of these exception-drawing legal instruments were based on abstract, non-textually referential considerations rooted in the unique circumstances of special cases and a rational vision of the pragmatic purposes of the law under the principle of the general good. While the Medinese shared discretion with the Kufans and later Ḥanbalīs to the exclusion of the Shāfiʿīs, they held preclusion in common only with the Ḥanbalīs to the exclusion of both the Ḥanafīs and Shāfiʿīs. In its distinctively Medinese form, discretion consistently permits—because of extenuating conditions—what standard analogies disallow.[37] Preclusion consistently disallows—on the basis of suspect circumstances—what standard analogies ordinarily permit.[38]

Dissent in Early Islamic Law

Mālik's terminology in the *Muwaṭṭa'* indexes various types of Medinese praxis vis-à-vis the dissenting opinions of his predecessors and contemporaries both inside and outside of Medina. Mālik's attention to dissent in citing his terminology gives the *Muwaṭṭa'* a broad communal perspective and distinctive transregional scope. The same may be said of Saḥnūn's

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[37] For example, the general principle of Islamic law in sales transactions is that they must stipulate set quantities at agreed prices. On the basis of discretion as embodied in Medinese praxis, however, Mālik states that buyers have legitimate rights to all the produce from patches of watermelons, cucumbers, melons, carrots, and the like from the time the first fruits appear until the patches dry up at the end of the growing season despite the fact that it is impossible to know in advance what the quantity or quality of the produce will be (see Abd-Allah, "*ʿAmal*," 258–59).

[38] The Medinese applied the principle of preclusion regarding a parent's right to repossess a gift given to a son or daughter. Ordinarily, that right would stand, and parents would be free to take back their gifts. If, however, the child receiving a parental gift had entered into a social or economic transaction of consequence based on the gift's value such as a marriage contract, the parent was precluded from taking the gift back (see Abd-Allah, "*ʿAmal*," 267–68). In this example, preclusion disallows what would ordinarily be permissible (taking back a gift) because of the special circumstance of the social or economic transaction based on the child's possession of the gift.

Mudawwana. Mālik was not only aware of dissenting opinions among the Medinese and non-Medinese but took active interest in them and regarded them as useful. He disliked for disputing jurists to engage in polemics and insisted that they were not "gamecocks" to be pitted against each other.[39] His biography shows that he had direct personal interest in the opinions of his Kufan peer Abū Ḥanīfa, whom he met personally in Medina on more than one occasion. In later years, Abū Ḥanīfa's son Ḥammād continued to visit Mālik, and the two would discuss Abū Ḥanīfa's positions.[40] Mālik's terminology in the *Muwaṭṭa'*, as will be shown, often reflects familiarity with Abū Ḥanīfa and Kufan jurisprudence. Mālik's attention to divergent juristic opinions is embodied in his principle of "heeding dissent" (*ri'āyat al-khilāf*) and taking differences of opinion seriously. "Heeding dissent" is attributed to Mālik in pre-modern discussions of Islamic jurisprudence and is evidenced in his positive law.[41] David Santillana drew attention to

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[39] As noted later, Abū Yūsuf pursued studies in Medina. He subsequently returned to the city as an accomplished jurist in the retinue of the Abbasid caliph and challenged Mālik to debate him before the caliph. Mālik refused and made the observation that scholars were not gamecocks to be pitted against each other (al-Qāḍī 'Iyāḍ ibn Mūsā, *Tartīb al-madārik wa taqrīb al-masālik li-ma'rifat a'lām madhhab Mālik*, 1:164; Muḥammad Zāhid al-Kawtharī, *Fiqh ahl al-'Irāq wa ḥadīthuhum*, 51–52).

[40] See 'Iyāḍ, *Tartīb*, 1:164; al-Kawtharī, *Fiqh*, 51–52.

[41] For example, Saḥnūn registers Mālik's opinion in the *Mudawwana* that when a judge hands down a ruling but later rethinks it and finds a contrary decision to be stronger, he may alter his earlier ruling, if it had the support of dissenting scholars (*al-'ulamā'*). Mālik clarifies that the judge is justified in altering his earlier decision, if he desires, by virtue of the dissenting position (see *Mud.*, 4:76). In another case, Malik's opinion regarding ritual wiping over footwear (*al-masḥ 'alā al-khuffayn*) was that one should wipe over both the top and bottom of one's footwear. Saḥnūn asks Ibn al-Qāsim in the *Mudawwana* about the validity of following the contrary practice of just wiping over the tops. Ibn al-Qāsim states his preference that such a person not follow that procedure, yet he acknowledges that it is generally valid because of the dissenting position of the Medinese jurist 'Urwa ibn al-Zubayr, who would only wipe over the tops of his footwear. This precept is discussed in full later and is an example of internal Medinese dissent (see *Mud.*, 1:43). In another example, Saḥnūn asks Ibn al-Qāsim about a man who enters the sanctuary of Mecca without the intention of performing the lesser or major pilgrimages (*'umra* and *ḥajj*) and returns to his land without having ever performed them. Mālik strongly disliked that any Muslim enter Mecca without being in pilgrim's garb, either with the intent to perform the lesser or major pilgrimage. Ibn al-Qāsim states his opinion that he does not believe the man is under legal obligation to return and perform them (having missed that opportunity during his stay in the sanctuary). He states that the man has done an act of disobedience. Ibn al-Qāsim notes, however, that al-Zuhrī dissented and held there was no harm in entering Mecca without ritual garb and the intention to perform lesser or major pilgrimage rites. Ibn al-Qāsim heeds al-Zuhrī's dissent, stating that he does not want to make the lesser or major pilgrimage obligatory for that man due to al-Zuhrī's dissenting opinion. He adds that Mālik's opinion was not categorical; it simply did not please him (*lā yu'jibunī*) that one enter the Meccan sanctuary without the proper intention (See *Mud.*, 1:304). Mālik still regarded the matter as free of legal impediments (*wāsi'*) because Ibn 'Umar had returned

the principle early in the last century.[42] In living by this standard, Mālik would sometimes modify his personal legal opinions in light of the dissenting positions of other jurists, including those from Kufa.[43] Similar interest in dissent as pedagogically and epistemologically vital to the cultivation of the juristic acumen can be witnessed among the Mālikīs of North Africa and Andalusia in the generations subsequent to Mālik.[44] In their careful attention to dissent, the jurists of these regions stood in direct continuity with Mālik and the Medinese tradition he embodied.

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to Mecca without being in pilgrim's garb after hearing of the outbreak of civil war (*al-fitna*) (*Muw.*, 1:303).

[42] David Santillana refers to the principle of "heeding dissent" as "taking controversies into account" (*tenere conto delle controversie*). He observes that Mālik sometimes performs discretion (*istiḥsān*) on the basis of heeding dissent (see David Santillana, *Istituzioni di diritto musulmano malichita con reguardo anche al sistema sciafita*, 1:57).

[43] See Abd-Allah, "*ʿAmal*," 259–61.

[44] See Miklos Muranyi, *Materialen zur mālikitischen Rechtsliteratur*, 27–28, 50–57; idem, *Beiträge*, 2; idem, *Rechtsbücher*, 165. He demonstrates that early jurists attached great value to dissenting legal opinions. They collected them meticulously and even attended to the divergent opinions of their rivals. They took especially careful note of dissenting views within their own tradition (Muranyi, *Materialen*, 27–28, 50–57; idem, *Beiträge*, 2; idem, *Rechtsbücher*, 165).

In third/ninth-century North Africa, the scholarly circles of Kairouan and Andalusia went to lengths to gain as much exposure to divergent legal opinions as possible both within and outside of the Medinese tradition (Muranyi, *Beiträge*, 2; idem, *Rechtsbücher*, 165). The prominent third/ninth-century Andalusian legist ʿAbd al-Malik ibn Ḥabīb (d. 238/852) assiduously collected new material not just on Mālik's own changing points of view but on other voices within the Medinese tradition among Mālik's contemporaries and successors who disagreed with him. Ibn Ḥabīb's legal compendium, *al-Wāḍiḥa*, was highly regarded as an excellent complement to Saḥnūn's *Mudawwana* in the Mālikī juristic circles of North Africa precisely because it was a uniquely fertile source of divergent legal perspectives (Muranyi, *Materialen*, 27). The third/ninth-century Cordovan jurist Muḥammad ibn Aḥmad al-ʿUtbī (d. 255/869), who compiled an additional compendium of Mālik's opinions known as the *ʿUtbiyya*, joined his peers in praise of Ibn Ḥabīb's *Wāḍiḥa* for its close attention to internal Medinese dissent (Muranyi, *Materialen*, 27).

As Muranyi indicates, manuscript evidence in Kairouan shows that the content of Ibn Ḥabīb's *Wāḍiḥa* was rich. He transmitted not only the dissenting opinions of the Medinese but also of prominent early jurists from Egypt, North Africa, Syria, and Andalusia. He paid special attention to collecting the opinions of Mālik's contemporary, the prominent Syrian jurist ʿAbd al-Raḥmān al-Awzāʿī (d. 157/774). Al-Awzāʿī's school proliferated in Andalusia before the Medinese teaching took root there. Ibn Ḥabīb and his receptors took active interest in al-Awzāʿī's views despite the fact that rivalry between the followers of al-Awzāʿī and Mālik still existed in Andalusia in his time (Muranyi, *Materialen*, 28). In third/ninth-century Kairouan, Mālikīs and Ḥanafīs competed against each other for judicial offices. At the scholarly level, this rivalry manifested itself in attention to compiling the rival's dissenting opinions, which constituted the basic substance of public debates (see Muranyi, *Beiträge*, 2).

Mālik's respect for dissent and his willingness to modify personal decisions by "heeding" the valid controversies of other legists stands in sharp contrast to the common paradigm in Western scholarship that dissent in the early period of Islamic law was fiercely divided along regional lines and was recalcitrant, recriminating, and dogmatically partisan.[45] As a proponent of this view, Schacht characterizes the formative period as a time of "violent conflict of opinions."[46] In the same vein, Fazlur Rahman speaks of the "stormy formative period," which he depicts as a time of dynamic legal creativity matched with intensely contested differences of opinion.[47] The notion that legal dissent in the formative period was turbulent and unaccommodating fits Schacht's reading of Islamic legal origins from a largely Shāfiʿī frame of reference and his heavy reliance on early legal polemical literature.[48]

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[45] Early in the last century, David Margoliouth asserted that, "It does not seem that Moslems ever made the mistake of thinking jurisprudence easy, and supposing that lawyers quibbled out of pure malignity" (David Samuel Margoliouth, *Early Development of Mohammedanism: Lectures Delivered in the University of London*, 96, henceforth cited as Margoliouth, *Mohammedanism*). More recently, Kevin Reinhart has proposed that, "As far as one can tell, it is only later scholars who are discomfited by the plurality of Muslim doctrine in its formative period" (Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought*, 27).

Respect for divergent legal opinions generated the phenomenon of dissent literature, which "codified" divergent opinions to an "astounding extent" and was destined to become one of the most prolific genres of Islamic legal literature (Makdisi, *Humanism*, 32–33). Makdisi emphasizes that dissent among Sunnī jurists was inseparably linked to affirmation of its contraries—consensus and orthodoxy—which were only knowable against the background of dissent. He stresses that, "In Islam, dissent was not merely allowed, or simply encouraged, it was virtually prescribed as an obligation upon each and every Muslim. The give-and-take of disputation, of argumentation and debate, was vital to the Islamic process of determining orthodoxy" (Makdisi, *Humanism*, 32–33).

Makdisi insists that Muslim scholars were expected to challenge rulings that they regarded as mistaken. Otherwise, it would be assumed that they were in agreement, "Between consent and dissent, the system made no room for abstentions" (Makdisi, *Humanism*, 32–33). Wael Hallaq also observes that this phenomenon was not just characteristic of the later period. He notes that Muslim jurists of the second/eighth century enjoyed considerable personal freedom in making and expressing their opinions. Their legal doctrines were seldom anonymous. Jurists were not bound to the opinions of particular regional authorities, and dissent existed both within regions and beyond them (see Wael Hallaq, "From Regional to Personal Schools of Law? A Reevalutation," 1–26, henceforth cited as Hallaq, "Regional Schools?"; cf. Melchert, "Traditionist-Jurisprudents," 400).

[46] Schacht, *Origins*, 1.

[47] Rahman, *Islam*, 77–78.

[48] Joseph Lowry argues that al-Shāfiʿī did not welcome the wide-ranging dissent of his era but looked upon it as "illusory." In his view, al-Shāfiʿī proposed his new legal methodology as an attempt to find a basis for consensus by setting objective referential guidelines in revealed texts. In Lowry's view, he advanced his focus on the explicit clarification of

The notion of parochialism in early Islamic legal dissent fosters the misconception that divergent legal opinions were monolithic and static. As noted, Ibn al-Qāsim states that Mālik recommended that judges review their verdicts about which they had doubts in light of the dissenting opinions of other scholars. It is an excellent illustration of Mālik's principle of heeding dissent, because of the generally binding nature of judicial verdicts in Islamic law.[49] The correspondence between Mālik and al-Layth ibn Saʿd (d. 175/791), which is discussed later, is a classic statement of the right to dissent and the proclivity of early jurists to differ at the local and regional levels. Al-Layth is courteous and deferential in his letter to Mālik but insists on his right to disagree with him.[50]

A survey of primary source material shows that prominent individual jurists reassessed and often changed their legal opinions. Muḥammad ibn Muslim ibn Shihāb al-Zuhrī (d. 124/742), one of Mālik's primary teachers and one of the most prominent scholars of the formative period, was known for frequent and sometimes radical revisions of opinion. Al-Layth, who was a student of al-Zuhrī, observes that one of his associates wrote on various occasions to al-Zuhrī about a particular legal question and

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textual meaning (*al-bayān*) as an alternative to the sea of dissent that surrounded him (Lowry, "Four Sources?," 49).

Many of Schacht's generalizations are based on the intensely polemical early Shāfiʿī treatise *Kitāb ikthilāf Mālik wa al-Shāfiʿī* (The Dissent of Mālik and al-Shāfiʿī) and the polemical tracts of Abū Yūsuf Yaʿqūb ibn Ibrāhīm (d. 182/798) and al-Shaybānī (see [the Shāfiʿī Interlocutor], *Kitāb ikhtilāf Mālik wa al-Shāfiʿī* in Muḥammad ibn Idrīs al-Shāfiʿī's *Kitāb al-umm*, 7:191–269, Abū Yūsuf's *al-Radd ʿalā siyar al-Awzāʿī*, and Muḥammad ibn al-Ḥasan al-Shaybānī's *Kitāb al-ḥujja ʿalā ahl al-Madīna*). When not placed in the broader context of Islamic dissent literature as a whole, which was generally fair and balanced, tracts such as these create the picture that early juristic dissent was bitter, arbitrary, and parochial. Schacht did not have access to Abū Bakr Muḥammad Ibn al-Labbād's (d. 333/944) *Kitāb al-radd ʿalā al-Shāfiʿī*, a relatively early anti-Shāfiʿī Mālikī disputation, but Ibn al-Labbād reflects the same uncompromising attitude as the Ḥanafī and Shāfiʿī polemics that preceded him.

As polemical literature indicates, Muslim jurists were not always sanguine toward colleagues who held contrary views. Their rivalries, especially when competing for judgeships, protecting their prerogatives, or seeking to expand their school's influence at another's expense, were potentially bitter. In diatribe and polemics, no attempt is made to illuminate a rival's reasoning and methodology. Rather, their approach to the law is dismissed as wholly without grounds. The purpose of such verbal attacks was to convince and win over others, not to edify. But instances of emotional and highly parochial disagreement in the formative period should not be universalized as the sole salient characteristic of dissent in that or subsequent ages.

[49] *Mud.*, 4:76.

[50] Muḥammad ibn Abī Bakr al-Jawziyya, *Iʿlām al-muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, (Cairo: Maṭbaʿat al-Saʿāda), 3:94–95, 99–100, henceforth cited as Ibn al-Qayyim, *Iʿlām* (Saʿāda).

received three different answers.[51] Biographical reports state that Mālik habitually rethought his positions and frequently modified them.[52] In the *Mudawwana*, Ibn al-Qāsim gives abundant evidence of Mālik changing his opinions. He often makes a special point to note explicitly when Mālik did not do this but held consistently to one view throughout his lifetime. Ibn al-Qāsim himself felt at liberty to disagree with Mālik and take an independent stance.[53] Ashhab ibn ʿAbd al-ʿAzīz (d. 204/819), another of Mālik's principal students and personal secretaries, was known for his tendency to dissent from Mālik's opinions and prefer his own.[54]

In noting the openness to dissent of second/eighth-century jurists and the fact that differences of legal opinion existed at the local level as well as abroad, Wael Hallaq questions whether "regional schools"—after the manner that Schacht and others conceived of them—actually ever existed.[55] In showing that internal dissent in Medina was not only extensive but valued in Mālikī juristic circles, Miklos Muranyi's work also calls for revaluation of the standing paradigm of the "regional schools" in the formative history of Islamic law.[56] As *Mālik and Medina* shows, proof of internal dissent within the so-called "regional schools" far outweighs evidence for any alleged unanimity.

The dynamic of internal dissent is to be found in the Ḥanafī school's classic dialectic between Abū Ḥanīfa and his students, especially the most prominent of his successors: Zufar ibn al-Hudhayl (d. 158/775), Abū Yūsuf Yaʿqūb ibn Ibrāhīm (d. 182/798), and al-Shaybānī. Till this day, mastery of the inner-school dialectic between these figures—especially Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī—remains pivotal for issuing valid juristic pronouncements (*fatwā*s) in the Ḥanafī school. It is reasonable to hypothesize

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[51] Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3:96.

[52] See Abd-Allah, "*ʿAmal*," 90–92; ʿIyāḍ, *Tartīb*, 1:145–46; Ibrāhīm ibn Mūsā al-Shāṭibī, *al-Muwāfaqāt fī uṣūl al-sharīʿa*, 4:286.

[53] For illustrations of Ibn al-Qāsim distinguishing between Mālik's opinions, those of others, and his own; his stating that he does not recall Mālik's opinion in given matters; his indicating that one of Mālik's opinions is older while another is the opinion he last held before he died; his stating that Mālik's students would continue to ask him about certain questions from year to year to see if he had retracted them; and Ibn al-Qāsim's disagreeing with Mālik, see *Mud.*, 1:20, 57, 69, 100, 192, 251, 256, 264, 272, 272, 284, 289; 2:189, 197, 391; 3:86; 4:92, 94, 116; 434.

[54] See Muḥammad ibn Aḥmad ibn Rushd (the Elder/al-Jadd), *al-Muqaddimāt al-mumahhidāt li-bayān mā iqtaḍathū rusūm al-Mudawwana min al-aḥkām al-sharʿiyyāt*, 1:27–28; Sezgin, *Geschichte*, 1:465; Muḥammad Abū Zahra, *Mālik: ḥayātuhū wa ʿaṣruhū, ārāʾuhū wa fiqhuhū*, 236–37, 248.

[55] See Hallaq, "Regional Schools?" 1–26; cf. Melchert, "Traditionist-Jurisprudents," 400.

[56] See Muranyi, *Materialen*, 50–57.

that the dynamic of internal and external dissent was characteristic of other regions where Islamic law came to maturity, and the *Muṣannaf*s of Abū Bakr ʿAbd al-Razzāq ibn Ibrāhīm (d. 211/826) and Abū Bakr ʿAbd-Allāh ibn Muḥammad ibn Abī Shayba (d. 235/849) and other early sources offer ample support for this view. Later dissenting voices such as those of al-Shāfiʿī, Ibn Ḥanbal, and Dāwūd al-Ẓāhirī should be seen in continuity with the dynamic of disputation and diversity of opinion as an essential element of early Islamic intellectual history.

The Relative Paucity of Legal Ḥadīth

For more than a century, one of the predominant paradigms in Islamic legal studies has been that *ḥadīth* ultimately became, as Patricia Crone states, the "real stuff of Islamic law" and that there was virtually a one-to-one correspondence between *ḥadīth* and doctrine.[57] Conjoined with this view is the notion that early Muslims readily fabricated *ḥadīth*s to cover "most legal doctrines" and relied upon these fabrications to make their views authoritative.[58] Because of the presumed verbatim correlation

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[57] See Patricia Crone, *Roman, provincial, and Islamic law: The origins of the Islamic patronate*, 23, henceforth cited as Crone, *Roman law*.

[58] Crone, *Roman law*, 23–24; cf. Calder, *Studies*, vi. Ignaz Goldziher was among the first and strongest proponents of this paradigm, and Crone enthusiastically supports his thesis. Goldziher insists that, "Each party with a doctrine gave 'the form of *ḥadīth*' to his theses, and that consequently the most contradictory tenets had come to wear the garb of such documentation." He continues that—in the areas of ritual, theology, or jurisprudence—no school and no party with a given political contention failed to produce a *ḥadīth* or "a whole family" of *ḥadīth*s in favor of their point of view and exhibiting in their chains of narration all the external signs of correct transmission. Through massive fabrication, *ḥadīth*s, in Goldziher's view, came to form the "framework of the earliest development of religious and ethical thought in Islam" (Ignaz Goldziher, *Introduction to Islamic Theology and Law*, 39–41)." In his view, every legal opinion, personal whim, *sunna* or innovation sought out and found its textual referent in the form of a *ḥadīth*, which the "pious community" was prepared "with great credibility to believe" as long as it was cloaked in the words of the Prophet (from Scott Lucas, *Constructive Critics, Ḥadīth Literature, and the Articulation of Sunnī Islam: The Legacy of the Generation of Ibn Saʿd, Ibn Maʿīn, and Ibn Ḥanbal*, 11, henceforth cited as Lucas, *Critics*). C. Snouck Hurgronje endorses this view and concurs that *ḥadīth*s constituted "a gigantic web of fiction," which became "the organ of opinions, ideas, and interests, whose lawfulness was recognized by every influential section of the Faithful" (Snouck Hurgronje, *Mohammedanism: Lectures on Its Origins, Its Religious and Political Growth, and Its Present State*, 70–71).

Joseph Schacht champions Goldziher's "brilliant discovery" and asserts that *ḥadīth*s were "documents not of the time to which they claim to belong" but of successive stages of the development of doctrines during the first centuries of Islam. He holds that this view became the "corner-stone of all serious investigation of early Muhammadan law and jurisprudence, even if some later authors, while accepting Goldziher's method in principle, in their natural desire for positive results were inclined to minimize it in practice"

between *ḥadīth* and disputed teachings, there was a "staggering proliferation" of *ḥadīth*s to cover a multitude of creedal and legal claims.[59] The paradigm of massive *ḥadīth* fabrication to buttress regional ideological rivalries is also closely linked to the notion that dissent in the "stormy formative period" was violent and uncompromising, pitting jurists against each other along regional lines.[60] *Ḥadīth* studies have matured greatly

(Schacht, *Origins*, 4; cf. Santillana, *Istituzioni*, 1:31; Margoliouth, *Mohammedanism*, 108; Lucas, *Critics*, 6).

Although Fazlur Rahman modifies some of Schacht's views on *ḥadīth* fabrication, he agrees that *ḥadīth* provided "titanic inclusiveness of all the details of daily life as medieval law and *ḥadīth* literature make out to be the case" (Rahman, *Islam*, 51, cf. 57). For Fazlur Rahman, the inherent logic of the *ḥadīth* "movement" in early Islamic history meant that "every theological, dogmatic or legal doctrine" had to be projected back to the Prophet's explicit authority. This meant that the "creative process" of Islamic law (which in Rahman's view came to an end with the close of the formative period) could only have continued in future generations with the continued "massive and incessant fabrication" of *ḥadīth*s (Rahman, *Islam*, 59). "Gradually but surely the whole of the living tradition" as diversely as it had come to be in Islam's various regional centers found its embodiment in *ḥadīth*s, which ultimately emerged as "an all-engulfing discipline" (Rahman, *Islam*, 61).

[59] See Hallaq, *Origins*, 5, 102–03, 126. In referring to the "staggering proliferation of Prophetic *ḥadīth*," Hallaq contends that, "The differences among the geographical schools (as well as among scholars within each school) amounted in fact to a competition among conflicting doctrines. And in order to lend a doctrine an authority sufficient to guarantee its 'success' over and against competing doctrine—say one attributed to a Companion—the chain of authority of the first doctrine was extended to the Prophet himself" (Hallaq, *Origins*, 16–17, cf. 123). This process of "projecting legal doctrines backward" led to the "rising tide" of legal *ḥadīth* in the formative period, which, in Hallaq's view, created the cultural and scholarly imperative that theoretically led to the accommodation of al-Shāfiʿī's legal theory (Hallaq, *Origins*, 16–17, 123).

Patricia Crone contends that *ḥadīth*s, "far from conserving the words of the Prophet," were reflections of the legal and doctrinal controversies of the two centuries immediately following his death. She asserts that Goldziher's discovery of this straightforward link between divergent *ḥadīth* content and dissenting legal doctrine in the formative period was one of the great intellectual breakthroughs in the academic study of Islamic law and the *ḥadīth* phenomenon (Crone, *Roman law*, 3; cf. John Burton, "Qurʾān and Sunnah: A Case of Cultural Disjunction," 152–53; Hallaq, "Master Architect?," 267; cf. Fred Donner, *Narratives of Islamic Origins: The Beginnings of Islamic Historical Writing*, 20–23). Each regional tradition of the formative period came, as it were, to possess its unique arsenal of *ḥadīth*s, which reflected the "bitter polemics" between them and constituted decisive evidence for the "most diverse" points of view (Crone, *Roman law*, 25).

[60] According to this view, the partisan spirit that imbued these interregional controversies provided the ideological generator for turning out massive bodies of legal doctrine fabricated as *ḥadīth*s to reinforce divergent school positions. Since the schools differed extensively in positive law, legal *ḥadīth*s were presumably fabricated to uphold their clashing doctrines. As a consequence, *ḥadīth* came to constitute a vast body of contradictory rules and teachings authorized by false attribution to the Prophet, which was rarely detected or questioned (see, for example, Crone, *Roman law*, 24).

over the last decades, but several old and insufficiently tested paradigms regarding *ḥadīth* continue to hold sway.[61]

Mālik and Medina calls a number of these cognitive frames into question. It shows that, although legal *ḥadīth* were numerous, their overall corpus remains relatively small and inconclusive when compared to the vast array of juristic opinions and serious issues of dissent that emerged in Islamic positive law during the formative period.[62] In many crucial areas of dispute, dissenting jurists lacked relevant *ḥadīth*s altogether.[63] Often,

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[61] Harald Motzki stands at the forefront in method and technique and has modified the Schachtian paradigm regarding legal *ḥadīth*. Motzki argues that the early *Muṣannaf* work of ʿAbd al-Razzāq, who died in the early third/ninth century, contains a substantial core of authentic material. He shows that *ḥadīth*s, taken as a whole, contain both reliable and unreliable transmissions. Motzki insists that all scholars, including skeptics, must seek to define a border area between what is and is not reliable based on objective criteria (see Harald Motzki, "The Question of the Authenticity of Muslim Traditions Reconsidered: A Review Article," 217–219, 223–24, 243, henceforth cited as Motzki, "Authenticity"). In a similar vein but from a different theoretical outlook, Fazlur Rahman notes that only by taking a balanced approach to historical evidence between credulity and extreme skepticism can "requisite reasonableness" be brought into the general discourse of Islamic studies. He suggests that, "on the whole, a healthy caution rather than outright skepticism is likely to lead to reliable and constructive results" (Rahman, *Islam*, 48–49, 52).

The positions of the extreme skeptics such as Wansbrough, Calder, and Crone call to mind the observation of Bishop Berkeley (d. 1753), who complained that the philosophers of his time "had raised the dust through which they complained they could not see" (G.C. Joyce, "Deism," in *The Encyclopedia of Religion and Ethics*, 4:539). Erwin Gräf welcomed the critical approach of modern Islamic studies and commended the works of Goldziher and others for removing naïve gullibility about Islam's primary sources and making serious historical study possible. Gräf warned, however, that Western scholarship must protect itself from an overly skeptical attitude in source criticism, which threatens to turn legitimate historical study into a medley of subjective lectoral intuitions about the sources. Gräf selected his narrow topic on hunting and slaughter law because it was far removed from the pivotal theological and political questions of early Islam and allowed him to rethink these essential methodological and interpretative questions in a limited field of concrete research (Erwin Gräf, *Jagdbeute und Schlachttier im islamischen Recht: Eine Untersuchung zur Entwicklung der islamischen Jurisprudenz*, 1–2; cf. Muranyi, "Frühe Rechtsliteratur," 225; Motzki, *Origins*, 31–32).

[62] The relative paucity of legal *ḥadīth* does not mean that legal *ḥadīth*s were few. The *Muwaṭṭaʾ* contains several hundred of them. Abū Dāwūd's *ḥadīth*-collection was devoted to legal *ḥadīth*s, and legal material in the form of *ḥadīth*s make up a substantial part of the *Muṣannaf* works of ʿAbd al-Razzāq and Ibn Abī Shayba and all later *ḥadīth* collections. Legal *ḥadīth*s are relatively few, however, when measured against the massive and intricately detailed corpus of early and later Islamic positive law and the immense body of juristic dissent that grew up around it.

[63] This is illustrated in the early controversy over taking the testimony of minors for wounds they inflict upon each other in fights. From the time of the Companions, the Medinese accepted the testimony of minors to establish wound or blood indemnities when they fought with each other in the absence of adult witnesses, and their testimony was taken before they were allowed to speak with adults who were not present. The Medinese position as glossed by Mālik is one of the clearest examples in the *Muwaṭṭaʾ* of the Medinese

legal disputation revolved around conflicting post-Prophetic reports (*āthār*), not specific *ḥadīth*s.[64] Frequently, relevant *ḥadīth*s supported only one side of a contested argument or pertained to peripheral matters and not to the central legal concerns that the jurists debated.[65] Where

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principle of the unstated good (*al-maṣāliḥ al-mursala*)—a Medinese principle which, by definition, applies in the absence of explicit textual documentation. Although acceptance of the testimony of minors in such cases was supported by juristic concurrence in Medina, it was intensely debated and almost universally rejected among the jurists of other regions. Mālik addresses this dissent in the *Muwaṭṭa'* and indicates that he was aware of it. No explicit *ḥadīth*s existed on the acceptance or rejection of the testimony of minors either before or after Mālik's time despite the fact that it constituted a crucial early legal debate and involved heavy monetary liabilities, which generally fell upon the tribal and kinship groups of the guilty (Abd-Allah, "*'Amal*," 696–700).

[64] The Kufans and Medinese differed on the assessment of silver indemnities for murder and involuntary manslaughter, and jurists referenced contradictory post-Prophetic reports. The Kufans set blood indemnities at ten thousand pieces of silver. The Medinese set them at twelve thousand. This dissent was rooted in the legal definition of the standard ratio between gold and silver coins. For the Kufans, the ratio was one-to-ten. For the Medinese, it was one-to-twelve. The Medinese recognized the one-to-ten ratio but regarded it as an anomalous *sunna* and restricted it exclusively to obligatory alms (*zakāh*). The Kufans and Medinese defended their contradictory positions on silver indemnities by reference to two contradictory post-Prophetic reports ostensibly referring to the same original Prophetic decree. The Kufans lacked supporting evidence in *ḥadīth*s on the matter, although the issue of silver indemnities was a critical legal question dating back to the earliest period, and the only *ḥadīth*s that existed on it were in favor of the Medinese position (see Yūsuf ibn ʿAbd al-Barr, *al-Istidhkār li-madhāhib fuqahā' al-amṣār wa ʿulamā' al-aqṭār fīmā taḍammanahū al-Muwaṭṭa' min maʿānī al-raʾy wa al-āthār wa sharḥ dhālika kullihī bi-al-ījāz wa al-ikhtiṣār*, 25:11–12; idem, *al-Tamhīd limā fī al-Muwaṭṭa' min al-maʿānī wa al-asānīd murattaban ʿalā al-abwāb al-fiqhiyya li- al-Muwaṭṭa'*, 14:193; ʿAbd al-Razzāq ibn Hammām al-Ṣanʿānī, *al-Muṣannaf li al-ḥāfiẓ al-kabīr Abī Bakr ʿAbd al-Razzāq ibn Hammām al-Ṣanʿānī*, 9:292, 296; Abū Bakr ʿAbd-Allāh ibn Muḥammad ibn Abī Shayba, *al-Kitāb al-muṣannaf fī al-aḥādīth wa al-āthār*, 5:344; cf. Abd-Allah, "*'Amal*," 553–54; al-Bājī, *al-Muntaqā*, 7:68; al-Zurqānī, *Sharḥ*, 5:137–39; Ibn Rushd, *Bidāya* [Istiqāma], 2:248).

[65] See Abd-Allah, "*'Amal*," 553, 556, 570–71, 599–600, 604–05, 606–08, 618, 622, 660, 750, 753–54; cf. 655–56. One of the well-known disputes of the formative period concerned annual accretions to wealth through wages, inheritance, gifts, and the like and whether such wealth should be assessed for the alms tax (*zakāh*) along with one's base capital. It was a crucial legal issue with extensive monetary ramifications for the poor and wealthy of the entire community. All jurists shared two legal texts on the matter, which were of generally acknowledged authenticity. Neither of the texts clearly bore out the validity of any of the dissenting opinions. The first text was a *ḥadīth* reporting that the Prophet said that no alms tax was required on wealth until a full lunar year had transpired after its possession. The second text was a post-Prophetic report according to which the caliph ʿUmar ibn al-Khaṭṭāb included newly born animals as part of the total herd of livestock upon which the alms tax was due. Although the Medinese and Kufans shared both texts and accepted them as valid, they differed on how to define private wealth in the aggregate regarding accretions that did not accrue from one's base capital. The Kufans regarded all monetary wealth, regardless of its source, to be analogous to livestock accretions, which ʿUmar's post-Prophetic report declared taxable. By analogy, they treated all monetary wealth as a single entity, regardless of whether or not increases to the base capital were the result of

pertinent *ḥadīth*s did exist, they were often shared by all jurists, who accepted them as valid but interpreted them in markedly different ways. In fact, the numerous legal *ḥadīth*s of Mālik's *Muwaṭṭa'* are almost universally shared. The early jurists generally accepted them all, and only a few were disputed.[66] Even more important when assessing the overall corpus of *ḥadīth*, only a small percentage of *ḥadīth* texts are strictly doctrinal or legal. In fact, most *ḥadīth*s have little or nothing directly to do with either theological doctrine or law. Consequently, it is methodologically crucial that *ḥadīth* be studied independently of the phenomenon of law and as a unique field in its own right. In the study of Islamic law and *ḥadīth*, neither discipline should be treated as subordinate to the categories of the other. Comparative studies of law and *ḥadīth* are indispensable, but the paradigms and general methodologies of each field of study must carefully avoid confusing the imperatives of one discipline for another.[67]

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profits or accretions. The Medinese considered the Kufan analogy as valid only for profits from base capital but not accretions. They interpreted 'Umar's post-Prophetic report in that light, relying on the non-textually referential source of praxis as their basic referent (Muḥammad ibn Aḥmad ibn Rushd, *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid* [Cairo: Dār al-Kutub al-'Arabiyya al-Kubrā, n.d.], 1:159–61, henceforth cited as Ibn Rushd, *Bidāya*; idem, *Bidāya* [Istiqāma], 1:263; see Abd-Allah, "*'Amal*," 564–570).

[66] The *ḥadīth*s cited against the Medinese in the early Shāfi'ī polemic *Ikhtilāf Mālik*, one of the most intensely anti-Medinese tracts of the formative period, are shared *ḥadīth*s taken from Mālik's *Muwaṭṭa'* with impeccable chains of transmission. The Medinese, Kufans, and others generally regarded the *ḥadīth*s of the *Muwaṭṭa'* as historically authentic as indicated by al-Shaybānī's transmission of the work, although they varied widely in their interpretations of them (see Abd-Allah, "*'Amal*," 172; Robert Brunschvig also observes this fact. See Brunschvig, "Polèmiques," 388; cf. Schacht, *Origins*, 12).

[67] Scott Lucas observes that the majority of *ḥadīth*s have no bearing on the law at all. He notes that this fact alone obliges researchers to go beyond legal texts before making sweeping judgments about *ḥadīth* literature (Lucas, *Critics*, 8).

Nabia Abbott stresses that the notion that early Muslim interest in *ḥadīth* was spurred by the exigencies of jurisprudence "distorts the picture of this first and basic phase of Islamic cultural development in the religious sciences." She emphasizes that early Muslim preoccupation with *ḥadīth* was driven by the Prophet's immense stature in the eyes of the community and the natural interest Muslims had in all aspects of his life for private and public edification (Abbott, *Studies in Arabic Literary Papyri*, 2:12).

Miklos Muranyi shows that for generations during the formative and post-formative periods, the Mālikī jurists of North Africa exhibited markedly different concerns from the traditionists (*muḥaddithūn*) in their attitude toward *ḥadīth*s and post-Prophetic reports. The technical requirements that the traditionists imposed upon their discipline were inappropriate in a strictly juristic ambience. The jurists of Kairouan devoted themselves to formulating and answering questions of law, not technicalities of *ḥadīth* transmission. Their focus long remained almost exclusively on the *Muwaṭṭa'* and *Mudawwana* as compendia of law and direct sources of jurisprudence independent of *ḥadīth*s and post-Prophetic reports. This fundamental preoccupation with legal concerns also informed their attention to juristic dissent, since it offered insights into the structure and workings of the law. Muranyi notes that the possible exception to this focus on the *Muwaṭṭa'* and *Mudawwana*

Despite their relative paucity with relation to the vast details of positive law, legal *ḥadīth*s are, nevertheless, numerous and constitute a conspicuous and all-important foundation of Islamic law. There is no question that juristic dissent in the formative period was sometimes based on conflicting *ḥadīth*s.[68] However, this prototype proves to be more the exception than the rule. In the formative period, legal interpretation (*ijtihād*) was the "real stuff" of the law, not the literal and verbatim citation of sacred texts. Legal dissent was complex and covered extensive new areas of law and legal speculation. From the beginning, legal doctrine in Islam touched on vast areas of gray in which the Qurʾān and *ḥadīth* did not provide explicit answers but required jurists to exercise their judgment. By their nature, the multiplicity of questions that arose was far more copious and detailed than the explicit content of Qurʾānic verses and legal *ḥadīth*. Discourse around these questions ultimately produced the distinctive interpretative methodologies that informed the legal reasoning of the early Imāms and laid the foundations for the legal schools that developed in their wake.

Mohammad Fadel provides a valuable illustration of the phenomenon of the relative paucity of legal *ḥadīth* in his study of the Islamic law of pledges (*ruhūn*).[69] He shows that strict limitation of legal extrapolation to available *ḥadīth* material simply could not provide the traditional Muslim

might be said to be their attention to the *ḥadīth* compilation of Mālik's student ʿAbd-Allāh ibn Wahb (see Muranyi, *Beiträge*, 3).

[68] *Mālik and Medina* gives examples of such controversies. For example, on the question of the exact posture for sitting in prayer, the early jurists took three distinct positions. Each position had the support of contrary *ḥadīth*s (see below "*Al-A: How to Sit in Prayer*;" Ibn ʿAbd al-Barr, *al-Tamhīd*, 3:223; Aḥmad ibn Muḥammad al-Ṭaḥāwī, *Sharḥ maʿānī al-āthār*, 1:334–339; cf. idem, *Mukhtaṣar ikhtilāf al-ʿulamāʾ: ikhtiṣār Abī Bakr Aḥmad ibn Muḥammad al-Jaṣṣāṣ al-Rāzī*, 1:212–13).

When the overt implications of *ḥadīth*s conflict with each other, Western scholars often interpret their semantic discrepancies as evidence of fabrication. Many presume that the jurists of the formative period were disturbed by the presence of contrary *ḥadīth*s, especially as more and more *ḥadīth*s came into circulation that were not consonant with their established legal positions. Some jurists of the formative period such as Abū Yūsuf did question the authenticity of irregular *ḥadīth*s and warned about the dangers of *ḥadīth* fabrication. Even they, however, were concerned with *ḥadīth* content—not just technically authentic transmission—and the normative and non-normative implications of *ḥadīth*s as indicants of the law as judged by established legal standards (see Abd-Allah, "*ʿAmal*," 172–76). In the *Mudawwana*, Ibn al-Qāsim, one of Mālik's principal students and transmitters, states explicitly regarding a technically authentic, non-normative solitary *ḥadīth* that was contrary to Medinese praxis, "But it is only like other *ḥadīth*s that have not been accompanied by praxis . . . . [*Ḥadīth*s such as these] remained [in the state of being] neither rejected as fabricated nor put into practice" (*Mud.*, 1:151–52; cf. Schacht, *Origins*, 63; Hallaq, *Origins*, 105; see Abd-Allah, "*ʿAmal*," 188–95).

[69] Fadel, "*Istihsan*," 161–76.

jurists of any school with an "actual corpus of what constitutes the law of pledges." Each school relied on legal interpretation to create its doctrine. Available revealed texts only touched on areas of marginal and tangential interest to the law. Taken in isolation, such *ḥadīth* material failed to provide explicit answers to such vital questions as the "central property right created by the pledge," who owns accretions to pledged collateral, and the prior right to the collateral of the person to whom the pledge is given vis-à-vis the competing claims of debtors and creditors. Fadel concludes that, "at least in purely quantitative terms, rules derived from non-revelatory sources make up the vast majority of actual Islamic law."[70]

The large number of shared legal *ḥadīth*s brings to light the additional fact that, in terms of semantic content, *ḥadīth* texts are almost always polysemic and open to a variety of valid, competing interpretations. The tendency of the wording of the Qurʾān and *ḥadīth* to convey multiple meanings and its consequently conjectural (*ẓannī*) nature when it comes to interpretation constitutes one of the central themes of traditional Islamic legal theory (*uṣūl al-fiqh*). Ulrike Mitter's study of unconditional manumission (*tasyīb*) touches on this phenomenon. She notes that relevant *ḥadīth*s on the topic are so open to interpretation that it is difficult to determine whether any of them is actually for or against unconditional manumission.[71] Mitter's findings dovetail with those of Mohammad Fadel and show that legal *ḥadīth*s often speak to matters of marginal legal import, while the elaboration of crucial related questions of legal doctrine had to be left to interpretation.[72]

Human thought is not dictated by facts. It makes sense of facts by organizing them in paradigms and cognitive frames. Facts never speak for themselves. We can only understand facts to the degree that they fit our mental constructs. When facts do not make sense within the context of our paradigms and cognitive frames, we reject them or fail to understand them adequately. In Islamic studies as in other fields, progress must be measured in terms of the degree to which we are conscious of our paradigms and are able to examine, review, and reset them so that they enable us to envision as broad and honest an account as possible of the facts

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[70] Fadel, "*ʾIstiḥsān*," 164–65, 167; cf. 166, note 13.

[71] Ulrike Mitter, "Unconditional Manumission of Slaves in Early Islamic Law: A *Ḥadīth* Analysis," 123, henceforth cited as Mitter, "Manumission." Mitter suggests that the historical reason for this ambivalence is that these *ḥadīth*s were not originally concerned with the legalities of unconditional manumission *per se* but with how the estates of deceased slaves freed in such a manner should be distributed.

[72] See Fadel, "*ʾIstiḥsān*," 164–65, 167; cf. 166, note 13.

in our primary sources. As long as our cognitive frames prove inadequate, the facts before us will remain largely incoherent and obstructed from well-founded understanding. *Mālik and Medina* strives to reshape the way scholars analyze Islamic legal origins by reconfiguring some of the crucial cognitive frames central to the law's primary sources so they can speak with clarity and allow for new understanding and bold original research that will provide us with a broader and more accurate vision of this tremendously rich and varied field of intellectual history.

PART ONE

MĀLIK AND THE MEDINESE TRADITION

CHAPTER ONE

MĀLIK IN MEDINA

Mālik's Medina and the World Beyond

Mālik was born in Medina sometime between 90/708 and 97/715.[1] He spent his entire life in the city teaching and issuing juristic pronouncements (*fatwā*s). He died and was buried there in the year 179/795.[2] The eighty to eighty-seven years of his life were almost evenly divided between the periods of Umayyad and Abbasid rule.

Unlike many scholars of his time, Mālik did not travel abroad in search of knowledge. His teachers were almost exclusively Medinese.[3] He never

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[1] Mālik's biographical sources give limited information about his boyhood. They agree that he began to study *ḥadīth* and other fields of Islamic learning at an early age (see Abū Zahra, *Mālik*, 16–17). He selected his teachers carefully, progressed rapidly in his studies, and soon attained wide recognition for personal integrity and intellectual acumen. Reports of Mālik's precociousness may be exaggerated, but they concur that the senior scholars of Medina allowed him to begin issuing independent juristic pronouncements as a young man, according to some reports, as early as seventeen (ʿIyāḍ *Tartīb*, 1:138; Sezgin, *Geschichte*, 1:457; Abū Zahra, *Mālik*, 24, 42, 48).

Mālik's students, including Muḥammad ibn Idrīs al-Shāfiʿī, described him as tall, broad-chested, and striking. He had a wide forehead, a full beard and mustache, and turned bald early in life. Contrary to the custom of his time, he did not dye his beard when he became older but left it white. Mālik's skin color was light, and he had handsome eyes and a well-shaped nose. Mālik's Kufan contemporary and peer Abū Ḥanīfa al-Nuʿmān ibn Thābit knew Mālik well, visited him several times in Medina, and referred to him as the "blue-eyed, blondish haired one" (*al-azraq al-ashqar*). Mālik's paternal lineage was Arab, but he had unspecified non-Arab blood on his maternal side (see ʿIyāḍ, *Tartīb*, 1:102–05, 112–14; Abd-Allah, "Abū Ḥanīfa" in *Encyclopaedia Iranica*, 1:297–98; al-Kawtharī, *Fiqh*, 51–52).

[2] Sezgin, *Geschichte*, 1:457; Abū Zahra, *Mālik*, 24, 48. Mālik spent most of his early maturity and adult life transmitting *ḥadīth*s, teaching the Medinese legal tradition, and issuing legal interpretations and juristic pronouncements according to it. He was engaged in teaching and active legal interpretation in Medina for as many as sixty to seventy years (Abū Zahra, *Mālik*, 51).

[3] This fact is borne out by the *Muwaṭṭaʾ*'s chains of transmission. Only twenty-three *ḥadīth*s in the *Muwaṭṭaʾ* come from non-Medinese scholars. These six non-Medinese authorities include the highly regarded Meccan Successor Abū al-Zubayr Muḥammad ibn Muslim (d. 126 or 128/743 or 745), from whom Mālik transmits eight *ḥadīth*s (Yūsuf ibn ʿAbd al-Barr, *Tajrīd al-tamhīd limā fī al-Muwaṭṭaʾ min al-maʿānī wa al-asānīd*, 155–57; Sezgin, *Geschichte*, 1:86–87). Mālik transmits another eight *ḥadīth*s from the noted Basran scholar Ḥumayd al-Ṭawīl al-Khuzāʿī (d. 142 or 143/759 or 760), who was one of the most highly regarded Successors of Basra (Ibn ʿAbd al-Barr, *Tajrīd*, 26–28; Sezgin, *Geschichte*, 1:89). He transmits two *ḥadīth*s from Ayyūb al-Sakhtiyānī (d. 131/748), another noted

left Medina except to perform the pilgrimage to Mecca. His entire upbringing and education took place in Medina, and most of his teachers were from the city. Mālik's belief, thought, and practice were predicated upon a profound conviction regarding the distinctive religious status of the city of the Prophet and its unique lineage of religious scholars.[4]

Mālik was known for his personal acumen and charisma,[5] but his standing as a jurist was fundamentally predicated on his direct association with the Medinese tradition and personal mastery of it. This primacy of Medina and its historical legacy is reflected in the early juristic circles of Kairouan, which in the second half of the third/ninth century continued to refer to themselves not as followers of Mālik (Mālikīs) but as adherents to "the school of the Medinese" (*madhhab al-Madaniyyīn*).[6] Mālik was their foremost reference for that legacy, but their attachment was to the Medinese tradition *per se*, not specifically to Mālik as its spokesman and representative.

Basran scholar of law and *ḥadīth*s (Ibn ʿAbd al-Barr, *Tajrīd*, 24). Mālik relates three *ḥadīth*s from the Khurasanian scholar ʿAṭāʾ ibn ʿAbd-Allah (d. 163/780) (Ibn ʿAbd al-Barr, *Tajrīd*, 114–15; Sezgin, *Geschichte*, 1:33). He narrates a single *ḥadīth* from the Syrian Ibrāhīm ibn Abī ʿUbla (d. 151 or 152/768 or 769) (Ibn ʿAbd al-Barr, *Tajrīd*, 12–13). Another single transmission comes from the highly regarded Iraqi scholar ʿAbd al-Karīm al-Jazīrī (d. 127/744) (Ibn ʿAbd al-Barr, *Tajrīd*, 107). Although the number of non-Medinese in the *Muwaṭṭaʾ* from whom Mālik transmits is small, the fact that he does transmit twenty-three *ḥadīth*s from them indicates that Mālik regarded taking knowledge from qualified non-Medinese teachers as valid (cf. Dutton, *Origins*, 14).

[4] Mālik transmits several *ḥadīth*s in the *Muwaṭṭaʾ* about Medina's unique blessing and elevated religious status, including the fact that the Prophet declared the city a sacred sanctuary (*ḥaram*) on a par with Mecca and Jerusalem and encouraged Muslims to visit it (*Muwaṭṭaʾ*, 2:885–90, henceforth cited as *Muw.*). Medina retained the aura of its historical prominence in Mālik's time and long afterward. It was the city of the Prophet's migration (*hijra*) and his religious capital. It contained his mosque, grave, and the graves of many of his Companions.

Ignaz Goldziher captures the centrality of Medina in the Muslim consciousness. Mālik and his followers would have agreed with him that, "Islam proper was born in Medina: its historical aspects took shape here. Whenever in Islam a need has been felt for religious construction, people have looked to the *sunna* (traditional usage) of Medina, the Medina in which Muhammad and his Companions first began to give palpable form to life in the spirit of Islam" (Goldziher, *Introduction*, 9).

[5] Like Abū Ḥanīfa, Mālik made it a habit to wear the finest clothing, often of bright white cloth. He disliked for people who could afford nice garments to wear shabby ones. It was especially important in Mālik's view that people of knowledge dress well, since handsome appearance engendered respect for their learning. He would say, "I dislike that God should bestow His bounty on anyone and that the outward effect of that bounty not be seen upon him [in his appearance], especially the people of knowledge." Mālik used scented oils of the highest quality and wore an attractive silver ring with a black stone. Inscribed on the ring were the words, "God is all we need; what an excellent keeper is He" (*ḥasbunā Allāh wa niʿma al-wakīl*). His house was attractive and well furnished (ʿIyāḍ, *Tartīb*, 1:112–14).

[6] Muranyi, *Beiträge*, 61.

For this reason, they were concerned with collecting a wide variety of Medinese opinions, even those that contradicted Mālik.[7]

Although Mālik restricted himself to the city of Medina, he was not isolated from the outside world. The Medina of his time should not be conceived of as a secluded, sleepy desert town, unaware of and unconcerned with regions beyond it. During the formative period of Islamic law, Medina was highly accessible, cosmopolitan, and critically important as a political and cultural center.[8] Visitors from around the entire Muslim world of Mālik's generation were always present there. Most importantly, each region brought its distinctive problems to the jurists of Medina, while scholars and students came there from far and wide to study and refine their knowledge.[9] It may be noted that pro-Arab political sentiment ran

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[7] Muranyi, *Beiträge*, 61. This perspective challenges Jonathan Brockopp's "great shaykh" hypothesis in Jonathan Brockopp, "Competing Theories of Authority in Early Maliki Texts," 16–19, henceforth cited as Brockopp, "Competing Theories." Brockopp's hypothesis is discussed later (see below 79–81).

[8] Medina was initially the religious and political center of Islam. The Prophet established his political authority there during the last ten years of his mission and applied in practice the precepts and principles of the Prophetic law. The first three caliphs based their administrations in Medina. The fourth caliph, ʿAlī ibn Abī Ṭālib (d. 40/661), began his rule there but soon moved his capital to Kufa shortly after 36/656. After ʿAlī's assassination, Muʿāwiya ibn Abī Sufyān (d. 60/680) ruled the Islamic realms from Damascus, bringing Medinese political hegemony to an end. The revolt of ʿAbd-Allāh ibn al-Zubayr (d. 73/692) against Umayyad rule in 64/683 temporarily restored the political supremacy of the Hijaz by making it the seat of an independent, albeit short-lived caliphate. When Ibn al-Zubayr's revolt was crushed nine years later, his defeat signaled the political demise of the Hijaz until modern times (see Syed Salman Nadvi, "ʿAbd Allāh ibn Al-Zubair and the Caliphate," 105. henceforth cited as Nadvi, "Ibn Al-Zubair"). Ibn al-Zubayr was widely regarded as an early legal authority and was counted as one of the three ʿAbd-Allāhs (*al-ʿAbādila*), the other two being ʿAbd-Allāh ibn ʿUmar and ʿAbd-Allāh ibn ʿAbbās, all three of whom ranked as primary Medinese authorities (for definition of the *ʿAbādila*, see Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:270; ʿAbd al-Razzāq, *al-Muṣannaf*, 2:192; Ibn Abī Shayba, *al-Muṣannaf*, 1:255). During the second half of Mālik's life when the Abbasids came to power, the political center of the Islamic world shifted eastward to Iraq, where the Abbasid caliph Abū Jaʿfar al-Manṣūr (d. 158/775) established Baghdad as his imperial capital in 145/762. The eclipse of Medina's political greatness did not, however, mean the end of its prominence as a center of culture and learning. In addition to its perpetual status as a religious sanctuary and burial place of the Prophet, poets and poetry flourished there for some time after Ibn al-Zubayr (see M. A. Shaban, *Islamic History, A.D. 600–750: A New Interpretation*, 71–73; Aḥmad Shalabī, *al-Tārīkh al-islamī wa al-ḥaḍāra al-islāmiyya: dirāsa taḥlīliyya shāmila li-al-tārīkh al-islāmī wa al-ḥaḍāra al-islāmiyya fī jamīʿ al-ʿuṣūr wa al-anhāʾ*, 2:65–67; Ḥasan Ḥasan, *Tārīkh al-Islam al-siyāsī wa al-dīnī wa al-thaqāfī wa al-ijtimāʿī*, 1:535–36). The Medinese also cultivated their own distinctive school of historical writing (Nadvi, "Ibn Al-Zubair," 6–7).

[9] Cf. Jonathan Brockopp, *Early Mālikī Law: Ibn ʿAbd al-Ḥakam and His Major Compendium of Jurisprudence*, 15, henceforth cited as Brockopp, *Early Law*. Patricia Crone's assessment of the meager legal contribution of the Hijaz to Islamic law in the formative

high during Mālik's lifetime, especially under the Umayyads. Mālik, who was of mixed Arab-non-Arab ancestry,[10] confronted the issue on many occasions. He expressed strong sympathies for the non-Arabs, asserted that they were the equals of the Arabs, and insisted that they be given the same rights.[11]

Medina, like Mecca to the south, annually drew Muslims from all over the Islamic world to perform the major and lesser pilgrimages (*ḥajj* and *ʿumra*) and the customary visitation (*ziyāra*) of the Prophet in Medina, which went hand-in-hand with the journey to Mecca. Manuscript records preserved in Kairouan demonstrate how, during the course of the third/ninth century, the institution of pilgrimage drew students by the hundreds to Mecca and Medina from Egypt, North Africa, Andalusia, and elsewhere

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period is consistent with her conception of pre-Islamic Arabia as isolated and culturally backward. Wael Hallaq demonstrates the error of her paradigm, which ignores generations of standard Western scholarship. Crone builds on the "erroneous assumption of the non-existence of any meaningful relation between what she sees as the arid [Arabian] South and the flourishing North" (see Wael Hallaq, "The Use and Abuse of Evidence: The Question of Provincial and Roman Influences on Early Islamic Law," 80–83; contrast Christopher Melchert, "The Early History of Islamic Law," 294, henceforth cited as Melchert, "Early History"). Hallaq notes that the Arabian peninsula was connected with the great pre-Islamic civilizations of the north by strong cultural and commercial links, and there was "a constant state of flux" between the Arabs of Arabia and its northern neighbors. By Mālik's time, the pre-Islamic flux between the Hijaz and the Fertile Crescent had become a stream of constantly flowing tributaries.

[10] Mālik was of Yemeni paternal lineage and belonged to the clan of Dhū Aṣbaḥ. On his maternal side, he was of unspecified non-Arab (*mawālī*) background (ʿIyāḍ, *Tartīb*, 1:102–05).

[11] Ibn al-Qāsim states explicitly that Mālik regarded Arabs as equal in their legal status to non-Arabs (*bi-manzilat al-Aʿājim*) (*Mud.* 1:384). Ibn al-Qāsim reports that Mālik objected to legal opinions holding non-Arab Muslims to be of lesser status (*ghayr akfāʾ*) than Arabs and unsuitable to marry Arab Muslim women. He regarded such opinions as contrary to the Prophetic law (*Mud.*, 2:144). In elaborating on Mālik's position, Ibn al-Qāsim explains that any Muslim of good character has the right to seek the hand of a previously married Muslim woman (virgins required special paternal sanction) even though she might be superior to him in social status and lineage. If she is content to marry him, the marriage should go forward even though her father or guardian may refuse to sanction it. In case of the guardian's objection, the marriage proposal should be brought before the political authority (*sulṭān*), who would authorize her marriage according to her wishes despite family objections (*Mud.*, 2:144).

Ibn al-Qāsim elaborates on Mālik's position regarding the status of non-Arabs by stating that all people (*al-nās kulluhum*) are equal, Arab and non-Arab. He explains that Mālik supported this position by a statement of ʿUmar ibn al-Khaṭṭāb (d. 23/644) during the final years of his caliphate that, if he could have lived longer, he would have raised the lowliest of the people to the status of the highest. Ibn al-Qāsim adds that Mālik especially liked another statement attributed to ʿUmar, "There is not a single Muslim but that he has a right to [part] of the wealth [of the public treasury], regardless of whether it be given or denied him, even if he be only a shepherd or shepherdess in Aden" (*Mud.*, 1:260).

in their search for knowledge conjoined with the desire to perform their obligatory religious rites.[12]

Although Mālik did not travel beyond the Hijaz, persons from around the Muslim world wrote him letters, which he seems to have answered dutifully. The important legal correspondence between Mālik and the prominent Egyptian jurist al-Layth ibn Saʿd will be treated later.[13] There is ample evidence of Mālik's correspondence in the *Mudawwana*.[14] Delegations from different parts of the Muslim world came to Mālik regularly and brought with them a wide variety of distinctive questions.[15] His biography describes the structured manner in which he received such groups by region.[16] The *Mudawwana* corroborates these reports and gives rich evidence of the diversity of issues that were brought to Mālik's attention from outlying regions. Muḥammad Abū Zahra contends that Mālik's constant exposure to regional delegations and foreign visitors made him familiar with outlying regions and kept him abreast of their local differences and unique problems. Abū Zahra suggests that because Mālik's visitors provided him with such a vast array of real life questions, he did not need recourse to Abū Ḥanīfa's highly hypothetical method of positing

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[12] Muranyi, *Beiträge*, 61.

[13] Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3:94–95 (see below 220–27).

[14] For example, Mālik corresponds with a judge from Kairouan on a complicated question of inheritance (*Mud.*, 3:86). Ibn al-Qāsim relates that Mālik received a letter from a man whose wife stipulated in her marriage contract that if her husband married a second wife, took a concubine, or decided to leave the country that the wife's mother have the option of divorcing the daughter from her husband. Mālik affirmed the mother's right, but the questioner wants also to know if the mother's right devolves to the daughter after her mother's death or can be transferred to someone else mentioned in the mother's bequest. Ibn al-Qāsim states that Mālik inclined toward the opinion that the right devolved to the daughter. He adds, however, that he failed to ascertain from Mālik what his response to the letter actually was (*Mud.*, 3:226).

[15] He is asked whether the inhabitants of coastal areas exposed to attack by sea should perform the "prayer of fear" (*ṣalāt al-khawf*) in the same truncated manner as is customary when there is danger of attack by land. Mālik replies that the prayer is not shortened when there is danger of being attacked by sea. He cites precedents from the people of Alexandria, Ashkelon, and Tunis (*Mud.*, 1:149). When questioned about the legitimacy of participating in military campaigns with corrupt Muslim rulers, Mālik acknowledges his awareness of the boldness (*jarāʾa*) of the Byzantines along their front and states that the harm (*ḍirār*) that would result in failure to check them is too great to avoid such campaigns because of unworthy leaders (*Mud.*, 1:369). Mālik is questioned about Muslim soldiers on the frontiers (*murābiṭūn*) and along the seacoasts who are on guard duty (*fī al-ḥaras*) at night and engage in loud forms of communal commemorations (*takbīr*). He states that he sees no harm in what they are doing, although he dislikes that it be taken to the point of rapture (*taṭrīb*) (*Mud.* 1:402).

[16] Mālik kept a special gate-keeper for visitors. He allowed visitors from the Hijaz to enter first. Then he would call the Syrians, followed by the Iraqis, the North Africans, and others (Abū Zahra, *Mālik*, 57, citing ʿIyāḍ, *Tartīb*).

speculative questions to elaborate legal doctrine. Immediate access to concrete problems from around the Muslim world enabled Mālik to elaborate his legal reasoning pragmatically with reference to the tangible circumstances of real cases in a manner suitable to his overriding attention to the general good (*maṣāliḥ*).[17]

Little if anything of significance that was happening in the Muslim world of Mālik's time was unfamiliar to him. Mālik responds to questions about the Qadarites (*al-Qadariyya*), early and later Kharijites (*al-Ḥarūriyya*, al-*Khawārij*, and *al-Ibāḍiyya*), factionalists (*ahl al-ʿaṣabiyya*) in Greater Syria (*al-Shām*), and other heretical innovators (*ahl al-ahwāʾ*). The *Mudawwana* makes reference to the people of the "majoritarian community and the *sunna*" (*al-jamāʿa wa al-sunna*).[18] Mālik is asked about the legitimacy of public stipends (*dīwāns*) granted in Egypt, Syria, Medina, and to the desert Arabs.[19] He expresses his opinion about the governors of Old Cairo (*al-Fusṭāṭ*) and the "seaport cities" (*wulāt al-miyāh*). He is asked about the rulings issued by the governor (*wālī*) of Alexandria and his judges. Mālik allows certain of their rulings to stand as long as they do not constitute blatant oppression (*jawran bayyinan*).[20] Visitors from Iberia tell Mālik of their travels to cold northerly regions where they are exposed to rain, ice, and snow and where churches provide their only shelter by night.[21] He hears the concerns of Berbers who trade with Spaniards (*al-Ashbāniyyīn*). Sicilian Muslims speak of trade with the Nubians. Mālik is visited by North African merchants who know how to write in the "Nubian script."[22] Questions are brought to him about precious mines discovered in the western regions of North Africa (*arḍ al-maghrib*).[23]

Prominent non-Medinese jurists regularly came to Medina. Abū Ḥanīfa is said to have made the pilgrimage dozens of times and have spent significant periods of political exile in Mecca.[24] As indicated earlier, he

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[17] Abū Zahra, *Mālik*, 18–19.

[18] *Mud.*, 1:407–08, cf. *Muw.*, 899–900; *Mud.*, 1:165, 409–10. Interestingly, few if any explicit questions about the Shīʿa appear in the *Muwaṭṭaʾ* or *Mudawwana*.

[19] *Mud.*, 1:402.

[20] *Mud.*, 4:77.

[21] They ask if it is permissible for them to stay in churches under such conditions, which Mālik permits on the basis of duress (*ḍarūra*) if there is nowhere else to stay (*Mud.*, 1:90).

[22] *Mud.*, 3:118.

[23] He is asked whether the mines can be inherited as private property. Mālik replies that they cannot but should belong to the public treasury (*Mud.*, 3:216).

[24] See Abd-Allah, "Abū Ḥanīfa," 1:297–98; al-Kawtharī, *Fiqh*, 51–52; ʿIyāḍ, *Tartīb*, 1:112–14.

reportedly met Mālik on various occasions and discussed questions of law with him. His son, Ḥammād, as noted, continued to have private sessions with Mālik after his father's death, and Mālik would inquire of him further about his father's legal positions.[25]

Abū Yūsuf, the principal student of Abū Ḥanīfa, studied under prominent Medinese scholars such as Mālik's teacher Hishām ibn ʿUrwa ibn al-Zubayr (d. 146/763).[26] Muḥammad ibn al-Ḥasan al-Shaybānī, who was among the most influential of Abū Yūsuf's students, studied in Medina under Mālik and transmitted from him an important recension of the *Muwaṭṭaʾ*, which al-Shaybānī probably received around the age of twenty.[27] Well into Mālik's time, Medina maintained its worldwide reputation as a principal center for religious learning.[28] Moreover, the students and scholars who traveled to Medina from various parts of the Islamic world probably enjoyed greater political freedom there than in other more centrally located regions of the empire.[29]

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[25] See ʿIyāḍ, *Tartīb*, 1:164; al-Kawtharī, *Fiqh*, 51–52.

[26] Sezgin, *Geschichte*, 1:88–89.

[27] See Harald Motzki, "The Jurisprudence of Ibn Shihāb az-Zuhrī: A Source-Critical Study," 31, henceforth cited as Motzki, "Zuhrī;" see also ʿIyāḍ, *Tartīb*, 1:164; al-Kawtharī, *Fiqh*, 51–52.

[28] Taqī ad-Dīn Aḥmad ibn Taymiyya (d. 728/1328) holds that during the first decades of Islam no center of Islamic learning claimed to vie with Medina. The city's unique status remained unchallenged until the death of the caliph ʿUthmān ibn ʿAffān in 35/656. According to Ibn Taymiyya, only during the course of the political and sectarian divisions that arose after ʿUthmān's assassination was the claim first made that the scholars of Kufa were on a par with those of Medina. Even after ʿUthmān's assassination, however, no other city during the early period claimed to be independent of Medina in matters of legal and religious knowledge (Taqī al-Dīn Aḥmad ibn Taymiyya, *Ṣiḥḥat uṣūl madhhab ahl al-Madīna*, 30). Historical reports from early scholars indicate that still in Mālik's time the greatness of non-Medinese scholars was often measured in proportion to how much of their learning had been taken from the scholars of Medina (Aḥmad Muḥammad Nūr-Sayf, "'*Amal ahl al-Medina bayna muṣṭalaḥāt Mālik wa ārāʾ al-uṣūlīyīn*," 24).

Ibn Taymiyya notes that the early Abbasid rulers continued to hold the scholars of Medina in high regard. Al-Manṣūr requested several of the prominent scholars of Medina, among them a number of Mālik's teachers, to come to Iraq to spread their knowledge. Al-Manṣūr reportedly requested Mālik himself to compile the *Muwaṭṭaʾ* as a legal standard for the empire. This question will be discussed later. It indicates, however, the status of Medinese knowledge in the Islamic tradition and casts light on Mālik's implicit concern in the *Muwaṭṭaʾ* with dissenting legal opinions outside Medina, especially in Kufa. Ibn Taymiyya contends that Medina continued to enjoy international prestige as a unique center of Islamic learning after Mālik's death, although by that time Baghdad and the other emerging centers of religious learning in Khurasan, Andalusia, and North Africa had begun to rival it (Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 26, 32–33).

[29] See Abbott, *Studies*, 2:24, 188; Rahman, *Islam*, xviii, 99.

Medinese Islamic learning was not drawn exclusively from local resources. Unlike Mālik, many prominent Medinese scholars before and after him traveled extensively abroad to gain religious learning. The prominent Successor Saʿīd ibn al-Musayyab al-Makhzūmī (d. 94/713), the most influential Medinese jurist prior to Mālik and principal instructor of Mālik's teacher al-Zuhrī, spent much time and effort traveling from region to region in search of uncollected *ḥadīth*s.[30] According to Abū al-Walīd Muḥammad ibn Aḥmad ibn Rushd the Elder (d. 520/1126), Ibn al-Musayyab was known as "the master of the Successors" (*sayyid al-tābiʿīn*) and widely regarded as the most knowledgeable scholar of his generation by virtue of the extensive learning he acquired abroad.[31]

Medina had extensive indirect contact with the *ḥadīth* scholars throughout the Muslim world by way of the *ḥadīth* project of the Umayyad caliph ʿUmar ibn ʿAbd al-ʿAzīz (d. 101/720), who was himself a product of Medina.[32] The *ḥadīth* project had interregional scope, embracing the various provinces of the Islamic world at the time. Its goal was to gather the first exhaustive collection of Prophetic *ḥadīth* by using the Umayyad mail system (*al-barīd*) to collect copies of manuscripts from

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[30] Joseph Schacht and many Western scholars of Islam hold that the number of reliably authentic transmissions going back to al-Zuhrī was small; they limit the authentic core of his legacy primarily to the examples of considered opinion (*raʾy*) attributed to him in the *Muwaṭṭaʾ* that Mālik relates having heard from al-Zuhrī directly. Harald Motzki challenges this view. He shows that, apart from the *Muwaṭṭaʾ*, other early sources of *ḥadīth*s and post-Prophetic reports that appeared since Schacht's publication of *Origens*—especially the transmissions of Maʿmar ibn Rāshid (d. 153/770) and ʿAbd al-Malik ibn Jurayj (d. 150/767) in the *Muṣannaf* of ʿAbd al-Razzāq—are old and genuine. These additional crossreferences allow for extensive reconstruction of al-Zuhrī's *ḥadīth* transmissions and legal rulings. Motzki concludes that the number of texts authentically attributed to al-Zuhrī is much larger than previously thought; al-Zuhrī's legacy did not consist merely of examples of considered opinion but of *ḥadīth*s, post-Prophetic reports, and accounts of the praxis of Prophet, Companions, and Successors. Mālik's *Muwaṭṭaʾ* is not the principal source of al-Zuhrī's legacy; in fact, it transmits only a relatively limited part of that legacy when compared to the much more numerous transmissions of Maʿmar and Ibn Jurayj in ʿAbd al-Razzāq. This new information, Motzki contends, allows us to study the development of Islamic legal reasoning during the first quarter of the second/eighth century and, to some extent, even during the preliminary stages of the first/seventh century (see Motzki, "Zuhrī," 47–48; 4, 19, 31).

[31] Ibn Rushd (al-Jadd), *al-Muqaddimāt*, 1:27.

[32] ʿUmar ibn ʿAbd al-ʿAzīz was born, grew up, and received his education in Medina. He served as the Umayyad governor of Medina for a period. In the *Muwaṭṭaʾ*, Mālik regards him as one of many prominent Medinese legal authorities.

scholars around the Muslim world.[33] It was placed under the direction of two of the most eminent Medinese scholars of the generation before Mālik, Abū Bakr ibn Muḥammad ibn Ḥazm (d. 120/737) and al-Zuhrī.[34]

Initially, ʿUmar ibn ʿAbd al-ʿAzīz intended to collect legal *ḥadīth* only, but al-Zuhrī expanded the project to include all types of *ḥadīth*. By virtue of his involvement in the project, al-Zuhrī came to exercise profound influence upon his contemporaries. His influence became so great that Nabia Abbott refers to the opening decades of the second/eighth century—the period of Mālik's youth and early manhood—as the "Age of Zuhrī."[35] Mālik had direct access to the project's *ḥadīth* manuscripts. ʿIyāḍ transmits that when Mālik died seven chests (*ṣanādīq*) of the *ḥadīth*s al-Zuhrī had collected were found in his house.[36]

Mālik's Teachers

Mālik spent a considerable part of his childhood and early youth—roughly from the ages of seven to sixteen—studying under a little-known

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[33] Shortly after ʿUmar ibn ʿAbd al-ʿAzīz became the Umayyad caliph in 99/718, he commissioned Abū Bakr ibn Ḥazm to collect and compile the *ḥadīth*s and *sunna* of the Prophet for fear they would be lost with the passing away of the early scholars. The project soon passed to al-Zuhrī, who continued to direct it for more than twenty-five years after ʿUmar's death (Sezgin, *Geschichte*, 1:56–57; Abbott, *Studies*, 2:25–26).

[34] Al-Zuhrī was the main director of the project. As noted, he was one of Mālik's principal teachers. Mālik may have studied under Abū Bakr ibn Ḥazm also, but the relationship is not as clear. Ibn Ḥazm ranked among the foremost Medinese scholars of his generation, and he served both as a governor and judge in Medina. He figures prominently in the chains of transmission of the *Muwaṭṭa'*. Mālik would have been in his late twenties at the time of Ibn Ḥazm's death, which was followed four years later by the death of al-Zuhrī (see Sezgin, *Geschichte*, 1: 56–57, 284; Abbott, *Studies*, 2: 25–26; Muḥammad ibn Khalaf Wakīʿ, *Akhbār al-quḍāh*, 1: 133–48). Ibn Ḥazm's son, ʿAbd-Allāh (d. 130/747), was one of Mālik's teachers. He was a notable scholar in his own right and was Mālik's primary transmitter for his father (Sezgin, *Geschichte*, 1:284).

[35] In collecting and recording *ḥadīth*s, al-Zuhrī relied systematically upon writing. As a consequence, the Age of al-Zuhrī became the age of manuscripts. Although Muslims had used writing from the time of the earliest transmission of *ḥadīth*s, the project firmly established the principal methods for written *ḥadīth* transmission, giving them prominence over purely oral methods (Abbott, *Studies*, 2:1, 7, 11–12, 25–26, 30–35, 52–53, 77; Sezgin, *Geschichte*, 1:53–60, 70–71, 79–80; Mustafa Azmi, *Studies in Early Ḥadīth Literature: With a Critical Edition of Some Early Texts*, 1–5, 28–106, 211, 231. Regarding the debate over the early oral and written transmission of *ḥadīth*s see Humphreys, *Islamic History*, 22; Gregor Schoeler, *The Oral and the Written in Early Islam*, 36–42; James Montgomery, "Introduction" to Gregor Schoeler's, *The Oral and the Written in Early Islam*, 13–14, 29; Donner, *Narratives*, 13, 16–17, 22).

[36] ʿIyāḍ, *Tartīb*, 1:149. ʿIyāḍ reports that they found additional chests Mālik had filled with the books of the scholars of Medina (*kutub ahl al-Madīna*).

Successor named ʿAbd-Allāh ibn Hurmuz.[37] Ibn Hurmuz is said to have been among the most knowledgeable scholars of his time in refuting sectarians (*ahl al-ahwāʾ*) and discussing the important theological questions about which people differed.[38] Through him, Mālik had the opportunity to become acquainted from an early age with the key Islamic controversies of the age.

Mālik acquired his learning almost exclusively from the generation of the younger Successors, Nāfiʿ (d. 117/735), the freedman of ʿAbd-Allāh ibn ʿUmar ibn al-Khaṭṭāb (d. 73/692), who was an older Successor, being the notable exception.[39] His principal teachers—al-Zuhrī, Rabīʿa, Yaḥyā ibn Saʿīd (d. 143/760), and Abū al-Zinād—studied under the renowned Seven Jurists (*al-Fuqahāʾ al-Sabʿa*) of Medina, who were all older Successors, and they transmitted directly from them.[40] The Seven Jurists were widely regarded as the most learned scholars of their time.[41] The actual number

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[37] See ʿIyāḍ, *Tartīb*, 1:116; Abū Zahra, *Mālik*, 32–33; Dutton, *Origins*, 12. In my dissertation, I mistakenly confuse Mālik's early teacher, ʿAbd-Allāh ibn Hurmuz, with al-Aʿraj, ʿAbd al-Raḥmān ibn Hurmuz (d. 117/735) (Abd-Allah, "*ʿAmal*," 62–63), which stands corrected here.

[38] ʿIyāḍ, *Tartīb*, cited in Abū Zahra, *Mālik*, 34); cf. Wilferd Madelung, *Der Imām al-Qāsim ibn Ibrāhīm und die Glaubenslehre der Zaiditen*, 241, henceforth cited as Madelung, *al-Qāsim*.

[39] The lives of the younger Successors spanned roughly the period between 70/689 and 135/752. They flourished toward the close of the first/seventh century and during the first three decades of the second/eighth. Although the younger Successors received some of their learning from the Companions, they received most of it from older Successors like Nāfiʿ (see ʿIyāḍ, 1:119–20; Abū Zahra, *Mālik*, 106–112; Sezgin, *Geschichte*, 1:457; and Nūr Sayf, "*ʿAmal ahl al-Madīna*" 16–22).

[40] ʿAbd-Allāh ibn Ṣāliḥ al-Rasīnī, "*Fiqh al-fuqahāʾ al-sabʿa wa atharuhū fī fiqh al-Imām Mālik*," 27–67.

[41] See Sezgin, *Geschichte*, 1:278–79; Abd-Allah, "*ʿAmal*", 56, 67–68; al-Rasīnī, "*Fiqh*," 27–67. Wael Hallaq states that the Seven Jurists "are acknowledged in the sources as having excelled in the law, but not yet in jurisprudence as a theoretical study—a discipline that was to develop much later" (Hallaq, *Origins*, 65). ʿAbd-Allāh al-Rasīnī shows that strong continuity exists between Mālik's opinions and those of the Seven Jurists (al-Rasīnī, "*Fiqh*," 27–67). There is no *a priori* reason to assume that the legal reasoning of the Seven Jurists differed significantly from that of Mālik and the later Medinese. The study of jurisprudence did not develop until the post-formative period, but, as will be discussed later, legal reasoning (like other concepts and patterns of thought) may exist, flourish, and fully mature independently of any conscious attempt to analyze it or impose terminologies. The sophistication or lack of it that the early jurists had cannot be measured in terms of whether or not they consciously articulated their legal reasoning as jurisprudential theory.

of the "Seven Jurists" varies from seven to twelve. The seven of them most frequently listed are:

- Saʿīd ibn al-Musayyab (d. 94/713).
- Al-Qāsim ibn Muḥammad (d. ca. 106/724), the grandson of the caliph Abū Bakr and nephew of ʿĀ'isha.
- ʿUrwa ibn al-Zubayr (d. 94/712), the younger brother of ʿAbd-Allāh ibn al-Zubayr and nephew of ʿĀ'isha.
- Sulaymān ibn Yasār (d. 100/718), the freedman of the Prophet's wife Maymūna.
- Khārija ibn Zayd ibn Thābit (d. 100/718).
- ʿUbayd-Allāh ibn ʿAbd-Allāh ibn ʿUtba (d. 98/716).
- Abū Bakr ibn ʿAbd al-Raḥmān ibn al-Ḥārith (d. 94/712).[42]

Mālik's teacher Abū al-Zinād compiled a book of the juristic pronouncements of the Seven Jurists upon which they reached consensus. Citations from the work appear in the *Mudawwana*.[43]

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[42] See Sezgin, *Geschichte*, 1:278–79; al-Rasīnī, "*Fiqh*," 27–67. The Seven Jurists comprised an authoritative legal council similar to ones that existed in Medina under the caliphates of Abū Bakr and ʿUmar (see Abd-Allah, "*ʿAmal*," 197–99). According to Mālik, the Prophet had directed the creation of such legal councils for solving questions lacking precedent in the Qur'ān or the *sunna*, "Gather together those of the believers who have knowledge and let it be a matter of consultation (*shūrā*) among you. But do not judge [in such matters] on the basis of just a single one [of you]" (Muḥammad ibn Abī Bakr al-Jawziyya, *Iʿlām al-muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*, (Beitut: Dār al-Kitāb al-ʿArabī), 1:73–74, henceforth cited as Ibn Qayyim, *Iʿlām* (Dār al-Kitāb); Muṣṭafā Aḥmad al-Zarqā, *al-Fiqh al-islāmī fī thawbihī al-jadīd: al-madkhal al-fiqhī al-ʿamm*, 1:192).

Of the seven, Saʿīd ibn al-Musayyab was the most influential, followed by al-Qāsim ibn Muḥammad, Sulaymān ibn Yasār, ʿUrwa ibn al-Zubayr, and Khārija ibn Zayd. Mālik refers to the *ḥadīth*s and post-Prophetic reports of the Seven Jurists throughout the *Muwaṭṭa'*. They are prominent in the *Mudawwana*, and Mālik undoubtedly regarded them as standing at the heart of the Medinese tradition and its praxis (see Sezgin, *Geschichte*, 1:278–79; al-Rasīnī, "*Fiqh*," 27–67). Mālik's *ḥadīth* mentioned above portrays the method of group legal reasoning in unprecedented matters that characterized the Medinese during the early caliphate and culminated in the circle of the Seven Jurists (see al-Zarqā, *Fiqh*, 1:170, 192; Maʿrūf al-Dawālībī, *al-Madkhal ilā ʿilm uṣūl al-fiqh*, 49–88; Abū Zahra, *Mālik*, 103; ʿAllāl al-Fāsī, *Maqāṣid al-sharīʿa al-islāmiyya*, 116–17; Ignaz Golziher, *Die Zāhiriten*, 8).

[43] See Sezgin, *Geschichte*, 1:465; Abū Zahra, *Mālik*, 248, 243. Abū Faraj Muḥammad ibn al-Nadīm (d. 380/990) mentions Abū Zinād's work in his famous fourth/tenth-century index of books, the *Fihrist* (see [Muḥammad ibn Isḥāq ibn al-Nadīm], *The Fihrist of al-Nadīm: A Tenth Century Survey of Muslim Culture*, 1:xv–xxiii). ʿAbd-Allāh al-Rasīnī collects and analyzes citations in the *Mudawwana* and other sources from Abū al-Zinād's book. The compilation has now been lost. In addition to the *Mudawwana, ḥadīth* works contain numerous citations from it (see al-Rasīnī, "*Fiqh*," Preface and 100–02).

Before and during Mālik's lifetime, Medina was the center of the Prophet's household (*Ahl al-Bayt*). Mālik studied under them and had close ties to them.[44] He transmits from Muḥammad al-Bāqir ibn ʿAlī Zayn al-ʿĀbidīn (d. 114/732) through his son Jaʿfar al-Ṣādiq ibn Muḥammad (d. 148/765), who was close to Mālik in age and is counted among his teachers and those of Abū Ḥanīfa.[45] It is not certain whether Mālik supported the Medinese rebellion of the prominent Ḥasanid leader Muḥammad al-Nafs al-Zakiyya (d. 145/762), but the Abbasids looked with suspicion upon Mālik as one of the many Medinese who were sympathetic to his cause.[46] It is

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[44] Mālik would have personally known ʿAlī Zayn al-ʿĀbidīn (d. 94/712), who died when Mālik was still in his young manhood. Muḥammad al-Bāqir ibn ʿAlī Zayn al-ʿĀbidīn (d. 114/732) and his brother Zayd ibn ʿAlī (d. 122/740) were several years older than Mālik and belonged roughly to the generation of his main teachers.

[45] Abū Zahra, *Mālik* (1997), 81–82, idem, *Abū Ḥanīfa* (1997), 63–66. Mālik transmits fourteen reports in the *Muwaṭṭaʾ* from Jaʿfar al-Ṣādiq, all of which include Muḥammad al-Bāqir in their chains of transmission. Mālik's transmissions from Jaʿfar al-Ṣādiq include four connected solitary *ḥadīth*s, all of which pertain to pilgrimage rites (*Muw.*, 364; two *ḥadīth*s in *Muw.*, 372; *Muw.*, 374–75). The four disconnected *ḥadīth*s pertain to the Friday sermon, how the Prophet was washed for burial, how the Prophet's sacrificial camels were slaughtered in the pilgrimage, and making rulings on the basis of the plaintiff's oath and a single witness (*Muw.*, 112; *Muw.*, 222; *Muw.*, 394; *Muw.*, 721). The six post-Prophetic reports are from ʿUmar, Fāṭima, and ʿAlī. The first from ʿUmar pertains to taking the poll tax from Magians as one would from Jews and Christians (*Muw.*, 278). The report from Fāṭima describes how she shaved the heads of her children Ḥasan, Ḥusayn, Zaynab, and Umm Kulthūm as newborns and gave the weight of their hair as charity in silver (*Muw.*, 501). The remainder are from ʿAlī. The first reports ʿAlī's disagreement with the caliph ʿUthmān over performance of the joined (*qirān*) mode of pilgrimage, in which the lesser (*ʿumra*) and major pilgrimages are done simultaneously. Mālik notes that the Medinese AN (*al-amr ʿindanā*) confirms ʿAlī's position (*Muw.*, 336). The second reports how ʿAlī did the pilgrim's chant (*talbiya*). Mālik reports that his practice is in keeping with the standard praxis of the Medinese people of knowledge (*Muw.*, 338). The third is about ʿAlī's practice regarding sacrificial animals for the pilgrimage (*Muw.*, 385). The last gives ʿAlī's opinion that the oath of abjuring one's wife (*al-īlā*) does not entail repudiation even after the passing of four months until the judge requires the husband to articulate his position. Mālik states that it is the "the precept among us" (*al-amr ʿindanā*; AN) (*Muw.*, 556).

[46] He was thirteen years younger than Jaʿfar al-Ṣādiq. Mālik does not transmit from al-Nafs al-Zakiyya in the *Muwaṭṭaʾ*.

Regarding the rebellion of al-Nafs al-Zakiyya, Muḥammad ibn Jarīr al-Ṭabarī (d. 310/923) narrates in his history that Mālik encouraged the people of Medina to back the rebellion of Muḥammad al-Nafs al-Zakiyya, who refused to give the oath of allegiance to the first Abbasid caliphs and rebelled against them with considerable support in Medina, Iraq, Persia, and elsewhere (cited in Abū Zahra, *Mālik*, 75–76). Other reports do not mention Mālik's giving explicit backing to al-Nafs al-Zakiyya but indicate that the Abbasids regarded Mālik as a supporter of his cause. The most famous account of Mālik's covert sympathy with al-Nafs al-Zakiyya's cause after the Abbasids had regained control of Medina was his insistence on transmitting (to their chagrin) a well-known *ḥadīth*, according to which marital repudiation (*ṭalāq*) is invalid under duress. The Abbasids insisted that Mālik cease transmitting the *ḥadīth* because the people interpreted it analogically as undercutting the

of note that although the *Muwaṭṭa'* and *Mudawwana* make reference to the Qadarites, Khārijites, and other sectarians as well as to the people of "the community and the *sunna*," there are few if any explicit references to the Shīʿa in either book.[47]

Mālik's biographical sources concur that he took pride in having always been selective in choosing teachers. He sat only with the best and most highly qualified. He only took *ḥadīth* from traditionists (*muḥaddithūn*) who (like him) were also jurists.[48] Mālik held that four types of scholars were unworthy of transmitting *ḥadīth*:

1) An incompetent (*safīh*).
2) A proponent of heresy or wrongful innovation.
3) A person who lies when speaking with others, even though there is no suspicion of dishonesty in his transmission of *ḥadīth*.
4) A learned man (*shaykh*) known for moral integrity and excellence and given to much worship but lacking true understanding of the knowledge he receives and transmits.[49]

Mālik did not entertain an uncritical view of Medina's scholarly community. He regarded a good part of the city's teachers as unworthy and unacceptable. In his view, a number of transmitters of *ḥadīth* in Medina fell into one or more of the four categories above. Accordingly, he never received or transmitted knowledge from them. Mālik said:

> I have met during my lifetime a large number (*jamāʿa*) of the people of Medina from whom I never took a single piece of instruction, even though they were people from whom knowledge was being taken. They were of

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legitimacy of their rule, since the Abbasids had forced the people of Medina to pledge their oath of allegiance to them (see Abū Zahra, *Mālik*, 72–74).

As a result of Abbasid disfavor, Mālik was publicly flogged. His arms were stretched out and pulled between two horses, and both shoulders were dislocated. The punishment was carried out during the reign of al-Manṣūr under the direction of the then governor of Medina, Jaʿfar ibn Sulaymān. Assuming that Mālik's punishment probably took place during the early years of al-Manṣūr's reign shortly after the death of al-Nafs al-Zakiyya, Muḥammad Abū Zahra estimates that it occurred around 145/762, when Mālik was in his late forties or early fifties and in the prime of his career (see Abū Zahra, *Mālik*, 75–76).

[47] See *Muw.*, 899–900; *Mud.*, 1:407–08; *Mud.*, 1:165, 409–10; *Mud.* (2002), 3:93–99.

[48] ʿIyāḍ, *Tartīb*, 1:123–25. ʿIyāḍ relates that Mālik also took care to receive instruction only in an atmosphere conducive to learning. It was his habit, for example, never to stand in a crowd of students when learning from his teachers but to sit with them under more favorable conditions.

[49] Yūsuf ibn ʿAbd al-Barr, *al-Intiqāʾ fī faḍāʾil al-thalātha al-aʾimma al-fuqahāʾ: Mālik wa al-Shāfiʿī wa Abī Ḥanīfa*, 16; cf. Lucas, *Critics*, 145.

> different types. Among them, there were those who would lie when speaking to people, although they would not lie when speaking about matters of knowledge. There were those among them who were ignorant of [the meaning and implications] of what they possessed. There were those among them who were accused of having unsound views (*kāna yurmā bi-raʾy sūʾ*). So I left all of them alone.[50]

According to another report, Mālik was asked why he did not transmit *ḥadīth* from the traditionists of Iraq. He replied that he had observed when they came to Medina that they took *ḥadīth* from unworthy transmitters.[51]

Mālik apparently regarded many *ḥadīth* transmitters in Medina as falling in the fourth category: pious and well-meaning but without understanding. Ibn Wahb reports that Mālik told him:

> I have met during my lifetime in this city [of Medina] people whose prayers, if they were asked to pray for rain, would be answered and who received much knowledge and many *ḥadīth*s by way of transmission. Yet I never transmitted a single *ḥadīth* from any of them. They were taken by excessive fear (*khawf*) of God and asceticism. This business (*shaʾn*), that is, *ḥadīth* and the giving of juristic pronouncements requires men characterized by mindfulness of God (*tuqā*), integrity (*waraʿ*), caution (*ṣiyāna*), perfectionism (*itqān*), knowledge, and understanding (*fahm*) so that they are able to perceive what is coming out of their heads and what the results of it will be tomorrow. As for those who lack this perfection (*itqān*) and awareness (*maʿrifa*), no benefit can be derived from them. They are not authoritative sources of knowledge (*ḥujja*), and one should not take knowledge from them.[52]

In a similar report attributed to Ibn Wahb and three other prominent students of Mālik, it is related that Mālik would often say:

> This knowledge [of *ḥadīth* and law] constitutes [the essence of our] religion. Consider carefully those from whom you take it. During my lifetime, I have met among these pillars (and he pointed to the [pillars of] the [Prophet's] mosque) a large number (lit., "seventy") of those who say, "the Prophet of God said . . .," from whom I never took a single bit of learning, despite the fact that there were among them those who, if they had been entrusted with a treasure, would have been found completely trustworthy. But they were not worthy of this business [of transmitting knowledge].[53]

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[50] ʿIyāḍ, *Tartīb*, 1:123; Ibn ʿAbd al-Barr, *al-Intiqāʾ*, 15–16.
[51] ʿIyāḍ, *Tartīb*, 1:123.
[52] ʿIyāḍ, *Tartīb*, 1:123.
[53] ʿIyāḍ, *Tartīb*, 1:123; Ibn ʿAbd al-Barr, *al-Intiqāʾ*, 16.

Mālik received extensive knowledge of *ḥadīth* from his teachers and came to be universally regarded as one of the most exemplary traditionists in his own right.[54] His younger Meccan contemporary, Sufyān ibn ʿUyayna (d. 196/811), a principal teacher of al-Shāfiʿī and renowned traditionist, jurist, and Qurʾānic commentator, regarded Mālik as "the strictest of critics with regard to transmitters (*rijāl*)." Scott Lucas observes that Mālik was not only a "*bona fide ḥadīth* critic," he was one of the first scholars "to engage in *ḥadīth*-transmitter criticism and employ its technical vocabulary."[55]

The Basran ʿAbd al-Raḥmān ibn Mahdī (d. 198/814), a student of Mālik and one of the most influential traditionists of his age,[56] contended that the Imāms of *ḥadīth* in his time were four: Sufyān al-Thawrī in Kufa, Mālik in the Hijaz, ʿAbd al-Raḥmān al-Awzāʿī in Syria, and Ḥammād ibn Zayd

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[54] See Lucas, *Critics*, 131, 143–45. Muḥammad ibn Ismāʿīl al-Bukhārī (d. 256/876) and Muslim ibn al-Ḥajjāj (d. 261/875) held Mālik in esteem as a master in *ḥadīth* transmission. Both relied heavily on the *Muwaṭṭaʾ* in their *ḥadīth* collections as demonstrated by the fact that most of the connected (*musnad*) *ḥadīth*s in the *Muwaṭṭaʾ* occur in the works of al-Bukhārī and Muslim. ʿAbd al-Bāqī's edition of the *Muwaṭṭaʾ* gives indication of every *ḥadīth* transmitted by al-Bukhārī and Muslim. In most cases, each of these *ḥadīth*s occurs simultaneously in both works. Later traditionists conferred upon Mālik the honorific title of "commander of the believers in *ḥadīth*" (*amīr al-muʾminīn fī al-hadīth*), which they applied to the master traditionists of each generation. This honor was conferred on traditionists who stood as scholarly and moral exemplars (*aʿlām wa aʾimma*), committed extensive numbers of *ḥadīth*s to memory, and understood the meanings and implications of what they transmitted. The title was given to Mālik's teacher Abū al-Zinād and to his Kufan and Basran contemporaries Sufyān al-Thawrī (d. 161/778) and Shuʿba ibn al-Ḥajjāj (d. 198/814). Al-Bukhārī is also designated by the title (Muḥammad ʿAjjāj al-Khaṭīb, *Uṣūl al-ḥadīth: ʿulūmuhū wa muṣṭalaḥuhū*, 446–47).

[55] Lucas, *Critics*, 144–45. Alfred von Kremer observes that Mālik seemed to have been the first to use critical methods to sift *ḥadīth*s (see Kremer, *Culturgeschichte*, 1:478).

ʿIyāḍ cites Mālik as stating that the formal method of transmitting *ḥadīth*s in Medina since the time of Saʿīd ibn al-Musayyab and the Seven Jurists had been for a reader to dictate from a scholar's books to other students while the scholar listened and corrected mistakes from memory. In *ḥadīth* terminology, this method is called "presentation" (*ʿarḍ*) and less commonly "recital" (*qirāʾa*). Mālik states that Ibn Hurmuz, Rabīʿa, al-Zuhrī, and other Medinese scholars received and transmitted their knowledge exclusively by this method. In keeping with this tradition, Mālik refused to dictate from his own works directly even at the personal request on the Abbasid caliph in a private session. Mālik believed the traditional Medinese method of transmission to be superior to scholars transmitting to their students directly, which is called "audition" (*samāʿ*). One of Mālik's students reports that he never once heard Mālik transmit the *Muwaṭṭaʾ* directly by audition during nineteen years of study. Mālik always had a student read from his manuscript to other students while Mālik listened and corrected (see ʿIyāḍ, *Tartīb*, 1:158, 162–63; Sezgin, *Geschichte*, 1:59; Schoeler, *Oral*, 33).

[56] Al-Shāfiʿī reportedly composed his legal treatise, *al-Risāla*, at the request of Ibn Mahdī. Al-Shāfiʿī regarded Ibn Mahdī as without peer in the science of *ḥadīth* (see Aḥmad ibn ʿAlī ibn Ḥajar al-ʿAsqalānī, *Kitāb tahdhīb al-tahdhīb*, 6:279–81; Sezgin, *Geschichte*).

(179/795) in Basra.[57] Mālik generally refused to transmit *ḥadīth*s that he regarded as defective or which lent themselves to erroneous interpretations, even if they were technically authentic.[58] Ibn Mahdī held that Mālik committed more *ḥadīth*s to memory than any other scholar of his generation, although he refrained from transmitting most of them. He asserted that Mālik did not err in the *ḥadīth*s he transmitted and that there was no one on the face of the earth more worthy of trust in *ḥadīth* than Mālik.[59]

As Mālik grew older, his prestige and influence in Medina became immense. He used his influence to oblige the traditionists and scholars of Medina to observe standards of transmission in *ḥadīth* similar to his own. Until his death, those who transmitted *ḥadīth* in Medina had to beware lest Mālik have them jailed for questionable transmissions and require them to correct their mistakes before permitting them to be set free.[60] Notable Medinese scholars such as ʿUthmān ibn Kināna (d. ca. 185/801), ʿAbd al-ʿAzīz ibn Abī Ḥazm (d. 185/801), and ʿAbd al-ʿAzīz ibn Muḥammad al-Darāwardī (d. 186/802) refrained from transmitting the *ḥadīth*s of certain traditionists during Mālik's lifetime out of deference (*hayba*) to him.[61]

Mālik as a Teacher and Jurist

Of all the eponymous Sunnī Imāms of law, none had more students from as widely diverse regional backgrounds as Mālik.[62] The majority came from the Hijaz, Egypt, North Africa, and Andalusia, but Mālik attracted students from all parts of the Umayyad and Abbasid empires, including significant numbers from Iraq, Syria, and Khurasan. He attracted students of all ages, although those of older age—many of whom were as old as Mālik—outnumbered his younger students. Muḥammad Abū Zahra

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[57] ʿIyāḍ, *Tartīb*, 1:132. ʿIyāḍ relates that Ibn Mahdī ranked Mālik's Basran contemporary Ḥammād ibn Zayd on the same level with Mālik. Both of them, he believed, exercised great precaution in the transmission of *ḥadīth*s.

[58] ʿIyāḍ, *Tartīb*, 1:148–49, 151. See "Solitary *Ḥadīth*s" in the discussion of Mālik's legal reasoning (below 107–129).

[59] ʿIyāḍ, *Tartīb*, 1:132. Scott Lucas notes that Mālik fully met the rigorous criteria that he set for anyone to be an Imām in *ḥadīth*s. Such an Imām must *not* transmit all he has heard. He must *not* transmit from all the scholars he has studied under, and he must *not* narrate everything he is asked to transmit or give answers to all who ask (Lucas, *Critics*, 131, 143–45, citing Ibn ʿAdī's *al-Kāmil*, 1:100, 119).

[60] ʿIyāḍ, *Tartīb*, 1:166.

[61] ʿIyāḍ, *Tartīb*, 1:166.

[62] Abū Zahra, *Mālik*, 229; ʿIyāḍ, *Tartīb*, 1:143; cf. Brockopp, *Early Law*, 15.

suggests that one of the main reasons for the spread of Mālik's teaching so widely and quickly through the Islamic world of his time was the large numbers and great diversity of his students.[63] The fact that many of his students were older lent him additional authority in a culture that venerated the elderly and looked to them for wisdom.

Mālik's method of teaching and the atmosphere of his circle of students differed diametrically from his Kufan counterpart, Abū Ḥanīfa. Abū Ḥanīfa fostered open discussion, encouraged free exchange of opinion, reasoned by consultation (*shūrā*), and placed extensive reliance upon speculation and the hypothetical method.[64] By contrast, Mālik's circle was dominated by his powerful, often intimidating personal charisma. The number of questions permitted was limited. Speculation and hypothesis were discouraged.[65]

Mālik's students held him in such deference and sat so still in his presence that it was said they sat as if birds were perched on their heads.[66]

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[63] Abū Zahra, *Mālik*, 229; ʿIyāḍ, *Tartīb*, 1:143; cf. Brockopp, *Early Law*, 15.

[64] See al-Kawtharī, *Fiqh*, 55–56.

[65] It is widely related that Mālik inspired awe mingled with fear (*hayba*) in those who sat in his presence. The reverential fear he inspired was so strong that it prevented many from finding the courage to ask any questions at all. One of Mālik's students, Ziyād ibn Yūnus (d. 211/826), relates that he never saw a scholar, a person given to worship, a shrewd villain (*shāṭir*), or a governor who was held in greater awe than Mālik (ʿIyāḍ, *Tartīb*, 1:166). Mālik's younger contemporaries Saʿīd ibn Abī Maryam (d. 224/838), al-Darāwardī, and ʿAbd al-Malik ibn al-Mājishūn (d. 212/827), all prominent scholars in close association with Mālik, report that they never felt in the presence of a governor or caliph the awe mingled with fear that they felt in Mālik's presence (ʿIyāḍ, *Tartīb*, 1:166–67).

Ibn Wahb, who ultimately became one of Mālik's primary transmitters of law, first came to visit Mālik at the head of a delegation of Egyptian pilgrims. They had charged Ibn Wahb with asking Mālik a number of questions on their behalf, among them the issue of how to determine the gender of hermaphrodites. Ibn Wahb relates that when he saw Mālik he felt such awe of him that he could not find the courage to ask the question, nor could anyone else in the Egyptian delegation (cited by Abū Zahra, *Mālik*, 100). Classification of a hermaphrodite as male or female has significant legal consequences for inheritance and other issues of law. Ibn Wahb's report is borne out by the *Mudawwana*, which indicates that no one had the courage to ask Mālik about the gender of hermaphrodites during his lifetime. When Ibn al-Qāsim is asked his legal opinion on hermaphrodites, he replies, "I never heard anything from Mālik pertaining to [hermaphrodites], and we never dared to ask anything about them." The questioner continues, "Did you ever hear him say anything about what their portion of the inheritance should be?" Ibn al-Qāsim replied, "No. But I personally prefer that one consider how [a hermaphrodite] urinates. If it urinates from the penis, it is a boy. If it urinates from the urethra, it is a girl" (*Mud.*, 2:187).

[66] ʿIyāḍ, *Tartīb*, 1:154, 167. ʿIyāḍ reports that when Sufyān al-Thawrī witnessed the deference which Mālik's students paid him, he composed the verses:

He refuses to answer but, out of awe, is not asked again.
(*Ya'bā al-jawāba fa-lā yurājaʿu haybatan.*)
The beards of those who would ask are lowered in humility:

Mālik was known for his reticence, and it was not his custom to respond to all questions.[67] When he refused to answer a question or stated that he did not know its answer, few had the courage to ask him a second time.[68] Since many found it impossible to ask the questions themselves, they would seek out Mālik's reader and scribe, Ḥabīb ibn Abī Ḥabīb (d. 218/833), as an intermediary who could bring questions to Mālik on their behalf.[69]

Because it was difficult to ask Mālik questions, especially hypothetical ones, his students would sometimes find outsiders who were not familiar with Mālik and were willing to raise questions on their behalf. Often the outsiders were given hypothetical questions under the guise that they were actual problems that had occurred.[70] Mālik was known for his

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(*fa-al-sā'ilūna nawākisu al-adhqāni*:)
It is the deportment of reverence, the glory of the power of righteousness.
(*Adabu al-waqāri wa 'izzu sulṭāni al-tuqā*.)
He inspires great awe yet possesses no [worldly] power.
(*fa-hwa al-muhību wa laysa dhā sulṭāni*.)

67 Mālik regarded excessive talk a blemish and was known for his reticence. He held that much talking detracted from knowledge and debased it. He did not permit debates or arguments in his presence, because he felt that they led to vanity and removed the light of knowledge ('Iyāḍ, *Tartīb*, 1:170). Excessive talking, in Mālik's view, was the sign of unmanly character and weak mindedness. He is reported to have remarked about a certain person, "How excellent he would be but for the fact that he speaks in a single day the words of an entire month" ('Iyāḍ, *Tartīb*, 1:189).

68 One man reports that he attended Mālik's circle and asked a question. Mālik answered him. He reciprocated with a counterargument. Mālik countered with an argument of his own. Then some of Mālik's students indicated to the man that he should be silent, so he ceased to argue ('Iyāḍ, *Tartīb*, 1:163). Another report relates that an Iraqi visitor to Mālik's circle asked two questions, which Mālik answered. The visitor then asked a third, which Mālik refused to answer. The man lost his patience, and Mālik advised him to be more modest and less persistent. The questioner responded by citing a questionable *ḥadīth*, "The bolder a man's face, the finer his understanding of the religion" (*idhā kathufa wajh al-rajul, daqqa dīnuhū*). Several of Mālik's students stood up, pulled the man's turban from his head, and choked him with it ('Iyāḍ, *Tartīb*, 1:167. The *ḥadīth* is not to be found in the standard *ḥadīth* collections).

69 'Iyāḍ, *Tartīb*, 1:153–54. Ibn Wahb relates the account of a man who came to Medina to ask Mālik a question but neither found the courage to ask it nor anyone to ask the question on his behalf. The man spent ten days not knowing what to do. Finally, after complaining to the people of Medina about his predicament, they directed him to bring the question to Mālik's scribe, who asked the question for him ('Iyāḍ, *Tartīb*, 1:168).

It is said that Ḥabīb would ask a sum of two pieces of gold for delivering a full reading of a text. Many traditionists held him in low esteem. Aḥmad ibn Ḥanbal and Yaḥyā ibn Ma'īn regarded him as a weak transmitter, if not a liar (see 'Iyāḍ., *Tartīb*, 1:378–79).

70 Mālik's reticence, his habit of only answering questions he was certain of, and his refusal to entertain hypothetical questions posed problems for his students, who found it difficult to discover Mālik's position on a variety of matters regarding which he was reluctant to speak. According to Ibn al-Qāsim, Mālik's closest students (*aṣḥābuhū*)

customary response, "*Lā adrī* (I do not know)." According to one report, he was once asked forty-eight questions in a single day and responded to thirty-two of them (two-thirds of them) with the words, "I do not know."[71] Mālik counseled his students to make a habit of saying these words and to acknowledge their ignorance readily regarding all questions about which they were uncertain.[72]

Muḥammad Abū Zahra suggests that Mālik's circumspection in *ḥadīth*, his general reticence, and his habit of admitting to ignorance all reflected his concern with the general good (*maṣlaḥa*).[73] Mālik once told Ibn Wahb that the Syrians would return to Syria, the Iraqis to Iraq, and the Egyptians to Egypt. They would take with them the legal opinions they had heard from him, while he was likely to alter those opinions after greater thought.[74] Mālik's biographical sources emphasize that he would ponder over difficult legal questions for long periods. He said that some questions kept him from food, drink, and sleep.[75] He once stated, "There is a single question that I have been reflecting upon for more than ten years. Even now I have not arrived at a [sound] considered opinion (*ra'y*) regarding it."[76]

Mālik's prestige in Medina extended beyond his circle of students. The city's governor (*amīr*), judge, and magistrate (*muḥtasib*) retained personal representatives in his circle to keep them informed of opinions relevant to their offices.[77] He never presided as the judge of Medina himself, but it is related that the city's governor occasionally called upon him to hand down judgments in his presence, especially in criminal cases, in which

attempted to surmount this problem by finding people not familiar with Mālik's circle to bring their questions before him (ʿIyāḍ, *Tartīb*, 1:151).

[71] ʿIyāḍ, *Tartīb*, 1:146. An official was once sent to Mālik to ask him a question on the governor's behalf. Mālik responded with his customary, "I do not know" (*lā adrī*). The man lost his patience and replied, "It is a trivial and simple question. I only wanted to inform the city governor about it." Mālik became angry and responded:

> A trivial and simple question! Nothing that pertains to knowledge is trivial. Have you never attended to what God, exalted be He, has said [in the Qurʾān (73:5)], "In certainty, We shall send down upon you a weighty message." All knowledge is weighty, especially what you will be asked on the Day of Resurrection (ʿIyāḍ, *Tartīb*, 1:147–48).

[72] ʿIyāḍ, *Tartīb*, 1: 145–46.

[73] Abū Zahra, *Mālik*, 88.

[74] ʿIyāḍ, *Tartīb*, 1:146.

[75] Al-Shāṭibī, *al-Muwāfaqāt*, 4:286; cf. ʿIyāḍ, *Tartīb*, 1:145–46.

[76] Al-Shāṭibī, *al-Muwāfaqāt*, 4:286.

[77] ʿIyāḍ, *Tartīb*, 1:87–88. Their interest is unlikely to have been purely scholastic. As has been noted, Mālik's political views sometimes clashed with authorities.

Mālik would pronounce the punishment to be meted out.[78] The Medinese jurists are also reported to have held private sessions with Mālik.[79]

Mālik's Works

The Muwaṭṭaʾ

The *Muwaṭṭaʾ* is the most important work Mālik composed.[80] Of all extant early works on Islamic law, it stands out as one of the oldest and most valuable.[81] Wael Hallaq asserts that the phenomenon of working with Islamic law as a "textual activity not merely as a matter of practice" and

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[78] ʿIyāḍ, *Tartīb*, 1:184.

[79] ʿIyāḍ, *Tartīb*, 1:157.

[80] According to ʿIyāḍ, Mālik wrote eight other essays and works, some of which were transmitted through multiple receptors. Fuat Sezgin makes no mention of them. ʿIyāḍ mentions Mālik's letter to al-Layth ibn Saʿd on the praxis of Medina, which will be examined later (ʿIyāḍ, *Tartīb*, 1:204–07; Sezgin, *Geschichte*, 1:457–64; cf. Dutton, *Origins*, 37–41.).

According to ʿIyāḍ, Mālik wrote a treatise (*risāla*) to Ibn Wahb on free will (*qadar*), which was transmitted by numerous people. ʿIyāḍ calls it a cogent refutation of the deniers of predetermination (*al-qadariyya*). Mālik's chapter on free will in the *Muwaṭṭaʾ* confirms his concern with this matter (*Muw.*, 2:898–901).

Mālik wrote a work on the observation of the heavenly bodies that taught how to determine the phases of the moon, the computation of seasons, and the passing of time in general. ʿIyāḍ describes it as an excellent work, upon which many relied (ʿIyāḍ, *Tartīb*, 1:204).

Mālik compiled a special work in ten parts (*juzʾ*) on the juridical desicisions (*aqḍiya*) for a certain Medinese judge (ʿIyāḍ, *Tartīb*, 1:205).

He composed a treatise on juristic pronouncements (*fatwās*). ʿIyāḍ states that it is well-known (ʿIyāḍ, *Tartīb*, 1:205).

Mālik compiled an exegetical work on the unusual (*gharīb*) vocabulary of the Qurʾān (ʿIyāḍ, *Tartīb*, 1:206).

ʿIyāḍ mentions another work attributed to Mālik titled *Kitāb al-sirr* (the book of the secret). He gives little credence to its attribution to Mālik and remarks that little has ever been said about it (ʿIyāḍ, *Tartīb*, 1:206–07).

Mālik is said to have written a treatise for the Abbasid caliph Hārūn al-Rashīd (d. 193/809) on good deportment (*adab*), containing religious admonitions (*mawāʿiẓ*). The book was transmitted by the Cordoban Mālikī jurist and historian ʿAbd al-Malik ibn Ḥabīb. ʿIyāḍ expresses doubts about its authenticity, noting that it contains weak *ḥadīth*s, the transmission of which was contrary to Mālik's principles (ʿIyāḍ, *Tartīb*, 1:207).

[81] Yasin Dutton refers to the *Muwaṭṭaʾ* as "one of the earliest, if not the earliest, formulation of Islamic law we possess" (Dutton, *Origins*, 22). The *Muwaṭṭaʾ* of ʿAbd al-ʿAzīz ibn al-Mājishūn, shortly to be discussed, antedates Mālik's *Muwaṭṭaʾ*. A fragment of Ibn al-Mājishūn's work exists in the manuscript collection of Kairouan and has been studied by Miklos Muranyi (Muranyi, *Fragment*, 33–39, 85; idem, "Frühe Rechtsliteratur," 227).

Majmūʿ al-fiqh and *Manāsik al-ḥajj wa aḥkāmuhū* of Zayd ibn ʿAlī were also written before the *Muwaṭṭaʾ*. E. Griffini first published these works in 1919. Both he and Fuat Sezgin regard them as authentic. Wilferd Madelung and others question their attribution to Zayd ibn ʿAlī, but all concur that they go back at least to the mid-second/eighth century (Sezgin, *Geschichte*, 1:400, 552–60; Madelung, *al-Qāsim*, 54).

the gradual "textualization" of the law toward the end of the first/seventh century should be seen as "the first major development in the production of permanent forms that were to survive into, and contribute to, the further formation of later Islamic law."[82] Both the *Muwaṭṭa'* and *Mudawwana* are invaluable specimens of early textualization.

The old and uniquely rich manuscript collection of Kairouan provides indispensable material pertinent to the origins of the *Muwaṭṭa'* and *Mudawwana* and the initial stages of textualization in Islamic law. The age, richness, and quality of the Kairouan manuscripts are unparalleled. In addition to Mālikī works, it includes some of the oldest known Ḥanafī and Shāfiʿī manuscripts and the earliest known examples of transition from parchment to paper.[83] Miklos Muranyi devoted more than three decades

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The manuscript of *Kitāb al-aṣl* of Sulaym ibn Qays al-Hilālī (d. before 95/714) also ranks as one of the earliest juristic compositions. Ibn al-Nadīm regards it as the oldest legal work of the Shīʿa (Sezgin, *Geschichte*, 1:400, 525–26).

A manuscript of *Kitāb al-manāsik* of Qatāda ibn Diʿāma (d. 118/736) exists in the Ẓāhiriyya Library of Damascus and also ranks among the earliest textualizations of the law (Sezgin, *Geschichte*, 1:400, 31–32).

[82] Hallaq, *Origins*, 66.

[83] Joseph Schacht drew academic attention to the potential value of Kairouan's rich manuscript collection in 1967, but academics made little use of it until Muranyi's research. He began cataloging the Kairouan parchments in the 1980s and developed a close working relation with the collection's librarians. With their help, he discovered in the 1990s new material bound within other manuscripts, which were not indicated in the library's book lists. The manuscript collection of Kairouan contains the oldest Arabic manuscripts of Islamic law presently known. Muranyi insists that the manuscript collection of Kairouan constitutes one of the most important discoveries for Islamic legal origins and allows us to study the foundations of the Medinese (Mālikī) tradition from the second/eighth until the fifth/eleventh century. He asserts that it is impossible to reconstruct the early history of the Mālikī school from the end of the second/eighth century and especially during the course of the third/ninth and fourth/tenth centuries without full utilization of the manuscripts of Kairouan. The overwhelming majority of the collection's materials pertain to the Medinese (Mālikī) traditions. Manuscript materials in the collection go back to the time of Mālik and his contemporary ʿAbd al-ʿAzīz ibn al-Mājishūn before 152/769. Saḥnūn collected much of the oldest materials in Kairouan during his stay in Medina, Mecca, Syria, and Egypt, while studying with Mālik's students there.

Regarding non-Mālikī material, the collection provides unique early exemplars of the Ḥanafī and Shāfiʿī schools. Fragments of the *Asadiyya*, which served as a catalyst for the *Mudawwana* and is discussed later, are among Muranyi's finds in Kairouan. The *Asadiyya* fragments contain early references to the teachings of Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī, for which there are few other ancient manuscript sources. The Kairouan collection also contains the earliest substantial manuscript of al-Shaybānī's *Kitāb al-aṣl* and the oldest complete redaction of al-Shāfiʿī's *Risāla*.

Miklos Muranyi notes that similar material may still be discovered (with the help of library assistants) in the extensive manuscript collections of Fez, Meknes, Rabat, and Tamagrut (see Brockopp, "Geneaologies," 396; Miklos Muranyi, "Visionen des Skeptikers," 208; idem, *Rechtsliteratur zwischen Quellenanalyse und Fiktion*, 224–241, henceforth

to his "ground-breaking" study of the Kairouan manuscripts, and, as Jonathan Brockopp asserts, Muranyi's work has become "required reading for all who are interested in the history and development of early Islamic thought."[84] Muranyi shows that a period of about seventy years elapsed during the first decades of the third/ninth century between the appearance of Mālik's *Muwaṭṭaʾ* in its various recensions and the compilation of the *Mudawwana* of Saḥnūn. During these seven decades, juristic manuals of diverse structure and arrangement were written, vestiges of which can now be reconstructed from later compilations and abridgements (*mukhtaṣarāt*).[85]

As noted earlier, Norman Calder disputes Mālik's authorship of the *Muwaṭṭaʾ*. He contends that the book's historical appearance was subsequent to the *Mudawwana* and radically revises the dating of both works.[86] Calder predicates his unconventional datings on inadequate paradigms about the formative period, especially the notion that Islamic law evolved from rudimentary beginnings to a universally acknowledged classical four-source legal theory. He also relies on a narrow textual base, drawing exclusively from internal evidence in printed works. Calder restricts himself to only one recension of the *Muwaṭṭaʾ*—that of the Andalusian jurist Yaḥyā ibn Yaḥyā al-Laythī (d. 235/849), which was not used in North Africa at the time—and he consults none of the older recensions which Saḥnūn and the North Africans actually relied upon.[87] Calder ignores rele-

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cited as Muranyi, *Rechtsliteratur*; idem, "A Unique Manuscript from Kairouan in the British Library: The *Samāʿ*-Work of Ibn al-Qāsim al-ʿUtaqī and Issues of Methodology," 326, 328–29; idem, *Beiträge*, xxix–xxxii, 2–3, 53; idem, *Materialen*, 50–57; idem, *Rechtsbücher*, 21–25; cf. Melchert, "Early History," 305).

[84] Muranyi discovered new manuscripts that are not catalogued in Sezgin's *Geschichte*. See also Brockopp, "Geneaologies," 393–96.

[85] Muranyi, *Beiträge*, xxix.

[86] See Calder, *Studies*, 24–30.

[87] Calder bases much of his *Muwaṭṭaʾ-Mudawwana* hypothesis on discrepancies between Yaḥyā's recension of the *Muwaṭṭaʾ* and Saḥnūn's citations from Mālik in the *Mudawwana*. Manuscript evidence in Kairouan shows, however, that, in Saḥnūn's collection of the *Mudawwana* material, he did not use Yaḥyā's recension but relied instead on the transmissions of Ibn Wahb, Ibn Ziyād, and Ibn al-Qāsim. The discrepancies that Calder notes in Saḥnūn citations from Mālik do not appear in Saḥnūn's three recensions. While Yaḥyā's recension of the *Muwaṭṭaʾ* came to be one of the most highly regarded in the Islamic world, it was only one of many others and was not used in North Africa, where the *Mudawwana* was compiled (Muranyi, "Frühe Rechtsliteratur," 230–31). A well-edited fragment of Ibn Ziyād's *Muwaṭṭaʾ* was readily available and would have been especially revealing, had Calder used it. Al-Shaybānī's recension was also available. Other recensions available in print today were not available when Calder wrote his book. That of Abū Muṣʿab appeared in 1993, the same year as Calder's *Studies*. Suwayd's version came out the following year, followed by al-Qaʿnabī's in 1999. Salīm ibn ʿĪd al-Hilālī's compendium

vant manuscripts, some of which were available in Western libraries.[88] He dismisses manuscript evidence including that of Kairouan on the grounds that we do not possess original parchments from Mālik's time but only transmissions of them in later renditions, which appeared a century or more afterwards. For Calder, to rely on anything but the (missing) original parchments requires us to put blind faith in the validity of chains of transmission (*isnāds*), which he rejects as unreliable.[89]

Christopher Melchert defends Calder and downplays Muranyi's findings on similar grounds. His defense of Calder offers little more than to repeat the same arguments. Melchert insists that the content of the Kairouan texts cannot be validly projected further back than the third/ninth century, the age of the parchments themselves. Following Calder's lead, he contends that to trust Muranyi's conclusions requires that we accept on faith the chains of transmission in the Kairouan manuscripts as "the verbatim transmission of the texts in question from the beginning of that century."[90] Such credence, in Melchert's eyes, is unwarranted, and he concludes that, "progress in the history of Islamic law in the [second/eighth] century will have to rest mainly on the shrewd reading of texts from the [third/ninth] century and later."[91]

Miklos Muranyi provides the strongest rebuttal of Calder and his supporters.[92] Of all their contentions, categorical rejection of manuscript evidence is the most sweeping, since it undercuts the historiographical foundation of Islamic studies. As Harald Motzki indicates, dismissing chains of transmission out of hand, if carried to its logical conclusion, would marginalize the historical value of all literary activity in the Muslim world for more than a thousand years until the appearance of the printing press in modern times.[93] Muranyi asserts that Calder's skeptical

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of recensions, *al-Muwaṭṭaʾ bi-riwāyātihī: Yaḥyā al-Laythī, al-Qaʿnabī, Abī Muṣʿab al-Zuhrī, [Suwayd ibn Saʿīd] al-Ḥadathānī, Ibn Bukayr, Ibn al-Qāsim, Ibn Ziyād, Muḥammad ibn al-Ḥasan bi-ziyādātihā wa zawāʾidihā wa ikhtilāf alfāẓihā*, appeared in 2003. It is difficult to use with precision because it is not always easy to identify various recensions.

[88] Muranyi, *Rechtsbücher*, 21–22, 25; idem, *Beiträge*, 51–52; cf. Brockopp, *Early Law*, 67–70; idem, "Competing Theories," 5, 9.

[89] See Calder, *Studies*, 24–30.

[90] Melchert, "Early History," 305.

[91] Melchert, "Early History," 305.

[92] See Muranyi, *Rechtsbücher*, 21–25; idem, "Visionen," 208; idem, *Rechtsliteratur*, 224–241. He refers to Calder's position as "sheer nonsense" (*barer Unsinn*) (see Muranyi, "Frühe Rechtsliteratur," 226).

[93] Motzki suggests that Calder and like-minded scholars define a borderline between reliable and unreliable chains of transmission (Motzki, "Authenticity," 243; see also Muranyi, "Visionen," 208).

contentions about chains of transmission are fundamentally misconstrued. Sound scholarly evaluation of manuscripts is never based exclusively or even primarily on placing trust in chains of transmission, and Calder's critique reflects lack of familiarity with manuscripts and how they are used as proof. Historiographical analysis of Islamic manuscripts, Muranyi notes, is "not concerned at all" with the reliability of chains of transmission as regards individual points of information in them but with the integrity of how the entire content of one codex is passed on to another. Manuscript evidence is not judged by the age of the parchment or paper it is written on alone but by wholistic study of structure, technique, and scribal notes in addition to comparative analysis of cross-references and collated texts. Regarding the manuscripts of Kairouan, Muranyi asserts that, in most cases, later manuscript material goes back to older sources "with remarkable meticulousness." The arguments of skeptics such as Calder, he insists, are refuted "again and again" through prudent textual analysis based on comparative content, colophons, scribal comments, and collation notes. Muranyi also observes how the misconception that the contents of manuscripts cannot be validly deemed older than the parchment or paper upon which they are written has inevitably skewed our chronologies for the origins of Islamic law.[94]

Harald Motzki, Susan Spectorsky, Jonathan Brockopp, Mohammad Fadel, and other scholars also take issue with Calder's hypothesis.[95] Motzki argues for the *Muwaṭṭa'*'s authenticity on grounds of internal "circumstantial" evidence. In his view, the "striking distribution of texts among Mālik's informants" makes it unlikely that the work is a collection of fictitious ascriptions. He asks why Mālik would cite extensive examples of al-Zuhrī's personal considered opinion (*ra'y*), for example, if the same information could have been construed as more authoritative in the form of Prophetic *ḥadīth*s or post-Prophetic reports from the Companions. Motzki also notes significant stylistic differences between transmitters. Mālik's transmissions

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[94] Muranyi, "Unique Manuscript," 328–29; idem, "Visionen," 208.

[95] Motzki, "Authenticity," 243; idem, "Zuhrī," 19, 21–23; Spectorsky, "*Sunnah*," 53. She finds Calder's "revised dating of early texts unconvincing." In note 8, she states that, "It is disappointing that Calder nowhere took account of Ibn Ḥanbal or any of the printed versions of his *masa'il*, long available in major libraries." See also Brockopp, "Geneaologies," 397; idem, *Early Maliki Law*, 97–98; Mohammad Fadel, "Authority in Ibn Abî Zayd al-Qayrawânî's *Kitâb al-nawâdir wa al-ziyâdât 'alâ mâ fî al-mudawwana min ghayrihâ min al-ummahât*: The Case of the 'The Chapter of Judgments' (*Kitâb al-aqḍiya*)," (in manuscript). Wael Hallaq accepts the general authenticity of the *Muwaṭṭa'* and regards it to be "an accurate account of Medinese doctrine as it stood by 150/767 or before." See Hallaq, *Origins*, 106.

from Nāfiʿ, for example, are "totally different" from his transmissions from al-Zuhrī, a fact which Schacht also noted.[96]

I find Calder's conclusions untenable. They are based on erroneous paradigms and a cursory and often arbitrary reading of the primary sources. As I noted in the Introduction, the *Mudawwana* refutes Calder directly. It contains numerous citations from the *Muwaṭṭaʾ*, even refers to the book by name, and presupposes the *Muwaṭṭaʾ* as its frame of reference.[97] It frequently repeats information from the *Muwaṭṭaʾ* verbatim, citing directly from the recensions of Ibn Wahb, Ibn al-Qāsim, or Ibn Ziyād.[98] But, as a rule, the *Mudawwana* complements the *Muwaṭṭaʾ* by picking up where it leaves off and adding supplementary information, typically in the form of the elaboration of detail based on legal interpretation (*ijtihād*) for unusual and unprecedented questions that are not in the *Muwaṭṭaʾ*.

Compilation of the Muwaṭṭaʾ

According to biographical reports, the Abbasid caliph al-Manṣūr requested Mālik to write a book that would provide him with a standard law code

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[96] Motzki, "Zuhrī," 19, 21–23.

[97] For Ibn al-Qāsim's reference to "what Mālik said in his book the *Muwaṭṭaʾ*, see *Mud.*, 4:492; *Mud.* (1994), 4:646; *Mud.* (1999), 7:2587; *Mud.* (2002), 11:353. For general citations, see *Mud.*, 1:157; cf. *Muw.*, 1:404; *Muw.* (Dār al-Gharb), 1:540–41; *Muw.* (*Riwāyāt*), 2:576–77; *Muw.* (Abū Muṣʿab), 1:541–42; *Muw.* (Suwayd), 452). See (*Mud.*, 1:155); cf. *Muw.*, 1:180; *Muw.* (Dār al-Gharb), 1:254; *Muw.* (*Riwāyāt*), 2:92; *Muw.* (Abū Muṣʿab), 1:229–30; *Muw.* (al-Qaʿnabī), 261; *Muw.* (Suwayd), 163–64.) See (*Mud.*, 3:6); cf. *Muw.*, 2:794–95; *Muw.* (Dār al-Gharb), 2:352–53; *Muw.* (Abū Muṣʿab), 2:439; *Muw.* (*Riwāyāt*), 4:82–83. For other cross references between the two works, see *Mud.*, 1:24, 40, 68, 70, 96, 99, 102, 103, 112, 119, 125–26, 141, 142, 146, 152, 157, 194, 195, 209, 231, 242, 257, 281, 282, 289, 293–94, 296; 2:142, 149, 160, 210, 397; 3:113, 215–16; 4:70–71, 77, 106, 412.

[98] For *Muwaṭṭaʾ* materials, Saḥnūn relied primarily on Ibn Ziyād's recension. Miklos Muranyi notes that there are significant structural similarities between Ibn Ziyād's recension of the *Muwaṭṭaʾ* and Saḥnūn's *Mudawwana*, especially in his format of presenting *ḥadīth*s buttressed by Mālik's considered opinion (Muranyi, "Frühe Rechtsliteratur," 230–31; idem, *Beiträge*, 8; idem, *Fragment*, 38). From Ibn Wahb, Saḥnūn transmitted the *Muwaṭṭaʾ*, the *Jāmiʿ* of Ibn Wahb, and other books as well (Muranyi, *Rechtsbücher*, 24, 26). Muranyi contends that Saḥnūn lived in two worlds. He deeply valued the *ḥadīth* material in the *Jāmiʿ* of Ibn Wahb as well as the jurisprudence of Ibn Wahb's transmission of the *Muwaṭṭaʾ*, which appears throughout the *Mudawwana* (Muranyi, *Beiträge*, 3–4, 51–52).

Ibn Wahb's *Jāmiʿ* was his primary *ḥadīth* compilation. Along with the *Muwaṭṭaʾ*, it remained the primary *ḥadīth* reference for the Mālikīs of North Africa until the close of the third/ninth century; the compilations of al-Bukhārī and Muslim found their way to the region around the mid-fourth/tenth century. Several manuscripts of the *Jāmiʿ* of Ibn Wahb exist in the manuscripts of Kairouan. It was not exclusively a collection of *ḥadīth*s. Like the *Muwaṭṭaʾ*, it contained other material such as post-Prophetic reports (see Muranyi, *Beiträge*, 3, 52, 64; idem, *Rechtsbücher*, 24, 26).

for his empire.[99] The authenticity of the account has been called into question, although al-Manṣūr's petition makes political sense.[100] It is reported that Mālik judiciously refused to comply. On the basis of the general good (*maṣlaḥa*), Mālik argued that a standard legal code would be harsh (*shadīd*) on the peoples of other regions, who had adopted contrary practices to which they were now long accustomed, which they believed to be correct, and which were supported by the *ḥadīth*s and legal opinions that had reached them.[101] Mālik's response indicates that he acknowledged the validity of divergent regional practices and is consistent with his principle of heeding dissent (*ri'āyat al-khilāf*).[102]

It seems unlikely that al-Manṣūr made this request of Mālik alone. He may well have made a general petition to the scholars of Medina, perhaps following Mālik's initial refusal. In any case, there was a flourish of activity among prominent Medinese jurists to compose works to which they all gave the title of *Muwaṭṭa'* prior to Mālik's production of his own compilation by that name. 'Abd al-'Azīz ibn al-Mājishūn (d. 164/780), a highly regarded Medinese contemporary of Mālik, was reportedly the first scholar in Medina to compile a work called the *Muwaṭṭa'* containing the consensus of the Medinese scholars.[103] A fragment of Ibn al-Mājishūn's *Muwaṭṭa'* exists in the archives of Kairouan and bears out the general validity of this narrative.[104] Reports about Ibn al-Mājishūn add that during

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[99] 'Iyāḍ, *Tartīb*, 1:192; cf. Dutton, *Origins*, 28–29; Muhammad Guraya, *Origins of Islamic Jurisprudence: With Special Reference to Muwatta Imam Malik*, 20. Al-Manṣūr is said to have wanted Mālik to undertake the task because he believed that the knowledge of Medina was superior to that of Iraq and other regional centers.

[100] See 'Iyāḍ, *Tartīb*, 1:192; Sezgin, *Geschichte*, 1:409. The request would have been politically astute because Medina was highly esteemed as a center of religious learning and its loyalty to al-Manṣūr and the Abbasids was suspect. Given Mālik's prominence in Medina and throughout the Islamic world of the time as well as his ambiguous relation to the Abbasid mandate to rule, his compliance with al-Manṣūr's wishes would have constituted an influential endorsement of the Abbasids. For similar political ends, al-Manṣūr unsuccessfully sought to constrain Abū Ḥanīfa to serve as his judge (see Abd-Allah, "Abū Ḥanīfa," 1:296, 298–99).

[101] 'Iyāḍ, *Tartīb*, 1:192.

[102] See Muranyi, *Fragment*, 34–35; 'Iyāḍ, *Tartīb*, 1:192; Ibn 'Abd al-Barr, *al-Tamhīd*, 1:86.

[103] 'Iyāḍ, *Tartīb*, 1:195; Nadhīr Ḥamdān, *al-Muwaṭṭa'āt li-al-Imām Mālik*, 65–66; cf. 'Abd al-Wahhāb 'Abd al-Laṭīf, "Preface" to al-Shaybānī's recension of the *Muwaṭṭa'*, 13 (Muḥammad ibn al-Ḥasan al-Shaybānī, *Muwaṭṭa' al-Imām Mālik: riwāyat Muḥammad ibn al-Ḥasan al-Shaybānī*, edited by 'Abd al-Wahhāb 'Abd al-Laṭīf, henceforth cited as *Muw.* [al-Shaybānī/'Abd al-Laṭīf]).

[104] The *Muwaṭṭa'* of Ibn al-Mājishūn in Kairouan was written before 152/769 and is contained in parchments dating prior to 275/769. The book offers a unique example of the early fixation of jurisprudence in written form. It was known in Egypt and Iraq in the fourth/tenth century. Ibn Wahb transmits some of Ibn al-Mājishūn's material in his

those days other scholars in Medina were busy compiling "*Muwaṭṭa'*s" (*al-Muwaṭṭa'āt*) of their own.[105] Mālik's principal student, Ibn Wahb composed a *Muwaṭṭa'*, parts of which are available in print.[106] It is related that Ibrāhīm ibn Muḥammad (d. 184/800) and Ismāʿīl ibn ʿAbd al-Raḥmān ibn Dhu'ayb al-Suddī (d. 128/745) also composed individual works, which they called *Muwaṭṭa'*s.[107]

Biographical accounts relate that Ibn al-Mājishūn's work reportedly contained only legal discourse (*kalām*) without *ḥadīth* and other supporting texts. Muranyi has shown that this generalization is not entirely valid. *Ḥadīth* and post-Prophetic reports played a role in Ibn al-Mājishūn's work, although they were largely peripheral. Muranyi adds that Ibn al-Mājishūn was primarily a jurist and lacked Mālik's expertise in *ḥadīth*.[108] It is related that when Mālik reviewed Ibn al-Mājishūn's compilation, he remarked,

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recension of the *Muwaṭṭa'*. Saḥnūn also relates extensive material from Ibn al-Mājishūn (Muranyi, *Fragment*, 33–39, 85; idem, "Frühe Rechtsliteratur," 227; Brockopp, "Geneaologies," 396). Muranyi concludes from his study of the Ibn al-Mājishūn fragment that he worked independently of Mālik (Muranyi, *Fragment*, 35).

[105] ʿIyāḍ, *Tartīb*, 1:195; Ḥamdān, *al-Muwaṭṭa'āt*, 65–66; cf. ʿAbd al-Laṭīf, "Preface" to al-Shaybānī's recension of the *Muwaṭṭa'*, 13 (*Muw.* [al-Shaybānī/ʿAbd al-Laṭīf]).

[106] His work consists almost exclusively of Prophetic *ḥadīth*s with little commentary or legal addendum. It lacks Mālik's distinctive terminology and does not appear to be merely a recension of Mālik's *Muwaṭṭa'*. See ʿAbd-Allāh ibn Wahb, *al-Muwaṭṭa' li-al-Imām ʿAbd-Allāh ibn Wahb ibn Muslim al-Qurashī: qiṭʿa min al-kitāb*. See also Ḥamdān, *al-Muwaṭṭa'āt*, 65–66.

[107] Ḥamdān, *al-Muwaṭṭa'āt*, 65–66.

[108] Muranyi's study shows that Ibn al-Mājishūn's book does not consist solely of statements of local consensus and considered opinion (*ra'y*). He cites *ḥadīth*s and post-Prophetic reports, although they are not as prominent as in Mālik's *Muwaṭṭa'* and stand in the background. Ibn al-Mājishūn often cites *ḥadīth*s with disconnected chains of transmission, which was customary in legal circles during the formative period. Muranyi asserts, however, that at the time Ibn al-Mājishūn compiled his work, the same *ḥadīth*s were in circulation in Medina with connected chains of transmission. Unlike Mālik, Ibn al-Mājishūn was not an exemplary scholar of *ḥadīth*. Muranyi contends that there is great conformity between Ibn al-Mājishūn's legal opinions, the content of Mālik's *Muwaṭṭa'*, and the great *ḥadīth* compilations of the third/ninth century. Muranyi's findings modify Nabia Abbott's view (based on biographical reports) that Ibn al-Mājishūn "made no attempt to quote Tradition in support of his legal views." Ibn al-Mājishūn's work had a topical (*muṣannaf*) legal structure like that which Mālik followed in his own compilation of the *Muwaṭṭa'* (see Muranyi, *Ein Fragment*, 35, 37–39, 85).

It is noteworthy that North Africa and the Muslim West do not seem to have participated actively in the largely Eastern *ḥadīth* movement. Manuscript evidence in Kairouan shows that the Mālikīs of North Africa relied for *ḥadīth*s primarily on the *Muwaṭṭa'* and Ibn Wahb's *Jāmiʿ* until the last decades of the third/ninth century. Several manuscripts of the *Jāmiʿ* exist in the Kairouan collection (Muranyi, *Beiträge*, 3, 52; see idem, *Rechtsbücher*, 24, 26). The *ḥadīth* compilations of al-Bukhārī and Muslim do not seem to have found their way into the region until mid-fourth/tenth century, almost a century after their authors' deaths (Muranyi, *Beiträge*, 64).

"What an excellent piece of work, but, if I had done it, I would have begun by [citing] legal texts (*āthār*). Then I would have corroborated that (*thumma shaddadtu dhālika*) by adding [legal] discussion." The reports state that Mālik then set his mind to composing his own *Muwaṭṭa'*.[109] Nadhīr Ḥamdān suggests that Mālik began work on the *Muwaṭṭa'* around 148/765, shortly after al-Manṣūr's request. Mālik did not complete the work, however, until some time following al-Manṣūr's death in 158/775. Mālik repeatedly reviewed and edited the *Muwaṭṭa'* for decades throughout his lifetime until his death in 179/795.[110]

Mālik's fame, the large number of his students, and the fact that he taught the *Muwaṭṭa'* over so many years made it one the most famous and extensively transmitted works of the formative period.[111] His *Muwaṭṭa'* has dozens of different versions. He reportedly authorized at least seventy-three recensions: seventeen of them Medinese, two Meccan, ten Egyptian, twenty-seven Iraqi, thirteen Andalusian, and four North African.[112] The most famous recension is that of the Cordoban scholar Yaḥyā ibn Yaḥyā al-Laythī[113] (d. 235/849), which is my standard reference in *Mālik and*

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[109] ʿIyāḍ, *Tartīb*, 1:195; Ḥamdān, *al-Muwaṭṭa'āt*, 65–66; cf. ʿAbd al-Laṭīf, "Preface" to al-Shaybānī's recension of the *Muwaṭṭa'*, 13 (*Muw.* [al-Shaybānī/ʿAbd al-Laṭīf]).

[110] Ḥamdān, *al-Muwaṭṭa'āt*, 67–68.

[111] Taqī ad-Dīn Aḥmad ibn Taymiyya (d. 728/1328) estimates the numbers of the *Muwaṭṭa'*'s transmitters at about one thousand seven hundred. He suggests that the actual number was even higher (Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 33; see also Sezgin, *Geschichte*, 1:458–59).

[112] Ḥamdān, *al-Muwaṭṭa'āt*, 79–83. Mālik did not transmit the *Muwaṭṭa'* by reading it out personally but listened and corrected while students read the text in his presence. Gregor Schoeler suggests that, because of this method of transmission, Mālik produced numerous written versions of the *Muwaṭṭa'* or had them written out by scribes. Schoeler doubts that Mālik gave the *Muwaṭṭa'* final shape or established a "canonical" version, on which the present recensions were based. He compares the divergent recensions of the *Muwaṭṭa'* to professorial lecture notes that students receive over various periods and which account by the nature of their compilation for high degrees of variation. Schoeler suggests that differences between the recensions of the *Muwaṭṭa'* resulted from Mālik's technique and his departures from the original script in successive revisions (Schoeler, *Oral*, 33).

[113] Yaḥyā ibn Yaḥyā was among over a dozen Andalusians who received the *Muwaṭṭa'* from Mālik. Of all the book's recensions, his is the most famous. When general reference is made to the *Muwaṭṭa'*, it is Yaḥyā's transmission that is meant, since it came to predominate over all others in the Muslim East and West. Hundreds of manuscripts of Yaḥyā's transmission exist. It is regarded as one of the last of the transmissions taken directly from Mālik and also was reputed to be one of the most exacting. Yaḥyā is deemed to have been one of Mālik's best students. Mālik commended his acumen and reputedly called him the "Intellect of Andalusia" (*ʿĀqil al-Andalus*). Yaḥyā initially took the *Muwaṭṭa'* from Ziyād ibn ʿAbd al-Raḥmān (d. 204/819), the first Andalusian to bring the Mālikī school to Andalusia. He subsequently went to Medina, where he heard all but three chapters of the *Muwaṭṭa'* from Mālik directly. He received this transmission in the year Mālik died (179/795). Yaḥyā also studied with al-Layth ibn Saʿd and others (see Ḥamdān, *al-Muwaṭṭa'āt*, 82,

Medina.[114] In my analysis of Mālik's terminology, I cross-reference Yaḥyā's version with the transmissions of Abū Muṣab ibn Abī Bakr al-Zuhrī[115] (d. 242/856) (Medinese), ʿAbd-Allāh ibn Maslama al-Qaʿnabī (d. 221/833)[116] (Medinese/Iraqi), Suwayd ibn Saʿīd al-Ḥadathānī[117] (d. 240/854) (Iraqi), and ʿAlī ibn Ziyād[118] (d. 183/799) (North African). I occasionally provide citations from the Kufan narration of the prominent early Ḥanafī jurist Muḥammad ibn al-Ḥasan al-Shaybānī[119] (d. 189/805), but I do not refer

87–88, 90–91; Dutton, *Origins*, 22–26; Muḥammad al-Shādhilī al-Nayfar, "Introduction" to *Muwaṭṭaʾ al-Imām Mālik: qiṭʿa minhu bi-riwāyat Ibn Ziyād*, 67–68; ʿAbd al-Majīd al-Turkī, "*al-Taqdīm*" in [Mālik b. Anas], *al-Muwaṭṭaʾ li-al-Imām Mālik ibn Anas: riwāyat ʿAbd-Allāh ibn Maslama al-Qaʿnabī*, 6).

[114] Ibn ʿAbd al-Barr, *al-Intiqāʾ*, 58–60; Aḥmad ibn ʿAlī ibn Ḥajar al-ʿAsqalānī, *al-Iṣāba fī tamyīz al-ṣaḥāba*, 11:300–01.

[115] Abū Muṣʿab ibn Abī Bakr ibn al-Qāsim al-Zuhrī was Medinese. He was appointed as a judge in Medina and came to be regarded among the most prominent jurists of the Medinese school. He had a strong personal connection to Mālik, and his transmission of the *Muwaṭṭaʾ* is among the most common after that of Yaḥyā ibn Yaḥyā; the two texts are relatively close. Like Yaḥyā, Abū Muṣʿab was also among the last transmitters to transmit from Mālik, and his recension was widely regarded as having met Mālik's final approval. It is the only Medinese transmission of the *Muwaṭṭaʾ* that reached us in full (see Ḥamdān, *al-Muwaṭṭaʾāt*, 79; Bashshār ʿAwwād Maʿrūf and Khalīl, Maḥmūd Muḥammad, "*Muqaddima*" in [Mālik b. Anas. *al-Muwaṭṭaʾ*] [recension of Abū Muṣʿab], 38–41; al-Nayfar, "Introduction," 70; cf. Salīm ibn ʿĪd al-Hilālī, "*Muqaddima*" in *al-Muwaṭṭaʾ bi-riwāyātihī*, 15–16).

[116] ʿAbd-Allāh ibn Maslama al-Qaʿnabī was originally Medinese but moved to Basra. He heard half of the *Muwaṭṭaʾ* from Mālik, whom he visited many times over a period of thirty years. Yaḥyā ibn Maʿīn regarded the transmissions of al-Qaʿnabī as one of the most exacting, and Ibn al-Madīnī and al-Nasāʾī regarded al-Qaʿnabī to be the most reliable transmitter of the *Muwaṭṭaʾ*. Mālik read half of the *Muwaṭṭaʾ* to al-Qaʿnabī, and al-Qaʿnabī read the other half to Mālik. He heard most of the work's *ḥadīth*s many times but he restricted himself in transmission to what he had read to Mālik, because Mālik held that method of transmission to be stronger. On the basis of manuscript and biographical evidence, ʿAbd al-Majīd al-Turkī believes that al-Qaʿnabī attended a sufficient number of sessions with Mālik to be able to transmit the *Muwaṭṭaʾ* in full. He notes, however, that there are deficiencies in the available manuscripts. As will be shown, extensive passages of the much fuller *Muwaṭṭaʾ* transmissions of Yaḥyā and Abū Muṣʿab are missing from al-Qaʿnabī (see Ḥamdān, *al-Muwaṭṭaʾāt*, 79; ʿAbd al-Majīd al-Turkī, "*al-Taqdīm*," 17–19; cf. al-Hilālī, "*Muqaddima*," 17–18).

[117] Suwayd ibn Saʿīd al-Ḥadathānī was among the many Iraqis who transmitted the *Muwaṭṭaʾ*, al-Shaybānī being the most prominent. He was known for his knowledge of *ḥadīth*s and his excellent memory (Ḥamdān, *al-Muwaṭṭaʾāt*, 80–81, 88, 120; ʿAbd al-Majīd al-Turkī, "*al-Taqdīm*," 9–10; al-Hilālī, "*Muqaddima*," 19).

[118] ʿAlī ibn Ziyād was from Tūnis. His transmission of the *Muwaṭṭaʾ* constitutes one of the four North African recensions. Ibn Ziyād transmitted it directly from Mālik. It is among the earliest transmissions of the *Muwaṭṭaʾ*. Although the printed edition of Ibn Ziyād's *Muwaṭṭaʾ* is only a very small fragment of the original, extensive tracts of Ibn Ziyād's recension are to be found in Saḥnūn's *Mudawwana*, as will be seen in *Mālik and Medina* (see Ḥamdān, *al-Muwaṭṭaʾāt*, 82, 100, 102).

[119] Al-Shaybānī's transmission of the *Muwaṭṭaʾ* is the most widely known and readily available in print after that of Yaḥyā al-Laythī. Al-Shaybānī's transmission is preserved

to him systematically since he generally deletes Mālik's comments and terminology. Muḥammad ibn Idrīs al-Shāfiʿī (d. 204/820) is also reported to have transmitted the *Muwaṭṭaʾ*. His recension is not currently available, but *Ikhtilāf Mālik wa al-Shāfiʿī* (The Dissent of Mālik and al-Shāfiʿī) contains citations from it, which differ from the Andalusian recension of Yaḥyā al-Laythī but generally agree with the Medinese transmission of al-Qaʿnabī.[120]

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in dozens of manuscripts. The Ḥanafīs value his transmission highly because he does not cite Mālik's opinions extensively or the praxis of Medina and substitutes for them reports transmitted from others than Mālik and legal interpretations of his own that are contrary to Mālik and often even to Abū Ḥanīfa and his other students. Al-Shaybānī's transmission characteristically mentions a *ḥadīth* or *ḥadīth*s that Mālik has transmitted and follows them with his personal legal interpretation, which may agree or disagree with the Medinese. He evaluates all statements with words such as "this is what we follow," "the juristic pronouncement (*fatwā*) is in accordance with this," "the reliance is on this," "this is sound" (*ṣaḥīḥ*), "this is overtly correct" (*wa huwa al-ẓāhir*), "this is the dominant opinion" (*wa huwa al-ashhar*), and so forth. Because he mentions so much additional material in addition to Mālik's transmission and fills it with personal legal interpretation (*ijtihād*), al-Shaybānī's recension became known as "Muḥammad's *Muwaṭṭaʾ*" (*Muwaṭṭaʾ Muḥammad*). It is valid to say that al-Shaybānī's transmission of the *Muwaṭṭaʾ* is a compilation of Hijazi *ḥadīth*s interpreted in the light of the considered opinion (*raʾy*) and post-Prophetic reports of the Iraqis. In this regard, it constitutes a sort of comparative text of Medinese and Iraqi law. See ʿAbd al-Majīd al-Turkī, "*al-Taqdīm*," 9; Ḥamdān, *al-Muwaṭṭaʾāt*, 96, 98.

120 [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 202; *Muw.* (al-Qaʿnabī), 1:158. Cf. *Muw.*, 1:206–07; *Muw.* (Dār al-Gharb), 1:283–84; *Muw.* (Abū Muṣʿab), 1:102; *Muw.* (Suwayd), 92–94. Al-Shāfiʿī memorized the *Muwaṭṭaʾ* in Mecca at the age of ten; he then traveled to Medina and received the text directly from Mālik. Al-Shāfiʿī's Meccan recension was regarded as having the highest standard of integrity (see Ḥamdān, *al-Muwaṭṭaʾāt*, 79–83.)

Regarding the author of *Ikhtilāf Mālik*, whom I refer to throughout the remainder of the book in brackets as the Shāfiʿī interlocutor, the dialogue in *Ikhtilāf Mālik* is worded as that of al-Shāfiʿī himself. The work's title speaks literally of a dispute between the two Imāms, although Mālik was not a party to the dispute and is not portrayed as such in the text. Robert Brunschvig, Muḥammad Abū Zahra, and Ahmed El Shamsy hold that the Shāfiʿī protagonist in *Ikhtilāf Mālik* was al-Shāfiʿī himself (see Brunschvig, "Polèmiques," 388–394; Abū Zahra, *Mālik*, 339; El Shamsy, "First Shāfiʿī," 307–08, 315). Given the work's tone and its manner of argumentation, I doubt that al-Shāfiʿī was anymore an actual speaker in the tract than was Mālik. Joseph Schacht contends that the Shāfiʿī protagonist in *Ikhtilāf Mālik* was al-Rabīʿ ibn Sulaymān, one of al-Shāfiʿī's principal students and transmitters (see Schacht, *Origins*, 13). I am inclined to believe that it might have been al-Rabīʿ or perhaps Abū Yaʿqūb al-Buwayṭī (d. 231/846). Al-Buwayṭī was among the most prominent Egyptian Shāfiʿīs, and his polemics were fundamental to the school's spread in that land at the expense of the prevailing Mālikī school. He appears to be the first of al-Shāfiʿī's disciples to refer to his master's teaching as the "Shāfiʿī school," and his recently discovered synopsis (*mukhtaṣar*) is the earliest known work of secondary scholarship in the Shāfiʿī tradition. Al-Buwayṭī emphasized the *ḥadīth* principle more emphatically than al-Shāfiʿī or than many other prominent early and later Shāfiʿī jurists. His *ḥadīth*-oriented approach won him avid followers among the proponents of tradition (*ahl al-ḥadīth*), to whom he offered a clear cut method that enabled them to engage effectively the proponents of considered opinion (*ahl al-raʾy*) by vindicating the supremacy of *ḥadīth*s as discreet legal statements, which is consistently the style of *Ikhtilāf Mālik* (see El Shamsy, "First Shāfiʿī," 301–04). I am

Most passages in Yaḥyā's *Muwaṭṭaʾ* have parallels in Abū Muṣʿab (d. 242/856) and al-Qaʿnabī (d. 221/836). Al-Qaʿnabī's version as it presently stands is less complete, especially in the second half, but gives useful parallels for the first half of Yaḥyā's text. The other available recensions of the *Muwaṭṭaʾ* are incomplete and provide only random parallels.[121]

The Mudawwana

The Mudawwana *in Print*

Over the last decades, the *Muwaṭṭaʾ* has received encouraging editorial attention, although it still needs more thorough scholarly work.[122] The editorial status of the *Mudawwana* has long lagged behind the *Muwaṭṭaʾ*. Despite its historical importance, the work has only recently begun to receive the critical attention it deserves.

The *Mudawwana* was first published in 1905.[123] It is not clear what manuscript material was used for that edition. Miklos Muranyi believes the first edition was probably based on a single, privately owned Fez manuscript, which subsequently disappeared and about which nothing is now known.[124] Until recently, subsequent printings of the *Mudawwana* have been based on the 1905 version.[125] In 2002, the United Arab Emirates published a new

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not sure of the tract's authorship but prefer, simply as a matter of scholarly precaution, to refer to its author as the Shāfiʿī interlocutor.

121 Cf. Yasin Dutton, "Juridical Practice and Madīnan *ʿAmal*: *Qaḍāʾ* in the *Muwaṭṭaʾ* of Mālik," 2–3. He also claims that the recensions of the *Muwaṭṭaʾ* are very similar.

122 Fuʾad ʿAbd al-Bāqīʾs undated edition of Yaḥyā's recension of the *Muwaṭṭaʾ* still remains useful and reliable. It is the one I rely on in my dissertation and this work. A new edition of the Yaḥyā's recension appeared in 1997 (Mālik ibn Anas, *al-Muwaṭṭaʾ*, ed. Bashshār ʿAwwād Maʿrūf). It is useful because of its footnote references to other recensions of the *Muwaṭṭaʾ* that had appeared by that time and to parallel citations in other early works. See the bibliography for other recensions of the *Muwaṭṭaʾ* that have appeared in print since 1980.

123 Saḥnūn ibn Saʿīd, *al-Mudawwana al-kubrā*, 8 vols., (Cairo: al-Maṭbaʿa al-Saʿāda, 1323/[1905]).

124 Muranyi, *Rechtsbücher*, ix.

125 Saḥnūn ibn Saʿīd, *al-Mudawwana al-kubrā*, 4 vols., Cairo: al-Maṭbaʿa al-Khayriyya, (1324/[1906]), henceforth cited as *Mud.*

Idem, *al-Mudawwana al-kubrā*, 16 vols., Cairo: Būlāq, (1325/[1907]).

Idem, *al-Mudawwana al-kubrā*, 4 vols., Beirut: Dār al-Fikr, (1398/[1978]).

Idem, *al-Mudawwana al-kubrā al-latī Rawāhā Saḥnūn ibn Saʿīd al-Tanūkhī ʿan ʿAbd al-Raḥmān ibn al-Qāsim al-ʿUtaqī ʿan Abī ʿAbd-Allāh Mālik ibn Anas al-Aṣbaḥī*, 6 vols., (Beirut: Dār Ṣādir, n.d.), henceforth cited as *Mud.* (Ṣādir).

Idem, *al-Mudawwana al-kubrā li-Mālik ibn Anas al-Aṣbaḥī: riwāyat Saḥnūn ibn Saʿīd al-Tanūkhī ʿan ʿAbd al-Raḥmān ibn al-Qāsim*, 5 vols, (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994), henceforth cited as *Mud.* (1994). The 1994 edition of the *Mudawwana* is a reprinting of the 1905 version with no new manuscript evidence.

edition of the *Mudawwana* not taken from the 1905 edition.[126] The editor of the 2002 edition, al-Sayyid ʿAlī al-Hāshimī, consulted a series of manuscripts but unfortunately does not indicate which manuscripts were referenced or what methodology was followed.[127] In general, the new 2002 edition agrees with the 1905 version, but there are several notable differences. Sometimes, it adds significant new material.[128] Its chapter headings frequently differ and are sometimes more complete. In other cases, the 2002 edition lacks chapter divisions and omits material that appear in the 1905-based editions.[129] These differences must go back to manuscript

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Idem, *al-Mudawwana al-Kubrā li-Mālik ibn Anas al-Aṣbaḥī: Riwāyat Saḥnūn ibn Saʿīd al-Tanūkhī ʿan ʿAbd al-Raḥmān ibn al-Qāsim*, ed. Ḥamdī al-Damardāsh Muḥammad. 9 vols., (Mecca: Ṣaydā & al-Maktaba al-ʿAṣriyya/Riyad: Maktabat Nizār Muṣṭafā al-Bāz, 1999), henceforth cited as *Mud.* (1999). The editor of the 1999 edition of the *Mudawwana* states that he checked his text against the printed editions of Dār al-Saʿāda (1905) and Dār al-Fikr (1978) (see *Mud.* [1999], 1:8). He does not claim to have done any original manuscript research, and there is no evidence of any. His editorial contribution lies in giving full references for Qurʾānic verses and *ḥadīth*s and providing an index of Qurʾānic verses and *ḥadīth*s.

[126] Saḥnūn ibn Saʿīd, *al-Mudawwana al-Kubrā li-Imām Dār al-Hijra al-Imām Mālik ibn Anas al-Aṣbaḥī al-Mutawwafā Sannat 179 h., Riwāyat al-Imām Saḥnūn ibn Saʿīd al-Tanūkhī al-Mutawwafā Sannat 240 h. ʿan al-Imām ʿAbd al-Raḥmān ibn al-Qāsim al-ʿUtaqī al-Mutawwafā Sannat 191 h*, ed. al-Sayyid ʿAlī ibn al-Sayyid ʿAbd al-Raḥmān al-Hāshimī, 12 vols., United Arab Emirates: Al-Shaykh Zāyid ibn Sulṭān Āl Nahayān, 1422/2002, henceforth cited as *Mud.* (2002).

[127] Al-Hāshimī told me personally in 2010 that numerous manuscripts were consulted, but he does not address this matter in the book itself or specify which ones they were.

[128] For example, the books on pilgrimage in the old editions based on the 1905 original lack extensive content that is provided in the 2002 edition, which is considerably longer and more detailed with dozens of new chapters not present in the old editions (see *Mud.* 1:295–367; *Mud.* [1994], 1:394–495; *Mud.* [1999], 2:467–579; *Mud.* [2002], 2:297–524). The old editions have thirteen chapter headings in the first book of pilgrimage. The 2002 edition has seventy-six and much new content. Only a limited number of chapters overlap in both editions. In the old editions, the second book of pilgrimage has five chapters. The 2002 edition has forty-six. The third book of pilgrimage is similar in both editions. The old editions have five chapter headings. The new editon has nine.

The chapters on mutual cursing (*liʿān*) are generally the same in content in the old editions and the 2002 edition, but the 2002 edition adds chapter headings that are lacking in the old ones (see *Mud.*, 2:335–38; *Mud.* [1994], 2:352–56; *Mud.* [1999], 3:1065–70; *Mud.* [2002], 5:175–82; cf. *Mud.*, 1:296–97; *Mud.* [2002], 2:297–305).

In the *Mudawwana*'s lengthy treatment of optional sales (*bayʿ al-khiyār*), both the old editions and the 2002 edition contain the same general content, but chapter divisions and wording differ (see *Mud.*, 3:223–27; *Mud.* [2002], 7:91–102; *Mud.*, 3:234–35, 237–38; *Mud.* [2002], 7:120–122). In the *Mudawwana*'s chapters on treatment of prisoners of war, there are also differences in both content and chapter division (*Mud.* 1:369–74; *Mud.* [2002], 3:12–25).

[129] For example, in the chapter on sitting in prayer, the new edition lacks an entire paragraph at the end, which occurs in the old editions (see *Mud.*, 1:74–75; *Mud.* [2002], 1:213–15).

variations. Again, regrettably, the text provides no apparatus for source identification or verification.

The 1905 edition of the *Mudawwana* and subsequent copies based on it contain editorial oversights such as misspellings and omitted words. All editions are inadequately indexed. Georges-Henri Bousquet provided a helpful index of the *Mudawwana* in 1970,[130] but all renditions of the work—even the 2002 edition—need new and more thorough topical and subject indexing.[131]

Compilation of the Mudawwana

The *Mudawwana* has a complex history, and its production involved numerous persons and stages over several generations.[132] The story of the *Mudawwana*'s compilation revolves around three primary figures: Asad ibn al-Furāt (d. 213/828), Ibn al-Qāsim, and Saḥnūn. To these three figures must be added the anonymous body of Saḥnūn's Tunisian students, who finally brought the work to completion in the decades following his death.

Asad ibn al-Furāt began the project. He hailed from Iraq and had studied with al-Shaybānī and others belonging to the circle of Abū Ḥanīfa.[133] Like many Kufans, Asad went to Medina, studied with Mālik, and became one of the *Muwaṭṭa*'s numerous authorized transmitters.[134] Around 179/795, Asad returned to Medina bringing with him a large corpus of Kufan legal questions which he desired to present before Mālik.[135] In bringing these questions to Medina and later taking them to North Africa, Asad showed

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The book on hunting (*Kitāb al-Ṣayd*) has eight chapters in the old edition (*Mud.*, 1:410–26; *Mud.* [1994], 1:532–41; *Mud.* [1999], 2:627–37), but there are no chapter headings at all regarding these matters in the 2002 edition (*Mud.* [2002], 3:101–20).

The same thing occurs in the chapter on alms taxes levied on accretions (*fawā'id*) (*Mud.*, 1:231; *Mud.* [2002], 2:136). The content is similar, but the 2002 edition lacks chapter divisions that are in the old editions.

In the book of inheritance, the old editions give the book's title (*Kitāb al-mawārīth*). The 2002 edition, does not give the book title, but other information is essentially the same (see *Mud.* 3:81; *Mud.* [2002], 6:128).

[130] Georges-Henri Bousquet, "*La Mudawwana*: Index avec la table générale des matières," *Arabica: revue d'études arabes*, 113–150.

[131] The 2002 edition provides a general index of Qur'ānic verses, *ḥadīth*s, post-Prophetic reports, important persons mentioned, and so forth but lacks a subject index other than traditional indexing of books and chapters (*Mud.* [2002], vol. 12).

[132] Muranyi, *Rechtsbücher*, ix.

[133] Muranyi, *Beiträge*, 23; Brockopp, *Early Law*, 17.

[134] Muranyi, *Beiträge*, 22.

[135] See Ibn Rushd (al-Jadd), *al-Muqaddimāt*, 1:27–28; Sezgin, *Geschichte*, 1:465; Abū Zahra, *Mālik*, 236–37, 248; cf. Melchert, "Ḥanafism," 334–35.

profound interest in the Medinese tradition, yet he maintained a strong connection with the Ḥanafī school until the end of his life.[136]

When Asad arrived in Medina with his questions, he learned that Mālik had just died. Asad took his project to Ibn Wahb but found him unwilling to cooperate.[137] He turned to Ashhab but lost interest because Ashhab so frequently disagreed with Mālik and preferred his own opinion.[138] Asad then presented his questions to Ibn al-Qāsim, who agreed to respond to them despite initial reluctance.[139] Through this process, Ibn al-Qāsim became the primary authority for what would ultimately become the *Mudawwana* and took on prominence in the emerging Mālikī tradition which he might not otherwise have had.

In 181/797, shortly after Asad's second visit to Medina, he settled in North Africa, bringing his compilation with him.[140] His book aroused great interest and became known as the *Asadiyya* after his name. Parts of it have been preserved among the manuscripts of Kairouan and studied by Miklos Muranyi.[141] Unlike the *Mudawwana*, the legal opinions recorded in the *Asadiyya*—to the dissatisfaction of the North Africans—were generally cited without reference to pertinent *ḥadīth*s, post-Prophetic reports, or explicit references to established Medinese praxis.[142] The Mālikīs of North Africa complained to Asad, "What you have brought us is just 'it appears to me', 'I conjecture', and 'I think'."[143]

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[136] Muranyi, *Beiträge*, 23; Brockopp, *Early Law*, 17.

[137] See Ibn Rushd (al-Jadd), *al-Muqaddimāt*, 1:27–28; Sezgin, *Geschichte*, 1:465; Abū Zahra, *Mālik*, 236–37, 248; cf. Melchert, "Ḥanafism," 334–35.

[138] See Ibn Rushd (al-Jadd), *al-Muqaddimāt*, 1:27–28; Sezgin, *Geschichte*, 1:465; Abū Zahra, *Mālik*, 236–37, 248.

[139] See Ibn Rushd (al-Jadd), *al-Muqaddimāt*, 1:27–28; Sezgin, *Geschichte*, 1:465; Abū Zahra, *Mālik*, 236–37, 248; Muranyi, *Beiträge*, 38; cf. Brockopp, *Early Law*, 19–22.

[140] Asad remained in North Africa the remainder of his life and took part in the conquest of Sicily. He was appointed judge of Kairouan around 203 and was known as the leading representative of the Ḥanafī school there (see Muranyi, *Beiträge*, 22).

[141] Muranyi, *Beiträge*, 41; cf. Brockopp, *Early Law*, 17. The *Asadiyya* contains valuable early references to Ḥanafī law in addition to legal opinions of Hijazi and Medinese origin. Contrary to earlier views, Muranyi's analysis shows that the book was not a preparatory work or merely a first draft of what later became the *Mudawwana*. The *Asadiyya* constituted an independent juristic work of considerable merit with a distinctively Ḥanafī stamp.

[142] In the context of these reports, it may be noted that the explicit North African desire for authoritative references for legal opinions came at a time when al-Shāfiʿī, who is famous for his insistence on concrete legal proof, was in his early thirties and had not yet begun to develop his "new school" (*al-madhhab al-jadīd*).

[143] ʿIyāḍ as cited in Abū Zahra, *Mālik*, 247–48.

Around 185/801, Saḥnūn made his way to the East with Asad's material in order to reveiw it with Ibn al-Qāsim and other students of Mālik, while seeking to add more authoritative evidence for its legal opinions. Saḥnūn spent thirteen years abroad in his journey for knowledge, studying with the most important representatives of the Medinese tradition in Medina, Mecca, and Egypt. Although Saḥnūn studied primarily under Ibn al-Qāsim, he also relied heavily on Ibn Wahb and Ashhab.[144] Saḥnūn's journeys were exceptionally fruitful. He returned to Tunisia with abundant materials which took decades to compile, and his learning made him the dominant figure of the Medinese school in North Africa.[145]

Saḥnūn's reworking of the *Asadiyya* was initially called the *Mukhtaliṭa* (the mixed or confused [compilation]) because of its lack of systematic organization, although Muranyi has shown that manuscripts of the *Mukhtaliṭa* and *Mudawwana* are remarkably similar.[146] In contrast to the *Asadiyya*, the *Mukhtaliṭa* appears only to have contained material from the legal legacy of Medina, not the numerous non-Medinese opinions that abound in the *Asadiyya*.[147] The *Mudawwana*—or, more fully, *al-Mudawwana al-kubrā* (the major compendium)—grew out of Saḥnūn's reworking of the *Asadiyya*, although it is not clear that Saḥnūn gave his compilation its final title, the *Mudawwana*.[148] Saḥnūn compiled selections

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[144] Muranyi, *Beiträge*, 34. Muranyi observes that Ibn al-Qāsim's answers tend to be shorter and more to the point than those of Ashhab (Muranyi, *Beiträge*, 38; cf. Brockopp, *Early Law*, 19–22).

Saḥnūn gleaned his extensive materials from three scholarly circles. Muranyi refers to the first of them as a Medinese-Meccan circle. It is exemplified in the teachings of Mālik as related by Ibn al-Qāsim in conjunction with parallel materials of Meccan origin from ʿAṭāʾ ibn Abī Rabāḥ and his contemporaries. The Medinese-Meccan materials constitute the oldest and primary level of Medinese jurisprudence in the *Mudawwana*. The second is the Egyptian-Medinese circle, including supplementary materials from Ibn al-Qāsim in addition to those of Ashhab ibn ʿAbd al-ʿAzīz and the Medinese circle of ʿAbd-Allāh ibn Nāfiʿ. The third circle, which was also the most recent, is constituted by *ḥadīth*s and post-Prophetic reports of Medinese providence, which Saḥnūn gathered primarily from Ibn Wahb and ʿAlī ibn Ziyād.

[145] Muranyi, *Beiträge*, 48, 34.

[146] Sezgin, *Geschichte*, 1:467; Abū Zahra, *Mālik*, 237. Fuat Sezgin contends that the *Mukhtaliṭa* was not as well organized as the *Mudawwana*. Present manuscript evidence in Kairouan demonstrates that the two works share identical sectional chapters and similar structures. However, formulations at the beginnings of chapters differ so that the two works would not be confused (see Sezgin, *Geschichte*, 1:467; Muranyi, *Beiträge*, 39, 42–43).

[147] Muranyi, *Beiträge*, 39, 41.

[148] Muranyi, *Beiträge*, 35, 39; see also Sezgin, *Geschichte*, 1:465; Abū Zahra, *Mālik*, 248, 243. Muranyi doubts that the *Mudawwana* got its title from Saḥnūn. The earliest mention of the title of the *Mudawwana* is from 258/871–72, eighteen years after Saḥnūn's death. Muranyi believes that Saḥnūn's students began collecting and collating his materials

of the materials he collected in individual codices, but the major compilation work of the *Mudawwana* was done by his students during the course of the third/ninth century.[149] Nevetheless, Saḥnūn remained the moving force behind the book's collection and ultimate compilation, and he has been traditionally identified as the work's chief collator.[150]

Cross-fertilization between the Mudawwana *and the Kufan Legal Method*

Manuscript evidence bears out that Saḥnūn kept a list of questions with him on his journeys which he systematically reviewed with teachers of the Medinese tradition.[151] This evidence of Saḥnūn's written questions is generally consistent with the traditional story that Saḥnūn's work, which

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during and after his lifetime, although they did not ultimately include all the data Saḥnūn had collected.

It is reported that once Saḥnūn had revised the *Asadiyya* under Ibn al-Qāsim's direction, the latter wrote to Asad requesting him to revise his copy according to Saḥnūn's alterations. Asad was infuriated by the suggestion. Ibn al-Qāsim, in turn, lost patience with Asad. According to tradition, when it was publicly known that Ibn al-Qāsim was promoting Saḥnūn's material over the *Asadiyya*, the North Africans ceased to attach authority to the *Asadiyya* and turned instead to the early *Mudawwana* tracts (Abū Zahra, *Mālik*, 248). Muranyi's studies in Kairouan show, however, that even after Asad's death, the *Asadiyya* continued to be highly regarded and was used as an instructional medium in North Africa and Sicily (Muranyi, *Beiträge*, 22).

149 See Sezgin, *Geschichte*, 1:468; Muranyi, *Beiträge*, 35–36, 39; Abū Zahra, *Mālik*, 239; Brockopp, *Early Law*, 23–24.

150 Muranyi, *Beiträge*, 34. The *Mudawwana* is not an "authored text." To this extent, Norman Calder is correct (see Calder, *Studies*, 17.) A comprehensive legal compendium by the title of the *Mudawwana* in its present-day form did not exist in Saḥnūn's time. He did not leave an authored edition of his work in his students' hands. The first manuscript evidence of a composite legal compendium with the title of the *Mudawwana* appears at the end of the third/ninth century. Before 257–258/877–878, the work existed as independent tracts, collations, and thematic sections that were studied by students of law but not compiled in the form of a single book (Muranyi, *Beiträge*, 35, 39; idem, "Frühe Rechtsliteratur," 232.) In later years, Saḥnūn's principal students were among the first to begin compiling all of the diverse tracts Saḥnūn had left behind into a comprehensive work, probably giving the *Mudawwana* its present chapter structure based on the titles of Saḥnūn's original tracts (Muranyi, *Beiträge*, 35).

In its present form, the *Mudawwana* contains only part of the materials that Saḥnūn collected and transmitted in his journeys abroad (Muranyi, *Beiträge*, 36). In the fourth/tenth century, ʿAbd-Allāh ibn Abī Zayd al-Qayrawānī (386/996) undertook a more comprehensive collection of the uncompiled remnants of Saḥnūn's journeys, much of which is contained in his recently published *al-Nawādir wa al-ziyādāt ʿalā mā fī al-Mudawwana* (Rarities and Addendums to What is in the *Mudawwana*). The express purpose of *al-Nawādir*, as its title indicates, was to collect material from Saḥnūn and others that was not included in the *Mudawwana*. By making this material available, Ibn Abī Zayd intended to extend the scope of the Mālikī school's juristic content beyond Saḥnūn to the greater wealth of the broader Medinese tradition (Muranyi, *Beiträge*, 160).

151 Muranyi, *Beiträge*, 38.

ultimately bore fruit in the *Mudawwana*, had its genesis in the questions that Asad ibn al-Furāt first took with him from Kufa to Medina.

Asad's Kufan questions in their Medinese context constituted a remarkable exchange of divergent techniques between the Kufan and Medinese traditions and represents a critical stage in the articulation of Mālikī positive law and legal reasoning. Abū Zahra focuses on the importance of Asad's questions and stresses the ramifications of the cross-fertilization they stimulated between the Kufan hypothetical method, out of which the intricacy of Asad's questions sprang, and the strictly non-hypothetical technique that Mālik and most jurists of the early formative period preferred.[152] The hypothetical, essentially Kufan stamp of Asad's questions can be seen throughout the *Mudawwana*.[153] Abū Zahra contends that it

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[152] See Abū Zahra, *Mālik*, 236–37, 248; see also Ibn Rushd (al-Jadd), *al-Muqaddimāt*, 1:27–28; Sezgin, *Geschichte*, 1:465; cf. Melchert, "Ḥanafism," 334–35. Christopher Melchert notes that the Islamic literary tradition identifies the adherents of considered opinion (*ra'y*) as the first to make systematic collections of juridical opinions. He cites Mālik's composition of the *Muwaṭṭa'*, Saḥnūn's collation of the *Mudawwana*, al-Shaybānī's early compendia of Ḥanafī law, and early breviaries (*mukhtaṣarāt*) (see Melchert, *Formation*, 198).

[153] Ibn al-Qāsim's responses in the *Mudawwana* pertain to both pragmatic questions of a distinctly Medinese stamp and hypothetical questions of a Kufan nature. Real-life situations are exemplified in the questions I noted earlier about Andalusians spending the nights in churches to get out of the cold and snow, inheriting rich mines discovered in western North Africa, and questions about various governors and their rulings (see *Mud.*, 1:90; 3:216; 4:77). In other instances, Ibn al-Qāsim is presented with material of an essentially hypothetical nature. In option sales, for example, he is asked about buyers holding option rights who die during the option period and whether the rights fall to their heirs. He is asked about buyers with option rights who go insane during the set period, become sick, or lose consciousness (see *Mud.*, 3:223–27; *Mud.* [2002], 7:91–102).

In Islamic law, bequests cannot be made to heirs. Ibn al-Qāsim is asked about the validity of a man making a bequest to an unrelated woman but whom he later marries and whether the bequest will remain valid once she has become a legitimate heir (*Mud.*, 4:296).

Regarding mutual cursing for adultery (*li'ān*), Ibn al-Qāsim is asked numerous hypothetical questions. He addresses how the precept would apply to a Muslim slave who had married a Jewish or Christian wife, whom he claims to have witnessed in the act of adultery. He is asked about an underaged boy whose legal testimony would be invalid, who marries an older woman, and accuses her of adultery (*Mud.*, 2:335–38).

As regards putting on the pilgrim's dress at the appointed areas (*mawāqīt*), which lie at considerable distances from Mecca, Ibn al-Qāsim is asked about a Christian slave who accompanies his master on the pilgrimage and embraces Islam during the pilgrimage rites. He notes that he would not be required to return to the appointed areas to don the pilgrim's garb and can put it on inside the borders of the sanctuary (*Mud.*, 1:304).

Ibn al-Qāsim is asked about the inheritance of a Christian who was claimed to have become a Muslim and received an Islamic burial. He has two sons, one a Muslim and the other Christian. The first contends he has exclusive rights to his father's inheritance because he died a Muslim. The other contends he did not actually become a Muslim but

was the infusion of the Kufan hypothetical perspective and its potential for systematically elaborating legal questions that was its greatest contribution to the formation of the nascent Mālikī school. Asad's Kufan questions introduced into the Mālikī juristic narrative an extensive body of new material which Mālik had either not addressed during his lifetime or which he had treated as practical questions but his students had not systematically compiled. The hypothetical framework of Asad's Iraqi questions also facilitated the precise and methodical articulation of Medinese precepts and principles.[154] Although analogy was central to Mālik's legal reasoning, the influx of the Kufan questions, rooted in and constructed around Abū Ḥanīfa's vigorous use of systematic analogy, probably accounts for the highly analogy-oriented structure of the *Mudawwana*.

In terms of sheer breadth, Asad's questions served as a catalyst for the fullest articulation of Medinese positive law in a manner that rivaled the contemporary circles of Kufan jurisprudence. In his response to these questions, whenever Ibn al-Qāsim has heard an answer from Mālik, he relates Mālik's opinion explicitly. When Asad's questions go beyond the material Ibn al-Qāsim recalls from Mālik, he often gives a presumptive answer on

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died a Christian. Therefore, the Christian son claims exclusive inheritance rights. The evidence of both sons is comparable, neither is capable of categorically disproving the other (*Mud.*, 3:84–86).

The dialogue narrative of the *Mudawwana* also reflects the role of hypothesis in Saḥnūn's questions. Norman Calder focuses on the repeated use in the *Mudawwana* of the formula "I said (asked)/he said (answered)" (*qultu*/*qāla*) and the contrasting technique of presenting legal texts with chains of transmission. (In the *Mudawwana*, Saḥnūn constitutes the first person questioner and Ibn al-Qāsim the respondent.) Calder contends that the "casuistic" style of the dialogue formula is by its nature characteristic of a legal process in its early stages as opposed to the "predominantly generalizing approach to the law [which] is characteristic of a mature tradition." Calder contends that both the casuistic and generalizing styles "coexist even in early periods" (Calder, *Studies*, 3–5). Miklos Muranyi observes that the dialogue formula of the *Mudawwana* reflects the fact that its materials were compiled for the purpose of standard legal instruction. The formula was already in use in the oldest stage of the *Mudawwana* transmission from Ashhab and Ibn Wahb to Saḥnūn. Muranyi contends that Calder lacks familiarity with the standard, every-day practice by which jurists of the formative period transmitted their materials to their students in third/ninth-century Egypt and North Africa (Muranyi, "Frühe Rechtsliteratur," 232–36). Because of the standardization inherent in hypothetical, analogy-based questions, the *Mudawwana* is, in fact, a highly generalizing work, relying on statements of principle and general (analogical) precept throughout. Its content and structure are affected—not just by the precept-based analogical nature of Medinese legal thought—but, as noted above, by the hypothetical method of Kufan legal analogy that accounts for the diversity of questions that Asad ibn al-Furāt brought to Medina. It is a common feature in the *Mudawwana* that, at some point in a chapter or series of related chapters, the dominant legal paradigm (standard legal precept or principle) is stated as the basis of Malik's interpretative extensions of the law.

[154] Abū Zahra, *Mālik*, 438–39.

Mālik's behalf based on analogy with similar positions Mālik took. In the absence of a clear precedent from Mālik, Ibn al-Qāsim will infer how he believes Mālik might have responded to the question on the basis of his broader juristic principles. In other cases, when Ibn al-Qāsim is unable to find or extrapolate an answer from Mālik, he gives his own considered opinion (*ra'y*). As noted before, Ibn al-Qāsim does not feel bound to agree with Mālik and takes the liberty to dissent. In several instances, he sets forth Mālik's opinion but disagrees with it and cites his own opinion to the contrary. When he does disagree, Ibn al-Qāsim will generally cite his reasons for diverging from Mālik, which constitute valuable references for discerning the nature of early Medinese legal reasoning.[155]

Comparing the Muwaṭṭa' *and the* Mudawwana

The Muwaṭṭa'

The *Muwaṭṭa'* is Mālik's masterpiece. It is well organized, elegant, and subtle. Its style reflects years of thoughtful revision and Mālik's mastery of *ḥadīth* and law. There is much more in it than first meets the eye. Mālik would remark to his students, "A book I compiled over forty years and you took from me in forty days, how little you understand of what is in it!"[156]

The *Muwaṭṭa'* serves multiple purposes. It presents the basic paradigms and applied principles of the Prophetic law but rarely goes into detail. The theme of praxis underlies and runs through the work, but explicit references to it are relatively rare.[157] The *Muwaṭṭa'* is a teaching text for stu-

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[155] See Abū Zahra, *Mālik*, 247, 438–39; Ibn Rushd (al-Jadd), *al-Muqaddimāt*, 1:27–28. As a rule, the *Mudawwana* narrative makes it easy to distinguish Mālik's opinions from Ibn al-Qāsim's various types of responses. If Ibn al-Qāsim is certain of Mālik's opinion on a matter, he transmits it formally, with expression such as, "I heard Mālik say this about it" or "Mālik said . . .". When he does not remember having heard anything directly from Mālik but has heard relevant reports from Mālik through other students, he will say something like, "I have heard nothing from Mālik on this, but it has reached my attention from him (*balaghanī 'anhu*) that he said this about it . . .". Often Ibn al-Qāsim will say, "I have heard nothing from Mālik pertaining to this, nor has anything that he said about it been brought to my attention, but my opinion on the matter is . . .". Ibn al-Qāsim frequently notes that one of Mālik's opinions is early while he adopted another later or prior to his death. He will also state that Mālik's students continued to ask him year after year about certain questions to determine if he had retracted his former opinions about them. When Ibn al-Qāsim has doubtful knowledge of Mālik's opinion, he states what he recalls prefaced by the words, "it appears to me" (*akhālu*), "I conjecture" (*aẓannu*), or "I think" (*aḥsabu*). See: *Mud.*, 1:20, 57, 69, 100, 192, 251, 256, 264, 272, 272, 284, 289; 2:189, 197, 391; 3:86; 4:92, 94, 116.

[156] 'Iyāḍ, *Tartīb*, 1:195.

[157] The opening chapter, *Kitāb wuqūt al-ṣalāh* (the book of prayer times), can be taken as an example. It makes no reference to Medinese praxis by name. Yet its entire narrative is constructed as a subtle argument for it. Mālik alludes to the role of the rightly-guided

dents and a valuable reference for advanced scholars.[158] Its legal materials make up the core body of "the proofs of disputation" (*adillat al-khilāf*) of Islamic law: those shared textual proofs in the Qurʾān, *ḥadīth*, and post-Prophetic reports that were commonly accepted, used, and disputed in the juristic community of Mālik's time and later generations.[159] The work constitutes a broad "well-trodden path" for the people of Medina and their praxis that collectively includes the greater Muslim community at large.[160]

The *Muwaṭṭaʾ* serves as an index of juristic dissent between the Medinese and non-Medinese, including extensive areas of disagreement among the Medinese themselves. Because of its attention to dissent, Mālik's *Muwaṭṭaʾ* foreshadows dissent literature (*ʿilm al-khilāf*), which later came

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caliphs, Companions, and Successors as the embodiments and protectors of praxis in Medina (as well as Kufa and other regions). See *Muw.*, 1:3–17.

158 Yasin Dutton regards the *Muwaṭṭaʾ* as "primarily a teaching text" (Dutton, *Origins*, 3–4, 22–24). The *Asadiyya, Mudawwana*, and other compendia of Medinese opinions were also used for instruction in scholarly circles (see Muranyi, *Beiträge*, 2, 61). The *Muwaṭṭaʾ* is more accurately described as an introductory teaching text, a book of fundamentals, and a masterly resumé for the trained scholar. The *Asadiyya, Mudawwana*, and other similar compendia often reiterate these fundamentals but build on them elaborate structures of legal interpretation (*ijtihād*).

159 The legal *ḥadīth*s of the *Muwaṭṭaʾ* were held in common among the early and later jurists. As noted before, the *ḥadīth*s cited against the Medinese in the early Shāfiʿī polemic *Ikhtilāf Mālik* are shared *ḥadīth*s taken directly from Mālik's *Muwaṭṭaʾ* with impeccable chains of transmission. The Medinese, Kufans, and others generally regarded the *ḥadīth*s of the *Muwaṭṭaʾ* as authentic as indicated by al-Shaybānī's transmission of the work, although they varied widely in their interpretations of them (see Abd-Allah, "*ʿAmal*," 172; Robert Brunschvig also observes this fact. See Brunschvig, "Polèmiques," 388; cf. Schacht, *Origins*, 12).

Jonathan Brown observes that the *Muwaṭṭa* is a mixture of *ḥadīth*s, post-Prophetic reports, information on the praxis of Medina, and Mālik's personal opinions (Jonathan Brown, "The Canonization of al-Bukhārī and Muslim: The Formation and Function of the Sunnī Ḥadīth Canon," 1:66; cf. Dutton, *Origins*, 3–4, 22–24). Brown does not take into account the distinctive content of the genre of *ḥadīth*s, post-Prophetic reports, and other materials that the work transmits and their central relation to the juristic context of the time. Both the *Muwaṭṭaʾ* and *Mudawwana* are fundamentally legal and interpretative in nature. The *ḥadīth*s and post-Prophetic reports cited in them are subsidiary to their fundamental legal purpose.

160 Cf. Dutton, *Origins*, 21. Dutton refers to the *Muwaṭṭaʾ* as the summation of all that Mālik "considered important in this Madinan tradition, which, in his view, saw its expression not only as a body of knowledge, handed down from one generation of scholars to the next, but as a continuous lived reality in the city where it had begun from the time it had begun." What Mālik considered important in the Medinese tradition in so far as the *Muwaṭṭaʾ* is concerned are the basic precepts of law that constituted the foundation upon which Medinese judicial pronouncements (*fatwā*s) were made. It is a book of basic law, not extended legal interpretation, but it lays the foundations for legal interpretation and dovetails with the *Mudawwana*. The summation of what Mālik deemed essential to the Medinese tradition must go beyond the *Muwaṭṭaʾ* to include the *Mudawwana* and other Medinese compendia.

to be of great importance in the history of Islamic law.[161] By providing a basic introduction to the primary textual proofs of Islamic law and the standard precepts of Medinese praxis, the *Muwaṭṭaʾ* sets forth the fundamentals underlying Mālik's reasoning and that of his primary Medinese peers. In this manner, the *Muwaṭṭaʾ* lays the groundwork for the *Mudawwana* and other compendia of Medinese legal interpretation.

As we have seen, the title of Mālik's *Muwaṭṭaʾ* was not unique. Similar Medinese compilations of the period used the same name. It is reasonable to assume that their shared title had something to say about the joint purpose behind their compilations. Alfred von Kremer holds that the *Muwaṭṭaʾ*'s title (which he renders as "the smoothed and leveled path") suggests that it avoids unnecessary difficulty and rigor.[162] Mālik's concern for avoiding rigidity and unnecessary formality while preserving balance and the ultimate intent of the law is borne out in his attention to the normative *sunna* and his application of the principles of discretion (*istiḥsān*), preclusion (*sadd al-dharāʾiʿ*), and the unstated good (*al-maṣāliḥ al-mursala*).[163]

The word *Muwaṭṭaʾ* also conveys a sense of communal consensus. Ibn ʿAbd al-Barr alludes to this semantic element in the *Muwaṭṭaʾ*'s title. He notes a certain non-normative and highly exceptional post-Prophetic report Mālik places in the *Muwaṭṭaʾ* regarding a judgment of ʿUmar ibn al-Khaṭṭāb against a wealthy Medinese who had deprived his slaves. In Ibn ʿAbd al-Barr's view, this report does not suit the work's title because it was never a matter of general concurrence (*lam yuwaṭṭaʾ ʿalayhī*). Not only was it contrary to Medinese praxis, none of the jurists inside or outside Medina ever agreed that it should be applied in practice.[164] Mālik's work constitutes a collectively "well-trodden path," walked on by the greater community, and its title situates the text at the center of broad majoritarian acceptance.

As noted, almost every legal *ḥadīth* transmitted in Mālik's *Muwaṭṭaʾ* was accepted as authoritative by other jurists in and outside of Medina, although they differed profoundly in their interpretation and applications.

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[161] Makdisi, *Humanism*, 32–33.

[162] Kremer, *Culturgeschichte*, 1:478.

[163] See Abd-Allah, "*ʿAmal*," 245–67, 436–81.

[164] See below "ʿUmar and the Camel Thieves" (Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:258–59; *Muw.*, 2:748; *Muw.* 2:748; *Muw.* [Dār al-Gharb], 2:294–95; Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:258–66; *Muw.* [Abū Muṣʿab], 2:470–71; *Muw.* [Suwayd], 228–29; *Muw.* [*Riwāyāt*], 3:580). It may also be noted that the third and sixth forms of the verbal root, *wāṭaʾa* and *tawāṭaʾa*, explicitly convey the sense of mutual agreement.

In this regard, Mālik's *Muwaṭṭaʾ* meets the standard Abū Yūsuf advocated of avoiding "irregular *ḥadīth*s" and "[following] those *ḥadīth*s that the community (*al-jamāʿa*) is following, which the jurists recognize [as valid], and which are in accordance with the [Qurʾān] and the *sunna*."[165] In its universality, the *Muwaṭṭaʾ* represents a standard text for the collective body of Muslims, whom Ibn al-Qāsim refers to in the *Mudawwana* as the path of "the [majoritarian] community and the *sunna*" (*al-jamāʿa wa al-sunna*).[166]

Goldziher regards the *Muwaṭṭaʾ* as a praxis-book and a reference of legal interpretaton. It sets forth the rituals, precepts, and normative practices of Islam on the basis of Medinese consensus and the normative *sunna* as it was being practised in Medina. He notes that the *Muwaṭṭaʾ* was meant to serve as a criterion by which to judge other matters of law that were doubtful, less well established, or simply constituted points of disagreement.[167] Yasin Dutton also emphasizes the role of the *Muwaṭṭaʾ* as a book of praxis, which he believes is indicated by its name.[168] He contends that "what Mālik effectively presents us with is a package, and this package, although reaching us in the textual form of a book entitled 'the *Muwaṭṭaʾ*,' was essentially one of *ʿamal*, i.e. action, rather than texts."[169]

Mālik's portrayal of Medinese praxis is more nuanced than Dutton implies. For Mālik, Medinese praxis was undoubtedly normative and authoritative, but the primacy of praxis remains a subtle and largely unspoken conviction underlying Mālik's presentation of *Muwaṭṭaʾ* texts. As noted, specific references to praxis in the book are relatively rare. One could argue that Mālik avoids making praxis a conspicuous argument in so far as possible. He regarded it as the surest guide to understanding the law and the traditional legacy of textual legal materials but not universally binding on the community.[170]

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[165] Abū Yūsuf Yaʿqūb ibn Ibrāhīm, *al-Radd ʿalā siyar al-Awzāʿī*, 30–31; Abd-Allah, "*ʿAmal*," 175.

[166] *Mud.*, 1:407–08, cf. *Mud.*, 1:165, 409–10.

[167] Ignaz Goldziher, *Muhammedanische Studien*, 2:213–14. Goldziher asserts that the *Muwaṭṭaʾ* was not, properly speaking, a compendium of *ḥadīth*s (*corpus traditionum*) but a compendium of law (*corpus juris*). He means by this that Mālik's purpose in compiling the *Muwaṭṭaʾ* was not to sift through or collect *ḥadīth*s (as would be the case in later *ḥadīth* compendia) but to collect the standard *sunna*.

[168] Dutton, *Origins*, 3–4, 22.

[169] Dutton, *Origins*, 3–4.

[170] In Yaḥyā's transmission of the *Muwaṭṭaʾ*, explicit terminological references to praxis occur fourteen times as postive praxis terms (praxis is in accord with this) and negative praxis terms (praxis is not in accord with this). There are ten references to the "praxis of the people" (*ʿamal al-nās*). Twenty-nine chapters of Yaḥyā's recension have praxis as part

Praxis as presented in the *Muwaṭṭaʾ* was hardly a monolithic "package," since its various component elements were not equally authoritative in Mālik's eyes. Dissent existed in Medina among the Medinese jurists themselves on significant aspects of local praxis, as Mālik indicates in the *Muwaṭṭaʾ*. In his mind, dissent regarding praxis was legitimate, and, in view of his principle of "heeding dissent," he regarded differences of juristic opinion to have legal and epistemological value as did North African and other juristic traditions subsequent to him.[171]

The *Muwaṭṭaʾ* and Mālik's biography give no indication that he rejected text-based jurisprudence within or without Medina. He interprets received legal texts in the light of praxis, but it is unlikely that Mālik regarded praxis as utterly independent of the legal texts that he and other jurists and traditionists in Medina had taken such care to receive and transmit. Indeed, as noted earlier, Mālik regarded the *Muwaṭṭaʾ* of Ibn al-Mājishūn as less perfect than it might have been because it lacked authoritative textual references. Mālik must not have regarded the revealed texts he provided in his *Muwaṭṭaʾ* to have been superfluous or merely a formality for convincing dissenting scholars of the validity of precepts embodied and observed in Medinese praxis.

Dutton adds that the *Muwaṭṭaʾ*'s importance lies in its being "our record of that law as a lived reality rather than the theoretical construct of later scholars."[172] The praxis the *Muwaṭṭaʾ* sets forth does appear to have been a "lived reality" in Medina, although a number of legal texts in the work are actually contrary to local praxis. Mālik often refers to the continuity of scholarly and popular practice regarding various Medinese precepts, even those that were internally disputed. But much of the fundamental content of Medinese praxis was itself clearly "the theoretical construct of later scholars," who are sometimes shown to have disagreed on its definition and content. Mālik himself figures among those dissenters. He did not regard Medinese praxis as a categorical imperative. It was diverse, organic, and growing. Its parts were not equally authoritative or unequivocal, and it was hardly a single package.

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of their titles (the praxis regarding such and such). In the entire work, there are only fifty-three explicit references to praxis. See index in Abd-Allah, "*ʿAmal*," 786–88.

[171] See above, "Dissent in Early Islamic Law." Dutton plays down the role of dissent in the *Muwaṭṭaʾ* and the qualitative differences between various strata of praxis that Mālik indexes in the book. In Dutton's view, the *Muwaṭṭaʾ* "presents a composite picture of what Mālik considered to be the essential aspects of the *dīn* in action" (Dutton, *Origins*, 3).

[172] Dutton, *Origins*, 4.

The Mudawwana

Compared to the *Muwaṭṭa'*, the *Mudawwana* is many books and authors in one. Like the *Muwaṭṭa'*, it serves multiple purposes. In some chapters, it sets forth legal fundamentals in the same manner as the *Muwaṭṭa'*. Its unique distinction, however, lies not in the areas where it overlaps with the *Muwaṭṭa'* but in its new materials that add a dimension of detailed legal interpretation which the *Muwaṭṭa'* lacks. In this regard, the *Mudawwana* is an uneven text and does not have the editorial consistency of the *Muwaṭṭa'*. The *Mudawwana*'s content and structure can prove unpredictable and frustrating, calling to mind its original name, the *Mukhtaliṭa* (the mixed or confused [compilation]). Its lack of symmetry reflects its complex editorial history and the fact that—unlike the *Muwaṭṭa'*—it was the labor of many hands over several generations.[173]

When the *Mudawwana* serves the same purpose as the *Muwaṭṭa'* by spelling out basic precepts of the law, it often repeats information from the *Muwaṭṭa'* verbatim, relying, as noted, on the recensions of Ibn Wahb, Ibn al-Qāsim, or Ibn Ziyād.[174] Often, it reinforces the *Muwaṭṭa* narrative by adding supplementary *ḥadīth*s, post-Prophetic reports, further information

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[173] On occasion, materials sometimes occur out of place, apparently reflecting unfinished editing. For example, the end of the chapter on festival sacrifices (*ḍaḥāyā*) deals randomly with the price of dogs, Christians selling wine, animals being killed in the sanctuary (*ḥaram*) of Mecca, and other unrelated matters. (See *Mud.* 2:6–8; *Mud.* [2002], 3:136–39).

The fairly loose organization of the chapters on pilgrimage in the *Mudawwana* is indicative of the work's often uneven process of editing. The material in these *Mudawwana* chapters is often unpredictably mixed—as is the case in some of the book's other chapters—this loose organization exemplifies why the *Mudawwana* is in great need of a sound scholarly edition with careful indexing (*Mud.*, 1:318 and more generally 1:295–367; *Mud.* [2002], 2:375–76 and more generally 2:297–524).

[174] For *Muwaṭṭa'* materials, Saḥnūn relied primarily on Ibn Ziyād's recension. Miklos Muranyi notes that there are significant structural similarities between Ibn Ziyād's recension of the *Muwaṭṭa'* and Saḥnūn's *Mudawwana*, especially in the format of first presenting *ḥadīth*s followed by Mālik's considered opinion (Muranyi, "Frühe Rechtsliteratur," 230–31; idem, *Beiträge*, 8; idem, *Fragment*, 38.) From Ibn Wahb, Saḥnūn transmitted the *Muwaṭṭa'*, the *Jāmi'* of Ibn Wahb, and other books as well (Muranyi, *Rechtsbücher*, 24, 26). Muranyi contends that Saḥnūn lived in two worlds. He deeply valued the *ḥadīth* material in the *Jāmi'* of Ibn Wahb as well as the jurisprudence of Ibn Wahb's transmission of the *Muwaṭṭa'*, which appears throughout the *Mudawwana* (Muranyi, *Beiträge*, 3–4, 51–52).

Ibn Wahb's *Jāmi'* was his primary *ḥadīth* compilation. Along with the *Muwaṭṭa'*, it remained the primary *ḥadīth* reference for the Mālikīs of North Africa until the close of the third/ninth century; the compilations of al-Bukhārī and Muslim found their way to the region around the mid-fourth/tenth century. Several manuscripts of the *Jāmi'* of Ibn Wahb exist in the manuscripts of Kairouan. It was not exclusively a collection of *ḥadīth*s. Like the *Muwaṭṭa'*, it contained other material such as post-Prophetic reports. (See Muranyi, *Beiträge*, 3, 52, 64; idem, *Rechtsbücher*, 24, 26).

on Medinese praxis, or demonstrating the endorsement of other scholars, even at times citing prominent non-Medinese jurists.[175]

Again, what made the *Mudawwana* unique and gave it distinction in the Mālikī tradition is the fact that it generally provides legal interpretations for difficult and unprecedented questions that go beyond the *Muwaṭṭa'*s scope and purpose. This interpretative dimension is the *Mudawwana*'s claim to fame. The work treats "hard cases" of the law and shows how the fundamentals set forth in the *Muwaṭṭa'* apply to them.[176] As Miklos Muranyi observes, the early jurists of Kairouan were primarily concerned with this elaborative aspect of the *Mudawwana*'s juristic content. They relied upon it as a source of legal interpretation. They studied it and similar compendia out of a fundamental concern with finding answers to difficult legal questions, not as a source of *ḥadīth*s or post-Prophetic reports nor in order to extrapolate the law from such revealed texts directly.[177]

As a book of advanced legal interpretation (*ijtihād*), the *Mudawwana* complements the *Muwaṭṭa'* by picking up where it leaves off and adding elaborate details for unusual questions that are not in the *Muwaṭṭa'* or suitable to its purpose.[178] In this regard, the *Mudawwana* frequently begins its narrative by repeating fundamental *Muwaṭṭa'* precepts but then

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[175] See, for example, *Mud.*, 1:24, 40, 68, 70, 96, 99, 102, 103, 112, 119, 125–26, 141, 142, 146, 152, 157, 194, 195, 209, 231, 242, 257, 281, 282, 289, 293–94, 296; 2:142, 149, 160, 210, 397; 3:113, 215–16; 4:70–71, 77, 106, 412; for references to other scholars, see *Mud.*, 1:194; 2:188, 194, 386, 395; 3:84, 96, 129; 4:84, 120, 121.

[176] "Hard cases make bad law." The foundations of the law need to be spelled out clearly and set forth without undue complexity for them to be properly understood and accessed. The *Mudawwana* treats both easy and hard cases of law, but its treatment of complex questions is what makes it distinctive and sets it apart from the *Muwaṭṭa'*, which tends to avoid "hard cases." The materials presented in the *Muwaṭṭa'* are basic and uncomplicated, enabling the book to lay down the rudimentary foundations of the Medinese school.

[177] See Muranyi, *Beiträge*, 3.

[178] See, for example, the *Mudawwana*'s loosely organized but detailed chapters on the pilgrimage (*Mud.*, 1:295–367; *Mud.* [2002], 2:297–524).

The *Muwaṭṭa'*, for example, is concerned with establishing the base sum (*niṣāb*) for gold and silver in the alms tax. The *Mudawwana* is only tangentially concerned with this important fundamental but goes beyond it to treat questions such as whether a person who possessed less than the base sum of gold for more than a full lunar year (the period after which the tax becomes due) would be required to pay the tax if he sold that gold for two hundred pieces of silver, the base sum for the alms tax in that metal. Ibn Qāsim states that he would be required to pay the alms tax in that case (see *Mud.*, 1:208–10).

As a fundamental precept of law, pilgrims who enter Mecca without having put on special pilgrim's garb at the appointed places (*mīqāt*s) are required to return to those places and put on the garb or make an animal sacrifice as compensation. In the *Mudawwana*, however, Saḥnūn raises the question of whether this standard ruling would also apply to a Christian servant who embraced Islam in Mecca and desired to perform the pilgrimage (see *Mud.*, 1:304).

proceeds directly to unprecedented legal questions.[179] In other chapters, the *Mudawwana* fails to treat at all primary material presented in the *Muwaṭṭa'* and deals exclusively with legal elaboration.[180] In all these instances, the *Mudawwana* presupposes the *Muwaṭṭa'* as its frame of reference.

Given the constrasting purposes of the *Muwaṭṭa'* and the *Mudawwana*, Mālik assumes different profiles in each book. In the *Muwaṭṭa'*, he sets forth what he regards as the best Medinese interpretation of the textual materials cited, and he occasionally defends his views at some length. He appears repeatedly in the *Muwaṭṭa'* as a definitive source of the Medinese heritage and an arbiter of its authentication and elucidation, especially when there was internal dissent in Medina. In the *Muwaṭṭa'*, Mālik is an

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In the *Muwaṭṭa'*, Mālik clarifies that no single period has been set for the option to return defective purchased goods. The *Mudawwana* gives examples of different types of appropriate option periods. It also treats questions such as what is to be done if the person holding an option to return purchased goods should die or become insane and lose legal competence. In the same context, Saḥnūn asks about a wife who discovers after marriage that her husband has leperosy and seeks to be separated from him (see *Mud.*, 3:225).

Saḥnūn transmits from Mālik information on the newborn sacrifice (*al-ʿaqīqa*), which is essentially the same as in the *Muwaṭṭa'*, noting that a single sheep is sacrificed for a boy and a girl alike. He raises the question, however, of what is to be done in the case of twins and is told that one sheep is sacrificed for each (see *Mud.*, 2:9).

[179] In optional sales agreements (*bayʿ al-khiyār*), the *Mudawwana* overlaps completely with the *Muwaṭṭa'*, although presenting extensive addition support (see *Muw.*, 2:671; *Muw.* [Dār al-Gharb], 2:201; Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:219–20, 232; *Muw.* [Suwayd], 206; *Muw.* [Abū Muṣʿab], 2:379–80; *Muw.* [*Riwāyāt*], 3:442–43; *Muw.*; *Mud.*, 3:223–27; *Mud.* [2002], 7:91–102; *Mud.*, 3:234–35, 237–38; *Mud.* [2002], 7:120–122).

[180] Regarding the festival prayers, the *Mudawwana* fails to treat the precept elaborated in the *Muwaṭṭa'* that there is no general call to prayer (*adhān*) or call for the beginning of the prayer (*iqāma*). The *Mudawwana* chapter is relatively short. In the *Nawādir*, which complements the *Mudawwana*, Ibn Abī Zayd merely repeats this ruling from the *Mukhtaṣar* of Ibn ʿAbd al-Ḥakam without giving details. (See *Muw.*, 1:177–82; *Mud.* 1:154–56; *Mud.* [2002], 1:402–11; see ʿAbd-Allāh ibn ʿAbd al-Raḥmān ibn Abī Zayd al-Qayrawānī, *al-Nawādir wa al-ziyādāt ʿalā mā fī al-Mudawwana min ghayrihā min al-ummahāt*, 1:497–98, 500; Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:12–13; Ibn ʿAbd al-Barr, *al-Tamhīd*, 5:219–20; ʿAbd al-Razzāq, *al-Muṣannaf*, 3:277; Ibn Abī Shayba, *al-Muṣannaf*, 1:490; al-Zurqānī, *Sharḥ*, 2:112–113.).

Regarding the newborn sacrifice, which is quite elaborately treated in the *Muwaṭṭa'*, the *Mudawwana* has a concise chapter, shorter and less detailed than what is in the *Muwaṭṭa'*. The chapter on newborn sacrifices does not occur at all in the new 2002 edition of the *Mudawanna*. (See *Muw.*, 2:501–02; *Muw.* [Dār al-Gharb], 1:646–48; Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:378; *Muw.* [Abū Muṣʿab], 2:205–06; *Muw.* [Suwayd], 332–33; *Muw.* [Ibn Ziyād], 134–37. 135; *Muw.* [*Riwāyāt*], 3:145–48; *Mud.* 2:9; *Mud.* [2002], 3:139).

The book of legal rulings (*Kitāb al-Aqḍiya*), which is substantial in the *Muwaṭṭa'* is very short in the *Mudawwana* and lacks much of the material presented in the *Muwaṭṭa'*, not to mention its lack of intricate details of legal interpretation (see *Muw.*, 2:719–60; *Mud.*, 4:69–79; *Mud.* [2002], 8:481–512). All editions appear to be missing material and reflect the *Mudawwana*'s often uneven structure.

exemplar of the Medinese way.[181] He stands as an heir to its legal tradition and an eminent representative of the Medinese school—not an independent authority—and his status as a lawgiver is a function of how centrally positioned he stood within the Medinese tradition.

In the *Mudawwana*, Mālik sometimes serves the same purpose as an articulator of the Medinese tradition that he does in the *Muwaṭṭa'*, but, when it comes to hard cases and detailed applications of the law, he stands out as an independent legal authority and a source of authoritative legal interpretation (*ijtihād*) based on his knowledge and personal embodiment of the Medinese way. He does not stand alone in this regard, but is often flanked by older and newer authorities such as his teachers and earlier Medinese scholars or his students, especially Ibn al-Qāsim and Ashhab. Yet Mālik's legal interpretations make up the core material of the *Mudawwana* and are by far its most significant element. This vital difference between the two books makes the *Mudawwana* complementary to the *Muwaṭṭa'* and an essential reference for studying Mālik's applied legal reasoning.[182]

Regarding Mālik's role in the Medinese tradition of the formative period, Jonathan Brockopp suggests that the image of Mālik as a charismatic juristic authority—an image which he believes is reflected in Saḥnūn's *Mudawwana* and early Mālikī synopsis (*mukhtaṣar*) literature which emerged in the generation of Saḥnūn—had the effect of giving Mālik the legal status of an independent "generator of the law" in competition with the authority of the Qurʾān and *sunna*. Brockopp proposes this conception as the "great shaykh" theory. For Brockopp, the persona of the "great shaykh" came to constitute in effect the "roots of the law." Although later "classical" jurisprudence never promoted such a theory, the unique individual authority of the "great shaykh" in this nascent theory constituted the law's generative source in contrast to the four "classical" roots of law, which would later win the day.[183] Brockopp compares the charismatic authority of "great shaykhs" to "generate law" to the religious prerogative of the pre-Islamic diviner (*kāhin*), arbitrator (*ḥakam*), or tribal chieftain. He speaks

[181] As noted earlier, the juristic circles of Kairouan in the second half of the third/ninth century referred to themselves as followers of Medinese school (*madhhab al-Madaniyyīn*), not as followers of Mālik (Muranyi, *Beiträge*, 61).

[182] Jonathan Brockopp refers to the *Mudawwana* as a "source book, containing opinions and proofs that could be used by scholars in determining their own solution to a problem." He notes that Saḥnūn often opens his treatments of various legal matters by presenting two contrary versions of the same story (see Brockopp, *Early Law*, 105).

[183] Jonathan Brockopp, "Competing Theories," 19.

of "quasi-divine" powers attributed to the "great shaykhs," citing parallels from the Sufi and Shīʿī traditions, and concludes that the conception of the "great shaykh" is "fundamentally [a] theological statement of how great persons transmit the divine law."[184]

The correspondence between Mālik and al-Layth ibn Saʿd, which is discussed later, constitutes a forthright statement of how both men conceived of juristic authority.[185] It gives no indication of Brockopp's "great shaykh" construct, and later Mālikī jurists do not seem to have departed radically from this earlier view. In the correspondence of Mālik and al-Layth ibn Saʿd, juristic authority did not rest in charisma, spiritual status, or other unique personal qualities. Both jurists emphasize the authority of the Medinese tradition as the exemplification of the Prophetic legacy, and they regard their personal juristic merit as rooted in their close adherence to that tradition and avoidance of deviation and irregular opinions.

Mālik functioned within a rationalistic legal tradition. His legal reasoning and that of the Mālikī school after him was markedly different from the so-called "classical" four-source theory that al-Shāfiʿī would adopt and advocate, but Mālik's authority was hardly arbitrary. It remained consistently derivative, secondary, and subordinate. His legal technique and that of his teachers was open to objective discourse and legal analysis, as Ibn al-Qāsim's portrayals and applications of it throughout the *Mudawwana* clearly indicate. Mālik's reasoning was not something that he or anyone else conceived of as emanating miraculously from divine illumination, which he was incapable of demonstrating to others. His legal interpretation differed generically from the unveiling of unseen realities (*mukāshafa*) that lies at the core of theosophical Sufism or the charismatic authority of the Shīʿī Imāms.

As Miklos Muranyi demonstrates, attachment to the Medinese tradition—not to Mālik or to any particular representative of it—was characteristic of juristic circles in North Africa and Andalusia during the second half of the third/ninth century and for generations following Saḥnūn's death. Despite profound reverence for Mālik, the jurists of Kairouan did not refer to themselves as Mālikīs but as followers of "the school of the Medinese" (*madhhab al-Madanīyyīn*). Like generations of jurists who followed in their tradition, they were astutely interested in understanding the Medinese legacy in the broadest sense, including divergent points of

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184 Jonathan Brockopp, "Competing Theories," 19.

185 See Abd-Allah, "*ʿAmal*," 304–05.

view that Mālik had taken during his lifetime and the dissenting voices of other Medinese. They did not regard it as sufficient to rely exclusively on the *Muwaṭṭa'* or Mālik's legal opinions in the *Mudawwana* or other juristic compendia of his views but also drew on other Medinese authorities such as Ibn al-Mājishūn and al-Darāwardī.[186] A cognate concern for the broader Medinese tradition can be found in later Mālikī works and shows direct continuity with the attitudes and convictions of the earliest Medinese jurists. The fundamental purpose, for example, of ʿAbd-Allāh ibn Abī Zayd al-Qayrawānī (d. 386/996) in his compendium *al-Nawādir wa al-ziyādāt* was to complement the *Mudawwana* by collating rare and divergent transmissions of the Medinese tradition that had not been included in the work.[187]

Other Early Compendia of Mālik's Opinions

By the late third/ninth century, the *Mudawwana* came to constitute the most important source book of the Medinese legal tradition next to the *Muwaṭṭa'*.[188] The *Mudawwana* was, however, only one of several scholarly compendia of Mālik's legal opinions and interpretations. Of these other collections, the *Mawwāziyya, Wāḍiḥa*, and *ʿUtbiyya (Mustakhraja)* rank among the most important. Remnants of them exist in manuscript form and are cited in later works.[189] None of them has yet appeared in print.

The *Mawwāziyya* was named after the highly-regarded early Alexandrian Mālikī jurist Muḥammad ibn Ibrāhīm ibn al-Mawwāz (d. 269 or 281/882 or 894), who was a student of several of the most renowned Egyptian Mālikīs

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[186] See Muranyi, *Beiträge*, 61; idem, *Materialen*, 27.

[187] See Muranyi, *Beiträge*, 43, 160; idem, *Materialen*, 72; idem, *Fragment*, ix. Similarly, in compiling his encyclopedic *al-Dhakhīra*, al-Qarāfī takes pride in the nearly forty diverse manuscripts from which he drew and the variety of opinions they afford (see Aḥmad ibn Idrīs al-Qarāfī, *al-Dhakhīra li-Shihāb al-Dīn Aḥmad ibn Idrīs al-Qarāfī*, 1:5–8, henceforth cited as al-Qarāfī, *al-Dhakhīra*). Khalīl ibn Isḥāq (776/1373) opens his celebrated *Mukhtaṣar*, which remained for centuries the fundamental reference for Mālikī juristic pronouncements (*fatwās*), by clarifying how his highly abbreviated terminology identifies concurring and dissenting voices from earlier and later Mālikī sources which he indexes in the telegraphic style of his extremely condensed text (see Khalīl ibn Isḥāq, *Mukhtaṣar al-ʿallāma Khalīl*, 8–9).

[188] Muranyi, *Rechtsbücher*, ix.

[189] See Muranyi, *Materialen*, 70–72, 14, 22, 27–28, 50. 57; idem, "Unique Manuscript," 329, 343; idem, *Beiträge*, 61; Sezgin, *Geschichte*, 1:474–76, 362.

of his time.[190] It is also referred to as *Kutub Ibn al-Mawwāz*.[191] Muranyi notes that in the fourth/tenth century the *Mawwāziyya* was one of the best-known and most comprehensive legal compendia in North Africa. Many of the chapters of Ibn Abī Zayd's *al-Nawādir* contain citations from the *Mawwāziyya*.[192]

The *Mawwāziyya* ranks among the most important of early Mālikī compendia, because of its well-structured organization and attention to analogical precepts. It systematically organized the positive law of the Mālikī school (*furūʿ*) according to the underlying precepts that informed them.[193] ʿIyāḍ describes the *Mawwāziyya* as one of the most illustrious (*ajall*) books the Mālikīs ever produced. He also ranks it among the most reliable sources of Mālik's legal opinions. It contains the most elaborate (*absaṭ*) discussions and ranks among the most comprehensive (*awʿab*) of all the early compendia.[194]

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[190] Later Mālikīs regarded Ibn al-Mawwāz as having been influential in establishing and spreading the Mālikī school, as reflected in the saying, "Were it not for the two *shaykh*s, the two Muḥammads, and the two judges the Mālikī school would have passed away" (Aḥmad ibn Idrīs al-Qarāfī, *al-Dhakhīra* [1961], 1:17, henceforth cited as al-Qarāfī, *al-Dhakhīra* [Cairo].) The two *shaykh*s were ʿAbd-Allāh ibn Abī Zayd (386/996) of Kairouan and Abū Bakr ibn ʿAbd-Allāh al-Abharī (d. 375/985) of Baghdad. The two "Muḥammads" were Saḥnūn and Ibn al-Mawwāz, and the two judges were the prominent judges, jurists, and legal theorists of Baghdad ʿAlī ibn al-Qaṣṣār (d. 398/1008) and ʿAbd al-Wahhāb ibn ʿAlī (d. 422/1031).

[191] Muranyi, *Materialen*, 70.

[192] Muranyi, *Materialen*, 72.

[193] Muranyi, *Materialen*, 72; Sezgin, *Geschichte*, 1:474. It was widely held that the *Mawwāziyya* took precedence over its counterparts among the primary source works (*al-ummuhāt*), because Ibn al-Mawwāz's format systematically brings to light the connection between specific legal deductions (*furūʿ*) and the basic precepts and established principles of Mālikī jurisprudence, while other compilers of Mālik's opinions focused primarily on collecting new chains of transmission for them (ʿIyāḍ and Ibn Farḥūn as cited in Abū Zahra, *Mālik*, 244–45).

A portion of the *Mawwāzīya* was devoted to a refutation of al-Shāfiʿī's criticisms of Mālik. Some Mālikīs regarded it to be the most excellent rebuttal of its kind (ʿIyāḍ and Ibn Farḥūn as cited by Abū Zahra, *Mālik*, 245). Other noted early Mālikīs also wrote refutations of al-Shāfiʿī, among them: Saḥnūn; Ibn ʿAbd al-Ḥakam (I have not been able to ascertain which Ibn ʿAbd al-Ḥakam this was. It would be either ʿAbd-Allāh [d. 214/829], who studied under Mālik, or his son Muḥammad [d. 268/882], who was a close friend of al-Shāfiʿī, studied under him for a while, followed his school for a time, and then returned to the Mālikī school. [See Sezgin, *Geschichte*, 1:474]); the North African jurist Yaḥyā ibn ʿUmar al-Kinānī (d. 289/902); the famous Iraqi Mālikī judge Ismāʿīl ibn Isḥāq (d. 282/895); Saʿīd ibn Muḥammad al-Ghassānī (d. 302/915); and Abū Bakr ʿAbd-Allāh ibn Muḥammad (453/1061) both of Kairouan. (See ʿIyāḍ, *Tartīb*, 1:27–28; Sezgin, *Geschichte*, 1:474–76, 360, 601).

[194] ʿIyāḍ and Ibn Farḥūn as cited in Abū Zahra, *Mālik*, 244–45.

The *Wāḍiḥa* and the *ʿUtbiyya (Mustakhraja)* were intended to expand upon the *Mudawwana*.[195] Both works constituted an important part of the curriculum of the jurists of Kairouan.[196] The works also served as primary references for the Mālikīs of Muslim Spain and Portugal.[197] The *Wāḍiḥa* was compiled by the prominent Andalusian jurist ʿAbd al-Malik ibn Ḥabīb. Fragments of it exist in the manuscripts of Kairouan.[198] Ibn Ḥabīb shows great interest in Mālik's considered opinion (*raʾy*) and the contrary opinions of his Medinese contemporaries and successors, which often differ greatly. His compendium demonstrates that the early Mālikīs did not rely exclusively on the *Muwaṭṭaʾ* or the opinions of Mālik in their legal compositions. The circle from which they drew was much wider, including Ibn al-Mājishūn and others.[199] The Andalusian jurist Muḥammad ibn Aḥmad al-ʿUtbī—compiler of the *ʿUtbiyya*—praised the *Wāḍiḥa* highly as the best representation of the Medinese school because of its close attention to internal dissent.[200] It was highly regarded among Mālikīs, many of whom ranked it in second place after the *Mudawwana*.[201]

The *ʿUtbiyya* is also known as the *Mustakhraja* from its original title.[202] It is based on transmissions (*asmiʿa* or *samāʿāt*) from Ibn al-Qāsim, which al-ʿUtbī collected and revised.[203] The esteemed Andalusian Mālikī Muḥammad ibn al-Labbād al-Lakhmī (d. 333/944) was an important transmitter of the *ʿUtbiyya*. He too was highly regarded among the jurists of Kairouan because of his expertise in the dissenting opinions of the

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[195] This purpose is reflected in the *ʿUtbiyya*'s full title, which was *al-Mustakhraja min al-Asmiʿa [al-Samāʿāt] mimmā Laysa fi al-Mudawwana* (gleanings of transmitted reports not in the *Mudawwana*) (Muranyi, "Unique Manuscript," 343; idem, *Materialen*, 50). The full title of the *Wāḍiḥa* was *al-Wāḍiḥa fi al-sunan wa al-fiqh* (the lucid [compilation] on [aspects of] the *sunna* and jurisprudence) (Muranyi, *Materialen*, 14; cf. Sezgin, *Geschichte*, 1:362).

[196] Muranyi, *Beiträge*, 61.

[197] Sezgin, *Geschichte*, 1:362.

[198] Muranyi, *Materialen*, 14; cf. Sezgin, *Geschichte*, 1:362.

[199] Muranyi, *Materialen*, 27.

[200] Muranyi, *Materialen*, 27. Manuscript evidence shows that the *Wāḍiḥa* was extremely rich in content. In addition to the opinions of the Medinese, it transmits those of the early Egyptian jurists, which are sometimes contrary to those of Mālik. Ibn al-Ḥabīb also transmits the juristic opinions of prominent North Africans, Andalusians, and the Syrian al-Awzāʿī (Muranyi, *Materialen*, 22, 28).

[201] Sezgin, *Geschichte*, 1:362.

[202] Muranyi, *Materialen*, 50. The *ʿUtbiyya*'s full title was *al-Mustakhraja min al-asmiʿa [al-samāʿāt] mimmā laysa fi al-Mudawwana* (gleanings of transmitted reports not in the *Mudawwana*) (Muranyi, "Unique Manuscript," 343; idem, *Materialen*, 50).

[203] Muranyi, "Unique Manuscript," 343; cf. Sezgin, *Geschichte*, 1:472.

Medinese jurists.[204] Like the *Wāḍiḥa*, the *ʿUtbiyya* contains extensive material on the divergent opinions of Mālik and the dissenting views of his principal students, much of which is transmitted in Ibn ʿAbd al-Barr's commentaries on the *Muwaṭṭaʾ*.[205]

In addition to these four principal source books of Mālik's legal interpretations in the formative period—the *Mudawwana, Mawwāziyya, Wāḍiḥa*, and *ʿUtbiyya*—two other early works deserve mention. *Al-Mukhtaṣar al-kabīr fī al-fiqh* of ʿAbd-Allāh ibn ʿAbd al-Ḥakam is among the most important of these and has been extensively studied by Jonathan Brockopp.[206] There was also an independent compilation of Mālik's opinions as transmitted by Ashhab, which was called *Mudawwanat Ashhab* or *Kutub Ashhab*. ʿIyāḍ states that it was large and of excellent quality, containing much knowledge. Other reports state that Ibn al-Qāsim and Ashhab vied with each other in promoting the compilations attributed to each of them respectively.[207]

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[204] Muranyi, *Materialen*, 50, 57; idem, "Unique Manuscript," 329, 343.

[205] Muranyi, *Rechtsbücher*, 166–167. Many traditional Mālikī jurists doubted the authenticity and value of the *ʿUtbiyya*. Muḥammad ibn ʿAbd al-Ḥakam (d. 268/882), an Egyptian contemporary of al-ʿUtbī, is reported to have contended that the *ʿUtbiyya* was mostly lies and baseless opinions. The Cordoban jurist and judge Muḥammad ibn Yaḥyā (d. 330/942) contended that the *ʿUtbiyya* contained numerous transmissions that had been rejected by others in addition to many irregular (*shādhdh*) opinions. (ʿIyāḍ, *Tartīb* and Ibn Farḥūn as cited by Abū Zahra, *Mālik*, 240).

[206] Brockopp, *Early Law*; cf. Sezgin, *Geschichte*, 1:467; Abū Zahra, *Mālik*, 238.

[207] ʿIyāḍ, *Tartīb* as cited by Abū Zahra, *Mālik*, 235–36. As Miklos Muranyi notes, Saḥnūn asked Ashhab the same questions that he presented to Ibn al-Qāsim (Muranyi, "Frühe Rechtsliteratur," 229).

CHAPTER TWO

AN OVERVIEW OF MĀLIK'S LEGAL REASONING

Introduction

Based on his study of the early Fāṭimid treatise on comparative law, *Ikhtilāf uṣūl al-madhāhib*, Devin Stewart observes that a "sophisticated community of legal interpretation" may exist in the absence of articulated legal theory.[1] He asserts that the Jewish legal tradition exemplifies this reality. Stewart contends that Rabbinic law, although sophisticated in its application, "by and large produced no genre equivalent to *uṣūl al-fiqh*."[2] The fact that a "sophisticated community of legal interpretation" may exist in the absence of legal theory is crucial for the sound understanding of the formative period of Islamic law and the emergence of the Sunnī schools of law. Similarly, the relative scarcity in that period of standard terminologies for legal concepts such as analogy cannot be taken as evidence on grounds of "the argument from silence" (*argumentum e silentio*) that the legal methods they later identified were not present or fully developed much earlier.

The ability to attain a fundamental although inarticulate grasp of conceptual categories, cognitive structures, and applied methodologies is a common feature in the history of human cognition.[3] Developing a natural

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[1] Devin Stewart, "Muḥammad b. Dā'ūd al-Ẓāhirī's Manual of Jurisprudence, *al-Wuṣūl ilā Maʿrifat al-Uṣūl*," 100.

[2] Stewart, "Ẓāhirī's Manual," 100.

[3] In the history of human cognition, thought patterns and cognitive structures often emerge first, mature, and reach sophistication before analytical theories and standardized terminologies are developed that make them pedagogically accessible to others. Applied geometry in art and architecture was practiced for millennia before the axioms and theorems were elaborated that elucidated the principles underlying them. Euclid (fl. ca. 300 BCE) deduced the axioms of geometry quite late in Greek intellectual history. Logically, his axioms come before the theorems they explain. But, historically, the theorems appeared first and the axioms came later (Morris Cohen and Ernest Nagel, *An Introduction to Logic and Scientific Method*, 132). Zeno (d. ca. 430 BCE) and Socrates (d. ca. 399 BCE) were epitomies of systematic logic and common sense. They used these tools to reveal the fallacies of others, especially sophists and demagogues. Neither Zeno nor Socrates articulated systematic theories or terminologies of logic or logical fallacies. Decades later, Aristotle (d. 322 BCE) analyzed their dialogues and worked out an articulate system and terminology for classical logic and an array of formal and informal fallacies (see *The Encyclopedia of*

feel for what we understand is a radically different enterprise from articulating that understanding in words (as "meta-discourse") and coining precise terms for the concepts we instinctually grasp.[4] Few people master both processes simultaneously. Sherman Jackson notes that "there is no

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Philosophy, s.v. "History of Logic"). Complex and highly developed human languages consistently adhere to systematic grammatical structures and morphologies over centuries. They pass their linguistic intricacies unconciously from one generation to another, long in advance and often in the complete absence of articulate linguistic sciences that define their structures and set terminologies. Classical Arabic was spoken for generations before Sībawayh (d. 180/796), the great Arabic grammarian and morphologist, provided it with his brilliant linguistic aparatus of categories and terminologies.

Muḥyī al-Dīn ibn al-ʿArabī did not employ the term "unicity of existence" (*waḥdat al-wujūd*) in his writings, although he speaks repeatedly of the ineffable reality of existence and its essential unicity. Charles Darwin did not use the term "evolution" in *Origins of Species*, although his book is the seminal work of modern evolutionary theory (see "Wallace, Alfred Russell," in *The New Encyclopaedia Britannica*, 12:466). In modern finance, Jack Welch was given credit for the concept of "shareholder value" on the basis of a famous speech he delivered in 1981. Welch never used the term a single time in his presentation, although his speech became the rallying point for the "shareholder value" movement (see "Welch denounces corporate obsessions: Shareholder value emphasis 'misplaced' " in *The Financial Times*, March 13, 2009, front page).

[4] The emergence of theory and terminology to explain living cognitive structures constitutes a critical and occasionally dangerous phase in intellectual history. Prodicus (d. ca. 395 BCE), a teacher of Socrates, stated, "The right use of terms is the beginning of knowledge." Antisthenes (d. ca. 365 BCE), one of Socrates' students, asserted that, "The examination of terms is the beginning of education" (R.M. Wenley, "Cynics," in *The Encyclopedia of Religion and Ethics*, 4:380). Sound exposition and careful use of terms facilitate the further development on a broader pedagogical level of the ideas they embody. At the same time, inadequate exposition of theories and terms and their mistaken application may obscure earlier concepts and inhibit their fuller development by entangling them in a net of inadequate cognitive frames. Al-Shāṭibī, the great Andalusian master of jurisprudence, advised students of the law to return to the earliest legal texts because their understanding of the purposes and principles of the law was superior to later jurists, who were more deductive and formalistic in their approach and lacked the instinctive, overall vision of the earliest jurists (see al-Shāṭibī, *al-Muwāfaqāt*, 1:42–61).

Because intuitive and organic conceptualization often functions independently of theories and terminologies, no intrinsic cognitive or historical relationship necessarily exists between the two processes. Modern mathematics and logic show that the relationship between conceptions and terms may be entirely arbitrary. We may call a concept or idea by any name and assign them unknown values such as X, Y, and Z. Emergent theories and terminologies may express the underlying concepts of a cognitive system so coherently that they provide a catalyst for greater mastery and further development. They can also do the opposite and unwittingly distort or misrepresent the original ideas they seek to articulate. Early studies of English grammar imposed foreign Latinate constructs upon it, which obscured the intrinsic nature of the English language. Joseph Priestley—father of modern chemistry and great Enlightenment theologian, polymath, and pedagogist—devised a new framework for English grammar based on Anglo-Saxon, which brought to light the inner workings of modern English and facilitated its proper teaching and use (see John Passmore, "Priestely, Joseph" in *The Encyclopedia of Philosophy*, 6:451–53; "Priestley, Joseph", in *The New Encyclopaedia Britannica* 9:696).

necessary connection between philosophical systematization and professional competence."[5] Wael Hallaq observes that the Kufans and Medinese had no set terminology for consensus in the formative period. He adds that such "lack of a fixed technical term for consensus does not mean that it was rudimentary or even underdeveloped. On the contrary, it was seen as binding and, furthermore, determinative of *ḥadīth*."[6] In his groundbreaking research on Islamic legal maxims and precepts, Wolfhart Heinrichs draws attention to "terminological laxity" in the initial areas of Islamic legal development.[7]

In looking at the main outlines of Mālik's legal reasoning, it is essential to keep in mind the distinction between professional competence and applied understanding, on the one hand, and the identification of such reasoning in the world of theory and terminology, on the other. As a practioner of applied Islamic jurisprudence, Mālik like many of his counterparts in the formative period was subtle and highly competent, which the subsequent discussion of his legal reasoning attempts to show. Whether he was interested in or adept at articulating the inner workings of his professional competence in abstract theoretical terms is entirely another question.

Bernard Weiss notes the profound difference in Islamic history between positive law (practical jurisprudence: *fiqh*) and legal theory (theoretical jurisprudence: *uṣūl al-fiqh*).[8] In the study of Islamic legal origins, historical study of concepts and patterns of reasoning must not be confused with the development of legal theories and terminologies. Only when we keep the distinction between concepts and theories clear can we determine not only how and when theoretical and terminological developments emerged but also whether they clarified, obscured, promoted, or altered the processes of legal reasoning that preceded them. We cannot make sweeping statements about Islamic positive law and the reasoning underlying it based solely on post-formative legal theory, just as we cannot do the inverse. Neither field is of necessity historically subordinate to the other. Each requires independent investigation before the historical links between them can be properly discerned and fully understood.

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[5] Sherman Jackson, "Fiction and Formalism: Toward a Functional Analysis of *Uṣūl al-Fiqh*," 186, note 20.

[6] Hallaq, *Origins*, 110.

[7] Wolfhart Heinrichs, "Structuring the Law: Remarks on *Furūq* Literature," 335–36.

[8] Bernard Weiss, *The Spirit of Islamic Law*, xi.

Hamilton Gibb holds that, "The real foundation [of Islamic law] is to be sought in the attitude of mind which determined the methods of utilizing [its] sources."[9] Christopher Melchert observes similarly that Islamic law is nearer to being a process than a code.[10] Mālik's approach to the law was rational and pragmatic. He was not rigorously commited to the letter of the law or technical formalities but applied the law in a manner consistent with the Medinese tradition with a view to its spirit and overall purpose.

Mālik's legal reasoning was based on a wide variety of sources: Medinese praxis, solitary *ḥadīth*s with complete and incomplete chains of transmission, post-Prophetic reports, concessions for regional customs (*ʿurf*), precedent- and precept-based analogy, discretion (*istiḥsān*), preclusion (*sadd al-dharāʾiʿ*), and the unstated good (*al-maṣāliḥ al-mursala*). In the post-Shāfiʿī period, the Mālikī tradition continued to hold to these sources. It never repudiated them in the light of post-formative developments in jurisprudence within its own or other schools of law.

Few jurists of the formative or post-formative periods—Sunnī, Shīʿī, and Khārijī (Ibāḍī) alike—subscribed to such an extensive variety of legal references as Mālik and the Medinese. Interestingly, the sources of law attributed to Aḥmad ibn Ḥanbal overlap with those of Mālik at every point, although Ibn Ḥanbal applied them differently. He accepted non-textual referents such as Medinese praxis, discretion, preclusion, and the unstated good but put special restrictions upon them. Of all Sunnī, Shīʿī, and Khārijī Imāms, Aḥmad ibn Ḥanbal and the school that grew up around him relied upon the largest and most diverse body of transmitted texts. They made the broadest possible use of available textual sources, including various types and gradations of *ḥadīth*s and post-Prophetic reports that were marginalized in other traditions.[11]

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[9] H.A.R. Gibb, *Mohammedanism*, 62.

[10] Melchert, *Formation*, xiii.

[11] See ʿAbd-Allāh ibn ʿAbd al-Muḥsin al-Turkī, *Uṣūl madhdhab al-Imām Aḥmad ibn Ḥanbal: dirāsa uṣūliyya muqārana* 576; Abū Zahra, *Mālik*, 451.

To illustrate the textual richness of Ibn Ḥanbal's method, one need only consider the multiplicity of doctrines embodied in his *Musnad*, the most voluminous of all *ḥadīth* works, in conjunction with the remarkable variety of dissenting opinions in the post-Prophetic reports of the *Muṣannaf*s of ʿAbd al-Razzāq and Ibn Shayba. Virtually every *ḥadīth* and legal interpretation in these works is potentially valid in Ḥanbalī methodology according to its hierarchy of sources that extend from the technically sound (*ṣaḥīḥ*) *ḥadīth*s to weak (*ḍaʿīf*) ones and the post-Prophetic reports of the Companions, Successors, and subsequent early generations. In addition to this, the Ḥanbalīs frequently apply the presumption of continuity (*al-istiṣḥāb*), which is acknowledged by all Sunnī legal traditions. In the

Mālik's Use of the Qur'ān

Mālik makes substantial use of the Qur'ān in the *Muwaṭṭa'* to set the parameters of precepts and establish the meanings of legal language, which demonstrates that it constituted one of his material sources of law.[12] In the formative period, the pivotal issue regarding the Qur'ān as a source of law revolved around the extent to which its generally unrestricted (*'āmm*) statements should be treated as universal legal declarations. For Abū Ḥanīfa, his principle of the generalization of standard legal proofs (*ta'mīm al-adilla*)[13] boldly asserted the unrestricted applicability of broad legal pronouncements in the Qur'ān and standard *ḥadīth* texts.[14]

Ḥanbalī tradition, for example, the presumption of continuity may often function in social transactions (*mu'āmalāt*) as an open-ended legal proof in the absence of explicit texts in sources such as those just mentioned. In such cases, the presumption of continuity functions as an independent source of law on the basis of the principle of essential permissibility (*al-ibāḥa al-aṣliyya*) (see Muḥammad Abū Zahra, *Ibn Ḥanbal: ḥayātuhū wa 'aṣruhū, ārā'uhū wa fiqhuhū* [1997], 225–30; idem, *Abū Ḥanīfa* [1997], 364–84).

[12] Yasin Dutton asserts that the Qur'ān was central to Mālik's formulation of the law, which, in his view, "was always very much a Qur'ān-based and Qur'ān-generated system" (see Dutton, *Origins*, 61–62, 78, 90, 158; idem, "Juridical Practice," 19).

Fazlur Rahman speaks of the Qur'ān as one of Islamic law's "material principles or sources" (Rahman, *Islam*, 68). Wael Hallaq observes that all proponents of Islamic law took the primacy of the Qur'ān for granted (Hallaq, *Origins*, 74).

Western scholarship long held, however, that the Qur'ān contained comparatively little legal content and, as a consequence, never constituted in practice a primary source of Islamic law, especially when compared with legal *ḥadīth*s. S.D. Goitein challenged this notion. He showed that minimization of the Qur'ān's role as a legal source was based on a misreading of its content. He held that the legal material of the Qur'ān, if properly gauged, is comparable to that of the Biblical Pentateuch, known in Jewish tradition as "The Law" (Torah) (S.D. Goitein. "The Birth-Hour of Muslim Law? An Essay in Exegesis," 70; cf. Hallaq, *History*, 30–4; Dutton, *Origins*, 160.).

[13] As noted earlier, Abū Ḥanīfa's principle of "the generalization of proofs" (*ta'mīm al-adilla*) is one of the most distinctive underpinnings of his legal reasoning. The generalization of proofs grants standard proof texts in the Qur'ān and well-known *ḥadīth*s their fullest logical and reasonable application, conceding to them the broadest authority and treating them virtually as universal legal decrees (see Abd-Allah, "Abū Ḥanīfa," 1:300; Abū Zahra, *Abū Ḥanīfa* [1965], 237–58; cf. idem, *al-Imām al-Ṣādiq*, 344–50). Abū Yūsuf refers to such standard generalized texts as the well-known *sunna* or the texts that the jurists have given recognition (see Abd-Allah, "*'Amal*," 174–75; Abū Zahra, *Abū Ḥanīfa*, 325, 337–39; Sha'bān, *Uṣūl*, 149–53). Many additional examples of Kufan application of the generalization of legal proofs occur in *Mālik and Medina*. No other Sunnī school grants such universality and sweeping categorical authority to generally unrestricted statements of law. The foundational texts that Abū Ḥanīfa relied upon as his basis of legal generalization serve a purpose cognate to Mālik's use of standard legal precepts (Abd-Allah, "Abū Ḥanīfa," 1:300; cf. al-Kawtharī, *Fiqh*, 37; Abū Zahra, *Mālik*, 266–67; idem, *Abū Ḥanīfa*, 245–68; al-Zarqā, *Fiqh*, 1:136–38; al-Dawālībī, *Madkhal*, 153–60).

[14] For example, Abū Ḥanīfa held that the alms tax should be collected on all agricultural produce—despite sound solitary *ḥadīth*s to the contrary—based on unconditional

Juridical restrictions on the applicability of universal legal statements in the Qurʾān implied that contrary legal statements—especially those in solitary connected *ḥadīth*s (*aḥādīth al-āḥād*)—had the power to set boundaries on broad Qurʾānic statements and render them specifically restricted (*khāṣṣ*) in application. Abū Ḥanīfa and his followers treated unrestricted Qurʾānic verses as explicitly conclusive (*naṣṣ*) legal statements, not as overt (*ẓāhir*) and potentially inconclusive proofs. Insistence upon the categorical universality of unrestricted general statements in the Qurʾān placed them at the pinnacle of the Kufan hierarchy of legal sources and systematically precluded restricted specifications from lesser sources of law, especially contrary solitary *ḥadīth*s.[15] The *Muwaṭṭaʾ* contains many examples of dissent between the Kufans and the Medinese in which the Kufans based their dissenting opinions on their different attitudes toward the absolute application of general Qurʾānic legal verses.[16]

In the language of later jurisprudents, Mālik regarded all generally unrestricted legal statements in the Qurʾān and other revealed texts as overt (*ẓāhir*) proofs (as opposed to being explicitly conclusive [*naṣṣ*] legal statements). Consequently, he allowed for them to be interpreted and further restricted on the basis of other sources of law.[17] On such grounds, later

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application of the generality of the Qurʾānic verse 6:141, which mentions pomegranates and other types of fruit and enjoins that their due be paid on the day of their harvest (Abd-Allah, "*ʿAmal*," 410–15; Ibn ʿAbd al-Barr, *al-Istidhkār*, 9:274–275; cf. ʿAbd al-Razzāq, *al-Muṣannaf*, 4:121).

Joseph Schacht recognizes the centrality of the Qurʾānic text in Ḥanafī legal reasoning in the formative period. He observes that their Qurʾānic methodology contrasted sharply with that of al-Shāfiʿī, who like the Medinese allowed universal statements in the Qurʾān to be specifically restricted in the light of solitary *ḥadīth*s. Based on references to Ḥanafī legal reasoning in early Kufan and Shāfiʿī texts, Schacht describes the Kufan position regarding the Qurʾān in terms consistent with the position of Ḥanafī legal reasoning on the generalization of legal proofs (see Schacht, *Origins*, 29–30). Schacht observes that the Qurʾān was central to Abū Yūsuf's jurisprudence. Schacht regarded this primacy of the Qurʾānic text in isolation as essentially the opposite of al-Shāfiʿī's view, which was based on "interpretation of the Koran in the light of the traditions of the Prophet" (Schacht, *Origins*, 29). As indicated, Abū Ḥanīfa, Abū Yūsuf, and their Kufan circle regarded the Qurʾānic text as a definitive legal statement. The universality of its generally unrestricted (*ʿāmm*) statements could only be validly delimited to more specific meanings by strong, normative *ḥadīth*s, not by irregular solitary ones. Al-Shāfiʿī's method, on the other hand, allowed the generally unrestricted statements of the Qurʾān to be specified and restricted by authentic solitary *ḥadīth*s.

[15] See Abū Zahra, *Mālik*, 262; cf. al-Kawtharī, *Fiqh*, 37; Abū Zahra, *Mālik*, 266–67; idem, *Abū Ḥanīfa*, 245–68; al-Zarqā, *Fiqh*, 1:136–38; al-Dawālībī, *Madkhal*, 153–60.

[16] See, for example, Abd-Allah, "*ʿAmal*," 555–57, 571–76, 592–95, 640–48, 661–64, 665–67, 696–99, 713–22.

[17] Later Mālikī jurists held that Mālik deemed it valid to limit the general application of unrestricted Qurʾānic verses by reference to a variety of legal sources and principles,

Mālikīs asserted that generally unrestricted foundational texts should be deemed presumptively authoritative (*ẓannī*) and not conclusive (*qaṭʿī*). Any generally unrestricted legal statement, whether in the Qurʾān or *ḥadīth*, pertained in its conceptual universality only presumptively to all the potential particulars to which it could be logically extended unless additional proof existed to the contrary. Therefore, general statements were regarded as inherently polysemic and ambiguous by nature. From Mālik's perspective, overt legal texts do not independently constitute universal statements of law.[18] From the standpoint of Abū Ḥanīfa's legal reasoning, general legal statements taken from the Qurʾān and standard legal texts of unquestioned authority were regarded as definitively conclusive (*qaṭʿī*) in meaning. They overruled the delimitations of all contrary texts

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and they included precept-based analogies among such legal references (see Abd-Allah, "*ʿAmal*," 151–54). According to Ibn Rushd, Mālik used analogy on the basis of well-established precepts of law to restrict the meaning of a Qurʾānic verse in the following example. Islamic law allows the husband to initiate the divorce of his wife through repudiation (*ṭalāq*) twice. On each occasion, he retains the right to annul his repudiation and resume customary marital life if he does so before the wife's completion of her waiting period (*ʿidda*), which varies but is normally three menstrual cycles. If he does not take her back during this period, she becomes formally divorced, and he cannot remarry her without a new contract and dowry. A pertinent Qurʾānic verse states that when repudiated wives have neared completion of their waiting periods, their husbands should either take them back or separate from them in an equitable manner. It adds, "And call to witness two just (*ʿadl*) [men] from among you" (Qurʾān, 65:2). The overt meaning of this verse, Ibn Rushd notes, indicates that a repudiating husband is required by law to call two just witnesses to establish by testimony what the outcome of his repudiation has been. They must verify that he has either taken her back as his wife or that he has separated from her. Mālik holds, however, that it is not obligatory for him to call witnesses if he takes his wife back, although it would be recommended. In Ibn Rushd's view, Mālik based his opinion on analogy with other established precepts of law according to which a person who reclaims something that is rightfully his is not required to call witnesses to verify repossession. In Mālik's view, it is the repudiating husband's right to take back his wife as long as her waiting period has not expired (see Ibn Rushd, *Bidāya*, 2:51).

In allowing precept-based analogy to restrict general Qurʾānic meanings, Mālik's legal reasoning differs from both Abū Ḥanīfa and al-Shāfiʿī. Abū Ḥanīfa relied heavily on the Qurʾān as a primary source of standard legal analogues. He regarded generally unrestricted statements in the Qurʾān to be of definitive meaning, and this position underlies the unique Ḥanafī position regarding the specification and repeal of Qurʾānic verses. Hence, according to ʿĪsā ibn Abān and al-Karkhī, Abū Ḥanīfa did not permit Qurʾānic verses to be specifically restricted or qualified *ab initio* on the basis of analogical considerations. But once a verse had been given specific restrictions on the basis of other stronger legal references, Abū Ḥanīfa would allow its further specification through analogical reasoning (see Abd-Allah, "*ʿAmal*," 149–51). For al-Shāfiʿī, analogy was always subordinate to explicit legal texts. Hence, he did not regard the specification of Qurʾānic texts through analogy as legitimate (Abū Zahra, *Mālik*, 273).

[18] See Abū Zahra, *Mālik*, 262, 264–65; al-Zarqā, *Fiqh*, 1:137; al-Dawālībī, *Madkhal*, 153–57; see also Anderson, *Law Reform*, 6; Dutton, *Origins*, 90.

of lesser authority.[19] For al-Shāfiʿī, explicit (*naṣṣ*) and overt (*ẓāhir*) legal texts were both treated as universal and conclusively explicit legal statements, which meant that he allowed legal texts—especially connected solitary *ḥadīth*s—to restrict the general implications of Qurʾānic texts and the well-known *sunna*.[20]

Dutton shows that Mālik tends to treat Qurʾānic legal vocabulary in its most generally unrestricted sense, although he frequently renders its application specific through reference to various supplementary references, especially Medinese praxis.[21] Mālikī positive law also demonstrates that Mālik regarded generally unrestricted Qurʾānic texts to be open to interpretation. His chief reference in setting forth Qurʾānic meanings was,

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[19] From the Ḥanafī perspective, conclusive general statements could only be rendered presumptively authoritative (*ẓannī*) once they had been specifically restricted by the application of equally authoritative legal references (see Abd-Allah, "Abū Ḥanīfa," 1:300; cf. al-Kawtharī, *Fiqh*, 37; Abū Zahra, *Mālik*, 266–67; idem, *Abū Ḥanīfa*, 245–68; al-Zarqā, *Fiqh*, 1:136–38; al-Dawālībī, *Madkhal*, 153–60). Thus, Ḥanafī jurisprudence regards generally unrestricted statements to be conclusive only as long as they are not delimited and rendered specific by another authoritative text. Once a general text has been restricted in meaning, it ceases to be conclusive and may be further restricted by secondary ancillaries such as irregular solitary *ḥadīth*s. Hence, according to the early Ḥanafī jurisprudents ʿĪsā ibn Abān (d. 221/836) and ʿUbayd-Allāh ibn al-Ḥusayn al-Karkhī (d. 340/952), once a generally unrestricted text has been rendered specifically restricted, Abū Ḥanīfa permitted the full extent of its specification to be elaborated through analogy, although he did not regard analogy as having the power to render general texts specific independently (Abū Zahra, *Mālik*, 271–73). Like Mālik, Abū Ḥanīfa regarded solitary *ḥadīth*s to be among the weakest independent sources of law, but he regarded them as acceptable for repealing and specifying general Qurʾānic and extra-Qurʾānic statements of the law once those texts had been restricted to specific applications by more authoritative legal references.

From the standpoint of post-formative Mālikī legal theory, specifically restricted statements of law (*al-khāṣṣ*) that meet formal standards of authenticity take priority over those that are generally unrestricted (*al-ʿāmm*) (Abū Zahra, *Mālik*, 268). This stipulation does not apply to Abū Ḥanīfa's legal reasoning in the view of later Ḥanafī jurisprudents. One of the logical consequences of the Ḥanafī approach to generally unrestricted and specifically restricted texts is reflected in the school's distinctive conception of repeal (*naskh*). In the Ḥanafī view, generally unrestricted statements in the Qurʾān and other foundational texts can only be restricted to a specific application (*mukhaṣṣaṣ*) when the text indicating such restriction is linked to it in the same text or when there is some other indication that two relevant statements in separate texts were revealed at the same time. For example, a legal statement in one verse may be generally unrestricted in meaning but rendered specifically restricted in the verse following it. If the generally unrestricted and specifically restricted statements are not linked together contextually, however, or if there is some other indication that they were revealed at different times, the later of them to be revealed is regarded as repealing the earlier one (Abū Zahra, *Mālik*, 268–69; idem, *Abū Ḥanīfa*, 245–68).

[20] See Abū Zahra, *Mālik*, 262, 264–65; al-Zarqā, *Fiqh*, 1:137; al-Dawālībī, *Madkhal*, 153–57; see also Anderson, *Law Reform*, 6; Dutton, *Origins*, 90.

[21] Dutton, *Origins*, 71–73, 76–79, 81, 84–85, 88–91, 94–96.

however, Medinese praxis and not exclusively semantic considerations based on the formal implications of transmitted texts.[22]

Because Mālikī legal jurisprudence classified generally unrestricted texts as presumptively authoritative, it allowed for further restriction on a general text's legal application through a large number of ancillary references (*qarā'in*). Al-Qarāfī lists fifteen valid ancillaries for rendering general texts specific in Mālikī legal theory.[23] One of them was the general good (*al-maṣlaḥa*). General texts may only be broadly applied in their unrestricted generality as long as such applications do not conflict with the general good.[24] As we will see, this approach is consistent with the logic underlying Mālik's use of discretion, preclusion, and the unstated good.

Given the weakness in Mālikī legal thought of technically authentic solitary *ḥadīth*s, they lacked the authority to serve as independent ancillaries for rendering a generally unrestricted text specific despite the fact that generally unrestricted texts were conjectural and only presumptively authoritative. In this regard, the Mālikī and Ḥanafī positions are comparable. The Ḥanafīs did not permit the Qur'ān to be independently repealed or rendered specific by solitary *ḥadīth*s. In early Ḥanafī legal methodology, a solitary *ḥadīth* did not generally have the authority to specify even the general implications of an overt (*ẓāhir*) meaning of a Qur'ānic verse, even in cases when such verses were treated as conjectural.[25] Both the Mālikī

[22] Thus, while Abū Ḥanīfa held that the alms tax should be collected on all agriculture produce based on the generality of the Qur'ānic verse 6:141, Mālik qualified the verse by excluding fruit, provender, green vegetables and the like on the basis of solitary *ḥadīth*s supported by Medinese praxis (see Abd-Allah, "*'Amal*," 410–15; Ibn 'Abd al-Barr, *al-Istidhkār*, 9:274–275; cf. 'Abd al-Razzāq, *al-Muṣannaf*, 4:121).

[23] In his *Tanqīḥ al-fuṣūl* as cited by Abū Zahra, *Mālik*, 270.

[24] See al-Zarqā, *Fiqh*, 1:136. Muṣṭafā al-Zarqā holds that the Mālikī position allowing further restriction of qualified general statements on the basis of the general good reflects that the fundamental legal intent behind the law is to secure and protect the general good. It is contrary to the law's intent to strictly apply general precepts to circumstances where their application annuls the benefits for which they were intended. Al-Zarqā asserts that in Mālikī jurisprudence the more conjectural a legal precept is, the more strongly applies the criterion of further qualifying it by reference to the general good.

Restriction of the broad general implications of legal texts and precepts on the basis of the general good is also consistent with Mālik's application of discretion (*istiḥsān*) and preclusion (*sadd al-dharā'i'*). The essential characteristic of these principles is precisely to restrict the general scope of legal precepts (including those cited explicitly in legal texts) under exceptional circumstances when strict application of the rule would annul an aspect of the general good and bring about potential harm (*mafsada*).

[25] Murteza Bedir, "An Early Response to Shāfi'ī: 'Īsā b. Abān on the Prophetic Report," 303.

and Ḥanafī positions differ on this point from later Shāfiʿī jurisprudence. The Shāfiʿīs held that generally unrestricted texts were presumptively authoritative, but they regarded the sound solitary connected *ḥadīth* as sufficiently authoritative to render the general meanings of the Qur'ān specific.[26] Mālikī legal thought did regard the solitary *ḥadīth* as an authentic indication of specification, however, whenever that *ḥadīth* was in conformity with Medinese praxis. In such cases, the implications of the solitary *ḥadīth* were valid, even if they ran contrary to analogy or other well-established precepts of law.[27] But in such instances, it was Medinese praxis that was conclusive, while the solitary *ḥadīth* only served as a subordinate, historical witness to the institution of that praxis.

Mālik, *Ḥadīth*, and the *Sunna*

In Islamic legal history, the words *sunna* and *ḥadīth* must be viewed as complex terms. Like all complex terms, they have to be handled carefully to avoid fallacies resulting from vagueness and systematic ambiguity. *Sunna* is a legal category with different definitions and nuances among the jurists. In all schools, it related in some way to the Prophet's performative behavior and prescriptive directives. In the Mālikī school, the concept of the Prophetic *sunna* often connoted the Prophet's normative (praxis-constituting) example as opposed to his exceptional (non-praxis-constituting) precedents. In the Mālikī, Ḥanafī, and Ḥanbalī traditions as opposed to the Shāfiʿī school, the *sunna* could also be constituted by post-Prophetic reports (*āthār*) from Companions, especially the practices of the four rightly-guided caliphs.[28]

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[26] See Abd-Allah, "*ʿAmal*," 245–80; 143–44.

[27] Abū Zahra, *Mālik*, 288–89, 271, 305.

[28] The word *sunna* may be used both with regard to the *sunna* of the Prophet or other authoritative exemplars. Taking this in mind, Jonathan Brown refers to the *sunna* as always constituting an "authoritative precedent" (Jonathan Brown, "Critical Rigor vs. Juridical Pragmatism: How Legal Theorists and Ḥadīth Scholars Approached the Backgrowth of *Isnād*s in the Genre of *ʿIlal al-Ḥadīth*," 3). Such authoritative precedents sometimes extended to communal leadership in the wake of the Prophet—especially caliphal precedent—and examples of such extensions of the *sunna* occur in the *Muwaṭṭaʾ* and *Mudawwana*. Ibn ʿAbd al-Barr states that the word "*sunna*" when used in general without qualifications (*idhā uṭliqat*) was meant to refer to the *sunna* of God's Messenger. If its source of authority was someone else, it would be qualified by specific reference to that person (or persons) as in the case of "the *sunna* of Abū Bakr and ʿUmar" (Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:267). Susan Spectorsky asserts that, "no one ever wished to follow a *sunnah* which was *not* the *sunnah* of the Prophet." She notes that even when Isḥāq ibn Rāhawayh attributes a *sunna*

Ḥadīth constitute transmitted textual narratives which generally but not always go back to Prophetic authority. They have diverse classifications and gradations. Their legal status among the early and later jurists varied widely according to the rankings they were given. In the Mālikī and Ḥanafī traditions, how the legal content of technically authentic *ḥadīth* related to the overall precepts and principles of the law was crucial in determining their authority as material sources of law. Both schools classified technically authentic *ḥadīth* as either standard or non-standard on this basis. Such concern for comparative *ḥadīth* content was common

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to a person other than the Prophet, it is not because he regarded them as independent authorities but "because their authority [was] associated with [the Prophet's]" (Spectorsky, "*Sunnah*," 71–72). Saḥnūn relates in the *Mudawwana* that Mālik's teacher al-Zuhrī would say regarding the Medinese law of witnesses that "the *sunna* has long been established (MḌS; *maḍat al-sunna*) from the Messenger of God, God extol him and grant him perfect peace, and the two caliphs" regarding the matter (*Mud.*, 4:84).

In the *Muwaṭṭa'*, "the *sunna* of God's Messenger" (*sunnat Rasūl Allāh*) does not occur as one of Mālik's *sunna*-terms. The expression occurs twice, however, in post-Prophetic reports (*āthār*) that Mālik cites. A variant "the *sunna* of the Prophet" (*sunnat al-nabī*) occurs in a *ḥadīth*, which Mālik transmits. One of the post-Prophetic reports also mentions the *sunna* of the Prophet in conjunction with the *sunna* of God (*sunnat Allāh*): ʿAbd-Allāh ibn ʿUmar writes to the Umayyad ruler ʿAbd al-Malik ibn Marwān, informing him of his willingness to obey him in what is consistent with the *sunna* of God and the *sunna* of God's Messenger (*Muw.*, 2:983). In another post-Prophetic report, the caliph Abū Bakr states that he knows of no stipulated share of inheritance for grandmothers in the *sunna* of God's Messenger (*Muw.*, 2:513). In Mālik's *ḥadīth*, the Prophet states, "I have left with you two things which, if you follow them, you will never go astray: the Book of God and the *sunna* of His Prophet" (*Muw.*, 2:899).

In six additional instances, the *Muwaṭṭa'* cites reports that either use the word *sunna* or derivate verbs. In each case, the words refer explicitly or implicitly to the *sunna* of the Prophet. In one *ḥadīth*, the Prophet errs while leading a group prayer. He then institutes the *sunna* of two additional prostrations to amend for the mistake of inattention. He states, "I am made to forget (*unassā* or *ansā*) in order to establish a *sunna* (*li-asunna*)" (*Muw.*, 1:100). In another report, ʿĀ'isha enumerates three *sunna*s that were established in the case of a certain Companion woman named Barīra (*Muw.*, 2:562). ʿUmar ibn al-Khaṭṭāb mentions in a public address that the *sunna*s have been laid down clearly for the people, and they have been left following the clear path (*al-wāḍiḥa*) (*Muw.*, 2:824). In another report, ʿUmar decides against washing a garment he defiled and suffices with cleaning only the defiled part with water. He fears that changing the defiled garment for another and washing the defiled one later would establish that act as a *sunna*, which would be too difficult for the people to comply with (*Muw.*, 1:50). The Companion ʿAbd al-Raḥmān ibn ʿAwf reports having heard from the Prophet that the *sunna* as pertains to Jews and the Christians should also be followed with regard to the Magians (*Muw.*, 1:278). Al-Zuhrī remarks that people are mistaken about the *sunna* when they regard it as a *sunna* to walk behind funeral processions (*Muw.*, 1:226). Among the variety of *sunna*-terms that Mālik uses in the *Muwaṭṭa'* is the expression "the *sunna* of the Muslims," which occurs five times in the recension of Yaḥyā ibn Yaḥyā (*Muw.*, 2:692–93; 791; 804).

among the jurists of the formative period and continued to be hallmarks of the Mālikī and Ḥanafī schools afterwards.[29]

In all schools, individual *ḥadīth*s were linked with the *sunna* in one way or another as potential textual indicators of its content according to the distinctive methodologies of each school. For al-Shāfiʿī, the correlation between authentic solitary connected (*musnad*) *ḥadīth*s and the *sunna* was explicit, and the two words often appear as synonymous in his mind. The so-called "classical" principle of a one-to-one correspondence between the *sunna* and connected *ḥadīth*s rings truer of al-Shāfiʿī and the legal tradition he established than any other Sunnī school, although one must not overlook the subtleties of al-Shāfiʿī's application of the *ḥadīth*-principle.[30] As indicated before, the *ḥadīth*-principle must not be over-

[29] Joseph Schacht and others note that *sunna* and *ḥadīth*s were not synonymous in early Islamic legal reasoning and that the two concepts were often at odds with each other (see Schacht, *Origins*, 3; cf. Rahman, *Islam*, 45; Hallaq, *Origins*, 71). Ibn Mahdī, one of the most highly regarded traditionists (*muḥaddith*s) of the formative period, remarked that Sufyān al-Thawrī was an exemplar in *ḥadīth*s but not in the *sunna*; al-Awzāʿī was an exemplar in the *sunna* but not in *ḥadīth*s; and Mālik was an exemplar in both (ʿIyāḍ, *Tartīb*, 1:132). Mālik's caution toward *ḥadīth*s, his reliance upon Medinese praxis as the primary index of the *sunna*, and the general attitude of the Mālikī (and Ḥanafī) schools towards *ḥadīth*s—especially solitary transmissions of them—affirm that Mālik and the Kufans conceived of *ḥadīth*s and the *sunna* as distinct. For Mālik and for Abū Ḥanīfa, knowledge of the *sunna* was the criterion against which *ḥadīth*s were judged, interpreted, accepted, or rejected—not the reverse. The Kufans granted priority to *ḥadīth*s that were "more in keeping with the *sunna* as known through established school doctrine" (Schacht, *Origins*, 30; cf. Hallaq, *Origins*, 71). Like the Medinese, they judged the content of *ḥadīth*s by standards independent of their semantic content.

[30] A common paradigm underlying the analysis of Islamic legal origins is the idea that *ḥadīth*s and the *sunna* became identical in post-formative, constituting the hallmark of "classical" Islamic legal theory. Fazlur Rahman contends that from al-Shāfiʿī's perspective, *ḥadīth*s and the *sunna* were "coeval and consubstantial," constituting virtually one and the same thing (Rahman, *Islam*, 45). Norman Calder defines "revelation" in the classical period as constituted by the Qurʾān and the canonical collections of *ḥadīth*s. In his view, the legal schools undertook for more than a thousand years to "justify" their compendia of positive law by demonstrating that they could be harmonized with *ḥadīth*s (Calder, *Studies*, vi–vii). Calder asserts that the words and deeds of the Prophet came to constitute his *sunna* and the embodiment of God's divine law (*sharīʿa*). They were preserved by the Prophet's Companions in the form of *ḥadīth*s, and these *ḥadīth*s became the basis of all juristic discussion (*fiqh*) (Calder, *Studies*, vi). Similarly, G.H.A. Juynboll contends that *ḥadīth*s became *the* "vehicle" for the documentation of the *sunna* (G.H.A. Juynboll, "Some New Ideas on the Development of *Sunnah* as a Technical Term," 98). Likewise, Daniel Brown states that it is "axiomatic in classical doctrine" that the *sunna* can only be known by means of *ḥadīth*s (Daniel Brown, *Rethinking tradition in modern Islamic thought*, 81).

generalized to obscure the nuances of other emergent legal traditions or even complexities within the method that al-Shāfiʿī himself appled.[31]

The relation between the legal content of *sunna* and its textual and non-textual sources—connected and disconnected *ḥadīth*s, post-Prophetic reports, and praxis—is one of the most fundamental issues in the historiography of Islamic legal origins. All the early schools acknowledged the authority of the *sunna* but differed widely regarding the methods they used to determine what its content was and how it should be determined.[32] For Mālik and the school tradition that developed around him, Medinese praxis, connected and disconnected *ḥadīth*s, and post-Prophetic reports all constituted valid sources for ascertaining the legal content of the *sunna*. Although Ḥanbalīs are deemed among the staunchest proponents of tradition (*ahl al-ḥadīth*), many of them agreed with the Mālikīs on the validity of these additional textual and non-textual sources of the *sunna*. They differed only regarding the degrees of authority ascribed to each source and the uses they assigned them. The Ḥanafīs of the formative and post-formative periods also accepted connected and disconnected *ḥadīth*s and post-Prophetic reports as valid constituents of *sunna* but rejected Medinese praxis.[33]

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[31] Joseph Lowry notes, for example, that al-Shāfiʿī's writings often distinguish between the *sunna* and the various grades of narrated reports that serve to establish it (Lowry, "Four Sources?," 31–33).

[32] Dutton, *Origins*, 170.

[33] The axiom that *ḥadīth*s became tantamount to the *sunna* never applied across the board in Mālikī, Ḥanafī, or Ḥanbalī legal theory, not to mention the non-Sunnī schools of law. For Mālik and the early schools in general, solitary connected *ḥadīth*s provided only one of several ancillary sources for documenting the *sunna* (see Schacht, *Origins*, 3; cf. Hallaq, *Origins*, 71). In the Mālikī, Ḥanafī, and Ḥanbalī legal traditions during the formative and post-formative periods, disconnected (*mursal*) *ḥadīth*s and post-Prophetic reports were also potential indicants of *sunna*. Mālikī and Ḥanbalī jurisprudence—to the exclusion of the Ḥanafīs and Shāfiʿīs—also added Medinese legal praxis. For Mālik, all textual transmissions were subsidiary to praxis, which constituted his primary indicant of the *sunna*.

Wael Hallaq contends that Aḥmad ibn Ḥanbal and Dāwūd al-Ẓāhirī concurred that everything needed in the law "could be gleaned from the revealed language itself without impregnating these texts with human meaning" (Hallaq, *Origins*, 124). No school of Islamic law is more textual than the Ḥanbalī school in its attempt to find narrative precedents for legal rulings. It is not true, however, that such texts necessarily embodied "revealed language." Aḥmad ibn Ḥanbal—like Abū Ḥanīfa and Mālik—made ample use of post-Prophetic reports. Ibn Ḥanbal was able to rely as heavily as he did on texts because he multiplied so greatly the types he accepted. Ibn Ḥanbal did not categorically reject reason and the "impregnating" of revealed texts with "human meaning." His school avoided the use of considered opinion if precedents could be discovered in its textual resources;

In Islamic legal history, formative period debates over *ḥadīth* were not about *ḥadīth* as a general, all-inclusive genre. They were concerned with distinctive types of *ḥadīth*s (especially those in disconnected and solitary transmissions) as well as the semantic legal implications of *ḥadīth* content (standard as opposed to non-standard transmissions). When speaking of *ḥadīth* in the formative period of Islamic jurisprudence, it is necessary to distinguish not just between formally sound and unsound transmissions but between standard and non-standard, normative and non-normative, connected and disconnected, and solitary as opposed to multiply-transmitted (*mutawātir*) *ḥadīth*s. The discourse over *ḥadīth* during the early period also included the issue of how post-Prophetic reports and praxis should be construed with regard to *ḥadīth*. Failure to attend carefully to such distinctions leads to oversimplification and obscures the dynamic of the early debates.

The Disconnected Ḥadīth (al-Ḥadīth al-Mursal)

The distinction between disconnected (*mursal*) and connected (*musnad*) *ḥadīth*s[34] constituted one of the critical fault lines of juristic dissent in the formative and post-formative periods. Al-Shāfiʿī sought to marginal-

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nevertheless, the Ḥanbalī school stands alone alongside the Mālikīs in its formal endorsement of discretion, preclusion, and the unstated good, even if it narrows their scope.

[34] A connected *ḥadīth* (*ḥadīth musnad*) lists all the names of the *ḥadīth*'s transmitters over the generations back to the time of the Prophet. Mālik transmits a connected *ḥadīth* from Jaʿfar al-Ṣādiq from his father, Muḥammad al-Bāqir, from the Companion Jābir ibn ʿAbd-Allāh stating that Jābir witnessed the Prophet perform the circumambulation of the Kaʿba in a certain manner (*Muw.*, 364). A disconnected *ḥadīth* (*ḥadīth mursal*) fails to state all or some of the names of a *ḥadīth*'s transmitters over the generations going back to the Prophet. Mālik transmits a similar disconnected *ḥadīth* from Jaʿfar al-Ṣādiq from his father, Muḥammad al-Bāqir, stating that the Prophet sat down between the two sermons of the Friday prayer (*Muw.*, 112). This transmission omits the Companion from whom the *ḥadīth* was taken. For Mālik, Jaʿfar's disconnected *ḥadīth* is as authentic as his connected *ḥadīth*, because there is no question in Mālik's mind about the integrity of any of the links cited in either the connected or disconnected *ḥadīth*'s transmission. In the terminology of the traditionists (*muḥaddith*s), a disconnected *ḥadīth* fails to mention the name of the Companion from whom the *ḥadīth* was narrated, which is the case in the example just given. According to their terminology, a *ḥadīth* that fails to mention one or more transmitters other than a Companion is a cut-off *ḥadīth* (*ḥadīth munqaṭiʿ*). For jurists, the disconnected *ḥadīth* was given a broader definition, which is the one used in this book. It pertained to any *ḥadīth* with an incomplete chain of transmitters, whether the missing transmitter was a Companion, Successor, Successor of a Successor, someone else of a later generation, or more than one of those mentioned. See Ibn ʿAbd al-Barr, *al-Tamhīd*, 1:19–21 (1967); Muḥammad ibn ʿAbd-Allāh ibn Tūmart, *Kitāb aʿazz mā yuṭlab: mushtamil ʿalā jamīʿ taʿālīq al-Imām Muḥammad ibn Tūmart mimmā amlāhū Amīr al-Muʾminīn ʿAbd al-Muʾmin ibn ʿAlī*, 53.

ize disconnected *ḥadīth*s as authoritative sources of law, although their use had been ubiquitous for almost two hundred years before him and remained valid in other Sunnī traditions.[35] He insisted on the virtually exclusive reign of soundly transmitted connected *ḥadīth*s.[36] As Schacht recognizes, however, al-Shāfiʿī did not utterly reject disconnected *ḥadīth*s but relegated them as well as post-Prophetic reports to the status of "subsidiary arguments." Even he took recourse to them as independent references when he did not have access to connected *ḥadīth*s.[37] In the Mālikī, Ḥanafī, and Ḥanbalī legal traditions the status of disconnected *ḥadīth*s (as well as post-Prophetic reports) continued unchanged, and they remained ancillaries of the *sunna* in the post-formative period as they had been before.[38]

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[35] Susan Spectorsky observes that al-Shāfiʿī stood alone as the only jurist to insist upon a completely connected chain of *ḥadīth* transmitters to document the *sunna* (Spectorsky, "*Sunnah*," 54). Joseph Schacht states that the predominance of disconnected *ḥadīth*s in early Islamic jurisprudence was "staggering" (Schacht, *Origins*, 36). He infers that disconnected *ḥadīth*s came into existence before connected ones. For Schacht, early reliance on disconnected *ḥadīth*s represented a transitional phase culminating in "the real origins of Muhammadan law" when later jurists insisted on connected *ḥadīth*s (see Schacht, *Origins*, 39; cf. Hallaq, *History*, 18; Brown, "Critical Rigor," 3). While noting the observation of al-Khaṭīb al-Baghdādī that scholars held differing opinions on the disconnected *ḥadīth*, Juynboll remains consistent with the paradigm of "classical Islamic jurisprudence" and asserts that as the result of al-Shāfiʿī, *ḥadīth*s ceased to be acceptable in Islamic law without connected chains of transmission, while the disconnected *ḥadīth* "acquired the reputation of being far less 'sound'." Juynboll fully endorses the Schachtian paradigm and holds that the disconnected *ḥadīth* became universally unacceptable because of the influence of al-Shāfiʿī (see G.H.A. Juynboll, "Some Notes on Islam's First *Fuqaha'* Distilled from Early *Ḥadith* Literature," 287–88, 299).

These essentially Schachtian hypotheses are predicated on the presumption that al-Shāfiʿī's insistence upon connected *ḥadīth*s ultimately won the day and became universally accepted as "classical" Islamic jurisprudence. As noted earlier, the transition from disconnected to connected *ḥadīth*s never happened across the board. Disconnected *ḥadīth*s remained authoritative in the Ḥanafī and Mālikī schools. In the Ḥanbalī school, they were secondary to technically authentic connected *ḥadīth*s. In contrast to the Shāfiʿīs, however, the Ḥanbalīs continued to give disconnected *ḥadīth*s formal acceptance as a valid independent source of law, which was consistent with their conservative spirit and proclivity not to abandon earlier standard practice.

[36] Schacht observes that al-Shāfiʿī frequently uses post-Prophetic reports from the Companions and disconnected *ḥadīth*s of older Successors; he also occasionally cites *ḥadīth*s without careful attention to their chains of transmission (see Schacht, *Origins*, 36; Lucas, *Critics*, 151).

[37] Schacht, *Origins*, 38–39, 2–3, 19–20; see al-Kawtharī, *Fiqh*, 33–34; Spectorsky, "*Sunnah*," 54.

[38] See Abd-Allah, "'*Amal*," 155–61; al-Kawtharī, *Fiqh*, 32–33, 36 (note 1); Abū Zahra, *Mālik*, 294–95; idem, *Abū Ḥanīfa* (1997), 263–67; idem, *Ibn Ḥanbal* (1997), 172–92; Ibn ʿAbd al-Barr, *al-Tamhīd* (1967), 1:2, 6, 17; see also Ibn Tūmart, *Aʿazz*, 53–54; Ibn Ḥājib, *Mukhtaṣar*, 89.

Acceptance of the disconnected *ḥadīth* in the formative period typifies prominent jurists such as Saʿīd ibn al-Musayyab, ʿĀmir al-Shaʿbī (d. 103/721), Ibrāhīm al-Nakhaʿī (d. 96/715), al-Ḥasan al-Baṣrī, Abū Ḥanīfa, Sufyān al-Thawrī, al-Awzāʿī, and others.[39] Muḥammad Zāhid al-Kawtharī contends that disconnected *ḥadīth*s constituted roughly half of the legal *ḥadīth*s regarded as authoritative by early Muslim jurists.[40] More than a third of the *ḥadīth*s transmitted in the *Muwaṭṭa'* are disconnected. According to al-Ṭabarī and Ibn ʿAbd al-Barr, the Successors concurred on the validity of the disconnected *ḥadīth* as a source of law. No jurist categorically rejected them before al-Shāfiʿī did so at the turn of the third/ninth century.[41] Because al-Shāfiʿī's rejection of the disconnected *ḥadīth* and post-Prophetic reports marginalized a large body of legal materials, it had far-reaching effects on his positive law and constitutes one of the basic reasons for discrepancies between his positions and those of other jurists.

Jurists who accepted disconnected *ḥadīth*s set criteria for their validity similar to those regarding connected *ḥadīth*s. Mālikī jurisprudents stipulated that the final transmitter (*mursil*) in the disconnected chain (such as Mālik in the disconnected *ḥadīth*s of the *Muwaṭṭa'*) had to be trustworthy, fully qualified (*thiqa*), and known for transmitting from dependable authorities. In their view, fully connected chains of transmission were only required for narrators who drew their materials from weak and strong sources alike.[42] Al-Kawtharī contends that Abū Ḥanīfa followed identical criteria for disconnected *ḥadīth*s and that the Companions and Successors generally accepted disconnected *ḥadīth*s on such grounds.[43]

The famous Basran traditionist ʿAlī ibn al-Madīnī (d. 234/849) regarded Mālik's disconnected *ḥadīth*s as valid by virtue of their meeting the above criterion. Ibn al-Madīnī said:

> If Mālik reports a *ḥadīth* on the authority of "a man of the people of Medina" and you do not know who it is, [the *ḥadīth*] is authoritative [nonetheless].

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[39] See ʿUthmān ibn ʿUmar ibn al-Ḥājib, *Mukhtaṣar al-muntahā al-uṣūlī*, 89; al-Kawtharī, *Fiqh*, 32–33, 36 (note 1); Abū Zahra, *Mālik*, 294–95; cf. Schacht, *Origins*, 36.

[40] Al-Kawtharī, *Fiqh*, 32–33, 36 note 1.

[41] Ibn ʿAbd al-Barr, *al-Tamhīd* (1967), 1:4; cf. al-Kawtharī, *Fiqh*, 36 note 1, 32–33; he quotes Ibn ʿAbd al-Barr, al-Bājī, al-Ṭabarī, Abū Dāwūd, and Ibn Rajab.

[42] Ibn ʿAbd al-Barr, *al-Tamhīd* (1967), 1:2, 6, 17; see also Ibn Tūmart, *Aʿazz*, 53–54; Ibn Ḥājib, *Mukhtaṣar*, 89; al-Kawtharī, *Fiqh*, 32; Abū Zahra, *Mālik*, 296.

[43] Al-Kawtharī, *Fiqh*, 32.

> For [Mālik] used to select carefully (*kāna yantaqī*) [those from whom he transmitted].[44]

Muḥammad ibn Tūmart (d. 524/1130), the "*mahdī*" of the Muwaḥḥidūn movement and a contemporary of ʿIyāḍ, holds in his insightful *Kitāb aʿazz mā yuṭlab* that the stipulation of the trustworthiness of the final transmitter for disconnected *ḥadīth*s is no less satisfactory than the established criteria for authenticating connected *ḥadīth*s. If one cannot trust the stated transmitter of a disconnected *ḥadīth*, neither can one trust the stated transmitters of a connected *ḥadīth* to have reported faithfully and completely all the links of the chain of *ḥadīth* transmission.[45]

Ibn ʿAbd al-Barr's contends that early scholars transmitted *ḥadīth* in disconnected form for three principal reasons:

1. They had received a particular transmission from a group (*jamāʿa*) of different transmitters, which made it difficult to enumerate all channels of the transmission.
2. The traditionists sometimes forgot the original transmitters (in which case it was stipulated that they transmit exclusively from dependable sources).
3. In teaching *ḥadīth* to their students, the traditionists sometimes found it unnecessarily distracting to repeat the chain of transmission in full for each *ḥadīth*.[46]

If accurate, the first reason would have far reaching historical implications. If it was common practice for traditionists of the formative period to transmit *ḥadīth*s which they received through multiple channels as disconnected, their disconnected *ḥadīth*s would rank higher than solitary transmissions. They would be comparable to multiply-transmitted (*mutawātir*) *ḥadīth*s, giving them greater weight in juristic eyes than solitary *ḥadīth*s. Al-Ḥasan al-Baṣrī is reported to have said that whenever he heard a *ḥadīth* from four or more Companions, he would transmit it as a disconnected *ḥadīth*. According to a second report, whenever he transmits a *ḥadīth* from a single Companion whom he cites by name, he heard the

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[44] ʿIyāḍ, *Tartīb*, 1:141.
[45] Ibn Tūmart, *Aʿazz*, 53–54.
[46] Ibn ʿAbd al-Barr, *al-Tamhīd* (1967), 1:17.

ḥadīth from that Companion only. But when he transmits a *ḥadīth* as disconnected, he heard it from a multitude (lit., seventy) of Companions.[47]

The early Ḥanafī legal theorist ʿĪsā ibn Abān (d. 221/836) also contends that the disconnected *ḥadīth* was superior to the connected one.[48] Later Ḥanafīs modified their approach to disconnected *ḥadīth*s, ranking them as equal—instead of superior—to sound connected *ḥadīth*s.[49] Mālikī jurisprudents hold that Mālik regarded connected and disconnected *ḥadīth*s as essentially equal in status. According to Ibn ʿAbd al-Barr, this was the view of the majority of Mālikīs, although some regarded disconnected *ḥadīth*s to be stronger than connected ones.[50] In reality, both connected and disconnected *ḥadīth*s constituted ancillary sources of the *sunna* for Mālik, since he modified or rejected either of them according to how they corresponded to Medinese praxis.

Post-Prophetic Reports (Āthār)

In the Mālikī, Ḥanafī, and Ḥanbalī traditions, extensive utilization of post-Prophetic reports (*āthār; āthār al-ṣaḥāba*) was predominant during the formative period and continued to prevail during post-formative period despite the fact that al-Shāfiʿī called for their marginalization.[51] Susan Spectorsky notes that many jurists after al-Shāfiʿī did not accept his methodology, among them the "traditionist-jurisprudent" Isḥāq ibn Rāhawayh, who was especially close to Aḥmad ibn Ḥanbal. Ibn Rāhawayh continued to understand the *sunna* after the nuanced manner of the jurists of the early formative period, relying upon the post-Prophetic reports of the Companions and Successors as well as praxis as indicants of it.[52] In practice, even

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47 Cited by Abū Zahra, *Mālik*, 296.

48 Bedir, "Early Response," 306.

49 Bedir, "Early Response," 306.

50 Ibn ʿAbd al-Barr, *al-Tamhīd*, 1:2–6.

51 See Abd-Allah, "*ʿAmal*," 161–70; ʿAbd-Allāh al-Turkī, *Uṣūl*, 395–96; Abū Zahra, *Mālik*, 312–15; idem, *Ibn Ḥanbal* (1997), 192–202; idem, *Abū Ḥanīfa* (1997), 267–71.

Joseph Schacht observes that post-Prophetic reports from the Companions are numerous in early Islamic juristic works and often greatly outnumber the *ḥadīth*s they cite (Schacht, *Origins*, 22). Christopher Melchert notes that ʿAbd al-Razzāq, Ibn Abī Shayba, Aḥmad ibn Ḥanbal, and other "traditionist-jurisprudents" relied on the post-Prophetic reports of the Companions just as earlier jurists had done in the generations before them (Melchert, "Traditionist-Jurisprudents," 401–02).

52 Spectorsky, "*Sunnah*," 55, 72. Noting that the Ḥanbalīs continued to accept post-Prophetic reports, Christopher Melchert contends that "early Ḥanbalī tradition" ignored "much of Shāfiʿī's putative teaching" (Melchert, "Traditionist-Jurisprudents," 394). To Melchert, other aspects of Ḥanbalī and, for that matter, Mālikī legal reason appear archaic because they do not fit within the grand synthesis paradigm (see Christopher Melchert,

al-Shāfiʿī did not categorically reject post-Prophetic reports but continued to make limited use of them as subsidiary legal arguments.[53] Al-Bukhārī also regarded the opinions of the Companions as legally authoritative and looked upon them as constituting a "supplemental *sunna*" in addition to the "primary" *sunna* of the Prophet.[54]

The Mālikī, Ḥanafī, and Ḥanbalī schools regard post-Prophetic reports as vital legal sources. In each of the three traditions, post-Prophetic reports and the legal judgments (*fatāwā*) of the Companions constituted potential determinants of the Prophetic *sunna*.[55] As Fazlur Rahman notes,

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"Qur'ānic Abrogation across the Ninth Century," 83, henceforth cited as Melchert, "Abrogration;" idem, "Traditionist-Jurisprudents," 391, 394–95, 401). The Ḥanbalīs and other non-Shāfiʿī traditions of the late and post-formative period may arguably have "ignored" al-Shāfiʿī's methodology, but the word "ignore" sets a cognitive frame of general and normative acceptance. As a historical reality, the Hanbalis did not "ignore" al-Shāfiʿī's jurisprudence; they respected it but dissented, constituting by their dissent a different school of law, which in respects such as its adherence to the authority of post-Prophetic reports was truer to the pre-Shāfiʿī paradigms of Islamic legal reasoning and, in that regard, similar to the Mālikīs and Ḥanafīs. Likewise, in his teatment of Abū Dāwūd al-Sijistānī, Melchert relegates him mainly to "the fringe of the Ḥanbalī tradition," because of his "reaching out toward the rationalistic jurisprudents" (Melchert, "Traditionist-Jurisprudents," 395). Although the Ḥanbalī tradition was similar to the Shāfiʿī in its emphasis on textual formalism, it never rejected the rationalistic principles of pre-Shāfiʿī legal considered opinion (*raʾy*). No Sunnī school is more similar to the Mālikī in terms of its overall principles and legal instruments than the Ḥanbalī, although those rationalistic principles are more restricted in the Ḥanbalī school because of its overriding textual emphasis.

[53] Schacht contends that al-Shāfiʿī preferred in his early works to rely upon post-Prophetic reports over systematic analogy. See Schacht, *Origins*, 2–3, 19–20, 36; Lowry, "Four Sources?," 31–33, 40–43; Lucas, *Critics*, 151.

[54] Scott Lucas. "The Legal Principles of Muḥammad b. Ismāʿīl al-Bukhārī and Their Relationship to Classical Salafī Islam," 300, henceforth cited as Lucas, "Principles."

[55] See Abd-Allah, "*ʿAmal*," 161–70; ʿAbd-Allāh al-Turkī, *Uṣūl*, 395–96; Abū Zahra, *Mālik*, 312–15; idem, *Ibn Ḥanbal* (1997), 192–202; idem, *Abū Ḥanīfa* (1997), 267–71.

The *sunna*-generating potential of the post-Prophetic statements and actions of the Companions was based on their unique status as exemplars and transmitters of the Prophetic legacy. As Fazlur Rahman notes, for the generation after the Companions, all of their deeds and sayings were regarded as *sunna* since, "it was argued, the Companions, especially when they agreed, but even when they disagreed, were in the most privileged position to know and interpret the Prophet's conduct" (Rahman, *Islam*, 57; cf. Hallaq, *Origins*, 48–49). Susan Spectorsky notes that when Isḥāq ibn Rāhawayh attributes a *sunna* to someone other than the Prophet, it is not because he regarded that person as an independent authority but "because their authority is associated with [the Prophet's]" (Spectorsky, "*Sunnah*," 71–72).

In Mālik's treatment of how one should sit while praying, he relies in the *Muwaṭṭaʾ* almost exclusively on the statements and actions of the Companion Ibn ʿUmar. The textual structure illustrates Mālik's reliance upon prominent Companions to verify the content of the Prophetic *sunna* (see Abd-Allah, "*ʿAmal*," 161–70). Material cited elsewhere in the *Muwaṭṭaʾ* indicates Ibn ʿUmar's dedication to following the Prophet's *sunna* exactly. In this particular example, however, Ibn ʿUmar was not himself able to perform the Prophet's

the Companions were "followers and disciples" of the Prophet, not just "students." As his "followers and disciples," they did not merely record what their master had taught but attempted to live his teaching and embody it in their lives. It was inevitable that the actual "*dicta* and *facta*" of the Prophet's life became imperceptibly intertwined in their minds and conduct.[56]

Joseph Schacht contends that al-Awzāʿī's approach to *ḥadīth* was identical to contemporary Medinese and Iraqi jurists. He notes that al-Awzāʿī insists that the Prophet be followed. Yet, in his illustrations of the *sunna*, al-Awzāʿī adheres closely to the rulings and examples of Abū Bakr, ʿUmar, Ibn ʿUmar, and ʿUmar ibn ʿAbd al-ʿAzīz. He consistently grants priority to the legal rulings of the Companions; holds that Abū Bakr had a better understanding of the Qurʾān than Abū Hurayra (who was in the Prophet's company only a short time compared to Abū Bakr); and he refers with deep respect to earlier jurists, whom he calls "the scholars, our predecessors."[57]

Christopher Melchert contends that one of the pivotal transformations in Islamic jurisprudence during the course of the third/ninth century was that Prophetic *ḥadīth* eclipsed the post-Prophetic reports from the Companions and later authorities, with the exception of Imāmī Shīʿī jurisprudence, which advanced the reports of the Imāms as legal sources.[58] This generalization is valid for al-Shāfiʿī and the focus of some later *ḥadīth* collections. Among jurists, Prophetic *ḥadīth* only eclipsed post-Prophetic reports in the Shāfiʿī school and even then not categorically.

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sunna because of physical disability. Yet he enjoined others to adhere to the proper mode of sitting and not follow his contrary example on the mistaken presumption that it too constituted a *sunna* (Abd-Allah, "*ʿAmal*," 656–58).

[56] Rahman, *Islam*, 58; cf. Schacht, *Origins*, 27, 29, 50. Schacht notes that when the Medinese rely upon the post-Prophetic reports of Successors such as Saʿīd ibn al-Musayyab, they function on the premise that such jurists would not have issued a legal opinion "unless it were based on his knowledge of an authority for his doctrine." Schacht notes that the same presumption underlies Iraqi reliance upon the post-Prophetic reports of the Companions.

In illustrating that adherence to the examples of the Companions in the formative period did not imply relegating the Prophet to a secondary status, Fazlur Rahman asserts that the Prophet clearly constituted the paragon of authority and religious conduct for his Companions, "Any suggestion that this was not the case until about nine or even fifteen decades later, when formal *ḥadīth* was developed as a neat and perfected medium of transmitting information about the Prophet, must be rejected as a shallow and irrational 'scientific' myth of contemporary historiography" (Rahman, *Islam*, 52).

[57] Schacht, *Origins*, 34.

[58] Melchert, "Traditionist-Jurisprudents," 399; cf. Brown, "Critical Rigor," 4.

Mālik indicates the authority of post-Prophetic reports in his letter to al-Layth ibn Saʿd:

> Then among those who assumed authority after [the Prophet] there arose those who of all the people of his community (*umma*) were the closest in following [the Prophet] on the basis of what had been revealed to them [through him]. Whenever they had knowledge of a matter, they put it into practice (*anfadhūhu*). When they did not have knowledge of a matter, they inquired [among themselves] concerning it. They would then follow that [opinion] which was strongest concerning whatever they could find in the matter based on their legal interpretation (*ijtihād*) and the proximity of their era [to the Prophet]. If someone [among them] took issue with them and held another opinion that was stronger, they would abandon their earlier position.[59]

In this narration, Mālik expresses his conviction that the prominent Companions followed the Prophet's *sunna* closely and consistently. Their integrity, proximity to the Prophet, and knowledge of his teaching is what gave distinction to their legal judgments. As noted, this presumption underlies the authoritativeness of post-Prophetic reports and the legal judgments of the Companions for Mālik, Abū Ḥanīfa, and Aḥmad ibn Ḥanbal. It is for this reason that they regarded such reports as dependable sources for determining the content of the Prophetic *sunna* and no less authoritative in that regard than *ḥadīth*.[60]

Muḥammad Abū Zahra illustrates Mālik's use of post-Prophetic reports in his adopting a legal judgment of the caliph ʿUmar ibn al-Khaṭṭāb to establish the content of the *sunna* in contradiction to a relevant *ḥadīth* on the same matter. Mālik cites a post-Prophetic report in the *Muwaṭṭaʾ*, according to which the Companions Saʿd ibn Abī Waqqāṣ (d. 55/675) and al-Ḍaḥḥāk ibn Qays (d. 65/684) discussed points relating to pilgrimage rites. Al-Ḍaḥḥāk states that anyone performing the pilgrimage in a particular manner has no knowledge of what God commanded. Saʿd disagrees, "What an awful thing you have said!" Al-Ḍaḥḥāk justifies his position by saying that ʿUmar prohibited doing the pilgrimage the way Saʿd was defending. Saʿd reports that the Prophet performed the pilgrimage once in that manner, and they performed it with him in the same way.[61] As Abū Zahra observes, Mālik follows the legal judgment of ʿUmar as related by al-Ḍaḥḥāk, giving priority to ʿUmar's judgment over the

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[59] ʿIyāḍ, 1:34; Abū Zahra, *Mālik*, 122–23, 308–09; cf. Dutton, *Origins*, 37–38.
[60] Abū Zahra, *Mālik*, 315.
[61] *Muw.*, 1:344.

ḥadīth of Saʿd. Mālik grants precedence to the post-Prophetic report over a *ḥadīth* as a determinant of the *sunna* in this case.[62] In *Ikhtilāf Mālik*, the Mālikī protagonist asserts that Mālik took the position of al-Ḍaḥḥāk because ʿUmar had greater knowledge of the Prophet's *sunna* than Saʿd ibn Abī Waqqāṣ.[63]

This example typifies the difference between *ḥadīth* and *sunna* in the thought of Mālik. For Mālik, Saʿd's *ḥadīth* is a valid report of a Prophetic action but does not necessarily constitute a *sunna* on those grounds. ʿUmar's position as reflected in the post-Prophetic report does. Saʿd's *ḥadīth* is also a report of an action (*ḥikāyat ḥāl*), and such reports are inherently ambiguous in Mālikī jurisprudence, as will be discussed later. Muḥammad al-Zurqānī (d. 1122/1710) notes that ʿUmar's prohibition was based on his understanding that the Prophet's performance of the rites of pilgrimage after the manner that Saʿd described was due to the special circumstances of that year and was not intended as normative for all future years. Al-Zurqānī reasons further that ʿUmar supported his contrary interpretation of the Prophetic *sunna* by reference to the pertinent Qurʾānic verse (2:196). He asserts that al-Ḍaḥḥāk's statement that whoever performs the pilgrimage in the way indicated by Saʿd is ignorant of what God has commanded (i.e., the Qurʾān) is a reference to ʿUmar's reliance on the verse.[64]

Abū Zahra cites similar examples from *Ikthilāf Mālik*. He asserts that it was especially the post-Prophetic reports and legal judgments of prominent Companions such as Abū Bakr, ʿUmar, and Zayd ibn Thābit which Mālik deemed to be authoritative indicants of the Prophetic *sunna*, since such Companions spent long periods in direct contact with the Prophet which gave them intimate knowledge of his *sunna*.[65] Many of the prominent older Companions, who were the closest to the Prophet and presumably had the greatest knowledge of his *sunna*, transmitted relatively few *ḥadīth*s when compared to some of the younger Companions.[66] Use

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[62] Abū Zahra, *Mālik*, 315.

[63] Cited by Abū Zahra, *Mālik*, 315.

[64] Al-Zurqānī, *Sharḥ*, 3:69–70.

[65] Abū Zahra, *Mālik*, 317–18.

[66] For example, one hundred and forty-two *ḥadīth*s are attributed to Abū Bakr; five hundred and thirty-seven to ʿUmar; one hundred and forty-six to ʿUthmān; five hundred and eight-six to ʿAlī; and ninety-two to Zayd ibn Thābit. On the other hand, five thousand three hundred and seventy-four *ḥadīth*s are attributed to Abū Hurayra, who became a Muslim only about four years before the Prophet's death and hardly shared the same proximity and confidentiality with him as shared by Abū Bakr, ʿUmar, ʿUthmān, ʿAlī, and other more prominent Companions. ʿAbd-Allāh ibn ʿUmar transmitted two thousand six

of the post-Prophetic reports and legal judgments of older and more prominent Companions to establish the content of the Prophetic *sunna* allowed Mālik and other jurists to access their knowledge of the Prophetic event, which was not as fully accessible through exclusive reliance on the relatively few *ḥadīth*s they transmitted.[67] Although Mālik cites the post-Prophetic reports of the Companions and their legal judgments as indicants of the *sunna*, they too, like all textual references, are subordinate in his view to the praxis of Medina, which is always the main criterion by which Mālik interprets legal texts.

As regards the legal judgments of the Successors, Mālik and Abū Ḥanīfa apparently had similar outlooks. Both deemed the Successors to be important references for understanding the law but lacking the authority vested in the Companions. Abū Ḥanīfa felt free to differ with the Successors. Mālik seems to have held the same position.[68] Mālik did not regard the opinions of the Successors as a source of the *sunna*. But the opinions of certain prominent Successors such as those of the Seven Jurists of Medina, al-Zuhrī, Nāfiʿ, and ʿUmar ibn ʿAbd al-ʿAzīz had especially high standing with Mālik, as is illustrated by his numerous citations of their opinions in the *Muwaṭṭaʾ*.[69] The fact that Mālik felt at liberty to disagree with them, however, is borne out in numerous instances in the *Muwaṭṭaʾ* and confirms Abū Zahra's assessment of their authority in Mālik's eyes.[70]

The Solitary Connected Ḥadīth (Ḥadīth al-Āḥād al-Musnad)

The soundly transmitted connected solitary *ḥadīth* (*ḥadīth al-āḥād al-musnad al-ṣaḥīḥ*)[71] was the crux of contention between al-Shāfiʿī and the

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hundred and thirty *ḥadīth*s; the Prophet's wife ʿĀ'isha transmitted two thousand two hundred and ten; and ʿAbd-Allāh ibn ʿAbbās transmitted one thousand six hundred and sixty (Abbott, *Studies*, 2:66).

67 Cf. Abū Zahra, *Mālik*, 311–13; cf. Schacht, *Origins*, 34.

68 See Abū Zahra, *Mālik*, 320.

69 See Abū Zahra, *Mālik*, 318.

70 See Abd-Allah, "*ʿAmal*," 731–60.

71 Solitary *ḥadīth*s are referred to as "isolated *ḥadīth*s" (*al-aḥādīth al-āḥād*), the "report of a single narrator" (*ḥadīth al-wāḥid*), and "the report given in isolation" (*khabar al-infirād*). Solitary *ḥadīth*s are generally contrasted with multiply-transmitted *ḥadīth*s (*al-ḥadīth al-mutawātir*), which are well-known and transmitted through multiple sources at all stages of transmission. Ahmed El Shamsy refers to solitary *ḥadīth*s as "single-transmitter reports." He asserts that solitary *ḥadīth*s made up the majority of the traditionists' material (see El Shamsy, "First Shāfiʿī," 305). As noted earlier, both disconnected *ḥadīth*s and post-Prophetic reports are conspicuous in many *ḥadīth* collections. Disconnected *ḥadīth*s are also numerous and sometimes appear in greater numbers than the solitary connected *ḥadīth*s.

jurists of the formative and post-formative Mālikī and Ḥanafī traditions.[72] His so-called *ḥadīth*-principle is a misnomer because it is too general. More exactly, it should be understood as the "soundly transmitted connected solitary *ḥadīth*-principle." Its categorical acceptance as exemplified by al-Shāfiʿī represents one of the most important, yet controversial ideas in the history of Islamic law.[73] As indicated, it was interpreted very differently in the

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[72] Schacht's view regarding the role *ḥadīth*s in Islamic law holds that slow progression took place during the first two and a half centuries of the formative period, during which Islamic legal discourse was forced to find "more and more compelling sources of authority." In this process, authentic connected solitary *ḥadīth*s came to take the place of post-Prophetic reports and similar "less than compelling references" (see Brown, "Critical Rigor," 4). Schacht presumes that Mālikīs, Ḥanafīs, and other early jurisprudents ultimately abandoned their earlier positions and adopted al-Shāfiʿī's criteria for the independent authority of connected solitary *ḥadīth*s. In reality, such a radical change never came about. Solitary connected *ḥadīth*s continued to be viewed as problematic within the Mālikī and Ḥanafī traditions because of their inherently conjectural nature, not simply because of doubt about their historical authenticity.

The Schachtian paradigm has long set the chief cognitive frames dominating Western readings of Islamic legal origins. George Makdisi holds that, through the influence of al-Shāfiʿī's legal reasoning, the *ḥadīth*-thesis of the traditionists won out over the "ancient schools" (Makdisi, *Colleges*, 7).

For Wael Hallaq, a pre-*ḥadīth* period of Islamic law was followed by a *ḥadīth* period, which is exemplified in the legal reasoning of al-Shāfiʿī. Hallaq notes, however, that al-Shāfiʿī does not appear personally to have effected any significant change in Islamic legal developments. Yet Hallaq does not question that developments in Islamic legal history ultimately produced a "great synthesis" of classical Islamic jurisprudence. He simply regards al-Shāfiʿī as merely one among many who contributed to the process (Hallaq, *Origins*, 117). He believes that the science of *ḥadīth* criticism helped greatly to lead to the final triumph of *ḥadīth*s in Islamic law as its exclusive material source in conjunction with the Qurʾān. He contends that it took more than half a century after al-Shāfiʿī's death for *ḥadīth*s to attain this position (Hallaq, *Origins*, 109).

Christopher Melchert insists that "the history of Islamic law across the [third]/ninth century cannot be written without reference to the traditionist-jurisprudents and their strict advocacy of *ḥadīth*" (Melchert, "Traditionist-Jurisprudents," 383). He contends that *ḥadīth* "experts" emerged who sifted their narrations according to the authenticity of their chains of transmission. *Ḥadīth* then became authoritative legal referents merely on the basis of the integrity of their transmitters (Melchert, "Traditionist-Jurisprudents," 399).

Similarly, Patricia Crone states, "The classical jurisprudential rules were worked out by Shāfiʿī (d. 822). Shāfiʿī argued that *only* Prophetic tradition should be followed, and that such traditions should *always* be followed provided that they were authenticated by a faultless chain of transmitters." She continues that, "It was after Shāfiʿī's rules had been accepted that the Muslims began the task of putting together all the Prophetic traditions which could be considered authentic on the basis of their *isnād*s" (Crone, *Roman law*, 24–25).

[73] In al-Shāfiʿī's time, the debate over the status of solitary *ḥadīth*s extended to many regions. He notes that there were significant differences within every major city of his time regarding the evaluation of such *ḥadīth*s and their validity as independent legal references. He gives examples from Mecca, Medina, and Kufa. Al-Shāfiʿī did not attribute the positions he took to himself as original teachings. Rather, he identified them with the proponents of

emergent Shāfiʿī and Ḥanbalī traditions and had profound influence upon the *ḥadīth* sciences in particular. Wael Hallaq notes, "Yet, [al-Shāfiʿī's] insistence on the supremacy of Prophetic *ḥadīth* (and the Qurʾān) as the paramount sources of law did not gain immediate acceptance, contrary to what some modern scholars have argued."[74] In fact, al-Shāfiʿī's position on the solitary *ḥadīth* never fully won out over earlier competing notions that restricted its role in law. The Ḥanafīs and Mālikīs did not abandon their earlier positions.[75] Al-Shāfiʿī's *ḥadīth*-principle reigned supreme only within his own circle and laid the foundation for a distinctive Shāfiʿī school of law. Ibn Ḥanbal placed the soundly transmitted solitary *ḥadīth* at the

tradition (*ahl al-ḥadīth*) in general, whom he saw himself as representing (see Muḥammad ibn Idrīs al-Shāfiʿī, *Kitāb jimāʿ al-ʿilm*, 256).

[74] Hallaq, *Origins*, 109, 120–21.

[75] Norman Calder asserts that there are "only hints" in the *Mudawwana* of "material or literary forms which suggest that the law is hermeneutically derived from Prophetic *ḥadīth*." He regards the *ḥadīth*s that occur in the text as "frequently disruptive." Only rarely, he contends, do references to the Companions or Prophetic *ḥadīth*s "become a principle which is incorporated into the dialogue structure" (Calder, *Studies*, 12). By finding "only hints" in the *Mudawwana* of *ḥadīth*s playing their presumed future role in the law, Calder views the *Mudawwana* as a stage in the movement of Islamic law from its formative beginnings to the "classical" principles of the post-Shāfiʿī period. The manner in which solitary *ḥadīth*s and post-Prophetic reports are used in the *Muwaṭṭaʾ* and *Mudawwana*, however, coheres with the pattern of Medinese legal reasoning in which praxis is primary and textual referents are secondary. Again, later Mālikīs never abandoned this position but regarded it as indicative of Mālik's juristic acumen. In a number of cases, the wording of connected and disconnected *ḥadīth*s and post-Prophetic reports correspond closely to the precepts and principles of the Medinese tradition. As will be seen in Mālik's praxis-chapters, in such cases the texts are not "disruptive" but are cited as they stand as fully embodying the relevant legal precept and often given no further elaboration (see Abd-Allah, "*ʿAmal*," 652–76). Even in such cases, however, it is not the text that is ultimately authoritative but its conformity to legal parameters that are extraneous to it and are essentially determined by Medinese praxis.

Similarly to Calder, Christopher Melchert sees Mālik's method in the *Muwaṭṭaʾ* as showing signs of "primitiveness." Sometimes, Mālik "evidently lets *ḥadīth* reports speak for themselves in the manner of the traditionist-jurisprudents, yet we never see precisely the traditionalist form of argument." He notes how Mālik sometimes presents his unsupported opinion after the manner of "rationalistic jurisprudents." Often, his chapters are mixtures of *ḥadīth*s and legal opinions (Melchert, "Traditionist-Jurisprudents," 391). As in Calder's case, Melchert is evaluating the Medinese tradition in terms of the paradigm of "classical" legal theory. Mālik's legal reasoning is "primitive" in terms of its being an earlier indistinctive stage of legal development toward the presumed "classical" model. Melchert attends to statistical classifications of different types of *ḥadīth*s, post-Prophetic reports, and legal opinions without drawing correlations between them and how they figure into the overall content of Mālik's legal reasoning and the precepts and principles upon which it is based. Regarding the necessity for making proper correlations as the basis of statistical references, see also Dutton, *Origins*, 161 on the import of Qurʾānic content in Islamic law and the misconstrual of evidence.

center of his jurisprudence but never rejected the supplementary textual sources that al-Shāfiʿī had declined.[76] On the contrary, while al-Shāfiʿī narrowed his textual base, Ibn Ḥanbal expanded upon his.

For both Mālik and Abū Ḥanīfa and the legal traditions that emerged as part of their legacy, questions of authenticity of transmission, which were central to the application of al-Shāfiʿī's *ḥadīth*-principle, were seen as insufficient for the appraisal of the legal value of *ḥadīth* materials. The implications of the content of the text remained crucial to both camps, each of which relied on distinctive legal methodologies for the restriction and application of formally authentic *ḥadīth* materials to the overall body of the law.[77]

In the great *ḥadīth* debates between the jurists of the formative period, the issue was never one of "following" *ḥadīth per se*. Rather it was a question of how to follow them. Joseph Schacht notes that al-Shāfiʿī's predecessors were "already adducing" *ḥadīth*s from the Prophet, which they used on a par with post-Prophetic reports of the Companions and Successors and interpreted in the light of their "living traditions."[78] In the important early

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[76] Aḥmad ibn Ḥanbal and many proponents of tradition (*ahl al-ḥadīth*) shared al-Shāfiʿī's view that the sound solitary *ḥadīth* was independently authoritative. Ibn Ḥanbal did not agree, however, with al-Shāfiʿī's exclusion of other legal texts as material sources of law such as disconnected *ḥadīth*s and post-Prophetic reports. Not just Ibn Ḥanbal but many other proponents of tradition continued to accept such texts (see Muḥammad Abū Zahra, *al-Shāfiʿī: ḥayātuhū wa ʿaṣruhū, ārāʾuhū wa fiqhuhū*, 236–43; idem, *Mālik*, 312–15; idem, *Ibn Ḥanbal* [1997], 172–202; ʿAbd-Allāh al-Turkī, *Uṣūl*, 395–96, 263, 274–76).

[77] As noted, Miklos Muranyi shows that the North African Mālikīs long remained fundamentally concerned with the *Muwaṭṭaʾ* and *Mudawwana* as sources of law—not as sources of *ḥadīth* transmission or verification. He emphasizes that the jurists had very different concerns about *ḥadīth*s and post-Prophetic reports than the traditionists (*muḥaddithūn*). The technical requirements of the traditionists were insufficient and not fully relevant in juristic circles. Jurists were concerned with formulating and answering questions of law, not with technicalities of *ḥadīth* transmission (Muranyi, *Beiträge*, 3).

At the same time, it is also clear that the North Africans of Saḥnūn's generation desired textual references to *ḥadīth*s and post-Prophetic reports as part of the substance of their legal compendia. They reportedly regarded the *Asadiyya* as deficient in this regard. Asad, they complained, had given them nothing more than "it appears to me", "I conjecture," and "I think." These North African concerns reflect an interest in legal texts that is germane to those of al-Shāfiʿī and the traditionists and, according to historical reports, occurred at a time when al-Shāfiʿī was still at the beginning of his career. They inspired Saḥnūn's revisions, which laid the foundations for the *Mudawwana* (ʿIyāḍ as cited in Abū Zahra, *Mālik*, 247–48). Our understanding of the origins and development of Islamic jurisprudence in the formative period requires broader paradigms and cognitive frames that allow us to evaluate the nuances between these different positions on solitary *ḥadīth*s and the different trajectories they followed in law and the parallel sciences of *ḥadīth*.

[78] Schacht, *Origins*, 3.

polemic *Ikhtilāf Mālik wa al-Shāfiʿī*, the Shāfiʿī interlocutor states explicitly that Mālik customarily rejected solitary *ḥadīth*s as indicative of the Prophetic *sunna*, while accepting post-Prophetic reports of the Companions as more authoritative.[79] For al-Shāfiʿī, a solitary *ḥadīth* with a sound connected chain of transmission constituted a valid, independent source of law. It unquestionably provided dependable analogues for extending the law to unprecedented matters and could not be challenged or displaced by rival sources.[80]

Mālik and Abū Ḥanīfa, on the other hand, were circumspect regarding solitary *ḥadīth*s whenever they regarded their legal implications to be irregular (*shādhdh*) in terms of the normative precepts and principles of the law. They required that soundly transmitted solitary *ḥadīth*s be corroborated by other sources of law before their content could be validated as constituting legal norms.[81] For Mālik, Medinese praxis was the chief

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[79] Abū Zahra, *Mālik*, 315, 317–18; Abd-Allah, "*ʿAmal*," 348–53.

[80] Joseph Lowry contends that al-Shāfiʿī's legal reasoning entails an "essential binary" of revelation versus not-revelation (Lowry, "Four Sources?," 39–40). Revelation for al-Shāfiʿī was textually based in the Qurʾān and sound connected *ḥadīth*s. That which is not-revelation included post-Prophetic reports, unacceptable *ḥadīth* transmissions—disconnected *ḥadīth*s and flawed connected *ḥadīth*s—and most modes of considered opinion (*raʾy*) with the exception of analogies based on explicit textual proofs.

[81] Later Mālikī and non-Mālikī jurisprudents hold that Mālik rejected solitary *ḥadīth*s with sound chains of transmission on the basis of precept-based analogy, if their implications ran contrary to established precept (see [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 211–12; Abū Zahra, *Mālik*, 345; al-Qarāfī, *al-Dhakhīra* [Cairo], 1:119–20; al-Shāṭibī, *al-Muwāfaqāt*, 3:24; Muḥammad ibn Aḥmad al-Sarakhsī, *Kitāb al-uṣūl*, 1:338–39; al-Dābbūsī, *Taʾsīs*, 65; Muḥammad ibn ʿAbd al-Wāḥid ibn al-Humām, *al-Taḥrīr fī uṣūl al-fiqh al-jāmiʿ bayn iṣṭilāḥay al-ḥanafiyya wa al-shāfiʿiyya*, 3:116; Āl Taymiyya [Taqī al-Dīn Aḥmad ibn Taymiyya, ʿAbd al-Ḥalīm ibn ʿAbd al-Salām, and ʿAbd al-Salām ibn ʿAbd-Allāh], *al-Musawwda fī uṣūl al-fiqh*, 239; Abū al-Ḥusayn Muḥammad ibn ʿAlī al-Baṣrī, *Kitāb al-muʿtamad fī uṣūl al-fiqh*, 2:655, henceforth cited as Abū al-Ḥusayn al-Baṣrī, *al-Muʿtamad*).

Abū Bakr ibn al-ʿArabī illustrates Mālik's application of this principle in his marginalization of a well-known *ḥadīth* about washing seven times the pot in which a dog has licked. Mālik overrules the *ḥadīth* by reference to contrary precepts of law such as the permissibility of using trained hunting dogs and the fact that it is not required to wash the game they catch seven times (Cited in Muḥammad Abū Zahra, *Mālik*, 303, note 1; see also al-Shāṭibī, *al-Muwāfaqāt*, 2: 24; Abd-Allah, "*ʿAmal*," 182–83). In overruling solitary *ḥadīth*s on the basis of precept, Mālik's legal reasoning differs markedly with that of al-Shāfiʿī in the subsequent generation, who regarded solitary connected *ḥadīth*s with sound chains of transmission to be authoritative independent sources of law even if their overt meanings might appear anomalous to other established precepts of law.

Despite Abū Ḥanīfa's circumspect attitude toward solitary *ḥadīth*s, Abū Zayd ʿUmar al-Dabbūsī (d. 430/1039), Muḥammad ibn Aḥmad al-Sarakhsī (d. 483/1090), and Muḥammad ibn al-Humām (d. 861/1457) regarded Mālik's preference of analogy over contrary solitary *ḥadīth*s to constitute an important point of difference between him and Abū Ḥanīfa (ʿUbayd-Allāh ibn ʿUmar al-Dabbūsī, *Taʾsīs al-naẓar*, 65; al-Sarakhsī, *Kitāb al-uṣūl*,

criterion against which solitary *ḥadīth*s—like other legal texts—were evaluated. Ahmed El Shamsy notes that reliance upon the praxis of Medina "provided [the Mālikīs] with a way of overcoming the epistemological uncertainties of single-transmitter reports."[82] In the Mālikī tradition, the solitary *ḥadīth* remained a strictly dependent and ancillary source of the law standing in subordination to other sources.[83]

Abū Ḥanīfa's position on solitary connected *ḥadīth*s and that of his school in subsequent generations was similar. The chief difference lay in the criteria he used to determine regularity and irregularity in solitary *ḥadīth*s. Abū Ḥanīfa gauged them largely against normative (analogically valid) texts in the Qur'ān and *ḥadīth* as determined through his principle of the generalization of proofs (*ta'mīm al-adilla*). 'Īsā ibn Abān notes that in Ḥanafī jurisprudence the solitary *ḥadīth* did not constitute valid proof for establishing a Prophetic *sunna*. He asserts further that rejection of solitary *ḥadīth*s as independent sources of law was so common among the first generations of Muslim jurists that it constituted a type of consensus.[84] While Mālik gauged solitary *ḥadīth*s against Medinese praxis, Abū Ḥanīfa critiqued those same *ḥadīth*s in terms of their harmony or incongruity with the standard textual norms that were the basis of his jurisprudence.[85]

1:338–39; Ibn al-Humām, *al-Taḥrīr*, 3:116.). Al-Dabbūsī singled out this particular matter as constituting the major difference between the legal reasoning of Mālik and Abū Ḥanīfa. Muḥammad al-Kawtharī and others contend, however, that Abū Ḥanīfa rejected any solitary *ḥadīth*s that ran contrary to the well-established precepts to which he subscribed (al-Kawthari, *Fiqh*, 36–38; Sha'bān, *Uṣūl*, 63–65).

Abū Ḥanīfa's willingness to accept solitary *ḥadīth*s that are contrary to normative precepts is probably related to his concept of discretion (*istiḥsān*), which is discussed later and differs substantially from Mālik's application of discretion because of Abū Ḥanīfa's extensive use of solitary *ḥadīth*s in his application of it. Abū Ḥanīfa did not categorically reject irregular solitary *ḥadīth*s that were handed down with strong chains of transmission but granted them limited application regarding the specific subject matter to which they pertained. He looked upon them as legitimate exceptions to relevant standard analogies based on well-established legal norms, but he would continue to adhere to those legal norms in other normative cases. If strict application of the norm led to unnecessary hardship, however, or was unwarranted for some other reason, Abū Ḥanīfa would apply the solitary *ḥadīth* instead. Later Ḥanafīs referred to this usage as *sunna*-based discretion (*istiḥsān al-sunna*) (Abū Zahra, *Abū Ḥanīfa*, 325–26; idem, *Mālik*, 355; al-Zarqā, *Fiqh*, 1:92; cf. Sha'bān, *Uṣūl*, 149–50, 153; see also Abd-Allah, "*'Amal*," 255–58.).

[82] El Shamsy, "First Shāfi'ī," 305.

[83] See Abū Zahra, *al-Shāfi'ī*, 236–43; 'Abd-Allāh al-Turkī, *Uṣūl*, 263, 274–76.

[84] Bedir, "Early Response," 304.

[85] Joseph Schacht notes that the attitudes of the Iraqis and Medinese toward *ḥadīth*s were essentially the same and differed radically from those of al-Shāfi'ī. He observes that

Ahmed El Shamsy notes that it was characteristic of the proponents of considered opinion (*ahl al-raʾy/aṣḥāb al-raʾy*) to reject solitary *ḥadīth*s as "too uncertain" and rely instead on "extensive and complex legal reasoning, in which the analogical extension of known rules to new cases occupied a central position."[86] Bernard Weiss assesses the Ḥanafī approach to *ḥadīth* as rooted in a fundamental concern to "maximize certainty."[87] The same may be said of Mālik in his assessment of solitary *ḥadīth*s and other polysemic legal texts against the background of Medinese praxis and the full elaboration of the basic precepts and principles of the law as embodied in the Medinese legal tradition.[88]

Al-Shāfiʿī did not deny the element of conjecture implicit in solitary *ḥadīth*s. He states in *Kitāb jimāʿ al-ʿilm* that when the proponents of tradition (*ahl al-ḥadīth*) accepted isolated reports (*khabar al-khāṣṣa*) as a valid basis of analogy, they came into opposition with jurists who insisted upon definitive knowledge (*al-iḥāṭa*) in legal reasoning. He notes that such jurists regarded the proponents of tradition to be fundamentally mistaken in their reliance upon solitary *ḥadīth*s. He states:

> The most knowledgeable of people in jurisprudence in our opinion (*ʿindanā*) and in the opinions of most of [the proponents of tradition] are those who adhere most closely to *ḥadīth*. Yet, [in your opinion], these are the most ignorant [of people in jurisprudence (*ajhaluhum*)], because, in your opinion, ignorance is tantamount to accepting isolated reports (*khabar al-infirād*).[89]

Al-Shāfiʿī acknowledged that there were epistemological problems associated with legal arguments based on solitary *ḥadīth*s, but he regarded such problems as secondary when compared with the divine imperative to

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both the Iraqis and Medinese granted priority to post-Prophetic reports and systematic conclusions based on general rules over the implications of solitary *ḥadīth*s (Schacht, *Origins*, 21). Schacht observes that Iraqi jurisprudence rejected *ḥadīth*s when they were contrary to the Qurʾān, to "parallel" *ḥadīth*s, or whenever nothing similar to the rejected *ḥadīth* narration had been related from one of the four caliphs, "who carried out the divine commands after the Prophet." Such jurists rejected *ḥadīth*s which other jurists had concurred on abandoning or when the general legal consensus of law was contrary to them (Schacht, *Origins*, 30). Schacht elaborates in detail al-Shāfiʿī's rejection of the authority of the Companions as a subsidiary legal argument and his arguments in support of solitary *ḥadīth*s on the basis of the Qurʾānic command to obey the Prophet (Schacht, *Origins*, 13–20).

[86] El Shamsy, "First Shāfiʿī," 305.

[87] Bernard Weiss, "*Uṣūl*-Related *Madhhab* Differences Reflected in Āmidī's *Iḥkām*," 306; cf. El Shamsy, "First Shāfiʿī," 306.

[88] Cf. El Shamsy, "First Shāfiʿī," 306.

[89] Al-Shāfiʿī, *Jimāʿ al-ʿilm*," 256.

follow the Prophetic command. For al-Shāfiʿī, this injunction meant to adhere to the overt meanings of authentic solitary *ḥadīth* transmissions regardless of the implications of their content as gauged against the broader principles and precepts of the law in its normative sources.[90] Murteza Bedir observes that al-Shāfiʿī sought throughout his writings to displace the notion that authentic solitary *ḥadīth*s may be judged by reference to anything other than the formal evaluation of their chains of transmission.[91] ʿĪsā ibn Abān, on the other hand, argued that the rejection of individual *ḥadīth*s on the basis of their irregular implications was so common among the first generations of Muslim jurists that it virtually constituted a matter of consensus. Following their precedent, Ibn Abān regarded it as valid to reject legal texts that contradict established legal principles (*uṣūl*) and, similar to the Medinese, stressed the importance of the standard usage and praxis of the people (*ʿamal al-nās*) as a reference for sifting through contradictory reports.[92]

In some cases, Mālik and other early jurists like him who put restrictions upon the use of solitary *ḥadīth*s regarded the *ḥadīth*s they rejected as fabricated. Abū Yūsuf indicates such misgivings about irregular solitary *ḥadīth*s by referencing the statement of the Prophet:

> *Ḥadīth*s shall be divulged from me in great numbers. Whatever comes down to you from me that is in accordance with the Qurʾān is from me, but whatever comes down to you from me that contradicts (*yukhālifu*) the Qurʾān is not from me.[93]

In a similar statement attributed to Mālik in the *ʿUtbiyya*, he regarded a particular *ḥadīth* to have been fabricated on the basis of its irregularity and lack of coherence with established legal precepts.[94]

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[90] Lowry, "Four Sources?," 43–44.

[91] Bedir, "Early Response," 304.

[92] Bedir, "Early Response," 304, 309; cf. El Shamsy, "First Shāfiʿī," 305; cf. Schacht, *Origins*, 21.

[93] Abū Yūsuf, *al-Radd*, 24–25.

[94] Cited by al-Shāṭibī, *al-Muwāfaqāt*, 3:66–67. Mālik was admired as an exemplar among the traditionists. Sufyān ibn ʿUyyayna regarded him as "the strictest of critics with regard to transmitters (*rijāl*)." Not only was Mālik a "*bona fide ḥadīth* critic;" he was among the first "to engage in *ḥadīth*-transmitter criticism and employ its technical vocabulary" (Lucas, *Critics*, 144–45). Mālik reportedly possessed chests filled with *ḥadīth* manuscripts, including seven chests which he inherited from al-Zuhrī that were apparently from the *ḥadīth* collecting project that ʿUmar ibn ʿAbd al-ʿAzīz initiated (ʿIyāḍ, *Tartīb*, 1:148–149, 151; cf. Dutton, *Origins*, 19). Biographical reports state that Mālik never transmitted a single *ḥadīth* from many of the manuscripts he possessed and was resolved never to hand down

But often authenticity was not the question. Mālik transmits the relevant *ḥadīth* on optional sales agreements (*bayʿ al-khiyār*) with his "golden chain" of transmission (Mālik from Nāfiʿ from ʿAbd-Allāh ibn ʿUmar), which was widely regarded as the strongest chain of *ḥadīth* transmission.[95] After citing the *ḥadīth*, Mālik states that there was no established definition among the Medinese for option periods, nor was there any set precept regarding it that was ever instituted into local praxis.[96] The *ḥadīth* on optional sales agreements was a shared *ḥadīth*. Mālik and all jurists accepted it as impeccably authentic.[97] But Mālik diverged sharply from its overt meaning on the basis of Medinese praxis, holding that sales are made binding by the verbal agreement of the buyer and seller not by their

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a single *ḥadīth* from them as long as he remained alive (ʿIyāḍ, *Tartīb*, 1:148, 151; cf. Dutton, *Origins*, 19). After Mālik's death, his students are said to have found large quantities of the *ḥadīth*s of Ibn ʿUmar, the prominent Companion and Medinese authority, only two of which Mālik had transmitted in the *Muwaṭṭaʾ* (ʿIyāḍ, *Tartīb*, 1:148). It is reported that whenever Mālik was informed that a *ḥadīth* he was transmitting was not narrated by other authorities or was relied upon as a proof by proponents of wrongful innovations (*ahl al-bidʿa*), he would discard the *ḥadīth*, regardless of its authenticity (ʿIyāḍ, *Tartīb*, 1:150).

Al-Shāfiʿī relates that Mālik would discard altogether any *ḥadīth* about which he had doubts (ʿIyāḍ, *Tartīb*, 1:150; al-Shāṭibī, *al-Muwāfaqāt*, 4:289). Mālik warned against the use of irregular *ḥadīth*s. When asked about a certain irregular *ḥadīth*, Sufyān al-Thawrī advised the questioner to disregard it and stated that Mālik had prohibited utilization of such *ḥadīth*s (ʿIyāḍ, *Tartīb*, 1:138). Yaḥyā ibn Maʿīn (d. 233/847), a principal teacher of al-Bukhārī and Muslim, was once told that Mālik had knowledge of few *ḥadīth*s. He replied that Mālik only seemed to have knowledge of few *ḥadīth*s because of his thorough-going discrimination (*bi-kathrat tamyīzihi*) (ʿIyāḍ, *Tartīb*, 1:148).

Mālik was once told that Sufyān ibn ʿUyayna (d. 196/811), a principal teacher of al-Shāfiʿī and renowned traditionist, jurist, and Qurʾānic commentator of Mecca, had greater knowledge of *ḥadīth*s than Mālik. Mālik replied, "Shall I transmit to the people everything I have heard? In that case, I would be a fool (*aḥmaq*)." A variant transmission of the report gives Mālik's reply as, "... in that case, I would only be desiring to lead them astray." Mālik continues to say, "[As it is], *ḥadīth*s have already been divulged by me for each of which I would rather have been whipped than for them to have proceeded from me, and I am among the most frightened of people of the whip" (ʿIyāḍ, *Tartīb*, 1:149–50; al-Shāṭibī, *al-Muwāfaqāt*, 4:289).

[95] The "golden chain" is Mālik from Nāfiʿ from ʿAbd-Allāh ibn ʿUmar. It has been generally regarded as the strongest chain of *ḥadīth* transmission. In his discussion of this *ḥadīth*, ʿIyāḍ refers to it as "the most authentic" of all Medinese chains of transmission (see ʿIyāḍ, *Tartīb*, 1:72; cf. Motzki, *Origins*, 29; Dutton, *Origins*, 12).

[96] The *ḥadīth* states that both the buyer and seller have the option to conclude or forego an initial sales transaction as long as they have not parted company (*mā lam yatafarraqā*), except in the case of optional sales agreements (*bayʿ al-khiyār*). *Muw.*, 2:671; *Muw.* (Dār al-Gharb), 2:201; Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:219–20, 232; *Muw.* (Suwayd), 206; *Muw.* (Abū Muṣʿab), 2:379–80; *Muw.* (*Riwāyāt*), 3:442–43.

[97] See Abd-Allah, "*ʿAmal*," 641.

physically parting company.[98] (Despite heated disputes over this *ḥadīth*, no parallel *ḥadīth*s existed that explicitly supported any of the jurists' diverse legal arguments regarding it.)[99]

Al-Qarāfī discusses the legal contentions that emerged around the solitary *ḥadīth* concerning optional sales (*bayʿ al-khiyār*). He notes that Mālik regarded the praxis of the people of Medina to constitute a stronger argument in the matter than the solitary *ḥadīth*, which he narrates. Al-Qarāfī considers Mālik's treatment of the *ḥadīth* on optional sales in the light of al-Shāfiʿī's well-known contentions that, "If a *ḥadīth* is authentic, it is the school (*madhhab*) that I follow" and "If a *ḥadīth* is authentic, take my [contrary] school [position] and dash it against the wall." Al-Qarāfī states that if, by this, al-Shāfiʿī means that he will follow the implications of authentic *ḥadīth*s whenever there are no other legal arguments contradicting their implications, then there is no difference between him and any other jurist. But, if by these statements, he means that he will always follow the implications of an authentic *ḥadīth* despite the presence of strong, contrary legal arguments against its overt implications, then, al-Qarāfī asserts, al-Shāfiʿī went against the consensus of other jurists.[100]

Sometimes Malik uses praxis to show that part of a *ḥadīth* was repealed and the remainder was not. This view was untenable from al-Shāfiʿī's perspective, which regarded each *ḥadīth* as an integral statement of law. In the case of optional sales agreements, Ibn ʿAbd al-Barr holds that Mālik regarded the legal implications of the first part of the relevant *ḥadīth* to have been repealed. He believes that Mālik indicated its repeal by a second *ḥadīth* he places in the *Muwaṭṭaʾ* after it. Ibn ʿAbd al-Barr cites an additional report attributed to Mālik according to which he referred to the implications of the first part of the *ḥadīth* on optional sales agreements as one of those matters that had been put aside (*turika*) and never instituted as part of established praxis.[101]

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[98] Abd-Allah, "*ʿAmal*," 641–43. The *ḥadīth* was at the center of one of the great classical debates of early and later jurists regarding two points: whether sales were binding prior to parting company and what constituted valid option periods for returning purchased goods.

[99] See Abd-Allah, "*ʿAmal*," 641 and below "Al-Ā: Optional Sales Agreements (*Bayʿ al-Khiyār*)."

[100] Al-Qarāfī, *al-Dhakhīra* (Cairo), 1:146.

[101] See Abd-Allah, "*ʿAmal*," 640–48. The Shāfiʿī protagonist objects strongly in *Ikthilāf Mālik* to a similar example in which the Medinese held on the basis of praxis that half of a certain *ḥadīth* regarding the noon and afternoon prayers and the sunset and night prayers was still valid, while the other half of the *ḥadīth* had been repealed ([Shāfiʿī Interlocutor], *Ikthilāf Mālik*, 205).

In numerous cases, Mālik, Abū Yūsuf, and Ibn al-Qāsim judge solitary *ḥadīth*s as invalid legal references for reasons having nothing to do with fabrication. As noted before, the majority of the solitary *ḥadīth*s in *Ikhtilāf Mālik* upon which the Shāfiʿī protagonist builds his argument against the Medinese were transmitted by Mālik in the *Muwaṭṭaʾ* with impeccable chains of transmission. Neither Mālik nor al-Shāfiʿī questioned their authenticity. Yet Mālik frequently rejects their overt legal implications as more literally understood from a Shāfiʿī perspective. Mālik regarded these *ḥadīth*s to be irregular by virtue of their textual meanings and legal implications as gauged against Medinese praxis, but he did not question their formal authenticity as historical reports.[102] In one case, Mālik says, "I do not know what the reality (*ḥaqīqa*) of this *ḥadīth* is."[103] Ibn al-Qāsim explains Mālik's position regarding another irregular *ḥadīth*, "We do not know what the proper explanation (*tafsīr*) of it is."[104] Mālik

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Muḥammad Abū Zahra links Mālik's attitude toward solitary *ḥadīth*s to his concern for the general good (*maṣlaḥa*). He contends that Mālik would write down and commit to memory the *ḥadīth*s he learned from his teachers, but he would examine carefully what he taught and only transmit those *ḥadīth*s that met his standards of criticism and served the general good of the people if divulged and widely circulated (Abū Zahra, *Mālik*, 88). Similarly, Mālik is reported to have advised his lifelong Egyptian student and companion Ibn Wahb, who is said to have collected the *ḥadīth*s of Egypt and the Hijaz before joining Mālik's circle in Medina, to beware of those types of *ḥadīth*s and similar forms of transmitted learning which it is not proper (*lā yastaqīm*) to transmit (ʿIyāḍ, *Tartīb*, 1:151). Ibn Wahb later commented, "If God had not saved me through Mālik and al-Layth, I would have surely gone astray." A listener responded, "How is that?" Ibn Wahb replied, "I had become too involved with *ḥadīth*s (*akthartu min al-ḥadīth*) to the extent that I was becoming confused. I would set forth before Mālik and al-Layth [what I had heard], and they would say: 'Take this one, and discard that one' " (ʿIyāḍ and Ibn Farḥūn as cited by Abū Zahra, *Mālik*, 233; cf. Dutton, *Origins*, 19).

[102] Repeated examples of the contentions against the Medinese in *Ikhtilāf Mālik* are cited in what follows. At one point, the Shāfiʿī protagonist of the work, in noting that the Medinese frequently object to following isolated *ḥadīth*s (*khabar al-infirād*), compares them to those who refuse to subscribe to *ḥadīth*s altogether (*abṭalū al-aḥādīth kullahā*) ([Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 260–61).

[103] *Mud.*, 1:5 (8). Mālik sometimes says in the *Mudawwana* regarding certain *ḥadīth*s, "I do not know [recognize] it (*lā aʿrifuhū*)." This expression does not imply that the *ḥadīth* in question is unknown but that it is not recognized (*maʿrūf*) as applicable; it does not belong to praxis or what Abū Yūsuf calls the *sunna maʿrūfa*. Ibn al-Qāsim uses this idiom when noting that if the plaintiff refuses to take an oath, the defendant is not allowed to claim his right until he swears an oath in support of it, even if the defendant does not demand that the plaintiff take such an oath. Ibn al-Qāsim states that Ibn Abī Ḥāzim told him, "Not all the people know [recognize] (*laysa kull al-nās yaʿrifu hādhā*) that if the defendant (*al-maṭlūb*) refuses to take an oath, the plaintiff (*al-ṭālib*) is required to take one." Here, "the people" are the jurists. Their not knowing the ruling means that they do not know it to be valid; in other words, they do not accept it. See *Mud.*, 4:72.

[104] *Mud.*, 2:151.

says in another instance, "This *ḥadīth* has come down to us, but so has that [i.e., Medinese praxis] which establishes its weakness (*ḍaʿf*).[105] In a similar context, Mālik says, "This *ḥadīth* has come down to us, but the praxis is not in accordance with it."[106] In one of the most elaborate statements about irregular solitary *ḥadīth*s, Ibn al-Qāsim explains that many of these *ḥadīth*s "have continued to be above suspicion of fabrication (*ghayr mukadhdhab bihi*), but they are also not regarded as sound for application in practice."[107]

The famous Medinese jurist Ibn al-Mājishūn was asked why the Medinese transmitted *ḥadīth*s that they did not follow. He answered, "So that it be known that we have rejected them while having knowledge of them."[108] Similarly, Mālik stated that some of the people of knowledge among the Successors would transmit *ḥadīth*s or receive them from others but say, "We are not ignorant of them, but the praxis has been firmly established (*maḍā*) contrary to them."[109] Mālik's teacher Rabīʿat al-Raʾy said, "For me, one thousand [transmitting] from one thousand (i.e. Medinese praxis) is preferable to one [transmitting] from one. 'One [transmitting] from one' would tear the *sunna* right out of our hands."[110]

Abū Yūsuf's *al-Radd ʿalā siyār al-Awzāʿī* emphasizes the imperative of relying on the well-known *sunna* and avoiding irregular *ḥadīth*s.[111] ʿĪsā ibn Abān upholds the same position as a basic principle of Ḥanafī jurisprudence. For Ibn Abān, solitary *ḥadīth*s (*khabar al-āḥād*) are not adequate for establishing the *sunna*. He notes that solitary *ḥadīth*s should be rejected whenever they are contrary to an established *sunna* (*al-sunna al-thābita*); contradict the Qurʾān in a manner that leaves no possibility

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[105] *Mud.*, 1:98; cf. Schacht, *Origins*, 63; Hallaq, *Origins*, 105. Although "weakness" will become one of the fundamental terms of questionable transmissions among the traditionists, Mālik is not using the word in that sense here. Had the *ḥadīth* been unacceptably transmitted, there would have been no reason to reference Medinese praxis or anything else external to the transmission itself.

[106] *Mud.*, 1:164; cf. Schacht, *Origins*, 105; Hallaq, *Origins*, 105.

[107] *Mud.*, 2:151–52.

[108] ʿIyāḍ, *Tartīb*, 1:66.

[109] ʿIyāḍ, *Tartīb*, 1:66.

[110] ʿIyāḍ, *Tartīb*, 1:66. The Medinese judge Muḥammad ibn Abī Bakr ibn Ḥazm (son of the jurist, judge, and governor Abū Bakr ibn Ḥazm, who first directed ʿUmar ibn ʿAbd al-ʿAzīz's *ḥadīth* project) often handed down legal rulings consistent with Medinese praxis but contrary to solitary *ḥadīth*s. His brother ʿAbd-Allāh, one of Mālik's teachers, used to ask him why he rejected the pertinent *ḥadīth*s; Mālik reports that Muḥammad ibn Ḥazm replied to his brother, "But what then of the praxis?" Mālik explains that Muḥammad meant by this the consensus of Medina (Wakīʿ, *Akhbār*, 1:133–48, 1:176).

[111] See, for example, Abū Yūsuf, *al-Radd*, 14–15, 85–87, 63–64, 134–35, 107–10.

for reconciliation (*fīmā lā yaḥtamil al-maʿānī*); convey a meaning that is irregular (*shādhdh*); or if the narrators of the report followed in their personal behavior a practice contrary to what they transmitted in the solitary report (*qad rawāhu al-nās wa ʿamilū bi-khilāfihī*).[112] Abū Yūsuf asserts:

> Make the Qurʾān and the well-known *sunna* (*al-sunna al-maʿrūfa*) your guiding exemplar (*imāman qāʾidan*). Follow that and elaborate [the law] on its basis (*wa qis ʿalayhi*) regarding whatever presents itself to you that has not [already] been set forth clearly for you in the Qurʾān and *sunna*.[113]

He states in the same vein:

> Beware of irregular *ḥadīth*s and take care to follow those *ḥadīth*s which the community (*al-jamāʿa*) is following, which the jurists recognized [as valid], and which are in accordance with the Book and the *sunna*. Elaborate (*qis*) [legal] matters on that basis. As for what is contrary to the Qurʾān, it is not from the Prophet even if it has been brought down by a [sound] transmission (*riwāya*).[114]

In this last citation, Abū Yūsuf indicates that he regards irregular *ḥadīth*s as fabricated and not originating with the Prophet despite the fact of their having apparently sound chains of transmissions. Like Mālik and Ibn al-Qāsim, however, he sometimes indicates that he does not question the authenticity of certain irregular *ḥadīth*s but regards them as misleading because they pertain to unique aspects of the Prophet's behavior or special commands that were not normative. The fact that they originated in non-normative contexts is what gave them their irregularity and made them unsuitable as grounds for sound legal generalization. Abū Yūsuf regards a certain *ḥadīth* that al-Awzāʿī transmits to be authentic but considers al-Awzāʿī's conclusion based on it to be mistaken. Abū Yūsuf remarks:

> What the Messenger of God, God bless and keep him, said [in this *ḥadīth*] is just as he said, and knowledge of what al-Awzāʿī said pertaining to it has already reached us. But we regard it as irregular, and *ḥadīth*s that are irregular are not to be followed.[115]

On several occasions, Abū Yūsuf stresses that great caution is required to draw the correct conclusions from soundly transmitted irregular *ḥadīth*s. The following statement is typical:

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[112] Bedir, "Early Response," 303, 309.
[113] Abū Yūsuf, *al-Radd*, 32; cf. Dutton, *Origins*, 175.
[114] Abū Yūsuf, *al-Radd*, 30–31; cf. Dutton, *Origins*, 175.
[115] Abū Yūsuf, *al-Radd*, 103–05.

> We have heard before what al-Awzāʿī has told us about God's Messenger. But the *ḥadīth*s of God's Messenger have [diverse] meanings [*maʿān*], perspectives [*wujūh*], and interpretations, which only one whom God helps to that end can understand and see clearly.[116]

It is clear in the *Muwaṭṭa'* and *Mudawwana* that Mālik invoked Medinese praxis as the standard reference against which to evaluate solitary *ḥadīth*s and similar non-standard legal texts. Several examples have already been mentioned. In the following statement, Ibn al-Qāsim is questioned about a certain post-Prophetic report indicating that ʿĀ'isha once acted in the capacity of guardian (*walī*) in the marriage of a kinsman while the bride's father (the primary legal guardian) was traveling. Ibn al-Qāsim does not doubt the authenticity of the post-Prophetic report but remarks, "We do not know what the [correct] explanation of it is but believe that she appointed (*wakkalat*) someone else to act on her behalf in contracting the marriage." Even so, Saḥnūn adds that the marriage would be irregular (*shādhdh*) according to Mālik. Ibn al-Qāsim responds:

> This [post-Prophetic report] (*ḥadīth* meaning *athar*) has come down [to us]. If this report had been accompanied by praxis such that its [praxis] would have reached those whom we met during our lifetimes and from whom we received [our knowledge] and those whom they had met during their lifetimes, it would indeed be correct (*ḥaqq*) to follow it. But it is only like other reports (*ḥadīth*s) that have not been accompanied by praxis.
>
> [Another *ḥadīth*] has been transmitted from the Prophet, God bless and keep him, regarding the use of scent during the rites of pilgrimage. Also among that which has come down from him, God bless and keep him, are [the words], "the fornicator ceases to be a believer while he fornicates" and "… when he commits theft," but God has revealed [in the Qurʾān] the punishment of the fornicator and the cutting off [of the thief's hand] on the basis of [his being] a believer [and not an apostate].
>
> Other matters have been transmitted from other Companions as well that have no support (*lam yastanid*), are not strong (*yaqwā*), and regarding which the established praxis is contrary. [Indeed,] the majority of the people and the Companions followed something contrary to them.
>
> [*Ḥadīth*s such as these] have remained [in a state of being] neither rejected as fabricated (*ghayr mukadhdhab bihi*) nor put into practice. Rather the praxis was established in accordance with those *ḥadīth*s that were accompanied by the practices (*aʿmāl*) [of the earlier generations] and that were followed by the Companions of the Prophet, his [true] followers. Similarly, the Successors followed them in like manner without regarding what had come down and been transmitted [but was contrary to what they

[116] Abū Yūsuf, *al-Radd*, 38.

> did] to have been fabricated (*min ghayr takdhīb*) and without rejecting them outright.
>
> Thus, one should deliberately refrain from doing what has been deliberately omitted from being made part of the praxis (*fa-yutraku mā turika al-ʿamal bihi*), but it should not be regarded as fabricated. Yet, the praxis has been instituted in accordance with what has been practiced as praxis, and it is worthy of being believed as authentic.
>
> [In this matter we have been discussing,] the praxis which is firmly established and is accompanied by the practices (*ʿamāl*) [of others] is the Prophet's statement, God bless and keep him, "A woman shall only be given in marriage by a guardian" and the statement of ʿUmar, "A woman shall only be given in marriage by a guardian." Furthermore, ʿUmar separated a husband and wife who were married without a guardian.[117]

ʿAbd-Allāh ibn Qutayba (d. 276/889) notes the often conjectural quality of acceptable legal *ḥadīth*. By nature, they are subject to "forgetfulness, neglect, doubts, interpretations, and abrogations."[118] Similarly, Ibn Tūmart sets forth a number of considerations that can render solitary *ḥadīth*s conjectural, irregular, or otherwise unsuitable as the basis of sound legal generalizations until they are placed in the context of other sources of law such as, he notes, Medinese praxis. Solitary *ḥadīth*s, he asserts, are liable to additions, deletions, the transmitter's loss of memory, errors (*al-khaṭaʾ*), mistakes (*al-ghalaṭ*), oversights (*al-ghafla*), lies, later retraction of one's opinion regarding the *ḥadīth*'s applicability, contradiction with other *ḥadīth*s, and interpolation.[119]

Al-Shāṭibī notes that authentic statements may, as a matter of course, become ambiguous when removed from their original historical context. Such ambivalence pertains to solitary *ḥadīth*s as well as other texts. He classifies such equivocal texts under two categories: 1) those that are inherently ambiguous (*al-mutashābih al-ḥaqīqī*) and 2) those that are only incidentally ambiguous (*al-mutashābih al-iḍāfī*). The ambiguity of the first type, in al-Shāṭibī's view, can never be resolved. He gives as an illustration the single letters such as "*ālif, lām, mīm*" that come at the beginnings of several Qurʾānic chapters. The ambiguity of the second type, however, can be removed once the statement has been placed in proper context and related to the facts, precepts, and principles that pertain to it. Al-Shāṭibī believes that most ambiguous statements occurring in the textual sources of Islamic law are of this second type. In his view, it is the duty of any

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117 *Mud.*, 1:151–52; cf. Schacht, *Origins*, 63; Hallaq, *Origins*, 105.
118 Cited in Rahman, *Islam*, 77.
119 Ibn Tūmart, *Aʿazz*, 48, 51–52.

jurist giving a legal opinion to remove the ambiguity of such texts by finding their proper context prior to applying them. Only then can sound conclusions be drawn from them.[120] Al-Shāṭibī holds that early communal praxis constitutes one of the surest criteria against which to measure solitary *ḥadīth*s, assess their true meaning, and discern a proper context for them. He states:

> For whenever a jurist giving a legal interpretation contemplates a legal statement pertaining to some matter, he is required to look into many things, without which it would be unsound to apply that statement in practice. Consideration of the various types of praxis of the first generations (*aʿmāl al-mutaqaddimīn*) removes these ambiguities from the statement decisively. It renders distinct the repealing [text] from the one that was repealed. It provides specific clarification for what was ambiguously general, and so forth. Thus, it is an immense help in the process of making legal judgments. It is for this reason that Mālik ibn Anas and those who hold to his opinion relied upon it.[121]

The very notion of irregularity (*shudhūdh*) in solitary *ḥadīth*s is a cognitive frame that necessarily implies the existence of a standard reference by which such received texts can be judged. It implies criteria of judgment that lay beyond the dictates of these *ḥadīth*s and have greater authority than they. As we have seen, Abū Yūsuf and the early Ḥanafīs speak of such criteria as being determined by the Qurʾān, the well-known *sunna* (*al-sunna al-maʿrūfa*), and other *ḥadīth*s that the jurists recognize as valid. The preceding citations indicate that Mālik and the Medinese shared a similar perspective, although, for them, Medinese praxis was the ultimate standard by which legal texts were measured. For Mālik, Medinese praxis embodied the soundest and most normative applications of the Qurʾān and all legal texts. It constituted the living embodiment of the well-established *sunna*, and its authority rested in the fact that the greater body of the Medinese jurists recognized its validity.

Later Mālikī jurists often interpreted their school's position after a more textually referential type of reasoning which held that solitary *ḥadīth*s may provide authoritative legal knowledge if they are congruent with and supported by other sources and principles of law, one of which would be Medinese praxis.[122] When a solitary *ḥadīth* is supported by praxis,

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[120] Al-Shāṭibī, *al-Muwāfaqāt*, 3:85–93, 76, 98.

[121] Al-Shāṭibī, *al-Muwāfaqāt*, 3:76.

[122] See ʿIyāḍ, *Tartīb*, 1:71; al-Qarāfī, *al-Dhakhīra* (Cairo), 1:33; Ibn al-Ḥājib, *Mukhtaṣar*, 72; Ibn Tūmart, *Aʿazz*, 51–52; Abū Zahra, *Mālik*, 303.

however, such Mālikī jurists no longer regarded it as technically solitary, meaning that it would then rank among those standard *ḥadīth*s that correspond to the well-established *sunna*.[123]

Mālikī jurisprudents contend further that Mālik also rejected solitary *ḥadīth*s by referring them to legal sources and considerations other than praxis such as well-established precepts and general principles of law. An illustration of this is Mālik's circumspection regarding an irregular, solitary *ḥadīth* of formal authenticity that stipulates that one should discard the contents and wash seven times the pot from which a dog licks. Ibn al-Qāsim states that he asked Mālik about this *ḥadīth*. Mālik replied, "This *ḥadīth* has come down to us, but I do not know what the reality (*ḥaqīqa*) behind it is." Ibn al-Qāsim adds that Mālik regarded domestic dogs to be an exception on the basis of discretion (*istiḥsān*) to other carnivores (*sibāʿ*) that live in the wild, because such dogs live in human company and are like household members (*kaʾannahu min ahl al-bayt*). Thus, it would be unnecessarily severe to expect people to wash their pots seven times each time their dog ate from them. Ibn al-Qāsim goes on to say that Mālik also held that people should still consume the ghee (*samn*) or milk that might have been in the pot, even though their dog may have consumed some of it while they were not attending. Mālik would say, "I regard it as a great wrong (*ʿaẓīman*) that people throw out sustenance (*rizq*) that God has provided merely on account of a dog licking it."[124] Ibn al-Qāsim observes that Mālik had once been asked how he could justify this opinion about dogs when it was contrary to praxis regarding certain other types of animals. Mālik replied, "Each thing has it own particular standpoint [from which it must be considered]" (*li-kull shayʾ wajh*).[125]

The Andalusian judge and jurisprudent Abū Bakr ibn al-ʿArabī (d. 543/1148) regarded Mālik's reasoning in the case of the dog as an example of his granting priority to precept-based legal analogy (*qiyās*) over solitary *ḥadīth*s that were contrary to them. Ibn al-ʿArabī observes that the *ḥadīth* about washing a pot that a dog has licked from seven times and discarding its contents is contrary to the Qurʾānic verse that declares the catch of hunting dogs to be permissible for eating, "... and eat the catch that they apprehend for you (Qurʾān, 5:4)." For hunting dogs seize the

123 Abū Zahra, *Mālik*, 305.
124 *Mud.*, 1:5.
125 *Mud.*, 1:4.

catch in their mouths and sometimes carry it in their muzzles for a considerable time before the hunter gets it from them."[126]

Solitary Ḥadīth *and General Necessity* (ʿUmūm al-Balwā)

General necessity (*ʿumūm al-balwā*) is a Ḥanafī juristic concept referring to various types of day-to-day occurrences, inconveniences, and hardships that affect everyone such as having to walk in muddy streets in unpaved towns after rain. Situations belonging to the category of general necessity should be public knowledge by nature, since they affect most people and recur in their lives. Consequently, matters of law pertaining to general necessity should be familiar to the majority of jurists.[127] According to Abū Ḥanīfa, legal rulings that belong to the category of general necessity cannot be established by solitary *ḥadīth*s taken in isolation but must belong to the category of the well-known *sunna*. Solitary *ḥadīth*s in matters of general necessity that are not already established parts of law must be either fabricated, repealed, erroneous, or inapplicable for other reasons. Abū Ḥanīfa classifies criminal punishments (*ḥudūd*) established by Qurʾānic revelation and obligatory acts of atonement (*kaffārāt*) as belonging to the

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[126] Cited by al-Shāṭibī, *al-Muwāfaqāt*, 3:24. Ibn al-ʿArabī considers the question of when it is permissible to accept solitary *ḥadīth*s that conflict with definitive precepts of law. He remarks that Abū Ḥanīfa held it impermissible to apply such *ḥadīth*s overtly, while al-Shāfiʿī held it obligatory to do so. As for Mālik, Ibn al-ʿArabī continues, he adhered to neither position. Mālik held that a ruling indicated by a solitary *ḥadīth* may be regarded as valid despite the fact that it is contrary to a well-established precept, if there is another precept of law that supports it. If no other supporting precept exists, the contrary solitary *ḥadīth* must be rejected (cited by al-Shāṭibī, *al-Muwāfaqāt*, 3:24).

Muḥammad Abū Zahra contends that Ibn al-ʿArabī erred in his assessment of Abū Ḥanīfa's legal reasoning in the above quotation. He notes that the early Ḥanafī jurisprudents al-Karkhī and Ibn Abān illustrate that Abū Ḥanīfa's approach to solitary *ḥadīth*s in such cases was essentially the same as Mālik's (Abū Zahra, *Mālik*, 303, note 1). Whether in fact Abū Ḥanīfa and Mālik had the same approach to accepting solitary *ḥadīth*s when they contradicted certain precepts of law but agreed with others, it is clear that solitary *ḥadīth*s in the reasoning of both Mālik and Abū Ḥanīfa carried no independent authority in themselves and could, at best, only serve as ancillary references of law.

[127] See al-Kawtharī, *Fiqh*, 37, note 1; cf. Shaʿbān, *Uṣūl*, 63–65; Bedir, "Early Response," 303. Bedir states that general necessity (*ʿumūm al-balwā*) in Ḥanafī legal theory implies that "if a matter touches the life of society at large, it would have been known and related by the general public, hence, an individual report about such cases is not accepted." Al-Qarāfī illustrates the application of general necessity to solitary reports by stating that if the prayer-caller (*muʾadhdhin*) were to fall from the minaret while calling the Friday prayer, one would naturally expect to hear the story from multiple sources. If only a single isolated account told of the prayer-caller's fall and were not supported by other reports, one would have to question the account's validity (al-Qarāfī, *al-Dhakhīra* [Cairo], 1:113).

category of general necessity. Hence, he will not accept solitary *ḥadīth*s taken alone as adequate proof for them.[128]

Ibn Rushd regarded Mālik's use of praxis in assessing the legal implications of solitary *ḥadīth*s as cognate to Abū Ḥanīfa's reliance upon the notion of general necessity in critiquing them.[129] The *ḥadīth*s and post-Prophetic reports in the *Muwaṭṭa'* which Mālik cites in conjunction with his negative praxis terms (terms stating that such reports are contrary to praxis) are all solitary transmissions. A number of them pertain directly to matters of general necessity (*ʿumūm al-balwā*). From the Ḥanafī and Mālikī points of view, they carry legal implications that should have been generally recognized as valid among the earliest jurists and applied in practice. From the Ḥanafī standpoint, they are problematic if they were not already well known to the jurists. From the Medinese perspective, they are dubious if they were not instituted in local praxis as recognized by local jurists.[130]

In the *ʿUtbiyya*, Mālik is asked about performing the prostration of gratitude (*sajdat al-shukr*). He responds that one should not perform it. The questioner states that Abū Bakr, "according to what they say," performed the prostration of gratitude after his armies were granted a crucial victory. Mālik remarks that he regards the report to be falsely attributed to Abū Bakr. He states:

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[128] Al-Kawtharī, *Fiqh*, 37, note 1; Bedir, "Early Response," 303; Shaʿbān, *Uṣūl*, 63–65.

[129] Ibn Rushd, *Bidāya*, 1:102; cf. 1:140. Abū Ḥanīfa applied the principle of general necessity to solitary *ḥadīth*s in his stance on male guardianship in marriage. The requirement of male guardianship in marriage is based on a solitary *ḥadīth*. Since all of society is directly or indirectly involved in marriage, Abū Ḥanīfa deemed guardianship as pertaining to the realm of general necessity. He did not judge it to be an obligatory element in marriage contracts because he regarded the soundly transmitted solitary *ḥadīth* that supported it to be insufficient evidence (see Shaʿbān, *Uṣūl*, 64). Like most other Sunnī jurists, Mālik upheld male guardianship as a fundamental prerequisite for contracting a valid marriage. He accepted the relevant solitary *ḥadīth* as sufficient evidence, not on its own basis alone but because it agreed with Medinese praxis (see Shaʿbān, *Uṣūl*, 64; cf. *Mud.*, 1:151–52; Schacht, *Origins*, 63; Hallaq, *Origins*, 105).

[130] See Abd-Allah, "*ʿAmal*," 481–84. Muḥammad Abū Zahra contends that all Mālikī jurisprudents agree that solitary *ḥadīth*s must be rejected when they pertain to matters of general necessity and are not supported by stronger ancillary references. He cites as examples of such general necessity the five daily prayers, payment of the alms tax, and the fast of Ramaḍān. Abū Zahra asserts that Mālik's custom of rejecting irregular and solitary *ḥadīth*s in such cases, even when transmitted with sound chains of transmission, is similar to Abū Ḥanīfa's rejection of certain types of *ḥadīth*s that pertained to matters of general necessity (Abū Zahra, *Mālik*, 185–86).

> It is a type of misguidance that one should hear something and say, "This is something regarding which we have heard nothing to the contrary."... Many victories came to the Messenger of God, God bless and keep him, and to the Muslims after him. Did you ever hear about a single one of them prostrating [out of gratitude]?
>
> When something like this comes down to you that [must] have been part of the [general] experience of the people (*amr al-nās*) and took place right in their midst, yet you have heard nothing about it from them, let that be a sufficient indication for you. For if it had taken place, it would have been mentioned because it is part of the [general] experience of the people that took place among them. So, have you heard that anyone prostrated [out of gratitude]? Well, then, that [silence] is the consensus. When something comes down to you that you do not recognize, put it aside.[131]

In commenting on this passage, al-Shāṭibī notes that it is an explicit endorsement of the wide-spread general praxis, upon which jurists should rely in legal matters. No regard at all should be given to those rarities (*qalā'il*) and unusual actions (*nawādir al-afʿāl*) that have been handed down when the general and widespread praxis contradicts them.[132]

In Mālik's understanding of the legal implications of general necessity, as indicated in the preceding passage, it is the praxis (the experience of the people) which plays the crucial defining role. A solitary *ḥadīth* which is not supported by Medinese praxis will simply be discarded. Nevertheless, when solitary *ḥadīth*s agree with Medinese praxis, they constitute one of the most authoritative types of Medinese praxis and belong to the category later jurisprudents termed "transmissional praxis" (*al-ʿamal al-naqlī*). In such cases, the Mālikī tradition regarded solitary connected *ḥadīth*s as valid signs that the praxis in question was instituted by the Prophet and constituted part of his normative *sunna*.[133]

Solitary Ḥadīths *and Observed Behavior Narratives* (Ḥikāyāt al-Aḥwāl)

Many of Mālik's controversial judgments in the *Muwaṭṭa'* pertain to *ḥadīth*s and post-Prophetic reports portraying individual actions of the Prophet and his Companions that were not accompanied by clarifying statements. In other cases, some of Mālik's disputed opinions relate to legal judgments that earlier authorities handed down in special cases. For Mālik, such report of actions (observed behavior narratives) (*ḥikāyāt al-aḥwāl*)

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131 Cited by al-Shāṭibī, *al-Muwāfaqāt*, 3:66–67.
132 Al-Shāṭibī, *al-Muwāfaqāt*, 3:67.
133 See Abd-Allah, "*ʿAmal*," 410–15.

and individual legal rulings (*qaḍāyā al-aʿyān*) are inherently ambiguous. In the *Muwaṭṭaʾ*, Mālik often uses his negative praxis terms to distinguish between observed behavior narratives that he regards as non-normative (not the basis of praxis) and other reports of actions that he regards as reflecting the norm.[134]

Al-Shāṭibī treats the inherent ambiguity of narrations of observed behavior and special rulings at several points in his *Muwāfaqāt* and notes that their ambiguity has been discussed at length by Muslim jurisprudents, some of whom will be referenced later in this work.[135] Narrations of observed behavior and individual case rulings are always equivocal when unaccompanied by explicit statements that explain them adequately. For this reason, al-Shāṭibī asserts, they cannot be taken as valid indicants of the law until they are corroborated by reference to other sources and principles. He notes that they may appear to be contradictory to the continuous praxis (*al-ʿamal al-mustamirr*), whereas, in reality, they only appear that way.

Al-Shāṭibī adds that this same systematic ambiguity pertains to certain reported statements in *ḥadīth*s and post-Prophetic reports that have been extracted from larger discussions, conversations, or other types of situational dialogue. Such statements, al-Shāṭibī holds, are not legal statements, properly speaking. Rather, they should be classified under narrations of deeds and actions. Only those statements can be properly termed as "legal" which define specific rulings or clearly set down ordinances, precepts, commands, and prohibitions.[136]

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[134] See Abd-Allah, "*ʿAmal*," 436–448, 490–97.

[135] Al-Shāṭibī, *al-Muwāfaqāt*, 3:58; see also 1:118, 3:166, 4:58–59.

[136] Al-Shāṭibī, *al-Muwāfaqāt*, 4:59. Ibn Rushd alludes to the ambiguity of narrations of observed behavior in his treatment of Mālik's ruling that it is not obligatory in the rites of prayer to raise one's hands more than once at the beginning of the prayer when making the proclamation of God's greatness (saying the words "*Allāhu akbar*"). Mālik transmits a sound solitary connected *ḥadīth* in the *Muwaṭṭaʾ* to the contrary that reports that the Prophet was observed raising his hands at several intervals during the prayer, which many jurists held to be normative. According to Ibn Rushd, Mālik did not regard such narrations of observed behavior as sufficient to indicate that such actions were obligatory unless they were supported by explicit proof either in the form of an authentic legal statement or consensus (Ibn Rushd, *Bidāya*, 1:79). In a similar example concerning an Islamic ritual that is only evidenced by narrations of observed behavior in *ḥadīth*s and post-Prophetic reports, Ibn Rushd makes the same observation that such actions in isolation are too ambiguous to constitute proof of legal obligation until they are supported and clarified by explicit verbal proof (Ibn Rushd, *Bidāya*, 1:133).

ʿUthmān ibn ʿUmar ibn al-Ḥājib (d. 646/1249) gives a similar treatment to narrations of observed behavior related to the Prophet. He stresses that until the exact legal status of such actions are clarified, no one can validly lay claim to be imitating the Prophet merely

Taken alone, narrations of observed behavior are not sufficiently transparent to establish that the legal status of the actions they report should be regarded as obligatory or recommended. When, however, additional conflicting reports of observed behavior are produced from the Prophet, his Companions, or the Successors, such contrary accounts constitute sufficient proof to indicate the mere permissibility of the narratives they are at variance with. The legal presumption in such cases is that, if the act in question were obligatory or recommended, persons of such knowledge and authority would not have failed to comply.[137] The *Muwaṭṭa'* provides numerous examples of Mālik's citing contrary narrations of observed behavior to demonstrate that the matters they diverge from are merely permissible and not obligatory or recommended.[138]

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by copying his observed behavior. One must first determine the circumstances under which those actions were done, the degree of moral compulsion they have (obligatory, recommended, permissible), and whether they were done regularly and constitute normative behavior (see Ibn al-Ḥājib, *Mukhtaṣar*, 51–52).

[137] Cf. al-Bājī, *al-Muntaqā*, 1:350–51.

[138] For example, Mālik applies this principle to demonstrate that it is not obligatory to renew ritual ablutions after nosebleeds. He cites three post-Prophetic reports on the question that report that ʿAbd-Allāh ibn ʿUmar, ʿAbd-Allāh ibn ʿAbbās, and the eminent Medinese Successor Saʿīd ibn al-Musayyab had nosebleeds during the prayer; broke off praying; renewed their ablutions; returned; and completed the prayer. In the chapter that follows, Mālik cites a post-Prophetic report to the effect that two of the above—Saʿīd ibn al-Musayyab and ʿAbd-Allāh ibn ʿUmar—and Ibn ʿUmar's son, Sālim, were observed to have nosebleeds while praying but did not break off their prayers or renew their ablutions (*Muw.*, 1:38–39). All of these post-Prophetic reports are narrations of observed behavior, the second set clearly contrary to the first. The first set is not adequate to establish obligation, since the rationales of the persons doing the acts are unknown; they might have regarded what they did as obligatory, recommended, or simply permissible. On the other hand, the contrary reports clearly show that breaking off prayers and renewing ablutions because of a nosebleed is not obligatory, although still possibly recommended or simply permissible. Mālik takes the second set of reports as normative and demonstrates that by indicating in the chapter title that they are in accord with the praxis (*Muw.*, 1:38–39).

Some solitary *ḥadīth*s relate that the Prophet directed people not to drink while standing. Mālik cites post-Prophetic observed behavior narrations indicating that the Prophet's statement was not a categorical prohibition and that it is permissible to drink while standing. He reports that ʿUmar, ʿUthmān, ʿAlī, ʿAbd-Allāh ibn al-Zubayr, and ʿAbd-Allāh ibn ʿUmar used to drink while standing. Another post-Prophetic report cites that neither ʿĀ'isha nor Saʿd ibn Abī Waqqāṣ held there to be any harm in drinking while standing (*Muw.*, 2:925–26; see al-Zurqānī, *Sharḥ*, 5:306–07).

In a third example, Mālik states that it is not obligatory to prostrate after reading certain verses of the Qur'an known as the verses of prostration (*āyāt al-sujūd*), although post-Prophetic reports that Mālik cites in the same chapter relate that Abū Hurayra, ʿUmar, and ʿAbd-Allāh ibn ʿUmar were observed prostrating after reciting some of these verses. Mālik cites an additional post-Prophetic report stating that ʿUmar once recited such a

The ambiguity of reports of observed action calls attention to one of the most important considerations regarding *ḥadīth*s and post-Prophetic reports in Islamic law as well as the sciences of *ḥadīth*: such reports are generally polysemic and ambiguous in nature. Their inherent ambiguity later constituted one of the central concerns of post-formative Islamic legal theory, which continually draws attention to the semantic possibilities of texts.[139] Christopher Melchert contends that Muslim jurists ultimately "lost the purity and power of simply letting *ḥadīth* speak for itself."[140] In reality, *ḥadīth*s and post-Prophetic reports, as historical narrations taken out of context, rarely speak for themselves. Most of them are highly polysemic and open to diverse and often contradictory interpretations. As Abū Yūsuf states, "the *ḥadīth*s of God's Messenger have [diverse] meanings [*maʿān*], perspectives [*wujūh*], and interpretations, which only one whom God helps to that end can understand and see clearly."[141] Mālik's legal method is predicated on the underlying conviction that technically authentic texts must be properly contextualized in order to be suitable referents of law. As he states in the *Mudawwana*, "Each thing has its own particular standpoint [from which it must be considered]" (*li-kull shay' wajh*).[142]

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verse during his caliphate while delivering the oration at Friday prayer; he came down from the speaking platform (*minbar*), prostrated before the people, and they prostrated in turn. The following Friday, ʿUmar recited the same verse during the oration. The people prepared to prostrate, but ʿUmar prohibited them from doing so, telling them that it was not obligatory. This post-Prophetic report illustrates clearly the conception in Mālik's legal reasoning that observed behavior narrations are not transparent and are insufficient to establish legal obligation or categorical prohibition by themselves. It shows that contrary narrations of observed behavior when performed by persons of knowledge and authority are, however, sufficient to indicate that the matters they contradict are not obligatory or prohibited. This particular post-Prophetic report makes it clear that ʿUmar himself understood the principle and applied it in practice (*Muw.*, 1:205–07; cf. al-Bājī, *al-Muntaqā*, 1: 349–53; Ibn Rushd, *Bidāya*, 1:132).

139 See, for example, ʿAbd al-Wahhāb Khallāf's work, *ʿIlm uṣūl al-fiqh*, which is an easily readable, standard contemporary introduction to the subject based on traditional sources (Khallāf, *Uṣūl*, 20–22 and passim.)

140 Melchert, "Traditionist-Jurisprudents," 406.

141 Abū Yūsuf, *al-Radd*, 38.

142 *Mud.*, 1:4. The polysemic nature of *ḥadīth*s and post-Prophetic reports applies equally well to Qur'ānic verses. Revealed texts—whether in the Qur'ān or *ḥadīth*s—are not stated in the language of insurance policies. Their highly polysemic natures are essential to the phenomenon of revelation that underlies them. The role of *ḥadīth*s and post-Prophetic reports—regardless of their many types and classifications—will remain incoherent in the historiography of Islamic law and the *ḥadīth* sciences until it is acknowledged that such texts are inherently polysemic with the legal corollary that most *ḥadīth* texts validly support a number of contrary readings.

Mālik's View of Consensus

Early academic writing in the West on consensus in Islamic law tended to regard it as one of the law's most far-reaching conceptions.[143] Fazlur Rahman holds that it was "the most potent factor in expressing and shaping the complex belief and practice of Muslims, and at the same time the most elusive one in terms of its formation."[144] In the history of Islamic law, however, Muslim jurists lacked consensus on how to define consensus. They held very different views on what it was and how it should be used. Like *sunna* and *ḥadīth*, consensus in Islamic law constitutes a complex term. Care must be given to how particular jurists and their schools defined and used it. Moreover, the concept of consensus in Islamic legal history, as George Makdisi observes, must always be juxtaposed against the phenomenon of dissent, which served as the index by which jurists generally determined the content of their general agreement.[145]

Ulrike Mitter notes that the semantic implications of *ḥadīth*s are nuanced and rarely convey a single discrete meaning. She notes that the inherent ambiguity of *ḥadīth*s makes the operation of "dating" them by content precarious. When researchers force an interpretation on a *ḥadīth* which is wrong, their dating of that *ḥadīth* on that basis will also be misconstrued. She notes that the *ḥadīth*s on manumission which Patricia Crone has relied upon are so open to different interpretations that it is hardly possible to determine whether any of them was actually for or against unconditional manumission (*tasyīb*). In Mitter's view, this particular ambiguity in such *ḥadīth*s probably resulted from the fact that unconditional manumission was not the point of these texts at all but rather the distribution of the estate of manumitted slaves (Mitter, "Manumission," 123).

[143] Much early Western scholarship on Islamic law generalized broadly about consensus. Ignaz Goldziher regarded it as the foundation of Sunnī Islam; he contended that Shīʿī Islam, by contrast, was predicated on the concept of authority, namely that of the infallible Imāms (Goldziher, *Introduction*, 191, 50). Since the Sunnīs never agreed on a definition of consensus, it is hard to see how it constituted the basis of their law. As for the notion that Shīʿism was based on authority, Devin Stewart challenges this view and argues that Shīʿī jurisprudence was more nuanced and often affiliated itself with positions that were congruous to those of the Sunnī schools, including consensus (see Devin Stewart, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System*, 7, henceforth cited as Stewart, *Orthodoxy*). For Snouck Hurgronje, consensus had the all-important function of serving as the "ultimate mainstay of legal theory and the positive law in their final form." It guaranteed the authenticity of revealed sources and their correct interpretation as well as their valid extension through analogy (Snouck Hurgronje, *Mohammedanism*, 78–79).

[144] Rahman, *Islam*, 75.

[145] Makdisi, *Humanism*, 32–33. Snouck Hurgronje failed to perceive the fundamental link between consensus and dissent. In his view, consensus covered every detail of the law's application, "including the recognized differences of several schools." He held that "the stamp of [consensus] was essential to every rule of faith and life, to all manners and customs." All manners of ideas and practices that could not be deduced from the Prophet's teaching were, in his belief, incorporated into Islam through consenus (Snouck Hurgronje, *Mohammedanism*, 78–79; cf. Schacht, *Origins*, 2).

Mālik relies heavily on the consensus of Medina, and the city's jurists served as his reference for it. Compared to other jurists, his concept of consensus is uniquely concrete, straightforward, and, above all, practical. Nevertheless, consensus for Mālik remains a nuanced legal category and functions at different levels of authority. Mālik does not use the standard post-formative term for consensus (*ijmāʿ*). He employs a related word "concurrence" (*ijtimāʿ*) from the same root with roughly the same meaning. Sufyān al-Thawrī and al-Shāfiʿī also made at least occasional use of the term.[146] In many cases, however, Mālik uses no term for his particular type of consensus but simply notes that certain precepts were not matters of local dissent.[147]

In the generation after Mālik, al-Shāfiʿī articulated a concept of universal juristic consensus constituted by the totality of the Muslim community (*umma*), which he regarded as epistemologically conclusive. In al-Shāfiʿī's view, whenever something is a matter of consensus, one should be able to travel anywhere in the Islamic realms and find no Muslim ignorant of it or doubting its validity. He illustrates such consensus through basic matters of law such as fundamental religious obligations pertaining to prayer and fasting, which are well-known everywhere and universally agreed upon.[148]

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[146] For al-Thawrī, see ʿAbd al-Razzāq, *al-Muṣannaf*, 10:40. Al-Shāfiʿī uses the word in the form of Mālik's familiar Medinese construct AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*) (see Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:311). He also uses it in a modified form as AM (the concurred precept; *al-amr al-mujtamaʿ ʿalayhī*) (see Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:311–12).

[147] Among Mālik's most common expressions of consensus are the terms "the agreed precept among us" (*al-amr al-mujtamaʿ ʿalayhi ʿindanā*, which I abbreviate as AMN); "the agreed precept without dissent among us" (*al-amr al-ladhī lā ikhtilāf fihi ʿindanā*, which I abbreviate as A-XN), and "the *sunna* among us about which there is no dissent" (*al-sunna al-lattī lā ikhtilāf fihā ʿindanā*, which I abbreviate as S-XN). They have counterparts in the *Mudawwana*. As terms of local consensus, they made up an essential element in Medinese praxis but were not coextensive with it. The relation of Medinese consensus to praxis will be discussed in detail later in the treatment of Mālik's concept of praxis and his legal terminology.

Wael Hallaq notes the lack of a set terminology for consensus in Medina and Kufa during the formative period. He observes, however, that such "lack of a fixed technical term for consensus does not mean that it was rudimentary or even underdeveloped; on the contrary, it was seen as binding and, furthermore, determinative of *ḥadīth* (Hallaq, *Origins*, 110).

[148] See Muḥammad ibn Idrīs al-Shāfiʿī, *al-Risāla*, 531–35; idem, *Jimāʿ al-ʿilm*, 7:250–65; 255 (26), 256 (26), 257 (24); Abū Zahra, *al-Shāfiʿī*, 293–95).

Fazlur Rahman notes that in *Ikhtilāf Mālik* both the Shāfiʿī interlocutor and his Medinese rival agree that consensus was "the final and conclusive argument on everything." He believes this view of the authority of consensus to have been generally "representative of the early schools of law" (Rahman, *Islam*, 74).

Such a definition limits the utility of consensus as a legal instrument, since matters of universal agreement are few and difficult to establish beyond the fundamentals. They are also generally so clearly established in Islam's textual sources that they rarely constitute questions of potential dissent in which appeals to consensus have practical value.[149]

Mālik frequently appeals to local consensus to affirm rulings based on considered opinion (*ra'y*) and legal interpretation (*ijtihād*). His *amr*-terms in the *Muwaṭṭa'*, for example, tend to be products of considered opinion and legal interpretation, which Mālik confirms in some cases by reference to Medinese consensus.[150] Although the authority of Mālik's *sunna*-terms is generally rooted in the presumption of Prophetic precedent, they, too, often have a dimension of considered opinion in them because of their anomalous character vis-à-vis closely related precepts that were contrary to analogy with them. Mālik often affirms their authority by reference to local consensus.[151] He repeatedly relies upon Medinese consensus and praxis to "go against" the overt implications of *ḥadīth*s which he regards as authentic, or he invokes the principle to add details to *ḥadīth*s that are not indicated by their semantic content.[152]

Joseph Lowry contends that, for al-Shāfiʿī, consensus was always constituted by the "opinion of scholars" but pertained exclusively to the interpretation of a revealed texts. (Lowry, "Four Sources?," 39).

ʿIyāḍ insists that Mālik did not reject the consensus of the Muslim community as a whole (ʿIyāḍ, *Tartīb*, 1:72–73). His point is a technical formality. Any lesser circle of consensus is logically subsumed in a larger one. The broader consensus of the Muslim community naturally subsumes the more restricted parameters of Medinese consensus. Any broader, universal consensus—such as what al-Shāfiʿī endorsed in the succeeding generation—had by definition to include the consensus of the Medinese scholars, who also constituted part of the Muslim nation.

149 See Ahmad Hasan, *The Early Development of Islamic Jurisprudence*, 56, henceforth cited as Hasan, *Development*. As the concept of universal consensus developed among Muslim jurists, it became associated with the doctrine of its infallibity. Fazlur Rahman contends that when the doctrine of the theological infallibility of consensus emerged, it undercut the "pragmatic authority" that consensus originally had and fostered the notion of "a theoretical absoluteness of the Community in terms of truth-values." With this development, consensus emerged as a "theoretically founded mechanism of traditional authoritarianism" (Rahman, *Islam*, 78). Fazlur Rahman likens consensus in its initial stages to "enlightened public opinion in whose creation the formulation of schools was the most potent factor," although consensus "gradually vetoed many schools of law and theology even out of existence and discredited or modified or expanded the validity of others" (Rahman, *Islam*, 75).

150 See Abd-Allah, "*ʿAmal*," 691–730.

151 See Abd-Allah, "*ʿAmal*," 549–582.

152 See Abd-Allah, "*ʿAmal*," 640–48; 487–98.

Mālik regarded Medinese consensus as an authoritative legal argument. As we have just seen, he often invokes it as a vehicle for affirming legal authority in interpetative matters, indicating that he believed it had a certain "epistemic quality of certitude."[153] There is no indication that he believed it to be conclusively authoritative, infallible, or universally binding.[154] The Medinese jurists did not constitute a monolithic whole and often differed among themselves.[155] Mālik's references to local concurrence (*ijtimāʿ*; AMN) often appear to refer to majority opinions in which there were dissenting voices within Medina. In issues such as the validity of ruling on the basis of the plaintiff's oath supported by a solitary witness or taking the collective oath (*qasāma*) on the basis of circumstantial evidence in murder and involuntary manslaughter, Mālik firmly invokes Medinese consensus, but his terminology and legal argumentation acknowledge the validity of the dissenting positions of non-Medinese jurists in those matters.[156]

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[153] Wael Hallaq contends that the "epistemic quality of certitude" in consensus placed it "in diametrical opposition to *raʾy*, which, by definition, represented the opinion of an individual jurist" (Hallaq, *Origins*, 110–111). It should first be noted that Medinese considered opinion was not always individual. Sometimes it was collective. The precedent of ʿUmar's juristic counsel and the Seven Jurists of the next generation, which are discussed below, were instances of considered opinion as group thinking and general concurrence upon its outcome. Hallaq observes that the nature of consensus was to generate "unity of doctrine," while the nature of considered opinion had been to generate dissent. He argues that consensus could not "go against a *ḥadīth* of something the Prophet established" (Hallaq, *Origins*, 110–111). These generalizations do not apply to the Medinese concept of consensus.

[154] Hallaq questions Schacht's view that Medinese consensus was provincial and did not apply outside the city. Hallaq contends that the Medinese regarded their city's consensus as representing "the ruling consensus" and did not limit its validity to local use. He believes that the Medinese attributed such authority to their consensus because of the city's integral link to the Prophetic legacy, an assertion to which the Kufans could lay no comparable claim (Hallaq, *Origins*, 111).

[155] The highly regarded Egyptian traditionist and jurist Saʿīd ibn Abī Maryam (d. 224/838) contended that consensus was never reached (presumably outside Medina) on any matter pertaining to the *sunna* contrary to the *Muwaṭṭaʾ* (ʿIyāḍ, *Tartīb*, 1:191). His statement raises the question of whether the non-Medinese jurists ever reached consensus on matters, which, according to the *Muwaṭṭaʾ*, were also disputed among the jurists in Medina. There are instances in *Mālik and Medina* of precepts—such as the validity of making legal judgments on the basis of a single witness and oath—that were generally agreed upon in Medina but met with overwhelming dissent in other regions. It is worth investigating the degree to which the non-Medinese reached consensus or broad agreement on other matters about which the Medinese disagreed internally.

[156] See Abd-Allah, "*ʿAmal*," 691–730; 571–75; 713–722.

The consensus to which Mālik subscribed was functional and pragmatic. It constituted not a theory but a working legal instrument.[157] For Mālik, Medinese consensus, local juristic concurrence (majority agreement), and general praxis (which often lacked consensus) all had "practical rectitude-value," which made them valuable sources of law. Their practicality lay to a considerable extent in the fact that they were verifiable.[158]

Fazlur Rahman holds that consensus developed in Islamic law as "an organic process."[159] Mālik transmits a *ḥadīth* according to which ʿAlī asked the Prophet what to do when questions arose without precedent in the Qur'ān or the *sunna*. The Prophet replied:

> Gather together those of the believers who have knowledge. Let it be a matter of consultation (*shūrā*) among yourselves. Do not judge [in such matters] on the basis of just a single one [of you].[160]

This *ḥadīth* portrays an organic method of group-based legal reasoning in unprecedented matters. Such group-based reasoning was reportedly practiced in Medina under the caliphates of Abū Bakr and ʿUmar. In the next generation, it continued in the circle of the Seven Jurists of Medina.[161] Mālik probably regarded Medinese consensus as rooted in and having direct continuity with these early precedents. The caliphal counsels of Medina were not always based on complete consensus. Sometimes they concurred on decisions in the absence of prominent other Companions. Nevertheless, once the body took a decision, it was executed by the caliph's political authority and, from the Medinese perspective, presumably became instituted into the city's praxis.[162]

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[157] Mālik's approach to Medinese consensus confirms Fazlur Rahman's view that consensus in its earliest expressions was "functional" and had a "strong practical bent." Its legal utility did not reside in a conviction of the"absolute truth-value of its content" but in its "practical rectitude-value" (see Rahman, *Islam*, 68, 74–75).

[158] Maʿrūf al-Dawālībī suggests that Mālik relied upon Medinese consensus primarily because of its verifiability, which made it imminently practical. He notes that the content of the universal consensus of the Muslim community, on the other hand, constituted an ideal that was virtually impossible to verify beyond the most elemental Islamic practices (al-Dawālībī, *Madkhal*, 336).

[159] Rahman, *Islam*, 75.

[160] Ibn al-Qayyim, *I'lām* (Dār al-Kitāb) 1:73–74; al-Zarqā, *Fiqh*, 1:192.

[161] See al-Zarqā, *Fiqh*, 1:170, 192; al-Dawālībī, *Madkhal*, 49–88; Abū Zahra, *Mālik*, 103; al-Fāsī, *Maqāṣid*, 116–17; Ignaz Golziher, *Zāhiriten*, 8.

[162] See āl-Fāsī, *Maqāṣid*, 116–17; al-Zarqā, *Fiqh*, 1:170, 192. ʿAllāl al-Fāsī and Muṣṭafā al-Zarqā contend that the nascent concept of consensus grew out of the pragmatics of the consultative legislative assemblies of Medina under the first caliphs. As a source of Islamic law, this type of early consensus was neither formalistic nor absolute. It was, however, highly workable. Its authority did not rest, according to al-Fāsī, on the presumption

Muṣṭafā al-Zarqā calls this early form of caliphal consensus "group-based legal interpretation" (*ijtihād al-jamāʿa*).[163] Only leading Companions (*ruʾasāʾ al-nās*) made up the group. It did not include Companions of lesser stature or the common people. As noted, decisions endorsed by such consensus were often taken in the absence of some of the prominent Companions, which was also probably a practical concern. The rightly-guided caliphs are not reported to have suspended their collective deliberations until such persons could return to Medina and all the prominent Companions were present.[164] ʿUmar is reported during his caliphate, however, to have prohibited the Companions from settling in regions outside Medina. Muḥammad Abū Zahra contends that one of his reasons for doing so was to ensure that they be available for legal consultation and deliberation.[165]

The legal value of early group-based legal interpretation consisted in providing the caliph with a sound, practical method for solving problems and executing uniform decisions. Reports about it reflect the communitarian ideals of the early community, ideals that ceased to be a realistic aspiration after the rise of Umayyad and Abbasid despotism. Al-Fāsī holds that the rise of political tyranny brought this early communitarian approach to an end.[166] For Mālik, however, something akin to the old consensus of the Medinese jurists remained a practical reality, although even

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of absolute, theoretical conclusiveness but on the soundness of the consultative process among a substantial number of the Companions, reinforced by executive order.

In this sense, the proto-consensus of the earliest period would have been the function of legal and political authority working together, both of which were combined in the caliph. Whenever the caliph reached agreement on a matter with the consensus of his consultative committee, that matter became law, and the people were required to follow it by virtue of the caliphal executive authority that endorsed it. Al-Fāsī holds that those who were not present in the assembly remained free to express dissenting opinions, but their opinions had no effect on the law's administration (al-Fāsī, *Maqāṣid*, 116–17). The picture of internal dissent within Medina that the *Muwaṭṭaʾ* and *Mudawwana* portray appears consistent with al-Fāsī's general idea of individual dissent in caliphal times in the shadow of group consensus. Mālik gives ample evidence of significant dissent among the Medinese jurists, although their diverging views rarely seem to have affected the homogeneity of Medinese praxis.

163 Al-Zarqā, *Fiqh*, 1:192.

164 See Abū Zahra, *Mālik*, 327; al-Dawālībī, *Madkhal*, 86–87; al-Fāsī, *Maqāṣid*, 117.

165 Abū Zahra, *Mālik*, 103.

166 Al-Fāsī, *Maqāṣid*, 117. Al-Fāsī contends that when the original consultative bodies were no longer able to function, the concept of Muslim consensus was transformed into an unrealistic ideal. Consensus became a topic of "futile" discussion about the authoritativeness of the universal agreement of the Muslim nation, which in reality could hardly ever occur.

in Medina, Mālik often sufficed with the majority consensus of the Medinese scholars.[167]

Al-Shāfiʿī recognized the majoritarian nature of Medinese consensus. His protagonist in *Ikhtilāf Mālik* notes that Mālik sometimes uses the terms AN (the precept among us) and AMN (the agreed precept among us) for matters that lacked complete consensus in Medina.[168] The Mālikī protagonist of the work defines consensus as a majoritarian agreement in a manner that appears consistent with Mālik's conception. He states:

> When I find a generation (*qarn*) of the people of knowledge of a city adhering to an opinion upon which most of them agree (*muttafiqīn ʿalayhi*), I call that consensus, whether those who were before agreed to it or disagreed. For insofar as those who were before them are concerned, the majority of [these contemporaries who reached agreement] would not agree on a matter out of ignorance of what was held before them except on the grounds that it had been repealed or unless they had come to know of something

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[167] Mālik's choice of terminology for consensus is of note. Although *ijtimāʿ* and *ijmāʿ* both imply agreement, Mālik's term *ijtimāʿ* also conveys the sense of physical assembly. It conveyed the sense of a uniform opinion that came out of a judicial assembly and echoed the earlier ideal of the Medinese caliphs and the Seven Jurists. *Ijmāʿ*, on the other hand, which is the preferred term of later jurists, belongs semantically to the realm of ideas and opinions. It is fundamentally abstract and indicates a coming together of ideas, not necessarily of persons with similar ideas, which was a practical possibility in Medina but a logistic impossibility in the case of al-Shāfiʿī's concept of universal Muslim consensus.

[168] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 202–03, 267; al-Shāfiʿī, *al-Risāla*, 531–32. I found examples of Mālik's using the term AMN in the *Muwaṭṭaʾ* for matters of law about which there was internal Medinese dissent, but al-Shāfiʿī's statement that Mālik often cites AMN in matters of local dissent is an important ancillary indication that such differences existed in AMN precepts. The likelihood that AMN stood for a preponderant but less than total local consensus is further borne out by Mālik's use of other terms to negate explicitly the presence of dissent such as A-XN (the precept about which there is no dissent among us); AMN-X (the agreed precept without dissent among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā wa al-ladhī lā ikhtilāf fihi*); and S-XN (*sunna al-lattī lā ikhtilāf fihā ʿindanā*; the *sunna* among us about which there is no dissent). In the case of AMN, it is reasonable to conjecture that it may have constituted a concurrence (preponderant consensus) of the group of the Medinese jurists whom Mālik looked upon as authoritative, while rejecting others of the city whom Mālik may often have regarded as inadequately qualified to give juristic opinions, as is indicated by Mālik's biographical sources.

As for the term AN (the precept among us), it rarely if ever seems to indicate the juristic consensus of Medina. As will be seen, Mālik uses this term for matters regarding which there were significant dissenting opinions in Medina. Not infrequently, he mentions the dissenting Medinese jurists by name. The AN precept itself seems always to represent Mālik's personal position on the question of dissent and apparently reflects the standing praxis of the city. Throughout the *Muwaṭṭaʾ*, Mālik expresses his personal opinion on matters (for example, *hādhā raʾyī*; this is my considered opinion), but he does not do that in the case of the AN precepts. On the contrary, he buttresses his opinion by associating it with some form of significant collective agreement in Medina, even if it contrasts with significant dissent in the same city (see Abd-Allah, "*ʿAmal*," 731–60).

> else that was better-established than it, even though they may not mention what it is.[169]

When the Shāfiʿī protagonist of the work denies the accuracy of Medinese consensus regarding a matter, it is generally with reference to rulings that Mālik designates as AN and AMN.[170] After indicating that the term AN is used in Medina for precepts in which there was local dissent, the Shāfiʿī interlocutor of *Ikhtilāf Mālik* cannot conceive of its having any merit as a legal argument. For him, since Mālik invokes consensus for matters in which there was local dissent, his use of the word is "meaningless." The interlocutor continues, "if the word is meaningless, why have you burdened yourselves with it?"[171] He sees no qualitative differences or shades of gray, no middle ground between total consensus and lesser degrees of concurrence, not to mention the independent authority of praxis when unsupported by consensus.

Mālik and Regional Customs

Regional customs and conventions (*al-ʿurf* and *al-ʿāda*) constitute a valid legal reference and source of law in all Sunni schools. They play an especially significant role in the Mālikī and Ḥanafī traditions.[172] According to Muḥammad Abū Zahra, the prominence of regional customs in Mālik's reasoning reflects his attention to the general good (*maṣlaḥa*), since sound customs, as a rule, have strong links with the aspirations, needs, and necessities of people in the regions where they live.[173] As will be shown, Mālik's use of discretion (*istiḥsān*) is sometimes predicated on local customs. He also applies discretion on the basis of the general good.[174] For Abū Zahra,

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[169] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 264.

[170] See al-Shāfiʿī, *al-Risāla*, 531–35; [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 267; cf. Brunschvig, "Polèmiques," 391–93.

[171] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*," 249; cited by Brunschvig, "Polèmiques," 391.

[172] See al-Qarāfī, *al-Dhakhīra* (Cairo), 1:143, 87–88; Abū Zahra, *Mālik*, 420–24; Shaʿbān, *Uṣūl*, 176–78. Abū Zahra and Shaʿbān cite references pertaining to each of the four main Sunnī schools in their support of "sound customs" (*al-ʿurf al-ṣāliḥ*). Abū Zahra demonstrates that al-Shāfiʿī acknowedged the validity of sound local customs when they pertained to matters for which there were no explicit textual references in the law.

David Margoliouth observes that, "It was the earliest theory of Islam that the new religion should interfere as little as possible with pre-existing practice: that practice might and should be followed except where the divine law forbade it or superseded it" (Margoliouth, *Mohammedanism*, 105).

[173] Abū Zahra, *Mālik*, 420–21.

[174] Abd-Allah, "*ʿAmal*," 250–51.

when Mālik performs discretion on the basis of regional usages, he is, in fact, basing it on the general good, since Mālik regarded sound local customs to be manifestations of it.[175] Since Mālik accepted local customs as a basis for discretion, which, by its nature, draws exceptions to the general dictates of precepts, it is valid to say that Mālik regarded sound local customs as more authoritative than analogies when the two came into conflict, since his analogies were often precept-based.[176]

Al-Shāṭibī emphasizes that sound regional customs take a central part in Islamic law because of the general good that they normally embody. He observes that the principle is based in Prophetic precedent, because much of the Prophet's legislation was an affirmation of the sound customary practices of pre-Islamic Arabia. The pre-Islamic Arabs, like human societies in general, al-Shāṭibī reasons, developed many good customs before the advent Prophetic guidance. Such customs were especially well-suited for their environment and circumstances. The Prophet affirmed and perfected them, only abolishing those pre-Islamic customs that were unsound and detrimental. For this reason, al-Shāṭibī continues, the Prophet is reported in numerous *ḥadīth*s to have said that the purpose of his mission was to perfect the good moral qualities (*makārim al-akhlāq*) of the people, not to obliterate them. These moral qualities, in al-Shāṭibī's view, include their sound social customs and usages, which are the basis of their moral formation.[177]

Once the Prophet endorsed pre-Islamic customary conventions, they became technically part of his *sunna* and were incorporated into Medinese praxis. The newborn sacrifice (*ʿaqīqa*), which Mālik treats in a praxis chapter, shows how he believed pre-Islamic customs carried over into praxis when given a Prophetic mandate. Mālik cites a *ḥadīth*, indicating that the Prophet initially showed disfavor about the sacrifice's name because of its semantic connection with "filial disobedience" (*ʿuqūq*), which is derived from the same verbal root. Mālik acknowledges the

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[175] Abū Zahra, *Mālik*, 421. The report that Mālik did not want the Abbasid ruler al-Manṣūr to make Medinese jurisprudence an imperial standard for outlying regions reflects both his concern for customary practice and its connection to the general good. In his alleged response to al-Manṣūr, Mālik held that compelling the peoples of different regions to follow a Medinese code after other procedures had become customary for them would impose excessive difficulty upon them. It would be further unjustified since the well-established practices of their regions had been instituted by the Companions (see Abd-Allah, "*ʿAmal*," 100).

[176] See Abd-Allah, "*ʿAmal*," 245–54.

[177] Al-Shāṭibī, *al-Muwāfaqāt*, 2:213; Abū Zahra, *Mālik*, 374–75.

customary background of the practice, the fact that it became a well-established Medinese praxis, and that, as a (modified) Islamic practice, it had continuity going back to the time of the Prophet.[178]

The *Muwaṭṭa'* and *Mudawwana* provide illustrations of Mālik's attention to regional custom in applying the law. In cases of slander, Mālik relies upon local linguistic usage to determine whether the words in question were actually considered slanderous. Unlike some jurists, Mālik was not exclusively concerned with the formal semantic content of the words in standard speech but with the connotations they carried in regional usage. The literal meaning of a word might be harmless, but its local application could be injurious, and the reverse could also be true.[179] As a further illustration, Mālik holds that the alms tax must be paid on the harvest of pulses (*al-quṭniyya*) like legumes, chickpeas, and beans. He defines pulses in terms of the customary usage of the particular region and what they regard as constituting the different varieties of pulses among them. He states that such seeds include chickpeas (*al-ḥummuṣ*), lentils (*al-ʿadas*), kidney beans (*al-lūbiyā*), the common vetch (*al-julbān*), and all other types of legumes that "the people know well to belong to the variety of pulses." He emphasizes that the customary knowledge of the people in this matter is what the jurist relies on, regardless of how much the names and colors of the different varieties of the seeds may differ from place to place.[180]

Mālik stipulates that the blood indemnity (*diya*), which was assessed in gold, silver, and camels, only be paid in each region in the type of wealth customary for it. His praxis chapter on blood indemnities illustrates the primacy of local custom and embodies one of the five principal maxims of Islamic law, "custom shall have the power of law" (*al-ʿāda muḥakkama*).[181] Mālik's clarification of the ruling makes it explicit that the legal purpose of indemnity law requires that compensation be paid only in the form of wealth that is customarily established for a region. To pay a blood indemnity in camels to people who use gold and silver would violate the law's basic purpose, just as the payment of gold and silver to camel Bedouins would not have the same value for them as payment in camels, their standard form of wealth. Here, as Abū Zahra observes, giving local custom

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178 *Muw.*, 2:500–01.

179 Ibn Rushd, *Bidāya*, 2:266.

180 *Muw.*, 1:275.

181 See Wolfhart Heinrichs, "*Qawa'id* as a Genre of Legal Literature," 369; he renders the maxim as "custom is made the arbiter."

the power of law exemplifies the link between observing cultural norms and the general good (*maṣlaḥa*).[182]

For Mālik, regional customs are the primary referent in determining what constitutes a valid sale, rental contract, or similar contractual agreement. The Prophet endorsed the Arab custom of shaking hands to indicate the conclusion of a purchase, and in an important *ḥadīth*, which will be discussed later, the handshake is designated as the legal sign of a concluded trade. This *sunna*, in Mālik's view, did not apply for people who had different regional customs and did not recognize shaking hands as a customary element in concluding sales.[183] Gift giving comes under the rubric of Islamic law, because it is one of the ways by which property is transferred. The practice of giving gifts involves legal questions about whether or not a gift may be repossessed. Mālik does not give a universal definition for gift giving but defines it according to each people's local customs.[184]

Islamic law ordained that a thief's right hand be cut off if he or she were sane, of age, and not compelled to steal by intimidation or dire circumstances such as poverty. The stolen goods also had to have a certain minimal value and to have been stolen from a protective enclosure (*ḥirz*) that was adequate to protect them.[185] Stealing a purse of gold coins that had fallen on the street would not be punished by amputation but by some other interpretatively based punishment (*taʿzīr*) such as imprisonment because the purse had not been removed from a protective encloser. Consequently, the definition of protective enclosures constituted a crucial part of the Islamic law of theft. Mālik avoids universal definition of protective enclosures and leaves them to be defined by local custom. For him, a protective enclosure was whatever the people of a region customarily regarded as adequate for protecting their property from theft.[186]

In the *Mudawwana*, Saḥnūn provides an instance of legal rulings based on custom in the case of selling fresh fruits and vegetables. He asks Ibn al-Qāsim about options to return fresh produce such as watermelons, cucumbers, apples, peaches, and pomegranates. Ibn al-Qāsim answers that he never heard Mālik express an opinion about the matter. He recommends, however, that the jurist consider what the people customarily

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[182] See Abd-Allah, "*Amal*," 673–76.
[183] Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 50.
[184] Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 50.
[185] See Ibn Rushd, *Bidāya*, 2:269.
[186] Ibn Rushd, *Bidāya*, 2:271.

do (*mā yaṣnaʿu al-nās*) in such cases. If such sales are of the type in which people need the opinions of others and seek their counsel to estimate their quality, there is no harm in allowing a reasonable period of return as long as there is no danger that the fruit turn bad. But the buyer should not be allowed to take the fruit away, since it cannot later be specifically identified as the fruit he actually bought.[187]

Mālik's Utilization of Considered Opinion (*Raʾy*)

Of all terms in early Islamic jurisprudence, considered opinion (*raʾy*) ranks among the most all-encompassing and problematic. Like complex terms in general, it is especially prone to fallacy unless correctly and carefully defined.[188] Academic treatment of the early use of considered opinion has long been skewed by failure to study the phenomenon systematically in context and by generalizations based on the mistaken paradigm that Islamic law evolved from obscure, rudimentary beginnings into a collectively accepted four-source "classical" legal theory, in which analogical reasoning became the only acceptable rational tool for extending the law. From this perspective, the phenomenon of considered opinion in early Islamic legal history appears nondescript, inherently arbitrary, and lacking standard methodolgy.[189] By contrast, "classical" theory finally emerged and developed a jurisprudence that was clear, systematic, and methodological. "Classical" theory judiciously restricted legal speculation to four sources: the Qurʾān, *ḥadīth* as coterminous with *sunna*, consensus (*ijmāʿ*), and analogy (*qiyās*). Analogy remained the sole remnant of the

[187] *Mud.*, 3:224.

[188] Yasin Dutton observes that "considered opinion" (*raʾy*) as used in the formative period was a "composite term." It included various methods of legal reasoning, especially discretion, preclusion, and the unstated good. In his view, Mālik's use of considered opinion was distinctive in that its foundational referent was invariably the praxis of Medina. Dutton emphasizes that Mālik's reliance on praxis always provides the key to understanding his legal reasoning (Dutton, *Origins*, 34). Norman Calder regards considered opinion (*raʾy*) as a "generative concept." It was not arbitrary opinion but constituted "reflective consideration and mature judgment, something," in Calder's words, "that works in a degree of tension with the principle of submssion to older authority." He notes that verbs for considered opinion in the *Mudawwana* such as "do you not consider" (*a raʾayta*) and "I consider" (*arā*) are "verbal pivots," by means of which "the law is discovered, elaborated, and presented in literary form" (Calder, *Studies*, 12; cf. Hallaq, *History*, 19).

[189] See Ignaz Goldziher, *Die Ẓāhirīten: Ihr Lehrsystem und ihre Geschichte: ein Beitrag zur Geschichte der muhammedanischen Theologie*, 11, 21; Schacht, *Origins*, 98–133; Fazlur Rahman, *Islamic Methodology in History*, 1–26, henceforth cited as Rahman, *Methodology*; Hasan, *Development*, 53, 145–51.

unrestrained practice of considered opinion that had once flourished in the early period. In light of its new role, analogy constituted a historic compromise—a grand synthesis—between the former proponents of considered opinion (*aṣḥāb al-raʾy*) and their rivals, the proponents of tradition (*aṣḥāb al-ḥadīth*).[190]

Wael Hallaq observes that both the Ḥanafī and Mālikī traditions relied upon considered opinion (*raʾy*) and reflection (*naẓar*). He adds that, in fact, Mālik enjoyed "the lion's share of such practices."[191] Ahmed El Shamsy

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[190] Wael Hallaq regards considered opinion (*raʾy*) as the "third source" of law in second/eighth century Islamic jurisprudence. He contends that it relied upon liberal methods of reasoning that were gradually "suppressed" in the wake of al-Shāfiʿī's new synthesis. Although al-Shāfiʿī contributed to the process of its supression, he failed to accomplish this "historical feat" single-handedly (Hallaq, *Origins*, 121). Hallaq contends that by the middle of the third/ninth century *ḥadīth* had "won the war" against considered opinion, leaving only a few more "battles to be fought and won thereafter" (Hallaq, *Origins*, 123). Elsewhere, however, Hallaq questions the extent of al-Shāfiʿī's influence on his contemporaries and immediately subsequent generations. He contends that al-Shāfiʿī "in no way represented the culmination of Islamic law and jurisprudence. If anything, he stood somewhere in the middle of the formative period, half-way between the crude beginnings during the very first decades of the 8th century and the final formation of the legal schools at the beginning of the 10th. For [al-Shāfiʿī] succeeded neither in ejecting *raʾy* from the domain of legal reasoning nor, in consequence, in rendering the Prophetic Sunna unconditionally admissible. During the decades after his death, most of the Hanafites and no doubt the Muʿtazilites continued to uphold, under different guises, the role of human reason in the law" (Hallaq, "Master Architect?," 267). But Hallaq asserts that by the time of al-Shāfiʿī the movement of the proponets of considered opinion (*ahl al-raʾy*) "was beginning to decline," which he believes was due to the "rapid increase in the volume of Prophetic traditions that infiltrated legal doctrines" (Hallaq, "Master Architect?," 267).

Similarly, Christopher Melchert focuses on the "classical" role of the Qurʾānic text and *ḥadīth*s in four-source theory as one of the major "transformations" of Sunnī jurisprudence over the course of the third/ninth century. These revealed textual sources "eclipsed rational speculation as the formal basis of the law" (Melchert, "Traditionist-Jurisprudents," 399). In his view, the followers of Abū Ḥanīfa, Mālik, and others gradually adopted reliance upon *ḥadīth* as an independent source of law in opposition to local custom and considered opinion over the course of the third/ninth century in the wake of al-Shāfiʿī and adopted traditionist methods of "sorting reliable from unreliable *ḥadīth* reports." As if it were poetic justice, Melchert adds, however, that these former followers of considered opinion did not have to give up completely their "old sophistication, clever argumentation, and speculation about cases that had not come up in real life," since they were left with access to analogy. The "traditionist-jurisprudents," on the other hand, also found it necessary to modify their position of rejecting considered opinion out-of-hand by adopting analogy and becoming "more sophisticated" (Melchert, "Traditionist-Jurisprudents," 405–06).

[191] Hallaq, *History*, 131; cf. David Sanitillana, *Istituzioni*, 1:56.

Praxis and considered opinion were both among the most important elements of Mālik's legal reasoning. Goldziher observed quite early that considered opinion (*raʾy*) was an important element in Mālik's legal reasoning in addition to his reliance on Medinese praxis. He noted that the proponents of tradition (*aṣḥāb al-ḥadīth*) consistently counted Mālik among the adherents of considered opinion in the law (Goldziher, *Ẓāhirīten*, 3–5,

states expressively that the rationalist jurists of the formative period operated with "sophisticated tool kits."[192] Because considered opinion in the period was such an all-embracing phenomenon, it is necessary to break down some of these "sophisticated tool kits" into their fundamentals, especially the repertoires of Mālik and Abū Ḥanīfa.[193]

Mālik's "tool kit" contained four primary legal instruments: analogy based on precept or the precedents of earlier analogies (*al-qiyās ʿalā al-qawāʿid* and *al-qiyās ʿalā al-qiyās*), discretion (*al-istiḥsān*), preclusion

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29 note 1; cf. idem, *Studien*, 2:215–17). Similarly, Schacht and Guraya conclude that praxis and considered opinion were the two basic elements in Mālik's legal reasoning. According to Schacht, the same generalization holds true for Medinese jurisprudence as a whole (Schacht, *Origins*, 312; Muhammad Guraya, "The Concept of *Sunnah* in the *Muwaṭṭaʾ* of Mālik ibn Anas," 77; henceforth cited as Guraya, "*Sunnah*"). Hallaq observes that considered opinion lay at the heart of early Ḥanafī and Mālikī jurisprudence (Hallaq, *History*, 131). Yasin Dutton notes that considered opinion was the second fundamental element in Mālik's repertoire of legal instruments next to praxis, and he recognizes that Mālik's approach to considered opinion was rooted in Medinese praxis (Dutton, *Origins*, 34–35). Despite these observations, however, the notion still persists that Mālik belonged to the proponents of tradition (*ahl al-ḥadīth*) as opposed to the proponents of considered opinion (*ahl al-raʾy*) in Kufa. As noted earlier, this paradigm is misleading and must be corrected to accommodate Mālik's extensive reliance upon considered opinion as central to the Medinese tradition.

For Mālik, Medinese praxis constituted a source law. It established and clarified the content, validity, and the overall intent and purpose of the law. It constituted *the* authoritative non-textual source of the law, which potentially trumped or modified all else. On the basis of praxis, Mālik interprets, fleshes out, or rejects the textual sources of Islamic law. His many-faceted practice of considered opinion (*raʾy*) was his primary *modus operandi* of legal interpretation (*ijtihād*). Unlike praxis, it was not a reservoir of juridical legacies and earlier precedents but a dynamic instrument for applying the law to unique problems largely but not always without precedent in a manner consistent with established Medinese precedents and procedures. Mālik makes frequent reference to his personal considered opinion in the *Muwaṭṭaʾ* when arguing on behalf of Medinese positions he subscribes to that were matters of dissent outside Medina or not supported by local Medinese consensus. Mālik makes many such references, for example, when presenting precepts under the term AN (the precept among us; *al-amr ʿindanā*), which generally pertain to matters of dissent among the Medinese jurists (see Abd-Allah, "*ʿAmal*," 428–31; 731–60).

192 El Shamsy, "First Shāfiʿī," 305.

193 Schacht, Goldziher, Fazlur Rahman, and others identify some of the elements of considered opinion, especially discretion (*istiḥsān*), which they treat as an early form of legal interpretation (*ijtihād*). They contrast discretion with analogy (*qiyās*), which, in keeping with the paradigm of "classical" Islamic legal theory, they believe ultimately came to constitute the sole basis of legal interpretation (see Goldziher, *Ẓāhirīten*, 11–12, 21–22; Schacht, *Origins*, 98–133; Rahman, *Methodology*, 145–51; cf. Wael Hallaq, "*Uṣūl al-Fiqh*: Beyond Tradition," XII: 196; idem, *History*, 131; idem, *Origins*, 145–146). As we will see, considered opinion included many diverse elements, each of which can be readily identified in the legal reasoning of the rationalist jurisprudents of the formative and post-formative periods as reflected in their application of positive law.

(*sadd al-dharāʾiʿ*), and the unstated good (*al-maṣāliḥ al-mursala*). He used each of them extensively and in a relatively distinctive and easily identifiable manner. Interestingly and as repeatedly noted, all of these Medinese tools are given broad acknowledgement in the Ḥanbalī tradition, including the admission of certain grades of Medinese praxis. This seems to reflect the Ḥanbalī school's conservative nature, its adherence to early precedent, and its reluctance to depart from older legal usage despite profound esteem for al-Shāfiʿī and his work.

As for Abū Ḥanīfa, he made systematic use of analogy and discretion, but his techniques differed markedly and materially from those of Mālik. He rejected preclusion and the unstated good yet took recourse to legal fictions (*ḥiyal*) in certain branches of law, which occasionally served similar ends.[194] Again, as frequently noted, only al-Shāfiʿī ascribed to something akin to the so-called "classical" four-source theory, accepting Qurʾān- and *ḥadīth*-based analogy as his exclusive rational source.[195] In addition to the rational tools discussed below, we may add the presumption of continuity (*al-istiṣḥāb*), which served all Sunnī traditions but often had its most profound applications among jurists with strong textual orientations such as the Ḥanbalīs in their law of commercial contracts.[196]

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[194] See Abū Zahra, *Abū Ḥanīfa* (1997), 364–84.

[195] Al-Shāfiʿī makes it categorically clear that legal interpretation has only one valid mode: analogical reasoning. See al-Shāfiʿī, *al-Risāla*, 39, 25; idem, *Jimāʿ al-ʿilm*, 252 (in this passage, by the way, al-Shāfiʿī refers to "his book," presumably the *Risāla* which would indicate that *Kitāb jimāʿ al-ʿilm* was written later; he states that he has given analogical reasoning a more extensive treatment in that work.) See al-Shāfiʿī, *Jimāʿ al-ʿilm*, 253, 254, 258 (in the last of these passages, al-Shāfiʿī's opponent asks him on what basis he prohibits others to use anything other than analogy); al-Shāfiʿī, *Ibṭāl*, 270–71, 272; Abū Zahra, *al-Shāfiʿī*, 298–301. Joseph Lowry contends that al-Shāfiʿī insisted that analogy and legal interpretation (*ijtihād*) be regarded as synonymous, constituting one and the same thing. Analogy alone, in his view, constituted "the technique by which Islamic revelation offers an all-encompassing body of divine legislation" (Lowry, "Four Sources?," 26, 37–38).

[196] The presumption of continuity holds that, in the absence of sound evidence to the contrary, things will be presumed to remain in the present as they were known to have been in the past. It has many applications and is a fundamental legal instrument in all Sunnī schools. Thus, for example, the occupants of a house will generally be presumed to be its rightful owners, even if they lack a legal title, unless there is valid proof to the contrary. The principle of original permissibility (*al-ibāḥa al-aṣliyya*) is one of the corollaries of the presumption of continuity. The principle of original permissibility holds that, since God created humankind as vicegerents on earth and originally gave them extensive freedom to use and enjoy what is on it, things will be presumed to remain in that original state of permissibility until there are clear indications in revelation to the contrary. This principle was especially prominent in the literalist *Ẓāhirī* school, which regarded many matters as broadly permissible in the absence of explicit reprimands in standing revelatory texts. In the Ḥanbalī tradition, unprecedented commercial contracts were often treated

Careful attention to the "sophisticated tool kits" of the rationalist jurists of the formative period is essential to unraveling what constituted considered opinion in early Islamic law. Sound analysis of considered opinion is, perhaps, *the* pivotal question for writing a sound historiography of Islamic legal origins. It must be repeated that the "sophisticated tool kits" of the early period were never replaced or "suppressed" but carried over fully into the post-formative period.[197] Our understanding of Islamic legal history requires a full account of the continuity of these methods, while properly balancing parallel developments in dissenting methodologies that rejected some of the tools of rationalist discourse and modified others.

Mālik's Use of Analogical Reasoning

Analogy stands out as a conspicuous instrument of considered opinion in the tool kit of the early jurists.[198] It is widely attested from the earliest period of Islamic law and was not a later development. It was used in each of the major Sunnī traditions from their foundation.[199] Analogy is the only rational method that could boast of anything approaching consensus in the Sunnī mainstream.[200] Each of the four major Sunnī jurists—Mālik,

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with remarkable liberality through application of the presumption of continuity with reference to the corollary of original permissibility. Generally speaking, the presumption of continuity holds greater sway, the more literal and textually oriented the school that uses it. The Mālikīs and Ḥanafīs, for example, may often make more limited use of it than other schools, because of the store of the two schools' deductions based on their formidable rational instruments. In contract law, for example, they will generally extrapolate rulings based on overriding legal principles and precepts in their schools, not on the basis of the presumption of continuity (see Abū Zahra, *Ibn Ḥanbal* [1997], 225–30).

197 Cf. Hallaq, *Origins*, 121.

198 Western studies on Islamic legal origins have often failed to recognize the centrality of analogy to the formative period. Ignaz Goldziher regarded it as a "newly introduced legal source," which al-Shāfiʿī succeeded in giving disciplined application "without curtailing the prerogatives of scripture and tradition, and to restrict its free arbitrary application by means of methodical laws with respect to its usage" (Goldziher, *Ẓāhirīs*, 20–21).

199 See Abū Zahra, *al-Shāfiʿī*, 298–301, 309–10; idem, *Abū Ḥanīfa*, 325, 336–39; ʿAbd-Allāh al-Turkī, *Uṣūl*, 434, 559, 561–62, 573–76. The Ẓāhirī school is the exception, but it does not constitute a "major" Sunnī legal tradition, since it gradually became extinct. Like the Imāmī Shīʿa, the Ẓāhirīs rejected formal analogy as a valid juristic principle. See Stewart, "Ẓāhirī's Manual," 99–158.

200 Wael Hallaq notes that analogy was the single form of reason-based legal argumentation to which all the mainstream Sunnī jurists gave unqualified acceptance (see Wael Hallaq, "Non-Analogical Arguments in Sunni Juridical *Qiyās*," II: 288). He contends elsewhere, however, that Aḥmad ibn Ḥanbal was "rigid" and only later Ḥanbalīs adopted

Abū Ḥanīfa, al-Shāfiʿī, and Ibn Ḥanbal—issued legal rulings based on it.[201] The *Muwaṭṭaʾ* and *Mudawwana* abound in legal analogies, and the unique method Mālik employed undoubtedly constituted a foundational element in his legal reasoning.

As noted before, the appearance and development of theories and terminologies must not be confused with the radically different process of intuiting conceptual processes and forming working guidelines for them. Searching out terms for analogy in primary sources is not a viable methodology for discovering if the concept existed in the early period, although it is useful toward other ends. Nevertheless, the term "analogy" (*qiyās*) does occur in the *Mudawwana*.[202] It appears frequently in pre-Shāfiʿī Ḥanafī writings.[203] I found no instance of Mālik himself using the word "analogy"

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analogy (Hallaq, *Origins*, 129). Ibn Ḥanbal accepted analogy as a valid source of law, but, as will be shown, it played a less conspicuous role in his legal reasoning. Ibn Ḥanbal had recourse to the most extensive number of texts of any Sunnī Imām and only resorted to analogy when he had exhausted his textual references and failed to find a relevant precedent in any of them.

Analogy did not enjoy total consensus, however, because the jurists differed in their methods of applying it and the restrictions they were willing to use to curtail its stict application in all cases. There is an element of truth in the so-called four-source theory of "classical" Islamic law in that only four sources—the Qurʾān, *sunna*, consensus, and analogy—received unqualified endorsement in all mainstream Sunnī legal jurisprudence. The theory is fundamentally flawed when it presumes that agreement on these four sources led to universal rejection of everything else. Moreover, each school defined, understood, and applied the four sources in distinctly different ways. All schools accepted the *sunna*, for example, but differed in their attitudes toward praxis, connected and disconnected *ḥadīth*s, and post-Prophetic reports as constituent elements of the *sunna*. Regarding the inferential instruments of law—analogy, discretion, preclusion, and the unstated good—only analogy was a matter of consensus, although it too was applied in different ways. The remaining three instruments were the focus of dissent, not just concerning their scope and method of application but even with respect to whether or not they were valid in principle.

[201] See, for example, *Muw.*, 2:772, 789 (in the second example, Mālik reasons analogically on the basis of a *ḥadīth* pertaining to the emancipation of slaves, which he cited in the first example.); 1:105 (here Mālik reasons directly on the basis of a *ḥadīth*); 2:541 (Mālik extends the application of a Qurʾānic verse by explaining the implications of one of the words it contains, *iḥṣān* [the state of being married]). See also Abū Zahra, *Abū Ḥanīfa*, 325; idem, *Mālik*, 272–74, 344–45; idem, *al-Shāfiʿī*, 298–301, 309–10; idem, *Ibn Ḥanbal* (1997), 210–25; ʿAbd-Allāh al-Turkī, *Uṣūl*, 434, 559, 561–62, 573–76; Shaʿbān, *Uṣūl*, 149–53.

[202] Ibn al-Qāsim uses the word "*qiyās*" (*Mud.*, 1:44). In another instance, Ibn al-Qāsim explains Mālik's analogical reasoning using the term *ʿilla* (rationale; signifying analogy), which later become a standard term linked with analogical reasoning, especially when textually rooted. He states that "Mālik's rationale (*ʿilla*) here was [such and such]" (*Mud.*, 2:198). Elsewhere, he uses the word "*maḥmal*" (medium, means of conveyance) for a precept-based analogue Mālik has used repeatedly (*Mud.*, 1:229–30).

[203] See Abd-Allah, "*ʿAmal*," 174–75.

(*qiyās*), but he employs a variety of alternative expressions for it. In both the *Muwaṭṭaʾ* and *Mudawwana*, Mālik often prefaces his analogies by expressions such as, "this is like (*mithl*) [such and such];"[204] "this has the same status (*manzila*) as [such and such];"[205] and "what will clarify this to you is that . . ." (followed by an analogy),"[206] and so forth.[207] He sometimes makes analogies without any prefatory remarks.[208]

Muḥammad Abū Zahra notes that analogical reasoning is a natural part of the human thought process, which by nature thinks in terms of comparison and contrast. He cites a quotation attributed to Ismāʿīl ibn Yaḥyā al-Muzanī (d. 264/877), one of the influential early proponents of al-Shāfiʿī:

> From the times of the Messenger of God, God bless and keep him, until our day, the jurists have reasoned on the basis of analogies (*al-maqāyīs*) in all matters of law that pertain to our religion. There has been consensus among them that the likeness of what is true is true, and the likeness of what is false is false. Thus, it is not permissible for anyone to deny the validity of analogy. For it is [only] a matter of drawing likenesses (*al-tashbīh*) between things and applying similar [conclusions] on that basis (*wa al-tamthīl ʿalayhā*).[209]

Abū Yūsuf advises an opponent in disputation to make analogies (*qis*) on the basis of the Qurʾān and the well-known *sunna*.[210] Al-Shaybānī contends that analogy is to be done in unprecedented matters on the basis of transmitted precedents (*āthār*).[211] Al-Shāfiʿī confirms that al-Shaybānī's basic position (*aṣl*) in jurisprudence was that jurists must base their opinions either on a binding legal text (*khabar lāzim*) or an analogy

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[204] See *Muw.*, 2:494, 647–48, 795, 841; *Mud.*, 1:188; 2:361–62.

[205] See *Muw.*, 1:252, 272, 276, 355; 2:509, 568, 646, 668, 673, 706, 741–42, 765, 775, 794; *Mud.*, 1:188, 293, 294; 2:361–62.

[206] See *Muw.*, 2:768, 775 (here it occurs four times); *Mud.*, 1:294; 2:155, 156, 198, 394; 3:111, 129, 210, 211, 214, 216. The following expressions are sometimes followed by analogies, "this is because" (*Muw.*, 2:611); "this is of [the same] guise (*hayʾa*) as" (*Muw.*, 2:636); "the explanation (*tafsīr*) of this is" (*Muw.*, 2:666, 796); "the proof of this is" (*Muw.*, 1:254); "the basis of all of these [matters] is" (*Mud.*, 2:183); "also similar to this is" (*Muw.*, 2:734).

See, for example, *Mud.*, 3:118.

[207] The following expressions are sometimes followed by analogies, "this is because" (*Muw.*, 2:611); "this is of [the same] guise (*hayʾa*) as" (*Muw.*, 2:636); "the explanation (*tafsīr*) of this is" (*Muw.*, 2:666, 796); "the proof of this is" (*Muw.*, 1:254); "the basis of all of these [matters] is" (*Mud.*, 2:183; "also similar to this is" (*Muw.*, 2:734).

[208] See, for example, *Mud.*, 3:118 (10).

[209] Cited by Abū Zahra, *Mālik*, 344. The quotation as well as those that follow indicate clearly that analogy was part of Islamic legal reasoning from the beginning and did not originate with al-Shāfiʿī.

[210] See Abd-Allah, "*ʿAmal*," 174–75.

[211] Muḥammad ibn al-Ḥasan al-Shaybānī, *Kitāb al-ḥujja ʿalā ahl al-Madīna*, 1:43–44.

(*qiyās*).[212] In *Kitāb jimāʿ al-ʿilm*," al-Shāfiʿī's opponent states that "analogy (*qiyās*) is a firmly established type of knowledge regarding which the people of knowledge have reached consensus that it is true (*ḥaqq*)."[213]

Al-Shāfiʿī's Method of Legal Analogy

Al-Shāfiʿī differs from Abū Ḥanīfa, Mālik, and Ibn Ḥanbal in the manner in which he applies analogies, the authority he gives them, and the role they play in his overall strategy of legal interpretation (*ijtihād*). His referential analogies, as Joseph Lowry states, constitute "a carefully defined method for linking a rule to a revealed text in particular difficult cases."[214] The underlying rationale (*ʿilla*) or signifying analogy, upon which the essential similarity between the analogue and the new precedent is based, must be explicitly deduced from authoritative revealed texts, which, for al-Shāfiʿī, include authentically transmitted connected solitary *ḥadīth*s based on his well-known *ḥadīth*-principle. This point constituted the fundamental methodological difference between his doctrine of analogy and the parallel methods of Mālik and Abū Ḥanīfa. It also distinguished him from Ibn Ḥanbal who honored al-Shāfiʿī's *ḥadīth* principle and applied it in practice but modified it to suit his unique methodology that included a myriad of other legitimate supplementary legal texts, including weak *ḥadīth*s and post-Prophetic reports.[215]

The analogical techniques of Abū Ḥanīfa and Mālik, are strikingly similar despite certain fundamental differences. Both jurists reason from standard authoritative analogues. In the case of Abū Ḥanīfa, these are primarily normative legal texts taken from the Qurʾān and well-known *ḥadīth*s under the aegis of the basic Kufan principle of the generalization of legal proofs (*taʿmīm al-adilla*). In Mālik's case, he too references established revealed texts but frequently bases his analogies on chains

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[212] Muḥammad ibn Idrīs al-Shāfiʿī, *Kitāb al-radd ʿalā Muḥammad ibn al-Ḥasan*, 7:277–302; 280, henceforth cited as al-Shāfiʿī, *al-Radd*; cf. Zafar Ansari, "Islamic Juristic Terminology before Shāfiʿī: A Semantic Analysis with Special Reference to Kūfa," 19:255–300; 288–92.

[213] Al-Shāfiʿī, *Jimāʿ al-ʿilm*," 258 (6).

[214] Lowry, "Four Sources?," 47.

[215] Aḥmad ibn Ḥanbal accepted connected solitary *ḥadīth*s as independently valid analogues. But he accepted a much wider variety of transmitted texts as potential analogues and precedents of law. In application, analogy played a less prominent role in his method, simply because he had recourse to such a rich body of texts and only resorted to analogy when he failed to find a relevant precedent in them. See ʿAbd-Allāh al-Turkī, *Uṣūl*, 434, 559, 561–62, 573, 576.

of conclusive prior analogues (*al-qiyās ʿalā al-qiyās*) or directly on established Medinese legal precepts (*al-qiyās ʿalā al-qawāʿid*). As we have seen, both jurists marginalized the solitary connected *ḥadīth* because of its propensity to take on non-normative (irregular [*shādhdh*]) legal implications, unless, in Mālik's case, it agreed with Medinese praxis.[216]

Al-Shāfiʿī does not stipulate absolute similarity between his primary textual reference (the analogue) and the unprecedented matter to which the ruling (analogy) is applied. Lack of thoroughgoing likeness between an analogue and an unprecedented question leads to conjecture in the conclusion, especially when the analogue is a solitary *ḥadīth*. Al-Shāfiʿī acknowledged the conjecture implicit in his analogical method, but he states in *Kitāb jimāʿ al-ʿilm* that the distinctive position of the proponents of tradition (*ahl al-ḥadīth*) was to accept isolated reports (*khabar al-khāṣṣa*) as a valid basis of analogy despite the conjecture they entailed.[217]

While conceding that conjecture is inherent in analogies based on solitary connected *ḥadīth*s, al-Shāfiʿī contends that it is a religious duty to adhere to such legal deductions in the absence of stronger and more explicit revealed texts. In his view, to follow solitary *ḥadīth*s in such matters is both legally imperative and morally correct. It essentially constitutes an act of worship by obeying God, who, as al-Shāfiʿī frequently mentions, left no one at liberty to follow personal whim. To reach legal decisions based on something other than a clear legal text or an analogy based on an explicit text is a moral, not just a legal issue. In his view, failure to follow revealed texts is closer to iniquity (*ithm*) than to err because of having followed them. Legal reasoning, he asserts, must always be based

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[216] See Muḥammad ibn Idrīs al-Shāfiʿī, *Kitāb ibṭāl al-istiḥsān*," 7:267–77; 270–71, 272, henceforth cited as al-Shāfiʿī, *Ibṭāl*; idem, *al-Risāla*, 39, 25; idem, *Kitāb Jimāʿ al-ʿilm*," 252, 253, 254, 256, 258; Abū Zahra, *al-Shāfiʿī*, 299–301.

[217] Al-Shāfiʿī, *Jimāʿ al-ʿilm*," 256. Al-Shāfiʿī does not claim that following solitary *ḥadīth*s and making analogies on their basis constitutes definitive knowledge. Rather, he readily admits that his position on solitary reports, which he shared with the proponents of tradition, put them at variance with rationalist jurists who insisted upon definitive knowledge (*al-iḥāṭa*) in legal reasoning He draws a distinction between definitive knowledge, on the one hand, and overt knowledge (*ʿilm al-ẓāhir*), which is based on outwardly apparent meanings as produced by solitary *ḥadīth*s (Abū Zahra, *al-Shāfiʿī*, 298–99). He contends, however, that definitive knowledge is possible when the rationales of legal *ḥadīth*s are explicitly set forth within the text or when a ruling in an authoritative legal text is applied directly to matters that fall within the scope of the text itself, i.e., when there is complete similarity between the analogue and the new case to which it is applied (see Abū Zahra, *al-Shāfiʿī*, 298–301).

directly on revealed precedent or indirectly on analogy based on a standing textual reference (*ʿayn qāʾima*), which he defines as Qurʾānic texts and sound *ḥadīth*s.[218]

Al-Shāfiʿī's insistence on analogy as his sole rational tool of legal deduction is directly tied to his rejection of discretion, preclusion, and other manners of legal reasoning not based on explicit texts, which, in his opinion, are even more conjectural than isolated *ḥadīth*s and the analogies derived from them. His position is not surprising since application of such inferential principles generally leads, by their very nature, to conclusions that are contrary to the overtly literal implications of explicit texts. Al-Shāfiʿī judges such conclusions to be arbitrary and impermissible.

A significant portion of al-Shāfiʿī's work *Kitāb ibṭāl al-istiḥsān* is directed toward the Medinese (not just the Kufans, as often assumed). He describes as forbidden (*ḥarām*) the Medinese principle of preclusion, which he refers to as "*dharāʾiʿ*," because it contradicts the overt (*ẓāhir*) meaning of established legal texts.[219] Reasoning such as discretion and preclusion, he argues, is impermissible because "to follow what one arrives at on the basis of discretion (*al-qawl bi-mā istaḥsana*) constitutes an opinion the jurist has innovated (*yuḥdithuhu*) without basing it on an earlier precedent (*mithāl sabaqa*) [in revealed texts]."[220] In al-Shāfiʿī's view, such legal reasoning is intrinsically subjective. It is incapable of providing an objective criterion (such as he believes is provided by explicit legal texts) in terms of which others may clearly differentiate right opinions from wrong.[221] Because such reasoning is subjective and arbitrary, in al-Shāfiʿī's view, to permit a single jurist to apply it is tantamount to permitting other jurists to use it differently for arriving at contrary conclusions.[222]

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[218] See Abū Zahra, *al-Shāfiʿī*, 298–301.

[219] See al-Shāfiʿī, *Ibṭāl*, 269–70. These and several other passages of the work are directed toward the Medinese, who rely heavily on both discretion and preclusion. The examples that al-Shāfiʿī refers to—especially in matters of buying and selling (where Mālik applies the principle of preclusion extenstively)—are distinctively Mālikī. Al-Shāfiʿī concedes that he cannot agree with "our companion" (*ṣāḥibunā*), i.e., Mālik, his former teacher. He adds that al-Shaybānī's manner of reasoning can also be applied against Mālik in such cases (see al-Shāfiʿī, *al-Radd*, 300).

[220] Al-Shāfiʿī, *al-Risāla*, 25.

[221] Al-Shāfiʿī, *Jimāʿ al-ʿilm*, 253; idem, *Ibṭāl*, 272, 273.

[222] Al-Shāfiʿī, *Ibṭāl*, 273. By making legal reasoning a matter of religious morality and divine veneration, al-Shāfiʿī introduces an element of voluntaristic subjectivity, which, by its nature, restricts the pragmatic rationality of the law. Maʿrūf al-Dawālībī observes that al-Shāfiʿī's insistence on literal adherence to overt legal texts and his rejection of other forms of abstract legal reasoning run parallel to the later voluntaristic theology of Abū al-Ḥasan al-Ashʿarī (d. 324/935) (see al-Dawālībī, *Madkhal*, 174; Abd-Allah, "*ʿAmal*," 270).

In the view of Mohammad Fadel, al-Shāfiʿī's premise is essentially that:

> Islamic law in the first instance means rules derived from revelation. Thus, the pedigree of a rule depends on its affiliation to revelation. This leads to a natural hierarchy of sources (s. *dalīl*/ pl. *adillah*) into those that are strictly revelatory, i.e. Qurʾān, Sunnah, Ijmāʿ, and those that are derivative, e.g., *qiyās, istiḥsān* [discretion], *maṣlaḥah* [the general good] and *istiṣḥāb al-ḥāl* [the presumption of continuity].[223]

For al-Shāfiʿī, analogies are the least authoritative source of the law. One resorts to them only in the absence of an explicit legal text, and one may not make a legal analogy in contradiction to a legal text that is directly applicable.[224] Joseph Lowry contends similarly that, from the perspective of al-Shāfiʿī, Islam was "first and foremost a religion of laws." Islam's perfection and ultimate truth emerge only in the "fundamentally legislative design" of its authoritative revealed texts. In al-Shāfiʿī's legal thought the explicit clarification of the meanings of texts (*al-bayān*) constituted the

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Wael Hallaq suggests that al-Shāfiʿī may have been the first Muslim jurist to "articulate the notion that Islamic revelation provides a full and comprehensive evaluation of human acts." Kevin Reinhart classifies al-Shāfiʿī's position that "justice is to act only in obedience to God" as "theistic subjectivism." He notes that theistic subjectivism, taken to its literalist extreme—as in the case of Dāwūd al-Ẓāhirī—meant that "what was not explicitly covered by Revelation had no moral quality" (Reinhart, *Before Revelation*, 12). By contrast, it can be argued that the focus in Mālikī and Ḥanafi jurisprudence on principle and the modification of precept according to circumstance was predicated on the perception that human acts in and of themselves have inherent and rationally identifiable moral qualities as laid down by revelation but going beyond strict adherence to outward form. General legal precepts must occasionally be modified through special allowances or disallowances in order to keep them consistent with the law's ultimate purposes.

Mālik's approach to law contrasts with Wael Hallaq's assertion that "the most fundamental principle of Sunnī jurisprudence" was the conviction that "God decides on all matters and that the human mind is utterly incompetent to function as a judge in any human act" (Hallaq, *History*, 135; cf. Jonathan Brockopp's critique of Hallaq's thesis in Brockopp, "Competing Theories," 15). Such theistic subjectivism—predicated on the conviction that formal outward conformity to inscrutable divine will is the exclusive pivot of ethical and legal conduct—is a valid description of literalist readings of the law such as those of Dāwūd al-Ẓāhirī. It does not accurately reflect either the Ḥanafī or Mālikī perspectives, nor does it do justice to the legacy of Ḥanbalī jurisprudence and the greater tradition of al-Shāfiʿī himself, which ultimately played a leading role in developing the science of legal maxims (*al-qawāʿid al-fiqhiyya*) (see Heinrichs, "*Qawaʿid*," 367–72, 375).

223 Fadel, "'*Istiḥsān*," 163.

224 See Abū Zahra, *Mālik*, 273; idem, *al-Shāfiʿī*, 298–301. Ibn Ḥanbal is not radically different from al-Shāfiʿī in ranking analogy low in the hierarchy of his multiple sources. As indicated, Ibn Ḥanbal only resorts to analogy when absolutely necessary. But because he draws on an immensely wide corpus of texts and prefers to apply textually based legal precedents, even if they are of questionable authenticity, he resorts to analogy only occasionally (ʿAbd-Allāh al-Turkī, *Uṣūl*, 573, 576). In this regard it may be said that analogies have less authority for Ibn Ḥanbal than for al-Shāfiʿī.

cornerstone of his "juridical theology." For this reason, Lowry suggests, al-Shāfiʿī did not welcome dissent among the jurists but regarded it as "illusory" and proposed his methodology based on the clarification of textual meaning (*al-bayān*) as an alternative.[225]

In reality, there was no stark difference between al-Shāfiʿī and the other Imams regarding Islam as a religion of laws. All of them looked upon Islam as an all-embracing fabric of meaningful rules and purposeful legislation. Each would have agreed that its ultimate truth and perfection emerge in its "fundamentally legislative design." But they disagreed on the weaver and loom, the thread, and the weave. Abū Ḥanīfa and al-Shāfiʿī plied their sources in verticle hierarchies. Mālik and Ibn Ḥanbal interwove them in horizontal synergies. The four masters differed on the number and nature of spools they used of textual and non-textual threads, and they utilized the shuttle of reason in different ways. Mālik and Abū Ḥanīfa construed legal reasoning in a manner that contemplated revelation's ultimate purpose and design as implicitly entailed in its sources. Al-Shāfiʿī and Ibn Ḥanbal adhered closely to the established pattern of revelation itself as explicitly indicated in texts.

Analogical Reasoning on the Basis of Earlier Analogies and Standing Precepts

Mālik and Abū Ḥanīfa regularly formulated analogies directly from their respective bodies of standard legal analogues. In Mālik's case, these referents were often earlier analogies or precepts (*qawāʿid*) of law.[226] Abū

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[225] Lowry, "Four Sources?," 49.

[226] Al-Shāfiʿī insists that the results of an analogy cannot be regarded as a definitive legal text (*naṣṣ*) upon which other analogies can be based (Lowry, "Four Sources?," 36). For al-Shāfiʿī, one must always return to the original analogue when making analogies. This rule does not hold for Mālik. Mālikī jurisprudents hold that Mālik made analogies on the basis of earlier analogical conclusions. Neither he nor they believed it was required to return to the initial analogue. Any sound analogical deduction constituted a valid analogue for future applications (see Abd-Allah, "*ʿAmal*," 241–45). This is a distinctive characteristic of Mālik's concept of analogy among the four schools in the view of later jurisprudents. Ibn Rushd al-Jadd asserts that it is a matter of consensus among the Mālikīs that this type of analogy is valid (Ibn Rushd [al-Jadd], *al-Muqaddimāt*, 1:22–23; Abū Zahra, *Mālik*, 348). It differs from the rules of analogy among Ḥanafī and Shāfiʿī jurisprudents, who dissent among themselves regarding what constitutes a valid analogue but agree that one must always return to the original analogical base in new cases (see Abū Zahra, *Mālik*, 348; idem, *Abū Ḥanīfa*, 325, 337–39; cf. Shaʿbān, *Uṣūl*, 118, who mistakenly includes the Mālikīs in this consensus).

Ibn Rushd al-Jadd asserts that Mālik only regards it as legitimate to make analogies on the basis of new analogical extensions when they are conclusively sound. Consequently, Ibn Rushd continues, Mālikī jurisprudents do not regard the new analogy which is the

Ḥanīfa's custom, as has been amply indicated, was to extrapolate new rulings by referencing an approved body of well-known, generalized standard legal texts. Their distinctive methods of analogy, not their use of analogy *per se*, constituted a significant jurisprudential difference between them and the analogical reasoning of al-Shāfiʿī, Ibn Ḥanbal, and many other proponents of tradition (*ahl al-ḥadīth*), as we have seen. Mālik's analogue- and precept-based technique was abstract in the sense that it was based on broad legal ideas informed by tradition. The analogies of the other jurists, including Abū Ḥanīfa, were textually referential, since they relied on identifiable texts.

Robert Gleave notes regarding Sunnī usage of the word "analogy" (*qiyās*) that "ubiquitous translation of the term as 'analogy' is insufficiently nuanced." He observes that Sunnī jurists sometimes apply the word "analogy" to unmistakenly non-analogical modes of reasoning.[227] The complicated semantics of "analogy" as an Islamic legal concept are nowhere more evident than in Mālik's analogue- and percept-based analogies, which often do not fall within the parameters of strict analogical reasoning. Mālik's method of analogy generally links new rulings across the board (horizontally) to the corpus of Medinese law by reference to its established precepts and principles, although he also makes analogies on the basis of specific texts as well.[228] But Mālik's most distinctive analogies are logical applications of the law as a system of articulated statutes such as, for example, his repeated reference in inheritance law to the precept that "inheritance may only be distributed on the basis of certainty."[229]

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basis of further ones as constituting a derivative conclusion (*farʿ*). Rather, they regard the new analogical conclusion to constitute a basic analogue (*aṣl*) with independent validity. The term "derivative conclusion" is applied in Mālikī jurisprudence, according to Ibn Rushd, only when the results of legal reasoning lack conclusiveness (*qaṭʿ*). In that case, new analogies would not be valid if based on a doubtful (*ẓannī*) derivative. Ibn Rushd al-Jadd continues to assert that non-Mālikī jurists are mistaken in their insistence that analogies only be performed on the basis of the original analogues as set forth in the Qurʾān and *sunna* (Ibn Rushd [al-Jadd], *al-Muqaddimāt*, 1:22–23).

Muḥammad Abū Zahra emphasizes the practical advantage of such extended analogies since they multiply the number of concrete precedents and parallels to which the jurisprudent may refer in novel cases (Abū Zahra, *Mālik*, 348). Theoretically, all derivative conclusions from an original analogue should share the same rationale and lead to similar lines of deduction, but the full implications of that rationale may not be as readily apparent in the original analogue as they become through the process of derivative deduction.

227 Gleave, "Refutations," 267.

228 See *Muw.*, 1:105; 2:541; 2:772, 789. See also Abū Zahra, *Abū Ḥanīfa*, 325; Shaʿbān, *Uṣūl*, 149–53.

229 The precept that inheritance may only be distributed on the basis of certainty underlies the procedures followed in several instances of Medinese praxis and includes aspects of early Medinese usage (*Muw.*, 2:520; cf. *Mud.*, 3:81, 84, 85). Mālik cites various precedents

Although the jurists include Mālik's precept-based deductions under the generous blanket of what they term analogy, it might be more accurate to describe his manner of reasoning simply as application of general rules to particular cases.[230] Since each particular case is new, the crucial question is whether the unassimilated particular actually falls under the relevant general rule or whether there is some reason to limit its application in the specific case.

For Mālik, the analogues and precepts which he references in analogies are sometimes set forth without reference to Qurʾānic texts, *ḥadīth*, or other textual sources of law. Medinese praxis plays a conspicuous role in his determination of the content and scope of the precepts to which he subscribes. It is also on the basis of Medinese praxis that he establishes the authority of any textual references he may use and the details of the precepts that they fully or partially embody. Regarding Mālik's detailed precept on selling date harvests in advance, for example, the relevant *ḥadīth*, which places restrictions on such sales, although authentic from Mālik's perspective, provides only an incidental part of the overall precept, which Mālik set forth in full on the basis of praxis.[231]

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taken from Medinese praxis regarding the mutual inheritance of kinsmen killed simultaneously in battle and the rights and limitations of illegitimate children to inherit from their adopted fathers when their biological fathers are unknown (*Muw.*, 2:520–22, 741). Ibn al-Qāsim makes repeated analogical reference to this precept in the *Mudawwana* in accounting for Mālik's reasoning regarding a variety of other unprecedented cases. Ibn al-Qāsim relies upon the precept himself in giving legal interpretations for new questions he has not heard from Mālik. In fact, the particulars of some chapters on inheritance in the *Mudawwana* virtually revolve in their entirety around this precept (see *Mud.*, 3:81–85).

[230] As will be noted, Imāmī jurisprudence invoked the principle of the "transference of the ruling" (*taʿdiyat al-ḥukm*) as its technique of legal extention in unprecedented areas (Gleave, "Refutations," 287). This term expresses well Mālik's technique of making horizontal applications of precepts (rulings) to new legal questions, which Sunnī jurists refer to as precept-based analogy (*al-qiyās ʿalā al-qiyās*; *al-qiyās ʿalā al-qawāʿid*). The two procedures merit comparative study.

[231] See Abd-Allah, "*ʿAmal*," 135–44. In this example, which is discussed later, Mālik accepts as authentic a solitary *ḥadīth* that prohibits selling dates before the season's crop has appeared on the palm trees and begun to redden (*izhāʾ*). On the basis of Medinese praxis, Mālik elaborates the full scope of the precept and places the *ḥadīth* in a context that is not indicated by its semantic range. He asserts that the prohibition mentioned in the *ḥadīth* pertains only to date producing areas that are small and isolated and do not yield predictable annual date harvests. He asserts further on the basis of praxis that the prohibition in the *ḥadīth* does not pertain to well-watered and long-established date-producing lands like the fertile oases of Medina or the Nile valley (see *Mud.*, 3:119, 121–22). The fully fleshed out legal principle as Mālik elaborates it goes far beyond the *ḥadīth* and places it on the periphery of the argument. The text remains a useful ancillary but not an independent legal argument. It reflects limited aspects of the relevant precept but hardly constitutes a universal statement of the law.

The questions in the *Muwaṭṭa'* which Mālik indexes by citing his terminological references are often set forth in the form of general legal analogues and precepts. As a rule, they have greater breadth and provide considerably more information than what can be deduced from the accompanying textual references that Mālik and other early jurists cite. When these precepts are *amr*-terms such as AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*), A-XN (the precept without dissent among us; *al-amr al-ladhī lā ikhtilāf fihi ʿindanā*), AMN-X (the agreed precept without dissent among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā wa al-ladhī lā ikhtilāf fihi*), Mālik utilizes the precepts as normative, analogical legal references. He extends them by further analogy or simply applies them to relevant questions of law by direct statutory application. Both manners of reasoning are well attested in the *Muwaṭṭa'*.[232]

One of the remarkable characteristics of Mālik's legal reasoning in the *Muwaṭṭa'* is the relation between his *sunna*-terms and standard precept-based legal analogies. Mālik cites his *sunna*-terms as red flags to demarcate areas of the law where such analogies may not be extended.[233] In case

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[232] See Abd-Allah, "*'Amal*," 619–21, 673, 693–94, 703, 740, 743–44, 750–51. Because Mālik makes a point in the *Muwaṭṭa'* of articulating the law in terms of its general precepts, the *Muwaṭṭa'*, as earlier noted, may be regarded as a source book of the basic precepts of the Medinese school upon which legal interpretation (*ijtihād*) was meant to be performed.

For example, Mālik relates in the *Muwaṭṭa'* that ʿAlī sold a male camel named "ʿUṣayfīr" (little sparrow) for twenty camels (*baʿīr*). Another report states that ʿAbd-Allāh ibn ʿUmar bought a riding camel (*rāḥila*) for four camels (*baʿīr*) which he contracted to have delivered at a certain place on a given date. Mālik then explains the pertinent *amr*-precept (AMN) by reference to Medinese praxis. Such transactions, he asserts, are permissible (i.e., not contrary to the Prophetic prohibition of usurious bartering in kind [*ribā al-faḍl*]) if the uses of the animals bartered are distinctly different such as war and pack camels (*Muw.*, 2:652–53). Having articulated the precept fully to reveal its rationale, Mālik makes frequent analogical references to the same precept in the *Muwaṭṭa'* to support the validity of other types of barter in metals, agricultural produce, and so forth, many of which are also part of Medinese praxis (*Muw.*, 2:661, 662, 610).

Similarly, the *Mudawwana* treats the precept of defining personal wealth upon which the alms tax is due by repeatedly mentioning the precept that accretions (*fawā'id*) to base capital upon which the tax is due must be in one's possession for at least a full lunar year before the tax is due on those accretions. The work gives numerous detailed examples of this principle in application to unusual questions. Ibn al-Qāsim clarifies explicitly that the precept of accretion constituted the analogue (*maḥmal*) for all such cases (*Mud.*, 1:229–30).

[233] See Abd-Allah, "*'Amal*," 581–82, 660–61, 667, 716–18.

Such use of the *sunna* in Mālik's thought is exemplified, for example, in his position on the validity of the testimony of a solitary witness supported by the plaintiff's oath in the absence of written proof or the testimony of a second corroborating witness. The procedure is contrary to analogy with standard witness law. The legal texts that Mālik cites provide none of the crucial details regarding his application of the precept. As is often the

after case, Mālik invokes his *sunna*-terminology as validated by Medinese praxis to restrict the application of analogies in general matters where they would logically have been applied, if it were not for the delimitations dictated by the *sunna*. In many cases, Abū Ḥanifa will have applied analogy to these very areas on the basis of his standard generalized proof texts. Mālik usually shares the identical texts but does not generalize them in the same absolute fashion.

Given Mālik's extensive use of analogy and his attention to the legal opinions of Kufa and Abū Ḥanīfa in general, the *sunna*-terms of the *Muwaṭṭa'*,

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case, Mālik derives those details from Medinese praxis. He shows, first of all, that use of the single witness is legally valid, although it is contrary to the standard procedure of relying on at least two witnesses and runs contrary to other laws of evidence. He elaborates the procedure to be followed but adds the stipulation that this rule applies exclusively to trade, not to questions of marriage, divorce, slander, criminal punishments, and so forth (see Abd-Allah, "*'Amal*," 141–43, 571–76; *Muw*., 2:721–25; *Muw*., [Dār al-Gharb], 2:263–67; *Muw.* [Abū Muṣ'ab], 2:472–73; *Muw.* [Suwayd], 230–31; *Mwt.* [*Riwāyāt*], 3:529–36; *Mud.*, 4:70–71; *Mud.* [2002], 8:504–08).

In the following example, Mālik responds to a question about the rights of wives in a plural marriage on the basis of the precept-based analogue that the legitimate rights due to one's legal status whether as a business partner, a free person or slave, a husband or wife, and so forth must be preserved. A polygamous husband, according to Mālik, must treat his wives equally in material things. He must also alternate the nights he spends with each of them on an equal basis. Each wife must have the husband's company for the night that is regularly hers, whether she is a free woman or a slave, menstruating (in which case sexual intercourse would not be permissible) or not, healthy or sick, sane or insane. If, however, a husband should stipulate in a marriage contract with a woman that he will not treat her equally with her co-wives, the contract is to be annulled if brought to light before consummation of the marriage. If the marriage is consummated, however, it is to be regarded as valid, but the stipulation of unequal treatment is void. A wife may agree with her husband informally that she not be given equal treatment. Such a stipulation may not, however, constitute a valid part of a legal contract, and she maintains the right to retract her informal agreement at any time (*Mud.*, 2:195–99). Regarding the legal status of co-wives in plural marriages, Mālik was once asked if the wives had the right upon a husband's return from a journey on which he had taken only one of his wives to demand that he now spend an equal amount of time with each of them to the exclusion of the wife who accompanied him. Basing his reasoning on precept-based analogy, Mālik rules that they do not have that right. Ibn al-Qāsim explains that Mālik likened the demand of the co-wives in this instance to the case of a master owning a run away half-emancipated slave. Under usual circumstances, the half-emancipated slave would work alternately one day for his master and one day for himself until his earnings allowed him to purchase his full freedom. In the case of the runaway slave, however, Mālik asserts that the master has no right to compel the half-emancipated slave to work fulltime for him until he compensates him for the days of his absence. Mālik explains that if the master were granted his demand, it would be inconsistent with the slave's legal status as half-emancipated. On the contrary, Mālik states, the slave would now become a full slave. This, Ibn al-Qāsim states, was Mālik's rationale (*'illa*) in the case of the co-wives. To deprive a co-wife who had accompanied her husband on a journey of her right to equal cohabitation would be inconsistent with her legal status as a wife (*Mud.*, 2:198).

in particular, are telling examples of the broad nature and authoritative primacy of analogy in Mālik's legal reasoning. The implication of Mālik's delimitation of analogies through reference to the *sunna* is that, if it were not for the imperative of the *sunna* and its unique independent authority, which exempts these rulings from analogy, they would have fallen under the rubric of the standard analogy as a matter of course.[234]

Mālik's use of *sunna*-terms to mark off the bounds of analogy is strikingly similar to statements attributed to his Medinese contemporary Jaʿfar al-Ṣādiq, who contended that applying analogy (*qiyās*) to matters of *sunna* would destroy the religion. In place of analogy, Imāmī jurisprudence invoked the principle of the "transference of the ruling" (*taʿdiyat al-ḥukm*) as its technique of legal extention in unprecedented areas.[235] The Shīʿī term "transference of the ruling" appears similar to Mālik's technique of making horizontal applications of precepts (rulings) to new legal questions. Robert Gleave contends that Jaʿfar was, in fact, condemning the use of analogy across the board "without regard to restrictions imposed by other revelatory material."[236]

Christoper Melchert observes that Aḥmad ibn Ḥanbal took a similar position regarding the necessity of marking off the limits of analogy so that it not impinge upon the *sunna*. Ibn Ḥanbal declared that, "There is no *qiyās* in the *sunna*, and examples are not to be made up for it" (*wa laysa fi al-sunna qiyās wa lā yuḍrab lahā al-amthāl*).[237] Such reservations about analogy as potentially encroaching on the *sunna* bring to mind the statement of Mālik's teacher Rabīʿa in defense of Medinese praxis vis-à-vis the non-normative indications of solitary *ḥadīth*s. To follow such *ḥadīth*s, Rabīʿa contended, when contrary to established praxis "would tear the *sunna* right out of our hands."[238]

Legal Instruments Based on Inference (*Istidlāl*)

Each of the following three legal instruments—discretion (*istiḥsān*), preclusion (*sadd al-dharā'iʿ*), and the unstated good (*al-maṣāliḥ al-mursala*)—has the authority to qualify standard legal precepts, draw exceptions to

234 See Abd-Allah, "*ʿAmal*," 423, 549–582.
235 Gleave, "Refutations," 287.
236 Gleave, "Refutations," 269–70.
237 Melchert, *Formation*, 10.
238 ʿIyāḍ, *Tartīb*, 1:66.

them, and make unprecedented additions. Al-Qarāfī refers to them as modes of inference (*istidlāl*) to distinguish them from analogical reasoning, which involves specific application of formal texts or, in the Mālikī school, a clearly defined series of legal analogues and precepts.[239] Each of these three methods of inference has distinctive properties distinguishing it from the others. They can be easily identified in Mālik's legal reasoning once their properties are known. Not only are all three common in Mālik's application of the law, they are paramount. They function with such independent authority as to take priority over strict analogical deductions or direct applications of standard, well-established precepts whenever the conclusions of such analogies and standard rulings become harmful or otherwise inappropriate due to exceptional circumstances.

Sherman Jackson refers to these inferential legal instruments as "safety-net principles."[240] Mālik's legal reasoning is predicated on the juristic conviction that broad standard rules constitute guidelines that must sometimes be qualified, restricted, or suspended under special circumstances to meet the broader purposes for which they were legislated.[241] Such exceptions do not infringe upon the integrity of standard precepts but bring to light the proper scope of their legal application and elucidate their ultimate purpose.[242]

Reflecting on the nature of legal theory, Jackson notes that, by its nature, theory is filled with a "seemingly endless concatenation of exceptions, adjustments and ad-hoc qualifications invoked in order to sustain

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[239] Al-Qarāfī, *al-Dhakhīra* (Cairo), 1:147–48.

[240] Jackson, "Fiction," 195. Ignaz Goldziher holds that the introduction of analogy into Islamic law, which he deemed a later development, put formal limits on the "indiscriminate application" of considered opinion; he contends that discretion had the consequence of "canceling" such limits in favor of "uncontrolled" considered opinion (Goldziher, *Ẓāhirīs*, 12). The Shāfiʿī interlocutor in *Ikhtilāf Mālik* would have agreed; the Ẓāhirīs would also have concurred, while applying the same criticism to analogy, which they rejected. Goldziher's perspective fails to capture the position of the Mālikīs, Ḥanafīs, or Ḥanbalīs in the formative or post-formative periods. Goldziher asserts that the Ḥanafī school recognized discretion as a necessary "concession" that modified the methodological rigor of analogy, because they questioned the soundness of applying analogy in a rigorous manner, which sometimes violated the spirit of the law (Goldziher, *Ẓāhirīs*, 22).

[241] The delimitation of standard analogical precepts by reference to the authority of non-analogical *sunna*-based precepts is cognate to these legal instruments in terms of delimiting and marking off the scope of general analogical precepts. *Sunna*-based precepts differ in that they establish new legal norms and not exceptions to standing rules.

[242] Cited in Heinrichs, "*Qawāʿid*," 368. Heinrichs cites al-Shāṭibī's observation that "exceptions do not invalidate a general rule, because the stray particulars do not form a second general rule in opposition to the first." On the contrary such exceptions prove the validity of the rule to which they draw exception.

the appearance of a continued commitment to theory, either horizontally (across disparate areas of law) or vertically (to accommodate change in the face of an ostensibly unchanging theory)."[243] Similar conclusions may be applied to Mālik's understanding of the nature of legal precepts, but, whereas Jackson opposes the ideality of "theory" to the pragmatic reality of "fact," the *ad hoc* qualifications that Mālik makes to strict application of legal precepts do not contradict the precepts themselves. They do not constitute an adjustment of legal reality to theory but clarify the true scope of such legal precepts in terms of the overriding principles of the law as indicated in conception and theory.[244] Mālik's legal reasoning is systematic in this regard and not arbitrary. Its focus, however, is never on the letter of the law but on its overall purpose as regards specific situations.[245] David Santillana states that such principles of inference carry the implication that God instituted His laws for the wellbeing of society and the individual, "Human beings were not made for the law. The law was made for human beings."[246]

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[243] Jackson, "Fiction," 184.

[244] Santillana regarded discretion and legislation on the basis of the general good (*al-istiṣlāḥ*) as "subsidiary rules of law" (*regole sussidiarie di diritto*). He notes that they are used in special cases when the law ceases to be appropriate because of exceptional circumstances. The reasoning behind them is not tied to the specific precedents of particular cases but to the law taken as a whole (*tota lege perspecta*). He compares them to "juristic analogy" (*analogia iuris*) in Italian law as opposed to strict "legal analogy" (*analogia legis*). When strict legal analogy ceases to be appropriate, recourse is taken to juristic analogy, which is based on the "spirit of the law" as taken in its entirety, that is, its general principles which predominate theoretically over the totality of positive law in its details. Santillana asserts that for the jurist to follow his conscience in such matters is not arbitrary or subjective. It constitutes prudent judgment (*prudente arbitrio*), based on profound meditation of the law in its totality. It is an attempt to discover the rationale of utility, which is the spirit that informs the entire juridical system" (Santillana, *Istituzioni*, 1:55–57 and 1:55 note 161).

[245] In logic, classifications cannot be meaningful if they are not correctly divided into subclasses in as exhaustive a manner as possible. Fallacious classifications arise when things are categorized under headings where they do not belong. Mālik's use of discretion, preclusion, and the unstated good are legal and not logical exercises. Yet, in practice, they have the effect of contradicting the "logical" all-inclusiveness of general legal statements. They exclude exceptional issues as subcategories of rulings under which in reality they do not belong. They show that the apparent resemblances between those exceptions and the general rule are unimportant and that the exceptions pertain in fact to other categories of law that may not be readily apparent. We will see under the topic of preclusion that Mālik excludes certain types of marriage from inheritance rights. In his view, such dubious marriage contracts are not strictly subcategories of marriage law but overlap with inheritance law where they constitute violations, in which ostensibly valid marriage contracts have been manipulated as means to an illegitimate end.

[246] Santillana, *Istituzioni*, 1:55–57.

As we have seen, al-Shāfiʿī regarded all inferential legal instruments as invalid and essentially arbitrary.[247] Abū Ḥanīfa rejected preclusion but relied heavily upon discretion in its uniquely Ḥanafī form.[248] Abū Ḥanīfa's position on the unstated good (*al-maṣāliḥ al-mursala*) as applied in Mālik's legal reasoning is not altogether clear. Many contend that Abū Ḥanīfa did not uphold this principle or anything clearly cognate to it, but that may not be fully true. The Ḥanafī principle of necessity-based discretion (*istiḥsān al-ḍarūra*), which will be discussed shortly, bears certain similarities to Mālik's application of the unstated good.[249]

Discretion, preclusion, and the unstated good occur in the legal reasoning of Ibn Ḥanbal. His use of preclusion is particularly well evidenced and similar to that of Mālik. Discretion is an accepted feature of Ḥanbalī legal reasoning but is one of the least authoritative principles to which Ibn Ḥanbal subscribed. Hence, in practice at least, his notion of discretion appears notably different from Mālik's frequent application of the principle, which gave it conspicuous prominence in Mālikī positive law. Ibn Ḥanbal's application of the unstated good is also less dynamically authoritative than Mālik's use of it, since Ibn Ḥanbal does not allow it to take priority over explicit legal texts.[250]

Discretion and its cognate principles of preclusion and the unstated good are only arbitrary from the perspective that human beings lack the independent or assisted capacity to assess the moral and ethical qualities of legal acts in application or the view that justice is done in all cases by formal application of the law regardless of circumstance. From the stand-

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[247] See Abd-Allah, "*ʿAmal*," 220–22, 226, note 2.

[248] See Abd-Allah, "*ʿAmal*," 220–21, note 3, 264–65.

[249] Al-Zarqā, *Fiqh*, 1:87, 89 note 1; 1:123–24; Abd-Allah, "*ʿAmal*," 257–58.

[250] See ʿAbd-Allāh al-Turkī, *Uṣūl*, 515, 461, 474, 414–16, 419, 424, 430–31, 434–36; cf. Abū Zahra, *Ibn Ḥanbal*, 297–328. See Abd-Allah, "*ʿAmal*," 262, 269. Wael Hallaq mentions Aḥmad ibn Ḥanbal along with Dāwūd al-Ẓāhirī as part of the "anti-*raʾy*" movement. Hallaq links these two very different jurists primarily on the presumption that both rejected analogy, although he acknowledges that Ibn Ḥanbal only practiced it when absolutely necessary, while Dāwūd "rejected it categorically." Linking Ibn Ḥanbal with Dāwūd obscures the nuanced nature of Ibn Ḥanbal's conservative attachment to the legal traditions of the formative period—especially those of the people of Medina—and the ability of his thought and that of the later Ḥanbalī school to accommodate conflicting points of view in the name of tradition. In all legal questions Ibn Ḥanbal relies primarily on texts and marshals to that purpose the greatest variety of textual materials of any Sunnī Imām. His resources even included the non-textual source of Medinese praxis. Regarding analogy and other forms of considered opinion—discretion, preclusion, and the unstated good—Ibn Ḥanbal resorts to them only when "absolutely necessary" because of the lack of texts, yet he still subscribes to them in principle (see Hallaq, "Master Architect?," 267–68).

point of pragmatic legal reasoning, however, these inferential principles are based on sound considerations, which are abstract criteria based in wisdom and good sense and the capacity of the informed human mind to understand what is or is not in its best interest. Application of these inferential principles requires integrity, sound personal judgment, and an understanding of the implications and consequences of the myriad of circumstances that present themselves in each concrete application of the law.

The position of al-Shāṭibī and other later Mālikī jurisprudents who defended Mālik's reliance on inferential principles has a strikingly distinctive ethical tone. From their standpoint, general texts are instantiations of much broader non-textualized legal truths. Consequently, rigorous application of texts or analogies taken directly from them without view to unique realities on the ground must at times lead to excess and inequity and violate the underlying purposes of the legal system. From this pragmatic point of view, mechanical application of the law can never be a substitute for sound personal judgment and contextual receptivity.

Mālik's Use of Discretion (*Istiḥsān*)

Mālikī legal vocabulary apparently shared the term "*istiḥsān*" (discretion) with the Ḥanafīs from an early period, although the two concepts were distinctly different in practice.[251] Ibn Rushd asserts that discretion

[251] As noted earlier, concepts must not be confused with terminologies that are used to identify and define them. Nevertheless, Wael Hallaq identifies "*istiḥsān*/*maṣlaḥa*" as a shared Ḥanafī-Mālikī legal instrument. He asserts that the Mālikī tradition preferred to refer to its methods of inference as *istiṣlāḥ* (seeking the general good) and *maṣlaḥa* (the general good), not as *istiḥsān* (discretion) (Hallaq, *History*, 131). David Santillana held that both the Mālikīs and Shāfiʿīs upheld the principle of *istiṣlāḥ* (al-Ghazālī, a Shāfiʿī, uses that term in his *Musṭaṣfā* on legal theory). Santillana contends that the Ḥanafīs took a different course, following *istiḥsān* whenever rigorous application of analogy led to self-contradiction and ceased to fulfill its legal purpose (Sanitillana, *Istituzioni*, 1:56).

Hallaq contends that discretion ultimately became acceptable to later Mālikī jurists (as well as Shāfiʿīs and Ḥanbalīs) once the Ḥanafīs had "accommodated" it by linking it with standing textual referents. This Ḥanafī accommodation transformed discretion from an abstract legal principle into a type of inapparent textually based analogy, drawing exception to the standing analogical paradigm as based on standard texts (Hallaq, *Origins*, 145–146). Hallaq consistently describes discretion in strictly Ḥanafī terms as "an inovert form of analogy departing from standard analogy," failing to note its centrality in Mālikī postive law and legal theory (see Hallaq, *History*, 108, 131; idem, "*Uṣūl*," XII: 196). He believes that al-Shāfiʿī's "scathing criticism" of Ḥanafī discretion "dissuaded the Mālikīs from this mode of reasoning" (Hallaq, *History*, 132). In reality, textual "accommodation" of discretion always constituted the Ḥanafī norm and represented the primary difference between Ḥanafī discretion and the principle's mode of employment in Mālikī law.

was more common in Mālik's application of the law than analogy.[252] According to a report attributed to the prominent Egyptian disciple of Mālik, Aṣbagh ibn al-Faraj (d. 225/840), Mālik used to say that discretion (*istiḥsān*) constituted nine-tenths of legal knowledge.[253] Mālik applies the principle of discretion frequently in his positive law, especially in the *Mudawwana*.[254] Based on comparative study of early Islamic positive law in its primary sources, Muḥammad Abū Zahra asserts that Mālik made more frequent use of discretion than Abū Ḥanīfa.[255] Mohammad Fadel notes that, although the linguistic formalism of much later legal theory (*uṣūl al-fiqh*) relegated discretion to being a "subsidiary source of law," it continued to have validity among the Mālikīs, who remained faithful to Mālik's conviction that discretion constituted by far the greater part of legal knowledge.[256]

Mālik's concept of discretion functions as the opposite of preclusion. He uses discretion systematically to permit what ordinarily would not be allowed according to strict application of applicable precepts. He uses preclusion, on the other hand, to prohibit what systematic application of precepts would ordinarily permit. Discretion makes exceptions to general rules on the basis of special, non-normative circumstances that would make strict application of the precepts lead to unacceptable hardship or harm. Preclusion disallows certain actions that the general precept would ordinarily allow due to dubious circumstances. In overruling general precepts and making special allowances, discretion marks off the parameters within which the prohibitions of the precepts were intended to apply. The inverse may be said of Mālik's applications of preclusion.[257]

Abū Bakr ibn al-ʿArabī defines Mālik's concept of discretion as "putting aside the necessary consequences of a legal directive by way of making an exception to it through granting a special license (*tarakhkhuṣ*) because of

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[252] Cited by Ibrāhīm ibn Mūsā al-Shāṭibī, *al-Iʿtiṣām*, 2:321; he does not specify which Ibn Rushd he is quoting.

[253] Cited by al-Shāṭibī, *al-Iʿtiṣām*, 2:320. David Santillana took note of Abū Yūsuf and al-Shaybānī's extensive use of discretion; he notes that Mālik also made extensive use of the principle and regarded it as nine-tenths of the law. Santillana, *Istituzioni*, 1:55–57 and 1:55 note 161; Fadel, "*Istiḥsan*," 161–63.

[254] There is an interesting passage in the *Mudawwana*, in which Ashhab uses the terms reflection (*al-naẓar*) and discretion (*istiḥsān*), and he mentions the validity of two contrary opinions regarding the option to return newly purchased goods, one of the opinions being based on discretion and the other not based on it (see *Mud.*, 3:226).

[255] See Abū Zahra, *Mālik*, 453.

[256] Fadel, "*Istiḥsān*," 176.

[257] See al-Shāṭibī, *al-Muwāfaqāt*, 1:40; 4:205–06.

the contradiction (*muʿāraḍa*) of special circumstances."[258] Similarly, Ibn Rushd defines discretion as "that principle which repudiates (*ṭarḥ*) analogy whenever strict application of analogy will lead to excess (*ghulūw*) and exaggeration (*mubālagha*)."[259] In *Bidāyat al-mujtahid*, Ibn Rushd defines Mālik's concept of discretion as "attention (*al-iltifāt*) to general benefit (*maṣlaḥa*) and justice (*al-ʿadl*)."[260]

Al-Shāṭibī defends discretion on the grounds that one of the ultimate objectives of Islamic law is to remove difficulty and make things as easy for people as possible without violating the general dictates of the law. Only those legal requirements may be regarded as valid by the standards of Prophetic legislation that fall within the capacity of the people to perform without undue difficulty. (Al-Shāṭibī like other Islamic jurisprudents refers to this principle as "removing hardship" [*rafʿ al-ḥaraj*].) Whenever the circumstances of a particular case render strict application of the general rule harmful or excessively difficult, it becomes obligatory to avoid strict application of the general principle. Al-Shāṭibī reasons that the licenses (*aḥkām al-rukhaṣ*) provided in the Qurʾān and *sunna* such as the exemption of travelers from the obligation to fast in Ramaḍān are manifestations in revelation of the principle underlying discretion and demonstrate it to be firmly rooted in revelation.[261]

Al-Shāṭibī repudiates the claim that discretion is arbitrary in its departure from literal application of the textual references of the Prophetic law. He argues that discretion is no less a valid form of legal reasoning than analogy.[262] Application of discretion, he argues, is required to insure that the law is applied with justice and fairness in a manner that is consistent with its overall purpose. In serving this function, discretion has the effect of "granting priority to a limited good (*maṣlaḥa juzʾiyya*) over a universally applicable legal indicant (*dalīl kullī*)."[263] To reject discretion and adhere strictly to the dictates of general texts and precepts derived from them necessarily leads, in al-Shāṭibī's opinion, to the elimination of many individual and societal benefits that it is the purpose of Islamic law to secure.

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[258] Cited in al-Shāṭibī, *al-Iʿtiṣām*, 2:320–21.

[259] Cited in al-Shāṭibī, *al-Iʿtiṣām*, 3:21; he does not specify which Ibn Rushd—al-Jadd or al-Ḥafīd—he is quoting.

[260] Ibn Rushd, *Bidāya*, 2:112.

[261] Al-Shāṭibī, *al-Muwāfaqāt*, 1:102.

[262] Al-Shāṭibī, *al-Iʿtiṣām*, 2:320.

[263] Al-Shāṭibī, *al-Muwāfaqāt*, 4:205–06; cf. Abū Zahra, *Mālik*, 357.

Likewise, it brings about individual and societal harms that the law seeks to eliminate.[264]

According to Abū Bakr ibn al-ʿArabī, Mālik applied discretion on the basis of four major considerations: 1) local custom (*al-ʿurf*); 2) the general good; 3) consensus; and 4) the principle of removing hardship (*rafʿ al-ḥaraj*).[265] As indicated earlier, Muḥammad Abū Zahra notes that discretion based on local customs is a corollary of basing it on the general good, since, from the Mālikī point of view, sound regional usages are instances of the general good.[266] Likewise, the principle of removing fruitless and unnecessary hardship, as al-Shāṭibī argues at considerable length, is fundamentally an aspect of the general good. Making the law difficult by rigorous application of its rulings brings about harm in individual cases and creates an aversion to the law, which ultimately defeats its purpose.[267]

One of the most interesting applications of discretion in Mālik's legal reasoning is when he bases it on the legal principle of "heeding dissent" (*riʿāyat al-khilāf*). As noted earlier, Mālik would occasionally "heed the dissent" of prominent Medinese and non-Medinese jurists by modifying his own opinions out of respect for theirs. His concern and respect for the juristic opinions of others, most notably those of Kufa, are indicated by his terminology in the *Muwaṭṭaʾ*, and there are explicit examples in the *Mudawwana* of his basing cases of discretion on the dissenting opinions of other jurists.[268] In such cases, Mālik modifies his own position out of

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[264] Al-Shāṭibī, *al-Muwāfaqāt*, 1:100–02; 4:205–06.

[265] Cited by al-Shāṭibī in *al-Muwāfaqāt*, 4:207–08 and idem, *al-Iʿtiṣām*, 2:320–21, 324–25.

[266] See Abd-Allah, "*ʿAmal*," 205.

[267] Al-Shāṭibī, *al-Muwāfaqāt*, 3:60–76; 4:233–43.

[268] See Abd-Allah, "*ʿAmal*," 259–61. Saḥnūn gives an example of Ibn al-Qāsim "heeding dissent." The latter is asked about a man who enters the sanctuary of Mecca without the intention of performing the lesser or major pilgrimages (*ʿumra* and *ḥajj*) and returns to his land without having ever performed them. Mālik strongly disliked that any Muslim enter Mecca without being in pilgrim's garb, either with the intent to perform the lesser or major pilgrimage. Ibn al-Qāsim states his opinion that he does not believe the man is under legal obligation to return and perform them, (having missed that opportunity during his stay in the sanctuary). He states that the man has done an act of disobedience. Ibn al-Qāsim notes, however, that al-Zuhrī dissented and held there was no harm in entering Mecca without ritual garb and the intention to perform lesser or major pilgrimage rites. Ibn al-Qāsim heeds his dissent, stating that he does not want to make the lesser or major pilgrimage obligatory for that man due to al-Zuhrī's dissenting opinion. He adds that Mālik's opinion was not categorical; it simply did not please him (*lā yuʿjibunī*) that one enter the Meccan sanctuary without the proper intention (see *Mud.*, 1:304). Ibn al-Qāsim notes that Mālik did not like (*lā yuʿjibunī*) the opinion of al-Zuhrī on this matter. Mālik still regarded it as free of legal impediments (*wāsiʿ*) because Ibn ʿUmar had returned to Mecca without being in pilgrim's garb after hearing of the outbreak of civil war (*al-fitna*). *Muw.*,

deference to relevant dissenting opinions and makes allowances that he would not have ordinarily made.[269]

When discretion is based on fairness, removing hardship, and the general good—as it appears to be in Mālik's applications of it—it constitutes a rational legal tool based on an overall perception of benefit and harm in contrast to formal conformity with the letter of the law. It is an excellent example of the kind of pragmatic reasoning that was prominent in Islamic legal reasoning in the formative period.

Illustrations of Mālik's Use of Discretion

In buying and selling, the normative precept for Mālik is that transactions require that the quantities of the goods sold, the price to be paid, and the time of delivery be agreed upon and explicitly stated. Mālik makes allowances that depart from this precept on the basis of discretion. He states, for example, that the produce of patches of melons, cucumbers, carrots, and similar crops may be sold in total once the first fruits (*ṣalāḥ*) of the crop appear. The buyer will then have rights over the patch during the remainder of the season until it dries up. Mālik states further that no specified period has been set for the buyer's rights over the patch, because the people know well the periods that customarily apply in such matters.[270] On the basis of discretion, Mālik has exempted the makers of the contract from setting the quantities or the periods of the sale. Local customs clearly are also a consideration in this case as is Mālik's general attention to facility and the avoidance of undue difficulty.

1:303. In another example, Saḥnūn registers Mālik's opinion in the *Mudawwana* that when a judge hands down a ruling but later rethinks it and finds a contrary decision to be stronger, he is not required to alter his earlier ruling, if it had the support of dissenting scholars (*al-ʿulamāʾ*), whom he later refers to as "the people" (*al-nās*). Mālik clarifies that the judge is entitled to alter his earlier decision, if he desires, but is not required to do so because of the support of the dissenting position (see *Mud.*, 4:76). In another case, Malik's opinion regarding ritual wiping over footwear (*al-masḥ ʿalā al-khuffayn*) was that one should wipe over both the top and bottom of one's footwear. Saḥnūn asks Ibn al-Qāsim in the *Mudawwana* about the validity of following the contrary practice of just wiping over the tops. Ibn al-Qāsim states his preference that such a person not follow that procedure, yet it is generally valid because of the dissenting position of the Medinese jurist ʿUrwa ibn al-Zubayr, who would only wipe over the tops of his footwear. This precept is discussed in full later; it is an example of internal Medinese dissent and had counterparts among jurists outside of Medina, especially in Kufa (see *Mud.*, 1:43).

269 See al-Shāṭibī, *al-Iʿtiṣām*, 2:329–30.

270 *Muw.*, 2:619.

Ibn al-Qāsim regards the popular custom by which the people buy and sell women's ankle bracelets (*khalkhālayn*) to be permissible on the basis of discretion and adds that Ashhab held the same opinion.[271] He states that strict analogy in this matter would render such contracts null and void because of the irregularity in them according to standing precepts of the law. He validates these contrary customs on the grounds that they are matters that the people cannot avoid (*lā yajid al-nās minhu buddan*).[272] Here again, local customs constitute a primary referent in Ibn al-Qāsm's discretion. It is, however, also an instance of applying the principle of removing hardship. To prohibit something that the people need and cannot avoid would cause them undue difficulty.

As a general rule, Mālik held that no one should enter the precincts of Mecca from outlying areas except with the intention of performing the lesser (*ʿumra*) or greater pilgrimage (*ḥajj*) and by putting on the proper ritual garb (*al-iḥrām*). He did not agree with the dissenting opinion of his teacher al-Zuhrī that there was no harm in entering Mecca under such circumstances in customary dress. Mālik adds, however, that there is no problem for people living in areas not far from the sanctuary such as Ta'if and Jeddah to enter Mecca without intending to perform these rites or putting on the ritual garb, if they come there frequently in order to bring firewood, fruits, other food stuffs, and similar items for sale. Mālik based this case of discretion, at least in part, on the principle of removing hardship. He states that it would be burdensome for them (*yakburu ʿalayhim*) if they were required to don the ritual garb in such cases.[273]

In the above instance, Mālik's discretion is also likely to have taken the dissenting opinion of his teacher al-Zuhrī into account, which would reflect his application of the principle of heeding dissent (*riʿāyat al-khilāf*). Deference to dissenting opinions is clearer, however, in the following example, which also pertains to entering Mecca from outlying areas. Ibn al-Qāsim is asked about Muslims from distant lands like Egypt who enter Mecca without wearing ritual garb either intentionally or out of ignorance. Ibn al-Qāsim disapproves strongly of such practices but states that he would not require the person in question to atone for it through religious compensation because of al-Zuhrī's dissenting opinion that there is no harm in entering Mecca without ritual garb.[274]

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271 *Mud.*, 3:102.
272 *Mud.*, 3:102.
273 *Mud.*, 1:303; cf. *Mud.*, 1:304.
274 *Mud.*, 1:303.

In the following example, Mālik clearly applies the principle of heeding dissenting juristic opinion in his application of discretion. He modifies his stance on certain irregular types of marriage which, from his standpoint, are unconditionally invalid. Ordinarily, whenever such types of marriage occur, Mālik would deem them immediately annulled (*mansūkh*), meaning that there would be no formality of requiring the husband to repudiate the wife. When repudiation (*ṭalāq*) is required, the man and woman previously joined in the invalid marriage contract would retain rights of mutual inheritance during the waiting period immediately following repudiation in the event that one of them should unexpectedly die. In various instances of such invalid marriage contracts, however, certain non-Medinese jurists—apparently Kufans (Ibn al-Qāsim refers to them as "Easterners" [*ahl al-sharq* and *ahl al-mashriq*])—deemed the marital contracts to be valid. On the basis of discretion, Mālik modified his opinion in these special cases. He still annulled the marriages but required that they be voided through repudiation, granting both partners temporary rights of mutual inheritance. Ibn al-Qāsim states explicitly that Mālik modified his opinion out of deference to the contrary opinions of the Easterners.[275]

The Ḥanafī Method of Discretion

As observed, Mālik's method of discretion was fundamentally different from its counterpart in Abū Ḥanīfa's legal reasoning. Abū Ḥanīfa consistently based his practice of discretion on textual referents that indicated unobvious, non-normative analogies which could be invoked as alternatives to standard ones, when unusual conditions rendered standard

[275] *Mud.*, 2:185, 153; cf. al-Shāṭibī, *al-I'tiṣām*, 2:329–30. For additional illustrations of discretion, see *Mud.*, 1:193 and 1:90 regarding the permissibility of seeking shelter from rain and snow in churches. *Mud.*, 1:50 extends the license not to pay excessive prices for water to perform ritual ablutions when no other water is available. *Mud.*, 3:92 states that Mālik disapproved of certain commercial transactions but refused to deem them prohibited because their prohibition would cause the people great hardship; see also *Muw.*, 2:709, 636, 661, which are discussed below. Al-Shāṭibī cites as an early example of discretion the ruling of certain Companions to allow the use of public baths although they were technically in conflict with Islamic precepts of buying and selling which required the determination of exact quantities, while the quantities of water used in the baths was not exact (al-Shāṭibī, *al-I'tiṣām*, 2:318). He also cites the example of the juristic opinion that boarders be permitted to pay for their meals in advance, although again the exact type and amount of the food is not specified (al-Shāṭibī, 328–29). Ibn Rushd discusses instances of discretion in the Mālikī school that pertain to the liabilities of buyers (see Ibn Rushd, *Bidāya*, 2:112, 108). He also cites the example of Mālik's opinion that women in their menses should be allowed to hold and recite the Qur'ān for study purposes, although they are in a state of ritual impurity (Ibn Rushd, *Bidāya*, 1:29).

analogies inappropriate.[276] As we have seen, Mālik's practice of discretion, on the other hand, was systematically abstract and non-textual, based on the independent prerogative of the general good (*al-maṣlaḥa*). Abū Ḥanīfa's distinctive preference of text over principle in discretion brings to light once again the pronounced textual orientation of Kufan jurisprudence as well as its strong emphasis on analogy. Instead of being abstract and principle-based, Kufan discretion justified its departures from standard text-based analogies by discovering other textually indicated analogies in their place. Because the texts used for discretion were non-standard, they did not conform to the principle of the generalization of texts and would ordinarily have been overlooked.[277]

Because of its essentially analogical nature, the most common type of discretion in Abū Ḥanīfa's legal reasoning is called "inconspicuous analogy" (*al-qiyās al-khafī*) in Ḥanafī jurisprudence. It stands in opposition to customary Ḥanafī analogy, which was defined as "conspicuous analogy" (*al-qiyās al-jalī*).[278] There were, however, other varieties of discretion in Ḥanafī legal practice. Ḥanafī jurisprudents also speak of four other types:[279] 1) consensus-based discretion (*istiḥsān al-ijmāʿ*);[280]

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[276] Wael Hallaq suggests that the Ḥanafīs linked their application of discretion with texts during the third/ninth century "to remove the accusation of arbitrary reasoning." He contends that when they linked discretion to texts, they made it acceptable to other schools (Hallaq, *Origins*, 144–145; cf. idem, "*Uṣūl al-fiqh*," XII: 196). The Ḥanafī legal principle of the generalization of proofs (*taʿmīm al-adilla*), which lies at the foundation of their extensive use of analogy and, in effect, establishes the foundational precepts of their school, is well attested in the legal reasoning of Abū Ḥanīfa and his principal students. It is not a later development. Ḥanafī text-based discretion is equally well attested in the legal reasoning of Abū Ḥanīfa and is systematically consistent with the extensive textualism of the Kufan school.

[277] See Abū Zahra, *Mālik*, 453.

[278] Abū Zahra, *Mālik*, 355, 437; al-Zarqā, *Fiqh*, 1:83–84, 92. Muḥammad Abū Zahra notes the prevalence of inconspicuous analogy in Ḥanafī legal reasoning and the fact that it reflects the primacy of analogy in Abū Ḥanīfa's reasoning. He argues that, from the standpoint of Mālikī jurisprudence, inconspicuous analogy does not constitute a type of discretion at all but simply another form of analogy.

[279] See al-Zarqā, *Fiqh*, 1:92, 87; Abū Zahra, *Mālik*, 355. Wael Hallaq notes that discretion may be based on the principles of necessity and consensus (Hallaq, *Origins*, 145). As noted above, Hallaq fails to recognize discretion as a Mālikī legal instrument and focuses on it as a distinctively Ḥanafī mode. The general good is the underpinning of Medinese discretion. Judgments based on dire necessity fall under the rubric of the unstated good, which the Ḥanafīs do not literally accept but approximate through their utilization of necessity-based discretion (*istiḥsān al-ḍarūra*).

[280] Consensus-based discretion allows the jurist to set aside the strict dictates of standard analogy in matters where consensus has been reached on the validity of other relevant rulings contrary to analogy. Discretion based on consensus and custom (the fourth

2) *sunna*-based discretion (*istiḥsān al-sunna*);[281] 3) discretion based on dire necessity (*istiḥsān al-ḍarūra*); and 4) custom-based discretion.

Of these four additional types of discretion, discretion based on dire necessity (*istiḥsān al-ḍarūra*) is apparently the only instance of Ḥanafī discretion that was clearly contrary to analogy. It also appears to have greater resemblance to Mālik's understanding of discretion. In the view of Muṣṭafā al-Zarqā, discretion based on dire necessity was rooted in the need to fulfill a necessity (*sadd li-'l-ḥāja*) or remove an undue harm (*daf' li-'l-ḥaraj*).[282] Muḥammad Abū Zahra argues that Ḥanafī discretion based on dire necessity is cognate to Mālikī discretion but not to the Mālikī principle of the unstated good (*al-maṣāliḥ al-mursala*). He believes that Abū Ḥanīfa did not adopt as an independent source of law any principle as wide-ranging as the unstated good in the Mālikī tradition. Rarely, in Abū Zahra's view, did Abū Ḥanīfa ever allow the independent consideration of the general good to be his sole criterion in the absence of concrete textual referents. Abū Zahra also notes that discretion based on dire necessity is less common in Ḥanafī legal reasoning than any counterpart in the Mālikī school.[283] Al-Zarqā does not share this view and suggests that discretion based on dire necessity is an equivalent of the unstated good in Mālikī legal reasoning. He adds, however, that the Mālikīs developed their concept of the unstated good more fully. Thus, they came to regard it as an

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type) have nominal parallels in Mālikī discretion, according to its treatment in the works of post-formative Mālikī jurisprudents (Abū Zahra, *Mālik*, 355; al-Zarqā, *Fiqh*, 1:92).

[281] The Ḥanafī concept of *sunna*-based discretion does not have a clear parallel in Mālik's legal reasoning. The term is applied to cases where Abū Ḥanīfa sets aside strict application of analogy in preference for solitary *ḥadīth*s, which he would ordinarily not follow. The principle demonstrates again the central role of textual referents in Kufan legal reasoning (Abū Zahra, *Mālik*, 355; al-Zarqā, *Fiqh*, 1:92). Muṣṭafā al-Zarqā contends that it is mistaken to regard *sunna*-based discretion as a distinctive type of Ḥanafī discretion since it should simply be regarded as a derivative of the *sunna* (al-Zarqā, *Fiqh*, 1:93). Al-Zarqā's critique does not give adequate consideration to Abū Ḥanīfa's concept of the *sunna*, since it marginalized solitary *ḥadīth*s as authoritative indicants of it. A more accurate term for the process might be discretion based on solitary *ḥadīth*s. As indicated in the preceding discussion of Abū Ḥanīfa's use of analogy, he would, under special conditions, accept solitary *ḥadīth*s that are contrary to well-established precepts of law as exceptions from his policy of relying upon well-known *ḥadīth*s. Yet these exceptional solitary *ḥadīth*s would be given only limited acceptance. They remained anomalies (could not be used as analogues) and were restricted to the specific provisions mentioned in their texts (see Abd-Allah, "*Amal*," 239–40).

[282] Al-Zarqā, *Fiqh*, 1:87.

[283] Abū Zahra, *Mālik*, 355, 368, 391, 436–38, 453.

independent source of the law, while, in Ḥanafī legal thought, discretion based on dire necessity remained a branch of discretion.[284]

Mālik's Use of Preclusion (*Sadd al-Dharā'i'*)

As noted, discretion and preclusion work as opposites in Mālik's legal method. Discretion allows, due to special conditions, what would ordinarily be disallowed. Preclusion disallows what would ordinarily be allowed because of dubious circumstances. Literally, "*sadd al-dharā'i'*" means "the blocking of [illegitimate] means," that is, the obstruction of formally legitimate means to illegitimate ends. In the *Mudawwana*, Mālik refers to the procedure as "an [illegitimate] means" (*al-dharā'i'*),"[285] the same expression that al-Shāfi'ī uses in his repudiation of the technique.[286] In the opinion of later Muslim jurisprudents, this inferential juristic principle was a distinctive feature of the Mālikī and Ḥanbalī schools, although it was rejected by both the Ḥanafīs and Shāfi'īs.[287] Taqī ad-Dīn Aḥmad ibn Taymiyya (d. 728/1328) praises Mālik for his use of preclusion and asserts that the principle is primarily used for invalidating harmful legal fictions (*ḥiyal*).[288]

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[284] Al-Zarqā, *Fiqh*, 1:89 note 1; 1:123–24.

[285] See *Muw.*, 2:682; *Mud.*, 3:310.

[286] See al-Shāfi'ī, *Ibṭāl*, 269, 270.

[287] Ibn al-Qayyim, the noted Ḥanbalī jurist and student of Ibn Taymiyya, asserts that preclusion constituted one fourth of the religious obligation (*taklīf*) of the law. He treats the principle thoroughly and gives ninety-nine illustrations of it (cited and well treated in Abū Zahra, *Mālik*, 409 and al-Fāsī, *Maqāṣid*, 156); see also Ibn al-Qayyim, *I'lām* (Dār al-Kitāb), 3:121–44; Ibn Rushd [al-Jadd], *al-Muqaddimāt*, 2:198; Abū Zahra, *Mālik*, 405; idem, *Ibn Ḥanbal*, 314–28; 'Abd-Allāh al-Turkī, *Uṣūl*, 461, 474; al-Fāsī, *Maqāṣid*, 156; al-Zarqā, *Fiqh*, 1:106–08. Wael Hallaq contends that Aḥmad ibn Ḥanbal and Dāwūd al-Ẓāhirī concurred that everything needed in the law "could be gleaned from the revealed language itself without impregnating these texts with human meaning" (Hallaq, *Origins*, 124). As noted before, it is misleading to link Ibn Ḥanbal with Dāwūd; their approaches to the law were similar in some regards but distinctly different in others. No school of Islamic law is more textual than the Ḥanbalī school in its attempt to find textual precedents for legal rulings. It is not true, however, that such texts necessarily embodied "revealed language." Aḥmad ibn Ḥanbal—like Abū Ḥanīfa and Mālik—made ample use of post-Prophetic reports. Ibn Ḥanbal did not formally reject reason and the "impregnating" of revealed texts with "human meaning." His school avoided the use of considered opinion if precedents could be discovered in texts; nevertheless, the Ḥanbalī school stands alone alongside the Mālikīs in its formal endorsement of discretion, preclusion, and the unstated good, even if it narrows their scope.

[288] Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 51–53.

Al-Shāṭibī considers the principle of preclusion to be consistent with the premise that one of the foundational purposes of Islamic law is to secure benefits (*maṣāliḥ*) and ward off harms (*mafāsid*). Warding off harm is the primary objective of preclusion. Al-Shāṭibī holds further that warding off harm in Islamic law always takes priority over the acquisition of potential benefit whenever the two are mutually exclusive. He refers to the well-known Islamic legal maxim, "Whenever a [particular] harm exceeds (*arbat ʿalā*) a benefit, the legal judgment must be handed down with a view to [annulling] the harm."[289]

Muḥammad Abū Zahra and Muṣṭafā al-Zarqā state that it is not the concern of a jurist, when applying preclusion, to know for certain that the intent of the person whose act is precluded was actually to attain an illegitimate end through ostensibly permissible means. Rather, the jurist only evaluates the act itself and its potential consequences.[290] Nevertheless, the legal language used in conjunction with preclusion in the *Muwaṭṭaʾ* and *Mudawwana* often expresses presumption of suspicion about the intention of the person employing the precluded means. Ibn Rushd refers to this legal assumption as the "application of suspicion" (*iʿmāl al-tuhma*).[291] Al-Zuhrī is reported in the *Mudawwana* to have said that in the early period of Islam there had been no suspicion (*tuhma*) of a father who bore witness on behalf of his son. Later, however, when the morals of the people began to deteriorate, a father's bearing witness for his son and similar types of witness were prohibited because they drew the suspicion (*ittihām*) of not being trustworthy.[292] In the *Mudawwana*, Mālik regards as suspect (*yuttaham*) the motive of a man seeking to marry a woman while she is critically sick. The suitor's act raises the doubt that he initiated this unlikely marriage in order to seek a husband's portion of the woman's inheritance unlawfully. Mālik allows the marriage but disallows the spouse's rights of inheritance if the woman dies in her present sickness.[293] Other examples in the *Muwaṭṭaʾ* and *Mudawwana* use the

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289 Al-Shāṭibī, *al-Muwāfaqāt*, 4:272; 1:174.

290 Abū Zahra, *Mālik*, 406–07; al-Zarqā, *Fiqh*, 1:106, 108.

291 Ibn Rushd, *Bidāya*, 2:50, 17–18, 45, 84, 85, 86.

292 *Mud.*, 4:80.

293 *Mud.*, 2:186; Abd-Allah, "*Amal*," 130–31. Mālik, like other jurists, held that valid marriage contracts extend mutual inheritance rights to spouses. This precept is upheld in the authoritative textual sources that all Muslim jurists endorse. But if a suitor should marry a woman who is otherwise permissible to him in marriage at a time when she is critically ill, Mālik qualified this textually founded precept in the light of preclusion. The dubious circumstances of the marriage are sufficient cause, in his view, to suspect that the suitor's motive in marriage was to inherit the spouse's sizeable portion of the woman's estate that

expressions "suspicion" (*tuhma*) and "drawing suspicion" (*ittihām*) to justify applications of preclusion.[294]

In al-Shāṭibī's view, Abū Ḥanīfa and al-Shāfiʿī rejected preclusion because they repudiated of the presumption of suspicion that underlies it. He contends that both of them required explicit proof that the intent of the person in question was indeed to attain illegitimate ends through the use of outwardly permissible actions. In the presence of such proof, Abū Ḥanīfa and al-Shāfiʿī agreed that it was valid to prevent an ostensibly permissible act. Al-Shāfiʿī's opinion is evidenced in his writings, and he attributes a similar stance to his close friend al-Shaybānī.[295]

Although Abū Ḥanīfa's opinion appears straightforward and may not need further explanation, it is worthy of observation that his Murji'ite ("suspensionist") theology also rejected the judgment of outwardly wrongful actions on suspicion of immoral intent. Abū Ḥanīfa held that human acts can only be judged when the motive behind them has been fully discovered, for the "direction of the will determines the nature of the human act."[296]

Illustrations of Mālik's Application of Preclusion

In the following example, Mālik sets forth explicitly the concept of preclusion as a traditional Medinese legal principle and employs the word "[illegitimate] means" (*dharāʿi*). Medinese consensus allowed for the hiring out of male slaves and animals. It prohibited such transactions in the case of slave women. The reason for the difference, Mālik explains, is that slave women might be used for sexual services by those who hired them. The people of learning in Medina, he adds, always forbade such transactions in female slaves to all people on the grounds that to permit them would mean to provide the means (*dharīʿa*) for making permissible (*ḥalāl*) what is forbidden (*ḥarām*).[297]

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would ordinarily be due him as her legitimate husband. The act of allotting him that portion would encroach upon the legitimate rights of the woman's heirs. Mālik rules that the contract of marriage is technically valid, and the ailing woman must receive her wedding gift (*mahr*) in full. But if she dies during the course of her illness, the new husband shall be precluded from receiving any share of her estate by inheritance (*Mud.*, 2:186).

294 See *Muw.*, 2:868; *Mud.*, 4:105, 110.

295 See al-Shāfiʿī, *Ibṭāl*, 269–70; idem, *al-Radd*, 300, where he cites al-Shaybānī's arguments against preclusion; see al-Shāṭibī, *al-Muwāfaqāt*, 4:200–01. This is also Abū Zahra's reading of the postions of Abū Ḥanīfa and al-Shāfiʿī (Abū Zahra, *Mālik*, 412).

296 Meric Pessagno, "The *Murji'a, Īmān*, and Abū ʿUbaid," 390.

297 *Muw.*, 2:682; *Mud.*, 3:310.

In the *Mudawwana*, a case was brought before Mālik regarding a young woman whose mother and father had been separated since she was a child. The girl lived in her mother's custody and grew up to be beautiful. She had many excellent suitors of considerable wealth and station, but the father, who was still technically her guardian, refused to agree that she marry anyone but a certain kinsman of his, who lacked wealth and other merits. The mother brought the case to Mālik, and he ruled to preclude the father's right because of his abuse of the role of paternal guardianship, one of the chief purposes of which is to secure a marriage that is in the daughter's best interest. Mālik explains his ruling by reference to the legal maxim, "No harm [shall be done to others], nor shall harm be reciprocated [by harm]" (*lā ḍarar wa lā ḍirār*). He referred the daughter's case to the governor (*al-sulṭān*) who acted as her guardian and allowed her to marry one of the more worthy suitors who had sought her hand.[298]

Mālik states that it is part of Medinese consensus that a murderer will not be allowed to inherit any part of the indemnity (*diya*) ordinarily due a kinsman if he kills him, nor will he be allowed to receive any part of the deceased's estate. Furthermore, the murderer shall not be allowed to obstruct other relatives from inheriting in his stead who, because of their greater distance in kinship, would not ordinarily have been allowed to inherit as long as the killer remained alive and retained inheritance rights. In the case of involuntary manslaughter, Mālik relates that the jurists of Medina differed as to whether one who kills a kinsman by accident should be permitted to inherit from his estate. Some jurists held that he should be prohibited from any inheritance because of the suspicion (*tuhma*) that he designed the murder to appear as an accident in order to receive inheritance. Mālik dissents, however, and states that his opinion is that one who kills a relative accidentally be permitted to inherit his share of the estate.[299] Here again, Mālik's articulation of the principle of preclusion is clear. As in the preceding case, Mālik's discussion indicates that preclusion was a traditional part of Medinese legal reasoning. In fact, the other Medinese

[298] *Mud.*, 2:144. Mālik holds to the precept that a woman must have the consent of her guardian for her marriage contract to be valid. He holds further that the father has unique rights in affirming whom his daughter shall or shall not marry, if she has never been married before. Mālik precludes other relatives from the father's full guardianship rights on the grounds that they are unlikely to have the woman's interests at heart to the same extent as her father. In cases of the father's physical absence, Mālik does not extend his paternal right to other guardians who may be present, because, again, he holds that kinsmen other than the father are unlikely to have the woman's interest at heart (see *Mud.*, 2:5).

[299] *Muw.*, 2:868.

jurists in this case were more rigorous in their application of the principle than Mālik.

Medinese consensus allowed a father to repossess a gift (*nuḥl* or *'aṭā'*) that he gave his son or daughter, as long as the gift had not been given as charity (*ṣadaqa*). But if the son or daughter to whom the gift was given had entered into a consequential social or economic relation by virtue of possessing it, the father would be precluded from repossession. Mālik elucidates the matter by citing the example of a son having been loaned a considerable amount of money by creditors on the grounds that a lucrative gift the son received from his father could be claimed as collateral for failure to repay. Mālik gives a further example of a son having entered into a favorable marriage contract, in which one of the attractions to the bride's party was a generous gift the son had received from his father. In cases such as these, Mālik continues, it is impermissible for the father to take back what he has given.[300]

Mālik and the Unstated Good (*al-Maṣāliḥ al-Mursala*)

The term "*al-maṣāliḥ al-mursala*" literally means "untethered benefits," aspects of the general good (*al-maṣlaḥa*) that are not specifically mentioned in ("tethered to") revealed texts. The term "*mursal*" (untethered) indicates that these benefits are not "tied down" (*muqayyad*) in explicit textual references. Individual and societal benefits that fall under the heading of "the unstated good" stand in contrast to numerous other concrete benefits that are explicitly expounded or indirectly implied in revelatory texts. Consequently, benefits that pertain to "the unstated good" are not explicitly attested in the textual sources. In its constructive application, the unstated good is a principle of legal reasoning whereby unprecedented rulings are legislated to secure the best interest of individuals

[300] *Muw.*, 2:755. For additional illustrations of preclusion see: Mālik's rejection of certain claims that merchants make for failure to repay debts because their money has been invested abroad (*Mud.*, 4:105); his rejection of the claim of a dying man that one of his heirs has repaid a debt which that heir owed him (*Mud.*, 4:110); Ibn al-Qāsim's stern policy against merchants who use counterfeit coins and coins of false weight, which he justifies as a means for preserving markets from corruption (*Mud.*, 3:115; cf. *Muw.*, 2:635–36). According to Ibn Rushd [al-Jadd], the chapters of the *Mudawwana* on buying and selling are predicated on the principle of preclusion (Ibn Rushd [al-Jadd], *al-Muqaddimāt*, 2:198). Ibn Rushd (al-Ḥafīd) reiterates his grandfather's view and gives numerous illustrations (Ibn Rushd, *Bidāya*, 2:85–96). See also *Mud.*, 2:36, 17–18 regarding legal fictions and guardianship in marriage.

and societies that are without textual precedent. The principle also has a preclusive and protective application, according to which it suspends normative applications of the law for the welfare of society.[301]

Both the Mālikī and Ḥanbalī schools, as indicated earlier, subscribe to the principle of the unstated good, although it is less frequently used in the latter school.[302] Sulaymān al-Ṭūfī (d. 716/1316), an Imāmī Shīʿī with strong Ḥanbalī affiliations,[303] regarded the unstated good to have preponderant authority as a legal principle, but Ḥanbalīs have generally regarded his position as extreme.[304] Muḥammad Abū Zahra contends that the principle of the unstated good constitutes the pinnacle of Mālikī legal reasoning in that it looks upon all courses of action pertinent to the general good as potentially valid parts of Islamic law, regardless of whether or not they are explicitly witnessed in revealed texts, as long as the potential harms of those courses of action are not equal to or greater than their potential benefits.[305]

Although the unstated good is not recognized as a distinctive legal principle in Ḥanafī and Shāfiʿī legal reasoning, both schools have a pragmatic concern for the general good. As noted earlier, the Ḥanafī principle of discretion based on dire necessity (*istiḥsān al-ḍarūra*) bears some similarity to the unstated good.[306] According to Abū Zahra, al-Shāfiʿī held

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[301] See Abū Zahra, *Mālik*, 390; al-Zarqā, *Fiqh*, 1:97–98; al-Fāsī, *Maqāṣid*, 138–44; al-Dawālībī, *Madkhal*, 99.

[302] See Abū Zahra, *Mālik*, 368–69, 398; idem, *Ibn Ḥanbal*, 297–312; al-Zarqā, *Fiqh*, 1:126–29, 136–37; ʿAbd-Allāh al-Turkī, *Uṣūl*, 414–16, 419, 430–35. The chief theoretical difference between the Mālikī and Ḥanbalī conceptions of the unrestricted good regards the question of whether or not mere consideration of the general good may suspend or delimit the parameters of contrary legal texts. From the Ḥanbalī perspective the explicit text generally takes priority, whereas this is often not the case in Mālikī applications of the principle. In wholly unprecedented matters and in the absence of pertinent texts, however, Ḥanbalīs and Mālikīs alike grant legislative authority to the unrestricted good (see al-Zarqā, *Fiqh*, 1:136).

[303] See Stewart, *Orthodoxy*, 70.

[304] Abū Zahra, *Ibn Ḥanbal*, 312–13; al-Zarqā, *Fiqh*, 1:129; ʿAbd-Allāh al-Turkī, *Uṣūl*, 415, 424, 436 note 1; Mahmassani, *Falsafat*, 89.

[305] Abū Zahra, *Mālik*, 369.

[306] Abd-Allah, "'*Amal*," 257–58; as noted before, Wael Hallaq construes "*istiḥsān/maṣlaḥa*" as a shared Ḥanafī-Mālikī legal instrument. The identity of the two might hold in the case of necessity-based discretion (cf. Hallaq, *Origins*, 145–146). The essential quality of the unstated good in the Medinese school, however, is the fact that it is not textually indicated. Hallaq's term, the general good (*maṣlaḥa*), is too broad. The general good is often explicitly indicated in texts, although certain aspects of it are not. As indicated above, it is not clear that the Ḥanafis based discretion on the basis of the general good when utterly abstracted from texts. Wael Hallaq states that, "The theory of public interest (*maṣlaḥa, istiṣlāḥ*) represents another area of the law that witnessed a great deal of development. It

that the general good was a priority in Islamic law. In contrast to Mālik, however, he held that the benefits entailed in it were amply set forth in Islam's textual sources. The chief difference between Mālik and al-Shāfiʿī, therefore, would be over the issue of the unstated (*irsāl*) aspect of general benefit and the question of which elements pertaining to the general good are not tied down to specific texts or cannot be adequately inferred from them.[307] Al-Ghazālī mirrors this Shāfiʿī perspective of the general good in his concept of *istiṣlāḥ* (seeking the general good). It articulates al-Shāfiʿī's theoretical concern for the general good but omits direct reference to the uniquely Mālikī disposition of making rulings based on the abstract perception of the general good in the absence of specific textual references (*irsāl*).[308]

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now hardly needs arguing that Ghazālī's concept of *maṣlaḥa* expounded in *Shifāʾ* was an outstanding advance over previous concepts. Yet, Ghazālī's writings on this issue would seem unimpressive when compared with the monumental achievement of Shāṭibī in his *Muwāfaqāt*, a work entirely based on a unique and creative marriage between a notion of induction and the doctrine of *maṣlaḥa*. Although Shāṭibī seems to have assimilated in his work the views Ghazālī expressed in his *Shifāʾ*, he took the theory of *maṣlaḥa* into unprecedented dimensions. Shāṭibī, however, would not have been able to produce his theory without having had at his disposal a rich variety of highly developed doctrines of law and legal logic. While it is undeniable that Shāṭibī's theory is the outcome of a process that began in the second/eighth century, it would not be an exaggeration to maintain that he was far more indebted to the contributions made during the three centuries that immediately preceded him than to the earlier period" (see Wael Hallaq, "*Uṣūl al-Fiqh*," XII: 196). Hallaq's assessment of al-Shāṭibī is markedly different from al-Shāṭibī's assessment of himself. Al-Shāṭibī chose the title of his *Muwāfaqāt* on the premise that it would bring to light the fundamental similarities between the legal reasoning of Mālik and Abū Ḥanīfa. He regarded himself as standing squarely in the Mālikī tradition and bringing to light the underpinnings of its oldest jurisprudence. As indicated earlier, he urged students of jurisprudence to return to the oldest available legal texts instead of those of later jurists because the early jurists had the clearest conception of the principles of the general good and the ultimate purposes of the law, which al-Shāṭibī himself sought to bring to light in imitation of them. Al-Shāṭibī was a brilliant expounder of the Mālikī way but not necessarily an original expounder of it. His distinction over and above many other Mālikīs is in his conservatism and independence of the paradigms and cognitive frames of more textually bound jurisprudence.

[307] Abū Zahra, *Mālik*, 368.

[308] See al-Zarqā, *Fiqh*, 1:97, note 2. As earlier noted, Santillana holds that both the Mālikīs and Shāfiʿīs upheld the principle of *istiṣlāḥ*, while the Ḥanafīs followed *istiḥsān* whenever rigorous application of analogy became inappropriate and ceased to fulfill its legal purpose (Sanitillana, *Istituzioni*, 1:56). The term *istiṣlāḥ* accommodates the Shāfiʿī concern for textual referents and avoids the explicit reference in the Mālikī expression *al-maṣāliḥ al-mursala* to legislating the general good in the absence of explicit textual references. The word *istiṣlāḥ* is so general that few if any jurists would reject it, not even the Ḥanafīs, who had reservations about *al-maṣāliḥ al-mursala*. Again, the pivotal issue was that of legislating in the lack explicit textual referents (*irsāl*); it is not clear that the Shāfiʿīs accepted this principle, and it is clear that the Ḥanafīs had reservations about it.

Mālikī jurisprudents held that the principle of the unstated good (and this applies equally to Mālik's application of discretion and preclusion) is based on the concept that the ultimate purpose of the law is to secure what is best in humanity's interest in this and the next life. Al-Shāṭibī and al-Qarāfī oppose the view of the Shāfiʿī Fakhr al-Dīn al-Rāzī and similar scholastic theologians who held that the purpose of attaining general benefits (*maṣāliḥ*) could not be theologically attributed to God. They both argue that the fact that general benefits are central to the ultimate purposes of Islamic law is not a matter of speculative theology but is empirically based on the inductive study (*istiqrāʾ*) of the revealed sources of Prophetic law.[309] Al-Shāṭibī adds that the analogues and points of wisdom (*ḥikam*) that underlie the rulings of Islamic law in societal transactions (*al-muʿāmalāt*) tend to be set forth with clarity in the law's pertinent revealed sources. These analogues and points of wisdom indicate overriding societal purposes, and, in al-Shāṭibī's view, it is the purpose of the jurist to adhere to those purposes, not just to conform to the outward formalities of rulings.[310]

Jurisprudents such as Ibn Rushd expressed concern that the abstract nature of the unstated good might allow the law to be manipulated to undercut the purposes of the law and introduce detrimental innovations.[311] To minimize this danger, some later jurisprudents set down stipulations for application of the unstated good. Al-Shāṭibī contends that Mālik himself subscribed to similar requirements and followed them strictly.[312]

The principle of seeking the general good is so essentially Qurʾānic in its emphasis on legislating good and averting harm that no Muslim jurist would, in fact, object to it. The question regarding the validity of the unstated good, however, was not about the imperative to bring good about but whether or not that could be done by relying on purely non-textual, unprecedented considerations. The Mālikī term for the unstated good—*al-maṣāliḥ al-mursala*—emphasizes the abstract non-textual (*mursal*) aspect of the principle. As Joseph Lowry notes, "for al-Shāfiʿī, *all* law derives from revealed texts." For this reason, he denounced discretion, which, from his perspective, constituted an "unsupported [juristic] opinion" (see Lowry, "Four Sources?," 38–39, 49). It was on the same basis that he rejected preclusion and the unstated good.

309 See al-Shāṭibī, *al-Muwāfaqāt*, 2:6, 1:148; al-Qarāfī, *al-Dhakhīra* (Cairo), 1:142–43; 72–73; cf. Ibn Rushd, *Bidāya*, 2:5, 38; al-Shāṭibī, *al-Iʿtiṣām*, 2:295–97.

310 Al-Shāṭibī, *al-Muwāfaqāt*, cited by Abū Zahra, *Mālik*, 374–75.

311 Ibn Rushd, *Bidāya*, 2:28.

312 See al-Shāṭibī, *al-Iʿtiṣām*, 2:311–14, 283–87, 307–12. Among the most important of these specifications for al-Shāṭibī is that the unstated good be limited to societal transactions (*al-muʿāmalāt*) and exclude religious observances (*al-ʿibādāt*). He contends that Mālik was so rigorous in not allowing modifications in religious observances on the basis of the general good that some of his critics asserted—based on this standpoint alone—that he was not an independent interpreter of the law (*mujtahid*) but merely a strict adherent

Later Mālikī jurisprudents attempted to define the degree of immediate need required before principles of inference (*istidlāl*) such as the unstated good may be resorted to. In order to determine the validity of the need, they refer to its "point of suitability" (*munāsib*), the relevant concern that underlies the case. In this regard, later jurisprudents attempted to pattern the logic of inferential principles on legal analogy and the rationales (*ʿilal*) that inform its proper use.[313]

They did not regard rulings based on the inferential principles of discretion, preclusion, and the unstated good as having intrinsic permanence like other well-established precepts of Islamic law. In al-Qarāfī's explanation of this lack of fixity in inferential rulings, he asserts that precepts and rulings of the law fall into two categories: 1) those that are ends in themselves (*maqāṣid*) and 2) those that are means to ends (*wasāʾil*). Rulings based on the unstated good pertain exclusively to means. Thus, he reasons, they are legally valid only as long as they continue to secure the ends for which they were originally legislated.[314]

Illustrations of the Unstated Good

The clearest illustrations of the unstated good are in the legal decisions of the rightly-guided caliphs. Their rulings probably informed the Medinese understanding and application of the principle and underlie the way that Mālik and later Mālikī and Ḥanbalī jurisprudents conceived of it. Abū Bakr's decision to compile the Qurʾān, for example, illustrates the principle of the unstated good. Compilation of the Qurʾānic text had not been undertaken during the Prophet's lifetime, nor had he directed anyone explicitly to do it. When ʿUmar initially brought the suggestion to Abū Bakr, the latter replied, "How can I do something which the Messenger of God did not do himself?" After deciding that compilation of the Qurʾānic text was necessary, however, Abū Bakr ordered that it be done and ceased to express reservations about it.[315]

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to the Medinese tradition. On the other hand, al-Shāṭibī continues, Mālik gave such extensive authority to the general good in societal transactions that other critics accused him of going too far in his legal interpretations and to have taken the liberty to set down unprecedented legislation (*fataḥa bāb al-tashrīʿ*) (al-Shāṭibī, *al-Iʿtiṣām*, 2:311–12).

313 See al-Shāṭibī, *al-Iʿtiṣām*, 2:282–87, 307–13; idem, *al-Muwāfaqāt*, 4:27–32; al-Qarāfī, *al-Dhakhīra* (Cairo), 1:120–22, 142–43.

314 Al-Qarāfī, *al-Dhakhīra* (Cairo), 1:145–46; cf. Ibn Rushd, *Bidāya*, 1:162.

315 Al-Shāṭibī, *al-Iʿtiṣām*, 2:287–88.

Similarly, ʿUmar established public registries (*dawāwīn*) during his caliphate after Persian models, although nothing like that had been done earlier. He also instituted incarceration as punishment for certain crimes for which no ruling had been stipulated in Prophetic legislation.[316] Perhaps, the most sweeping inferential judgment of ʿUmar during his caliphate was his policy not to distribute the conquered lands in Iraq. He decided that allotment of Iraq's vast agrarian land holdings as private property to the conquering soldiers would weaken the state, although distribution of conquered lands had been the earlier legal norm.[317]

Although the Qurʾān states that alms-tax revenue (*zakāh*) may be given to those whose hearts are to be won over to Islam (*al-muʾallafa qulūbuhum*) (Qurʾān, 9:60), Mālik held on the basis of the unstated good that such distribution of alms revenue was only valid when Muslims were weak and in need of allies (as they were in the early period of Islam). Under circumstances when Islam was strong, however, he held it should be suspended.[318] On grounds of the unstated good, Mālik made exceptional stipulations regarding the taxation of traveling merchants to insure that they not be allowed to escape the payment of the alms-tax altogether.[319] Al-Shāṭibī deemed it valid on the basis of the unstated good that just rulers levy taxes upon the wealthy and upon agricultural produce in addition to the alms-tax, whenever alms-tax revenues were not sufficient to support the vital needs of the state, although such taxation had no explicit basis in revelation.[320]

Ibn Rushd refers to the Medinese ruling that women and slaves (male and female) guilty of fornication are not to be sent into temporary exile as part of their punishment (although such banning pertains to free male fornicators) as an instance of "analogy based on the general good" (*al-qiyās al-maṣlaḥī*).[321] The ruling is similar to preclusion in form (it disallows what would otherwise be the rule). In this case, "analogy based on the general good"—like analogy when applied in the law—creates a new fundamental ruling, not an individual exception from a rule. Yet the

316 See ʿAbd-Allāh al-Turkī, *Uṣūl*, 416.
317 Ibn Rushd, *Bidāya*, 1:236.
318 Ibn Rushd, *Bidāya*, 1:162.
319 Ibn Rushd, *Bidāya*, 1:159.
320 Al-Shāṭibī, *al-Iʿtiṣām*, 2:295–98.
321 See Ibn Rushd, *Bidāya*, 2:263; Abd-Allah, "*ʿAmal*," 606–09. For al-Shāfiʿī's legal presumption of universal applications of legal texts, see Abd-Allah, "*ʿAmal*," 139–40.

"analogy" here is not based on a precept or text but on abstract consideration of the general good.

Medinese praxis allowed the testimony of minors under given conditions as valid legal evidence in cases when they inflicted injuries upon each other in the absence of adult witnesses. Ibn Rushd contends that this procedure illustrates the principle of the unstated good, since the Medinese position was based on the general good and was not upheld in explicit texts.[322] He contends, that the Medinese did not regard the testimony of minors in such injuries to be actual testimony (*ḥaqīqa*). Rather their testimony constituted circumstantial evidence (*qarīnat ḥāl*). He notes that Mālik stipulates that the testimony of the minors must be taken before they split up or receive the advice of adults. If their testimony had constituted true legal testimony in its own right, there would be no reason for such a stipulation.[323] Similary, Mālik accepts circumstantial evidence in the case of collective oaths (*al-qasāma*) on the basis of the general good (*al-maṣlaḥa*) and defends the precept in those terms.[324] Later Mālikī jurists expanded on the legitimate use of circumstantial evidence on the basis of the unstated good to convict thieves and criminals in the absence of stronger evidence, even though these weaker forms of evidence had little weight in the revealed law.[325]

Mālik cites in the *Muwaṭṭa'* the case of a wealthy Medinese man named Ḥāṭib ibn Abī Balta'a, who starved his slaves, driving them to steal, slaughter, and eat another man's camel. The case was brought before the caliph 'Umar, who initially determined to punish the slaves. After deciding that Ḥāṭib's avarice had driven them to do the act, he decided instead to punish Ḥāṭib and doubled the price of the camel, which he made Ḥāṭib pay to the plaintiff. Mālik indicates that 'Umar's ruling was non-normative and was never incorporated in Medinese praxis.[326]

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[322] *Muw.*, 2:726; see Abd-Allah, "*'Amal*," 268–79.

[323] Ibn Rushd, *Bidāya*, 2:279; cf. al-Shāṭibī, *al-I'tiṣām*, 2:254.

[324] See Abd-Allah, "*'Amal*," 713–23.

[325] Al-Shāṭibī, *al-I'tiṣām*, 2:293–95.

[326] *Muw.*, 2: 748; see Abd-Allah, "*'Amal*," 649–52. Yaḥyā ibn Yaḥyā departed from legal norms in Cordova in a manner similar to 'Umar's practice in this account, perhaps in the light of this non-normative judgment of the caliph 'Umar. The Umayyad caliph of Cordova had intercourse with one of his slave girls in the daytime during the fast of Ramadan. He then repented from what he had done and called Yaḥyā ibn Yaḥyā and a number of his companions to ask them what his atonement (*kaffāra*) should be. Before anyone else could answer, Yaḥyā stated that the caliph would be required to fast two months in a row. His companions kept silent. When Yaḥyā left the caliph's presence, his companions asked him why he had given such a stringent ruling and not allowed him the other two standard

'Umar's ruling in the case of Ḥāṭib reflects the priority of the general good and is an instance of the application of the principle. 'Umar's ruling is exceptional and lacks a specific textual reference. Indeed, it is contrary to established legal standards. It does not allow Ḥāṭib to do anything that he would not ordinarily have been allowed to do (as in the case of discretion). It does not disallow that Ḥāṭib do anything he would have been customarily allowed to do (as in the case of preclusion). Because 'Umar's ruling is exceptional, it was not appropriate as normative praxis, although it set a valuable legal precedent and, no doubt for that reason, is preserved in the *Muwaṭṭa'* text. In this ruling, the unstated good has been given the power to alter and temporarily suspend standard rulings due to an unusual, non-normative circumstance.[327]

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options of feeding the poor or freeing a believing slave. Yaḥyā replied, "If we were to open that door for him, he would have intercourse every day [of Ramadan] and free [a slave]." 'Iyāḍ notes that Yaḥyā forced the caliph to follow the most difficult option so that he not repeat the act again (see 'Iyāḍ, *Tartīb*, 1:543).

[327] *Muw.*, 2:748; see Abd-Allah, "*'Amal*," 649–52. Al-Bājī states that Ḥāṭib was a man of extraordinary wealth. 'Umar's legal interpretation (*ijtihād*) in his case was predicated on the presumption that requiring Ḥāṭib to compensate only for the loss of a single camel (in accord with standard procedure) would neither have been sufficient to punish Ḥāṭib, with his considerable wealth, nor to keep him from starving his slaves in the future. Al-Bājī reports that Ibn Wahb was of the opinion that 'Umar doubled the fine on Ḥātib in lieu of cutting off the hands of the slaves; thus, by doubling the punishment, 'Umar symbolically exercised the legal norm but made Ḥātib carry the full load of the punishment. Al-Bājī continues to say that 'Umar—contrary to customary procedure—accepted the word of the plaintiff at face value regarding the price of his camel, because it was not 'Umar's intention to impose a fine on Ḥātib for the true value of the camel but to punish him by exacting a price far in excess of its value. For this reason, 'Umar told Ḥātib before ruling in the case that he would impose a fine upon him that would be difficult for him to bear (al-Bājī, *al-Muntaqā*, 6:64–65; cf. al-Zurqānī, *Sharḥ*, 4:438). The implication of al-Bājī's treatment of 'Umar's ruling in the case of Ḥātib is that it was a suitable ruling under the conditions and would be suitable for similar circumstances in the future. In itself, however, the ruling was unusual and non-normative; consequently, it could not constitute praxis but stood as a valid exception to it.

For additional examples of Mālik's application of the unstated good, see *Mud.*, 1:385–86. Among the examples treated here, Mālik responds to the question of whether it is allowed for Muslims at sea whose ship has been attacked and put on fire to jump into the sea, where they are likely to drown, or stay on the ship, where they are likely to be burned to death. He allows them to jump into the sea, if they think that they will be able to survive or to be taken as a prisoner if it is better than staying on the burning ship. Saḥnūn gives a citation from Ibn Wahb, who reports Rabī'a's opinion when asked about the same question. He also responds to the question of whether a Muslim can take off his armor in the water, which is likely to weigh him down and make him drown but expose him to the danger of being wounded or get rid of it with the hope of swimming to safety.

CHAPTER THREE

CRITIQUES OF MEDINESE PRAXIS

Theories on Praxis in Modern Studies

Theories about regional legal praxis during the formative period constitute one of the basic themes and dominant paradigms behind modern interpretations of Islamic legal origins.[1] The earliest conceptions of the *sunna*; the nature, transmission, and compilation of *ḥadīth*; the role of al-Shāfiʿī in the development of Islamic legal theory; and the post-formative formation of the primary schools of Islamic law and their guilds and institutions all have strong historiographical links to how we conceive of the established praxis in the early Muslim community.

Western scholars discuss "established practice" and "the living tradition" as a general phenomenon at the inception of the formative period, which they believe developed in similar ways in the major regions of the caliphate and Islamic empire.[2] They mention Medinese praxis as an important part of this phenomenon but rarely single it out for detailed analysis. The concerns of these scholarly writings are generally two-fold. They focus on the question: 1) of cultural and political history pertaining to how regional praxis originated and what it actually was and 2) what the early jurists conceived it to be. My concern in this book is exclusively with the second question, especially how Mālik conceived of and used Medinese praxis.[3]

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[1] Calder, *Studies*, 198. He observes, "Practice is indeed one of the major factors affecting the discussions of early Muslim law." He cites references to Medinese usage of praxis from the *Mudawwana* and *Muwaṭṭaʾ*. Calder notes that early Ḥanafī works refer less frequently to praxis than the Medinese, but they too share the concept. He points out al-Shaybānī's references to "what the people do is like this" (*hākadhā amr al-nās*) and "the praxis of the people is like this" (*hākadhā ʿamal al-nās*). Ḥanafī works register some early opposition to practice; Calder believes it was not a rejection of praxis *per se*, however, but of unacceptable popular practices (see Calder, *Studies*, 198–99).

[2] See Guraya, "*Sunnah*."

[3] With the exception of Yasin Dutton, Western interpretations of praxis are only incidentally concerned with how the early jurists conceived of and applied it. Those who contend that the original Prophetic component of praxis was small emphasize the proclivity of the early jurists, in their view, to identify praxis with the *sunna* and fabricate post-Prophetic reports and *ḥadīth*s to vindicate it by attributing it to higher authorities. Most of these paradigms of praxis and its connection with the fabrication of post-Prophetic reports and *ḥadīth*s rely heavily on the premise that the Umayyads, their judges, and political

The first question regarding the historical emergence and development of praxis in Medina and other formative-period regional centers as a socio-economic reality is beyond the scope of this study.

For Western scholars who deny that an authentic Prophetic *sunna* existed at the outset of the formative period, regional praxis constituted the primary source from which the content of the *sunna* was ultimately derived.[4] In their view, the organic practice of the emergent Muslim com-

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appointees were either largely impious or incompetent, if not hostile to the emerging Islamic ethic. For this reason, they exercised a corrupting influence over the social developments of the early community. Goldziher, who often draws analogies between Jewish and Islamic religious history, compares the Muslim scholars of the Umayyad period who sought to elaborate an authentic Islamic ethic to Talmudic scholars elaborating Rabbinic law during late Roman antiquity. Goldziher holds that pious Muslim scholars often took refuge in Medina during these worldly Umayyad times, because the city had come to constitute a source of inspiration and guidance for the Muslim "diaspora" (Goldziher, *Studien*, 2:29–32).

Crone's very different conception of "caliphal law" in the formative period has been noted and paints a different portrait of the Umayyads (Crone, *Roman law*, 7–8, 11, 15–16; cf. Marion Katz, *Body of Text: The Emergence of the Sunnī Law of Ritual Purity*, 112–16, 118–23, 163–64). Nabia Abbott also modified the premise of Umayyad impiety (Abbott, *Studies*, 2:18–25, 99; 1:9–19, 56). She shows that many of the Umayyads took an active interest in *ḥadīth*s and the cultivation of Islamic religious learning, their patronage of Ibn Ḥazm and al-Zuhrī in the *ḥadīth* collecting project serving as telling examples (see Abd-Allah, "*ʿAmal*," 57–58). Regardless of how sincere or insincere the Umayyads may have been, one must give them credit, Abbott observes, for being prudent (Abbott, *Studies*, 2:18–25, 99; 1:9–19, 56).

[4] For such scholars, the content of the *sunna* as later generations came to know it was largely derived from sources such as praxis and *ad hoc* legal implementation and projected back to the Companions and ultimately the Prophet through the fabrication of post-Prophetic reports and *ḥadīth*s in a constant search for always higher and more decisive authority. David Margoliouth, Henri Lammens, and Joseph Schacht represent variations of this view. For each of them, the extra-Qurʾānic legacy of the Prophet, if any, was small (see Margoliouth, *Mohammedanism*, 65–98; Henri Lammens, *Islam: Beliefs and Institutions*, 68–69; Schacht, *Origins*, 4–5, 20, 30, 40, 58, 61–63, 76, 80; idem, *An Introduction to Islamic Law*, 29–35; cf. Fazlur Rahman's analysis of these works (Rahman, *Islam* [1968 edition], 45–47, 54–55) and Hasan, *Development*, 90–9).

Patricia Crone falls into the above category. As Harald Motzki observes, she "stands completely in the Schachtian tradition" (Motzki, *Origins*, 46–47). Crone fully endorses both Goldziher and Schacht as *the* primary works on Islamic origins, noting that Schacht "showed that the beginnings of Islamic law cannot be traced further back in the Islamic tradition than to about a century after the Prophet's death, and this strengthened the *a priori* case in favour of the view that foreign elements entered the Sharīʿa" (Crone, *Roman law*, 7). She observes that Schacht "regarded the 'popular and administrative practice' of the Umayyads as having furnished the *'ulamā'* with their starting point." The chief limitation of Goldziher and Schacht, in her view, is that they failed to show in adequate detail how ancient Near Eastern traditions—especially those of Roman and Jewish provenance—became incorporated into early Islamic praxis. Schacht's treatment of the foreign background of "popular and administrative practice" in early Islamic law was uncharacteristically nebulous. He failed to make adequate use of available papyri, Syriac

munity, with some modifications, emerged during the early caliphate and subsequent Umayyad period as the conquering Muslim armies settled and put down roots in the various lands they conquered. The disparate content of this original practice evolved out of pre-Islamic Arab customs, the personal interpretations of Companions, and the *ad hoc* reasoning and policies of Umayyad jurdges and other prominent executive authorities. In addition to these indigenous Muslim contributions, there was conscious and unconscious borrowing from various Roman, Jewish, and other ancient Near Eastern sources. In each region, embryonic Islamic practices emerged in random fashion. Hence, there was considerable variation between regions, and no uniform Islamic praxis existed.[5]

According to this view, the development of the "ancient" (i.e., pre-Shāfiʿī) schools was a late Umayyad and early ʿAbbāsid phenomenon. The "ancient" period to which they belonged corresponded to the period of

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lawbooks, and "the massive secondary literature on late Roman and provincial law." Crone attempts to compensate for this deficiency by demonstrating more cogently how and from what sources (especially Jewish) ancient Near Eastern influences came into the original structure of Islamic law (Crone, *Roman law*, 8, 11, 15–16).

Like Crone, Norman Calder adopts the Schachtian paradigm, which he regards as "flexible and convincing" and "the best, perhaps the only, background theory, for a reading of early texts and their interaction with hadith (*sic*)" (Calder, *Studies*, 19, 198). Calder challenges Schacht's dating, which is to be expected given Calder's unconventional approach to the topic; other than that, he builds on the latter's view of formative period praxis with no major modifications. He notes that Schacht's analysis of early Islamic law led him to the conclusion that the practice of the Muslim community was the "raw material" of early juristic thought. In their generic reliance on local praxis, all the ancient regional schools were essentially the same; "no principle of order," no distinctive methodology governed their particular attitudes and approaches; what extensive differences did emerge between them as they developed at the local level were "purely fortuitous." Echoing Crone's emphasis on the need for detailed comparative study of ancient Near Eastern roots in early Muslim praxis, Calder asserts that Schacht had only an incipient grasp of the profound role that Roman and Jewish influences played in constituting formative Islamic praxis (Calder, *Studies*, 198–99).

Christopher Melchert also espouses the general Schachtian paradigm. He predicates his conception of the formation and development of the early "regional schools" on that basis, although he greatly modifies the Schachtian vision of how and when the classical schools emerged. Melchert is primarily concerned with the dynamic interplay in formative Islamic jurisprudence between considered opinion (*raʾy*) and overt adherence to *ḥadīth*s. Melchert does not focus on praxis, however, or undertake a historiographical review of its treatment in Islamic legal studies (see Melchert, *Formation*, 32; idem, "Traditionist-Jurisprudents," 383–87).

[5] See Joseph Schacht, *An Introduction to Islamic Law*, 29–35; Noel Coulson, *A History of Islamic Law*, 30–36; cf. Rahman, *Islam* (1968 edition), 45–47; idem, *Methodology*, 5; Hasan, *Development*, 90–91; Guraya, "*Sunnah*," 37. It is worthy of note that Émile Tyan does not treat Medinese praxis or the general phenomenon of regional practice in his history of the emergence of the Islamic judiciary in the formative period; see Émile Tyan, *Histoire de l'organisation judiciare en pays de l'Islam*.

Mālik's life. In his case, there was a clear connection between Medinese praxis, the rulings of the Medinese judiciary, and the policies of certain Umayyad rulers, who served to validate the authority of local praxis. In general, however, the nascent schools grew out of the dissatisfaction of jurists with the Umayyads and their judges, who often violated the spirit of the Qur'ān.[6]

According to this general paradigm, early Muslim jurists set out, in their discontent with the *status quo*, to elaborate their own ideal standards of legal conduct which they felt were consistent with the Qur'ānic ethic. To use Coulson's expression, they "reviewed" the practices and ethics of the Umayyad period on an individual basis.[7] The scholars of each region gradually came to agree upon a body of opinions and practices, which would later constitute the local consensus of that region's emerging school. Over the years, this regional unanimity became identical with local praxis. From it emerged the content of the *sunna* on the regional level as it was later recorded, although each ancient school necessarily produced a distinctive brand of the *sunna* to which it subscribed. In order to further undercut the authority of the official practices which they had rejected, the early jurists projected their doctrines back to earlier authorities—especially the Companions and prominent Successors—and ultimately to the Prophet himself in the form of newly manufactured *ḥadīth*s.[8] By this process, according to Schacht, the concept of the Prophetic *sunna* first emerged in Kufa. The Kufan *sunna* grew up through the back-projection of doctrine to buttress the authority of local Iraqi practices. The same

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[6] See Abd-Allah, "*'Amal*," 732–34.

In contrast to the notion of the impious and essentially secular Umayyads, Patricia Crone holds that the Umayyad caliphs saw themselves and were generally seen by their subjects as God's deputies (*Khalīfat Allāh*) on earth. Their title was "an unmistakable claim to supreme religious authority, and the caliphs held it to be their religious prerogative to institute laws and practices. The Umayyads seem to have regarded themselves "as entitled above all to define and administer God's law." Their position as God's deputies left no room for the counterclaims of jurists and religious scholars. Crone is distinctive in her view that Islamic law in its initial phase was distinctly "caliphal law." Caliphal prerogative enabled the Umayyads to make sweeping borrowings from the Near Eastern practices of late antiquity and incorporate them into praxis without popular opposition. In her adaptation of Schacht's theory, his references to Umayyad "administrative practice" should be understood as "a nascent legal system which might in due course have become the classical law of Islam: there is nothing to suggest that it was any less authoritative or any less comprehensive than that which the scholars were to create" (see Crone, *Roman law*, 15–16; cf. Katz, *Body of Text*, 112–16, 118–23, 163–64).

[7] Coulson, *History*, 30–41.

[8] See Coulson, *History*, 30–41; Schacht, *Introduction*, 29–34; idem, *Origins*, 58–81.

process soon developed parallels elsewhere. Schacht contends that during the same period, the Medinese used the concept of the Prophetic *sunna* only rarely.[9]

According to the general paradigm, the initial process of buttressing regional practices through the back-projection of post-Prophetic reports and *ḥadīth* spawned a second oppositional development. Scholars emerged who collected the *ḥadīth*s of the various regions and championed them as the sole constituent element of the authoritative Prophetic *sunna*. These proponents of *ḥadīth*, for whom al-Shāfiʿī would later become the chief spokesman, opposed the living traditions embodied in regional praxis and the emerging schools rooted in them. By championing *ḥadīth*, which in the eyes of their proponents reflected true Islamic practice, they sought to subvert the authority of the "ancient" schools in the same manner that those early schools had undercut the supremacy of Umayyad and early Abbasid practices. By their systematic advocacy of *ḥadīth* as the sole constituent of the Prophetic *sunna*, the *ḥadīth* scholars sought to produce a unified practice that transcended regional diversity, a task that was impossible for the adherents of the earlier formulations of "regional" *sunna*s.[10]

A second tendency in Western-language scholarship on Islam either affirms that an authentic Prophetic *sunna* existed from the earliest period or it refrains from denying the possibility of its existence. Scholars of this group do not insist categorically that the content of *sunna* was only formulated later during the post-Prophetic period.[11] Even when they affirm that there was an original Prophetic *sunna*, they disagree on how extensive its content was.[12]

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[9] Schacht, *Introduction*, 33; idem, *Origins*, 73–77; cf. Coulson, *History*, 40–41.

[10] Schacht, *Introduction*, 33–34; idem, *Origins*, 77–81; Coulson, *History*, 41–43.

[11] Goldziher belongs to this group (see Ignaz Goldziher, *Le dogme et la loi de l'Islam: histoire de développement dogmatique et juridique de la religion musulmane*, 34–39; idem, *Studien*, 2:11–16, 19–21, 29–32). Despite important differences between them, Goldziher, Fazlur Rahman, Ahmad Hasan, Zafar Ansari, and Muḥammad Guraya, Harald Motzki, Wael Hallaq, and Yasin Dutton may all be grouped in this category. They either agree that there was an initial Prophetic *sunna* and that the earliest practice of the Muslim community reflected it or they remain open to that possibility. As Fazlur Rahman notes, Goldziher differs conspicuously from Margoliouth, Lammens, and Schacht in his willingness to acknowledge an original Prophetic *sunna* (Rahman, *Methodology*, 5; idem, *Islam* [1968 edition], 45–47). Noel Coulson may also be placed here. In contrast to Schacht, he takes a modified position allowing for an authentic core of the Prophetic *sunna*, although Coulson regards the majority of what was attributed to the Prophet as spurious (Noel Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, 21–22, 60; idem, *History*, 64–65, 30–43).

[12] Fazlur Rahman holds that the original content of the Prophetic *sunna* must not have been extensive. He looks upon the greater part of what Muslims later regarded as the

Prophetic *sunna* as spurious (Rahman, *Islam* [1968 edition], 53–66; idem, *Methodology*, 18, 30–31, 44–45). Hallaq affirms that there was an authentic core at the heart of the Prophetic *sunna* but—like Rahman—regards it as having been limited in scope. Later Muslim generations greatly expanded on it through borrowings, both practical and idealistic (genuinely religious) (Hallaq, *History*, 16–17; idem, *Origins*, 8–78). Regarding the extent of the original Prophetic *sunna*, Fazlur Rahman and Hallaq have readings of early Islamic history that differ markedly from those of Hasan, Ansari, Guraya, and Dutton (Hasan, *Development*, 25–26, 87, 91–97, 100–01; Zafar Ansari, "The Early Development of Islamic Fiqh in Kūfah with Special Reference to the Works of Abū Yūsuf and Shaybānī," 19–20, 218–24, 253–54, henceforth cited as Ansari, "Development;" Guraya, "*Sunnah*,"40–41; Dutton, *Origins*, 152–53, 174–77, 180).

According to Goldziher and Fazlur Rahman, the original Prophetic *sunna* was commensurable with the first *ḥadīth*s circulating in the Muslim community. Neither this early *sunna* nor its corresponding body of *ḥadīth*s were far-reaching in content and certainly nowhere as extensive as the voluminous *ḥadīth* literature that appeared in the third/ninth century. Since the original *sunna* reflected the norms of the first Muslim community, it constituted a "living *sunnah*" in the form of established practice. The content of this practice expanded over the years; this expansion, as Rahman sees it, was primarily the result of the legal interpretations (*ijtihād*) of the Companions and prominent Successors for unprecedented problems (Rahman, *Islam* [1968 edition], 53–66; idem, *Methodology*, 18, 30–31, 44–45).

Fazlur Rahman reflects extensively on the symbiosis between the original historical praxis of the Muslim community in the immediate post-Prophetic era and the ultimate verbalization of praxis in the form of *ḥadīth*s. He presumes there was a natural imperative to verbalize the content of the *sunna* as embodied in the "silent" and "living" *sunna*, but he suggests that the first generations of Muslims failed to commit the full content of the early *sunna* to words because of the immense challenges facing them in light of their conquests and the rapid emergence of a new Islamic social order. Because of this initial failure of thorough verbalization of the *sunna*, he believes that as praxis developed, it soon came to constitute an undistinguishable mass of precedents in which those elements that had arisen in the original *sunna* could no longer be distinguished from additional elements that grew out of legal interpretation (Rahman, *Islam*, 54).

Although Goldziher posits an original Prophetic *sunna*, he believes that Muslims borrowed heavily from earlier Near Eastern traditions during the initial phases of the formative period. Later, *ḥadīth*s were fabricated to incorporate the content of the evolving community practice in an authoritative form. Consequently, as the "living *sunna*" developed over the years, it once again became commensurable with the enlarged body of *ḥadīth*s that had been fabricated and backprojected to reflect it at this later stage. Goldziher held that it was especially the "living *sunna*" or praxis of Medina that is reflected in the majority of *ḥadīth*s, although numerous *ḥadīth* transmissions were also fabricated by the Iraqis to preserve the authority of their local *sunna*, which differed notably from that of Medina. Although Goldziher and Rahman doubt the authenticity of the greater part of *ḥadīth* literature, they hold it to be a valuable historical reference for understanding the Qur'ān and the Prophet's historical *sunna* because it mirrors the early community's understanding of these sources (Goldziher, *Studien*, 2:11–21, 29–32; idem, *Dogme*, 31–39, 42–43; cf. Rahman, *Islam* [1968 edition], 53–66; idem, *Methodology*, 18, 30–31, 44–45). Hallaq takes a similar view (Hallaq, *Origins*, 102–04, 8–78; idem, *History*, 16–17).

Hasan, Ansari, and Guraya do not subscribe to the fabrication and backprojection thesis, yet there are important similarities between their views and the preceding ones. All three agree that the Muslim communities of the late formative (pre-Shāfiʿī) period looked upon the entirety of their established practices as "living *sunna*s." Praxis constituted the *sunna*. Distinctions were not made between those parts that had been instituted by the Prophet and others which were the result of later legal interpretation. For this reason, according to Hasan, Ansari, and Guraya, the "living *sunna*" had expanded extensively dur-

ing the generations prior to al-Shāfiʿī as a consequence of the natural development of community practice. As an organic and undifferentiated whole, this practice included not only the original *sunna* but the legal interpretations of the Companions, Successors, and other prominent later jurists. It also included the policies and practices of the Umayyad rulers and judges. Because of the organic nature of this undifferentiated mass and the inability of its adherents to distinguish between its diverse sources, it became increasingly necessary toward the time of al-Shāfiʿī to check this "living *sunna*" against the criterion of authentically transmitted *ḥadīth*s. Only by this new textual referent was it possible to cut through the undifferentiated practice and extract those parts of it that were authoritative and authentic from those that were not. Such a process only became possible in the time of al-Shāfiʿī because it was then that the *ḥadīth*s of all regions were compiled and the biographical and other sciences of *ḥadīth* had approached maturity (Hasan, *Development*, 13, 23–26, 87, 94–97, 100–01; Ansari, "Development," 19–20, 143, 209, 224, 253–54; Guraya, "*Sunnah*," 40–44).

Harald Motzki reviews Schacht's conception of early praxis and his theory that the growth of backprojected *ḥadīth*s "threatened to destroy the 'living tradition' of the schools" (Motzki, *Origins*, 20–21, 51–54, 131, 133). Motzki contends that, "The whole theory of an originally anonymous 'living tradition' which was retroactively projected back first to the Followers, then onto the *ṣaḥāba* and finally onto the Prophet, is a construct which is not tenable in this form." He acknowledges that the phenomenon of backprojection did occur, but it came "rather late, not [in] the manner in which traditions generally originated" (Motzki, *Origins*, 296). Motzki is fundamentally concerned with the phenomenon of post-Prophetic reports and *hadīth*s and their role in formative Islamic law. As noted, he does not rule out the possibility of an authentic core of Prophetic *sunna* in early praxis but remains noncommittal on either affirming or disclaiming its existence. Motzki resolves "to leave aside generalizing preconceptions about the reliability of textual elements, such as *isnād*s and *mutūn*, or the genres of sources, such as Prophetic *ḥadīth*s or biographical reports." He "does not take for granted special characteristics of the transmission process such as stability, creativity, organic growth, and the like" (Motzki, *Origins*, xvii). His research affirms, however, that the early *Muṣannaf* work of ʿAbd al-Razzāq, who died in the early third/ninth century, contains a substantial core of authentically transmitted reports. Motzki shows that *ḥadīth*s—taken as a whole—contain both reliable and unreliable elements. He urges all scholars of Islamic studies, including the skeptics, to seek to define a border area between reliable and unreliable transmissions based on objective scholarly criteria (see Motzki, "Authenticity," 217–219, 223–24, 243; idem, *Origins*, 20–21, 51–54, 131, 133).

Wael Hallaq modifies the Schachtian paradigm of Islamic legal origins by extending the length of the pre-classical formative period beyond the third/ninth century. He adopts standard Schachtian backprojection theory, however, and does not replace the Schachtian paradigm of praxis and its relation to backprojection with anything radically new. Although Hallaq does not deny the presence of an authentic Prophetic stratum of praxis, he asserts that the early scholars of each region conceived of their local practices as constituting *sunna*, extensive elements of which derived from the administrative and judicial policies of their regions. The scholars injected an ideal element based on their understanding of the Islamic religious ethic, which they first attributed to the higher authority of Companions and Successors. In their quest for more definitive authority, this long and complex process of backprojection ultimately required attribution of authority to the Prophet himself. Like Schacht, Hallaq believes the phenomenon began with the scholars of Iraq (Hallaq, *History*, 16–17; idem, *Origins*, 8–78, 103). Hallaq refers to earliest praxis as "Sunnaic practice," which he places in juxtaposition with the phenomenon of emergent backprojected *ḥadīth*s, drawn from diverse regional practices, which ultimately vied against the various expressions of "Sunnaic practice" that developed at the local level. "Sunnaic practice" originated in the Prophetic example and teaching, although much of the original Prophetic *sunna* was pre-Islamic practice which the Prophet had authorized

Yasin Dutton holds that there was an original Prophetic *sunna*, which lay at the foundation of Medinese praxis. Citing Motzki's comparative study of the *Muṣannaf* of ʿAbd al-Razzāq and parallel materials in the *Muwaṭṭaʾ*, Dutton argues that the picture of Islamic origins as portrayed in the *Muwaṭṭaʾ* has a legitimate claim to historical authenticity. Medinese praxis as reflected in the *Muwaṭṭaʾ* appears to represent "a continuous development of the 'practice' of Islam from its initial origin in the Qur'ān, *via* the *sunna* of the Prophet as its first expositor and the efforts (*ijtihād*) of the rightly-guided caliphs and the other Companions, right through the time of the early Umayyad caliphs and governors and other authorities among the Successors and the Successors of the Successors up to when Mālik, as a young man at the beginning of the second century, was collecting the material which he would later prune and present as the *Muwaṭṭaʾ*."[13]

The thesis of the massive fabrication and back-projection of *ḥadīth* in the formative period, which is closely linked to perceptions about early praxis, also rests to a great extent on the widely accepted premise that the transmission of *ḥadīth* during the first two centuries of the formative period was an essentially oral process in which writing was rarely if ever used. The orality of *ḥadīth* transmission made their fabrication and back-projection a relatively easy matter, there being no way of establishing

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through his adoption of it. The first generations of Muslims consciously identified this living *sunna* not just with the Prophet but with "other *sunna* founders," prominent Muslims whose actions sanctioned the earlier *sunna* and gave it greater authority. In Hallaq's view, the "dramatic increase in Prophetic authority" in the later phase of the formative period meant that post-Prophetic patterns of Sunnaic practice that had been later instituted were backprojected to him. Legal doctrines and practices that originated in various cities and towns in the conquered lands and were largely based on the model of the Companions were ultimately authorized by attribution to the Prophet (Hallaq, *Origins*, 102–04).

[13] Dutton, *Origins*, 176–80. Regarding Mālik's understanding and use of praxis, Dutton builds on a number of conclusions from "Mālik's Concept of *ʿAmal*" (see Dutton, *Origins*, 39–40). Although he contends that Medinese praxis constituted a single authoritative entity for Mālik as "the existential, lived, reality that Mālik found himself in," Dutton does not believe that Medinese praxis was anonymous or undifferentiated as most scholars have conceived early Islamic praxis to have been (Dutton, *Origins*, 180, 35–41). The multiple sources of Medinese praxis made the word a "composite term" for Mālik. He distinguished between various parts of praxis, some of which originated in the *sunna*, while others were later additions that resulted from post-Prophetic legal interpretation and administrative rulings. Dutton notes the distinction in Mālik's legal reasoning between *sunna* as an indicant of normative Prophetic practice as opposed to the non-normative actions of the Prophet reflected in many *ḥadīth*s, which Mālik regarded as authentic but not constitutive of praxis (Dutton, *Origins*, 180, 35–41).

fabrication beyond that of impugning transmitters.[14] Nabia Abbott, Fuat Sezgin, Mustafa Azmi, Muḥammad al-Khaṭīb, and others argue that the transmission of *ḥadīth* relied heavily on manuscripts and writing from the time of the Companions.[15] The early use of writing for the transmission of *ḥadīth* and all fields of learning in Islamic civilization is a principal theme of Fuat Sezgin's monumental history of the Arabic written word in all its principal fields, *Geschichte des arabischen Schrifttums*.[16] Gregor Schoeler

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[14] See Goldziher, *Dogme*, 31–39; cf. idem, *Studien*, 2:194–96, 31–32; idem, "Kämpfe um die Stellung des *Ḥadīṯ* im Islam," 864–65; Margoliouth, *Development*, 65–98; Lammens, *Islam*, 69–81; Schacht, *Origins*, 140–51 (he speaks of the "literary" and "pre-literary" periods); Coulson, *History*, 40–41; Rahman, *Islam* (1968 edition), 60; Ansari, "Development," 211, 19; Hasan, *Development*, 26.

[15] See Abbott, *Studies*, 2:5–87; see especially 2:33–64, "Continuous Written Transmission;" Azmi, *Studies*, 1–212; Sezgin, *Geschichte*, 1:53–84; al-Khaṭīb, *Uṣūl*, 139–227.

From their perspective, the traditionists (*muḥaddithūn*) simultaneously cultivated memorization and writing from the beginning. As a rule, a traditionist would compile a personal manuscript of the *ḥadīth*s he transmitted, and he would commit his manuscript to memory. Abbott holds that these personal manuscripts refreshed the traditionist's memory, while their memorization tended to guarantee the preservation and integrity of the manuscript. Conversely, this combination of writing and memory enabled traditionists to detect deletions and interpolations in their texts; in some cases, it also meant that they could reconstitute their original manuscripts from memory if their books were lost, damaged, or destroyed (Abbott, *Studies*, 2:53).

[16] Both Sezgin and Azmi hold that the chains of transmission in *ḥadīth*s and similar reports (*akhbār*) mirror the original manuscripts of the transmitters cited in the chains, despite the fact that they create the impression of being a purely oral process. Azmi notes, in this regard, that al-Bukhārī and Muslim drew heavily on the *Muwaṭṭa'*, but their chains of transmission cite Mālik only as a transmitter and never refer to his work (Azmi, *Studies*, 298–99; cf. Jalāl al-Dīn ʿAbd al-Raḥmān al-Suyūṭī, *Tanwīr al-ḥawālik: sharḥ Muwaṭṭa' Mālik*, 1:7).

As a corollary of his theory, Sezgin developed a method of analyzing chains of transmission as a means to restoring the contents of lost manuscripts and books. He applied his technique to the chains of transmission in al-Bukhārī, Muslim, and al-Ṭabarī (Sezgin, *Geschichte*, 1:82–83, 115–16, 323–25, 378–79; see Azmi, *Studies*, 293–300). Azmi asserts that the use of manuscripts in the process of *ḥadīth* transmission enabled the traditionists to cross-reference and compare the words of teachers and their students in order to detect errors and fabrications and determine their sources (Azmi, *Studies*, 231, 203–05, 211).

Since Sezgin's work appeared over four decades ago, his arguments regarding the authenticity of written transmission in early Islamic intellectual history have been extensively debated, critiqued, and criticized (Humphreys, *Islamic History*, 22; cf. Schoeler, *Oral*, 36, 43; Montgomery, "Introduction," 13–14). As Fred Donner notes, "it now seems clear, on the basis of numerous case studies, that material was often, if not usually transmitted orally or in only partially stabilized written form." He adds that Sezgin's insights into the process are useful for source criticism "only when tempered by a lively awareness of the fluid nature of oral transmission" (Donner, *Narratives*, 13; cf. Montgomery, "Introduction," 13–14). Donner notes that Sezgin's colleague Rudolf Sellheim argues consistently the contrary point of view, contending that "the texts of early compilations remained fluid under conditions of largely or partially oral transmission until the third and even fourth century AH" (Donner, *Narratives*, 17; cf. Montgomery, "Introduction," 13–14).

provides a useful critique of Sezgin and holds that oral and written transmission in early Islam, far from being mutually exclusive, supplemented each other.[17]

There is no doubt that fabrication took place in the transmission of *ḥadīth*. Muslims and non-Muslims, modern and traditional, have consensus on this fact. Indeed, awareness of the presence of falsification and error in the transmission of *ḥadīth* is one of the fundamental premises underlying the emergence of the sciences of *ḥadīth* in Islamic intellectual history.[18] The crucial question remains how extensive fabrication was and whether or not the jurists and traditionists were willing and able to detect it. Combined use of writing and memorization in the transmission of *ḥadīth* in conjunction with the biographical records and other disciplines of *ḥadīth* reduced the probability that massive fabrication—at least from third parties—would go undetected, and it increased the probability of sound transmission according to the standards of the traditionists.[19]

Gregor Schoeler argues that transmitted materials were often conveyed from teacher to student in a process similar to lecture notes, in which the lecturer often relied on written notes. The process involved both oral and written methods of transmission. Schoeler notes that we should not conceive of "orality" in early Islamic transmission as utterly independent of writing such as the purely oral transmission of certain epics and songs in come pre-literate cultures. It would be equally misleading, however, to conceive of written transmission in early Islamic history as the *verbatim* copying and production of editorially finished works. The two processes worked together, and Schoeler suggests that we avoid catchphrases such as "written transmission" as opposed to "oral transmission" and focus on the actual transmission process as something akin to lecturing and teaching practices (Schoeler, *Oral*, 41; cf. Donner, *Narratives*, 17; Montgomery, "Introduction," 13–14).

As Schoeler notes, written reports can be as readily falsified as oral ones. In the end, questions of orality and written transmission are not directly relevant to the question of authenticity; our assessment of the overall veracity of early Islamic transmission cannot be seen as hinging exclusively on questions of orality or written transmission (Schoeler, *Oral*, 41). Ultimately, our assessment of the overall validity of transmitted reports in Islamic civilization must be a critique of the process itself—independent of whether it was written or oral—and the integrity of the men and women involved in it. Careful attention must be given to content just as it is given to chains of transmission and biographical materials about transmitters, and correlations must be drawn between the two. Although law and *ḥadīth* are distinctive disciplines and should be treated as such, the body of legal *ḥadīth*s and post-Prophetic reports needs to be studied in comprehensive fashion in terms of the overall corpus of legal doctrines that overlap with them and go beyond them.

[17] Schoeler, *Oral*, 41.

[18] See, for example, ʿAbd al-Raḥmān ibn ʿAlī ibn al-Jawzī, *Kitāb al-Mawḍūʿāt*, ed. ʿAbd al-Raḥmān Muḥammad ʿUthmān, 3 vols. (Medina: al-Maktaba al-Salafiyya, 1386/1966), 1:35–54.

[19] The sheer volume of *ḥadīth* literature, which appeared spurious at first impression to scholars like Fazlur Rahman, is misleading in the view of Nabia Abbott, Mustafa Azmi, and Iftikhar Zaman (see Iftikhar Zaman, "The Evolution of a Ḥadīth: Transmission, Growth and the Science of *Rijāl* in a Ḥadīth of Saʿd b. Abī Waqqāṣ," 4–14, 20–29, 182–94). None of the

Regarding Rahman's theory that it was chiefly Medinese praxis that embodied most backprojected *ḥadīth*s, it should be noted that a substantial portion of Medinese praxis—by far the greater part of it, in fact—has no representation in *ḥadīth* at all. In many cases, Medinese praxis contradicted the very *ḥadīth*s that the Medinese themselves transmitted and claimed to be authentic. *Mālik and Medina* shows, interestingly, that a number of the most fundamental precepts in Medinese praxis which Mālik identified as rooted in the Prophetic *sunna* (such as certain basic precepts of the alms tax) were never recorded in *ḥadīth* form either inside or outside of Medina.

Because the early jurists lived at a time when the *ḥadīth* of various regions had not yet been compiled and the science of *ḥadīth* had not fully developed, Ahmad Hasan, Ansari, and Guraya hold that they did not have the means to review systematically the content of the praxis in their localities. Mālik's biography and his use of Medinese praxis offer a different picture of this process. As indicated earlier, biographical reports about

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ḥadīth collections contains *ḥadīth*s exclusively. They also contain post-Prophetic reports (*āthār*), the number of which is large in some collections. There is also much repetition in the *ḥadīth*s, and short fragments (*aṭrāf*) of longer *ḥadīth*s are customarily transmitted as separate narrations. According to Azmi, this method appeared during the second half of the first/seventh century (Azmi, *Studies*, 185–86; Zaman's "Evolution" focuses exclusively on this phenomenon). Abbot contends that one can account for the volume of *ḥadīth* literature as a process of geometric progression, and she doubts that the actual content of *ḥadīth* literature was unreasonably large (Abbott, *Studies*, 2:16, 44, 65–72, 178, 196, 268, 276; Azmi, *Studies*, 301–05). Abbott concludes on the basis of the consistency between the early papyri she studied and the content of later *ḥadīth* collections that, as a rule, the traditionists were trustworthy and careful in their transmissions, "There were comparatively few dishonest and unscrupulous men responsible for an occasional deception or forgery or, as is alleged particularly in the case of sectarians, for wholesale fabrications" (Abbott, *Studies*, 2:53, 73–83).

The fact that *ḥadīth*s contain contradictory materials does not constitute independent proof that they were fabricated. While one cannot rule out that such discrepancies resulted from error or willful falsification, such differences can also be attributed to other causes. It should be emphasized, however, that *ḥadīth*s—like any historical texts—are polysemic and not transparent. Therefore, it is also reasonable to hold that the contradiction between some *ḥadīth*s is a consequence of actual historical processes on the ground in the original events or statements reported, such as the repeal of earlier precepts. In some cases, the contents of *ḥadīth*s are not actually contradictory but contrary and can be harmonized by being placed in their proper contexts. The apparent contradictions between conflicting *ḥadīth*s reflect the textual ambiguities and deficiencies inherent in the genre, especially in solitary *ḥadīth*s and reports of action. For Mālik, one of the principal uses of Medinese praxis was to serve as a criterion by which to remove such ambiguities and textual limitations. Mālik relied upon praxis to discern those *ḥadīth*s that reflected the Prophet's normative and public conduct from the Prophet's exceptional, non-normative behavior. *Ḥadīth* literature, however, generally transmits normative and non-normative examples side by side, without distinguishing between them (see Abd-Allah, "*'Amal*," 436–448).

Mālik indicate that he had access to the large Umayyad *ḥadīth* compilations initiated by ʿUmar ibn ʿAbd al-ʿAzīz through his teacher al-Zuhrī, who was the principal scholar involved in the initiative, although Mālik refrained from transmitting them or using them as a criterion by which to judge Medinese praxis.[20] Furthermore, as indicated earlier, the *ḥadīth*s championed by the Shāfiʿī protagonist in *Ikhtilāf Mālik* against the Medinese are shared *ḥadīth*s and consist almost exclusively of *ḥadīth*s which Mālik himself transmits in the *Muwaṭṭaʾ*. Yet the Medinese systematically interpreted these *ḥadīth*s contrary to their overt meanings and in a manner that clashed with later Shāfiʿī *ḥadīth* interpretation.[21]

Mālik drew a distinction between aspects of Medinese praxis that he regarded to have been instituted by the Prophet (for which he often uses *sunna*-terms) and other aspects of praxis that resulted from post-Prophetic legal interpretation (*ijtihād*). He did not regard the totality of Medinese praxis as constituting a "living *sunna*." Analysis of Mālik's terminology indicates further that he drew a distinction between those parts of Medinese praxis that he regarded as *sunna* and those parts of praxis that were based on later legal interpretation but had the support of Medinese consensus. It does not appear that matters of legal interpretation upon which consensus was reached were ever elevated to the status of the "living *sunna*" merely by virtue of their having gained consensus. Finally, the consensus of Medinese jurists did not include all aspects of Medinese praxis. Medinese consensus and Medinese praxis were not coextensive, and Mālik differentiated between those types of praxis that were supported by local consensus and those that were not. The term AN (the

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[20] See Abd-Allah, "*ʿAmal*," 76–85.

[21] See Abd-Allah, "*ʿAmal*," 341–43. In another instance, the Shāfiʿī interlocutor declares the Medinese to be arbitrary because they accept several *ḥadīth*s in the *Muwaṭṭaʾ* reporting that the Prophet raised his hands at various times while performing the ritual prayer, yet they do not pray in that manner because it was not in accordance with praxis (see [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 201; *Muw.*, 1:75–77; Abd-Allah, "*ʿAmal*," 190–91). It may be of note that several *ḥadīth*s in this chapter describe the Prophet's manner of prayer without making mention of his raising his hands. The omission is significant since it presumably indicates that raising the hands was either not a part of the Prophet's action in such cases or at least not an essential part of the prayer ritual. The difference between al-Shāfiʿī and the Medinese in this tract was a difference over legal theory and the methodology of interpreting textual sources, not the authenticity of the *ḥadīth*s in question. Mālik evaluated *ḥadīth*s against Medinese praxis. Al-Shāfiʿī evaluated Medinese praxis against *ḥadīth*s. If a legal text appeared ambiguous, Mālik removed its ambiguity by placing it within the semantic context of praxis. For al-Shāfiʿī, it was the overt (*ẓāhir*) meaning of the text that took priority, and the praxis of Medina ceased to be a relevant criterion for evaluating *ḥadīth*s.

precept among us; *al-amr ʿindanā*) clearly stands in some instances for types of praxis that lacked local consensus, while terms such as AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*) enjoyed various degrees of majoritarian or complete consensus.[22]

Contemporary Islamic studies in Western languages agree that Medinese praxis constituted Mālik's conclusive argument.[23] Legal reasoning

[22] See Abd-Allah, "*ʿAmal*," 419–34.

[23] Goldziher, *Studien*, 2:141, 214–17; Schacht, *Origins*, 312–14, 58–59, 63; Rahman, *Methodology*, 13; Hasan, *Development*, 100–01; Ansari, "Development," 21, 184–85, 243; Guraya, "*Sunnah*," 77, 89, 147; Hallaq, *Origins*, 104–08; Dutton, *Origins*, 3; cf. Motzki, *Origins*, 27.

Wael Hallaq focuses on Mālik's use of praxis with regard to *ḥadīth*s. He notes that praxis always constituted the "final arbiter" in establishing the content of the Prophetic *sunna*. He adds that Medinese doctrine did not categorically reject *ḥadīth*s in favor of praxis but placed them on the periphery of legal argumentation, since praxis was regarded as a higher source of ultimate Prophetic authority (Hallaq, *Origins*, 104–08). Hallaq holds that Medinese reliance on praxis as the criterion for judging *ḥadīth*s involved "two competing conceptions of Prophetic sources of authority: the Medinese scholars' conception was that *their own* practice represented the logical and historical (and therefore legitimate) continuation of what the Prophet lived, said and did, and that "the newly circulating" *ḥadīth*s were at best redundant when they confirmed this practice and at worst, false, when they did not accord with the Prophetic past as continuously documented by their own living experience of the law" (Hallaq, *Origins*, 105–06). Hallaq's reference to "the newly circulating *ḥadīth*s" is his own historical inference. Nothing in the Medinese or Kufan sources indicates that jurists of the time perceived *ḥadīth*s as "newly circulating" or constituting an unprecedented source of authority that had recently emerged. As we have seen in the earlier discussion of solitary *ḥadīth*s, Mālik, Ibn al-Qāsim, and the Medinese regarded authentic non-normative *ḥadīth*s as old and having been transmitted parallel to praxis. The fact that they were legally problematic often had nothing to do with the question of their authenticity and certainly entailed no notion that they had been newly coined and circulated. This notion of the rising tide of "newly circulated *ḥadīth*s" is part of Hallaq's dominant paradigm, which he shares with many historians and which they have back projected into the sources.

Christopher Melchert contends that during the course of the third/ninth century, the adherents of Abū Ḥanīfa and Mālik "took up [the traditionist-jurisprudent] reliance on *ḥadīth* as opposed to local custom, rational speculation, and so on" (Melchert, "Traditionist-Jurisprudents," 405–06). While it is true that later Mālikīs such as Ibn ʿAbd al-Barr and Ibn Rushd take largely textual approaches to the law and seek to index Mālik's praxis precepts in terms of standard *ḥadīth*s, the Mālikī tradition as a whole remained faithful to the principle of Medinese praxis and the various instruments of legal inference and rational considered opinion that were rooted in it. They did not endorse a four-source classical legal theory in any systematic manner that led them to reject the earlier foundations of the school and reformulate the school's basic precepts and legal interpretations as predicated on those Medinese fundamentals.

Yasin Dutton notes that Medinese praxis included the Prophetic *sunna* but extended beyond it to take in post-Prophetic legal interpretations: all *sunna* was praxis, but not all praxis was *sunna*. He notes the distinctions that can be drawn in the *Muwaṭṭaʾ* between the diverse sources from which praxis arose. He broaches the question of whether or not Mālik regarded all types of Medinese praxis to be equally authoritative and suggests, on the basis of my study of Mālik's terminology in the *Muwaṭṭaʾ*, that Mālik probably did not regard all types of Medinese praxis as equally binding in authority. He also cites my

based on praxis was not unique to Mālik. It was characteristic of al-Layth ibn Saʿd, for example, as reflected in his correspondence with Mālik, which will be discussed later. Al-Layth, like Mālik, admitted the primacy of Medinese praxis but, unlike Mālik, conceded a high degree of competing authority to regional praxis outside Medina in regions that the Companions had settled during the early caliphate.[24] Abū Ḥanīfa shared a similar commitment to Kufan praxis in evalutating solitary *ḥadīth*s, although the primacy of generalized textual referents was a distinctive part of his legal reasoning.[25] Early Ḥanafī works such as those of al-Shaybānī make occasional references to praxis but not to the degree that the Medinese utilize the concept.[26] Fazlur Raḥman contends that al-Awzāʿī's reliance on the "living tradition" (praxis) was greater than his dependence upon legal *ḥadīth*, which stood in contrast to the more *ḥadīth*-based legal reasoning of his contemporary Sufyān al-Thawrī.[27]

Dutton notes that the phenomenon of praxis *per se* included other major regions of the early Islamic governance. He contends that praxis was first displaced in Iraq "and then later practically everywhere else" by the rise of *ḥadīth*, which came to be synonymous with the *sunna*, although in many cases they did not reflect the original *sunna*-based norms that made up

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reference to "mixed praxis" in Medina, in which the Medinese jurists dissented among themselves and countenanced the simultaneous existence of different types of praxis in the city. Dutton contends on the basis of Mālik's declining to allow al-Manṣūr to make the *Muwaṭṭaʾ* a standard imperial code that Mālik also acknowledged the general validity of types of regional praxis that were contrary to that of Medina (Dutton, *Origins*, 3–4, 38–45, 176–77, 180). He treats Mālik's use of praxis in conjunction with solitary *ḥadīth*s. Like Hallaq, he argues that praxis and *ḥadīth*s were not mutually exclusive in Mālik's mind, "*ʿAmal* may, or may not, be recorded by *ḥadīth*; and *ḥadīth* may, or may not, record *ʿamal*. Where they overlap they are a strong confirmation of each other; but where there is contradiction, *ʿamal* is preferred to *ḥadīth* by Mālik and the Madinans, even when the sources of the *ḥadīth* are completely trustworthy . . ." (Dutton, *Origins*, 45).

[24] Abd-Allah, "*ʿAmal*," 313–14.

[25] Al-Kawtharī, *Fiqh*, 35.

[26] Al-Shaybānī's makes references such as "what the people do is like this" (*hākadhā amr al-nās*) and "the praxis of the people is like this" (*hākadhā ʿamal al-nās*). Early Ḥanafī works also register some opposition to practice; Calder believes it was not a rejection of praxis *per se*, but of unacceptable popular practices (see Calder, *Studies*, 198–99). Wael Hallaq asserts that Kufan praxis unlike that of Medina "could not (and did not) claim continuity of Prophetic practice that the Medinese were able to do." "In fact, the term 'practice' (*ʿamal*), including any expression connoting notions of 'practice,' was virtually nonexistent in the Kufan discourse, although '*sunna*' for them at times referred to legal practice. Nor were references to uniterrupted past practices as frequent as those made by the Medinese. Second, the Iraqians could never claim the consensual unanimity that the Medinese easily claimed for their practice." (See Hallaq, *Origins*, 106).

[27] Rahman, *Islam*, 82.

original praxis. As praxis was displaced, "an almost totally *ḥadīth*-based, i.e. text-based, religion" became the essence of Islamic jurisprudence. Such textually based jurisprudence first developed in Iraq. It became the hallmark of the later work of al-Shāfiʿī and Ibn Ḥanbal and reached its most rigorous application in the formalistic textual literalism of Dāwūd al-Ẓāhirī, which contrasted radically from Mālik's non-textual, praxis-based view of the Qurʾān and *sunna*.[28]

The most useful contemporary studies of Mālik's reasoning in Arabic are those of Muḥammad Abū Zahra, Muṣṭafā al-Zarqā, ʿAllāl al-Fāsī, and Maʿrūf al-Dawālībī. The two university theses of Aḥmad Nūr-Sayf and ʿAbd-Allāh al-Rasīnī, to which I also refer, are of note. The first pertains to the praxis of Medina, while the second treats the legal interpretations of the Seven Jurists of Medina. Of all contemporary Arabic works on Mālik and Medinese jurisprudence, the most comprehensive and historiographically reliable is Abū Zahra's *Mālik*, and the present work builds on its arguments to an extensive degree. The work of Muḥammad Zāhid al-Kawtharī is also of great value. He lists a number of stipulations which he believes Abū Ḥanīfa placed upon the use of *ḥadīth*s. He contends that Abū Ḥanīfa relied upon Kufan praxis when examining *ḥadīth*s in a manner cognate to Mālik.[29] Since each of the above authors is cited in context at various points throughout this book, I will not bother to summarize their arguments here.

Other contemporary Arabic works on Islamic legal theory and the history of Islamic law which I was able to consult lack serious discussions of Medinese praxis and Mālik's legal reasoning. What relevant observations they make are generally taken from traditional works on Mālikī legal theory. They are worthy of note, even though they fail to give a comprehensive picture. Muḥammad Madkūr, Zakī al-Dīn Shaʿbān, and Muṣṭafā al-Sibāʿī observe that Mālik used Medinese praxis as a criterion against which he accepted, interpreted, or rejected solitary *ḥadīth*s.[30] Muḥammad Khuḍarī Bêk refers to the same categories of Medinese praxis as set forth in the works of al-Qāḍī ʿAbd al-Wahhāb, which are mentioned below.[31] ʿAlī Ḥasab-Allāh observes that Mālik regarded conclusions derived from

[28] Dutton, *Origins*, 3–4, 35, 38–41.

[29] See al-Kawtharī, *Fiqh*, 35; for Abū Ḥanīfa's stipulations in full see Abd-Allah, "*ʿAmal*," 762–764; al-Kawtharī, *Fiqh*, 36–38; Zakī al-Dīn Shaʿbān, *Uṣūl*, 63–65.

[30] See Muḥammad Sallām Madkūr, *Madkhal al-fiqh al-islāmī*, 40 ff.; Muṣṭafā al-Sibāʿī, *Al-Sunna wa makānatuhā*, 392; Shaʿbān, *Uṣūl*, 67; cf. Abū Zahra, *Mālik*, 290–94, 300–05.

[31] Muḥammad Khuḍarī Bêk, *Uṣūl al-fiqh*, 205.

analogy when based upon well-established precepts as taking priority over solitary *ḥadīth*s, but he does not delve into praxis.[32] Muḥammad Shalabī notes that Mālik's custom of granting priority to analogy over irregular solitary *ḥadīth*s was cognate to his use of praxis as a criterion against which to evaluate *ḥadīth*s.[33]

Formative-Period Polemics against Praxis

Abū Yūsuf's Critique of Hijazi Praxis

Abū Yūsuf's relatively short polemical tract *al-Radd ʿalā siyar al-Awzāʿī* was directed against the Syrian jurisprudent al-Awzāʿī, but it contains references to the people of the Hijaz and their reliance upon praxis.[34] In Abū Yūsuf's view, al-Awzāʿī's conception of praxis was essentially the same as the Medinese and warranted the same criticism. He makes no allusion to Abū Ḥanīfa's reliance upon Kufan praxis, although it was apparently part of the Kufan legal legacy.[35]

Abū Yūsuf's principal contention against the established practices of Syria and the Hijaz is that the source of such praxis cannot be identified, which veils it in uncertainty because its authenticity cannot be verified. This argument will become the most common criticism of praxis in the works of many later jurisprudents. The critique treats praxis as analogous

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[32] ʿAlī Ḥasab-Allāh, *Uṣūl al-tashrīʿ al-islāmī*, 55.

[33] Muḥammad Shalabī, *Al-Madkhal*, 146, 177.

[34] In light of Abbasid policy to institute Ḥanafī legal norms in the Egyptian judiciary toward the end of al-Layth ibn Saʿd's life, the anti-Syrian, anti-Medinese tracts of Abū Yūsuf and al-Shaybānī may have been meant to play a part in executing that policy. Abū Yūsuf, who died in 182/798 about seven years after al-Layth and three years after Mālik, and his student al-Shaybānī worked closely with the Abbasid caliphs. Both served as Abbasid judges, Abū Yūsuf having been invested sometime around 169/785 as the first Chief Judge (*qāḍī al-quḍāh*) in Islamic judicial history (see Sezgin, *Geschichte*, 1:419, 421; Abd-Allah, "*ʿAmal*," 53–54, notes 3 and 2.). In their attempt to undercut provincial praxis, *Siyar al-Awzāʿī* and al-Shaybānī's *al-Ḥujja* may represent a preparatory step toward instituting Ḥanafī judicial norms in the Abbasid state in keeping with al-Manṣūr's desire for uniform legal practice.

[35] Early Ḥanafī works seem to refer less frequently to praxis than the Medinese, but they shared the concept. Reference to Kufan praxis would have probably undercut the force of Abū Yūsuf's argument. Muḥammad al-Kawtharī contends that Abū Ḥanīfa had recourse to the local praxis of Kufa in evaluating *ḥadīth*s (al-Kawtharī, *Fiqh*, 35). Al-Shaybānī makes occasional references to Kufan praxis in his works. He states, for example, that "what the people do is like this" (*hākadhā amr al-nās*) and "the praxis of the people is like this" (*hākadhā ʿamal al-nās*). Early Ḥanafī works also register some opposition to praxis, although Calder believes it was not a rejection of praxis *per se*, but of unacceptable popular practices (see Calder, *Studies*, 198–99).

to *ḥadīth* in that it requires a chain of transmission for verification. It reflects the textual orientation of Ḥanafī legal reasoning. Abū Yūsuf states, for example:

> The people of the Hijaz hand down a given judgment, and when it is asked of them from whom [they received it], they answer, "This is a long established *sunna* (*bi-hādhā jarat al-sunna*)." Yet it may be that it is just a ruling handed down by the overseer of the market place or the judgment of some provincial governor.[36]

In a second text, al-Awzāʿī's protagonist states that the people of knowledge follow a particular matter in question which was the praxis of the Imāms (i.e. the rightly-guided caliphs). Abū Yūsuf rejects the claim:

> As for [al-Awzāʿī's] statement, "This has been the praxis of the Imāms and what the people of knowledge have held to be valid," it is like what the people of the Hijaz say, "This is the long established *sunna*." But that is unacceptable [to us], nor can it be accepted from those who have no knowledge [of the original source]. Who is the Imām who instituted this praxis? Who is the scholar who held to this opinion? [Let us know this] so that we may judge for ourselves whether or not he is a worthy source and is to be trusted in matters pertaining to knowledge.[37]

Abū Yūsuf often returns to the theme that praxis cannot be regarded as a sound legal reference unless it is verified by authentic legal texts. When addressing another question in which al-Awzāʿī has based his argument on praxis, Abū Yūsuf asks, "Does [al-Awzāʿī] possess any legal text (*athar*) with a complete chain of transmission (*isnād*) that has been transmitted by reliable transmitters (*al-thiqāt*) that the Messenger of God [did this]?"[38] He objects to al-Awzāʿī's assertion that, "the people continue to follow this (*lam yazal al-nās ʿalā hādhā*)," an expression with numerous parallels in the *Muwaṭṭa'* and *Mudawwana*.[39] Abū Yūsuf counters that most of the things the people continue to do are either improper or impermissible. He adds:

> In matters like this it is only the *sunna* that is to be followed [as it has come down] from God's Messenger . . . [and] from those of our predecessors who were his Companions and from the jurists.[40]

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[36] Abū Yūsuf, *al-Radd*, 11.
[37] Abū Yūsuf, *al-Radd*, 41–42.
[38] Abū Yūsuf, *al-Radd*, 22–23.
[39] See Abd-Allah, "*ʿAmal*," 583–99.
[40] See Abd-Allah, "*ʿAmal*," 583–99.

In *Al-radd ʿalā siyar al-Awzāʿī*, Abū Yūsuf does not attack Medinese claims to consensus. Al-Shaybānī, on the other hand, explicitly undercuts such Medinese claims by insisting that the people of Medina have been known to alter opinions to which they formerly adhered.[41] For al-Shāfiʿī, the invalidity of Medinese consensus constitutes a prominent part of his argument against Medinese jurisprudence. It is remarkable how similar the arguments of al-Shaybānī and al-Shāfiʿī are regarding Medinese reliance on praxis. Their arguments often sound so much alike that it would be difficult to distinguish their authorship as isolated texts. Since al-Shāfiʿī studied under al-Shaybānī and the two were reportedly close friends, it is not unlikely that al-Shāfiʿī's manner of thinking and expression reflects al-Shaybānī's influence.[42]

Abū Yūsuf's reasoning is similar to that of al-Shāfiʿī a generation later in his insistence that praxis be verified by authentic legal texts. It differs, however, in that Abū Yūsuf rejects solitary *ḥadīth*s as a valid criterion by which to judge praxis. At the same time, Abū Yūsuf accepts textual sources such as post-Prophetic reports and the opinions of earlier jurists as valid legal references in critiquing praxis.[43] Emphasis on textual reports (*āthār*) is even stronger in al-Shaybānī's critique of Medinese praxis.[44]

Al-Shaybānī's Polemic against the Medinese

Al-Shaybānī's critique of the legal reasoning of Medina reflects the textual principles of Kufan jurisprudence.[45] As noted, his argument is remarkably similar to that of al-Shāfiʿī. Al-Shaybānī's repeated critique of the

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[41] Al-Shaybānī, *al-Ḥujja*, 1:58–65.

[42] For example, al-Shaybānī often cites numeous *ḥadīth*s and post-Prophetic reports in *al-Ḥujja* to support his position and accuses the Medinese, in a manner characteristic of al-Shāfiʿī, of failing to follow the reports which they themselves have transmitted or of adhering to certain reports as opposed to reports, both of which they transmit. Ansari notes that al-Shaybānī frequently criticizes the Medinese in *al-Ḥujja* for making arbitrary use of *raʾy* in contradiction of legal texts instead of basing their doctrines on such texts. See Ansari, "Juristic Terminology," 290.

[43] See Abd-Allah, "*ʿAmal*," 170–79.

[44] See Ansari, "Juristic Terminology," 290; Abd-Allah, "*ʿAmal*," 333, note 3.

[45] I take al-Shaybānī's arguments against Medinese jurisprudence in the following section from citations in al-Shāfiʿī's refutation of al-Shaybānī in *al-Radd ʿalā Muḥammad ibn al-Ḥasan*. One of the interesting features of al-Shāfiʿī's *al-Radd* is that he appears to have compiled it early in his career. It is prior to *Ikhtilāf Mālik*, which mentions *al-Radd* and speaks of al-Shāfiʿī's role in that work as a protagonist of the Medinese legal tradition and of Mālik, under whom he studied (see al-Shāfiʿī, *al-Radd*, 297). In this citation, al-Shāfiʿī responds to al-Shaybānī's question by presenting the Medinese point of view. On two occasions, al-Shāfiʿī accuses al-Shaybānī of misrepresenting Mālik's opinions or attributing to him things which he had not said (al-Shāfiʿī, *al-Radd*, 280, 285). At the close of the section (al-Shāfiʿī, *al-Radd*, 297), al-Shāfiʿī presents a contrary point of view that reflects his

arbitrary nature of Medinese legal reasoning returns continually to the Medinese habit of granting priority to considered opinion (*raʾy*) over legal texts (*āthār*), upon which, in al-Shaybānī's view, their opinions should be directly based.

Like Abū Yūsuf, al-Shaybānī questions the continuity of Medinese praxis, noting that the Medinese sometimes adopt positions contrary to those which they held in the past.[46] He claims that the Medinese are arbitrary by virtue of their adherence to legal opinions for which they offer no proof in the textual sources of the law. Al-Shaybānī remarks:

> How can it be permissible for the people of Medina to be [so] arbitrary (*yataḥakkamū*) in this matter and select these four stipulations [in question] from among [other possible] stipulations? How do you think you would be able to refute the people of Basra, if they were to say, "We want to adhere to two other stipulations;" or the people of Syria, if they were to say, "We want three different stipulations?" Hence, it is proper that people do what is fair (*yunṣifa*) and not be arbitrary. . . . I will not follow any opinion unless the people of Medina produce for me a legal text (*athar*) supporting what they say so that I can follow it [instead]. But they have no text in this matter.[47]

Al-Shaybānī does not concede any excellence to Medinese praxis over the regional practices of Basra and Syria. He treats each regional praxis as having an equally legitimate claim against every other.

Al-Shaybānī doubts the source of Medinese praxis and calls its continuity into question. To follow praxis on the presumption that it originated in an authoritative source is at best conjecture (*ẓann*), whereas following a legal text is certainty (*yaqīn*).[48] He asserts that the prominent Successor and Medinese jurist Yaḥyā ibn Saʿīd, who was one of Mālik's principal teachers, once corroborated a particular legal position by stating that it was "one of the ancient rulings" (*min al-amr al-qadīm*). Al-Shaybānī remarks:

> "Ancient" could be from someone who is worthy of imitation and whose opinion is of binding authority just as it might be from governors (*al-wulāh*) who are not worthy of imitation and whose opinions are not binding. So from which of these two is it?[49]

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later legal reasoning. It appears to me that the closing statement is an editorial addition, perhaps of the later al-Shāfiʿī. Al-Shāfiʿī was known for correcting and editing his works.

[46] See Abd-Allah, "*ʿAmal*," 333–34, note 3.

[47] Cited in al-Shāfiʿī, *al-Radd*, 288.

[48] Cited in al-Shāfiʿī, *al-Radd*, 297.

[49] Cited in al-Shāfiʿī, *al-Radd*, 297.

Al-Shaybānī discusses an aspect of Medinese praxis pertaining to the indemnities (*diyāt*) required of Jews, Christians, and Magians for inflicted wounds and other types of bodily harm. Mālik treats the same matter in the *Muwaṭṭa'* and refers to it as an AN (the precept among us; *al-amr ʿindanā*).[50] According to al-Shaybānī, al-Zuhrī held a dissenting opinion; transmitted *ḥadīth*s to the contrary; and held that Abū Bakr, ʿUmar, and ʿUthmān had not followed this ruling. Al-Zuhrī contended instead that the indemnity rulings in question were instituted by Muʿāwiya.[51] Al-Shaybānī asserts that this praxis was a matter of dissent within Medina.[52] Elsewhere, al-Shaybānī argues that Mālik had once said that the Medinese had not held to a particular ruling regarding legal retaliation (*qiṣāṣ*) for intentionally cutting off a finger until a certain deputy governor (*ʿāmil*), ʿAbd al-ʿAzīz ibn al-Muṭṭalib, had handed it down as a ruling. Al-Shaybānī contends that in some cases the praxis in Medina may go back to a policy which had been institued by one of the city's governors.[53]

Early Shāfiʿī Contentions Regarding Medinese Praxis

Muḥammad Abū Zahra identifies two main points regarding Medinese praxis in the early Shāfiʿī polemical tract *Ikhtilāf Mālik*. First, its author demonstrates that the Medinese lacked consensus on numerous matters of law embodied in their praxis. Secondly, he champions the authority of solitary *ḥadīth*s, arguing that they may not be overruled by scholarly consensus based on unsubstantiated sources of law or legal interpretation such

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[50] *Muw.*, 2:864.

[51] Al-Shāfiʿī, *al-Radd*, 291.

[52] Although al-Shaybānī's contention on this issue does not agree in detail with Mālikī sources, his claim that this praxis was an issue of dissent is consistent with my interpretation that Mālik's term AN (the precept among us; *al-amr ʿindanā*) is generally indicative of significant differences of opinion among the Medinese jurists. In the *Muwaṭṭa'*, Mālik cites ʿUmar ibn ʿAbd al-ʿAzīz as his authority on this praxis. This is confirmed in the *Mawwāziyya*. Certain aspects of the precept were upheld on the authority of Yaḥyā ibn Saʿīd and Sulaymān ibn Yasār among the Seven Jurists. No mention is made of Muʿāwiya in either source, although it is clear from numerous citations in the *Muwaṭṭa'* that Mālik regarded Muʿāwiya as a trustworthy transmitter and authoritative interpreter of the law. There is also no mention of al-Zuhrī's dissent. Al-Bājī, who presents this information, supports this AN by analogy to another precept pertaining to the indemnities for women (*Muw.*, 2:864; al-Bājī, *al-Muntaqā*, 7:97–98).

[53] Cited in al-Shāfiʿī, *al-Radd*, 302. I found no extended discussion of the ruling in the *Muwaṭṭa'*, although Mālik cites an AMN that is analogical to it and mentions the ruling in passing and in the context of another precept (see *Muw.*, 2:875). Al-Bājī contends that the ruling in question is in keeping with the general provisions of the pertinent Qur'ānic verse (Qur'ān, 5:45), which, in al-Bājī's view, is the principal source for the AMN.

as Medinese praxis.[54] At one point, the Shāfiʿī protagonist notes that the Mālikīs object to following isolated *ḥadīth*s (*khabar al-infirād*). He notes that Medinese claims of consensus in contradiction to solitary *ḥadīth*s are identical to the manner (*ṭarīq*) of those who refuse to subscribe to *ḥadīth* altogether (*abṭalū al-aḥādīth kullahā*). Yet those who utterly refuse *ḥadīth* lay claim to following the consensus of all scholars (*ijmāʿ al-nās*), while the Medinese only lay claim to the consensus of their city.[55]

Robert Brunschvig notes that the Shāfiʿī protagonist of *Ikthilāf Mālik*, whom he assumes to be al-Shāfiʿī, contends in the strongest terms that the Mālikīs are arbitrary. He denies that there is any method to their legal reasoning. He even asserts at several points that the Medinese are incompetent and unqualified to issue legal opinions.[56] Not only does the Shāfiʿī interlocutor call Medinese consensus into question, he contends that Medinese praxis is equally questionable. At one point, he claims that Medinese praxis, like their consensus, is merely a dubious word that they say (*aqāwīlukum*) without substantive authority.[57] He accuses the Medinese of being the most culpable of all people when it comes to their failure to follow Prophetic *ḥadīth* or even to follow their own local traditions consistently.[58]

As Brunschvig observes, there are cases when the Shāfiʿī protagonist contends that Mālik has not based certain opinions on Medinese praxis but on the views of Abū Ḥanīfa.[59] Noting that the Shāfiʿī interlocutor in *Ikhtilāf Mālik* argues systematically against the Medinese throughout the work by citing *ḥadīth*s that Mālik himself has transmitted, Brunschvig asserts that by this technique he places Mālik the traditionist, the authenticity of whose transmission is above doubt, in juxtaposition to Mālik the jurist, whose legal reasoning he questions.[60]

The Shāfiʿī protagonist contends that the Medinese may only validly lay claim to consensus in matters regarding which they have had total local consensus over the generations.[61] He asserts further that the Medinese

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[54] Abū Zahra, *Mālik*, 339; cf. Brunschvig, "Polèmiques," 388, 391–94.

[55] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 260–61.

[56] Brunschvig, "Polèmiques," 388–392; for examples not cited above, see [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 201, 202–03, 206, 208, 215–16, 233, 258, 260, 265.

[57] See [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 259; cf. ibid., 206, 207, 226.

[58] See [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 202–03, 206, 208, 258–59, 265.

[59] See Brunschvig, "Polèmiques," 389–390, 392; see [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 223, 230–31, 267.

[60] Brunschvig, "Polèmiques," 388.

[61] Brunschvig, "Polèmiques," 393; [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 202–03, 267.

have only reached local consensus in matters on which the jurists of other regions also have consensus. Likewise, when the Medinese fail to have local consensus on a matter that issue has been a matter of dissent in all other regions as well.[62] Brunschvig notes, however, that the Shāfiʿī interlocutor produces no evidence to substantiate his claim.[63] Nevertheless, this assertion in *Ikhtilāf Mālik*, whether or not it was accurate in fact, indicates clearly the Shāfiʿī perspective that Medinese consensus had no distinctive merit over and against the consensus of the Muslim nation at large.

The Shāfiʿī protagonist protests that he cannot discover who the constituents of Medinese consensus are. He states, for example:

> Thus, you have said that they reached consensus, but you have not transmitted the opinion you hold from a single Imām. I do not know who constitutes the "people" (or the scholars; *al-nās*) for you.[64]

He states similarly:

> So who is it that reached consensus on setting aside the *sunna* and following something contrary to ʿUmar? Would that I knew (*fa-yā layta shiʿrī*) just who these "makers of concurrence" (*hāʾulāʾ al-mujtamiʿūn*) were.[65]

My analysis of Mālik's terminology indicates that he drew a distinction between different types of Medinese praxis, including those that had the support of local consensus and those that did not. *Ikhtilāf Mālik* asserts, however, that at least some of the Medinese claimed that there was total consensus in Medina upon the precepts to which the Medinese subscribed. At one point, for example, the Shāfiʿī protagonist states after having indicated that there were dissenting opinions in Medina on a certain legal question, "Now where is your claim that knowledge in Medina is like a legacy regarding which they do not disagree."[66] He refers again later to the claim of his Medinese opponent that the jurists of Medina never disagree and argues as before that the jurists of Medina did disagree on certain matters and that the rulers of the city (*al-umarāʾ*) would follow the opinions of some of them instead of others, thus making the opinions they selected integral parts of Medinese praxis.[67] As indicated elsewhere,

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[62] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 202–03, 253; Brunschvig, "Polèmiques," 393–94.
[63] Brunschvig, "Polèmiques," 393–94.
[64] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 202–03.
[65] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 232.
[66] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 235.
[67] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 259.

the special distinction of AN precepts appears to be that they indicate types of praxis lacking local consensus but that were often incorporated into praxis by executive or judicial fiat, despite the dissenting opinions of some local jurists.

As indicated before, one of the most distinctive features of al-Shāfiʿī's legal reasoning is his standing presumption that sound solitary *ḥadīth*s shall be taken as normative, unrepealed, and universal unless they are textually qualified and restricted by other sound *ḥadīth*s.[68] Throughout *Ikhtilāf Mālik*, the Shāfiʿī protagonist asserts that solitary *ḥadīth*s must be treated as complete, normative statements of the precepts to which they pertain, whether they are reports of Prophetic statements, actions, or individual rulings for particular cases. In contrast to the general pattern of Mālik's legal reasoning, he draws no distinction between explicit directives and reports of actions.[69] According to al-Shāṭibī (as will be discussed in more detail later), one of the chief functions of Medinese praxis in Mālik's reasoning was to serve as his primary criterion in legal *ḥadīth* for establishing whether or not they were normative or repealed.[70] Most of the Shāfiʿī interlocutor's contentions against Mālik in *Ikhtilāf Mālik*, which are based on Mālik's own *ḥadīth* transmissions in the *Muwaṭṭaʾ*, pertain to reports of actions. Some are individual case rulings (*qaḍāyā ʿayān*), which are also ambiguous in Mālikī legal reasoning, and only a few pertain to verbal directives from the Prophet.

In another instance, the Shāfiʿī interlocutor again regards Mālik as arbitrary, because of his position on several *ḥadīth*s in the *Muwaṭṭaʾ* reporting that the Prophet raised his hands at various times while performing the ritual prayer.[71] The Shāfiʿī protagonist notes that Mālik also narrates that Ibn ʿUmar prayed in the same manner, yet Mālik did not regard repeated raising of the hands in ritual prayer to be part of the praxis of Medina. The Shāfiʿī interlocutor asks his Medinese counterpart how one can regard it permissible to follow certain individual statements of Ibn ʿUmar as authoritative for other questions (as Mālik clearly does) but not regard his action to be authoritative in this particular case when it is supported by the action of the Prophet, which the Shāfiʿī protagonist describes as the *sunna*. As this case illustrates again, the Shāfiʿī interlocutor is unable to

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[68] See Abd-Allah, "*ʿAmal*," 140–41.
[69] See Abd-Allah, "*ʿAmal*," 188–95.
[70] Al-Shāṭibī, *al-Muwāfaqāt*, 3:56–76, 4:239–43; Abd-Allah, "*ʿAmal*," 436–48.
[71] See [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 201; *Muw.*, 1:75–77; Abd-Allah, "*ʿAmal*," 190–91.

recognize any qualitative difference between the signification of reports of action and explicit verbal directives.[72]

In a subsequent example, the Shāfiʿī protagonist contends that the Medinese have made a directive (*qawl*) of ʿUmar the basis of their praxis but have failed to imitate his practice in other matters despite the fact that the Medinese transmit ʿUmar's contrary practice and know it well.[73] In another example, the interlocutor objects to Mālik's opinion that Medinese praxis is not in keeping with a certain ruling ʿUmar handed down. He argues that if ʿUmar is an authoritative proof (*ḥujja*) in one instance, he must be so in others."[74] The cognitive framework of the Shāfiʿī protagonist admits of no possibility that there might be something about the circumstances of ʿUmar's ruling in a particular case that makes it unusual (perhaps even in ʿUmar's eyes) and, hence, not a valid normative standard for standard legal judgments.

Because of these discrepancies between Medinese praxis and certain reports of action—whether in the form of *ḥadīth* or post-Prophetic reports—and individual case rulings, the Shāfiʿī protagonist contends that the Medinese are culpable of failing to follow the Prophet and even many of their indigenous traditions. It is also on this basis that he makes the charge that the Medinese are incompetent and should not be allowed to issue juristic pronouncements (*fatwā*s). In another instance, the Shāfiʿī interlocutor observes that the Medinese generally follow the directives of ʿUmar but sometimes fail to adhere to his actions even when they conform to Medinese reports of the Prophet's actions. The interlocutor contends:

> It ought not be permitted that one who is ignorant of things such as these be able to speak about [other] concerns of knowledge that are even more meticulous (*adaqq*).[75]

A number of the Shāfiʿī protagonist's harshest criticisms of the Medinese come when the Medinese spokesman evaluates certain isolated actions of Abū Bakr and ʿUmar as permissible (as opposed to recommended) and even disliked (*makrūh*) (as opposed to permissible). Taking note of this

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[72] See [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 201; *Muw.*, 1:75–77; Abd-Allah, "*ʿAmal*," 190–91. It may be of note that several *ḥadīth*s in this chapter describe the Prophet's manner of prayer without making mention of his raising his hands. The omission is significant since it presumably indicates that raising the hands was either not a part of the Prophet's action in such cases or at least not an essential part of the prayer ritual.

[73] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 202.

[74] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 233.

[75] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 201.

discussion, Fazlur Rahman presumes that the Medinese disliked certain Prophetic actions in contrast to the doctrine of Prophetic infallibility, which, he contends, emerged later and became essential to the development of Islamic law.[76] In the context of how Mālik applied Medinese consensus, however, the assessment of these texts as merely permissible or even disliked had nothing to do with Prophetic infallibility but with the fundamental Medinese distinction—based on the normative Prophetic example—between Prophetic acts that constituted the standard norm and others that were exceptions to it and would be reprehensible if substituted for the norm. All of the non-normative examples the Shāfiʿī interlocutor mentions are inherently ambivalent reports of actions. As will be demonstrated later, isolated, non-normative actions, which are determined to be such by reference to praxis, may become reprehensible and even forbidden when made normative.[77]

Mālik transmits a *ḥadīth* which reports that the Prophet once recited a certain chapter of the Qurʾān while leading the festival (*ʿīd*) prayer. The Medinese proponent states that the people of Medina attach no importance (*fa-innā lā nubālī*) to whether one recites this chapter when leading the festival prayer or another. The Shāfiʿī interlocutor fervently objects, contending that one must regard it as desirable (*mustaḥabb*) to recite the same chapter as the Prophet recited in such prayers, "You ought to regard things the Prophet did as preferable in all cases."[78]

The Medinese representative holds that it is the normative procedure that one leading people in the sunset prayer recite short chapters of the Qurʾān. Mālik transmits a *ḥadīth* stating that the Prophet once recited two exceptionally long chapters in that prayer. The Medinese regard it as reprehensible (*makrūh*) for one to do that. The Shāfiʿī interlocutor remarks that he cannot understand how anyone could regard an action of the Prophet to be reprehensible. He takes this opinion as a clear indication of the weakness of the Medinese school in all matters (*ḍaʿf madhhabikum fī kull shayʾ*).[79] In this as in similar cases, the underlying presumptions of the Medinese and the Shāfiʿī protagonist are fundamentally at odds. Mālik's position presumes that the Prophet's long recitations were non-normative based on standard Prophetic practice and established praxis. The Prophet's exception to this in the lengthy recitation reflected different circumstances. In its original context, it was appropriate but not when

[76] Rahman, *Islam*, 69–71.
[77] See Abd-Allah, "*ʿAmal*," 465–74.
[78] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 205.
[79] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 206.

taken as a norm for all circumstances. The Shāfiʿī interlocutor presumes as a matter of principle that all Prophetic actions are potentially praiseworthy norms in all circumstances and cannot be otherwise evaluated independently by considerations outside the texts themselves.

Similarly, the Medinese regard it to be a normative practice that one leading people in any of the five daily congregational prayers should not recite excessively long chapters of the Qurʾān because of the difficulty it may cause for the congregation. Mālik transmits post-Prophetic reports stating that Abū Bakr and ʿUmar recited on different occasions the longest chapters in the Qurʾān during the dawn prayer. The Medinese proponent states that these actions of Abū Bakr and ʿUmar are regarded as disliked (*makrūh*). The Shāfiʿī protagonist rejoins that in this case the Medinese have gone against the praxis of their Imāms. He repeats that such contradictions indicate the overall weakness of the school and concludes that it shows again that they are so heedless and negligent that they should not be permitted to make juristic pronouncements, much less to consider themselves superior to others in the knowledge they have.[80]

In a similar instance, the Medinese conclude that a particular act of the Prophet is reprehensible based on an explicit, contrary directive of ʿUmar. The Shāfiʿī interlocutor accuses them of total arbitrariness and of making off-handed decisions on the basis of their whims without insight (*tabaṣṣur*) or sound deliberation (*ḥusn al-rawiyya*).[81] Again, the Shāfiʿī protagonist's legal reasoning does not concede that there may be qualitative distinctions between different Prophetic acts, especially between what is normative and what is not. It presumes all isolated texts to be potentially normative and reflective of the Prophet's public message and standard practice. As will be seen, praxis is normative by its very nature. In judging isolated acts of Abū Bakr and ʿUmar, the interlocutor makes no distinction between this particular act and their presumably standard behavior in leading the other dawn prayers, which would have constituted their praxis and been a potential referent for Medinese praxis in general.

Ultimately, the most significant differences between the legal reasoning of the Mālikī and Shāfiʿī proponents in *Ikhtilāf Mālik* have to do with the different spectrums through which they view their legal sources in general and in solitary *ḥadīth*s in particular. The Shāfiʿī protagonist rejects many of the legal sources to which Mālik and the Medinese subscribed,

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[80] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 207–08.
[81] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 207–08.

notably praxis, post-Prophetic reports, and the authoritative directives and rulings of the rightly-guided caliphs and certain governors. He does not acknowledge the distinction between what is normative and what is not normative as determined by extra-*ḥadīth* evidence, a distinction which is consistently reflected in Mālik's opinions, especially with regards to reports of action.

The Shāfiʿī interlocutor has a very different presumption about normativity. His default position is that every Prophetic act shall be deemed normative unless the contrary is textually demonstrated. The qualitative differences between one *ḥadīth* and another, from this perspective, are not primarily a function of meaning and legal implication but rather considerations of formal authenticity of transmission and a comparative study of texts. Legal decisions, from this point of view, are largely the product of textual hierarchies. Mālik and the Medinese may deem an act of the Prophet to be disliked (if proposed as a normative policy for others) in light of contrary statements or the policies of Abū Bakr and ʿUmar. Their position is incompatible with the cognitive frames of the Shāfiʿī protagonist's reasoning. At the same time, to follow Abū Bakr and ʿUmar in some cases but not in others appears from his perspective indefensibly arbitrary and contradictory. For Mālik, the Medinese, and later Mālikīs, the hierarchical authority of the Prophet, Abū Bakr, and ʿUmar was not the chief issue. The principal juristic question was the inherent ambiguity of transmitted reports, especially reports of action and individual case rulings. Such transmitted reports regardless of how authentically they may have been handed down and reported are not transparent and cannot serve as authentic legal guidelines until they are evaluated against the law's standard norms and principles. In the Medinese tradition the criterion for such judgment was praxis.

One of the best illustrations in *Ikhtilāf Mālik* of the difference between Medinese legal reasoning and that of the Shāfiʿī interlocutor is the latter's insistence that a particular solitary *ḥadīth* is more authoritative than the contrary report of Medinese consensus. Both pieces of information, he insists, have come down as isolated reports (*khabar al-infirād*). He wonders why the Medinese even bother to transmit *ḥadīth*, since they follow them so arbitrarily. The Medinese proponent replies that they have often relied on the concurrence of the Medinese (*mā ijtamaʿa ʿalayhi ahl al-Madīna*). Noting again how averse the Medinese seem to be to following solitary *ḥadīth*s, the Shāfiʿī interlocutor contends that Medinese adherence to local consensus instead of contrary solitary *ḥadīth*s is self contradictory, since both the report of the texts of *ḥadīth*s and Medinese

consensus have come down to them by way of isolated reports (*khabar al-infirād*).[82]

The Shāfiʿī protagonist's concern regarding authenticity and legal applicability is formal and strictly hierarchical. It looks exclusively to the method and manner of transmission and the rank of authority of the original source. In the cases just mentioned, consensus ranks as an authoritative source, but knowledge of it has been transmitted from one person to another from one generation to another. Thus, he uses the same standards of authenticity to judge it that he would use to judge a solitary report. Since solitary *ḥadīth*s are rooted in the Prophet's authority, which without question is higher, the only legitimate consideration that might give consensus greater authority would be if it had been reported by multiple authentic chains of transmission. The Shāfiʿī interlocutor does not acknowledge the possibility of a qualitative difference between an authentic report of consensus emanating from a body of jurists, learned in the Prophetic *sunna* and the Medinese legal tradition as based in normative praxis, and a contrary formally authentic but solitary *ḥadīth* which, as a legal text, is open to a variety of interpretations.

From the perspective of the Shāfiʿī protagonist, the only relevant question is Prophetic authority in the absolute ranked against a lower, fallible source of authority. From the Medinese perspective, which is cognate in this regard to Abū Ḥanīfa and the Kufan tradition to which he belonged, law works within a broad legal cognitive frame that cannot be dictated by isolated reports—as formally authentic as they may or may not be—but by an overall jurisprudential wisdom (*fiqh*) that embraces and interprets all reports and sources of law, including Medinese and Kufan praxis. The question is not whether the Prophet was more authoritative than a body of jurists deliberating on his message but whether a body of jurists informed of the broader Prophetic tradition is a better reference for the Prophetic legacy than a solitary *ḥadīth* isolated from its original historical context.

Critiques of Praxis in Post-Formative Legal Theory

Praxis in Ḥanafī Works

Al-Sarakhsī's *Uṣūl* contains a brief but useful discussion of Medinese consensus from a Ḥanafī point of view. He apparently draws no distinction

[82] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 260–61.

between Medinese praxis and consensus. Al-Sarakhsī asserts that the consensus of the Companions constitutes a definitive legal argument. He adds that it includes the highest type of Medinese consensus as well as the consensus of the Prophet's family (*al-ʿitra*). This acknowledgement does not constitute a formal recognition of the independent authority of either the consensus of Medina or that of the Prophet's family. It is rather an observation that the formal definition of consensus would necessarily entail these subcategories of consensus as well as many others. Al-Sarakhsī asserts that Mālik regarded the consensus of Medina to be authoritative. He rejects that contention and disparages those who uphold it. Medina, he argues, is just another city, no more excellent than any other. He alleges that there is no city in his time whose people are more ignorant than those of Medina.[83]

Ibn al-Humām and his commentator, Amīr Bādishāh, draw no distinction between Medinese consensus and praxis. Unlike al-Sarakhsī, they hold that Medinese consensus, while not definitive, still constitutes a sufficiently strong conjectural argument (*ḥujja ẓanniyya*) and should be given priority over contrary solitary *ḥadīth*s.[84] Aḥmad ibn ʿAbd al-Raḥīm al-Fārūqī, known as Shāh Walī-Allāh al-Dahlawī (1176/1762), mentions Medinese praxis but does not treat it in any depth.[85]

Praxis in Muʿtazilī Works

Neither al-Qāḍī ʿAbd al-Jabbār ibn Aḥmad al-Asadābādī (d. 415/1025) nor Abū al-Ḥusayn Muḥammad ibn ʿAlī al-Baṣrī (d. 436/1044) draws a distinction between Medinese consensus and praxis. Both employ identical arguments in rejecting the validity of Medinese consensus. They argue that the Qurʾānic authority for consensus is embodied in the verse 4:115. The verse is general, specifying no group of believers to the exclusion of any others. Consequently, any type of consensus constituted exclusively by a particular group of believers such as those of Medina cannot be valid. They argue that Medina's legal tradition has no special claim to excellence over other cities, and they see no point in the argument contending that Islam attained its state of perfection (*kamāl*) there. The same perfection,

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[83] Al-Sarakhsī, *Uṣūl*, 1:314, 318.

[84] Ibn al-Humām, *al-Taḥrīr*, 3:245 and Muḥammad Amīn Amīr Bādishāh, *Taysīr al-taḥrīr*, 3:245.

[85] Shāh Walī-Allāh, *al-Inṣāf*, 9, 11. I found no mention of praxis in *Ḥujjat Allāh al-bāligha*.

they assert, took place in Mecca after its conquest. Nor do they regard the argument that the Qurʾān was revealed in Medina as giving the city any special legal distinction.[86]

Praxis in Shāfiʿī Works

Al-Ghazālī presents a terse discussion of Medinese consensus and praxis in his jurisprudential work, *Al-Musṭaṣfā*. He distinguishes between the two concepts and asserts that Mālik only regarded Medinese consensus as authoritative. Al-Ghazālī observes that Medina never contained all of the Prophet's Companions at one time, neither before nor after the great migration (*hijra*). In the generations subsequent to the Prophet, the scholars of Medina hardly represented all the people of learning. Rather, the people of learning were always scattered throughout the various regions of the Muslim world. For al-Ghazālī, valid consensus must include the uniform agreement of all Muslim scholars. On that basis, he concludes that Mālik's reliance on Medinese consensus has no authority. Medinese praxis can claim no legitimacy as constituting a majority opinion, since in legal deduction, a preponderant majority carries no intrinsic authority. Al-Ghazālī states that the Mālikīs have belabored (*takallafū*) various justifications for their reliance upon praxis. He claims to have refuted them sufficiently in another work, *Tahdhīb al-Uṣūl*, and finds no need to repeat himself in the *Musṭaṣfā*.[87]

Unlike al-Ghazālī, al-Āmidī does not assert that Mālik regarded the consensus of Medina to be the only valid type of consensus. Nevertheless, al-Āmidī refuses to concede that Medinese consensus has any legal authority. Like numerous other jurists who opposed the Mālikī concept of praxis, al-Āmidī asserts that Medina has no unique excellence over other cities. He mentions and refutes a number of arguments that he believes to reflect standard Mālikī justifications of praxis. He rejects their argument that truth shall never depart from the people of Medina because it was to their city that the great migration was made; that it is the site of the Prophet's grave; the place where the Qurʾān was revealed; or because the people of Medina learned the proper interpretation of the Qurʾān from the Prophet and had extensive knowledge of his teaching and the cir-

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[86] Al-Qāḍī ʿAbd al-Jabbār, *al-Sharʿīyāt*, 205–15; Abū al-Ḥusayn al-Baṣrī, *al-Muʿtamad*, 2:492 ff.

[87] Abū Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī, *al-Musṭaṣfā min ʿilm al-uṣūl*, 1:187–88.

cumstances of his life. Al-Āmidī mentions another argument that their consensus should take precedence over other types of consensus because the authority of their transmissions of *ḥadīth* takes precedence over the transmissions of other cities. He makes the interesting observation, however, that Mālik only regarded Medinese consensus to take priority (to be *awlā*) in those matters of law upon which there were dissenting opinions elsewhere.[88] Al-Āmidī asserts that Mālik did not regard it as impermissible for others to disagree with Medinese consensus in such matters. Al-Āmidī concludes by refuting the authority of Medinese consensus on the grounds that textual authority for consensus requires it to be universal, and universal consensus cannot be restricted to the learned people of Medina.[89]

ʿAbd-Allāh ibn ʿUmar al-Bayḍāwī (d. 685/1286) treats Medinese consensus in a few words, asserting that Mālik regarded it as authoritative because of a well-attested *ḥadīth* which states that Medina has expurgated dross (*al-khabath*) from its midst. He explains that the *ḥadīth* is a weak argument in support of Medinese consensus.[90] Jamāl al-Dīn ʿAbd al-Raḥīm al-Isnawī (d. 772/1370) treats Medinese consensus and praxis separately and argues (surprisingly for a Shāfiʿī) that neither of the two Medinese legal arguments is completely without authority and may legitimately take priority over solitary *ḥadīth*s. His argumentation is similar to that of Ibn al-Humām. Al-Isnawī alludes to the Mālikī jurisprudent Ibn al-Ḥājib and includes an interesting discussion of the consensus of the Prophetic family (*al-ʿitra*).[91]

Praxis from a Ẓāhirī Perspective

One of the sharpest criticism of Medinese praxis comes from the Andalusian Ẓāhirī ʿAlī ibn Aḥmad ibn Ḥazm (d. 456/1064). The Ẓāhirī school was the most literal of all Islamic schools of law and rejected analogy (*al-qiyās*), discretion (*al-istiḥsān*), preclusion (*sadd al-dharā'ʿ*), and the unstated good (the unstated good). Robert Brunschvig describes Ibn Ḥazm as a virulent enemy of the Mālikī school.[92] The Ẓāhirī school was the major rival of the Mālikīs in Iberia just as the Shāfiʿīs were the major

[88] Sayf al-Dīn al-Āmidī, *al-Iḥkām fī uṣūl al-aḥkām*, 1:180–81.
[89] Al-Āmidī, *al-Iḥkām*, 1:180–81.
[90] ʿAbd-Allāh ibn ʿUmar al- Bayḍāwī, *Minhāj al-wuṣūl fī ʿilm al-uṣūl*, 2:287.
[91] Jamāl al-Dīn ʿAbd al-Raḥīm al-Isnawī, *Nihāyat al-sūl*, 2:287.
[92] Brunschvig, "Polèmiques," 394.

rivals of the Ḥanafīs in pre-Safavid Sunnī Iran. This Andalusian rivalry explains in part the intensity of Ibn Ḥazm's critique. Moreover, the very nature of the textual literalism of Ibn Ḥazm's school excluded all non-textual considerations such as praxis and extra-textual considered opinion (*raʾy*) as valid constituents of Islamic law, which rendered the most basic acceptance of Medinese praxis a cognitive impossibility.

Ibn Ḥazm denies that the Medinese jurists had any priority in knowledge or legal interpretations over the early jurists of other centers of Islamic legal learning. He bases this contention on the textual proof that there are no statements in the Qurʾān or *ḥadīth* that obligate Muslims to follow the people of Medina. Ibn Ḥazm expounds that, if Medinese consensus had, in fact, constituted a conclusive legal argument, God would have made that clear in the Qurʾān or the Prophet would have stated it explicitly in a *ḥadīth*.[93]

Ibn Ḥazm followed the Shāfiʿī school prior to becoming a Ẓāhirī and reiterates many of the Shāfiʿī arguments against Mālik.[94] He asserts the priority of solitary *ḥadīth*s over praxis and contends that there had been extensive dissent among the Medinese jurists. He holds that the Seven Jurists of Medina only reached consensus on a few questions.[95]

Ibn Ḥazm doubts the continuity of Medinese praxis, contending like Abū Yūsuf and al-Shaybānī that, in many cases, it may have had its origins in the decisions of the overseer of Medina's marketplace.[96] He asserts that Medinese praxis was often instituted by the judges or governors of Medina, who, in his view, only handed down and executed rulings after conferring with their Umayyad superiors in Syria. He concludes that much of what came to constitute Medinese praxis has no greater authority than that of the Umayyad caliphs.[97]

Generalizations about Praxis Seen through the Prism of Post-Formative Juristic Critiques

At the outset of his defense of Medinese consensus, ʿIyāḍ asserts that its chief antagonists among the followers of other schools constitute a "single

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[93] ʿAlī ibn Aḥmad ibn Ḥazm, *al-Iḥkām fī uṣūl al-aḥkām*, 4:205, 217; 6:170–71 as cited by Brunschvig, "Polèmiques," 397.

[94] Ibn Ḥazm, *al-Iḥkām*, 2:123, as cited by Brunschvig, "Polèmiques," 399.

[95] Ibn Ḥazm, *al-Iḥkām*, 2:113, as cited by Brunschvig, "Polèmiques," 399.

[96] See Ibn Ḥazm, *al-Iḥkām*, 2:113–119, 106–112; 4:209; 6:172, as cited by Brunschvig, "Polèmiques," 399.

[97] Ibn Ḥazm, *al-Iḥkām*, 2:118, as cited by Brunschvig, "Polèmiques," 400.

band" (*ilb wāḥid*) against the Mālikīs on this issue. Not surprisingly for a Mālikī, he contends that they based their arguments on conjecture, never having investigated the question carefully or having conceived of it accurately. Without bothering to inquire of the Mālikīs concerning their opinions on Medinese praxis, many of those who argued against it have uncritically taken over the assumptions of other antagonists about what the Mālikīs believe and have attributed to Mālik positions he never held. ʿIyāḍ singles out al-Ghazālī as an example. In some cases, he argues, their fervor to condemn the Mālikī school led them even to calumniate the city of Medina itself.[98]

Several pre-modern non-Mālikī arguments against Medinese praxis fit ʿIyāḍ's generalization. They have the appearance of tangential exercises for quickly dispensing of Medinese consensus and praxis as legitimate issues of juristic discussion. Their arguments often reflect the insularity of their schools and jurisprudential thought, especially in their tacit and seemingly subconscious endorsement of an exclusively textual orientation in defining the sources of Islamic law. Their treatments of Medinese consensus and praxis are remarkably brief when compared to their extensively detailed discussions on the minutest points of jurisprudence to which their own schools subscribe.

Robert Brunschvig observes in his study of Ibn Ḥazm's anti-Mālikī polemics on Medinese praxis that his refutations tend to be syllogistic.[99] This observation applies to other antagonists of Medinese consensus. Many argue on the basis of essentially syllogistic premises that the textual authority of Medinese consensus cannot be valid. Their major premise is that consensus must be universal to be valid. Their minor premise is that the people of knowledge in Medina did not constitute a universal gathering of scholars. Hence, their conclusion is irrefutably that Medinese consensus cannot be valid.

Syllogistic thinking must begin with an absolute proposition in order to lead to a definitive conclusion. It requires that its middle term (such as the universality of consensus) be stated as either a positive or negative universal. The middle term must be distributed in at least one of the premises. If the middle term cannot be universally stated (as it is in the above refutation of Medinese consensus), no supporting conclusion can be drawn. Whether the reasoning of the non-Mālikī antagonists of Medinese consensus and praxis be regarded as formally syllogistic or not, the

[98] ʿIyāḍ, *Tartīb*, 1:67–68.
[99] Brunschvig, "Polèmiques," 395–97.

concepts of Medinese consensus and praxis as conceived of in Mālikī legal reasoning do not fit neatly into the all-or-nothing premises of classical syllogistic reasoning.

The validity of consensus and praxis is not absolute—in the manner of formally deductive argumentation—but is relative and based on considerations of possibility and probability. Moreover, the non-textual nature of these two fundamental Medinese concepts excludes them from the cognitive frames to which most non-Mālikīs and, indeed, many later Mālikīs themselves subscribed. The essentially syllogistic reasoning of the anti-Mālikī antagonists enabled them to determine what these Medinese concepts were not. It did not, however, allow them to make sound qualitative statements about what Medinese consensus and praxis actually were and what relative legal merit they possessed.

Several of the preceding arguments, for example, critique the Medinese concept of consensus in light of the Qur'ānic verse 4:115, which they interpret to exclude the restriction of consensus to any particular group of Muslims such as the jurists of Medina. This argument does not, however, allow for the evaluation of Medinese consensus in terms of its practical merit as a limited consensus of qualified scholars whose opinions could be identified with relative accuracy and who claimed continuity with the original Prophetic event.

Al-Shāṭibī argues for the validity of consensus in general, not purely on the basis of presumed textual authority, but as a legal argument with its own intrinsic merit. He likens the conceptual basis of consensus to the conclusions of inductive reasoning (*al-istiqrā'*), which he identifies as *the* proper mode of legal reasoning and the only method that can ultimately render conclusive knowledge because it consists of numerous examples.[100] In the case of consensus, its inherent value lies in the "group induction" that it represents as the cumulative effect of the knowledge and reflection of the learned persons who constitute the consensus. There is a high degree of probability that the conclusions they reach will be sound. Al-Shāṭibī disparaged the rigorously deductive textualism of later jurists, who sought to refute or justify precepts of law on the basis of relevant individual textual references. Such reasoning, al-Shāṭibī held, could hardly provide conclusive evidence for any matter in Islamic law, not even its most crucial underlying principles. Regardless of their authenticity, the texts it relies upon are rarely univocal but are almost always polysemic

[100] Al-Shāṭibī, *al-Muwāfaqāt*, 1:42–61.

and ultimately conjectural when taken in isolation.[101] Almost without exception, the preceding anti-Mālikī arguments against consensus and praxis fall within the range of such textual deductions.

The argument of Ibn al-Humām is a notable exception. He focuses on the qualitative merit of Medinese consensus. Ibn al-Humām is not concerned solely with what Medinese consensus is *not* according to familiar legal categories and cognitive frames but what it actually *is*. Its relative merit, he contends, is that it constitutes a "sufficiently strong conjectural argument" (*ḥujja ẓanniyya*) for rejecting contrary solitary *ḥadīth*s. The very notion of reliance on a "sufficiently strong conjectural argument" would have been foreign to those jurists insisting on the conclusive authority of absolute consensus.

Several concepts central to Mālik's legal reasoning pertain exclusively to the realm of probable inference and conflict with the imperative of rigorous textual deduction. Medinese consensus and praxis, as we have seen, belong to this category, but the same applies to percept-based analogy (*al-qiyās ʿalā al-qawā'id*) and Mālik's characteristic modes of inference: discretion (*istiḥsān*), preclusion (*sadd al-dharā'iʿ*), and the unstated good (*al-maṣāliḥ al-mursala*). The same sense of probability applies to the inference of the Prophetic *sunna* from the post-Prophetic reports and the juristic pronouncements of the Companions, based on the probability that the Companions were not ignorant of the Prophet's *sunna* and would not have willfully ruled in violation of it. From a Mālikī and Ḥanafī perspective, of course, an even greater degree of conjecture applies to the derivation of normative *sunna*s from solitary *ḥadīth*s.

Modern logicians draw attention to the inadequacy of syllogistic modes of thinking for analyzing the propositions and relationships of the real world, where all-or-nothing propositions rarely work. Augustus De Morgan observes that human beings, given the nature of their limited perceptive faculties, are required to think on the basis of probable inferences because they rarely have access to absolute deductions.[102] In light of the implicit role of probable inference in Mālik's legal reason, it is important to consider how the textualism of later jurisprudents and the type of all-or-nothing syllogistic reasoning that often grew up alongside it narrowed their cognitive frames and hampered them from understanding the basic non-textual and inferential principles behind Mālikī legal reasoning.

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[101] Al-Shāṭibī, *al-Muwāfaqāt*, 1:42–61.

[102] Cohen and Nagel, *Logic*, 165; 111–14, 137.

CHAPTER FOUR

MEDINESE PRAXIS IN THE EYES OF ITS ADVOCATES

Introduction

As the previous chapter shows, the general refrain of those jurists who called the praxis of Medina into question in the formative and post-formative periods was to doubt the authenticity of its cross-generational preservation, development, and transmission. They may not have challenged the general Islamic belief in the eminence of the Prophet's city in his time. But they disputed the Medinese contention that the way of life he instituted there among his Companions had been verifiably maintained and handed down by the Successors until it reached Mālik two generations later.[1] Some of them regarded Medina in the post-Prophetic period as no different from any other city. Even if there might have been continuity regarding certain practices, the critics of praxis questioned that the Medinese possessed verifiable means to establish that link and distinguish authentic elements of Prophetic praxis from subsequent adulterations and false accretions. In some cases, they insisted that Medinese praxis was no different in quality from the praxis of other regional centers of the early period and that none of them could be trusted as historically authentic.

For such jurists, it was inconceivable that praxis could function as an independent source of law or call into question the authority of sound textual reports from the Prophet with explicit chains of narration (*isnāds*), especially when their overt meanings contradicted Medinese praxis. Praxis had no *isnād*. In the eyes of its critics, it was amorphous, anonymous, and obscure. In their logic, praxis was, by its very nature, open to suspicion and could not possibly dispute valid textual authority. Since the writings of these jurists are largely polemic, they rarely make an effort to search out other paradigms that would cast Medinese praxis in a more favorable light.

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[1] The "golden chain" of *ḥadīth* transmission is "Mālik from Nāfiʿ from Ibn ʿUmar from the Prophet," which are two generations. As noted earlier, Mālik's teacher Nāfiʿ belonged to the early Successors, as did the Seven Jurists. Most of Mālik's teachers belonged, however, to the later Successors. They also had direct contact with the Companions—otherwise they would not have been deemed among the Successors—but generally when they were very young and the remaining Companions advanced in age.

In what follows, I will attempt to elucidate the cognitive frames implicit in Mālik's reliance on Medinese praxis as a fundamental and conclusive juristic argument. I base the chapter primarily on Mālik, al-Layth ibn Saʿd, and post-formative Mālikī and Ḥanbalī legal theorists, especially the Andalusian Mālikī jurist Ibrāhīm ibn Mūsā al-Shāṭibī. My sole concern is to explore what Mālik and prominent jurists who endorsed praxis believed about it and how they justified that belief. I am not concerned in the following treatment with important questions about the cultural, political, economic, and social history of Medina in the formative period that pertain to what Medinese praxis was *in fact*, how it actually originated, and whether or not it had been kept intact until Mālik's time. I speak of praxis as a religious belief and juristic indea, not necessarily a historical fact.

The Correspondence of Mālik and al-Layth ibn Saʿd

Al-Qāḍī ʿIyāḍ transmits a short letter from Mālik to the Egyptian jurist al-Layth ibn Saʿd, which was written after it had come to Mālik's attention that al-Layth, who was a fellow protagonist of Medinese praxis, had issued juristic pronouncements (*fatwā*s) contrary to it. ʿIyāḍ asserts that the letter has been authentically transmitted. He includes a portion of al-Layth's response, which I have taken in full from the Ḥanbalī jurist Muḥammad ibn Abī Bakr Ibn Qayyim al-Jawziyya (d. 751/1350). ʿIyāḍ's version leaves out al-Layth's criticisms, but Ibn al-Qayyim does not.[2]

Mālik's letter is a valuable personal statement of his reasoning as regards praxis.[3] It represents one of the most explicit statements on the subject attributed to him and conveys a clear conception of the unique status and conclusive authority that the praxis of Medina held in his eyes.[4]

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[2] ʿIyāḍ, *Tartīb*, 1:64–65; Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3:107–114; cf. Dutton, *Origins*, 37–41. Al-Layth was Mālik's close friend and peer. Both had been students together in Medina. As Muḥammad Abū Zahra notes, the letters illustrate Mālik's habit of corresponding on matters of law with his friends and students (Abū Zahra, *Mālik*, 134). We have seen other evidence of that correspondence in Mālik's biography.

[3] Muḥammad Abū Zahra contends that the underlying principles of legal reasoning in Mālik and al-Layth as reflected in the letter are also virtually identical. Unlike the contentions of al-Shāfiʿī regarding solitary *ḥadīth*s in the subsequent generation, such *ḥadīth*s are not even brought up in the letters as a point of discussion. Both letters insist upon the necessity of following the praxis of the Companions. They indicate, furthermore, that studying the opinions of the Companions and Successors is essential to the proper understanding of the Prophetic law. As Abū Zahra notes, al-Layth bases each of his arguments against Mālik on considerations regarding specific points of dissent in the practice of the Companions and Successors (see Abū Zahra, *Mālik*, 133–34).

[4] See Abū Zahra, *Mālik*, 331–32.

Al-Layth's response affirms his general agreement with Mālik but articulates a different assessment of regional variations of praxis in Damascus (*al-Shām*), Homs, Egypt, and Iraq. He acknowledges the superiority of Medinese praxis in all matters of consensus between the jurists of Medina, but endorses regional forms of praxis as potentially legitimate alternatives in areas where the Medinese themselves disagreed. Neither letter is polemical, although later Mālikī polemicists made extensive use of them.[5]

Mālik prefaces his admonition by alluding to al-Layth's special status in Egypt as the people's *muftī*.[6] He asserts that, because the Egyptians place their trust in al-Layth, he carries a heavy moral burden before God for issuing juristic pronouncements (*fatwā*s) contrary to the praxis of Medina. Mālik states, "It is only fitting that you fear God with respect to yourself and follow what you can [truly] hope to attain salvation (*al-najāh*) by following [namely, the praxis of the people of Medina]."[7]

Mālik supports his warning by citing two Qur'ānic verses. The first speaks of the excellence of the Meccan and Medinese Companions who were the Prophet's first followers and established Islam in Medina. The verse also praises those who came later and followed their examples closely (Qur'ān, 9:100). The second verse alludes to the excellence of those who follow the revelation and repent from wrongful ways (Qur'ān, 39:18). In Mālik's view, both verses are allusions to the unique status of the Medinese and their city's praxis. He asserts that, in law, all Muslims are subordinate (*tabʿ*) to the people of Medina by virtue of their intimate historical relationship to the Prophet. Medina was the home to which the Prophet made his migration (*hijra*). It was there that the legal verses of the Qur'ān were revealed and initially applied. The Prophet directed his verbal commands and prohibitions to the people of Medina in person. They obeyed him and received his injunctions faithfully. The Prophet established his *sunna* in Medina, and the city's people continued to adhere to it faithfully after his death.[8]

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[5] Robert Brunschvig regards Mālik's letter as an exhortation, although subsequent Mālikī jurisprudents cited it in defense of Medinese praxis in their polemical arguments against those who disputed the validity of praxis (Brunschvig, "Polèmiques," 381, 383).

[6] Al-Layth summarizes the contents of an earlier letter he received from Mālik. He begins by acknowledging receipt of additional documents (*kutub*) with Mālik's legal opinions, which Mālik's had returned to al-Layth in his letter. Al-Layth had received the original documents from another source and sent them to Mālik for correction and verification. Mālik returned them with his corrections and comments affixed with his private seal (*khātam*). Mālik notes al-Layth's express desire to have Mālik correct and verify the opinions he receives from him (see Ibn al-Qayyim, *Iʿlām* [Saʿāda], 3:94–95).

[7] Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3:94–95.

[8] Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3:94–95.

Mālik alludes to the role of the rightly-guided caliphs in preserving the city's legacy of Prophetic praxis. When the caliphs assumed control after the Prophet's death, they continued to follow him more closely than anyone else in the Islamic community (*umma*):

> When problems presented themselves for which they had knowledge [from the Prophet], they put into practice [what they already knew]. When they did not have knowledge of a matter, they inquired [of others]. On the basis of legal interpretation (*ijtihād*) and their recent experience with the Prophet (*ḥadāthat ʿahdihim*), they would follow those opinions they knew to be the strongest. If anyone held a sounder contrary view or contended that another opinion was stronger and, therefore, preferable, they would set aside their former view and make the contrary opinion their practice.[9]

Mālik asserts that the Medinese Successors followed in the footsteps of the Companions. They too adhered carefully to the *sunna*-rulings (*tilka al-sunan*) that had been established in Medina earlier.

Mālik concludes by emphasizing the imperative to follow the praxis of Medina in matters of law:

> Whenever a matter [of law] predominates (is *ẓāhir*) in Medina and is followed in praxis, I do not believe anyone has the prerogative to go against it on the basis of the limited part of this same legacy which they possess, this legacy which no one [else] may take for himself or lay claim to. If the inhabitants of the [garrison] cities (*ahl al-amṣār*) should begin to say, "But this is the praxis of our city" or "This is what those who preceded us have always been doing," they would not, in doing that, be following the surest and most reliable course (*lam yakūnū min dhālika ʿalā thiqa*), nor would they be doing what is permissible for them.[10]

Mālik's closing statement implies that he and the jurists of Medina—as opposed to those of the regional centers—know the legacy of their local praxis well and are "following what is the surest and most reliable course" in their adherence to it. He expresses his hope that his sole motive in writing to al-Layth has been to give good counsel for the sake of God and that he has not been motivated by a parochial spirit. Mālik insists, however, that it is imperative for him to advise al-Layth to adhere more closely to Medinese praxis.[11]

Mālik observes in his letter that the Companions were not always in complete agreement regarding the matters of legal interpretation which

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[9] Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3:94–95.
[10] Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3:94–95.
[11] Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3:94–95.

the rightly-guided caliphs instituted as praxis. But despite their dissenting opinions, they consented to follow the caliphal example. The view Mālik expresses regarding dissent among the Companions on praxis is consonant with the belief of ʿAllāl al-Fāsī that the local consensus (*ijtimāʿ*) that underlay Medinese praxis was not always unanimous nor regarded as infallible. Its validity rested in strong scholarly endorsement buttressed by the pragmatic authority of executive order.[12]

In his letter, Mālik refers to two sources of Medinese praxis: 1) the *sunna* of the Prophet and 2) later legal interpretation (*ijtihād*). As we will see below, post-formative Mālikī and Ḥanbalī proponents of praxis use the same division, although some of them add further distinctions. It is clear from Mālik's correspondence that he firmly believes in the continuity of Medinese praxis until it reached him in his time. Al-Layth does not question the presumption.

In Mālik's view, the unique excellence of the legal interpretations of the rightly-guided caliphs makes them a principal source of Medinese praxis. Their excellence, in Mālik's view, is rooted in the extensive knowledge they gained from direct lenthy exposure to the Prophetic teaching. Their personal knowledge was complemented by access to the other Companions, whom they made a habit of consulting. Abū Zahra observes that Mālik's view of the Companions was the underpenning of both his extensive reliance upon Medinese praxis and his acceptance of post-Prophetic reports (*āthār*) as well as the juridical pronouncements (*fatwā*s) of the Companions.[13]

The response of al-Layth ibn Saʿd is amiable and courteous. He begins and concludes by expressing his esteem for Mālik.[14] At several points, al-Layth emphasizes his basic agreement with Mālik. He concurs that he should, indeed, fear God because of the reliance of the people of his land on his legal opinions. He agrees that all people, as Mālik has asserted, are indeed subordinate (*tabʿ*) to the people of Medina in matters of religious knowledge by virtue of the special relation they had with the Prophet and the extensive knowledge he imparted to them. Al-Layth assures Mālik that his advice has met with his full approval and left a good impression upon him. He writes:

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[12] Al-Fāsī, *Maqāṣid*, 116–17; Abd-Allah, "*ʿAmal*," 195–204.
[13] Abū Zahra, *Mālik*, 133–34; see Abd-Allah, "*ʿAmal*," 161–170.
[14] Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3:94–95, 99–100.

> I have come across no one regarded as having knowledge with a greater aversion than I to making irregular juridical pronouncements (*shawādhdh al-futyā*) nor who holds the scholars of Medina of the past in greater esteem or follows more closely those of their juridical pronouncements upon which they reached consensus (*futyāhum fīmā ittafaqū ʿalayhi*).[15]

Al-Layth insists, however, that his dissenting juridical pronouncement are not irregular, despite the fact that they diverge from Medinese praxis. His opinions can validly claim to be standard because they are based on variations of praxis which the Companions instituted outside Medina during the caliphates of Abū Bakr, ʿUmar, and ʿUthmān, which were neither challenged nor altered.

By indicating again that he is the most rigorous person he knows in adhering to Medinese consensus, al-Layth implies that those aspects of Medinese praxis from which he has dissented lacked the support of local consensus. Here again, it is evident that Medinese praxis and local consensus were not coextensive. The latter was a subcategory of the former.[16] In the remainder of the letter, al-Layth alludes to significant dissenting opinions among prominent Medinese jurists such as al-Zuhrī and Rabīʿa concerning certain precepts embodied in Medinese praxis that lacked local consensus.[17]

Al-Layth elaborates on his argument regarding the validity of the types of regional praxis that he has relied upon in his dissenting opinions:

> But many of these same Companions who were among the first to embrace Islam left [Medina] to engage in campaigns (*jihād*) on behalf of God and His religion, seeking God's pleasure. They put together armies, and the people gathered around them. They made the Book of God and the *sunna* of His Prophet well known to [the people], not concealing from them anything of which they had knowledge. In every one of their legions (*jund*), there was a special group (*ṭāʾifa*) that taught the Book of God and the *sunna* of His Prophet and gave legal interpretations (*ijithād*) on the basis of their considered opinion (*raʾy*) regarding those matters which the Qurʾān and *sunna* had not made clear to them (*lam yufassirhu lahum*). Abū Bakr, ʿUmar, and ʿUthmān—whom [all] the Muslims chose to be their leaders—had done this before them (*taqaddamahum ʿalayhi*). Nor was it characteristic of these three to neglect or be heedless of the affairs of the Muslim armies. On the

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[15] Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3:95.

[16] See Abd-Allah, "*ʿAmal*," 427–31.

[17] Al-Layth observes that some aspects of Medinese praxis originated in the juridical pronouncements of prominent Medinese scholars. He gives no indication that he regarded their juridical pronouncements as constituting *sunna* even when supported by local consensus.

> contrary, they used to correspond with them about the slightest thing (*fī al-amr al-yasīr*) in order to see to it that the religion was properly established and to take precautions against differences developing around the Book of God and the *sunna* of His Prophet. Thus, they set aside no matter without teaching it to [the armies] which the Qur'ān had made clear or that had been the practice of the Prophet (*'amila bihi al-nabī*), may God bless him and keep him, or regarding which they had consulted together after he had gone.[18]

Al-Layth concludes:

> Whenever there is a matter which constituted the practice (*'amal*) of the Companions . . . in Egypt, Syria, or Iraq during the caliphates of Abū Bakr, 'Umar, or 'Uthmān which they continued to perform until their deaths, the caliphs not having commanded them to do otherwise, I do not regard it permissible today for Muslim armies to initiate (*yuḥdithū*) something contrary which had not been practiced by those of the Prophet's Companions who were their predecessors (*salafuhum*) or the Successors who came after them, despite the fact that the Companions of God's Messenger . . . dissented after his death on several points in the juridical pronouncements they made. Were it not that I know already that you have knowledge of [such points of difference], I would write them down for you. Afterwards, the Successors—Sa'īd ibn al-Musayyab and others of his stature—dissented in the strongest fashion (*ashadd al-ikhtilāf*) on [certain] questions after the Companions of God's Messenger, may God bless him and keep him, had gone.[19]

As with Mālik, the conception that the post-Prophetic reports and juridical pronouncements of the Companions constitute an authoritative source of law is central to al-Layth's legal reasoning. He asserts firmly that the first three rightly-guided caliphs, who ruled from Medina and whose caliphal appointments were based on consensus, oversaw the institution of legal praxis in the newly conquered provinces. Consequently, he does not concede the right to anyone (including Mālik) to disregard what the rightly-guided caliphs themselves did not object to during their lifetimes.[20]

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[18] Ibn al-Qayyim, *I'lām* (Sa'āda), 3:95.

[19] Ibn al-Qayyim, *I'lām* (Sa'āda), 3:95–96. Al-Layth refers to the *sunna* of the Prophet explicitly in the first of these passages. He refers toward the end to the Prophet's *sunna* as "what had been the Prophet's praxis" (*'amila bihi al-nabī*), which may be taken as a distinction similar to that in Medinese praxis between normative (praxis-constituting) behavior and non-normative (non-praxis-constituting) behavior in the Prophetic example.

[20] When al-Layth mentions that he regards it impermissible for Muslim armies to initiate new practices that are contrary to those which the Companions originally instituted in various regions, it may be that he has in mind the attempts of later governors in his time (including the Abbasid caliph al-Manṣūr) to institute more uniform legal praxis in his native Egypt and other provinces (see Abd-Allah, "*'Amal*," 99–102; 392–94). Al-Manṣūr apparently desired legal uniformity in his empire, as indicated by his proposal to Mālik to

Al-Layth does not question the continuity of regional variations of praxis, just as he does not doubt the continuity and authenticity of the praxis of the people of Medina.

Al-Layth gives further justification of his dissent from Medinese praxis on certain points. He reminds Mālik that their teachers al-Zuhrī and Rabīʿat al-Raʾy, whom al-Layth describes as the most prominent Medinese scholars during their time, were known to disagree with Medinese praxis. Al-Layth observes that Rabīʿa disagreed so extensively with certain precepts of Medinese praxis that he aroused the disapproval of other prominent Medinese jurists including Mālik himself, who then decided not to sit in Rabīʿa's circle any longer. Yet, al-Layth continues, Rabīʿa was an excellent jurist from whom much benefit was derived and whose considered opinion was excellent. Al-Layth observes that al-Zuhrī, despite the excellence of his knowledge, frequently changed his opinion in legal matters. He adds that one of his associates wrote to al-Zuhrī about a particular matter on several diverse occasions and received three different answers.[21]

Al-Layth draws Mālik's attention to an earlier dispute the two of them once had about the validity of certain types of well-established Medinese praxis such as joining the sunset and night prayers on rainy nights or when the streets are muddy and the practice of handing down rulings on the

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make the *Muwaṭṭaʾ* the imperial legal standard. During the last years of al-Layth's life and for decades thereafter, the Abbasids undertook initiatives to control the Egyptian judiciary by appointing largely Ḥanafī judges who generally earned the disdain of al-Layth and the populace because of their attempts to alter certain indigenous legal practices. See Muḥammad ibn Yūsuf al-Kindī, *Kitāb al-wulāh wa kitāb al-quḍāh*, 371–72.

Toward the end of al-Layth's life (175/791) and for some time afterwards, the Abbasids apparently sought to adopt a policy in Egypt of instituting a standard legal norm according to the Ḥanafī school. In early 165/781, the Abbasid ruler al-Mahdī sent the Iraqi judge Ismāʿīl ibn al-Yasaʿ al-Kindī to Egypt, where he attempted to institute numerous changes in standard Egyptian legal practices, especially the abolition of certain types of endowed properties, which earned him the hatred of the populace. Al-Layth regarded the judge as an honest man in money matters but accused him of making unwarranted innovations contrary to the Prophetic *sunna*. At al-Layth's request, al-Kindī was removed from office in 167/783. He was soon replaced by an expertly trained Mālikī, ʿAbd al-Malik ibn Muḥammad al-Ḥazmī (presided from 170/786 till 174/790), who met the approval of al-Layth and the Egyptian masses for his integrity and extensive knowledge of the Medinese school. Al-Ḥazmī presided until two years after al-Layth's death. He was succeeded by a stern but just Ḥanafī judge, Muḥammad ibn Masrūq al-Kindī. During the greater part of the thirty-four years after the appointment of al-Kindī, however, and until 199/814, when the last Iraqi judge was removed, six different Iraqi judges were appointed to head the Egyptian judiciary for a little more than a quarter of a century. Only three are explicitly designated as Ḥanafīs, each of whom was deemed as reputable although generally unpopular because of their policies. See al-Kindī, *al-Wulāh*, 371–424.

[21] Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3:96.

basis of the plaintiff's oath supported only by the testimony of a solitary witness. He observes that the Companions did not institute such practices in Damascus, Homs, Iraq, or Egypt, neither did the rightly-guided caliphs write to them directing them to do so.[22]

Before closing his letter, al-Layth presents his objections to four of Mālik's legal opinions. He mentions that he had written to Mālik about some them earlier. Because he never received a reply from Mālik about them, al-Layth followed his own opinion concerning them. He objects that Mālik adheres to his own transmission of a *ḥadīth* regarding the Prophet's allotment of extra shares of war booty to a Companion who had fought on horseback, although the wording of Mālik's narration varies somewhat from another version of the same *ḥadīth*, which according to al-Layth all others (*al-nās kullhum*) transmit and the entire Muslim community (*umma*) follows. Al-Layth insists, "Even if you heard this *ḥadīth* from a person whom you regard highly, it is not fitting that you adhere to an opinion contrary to the entire Muslim community."[23] The letter concludes by asserting that Mālik frequently passes over contrary *ḥadīth*s. Al-Layth emphasizes, however, that this practice does not lower Mālik's high esteem in his eyes. He urges Mālik to continue writing to him with news of himself and his family. He asks him how he can be of service to him, his friends, and family, a matter which, he insists, gives him great pleasure. He wishes Mālik long life so the people continue to benefit from his knowledge, and he expresses his concern about the great loss that he fears will come when Mālik is gone.[24]

Praxis in Mālikī and Ḥanbalī Works on Legal Theory

The writings of ʿIyāḍ, Ibn Rushd, and al-Shāṭibī contain insightful discussions of Medinese praxis, most of which are cited throughout this work

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[22] Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3:96–98.

[23] Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3:98–99. Abū Zahra takes issue with this assertion in al-Layth's letter and notes that Abū Ḥanīfa reportedly held an opinion similar to Mālik on the same question. Abū Yūsuf states in *al-Radd ʿalā siyar al-Awzāʿī* that al-Awzāʿī followed the *ḥadīth* (to which al-Layth refers), which, in Abū Yūsuf's opinion is a solitary *ḥadīth* and, consequently, not authoritative (Abū Zahra, *Mālik*, 132–33, note 2). Abū Yūsuf's claim that the *ḥadīth* is solitary would not necessarily contradict al-Layth's claim that the entire Muslim nation followed it, since the definition of a solitary *ḥadīth* pertains to its earlier and not its later stages of transmission. A *ḥadīth* may be widely transmitted at a later stage, yet still regarded as solitary because of its limited transmission at an earlier stage.

[24] Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3:99–100.

and need not be summarized here.[25] Many other Mālikī works refer to praxis but take its validity for granted and do not treat it in detail. Neither al-Qarāfī nor Ibn Tūmart discusses Medinese praxis in depth, although both assert it to be a valid legal argument and a necessary ancillary to the proper understanding of solitary *ḥadīth*s.[26] Ibn al-Ḥājib states similarly that solitary *ḥadīth*s, although intrinsically ambiguous, may produce definitive knowledge when supported by other ancillaries (*qarā'in*). He does not identify the ancillaries or indicate that praxis is one of them.[27] Ibrāhīm ibn Farḥūn (d. 799/1397) touches on praxis and the consensus of the Companions. His discussion appears to have been taken directly from ʿIyāḍ.[28]

Other than the Mālikīs, few pre-modern Muslim jurisprudents treat Medinese consensus and praxis with as much sympathy and in as great detail as certain Ḥanbalīs, especially the three prominent scholars of the Taymiyya family (Majd al-Dīn ʿAbd al-Salām ibn ʿAbd-Allāh ibn Taymiyya [d. 652/1254]; Shihāb al-Dīn ʿAbd al-Ḥalīm ibn ʿAbd al-Salām ibn Taymiyya [d. 682/1284]; Taqī Aḥmad ad-Dīn ibn Taymiyya [d. 728/1328]), and the latter's student and disciple, Ibn Qayyim al-Jawziyya (d. 751/1350). Their position was not, however, a matter of Ḥanbalī consensus. Muwaffaq al-Dīn ʿAbd-Allāh ibn Aḥmad ibn Qudāma (d. 620/1223) unequivocally repudiates Medinese consensus along lines similar to those of al-Ghazālī, which were discussed earlier.[29] As will be seen, Ibn Rāhawayh and al-Bukhārī, who were not technically Ḥanbalīs but belonged to the proponents of tradition, seem also to have held accommodating views of Medinese praxis somewhat similar to those of the Taymiyya family and Ibn al-Qayyim.

Taqī al-Dīn ibn Taymiyya mentions the argument that Mālik regarded his city's consensus to be authoritative even when the non-Medinese disagreed. Ibn Taymiyya asserts that, according to some Mālikīs, Mālik only regarded Medinese consensus to be authoritative in contrast to the dissenting consensus of the non-Medinese if Medinese consensus was rooted in

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[25] Ibn Rushd mentions in *Bidāyat al-mujtahid* that he wrote about praxis at length in another unspecified work devoted exclusively to jurisprudence (*al-kalām al-fiqhī*) (Ibn Rushd, *Bidāya*, 1:60).

[26] Al-Qarāfī, *al-Dhakhīra* (Cairo), 1:33, 128–29, 141; Ibn Tūmart, *Aʿazz*, 48–52.

[27] Ibn al-Ḥājib, *Mukhtaṣar*, 72, 59–60.

[28] Ibrāhīm ibn ʿAlī ibn Farḥūn, *Kitāb al-dībāj al-mudhahhab fī maʿrifat aʿyān ʿulamāʾ al-madhhab*, 16.

[29] Muwaffaq al-Dīn Abū Muḥammad ʿAbd-Allāh ibn Aḥmad ibn Qudāma, *Rawḍat al-nāẓir wa junnat al-manẓar fī uṣūl al-fiqh ʿalā madhhab al-Imām Aḥmad ibn Ḥanbal*, 72.

a Prophetic *sunna*, constituting "transmissional praxis" (*al-ijmāʿ al-naqlī*).[30] He gives no weight to such arguments, which he regards as begging the question, since, for Ibn Taymiyya, the Medinese only reached consensus on matters that were derived from the *sunna*.[31] He mentions other Mālikī opinions, such as the contention that Mālik relied upon Medinese consensus only to establish the preponderance of certain opinions that had been issues of dissent elsewhere. He alludes to another opinion that Medinese consensus was constituted only by the Companions and Successors. He quotes the opinion of the Mālikī jurist al-Qāḍī ʿAbd al-Wahhāb in support of praxis, which I will discuss in more detail below.[32]

Shihāb al-Dīn ibn Taymiyya asserts that the praxis of Medina does not have the authority to take priority over solitary *ḥadīth*s. He notes that those who regard praxis as having the authority to establish the preponderance of one *ḥadīth* over another contrary *ḥadīth* that is not in conformity with Medinese praxis do so on the presumption that the latter *ḥadīth* was repealed. He states that Ibn Ḥanbal may have regarded Medinese praxis as a valid basis upon which to establish the priority of one *ḥadīth* over another contrary one, based on the numerous instances when Ibn Ḥanbal appears to have done so.[33]

Ibn al-Qayyim's treatment of Medinese praxis and consensus follows the outlines of Ibn Taymiyya's approach to them in *Ṣiḥḥat uṣūl*. Like Ibn Taymiyya, he draws a distinction between different grades of Medinese praxis, the first and highest one being traceable to the Prophet and constituting an aspect of his *sunna*. The second category has lesser authority because it was instituted by the rightly-guided caliphs and Companions on the basis of their legal interpretation (*ijtihād*). The third and lowest type of praxis was instituted through application of the legal interpretations of

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[30] For the definition of transmissional praxis (*ijmāʿ al-naqlī*), see Abd-Allah, "*ʿAmal*," 410–15 and below 231–35.

[31] Āl Taymiyya (Taqī al-Dīn Aḥmad ibn Taymiyya, ʿAbd al-Ḥalīm ibn ʿAbd al-Salām ibn Taymiyya, ʿAbd al-Salām ibn ʿAbd-Allāh ibn Taymiyya), *al-Musawwda fī uṣūl al-fiqh*, 331–33, henceforth cited as Āl Taymiyya, *al-Musawwada*; see Abd-Allah, "*ʿAmal*," 409–19. The *Musawwada* was compiled on jurisprudence and was authored by the three primary Taymiyya scholars just mentioned. It treats Medinese consensus and praxis separately. Taqī al-Dīn provides the discussion of Medinese consensus. His father, Shihāb al-Dīn, treats Medinese praxis. Taqī al-Dīn is less sympathetic in his treatment of Medinese consensus in the *Musawwada* than he is in his defense of the Medinese school in his work *Ṣiḥḥat uṣūl madhhab ahl al-Madīna*. In the *Musawwada*, Taqī al-Dīn asserts that Medinese consensus is not authoritative, which contradicts his opinion in *Ṣiḥḥat uṣūl* (see Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 26–28).

[32] Āl Taymiyya, *al-Musawwada*, 331–33; see Abd-Allah, "*ʿAmal*," 409–19.

[33] Āl Taymiyya, *al-Musawwada*, 313, 239.

later Medinese scholars and civil authorities. Not only is this third grade the least authoritative, Ibn al-Qayyim questions whether it should be deemed as having any authority at all. He strongly repudiates Medinese praxis whenever it is relied upon to reject isolated solitary *ḥadīth*s.[34]

Similarly, Ibn al-Qayyim does not acknowledge that the legal interpretations of the Companions in Medina should be given priority over the legal interpretations of their peers among the Companions in any other region. He argues that the quality of legal interpretations must be judged solely on the personal merit of the scholars making those interpretations. In this regard, many of the best and most learned people of Medina left the city at an early time and moved to Kufa, Basra, Syria, and elsewhere. Ibn al-Qayyim argues that the *sunna*, which, as a Ḥanbalī, he naturally believes may be independently constituted by solitary *ḥadīth*s, must constitute the criterion by which praxis is judged, and Medinese praxis may not be construed as a valid criterion for judging the *sunna*. One should rely upon the *sunna* of the infallible Prophet, Ibn al-Qayyim asserts, not upon the praxis of fallible Muslims.[35]

Ibn Rāhawayh's attitude toward praxis is not completely clear. Interestingly, he employs the expression "*al-sunna ʿindanā*," (SN; the *sunna* among us), which is one of Mālik's standard terms in the *Muwaṭṭaʾ*.[36] Susan Spectorsky notes that many jurists after al-Shāfiʿī did not accept his methodology. She asserts that Isḥāq ibn Rāhawayh, who had especially close ties to Aḥmad ibn Ḥanbal, was clearly among them. He continued to understand and apply the *sunna* after the nuanced manner of the jurists of the early formative period such as having reference to praxis and the post-Prophetic reports of the Companions and Successors.[37] She asserts that Ibn Rāhawayh shows no "regional or parochial tendencies." Thus, he would not have deemed Medinese praxis a final authority. At the same time, his legal method "combined traditions, practice, and scholarly opinion."[38] The conservatism of both Aḥmad ibn Ḥanbal and Ibn Rāhawayh made them incline to acknowledging older legal methods. The proclivity of the broader Ḥanbalī tradition—despite its rigorous emphasis on the priority of texts—to acknowledge and apply discretion (*istiḥsān*), preclusion (*sadd al-dharāʾiʿ*), and the unstated good (*al-maṣāliḥ al-mursala*) may also

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[34] Ibn al-Qayyim, *Iʿlām* (Dār al-Kitāb) 2:407–08; idem, (Saʿāda), 2:361–73.
[35] Ibn al-Qayyim, *Iʿlām* (Dār al-Kitāb) 2:407–08; idem, (Saʿāda), 2:361–73.
[36] Spectorsky, "*Sunnah*," 55.
[37] Spectorsky, "*Sunnah*," 55, 72.
[38] Spectorsky, "*Sunnah*," 74.

be a reflection of the archaic nature of these principles and the characteristic conservatism of the Ḥanbalī way.

Al-Bukhārī was a student of Ibn Rāhawayh and relied upon him heavily in his *ḥadīth* transmissions.[39] Al-Bukhārī, like Ibn Ḥanbal and Ibn Rāhawayh, was a trained traditionist who gave juristic pronouncements. As Scott Lucas observes, he includes a lengthy chapter in his *ḥadīth* compendium in praise of the consensus (*ijtimāʿ*) of the sacred sanctuaries of Mecca and Medina. He upholds the authority of the consensus of the Companions by virtue of their association with the two sanctuaries during the Prophet's lifetime.[40] In light of this, Lucas contends that al-Bukhārī's defense of the consensus of Mecca and Medina may be read as an endorsement of the praxis of Medina.[41]

Categories of Medinese Praxis

Juristic Classifications of Medinese Praxis

As we have seen, Mālik points to two sources of Medinese praxis in his letter to al-Layth ibn Saʿd: the *sunna* and legal interpretations (*ijtihād*). The influential Mālikī jurisprudents al-Qāḍī ʿAbd al-Wahhāb and al-Qāḍī ʿIyāḍ as well as the Ḥanbalī jurists Ibn Taymiyya and Ibn al-Qayyim also divide Medinese praxis into these two basic categories. They identify the first as praxis going back to the era of the Prophet, which they presume to be directly or indirectly rooted in the *sunna*. Al-Qāḍī ʿAbd al-Wahhāb, Ibn Taymiyya, and Ibn al-Qayyim apply the term "transmissional praxis" to it. ʿIyāḍ calls it "transmissional consensus" (*al-ijmāʿ al-naqlī*). They define the second category as praxis based on Medinese legal interpretations in the post-Prophetic period, beginning with the rightly-guided caliphs. It is further divided into two subcategories: old praxis (*al-ʿamal al-qadīm*), which goes back to the rightly-guided caliphs, and late praxis (*al-ʿamal al-muta'akhkhir*), which grew out of the legal inferences of later Medinese scholars.[42]

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[39] Spectorsky, "*Sunnah*," 74.

[40] Lucas. "Principles," 295, 300.

[41] Lucas. "Principles," 302.

[42] The citations from al-Qāḍī ʿAbd al-Wahhāb are taken from Āl Taymiyya, *al-Musawwada*, 331–33; ʿIyāḍ, *Tartīb*, 1:68–69; Ibn al-Qayyim, *Iʿlām* cited by Abū Zahra, *Mālik*, 335–336.

Transmissional Praxis (al-ʿAmal al-Naqlī)

ʿAbd al-Wahhāb and ʿIyāḍ identify four theoretical sources of transmissional praxis based on the standard jurisprudential definitions of the *sunna*: 1) the express statements (*aqwāl*) from the Prophet; 2) his deeds (*afʿāl*); 3) his tacit approvals (*iqrār; taqrīr*) of the deeds and customs of others; and 4) his deliberate omission (*tark*) of things which would have been commonly known, if he had established explicit guidelines about them.[43]

To illustrate the first two types of transmissional praxis, ʿIyāḍ mentions the public call to prayer (*al-adhān* and *al-iqāma*), which varied somewhat in Medinese praxis from other regions. He cites the designation of prayer times; omitting the formulaic invocation of God's name (*al-basmala*) in congregational prayers; certain traditional units of measure (the Medinese *ṣāʿ* and *mudd*), which were used as standards for the alms tax (*zakāh*); and public endowments (*awqāf; aḥbās*). He asserts that the authenticity of such matters in transmissional praxis is as certain as the collective knowledge the people of Medina have regarding the site of the Prophet's mosque, his speaking platform (*minbar*), grave, and the boundaries of the city. Such things, ʿIyāḍ insists, must have come down from the Prophet's time, even though (as is the case with most of them) there are no explicit texts to confirm them.[44] Ibn al-Qayyim cites the same examples and adds certain agricultural conventions and the custom of making the first call to prayer from high places.[45]

ʿIyāḍ gives no example of the third classification (matters based on the Prophet's tacit approval). But the *Muwaṭṭaʾ* provides instances of praxis that would fall in this category, such as special exemptions in commercial and labor agreements.[46] The proof of the Prophet's tacit approval in Medinese transmissional praxis, in ʿIyāḍ's view, is borne out by the fact that none of the city's jurists voiced disapproval (*inkār*) of them.[47] As an illustration of the fourth type of tranmissional praxis (based on the Prophet's deliberate omission), ʿIyāḍ cites the Medinese praxis of not collecting

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[43] The citations from al-Qāḍī ʿAbd al-Wahhāb are taken from Āl Taymiyya, *al-Musawwada*, 331–33; ʿIyāḍ, *Tartīb*, 1:68–69.

[44] ʿIyāḍ, *Tartīb*, 1:68.

[45] Cited from Ibn al-Qayyim, *Iʿlām* by Abū Zahra, *Mālik*, 335–336.

[46] See Abd-Allah, "*ʿAmal*," 588, 617–22. Medinese praxis allowed for shared-profit labor contracts (*musāqāh*) on lands containing open, unproductive (*bayḍāʾ*) areas contrary to the general principle of risk (as pertains to the open land). It allowed for the sale and possession of gold and silver-inlayed swords and copies of the Qur'an, although the actual weights of the metals were not known and men were not generally allowed to possess items decorated in gold and silver other than a silver ring.

[47] ʿIyāḍ, *Tartīb*, 1:68; Abd-Allah, "*ʿAmal*," 408–09.

alms taxes on fruit, provender, and green vegetables.[48] The *Muwaṭṭa'* contains other relevant examples pertaining to bequests and indemnities.[49]

ʿAbd al-Wahhāb and ʿIyāḍ regard all transmissional praxis as an incontrovertible legal proof (*ḥujja*). ʿIyāḍ asserts that it takes priority over all contrary solitary texts and legal arguments. Both ʿIyāḍ and ʿAbd al-Wahhāb insist that Mālikīs agree on the conclusive authority of transmissional praxis.[50] Ibn Taymiyya and Ibn al-Qayyim also take that position.[51]

Inference-based Praxis: Old (al-ʿAmal al-Qadīm) *and Late Praxis* (al-ʿAmal al-Muta'akhkhir)

The second category of praxis owed its inception to the legal inference (*istidlāl*) and interpretation (*ijtihād*) of the Medinese caliphs and jurists in the post-Prophetic period. ʿAbd al-Wahhāb, Ibn Taymiyya, and Ibn al-Qayyim break it down into the two subcategories indicated above. The first was derived from the legal interpretations of the Medinese caliphate. The second arose from legal opinions subsequent to that period. Ibn Taymiyya refers to inference-based praxis established during the rightly-guided caliphate until the death of ʿUthmān as "old praxis" (*al-ʿamal al-qadīm*).[52]

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[48] ʿIyāḍ, *Tartīb*, 1:68; see Abd-Allah, "*ʿAmal*," 555, *Muw.*, 1:276.

[49] *Muw.*, 2:814, 859; see Abd-Allah, "*ʿAmal*," 706–07, 736–37. One of the most explicit statements in the *Muwaṭṭa'* of praxis rooted in Prophetic omission is the failed attempt of certain Umayyad governors to institute the call to prayer in annual festival prayers. Mālik cites local juristic opposition to the attempt and asserts that the Prophet's *sunna* did not involve the call to prayer on such occasions. He refers to it as a *sunna* about which there were no dissenting opinions (see *Muw.*, 1:177; Abd-Allah, "*ʿAmal*," 658–60). There are similar parallels in the *Muwaṭṭa'*. It frequently indicates continuity of praxis based on scholarly approval. In numerous terms, Mālik refers to the people of knowledge of Medina and the fact that they have always held certain types of praxis be valid (see Abd-Allah, "*ʿAmal*," 583–99; 618–22).

[50] ʿIyāḍ, *Tartīb*, 1:68–69; Āl Taymiyya, *al-Musawwada*, 331–33. The *Muwaṭṭa'* does not support this claim. For example, there was dissent among the Seven Jurists of Medina over certain *sunna*-precepts such as accepting the testimony of a plaintiff supported by a single witness, which ʿIyāḍ agrees was part of "transmissional consensus" (*Muw.*, 2:721–25; see Abd-Allah, "*ʿAmal*," 571–76). For other examples of Medinese dissent in *sunna*-based praxis, see Abd-Allah, "*ʿAmal*," 572–73; 665–67; 669; 754–55; 734–36; 737–39; 741–42; 746–48; 749–50; 752–54.

[51] ʿIyāḍ, *Tartīb*, 1:68–69; Āl Taymiyya, *al-Musawwada*, 331–33; Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 23; Ibn al-Qayyim, *I'lām* as cited in Abū Zahra, *Mālik*, 335–36. Ibn Taymiyya asserts, in fact, that each of the four Sunnī Imāms regarded transmissional praxis as authoritative. For examples of such praxis, see Abd-Allah, "*ʿAmal*," 556, 562, 565, 572–73, 586, 592; cf. 552, 558, 590, 597–98.

[52] The early caliphate lasted in Medina only until ʿUthmān's death. The fourth rightly-guided caliph, ʿAlī, moved his capital to Kufa. ʿAlī constitutes one of the primary legal references in the jurisprudence of Abū Ḥanīfa. To the extent that Ibn Taymiyya's reasoning about the role of the early caliphate in influencing praxis is correct, it is reasonable to assume that ʿAlī's transferral of the caliphal capital to Kufa laid the foundations in that city

He calls inference-based praxis that grew up afterwards and included the age of the Successors as "late praxis" (*al-ʿamal al-muta'khkhir*).[53] ʿIyāḍ draws no distinction between types of praxis that resulted from early legal interpretation (in the era of the Companions and first Successors) and later rulings from the Successors.[54]

ʿIyāḍ states that most Mālikīs did not regard inference-based Medinese praxis as binding. He contends that some, especially the Mālikīs of Baghdad, held that it had no distinctive merit and could not be used to differentiate between the stronger of two conflicting legal interpretations. Other Mālikīs, he continues, held that inference-based praxis, although not inherently authoritative, did constitute a useful reference for determining which of two conflicting legal arguments was stronger. He adds that a third group of Mālikīs, notably those of North Africa and Andalusia (*al-maghrib*), held that inference-based praxis had binding authority and should always be given priority over contrary solitary *ḥadīth*s and conflicting legal arguments. ʿIyāḍ asserts that other Mālikīs profoundly disagreed with the North Africans and Andalusians on this matter.[55]

Al-Qāḍī ʿAbd al-Wahhāb, who belonged to the Mālikīs of Baghdad, is reported to have regarded no type of Medinese praxis to be inherently authoritative if it was derived from legal interpretation, which conforms with ʿIyāḍ's assessment of the Baghdad Mālikīs. Ibn Taymiyya asserts that some Mālikīs regarded old praxis as authoritative when verified by local consensus. In such cases, they regarded praxis as a special instance of consensus, although distinctive from the consensus of the entire Muslim community (*umma*) and not equally authoritative.[56] ʿAbd al-Wahhāb states that late praxis was not regarded as authoritative by meticulous

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for a reputation of legal authenticity and authority that would ultimately rival Medina. As noted before, Muḥammad al-Kawtharī contends that Kufan praxis was one of the sources of Abū Ḥanīfa's legal reasoning, although Abū Yūsuf and al-Shaybānī rejected reliance on praxis in their polemical writings (see al-Kawtharī, *Fiqh*, 35–38). As noted earlier, Ibn Taymiyya held that, until the death of ʿUthmān, no center of Islamic religious knowledge could vie with Medina (Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 30; Abd-Allah, "*ʿAmal*," 52–53). Ibn Taymiyya asserts that al-Shāfiʿī, according to one report related from him, regarded old Medinese praxis to be authoritative. Ibn Taymiyya indicates that Ibn Ḥanbal may also have held this view since he regarded the legal interpretations of the first four rightly-guided caliphs as conclusively binding (see Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 161–69).

[53] Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 26–28; for ʿAbd al-Wahhāb and Ibn Taymiyya see Āl Taymiyya, *al-Musawwada*, 331–32; Ibn al-Qayyim *Iʿlām* as cited in Abū Zahra, *Mālik*, 335–36; cf. Dutton, *Origins*, 36–37.

[54] ʿIyāḍ, *Tartīb*, 1:69–70.

[55] ʿIyāḍ, *Tartīb*, 1:69–70.

[56] Āl Taymiyya, *al-Musawwada*, 331–32.

(*muḥaqqiqūn*) Mālikī scholars. This implies that there were other Mālikī jurists who regarded it to be authoritative (such as the Andalusians and North Africans mentioned above), although they were not "meticulous" in ʿAbd al-Wahhāb's eyes.

Ibn Taymiyya and Ibn al-Qayyim both hold old Medinese praxis in high esteem. Ibn al-Qayyim asserts that all Medinese praxis instituted under the Medinese caliphate belongs to the category of the *sunna*. His categorization of old praxis as *sunna*, although it was rooted in caliphal precedent, is consistent with the principle of Ḥanbalī jurisprudence that the legal pronouncements (*fatwā*s) and post-Prophetic reports of the Companions constitute a valid source of the Prophetic *sunna*. Both Ibn Taymiyya and Ibn al-Qayyim draw a sharp distinction, however, between old and late praxis. Ibn al-Qayyim emphasizes that the two must never be confused. Like many Mālikīs, neither jurist regarded late praxis as authoritative. Ibn al-Qayyim stresses that late praxis may not be given priority over contrary solitary *ḥadīth*s. It should be noted, however, that neither Ibn Taymiyya nor Ibn al-Qayyim makes a distinction between those precepts of old and late praxis that were supported by Medinese local consensus and others that were not.[57]

Juristic Classifications of Praxis in the Light of Mālik's Terminology

The preceding classifications of Medinese praxis based on post-formative Mālikī and Ḥanbalī jurisprudence are exclusively concerned with its presumptive sources. None of the categories relates specifically to types of praxis that lacked local consensus. As we have seen, Mālik's conception of Medinese praxis broke it down into the same fundamental categories as later jurists, but his terminology in the *Muwaṭṭaʾ* and the correspondence between him and al-Layth ibn Saʿd indicate clearly that praxis in Medina—like that of other regional centers—enjoyed varying degrees of local consensus and dissent.

In many cases, the presumed sources of Medinese praxis are not clearly indicated in the *Muwaṭṭaʾ*.[58] Often, one can only estimate the source of

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[57] Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 27–28; Ibn al-Qayyim, *Iʿlām* as cited in Abū Zahra, *Mālik*, 335–36.

[58] Even with regard to those praxis precepts that appear to have been the result of inference and legal interpretation, it is rarely possible to trace their origin or determine whether they belonged to the category of old or late praxis. The AMN about the permissibility of using a Magian's hunting dog is a good example. Mālik supports the precept's validity by analogy. He does not, however, give any indication of who first drew that

praxis from other textual evidence in the *Muwaṭṭaʾ, Mudawwana*, or other works. It appears, however, that all of Mālik's primary terminological expressions in the *Muwaṭṭaʾ* and *Mudawwana* can potentially apply to "transmissional praxis."[59] His *sunna*-terms refer consistently to it. They differ from the *amr*-terms AN (*al-amr ʿindanā*; the rule among us) and AMN (*al-amr al-mujtamaʿ ʿalayhi ʿindanā*; the agreed rule among us) in this regard. The *amr*-terms occasionally refer to *sunna*-based transmissional praxis, but, as a rule, are derived from or include elements of legal interpretation as well, which would classify them as old and late praxis.[60]

The term -zĀIb (this is the precept which the people of knowledge in our city still continue to follow; *wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-baladinā*) falls consistently into the category of transmissional praxis. Most explicit *ʿamal*-terms of the *Muwaṭṭaʾ* also belong to that category. Likewise, the contents of the *ʿamal*-chapters in the *Muwaṭṭaʾ* (chapters beginning with that word and illustrating what the

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analogy or who was responsible for the full legal interpretation. There is evidence that the Medinese Companion Jābir ibn ʿAbd-Allāh dissented regarding this AMN, but one cannot determine on that basis alone whether the AMN constituted old or late praxis. Jābir lived until the year 78/697, which fell within two decades of Mālik's birth and well within the period of the educational activities of his teachers. See Abd-Allah, "*ʿAmal*," 693–700.

Similarly, when Mālik reports in a praxis chapter on the indemnities in gold and silver that ʿUmar set for manslaughter, Mālik remarks toward the end of the chapter that it is the AMN that those who rely upon camels as their livelihood should not be paid indemnities in gold or silver. Likewise, indemnities are not paid in camels to people whose livelihoods revolve around the use of gold and silver. Those who primarily use silver are not given indemnities in gold, and those who primarily use gold are not given indemnities in silver. But again, the source of these clarifications is not clear. Although Mālik states explicitly that ʿUmar set the amounts of the indemnities for gold and silver, there is no specific indication that he also stipulated these fuller rulings which are the substance of this AMN. See *Muw.*, 2:850; Abd-Allah, "*ʿAmal*," 673–79.

Medinese praxis stipulated that a wife could be separated from her husband if he failed to support her. Mālik indexes this precept under the praxis term ĀdIb (this is what I found the people of knowledge in our city following; *wa ʿalā hādhā adraktu ahl al-ʿilm bi-baladinā*). The precept appears to be the result of legal interpretation, but its source is again difficult to identify. Mālik states in the Muwaṭṭaʾ that Saʿīd ibn al-Musayyab held this opinion. If the precept were the result of legal interpretation, it is possible that it originated with Saʿīd. Reports from the *Mudawwana* indicate, however, the ʿUmar ibn ʿAbd al-ʿAzīz implemented the precept; when he inquired of its validity, Saʿīd ibn al-Musayyab sent him word that it was the *sunna*. There is some question, however, as to whether or not the precept actually went back to the Prophet according to Medinese sources. If it did not clearly go back to the Prophet's legislative activity in Medinese eyes, it would be virtually impossible on the basis of the material I have found to determine whether it was an old or a late Medinese praxis. See *Muw.,* 2:589; *Mud.*, 2:194; see Abd-Allah, "*ʿAmal*," 602–05; cf. 700–02, 740.

[59] See Abd-Allah, "*ʿAmal*," 576–78, 611–12, 678, 686, 725–27, 757–58.

[60] See Abd-Allah, "*ʿAmal*," 576–78, 611–12, 678, 686, 725–27, 757–58.

praxis in a particular matter is) pertain to transmissional praxis with one apparent exception.[61]

Post-Prophetic legal interpretation constitutes a predominant element in the precepts Mālik identifies by the term AMN, although, as just noted, it may occasionally include elements derived from transmissional praxis.[62] Moreover, those instances of AMN that undoubtedly include transmissional praxis also contain at least some additional element of post-Prophetic legal interpretation, which adds new details to the original precept. The complex nature of Mālik's AMN terms tends to agree with what Mālik says about that term in the report of his nephew Ibn Abī Uways, where he states explicitly that AMN consisted of the legal opinions of the Medinese jurists.[63] In general, AMN is one of the broadest and most inclusive of all Mālik's terminologies. It sometimes shares the scope of the strongest *sunna*-term, S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*), although in those same examples, the S-XN proper appears to exclude material that the AMN adds by way of post-Prophetic legal interpretation.[64]

One of the most distinctive features of Mālik's terminology is that it is consistently concerned with various levels of Medinese consensus or the presence of significant local dissent. As we have seen, al-Layth's letter to Mālik shows similar concern with different grades of Medinese praxis with reference to the consensus and dissent of the Medinese scholars. He describes himself as the most adamant of jurists in following Medinese consensus and the most averse to irregular (*shādhdh*) legal opinions even when he adopts a dissenting position. He feels at liberty to disagree with those types of praxis about which the Medinese jurists themselves have disagreed. In such cases, he feels justified to follow the contrary praxis of his own country or other regions as long as that praxis was instituted by the Companions during the rule of the first three rightly-guided caliphs in Medina.[65]

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[61] See Abd-Allah, "*ʿAmal*," 611–12, 678, 686.

[62] See Abd-Allah, "*ʿAmal*," 719–20.

[63] See Abd-Allah, "*ʿAmal*," 725–26.

[64] See Abd-Allah, "*ʿAmal*," 719–20, 726–27.

[65] See Abd-Allah, "*ʿAmal*," 312–13, 322–23. Al-Layth draws a distinction between Medinese praxis and Medinese consensus. Indeed, Mālik had written to al-Layth because of his disagreement with types of Medinese praxis such as the precept of passing legal judgments on the basis of the oath of a single plaintiff supported by the testimony of a single witness. Mālik refers to this precept in the *Muwaṭṭaʾ* as MḌS (the *sunna* that has long been established; *maḍat al-sunna*), a term which—like AN, S (*al-sunna*), and SN (the *sunna* among us; *al-sunna ʿindanā*)—gives no explicit indication of Medinese consensus. As analysis of

The term AN falls predictably within the category of praxis precepts that lacked local consensus. This difference between AN and AMN is explicit when Mālik cites his personal opinion on an AN regarding wound indemnities. Mālik's opinion in support of the AN agrees with al-Zuhrī but is at odds with Saʿīd ibn al-Musayyab. Mālik clarifies that there is no AMN in this particular matter.[66] As will be shown later, there are several indications that the term AN consistently refers to Medinese praxis. The report of Ibn Abī Uways also defines AN as such. It states further that AN precepts constitute the legal precedents followed by the Medinese judiciary, and he asserts that such precepts are known by the ignorant and the knowledgeable alike. Ibn Abī Uways gives no indication that AN precepts were supported by Medinese consensus.[67] According to a report in the *Mudawwana*, al-Zuhrī refers to an AN precept pertaining to the marriage rights of wives and repeats twice that it was followed by the Medinese judges.[68]

The Medinese Community in Mālik's Eyes

Mālik devotes an entire chapter of the *Muwaṭṭaʾ* to the excellence of Medina and its special status in Prophetic revelation.[69] He begins with a Prophetic supplication blessing the city's units of measure (the *ṣāʿ* and *mudd*).[70] He follows it with a more general *ḥadīth* that repeats the supplication, indicates its context and original meaning, and mentions the Prophet's designating the city for his special blessing and making it an inviolable sanctuary.[71]

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this MḌS precept indicates, there is evidence that the Medinese jurists ʿUrwa ibn al-Zubayr and al-Zuhrī took issue with it (see Abd-Allah, "*ʿAmal*," 329, 572–73).

[66] *Muw.*, 2:859; Abd-Allah, "*ʿAmal*," 734–35. I did not undertake a systematic analysis of terms like MḌS, SN, and S. They are, of course, semantically similar to AN in that they give no explicit indication of Medinese consensus and at least sometimes are used to include types of praxis not supported by Medinese consensus. See Abd-Allah, "*ʿAmal*," 665–66, 572–73.

[67] ʿIyāḍ, *Tartīb*, 1:194; see Abd-Allah, "*ʿAmal*," 732.

[68] *Mud.*, 2:195; Abd-Allah, "*ʿAmal*," 733. Many of the AN precepts in the *Muwaṭṭaʾ* pertain to matters that would have come under the jurisdiction of the Medinese judiciary or some other local authority such as the city's governor or magistrate (*muḥtasib*). See Abd-Allah, "*ʿAmal*," 732–33, 666–67, 676–77, 737, 740–41, 745.

[69] *Muw.*, 2:884–97.

[70] As noted, the definition of these units of measure was not based on textual evidence but the praxis of Medina and constituted one of points of contention between the Kufans and the Medinese.

[71] *Muw.*, 2:884–85.

In his letter to al-Layth ibn Saʿd, Mālik states clearly his lofty conception of Medina, its people, and community of scholars. He asserts, as we have seen, that all people are subordinate (*tabʿ*) to them in matters of religious knowledge by virtue of their unique historical relation to the Prophetic event and subsequent commitment to its protection and cultivation as a communal legacy.[72] The cumulative heritage of the people of Medina, in Mālik's view, could not be claimed by the residents of any other city. He concludes his letter to al-Layth saying:

> Whenever a matter [of law] is predominant (*ẓāhir*) in Medina and followed in the praxis, I do not believe that anyone has the prerogative to go against it on the basis of the limited part of this same legacy that they possess, this legacy which none may take for himself or lay claim to. If the inhabitants of the [garrison] cities (*ahl al-amṣār*) should begin to say, "But this is the praxis of our city" or "This is what those who preceded us were always doing," they would not, in doing that, be following the surest and most reliable course, nor would they be doing what is permissible for them.[73]

As this citation shows, the paramount import of Medinese praxis in Mālik's eyes was established beyond question. He was confident that he knew the content of praxis well and that it had been transmitted to him in the "surest and most reliable" manner. Mālik acknowledges that similar types of praxis grew up in the garrison cities. They were not without legitimacy in his eyes—a position that he also asserted when declining al-Manṣūr's request to make Medinese praxis the standard of the Abbasid realms—but such forms of regional praxis could not equal or rival the Medinese. The praxis of Medina, in Mālik's view, had been carefully instituted by the Prophet and cultivated by his Companions—especially the rightly-guided caliphs—and its link to Mālik two generations later had been preserved by the integrity of his teachers.

Jurists as Heirs and Guardians of Praxis

The excellence of the scholars of Medina is a theme that runs through the *Muwaṭṭaʾ*.[74] As earlier citations from Mālik show, he regarded the community of the Medinese jurists as worthy heirs of their city's praxis

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[72] ʿIyāḍ, *Tartīb*, 1:194; see Abd-Allah, "*ʿAmal*," 539–40.

[73] Ibn al-Qayyim, *Iʿlām*, (Saʿāda), 3:94–95; see Abd-Allah, "*ʿAmal*," 315–18.

[74] See, for example, *Muw*., 1:3–17. Although no reference is made in the chapter to praxis by name, this entire opening chapter of the *Muwaṭṭaʾ* establishes the prominence of the Companions and Successors in establishing and protecting praxis both in Medina and other centers, especially Kufa.

and guardians of its content. His terminology makes repeated reference to them in this capacity. Mālik's most common allusion to his teachers in the *Muwaṭṭaʾ* as reference points for verifying praxis is, "Those people of knowledge whom I am pleased to accept" (*man arḍā min ahl al-ʿilm*).[75] He uses other variations such as, "This is the precept which the people of knowledge in our city still continue to follow" (*wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-baladinā*).[76] Mālik's conception of the status of the Medinese jurists from whom he received his instruction is explicit in the report attributed to him by Ibn Abī Uways. In it, Mālik refers to Medinese praxis as "a legacy that one generation has handed down to another until our time." He describes them as "the people of learning and excellence and the Imāms whose examples are worthy of being followed [and] from whom I received my learning." He describes them as those who were heedful of God, and, as in his letter to al-Layth, he stresses the continuity of their teaching and practice through the generations from the Companions to the Successors until it reached him.[77]

In the *Muwaṭṭaʾ*, Mālik indicates the Prophet's concern with establishing balanced, normative praxis as will be shown below. He draws particular attention to the role of the rightly-guided caliphs and Companions in continuing that legacy after him. Mālik transmits that the caliph ʿUmar was delivering the Friday prayer sermon (*khuṭba*) from the mosque speaking platform and noticed a latecomer. Before all who were present, ʿUmar asked the latecomer about his excuse. The man replied that he had been in the market shopping, had heard the call to prayer, went to make his ablutions, and then came. ʿUmar indicated that everything he had done was contrary to what the community was taught, even his making ablutions instead of ritual washing (*ghusl*).[78] In another report, Mālik relates that ʿUmar instructed the people from the mosque speaking platform on the correct wording of the testimony of faith (*tashahhud*) which is made while sitting during the ritual prayer.[79] Mālik transmits other post-

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[75] See, for example, *Muw*., 2:615; Abd-Allah, "*ʿAmal*," 538–45.

[76] See Abd-Allah, "*ʿAmal*," 585–96.

[77] ʿIyāḍ, *Tartīb*, 1:194; see Abd-Allah, "*ʿAmal*," 539–40. Abū Yūsuf does not acknowledge praxis as a valid independent source of the law, although he refers obliquely to its importance when he mentions "those *ḥadīth*s that the community is following." Like Mālik and al-Layth, Abū Yūsuf also identifies the community of jurists as the chief repositories of authority in the sound transmission and proper interpretation of legal texts, "Follow those *ḥadīth*s that the community (*al-jamāʿa*) is following [and] which the jurists recognize [as valid]" (see Abd-Allah, "*ʿAmal*," 403–09; 448–53.)

[78] *Muw.*, 1:101–02.

[79] *Muw.*, 1:90–91.

Prophetic reports that portray ʿUmar instructing the Medinese about various aspects of praxis and carefully making clear to them the distinction between normative and non-normative, what they should imitate and what they should not.[80]

In many post-Prophetic reports narrated in the *Muwaṭṭaʾ*, ʿAbd-Allāh ibn ʿUmar is portrayed in a similar light as a conscious conveyor and guardian of praxis.[81] He instructs the people in the details of praxis and takes steps to insure that they understand them properly.[82] Mālik's examples in the *Muwaṭṭaʾ* frequently portray other Companions and Successors in this role. Mālik cites a post-Prophetic report relating that vouchers (*ṣukūk*) were distributed among the people of Medina during the early Umayyad period to be redeemed for food that was scheduled for later delivery. The people began to speculate in them, selling the vouchers at various prices before the food arrived. Zayd ibn Thābit and another Companion of the Prophet (whose name is not given) went to Marwān ibn al-Ḥakam, the city's governor at the time, and reprimanded him. Marwān called out the guard (*al-ḥaras*), sent them among the people to collect the vouchers, and saw that they were returned to their original owners.[83]

Although Mālik regarded his teachers as the criterion by which he gauged the authenticity of praxis, he did not regard all the scholars of Medina as falling in that category. As we have seen, Mālik selected his teachers carefully and did not regard many of the Medinese scholars around him as competent jurists or worthy heirs of the Prophetic legacy in Medina. His frequent references to the scholars with whom he is pleased and those from whom he took his knowledge make it explicit that Mālik excluded many other local scholars as valid points of reference for Medinese praxis. Moreover, Mālik did not regard the practices and customs of the people of Medina as independently authoritative. To constitute a legal proof, praxis needed the endorsement of Mālik's teachers. Their explicit or tacit endorsement constituted its authentic *isnād* in Mālik's view. Regarding a certain local religious practice, for example, Mālik states that he has seen the people of Medina do it. But by stating that "those whom he met and whom he follows" (*al-ladhina adraktuhum wa aqtidi bihim*), would

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80 See Abd-Allah, "*ʿAmal*," 629–32; 194–95.
81 See Abd-Allah, "*ʿAmal*," 629–32, 658, 688–89.
82 See, for example, *Muw.*, 1:168, 169, 217.
83 *Muw.*, 2:641.

not do it, Mālik indicates that the practice was a popular accretion and not an instance of sound Medinese praxis or a source of law.[84]

As an heir of the Medinese legacy, Mālik strived to set a sound public example that reflected traditional Medinese praxis as his teachers had done. Al-Shāṭibī praises Mālik for carefully setting a normative example in his public life.[85] Ibn al-Qāsim gives examples in the *Mudawwana* of various optional matters of worship which Mālik preferred to practise privately (*fī khāṣṣat nafsihī*) but did not deem appropriate to do in public or encourage the people to immitate.[86]

Praxis and the Golden Mean

The contrast between the public and private domains of Islamic life is one of the distinctive traits of Islamic culture and civilization as they developed over the centuries, especially as reflected in domestic architecture. This dichotomy is also clear in the Prophet's life. Although he was an extremely public persona and those around him had direct access to him, his life had other intimately private dimensions with his closest friends and family and in his acts of solitary worship, especially at night.

In al-Shāṭibī's view, the Prophet strived to set moderate and well-balanced examples in public in order to establish a healthy and viable religious and social norm which all could follow. In private, he pursued patterns of intense prayer and spirituality that he could sustain while meeting his social obligations, but which were beyond the capacity of the people in general. By making his public and private behavior distinct, the Prophet instituted Medinese praxis as a properly balanced, standard source of Islamic normativity. It was designed neither to be too rigid and harsh, which would engender repugnance. Nor was it too lax, giving rise to neglectfulness and moral decay. In establishing this balanced public norm, the Prophet preferred simplicity and ease and as little formality as possible. Of all legal considerations, the conviction that Medinese praxis embodied a golden mean is among the most important.[87]

Al-Shāṭibī cites numerous *ḥadīth*s and post-Prophetic reports emphasizing the imperative that Islamic jurists seek to preserve the golden mean in all the judgments and pronouncements they issue. The golden mean in

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[84] *Mud.*, 1:157.
[85] See Abd-Allah, "*'Amal*," 403–09.
[86] *Mud.*, 1:120–21.
[87] See al-Shāṭibī, *al-Muwāfaqāt*, 3:60–76, 4:233–43.

Medinese praxis and in the sound application of Islamic law in other times and places embodies the principle of removing hardship (*rafʿ al-ḥaraj*), which is one of the primary legal objectives behind Mālik's use of discretion (*istiḥsān*). By the same token, it embodies the principle of preclusion (*sadd al-dharāʾiʿ*) by obstructing potential harms that might occur by normalizing exceptional behavior and rigid applications of the law.[88]

Mālik cites numerous texts in the *Muwaṭṭaʾ* that reflect the Prophet's abiding concern for instituting normative standards in public and maintaining codes of behavior that instilled moderation and balance, a golden mean that accommodated men and women, the weak and the strong, and the young and old. As a golden mean, Medinese praxis constituted a "well-trodden path" (*muwaṭṭaʾ*) for all. Mālik transmits the following *ḥadīth* in the *Muwaṭṭaʾ*:

> When any of you leads people in prayer, let him make it easy (*fa-ʾl-yukhaffif*). For among them are the weak, the sick, and the old. But when any of you prays alone, let him lengthen his prayer as long as he desires.[89]

Al-Shāṭibī cites an authoritative *ḥadīth* from the Prophet's wife ʿĀ'isha that he would not pray the voluntary sunrise prayer (*ṣalāt al-ḍuḥā*) despite his express personal desire to do so, for fear that it would become a customary part of the people's worship and would be too difficult for them to maintain. It should also be noted that in a desert oasis such as Medina, early morning was the prime time of work and social activity before the heat of midday. Making the sunrise prayer a customary practice would have endangered the general good by diminishing meaningful social activity at that critical time of day.[90]

Likewise, the Prophet prohibited his followers from performing the uninterrupted fast (*al-wiṣāl*)—a fast that continues unbroken for a given number of days and nights—yet the Prophet continued to practice it even after its general prohibition, and he allowed certain Companions to do so as well. The Prophet is reported to have said that God gave him the strength to perform the interrupted fast, while still having the energy to perform customary activities. As for the Companions whom he gave special permission to perform the uninterrupted fast after its general prohibition, al-Shāṭibī asserts that they, like the Prophet, had the strength to perform it while still fulfilling their normal responsibilities. Although

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[88] See al-Shāṭibī, *al-Muwāfaqāt*, 3:60–76, 4:233–43.
[89] *Muw.*, 1:134.
[90] See al-Shāṭibī, *al-Muwāfaqāt*, 3:60–64.

they were given special permission, the Prophet's general prohibition became the rule. It continued to hold for the believers as a whole and became part of standard Medinese praxis.[91]

The Prophet encouraged his followers to pray additional voluntary prayers (*nawāfil*) but directed that they not be prayed in congregation after the manner of the obligatory prayers, for fear that they would become customary and cease to be optional. He indicated that it was better for people to pray supererogatory prayers in their homes rather than in mosques. Al-Shāṭibī notes, however, that in some *ḥadīth*s the Prophet occasionally prayed voluntary prayers in private congregations in the houses of some of his close Companions. In such cases, al-Shāṭibī contends, the Prophet's standard directive that supererogatory prayers not be prayed in congregation in public continued to hold. His exceptional private worship exemplified an ideal toward which the believer could strive. It was in that sense more excellent that the Prophet's public example in worship, yet the superiority of these special types of worship was conditional on their remaining private and not becoming normative for the community as a whole.[92]

In its concern for balance, moderation, and establishing viable positive norms, the praxis of Medina embodied the principle of the general good (*maṣlaḥa*), which was one of the primary concerns of Mālik's legal reasoning.[93] Keeping the public domain of worship and religious life within the golden mean constitutes an application of the principle of preclusion (*sadd al-dharā'i'*) at the foundation of Medinese praxis and a guiding rule of thumb for those who sought to preserve its content and legacy in future generations.[94] Praxis discouraged certain outwardly legitimate types of behavior because of the danger that they would come to constitute new public norms. Al-Shāṭibī insists that Mālik understood this dichotomy between public and private worship in such terms. Mālk is reported to have said, for example, that it is permissible to pray supererogatory prayers in private congregations of around two or three persons or under other circumstances when there is no danger of notoriety (*istishhār*). He regarded it as reprehensible (*makrūh*) that supererogatory prayers be prayed in larger congregations under circumstances that would

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[91] See al-Shāṭibī, *al-Muwāfaqāt*, 3:60–64.
[92] See Abd-Allah, "*'Amal*," 262–67.
[93] See al-Shāṭibī, *al-Muwāfaqāt*, 3:56–76; 4:239–43.
[94] See Abd-Allah, "*'Amal*," 262–67.

be likely to bring about widespread public notice and threaten the established balance of praxis.[95]

Mālik frequently cites texts in the *Muwaṭṭa'* that show that the Companions understood the need to preserve the gold mean and maintain balanced norms that were within the capacity of all to follow. Mālik relates in the *Muwaṭṭa'* that the caliph ʿUmar once set out at the head of a party of horsemen which included ʿAmr ibn al-ʿĀṣ (d. 43/664). They set up camp for the night not far from an oasis. That night, ʿUmar had an erotic dream, and the seminal fluid ritually impurified his clothing. There was not enough water in the camp for ʿUmar to wash himself and his clothing. Before the break of dawn, he woke the men up and they rode to a watering pool at the oasis. Once there, ʿUmar set about washing his soiled clothing in the dark. He was still washing when the first light of dawn appeared and the time for prayer came. ʿAmr said to him, "Dawn has overtaken you. We have other garments with us. Put yours aside and let them be washed." ʿUmar replied, "How strange of you, ʿAmr ibn al-ʿĀṣ! Even if you can find other garments, will all the people be able to? By God, if I were to do [as you suggest], it would become a *sunna*. I will wash what I see instead and sprinkle water over what I cannot see."[96]

In his commentary on this report, Ibn ʿAbd al-Barr states that ʿUmar was aware how closely the people imitated him and wanted to set an easy example for them which they could follow without undue difficulty.[97] Al-Shāṭibī emphasizes that preservation of the golden mean must be continually in the mind of the independent legal interpreter and jurisconsult (*muftī*) in applying the law to new circumstances:

> The jurisconsult who has attained the highest caliber is the one who leads the people along the well-known path of moderation (*al-maʿhūd al-wasaṭ*) in those matters that pertain to the general public (*al-jumhūr*). He neither constrains them to follow a policy that is severe (*madhhab al-shidda*), nor does he let them incline toward the direction of dissolution (*inḥilāl*).[98]

In al-Shāṭibī's view, religious scholars have a social obligation to set public examples on the basis of the established praxis of the first generations of

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[95] Al-Shāṭibī, *al-Muwāfaqāt*, 3:62–63.

[96] *Muw.*, 1:50. The report shows that the people looked upon the example of prominent Companions of the Prophet of the stature of ʿUmar as indicative of the *sunna*, which remained one of the essential principles of the Ḥanafī, Mālikī, and Ḥanbalī schools (see Abd-Allah, "*ʿAmal*," 161–69).

[97] Ibn ʿAbd al-Barr, *al-Istidhkār*, 1:361.

[98] Al-Shāṭibī, *al-Muwāfaqāt*, 4:239.

Islam. They must take care not to normalize those types of essentially individual religious behavior that the first generations persistently restricted to the private, exceptional, and non-normative realm.[99] The failure of prominent social figures to set moderate and well-balanced normative examples in public is impermissible on grounds of the Mālikī inferential principle of preclusion (*sadd al-dharā'i'*), since that failure disturbs the golden mean:

> For it is likely that the ignorant, when they see a scholar persistently doing a thing will conclude that it is obligatory. Preclusion is something that the law demands [in such cases] and is one of the definitive (*qaṭ'īya*) principles of the law.[100]

Mimesis and Early Islamic Praxis

Mimesis is the deliberate imitation of a person, class, or group of people by others as a factor of social continuity or change.[101] Many of the

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[99] Al-Shāṭibī, *al-Muwāfaqāt*, 3:70–71.

[100] Al-Shāṭibī, *al-Muwāfaqāt*, 3:61–62.

[101] Literally, mimesis means "to imitate exactly." The word is used differently in art, history, philosophy, anthropology, and other disciplines. In using the above definition in this chapter, I base my understanding largely on Arnold Toynbee's *A Study of History* (citations are given below). In traditional tribal societies, mimesis establishes identity and preserves continuity. It is the basis of standards, customs, and ethical norms. Mimesis generally constitutes a supreme and even sacred cultural value in such cultures.

Just as mimesis may serve to integrate and preserve cultures, it is a double-edged sword and has the power to transform them positively and negatively, often with unexpected rapidity. In emergent civilizations, the "creative minorities" that serve as their vanguards acquire the power of mimesis and take it out of the hands of the former, often outdated or defunct cultural elites. The new "creative" elite evokes mimesis through "voluntary allegiance by charm," not force. "Dominant minorities" (oppressive elites), on the other hand, use force to take power and maintain control. They frequently appear in history after the initial stages when a "creative" elite succeeds in giving rise to an emergent civilization. The "dominant" elite usurps control and consolidates power and privilege to the benefit of its class or group. "Dominant minorites" may also evoke mimesis—such as the artificial imitation of the vanquished for the victor—but it is of a different type and has contrasting historical consequences. "Dominant minorities" tend to divide and stratify societies, not unify them. They intimidate and alienate instead of attracting. Because "creative minorities" rely on "charm" and not force, they have the potential to promote rapid social reconfiguration and foster new cultural ideals and identities both within and outside the groups that follow them. In emergent civilizations, the charismatic power of mimesis in the hands of the "creative minority" may lay the foundations for broad intercultural synergy and compatibility. The universal appeal of the mimesis evoked allows the emergent civilization to "radiate" its influence and foster dynamic contact between its own people and the outside world. As Toynbee observes, mimesis and its decline and disappearance are among the most important of all social barometers in history. Mimesis is among those vital cultural factors that constitute the "lifeblood, the marrow and pith, the essence and epitome of

preceding examples reflect its centrality in early Islamic society. As Ibn ʿAbd al-Barr states about ʿUmar's precedent of washing his own clothes at the oasis instead of taking new ones, he "was aware how closely the people imitated him and wanted to set an easy example for them which they could follow without undue difficulty." Al-Shāṭibī emphasizes that mimesis (*taqlīd*) was exceptionally strong in pre-Islamic Arab society and constituted one of the most important elements in its culture. Their communal propensity toward the meticulous imitation of the customs of forefathers, elders, and honorary figures constituted one of the Prophet's major challenges at the beginning of his message, just as it became one of his greatest resources after he won his people's hearts.[102]

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civilization." All other elements—economic, technological, administrative, political, and military—are superficial and nonessential by comparison. In Toynbee's words, they are "trivial manifestations of civilization's nature," and the same applies to human culture in general. (See Toynbee, *Study*, 5:198–203; cf. 1:115, 147; 4:47; 5:527, 35–47, 63; 7:423, 762, 767–68; 9:180, 214).

Alexander the Great (d. 323 BCE) exemplifies the power of mimesis as a unexpectedly rapid and comprehensive transformative force in history. His legacy—real and imagined—inspired emulation to a degree that has few counterparts in human history. Two centuries earlier, Cyrus the Great of Persia (d. ca. 530 BCE), founder of the Achaemenid Empire, constituted an important historical parallel. In fact, Cyrus may be said to have laid the foundations upon which Alexander built. Both Cyrus and Alexander used military force to conquer but did not rely upon it to evoke mimesis. Alexander insisted on treating non-Greeks ("the barbarians") as Greeks, much to the chagrin of his troops and many Greek intellectuals of the time. Cyrus had the habit of forgiving the vanquished, who often had been the first to go to war, and cultivate their allegiance.

Ironically, little detail has ever been known about Alexander as established historical fact. His youth, meteoric rise, and early death made it virtually impossible to discern the truth about him from fiction. But the legends and myths that grew up around him—inspired by his charismatic youthfulness, stunning conquests, and revolutionary Panhellenic policy—proved ultimately more powerful than Alexander himself. His legacy led to the rapid transformation of the ancient world. It helped bring about a global economic and cultural synthesis that was centered in Alexandria and stretched from Gibraltar to the Punjab. It fostered *koinê* Greek as a lingua franca. Ultimately, it facilitated the rise of the Roman Empire, the emergence of new and innovative philosophies and religious movements, and the development and spread of Christianity. The global expansion of Hellenism profoundly affected the evolution of Mahayanan Buddhism in Afghanistan and Central Asia. In the Indian subcontinent, Hellenism was an important catalyst in the final transformation of Vedic religion into Hinduism.

The venture of Islam as an emergent world civilization cannot be fully understood without a sound grasp of the power of mimesis in history. In many regards, early Islamic history with its charismatic figures, rapid conquests and consolidations, transcontinental governance, *pax islamica*, extensive cultural reach, and the spread of Arabic and New Persian as lingua francas invites comparison with Alexander the Great and the Hellenistic movement a millennium earlier (see Arrian [Favius Arrianus Xenophon], *The Campaigns of Alexander*, "Introduction," 18–28; Toynbee, *Study*, 5:37–41, 58, 61–62, 131–47; 1:5–6, 91–92, 108, 153–54; 2:127–28, 138–40; 7:310–11, 422–26; 8:90–91).

[102] Al-Shāṭibī, *al-Muwāfaqāt*, 4:249; see Abd-Allah, "*ʿAmal*," 438.

The Prophet's antagonists continually invoked the prerogative of mimesis against him and accused him of violating the sanctity of their fore fathers by seeking to alter established beliefs and practices. The oligarchies that opposed the Prophet were motivated to make this claim to protect their vested interests. The majority of their followers were not. For them, the obligation to preserve the way of their forefathers grew out of a deeply instilled conviction and reflected a genuine cultural response. It was natural for them to see the new religion as a harmful innovation (*bidʿa*) that threaten the established ways of their elders, as the Qu'rān makes repeatedly clear (see Qur'ān, 2:170; 5:104; 7:28, 70, 173; 10:78; 31:21; 34:43; 43:22–24). The Prophet's uncle and protector Abū Ṭālib ibn ʿAbd al-Muṭṭalib (d. 4 BH/619) held his nephew in esteem and acknowledged his personal vitue and the merit of his teaching, but the established pattern of mimesis never loosened its grip upon him. Even on his deathbed, Abū Ṭālib was unable to forsake the norms of his tribal forefathers or bear the accusation that he had.[103]

Although the Prophet altered detrimental beliefs and customs, he did not seek to abolish mimesis as an Arab cultural norm but to put it on a new foundation. The success of his mission was finally realized when he succeeded in reversing the status quo and enlisted the cultural prerogative of mimesis to his advantage. Toward the end of his mission, the Prophet emerged as the most esteemed honorary figure the Arabs had known. He established himself as the new standard of mimesis and replaced the cultural authority of the elites who had opposed him as well as the precedents of their idolatrous forefathers.[104]

Al-Shāṭibī observes that the Prophet did not rely on personal integrity alone to reverse the status quo and make himself the new object of mimesis. He also enlisted the authority of the most ancient and illustrious of the Arabs' forefathers. His teaching emphasized its continuity with the primordial examples of Abraham and the prehistoric Arabian Prophets—Hūd (of southeastern Yemen) and Ṣāliḥ (of northwestern Hijaz)—whom the Arabs of his time counted among their legendary forebears. Second, the new standards of mimesis that the Prophet set became the criterion by which he affirmed continuity with the sound norms inherited from the past, while substituting new values and practices for the detrimental ones that had come to predominate. In all of this, his claim was not to

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[103] See ʿAbd al-Malik ibn Hishām, *al-Sīra al-nabawiyya li-Ibn Hishām*, 4 vols. in 2, 2:415–18.
[104] Al-Shāṭibī, *al-Muwāfaqāt*, 4:249; see Abd-Allah, "*ʿAmal*," 438.

establish something new but to purify and redeem what was ancestral and old. It was to put the mimesis of his followers on a sound footing.[105]

The cultural instinct of mimesis in the first generations of the newly-converted Arab Muslims did not end with the Prophet. After his demise, his Companions and their Successors became the objects of mimesis for those around them. The ubiquitous force of mimesis in eary Islamic culture is especially manifest in the stature of the *sunna* and the phenomenon of praxis, both in Medina and the Arab garrison cities. It also explains why Mālik understood that it would be unduly harmful for the Abbasids to attempt to alter regional praxis by imposing a uniform legal standard. For Mālik and the first generations of jurists in Medina and other centers of Islamic law, mimesis was a tangible reality in their lives and a natural and vital cultural norm. It informed their understanding of the Prophet's legacy and their attention to local and regional praxis.

General Observations about Praxis and Legal Texts

There are numerous instances in the *Muwaṭṭa'* of praxis-precepts apparently belonging to the category of transmissional praxis for which few if any *ḥadīth*s, post-Prophetic reports, or other textual sources of law exist. In several other instances of apparently transmissional praxis, the pertinent *ḥadīth*s or other texts which lend it support do not spell out the full scope of the precept or elaborate the details of how it should be implemented. Mālik provides such information by reference to the non-textual source of Medinese praxis.[106]

The praxis of Medina takes on a number of different configurations in its correlation with legal *ḥadīth*s and post-Prophetic reports. On occasion, Mālik invokes praxis as a conclusive source of law in the complete absence of either type of supporting or conflicting relevant legal texts. Often, established praxis is in conformity with received *ḥadīth* texts and post-Prophetic reports, and they substantiate each other. Sometimes, praxis supports one or more texts of either type to the exclusion of others that are contradictory. In some cases, praxis has no explicit supporting texts and is contrary to those that have been handed down. In many other instances, praxis clarifies the meaning of received legal texts by putting

[105] Al-Shāṭibī, *al-Muwāfaqāt*, 4:249; see Abd-Allah, "*'Amal*," 438.

[106] See Abd-Allah, "*'Amal*," 553, 556, 604–05, 599–600, 606–08, 618, 622, 660, 750, 753–54, 562, 574, 655–56.

them in broader context. In such cases, it may serve to restrict, modify, or supplement their legal implications by adding a range of conditions that are not explicitly set forth in them. In the following discussion, we will look at various applications of Medinese praxis in these different capacities. The analysis of Mālik's terminology which follows provides detailed analysis of several other examples.

Regarding Mālik's reliance on praxis in the complete absence of legal texts, both Mālik and al-Layth ibn Sa'd speak of it as a conclusive and independent source of law, although the latter has misgivings about its authority to overrule contrary *ḥadīth*s when they did exist. 'Iyāḍ reports that Abū Yūsuf visited Medina in the retinue of the Abbasid caliph and questioned Mālik in the caliph's presence about the validity of praxis on a number of issues for which praxis was uncorroborated by legal texts. Abū Yūsuf raises the same objections in *al-Radd 'alā siyar al-Awzā'ī*. He observes in both narratives that the Medinese transmit no *ḥadīth*s in support of their distinctive manner for calling the prayer, which differed somewhat from customary Kufan practice. Mālik replied:

> Glory be to God, [how preposterous]! I have never seen anything stranger than this. Every day, five times a day the call to prayer is made above the heads of witnesses. [It is something] that the sons have inherited from their fathers from the time of the Messenger of God, upon whom be peace, until the present. In such matters do you need "so and so transmitting on the authority of so and so?" On the contrary, we regard [such praxis] to be sounder than *ḥadīth*.[107]

Abū Yūsuf then inquired about Medinese textual proof for their distinctive definition of traditional measures. Mālik's students were sent to gather several local merchants, who then came to the caliph's assembly bringing their measuring containers. They informed those present that they had inherited their measures from their fathers, who in turn had received them from them fathers, who had been Companions of the Prophet. Mālik remarked again to Abū Yūsuf that he regarded such evidence as stronger than *ḥadīth*.[108]

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[107] 'Iyāḍ, *Tartīb*, 1:224. Mālik's retort calls to mind the statement of his teacher Rabī'a, which pertains to the concept of transmissional praxis, that Medinese praxis rightfully takes precedence over solitary *ḥadīth*s, because, "One thousand [transmitting] from one thousand (i.e. Medinese praxis) is preferable to me over one [transmitting] from one. For 'one [transmitting] from one' would tear the *sunna* right out of our hands" (see 'Iyāḍ, *Tartīb*, 1:66).

[108] 'Iyāḍ, *Tartīb*, 1:224.

Often, Mālik cites *ḥadīth*s in the *Muwaṭṭaʾ* in support of local praxis. For Ibn Rushd, ʿIyāḍ, and al-Shāṭibī, whenever Medinese praxis is accompanied by supporting texts, it constitutes the strongest category of transmissional praxis. Al-Shāṭibī refers to such praxis as "the *sunna* that has been followed and the straight way [of guidance]" (*al-sunna al-muttabaʿa wa al-ṣirāṭ al-mustaqīm*). His use of the term "the *sunna* that has been followed" implies that such types of praxis indicate that the *ḥadīth*s in harmony with them originated in the Prophetic period as balanced legal norms and were consciously incorporated as such in the Medinese communal legacy. Hence, al-Shāṭibī regards the authority of such instances of transmissional praxis as binding upon the entire Islamic community.[109] Ibn Taymiyya takes a similar position. He relates that Ibn Ḥanbal said, "If the people of Medina hold to the validity of a *ḥadīth* and have a praxis in accordance with it, [that *ḥadīth*] constitutes the ultimate [proof] (*al-ghāya*)."[110]

Mālik frequently cites *ḥadīth*s and post-Prophetic reports in the *Muwaṭṭaʾ* that are in conformity with Medinese praxis in conjunction with the term -zĀIb (this is the precept which the people of knowledge in our city still continue to follow; *wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-baladinā*). When Mālik uses this term, the relevant precept of law is fully set forth in the supporting *ḥadīth* texts and does not need further elaboration. Such legal texts constitute unambiguous and fully articulated legal precepts in themselves.[111] The term -zĀIb in such cases makes explicit that the actions or injunctions in the texts were neither repealed nor non-normative but always constituted standard parts of the law as indicated by continuous Medinese consensus.[112] Nevertheless, -zĀIb is relatively rare in the *Muwaṭṭaʾ* by virtue of the fact that the precepts it indexes require no additional information beyond what is already stated in their original wording. In most other cases when Mālik cites supporting texts in conjunction with precepts, he provides significant, even essential, additional information from the non-textual source of Medinese praxis

[109] Al-Shāṭibī, *al-Muwāfaqāt*, 3:56; cf. ʿIyāḍ, *Tartīb*, 1:70–71.

[110] Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 27.

[111] See Abd-Allah, "*ʿAmal*," 397–98, 585–96. As a rule, the *ḥadīth*s in question are solitary *ḥadīth*s, as are the majority of *ḥadīth*s in the *Muwaṭṭaʾ* and other *ḥadīth* compendia. Abū Zahra asserts that, from the standpoint of Mālikī jurisprudence, when technically solitary *ḥadīth*s are in conformity with Medinese praxis, they cease to belong to that category but take on the legal status of *ḥadīth*s with multiple transmissions (Abū Zahra, *Mālik*, 305; Abd-Allah, "*ʿAmal*," 179).

[112] See Abd-Allah, "*ʿAmal*," 585–96.

which either is not contained in those texts at all or is only indicated in them with some degree of ambiguity.[113]

When praxis confirms one text as opposed to another, the advocates of praxis regarded it to be a sound criterion for determining which of them was stronger or constituted the intended norm. One of the most explicit statements regarding Mālik's use of praxis in this manner is the following citation from Ibn al-Qāsim in the *Mudawwana*:

> This [text] has come down [to us], and if this *ḥadīth* had been accompanied by praxis such that that [praxis] would have reached those whom we met during our lifetimes and from whom we received [our learning] and those whom they met during their lifetimes, it would indeed be correct to follow it. . . . Yet praxis has been established in accordance with those [*ḥadīth*s] that were accompanied by the practices (*aʿmāl*) [of the earlier generations] and which were adhered to by the Companions of the Prophet, who were his followers. Similarly, the Successors followed them in like manner without regarding what had come down and been transmitted [but was contrary] to have been fabricated or rejecting [such texts] outright. Thus, that [text] is passed over which has been passed over in praxis, yet it is not regarded to have been fabricated. But praxis continues to be done in accordance with what has [long] been established as praxis, and it is regarded to be certainly authentic.[114]

For Ibn al-Qāsim, *ḥadīth*s in conformity with praxis are always valid sources of law while contrary *ḥadīth*s are not, yet they are not necessarily regarded as spurious. He stresses this point repeatedly, and additional citations to that effect have been provided earlier.[115]

Ibn Taymiyya agrees with the Medinese that one of the most useful applications of transmissional praxis is as a criterion for interpreting contrary *ḥadīth*s and analogies (deductive legal arguments) whenever praxis supports the conclusions drawn from one of them but not the other. He asserts, in fact, that both al-Shāfiʿī and Ibn Ḥanbal had recourse to the praxis of the people of Medina in such cases. He adds that Ibn Ḥanbal

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[113] Medinese praxis supported by a solitary *ḥadīth* was not always conclusive in the eyes of the advocates of praxis. In his correspondence with Mālik, al-Layth ibn Saʿd expresses strong reservations about the Medinese precept of accepting the oath of the plaintiff supported by a single witness. He does not question its application in Medina but notes that it was never instituted as praxis anywhere else. He also objects to the fact that Mālik frequently passes over *ḥadīth*s that are contrary to praxis.

[114] *Mud.*, 2:151–52; see Abd-Allah, "*ʿAmal*," 180–81.

[115] Abd-Allah, "*ʿAmal*," 173.

reportedly preferred the legal interpretations of Medinese jurists over those of their Iraqi counterparts.[116]

One of the most controversial aspects of Medinese praxis was how to evaluate it when it lacked supporting legal texts yet contradicted those that had been received. According to Ibn ʿAbd al-Barr, however, the majority of Mālikī jurisprudents rejected both connected (*musnad*) and disconnected (*mursal*) *ḥadīth*s—both of which were valid legal sources in the Medinese tradition—whenever they were contrary to praxis.[117]

As noted above, Shihāb al-Dīn ibn Taymiyya acknowledges that praxis is a valid reference from distinguishing repealed from repealing *ḥadīth*s, but he categorically repudiates it as having independent authority to overrule solitary *ḥadīth*s when there is no supporting text for Medinese praxis.[118] Ibn al-Qayyim takes the same view and insists that praxis is to be judged by *ḥadīth*s and not vice verse.[119]

ʿIyāḍ takes a similar position. He distinguishes between whether or not the praxis contrary to a *ḥadīth* belonged to transmissional or inference-based praxis (*ʿamal ijtihādī*). He contends that the majority of Mālikī jurisprudents held that authentic solitary *ḥadīth*s should take precedence over contrary Medinese praxis whenever it was the result of legal interpretation (*ijtihād*).[120] He also holds that whenever a *ḥadīth* is authentic—even if it is solitary and regardless of whether or not it was transmitted by Medinese or non-Medinese Traditionists—and there is no corresponding praxis either supporting it or contradicting it, then one is obliged to follow the legal implications of the *ḥadīth*. He defends the Mālikī school against the criticism of those who have held that the Medinese refused to follow the implications of *ḥadīth*s unless there was clear support for them in the praxis of Medina. He contends that the Mālikī school only rejected *ḥadīth*s that were clearly contrary to praxis but not when there was simply no corresponding praxis at all.[121]

Al-Shāṭibī takes a different point of view. He holds that it is generally invalid to apply the apparent legal implications of a *ḥadīth* when they lack precedent in Medinese praxis. The absence of a corresponding type of praxis, in his view, constitutes a tacit contradictory praxis negating the

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116 Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 27.
117 Ibn ʿAbd al-Barr, *al-Tamhīd* (1967), 1:2–6; see Abd-Allah, "*ʿAmal*," 160–61.
118 Āl Taymiyya, *al-Musawwada*, 239, 313.
119 Ibn al-Qayyim, *Iʿlām* (Dār al-Kitāb), 2:407–08; ibid. (Saʿāda), 2:361–73.
120 ʿIyāḍ, *Tartīb*, 1:71.
121 ʿIyāḍ, *Tartīb*, 1:71–72.

validity of such potential implications. Absence of praxis indicates that something else was originally intended by the semantics of such *ḥadīth*s, making it invalid to incorporate them in praxis at a later time. He divides the behavior of the Companions and Successors regarding interpretations they did *not* apply in praxis into two categories: First, those that constituted likely applications of praxis (*maẓinnat ʿamal*), if the first generations had regarded them to be appropriate, and second, those that were not likely applications of praxis (*maẓinnat ʿamal*) for the first generations. Only the legal implications of texts that fall in the first category are not to be put into practice later. Matters falling into the second category, however, must be evaluated in terms of the unstated good (*al-maṣāliḥ al-mursala*). If they are found to be in keeping with its dictates and the ultimate purposes of the law, they are desirable and should be instituted in later applications of the law. If they are found to be contrary to the unstated good, they are unacceptable and should remain outside the scope of applied practice.[122]

Using Praxis to Distinguish Repealed (Mansūkh) *from Repealing* (Nāsikh) *Texts*

When there is categorical contradiction between the legal implications of a *ḥadīth* of accepted authenticity and a contrary one supported by the praxis of Medina, Mālikī jurisprudents frequently take such variance as an indication that the precept in the contrary *ḥadīth* was repealed (*mansūkh*), whether that is explicitly indicated in the contrary *ḥadīth* or not. The repealing (*nāsikh*) precept that replaced it is naturally regarded as the one embodied in the standing praxis by virtue of its continuity in the post-Prophetic period. Theoretically, repealing types of praxis belong to the category of transmissional praxis, since abrogation of established precepts rested upon Prophetic authority and could not occur independently after his death. Ibn Taymiyya also refers to such use of praxis as valid.[123]

Al-Shāṭibī cites examples of *ḥadīth*s that the Medinese regarded as repealed by virtue of their variance with established praxis. He asserts that just as some Qurʾānic verses clearly abrogate others, so are *ḥadīth*s abrogated by other *ḥadīth*s (which is a generally agreed-upon point of jurisprudence). Sound legal interpretation requires that the jurist be able to find adequate references to distinguish between both types of *ḥadīth*.

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[122] Al-Shāṭibī, *al-Muwāfaqāt*, 3:64–76.

[123] Āl Taymiyya, *al-Musawwada*, 313, 239; see Abd-Allah, "*ʿAmal*," 366.

From al-Shāṭibī's point of view, such distinctions are difficult for jurists to make on the basis of textual evidence alone. He cites a statement attributed to Mālik's teacher al-Zuhrī that jurists have often proven incapable of determining which of the Prophet's *ḥadīth* were repealed and which were repealing. Al-Shāṭibī continues to say that Mālik's reliance upon praxis made the matter of distinguishing between repealed and repealing *ḥadīth*s relatively reliable and straightforward.[124]

Post-Prophetic reports of the Companions, as indicated earlier, were also used by Mālik and other jurists of the formative period to indicate repeal in a manner similar to the use of praxis for the same purpose. The use of post-Prophetic reports as references against which to interpret *ḥadīth* and as an independent source of Islamic law—as they are in Mālikī, Ḥanafī, and Ḥanbalī jurisprudence—is, in fact, cognate to relying upon praxis for that purpose.[125] By looking at the post-Prophetic reports of the early community, the jurist looks for the remnants of the last praxis that the Companions adhered to following the Prophet's death. On these grounds, their praxis is presumed to repeal contrary *ḥadīth*s. The legal behavior of the Companions in the post-Prophetic period was regarded as giving a clear picture of which precepts they regarded as still binding upon themselves (because they were not repealed) and which were not (because they had been repealed).[126]

Throughout the *Muwaṭṭaʾ*, Mālik makes frequent use of post-Prophetic reports as crucial indices of the law. Their harmony with praxis serves the same purpose for Mālik as that of supporting *ḥadīth*s. The use of corroborating post-Prophetic reports is especially conspicuous in several of the praxis chapters of the *Muwaṭṭaʾ*, which are analyzed below. In the praxis chapter on the newborn sacrifice (*ʿaqīqa*), for example, Mālik invokes Medinese praxis to counter Kufan claims that the newborn sacrifices was an abrogated pre-Islamic custom. Mālik states explicitly, that the custom of newborn sacrifice was a continuous part of Medinese praxis since the days of the Prophet. As further confirmation, he cites post-Prophetic reports showing that they were performed for each of the Prophet's grandchildren, that ʿUmar had them performed for each newborn child in his

124 Al-Shāṭibī, *al-Muwāfaqāt*, 3:69–70.
125 See Abd-Allah, "*ʿAmal*," 161–69.
126 See Abd-Allah, "*ʿAmal*," 687, 560; cf., 646.

family, and that the prominent Medinese jurist ʿUrwa bin al-Zubayr of the Seven Jurists also did the same.[127]

Using Praxis to Distinguish between Normative and Non-Normative Texts

Distinction between the normative and non-normative lies at the heart of Medinese praxis. By its nature, praxis is a description of society's behavior, not that of the peculiarities of private behavior. In his discussion of Medinese praxis in the *Muwāfaqāt*, al-Shāṭibī draws attention to the inherent normativeness of Medinese praxis and Mālik's reliance upon it for that reason as a primary legal tool. He emphasizes that competent jurisprudence requires attention to this feature of the Prophetic example as reflected in praxis:[128]

> For whenever an independent interpreter of the law (*mujtahid*) contemplates a legal statement pertaining to a matter, he is required to look into many things without which it would be unsound to put that statement into practice. Consideration of the various types of practice (*ʿamal*) of the early generation removes these ambiguities from the statement definitively. It renders distinct what was repealed from what was not repealed. It provides a clarification for what is ambiguous, and so forth. Thus, it is an immense help in the process of conducting independent legal interpretation (*ijtihād*). It is for this reason that Mālik ibn Anas and those who follow his opinion have relied upon it.[129]

Elsewhere, al-Shāṭibī asserts that the praxis of Medina by its essentially normative nature should be a standard reference upon which the jurist relies in attempting to determine the soundest implications of legal texts.[130]

Al-Shāṭibī indicates that the Prophet's public acts were not always normative. Due to special circumstances, they were sometimes exceptional and, consequently, not incorporated into Medinese praxis. The

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[127] See Abd-Allah, "*ʿAmal*," 687, 560; cf. 646. Mālik's treatment of the newborn sacrifice also brings to light his use of praxis as a referent to distinguish normative procedures from non-normative, which is discussed below. He places the normative post-Prophetic reports indicated above in the praxis chapter but places outside that chapter a non-normative post-Prophetic report on how Fāṭima, the Prophet's daughter, shaved the hair of each of her newborns, weighed it, and gave that weight in silver as charity. By this textual structuring, Mālik indicates the normativity of the first group of texts and the non-normativity of the contrary text. The distinction is not clear from the texts alone. (See Abd-Allah, "*ʿAmal*," 671–72.)

[128] See al-Shāṭibī, *al-Muwāfaqāt*, 3:60–76, 4:233–43.

[129] Al-Shāṭibī, *al-Muwāfaqāt*, 3:76; for discussion of this quotation, see Abd-Allah, "*ʿAmal*," 178.

[130] Al-Shāṭibī, *al-Muwāfaqāt*, 3:58–59.

*ḥadīth*s that report such non-normative public acts, however, often give no clear semantic indication of their unusual nature. They simply report the Prophet's actions as observed without necessarily identifying their circumstances or broader contexts. It is difficult and, at best, highly conjectural in such cases to determine from the semantic contents of such *ḥadīth*s which type of reported Prophetic behavior was normative and which was exceptional. Such *ḥadīth*s tend to be reports of actions, not explicit Prophetic statements. Reports of action, as indicated earlier, are inherently conjectural in Mālikī jurisprudence. They only provide reliable legal information when placed in proper context by reference to stronger ancillary references, especially the praxis of the people of Medina.[131]

As an example of a non-normative public act of the Prophet—the authenticity of which al-Shāṭibī and other jurists do not question—he cites the instance of the Prophet's standing up to receive his cousin Jaʿfar ibn Abī Ṭālib (d. 8/629) upon his advent to Medina after years of exile in Ethiopia in the wake of the first immigration (*hijra*), which was to that land. Another *ḥadīth* reports that the Prophet stood up to greet Saʿd ibn Muʿādh (d. 5/626), tribal leader of the Medinese tribe al-Aws. Both reports are deemed authentic but contrary to praxis. The normative behavior of the Prophet and his Companions was not to stand up when meeting others as reflected in the Prophet's explicit teachings and his prohibition that his Companions stand up to honor him. Again, the first two *ḥadīth*s are reports of actions. They were appropriate to the special circumstances of their occasions, and, as non-normative acts, do not contradict standard praxis as it applies under ordinary conditions.[132] Rather, they draw suitable exceptions to it.

Al-Shāṭibī notes that the Prophet reportedly once wiped over his turban while performing ritual ablutions (*wuḍūʾ*), which is contrary to established Medinese praxis. He contends that the Prophet's action in this case was not normative, since it was done at a time when he was ill. Consequently, it was never incorporated as a part of Medinese praxis. Similarly, the Prophet commanded his followers on one of the religious days of festivity (*ʿīd*) not to store away the meat of their sacrificial animals but to distribute it to the poor. In this case, the *ḥadīth* texts clarify the non-normative nature of the command. As the Prophet later explained in the same *ḥadīth*, his prohibition that day was because of an impover-

[131] See Abd-Allah, "*ʿAmal*," 188–95.
[132] See al-Shāṭibī, *al-Muwāfaqāt*, 3:64.

ished clan on the verge of starvation that was passing through Medina and needed the food.[133]

Al-Shāṭibī also notes that it can be misleading to generalize on the basis of isolated instances of the Prophet's not having disapproved of certain mistaken or objectionable types of behavior which took place around him or were brought to his attention. Jurists must be cautious about concluding from such reports that the Prophet actually gave such actions his tacit approval (*iqrār*). In some instances, it is clear that the Prophet regarded behavior he witnessed around him as inappropriate but did not see fit to correct the person immediately, especially if the person's behavior had been a simple oversight or lapse that he would likely correct on his own. In other cases of mistaken behavior, al-Shāṭibī continues, the person doing the act may not have understood at the time that it was mistaken but have realized that later. Because the person did not repeat the action, no occasion arose for the Prophet to correct it later.[134]

The following are examples of post-Prophetic reports in the *Muwaṭṭaʾ* that are contrary to normative praxis and illustrate how the ambiguities regarding normativeness and non-normativeness can pertain to post-Prophetic reports as well as *ḥadīth*s. Mālik cites a post-Prophetic report on how Ibn ʿUmar performed the ritual washing (*ghusl*). In general, the actions related in this narration reflect the normative manner in which ritual bathing is performed according to Mālik. But it also relates that Ibn ʿUmar had the habit of sprinkling water into his eyes during the process.[135] In most transmissions of the *Muwaṭṭaʾ*, Mālik adds the clarification that Ibn ʿUmar's habit of spinkling water into his eyes during ritual bathing was contrary to praxis. Ibn ʿAbd al-Barr comments further that Ibn ʿUmar's habit constituted one of his eccentricities (*shadhāʾidh*) which he did out of piety (*waraʿ*) but which no one else did in imitation of him.[136] Al-Shaybānī also affirms that the people of Medina did not regard Ibn ʿUmar's habit as part of local praxis but merely one of Ibn ʿUmar's personal habits. He notes that Abū Ḥanīfa and the majority of jurists agreed with the Medinese on this matter.[137]

Mālik cites a post-Prophetic report according to which an early Successor named Abū ʿAbd-Allāh ʿAbd al-Raḥman al-Ṣanābiḥī (d. between

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[133] See al-Shāṭibī, *al-Muwāfaqāt*, 3:64–67.
[134] Al-Shāṭibī, *al-Muwāfaqāt*, 3:67–68.
[135] *Muw*., 1:44–45.
[136] Cited by Muṣṭafā al-Zurqānī, *Sharḥ*, 1:134.
[137] Al-Shaybānī, *al-Ḥujja*, 1:58; cf. *Muw*. (al-Shaybānī/ʿAbd al-Laṭīf)., 45.

70–80/689–699) mentions that he first came to Medina during the caliphate of Abū Bakr. He reports that he once prayed the sunset prayer directly behind the caliph, who was leading the prayer. Al-Ṣanābiḥī mentions the chapters of the Qur'ān that Abū Bakr recited aloud in the first two prayer units (*rak'a*). He then says:

> When [Abū Bakr] stood up for the third unit, [(which is recited silently)] I came up to him from behind and got so close that my cloak almost touched his. I heard him recite the opening chapter (*umm al-Qur'ān*) and then this verse, "Our Lord, let our hearts not go astray after You have granted us guidance, but bestow mercy upon us from Your very presence: In certainty, You are the One who bestows benefactions" (Qur'ān, 3:7).[138]

Mālik states in a report transmitted in the *Mudawwana* that he does not regard it as praxis to recite the verse al-Ṣanābiḥī mentions in the report during the third prayer unit of the sunset prayer after recitation of the opening chapter of the Qur'ān.[139]

It should be noted that Abū Bakr had been reciting the verse quietly to himself. It was not his intent that those praying behind him perceive that he was reciting anything additional to the standard opening chapter in that prayer unit or imitate him by doing so themselves, which might have transformed his private choice into a matter of standard praxis for the evening prayer. Al-Ṣanābiḥī's coming up behind Abū Bakr during the prayer and getting so close that he could hear him was also unusual. In this report, al-Ṣanābiḥī discovers through his own secretiveness and non-normative behavior a private act which Abū Bakr was keeping to himself. By transmitting what he discovered, al-Ṣanābiḥī removes Abū Bakr's hidden act from the cover of privacy and makes it public knowledge and a potential element of normative praxis for others in the future. For this reason, Mālik makes a point in most transmissions of the *Muwaṭṭa'* to clarify that Abū Bakr's act constituted exceptional behavior and not a desired norm. By this, Mālik keeps Abū Bakr's concealed act what it was originally intended to be, an exceptional and legitimate personal choice but not the normative example of a Medinese Imām embodying the standard praxis of the city.

As mentioned earlier, Mālik rejected the practice of performing prostrations of gratitude to God (*sajdat al-shukr*) when one meets with the coincidence of good fortune. He was told that Abū Bakr had reportedly

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138 *Muw.*, 1:79.
139 *Mud.*, 1:68.

made a prostration of gratitude after news reached him of a great victory his armies had won. Mālik denied the authenticity of the report on the basis of the lack of a corroborating normative praxis.[140] Al-Shāṭibī comments that this report indicates that one should rely upon the general praxis of the many and not the isolated implications of the rarities and unusual actions that have been transmitted (*qalā'il mā nuqila wa nawādir al-afʿāl*) when the general and widespread praxis is contrary to them.[141]

Al-Shāṭibī points out that many apparently conflicting statements of the Prophet do not contradict themselves in reality once reference to praxis puts them in proper context. One of them represents the normative (praxis) position, while the other is exceptional and never become part of praxis for that reason. He cites the Prophet's statement, "Pray the dawn prayer at the break of dawn" (*asfirū bi-'l-fajr*), which is supported by Medinese praxis. In another formerly authentic *ḥadīth*, the Prophet said, "Whoever prays one prayer unit (*rakʿa*) of the dawn prayer before sunrise has made the dawn prayer." The second *ḥadīth* may appear to be at odds with the first. It pertains, however, to exceptional circumstances when one has not been able to pray on time. It is not normative and was never incorporated into Medinese praxis. For al-Shāṭibī, the second *ḥadīth* was meant to set the legal parameters within which performance of the dawn prayer is valid. It was not the Prophet's intent in the *ḥadīth* to establish a norm for praying the dawn prayer just before sunrise.[142] When Mālik mentions the second *ḥadīth* in the *Muwaṭṭa'*, he concludes the chapter with a post-Prophetic report from Abū Hurayra indicating that whoever delays in joining the prayer when it first begins has failed to acquire its full blessing.[143]

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[140] This calls to mind the citation from Mālik given earlier, "It is a type of misguidance that one should hear something and say, 'This is something regarding which we have heard nothing to the contrary.' . . . Many victories came to the Messenger of God, God bless and keep him, and to the Muslims after him. Did you ever hear about a single one of them prostrating [out of gratitude]? When something like this comes down to you that [must] have been part of the experience of the people and took place right in their midst, yet you have heard nothing about it from them, then let that be a sufficient indication for you. For if it had taken place, it would have been mentioned because it is part of the experience of the people (*amr al-nās*) that took place among them. So, have you heard that anyone prostrated [out of gratitude]? Well, then, that [silence] is the consensus. When something comes down to you that you do not recognize, put it aside" (cited by al-Shāṭibī, *al-Muwāfaqāt*, 3:66–67; cf. *Mud.*, 1:108; see Abd-Allah, "*ʿAmal*," 186–87; cf. Dutton, *Origins*, 42).

[141] Al-Shāṭibī, *al-Muwāfaqāt*, 3:66–67; see Abd-Allah, "*ʿAmal*," 187.

[142] Al-Shāṭibī, *al-Muwāfaqāt*, 3:58–59; cf. *Mud.*, 1:61.

[143] *Muw.*, 1:11.

Using Praxis to Distinguish Isolated from Habitual Actions

Al-Shāṭibī elaborates on the legal and ethical distinction between the quality of habitual acts as opposed to isolated ones. He draws attention to the qualitative differences between the ethical and legal value of identical acts when they are performed once or rarely and when they are done repeatedly. The intrinsic positive or negative value of the act is extenuated when it becomes a frequent norm. Whatever the property the act had in isolation, it is magnified by repetition.[144] His discussion of the variant legal

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[144] See al-Shāṭibī, *al-Muwāfaqāt*, 1:132–42. To use a contemporary example, smoking a single cigarette is not as harmful as making a habit of smoking several cigarettes a day.

Muslim jurisprudents classify actions as falling within the five legal and ethical classifications: obligatory (*wājib*), recommended (*mandūb*), indifferent (*mubāḥ*), reprehensible (*makrūh*), and forbidden (*ḥarām*). In the view of al-Shāṭibī, the value of acts falling under these classifications is not absolute but is affected by repetition or lack of it. For al-Shāṭibī, these classifications are only precise when applied to individual acts in isolation. All volitional acts fall within three broader categories of Islamic jurisprudence: what is requisite to do (*maṭlūb al-fiʿl*), what is requisite not to do (*maṭlūb al-tark*), and what is a matter of choice (*mukhayyar fihi*) or essentially indifferent as regards its ethical and legal value.

For al-Shāṭibī, acts categorized as obligatory or recommended are requisite to do in essence and when taken in isolation. Similarly, acts classified as forbidden or reprehensible are, in essence, requisite not to do and when taken in isolation. At this level, obligatory and recommended acts are equal in the sense that they belong to the same overarching category. The same applies for acts that are forbidden and reprehensible. Obligatory and recommended acts differ in terms of the five act classifications because of their attendant consequences, that is, the social and individual benefits they bring. The same is true of forbidden and reprehensible acts. Their different statuses under the five-act classification reflects the greater and lesser harms that each of them leads to.

In the view of al-Shāṭibī, general good (*maṣlaḥa*) and general harm (*mafsada*) are the pivotal indices determining the five act classifications. The general good of obligatory acts is absolute. The general good of recommended acts is relative. The general good of indifferent acts is negligible as is their general harm. Likewise, forbidden deeds entail far-reaching, absolute types of harm, while reprehensible acts do not. The performance of obligatory acts pertains to ultimate necessities (*ḍarūriyāt*), as does the obstruction of forbidden ones.

Al-Shāṭibī's understanding of the ethical and legal nature of acts is pertinent to the nature of praxis. It illustrates that an obligatory and a recommended act differ in terms of their immediate legal consequences. Failure to perform a single obligatory act constitutes a breach and is blameworthy. Failure to perform a single recommended act does not constitute such a breach and is not blameworthy. The same consideration applies in reverse to forbidden and reprehensible acts. In the case of failure to perform recommended acts or of performing reprehensible ones, they are pardonable as isolated actions (*maʿfūw ʿanhā*) by virtue of the principle of removing hardship (*rafʿ al-ḥaraj*) and not placing excessive demands upon people. Again, within each category, it is the consequences of each act after the fact that is the fundamental difference between them. When the same act is done repeatedly and becomes customary, its ethical and legal quality shifts in the direction of the general good or harm that it implicitly contains. The quality of acts is altered by the quantity with which they are done. Systematic failure to perform recommended acts leads to harm by eliminating altogether the relative general good they contain individually. Regular performance of a recommended act does not make it obligatory *per se* but puts it in a

and ethical values of habitual and isolated acts accounts for the surprising Medinese legal convention, which was noted earlier, of classifying certain actions of the Prophet, Abū Bakr, and ʿUmar as indifferent (*mubāḥ*) and reprehensible (*makrūh*). In *Ikhtilāf Mālik*, the Shāfiʿī protagonist finds such categorizations contradictory and incomprehensible.[145] From the Medinese perspective, the actions mentioned in these texts are not indifferent or reprehensible as isolated instances in their original context. But they take on the contrary values indicated in their legal evaluations when viewed as general prescriptions, that is, when from the standpoint of praxis, they are conceived of as frequently repeated habitual norms for the community at large.

Mālik transmits the well-known *ḥadīth* that the Prophet recited certain chapters of the Qurʾān in the festival (*ʿīd*) prayers. For many jurists, the recitation of these two particular chapters is taken as a *sunna* to be continually repeated. For Mālik, the Prophet's selection of these chapters was neutral. The prayer leader is at liberty to recite them or any other verse or chapters of the Qurʾān. Al-Shāfiʿī's protagonist in *Ikhtilāf Mālik* strongly disagrees. He states, "You ought to regard [all] things that the Prophet has done as recommendable (*mustaḥabb*) in all cases."[146] Again, Mālik's position is not a judgment on the Prophet's recitation as an isolated act performed on a particular occasion. Rather, he evaluates the act as indifferent from the standpoint of making it a universal standard and perhaps unbending norm for all future cases.

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qualitative category similar to that of obligatory acts. The reverse is true of reprehensible acts. The habit of avoiding them removes altogether the lesser harm they contain and is recommended, while repeated performance of them emphasizes the relative harm in them individually and makes it qualitatively similar to the general harm in forbidden acts.

Al-Shāṭibī applies the same principle to indifferent acts. They are matters of choice in isolation because the good and the harm they contain are negligible in isolation. This characteristic alters when they become habitual or are done repeatedly. With repetition, the negligible good or harm in the indifferent act may cease to be negligible. The indifferent act taken in isolation tends to gravitate toward the recommended or reprehensible when done repeatedly. In al-Shāṭibī's view, habitual performance of certain indifferent acts may even elevate them to the qualitative level of obligatory or forbidden acts. Consequently, it may be in the interest of the social application of certain essentially indifferent acts that they are given the classification of recommended or reprehensible acts. It is this aspect of al-Shāṭibī's reasoning that appears to be reflected in Mālik's legal reasoning in his classification of certain clearly permissible actions as reprehensible.

[145] See [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 201, 205–08. The *ḥadīth*s and post-Prophetic reports that the Shāfiʿī interlocutor refers to are all reports of isolated actions. As frequently noted, reports of actions constitute equivocal legal texts from the standpoint of Mālikī legal reasoning (see Abd-Allah, "*ʿAmal*," 191–92).

[146] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 205; see Abd-Allah, "*ʿAmal*," 351–52.

Both the position of Mālik and the Shāfiʿī protagonist regarding what should be recited at the festival prayers imply assumptions about the Prophet's legal intent behind selecting these particular chapters for recitation in prayer. As Ibn al-Ḥājib indicates in his treatment of the ambiguity of isolated actions—such as the Prophet's recitation of these chapters—one can only determine that an act which the Prophet did is recommended (as opposed to being neutral) after determining the Prophet's intent and purpose in his original performance of the act. Without such knowledge, one cannot validly claim to be imitating the Prophet merely by repeating the identical act.[147] To emulate is not just to copy. It requires agreement between the outward form of the act and the inward purpose that it originally was meant to have. Mere imitation of the outward act in a manner contrary to its original context and purpose could, under certain circumstances, amount to a parody of the original act or in any case take on a different character.

To state that a particular Prophetic act is recommendable means to commend that act as prescriptive behavior for repetition by others as much as possible. It is an evaluation that has the potential of incorporating the act into communal practice. The categorical statement of al-Shāfiʿī's interlocutor in *Ikhtilāf Mālik* that every Prophetic act should be deemed recommendable presumes that the Prophet intended each act he did to be normative despite exceptional contexts and special cases, which are not systematically indicated in the texts themselves. The difference of the two legal perspectives is rooted in contrasting conceptions of how the textual source of *ḥadīth* and the non-textual source of praxis reflect the Prophetic legacy.

The Shāfiʿī interlocutor in *Ikthilāf Mālik* states that the Medinese have transmitted a *ḥadīth* relating that the Prophet once recited two long chapters of the Qurʾān while leading the evening prayer. He observes that they also report that Abū Bakr and ʿUmar on separate occasions recited the longest chapters in the Qurʾān while leading the people in the dawn prayer. The Medinese assess the *ḥadīth* and the two post-Prophetic reports as reprehensible (*makrūh*), which prompts one of the interlocutor's most stringent condemnations. He remarks that he cannot conceive how anyone could consider something that the Prophet did as reprehensible and asserts that the Medinese position is a clear indication of the weakness of their approach (*madhhab*) in other matters as well. In their failure to

[147] Ibn al-Ḥājib, *Mukhtaṣar*, 51–52; see Abd-Allah, "*ʿAmal*," 191–92.

endorse the actions of these three authoritative figures, the Shāfiʿī interlocutor insists, they have contradicted their own praxis and the authority of their Imāms, again indicating the weakness of their reasoning. He concludes that the Medinese are so heedless and negligent that they should not be permitted to give juristic pronouncements (*fatwā*s), much less consider themselves superior to others in knowledge. In a similar instance, he concludes that the Medinese are simply arbitrary and make offhand decisions according to their whims and fancies without reflection (*tabaṣṣur*) or sound deliberation (*ḥusn al-riwāya*).[148]

As before, each of the texts reports an isolated action. The behavior they reflect is contrary to the well-established legal norms of praxis. As regards the exceptionally lengthy recitations, the standard established by praxis is attested in the *ḥadīth* that Mālik transmits in the *Muwaṭṭa'* which was mentioned earlier:

> When any of you leads the people in prayer, let him make it easy. For there are among them the weak, the sick, and the old. But when any of you prays alone, let him lengthen his prayer as long as he desires.[149]

The exceptionally long recitations of Abū Bakr and ʿUmar, which did not reflect their personal convention as prayer leaders, were far in excess of the established norm and would make praying the dawn prayer unbearable for the majority of the people if incorporated into praxis and made a legal standard.

Mālik does not classify these isolated actions of the Prophet, Abū Bakr, and ʿUmar as reprehensible in their original frame of reference but rather only when taken out of context and made normative through general application. Their quality as individual acts which were originally justified due to special conditions shifts radically when they are considered as habitual and normative rules. Mālik's classification of them as reprehensible also coheres with his general principle of preclusion (*sadd al-dharāʿi'*). Taken in isolation and in specific contexts, the acts are permissible and possibly recommended. Mālik classifies them as reprehensible, however, to exclude them from normative praxis because of the harm they would be likely to bring if generalized as common conduct under ordinary circumstances.[150]

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[148] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 207–08.
[149] *Muw.*, 1:134.
[150] See Abd-Allah, "*ʿAmal*," 442–44, 463–65.

Al-Shāṭibī emphasizes that certain types of Prophetic statements (such as situational discourse and isolated parts of conversation removed from context) are potentially as ambiguous as reports of isolated actions. In fact, he contends that ambiguous statements of this type should be classified with isolated actions in terms of their inconclusiveness as legal references. His position has strong support in Ibn al-Qāsim's discussion in the *Mudawwana* of formerly authentic *ḥadīth*s that are unsupported by praxis.[151]

Comparing Mālik's Use of Praxis to Abū Ḥanīfa's Concept of General Necessity (ʿUmūm al-Balwā)

In *Bidāyat al-Mujtahid*, Ibn Rushd regards the legal reasoning behind Mālik's use of praxis as comparable to Abū Ḥanīfa's attention to general necessity in his assessment of solitary *ḥadīth*s.[152] Muḥammad Abū Zahra holds that all Mālikī jurisprudents agreed that solitary *ḥadīth*s should be rejected when they pertain to matters of general necessity and are not well-known and supported by stronger sources of law,[153] praxis being one of the most important of these references from the Mālikī point of view. Praxis should by its nature embody all precepts pertaining to general necessity, although praxis includes other matters as well. According to Ibn Rushd, the occasions (*asbāb*) relating to the precepts embodied in praxis are often so common and recur so frequently that it is not reasonable that the Medinese should have forgotten, distorted, or intentionally put them aside during the two generations prior to Mālik. He regards Medinese praxis as superior to Kufan reliance upon general necessity in the interpretation of *ḥadīth* because of the greater integrity and standing of the Medinese community and the likelihood that they preserved their praxis intact until the time of Mālik.[154]

Whenever the legal implications of a *ḥadīth* conform to Medinese praxis, Ibn Rushd continues, there is a high probability (*ghalabat ẓann*) that the implications of the *ḥadīth* are valid. But whenever the legal implications of a *ḥadīth* are contrary to praxis there is a low probability (*ḍaʿf ẓann*) that those implications are valid. When the implications of a *ḥadīth* are contrary to praxis, Ibn Rushd generally regards it to have been repealed; that the transmission of the *ḥadīth* was faulty; or that for other reasons the

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151 *Mud.*, 2:151–52; see al-Shāṭibī, *al-Muwāfaqāt*, 1:61; Abd-Allah, "*ʿAmal*," 189–90.
152 Ibn Rushd, *Bidāya*, 1:102; cf., ibid., 1:140; see Abd-Allah, "*ʿAmal*," 185–86.
153 Abū Zahra, *Mālik*, 294; Abd-Allah, "*ʿAmal*," 185–86.
154 See Ibn Rushd, *Bidāya*, 1:102; cf., ibid., 1:140.

implications of the *ḥadīth* cannot be legally binding. Nevertheless, he does not believe it valid to reject systematically and categorically the implications of well-established solitary *ḥadīth*s that are contrary to Medinese praxis. Here Ibn Rushd invokes the principle of general necessity as a rule of thumb. The strength of praxis in such cases is to be gauged by the extent to which the matter related in the *ḥadīth* pertains to general necessity. He concludes that praxis is a sufficiently conclusive criterion for rejecting well-established *ḥadīth*s that fall under the heading of general necessity, but he regards praxis as insufficient evidence to reject such *ḥadīth*s when they do not pertain to general necessity.[155]

Using Praxis to Distinguish between the Prophet's Different Roles (Taṣarrufāt)

Aḥmad ibn Idrīs al-Qarāfī observes that the Prophet functioned in a variety of different public and private capacities (*taṣarrufāt*). He served as a divine Messenger and universal law giver, state leader, military commander, judge, city governor, head of family, and so forth. The variety of these societal roles provides the original context for what he said and did as reflected in *ḥadīth* literature. But the *ḥadīth*s that come down from him do not necessarily give any textual indication of those roles. They take on a variety of meanings and have markedly different legal implications according to the original historical context that the jurist consciously or unconsciously assigns to them. Al-Qarāfī asserts that the jurist must, therefore, always strive to determine the specific capacity in which the Prophet made statements or did specific deeds before applying *ḥadīth*s as legal proofs.[156] From the Mālikī perspective, the praxis of Medina helps the jurist determine the social and private capacities of the Prophet as reflected in *ḥadīth*. Praxis does this by distinguishing normative from nonnormative behavior and also through its tendency to put restrictions on or add modifications and supplementary information to *ḥadīth*s that may not be explicit in their wording.

For example, the generally accepted *ḥadīth*, "Whoever kills an enemy [on the battlefield] has a right to his armor," has contrasting legal implications in this light. Each of them is reflected in the different legal interpretations of the schools. If a jurist presumes that the Prophet made this

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155 Ibn Rushd, *Bidāya*, 1:102.

156 See Aḥmad ibn Idrīs al-Qarāfī, *al-Iḥkām fī tamyīz al-fatāwā ʿan al-aḥkām wa taṣarrufāt al-qāḍī wa al-imām*, 99, 109–11; al-Fāsī, *Maqāṣid*, 110–12.

statement as universal lawgiver, its literal application suits all future cases. If the *ḥadīth* is held to reflect the Prophet as a commander in a particular campaign, it becomes a strategic consideration and no longer takes on universal implications.[157] Mālik states that, to his knowledge, permission for soldiers to claim the armor of adversaries they kill on the battlefield was unique to the Battle of Ḥunayn, which was fought immediately following the conquest of Mecca. Thus, the permission for soldiers to claim the armor of fallen enemies they kill in battle is the prerogative of the Imam and is based on his personal assessment.[158]

The shared *ḥadīth*, "Whoever brings fallow land (*mawātan*) to life, owns it," is another example. If the *ḥadīth* is understood as arising from the Prophet's role as governor of Medina, it is a policy statement. In that case, its legal implication would be that official permission is required to bring abandoned land under cultivation, at least in certain cases such as fallow areas in preserves or around towns and cities, which is the Medinese point of view. But if, on the other hand, the Prophet's public role in the *ḥadīth* is understood as that of universal lawgiver, it applies without restriction to all times and places and does not require official permission.[159]

Using Praxis to Modify and Supplement Textual Content

The *Muwaṭṭaʾ* contains numerous instances of *ḥadīth*s and post-Prophetic reports which Mālik explicitly indicates as being in harmony or at variance with Medinese praxis. He probably did not believe that praxis in such cases was derived from the relevant texts themselves but that they and the Medinese praxis corresponding to them had grown up simultaneously and been independently instituted by the Prophet or later legal authorities like the Companions. He would not have regarded these texts literally as the "sources" of praxis but as reflections of it or departures from it that were rooted in the same Prophetic mandate that underlay praxis and the texts alike.[160] Because Medinese praxis, in Mālik's view, was an independent source of law rooted in the same Prophetic event as *ḥadīth* narrations, it had the prerogative to restrict, supplement, and otherwise modify the explicit content of *ḥadīth*.

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[157] See al-Qarāfī, *al-Iḥkām*, 99, 109–11; al-Fāsī, *Maqāṣid*, 110–12.

[158] *Mud.*, 1:390.

[159] See Al-Qarāfī, *al-Iḥkām*, 99, 109–11; cf. al-Fāsī, *Maqāṣid*, 110–12.

[160] See Abd-Allah, "*ʿAmal*," 560–64, 571–76, 623–26, 629–32, 656–58, 661–65, 703–23, 734–43.

The precept regarding legal judgments based on the oath of a plaintiff supported by a single witness, which has been repeatedly cited, is a good example. Mālik asserts the validity of the relevant *ḥadīth* in the *Muwaṭṭaʾ*. He adds post-Prophetic reports showing that prominent Successors made legal judgments on its basis, indicating that it was not repealed. But the post-Prophetic reports add no information about what the *ḥadīth*'s laconic expression, "making judgments on the basis of an oath and a single testimony," actually means or what restrictions it might have had. Mālik fills in the gaps by reference to Medinese praxis. He clarifies the procedure and adds that it pertains exclusively to monetary transactions (*al-amwāl*), not criminal cases, marriage, divorce, emancipation, theft, or slander.[161]

In cases such as these, the purpose of Mālik's citation of texts functions as a testimony to the continuity of the praxis in question. The texts are referents to praxis but not the sources of the precepts to which they pertain, which, from Mālik's point of view, were simultaneously embodied in authentic praxis at the time of the historical inception of the relevant text. As later legal references, such texts are ancillary and secondary. They clarify certain aspects of the praxis in question, but, in Mālik's simultaneously textual and non-textual approach to the foundations of Islamic law, praxis is preliminary and has greater authority.[162]

Similarly, Mālik cites texts reporting that the Prophet and his Companions wiped over their footwear when performing ritual ablutions. But none of the texts describes exactly how the wiping is to be performed. Mālik provides that information from praxis.[163] Similarly, Mālik cites *ḥadīth*s reporting that the Prophet annulled a presumptively adulterous marriage by mutual cursing (*liʿān*), the procedure for which is provided in the Qurān. Again, none of the precept's textual sources provide the additional information that a couple whose marriage is annulled by mutual cursing may not remarry. Mālik provides that information by recourse to Medinese praxis.[164]

In working with revealed texts, Mālik often adds nuances and "detailed qualifications" (*tafṣīl*), for which he was well known among later jurists. As a rule, such supplementary information cannot be derived from the relevant texts. For example, Mālik accepts as authentic a solitary *ḥadīth* that prohibits selling dates before the season's crop has appeared on the palm

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[161] *Muw.*, 2:721–22; Abd-Allah, "*ʿAmal*," 514.
[162] See also *Mud.*, 2:151–52; see Abd-Allah, "*ʿAmal*," 179–81.
[163] Abd-Allah, "*ʿAmal*," 655–56.
[164] See Abd-Allah, "*ʿAmal*," 562.

trees and begun to redden (*izhā'*). Once the crop has begun to show this initial sign of maturity, the *ḥadīth* states that the crop may then be sold in advance on the condition that it be harvested in the form of fresh (*busr*) and ripe (*ruṭab*) dates but not as dried (*tamr*) dates. In his elaboration on the precept, Mālik indicates on the basis of praxis that the prohibition mentioned in the *ḥadīth* pertains only to small and isolated oases that do not yield predictable annual date harvests. These date orchards produce well some years and fail during others. It is with regard to them that the principle of reddening applies, because it is a sign that the trees will bear fruit that year. The time between the reddening of the dates and their harvest as fresh dates is relatively short, generally only a week or somewhat longer. Mālik clarifies that there is little likelihood that the harvest will perish or be destroyed during that short interval. He adds that since the time elapsing between the reddening of the dates and their being harvested as dried dates is considerably longer, the hazard that the crop will be lost is too great and therefore is not allowed. He asserts further that the prohibition mentioned in the *ḥadīth* does not pertain to well-watered and long-established date-producing lands like the fertile oases of Medina or the Nile valley. In such regions, it is permissible to sell date crops as dried dates at the time of the first reddening of the dates in the palms and even to sell such crops more than a year in advance, which, Mālik notes, had long been customary in Medina.[165]

Mālik's elaboration of the full scope of legal precepts by reference to combined textual and non-textual sources indicates how he assessed textual sources taken in isolation. It implies that he regarded many authentic texts—like the solitary *ḥadīth* on date harvests—as only partially reflective of the broader legal realities to which they pertain, despite the fact that no semantic qualifications in the narrated text indicate that restriction.

[165] See *Mud.*, 3:119, 121, 122; Abd-Allah, "*'Amal*," 135–44.

PART TWO

MĀLIK'S TERMINOLOGY IN THE *MUWAṬṬA'* AND *MUDAWWANA*

CHAPTER FIVE

MĀLIK'S TERMINOLOGY

Introduction

Mālik's terminology in the *Muwaṭṭa'* is one of the book's most intriguing characteristics. His distinctive terms occur in most available recensions of the work.[1] Variations occur between the terms Mālik uses in the different transmissions of the *Muwaṭṭa'*, especially that of ʿAlī ibn Ziyād (of Qayrawān), which is one of the earliest transmissions of the work. The somewhat later recensions of Abū Muṣʿab al-Zuhrī (of Medina), ʿAbd-Allāh ibn Maslama al-Qaʿnabī (of Medina), Suwayd ibn Saʿīd al-Ḥadathānī (of Iraq), and Yaḥyā ibn Yaḥyā al-Laythī (of Andalusia) show strong overriding similarities in Mālik's terminology, although they too exhibit differences.

Mālik's *Muwaṭṭa'* terminology has parallels in the *Mudawwana*, although terminologies are not as conspicuous in the *Mudawwana* or as central to its structure and purpose as they are in the *Muwaṭṭa'*. Most terms cited in the *Mudawwana* come directly from Mālik.[2] Occasionally, the *Mudawwana* transmits similar terminological expressions from his teachers Rabīʿat

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[1] Mālik's terminology does not occur in al-Shaybānī's recension of the *Muwaṭṭa'*. As a rule, al-Shaybānī discusses legal materials in the *Muwaṭṭa'* that are relevant to his Kufan Ḥanafī point of view. He omits Mālik's comments, arguments, and terminology, since they are not relevant to his purpose. As for Mālikī transmissions of the *Muwaṭṭa'*, the printed version of Ibn al-Qāsim's version may at first appear to be an exception. But we do not actually have Ibn al-Qāsim's original transmission in the presently available edition. Rather, we are dealing with a reworking of it by ʿAlī ibn Muḥammad al-Qābisī (d. 403/1012), who reorganized Ibn al-Qāsim's original recension about two hundred years later, making it into a *ḥadīth* work organized by transmitters (a *musnad*). It appears from the present edition's introduction, however, that Ibn al-Qāsim's original recension of the *Muwaṭṭa'* contained Mālik's standard terms. The editor, Muḥammad al-Mālikī, gives an example of Ibn al-Qāsim's transmission of Mālik's term AN (the precept among us; *al-amr ʿindanā*) (see Muḥammad al-Mālikī, "Introduction," *Muw.* [Ibn al-Qāsim], 13–14). Ample evidence from the *Mudawwana* shows that Ibn al-Qāsim cited Mālik's terms when transmitting the *Muwaṭṭa'*. Since al-Qābisī in keeping with his purpose generally deleted post-Prophetic reports and Mālik's legal statements from his reworking of the *Muwaṭṭa'*, Mālik's original terminology was not relevant to al-Qābisī's final edition.

[2] See, for example, *Mud.*, 1:24, 40, 68, 70, 96, 99, 102, 103, 112, 119, 125–26, 141, 142, 146, 152, 157, 194, 195, 209, 231, 242, 257, 281, 282, 289, 293–94, 296; 2:142, 149, 160, 210, 397; 3:113, 215–16; 4:70–71, 77, 106, 412.

al-Raʾy,[3] Abū al-Zinād,[4] Yaḥyā ibn Saʿīd,[5] Yazīd ibn ʿAbd-Allāh ibn Qusayṭ (d. 122/739),[6] and al-Zuhrī.[7] Mālik's students Ibn al-Qāsim and Ashhab also employ such terminologies in a manner similar to their teacher.[8] These citations of terms from Mālik's teachers and students in the *Mudawwana* show that Mālik's terminology did not begin with him but was part of an older and broader Medinese tradition that he inherited and refined. They provide valuable comparative background and merit close study.

Mālik's terminology in the *Muwaṭṭaʾ* and *Mudawwana* is archaic and provides a barometer reflecting shifting legal concerns in the formative period of Islamic law. It contrasts from the lexicon of standard legal terminologies that later prevailed in the discourse of the post-formative jurists, and it reflects technical considerations not readily discernible in the later jurists even within Mālik's own school. Indeed, the sparseness of the commentaries of later Mālikīs on Mālik's terminology indicates that his terms may not have remained clearly intelligible to them such as the nature of his dichotomy between *sunna*- and *amr*-terms. This terminological opposition draws a careful distinction between precept-based analogy and the authority of the *sunna*, which, as frequently noted, has the power to override analogy. Mālik's archaic terminology also reflects his attention to different levels of concensus or the lack of it among Medinese scholars, while many of the expressions he uses reflect his concern for indexing various levels of Medinese authority, consensus, and dissent that are not typical of or even germane to later juridical terminologies and their preoccupations.

Among the archaic expressions in Mālik's terminology is his consistent use of the term *ijtimāʿ* (concurrence) instead of consensus (*ijmāʿ*), which later became virtually the only term for juristic agreement. His contemporary Sufyān al-Thawrī also used the same term (*ijtimāʿ*).[9] Al-Shāfiʿī employed Mālik's expression AMN[10] (the agreed precept among us; *al-amr*

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[3] *Mud.*, 1:194; 3:96, 129.
[4] *Mud.*, 2:188.
[5] *Mud.*, 1:287; 2:194, 395; 3:84, 96, 129.
[6] *Mud.*, 1:110; 2:188.
[7] *Mud.*, 1:150, 287; 2:386, 395; 4:84, 120, 121.
[8] See *Mud.*, 1:241; 2:197, 369.
[9] SeeʿAbd al-Razzāq, *al-Muṣannaf*, 10:40.
[10] For purposes of practicality, I devised symbols such as SN (for the *sunna* among us; *al-sunna ʿindanā*), S-XN (for the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fihā ʿindanā*), AN (for the precept among us; *al-amr ʿindanā*), and AMN (for the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*) for Mālik's principal terms. I left other expressions, which I did not deem to be technically terminological,

al-mujtamaʿ ʿalayhi ʿindanā).[11] He also used a modified term AM (the concurred precept; *al-amr al-mujtamaʿ ʿalayhī*).[12]

The phraseology of Mālik's terminology is not fixed. It seems to vacillate between common semantic usages rooted in the original Arabic meanings of the words and the special technical limitations that Mālik generally imposes upon his terminology. One of the most important of these technical restrictions is Mālik's systematic limitation of *sunna*-terms in the *Muwaṭṭaʾ* to legal precepts that are contrary to standing juridical analogies. Despite irregularities, Mālik applies his terminology overall in a fairly systematic manner.

It is noteworthy that Mālik does not cite terms for most precepts in the *Muwaṭṭaʾ*, and further study is required to determine more exactly what dictated his use of terms in some cases as opposed to others. Still, Mālik's use of terminology is extensive and allows for a number of valid conclusions about his conception of Medinese praxis (*ʿamal*) and attitude toward dissent. As we will see, the manner in which Mālik uses terminology indicates that he was conscious of dissenting legal interpretations within and without Medina, regarded them to be significant, and felt it important to communicate his position regarding them to other jurists and students of the law.

Like other legists of the formative period, Mālik is generally reticent about revealing the workings of his legal reasoning to his broader literary audience, although Ibn al-Qāsim's statements in the *Mudawwana* make it clear that Mālik thought carefully and systematically about legal questions and occasionally revealed his thinking to his closest students.[13] We encounter disclosures of Mālik's legal reasoning in both the *Muwaṭṭaʾ* and *Mudawwana*. There are several examples in the *Muwaṭṭaʾ* when Mālik sets forth his reasoning. In the *Mudawwana*, it is typically Ibn al-Qāsim who explains how Mālik reasoned based either on what he heard him say

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in their original Arabic with translation since I regard them essentially as commentary. S stands for *sunna*, A for *amr*, M stands for concurrence (*mujtamaʿ*); N stands for "among us" (*ʿindanā*); the hyphen (-) stands for "no" (i.e., negation of dissent), and X stands for dissent (*ikhtilāf*). A key to my symbols and a comprehensive index of Mālik's terms and expressions in the *Muwaṭṭaʾ* recension of Yaḥyā ibn Yaḥyā may be found in my dissertation, "Mālik's Concept of *ʿAmal*," Appendix 2, 766–88.

[11] See Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:311.

[12] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:311–12.

[13] See *Mud.*, 1:20, 57, 69, 100, 192, 251, 256, 264, 272, 272, 284, 289; 2:189, 197, 391; 3:86; 4:92, 94, 116; ʿIyāḍ, *Tartīb*, 1:145–46; al-Shāṭibī, *al-Muwāfaqāt*, 4:286.

directly or what he came to understand during his decades with Mālik as a principal student.

Theories Regarding Mālik's Terminology

Modern scholars noted Mālik's distinctive terminology early, although they rarely gave it close attention. Ignaz Goldziher and Joseph Schacht treat it in passing. Although Goldziher does not analyze Mālik's terminology in the *Muwaṭṭaʾ*, he concludes that terms such as AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*) and Mālik's explicit references to the learned people of Medina such as "this is what I found the people of knowledge in our city following" (*wa ʿalā hādhā adraktu ahl al-ʿilm bi-baladinā*) and "this is the precept which the people of knowledge in our city continue to follow" (*wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-baladinā*) were indicants of Medinese consensus. Such Medinese consensus, in Goldziher's view was the chief underpinning of Mālik's legal reasoning.[14] Schacht holds that Mālik's explicit references to praxis and his *amr*-terms in the *Muwaṭṭaʾ* such as AN (the precept among us; *al-amr ʿindanā*), AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*), and A-XN (the precept without dissent among us; *al-amr al-ladhī lā ikhtilāf fihi ʿindanā*) are all identical references to Medinese praxis. His analysis does not go beyond that assertion.[15]

Fazlur Rahman, Ahmad Hasan, Zafar Ansari, and Muhammad Guraya consider Mālik's terminology somewhat more closely but without correlating it to the legal content of the precepts with which it was associated. They conclude that Mālik's terms were essentially equivalent in meaning and regard the semantic differences between Mālik's different usages as essentially fortuitous.[16] Fazlur Rahman holds that AMN stands for the

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[14] Goldziher, *Studien*, 2:214.

[15] Schacht, *Origins*, 62–63. My study confirms that these *amr*-terms all indicate Medinese praxis, although AN does not, as a rule, refer to Medinese consensus. AMN sometimes refers to majoritarian concurrence as opposed to the complete agreement indexed by A-XN.

[16] The study of terms, chains of transmission, and similar types of technical data requires careful correlation between form and content. In the absence of drawing meaningful correlations between the terms and their concrete legal purport in context, the researcher is apt to fall into the common statistical fallacy of generalizing about large quantities of data merely on the basis of outward appearances and the simple observation of frequencies and numerical proportions, which are essentially meaningless in the absence of sound correlations between them and their referents.

sunna in the sense of the "living" *sunna* of the community. He asserts that the term exemplifies how the concepts of *sunna* and consensus merged in the early Muslim community.[17] Similary, Ansari asserts that Mālik's term S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*) is equivalent to AMN. He holds that the explicit indication of consensus in S-XN shows that the authority of the precept arises from its having the support of local consensus, not from some other consideration.[18] Ahmad Hasan holds in like fashion that terms such as S-XN, MḌS (the *sunna* has long been established; *maḍat al-sunna*), SN (the *sunna* among us; *al-sunna ʿindanā*), AN, AMN, and A-XN are equivalent and are used interchangeably. He concludes that Mālik regarded Medinese praxis and the *sunna* as coterminus.[19] Guraya observes that Mālik never uses *sunna*-terms in conjunction with the legal decisions of caliphs, governors, or judges. He does not pursue this important observation further or conclude on its basis that there was a basic difference between Mālik's use of *sunna* and *amr*-terms, which is one of the most important aspects of Mālik's terminology.[20]

My dissertation, "Mālik's Concept of *ʿAmal*," presented the first extensive discussion of Mālik's terminology in a Western language. Since the

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Statistical fallacies are not uncommon in contemporary studies of Islamic legal origins and *ḥadīth*s. In Melchert's cursory reading of the *Muwaṭṭaʾ*, he generalizes on the basis of simple statistical frequencies between *ḥadīth*s, post-Prophetic reports, and legal opinions without correlating them to their legal purport in context. On this generalized and uncontextualized statistical basis, he concludes that Mālik sometimes follows the "manner of the traditionist-jurisprudents," by letting *ḥadīth*s "speak for themselves," although he never seems to follow "precisely the traditionalist form of argument." Melchert suggest that Mālik's perplexing approach to texts shows "signs of primitiveness." In this particular case, Melchert's statistical fallacy of not correlating the texts with their legal purport in the *Muwaṭṭaʾ* is aggravated by his attempt to evaluate Mālik's method against the dominant paradigm of "great synthesis" theory. Since Mālik's legal reasoning (and, for that matter, the reasoning of other non-Shāfiʿī jurists of the formative or post-formative periods) does not fit the logic or method of the four-source theory, Melchert is unable to assess their reasoning accurately on its own merits and, instead of examining the inadequacy of his own cognitive frames, he pronounces the verdict that Mālik represented a primitive stage in the evolution of Islamic jurisprudence (see Melchert, "Traditionist-Jurisprudents," 391).

17 Rahman, *Methodology*, 18, 13. My analysis indicates by contrast that AMN and Mālik's other *amr*-terms tend to be rooted in later legal interpretation (*ijtihād*), although occasionally with tenuous or indirect links to the *sunna*.

18 Ansari, "Development," 145.

19 Hasan, *Development*, 100–01. My analysis shows that although Mālik's terms sometimes overlap, they may be divided into inclusive and exclusive categories and tend to have fairly distinctive meanings.

20 Guraya, "*Sunnah*," 93–94.

work was never published, it had little effect on subsequent academic developments, although Yasin Dutton accepted my findings and elaborated upon them in his *Origins of Islamic Law*. Based on my conclusions, he notes that Mālik typically differentiates instances of praxis rooted in the Qurʾān and *sunna* from others based on legal interpretation. As noted earlier, though, Dutton insists somewhat equivocally that Mālik saw all elements of Medinese praxis—whatever their origin—as inextricably bound together in a single whole, "namely, the *ʿamal* of the people of Madina."[21] Dutton also draws attention to my notion of "mixed" praxis—types of Medinese praxis that were internally diverse—a phenomenon that tends to argue against Mālik having viewed Medinese praxis as having been inextricably bound in a single coherent whole.[22]

Wael Hallaq makes occasional references to Medinese legal terminology. He holds that terms such as "*sunna māḍiya, al-amr al-mujtamaʿ ʿalayhī ʿindanā*, etc." constituted continuous local practice for the Medinese. It was upheld by "the cumulative, common opinions of scholars," which became the "final arbiter in determining the content of the Prophet's Sunna." He contends that the traditional authority of the Medinese jurists as reflected in such terminology and "the newly circulating *ḥadīth*s" constituted two competing sources of Prophetic authority.[23] It would be more

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[21] Dutton, *Origins*, 3. Dutton observes on the basis of my assessment of *Muwaṭṭaʾ* terminology, for example, that it is questionable whether Mālik held that all types of Medinese praxis were equally authoritative. He notes that Mālik's letter to al-Layth ibn Saʿd seems to indicate that Mālik held that all categories of Medinese practice had a claim to being followed whatever their origin. He observes again, however, that my study of the *Muwaṭṭaʾ* indicates to the contrary that Mālik "drew clear distinctions between different types of *ʿamal* and the degree to which they were binding" (Dutton, *Origins*, 39–40). Mālik certainly felt that all types of Medinese praxis were worthy of being followed, and he seems to have veered from praxis very little himself, if at all. It is equally clear, however, that he made distinctions between precepts of praxis having greater or lesser authority, and he did not believe that Medinese praxis had such binding authority that it should be imposed by Islamic civil authorities upon all Islamic realms, a point which Dutton also acknowledges (Dutton, *Origins*, 40).

[22] See Dutton, *Origins*, 40.

[23] Hallaq, *Origins*, 105–06. In this assertion, Hallaq is projecting his own scholarly paradigm regarding the evolution of Islamic law on the material before him. The evidence is not speaking for itself. In the *Muwaṭṭaʾ* and *Mudawwana*, there is little evidence that Mālik and the Medinese regarded praxis and *ḥadīth*s as ever constituting competing sources of authority, and there is overwhelming testimony to the contrary. Nor is there any indication in the Medinese sources that they regarded *ḥadīth*s that were contrary to praxis as "newly circulating." This is again Hallaq's backprojection of an inadequate historiographical cognitive frame upon the evidence.

accurate to say that the Medinese looked upon praxis and *ḥadīth* as two congruent sources of legal authority, although the latter were consistently evaluated and interpreted against the background of praxis as the decisive criterion.

Norman Calder makes passing reference to Medinese use of praxis and Mālik's terms without treating them in detail. He draws attention to al-Shaybānī's references to praxis—"what the people do is like this" (*hākadhā amr al-nās*) and "the praxis of the people is like this" (*hākadhā ʿamal al-nās*)—which appear cognate to both Mālik's terminology and his reliance on Medinese praxis.[24] Susan Spectorsky gives a citation showing that Isḥāq ibn Rāhawayh used the term SN (the *sunna* among us; *al-sunna ʿindanā*), which is the most common of Mālik's *sunna*-terms.[25] Neither she nor Calder, however, attempts to draw structural parallels between these terminological references and Mālik's terminology in the *Muwaṭṭaʾ*.

Traditional Mālikī works contain surprisingly little discussion of Mālik's terminology. This is true even of Ibn ʿAbd al-Barr's elaborate *Muwaṭṭaʾ* commentaries, the *Istidhkār* and *Tamhīd*. The *Muwaṭṭaʾ* commentaries of al-Bājī and al-Zurqānī and Mālikī legal compendia tend to pass over the terms without comment. For the writers of both the compendia and the commentaries, Mālik's archaic terminology seems either to have become self-evident, no longer clearly meaningful, or, perhaps, even irrelevant. The sole concern of later legists was to clarify and often defend the precepts of the school, which involved extensive attention to dissenting opinions, not the idiosyncracies of Mālik's terminology.

Mālik's terminology was not interchangeable across the board, although it sometimes overlaps and certain terms are occasionally combined with each other as part of nuanced legal discussions. Overall, there are noteworthy differences between Mālik's terms, especially the fundamental dichotomy between *sunna* and *amr*-terms, the former being contrary to analogy while the latter flag standard analogues, which are generally based on legal interpretation (*ijtihād*) or have a significant interpretative component. It is also apparent from Mālik's terminology that he distinguishes

[24] See Calder, *Studies*, 198–99. Calder notes that early Ḥanafī works refer less frequently to praxis than the Medinese, but they too share the concept. He points out that Ḥanafī works register some early opposition to practice. Calder believes their opposition was not a rejection of praxis *per se* but of unacceptable popular practices. Cf. Hallaq, *Origins*, 106.

[25] Spectorsky, "*Sunnah*," 55.

between matters of praxis that are supported by local consensus and others which are not.[26]

Although the phraseology of Mālik's terminology in the *Muwaṭṭaʾ* is flexible, his terms in the presently available recensions of the work fall into several fairly consistent classifications. Some terms like AN (the precept among us; *al-amr ʿindanā*) and AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*) generally occur consistently in identical form. Numerous other expressions like "the praxis of the people is not in accordance with this among us" (*wa laysa ʿalā hādhā ʿamal al-nās ʿindanā*) and "the precept among us continues to be in accord with this" (*wa lam yazal al-amr ʿindanā ʿalā hādhā*) occur only once or twice. I would classify them as comments and not technical terms.

Mālik's terminology is not rigorous, yet it is internally coherent and maintains generally consistency. *Sunna*-terms are restricted to types of praxis deemed to have originated with the Prophet, which were not the product of subsequent legal interpretation (*ijtihād*). The term *amr* (precept), on the other hand, has a broad semantic range but is generally used for precepts derived from legal interpretation. When the word *amr* occurs in the term AMN, it seems invariably to refer to legal interpretation, although it frequently occurs in conjunction with rulings attested in Qurʾānic verses or solitary *ḥadīth*s (*aḥādīth al-āḥād*) that required interpretation for full legal application. When used with expressions like "the precept the people follow" (*amr al-nās*) and "this is the precept which the people of knowledge in our city continue to follow" (*wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-bilādinā*), Mālik's *amr*-terms refer to Prophetic practices belonging to the category of the *sunna*.

I divide Mālik's principal technical terms such as AN, AMN, S-XN into two broad categories: exclusive and inclusive terms. Exclusive terms are restricted to a single usage. Inclusive terms overlap with others. The more a term is qualified by adjectives and other modifiers, the more restricted and exclusive it seems to become.

The least ambiguous and most exclusive terms in the *Muwaṭṭaʾ* are those containing negations such as S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*), AMN-X (the agreed precept among us about which there is no dissent; *al-amr al-mujtamaʿ ʿalayhi ʿindanā al-ladhī lā ikhtilāf fihi ʿindanā*;), and A-XN

[26] See Abd-Allah, "*ʿAmal*," 419–33.

(the precept about which there is no dissent among us; *al-amr al-ladhī lā ikhtilāf fihi ʿindanā*).

Why Does Mālik Use Terms in the *Muwaṭṭaʾ*?

The recensions of Mālik's *Muwaṭṭaʾ* contain several hundred terms and legal comments, although, as noted before, the majority of the material that Mālik presents in the book occurs without any terms being appended to them at all. This unexpounded material constitutes the backdrop against which Mālik's terminology functions and, as noted, requires careful analysis. On occasion, I attend to Mālik's unexpounded material, but, due to the limitations of the present study, I focus on the nature of the precepts associated with terms and comments and not those that occur without them.

Mālik adds comments and attaches his terms to precepts when treating matters of dissent between important legists in and outside of Medina or with regard to precedents regarded as unwarranted, notably those of certain Umayyad rulers other than ʿUmar ibn ʿAbd-al-ʿAzīz, even though later jurists may have concurred in rejecting those precedents. Mālik seems not to append his terms to precepts when they were matters of general agreement or matters of dissent that he does not seem to have deemed as particularly important. He states, for example, that the alms tax (*zakāh*) is levied on gold and silver, wheat, barley, dried dates, raisins, and olives. This was a matter of consensus among the legists, and the precept occurs without comment or terminological reference.[27] Similarly, there was consensus on the stipulation that bequests not exceed one third of the deceased's estate. Mālik simply cites the ruling without further exposition.[28] This pattern is repeated in numerous other examples, although it is not clear that it applies universally to the *Muwaṭṭaʾ*'s content.

In some cases, differences of opinion predominated among the Companions and Successors, but general consensus had been reached by Mālik's time. The Companions and Successors differed, for example, regarding whether or not eating meat roasted over an open flame broke one's state of ritual purity. Contrary solitary *ḥadīth*s supported both positions. General consensus had been reached in Mālik's time, however, that eating roasted meat did not break ritual purity and that the *ḥadīth*s to the

[27] *Muw.*, 1:244–45; Ibn Rushd, *Bidāya*, 1:147–48.
[28] *Muw.*, 2:763–64; Ibn Rushd, *Bidāya*, 2:202.

contrary had been repealed, although Aḥmad ibn Ḥanbal later revived the earlier difference. Mālik cites relevant *ḥadīth*s and post-Prophetic reports upholding the precept but cites no terms and gives no explanation.[29] Another example is the disagreement of the early legists about the validity of a master marrying his slave woman without emancipating her first. By Mālik's time, general consensus had been reached that such marriages were not permissible. The slave woman must first be emancipated and then married. Again, Mālik cites the ruling without a term or comment. The *Mudawwana* relates that Mālik's teacher Abū al-Zinād concurred on the prohibition and noted that the precept was "the *sunna* that I found the people following" (*al-sunna al-latī adraktu al-nās ʿalayhā*).[30]

One of the chief purposes of Mālik's terminology in the *Muwaṭṭaʾ* and ostensibly that of his teachers was to indicate the status of Medinese praxis or of their personal positions with regard to the dissenting opinions of other legists. In his letter to Mālik, Layth ibn Saʿd commends Mālik's knowledge of the dissenting legal opinions of the Companions.[31] Ibn Taymiyya contends that the *Muwaṭṭa*'s structure reflects Mālik's special attention to the divergent opinions of the Kūfans.[32] The link between Mālik's terminology and the divergent legal judgments among the earlier and later legists of Medina and other cities demonstrates not only that Mālik kept abreast of their opinions but acknowledged them as significant. It reflects in a fairly comprehensive manner the principle of *riʿāyat al-khilāf* (heeding dissent).

A number of Mālik's terms indicate general Medinese consensus. These are terms that explicitly negate the presence of dissent such as S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*), A-XN (the precept without dissent among us; *al-amr al-ladhī lā ikhtilāf fīhi ʿindanā*), and AMN-X (the agreed precept without dissent among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā wa al-ladhī lā ikhtilāf fīhi*). The terms clearly indicate regional, as opposed to universal consensus, but may not stand for complete consensus within Medina itself, since Mālik did not deem the legal opinions of all Medinese scholars to be worthy of consideration.[33] AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*), on the other hand, makes no explicit denial

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[29] *Muw.*, 1:25–28; Ibn Rushd, *Bidāya*, 1:24; al-Rasīnī, "*Fiqh*," 217.
[30] *Muw.*, 2:537–38; *Mud.*, 2:188; al-Zurqānī, *Sharḥ*, 4:37.
[31] Ibn al-Qayyim (Saʿāda), *Iʿlām*, 3: 396.
[32] Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 79.
[33] See Abd-Allah, "*ʿAmal*," 72–76.

of local differences and seems sometimes to signify majority consensus in Medina often accompanied by a significant dissenting voice or voices within the city's legal tradition such as ʿUmar ibn al-Khaṭṭāb or his son Ibn ʿUmar.[34] One of the best illustrations of an AMN used as a probable indication of majority consensus with significant local dissent is the AMN regarding the inheritance of the son of unknown paternal descent. ʿUthmān ibn Kināna (d. ca. 185/ca. 801) held a dissenting opinion in the matter. Ibn Kināna was widely regarded as one of Mālik's most prominent, exacting, and well-studied students, and it appears in this instance that Mālik has deferred in his AMN to his principal student's dissenting voice.[35]

The term AN (the precept among us; *al-amr ʿindanā*) differs from the former terms in that it represents Mālik's position on matters regarding which there was significant dissent among Medina's prominent legists. AN also seems to index standing Medinese praxis, which sometimes existed independently of local scholarly consensus due to the effect of established judicial practice or the prestige of particular jurists regarding matters of local dissent that fell outside the jurisdiction of the court. Significant differences of legal opinion in Medina are clearly acknowledged in terms like "this is my considered opinion" (*hādhā raʾyī*), "I have this considered opinion" (*urā hādhā*), "this is what I prefer of what I have transmitted about this [matter]" (*hādhā aḥabb mā samiʿtu ilayya fī dhālika*), and so forth.[36]

Mālik's conception of the authoritativeness of Medinese praxis in matters of dissent is explicit in his letter to al-Layth ibn Saʿd. By contrast, al-Layth, adhered to Medinese praxis when it was supported by Medinese consensus but felt at liberty to diverge from it regarding precepts where the Medinese themselves had disagreed.[37] Assuming that Mālik's expressions of legal preference conform to Medinese praxis, it appears, as ʿAllāl al-Fāsī suggests, that Mālik regarded established praxis as the best criterion for legal precepts derived from ambiguous or contradictory referents and regarding which there had been significant dissent among the legists.[38] If Mālik relied upon praxis in conjectural or doubtful matters, it follows that he also held praxis to be authoritative for precepts that enjoyed the

[34] Abd-Allah, "*ʿAmal*," 424–28.

[35] See Abd-Allah, "*ʿAmal*," 702.

[36] Abd-Allah, "*ʿAmal*," 530. David Margoloiuth took note of juristic expressions such as "I like" and "I dislike," commenting that they imply that the jurists were "settling things according to their predilections: though doubtless these were what they supposed to be most agreeable to the system of the Koran." See Margoliouth, *Mohammedanism*, 94.

[37] See Abd-Allah, "*ʿAmal*," 304–05.

[38] Al-Fāsī, *Maqāṣid*, 147, 150–51.

general concurrence or complete consensus of the great legists to whom he ascribed.

Mālik frequently sets forth in the *Muwaṭṭaʾ* and *Mudawwana* broad statements of the legal percepts on the basis of which he reasons. His reasoning is often a direct application of these comprehensive rules, which, as noted earlier, was referred to by later jurisprudents as precept-based analogy (*al-qiyās ʿalā al-qiyās; al-qiyās ʿalā al-qawāʿid*) in contrast to referential analogy based on textual legal referents in Qurʾanic verses or Prophetic *ḥadīth*. Precept-based legal reasoning is common in the *Muwaṭṭaʾ* and conspicuous in the great compendia of legal interpretation (*ijtihād*) such as the *Mudawwana, Mawwāzīya, Wāḍiḥa*, and *ʿUtbīya*, which are the principal sources of Mālik's reasoning in unprecedented matters and unusual circumstances.[39]

In the *Muwaṭṭaʾ*, Mālik sets forth the fundamental precepts of the Medinese tradition, which constituted the basis of his legal positions and personal interpretations. Mālik's explicit defense of Medinese legal positions in the *Muwaṭṭaʾ* is, however, relatively rare and seems only to occur where Mālik regards it to be necessary, especially regarding issues surrounded by significant controversy. One such controversy was the Medinese position that a defendant—in the absence of binding evidence by the plaintiff—could establish his case in monetary disputes by taking an oath in conjunction with a solitary supporting witness. Mālik supports the Medinese position in this precept with one of his longest legal arguments in the *Muwaṭṭaʾ*. Al-Layth ibn Saʿd argued that Medinese praxis on the matter had never become established judicial practice anywhere else outside of Medina. He asserted further that the four rightly-guided caliphs never took it upon themselves to institute this unique Medinese practice outside of Medina. The Medinese praxis of making legal judgments in monetary disputes on the basis of the plaintiff's oath and a single supporting witness was vigorously disputed outside of Medina. Al-Shāfiʿī argued that it was never a matter of consensus even in Medina itself.[40]

Mālik was not the first jurist to cite Medinese praxis as a criterion for correctness in matters of legal dissent. The famous Medinese jurist, judge, and city governor Abū Bakr ibn Ḥazm, who was one of Mālik's teachers and died around the time that Mālik was thirty, was asked how to proceed in legal matters where the legists had differed. He replied, "If you find that

[39] See Abd-Allah, "*ʿAmal*," 97–107.
[40] Abd-Allah, "*ʿAmal*," 571–73.

the people of Medina have reached consensus on a matter, have no doubt that it is the truth."[41] Mālik clearly shared his teacher's opinion about Medinese consensus. The *Muwaṭṭaʾ* indicates, however, that there were types of praxis unsupported by the consensus of the Medinese legists. Mālik adhered to local praxis in these matters as well. Mālik's letter to al-Layth ibn Saʿd testifies to Mālik's preference of praxis even in matters of local dissent. Probably, he regarded them to be the best products of Medinese legal interpretation, despite significant differences of opinion about them in Medina. Mālik may also have had other reasons for following locally disputable praxis such as the general good (*al-maṣlaḥa*), given the customary authority precepts of praxis would had taken on in public life simply by having become established norms.

ʿIyāḍ and ʿAbd al-Wahhāb contend that Mālikī jurists disagreed on the authority of types of praxis that were not established in the Prophetic period but derived from later legal interpretation. Some of them—apparently like Mālik himself—regarded all types of praxis to be a standard criterion. Others attributed considerably less authority to inference-based praxis.[42] Although Mālik's use of praxis conforms with the first position, his attention to dissent within and without Medina acknowledges the legitimacy of the second. Mālik's awareness of the general validity of dissent in Islamic law is further borne out by his alleged refusal of al-Manṣūr's proposal that he make the Medinese tradition the standard legal norm for his empire. According to the account, Mālik affirmed the legitimacy of the divergent practices of different regions on the basis of the dissenting juridical opinions that had reached them from the time of the Companions.[43]

What Mālik Reportedly Said about His Terminology

The fullest statement I have found of Mālik's personal understanding of his terminology is a report from his nephew Ismāʿīl ibn Abī Uways.[44] Ibn Abī Uways relates what Mālik meant by the expressions AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*), "in our city" (*bi-baladinā*), "I found the people of knowledge [following]" (*adraktu ahl*

[41] Wakīʿ, *Akhbār*, 1:143–44.
[42] See Abd-Allah, "*ʿAmal*," 416–17.
[43] ʿIyāḍ, *Tartīb*, 1:192; Sezgin, *Geschichte*, 1:409; Abd-Allah, "*ʿAmal*," 99–102, 392–94.
[44] ʿIyāḍ, *Tartīb*, 1:194.

al-ʿilm), and "I heard some of the people of knowledge [transmit]" (*samiʿtu baʿḍ ahl al-ʿilm*). He relates that Mālik said:

> Regarding most of what occurs in the book (*Muwaṭṭaʾ*) [termed] as "considered opinion" (*raʾy*), upon my life it is not [exclusively] my considered opinion but what has been transmitted to me from a number of the people of learning and excellence and the Imāms, whose examples are worthy of being followed and from whom I received my learning. They were people heedful of God. It was a burden for me to mention them [by name], so I said, "this is my considered opinion." I said this whenever their considered opinion was like the considered opinion they found the Companions following and which I later found my teachers following. It is a legacy that one generation handed down to another until our time.
>
> Where I have used "I have [this] considered opinion" (*urā*), it is the considered opinion of a group of the Imāms of earlier times.
>
> Where I have used "the agreed precept among us" (AMN), it constitutes the opinions [*qawl*] of the people of legal learning and knowledge on which concurrence (*ijtimāʿ*) was reached without their having differed about [those opinions].
>
> Where I have used "the precept among us" (AN), it is the praxis that the people here have been following. Rulings (*al-aḥkām*) are handed down in accordance with it, and both the ignorant and knowledgeable are familiar with it.
>
> Similarly, where I have said "in our city" or "some of the people of knowledge," it is the opinions of some of the people of knowledge whom I regarded as preferable.
>
> Regarding what I did not hear transmitted from the people of knowledge, I made [my own] legal interpretation (*ijtihād*), taking into consideration the tradition (*madhhab*) of those I had known until my conclusion appeared to be true or nearly true. I did this so as not to depart from the tradition (*madhhab*) of the considered opinions (*ārāʾ*) of the people of Medina, even when I had not heard the matter transmitted specifically. I attributed the considered opinion to myself after exercising legal interpretation on the basis of the *sunna*, what the people of knowledge whose examples are worthy of imitation had long been following (*maḍā ʿalayhī*), and the norm (*amr*) that has been the praxis here from the time of God's Messenger, God bless him and greet him with peace, the rightly guided Imāms, and [the teachers] I knew. So even this is their considered opinion, and I did not turn to the considered opinion of others.[45]

The report of Ibn Uways contradicts my hypothesis that AMN often stood for majoritartian concurrence and not necessarily absolute consensus in Medina. Ibn Uways acknowledges no qualitative difference as far

[45] ʿIyāḍ, *Tartīb*, 1:194.

as consensus is concerned between AMN and other similar terms that explicitly negate the presence of dissent such as AMN-X, A-XN, and S-XN, although he does not reference those terms specifically.[46]

It is of note that the report of Ibn Abī Uways identifies AN as standing for precepts of Medinese praxis that became part of the judicial norms of the Medinese judiciary. Not surprisingly, Mālik describes such AN precepts as well-known to both the ignorant and the learned alike. The report makes no reference to local dissent among the Medinese scholars regarding the AN precepts. Yet, as indicated before, evidence that the AN precepts often reflected internal Medinese dissent is to be found in the *Muwaṭṭa'* itself, and the work also provides evidence that AN precepts often constituted the legal policy of the Medinese judiciary.[47] Judicial policy seems to have instituted such AN precepts as part of Medinese praxis for all people in the city, even for those who disagreed with them. Because of the power of the Medinese judiciary to make AN precepts part of uniform Medinese praxis in the face of local dissent, I suggest that non-judicial dissenting precepts were sometimes incorporated into Medinese praxis without uniformity in matters that did not fall under secular authority, producing types of Medinese praxis that were "mixed."[48] "Mixed" praxis is evidenced in the *Muwaṭṭa'* as the following chapters will show.

In the report of Ibn Abī Uways, Mālik claims to have adhered as closely as possible in his legal interpretations to the well-established *sunna* and to

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[46] I found little decisive evidence of differences of opinion among the scholars of Medina on AMN precepts, in contrast to the AN precepts, where the *Muwaṭṭa'* itself often references local dissent. My hypothesis that AMN refers to majority consensus is based on limited evidence. It is, however, supported by the opinion of al-Shāfiʿī that the Medinese scholars held dissenting opinions regarding AMN and AN (see Abd-Allah, "*ʿAmal*," 195–204). It is also indicated by the distinctive semantic difference between AMN and Mālik's negative consensus terms such as A-XN that explicitly deny the presence of dissent. Finally, my interpretation of AMN was also inspired by the convictions of ʿAllāl al-Fāsī and Muṣṭafā Zarqā that the concept of consensus as it emerged in Islamic legal history was originally conceived of as majoritarian and not absolute (see Abd-Allah, "*ʿAmal*," 195–204, 343–48).

Proper evaluation of al-Shāfiʿī's assertion that the Medinese disagreed concerning AMN precepts ultimately requires knowledge of who the dissenting scholars in Medina were. As Mālik's biography repeatedly indicates, he did not regard all scholars—whether Medinese or non-Medinese—as worthy of giving legal opinions even if they were pious and upright. In light of this, it is possible that the dissenting opinions al-Shāfiʿī had in mind regarding AMN precepts may have belonged to those Medinese scholars whom Mālik did not regard as worthy constituents of consensus.

[47] See Abd-Allah, "*ʿAmal*," 428–31, 732–34.

[48] "Mixed praxis," as indicated earlier, refers to praxis in which some of the Medinese follow Mālik's AN, while others followed the dissenting opinions of other Medinese jurists.

those precepts of law to which the Medinese traditionally subscribed and that had been incorporated in their communal praxis. Mālik asserts that his opinions are neither original, nor were they taken from non-Medinese sources. He portrays himself as a faithful transmitter of and adherent to the Medinese legacy. According to this claim, his legal views were invariably rooted either in the Medinese tradition or modeled after it on the basis of independent legal reasoning.

The *Muwaṭṭaʾ* shows that Mālik's opinions stay within the Medinese tradition. They are frequently corroborated by similar or supporting views of the earlier Medinese jurists. As the discussion of this section will show, post-Prophetic reports in ʿAbd al-Razzāq, Ibn Abī Shayba, and Ibn ʿAbd al-Barr give explicit evidence that Mālik's analogies and other aspects of his legal reasoning often agree verbatim with great scholars before him in the Medinese tradition. But Mālik's insistence on his lack of originality and dependence on the Medinese tradition in the report of Ibn Abī Uways must be modified to allow for the considerable scope of his personal acumen and legal genius as an independent thinker. His independence of mind is frequently evidenced in the *Muwaṭṭaʾ* and to a greater extent in the *Mudawwana*. Mālik's extensive use of expressions such as "I have this considered opinion" (*urā hādhā*) and "this is my considered opinion" (*hādhā raʾyī*) clearly indicate that he spoke with personal authority, however much his authority was rooted in and dependent on the legacy of earlier Medinese teachers.

Mālik's portrayal of his considered opinion (*raʾy*) in this report carries with it an implicit acknowledgement of the reality of local dissent. In this regard, it can be read as cognate to the same reality of local dissent that is represented in Mālik's AN precepts. Mālik asserts in the report that his considered opinion (*raʾy*) in most cases is in keeping with the considered opinion of more than one of the prominent Medinese jurists before him. The statement indicates that such matters also constituted points of dissent among the local jurists, since there were obviously other Medinese jurists from whom Mālik had heard contrary opinions. Similarly, Mālik states later in the report that he follows those opinions of the earlier jurists which he regarded to be preferable. This statement too implies that dissent was part of the local Medinese tradition. Thus, there were opinions that were to be preferred over others regarding identical precepts of law.

If terms in the *Muwaṭṭaʾ* like "this is my considered opinion" (*hādhā raʾyī*) and "I discern this" (*urā hādhā*) refer to opinions of Mālik that are in keeping with the opinions of certain prominent Medinese jurists as opposed to others, the question arises as to what distinction, if any, exists

between these expressions and Mālik's use of AN. I was not able to make a systematic study of the *ra'y*-terms of the *Muwaṭṭa'* or other similar terms expressing the legal judgments that Mālik personally preferred. Occasionally, he speaks of a particular judgment as his personal preference while simultaneously citing the term AN.[49] As a rule, however, Mālik's *ra'y*-terms and other expressions of his personal preference occur in isolation from the *Muwaṭṭa*'s *sunna*- and *amr*-terms. If AN terms refer to local praxis under the aegis of the Mediese judiciary and other mechanisms of social authority—as the report of Ibn Abī Uways and my analysis indicate—a second question arises regarding Mālik's *ra'y*-terms and those of his personal preference. Do they also represent Medinese praxis, or did they refer to Mālik's personal preference in matters of mixed Medinese praxis?

Terminology in the *Mudawwana*

As indicated, the *Mudawwana* contains occasional legal terms similar to those in the *Muwaṭṭa'*. Such terminology in the *Mudawwana* is incidental and does not play the same central role in the text as it does in the *Muwaṭṭa'*.[50] I refer to terminology from the *Mudawwana* whenever I find parallels between it and the select terminological precepts of the *Muwaṭṭa'*, which I studied, paying special attention to noteworthy discrepancies between the terms used in both books on the same or closely related precepts.

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[49] For example, *Muw.*, 2: 502, 661.

[50] I was not able to make a systematic study of the terminology of the *Mudawwana*. As indicated earlier, the work stands in need of further editing and indexing, which would also serve to facilitate such study. Terminology in the *Mudawwana* comes from multiple sources and diverse channels of transmission. Terminological references are sometimes included in the occasional inserts of additional basic information that Saḥnūn adds to the text (see Abd-Allah, "*'Amal*," 107–13). The terminology of the *Muwaṭṭa'* comes primarily from Mālik, although its origins were rooted in the broader Medinese legal tradition, which is occasionally indicated in the *Muwaṭṭa'* itself. Most terms cited in the *Mudawwana* appear to come from Mālik. Sometimes, they are cited verbatim from one of Saḥnūn's transmissions of the *Muwaṭṭa'*. Other citations of terms come from Mālik's teachers al-Zuhrī, Yaḥyā ibn Sa'īd, Rabī'a, Abū al-Zinād, and Ibn Qusayṭ. There are also a few terms attributed to Mālik's students Ibn al-Qāsim and Ashhab (see Abd-Allah, "*'Amal*," 546). Because of the variety of their sources, the terms of the *Mudawwana* do not seem to constitute a single consistent terminology. They do constitute, however, a valuable historical background against which to study Mālik's terminology. They also reflect that, to a considerable degree, Mālik's terms are an archaic Medinese phenomenon, which had parallels elsewhere in the formative period, but seems ultimately to have died out.

Explicit *ʿamal*-terms are not common in the *Muwaṭṭaʾ* or *Mudawwana*, although they may have been more common in Ibn Ziyād's early recension of the work. In Ibn Ziyād's recension, the expression "the praxis among us" (*ʿamal ʿindanā*) occurs where other recensions have the *amr*-term AN (*al-amr ʿindanā*; the precept among us). AN is the predominant term in Ibn Ziyād's recension as it is in the others, but his use of "the praxis among us" (*al-ʿamal ʿindanā*) serves as a further indication that AN did stand for Medinese praxis in Mālik's mind. The fact that AN also stood for praxis in Ibn Ziyād is borne out by his use of the expression "the AN is in accordance with this" (*wa ʿalā dhālika al-amr ʿindanā*).[51]

In the other available recensions of the *Muwaṭṭaʾ, sunna* and *amr*-terms eclipse praxis-terms. *ʿAmal*-terms occur frequently in the *Mudawwana*, but do not seem to outnumber *sunna* and *amr*-terms. Most of them seem to belong to the category of the negative *ʿamal*-terms, which state that the praxis of Medina was not in accordance with the legal issue in question. The *Mudawwana* also contains many *sunna* and *amr*-terms. The former appear to be more common than the latter, while the reverse is true in the *Muwaṭṭaʾ*. Of the *amr*-terms in the *Mudawwana*, AN is the most common according to my readings. This is also the case in the *Muwaṭṭaʾ*. The terms AMN and A-XN occur rarely in the *Mudawwana*. Both are among the standard terminology of the *Muwaṭṭaʾ*, and the handful of examples of them I found in the *Mudawwana* are cited directly from Mālik.[52]

Terms occur in the *Mudawwana* that Mālik does not use in the later recensions of the *Muwaṭṭaʾ*, even though, in some cases, the *Mudawwana* attributes those same terms to Mālik. Among the most notable of these are "the ancient precept" (*al-amr al-qadīm*), "the precept the people follow has been long established" (*maḍā amr al-nās*); "the ancient precept of the people" (*amr al-nās al-qadīm*), "the precept of the Prophet" (*amr al-nabī*), and "the state of affairs" (*al-shaʾn*), which appears to be a synonym of *amr*.[53] Ibn al-Qāsim relates to Saḥnūn, for example, that Mālik told him that the Medinese formula for legal oaths constituted the praxis (*ʿamal*) in accordance with which the precept the people follow had long been established (*maḍā amr al-nās*).[54] The *Mudawwana* states explicitly that for judges to hand down verdicts in the mosque is correct (*min*

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[51] See *Muw.* (Ibn Ziyād), 135; cf. ibid. 155, 173, 181, 199.

[52] *Mud.*, 4:282–83; 4:106; cf. Abd-Allah, "*ʿAmal*," 548.

[53] See *Mud.*, 1:24, 68, 102, 146, 193–95, 281, 293; 4:70–71, 76, 77; cf. Abd-Allah, "*ʿAmal*," 548.

[54] *Mud.*, 4:70–71.

al-ḥaqq) and pertains to the old way in which things were done in the past (*wa hūwa min al-amr al-qadīm*).[55] The expression "the precept of the Prophet" appears in a manner consistent with Mālik's use *amr*-terms in the *Muwaṭṭa'* to include precepts based either on Prophetic authority or on legal interpretation. What is especially distinctive about them is that they are not contrary to analogy with other precepts of law.[56]

[55] *Mud.*, 4:76.
[56] See Abd-Allah, "*'Amal*," 526–27.

CHAPTER SIX

THE *SUNNA*-TERMS

General Observations about the *Sunna*-Terms

I indexed forty *sunna*-terms in Yaḥyā ibn Yaḥyā al-Laythī's recension of the *Muwaṭṭa'*[1] and divide them into five main categories.[2] The first and numerically largest of these classifications is the term S-XN (the *sunna* among us about which there is no dissent; *al-sunna al-latī lā ikhtilāf fīhā ʿindanā*) and its variations, all of which explicitly indicate Medinese consensus by denying the presence of dissenting opinions within the city. I found thirteen terms in Yaḥyā's recension that fall within this grouping.[3]

The second most common category is that of MḌS (the *sunna* has long been established; *maḍat al-sunna*), including similar expressions that employ the verb "*maḍat*" (to have been long established).[4] As a corollary of the continued operativeness that it stands for, MḌS is also an explicit legal statement that the *sunna*-precept in question was never repealed. Such repudiation of the possibility of abrogation is often essential to Mālik's use of the term. I classified eight *sunna*-terms within this group.[5] There is a ninth instance of "the *sunna* has been established, regarding which there is no dissent among us" (*maḍat al-sunna al-latī lā ikhtilāf fīhā ʿindanā*),[6] but I classified it among the S-XN terms because of its explicit denial of dissent.

The third category is that of SM (the *sunna* of the Muslims; *sunnat al-muslimīn*) and its variations. I found it five times in the *Muwaṭṭa'*.[7] It occurs once as SM-X (*sunnat al-muslimīn al-latī lā ikhtilāf fīhā*) (the *sunna*

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[1] I was unable to index Mālik's terminology in the other available recensions, each of which contains conspicuous numbers of terms—often agreeing with Yaḥyā's transmission—but with noteworthy discrepancies here and there.

[2] See Abd-Allah, "*ʿAmal*," 778–79 for the index of these five categories.

[3] *Muw.*, 1:177, 182, 246, 252, 276; 2:502, 568, 586, 713, 765, 775, 804, 879.

[4] Yasin Dutton notes that the term "*maḍat*" refers to a "continuous practice instituted in the past and still operative in the present." It does not merely indicate the idea of past practice as some Western scholars have presumed (see Dutton, *Origins*, 164).

[5] *Muw.*, 1:208, 318; 2:507, 569, 692, 722, 724, 725.

[6] *Muw.*, 1:182.

[7] *Muw.*, 2:692, 693; 791; 804 (occurs twice here).

of the Muslims regarding which there is no dissent). Again, because of explicit denial of dissent, I classified SM-X with the S-XN terms. In another instance, SM occurs in conjunction with "*maḍat*," MḌSM (the *sunna* of the Muslims has been long established; *maḍat sunnat al-muslimīn*), which I classified with the MḌS terms.

The fourth classification is SN (the *sunna* among us; *al-sunna ʿindanā*). It occurs ten times.[8] It appears once in the form SN: ådIb (the *sunna* among us which I found the people of knowledge in our city following; *al-sunna ʿindanā al-latī adraktu ʿalayhi al-nās ʿindanā*). A fifth *sunna*-category is simply S (*al-sunna*) and occurs six times in Yaḥyā's recension.[9]

The highest percentage of *sunna*-terms occurs in the chapter on the alms tax (*zakāh*), where variations of the term occur seven times,[10] although Mālik's forty *sunna*-terms are generally dispersed throughout the *Muwaṭṭaʾ*. They occur both in chapters pertaining to ritual and non-ritual concerns, although MḌS and SM occur exclusively in chapters pertaining to non-ritual matters. Conclusions about the meaning and implications of the *sunna*-terms are given at the end of this chapter.

Examples of *Sunna*-Terms

1. *S-XN*: Zakāh *on Gold and Silver*

> Mālik states the S-XN[11] that the alms tax is required on the base sum of twenty pieces of gold and two hundred pieces of silver.[12]

Mālik refers to this precept as S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*) in the recensions of Abū Muṣʿab, al-Qaʿnabī, and Yaḥyā. Each of the three transmitters gives essentially the same material with minor variations in wording.[13] Suwayd's recension of the *Muwaṭṭaʾ* lacks this chapter. Instead, Suwayd has a short general chapter on the alms tax (*zakāh*) with mixed legal content. His

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[8] *Muw.*, 1:111, 268, 273, 276; 2:583, 706, 722 (occurs twice here), 770, 843.

[9] *Muw.*, 1:92, 367, 463; 2:705, 735, 810.

[10] *Muw.*, 1:246, 252, 268, 273, 276 (twice), 280.

[11] S-XN stands for "the *sunna* among us about which there is no dissent" (*sunna al-lattī lā ikhtilāf fīhā ʿindanā*).

[12] *Muw.*, 1:246; *Muw.* (Dār al-Gharb), 1:336; *Muw.* (Abū Muṣʿab), 1:252; *Muw.* (al-Qaʿnabī), 279; *Muw.* (Suwayd), 178–81; *Muwt.* (Riwāyāt), 2:233.

[13] *Muw.* (Dār al-Gharb), 1:336; *Muw.* (Abū Muṣʿab), 1:252; *Muw.* (al-Qaʿnabī), 279. Both texts omit the word "in coin" (*ʿaynan*), which occurs in the recension of Yaḥyā; cf. Ibn ʿAbd al-Barr, *al-Istidhkār*, 9:33.

cursory chapter includes some of the materials contained in the other recensions, which are distributed in those recensions among a variety of chapters. Since Suwayd does not cite the explicit precept given above, not surprisingly he fails to mention Mālik's S-XN term or an alternative for it.[14] The precept does not occur in the presently available recension of Ibn Ziyād.

In the *Mudawwana*,[15] Saḥnūn does not refer to the precept as an S-XN but as "a continually established *sunna*" (*sunna māḍiya*), an expression equivalent to Mālik's *Muwaṭṭa'* term MḌS (the *sunna* has long been established; *maḍat al-sunna*). The expression reflects the conviction that the precept had Prophetic origins and enjoyed unbroken continuity from the past to the present. In Saḥnūn's eyes as no doubt in Mālik's also, this precept was probably regarded as transmissional praxis, that is, praxis going back to the Prophet.[16] Saḥnūn produces evidence in the *Mudawwana* attesting to the Prophetic roots of the gold standard, which is essential to this precept. He cites *ḥadīth*s from Ashhab and Ibn Wahb in which the Prophet established the ratio of one to ten between gold and silver in the alms tax.[17]

In adducing such evidence, Saḥnūn's primary concern regarding this precept in the *Mudawwana* was to establish the gold and silver ratio for the alms tax as one to ten. In addition to the *ḥadīth*s just mentioned, he produces reports indicating that the base sum of silver rested on the Prophet's statement that no alms tax is required for amounts less than five Prophetic ounces (*ūqiyya*) of silver. He then cites Ibn al-Qāsim's reasoning that one Prophetic ounce was equal to forty pieces of silver (*dirham*s) as indicated by another Prophetic statement that half a piece of gold (*dīnār*) amounted to twenty pieces of silver. On this basis, Ibn al-Qāsim reasons

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[14] *Muw.* (Suwayd), 178–81.

[15] This chapter of the *Mudawwana* is a good example of the book's content and genre as compared with the *Muwaṭṭa'*. The bulk of Saḥnūn's material in the chapter comes from Mālik and Ibn al-Qāsim and is interpretative, focusing on atypical problems that required legal interpretation such as whether a man who possessed less than the base sum of gold—for example, ten pieces of gold—for more than a year (the required period for the alms tax to become due) but then sold them for two hundred pieces of silver (the required base sum for that metal) would he be required to pay the alms tax. Ibn Qāsim informs him that he would be immediately required to pay the alms tax in that case (*Mud.*, 1:208–10).

[16] *Mud.*, 1:209; *Mud.* (2002), 2:90. Ibn Rushd reads Mālik's designation of the precept as a *sunna* in this case to indicate its origin in Prophetic legislation (see Abd-Allah, "*'Amal*," 410–15).

[17] *Mud.*, 1:210; *Mud.* (2002), 2:93–95.

that the gold-silver ratio of one to ten for the alms tax is a continually established *sunna*.

Mālik's S-XN precept pertains to setting the base sum (*niṣāb*)[18] of gold and silver for the alms tax. Silver was the common currency of transaction in Arabia during the Prophetic period and the silver standard in the alms tax was universally applied during that era.[19] Consequently, the procedure in collecting alms on silver was a well-known matter of consensus among the jurists. The silver standard in the alms tax had been universally applied during the Prophetic period. Dissent regarding this precept did not concern silver, therefore, but only the definition of the base sum of gold for the alms tax.

Many *ḥadīth*s and post-Prophetic reports in ʿAbd al-Razzāq, Ibn Abī Shayba, and Ibn ʿAbd al-Barr reflect the unchallenged predominance of silver in Arabia during the Prophetic period, although they also give isolated instances of the Prophet dealing with communities that used gold as their common currency. Some of these materials report that the Prophet set a gold standard for the alms tax and indemnities during his lifetime. The reports make it clear, however, that during the reign of ʿUmar gold became a common currency parallel to silver because of its prevalence

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[18] The "base sum" (*niṣāb*) is the minimal amount upon which the alms tax is due after the passing of a full lunar year.

[19] Numerous early post-Prophetic reports in ʿAbd al-Razzāq and Ibn Abī Shayba reflect the predominance of silver in the earliest period. Such reports often give the silver standard exclusively without mentioning gold, indicating that the silver standard spread first, and the gold standard came into widespread use later (ʿAbd al-Razzāq, *al-Muṣannaf*, 4:83–84; Ibn Abī Shayba, *al-Muṣannaf*, 2:354–356). ʿAbd al-Razzāq cites a disconnected *ḥadīth* from Jaʿfar al-Ṣādiq, for example, that the Prophet set the base sum of the alms tax at two hundred pieces of silver. Jaʿfar's *ḥadīth* makes no reference to gold (ʿAbd al-Razzāq, *al-Muṣannaf*, 4:92).

Ibn al-ʿArabī agrees that confusion over the base sum for the alms tax in gold reflects the fact that gold was a little used currency in Medina during the Prophetic period. He asserts that the amount of the base sum in silver, which the Prophet set, was well known because of the currency's predominance. This was not the case with gold, which, although it was present in the markets of Prophetic Arabia, was treated as a commodity (*silʿa*) and not a currency because of its rarity (Abū Bakr ibn al-ʿArabī, *Kitāb al-qabas fī sharḥ Muwaṭṭaʾ Mālik ibn Anas*, 2:457–59). Ibn al-ʿArabī holds that the Companions set the base sum of gold by estimating its value in silver at the ratio of one to ten. In Suwayd's recension of the *Muwaṭṭaʾ*, Mālik reports in his short chapter on the alms tax that the caliph ʿUmar set the poll tax (*jizya*) for non-Muslim clients of the state who lived in regions where gold was plentiful at four pieces of gold (*dīnār*s) and for non-Muslim clients in regions where silver was predominant at forty pieces of silver (*dirham*s) (*Muw.* [Suwayd], 179). The report indicates that ʿUmar instituted poll tax payments in gold and silver on the same one to ten ratio. The same report occurs in the *Muwaṭṭaʾ* recensions of al-Qaʿnabī, Abū Muṣʿab, and Yaḥyā but is cited in their chapters on the poll tax (*Muw.* 1:279; *Muw.* [al-Qaʿnabī], 312; *Muw.* [Abū Muṣʿab], 1:290).

in caliphal regions such as Egypt.[20] In light of the early predominance of silver and the later emergence of gold, Ibn al-ʿArabī asserts that the definitive definition of the gold standard was primarily the work of the Companions based on their estimation of parallel values in silver. Thus, this S-XN, although rooted in Prophetic legislation, is a borderline case where the distinction between "transmissional praxis" and "old praxis" (*al-ʿamal al-qadīm*), which was based on the legal interpretation of the Companions, is not forthright.

Mālik cites no *ḥadīth*s or post-Prophetic reports in support of this ruling. The precept is one of many examples of an Islamic ruling of fundamental importance about which there was dissent but for which relatively few *ḥadīth*s existed. Those few that did exist on the gold standard were not classified as being verifiably authentic, although they confirmed the general ruling. Ibn Abī Zayd states that the relevant *ḥadīth*s regarding the Prophet's setting the base sum for alms at twenty pieces of gold are weak. He contends that jurists accepted the precept on the basis of praxis, not textual evidence.[21] Ibn Rushd and others agree that the base sum required in the alms tax for silver is supported by authentic *ḥadīth*s but that no *ḥadīth*s of verifiable authenticity establish the minimum amount required for gold. Al-Bājī concurs and gives the unsound *ḥadīth*s in question. They can be readily found in ʿAbd al-Razzāq, Ibn Abī Shayba, and Ibn ʿAbd al-Barr.[22]

Ibn Rushd confirms the opinion of Ibn Abī Zayd that Mālik derived this *sunna* precept from Medinese praxis.[23] In Mālik's time, there was virtual consensus among the jurists of Medina, Kufa, and elsewhere on this S-XN

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[20] See ʿAbd al-Razzāq, *al-Muṣannaf*, 9:295–96; Ibn Abī Shayba, *al-Muṣannaf*, cf. 5:344; Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:12; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:189–90, 192.

[21] Ibn Abī Zayd, *al-Nawādir*, 2:107.

[22] Ibn Rushd, *Bidāya*, 1:150; al-Bājī, *al-Muntaqā*, 2:95. Ibn ʿAbd al-Barr states that no *ḥadīth* from the Prophet has been soundly transmitted on alms tax for gold. He then gives a *ḥadīth* from ʿAlī which stipulates twenty pieces of gold and notes that Abū Ḥanīfa is believed to have transmitted this *ḥadīth*, although it is not historically established that he did. He states that the masters (*al-ḥuffāẓ*) transmit the report from ʿAlī as a post-Prohetic report (Ibn ʿAbd al-Barr, *al-Istidhkār*, 9:34). Ibn Abī Shayba cites the post-Prophetic report from ʿAlī that the base sum for the alms tax is twenty pieces of gold (Ibn Abī Shayba, *al-Muṣannaf*, 2:357). ʿAbd al-Razzāq cites that the Prophet directed ʿAlī to take alms from 200 pieces of silver and twenty pieces of gold (ʿAbd al-Razzāq, *al-Muṣannaf*, 4:89). Al-Qarāfī cites the *ḥadīth* of ʿAlī. He notes that it has a defective chain of transmission (al-Qarāfī, *al-Dhakhīra*, 3:11–12). Ibn Abī Zayd notes that the *ḥadīth* on the twenty pieces of gold is weak, although the people have accepted it through practice (*al-ʿamal*) (Ibn Abī Zayd, *al-Nawādir*, 2:107).

[23] Ibn Rushd, *Bidāya*, 1:150.

precept, but it had not always enjoyed consensus. Al-Ḥasan al-Baṣrī is known for his dissenting position on the issue. He held that the base sum for the alms tax in gold was forty pieces of gold, not twenty.[24] Ibn Rushd and others mention that a small party of jurists agreed with al-Ḥasan without specifying who those jurists were.[25] According to Ibn al-ʿArabī, al-Ḥasan al-Baṣrī did not accept the one-to-ten ratio that the Companions had set as valid, which led to his dissenting position on the base sums required for the alms tax in gold and silver.[26] Al-Bājī contends that after al-Ḥasan's time (the generation before Mālik) complete consensus was reached on the standard opinion that the base sum for gold was twenty gold pieces.[27]

In this precept as elsewhere, Mālik consistently uses his *sunna*-term for an anomalous precept of law. By invoking the term, he demarcates what he regards to be the proper boundaries of analogy. Significant legal difference existed between the Kufans and Medinese relevant to this S-XN precept on gold and silver ratios. It explains why Mālik cites a *sunna*-term in this case with its independent authority to restrict legal analogy. For the Kufans, the gold and silver ratio in the alms tax of one to ten constituted the standard legal analogy for all relevant legal matters involving stipulated amounts of bullion such as indemnities (*diyāt*) for wounds and manslaughter. The Medinese position held that the ratio of one to ten, as set forth in this S-XN precept, was contrary to analogy. It applied exclusively to the alms and poll taxes (technically acts of ritual) but did not apply to indemnities involving bullion payments (technically non-ritual matters of law) where the ratio was one to twelve.[28]

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[24] Ibn Rushd, *Bidāya*, 1:150; al-Bājī, *al-Muntaqā*, 2:95; Ibn ʿAbd al-Barr, *al-Tamhīd*, 7:18–19; idem, *al-Istidhkār*, 9:38–39: Ibn Abī Shayba, *al-Muṣannaf*, 2:357–58; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:86; Ibn al-ʿArabī, *al-Qabas*, 2:459.

[25] Ibn Rushd, *Bidāya*, 1:150 (20); al-Bājī, *al-Muntaqā*, 2:95; Ibn ʿAbd al-Barr, *al-Tamhīd*, 7:18–19; idem, *al-Istidhkār*, 9:38–39: Ibn Abī Shayba, *al-Muṣannaf*, 2:357–58.

[26] Ibn al-ʿArabī, *al-Qabas*, 2:457–59.

[27] Al-Bājī, *al-Muntaqā*, 2:95. Ibn ʿAbd al-Barr and ʿAbd al-Razzāq give evidence that challenges al-Bājī's contention. They report that Mālik's Kufan contemporary Sufyān al-Thawrī agreed with al-Ḥasan (Ibn ʿAbd al-Barr, *al-Tamhīd*, 7:18–19; idem, *al-Istidhkār*, 9:38–39; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:86). Ibn ʿAbd al-Barr also notes that most of the Ẓāhirīs, who were subsequent to Mālik's time, concurred with al-Ḥasan's opinion (Ibn ʿAbd al-Barr, *al-Tamhīd*, 7:18–19; idem, *al-Istidhkār*, 9:38–39).

[28] See Abd-Allah, "*ʿAmal*," 553–54; al-Bājī, *al-Muntaqā*, 7: 68; al-Zurqānī, *Sharḥ*, 5: 137–39; Ibn Rushd, *Bidāya* (Istiqāma), 2:248. Al-Shāfiʿī also makes reference to the different gold and silver ratios in Medina in his debate with al-Shaybānī. Al-Shaybānī takes the Kufan position that the standard ratio between gold and silver is one to ten. He accuses the Medinese of contradicting themselves by establishing the ratio of one to twelve in the

After stating the precept, Mālik's discussion that follows brings out the anomalous nature of this S-XN. He notes that the basic amounts required for gold and silver in the alms tax are independent of each other and do not correspond to the relative values of either. He states that if a person possessed one hundred and sixty pieces of silver in a city where the rate of exchange between gold and silver was one to eight according to local market value, such that the one hundred and sixty silver coins had the worth of twenty gold coins, that person would still not be required to pay the alms tax on the silver coins until they reached the base sum of two hundred pieces of silver. He emphasizes further that the size of the gold and silver coins as pertains to the requirement to pay the alms tax must be standard. Payment of the alms tax is not required, for example, on twenty gold coins or two hundred pieces of silver coins of substandard weight.[29]

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

> Mālik cites his S-XN term for the precept. He adds a reference to his having heard it from the people of knowledge.[30] The precept holds that the alms tax is not levied on any types of fruit such as pomegranates, peaches, and figs. Mālik states further that the alms tax is also not levied on freshly mown provender (*al-qaḍb*) or various types of edible greens (*buqūl*) nor on the money earned for selling them until that profit has remained in one's possession for the cycle of a full lunar year.[31]

Mālik adds to the *sunna*-term S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*) in this precept the observation that he heard it endorsed by "the people of knowledge whom [he] has heard" (*min ahl al-ʿilm*). The term occurs with this comment

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ratios of gold and silver in indemnities. Al-Shāfiʿī counters that one to twelve ratio is the standard analogy for the Medinese. They follow it in all pertinent matters of law other than the alms tax. They regard the ratio of gold and silver in the alms tax to be contrary to analogy, just as they believe that no analogies apply to the monetary values of the various types of livestock liable to the alms tax tithing. For the Medinese, the base sums required in alms tax for camels, cattle, and sheep are not analogous to each other ([Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 277–79; for examples, see *Muw.*, 2:833, 850).

[29] *Muw.*, 1:246–47.

[30] The S-XN term in full is "the *sunna* among us about which there is no dissent and what I have heard transmitted from the people of knowledge (*al-sunna al-latī lā ikhtilāf fīhā ʿindanā wa al-ladhī samiʿtu min ahl al-ʿilm*).

[31] *Muw.*, 1:276; *Muw.* (Dār al-Gharb), 1:372; *Muw.* (Abū Muṣʿab), 1:286; *Muw.* (al-Qaʿnabī), 309–10; *Muw.* (Dār al-Gharb), 1:372; *Mwt.* (*Riwāyāt*), 2:284; Ibn ʿAbd al-Barr, *al-Istidhkār*, 9:270.

in the recensions of Abū Muṣʿab, al-Qaʿnabī, and Yaḥyā. The chapter's content is essentially the same in the three editions with slight textual differences.[32] The Suwayd edition as it stands does not have this chapter, nor does the precept occur in the present fragment of the *Muwaṭṭaʾ* of Ibn Ziyād.

Saḥnūn has a short chapter in the *Mudawwana* on this topic, which contains no terminological references. It goes into elaborate detail on the types of fruits and green produce exempted from the alms tax including fruits that can be dried and stored for provision, which is typical of how the *Mudawwana* expands on the *Muwaṭṭaʾ*. He emphasizes like Mālik in the *Muwaṭṭaʾ* that no alms tax is due on profits from selling such fruits and produce until a full lunar year has passed over the profit.[33] Saḥnūn adduces post-Prophetic reports confirming the praxis of exempting fruits and green produce from the alms tax. He cites a *ḥadīth* from Ibn Wahb that the Prophet declared that no alms tax was due on green produce (*al-khuḍar*), which he follows with a post-Prophetic report from ʿUmar and ʿAlī to the same effect. He then cites attestations of support from prominent early jurists: al-Layth ibn Saʿd, Rabīʿat al-Raʾy, al-Zuhrī, ʿAṭāʾ ibn Abī Rabāḥ, ʿAṭāʾ al-Khurāsānī, Sufyān ibn ʿUyayna, and others.[34]

This precept falls under the category of transmissional praxis. ʿIyāḍ holds that it was rooted in the Prophet's deliberate omission (*tark*) of such fruits and green produce from the alms tax. His legal presumption is that the Prophet could not have required the alms tax for these types of produce, since any Prophetic policy to the contrary would necessarily have been known to the people of Medina and incorporated into their praxis.[35] Ibn ʿAbd al-Barr, al-Bājī, Ibn al-ʿArabī, and al-Qarāfī agree. They note that Medina was an agricultural settlement in which these types of produce constituted common crops. The city's people would have inevitably known that the alms tax was required on them, if the Prophet had obliged them to pay it.[36]

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[32] *Muw.* (Abū Muṣʿab), 1:286; *Muw.* (al-Qaʿnabī), 309–10; *Muw.* (Dār al-Gharb), 1:372; *Mwt.* (*Rīwāyāt*), 2:284; Ibn ʿAbd al-Barr, *al-Istidhkār*, 9:270.

[33] *Mud.*, 1:252; *Mud.* (2002), 2:184–87.

[34] *Mud.*, 1:253; *Mud.* (2002), 2:185–87.

[35] See Abd-Allah, "*ʿAmal*," 410–15.

[36] Ibn ʿAbd al-Barr, *al-Istidhkār* (1971), 1:154; al-Bājī, *al-Muntaqā*, 2:170. Ibn ʿAbd al-Barr cites Medinese praxis in this instance as evidence that the Prophet excused pomegranates, peaches, edible greens, and similar types of produce from collection in the alms tax (*ʿafā ʿanhā*) (idem, *al-Istidhkār*, 9:271). Al-Qarāfī notes that the people of Medina would have known well from the time of the Prophet that the alms tax was required in these types of produce, if the Prophet had collected it from them. He cites Mālik's argumentation to that

This precept of Medinese *sunna* is another example of a fundamental praxis that was a matter of significant dissent with widespread social consequences but for which relatively few if any *ḥadīth*s were transmitted. Mālik emphasizes that he heard the precept from the people of knowledge in Medina. He cites no *ḥadīth*s, post-Prophetic reports, or other types of textual evidence in its support. Ibn ʿAbd al-Barr and al-Qarāfī assert that no sound *ḥadīth* has been transmitted on this matter.[37] Al-Shawkānī states that little textual information ever existed on the topic. Like al-Qarāfī, he adds that al-Tirmidhī held that no *ḥadīth* of verifiable authenticity was ever transmitted regarding this precept.[38]

The Kufans and Abū Ḥanīfa held a dissenting position.[39] They required that the alms tax to be paid on all fruits and green produce. They supported their position with a *ḥadīth* specifying that alms are due for the "greens (*al-khuḍr*) that the earth produces." Ibn ʿAbd al-Barr states that the *ḥadīth* lacked a sound chain of transmission and originated as a post-Prophetic report of Ibrāhīm al-Nakhaʿī, documentation for which is provided in ʿAbd al-Razzāq.[40] According to Ibn Rushd, Abū Ḥanīfa based his

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effect against Abū Yūsuf in the presence of the Abbasid caliph, and the fact that Abū Yūsuf is reported to have accepted it (al-Qarāfī, *al-Dhakhīra*, 3:74). Ibn al-ʿArabī notes that various types of edible greens were being grown in Medina and its surrounding villages during the Prophet's time; yet the Prophet never attempted to collect alms from them, nor did the caliphs after him. He adds that pomegranates, peaches, quinces, and similar varieties of fruit were grown in Ta'if during the Prophet's time, and he is not known to have collected the alms tax in them either, nor was that done by any of the early caliphs who succeeded him (Ibn al-ʿArabī, *al-Qabas*, 2:459, 472).

37 Ibn ʿAbd al-Barr, *al-Istidhkār*, 9:270–71; al-Qarāfī, *al-Dhakhīra*, 3:74.

38 Muḥammad ibn ʿAlī al-Shawkānī, *Nayl al-awṭār min ḥadīth Sayyid al-Akhyār: sharḥ Muntaqā al-akhbār*, 4: 203–04; al-Qarāfī, *al-Dhakhīra*, 3:74; cf. ʿAbd al-Razzāq, *al-Muṣannaf*, 4:119. He cites a *ḥadīth* to the opposite effect that no alms are due on green produce. Footnote one explains that it is not of verified authenticity, although there is a disconnected *ḥadīth* with the same meaning that has been followed in praxis by the people of knowledge.

39 The prominent Kufans Ibrāhīm al-Nakhaʿī, Ḥammād ibn Abī Sulaymān, and Abū Ḥanīfa required collection of the alms tax on all such produce whether it was storable or not (Ibn ʿAbd al-Barr, *al-Istidhkār*, 9:275; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:121; Ibn Abī Shayba, *al-Muṣannaf*, 2:371–72; al-Bājī, *al-Muntaqā*, 2: 170; al-Ṭaḥāwī, *Sharḥ*, 2:84–89). Ibn Abī Shayba also attributes the position to Mujāhid (Ibn Abī Shayba, *al-Muṣannaf*, 2:371). Both ʿAbd al-Razzāq and Ibn Abī Shayba also attribute the position to ʿUmar ibn ʿAbd al-ʿAzīz (ʿAbd al-Razzāq, *al-Muṣannaf*, 4:121; Ibn Abī Shayba, *al-Muṣannaf*, 2:371). Ibn Abī Shayba states that ʿUmar directed his representatives in Yemen to collect the alms tax on such produce.

40 Ibn ʿAbd al-Barr, *al-Istidhkār*, 9:270–71; ʿAbd al-Razzāq cites it as a report from Ibrāhīm (ʿAbd al-Razzāq, *al-Muṣannaf*, 4:121). ʿAbd al-Razzāq also cites a transmission from Mūsā ibn Ṭalḥa that al-Ḥajjāj ibn Yūsuf sent him to Iraq to collect alms on its green produce. Mūsā told al-Ḥallāj that he possessed a letter (*kitāb*) from Muʿādh ibn

position not on a specific *ḥadīth* but on the general import (*ʿumūm*) of another well-known *ḥadīth*, which Mālik also transmits in the *Muwaṭṭaʾ*, "Take ten percent of what is watered by the sky, springs, and ground water, and five percent from what is irrigated," which generally agrees with the Kufan *ḥadīth* just mentioned.[41]

When taken as an unqualified legal statement, the *ḥadīth* indicates that the alms tax should be required on all agricultural produce.[42] Ibn ʿAbd al-Barr adds that, in addition to this *ḥadīth*, Abū Ḥanīfa's position was based on all-inclusive application of the Qurʾānic verse 6:141, which mentions pomegranates and other types of fruit and enjoins that their due be paid on the day of their harvest.[43] Abū Ḥanīfa's reasoning in this instance is an illustration of his principle of the generalization of standard legal proofs (*taʿmīm al-adilla*), which stands at the core of his legal method.

In this precept, Mālik invokes his *sunna*-term to signal that the Medinese position is contrary to analogy with a contrary general rule. As we have seen, Abū Ḥanīfa and prominent Kufan jurists before him adhered strictly to analogy in this case. Once again, the textual evidence in *ḥadīth*s is scant, both as regards the Medinese and the Kufan positions alike. The main *ḥadīth* upon which Abū Ḥanīfa probably places reliance and generalizes was shared with the Medinese and other jurists. Their interpretation of it, however, was distinctly different and allowed it to be qualified by contrary ancillary evidence. For Mālik, the Medinese praxis of not collecting alms tax on certain types of agricultural produce was the primary evidence restricting the general application of competing texts. All jurists accept the authenticity of the *ḥadīth* Abū Ḥanīfa relies upon, but the Medinese and most non-Ḥanafī jurists restrict its general implications to apply only to specific types of produce.

Mālik states at the close of the precept that money received from the sale of such non-taxable produce is not subject to the alms tax until a full lunar year has passed from the time of its acquisition. This stipulation appears to be included under the S-XN. Ibn ʿAbd al-Barr knows of no

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Jabal on the authority of the Prophet when he deputed him to Yemen, directing him to collect the alms tax from wheat, barley, raisins, and dates but making no mention of green produce. Al-Ḥajjāj acknowledged that it was true (ʿAbd al-Razzāq, *al-Muṣannaf*, 4:119–20; cf. Ibn Abī Shayba, *al-Muṣannaf*, 2:371). Ibn Abī Shayba transmits the account of Muʿādh ibn Jabal and similar reports from ʿAlī and Abū Mūsā al-Ashʿarī (Ibn Abī Shayba, *al-Muṣannaf*, 2:371).

41 *Muw.*, 1:271; al-Ṭaḥāwī, *Sharḥ*, 2:84–89.

42 Ibn Rushd, *Bidāyā*, 1:149; al-Ṭaḥāwī, *Sharḥ*, 2:84–89.

43 Ibn ʿAbd al-Barr, *al-Istidhkār*, 9:274–275; cf. ʿAbd al-Razzāq, *al-Muṣannaf*, 4:121.

differences among the people of Medina on this aspect of the precept.[44] Maʿmar relates from al-Zuhrī, however, that he did not agree with this provision and required alms from non-taxable fruits and green goods, if they were sold for cash which was equal to the base sum required for alms.[45] If this was in fact al-Zuhrī's position and he continued to hold it, his dissent would contradict Mālik's contention that there was complete consensus in Medina on the precept. The Medinese presumably held that al-Zuhrī finally came to agree with the precept.[46] This is, at least, what Saḥnūn seems to assert in the *Mudawwana* by his report that al-Zuhrī did endorse this position.[47]

3. *SthN-X:*[48] *Bequests to Heirs*

> Yaḥyā ibn Yaḥyā states that he heard Mālik relate that the Qurʾanic verse, "…if one leaves wealth behind, let him make a bequest for parents and relatives…" (Qurʾan 2:180), was repealed by revelation of the Qurānic verses stipulating the shares of inheritance designated for parents and relatives (Qurʾan 4:7, 11–12, 176). Yaḥyā adds that he heard Mālik cite this S-XN-term while asserting that it is impermissible for a person to make a bequest for an heir unless the other rightful heirs allow it. If some allow it and others do not, the bequest will be subtracted from the shares of those who allowed it but not from the shares of those who did not.[49]

Unlike most S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*) terms, the term in this chapter is

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[44] Ibn ʿAbd al-Barr, *al-Istidhkār*, 9:270.

[45] ʿAbd al-Razzāq, *al-Muṣannaf*, 4:120; cf. Ibn Abī Shayba, *al-Muṣannaf*, 2:371. ʿAbd al-Razzāq's own position on the matter agrees that such produce is not directly subject to the alms tax. He stipulates in contrast to the closing clause of Mālik's precept that income accrued from selling fruits and green produce should be taxed at the time of sale, if it amounts to the base sum of coins upon which the alms tax is due (ʿAbd al-Razzāq, *al-Muṣannaf*, 4:118–19). According to Ibn Abī Shayba, this was also the position of Makḥūl (Ibn Abī Shayba, *al-Muṣannaf*, 2:372).

[46] Al-Zuhrī's opinions are often problematic in assessing Mālik's assertions of Medinese concurrence. In this case and many others, al-Zuhrī is on record with a dissenting point of view. Al-Layth ibn Saʿd contended that al-Zuhrī, despite the excellence of his knowledge and considered opinion, frequently changed his opinion in legal matters. Al-Layth adds that one of his associates wrote to al-Zuhrī about a particular matter on several diverse occasions and received three different and contradictory answers (Ibn al-Qayyim, *Iʿlām* [Saʿāda], 3:96).

[47] *Mud.*, 1:253.

[48] *SthN-X* in this precept stands for "the firmly established *sunna* among us about which there is no dissent" (*al-sunna al-thābita ʿindanā al-latī lā ikhtilāf fīhā*).

[49] *Muw.*, 1:765–66; *Muw.* (Dār al-Gharb), 2:315; *Muw.* (Abū Muṣʿab), 2:512–13: *Mwt.* (*Riwāyāt*), 4:15; Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:55; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:265.

qualified by an adjective. It reads "the firmly established *sunna* among us about which there is no dissent" (*al-sunna al-thābita ʿindanā al-latī lā ikhtilāf fīhā*). I classify it as an S-XN term. Both Yaḥyā and Abū Muṣʿab cite the same SthN-X term from Mālik. They also transmit essentially the same legal material with some difference in wording.[50] The chapter does not occur in the recensions of al-Qaʿnabī, Suwayd, and Ibn Ziyād. In the *Tamhīd*, Ibn ʿAbd al-Barr relates the expression without adjectival qualification as a standard S-XN term, which may be an editorial oversight.[51] Mālik's insertion of the adjecive "firmly established" in the term reflects how his terminology is not absolutely fixed but vacillates between explicit semantic statements and standardized terminological expressions.

Saḥnūn does not provide a full discussion of the precept and gives no citation of terms. His presentation lacks the details of the *Muwaṭṭaʾ* as regards the basic precept, but, in typical *Mudawwana* fashion, it elaborates a number of important questions of legal interpretation and illustrates how the *Mudawwana* complements the *Muwaṭṭaʾ* as a compendium of legal interpretation based on the primary precepts set forth in the *Muwaṭṭaʾ*.[52] Saḥnūn inserts transmitted materials vindicating Mālik's S-XN but without stating the term or precept in detail. He cites *ḥadīth*s from Ibn Wahb and Ibn Lahīʿa declaring that bequests to heirs are not permissible. He cites a *ḥadīth* from Ibn Wahb that the Prophet said in the year of the

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[50] *Muw.* (Dār al-Gharb), 2:315; *Muw.* (Abū Muṣʿab), 2:512–13: *Mwt.* (*Riwāyāt*), 4:15; Ibn ʿAbd al-Barr gives the same term in *al-Istidhkār*, 23:55 but gives the term S-XN in *al-Tamhīd*, 13:265.

[51] Ibn ʿAbd al-Barr gives the same term as Yaḥyā and al-Qaʿnabī in *al-Istidhkār*, 23:55 but cites it as S-XN in *al-Tamhīd*, 13:265. *Al-Istidhkār* is a more comprehensive commentary of the *Muwaṭṭaʾ* and follows its text more closely than the *Tamhīd*, which is concerned with the *ḥadīth*s of the *Muwaṭṭaʾ*. The S-XN in the *Tamhīd* is probably an editorial mistake, but it reflects how close the qualified term of this chapter is to S-XN in the editor's eyes—be that Ibn ʿAbd al-Barr or another editor—and that confusion is understandable.

[52] *Mud.*, 4:289, 296, 307–09; *Mud.* (2002), 10:149–50, 169–70, 201–05. Saḥnūn provides an application of the principle of preclusion (*sadd al-dharāʾiʿ*) in establishing that heirs cannot give legal testimony in bequests that bring them personal benefit (*Mud.*, 4:289). He asks Ibn al-Qāsim about a man who makes a bequest to his brother who, at the time, is a valid heir. The man making the bequest later has a son who blocks his brother from inheritance. He asks if the earlier bequest will remain valid? Ibn al-Qāsim replies that it shall, because the brother is no longer technically an heir. He informs Saḥnūn that he heard this directly from Mālik. Saḥnūn asks about a bequest to an unrelated woman whom the man making the bequest later marries. Ibn al-Qāsim informs him that the bequest will now be invalid, because the woman has become a technical heir through marriage (*Mud.*, 4:296). Saḥnūn asks about a bequest to an heir to make pilgrimage on the deceased's behalf, and Ibn al-Qāsim gives an interesting discussion citing an opinion of Mālik that he never changed. Ibn al-Qāsim also gives a personal opinion contrary to Mālik on a related issue (*Mud.*, 4:309, cf. 4:307).

conquest of Mecca that bequests were not allowable to heirs unless the heirs permit them.[53] Saḥnūn adds post-Prophetic reports giving the legal interpretations relevant to this precept from Rabīʿat al-Raʾy and Yaḥyā ibn Saʿīd.[54] The *ḥadīth* was not regarded as strong by *ḥadīth* scholars.[55] Ibn ʿAbd al-Barr contends that this *ḥadīth* was originally a post-Prophetic report on the authority of Ibn ʿAbbās, which was inexactly transmitted as a *ḥadīth*.[56]

In the opinions of Ibn Rushd, al-Bājī, al-Zurqānī, and others, this precept falls under the category of transmissional praxis.[57] Jurists had widespread agreement that bequests should not ordinarily be made to heirs and that the above Qurʾānic verse (Qurʾan 2:180) directing people to make such bequests was repealed.[58] Technically, "heirs" in Islamic legal parlance are those persons related to the deceased by kinship or marriage who are specifically designated as such by the appropriate Qurʾānic verses. There was consensus among the jurists that other relatives who are not designated for inheritance in these verses are not technically classified as heirs.[59]

It is clear from Mālik's wording in the *Muwaṭṭaʾ* that he regarded the Qurʾānic verse on bequests to have been repealed. The Kufans and many other jurists shared this point of view.[60] The Yemeni jurist Ṭāwūs and others held, however, that the verse had not been repealed but merely rendered specific (*makhṣūṣ*) by the revelation of the later verses (Qurʾan 4:7, 11–12, 176), which set the stipulated shares of inheritance. In their dissenting view, the later verses restricted the earlier one to bequests for

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[53] *Mud.*, 4:307–08; *Mud.* (2002), 10:202–04.

[54] *Mud.*, 4:307.

[55] See Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:20; al-Bājī, *al-Muntaqā*, 6: 179; al-Zurqānī, *Sharḥ*, 4: 482.

[56] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:20.

[57] Ibn Rushd, *Bidāya*, 2:201; al-Bājī, *al-Muntaqā*, 6:179; al-Zurqānī, *Sharḥ*, 4:482; Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:14; idem, *al-Istidhkār*, 23:20; al-Ṭaḥāwī, *Sharḥ*, 4:219–224; al-Ṭaḥāwī, *Mukhtaṣar*, 5:5–6; al-Qarāfī, *al-Dhakhīra*, 7:15–16.

[58] Al-Zurqānī, *Sharḥ*, 4:482; see also al-Bājī, *al-Muntaqā*, 6:179; Ibn Rushd, *Bidāya*, 2:201.

[59] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:12. In general, heirs receive set percentages according to Qurʾānic stipulations. Bequests fall outside the stipulated allotments of inheritance and are customarily made to non-heirs but may not exceed one third of the overall estate of the deceased at death. Most jurists held that it was highly recommended to make bequests for relatives who are not technically heirs, especially if they are poor (see Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:14–15).

[60] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:11–13.

relatives who were not included among the stipulated heirs such as relatives on one's maternal side.[61]

Ibn ʿAbd al-Barr states that the jurists agreed on the general precept that bequests could not be made to heirs. They differed on the permissibility and procedure involved in such bequests, if the designated heirs permitted them. Most jurists allowed such bequests, when the heirs agreed.[62] Ṭāwūs, Ibrāhīm al-Nakhaʿī, and Qatāda held that legal bequests in general—whether to heirs or non-heirs—were not valid unless the estate of the person making the bequest was sufficiently large such as a thousand or several thousand pieces of silver. They based this on their reading of the Qurʾānic verse of bequests, which directs persons leaving "wealth" (*khayr*) behind to make bequests. Paltry amounts of gold and silver, in their view, did not constitute "wealth." What little the deceased left in such cases should only go as inheritance to rightful heirs so that they are not left destitute.[63] Most jurists disagreed with the limitation of bequests to "wealth" as defined above as "ample wealth." They held that making bequests was recommended no matter what the size of the deceased's estate as long as the bequests did not exceed one third of the total value and were not made to Qurʾānic heirs. This was the opinion of Mālik, Abū Ḥanīfa, al-Thawrī, al-Awzāʿī, al-Shāfiʿī, Ibn Ḥanbal, and Ibn Rāhawayh and is implicit in Mālik's S-XN.[64]

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[61] See al-Zurqānī, *Sharḥ*, 4: 482; Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:10–11

[62] Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:265; idem, *al-Istidhkār*, 23:18–20; cf. Ibn Abī Shayba, *al-Muṣannaf*, 6:209.

[63] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:10–11; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:62–64. ʿAlī, Ibn ʿAbbās, and ʿĀʾisha reportedly held this view also.

[64] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:11. See also Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:19–20; idem, *al-Tamhīd*, 13:265; al-Zurqānī, *Sharḥ*, 4:482; see also al-Bājī, *al-Muntaqā*, 6:179; Ibn Rushd, *Bidāya*, 2:201. Ibn ʿAbd al-Barr, Ibn Rushd, al-Bājī, and al-Zurqānī note that dissent existed about the validity of the provision Mālik mentions at the end of this precept regarding whether bequests for non-stipulated heirs are valid when taken from the shares of heirs who agreed to allow it. Ibn Rushd, Bājī, and al-Zurqānī interpret the position of Mālik and others who agreed that bequests could be made to heirs with the permission of the other heirs was based on the fact that their rights were not in danger of being violated in such cases. Ibn Abī Zayd states similarly that laws of bequest are governed by the Qurʾānic principle (4:12) that no mutual harm shall be caused (*ghayr muḍārr*) (Ibn Abī Zayd, *al-Nawādir*, 11:350). The contrary opinion, in Ibn Rushd's view, was predicated on the presumption that the prohibition of bequests to heirs was not rationale-based (*muʿallal*), which put it beyond the scope of legal interpretation. Among later jurists, Dāwūd al-Ẓāhirī and al-Muzanī, both of whom belonged to the generation after Mālik, took strong positions prohibiting bequests to heirs whether the other heirs permitted or not. Their position was based on the overt meaning of the *ḥadīth* that bequests are not valid for heirs. Ṭāwūs and other early jurists took a similar position unless the estates were large enough to be validly considered as wealth (ʿAbd al-Razzāq, *al-Muṣannaf*, 9:63–64).

Most of the jurists held—as does Mālik in this S-XN—that bequests to heirs were conditional on the permission of the other heirs.[65] If they permitted them, they were valid. If they did not permit them, they were invalid. They differed as to whether such procedures were to be called bequests or gifts. The difference is not semantic. Defining such transferrals of property as gifts involved certain legal prerogatives such as the ability to reclaim them that did not pertain to the more absolute transference of property involved in bequests.[66]

As noted, there is a *ḥadīth* prohibiting bequests for heirs. It is transmitted through several channels, although al-Bājī and al-Zurqānī question the soundness of these channels. Al-Bājī states that despite differences of opinion regarding the validity of this *ḥadīth*, the jurists were always in widespread agreement about the soundness of its application in practice. Al-Zurqānī and others relate a *ḥadīth* permitting bequests to be taken from the shares of heirs who permit it, but they add that there is doubt about the soundness of this *ḥadīth*.[67] There is no mention of any other significant contrary *ḥadīth* explicitly disallowing such bequests under all circumstances. According to Ibn Rushd, the dissenting opinions were not based on a contrary *ḥadīth* but on a literal reading of the overt meaning of the *ḥadīth* referred to above, "bequests shall not be made to heirs."[68]

This widely agreed precept is another example of a standard matter of law for which there was limited and inconclusive textual evidence. The weak supporting *ḥadīth*s transmitted in the matter were shared by the jurists and generally confirmed the majority point of view. The primary

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[65] Differences on bequests to heirs went back to the earliest period and involved the Medinese as well as others. ʿAlī, Ibn ʿUmar, and Ibn Jubayr took strong positions against bequests made to heirs. In one post-Prophetic report in Ibn Abī Shayba, Ibn ʿUmar is reported to have regarded the making of bequests to heirs as an innovation begun by the early Khārijīs (*al-Ḥarūriyya*) (Ibn Abī Shayba, *al-Muṣannaf*, 6:209). ʿAbd al-Razzāq relates that ʿUmar ibn ʿAbd al-ʿAzīz held that a person could make a bequest (called *ṣadaqa* in this report) to heirs if it was less than one third of the estate. Al-Thawrī made special allowances for bequests to the wife (see ʿAbd al-Razzāq, *al-Muṣannaf*, 9:70). Al-Ḥasan al-Baṣrī held that if a person made a bequest to indigent heirs, they would be allowed to receive "one third of one third" (one ninth) of his estate. Ibn Sīrīn held that bequests of less than one third of the estate were generally permissible as long as they did not arouse suspicion of abuse. Ibn al-Musayyab reportedly held a similar position (ʿAbd al-Razzāq, *al-Muṣannaf*, 9:95, 83).

[66] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:19.

[67] Al-Bājī, *al-Muntaqā*, 6:179; al-Zurqānī, *Sharḥ*, 4:482; Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:20.

[68] Ibn Rushd, *Bidāya*, 2:201. Dāwūd al-Ẓāhirī held it was obligatory to make bequests for non-inheriting relatives; see Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:14–15.

ḥadīth in question is regarded as authentic and has numerous solitary paths of transmission, many of which did not have the same degree of formal authenticity.[69] As indicated, Ibn ʿAbd al-Barr mentions a *ḥadīth* transmitted from Ibn ʿAbbās stating that the Prophet had allowed such bequests if the heirs agreed. Ibn ʿAbd al-Barr asserts that it is not an authenticated transmission but originated as a post-Prophetic statement of Ibn ʿAbbās.[70]

In Islamic law, bequests are contrary to analogy with other rulings governing disposal of private property. Ordinarily, one is free to dispose of one's property as one sees fit through commercial transactions, gift giving, charity, and similar exchanges. This is not the case with laws of bequests and inheritance. Heirs have a right over one's estate once death approaches through conditions such as critical sickness. As a rule, bequests cannot be made to heirs and cannot exceed one third of the total estate. Mālik's use of the *sunna*-term here fits the pattern of his invoking the *sunna* in precepts that are not in keeping with standard legal analogies.

Mālik apparently relied on Medinese praxis to gloss the relevant Qurʾānic verses and flesh out the fuller scope of this precept. Praxis verifies that the first verse mentioned in the precept was repealed by later inheritance verses. As is often the case with Mālik's use of the non-textual source of praxis, it establishes legal parameters in cases where nothing explicit is stated in the relevant legal texts (here the later Qurʾānic verses). In this case, praxis indicates that the making of bequests to parents and relatives had been repealed. Primary sources indicate, as we have seen, that dissent on this precept existed in Medina in the earliest period as it did elsewhere. This throws the conclusiveness of Mālik's denial of dissent in his S-XN into question.

4. *SN and S-XN: Marriage Annulment through Mutual Cursing* (Liʿān)

Mālik cites a lengthy *ḥadīth* describing how the Prophet administered the ruling of mutual cursing (*liʿān*) when a spouse accuses his partner of adultery but lacks sufficient evidence. Mālik adds a comment from al-Zuhrī that the Prophet's precedent in this case became the *sunna* for mutual cursing. Mālik cites a second *ḥadīth* stating that the Prophet once administered the policy of mutual cursing, separated the former spouses, and put the child in

[69] Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:265; idem, *al-Istidhkār*, 23:13–24; Ibn Abī Shayba, *al-Muṣannaf*, 6:209; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:70; cf. al-Qarāfī, *al-Dhakhīra*, 7:15–16.

[70] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:20.

the mother's custody. Mālik cites the Qur'ānic verses that contain the wording of the oaths of mutual cursing (Qur'an 24:6).

Mālik states that it is the SN (the *sunna* among us; *al-sunna ʿindanā*) that spouses who perform the act of mutual cursing are perpetually forbidden to remarry. If the former husband later retracts his oath, he shall be flogged for slandering his wife. He will then be permitted to claim paternity (if there was a child), but he will still not be allowed to remarry the mother. Mālik states that this is the S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*).[71]

I classify Mālik's SN term here as inclusive and overlapping with the S-XN. The SN occurs, however, only in the recension of Yaḥyā. In the recensions of Abū Muṣʿab and Suwayd, S-XN is the only term cited. Both Abū Muṣʿab and Suwayd use the word *sunna* without any qualification where Yaḥyā cites the term SN. This strengthens my presumption that SN in Yaḥyā's transmissions stands for S-XN.[72] The precept does not occur in the present recensions of al-Qaʿnabī or Ibn Ziyād.

Similarly to Abū Muṣʿab and Suwayd, Saḥnūn transmits from Mālik in the *Mudawwana* that it is a *sunna* to separate the husband and wife in the case of mutual cursing and does not invoke the term SN. He notes that the marriage bonds are dissolved, and they may not remarry under any circumstances. Saḥnūn's text does not use the term S-XN as it occurs in the above recensions but a slight variation in wording, "the *sunna* among us about which there is no doubt" (*al-sunna ʿindanā al-lattī lā shakk fīhā*) which he transmits from Mālik and then through Ibn Wahb

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[71] *Muw.*, 2:566–68; *Muw.*, (Dār al-Gharb), 2:76–79; Ibn ʿAbd al-Barr, *al-Tamhīd*, 11:231–32; *Muw.* (Abū Muṣʿab), 1:624–25; *Muw.* (Suwayd), 281; *Muw.* (Riwāyāt), 3:262–65.

[72] *Muw.*, (Dār al-Gharb), 2:76–79; *Muw.* (Abū Muṣʿab), 1:624–25; *Muw.* (Suwayd), 281; *Muw.* (*Riwāyāt*), 3:262–65. He gives the S-XN in the same form as in the recension of Yaḥyā as "the *sunna* about which there is no doubt among us and no difference of opinion." Cf. Ibn ʿAbd al-Barr, *al-Tamhīd*, 11:231–32, which also gives the S-XN; cf. Muḥammad ibn al-Ḥasan al-Shaybānī, *Muwaṭṭaʾ al-Imām Mālik: riwāyat Muḥammad ibn al-Ḥasan al-Shaybānī maʿa al-taʿlīq al-mumajjad ʿalā Muwaṭṭaʾ Muḥammad: sharḥ al-ʿallāma ʿAbd al-Ḥayy al-Luknawī*, ed. Taqī al-Dīn al-Nadawī, 2:552–53, henceforth cited as *Muw.* (al-Shaybānī/al-Nadawī).

After this *sunna* precept, Mālik cites two AN-rulings that are connected to it and appear to be the products of legal interpretation. The first of them pertains to a spouse performing mutual cursing after already repudiating his wife a third and final time, when he learns that she is pregnant but claims that he is not the child's father. The second AN-precept states that the application of mutual cursing holds for the Christian or Jewish wife of a Muslim just as it pertains to Muslim wives (slave or free). Saḥnūn relates this last AN-precept from Abū al-Zinād—the transmitter of the Seven Jurists of Medina—who refers to it, however, not as AN but as MḌS (the *sunna* has long been established; *maḍat al-sunna*) (*Mud.*, 2:336).

on the authority of al-Zuhrī, Yaḥyā ibn Saʿīd, and Rabīʿat al-Raʾy.[73] Saḥnūn transmits *ḥadīth*s on mutual cursing from Ibn ʿUmar and Sahl ibn Saʿīd al-Anṣārī. Sahl states that he was present at a mutual cursing performed in the Prophet's presence. Sahl then adds that the procedure became "the long established *sunna*" (MḌS; the *sunna* has long been established; *maḍat al-sunna*) that the mutual cursors are separated and never allowed to remarry.[74]

This *sunna* precept falls under the classification of transmissional praxis. The *ḥadīth* Mālik cites at the beginning of his discussion relates the precept directly to Prophetic precedent in addition to its being supported by a Qurʾānic verse. The fact that it is transmissional praxis is further corroborated by the *ḥadīth*s just mentioned in the *Mudawwana*, the second of which refers to mutual cursing as "the established *sunna*" (MḌS), indicating unbroken continuity with the Prophetic past. Al-Zuhrī explicitly states, "This became afterward the *sunna* regarding those who perform the mutual cursing." Mālik and al-Zuhrī both use the word *sunna* explicitly in this precept to refer to the *sunna* of the Prophet.

This example stands out from the preceding three in that Mālik supports it by referring to two *ḥadīth*s. But, as is often the case, the *sunna* precept as set forth in the *Muwaṭṭaʾ* provides details that are not explicit

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[73] *Mud.*, 2:337; *Mud.* (2002), 5:181.

[74] *Mud.*, 2:338: *Mud.* (2002), 5:182. Saḥnūn's passage illustrates again how the *Mudawwana* corroborates and elaborates on the *Muwaṭṭaʾ*. Although Saḥnūn quotes from Mālik directly, he adds supporting information from *ḥadīth*s and post-Prophetic reports. He provides extensive legal details from Mālik, Ibn al-Qāsim, and earlier Medinese scholars regarding unusual circumstances. The *Mudawwana* delves into issues such as how mutual cursing works in the case of two Muslim co-wives or a Jewish or Christian wife married to a Muslim freeman. How does it apply to Muslim slaves married to each other or to Muslim slaves married to Jewish or Christian women? Saḥnūn asks about a man who has been long absent from his wife and finally returns home to learn that she has deceased and left a child whom he refuses to recognize as his own. What of a man who marries a woman but does not cohabitate with her? Yet she conceives a child and claims that he would meet with her in her family's house secretly? The *Mudawwana* provides the details that Muslims performing mutual cursing do so in the presence of the *imām* and in their central mosques or similar places of religious sanctity. The *Mudawwana* relates that this does not apply to the Christian or Jewish wives of a Muslim. Rather, they take their oaths in their churches or at other religious sites they hold in sanctity. They take the oath in God's name just as Muslims do. Saḥnūn's material clarifies the ruling in the case of a husband who initiates the process of mutual cursing but does not complete it and declares that he has borne false witness against his wife. He raises the question of a boy married to an older woman who accuses her of adultery. Ibn al-Qāsim relates from Mālik that the boy's claim is void because he is under age. Neither is he allowed to perform mutual cursing because of his age, nor is he held guilty of slander for the same reason (*Mud.*, 2:335–38; cf. idem, 4:71).

in the *ḥadīth* texts. The first detail is that the spouses must be separated after the act of mutual cursing. The second is that they are never allowed to remarry. Ibn ʿAbd al-Barr states that all the early jurists of Medina, the Hijaz, Syria, and Kufa agreed that mutual cursing takes the place of repudiation and that it is a *sunna* that the husband and wife be separated.[75] Al-Ṭaḥāwī states, however, that Abū Ḥanīfa and his circle did not hold this position. They contended that mutual cursing did not in itself separate the husband and wife. Rather, it was required that they be officially separated by a judge. He attributes this position to Sufyān al-Thawrī and al-Awzāʿī.[76]

The second point that spouses separated by mutual cursing are never allowed to remarry is one of the main points of Mālik's S-XN and was the principal point of dissent. Ḥammād ibn Abī Sulaymān, Abū Ḥanīfa, and al-Shaybānī held that the husband could remarry his former wife on the basis of a new contract, if he repudiated his oath and took the punishment for slander. This opinion is also attributed to Saʿīd ibn Jubayr, Saʿīd ibn al-Musayyab, Ibrāhīm al-Nakhaʿī, and al-Zuhrī, although the contrary is also attributed to both al-Zuhrī and al-Nakhaʿī.[77] There was internal dissent on the matter in Kufa. Abū Yūsuf, Zufar ibn Hudhayl, and al-Thawrī held the Medinese position on this matter. Ibn ʿAbd al-Barr indicates that there was dissent in Medina on this matter.[78] Despite a supporting *ḥadīth*,

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[75] Ibn ʿAbd al-Barr, *al-Tamhīd*, 11:214; idem, *al-Istidhkār*, 17:202. Al-Shaybānī notes in his recension of the *Muwaṭṭaʾ* that the Kufans agree on this matter; *Muw.* (al-Shaybānī/al-Nadawī), 2:552–53.

[76] Al-Ṭaḥāwī, *Mukhtaṣar*, 2:505. The Basran jurist ʿUthmān al-Battī did not agree. He held that mutual cursing did not end the bond of marriage until the spouses are divorced. He preferred that a spouse performing mutual cursing repudiate his wife afterwards (Ibn ʿAbd al-Barr, *al-Tamhīd*, 11:214; cf. idem, *al-Istidhkār*, 17:234–36; al-Ṭaḥāwī, *Mukhtaṣar*, 2:505). This stipulation is given vague support by another *ḥadīth*, which Mālik does not cite, according to which the Prophet stated that the husband would have no possibility of taking his wife back after the mutual cursing (Ibn ʿAbd al-Barr, *al-Tamhīd*, 11:213–14; ʿAbd al-Razzāq, *al-Muṣannaf*, 7:119). It is an ambiguous text. Some jurists understood it to mean merely that the Prophet separated the mutual cursers by sundering the marriage bond himself as a judicial act in addition to the act of mutual cursing (Ibn ʿAbd al-Barr, *al-Tamhīd*, 11:213).

[77] Ibn ʿAbd al-Barr, *al-Istidhkār*, 17:234–36; idem, *al-Tamhīd*, 11:216–17; ʿAbd al-Razzāq, *al-Muṣannaf*, 7:112–14; Ibn Abī Shayba, *al-Muṣannaf*, 4:116, 199; al-Ṭaḥāwī, *Mukhtaṣar*, 2:506–07.

[78] Abū Ḥanīfa agreed that a husband who retracts his oath of mutual cursing should be flogged for slander and given paternity rights if there is a child, but Abū Ḥanīfa allowed the former husband to remarry his former wife upon retraction of his oath. Ibn Rushd adds that other jurists held that the former wife would immediately become the wife of her former husband, if he admitted to having lied in his oath and submitted to the required flogging, and al-Shāfiʿī later concurred with this earlier opinion (Ibn Rushd, *Bidāya* [Istiqāma],

Ibn ʿAbd al-Barr states that this question lacked dependable textual support and was primarily based on analogy (*muqāyasa*) and legal reflection (*naẓar*).[79]

From Mālik's point of view, the precept of mutual cursing is contrary to analogy with the standard precepts concerning repudiation (*ṭalāq*) in that it precludes the possibility of remarriage.[80] Abū Ḥanīfa and others like him who held it permissible for the husband and wife to remarry after mutual cursing judged it as analogous to repudiation in this regard.[81]

5. *S-XN and SN*: Zakāh *on Inheritance*

> Mālik states it is the S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*) that heirs who inherit commercial goods, houses, or slaves or the right to collect debts due to the deceased are not required to pay the alms tax (*zakāh*) on their earnings from selling such goods or receiving payment of debts until they have had the money in their

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2: 120; Ibn ʿAbd al-Barr, *al-Tamhīd*, 11:217; Ibn Abī Shayba, *al-Muṣannaf*, 5:503–04; cf. *Mud*. 2:337–38).

Saʿīd ibn al-Musayyab is said to have allowed the husband to remarry if he repudiated himself and took the punishment for slander. Al-Ḥasan al-Baṣrī, Ibrāhīm al-Nakhaʿī, and Ibn Shihāb al-Zuhrī are also said to have held this opinion, although they are reported to have held the contrary opinion as well (Ibn ʿAbd al-Barr, *al-Tamhīd*, 11:216–17; idem, *al-Istidhkār*, 17:234–36; ʿAbd al-Razzāq, *al-Muṣannaf*, 7:112–14).

The dissenting position was also upheld by al-Layth ibn Saʿd, al-Awzāʿī, and many of the later jurists, notably al-Shāfiʿī, Abū Thawr, Ibn Ḥanbal, and Isḥāq ibn Rāhawayh (Ibn ʿAbd al-Barr, *al-Istidhkār*, 17:234–36; idem, *al-Tamhīd*, 11:216–17; ʿAbd al-Razzāq, *al-Muṣannaf*, 7:112–14; Ibn Abī Shayba, *al-Muṣannaf*, 4:116, 199; 6:10). The position that the spouses separated by mutual cursing would never be allowed to remarry was said to be the opinion of ʿUmar, ʿAlī, Ibn Masʿūd and "most of the jurists among the Successors in Medina" (Ibn ʿAbd al-Barr, *al-Tamhīd*, 11:216; idem, *al-Istidhkār*, 17:234–36; ʿAbd al-Razzāq, *al-Muṣannaf*, 7:112–14).

79 Ibn ʿAbd al-Barr, *al-Istidhkār*, 17:237.

80 In Islamic law, upon the first and second instances of repudiation, a waiting period (*ʿidda*) follows the husband's declaration of repudiation. During this period, the husband is allowed to take his wife back. If the waiting period transpires before the husband takes back his repudiated wife, she becomes divorced (*bayyina*). He may, however, remarry her on the basis of a new contract and dowry, if she consents to remarry him. Her husband would, however, be prohibited from remarrying his wife, if it were the third repudiation, after which she becomes immediately and irrevocably divorced.

81 Noting the anomalous nature of mutual cursing, al-Bājī states that some jurists classified it for that reason as an annulment (*faskh*) of marriage and not a repudiation. He personally disagrees with that classification because remarriage is allowed in cases of annulment (see al-Bājī, *al-Muntaqā*, 4:78). Mutual cursing is also contrary to analogy with the rules of evidence for establishing sexual infidelity, which require a minimum of four eyewitnesses. In the case of mutual cursing, there is only a single witness, the repudiating husband. The wife is able to avoid punishment by taking a contrary oath. This much of the ruling is established by Qurʾānic texts and was not a matter of dissent among the jurists.

> possession for a full lunar year (*ḥawl*). Mālik adds that it is the SN (the *sunna* among us; *al-sunna ʿindanā*) that heirs are not required to pay alms tax on the money they receive as inheritance until they have had that money in their possession for a full lunar year.[82]

The two *sunna*-precepts cited here from the *Muwaṭṭaʾ* are not identical, although they are similar and overlap. The S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*) pertains to the inheritance of non-monetary properties such as houses on which the alms tax is not due until the property is sold. It also pertains to money collected as debts. The SN pertains to the inheritance of monetary wealth (gold and silver) and livestock. In the S-XN precept, the alms tax is not paid on the goods themselves but whatever money one accrues by selling the property or collecting the debt. The SN, on the other hand, pertains to money and livestock, which unlike goods and houses fall directly under the purview of the alms tax. It is conceivable that a jurist could agree to the S-XN regarding non-monetary property and collectable debts but disagree on the SN. According to ʿAbd al-Razzāq, al-Zuhrī held a dissenting position on the SN precept.[83]

This precept occurs in the recensions of Yaḥyā, al-Qaʿnabī, and Abū Muṣʿab.[84] It does not appear in the transmissions of either Suwayd or Ibn Ziyād. Al-Qaʿnabī uses the same terms as Yaḥyā. Both recensions cite the first precept as SN and the second as S-XN with essentially the same texts. Abū Muṣʿab employs the term SN for both precepts and does not cite the term S-XN.[85]

Saḥnūn transmits the same precept in the *Mudawwana*, citing material from Mālik's *Muwaṭṭaʾ* through Ibn al-Qāsim. For both precepts, Ibn al-Qāsim—like Abū Muṣʿab—cites the term SN and does not use the term S-XN.[86]

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[82] *Muw.*, 1:252; *Muw.*, (Dār al-Gharb), 1:343; Ibn ʿAbd al-Barr, *al-Istidhkār*, 9:88; *Muw.* (Abū Muṣʿab), 259; *Muw.* (al-Qaʿnabī), 285; *Mwt.* (*Rịwāyāt*), 2:242–43.

[83] ʿAbd al-Razzāq, *al-Muṣannaf*, 4:79.

[84] *Muw.*, 1:252; *Muw.*, (Dār al-Gharb), 1:343; Ibn ʿAbd al-Barr, *al-Istidhkār*, 9:88; *Muw.* (Abū Muṣʿab), 259; *Muw.* (al-Qaʿnabī), 285; *Mwt.* (*Rịwāyāt*), 2:242–43.

[85] *Muw.* (Abū Muṣʿab), 259; cf. Ibn ʿAbd al-Barr, *al-Istidhkār*, 9:88.

[86] *Mud.*, 1:231; *Mud.* (2002), 136. Saḥnūn transmits supporting post-Prophetic reports in support of Mālik's precept and shows its continuity within the Medinese tradition. He cites transmissions from Ibn al-Qāsim and Ibn Wahb on Mālik's authority that al-Qāsim ibn Muḥammad, one of the prominent Seven Jurists of Medina, described the precept of not taxing accretions until a full lunar year had passed as the policy of the caliph Abū Bakr. He notes that Abū Bakr would, however, deduct alms taxes that were due from people's allotments (*ʿaṭāʾ*) when he distributed them. Abū Bakr's policy does not contradict Mālik's

In light of the above discrepancies between transmissions, it may be that the terms S-XN and SN are meant to be equivalent in the texts of al-Qaʿnabī and Yaḥyā, in which case SN appears to be an inclusive term. As an inclusive term, the semantic range of SN includes precepts upon which there was complete consensus, although it would not be within the semantic range of S-XN to stand for precepts upon which there had been continuous dissent in Medina among those whom Mālik regarded as legitimate constituents of local consensus.[87]

Both *sunna*-precepts were issues of dissent between the Medinese and the jurists of Kufa, including Abū Ḥanīfa, his followers, and Sufyān al-Thawrī.[88] Their contrary positions were based on the contrasting definitions that the jurists of Medina and Kufa gave to aggregate wealth upon which the alms tax was due. The Kufans defined a person's wealth as a single entity regardless of whether or not it was made up of base capital (*al-aṣl*), profits (*arbāḥ*) on the base capital, or outside accretions (*fawā'id*) (such as inheritance, gifts, wages, and newly born livestock). Mālik and the Medinese made a distinction for purposes of the alms tax between base

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precept, since the caliph would not take the alms tax on the allotments themselves if no tax was due on other property. ʿAbd al-Razzāq transmits the same account about the caliph Abū Bakr in his *Muṣannaf* and clarifies that Abū Bakr was not taking the alms tax on the allotments themselves but in lieu of other property on which it had become due (ʿAbd al-Razzāq, *al-Muṣannaf*, 4:75–76; cf. *Mud.*, 1:233). Saḥnūn relates similar information from the caliph ʿUthmān. He transmits a post-Prophetic report from Ibn ʿUmar on the principle of not immediately taxing accretions. Ibn Wahb asserts that people of knowledge have transmitted similar information regarding ʿUthmān, ʿAlī, Rabīʿat al-Raʾy, Yaḥyā ibn Saʿīd, Sālim ibn ʿAbd-Allāh ibn ʿUmar, and ʿĀ'isha. Saḥnūn relates from Ibn Mahdī who corroborates that ʿAlī, Ibn ʿUmar, and ʿĀ'isha upheld this policy (*Mud.*, 1:233).

ʿAbd al-Razzāq and Ibn Abī Shayba relate information similar to Saḥnūn in the *Mudawwana*. They give post-Prophetic reports establishing the ʿAlī, Ibn ʿUmar, Nāfiʿ, ʿUmar ibn ʿAbd al-ʿAzīz, and others held to the principle of accretions in a manner similar to Mālik (Ibn Abī Shayba, *al-Muṣannaf*, 2:386–87; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:75). They indicate that Makḥūl held views similar to Abū Ḥanīfa and the later Kufans, holding that person's possessing the minimum amount upon which the alms tax is due should designate a month of the year in which to pay the alms tax. Accretions should all be taxed with base capital during that month. If one has not designated such a month, the alms tax should be paid on accretions immediately upon receiving them (ʿAbd al-Razzāq, *al-Muṣannaf*, 4:79). Ibn ʿAbbās, Ibn Masʿūd, Ibn Jurayj, and al-Thawrī also held the position that accretions should be immediately taxed (ʿAbd al-Razzāq, *al-Muṣannaf*, 4:78–81). Ibn Abī Shayba and ʿAbd al-Razzāq relate that al-Zuhrī held a similar opinion that accretions should be immediately taxed along with one's aggregate wealth in a manner similar to the Kufans (Ibn Abī Shayba, *al-Muṣannaf*, 2:387; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:79).

[87] For discussion of how Mālik's terms overlap and constitute inclusive and exclusive categories, see Abd-Allah, "*ʿAmal*," 419–34, 523–29.

[88] ʿAbd al-Razzāq, *al-Muṣannaf*, 4:80–81; al-Ṭaḥāwī, *Mukhtaṣar*, 1:422–23.

capital and resulting profits, on the one hand, and, on the other, between accretions that had no direct connection to base capital or profits.[89]

According to the Kufans, whenever the amount of a person's wealth reached the base sum (*niṣāb*) upon which the alms tax is due, that person was required to pay the alms tax after one full lunar year had passed over the entirety of his or her personal wealth, which was taken as a single entity, despite earnings and accretions that might have been accrued during a period of less than one lunar year.[90] The Kufan position diverged in this regard from both Mālik's S-XN and SN.

In contrast to the Kufans, Mālik held that accretions were not taxed along with base capital but were given independent dates according to when they were received. Profits derived from the base capital, on the other hand, should be computed as part of the overall capital upon which the alms tax was due once a full lunar year had passed over the base capital, regardless of whether the profits had been made a full year before the due date or only a single day. Mālik held that the natural increase (accretion) of livestock—camels, cattle, and sheep—was also calculated as part of the entire herd at the time when the alms tax is due, whether the offspring had been born a full year earlier or only a day.

For Mālik, outside accretions to wealth were anomalous. They were only added to the base capital as long as it remained below the minimum level upon which the alms tax was due. If the accretions were sufficiently large to bring the base capital above the minimal level, the beginning of the lunar year period was marked from the time the accretion was received. Additional accretions were not added to one's base capital. Each new accretion, including the money received from inherited property or receipt of an inherited debt, would be assigned its own due date, as reflected in the *sunna*-precepts in the above example.[91]

Mālik's commentators define the principle behind the Medinese position as "the right of growth" (*ḥaqq al-tanmiya*). According to their view, the alms tax can only be required once the owner has had a full lunar year's opportunity to increase his or her new capital. The right of growth

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[89] See Ibn Rushd, *Bidāya*, 1:159–61; cf. al-Bājī, *al-Muntaqā*, 2:112; al-Zurqānī, *Sharḥ*, 2:327; al-Ṭaḥāwī, *Mukhtaṣar*, 1:422–23.

[90] See Ibn Rushd, *Bidāya*, 1:160.

[91] See Ibn Rushd, *Bidāya* 1:159–62; al-Bājī, *al-Muntaqā*, 2:112; al-Zurqānī, *Sharḥ*, 2:327.

is a fundamental principle underlying Mālik's concept of the alms tax in the *Muwaṭṭa'* and *Mudawwana*.[92]

According to Ibn Rushd, two legal texts of generally accepted authenticity among the early jurists apply in this case to Mālik's S-XN and SN, although neither text explicitly bears out Mālik's position. The first is a *ḥadīth* reporting that the Prophet said that no alms tax was required on wealth until a full lunar year had transpired after its possession. The second text was a post-Prophetic report according to which the caliph ʿUmar ibn al-Khaṭṭāb included newly born animals as part of the total herd of livestock upon which the alms tax is due.[93]

The Medinese and the Kufans shared both set of texts and accepted the validity of the precepts as set forth in them but differed notably on the critical issue of how to define personal wealth in aggregate.[94] The Kufans regarded all monetary wealth to be analogous to livestock accretions. On this basis, they treated wealth as a single entity, regardless of whether or not increases to the base capital were the result of profits or

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[92] Mālik states, for example, that it is the A-XN (the precept without dissent among us; *al-amr al-ladhī lā ikhtilāf fihi ʿindanā*) that one who loans money is not required to pay the alms tax on it until it is repaid, unless it is repaid before a full year has transpired. Even if the money is not repaid for several years, only a single year's payment of the alms tax is due once it is repaid. Mālik reports that ʿUmar ibn ʿAbd al-ʿAzīz made his governors return properties which they had wrongfully expropriated and only required the rightful owners of those properties to pay the alms tax for a single year, since the properties had been uncollectable during the preceding time (*Muw.*, 1:253). Al-Bājī and al-Zurqānī explain that in both cases the owners of the property were excluded from their right to growth because they did not have the ability to augment their wealth during the time that it was loaned or, in the example of ʿUmar ibn ʿAbd al-ʿAzīz, during the period it was wrongfully expropriated (al-Bājī, *al-Muntaqā*, 2:113–14; al-Zurqānī, *Sharḥ*, 2:328–30).

The *Mudawwana* relates that Mālik's position on the inheritance of houses, commodities (*silaʿ*), indemnity payments, and sums paid for the emancipation of slaves was consistent with the above precepts. Saḥnūn focuses extensively on the legal principle of accretion (*al-māl al-fā'id*) and the right of growth. He lists inheritance as a type of accretion and gives numerous illustrations of what constitute accretions to wealth in a manner consistent with the *Mudawwana*'s focus on issues of legal interpretation. He cites the case, for example, of a person possessing a large amount of gold upon which the alms tax would have been due and who gives half of it away as a loan but then loses the remainder. Ibn al-Qāsim explains that the alms tax is not due on the debt in this case (*Mud.*, 1:222–26, 229–31). He clarifies that the wages of hired workers and the dowries of married women constitute accretions. These materials on accretions in the *Mudawwana* illustrate the application of precept-based analogy, and Mālik states explicitly that the principle of wealth accretion is the standard analogue (*maḥmal*) of all such cases (*Mud.*, 1:229–30).

[93] Ibn Rushd, *Bidāya*, 1:159–61; idem, *Bidāya* (Istiqāma), 1:263; Ibn ʿAbd al-Barr, *al-Istidhkār*, 9:88.

[94] Ibn Rushd, *Bidāya*, 1:159–61; idem, *Bidāya* (Istiqāma), 1:263.

accretions. The Medinese, on the other hand, considered the Kufan analogy as valid only for profits from base capital but not outside accretions. As elsewhere, Mālik has applied both *sunna*-terms to restrict the limits of legal analogy.

The *ḥadīth* and the post-Prophetic report Mālik mentions in conjunction with these *sunna*-terms indicate that the precept indexed went back to the earliest period and would constitute transmissional praxis. The question of how accretions were to be treated in the alms tax was by its nature the sort of concern that would have arisen early. Presumably, Mālik regarded the Medinese precepts on accretions to go back to the Prophetic period and also to be part of transmissional praxis. No explicit textual evidence supports Mālik's distinctive position on aggregate wealth or, for that matter, that of the dissenting views in Kufa. The definition of wealth in this precept is another illustration of a fundamental aspect of long-established Medinese praxis regarding which no explicit supporting *ḥadīth*s were transmitted either for or against. Once again, Mālik relied on Medinese praxis for essential details of the Prophetic law that are not spelled out in received texts.

6. *MḌS: A Plaintiff with One Supporting Witness*

Mālik begins the chapter with a *ḥadīth* stating that the Prophet handed down a verdict on the basis of the oath of a plaintiff supported by the testimony of a single witness. He then cites a post-Prophetic report narrating that ʿUmar ibn ʿAbd al-ʿAzīz wrote to his governor in Kufa and directed him to give verdicts on the basis of the oath of the plaintiff supported by the testimony of a single witness. Mālik cites a post-Prophetic report stating that Abū Salama, a highly regarded Medinese judge of the seventh century, and Sulaymān ibn Yasār were asked about the validity of giving verdicts on this basis and held that it was valid.

Mālik states that "the *sunna* has long been established" (MḌS; *maḍat al-sunna*) upholding verdicts based on the oath of the plaintiff supported by the testimony of a single witness. He adds that, if the plaintiff refuses to take an oath, the defendant will be asked to take an oath absolving himself of liability. If the defendant takes such an oath, the plaintiff will forfeit his claim. But if the defendant also refuses to take an absolving oath, the plaintiff's claim shall stand.

Mālik adds that this procedure is not valid in legal cases pertaining to Qurʾān-based punishments (*ḥudūd*),[95] verification of marriage, divorce,

[95] Qurʾānic-based punishments (*ḥudūd*) are those explicitly set forth in the Qurʾān. They have a counterpart in Islamic law which is extra-Qurʾānic punishments (*taʿzīr*).

emancipation, slander, or theft. Mālik supports his positions by a relatively lengthy legal argument.[96]

The recensions of Yaḥyā, Abū Muṣʿab, and Suwayd cite this same term MḌS (the *sunna* has long been established; *maḍat al-sunna*). Their three texts are in general agreement. The precept does not occur in the present recensions of Ibn Ziyād or al-Qaʿnabī.[97]

Saḥnūn transmits a text from Ibn Wahb in the *Mudawwana*, according to which al-Zuhrī uses words similar to those of Mālik and invokes the term MḌS to corroborate the same precept. In the report, al-Zuhrī clarifies that this procedure had never been used in marriage or divorce from the days of the Prophet and the first rightly-guided caliphs. Saḥnūn adds another post-Prophetic text stating that Saʿīd ibn al-Musayyab and Rabīʿa upheld the precept. He cites the entirety of the Seven Jurists of Medina as having supported it.[98] He cites Ibn al-Qāsim as declaring that it was the *sunna* to rule on the basis of an oath and single supporting witness in monetary rights. Ibn al-Qāsim defends the precept by comparing its anomalous nature to collective oaths (*al-qasāma*). He gives the specific wording of the oaths and asserts that the wording and general procedure have been long established parts of Medinese praxis, emphasizing that the custom of the people has always been in conformity with this procedure (*maḍā amr al-nās*).[99] Saḥnūn transmits that ʿUmar ibn ʿAbd al-ʿAzīz wrote to his governors directing them to judge on the basis of the precept. He asserts that the first generation of scholars (*al-salaf*) concurred on its validity in monetary rights.[100]

This precept constituted a major point of contention between the Medinese and the non-Medinese, although there was even dissent about it in Medina itself. According to the Shāfiʿī protagonist in *Ikhtilāf Mālik*, the prominent Medinese jurists ʿUrwa ibn al-Zubayr, one of the Seven Jurists of Medina, and al-Zuhrī expressed their disagreement with it.[101] It is

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Extra-Qurʾānic punishments are based exclusively on the interpretations and assessments of jurists and judges. They have no explicit references in the revealed sources.

[96] *Muw.*, 2:721–25; *Muw.*, (Dār al-Gharb), 2:263–67; *Muw.* (Abū Muṣʿab), 2:472–73; *Muw.* (Suwayd), 230–31; *Mwt.* (*Riwāyāt*), 3:529–36.

[97] *Muw.*, 2:721–25; *Muw.*, (Dār al-Gharb), 2:264; *Muw.* (Abū Muṣʿab), 2:472–73; *Muw.* (Suwayd), 230–31; *Mwt.* (*Riwāyāt*), 3:532; Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:60.

[98] *Mud.*, 4:84, 94; *Mud.* (2002), 9:21–23; 56–57. The Shāfiʿī interlocutor in *Ikhtilāf Mālik* confirms that Rabīʿa supported the validity of this precept ([Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 197).

[99] *Mud.*, 4:70–71; *Mud.* (2002), 8:504–08.

[100] *Mud.*, 4:94; *Mud.* (2002), 9:56–57.

[101] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 196–97.

noteworthy that Saḥnūn's reference to the Seven Jurists above puts ʿUrwa ibn al-Zubayr at the beginning of the list of the Seven Jurists supporting this precept, obviously countering the argument of his having been opposed to it.[102] But Ibn ʿAbd al-Barr and others give evidence of the dissenting positions of ʿUrwa and al-Zuhrī. Both held different points of view about the precept at various times. Al-Zuhrī was well known for his opposition to the precept. He asserted that it was something the people had innovated (*aḥdathahū al-nās*). While working as a judge in Medina, however, al-Zuhrī reportedly applied this precept in his rulings in accordance with Medinese praxis.[103]

As for jurists outside of Medina, Ibn Rushd states that neither al-Awzāʿī, al-Layth ibn Saʿd, nor the majority of the jurists of Iraq held the precept to be valid.[104] As noted earlier, al-Layth contends that this precept never became part of the praxis of the regions beyond Medina. He holds that the Companions never instituted it there, nor did the first rightly-guided caliphs enjoin the peoples of those regions to apply it in law. In contrast to al-Layth's contention, Mālik mentions a post-Prophetic report prior citing that ʿUmar ibn ʿAbd al-ʿAzīz wrote to his governor in Kufa directing him to institute the precept there and gave such orders to his other governors. Mālik contends that the Companions did in fact institute the precept in all the various Islamic realms (*fī kull al-buldān*) to which they traveled during their lives.[105] Layth's position in his letter to Mālik was that ʿUmar ibn ʿAbd al-ʿAzīz later retracted that position.[106] Although al-Layth (unlike al-Shāfiʿī) does not mention details about the dissenting opinions of the Medinese jurists on this issue, he hints at their internal dissent in his letter to Mālik. Al-Layth refuses to uphold the precept's validity and feels justified in joining the dissenting positions of earlier Medinese scholars, while asserting that he is among the most rigorous of jurists in adhering to the consensus of the Medinese jurists when they do not disagree.[107]

Mālik considered this precept as transmissional praxis. He shows its continuity with the Prophetic legacy by citing the *ḥadīth* with which he begins the chapter. His *sunna*-term indicates belief of such continuity,

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[102] *Mud.*, 4:84, 94; *Mud.* (2002), 9:21–23; 56–57.

[103] See *Mud.*, 4:94; *Mud.* (2002), 9:56–57; Ibn Rushd, *Bidāya*, 2:282; al-Rasīnī, "*Fiqh*," 195; Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:53; idem, *al-Tamhīd*, 13:56; Ibn Abī Shayba, *al-Muṣannaf*, 5:4.

[104] Ibn Rushd, *Bidāya*, 2:282.

[105] See Ibn ʿAbd al-Barr, *al-Tamhīd*, 1:56; idem, *al-Istidhkār*, 22:51, 55.

[106] See Ibn al-Qayyim, *Iʿlām*, (Saʿāda), 3:97.

[107] See Abd-Allah, "*ʿAmal*," 311–14, 321–31.

and Ibn al-Qāsim also refers to the procedure as the *sunna*.[108] In this case again, Medinese praxis adds details of fundamental legal import that are not explicit in the pertinent texts. The most important of these points is that the precept applies exclusively to monetary matters. Transmitters of the *ḥadīth* sometimes mentioned that fact by way of commentary. Al-Shāfiʿī also restricted the *ḥadīth*'s application to monetary matters as did Mālik, but those restrictions are not specifically mentioned in the core texts of the various recensions of the relevant *ḥadīth*s.[109]

Like other *sunna*-precepts discussed so far, this precept is contrary to analogy with related precepts of Islamic law. As a rule, the plaintiff is required to substantiate claims by the supporting testimony of at least two male witnesses of good character or the testimony of one acceptable male and two women of good character as set forth in the Qurʾan (2:282).[110] As indicated in Mālik's text in the *Muwaṭṭaʾ*, he regards this precept to be a special exception, applicable only to money matters. There is a second procedure, however, which is also followed exclusively in money matters and upon which there was general consensus among jurists in and outside of Medina, as Mālik himself states at the close of his argument in defense of this precept. The second procedure pertains to cases in which the plaintiff has no witness at all. According to that procedure, the defendant is asked to take the first oath (which is the opposite of the procedure set forth in the MḌS-precept). If he takes an oath absolving himself of responsibility, the plaintiff's claim will be dismissed. If the defendant refuses to absolve himself by an oath, the plaintiff may lay claim to his right by taking an oath in support of his claim.[111] Mālik's *sunna* precept is contrary to analogy with this second procedure. In the second procedure, the defendant is given the chance to absolve himself at the outset by taking an oath contrary to the plaintiff's claim. According to the MḌS-precept, the plaintiff's claim is deemed sufficiently strong when supported by a single witness that his oath is taken first and the defendant is not permitted to absolve himself from the outset.

Ibn ʿAbd al-Barr asserts that none of the Companions was known to have repudiated this precept. The post-Prophetic reports for those Companions, Successors, and early jurists who upheld it are very numerous.

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[108] *Mud.*, 4:70.

[109] Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:59, 41–56; idem, *al-Istidhkār*, 22:60; see Aḥmad ibn Muḥammad al-Ṭaḥāwī, *Ikhtilāf al-fuqahāʾ*, 193.

[110] Ibn Rushd, *Bidāya*, 2:282.

[111] *Muw.*, 2: 724–25.

He reports that Abū Bakr, ʿUmar, ʿUthmān, ʿAlī (the four rightly-guided caliphs), Ibn ʿUmar, and Ubayy ibn Kaʿb all handed down judgments on its basis.[112] It was, however, an issue upon which dissent appeared later and became strong. Al-Shaʿbī, Ibrāhīm al-Nakhaʿī, al-Layth ibn Saʿd, al-Awzāʿī, al-Thawrī, Abū Ḥanīfa, his followers, and most of the Kufans repudiated the precept.[113] Although the Cordovan Yaḥyā ibn Yaḥyā transmits the precept in his recension of the *Muwaṭṭaʾ*, he later repudiated it in Andalusia on the grounds that al-Layth ibn Saʿd had objected to it.[114]

According to Ibn Rushd, those who dissented regarding Mālik's MḌS-precept did so on the ground that it was contrary to the procedure set forth in the Qurʾān, which is supported by another *ḥadīth* requiring more than one witness.[115] Ibn ʿAbd al-Barr notes that many of those who opposed the ruling held that it had been repealed by the Qurʾānic verse calling for two witnesses or one male witness and that of two women. They insisted that oaths were instituted in Islamic law primarily for the benefit of protecting defendants by allowing them to repudiate claims against them in the absence of sufficient evidence. As a rule, oaths are not used in the law to establish claims to rights on behalf of plaintiffs lacking sufficient evidence.[116] The Shāfiʿī protagonist in *Ikhtilāf Mālik* also affirms that those who opposed this precept reasoned on such grounds.[117]

Mālik's argument shows that he is aware of the reasoning behind the dissenting position. He points out that the second procedure mentioned above is, like the procedure to which he subscribes in the MḌS-precept, contrary to the Qurʾānic text. Mālik reasons further that if jurists can accept this second procedure, for which there is no explicit Qurʾānic authority, they should regard the well-established *sunna* (MḌS) as sufficiently strong to vouch for the validity of this precept despite its also being contrary to the Qurʾan.[118] Ibn ʿAbd al-Barr expresses his admiration for Mālik's extensive awareness of previous dissent on this issue and asserts that his statements regarding the precept show how well aware he

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[112] Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:56; idem, *al-Istidhkār*, 22:51–53.

[113] Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:57; idem, *al-Istidhkār*, 22:52–53; Ibn Abī Shayba, *al-Muṣannaf*, 5:4; al-Ṭaḥāwī, *Ikhtilāf*, 193; al-Ṭaḥāwī, *Mukhtaṣar*, 3:342–43.

[114] Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:57; idem, *al-Istidhkār*, 22:51.

[115] Ibn Rushd, *Bidāya*, 2:282; see al-Ṭaḥāwī, *Ikhtilāf*, 193–94; *al-Ṭaḥāwī, Sharḥ*, 3:437; al-Ṭaḥāwī, *Mukhtaṣar*, 3:342–43.

[116] Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:57; cf. idem, *al-Istidhkār*, 22:55; al-Ṭaḥāwī, *Sharḥ*, 3:437–39; al-Ṭaḥāwī, *Mukhtaṣar*, 3:342–43.

[117] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 196.

[118] *Muw.*, 2:724–25.

was of the dissenting opinions of jurists in the generations before his time including the Kufans.[119]

The Shāfiʿī protagonist in *Ikhtilāf Mālik* subscribes to this *sunna* precept because of the solitary *ḥadīth* which Mālik transmits in its support. For Mālik, that shared solitary *ḥadīth* serves as an ancillary to praxis. It indicates that Medinese praxis is in conformity with what the Prophet did and must have its origin in his practice. The *ḥadīth* serves as an index of praxis but not as independent proof of its validity. The vital details of the precept, as indicated, are not derived from the legal text but from the non-textual source of local praxis. This is an example of how a solitary *ḥadīth*, which would not otherwise have been authoritative in Mālik's eyes, takes on authority by virtue of its conformity with Medinese praxis and is allowed to delimit standing legal analogies under the aegis of the *sunna*.[120] That same solitary *ḥadīth* is marginalized by Abū Ḥanīfa because of its incompatibility with contrary standardized proofs. Although the non-Medinese rejected this precept and prominent Medinese such as al-Zuhrī expressed dissatisfaction with it, none of them produced or claimed to possess an explicit contrary *ḥadīth* repudiating the principal *ḥadīth* upholding this precept or declaring it to have been repealed.

Mālik's *Sunna*-Terms in Summary

There is a clear connection between Mālik's use of terminology in the preceding *sunna*-terms and the fact that they related to significant matters of dissent among the jurists of the formative period. This link shows that dissent constituted an essential criterion by which Mālik determined when to use his terminology in the *Muwaṭṭaʾ*. In each example, his terminology and discussion index and clarify where the Medinese stood on these controversial positions in contrast to the dissenting opinions of other jurists. When the terms relate to precepts with internal Medinese dissent, they indicate where Mālik stood with regard to such local disputes. The differences of opinion within Medina regarding Mālik's use of MḌS in this chapter raise the question of to what extent Mālik's *sunna*-terms indicate explicit consensus or veer from it as does the term AN and similar terms in the *Muwaṭṭaʾ*.

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[119] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:57.

[120] See Abd-Allah, "*ʿAmal*," 179–84; cf. 484–87.

The *sunna*-terms in this chapter appear to belong to the oldest stratum of transmissional praxis going back to the time of the Prophet and the first generation of the Companions, although that link would sometimes have been open to dispute before and after Mālik's time. As we have seen in the last MḌS precept (the *sunna* has long been established; *maḍat al-sunna*), even the prominent Medinese jurist al-Zuhrī is on record as doubtful of the origins of the precept.

The presumed antiquity of *sunna*-precepts in the *Muwaṭṭa'* appears to apply to the remainder of Mālik's *sunna*-terms that were not studied in this chapter. In some instances Mālik indicates the continuity between his Medinese *sunna*-precepts and the Prophet by citing relevant *ḥadīth*s and post-Prophetic reports. In the examples studied, however, there are limited supporting texts for Mālik's *sunna*-precepts as well as for the dissenting positions of his non-Medinese (and occasionally Medinese) adversaries. What texts do exist are not fully explicit and, consequently, do not reveal the full scope of the *sunna* precepts as transmitted in Medinese praxis or the opinions of dissenting jurists. When explicit textual evidence is lacking, Mālik's *sunna*-precepts can only be deemed to be rooted in transmissional praxis on the presumption of continuity (*istiṣḥāb al-ḥāl*), since they pertain to rudimentary aspects of the Prophetic law, such as the collection of the alms tax, which Mālik believed went back to the initial institution of such matters in the Medinese community's praxis during the earliest period.

Fazlur Rahman contends that praxis and the "living *sunna* were virtually identical in the formative period.[121] But Mālik makes a distinction between the *sunna* and Medinese praxis in general, and this distinction will become clearer in the study of the non-*sunna* terms. Mālik's terminology and discussions in the *Muwaṭṭa'* and his references to praxis in his correspondence with al-Layth ibn Sa'd reflect his awareness of the different levels of Medinese praxis—practices instituted by Prophetic mandate and others elaborated on the basis of later legal interpretation—Mālik would not have regarded the identity of *sunna* and praxis as being a single "living" development over the course of the formative period as a whole.

In practice, Mālik like some later jurists probably would have distinguished between transmissional praxis, which may be called the "living *sunna*" and was conceived of as having unbroken continuity in Medina

[121] Rahman, *Islam*, 76.

since the Prophet, and between various forms of later interpretational praxis. Praxis per se was a broad concept. It included *sunna* precedents but also contained elements that grew up organically through legal interpretation over the generations. Although Mālik's terminology is preoccupied with the dichotomy between what is analogical and non-analogical in the Prophetic legacy, he clearly distinguishes *sunna* materials from those derived from legal interpretation.

The scarcity of explicit legal texts for or against the *sunna*-precepts in the *Muwaṭṭa'* is one of the most significant observations of the chapter and this study as a whole. Even in the case of those precepts for which Mālik cites relevant texts, Medinese praxis was predictably and systematically richer in content than available *ḥadīth*s and post-Prophetic reports. In Mālik's legal reasoning, the living example of praxis always presided over Qur'ānic and other received legal texts. It clarified the meaning of textual language, indicated the historical context of the original message, and provided essential details that are rarely explicit in the texts. When Mālik cites supporting texts, they appear to have essentially the function of indicating the source or continuity of the praxis in question. In this regard, received texts serve as indexes or ancillaries to praxis. The full content of Mālik's precepts, however, comes from praxis, not from relevant texts. Such praxis as relates to the Prophetic legacy behind Medinese praxis was certainly transmissional in Mālik's conceptualization as it was in the eyes of later jurists who coined the term.

The relative paucity of authoritative texts to support the praxis-based precepts of Medina made possible the later criticisms of those like Abū Yūsuf, al-Shaybānī, and al-Shāfiʿī who held that the source and continuity of Medinese praxis were questionable and refused to subscribe to its precepts unless textual support were produced for them. Their insistence upon textual proof distinguishes their legal method from that of al-Layth ibn Saʿd in his letter to Mālik, which recognizes the centrality of Medinese and regional praxis but claims the right to dissent wherever the Medinese have themselves dissented.[122] Al-Layth does not question the priority of Medina over other cities in matters of transmissional knowledge and continues personally to adhere to Medinese local consensus.[123] The paucity of legal texts made it difficult for the Medinese to uphold the validity of their

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[122] For the letter see ʿIyāḍ, *Tartīb*, 1:64–65; Muḥammad ibn Abī Bakr ibn Qayyim al-Jawziyya, *Iʿlām al-muwaqqiʿīn ʿan Rabb al-ʿālamīn*, (Cairo: Dār al-Kutub al-Ḥadītha), 3:107–14, henceforth cited as Ibn al-Qayyim, *Iʿlām* (Dār al-Kutub).

[123] See Abd-Allah, "*ʿAmal*," 321–56.

praxis-based teaching under the ground rules of those who insisted upon legal texts as an exclusive criterion of law. The authority of non-textual Medinese praxis rested upon the reputation of Medina and the integrity of its people of learning as guardians of praxis, not the fact of that praxis had been comprehensively archived in legal *ḥadīth*s and post-Prophetic reports.

The reality that much of the substance of Medinese transmissional praxis existed in the absence of explicit texts in *ḥadīth*s and post-Prophetic reports conforms in part to Fazlur Rahman's contention that the *sunna* was originally "silent," "non-verbal" praxis. He asserts further that, in each succeeding generation, the notion of *sunna* applied to "the actual content of the behavior of each succeeding generation insofar as that behavior exemplified the Prophetic pattern."[124] "Non-verbal" and "silent" do not mean the same thing if the former is understood to mean oral and "non-textual." The original *sunna* must certainly have had an ample verbal component, but the paucity of legal *ḥadīth*s as compared with the richness of transmissional praxis indicates that the original component of *sunna* that was "lived" and even formally and informally "spoken" was neither fully nor unambiguously textualized by its transmitters.

In Fazlur Rahman's view, praxis was originally rooted in the *sunna* but continued to grow organically in the post-Prophetic period. Its organic growth created a disparity and tension between those parts of praxis that were originally part of the *sunna* in the "pristine period" and the new parts, which had grown up around it. Fazlur Rahman believes that this natural expansion of the *sunna*—without being distinguished from later organic accretions—brought about a "disengagement" between the content of the *sunna* (now mixed with its new additions) and *ḥadīth*, which he believes had originally been consubstantial and coeval with the "living" *sunna* as pristine praxis.[125]

Again, the paucity of *ḥadīth*s for many rudiments of tranmissional praxis calls Fazlur Rahman's presumption into question. The "living" *sunna* as transmissional praxis and legal *ḥadīth* as textualizations of earlier Prophetic precedent appear never to have been consubstantial or coeval. The latter lagged behind the former, no doubt because there was no imperative to formally textualize everything that was already embodied in praxis.

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[124] Rahman, *Islam*, 54–55.
[125] Rahman, *Islam*, 58–59.

Praxis was *the* vehicle of transmitting of *sunna*. *Ḥadīth*s and post-Prophetic reports were ancillary and only partially complete legal references.

By virtue of the ancillary nature of *ḥadīth*, they often transmit Prophetic precedents that were not *sunna* in the sense of being normative or praxis-generating. Consequently, a substantial core of Islamic positive law till this day is closely associated with normative and non-normative Prophetic precedent and remains a matter of extensive dissent from the early periods. Even more of the content of that dissent was never accompanied by explicit and unequivocal *ḥadīth*s but appears to have been transmitted in the greater part of the formative period by praxis or, in the absence of praxis, to have been elaborated on the basis of considered opinion and legal interpretation. Medinese praxis did grow organically, but Mālik, al-Layth, and other jurists of the formative and post-formative periods felt themselves competent to distinguish between what elements of praxis were transmissional—emanating from the "pristine" *sunna*—and which were inference-based—being rooted in post-Prophetic legal reasoning.

It is not the fundamental concern of this study to address questions of historical authenticity and how the concept of Medinese praxis actually affected the development of Islamic law and *ḥadīth* transmission as an objective historical reality on the ground, but it is clear that the content of praxis and how Muslims of the formative period conceived of it is crucial to understanding the process and ultimate historical reality of *ḥadīth* textualization and transmission in history. As a tangible reality on the ground, praxis likely affected the formulation of *ḥadīth* and post-Prophetic narratives in ways not generally taken into consideration. By virtue of its organic thoroughness, the concrete presence of praxis before people's eyes in their day-to-day lives lessened the imperative of archiving the Prophetic legacy through all-inclusive textual transmission of every detail. For the same reason, Medinese praxis provided Mālik and the scholars of Medina with the missing semantic links of their legal texts.

For early *ḥadīth* transmitters during the formative period both conscious and unconscious reliance upon lived praxis must have affected the material they chose to transmit and often dictated and justified the terse language of their narratives. *Hadīth*s regarding rituals such as ablutions and daily prayers, for example, assume a semantic context in which the receptor of the *ḥadīth* is not completely ignorant *ab initio* of what is being spoken about but is already generally familiar with the practice being reported. Even with an excellent knowledge of Arabic, it is virtually impossible for a person experientially ignorant of the living content of *ḥadīth* to construe properly from the textual message alone how to perform the

acts of which they speak. Given the highly elliptical and contextual nature of the Qurʾān and *ḥadīth* and their historical reception in the context of a lived praxis and an organically shared experience, awareness of that praxis remains essential to their proper understanding.

*Ḥadīth*s such as the narration that the Prophet handed down verdicts on the basis of the oath of the plaintiff supported by the testimony of a single witness are strikingly ambiguous (from the perspective of their detailed Medinese interpretation) when divorced from their semantic context in praxis. Again, however, that ambiguity would not have been problematic for original transmitters and receptors who were familiar with the lived experience of the precept that the *ḥadīth*'s wording sought to reflect. The very terseness of the *ḥadīth* narrative was only semantically possible because of the all-embracing reality of praxis, which constituted its fuller context.[126] Living within the semantic context of Medinese praxis, transmitters and receptors of individual *ḥadīth*s and post-Prophetic reports may not have been conscious of the ambiguities that the texts they transmitted would evoke for future receptors who were not acquainted with the same semantic context that was familiar to them. They would not have recognized the need to clarify their textual transmission in greater detail. As time passed, the texts they transmitted, would become far more ambiguous once divorced from their context in praxis. They would also become more prone to divergent interpretations than they had been within the original context of living praxis.

The relative paucity of explicit legal texts regarding the precepts of Medinese praxis must be gauged against the background that the issues they concerned were highly disputed. All *sunna*-precepts discussed in this chapter constituted major issues of law and crucial controversies among the early jurists, especially those of Kufa and Medina, and, in some cases (such as the MḌS precept above), even between the Medinese themselves. Fabrication of *ḥadīth*s undoubtedly took place during the formative period. This is a matter of universal consensus, but the relative paucity of legal *ḥadīth*s for these critical questions indicates that such fabrication was hardly as systematic or successful as has been widely presumed. For if *ḥadīth* fabrication had been thoroughly systematic, ample numbers of explicit *ḥadīth*s and post-Prophetic reports would have been put into circulation to support these Medinese precepts as well as the dissenting positions of the non-Medinese. Presuming even that solitary *ḥadīth*s such

[126] See Abd-Allah, "*ʿAmal*," 298–99; cf. 436–48.

as those mentioned by Ibn ʿAbd al-Barr, ʿAbd al-Razzāq, Ibn Abī Shayba, Ibn Rushd, al-Bājī, and al-Zurqānī in support of some of these Medinese precepts were themselves fabricated, it is significant that the later tradition did not recognize them as having established authenticity despite the fact that they supported their agreed position.

Each of the *sunna*-precepts discussed in this chapter is contrary to analogy with related precepts of law. Often they represent points of significant difference with the non-Medinese, precisely because the latter applied relevant analogies to these matters. As we have seen, the Kufans and others treated mutual cursing (*liʿān*) as analogous to repudiation (*ṭalāq*). Likewise, they treated wealth obtained through accretions as analogous for purposes of the alms tax to wealth accrued from profits or base capital. Mālik's *sunna*-terms serve as red flags, signaling that there is something distinctive about these precepts, which makes them anomalous and excludes them from the domain of reasoned analogy.

CHAPTER SEVEN

TERMS REFERRING TO THE PEOPLE OF KNOWLEDGE IN MEDINA

General Observations

I categorize forty-one of Mālik's terminological expressions in the *Muwaṭṭa'* as references to the people of knowledge in his city.[1] As indicated earlier, Mālik's criterion for assessing the integrity of Medinese praxis was based on its endorsement by Medinese scholars, who were the chief conduits of praxis in his eyes. Mālik did not blindly subscribe to Medinese praxis simply because it was the customary practice of the common people of Medina, which he piously presumed to have authoritative continuity. He distinguished between the practices of the Medinese people in general and Medinese praxis as specifically endorsed by and embodied in his teachers. As indicated earlier, when asked about certain ritual practices of the Medinese during the festive days following the pilgrimage, Mālik states, "I have seen the [common] people (*al-nās*) doing that," but he then observes that what the people do was not the praxis of his teachers, "those whom I met and whom I follow" (*al-ladhīna adraktuhum wa aqtadī bihim*).[2]

Most of Mālik's references to people of knowledge in the *Muwaṭṭa'* speak of the people of knowledge in Medina in general terms, giving the impression that Mālik uses these references as indicants of concurrence (*ijtimā'*). He will say, for example, that the people of knowledge of his city have always held to the validity of a certain precept. He states that the people of knowledge whom he encountered during his lifetime held to the validity of the precept in question. Other expressions are more general. Mālik will say, for example, "this is what I have heard transmitted from the people of knowledge" or simply, "this is what I have heard transmitted."

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[1] *Muw.*, 1:13, 71, 105, 250, 268 (twice), 276, 280, 309, 335, 338, 364, 386; 2:456, 503, 506, 511, 514, 515, 517, 518, 520, 521, 522, 534, 541, 565, 568, 589, 590, 615, 653, 671, 673, 708, 788 (twice), 826, 844, 865, 879. See Abd-Allah, "*'Amal*," Appendix 2, 780–81.

[2] *Mud.*, 1:157.

There are a few expressions which explicitly refer to the totality of persons whom Mālik regarded as "people of knowledge." He states once that all whom he encountered hold to the validity of a certain precept. On another occasion, he has not heard the contrary from any of the people of knowledge. In another instance, he states that none of the people of learning doubts the precept in question. In yet another instance, he asks the rhetorical question of whether anyone could doubt the validity of the precept he is discussing.[3]

A few expressions Mālik uses in reference to the people of knowledge appear to designate limited groupings of the Medinese jurists. The most common of these expressions is "those people of knowledge whom I am pleased to accept" (*man arḍā min ahl al-ʿilm*). Similarly, he once uses the terse expression, "the group in our city" (*al-jamāʿa bi-baladinā*).[4] Such designations of limited groupings do not appear to be indicants of Medinese local consensus but rather of Mālik's personal preference for the opinions of certain Medinese jurists as opposed to others. This is, in fact, the explanation that Mālik himself is reported to have given for his usage of these terms in his statement on terminology mentioned earlier.[5] The expression, "those people of knowledge whom I am pleased to accept" (*man arḍā min ahl al-ʿilm*), however, is not clear in this regard. Semantically, it references the jurists whom Mālik regarded as acceptable but could, in fact, mean the totality of the Medinese jurists, on the ground that Mālik was pleased to accept them all. At the same time, Mālik's biography indicates that there were many upright people of knowledge in Medina whom he did not regard as worthy of transmitting legal opinions or constituting local consensus.[6] In light of this, it is likely that Mālik's preference as indicated in this expression excludes such Medinese people of learning.

Almost two-thirds of Mālik's references to the people of knowledge occur in combination with other terms and expressions. The two terms that occur most frequent in conjunction with other terms are "and this is what I found the people of knowledge following" (*wa hādhā al-ladhī adraktu ʿalayhi ahl al-ʿilm bi-baladinā*) and "this is what I have heard transmitted from the people of knowledge" (*wa hādhā al-ladhī samiʿtu min ahl al-ʿilm*). There does not seem to be a particular pattern to the specific terms that Mālik uses in conjunction with his references to the

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[3] See *Muw.*, 2:541, 788, 521; 1:386.
[4] *Muw.*, 2:615.
[5] Abd-Allah, "*ʿAmal*," 538–45.
[6] See Abd-Allah, "*ʿAmal*," 72–76.

Medinese people of knowledge. They occur in connection with a wide variety of terms such as S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*), MḌS (the *sunna* has long been established; *maḍat al-sunna*), SN (the *sunna* among us; *al-sunna ʿindanā*), AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*), AMN-X (the agreed precept without dissent among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā wa al-ladhī lā ikhtilāf fīhi*), A-XN (the precept without dissent among us; *al-amr al-ladhī lā ikhtilāf fīhi ʿindanā*), and AN (the precept among us; *al-amr ʿindanā*).

Examples

1. *-zĀIb:*[7] *The Pilgrim's Chant* (Talbiya)

> Mālik cites a *ḥadīth* indicating that the Prophet permitted his Companions when they were performing the pilgrimage with him and setting out from their encampment in Minā to ʿArafa [on the ninth day of pilgrimage] to say the proclamation of God's oneness (*al-tahlil*) or the proclamation of God's greatness (*al-takbīr*). Mālik cites a post-Prophetic report stating that ʿAlī ibn Abī Ṭālib used to repeat the pilgrim's chant (*talbiya*)[8] until the sun passed the meridian on the Day of ʿArafa. Mālik then states, "This is the precept (*amr*) which the people of knowledge in our city still continue to follow" (-zĀIb). He then cites post-Prophetic reports indicating that ʿĀ'isha and ʿAbd-Allāh ibn ʿUmar would do the same.[9]

This precept occurs in the recensions of Yaḥyā, Abū Muṣʿab, al-Qaʿnabī, Suwayd, and al-Shaybānī. It is missing from the short Ibn Ziyād fragment. The term as cited above occurs in the transmissions of Yaḥyā, al-Qaʿnabī, and Abū Muṣʿab. Suwayd presents essentially the same legal content but does not give Mālik's term. Chapter titles and wording differ somewhat in the various recensions, although the legal content and purport is similar.

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[7] For a key to the symbols, see Abd-Allah, "*ʿAmal*," Appendix 2, 766–68. I stands for the people of knowledge; b stands for "in our city;" the hyphen (-) shows negation; -z stands for "still continue to follow;" and Ā this precept. The term -zĀIb stands for "This is the precept that the people of knowledge in our city still continue to follow" (*wa dhālika al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-baladinā*).

[8] The *talbiya* consists of the words, "Here I am, God, [responding to Your call]; here I am. Here I am; You have no partner; here I am. All praise and bounty are Yours and all dominion. You have no partner" (*Labbayk, Allāhumma, labbayk. Labbayka, lā sharīka laka, labbayk. Inna al-ḥamda wa al-niʿmata laka wa al-mulk. Lā sharīka lak.*)

[9] *Muw.*, 1:337–38; *Muw.* (Dār al-Gharb), 1:454; *Muw.* (Abū Muṣʿab), 1:431; *Muw.* (al-Qaʿnabī), 378–79; *Muw.* (Suwayd), 391–93; *Muw.* (al-Shaybānī/al-Nadawī), 2:244; *Muw.* (*Riwāyāt*), 2:426–27.

Al-Shaybānī also mentions this question. As is generally the rule with his recension of the *Muwaṭṭa'*, he comments on the chapter's content from the Ḥanafī Kufan point of view and deletes what is not relevant to his purpose, including Mālik's terminology.[10]

Saḥnūn treats this precept briefly in the *Mudawwana* but cites no terms. He asks Ibn al-Qāsim when the pilgrim's chant should cease and is given an answer consistent with the *Muwaṭṭa'* text above. Ibn al-Qāsim explains that he and Mālik's principal students asked him about the specific details of the matter (*waqafnāhū ʿalā dhālika*) on more than one occasion. Saḥnūn presents a number of other details that are not mentioned in the *Muwaṭṭa'* text and closes with Ibn al-Qāsim's observation that the entire issue regarding the pilgrim's chant is open-ended and unencumbered (*wāsiʿ*) and should not be treated with rigidity.[11]

It is apparent from the context that Mālik's expression, -zĀIb (this is the precept which the people of knowledge in our city still continue to follow; *wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-baladinā*), indicates that he regarded the praxis in question to have unbroken continuity from the days of the Prophet and his Companions. It falls under the heading of transmissional praxis. Mālik's wording indicates that there was local consensus on its validity, although other textual evidence points to differences among the Medinese jurists about it, as will be shown.

Mālik uses his reference to Medinese praxis here as confirmatory commentary on the *ḥadīth* at the beginning of the chapter, which indicates that the Companions, when they made pilgrimage with the Prophet, would either repeat the pilgrim's chant (as did ʿAlī in the post-Prophetic report) or chant the declaration of God's greatness (*al-takbīr*) without any of them objecting to either practice.[12] Mālik cites several reports to support the precept. Unlike his presentation in the *sunna*-precepts, where he formulates the content and details of precepts separately from narrated texts, he cites his terminology here merely as a confirmation of the report he transmits. The precept is contained in the explicit wording of his reports, and the term is cited immediately after the first post-Prophetic report, indicating the continuity of Medinese praxis in conformity with the practice of ʿAlī. In contrast to the *sunna*-terms, Mālik does not add

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[10] *Muw.*, 1:337–38; *Muw.* (Dār al-Gharb), 1:454; *Muw.* (Abū Muṣʿab), 1:431; *Muw.* (al-Qaʿnabī), 378–79; *Muw.* (Suwayd), 391–93; *Muw.* (al-Shaybānī/al-Nadawī), 2:244; *Muw.* (*Riwāyāt*), 2:426–27; Ibn ʿAbd al-Barr, *al-Tamhīd*, 8:127; *idem, al-Istidhkār*, 11:156.

[11] *Mud.*, 1:296–97; *Mud.* (2002), 2:304–05.

[12] *Muw.*, 337; *Muw.* (Dār al-Gharb), 1:454.

additional information to the precept going beyond what is specifically indicated in the reports themselves, other than the consideration that he regarded his post-Prophetic reports to reflect the norm of the people of knowledge in Medina.

Ibn ʿAbd al-Barr relates that Mālik's opinion as reflected in the *Muwaṭṭaʾ* was the view of a large body of the first generations of Muslims as well as "most" of the people of Medina (*akthar ahl al-Madīna*).[13] There were several opinions about exactly when and where the pilgrim's chant should end. Among the most important of the dissenting views from Mālik's perspective was that the chant should continue throughout the ninth day, the day of ʿArafa, and until the stoning of the largest pillar of Satan on the following day. This view had the explicit support of another Prophetic *ḥadīth*. Most of the jurists—including Abū Ḥanīfa and Sufyān al-Thawrī of Kufa, Ibn Abī Laylā, al-Shāfiʿī, Ibn Ḥanbal, and Isḥāq ibn Rāhawayh—took this position along with the proponents of tradition (*ahl al-ḥadīth*).[14] Later jurists like al-Shāfiʿī and Aḥmad ibn Ḥanbal also took the Kufan position, which is supported by a strong *ḥadīth* transmitted in the collections of al-Bukhārī and Muslim.[15]

The details of how and when to perform the pilgrim's chant is a matter of dissent going back to the first generation of Muslims and continuing through all later generations until the present. It is a matter in which the Companions, the Successors, and subsequent generations of jurists regarded the various dissenting opinions to be innocuous.[16] All authoritative texts pertaining to this precept, both those in the *Muwaṭṭaʾ* and the *ḥadīth*s supporting the Kufan position, are reports of observed actions.

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[13] Ibn ʿAbd al-Barr ascribes the practice to Abū Bakr, ʿUmar, ʿUthmān, ʿĀʾisha, Umm Salama, Ibn al-Musayyab, Sulaymān ibn Yasār, Saʿīd ibn Yazīd, and al-Zuhrī. Mālik's text cites ʿAlī as well as ʿĀʾisha and Ibn ʿUmar. He notes that ʿĀʾisha and ʿUthmān are reported to have held contrary opinions. ʿAlī, on the other hand, held consistently to the position that Mālik reports him as taking in the *Muwaṭṭaʾ* (Ibn ʿAbd al-Barr, *al-Istidhkār*, 11:158–59; idem, *al-Tamhīd*, 8:126, 130; Ibn Abī Shayba, *al-Muṣannaf*, 3:356–57).

[14] Ibn ʿAbd al-Barr, *al-Istidhkār*, 11:160–61; idem, *al-Tamhīd*, 8:125–31; Ibn Abī Shayba, *al-Muṣannaf*, 3:356–57; al-Ṭaḥāwī, *Sharḥ*, 2:300–06. This dissenting view is also ascribed to the Companion Ibn Masʿūd—one of the primary Kufan authorities—Ibn ʿAbbās, ʿAṭāʾ ibn Abī Rabāḥ, Ṭāwūs, Saʿīd ibn Jubayr, and Ibrāhīm al-Nakhaʿī. Ibn ʿUmar was also on record as supporting this position.

[15] The *ḥadīth* reports that the Prophet continued to make the pilgrim's chant (*talbiya*) into the tenth day of pilgrimage until he had performed the rite of casting pebbles at the pillar of Satan (see al-Bājī, *al-Muntaqā*, 2: 216; al-Zurqānī, *Sharḥ*, 3: 56–57). Al-Bājī and al-Zurqānī also note that the praxis in question was a point of contention between the Medinese and the Kufan jurists Abū Ḥanīfa and Sufyān al-Thawrī.

[16] Ibn ʿAbd al-Barr, *al-Istidhkār*, 11:158, 162; idem, *al-Tamhīd*, 8:123–25.

They narrate what the Prophet and his Companions did, not what they said about their actions or how they assessed them in legal terms. As mentioned earlier, such reports of observed behavior (*ḥikāyāt al-aḥwāl*), Prophetic and otherwise, are inherently ambiguous. According to Mālikī legal theorists, reported actions may be taken to indicate permissibility but are insufficient in themselves to prove obligation, recommendation, or normativeness. On the other hand, reports of contrary actions by prominent, knowledgeable Companions and jurists—such as the Companions mentioned in this precept—are sufficient evidence that a reported Prophetic action to which they are contrary is not obligatory.[17]

According to Mālikī, Ḥanafī, and Ḥanbalī legal theorists, post-Prophetic reports about prominent Companions may constitute sufficient indication of the Prophetic *sunna* on the presumption that those Companions knew the Prophetic *sunna* well and adhered to it closely.[18] This seems to be how Mālik is using the post-Prophetic reports he cites in this example, although he does not make specific reference to the term *sunna*. As the *ḥadīth* indicates at the beginning of Mālik's discussion, the Companions of the Prophet repeated both the standard pilgrim's chant and the proclamation of God's greatness (*al-takbīr*) in his presence during the pilgrimage. Mālik's presumption in citing the post-Prophetic reports seems to be that the Prophet would have made it clear at some point to the three prominent Companions mentioned in this example that it was either obligatory for them or a desirable norm that they continue to make the pilgrim's chant until the tenth day of pilgrimage, if that had been his standard *sunna*. In this case, Mālik's reference to local praxis supported by the post-Prophetic reports of three prominent Companions distinguishes normative from non-normative Prophetic actions. On the presumption that Mālik was aware of the Prophet's action as reported in the *ḥadīth* supporting the Kufan position, his reference to local praxis indicates that the Prophet's action in that case was not intended to become the established norm.

2. *-zĀIb: Regarding Circumambulation of the Kaʿba* (Ṭawāf)

Mālik cites a *ḥadīth* indicating that the Prophet made the first three circuits around the Kaʿba during his circumambulation of it at a rapid pace (*raml*) beginning and and returning to the corner with the Black Stone and doing

[17] See Abd-Allah, "*ʿAmal*," 188–95.
[18] See Abd-Allah, "*ʿAmal*," 161–70.

> that for three circuits. Mālik cites the term -zĀIb (this is the precept which the people of knowledge in our city continue to follow; *wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-baladinā*). He cites post-Prophetic reports in the remainder of the chapter, showing that ʿAbd-Allāh ibn ʿUmar and ʿUrwa ibn al-Zubayr performed circumambulation around the Kaʿba in the same manner. He cites a post-Prophetic report that ʿAbd-Allāh ibn al-Zubayr put on the pilgrim's garb (*iḥrām*) at Tanʿīm [on the sanctuary outskirts a few miles northeast of Mecca] and did the first circuits at a rapid pace. Mālik concludes with a post-Prophetic report to the effect that Ibn ʿUmar would omit certain rites of the circumambulation including the rapid pace of the first three circuits when initiating the rite of pilgrimage within the precincts of Mecca.[19]

This precept occurs in the recensions of Yaḥyā, Abū Muṣʿab, al-Qaʿnabī, Suwayd, and al-Shaybānī. It does not occur in the Ibn Ziyād fragment. The term is cited identically in three of them: Yaḥyā, Abū Muṣʿab, and al-Qaʿnabī, although their chapters differ somewhat in wording, content, and structure. Suwayd's chapter structure and content differ somewhat from the others. As in the preceding example, he does not cite any terminology. Al-Shaybānī comments on the *ḥadīth*, affirming that Ḥanafī practice is in accordance with it. As is usually the case, he omits Mālik's term.[20]

Saḥnūn gives little attention to this precept in the *Mudawwana*, although he relates details that are not in the *Muwaṭṭaʾ*.[21] He seems to rely on the *Muwaṭṭaʾ* text, however, to provide all that is essential regarding this fairly straightforward religious practice.

This precept falls into the category of transmissional praxis. The term -zĀIb (this is the precept which the people of knowledge in our city continue to follow; *wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-baladinā*) indicates that the praxis of the Medinese people of knowledge remained in direct continuity with the Prophet's action as reported in the *ḥadīth* and the appended post-Prophetic reports. Mālik's term also gives indication of local Medinese consensus. He cites evidence indicating that Medinese praxis in this case conforms with the transmitted account of the Prophet and the praxis of prominent Medinese people of knowledge after

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[19] *Muw.*, 1:364–65; *Muw.* (Dār al-Gharb), 1:489–90; cf. *Muw.* (Abū Muṣʿab), 1:489–90; *Muw.* (al-Qaʿnabī), 405–06; *Muw.* (Suwayd), 414–15; *Muw.* (al-Shaybānī/al-Nadawī), 2:344–45; *Muw.* (*Rīwāyāt*), 2:489–91.

[20] *Muw.*, 1:364–65; *Muw.* (Dār al-Gharb), 1:489–90; *Muw.* (Abū Muṣʿab), 1:489–90; *Muw.* (al-Qaʿnabī), 405–06; *Muw.* (Suwayd), 414–15; *Muw.* (al-Shaybānī/al-Nadawī), 2:344–45; *Muw.* (*Rīwāyāt*), 2:489–91; Ibn ʿAbd al-Barr, *al-Istidhkār*, 12:122–23.

[21] *Mud.*, 1:318; *Mud.* (2002), 2:376.

him. Mālik's commentators note that the precept in question is in keeping with a command of the Prophet as indicated by Mālik's *ḥadīth*. Several *ḥadīth*s report that when the Prophet and his Companions entered Mecca after the Armistice of al-Ḥudaybiyya, the Meccan idolaters taunted them at a distance and claimed that the fevers of Medina had so emaciated them that they lacked the strength to make the seven circumambulations around the Kaʿba. In response, the Prophet commanded his Companions to walk rapidly during the first three circuits around the Kaʿba to show the Meccans that he and his Companions were still strong and vigorous. Other *ḥadīth*s indicate that the Prophet continued to perform the circumambulation around the Kaʿba in this manner even following the conquest of Mecca after the inhabitants of the city embraced Islam.[22]

According to commentators, the precept had extensive agreement among all jurists. In the words of Ibn ʿAbd al-Barr, there was consensus among the jurists that anyone who performed the first three circumambulations around the Kaʿba at a rapid pace (*raml*) when first entering Mecca in the rites of the lesser (*ʿumra*) or greater pilgrimages (*ḥajj*) had done what was appropriate (*faqad faʿala mā yanbaghī*). He contends that this was a matter upon which there was concurrence (AMN; *amr mujtamaʿ ʿalayhi*). He notes that the jurists only disagreed about whether the first three rapid circumambulations were a *sunna* that should always be done under the appropriate circumstances or whether the applicability of this act was limited to the Prophetic period because of the special circumstances that pertained after the Armistice of al-Ḥudaybiyya. In the latter case, those who desired to perform it were free to do so, and those who preferred not to do it were free to put it aside.[23]

The caliph ʿUmar, his son Ibn ʿUmar, Ibn Masʿūd, Mālik, Abū Ḥanīfa, al-Thawrī, al-Shāfiʿī, Ibn Ḥanbal, and Ibn Rāhawayh held that walking the first three circumambulations at a rapid pace was a continuous *sunna*, which ought always to be performed when beginning the rites of the lesser and greater pilgrimage.[24] Among those who held the contrary view that the rapid circumambulations were a historical vestige of conditions pertaining to the Armistice of al-Ḥudaybiyya were Ṭāwūs, ʿAṭāʾ, Mujāhid, al-Ḥasan al-Baṣrī, Sālim ibn ʿAbd-Allāh, al-Qāsim ibn Muḥammad, and Saʿīd ibn Jubayr. The jurist most well-known for his adherence to this

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[22] Al-Bājī, *al-Muntaqā*, 2:284; al-Zurqānī, *Sharḥ*, 3:124–26.

[23] Ibn ʿAbd al-Barr, *al-Istidhkār*, 12:125–26; al-Ṭaḥāwī, *Sharḥ*, 2:249–53.

[24] Ibn ʿAbd al-Barr, *al-Istidhkār*, 12:127; idem, *al-Tamhīd*, 9:9, 12–14; Ibn Abī Shayba, *al-Muṣannaf*, 3:205.

opinion was Ibn ʿAbbās, although he reportedly held the contrary view also. The same is reported about the caliph ʿUmar.[25]

Similarly to the preceding example but in contrast to some of the *sunna*-precepts, Mālik cites his term here in connection with a precept for which he provides ample texts. Once again, Mālik does not formulate the precept separately but cites his term immediately after the first report to indicate that the practice reported in it corresponds to the praxis of the people of Medina, which he holds to be in continuity with it. In contrast to the *sunna*-precepts, Mālik does not provide additional information to the texts that he cites other than indicating that the actions reported in the texts are normative and not repealed or exceptional.

The post-Prophetic report about Ibn ʿUmar, who performed the circumambulations somewhat differently when initiating the pilgrimage from Mecca, is cited at the close of Mālik's discussion. It does not contradict the other reports but reflects the well-established precept that pilgrimage rites are performed somewhat differently for those who inhabit Mecca or take up temporary residence in that city. Some of these distinctions are mentioned in the Qurʾan (2:196).[26]

3. *-zĀIb: Steeping Dates with Raisins*

Mālik cites two *ḥadīth*s at the beginning of this discussion, which report that the Prophet forbade (*nahā ʿan*) that fresh dates (*busr*) be steeped with pulpy dates (*ruṭab*) or that dried dates (*tamr*) be steeped with raisins. Mālik introduces his term after the second *ḥadīth* in which the Prophet forbade drinking such drinks. Mālik concludes by saying that steeping such fruits together is disliked (*yukrahu*) because of the Prophet's order against it.[27]

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[25] Ibn ʿAbd al-Barr, *al-Istidhkār*, 12:127, 130–34, 138; idem, *al-Tamhīd*, 9:9–14; Ibn Abī Shayba, *al-Muṣannaf*, 3:339–40; al-Zurqānī, *Sharḥ*, 2: 124–26; al-Bājī, *al-Muntaqā*, 2: 284; cf. al-Ṭaḥāwī, *Sharḥ*, 2:249–53. Ibn ʿAbbās reportedly also held a third opinion according to which one should walk normally between the Yamānī corner of the Kaʿba (the one just before the Black Stone) and begin the quick pace at the Black Stone. Ibn ʿUmar may also have been of this opinion. This view is consistent with the second, however, since Quraysh would not have seen the Muslims during that part of the circumambulation, because the Kaʿba would have blocked their vision. The Muslims would only have come into their sight after coming to the Black Stone. The overwhelming majority of jurists, however, held that the rapid pace takes in the entire circumambulations beginning and ending at the Black Stone (Ibn ʿAbd al-Barr, *al-Istidhkār*, 12:133). Mālik seems to address this third dissenting position indirectly, since the *ḥadīth* he cites states specifically that the Prophet began and ended the first three rapid circumambulations at the Black Stone.

[26] Al-Bājī, *al-Muntaqā*, 2:286; al-Zurqānī, *Sharḥ*, 3:126.

[27] *Muw.*, 2:844; *Muw.* (Dār al-Gharb), 2:411–12; *Muw.* (Abū Muṣʿab), 2:47–48; *Muw.* (al-Shaybānī/al-Nadawī), 3:119–20; *Muw.* (*Riwāyāt*), 4:175.

This precept occurs in the recensions of Yaḥyā, Abū Muṣʿab, and al-Shaybānī. It does not occur in al-Qaʿnabī, Suwayd, or the Ibn Ziyād fragment. Abū Muṣʿab has a different chapter title, however, and does not list the term. Al-Shaybānī gives no chapter title. He cites the pertinent *ḥadīth*s but adds no comments and does not cite Mālik's term. In this instance, Mālik's term occurs only in the recension of Yaḥyā, which is confirmed in Ibn ʿAbd al-Barr's *Istidhkār* and *Tamhīd*.[28]

In the *Mudawwana*, Saḥnūn transmits the same precept with similar statements, and he cites no term in conjunction with it. Here, the *Mudawwana* overlaps with the *Muwaṭṭaʾ* but provides detailed information not available in the former. Saḥnūn asks Ibn al-Qāsim about steeping these types of fruits together. Ibn al-Qāsim reports that Mālik told him that they should not be steeped together but may be steeped separately. Mālik stated that he disliked (*lā uḥibb*) that they be steeped in a single container and drunk because of the Prophet's prohibition. Saḥnūn pursues the issue further by asking about steeping grains such as wheat (*ḥinṭa*) and barley (*shaʿīr*), mixing honey with steeped fruits, leaving bread in steeped fruits, and the like. Ibn al-Qāsim clarifies again that Mālik disliked such types of mixed fruit steeping because of the Prophetic *ḥadīth*. Nevertheless, Ibn al-Qāsim explains, fruit juices and beverages made from mixed steeped fruits were permissible in Mālik's view—even if they produced foam—as long as they did not intoxicate.[29]

Like the preceding examples, this precept constitutes transmissional praxis. Mālik contends clearly that it originated with the command of the Prophet as documented in the two *ḥadīth*s. Once again Mālik's term -zĀIb (this is the precept which the people of knowledge in our city continue to follow; *wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-baladinā*) is used in conjunction with texts. It provides little additional information beyond what those texts already provide, other than Mālik's observation that the practice of steeping these substances together is disliked (*yukrahu*). Unlike the preceding examples in this chapter, the *ḥadīth*s in this example are reports of statements and not actions.

The Prophetic prohibition of steeping various types of fruits together is transmitted in multiply-transmitted (*mutawātir*) *ḥadīth*s of established authenticity according to the criteria of the traditionists. All *ḥadīth*s

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[28] *Muw.* (Dār al-Gharb), 2:411–12; *Muw.* (Abū Muṣʿab), 2:47–48; *Muw.* (al-Shaybānī/al-Nadawī), 3:119–20; *Muw.* (*Riwāyāt*), 4:175; Ibn ʿAbd al-Barr, *al-Istidhkār*, 24:289; *idem, al-Tamhīd*, 14:139.

[29] *Mud.*, 4:410–11: *Mud.* (2002), 11:101–05.

consistently uphold the overt meaning of the two *ḥadīth*s Mālik transmits at the beginning of the chapter. There were no contrary *ḥadīth*s permitting the steeping of mixed fruits. All jurists, including those who held dissenting opinions accepted these *ḥadīth*s as authentic, although they disagreed in their legal purport and interpretation.[30]

Ibn ʿAbd al-Barr contends that Mālik's comments on the *ḥadīth*s he transmits indicate that he regarded the Prophetic prohibition in this case not to be categorical but to be a matter of worship and choice (*nahya ʿibāda wa ikhtiyār*). Al-Layth ibn Saʿd and Abū Ḥanīfa were the primary dissenting voices in Mālik's time. Ibn ʿAbd al-Barr notes that neither of them held that the prohibition was categorical, and they agreed that harshness and inflexibility (*shidda*) were inappropriate in such matters. This was also Mālik's opinion as indicated by the wording of his *Muwaṭṭaʾ* text and the transmissions of Saḥnūn in the *Mudawwana*.[31] The Medinese held a similar view that the Prophet had given the command against steeping these

[30] Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:135–39; cf. Ibn Abī Shayba, *al-Muṣannaf*, 5:91; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:210–16.

[31] Ibn ʿAbd al-Barr, *al-Istidhkār*, 24:290–93; idem, *al-Tamhīd*, 14:140. Al-Ḥasan al-Baṣrī, Qatāda, Sufyān al-Thawrī, al-Shaybānī, al-Shāfiʿī, and most of the jurists in and outside Medina took positions similar to that of Mālik (Ibn Abī Shayba, *al-Muṣannaf*, 5:91–92; cf. ʿAbd al-Razzāq, *al-Muṣannaf*, 9:210–16). Ibrāhīm al-Nakhaʿī of Kufa dissented, and Ibn ʿUmar of Medina may also have taken a dissenting position, although Ibn ʿAbd al-Barr doubts the authenticity of reports ascribing this position to Ibn ʿUmar. Abū Yūsuf held different views but ultimately took the position of his teacher, Abū Ḥanīfa. Abū Ḥanīfa did not reject the *ḥadīth*s as inauthentic but interpreted them as reflecting the difficult living conditions of Medina in the Prophet's time (Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:140). Abū Ḥanīfa's position was based on the consideration that other agreed *ḥadīth*s allow one to steep each of these fruits separately, a point that Mālik concurred with as Ibn al-Qāsim indicates in the *Mudawwana* (*Mud.*, 4:410–11: *Mud.* [2002], 11:101–05). Abū Ḥanīfa reasoned that it was not the steeping (*intibādh*) of the fruits together that was prohibited *per se* but producing intoxicating drinks by steeping them together. He held that it was permissible to steep these various combinations of dates and raisins together, provided that one took care not to leave them ferment long enough to become intoxicating (Ibn ʿAbd al-Barr, *al-Istidhkār*, 24:292–93l Ibn Rushd, *Bidāya*, 1:281; al-Zurqānī, *Sharḥ*, 5:126–27); cf. al-Ṭaḥāwī, *Sharḥ*, 4:8–17). Abū Ḥanīfa held that the Prophet made this declaration about steeping combinations of dates and raisins at a time when the Muslims of Medina were living under straitened circumstances; under such conditions, the practice of steeping these fruits together was extravagant and wasteful. Abū Ḥanīfa's position on steeping these fruits together may relate also to his principle of rejecting the implications of solitary *ḥadīth*s when they pertain to customary matters of general necessity (*ʿumūm al-balwā*), which by their nature should be well known by virtue of established practice or multiply-transmitted *ḥadīth*s (see Abd-Allah, "*ʿAmal*," 762–64). Al-Layth ibn Saʿd also held this position and saw no harm in steeping the fruits together and drinking the beverage. He understood the prohibition in the *ḥadīth* only constituted a general directive because of the fact that mixing the two fruits made them stronger and led them ferment faster (Ibn ʿAbd al-Barr, *al-Istidhkār*, 24:292–93).

fruits together because they fermented more rapidly than normal when mixed and turned imperceptibly into intoxicating beverages.[32] According to this view, the Prophet's prohibition in this case embodied the Medinese legal principle of preclusion (*sadd al-dharā'iʿ*), a principle to which Abū Ḥanīfa did not subscribe. His interpretation of the *ḥadīth*, therefore, would appear consistent with his rejection of the principle of preclusion. From the Medinese point of view, which endorsed the principle of preclusion, there was no harm in the act of steeping these substances together in itself, but it was disliked because of being the means to something prohibited, namely the production of intoxicating drinks.

Al-Zurqānī affirms Mālik's position that the Prophet's command in this case did not indicate strict prohibition of steeping such fruits together but only that the practice was disliked. The fact that the Prophet's command against steeping such fruits together was not a categorical prohibition was, in al-Zurqānī's view, the point that Mālik intended to emphasize by declaring that the practice was disliked (*yukrahu*). Overt (*ẓāhir*) statements of law are conjectural (*ẓannī*) in Mālikī jurisprudence.[33] Mālik's reliance on a continuous transmissional praxis of the Medinese jurists to interpret the two *ḥadīth*s in a manner contrary to their overt meaning (prohibition instead of dislike) is an illustration of his modifying the meaning of an overt text on the basis of praxis. As such, it is another example of how praxis—and not the text itself—provides the semantic background for what the text originally meant from a Medinese perspective.

Mālik's citation of the *ḥadīth*s in this chapter and his comment on them that they indicate dislike by virtue of the Prophet's command is similar to his invocation of *sunna* to undercut and delimit analogies in the *sunna*-terms. What Mālik says at the end of the chapter is not redundant. It is an implicit rejection of Abū Ḥanīfa's adherence to general analogy based on the essential validity of steeping individual fruits in isolation as opposed to steeping them together. On the basis of that analogy, Abū Ḥanīfa discerns the *ḥadīth*s' purpose as having nothing essentially to do with the manner of steeping but with the production of intoxicating alcohol. If brewing intoxicants is avoided, there is no harm in mixing these fruits. Mālik's disagreement is not stringent, as his use of the term "disliked" instead

[32] Ibn Rushd, *Bidāya*, 1:281; al-Zurqānī, *Sharḥ*, 5:126–27; cf. Ibn ʿAbd al-Barr, *al-Istidhkār*, 24:292–93l; al-Ṭaḥāwī, *Sharḥ*, 4:8–17.

[33] See Abd-Allah, "*ʿAmal*," 146–47.

of "prohibited" indicates.[34] As with the *sunna*-terms, Mālik's invocation of the Prophet's authority in these *ḥadīth*s delimits Abū Ḥanīfa's use of analogical rationalism. It is as if Mālik were to say, were it not for these *ḥadīth*s and Medinese praxis in accord with them, I too would have followed Abū Ḥanīfa's analogy.

4. *-zĀIN:*[35] *The Waiting Period* (ʿIdda) *of a Pregnant Woman Whose Husband Dies*

Mālik begins by citing a post-Prophetic report containing a *ḥadīth* reporting that the Companions ʿAbd-Allāh ibn ʿAbbās and Abū Hurayra disagreed concerning the waiting period (*ʿidda*) required of a pregnant woman whose husband dies and how soon she should be allowed to remarry after the husband's death. Ibn ʿAbbās held that she must wait either until she delivers the child or until four months and ten days (the standard mourning period of widows) have passed, adding that she is bound to follow which ever of the two periods is longer. Abū Hurayra contended, on the other hand, that

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[34] Mālik's use of the word "it is disliked" (*yukrahu*) (the verbal form of *makrūh*) is one of the early and not infrequent attestations of standard later legal terms in Mālik's discourse with parallels in his student Ibn al-Qāsim. Mālik's reference to dislike in this example reflects the conception behind later legal terminology for the five act classifications (*al-aḥkām al-taklīfiyya*): obligatory (*wājib*), recommended (*mandūb*), permissible (*mubāḥ*), disliked (*makrūh*), and forbidden (*ḥarām*). Mālik's usage of dislike, however, may also reflect his caution in declaring matters forbidden without conclusive proof. The meaning of the word "disliked" (*makrūh*) was often stronger in the formative period than it became later. In the early period "disliked" was sometimes tantamount to "forbidden." Al-Shāṭibī illustrates this point and asserts that the early jurists took care not to describe matters of law as prohibited (*ḥarām*) unless they had certain knowledge of categorical prohibition. He quotes Mālik, "It is not the custom of the people (*amr al-nās*) or the custom of our predecessors who have gone before us and whose examples we emulate and upon whom is the utter reliance (*miʿwal*) of Islam that one say, 'This is permissible (*ḥalāl*) and that is forbidden.' Rather, it was [their custom] to say, 'I dislike (*akrahu*) this, and I am of this opinion (*arā*) about that.' As for saying 'permissible' and 'forbidden', it is a fabrication against God (*iftirā' ʿalā Allāh*) .... For the permissible is what God and His Messeger have declared permissible, and the forbidden is what they have declared to be forbidden" (al-Shāṭibī, *al-Muwāfaqāt*, 4:286–87).

Similarly, Ibn al-Qāsim says about a certain question in the *Mudawwana*, "In my opinion, it is not clearly forbidden (*al-ḥarām al-bayyin*) ... but I dislike (*akrahu*) that it be put into practice" (*Mud.*, 3:122). Compare Ibn al-Qāsim's statement about another matter, "I do not like it (*lā yuʿjibunī*). It is not permissible, rather, it is forbidden" (*Mud.*, 2:379)). In *Siyar al-Awzāʿī*, Abū Yūsuf claims that this was also the position of the prominent early Kufan jurist Ibrāhīm al-Nakhaʿī and his associates. When they issued legal opinions permitting certain things and forbidding others, they would say, "this is disliked" (*makrūh*) or "there is no harm in it" (*lā ba's bihi*). They regarded it reprehensible to say of such matters that they were either permissible (*ḥalāl*) or forbidden (*ḥarām*) (Abū Yūsuf, *al-Radd*, 73).

[35] The term -zĀIN stands for, "this is the precept which the people of knowledge among us still continue to follow" (*wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm ʿindanā*).

she may remarry immediately after she delivers her child. In a narration of the Prophet's wife Umm Salama, she narrates that a certain woman, Subayʿa al-Aslamiyya, delivered a child shortly after her husband's death. Two suitors, one younger and the other older, offered to marry her. Subayʿa inclined toward the younger. Umm Salama states that the older man protested that Subayʿa was not yet free to marry because she had not completed the four months and ten days of waiting. Umm Salama explains that Subayʿa's relatives were abroad at the time and the older suitor was attempting to delay the marriage until they returned, hoping that he could use his influence upon them to convince Subayʿa to marry him instead of the younger suitor. Subayʿa brought the matter to the Prophet's attention, who told her that it was permissible for her to marry immediately.

Mālik cites another post-Prophetic report stating that ʿAbd-Allāh ibn ʿUmar and his father, ʿUmar, upheld the legal implications of Umm Salama's account. ʿUmar would say that a pregnant wife whose husband dies may remarry immediately after delivering her child, "even if her deceased husband is still lying on his deathbed and has not yet been buried."

Mālik concludes the chapter by citing two shorter versions of the *ḥadīth* about Subayʿa, with which the chapter began. After the last of them, he cites the term -zĀIN (this is the precept which the people of knowledge among us still continue to follow; *wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm ʿindanā*).[36]

This precept occurs in the recensions of Yaḥyā, Abū Muṣʿab, and Suwayd. It is not in the present recensions of al-Qaʿnabī or Ibn Ziyād. Abū Muṣʿab omits the two concluding *ḥadīth*s and presents Mālik's term more elaborately as A-XN (the precept without dissent among us; *al-amr al-ladhī lā ikhtilāf fihi ʿindanā*) followed by an expression essentially the same as Yaḥyā's term, "... and what I encountered the people of knowledge doing in our city (... *wa al-ladhī adraktu ʿalayhī ahl al-ʿilm bi-baladinā*). He gives an additional statement related to the precept, which Yaḥyā does not have, about a woman whose husband dies while absent. She should begin the date of her waiting period from the time the husband died or repudiated her. If she had not known of his death until the period passed, she is not required to mourn him if the prescribed period of mourning has lapsed. Suwayd does not cite the term. He omits the post-Prophetic report of Ibn ʿUmar but adds additional post-Prophetic reports that affirm the same point.[37]

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[36] *Muw.*, 2:589–90; *Muw.* (Dār al-Gharb), 2:104–06; *Muw.* (Abū Muṣʿab), 1:654–56; *Muw.* (Suwayd), 292–94; *Muw.* (*Riwāyāt*), 3:305–309.

[37] *Muw.*, 2:589–90; *Muw.* (Dār al-Gharb), 2:104–06; *Muw.* (Abū Muṣʿab), 1:654–56; *Muw.* (Suwayd), 292–94; *Muw.* (*Riwāyāt*), 3:305–309; Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:174.

Saḥnūn presents materials in the *Mudawwana* that are similar to Abū Muṣʿab's opening remarks regarding a woman whose husband dies while absent from her. Saḥnūn does not give the precept in full as it occurs in the *Muwaṭṭa'*, nor does he give the account of Umm Salama or cite any Medinese terminology. Occasionally, the *Mudawwana* fails to treat basic material given in the *Muwaṭṭa'*, which is the case in this example. This is consistent with the *Mudawwana*'s role as a complementary text to the legal fundamentals given in the *Muwaṭṭa'*.[38]

In Yaḥyā's transmission, Mālik's refers to the people of knowledge in this precept by the term -zĀIN (this is the precept which the people of knowledge among us still continue to follow; *wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm ʿindanā*). The term affirms continuous Medinese juristic consensus on the matter. Abū Muṣʿab first cites the term A-XN (the precept without dissent among us; *al-amr al-ladhī lā ikhtilāf fīhi ʿindanā*), which is an explicit affirmation of traditional juristic continuity, and follows it with a statement similar in meaning to Yaḥyā's term. As in earlier examples, both terms are used to confirm the legal implications of the texts Mālik cites without adding legal material from non-textual sources. Mālik's terms in both transmissions indicate that the overt legal inferences based on his received texts are valid as they stand. They have not been repealed. They do not require interpretation, and they been not been modified by other legal considerations. As in the preceding examples of Mālik's references to the people of knowledge, praxis provides verification and endorsement of textual information. The post-Prophetic report of ʿUmar (that a wife may remarry immediately after delivery, even if her husband is on his deathbed) removes any ambiguities from the *ḥadīth*s in question, which Mālik might conceivably have wanted to clarify.

This precept belongs to the category of transmissional praxis. It is based on a precedent that the Prophet set and is supported by the post-Prophetic statements of prominent Companions to show that it was not repealed and to convey its full legal purport. The precept is consonant with the Qurʾānic verse (Qurʾān, 4:65), which states that the waiting period for pregnant women who are divorced during their pregnancies continues until the time they deliver. As Ibn Rushd notes, however, the

[38] *Mud.*, 2:75; *Mud.* (2002), 4:316–18.

verse pertains to repudiation (*ṭalāq*), while this precept pertains to the spouse's decease.[39]

There was widespread agreement and virtual unanimity among early jurists inside and outside of Medina on the validity of this precept.[40] Mālik reports in his presentation above, however, that Ibn ʿAbbās held a contrary view. It is reported that Ibn ʿAbbās later changed his opinion and adopted the majority view. Ibn ʿAbd al-Barr held that reports about Ibn ʿAbbās's changing his opinion are probably authentic, since his primary students are not known to have held to Ibn ʿAbbās's earlier opinion.[41]

It is reported that ʿAlī held the same position as Ibn ʿAbbās. Ibn Rushd and others interpret the position of ʿAlī and the initial position of Ibn ʿAbbās as based on their combining the two pertinent verses of the Qurʾān, the first of which (Qurʾān, 2:234) pertains explicitly to women whose husbands die (although it makes no reference to pregnant women). It specifies a waiting period of four months and ten days. The second verse (Qurʾān, 4:65) is the one mentioned above about the waiting period for women who are repudiated during pregnancy. By taking the verses together, ʿAlī and Ibn ʿAbbās concluded that the waiting period for a pregnant woman whose husband dies should be whichever of the two periods is longer.[42]

Like Mālik, most of the jurists held it valid for the wife of a deceased husband who delivers following his death to remarry immediately after delivery. This was also a point of contention. Al-Ḥasan al-Baṣrī, al-Shaʿbī, Ibrāhīm al-Nakhaʿī, and Abū Ḥanīfa's teacher Ḥammād held that the newly delivered wife of a deceased husband could not remarry until her post-partum bleeding had ceased. Other jurists held that post-partum bleeding was not an impediment to her remarriage, although she should not engage in conjugal relations after marriage until the bleeding has ceased.[43]

Yaḥyā's expression "among us" (*ʿindanā*) in the term -zĀIN appears to be equivalent to the expression "in our city" in the term of Abū Muṣʿab and in the previous terms -zĀIb ("this is the precept that the people of knowledge in our city still continue to follow" [*wa hādha/dhālika al-amr*

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[39] Ibn Rushd, *Bidāya* (Istiqāma), 2:95.

[40] Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:175, 178; Ibn Rushd, *Bidāya* (Istiqāma), 2:95; al-Bājī, *al-Muntaqā*, 4:132–33; al-Zurqānī, *Sharḥ*, 4:142–46.

[41] See Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:175–78; idem, *al-Tamhīd*, 11:311–12; Ibn Rushd, *Bidāya* (Istiqāma), 2:95; al-Bājī, *al-Muntaqā*, 4:132–33; al-Zurqānī, *Sharḥ*, 4:142–46.

[42] See Ibn ʿAbd al-Barr, *al-Tamhīd*, 11:311–12; idem, *al-Istidhkār*, 18:175–78; Ibn Rushd, *Bidāya* (Istiqāma), 2:95; al-Bājī, *al-Muntaqā*, 4:132–33; al-Zurqānī, *Sharḥ*, 4:142–46.

[43] Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:178.

al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-baladinā]) that we have examined. Explicit reference to "our city" instead of "among us" is the more common phrasing of these terms.

5. *ĀdIb:*[44] *Joining the Friday Prayer Late*

> Mālik reports that al-Zuhrī held it to be the *sunna* that a person who comes late to the Friday prayer but is able to perform at least one prayer unit (*rakʿa*) with the *imām* has technically performed the Friday prayer. He need only make up one more prayer unit [to complete the two required] after the *imām* has finished praying. Mālik cites the term -ĀdIb and adds that the rationale underlying this precept is that the Prophet said that whoever makes at least one prayer unit [of a communal prayer with the *imām*] has partaken of that prayer.[45]

This precept occurs in the recensions of Yaḥyā, Abū Muṣʿab, al-Qaʿnabī, and Suwayd. It is not in the Ibn Ziyād fragment. Each of the four recensions cites the same term, and their texts are similar.[46]

In the *Mudawwana*, Saḥnūn cites *ḥadīth*s and adds post-Prophetic reports from Ibn ʿUmar, al-Shaʿbī, ʿAlqama, and Ibrāhīm al-Nakhaʿī complementing the *Muwaṭṭaʾ* text and upholding Mālik's ruling. Contrary to the four recensions of the *Muwaṭṭaʾ*, Saḥnūn cites no term from Mālik in conjunction with the precept.[47]

As in the preceding examples, the precept falls under the rubric of transmissional praxis. Al-Zuhrī's opinion that Medinese praxis on this matter was the *sunna* means that he too regarded it to be transmissional praxis rooted in Prophetic teaching. But Mālik's clarification that the rationale underlying the precept is in the *ḥadīth* that he mentions, which is about coming late to prayers and is not specific to the Friday prayer, indicates that justifying Medinese praxis in this matter required an element of legal interpretation, since there was no explicit textual evidence. The *sunna* in this case would have either been part of the original transmission of the praxis from the Medinese perspective or the result of later legal interpretation (*ijtihād*) based, perhaps, on the *ḥadīth* Mālik cites.

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[44] The term ĀdIb stands for, "This is what I found the people of knowledge in our city following" (*wa ʿalā dhālika/hādhā adraktu ahl al-ʿilm bi-baladinā*).

[45] *Muw.*, 1:105; *Muw.* (Dār al-Gharb), 1:161–62; *Muw.* (Abū Muṣʿab), 1:172; *Muw.* (al-Qaʿnabī), 209; *Muw.* (Suwayd), 127; *Muw.* (*Riwāyāt*), 1:447–48.

[46] *Muw.* (Dār al-Gharb), 1:161–62; *Muw.* (Abū Muṣʿab), 1:172; *Muw.* (al-Qaʿnabī), 209; *Muw.* (Suwayd), 127; *Muw.* (*Riwāyāt*), 1:447–48; Ibn ʿAbd al-Barr, *al-Istidhkār*, 5:64.

[47] *Mud.*, 1:137–38; *Mud.* (2002), 1:361–63.

According to Ibn ʿAbd al-Barr, Mālik based his position on the praxis of Medina—not on explicit textual proof—and the fact that juristic pronouncements (*fatwā*s) in Medina had long been based on this opinion. Ibn ʿAbd al-Barr notes that the *ḥadīth* Mālik cites does not constitute explicit textual proof but is merely a general indicant of the *sunna*. It serves as valid proof for Mālik because he regarded the Friday prayer to be analogous to other communal prayers in terms of what constitutes joining it on time. Ibn ʿAbd al-Barr also believes that the manner in which Mālik presents his material in this chapter indicates his full awareness of the regional dissent of the early jurists on this issue.[48]

The term ĀdIb (this is what I found the people of knowledge in our city following; *wa ʿalā hādhā adraktu ahl al-ʿilm bi-baladinā*) gives no explicit indication of scholarly continuity going back to the institution of a Prophetic *sunna*. Within the confines of Mālik's text, al-Zuhrī and no one earlier than he constitutes the authoritative frame of reference for this praxis belonging to the *sunna*. The term ĀdIb does indicate, however, that the precept in question ultimately became part of local Medinese juristic consensus and that Mālik had received it as such.

The precept is of the nature of general necessity (*ʿumūm al-balwā*).[49] Whenever Friday prayers are instituted, there will be people who come late, who miss all but the last prayer unit, and who need to know what is required of them to finish the prayer correctly. It is likely that the full precept as Mālik cites it and supports it by reference to the general *ḥadīth* went back to the initial institution of the Friday prayer in Medina during the Prophetic era. It is unlikely that clarification of this point waited until al-Zuhrī's generation.

Mālik's comment in support of al-Zuhrī constitutes the same supportive legal reasoning that Mālik uses to defend the validity of Medinese praxis elsewhere. Mālik's textual reference to the *ḥadīth* serves to index the praxis as "transmissional." It does not imply that the *ḥadīth* itself was the source of the praxis, of al-Zuhrī's opinion, or the opinions of other Medinese jurists. Mālik simply indicates that the *ḥadīth* provides the rationale embodied in praxis. From the Medinese perspective, local juristic conviction on the matter would likely have been rooted in the existential reality of praxis and not directly attested in any textual ancillary (like Mālik's *ḥadīth*). Other than al-Zuhrī's statement, Mālik cites no

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[48] Ibn ʿAbd al-Barr, *al-Istidhkār*, 5:65; ʿAbd al-Razzāq, *al-Muṣannaf*, 3:235–36.

[49] See Abd-Allah, "*ʿAmal*," 184–88.

explicit textual evidence that bears out the full scope of this precept. His usage of the term ĀdIb adds nothing new from local praxis in addition to what al-Zuhrī states, although, as just indicated, Mālik's citation of the *ḥadīth* has the purpose of supporting the validity of al-Zuhrī's position.

This precept was a matter of dissent among the early jurists. The majority of them, including those outside Medina, held opinions similar to the Medinese. The opinion is attributed to Ibn ʿUmar, Ibn Masʿūd, Saʿīd ibn al-Musayyab, Ibrāhīm al-Nakhaʿī, al-Zuhrī, al-Thawrī, Zufar ibn Hudhayl, al-Awzāʿī, al-Shaybānī, and al-Shāfiʿī. It was probably the opinion of al-Layth, although a contrary opinion is also attributed to him.[50]

Abū Ḥanīfa and Abū Yūsuf did not exactly disagree with Mālik and the Medinese people of knowledge on this matter, but they went further, holding that as long as the latecomer joined the prayer before it has completely finished (that is, even after the "bowing" [*rukūʿ*] of the final prayer unit), he had still formally partaken of the prayer and need only pray the two prayer units missed in order to have fully performed the prayer. They based this on another general *ḥadīth*, "Pray [with the *imām*] what you have reached [on time], and make up what you have missed."[51] For Mālik and the Medinese, to enter the prayer after the final bowing was too late, since the last prayer unit had been missed by failing to perform the bowing. Such a latecomer would have to pray four prayer units, the number customarily prayed for the noon (*ẓuhr*) prayer, which occurs at the same time of day.[52]

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[50] Ibn ʿAbd al-Barr, *al-Istidhkār*, 5:65–66; ʿAbd al-Razzāq, *al-Muṣannaf*, 3:234–36; al-Bājī, *al-Muntaqā*, 1:191; al-Zurqānī, *Sharḥ*, 1:323; cf. Ibn Rushd, *Bidāya*, 1:111.

[51] Ibn ʿAbd al-Barr, *al-Istidhkār*, 5:64, 66–67 and footnote and text 5:66; al-Bājī, *al-Muntaqā*, 1:191; al-Zurqānī, *Sharḥ*, 1:323; cf. Ibn Rushd, *Bidāya*, 1:111.

[52] See al-Bājī, *al-Muntaqā*, 1:191; al-Zurqānī, *Sharḥ*, 1:323; cf. Ibn Rushd, *Bidāya*, 1:111. There was another dissenting opinion that if no oration (*khuṭba*) were given in the Friday prayer, four prayer units were to be prayed instead of two. This was a strong Meccan opinion. ʿUmar, Makḥūl, Ibrāhīm, Ibn Sīrīn, al-Ḥasan al-Baṣrī, Ṭāwūs, and others held it (ʿAbd al-Razzāq, *al-Muṣannaf*, 3:171; Ibn Abī Shayba, *al-Muṣannaf*, 1:455–56, 460–61). This specific point of difference is not explicitly registered in Mālik's wording in the *Muwaṭṭaʾ*, but it may be understood, since there were early jurists who held that one who came late and missed the Friday oration had, in fact, missed the Friday prayer even if that person had prayed the entirety of the ritual prayer that follows the oration. The opinion that one must attend the Friday oration for the prayer to be valid is attributed to the Syrian Makḥūl, the Meccans Mujāhid and ʿAṭāʾ ibn Abī Rabāḥ, the Yemeni Ṭāwūs, and others. They required anyone who missed the Friday oration to perform four prayer units independently after the communal prayer (Ibn ʿAbd al-Barr, *al-Istidhkār*, 5:65; ʿAbd al-Razzāq, *al-Muṣannaf*, 3:235–36; al-Zurqānī, *Sharḥ*, 1:323; see also al-Bājī, *al-Muntaqā*, 1: 191; Ibn Rushd, *Bidāya*, 1:111).

6. *ĀdIb:*[53] *Husbands Who Cannot Support Their Wives*

> Mālik states that Saʿīd ibn al-Musayyab held that a husband and wife should be separated if the husband is unable to support her. Mālik closes by citing the term ĀdIB (this is what I found the people of knowledge in our city following; *wa ʿalā dhālika/hādhā adraktu ahl al-ʿilm bi-baladinā*).[54]

This precept occurs in the three recensions of Yaḥyā, Abū Muṣʿab, and Suwayd, and their texts are similar. The precept does not occur in the present texts of al-Qaʿnabī or Ibn Ziyād. Each of the recensions with the term cites it from Mālik with similar wording, although Abū Muṣʿab adds after it that Mālik said, "and my considered opinion is in accordance with this" (*wa ʿalā dhālika raʾyī*).[55]

In the *Mudawwana*, Saḥnūn cites Saʿīd ibn al-Musayyab's statement as given above and relates Mālik as saying, "all whom I met held this opinion (*kulla man adraktu yaqūlūna dhālika*) that if a husband fails to support his wife they will be separated."[56] His text closely parallels the *Muwaṭṭaʾ*, and Mālik's expression in the *Mudawwana* is synonymous to his ĀdIb in the *Muwaṭṭaʾ*, although it differs in wording.[57] Saḥnūn produces further textual evidence to substantiate the validity of the ruling. He transmits that Mālik's teachers Yaḥyā ibn Saʿīd and Rabīʿa held to the precept's validity.[58] He cites an interesting report that Ibn Musayyab emphatically regarded it as a *sunna*. When Abū Zinād questions him further on the behalf of ʿUmar ibn ʿAbd al-ʿAzīz about its being a *sunna*, Ibn al-Musayyab replies, "[Is it] a *sunna*? [Is it] a *sunna*? Yes, it is a *sunna*! (*Sunna? Sunna? Naʿam, sunna!*)."[59]

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[53] The term ĀdIb stands for, "This is what I found the people of knowledge in our city following" (*wa ʿalā dhālika/hādhā adraktu ahl al-ʿilm bi-baladinā*).

[54] *Muw.*, 2:589; *Muw.* (Dār al-Gharb), 2:104; *Muw.* (Abū Muṣʿab), 1:654; *Muw.* (Suwayd), 292; *Muw.* (*Riwāyāt*), 3:305.

[55] *Muw.* (Dār al-Gharb), 2:104; *Muw.* (Abū Muṣʿab), 1:654; *Muw.* (Suwayd), 292; *Muw.* (*Riwāyāt*), 3:305; Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:166.

[56] In the 2002 edition of the *Mudawwana*, however, the expression is given as "those I encountered held this opinion" (*kāna man adraktu yaqūlūna dhālika*). See *Mud.* (2002), 4:31.

[57] *Mud.* 2:194; *Mud.* (2002), 4:30–32.

[58] *Mud.*, 2:194; *Mud.* (2002), 4:31.

[59] *Mud.*, 2: 194; *Mud.* (2002), 4:31. *Mud.*, 2:192–94; *Mud.* (2002), 4:24–31. Ibn Abī Shayba and ʿAbd al-Razzāq transmit similar reports (Ibn Abī Shayba, *al-Muṣannaf*, 4:174; ʿAbd al-Razzāq, *al-Muṣannaf*, 7:96; Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:166–67; al-Zurqānī, *Sharḥ*, 4:141). In keeping with its purpose, the *Mudawwana* adds relevant details of legal interpretation pertaining to the practical application of the precept, explaining, for example, conditions in which a wife—even one who is independently wealthy—may later demand

Explicit *ḥadīth*s are lacking for this precept, and it is difficult to determine whether Mālik regarded this ĀdIb as transmissional or old praxis. He gives no clear indication in the *Muwaṭṭaʾ* that it went back to the Prophet but cites this reference to the Medinese people of knowledge (ĀdIb) as a footnote appended to the opinion of the Successor Saʿīd ibn al-Musayyab, who stood out as one of the precept's most forceful proponents. Mālik adds no additional commentary in the *Muwaṭṭaʾ* on the legal content of the matter. His term serves the purpose of indicating the degree of support and continuity that the precept had among the Medinese jurists. As noted below, however, ʿUmar ibn ʿAbd-ʿAzīz and al-Zuhrī are reported both to have equivocated on the precept, supporting it at times and dissenting from it at others. Presumably, Mālik regarded al-Zuhrī, who certainly counted among the most illustrious teachers he met, to have ultimately fallen in line with the preponderant Medinese view on the matter.

This precept constituted a point of dissent between the Medinese and the Kufan jurists Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī, and Sufyān al-Thawrī. The dissenting jurists held that a husband's failure to support his wife was not sufficient grounds for separating them. It is reported, however, that Abū Ḥanīfa's teacher, Ḥammād ibn Abī Sulaymān, differed with the Kufans on this matter and held the same opinion as Ibn al-Musayyab.[60]

None of the precept's supporters or dissenters argued from an explicit Qurʾānic verse or *ḥadīth*. Al-Ḥasan al-Baṣrī is said to have based his opinion on the general implications of the Qurʾānic verses (67:7 and 2:286), which indicate that husbands should support their wives according to their means and that God does not tax anyone beyond their capacity.[61] According to Ibn Rushd, the Kufan position was based upon the premise of the inviolability of marriage, which, as a general principle, was a matter of scholarly consensus. They held that only such acts or inactions could legitimately dissolve marriage that are verified in the Qurʾān and *sunna* as terminating marriage bonds or are supported by consensus.[62]

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of her delinquent husband to repay her for personal expenses she incurred from her private wealth.

[60] ʿAbd al-Razzāq, *al-Muṣannaf*, 7:95–96; Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:169–70; Ibn Abī Shayba, *al-Muṣannaf*, 4:174–75; al-Ṭaḥāwī, *Mukhtaṣar*, 2:366–67; cf. Ibn Rushd, *Bidāya* (Istiqāma), 2:51–52; cf. al-Bājī, *al-Muntaqā*, 4:131. Al-Ḥasan al-Baṣrī, al-Shaʿbī, and ʿAṭāʾ also dissented from the Medinese position. Such dissent is attributed as well to ʿUmar ibn ʿAbd al-ʿAzīz and al-Zuhrī, although, as indicated earlier, the contrary is also said to have been their opinion.

[61] Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:169; cf. al-Ṭaḥāwī, *Mukhtaṣar*, 2:366–67.

[62] Ibn Rushd, *Bidāya* (Istiqāma), 2:51–52; cf. al-Bājī, *al-Muntaqā*, 4:131.

The Medinese held that the husband's obligation to support his wife was one of the fundamental duties of marriage and should be individually assessed on the basis of what was customarily acceptable given a husband's economic and social status. (Al-Bājī provides at length the customary definitions of family support based on the *Mudawwana, Mawwāziyya, ʿUtbiyya*, and other early Mālikī sources.[63]) The Medinese held further that marriage may be dissolved at the wife's request through returned dowry divorce (*khulʿ*). She may, however, retain her dowry gift whenever her husband brings about dissolution of the marriage through personal injury (*ḍarar*). A husband's failure to support his wife in a customarily acceptable fashion according to his economic and social station was regarded to be an instance of personal injury to the wife.[64]

If one regards the precept to have been a Medinese *sunna* in the sense that it was deemed to have Prophetic authority, it would be another example of a precept of Medinese praxis for which there were few if any explicit textual references in later sources and regarding which there had been significant dissenting opinions among the jurists of the formative period. No explicit *ḥadīth*s support the Medinese position or that of the dissenters.[65] Other early evidence relates that this precept was in keeping with the policy of ʿUmar ibn al-Khaṭṭāb. During his caliphate, he wrote to his commanders directing them to inform soldiers who were absent from their wives and failed to support them that they either send their wives support or divorce them.[66] In light of the available evidence, ʿUmar's policy appears to be the earliest record to the precept's application. It may have been a caliphal *sunna*. It is difficult to determine whether ʿUmar's policy reflected his legal interpretation or his personal knowledge of the Prophet's *sunna*. Al-Ṭaḥāwī, who supports the dissenting Kufan position, notes Ibn al-Musayyab's insistence that the precept was a "*sunna*" but observes that he need not have meant it to be a Prophetic *sunna*.[67]

Al-Bājī cites the Qurʾānic verse (Qurʾān 2:233), which requires a husband to support his wife in a customarily acceptable manner (*bi-ʾl-maʿrūf*) as part of the background of the Medinese legal position on the obligation of reasonable wife support. Neither al-Bājī nor Ibn Rushd produces

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[63] Al-Bājī, *al-Muntaqā*, 4:131.

[64] See al-Bājī, *al-Muntaqā*, 4:126–32, 60–69; *Muw.*, 2:564–65; Ibn Rushd, *Bidāya* (Istiqāma), 2:51–52; al-Zurqānī, *Sharḥ*, 4:141.

[65] See Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:170.

[66] Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:167; ʿAbd al-Razzāq, *al-Muṣannaf*, 7:93–94; Ibn Abī Shayba, *al-Muṣannaf*, 4:175.

[67] Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:170.

further textual references. Rather they both present rational arguments predicated on the ultimate requirements and purposes of marriage as a legal institution.[68] In noting the Kūfan critique of the Medinese position, Ibn Rushd indicates that they too lacked explicit texts on the question but based their objections on general legal argumentation.[69]

7. *ĀdIb:*[70] *The Banishment of Fornicators*

> Mālik cites a post-Prophetic report stating that the caliph Abū Bakr punished an unmarried man who admitted to fornicating with a slave girl and banished him to the town of Fadak (about two days journey north of Medina). Mālik follows it by a discussion of why one is required to accept later denials of confessed fornicators or adulterers. He states that it is the ĀdIb (this is what I found the people of knowledge in our city following; *wa ʿalā hādhā adraktu ahl al-ʿilm bi-baladinā*) that slaves (*ʿabīd*) are not banished in cases of fornication.[71]

This precept occurs in the *Muwaṭṭaʾ* transmissions of Yaḥyā and Abū Muṣʿab.[72] It does not occur in the recensions of al-Qaʿnabī, Suwayd, and Ibn Ziyād. The full term ĀdIb (this is what I found the people of knowledge in our city following; *wa ʿalā hādhā adraktu ahl al-ʿilm bi-baladinā*) occurs only in one printed version of Yaḥyā's transmission.[73] In other versions, it occurs in a similar shortened form as "this is what I found the people of knowledge following." Although this omission of reference to "our city" (*wa ʿalā hādhā adraktu ahl al-ʿilm*) is unusual for Mālik, it is apparently accurate, since Ibn ʿAbd al-Barr gives the same citation from Yaḥyā in the *Istidhkār*.[74] Abū Muṣʿab uses the expression "the precept which I found the people of knowledge in our city following" (*al-amr al-ladhī adraktu ʿalayhī ahl al-ʿilm bi-baladinā*), which is close to the full term ĀdIb. He cites the precept after this expression and appends to it

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[68] Al-Bājī, *al-Muntaqā*, 4:126, 131; see Ibn Rushd, *Bidāya* (Istiqāma), 2:51–52; cf. Ibn ʿAbd al-Barr, *al-Tamhīd*, 11.

[69] See ibn Rushd, *Bidāya* (Istiqāma), 2:51–52; al-Bājī, *al-Muntaqā*, 4:126, 131.

[70] The term ĀdIb stands for "this is what I found the people of knowledge in our city following" (*wa ʿalā dhālika/hādhā adraktu ahl al-ʿilm bi-baladinā*).

[71] *Muw.*, 2:826; *Muw.* (Dār al-Gharb), 2:388; *Muw.* (Abū Muṣʿab), 2:22–23, 26; *Muw.* (*Riwāyāt*), 4:135–36; *Muw.* (al-Shaybānī/al-Nadawī), 3:89–90.

[72] *Muw.*, 2:826; *Muw.* (Dār al-Gharb), 2:388; *Muw.* (Abū Muṣʿab), 2:22–23, 26; *Muw.* (*Riwāyāt*), 4:135–36; *Muw.* (al-Shaybānī/al-Nadawī), 3:89–90.

[73] *Muw.* (Dār al-Gharb), 2:388.

[74] *Muw.*, 2:826; Ibn ʿAbd al-Barr, *al-Istidhkār*, 24:94. I believe the edition of Fu'ad ʿAbd al-Bāqī is more accurate here, since it agrees with Ibn ʿAbd al-Barr's *Istidhkār*. Usage of the full term ĀdIb in the Dār al-Gharb edition is probably an oversight.

Mālik's observation, "and that is the best of what I have heard transmitted" (*wa dhālika aḥsan mā sami'tu*).[75] As is customary, al-Shaybānī's recension gives no citation of Mālik's term.[76] I failed to find discussion of this precept in the *Mudawwana*.[77]

The majority of the early jurists agreed with this precept. They also concurred that banishment as an additional punishment for fornication applied exclusively to free men, not slaves or women. Some substituted imprisonment for banishment, although most held that the free male fornicator should be banished outside of his native town. Others contended that he should be imprisoned in the town to which he was banished.[78]

There is conflicting evidence on this precept from the Prophet and Abū Bakr. According to a transmission in ʿAbd al-Razzāq, the Prophet handed down a ruling that both fornicators witnessed in the act—male and female—be punished by lashing and then be both exiled for a year to different regions.[79] Ibn ʿUmar, one of the leading Medinese authorities, had a slave girl of his, who was found guilty of fornication, banished to Fadak.[80] Ibrāhīm al-Nakhaʿī of Kufa apparently concurred on the correctness of the report banishing both fornicators, since he held—in contrast to the later Kufans—that if both fornicators were banished, they should be banished to different villages.[81]

Abū Ḥanīfa dissented with the Medinese and his Kufan teachers by rejecting banishment in general as punishment for fornication, which he regarded as an invalid punishment of fornication under any circumstances for male or female, free or slave. Despite the existence of a formally authentic solitary *ḥadīth* stating that the Prophet banished a free

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[75] *Muw.* (Abū Muṣʿab), 2:22–23, 26.
[76] *Muw.* (al-Shaybānī/al-Nadawī), 3:89–90.
[77] *Mud.* 4:379–410; *Mud.* (2002), 11:5–101.
[78] Ibn ʿAbd al-Barr, *al-Istidhkār*, 24:94.
[79] ʿAbd al-Razzāq, *al-Muṣannaf*, 7:313.
[80] ʿAbd al-Razzāq, *al-Muṣannaf*, 7:312.
[81] ʿAbd al-Razzāq, *al-Muṣannaf*, 7:314–15. According to ʿAbd al-Razzāq, Abū Ḥanīfa transmits from his teachers Ḥammād and Ibrāhīm al-Nakhaʿī that Ibn Masʿūd, one of the principal Kufan authorities, held that both fornicators be lashed and exiled for a year to different villages (ʿAbd al-Razzāq, *al-Muṣannaf*, 7:312). Similarly, in Mālik's time, al-Awzāʿī and al-Thawrī held the dissenting view that all fornicators should be banished—men and women, free and slave. In the generation after Mālik, al-Shāfiʿī took a similar position, although three different opinions are attributed to him. According to one of these opinions, he held that banishment applied to male and female alike for the period of a year. According to a second opinion, he restricted banishment to only half a year, an opinion with which al-Ṭabarī also concurred. According to a third opinion, al-Shāfiʿī had misgivings about the validity of banishing slaves (Ibn ʿAbd al-Barr, *al-Istidhkār*, 24:95).

male fornicator from Medina for one year after having him flogged, Abū Ḥanīfa acknowledged the *ḥadīth* but did not apply it because of his position regarding solitary *ḥadīth*s when they constitute the only evidence relating to Qur'ān-based punishments (*ḥudūd*). For all such punishments, Abū Ḥanīfa required conclusive extra-Qurānic evidence.[82]

Al-Zurqānī states that some later Ḥanafīs claimed that the *ḥadīth* Mālik references in this question had been repealed. Such a claim on Abū Ḥanīfa's part would explain why Mālik cites the post-Prophetic report about Abū Bakr's enforcement of the precept instead of simply stating the solitary *ḥadīth*. Abū Bakr's decision was taken after the Prophet's death. Like standing praxis in general, Abū Bakr's practice during his caliphate indicates that, in his view, the *ḥadīth* had not been repealed. Al-Zurqānī produces citations from later compilations of *ḥadīth* to show not only that the Prophet enforced this precept but that Abū Bakr and ʿUmar both continued to enforce it after his death. Consequently, it was a standing *sunna* of the Prophet in their view.[83] ʿAbd al-Razzāq adds that ʿAlī also followed this policy.[84]

The information that Ibn Rushd and al-Zurqānī provide also argues that the precept belonged to transmissional praxis. Again, the *Muwaṭṭaʾ* gives no clear indication of that fact, unless one argues that Mālik was citing the post-Prophetic report of Abū Bakr as an indicant of Prophetic *sunna*, which, as indicated before, is one of the fundamental uses of the post-Prophetic reports of the Companions in Mālik's legal reasoning.[85] Although Mālik gives no explicit textual indication of the origins of this precept in the *sunna* or later legal interpretation, his citation of the term ĀdIb and variations of the term close to it in meaning clarify that the precept belonged to the local consensus of the Medinese juristic community.

In this example, Mālik provides additional information from Medinese praxis to clarify the meaning of the post-Prophetic report about Abū Bakr. The post-Prophetic report is a report of an action or, more specifically in this case, what later jurisprudents called an "isolated ruling" (*qaḍiyyat ʿayn*).[86] Mālik provides the supplementary information that banishment does not apply to slaves. This addition is not explicit in the post-Prophetic

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[82] Ibn Rushd, *Bidāya*, 2:263; al-Zurqānī, *Sharḥ*, 5:96–98. For Abū Ḥanīfa's restrictions on solitary *ḥadīth*s, see Abd-Allah, "*ʿAmal*," 762–64.

[83] See Ibn ʿAbd al-Barr, *al-Istidhkār*, 24:94; Ibn Abī Shayba, *al-Muṣannaf*, 5:497, 501; Ibn Rushd, *Bidāya*, 2:263; al-Zurqānī, *Sharḥ*, 5:96–98.

[84] ʿAbd al-Razzāq, *al-Muṣannaf*, 7:314–15.

[85] See Abd-Allah, "*ʿAmal*," 161–70.

[86] See Abd-Allah, "*ʿAmal*," 188–95.

report, which mentions that the fornicator's sexual partner had been an unmarried slave girl virgin who became pregnant as a result. The text reports that the young man admitted his compliance but makes no mention of the slave girl. Mālik appears again to rely upon Medinese praxis to flesh out the meaning of the text, which, in its general ambiguity, could be applied to slaves as well as free. In terms of content provided, Mālik's use of terminology here differs in that he provides additional legal information, while in earlier examples he cites the term ĀdIb primarily as an indication of the status of the praxis involved as reflected in cited texts and provides no additional information in conjunction with it.

According to Ibn Rushd, Mālik's position was that banishment in cases of fornication was an exceptional additional punishment and pertained exclusively to free men, not to free women or to slaves of either gender. Banishment did not apply to free women or slaves because it was likely to lead to bigger problems. Mālik's reasoning in this case, according to Ibn Rushd, is an example of preclusion, which Ibn Rushd refers to in this case as "analogy based on the general good" (*al-qiyās al-maṣlaḥī*).[87]

Mālik's References to the People of Knowledge in Summary

The references to the Medinese people of knowledge surveyed in this chapter have been restricted to those that occur in isolation and not in connection with the *sunna-* and *amr*-terms, with which they do often occur. Such references to the people of knowledge in Medina appear in some of the remaining examples of Mālik's terminology studied below.[88]

The terms -zĀIb (this is the precept that the people of knowledge in our city still continue to follow; *wa dhālika al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-baladinā*), ĀdIb (this is what I found the people of knowledge in our city following; *wa ʿalā dhālika/hādhā adraktu ahl al-ʿilm bi-baladinā*), and their cognate terms studied in this chapter appear always to be indicants of local Medinese consensus. I found no evidence of dissenting opinions among the Medinese regarding the precepts for which Mālik uses these terms. The term -zĀIb, which I have cited in conjunction with *ḥadīth*s and post-Prophetic reports, indicates the continuity of Medinese praxis and consensus on the precept in question. The term ĀdIb lacks the

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87 See Ibn Rushd, *Bidāya*, 2:263. For al-Shāfiʿī's legal presumption of universal applications of legal texts, see Abd-Allah, "*ʿAmal*," 139–40.

88 See Abd-Allah, "*ʿAmal*," 616.

same semantic indication of continuity. It indicates simply that, at least in Mālik's time, local consensus had been reached on the matter. It is reasonable to assume that Mālik uses the term ĀdIb in matters upon which there may not have been initial consensus among the Medinese jurists, but I have found no evidence to support that assumption. Furthermore, it is also conceivable that the terms -zĀIb and ĀdIb do not stand for total local consensus, such as is explicitly indicated by the semantics of terms like S-XN, A-XN, and AMN-X, which negate the presence of any juristic differences on the local level. It is possible that the consensus indicated in -zĀIb and ĀdIb is concurrence (*ijtimāʿ*), which, as I suggest, may also be what Mālik had in mind when he cited the expression AMN.[89]

The precepts in each of the preceding references to the Medinese people of knowledge constitute points of dissent between the Medinese and non-Medinese jurists of the formative period. As in the case of the *sunna*-precepts examined earlier, roughly two-thirds of which contrasted with dissenting views of Abū Ḥanīfa,[90] most but again not all of the precepts just studied constituted points of difference with Abū Ḥanīfa, two of them involving both Abū Ḥanīfa and his fellow Kufan Sufyān al-Thawrī.[91] Others of these examples, constituted issues of dissent with Ibn ʿAbbās and possibly ʿAlī ibn Abī Ṭālib,[92] and, in another example, Ṭāwūs (with whom Mālik also disagreed on one of the earlier *sunna*-precepts),[93] Makḥūl, and ʿAṭāʾ ibn Abī Rabāḥ.[94]

The -zĀIb precepts seem to fall with the category of transmissional praxis. Three examples are supported by *ḥadīth*s. Another occurs in association with a *ḥadīth*, which, however, does not present the content of the precept itself but pertains to the same question. It also is given in the context of post-Prophetic reports of prominent Companions whom Mālik regarded as repositories of the normative *sunna*.

The sources of the ĀdIb precepts are not readily apparent, at least within the context of the materials presented in the *Muwaṭṭaʾ*. Al-Zuhrī states that the first of the precepts is *sunna*, but the *ḥadīth* that Mālik cites to support al-Zuhrī's position does not contain the legal precept explicitly. I found no explicit *ḥadīth*s regarding dissolution of the marriage of a man

89 See Abd-Allah, "*ʿAmal*," 424–28.
90 See Abd-Allah, "*ʿAmal*," 556–57, 562, 565–66, 573.
91 See Abd-Allah, "*ʿAmal*," 586–87, 592–93, 603, 606.
92 See Abd-Allah, "*ʿAmal*," 590–91, 597–98.
93 Abd-Allah, "*ʿAmal*," 558.
94 See Abd-Allah, "*ʿAmal*," 601–02.

who fails to support his wife or the precept of exempting slaves from banishment when guilty of fornication. Again, however, Saʿīd ibn al-Musayyab is said to have regarded the first of these to be a *sunna*, while the practice regarding the banishment of fornicators is reported to have gone back to the Prophet's time.

If one regards the ĀdIb precepts analyzed in this chapter as instances of transmissional praxis, they provide further illustrations of well-established aspects of praxis that went back to the Prophetic era but for which there were few if any explicit texts. From the manner of Mālik's presentation of this material in the *Muwaṭṭa'* (especially the ĀdIb precepts), the primary information that he seems to want to communicate about them is that they are part of the local consensus of the Medinese people of knowledge. That issue, for Mālik, apparently takes precedence over specific textual indications of praxis origins.

Despite the lack of explicit support in early texts for many of the precepts of this chapter, the role of texts in them such as the post-Prophetic reports of Companions and prominent Medinese Successors is distinctively different from the preceding chapter on the *sunna*-terms. Most of the precepts in that chapter were unaccompanied by explicit legal texts. Even when Mālik provided supporting texts, he added essential information from the non-textual source of Medinese praxis that could not have been deduced from the texts themselves. In this chapter, on the other hand, Medinese praxis supported by the consensus of the Medinese people of knowledge is used primarily to support the validity of precepts as set forth in the texts that Mālik cites or reflected in the actions those texts report. In some cases, however, Mālik relies on Medinese praxis to validate the interpretation that he gives these texts, especially when the texts or interpretations are conjectural. Many of the texts cited in this chapter are reports of actions, which are inherently ambiguous, but Mālik's validation of them by reference to Medinese praxis and consensus removes their ambiguity.[95]

Praxis is used to verify that the Medinese people of knowledge regarded certain actions of prominent Companions to constitute the desired norm.[96] Even the precept prohibiting the banishment of slaves may be said to be indicated by the text Mālik cites regarding a ruling Abū Bakr handed down regarding a man who fornicated with a slave girl (since the text indicates that the young man was banished and makes no mention of the slave girl).

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[95] See Abd-Allah, "*'Amal*," 188–95.
[96] See Abd-Allah, "*'Amal*," 588–89.

Nevertheless, that precept is not at clear in the text which Mālik cites.[97] In the case of two quite explicit statements that Mālik transmits from the Prophet, he supports an interpretation of those texts that is contrary to their overt meaning by reference to the continuous praxis of the Medinese people of knowledge.[98]

[97] See Abd-Allah, "*ʿAmal*," 607–08.
[98] See Abd-Allah, "*ʿAmal*," 592–596.

CHAPTER EIGHT

REFERENCES TO MEDINESE PRAXIS

General Observations

The word "praxis" (*ʿamal*) does not occur frequently in the *Muwaṭṭaʾ* when compared with words like *sunna* and *amr* (precept) or Mālik's references to the people of knowledge of Medina. As noted earlier, Ibn Ziyād's recension of the *Muwaṭṭaʾ* generally refers to Medinese praxis as AN (the precept among us; *al-amr ʿindanā*), but also contains what appears as an archaic form of AN stated as "the praxis among us" (*al-ʿamal ʿindanā*).[1] The expression "the praxis among us" does not occur in Yaḥyā's recension. The *Mudawwana* also makes considerably more frequent use of the term "precept" (*amr*) than "praxis." Ibn al-Qāsim does relate to Saḥnūn, however, that Mālik told him that the Medinese formula for legal oaths constituted the praxis (*ʿamal*) in accordance with which the precept the people follow had long been established (*maḍā amr al-nās*).[2] I was able to find and index only fourteen explicit terminological expressions containing the word "praxis" in Yaḥyā's recension of the *Muwaṭṭaʾ*.[3] These expressions fall into two categories: 1) affirmative praxis terms and 2) negative praxis terms. Yaḥyā's transmission contains seven examples of each.

Affirmative praxis terms are those that refer to praxis in corroboration of a precept in question. They affirm that that precept is part of Medinese praxis. The expression "the praxis of the people" AlNs (*ʿamal al-nās*) is one of these affirmative references and occurs four times. The negative praxis terms negate the word "praxis" to indicate that a particular legal position is contrary to Medinese usage. The expression -ĀAl "praxis is not in accordance with [this]" (*laysa ʿalayhi al-ʿamal*) is the most common example and occurs five times. Both the affirmative and negative praxis terms occur in a wide variety of chapters and subject matters, both those pertaining to acts of worship and others relating to social transactions.

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[1] See *Muw.* (Ibn Ziyād), 135; cf. ibid. 155, 173, 181, 199.
[2] *Mud.*, 4:70–71.
[3] See index in Abd-Allah, "*ʿAmal*," 786–87.

The most common occurrence of the word "praxis" in the *Muwaṭṭa'* is not in reference to specific texts that Mālik cites but in the titles of Mālik's twenty-nine "praxis chapters," which carry the title "The Praxis Regarding…" (AlA) (*al-ʿAmal fī…*). With a few exceptions, the AlA chapters pertain to fundamental acts of ritual such as ablutions, certain types of prayers, the legal consequences of voluntary vows (*nudhūr*), and the newborn sacrifice (*ʿaqīqa*). Exceptions to this pattern are the praxis regarding festival sacrifices (not technically a matter of ritual), indeminities (*diya*) for murder and broken teeth, and greetings.[4] An index of the praxis chapters in provided in my dissertation, Appendix 2, Table 9.[5]

Affirmative Praxis Terms

1. *AlNs: Payment for Animals before Delivery Dates*

> Mālik states that it is permissible to buy animals to be delivered at later dates, if the date of delivery is stipulated, the animal is fully described, and the price is paid in full. Mālik adds that this has continued to be the praxis of the people which they regard as permissible in their mutual dealings and that the people of Medina have always regarded it as legitimate. [6]

The full expression of the term in this chapter, which I have shortened for convenience to AlNs (the praxis of the people; *ʿamal al-nās*), is "this continues to be part of the praxis of the people that is [regarded as] permissible among them and which the people of knowledge in our city continue to regard as valid" (*wa lam yazal dhālika min ʿamal al-nās al-jāʾiz baynahum wa al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-baladinā*). The precept occurs with essentially the same text and terminology in the recensions of both Yaḥyā and Abū Muṣʿab.[7] It does not occur in al-Qaʿnabī's recension nor that of Ibn Ziyād. Suwayd gives a *ḥadīth* about buying camels, which the recensions of Yaḥyā and Abū Muṣʿab lack. He produces three post-Prophetic reports that are in the recensions of Yaḥyā and Abū Muṣʿab on

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[4] *Muw.*, 2:501–02, 850, 862, 959.

[5] Abd-Allah, "*ʿAmal*," 788. Praxis chapters occur most frequently in the first two books of the *Muwaṭṭa'*, which pertain to ablutions, ritual purity (*ṭahāra*), and prayer. These two books, although among the longest in size in the *Muwaṭṭa'*, contain noticeably the least number of other terminological expressions.

[6] *Muw.*, 2:653; *Muw.* (Dār al-Gharb), 2:182; Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:91; *Muw.* (Abū Muṣʿab), 2:359; *Muw.* (Suwayd), 203–04; *Muw.* (*Riwāyāt*), 3:420.

[7] *Muw.*, 2:653; *Muw.* (Dār al-Gharb), Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:91; 2:182; *Muw.* (Abū Muṣʿab).

this topic but fails to give a full citation of the precept or the praxis term.[8] I failed to locate this precept in the *Mudawwana*.[9]

This precept is related to a preceding AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*) supported by the post-Prophetic reports of prominent Companions and a statement of al-Zuhrī regarding bartering animals for each other.[10] The praxis precept differs from the AMN. The former is about purchasing animals with money, not through barter in kind. In the barter examples under the AMN, the animal that is bought must be delivered immediately, while the animals to be exchanged for it as its price may be delivered later. This is the inverse of the precept governing the trade of animals for money.[11]

The chapter immediately following the 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 particular animal to be delivered at a later time, even though the buyer may personally have seen that animal and been satisfied with it. The condition of the animal may alter by the time of delivery. Therefore, the animal must be sold by description, and the seller must be held responsible for fulfilling the description that he gives.[12]

This precept constituted a matter of dissent among the jurists of the formative and post-formative periods. Ibn ʿUmar, al-Zuhrī, Mālik, al-Layth ibn Saʿd, al-Awzāʿī, and al-Shāfiʿī held that such sales of animals when accurately described are permissible as they are for other goods of sale. The Kufan jurists Ibn Masʿūd, Sufyān al-Thawrī, Abū Ḥanīfa, and his students Abū Yūsuf and al-Shaybānī did not allow the sale of animals on the basis of description. They argued that such descriptions lack sufficient exactness (*ḍabṭ*) because of the great discrepancies between the real and apparent colors and ages of animals. ʿAbd al-Razzāq reports that ʿUmar, Shurayḥ, and al-Shaʿbī also had misgivings about selling animals on the basis of inadequate descriptions.[13] According to Ibn Abī Shayba, Ibrāhīm

[8] *Muw.* (Suwayd), 203–04.

[9] *Mud.*, 3:185–88, 181–306, 117–181; *Mud.* (2002), 7:16–19, 5–51; 6:247–430.

[10] This AMN precept is also missing from the recension of Suwayd, *Muw.* (Suwayd), 203–04.

[11] See *Muw.*, 2:652–53. For discussions see al-Bājī, *al-Muntaqā*, 5:19–21; al-Zurqānī, *Sharḥ*, 4:254–56; Ibn Rushd, *Bidāya* (Istiqāma), 2:124–25, 132–34.

[12] *Muw.*, 2:654; see al-Zurqānī, *Sharḥ*, 4:258.

[13] ʿAbd al-Razzāq, *al-Muṣannaf*, 8:24; Ibn Abī Shayba, *al-Muṣannaf*, 4:424; cf. al-Ṭaḥāwī, *Mukhtaṣar*, 3:12.

al-Nakhaʿī also disliked sales based on the description of goods that could not be witnessed.[14]

The Medinese argued, on the other hand, that descriptions of animals for sales purposes were adequate and that the Prophetic *sunna* had allowed for similar designations of animals for indemnities. They also argued that the Prophet himself had made comparable transactions in camels, and Mālik transmits the *ḥadīth* in question in the *Muwaṭṭaʾ*.[15] Saʿīd ibn al-Musayyab may have constituted a dissenting voice on this matter in Medina. It is related that he did not allow any types of sale merely on the basis of description, but the contrary has also been transmitted from him in keeping with the general view of the Medinese jurists.[16]

Mālik's citation of his terminological reference is another instance of his using terms to index points of difference between the Medinese and the non-Medinese by indicating the status of the relevant Medinese precept among the people of Medina. Mālik's full statement of his term in Yaḥyā and Abū Muṣʿab includes reference to the praxis of the people and an indication that the people of knowledge in Medina had upheld that praxis as valid. The combined reference to popular praxis and scholarly support for it indicate that the praxis was both widespread in Medina (practiced by the people) and had continuity in the eyes of authoritative Medinese scholarship. Mālik's reference to scholarly consensus here is similar to his expression -zĀIb ("this is the precept that the people of knowledge in our city still continue to follow") in the previous chapter, which indicates that the consensus of the people of knowledge of Medina on this matter went back for generations. Mālik again cites no specific texts containing the precept. As a recurrent form of trade, the precept belongs by its nature to the category of general necessity (*ʿumūm al-balwā*). According to Ibn Rushd, this precept illustrates how Mālik often relies upon Medinese praxis in a manner cognate to Abū Ḥanīfa's use of the concept of general necessity.[17]

Transactions of this type surely went back to the earliest period. Despite the lack of indicants in pertinent legal texts, the precept appears to fall within the scope of transmissional praxis of the type that ʿAbd al-Wahhāb

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[14] Ibn Abī Shayba, *al-Muṣannaf*, 4:314.

[15] Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:92–94; Ibn ʿAbd al-Barr, *al-Tamhīd*, 12:255, 258–59; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:23–26; Ibn Abī Shayba, *al-Muṣannaf*, 4:314, 4:423; cf. al-Bājī, *al-Muntaqā*, 5:21.

[16] Ibn ʿAbd al-Barr, *al-Tamhīd*, 12:260; cf. ʿAbd al-Razzāq, *al-Muṣannaf*, 8:25–26; Ibn Abī Shayba, *al-Muṣannaf*, 4:314, 4:423; cf. al-Bājī, *al-Muntaqā*, 5:21.

[17] See Abd-Allah, "*ʿAmal*," 403–09, 448–53, 184–88.

and ʿIyāḍ describe as going back to the Prophet's tacit approval (*iqrār*).[18] The continuous consensus of the Medinese people of knowledge on the precept serves as an indication of tacit Prophetic approval on the presumption that they would not have been ignorant of the Prophet's prohibiting such transactions, if that had been the case. If the Prophet had prohibited such transactions in Medina, some objection should have been registered within the ranks of its scholarly community.

This example illustrates again the relative paucity of legal *ḥadīth*s for many important matters of law. The praxis precept—cited in the absence of explicit supporting textual sources of law—is another instance of Mālik's reliance upon the non-textual source of Medinese praxis to provide information for which there were few, if any, texts.

2. *AlNs: Defining Lands Suitable for Shared-Profit Farm Labor* (Musāqāh)

> Mālik concludes a lengthy chapter pertaining to shared-profit farm labor (*al-musāqāh*)[19] by defining at what point a contract on such lands is prohibited because the proportion of standing trees and crops (*uṣūl*) is too little compared to the tilled land (*al-bayḍā'*) where crops have been planted but have not begun to grow. Mālik states that shared-profit farm labor contracts are only valid on such lands if the proportion of the tilled fields makes up one-third or less of the total land under contract. He upholds the validity of this precept by stating that it has been part of what the people do (*amr al-nās*) to make these contracts on lands containing some tilled land. He notes by analogy that they also permit sales contracts involving payment in gold and silver coin for copies of the Qur'ān, swords, rings, and the like that are embellished with gold and silver. Such transactions in such embellished goods, Mālik continues, are permissible and frequently engaged in by the people. Furthermore, nothing has been transmitted stipulating the exact point at which transactions of this nature cease to be permissible. Nevertheless, the AN (the precept among us; *al-amr ʿindanā*) regarding such matters and which the people have applied in praxis (*ʿamila bihī al-nās*) is that gold

[18] See Abd-Allah, "*ʿAmal*," 410–15.

[19] Shared-profit farm labor (*musāqāh*) is a type of agrarian contract for working farm land whereby the owner of a piece of land containing fruit trees, date palms, grapes, and similar established perennial crops agrees to hire a laborer who will share in one half the produce of the land or some other share that they agree upon on condition that the laborer tend to the watering and necessary maintenance of the land. Mālik forbids such contracts upon "tilled lands" (*al-bayḍā'*), open plantable fields with no standing crops or established trees and vines. This is because the tilled lands present the additional risk that the crop that has been planted will not sprout or will not grow well if it does. For Mālik, the proper legal arrangement for labor contracts on tilled lands is rent (*al-kirā'*) or wages.

> and silver in such articles must not constitute more than one third the value of the entire item.[20]

This term occurs only in the recension of Yaḥyā. Abū Muṣʿab's text is similar but lacks some of Mālik's comments including the term. He describes, however, the same procedure Mālik describes for selling items ornamented with gold and silver as what the people have applied in praxis (*ʿamila bihī al-nās*) and regarded as valid.[21] The precept is lacking from the transmissions of al-Qaʿnabī, Suwayd, and Ibn Ziyād.

In the new edition of the *Mudawwana*, the initial chapter relevant to this precept is called "The Praxis Regarding Shared-Profit Farm Labor" (*al-ʿamal fī al-musāqāh*).[22] Saḥnūn does not treat the basic *Muwaṭṭaʾ* precept *per se*, nor does he cite any Medinese terminology regarding it other than the chapter title. He relates from Ibn Wahb on the authority of Ibn ʿUmar that the Prophet followed a procedure regarding the Jews of Khaybar that was in keeping with Mālik's precept. He does not state the exact proportion of untilled to tilled land but notes that the untilled land was subsidiary (*tabʿ*) and the tilled land made up by far the greater part. Later, Saḥnūn cites Ibn Wahb again as specifying that Mālik permitted such shared-profit land contracts on the basis of the Prophet's Khaybar policy. Again, the actual proportions of tilled to untilled land are not specified other than the fact that the untilled land was little compared to the land permanently planted.[23]

Al-Ṭabarī treats this precept extensively in his excellent but fragmentary *Ikhtilāf al-Fuqahāʾ*. He notes that all jurists concur on the validity of hiring a person at a stipulated wage to tend standing crops such as dates and unplanted land. Hiring labor at a determined wage would be the standard method for cultivating such unplanted lands. He notes that Mālik's position was based on the Prophet's procedure in dealing with the Jews of Khaybar. He relates Mālik's position on permitting shared-profit labor agreements for limited amounts of newly planted land, which necessarily involves risk (*gharar*) for the laborer and would not ordinarily be warranted. Al-Awzāʿī regarded such contracts for a third, half, or

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[20] *Muw.*, 2:708–09; *Muw.* (Dār al-Gharb), 2:246; *Muw.* (Abū Muṣʿab), 2:283–84; *Muw.* (*Riwāyāt*), 3:502–03; cf. Muḥammad ibn Jarīr al-Ṭabarī, *Ikhtilāf*, 141–44.

[21] *Muw.* (Abū Muṣʿab), 2:283–84.

[22] *Mud.* (2002), 8:279. In the old edition, the chapter heading makes no reference to praxis.

[23] *Mud.*, 4:2, 12; *Mud.* (2002), 8:279–281, 306–08.

even two thirds of the newly planted land to be reprehensible [but not forbidden].[24]

Al-Thawrī saw no harm in shared-profit labor for a third or half of the land. Al-Shāfiʿī held that the *sunna* allowed such shared-profit labor agreements only for standing date palms, but the *sunna*, in al-Shāfiʿī's view, also indicates that shared-profit labor agreements are not permissible for a third, a fourth, on any other portion of newly planted lands. Rather wage payment is required in such cases. Al-Shāfiʿī also rejects the special Medinese allowance for selling copies of the Qurʾān or swords embellished with gold. For al-Shāfiʿī the price of the adorned items must be sold for amounts of gold or silver equal to the weight of the respective metals.[25]

Abū Ḥanīfa did not allow shared-profit labor agreements on newly planted lands or standing crops. Abū Yūsuf and al-Shaybānī allowed shared-profit labor agreements for a third or fourth and permitted such agreements for date palms. Abū Ḥanīfa's position is based on the general consensus that wage payment is valid for such contracts. He generalizes analogically on the basis of this consensus and applies it to standing date crops as well, since it is unknown how much the dates will ultimately produce. Abū Yūsuf and al-Shaybānī allow it, however, on the basis of analogy with another matter of juristic consensus on the permissibility of shared profit agreements (*muqāraḍa*). In such agreements, a person is advanced money for trading or other purposes. The person providing the capital shares in the profits of the enterprise.[26]

According to Ibn Rushd, this precept constituted a point of dissent between Mālik, on the one hand, and Abū Yūsuf, al-Shaybānī, Sufyān al-Thawrī, Ibn Abī Laylā, al-Layth ibn Saʿd, and other early prominent jurists, on the other. The dissenters regarded shared-profit farming contracts to be generally permissible on lands containing tilled fields in addition to standing fruit trees and vines. They did not agree with Mālik's stipulation that the tilled portions must be one-third or less of the total land.[27]

Mālik's stipulation that one-third or less of the land may be tilled is apparently the result of legal interpretation (*ijtihād*). The terms that Mālik

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[24] Al-Ṭabarī, *Ikhtilāf*, 141–44, 148.

[25] Al-Ṭabarī, *Ikhtilāf*, 144–47.

[26] Al-Ṭabarī, *Ikhtilāf*, 147–48.

[27] Ibn Rushd, *Bidāya* (Istiqāma), 2:243; cf. Ibn ʿAbd al-Barr, *al-Istidhkār*, 21:239–40; Ibn ʿAbd al-Barr, *al-Tamhīd*, 12:322–25; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:95–101; cf. al-Ṭabarī, *Ikhtilāf*, 141–48; al-Ṭaḥāwī, *Mukhtaṣar*, 4:26–27. Ibn Rushd does not state what proportions, if any, were regarded as acceptable.

employs in this expample are not invoked to prove that the stipulation of one-third or less itself came down as an established part of Medinese praxis regarding shared-profit farming. Rather, Mālik states that the custom of the people in Medina has been to allow for such contracts in lands that contained tilled portions. He indicates, furthermore, that those portions of tilled land must be subsidiary (*tabʿ*) to the remainder of the property. His stipulation of the maximum for tilled lands as one third or less is Mālik's definition of what "subsidiary" means.[28]

Mālik presents his definition of "subsidiary" portions of land as a derivative of analogical reasoning based on the established precept in Medinese praxis which allows for the sale for gold and silver coin of gold and silver-embellished objects such as copies of the Qurʾān, swords, and rings. His reasoning is an example of precept-based analogy and is one of many explicit examples of such analogies in the *Muwaṭṭaʾ*. Mālik describes sale of such embellished items as a part of Medinese praxis in continuity with the past, "this has always been a custom of the people (ANs; *amr al-nās*) among us".[29]

Mālik explains that such types of sales contracts have always been permissible in Medina although nothing has come down stating specifically at what point such types of contracts should be forbidden. (Al-Bājī clarifies that Mālik means that no textual evidence has been transmitted regarding the matter.)[30] Nevertheless, the AN (*al-amr ʿindanā*), which has been the praxis of the people, is that gold and silver must not exceed in value one-third of the total value of the item embellished by them.[31]

The basic aspects of the precepts to which Mālik's terms refer appear to belong to Medinese transmissional praxis: namely, the custom of making shared-profited farming contracts on tilled lands in addition to standing fruit trees and vines and the custom of selling items embellished with gold and silver for unequal weights of gold and silver coin. Both matters belong to the nature of general necessity (*ʿumūm al-balwā*). In the case of selling embellished items for gold and silver coin, Mālik indicates that no texts have been transmitted stipulating the one-third limit. Nevertheless, that stipulation has been established in Medinese praxis, which appears as Mālik's authoritative reference. Again, Mālik relies upon the non-textual

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[28] *Muw.*, 2:707; *Muw.* (Dār al-Gharb), 2:246; *Muw.* (Abū Muṣʿab), 2:283–84; *Muw.* (*Riwāyāt*), 3:502–03.

[29] *Muw.*, 2:636.

[30] Al-Bājī, *al-Muntaqā*, 5:138.

[31] For explanation of the analogy itself, see Abd-Allah, "*ʿAmal*," 619, n. 1, and 618, n. 2.

source of Medinese praxis for details not provided in textual sources of law. He apparently transfers that stipulation by analogy to define what kinds of lands are valid for profit-sharing farming contracts.

Both precepts reflect Mālik's application of discretion (*istiḥsān*). They make for special allowances where strict application of the general rule would not.[32] In both cases, the logic of discretion is supported by customary practice and local consensus and stands on the merit of that consensus and not solely on its intrinsic value as legal reasoning. The discretion involved in the case is something that has long been incorporated in Medinese praxis. As such, it shows that the logic of discretion was also an established part of traditional Medinese legal reasoning in the formative period.

3. *AlNs: Contracts of Earned Emancipation* (Mukātaba)

> Mālik states that he has heard some of the people of knowledge say regarding the Qurʾānic verse, "... and give unto them something of God's wealth that He has given to you" (Qurʾān, 24:33), that it refers to the usage whereby a master exempts a slave who is contracted to earn his freedom from having to pay a portion of the remaining sum for emancipation once most of it has been paid off. Mālik reiterates that this is what he has heard from the people of knowledge and that he found the "praxis of the people among us" to be in accord with it. Mālik cites a post-Prophetic report that ʿAbd-Allāh ibn ʿUmar made a contract of earned emancipation with one of his slaves who was to pay him thirty-five thousand pieces of silver. When the slave neared completion of the payments, Ibn ʿUmar exempted him from the last five thousand.[33]

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[32] The general precept regarding shared-profit farming is that it is not permissible for tilled lands before the crops have begun to grow; the general precept for exchanges of gold and silver (including gold and silver coin) is that gold must be exchanged for gold and silver for silver in like quantities by simultaneous transactions. Gold and silver may be exchanged for each other at any agreed rate as long as the transaction is simultaneous. Purchasing copies of the Qurʾān and the other items that are embellished with gold constitutes an exchange of gold for gold in unequal quantities if the purchase is made with gold coins. The Medinese praxis in the matter, however, was to make such transactions permissible as long as they were reasonable; that reasonability was determined by the proportions of the valuable metals in the item to the whole; the embellishment in gold or silver must not exceed one-third the value of the price of the article, and no credit was to be involved in the purchase. See *Muw.*, 2:636.

[33] *Muw.*, 2:788; *Muw.* (Dār al-Gharb), 2:344–45; Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:254l *Muw.* (Abū Muṣʿab), 2:430–31; *Muw.* (Suwayd), 353; *Muw.* (*Riwāyāt*), 4:73–74.

This precept occurs in the recensions of Yaḥyā, Abū Muṣʿab, and Suwayd. It is missing from al-Qaʿnabī and Ibn Ziyād.[34] As indicated above, Mālik's expression in Yaḥyā's transmission reads, "I heard some of the people of knowledge say" regarding the Qurʾānic verse and precept. He then adds, "This is what I have heard from [some of] the people of knowledge, and I found the praxis of the people among us to be in accordance with it" (*wa samiʿtu baʿḍ ahl al-ʿilm yaqūl fī. . . . Fa-hādhā al-ladhī samiʿtu min ahl al-ʿilm wa adraktu ʿamal al-nās ʿalā dhālika ʿindanā.*)[35] Terminological references in other recensions of the *Muwaṭṭaʾ* vary somewhat. Abū Muṣʿab cites the same verse and Mālik's interpretation of it. He then cites Mālik as stating, "that is the best of what I have heard transmitted and the praxis of the people is in accordance with it" (*dhālika aḥsan mā samiʿtu; qāla wa ʿalā dhālika ʿamal al-nās*).[36] Suwayd's text is similar to Yaḥyā and Abū Muṣʿab, although the structure of his chapter differs. His terminological expression is closer to Abū Muṣʿab. After relating Mālik's comment on the Qurʾānic verse, he cites Mālik as stating, "that is the best of what I have heard transmitted and the praxis of the people of knowledge and the praxis of the people among us in in accordance with it (*wa ʿalā dhālika ʿamal ahl al-ʿilm wa ʿamal al-nās ʿindanā*).[37]

The initial chapter of the *Mudawwana* on contracts of earned emancipation follows the *Muwaṭṭaʾ* closely and is essentially a direct transmission from it. Saḥnūn cites similar terminological expressions. He cites Ibn al-Qāsim's transmission of Mālik's interpretation of the verse followed by Mālik's expression, "I heard more than one of the people of knowledge" say that the slave should be exempted from the final installments of his emancipation contract. Saḥnūn transmits from Ibn Wahb, Ibn al-Qāsim, Ibn Ziyād, and Ashhab that they narrated from Mālik that he said, "that is the best of what I heard transmitted. It is what the people of knowledge follow and is in accord with the praxis of the people among us" (*wa ʿalayhī ahl al-ʿilm wa ʿamal al-nās ʿindanā*). As in the *Muwaṭṭaʾ*, Saḥnūn cites the precedent of how Ibn ʿUmar applied this precept. He complements the *Muwaṭṭaʾ* with some additional information, citing, for example, a post-Prophetic report from Ibn Wahb stating that ʿAlī called for a generous

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[34] *Muw.*, 2:788; *Muw.* (Dār al-Gharb), 2:344–45; Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:254l *Muw.* (Abū Muṣʿab), 2:430–31; *Muw.* (Suwayd), 353; *Muw.* (*Riwāyāt*), 4:73–74.

[35] *Muw.*, 2:788; *Muw.* (Dār al-Gharb), 2:344–45; Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:254.

[36] *Muw.* (Abū Muṣʿab), 2:430–31.

[37] *Muw.* (Suwayd), 353.

one quarter exemption of the final payment. He gives another post-Prophetic report stating that the Kufan jurist Ibrāhīm al-Nakhaʿī held that such exemptions of earned emancipation had been encouraged by God in the Qurʾān.[38]

According to Ibn ʿAbd al-Barr the chief issue of dissent about the Qurʾānic verse that Mālik cites was whether it was recommended or required for the emancipator to exempt a slave from the final installment.[39] Mālik's opinion was that it is recommended. This was also the view of Abū Ḥanīfa and Abū Yūsuf, who read the verse as an encouragement to do good for the slave but not a requirement. From their point of view, the master would carry whatever financial loss accrued from the exemption.[40] Some jurists held that such exemptions were binding on the Muslim community in aggregate (*jamāʿat al-nās*) or (*jamāʿat al-muslimīn*), which meant that the final portion would be paid from the public treasury (*bayt al-māl*).[41] ʿUmar ibn al-Khaṭṭāb is reported to have held this position. Mālik's teacher, Zayd ibn Aslam (d. 136/753), is said to have held that the verse meant that the city governor (*amīr*) was to give the remaining money to the slave from the alms funds, while the master need give nothing.[42] The Basran jurist ʿUthmān al-Battī held that the verse directed the people to give charity (*ṣadaqa*) to help the slave meet the final payment.[43] Al-Shāfiʿī read the verse as implying obligation and held that the master was required to exempt the slave from part of the final payment. Although al-Shāfiʿī did not stipulate a set portion that needed to be exempted, he preferred that it be one quarter of the entire contract.[44]

In light of this information, this precept is an instance of Medinese praxis upon which there were differences of opinion in Medina itself. Mālik's terminology gives no indication that the precept was part of Medinese consensus. Instead, he states that he has heard it from "some" of the people of knowledge in Medina, indicating thereby that he may have heard the contrary from others, such as, perhaps, his teacher Zayd ibn Aslam. Mālik cites the post-Prophetic report of Ibn ʿUmar as an example

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[38] *Mud.*, 3:2–3; *Mud.* (2002), 5:363–64; cf. ʿAbd al-Razzāq, *al-Muṣannaf*, 8:376–77.
[39] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:254.
[40] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:254; cf. al-Ṭaḥāwī, *Sharḥ*, 2:484.
[41] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:255; Ibn Rushd, *Bidāya* (Istiqāma), 2:369.
[42] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:259; al-Bājī, *al-Muntaqā*, 7:7–8.
[43] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:259; al-Bājī, *al-Muntaqā*, 7:7–8.
[44] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:255–56; see *Mud.*, 3:2–3; *Mud.* (2002), 5:364; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:375–76.

of the precept in application. It is, however, a reported action, making it inherently ambiguous and inconclusive legal evidence according to Mālikī legal reasoning.[45]

Mālik apparently regarded Ibn ʿUmar's action to be a reflection of the latter's interpretation of the Qurʾānic verse pertaining to earned emancipation. Mālik's chief reliance in interpreting the verse, however, is upon the opinion of "some" of the Medinese people of knowledge and the fact that their opinion is simultaneously reflected in the praxis of the people. Praxis is the semantic context against which Ibn ʿUmar's action is read and given legal weight. His reported action alone does not stand as independent proof.

In this example, Mālik once again relies upon the non-textual source of Medinese praxis to interpret the Qurʾān and clarify its meaning. The Qurʾānic text makes it clear that the slave earning emancipation should be given "something of God's wealth that He has given unto you." It does not specify who should be responsible for giving that wealth or from what source it should be taken, although, in the view of al-Bājī, the overt meaning (*ẓāhir*) of the text is that the slave's master should be the one to make the donation.[46]

Mālik probably regarded Medinese praxis in this case to go back to the Prophetic era (transmissional praxis), since it is directly related to the relevant Qurʾānic verse and the action of Ibn ʿUmar. Nevertheless, because of the dissenting views of ʿUmar and the prominent Medinese jurist Zayd ibn Aslam, the source of the praxis is more conjectural than types of transmissional praxis that were unequivocally supported by Medinese local consensus.

4. *ĀAl: Inheritance Allotments for Kin Who Perish in the Same Battles or Calamities*

> Mālik sets forth the precept that heirs who have mutual rights of inheritance (*mutawārithūn*) and perish together in calamities such as shipwrecks, battles, and the like may not formally receive their mutual shares of inheritance [after death] that they would have received from each other [had they died separately] as long as it is not known which of them died before the other. Their properties shall be divided directly among their surviving heirs. Mālik introduces this precept with the expression, "this is the precept (*amr*) about which there is no dissent and no doubt among any of the people of

[45] See Abd-Allah, "*ʿAmal*," 188–95.
[46] Al-Bājī, *al-Muntaqā*, 7:8.

> knowledge in our city, and the praxis is in accord with this." After citing the precept, Mālik states, "It is not meet that anyone inherit from anyone else on the basis of doubt. Rather, inheritance shall be distributed only on the basis of certainty by way of [certain] knowledge or testimony."[47]

This precept occurs in the transmissions of Yaḥyā, Abū Muṣʿab, and Suwayd. It is missing in the recensions of al-Qaʿnabī and Ibn Ziyād as they presently stand.[48] The term abbreviated as ĀAl stands for "and the praxis is in accord with this" (*wa ka-dhālika al-ʿamal*). It stands in Yaḥyā's transmission for a longer statement, "This is the precept (*amr*) about which there is no dissent and no doubt among any of the people of knowledge in our city, and the praxis is in accord with this" (*wa dhālika al-amr al-ladhī lā ikhtilāf fīhi wa lā shakk ʿinda aḥad min ahl al-ʿilm bi-baladinā, wa ka-dhālika al-ʿamal*).[49] Abū Muṣʿab gives the same general information but cites Mālik as referring to the "people of knowledge" (*ahl al-ʿilm*) instead of the "people of knowledge in our city." He ends with Mālik's statement as it occurs in Yaḥyā's recension, "and the praxis is in accord with this" (*wa ka-dhālika al-ʿamal*). Suwayd has the same chapter title and general content, but his structure differs. He cites Mālik as transmitting from his teacher Rabīʿa and "more than one of the people of knowledge" that no mutual inheritance was distributed among those killed in the Battle of the Camel, Ṣiffīn, al-Ḥārra, or Qudayd. None of those killed or their kinsmen who were killed with them received inheritance distributions from each other if it was not known which of them died first. Suwayd does not provide any term or statement from Mālik for this precept.[50]

In the *Mudawwana*, Saḥnūn produces evidence from Ibn Wahb that ʿUmar ibn al-Khaṭṭāb followed this precept. The text is similar to Suwayd's transmission. Mālik relates from Rabīʿa and other people of knowledge he encountered that no mutual inheritance was distributed among those killed in the Battle of the Camel, Ṣiffīn, al-Ḥārra, or Qudayd because it was not known which of the dead died first. Ibn Wahb relates that ʿUmar ibn ʿAbd al-ʿAzīz implemented the same policy in Iraq. Ibn Wahb transmits a similar report from ʿUmar ibn ʿAbd al-ʿAzīz through al-Thawrī. He relates further that ʿAlī implemented the same judgement. Saḥnūn

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[47] *Muw.*, 2:520–21; *Muw.* (Dār al-Gharb), 2:24–25; *Muw.* (Abū Muṣʿab), 2:535–36; *Muw.* (Suwayd), 183–84; *Muw.* (*Riwāyāt*), 3:177–78.

[48] *Muw.*, 2:520–21; *Muw.* (Dār al-Gharb), 2:24–25; *Muw.* (Abū Muṣʿab), 2:535–36; *Muw.* (Suwayd), 183–84; *Muw.* (*Riwāyāt*), 3:177–78.

[49] *Muw.*, 2:520–21; *Muw.* (Dār al-Gharb), 2:24–25.

[50] *Muw.* (Suwayd), 183–84.

transmits that ʿUmar followed this procedure regarding inheritance of his wife Umm Kulthūm and his son by her, Zayd ibn ʿUmar. Both died immediately after childbirth.[51]

The chapter complements the *Muwaṭṭaʾ* while reflecting the *Mudawwana*'s distinctive concern for legal interpretation. It treats the issue of defining clan groups that are so large they cannot be numerically designated as specific kinship groups. It treats the issue of a Christian who dies and is given a Muslim burial. One of his sons contends he died a Muslim—as indicated by his Muslim burial—and the other son contends he died a Christian. The evidence both sons produces is comparable (*takāfaʾat al-bayyinatān*). Ibn al-Qāsim clarifies that the inheritance should be divided between the two sons. If, however, there is overwhelming evidence that he died a Christian, his Muslim burial will not constitute proof to the contrary.[52] Mālik's treatment of inheritance as related in the *Mudawwana* makes frequent reference to the general precept that inheritance can only be distributed on the basis of certain evidence (*al-bayyina*), which is the legal principle underlying this precept in the *Muwaṭṭaʾ*. Ibn al-Qāsim applies and repeats that same principle.[53]

This precept pertains to the transferal of legacies as part of the arithmetically stipulated portions of marital and kinship inheritance established in the Qurʾān (Qurʾān, 4:7, 10–12, 176). It is an important precept because the largest portions go to those who are nearest to the deceased in paternal lineage and marriage, and some heirs take priority over others and "block out" other surviving heirs from the portions they would have received in their absence. The sequence in which potential heirs may have died in calamities and battles could profoundly affect the amounts of property that the surviving heirs receive.[54]

Mālik indicates emphatically that this precept is supported by the local consensus of Medina, although, according to Ibn Rushd, it was a point of internal dissent between the Medinese jurists as well as the majority of the Kufan and Basran jurists. Post-Prophetic reports indicate that ʿUmar and ʿAlī held dissenting opinions in other cases where people were drowned at the same time or died in a collapsed building.[55] Most reports

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[51] *Mud.*, 3:85; *Mud.* (2002), 6:141–43.

[52] *Mud.*, 3:84–86; *Mud.* (2002), 6:137–45.

[53] *Mud.*, 3:84–85, 81; *Mud.* (2002), 6:137–43, 128–32.

[54] For an illustration, see Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:508–09; ʿAbd al-Razzāq, *al-Muṣannaf*, 10:295–96.

[55] Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:507; ʿAbd al-Razzāq, *al-Muṣannaf*, 10:294–96; Ibn Abī Shayba, *al-Muṣannaf*, 6:277–78.

relate that Abū Ḥanīfa disagreed with the Medinese on this issue also, although, according to the Ḥanafī jurist Aḥmad ibn Muḥammad al-Ṭaḥāwī (d. 321/933), Abū Ḥanīfa held the same opinion as the Medinese. He attributes this opinion to Abū Yūsuf and al-Shaybānī as well and to the prominent Iraqi jurists Ibn Shubruma and al-Thawrī. Al-Ṭaḥāwī states that Abū Ḥanīfa originally took the Kufan position but had doubts about it until he went to Medina and took the Medinese position from Abū al-Zināḍ.[56] The Kufan and Basran dissenting views generally held that the legacies of mutual heirs who perished together in the same battles and calamities were to be readjusted by formally distributing to each of those deceased the portion that they would have received from the others. The surviving heirs would then inherit their shares from the readjusted estates of the deceased according to their nearness to them in kinship and marriage.[57]

In terms of the praxis classifications of later jurisprudents, the precept in this case appears to belong to "old praxis" (*al-ʿamal al-qadīm*): post-Prophetic Medinese praxis that originated in the legal interpretations of the Companions, especially the early rightly-guided caliphs.[58] Medinese praxis on this precept goes back at least to the caliphate of ʿAlī. As noted, Mālik cites a report according to which his teacher Rabīʿa stated that many of the people of knowledge of Medina transmitted to him that this precept was the procedure that the Medinese followed concerning the legacies of those who were killed in the Battle of the Camel (36/656), Ṣiffīn (37/657), al-Ḥarra (63/683), and Qudayd (72/692).[59] According to al-Bājī, the praxis in this instance goes back to the consensus of the Companions, although he makes no mention of the post-Prophetic reports that ʿUmar and ʿAlī held dissenting opinions. Rather, al-Bājī states explicitly that the

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[56] Al-Ṭaḥāwī, *Mukhtaṣar*, 4:454–55; see also Ibn Rushd, *Bidāya* (Istiqāma), 2:348–49.

[57] See Ibn Rushd, *Bidāya* (Istiqāma), 2:348–49; cf. Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:507; ʿAbd al-Razzāq, *al-Muṣannaf*, 10:294–96; Ibn Abī Shayba, *al-Muṣannaf*, 6:277–78.

[58] See Abd-Allah, "*ʿAmal*," 415–19.

[59] *Muw.*, 2:520. The Battle of the Camel took place during the caliphate of ʿAlī between his forces and those of al-Zubayr, Ṭalḥa, and ʿĀ'isha, who demanded revenge for the death of the third caliph, their kinsman ʿUthmān. Al-Zurqānī estimates that almost a thousand Meccans and Medinese died in the Battle of the Camel. Ṣiffīn took place in Iraq between the armies of ʿAlī and Muʿāwiya; many Medinese were in ʿAlī's ranks. Al-Ḥarra was probably the bloodiest of all these battles for the Medinese. It resulted after the city expelled the Umayyad governor whom Yazīd ibn Muʿāwiya had placed in authority. Al-Ḥarra took place just outside Medina; thousands of Medinese were killed and the inhabitants of the city were exposed to pillage and other crimes after the defeat. Qudayd was the battle in which ʿAbd-Allāh ibn al-Zubayr was killed in fighting the Syrian troops of al-Ḥajjāj on behalf of the Umayyad ruler ʿAbd al-Malik ibn Marwān. See Wakīʿ, *Akhbār*, 1:123; al-Zurqānī, *Sharḥ*, 3:449–50.

procedure Mālik sets forth was what was followed upon the death of ʿUmar's wife Umm Kulthūm. The living heirs inherited from them directly without any formal transferals between the estates of Umm Kulthūm and her son.[60] Al-Ṭaḥāwī notes the dissenting position of ʿUmar and ʿAlī. He also attributes it to Ibn Masʿūd, but he adds the detail that they did not allow those who died simultaneously to inherit directly from each other's estates by changing the configuration of heirs with rights to the estate but only from the portion of the inheritance that would have been given the others (*tilād amwālihim*).[61]

According to ʿAbd al-Razzāq and Ibn Abī Shayba, Mālik's precept constituted the policy of Zayd ibn Thābit, ʿUmar ibn ʿAbd al-ʿAzīz, and al-Zuhrī. The latter stated that the "*sunna* has long been established" (*maḍat al-sunna*) in accordance with this precept.[62] ʿAbd al-Razzāq transmits from Yaḥyā ibn Saʿīd, Khārija ibn Zayd, and Zayd ibn Thābit that Mālik's precept constituted the ruling that was followed in the case of the martyrs of al-Ḥārra. It was also the policy that Abū Bakr followed in the Battle of Yamāma.[63] Shurayḥ held a dissenting view regarding people who drowned at the same time or died in collapsed houses or from the plague. His opinion was also shared by al-Shaʿbī.[64] Ibrāhīm al-Nakhaʿī also had those who died at the same time inherit form each other.[65] A judge of ʿAbd-Allāh ibn al-Zubayr (ʿAbd-Allāh ibn ʿUtba) also ruled that people who drowned at the same time should inherit from each other prior to further distribution of their estates.[66]

This precept shows some articulation of Mālik's legal reasoning. He gives the general precept of inheritance, which he believes to be the ruling paradigm that underlies the precept. He clarifies that inheritance may only be distributed on the basis of certain knowledge. As mentioned earlier, Ibn al-Qāsim refers to this broad precept of certainty in inheritance several times in the *Mudawwana* to explain his personal legal interpretations or those of Mālik on various questions.[67] For Mālik in the *Muwaṭṭaʾ* and Ibn al-Qāsim in the *Mudawwana*, this general precept (inheritance may only

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[60] Al-Bājī, *al-Muntaqā*, 6:253; al-Ṭaḥāwī, *Mukhtaṣar*, 4:455–56.
[61] Al-Ṭaḥāwī, *Mukhtaṣar*, 4:455.
[62] ʿAbd al-Razzāq, *al-Muṣannaf*, 10:297–98; Ibn Abī Shayba, *al-Muṣannaf*, 6:278–79; al-Ṭaḥāwī, *Mukhtaṣar*, 4:455–56.
[63] ʿAbd al-Razzāq, *al-Muṣannaf*, 10:298.
[64] Ibn Abī Shayba, *al-Muṣannaf*, 6:277–79; al-Ṭaḥāwī, *Mukhtaṣar*, 4:455.
[65] Ibn Abī Shayba, *al-Muṣannaf*, 6:278.
[66] Ibn Abī Shayba, *al-Muṣannaf*, 6:277.
[67] *Mud.*, 3:84, 85.

be distributed on the basis of certain knowledge) is the key as opposed to any reference to a particular precedent or transmitted textual statement of law. The precept works like a maxim and explains why the ruling in this case should stand as it is. It is a rationalistic approach to the law and reflects Mālik's penchant for drawing analogies on the basis of precepts, not specific texts (*al-qiyās ʿalā al-qiyās; al-qiyās ʿalā al-qawāʿid*).

This precept reflects the classical pattern of legal differences between the Iraqis and the Medinese. Despite the antiquity of the issue, which was rooted in critical early battles and other shared social realities (collapsed buildings and drownings) and had far-reaching monetary import for tribes and individuals alike, no *ḥadīth*s existed for either side of the legal argument. The precept was a product of legal interpretation (*ijtihād*). Although dissent over it was principally divided along Iraqi-Medinese lines, we see again that these differences of opinion were not monolithic. Some prominent Medinese held the Iraqi position, while certain leading Iraqi jurists adopted the Medinese point of view. In this case, Abū Ḥanīfa himself is explicitly on record in an early Ḥanafī source expressing his doubts about the validity of the Iraqi position, which led him and his followers Abū Yūsuf and al-Shaybānī ultimately to adopt the viewpoint of the Medinese.

Negative Praxis Terms

1. *Al-Ā:*[68] *Qurʾānic Prostrations*

> Mālik cites a report according to which ʿUmar ibn al-Khaṭṭāb recited a verse containing one of the Qurʾānic prostrations (*sujūd al-Qurʾān*)[69] while delivering the public address from the pulpit (*minbar*) during the Friday prayer. After reciting the verse, ʿUmar descended from the pulpit, prostrated himself, and the congregation prostrated themselves also. The next Friday, ʿUmar recited the same verse from the pulpit during the prayer. The people began to prepare themselves to perform the prostration as they had done the Friday before. ʿUmar told them, "As you were (*ʿalā rislikum*). God has not made it binding upon us to do this, unless we desire to." ʿUmar did not descend from the pulpit or prostrate himself, and he prohibited the people

[68] The abbreviation Al-Ā stands for "not in accordance with praxis" (*laysa ʿalayhi al-ʿamal*).

[69] Qurʾānic prostrations (*sujūd al-Qurʾān*) refer to specific verses in the Qurʾān which the reciter is directed to make a prostration to God after reciting.

> from doing so. Mālik concludes this post-Prophetic report by stating that it is "not in accordance with praxis" (Al-Ā) that the *imām* come down from the pulpit after reciting a prostration verse and prostrate himself. Mālik then states that it is the AN (*al-amr ʿindanā*) that the Qurʾānic verses in which prostration is imperative (*ʿazāʾim sujūd al-Qurʾān*) [when they are recited] are eleven, none of them being included in the latter portion of the Qurʾān (*al-mufaṣṣal*).[70]

This precept and others discussed in the following chapter are designated in the *Muwaṭṭaʾ* as "not in accordance with praxis" (Al-Ā; *laysa ʿalayhi al-ʿamal*). In this case, the expression occurs in the recensions of Yaḥyā and al-Qaʿnabī.[71] Abū Muṣʿab uses the expression "*amr*" (precept) instead of praxis and relates from Mālik that the "precept among us" (AN) is not (*laysa al-amr ʿindanā*) that the *imām* descend from the pulpit after reciting a prostration verse and perform the prostration.[72] Abū Muṣʿab's transmission shows the close relation in Mālik's usage between the words "praxis" and "*amr*" (precept), which we have seen earlier. As Suwayd's text presently stands, it reads, "The praxis in my view (*al-ʿamal ʿindī*) is that the *imām* come down from the pulpit if he reads a prostration verse and make the prostration."[73] I believe this is an editorial error for "the praxis in my view is <u>not</u> (*laysa al-ʿamal ʿindī*) that the *imām* come down from the pulpit . . .," since Mālik takes that position in the other recensions of the *Muwaṭṭaʾ*, and this practice does not fit Mālik's treatment of Qurʾānic prostrations in the *Mudawwana*, although Saḥnūn does not treat this specific issue there. The precept is not present in the *Muwaṭṭaʾ* fragment of Ibn Ziyād.

In the *Mudawwana*, Saḥnūn transmits from Mālik through Ibn al-Qāsim that there are eleven prostration verses in the Qurʾān, none of which occurs in the latter portion (*al-mufaṣṣal*).[74] Al-Ṭaḥāwī transmits from al-Thawrī that Mālik held these eleven prostrations to be a matter of consensus among the jurists.[75] He specifically enumerates the prostration verses and

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[70] *Muw.*, 1:206–07; *Muw.* (Dār al-Gharb), 1:283–84; *Muw.* (Abū Muṣʿab), 1:102; *Muw.* (Suwayd), 92–94; *Muw.* (al-Qaʿnabī), 1:158; *Muw.* (Riwāyāt), 2:152–53. The latter portion of the Qurʾān (*al-mufaṣṣal*) as referred to here extends from chapter 49 till the closing chapter 114.

[71] *Muw.*, 1:206–07; *Muw.* (Dār al-Gharb), 1:283–84; Ibn ʿAbd al-Barr, *al-Istidhkār*, 8:108–09; *Muw.* (al-Qaʿnabī), 1:158; *Muw.* (Riwāyāt), 2:152–53.

[72] *Muw.* (Abū Muṣʿab), 1:102.

[73] *Muw.* (Suwayd), 92–94.

[74] *Mud.*, 1:105; *Mud.* (2002), 1:289.

[75] Al-Ṭaḥāwī, *Mukhtaṣar*, 1:238; al-Ṭaḥāwī contests this consensus, however, and claims that only ten of these eleven verses, which he lists, were accepted as Qurʾānic prostrations by consensus; al-Ṭaḥāwī, *Sharḥ*, 1:466.

provides extensive details about how and when they ought or ought not to be recited. He notes that Mālik did not regard it as obligatory (*wājib*) to make Qurʾānic prostrations and followed the opinion of ʿUmar in that regard. Saḥnūn does not relate the story of ʿUmar on the Friday pulpit or cite terms or commentary from Mālik relevant to the issue.[76]

Dissent among the early and the later jurists over the prostration verses of the Qurʾān is well known. Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī regarded such prostrations to be obligatory (*wājib*). Mālik, al-Layth, al-Awzāʿī, al-Shāfiʿī, and Ibn Ḥanbal held that it was a *sunna* to make such prostrations but not obligatory.[77] Zayd ibn Thābit held that it was not obligatory to perform the prostration after reciting the prostration verses, and Ubayy ibn Kaʿb and Ibn ʿAbbās—like Mālik—held that there were no prostration verses in the latter portion of the Qurʾān. This was also the opinion of Anas ibn Mālik and al-Ḥasan al-Baṣrī.[78] Several *ḥadīth*s have been transmitted regarding Qurʾānic prostrations. A number of them confirm ʿUmar's practice and the Medinese position that such prostrations are not obligatory or in the latter portion of the Qurʾān, but there are numerous *ḥadīth*s that affirm the presence of such verses in the latter portion of the Qurʾān. Some state that the Prophet performed such prostrations for the relevant verses of the latter portion of the Qurʾān in Mecca but not after making his migration to Medina.[79] The relevant *ḥadīth*s are reports of actions, and al-Ṭaḥāwī draws attention to the ambiguities implicit in them.[80]

The post-Prophetic report from ʿUmar, which Mālik cites in this chapter, illustrates the inherent legal ambiguity in reports of actions. Taken in isolation and without commentary, ʿUmar's actions are contradictory. Only his explanation clarifies his intent and removes the ambiguity and apparent contradiction. Ibn ʿAbd al-Barr, al-Bājī, and al-Zurqānī hold that ʿUmar performed these actions in order to make clear to the people of Medina (the majority of whom would have been in attendance at the Friday prayer) that it was not obligatory for them to prostrate themselves after reciting prostration verses of the Qurʾān. They contend that ʿUmar's

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[76] *Mud.*, 1:105–07; *Mud.* (2002), 1:289–94.

[77] Ibn ʿAbd al-Barr, *al-Istidhkār*, 8:97; Ibn ʿAbd al-Barr, *al-Tamhīd*, 6:80; al-Ṭaḥāwī, *Sharḥ*, 1:460; al-Ṭaḥāwī, *Mukhtaṣar*, 1:240; cf. ʿAbd al-Razzāq, *al-Muṣannaf*, 3:335–341; al-Bājī, *al-Muntaqā*, 1:351.

[78] Al-Ṭaḥāwī, *Sharḥ*, 1:4458–63; ʿAbd al-Razzāq, *al-Muṣannaf*, 3:343.

[79] Al-Ṭaḥāwī, *Sharḥ*, 1:457–73; ʿAbd al-Razzāq, *al-Muṣannaf*, 3:343–44; Ibn ʿAbd al-Barr, *al-Istidhkār*, 8:99–100, see also its note 2.

[80] Al-Ṭaḥāwī, *Sharḥ*, 1:457–60.

instructions from the pulpit in this example constitute a consensus of the Companions because none of them objected to what ʿUmar said or did.[81]

By stating what the praxis is not, Mālik indicates that the praxis of Medina in this matter is that the *imām* remain upon the pulpit after reciting a Qurʾānic prostration and not come down from it to prostrate. Mālik has indicated by reference to Medinese praxis which of the two actions of ʿUmar reported in the post-Prophetic report should be taken as the normative standard. ʿUmar's action on the first Friday when he descended and prostrated himself is not normative in Mālik's view. Consequently, it was not incorporated into praxis. ʿUmar's action on the second Friday when he recited the same verse and did not prostrate constituted the desired norm and became standard Medinese praxis. The example illustrates how Mālik relies upon the non-textual source of Medinese praxis to interpret textual sources of the law. The post-Prophetic report as transmitted in the *Muwaṭṭaʾ* relates two contrary actions with the explanation that the act of prostration involved is not obligatory, but the text itself does not establish which of the two actions should be regarded as the norm. Mālik verifies the norm by reference to standing Medinese praxis.[82]

The source of the praxis in this instance is not explicit, although, as noted, several *ḥadīth*s treat this issue, indicating that it went back to the Prophetic period. In Mālik's report, ʿUmar states, "God has not made it binding upon us to do it . . .". According to Mālikī legal reasoning and that of other prominent early jurists, such statements from prominent Companions are regarded as indications of the Prophetic *sunna* on the presumption that no Companion would have made claims of this sort about God without having had relevant knowledge from the Prophet.[83] It seems unlikely on the basis of the information that Mālik provides, however, that the Prophet instituted a praxis regarding whether or not the *imām* should descend from the pulpit and prostrate himself in congregation during Friday prayers after reciting a prostration verse of the Qurʾān. Otherwise, the matter would have required no demonstration on the part of ʿUmar but would have already been embodied in praxis. The praxis in this instance

[81] See Ibn ʿAbd al-Barr, *al-Tamhīd*, 6:80; al-Bājī, *al-Muntaqā*, 1:350–51; al-Zurqānī, *Sharḥ*, 2:196–97.

[82] The fact that ʿUmar states that it was not required of the people to prostrate themselves after reciting a Qurʾānic prostration may be interpreted as meaning that it should not become normative behavior for the *imām* to descend from the pulpit and prostrate himself after reciting one of the verses. Nevertheless, there is no reason why something less than obligatory (for example, something recommended) should not be normative.

[83] See Abd-Allah, "*ʿAmal*," 161–70.

appears to be the result of ʿUmar's legal interpretation (*ijtihād*) based on his understanding of the general legal implications of the precept that it is not binding for one to prostrate oneself after reading a prostration verse of the Qurʾān. Consequently, this example appears to belong to the category of old praxis (*al-ʿamal al-qadīm*), instead of transmissional praxis (*al-ʿamal al-naqlī*).[84]

In *Ikhtilāf Mālik*, the Shāfiʿī proponent refers to Mālik's AN at the end of this precept that there are no imperative prostrations in the last portion of the Qurʾān (*al-mufaṣṣal*). He uses the reference as part of his contention that the Medinese inaccurately claim consensus in matters regarding which there were locally dissenting opinions. He cites the Medinese as stating, "We hold that the people (or scholars; *al-nās*) have reached concurrence (*ijtimāʿ*) that there are eleven verses in the Qurʾān after reading which it is imperative to prostrate and none of them is in the latter portion of the Qurʾān (*al-mufaṣṣal*).[85] The interlocutor emphasizes that consensus must be universal to be valid in contrast to Medinese claims to local consensus. He insists that the Medinese must not claim consensus except in matters completely lacking dissent. He protests that he does not know whom the Medinese mean by their reference to "the people."[86]

In Yaḥyā's transmission of the *Muwaṭṭaʾ*, however, Mālik gives no explicit indication of local consensus on the matter in question but labels it as an AN. He states:

> The AN (*al-amr ʿindanā*) is that those Qurʾānic verses that make prostration imperative (*ʿazāʾim sujūd al-Qurʾān*) [when they are recited] are eleven, none of them being included in the latter portion of the Qurʾān (*al-mufaṣṣal*).[87]

The Shāfiʿī interlocutor in this case is following a recension of the *Muwaṭṭaʾ* close to that of al-Qaʿnabī and Abū Muṣʿab. Al-Qaʿnabī states that "the people concur (*ijtamaʿ al-nās*) that the imperative prostrations of the Qurʾān are eleven prostration [verses], none of them being in the latter portion of the Qurʾān."[88] Abū Muṣʿab produces the same information but uses the expression "the people have consensus" (*ajmaʿa al-nās*).[89] Ibn ʿAbd al-Barr refers to this point of difference. He regards Yaḥyā's transmission

[84] See Abd-Allah, "*ʿAmal*," 410–19.
[85] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 202.
[86] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 202.
[87] See *Muw.*, 1:207; *Muw.* (Dār al-Gharb), 1:284; *Muw.* (*Riwāyāt*), 2:153.
[88] *Muw.* (al-Qaʿnabī), 158.
[89] *Muw.* (Abū Muṣʿab), 1:102–03.

to be more reliable, since it was received from Mālik shortly before his death, and he contends that there was no dissent about the matter, since all jurists agreed that there were eleven prostration verses in the chapters of the Qur'ān prior to the latter portion.[90]

The wording "those Qur'ānic verses that make prostration imperative" leaves open the possibility that there are other verses (such as the two in the latter part of the Qur'ān; Qur'ān 84:21, 96:19) which one *may* prostrate voluntarily after reciting. The position that it is valid to prostrate after reading these verses is consistent with Mālik's presentation of the precept in the *Muwaṭṭa'*. It accommodates the actions that Mālik reports the Prophet and certain of his Companions as having done, since they prostrated after reciting these optional prostration verses. The optional nature of these verses is the lesson that ʿUmar taught the Medinese through his actions when he first led the Friday prayer and prostrated before the congregation after reciting them. Then, he recited the same verses from the latter part of the Qur'ān a second Friday but refrained from prostrating. According to Mālik, ʿUmar stated on the second occasion, "As you were (*ʿalā rislikum*)! God did not make it obligatory for us unless we desire."[91] All of the reports in this chapter are reports of actions, which, as noted frequently, are semantically and legally ambiguous when taken in isolation. In Mālik's legal reasoning, he repeatedly clarifies the juristic status of reports of action by reference to praxis, as he does in this case also.[92]

2. *Al-Ā: ʿUmar's Letter to a Military Commander*

Mālik cites a post-Prophetic report according to which ʿUmar ibn al-Khaṭṭāb sent a letter to the commander of one of his armies telling him he had received word that some of the commander's soldiers had been tracking down the enemy in their mountain hideaways. Finding them too well fortified to dislodge, the Muslim soldiers lured out the enemy by telling them in Persian, "Have no fear." When the enemy came out, the Muslim soldiers put them to death. ʿUmar concludes his letter by saying that if he knew the whereabouts of Muslim soldiers such as these, he would put them to death. Yaḥyā ibn Yaḥyā states after this post-Prophetic report that he heard Mālik state that there was no concurrence on the *ḥadīth* (*laysa . . . bi-'l-mujtamaʿ ʿalayhī*) and that praxis was not in accordance with it.[93]

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[90] Ibn ʿAbd al-Barr, *al-Istidhkār*, 8:97.

[91] *Muw.*, 1:206.

[92] See Abd-Allah, "*ʿAmal*," 194–95.

[93] *Muw.*, 2:448–49; *Muw.* (Dār al-Gharb), 1:578; Ibn ʿAbd al-Barr, *al-Istidhkār*, 14:84; *Muw.* (Abū Muṣʿab), 1:358–59; *Muw.* (*Riwāyāt*), 3:18–19.

This explicit negation of praxis occurs exclusively in Yaḥyā's recension.[94] Abū Muṣʿab produces the same precept with slightly different wording. Like Yaḥyā, he notes that ʿUmar's post-Prophetic report lacks concurrence (*laysa . . . bi-'l-mujtamaʿ ʿalayhī*), but he makes no reference to its being contrary to praxis.[95] The precept is missing from the recensions of al-Qaʿnabī, Suwayd, and Ibn Ziyād.

I failed to find this specific precept in the *Mudawwana*. Saḥnūn treats the issue of granting safe passage (*amān*) to non-Muslims in war zones and taking prisoners of war. He indicates that there are circumstances in which prisoners of war may be put to death. He treats in some detail the question of non-Muslims found in Muslim territory without having been granted safe passage and who claim to be merchants and not fighters. Mālik states that some of these questions are problematic (*mushkila*).[96]

The post-Prophetic report about ʿUmar in the *Muwaṭṭa'* occurs in a short chapter in the Book of *Jihād* pertaining to covenants of safe passage (*amān*) that individual Muslims unofficially grant to the enemy. The precept itself pertains, as al-Bājī and al-Zurqānī note, to the laws of granting safe passage (*ta'mīn*) and protection of non-Muslim property in Muslim-controlled areas. The Muslim soldiers whose perfidy ʿUmar condemned had, in effect, granted safe passage to their Persian enemies by telling them the words, "Have no fear." But they broke their covenant by killing the Persians after their surrender.

Ibn ʿAbd al-Barr gives extensive discussion of ʿUmar's policy regarding treachery from Muslim soldiers on the Persian front, his insistence that "God knows all languages," and that the Persian words the soldiers used to lure them out of hiding constituted legal grant of safe passage (*al-amān*). Ibn ʿAbd al-Barr notes that there was no consensus either inside or outside of Medina on the literal application of ʿUmar's statement that he would put such Muslim soldiers to death. He asserts that he knows of no difference of opinion among the jurists that any words or signals indicating safe passage or understood by the enemy as indicating safe passage constitute grant of safe passage (*amān*) and must be respected. Most of the scholars held that such indications of safe passage were valid regardless

[94] *Muw.*, 2:448–49; *Muw.* (Dār al-Gharb), 1:578; Ibn ʿAbd al-Barr, *al-Istidhkār*, 14:84.
[95] *Muw.* (Abū Muṣʿab), 1:358–59.
[96] *Mud.* 1:369–74; *Mud.* (2002), 3:12–25.

of whether or not they were made by Muslims of high or low social status or by women or slaves.[97]

Mālik's statement that there is no concurrence on this post-Prophetic report may be an indication that there was no general consensus among the Medinese as to its authenticity.[98] Al-Zurqānī states further that some Mālikī jurists held that the overt meaning (*ẓāhir*) of ʿUmar's letter is misleading. They interpreted ʿUmar's statement that he would put such soldiers to death as a threat meant to intimidate them from breaking covenants of security in the future. These jurists did not believe that ʿUmar actually intended that his threat ever be implemented or become a standing legal precedent.[99]

According to al-Bājī, this precept constituted a point of dissent between Mālik and Abū Yūsuf. The latter held that ʿUmar's position as expressed in the letter should constitute the standard. Such Muslim soldiers should be put to death. Abū Ḥanīfa is said, however, to have held the same opinion on the matter as Mālik.[100] In contrast to most issues of dissent in the *Muwaṭṭaʾ*, this particular matter appears to have been primarily a matter of difference of opinion between Mālik and Abū Yūsuf.

Muslim jurists concurred that what the perfidious soldiers did was forbidden (*ḥarām*). The point of dissent was whether the Muslim soldiers should be punished with death for this forbidden act.[101] The fact that Mālik regarded the treachery of the Muslim soldiers to be wrong is indicated by the content of the remainder of the chapter. He shows first that even a friendly gesture of the hand is sufficient to indicate safe passage and no words need be said at all. It stands to reason that Mālik would have regarded the soldiers' statement to the Persians as an unequivocal covenant of safe passage. Mālik cites Ibn ʿAbbās as stating that God would empower an enemy over any people that breaks its covenants out of treachery.[102]

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[97] Ibn ʿAbd al-Barr, *al-Istidhkār*, 14:85–87; cf. Ibn Abī Shayba, *al-Muṣannaf*, 6:516–18; ʿAbd al-Razzāq, *al-Muṣannaf*, 5:292.

[98] See al-Zurqānī, *Sharḥ*, 3:292–93.

[99] Al-Zurqānī, *Sharḥ*, 3:293; cf. Ibn ʿAbd al-Barr, *al-Istidhkār*, 14:87. This juristic opinion illustrates the point made earlier that in Mālikī juristic reasoning overt (*ẓāhir*) statements are regarded as conjectural. See Abd-Allah, "*ʿAmal*," 146–47.

[100] Al-Bājī, *al-Muntaqā*, 3:174.

[101] Al-Bājī, *al-Muntaqā*, 3:172–74; al-Zurqānī, *Sharḥ*, 3:292–93; Ibn ʿAbd al-Barr, *al-Istidhkār*, 14:87.

[102] *Muw.*, 2:449.

The post-Prophetic report that Mālik cites in this example is a Kufan, not a Medinese transmission. Mālik transmits it from "a man of the people of Kufa," without specifying who he was.[103] Al-Zurqānī notes that the chain of transmission in the report is disconnected. It does not mention the intermediary through whom the Kufan reporter received the report from ʿUmar. Reports with disconnected chains of transmission like this are common in the *Muwaṭṭaʾ*, and, as pointed out earlier, both Mālikī and Ḥanafī legal reasoning accepted such transmissions as authentic sources of law as long as the person mentioned as the final authority in the chain of transmission is acceptable.[104]

Whatever Mālik's reasons for rejecting the overt implications of this Prophetic report may have been, it is clear that he rejects it by reference to praxis. The Shāfiʿī interlocutor in *Ikhtilāf Mālik* agrees with Mālik's legal conclusion but strongly objects to his methodology. The Shāfiʿī spokesman condemns Mālik's reliance upon praxis in the absence of cited legal texts as sufficient for rejecting the implications of ʿUmar's report. The interlocutor holds that the Muslim soldiers should not be put to death because of the precept mentioned in another *ḥadīth* that no Muslim shall be put to death over a non-Muslim.[105] But Mālik did not subscribe to that position in the absolute. He states in the *Muwaṭṭaʾ* that it is the "precept among us" (AN; *al-amr ʿindanā*) that a Muslim not be put to death over a non-Muslim except in premeditated murder (*yaqtuluhū ghīlatan*).[106] According to this precept, it could be argued that the Muslim soldiers should indeed have been put to death because they premeditated the murder of their hostages in direct violation of the laws of immunity and safe passage (*amān*).

3. *Al-Ā: ʿĀʾisha's Reading of an Abrogated Qurʾānic Verse*

Mālik cites a post-Prophetic report from ʿĀʾisha according to which she said that a Qurʾānic verse was revealed stating that the prohibition of marriage by virtue of kinship through shared nursing (*raḍaʿa*) only takes effect after ten nursings. The original verse was abrogated to five. It was still being recited as part of the Qurʾān at the time of the Prophet's death. Yaḥyā ibn

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[103] See al-Zurqānī, *Sharḥ*, 3:292–93. Al-Zurqānī holds that this Kufan was probably Sufyān al-Thawrī.

[104] See Abd-Allah, "*ʿAmal*," 155–61.

[105] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 241.

[106] *Muw.*, 2:864.

> Yaḥyā relates that he heard Mālik state regarding this report that praxis was not in accordance with it (*laysa ʿalā hādhā al-ʿamal*).[107]

As in the preceding example, this negative praxis term occurs exclusively in the transmission of Yaḥyā ibn Yaḥyā al-Laythī.[108] Both Abū Muṣʿab and Suwayd treat the issue of shared nursings and present the *ḥadīth* of ʿĀ'isha, which is contrary to the Medinese position, but they do not cite any term or commentary from Mālik on it. Suwayd concludes his chapter with a report that al-Zuhrī held that both minimal and extensive shared nursings establish nursing kinship and prohibit marriage on the maternal (nursing woman's) side.[109] The precept is not to be found in the present recensions of al-Qaʿnabī and Ibn Ziyād.

Saḥnūn corroborates Mālik's position through Ibn al-Qāsim that as few as one or two mouthfuls of nursing milk establish nursing kinship and prohibit marriage. He produces further evidence through Ibn Wahb demonstrating that this opinion was widely held among the Companions. He cites al-Qāsim ibn Muḥammad, Saʿīd ibn al-Musayyab, ʿUrwa ibn al-Zubayr, and Mālik's teachers Rabīʿa, al-Zuhrī, and others. Saḥnūn also cites prominent non-Medinese jurists such as Ibn Masʿūd, Ṭāwūs, ʿAṭā' ibn Abī Rabāḥ, and Makḥūl. He quotes al-Zuhrī that "the precept Muslims follow finally reached this [position]" (*intahā amr al-Muslimīn ilā dhālika*). The chapter treats a number of details such as whether nursing milk force-fed a baby through the mouth (*al-wajūr*) or nose (*al-saʿūt*) or given in an enima has any legal effect. Saḥnūn asks Ibn al-Qāsim whether the legal effect of shared nursing also applies to non-Muslim (*mushrik*) wet-nurses. This additional material illustrates again the *Mudawwana*'s fundamental concern with more elaborate legal interpretation beyond affirmation of basic legal principles and precepts.[110]

Mālik's position on shared nursing kinship was that nursing-based kinship and consequent prohibition in future marriage between babies with a common wet-nurse takes legal effect after a single nursing. This opinion was held by ʿAlī, Ibn Masʿūd, Ibn ʿUmar, Ibn ʿAbbās, al-Ḥasan al-Baṣrī, Mujāhid, Saʿīd ibn al-Musayyab, ʿUrwa ibn al-Zubayr, Ṭāwūs, Makḥūl,

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[107] *Muw.*, 2:608; *Muw.* (Dār al-Gharb), 2:128; Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:286; *Muw.* (Abū Muṣʿab), 2:14; *Muw.* (Suwayd), 307–08; *Muw.* (*Riwāyāt*), 3:345.

[108] *Muw.*, 2:608; *Muw.* (Dār al-Gharb), 2:128; Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:286; *Muw.* (*Riwāyāt*), 3:345.

[109] *Muw.* (Abū Muṣʿab), 2:14; *Muw.* (Suwayd), 307–08.

[110] *Mud.*, 2:288–89; *Mud.* (2002), 4:273–76.

ʿAṭāʾ, al-Zuhrī, Qatāda, Ḥammād ibn Abī Sulaymān, and other prominent jurists inside and outside of Medina. This position was espoused by Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī, Sufyān al-Thawrī, al-Layth ibn Saʿd, al-Awzāʿī, and other prominent jurists among Mālik's contemporaries.[111] Al-Layth ibn Saʿd regarded it as a matter of Islamic consensus (*ajmaʿ al-Muslimūn*).[112]

ʿĀʾisha was the chief dissenting voice on this precept, although she did not stand alone. She held that nothing less than five definite nursings would establish kinship by nursing or prohibit future marital unions. She also applied this ruling to young and old alike, whereas other jurists held that shared nursing only established kinship during infancy. ʿĀʾisha's position was not consistent. Her definition of the number of nursings differs in various reports, and it is not clear what her final position was.[113] Umm Faḍl and Ḥafṣa are also reported to have concurred with ʿĀʾisha.[114] ʿUmar is also reported to have held a position similar to ʿĀʾisha that one or two nursings did not have legal effect.[115] The same position is also attributed to al-Mughīra ibn Shuʿba.[116] Ṭāwūs contended that the original position of the law was that ten nursings established kinship and prohibited marriage, but this was later reduced to a single nursing.[117]

ʿAbd-Allāh ibn al-Zubayr held a position similar to his kinswoman ʿĀʾisha, and contended that one or two suckings did not establish kinship or prohibit marriage. Sulaymān ibn Yasār and Saʿīd ibn al-Musayyab are also reported as having agreed with this opinion, although Ibn al-Musayyab apparently altered his position to confirm with the majority. ʿAbd al-Razzāq reports that he was once told that ʿĀʾisha held that only five or seven nursings were legally effective, and he replied that even a single drop of nursing milk that enters the stomach is enough to create the kinship bond and prohibit future marriage.[118] Ibn Abī Shayba's

[111] Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:288, 259–60; ʿAbd al-Razzāq, *al-Muṣannaf*, 7:466–69; Ibn Abī Shayba, *al-Muṣannaf*, 3:542–43.

[112] Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:260.

[113] Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:287, 267; Ibn ʿAbd al-Barr, *al-Tamhīd*, 11:390–91; ʿAbd al-Razzāq, *al-Muṣannaf*, 7:466.

[114] ʿAbd al-Razzāq, *al-Muṣannaf*, 7:469–70; Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:262.

[115] ʿAbd al-Razzāq, *al-Muṣannaf*, 7:471.

[116] Ibn Abī Shayba, *al-Muṣannaf*, 3:542.

[117] Ibn Abī Shayba, *al-Muṣannaf*, 3:543.

[118] ʿAbd al-Razzāq, *al-Muṣannaf*, 7:468.

transmission regarding Sulaymān ibn Yasār also makes it doubtful that he actually dissented from the standard view.[119]

This was a precept in which there was local dissent in Medina at the earliest stage. Indeed, dissent on the issue appears to have been restricted to Medina, although it was apparently resolved at an early time and consensus prevailed in the city.[120] Nevertheless, that earliest dissent reappeared in the generation of al-Shāfiʿī. He and a number of his contemporaries—Ibn Ḥanbal, Isḥāq ibn Rāhawayh, Abū Thawr, and Abū ʿUbayd—revived positions identical or similar to that of ʿĀʾisha.[121] They transmitted a contrary *ḥadīth* that one or two suckings did not effect prohibition. Ibn al-Zubayr seems also to have based his opinion on this *ḥadīth*.[122] Al-Shāfiʿī took the position that five separate nursings (*raḍaʿāt*) were required to effect kinship and require prohibition of marriage.[123]

In the case of this particular negative praxis term ("this is not in accord with praxis; *Al-Ā, laysa ʿalā hādhā al-ʿamal*), Mālik demonstrates his overall concern with dissent as a standing legal principle. Although there was virtual consensus among the early jurists on this matter in disagreement with ʿĀʾisha, Mālik draws special attention to her minority opinion (notably, that of a woman jurist) despite the fact that until the time of al-Shāfiʿī it appears not to have constituted a significant point of difference outside ʿĀʾisha's circle.

Commentators seem to be in general agreement that what ʿĀʾisha meant in the post-Prophetic report is that the repealed Qurʾānic verse she refers to had been completely abrogated during the last days of the Prophet's lifetime. For this reason it was not included in the standard recitation of the Qurʾān, but the knowledge of its abrogation did not reach some of the Prophet's Companions until after his death. This is why the verse continued to be recited by some of them after the Prophet died.[124]

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[119] Ibn Abī Shayba, *al-Muṣannaf*, 3:542.

[120] Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:288, 259–60; ʿAbd al-Razzāq, *al-Muṣannaf*, 7:466–69; Ibn Abī Shayba, *al-Muṣannaf*, 3:542–43; al-Zurqānī, *Sharḥ*, 4:184–85; Ibn Rushd, *Bidāya* (Istiqāma), 2:35.

[121] Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:262; Ibn Abī Shayba, *al-Muṣannaf*, 3:542; Ibn Rushd, *Bidāya* (Istiqāma), 2:35–36; al-Zurqānī, *Sharḥ*, 4:184.

[122] Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:263; ʿAbd al-Razzāq, *al-Muṣannaf*, 7:467–70; Ibn Abī Shayba, *al-Muṣannaf*, 3:542; Ibn Rushd, *Bidāya* (Istiqāma), 2:35–36; al-Zurqānī, *Sharḥ*, 4:184.

[123] Ibn ʿAbd al-Barr, *al-Istidhkār*, 18:264.

[124] See al-Zurqānī, *Sharḥ*, 4:184–85; al-Bājī, *al-Muntaqā*, 4:156–57; Yaḥyā ibn Yaḥyā al-Nawawī, *Sharḥ Muslim*, 3:631–32. Al-Bājī and al-Zurqānī observe that the repealed verse ʿĀʾisha refers to cannot be regarded as a legitimate part of the Qurʾānic recension in the

According to Ibn Rushd and other commentators, Mālik's position regarding the effectiveness of a single nursing in establishing nursing-kinship was based on the generality (*ʿumūm*) of the pertinent Qurʾānic verse (Qurʾān, 4:23), which states simply that marriage is prohibited by shared nursing but does not specify what amount of mouthfuls effectively constitute "nursing". Thus, Mālik and the majority of early jurists held that nursing-based kinship takes effect with a single nursing, since one nursing is the minimum amount for which the word "nursing" (*raḍāʿa*) may be validly used. According to this view, Mālik's rejection of the overt (*ẓāhir*) implication of ʿĀʾisha's report is an example of his granting priority to the generality of the Qurʾānic text over the contrary implications of solitary *ḥadīth*s that are not supported by the praxis of Medina.[125]

Al-Bājī holds that ʿĀʾisha's report does not literally contradict Medinese praxis. Only the overt implication of her report appears discrepant. The conclusion generally drawn from ʿĀʾisha's statement, as mentioned earlier, is that the verse speaking of the five nursings was also repealed from the recitation of the Qurʾān but that knowledge of its abrogation did not reach some of the Companions until after the Prophet's death. ʿĀʾisha's report may be interpreted to mean that the ruling that the prohibition by nursing does not become effective until after the fifth nursing was also repealed. For it is unlikely that the recitation of the verse would have been abrogated unless the ruling pertaining to it had been repealed also.[126] (However, al-Shāfiʿī's position was reportedly that recitation of the verse on the ten nursings had been repealed but that the ruling contained in the verse had continued to be law.)[127]

Al-Bājī asserts that Mālik used the expression that praxis was not in accordance with ʿĀʾisha's report not because he or other Medinese jurists regarded her opinion actually to be contrary to Medinese praxis as embodied in the relevant general precept.[128] Al-Bājī holds instead that Mālik made it a point to cite ʿĀʾisha's reported statement and then note

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post-Prophetic period, since, by traditional legal definition, the Qurʾānic cannon can only be established by multiply-transmitted (*mutawātir*) reports of verses. ʿĀʾisha's report, although authentic, is solitatary and not multiply-transmitted (al-Bājī, *al-Muntaqā*, 4:156; al-Zurqānī, *Sharḥ*, 4:184–85).

[125] Ibn Rushd, *Bidāya*, (Istiqāma), 2:35; Abū Zahra, *Mālik*, 301. See Abd-Allah, "*ʿAmal*," 147–48.

[126] See al-Bājī, *al-Muntaqā*, 4:156.

[127] Al-Nawawi, *Sharḥ*, 3:631.

[128] See Abd-Allah, "*ʿAmal*," 639.

that it was not in keeping with praxis because most people are incapable of understanding how the interpretation of a report may be valid if it is contrary to its overt meaning. Many people, al-Bājī holds, are not capable of understanding how a report can have a valid interpretation contrary to its overt meaning even if such interpretations are repeated to them over and over again. Such persons generally become only more confused by such repetitions. (Al-Bājī adds that the problem of not being able to understand anything but the overt meaning of texts became especially severe in his time.) Thus, according to al-Bājī, Mālik used his negative praxis term in view of the incapacity of most people to understand the interpretation of a text that is not obvious.[129] One could apply this same view to the preceding example, in which the statement of ʿUmar (as some Mālikī jurists have observed) can be interpreted as not being contrary to Medinese praxis.[130] The inability of many people to understand anything other than the obvious, literal meaning of a text may explain Mālik's use of texts. Like other jurists, the people in general would not be able to conceive of praxis as authoritative without its having some foundation in the texts or without the texts being shown to have their foundation in it.

It is difficult to determine the source of the Medinese praxis that Mālik has in mind except with reference to textual evidence. I have noted the relevant general Qurʾānic verse (Qurʾān, 4:23), but Mālik does not cite it in conjunction with ʿĀʾisha's report in this sub-chapter. Presumably, the type of praxis Mālik has in mind in this example belonged to the category of transmissional praxis (*al-ʿamal al-naqlī*), going back to the revelation of the original verse and its subsequent repeal in recitation and practice.

4. *Al-Ā: Optional Sales Agreements* (Bayʿ al-Khiyār)[131]

Mālik cites a *ḥadīth* stating that the Prophet gave both the buyer and seller the right of option to conclude or forego an initial sales transaction as long as they did not part company (*mā lam yatafarraqā*), except in the case of optional sales agreements (*bayʿ al-khiyār*). Mālik then observes that there is no established period of limitation for options among the Medinese

[129] Al-Bājī, *al-Muntaqā*, 4:156–57.

[130] See Abd-Allah, "*ʿAmal*," 635.

[131] *Bayʾ al-khiyār* is an optional sales agreement in which the designated purchaser is given a stipulated period to make a final choice (*khiyār*) to buy the item agreed upon or return it to the seller. There were differences of opinion among the jurists regarding both the definition and the legitimacy of optional sales (*bayʿ al-khiyār*); it constituted one of the great debates of Islamic jurisprudence.

(*ʿindanā*), nor is there any set precept regarding it that became part of praxis.[132]

Optional sales agreements are given brief and straightforward treatment in the *Muwaṭṭaʾ*. Mālik's observation, "This has no established period of limitation among us, nor does it have a set precept that has been put in practice" (*wa laysa li-hādhā ʿindanā ḥadd maʿrūf wa lā amr maʿmūl bihī fīhi*), occurs only in the transmissions of Yaḥyā and Suwayd, although Suwayd's presentation is shorter and he omits the words "among us" (*ʿindanā*).[133] Abū Muṣʿab transmits the *ḥadīth* and treats the precept of optional sales after the manner of Yaḥyā and Suwayd, but he does not provide Mālik's comment on the *ḥadīth* or the fact that there was no set Medinese praxis for optional sales periods.[134] The chapter does not occur in al-Qaʿnabī's recension or that of Ibn Ziyād as they presently stand.

The *Mudawwana* provides detailed treatment of optional sales agreements, giving another illustrative example of how the work generally seeks to elaborate on the basic precepts of the *Muwaṭṭaʾ* by providing in depth treatment of extraordinary cases and unusual questions. It is an interesting chapter because of the elaborate detail in Medinese praxis regarding the optional sales periods the Medinese set for various types of commodities.[135] The *Mudawwana* repeats the basic information on

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[132] *Muw.*, 2:671; *Muw.* (Dār al-Gharb), 2:201; Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:219–20, 232; *Muw.* (Suwayd), 206; *Muw.* (Abū Muṣʿab), 2:379–80; *Muw.* (*Riwāyāt*), 3:442–43.

[133] *Muw.*, 2:671; *Muw.* (Dār al-Gharb), 2:201; *Muw.* (Suwayd), 206; Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:219–20; Ibn ʿAbd al-Barr, *al-Tamhīd*, 12:216; *Muw.* (*Riwāyāt*), 3:442–43.

[134] *Muw.* (Abū Muṣʿab), 2:379–80.

[135] See *Mud.*, 3:223–44; *Mud.* (2002), 7:91–146. For example, Saḥnūn asks Ibn al-Qāsim to describe optional sales agreements according to Mālik's understanding of them. Ibn al-Qāsim explains that the option periods necessarily differ from one type of sale to another in Mālik's opinion. One or two days are enough to discover hidden defects in a purchased garment or riding animal. A month may be required, however, to discover the defects in a house. He relates Mālik as stating that different things have different aspects (*wa li-'l-ashyāʾ wujūh*) in accordance with which people know their value, make choices about them, and receive advice. There is no harm in optional sales agreements whenever people are required to test (*ikhtibār*) the products they buy. However, the option period must not be made so long as to lead to jeopardy (*gharar*). He gives further reports from Mālik explaining when options are valid and when they are not and what constitutes undue jeopardy (*gharar*) and chance (*muqāmara*). The chapter includes questions about what to do if the person with the option to return should die during that period and whether his option is extended to his heirs. It considers what procedure to follow if the person with the option loses his sanity during the option period. He asks about persons becoming sick or losing consciousness during the option period and is told that such cases are brought to the attention of the civil authority (*al-sulṭān*), who has the responsibility to guarantee that no undue harm (*iḍrār*) is caused either party and to annul the sale if there is harm (see *Mud.*, 3:223–27; *Mud.* [2002], 7:91–102.)

optional sales set forth in the *Muwaṭṭaʾ*. Ibn al-Qāsim explains optional sales in detail. Then, similarly to Yaḥyā and Suwayd, Saḥnūn provides Mālik's commentary on the *ḥadīth* and cites the same expression that occurs in Yaḥyā's transmission, "This has no established period of limitation among us, nor does it have a set precept that is put in practice" (*wa laysa li-hādhā ʿindanā ḥadd maʿrūf wa lā amr maʿmūl bihī fīhi*). Saḥnūn continues to provide the same content and structure of the chapter as it occurs in the *Muwaṭṭaʾ*, while providing additional commentary from Ashhab and others. Ashhab affirms Mālik's position on optional sales. He contends that "the people of knowledge from the Hijaz reached concurrence (*ijtimāʿ*)" that if the buyer and seller agree to a sale among themselves [by words], it becomes at once legally binding (*lāzim*). Ashhab notes that the praxis (*ʿamal*) is not in accordance with Mālik's *ḥadīth*, which he believes was repealed (*mansūkh*) by the Prophet's statement in the *ḥadīth* that "Muslims are bound by the conditions they make (*al-Muslimūn ʿalā shurūṭihim*)" and another *ḥadīth*—transmitted in the *Muwaṭṭaʾ*—specifying that if the buyer and seller disagree, the seller is required to take an oath.[136]

Dissent over optional sales agreements and Mālik's *ḥadīth* in the *Muwaṭṭaʾ* constitutes one of the great legal debates of the formative and post-formative periods. ʿIyāḍ states that Mālik's position on this *ḥadīth* gave rise to some of the strongest recriminations between the Mālikīs and dissenting scholars. Mālik transmits the relevant *ḥadīth* with the "golden chain" (Mālik from Nāfiʿ from ʿAbd-Allāh ibn ʿUmar), which was widely regarded as the strongest chain of *ḥadīth* transmission. In the view of Mālik's opponents, he rejected this *ḥadīth* in favor of the praxis of the people of Medina.[137]

There was no lack of other pertinent *ḥadīth*s regarding optional sales. Although Mālik relied on reference to Medinese praxis, both he and those who opposed his interpretation supported their views by reference to pertinent *ḥadīth*s and post-Prophetic reports. Despite the extistence of these

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[136] *Mud.*, 3:234–35, 237–38; *Mud.* 7:120–122; 128–31; cf. *Muw.*, 2:671; *Muw.* (Dār al-Gharb), 2:201; *Muw.* (*Riwāyāt*), 3:442–43; see al-Ṭabarī, *Ikhtilāf*, 56–57.

[137] ʿIyāḍ, *Tartīb*, 1:72. See also Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:224–25; Ibn ʿAbd al-Barr, *al-Tamhīd*, 12:215–16; see al-Ṭabarī, *Ikhtilāf*, 56. Ibn ʿAbd al-Barr confirms that all Muslim scholars of jurisprudence and *ḥadīth* agree that the *ḥadīth* of Ibn ʿUmar, which Mālik cites in the *Muwaṭṭaʾ*, is among the most authentically established of all solitary *ḥadīth*s. No one entertained any doubt about its historical authenticity. Disagreement was about whether or not the *ḥadīth* was repealed and what its correct legal interpretation should be. There were also questions about its wording, since it is transmitted with variant wordings in different recensions, although all agree in their general sense.

*ḥadīth*s, however, the precept of optional sales may still be used to illustrate the relative paucity of legal texts. No categorically explicit *ḥadīth*s existed on either side of the argument that served to resolve it conclusively, and none of texts on either side of the debate supports any particular position by unequivocally addressing the core issues of dissent.[138]

Dissent over optional sales agreements focused on two essential questions of law relating to Mālik's *ḥadīth*. Each point constituted a point of disagreement between the early and later jurists both within and without the city of Medina. The first issue concerned the definition of what constitutes a binding sales agreement. Is such an agreement constituted merely by a verbal or written agreement (*ʿaqd*) between a buyer and seller, or does their sale become binding only after the buyer and seller have parted company?[139] There was internal dissent within Medina on this point just as there were differences over it in other centers of Islamic jurisprudence in the formative period.[140]

The second point of legal contention concerned the definition of optional sales agreements (*bayʿ al-khiyār*). Based on how jurists defined optional sales, they differed on the permissibility of such sales and, if they were permissible, for what designated periods? Ibn ʿAbd al-Barr explains that Mālik's statement that there was no established period of limitation (*ḥadd maʿrūf*) in optional sales agreements in Medina implies that the Medinese never established a single set limit for optional sales such as the three day limit that the Kufans and later Shāfiʿīs upheld. Rather, the Medinese regarded the option periods to vary according to the type of item sold. In the *Mudawwana*, Saḥnūn clarifies these different option periods in great detail. Sometimes three days are sufficient, but considerably longer periods are required in other cases. Real estate, for example, requires more time to assess than clothing or animals.[141]

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[138] See, for example, al-Ṭaḥāwī, *Sharḥ*, 3:271–78; Ibn ʿAbd al-Barr, *al-Tamhīd*, 12:215–20; and Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:224–33.

[139] Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:233.

[140] Ibn ʿUmar, Ibn Musayyab, al-Zuhrī, and Ibn Abī Dhi'b were among the chief Medinese dissenters on this particular point. Rabīʿa vacillated between different opinions on the matter. Some of the dissenting Medinese views were identical to those later taken by the Shāfiʿīs, and Mālikīs continued to dispute this issue among themselves in later generations during the post-formative period (Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:233; al-Ṭaḥāwī, *Sharḥ*, 3:275–76. See also Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:230–31; cf. Ibn ʿAbd al-Barr, *al-Tamhīd*, 12:219–20; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:51–52; Ibn Abī Shayba, *al-Muṣannaf*, 4:507; al-Ṭabarī, *Ikhtilāf*, 57).

[141] Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:233. Later commentators also differed regarding the meaning of Mālik's observation at the end of the precept that the matter was not clearly defined in the praxis of Medina. Most Mālikī jurists held that Mālik's comment addressed

Regarding the first point on what constitutes a binding sales agreement, Mālik held that sales transactions became immediately binding once an agreement is made, except in the case of optional sales agreements (*bayʿ al-khiyār*). The formality of whether or not the buyer and seller part company during or after the agreement is of no legal consequence in any type of sale. Mālik's position is said to have been based on the overriding precept of Islamic law that all contracts and covenants are binding, which is repeatedly emphasized in the Qurʾān (see Qurʾān 5:1; 2:177; 3:72; cf. 5:89, 6:152; 16:91; 17:34; 33:15, 23; 13:20; 48:10). The immediate finality of any sales agreement as embodied in this principle is said to have been the opinion of Rabīʿa, Ibrāhīm al-Nakhaʿī, Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī, Sufyān al-Thawrī, and others.[142] Ibn ʿAbd al-Barr notes that Abū Ḥanīfa rejected the *ḥadīth*'s overt implications because of its being contrary to the generally established principles of Islamic law as Abū Ḥanīfa understood them regarding the validity of contracts. His policy toward the *ḥadīth* of Ibn ʿUmar in this case is consistent with his approach to solitary *ḥadīth*s in general and exemplifies his standard methodology of the generalization of standard legal proofs (*taʿmīm al-adilla*).[143]

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the second point of contention (the definition of optional sales agreements). His comment meant that there was no well-known limit or established custom in Medina regarding the length of the period during which the purchaser of an item has the option (*khiyār*) when entering upon such a contract (see ʿIyāḍ, *Tartīb*, 1:72; Ibn Rushd, *Bidāya* [Istiqāma], 2:207–08; al-Bājī, *al-Muntaqā*, 5:55–57; al-Zurqānī, *Sharḥ*, 4:282–84). Others understood Mālik's comment as indicating his rejection of the first part of the *ḥadīth*: that Medinese praxis set no particular period of limitation that was binding on the buyer and seller when parting company under the auspices of an optional sales agreement. There was no praxis in Medina consistent with that part of the *ḥadīth* (Cf. ʿIyāḍ, *Tartīb*, 1:72; he objects to this reading. Al-Shāṭibī adheres to it, however, and cites Mālik's comment regarding this *ḥadīth* as one of several examples of his rejecting *ḥadīth*s of conjectural meaning and with questionable legal implications when they are contrary to well-established precepts and principles of Islamic law (see al-Shāṭibī, *al-Muwāfaqāt*, 3:20–21). Ibn ʿAbd al-Barr suggests that Mālik regarded the *ḥadīth* of Ibn ʿUmar to have been repealed because Medinese praxis was not in accord with it (Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:221–22). As we have seen from the *Mudawwana*, Mālik's student Ashhab claimed explicitly that the *ḥadīth* had been repealed (*Muw.*, 2:671). Ibn ʿAbd al-Barr believes that Mālik indicates the fact of repeal by citing the *ḥadīth* of Ibn Masʿūd after it, and he gives Ibn al-Qāsim's support of that interpretation (Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:221–22).

142 See Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:226–28; cf. al-Ṭaḥāwī, *Mukhtaṣar*, 3:46, 49; Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:224–25Ibn ʿAbd al-Barr, *al-Tamhīd*, 12:219–20; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:52; Ibn Abī Shayba, *al-Muṣannaf*, 4:507; Ibn Rushd, *Bidāya* (Istiqāma), 2:207; al-Zurqānī, *Sharḥ*, 4:282–84; al-Bājī, *al-Muntaqā*, 5:55–56; al-Ṭabarī, *Ikhtilāf*, 56–59.

143 Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:226–28; cf. Ibn ʿAbd al-Barr, *al-Tamhīd*, 12:219–20; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:52; Ibn Abī Shayba, *al-Muṣannaf*, 4:507. For the generalization of standard legal proofs in Abū Ḥanīfa's methodology, see Abd-Allah, "Abū Ḥanīfa," 1:300; Abū Zahra, *Abū Ḥanīfa* (1965), 237–58; cf. idem, *al-Imām al-Ṣādiq*, 344–50.

Among the many Medinese and non-Medinese jurists who followed the overt meaning of the *ḥadīth* were Ibn ʿUmar, Shurayḥ, Saʿīd ibn al-Musayyab, al-Ḥasan al-Baṣrī, Ṭāwūs, al-Zuhrī, Ibn Jurayj, Yaḥyā ibn al-Qaṭṭān, Ibn Mahdī, al-Awzāʿī, al-Layth ibn Saʿd, Sufyān al-Thawrī, Sufyān ibn ʿUyayna, ʿAbd-Allāh ibn al-Mubārak, al-Shāfiʿī, Ibn Ḥanbal, Isḥāq ibn Rāhawayh, Abū Thawr, Dāwūd al-Ẓāhirī, and others. They all held that sales were only binding once the buyer and seller had parted company even if the buyer and seller made a verbal agreement.[144] Al-Awzāʿī held to the literal import of the *ḥadīth* in all sales contracts except when civil authorities sold war booty (*ghanā'im*), partners sold their portions of inheritance, or partners in business sold their shares of a business. In the case of those three exceptions, al-Awzāʿī followed the position that once they agreed and shook hands, the sale was conclusively concluded.[145] These interpretations held to the overt (*ẓāhir*) meaning of the *ḥadīth*, while many dissenting jurists argued that the verb "to part company" (*tafarraqa*), as evidenced in Qurʾānic usage (Qurʾān, 4:130), may also be taken to mean to disagree.[146]

Regarding the second point of law about the length of the option periods, Mālik held that their length depended on the type of item purchased and the amount of time customarily required to determine the worth and defects of such items. As noted, different option periods are discussed extensively in the *Mudawwana*. Al-Bājī also provides examples of various recommended option periods that are mentioned in the *Mudawwana*, *Wāḍiḥa*, and *Mawwāziyya*. Mālik recommended about a month for buying a house on option so that one could adequately check its walls and foundations, come to know the neighbors, and so forth. For items like clothing, Mālik felt that a duration of one to two days was sufficient.[147]

Sufyān al-Thawrī and others reportedly held that such option periods were not permissible under any circumstances, since sales agreements

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[144] Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:230–31; cf. al-Ṭaḥāwī, *Sharḥ*, 3:274; idem, *Mukhtaṣar*, 3:47; Ibn ʿAbd al-Barr, *al-Tamhīd*, 12:219–20; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:51–52; Ibn Abī Shayba, *al-Muṣannaf*, 4:507; al-Ṭabarī, *Ikhtilāf*, 57; Ibn Rushd, *Bidāya* (Istiqāma), 2:207; al-Zurqānī, *Sharḥ*, 4:282–84; al-Bājī, *al-Muntaqā*, 5:55–56.

[145] Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:231; cf. Ibn ʿAbd al-Barr, *al-Tamhīd*, 12:219–20; al-Ṭabarī, *Ikhtilāf*, 57.

[146] Ibn ʿAbd al-Barr, *al-Istidhkār*, 20:230–31; al-Ṭaḥāwī, *Sharḥ*, 3:274; cf. Ibn ʿAbd al-Barr, *al-Tamhīd*, 12:219–20; ʿIyāḍ, *Tartīb*, 1:72; al-Bājī, *al-Muntaqā*, 5:55; al-Zurqānī, *Sharḥ*, 4:283; al-Ṭabarī, *Ikhtilāf*, 57–59. For other usages of the verb in this sense, see Qurʾān 98:4; 3:105; 42:14; 3:103; 42:13.

[147] Al-Bājī, *al-Muntaqā*, 5:56; Ibn Rushd, *Bidāya* (Istiqāma), 2:207.

become immediately binding.[148] Abū Ḥanīfa and some other Kufan jurists held that option periods should never exceed three days, which is the position that al-Shāfiʿī took. As noted, Abū Ḥanīfa reasoned that the basic precept of Islamic law is that all contracts are immediately binding once concluded. He did not allow any exception to this general precept to 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), who was known for his weak intelligence and poor judgment, that he could have an option period of three days on items that he purchased.[149] Abū Ḥanīfa's use of the solitary *ḥadīth* regarding Ḥabbān ibn Munqidh to draw an exception to well-established precepts of law in this manner is an illustration of the textually-based Ḥanafī method of discretion that later Ḥanafī jurisprudents referred to as "*sunna*-based discretion" (*istiḥsān al-sunna*).[150] Abū Yūsuf and al-Shaybānī disagreed with Abū Ḥanīfa on this matter and left option periods open. They held that there are no stipulated option periods in optional sales agreements, rather any period should be valid upon which the buyer and seller agree.[151] Some jurists objected that any allowance that renders sales agreements non-binding until the transpiration of an indefinite optional period could place either party in undue jeopardy (*gharar*). The prohibition of undue jeopardy is a fundamental precept of Islamic law.[152]

After mentioning the *ḥadīth* on optional sales, Mālik cites a second *ḥadīth* according to which the Prophet said that whenever a buyer and seller (*bayyiʿayn*) disagree over the terms of their agreement while carrying out a transaction, the word of the seller is to be followed. If they still cannot reach an agreement, each returns to the other what was taken from him.[153] According to al-Zurqānī, Ibn ʿAbd al-Barr held that Mālik placed this second *ḥadīth* after the first on optional sales to indicate that the former *ḥadīth* had been repealed. The implication of the second *ḥadīth*, according to Ibn ʿAbd al-Barr, is that the agreement of buying and selling was finalized prior to the buyer and seller parting company. The buyer paid the price. The seller handed over the item that was being sold. They then disagreed on the terms of their agreement. Either the word of

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148 Ibn Rushd, *Bidāya* (Istiqāma), 2:207; al-Ṭaḥāwī, *Mukhtaṣar*, 3:51–55.

149 Ibn Rushd, *Bidāya* (Istiqāma), 2:207; al-Bājī, *al-Muntaqā*, 5:56; al-Zurqānī, *Sharḥ*, 4:283.

150 See Abd-Allah, "*ʿAmal*," 255–57.

151 Ibn Rushd, *Bidāya* (Istiqāma), 2:207.

152 See Ibn Rushd, *Bidāya* (Istiqāma), 2:207; al-Shāṭibī, *al-Muwāfaqāt*, 3:21.

153 *Muw.*, 2:671.

the seller is to be followed or the agreement broken off with each party returning to the other what had been taken.[154]

Ibn ʿAbd al-Barr relates that Mālik remarked regarding the *ḥadīth* on optional sales that the precept underlying it had been put aside (*turika*) and never instituted in praxis.[155] Mālik's statement calls to mind the statement of Ibn al-Qāsim in the *Mudawwana* in speaking of *ḥadīth*s whose authenticity is above question but that have come down without being accompanied by praxis. Such *ḥadīth*s are not to be put into practice after having been excluded from implementation during Islam's first generations. Only those *ḥadīth*s are to be applied in the law that have been accompanied by praxis. Other *ḥadīth*s that have been "passed over" in the praxis of earlier times are also to be "passed over" in later legal practice.[156] Ibn al-Qāsim's position in the *Mudawwana* regarding authentic *ḥadīth*s that are not accompanied by praxis mirrors Mālik's position in this example and in other instances when Mālik uses the expression "not in accordance with praxis" (Al-Ā).

Al-Shāṭibī reflects a similar point of view in his contention that it is not legitimate to put *ḥadīth*s into practice when there was no corresponding praxis regarding them among the first generations. Jurists may not draw legal implications from the texts of *ḥadīth*s and post-Prophetic reports that the first generations would have naturally drawn themselves in the context of their time if they failed to do that. If such legal implications had truly reflected the intent of the law, the first generations would have applied them in praxis. For al-Shāṭibī, the first generations, who were addressed directly by the Prophet and his Companions, understood from experience what the praxis behind the texts of the law was meant to be. If a *ḥadīth* carries a legal implication that they would have been likely to put into practice had they known it to be valid, their example in not following that implication indicates either that it was repealed or that it was never the purpose of the Prophetic law.[157]

In the example of the *ḥadīth* on optional sales, the prominent Medinese Companion ʿAbd-Allāh ibn ʿUmar and the prominent Medinese Successor Saʿīd ibn al-Musayyab followed the *ḥadīth*'s overt meaning. Al-Bukhārī transmits a relevant post-Prophetic report stating that whenever Ibn ʿUmar wanted to buy an item very much, he would make the purchase, get up,

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154 Al-Zurqānī, *Sharḥ*, 4:284–85; ʿIyāḍ, *Tartīb*, 1:72.
155 Cited by al-Zurqānī, *Sharḥ*, 4:285.
156 See Abd-Allah, "*ʿAmal*," 180–81.
157 See al-Shāṭibī, *al-Muwāfaqāt*, 3:64–76; Abd-Allah, "*ʿAmal*," 509–14.

and part physical company with the seller so that the agreement become irrevocable.[158] But the praxis of Medina, as Mālik and others indicate, was contrary to both Ibn ʿUmar and Saʿīd ibn al-Musayyab.

The precept underlying this praxis falls in the category of general necessity (*ʿumūm al-balwā*). Making contracts of buying and selling is a common aspect of daily life. By their nature, optional sales agreements belong to the kinds of transactions that should be widely known and have constituted widespread praxis. Optional sales would also have come directly under the jurisdiction of the Medinese judiciary, which would have had the responsibility of settling disputes that arose over sales contracts in general. Finally, Mālik's stance on optional sales agreements exemplifies what al-Shāṭibī describes as "following the widespread praxis of the many instead of the contrary praxis of the few."[159]

5. *AlN-Ā: ʿUmar and the Camel Thieves*

> Mālik transmits a post-Prophetic report according to which the slaves of a man named Ḥāṭib stole a camel from another man of the tribe of Muzayna, slaughtered, and ate it. The matter was brought before ʿUmar ibn al-Khaṭṭāb for judgment. Initially, he commanded that the hands of the slaves be cut off. Then he changed his mind and said to Ḥāṭib, "I believe you have been starving [your slaves]. . . . By God, I am going to impose a fine upon you that will be hard for you to bear." ʿUmar asked the man from Muzayna how much his camel was worth. The man replied that he would have been unwilling to sell it for four hundred pieces of silver. ʿUmar commanded Ḥāṭib to pay the man of Muzayna eight hundred pieces of silver. Mālik adds after this post-Prophetic report that the praxis among us is not in accordance with the indemnity [for what was stolen] in this manner. Rather the custom of the people (*amr al-nās*) among us is well-established that a person is only fined the price of the camel or [other] animal on the day he took it.[160]

This negative praxis term occurs in the recensions of Yaḥyā, Abū Muṣʿab, and Suwayd. Abū Muṣʿab makes no reference to the "custom of the people" (*amr al-nās*) following the negative praxis term.[161] Ibn ʿAbd al-Barr notes that Ibn Wahb transmits the same *ḥadīth* in his *Muwaṭṭaʾ* and relates that Mālik said that the "precept among us" (*al-amr ʿindanā*; AN) was not in

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[158] Abd-Allah, "*ʿAmal*," 643.

[159] See Abd-Allah, "*ʿAmal*," 509–14.

[160] *Muw.*, 2:748; *Muw.* 2:748; *Muw.* (Dār al-Gharb), 2:294–95; Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:258–66; *Muw.* (Abū Muṣʿab), 2:470–71; *Muw.* (Suwayd), 228–29; *Muw.* (*Riwāyāt*), 3:580.

[161] *Muw.* 2:748; *Muw.* (Dār al-Gharb), 2:294–95; *Muw.* (Abū Muṣʿab), 2:470–71; *Muw.* (Suwayd), 228–29; *Muw.* (Suwayd), 228–29.

accordance with this but with the [animal's] value.[162] The precept is missing from the recension of al-Qaʿnabī and Ibn Ziyād. I was unable to locate it in the *Mudawwana*.

Ibn ʿAbd al-Barr observes that Mālik included this post-Prophetic report from ʿUmar in his *Muwaṭṭaʾ*, although it was not agreed upon (lit., "well-trodden") (*lam yawaṭṭaʾ ʿalayhī*), and none of the jurists followed its literal implications, ever agreed with the ruling, or followed it in practice.[163] He notes that there is consensus among the jurists that one is held responsible only for the value of items destroyed and that such values are not based on the plaintiff's claim but must be proven.[164] Ibn ʿAbd al-Barr also claims that there was also consensus among the scholars that the value of stolen items cannot be ascertained on the basis of the plaintiff's claim alone, as ʿUmar had done in this case.[165]

I found no evidence of dissenting opinions among the early jurists regarding Mālik's opinion in this example. Ibn ʿAbd al-Barr reports that the scholars reached consensus that the fine a thief pays in compensation for what he has stolen should not exceed the value of the item stolen. In this example, Mālik is apparently using his terminological reference only to indicate that ʿUmar's ruling regarding Ḥāṭib was non-normative and contrary to praxis, even though there seems to have been no disagreement on the matter in Mālik's time. Mālik's indication that ʿUmar's judgment was contrary to praxis is similar to his use of the expression "not in accordance with praxis" (Al-Ā) after the *ḥadīth* of ʿĀ'isha regarding kinship through nursing, upon which there were also apparently no disagreements in Mālik's time.[166]

ʿUmar's judicial ruling reflects the priority of the general good (*maṣlaḥa*) and is an instance of making rulings on the basis of the unstated good (*al-maṣāliḥ al-mursala*). ʿUmar's ruling has no specific textual reference but was formulated on the basis of his understanding of the general good. It is an exceptional ruling, which is often the case in application of the unstated good, and does not have the normativeness of general allowances and disallowances that fall under the heading of Mālik's use of discretion (*istiḥsān*) and preclusion (*sadd al-dharāʾiʿ*). It is of the nature of discretion and preclusion to establish customary legal norms. The allowances and

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[162] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:261–62.
[163] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:258–59.
[164] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:259; al-Zurqānī, *Sharḥ*, 4:438.
[165] Cited by al-Zurqānī, *Sharḥ*, 4:438.
[166] See Abd-Allah, "*ʿAmal*," 188–95.

disallowances that they provide may be expected to occur and recur on a regular basis. The unstated good, however, has the power to alter and temporarily suspend standard rulings, which is what ʿUmar has done in this case. ʿUmar's ruling is especially appurtenant to the later legal ruling that Yaḥyā ibn Yaḥyā al-Laythī is said to have handed down regarding the caliph of Cordova who broke the fast of Ramaḍān and was not allowed to use feeding the poor or the freeing of a slave as atonement for the deed, although any of these Qurʾānic options would have been technically valid. It is reasonable that Yaḥyā's ruling against the caliph was inspired by the caliph ʿUmar's example.[167]

The post-Prophetic report in this chapter cites an individual legal ruling (*qaḍiyyat ʿayn*), which—like reports of action in general—are conjectural in Mālikī legal reasoning and regarded in isolation as insufficient evidence that the ruling or action they report is normative or obligatory.[168] The Shāfiʿī interlocutor of *Ikhtilāf Mālik* does not believe ʿUmar's judgment in this matter constituted the proper legal norm to be followed in such cases, but he accuses the Mālikīs of being arbitrary in citing ʿUmar's action in this case and then stating that it is contrary to praxis. He asks them on what basis they can regard ʿUmar's statements to be authoritative in some instances but not in others.[169]

Mālik's use of the term Al-Ā indicates that ʿUmar's ruling in the case of Ḥāṭib never constituted a legal norm in Medina. Al-Bājī states that the defendent, Ḥāṭib ibn Abī Baltaʿa, was a man of great wealth, and ʿUmar's legal interpretation (*ijtihād*) in his case was predicated on the presumption that requiring Ḥāṭib to compensate only for the loss of a single camel (in accord with standard procedure) would neither have been sufficient to punish him, with his considerable wealth, nor to keep him from starving

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[167] This important precedent was noted earlier. The Umayyad caliph of Cordova had intercourse with one of his slave girls in the daytime during the fast of Ramadan. He then repented from what he had done and called Yaḥyā ibn Yaḥyā and a number of his companions to ask them what his atonement (*kaffāra*) should be. Before anyone else could answer, Yaḥyā stated that the caliph would be required to fast two months in a row. His companions kept silent. When Yaḥyā left the caliph's presence, his companions asked him why he had given such a stringent ruling and not allowed him the other two standard options of feeding the poor or freeing a believing slave. Yaḥyā replied, "If we were to open that door for him, he would have intercourse every day [of Ramadan] and free [a slave]." ʿIyāḍ notes that Yaḥyā forced the caliph to follow the most difficult option so that he not repeat the act again (see ʿIyāḍ, *Tartīb*, 1:543).

[168] See Abd-Allah, "*ʿAmal*," 188–95.

[169] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 231; see Abd-Allah, "*ʿAmal*," 353–56.

his slaves in the future. Al-Bājī reports that Ibn Wahb was of a similar opinion. Al-Bājī continues to say that ʿUmar accepted the word of the plaintiff (the man from Muzayna) regarding the value of his camel, because it was not ʿUmar's intention to impose a fine on Ḥāṭib for the value of the camel anyway but to impose an indemnity far in excess of its value. As ʿUmar told Ḥāṭib before hand, he would impose a fine upon him that would be difficult for him to bear.[170] The implication of al-Bājī's treatment of ʿUmar's ruling in the case of Ḥāṭib ibn Abī Balta'a is that it was a suitable ruling under the circumstances. It might also be suitable for similar circumstances in the future, but such circumstances would be unusual and not the norm. Consequently, it did not constitute praxis but an exception to praxis.

The fact that Medinese praxis, then, was contrary to ʿUmar's ruling is no indication that ʿUmar's judgment was mistaken in Mālik's view or that he regarded ʿUmar's ruling as anything less than just. Mālik's observation in commenting on the report indicates that ʿUmar's ruling was exceptional, as suitable as it may have been to its particular time and place. As in the earlier case regarding ʿĀ'isha and kinship through nursing, Mālik draws attention to ʿUmar's exceptional ruling, possibly with a view to avoiding future dissent or misreading of ʿUmar's example but as an instructive example in context.

Viewed in this manner, ʿUmar's ruling in the case of Ḥāṭib (although not standard procedure [praxis] for cases of theft), would have the same validity as other exceptional legal decisions in Mālikī jurisprudence such as those made on the basis of the principles of discretion and preclusion, which draw exceptions to general rules or procedures because of special circumstances. The difference in the case of the unstated good, as noted, is that there is always a normative quality to discretion and preclusion which may or may not be present in cases of the unstated good. Precepts based on discretion and preclusion are incorporated into praxis. ʿUmar's decision, by contrast, was probably never meant to be normative but stands out as an exceptional decision.

[170] Al-Bājī, *al-Muntaqā*, 6:64–65; cf. al-Zurqānī, *Sharḥ*, 4:438.

The Praxis Chapters

1. *AlA:*[171] *Ritual Wiping over Footwear* (al-Masḥ ʿalā al-Khuffayn)

> Mālik cites a post-Prophetic report according to which ʿUrwa ibn al-Zubayr used to perform ritual wiping (*masḥ*) over his leather footwear by wiping only over the top and not the bottom of the footwear. Mālik then cites another report according to which al-Zuhrī was asked how ritual wiping over leather footwear ought to be done. Al-Zuhrī demonstrated it by wiping over both the top and the bottom of his footwear. Mālik states after al-Zuhrī's report that he regarded al-Zuhrī's position to be preferred (*aḥabb*) over what he has heard regarding this matter.[172]

The expression "the praxis regarding [such and such]" (AlA; al-*ʿamal fī* [*kadhā*]) occurs in the *Muwaṭṭaʾ* twenty-nine times. It appears exclusively as a title chapter. It does not occur as an appended commentative term like other instances of Mālik's terminology and commentary. Although generally Mālik's references to praxis are most frequent in non-ritual matters (*muʿāmalāt*), the majority of praxis chapters occur in acts of worship (*ʿibādāt*), which is also the case in the present chapter.[173]

Praxis chapters on this precept occur in essentially the same form in the recensions of Yaḥyā, Abū Muṣʿab, al-Qaʿnabī, and Suwayd. All conclude with Mālik's words of personal preference for al-Zuhrī's position.[174] The chapter does not occur in the Ibn Ziyād fragment.

Saḥnūn transmits this precept in the *Mudawwana* and relates through Ibn al-Qāsim Mālik's description of how he witnessed al-Zuhrī perform the ritual wipings over his footwear, which is more detailed than in the *Muwaṭṭaʾ*. Saḥnūn inquires about a person who follows the procedure which Mālik attributes to ʿUrwa, and Ibn al-Qāsim clarifies that Mālik told them that ʿUrwa's alternative method of wiping is also valid, although Mālik preferred that one repeat the wiping according to the technique of al-Zuhrī if the time for prayer has not transpired and repeat the prayer. Saḥnūn supplements Mālik's transmission with a *ḥadīth* from Ibn Wahb stating that the Prophet was seen doing the ritual wiping in the manner al-Zuhrī followed. He gives a post-Prophetic report from Ibn ʿUmar

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[171] This notation stands for, "the praxis regarding . . ." *al-ʿamal fī . . .*".

[172] *Muw.*, 1:38; *Muw.* (Dār al-Gharb), 1:79; Ibn ʿAbd al-Barr, *al-Istidhkār*, 2:260; *Muw.* (Abū Muṣʿab), 1:41–42; *Muw.* (al-Qaʿnabī), 108; *Muw.* (Suwayd), 61; *Muw.* (*Riwāyāt*), 1:282–83.

[173] An index of the praxis chapters in provided in my dissertation, Appendix 2, Table 9 in Abd-Allah, "*ʿAmal*," 788.

[174] *Muw.*, 1:38; *Muw.* (Dār al-Gharb), 1:79; Ibn ʿAbd al-Barr, *al-Istidhkār*, 2:260; *Muw.* (Abū Muṣʿab), 1:41–42; *Muw.* (al-Qaʿnabī), 108; *Muw.* (Suwayd), 61; *Muw.* (*Riwāyāt*), 1:282–83.

to the same effect. Saḥnūn then includes a number of issues related to the details of legal interpretation such as how big a tear in the footwear must be to render wiping over it invalid. He asks about wearing an additional pair of leather footwear over an original pair and how the wiping is performed in that case. He gets clarification that wiping over footwear applies equally to women as it does to men. He asks about the legitimacy of women putting on footwear to preserve henna (*ḥinnā'*) designs on their feet without having to wash them in ablutions. He clarifies that there is no time limit to the number of days one may wear the footwear and still wipe over them. Ibn al-Qāsim notes that Mālik changed his opinion about wiping over socks with stitched leather on the outside, although Ibn al-Qāsim still prefers Mālik's original opinion on the matter.[175]

ʿAlī, al-Ḥasan al-Baṣrī, ʿAṭāʾ ibn Abī Rabāḥ, Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī, Sufyān al-Thawrī, and others dissented in this matter. They agreed with ʿUrwa's method and held that the proper manner for ritual wiping was only to wipe over the top of footwear. In subsequent generations, Ibn Ḥanbal, Ibn Rāhawayh, and Dāwūd al-Ẓāhirī also held to this opinion.[176]

Al-Shaybānī contends against the Medinese on this point and cites what he refers to as the "well-known post-Prophetic report of ʿUmar ibn al-Khaṭṭāb," according to which ʿUmar said, "If religion were done on the basis of considered opinion (*raʾy*), there would be more reason for wiping over the bottom of the footwear than the top." Al-Shaybānī interprets the statement as an objection (*inkār*) to wiping over the bottom of the footwear. He accuses the Medinese of departing from ʿUmar's position as exemplified in ʿUrwa ibn al-Zubayr, whom al-Shaybānī regards as having greater knowledge of the *sunna* and greater understanding of the knowledge transmitted from the past (*al-riwāya*) than al-Zuhrī. Al-Shaybānī adds that the Medinese have transmitted no post-Prophetic reports supporting al-Zuhrī's contrary position.[177] Al-Shaybānī notes a post-Prophetic report and *ḥadīth* from ʿAlī that if the religion were based on considered opinion (*raʾy*), it would be more appropriate to wipe over the bottom of one's footwear rather than the top. ʿAlī then states that he witnessed the Prophet wiping over the top of his footwear. Al-Mughīra ibn Shuʿba

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[175] *Mud.*, 1:43–46; *Mud.* (2002), 1:146–51.

[176] See Ibn ʿAbd al-Barr, *al-Istidhkār*, 2:260–63; Ibn ʿAbd al-Barr, *al-Tamhīd*, 2:235–38; al-Ṭaḥāwī, *Mukhtaṣar*, 1:138; Ibn Rushd, *Bidāya*, 1:111; al-Shaybānī, *al-Ḥujja*, 1:35.

[177] Al-Shaybānī, *al-Ḥujja*, 1:35.

transmits a similar *ḥadīth*, which, as Ibn ʿAbd al-Barr notes, upholds the position of those who wipe only over the top of their footwear.[178]

Medinese dissent on this matter went further than the two differences in technique illustrated in the reports of ʿUrwa and al-Zuhrī. ʿĀ'isha held an unconventional opinion in this matter. She disliked the practice of wiping over leather footwear and preferred that one take off one's footwear—even if it meant cutting it off with a knife—and wash the feet. According to Ibn Abī Shayba, ʿAlī and Ibn ʿAbbās shared a similar opinion and disliked wiping over footwear except in times of travel or extreme cold.[179]

As indicated in the *Mudawwana*, Mālik regarded both the procedures of ʿUrwa and al-Zuhrī in wiping over footwear to be valid. Even in the *Muwaṭṭa'*, he does not object to ʿUrwa's practice but includes it along with that of al-Zuhrī in this praxis chapter. By his commentary, Mālik indicates, however, not that he considers ʿUrwa's custom to be mistaken but that he regards al-Zuhrī's practice to be preferable. According to al-Bājī, both Saḥnūn and Ibn Ḥabīb (the compiler of the *Wāḍiḥa*) transmitted reports from Mālik to the effect that he regarded it as obligatory to wipe over the top of the footwear in performing ritual wipings, but he did not regard it as obligatory that one also wipe over the bottom of the footwear.[180] Mālik regarded it as preferable, however, to do both, and al-Zuhrī's practice includes both acts. It combines what is obligatory with what is preferrable.

The statement attributed to ʿUmar ibn al-Khaṭṭāb does not necessarily imply his having objected to ritually wiping over the bottom of footwear. It may be taken as supporting the position that it is obligatory to wipe over the top of the footwear and not the bottom, even though one would think that there is greater reason to wipe the bottom than the top, which generally is cleaner.

Medinese praxis regarding ritual wiping over footwear appears to belong to the category of "mixed praxis." In other words, there would have been more than one type of praxis in Medina on this matter. Presumably, some Medinese customarily performed the ritual wiping after the manner of ʿUrwa, one of the principle constituents of the Seven Jurists of Medina. Others performed it according to the practice exemplified by Mālik's teacher al-Zuhrī. Praxis regarding ritual wiping did not come under the jurisdiction of the Medinese judiciary. As I have suggested, it

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[178] Ibn ʿAbd al-Barr, *al-Istidhkār*, 2:263; Ibn ʿAbd al-Barr, *al-Tamhīd*, 2:236–39; Ibn Abī Shayba, *al-Muṣannaf*, 1:165; cf. ʿAbd al-Razzāq, *al-Muṣannaf*, cf. 1:191–210.

[179] Ibn Abī Shayba, *al-Muṣannaf*, 1:169.

[180] Al-Bājī, *al-Muntaqā*, 1:81.

was probably the authority of the Medinese judiciary that established the uniformity of certain types of praxis that fell under its jurisdiction in which there were significant differences of opinion among the Medinese people of knowledge.[181] In the case of ritual wiping, which lay beyond the judiciary's purview, Medinese praxis apparently never became unified.

Mālik precedes this chapter by another containing several *ḥadīth*s and post-Prophetic reports about ritual wiping. These reports indicate that the Prophet and his Companions performed ritual wiping on their footwear. The reports also indicate certain details pertinent to ritual wiping such as the requirement of being in a state of ritual purity (*ṭahāra*) before putting on the footwear. None of the reports indicate exactly how the wiping is to be done, which is indicated in the praxis chapter itself. Praxis regarding ritual wiping over footwear belongs to the category of transmissional praxis (*al-ʿamal al-naqlī*). It also pertains to general necessity (*ʿumūm al-balwā*), because it is the sort of thing that was done regularly by large numbers of people.

It is noteworthy that Mālik regards the examples of ʿUrwa and al-Zuhrī—both being among the most prominent Medinese scholars of their generations—as valid indications of this praxis. From their personal knowledge and experience based on the Medinese tradition, both indicate how ritual wiping over footwear is to be performed. This is another example of how Medinese transmissional praxis (*al-ʿamal al-naqlī*) provided information for which Mālik did not cite any early supporting legal texts, *ḥadīth*s, or post-Prophetic reports. Indeed, al-Shaybānī's critique of Mālik for preferring al-Zuhrī's manner of performing the ritual wiping is that it ran contrary to textual evidence in the form of *ḥadīth*s and post-Prophetic reports that corroborated ʿUrwa's position, while, in al-Shaybānī's opinion, there were none supporting the example of al-Zuhrī.[182]

2. *AlA: The Sitting Posture in Prayer*

This praxis chapter contains five post-Prophetic reports and no additional comments from Mālik other than the title chapter, indicating that its contents are consistent with Medinese praxis. The first four reports pertain to things that ʿAbd-Allāh ibn ʿUmar said and did regarding the praxis of sitting in prayer. The fifth report relates how al-Qāsim ibn Muḥammad taught the people to sit while performing prayer. Al-Qāsim corroborates what has been attributed to Ibn ʿUmar, stating that the latter taught it to him and told

[181] See Abd-Allah, "*ʿAmal*," 756–59, 429–31.
[182] Al-Shaybānī, *al-Ḥujja*, 1:35.

> him it was the manner in which his father, ʿUmar, used to sit while praying. In the first report, Ibn ʿUmar sees a man playing with pebbles on the ground while sitting in prayer. After the prayer, Ibn ʿUmar prohibits him from doing that and directs him to sit during his prayer as the Prophet had done. The man asks Ibn ʿUmar how to sit in that manner, and Ibn ʿUmar explains. In the second report, a man once sat next to Ibn ʿUmar during prayer and crossed his legs in an uncustomary fashion under himself while sitting in prayer. Afterward, Ibn ʿUmar reprimands this person for praying in that manner. The man rejoins by saying that he noticed Ibn ʿUmar praying in the objectionable way himself. Ibn ʿUmar explains that he does so only because of pain in his legs [which makes it unbearable to position his foot properly]. In the third report, a man notices Ibn ʿUmar sitting in prayer in this uncustomary fashion and asks him about it afterwards. Ibn ʿUmar replies, "It is not the *sunna* of the prayer. I do it only because of the pain I feel." In the fourth report, a boy imitates Ibn ʿUmar's non-normative manner of sitting in prayer, and Ibn ʿUmar responds by saying that his foot is not strong enough to support his weight. In the fifth report, al-Qāsim ibn Muḥammad affirms the continuity of this praxis through his own reception of the Medinese tradition.[183]

This praxis chapter occurs in the recensions of Yaḥyā, Abū Muṣʿab, al-Qaʿnabī, and Suwayd. It is not in Ibn Ziyād as it presently stands. There are some discrepancies in wording, but all editions are essentially the same.[184]

In the *Mudawwana*, Saḥnūn supplements the *Muwaṭṭaʾ* on this precept. He cites Mālik describing how to sit in the prayer and noting that the manner of sitting at the end of the prayer and in the middle sitting (*al-tashahhud*) is the same. Mālik clarifies that women sit in the prayer exactly like men. (All of these issues were matters of legal dissent.) He cites Mālik as stating that he did not meet (*mā adraktu*) anyone from the people of knowledge but that they prohibited the practice of sitting on one's toes (*al-iqʿāʾ*). Saḥnūn cites post-Prophetic reports and a *ḥadīth* from Ibn Wahb that are in accord with Medinese praxis on how to sit in prayer. He also repeats the post-Prophetic report according to which Ibn ʿUmar corrected a boy for playing with gravel during the prayer and directed him to sit correctly.[185]

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[183] *Muw.*, 1:88–90; *Muw.* (Dār al-Gharb), 1:142–44; *Muw.* (Abū Muṣʿab), 1:191–92; *Muw.* (al-Qaʿnabī), 227–31; *Muw.* (Suwayd), 141–42; *Muw.* (*Riwāyāt*), 1:406–09.

[184] *Muw.*, 1:88–90; *Muw.* (Dār al-Gharb), 1:142–44; *Muw.* (Abū Muṣʿab), 1:191–92; *Muw.* (al-Qaʿnabī), 227–31; *Muw.* (Suwayd), 141–42; *Muw.* (*Riwāyāt*), 1:406–09.

[185] *Mud.*, 1:74–75; *Mud.* (2002), 1:213–15.

The praxis as described in the first four reports constitutes a matter of general agreement between the Medinese and the non-Medinese. It pertains to how one places one's hands on the lap while sitting in prayer and specifies that one sit with one's weight on the ball of the right foot, which is kept erect with the bottoms of the toes touching the ground. The top of the left foot, on the other hand, is placed against the ground and the foot is turned inward underneath the body. As Ibn ʿAbd al-Barr reports, this "general" manner of sitting was agreed by consensus among the jurists.[186]

The fifth report of al-Qāsim ibn Muḥammad, however, reflects a significant point of difference between Abū Ḥanīfa and the Medinese. Ibn al-Qāsim states that one should sit on the left hip and not the left foot and shin during the middle and final sitting of the ritual prayer (during the testimony of faith [*tashahhud*]). It is transmitted that Anas ibn Mālik, Mujāhid, Muḥammad al-Bāqir, Ibn Sīrīn, and other prominent early jurisprudents held that one should sit on the left foot and shin throughout all sittings of the prayer, contrary to what Mālik describes as Medinese praxis.[187] Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī, al-Thawrī, and other later jurisprudents also held this position.[188] Al-Shāfiʿī endorsed that posture in the middle sitting but held that one should sit in the final sitting in the same manner as reflected in Medinese praxis. Al-Ṭabarī espoused both positions because they were each attested in *ḥadīth*s.[189]

This is a matter on which there were differences of opinion within Medina. Ṭāwūs transmits that he saw Ibn ʿUmar, Ibn ʿAbbās, and Ibn al-Zubayr all prayer in a manner conforming to the Kufan position. The same is reported about Sālim ibn ʿAbd-Allāh, Nāfiʿ, ʿAṭāʾ, and Ṭāwūs himself. As the *Muwaṭṭaʾ* and other transmissions show, however, Ibn ʿUmar acknowledged his departure from what he regarded as the proper *sunna* of sitting because of pain. Ibn ʿAbbās and others regarded the contrary manner of sitting to be the *sunna*.[190]

This is an issue in which the dissent of the jurists is supported by conflicting *ḥadīth*s. The three different positions of Mālik, Abū Ḥanīfa, and

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[186] Cited by al-Zurqānī, *Sharḥ*, 1:273.

[187] Ibn ʿAbd al-Barr, *al-Tamhīd*, 3:221; ʿAbd al-Razzāq, *al-Muṣannaf*, 2:190; Ibn Abī Shayba, *al-Muṣannaf*, 1:254–56.

[188] Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:264–65; Ibn ʿAbd al-Barr, *al-Tamhīd*, 3:216, 223; al-Ṭaḥāwī, *Mukhtaṣar*, 1:212–13; al-Ṭaḥāwī, *Sharḥ*, 1:334–339; al-Bājī, *al-Muntaqā*, 1:166.

[189] Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:264–65; Ibn ʿAbd al-Barr, *al-Tamhīd*, 3:216, 223; al-Ṭaḥāwī, *Mukhtaṣar*, 1:212–13; al-Ṭaḥāwī, *Sharḥ*, 1:334–339.

[190] Ibn ʿAbd al-Barr, *al-Tamhīd*, 3:217–18; ʿAbd al-Razzāq, *al-Muṣannaf*, 2:190–95; Ibn Abī Shayba, *al-Muṣannaf*, 1:254–55.

al-Shāfiʿī are witnessed in three different *ḥadīth*s.[191] Ibn ʿAbd al-Barr notes that, although the jurists disagreed on the best mode of sitting in the prayer, none of them espoused their way as obligatory (*farḍ*). Therefore, they did not require that one who failed to do it should repeat the prayer.[192] The legal consequence of this clear difference in revealed texts, however, was that none of the jurists regarded any of the three possible modes of sitting as obligatory or essential to the correct performance of the prayer.

The type of praxis treated in this chapter pertains to acts of ritual. It belongs to the category of transmissional praxis, as is indicated by the content of the reports Mālik cites. In the first report, Ibn ʿUmar enjoins the man to pray after the manner of the Prophet, implying that the model that Ibn ʿUmar seeks to uphold is the Prophetic model, although Ibn ʿUmar was not able to follow it himself. In the third and fourth reports, Ibn ʿUmar speaks of the *sunna* of the prayer, which he is unable to perform because of pain and weakness in his leg. (Al-Bājī reports that Ibn ʿUmar's feet were seriously wounded in the Battle of Khaybar and never completely healed).[193] Mālik adds no additional information other than what is contained in the reports he cites but indicates by the chapter title that its contents are consistent with Medinese praxis. The fifth report shows conscious continuity between the praxis of al-Qāsim ibn Muḥammad and the Companions, ʿAbd-Allāh ibn ʿUmar and his father, ʿUmar ibn al-Khaṭṭāb.

The reports cited in this chapter portray of ʿAbd-Allāh ibn ʿUmar as a guardian of praxis. As al-Bājī points out, the second, third, and fourth reports indicate that the people looked up to persons of caliber such as Ibn ʿUmar, regarded them as worthy of mimesis (*al-iqtidāʾ*), and took them as their standards for praxis. Ibn ʿUmar is portrayed as conscious of his role as a guardian of praxis. He indicates to the three persons in these reports that his manner of sitting in the prayer is not normative. It is contrary to the *sunna* of prayer and should not be imitated by persons capable of following the *sunna*. Ibn ʿUmar's example in these reports is an illustration of al-Shāṭibī's concept of the ideal role of the religious scholar as fostering and preserving the content of sound, normative praxis.[194]

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[191] Ibn ʿAbd al-Barr, *al-Tamhīd*, 3:223; al-Ṭaḥāwī, *Sharḥ*, 1:334–339; cf. al-Ṭaḥāwī, *Mukhtaṣar*, 1:212–13.

[192] Ibn ʿAbd al-Barr, *al-Tamhīd*, 3:219.

[193] Al-Bājī, *al-Muntaqā*, 1:165.

[194] See al-Shāṭibī, *al-Muwāfaqāt*, 3:61–62; Abd-Allah, "*ʿAmal*," 403–09, 448–53.

3. *AlA: S-XN: Festival Prayers* (Ṣalāt al-ʿĪdayn)

> Mālik states he heard it transmitted from several of the Medinese scholars that there has been no general call to prayer (*nidāʾ*) or commencement call for the prayer (*iqāma*) in either of the two festival (*ʿīd*) prayers from the time of God's Messenger until the present day. He states that this is the S-XN (the *sunna* among us about which there is no dissent; *al-sunna al-lattī lā ikhtilāf fīhā ʿindanā*). In conclusion, Mālik adds a report according to which ʿAbd-Allāh ibn ʿUmar used to bathe himself ritually before setting out to join in the festival prayers.[195]

This praxis chapter occurs in the recensions of Yaḥyā, Abū Muṣʿab, and al-Qaʿnabī.[196] Each of the three presents essentially the same content and cites the S-XN term. Suwayd has a similar chapter but makes no reference to praxis in his chapter title. Suwayd also cites the term S-XN.[197] The precept is not in the Ibn Ziyād fragment.

The *Mudawwana* contains a relatively short chapter on the festival prayers, but I failed to find any discussion in the book on this precept.[198] In the *Nawādir*, Ibn Abī Zayd transmits from Mālik from the *Mukhtaṣar* of ʿAbd-Allāh ibn ʿAbd al-Ḥakam (d. 214/829) that there is no general call to prayer (*adhān*) or call for beginning the prayer (*iqāma*) in festival (*ʿīd*) prayers, but he gives none of the details that Mālik transmits in the *Muwaṭṭaʾ*.[199]

This precept is an explicit example of transmissional praxis based on the Prophet's deliberate omission (*tark*). Mālik states that there had been "no general call to prayer (*nidāʾ*) or call for beginning the prayer (*iqāma*) in either of the two festival (*ʿīd*) prayers from the time of God's Messenger until the present day." Ibn ʿAbd al-Barr notes that the structure and content of Mālik's chapter reflect the fact that he had no connected or disconnected *ḥadīth*s to support this precept, although *ḥadīth*s testifying that the Prophet made no calls to prayer for the festival prayers have been authentically transmitted. He notes, however, that it is a matter regarding which there was no dissent among the jurists either in or outside of Medina. The fact that the calls to prayer are limited to the obligatory prayers

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[195] *Muw.*, 1:177; *Muw.* (Dār al-Gharb), 1:250; Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:10; *Muw.* (Abū Muṣʿab), 1:227; *Muw.* (al-Qaʿnabī), 258; *Muw.* (Suwayd), 161–62; *Muw.* (*Riwāyāt*), 2:85–86.

[196] *Muw.*, 1:177; *Muw.* (Dār al-Gharb), 1:250; Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:10; *Muw.* (Abū Muṣʿab), 1:227; *Muw.* (al-Qaʿnabī), 258; *Muw.* (*Riwāyāt*), 2:85–86.

[197] *Muw.* (Suwayd), 161–62.

[198] Cf. *Mud.* 1:154–56; *Mud.* (2002), 1:402–11. I looked elsewhere also but failed to find any discussion of this precept.

[199] See Ibn Abī Zayd, *al-Nawādir*, 1:497–98, 500. For Ibn Abī Zayd's transmission of the *Mukhtaṣar*, see *idem, al-Nawādir*, 1:14.

is a matter firmly attested by all generations of the early Muslims and their jurists.[200]

Al-Bājī knows of no dissenting opinions among the jurists regarding Mālik's precept that there is no general call (*adhān*) or commencement call (*iqāma*) to prayer in the two festival prayers.[201] It was, however, a matter of early dissent that disappeared afterwards. Certain Umayyad heads of state and their governors (Muʿāwiya, Marwān ibn al-Ḥakam, Ziyād ibn Abīhī, and al-Ḥajjāj ibn Yūsuf) attempted to institute both calls to prayer as part of the festival.[202] According to Ibn Ḥabīb in the *Wāḍiḥa*, the Umayyad ruler Hishām was the first to attempt to institute this policy.[203] Praying the festival prayers without calls to prayer was the practice of the rightly-guided caliphs Abū Bakr, ʿUmar, ʿUthmān, and ʿAlī. There was no difference of opinion about the validity of their practice in their day.[204] Ibn ʿAbd al-Barr states that it was a matter of concurrence (*mujtamaʿ ʿalayhī*) in the Hijaz and in Iraq until Muʿāwiya innovated the call to prayer in the festival prayers and directed his governors to do the same.[205]

Ibn ʿAbd al-Barr, ʿAbd al-Razzāq, and Ibn Abī Shayba indicate that ʿAbd-Allāh ibn al-Zubayr asked Ibn ʿAbbās about the validity of not making calls to prayer in the festival prayers. (It must be born in mind that Ibn al-Zubayr's caliphate occurred at a time when the Umayyad practice of making the calls to prayer in the festival prayers would have become the widespread custom.) Ibn ʿAbbās informed him that there should be no call to prayer, and Ibn al-Zubayr followed his counsel as long as relations between the two men were good. When relations between them soured (*sāʾ al-ladhī baynahum*), however, Ibn al-Zubayr went against Ibn ʿAbbās's counsel and reinstituted the Umayyad practice of making calls to prayer at the festival prayers.[206] In light of this information, Mālik's citation of the *sunna*-term not only indexes the Medinese position vis-à-vis

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[200] Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:10, 12; Ibn ʿAbd al-Barr, *al-Tamhīd*, 5:219.

[201] Al-Bājī, *al-Muntaqā*, 1:315.

[202] See Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:12–13; Ibn ʿAbd al-Barr, *al-Tamhīd*, 5:219–20; ʿAbd al-Razzāq, *al-Muṣannaf*, 3:277; Ibn Abī Shayba, *al-Muṣannaf*, 1:490; al-Zurqānī, *Sharḥ*, 2:112–113.

[203] Cited in Al-Bājī, *al-Muntaqā*, 1:315.

[204] Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:13; ʿAbd al-Razzāq, *al-Muṣannaf*, 3:278; Ibn Abī Shayba, *al-Muṣannaf*, 1:491.

[205] Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:14; Ibn ʿAbd al-Barr, *al-Tamhīd*, 5:219; Ibn Abī Shayba, *al-Muṣannaf*, 1:491.

[206] See Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:14; ʿAbd al-Razzāq, *al-Muṣannaf*, 3:277–78; Ibn Abī Shayba, *al-Muṣannaf*, 1:491.

Umayyad policy but also the policy of Ibn al-Zubayr during the latter part of his caliphate.

Mālik's insertion of the term S-XN in this example has the earlier dissent of the Umayyad rulers in mind (not the generality of the jurists). By invoking a *sunna*-term, Mālik implicitly indicates that the mistaken Umayyad policy was based on an invalid use of analogy by regarding the festival prayers to be analogous to daily prayers, in which the two calls to prayer are employed. As before, the S-XN term invokes the authority of the *sunna* to overturn analogical extensions of the law into fundamentally anomalous precepts.

Ibn ʿUmar's example in performing the ritual washing prior to the festival prayers was not an issue of dissent among the jurists, who all regarded it as desirable. Al-Shaybānī states in his commentary on this post-Prophetic report that Abū Ḥanīfa regarded it as good (*ḥasan*) to perform the bathing, although he did not regard it as obligatory (*wājib*).[207] Al-Bājī quotes reports from early Mālikī compendia of law stating that Mālik also did not regard the ritual bathing prior to the festival prayers as obligatory, although he held it to be desirable.[208] Mālik gives no indication in the *Muwaṭṭa'* of whether or not he regarded this matter to be obligatory or desirable. By placing Ibn ʿUmar's post-Prophetic report in the chapter, however, he indicates that Ibn ʿUmar's practice constituted a normative part of praxis.

This S-XN is one of the most explicit indications of transmissional praxis in the *Muwaṭṭa'*. Mālik states that it is a matter which has been part of the continuous praxis of Medina from the time of the Prophet until the present. Mālik does not support the S-XN precept by reference to *ḥadīth*s or other legal texts. As in many preceding examples, Mālik relies on the independent authority of the non-textual source of Medinese praxis. It is another example of fundamental precepts of law for which few if any *ḥadīth*s were transmitted.

Finally, the report about ʿAbd-Allāh ibn ʿUmar's practice of bathing before the festival prayers is a report of an action. Nothing in the text indicates that it should be normative, recommended, or obligatory. Ibn ʿUmar's behavior might have been strictly personal like his habit of sprinkling water in his eyes when performing the ritual bath, which Mālik draws

[207] *Muw.* (al-Shaybānī/ʿAbd al-Laṭīf), 48.
[208] Al-Bājī, *al-Muntaqā*, 1:315–16.

attention to as non-normative.[209] By placing Ibn ʿUmar's post-Prophetic report in this praxis *ʿamal*-chapter, however, Mālik removes any implicit ambiguity of the report and indicates that Ibn ʿUmar's behavior in this case reflects a desired norm. This is another example of Mālik's conception of praxis as a standard by which to distinguish normative from non-normative behavior.

4. *AlA: Sacrificial Camels* (al-Hady) *Driven to Pilgrimage*

> Mālik cites seven post-Prophetic reports telling how ʿAbd-Allāh ibn ʿUmar used to prepare the sacrificial camels which he drove to Mecca to be sacrificed upon the conclusion of pilgrimage. The reports contain statements Ibn ʿUmar made about these animals such as what their minimum ages should be. The reports tell how Ibn ʿUmar placed garlands the camels, where he would take them, how he would sacrifice them, and what he said when doing so. They report how he decorated the Kaʿba with the expensive cloth he had used to ornament the animals but how, at other times, he gave the cloth away as charity to the poor instead. The post-Prophetic reports relate how Ibn ʿUmar would eat some of the meat from the camels himself and distribute the remainder to the poor. Mālik concludes the chapter with a report according to which ʿUrwa ibn al-Zubayr enjoined his children never to select an animal as a sacrificial victim in pilgrimage that they would be ashamed to receive as a gift from a person who had treated them with generosity. He explains that God is the most generous of all beings and that it is fitting that excellent animals be sacrificed for God's sake during the pilgrimage.[210]

This praxis chapter occurs with the same title in the recensions of Yaḥyā, Abū Muṣʿab, and Suwayd. The wording, structure, and content of Yaḥyā and Abū Muṣʿab are close.[211] Suwayd's chapter is similar but differs somewhat in content and structure. The precept and chapter are not available in the present editions of al-Qaʿnabī or Ibn Ziyād.[212]

I failed to find discussion of the precept in the *Mudawwana*. The chapters on pilgrimage in the old edition are among the most deficient in book. The new 2002 edition adds extensive materials missing in the old edition but does not treat this question specifically.[213]

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[209] See *Muw.*, 1:44–45; al-Shaybānī quotes Mālik as saying that Ibn ʿUmar's putting water in his eyes while bathing was not praxis; *Muw.* (al-Shaybānī/ʿAbd al-Laṭīf), 45.

[210] *Muw.*, 1:379–80; *Muw.* (Dār al-Gharb), 1:510–12; *Muw.* (Abū Muṣʿab), 1:472–74; *Muw.* (Suwayd), 403–05; *Muw.* (*Riwāyāt*), 2:521–25.

[211] *Muw.*, 1:379–80; *Muw.* (Dār al-Gharb), 1:510–12; *Muw.* (Abū Muṣʿab), 1:472–74; *Muw.* (*Riwāyāt*), 2:521–25.

[212] *Muw.* (Suwayd), 403–05.

[213] *Mud.* (2002), 2:363–65, 501–02; cf. 2:338–41, 348–49; 496.

There was general agreement among the jurists on most of the praxis as set forth in this chapter with dissent only on one point. Mālik reports that Ibn ʿUmar would mark his sacrificial camels by inflicting a cut on the left side of their humps. (This manner of wounding is called "marking" [*ishʿār*]). Abū Ḥanīfa is reported to have disliked the practice of "marking" on the general grounds that it constituted mutilation. The Prophet forbade the mutilation of humans and animals alike. It is related that Ibrāhīm al-Nakhaʿī—who taught Abū Ḥanīfa's teacher—held this opinion.[214] This reasoning, as attributed to Abū Ḥanīfa, is an example of his reliance on established precepts of law, almost invariably textually based, which he generalizes in order to overrule irregular *ḥadīth*s and other legal texts (*taʿmīm al-adilla*).[215] Abū Yūsuf, al-Shaybānī, al-Shāfiʿī, Ibn Ḥanbal, Ibn Rāhawayh, and Abū Thawr did not agree with Abū Ḥanīfa in this matter and endorsed pre-sacrificial marking of animals on the right hump.[216] The dissent Mālik seems to have had in mind in this case appears to have been exclusively with his contemporary Abū Ḥanīfa.

Other early jurists, who held positions similar to that of Mālik, argued that "marking" was part of the *sunna* of the Prophet, which he had done during his final pilgrimage as reported in various *ḥadīth*s. They reasoned further that marking, like branding, is supposed to be done in a manner that is not excessively painful, does not mutilate, and is not injurious to the animal's health. The purpose of marking, they argued, was to enable the poor to identify which animals were bound for sacrifice and facilitate the general distribution of their meat as charity. The poor would customarily follow marked animals so that they could be present at the sacrifice in order to receive a share of the animal's meat. The jurists added that making the markings on sacrificial animals also allowed them to be identified if they broke away from their masters or got lost. Poor people who found them would also be able in that case to sacrifice and eat them.[217]

It is related that Abū Yūsuf and al-Shaybānī disagreed with Abū Ḥanīfa regarding the marking of sacrificial animals. They regarded marking to be part of the *sunna* but held, in contrast to Mālik's perspective based on praxis, that marking was to be done on the right and not the left side

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[214] Ibn ʿAbd al-Barr, *al-Istidhkār*, 12:269; al-Ṭaḥāwī, *Mukhtaṣar*, 2:72; al-Zurqānī, *Sharḥ*, 3:158–59; al-Bājī, *al-Muntaqā*, 2:312.

[215] See Abd-Allah, "*ʿAmal*," 226–230.

[216] Ibn ʿAbd al-Barr, *al-Istidhkār*, 12:269; al-Ṭaḥāwī, *Mukhtaṣar*, 2:73.

[217] Al-Zurqānī, *Sharḥ*, 3:158–60; al-Bājī, *al-Muntaqā*, 2:312; al-Ṭaḥāwī, *Mukhtaṣar*, 2:73.

of the camel's hump and supported their position by legal texts to that effect.[218]

Characteristically, this praxis chapter pertains to ritual. Mālik surely regarded this praxis to be transmissional. He cites no *ḥadīth*s from the Prophet, but his post-Prophetic report of Ibn ʿUmar decorating the Kaʿba with the expensive cloths that had been placed over the victims indicates that the praxis in this case goes back to pre-Islamic customs of decorating the Kaʿba by draping it with special cloths. Although Mālik cites no *ḥadīth*s on this matter, many *ḥadīth*s on it did exist and are cited by al-Zurqānī and al-Bājī to indicate the authenticity of Medinese praxis in the matter. Al-Zurqānī points out that Ibn ʿUmar's actions are also validated by various verses of the Qurʾān (Qurʾān, 2:196, 22:36, 28).[219]

Mālik's almost exclusive reliance in this chapter on the statements and actions of Ibn ʿUmar appears to be another illustration of his reliance upon prominent Companions to verify the content of the Prophetic *sunna*.[220] Material cited elsewhere in the *Muwaṭṭaʾ* (such as the post-Prophetic reports in the praxis chapter on how to sit when performing prayer) indicate Ibn ʿUmar's dedication to following the Prophet's *sunna* exactly. In that example, Ibn ʿUmar was himself unable to practice the Prophet's *sunna* because of physical disability but enjoined others to adhere to it and not follow his contrary example on the presumption that it too constituted a *sunna*.[221]

Mālik's heavy reliance upon Ibn ʿUmar in this and other examples indicates his high estimation of him as a close adherent to the *sunna*. Mālik must have regarded the authority of Ibn ʿUmar to be of the same category in this regard as his father, ʿUmar ibn al-Khaṭṭāb, and the other rightly-guided caliphs, whom Mālik alludes to in his letter to al-Layth ibn Saʿd and whom he describes as having followed the Prophet more closely than anyone else in his community (*umma*). Mālik states in that letter how these prominent Companions would follow what they learned from the Prophet, how they would inquire of other Companions about what they had no knowledge of, and how they performed legal interpretations (*ijtihād*) in other matters on the basis of their knowledge and their recent experience with the Prophet.[222]

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[218] Al-Zurqānī, *Sharḥ*, 3:158.
[219] Al-Zurqānī, *Sharḥ*, 3:158–60; al-Bājī, *al-Muntaqā*, 3:312–15.
[220] See Abd-Allah, "*ʿAmal*," 161–70.
[221] Abd-Allah, "*ʿAmal*," 656–58.
[222] See Abd-Allah, "*ʿAmal*," 316–17.

It is unlikely, however, that Mālik regarded these several post-Prophetic reports of Ibn ʿUmar to be authoritative independent indications of praxis. Mālik's ultimate reference here was again the praxis itself. The conformity of Ibn ʿUmar's statements and behavior to praxis is what made them sound textual indicants of law. Although Mālik adds no additional details to the precepts of this chapter as they are set forth in the post-Prophetic reports, he indicates by placing them in this praxis chapter that he regards them to reflect a desired norm. As we have seen, in some instances, Mālik regards certain actions of Ibn ʿUmar, other prominent Companions, and even the Prophet himself as reflecting exceptional behavior and not establishing normative legal norms. The examples in this chapter appear to be another illustration of how Mālik uses praxis to differentiate between reports of normative and non-normative behavior.[223] One is reminded again of the quotation of Ibn al-Qāsim in the *Mudawwana* that legal texts may not be regarded as being valid for application unless they correspond to a living praxis that accompanies them.[224] For Mālik, as we have seen repeatedly, it is the non-textual source of Medinese praxis that is his primary referent in evaluating, interpreting, and even setting aside otherwise authentic textual sources of law.

5. *AlA: Washing the Bodies of Martyrs*

> Mālik cites a post-Prophetic report stating that ʿUmar ibn al-Khaṭṭāb's body was washed, shrouded, prayed over, and then buried after his assassination. He clarifies that ʿUmar died as a martyr (*shahīd*). Mālik states after this post-Prophetic report that it is the *sunna* that martyrs who die on the battlefield are buried in the clothing they die wearing. Their bodies are not washed, and funeral prayers are not said for them. Mālik states that he has heard this reported from the people of knowledge. He adds that the bodies of martyrs who survive for whatever time after battle that God wills are washed, shrouded, and prayed over when they die as was the practice carried out (*ʿumila bi-ʿUmar ibn al-Khaṭṭāb*) in the case of ʿUmar ibn al-Khaṭṭāb.[225]

This praxis chapter occurs in the transmissions of Yaḥyā and Abū Muṣʿab. There is some difference in the wording of the texts and the content and structure of the chapters. Both make reference to burying martyrs on the

[223] See Abd-Allah, "*ʿAmal*," 465–74.
[224] See *Mud.*, 2:151–52; Abd-Allah, "*ʿAmal*," 180–81.
[225] *Muw.*, 2:463.

battlefield in the clothes in which they died as being the *sunna*.[226] The chapter is not in the present editions of al-Qaʿnabī, Suwayd, or Ibn Ziyād. I was unable to find discussion of this precept in the *Mudawwana*.

There was extensive dissent among the jurists about making the funeral prayer for martyrs who died on the battlefield, and *ḥadīth*s conflict on this point as well.[227] This is a precept of law in which dissenting opinions among the jurists are rooted in explicit differences between various narrations of Prophetic *ḥadīth*s, some of which are clearly contrary to others. Some state that the Prophet prayed the funeral prayer for the martyrs of Uḥud, while others explicitly deny that.[228]

Mālik, al-Layth, al-Awzāʿī, al-Shāfiʿī, Ibn Ḥanbal, Ibn Rāhawayh, al-Ṭabarī, and Dāwūd al-Ẓāhirī held that funeral prayers are not made for martyrs.[229] ʿAbd al-Razzāq transmits from the early Syrian jurist Sulaymān ibn Mūsā (d. 119/737) that martyrs are not washed but are buried as they are on the battlefield. If they live, they are washed and prayed for like others. Sulaymān concludes by stating that this was the established practice, "We found the people doing this, and it was the practice of the people who passed away before us" (*wa wajadnā al-nās ʿalā dhālika wa kāna ʿalayhī man maḍā qablanā min al-nās*).[230]

ʿIkrima, Ibn Abī Laylā, al-Thawrī, Abū Ḥanīfa and his disciples, al-Awzāʿī, and a number of other early jurists held that funeral prayers were to be said for martyrs but they are not washed. They related numerous *ḥadīth*s and post-Prophetic reports in support of their claim, including disconnected *ḥadīth*s that the Prophet prayed for the martyrs of Uḥud and seventy times for his uncle Ḥamza, whom he would place the other martyrs next to individually when performing the prayers. Al-Zuhrī, however, transmits a *ḥadīth* according to which the Prophet prayed for Ḥamza but not for the other martyrs of the battle. There is also a *ḥadīth* that the Prophet made the funeral prayer for the martyrs of the Battle of Badr, which took place before Uḥud.[231] Saʿīd ibn al-Musayyab and al-Ḥasan

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[226] *Muw.*, 2:463; *Muw.* (Dār al-Gharb), 1:596; *Muw.* (Abū Muṣʿab), 1:367–68; *Muw.* (*Riwāyāt*), 3:42–43.

[227] Ibn ʿAbd al-Barr, *al-Istidhkār*, 14:258–60, 262; Ibn ʿAbd al-Barr, *al-Tamhīd*, 10:151–52; cf. Razzāq, *al-Muṣannaf*, 5:272–74, cf. 5:276–77, 3:540–41; Ibn Abī Shayba, *al-Muṣannaf*, 6:450–51.

[228] Cf. ʿAbd al-Razzāq, *al-Muṣannaf*, 5:276–77; Ibn Abī Shayba, *al-Muṣannaf*, 6:450.

[229] Ibn ʿAbd al-Barr, *al-Istidhkār*, 14:258, 262; Ibn ʿAbd al-Barr, *al-Tamhīd*, 10:152–53; al-Bājī, *al-Muntaqā*, 3:210; Ibn Rushd, *Bidāya*, 1:133.

[230] ʿAbd al-Razzāq, *al-Muṣannaf*, 5:274–75, 3:544.

[231] Ibn ʿAbd al-Barr, *al-Istidhkār*, 14:258, 262–63; Ibn ʿAbd al-Barr, *al-Tamhīd*, 10:153–53; ʿAbd al-Razzāq, *al-Muṣannaf*, 5:273, 275, 277, 3:545–47; Ibn Abī Shayba, *al-Muṣannaf*, 6:451;

al-Baṣrī held that all martyrs are washed just like other Muslims. They argued that the martyrs of Uḥud were not washed because of their large numbers and the fact that Muslims were still preoccupied with the course of the battle. Ibn ʿAbd al-Barr states that he knows of only one other early jurist (ʿUbayd-Allāh ibn al-Ḥasan al-Anbārī) who agreed with the opinion of Ibn al-Musayyab and al-Ḥasan. There were, however, later jurists who agreed with them.[232]

There was consensus among the jurists that martyrs who are fatally wounded on the battlefield but are carried away alive and die later after having eaten and drunk are to be washed and prayed for in a matter analogous with ʿUmar and ʿAlī.[233] It is noteworthy that Mālik uses the verb "practice carried out" (*ʿumila bi-*) for the procedure followed with ʿUmar. Here, the "practice carried out" refers to a specific case, not a common practice, although the procedure followed with ʿUmar constituted the norm for "martyrs" who did not die on the battlefield.[234]

Mālik uses the *sunna*-term for a matter regarding which there had been significant dissent among the jurists, who included, as Mālik's comments indicate, Saʿīd ibn al-Musayyab, who was the most prominent of Medinese jurists before Mālik and the head of the Seven Jurists of Medina. Mālik gives no indication of local consensus behind this *sunna* precept. He simply states that it is the *sunna* but not that it is the S-XN. It is a *sunna* precept, nevertheless, and made up an aspect of Medinese praxis, as indicated by its inclusion in a praxis chapter. Mālik's use of the word *sunna* here is in keeping with his tendency to invoke the *sunna* to confirm the validity of practices contrary to standard precepts. The burial of martyrs according to Mālik and those who follow this precept is contrary to analogy with the standard Islamic norms of the washing, preparation, and burial of the dead. Ibn ʿAbd al-Barr draws attention to the anomalous nature of this *sunna*. He states that there is consensus among Muslims that the dead are to be washed, but in this particular precept, the *sunna*

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al-Ṭaḥāwī, *Sharḥ*, 2:30–37; al-Ṭaḥāwī, *Mukhtaṣar*, 1:396–98; al-Bājī, *al-Muntaqā*, 3:210; Ibn Rushd, *Bidāya*, 1:133.

232 Ibn ʿAbd al-Barr, *al-Istidhkār*, 14:260–61; Ibn ʿAbd al-Barr, *al-Tamhīd*, 10:152–53; ʿAbd al-Razzāq, *al-Muṣannaf*, 5:275, 3:545; Ibn Abī Shayba, *al-Muṣannaf*, 6:451; al-Bājī, *al-Muntaqā*, 3:210; Ibn Rushd, *Bidāya*, 1:133.

233 Ibn ʿAbd al-Barr, *al-Istidhkār*, 14:263–64; Ibn ʿAbd al-Barr, *al-Tamhīd*, 10:153–55; ʿAbd al-Razzāq, *al-Muṣannaf*, 5:275, 3:545; Ibn Abī Shayba, *al-Muṣannaf*, 6:451; al-Bājī, *al-Muntaqā*, 3:210.

234 Al-Bājī, *al-Muntaqā*, 3:210.

has drawn an exception to standard procedure.[235] Mālik shows that in cases like the death of ʿUmar ibn al-Khaṭṭāb, the special exceptions of martyrs who die on the battlefield no longer pertain.

This example appears to be another illustration of Medinese praxis in the absence of local consensus among the people of knowledge. Presumably, the burial of martyrs on the battlefield came under the authority of the commander (*amīr*) or some other executive authority, which would account for its becoming uniform praxis in the absence of consensus. Again, Mālik's *sunna* precept is contrary to analogy with related precepts of burial. As regards the funeral prayer for martyrs, Abū Ḥanīfa treats their burial rites as analogous to customary Muslim burials. Mālik invokes the *sunna* to justify the anomalous nature of the Medinese precept and marks it off from the application of analogy.

As before, the content of this praxis chapter pertains to ritual. The praxis underlying its precepts appears to be transmissional. Al-Bājī states that the *sunna* precept in this case is in keeping with a formally authentic *ḥadīth* according to which the Prophet did not wash, shroud, or pray over the bodies of the martyrs killed at the battle of Uḥud.[236] Mālik cites no *ḥadīth*s or other supporting legal texts. Instead, he provides a summary of what he has heard on the matter from the Medinese people of knowledge as supported by their praxis. He explains the reason why the procedure regarding the burial of martyrs who die on the battlefield differs from those who die of their wounds later or were assassinated as in the case of ʿUmar ibn al-Khaṭṭāb.

6. *AlA: The Newborn Sacrifice* (al-ʿAqīqa)

Mālik begins the chapter by citing four relevant post-Prophetic reports. He ends by elaborating the precept of newborn sacrifice (*ʿaqīqa*), which is performed by sacrificing a sheep to mark the successful birth of a child. The first post-Prophetic reports states that ʿAbd-Allāh ibn ʿUmar always provided a sheep for the newborn sacrifice for any member of his family who asked for it. He would sacrifice one sheep for each newborn child, whether a boy or a girl. The second report states that the Companion Ibrāhīm ibn al-Ḥārith used to say that it was preferable always to perform the newborn sacrifice even when one did not have a sheep and could only sacrifice a sparrow. The third report relates how the sacrifice was performed in the cases of al-Ḥasan and al-Ḥusayn, the grandsons of the Prophet. The fourth report states that

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235 ʿAbd al-Barr, *al-Tamhīd*, 10:155; *al-Istidhkar*, 14:270.

236 See al-Bājī, *al-Muntaqā*, 3:210.

> ʿUrwa ibn al-Zubayr performed the newborn sacrifice for each of his children. He would sacrifice one sheep for each boy and each girl. Mālik then states that sacrificing one sheep for a boy or girl is the AN (*al-amr ʿindanā*) regarding the newborn sacrifice. The sacrifice is not obligatory (*wājib*), but it is preferable to practice it (*yustaḥabb al-ʿamal bihā*). It is a matter (*amr*) to which the people among us continue to adhere (*wa hīya min al-amr al-ladhī lam yazal ʿalayhi al-nās ʿindanā*). Mālik continues to say that performance of the newborn sacrifice is analogous to (*bi-manzilat*) other types of ritual sacrifice. Hence, animals that are one-eyed, emaciated, sick, or have broken bones are not acceptable. Neither the meat nor hide of the newborn sacrifice is to be sold. The bones of the sacrifice may be broken [when it is being cut up after slaughter]. The family performing the newborn sacrifice should eat part of the meat and give part of it in charity. None of the blood from the sacrifice is to be smeared on the head of the newborn child.[237]

This precept occurs in the recensions of Yaḥyā, Abū Muṣʿab, and Suwayd, who all present it in a praxis chapter. Ibn Ziyād gives the chapter the title of the "Newborn Sacrifice" (*al-ʿAqīqa*) without reference to praxis in the title, but he makes explicit reference to local praxis regarding newborn sacrifices within the chapter. After mentioning that one sheep is sacrificed for boys and girls alike, Ibn Ziyād quotes Mālik as stating that "the praxis among us is in accordance with this" (*wa ʿalā dhālika al-ʿamal ʿindanā*).[238] The precept does not occur in the transmission of al-Qaʿnabī. In Yaḥyā's transmission, Mālik states after the AN that "the sacrifice is not obligatory, but it is preferable to practice it (*yustaḥabb al-ʿamal bihā*). It is a matter to which the people among us have customarily adhered.[239] Abū Muṣʿab's recension states that the sacrifice is recommended but not obligatory, but he cites it as an A-XN (the precept without dissent among us; *al-amr al-ladhī lā ikhtilāf fīhi ʿindanā*). He follows with the same concluding remarks as in Yaḥyā, Suwayd, and Ibn Ziyād that the people among us have always customarily held to it. Ibn Ziyād also includes the term A-XN but applies it to the fact that only one sheep is slaughtered for boys and girls alike.[240] Suwayd's wording differs somewhat from Yaḥyā but is close in content.[241]

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[237] *Muw.*, 2:501–02; *Muw.* (Dār al-Gharb), 1:646–48; Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:378; *Muw.* (Abū Muṣʿab), 2:205–06; *Muw.* (Suwayd), 332–33; *Muw.* (Ibn Ziyād), 134–37. 135; *Muw.* (*Riwāyāt*), 3:145–48.

[238] *Muw.*, 2:501–02; *Muw.* (Dār al-Gharb), 1:646–48; Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:378; *Muw.* (Abū Muṣʿab), 2:205–06; *Muw.* (Suwayd), 332–33; *Muw.* (Ibn Ziyād), 134–37. 135; *Muw.* (*Riwāyāt*), 3:145–48.

[239] *Muw.*, 2:501–02; *Muw.* (Dār al-Gharb), 1:646–48; Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:378.

[240] *Muw.* (Abū Muṣʿab), 2:205–06.

[241] *Muw.* (Suwayd), 332–33.

All four recensions include Mālik's statement that performance of the newborn sacrifice is analogous to (*bi-manzilat*) other types of ritual sacrifice.

Saḥnūn cites that Mālik regarded the newborn sacrifice as recommended. He quotes Mālik as stating that it "continues to be a part of the praxis of the Muslims" (*lam tazal min ʿamal al-Muslimīn*). He notes that it is not obligatory nor a binding *sunna* (*sunna lāzima*), but the practice of doing it is recommended. He notes how the newborn sacrifice was performed in the case of al-Ḥasan and al-Ḥusayn, the sons of the Prophet's daughter Fāṭima. He notes that animals validly slaughtered in the newborn sacrifice are the same as those slaughtered in the greater annual festivals (*al-ʿīd*). He notes that only one sheep is sacrificed for both boys and girls. In keeping with the *Mudawwana*'s concern with legal interpretation, the question is raised about twins. Saḥnūn relates Mālik's opinion that a separate sheep is slaughtered for each twin.[242]

Al-Layth ibn Saʿd and Mālik's teacher Abū al-Zinād ibn al-Dhakwān dissented from Mālik's AN. They regarded the newborn sacrifice as obligatory, not recommended as Mālik holds. Mālik's use of the term AN reflects dissent within and without Medina. Given internal Medinese dissent on this precept, al-Layth ibn Saʿd's disagreement regarding it confirms his assertion to Mālik that al-Layth only dissents from Medinese praxis in matters about which the Medinese jurists themselves dissented, while being among the closest adherents to Medina in matters of local consensus.[243]

The jurists disagreed on the issue of sacrificing only one sheep for baby boys and girls alike. Relevant *ḥadīth*s and post-Prophetic reports also differed on this matter. Some *ḥadīth*s state that the Prophet sacrificed one sheep each for al-Ḥasan and al-Ḥusayn. This was the opinion of Ibn ʿUmar, ʿUrwa ibn al-Zubayr, and Muḥammad al-Bāqir.[244] According to Ibn Abī Shayba, al-Qāsim ibn Muḥammad and al-Zuhrī are also reported to have held this position.[245] ʿĀʾisha and Ibn ʿAbbās held, however, that two sheep should be sacrificed for a boy and one for a girl, which became the view of al-Shāfiʿī, Ibn Ḥanbal, Ibn Rāhawayh, Abū Thawr, Dāwūd al-Ẓāhirī,

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[242] *Mud.*, 2:9. This chapter occurs only in the old edition of the *Mudawwana*. It is missing from the new edition; see *Mud.* (2002), 3:139.

[243] See Abd-Allah, "*ʿAmal*," 63–64, note 2.

[244] Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:377–78; Ibn ʿAbd al-Barr, *al-Tamhīd*, 10:397–99; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:331; Ibn Abī Shayba, *al-Muṣannaf*, 5:112–13.

[245] Ibn Abī Shayba, *al-Muṣannaf*, 5:112–13.

and al-Ṭabarī. This position was also attested in contrary *ḥadīth*s which assert that the Prophet sacrificed two sheeps for al-Ḥasan and al-Ḥusayn.[246]

Al-Ḥasan al-Baṣrī held the opinion that no newborn sacrifice was performed in the case of a girl and one sheep was sacrificed in the case of a boy. Qatāda is also reported as following al-Ḥasan regarding this opinion. According to Ibn ʿAbd al-Barr this position was based on two *ḥadīth*s stating that the boy (*ghulām*) "has his newborn sacrifice" but making no reference to girls. Al-Ḥasan and Qatāda are also said to have held that the head of the child should be daubed in the blood of the sacrifice, a practice which the majority of the jurists disliked as reminiscent of pre-Islamic customs that had been repealed by Islam.[247] Mālik is clearly addressing this opinion when he asserts that blood from the newborn sacrifice should not be daubed on the child's head. There was general consensus among the jurists that only such animals as are acceptable for festival sacrifices are valid for newborn sacrifices, although Ibn ʿAbd al-Barr mentions that certain rare persons whose dissent is not regarded as significant (*lā yuʿaddu khilāfan*) opposed this view.[248]

Mālik's discussion in this chapter is another of several examples in the *Muwaṭṭaʾ* and *Mudawwana* of his using terms such as "obligatory" (*wājib*) and "recommended" (*yustaḥabb/mustaḥabb*), which became part of the standard secondary vocabulary of Islamic legal terminology. Some of Mālik's terminological usages were shared with later jurists in general and became standard. Several other terms—especially Mālik's *sunna*- and *amr*-terms—are archaic and ceased to be part of standard legal jargon.

The newborn sacrifice is one of many pre-Islamic Arabian customs that were recognized by Islam with modifications. It was a matter of dissent among the jurists. The relevant *ḥadīth*s report that the practice was done but do not give details. The newborn sacrifice is another example of an aspect of Islamic law that was transmitted in all regions by living praxis.

Mālik's clarification that it is permissible to break the bones of the newborn sacrifice after the animal's slaughter constitutes a second modification of the pre-Islamic Arabian custom of newborn sacrifices. In the pre-Islamic custom it was taboo to break the bones of the sacrificial

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246 Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:378; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:327–31; Ibn Abī Shayba, *al-Muṣannaf*, 5:112; cf. al-Ṭaḥāwī, *Ikhtilāf*, 90.

247 Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:381; Ibn ʿAbd al-Barr, *al-Tamhīd*, 10:399; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:332–33; Ibn Abī Shayba, *al-Muṣannaf*, 5:115; al-Zurqānī, *Sharḥ*, 3:420.

248 Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:383.

animal. In al-Zurqānī's view, the pre-Islamic Arabs looked upon the breaking of the bones of the newborn sacrifice as an ill omen for the child's health and safety.[249]

Abū Ḥanīfa held that the newborn sacrifice was neither obligatory nor a part of the *sunna*. He contended that it was voluntary (*taṭawwuʿ*).[250] The Kufan al-Thawrī seems to have held a similar position to Abū Ḥanīfa. He held that the newborn sacrifice was not obligatory, but that it was good (*ḥasan*) if one did it.[251] Al-Shaybānī states in his recension of the *Muwaṭṭaʾ* that the newborn sacrifice was a pre-Islamic custom that had been practiced during the first part of the Prophet's mission but was later repealed. He asserts that the second festival prayer (*ʿīd al-aḍḥā*) abrogated all types of pre-Islamic sacrifices that had been customary before its institution. Similarly in al-Shaybānī's view, the fast of Ramaḍān repealed other types of [obligatory] fasting that had preceded it. Ritual washing (*ghusl al-janāba*) abrogated all preceding rites of [obligatory] ritual bathing, and obligatory alms (*zakāh*) abrogated the forms of [obligatory] charity that had preceded it.[252] Unlike Mālik, Abū Ḥanīfa held that one should sacrifice two sheeps for a male child and one for a girl, which is supported by certain *ḥadīth*s that report the Prophet as having sacrificed two sheeps for the births of his grandsons, al-Ḥasan and al-Ḥusayn.[253]

Again the precept in this praxis chapter pertains to a matter of ritual and falls under the category of transmissional praxis. As indicated, it originated as a pre-Islamic custom but was preserved with modifications after the coming of Islam.

Mālik cites a *ḥadīth* just prior to this praxis chapter, indicating that the Prophet permitted the performance of the newborn sacrifice, although indicating some disfavor with its customary name because of the semantic connection between it (*ʿaqīqa*) and the word for "disobedience" [especially to parents] (*ʿuqūq*), which is derived from the same root. He then cites two post-Prophetic reports indicating that Fāṭima, the daughter of the Prophet, shaved the heads of her sons and daughters, al-Ḥasan, al-Ḥusayn, Zaynab, and Umm Kuthūm, presumably at the time of their

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[249] Al-Zurqānī, *Sharḥ*, 3:420; cf. al-Bājī, *al-Muntaqā*, 3:103–04; Ibn Rushd, *Bidāya* (Istiqāma), 1:449–450.

[250] Al-Ṭaḥāwī, *Ikhtilāf*, 89–90; al-Ṭaḥāwī, *Mukhtaṣar*, 3:233–34; al-Bājī, *al-Muntaqā*, 3:102; al-Zurqānī, *Sharḥ*, 3:419; Ibn Rushd, *Bidāya* (Istiqāma), 1:448–49.

[251] Al-Ṭaḥāwī, *Ikhtilāf*, 90.

[252] *Muw.* (al-Shaybānī/ʿAbd al-Laṭīf), 226; cf. al-Ṭaḥāwī, *Ikhtilāf*, 89.

[253] Al-Bājī, *al-Muntaqā*, 3:102; al-Zurqānī, *Sharḥ*, 3:419; Ibn Rushd, *Bidāya* (Istiqāma), 1:448–49.

newborn sacrifices, weighed the hair against an equal amount of gold, and gave the gold as charity.[254]

Mālik's observation in the praxis chapter that "performance [of the newborn sacrifice] is a matter (*amr*) to which the people among us continue to adhere" (*wa hīya min al-amr al-ladhī lam yazal ʿalayhī al-nās ʿindanā*) acknowledges the customary roots of the practice, the fact that it was a well-established Medinese praxis, and that, as a (modified) Islamic practice, it had continuity going back to the time of the Prophet.

Mālik cites several texts in this praxis chapter that give further details on the AN precept such as the fact that the newborn sacrifice consists of one sheep for each new born, whether a girl or a boy. Again, however, as is often the case in Mālik's legal reasoning, the greater part of the detail regarding the AN precept is taken directly from Medinese praxis without any textual references to *ḥadīth*s or post-Prophetic reports. The observation that the bones of the newborn sacrifice may be broken and that none of the blood of the sacrifice is to be daubed on the head of the child belong to this category.

The post-Prophetic reports that Mālik cites just prior to this praxis chapter state, as indicated, that Fāṭima shaved off the hair of her children at the time of their nativities and gave the weight of the hair in gold as charity. By not including this report in the praxis chapter, Mālik indicates that he does not regard Fāṭima's action to be normative and does not want it to be confused with standard Medinese praxis. At the same time, Mālik regarded her act to be honorable and worthy of note. For that reason, he includes it in two separate transmissions in the *Muwaṭṭaʾ*. The structure Mālik gives his reports in this regard is the same as in the praxis chapter on whether nosebleeds break the state of ritual purity. In that case, Mālik stated the post-Prophetic reports that were contrary to praxis although performed by great Medinese authorities prior to the praxis chapter. In the praxis chapter itself, he included the reports of other Medinese authorities which were consistent with praxis and which he regarded to be normative.[255]

Mālik has drawn the distinction between Fāṭima's actions and those of ʿAbd-Allāh ibn ʿUmar and ʿUrwa ibn al-Zubayr on the basis of his received knowledge of normative Medinese praxis. This is another example of the primacy of praxis as a non-textual source for Mālik both in the content

254 *Muw.*, 2:500–01.

255 See Abd-Allah, "*ʿAmal*," 188–95.

and the general understanding of the law. It was on the basis of received praxis as upheld by his teachers that he differentiated between legal texts that report normative and non-normative actions on the part of the Prophet or post-Prophetic legal authorities.[256]

Finally, Mālik makes explicit use of analogical reasoning in his discussion of Medinese praxis in this chapter. He states that the newborn sacrifice is analogous to (*bi-manzilat*; lit., "of the same status as") other types of ritual sacrifice. His use of the expression "of the same status as" is one of his preferred terminological usages regarding analogy and not the expression "*qiyās*", which would later become standard legal jargon. By analogy, Mālik then states that animals that are one-eyed, emaciated, sick, or have broken bones are not to be used in the newborn sacrifice just as they are not suitable for other types of ritual sacrifices in Islamic law.

7. *AlA: Amounts of Indemnities* (Diya) *in Gold and Silver*

> Mālik cites a post-Prophetic report according to which ʿUmar ibn al-Khaṭṭāb assessed (*qawwama*) the blood indemnity (*diya*) [for involuntary manslaughter and murder] at one thousand pieces of gold for people who primarily use gold currency (*ahl al-dhahab*) and twelve thousand pieces of silver for people who primarily use silver currency (*ahl al-wariq*). Mālik explains that the Syrians and Egyptians [customarily] use gold, and the Iraqis [customarily] use silver. He states that he has heard it transmitted that blood indemnities are to be given in installments over three to four years. He states that the installment period of three years is the preferable period in his view regarding what he has heard transmitted in this matter. Finally, Mālik states that it is the AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*) that camels do not constitute an acceptable blood indemnity for settled communities (*ahl al-qurā*), just as gold and silver are not acceptable indemnities for bedouins (*ahl al-ʿamūd*; "tent dwellers"). Similarly, gold is not an acceptable blood indemnity for users of silver, and silver is not an acceptable indemnity for users of gold.[257]

This praxis chapter occurs in the recensions of both Yaḥyā and Abū Muṣʿab. Their texts are similar, but where Yaḥyā has the AMN beginning with camels not being suitable for non-Bedouin communities, Abū Muṣʿab employs the term AN.[258] This praxis chapter does not occur in al-Qaʿnabī, Suwayd, or Ibn Ziyād.

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[256] See Abd-Allah, "*ʿAmal*," 436–81.

[257] *Muw.*, 2:850; *Muw.* (Dār al-Gharb), 2:418; *Muw.* (Abū Muṣʿab), 2:244–45; *Muw.* (*Riwāyāt*), 4:187.

[258] *Muw.*, 2:850; *Muw.* (Dār al-Gharb), 2:418; *Muw.* (Abū Muṣʿab), 2:244–45; *Muw.* (*Riwāyāt*), 4:187.

In the *Mudawwana*, Saḥnūn asks Ibn al-Qāsim if indemnities may be paid in cattle, sheep, and horses (as well as camels). In language consistent with the *Muwaṭṭa'*, Ibn al-Qāsim informs him that Mālik restricted indemnities to camels, gold, and silver. Saḥnūn asks who constitute the people whose primary currency is gold. He is told they are the people of Egypt and Greater Syria (*al-Shām*). He asks who pays silver and is told the people of Iraq. He asks who pay in camels and is told tent and desert dwellers (*ahl al-ʿamūd wa ahl al-bawādī*). Saḥnūn asks about Bedouins who say they will pay their indemnities in gold and silver or people of silver who say they will pay in gold. Ibn al-Qāsim responds that Mālik held that only gold is accepted from people whose primary currency is gold. Only silver is accepted from people of silver, and only camels are accepted from people of camels.[259]

The legal issue of camel, silver, and gold indemnities was one of the prominent debates of early Islamic jurisprudence. Ibn ʿAbd al-Barr states that indemnities were a matter in which the dissent of the Successors was "very tumultuous" (*muḍṭarib jiddan*), and there were many contradictory opinions.[260] The issue was chiefly a question of legal interpretation, although it was buttressed by explicitly contradictory post-Prophetic reports from ʿUmar. Mālik refers in the *Muwaṭṭa'* to the letter (*kitāb*) of ʿAmr ibn Ḥazm, which the Prophet had written mentioning indemnities in camels, gold, and silver.[261] All scholars agreed that the Prophet had set the indemnity at one hundred camels. Their differences of opinion were exclusively about what amounts were equivalent to camels in gold and silver. They also disagreed on whether or not cattle, sheep, and precious cloth (*ḥulal*) could be accepted in lieu of camels, gold, or silver.[262]

The issue of indemnities became problematic during the caliphate of ʿUmar because of the plentifulness of wealth, inflation, and the rising and falling prices of camels. ʿUmar expressed his fears that Muslim rulers after him would set indemnities arbitrarily so that they would either be too little or too much. He set the silver indemnity at 12,000 pieces of silver, which was not to be increased. He set the camel indemnity at 100 head of camels and he set indemnities in cattle and sheep. He contended that the Prophet had not fixed indemnities in gold and silver and that, if he had

[259] *Mud.*, 4:438; *Mud.* (2002), 11:199–200.
[260] Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:190, 193.
[261] *Muw.*, 2:859; Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:126.
[262] Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:188.

done so ʿUmar would have followed him. ʿUmar took the camel indemnity as the base line.[263]

There was dissent among the Hijazis and Iraqis over the amount of silver at which ʿUmar set the indemnity for murder. The Hijazis held it had been set at 12,000 pieces of silver (*dirham*s), while the Iraqis transmitted from ʿUmar that he set it at 10,000. All transmissions from ʿUmar agree, however, that he set the indemnity in gold at 1,000 pieces of gold (*dīnār*s). The early and later jurists all agreed on this. In the earliest period, there was also no disagreement about the size of the indemnity in silver. The Iraqis only have the post-Prophetic report they transmit from ʿUmar, but the Hijazis had many *ḥadīth*s and post-Prophetic reports on this matter stating that the indemnity had been set at 12,000 pieces of silver.[264]

Most transmitted information on silver indemnities confirmed the Hijazi position. They transmit *ḥadīth*s from the Prophet as well as post-Prophetic reports, including their version of ʿUmar's caliphal practice. The Iraqis had no *ḥadīth*s in this matter but only post-Prophetic reports and relied upon their contrary report of the caliphal practice of ʿUmar. Reports from ʿUthmān, ʿAlī, and Ibn ʿAbbās also upheld that the indemnity was 12,000 pieces of silver.[265]

Mālik, Abū Ḥanīfa, Zufar, and al-Layth ibn Saʿd contended that indemnities were only valid in camels, gold, or silver. This was one of the opinions of al-Shāfiʿī. Al-Thawrī, Yūsuf, al-Shaybānī, the seven jurists of Medina, al-Zuhrī, Qatāda, Ṭāwūs, and ʿAṭāʾ held—according to a post-Prophetic report from ʿUmar—that indemnities were also valid in other customary items of value such as cattle, sheep, and fine Yemeni cloth (*ḥulal*).[266]

The Kufans, as noted earlier, held that the ratio between gold and silver currencies was one to ten, which is the standard gold-silver ratio in obligatory alms (*zakāh*). In the Medinese view, however, the gold-silver ratio as regards obligatory alms is contrary to analogy. The standard ratio between the two bullions is one to twelve, as reflected in Mālik's

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[263] Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:189–90; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:291–92, 295–96; Ibn Abī Shayba, *al-Muṣannaf*, 5:344–45.

[264] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:11–12; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:193; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:292, 296; Ibn Abī Shayba, *al-Muṣannaf*, 5:344.

[265] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:12–13; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:190–92; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:296–97; Ibn Abī Shayba, *al-Muṣannaf*, 5:344.

[266] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:13–15; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:188–90, 193–94; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:288–90, 293; Ibn Abī Shayba, *al-Muṣannaf*, 5:345–46.

transmission of the post-Prophetic report from ʿUmar.[267] The legal difference between Abū Ḥanīfa and Mālik in this instance is reflected in two contradictory post-Prophetic reports ostensibly referring to the same original legal decree. This is an explicit textual conflict. It is the kind of literal textual conflict presumed to characterize Islamic law in much secondary literature on the origins of Islamic law. As reflected repeatedly in the present study, such explicit textual conflict in Islamic law was the exception, not the rule. Most matters of dissent pertained to shared texts or matters that had no explicit texts at all.

This praxis chapter gives an explicit example of the primacy of local custom as the basis for legal judgments and embodies one of the five principal maxims of Islamic law, "custom shall have the power of law" (*al-ʿāda muḥakkama*).[268] ʿUmar's ruling, given during the days of his caliphate, has international scope and was based on the customary economic realities of various regions under his governance. Syria and Egypt were lands where gold currency predominated. Silver was most common in Iraq. The camel Bedouins, however, relied primarily upon camels as their principal source of wealth instead of gold and silver. ʿUmar's ruling was handed down on the basis of these regional economic differences. Mālik's clarification of the ruling makes it explicit that the legal purpose of the indemnity as the transferal of a standard form of value with clearly defined value on the local level requires that indemnities be paid only in the form of wealth that is the standard form of wealth used in that region. To pay a blood indemnity in camels to people who use gold and silver, for example, would violate the basic purpose of the indemnity, just as the payment of gold and silver to camel Bedouins would be of different value than payment in camels, their standard form of wealth. Giving local custom the power of law in indemnities exemplifies the link between observation of cultural norms and the general good (*maṣlaḥa*), which is one of the chief principles underlying Mālik's endorsement of local customs.[269]

As in similar examples, the complexity of material presented in a chapter often brings in additional terms to clarify the standing of specific details. In this case, Mālik inserts the term AMN to indicate Medinese majority opinion that camels do not constitute an acceptable blood

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[267] See Abd-Allah, "*ʿAmal*," 553–54; al-Bājī, *al-Muntaqā*, 7:68; al-Zurqānī, *Sharḥ*, 5:137–39; Ibn Rushd, *Bidāya* (Istiqāma), 2:48.

[268] Heinrichs, "*Qawaʿid*," 369; he renders the maxim as "custom is made the arbiter."

[269] Abū Zahra, *Mālik*, 420–21; Abd-Allah, "*ʿAmal*," 250–51.

indemnity for users of gold and silver. The source of the AMN is not indicated, and I have not been able to find accounts regarding the extent to which the opinion expressed in this AMN was a matter of consensus among the jurists in general. It is reasonable to assume, however, that the content of the AMN pertains to the sort of legal matters that would likely have been articulated in the wake of ʿUmar's assessment of gold and silver indemnities—especially given the differences in gold and silver ratios from the Medinese and Kufan perspectives. Based on the Kufan ratio of the two bullions, payment of a gold indemnity in silver according to the Kufan ratio would probably have been more attractive to gold-users than payment in gold.

As reflected in formally authentic *ḥadīth*s, the blood indemnity for camels is said to be the only blood indemnity that the Prophet set.[270] It seems unlikely that the relationship between blood indemnities paid in camels and those paid in gold and silver would have been made clear at a time when indemnities and gold and silver had not yet been officially assessed. It appears, therefore, that Mālik's AMN goes back to the legal interpretation (*ijtihād*) of the early Medinese jurists. It may have been based in the legal interpretation of the Companions regarding the prior assessment of the gold and silver indemnities.

In contrast to the previous praxis chapters, this precept does not pertain to ritual. It is not clear from Mālik's text what ʿUmar ibn al-Khaṭṭāb based his assessment for the gold and silver indemnities upon. It was widely held that ʿUmar's reasoning in the matter was based on the value of the older camel indemnity, which the Prophet had set at one hundred camels, as reassessed in terms of gold and silver. This was al-Shāfiʿī's opinion. For that reason, he held in contrast to Mālik and Abū Ḥanīfa that indemnities in gold and silver are not fixed amounts but vary with the fluctuation of the value in gold and silver of one hundred camels.[271]

Some jurists held that ʿUmar's assessment of the indemnities in gold and silver was not based on the indemnity the Prophet had set in camels. Al-Bājī notes in this regard that a particular *ḥadīth* supporting ʿUmar's reliance upon the camel indemnity is not regarded as having well-established authenticity. Both Mālik and Abū Ḥanīfa appear to have regarded the indemnities that ʿUmar proclaimed in gold and silver to have both been based on individual knowledge that ʿUmar had received from the

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[270] See *Muw.*, 2:849 and citations in preceding footnote.

[271] Al-Bājī, *al-Muntaqā*, 7:68–69; al-Zurqānī, *Sharḥ*, 5:137–39; Ibn Rushd, *Bidāya*, 2:248.

Prophet. Consequently, neither of the two Imāms held that gold and silver indemnities fluctuate according to the market value of camels. Al-Bājī suggests that they regarded the monetary value of indemnities to have been independently established by Prophetic authority, not the product of legal interpretation based on the Prophetic indemnity in camels.[272] In such a case, the praxis regarding the size of the gold and silver indemnities would belong to the category of transmissional praxis. Nevertheless, placing it in that category is a matter of conjecture, and Mālik gives no textual indication of what he regarded the ultimate source of praxis in this matter to be. He undoubtedly regarded this praxis as authoritative, and, as indicated in his letter to al-Layth ibn Sa'd, Mālik insisted upon the authoritativeness of the rightly-guided caliphs by virtue of their personal knowledge of the *sunna* and close adherence to it.[273]

Mālik indicates in this chapter that he heard two different opinions from the Medinese jurists regarding the installment periods for paying indemnities. Some told him the installments should be divided over three years. Others held that the period should be four. Mālik states his preference for the first opinion. Since both opinions are included in the praxis chapter, indemnities in gold and silver appear to be another instance of mixed praxis. In this case, however, the praxis in question came under the authority of the judiciary, which was not the case in the earlier examples of diverse Medinese praxis in matters such as wiping over footwear or the details of the newborn sacrifice.[274] Indemnity installments may, then, have constituted a mixed Medinese judicial praxis. Some Medinese judges handed down rulings stipulating the three-year period, while others stipulated four. Or Medinese judges chose between both alternatives according to the exigencies of the cases brought before them.

Mālik's Praxis Terms in Summary

Affirmative Praxis Terms

Most precepts analyzed in this chapter in connection with Mālik's affirmative praxis terms involve issues of dissent between the Medinese and Kufan jurists of the early formative period. In the second example on the

[272] Al-Bājī, *al-Muntaqā*, 7:68.
[273] See Abd-Allah, "*'Amal*," 314–21.
[274] See Abd-Allah, "*'Amal*," 652–56.

validity of shared profit farm labor contracts, there was no dissent regarding the basic precept, which Mālik describes as an unbroken Medinese praxis, but the Iraqis Abū Ḥanīfa, Sufyān al-Thawrī, Ibn Abī Laylā, and al-Shaybānī and the Egyptian al-Layth ibn Saʿd disagreed with Mālik's analogy that the maximum amount of unplanted land must be one-third or less when compared to standing crops and fruit trees.[275]

The fourth example involved a difference of opinion between the Medinese, on the one hand, and the Kufans and Basrans, on the other. The third example involved dissent within Medina itself. It is one of several examples of Medinese praxis for which there was no city consensus but which constituted standard local praxis nevertheless. I was unable to determine whether or not there was agreement or dissent on the matter outside Medina, although I expect that there was, since al-Shāfiʿī contended that there was never dissent regarding an issue within Medina but that there were similar differences regarding the matter among jurists outside the city.[276]

The first three affirmative praxis precepts studied here appear to belong to the category of transmissional praxis. Of these, the first two were instances of Mālik's reliance upon transmissional praxis to provide legal information not found in the transmitted texts that he cites or for which he cites no legal texts at all. The rulings all pertain to matters of general necessity (*ʿumūm al-balwā*): common concerns such as buying animals and making labor contracts on farm lands which people should generally have been aware of because they pertain to their everyday lives. In the first example, Mālik adds in addition to his affirmative praxis term that the precept in question is supported by local consensus and has continuity with past practice by citing the term -zĀIb ("this is the precept that the people of knowledge in our city still continue to follow"). In the third example, Mālik relies upon the non-textual source of Medinese praxis supported by the report of an action that Ibn ʿUmar performed in order to provide an interpretation for the legal implications of a Qurʾānic verse of conjectural meaning.

The fourth example appears to belong to the category of old praxis (*al-ʿamal al-qadīm*): praxis going back to the legal interpretations of the Companions and not based directly on Prophetic authority. This is one of

[275] See Abd-Allah, "*ʿAmal*," 618–23.
[276] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 202–03, 253; see Abd-Allah, "*ʿAmal*," 343–48.

several examples in the *Muwaṭṭa'* of old praxis, in which it is clear that the Companions put a particular precept into practice but it is not clear what the ultimate source of that praxis was. It may have been the product of their individual legal reasoning, but it may also have been based on Prophetic knowledge that they had which was not transmitted in *hadīth*s to subsequent generations.

Negative Praxis Terms

As in the case of the affirmative praxis terms, differences between the Medinese and the Kufans are characteristic of the precepts for which Mālik cites his negative praxis terms. In the fourth example in the study of negative praxis terms, however, the primary issue of dissent comes from the Medinese jurists ʿAbd-Allāh ibn ʿUmar and Saʿīd ibn al-Musayyab, although similar differences were attributed to the non-Medinese al-Ḥasan al-Baṣrī, al-Awzāʿī, and al-Layth ibn Saʿd. The Kufans Abū Ḥanīfa and Sufyān al-Thawrī both agreed with Mālik on the specific point about which the others dissented, but the two Kufan jurists disagreed with Mālik regarding the second part of the example regarding optional sales agreements (*bayʿ al-khiyār*), while Abū Yūsuf and al-Shaybānī later took a position in the entire matter which was close to Mālik's.

I could find no evidence of dissent during Mālik's time on the third and fifth examples. The primary characteristic of all of the examples in which Mālik uses his negative praxis terms, however, appears to be Mālik's intent to indicate by them that he does not regard the overt (*ẓāhir*) meaning of the texts he cites to be legally valid because it was not accompanied by Medinese praxis.

In these examples of Mālik's use of the negative praxis terms, one sees again how authoritative his regard for the non-textual source of Medinese praxis was as the primary backdrop against which to read the textual sources of the law. The manner in which Mālik uses praxis in these examples reflects the ideas that Ibn al-Qāsim sets forth in the *Mudawwana* that no legal texts may be regarded as legally valid unless they have been historically accompanied by praxis. Just as Mālik transmits the texts he modifies in these examples and clearly regarded them as authentic, Ibn al-Qāsim also states that he does not doubt the historical authenticity of such legally problematic texts that have not been accompanied by praxis. For Ibn al-Qāsim, whatever the reason may be for the discrepancy between the overt legal implications of problematic texts and the content of historical praxis, it is not valid to institute those legal implications into late

praxis, if the first generations of Muslims had not done so.[277] Al-Shāṭibī developed this principle more fully in his *Muwāfaqāt*. The Companions and the first generations of Muslims, in al-Shāṭibī's view, understood the practical implications which Qur'ānic and Prophetic statements addressed. If a received text appears to have a semantic implication that the first generations would have been likely to practice but did not understand it from the text and therefore put into practice, that implication was not the intent of the law. It may have been repealed. There may have been some mistake in the transmitted wording. The implication of the text may not have been the original intent of the law. In any case, al-Shāṭibī holds, the jurist must adhere to the praxis of the first generation, not to the contrary legal implications of problematic texts.[278]

As indicated in some of the negative praxis terms, the overt meaning of a legal text may conflict with Medinese praxis, but the text itself may also convey less obvious implications, which are fully in conformity with praxis. Al-Bājī suggests in some cases that the texts with which Mālik uses his negative praxis terms were in reality actually supportive of praxis. Mālik cites the negative praxis terms in such cases, according to al-Bājī, because most readers are incapable of comprehending anything other than the overt meaning of texts, even if the validity of other interpretations is explained to them over and over again. Al-Bājī believes that Mālik cites the negative praxis terms in such cases because it is more reliable than relying upon the capacity of his readers and transmitters to understand the subtleties of non-obvious interpretations, as historically valid as they may have been in Mālik's eyes.

The post-Prophetic reports and *ḥadīth*s with which Mālik uses his negative praxis terms are all solitary transmissions. A number of them pertain directly to matters of general necessity (*ʿumūm al-balwā*). From both the Ḥanafī and Mālikī points of view, they carry legal implications that should have been generally recognized as valid among the earliest jurists and applied in practice.[279] Mālik's use of negative praxis terms provides examples of his reliance upon praxis to distinguish between reports of actions that he regards to be non-normative (not the basis of praxis) and other reports of actions that he regards as reflecting the norm.[280]

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[277] See Abd-Allah, "*ʿAmal*," 180–81.
[278] See Abd-Allah, "*ʿAmal*," 509–14.
[279] See Abd-Allah, "*ʿAmal*," 481–84.
[280] See Abd-Allah, "*ʿAmal*," 436–448, 490–97.

In the case of Mālik's precept on optional sales agreements (*bayʿ al-khiyār*), Ibn ʿAbd al-Barr holds that Mālik regarded the legal implications of the first part of the relevant *ḥadīth* he cites to have been repealed. He believes that Mālik intended to indicate the fact of its repeal by the second *ḥadīth* he placed in the *Muwaṭṭaʾ* after it. Ibn ʿAbd al-Barr cites an additional report attributed to Mālik according to which he referred to the implications of the first part of the *ḥadīth* on optional sales agreements as one of those matters that had been put aside (*turika*) and not made part of established praxis.[281] For Ibn ʿAbd al-Barr, this example constitutes an instance of Mālik's using praxis as a means of establishing that the precept of one *ḥadīth* had been repealed while the precept contained in a contrary *ḥadīth* had not. Mālik's statement about the precept at the beginning of the first *ḥadīth* cited in the *Muwaṭṭaʾ* on optional sales agreements again calls to mind Ibn al-Qāsim's statement about problematic authentic *ḥadīth*s in the *Mudawwana*. In light of Ibn ʿAbd al-Barr's interpretation, Mālik's position on the optional sales agreement *ḥadīth* is an instance of his regarding part of a *ḥadīth* text to have been repealed, while holding the remainder of the text to remain unabrogated and valid. The Shāfiʿī interlocutor objected strongly in *Ikthilāf Mālik* to a similar example in which the Medinese held on the basis of their praxis that part of a *ḥadīth* regarding the noon and afternoon prayers and the sunset and night prayers were still valid, while a certain part of the same *ḥadīth* had been repealed. Since there were no outside textual references supporting this distinction and since the interlocutor did not regard the non-textual source of Medinese praxis to be authoritative, he rejected this distinction.[282]

Example five provides an instance of a precept of Medinese praxis regarding which there were differences of opinion among the Medinese jurists. In this case, the precept pertains to what constitutes a valid sales agreement and came under the jurisdiction of the local judiciary. It is an example of a matter of law regarding which the authority of the Medinese judiciary would have been able to institute and maintain a uniform judicial practice in favor of one of the dissenting opinions instead of the other. Similarly, in the praxis chapters there was dissent among the Medinese jurists regarding whether or not martyrs who die on the battlefield should be washed, shrouded, and prayed over prior to burial. But the praxis in

[281] See Abd-Allah, "*ʿAmal*," 640–48.
[282] [Shāfiʿī Interlocutor], *Ikthilāf Mālik*, 205.

such cases did not come under the discretion of Medinese executive authority.[283]

The Praxis Chapters

There is a consistent pattern of dissent between the Kufans and the Medinese in the praxis chapters. In some cases, the differences are slight (for example, in the chapter on the details of how to sit while performing the ritual prayer). In general, the differences in the precepts of these chapters are only on particular details of the practice in question, not the entire praxis as a whole.[284] In four of the chapters, Mālik inserts other terminological expressions such as S-XN, S, AN, and AMN in addition to identifying the precept in question as a part of Medinese praxis by putting it in a praxis chapter.[285] It is noteworthy that there were apparently no significant differences of opinion among the jurists at any time regarding the praxis that Mālik classifies as S-XN. But various Umayyad governors had unsuccessfully attempted to establish a contrary praxis. Mālik invokes the authority of this most powerful of all the *sunna*-terms to emphasize the error of their judgment. Mālik follows the S-XN term with one of the most explicit statements on the concept of transmissional praxis (*al-ʿamal al-naqlī*) in the *Muwaṭṭaʾ*.[286] All the *sunna*-terms that occur in the praxis chapters are consistent with the anomalous nature of Mālik's other *sunna*-terms in the *Muwaṭṭaʾ*. They all vindicate anomalous legal rulings and mark off the limits of valid analogy. In the praxis chapters where such *sunna*-terms occur, as is generally the case elsewhere, some dissenting jurists had overruled Mālik's *sunna*-rulings by extending analogies to them.[287]

All of the precepts in the praxis chapters pertain to matters of ritual except for the seventh example, which pertains to indemnities in gold and silver. All precepts appear to belong to transmissional praxis, with the possible exception of the seventh example, in which the ultimate source of the praxis is difficult to determine. The seventh example may go back to the personal legal interpretation of the second caliph, ʿUmar ibn al-Khaṭṭāb. It may also have been based on his personal knowledge of

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[283] See Abd-Allah, "*ʿAmal*," 667.
[284] See Abd-Allah, "*ʿAmal*," 657, 661–63, 652–53, 665–66.
[285] See Abd-Allah, "*ʿAmal*," 659–61; 666–67; 671–72; 674–75.
[286] See Abd-Allah, "*ʿAmal*," 659–60.
[287] See Abd-Allah, "*ʿAmal*," 660–61; 666–67.

the Prophetic teaching.[288] In the praxis chapter on the newborn sacrifice (*ʿaqīqa*), Mālik states that the precept has always been (*lam yazal*) one of the customs of the people of Medina. He indicates that this custom, which was originally pre-Islamic and had been modified by Prophetic revelation, was always an aspect of Medinese praxis from the time of the Prophet through subsequent generations.[289]

Mālik cites several texts (generally post-Prophetic reports and especially post-Prophetic reports from ʿAbd-Allāh ibn ʿUmar) in some of the praxis chapters I analyzed. Sometimes, Mālik provides no additional information to what is provided in the texts he cites, relying upon the chapter title to indicate that the matter in question is practiced essentially as reported and that it had the authority of Medinese praxis. Use of post-Prophetic reports, as indicated earlier, is an important legal instrument in Mālikī, Ḥanafī, and Ḥanbalī legal reasoning, although it is marginal in the Shāfiʿī school. One of the advantages of Mālik's use of post-Prophetic reports is that they can indicate more conclusively than *ḥadīth*s whether or not a matter the Prophet is reported to have done or said was later repealed.[290] Mālik appears to relie heavily upon post-Prophetic reports in his praxis chapters for this reason. Al-Shaybānī argues that the newborn sacrifice was a pre-Islamic custom abrogated by Islam. Mālik implicitly counters such a claim by citing post-Prophetic reports to the effect that the sacrifice was performed by the Companion Ibn ʿUmar and the Successor ʿUrwa ibn al-Zubayr. Mālik then adds in summary fashion that the newborn sacrifice has always been a continuous part of the praxis of the people of Medina.[291]

Even though post-Prophetic reports in isolation are a useful ancillary in establishing whether or not a precept was repealed, they are not conclusive proof of repeal when they conflict. Post-Prophetic reports may also be insufficient for determining whether the actions performed constitute normative practice. By placing post-Prophetic reports that relate actions in praxis chapters, Mālik indicates that such actions constitute the desired norm. In the praxis chapter on the newborn sacrifice, Mālik reports the procedures that Ibn ʿUmar and ʿUrwa ibn al-Zubayr followed in performing the newborn sacrifice, indicating that they fall within normative practice. Just prior to the praxis chapter, Mālik cites reports about

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288 See Abd-Allah, "*ʿAmal*," 675–76.
289 See Abd-Allah, "*ʿAmal*," 668–72.
290 See Abd-Allah, "*ʿAmal*," 488–90.
291 See Abd-Allah, "*ʿAmal*," 668–73.

what Fāṭima, the daughter of the Prophet, did when performing the newborn sacrifice for her children. By not including Fāṭima's actions in the praxis chapter, Mālik indicates that what Fāṭima did was exceptional and does not constitute a universal norm in the newborn sacrifice. As noted, there are other examples of Mālik's treatment of post-Prophetic reports in this manner in the *Muwaṭṭa'*.[292] According to al-Shāṭibī, one of the most important uses of praxis in interpreting legal texts is that it enables the jurist to draw distinctions like these between reports of normative and non-normative actions.[293]

Mālik's reliance in the praxis chapters upon the statements and actions of prominent Medinese persons of knowledge such as ʿUrwa ibn al-Zubayr, al-Qāsim ibn Muḥammad, al-Zuhrī, and especially ʿAbd-Allāh ibn ʿUmar indicates the high esteem in which he held them. It mirrors his esteem for his Medinese predecessors as expressed in his letter to al-Layth ibn Saʿd, which expresses Mālik's belief in their authority by virtue of their close adherence to the Prophet's example and their unique access to Medina's legacy of knowledge, unmatched, in Mālik's view, by the scholars of any other city.[294] Mālik illustrates this legacy in some of the praxis chapters. In the chapter on how to sit while performing the ritual prayer, Mālik cites post-Prophetic reports portraying Ibn ʿUmar as a conscious guardian of Medinese praxis. The chapter concludes with a report in which al-Qāsim ibn Muḥammad teaches people how to sit while performing the prayer. Al-Qāsim states specifically that Ibn ʿUmar taught him to sit in that fashion and told him it was the practice of his father, ʿUmar ibn al-Khaṭṭāb.[295]

Two praxis chapters presented illustrations of mixed praxis, types of Medinese praxis in which there was more than one way of doing something. In the chapter on wiping over footwear (*masḥ*), Mālik cites reports that indicate two ways of performing the wiping. He then states which of the two he prefers. The praxis in this case lay beyond the purview of the Medinese judiciary, which helps explain its local diversity. Mālik indicates similarly that there were two opinions on the installment periods for indemnity payments. As before, he gives his preference. The praxis for indemnities, however, did fall under the jurisdiction of the Medinese judges. It is not unreasonable to presume that some of them preferred one

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[292] See Abd-Allah, "*ʿAmal*," 668–72.
[293] See Abd-Allah, "*ʿAmal*," 436–48.
[294] See Abd-Allah, "*ʿAmal*," 316–17.
[295] See Abd-Allah, "*ʿAmal*," 656–58.

installment period, and others preferred the other or alternated among them according to the circumstances of each particular case.[296]

I noted two examples of analogical reasoning the praxis chapters. The first was the case of shared-profit farm labor contracts (*al-musāqāh*), in which the analogue was taken from Medinese praxis in the gold and silver trade.[297] The second was the analogy Mālik draws between the newborn sacrifice (*al-ʿaqīqa*) and other types of ritual sacrifice.[298] Both are examples of Mālik's distinctive mode of analogical reasoning based on established precepts of law.[299]

[296] See Abd-Allah, "*ʿAmal*," 676–77.
[297] Abd-Allah, "*ʿAmal*," 618–22.
[298] Abd-Allah, "*ʿAmal*," 668–72.
[299] Abd-Allah, "*ʿAmal*," 226–34.

CHAPTER NINE

AMR-TERMS SUPPORTED BY LOCAL CONSENSUS

General Observations

Mālik uses a variety of *amr*-terms in the *Muwaṭṭa'* to stand for Medinese consensus and praxis. I divide them into two major divisions: 1) those that explicitly indicate total Medinese consensus by stating that there was no dissent about them among the Medinese jurists and 2) those referring only to concurrence (*ijtimā'*) without explicit denial of local dissent. The two most common examples of the first division are the terms AMN-X (the agreed precept without dissent among us; *al-amr al-mujtama' 'alayhi 'indanā wa al-ladhī lā ikhtilāf fihi*) and A-XN (the precept without dissent among us; *al-amr al-ladhī lā ikhtilāf fihi 'indanā*). AMN-X occurs seven times in the *Muwaṭṭa'*. In four instances, it occurs with the expression *ådIb* (this is what I found the people of knowledge in our city following; *wa 'alā hādhā adraktu ahl al-'ilm bi-baladinā*). The expression A-XN occurs twenty-four times in the *Muwaṭṭa'*. It occurs twelve times by itself and another twelve times with slight changes in wording or in various combinations with other terms.[1]

The most common example of the second category of concurrence without explicit denials of dissent is the term AMN (the agreed precept among us; *al-amr al-mujtama' 'alayhi 'indanā*).[2] It occurs forty-nine times in the *Muwaṭṭa'*, forty-three times by itself and six times in various combinations. AMN is the second most common term in the *Muwaṭṭa'*, the most common being AN (the precept among us; *al-amr 'indanā*), which is discussed in the next chapter. The expression *-zĀIb* (this is the precept that the people of knowledge among us still continue to follow; *wa hādhā al-amr al-ladhī lam yazal 'alayhi ahl al-'ilm 'indanā*), which was discussed earlier, also apparently stands for Medinese consensus and is similar to the *amr*-terms that give specific indication of consensus.[3]

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[1] For an index of these references in the *Muwaṭṭa'*, see Abd-Allah, "*'Amal*," appendix 2.
[2] For the index of AMN terms, see Abd-Allah, "*'Amal*," appendix 2.
[3] See Abd-Allah, "*'Amal*," 583–85.

The distinction I make between the two categories of *amr*-terms indicating consensus is not definitive. In Mālik's mind, AMN-X, A-XN, and AMN may have been synonymous. As we have seen, his definition of AMN in the report of Ibn Abī Uways identifies it with complete local consensus.[4] But the semantic difference in wording between the two categories deserves special attention. The term AN gives no semantic indication of consensus, and study of the term in context demonstrates its link with matters of local dissent. It is reasonable to presume that the semantic difference in AMN is also meaningful. As indicated earlier, al-Shāfiʿī identified both AMN and AN as lacking the complete consensus of the Medinese jurists.[5] In confirmation of his contention, I have found evidence of AMN precepts about which the scholars of Medina apparently disagreed.[6]

Examples of *Amr*-Terms Indicating Consensus

1. *AMN: Using a Magian's Hunting Dogs*

> Mālik states the AMN that the catch which a Muslim hunter procures by using the hunting dogs of a Magian is permissible to eat (*ḥalāl*), even if the dogs kill the catch before the hunter can reach and slaughter it. Mālik states that this ruling is analogous (*wa innamā mathal dhālika*) to a Muslim's using a Magian's knife to slaughter an animal or his bow and arrow to hunt with. Mālik observes that the catch of a Magian hunter who uses a Muslim's trained hunting dogs is not permissible for a Muslim to eat unless the latter apprehends the catch before it dies and slaughters it properly. Mālik states that this second ruling is analogous (*wa innamā mathal dhālika*) to a Magian's using a Muslim's knife to slaughter an animal or using his bow and arrow to hunt with.[7]

This precept occurs in the transmissions of Yaḥyā, Abū Muṣʿab, and Ibn Ziyād. The AMN term occurs in each of these recensions. Mālik's analogy between this precept and a Magian's using a Muslim's knife or bow also occurs in them all. Abū Muṣʿab and Yaḥyā use the same expression for Mālik's analogy (*wa innamā mathal dhālika*). Ibn Ziyād uses instead the expression that it "has the same status" (*bi-manzilat*) for the analogy.[8]

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[4] See Abd-Allah, "*ʿAmal*," 540–43.

[5] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 202–03, 267; al-Shāfiʿī, *al-Risāla*, 531–32.

[6] See Abd-Allah, "*ʿAmal*," 424–28, 723–25.

[7] *Muw.*, 2:494; *Muw.* (Dār al-Gharb), 1:638; Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:293; *Muw.* (Abū Muṣʿab), 1:196–97; *Muw.* (Ibn Ziyād), 198–224; *Muw.* (*Riwāyāt*), 3:123–27.

[8] *Muw.*, 2:494; *Muw.* (Dār al-Gharb), 1:638; Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:293; *Muw.* (Abū Muṣʿab), 1:196–97; *Muw.* (Ibn Ziyād), 198–224; *Muw.* (*Riwāyāt*), 3:123–27.

Both expressions are commonly used to refer to legal analogies in the *Muwaṭṭa'* and the *Mudawwana*.[9] The precept does not occur in the recensions of al-Qaʿnabī or Suwayd. Mālik's analogy did not originate with him but seems to have been a familiar standard legal analogy for this case. Post-Prophetic reports from Saʿīd ibn al-Musayyab, for example, show him using the same analogy which Mālik cites in the *Muwaṭṭa'* in upholding this precept.[10]

The precept occurs in the *Mudawwana* but without the citation of Mālik's terms. Saḥnūn asks Ibn al-Qāsim about the validity of a Muslim hunting with a dog that a Magian has trained. He is assured that Mālik regarded the game the Muslim takes with the Magian's dog as permissible, and Saḥnūn verifies further through Ibn al-Qāsim that this was indeed Mālik's opinion. Saḥnūn then asks about animals caught in traps and is informed that they must be apprehended before they die.[11]

Ibn ʿAbd al-Barr states that there was no difference of opinion among the jurists regarding the fact that the meat Magians sacrificed or the game they killed was not permissible to Muslims just as it was not permissible for Muslims to marry Magian women.[12] Al-Ḥasan al-Baṣrī regarded it as disliked (*makrūh*) for a Muslim to take game using a Magian's hunting dog, and a number of other early jurists shared this opinion. These included Jābir ibn ʿAbd-Allāh, ʿAṭā', Mujāhid, Ibrāhīm al-Nakhaʿī, al-Thawrī, and Ibn Rāhawayh. According to Ibn ʿAbd al-Barr and reports in Ibn Abī Shayba, their opinion was based on the Qurʾānic verse on hunting dogs (Qurʾān, 5:4), which is addressed to Muslims and speaks of the hunting dogs that they train. Since the verse does not address others who train hunting dogs, they regarded the use of such dogs as disliked (but not forbidden). They also rely on a *ḥadīth* according to which the Companions were prohibited from eating game taken by a Magian's hunting dog. It is reported that al-Ḥasan and Mujāhid disliked the consumption of game killed by a Christian's hunting dog on the same grounds. According to a contrary report in Ibn Abī Shayba, however, al-Ḥasan did not see any harm in using a dog trained by a Christian or Jew.[13] Most of the early jurists held that such game was permissible just as they regarded it permissible to hunt with a Magian's weapon. This was the opinion of Saʿīd ibn al-Musayyab, al-Zuhrī,

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[9] See Abd-Allah, "*ʿAmal*," 211–12; see above 146–47.

[10] Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:294; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:468; Ibn Abī Shayba, *al-Muṣannaf*, 4:242.

[11] *Mud.*, 1:418; *Mud.* (2002), 3:110–11.

[12] Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:294.

[13] Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:294–96; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:468–69; Ibn Abī Shayba, *al-Muṣannaf*, 4:242–43; Ibn Rushd, *Bidāya*, (Istiqāma), 1:448.

and ʿAṭāʾ. It was the opinion of Mālik, Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī, and al-Shāfiʿī. Like Mālik, they held that the dog is merely an instrument (*āla*) of slaughter.[14]

The dissenters regarded it as disliked (*makrūh*) that a Muslim eat the catch he procures by using a Magian's hunting dogs because the Qurʾānic verse on hunting dogs (Qurʾān, 5:4) was addressed to Muslim believers. In their view, the verse pertained specifically to dogs that Muslims had trained for hunting.[15] As Mālik's analogies in the text indicate, his AMN is predicated on the principle that trained hunting dogs are merely instruments of the hunt. The permissibility of the catch is determined by the religious affiliation of the hunter, not by the ownership of the instrument he uses.[16]

No explicit *ḥadīth*s support Mālik's AMN or the dissenting opinions. The ruling was apparently the exclusive product of legal interpretation (*ijtihād*). Mālik's allusion to analogies in the AMN's support is further indication of its root in considered opinion. The dissenting position of Jābir ibn ʿAbd-Allāh and other early jurists, according to Ibn Rushd, was based on their understanding of the implicit implications of the relevant Qurʾānic verse. If this Medinese AMN had its origin in the time of the Companion Jābir ibn ʿAbd-Allah, it presumably belonged to the category of old praxis (*al-ʿamal al-qadīm*), which was based on the legal interpretations of the Companions.[17] Mālik gives no indication in the *Muwaṭṭaʾ* of the ultimate source of this praxis. On the contrary, the information that he deems significant to communicate is that this precept, whatever its ultimate source, has the support of general Medinese concurrence (*ijtimāʿ*).

If the report is accurate that Jābir ibn ʿAbd-Allāh dissented regarding this AMN precept, his disagreement would constitute a significant difference of opinion in Medina. It is plausible that Jābir's dissenting opinion led Mālik to avoid claiming total consensus for this precept by denying any contrary opinions in Medina as in the terms AMN-X or A-XN. Mālik's AMN, in that case, would refer to a preponderant majority consensus of

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[14] Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:294–96; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:468; al-Ṭaḥāwī, *Mukhtaṣar*, 3:194; Ibn Rushd, *Bidāya*, (Istiqāma), 1:448.

[15] Ibn Rushd, *Bidāya*, (Istiqāma), 1:448; Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:294–96; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:468–69; Ibn Abī Shayba, *al-Muṣannaf*, 4:242–43; al-Ṭaḥāwī, *Ikhtilāf*, 59.

[16] See al-Bājī, *al-Muntaqā*, 3:127; al-Zurqānī, *Sharḥ*, 3:404; Ibn Rushd, *Bidāyah* (Istiqāma), 1:44.

[17] See Abd-Allah, "*ʿAmal*," 415–19.

the Medinese people of knowledge, excluding Jābir and anyone else in Medina who followed his opinion.

The analogies in this example are both instances of analogical reasoning based on related precepts of law, not on specific scriptural texts. As we have seen, basing analogies on precepts is a distinctive feature of Mālik's legal reasoning and continued to be espoused by the Mālikī school in later generations.[18] Mālik's wording in the *Muwaṭṭa'* clearly indicates that the Medinese AMN is undoubtedly valid because of the precept-based analogy he invokes. The nature of this AMN precept contrasts with Mālik's *sunna*-precepts. Not only does it appear clearly to be the product of legal interpretation (*ijtihād*) and not rest upon Prophetic authority, but it is analogous to related precepts of law in a manner that is inherently authoritative by force of analogy alone. The *sunna*-precepts derive their cogency strictly from Prophetic authority. As we have seen, Mālik's *sunna*-precepts predictably run contrary to analogy with related precepts. Because the *sunna*-precepts derive their validity from Prophetic authority and no other form of legal reasoning, however, Mālik's citation of them constitutes an implicit acknowledgement of the inherent authority of analogical reasoning. The presumption that seems to underlie Mālik's invocation of the *sunna* in such cases is that, were it not for the prerogative of Prophetic authority to override strict application of analogy, these exceptions would, indeed, have been overruled by their contrary relevant analogies. In drawing exception to analogies, Mālik's *sunna*-terms indicate simulataneously the authority of the *sunna* as well as the dominant jurisdiction of legal analogy in his thought.

2. *AMN: Taking the Testimony of Minors*

> Mālik cites a post-Prophetic report that ʿAbd-Allāh ibn al-Zubayr used to hand down legal judgments on the basis of the testimony of minors (*ṣibyān*) regarding injuries and wounds they received from fighting with each other. Mālik states it is the AMN that the testimony of minors is permissible when they inflict wounds and injuries upon each other. Their testimony must be taken before they break up or have the opportunity to speak with adults, who might intimidate them or instruct them to give false witness. The testimony of minors is not permissible in other matters. Mālik adds that the testimony of minors under such circumstances is valid if they give it to reliable (*ʿudūl*) adult witnesses before breaking up.[19]

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[18] See Abd-Allah, "*ʿAmal*," 226–34.

[19] *Muw.*, 2:726.

This precept occurs in the recensions of Yaḥyā, Abū Muṣʿab, and Suwayd. Each of them cites the same AMN term with slight textual differences.[20] The precept does not occur in the transmissions of al-Qaʿnabī or Ibn Ziyād.

Saḥnūn treats this precept in the *Mudawwana* and adds important details. He cites Ibn al-Qāsim as explaining that the procedure pertains to wounds and death if witnessed by two or more minors before they separate and have the opportunity to speak to adults. He notes that the witness of a single minor in this case is not adequate nor the witness of women in conjunction with them. Saḥnūn's treatment reflects the preoccupation of the *Mudawwana* with fleshing out detailed legal interpretations, including questions such as accepting the witness formally registered from minors if they reaffirm it after maturity and the acceptance of the testimony of slaves after emancipation or of Christians after becoming Muslims. Saḥnūn substantiates Mālik's opinion regarding the precept by stating that many of his major students including Ashhab supported it. He notes, however, that there was internal Medinese dissent regarding the validity of accepting the witness of women and minors in cases of murder and involuntary manslaughter.[21]

Ibn ʿAbd al-Barr transmits from ʿAbd al-Malik (presumably the Andalusian jurist ʿAbd al-Malik ibn Ḥabīb) that he described this precept as being in continuity with the precept of the people from earliest period and a matter of concurrence according to the opinions of our followers [of the Medinese tradition] (*lam yazal min amr al-nās qadīman wa hūwa mujtamaʿ ʿalayhī min raʾy aṣḥābinā*).[22] I found no similar terminological expressions on the precept in the *Mudawwana*. Saḥnūn transmits from Ibn Wahb that ʿAlī, Shurayḥ, Ibn ʿUmar, ʿUrwa, Ibn Qusayṭ, Abū Bakr ibn Ḥazm, and Rabīʿat al-Raʾy upheld the validity of this precept. He transmits through Ibn Mahdī that Ibrāhīm al-Nakhaʿī and al-Ḥasan al-Baṣrī also endorsed this process. Abū al-Zinād claimed that it was a *sunna*, and ʿUmar ibn ʿAbd al-ʿAzīz held the same position based on a *ḥadīth* of Ibn Wahb.[23]

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[20] *Muw.*, 2:726; *Muw.* (Dār al-Gharb), 2:268–69; Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:77; *Muw.* (Abū Muṣʿab), 2:477–78; *Muw.* (Suwayd), 232–33; *Muw.* (*Rīwāyāt*), 3:538.

[21] *Mud.*, 4:84–85, 80; *Mud.* (2002), 4:23–26; 8–9.

[22] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:77.

[23] *Mud.*, 4:85; *Mud.* (2002), 4:25–26; cf. ʿAbd al-Razzāq, *al-Muṣannaf*, 8:351; Ibn Abī Shayba, *al-Muṣannaf*, 4:364.

This precept constituted a point of extensive dissent. Outside the jurists of Medina, most early Muslim legists held that the testimony of minors was never admissible under any circumstances. The Kufan jurists Abū Ḥanīfa and Sufyān al-Thawrī were among those who upheld the dissenting view in this case.[24] It is reported, however, that ʿAlī applied it on the grounds that the minors' testimony be taken immediately before they were allowed to break up or speak with their families. Saʿīd ibn al-Musayyab, ʿUrwa, Muḥammad al-Bāqir, al-Shaʿbī, Ibn Abī Laylā, al-Zuhrī, and Ibrāhīm al-Nakhaʿī supported the precept, although there is difference of opinion about the consistency of the latter.[25] Ibn ʿAbbās did not support this precept or allow for its application. Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī, Sufyān al-Thawrī, and al-Shāfiʿī regarded the precept as invalid even if the testimony of the minors were taken before they had the opportunity to break up.[26] Shurayḥ, al-Shaʿbī, Ibn Abī Laylā, al-Qāsim ibn Muḥammad, Makḥūl, al-Ḥasan al-Baṣrī, Ibn Ḥanbal, Ibn Rāhawayh, Abū Thawr, and a number of other jurists held, however, that the testimony of the minors should be recorded and preserved until the time of their maturity. After having reached maturity, they were required to validate or repudiate their earlier testimony.[27]

Al-Rasīnī cites this precept as an example of an AMN regarding which there had been differences of opinion in Medina. He contends, as is also indicated above, that al-Qāsim ibn Muḥammad did not agree with this precept, citing a report that he did not regard the testimony of minors as acceptable.[28] The evidence al-Rasīnī gives, however, is not conclusive. The general language of al-Qāsim's opinion appears to pertain to the normative precept, mentioned in Mālik's text and upheld by the Medinese and non-Medinese alike, that the testimony of minors is not generally admissible. More explicit information from al-Qāsim is required to determine whether he actually dissented regarding the AMN and would not allow the testimony of minors as a special provision in the case of wounds they inflict upon each other when fighting.

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[24] Al-Ṭaḥāwī, *Mukhtaṣar*, 3:337–38; al-Zurqānī, *Sharḥ*, 4:387; see also al-Bājī, *al-Muntaqā*, 5:229 and Ibn Rushd, *Bidāya*, 2:279.

[25] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:79; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:350–51; Ibn Abī Shayba, *al-Muṣannaf*, 4:364; al-Ṭaḥāwī, *Mukhtaṣar*, 3:337–38.

[26] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:79–80; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:348–49; Ibn Abī Shayba, *al-Muṣannaf*, 4:364; al-Ṭaḥāwī, *Mukhtaṣar*, 3:337–38.

[27] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:80–81; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:350; Ibn Abī Shayba, *al-Muṣannaf*, 4:364; al-Ṭaḥāwī, *Mukhtaṣar*, 3:337–38.

[28] Al-Rasīnī, "*Fiqh*," 415; see Abd-Allah, "*ʿAmal*," 70, note 2.

Several reports substantiate the widespread agreement of the Medinese jurists on this special AMN provision for the testimony of minors. Mālik himself cites that ʿAbd-Allāh ibn al-Zubayr applied the AMN as a rule of law. Saḥnūn cites a report from Ibn Wahb, according to which ʿAlī ibn Abī Ṭālib, ʿAbd-Allāh ibn ʿUmar, Ibn Qusayṭ, Abū Bakr ibn Ḥazm, and Rabīʿat al-Raʾy upheld this precept as well as the early Iraqi judge Shurayḥ ibn al-Ḥārith al-Kindī (d. 78/697), who was famed for his legendary wisdom. Saḥnūn notes interestingly that Abū al-Zinād ibn Dhakwān and ʿUmar ibn ʿAbd al-ʿAzīz regarded this precept as a *sunna*.[29] It is also reported that Saʿīd ibn al-Musayyab, ʿUrwa ibn al-Zubayr, and al-Zuhrī held the ruling to be valid as well as the caliph Muʿāwiya and the prominent non-Medinese jurists al-Shaʿbī, Ibn Abī Laylā, and Ibrāhīm al-Nakhaʿī. The Companion Ibn ʿAbbās is also said to have agreed with the precept.[30]

The ultimate source of this praxis is unclear. Although Abū al-Zinād and ʿUmar ibn ʿAbd al-ʿAzīz regarded it as a *sunna*, they seem to have stood alone in that claim. Saḥnūn gives no indication of the basis of their claim. None of the sources I consulted cites any *ḥadīth*s in support of this precept. It is noteworthy, however, that their report invokes the authority of the *sunna* to uphold a non-analogical precept, which is typical of Mālik's use of *sunna*-terms. The noted Meccan jurist and scholar, ʿAbd al-Malik ibn Jurayj (d. 150 or 151/767 or 768) asserted that no jurist held to the validity of the AMN prior to ʿAbd-Allāh ibn al-Zubayr's application of it.[31]

This AMN is likely an instance of the legal interpretation of the Medinese Companions, making it an example of old praxis (*al-ʿamal al-qadīm*). Ibn Rushd holds it to be an illustration of Medinese application of the principle of the unstated good (*al-maṣāliḥ al-mursala*). If he is accurate, there would have been no scriptural texts for the ruling.[32] He contends that the Medinese did not regard the testimony of minors in injuries from fighting to be actual testimony (*ḥaqīqa*). It was rather a type of circumstantial evidence (*qarīnat ḥāl*). Ibn Rushd draws attention to Mālik's stipulation in the AMN that the testimony of the minors must be taken before they split up or receive the advice of adults. If their testimony constituted real legal testimony in its own right, there would be no reason for making this stipulation.[33] As indicated earlier in discussion of the unstated good

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[29] *Mud.*, 4:84–85.

[30] Al-Zurqānī, *Sharḥ*, 4: 387; al-Bājī, *al-Muntaqā*, 5: 229; cf. al-Ṭaḥāwī, *Mukhtaṣar*, 3:337–38.

[31] Al-Bājī, *al-Muntaqā*, 5: 229.

[32] See Abd-Allah, "*Amal*," 268–79; by definition, the unstated good applies to areas where the good it legislates is not specifically stated in scriptural texts.

[33] Ibn Rushd, *Bidāya*, 2:279; cf. al-Shāṭibī, *al-Iʿtiṣām*, 2:254.

(*al-maṣāliḥ al-mursala*), Mālikī jurists accepted circumstantial evidence on its basis. As will be seen, Mālik himself accepts circumstantial evidence in the case of collective oaths (*al-qasāma*) on the basis of the general good (*al-maṣlaḥa*).[34]

Al-Bājī highlights the general good (*al-maṣlaḥa*) that he believes is the foundation of this AMN. He points out that minors usually associate with their peers to the exclusion of adults when they play. Furthermore, minors may often engage in types of play and other activities that bring injury upon themselves and, in some cases, even death. If the stipulation were made that the testimony of worthy adults were the only acceptable evidence in cases of injuries to minors, it would become virtually impossible to establish liability in such cases and to award due legal compensation to the injured parties.[35]

Mālik's AMN is a good example of the general paucity of legal *ḥadīth*s as compared to the extensiveness of essential legal doctrine. As Mālik himself and other sources indicate, the testimony of minors in injuries they inflict upon each other was an issue of intense and widespread dissent. It was a critical legal matter directly related to the general good and allocation of potentially large indemnities. Nevertheless, no *ḥadīth*s existed on this issue.

This precept runs contrary to analogy in a manner similar to Mālik's *sunna*-precepts. Although some early juristic authorities regarded it as a *sunna*, Mālik does not classify it that way in the *Muwaṭṭa'*. It lacks the authority of the *sunna* to draw exception to standard analogies. It draws exception, however, through the mandate of the general good (*al-maṣlaḥa*) through application of the principle of the unstated good (*al-maṣāliḥ al-mursala*). The prerogative of this precept to draw exception to the general rule in a manner tantamount to the *sunna* demonstrates the authority of the general good in Mālik's mind and the legal tradition of Medina.

3. *AMN: The Inheritance of an Unknown Son*

> Yaḥyā ibn Yaḥyā states he heard Mālik say it was the AMN that if a man who has more than one son and informs one of them before he dies that a certain person is his [unknown] son, the testimony of that single son will not be sufficient to establish the kinship relation of the newly claimed son to the father [such that he would become a fully legitimate heir]. Nevertheless, the newly claimed son shall receive his proportion of inheritance from the

[34] See Abd-Allah, "*'Amal*," 713–23.
[35] al-Bājī, *al-Muntaqā*, 5:229.

> lot of his legitimate brother who gave testimony in support of his parentage. Mālik gives the example of a man who dies, leaving only two legitimate sons as legal heirs with an estate of six hundred pieces of gold. Customarily, each son would receive three hundred pieces of gold. If one of the two sons gives testimony affirming the birthright of a third, unknown son, the son making the testimony receives only two hundred gold pieces. His unknown brother would receive one hundred pieces taken from the legitimate son's original portion. The second legitimate son, who did not confirm the testimony, receives his original allotment of three hundred pieces of gold. Mālik adds that this ruling is analogous to (*bi-manzilat*) a woman who claims that her deceased father or husband owed a debt in the absence of contrary evidence from her father's other legitimate heirs. The woman pays the creditor the proportion of his debt that corresponds to her proportion of the overall inheritance.[36]

This precept occurs in the recensions of Yaḥyā and Abū Muṣʿab. Both transmissions cite the AMN and mention Mālik's analogy to a woman claiming that her deceased father owed a debt, using the same language for the analogy.[37] Suwayd does not transmit this chapter *per se* but produces the same material which Yaḥyā transmits just before it regarding attribution of paternity.[38] The precept does not occur in the recensions of al-Qaʿnabī or Ibn Ziyād either. I did not find discussion of this precept in the *Mudawwana*.[39]

In contrast to the *sunna*-terms, this AMN conforms to the general analogical pattern of Mālik's legal reasoning. Most examples of the *amr*-terms indicating consensus reflect Mālik's distinctive method of drawing legal analogies on the basis of established precepts of law. This example is especially illustrative. Its basis is rooted in legal interpretation (*ijtihād*) with no apparent scriptural referents. Presumably the precept of the woman's testimony on outstanding debts constituted the analogue of Mālik's AMN precept on unknown sons—not because one precept was more cogent than the other—but because the precedent of the woman's testimony was older and had been incorporated into Medinese praxis at an earlier time.

Mālik's AMN constituted a point of difference between the Medinese and Kufans. The latter held that the legitimate brother giving testimony on behalf of the unknown son's birthright must divide half of his share

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[36] *Muw.*, 2:741–42; *Muw.* (Dār al-Gharb), 2:285–86; Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:196; *Muw.* (Abū Muṣʿab), 2:465–66; *Muw.* (*Riwāyāt*), 3:564–65.

[37] *Muw.*, 2:741–42; *Muw.* (Dār al-Gharb), 2:285–86; Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:196; *Muw.* (Abū Muṣʿab), 2:465–66; *Muw.* (*Riwāyāt*), 3:564–65.

[38] *Muw.* (Suwayd), 224–25.

[39] *Mud.*, 4:69–79; *Mud.* (2002), 8:481–512.

of inheritance (making one hundred and fifty pieces of gold instead of one hundred) with the unknown brother, not a third as in the Medinese position. Like the Medinese, the Kufans held that any other legitimate brothers not giving supporting testimony would receive their original inheritance portions undiminished, as long as no binding evidence was produced to establish the unknown son's birthright.[40]

The jurists agree that the kinship relation of an unknown brother can only be legally established if affirmed by two brothers or all the heirs. Their dissenting positions are not about the validity of the kinship tie but what rights may be due on an heir who affirms that connection while the others do not affirm it.[41] Mālik's opinion as set forth in this precept is regarded as standard, namely that the person affirming the kinship relation is not held responsible for more than his portion of the inheritance that would have been due just as would have been the case with acknowledging a debt. They generally ascribe to the validity of this analogy. Ibn Ḥanbal held an opinion similar to that of Mālik on this question.[42] Ibn ʿAbd al-Barr states that the Kufans dissented regarding this precept and held that a brother affirming his father's paternity of an unknown brother must give him half of his estate. Al-Shāfiʿī held that the brother making the affirmation is not required to give him a share of his estate because the unknown brother's kinship relation cannot be established by the brother's lone testimony. He may, however, allow him to share in his inheritance if he likes. There are differences of opinion about al-Shāfiʿī's adhering consistently to this opinion. Al-Layth ibn Saʿd is said to have held a position similar to that of al-Shāfiʿī.[43]

ʿUthmān ibn Kināna (d. ca. 185/ ca. 801), one of Mālik's most prominent students and his successor after his death as the head of the Medinese school, agreed with the Kufan practice and not with Mālik's AMN as stated in the *Muwaṭṭaʾ*. Al-Bājī and al-Zurqānī register Ibn Kināna's dissenting position but give no indication of whether he disagreed with Mālik during his lifetime or after Mālik's death.[44] If Ibn Kināna dissented during Mālik's lifetime, this AMN would be an interesting illustration of AMN as majority consensus. In this case, the dissenting voice would have been one of Mālik's students. Like Ibn Wahb, Ibn al-Qāsim, and other prominent

[40] See al-Bājī, *al-Muntaqā*, 6:17; al-Zurqānī, *Sharḥ*, 4:421.
[41] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:198.
[42] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:198.
[43] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:198–99.
[44] See al-Bājī, *al-Muntaqā*, 6:17; al-Zurqānī, *Sharḥ*, 4:421.

students of Mālik, Ibn Kināna had sufficient credentials during and after Mālik's life to engage in independent legal interpretation (*ijtihād*). If indeed Mālik's AMN refers here to Ibn Kināna's dissent, it would reflect the high regard in which he held his closest students. The dissenting position of Ibn Kināna from his teacher Mālik is an excellent illustration of the phenomenon Wael Hallaq has observed that during the formative period jurists even at the regional level enjoyed considerable personal freedom to dissent and were not bound to the opinions of their teachers or a particular Imām. As Hallaq further observes in this context, "regional schools" as monolithic bodies of localized legal practice and doctrine—after the manner that Schacht and others conceived of them—do not seem to have actually ever existed.[45]

Al-Layth ibn Saʿd reportedly disagreed with this AMN. His opinion was that the newly claimed unknown brother had no rights of inheritance from the father unless binding evidence were produced to establish his kinship. If the father claimed the unknown son on his deathbed, as in Mālik's example, al-Layth would only accept his testimony and give the unknown brother full inheritance rights if there were at least two acceptable witnesses.[46] Al-Layth's dissent is especially significant, since he describes himself in his letter to Mālik as one of the most astute followers of the Medinese legal tradition in matters upon which they had agreed (*fīmā ittafaqū ʿalayhi*), while reserving for himself the right to dissent with the Medinese in any legal opinion in which they themselves disagreed.[47]

None of my sources cites any *ḥadīth*s to support this AMN or any of the contrary opinions of dissenting jurists. The AMN appears to have been an instance of praxis resulting from later Medinese legal interpretation (*ijtihād*). Again, this inference is strengthened by Mālik's resorting to analogy to support the AMN's validity. There is no indication when this legal interpretation was made. As indicated earlier, it is plausible that the AMN's analogue regarding the woman heir who brings one of her deceased father's debts to light was historically prior in Medinese praxis, since Mālik refers to it in support of the present precept. Characteristically, Mālik does not show particular concern in communicating the origin of the AMN but rather the fact that it was supported by the concurrence (*ijtimāʿ*) of the Medinese scholars. In this case, again, they appear to have been a majority

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45 Seev Hallaq, "Regional Schools?," 1–26, Melchert, "Traditionist-Jurisprudents," 400.
46 See al-Bājī, *al-Muntaqā*, 6:17; al-Zurqānī, *Sharḥ*, 4:421.
47 See Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3: 95; Abd-Allah, "*ʿAmal*," 322–23.

with a dissenting local minority. As before, this precept conforms to the pattern of the general paucity of legal *ḥadīth*s.

4. *AMN and A-XN: Permission to Alter Bequests Other than Deferred Manumission* (Tadbīr)

> Mālik cites the *ḥadīth*, "No Muslim possessing anything in which he makes a bequest (*waṣiyya*) has the right to pass two nights pass without the bequest being put in writing and kept in his possession." Mālik states it is the AMN that a person may alter whatever he likes in his bequest during his lifetime whether in times of health or illness, including the emancipation of slaves. He may [later] discard the bequest altogether or alter it as he sees fit, except in the case of deferred manumission (*tadbīr*).[48] The stipulation of deferred manumission, once given, may never be altered or revoked. Mālik explains the precept by reference to the preceding *ḥadīth*, which stipulates that bequests be put in writing without delay. Mālik reasons that, if it were not possible for the maker of a bequest to alter it, it would necessarily follow that the property entailed in the bequest be impounded (*maḥbūs*) such that it could not be sold or given away at the time that the bequest was made. This is not so except in the case of deferred manumission. Mālik then states that it is the A-XN that the maker of a bequest may change whatever he wants in the bequest except for deferred manumission.[49]

This precept occurs in the recensions of Yaḥyā and Abū Muṣʿab. Both cite the same AMN and A-XN terms.[50] Suwayd transmits the same material with a longer title and begins with the same *ḥadīth* about putting bequests down in writing. He does not transmit Mālik's discussion of the precept or his citation of terms. Suwayd includes a post-Prophetic report that Ibn ʿUmar directed a rich young man to make a bequest for the benefit of

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[48] "Deferred manumission" (*tadbīr*) is a type of irrevocable manumission that is classified as a binding, irrevocable contractual agreement by which a master promises a slave, who is subsequently referred to as a *mudabbar* (a slave to be manumitted belatedly), that he or she will be set free upon the master's death. Deferred manumission is regarded as an exceptional bequest. Like other bequests it pertains to the disposition of the master's property (of which the slave was a legal part) after the owner's death. Like other property under bequest, it exempted the manumitted slave from inheritance by legal heirs. Consonant with other types of bequests, deferred manumission could only be applied to slaves who, in the aggregate, constituted one third or less of the master's total estate. On the other hand, deferred manumission was an exceptional type of bequest in that it could not be revoked; in that regard, it was in keeping with other types of manumission that were perpetually binding. See *Muw.*, 2:814; Ibn Rushd, *Bidāya*, (Istiqāma), 2:381–85.

[49] *Muw.*, 2:761; *Muw.* (Dār al-Gharb), 2:309–10; Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:21; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:247; *Muw.* (Abū Muṣʿab), 2:505–06; *Muw.* (*Riwāyāt*), 4:7–8.

[50] *Muw.*, 2:761; *Muw.* (Dār al-Gharb), 2:309–10; Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:21; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:247; *Muw.* (Abū Muṣʿab), 2:505–06; *Muw.* (*Riwāyāt*), 4:7–8.

a female paternal cousin, since all of his heirs lived far away in Greater Syria. He ends with the unusual term AM (*al-amr al-mujtamaʿ ʿalayhī*) that a person of weak intellect or similar legal disabilities who has clarity or intermittently regains consciousness is allowed to make a bequest if they understand what they are doing at the time. In the transmissions of Yaḥyā and Abū Muṣʿab, this AM occurs as the normal term AMN but is put in the next chapter.[51] The precept does not occur in the recensions of al-Qaʿnabī or Ibn Ziyād as they presently stand.

Saḥnūn transmits in the *Mudawwana* much of the same information as Mālik transmits in this chapter in the *Muwaṭṭaʾ*. As is often the case, the chapter elaborates beyond the core precept by giving details of legal interpretation. Saḥnūn cites Mālik as stating that it is the AMN that bequests may be changed or annulled completely. He then cites the *ḥadīth* with which Mālik begins the chapter.[52] Saḥnūn produces supporting documentation from Ibn Wahb showing that Abū Bakr ibn Ḥazm, Yaḥyā ibn Saʿīd, Ibn Qusayṭ, Ibn Hurmuz, and al-Zuhrī endorsed Mālik's precept. He cites Ibn Qusayṭ and Yaḥyā ibn Saʿīd as stating that "the juridical ruling of the people" (*qaḍāʾ al-nās*) is in accord with the precept. Saḥnūn adds materials from Mālik about deferred manumission (*tadbīr*) being exceptional in this regard in that it cannot be reversed.[53]

There was widespread agreement among the early jurists on the precept that bequests may be altered or discarded during one's lifetime but that the stipulation of deferred manumission cannot be altered. The slave manumitted by deferment was impounded in the sense that he or she could not be sold, given away as a gift, inherited, or otherwise transferred once the stipulation had been made. Al-Zurqānī states that the preponderant majority (*al-jumhūr*) of the early jurists of the Hijaz, Syria, and Kufa held this position.[54] Ibn ʿAbd al-Barr cites that this precept is a matter of general concurrence (*mujtamaʿ ʿalayhi*) except for the point relating to deferred manumission. Some jurists held that promises of deferred manumission could be rescinded and such slaves could be sold. Those who held that slaves under deferred manumission could be sold also held that bequests involving deffered manumission could be altered.[55] Mālik, Abū Ḥanīfa, their followers, al-Thawrī, al-Awzāʿī, and other early jurists held

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[51] *Muw.* (Suwayd), 245–46; cf. *Muw.*, 762; *Muw.* (Abū Muṣʿab), 2:507.
[52] *Mud.*, 4:282–83; *Mud.* (2002), 10:128–32.
[53] *Mud.*, 4:282–83, 298–99; *Mud.* (2002), 10:128–32; 178–80.
[54] Al-Zurqānī, *Sharḥ*, 5: 75.
[55] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:21–22; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:246.

that promises of deferred manumission could not be changed and that bequests involving such promises could not be altered. Ibn ʿUmar, Ibn al-Musayyab, Ibrāhīm al-Nakhaʿī, and al-Zuhrī are said to have disliked the act of selling a slave under promise of deferred manumission.[56] Jābir ibn ʿAbd-Allāh, Mujāhid, ʿAṭāʾ, Ṭāwus, a number of other Successors, al-Shāfiʿī, Ibn Ḥanbal, and Ibn Rāhawayh held that the promise of deferred manumission could be altered.[57] There is an authentically transmitted *ḥadīth* to the effect that the Prophet sold a slave under deferred manumission. A post-Prophetic report transmits similar information from ʿĀʾisha.[58]

Al-Zurqānī does not give details about the dissenting jurists who did not belong to this early preponderant majority. Al-Awzāʿī, who did, of course, belong to Mālik's generation, is reported to have held that one could sell a slave manumitted by deferment to a person who intended to set him free.[59] In the generations after Mālik, al-Shāfiʿī, Ibn Ḥanbal, and the Ẓāhirīs registered their disagreement with this precept.

Abū Ḥanīfa was not fully in agreement with Mālik's AMN precept. Mālik draws a distinction between deferred manumission and other types of bequests, which might also involve other types of manumission which Mālik did not regard as falling under the definition of deferred manumission. Mālik's distinction between deferred manumission and bequests involving other types of manumission is indicated in the wording of his AMN when he refers to bequests that entail manumission but may be altered.[60] Many early jurists agreed with Abū Ḥanīfa's position that no such distinction could be drawn between deferred manumission and any other types of emancipation stipulated in bequests.[61]

It appears from Mālik's discussion of this AMN that he regarded it as transmissional praxis. He observes from the *ḥadīth* cited at the beginning of the chapter that the Prophet required makers of bequests to put them

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[56] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:22; cf. al-Ṭaḥāwī, *Ikhtilāf*, 47–48.

[57] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:22; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:247–48; cf. Ibn Abī Shayba, *al-Muṣannaf*, 6:219.

[58] Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:248; Ibn Rushd, *Bidāya* (Istiqāma), 2:383. Al-Ṭaḥāwī also transmits a *ḥadīth* according to which a Companion freed a slave on the basis of deferred manumission but later needed to sell the slave to meet the Companion's dire financial need. The Prophet asked another Companion to purchase the manumitted slave, give the money to his former owner to meet his need, and presumably keep the slave under the contract of deferred manumission as with the former owner. See al-Ṭaḥāwī, *Ikhtilāf*, 48.

[59] Al-Zurqānī, *Sharḥ*, 5:74–75.

[60] See Ibn Rushd, *Bidāya* (Istiqāma), 2:381; al-Bājī, *al-Muntaqā*, 7:45–47; al-Zurqānī, *Sharḥ*, 5:74–75.

[61] Ibn Rushd, *Bidāya* (Istiqāma), 2:381.

in writing as soon as possible. As a legal corollary of the Prophet's statement, Mālik reasons that ordinary bequests are readily open to alteration and revocation. If that were not the case, the legal consequence would have necessarily followed that all properties designated in bequests be impounded and restricted from being sold, given as gifts, or transferred through other means. In that case there would have been a parallel praxis of impoundment of bequest properties. Mālik indicates in another AMN pertaining to deferred manumission that no such praxis existed.[62]

In this AMN and A-XN, Mālik reasons on the basis of the absence of any contrary praxis restricting the disposal of bequest properties that the Prophet must have generally allowed bequests to be altered or revoked at will. The making and altering of bequests is a matter of general necessity (*ʿumūm al-balwā*), so the question of transferring bequest properties must have arisen at an early time. According to the understanding of ʿAbd al-Wahhāb and ʿIyāḍ, lack of praxis in Medina in certain matters falls within the category of transmissional praxis on the presumption that the absence of such praxis reflects the Prophet's deliberate omission (*tark*), since any contrary praxis would have been well-known if the Prophet had instituted it.[63] This seems to be the kind of reasoning that Mālik has in mind in this case. The Prophet insisted that all bequests be put in writing without delay. Hence, the designation of bequest properties must have been well known. It follows that the legal status of such properties would also have been well known and legally regulated, if the Prophet had required specific regulations. Just as existing praxis often falls under the category of general necessity (*ʿumūm al-balwā*), in this AMN and A-XN, the absence of praxis falls under general necessity, again calling to mind Ibn al-Qāsim's justification of Medinese praxis as a standard by which to judge authentic *ḥadīth*s when they imply a particular praxis, which never came to exist in Medina.[64]

In this example, the terms AMN and A-XN are cited in conjunction with the same precept. They appear to be synonymous. AMN, as indicated earlier, is an inclusive term and may include A-XN. The term A-XN, on the other hand, is exclusive and does not appear to overlap with AMN when the latter indicates majority and not total consensus. But the terms may not be identical in this example. The A-XN is straightforward. It simply states that all bequests may be altered or revoked except in the case of

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[62] *Muw.*, 2:814.
[63] See Abd-Allah, "*ʿAmal*," 410–15.
[64] See Abd-Allah, "*ʿAmal*," 180–81.

deferred manumission. The A-XN wording does not involve Mālik's complex definition of what does or does not fall within the purview of deferred manumission. The AMN, on the other hand, clearly pertains to Mālik's distinction between deferred manumission and other types of emancipation that may be stipulated in bequests but do not fall under the heading of deferred manumission. Abū Ḥanīfa would have agreed with the A-XN. He would not have agreed with the AMN. As we have seen, Abū Ḥanīfa regarded all bequests involving the emancipation of slaves to fall under the heading of deferred manumission.

Mālik's AMN in this example combines elements that are analogous with others that are not. The fundamental precept is analogous as regards types of bequests pertaining to emancipation that do not belong to the category of deferred manumission and are completely in keeping with the standard law of bequests. But the precept is contrary to analogy in its stipulation that deferred manumission, according to Mālik's definition of it, is exceptional and cannot be altered or revoked once it has been pronounced. Mālik regards deferred manumission to be contrary to analogy with general bequests only in this particular detail about their irrevocability. He indicates in his AMN on deferred manumission that the execution of deferred manumission after the master's death is done in the same manner as the execution of all other types of standing bequests.[65]

5. *AMN: Bequests to Free Jointly Owned Slaves*

> Mālik begins with a *ḥadīth* stating that anyone who frees his share of a jointly owned slave and has enough money to pay the slave's total emancipation will be required to pay his partners their shares for the slave [so that the slave may go free]. He stipulates that the values of the shares must be equitably determined. Each shareholder shall receive his due portion, and the slave will be emancipated by the master who initiated the manumission, [which gives him patronage rights (*walā'*) regarding the slave after he or she is freed]. If the person who first frees his share of the slave does not have sufficient money to compensate his partners, only his share of the slave shall be set free. Mālik states it is the AMN regarding a jointly owned slave one of whose masters bequeaths that his share of the slave shall be freed upon the master's death that only his share of the slave will be set free when the master dies. The remaining shares of the slave will not be freed against that master's estate unless the master himself had stipulated that. In that case, as many shares of the slave shall be bought out [from the other owners] as one-third of the deceased master's estate allows. The reason for this, Mālik

[65] *Muw.*, 2:814.

> explains, is that the estate of the deceased master—taken as a whole—ceases to be his property upon his death and devolves to his heirs, except for any specific bequests he made, [which may not exceed one-third of the total value of the estate]. Therefore, to emancipate the remaining shares of the slave from the master's estate would amount to freeing the slave from the property of the rightful heirs, who—Mālik notes—had not initiated the emancipation and, consequently, would receive no rights of patronage, which pertain solely to the initial emancipator. Mālik indicates that to free a slave at the expense of heirs would cause them detriment (*ḍarar*).[66]

This precept occurs in the recensions of Yaḥyā, Abū Muṣʿab, and Suwayd. The chapter is similar in all three transmissions. They all cite the AMN in generally the same format, although Suwayd—as is frequently the case—lacks the same chapter divisions.[67] The precept is missing from al-Qaʿnabī and the Ibn Ziyād fragment.

Saḥnūn relates the same precept from Mālik in the *Mudawwana*, although he gives no citation of terms from Mālik or others. He cites supporting evidence from Rabīʿat al-Raʾy, who based his opinion on a *ḥadīth* similar to the one with which Mālik opens this chapter in the *Muwaṭṭaʾ*. He cites other supporting evidence, including post-Prophetic reports from ʿUmar and Ibn ʿUmar. Saḥnūn asks questions relevant to legal interpretation of the precept in practice such as how it should be applied in the case of a person who is critically sick and understakes the emancipation of a jointly owned slave.[68]

Mālik and the majority of the jurists of the Hijaz and Iraq held that if a person emancipates part of a jointly owned slave, the slave must be completely freed and is not required to exert himself to pay for the remaining portions.[69] Ibn ʿAbd al-Barr clarifies that there was no dissent among the jurists that a person making partial emancipation of a slave is not held accountable for paying the remaining shares of his partners unless he has enough wealth to cover their portions. There was dissent, however, about whether or not the slave should be compelled to earn payment for the remaining portions, if the emancipator is unable to pay them. This dissent was based on differences in transmitted reports and the different opinions of the early jurists. A *ḥadīth* contrary to the one Mālik cites in the *Muwaṭṭaʾ* states, for example, that if the shareholder lacks sufficient

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[66] *Muw.*, 2:772–73.

[67] *Muw.*, 2:772–73; *Muw.* (Dār al-Gharb), Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:131; 2:323–24; *Muw.* (Abū Muṣʿab), 2:399–400; *Muw.* (Suwayd), 335–37; *Muw.* (*Riwāyāt*), 4:29–31.

[68] *Mud.*, 2:381–82; *Mud.* (2002), 5:305–07; cf. ʿAbd al-Razzāq, *al-Muṣannaf*, 9:149–50.

[69] Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:284–85, 288; Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:121.

wealth, the slave should work to earn payment for the remaining shares without undue difficulty being imposed upon him.[70]

Ibn ʿAbbās, al-Awzāʿī, Ibn Abī Laylā, al-Thawrī, Abū Yūsuf, al-Shaybānī, and others held that if a person freeing a jointly owned slave has sufficient wealth for his partner's shares, the slave is not required to exert himself to pay for the remaining portions. If he lacks sufficient wealth, the slave must work to pay off the remaining portions. The slave is technically free, however, from the time that the first portion is set free, although he is required to exert himself to repay the remaining shares.[71]

In the view of Abū Ḥanīfa, if a man with sufficient wealth emancipates a jointly owned slave, his partner is given the choice to share in the emancipation and the rights of patronage (*al-walāʾ*), or he may require the slave to exert himself to pay for the outstanding portion and still share the rights of patronage. He may also force his partner to pay the outstanding portion, and the partner may require the slave to pay him back. If the emancipator is poor, the partner may hold the slave responsible to earn payment for the remaining portion and share patronage rights, or he may free his portion and share such rights. Abū Ḥanīfa regarded the slave who was earning payment of the outstanding shares as tantamount to a contractually emancipated slave (*mukātab*) in all legal rulings pertaining to him. Zufar held that the entirety of the slave is set free against the partner who freed his share. The emancipator is required to pay back the partner's share whether he be rich or poor. Abū Ḥanīfa and Zufar did not follow either of the two *ḥadīth*s transmitted in this matter.[72] Abu Hanifa held that the slave is emancipated in proportion to the portion manumitted and then works (*siʿāya*) to earn the remainder of what is due, regardless of whether the master is wealthy or poor. Abū Yūsuf and al-Shaybānī went against him in this because they did not believe the slave should be required to work off his freedom for the unpaid portions. Most jurists agreed with their position.[73]

Ibn Ḥanbal followed the *ḥadīth* of Ibn ʿUmar and took a position similar to that of al-Shāfiʿī. If the emancipator has sufficient wealth, he is held liable to pay his partner. If he does not have adequate wealth, only that

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[70] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:118–20; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:278–82; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:150–52.

[71] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:123–24; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:284–87; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:149, 152–54.

[72] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:124; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:287; al-Ṭaḥāwī, *Sharḥ*, 2:478–79.

[73] Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:288; al-Ṭaḥāwī, *Sharḥ*, 2:479.

portion of the slave is emancipated that was technically set free. The slave remains part free and part slave and is not required to exert himself to earn his freedom.[74]

The Basran Successor Muḥammad ibn Sīrīn (d. 110/729) and Mālik's teacher Rabīʿat al-Raʾy both held irregular (*shādhdh*) opinions on this matter. Ibn Sīrīn contended that whenever a person who owns a slave jointly frees his share of the slave, the remaining shares of the slave shall be freed at the expense of the public treasury (*bayt al-māl*).[75] For Ibn Sīrīn, there would have been no question of the slave being freed at the expense of the master's heirs nor of the slave being freed from one-third of the master's estate, as stipulated in Mālik's AMN. Rabīʿa held, on the contrary, that it is invalid for a person to free his share of a jointly-owned slave without the consent of the other shareholders, because of the detriment (*ḍarar*) to the other shareholders that his action may cause. Rabīʿa also would have dissented on Mālik's AMN and have added the stipulation that the manumitting master may not make such an emancipation bequest without the prior consent of the other shareholders. However, Ibn Rushd doubts the authenticity of this report about Rabīʿa, using the expression "it has been said about Rabīʿa" (*qīla ʿan Rabīʿa*), which is customarily used in traditional Islamic texts to indicate the transmitter's uncertainty about the authority of the report he transmits.[76]

Al-Awzāʿī, Ibn Abī Laylā, Abū Yūsuf, al-Shaybānī, and the majority of Kufans are said to have held that the jointly-owned slave becomes free on the day that the initiating shareholder sets free his share of the slave. If the emancipator is financially unable to compensate his partners, the slave will still be set free, but the newly freed slave will be required to compensate the other shareholders from his or her earnings. The rights of patronage and clientship will go exclusively to the initial emancipator. Ibn Abī Laylā and certain other unspecified jurists also held that the slave could require the shareholder who initiated his emancipation to compensate him for his earnings, which he was required to pay out to the other shareholders, if the emancipator were financially solvable and capable of carrying the expenses.[77]

It may be inferred that al-Awzāʿī, Ibn Abī Laylā, Abū Yūsuf, al-Shaybānī, and the majority of Kufans would have dissented with Mālik's AMN, at

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74 Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:125.
75 Ibn Rushd, *Bidāya* (Istiqāma), 2:362; al-Zurqānī, *Sharḥ*, 5:6.
76 Ibn Rushd, *Bidāya* (Istiqāma), 2:360.
77 Ibn Rushd, *Bidāya* (Istiqāma), 2:360.

least the provision that the jointly-owned slave be declared completely emancipated upon the death of the initial emancipator and be required to compensate the other partners from his own earnings, if sufficient funds were lacking from the master's estate. Abū Ḥanīfa is reported to have held a similar position, although he, unlike the others, held that if the master who first freed his share of the slave had himself compensated the other shareholders from his private wealth, he could require the slave to exert himself and gain earnings through which to compensate the emancipator for his expenses as paid out to the partners.[78]

The source of Mālik's AMN is not evident. It is appended to a *ḥadīth*, but the provisions of the AMN are not explicit in the *ḥadīth*'s text. In Mālik's view, the AMN constitutes a logical legal corollary of the *ḥadīth*. The relevant stipulation in the *ḥadīth* is that a shareholder who frees his share of a jointly-owned slave shall not be required to compensate the other shareholders, if he lacks sufficient wealth to do so. (The Kufans argued that this stipulation was not part of the original *ḥadīth* text but was the personal commentary of Nāfiʿ, the *ḥadīth*'s transmitter, which became interpolated into the original wording.)[79] The AMN differs in that it pertains to the special case of a master freeing his share of a jointly owned slave as part of a bequest (*waṣiyya*).

According to the Islamic law of inheritance and bequests, the entirety of the deceased's estate immediately devolves to the property of his designated heirs, except for those parts of the estate that were specifically set aside as bequests on the condition that their total value not exceed one-third of the overall value of the estate. Mālik explains that, in effect, the master—no matter how wealthy he may have been during his lifetime—no longer possesses sufficient wealth to free the remaining shares of the slave unless he specifically designated such use of his wealth in the bequest and it falls within one-third of his estate.

It is not clear whether the legal corollary embodied in the AMN belonged to transmissional praxis or inference-based praxis resulting from post-Prophetic legal interpretation (*ijtihād*). Characteristically, Mālik gives no indication in the *Muwaṭṭaʾ* of the historical source of this Medinese precept. As before, his primary concern is the fact that the AMN is supported by the concurrence (*ijtimāʿ*) of the Medinese jurists. As in a number of similar cases, that concurrence in this case may well have been a

[78] Ibn Rushd, *Bidāya* (Istiqāma), 2:360.
[79] Ibn Rushd, *Bidāya* (Istiqāma), 2:361.

majoritarian and not a total consensus of the Medinese scholars, possibly excluding, for example, Mālik's teacher, the prominent Successor Rabīʿat al-Raʾy.

The AMN in this example is the direct consequence of the interplay of two well-established Medinese precepts of law: first, concerning the emancipation of jointly-owned slaves and, second, pertaining to the disposition of bequests. Mālik cites a similar AMN later in the *Muwaṭṭaʾ* which sets forth other corollaries regarding the emancipation of jointly-owned slaves when one of the shareholders initiates the slave's emancipation through a contract of contractual emancipation (*mukātaba*). The contractual emancipation AMN obliges all the other shareholders to make a similar contract without obliging the initial emancipator to compensate them.[80] The two AMNs are not strictly analogical, and no concrete analogies are drawn in them. Nevertheless, they are consistent with other well-established precepts of Medinese law and lack the exceptional and anomalous character of Mālik's *sunna*-precepts.

The paucity of legal *ḥadīth* is manifest in this example as in many before. A relevant solitary *ḥadīth* exists on the general topic but does not provide the detailed information contained in the AMN precept, nor did explicit contrary *ḥadīth*s exist to support the contrary positions of dissenting jurists.

6. *AMN and S-XN: The Collective Oath* (Qasāma)

> Mālik cites two *ḥadīth*s pertaining to the collective oath (*al-qasāma*).[81] He states that it is the AMN, what he has heard [transmitted] from those who are acceptable to him (*mimman arḍā*) regarding collective oaths, and the concurrence (*ijtimāʿ*) of the Imāms of early and recent times that the plaintiffs take the first oaths and that collective oaths are only required in two circumstances. Either the victim states before dying that a certain person was responsible for his death or the plaintiffs produce circumstantial evidence (*lawth min bayyina*) indicating the defendant's guilt, even if it is not

[80] *Muw.*, 2:789. In the contract of contractual emancipation (*mukātaba*), the master agrees to allow the slave to work independently in order to earn his or her freedom within a stipulated period. Mālik provides an explanation of his legal reasoning in the contractual emancipation AMN.

[81] The collective oath (*al-qasāma*) was a pre-Islamic custom that carried over into the Prophetic law. It is taken in cases of murder. It establishes guilt of murder or general liability in cases of involuntary manslaughter in the absence of conclusive evidence when there is sufficient circumstantial evidence in the hands of the plaintiffs indicating the guilt or liability of the defendant. The plaintiffs are required to take fifty oaths supporting their certainty of the defendant's guilt; the defendant is then allowed to take fifty oaths affirming his innocence.

> conclusive (*qāṭiʿa*). Mālik adds that this precept is the S-XN and that the praxis of the people continues to be in accordance with (*wa al-ladhī lam yazal ʿalayhi ʿamal al-nās*) the procedure that, in cases of murder and involuntary manslaughter, it is the plaintiffs who take the first collective oaths. He points out that in the *ḥadīth* cited, the Prophet let the plaintiffs take the first oaths.[82]

This precept occurs in the recensions of Yaḥyā and Abū Muṣʿab. The structure of their chapters varies. Abū Muṣʿab subdivides his material on collective oaths into three successive chapters.[83] He does not cite the AMN term but indexes the precept instead as "the precept I found the people following" (*al-amr al-ladhī adraktu al-nās ʿalayhi*). He follows this with the same expression in Yaḥyā that the precept has the concurrence of the Imāms of early and recent times. Abū Muṣʿab follows this with a praxis chapter (*Bāb al-ʿAmal fī al-Qasāma*), in which he cites the S-XN term and precept.[84] This material does not occur in the transmissions of al-Qaʿnabī, Suwayd, or Ibn Ziyād.

Saḥnūn treats collective oaths extensively in the *Mudawwana*, although I found no instance of his citing the same terms for this precept that Mālik uses in the *Muwaṭṭaʾ*. He does cite Mālik as stating that the basic procedure in collective oaths was a *sunna*. Regarding another precept related to collective oaths, Saḥnūn cites Mālik as stating that it is MḌS (the *sunna* has long been established; *maḍat al-sunna*) that collective oaths cannot be administered on the basis of a single valid witness against an accused murderer. Two or more other persons are required, who give fifty oaths among themselves. Ibn al-Qāsim further explains the nature of this *sunna*-based difference between collective oaths and standard legal oaths.[85] Saḥnūn elaborates several details on collective oaths that are not in the *Muwaṭṭaʾ*. Ibn al-Qāsim explains how collective oaths are contrary to legal oaths in general. He gives the exact wording of the oaths according to the established practice of how they were traditionally given on the Prophet's pulpit (*minbar*) in Medina. Saḥnūn asks him to clarify what constitutes circumstantial evidence (*al-lawth min al-bayyina*), and Ibn al-Qāsim gives Mālik's definition as one just witness who had been present at the crime.[86] Saḥnūn includes a citation in which Ibn al-Qāsim makes reference to "what

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[82] *Muw.*, 2:877–79; *Muw.* (Dār al-Gharb), 2:451–55; Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:309; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:256; *Muw.* (Abū Muṣʿab), 2:259–64; *Muw.* (*Riwāyāt*), 4:237–43.

[83] *Muw.*, 2:877–79; *Muw.* (Dār al-Gharb), 2:451–55; Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:309; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:256; *Muw.* (Abū Muṣʿab), 2:259–64; *Muw.* (*Riwāyāt*), 4:237–43.

[84] *Muw.* (Abū Muṣʿab), 2:259–64.

[85] *Mud.*, 4:70; *Mud.* (2002), 8:484–85.

[86] *Mud.*, 4:492–94; *Mud.* (2002), 11:353–60.

Mālik said in his book, the *Muwaṭṭa'*"—an indication, as indicated earlier, that the *Muwaṭṭa'* was compliled and known by its title before the *Mudawwana*.[87] According to transmissions in ʿAbd al-Razzāq and Ibn Abī Shayba, al-Zuhrī referred to collective oaths as belonging to earliest practice (*al-amr al-awwal*).[88]

Ibn ʿAbd al-Barr states that of all legal rulings related from the Prophet, he knows of no case with as much confusion (*iḍṭirāb*) and contradiction (*taḍādd*) as the story of the collective oaths. He notes that there was also extensive dissent among the jurists about their validity, how they are to be performed, and what legal claims may be made on their basis.[89] Some jurists protested that Mālik in this case had made a *sunna* out of something that had nothing to do with the *sunna* at all. They also objected to his stating that this precept was an AMN, that it agreed with what he had heard from those with whom he was content, and that it was a matter of concurrence among the Imāms of early and later times. They questioned how Mālik could have said this when al-Zuhrī transmits a *ḥadīth* that the Prophet began a collective oath with the Jews in Khaybar, who were the defendants.[90]

There are two points in this AMN, each of which constituted an issue of dissent among the early jurists. The first point is that the plaintiffs take the first oaths. The S-XN pertains exclusively to this stipulation. The second point pertains to the nature of the evidence required to use collective oaths. Interestingly, Mālik does not include in this AMN the question of whether or not collective oaths constitute strong enough evidence to justify capital punishment instead of the alternative of accepting a blood indemnity (*diyat al-qatl*). ʿUmar ibn al-Khaṭṭāb and other legal authorities such as ʿUmar ibn ʿAbd al-ʿAzīz held that collective oaths were only valid for blood indemnities and not for capital punishment.[91]

The order of the oaths, which is the point of the S-XN and pertains to the initial wording of the AMN, constituted a point of difference between Mālik and Abū Ḥanīfa. Like many Kufan and Basran jurists, Abū Ḥanīfa held that the defendants and not the plaintiffs must be offered the opportunity to take the first of the collective oaths. If the defendants swear to their innocence under the collective oath, the dissenting Kufan and Basran

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[87] *Mud.*, 4:492; *Mud.* (2002), 11:353. The citation reads, "Mālik said in his book the *Muwaṭṭa'*," which he follows by certain details pertaining to the liabilities of defendants in collective oaths. See above 6–7, 51–57.

[88] ʿAbd al-Razzāq, *al-Muṣannaf*, 10:36, 39–40; Ibn Abī Shayba, *al-Muṣannaf*, 6:15, 5:441–42.

[89] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:307–08.

[90] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:325.

[91] Ibn Rushd, *Bidāya* (Istiqāma), 2:419, 421.

jurists held that they must be immediately exonerated. The plaintiffs may bring no further claim against them as long as they lack more conclusive evidence. This position was based on the consideration that, in the Islamic law of juridical oaths, the plaintiff is required to produce sufficient evidence of guilt, while the defendant is permitted to clear himself by taking an oath in the absence of such evidence. It was on such grounds that Abū Ḥanīfa—consistent with his principle of establishing and adhering to standard legal analogies based on the generalization of foundational texts—dissented from the Medinese position on the order of collective oaths and treated them instead as analogous to the general precepts of oaths in Islamic law despite *ḥadīth*s to the contrary.[92]

Mālik's position on the order of witnesses in collective oaths was followed by al-Shāfiʿī, Ibn Ḥanbal, Ibn Rāhawayh, all of whom adhered to the explicit implications of the *ḥadīth*s on this matter, which go back to Mālik and others. There are, however, contrary *ḥadīth*s according to which the Prophet had the original defendants (the Jews of Khaybar) begin with the oaths and not the plaintiffs as in the case of Mālik's transmission.[93] Al-Zuhrī transmits a *ḥadīth* that the Prophet began with the defendants. He also transmits from Saʿīd ibn al-Musayyab and ʿUmar ibn ʿAbd al-ʿAzīz that collective oaths were first required of the defendants.[94] It was, however, a matter of internal dissent in Medina. ʿAbd al-Razzāq and Ibn Abī Shayba transmit that al-Zuhrī contended that it was the *sunna* of God's Messenger that one began with the defendants in collective oaths in the absence of conclusive evidence. If a single person among the defendants refuses to take the oath of innocence, the plaintiffs are then allowed to take collective oaths to establish the defendants' guilt. If they take fifty oaths among them, they have a right to the indemnity of the dead man. If one of them refuses, they have no right to the indemnity.[95]

Regarding the second point of the AMN, Abū Ḥanīfa held that the statement of a dying person that someone was responsible for his death did not constitute sufficient evidence to warrant collective oaths. Many non-Medinese jurists apparently shared this opinion. Ibn Rushd states that,

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[92] Al-Ṭaḥāwī, *Sharḥ*, 3:96–102; al-Ṭaḥāwī, *Mukhtaṣar*, 5:177–84; al-Bājī, *al-Muntaqā*, 7:55; Ibn Rushd, *Bidāya* (Istiqāma), 2:421; al-Zurqānī, *Sharḥ*, 5:187.

[93] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:304–07, 318, 320; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:247–60; ʿAbd al-Razzāq, *al-Muṣannaf*, 10:27–28.

[94] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:321; ʿAbd al-Razzāq, *al-Muṣannaf*, 10:38; Ibn Abī Shayba, *al-Muṣannaf*, 5:442; cf. al-Ṭaḥāwī, *Sharḥ*, 3:96–102.

[95] ʿAbd al-Razzāq, *al-Muṣannaf*, 10:28–29; Ibn Abī Shayba, *al-Muṣannaf*, 6:15; Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:319–20.

among the non-Medinese jurists, only al-Layth ibn Saʿd shared Mālik's position on the evidence required to warrant collective oaths.[96]

Jurists who regarded collective oaths as valid broke down into two groups. One group—such as Mālik, al-Layth ibn Saʿd, and al-Shāfiʿī—regarded them as an instance of circumstantial evidence, which, although not certain, convinces the intellect and sound opinion (*yaghlibu ʿalā al-ʿaql wa al-ẓann*). They held that collective oaths served the purpose of protecting life and consequently did not require definitive proof. For this reason, they let the plaintiffs take the first oaths. The second group, which was made up of most the Basran jurists and some of the Kufans, required collective oaths and payment of indemnities because the dead person was found under suspicious circumstances among a certain people. They required the defendants, however, to give the first oaths and pay the indemnity.[97]

Al-Thawrī, Abū Ḥanīfa, Zufar, Abū Yūsuf, and al-Shaybānī held that in circumstances requiring collective oaths, fifty men of the suspect place where the victim was found are chosen by the dead man's guardian (*walī*). If they are less than fifty, they repeat the oaths. If they refuse to take the oath, they are required to pay the victim's indemnity. They are also impounded until they either admit to the crime or take the oath. Abū Yūsuf held that they were not to be imprisoned, but the indemnity was required of them and had to be paid over a three-year period.[98] Al-Thawrī transmits a post-Prophetic report that ʿUmar made people from a certain area swear collective oaths that they were not responsible for a man's murder. They took the oaths, but he required them to pay the indemnity all the same.[99]

Another group of jurists rejected collective oaths outright and granted no legal rights on their basis. Abū Qalāba, Sālim ibn ʿAbd-Allāh, ʿUmar ibn ʿAbd al-ʿAzīz, the Meccan jurists, and several others are numbered in this group. ʿUmar ibn ʿAbd al-ʿAzīz is reported to have raised his concerns about collective oaths on his deathbed and called Abū Qalāba to express his objections to it. ʿUmar then wrote to his governors requiring them to demand at least two witnesses in murder cases.[100] Sālim ibn ʿAbd-Allāh

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96 Ibn Rushd, *Bidāya* (Istiqāma), 2:423; al-Bājī, *al-Muntaqā*, 7:52, 56.

97 Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:308, 318–19; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:263–64.

98 Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:312–14; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:264, 266–67.

99 Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:314.

100 Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:326–29; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:264; ʿAbd al-Razzāq, *al-Muṣannaf*, 10:38–39; Ibn Abī Shayba, *al-Muṣannaf*, 6:11, 5:439–40, 443–45.

expressed his concerns that certain tribes had begun to take collective oaths lightly and should be given exemplary punishment for their attitude towards them. Ibn ʿAbd al-Barr notes that those who rejected collective oaths outright did so on the basis of considered opinion (*raʾy*) because they are contrary to the established *sunna* that defendants are required to take oaths in denial of charges in the lack of substantial evidence.[101] Ibn ʿAbd al-Barr notes that in the various *ḥadīth* narrations on the collective oath, the Prophet handed down no judgment, since the plaintiffs refused to take the oath or accept the oaths of the defendants. According to some of the *Muwaṭṭaʾ* and other transmissions, the Prophet himself paid the indemnity for the Companion slain in Khaybar.[102]

A few early jurists such as al-Ḥasan al-Baṣrī rejected the validity of collective oaths on other grounds. They regarded them to be invalid pre-Islamic customs. Despite the relevant *ḥadīth*s on collective oaths, they did not believe that the *ḥadīth*s proved that the Prophet had actually authorized collective oaths. They noted that the *ḥadīth*s on collective oaths such as those Mālik cites in the *Muwaṭṭaʾ* fail to indicate that the Prophet ever administered collective oaths in fact. He offered the option of taking such oaths to certain of his Companions, whose kinsman had been murdered in Khaybar under suspicious circumstances. But these Companions turned down the option of taking the oaths because they did not want to swear by God regarding matters of which they had no certain knowledge. The dissenting jurists who opposed collective oaths discerned that the Prophet knew that his Companions would refuse to follow the pre-Islamic custom of collective oaths because of the moral principles they had imbibed. The Prophet made them the offer of taking collectives oath to demonstrate by their refusal the superiority of his ethic over the customary practices of the pre-Islamic period.[103]

Those who rejected the validity of collective oaths observed that they run contrary to three established norms of Islamic law. The first, which is referred to in the above paragraph, is that it is not permissible to make a juridical oath in the absence of certain knowledge. The second is that juridical oaths are used in monetary transactions in the absence of

[101] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:328.

[102] *Muw.*, 2:877–79; *Muw.* (Dār al-Gharb), 2:451–55; Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:307–08.

[103] Ibn Rushd, *Bidāya* (Istiqāma), 2:419–20; cf. Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:255; ʿAbd al-Razzāq, *al-Muṣannaf*, 10:27; Ibn Abī Shayba, *al-Muṣannaf*, 5:441; al-Ṭaḥāwī, *Mukhtaṣar*, 5:184.

conclusive evidence, not in capital crimes.[104] The third principle is that in all other precepts pertaining to oaths, the defendant and not the plaintiff is offered the first opportunity to take the oath and block the plaintiff's oath by technically clearing himself.[105]

Mālik's collective oath precept is contrary to analogy with related precepts of Islamic law within the Medinese and broader Islamic legal traditions. His use of the *sunna*-term S-XN in this example is consistent with his usage of *sunna*-terms elsewhere in the *Muwaṭṭa'* to establish the authority of non-analogous precepts. As with similar usages of *sunna*-terms, the fact that Mālik resorts to them demonstrates the inherent, overarching authority of analogical reasoning in his mind.[106] Ibn Rushd states that Mālik regarded collective oaths to be a unique *sunna* which like many other types of *sunna* drew exception to general precepts of law. He holds that Mālik's justification of collective oaths was essentially a consideration of the general good (*al-maṣlaḥa*) and the imperative to protect life.[107]

Ibn Rushd's observations are supported by the text of the *Muwaṭṭa'*. In Mālik's defense of collective oaths, he supports his position that the plaintiffs have the right to the first oath and that the testimony of a dying man regarding who killed him is sufficient evidence to warrant the use of a collective oath against the accused. Mālik explicitly indicates his conception of the underlying principle of the general good and, on that basis, draws a sharp contrast between the collective oath and contrary analogues in the Islamic law of oaths:

> The difference between the collective oath (*qasāma*) in cases of murder and between oaths in [money] rights is that a person who loans money to another takes steps to establish evidence of his right against the one [to whom he makes the loan]. But when a person desires to kill another person, he does not do it in the midst of a large group of people. Rather he seeks out a secluded place. . . . So if the collective oath is used only when there is established evidence or if one were to follow in it the procedure followed regarding [money] rights, there would be great loss of life (*halakat al-dimā'*). People would dare to take life once they knew what the verdict in the collective oath would be. But the collective oath has been set down for the guardians of the victim (*wulāt al-dam*), who take the first oaths in it, in order to make people refrain from shedding blood and in order that the

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104 See Abd-Allah, "*'Amal*," 141–43.
105 Ibn Rushd, *Bidāya* (Istiqāma), 2:419.
106 See Abd-Allah, "*'Amal*," 576–82.
107 Ibn Rushd, *Bidāya* (Istiqāma), 2:420.

> murderer beware lest he be apprehended in matters like this by his victim's [last] words.[108]

Thus, Mālik unequivocally defended the anomalous nature of the precept of the collective oath against the contentions of dissenting jurists by reference to the principle of the general good, which Abū Zahra holds to be the central concern of Mālik's legal reasoning.[109]

Mālik regarded collective oaths to belong to the category of transmissional praxis (*al-ʿamal al-naqlī*), which is indicated by his citation of the two *ḥadīth*s at the beginning of the chapter. According to these *ḥadīth*s, the Prophet did not, however, actually administer the collective oath. As noted by some of the dissenters, the *ḥadīth*s report only that he first offered the oaths to the plaintiffs, who declined to take them. After his statement of the S-XN and reference to the continuous praxis of the people of Medina, Mālik points out that the procedure of beginning with the plaintiffs is what the Prophet is reported to have done.

The source for the other element of the AMN precept regarding what type of evidence is required for collective oaths is not clear. The definition of evidence was likely the product of Medinese legal interpretation (*ijtihād*), since the *ḥadīth*s that Mālik cites constitute the only instance of collective oaths during the Prophet's life.[110] The victim in that case had been found dead. No one heard his dying words so that his case did not provide a precedent for Mālik's AMN stipulation that the last words of the victim constitute sufficient circumstantial evidence for the application of a collective oath.

AMN in this example appears to be an inclusive term[111] taking in the S-XN. By contrast, the S-XN is exclusive. It does not include the part of the AMN pertaining to evidence. Mālik refers to the concurrence (*ijtimāʿ*) of the Imāms of the past and present in his gloss on the AMN. It seems reasonable to assume that it was the praxis of these Imāms—not transmissional praxis—which provided the Medinese with the stipulations required in circumstantial evidence for collective oaths. Similarly, in an earlier example, Mālik cites an AMN that appears to include an A-XN, but the wording of the A-XN omits a key point of dissent between early jurists,

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[108] *Muw.*, 2:880.

[109] See Abd-Allah, "*ʿAmal*," 269, 205, 83.

[110] See Ibn Rushd, *Bidāya* (Istiqāma), 2:419–20.

[111] For the distinction between inclusive and exclusive terms in Mālik's terminology, see Abd-Allah, "*ʿAmal*," 523–29; see below 4–5, 277–81.

which, however, is affirmed by the AMN.[112] A second example of an AMN in Mālik's chapter on the laws of inheritance also includes a *sunna*-term. The term Mālik cites there is AMN: S-XN: ādIb.[113] One element of that precept—namely, the stipulation that a Muslim may not inherit a non-Muslim relative—is supported by a *ḥadīth*, which Mālik cites. This indicates that it arose from the *sunna*, and Mālik gives other clear indications in that precept that its ruling was derived from the Prophetic *sunna*. An additional element of the precept, however—that a Muslim may not inherit a non-Muslim freedman client (*mawlā*)—is not explicitly indicated by the *sunna*. In that example, Mālik supports this additional element of the AMN precept by the praxis of earlier Imāms, in this case, ʿUmar ibn al-Khaṭṭāb and ʿUmar ibn ʿAbd al-ʿAzīz.[114]

Mālik cites several *amr*-precepts elsewhere in the *Muwaṭṭa'* that set forth various particulars about the praxis of the collective oath. Each of them appears to be the product of legal interpretation (*ijtihād*). He cites an AN, for example, that finding a body in a village, near a house, or in some similar location is not sufficient evidence to make a collective oath against the inhabitants of those places, since the body might have been placed there by others.[115] He cites another AN that a minimum of two plaintiffs are required for a collective oath in cases of murder and that they shall repeat their oaths fifty times. (Saʿīd ibn al-Musayyab and al-Zuhrī dissented regarding this matter and held it to be an innovation of Muʿāwiya.)[116] A third AN of Mālik pertains to collective oaths in the case of slaves. With it, he cites an A-XN stating that women are excluded from taking collective oaths when they pertain to murder but not when they relate to involuntary manslaughter.[117] These cases indicate that Mālik's *amr*-term as used in the AMN precept on collective oaths is not strictly anomalous but is used as an analogue in related cases.

In another instance in the *Muwaṭṭa'*, however, Mālik upholds application of the ruling contrary to the norm. He indicates that it is not part

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[112] See Abd-Allah, "*ʿAmal*," 707.

[113] This stands for "the agreed precept among us; the *sunna* among us about which there is no dissent; and what I found the people of knowledge in our city following (*al-amr al-mujtamaʿ ʿalayhi ʿindanā wa al-sunna al-latī lā ikhtilāf fihā wa al-ladhī adraktu ʿalayhi ahl al-ʿilm bi-baladinā*).

[114] *Muw.*, 2:519–20.

[115] *Muw.*, 2:871.

[116] *Muw.*, 2:881; al-Rasīnī, "*Fiqh*," 410.

[117] *Muw.*, 2:883, 881.

of normative praxis and cites a praxis-term for it instead of an *amr*-one. In this case, Mālik transmits a report according to which ʿUmar ibn al-Khaṭṭāb once attempted to apply a collective oath in an unusual instance of involuntary manslaughter when a horse belonging to a certain tribesman had been made to bolt. The horse crushed the finger of a man from another tribe, who died afterwards. Neither party would take the collective oaths. Apparently, the plaintiffs were not sure that their tribesman had died as a result of the incident, nor were the defendants sure that the incident had not caused his death. ʿUmar arbitrated an independent settlement between them.[118] The anomalous aspect of this report as far as the collective oath is concerned is that ʿUmar first offered the oaths to the defendants—in contrast to Mālik's S-XN, which Mālik described as reflecting the concurrence (*ijtimāʿ*) of the Imāms of early and later times. Mālik cites the negative praxis term (not in accordance with praxis; *laysa ʿalayhi al-ʿamal*) after this report.[119] He refers back to the precept later as proof that people are held liable for the injuries that the animals cause which they drive, ride, or herd.[120]

This contrary Medinese report about ʿUmar's application of the collective oath conforms with the Ḥanafī position. Mālik might have accounted several ways for the discrepancy in its content, such as its having been a mistake of the transmitter or having been a modification of the general precept that ʿUmar made on the basis of independent legal interpretation (*ijtihād*), given the the special circumstances of the case. Mālik's position regarding it appears consistent with Ibn al-Qāsim's approach in the *Mudawwana*, as noted before, regarding a situation when ʿĀ'isha is reported to have done something contrary to Medinese praxis:

> We do not know what the [correct] interpretation (*tafsīr*) of this is but believe that she appointed someone else to act as her representative. . . . This [report] has come down [to us]. If this *ḥadīth* had been accompanied by praxis such that its [praxis] would have reached those whom we met during our lifetimes and from whom we received [our knowledge] and those whom they had met during their lifetimes, it would indeed be correct (*ḥaqq*) to follow it. But it is only like other *ḥadīth*s that have not been accompanied by praxis. . . . [*Ḥadīth*s such as these] remained [in the state of being] neither rejected as fabricated nor put into practice. . . .[121]

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118 See al-Bājī, *al-Muntaqā*, 7:73.
119 *Muw.*, 2:851.
120 *Muw.*, 2:869.
121 See Abd-Allah, "*ʿAmal*," 188–95.

The issue of collective oaths is an example of significant dissent from the early period over a shared body of *ḥadīth*s on a single Prophetic precedent. Collective oaths were a matter of considerable gravity in a tribal society. In Mālik's time and for generations afterwards, the different positions that the jurists took on collective oaths had extensive implications and involved substantial economic liabilities in the form of the indemnities involved, which fell, at least in part, on the tribal affiliations of the guilty. All dissenting positions, however, revolve around the same legal texts, and juristic parties with divergent views did not produce contrary *ḥadīth*s to support their own positions.

Collective oaths, as noted, are contrary to the norms of evidence in Islamic law. Mālik's position regarding them as well as the dissenting positions of other jurists illustrate how irregular (*shādhdh*), non-normative legal positions were treated in the legal reasoning of the early jurists. All legal opinions regarding the precept were articulated in terms of the broader norms of the Prophetic law. Mālik does this by citing his *sunna*-term, indicating that collective oaths are contrary to Medinese norms but may not be overturned on those grounds because of their basis in the *sunna* and the imperative of protecting the general good (*al-maṣlaḥa*), which would be threatened if normative procedures were followed. Both dissenting positions modify or reject collective oaths on the basis that they are contrary to the norms governing juridical oaths. The Kufans and Basrans modified collective oaths by allowing the defendants to take them first and block the plaintiffs' claims. The other dissenting party of jurists rejected collective oaths because they ran contrary to the standard legal ethic of Islam. They did not reject the transmitted *ḥadīth*s but interpreted them in light of the standing principles of the law. Collective oaths were never administered during the Prophet's life, they contended that he had offered the option of taking them to the plaintiffs with the understanding that they would reject them (as they did) on the basis of their inconsistence with Islamic norms.

Mālik's *Amr*-Terms for Consensus in Summary

I focused exclusively in this analysis on the term AMN and only touched coincidentally on other *amr*-terms such as A-XN. The AMN precepts that I surveyed show the characteristic pattern of Medinese-Kufan difference of opinion, although again jurists from other regions are also frequently involved in the disagreement. Each of these AMN's except for the first

constitutes a point of difference on at least some important point between Mālik and Abū Ḥanīfa. (Abū Ḥanīfa is reported to have agreed with Mālik regarding the first AMN precept, but it still constituted an issue of dissent between Mālik and the Kufan Sufyān al-Thawrī.)[122] Other prominent non-Medinese jurists who are reported to have disagreed with some of the AMN precepts in this chapter are al-Ḥasan al-Baṣrī, the Baṣran Ibn Sīrīn, al-Layth ibn Saʿd, al-Awzāʿī, the Meccans ʿAṭāʾ ibn Abī Rabāḥ and Mujāhid, and the Kufans Ibn Abī Laylā, Abū Yūsuf, and al-Shaybānī.

In four of the AMN's surveyed, prominent Medinese jurists appear to have possibly dissented from Mālik's precept. The Medinese Companion Jābir ibn ʿAbd-Allāh reportedly disagreed with the first AMN. Mālik's teacher Rabīʿat al-Raʾy disagreed with the fifth AMN. His opinion in that matter is said to have been unique and unusual (*shādhdh*) and possibly unauthentic. Mālik's prominent student Ibn Kināna is reported to have dissented from the third AMN, although it is not clear whether he did so during or after Mālik's lifetime. Finally, al-Qāsim ibn Muḥammad may have disagreed with the second AMN precept. In that case, however, not enough is known about the full scope of al-Qāsim's opinion to determine whether he was actually in disagreement with Mālik's AMN or only appears to disagree.

These possibilities of valid internal dissent on precepts of Medinese praxis tend to bear out my thesis that the concurrence (*ijtimāʿ*) Mālik is referring to in his AMN precepts is a majority and not a total local concensus of the Medinese jurists. As frequently noted, such an interpretation of Mālik's AMN term coheres with al-Shāfiʿī's contention that there were differences of opinion in Medina regarding Mālik's AMN's and his AN's.[123] The example of al-Layth ibn Saʿd's disagreement with one of the preceding AMN precepts also bears out that contention, since al-Layth describes himself as consistently following the Medinese in legal issues in which they did not dissent.

The possibility of significant internal dissent among the Medinese jurists regarding Mālik's AMN is contrary to the definition of that term that Ibn Abī Uways relates on Mālik's authority. According to him, Mālik said:

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[122] See Abd-Allah, "*ʿAmal*," 693, 696.
[123] See Abd-Allah, "*ʿAmal*," 343–47.

> What [I used] AMN for constitutes opinions of the people of learning in jurisprudence (*fiqh*) and knowledge upon which concurrence (*ijtimāʿ*) was reached without their having dissented regarding them (*mā ujtumiʿa ʿalayhi min qawl ahl al-fiqh wa al-ʿilm lam yakhtalifū fīhi*).[124]

According to this definition, no apparent difference existed in Mālik's mind between AMN and other *amr*-terms standing for total Medinese consensus which state specifically that no differences of opinion existed among the Medinese such as AMN-X and A-XN. As mentioned earlier, this specification that there was no disagreement among the Medinese jurists regarding Mālik's AMN precepts may have been a reading of later Mālikīs who sought to lend greater authority to his AMN precepts than they were likely to have had if conceived of as majority consensus.[125] The concept of a majority consensus or even of a preponderant majority, although, in practice a much more workable concept than that of absolute consensus, may have appeared tentative in the eyes of later jurisprudents in the light of Shāfiʿī jurisprudential emphasis upon absolute consensus (*ijmāʿ*) as constituting the consensus of the entire community (*umma*).[126]

Mālik's expressions in the *Muwaṭṭaʾ* reflect his concern with delineating authority but not with indicating the sources of his precepts. The sources of the AMN precepts studied in this chapter are often unclear from Mālik's text in the *Muwaṭṭaʾ*. Two appear to belong to the category of transmissional praxis (*al-ʿamal al-naqlī*) as defined by later jurisprudents. Each of them appears, however, to contain additional elements derived from personal legal interpretation (*ijtihād*). The AMN on collective oaths, for example, contains an element that Mālik refers to as S-XN. It also contains a second point regarding the evidence that is required to make collective oaths valid. These laws of evidence appear to be the result of legal interpretation. Mālik refers to the praxis of the Imāms past and present in conjunction with his AMN on collective oaths, and this appears to indicate that those parts of the collective oath that were not derived from transmissional praxis were the products of later interpretational praxis as upheld by successive Imāms, especially ʿUmar ibn al-Khaṭṭāb and ʿUmar ibn ʿAbd al-ʿAzīz.[127]

The presence of elements of personal legal interpretation in Mālik's AMN precepts is supported by the report of Ibn Abī Uways on the meaning

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[124] See Abd-Allah, "*ʿAmal*," 539.
[125] See Abd-Allah, "*ʿAmal*," 543.
[126] See Abd-Allah, "*ʿAmal*," 195–204.
[127] See Abd-Allah, "*ʿAmal*," 719–20.

of Mālik's terminology. Mālik refers to the term AMN in that definition as being constituted by the opinions (*aqwāl*) of the Medinese jurists. Nevertheless, the term AMN is not restricted exclusively to matters of legal interpretation. According to my analysis of Mālik's terminology, AMN serves as an inclusive term. It can be expanded to include Mālik's *sunna*-terms and, hence, transmissional praxis—as in the case of Mālik's AMN on collective oaths and the AMN on inheritance referred to above. It can also include terms such as A-XN, as indicated in the fourth AMN precept of this chapter. But the *sunna*-terms and the term A-XN in the above example are exclusive and do not include the full scope of the AMN. They apply only to a limited part of Mālik's overall AMN precept. In the fourth AMN in this chapter, Abū Ḥanīfa would have found himself in agreement with Mālik's A-XN but would have dissented with the broader wording of the more inclusive AMN in the same chapter.[128]

The origin of the legal interpretation in most of the AMN precepts in this chapter cannot be established on the basis of the information Mālik gives in the *Muwaṭṭaʾ*. In some cases, as for example in the case of the AMN on inheritance just referred to, it is clear that the legal interpretation underlying it goes back as least as far as ʿUmar ibn al-Khaṭṭāb, because it is reported to have been part of his practice. In other cases, the legal interpretation is so closely tied to well-established *sunna*-precepts—such as in the laws regarding bequests—that it is reasonable that the legal interpretation must have gone back to the Companions. Mālik does not appear to have been concerned with communicating a distinction between what later legal theorists referred to as old praxis (*al-ʿamal al-qadīm*), which went back to the legal interpretation of the Companions, and late praxis (*al-ʿamal al-mutaʾakhkhir*), which went back to the legal interpretations of the Medinese Successors.[129] On the contrary, whatever the origin of the legal interpretation of Mālik's AMN, his primary concern is with the authority of the ultimate ruling as supported by the concurrence (*ijtimāʿ*) of the Medinese jurists and occasionally buttressed by personal legal reasoning.

One of the most important characteristics of the AMN precepts in this chapter is Mālik's legal reasoning, which he sets forth in them to defend their conventional authority. He accounts for the first and third AMN's by reference to analogical reasoning. As in earlier examples from

[128] Abd-Allah, "*ʿAmal*," 707.
[129] See Abd-Allah, "*ʿAmal*," 415–19.

the *Muwaṭṭa'*, his analogies in these examples are examples of the distinctively Mālikī methodology of basing analogical reasoning on established precepts of law instead of specific revealed texts.[130] Furthermore, these AMN's have analogous applications to other precepts of law. They do not have the consistently anomalous nature of the precepts Mālik marks off by his *sunna*-terms.

The fourth and fifth AMN's in this chapter do not contain analogical reasoning but are akin to the AMN's that do contain analogies. In these examples, Mālik accounts for the AMN precepts by reasoning directly from related precepts of law, attempting to demonstrate that the AMN precepts are the necessary legal corollaries of those related precepts. Although they are not the products of analogy, these particular AMN precepts are still contrary to Mālik's *sunna*-precepts, for these AMN's are in keeping with the implications of other established precepts and are not of an anomalous nature.

The second and sixth AMN's are exceptions to general rules. The second, which permits the use of the testimony of minors under certain circumstances, is apparently based on the Medinese concern for the general good as an independent legal proof. It draws exception to the general rules governing testimony not by virtue of the explicit textual authority of the Prophetic *sunna* but on the basis of legal interpretation based on the principle of the unstated good (*al-maṣāliḥ al-mursala*), one of the chief functions of which is to draw such exceptions to general rules.[131] The precept on collective oaths, as amply noted, is contrary to at least three established precepts of Islamic law, and some jurists rejected collective oaths on these grounds. Mālik defends the validity of collective oaths, despite their anomalous nature, by reference to the principle of the general good and responds to the objections of those who dissented from the Medinese position on the same grounds.

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[130] For treatment of this type of analogy and comparison with Abū Ḥanīfa and al-Shāfiʿī, see Abd-Allah, "*ʿAmal*," 216–34; see below 145–57.

[131] See Abd-Allah, "*ʿAmal*," 268–75.

CHAPTER TEN

AN: AL-AMR ʿINDANĀ

General Observations

AN, "the precept among us" (*al-amr ʿindanā*) is the most common term in the *Muwaṭṭaʾ*. It occurs one-hundred and four times by itself and thirteen times with slight modification or in combination with various other terms.[1] None of these thirteen additional forms can be regarded as an independent term, since they do not occur more than once each. In all, AN occurs one-hundred and seventeen times in the *Muwaṭṭaʾ*, which makes it almost two and a half times as frequent as the second most common term, AMN, "the agreed precept among us" (*al-amr al-mujtamaʿ ʿalayhi ʿindanā*), which occurs forty-three times by itself, six times with slight modifications and in various combinations, and forty-nine times in all.[2] AN is also the most evenly distributed term in the *Muwaṭṭaʾ*. It occurs in chapters that pertain to acts of ritual as well as those that treat human transactions. It occurs in chapters that contain numerous other types of terms but also in chapters that contain no other terms at all.[3]

According to Mālik's observations on his terminology as transmitted by Ibn Abī Uways, AN precepts reflected the praxis of Medina. Mālik reportedly said:

> What I have called "the precept among us" (*al-amr ʿindanā*) is the praxis that the people among us here (*al-nās ʿindanā*) have been following. Rulings are handed down in accordance with it (*bi-hī jarat al-aḥkām*), and both those who are ignorant and knowledgeable know what it is.[4]

In this statement, Mālik makes no mention of AN having the supporting concurrence (*ijtimāʿ*) of the Medinese scholars. As will be seen in

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[1] In the *Mudawwana*, Mālik uses the variation "among us in Medina" (*ʿindanā bi-ʾl-Madīna*) when explaining how oaths are to be taken from the Prophet's mosque speaking platform (*minbar*) (see *Mud.*, 4:71; *Mud.* [2002], 8:487).

[2] See Abd-Allah, "*ʿAmal*," Appendix 2 for an index to AN terms, and see ibid., 692 for AMN.

[3] See Abd-Allah, "*ʿAmal*," Appendix 2, Table 2 for the distribution of terms in the *Muwaṭṭaʾ* according to chapters.

[4] ʿIyāḍ, *Tartīb*, 1:194; see Abd-Allah, "*ʿAmal*," 539–40.

some of the following examples of AN, there is occasional evidence in the *Muwaṭṭa'* itself for significant difference of opinion among the Medinese jurists regarding the validity of certain AN precepts.

Furthermore, according to the report of Ibn Abī Uways, Mālik drew a connection between AN and the policies of the Medinese judiciary. As suggested earlier, in matters that fell under the jurisdiction of the Medinese courts, it was quite possibly the authority of the court itself that created a unified praxis in Medina despite dissent among the local jurists.[5] The same consideration would apply to matters of law that came under different types of local executive authority, such as the office of the governor (*amīr*) or the magistrate of public conduct (*muḥtasib*). As noted in the discussion of Mālik's praxis-chapters, the prominent Medinese jurist Saʿīd ibn al-Musayyab disagreed with a Medinese praxis, which Mālik describes as a [non-analogical] *sunna*, that martyrs killed on the battle field be buried as they are without washing, shrouding, or being prayed over. This praxis precept did not fall under the jurisdiction of the Medinese courts, but its execution in practice would have fallen customarily under the office of the governor (*amīr*) or his deputy serving as the commander of the army.[6]

Al-Zuhrī is quoted in the *Mudawwana* as referring to a precept regarding the marital rights of the wife as the AN. In this citation, he repeats twice that this precept is an AN and constitutes the ruling in accordance with which the judges hand down their rulings.[7] Many AN precepts in the *Muwaṭṭa'*, however, pertain to matters of law that did not fall under the authority of the judiciary or other branches of local executive authority, such as the many AN's pertaining to voluntary acts of ritual. In the presence of dissenting opinions among Medinese scholars on such AN precepts, whatever uniformity of praxis there may have been in Medina would probably have been a function of the prestige and consequent social influence of those Medinese jurists who subscribed to the AN as Mālik delineates it. But praxis in such cases may often not have been uniform. It may have been "mixed" in the sense that some of the Medinese followed the preference of certain local jurists on the matter, while others followed the preference of the dissenting jurists. In the praxis of wiping over footwear (*masḥ*), for instance, there were apparently two types of Medinese

[5] See Abd-Allah, "*ʿAmal*," 538–44.
[6] See Abd-Allah, "*ʿAmal*," 666–67.
[7] *Mud.*, 2:195.

praxis on the matter. Mālik regarded both of them as constituting Medinese praxis but indicated which of them he personally preferred.[8]

There are additional examples of "mixed" praxis in the *Muwaṭṭaʾ* that fell under the jurisdiction of the judiciary. The question of the installment periods for indemnity (*diyāt*) payments, for example, belongs to this category, and Mālik indicates that there were two types of praxis in Medina on the issue. Here again, Mālik indicates which of the two opinions he prefers.[9] Thus, diversity of praxis was also possible within the Medinese judicial tradition, which did not necessarily constitute a monolithic, juristic whole lacking dissent or diverse precedents.

AN Precepts Pertaining to Ritual

1. *AN: Recitation behind an Imām*

> Mālik cites a post-Prophetic report that ʿAbd-Allāh ibn ʿUmar held that a person praying behind an *imām* should not recite anything from the Qurʾān and that the *imām*'s recitation was sufficient for him. Ibn ʿUmar held, however, that one should recite from the Qurʾān when praying by oneself. Mālik states that Ibn ʿUmar used not to recite anything when praying behind the *imām*. Mālik then states that the AN is that one recite some part of the Qurʾān to oneself during those parts of the prayer that are silent while praying behind the *imām* and that one not recite anything to oneself when in those parts of the prayer that the *imām* prays out loud. Mālik cites a *ḥadīth* according to which the Prophet instructed the Companions not to recite the Qurʾān when praying behind the *imām* in those parts of the prayer that the *imām* recites out loud.[10]

This discussion occurs in the recensions of Yaḥyā, Abū Muṣʿab, al-Qaʿnabī, and Suwayd. It is missing from the Ibn Ziyād fragment. The AN occurs only in Yaḥyā's transmission.[11] Abū Muṣʿab and al-Qaʿnabī have shorter chapters, beginning with the *ḥadīth* and the post-Prophetic report that Ibn ʿUmar would not recite behind the *imām*. They do not follow it with the AN.[12] Suwayd divides the material into two chapters. He begins with

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[8] See Abd-Allah, "*ʿAmal*," 654–55.

[9] See Abd-Allah, "*ʿAmal*," 676–77.

[10] *Muw.*, 1:86; *Muw.* (Dār al-Gharb), 1:138–39; Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:228; Ibn ʿAbd al-Barr, *al-Tamhīd*, 3:182; *Muw.* (Abū Muṣʿab), 1:96–97; *Muw.* (al-Qaʿnabī), 150–53; *Muw.* (Suwayd), 89–90; *Muw.* (*Riwāyāt*), 1:400–04.

[11] *Muw.*, 1:86; *Muw.* (Dār al-Gharb), 1:138–39; Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:228; Ibn ʿAbd al-Barr, *al-Tamhīd*, 3:182; *Muw.* (*Riwāyāt*), 1:400–04.

[12] *Muw.* (Abū Muṣʿab), 1:96–97; *Muw.* (al-Qaʿnabī), 150–53.

the *ḥadīth* and follows it with the post-Prophetic report of Ibn ʿUmar. In the next chapter, he cites four post-Prophetic reports that ʿUrwa, al-Qāsim ibn Muḥammad, al-Zuhrī, and Nāfiʿ ibn Jubayr would recite behind the *imām* in the silent parts of the prayer. He does not cite the AN but gives instead Mālik's comment—which conforms to Yaḥyā's AN—that "this is preferable to me regarding what I have heard transmitted [in this matter] (*dhālika aḥabb mā samiʿtuhū ilayya*).[13]

In the *Mudawwana*, Saḥnūn cites Ibn al-Qāsim as stating that Mālik said that praxis was not in accordance with the post-Prophetic report of Ibn ʿUmar. The report clarifies that Mālik regarded Ibn ʿUmar's position as mistaken and held that one who prayed after Ibn ʿUmar's fashion should repeat the prayer within the given prayer time.[14] (His opinion that the prayer should be repeated within the prayer time indicates that Mālik regarded Ibn ʿUmar's prayer as technically valid but preferred that it be redone in accordance with standard praxis.)[15] Saḥnūn cites the *ḥadīth*, which Ibn al-Qāsim has stated earlier that he follows, that anyone who does not recite the Opening Chapter of the Qurʾān has not prayed unless praying behind an *imām*.[16]

Again, Mālik uses the term AN in connection with a precept having significant dissent among the Medinese jurists. In this case, the dissenting opinion in Medina was that of Ibn ʿUmar. His opinion and contrary practice are cited prior to stating the AN. In the chapter just preceding this one, however, Mālik cites post-Prophetic reports that support this AN, indicating the conforming positions of such prominent Medinese legists as ʿUrwa ibn al-Zubayr and al-Qāsim ibn Muḥammad. After citing their post-Prophetic reports, Mālik states, "This is what I prefer regarding what I have heard [transmitted] in this matter" (*wa dhālika aḥabb mā samiʿtu ilayya fī dhālika*).[17]

Ibn ʿAbd al-Barr notes that this issue was a matter of difference among the Companions, Successors, and later jurists and that there is also con-

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[13] *Muw.* (Suwayd), 89–90.

[14] *Mud.*, 1:68; *Mud.* (2002), 1:197–99.

[15] It is a standard principle of Islamic law that failure to perform what is obligatory and essential to the validity of a prayer requires categorically that it be repeated at some future time. When something recommended is omitted, the prayer is technically valid. It should be repeated within the given prayer time. If, however, that is not done, it need not be repeated at another future time.

[16] *Mud.*, 1:70–71.

[17] *Muw.*, 1:85.

flicting evidence from *ḥadīth*s regarding it.[18] Saʿīd ibn al-Musayyab, Sālim ibn ʿAbd-Allāh, al-Zuhrī, Qatāda, Abd-Allāh ibn al-Mubārak, Ibn Ḥanbal, Ibn Rāhawayh, Dāwūd al-Ẓāhirī, and al-Ṭabarī held like Mālik in his AN that one does not recite in the parts of the prayer the *imām* recites outloud but does recite in the silent parts of the prayer.[19] Mālik's opinion was shared by the jurists of the Hijaz, Greater Syria, and most of the Basrans.[20]

The Kufans held that one does not recite behind the *imām*—neither in the loud or silent parts of the prayer. According to the *Muwaṭṭa'* text, this was the positon of Ibn ʿUmar. It is also attributed to Ibn Masʿūd and ʿAlī, although there are contrary transmissions for all three.[21] Abū Ḥanīfa's opinion that one does not recite with the *imām* either in loud or silent parts of the prayer is attributed to Zayd ibn Thābit and Jābir ibn ʿAbd-Allāh. It was also the opinion of al-Thawrī, Ibn ʿUyayna, Ibn Abī Laylā, al-Ḥasan al-Baṣrī, and many Successors in Iraq. They relied on a *ḥadīth* of Jābir ibn ʿAbd-Allāh that "whoever [prays with] an *imām*, [the *imām*'s] recitation constitutes his recitation," which was regarded as weak, although al-Thawrī regarded it as acceptable. The Kufans have other *ḥadīth*s supporting their position. They also argue that most jurists agree that if the *imām* fails to recite, although the people praying behind him recite, their prayers are not valid. This demonstrates that the *imām*'s recitation is essential.[22] The Kufans regard reciting behind the *imām* in loud and silent prayers to be disliked (*makrūh*).[23]

Al-Shāfiʿī's position in Iraq (his old school) was the same as Mālik's. He held later (the new school), that one recited only the Opening Chapter (*al-Fātiḥa*) with the *imām* in the loud parts of the prayer and the Opening Chapter and additional verses in the silent parts of the prayer.[24] Al-Shāfiʿī's position was also held by al-Awzāʿī, al-Layth ibn Saʿd, and Abū Thawr. It is attributed to ʿUbāda ibn al-Ṣāmit, Ibn ʿAbbās, and Ibn ʿAmr, ʿUrwa, Saʿīd

[18] Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:227; Ibn ʿAbd al-Barr, *al-Tamhīd*, 3:176–77; ʿAbd al-Razzāq, *al-Muṣannaf*, 2:120–27; Ibn Abī Shayba, *al-Muṣannaf*, 1:332.

[19] Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:228; ʿAbd al-Razzāq, *al-Muṣannaf*, 2:132–33; Ibn Abī Shayba, *al-Muṣannaf*, 1:327–28.

[20] Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:246.

[21] Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:228; ʿAbd al-Razzāq, *al-Muṣannaf*, 2:122–23, 140–41.

[22] Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:239–46; Ibn ʿAbd al-Barr, *al-Tamhīd*, 3:183, 188, 192–94; ʿAbd al-Razzāq, *al-Muṣannaf*, 2:137–38; Ibn Abī Shayba, *al-Muṣannaf*, 1:331–32.

[23] Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:245–46; Ibn ʿAbd al-Barr, *al-Tamhīd*, 3:197; al-Ṭaḥāwī, *Sharḥ*, 1:278–85; al-Ṭaḥāwī, *Mukhtaṣar*, 1:204–207.

[24] Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:228–29, 233.

ibn Jubayr, Makḥūl, and al-Ḥasan al-Baṣrī.[25] ʿUbāda ibn al-Ṣāmit transmits a *ḥadīth* that the Prophet told the people not to recite anything with him except for the Opening Chapter.[26]

Medinese praxis may not have been uniform regarding this AN precept. Ibn ʿUmar's position, as indicated by the post-Prophetic report that Mālik cites, did not reflect Ibn ʿUmar's personal practice alone but was also something that he instructed others to emulate him in doing. It is likely that some of the Medinese people continued to follow Ibn ʿUmar's teaching in their daily ritual practice. The praxis of whether one actually recites to oneself during the silent parts of group prayer or recites nothing at all does not pertain to outward practice. It is a private matter and, by its nature, would depend upon personal choice and discretion. It did not come under the judiciary or local executive authority. The uniformity of Medinese praxis to the AN in this example or lack of it would have been a function of the prestige and social influence of those Medinese jurists who practiced and taught the AN. (Al-Bājī states that, according to the *Mawwāziyya*, Mālik's prominent student Ibn Wahb did not follow this AN but preferred the position of Ibn ʿUmar instead.)[27] The Kufan position in this matter was also in conformity with Ibn ʿUmar's point of view.[28]

The *ḥadīth* that Mālik cites after this AN does not explicitly support either the AN or the dissenting position of Ibn ʿUmar. It indicates only that one is not to recite the Qurʾān in those parts of the prayer that the *imām* recites out loud. It does not pertain to what one ought to do during the silent parts of the group prayer, which is the point of difference between the AN and Ibn ʿUmar's position. Mālik probably regarded the praxis of the AN as transmissional. Nevertheless, it would constitute a transmissional praxis regarding which there were important differences in Medina. The chief indication Mālik is giving by his citation of the term AN, however, has nothing to do with the source of this praxis but reflects his attention to the fact that the praxis in question was not supported by Medinese concurrence (*ijtimāʿ*).

This was not an indifferent matter of dissent. Valid recitation in required prayers is one of the fundamental juristic concerns of Islamic law. Despite the dissent on this issue within and outside of Medina, dissenting parties

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[25] Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:233–35; Ibn ʿAbd al-Barr, *al-Tamhīd*, 3:185, 191; ʿAbd al-Razzāq, *al-Muṣannaf*, 2:129–31, 134–35; Ibn Abī Shayba, *al-Muṣannaf*, 1:328–29.

[26] Ibn ʿAbd al-Barr, *al-Istidhkār*, 4:236.

[27] Al-Bājī, *al-Muntaqā*, 1:159.

[28] See Ibn Rushd, *Bidāya*, 1:90–91.

shared the same *ḥadīth*s and are not known to have produced more explicit ones of their own to defend their positions.

2. *AN: Conjugal Relations in the Case of False Menstrual Bleeding* (Istiḥāḍa)

> Mālik states it is the AN that it is permissible for a husband to have conjugal relations with his wife if she has false menstrual bleeding (*al-mustaḥāḍa*) on days when it is permissible for her to make her ritual prayer. Similarly, a husband may have conjugal relations with his wife who has delivered a child (*al-nufasāʾ*) if she continues to bleed after the normal period of postpartum bleeding. Her condition is analogous (*bi-manzilat*) to a wife with false menstrual bleeding. Mālik concludes by saying that the AN regarding women with false menstrual bleeding is in accordance with a post-Prophetic report, which states that they are only required to take one ritual bath (*ghusl*) and perform ritual washings (*wuḍūʾ*) for every prayer after that. Mālik states that this is what is preferable to him of what has been transmitted to him regarding this matter.[29]

This precept occurs in the recensions of Yaḥyā, Abū Muṣʿab, al-Qaʿnabī, and Suwayd. It is not in the Ibn Ziyād fragment in its present form, although Saḥnūn transmits the precept from Ibn Ziyād's recension in the *Mudawwana* without citing the AN term.[30] The structure and wording of the recensions differ, but each contains Mālik's two AN terms with the exception of Ibn Ziyād.[31]

As noted, Saḥnūn cites Mālik through Ibn Ziyād and adds additional information from Ibn Wahb. He states Mālik's precepts and defines in detail what constitutes false menstruation and excessive postpartum bleeding.[32] Ibn ʿAbd al-Barr quotes Ibn Wahb as transmitting from Mālik that he regarded this precept as the "precept of the people of jurisprudence and knowledge" (*amr ahl al-fiqh wa al-ʿilm*), who held this opinion whether the bleeding be little or much.[33]

The jurists differed on the permissibility of having conjugal relations with wives who had continuous or excessive postpartum bleeding. This dissent was present in Medina as it was elsewhere. Sulaymān ibn Yasār

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[29] *Muw.*, 1:63; *Muw.* (Dār al-Gharb), 1:108–09; *Muw.* (Abū Muṣʿab), 1:69–70; *Muw.* (al-Qaʿnabī), 130–32; *Muw.* (Suwayd), 75–76; *Muw.* (*Riwāyāt*), 1:346–47.

[30] *Mud.*, 1:54–55; *Mud.* (Ṣādir), 1:49–50: *Mud.* (2002), 1:167–73.

[31] *Muw.*, 1:63; *Muw.* (Dār al-Gharb), 1:108–09; *Muw.* (Abū Muṣʿab), 1:69–70; *Muw.* (al-Qaʿnabī), 130–32; *Muw.* (Suwayd), 75–76; *Muw.* (*Riwāyāt*), 1:346–47.

[32] *Mud.*, 1:54–55; *Mud.* (Ṣādir), 1:49–50: *Mud.* (2002), 1:167–73.

[33] Ibn ʿAbd al-Barr, *al-Istidhkār*, 3:248; Ibn ʿAbd al-Barr, *al-Tamhīd*, 2:423.

held that such women had special license to pray, but it did not give their husbands allowance for sexual intercourse. Al-Zuhrī held the same opinion. This opinion is attributed to ʿĀ'isha, Ibrāhīm al-Nakhaʿī, al-Ḥasan al-Baṣrī, Ibn Sīrīn, al-Shaʿbī, and others.[34] The majority of the jurists held, however, that women with false menstrual bleeding or excessive postpartum bleeding should pray, fast, perform circumambulations around the Kaʿba, recite the Qur'ān, and have conjugal relations with their spouses. This opinion is attributed to Ibn ʿAbbās, Saʿīd ibn al-Musayyab, al-Ḥasan al-Baṣrī (who has the opposite view attributed to him also), Saʿīd ibn Jubayr, ʿIkrima, and ʿAṭā' ibn Abī Rabāḥ. It is the opinion of Mālik, al-Layth ibn Saʿd, al-Thawrī, al-Awzāʿī, al-Shāfiʿī, Ibn Ḥanbal, and Ibn Rāhawayh.[35] ʿAṭā' ibn Abī Rabāḥ, who held the majority view, was challenged on this position and asked, "Is this considered opinion (*ra'y*) or [transmissional] knowledge (*ʿilm*)?" He replied, "we have heard [it transmitted] that if she prays and fasts, it is permissible for her husband to have conjugal relations with her."[36]

Mālik cites *ḥadīth*s and post-Prophetic reports prior to the AN, which indicate that the Prophet and various prominent early Medinese jurists did not regard false menstrual bleeding (*al-istiḥāḍa*) to be the same as normal menstrual bleeding. In these reports, the Prophet advised women who suffered from continuous flows to perform the ritual washing (*ghusl*) and resume their daily ritual prayers once the customary times of their normal menstrual bleeding had passed.[37] Mālik gives no explicit textual support for the AN that such women may have conjugal relations with their spouses, however, and Ibn Rushd speaks of it as one of those matters of Prophetic law for which no texts have come down.[38] Indeed, Mālik's wording in the *Muwaṭṭa'* indicates that the primary evidence for permissibility of conjugal relations is based on analogy with the *ḥadīth* that she is directed to make her prayers. As in many other instances, however, it appears that

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[34] Ibn ʿAbd al-Barr, *al-Istidhkār*, 3:246; Ibn ʿAbd al-Barr, *al-Tamhīd*, 2:421–22; ʿAbd al-Razzāq, *al-Muṣannaf*, 1:311; Ibn Abī Shayba, *al-Muṣannaf*, 1:118–20; al-Zurqānī, *Sharḥ*, 1:185; cf. al-Bājī, *al-Muntaqā*, 1:127; Ibn Rushd, *Bidāya* (Istiqāma), 1:61; cf. al-Ṭaḥāwī, *Mukhtaṣar*, 1:165–67; al-Ṭaḥāwī, *Sharḥ*, 1:-128–39.

[35] Ibn ʿAbd al-Barr, *al-Istidhkār*, 3:247–48; Ibn ʿAbd al-Barr, *al-Tamhīd*, 2:423; ʿAbd al-Razzāq, *al-Muṣannaf*, 1:310–11; al-Zurqānī, *Sharḥ*, 1:185; cf. al-Bājī, *al-Muntaqā*, 1:127; Ibn Rushd, *Bidāya* (Istiqāma), 1:61; cf. al-Ṭaḥāwī, *Mukhtaṣar*, 1:165–67; al-Ṭaḥāwī, *Sharḥ*, 1:-128–39.

[36] ʿAbd al-Razzāq, *al-Muṣannaf*, 1:311.

[37] *Muw.*, 1:62–63.

[38] Ibn Rushd, *Bidāya* (Istiqāma), 1:61.

Medinese praxis—and not just analogy based on a text—provides the further details of this precept that are not explicit in the texts.

The ultimate source of this praxis is not fully indicated, although there is partial textual evidence for it in the *ḥadīth* Mālik transmits. One would expect the full scope of the two AN precepts to have been as old as the provision that women who have continuous bleeding should make their ritual prayers, since the question of conjugal relations between husband and wife is likely to have been a concern of those persons who initially brought the question of continuous flows to the Prophet. It is likely, therefore, that this AN belongs to the category of transmissional praxis. The absence of explicit supportive texts is another example of the general paucity of legal *ḥadīth* for types of praxis going back to the time of the Prophet, not in the sense that no *ḥadīth*s exist at all on the matter but that they do not provide the full scope of the pertinent legal precepts.

Jurists who upheld this AN held that it was an implicit corollary of the precept that women with false menstrual flows resume their prayers. They reasoned that if such women were directed to resume their prayers, which is of great religious consequence, it goes without saying that she could also resume normal conjugal relations. Those who dissented held that the directive to a woman with continuous flows to resume her ritual prayer was a special license, having no bearing on conjugal relations.[39]

Mālik's use of analogy is noteworthy in this example. The *ḥadīth*s and post-Prophetic reports that he cites pertain exclusively to the woman with a continuous false menstrual flow as does the first part of the AN precept. Mālik indicates, however, that women who continue to bleed an unusually long time after childbed are analogous. This constitutes both an application of analogy on the basis of legal precept and not a specific text, and it also is an example of the application of analogy in the area of religious ritual.

3. *AN: Praying Voluntary Prayers at Night and Day*

> Mālik cites a post-Prophetic report that ʿAbd-Allāh ibn ʿUmar used to say that voluntary prayers during the night or day consist of two prayer units (*rakʿa*). One ends each prayer by giving the greeting of peace (*taslīm*) after every two prayer units. Mālik states that this is the AN.[40]

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[39] Ibn Rushd, *Bidāya* (Istiqāma), 1:61; al-Bājī, *al-Muntaqā*, 1:127.

[40] *Muw.*, 1:119–22; *Muw.* (Dār al-Gharb), 1:176; *Muw.* (Abū Muṣʿab), 1:113; *Muw.* (al-Qaʿnabī), 166; *Muw.* (*Riwāyāt*), 1:491–92.

This chapter occurs in the recensions of Yaḥyā, Abū Muṣʿab, and al-Qaʿnabī. Only Yaḥyā states the term AN. Abū Muṣʿab and al-Qaʿnabī give the post-Prophetic report of Ibn ʿUmar but do not follow it by stating the AN precept.[41] Suwayd has a chapter on how the Prophet prayed at night but lacks this chapter and Mālik's AN precept.[42] The precept does not exist in the present recension of Ibn Ziyād.

In the *Mudawwana*, Saḥnūn transmits this precept from Mālik but without citing Mālik's terminology. He transmits substantiating information from Ibn Wahb that ʿAlī, Yaḥyā ibn Saʿīd, al-Layth ibn Saʿd, and al-Zuhrī prayed after this fashion. Ibn al-Qāsim states that Mālik made no stipulations about how many voluntary prayer units should customarily be made, but that it is the Iraqis who have done that.[43]

This precept was a point of difference with the Kufans who permitted that voluntary prayers be prayed in groupings of two, four, eight, or ten units together without being separated by the greeting of peace. Ibn ʿUmar also followed this practice by praying voluntary prayers in the daytime as four units each, although Ibn ʿAbd al-Barr questions the authenticity of such reports. This practice is also attributed to ʿAlī and others.[44] Abū Ḥanīfa and Sufyān al-Thawrī held that there is no set manner in which voluntary prayers are to be performed. They held that one could perform them in the manner that Mālik has described in his AN or in series of three, four, or any other number of prayer units, giving the greeting of peace at the end to complete the prayer.[45]

According to Ibn Rushd, one of the reasons for this contrary Kufan position was a *ḥadīth* transmitted by the Prophet's wife ʿĀ'isha, in which she described how the Prophet used to pray during the night in her house. She says that he would pray four prayer units, which she reports were so long and beautiful as to be beyond description. He would follow these with another four and would complete his night prayers by praying three prayer units.[46] Mālik transmits this *ḥadīth* in the *Muwaṭṭaʾ* in the chapter following the one containing this AN. He also transmits

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[41] *Muw.*, 1:119–22; *Muw.* (Dār al-Gharb), 1:176; *Muw.* (Abū Muṣʿab), 1:113; *Muw.* (al-Qaʿnabī), 166; *Muw.* (*Riwāyāt*), 1:491–92.

[42] *Muw.* (Suwayd), 99.

[43] *Mud.*, 1:96–98; *Mud.* (2002), 1:262–65.

[44] Ibn ʿAbd al-Barr, *al-Istidhkār*, 5:223; ʿAbd al-Razzāq, *al-Muṣannaf*, 2:501–02; cf. Ibn Abī Shayba, *al-Muṣannaf*, 2:74–75; al-Ṭaḥāwī, *Mukhtaṣar*, 1:223; al-Ṭaḥāwī, *Sharḥ*, 1:-434–37.

[45] See al-Bājī, *al-Muntaqā*, 1:213–14; al-Zurqānī, *Sharḥ*, 1:363–64; Ibn Rushd, *Bidāya*, 1:122.

[46] Ibn Rushd, *Bidāya*, 1:122.

other relevant *ḥadīth*s, such as one in which Ibn ʿAbbās describes how he prayed with the Prophet one night. These *ḥadīth*s describe the Prophet as praying voluntary prayers in sets of two prayer units each as reflected in Mālik's AN.[47]

All *ḥadīth*s concerned with this AN are reports of actions. Given the inherent conjecture in reports of action, it is not possible to determine on their basis alone which of them were normative and which were not. By reference to Medinese praxis as reflected in the AN, Mālik again makes use of the non-textual source of praxis (in this case presumably transmissional praxis) to distinguish between normative and non-normative reports. Hearkening back to al-Shāṭibī's conception of Medinese praxis, the precept reflected by Mālik's normative AN in this example would constitute the closely followed *sunna* (*al-sunna al-muttabaʿa*).[48] Dissent on this question revolved around a number of shared *ḥadīth*s, all of which were accepted as authentic. The *ḥadīth*s are inherently polysemic, and Mālik resolves their conjectural implications by reference to praxis.

4. *AN: The Number of Proclamations of God's Greatness* (Takbīrāt) *in Festival Prayers*

> Mālik cites a post-Prophetic report stating that Abū Hurayra, when leading the two festival prayers (*ṣalāt al-ʿīd*), would make seven proclamations of God's greatness (*takbīrāt*)[49] in the first prayer unit (*rakʿa*) before reciting from the Qurʾān. He would then make five proclamations of greatness in the second prayer unit prior to recitation. Mālik states that this is the AN.[50]

This precept occurs in the *Muwaṭṭaʾ* recensions of Yaḥyā, Abū Muṣʿab, al-Qaʿnabī, and Suwayd. It is missing from the Ibn Ziyād fragment. Yaḥyā and al-Qaʿnabī cite the post-Prophetic report of Abū Hurayra and follow it with the AN. Abū Muṣʿab and Suwayd cite the report but do not follow it with the AN.[51]

The *Mudawwana* presents this precept with essentially the same text as the *Muwaṭṭaʾ*, and Saḥnūn cites Mālik as stating that the precept is the AN.

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[47] *Muw.*, 1:120–22.

[48] See Abd-Allah, "*ʿAmal*," 490–97.

[49] The proclamation of God's greatness (*takbīra*) is to say the words "God is greatest" (*Allāh akbar*). It constitutes the opening act of the prayer ritual and is also invoked as a celebrative ritual on other occasions.

[50] *Muw.*, 1:180; *Muw.* (Dār al-Gharb), 1:254; Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:49; *Muw.* (Abū Muṣʿab), 1:229–30; *Muw.* (al-Qaʿnabī), 261; *Muw.* (Suwayd), 163–64; *Muw.* (*Riwāyāt*), 2:92.

[51] *Muw.*, 1:180; *Muw.* (Dār al-Gharb), 1:254; Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:49; *Muw.* (Abū Muṣʿab), 1:229–30; *Muw.* (al-Qaʿnabī), 261; *Muw.* (Suwayd), 163–64; *Muw.* (*Riwāyāt*), 2:92.

Saḥnūn transmits through Ibn Wahb that Mālik stated that festival prayers should be recited according to this manner. He lends it further support through two *ḥadīth*s from Ibn Wahb and transmits from him that Abū Hurayra and a number (*jamāʿa*) of the people of Medina prayed the festival prayers in this way.[52]

Ibn al-Qāsim's statement in the *Mudawwana* that this precept was an AN and was followed by a group of the people of Medina (*jamāʿa min ahl al-Madīna*) is an indication, however, that this AN was not a matter of local consensus.[53] According to Ibn Rushd, the Companions Ibn ʿAbbās and Anas ibn Mālik held that there should be nine proclamations of greatness in each unit of the festival prayers. The prominent Medinese Successor Saʿīd ibn al-Musayyab is also said to have been of this opinion.[54]

The only *ḥadīth*s transmitted on this matter are those supporting the position of Mālik, but there was considerable dissent about it among the Companions. The Kufans do not transmit *ḥadīth*s that affirm their contrary position.[55] The relevant *ḥadīth*s have many channels of transmission, which are are all good (*ḥisān*) according to the evaluations of *ḥadīth* scholars. Mālik, al-Layth, and al-Shāfiʿī hold that the number of proclamations are seven and five. Al-Shāfiʿī differs in that he does not include the opening proclamation of greatness as one of them. (Thus, he begins the prayer with eight proclamations in all.) Ibn Ḥanbal held a position similar to Mālik but put words of praise and exaltation of the Prophet between the declarations of greatness.[56]

The Kufans al-Thawrī, Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī held that there are five proclamations in the first prayer unit and four in the second. Thus, there are three in addition to the standard proclamations of opening the prayer, standing, and bowing. The Kufan position is explicitly transmitted from Ibn Masʿūd, who taught the Kufans to pray after this fashion. The same is related from Ḥudhayfa and Abū Mūsā, Masrūq, and Jābir ibn ʿAbd-Allāh.[57] The Kufan position has been transmitted by a large

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[52] *Mud.*, 1:155; *Mud.* (2002), 1:406–08.

[53] *Mud.*, 1:155; *Mud.* (2002), 1:406–08.

[54] Ibn Rushd, *Bidāya*, 1:127.

[55] Ibn ʿAbd al-Barr, *al-Tamhīd*, 5:254; Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:52; ʿAbd al-Razzāq, *al-Muṣannaf*, 3:291–93; Ibn Abī Shayba, *al-Muṣannaf*, 1:493.

[56] Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:49–51, 53; Ibn ʿAbd al-Barr, *al-Tamhīd*, 5:253; ʿAbd al-Razzāq, *al-Muṣannaf*, 3:291; Ibn Abī Shayba, *al-Muṣannaf*, 1:494–95.

[57] Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:51–53; Ibn ʿAbd al-Barr, *al-Tamhīd*, 5:253–54; ʿAbd al-Razzāq, *al-Muṣannaf*, 3:293–94, 296; Ibn Abī Shayba, *al-Muṣannaf*, 1:493–94; al-Ṭaḥāwī, *Mukhtaṣar*, 1:374–75.

group of the early jurists in Iraq and the Companions and Successors. None of them was transmitted as praying differently in the two festival prayers except ʿAlī, and the transmissions about ʿAlī are not strong.[58]

There were a number of other dissenting positions on the number of proclamations performed in the festival prayers. Ibn ʿAbbās held that there were seven proclamations in the first unit and six in the second. It is also transmitted from him that one could do a total of nine, eleven, or thirteen.[59] It has been transmitted from ʿAlī that he did eleven in all: six in the first prayer unit and five in the second. According to another report, ʿAlī prayed two different ways in each of the two annual festival prayers.[60]

According to Ibn Rushd and al-Bājī, no authentic *ḥadīth*s were transmitted on how many proclamations of God's greatness the Prophet made when praying the festival prayers. Numerous *ḥadīth*s state that the Prophet led the people in praying the festival prayers, but they leave out this detail. The chapter in which Mālik cites this AN contains *ḥadīth*s stating the portions of the Qur'ān that the Prophet recited while leading the festival prayers, but they do not provide details about the number of proclamations of greatness. There would have been no question in Mālik's mind that the praxis of festival prayers went back to the time of the Prophet and belonged to the category of what later jurists called transmissional praxis. Al-Bājī and Ibn Rushd hold that Mālik's AN precept in this example was derived from transmissional praxis, which, in their view, was in conformation with the post-Prophetic report that Mālik transmits from Abū Hurayra.[61]

This AN is another example of a fundamental religious practice that is attested in numerous *ḥadīth*s—although they support only one position out of several—yet the *ḥadīth*s were not regarded as enjoying the highest level of transmissional authenticity and did not by themselves constitute sufficient legal proof.

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[58] Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:53–54.

[59] Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:52; Ibn ʿAbd al-Barr, *al-Tamhīd*, 5:253; ʿAbd al-Razzāq, *al-Muṣannaf*, 3:294–95.

[60] Ibn ʿAbd al-Barr, *al-Istidhkār*, 7:52–53; Ibn Abī Shayba, *al-Muṣannaf*, 1:494.

[61] Ibn Rushd, *Bidāya*, 1:127; al-Bājī, *al-Muntaqā*, 1:319. Al-Bājī states that there is a *ḥadīth* on the number of proclamations of God's greatness that the Prophet made in the festival prayers which supports Mālik's AN. He observes, however, that this *ḥadīth* is not regarded to be authentic.

5. *AN: Proclamation of God's Greatness* (Takbīr) *during the Festive Days of Pilgrimage* (Ayyām al-Tashrīq)

> Mālik states it is the AN that the proclamation of God's greatness (*takbīr*) is performed after each of the obligatory daily prayers during the festive days of the pilgrimage (*ayyām al-tashrīq*), beginning with the proclamation of greatness that the *imām* makes with the congregation praying behind him on the day of sacrifice [the tenth day of the pilgrimage] after the noon (*ẓuhr*) prayer and ending with the final proclamation of greatness by the *imām* and the people praying with him following the dawn (*ṣubḥ*) prayer on the last of the festive days of the pilgrimage. Mālik states that the proclamation of God's greatness is required (*wājib*) of men and women during the festive days whether they pray in groups or alone and whether they are present in the pilgrimage or are elsewhere. Mālik states that "the numbered days" (*al-ayyām al-maʿdūdāt*) mentioned in the Qurʾān [2:203][62] in connection with the pilgrimage refer to the festive days of the pilgrimage.[63]

This chapter occurs in the recensions of Yaḥyā, Abū Muṣʿab, and Suwayd.[64] The transmissions of Yaḥyā and Abū Muṣʿab are similar and both contain the AN precept.[65] Suwayd has the same chapter heading, but his wording and structure differ. He does not include the AN nor the additional comments of Mālik that are in Yaḥyā and Abū Muṣʿab.[66] The precept does not occur in al-Qaʿnabī or the present edition of Ibn Ziyād. In the *Mudawwana*, however, Saḥnūn transmits essentially the same material about this precept from the *Muwaṭṭaʾ* recension of Ibn Ziyād and gives Mālik's AN term.[67]

As is often the case with the *Mudawwana*, Saḥnūn repeats the information in the *Muwaṭṭaʾ* and adds extensive corroborating and elaborative material. He states that the proclamations of greatness begin after the *imām* performs his sacrifice [on the tenth day of the pilgrimage]. The text gives the exact wording of the proclamation and states that it is done three times after every obligatory prayer. The transmission continues to give information corresponding to the *Muwaṭṭaʾ* text including definition of the festive days of pilgrimage, although differing somewhat in structure

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[62] The verse reads, "And call [the name of God] to remembrance during the numbered days."

[63] *Muw.*, 1:404; *Muw.* (Dār al-Gharb), 1:540–41; *Muw.* (Abū Muṣʿab), 1:541–42; *Muw.* (Suwayd), 452; *Muw.* (*Riwāyāt*), 2:576–77.

[64] *Muw.*, 1: 404.

[65] *Muw.*, 1:404; *Muw.* (Dār al-Gharb), 1:540–41; *Muw.* (Abū Muṣʿab), 1:541–42; *Muw.* (*Riwāyāt*), 2:576–77.

[66] *Muw.* (Suwayd), 452.

[67] *Mud.*, 1:157; *Mud.* (2002), 1:413–14.

and content. Ibn al-Qāsim informs Saḥnūn that Mālik was asked about making the proclamations of greatness during the festive days of pilgrimage at times other than immediately after the daily prayers. Mālik replied, "I have seen the people doing that. As for those whom I met and whose example I follow (*ammā man adraktu wa aqtadī bihim*), they only made the proclamations of greatness immediately after the daily prayers." This important text shows—as frequently noted—that, for Mālik, the circle of Medinese scholars on whom he depended constituted his criterion of authority for local praxis, and he distinguished between them and the common practice of the people. Ibn al-Qāsim then specifies when the proclamations begin and when they end, giving the same information as in the above *Muwaṭṭa'* text and verifying that what he has said is Mālik's opinion. Saḥnūn adds supporting texts from Abū Bakr ibn Muḥammad ibn Ḥazm, Yaḥyā ibn Saʿīd, and Ibn Abī Salama.[68]

There was general agreement among the jurists that the Qur'ānic verse Mālik refers to at the end of this AN referred to the practice of making the proclamations of God's greatness during the festive days of the pilgrimage following the performance of the obligatory prayers. Opinions of the jurists differed greatly regarding the details of the practice of declaring God's greatness on these days. Their differences extended to the details set forth in Mālik's AN. Ibn Rushd states that there were ten different opinions on the matter, which he attributes to the fact that recitation of the proclamations of greatness was transmitted exclusively by praxis without any authentic *ḥadīth*s. Al-Zurqānī corroborates Ibn Rushd's position.[69]

Mālik's definition of "the numbered days" was also a matter of juristic consensus. There were differences from the earliest period, however, about when exactly the proclamations of greatness should begin and end. ʿUmar reportedly began them on the ninth day and continued to make them until the noon prayer on the last of the festive days of pilgrimage. Ibn Masʿūd had a similar practice and continued the proclamations until the afternoon prayer (*al-ʿaṣr*) on the last of the festive days. Similar differences are transmitted from Saʿīd ibn Jubayr, Ibn ʿAbbās, Zayd ibn Thābit, and others. Al-Ḥasan al-Baṣrī affirmed the same position as Mālik's AN. Ibn ʿAbd al-Barr regards these differences as being matters of great latitude.[70]

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[68] *Mud.*, 1:157; *Mud.* (2002), 1:413–14.

[69] Ibn Rushd, *Bidāya*, (Istiqāma), 1:213; al-Zurqānī, *Sharḥ*, 3:217; cf. al-Bājī, *al-Muntaqā*, 3:41–43.

[70] Ibn ʿAbd al-Barr, *al-Istidhkār*, 13:171–74; cf. Ibn Abī Shayba, *al-Muṣannaf*, 3:240–41.

The prominent Medinese jurist al-Zuhrī agreed on the time when the proclamations of greatness begin as set forth in Mālik's AN, but, according to Ibn Rushd, he disagreed regarding the time when they were supposed to end. Whereas Mālik states that the proclamations end with the dawn prayer on the last of the festive days, al-Zuhrī held that they did not end until after performance of the afternoon prayer on that day. Sufyān al-Thawrī is said to have taken al-Zuhrī's position regarding the time when the proclamations of greatness ended, but he believed that they should begin a day earlier than in Mālik's AN.[71] Some jurists held that the proclamations of greatness were required only of men and not of both men and women as in Mālik's AN. Some held in contrast to Mālik's AN that the proclamations applied exclusively to people praying in groups, not to individuals praying by themselves. Other jurists held that the proclamations of God's greatness pertained only to Muslims performing the pilgrimage.[72]

This AN falls under the category of transmissional praxis. It constitutes another instance of a fundamental precept that is integrally related to the Prophetic *sunna* but was transmitted by the non-textual source of praxis without supporting textual verification in *ḥadīth* texts. It was an issue of extensive differences of opinion among the early jurists. As indicated by al-Zuhrī's differences in the matter, there were also dissenting positions among the Medinese jurists on the matter. Few fundamental matters of Islamic law had as extensive a variety of differences of opinion as this AN precept. The absence of explicit *ḥadīth*s in this case indicates both the cultural effect of standing praxis on limiting their transmission. It also shows that however many legal *ḥadīth*s may have been fabricated, it was hardly the case that for every dissenting position in law jurists were able to produce explicit corresponding *ḥadīth*s to vindicate their positions.

AN Precepts Pertaining to Social Transactions

1. *AN: No Fixed Indemnity for Penetrating Body Wounds* (Al-Nāfidha)

   Mālik states that Saʿīd ibn al-Musayyab held that the indemnity for any wound penetrating (*nāfidha*) the flesh of a body limb should be fixed at one-third the indemnity for loss of that limb. Mālik observes that al-Zuhrī

[71] Ibn Rushd, *Bidāya*, (Istiqāma), 1:213.

[72] See Ibn Rushd, *Bidāya*, (Istiqāma), 1:213; al-Zurqānī, *Sharḥ*, 3:217; cf. al-Bājī, *al-Muntaqā*, 3:41–43. No indication is given of who held these opinions with the exception of Ibn Rushd's specification of the positions of al-Zuhrī and Sufyān al-Thawrī.

did not hold this opinion. Mālik continues to say that there is no AMN (*amr mujtamaʿ ʿalayhi*) in this matter and that it is his opinion that the amount of such indemnities be left to the legal interpretation (*ijtihād*) of the Imām. Mālik states that the AN is that the brain wound (*maʾmūma*), cranial wound (*munaqqila*), and skull wound (*mūḍiḥa*) pertain only to wounds inflicted upon the head or face.[73] Similar wounds inflicted upon other limbs of the body are matters of legal interpretation (*ijtihād*).[74]

This AN precept occurs in the recensions of Yaḥyā and Abū Muṣʿab. Abū Muṣʿab has different chapter divisions and overall structure. He treats the issue of penetrating wounds (*nāfidha*) earlier, giving Ibn al-Musayyab's opinion, Mālik's statement that there is no AMN in penetrating wounds, and his view that they should be matters of legal interpretation.[75] Abū Muṣʿab later cites Yaḥyā's AN as an AMN—namely that brain, cranial, and skull wounds pertain only to the face and head. The same terms are not applied to body wounds, which are left to legal interpretation.[76] This precept does not appear in the recensions of al-Qaʿnabī, Suwayd, or Ibn Ziyād.

In the *Mudawwana*, Saḥnūn asks Ibn al-Qāsim about the definition of the skull wound (*mūḍiḥa*), cranial wound (*munaqqila*), brain wound (*maʾmūma*), and internal wound (*jāʾifa*) according to Mālik. He asks a number of detailed questions of legal interpretation such as whether these types of wounds to the face have indemnities equal to when they are inflicted on the head or are to be increased when they leave a scar. Ibn al-Qāsim notes that Mālik's opinions differed on internal wounds. He held at one time that they were worth one-third the indemnity of the limb and, at another time, two-thirds. Ibn al-Qāsim states that he personally prefers Mālik's second opinion that they should be awarded two-thirds the indemnity. I did not find an terms associated with these precepts in the *Mudawwana*.[77]

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[73] Mālik has discussed the indemnities fixed for these three types of wounds just prior to the discussion of this AN. The brain wound (*maʾmūma*), according to Mālik, is defined as a head or facial wound that lays bare the *dura mater* of the brain; the cranial wound (*munaqqila*) shatters the small bones next to the cranium but does not penetrate the brain matter; and the skull wound (*mūḍiḥa*) lays bare the skull bone without penetrating further. See *Muw.*, 2:858–59.

[74] *Muw.*, 2:859; *Muw.* (Dār al-Gharb), 2:429–30; Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:132; *Muw.* (Abū Muṣʿab), 2:234–36; *Muw.* (*Riwāyāt*), 4:201–04.

[75] *Muw.* (Abū Muṣʿab), 2:225.

[76] *Muw.* (Abū Muṣʿab), 2:236.

[77] *Mud.*, 4:434; *Mud.* (2002), 187–88.

As Mālik explicitly indicates, however, there was significant local dissent on this AN between two of the most important Medinese jurists, Saʿīd ibn al-Musayyab and al-Zuhrī. Mālik indicates in this example that AMN and AN are not identical terms. The term AMN does not apply to this AN precept because of lack of local concurrence.

Ibn ʿAbd al-Barr notes that this precept was a matter of legal interpretation with no set stipulations or *sunna*. He presumes that Saʿīd ibn al-Musayyab's opinion was based on analogy with the internal body wound (*jāʾifa*). Any wound reaching the interior was believed to have wounded a life-threatening point (*maqtal*) and, in one view, deserved one-third of a full indemnity. The penetrating wound (*nāfidha*) to a limb was not seen as life-threatening and should receive one-third the indemnity of that limb.[78] Mālik, Abū Ḥanīfa, and al-Shāfiʿī held that no indemnities were set for anything less than the brain wound. ʿUmar, Muʿādh ibn Jabal, Masrūq, al-Shaʿbī, and others held, however, that the indemnity was to pay the wounded person's doctor expenses. ʿUmar ibn ʿAbd al-ʿAzīz upheld this opinion and wrote to his governors directing them to execute it. Ibrāhīm al-Nakhaʿī held that the indemnity for any wound less than the brain wound was what both parties agreed upon (*al-ṣulḥ*).[79]

Ibn Jurayj, Yaḥyā ibn Saʿīd, Mālik, Abū Ḥanīfa, al-Shāfiʿī, their disciples, and the majority of scholars held that the skull wound (*mūḍiḥa*), with its particular indemnity, pertained only to the head and face, not to other limbs of the body. Al-Layth ibn Saʿd, al-Awzāʿī, and some other jurists applied that term broadly and awarded the indemnity associated with it for any part of the body where bone was exposed. Al-Awzāʿī set the indemnity for such wounds that were not to the head and face as one half the indemnity for the face. This was also reportedly the verdict of ʿUmar during his caliphate.[80]

The indemnity of the skull wound to the head and face was a matter of juristic concurrence. Most jurists held that the Prophet had set it himself. They dissented regarding the application of the same term to other limbs of the body and setting fixed indemnities for them.[81] There were also slight differences among the jurists on the legal definition of

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[78] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:131–32. For definition of the internal body wound, see Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:126.

[79] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:126–27.

[80] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:119–21; cf. al-Ṭaḥāwī, *Mukhtaṣar Ikhilāf*, 5:107–09.

[81] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:121.

the cranial wound (*munaqqila*) and the appropriate indemnities.[82] ʿUmar, ʿUthmān, Zayd ibn Thābit, and Saʿīd ibn al-Musayyab are also said to have set indemnities for certain lesser wounds. The majority, however, held that such wounds were left to arbitration (*al-ḥukūma*), mutual agreement (*al-ṣulḥ*), and legal interpretation with nothing having been specifically set.[83] Ibn al-Zubayr allowed for injury-in-kind (*qawad*) in the case of brain and cranial wounds. The majority of jurists held, however, that injury-in-kind should not be permitted in any of these or similar wounds because of the danger that infliction of the injury could lead to death.[84]

In the *Muwaṭṭaʾ* text, Mālik has been discussing indemnities for head and facial wounds just prior to his presentation of Saʿīd ibn al-Musayyab's dissenting opinion. Each of the wounds discussed constitutes a penetrating (*nāfidha*) wound, and each of them had a fixed indemnity set down by the Prophet in a letter he dispatched to one of his regional governors. Mālik refers to this letter just prior to giving Ibn al-Musayyab's opinion.

Al-Bājī states that semantically the three terms "brain wound" (*maʾmūma*), "cranial wound" (*munaqqila*), and "skull wound" (*mūḍiḥa*) could be applied to wounds that penetrate other parts of the body. Mālik's comments in the AN and the discussion preceding it clarify that these terms are restricted in application to head and facial wounds.[85] Saʿīd ibn al-Musayyab, in al-Zurqānī's view, did not agree to this semantic restriction of the three terms.[86]

Mālik might have regarded the praxis of this AN to belong to the category of transmissional praxis (*al-ʿamal al-naqlī*), which went back to the time of the Prophet. Mālik held that the indemnities fixed for brain, cranial, skull, and a number of other wounds had been determined by the Prophet in the letter just mentioned. Mālik probably regarded the Medinese praxis which drew an exception to these types of penetrating head and facial wounds as well as deep wounds to other parts of the body as also going back to the time of the Prophet. Mālik probably regarded the absence of fixed indemnities in such matters and the fact that Medinese praxis left them to the independent judgment (*ijtihād*) of the Imām as

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[82] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:123.
[83] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:127–28; Ibn Abī Shayba, *al-Muṣannaf*, 5:352.
[84] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:133; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:459–65.
[85] Al-Bājī, *al-Muntaqā*, 7:87.
[86] Al-Zurqānī, *Sharḥ*, 5:152.

going back to the Prophet's deliberate omission (*tark*).[87] In the discussion preceding the AN, for example, Mālik defends a second position he has taken that there are no indemnities for head or facial wounds that are less serious than the skull wound (*mūḍiḥa*). He argues that the skull wound is the least serious head and facial wound for which the Prophet fixed an indemnity in the letter he dispatched to his governor. Mālik then notes that none of the Imāms of the past or present ever awarded indemnities for head or facial wounds that were less serious than the skull wound. Mālik is apparently arguing that the praxis of not awarding indemnities for such wounds goes back to the deliberate omission (*tark*) of the Prophet, which explains the positions of subsequent "Imāms of the past or present."

Finally, it should be pointed out that awarding indemnities was a matter that fell under the jurisdiction of the Medinese judiciary, as indicated by Mālik's several references in this chapter to the praxis and the personal legal interpretation of the Imāms. The fact that no fixed indemnities were set in this AN indicates again that Medinese praxis left a number of legal issues to the personal discretion of judges, which would be another example of mixed praxis falling under the jurisdiction of the city's judiciary.

2. *AN: Indemnities for Broken Teeth*

> Mālik cites a report that Marwān ibn al-Ḥakam sent a messenger to the Companion Ibn ʿAbbās asking him what the indemnity was for a knocked out molar tooth. Ibn ʿAbbās told the messenger that it was five camels. Later, Marwān sent his messenger back to Ibn ʿAbbās to ask him why he set the indemnity for a back tooth at the same amount that is given for a frontal tooth. Ibn ʿAbbās answered, "Why did you not compare it to the fingers? The indemnity of each of them is the same." Mālik cites another report that ʿUrwa ibn al-Zubayr considered the indemnity of all teeth to be identical. Mālik then states that it is the AN that the indemnity of all teeth—frontal as well as back teeth—is the same. He states that this is because the Prophet said, "Five camels for a tooth," and the molar is one of the teeth. None of them is regarded as being worth more than the others.[88]

This precept occurs only in the transmissions of Yaḥyā and Abū Muṣʿab, and both cite the same AN term. Yāḥyā presents this precept in a praxis chapter. Abū Muṣʿab uses a similar title without reference to praxis. His

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[87] See Abd-Allah, "*ʿAmal*," 410–15.

[88] *Muw.*, 2:862; *Muw.* (Dār al-Gharb), 2:432; *Muw.* (Abū Muṣʿab), 2:237–38; *Muw.* (*Riwāyāt*), 4:207–08.

structure and content also vary.[89] The precept does not occur in the recensions of al-Qaʿnabī, Suwayd, or Ibn Ziyād as they presently stand.

The *Mudawwana* does not treat this precept at length, nor does it state any of Mālik's terms. Saḥnūn does narrate from Mālik, however, that he held the indemnities of all teeth to be equal, each tooth having the value of five camels.[90]

There was consensus that the indemnity for frontal teeth was five camels.[91] It is clear from the *Muwaṭṭaʾ* that Marwān ibn al-Ḥakam did not dispute this ruling, although he questioned that the indemnity for back teeth should be equal to frontal teeth. The chapter preceding Mālik's AN cites reports indicating that there were dissenting opinions among the Companions and Successors regarding the indemnities for back teeth. He cites a post-Prophetic report according to which ʿUmar ibn al-Khaṭṭāb awarded an indemnity of one male camel (*jamal*) for a molar. Muʿāwiya is reported to have awarded five, the same indemnity that Ibn ʿAbbās stipulated. Mālik cites another report according to which the prominent Medinese Successor Saʿīd ibn al-Musayyab commented on the differences between the opinions of ʿUmar and Muʿāwiya saying that the indemnity was [too] low in ʿUmar's judgment and [too] high in Muʿāwiya's. Saʿīd ibn al-Musayyab states that if he were to rule in the matter, he would award two camels. He concludes by saying, "… every person giving an independent legal opinion is given a reward" (*wa kullu mujtahid maʾjūr*).[92] The majority of early jurists including Abū Ḥanīfa agreed with Mālik's AN. ʿUmar ibn ʿAbd al-ʿAzīz, however, is said to have preferred the position of Saʿīd ibn al-Musayyab.[93]

Ibn ʿAbd al-Barr notes that a large number of the early jurists outside Medina took the same position as Mālik on this precept. Some of the Successors disagreed, however, which—he explains—is why Marwān sent a messenger to Ibn ʿAbbās to learn his answer. As is clear from Ibn ʿAbbās's answer and, as Ibn ʿAbd al-Barr also notes, his response was made on the basis of legal analogy and not reference to given texts. There was a *ḥadīth* on this matter. Much of the dissent among the Successors was based, however, on a post-Prophetic report that front teeth had the indemnity of five

[89] *Muw.*, 2:862; *Muw.* (Dār al-Gharb), 2:432; *Muw.* (Abū Muṣʿab), 2:237–38; *Muw.* (*Riwāyāt*), 4:207–08.
[90] *Mud.*, 4:436; *Mud.* (2002), 11:193–94.
[91] Ibn Rushd, *Bidāya* (Istiqāma), 2:416.
[92] *Muw.*, 2:861.
[93] Al-Bājī, *al-Muntaqā*, 7:93; al-Zurqānī, *Sharḥ*, 5:156.

camels, while the remainder of teeth were worth only two camels whether they were in the upper or lower jaw. Ṭāwūs also held that front teeth took priority over back teeth, and small camels were paid for molars. Ṭāwūs based his position on the considered opinion that some teeth were more valuable than others "in the view of the people considered opinion (*raʾy*) and consultation (*mashwara*)".[94] ʿAlī, Ibn Masʿūd, al-Ḥasan al-Baṣrī, Shurayḥ, ʿUrwa ibn al-Zubayr, Ibrāhīm al-Nakhaʿī, al-Shaʿbī, Masrūq, Makḥūl, and ʿUmar ibn ʿAbd al-ʿAzīz held that all teeth were equal. Qatāda and al-Zuhrī also held this opinion.[95] According to ʿAbd al-Razzāq, ʿUmar also held that back teeth deserved a lower indemnity than frontal teeth.[96] According to another account in Ibn Abī Shayba, however, ʿUmar regarded all teeth as equal.[97]

Mālik cites this AN in a praxis-chapter. Consistently with his arrangement of other praxis-chapters, he cites the dissenting opinions of ʿUmar ibn al-Khaṭṭāb and Saʿīd ibn al-Musayyab in a chapter immediately preceding it, indicating that their divergent opinions do not constitute Medinese praxis. It is apparent from the chapter structure and wording of the *Muwaṭṭaʾ* that Mālik's AN constituted the praxis of Medina.

Mālik regards this AN to be supported by the *ḥadīth* that he cites at the end of the chapter, the overt (*ẓāhir*) meaning of which is that the indemnity for all teeth in general was fixed at five camels. Al-Bājī regards the wording of the *ḥadīth* to be conjectural. As discussed earlier, overt statements are classified as conjectural in Mālikī legal reasoning.[98] He notes that the *ḥadīth* may be validly interpreted as an implicit reference to certain teeth—such as the frontal teeth—as opposed to them all, including back teeth, the loss of which does not distort one's appearance.[99] According to the report Mālik cites, Saʿīd ibn al-Musayyab regarded the indemnity of back teeth to be a matter of personal legal interpretation (*ijtihād*), not falling explicitly under the wording of the Prophetic *ḥadīth*.

In addition to citation of the *ḥadīth*, Mālik supports this AN by indicating that it was Medinese praxis and was supported by Ibn ʿAbbās and ʿUrwa ibn al-Zubayr. He sets forth the reasoning of Ibn ʿAbbās. The analogy

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[94] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:149–50; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:344–47; Ibn Abī Shayba, *al-Muṣannaf*, 5:365–67.

[95] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:150–51; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:344–46; Ibn Abī Shayba, *al-Muṣannaf*, 5:366.

[96] ʿAbd al-Razzāq, *al-Muṣannaf*, 9:345.

[97] Ibn Abī Shayba, *al-Muṣannaf*, 5:366.

[98] See Abd-Allah, "*ʿAmal*," 146–48.

[99] See al-Bājī, *al-Muntaqā*, 7:94.

Ibn ʿAbbās makes to support his judgment on back teeth was based on other established precepts of law, which were also standard Medinese praxis. It is not based explicitly on a revealed text. Ibn ʿAbbās asserts that the precept that the indemnity for all teeth is equal is analogous to the precept that the indemnity of each finger is equal. Ibn ʿAbbās implies that, although the uses and appearance of teeth are not all the same, likewise the utilities of each of the fingers are different, but they have the same indemnity. By reference to praxis and the reasoning of Ibn ʿAbbās, Mālik indicates that it is the overt (*ẓāhir*) meaning of the *ḥadīth* that constitutes the intended legal meaning.

The praxis underlying this AN appears to lie somewhere between transmissional and old praxis (*al-ʿamal al-qadīm*). Mālik obviously regarded his precept to be implicit in the *ḥadīth* he cites, since he mentions its wording in support of it. Yet, the AN could not have been a well-known praxis in the Prophet's time, if prominent authorities such as ʿUmar ibn al-Khaṭṭāb and Saʿīd ibn al-Musayyab held contrary opinions.

Like the preceding example, this AN falls under the jurisdiction of civil authority. Ibn ʿAbbās is asked to give an opinion by Marwān ibn al-Ḥakam, who as the local governor, had the responsibility to put it into law. Similarly, when Mālik refers to ʿUmar ibn al-Khaṭṭāb and Muʿāwiya, he is reporting legal judgments that they handed down while in positions of civil authority. Even Saʿīd ibn al-Musayyab implicitly notes the connection of the ruling to civil jurisdiction when he says, "If I were to judge in the matter . . .". He did not have the authority to hand down such a judgment, however, because he was not a judge.

This AN precept was a matter of local Medinese dissent and constitutes another of the many issues of Islamic law in which there is relative paucity of *ḥadīth*s as explicit indicants of the dissenting opinions of the jurists.

3. *AN: The Divorcement Oath* (Al-Īlāʾ)

Mālik cites a post-Prophetic report that ʿAlī ibn Abī Ṭālib held that taking the divorcement oath (*īlāʾ*)[100] does not constitute a pronouncement of repudiation (*taṭlīqa*), even if four months pass from the time it is made until the husband has been brought before a judge and required to choose either to resume normal marital relations with his wife or make an explicit pronouncement of repudiation. Mālik states that this is the AN. He cites another post-Prophetic report that ʿAbd-Allāh ibn ʿUmar held the same opinion as

[100] *Īlāʾ* was a pre-Islamic custom whereby a husband took an oath that he would no longer have sexual relations with his wife. See al-Zurqānī, *Sharḥ*, 4: 75–76.

> ʿAlī. Mālik then cites other reports stating that Saʿīd ibn al-Musayyab, Abū Bakr ibn ʿAbd al-Raḥmān, and al-Zuhrī did not agree to this precept. They held, on the contrary, that once four months had transpired after the pronouncement of the divorcement oath without the resumption of normal marital relations, the husband would be technically regarded as having made a single pronouncement of repudiation. Mālik reports that Marwān ibn al-Ḥakam used to hand down legal judgments in accordance with the opinion held by al-Zuhrī.[101]

This AN precept occurs in the recensions of Yaḥyā, Abū Muṣʿab, and Suwayd. Each of them state the AN, although Suwayd states the AN twice in the same chapter. The content and structure of the chapters differs somewhat, and Suwayd lacks the extensive legal comments that occur in the transmissions of Yaḥyā and Abū Muṣʿab.[102] The precept is missing from the transmissions of al-Qaʿnabī and Ibn Ziyād.

Saḥnūn gives this precept considerable attention. He gleans extensive information about what does and does not constitute a divorcement oath (*īlāʾ*).[103] He receives clarification about whether a wife under such an oath for a year without the husband having been required to make a repudiation is actually repudiated. He produces some of the most extensive supporting evidence for any precept in the *Mudawwana*. He transmits through Ibn Wahb through Jaʿfar al-Ṣādiq and Muḥammad al-Bāqir that ʿAlī held to Mālik's precept. He produces similar supporting post-Prophetic reports from Ibn ʿUmar, al-Qāsim ibn Muḥammad, and ʿĀʾisha. He transmits another report from Ibn Wahb on the authority of "people of knowledge" that ʿUmar, ʿUthmān, numerous Companions, Abū al-Dardāʾ, ʿUrwa, al-Qāsim, Saʿīd ibn al-Musayyab, Sulaymān ibn Yasār, ʿUmar ibn ʿAbd al-ʿAzīz, Yaḥyā ibn Saʿīd, Abū al-Zinād, Mujāhid, and Saʿīd ibn Jubayr all concurred that pronouncement of the divorce oath does not lead to repudiation until the husband has been brought before a judge and forced to decide. Sulaymān ibn Yasār adds, "even if a year has gone by." A similar report is transmitted from ʿAlī, and Ibn Wahb reports ʿĀʾisha as stating, "even if seven years have gone by."[104]

According to Ibn Rushd, dissent regarding this precept was rooted in the conjectural wording of the relevant Qurʾānic verses (Qurʾān, 2: 226–27).

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[101] *Muw.*, 2:556–57; *Muw.* (Dār al-Gharb), 2:65–66; *Muw.* (Abū Muṣʿab), 1:608; *Muw.* (Suwayd), 274–75; *Muw.* (*Riwāyāt*), 3:245–49.

[102] *Muw.*, 2:556–57; *Muw.* (Dār al-Gharb), 2:65–66; *Muw.* (Abū Muṣʿab), 1:608; *Muw.* (Suwayd), 274–75; *Muw.* (*Riwāyāt*), 3:245–49.

[103] *Mud.*, 2:320–27; *Mud.* (2002), 5:141–54.

[104] *Mud.*, 2:327; cf. Ibn Abī Shayba, *al-Muṣannaf*, 4:132–33.

The verses stipulate the four month period as the limit for the divorcement oath but do not clarify whether or not the elapsing of that period constitutes a pronouncement of repudiation or whether—in accord with Mālik's AN—the spouse making the divorcement oath shall be forced at that time to make a decision on continuing the marriage or determining to get a divorce.[105] As before, Mālik indicates clearly that this precept constituted a matter of dissent among prominent Medinese jurists. The precept falls under the jurisdiction of the judiciary. Mālik indicates that Marwān ibn al-Ḥakam handed down rulings in accordance with the opinion that Saʿīd ibn al-Musayyab and al-Zuhrī regarded as correct, which was contrary to the AN. Abū Ḥanīfa and the Kufans are also said to have held to an opinion contrary to Mālik's AN.[106]

Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī, Sufyān al-Thawrī, and a number of other Kufan jurists held that after four months passed, the divorcement oath became tantamount to a single repudiation, and the husband had no right to take his wife back. This was the opinion of Ibn ʿAbbās, Ibn Masʿūd, Zayd ibn Thābit, and is transmitted as an opinion of ʿUthmān and Ibn ʿUmar. There is no dispute that this was the position of Ibn ʿAbbās and Ibn Masʿūd. It was also the position of ʿAṭāʾ ibn Abī Rabāḥ, al-Ḥasan al-Baṣrī, Ibrāhīm al-Nakhaʿī, Masrūq, Ibn Sīrīn, Muḥammad ibn al-Ḥanafiyya, ʿIkrima, and others. There were differences among them about whether the woman was required to enter her waiting period after that time.[107]

Contrary reports are transmitted from ʿAlī and Ibn Masʿūd that after four months the divorcement oath becomes a single repudiation if the husband does not take his wife back before that time. Ibn ʿAbd al-Barr contends that these reports about ʿAlī are not as authentically transmitted as reports confirming Mālik's narration of ʿAlī's contrary opinion.[108] Sālim ibn ʿAbd-Allāh, Abū al-Dardāʾ, and ʿĀʾisha are also said to have held that the divorcement oath becomes a single repudiation after four months. There are differing reports about ʿUthmān's position on the matter.[109] According to Ibn ʿAbd al-Barr, the most carefully narrated account from Saʿīd ibn al-Musayyab is that he regarded the divorcement oath as becoming a single repudiation after four months.[110] Al-Zuhrī also stated this opinion

[105] Ibn Rushd, *Bidāya*, 2:60.
[106] Ibn Rushd, *Bidāya*, 2:60; al-Bājī, *al-Muntaqā*, 5:33; al-Zurqānī, *Sharḥ*, 4:75–76.
[107] Ibn ʿAbd al-Barr, *al-Istidhkār*, 17:89–91; ʿAbd al-Razzāq, *al-Muṣannaf*, 6:446–57; Ibn Abī Shayba, *al-Muṣannaf*, 4:131–32; al-Ṭaḥāwī, *Mukhtaṣar*, 2:473–75.
[108] Ibn ʿAbd al-Barr, *al-Istidhkār*, 17:82–85; Ibn Abī Shayba, *al-Muṣannaf*, 4:132–33.
[109] Ibn ʿAbd al-Barr, *al-Istidhkār*, 17:85–86.
[110] Ibn ʿAbd al-Barr, *al-Istidhkār*, 17:88.

that the divorcement oath became a single repudiation after four months, but that the husband had the right to take his wife back. Qatāda objected that al-Zuhrī neither followed the opinion of ʿAlī, Ibn Masʿūd, Ibn ʿAbbās, or Abū al-Dardāʾ in the matter.[111]

As in the preceding example, Medinese judicial tradition was not uniform in this matter. Marwān ibn al-Ḥakam represents a variation from the AN in local judicial practice. In the preceding example, ʿUmar ibn al-Khaṭṭāb and ʿUmar ibn ʿAbd al-ʿAzīz were reported to have represented departures from the judicial procedure spelled out in Mālik's AN.[112]

The source of this praxis is difficult to determine. The precept pertains to the interpretation of a Qurʾānic verse. It is likely that the related praxis would have been either of the category of transmissional or old praxis, but Mālik does not indicate what the Companions ʿAlī and Ibn ʿUmar based their interpretations on, nor does he indicate the basis of the other dissenting views. Again, Mālik shows no particular concern for indicating the source of the praxis but rather in asserting that it was a type of praxis supported by authoritative Medinese jurists, although not supported by their concurrence (*ijtimāʿ*).

Here again, the AN pertains to a matter of local Medinese dissent. The basic textual referent is a polysemic verse of the Qurʾān. Dissenting opinions on the precept constitute diverse applications of the verse. There were no explicit *ḥadīth*s to resolve these differences of opinion and champion one point of view as opposed to another.

4. *AN: Advancing Emancipation Deadlines and Reducing the Cost of a Slave under Contract of Earned Emancipation* (Mukātaba)

Mālik begins the chapter with a post-Prophetic report that the Prophet's wife Umm Salama would reduce the agreed amount of earned emancipation contracts (*mukātaba*)[113] with her slaves (*kānat tuqāṭiʿ*) for amounts of gold and silver they would pay in advance. After discussing related precepts, Mālik states it is the AN that a master may make an agreement with one of his slaves under a contract of earned emancipation according to which the contracted slave shall be required to pay a reduced amount of money for freedom but prior to the originally agreed deadline. Mālik states that

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[111] Ibn ʿAbd al-Barr, *al-Istidhkār*, 17:91–92; ʿAbd al-Razzāq, *al-Muṣannaf*, 6:456; cf. Ibn Abī Shayba, *al-Muṣannaf*, 4:131–32.

[112] See Abd-Allah, "*ʿAmal*," 738–39.

[113] The contract of earned emancipation (*mukātaba*) constituted an agreement between slave and master that the slave shall work to earn his freedom within a given period by paying an agreed sum.

> those who objected to this precept (*kariha dhālika man karihahū*) regarded it as analogous (*anzalahū manzilat*) to certain agreements between creditors and debtors that are impermissible. In such loan agreements, the creditor agrees to reduce the amount of the debt, if the debtor will pay at an earlier deadline. Mālik argues that the two matters are not analogous (*wa laysa hādhā mithl al-dayn*). In this case, the master is not receiving gold for gold or silver for silver. He has only made an agreement for the purpose of speeding up the process of the slave's manumission, which will give the master rights of inheritance, alter the legal status of the slave to a freeman, and bring the sacred honor (*ḥurma*) of emancipation closer to the master. Mālik states that the real analogy in this matter [which is acknowledged as permissible] is that of a master saying to his slave, "Bring me such and such an amount of money, and you will be free." The master then changes his mind and says, "Bring me a lesser amount of money, and you will be free." Mālik elucidates further that the money which the slave under contract of earned emancipation agrees to pay his master is not an established debt (*dayn thābit*). For if the slave under contract should become bankrupt, the master would have no right to claim any part of the slave's estate along with the slave's creditors.[114]

This precept occurs in the transmissions of Yaḥyā and Abū Muṣʿab, both of whom have similar texts and cite Mālik's AN.[115] It does not appear in the recensions of al-Qaʿnabī, Suwayd, or Ibn Ziyād.

In the *Mudawwana*, Saḥnūn quotes Mālik as citing this AN with wording similar to that of Yaḥyā and Abū Muṣʿab with slight differences in text and content.[116] Saḥnūn relates that Mālik saw no harm in this procedure or its opposite that agreement be reached that the slave pay a larger amount over a longer period. Ibn al-Qāsim further justifies the precept by an analogy somewhat different from the *Muwaṭṭaʾ*. Like Mālik, he explains that the procedure of altering what the slave must pay for freedom does not constitute a type of debt. He gives another illustration of why the initial contract of emancipation may have been made in silver but may be validly paid in gold. Saḥnūn further supplements the precept by citing the same *ḥadīth* of Umm Salama through Ibn Wahb and giving additional post-Prophetic reports from Ibn Wahb that Ibn ʿAbbās, Ibn ʿUmar, and other Companions, and a number of earlier scholoars saw no harm in this precept. He cites Rabīʿat al-Raʾy as stating that the precept continues

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[114] *Muw.*, 2:794–95; *Muw.* (Dār al-Gharb), 2:352–53; *Muw.* (Abū Muṣʿab), 2:439; *Muw.* (*Riwāyāt*), 4:82–83.

[115] *Muw.*, 2:794–95; *Muw.* (Dār al-Gharb), 2:352–53; *Muw.* (Abū Muṣʿab), 2:439; *Muw.* (*Riwāyāt*), 4:82–83.

[116] *Mud.*, 3:6; *Mud.* (2002), 5:376.

to be the precept of the Muslims (*mā zāla amr al-Muslimīn*). He explains their legal reasoning that such adjustments are simply instances of good (*maʿrūf*) in conjunction with the general good entailed in contractual emancipation. He transmits from Yaḥyā ibn Saʿīd that it was the habit of the people (*al-nās*) to allow this procedure.[117] In keeping with the *Mudawwana*'s general concern with legal interpretation, Saḥnūn raises the question of whether a slave under contract of earned emancipation pay deliver payment and receive freedom while his master is away on travel without having empowered a trustee (*wakīl*) on his behalf. Ibn al-Qāsim explains that the slave should deliver the payment to the civil authority (*sulṭān*) and become free whether the payment is made early or on time. He clarifies that this was Mālik's opinion and that many authoritative reports have continued to be transmitted (*qad maḍat al-āthār*) to this effect.[118]

Mālik's discussion shows clearly that there were differences of opinion among the early jurists over this AN precept. He does not specify who the dissenting jurists were or whether they were Medinese or non-Medinese. Ibn ʿAbd al-Barr notes that Mālik's AN precept simply reflects the legal implication of the *ḥadīth* with which he opens the chapter. He notes that the jurists differed on the precept's validity. Ibn ʿUmar regarded it as disliked (*makrūh*) and dissented from Umm Salama's position. Al-Layth ibn Saʿd, Ibn Ḥanbal, and Ibn Rāhawayh followed Ibn ʿUmar's view. Al-Shāfiʿī regarded the transaction as analogous to a debt that a freeman takes but then agrees to pay part of it off quickly on the grounds that the remainder be dropped.[119] According to Ibn ʿAbd al-Barr, al-Zuhrī contended that he knew of no one who disliked this procedure except for Ibn ʿUmar. Al-Zuhrī, Rabīʿa, Abū al-Zinād, Jābir ibn ʿAbd-Allāh, Ibn Hurmuz, al-Shaʿbī, Ibrāhīm al-Nakhaʿī, Ṭāwūs, al-Ḥasan al-Baṣrī, Ibn Sīrīn, and Abū Ḥanīfa accepted it as valid.[120] According to al-Ṭaḥāwī, the Kufans did not regard this precept as valid. Other reports indicate, however, that Abū Ḥanīfa was of the same opinion as Mālik regarding this precept, but al-Ṭaḥāwī does not regard this transmission as strong.[121] According to Ibn Abī Shayba, however, al-Shaʿbī, al-Ḥasan al-Baṣrī, Ibn Sīrīn, and

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[117] *Mud.*, 3:6; *Mud.* (2002), 5:374–76.

[118] *Mud.*, 3:12; *Mud.* (2002), 5:390–93.

[119] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:287; cf. cf. al-Bājī, *al-Muntaqā*, 7:20; al-Zurqānī, *Sharḥ*, 5:47–48; Ibn Rushd, *Bidāya* (Istiqāma), 2:378.

[120] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:288; Ibn Abī Shayba, *al-Muṣannaf*, 4:473–74; cf. al-Bājī, *al-Muntaqā*, 7:20; al-Zurqānī, *Sharḥ*, 5:47–48; Ibn Rushd, *Bidāya* (Istiqāma), 2:378.

[121] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:287–88.

Sufyān al-Thawrī agreed with Ibn ʿUmar, and held that this procedure was disliked.[122]

Precept-based analogical reasoning plays a conspicuous role both in Mālik's defense of the AN and the dissenting position, as Mālik presents it. He argues that those who have disagreed with the AN have done so on the basis of their analogy (also precept-based) between the contract of earned emancipation and debt obligations. Mālik clarifies why he regards the dissenting analogy to be false. He sets forth his own contrary analogy and concludes that the agreement of the contracted slave is not a debt. Mālik alludes to the established precept of law regarding slaves engaged in earned emancipation contracts who go bankrupt and have outstanding debts. The creditors who loaned them money have rights to the slaves remaining estate, but the master engaged in the earned emancipation contract possesses no such right. Because some of the rights that accrue to creditors in cases of bankruptcy do not accrue to masters making a contract of earned emancipation, earned emancipation does not constitute a debt.

Because of this analogical reasoning in the AN and the absence of related texts, it appears that this AN was the product of personal legal interpretation (*ijtihād*). But it is not possible from the information that Mālik presents in the *Muwaṭṭaʾ* to determine whether this legal interpretation was early or late and constituted old or late praxis, according to the classifications of later legal theorists.[123]

No *ḥadīth*s exist on this specific question of dissent. The precept is clearly analogical. The issue for Mālik is not one of anomaly, as with the *sunna*-precepts, but simply of getting the juristic analogy right. In addition to his use of precept-based analogy, Mālik's reasoning on the AN illustrates his attention to the general good (*al-maṣlaḥa*) as an independent legal argument. Although the AN is an analogy and not an instance of the unstated good (*al-maṣāliḥ al-mursala*), the independent authority of rationally perceived benefits and harms, which is attested in Mālik's reasoning here, is the fundamental principle that underlies the ruling as well as the principle of the unstated good. He notes that contracts of earned emancipation are justifiable on the grounds that they give the master rights of inheritance, the slave becomes free, and the master acquires the sacred honor of having freed a slave.

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[122] Ibn Abī Shayba, *al-Muṣannaf*, 4:474.

[123] See Abd-Allah, "*ʿAmal*," 415–19.

5. *AN: Punishment in Conspiracies to Commit Murder*

> Mālik states it is the AN that many free men may be put to death for [conspiring in] the murder of one man; that many women may be put to death for the murder of one woman; and that many slaves may be put to death for the murder of a single slave.[124]

This precept occurs in the recensions of Yaḥyā and Abū Muṣʿab. Abū Muṣʿab's wording differs somewhat from that of Yaḥyā, but both cite Mālik's AN term. [125] The chapter is missing from the transmissions of al-Qaʿnabī, Suwayd, and Ibn Ziyād.

Saḥnūn does not treat this precept in detail or provide additional support for it, nor does he transmit Mālik's AN term. He asks Ibn al-Qāsim, however, if a group of persons who conspire to kill a woman may be put to death for her murder. Ibn al-Qāsim replies that they will all be put to death for complicity in her murder. Saḥnūn follows up by asking if the same applies to persons who conspire to kill a boy or girl, a Christian, or a slave. Ibn al-Qāsim replies that Mālik held that they would all be put do death for their complicity in such murders.[126]

This precept is based on a famous murder case in Ṣanʿā' in which a woman and six men conspired to murder her step son. ʿUmar put them all to death and stated that if all the population of Ṣanʿā had conspired in the murder, he would have put them all to death.[127] According to a report in ʿAbd al-Razzāq, ʿUmar at first hesitated regarding the validity of his judgment in the Ṣanʿā' case but was advised by ʿAlī to carry it out. ʿAlī's opinion was based on the analogy that if several persons conspired to steal a camel, they should all have a hand amputated.[128]

Ibn Rushd states that there was widespread agreement among the early jurists concerning the validity of ʿUmar's ruling. Abū Ḥanīfa and the Kufans agreed. But some of the important jurists of Medina dissented: ʿAbd-Allāh ibn al-Zubayr, al-Zuhrī, and, according to some reports, the Companion Jābir ibn ʿAbd-Allāh.[129] The jurists differed about the validity of putting more than one person to death for the murder of a single person. ʿAlī, Ibn

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[124] *Muw.*, 2:872; *Muw.* (Dār al-Gharb), 2:444–45; Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:252; *Muw.* (Abū Muṣʿab), 2:249; *Muw.* (*Riwāyāt*), 4:227–28.

[125] *Muw.*, 2:872; *Muw.* (Dār al-Gharb), 2:444–45; Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:252; *Muw.* (Abū Muṣʿab), 2:249; *Muw.* (*Riwāyāt*), 4:227–28.

[126] *Mud.*, 4:496; *Mud.* (2002), 11:364–65.

[127] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:232–34; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:475–79; see also *Muw.*, 2:871; Ibn Rushd, *Bidāya*, 2:241.

[128] ʿAbd al-Razzāq, *al-Muṣannaf*, 9:477.

[129] Ibn Rushd, *Bidāya*, 2:241.

ʿAbbās, Ibrāhīm al-Nakhaʿī, al-Shaʿbī, Qatāda, al-Ḥasan al-Baṣrī, al-Thawrī, al-Awzāʿī, al-Layth ibn Saʿd, Mālik, Abū Ḥanīfa, al-Shāfiʿī, Ibn Ḥanbal, Ibn Rāhawayh, and Abū Thawr concurred with ʿUmar's decision and held that a group of persons could be put to death for complicity in the murder of a single person regardless of whether the group was large or small.[130] ʿAbd-Allāh ibn al-Zubayr, Ibn Sīrīn, and al-Zuhrī held that only one person may be put to death for the murder of a single person. This opinion is attributed to Muʿādh ibn Jabal and others. It was the opinion of Dāwūd al-Ẓāhirī. Muʿādh reportedly objected to ʿUmar's ruling in the Ṣanʿā' case and protested that he had no right to put more than one soul to death for the death of a single soul. Maʿmar transmits that al-Zuhrī held that two people were not to be put to death for a single person, nor were two hands to be cut off for a single theft. Contradictions in this matter are attributed to al-Thawrī, Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī.[131] According to ʿAbd al-Razzāq, al-Zuhrī acknowledged ʿUmar's judgment but contended that the *sunna* had been long established afterwards (*thumma maḍat al-sunna*) that only one person is put to death for a single person.[132] It is a basic Qurʾānic concept and the principle of the *sunna* that only one person is put to death for another. This ruling is normative, and ʿUmar's ruling is an exception to that norm based on the principle of the unstated good. It did have some basis in *ḥadīth*, however. Ibn Abī Shayba transmits a *ḥadīth* that a man once held another man while a partner killed him. The Prophet put the murderer to death and imprisoned the other. When Ḥammād ibn Abī Sulaymān and al-Ḥakam were asked about the *ḥadīth*, they replied that only one person is put to death for another.[133]

The praxis behind this AN apparently belongs to the category of old praxis (*al-ʿamal al-qadīm*), going back to the personal legal interpretation of ʿUmar ibn al-Khaṭṭāb. The scope of the precept, however, has been expanded to take in women and slaves as well, who were not explicitly included in ʿUmar's original decision, although his reference to "all the people of Ṣanʿā' " would include them. This is another example of an AN precept that fell under the jurisdiction of the Medinese judiciary and local executive authority.

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130 Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:234–35; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:475–79.

131 Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:235–36; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:475–77; Ibn Abī Shayba, *al-Muṣannaf*, 5:438.

132 ʿAbd al-Razzāq, *al-Muṣannaf*, 9:475, 477.

133 Ibn Abī Shayba, *al-Muṣannaf*, 5:438.

According to Ibn Rushd, ʿUmar ibn al-Khaṭṭāb's personal legal interpretation in this question was a reflection of the principle of the unstated good (*al-maṣāliḥ al-mursala*). The presumption underlying his judgment was that the only type of punishment in cases of conspiracy to murder that would constitute effective prevention must apply equally to all who willfully partook in the crime.[134]

In each of the preceding examples of AN precepts, there was dissent about them among the Medinese jurists. In the present example and each preceding AN with the possible exception of the fourth one on earned emancipation contracts, where I was unable to identify the dissenting parties, the crucial debate over the precepts was among prominent Medinese jurists. In these cases, Mālik would appear more concerned with registering his position on internal Medinese dissent than he is with addressing the issue of dissent outside of Medina. Medinese legal opinions were neither static nor monolithic, and legal debate and its natural corollary of dissent appear to have been as dynamic within Medina as they were in other legal centers.

Mālik's AN Terms in Summary

In all but one of the examples of AN precepts examined in this chapter, there was evidence of significant differences of opinion on them among the Medinese jurists. In four of the examples, Mālik draws attention to those differences in the text of the *Muwaṭṭaʾ* itself. In another example, Mālik states generally that differences of opinion regarding the AN existed, but he does not specify who held them, and I could find no specific information on that precept in other sources. Saʿīd ibn al-Musayyab disagreed with four of the AN precepts in this chapter. Another of the Seven Jurists of Medina, Sulaymān ibn Yasār, dissented with another of them. Mālik's teacher al-Zuhrī disagreed with three of the AN precepts analyzed. Similarly, al-Zuhrī and Saʿīd ibn al-Musayyab dissented with another of the AN precepts discussed earlier, while Mālik's teacher Abū al-Zinād ibn Dhakwān disagreed with another.[135] Prominent Medinese Companions are also reported to have disagreed with some of the AN precepts analyzed in this chapter: ʿUmar ibn al-Khaṭṭāb, Ibn ʿUmar, ʿĀʾisha, Jābir ibn ʿAbd-

[134] Ibn Rushd, *Bidāya*, 2:241.
[135] See Abd-Allah, "*ʿAmal*," 720, 668–69.

Allāh, ʿAbd-Allāh ibn al-Zubayr, and the prominent Successor and one-time governor of Medina, the Umayyad caliph ʿUmar ibn ʿAbd al-ʿAzīz.

In several of the AN's in this chapter, I was unable to determine what the extent of agreement or disagreement on them was outside of Medina. Abū Ḥanīfa and Sufyān al-Thawrī disagreed with two of them. Ibrāhīm al-Nakhaʿī, Ibn Sīrīn, and an unspecified group of other jurists are reported to have disagreed with another. Ibn ʿAbbās is reported to have disagreed with one of the AN precepts. It is reported that there was extensive disagreement among the jurists regarding the last AN of the chapter, but I was unable to find details about the disagreement.

The source of praxis for the AN's analyzed in this chapter is difficult to determine. In some cases, Mālik cites relevant Qurʾānic verses or *ḥadīth*s, indicating that the roots of the praxis went back to the Prophetic era. Such AN precepts were probably transmissional praxis. If that is the case, most of the AN's presented in this chapter were transmissional. All of the AN's pertaining to matters of ritual appear to fall in that category. One of the AN's appears to belong to the category of old praxis (*al-ʿamal al-qadīm*), going back to the personal legal interpretation (*ijtihād*) of the Companions. Two of the AN's appear to be either transmissional or old praxis. Although another AN appears to have been the product of legal interpretation, it is not possible to determine from the information Mālik gives whether it originated with the legal interpretation of the Companions in Medina or with that of the Successors, which would place it in the classification of late praxis (*al-ʿamal al-mutaʾakhkhir*). Since all of the precepts analyzed in this chapter are classified as AN's, despite the apparently wide diversity of their historical sources, Mālik did not use the term AN to identify the source of the praxis in these precepts but rather to indicate that, although they were part of Medinese praxis, they were not supported by Medinese juristic concurrence (*ijtimāʿ*). He makes this distinction between AN and the term AMN quite explicit, for example, in the first AN precept of this chapter.

It is clear from the AN precepts in this chapter as well as from Mālik's reliance upon praxis in other matters in which there had been significant differences of opinion among the Medinese jurists that Mālik looked upon Medinese praxis as a valid and authoritative source of law even in matters upon which there was no Medinese concurrence of opinion. Nevertheless, Mālik must have believed that there were different grades of authority to those types of local praxis such as AMN, AMN-X, A-XN, and S-XN that were explicitly supported by the concurrence and consensus of the Medinese jurists as opposed to precepts like AN that were not. Otherwise,

there would be little point in his drawing a distinction between them in his terminology and making the clarifications about dissenting opinions which he frequently adds. He might as well have classified them all as simply belonging to Medinese praxis.

Finally, in the AN precepts just studied, extensive examples occur of Mālik's reliance upon the non-textual source of transmissional Medinese praxis for precepts regarding which few if any *ḥadīth*s were transmitted despite the fact that these matters constituted issues of dissent within and outside of Medina. Mālik's use of analogical reasoning to set forth and explain his legal reasoning is also exemplified in three instances of the AN precepts just studied.

CONCLUSION

The theme of *Mālik and Medina*, namely the elucidation of Mālik's legal reasoning in comparison with other early Muslim jurists, has both direct and indirect bearing on the study of Islamic legal origins, the rise of *ḥadīth* literature, and Islamic intellectual history. One of the work's major objectives since its inception has been the quest for accurate and comprehensive cognitive frames to facilitate new and original research in these fields and fuller investigation of the primary sources. Of the several paradigms suggested in the book, among the most important is its reassessment of how the four major Sunnī schools of law (*madhāhib*) emerged. This conception may be called the *four-school theory* of Islamic legal origins.[1] It reappraises earlier views and holds that the schools grew up during the first three centuries of Islam as consistent, yet largely unspoken legal methodologies with distinctive bodies of positive law systematically based on them.[2]

The genesis of the four Sunnī schools in this manner constitutes *the* pivotal development of the formative period.[3] It set the stage for the legal developments—pedagogical, theoretical, administrative, institutional, and literary—that were to follow in the post-formative or "classical" period of Islamic law and constitutes the central theme of the origins of Islamic law and its further evolution over history. As the formative period came to an end, each of the four schools continued to follow for more than a millennium the trajectory of its inner logic until the advent of colonial rule and the postcolonial Muslim nation-state, which ushered in the various revisions and reformulations of Islamic law characteristic of the modern period.

The four emergent school traditions of Islam's first three centuries pursued the inherent rationale of their traditions with consistency and

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[1] It may be regarded as a revised theory in the sense that Schacht and other Western scholars until relatively recently also held that the emergence of the four schools was the principal historical development accomplished during the first three centuries of Islamic law. But, as mentioned below, they conceived of the schools differently.

[2] As discussed earlier, "sophisticated communities of legal interpretation" may exist in the absence of articulated legal theory (Stewart, "Ẓāhirī's Manual," 100).

[3] As noted in the introduction, I unfortunately found it beyond my capacity to undertake a comparative treatment of non-Sunnī traditions of Islamic jurisprudence. Although such work is required in the future, I do not believe the omission will substantially alter the book's conclusions.

sophistication. The *élan* of the largely unarticulated legal reasoning of each of them was acquired through years of apprenticeship under master jurists who devoted their lifetimes to the study, application, and systematic review and elaboration of positive law. Mālik's principal transmitters Ibn Wahb and Ibn al-Qāsim spent thirty and twenty years respectively studying at his feet.

Distinctive techniques and tools of reasoning such as the generalization of textual proofs (*taʿmīm al-adilla*) for the Kufans or analogue- and precept-based analogy (*al-qiyās ʿalā al-qiyās; al-qiyās ʿalā al-qawāʿid*) for the Medinese are illustrative of the methods they used. Like other aspects of these implicit methodologies, such established modes of thought and approaches to the law persisted into the post-formative age. Their practitioners continued to use them, regard them as valid, and defend them from the critiques of others. In conjunction with other guiding principles of law specific to each school tradition, their distinctive methods marked off contrasting paths of legal interpretation (*ijtihād*) and distinctively diverse but broadly compatible ways of looking at the law.

The theory of the early emergence of the Sunnī schools as outlined in this book—stressing their independence, tacit underlying coherence, and lasting continuity—has several additional ramifications for Islamic historiography. First, it implies a sharper definition of the formative and post-formative periods. It casts legal interpretation and dissent in a new light, while revealing the nuanced and relatively circumscribed role of *ḥadīth* in all schools for the elaboration of their exhaustive legal deductions in positive law. It calls for reassessment of the "great synthesis" theory of Islamic legal origins, which has long held virtually unquestioned sway over the minds of most intellectual historians in the field.[4]

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[4] Wael Hallaq refers to the presumed process of the amalgamation of the disparate Sunnī legal methods in the formative period into a single "classical legal" theory as the "Great Synthesis." He believes that, "On both the ideological and legal levels, the history of Islam between 150 and 250 H (ca. 770 and 960) can be characterized as a process of synthesis, with the opposing movements of traditionalism and rationalism managing (though not without a considerable struggle) to merge into one another as to produce a 'third solution'—what we have called here the 'Great Synthesis.'" He also speaks of this hypothetical phenomenon as the "great rationalist-traditionalist synthesis," out of which evolved classical Islamic legal theory (see Hallaq, *Origins*, 124; idem, *History*, 35, 5). Christopher Melchert portrays this paradigm as the "grand compromise." By virtue of this "grand compromise," "Muslims gained a system demonstrably based on revelation but penetrable at multiple levels, affording the widest scope of intellectual play. What they lost was the purity and power of simply letting *ḥadīth* speak for itself" (Melchert, "Traditionist-Jurisprudents," 383, 391, 406; idem, *Formation*, 1).

In the wake of al-Shāfiʿī, Sunnī legal reasoning did *not* culminate in a consensus of juristic minds and unite behind him or anyone else in a single "classical" four-source theory of Islamic law. The proposed *four-school theory* of Islamic legal origins calls for careful reevaluation of al-Shāfiʿī's role in intellectual history and the meaning and place of legal theory (*uṣūl al-fiqh*) as it developed and flourished in the post-formative period. Unquestionably, al-Shāfiʿī stands out as one of the great minds and master "architects" of Islamic law. His influence in the formative and post-formative periods was pivotal, profound, and far-reaching. He was the author of the Shāfiʿī school and a pioneer in the metanarrative process that would ultimately produce the monumental deliberations of Islamic legal theory. But neither al-Shāfiʿī nor post-formative legal theory were ever able to alter radically the course of the independent approaches of the other major Sunnī traditions or modify their corpuses of positive law.[5] Al-Shāfiʿī can no longer be viewed as *the* "master architect" of Islamic law and legal theory or the "jurist-victor who brought the 8th-century unbridled law down to the knees of revelation."[6]

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[5] Sherman Jackson rightly notes regarding the presumed "causative or generative force" of "classical" Islamic legal theory that "the most half-hearted adherence to its dictates" would have "dislodged old school opinion but did not" (see Jackson, "Fiction and Formalism," 180).

[6] See Wael Hallaq, "Introduction: The Formation of Islamic Law," xvii–xviii; idem, *Origins*, 109, 119, 123; idem, "Master Architect?," 257–58, 263, 267, 270–71; cf. idem, "*Uṣūl al-Fiqh*," XII: 177, 179, 182; Calder, *Studies*, 53; Schacht, *Introduction*, 46; idem, *Origins*, 1; Melchert, "Abrogation," 92–93, 96; Brockopp, "Competing Theories," 4; cf. Lowry, "Four Sources?," 28, note 17; Fadel, "*Istiḥsān*," 162.

Ignaz Goldziher sums up what was to become the dominant paradigm of Islamic legal origins for decades. He asserts that, "Islamic jurisprudence acknowledges al-Shāfiʿī as the *imam* [*sic*] whose most remarkable work consists of creating a corrective which—on account of the spreading subjective trend of *fiqh* vis-à-vis the traditional point of view which accompanied Abū Ḥanīfa's system—proved to be of urgent necessity. In this respect, quite apart from the services of Mālik ibn Anas, Muslims rightfully consider Imam al-Shāfiʿī as the vindicator of traditionalism" (Goldziher, *Ẓāhirīs*, 20–21).

Joseph Schacht followed Goldziher's lead and stands out among the modern scholars who championed al-Shāfiʿī as having established the essentials of four-source legal theory, which he contends to have been essentially al-Shāfiʿī's "achievement" and came to constitute the "classical theory of Muḥammadan law, as developed by the Muḥammadan jurisprudents" (Schacht, *Origins*, 1–2, 11; cf. Abd-Allah, "*ʿAmal*," 121–28; Hallaq, "Master Architect?," 257; El Shamsy, "First Shāfiʿī," 323). For Schacht, al-Shāfiʿī's success in positing "classical" four-source theory constituted the primary element that came to constitute Sunnī identity vis-à-vis the Shīʿa and other heterodox groups (see Lowry, "Four Sources?," 25–27).

Although he modifies some of its implications in the work of Joseph Schacht, Fazlur Rahman continues to work within the great synthesis paradigm. He holds that it brought about the rise of "orthodoxy" toward the end of the third/ninth and beginning of the fourth/tenth centuries and was the result of the work of al-Shāfiʿī, whose profound influence finally put an end to the clashes of opinion that had been characteristic of the "stormy

formative period." Al-Shāfiʿī's new formulation of the law would have lasting permanence, although with this rise of "classical" Islamic legal theory, "One of the most creative and brilliant epochs of all intellectual history came to a sudden close," and Islamic law "developed but little since" (See Rahman, *Islam*, 77–78).

George Makdisi also works within the general Schachtian paradigm and holds that, through the influence of al-Shāfiʿī's legal reasoning, the "*ḥadīth*-thesis" of the traditionists won out over the "ancient schools" (Makdisi, *Colleges*, 7).

Similarly to Schacht, Wael Hallaq sees the emergence of "classical" legal theory not merely as reflecting "a synthesis between rationalism and traditionalism" but as *the* seminal phenomenon standing at the definition of Sunnī Islam "as a distinct legal, theological, and political entity." Legal theory, in Hallaq's view, came to be "a constitutive ingredient in the creation of *madhhab*s, the legal schools that . . . contributed fundamentally to the phenomenon called Sunnism" (Hallaq, "Introduction," xxviii). He asserts that, "This being the state of our knowledge, there appears to be little reason to question the purported fact that since its inception in the work of Shafiʿi, *uṣūl al-fiqh*, as we now know it, became, in an unwavering continuity, the standard legal methodology of Sunni Islam" (Hallaq, "Master Architect?," 257). At times, Hallaq struggles with the Schachtian paradigm, as will be seen in the citations below. He attempts to modify it but does not replace it. Hallaq acknowledges the widespread notion of the continuity between al-Shāfiʿī's legal theory and the content of classical Islamic jurisprudence and the concurrent conviction that al-Shāfiʿī was not only the "master architect" of Islamic jurisprudence but constituted the "jurist-victor who brought the 8th-century unbridled law down to the knees of revelation." Interestingly, however, Hallaq also notes that, contrary to the Schachtian paradigm, "historical evidence in the early and medieval sources is not only discordant with this assumption but, in its aggregate effect, also seems to contradict it." He notes that "Shāfiʿī's *Risāla* and the theory it embodied had very little, if any, effect upon most of the 9th century; and that the image of Shāfiʿī as the founder of *uṣūl al-fiqh* was a later creation." He adds that al-Shāfiʿī's ideas long remained "a minority view" and that the earlier schools did not retreat regarding their diverse positions on positive law, abandon their doctrines once and for all, or join al-Shāfiʿī's ranks. Yet Hallaq still subscribes to the "great synthesis" theory and contends that only toward the end of the third/ninth century did the "two camps" of the jurists begin to draw closer to each other, bringing about a "synthesis of traditionalism and rationalism." This synthesis then "paved the way" for the emergence of Islamic jurisprudence in full force, "And once this science bloomed, at the hands of Ṣayrafī, Qaffāl, and their like, the rudimentary synthesis created by Shāfiʿī a century earlier became relevant and thus was rejuventated in the form of commentaries on the *Risāla* and by attributing the entire ramifications of the synthesis to Shāfiʿī himself. Shāfiʿī thus becomes the founder of *uṣūl al-fiqh*" (see Hallaq, *Origins*, 109, 119, 123; idem, "Master Architect?," 257–58, 263, 267, 270–71; idem, "Introduction," xvii–xviii; cf. idem, "*Uṣūl al-fiqh*," XII: 177, 179, 182). Instead of replacing the Schachtian paradigm, Hallaq pushes back the dates of the emergence of a "classical" Islamic jurisprudence by a century or more and questions the degree of continuity between al-Shāfiʿī's contribution in the *Risāla* and the historical emergence of legal theory. He still ultimately believes that Islamic jurisprudence as expressed in the four-source legal theory came to constitute "classical Islamic legal theory" and "Islamic law and jurisprudence did finally come to accept this synthesis." He simply doubts that al-Shāfiʿī may be accurately designated as the jurist who effected that formulation. For Hallaq, a pre-*ḥadīth* period of Islamic law was followed by a *ḥadīth* period, which is exemplified in its legal reasoning by al-Shāfiʿī. He asserts that, "The jurist whose work best exemplifies this transition from what we may call the pre-*ḥadīth* to the *ḥadīth* period was al-Shāfiʿī. This is not to say that he brought about any significant change in Islamic legal development, for he was merely one among many who contributed to this process" (see Hallaq, "Master Architect?," 270; idem, *Origins*, 117, 121).

Christopher Melchert asserts that modern scholars of Islamic legal origins believe that "the later synthesis of rationalist and traditionalist methods was effected only gradually, in

Western study of Islamic law has long focused on the law's origins.[7] Its conclusions have generally been marked by a quasi-Darwinian notion that Islamic law originated from the most rudimentary beginnings and evolved over the next two and a half or three centuries in Hegelian fashion from a "thesis" of reliance on free-ranging considered opinion (*raʾy*) to an "antithesis" of strict adherence to the *ḥadīth* principle. Al-Shāfiʿī then consolidated the "thesis" and "antithesis" into a final grand "synthesis" in the so-called "classical" four-source theory of Islamic law, which combined—as if by compromise—elements of both earlier approaches and theoretically became the standard of Sunnī jurisprudence for more than a thousand years.[8]

The internal consistency and sophistication of Islamic legal reasoning in the formative period as illustrated in *Mālik and Medina* challenge the notion of the law's purportedly primitive and rudimentary beginnings.

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spite of resistance on both sides," which he believes constituted the dominant transformation in the history of Islamic law (Melchert, "Traditionist-Jurisprudents," 384–85).

Patricia Crone entirely endorses and works within the Schachtian paradigm. She asserts that, "The acceptance of Shāfiʿī's rules drastically changed the relationship between legal doctrine and Ḥadīth." She states further that, "The classical jurisprudential rules were worked out by Shāfiʿī (d. 822). Shāfiʿī argued that *only* Prophetic tradition should be followed, and that such traditions should *always* be followed provided that they were authenticated by a faultless chain of transmitters." She continues that, "It was after Shāfiʿī's rules had been accepted that the Muslims began the task of putting together all the Prophetic traditions which could be considered authentic on the basis of their *isnāds*" (Crone, *Roman law*, 24–25; cf. Calder, *Studies*, vi, 18–19).

[7] Wael Hallaq observes that the notable exception to this has been in the area of Islamic law in the modern period, which has also received considerable attention (Hallaq, *Origins*, 1). Kevin Reinhart emphasizes that questions about the origins of Islamic law are ultimately of limited value for understanding the phenomenon of how Islam works as a religious system of beliefs and rulings (Reinhart, *Before Revelation*, 10).

[8] Christopher Melchert regards six "transformations" to have been pivotal to the development of Sunnī jurisprudence over the course of the third/ninth century. 1) Textual sources (Qurʾan and *ḥadīth*s) eclipsed rational speculation as the formal basis of the law. 2) *Ḥadīth* reports from the Prophet eclipsed reports from Companions and later authorities (although reports from Imāms remained important for Shīʿī jurisprudence). 3) Experts sifted *ḥadīth* reports primarily by comparison of their chains of transmission and, secondarily, by examination of the personal qualities of their transmitters. 4) Personal schools eclipsed regional ones, such that jurisprudents came to be identified primarily with one or another teacher of the past rather than a particular region. 5) Legal texts stabilized and some became the literary bases of personal schools. 6) Jurisprudence and *ḥadīth*s were professionalized and specialized, each becoming increasingly distinct from the other (see Melchert, "Traditionist-Jurisprudents," 399; cf. George Makdisi, "*Ṭabaqāt*-Biography: Law and Orthodoxy in Classical Islam," 371–96; Hallaq, "Master Architect?," 588–91). Melchert's "transformations" are not empirical findings. Rather they are essentially the logical implications of the flawed four-source paradigm. They reflect a fundamental misunderstanding of the role that texts and considered opinion played in the school traditions of the formative and post-formative periods as well as the nature of personal and regional dissent.

The complexity and consistency of considered opinion and diversity of approaches to *ḥadīth* during this time also show that the dichotomy between the proponents of considered opinion (*ahl al-raʾy*) and the proponents of tradition (*ahl al-ḥadīth*) was considerably more nuanced than has been presupposed. Despite their often stringent disagreements, neither camp was ever at war with the other, distinctly regional, or even diametrically opposed in its approach to the law. Each center of legal development and most jurists in them shared the propensities of either predispostion to some extent. Scholars such as Mālik and Ibn Rāhawayh were accomplished masters of both.

In traditional Islamic historiography, the first three centuries of Islam constituted the formative period of Islamic law. The beginning of the fourth/tenth century was seen as the watershed between the ancients (*al-mutaqaddimūn*) and the moderns (*al-mutaʾakhkhirūn*).[9] The *four-school* paradigm argues for restitution of this traditional dating of the formative period, which was commonly accepted in the West until relatively recent years, but for new reasons. It asserts not only that the four Sunnī schools emerged as implicit legal methodologies in the formative period, which set forth their distinctive bodies of positive law, but that they also attained maturity in that time and established in vast bodies of positive law the inherent methodological characteristics that would mark them off from each other for the next millennium.

Contemporary scholarship agrees that the formative period must include at least the first two and a half or three centuries of Islam. As long as the emergence of the principal Sunnī schools of law was seen as the critical outgrowth of the period and the initial grounding phase of Islamic law, the traditional dating of the formative period until roughly the mid-third/ninth or the beginning of the fourth/tenth century remained adequate. It was roughly on this basis that Joseph Schacht and others based their dating of the period.[10] Although Schacht and several other earlier scholars held that the emergence of the Sunnī schools was the pivotal event of the formative period and agreed to a similar dating of it, they did so on very different grounds. They did not view the early Sunnī schools as systematic legal methodologies. Instead, they regarded them as "personal juristic entities" and regional consolidations of positive law that gradually

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[9] See Humphreys, *Islamic History*, 211–12; Melchert, "Traditionist-Jurisprudents," 406, cf. 399; idem, "Early History," 293.

[10] See Hallaq, "Introduction," xix; cf. Melchert, *Formation*, xxii; Hallaq, *Origins*, 2; Rahman, *Islam*, 60.

approached a radically different post-formative synthesis in the "classical" period when "legal theory finally came of age."[11]

In the *four-school theory* of Islamic legal origins, applied legal methodology was primary. "Personal juristic entities" were secondary and remained subordinate to the traditions and methods of legal reasoning which the jurists and their close colleagues had implemented in positive law. By the beginning of the post-formative period, the role of discursive legal theory was still nebulous at best, and although it would gradually "come of age" over subsequent centuries, its ultimate effect on each school's standing body of substantive law was subtle and complex and remains to be adequately examined.[12]

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[11] See Hallaq, "Introduction," xix. It is generally held that by the end of the third/ninth century, the Ḥanafī school had consolidated in Iraq. Mālikī and Shāfiʿī positive law had crystallized in their respective centers, and the disciples of Aḥmad ibn Ḥanbal had collected his legal opinions (see Melchert, *Formation*, xxii; Hallaq, *Origins*, 2; Rahman, *Islam*, 60).

[12] Sherman Jackson states, "In the end, however, legal theory remains standing as a monumental but fairly empty ruin whose authority can only be sustained through a reliance upon a never-ending series of 'ad-hoc adjustments' and 'make-shift apologies' " (Jackson, "Fiction and Formalism," 184). I believe this generalization is premature. Post-formative works on legal theory constitute a vast and largely unexplored array of works, many of which remain in manuscript. Some are, indeed, casuistic, apologetic, and polemical, but certain others are serious empirical attempts at discovering the epistemological foundations of the distinctive school traditions. Al-Shāṭibī's *Muwāfaqāt* and *Iʿtiṣām*, the *Musawwada* of Āl Taymiyya, and Ibn al-Qayyim's *Iʿlām* are cases in point.

Despite their generic similarities, works of Islamic legal theory are diverse and subtle. They are not easy to read or assess and cannot be properly understood outside of the context of the formal civilities of the highly literate and urbane civilization and scholarly culture of the post-formative period that produced them. Many of the works are written by professionals for professionals who were deeply steeped in Islam's various legal traditions, perfectly familiar with the sources, adept at diverse methods of extrapolation and disputation, and abreast of the ongoing discussions of the jurisprudential narrative. Their works were part of an elaborate intercultural discourse that had gone on for generations and was regarded as the acumen of learning and hallmark of legal sophistication. For this reason, despite their elaborate detail, traditional works of legal theory often leave much unsaid. They require extensive commentary and familiarity with the prooftexts, the "classical" debates and continuous contentions of legal theory, and the workings of postive law for us to understand them today. Shāh Walī-Allāh's *Ḥujjat Allāh al-bāligha* illustrates this well. His masterpiece is astutely subtle. Its profound depth is unfathomable without a solid understanding of the intellectual climate that produced it.

In some cases, the apparent "ad-hoc adjustments" and "make-shift apologies" in traditional works on legal theory reflect a culture that required outward displays of respect for the other and an elaborate formal etiquette regarding how divergent opinions were to be acknowledged and refuted. Al-Bājī's works on legal theory are a case in point. His work, *Iḥkām al-fuṣūl fī aḥkām al-uṣūl* is in part a tacit refutation of Ibn Ḥazm, with whom he engaged in scholarly debate in other contexts. As ʿAbd al-Majīd al-Turkī suggests, al-Bājī's title seems consciously designed to echo the title of Ibn Ḥazm's highly polemical and ardently anti-Mālikī *al-Iḥkām fī uṣūl al-aḥkām* (see Sulaymān ibn Khalaf al-Bājī, *Iḥkām al-fuṣūl fī aḥkām al-uṣūl* and ʿAbd al-Majīd al-Turkī's introduction, "*al-Tamhīd*," 1:10 and passim). Yet al-Bājī hardly mentions his opponent by name in *Iḥkām al-fuṣūl*, as if Ibn

In recent decades significant debate has arisen in the West about where to cut off the formative period. Some scholars have argued for extending it well into the fourth/tenth and even fifth/eleventh centuries.[13] Their arguments revolve around what features of Islamic law should be deemed as crucial to its initial formation. By definition, the formative period can only end once all the essential constitutive elements of the law and its practice had fully emerged.[14] The arguments for extending the formative period remain essentially "Schachtian" in character. They build on Schacht's general "great synthesis" paradigm but differ in their interpretation of what that synthesis ultimately entailed and when it was finally accomplished.

On the basis of the new *four-school* paradigm suggested in this work, the formative period should be dated as ending with the formation of the

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Ḥazm did not deserve the merit because of his emphatic lack of the academic courtesies that al-Bājī and his peers exemplified and expected from each other. On the other hand, al-Bājī respectfully mentions a host of other Mālikī, Ḥanafī, and Shāfiʿī legal theorists by name and reproduces their dissenting opinions and arguments, albeit in a manner that requires of the modern reader great familiarity with the ongoing discourse, which was so well known to al-Bājī's readership that it warranted only minimal explanation in his eyes.

[13] George Makdisi stands out among the most important of these voices. He identifies the hallmark of the classical (post-formative) period as the institutionalization of the Islamic law college (*madrasa*) and the paraphernalia that emerged with it, such as complex endowments, educational buildings, professorial staffs, and official curricula. Institutional development was so consequential, in Makdisi's view, that we may validly divide Islamic legal history into the pre- and post-*madrasa* phases. Although Makdisi sees the emergence of the schools of law as an essentially third/ninth century phenomenon, he doubts that their appearance constituted the pivotal development distinguishing the earlier period of Islamic law from the later. The establishment of "guild schools," which came to constitute the foundations of the great law colleges and had the primary function of unifying school doctrine and certifying jurisprudents, extended well beyond the third/ninth century into the fourth/tenth century and even further. "Guild schools" had their roots in the beginning of the fourth/tenth century but became a familiar part of the Islamic intellectual landscape from the fifth/eleventh century onwards (Makdisi, *Colleges*, xiii, 1, 77; cf. idem, *Humanism*, xix, 18–20; Melchert, "Traditionist-Jurisprudents," 399–400).

Wael Hallaq identifies four constitutive elements as central to the formation of classical Islamic law: the judiciary, the schools of positive law, the self-conscious cultivation of jurisprudence, and the emergence of school doctrine. He concedes that the first two of these elements were recognizable in the third/ninth century, but he argues that the remaining ones were not fully constituted until a century later. For Hallaq, the formative period extends well into the fourth/tenth century (Hallaq, *Origins*, 2–3; idem, "Introduction," xix–xx).

Like Hallaq, Christopher Melchert holds that the emergence of full-blown classical legal theory should be regarded as a formative-period legal phenomenon. He dates the formation of jurisprudence after the fourth/tenth century and contends that it reached its fruition in the fifth/eleventh and even sixth/twelfth centuries. He also adds features pertaining to the full institutional development of the schools (see Melchert, "Traditionist-Jurisprudents," 399; idem, *Formation*, xvi, xxii, 31–35; cf. Lowry, "Four Sources?," 23, note 3).

[14] See Hallaq, "Introduction," xix–xx; Melchert, *Formation*, xxii.

major Sunnī schools as implicit legal methodologies buttressed by their vast corpuses of applied positive law. From this perspective, the paradoxical history of Islamic legal theory constitutes a distinctly and considerably delayed post-formative development.[15] Advancement in other important legal arenas should also be classified as post-formative and incidental to the seminal event of the initial emergence of the schools. This includes such important indices of Islamic legal growth as the fleshing-out of the judiciary, the full institutionalization of the magistrate (*al-ḥisba*), the emergence of endowment-based guild-like legal colleges (*madāris*), the propagation of authorized legal curricula, the promulgation of objective standards for the formal qualification of jurists and judges within the various schools, and the growth and development of *fatwā* literature.

Contrary to most standard treatments of Islamic law, legal reasoning in the formative period grew up against an intellectual background that did not militate against dissent but often fostered it with respect and regarded it as an essential component of the mature legislative acumen. *Mālik and Medina* repeatedly shows that the platform for dissent in the formative period was not strictly limited to interregional dialogue, nor can any center of legal development be presumed to have held to an essentially monolithic formulation of its substantive law. On the contrary, fundamental dissent was conspicuously outspoken and widely condoned both at the local and regional levels. Dissenting voices could be found in all regions. Local scholars in the various centers differed among themselves as energetically as they did with jurists from other areas. Although clashing opinions were sometimes ardent, a universal culture of dissent emerged from the legal circles of the period, which was refined over time and came to pervade the Islamic world and constitute an essential aspect in the evolution of its newly developing global civilization. Mālik's terminology in the *Muwaṭṭa'* mirrors that culture in its early stages and indexes his close attention to differences of juristic opinion at both the local and regional levels.

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[15] Makdisi was among the first to draw attention to the paradox that nearly two centuries elapsed between the appearance of al-Shāfiʿī's *Risāla* and the emergence of the "first independent and comprehensive works" of classical Islamic legal theory. He notes that, in addition to this gap in time, there were profound differences in form, content, and intellectual pedigree between al-Shāfiʿī's *Risāla* and the first classical works of the jurisprudential tradition (see Stewart, "Ẓāhirī's Manual," 100–05, idem, *Orthodoxy*, 30–31; cf. Hallaq, "Master Architect?," 257–58, 263, 267, 270; Reinhart, *Before Revelation*, 15, 21; Melchert, "Traditionist-Jurisprudents," 399, 406).

The dynamic of dissent must be seen as one of the central realities of the formative period. It was not only the reflection of an emergent scholarly culture but grew out of the natural ambience in which the emerging legal methodologies of the school traditions grew up and flourished, unencumbered by state strictures or anything approaching an ecclesiastical hierarchy. Free to cultivate their own standards and unique approaches to the law, each of the four schools set about collecting and compiling for future study important precedents of dissent from the past.

Ijtihād—and not *ḥadīth*—was the "real stuff" of the emergent law. In all regions and schools, the elaboration of legal precepts in the fundamentals and details of the law was primarily the function of legal interpretation, even in those approaches with the most literal and textually oriented methodologies. The primacy of legal interpretation and the culture of openness to dissent that fostered it informed the reigning juristic attitudes toward *ḥadīth* and the various methods that were developed for using them. *Mālik and Medina* shows that the common notion that early legal dissent manifested itself primarily as a battle between dueling *ḥadīth*s is inaccurate. In most cases analyzed in the book, jurists were working with the same or similar materials. Most of the legal *ḥadīth*s and post-Prophetic reports of the *Muwaṭṭa'*, which generally overlap with later Sunnī *ḥadīth* collections, were shared by the Sunnī jurists of all regions, although—given their independent spirit and propensity to differ in legal interpretation—they diverged widely in their readings of these materials and their applications of them in concrete legal practice.

In other cases when the jurists did not accept identical materials, they frequently showed their awareness of the divergent *ḥadīth*s and post-Prophetic reports in question. They often considered their opponents' material as authentic but, again, for their own methodological reasons, refused to regard such interpretations as binding. In many cases, authoritative legal texts did not exist at all on either side of an argument. There is little evidence in early legal sources that jurists willfully and systematically fabricated legal *ḥadīth*s so that they could cite them in support of their dissenting positions, despite the fact that explicit supporting texts would have helped them tremendously in making each case. These findings refute the common hypothesis that early Muslim jurists were motivated to fabricate legal *ḥadīth*s *en masse* and that each legal doctrine had an independent body of *ḥadīth*s that explicitly supported it. Consequently, it is erroneous to presume that the dating of any particular legal *ḥadīth* or post-Prophetic report can be determined by its apparent conformity or lack of conformity to a particular line of juristic argumentation.

BIBLIOGRAPHY

Abbott, Nabia. *Studies in Arabic Literary Papyri II: Qur'ānic Commentary and Tradition*. The University of Chicago Oriental Institute Publications, Volume 76. Chicago: The University of Chicago Press, 1967.

Abd-Allah, Umar F. "Abū Ḥanīfa." In *Encyclopaedia Iranica*, 1:295–301.

———. "Mālik's Concept of *ʿAmal* in the Light of Mālikī Legal Theory." 2 vols. Chicago: University of Chicago Ph.D. Dissertation, 1978. Cited as "*ʿAmal*."

———. "Theological Dimensions of Islamic Law." In *The Cambridge Companion to Classical Islamic Theology*. Edited by T.J. Winter. Cambridge: Cambridge University Press, 2008: 237–57.

ʿAbd al-Jabbār ibn Aḥmad al-Asadābādī, al-Qāḍī. *al-Mughnī*. Edited by Amīn al-Khūlī. Vol. 17: *al-Sharʿiyyat*. Cairo: al-Muʾassasa al-Miṣriyya al-ʿĀmma li-al-Taʾlīf wa al-Tarjama wa al-Ṭabāʿa wa al-Nashr, 1382/1962.

ʿAbd al-Laṭīf, ʿAbd al-Wahhāb. "Preface" in *al-Muwaṭṭaʾ*] [recension of al-Shaybānī]. *Muwaṭṭaʾ al-Imām Mālik: riwāyat Muḥammad ibn al-Ḥasan al-Shaybānī*. Edited by ʿAbd al-Wahhāb ʿAbd al-Laṭīf. Cairo: al-Majlis al-Aʿlā li-al-Shuʾūn al-Islāmiyya, 1387/1967. Cited as *Muw.* (al-Shaybānī/ʿAbd al-Laṭīf).

ʿAbd al-Razzāq ibn Hammām al-Ṣanʿānī. *al-Muṣannaf li al-ḥāfiẓ al-kabīr Abī Bakr ʿAbd al-Razzāq ibn Hammām al-Ṣanʿānī*. Edited by Ḥabīb al-Raḥmān al-ʿAẓamī. 11 vols. and index. Johannesburg: al-Majlis al-ʿIlmī, 1390–92/1970–72; Beirut: al-Maktab al-Islāmī, 1403/1983.

Abdul-Qadir, Muhammad al-Aroosi, "The Reception and Development of Malikite Legal Doctrine in the Western Islamic World." Edinburgh: University of Edinburgh Ph.D. Dissertation, 1973.

Abdel-Rahman, Hassan. "L'argument *a maiori* et l'argument par analogie dans la logique juridique musulmane." In *Rivista internazionale di filosofia del diritto*, 98, ser. 4 (1971): 127–48.

Abrahamov, Binyamin. *Islamic Theology: Traditionalism and Rationalism*. Edinburgh: Edinburgh University Press, 1998.

Abū Dāwūd al-Sijistānī, Sulaymān ibn al-Ashʿath. *Kitāb masāʾil al-Imām Aḥmad*. Edited by Muḥammad Bahja al-Bayṭār. Cairo: Dār al-Manār, 1353/1934; Beirut: Muḥammad Amīn Damj, n.d.

Abū Dāwūd al-Ṭayālisī, Sulaymān ibn Dāwūd. *Musnad Abī Dāwūd al-Ṭayālisī*. Reprinted in Beirut: Dār al-Maʿrifa, n.d.

Abū al-Ḥusayn al-Baṣrī, Muḥammad ibn ʿAlī. *Kitāb al-muʿtamad fī uṣūl al-fiqh*. Edited by Muḥammad Ḥamīd-Allāh. 2 vols. Damascus: al-Maʿhad al-ʿIlmī al-Fransī li-al-Dirāsāt al-ʿArabiyya, 1384/1964.

Abū Yūsuf Yaʿqūb ibn Ibrāhīm. *al-Radd ʿalā siyar al-Awzāʿī*. Edited by Abū al-Wafāʾ al-Afghanī. Hyderabad: Lajnat Iḥyāʾ al-Maʿārif al-Nuʿmāniyya, 1357/1938.

Abū Zahra, Muḥammad. *Abū Ḥanīfa: ḥayātuhū wa ʿaṣruhū, ārāʾuhū wa fiqhuhū*. Cairo: Dār al-Fikr al-ʿArabī, 1955.

———. *Abū Ḥanīfa: ḥayātuhū wa ʿaṣruhū, ārāʾuhū wa fiqhuhū.* Cairo: Dār al-Fikr al-ʿArabī, 1965. Cited as *Abū Ḥanīfa* (1965).

———. *Abū Ḥanīfa: ḥayātuhū wa ʿaṣruhū, ārāʾuhū wa fiqhuhū*. Cairo: Maṭbaʿat al-Madanī, 1997. Cited as *Abū Ḥanīfa* (1997).

———. *Ibn Ḥanbal: ḥayātuhū wa ʿaṣruhū, ārāʾuhū wa fiqhuhū*. Cairo: Dār al-Fikr al-ʿArabī, n.d.

———. *Ibn Ḥanbal: ḥayātuhū wa ʿaṣruhū, ārāʾuhū wa fiqhuhū*. Cairo: Dār al-Fikr al-ʿArabī, 1418/1997. Cited as *Ibn Ḥanbal* (1997).

——. *al-Imām al-Ṣādiq: ḥayātuhū wa ʿaṣruhū, ārāʾuhū wa fiqhuhū.* Cairo: Dār al-Fikr al-ʿArabī, 1965.
——. *al-Imām al-Ṣādiq: ḥayātuhū wa ʿaṣruhū, ārāʾuhū wa fiqhuhū.* Cairo: Dār al-Fikr al-ʿArabī, 1993. Cited as *al-Imām al-Ṣādiq* (1993).
——. *Mālik: ḥayātuhū wa ʿaṣruhū, ārāʾuhū wa fiqhuhū.* Cairo: Dār al-Fikr al-ʿArabī, 1997. Cited as Muhammad Abū Zahra, *Mālik*, (Dār al-Fikr).
——. *Mālik: ḥayātuhū wa ʿaṣruhū, ārāʾuhū wa fiqhuhū.* Cairo: al-Maktaba al-Anglo al-Miṣriyya, n.d.
——. *al-Shāfiʿī: ḥayātuhū wa ʿaṣruhū, ārāʾuhū wa fiqhuhū.* Cairo: Dār al-Fikr al-ʿArabī, 1948.
Aḥdab, Khaldūn, al-. *Zawāʾid tārīkh Baghdād ʿalā al-kutub al-sitta*. 10 vols. Damascus: Dār al-Qalam, 1417/1996.
Āl Taymiyya. (Taqī al-Dīn Aḥmad ibn Taymiyya, ʿAbd al-Ḥalīm ibn ʿAbd al-Salām ibn Taymiyya, ʿAbd al-Salām ibn ʿAbd-Allāh ibn Taymiyya). *al-Musawwda fī uṣūl al-fiqh*. Edited by Muḥammad Muḥyī al-Dīn ʿAbd al-Ḥamīd. Cairo: Maṭbaʿat al-Madanī, 1964.
Āmidī, Sayf al-Dīn, al-. *al-Iḥkām fī uṣūl al-aḥkām*. 3 vols. Cairo: Maṭbaʿat Muḥammad ʿAlī Ṣabīḥ wa Awlādihī, 1387/1967.
Anderson, Norman. *Law Reform in the Muslim World*. London: University of London Press, 1976.
Ansari, Zafar Ishaq. "The Early Development of Islamic Fiqh in Kūfah with Special Reference to the Works of Abū Yūsuf and Shaybānī." Montreal: McGill Univeristy Ph.D. Dissertation, 1966. Cited as "Development."
——. "Islamic Juristic Terminology before Shāfiʿī: A Semantic Analysis with Special Reference to Kūfa." *Arabica*, 19 (1972): 255–300.
Arrian [Favius Arrianus Xenophon], *The Campaigns of Alexander*. Translated by Aubrey de Sélincourt. Edited by Betty Radice. "Revised, with a new introduction and notes" by J.R. Hamilton. New York: Penguin Books, 1982.
Azmi, Mohammad Mustafa. *Studies in Early Ḥadīth Literature: With a Critical Edition of Some Early Texts.* Beirut: al-Maktab al-Islāmī, 1968.
Bādishāh, Muḥammad Amīn Amīr. *Taysīr al-taḥrīr*. With Muḥammad ibn ʿAbd al-Wāḥid ibn al-Humām. *al-Taḥrīr fī uṣūl al-fiqh al-jāmiʿ bayn iṣṭilāḥay al-ḥanafiyya wa al-shāfiʿiyya*. 4 vols. in 2. Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1350–1351/[1931–1932].
Bājī, Sulaymān ibn Khalaf al-. *Iḥkām al-fuṣūl fī aḥkām al-uṣūl*. 2 vols. Edited by ʿAbd al-Majīd al-Turkī. Beirut: Dār al-Gharb al-Islāmī, 1995.
——. *Kitāb al-ishāra fī maʿrifat al-uṣūl wa al-wijāza fī maʿānī al-dalīl*. Edited by Muḥammad ʿAlī Farkūs. Mecca: al-Maktaba al-Makkiyya, 1416/1996.
——. [*al-Muntaqā*]: *Sharḥ Muwaṭṭaʾ Imām Dār al-Hijra, Sayyidinā Mālik ibn Anas*. 7 vols. Cairo: Maṭbaʿat al-Saʿāda, 1331/[1912].
Bayḍāwī, ʿAbd-Allāh ibn ʿUmar al-. *Minhāj al-wuṣūl fī ʿilm al-uṣūl*. With the commentaries *Manāhij al-ʿuqūl* by Muḥammad ibn al-Ḥasan al-Budakhshī and *Nihāyat al-Sūl* by Jamāl al-Dīn ʿAbd al-Raḥīm al-Isnawī. 3 vols. Cairo: Maṭbaʿat Muḥammad ʿAlī Ṣabīḥ, [1969].
Bedir, Murteza. "An Early Response to Shāfiʿī: ʿĪsā b. Abān on the Prophetic Report (*Khabar*)." In *Islamic Law and Society*, 9, 3 (2002): 285–311.
Bêk, Muḥammad Khuḍarī. *Uṣūl al-fiqh*. Cairo: al-Maktaba al-Tijāriyya al-Kubrā, 1391/1971.
Berg, Herbert. "Competing Paradigms in the Study of Islamic Origins: Qurʾān 15:89–91 and the Value of *Isnāds*." In *Method and Theory in the Study of Islamic Origins*. Edited by Herbert Berg. Leiden: Brill, 2003: 259–290.
Bousquet, Georges-Henri. "*La Mudawwana*: Index avec la table générale des matières." *Arabica: revue d'études arabes*, 17 (1970): 113–150.
Brockopp, Jonathan E. "Competing Theories of Authority in Early Maliki Texts." In *Studies in Islamic Legal Theory*. Edited by Bernard G. Weiss. Leiden: Brill, 2002:3–22. Cited as "Competing Theories."
——. "Early Islamic Jurisprudence in Egypt," In *International Journal of Middle East Studies*, 30 (1998): 167–82.

———. *Early Mālikī Law: Ibn ʿAbd al-Ḥakam and His Major Compendium of Jurisprudence*. In *Studies in Islamic Law and Society*, 14. Leiden: E.J. Brill, 2000. Cited as *Early Law*.
———. "Literary Genealogies from the Mosque-Library of Kairouan." In *Islamic Law and Society*, 6,3. Leiden: Brill, 1999:393–402. Cited as "Genealogies."
———. "Review of *The Origins of Islamic Law: The Qurʾān, the Muwaṭṭaʾ, and Madīnan ʿAmal* by Yasin Dutton." In *Islamic Law and Society*, 7 (2000): 398–400.
Brown, Daniel W. *Rethinking tradition in modern Islamic thought*. Cambridge: Cambridge University Press, 1996.
Brown, Jonathan A.C. "The Canonization of al-Bukhārī and Muslim: The Formation and Function of the Sunnī Ḥadīth Canon." 2 vols. Chicago: University of Chicago Ph.D. Dissertation, 2006.
———. "Critical Rigor vs. Juridical Pragmatism: How Legal Theorists and Ḥadīth Scholars Approached the Backgrowth of *Isnād*s in the Genre of *ʿIlal al-Ḥadīth*." In *Islamic Law and Society*, 14, vol. 1 (2007): 1–41.
Brunschvig, Robert. "Polémiques médiévales autour du rite de Malik." In *Andalus*, 15 (1950): 377–435.
Burton, John. "Qurʾān and Sunnah: A Case of Cultural Disjunction." In *Method and Theory in the Study of Islamic Origins*. Edited by Herbert Berg. Leiden: Brill, 2003:137–158.
———. "Redating the Timetable of Early Islam." In *Journal of the American Oriental Society*, 115 (1995): 453–462.
———. *The Sources of Islamic Law: Islamic Theories of Abrogation*. Edinburgh: Edinburgh University Press, 1990.
Calder, Norman. "Law." In *History of Islamic Philosophy*. Edited by Seyyed Hossein Nasr and Oliver Leaman, 2: 979–98. London: Routledge, 1996.
———. *Studies in Early Muslim Jurisprudence*. Oxford: Clarendon Press, 1993.
———. "*Tafsīr* from Ṭabarī to Ibn Kathīr." In *Approaches to the Qurʾān*. Edited by G.R. Hawting and Abdul-Kader A. Shareef, 101–40. Routledge/SOAS Series on Contemporary Politics and Culture in the Middle East. London: Routledge, 1993.
Chaumont, Eric. "A propos du *Kitāb al-Radd ʿalā al-Shāfiʿī* attribué à Abū Bakr Muḥammad Ibn al-Labbād al-Qayrawānī (m. 333/944)." In *Studies in Islamic and Middle Eastern Texts and Traditions in Memory of Norman Calder*. Edited by G.R. Hawting et al., 75–84. *Journal of Semitic Studies Supplement 12*. Oxford: Oxford University Press, 2000.
Cohen, Morris R. and Ernest Nagel. *An Introduction to Logic and Scientific Method*. New York: Harcourt, Brace, & Co., 1939.
Cook, Michael. *Commanding Right and Forbidding Wrong in Islamic Thought*. Cambridge: Cambridge Univesity Press, 2000.
———. *Early Muslim Dogma: A Source Critical Study*. Cambridge: Cambridge University Press, 1981.
———. "The Opponents of Writing Tradition in Early Islam." In *Arabica*, 44 (1997): 437–530.
Coulson, Noel J. *Conflicts and Tensions in Islamic Jurisprudence*. Chicago: University of Chicago Press, 1969.
———. *A History of Islamic Law. Islamic Surveys*, no. 2. Edinburgh: Edinburgh University Press, 1964.
Crone, Patricia. *God's Rule: Government and Islam: Six Centuries of Medieval Islamic Political Thought*. New York: Columbia University Press, 2004.
———. "Jāhilī and Jewish Law: The *qasāma*." In *Jerusalem Studies in Arabic and Islam*, 4 (1984): 153–201.
———. *Meccan Trade and the Rise of Islam*. Princeton: Princeton University Press, 1987.
———. *Roman, provincial, and Islamic law: The Origins of the Islamic patronate*. Cambridge Studies in Islamic Civilization. Cambridge: Cambridge University Press, 1987. Cited as *Roman law*.
———. "Two Legal Problems Bearing on the Early History of the Qurʾān." In *Jerusalem Studies in Arabic and Islam*, 18 (1994): 1–37.

Crone, Patricia and Martin Hinds. *God's Caliph: Religious Authority in the First Centuries of Islam*. Cambridge: Cambridge University Press, 1986.
Dabbūsī, ʿUbayd-Allāh ibn ʿUmar al-. *Taʾsīs al-naẓar*. Cairo: Zakariyyā ʿAlī Yūsuf, 1972.
Dawālībī, Muḥammad Maʿrūf al-. *al-Madkhal ilā ʿilm uṣūl al-fiqh*. Beirut: Maṭbaʿat Dār al-ʿIlm li-al-Malāyīn, 1385/1965.
Donner, Fred M. *Narratives of Islamic Origins: The Beginnings of Islamic Historical Writing*. Princeton: The Darwin Press, 1998.
Dutton, Yasin. "*ʿAmal* v. *Ḥadīth* in Islamic Law: The Case of *Sadl al-Yadayn* (Holding One's Hands by One's Sides) When Doing the Prayer." In *Islamic Law and Society*, 3 (1996): 13–40.
———. "Juridical Practice and Madīnan *ʿAmal*: *Qaḍāʾ* in the *Muwaṭṭaʾ* of Mālik." In *Journal of Islamic Studies*, 10:1 (1999):1–21.
———. *Original Islam: Mālik and the madhhab of Madina*. London: Routledge, 2007.
———. *The Origins of Islamic Law: The Qurʾān, the Muwaṭṭaʾ, and Madīnan ʿAmal*. Richmond: Curzon, 1999.
———. "Review of *Studies in Early Muslim Jurisprudence* by Norman Calder, (Oxford: Clarendon Press, 1993)." In *Journal of Islamic Studies*, 5:1 (January 1994): 102–108.
El Shamsy, Ahmed. "The First Shāfiʿī: The Traditionalist Legal Thought of Abū Yaʿqūb al-Buwayṭī (d. 231/846)." In *Islamic Law and Society*, 14, 3 (2007): 301–41.
The New Encyclopaedia Britannica. Edited by Philip W. Goetz. 32 vols. Chicago: Encyclopaedia Britannica Incorporated, 1987.
Encyclopaedia Iranica. Edited by Ehsan Yarshater. 15 vols. London: Routledge and Kegan Paul: 1983–.
The Encyclopedia of Philosophy. Editor Paul Edwards. 4 vols. New York: Macmillan, 1972.
The Encyclopedia of Religion and Ethics. Edited by James Hastings with the assistance of John A. Selbie and others. 13 vols. Edinburgh: T. & T. Clark, 1917–22.
Ess, Josef van. *Zwischen Ḥadīṯ und Theologie. Studien zum Enstehen prädestinatianischer Überlieferungen. Studien zur Sprache, Geschichte und Kultur des islamischen Orients*. Neu Folge 7. Berlin: Walter de Gruyter, 1975.
Fadel, Mohammad. "'*Istihsan* Is Nine-Tenths of the Law': The Puzzling Relationship of *Usul* to *Furuʿ* in the Maliki *Madhhab*." In *Studies in Islamic Legal Theory*. Edited by Bernard G. Weiss. Leiden: Brill, 2002: 161–76.
———. "Authority in Ibn Abî Zayd al-Qayrawânî's *Kitâb al-nawâdir wa al-ziyâdât ʿalâ mâ fî al-Mudawwana min ghayrihâ min al-ummahât*: The Case of the 'The Chapter of Judgments' (*Kitâb al-aqḍiya*)." In manuscript.
Fāsī, ʿAllāl al-. *Maqāṣid al-sharīʿa al-islāmiyya*. Casablanca: Maktabat al-Waḥda al-ʿArabiyya, [1967].
Fierro, Maribel. "El alfaquí beréber Yaḥyà b. Yaḥyà al-Layṯī (m. 234/848)." In *Estudios onomástico-biográficos de al-Andalus* 8: *Biografías y género biográfico en el occidente islámico*. Edited by María Luisa Avila and Manuela Marín. Madrid: Consejo Superior de Investigaciones Científicas, 1997: 269–344.
———. "Review of B. Ossendorf-Conrad, *Das 'K. al-Wadiha' des ʿAbd al-Malik b. Habib*." In Bulletin of the School of Oriental and Africa Studies, 61 (1998): 133–134.
Forneas, J.M. "Datos para un estudio de la *Mudawwana* de Saḥnūn en al-Andalus." In *Actas del IV. Coloquio hispano-tunecina.* Palma de Mallorca, 1979. Madrid: Instituto Hispano-Arabe de Cultura, 1983: 93–118.
Ghazālī, Abū Ḥāmid Muḥammad ibn Muḥammad al-. *al-Muṣṭaṣfā min ʿilm al-uṣūl*. 2 vols. Cairo: al-Maṭbaʿa al-Amīriyya bi-Būlāq, 1322/[1903]; reprint ed., Baghdad: Maktabat al-Muthannā, 1970.
Gleave, Robert M. "Imāmī Shīʿī Refutations of *Qiyās*." In *Studies in Islamic Legal Theory*. Edited by Bernard G. Weiss. Leiden: Brill, 2002: 267–291. Cited as "Refutations."
Gibb, H.A.R. *Mohammedanism*. Oxford: Oxford University Press, 1949/1970.
Goitein, S.D., "The Birth-Hour of Islamic Law?" In *The Muslim World* (1960), 1:23–29.
———. "The Birth-Hour of Muslim Law? An Essay in Exegesis." In *The Formation of Islamic Law*. Edited by Wael B. Hallaq, 69–75. *The Formation of the Classical Islamic World*.

vol. 27. Edited by Lawrence I. Conrad. Burlington, Vermont: Ashgate Publishing Co., 2004.
Goldziher, Ignaz. *Dogme et la loi de l'Islam: histoire de développement dogmatique et juridique de la religion musulmane, Le*. Translated by Félix Arin. Paris: P. Geuthner, 1973.
———. *Introduction to Islamic Theology and Law*. Translated by Andras and Ruth Hamori with an introduction and additional notes by Bernard Lewis. Princeton: Princeton University Press, 1981.
———. "Kämpfe um die Stellung des *Ḥadīṯ* im Islam." In *Zeitung der deutschen Morgenländischen Gesellschaft*, 61(1907): 860–72.
———. *Muhammedanische Studien*. 2 vols. in 1. Hildesheim: Georg Olms Verlagsbuchhandlung, 1961.
———. *Muslim Studies* (*Muhammedanische Studien*). Edited by S.M. Stern, translated by C.R. Barber and S.M. Stern. 2 vols. London: George Allen and Unwin, 1971.
———. *The Ẓāhirīs: Their Doctrine and Their History: A Contribution to the History of Islamic Theology*. Translated and edited by Wolfgang Behn. Leiden: E.J. Brill, 1971.
———. *Die Ẓāhiriten: Ihr Lehrsystem und ihre Geschichte: ein Beitrag zur Geschichte der muhammedanischen Theologie*. Leipzig: n.p., 1884; reprinted edition, Hildesheim: Georg Olms Verlagsbuchhandlung, 1967.
Gräf, Erwin. *Jagdbeute und Schlachttier im islamischen Recht: Eine Untersuchung zur Entwicklung der islamischen Jurisprudenz.* Bonn: Selbstverlag des Orientalischen Seminars der Universität Bonn: 1959.
Graham, William A. *Beyond the Written Word: Oral aspects of scripture in the history of religion*. Cambridge: Cambridge University Press, 1993.
———. "Review of *Quranic Studies: Sources and Methods of Scriptural Interpretation* by John Wansbrough." In *Journal of the American Oriental Society*, 100 (1980): 137–41.
Guraya, Muhammad Yusuf. "The Concept of *Sunnah* in the *Muwaṭṭa'* of Mālik ibn Anas." M.A. thesis, McGill University, 1969. Cited as "*Sunnah*."
———. *Origins of Islamic Jurisprudence: With Special Reference to Muwatta Imam Malik*. Lahore: Muhammad Ashraf, 1996.
Hakim, Avraham. "Conflicting Images of Lawgivers: The Caliph and the Prophet in *Sunnat 'Umar* and *Sunnat Muḥammad*." In *Method and Theory in the Study of Islamic Origins*. Edited by Herbert Berg. Leiden and Boston: Brill, 2003: 159–77.
Hallaq, Wael B. "The Authenticity of Prophetic Ḥadīth: A Pseudo-Problem." In *Studia Islamica*, 89 (1999): 75–90.
———. *Authority, Continuity, and Change in Islamic Law.* Cambridge: Cambridge University Press, 2001.
———. "Early *Ijtihād* and the Later Construction of Authority." In *The Formation of Islamic Law*. Edited by Wael B. Hallaq, 317–349. *The Formation of the Classical Islamic World*, vol. 27. Edited by Lawrence I. Conrad. Burlington, Vermont: Ashgate Publishing Co., 2004.
———. "From Regional to Personal Schools of Law? A Reevaluation." In *Islamic Law and Society*, 8 (2001): 1–26. Cited as "Regional Schools?"
———. *A History of Islamic Legal Theories: An Introduction to Sunni Uṣūl al-Fiqh*. Cambridge: Cambridge University Press, 1997.
———. "Introduction: The Formation of Islamic Law." In *The Formation of Islamic Law*. Edited by Wael B. Hallaq, xiii–xl. *The Formation of the Classical Islamic World*, vol. 27. Edited by Lawrence I. Conrad. Burlington, Vermont: Ashgate Publishing Co., 2004.
———. *An Introduction to Islamic Law*. Cambridge: Cambridge University Press, 2009.
———. *Law and Theory in Classical and Medieval Islam.* Brookfield, Vt.: Variorum, 1994.
———. "Logic, Formal Arguments and Formalization of Arguments in Sunnī Jurisprudence." In Hallaq, Wael B. *Law and Theory in Classical and Medieval Islam.* Brookfield, Vt.: Variorum, 1994, III: 317–58.
———. "Non-Analogical Arguments in Sunni Juridical *Qiyās*." In *Arabica*, 36 (1989): 286–306.
———. "On Dating Mālik's *Muwaṭṭa'*." In *UCLA Journal of Islamic and Near Eastern Law*, 1 (2001–02): 47–65.

——. "On Inductive Corroboration, Probability and Certainty in Sunnī Legal Thought." In *Law and Theory in Classical and Medieval Islam*. Edited by Wael B. Hallaq. Brookfield, Vt.: Variorum, 1994, IV: 3–31.
——. *Origins and Evolution of Islamic Law, The*. Cambridge: Cambridge University Press, 2005.
——. *Sharīʿa: Theory, Practice, Transformations*. Cambridge: Cambridge University Press, 2009.
——. "The Use and Abuse of Evidence: The Question of Provincial and Roman Influences on Early Islamic Law." In *Journal of the American Oriental Society*, 110 (1990): 79–91. Cited as "Evidence."
——. "*Uṣūl al-Fiqh*: Beyond Tradition." In *Law and Theory in Classical and Medieval Islam*. Edited by Wael B. Hallaq. Brookfield, Vt.: Variorum, 1994, XII: 172–202.
——. "Was al-Shāfiʿī the Master Architect of Islamic Jurisprudence." In *The Formation of Islamic Law*. Edited by Wael B. Hallaq. *The Formation of the Classical Islamic World*, vol. 27. Edited by Lawrence I. Conrad. Burlington, Vermont: Ashgate Publishing Co., 2004: 257–75. Cited as "Master Architect?"
——. "Was al-Shāfiʿī the Master Architect of Islamic Jurisprudence?" In *International Journal of Middle East Studies* 25 (1993): 587–605.
Ḥamdān, Nadhīr. *al-Muwaṭṭa'āt li-al-Imām Mālik*. Damascus: Dār al-Qalam, 1412/1992.
Ḥasab-Allāh, ʿAlī. *Uṣūl al-tashrīʿ al-islāmī*. Cairo: Dār al-Maʿārif, 1391/1971.
Hasan, Ahmad. *The Early Development of Islamic Jurisprudence*. Islamabad: Islamic Research Institute, 1970. Cited as *Development*.
Ḥasan Ibrāhīm Ḥasan. *Tārīkh al-Islam al-siyāsī wa al-dīnī wa al-thaqāfī wa al-ijtimāʿī*. 4 vols. Cairo: Maktabat al-Nahḍa al-Miṣriyya, 1961.
Hawting, G[erald] R. "An Ascetic Vow and an Unseemly Oath?: *īlāʾ* and *ẓihār* in Muslim Law." In *Bulletin of the School of Oriental and African Studies*, 57 (1994): 113–25.
——. *The First Dynasty of Islam: The Umayyad Caliphate AD 661–750*. London: Croom Helm, 1986.
——. "John Wansbrough, Islam, and Monotheism." In *Method and Theory in the Study of Religion*, 9.1 (1997): 23–38.
——. "The Role of Qurʾān and *Ḥadīth* in the Legal Controversy about the Rights of a Divorced Woman during Her 'Waiting Period' (*ʿidda*)." In *Bulletin of the School of Oriental and African Studies*, 52 (1989): 430–45.
——. "The Significance of the Slogan *lā ḥukm illā lillāh* and the References to the *ḥudūd* in the Traditions about the Fitna and the Murder of ʿUthmān." In *Bulletin of the School of Oriental and African Studies*, 41 (1978): 453–63.
Heinrichs, Wolfhart P. "*Qawāʿid* as a Genre of Legal Literature." In *Studies in Islamic Legal Theory*. Edited by Bernard G. Weiss. Leiden: Brill, 2002: 365–384.
——. "Structuring the Law: Remarks on the *Furūq* Literature." In *Studies in Honour of Clifford Edmund Bosworth*, vol. 1: *Hunter of the East: Arabic and Semitic Studies*. Edited by Ian Richard Netton. Leiden: Brill, 2000: 332–344.
Hilālī, Salīm ibn ʿĪd, al-. "*Muqaddima*." In [Mālik b. Anas. *al-Muwaṭṭaʾ*]. *al-Muwaṭṭaʾ bi-riwāyātihī: Yaḥyā al-Laythī, al-Qaʿnabī, Abī Muṣʿab al-Zuhrī,* [*Suwayd ibn Saʿīd*] *al-Ḥadathānī, Ibn Bukayr, Ibn al-Qāsim, Ibn Ziyād, Muḥammad ibn al-Ḥasan bi-ziyādātihā wa zawāʾidihā wa ikhtilāf alfāẓihā*. 5 vols. Dubai: Maktabat al-Furqān, 1423/2003.
Hodgson, Marshall G.S. *The Venture of Islam: Conscience and History in a World Civilization.* Vol. 1: *The Classical Age of Islam*. Vol. 2: *The Expansion of Islam in the Middle Periods*. Vol. 3: *The Gunpowder Empires and Modern Times*. Chicago: The University of Chicago Press, 1977.
Humphreys, R. Stephen. "The Historian, His Documents, and the Elementary Modes of Historical Thought." In *History and Theory*, 19, No. 1 (Feb. 1980): 1–20.
——. *Islamic History: A Framework for Inquiry*. Princeton: Princeton University Press, 1991.
Hurgronje, Christian Snouck. *Mohammedanism: Lectures on Its Origins, Its Religious and Political Growth, and Its Present State.* New York: Putnam's Sons, 1916.

Ibn ʿAbd al-Barr, Yūsuf. *al-Intiqāʾ fī faḍāʾil al-thalātha al-aʾimma al-fuqahāʾ: Mālik wa al-Shāfiʿī wa Abī Ḥanīfa*. Cairo: Maktabat al-Qudsī, 1350/[1931].

———. *al-Istidhkār li-madhāhib fuqahāʾ al-amṣār wa ʿulamāʾ al-aqṭār fīmā taḍammanahū al-Muwaṭṭaʾ min maʿānī al-raʾy wa al-āthār*. Edited by ʿAlī al-Najdī Nāṣif. 2 vols. [incomplete]. Cairo: al-Majlis al-Aʿlā li-al-Shuʾūn al-Islāmiyya, 1391–/1971–. Cited as *al-Istidhkār* (1971).

———. *al-Istidhkār li-madhāhib fuqahāʾ al-amṣār wa ʿulamāʾ al-aqṭār fīmā taḍammanahū al-Muwaṭṭaʾ min maʿānī al-raʾy wa al-āthār wa sharḥ dhālika kullihī bi-al-ījāz wa al-ikhtiṣār*. Edited by ʿAbd al-Muʿṭī Amīn Qalʿajī. 30 vols. Cairo: Dār Qutayba li-al-Ṭibāʿa wa al-Nashr, 1414/1993.

———. *Tajrīd al-tamhīd limā fī al-Muwaṭṭaʾ min al-maʿānī wa al-asānīd*. Cairo: Maktabat al-Qudsī, 1931.

———. *al-Tamhīd limā fī al-Muwaṭṭaʾ min al-maʿānī wa al-asānīd: aw al-taqaṣṣī li-ḥadīth al-Muwaṭṭaʾ wa shuyūkh al-Imām Mālik*. Edited by Muṣṭafā ibn Aḥmad al-ʿAlawī and Muḥammad ʿAbd al-Karīm al-Bakrī. 12 vols. Rabat: al-Maṭbaʿa al-Malakiyya, 1387/1967. Cited as *al-Tamhīd* (1967).

———. *al-Tamhīd limā fī al-Muwaṭṭaʾ min al-maʿānī wa al-asānīd murattaban ʿalā al-abwāb al-fiqhiyya li- al-Muwaṭṭaʾ*. Edited by Usāma ibn Ibrāhīm. 18 vols. Cairo: al-Fārūq al-Ḥadītha li-al-Ṭibāʿa wa al-Nashr, 1999/1420.

Ibn Abī Shayba, Abū Bakr ʿAbd-Allāh ibn Muḥammad. *al-Kitāb al-muṣannaf fī al-aḥādīth wa al-āthār*. Edited by Muḥammad ʿAbd al-Salām Shāhīn. 9 vols. Beirut: Dār al-Kutub al-ʿIlmiyya, 1416/1995.

Ibn Abī Zayd al-Qayrawānī, ʿAbd-Allāh ibn ʿAbd al-Raḥmān. *al-Nawādir wa al-ziyādāt ʿalā mā fī al-Mudawwana min ghayrihā min al-ummahāt*. Edited by ʿAbd al-Fattāḥ Muḥammad al-Ḥullū. 15 vols. Beirut: Dār al-Gharb al-Islāmī, 1999.

[Ibn Anas, Mālik. *al-Muwaṭṭaʾ*]. *al-Muwaṭṭaʾ bi-riwāyātihī: Yaḥyā al-Laythī, al-Qaʿnabī, Abī Muṣʿab al-Zuhrī, [Suwayd ibn Saʿīd] al-Ḥadathānī, Ibn Bukayr, Ibn al-Qāsim, Ibn Ziyād, Muḥammad ibn al-Ḥasan bi-ziyādātihā wa zawāʾidihā wa ikhtilāf alfāẓihā*. Edited by Abū Usāma Salīm ibn ʿĪd al-Hilālī al-Salafī. 5 vols. Dubai: Maktabat al-Furqān, 1423/2003. Cited as *Muw.* (*Riwāyāt*).

[———. *al-Muwaṭṭaʾ*] [recension of Abū Muṣʿab]. *al-Muwaṭṭaʾ li-Imām Dār al-Hijra Mālik ibn Anas: riwāyat Abī Muṣʿab al-Zuhrī al-Madanī*. Edited by Bashshār ʿAwad Maʿrūf and Maḥmūd Muḥammad Khalīl. 2 vols. Beirut: Muʾassasat al-Risāla, 1993. Cited as *Muw.* (Abū Muṣʿab).

[———. *al-Muwaṭṭaʾ*] [recension of Ibn al-Qāsim summarized by al-Qābisī]. *Muwaṭṭaʾ al-Imām Mālik ibn Anas: riwāyat Ibn al-Qāsim wa talkhīṣ al-Qābisī*. Edited by Muḥammad ibn ʿAlawī al-Mālikī. Jeddah: al-Shurūq, 1408/1988. Cited as *Muw.* (Ibn al-Qāsim).

[———. *al-Muwaṭṭaʾ*] [recension of Ibn Ziyād]. *Muwaṭṭaʾ al-Imām Mālik: qiṭʿa minhu bi-riwāyat Ibn Ziyād*. Edited by Muḥammad al-Shādhilī al-Nayfar. Beirut: Dār al-Gharb al-Islāmī, 1980/1400. Cited as *Muw.* (Ibn Ziyād).

[———. *al-Muwaṭṭaʾ*] [recension of al-Qaʿnabī]. *al-Muwaṭṭaʾ li-al-Imām Mālik ibn Anas: riwāyat ʿAbd-Allāh ibn Maslama al-Qaʿnabī*. Edited by ʿAbd al-Majīd Turkī. Beirut: Dār al-Gharb al-Islāmī, 1999. Cited as *Muw.* (al-Qaʿnabī).

[———. *al-Muwaṭṭaʾ*] [recension of al-Shaybānī]. *Muwaṭṭaʾ al-Imām Mālik: riwāyat Muḥammad ibn al-Ḥasan al-Shaybānī maʿa al-taʿlīq al-mumajjad ʿalā Muwaṭṭaʾ Muḥammad: sharḥ al-ʿallāma ʿAbd al-Ḥayy al-Luknawī*. Edited by Taqī al-Dīn al-Nadawī. 3 vols. Damascus: Dār al-Qalam, 1412–1413/1991–1992. Cited as *Muw.* (al-Shaybānī/al-Nadawī).

[———. *al-Muwaṭṭaʾ*]. Shaybānī, Muḥammad ibn al-Ḥasan al-. *Muwaṭṭaʾ al-Imām Mālik* by Mālik ibn Anas. Edited by ʿAbd al-Wahhāb ʿAbd al-Laṭīf. Cairo: al-Majlis al-Aʿlā li-al-Shuʾūn al-Islāmiyya, 1387/1967.

[———. *al-Muwaṭṭaʾ*] [recension of al-Shaybānī]. *Muwaṭṭaʾ al-Imām Mālik: riwāyat Muḥammad ibn al-Ḥasan al-Shaybānī*. Edited by ʿAbd al-Wahhāb ʿAbd al-Laṭīf. Cairo: al-Majlis al-Aʿlā li-al-Shuʾūn al-Islāmiyya, 1387/1967. Cited as *Muw.* (al-Shaybānī/ʿAbd al-Laṭīf).

——. *al-Muwaṭṭa'* [recension of Suwayd ibn Saʿīd al-Ḥadathānī]. Edited by ʿAbd al-Majīd Turkī. Beirut: Dār al-Gharb al-Islāmī, 1994. Referred to as *Muw.* (Suwayd).

——. *al-Muwaṭṭa'* [recension of Yaḥyā b. Yaḥyā]. Edited by Bashshār ʿAwwād Maʿrūf. 2 vols. Beirut: Dār al-Gharb al-Islāmī, 1417/1997. Referred to as *Muw.* (Dār al-Gharb).

——. *al-Muwaṭṭa'* [recension of Yaḥyā b. Yaḥyā]. Edited by Muḥammad Fu'ād ʿAbd al-Bāqī. 2 vols. Cairo: Dār Iḥyā' al-Turāth al-ʿArabī, n.d. Referred to as *Muw.*

——. *al-Muwaṭṭa'* [recension of Yaḥyā b. Yaḥyā]. Edited by Muḥammad Fu'ād ʿAbd al-Bāqī. 2 vols. Cairo: Dār Iḥyā' al-Kutub al-ʿArabiyya, 1955. Reprint Beirut: Dār al-Kutub al-ʿIlmiyya, n.d. Referred to as *Muw.*; it is identical to the Dār Iḥyā' al-Turāth al-ʿArabī edition.

Ibn al-ʿArabī, Abū Bakr. *Kitāb al-qabas fī sharḥ Muwaṭṭa' Mālik ibn Anas*. Edited by Muḥammad ʿAbd-Allāh wuld Karīm. 3 vols. Beirut: Dār al-Gharb al-Islāmī, 1992.

Ibn Daqīq al-ʿĪd, [Muḥammad ibn ʿAlī]. *Sharḥ al-arbaʿīn ḥadīthan al-Nawawiyya*. Jeddah: Mu'assasat al-Ṭibāʿa wa al-Ṣiḥāfa wa al-Nashr, n.d.

Ibn Farḥūn, Ibrāhīm ibn ʿAlī. *Kitāb al-dībāj al-mudhahhab fī maʿrifat aʿyān ʿulamā' al-madhhab*. Cairo: ʿAbbās ibn ʿAbd al-Salām ibn Shāqrūn, 1351/1932.

Ibn Ḥajar, Aḥmad ibn ʿAlī al-ʿAsqalānī. *al-Iṣāba fī tamyīz al-ṣaḥāba*. With *al-Istīʿāb fī maʿrifat al-aṣḥāb* by Yūsuf ibn ʿAbd al-Barr. 4 vols. Cairo: Maktabat al-Saʿāda, 1328/[1910]; reprint edition, Baghdad: Maktabat al-Muthannā, [1390/1970].

——. *Kitāb tahdhīb al-tahdhīb*. 12 vols. Beirut: Dār Ṣādir, 1968.

Ibn al-Ḥājib, ʿUthmān ibn ʿUmar. *Mukhtaṣar al-muntahā al-uṣūlī*. Cairo: Maṭbaʿat Kurdistān al-ʿIlmiyya, 1326/[1908].

Ibn Ḥazm, ʿAlī ibn Aḥmad. *al-Iḥkām fī uṣūl al-aḥkām*. Edited by Aḥmad Muḥammad Shākir. 8 vols. in 1. Cairo: Maṭbaʿat al-Saʿāda, 1345–1348/1926–1929.

Ibn Ḥibbān, Abū Ḥātim Muḥammad. *Kitāb al-majrūḥīn min al-muḥaddithīn wa al-ḍuʿafā' wa al-matrūkīn*. Edited by Maḥmūd Ibrāhīm Zāyid. 3 volumes. Halab: Dār al-Waʿyi, 1396/[1976].

[Ibn Hishām, ʿAbd al-Malik]. *al-Sīra al-nabawiyya li-Ibn Hishām*. 4 vols. in 2. Edited by Muṣṭafā al-Saqā, Ibrāhīm al-Abyārī, and ʿAbd al-Ḥafīẓ Shalabī. (N.p.: Mu'assasat ʿUlūm al-Qur'ān, n.d.

Ibn al-Humām, Muḥammad ibn ʿAbd al-Wāḥid. *al-Taḥrīr fī uṣūl al-fiqh al-jāmiʿ bayn iṣṭilāḥay al-ḥanafiyya wa al-shāfiʿiyya*. In *Taysīr al-taḥrīr* by Muḥammad Amīn Amīr Bādishāh. 4 vols. in 2. Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1350–1351/[1931–1932].

Ibn Isḥāq, Khalīl. *Mukhtaṣar al-ʿallāma Khalīl*. Cairo: Dār al-Fikr, 1401/1981.

[Ibn Khaldūn, ʿAbd al-Raḥman ibn Muḥammad]. *An Arab Philosophy of History: Selections from the Prolegomena of Ibn Khaldūn of Tunis (1332–1406)*. Translated by Charles Issawi. Princeton: Darwin Press, 1987.

——. *The Muqaddima: An Introduction to History*. 3 vols. Translated by Franz Rosenthal. New York: Bollingen Foundation, 1958.

——. *Muqaddimat Ibn Khaldūn*. 3 vols. Edited by ʿAlī ʿAbd al-Wāḥid Wāfī. Cairo: Dār al-Nahḍa, n.d.

Ibn al-Labbād, Abū Bakr Muḥammad. *Kitāb al-radd ʿalā al-Shāfiʿī*. Edited by ʿAbd al-Majīd ibn Ḥamda. Tunis: Dār al-ʿArab li-al-Ṭibāʿa, 1406/1986.

[Ibn al-Muqaffaʿ, ʿAbd-Allāh]. *Āthār Ibn al-Muqaffaʿ: Kalīla wa Dimna; al-adab al-kabīr; al-adab al-ṣaghīr; al-durra al-yatīma; risāla fī al-ṣaḥāba; al-āthār al-ukhrā*. Edited by ʿUmar Abū Naṣr. Beirut: Dār Maktabat al-Ḥayāh, 1966.

[Ibn al-Nadīm, Muḥammad ibn Isḥāq.] *The Fihrist of al-Nadīm: A Tenth Century Survey of Muslim Culture*. Edited and translated by Bayard Dodge. 2 vols. New York: Columbia University Press, 1970.

Ibn Qayyim al-Jawziyya, Muḥammad ibn Abī Bakr. *Iʿlām al-muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*. Edited by Muḥammad Muḥyī-al-Dīn ʿAbd al-Ḥamīd. 4 vols. Cairo: Maṭbaʿat al-Saʿāda, 1374/1955. Cited as Ibn al-Qayyim, *Iʿlām* (Saʿāda).

——. *Iʿlām al-muwaqqiʿīn ʿan Rabb al-ʿĀlamīn*. Edited by ʿAbd al-Raḥmān al-Wakīl. 4 vols. Cairo: Dār al-Kutub al-Ḥadītha, 1969. Cited as Ibn al-Qayyim, *Iʿlām* (Dār al-Kutub).

——. *I'lām al-muwaqqi'īn ʿan Rabb al-ʿĀlamīn*. Edited by Muḥammad al-Muʿtaṣim bi-Llāh al-Baghdādī. 4 vols. Beirut: Dār al-Kitāb al-ʿArabī, 1418/1998. Cited as Ibn al-Qayyim, *I'lām* (Dār al-Kitāb).

Ibn Qudāma, Muwaffaq al-Dīn Abū Muḥammad ʿAbd-Allāh ibn Aḥmad. *al-Mughnī*. Edited by ʿAbd-Allāh ibn ʿAbd al-Muḥsin al-Turkī and ʿAbd al-Fattāḥ Muḥammad al-Ḥullū. 15 vols. Cairo: Hajr li-al-Ṭibāʿa wa al-Nashr, 1406–1411/1986–1990.

——. *Rawḍat al-nāẓir wa junnat al-manẓar fī uṣūl al-fiqh ʿalā madhhab al-Imām Aḥmad ibn Ḥanbal*. Cairo: al-Maṭbaʿa al-Salafiyya, 1378/1958.

Ibn Rushd [the Younger/al-Ḥafīd], Muḥammad ibn Aḥmad. *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid*. Cairo: Dār al-Kutub al-ʿArabiyya al-Kubrā, n.d.

——. *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid*. 2 vols. in 1. Cairo: Maṭbaʿat al-Istiqāma, 1371/1952. Referred to as Ibn Rushd, *Bidāya* (Istiqāma).

Ibn Rushd [the Elder/al-Jadd], Muḥammad ibn Aḥmad. *al-Muqaddimāt al-mumahhidāt li-bayān mā iqtaḍathū rusūm al-Mudawwana min al-aḥkām al-sharʿiyyāt*. 4 vols. Cairo: al-Maṭbaʿa al-Khayriyya, 1324/1906.

Ibn Taymiyya, Taqī al-Dīn Aḥmad. *al-Musawwda fī uṣūl al-fiqh*. See Āl Taymiyya, *al-Musawwda fī uṣūl al-fiqh*.

——. *Ṣiḥḥat uṣūl madhhab ahl al-Madīna*. Edited by Zakariyyā ʿAlī Yūsuf. Cairo: Maṭbaʿat al-Imām, 1964.

Ibn Tūmart, Muḥammad ibn ʿAbd-Allāh. *Kitāb aʿazz mā yuṭlab: mushtamil ʿalā jamīʿ taʿālīq al-Imām Muḥammad ibn Tūmart mimmā amlāhū Amīr al-Muʾminīn ʿAbd al-Muʾmin ibn ʿAlī*. Algiers: Maṭbaʿat Pierre Fontana, 1321/1904.

Ibn Wahb, ʿAbd-Allāh. *al-Ǧāmiʿ: Die Koranwissenschaften*. Edited by Miklos Muranyi. *Quellenstudien zur Ḥadiṯ- und Rechtsliteratur in Nordafrika*. Wiesbaden: Otto Harrassowitz, 1995.

——. *al-Ǧāmiʿ: Tafsīr al-Qurʾān* (*Die Koranexegese*). Edited by Miklos Muranyi. *Quellenstudien zur Ḥadiṯ- und Rechtsliteratur in Nordafrika*. Wiesbaden: Otto Harrassowitz, 1993.

——. *al-Muwaṭṭaʾ li-al-Imām ʿAbd-Allāh ibn Wahb ibn Muslim al-Qurashī: Qiṭʿa min al-Kitāb*. Edited by Hishām ibn Ismāʿīl al-Ṣīnī. Jeddah: Dār Ibn al-Jawzī, 1420/1999.

Isnawī, Jamāl al-Dīn ʿAbd al-Raḥīm al-. *Nihāyat al-sūl*. In *Minhāj al-wuṣūl fī ʿilm al-uṣūl* by ʿAbd-Allāh ibn ʿUmar al-Bayḍāwī. 3 vols. Cairo: Maṭbaʿat Muḥammad ʿAlī Ṣabīḥ, [1969].

ʿIyāḍ ibn Mūsā, al-Qāḍī. *Tartīb al-madārik wa taqrīb al-masālik li-maʿrifat aʿlām madhhab Mālik*. Edited by Aḥmad Bakīr Maḥmūd. 3 vols. Beirut: Maktabat al-Ḥayāh, 1387/1967.

Jackson, Sherman A. "Fiction and Formalism: Toward a Functional Analysis of *Uṣūl al-Fiqh*." In *Studies in Islamic Legal Theory*. Edited by Bernard G. Weiss. Leiden: Brill, 2002: 177–201.

——. *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī*. Leiden: Brill, 1996.

——. "Setting the Record Straight: Ibn al-Labbād's Refutation of al-Shāfiʿī." In *Journal of Islamic Studies*, 11 (2000): 121–46.

Jawhari, ʿAbd al-Raḥmān ibn ʿAbd-Allāh al-Ghāfiqī. *Musnad al-Muwaṭṭaʾ*. Edited by Luṭfī ibn Muḥammad al-Ṣaghīr and Ṭahā ibn ʿAlī Būsarīḥ. Beirut: Dār al-Gharb al-Islāmī, 1997.

Jubbī, al-. [unknown] *Sharḥ gharīb alfāẓ al-Mudawwana*. Edited by Muḥammad Maḥfūẓ. Beirut: Dār al-Gharb al-Islāmī, 1402/1982.

Juynboll, G.H.A. "Early Islamic Society As Reflected in Its Use of *Isnāds*." In *Le Muséon*, 107 (1994): 151–94.

——. *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Ḥadīth*. Cambridge: Cambridge University Press, 1983.

——. "Nāfiʿ, the *Mawlā* of Ibn ʿUmar, and His Position in Muslim *Ḥadīth* Literature." In *Der Islam*, 70 (1993): 207–44.

——. "Some New Ideas on the Development of *Sunnah* as a Technical Term." In *Jerusalem Studies in Arabic and Islam,* 10 (1987): 97–118.

——. "Some Notes on Islam's First *Fuqaha'* Distilled from Early *Hadith* Literature." In *Studies on the Origins and Uses of Islamic Hadith*. Edited by G.H.A. Juynboll. Leiden: Variorum, 1996: VIII: 287–314.
——. "Some Thoughts on Early Muslim Historiography." In *Bibliotheca Orientalis*, 49 (1992): 685–91.
——. *Studies on the Origins and Uses of Islamic Hadith*. Leiden: Variorum, 1996.
Kaḥḥāla, ʿUmar Riḍā. *Muʿjam al-muʾallifīn: tarājim muṣannifī al-kutub al-ʿarabiyya*. 15 vols. Damascus: Maṭbāʿat al-Taraqqī, 1378/1959.
Katz, Marion Holmes. *Body of Text: The Emergence of the Sunnī Law of Ritual Purity*. Albany: State University of New York Press, 2002.
Kawtharī, Muḥammad Zāhid al-. *Fiqh ahl al-ʿIrāq wa ḥadīthuhum*. Edited by ʿAbd al-Fattāḥ Abū Ghudda. Beirut: Matabat al-Maṭbūʿāt al-Islāmiyya, 1390/1970.
Khallāf, ʿAbd al-Wahhāb. *ʿIlm uṣūl al-fiqh*. Cairo: Maktabat al-Daʿwa al-Islāmiyya, n.d.
Khaṭīb, Muḥammad ʿAjjāj al-. *Uṣūl al-ḥadīth: ʿulūmuhū wa muṣṭalaḥuhū*. Beirut: Dār al-Fikr al-Ḥadīth, 1386/1967.
Khinn, Muṣṭafā Saʿīd al-. *Athar al-ikhtilāf fī al-qawāʿid al-uṣūliyya fī ikhtilāf al-fuqahāʾ*. Cairo: Muʾassasat al-Risāla, 1392/1972.
Kindī, Muḥammad ibn Yūsuf al-. *Kitāb al-wulāh wa kitāb al-quḍāh*. Edited by Rhuvon Guest. *The Governors and Judges of Egypt: Kitāb el 'Umarā' (el Wulāh) wa Kitāb el Quḍāh; together with an Appendix Derived Mostly from Raf' el Iṣr by Ibn Ḥajar. E.J.W. Gibb Memorial Series*, no. 19. Leiden: E.J. Brill, 1912.
Koren, J. and Y.D. Nevo. "Methodological Approaches to Islamic Studies." In *Der Islam,* 68 (1991): 87–107.
Kremer, Alfred von. *Culturgeschichte des Orients unter den Chalifen*. 2 vols. Vienna: Wilhelm Braumüller, 1875–77.
Lammens, Henri. *Islam: Beliefs and Institutions.* Translated by Sir. E. Denison Ross. London: Methuen & Co., 1929.
Laroui, Abdallah. *Islam et histoire: essai d'epistémologie*. Paris: A. Michel, 1999.
Lecomte, Gerard. "Un exemple d'evolution de la contraverse en Islam: de 'Ikhtilāf al-ḥadīṯ d'al-Shāfiʿī ." In *Studia Islamica*, 27 (1967): 9.
Lecker, Michael. "'Amr b. Ḥazm al-Anṣārī and Qurʾān 2,256: 'No Compulsion Is There in Religion'." In *Oriens*, 35 (1996): 57–64.
——. "Biographical Notes on Ibn Shihāb al-Zuhrī." In *Journal of Semitic Studies*, 41 (1996): 21–63.
——. "Al-Zuhrī." In *The Encyclopedia of Islam*. New Edition. Leiden: E.J. Brill, 1954–1960.
Lohlker, Rüdiger. "Ḥadīṯ and Islamic Law." In *Oriente Moderno*, *Hadith in Modern Islam*. Rome: Consiglio Nazionale delle Ricerche, vol. 21, no. 82 (2002): 19–29.
Lowry, Joseph E. "Does Shāfiʿī Have a Theory of 'Four Sources' of Law?" In *Studies in Islamic Legal Theory*. Edited by Bernard G. Weiss. Leiden: Brill, 2002: 23–50. Cited as "Four Sources?"
——. *Early Islamic Legal Theory: The Risāla of Muḥammad Ibn Idrīs Al-Shāfiʿī.* Boston: Brill, 2007.
——. "The Legal Hermeneutics of al-Shāfiʿī and Ibn Qutayba: A Reconsideration." In *Islamic Law and Society*, 11, 1 (2004): 1–43.
Lucas, Scott Cameron. "The Arts of *Ḥadīth* Compilation and Criticism: A Study of the Emergence of Sunnism in the Third/Ninth Century." 2 vols. Chicago: University of Chicago Ph.D. Dissertation, 2002.
——. *Constructive Critics, Ḥadīth Literature, and the Articulation of Sunnī Islam: The Legacy of the Generation of Ibn Saʿd, Ibn Maʿīn, and Ibn Ḥanbal*. Leiden: Brill, 2004. Cited as *Critics*.
——. "The Legal Principles of Muḥammad b. Ismāʿīl al-Bukhārī and Their Relationship to Classical Salafī Islam. In *Islamic Law and Society*, 13, 3 (2006): 289–324. Cited as "Principles."

Madelung, Wilferd. *Der Imām al-Qāsim ibn Ibrāhīm und die Glaubenslehre der Zaiditen. Studien zur Sprache, Geschichte, und Kultur des islamischen Orients. Neue Folge*. Vol. 1. Berlin: Walter de Gruyter, 1965. Cited as *al-Qāsim*.

Madkūr, Muḥammad Sallām. *Madkhal al-fiqh al-islāmī*. Cairo: al-Dār al-Qawmiyya li-al-Ṭibāʿa wa al-Nashr, 1384/1964.

Mahmassani, Sobhi Rajab. *Falsafat al-tashrīʿ fī al-Islām: The Philosophy of Jurisprudence in Islam*. Translated by Farhat Ziadeh. Leiden: E.J. Brill, 1961.

Makdisi, George. "Ash'ari and the Ash'arites in Islamic Religious History." In *Studia Islamica*, 17 (1962), 37–80; 18 (1963), 19–39.

———. "The Juridical Theology of Shāfiʿī: Origins and Significance of *Uṣūl al-Fiqh*." In *Studia Islamica*, 59 (1984): 5–47.

———. "Muslim Institutions of Learning in Eleventh-Century Baghdad." In *Bulletin of the School of Oriental and African Studies*, 24 (1961): 1–56.

———. *The Rise of Colleges: Institutions of Learning in Islam and the West*. Edinburgh: Edinburgh University Press, 1981. Cited as *Colleges*.

———. *The Rise of Humanism in Classical Islam and the Christian West with Special Reference to Scholasticism*. Edinburgh: Edinburgh University Press, 1990. Cited as *Humanism*.

———. "*Ṭabaqāt*-Biography: Law and Orthodoxy in Classical Islam." In *Islamic Studies* (Islamabad), 32 (1993): 371–96.

Margoliouth, David Samuel. *The Early Development of Mohammedanism: Lectures Delivered in the University of London*. New York: C. Scribner's Sons, 1914. Cited as *Mohammedanism*.

Maʿrūf, Bashshār ʿAwwād and Maḥmūd Muḥammad Khalīl. "*Muqaddima*." In [Mālik b. Anas. *al-Muwaṭṭaʾ*] [recension of Abū Muṣʿab]. *al-Muwaṭṭaʾ li-Imām Dār al-Hijra Mālik ibn Anas: rìwāyat Abī Muṣʿab al-Zuhrī al-Madanī*. Edited by Bashshār ʿAwad Maʿrūf and Maḥmūd Muḥammad Khalīl. 2 vols. Beirut: Muʾassasat al-Risāla, 1993: 5–47.

Melchert, Christopher. "The Early History of Islamic Law." In *Method and Theory in the Study of Islamic Origins*. Edited by Herbert Berg. Leiden and Boston: Brill, 2003: 293–324. Cited as "Early History."

———. "The Formation of the Sunnī Schools of Law." In *The Formation of Islamic Law*. Edited by Wael B. Hallaq. *The Formation of the Classical Islamic World*, vol. 27. Edited by Lawrence I. Conrad. Burlington, Vermont: Ashgate Publishing Co., 2004: 351–66.

———. *The Formation of the Sunni Schools of Law: 9th-10th Centuries C.E.* In *Studies in Islamic Law and Society*, 4. Leiden: E.J. Brill, 1997. Cited as *Formation*.

———. "How Ḥanafism Came to Originate in Kufa and Traditionalism in Medina." *Islamic Law and Society*, 6 (1999): 318–47. Cited as *Formation*.

———. "Qurʾānic Abrogation across the Ninth Century." In *Studies in Islamic Legal Theory*. Edited by Bernard Weiss. Leiden: E.J. Brill, 2002: 75–98. Cited as "Abrogation."

———. "Review of *The Origins of Islamic Law: The Qurʾān, the Muwaṭṭaʾ and Madīnan ʿAmal* by Yasin Dutton." In *Journal of the American Oriental Society*, 121 (2001): 713–15.

———. "Traditionist-Jurisprudents and the Framing of Islamic Law." In *Islamic Law and Society*, 8, no. 3 (2001): 383–406. Cited as "Traditionist-Jurisprudents."

Messick, Brinkley. *The Calligraphic State: Textual Domination and History in a Muslim Society*. Berkeley: University of California Press, 1993.

Mitter, Ulrike. "Unconditional Manumission of Slaves in Early Islamic Law: A *Ḥadīth* Analysis." In *The Formation of Islamic Law*. Edited by Wael B. Hallaq. Burlington, Vermont: Ashgate Publishing Co., 2004: 115–52. Cited as "Manumission."

Montgomery, James. "Introduction." In *The Oral and the Written in Early Islam* by Gregor Schoeler. Translated by Uwe Vagelpohl. Edited by James E. Montgomery. London and New York: Routledge, Taylor, & Francis Group, 2006: 1–27.

Motzki, Harald. "The Author and His Work in Islamic Literature of the First Centuries: The Case of ʿAbd al-Razzāq's *Muṣannaf*." In *Jerusalem Studies in Arabic and Islam*, 28 (2002).

———. "The Collection of the Qurʾān: A Reconsideration of Western Views in Light of Recent Methodological Developments." In *Der Islam*, 78 (2001): 1–34.

——. "Der Fiqh des -Zuhrī: die Quellenproblematik." In *Der Islam*, 68 (1991): 1–44.
——. "The Jurisprudence of Ibn Shihāb al-Zuhrī: A Source-Critical Study." [The updated English edition of "Der Fiqh des -Zuhrī"]. Last accessed in 2008. Nijmergen, 2001: http://webdoc.ubn.kun.nl/mono/m/motzki_h/juriofibs.pdf, 55pp. Cited as "Zuhrī."
——. "The *Muṣannaf* of ʿAbd al-Razzāq al-Ṣanʿānī As a Source of Authentic *Aḥādīth* of the First Century A.H." In *Journal of Near Eastern Studies*, 50 (1991): 1–21.
——. *The Origins of Islamic Jurisprudence: Meccan Fiqh before the Classical Schools*. [English translation of *Die Anfänge der islamischen Jurisprudenz*]. Translated by Marion Holmes Katz. In *Islamic History and Civilization: Studies and Texts*, Vol. 41. Leiden: E.J. Brill, 2002.
——. "The Prophet and the Cat: On Dating Mālik's *Muwaṭṭaʾ* and Legal Traditions." In *Jerusalem Studies in Arabic and Islam*, 22 (1998): 18–83.
——. "The Question of the Authenticity of Muslim Traditions Reconsidered: A Review Artilce." In *Method and Theory in the Study of Islamic Origins*. Edited by Herbert Berg. Leiden: Brill, 2003: 211–257. Cited as "Authenticity."
——. "The Role of Non-Arab Converts in the Development of Early Islamic Law." In *Islamic Law and Society*, 6 (1999): 293–317.
Muranyi, Miklos. *ʿAbd Allāh b. Wahb: Leben und Werk: al-Muwaṭṭaʾ, Kitāb al-Muḥāraba. Quellenstudien zur Ḥadīṯ- und Rechsliteratur in Nordafrika*. Wiesbaden: Otto Harrassowitz, 1992.
——. *Ein altes Fragment medinensischer Jurizprudenz aus Qairawān aus dem Kitāb al-Ḥaǧǧ des ʿAbd al-ʿAzīz b. ʿAbd Allāh b. Abī Salama al-Māǧišūn (st. 164/780–81)*. *Abhandlungen für die Kunde des Morgenlandes*, Band XLII, 3. Stuttgart: Kommissionsverlag F. Steiner, 1985. Cited as *Fragment*.
——. *Beiträge zur Geschichte der Ḥadīṯ- und Rechtsgelehrsamkeit der Mālikiyya in Nordafrika bis zum 5 Jh. d.H: Bio-bibliographische Notizen aus der Moscheebibliothek von Qairawān.*Wiesbaden: Harrassowitz, 1997.
——. "Die frühe Rechtsliteratur zwischen Quellenanalyse und Fiktion." In *Islamic Law and Society*, 4 (1997): 224–41. Cited as "Frühe Rechtsliteratur."
——. "*Man ḥalafa ʿalā Minbarī āthiman . . .*': Bermerkungen zu einem frühen Traditionsgut." In *Die Welt des Orients*, 18 (1987): 92–131.
——. *Materialen zur mālikitischen Rechtsliteratur*. Wiesbaden: Harrassowitz, 1983.
——. "Der *Muwaṭṭaʾ*-Kommentar des Andalusiers al-Qanāziʿī (st. 413/1022): Ein Beitrag zum andalusischen Überlieferunswesen." In *Der Islam*, Vol. 82 (2005): 52–105.
——. "Neue Materialen zur *Tafsīr*-Forschung in der Moscheebibliothek von Qairawān." In *The Qurʾan As Text*. Edited by Stefan Wild. *Islamic Philosophy and Theology and Science: Texts and Studies*, XXVII: 225–55. Leiden: E.J. Brill, 1996.
——. "Qairawāner Miszellaneen II: Das *Kitāb Musnad Mālik b. Anas* von Ismāʿīl b. Isḥāq al-Qāḍī (199/815–282–895)." *Zeitschrift der deutschen morgenländischen Gesellschaft*, 138 (1988): 128–47.
——. "Qairawāner Miszellaneen III: Nota sobre la tranmisión escrita de la *Mudawwana* en Ifriqiya segun algunos manuscritos recientemente descubiertos." In *al-Qanṭara*, 10 (1989): 215–31.
——. *Die Rechtsbücher des Qairawāners Saḥnūn b. Saʿīd: Entstehungsgeschichte und Werküberlieferung. Abhandlungen für die Kunde des Morgenlandes*, Band LII, 3. Stuttgart: Kommissionsverlag F. Steiner, 1999.
——. "Rechtsliteratur zwischen Quellenanalyse und Fiktion." In *Islamic Law and Society*, vol. 4, no. 2 (1997): 224–241.
——. "A Unique Manuscript from Kairouan in the British Library: The *Samāʿ*-Work of Ibn al-Qāsim al-ʿUtaqī and Issues of Methodology." In *Method and Theory in the Study of Islamic Origins*. Edited by Herbert Berg. Leiden: Brill, 2003): 325–68.
——. "Visionen des Skeptikers." In *Der Islam*, vol. 81 (2004): 206–217.
Nadvi, Syed Salman. "'Abd Allāh ibn Al-Zubair and the Caliphate." Chicago: University of Chicago Ph.D. Dissertation, 1972. Cited as "Ibn Al-Zubair."

Nawawī, Yaḥyā ibn Yaḥyā, *Sharḥ Muslim*. Edited by ʿAbd-Allāh Aḥmad Abū Zīna. 5 vols. Cairo: Dāral-Shaʿb, n.d.

Nayfar, Muḥammad al-Shādhilī, al-. ["Introduction."] In [Mālik b. Anas. *al-Muwaṭṭaʾ*] [recension of Ibn Ziyād]. *Muwaṭṭaʾ al-Imām Mālik: qiṭʿa minhu bi-rìwāyat Ibn Ziyād*. Edited by Muḥammad al-Shādhilī al-Nayfar. Beirut: Dār al-Gharb al-Islāmī, 1980/1400: 7–112.

Nūr-Sayf, Aḥmad Muḥammad. "*ʿAmal ahl al-Medina bayna muṣṭalaḥāt Mālik wa ārāʾ al-uṣūlīyīn*." Mecca: King Abdul-Aziz University M.A. Thesis, 1972.

Ossendorf-Conrad, Beatrix. *Das "K. al-Wāḍiḥa" des ʿAbd al-Malik b. Ḥabīb: Edition und Kommentar zu Ms. Qarawiyyīn 809/40* (*Abwāb al-Ṭahāra*). Beirut: Kommission bei Franz Steiner Verlag Stuttgart, 1994.

Pessagno, J. Meric. "The *Murjiʾa*, *Īmān*, and Abū ʿUbaid." In *The Journal of the American Oriental Society*, Vol. 95, No. 3 (1975): 382–94.

Powers, David. *Studies in Qurʾān and Ḥadīth*. Berkeley: University of California Press, 1986.

Qāḍī, Wadād al-. "The Religious Foundation of Late Umayyad Ideology." In *Saber religioso y poder politico en el Islam: Actas del simposio internacional, Granada, 15–18 octubre 1991*. Edited by Manuela Marín and Mercedes García-Arenal. Madrid: Agencia Española de Cooperacíon Internacional, 1994: 231–73.

Qarāfī, Aḥmad ibn Idrīs al-. *al-Dhakhīra*. Edited by ʿAbd al-Wahhāb al-Laṭīf and ʿAbd al-Samīʿ Imām. 1 vol. [incomplete]. [Cairo]: al-Jāmiʿa al-Azhariyy, Maṭbaʿat Kulliyyāt al-Sharīʿa, 1381–/1961–. Cited as *al-Dhakhīra* (Cairo).

———. *al-Dhakhīra li-Shihāb al-Dīn Aḥmad ibn Idrīs al-Qarāfī*. Edited by Muḥammad Ḥijjī. 14 vols. Beirut: Dār al-Gharb al-Islāmī, 1994.

———. *al-Iḥkām fi tamyīz al-fatāwā ʿan al-aḥkām wa taṣarruſāt al-qāḍī wa al-imām*. Edited by ʿAbd al-Fattāḥ Abū Ghudda. Beirut: Dār al-Bashāʾir al-Islāmiyya, 1995/1416.

Rahman, Fazlur. *Islam*. Garden City, N.Y.: Doubleday & Co., 1968. Cited as (1968 edition).

———. *Islam*. Second edition. With Foreword by John E. Woods. Chicago: University of Chicago Press, 2002.

———. *Islamic Methodology in History. Publications of the Central Institute of Islamic Research* (*Pakistan*), no. 2. Karachi: Central Institute of Islamic Research, 1965. Cited as *Methodology*.

Rasīnī, ʿAbd-Allāh ibn Ṣāliḥ al-. "*Fiqh al-fuqahāʾ al-sabʿa wa atharuhū fi fiqh al-Imām Mālik*." Mecca: King ʿAbd al-ʿAzīz University M.A. Thesis., 1391–92/1971–72.

Reinhart, A. Kevin. *Before Revelation: The Boundaries of Muslim Moral Thought*. Albany: State University of New York Press, 1995.

———. "Like the Difference between Heaven and Earth: Ḥanafī and Shāfiʿī Discusions of *Farḍ* and *Wājib* in Theology and Uṣūl." In *Studies in Islamic Legal Theory*. Edited by Bernard G. Weiss. Leiden: Brill, 2002: 205–234. Cited as "Difference."

Rosenau, Pauline Marie. *Post-Modernism and the Social Sciences: Insights, Inroads, and Intrusions*. Princeton: Princeton University Press, 1992.

Rosenthal, Franz, translator. [ʿAbd al-Raḥmān ibn Muḥammad ibn Khaldūn]. *The Muqaddima: An Introduction to History*. 3 vols. New York: Bollingen Foundation, 1958

Saḥnūn ibn Saʿīd. *al-Mudawwana al-kubrā*. 8 vols. Cairo: al-Maṭbaʿa al-Saʿāda, 1323/[1905].

———. *al-Mudawwana al-kubrā*. 4 vols. Cairo: al-Maṭbaʿa al-Khayriyya, 1324/[1906]. Cited as *Mud.*

———. *al-Mudawwana al-kubrā*, 16 vols. Cairo: Būlāq, 1325/[1907].

———. *al-Mudawwana al-kubrā*, 4 vols. Beirut: Dār al-Fikr, 1398/[1978].

———. *al-Mudawwana al-kubrā allatī rawāhā Saḥnūn ibn Saʿīd al-Tanūkhī ʿan ʿAbd al-Raḥmān ibn al-Qāsim al-ʿUtaqī ʿan Abī ʿAbd-Allāh Mālik ibn Anas al-Aṣbaḥī*. 6 vols. Beirut: Dār Ṣādir, n.d. Cited as *Mud.* (Ṣādir).

———. *al-Mudawwana al-kubrā li-Imām Dār al-Hijra al-Imām Mālik ibn Anas al-Aṣbaḥī al-mutawwafā sannat 179 h., riwāyat al-Imām Saḥnūn ibn Saʿīd al-Tanūkhī al-mutawwafā sannat 240 h. ʿan al-Imām ʿAbd al-Raḥmān ibn al-Qāsim al-ʿUtaqī al-mutawwafā sannat*

191 h. Edited by al-Sayyid ʿAlī ibn al-Sayyid ʿAbd al-Raḥmān al-Hāshimī. 12 vols. United Arab Emirates: al-Shaykh Zāyid ibn Sulṭān Āl Nahayān, 1422/2002. Referenced as *Mud.* (2002).

———. *al-Mudawwana al-kubrā li-Mālik ibn Anas al-Aṣbaḥī: riwāyat Saḥnūn ibn Saʿīd al-Tanūkhī ʿan ʿAbd al-Raḥmān ibn al-Qāsim.* 5 vols. Beirut: Dār al-Kutub al-ʿIlmiyya, 1994. Cited as *Mud.* (1994).

———. *al-Mudawwana al-kubrā li-Mālik ibn Anas al-Aṣbaḥī: riwāyat Saḥnūn ibn Saʿīd al-Tanūkhī ʿan ʿAbd al-Raḥmān ibn al-Qāsim.* Edited by Ḥamdī al-Damardāsh Muḥammad. 9 vols. Mecca: Ṣaydā & al-Maktaba al-ʿAṣriyya/ Riyad: Maktabat Nizār Muṣṭafā al-Bāz, 1999. Cited as *Mud.* (1999).

Santillana, David. *Istituzioni di diritto musulmano malichita con reguardo anche al sistema sciafita.* 2 vols. Rome: A.R.E., 1926–[1938].

Sarakhsī, Muḥammad ibn Aḥmad al-. *Kitāb al-uṣūl.* Edited by Abū al-Wafāʾ al-Afghānī. 2 vols. in 1. Hyderabad: Lajnat Iḥyāʾ al-Maʿārif al-Nuʿmāniyya, 1372/1953.

Schacht, Joseph. *An Introduction to Islamic Law.* Oxford: Clarendon Press, 1964.

———. *The Origins of Muhammadan Jurisprudence.* Oxford: Clarendon Press, 1959.

Schoeler, Gregor. "Foundations for a New Biography of Muḥammad: The Production and Evaluation of the Corpus of Traditions according to ʿUrwah b. al-Zubayr." In *Method and Theory in the Study of Islamic Origins*. Edited by Herbert Berg. Leiden: Brill, 2003: 21–28.

———. *The Oral and the Written in Early Islam.* Translated by Uwe Vagelpohl and edited by James E. Montgomery. London and New York: Routledge, Taylor, & Francis Group, 2006.

Sezgin, Fuat. *Geschichte des arabischen Schrifttums.* Vol. 1: *Qurʾānwissenschaften, Ḥadīt, Geschichte, Fiqh, Dogmatik, Mystik bis ca. 430 H.* Leiden: E.J. Brill, 1967.

Shaban, M.A. *Islamic History, A.D. 600–750: A New Interpretation.* Cambridge: University Press, 1976.

Shaʿbān, Zakī al-Dīn. *Uṣūl al-fiqh al-islāmī.* Cairo: Maṭbaʿat Dār al-Taʾlīf, 1964–65.

[Shāfiʿī Interlocutor, the]. *Kitāb ikhtilāf Mālik wa al-Shāfiʿī.* In *Kitāb al-umm* by Muḥammad ibn Idrīs al-Shāfiʿī. 7: 277–302. Edited by Muḥammad Zuhrī al-Najjār. 8 vols. Cairo: Maktabat al-Kulliyyāt al-Azhariyya, 1381/1961.

Shāfiʿī, Muḥammad ibn Idrīs al-. *Kitāb ibṭāl al-istiḥsān.* In *Kitāb al-umm*, 7:267–277. Cairo: al-Maṭbaʿa al-Kubrā al-Amīriyya bi-Būlāq, 1325/1907. Cited as *Ibṭāl.*

———. *Kitāb jimāʿ al-ʿilm.* In *Kitāb al-umm* by idem. 7:250–265. Cairo: al-Maṭbaʿa al-Kubrā al-Amīriyya bi-Būlāq, 1325/1907.

———. *Kitāb al-radd ʿalā Muḥammad ibn al-Ḥasan.* In *Kitāb al-umm* by idem. 7:277–302. Cairo: al-Maṭbaʿa al-Kubrā al-Amīriyya bi-Būlāq, 1325/1907. Cited as al-Shāfiʿī, *al-Radd.*

———. *Kitāb al-umm.* 7 vols. Cairo: al-Maṭbaʿa al-Kubrā al-Amīriyya bi-Bulāq, 1325/1907. This is the edition used throughout this work.

———. *Kitāb al-umm.* Edited by Muḥammad Zuhrī al-Najjār. 8 vols. Cairo: Maktabat al-Kulliyyāt al-Azhariyya, 1381/1961.

———. *al-Risāla.* Edited by Aḥmad Muḥammad Shākir. Cairo: al-Maṭbaʿa al-Kubrā al-Amīriyya bi-Būlāq, 1358/1945.

Shāh Walī-Allāh Aḥmad ibn ʿAbd al-Raḥīm al-Fārūqī. *Ḥujjat Allāh al-bāligha.* 2 vols. in 1. Delhi: Kutubkhāneh-e Rashīdiyya, 1373/1953.

———. *al-Inṣāf fī bayān sabab al-ikhtilāf.* Lahore: Hayʾat al-Awqāf bi-Ḥukūmat al-Banjāb, 1971.

Shalabī, Aḥmad. *al-Tārīkh al-islamī wa al-ḥaḍāra al-islāmiyya: dirāsa taḥlīliyya shāmila li-al-tārīkh al-islāmī wa al-ḥaḍāra al-islāmiyya fī jamīʿ al-ʿuṣūr wa al-anhāʾ.* 6 vols. Cairo: Maktabat al-Nahḍa al-Miṣriyya, 1966.

Shalabī, Muḥammad Muṣṭafā. *al-Madkhal fī-ʾl-taʿrīf bi-al-fiqh al-islāmī.* Cairo: Maṭbaʿat Dār al-Taʾlīf, 1385/1966.

Shāṭibī, Ibrāhīm ibn Mūsā al-. *al-Iʿtiṣām.* 3 vols. Cairo: Maṭbaʿat al-Manār, 1331/1913.

——. *al-Muwāfaqāt*. Edited by Abū ʿUbayda Mashhūr ibn Ḥasan Āl Sulaymān. 6 vols. Al-Khubar: Dār Ibn ʿAffān li-al-Nashr wa al-Tawzīʿ, 1417/1997.

——. *al-Muwāfaqāt fī uṣūl al-sharīʿa*. Edited by ʿAbd-Allāh Drāz. 4 vols. in 2. Cairo: al-Maktaba al-Tijāriyya al-Kubrā, n.d. This is the edition cited throughout this work.

Shawkānī, Muḥammad ibn ʿAlī al-. *Nayl al-awṭār min ḥadīth Sayyid al-akhār: sharḥ Muntaqā al-akhbār*. 9 vols. Beirut: Dār al-Jīl, 1973.

Shaybānī, Muḥammad ibn al-Ḥasan al-. *Kitāb al-ḥujja ʿalā ahl al-Madīna*. Edited by Mahdī Ḥasan al-Kīlānī al-Qādirī. 1 vol. [incomplete]. Hyderabad: al-Maṭbaʿa al-Sharqiyya, 1385–/1965–.

[——. *al-Muwaṭṭaʾ*] [recension of al-Shaybānī]. *Muwaṭṭaʾ al-Imām Mālik: riwāyat Muḥammad ibn al-Ḥasan al-Shaybānī maʿa al-taʿlīq al-mumajjad ʿalā Muwaṭṭaʾ Muḥammad: sharḥ al-ʿallāma ʿAbd al-Ḥayy al-Luknawī*. Edited Taqī al-Dīn al-Nadawī. 3 vols. Damascus: Dār al-Qalam, 1412–1413/1991–1992. Cited as *Muw.* (al-Shaybānī/al-Nadawī).

[——. *al-Muwaṭṭaʾ*]. Shaybānī, Muḥammad ibn al-Ḥasan al-, transmitter. *Muwaṭṭaʾ al-Imām Mālik* by Mālik ibn Anas. Edited by ʿAbd al-Wahhāb ʿAbd al-Laṭīf. Cairo: al-Majlis al-Aʿlā li-al-Shuʾūn al-Islāmiyya, 1387/1967.

[——. *al-Muwaṭṭaʾ*] [recension of al-Shaybānī]. *Muwaṭṭaʾ al-Imām Mālik: riwāyat Muḥammad ibn al-Ḥasan al-Shaybānī*. Edited by ʿAbd al-Wahhāb ʿAbd al-Laṭīf. Cairo: al-Majlis al-Aʿlā li-al-Shuʾūn al-Islāmiyya, 1387/1967. Cited as *Muw.* (al-Shaybānī/ʿAbd al-Laṭīf).

Sibāʿī, Muṣṭafā Ḥusnī al-. *al-Sunna wa makānatuhā fī al-tashrīʿ al-islāmī*. Cairo: Maktabat Dār al-ʿUrūba, 1961.

Spectorsky, Susan A. "Aḥmad Ibn Ḥanbal's *Fiqh*." In *Journal of the American Oriental Society*, 102 (1982): 461–65.

——. "*Sunnah* in the Responses of Isḥāq b. Rāhwayh." In *Studies in Islamic Legal Theory*. Edited by Bernard G. Weiss. Leiden: Brill, 2002: 51–74.

Stewart, Devin J. *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunni Legal System*. Salt Lake City: University of Utah Press, 1998. Cited as *Orthodoxy*.

——. "Muḥammad b. Dāʾūd al-Ẓāhirī's Manual of Jurisprudence, *al-Wuṣūl ilā Maʿrifat al-Uṣūl*." In *Studies in Islamic Legal Theory*. Edited by Bernard G. Weiss. Leiden: Brill, 2002: 99–158. Cited as "Ẓāhirī's Manual."

Suyūṭī, Jalāl al-Dīn ʿAbd al-Raḥmān al-. *Tanwīr al-ḥawālik: sharḥ Muwaṭṭaʾ Mālik*. 3 vols. in 1. Cairo: Dār Iḥyāʾ al-Kutub al-ʿArabiyya, n.d.

Syamsuddin, Sahiron. "Abū Ḥanīfah's Use of the Solitary *Ḥadīth* as a Source of Islamic Law. In *Islamic Studies*, vol. 40, no. 2 (1422/2001): 257–72.

Ṭabarī, Muḥammad ibn Jarīr al-. *Ikhtilāf al-fuqahāʾ*. Beirut: Dār al-Kutub al-ʿIlmiyya, n.d.

Ṭaḥāwī, Aḥmad ibn Muḥammad al-. *Ikhtilāf al-fuqahāʾ*. Edited by Muḥammad Ṣaghīr Ḥasan al-Maʿṣūmī. Islamabad: Maʿhad al-Buḥūth al-Islāmiyya, 1391/1971.

——. *Mukhtaṣar ikhtilāf al-ʿulamāʾ: ikhtiṣār Abī Bakr Aḥmad ibn Muḥammad al-Jaṣṣāṣ al-Rāzī*. Edited by ʿAbd-Allāh Nadhīr Aḥmad. 5 vols. Beirut: Dār al-Bashāʾir al-Islāmiyya, 1427/2007.

——. *Sharḥ maʿānī al-āthār*. Edited by Ibrāhīm Shams al-Dīn. 4 vols. Beirut: Dār al-Kutub al-ʿIlmiyya, 1427/2006.

Toynbee, Arnold. *A Study of History*. 12 vols. London: Oxford University Press, 1934–1961.

Turkī, ʿAbd-Allāh ibn ʿAbd al-Muḥsin al-. *Uṣūl madhdhab al-Imām Aḥmad ibn Ḥanbal: dirāsa uṣūliyya muqārana*. Cairo: Maṭbaʿat Jāmiʿat ʿAyn Shams, 1394/1974.

Turkī, ʿAbd al-Majīd, "*al-Tamhīd*." In *Iḥkām al-fuṣūl fī aḥkām al-uṣūl* by Sulaymān ibn Khalaf al-Bājī. 2 vols. Edited by ʿAbd al-Majīd al-Turkī. Beirut: Dār al-Gharb al-Islāmī, 1995: 1:9–168.

——. "*al-Taqdīm*." In [Mālik b. Anas. *al-Muwaṭṭaʾ*] [recension of al-Qaʿnabī]. *al-Muwaṭṭaʾ li-al-Imām Mālik ibn Anas: riwāyat ʿAbd-Allāh ibn Maslama al-Qaʿnabī*. Edited by ʿAbd al-Majīd Turkī. Beirut: Dār al-Gharb al-Islāmī, 1999: 5–74.

——. [Spelled Turki, Abdel-Magid.] "Le *Muwaṭṭa'* de Mālik, ouvrage de *fiqh*, entre le *ḥadīṯ et le ra'y*." In *Studia Islamica*, 86 (1997): 5–35.

Tyan, Émile. *Histoire de l'organisation judiciare en pays de l'Islam*. Revised second edition. Leiden: E.J. Brill, 1960.

Wakīʿ, Muḥammad ibn Khalaf. *Akhbār al-quḍāh*. 3 vols. Cairo: Maṭbaʿat al-Istiqāma, 1947–50.

Wansbrough, John. *Quranic Studies: Sources and Methods of Scriptural Interpretation. London Oriental Series*, Volume 31. Oxford: Oxford University Press, 1977.

——. *Res Ipsa Loquitur: History and Mimesis*. Jerusalem: The Israel Academy of Sciences and Humanities, 1987.

——. "Res Ipsa Loquitur: History and Mimesis." In *Method and Theory in the Study of Islamic Origins*. Edited by Herbert Berg. Leiden: Brill, 2003: 3–19.

——. *The Sectarian Milieu: Content and Composition in Islamic Salvation History*. Oxford: Oxford University Press, 1978.

Weiss, Bernard G. *The Spirit of Islamic Law*. Athens, Ga.: University of Georgia Press, 1998.

——. *Studies in Islamic Legal Theory*. Edited by Bernard G. Weiss. Leiden: Brill, 2002.

——. "*Uṣūl*-Related *Madhhab* Differences Reflected in Āmidī's *Iḥkām*." In *Studies in Islamic Legal Theory*. Edited by Bernard G. Weiss. Leiden: Brill, 2002: 293–313.

Zaman, Iftikhar. "The Evolution of a Ḥadīth: Transmission, Growth and the Science of *Rijāl* in a Ḥadīth of Saʿd b. Abī Waqqāṣ." Chicago: University of Chicago Ph.D. Dissertation, 1991.

——. "The Science of *Rijāl* As a Method in the Study of Ḥadīths." In *Journal of Islamic Studies*, 5 (1994): 1–34.

Zarqā, Muṣṭafā Aḥmad al-. *al-Fiqh al-islāmī fī thawbihī al-jadīd: al-madkhal al-fiqhī al-ʿamm*. 3 vols. Beirut: Dār al-Fikr, 1968.

Zurqānī, Muḥammad ibn ʿAbd al-Bāqī al-. *Sharḥ Muwaṭṭa' al-Imām Mālik*. Edited by Ibrāhīm ʿAṭūwa ʿIwaḍ. 5 vols. Cairo: Maktabat al-Ḥalabī, 1381/1961.

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