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

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

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

tive ᶜamal term. In the third example Mālik relies upon the non-textual source of Madīnan ᶜamal supported by a report of an action which Ibn ᶜUmar did in order to provide an interpretation of the legal implications of a Qur'ānic verse of conjectural meaning. The fourth example appears to be of the category of what legal theorists later called "ᶜamal qadīm", i.e., ᶜamal which went back to the ijtihād of the Companions. This is one of several examples of such ᶜamal, however, in which it is clear that the Companions put the precept into practice but in which the ultimate source of the ᶜamal is not clear. It may have been based on their ijtihād, and it may also have been based on knowledge which they had which was not transmitted to subsequent generations.

The Negative ᶜAmal Terms

Again differences between the Madīnans and Kūfans are a frequent characteristic in these precepts. In the fourth example of the section on negative ᶜamal terms, however, the primary difference of opinion comes from the Madīnans ᶜAbd-Allāh ibn ᶜUmar and Saᶜīd ibn al-Musayyab as well as al-Ḥasan al-Baṣrī, al-'Awzāᶜī, and al-Laith ibn Saᶜd; 'Abū Ḥanīfah and Sufyān ath-Thawrī of Kūfah agree with Mālik on the point in that example about which these others disagree, but they disagree with Mālik regarding the second part of that example--baiᶜ al-khiyār--whereas 'Abū Yūsuf and ash-Shaibānī took a position on the entire matter which was very

close to Mālik's. I could find evidence of no differences of opinion during Mālik's time on the third and fifth examples in this section. The primary characteristic of all of the examples in which Mālik uses his negative ᶜamal terms, however, appears to be one of Mālik's indicating that he does not regard the obvious [ẓāhir] or explicit meaning of the text cited to be legally valid because of the fact that it has not been accompanied by Madīnan ᶜamal.

In these examples of Mālik's use of the negative ᶜamal terms, therefore, one sees how authoritative Mālik regarded the non-textual source of Madīnan ᶜamal to be as a reference against which to interpret the textual sources of law. The manner in which Mālik uses ᶜamal in these examples reflects the principle of legal theory which Ibn al-Qāsim sets forth in the Mudawwanah, namely, that no legal texts will be regarded to be legally valid unless they have been accompanied by ᶜamal. Ibn al-Qāsim also states in that quotation that he does not doubt the authenticity of all such texts which have not been accompanied by ᶜamal; his principle is that whatever the reason for the discrepancy between the legal implications of such texts and the content of ᶜamal, it is not valid to institute such legal implications into ᶜamal if the first generations of Muslims did not do so.[1] Ash-Shāṭibī develops this principle of legal theory in his Muwāfaqāt. The Companions and the first generation of Muslims,

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

he holds, understood the practical implications of the legal statements that were addressed to them. Therefore, if a text seems to have a semantic implication but the first generations did not put that implication into practice, it is most probable that that practical implication was not actually intended. It may have been abrogated, there may be some mistake in the wording, it may be that the wording appears to imply what it actually does not, and so forth. One adheres to the ᶜamal of the first generations, ash-Shāṭibī holds, instead of the contrary implications of legal texts because of the probability that the contradictions between their ᶜamal and the implications of formally authentic legal texts may be apparent but not real.[1] Such an approach to legal texts, of course, is virtually the opposite of the ẓāhirī literalist approach, according to which it is always the obvious or apparent semantic implication of the text which takes priority.

As indicated in some of these examples in which Mālik uses the negative ᶜamal terms, it is the apparent meaning of the contrary text which conflicts with ᶜamal, whereas the texts also carry implications which are not obvious but which are in conformity with ᶜamal. Al-Bājī suggests in some cases that the texts with which Mālik uses these negative ᶜamal terms are actually supportive of ᶜamal. Mālik cites the negative ᶜamal terms in such cases, however,

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

al-Bājī suggests, because most people are not capable of comprehending anything but the obvious [ẓāhir] meaning of texts, even if other interpretations are explained to them over and over again. Hence, al-Bājī believes that Mālik cites the negative ᶜamal terms in such cases because it is more simple and reliable than relying upon the capacity of his readers and transmitters to understand interpretations which are not obvious.[1]

It might also be pointed out that the āthār and ḥadīth with which Mālik uses his negative ᶜamal terms are isolated reports. Some of them, furthermore, pertain directly to the realm of ᶜumūm al-balwā such that one would expect the knowledge and practice of them to be widespread if it had actually been intended that they be put into practice, for example, customary manners of buying and selling, laws pertaining to nursing children, and so forth.[2] These are also examples, therefore, of Mālik's reliance upon ᶜamal to reject contrary isolated legal texts, and, as Ibn Rushd observes, it is cognate in that regard to 'Abū Ḥanīfah's rejection of isolated ḥadīth which pertain to ᶜumūm al-balwā and which carry legal implications that are not generally known or regarded to be valid by the early fuqahā'.[3]

There are instances in these examples of Mālik's re-

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[1]See above, pp. 632-640.

[2]See above, pp. 636-648.

[3]See above, pp. 481-484.

lying upon ᶜamal to distinguish between reports of actions which he regards to be non-normative [i.e., not ᶜamal] and reports of actions which he regards as reflecting the desired norm.[1] In the case of baiᶜ al-khiyār, Ibn ᶜAbd-al-Barr holds that Mālik regarded the legal implications of the first part of the ḥadīth to have been abrogated, and he believes Mālik indicates that in the text of the Muwaṭṭa' by the ḥadīth which he places after the ḥadīth on baiᶜ al-khiyār; he cites a report attributed to Mālik according to which Mālik refers to the implications of the first part of the ḥadīth on baiᶜ al-khiyār as one of those matters which had been put aside [turika] and had not become part of ᶜamal.[2] This example, according to Ibn ᶜAbd-al-Barr's interpretation of it, therefore, would be an instance of Mālik's using ᶜamal as a means of establishing that the precept of one ḥadīth had been abrogated while the precept of a contrary ḥadīth--namely, the ḥadīth Mālik cites after the ḥadīth on baiᶜ al-khiyār had not been. The statement attributed to Mālik about the precept in the first part of the ḥadīth on baiᶜ al-khiyār having been abrogated reminds one of Ibn al-Qāsim's statement in the Mudawwanah. Furthermore, if Ibn ᶜAbd-al-Barr's interpretation is correct, this would be an instance where Mālik regarded part of the text of a ḥadīth to have been ab-

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[1]See above, pp. 436-448, 490-497.

[2]See above, pp. 640-648.

rogated, while regarding another part of the text to still be a valid part of the law. Ash-Shāfiᶜī objects very strongly in "Ikhtilāf Mālik" to a similar example in which the Mālikīs have held on the basis of Madīnan ᶜamal that part of a ḥadīth regarding praying noon and afternoon prayers together or sunset and evening prayers is still a valid part of ᶜamal while part of the ḥadīth had been abrogated. Since there are no textual references for their distinction and since ash-Shāfiᶜī does not regard the non-textual source of Madīnan ᶜamal to be legitimate, he rejects this distinction.[1]

Example five in this section is an instance of a precept of Madīnan ᶜamal regarding which there were differences of opinion among the Madīnan people of knowledge. In this case, however, the precept, which pertains to what constitutes an agreement to buy or sell, came under the jurisdiction of the Madīnan judiciary. Hence, it is one of those matters regarding which the authority of the judiciary would have been able to create and maintain uniform ᶜamal according to that opinion of the Madīnan people of knowledge which it regarded to be correct. Similarly, in the ᶜamal chapters there was a difference of opinion among the Madīnan ᶜulamā' regarding whether or not martyrs who die on the battlefield should be washed, shrouded, and prayed over prior to burial. The ᶜamal in such cases, however, would have come under the

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[1]Ash-Shāfiᶜī, "Ikhtilāf Mālik," p. 205.

discretion of Madīnan executive authority, such as that of the 'amīr [commander] who led the army.[1]

The ᶜAmal Chapters

In the ᶜamal chapters I have analyzed one finds the characteristic pattern of differences between the Kūfans and Madīnans, although in some cases the differences are quite slight--as, for example, in the chapter on how one is to sit while making ṣalāh[2]--and generally the differences are only regarding a limited part of the entire ᶜamal which Mālik sets forth.[3] In four of the chapters analyzed Mālik inserts other terminological expressions: S-XN, S, AN, and AMN.[4] It is noteworthy that there were apparently no significant differences of opinion among the fuqahā' at any time regarding the precept for which Mālik cites the term S-XN. Various 'Umayyad governors and heads of state, however, are reported to have attempted to establish ᶜamal contrary to that precept, and Mālik seems to have used the term with reference to them. Mālik follows that S-XN term, as mentioned, with one of the most explicit statements of the concept of ᶜamal naqlī in the Muwaṭṭa'.[5] It might also be noted that the two sunnah terms which occur in the ᶜamal chapters

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[1]See above, p. 667. [2]See above, p. 657.

[3]See above, pp. 661-663; 652-653; 665-666.

[4]See above, pp. 659-661; 666-667; 671-672; 674-675.

[5]See above, pp. 659-660.

I have analyzed are, like the other sunnah terms in the Muwaṭṭa' which I have studied, contrary to analogy with related precepts of law, and in these examples again the opinions contrary to the sunnah precepts are opinions that have extended those analogies to include the matters to which the sunnah precepts pertain.[1]

All of the precepts of these ᶜamal chapters pertain to matters of religious ritual except for the seventh example, which pertains to the size of the diyah in gold and silver. They are all of the category of ᶜamal naqlī, again with the possible exception of the seventh example, in which the ultimate source of the ᶜamal is difficult if not impossible to determine.[2] In the ᶜamal chapter on ᶜaqīqah, Mālik states that the precept has always been ["lam yazal"] one of the customs of the people of Madīnah, indicating that this originally pre-Islamic custom which had been somewhat modified by Islam had been a continuous part of Madīnan ᶜamal over the generations.[3]

Mālik cites several texts--generally āthār and especially āthār reporting actions or statements of ᶜAbd-Allāh ibn ᶜUmar--in some of the ᶜamal chapters I have analyzed. Sometimes Mālik provides no additional information to what is already contained in the texts he cites. Use of āthār, as

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[1]See above, pp. 660-661, 666-667. [2]See above, pp. 675-676.

[3]See above, pp. 668-672.

discussed earlier, is an important part of Mālikī, Ḥanafī, and Ḥanbalī legal theory. One of the advantages of using āthār is that they can indicate more conclusively than ḥadīth whether or not a matter which the Prophet is reported to have done or spoken about was abrogated.[1] It may be for this reason that Mālik relies heavily on āthār in these ᶜamal chapters; ash-Shaibānī argues that ᶜaqīqah, for example, was a pre-Islamic custom which had been abrogated, and Mālik cites reports to the effect that it was not only done in the case of the Prophet's grandchildren but that the Companion Ibn ᶜUmar continued to do it in the case of the newly born children in his extended family and that the prominent Madīnan Successor ᶜUrwah ibn az-Zubair did likewise. Mālik then adds that ᶜaqīqah has been a continous part of the ᶜamal of the Madīnan people.[2]

Nevertheless, even though āthār are a useful ancillary in establishing that a matter was not abrogated, they are not always a conclusive indication of that fact. Furthermore, it is not always possible to determine from āthār which report actions of Companions whether or not those actions constitute a desired norm. Thus, by placing āthār which report actions in ᶜamal chapters, Mālik indicates that the āctions reported in them constitute the desired norm. In the ᶜamal chapter on ᶜaqīqah, for example, Mālik reports actions which

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[1]See above, pp. 488-490. [2]See above, pp. 668-673.

Ibn ᶜUmar and ᶜUrwah ibn az-Zubair are reported to have done when performing ᶜaqīqah. Just prior to the ᶜamal chapter, however, he cites reports of actions that Fāṭimah is reported to have done when she performed ᶜaqīqah for her children. By not including Fāṭimah's actions in the ᶜamal chapter, Mālik appears to be indicating that what Fāṭimah is reported to have done does not constitute the desired norm in ᶜaqīqah, and, as pointed out, there are other examples of this in the Muwaṭṭa'.[1] According to ash-Shāṭibī, one of the most important uses of ᶜamal in interpreting legal texts is that it enables the faqīh to draw distinctions like these between reports of normative and non-normative actions.[2]

Mālik's reliance in these ᶜamal chapters upon the statements and actions of prominent Madīnan people of knowledge like ᶜUrwah ibn az-Zubair, az-Zuhrī, al-Qāsim ibn Muḥammad, but especially ᶜAbd-Allāh ibn ᶜUmar indicates in what high esteem he held them. One can consider in this regard the statements in Mālik's letter to al-Laith ibn Saᶜd, according to which he holds that those persons assumed authority in Madīnah after the Prophet's death who followed his example most closely. In that letter Mālik continues to say that the Madīnan Successors continued to follow the same course as the Companions and that this is a legacy in Madīnah which no other city can claim for itself.[3] Mālik portrays

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[1]See above, pp. 668-672. [2]See above, pp. 436-448.

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

this legacy in some of the ᶜamal chapters. In the ᶜamal chapter regarding how one is supposed to sit while performing ṣalāh, for example, Mālik cites āthār which portray Ibn ᶜUmar as a guardian of ᶜamal, as it were, and he concludes the chapter by citing a report according to which al-Qāsim ibn Muḥammad teaches people how they are to sit while performing the ṣalāh and states that Ibn ᶜUmar had taught it to him and had said that it was also the practice which his father, ᶜUmar ibn al-Khaṭṭāb, used to do.[1]

There were examples in two of these chapters of what I believe to be mixed ᶜamal, i.e., types of Madīnan ᶜamal in which there were more than one way of doing the matter. In the ᶜamal chapter on masḥ, for example, Mālik cites reports which indicate two ways of performing masḥ, and Mālik states which of them he prefers. The ᶜamal in this case did not come under the authority of the Madīnan judiciary.[2] Regarding the ᶜamal of what the installment periods should be over which diyah's are to be paid, Mālik indicates that there were two opinions: three years or four years. He again states his preference, namely, three years. In this case, however, the ᶜamal did come under the jurisdiction of the Madīnan judiciary. Some judges may have preferred one period, while others preferred another, or it may have been

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[1] See above, pp. 656-658.

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

that they set the periods according to the circumstances of the case.[1]

Finally, it might be noted that I found two examples of analogical reasoning in the precepts studied in this chapter on ᶜamal terms. The first was in the case of the ᶜamal regarding musāqāh.[2] The other is the analogy which Mālik draws between ᶜaqīqah and other types of ritual sacrifice, such as the sacrifices done during the pilgrimage.[3] Not only are these examples of Mālik's familiarity with analogical reasoning, but it is also to be noted that both are instances of analogical reasoning made on the basis of established precepts of law, which, as discussed earlier, is an important characteristic of Mālikī and Ḥanafī analogical reasoning.[4]

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[1]See above, pp. 676-677. [2]Above, pp. 618-622.

[3]Above, pp. 668-672. [4]Above, pp. 226-234.

CHAPTER X

'AMR TERMS SUPPORTED BY LOCAL CONSENSUS

General Observations

There are a variety of 'amr terms in the Muwaṭṭa' that stand for Madīnan local consensus. I have divided them, however, into two major divisions: 1) those which give explicit indication of total Madīnan consensus by stating that there were no differences of opinion regarding them and 2) those which refer to local consensus [ijtimāᶜ] but do not give this explicit indication of total consensus. The two most common examples of the first division are the terms AMN-X ["al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā wa 'l-ladhī lā 'khtilāf fīhi;" that 'amr regarding which there is consensus among us and regarding which there are no differences of opinion] and A-XN ["al-'amr al-ladhī lā 'khtilāf fīhi ᶜindanā;" that 'amr regarding which there are no differences of opinion among us]. AMN-X occurs seven times; in four of these instances the expression ẋdIb ["wa hādhā 'l-ladhī 'adraktu ᶜalaihi 'ahl al-ᶜilm bi-baladinā"] is used with it. The expression A-XN, on the other hand, occurs twelve times by itself and twelve times with slight changes or in various

combinations; hence, A-XN occurs twenty-four times in all.[1]

The most common example of the second category of terms standing for Madīnan local consensus is the term AMN ["al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā;" that 'amr upon which there is consensus (ijtimāᶜ) among us], which occurs forty-three times by itself and six times in various combinations.[2] Occurring forty-nine times in all, AMN is the second most common term in the Muwaṭṭa', the most common being AN, which is discussed in the next chapter. The expression -zĀIb ["wa hādhā 'l-'amr al-ladhī lam yazal ᶜalaihi 'ahl al-ᶜilm bi-baladinā"], which was discussed earlier, also apparently stands for Madīnan consensus,and, hence, would be another 'amr term of the category to which AMN belongs.[3]

It may be that there is no difference between the type of local consensus indicated by the first and second divisions of the 'amr terms which stand for local consensus. Nevertheless, I believe that it is important to take account of the clear semantic differences between the wording of the terms of these two categories. As stated earlier, it may be the case that terms like AMN-X and A-XN, which explicitly deny the presence of differences of opinion regarding them, stand for a total consensus, whereas the term AMN stands for a majority consensus--perhaps a preponderant ma-

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[1]For these references in the Muwaṭṭa', see appendix 2 below.

[2]See appendix 2. [3]See above, pp. 583-585.

jority consensus--of the people of knowledge in Madīnah whom Mālik regarded to be the constituents of Madīnan consensus.[1]

Examples

1. AMN: Regarding Use of a Magian's Hunting Dogs

> Mālik states that it is the AMN that the catch a Muslim hunter procures by using the hunting dogs of a Magian is ḥalāl [permissible to eat], even if the dogs kill the catch before the hunter can reach it and slaughter it Islamically. Mālik states that this is analogous ["wa 'innamā mathal dhālika"] to a Muslim's using the knife of a Magian to slaughter an animal or his using the bow and arrow of a Magian to hunt with. Mālik continues to say that the catch of a Magian hunter who uses a Muslim's trained hunting dogs is not ḥalāl for a Muslim unless the Muslim apprehends the catch before it dies or is killed and slaughters it Islamically. Mālik states that this is analogous ["wa 'innamā mathal dhālika"] to a Magian's using the knife of a Muslim to slaughter an animal or his using the bow and arrow of a Muslim to hunt with.[2]

Mālik and 'Abū Ḥanīfah are reported to have held the same opinion on the precept in this example. The Companion Jābir ibn ᶜAbd-Allāh,[3] however, and al-Ḥasan al-Baṣrī, ᶜAṭā' ibn 'Abī Rabāḥ, Mujāhid, and Sufyān ath-Thawrī are said to have disagreed. According to Ibn Rushd, they regarded it to be makrūh [reprehensible] that a Muslim eat the catch

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

[2] Muwaṭṭa', 2:494.

[3] JĀBIR IBN ᶜABD-ALLĀH ibn ᶜAmr al-Khazrajī (16bh-78/607-697) was an important Madīnan Companion and was regarded as being very knowledgeable of Islam. He is reported to have kept a compilation of ḥadīth, which is known as the "Ṣaḥīfah" of Jābir. Sezgin discusses the transmission of the work and believes that all of its contents are probably contained in the Musnad of Ibn Ḥanbal. Sezgin, 1:85. Jābir is said to have been the last Companion to have died in Madīnah; see Azmi, p. 52.

he procures by using the trained hunting dogs of a Magian. Their reason, Ibn Rushd holds, is that the Qur'ānic verse which makes the catch of trained hunting dogs permissible is addressed to Muslim believers and pertains specifically to dogs which they have trained to hunt.[1]

Mālik's AMN, on the other hand, as his commentators point out and as is indicated by the analogies he cites in the Muwaṭṭa', is that trained hunting dogs are only the instrument of the hunt and that the permissibility of the catch is determined by religious affiliation of the hunter, not by the instrument which he uses.[2]

The references I have consulted mention no ḥadīth to support Mālik's AMN or the opinions contrary to it. It is apparently a product of ijtihād, as would appear to be indicated by Mālik's citation of the analogy which he regards as supporting the validity of the AMN. Even the contrary opinion of Jābir ibn ᶜAbd-Allāh and others, according to Ibn Rushd's understanding of it, was based on their interpretation of the implications of the pertinent Qur'ānic verse, which speaks of dogs which Muslims have trained, while making no reference to other types of hunting dogs. If this AMN originated around the time of the dissenting opinion of

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[1]Ibn Rushd, (Istiqāmah), 1:448. The pertinent verse is Qur'ān, 5:4.

[2]See al-Bājī, 3:127; az-Zurqānī, 3:404; Ibn Rushd, (Istiqāmah), 1:448.

the Companion Jābir ibn ᶜAbd-Allāh, one would classify this precept as being of the category of what later legal theorists called "ᶜamal qadīm", "ancient" ᶜamal which began with the ijtihād of the Companions.[1] But Mālik gives no indication of the ultimate source of this ᶜamal in the Muwaṭṭa'. On the contrary, the information which he deems it significant to communicate is that this precept, whatever its ultimate source, is supported by Madīnan ijtimāᶜ.

If the report is correct that the Madīnan Companion Jābir ibn ᶜAbd-Allāh disagreed with this AMN precept, that disagreement, of course, constitutes a disagreement within Madīnah. It may be because of Jābir's disagreement that Mālik does not say that this is a matter regarding which there were no differences of opinion. His AMN, therefore, may refer to a preponderant majority consensus of the Madīnan people of knowledge, excluding Jābir.

The analogy in this example is significant. It is an instance of analogical reasoning based on precepts instead of texts.[2] But, in addition to that, even if the ultimate source of the analogy is unknown, Mālik's citation of the analogy indicates, nevertheless, that he regarded this precept to be analogous to others. The nature of this AMN precept, therefore, is different than the nature of the sunnah precepts not only in that it appears to be the prod-

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[1]See above, pp. 415-419. [2]See above, pp. 226-234.

u c t of ijtihād and does not go back to Prophetic authority but also because it is analogous to related precepts of law, while the sunnah precepts are contrary to analogy with related precepts of law.

2. AMN: A Special Provision for the Testimony of Youths

> Mālik cites an 'athar which reports that ᶜAbd-Allāh ibn az-Zubair[1] used to hand down legal judgments on the basis of the testimony of youths [ṣibyān] in cases regarding injuries and wounds they had received from each other. Mālik states that it is the AMN that the testimony of youths is permissible when they inflict wounds or injuries upon each other. Their testimony must be taken before they break up or have had the opportunity to talk with those who might intimidate them or instruct them [to give false witness, etc.]. The testimony of youths is not permissible in other matters. Mālik adds that the testimony of youths under such circumstances is valid if they give it to reliable [ᶜudūl] adult witnesses before they break up.[2]

This precept is reported to have constituted a point of difference between the Madīnans and 'Abū Ḥanīfah, Sufyān ath-Thawrī, and, according to az-Zurqānī, the majority of the fuqahā', who held that the testimony of youths was impermissible under all circumstances.[3] As mentioned earlier, ar-Rasīnī cites this precept in his thesis as an example of an AMN regarding which there had also been differences of opinion in Madīnah. He holds that al-Qāsim ibn Muḥammad had not agreed to this precept because of a report that al-

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[1]For data, see above, p. 50, n. 1. [2]Muwaṭṭa', 2:726.

[3]Al-Bājī, 5:229; az-Zurqānī, 4:387; Ibn Rushd, 2:279 (1).

Qāsim ibn Muḥammad held that the testimony of youths was not permissible.[1] It is possible that al-Qāsim did disagree with this AMN precept, in which case it would be an example of Mālik's citation of the term AMN for a matter regarding which there was a preponderant consensus in Madīnah--the following discussion cites reports of extensive agreement on this precept in Madīnah--but for which there was no total consensus among the Madīnan fuqahā'. Nevertheless, I do not believe that ar-Rasīnī has cited sufficient evidence to support his conclusion. According to his report, al-Qāsim has stated the general precept regarding the testimony of youths. It is clear from Mālik's wording of the AMN precept that he also subscribes to this general precept; he regards this AMN, however, to be a special exception to that general rule. More explicit information is required from al-Qāsim before it can be established that he did not also agree with the Madīnan fuqahā' on this special provision.

There are reports substantiating the agreement of numerous prominent Madīnans on this precept. Mālik cites himself the information that ᶜAbd-Allāh ibn az-Zubair put it into practice. Saḥnūn cites a report from Ibn Wahb according to which ᶜAlī ibn 'Abī Ṭālib, ᶜAbd-Allāh ibn ᶜUmar, Ibn Qusaiṭ, 'Abū Bakr ibn Ḥazm, and Rabīᶜah are said to have held to this precept as well as the early Iraqi qāḍī Shuraiḥ

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[1] Ar-Rasīnī, p. 415; see above, p. 70, n. 2.

al-Kindī.[1] Saḥnūn states further that 'Abū 'z-Zinād ibn Dhakwān and ᶜUmar ibn ᶜAbd-al-ᶜAzīz regarded this precept to be sunnah.[2] It is also reported that Saᶜīd ibn al-Musayyab, ᶜUrwah ibn az-Zubair, and az-Zuhrī held to it as well as the prominent non-Madīnans ash-Shaᶜbī, Ibn 'Abī Lailā, Muᶜāwiyah, and 'Ibrāhīm an-Nakhaᶜī. Some reports also have it that Ibn ᶜAbbās agreed.[3]

The ultimate source of this ᶜamal is unclear. Although 'Abū 'z-Zinād and ᶜUmar ibn ᶜAbd-al-ᶜAzīz are reported to have held that it was sunnah; they seem to be unique in that claim, and Saḥnūn gives no indication of what the basis of their statement was. Ibn Juraij is said to have reported that none had held to this precept prior to ᶜAbd-Allāh ibn az-Zubair.[4] None of the sources I have consult-

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[1] Mudawwanah, 4:84-85; and al-Bājī, 5:229.
SHURAIḤ ibn al-Ḥārith ibn Qais al-Kindī (d. 78/697) was born in the Yaman during the life of the Prophet, whom, however, he never saw. Shuraiḥ was first appointed qāḍī in Iraq by the caliph ᶜUmar ibn al-Khaṭṭāb and continued on as qāḍī under ᶜUthmān and the 'Umayyads. He presided in Kūfah for sometime and then in Baṣrah; in all, he would have presided over the judiciary about sixty years. He was removed in 77/696 by al-Ḥajjāj. Shuraiḥ was regarded as one of the most important fuqahā' and qāḍī's of the early period; many legal opinions attributed to him are still preserved in works like that of Wakīᶜ. Shuraiḥ died at an advanced age. Sezgin, 1:402.

[2] Mudawwanah, 4:84-85. [3] Az-Zurqānī, 4:387; al-Bājī, 5:229.

[4] Al-Bājī, 5:229.
ᶜAbd-al-Malik ibn ᶜAbd-al-ᶜAzīz IBN JURAIJ (80-150 or 151/699-767 or 768) was an important Makkan Successor, muḥaddith, and faqīh. He is said to have been the first in Makkah to have arranged his compilation of ḥadīth systematically. Ibn Juraij died in Baghdād. Sezgin, 1:91.

ed cites any ḥadīth in support of the precept.

It would appear most likely that this precept is an instance of the ijtihād of Madīnan Companions and, hence, of the category of ᶜamal qadīm. Ibn Rushd holds, for example, that it is an instance of the Madīnan application of the principle of al-maṣāliḥ al-mursalah,[1] which would imply that there were no texts in the original sources of the law to support it. Ibn Rushd holds that the Madīnans did not regard the testimony of youths in this matter to be an actual testimony ["ḥaqīqatan"] but rather that they considered it to be a type of circumstantial evidence, which Ibn Rushd refers to as "qarīnat ḥāl". This is why, Ibn Rushd believes, Mālik stipulates in this precept that the testimony of the youths must be taken before they are allowed to split up or to have received the counsel of others. If the testimony of these youths were regarded to be an actual testimony in its own right, there would be no reason to make this stipulation.[2] As indicated in the discussion on al-maṣāliḥ al-mursalah, Mālikī fuqahā' accepted circumstantial evidence on the basis of al-maṣāliḥ al-mursalah,[3] and Mālik justifies the acceptance of circumstantial evidence in qasāmah on the basis of the principle of maṣlaḥah.[4]

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[1]See above, pp. 268-279.

[2]Ibn Rushd, 2:279 (10); cf. ash-Shāṭibī, Al-Iᶜtiṣām, 2:254.

[3]See above, p. 275. [4]See below, pp.713-723.

Al-Bājī also discusses the maṣalaḥah which he believes this precept is based upon; he points out that youths usually associate with their peers to the exclusion of adults and that they usually play by themselves. Furthermore, he continues, youths often engage in types of play and other activities which can bring injury to themselves and in some cases even death. Thus, if it were stipulated that the testimony of worthy adults were the only acceptable evidence in such cases, it would become virtually impossible to establish liability in cases of such injury and to award due compensation to the injured party.[1]

3. AMN: Regarding Inheritance Due an Illegitimate Son

> Yaḥyā ibn Yaḥyā states that he has heard Mālik say that it is the AMN that if a man who has more than one son tells one of them before he dies that a certain person is his [illegitimate] son, the testimony of that single son will not be sufficient to establish the kinship of the newly claimed son to the father. Nevertheless, the newly claimed son will receive that proportion of the brother's inheritance who is giving testimony which he would have ordinarily received from that brother, had the kinship of the illegitimate brother actually been established. Mālik gives the example of a man who dies, leaving two sons. The man leaves behind 600 pieces of gold, of which each son would have received 300 pieces. If one of these sons gives such a testimony, however, he will receive 200 pieces of gold; the illegitimate brother will receive 100 pieces; and the other brother will receive 300. Mālik says that this is analogous [bi-manzilat] to a woman who makes the claim that her deceased father or husband had owed someone a debt but regarding which there is no other evidence and which the other heirs deny to be true. The woman must pay to

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[1] Al-Bājī, 5:229.

> the creditor in that case the proportion of her share of inheritance that would have gone toward payment of that debt had there been sufficient evidence to establish the existence of the debt.[1]

This precept constituted a point of difference between the Madīnans and the Kūfans, who held that the legitimate brother giving testimony in this case regarding the kinship of his illegitimate brother would divide half of his share of the inheritance with the illegitimate brother. Like the Madīnans they held that the other brothers involved would not be required to share any of their inheritance with the newly claimed illegitimate brother, as long as his kinship to their father had not been sufficiently established. (In terms of Mālik's illustration, this would mean that the brother giving testimony would receive 150 pieces of gold; the newly claimed illegitimate brother would receive 150 pieces; and the other brother would receive 300.) Ibn Kinānah--one of Mālik's most prominent students and the one who assumed Mālik's position at the head of the Madīnan school after Mālik's death[2]--agreed with the Kūfan position. No indication is given, however, of whether or not Ibn Kinānah disagreed with Mālik on this matter before or after Mālik's death. Al-Laith ibn Sa^{c}d is also reported to have disagreed. He was of the opinion that the newly claimed illegitimate brother had no rights of inheritance from the father until there

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[1] Muwaṭṭa', 2:741-742. [2] See above, p. 84 , n. 3.

was sufficient evidence to establish his kinship to the father.[1] If the father had claimed the son as his own while upon his deathbed, as in the above example, at least two acceptable witnesses would be required.

None of the sources I have had access to cites any ḥadīth in support of this precept or in support of the opinions contrary to it. It would appear, therefore, to be an instance of ᶜamal that resulted from Madīnan ijtihād. Mālik's presentation of the analogy which he believes to support the precept might also be an indication of the fact that this precept had originated from ijtihād. No indication is given, however, of when the ijtihād underlying this precept originated. Again the information which Mālik deems significant to communicate is that this precept was supported by the ijtimāᶜ of the Madīnan ᶜulamā'.

The dissenting opinion of Ibn Kinānah, as mentioned above, may be an indication that there were differences of opinion on this AMN in Madīnah, and, hence, that it did not represent a total consensus of the Madīnan ᶜulamā'. As pointed out, however, it is not known whether Ibn Kinānah, a student of Mālik, took the Kūfan position in this matter before or after Mālik's death. The differing opinion of al-Laith ibn Saᶜd is also significant, since he describes himself in his letter to Mālik as a close follower of Madīnan local consensus, while reserving the right to disagree with them on

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[1]See az-Zurqānī, 4:421; al-Bājī, 6:17.

matters in which they themselves had disagreed.[1]

Finally, the analogy in this example is significant. Although Mālik gives no explicit indication that the ijtihād from which this AMN precept originated was based on that analogy, his citation of it indicates--as in example 1 of this chapter--that Mālik regarded this AMN precept to be analogical. Hence, it is not contrary to analogy with related precepts as is the case with Mālik's sunnah terms.[2] It might also be pointed out that this example of analogical reasoning, like all examples cited thus far from the Muwaṭṭa', is an instance of analogical reasoning based on precepts of law and not on specific texts.[3]

4. AMN: Permission to Alter Bequests Other than Tadbīr[4]

> Mālik cites the ḥadīth: "No Muslim possessing anything in which a bequest [waṣīyah] is to be made has the right that [so much as] two nights pass before the

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[1]See above, pp. 321-331. [2]See above, pp. 576-582.

[3]See above, pp. 226-234.

[4]Tadbīr: A contractual obligation [ʿaqd] by which a master promises the slave, who is then called a "mudabbar", that the slave will be free upon the master's death. Tadbīr is regarded to be an exceptional type of bequest [waṣīyah]. Like other bequests, it pertains to the disposition of the master's property--of which the slave would be regarded to be a part--after the master's death. Hence, like bequests, it exempts property of the master from the inheritance of the rightful heirs. Like other bequests, therefore, tadbīr can only be executed within one-third the master's estate (see Muwaṭṭa', 2:814). Tadbīr is an exceptional type of waṣīyah, however, in that it constitutes a binding contract which the master has no right to alter, once it has been made. See Ibn Rushd, (Istiqāmah), 2:381-385.

> bequest has been put down in writing and is in his possession." Mālik then states that it is the AMN that a person may alter, as long as he is alive, whatever he wants to alter regarding bequests which he makes during times of health or illness which pertain to the emancipation of slaves of his or to other matters. He may discard the bequest altogether or alter it however he sees fit, except in the case of tadbīr. The stipulation of tadbīr, once given, may never be altered. Mālik explains this precept by reference to the preceding ḥadīth. This ḥadīth has stipulated that bequests must be put in writing as soon as possible. If it were not permissible, however, for the maker of such bequests to alter them after they had been made, it would follow that the property to which the bequest pertains would be restricted [maḥbūs] [from being sold, given as a gift, etc.] at the time the bequest was made, [which is not the case except in the instance of tadbīr]. Mālik then states that it is the A-XN that the maker of a bequest may change whatever he wants to in it except for tadbīr.[1]

There was widespread agreement among the early fuqahā', according to az-Zurqānī, regarding the validity of the precept that bequests could be altered or discarded during one's lifetime and that the stipulation of tadbīr could not be altered, once made, and that the mudabbar slave, therefore, could not be sold, given away as a gift, and so forth. Az-Zurqānī states that it was a point of agreement among the preponderant majority [jumhūr] of the early fuqahā' of the Ḥijāz, Syria, and Kūfah.[2] His expression would indicate, however, that it was, nevertheless, a point of difference, i.e., among those who were not part of this "preponderant majority". In the subsequent generations after Mālik's life, ash-Shāfiᶜī, Ibn Ḥanbal, and the Ẓāhirīs disagreed, for example, and, according to Ibn Rushd, they based their reason-

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[1] Muwaṭṭa', 2:761. [2] Az-Zurqānī, 5:75.

ing on a ḥadīth which reports that the Prophet once sold a mudabbar.[1] Al-'Awzā^{c}ī is said to have held that one could sell a mudabbar to a person who intended to set him free,[2] and it is possible that others held opinions similar to those of ash-Shāfi^{c}ī, Ibn Ḥanbal, and the Ẓāhirīs during the time of Mālik.

Nevertheless, 'Abū Ḥanīfah would not have agreed with Mālik's AMN precept, as set forth above. For Mālik is drawing a distinction in this precept between tadbīr and other types of waṣīyah which involve emancipation but which Mālik does not regard to be of the category of tadbīr. This distinction between tadbīr and other types of bequests involving emancipation is said to be a well-known part of Mālik's fiqh and is what he is referring to when he speaks in the AMN precept about bequests pertaining to emancipation of one's slaves which may be altered.[3] Many fuqahā', including 'Abū Ḥanīfah, according to Ibn Rushd, held that no such distinctions could be drawn between tadbīr and other types of bequests involving emancipation.[4]

It would appear from Mālik's discussion of this AMN that he regarded it to be of the category of ^{c}amal naqlī. He reasons from the ḥadīth cited at the beginning of the

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[1]Ibn Rushd, (Istiqāmah), 2:383. [2]Ibid.

[3]See ibid., 2:381; al-Bājī, 7:45-47; az-Zurqānī, 5: 74-75.

[4]Ibn Rushd, (Istiqāmah), 2:381.

chapter that the Prophet required makers of bequests to put them into writing immediately. He reasons further that if it were not permissible to alter such bequests, it would follow as a legal consequence that there would be another precept in ᶜamal according to which the properties designated in bequests would be restricted from being sold, given as gifts, and so forth. There was no such ᶜamal except in the case of tadbīr, as Mālik indicates in another AMN precept pertaining to tadbīr.[1] Hence, Mālik's reasoning is apparently that the absence of ᶜamal restricting the disposal of properties designated by bequests is an indication that the Prophet permitted bequests to be altered when they pertained to matters other than tadbīr, for which there is such an ᶜamal. Lack of ᶜamal regarding the disposal of properties designated by bequests would be an instance of ᶜamal naqlī going back to what al-Qāḍī ᶜAbd-al-Wahhāb al-Baghdādī and ᶜIyāḍ refer to as the Prophet's "tark", i.e., his having omitted something from ᶜamal which would have been well-known if he had required it.[2] This seems also to be what Mālik has in mind in this case. The Prophet insisted that all persons making bequests put them in writing immediately. Hence, the designation of such properties would have been well-known; it follows, then, that the legal status of such properties would also have been well-known. Madīnan ᶜamal

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[1] Muwaṭṭa', 2:814. [2] See above, pp. 410-415.

in this case would pertain to the nature of ᶜumūm al-balwā.[1]

Mālik uses the term AMN at the beginning of this precept and the term A-XN at the conclusion. It would appear that this AMN, therefore, is also an A-XN. I do not believe that this is necessarily the case. For the A-XN is that bequests may be altered except in the case of tadbīr. The wording of the A-XN does not involve the definition of tadbīr; unlike the AMN, it involves no distinction between tadbīr and other types of bequests involving emancipation which Mālik does not regard as falling within the category of tadbīr. 'Abū Ḥanīfah could agree with the wording of the A-XN, but, as pointed out above, 'Abū Ḥanīfah could not agree with the wording of the AMN. For 'Abū Ḥanīfah regards all bequests involving the emancipation of one's slaves to be types of tadbīr.

The AMN precept contains elements that are analogous and elements that are contrary to analogy. The analogous part of the precept is the provision that there are types of bequests pertaining to emancipation that are completely analogous to other types of bequests and are not the same as tadbīr. The part of the precept contrary to analogy is the stipulation that tadbīr is exceptional in that it cannot be altered once it has been made. Nevertheless, this is the only respect in which Mālik regards tadbīr to be an anomaly

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[1]See above, pp. 184-188.

to other types of bequests. For,as Mālik indicates in his AMN precept on tadbīr, the execution of tadbīr after the master's death is done in the same manner as the execution of other types of bequests.[1]

5. AMN: Bequests to Set Free One's Share of a Jointly Owned Slave

> Mālik begins with a ḥadīth which states that whoever sets free his share of a jointly owned slave and has enough money to pay the slave's total price, will be required to pay each of his partners the value of their shares [so that the slave may go free]. The value of these shares must be determined fairly; each shareholder receives the portion due him; and the slave will be emancipated at the hands of the man who first set his portion of the slave free. (This means that that person will receive the right's of the slave's clientship [walā'] and, as a result, certain rights to inherit from the slave.) But if the person who frees his share of the slave does not have sufficient money, then only his share of the slave will be set free. Mālik states that it is the AMN regarding a jointly owned slave one of whose masters bequeathes that his share of the slave be freed upon that master's death that, upon the master's death, only his share of the slave will be set free and the remaining shares of the slave will not be freed against that master's estate, unless the master had stipulated that the remaining shares be freed against his estate, in which case as much of the slave would be set free as one-third of the master's estate would permit. The reason for this, Mālik explains, is because the entire estate of the master ceases to be his property upon his death and becomes that of his heirs, except for any specific bequests he has made, [which cannot exceed one-third the 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 heirs, who--Mālik points out--had not initiated the matter and who would not receive any of the rights of clientship,which the master would have received. Mālik indicates that to free the slave at the expense of the heirs would be to cause them undue harm [ḍarar].[2]

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[1] Muwaṭṭa', 2:814. [2] Ibid., 2:772-773.

I was unable to find detailed information about the opinions of the early fuqahā' regarding the AMN precept in this example. I was able, however, to find information regarding the different opinions of early fuqahā' regarding the legal implications of the ḥadīth which Mālik cites at the beginning of the chapter, and I believe one can infer from that information some of the points of difference that must have existed regarding Mālik's AMN.

The Baṣran Successor Ibn Sīrīn,[1] for example, and Mālik's teacher Rabīᶜah are both said to have held unusual [shādhdh] opinions on this matter. Ibn Sīrīn is said to have held that whenever a person who owns a slave jointly frees his share of the slave, the remainder of the slave will be freed at the expense of the public treasury [bait al-māl].[2] Thus, for Ibn Sīrīn there would be no question of the slave's being freed at the expense of the master's heirs nor of the slave being freed from one-third of the master's estate. Rabīᶜah held, on the contrary, that it is invalid for a person to free his share of a slave without the consent of the other shareholders, because of the harm [ḍarar] which his action would bring to the other share-

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[1]MUḤAMMAD IBN SĪRĪN al-Baṣrī al-'Anṣārī (ca. 33-110/ca. 653-729) was a significant Baṣran Successor. He transmitted ḥadīth from many Companions. In addition to being known as a muḥaddith, Ibn Sīrīn was known as a faqīh, an ascetic, and a famed interpreter of dreams. Sezgin, 1:633.

[2]Ibn Rushd, (Istiqāmah), 2:362; az-Zurqānī, 5:6.

holders. Thus, Rabīᶜah would have wanted to add the stipulation to Mālik's AMN that the master must have this consent before his bequest to liberate his share of the slave will be valid. Furthermore, it is not clear whether or not Rabīᶜah held that the shareholder who sets free his share of the slave would still have to compensate the others after they had consented. It might be noted, however, that Ibn Rushd seems to doubt the authenticity of this report about Rabīᶜah. He uses the expression "qīla ᶜan Rabīᶜah" [it is said about Rabīᶜah], which is often used to indicate the writer's doubt about the authenticity of the report.[1]

Al-'Awzāᶜī, Ibn 'Abī Lailā, 'Abū Yūsuf, ash-Shaibānī, and the majority of the Kūfans are said to have held that the slave becomes free on the day that the shareholder sets free his share of the slave. If that shareholder is unable financially to compensate the other shareholders, the slave will still be emancipated but will have to compensate the shareholders from his own earnings. Nevertheless, the rights of clientship go to the one who first freed his share of the slave. Ibn 'Abī Lailā and some others also held that the slave could require the shareholder who first set his share free to compensate the slave for his earnings which had gone to compensate the other shareholders, if that shareholder later became financially capable of doing

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[1]Ibn Rushd, (Istiqāmah), 2:360.

so.[1] Thus, these fuqahā' would have at least added the provision to Mālik's AMN that the slave would be declared completely free upon the death of the master and that the slave would compensate the other shareholders from his own earnings, if there were not sufficient funds within the master's estate. 'Abū Ḥanīfah is said to have held a somewhat similar position, although he held, unlike the others, that if the master who first freed his share of the slave had himself compensated the other shareholders from his own wealth, he could require the slave to exert himself and compensate the master for this compensation which the master had paid.[2]

The ultimate source of Mālik's AMN precept is not clear. It is cited in conjunction with a ḥadīth. Nevertheless, the AMN is not contained in the ḥadīth; rather the AMN is, from Mālik's point of view, a legal consequence of the precept contained in the ḥadīth. The relevant stipulation in the ḥadīth is that a shareholder who frees his share of a jointly owned slave will not be required to compensate the other shareholders if he lacks sufficient wealth to do so. (It might be noted that the Kūfans are reported to have argued that this stipulation was not part of the original ḥadīth but is, rather, a commentary of Nāfiᶜ--the transmitter of the ḥadīth--which then came to be regarded as part of the ḥadīth's original text.[3]) The AMN, of course, per-

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[1]Ibn Rushd, (Istiqāmah), 2:360. [2]Ibid. [3]Ibid., 2:361.

tains to a master who frees his share of a jointly owned slave as part of his bequest [waṣīyah]. Since, according to the Islamic law of bequests and inheritance, the entirety of one's estate goes upon one's death to the designated heirs, except for those parts of the estate which have been designated specifically as bequests, Mālik explains that, in effect, the master--no matter how wealthy he may have been--no longer possesses sufficient wealth at the time of the disposition of his bequest to compensate the other shareholders of the slave.

It is possible that this implication of the AMN was part of the non-textual source of Madīnan ᶜamal naqlī and that it was made clear when the laws of bequests and the laws pertaining to the emancipation of slaves were set down. It is also possible that the AMN was deduced by later Madīnan fuqahā' in the same manner that Mālik has set forth the reasoning behind it, in which case the AMN would be the result of ijtihād, although it would be impossible from the information Mālik gives to date that ijtihād. Whatever the ultimate source of this AMN precept, therefore, what is most apparent from the text of the Muwaṭṭa' is the fact that Mālik is not primarily concerned with communicating the source of this ᶜamal but, rather, with indicating that it is supported by Madīnan ijtimāᶜ, and the Madīnan ijtimāᶜ in this case, as indicated above, may not include the agreement of the prominent Madīnan Successor and teacher of Mālik, Rabīᶜah.

The AMN precept in this example is the direct consequence of two accepted Madīnan precepts of law, the precept pertaining to the emancipation of jointly owned slaves and the precept pertaining to the disposition of bequests. There is a similar AMN precept later in the Muwaṭṭa' which sets forth other consequences of the precept regarding the emancipation of jointly owned slaves.[1] Thus, although these two AMN precepts are not analogical, properly speaking--for they involve no analogies--nevertheless, they are consistent with other well-established precepts and do not have the exceptional and anomalous character of Mālik's sunnah precepts.

6. Qasāmah[2]

> Mālik cites two ḥadīth pertaining to qasāmah. He then states that it is the AMN and that which he has heard [transmitted] from those who are acceptable to him ["mimman 'arḍā"] regarding the qasāmah and that upon which has been the ijtimāᶜ of the 'imām's of early and of recent times that the plaintiffs take the first oaths in qasāmah and that qasāmah is required by only two circumstances: either the victim says before dying that a certain person has killed him or the plaintiffs bring circumstantial evidence ["lawth min bayyinah"] against the defendant, even if it is not conclusive ["qāṭiᶜah"]. Mālik says that it is the S-XN and that in accordance with which the ᶜamal of the people has always been ["wa 'l-ladhī lam yazal ᶜalaihi ᶜamal an-nās"] that in both

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[1] Muwaṭṭa', 2:789. This precept pertains to the contract of mukātabah, in which the masters makes an agreement that the slave will work to earn his freedom; the AMN is that if one of the shareholders of a jointly owned slave makes a contract of mukātabah regarding his share of the slave, then all other shareholders will also be obliged to make such a contract with the slave. Again, Mālik explains the reasoning behind the precept.

[2] Qasāmah: A method--which was a pre-Islamic custom originally--according to which guilt is established in cases

cases of murder and involuntary manslaughter it is the plaintiffs who take the first oaths in qasāmah. Mālik points out that in the ḥadīth cited at the beginning of the chapter the Prophet is reported to have let the plaintiffs take the first oaths.[1]

There are two points in this AMN precept, each of which constituted a point of difference among the early fuqahā'. The first point is that the plaintiffs take the first oaths in qasāmah; the S-XN, by the way, pertains exclusively to this point. The second point pertains to the nature of the evidence required for qasāmah. It might be noted that Mālik does not include in this AMN precept the question of whether or not qasāmah is a valid basis upon which to inflict capital punishment. ᶜUmar ibn al-Khaṭṭāb and others, for example, are said to have held that qasāmah could only be used for awarding diyah's but not for capital punishment. Similarly, ᶜUmar ibn ᶜAbd-al-ᶜAzīz is said to have been against the use of qasāmah for taking life.[2]

The S-XN and the first point of the AMN constituted a point of difference between Mālik and 'Abū Ḥanīfah, who like many Kūfans and Baṣrans held that it was the defendants and not the plaintiffs who are to be offerred the opportunity to take the first oaths in qasāmah. If they take those oaths and swear that they are not guilty, they will be ex-

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of murder and liability in cases of involuntary manslaughter in the absence of conclusive evidence but when there is sufficient circumstantial evidence in the hands of the plaintiff against the defendant. Either party is required to take fifty oaths supporting his claim.

[1]Muwaṭṭa', 2:877-879. [2]Ibn Rushd, (Istiqāmah), 2:419,421.

empt from liability and no further claims may be brought against them in the absence of more conclusive evidence. This position is said to have been based on the consideration that in the Islamic law of oaths it is the plaintiff who is required to produce sufficient evidence to support his claim, while the defendant, in the absence of such evidence, is permitted to clear himself by taking an oath to the contrary. Thus, 'Abū Ḥanīfah regarded qasāmah to be analogous to other procedures in Islamic law involving the taking of oaths.[1]

Regarding the second point of the AMN, 'Abū Ḥanīfah held that the statement of a dying person that a certain person was responsible for his murder was not sufficient evidence to warrant the use of qasāmah against the accused. Apparently, many of the non-Madīnan fuqahā' held this same opinion; Ibn Rushd states, for example, that of the non-Madīnan fuqahā' only al-Laith ibn Sa^{c}d took Mālik's position in this matter.[2]

According to Ibn Rushd, there were also a few early fuqahā' who opposed qasāmah altogether. They are said to have held that it was an invalid pre-Islamic custom and that there was not sufficient evidence to prove that the Prophet had authorized it, noting that in the ḥadīth on qasāmah, such

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[1]Al-Bājī, 7:55; Ibn Rushd, (Istiqāmah), 2:421; az-Zurqānī, 5:187.

[2]Ibn Rushd, (Istiqāmah), 2:423; al-Bājī, 7:52, 56.

as the ḥadīth which Mālik cites in the Muwaṭṭa', the Prophet never administered the qasāmah. He offerred the option of qasāmah to some of the Companions one of whose close relatives had been murdered under suspicious circumstances, but these Companions turned down the option of qasāmah, because they did not want to take oaths regarding matters of which they had no certain knowledge. These opponents of qasāmah are said to have argued further that the Prophet had known that his Companions would refuse to take the option of qasāmah because of the Islamic principles which they had been taught and that the Prophet made the offer to them in order to demonstrate by their refusal the superiority of Islamic over pre-Islamic ethics.[1]

The opponents of qasāmah have also pointed out, according to Ibn Rushd, that qasāmah is contrary to three well-established precepts of Islamic law. The first, which is referred to in the above paragraph, is that it is not permissible that one take an oath regarding a matter of which one does not have certain knowledge. The second is that in the absence of conclusive evidence, oaths are used in Islamic law in money matters and not in matters that pertain to capital punishment.[2] And the third is that in all other precepts pertaining to the taking of oaths it is the defendants and not the plaintiffs who are offerred the oppor-

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[1]Ibn Rushd, (Istiqāmah), 2:419-420.

[2]See above, pp. 141-143.

tunity to take the oaths first and thereby clear themselves.[1]

Mālik's qasāmah precept, therefore, is contrary to analogy with other precepts of Islamic law. In that regard, his use of the sunnah term S-XN in this example is similar to his usage of sunnah terms elsewhere in the Muwaṭṭa'.[2] Ibn Rushd states that Mālik regarded the qasāmah to be a unique sunnah which like many other types of sunnah drew exception to other general precepts of law. He continues to state that Mālik held that the reason for qasāmah was the need to protect life.[3]

Both of Ibn Rushd's statements are supported by the text of the Muwaṭṭa'. In his defense of the precept of qasāmah, Mālik supports his contentions that the plaintiffs must be the first to take the oaths and that the testimony of a dying man about who killed him is sufficient evidence to warrant the use of qasāmah against the accused. In so doing, Mālik emphasizes the principle of maṣlaḥah and contrasts qasāmah with precepts of law regarding the use of oaths in other matters:

> The difference between qasāmah in cases of murder and between oaths regarding [money] rights is that a person who loans money to another takes steps to establish evidence of his right against him [to whom he makes the loan]. But when a person desires to kill another, he does not do it in the midst of a large group of people. Rather, he seeks out a secluded place. . . . So if qa-

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[1]Ibn Rushd, (Istiqāmah), 2:419. [2]See above, pp.576-582.

[3]Ibn Rushd, (Istiqāmah), 2:420.

> sāmah were used only when there were well-established evidence or if one were to follow in it the procedure which is followed regarding [money] rights, there would be great loss of life ["halakat ad-dimā'"]. People would dare to take life once they knew what the verdict in qasāmah would be. But qasāmah has been set down for the guardians of the victim [wulāt ad-dam], who take the first oaths in it, in order to make people refrain from the shedding of blood and in order that the murderer beware lest he be apprehended in matters like this by his victim's [last] words.[1]

Thus, Mālik has defended the precept of qasāmah against the contentions which other fuqahā' are reported to have had against it, and he has sought to justify the anomalous nature of qasāmah by reference to the principle of maṣlaḥah, which 'Abū Zahrah regards as being the most central concern of Mālikī legal theory.[2]

Mālik regards qasāmah to be of the category of what later theorists called "ᶜamal naqlī", which is indicated by his citation of the two ḥadīth at the beginning of the chapter. According to those ḥadīth the Prophet did not complete his administration of qasāmah. The ḥadīth report, nevertheless, that the Prophet offerred the oaths first to the plaintiffs, who, as already mentioned, declined to take them and were not satisfied that qasāmah be implemented in their case. Thus, after his statement of the S-XN and his reference to the continuous ᶜamal of the people, Mālik points out that the procedure of beginning with the plaintiffs is what the Prophet is reported to have done.

The source of the other part of the AMN precept re-

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[1] Muwaṭṭa', 2:880. [2] See above, pp. 269, 205, 83.

garding what evidence is required for qasāmah is not as clear. It is likely, however, that it is the product of Madīnan ijtihād, since, according to Ibn Rushd, the ḥadīth Mālik cites report the only instance of qasāmah which is known to have taken place during the Prophet's career.[1] The victim in that case had been found dead; thus, it did not provide a precedent for Mālik's stipulation that the last words of the victim constitute sufficient evidence for qasāmah.

It appears to me that the AMN in this example is an inclusive term[2] taking in the S-XN, while the S-XN excludes that part of the AMN which pertains to evidence. It is worthy of note, I believe, that Mālik refers to the ijtimāᶜ of the 'imām's of the past and present in reference to the AMN; perhaps it is from the ᶜamal of these 'imām's--instead of ᶜamal naqlī--that the Madīnans have taken these stipulations about evidence. Similarly, in an earlier example it appears that Mālik's AMN includes an A-XN, while the A-XN omits from its wording an important point of difference between some of the early fuqahā'.[3] There is another example of an AMN which includes a sunnah term in Mālik's chapter on the laws of inheritance. The term Mālik cites is AMN: S-XN: x̄dIb ["al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā wa 's-sunnah al-latī lā 'khtilāf fīhā wa 'l-ladhī 'adraktu

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[1]See Ibn Rushd, (Istiqāmah), 2:419-420.

[2]See discussion of inclusive and exclusive terms above, pp. 523-529.

[3]See above, p.707.

ᶜalaihi 'ahl al-ᶜilm bi-baladinā"]. Part of that precept--namely, the stipulation that a Muslim may not inherit a non-Muslim relative--is supported by a ḥadīth which Mālik cites and other clear indications that it is part of the Prophetic sunnah. Another part of the precept, however--namely, that a Muslim also may not inherit a non-Muslim freedman client [mawlā]--is not explicitly indicated by the sunnah. It is noteworthy that in this example Mālik supports this additional part of the AMN precept which is not part of the explicit sunnah by the ᶜamal of earlier 'imām's: ᶜUmar ibn al-Khaṭṭāb and ᶜUmar ibn ᶜAbd-al-ᶜAzīz.[1]

Mālik cites several 'amr precepts elsewhere in the Muwaṭṭa' which set forth various particulars about the ᶜamal of qasāmah; each of these appears to be a product of ijtihād. It is the AN, for example, that finding a body in a village, near a house, or in some similar location is not sufficient evidence to bring qasāmah against the inhabitants of such places, because the body might have been placed there by others.[2] It is the AN that at least two plaintiffs are required for qasāmah in cases of murder and that they repeat their oaths fifty times; it is reported that Saᶜīd ibn al-Musayyab and az-Zuhrī disagreed with this precept and regarded it to be an innovation of Muᶜāwiyah.[3] There is another

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[1]Muwaṭṭa', 2:519-520. [2]Ibid., 2:871.

[3]Ibid., 2:881 and ar-Rasīnī, p. 410.

AN precept pertaining to qasāmah in the case of slaves and an A-XN which excludes women from taking oaths in qasāmah when they pertain to cases of murder, as opposed to involuntary manslaughter.[1]

Finally, it should be pointed out that Mālik transmits a report in the Muwaṭṭa' according to which ᶜUmar ibn al-Khaṭṭāb once attempted to use qasāmah in an unusual case in which a horse belonging to a certain tribesman and which had been made to stampede crushed the finger of another tribesman, who died thereafter. Neither party would take the oaths of qasāmah in that case of involuntary manslaughter, however. Apparently, the plaintiffs were not sure that the man from their tribe had died as a result of the incident, nor were the defendants sure that he had not. ᶜUmar therefore made an independent settlement between them.[2] Nevertheless, the significant point in this report in so far as qasāmah is concerned is that it reports that ᶜUmar first offerred the oaths to the defendants--in contrast to Mālik's S-XN, which he has also described as being the ijtimāᶜ of the 'imām's of early and later times. Mālik cites his negative ᶜamal term, Al-x̄, after this report,[3] and he refers back to it later as an indication that people are held liable for the injuries which the animals they drive, ride, or herd

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[1]Muwaṭṭa', 2:883, 881. [2]See al-Bājī, 7:73.

[3]Muwaṭṭa', 2:851.

cause to others.[1]

What is interesting about this report, of course, is the fact that it is in conformity with the Ḥanafī position regarding qasāmah, although it is a report of an isolated legal judgment which would make it conjectural according to Mālikī legal theory.[2] Mālik might have accounted for this discrepancy in the report in several ways, such as its having been a mistake of the transmitter or its having been an alteration which ᶜUmar ibn al-Khaṭṭāb made on the basis of his personal ijtihād according to the circumstances of the case. Nevertheless, one is reminded of the statement of Ibn al-Qāsim in the Mudawwanah in a similar situation when faced with a report about something ᶜĀ'ishah is said to have done which would have been contrary to Mādīnan ᶜamal:

> We do not know what the [correct] interpretation [tafsīr] of it is but believe that she appointed someone else to act as her representative . . . . This has come down [to us], and if this ḥadīth had been accompanied by ᶜamal such that that [practice] would have reached those whom we met during our lifetimes and from whom we received [our 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 that have not been accompanied by ᶜamal. . . .
> . . . . . .
> [Ḥadīth such as these] remained [in the state of being] neither rejected as fabricated or put into practice. . . .[3]

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[1] Muwaṭṭa', 2:869. [2] See above, pp. 180-181.

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

Conclusions

I have focused exclusively in this analysis on the term AMN and have touched on other terms like A-XN only coincidentally. The AMN's which I have surveyed in this chapter show the characteristic pattern of Madīnan-Kūfan differences of opinion, although again other fuqahā' are also occasionally involved in the disagreement. Each of these AMN's except for the first constitutes a point of difference on at least some point between Mālik and 'Abū Ḥanīfah. (Although 'Abū Ḥanīfah is reported to have agreed with Mālik regarding the first AMN precept, it is said, nevertheless, to have constituted a point of difference between Mālik and the Kūfan Sufyān ath-Thawrī, who is also reported to have been in disagreement with Mālik's second AMN.[1]) Other prominent non-Madīnan fuqahā' who are reported to have disagreed with some of the AMN precepts of this chapter are al-Ḥasan al-Baṣrī,[2] the Baṣran Ibn Sīrīn,[3] al-Laith ibn Sa^{c}d,[4] al-'Awzā^{c}ī,[5] the Makkans ^{c}Aṭā' ibn 'Abī Rabāḥ and Mujāhid,[6] and the Kūfans Ibn 'Abī Lailā, 'Abū Yūsuf, and ash-Shaibānī.[7]

In four of the AMN's surveyed in this chapter there are possibilities of at least one prominent Madīnan faqīh having disagreed. The Madīnan Companion Jābir ibn ^{c}Abd-Allāh is reported to have disagreed with the first AMN.[8] There

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[1]See above, pp. 693, 696 [2]Above, p. 693. [3]Above, p. 709.
[4]Above, pp. 701-702. [5]Above, pp. 705, 709.
[6]Above, p. 693 [7]Above, p. 709. [8]Above, p. 695.

is a possibility that Mālik's teacher Rabīᶜah disagreed with the fifth AMN; Rabīᶜah's opinion in that matter is said to have been unusual and unique [shādhdh], and, as mentioned, Ibn Rushd seems to doubt the accuracy of the report.[1] Mālik's prominent student Ibn Kinānah is reported to have disagreed with the third AMN precept, although it is not known whether he did so during Mālik's lifetime or afterward.[2] Finally, al-Qāsim ibn Muḥammad, who was one of the so-called Seven Fuqahā' of Madīnah, 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 or not he was actually in disagreement with Mālik's AMN.[3] Nevertheless, if these examples did in fact constitute disagreements among Madīnan fuqahā' during or prior to Mālik's life, it would be an indication, I believe, that the ijtimāᶜ which Mālik is referring to in his AMN is a majority and not a total consensus of the Madīnan fuqahā'. Such a position is also supported by ash-Shāfiᶜī's contention that there were differences of opinion in Madīnah regarding Mālik's AMN's and his AN's.[4]

The possibility of differences of opinion among Madīnan fuqahā' regarding Mālik's AMN's is contrary to the definition which Ibn 'Abī 'Uwais is reported to have trans-

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[1]See above, pp. 705-710. [2]Above, pp. 701-702.

[3]Above, pp. 696-697. [4]See above, pp. 343-347.

mitted from Mālik. According to him, Mālik said:

> That for which [I have used] "al-'amr al-mujtamaᶜ ᶜalaihi" constitutes opinions of the people of learning in fiqh and knowledge upon which ijtimāᶜ has been reached without their having differed in them ["mā 'jtumiᶜa ᶜalaihi min qawl 'ahl al-fiqh wa 'l-ᶜilm, lam yakhtalifū fīhi"].[1]

There would apparently be no difference, according to this definition, between AMN and the other 'amr terms which stand for Madīnan ijtimāᶜ but state specifically that there have been no differences of opinion among the Madīnans on the matter, i.e., AMN-X and A-XN. It is possible, as I mentioned earlier, that this specification that there was no disagreement among Madīnan fuqahā' regarding Mālik's AMN precepts was an interpolation of later Mālikīs who sought to lend greater authority to AMN than it was likely to have if conceived of as a majority consensus.[2] The concept of a majority consensus or even a consensus of the preponderant majority--although a very workable concept--would likely have appeared very tentative in the light of ash-Shāfiᶜī's emphasis upon 'ijmāᶜ as constituting a total consensus of the entire 'ummah.[3]

The source of the AMN precepts I have studied in this chapter is often unclear from the text of the Muwaṭṭa'. Two of them appear to pertain to the category of ᶜamal naqlī.[4] It is possible that each of them contains at least some ele-

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[1]See above, p. 539. [2]Above, p. 543.

[3]See above, pp. 195-204. [4]Above, pp. 705-706, 718-720.

ment of ijtihād. The AMN on qasāmah, for example, while containing a point which Mālik refers to as S-XN, also contains a second point regarding the evidence which is required in qasāmah, which would appear to have been the result of ijtihād, since the Prophet is reported to have turned to qasāmah only once during his career and, thus, it is not likely that there would have been precedents in his sunnah which would cover some of these stipulations on evidence. As noted, Mālik refers to the ᶜamal of the 'imām's of the past and the present in conjunction with the AMN on qasāmah, and I believe this may be an indication that those parts of qasāmah which are not derived from ᶜamal naqlī are the products of the ijtihād and ᶜamal of these 'imām's. Similarly, in another AMN on inheritance, part of the precept appears to be taken from ᶜamal naqlī and is referred to by the term S-XN, while another part of the precept would appear to have been taken from the ᶜamal of 'imām's like ᶜUmar ibn al-Khaṭṭāb and ᶜUmar ibn ᶜAbd-al-ᶜAzīz.[1]

The presence of elements of ijtihād in Mālik's AMN is supported by the report from Ibn 'Abī 'Uwais. For Mālik refers to AMN in that definition as being constituted by opinions [qawl] of the Madīnan fuqahā'. Nevertheless, the term AMN is not restricted to matters of ijtihād exclusively. According to my analysis of Mālik's terminology, AMN

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[1]See above, pp. 719-720.

is an "inclusive" term.[1] It can include Mālik's sunnah terms and, hence, ᶜamal naqlī--as in Mālik's AMN on qasāmah and the AMN on inheritance, referred to above. It can also include terms like A-XN, as indicated in the fourth AMN precept of this chapter.[2] But the sunnah terms and the term A-XN in the above example do not include the full scope of the AMN. Rather, in each of these examples the sunnah term or the other 'amr term is applied to only a limited part of the AMN precept. In the fourth AMN precept in this chapter, for example, 'Abū Ḥanīfah would agree with Mālik's A-XN, while he would not have been able to agree with the wording of the more inclusive AMN.[3]

The origin of the ijtihād in most of the AMN precepts discussed in this chapter cannot be established on the basis of the information which Mālik gives in the Muwaṭṭa'. In some cases, as for example in the case of the AMN on inheritance referred to above, it is clear that the ijtihād would go back as least as far as ᶜUmar ibn al-Khaṭṭāb, because it is reported to have been part of his ᶜamal. In other cases, the ijtihād is so closely tied to well-established sunnah precepts--such as the laws regarding bequests--that it would seem probable that the ijtihād must have gone back to the Companions. Nevertheless, it does not appear likely from

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[1]See above, pp. 523-529. [2]Above, p.707.

[3]Ibid.

my study of Mālik's AMN precepts that he was concerned with communicating a distinction between what later legal theorists refer to as "ᶜamal qadīm"--ancient ᶜamal, i.e., going back to the ijtihād of the Companions--and "ᶜamal muta'akhkhir"--later ᶜamal, i.e., going back to the ijtihād of the Madīnan Successors.[1] On the contrary, whatever the origin of the ijtihād in Mālik's AMN's, his primary concern is apparently that of indicating whether that ijtihād was supported by the ijtimāᶜ of the Madīnan fuqahā'.

Another important characteristic of the AMN precepts studied in this chapter is the legal reasoning which Mālik uses to explain or defend them. Mālik accounts for the first and third AMN's by analogical reasoning.[2] His analogical reasoning in these examples, as in earlier examples from the Muwaṭṭa', is an illustration of analogical reasoning based on well-established precepts of law instead of specific legal texts, which I regard to be a fundamental characteristic of Mālikī and Ḥanafī qiyās and an important difference between their conception of qiyās and that of ash-Shāfiᶜī.[3] Furthermore, these AMN's are analogous to other precepts of law and are not of an anomalous nature, in contrast to the precepts of Mālik's sunnah terms.[4]

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[1]See above, pp. 415-419.

[2]Above, pp. 693-695, 700, 703. [3]Above, pp. 216-234.

[4]See above, 576-582.

The fourth and fifth AMN's do not contain analogical reasoning but are akin, nevertheless, to those AMN's which 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 consequences of those related precepts.[1] Although not the products of analogy, these AMN precepts are, nevertheless, contrary to Mālik's sunnah 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 youths under certain circumstances, is regarded by Ibn Rushd and al-Bājī to be based on the consideration of maṣlaḥah.[2] It draws exception to the general precept of testimony not by virtue of the explicit textual authority of the Prophetic sunnah but,rather, on the basis of ijtihād based on the principle of al-maṣāliḥ al-mursalah, one of the chief functions of which is to draw such exceptions.[3] The precept of qasāmah, as pointed out, is contrary to at least three well-established precepts of Islamic law, and some fuqahā' are reported to have opposed qasāmah by virtue of that reason. Mālik defends the validity of the anomalous nature

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[1]See above, pp. 707- 708, 713. [2]Above, pp. 699-700.

[3]Above, pp. 268-275.

of qasāmah, however, by reference to the principle of maṣlaḥah and responds to the objections of those who are reported to have disagreed with the Madīnan conception of qasāmah.[1]

[1]See above, pp. 716-718.

CHAPTER XI

AL-'AMR ᶜINDANĀ:

AN

General Observations

Al-'Amr ᶜindanā [AN; the 'amr among us; the 'amr which we follow, which we regard to be correct] is the most common term in the Muwaṭṭa'. It occurs 104 times by itself and 13 times in various combinations or with slight modifications, none of which occurs more than once. Thus, in all, AN occurs 117 times, which makes it almost two and a half times as numerous as the second most common term, AMN, which occurs 43 times by itself, 6 times in various combinations or with slight modifications, and 49 times in all.[1]

AN, furthermore, is the most evenly distributed term in the Muwaṭṭa'. It occurs in chapters that pertain to social transactions and those which pertain to religious rituals and acts of worship. It occurs in chapters that contain numerous other types of terms, and it occurs in chapters which contain no other terms at all.[2]

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[1]See above, p. 692, and see appendix 2 for the index of AN's.

[2]See appendix 2, table 2 on the distribution of terms according to chapters.

AN and ᶜAmal

According to Mālik's statement as transmitted by his nephew Ibn 'Abī 'Uwais, AN precepts are part of the ᶜamal of Madīnah. Mālik is reported to have said:

> That for which I have said "al-'amr ᶜindanā" is the ᶜamal which the people among us here [an-nās ᶜindanā] have been following. Rulings are handed down in accordance with it ["bihī jarat al-'aḥkām"], and both those who are ignorant and knowledgeable know what it is.[1]

In this statement Mālik makes no mention of AN being supported by Madīnan ijtimāᶜ, and, as will be seen in some of the AN precepts to be analyzed in this chapter, there is sometimes evidence in the Muwaṭṭa' of significant differences of opinion among the Madīnan fuqahā' regarding the validity of AN precepts.[2] Furthermore, according to this report, Mālik draws a connection between AN and the Madīnan judiciary. As suggested earlier, in matters that came under the jurisdiction of the Madīnan courts, it was probably the authority of the judiciary which created unified ᶜamal in Madīnah despite different opinions among the fuqahā'.[3] The same would apply to matters of law that came under different types of executive authority, such as the office of the muḥtasib [the overseer of the marketplace and public morals] and the office of the 'amīr. As mentioned earlier in the discussion of Mālik's ᶜamal chapters, the prominent Madīnan faqīh Saᶜīd

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[1] See above, pp. 539-540.

[2] See below, pp. 731-760.

[3] See above, pp. 538-544.

ibn al-Musayyab is reported to have disagreed with the Madīnan ᶜamal, which Mālik describes as sunnah, that martyrs who are killed on the battlefield are to be buried as they are without their bodies being washed, shrouded, or prayed over. Although this precept would not have come under the jurisdiction of the Madīnan judiciary, the execution of it, nevertheless, would have come under the executive authority of the 'amīr or the commander of the army.[1]

Az-Zuhrī is quoted in the Mudawwanah as referring to an important precept regarding the rights of the wife in marriage as the AN; in that citation, az-Zuhrī repeats twice that this AN constitutes the precept in accordance with which the judges hand down their rulings.[2] Many AN precepts in the Muwaṭṭa', however, pertain to matters of Islamic law which did not come under the jurisdiction of the judiciary or of other types of executive authority--such as, for example, those AN's which pertain to voluntary acts of worship. In the presence of differences of opinion among the Madīnan fuqahā' on matters of that sort, whatever uniformity of ᶜamal there was would probably have been a function of the prestige and consequent social influence of those Madīnan fuqahā' who subscribed to the AN. ᶜAmal in such cases may often not have been uniform, however, but mixed--some people following the preference of certain fuqahā', while others fol-

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[1]See above, pp. 666-667. [2]Mudawwanah, 2:195 (24).

lowed the preference of other fuqahā'. In the example of the ᶜamal in masḥ, for instance, there were apparently two types of Madīnan ᶜamal in the matter; Mālik regards both of them to be ᶜamal but indicates which of them he prefers.[1]

It should be pointed out, however, that there are also examples in the Muwaṭṭa' of mixed ᶜamal which came under the jurisdiction of the judiciary. Regarding the question of what the length should be of the installment periods over which indemnities [diyāt] are to be paid, Mālik indicates that there were two ᶜamal's in Madīnah. One of them set the period at three years, which Mālik states is the position he prefers; the other set the period at four years.[2] Thus, some diversity in ᶜamal was also part of the Madīnan judicial tradition.

AN's Pertaining to Social Matters

1. AN: No Fixed Indemnity for Penetrating Wounds to the Body

> Mālik states that Saᶜīd ibn al-Musayyab held that the indemnity for any wound which penetrates the flesh of a limb of the body is fixed at one-third the indemnity for the destruction of that limb. Mālik then states that az-Zuhrī did not hold this opinion, and Mālik continues to say that there is no AMN in the matter and that it is his opinion that the amount of such indemnities should be left up to the ijtihād of the 'imām. It is the AN, Mālik states, that the ma'mūmah, munaqqalah, and mūḍiḥah wounds[3] pertain only to wounds that

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[1]See above, pp. 654-655. [2]Above, pp. 676-677.

[3]These are the terms used for three types of wounds which penetrate the face or skull. Mālik discusses them and the indemnities which have been fixed for them just prior

are inflicted upon the head or face. Similar wounds inflicted upon limbs of the body are matters of ijtihād.[1]

I have found no information regarding what the opinions of the non-Madīnan fuqahā' were regarding Mālik's AN. As Mālik clearly indicates, however, the prominent Madīnan faqīh Sa^{c}īd ibn al-Musayyab did not agree with this AN precept. Mālik indicates in this example the difference between his conception of AMN and AN. He and az-Zuhrī disagree with Sa^{c}īd ibn al-Musayyab, and Mālik states that there is no AMN in the matter. Mālik then sets forth his own opinion, which is contrary to Sa^{c}īd ibn al-Musayyab's, and he calls it an AN.

Mālik has been discussing the indemnities for the ma'mūmah, munaqqalah, and mūḍiḥah just prior to his presentation of Sa^{c}īd ibn al-Musayyab's opinion. Each of these wounds is a penetrating [nāfidhah] wound, and each of them has a fixed indemnity which the Prophet set down in a letter he dispatched to one of his regional governors; Mālik also refers to this letter just prior to his presentation of Ibn al-Musayyab's opinion. Al-Bājī states that semantically the words "ma'mūmah," "munaqqalah," and "mūḍiḥah" can be applied to wounds that penetrate any part of the body; Mā-

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to his discussion of this AN. The ma'mūmah is, according to Mālik, a wound which lays bare the dura mater or the brain. The munaqqalah shatters the small bones next to the cranium but does not penetrate to the brain. The mūḍiḥah lays bare the skull bone. See Muwaṭṭa', 2:858-859.

[1]Muwaṭṭa', 2:859.

lik, however, restricts the application of these words to head and facial wounds, as indicated by the wording of the AN and even more specifically by the discussion which precedes it.[1] Sa^{c}īd ibn al-Musayyab, as aẕ-Zurqānī indicates, apparently did not agree to this semantic restriction of the words.[2]

I believe Mālik would have regarded the ^{c}amal of this AN to be of the category of what later legal theorists termed to be ^{c}amal naqlī, ^{c}amal going back to the time of the Prophet. Mālik held that the indemnities fixed for wounds like the ma'mūmah, munaqqalah, mūḍiḥah, and so forth had been set by the Prophet, and, as mentioned, he refers to a letter which the Prophet had dispatched to one of his governors setting forth what the indemnities for these wounds should be. Thus, Mālik must have regarded the Madīnan ^{c}amal which drew an exception between these types of penetrating head and facial wounds and penetrating wounds to the body as going back to the time of the Prophet. Mālik probably would have regarded the absence of fixed indemnities in such matters and the ^{c}amal that they be left up to the judgment [ijtihād] of the 'imām as going back to the Prophet's willful omission [tark].[3] In the discussion preceding the AN, for example, Mālik defends a position he has taken that there are no indemnities for head or facial wounds that are less serious than the mūḍiḥah, which lays bare the skull bone. Mālik reasons that the

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[1] Al-Bājī, 7:87. [2] Az-Zurqānī, 5:152.

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

mūḍiḥah is the least serious head and facial wound for which the Prophet has fixed an indemnity in the letter dispatched to his governor. Mālik notes that, in addition to this, none of the 'imām's of the past or of present times have awarded indemnities for head and facial wounds less serious than the mūḍiḥah. Thus, Mālik is apparently reasoning that the ᶜamal of not awarding indemnities for such wounds goes back to the tark of the Prophet.

Finally, it should be pointed out that the awarding of indemnities was a matter which came under the jurisdiction of the judiciary, as indicated by Mālik's several references in this chapter to the ᶜamal and ijtihād of the 'imām's.

2. AN: The Indemnity for Teeth that Are Knocked Out

> Mālik cites a report according to which Marwān ibn al-Ḥakam sent a messenger to the Companion Ibn ᶜAbbās to ask him what the indemnity was for a molar tooth that has been knocked out. Ibn ᶜAbbās informs the messenger that it is five camels. Later Marwān sends his messenger back to Ibn ᶜAbbās to ask him why he has set the indemnity for a back tooth at the same amount which is given for a front tooth. Ibn ᶜAbbās answers, "Why have you not compared it to the fingers? The indemnity of each of them is the same." Mālik cites another report which states that ᶜUrwah ibn az-Zubair considered the indemnity of all teeth to be equal. Mālik then states that it is the AN that the indemnity of all teeth--front teeth and back teeth--is equal. Mālik states that this is because the Prophet has said, "Five camels for a tooth," and a molar is one of the teeth; none of them is regarded to be worth more than the others.[1]

There is said to have been complete consensus that the

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[1] Muwaṭṭa', 2:862.

indemnity for front teeth which are knocked out had been set at five camels.[1] It is clear from the text of the Muwaṭṭa' that Marwān ibn al-Ḥakam, who had doubts about whether or not the indemnity of back teeth should be equal to the indemnity of front teeth, recognized that the indemnity of five camels was what had been set for front teeth. In the chapter preceding Mālik's AN, he cites reports that indicate that there were differences of opinion among the Companions and Successors regarding what the indemnities for back teeth ought to be. He cites an 'athar according to which ᶜUmar ibn al-Khaṭṭāb awarded an indemnity of only one male camel [jamal] for a molar, while Muᶜāwiyah is reported to have awarded five--the same indemnity which Ibn ᶜAbbās held to be correct. Mālik cites another report according to which the prominent Madīnan Successor Saᶜīd ibn al-Musayyab comments on these differences between the opinions of ᶜUmar and Muᶜāwiyah and states that the indemnity is low in ᶜUmar's judgment and high in Muᶜāwiyah's. Saᶜīd ibn al-Musayyab states that if he were to rule in the matter, he would award two camels, which would be somewhere in between. Ibn al-Musayyab concludes by saying, ". . . And every mujtahid is given a reward" ["wa kullu mujtahid ma'jūr"].[2]

The majority of the fuqahā', including 'Abū Ḥanīfah, are said to have agreed with the precept of Mālik's AN.

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[1]Ibn Rushd, (Istiqāmah), 2:416. [2]Muwaṭṭa', 2:861.

ᶜUmar ibn ᶜAbd-al-ᶜAzīz, however, is said to have preferred the position of Saᶜīd ibn al-Musayyab.[1]

Mālik cites this AN in an ᶜamal Chapter, while citing the reports of the contrary opinions of ᶜUmar ibn al-Khaṭṭāb and Saᶜīd ibn al-Musayyab in a chapter which immediately precedes it. Thus, it is apparent from the text of the Muwaṭṭa' that this AN was the ᶜamal of Madīnah. Mālik regards this AN as being supported by the ḥadīth which he cites at the end of the chapter, the ẓāhir [apparent, obvious] meaning of which is that the indemnity for all teeth had been fixed at five camels. Al-Bājī regards the wording of the ḥadīth, however, to be of conjectural meaning. (One is reminded in that regard of the contention in Mālikī legal theory that ẓāhir statements are held to be of conjectural meaning.[2]) One might also interpret the ḥadīth as an understood reference to some of the teeth--such as, for example, the front teeth, on the indemnity of which all agree--as opposed to all the teeth, including the back teeth, the loss of which would not effect one's appearance.[3] Saᶜīd ibn al-Musayyab, according to the report which Mālik cites, certainly regarded the indemnity of back teeth to be a matter of ijtihād.

Mālik supports this AN precept in addition to citing the ḥadīth by indicating that it is ᶜamal and supported by

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[1]Al-Bājī, 7:93; az-Zurqānī, 5:156.

[2]See above, pp. 146-148. [3]See al-Bājī, 7:94.

Ibn ᶜAbbās and ᶜUrwah ibn az-Zubair and by setting forth the reasoning of Ibn ᶜAbbās. It is noteworthy that the analogy which Ibn ᶜAbbās is reported to have used is one that is based on precepts of law. He contends that the precept that the indemnity of all teeth is equal is analogous to the precept that the indemnity of each of the fingers is equal, although, Ibn ᶜAbbās implies, the utilities of each of the fingers--like each of the teeth--are not equal. By reference to ᶜamal and the reasoning of Ibn ᶜAbbās Mālik indicates that it is the ẓāhir meaning of the ḥadīth which is the intended meaning.

The ᶜamal of this AN would appear to lie somewhere between ᶜamal naqlī and ᶜamal qadīm. Mālik obviously regards it to be implicit in a statement attributed to the Prophet. But, on the other hand, it could not have been a well-known ᶜamal during the time of the Prophet, if such prominent persons as ᶜUmar ibn al-Khaṭṭāb and Saᶜīd ibn al-Musayyab did not agree with it.

Like the preceding example, this AN comes under the jurisdiction of civil authority. Ibn ᶜAbbās is asked for and gives an opinion, but it is Marwān ibn al-Ḥakam who possesses the authority to put it into law. Similarly, when Mālik refers to ᶜUmar ibn al-Khaṭṭāb and Muᶜāwiyah, he reports the legal judgments [qaḍā'] which they made when in civil authority. Saᶜīd ibn al-Musayyab is reported to have said, ". . . If I were to judge in the matter . . ." Saᶜīd ibn al-Musay-

yab could not judge in the matter, however, because he was never a qāḍī and possessed no powers of jurisdiction.

3. AN: Regarding Divorce and the Pronouncement of Īlā'.[1]

> Mālik cites an 'athar which reports that ᶜAlī ibn 'Abī Ṭālib held that one's taking an oath of Īlā' from one's wife is not regarded to be a pronouncement of divorce [taṭlīqah], even if four months have passed, until the husband has been brought before the law and required to make his choice either to resume normal relations with his wife or make a pronouncement of divorce. Mālik then states that this is the AN, and he cites another 'athar which reports that ᶜAbd-Allāh ibn ᶜUmar held the same opinion. Mālik then cites other reports which state that Saᶜīd ibn al-Musayyab, 'Abū Bakr ibn ᶜAbd-ar-Raḥmān, and az-Zuhrī did not agree to this precept; they held, on the contrary, that once four months had passed after the pronouncement of Īlā' without the resumption of normal marital relations, the husband would be technically regarded as having made one pronouncement of divorce. Mālik reports, furthermore, that Marwān ibn al-Ḥakam used to hand down legal judgments in accordance with the opinion held by Ibn al-Musayyab and az-Zuhrī.[2]

According to Ibn Rushd, disagreements on this precept resulted from the conjectural wording of the pertinent Qur'ānic verses,[3] which, while stipulating the four month period, do not make it clear whether or not the elapsing of that period constitutes a pronouncement of divorce or whether, according to the opinion expressed in Mālik's AN, the one taking the oath of Īlā' would be forced at that time to make a decision.[4] Again, Mālik indicates clearly that this precept constituted a difference of opinion among prominent Ma-

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[1] Īlā': A pre-Islamic custom according to which a husband takes an oath that he will no longer have sexual relations with his wife. See az-Zurqānī, 4:75-76.

[2] Muwaṭṭa', 2:556-557. [3] Qur'ān, 2:226-227.

[4] Ibn Rushd, 2:60 (25).

dīnan fuqahā'. This ᶜamal also comes under the jurisdiction of the judiciary, and Mālik indicates that Marwān ibn al-Ḥakam used to hand down legal rulings in accordance with the opinion which Saᶜīd ibn al-Musayyab and az-Zuhrī regarded to be correct. 'Abū Ḥanīfah and the Kūfans are also said to have held to the opinion contrary to Mālik's AN.[1]

As in the preceding example, Madīnan judicial tradition was not uniform in this matter. Marwān ibn al-Ḥakam represents a variation from the AN in that practice. In the preceding example, ᶜUmar ibn al-Khaṭṭāb and ᶜUmar ibn ᶜAbd-al-ᶜAzīz are reported to have represented variations from the judicial practice of the AN.[2]

The source of the ᶜamal is again difficult to determine. It pertains to the interpretation of a Qur'ānic verse. Thus, it is likely that the ᶜamal would be either of the category of ᶜamal naqlī or ᶜamal qadīm, but one does not know what the Companions ᶜAlī or Ibn ᶜUmar based their interpretations on or what was the basis of the contrary interpretations. It does not appear to be the point of Mālik's AN to indicate the source of the ᶜamal, however, but rather to indicate that it is a type of ᶜamal supported by authoritative Madīnans but, nevertheless, not supported by Madīnan ijtimāᶜ.

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[1]Ibn Rushd, 2:60 (25); al-Bājī, 5:33; az-Zurqānī, 4: 75-76.

[2]See above, pp. 738-739.

4. AN: Advancing the Mukātab's[1] Deadline and Reducing the Amount

> Mālik states that it is the AN that a master may make an agreement with his mukātab according to which the mukātab will be required to pay a reduced amount of money in order to attain his freedom but will have to pay it before the the deadline which had originally been agreed upon. Mālik then states that those who have objected ["kariha"] to this precept did so because they regarded it to be analogous ["li'annahū 'anzalahū manzilat . . ."] to agreements between creditors and debtors--which are regarded to be impermissible--according to which the creditor agrees to reduce the amount of the debt, if the debtor will pay it at an earlier deadline. Mālik argues, however, that the two matters are not analogous ["wa laisa hādhā mithl ad-dain"]. For in this case, the master is not receiving gold for gold or silver for silver. He has only made an agreement the purpose of which is to speed up the process of the slave's emancipation, which will give him rights of inheritance, alter the legal status of the slave, to that of a free man, and bring closer to the master the sacred honor [ḥurmah] of emancipation. Mālik states that the real likeness of this matter is that of a master saying to his slave, "Bring me such and such an amount of money, and you will be free," who then changes his mind and says, "Bring me a lesser amount of money,and you will be free." Furthermore, Mālik continues, the money which a mukātab agrees to pay his master is not an established debt [dain thābit]. For if the mukātab should become bankrupt, the master has no right to claim a part of the mukātab's estate along with the other creditors.[2]

It is clear from Mālik's discussion that there were differences of opinion among the fuqahā' regarding the validity of this AN precept. Mālik does not specify who these fuqahā' were, however, who objected to the AN or whether they were Madīnans or non-Madīnans, and I did not find additional information on this point in other sources.[3] It is note-

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[1] Mukātab: A slave who makes a contract of mukātabah. For the definition of mukātabah, see above, p. 623, n. 2.

[2] Muwaṭṭa', 2:794-795.

[3] See al-Bājī, 7:20; az-Zurqānī, 5:47-48; Ibn Rushd, (Istiqāmah), 2:378.

worthy, however, that analogies play a role in both the AN and the contrary position, according to Mālik's presentation of them. Mālik argues that those who have disagreed with the AN have done so on the basis of what he regards to be a faulty analogy between the contract of mukātabah and the obligations of indebtedness. Mālik explains why he regards the analogy to be false, sets forth an analogy of his own, and concludes by arguing that the agreement of mukātabah is not a debt, properly speaking, because some of the rights which accrue to creditors in cases of bankruptcy do not pertain to those who make contracts of mukātabah in times of bankruptcy.

Because of this analogical reasoning in the AN precept and the absence of related texts, it would appear that this AN was the product of ijtihād. But it would not be possible to determine from the information Mālik presents whether this ijtihād and the subsequent Madīnan ᶜamal constituted ᶜamal qadīm or ᶜamal muta'akhkhir.[1]

5. AN: Capital Punishment in Conspiracies to Commit Murder

> Mālik states that it is the AN that many free men may be put to death over the murder of a single man; that many women may be put to death over the murder of a single woman; or that many slaves may be put to death over the murder of a single slave.[2]

According to Ibn Rushd, this precept is a matter of

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[1] See above, pp. 415-419. [2] Muwaṭṭa', 2:872.

ijtihād going back to a decision of ᶜUmar ibn al-Khaṭṭāb, who made the ruling that a party of Yamanīs who partook in the murder of a single man should all be put to death for their part in the murder. ᶜUmar ibn al-Khaṭṭāb is reported to have said, "Had all the people of Ṣanᶜā' conspired in his murder, I would have put them all to death."[1]

Ibn Rushd states that there was widespread agreement among the early fuqahā' regarding this judgment of ᶜUmar. 'Abū Ḥanīfah and the Kūfans, for example, are said to have agreed. Some of the important Madīnan fuqahā', however, are reported to have differed: ᶜAbd-Allāh ibn az-Zubair, az-Zuhrī, and, according to some reports, the Companion Jābir ibn ᶜAbd-Allāh.[2]

The ᶜamal behind this AN, therefore, would appear to be of the category of ᶜamal qadīm, going back to the ijtihād of ᶜUmar ibn al-Khaṭṭāb. The scope of the precept had been enlarged, however, to pertain to women and slaves as well, who were not involved in ᶜUmar's original decision. This would be another example of an AN precept which came under the authority of the Madīnan judiciary and executive authority.

It might also be pointed out that, according to Ibn Rushd, ᶜUmar ibn al-Khaṭṭāb's ijtihād in this question is

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[1]See Muwaṭṭa', 2:871; Ibn Rushd, 2:241 (9).

[2]Ibn Rushd, 2:241 (9).

a reflection of the principle underlying al-maṣāliḥ al-mursalah, on the presumption that the only type of punishment in cases of conspiracy to murder which would be effective in preventing such conspiracies is one that applies the punishment equally to all.[1]

AN's Pertaining to Ritual and Worship

1. AN: Recitation during Prayer When Praying behind an 'Imām

> Mālik cites an 'athar which states that ᶜAbd-Allāh ibn ᶜUmar held that one who is praying behind an 'imām should not recite anything from the Qur'ān and that the recitation of the 'imām is sufficient for him. Ibn ᶜUmar held, however, that one should recite from the Qur'ān when praying by oneself. Mālik states that Ibn ᶜUmar used not to recite anything when praying behind the 'imām. Mālik then states that it is the AN that one recite some part of the Qur'ān to oneself during those parts of the prayer which are silent, while praying behind the 'imām, but that one not recite anything to oneself when praying behind the 'imām in those parts of the prayer which the 'imām prays out loud. Mālik cites a ḥadīth according to which the Prophet instructed the Companions not to recite the Qur'ān when praying behind an 'imām in those parts of the prayer which the 'imām recites out loud.[2]

Here again the AN is used in connection with a precept regarding which there had been significant differences of opinion in Madīnah, for the opinion of Ibn ᶜUmar, which is cited just prior to the AN, is contrary to it. In the chapter just preceding this one, however, Mālik cites āthār which support the AN, indicating that such prominent Madīnans as ᶜUrwah ibn az-Zubair and al-Qāsim ibn Muḥammad held to the precept of the AN. After citing these āthār, Mālik states,

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[1] Ibn Rushd, 2:241 (9). [2] Muwaṭṭa', 1:86.

"This is what I prefer regarding what I have heard [transmitted] in this matter" ["wa dhālika 'aḥabb mā samiᶜtu 'ilayya fī dhālika"].[1]

In the context in which Mālik makes this statement of preference, it appears to be directed toward the contrary opinion of Ibn ᶜUmar. Such statements of preference occur frequently in the Muwaṭṭa'. In the ᶜamal chapters, for example, there were two instances in which Mālik uses the above expression in cases of mixed ᶜamal to indicate which of them he prefers. Since, in those examples, the other variation of ᶜamal, which he does not prefer, is also included in the ᶜamal chapter, Mālik's statement of preference is an indication that both varieties were regarded to be valid parts of ᶜamal, even though he personally prefers one of them over the other.[2] Similarly, it appears that Mālik is indicating by his statement of preference in this example that he does not regard Ibn ᶜUmar's position to be invalid but that he prefers the AN to it.[3]

It is possible that Madīnan ᶜamal was not uniform in this matter. Ibn ᶜUmar's position, as indicated by the 'athar which Mālik cites, reflects not only Ibn ᶜUmar's personal practice but also what he taught others to do. It is likely, therefore, that some Madīnans continued to follow Ibn ᶜUmar's prac-

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[1] Muwaṭṭa', 1:85. [2] See above, pp. 652-654, 673, 676-677.

[3] Cf. al-Bājī, 1:159. He states that Mālik regarded the precept of the AN to be mustaḥabb in comparison with Ibn ᶜUmar's position.

tice. For the ᶜamal of whether or not one recites silently to oneself during the silent parts of the prayer or not at all is an ᶜamal that depends upon personal discretion. It does not come under the authority of the judiciary or executive, and even if it had, there would have been no way to enforce it. Rather, the uniform conformity of Madīnan ᶜamal to the AN in this example would have been, I believe, a function of the prestige and social influence among the Madīnans of those of the Madīnan fuqahā' who practiced and taught the AN. (Al-Bājī states that, according to the "Mawwāzīyah", Mālik's prominent student Ibn Wahb did not follow this AN but followed the position of Ibn ᶜUmar instead.[1])

The ḥadīth which Mālik cites after this AN supports both the AN and the contrary position of Ibn ᶜUmar. It indicates only that one is not to recite the Qur'ān in those parts of the prayer which the 'imām recites out loud. It does not pertain, however, to what one ought to do during those parts of the prayer which are silent, which is the point of difference between the AN and Ibn ᶜUmar's position. Mālik probably would have regarded the ᶜamal of the AN to be of the category of ᶜamal naqlī. Nevertheless, it is ᶜamal naqlī regarding which there were significant differences in Madīnah. It would appear, therefore, that the chief indication Mālik is giving by his citation of the term AN has noth-

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[1] Al-Bājī, 1:159. The Kūfan position in this matter was also in conformity with Ibn ᶜUmar's position; see Ibn Rushd, 1:90-91 (20).

ing to do with the source of the ᶜamal but pertains rather to the fact that the ᶜamal in question is not supported by Madīnan ijtimāᶜ.

2. AN: Conjugal Relations with Wives Who Bleed Continuously

> Mālik states that it is the AN that it is permissible for a husband to have conjugal relations with his wife who has continuous bleeding [al-mustaḥāḍah] on those days when it is permissible for her to make ṣalāh. Similarly, a husband may have conjugal relations with his wife who has delivered a child [an-nufasā'] if she continues to bleed after the normal period of bleeding after delivery. For she is analogous [bi-manzilat] to the mustaḥāḍah.[1]

According to az-Zurqānī the majority of the fuqahā' agreed to the validity of this AN precept. The prominent Madīnans Sulaimān ibn Yasār and az-Zuhrī, however, are said to have disagreed, which is also reported to have been the position of ᶜĀ'ishah. 'Ibrāhīm an-Nakhaᶜī, the Baṣran Ibn Sīrīn, and an unspecified group of other fuqahā' are also reported to have disagreed.[2]

Mālik cites ḥadīth and āthār prior to the AN which indicate that the Prophet and various prominent early Madīnan fuqahā' did not regard continuous bleeding [al-istiḥāḍah] to be the same as menstrual bleeding and that the Prophet advised women who had such continuous bleeding to bathe themselves and resume daily prayers once the customary time of their menstrual periods had passed.[3] There is no explicit

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[1] Muwaṭṭa', 1:63.

[2] Az-Zurqānī, 1:185; cf. al-Bājī, 1:127; Ibn Rushd, (Istiqāmah), 1:61

[3] Muwaṭṭa', 1:62-63.

textual support for the AN, however, and Ibn Rushd speaks of it as one of those matters in Islamic law for which no texts have come down.[1]

The ultimate source of this ᶜamal is not indicated. One would expect it to have been as old as the provision that women who have continuous bleeding may make ṣalāh, since the question of conjugal relations between husband and wife is also likely to have been a concern of those persons who brought the question of istiḥāḍah to the Prophet. It is likely, therefore, that this AN is of the category of ᶜamal naqlī and that the absence of explicit supportive texts is another example of the lack of ḥadīth for types of ᶜamal going back to the time of the Prophet. The fuqahā' who upheld the AN are said to have held that it is an implicit consequence of the precept that the mustaḥāḍah may resume prayer; they reason that if she is permitted to resume prayer, which is of great religious consequence, it goes without saying that she can resume normal conjugal relations. Those who disagreed, however, are said to have held that the permission of the mustaḥāḍah to resume making ṣalāh was a special license and had nothing to do with conjugal relations.[2]

Finally, Mālik's use of analogy is noteworthy in this example. The ḥadīth and āthār which he cites pertain exclusively to the mustaḥāḍah, as does the first part of the AN

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[1]Ibn Rushd, (Istiqāmah), 1:61. [2]Ibid.; al-Bājī, 1:127.

precept. He indicates, however, that women who continue to bleed an unusually long period of time after childbed are analogous [bi-manzilat] to the mustaḥāḍah.

3. AN: Regarding Voluntary Prayers

> Mālik cites an 'athar which reports that ᶜAbd-Allāh ibn ᶜUmar used to say that voluntary prayers during the night or day consist of two rakᶜah's [prayer units] and that one does taslīm [says, "as-salāmu ᶜalaikum"] after every two rakᶜah's. Mālik states that this is the AN.[1]

I know of no differences of opinion among the Madīnans regarding this precept. It constituted a point of difference, however, between Mālik and the Kūfans Sufyān ath-Thawrī and 'Abū Ḥanīfah, although 'Abū Yūsuf and ash-Shaibānī are reported to have held the same opinion in the matter as Mālik. 'Abū Ḥanīfah and Sufyān ath-Thawrī held that there is no set manner in which voluntary prayers are to be performed. They felt that one could perform them in the manner that Mālik has described or in series of three, four, or any number of rakᶜah's, making only one taslīm at the end.[2]

According to Ibn Rushd, one of the bases for this contrary Kūfan position was a ḥadīth transmitted from ᶜĀ'ishah, the wife of the Prophet, in which she describes how the Prophet used to pray during the night in their house. She says that he would pray four rakᶜah's, which she says were too

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[1] Muwaṭṭa', 1:119.

[2] See al-Bājī, 1:213-214; az-Zurqānī, 1:363-364; Ibn Rushd, 1:122 (1).

long and too beautiful to be described, that he would follow these with another four, and that he would finish by praying three.[1] Mālik transmits this ḥadīth in the Muwaṭṭa' in the chapter following the chapter containing this AN, and he also transmits other ḥadīth, such as one in which Ibn ᶜAbbās describes how he prayed with the Prophet one night, which report the Prophet having prayed in series of two rakᶜah's.[2]

These ḥadīth are reports of actions, and it would not be possible to determine on the basis of the material contained in them alone whether one of them were normative and another not. By reference to the Madīnan ᶜamal reflected in the AN, however, Mālik appears to be using the non-textual source of ᶜamal, which in this case would be ᶜamal naqlī, to distinguish between reports of normative and non-normative actions. In the terminology of ash-Shāṭibī the ᶜamal reflected by Mālik's normative AN in this example would constitute as-sunnah al-muttabaᶜah.[3]

4. AN: The Number of Takbīrah's[4] in ᶜId Prayers

> Mālik cites an 'athar which reports that 'Abū Hurairah would lead both of the annual ᶜīd prayers, making seven takbīrah's in the first rakᶜah before recitation

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[1]Ibn Rushd, 1:122 (1). [2]Muwaṭṭa', 1:120-122.

[3]For ash-Shāṭibī's discussion of the use of ᶜamal to distinguish between normative and non-normative actions and the concept of sunnah muttabaᶜah, see above, pp. 490-497.

[4]Takbīrah: A gesture made in ṣalāh in which one raises one's hands parallel to the shoulders or ears with palms fac-

of the Qur'ān and five takbīrah's in the second rakᶜah before recitation. Mālik states that this is the AN.[1]

Ibn al-Qāsim refers to this precept in the Mudawwanah as an AN, and he says that it was followed by a group of the people of Madīnah ["jamāᶜah min 'ahl al-Madīnah"], which, although he does not indicate who among the Madīnans may have disagreed with it, is an indication that not all agreed.[2] According to Ibn Rushd, the Companions Ibn ᶜAbbās and 'Anas ibn Mālik held that there should be nine takbīrah's in each rakᶜah of ᶜīd prayers. The prominent Madīnan Successor Saᶜīd ibn al-Musayyab is said also to have held that opinion.[3]

According to Ibn Rushd and al-Bājī, no authentic ḥadīth have been transmitted on how many takbīrah's the Prophet made when praying ᶜīd prayers, although there are numerous ḥadīth about the Prophet's having led the people in praying ᶜīd prayers. The chapter in which Mālik cites this AN, for example, contains such ḥadīth reporting which parts of the Qur'ān the Prophet recited while leading both of the annual ᶜīd prayers. Thus, there would have been no question in Mālik's mind about the ᶜamal of ᶜīd prayers going back to the Prophet. Al-Bājī and Ibn Rushd hold that Mālik's AN precept in this example, therefore, is derived from the nontextual source of Madīnan ᶜamal naqlī, which was in conform-

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ing outward and says the words, "Allāhu 'akbar" [God is the greatest of all]. For the definition of ᶜīd prayers, see above, p. 659, n. 2.

[1]Muwaṭṭa', 1:180. [2]Mudawwanah, 1:155 (24).

[3]Ibn Rushd, 1:127 (19).

ity with the 'athar which Mālik transmits from 'Abū Hurairah.[1]

5. AN: Takbīr after Prayer during the Days of Tashrīq[2]

> Mālik states that it is the AN that takbīr is done after each of the obligatory daily prayers during the days of tashrīq, beginning with the takbīr of the 'imām and the people praying with him on the day of sacrifice [the tenth day of the pilgrimage] after the ẓuhr [noon] prayer and ending with the takbīr of the 'imām and the people praying with him after the dawn [ṣubḥ] prayer on the last of the days of tashrīq. Mālik then states that takbīr is required [wājib] of men and women during the days of tashrīq, whether they pray in groups or by themselves, whether they are present at the pilgrimage or elsewhere in the world. Mālik states that "al-'ayyām al-maᶜdūdāt" [the numbered days] referred to in the Qur'ān are a reference to the days of tashrīq.[3]

There is said to have been general agreement among the fuqahā' that the Qur'ānic verse Mālik refers to at the end of this AN--". . . And call [the name of] God to remembrance during the numbered days"[4]--is a reference to the practice of doing takbīr during the days of tashrīq after the performance of the obligatory prayers. But there were extensive differences of opinion among the fuqahā' regarding the details of this ᶜamal, such as those which Mālik has set forth in the AN. Without going into all of the details of these differences, Ibn Rushd states that there were ten different opinions on

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[1]Ibn Rushd, 1:127 (19); al-Bājī, 1:319. Al-Bājī says that there is a ḥadīth on the number of takbīrah's which the Prophet recited in ᶜīd prayers and that it supports Mālik's AN. This ḥadīth, he states, however, is not regarded to be authentic.

[2]Tashrīq: Three days of festivity at the conclusion of the pilgrimage and following ᶜīd al-'aḍḥā.

[3]Muwaṭṭa', 1:404. [4]Qur'ān, 2:203.

this matter, which he attributes to the fact that this matter was transmitted exclusively by ᶜamal without there being any authentic ḥadīth in the matter, which is also corroborated by az-Zurqānī.[1]

The prominent Madīnan az-Zuhrī agreed on the time when the takbīr is supposed to begin as set forth in Mālik's AN, but, according to Ibn Rushd, az-Zuhrī disagreed regarding the time when the takbīr of the days of tashrīq is supposed to end. Whereas Mālik states that it ends with the dawn prayer on the last of the days of tashrīq, az-Zuhrī is said to have held that it did not end until after the ᶜaṣr [afternoon] prayer on that day. Sufyān ath-Thawrī is said to have taken az-Zuhrī's position regarding the time when the takbīr ends, but he believed that the takbīr should begin a day earlier.[2] There were some who held that the takbīr pertained only to men; not to men and women as in Mālik's AN. There were some who held in contrast to Mālik's AN that it pertained to those who were praying in groups and not to those who were praying by themselves. Some held that the takbīr pertained only to those who were participating in the pilgrimage, and so forth.[3]

This AN, therefore, would be of the category of ᶜamal

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[1]Ibn Rushd, (Istiqāmah), 1:213; az-Zurqānī, 3:217; cf. al-Bājī, 3:41-43.

[2]Ibn Rushd, (Istiqāmah), 1:213.

[3]See citations in note 1. No indication is given of who held these opinions, with the exception of Ibn Rushd's specification of az-Zuhrī and Sufyān ath-Thawrī's positions.

naqlī, and it would be another instance of a precept which had been transmitted almost exclusively by the non-textual source of ᶜamal without the supporting verification of explicit legal texts. It is also a matter regarding the details of which there were extensive differences of opinion among the early fuqahā', and, as indicated by az-Zuhrī's somewhat different position in this matter, there was also disagreement on the AN among the prominent Madīnan fuqahā'.

Conclusions

In all but one of the examples of AN analyzed in this chapter there was evidence of significant differences of opinion among the Madīnan fuqahā', which in four of the examples were explicitly set forth in the Muwaṭṭa'.[1] In another of the examples, Mālik indicates that there were differences of opinion regarding the AN, but he does not indicate from whom that difference of opinion came, and I could find no specific information in other sources.[2] Saᶜīd ibn al-Musayyab is reported to have disagreed with four of the AN's in this chapter.[3] Another of the so-called Seven Fuqahā' of Madīnah, Sulaimān ibn Yasār, is reported to have disagreed with one of them.[4] And Mālik's teacher az-Zuhrī is reported as having disagreed with three of the AN precepts analyzed.[5] Similarly,

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[1]See above, pp. 734 - 735, 738 - 739, 741 , 746-747. I could find no evidence for differences of opinion in Madīnah on the third AN pertaining to worship, pp. 751 - 752.

[2]Above, pp. 743 - 744. [3]Above, pp. 734-735, 738-741, 753.

[4]Above, p. 749. [5]Above, pp. 745, 749, 755.

az-Zuhrī and Sa^{c}īd ibn al-Musayyab are reported to have disagreed with one of the AN's discussed prior to this chapter, while Mālik's teacher 'Abū 'z-Zinād ibn Dhakwān is reported to have disagreed with another.[1] Prominent Madīnan Companions are also reported to have disagreed with some of these AN's analyzed in this chapter: ^{c}Umar ibn al-Khaṭṭāb,[2] Ibn ^{c}Umar,[3] ^{c}Ā'ishah,[4] Jābir ibn ^{c}Abd-Allāh,[5] ^{c}Abd-Allāh ibn az-Zubair,[6] and the prominent Successor and one-time governor of Madīnah ^{c}Umar ibn ^{c}Abd-al-^{c}Azīz.[7]

In several of the AN's of this chapter I was unable to determine what the extent of agreement or disagreement upon the precept was outside of Madīnah. 'Abū Ḥanīfah is reported as having disagreed with two of them;[8] Sufyān ath-Thawrī is also reported to have disagreed with two of the AN's of this chapter;[9] and 'Ibrāhīm an-Nakha^{c}ī, Ibn Sīrīn, and an unspecified group of others are reported to have disagreed with another.[10] Ibn ^{c}Abbās is reported to have dis-

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[1]See above, pp. 720, 668-669. In other examples of Madīnan differences of opinion other than those in the AMN's, az-Zuhrī and ^{c}Urwah ibn az-Zubair are reported to have disagreed with Mālik's MdS precept (p. 572). Sa^{c}īd ibn al-Musayyab is said to have disagreed with an ^{c}amal precept described as SN (p. 666). Mālik's teacher Zaid ibn 'Aslam and the Companion ^{c}Umar ibn al-Khaṭṭāb are said to have disagreed with one of the ^{c}amal precepts (p. 678), while Sa^{c}īd ibn al-Musayyab and Ibn ^{c}Umar are said to have disagreed with another ^{c}amal precept (p. 679).

[2]Above, pp. 738-739. [3]Above, p. 746. [4]Above, p. 749.

[5]Above, p. 745. [6]Above, p. 745. [7]Above, pp. 738-739.

[8]Above, pp. 742, 751. [9]Above, pp. 751, 755.

[10]See above, p. 749.

agreed with another,[1] while there is said to have been extensive disagreement among the fuqahā' regarding the last AN of this chapter, although I was able to find few details about it.[2]

The source of the Madīnan ᶜamal in many of these examples would be very difficult to determine, although in some cases Mālik cites ḥadīth related to the AN or refers to Qur'ānic verses, which indicate that he regarded those particular AN's as going back to the era of the Prophet.[3] Most of the AN's I have analyzed in this chapter would appear to be of the category of ᶜamal naqlī; all of the AN's pertaining to matters of ritual and worship, for example, appear to fall in that category.[4] One of the AN's appears to be of the category of ᶜamal qadīm, i.e., going back to the ijtihād of the Companions.[5] Two of the AN's appear to be either ᶜamal naqlī or ᶜamal qadīm,[6] and, although another of the AN's appears to have been the product of ijtihād, it would not be possible to determine from the information Mālik gives whether it originated with the ijtihād of the Madīnan Companions--and, hence,

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[1]See above, p. 753. [2]Above, pp. 754-755.

[3]See, for example, pp. 736-737, 738, 742, 748, 751-752, 753, above.

[4]Above, pp. 736-737, 748, 750, 751-752, 753, 755-756; cf., 740, 742.

[5]Above, p. 745. [6]Above, pp. 740, 742.

was ᶜamal qadīm--or whether it originated with the ijtihād of Madīnan Successors--and, hence, should technically be classified as ᶜamal muta'akhkhir.[1] Since all of the precepts analyzed in this chapter are classified as AN's, despite the apparently wide range of diversity of their sources, one is led to conclude that Mālik is not using the term AN to identify the source of the ᶜamal of these precepts but, rather, to indicate that, although they are part of Madīnan ᶜamal, they are not supported by Madīnan local consensus. Mālik makes this distinction between AN and the term AMN quite explicit, for example, in the first AN precept of this chapter.[2]

It is clear from the AN precepts in this chapter as well as Mālik's reliance upon ᶜamal in other matters in which there had been significant differences of opinion among the Madīnan fuqahā' that Mālik regarded Madīnan ᶜamal to be a valid source of law even in matters upon which there was no Madīnan consensus. Nevertheless, Mālik must have believed that there was some difference between the authoritativeness of those types of ᶜamal like AMN, AMN-X, A-XN, S-XN, and so forth, which were supported by the consensus of the Madīnan fuqahā', and those like AN which were not. Otherwise, there would seem to be little point in drawing a distinction between them in his terminology; he might just as well have referred to them all, for example, as Madīnan ᶜamal.

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[1]See above, p. 744. [2]Above, pp. 734-735.

Finally, there were examples in this chapter as in earlier examples of Mālik's providing detailed information from the non-textual source of ᶜamal naqlī for precepts regarding which no authentic ḥadīth had been transmitted.[1] Furthermore, there were three instances of analogies in these AN's.[2]

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[1]See above, pp. 749-750, 753, 754-755.

[2]Above, pp. 740, 743-744, 750.

APPENDIX 1

'ABŪ ḤANĪFAH'S RESTRICTIONS UPON THE ACCEPTANCE OF ISOLATED ḤADĪTH

APPENDIX 1

'ABŪ ḤANĪFAH'S RESTRICTIONS UPON THE ACCEPTANCE OF ISOLATED ḤADĪTH[1]

1. Isolated ḥadīth must not be contrary to the well-known, established precepts of the Ḥanafī school

2. Isolated ḥadīth must not be contrary to the general [ᶜāmm] or obvious [ẓāhir] meaning of Qur'ānic texts, which 'Abū Ḥanīfah regards as being definitive in terms of their general or obvious indications

3. Isolated ḥadīth must not be contrary to the well-known sunnah of the Prophet, whether that sunnah be based on words or deeds of the Prophet

4. If there are two or more contradictory isolated ḥadīth in a matter, 'Abū Ḥanīfah will give one of them priority over the others by virtue of such considerations as the transmitter of that ḥadīth having been faqīh, while the others were not

5. 'Abū Ḥanīfah will reject an isolated ḥadīth if the transmitter of it is known to have followed a practice contrary to what is embodied in the ḥadīth[2]

6. When two or more isolated ḥadīth agree on a matter,

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[1]The following stipulations are taken primarily from al-Kawtharī, pp. 36-38. Some of the details are taken also from Zakī-ad-Dīn Shaᶜbān, the citations for which are given individually.

[2]Shaᶜbān states that 'Abū Ḥanīfah held that the transmitters of such ḥadīth must have known the rulings embodied in them to have been abrogated or, for some other reason, not to have been obligatory or desirable. And, if this were not the case and the transmitter had simply refused to follow the ḥadīth willfully, 'Abū Ḥanīfah reasoned that the transmitter would not be regarded to be worthy of transmitting ḥadīth. Zakī-ad-Dīn Shaᶜbān, pp. 63-65.

but one or more of them contain additional information which is not contained in the others, 'Abū Ḥanīfah will not accept that additional information, but will follow instead only that upon which all of the ḥadīth agree

7. 'Abū Ḥanīfah rejects isolated ḥadīth which pertain to matters of the nature of ᶜumūm al-balwā [general necessity][1] when the rulings in those ḥadīth are unknown to the Kūfan fuqahā' or through other well-established sources of law

8. 'Abū Ḥanīfah rejects isolated ḥadīth whenever any of the Companions, who held to a practice contrary to that ḥadīth, is known to have rejected it

9. Similarly, 'Abū Ḥanīfah rejects isolated ḥadīth whenever any of the highly regarded Muslims of the early generations [as-salaf] are known to have rejected them

10. When isolated ḥadīth which stipulate the severity of accepted and well-established criminal punishments [ḥudūd] and other punitive measures [ᶜuqūbāt] differ with each other, 'Abū Ḥanīfah follows those ḥadīth the stipulations of which are the least severe[2]

11. Similarly, when isolated ḥadīth which stipulate what the offenses are for which punishments are to be inflicted conflict with each other, 'Abū Ḥanīfah follows those ḥadīth which make the minimum offense greatest[3]

12. When two or more isolated ḥadīth conflict with each other on the same matter, 'Abū Ḥanīfah follows those ḥadīth which are supported by the largest number of āthār

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

[2]It might be noted that 'Abū Ḥanīfah does not regard isolated ḥadīth as being an independent source for establishing criminal punishments and punitive measures, because he regards such matters as being of the nature of ᶜumūm al-balwā.

[3]For example, 'Abū Ḥanīfah--as al-Kawtharī points out--rejects a ḥadīth which states that a thief's hand should be cut off for stealing a quarter of a piece of gold for a ḥadīth which sets the minimum at ten pieces of silver.

13. 'Abū Ḥanīfah will reject isolated ḥadīth whenever they are contrary to the ʿamal of the Companions and Successors in any of the cities in which they settled

14. 'Abū Ḥanīfah stipulates that the transmitter of the ḥadīth must have retained the ḥadīth in perfect memory from the time he first heard it until the time he transmitted it and that the transmitter must not have had to rely upon writing the ḥadīth down in order to transmit it

APPENDIX 2

SYMBOLS AND SPECIAL INDEXES FOR MĀLIK'S TERMINOLOGY IN THE MUWAṬṬA'

TABLE 1

KEY TO SYMBOLS

Symbol	Meaning
-o	sign of negation, as in -x [not x; there is no x]
ō	"on; in accordance with," as in x̄ [in accordance with x. [ᶜalā hādhā]
:	"and," when joining qualifiers.
ẋ	"in," as in ẋ, "in x, on this matter."
]	"from; of," as in]Ib,"of the people of knowledge in our city."
o'	"other than," as in x', "a different x, a contrary precept."
;	"but rather," as in -x;x',"not this precept, but rather another precept."
1	"anyone" ['aḥad], as in -st1]Iqlx, "I have never heard any [not one] of the men of knowledge say that."
@	"all" [kull], as in @dqlx, "all those I met [in my early years] said this."
&	"and," but only when used within the qualifying expression and not when joining different qualiers, as in q&ḥ, "of old and late" [qadīman wa ḥadīthan].
?	"is there?"
A	"al-'amr" [the directive].
Ā	"ᶜalā hādha-l-'amr" [in accordance with this directive].
Ȧak	"I follow ['ākhudhu bi] this directive."
Ȧl	"al-ᶜamal"
Alẋ	"al-ᶜamal fī x" [used for the chapters in the Muwaṭṭa' that are so entitled. Not a term].
AlN	"al-ᶜamal ᶜindanā"
AlNs . . .	"ᶜamal an-nās"
AMN	"al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā"
AMN-XN . .	"al-'amr al-mujtamaᶜ ᶜalaihi ᶜindanā al-ladhī la-khtilāf fīhi"
AN	"al-'amr ᶜindanā"
ANx̄	"wa ᶜalā hādhā al-'amr ᶜindanā"
AN-X . . .	"al-'amr ᶜindanā al-ladhī la-khtilāf fīhi"
ANn	"this is the AN that we hold to [na'khudhu bihi]"
ANs	"'amr an-nās"
ANsN . . .	"wa hādhā 'amr an-nās ᶜindanā"
A-X	"al-'amr al-ladhī la-khtilāf fīhi"
A-XN . . .	"al-'amr al-ladhī la-khtilāf fīhi ᶜindanā"

TABLE 1--Continued

b	"bi-baladinā" [in our city"
-bg	"mā balaghanī" or "lam yablughnī" [nothing has reached me; I have not heard]
d	"'adraktu" [I met (during the early years of my life)]
F	"al-fuqahā'"
FN	"fuqahā'unā"
ḥb	"hādhā 'aḥabb mā samiᶜtu 'ilayya," etc. [this is what I regard as preferable of all that I have heard, or I prefer this]
ḥd	"ḥadd" [a limit]
ḥdmᶜrfmqt .	"ḥadd maᶜrūf mawqūt" [a limit well-known and stipulated]
ḥth	"ḥadīth"
I	"'ahl al-ᶜilm" [the people of knowledge]
Ib	"'ahl al-ᶜilm bi-baladinā [the people of knowledge in our city]
Ij	"'ijmāᶜ" [consensus]
Ijt	"ijtihād" [the exercise of one's reason to formulate an independent legal judgment]
IjtIm . . .	"ᶜala-jtihād al-'imām" [this is in accordance with the independent legal judgment of the 'imām]
Im	"al-'imām"
Ims	"al-'a'immah" [the 'imām's]
Inh	"'ahl al-ᶜilm yanhawna ᶜan" [the people of knowledge prohibit (this)]
Jb	"al-jamāᶜah bi-baladinā" [(our) group in our city]
jz	"yajūz, jā'iz, etc" [this is permissible]
lx	"like x"
lxAl . . .	"wa ka-dha-l-ᶜamal" [and the ᶜamal is also like this]
M	"mujtamaᶜ ᶜalaihi" [having consensus upon it]
-Mḥth . . .	"there is no consensus on this ḥadīth"
Māḍ	"al-māḍī" or "mā maḍā" [that which was established in the past]
mal	"maᶜmūl bihi" [having been put into practice]
Mḍ	"maḍat" or "maḍā" [it has been established in the past]
MḍS	"maḍat as-sunnah"
mk	"makrūh" [abhorrent]
Ms	"al-muslimīn" [of the Muslims]
N	"ᶜindanā" [with us; in our city; in our opinion]
Ns	"an-nās" [the people]
q&ḥ	"qadīman wa ḥadīthan" [of old and of late]
ql	"yaqūlūn" or "yaqūl" [they say; he says; they said, etc.]
rḍ	"man 'arḍā" [those with whom I am pleased]
ry	"rā'y" [opinion]

TABLE 1--Continued

S	"as-sunnah"
SMs	"sunnat al-muslimīn"
SN	"as-sunnah ᶜindanā"
SN-X . . .	"as-sunnah ᶜindanā al-lattī la-khtilāf fīhā"
-XN . . .	"as-sunnah al-lattī la-khtilāf fīhā ᶜindanā"
Sth-XN . .	"as-sunnah ath-thābitah al-lattī la-khtilāf fīhā ᶜindanā"
shk	"shakk" [doubt]
-shkx̄ḷIb .	"there is no doubt on this matter in a single of the people of knowledge in our city"
Slṭ	"as-sulṭān" [the civil authority]
st	"samiᶜtu" or "kuntu 'asmaᶜ" [I have heard]
stx	"I heard x"
-T	"no term," i.e. there is no term in the chapter
wj	"wājib" [obligatory]
x	"this; this matter; that which; etc."
-x	"not x," i.e. it is not this
x̄	"on x," i.e. in accordance with this
ẋ	"in x," i.e. in this matter
x'	"other than x," i.e. a contrary precept
x̄dIb . . .	"wa ᶜalā hādhā 'adraktu 'ahl al-ᶜilm bi-baladinā" [I found the people of knowledge in our city doing this (or holding to this) early in my life]
xjz	"hādhā jā'iz," etc. [this is permissible]
x-jz	"this is not permissible"
X	"ikhtilāf" [difference of opinion]
-X	"la-khtilāf" [no difference of opinion]
-z	"mā zāl" or "lam yazal" [it has not eased to be; it still is; it has always been]
-zx̄Ib . . .	"lam yazal ᶜalā hādhā 'ahl al-ᶜilm bi-baladinā"
-zInhx .. .	"lam yazal 'ahl al-ᶜilm yanhawna ᶜan hādhā"

TABLE 2

THE DISTRIBUTION OF TERMS

ACCORDING TO CHAPTERS

Abbr. of Chapter	Page Numbers, Full Title, Length
1. Ṣ/wqt	(1:3-18),"K. Wuqūt aṣ-Ṣalāh," [15]
	ĀdNs&Ib
2. Ṭ	(1:18-67),"K. aṭ-Ṭahārah," [49]
	AN [4] Alχ [6]
3. Ṣ	(1:67-100), "K. aṣ-Ṣalāh," [33]
Sχ	AN [2] -bgχ;xdNsx̄: -zx̄Ib Alχ [2]
4. Ṣ/sw	(1:100),"K. as-Sahw," [1]
	-T Alχ
5. Ṣ/jum	(1:101-113), "K. al-Jumu^{c}ah," [12]
	SN x̄dIb Alχ

TABLE 2--Continued

6. ṢAlrmḍ	(1:113-117), "K. aṣ-Ṣalāh fī Ramaḍān," [4]
	-T
7. ṢAll	(1:117-129), "K. Ṣalāt al-Lail," [12]
	AN AlN-x̄
8. ṢAljam	(1:129-143), "K. Ṣalāt al-Jamāᶜah," [14]
	-T Alx
9. ṢAlqṣr	(1:143-177), "K. Qaṣr aṣ-Ṣalāh fi-s-Safar," [34]
	-T Alx
10. ṢAlid	(1:177-183), "K. al-ᶜĪdain," [6]
	S-XN MḍS-XN Alx
11. ṢAlxf	(1:183-186), "K. Ṣalāt al-Khawf," [3]
	-T

TABLE 2--Continued

12. Ṣ/ks	(1:186-190), "K. Ṣalāt al-Kusūf," [4]
	-T Alx
13. Ṣ/sq	(1:190-193), "K. al-Istisqā'," [3]
	-T Alx
14. Ṣ/qbl	(1:193-199), "K. al-Qiblah," [6]
	-T
15. Ṣ/qur'ān	(1:199-222), "K. al-Qur'ān," [23]
	AN Al-x̄ Alx
16. Ṣ/jnz	(1:222-244), "K. al-Janā'iz," [2]
	-T
17. Z	(1:244-286), "K. az-Zakāh," [42]

S-XN AMN: A-XN AN [5] Alx
SN-X AMN [2] AN: x̄drḍ]I
S-XN: stx]I A-XN

TABLE 2--Continued

	MḌS MḌS: x̄dIb SN [2] SN: x̄dIb A-XN: stI
18. ṢM	(1:286-312), "K. aṣ-Ṣiyām," [26]
	AN: x̄dIb
19. ṢM/kf	(1:312-322), "K. al-I^{c}tikāf," [10]
	Māḍ]S AN-X ANx̄
20. Ḥ	(1:322-426), "K. al-Ḥajj," [104]
	S A-XN [2] x̄dIb Ādlb [2] -XxN: ?1shkx AN [4] ANx̄ ANn Alx [4]
21. J	(2:443-472), "K. al-Jihād," [29]
	S x̂IjtIm: x-NAm^{c}rfmqt;IjtSlṭ Al-x̄: -Mhth Alx [2]
22. NDH	(2:472-482), "K. an-Nudhūr wa-l-'Aimān," [10]
	AN [3] Alx [2]

TABLE 2--Continued

23. D	(2:482-488), "K. aḍ-Ḍaḥāyā," [6]
	-T
24. D/dhb	(2:488-491 , "K. adh-Dhabā'iḥ," [3]
	-T
25. D/ṣd	(2:491-500), "K. aṣ-Ṣaid," [9]
	AMN AN
26. D/aq	(2:500-503), "K. al-ᶜAqīqah," [3]
	AN: -wj;ḥbAlx̄: NsN Alx
27. FRḌ	(2:503-523), "K. al-Farā'iḍ," [20]
MḍS AMN: S-X: x̄dIb	AMN [3] AMN-X: x̄dIb [4] AMN: x̄dIb [3] A-X: -shkḷIb: lxAl x̄dIb
28. NK	(2:523-550), "K. an-Nikāḥ," [27]
@dqlx	AN [4] stx: ANx̄ stx: ANsNx̄ [2]

TABLE 2--Continued

29. NK/ṭlq	(2:550-601), "K. aṭ-Ṭalāq," [51]

SN-X̄
MḍS
SN: SNx̄-shkẋ-Xẋ x̄dIb [2] AN [10]
SN ANx̄ [4]
xAxN: stx]I

30. NK/rḍ	(2:601-609), "K. ar-Riḍā^{c}," [8]

Al-x̄

31. B	(2:609-687), "K. al-Buyū^{c}," [78]

AMN-X AN [12] -zĀNsN: xjz
AMN [13] ANx̄ [2] -zx̄ANsN
A-XN -zInhx AN: ĀJb ḥbx: -zx̄ANsN
Amk-XN -zx̄AN -zx]AlNsjz: -zx̄Ib
-XẋN AN:-zĀNsN: xjz -hḍm^{c}rfẋN: ẋ-Almal
-xN;x'

32. B/qrḍ	(2:687-703), "K. al-Qirāḍ," [16]

x-jz;x'&Māḍ]SMs
x-jz: x-]SMs AMN

33. B/msq	(2:703-711), "K. al-Musāqāh," [8]

SN AN ANs
S AN: stx AlNsAẋN
ANx̄

TABLE 2--Continued

34. B/kr	(2:711-712), "K. Kirā' al-'Arḍ," [2]		
	-T		
35. B/shf	(2:713-719), "K. ash-Shuf^{c}ah," [6]		
	x̄S-XN	AN [2] ANx̄ -ḥdẋN -xN	
36. QḌ	(2:719-761), "K. al-'Aqḍīyah," [42]		
MḍS [3] SN [2] S	AMN [4] A-XN AN: A-XN AN: A-XN: ḥbx AN-X [2]	AN [9] ANx̄ [3]	Al-x̄;x̄'MḍANsN Almal
37. QḌ/wṣ	(2:761-772), "K. al-Waṣīyah," [11]		
SthN-X SN	AMN [2] AN-X	AN [3] Ḍak	
38. ITQ	(2:772-787), "K. al-^{c}Itq wa-l-Walā'," [15]		
	S-XNx'	AMN [3]	

TABLE 2--Continued

39. ITQ/ktb	(2:787-810), "K. al-Mukātab," [23]

]SMs-X AMN-X AN [6] stx]I: stx]I: x̄dAlNsN
]SMs AMN [6] AN: -st1]Imsx̄: st]IqlxAjz&x-wj
x-]SMs A-XN

40. ITQ/dbr	(2:810-819), "K. al-Mudabbar," [9]

S

41. ḤD	(2:819-842), "K. al-Ḥudūd," [23]

AMN [3] x̄dIb AN [7]
A-XN ANx̄

42. ḤD/shrb	(2:842-849), "K. al-'Ashribah," [7]

SN -zĀIb

43. ḤD/aql	(2:849-877), "K. al-ᶜUqūl," [28]

AMN [6]
-AMNx̄
AMN-X x̄ryFN AN [14] Al-x̄
A-XN: st]I [4] Alx̄ [2]
AN-X [2]

TABLE 2--Continued

44. ḤD/qsm	(2:877-884), "K. al-Qasāmah," [7]

A-XN AN
AMN: st]rḍ: x̄Ijmsq&h: S-XN: -zx̄AlNs AN: -st1]Iqlx

Note: The remaining seventeen chapters of the Muwaṭṭa' (pp. 884-1004) contain no terms. They are chapters pertaining to matters of belief, character, and manners. One of the chapters, however--"Kitāb al-Salām," (2:959-963)--contains an Alx chapter on how one should give greetings.

TABLE 3

INDEX TO SUNNAH TERMS

Term	Chapter and Page Number
S-XN	Ṣ/id: 177; Z: 246, 252; ITQ: 775.
S-XN$\bar{x}$	B/shf: 713.
AMN: stx]rḍ: $\bar{x}$IjIms q&ḥ: S-XN: -z$\bar{x}$AlNs	ḤD/qsm: 879.
S-XN: stx]I	Z: 276.
MḍS-XN	Ṣ/id: 182.
SN-X$\bar{x}$	NK/ṭlq: 586.
SthN-X	QḌ/wṣ: 765.
SN: SN$\bar{x}$-shkx&-Xx	NK/ṭlq: 568.
SMs-X	ITQ/ktb: 804.
AMN: S-X: $\bar{x}$dIb	FRḌ: 520.
MḍS	FRḌ: 507; NK/ṭlq: 569; QḌ: 722, 724, 725.
M$\bar{a}$ḍ]S	ṢM/kf: 318.
MḍS: $\bar{x}$dIb	Z: 280.
MḍSMs	B/qrḍ: 692.
]SMs	ITQ/ktb: 804.
x-jz: x-]SMs . . .	B/qrḍ: 693.
AMN: x'-]SMs . . .	ITQ/ktb: 791.

INDEX TO SUNNAH TERMS--Continued

TABLE 4

INDEX OF REFERENCES

TO THE PEOPLE OF KNOWLEDGE

Term	Remainder of Usage Chapter and Page Number
Apparent Allusions to Consensus	
-zx̄Ib . . .	[-zĀIb] Ḥ: 338, 364; NK/ṭlq: 590; ḤD/shrb: 844.
	[-bgẋ;xdNsx̄: -zx̄Ib] Ṣ: 71.
	[-zx]AlNs: xjz: -zx̄Ib] B: 653.
-zInhx	[Amk-XN: -zInhx] B: 673.
x̄dIb . . .	Ṣ/jum: 105; Ḥ: 335; FRḌ: 522; NK/ṭlq: 589; ḤD: 826.
	[AMN: S-XN: x̄dIb] FRḌ: 520.
	[MḍS: x̄dIb] Z: 280;
	[SN: x̄dIb] Z: 268.
	[AMN-X: x̄dIb] FRḌ: 506, 515, 517, 518.
	[AMN: x̄dIb] FRḌ: 503, 511, 514.
	[AN: x̄dIb] ṢM: 309.
x̄dNs&Ib	[ĀdNs&Ib] Ṣ/wqt: 13.
@dqlx . . .	NK: 541.
-shkṯIb	[A-X: -shkṯIb: lxAl] FRḌ: 521.
?1shkẋ	[-XẋN: ?1shkẋ] Ḥ: 386.
x̄ryFN . . .	ḤD/aql: 865.

INDEX OF REFERENCES TO THE

PEOPLE OF KNOWLEDGE--Continued

Allusions to Groupings of the People of Knowledge

x̄Jb	[ĀJb: AN] B: 615.
x̄drḍ]I . .	[AN: x̄drḍ]I] Z: 268.
stx]rḍ	[AMN: stx]rḍ: x̄IjImsq&ḥ: S-XN: -zx̄AlNs] ḤD/qsm: 879.
stx]I	[S-XN: stx]I] Z: 276. [A-XN: stx]I] Z: 250. [AN: stx]I] NK/ṭlq: 568. [AN: -st1]Imsx̄': stx]I] ITQ/ktb: 788. [stx]I: stx]I: x̄dAlNsN] ITQ/ktb: 788.
stx	[AN: stx] B/msq: 708. [stx: ANsNx̄] NK: 534, 565.
ẋ-Am^{c}rfmqt	[xīj̄tIm: ẋ-Am^{c}rfmqt;xīj̄tSlṭ] J: 456.
ẋ-ḥdm^{c}rfN	[ẋ-ḥdm^{c}rfN: ẋ-Almal] B: 671.

TABLE 5

INDEX TO A-XN'S

TABLE 6

INDEX TO AMN'S

TABLE 7

INDEX TO AN'S

Term	Chapter and Page Number
AN	T: 22, 60, 63, 63; Ṣ: 86, 92; Ṣ/l: 119; Ṣ/qur'ān: 207; Z: 254, 255, 255, 266, 269; Ḥ: 336, 355, 360, 404; NDH: 473, 474, 479; D/sḍ: 496; NK: 525, 530, 530, 536; NK/ṭlq: 556, 563, 578, 581, 581, 583, 583, 592, 593, 594; B: 610, 615, 619, 638, 644, 646, 661, 662, 665, 670, 671, 676; B/msq: 705; B/shf: 715, 717; QḌ: 732, 733, 735, 735, 738, 743, 748, 753, 758; QḌ/wṣ: 769, 770, 771; ITQ/ktb: 789, 794, 798, 800, 810, 816; ḤD: 827, 830, 836, 836, 837, 837, 838; ḤD/aql: 857, 858, 858, 859, 860, 862, 863, 864, 864, 865, 869, 870, 871, 872; ḤD/qsm: 881.
AN$\bar{x}$	ṢM/kf: 315; Ḥ: 362; NK/ṭlq: 560, 569, 571, 588; B: 621, 666; B/msq: 710; B/shf: 717; QḌ: 726, 744, 756; ḤD: 830.
-z$\bar{x}$AN . . .	B: 684.
AN: $\bar{x}$dIb	ṢM: 309.
AN: $\bar{x}$drḍlI	Z: 268.

INDEX TO AN'S--Continued

TABLE 8

INDEX TO TERMS

WITH ^cAMAL AND AN-NĀS

Term	Remainder of Usage Chapter and Page Number
Negative ^cAmal Terms	
Al-x̄	Ṣ/qur'ān: 206; NK/rḍ: 608; ḤD/aql: 851.
	[Al-x̄;x̄'MḍANsN] QḌ: 748.
	[Al-x̄: -Mḫth] J: 449.
AlN-x̄	Ṣ/l: 125.
ẋ-Almal	[ẋ-ḥdm^crfN: ẋ-Almal] B: 671.
Positive ^cAmal Terms	
-zx̄AlNs	[AMN: stx]rḍ: x̄IjImsq&ḥ: S-XN: -zx̄AlNs] ḤD/qsm: 879.
-zx]AlNs	[-zx]AlNs: xjz: -zx̄Ib] B: 653.
x̄dAlNsN	[stx]I: stx]I: x̄dAlNsN] ITQ/ktb: 788.
AlNsAẋN	B/msq: 709.
lxAl	Z: 275.
	[A-X: -shkḷIb: lxAl] FRḌ: 521.
Almal	QḌ: 735.

INDEX TO TERMS WITH

ᶜAMAL AND AN-NĀS--Continued

Terms Using an-Nās

-zx̄ANsN	B: 636.
	[ḥbx:-zx̄ANsN] B: 661.
	[AN: x-wj;ḥbAlx̄: -zx̄ANsN] D/aq: 502
	[AN:-zĀNsN: xjz] B: 670.
x̄'MḌANsN	[Al-x̄;x̄'MḌANsN] QḌ: 748.
x̄dANs&Ib	[ĀdNs&Ib] Ṣ/wqt: 13.
x̄ANsN	[stx: x̄ANsN] NK: 534, 565.
x̄dNs	[-bgx̧;xdNsx̄: -zx̄Ib] Ṣ: 71.
ANs	B/msq: 709.

TABLE 9

INDEX TO ᶜAMAL CHAPTERS

SELECTED BIBLIOGRAPHY

SELECTED BIBLIOGRAPHY

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