CHAPTER FIVE

MĀLIK'S TERMINOLOGY

Introduction

Mālik's terminology in the *Muwaṭṭa'* is one of the book's most intriguing characteristics. His distinctive terms occur in most available recensions of the work.[1] Variations occur between the terms Mālik uses in the different transmissions of the *Muwaṭṭa'*, especially that of ʿAlī ibn Ziyād (of Qayrawān), which is one of the earliest transmissions of the work. The somewhat later recensions of Abū Muṣʿab al-Zuhrī (of Medina), ʿAbd-Allāh ibn Maslama al-Qaʿnabī (of Medina), Suwayd ibn Saʿīd al-Ḥadathānī (of Iraq), and Yaḥyā ibn Yaḥyā al-Laythī (of Andalusia) show strong overriding similarities in Mālik's terminology, although they too exhibit differences.

Mālik's *Muwaṭṭa'* terminology has parallels in the *Mudawwana*, although terminologies are not as conspicuous in the *Mudawwana* or as central to its structure and purpose as they are in the *Muwaṭṭa'*. Most terms cited in the *Mudawwana* come directly from Mālik.[2] Occasionally, the *Mudawwana* transmits similar terminological expressions from his teachers Rabīʿat

[1] Mālik's terminology does not occur in al-Shaybānī's recension of the *Muwaṭṭa'*. As a rule, al-Shaybānī discusses legal materials in the *Muwaṭṭa'* that are relevant to his Kufan Ḥanafī point of view. He omits Mālik's comments, arguments, and terminology, since they are not relevant to his purpose. As for Mālikī transmissions of the *Muwaṭṭa'*, the printed version of Ibn al-Qāsim's version may at first appear to be an exception. But we do not actually have Ibn al-Qāsim's original transmission in the presently available edition. Rather, we are dealing with a reworking of it by ʿAlī ibn Muḥammad al-Qābisī (d. 403/1012), who reorganized Ibn al-Qāsim's original recension about two hundred years later, making it into a *ḥadīth* work organized by transmitters (a *musnad*). It appears from the present edition's introduction, however, that Ibn al-Qāsim's original recension of the *Muwaṭṭa'* contained Mālik's standard terms. The editor, Muḥammad al-Mālikī, gives an example of Ibn al-Qāsim's transmission of Mālik's term AN (the precept among us; *al-amr ʿindanā*) (see Muḥammad al-Mālikī, "Introduction," *Muw.* [Ibn al-Qāsim], 13–14). Ample evidence from the *Mudawwana* shows that Ibn al-Qāsim cited Mālik's terms when transmitting the *Muwaṭṭa'*. Since al-Qābisī in keeping with his purpose generally deleted post-Prophetic reports and Mālik's legal statements from his reworking of the *Muwaṭṭa'*, Mālik's original terminology was not relevant to al-Qābisī's final edition.

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

al-Raʾy,[3] Abū al-Zinād,[4] Yaḥyā ibn Saʿīd,[5] Yazīd ibn ʿAbd-Allāh ibn Qusayṭ (d. 122/739),[6] and al-Zuhrī.[7] Mālik's students Ibn al-Qāsim and Ashhab also employ such terminologies in a manner similar to their teacher.[8] These citations of terms from Mālik's teachers and students in the *Mudawwana* show that Mālik's terminology did not begin with him but was part of an older and broader Medinese tradition that he inherited and refined. They provide valuable comparative background and merit close study.

Mālik's terminology in the *Muwaṭṭaʾ* and *Mudawwana* is archaic and provides a barometer reflecting shifting legal concerns in the formative period of Islamic law. It contrasts from the lexicon of standard legal terminologies that later prevailed in the discourse of the post-formative jurists, and it reflects technical considerations not readily discernible in the later jurists even within Mālik's own school. Indeed, the sparseness of the commentaries of later Mālikīs on Mālik's terminology indicates that his terms may not have remained clearly intelligible to them such as the nature of his dichotomy between *sunna*- and *amr*-terms. This terminological opposition draws a careful distinction between precept-based analogy and the authority of the *sunna*, which, as frequently noted, has the power to override analogy. Mālik's archaic terminology also reflects his attention to different levels of concensus or the lack of it among Medinese scholars, while many of the expressions he uses reflect his concern for indexing various levels of Medinese authority, consensus, and dissent that are not typical of or even germane to later juridical terminologies and their preoccupations.

Among the archaic expressions in Mālik's terminology is his consistent use of the term *ijtimāʿ* (concurrence) instead of consensus (*ijmāʿ*), which later became virtually the only term for juristic agreement. His contemporary Sufyān al-Thawrī also used the same term (*ijtimāʿ*).[9] Al-Shāfiʿī employed Mālik's expression AMN[10] (the agreed precept among us; *al-amr*

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[3] *Mud.*, 1:194; 3:96, 129.
[4] *Mud.*, 2:188.
[5] *Mud.*, 1:287; 2:194, 395; 3:84, 96, 129.
[6] *Mud.*, 1:110; 2:188.
[7] *Mud.*, 1:150, 287; 2:386, 395; 4:84, 120, 121.
[8] See *Mud.*, 1:241; 2:197, 369.
[9] SeeʿAbd al-Razzāq, *al-Muṣannaf*, 10:40.
[10] For purposes of practicality, I devised symbols such as SN (for the *sunna* among us; *al-sunna ʿindanā*), S-XN (for the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fihā ʿindanā*), AN (for the precept among us; *al-amr ʿindanā*), and AMN (for the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*) for Mālik's principal terms. I left other expressions, which I did not deem to be technically terminological,

al-mujtamaʿ ʿalayhi ʿindanā).[11] He also used a modified term AM (the concurred precept; *al-amr al-mujtamaʿ ʿalayhī*).[12]

The phraseology of Mālik's terminology is not fixed. It seems to vacillate between common semantic usages rooted in the original Arabic meanings of the words and the special technical limitations that Mālik generally imposes upon his terminology. One of the most important of these technical restrictions is Mālik's systematic limitation of *sunna*-terms in the *Muwaṭṭaʾ* to legal precepts that are contrary to standing juridical analogies. Despite irregularities, Mālik applies his terminology overall in a fairly systematic manner.

It is noteworthy that Mālik does not cite terms for most precepts in the *Muwaṭṭaʾ*, and further study is required to determine more exactly what dictated his use of terms in some cases as opposed to others. Still, Mālik's use of terminology is extensive and allows for a number of valid conclusions about his conception of Medinese praxis (*ʿamal*) and attitude toward dissent. As we will see, the manner in which Mālik uses terminology indicates that he was conscious of dissenting legal interpretations within and without Medina, regarded them to be significant, and felt it important to communicate his position regarding them to other jurists and students of the law.

Like other legists of the formative period, Mālik is generally reticent about revealing the workings of his legal reasoning to his broader literary audience, although Ibn al-Qāsim's statements in the *Mudawwana* make it clear that Mālik thought carefully and systematically about legal questions and occasionally revealed his thinking to his closest students.[13] We encounter disclosures of Mālik's legal reasoning in both the *Muwaṭṭaʾ* and *Mudawwana*. There are several examples in the *Muwaṭṭaʾ* when Mālik sets forth his reasoning. In the *Mudawwana*, it is typically Ibn al-Qāsim who explains how Mālik reasoned based either on what he heard him say

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in their original Arabic with translation since I regard them essentially as commentary. S stands for *sunna*, A for *amr*, M stands for concurrence (*mujtamaʿ*); N stands for "among us" (*ʿindanā*); the hyphen (-) stands for "no" (i.e., negation of dissent), and X stands for dissent (*ikhtilāf*). A key to my symbols and a comprehensive index of Mālik's terms and expressions in the *Muwaṭṭaʾ* recension of Yaḥyā ibn Yaḥyā may be found in my dissertation, "Mālik's Concept of *ʿAmal*," Appendix 2, 766–88.

[11] See Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:311.

[12] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:311–12.

[13] See *Mud.*, 1:20, 57, 69, 100, 192, 251, 256, 264, 272, 272, 284, 289; 2:189, 197, 391; 3:86; 4:92, 94, 116; ʿIyāḍ, *Tartīb*, 1:145–46; al-Shāṭibī, *al-Muwāfaqāt*, 4:286.

directly or what he came to understand during his decades with Mālik as a principal student.

Theories Regarding Mālik's Terminology

Modern scholars noted Mālik's distinctive terminology early, although they rarely gave it close attention. Ignaz Goldziher and Joseph Schacht treat it in passing. Although Goldziher does not analyze Mālik's terminology in the *Muwaṭṭa'*, he concludes that terms such as AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*) and Mālik's explicit references to the learned people of Medina such as "this is what I found the people of knowledge in our city following" (*wa ʿalā hādhā adraktu ahl al-ʿilm bi-baladinā*) and "this is the precept which the people of knowledge in our city continue to follow" (*wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-baladinā*) were indicants of Medinese consensus. Such Medinese consensus, in Goldziher's view was the chief underpinning of Mālik's legal reasoning.[14] Schacht holds that Mālik's explicit references to praxis and his *amr*-terms in the *Muwaṭṭa'* such as AN (the precept among us; *al-amr ʿindanā*), AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*), and A-XN (the precept without dissent among us; *al-amr al-ladhī lā ikhtilāf fihi ʿindanā*) are all identical references to Medinese praxis. His analysis does not go beyond that assertion.[15]

Fazlur Rahman, Ahmad Hasan, Zafar Ansari, and Muhammad Guraya consider Mālik's terminology somewhat more closely but without correlating it to the legal content of the precepts with which it was associated. They conclude that Mālik's terms were essentially equivalent in meaning and regard the semantic differences between Mālik's different usages as essentially fortuitous.[16] Fazlur Rahman holds that AMN stands for the

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[14] Goldziher, *Studien*, 2:214.

[15] Schacht, *Origins*, 62–63. My study confirms that these *amr*-terms all indicate Medinese praxis, although AN does not, as a rule, refer to Medinese consensus. AMN sometimes refers to majoritarian concurrence as opposed to the complete agreement indexed by A-XN.

[16] The study of terms, chains of transmission, and similar types of technical data requires careful correlation between form and content. In the absence of drawing meaningful correlations between the terms and their concrete legal purport in context, the researcher is apt to fall into the common statistical fallacy of generalizing about large quantities of data merely on the basis of outward appearances and the simple observation of frequencies and numerical proportions, which are essentially meaningless in the absence of sound correlations between them and their referents.

sunna in the sense of the "living" *sunna* of the community. He asserts that the term exemplifies how the concepts of *sunna* and consensus merged in the early Muslim community.[17] Similary, Ansari asserts that Mālik's term S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*) is equivalent to AMN. He holds that the explicit indication of consensus in S-XN shows that the authority of the precept arises from its having the support of local consensus, not from some other consideration.[18] Ahmad Hasan holds in like fashion that terms such as S-XN, MḌS (the *sunna* has long been established; *maḍat al-sunna*), SN (the *sunna* among us; *al-sunna ʿindanā*), AN, AMN, and A-XN are equivalent and are used interchangeably. He concludes that Mālik regarded Medinese praxis and the *sunna* as coterminus.[19] Guraya observes that Mālik never uses *sunna*-terms in conjunction with the legal decisions of caliphs, governors, or judges. He does not pursue this important observation further or conclude on its basis that there was a basic difference between Mālik's use of *sunna* and *amr*-terms, which is one of the most important aspects of Mālik's terminology.[20]

My dissertation, "Mālik's Concept of *ʿAmal*," presented the first extensive discussion of Mālik's terminology in a Western language. Since the

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Statistical fallacies are not uncommon in contemporary studies of Islamic legal origins and *ḥadīth*s. In Melchert's cursory reading of the *Muwaṭṭaʾ*, he generalizes on the basis of simple statistical frequencies between *ḥadīth*s, post-Prophetic reports, and legal opinions without correlating them to their legal purport in context. On this generalized and uncontextualized statistical basis, he concludes that Mālik sometimes follows the "manner of the traditionist-jurisprudents," by letting *ḥadīth*s "speak for themselves," although he never seems to follow "precisely the traditionalist form of argument." Melchert suggest that Mālik's perplexing approach to texts shows "signs of primitiveness." In this particular case, Melchert's statistical fallacy of not correlating the texts with their legal purport in the *Muwaṭṭaʾ* is aggravated by his attempt to evaluate Mālik's method against the dominant paradigm of "great synthesis" theory. Since Mālik's legal reasoning (and, for that matter, the reasoning of other non-Shāfiʿī jurists of the formative or post-formative periods) does not fit the logic or method of the four-source theory, Melchert is unable to assess their reasoning accurately on its own merits and, instead of examining the inadequacy of his own cognitive frames, he pronounces the verdict that Mālik represented a primitive stage in the evolution of Islamic jurisprudence (see Melchert, "Traditionist-Jurisprudents," 391).

17 Rahman, *Methodology*, 18, 13. My analysis indicates by contrast that AMN and Mālik's other *amr*-terms tend to be rooted in later legal interpretation (*ijtihād*), although occasionally with tenuous or indirect links to the *sunna*.

18 Ansari, "Development," 145.

19 Hasan, *Development*, 100–01. My analysis shows that although Mālik's terms sometimes overlap, they may be divided into inclusive and exclusive categories and tend to have fairly distinctive meanings.

20 Guraya, "*Sunnah*," 93–94.

work was never published, it had little effect on subsequent academic developments, although Yasin Dutton accepted my findings and elaborated upon them in his *Origins of Islamic Law*. Based on my conclusions, he notes that Mālik typically differentiates instances of praxis rooted in the Qurʾān and *sunna* from others based on legal interpretation. As noted earlier, though, Dutton insists somewhat equivocally that Mālik saw all elements of Medinese praxis—whatever their origin—as inextricably bound together in a single whole, "namely, the *ʿamal* of the people of Madina."[21] Dutton also draws attention to my notion of "mixed" praxis—types of Medinese praxis that were internally diverse—a phenomenon that tends to argue against Mālik having viewed Medinese praxis as having been inextricably bound in a single coherent whole.[22]

Wael Hallaq makes occasional references to Medinese legal terminology. He holds that terms such as "*sunna māḍiya, al-amr al-mujtamaʿ ʿalayhī ʿindanā*, etc." constituted continuous local practice for the Medinese. It was upheld by "the cumulative, common opinions of scholars," which became the "final arbiter in determining the content of the Prophet's Sunna." He contends that the traditional authority of the Medinese jurists as reflected in such terminology and "the newly circulating *ḥadīth*s" constituted two competing sources of Prophetic authority.[23] It would be more

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[21] Dutton, *Origins*, 3. Dutton observes on the basis of my assessment of *Muwaṭṭaʾ* terminology, for example, that it is questionable whether Mālik held that all types of Medinese praxis were equally authoritative. He notes that Mālik's letter to al-Layth ibn Saʿd seems to indicate that Mālik held that all categories of Medinese practice had a claim to being followed whatever their origin. He observes again, however, that my study of the *Muwaṭṭaʾ* indicates to the contrary that Mālik "drew clear distinctions between different types of *ʿamal* and the degree to which they were binding" (Dutton, *Origins*, 39–40). Mālik certainly felt that all types of Medinese praxis were worthy of being followed, and he seems to have veered from praxis very little himself, if at all. It is equally clear, however, that he made distinctions between precepts of praxis having greater or lesser authority, and he did not believe that Medinese praxis had such binding authority that it should be imposed by Islamic civil authorities upon all Islamic realms, a point which Dutton also acknowledges (Dutton, *Origins*, 40).

[22] See Dutton, *Origins*, 40.

[23] Hallaq, *Origins*, 105–06. In this assertion, Hallaq is projecting his own scholarly paradigm regarding the evolution of Islamic law on the material before him. The evidence is not speaking for itself. In the *Muwaṭṭaʾ* and *Mudawwana*, there is little evidence that Mālik and the Medinese regarded praxis and *ḥadīth*s as ever constituting competing sources of authority, and there is overwhelming testimony to the contrary. Nor is there any indication in the Medinese sources that they regarded *ḥadīth*s that were contrary to praxis as "newly circulating." This is again Hallaq's backprojection of an inadequate historiographical cognitive frame upon the evidence.

accurate to say that the Medinese looked upon praxis and *ḥadīth* as two congruent sources of legal authority, although the latter were consistently evaluated and interpreted against the background of praxis as the decisive criterion.

Norman Calder makes passing reference to Medinese use of praxis and Mālik's terms without treating them in detail. He draws attention to al-Shaybānī's references to praxis—"what the people do is like this" (*hākadhā amr al-nās*) and "the praxis of the people is like this" (*hākadhā ʿamal al-nās*)—which appear cognate to both Mālik's terminology and his reliance on Medinese praxis.[24] Susan Spectorsky gives a citation showing that Isḥāq ibn Rāhawayh used the term SN (the *sunna* among us; *al-sunna ʿindanā*), which is the most common of Mālik's *sunna*-terms.[25] Neither she nor Calder, however, attempts to draw structural parallels between these terminological references and Mālik's terminology in the *Muwaṭṭaʾ*.

Traditional Mālikī works contain surprisingly little discussion of Mālik's terminology. This is true even of Ibn ʿAbd al-Barr's elaborate *Muwaṭṭaʾ* commentaries, the *Istidhkār* and *Tamhīd*. The *Muwaṭṭaʾ* commentaries of al-Bājī and al-Zurqānī and Mālikī legal compendia tend to pass over the terms without comment. For the writers of both the compendia and the commentaries, Mālik's archaic terminology seems either to have become self-evident, no longer clearly meaningful, or, perhaps, even irrelevant. The sole concern of later legists was to clarify and often defend the precepts of the school, which involved extensive attention to dissenting opinions, not the idiosyncracies of Mālik's terminology.

Mālik's terminology was not interchangeable across the board, although it sometimes overlaps and certain terms are occasionally combined with each other as part of nuanced legal discussions. Overall, there are noteworthy differences between Mālik's terms, especially the fundamental dichotomy between *sunna* and *amr*-terms, the former being contrary to analogy while the latter flag standard analogues, which are generally based on legal interpretation (*ijtihād*) or have a significant interpretative component. It is also apparent from Mālik's terminology that he distinguishes

[24] See Calder, *Studies*, 198–99. Calder notes that early Ḥanafī works refer less frequently to praxis than the Medinese, but they too share the concept. He points out that Ḥanafī works register some early opposition to practice. Calder believes their opposition was not a rejection of praxis *per se* but of unacceptable popular practices. Cf. Hallaq, *Origins*, 106.

[25] Spectorsky, "*Sunnah*," 55.

between matters of praxis that are supported by local consensus and others which are not.[26]

Although the phraseology of Mālik's terminology in the *Muwaṭṭaʾ* is flexible, his terms in the presently available recensions of the work fall into several fairly consistent classifications. Some terms like AN (the precept among us; *al-amr ʿindanā*) and AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*) generally occur consistently in identical form. Numerous other expressions like "the praxis of the people is not in accordance with this among us" (*wa laysa ʿalā hādhā ʿamal al-nās ʿindanā*) and "the precept among us continues to be in accord with this" (*wa lam yazal al-amr ʿindanā ʿalā hādhā*) occur only once or twice. I would classify them as comments and not technical terms.

Mālik's terminology is not rigorous, yet it is internally coherent and maintains generally consistency. *Sunna*-terms are restricted to types of praxis deemed to have originated with the Prophet, which were not the product of subsequent legal interpretation (*ijtihād*). The term *amr* (precept), on the other hand, has a broad semantic range but is generally used for precepts derived from legal interpretation. When the word *amr* occurs in the term AMN, it seems invariably to refer to legal interpretation, although it frequently occurs in conjunction with rulings attested in Qur'ānic verses or solitary *ḥadīth*s (*aḥādīth al-āḥād*) that required interpretation for full legal application. When used with expressions like "the precept the people follow" (*amr al-nās*) and "this is the precept which the people of knowledge in our city continue to follow" (*wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm bi-bilādinā*), Mālik's *amr*-terms refer to Prophetic practices belonging to the category of the *sunna*.

I divide Mālik's principal technical terms such as AN, AMN, S-XN into two broad categories: exclusive and inclusive terms. Exclusive terms are restricted to a single usage. Inclusive terms overlap with others. The more a term is qualified by adjectives and other modifiers, the more restricted and exclusive it seems to become.

The least ambiguous and most exclusive terms in the *Muwaṭṭaʾ* are those containing negations such as S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*), AMN-X (the agreed precept among us about which there is no dissent; *al-amr al-mujtamaʿ ʿalayhi ʿindanā al-ladhī lā ikhtilāf fihi ʿindanā*;), and A-XN

[26] See Abd-Allah, "*ʿAmal*," 419–33.

(the precept about which there is no dissent among us; *al-amr al-ladhī lā ikhtilāf fihi ʿindanā*).

Why Does Mālik Use Terms in the *Muwaṭṭaʾ*?

The recensions of Mālik's *Muwaṭṭaʾ* contain several hundred terms and legal comments, although, as noted before, the majority of the material that Mālik presents in the book occurs without any terms being appended to them at all. This unexpounded material constitutes the backdrop against which Mālik's terminology functions and, as noted, requires careful analysis. On occasion, I attend to Mālik's unexpounded material, but, due to the limitations of the present study, I focus on the nature of the precepts associated with terms and comments and not those that occur without them.

Mālik adds comments and attaches his terms to precepts when treating matters of dissent between important legists in and outside of Medina or with regard to precedents regarded as unwarranted, notably those of certain Umayyad rulers other than ʿUmar ibn ʿAbd-al-ʿAzīz, even though later jurists may have concurred in rejecting those precedents. Mālik seems not to append his terms to precepts when they were matters of general agreement or matters of dissent that he does not seem to have deemed as particularly important. He states, for example, that the alms tax (*zakāh*) is levied on gold and silver, wheat, barley, dried dates, raisins, and olives. This was a matter of consensus among the legists, and the precept occurs without comment or terminological reference.[27] Similarly, there was consensus on the stipulation that bequests not exceed one third of the deceased's estate. Mālik simply cites the ruling without further exposition.[28] This pattern is repeated in numerous other examples, although it is not clear that it applies universally to the *Muwaṭṭaʾ*'s content.

In some cases, differences of opinion predominated among the Companions and Successors, but general consensus had been reached by Mālik's time. The Companions and Successors differed, for example, regarding whether or not eating meat roasted over an open flame broke one's state of ritual purity. Contrary solitary *ḥadīth*s supported both positions. General consensus had been reached in Mālik's time, however, that eating roasted meat did not break ritual purity and that the *ḥadīth*s to the

[27] *Muw.*, 1:244–45; Ibn Rushd, *Bidāya*, 1:147–48.
[28] *Muw.*, 2:763–64; Ibn Rushd, *Bidāya*, 2:202.

contrary had been repealed, although Aḥmad ibn Ḥanbal later revived the earlier difference. Mālik cites relevant *ḥadīth*s and post-Prophetic reports upholding the precept but cites no terms and gives no explanation.[29] Another example is the disagreement of the early legists about the validity of a master marrying his slave woman without emancipating her first. By Mālik's time, general consensus had been reached that such marriages were not permissible. The slave woman must first be emancipated and then married. Again, Mālik cites the ruling without a term or comment. The *Mudawwana* relates that Mālik's teacher Abū al-Zinād concurred on the prohibition and noted that the precept was "the *sunna* that I found the people following" (*al-sunna al-latī adraktu al-nās ʿalayhā*).[30]

One of the chief purposes of Mālik's terminology in the *Muwaṭṭaʾ* and ostensibly that of his teachers was to indicate the status of Medinese praxis or of their personal positions with regard to the dissenting opinions of other legists. In his letter to Mālik, Layth ibn Saʿd commends Mālik's knowledge of the dissenting legal opinions of the Companions.[31] Ibn Taymiyya contends that the *Muwaṭṭa*'s structure reflects Mālik's special attention to the divergent opinions of the Kūfans.[32] The link between Mālik's terminology and the divergent legal judgments among the earlier and later legists of Medina and other cities demonstrates not only that Mālik kept abreast of their opinions but acknowledged them as significant. It reflects in a fairly comprehensive manner the principle of *riʿāyat al-khilāf* (heeding dissent).

A number of Mālik's terms indicate general Medinese consensus. These are terms that explicitly negate the presence of dissent such as S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fīhā ʿindanā*), A-XN (the precept without dissent among us; *al-amr al-ladhī lā ikhtilāf fīhi ʿindanā*), and AMN-X (the agreed precept without dissent among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā wa al-ladhī lā ikhtilāf fīhi*). The terms clearly indicate regional, as opposed to universal consensus, but may not stand for complete consensus within Medina itself, since Mālik did not deem the legal opinions of all Medinese scholars to be worthy of consideration.[33] AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*), on the other hand, makes no explicit denial

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[29] *Muw.*, 1:25–28; Ibn Rushd, *Bidāya*, 1:24; al-Rasīnī, "*Fiqh*," 217.
[30] *Muw.*, 2:537–38; *Mud.*, 2:188; al-Zurqānī, *Sharḥ*, 4:37.
[31] Ibn al-Qayyim (Saʿāda), *Iʿlām*, 3: 396.
[32] Ibn Taymiyya, *Ṣiḥḥat uṣūl*, 79.
[33] See Abd-Allah, "*ʿAmal*," 72–76.

of local differences and seems sometimes to signify majority consensus in Medina often accompanied by a significant dissenting voice or voices within the city's legal tradition such as ʿUmar ibn al-Khaṭṭāb or his son Ibn ʿUmar.[34] One of the best illustrations of an AMN used as a probable indication of majority consensus with significant local dissent is the AMN regarding the inheritance of the son of unknown paternal descent. ʿUthmān ibn Kināna (d. ca. 185/ca. 801) held a dissenting opinion in the matter. Ibn Kināna was widely regarded as one of Mālik's most prominent, exacting, and well-studied students, and it appears in this instance that Mālik has deferred in his AMN to his principal student's dissenting voice.[35]

The term AN (the precept among us; *al-amr ʿindanā*) differs from the former terms in that it represents Mālik's position on matters regarding which there was significant dissent among Medina's prominent legists. AN also seems to index standing Medinese praxis, which sometimes existed independently of local scholarly consensus due to the effect of established judicial practice or the prestige of particular jurists regarding matters of local dissent that fell outside the jurisdiction of the court. Significant differences of legal opinion in Medina are clearly acknowledged in terms like "this is my considered opinion" (*hādhā raʾyī*), "I have this considered opinion" (*urā hādhā*), "this is what I prefer of what I have transmitted about this [matter]" (*hādhā aḥabb mā samiʿtu ilayya fī dhālika*), and so forth.[36]

Mālik's conception of the authoritativeness of Medinese praxis in matters of dissent is explicit in his letter to al-Layth ibn Saʿd. By contrast, al-Layth, adhered to Medinese praxis when it was supported by Medinese consensus but felt at liberty to diverge from it regarding precepts where the Medinese themselves had disagreed.[37] Assuming that Mālik's expressions of legal preference conform to Medinese praxis, it appears, as ʿAllāl al-Fāsī suggests, that Mālik regarded established praxis as the best criterion for legal precepts derived from ambiguous or contradictory referents and regarding which there had been significant dissent among the legists.[38] If Mālik relied upon praxis in conjectural or doubtful matters, it follows that he also held praxis to be authoritative for precepts that enjoyed the

[34] Abd-Allah, "*ʿAmal*," 424–28.

[35] See Abd-Allah, "*ʿAmal*," 702.

[36] Abd-Allah, "*ʿAmal*," 530. David Margoloiuth took note of juristic expressions such as "I like" and "I dislike," commenting that they imply that the jurists were "settling things according to their predilections: though doubtless these were what they supposed to be most agreeable to the system of the Koran." See Margoliouth, *Mohammedanism*, 94.

[37] See Abd-Allah, "*ʿAmal*," 304–05.

[38] Al-Fāsī, *Maqāṣid*, 147, 150–51.

general concurrence or complete consensus of the great legists to whom he ascribed.

Mālik frequently sets forth in the *Muwaṭṭaʾ* and *Mudawwana* broad statements of the legal percepts on the basis of which he reasons. His reasoning is often a direct application of these comprehensive rules, which, as noted earlier, was referred to by later jurisprudents as precept-based analogy (*al-qiyās ʿalā al-qiyās; al-qiyās ʿalā al-qawāʿid*) in contrast to referential analogy based on textual legal referents in Qurʾanic verses or Prophetic *ḥadīth*. Precept-based legal reasoning is common in the *Muwaṭṭaʾ* and conspicuous in the great compendia of legal interpretation (*ijtihād*) such as the *Mudawwana, Mawwāzīya, Wāḍiḥa*, and *ʿUtbīya*, which are the principal sources of Mālik's reasoning in unprecedented matters and unusual circumstances.[39]

In the *Muwaṭṭaʾ*, Mālik sets forth the fundamental precepts of the Medinese tradition, which constituted the basis of his legal positions and personal interpretations. Mālik's explicit defense of Medinese legal positions in the *Muwaṭṭaʾ* is, however, relatively rare and seems only to occur where Mālik regards it to be necessary, especially regarding issues surrounded by significant controversy. One such controversy was the Medinese position that a defendant—in the absence of binding evidence by the plaintiff—could establish his case in monetary disputes by taking an oath in conjunction with a solitary supporting witness. Mālik supports the Medinese position in this precept with one of his longest legal arguments in the *Muwaṭṭaʾ*. Al-Layth ibn Saʿd argued that Medinese praxis on the matter had never become established judicial practice anywhere else outside of Medina. He asserted further that the four rightly-guided caliphs never took it upon themselves to institute this unique Medinese practice outside of Medina. The Medinese praxis of making legal judgments in monetary disputes on the basis of the plaintiff's oath and a single supporting witness was vigorously disputed outside of Medina. Al-Shāfiʿī argued that it was never a matter of consensus even in Medina itself.[40]

Mālik was not the first jurist to cite Medinese praxis as a criterion for correctness in matters of legal dissent. The famous Medinese jurist, judge, and city governor Abū Bakr ibn Ḥazm, who was one of Mālik's teachers and died around the time that Mālik was thirty, was asked how to proceed in legal matters where the legists had differed. He replied, "If you find that

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

[40] Abd-Allah, "*ʿAmal*," 571–73.

the people of Medina have reached consensus on a matter, have no doubt that it is the truth."[41] Mālik clearly shared his teacher's opinion about Medinese consensus. The *Muwaṭṭaʾ* indicates, however, that there were types of praxis unsupported by the consensus of the Medinese legists. Mālik adhered to local praxis in these matters as well. Mālik's letter to al-Layth ibn Saʿd testifies to Mālik's preference of praxis even in matters of local dissent. Probably, he regarded them to be the best products of Medinese legal interpretation, despite significant differences of opinion about them in Medina. Mālik may also have had other reasons for following locally disputable praxis such as the general good (*al-maṣlaḥa*), given the customary authority precepts of praxis would had taken on in public life simply by having become established norms.

ʿIyāḍ and ʿAbd al-Wahhāb contend that Mālikī jurists disagreed on the authority of types of praxis that were not established in the Prophetic period but derived from later legal interpretation. Some of them—apparently like Mālik himself—regarded all types of praxis to be a standard criterion. Others attributed considerably less authority to inference-based praxis.[42] Although Mālik's use of praxis conforms with the first position, his attention to dissent within and without Medina acknowledges the legitimacy of the second. Mālik's awareness of the general validity of dissent in Islamic law is further borne out by his alleged refusal of al-Manṣūr's proposal that he make the Medinese tradition the standard legal norm for his empire. According to the account, Mālik affirmed the legitimacy of the divergent practices of different regions on the basis of the dissenting juridical opinions that had reached them from the time of the Companions.[43]

What Mālik Reportedly Said about His Terminology

The fullest statement I have found of Mālik's personal understanding of his terminology is a report from his nephew Ismāʿīl ibn Abī Uways.[44] Ibn Abī Uways relates what Mālik meant by the expressions AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*), "in our city" (*bi-baladinā*), "I found the people of knowledge [following]" (*adraktu ahl*

41 Wakīʿ, *Akhbār*, 1:143–44.
42 See Abd-Allah, "*ʿAmal*," 416–17.
43 ʿIyāḍ, *Tartīb*, 1:192; Sezgin, *Geschichte*, 1:409; Abd-Allah, "*ʿAmal*," 99–102, 392–94.
44 ʿIyāḍ, *Tartīb*, 1:194.

al-ʿilm), and "I heard some of the people of knowledge [transmit]" (*samiʿtu baʿḍ ahl al-ʿilm*). He relates that Mālik said:

> Regarding most of what occurs in the book (*Muwaṭṭaʾ*) [termed] as "considered opinion" (*raʾy*), upon my life it is not [exclusively] my considered opinion but what has been transmitted to me from a number of the people of learning and excellence and the Imāms, whose examples are worthy of being followed and from whom I received my learning. They were people heedful of God. It was a burden for me to mention them [by name], so I said, "this is my considered opinion." I said this whenever their considered opinion was like the considered opinion they found the Companions following and which I later found my teachers following. It is a legacy that one generation handed down to another until our time.
>
> Where I have used "I have [this] considered opinion" (*urā*), it is the considered opinion of a group of the Imāms of earlier times.
>
> Where I have used "the agreed precept among us" (AMN), it constitutes the opinions [*qawl*] of the people of legal learning and knowledge on which concurrence (*ijtimāʿ*) was reached without their having differed about [those opinions].
>
> Where I have used "the precept among us" (AN), it is the praxis that the people here have been following. Rulings (*al-aḥkām*) are handed down in accordance with it, and both the ignorant and knowledgeable are familiar with it.
>
> Similarly, where I have said "in our city" or "some of the people of knowledge," it is the opinions of some of the people of knowledge whom I regarded as preferable.
>
> Regarding what I did not hear transmitted from the people of knowledge, I made [my own] legal interpretation (*ijtihād*), taking into consideration the tradition (*madhhab*) of those I had known until my conclusion appeared to be true or nearly true. I did this so as not to depart from the tradition (*madhhab*) of the considered opinions (*ārāʾ*) of the people of Medina, even when I had not heard the matter transmitted specifically. I attributed the considered opinion to myself after exercising legal interpretation on the basis of the *sunna*, what the people of knowledge whose examples are worthy of imitation had long been following (*maḍā ʿalayhī*), and the norm (*amr*) that has been the praxis here from the time of God's Messenger, God bless him and greet him with peace, the rightly guided Imāms, and [the teachers] I knew. So even this is their considered opinion, and I did not turn to the considered opinion of others.[45]

The report of Ibn Uways contradicts my hypothesis that AMN often stood for majoritartian concurrence and not necessarily absolute consensus in Medina. Ibn Uways acknowledges no qualitative difference as far

[45] ʿIyāḍ, *Tartīb*, 1:194.

as consensus is concerned between AMN and other similar terms that explicitly negate the presence of dissent such as AMN-X, A-XN, and S-XN, although he does not reference those terms specifically.[46]

It is of note that the report of Ibn Abī Uways identifies AN as standing for precepts of Medinese praxis that became part of the judicial norms of the Medinese judiciary. Not surprisingly, Mālik describes such AN precepts as well-known to both the ignorant and the learned alike. The report makes no reference to local dissent among the Medinese scholars regarding the AN precepts. Yet, as indicated before, evidence that the AN precepts often reflected internal Medinese dissent is to be found in the *Muwaṭṭa'* itself, and the work also provides evidence that AN precepts often constituted the legal policy of the Medinese judiciary.[47] Judicial policy seems to have instituted such AN precepts as part of Medinese praxis for all people in the city, even for those who disagreed with them. Because of the power of the Medinese judiciary to make AN precepts part of uniform Medinese praxis in the face of local dissent, I suggest that non-judicial dissenting precepts were sometimes incorporated into Medinese praxis without uniformity in matters that did not fall under secular authority, producing types of Medinese praxis that were "mixed."[48] "Mixed" praxis is evidenced in the *Muwaṭṭa'* as the following chapters will show.

In the report of Ibn Abī Uways, Mālik claims to have adhered as closely as possible in his legal interpretations to the well-established *sunna* and to

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[46] I found little decisive evidence of differences of opinion among the scholars of Medina on AMN precepts, in contrast to the AN precepts, where the *Muwaṭṭa'* itself often references local dissent. My hypothesis that AMN refers to majority consensus is based on limited evidence. It is, however, supported by the opinion of al-Shāfiʿī that the Medinese scholars held dissenting opinions regarding AMN and AN (see Abd-Allah, "*ʿAmal*," 195–204). It is also indicated by the distinctive semantic difference between AMN and Mālik's negative consensus terms such as A-XN that explicitly deny the presence of dissent. Finally, my interpretation of AMN was also inspired by the convictions of ʿAllāl al-Fāsī and Muṣṭafā Zarqā that the concept of consensus as it emerged in Islamic legal history was originally conceived of as majoritarian and not absolute (see Abd-Allah, "*ʿAmal*," 195–204, 343–48).

Proper evaluation of al-Shāfiʿī's assertion that the Medinese disagreed concerning AMN precepts ultimately requires knowledge of who the dissenting scholars in Medina were. As Mālik's biography repeatedly indicates, he did not regard all scholars—whether Medinese or non-Medinese—as worthy of giving legal opinions even if they were pious and upright. In light of this, it is possible that the dissenting opinions al-Shāfiʿī had in mind regarding AMN precepts may have belonged to those Medinese scholars whom Mālik did not regard as worthy constituents of consensus.

[47] See Abd-Allah, "*ʿAmal*," 428–31, 732–34.

[48] "Mixed praxis," as indicated earlier, refers to praxis in which some of the Medinese follow Mālik's AN, while others followed the dissenting opinions of other Medinese jurists.

those precepts of law to which the Medinese traditionally subscribed and that had been incorporated in their communal praxis. Mālik asserts that his opinions are neither original, nor were they taken from non-Medinese sources. He portrays himself as a faithful transmitter of and adherent to the Medinese legacy. According to this claim, his legal views were invariably rooted either in the Medinese tradition or modeled after it on the basis of independent legal reasoning.

The *Muwaṭṭaʾ* shows that Mālik's opinions stay within the Medinese tradition. They are frequently corroborated by similar or supporting views of the earlier Medinese jurists. As the discussion of this section will show, post-Prophetic reports in ʿAbd al-Razzāq, Ibn Abī Shayba, and Ibn ʿAbd al-Barr give explicit evidence that Mālik's analogies and other aspects of his legal reasoning often agree verbatim with great scholars before him in the Medinese tradition. But Mālik's insistence on his lack of originality and dependence on the Medinese tradition in the report of Ibn Abī Uways must be modified to allow for the considerable scope of his personal acumen and legal genius as an independent thinker. His independence of mind is frequently evidenced in the *Muwaṭṭaʾ* and to a greater extent in the *Mudawwana*. Mālik's extensive use of expressions such as "I have this considered opinion" (*urā hādhā*) and "this is my considered opinion" (*hādhā raʾyī*) clearly indicate that he spoke with personal authority, however much his authority was rooted in and dependent on the legacy of earlier Medinese teachers.

Mālik's portrayal of his considered opinion (*raʾy*) in this report carries with it an implicit acknowledgement of the reality of local dissent. In this regard, it can be read as cognate to the same reality of local dissent that is represented in Mālik's AN precepts. Mālik asserts in the report that his considered opinion (*raʾy*) in most cases is in keeping with the considered opinion of more than one of the prominent Medinese jurists before him. The statement indicates that such matters also constituted points of dissent among the local jurists, since there were obviously other Medinese jurists from whom Mālik had heard contrary opinions. Similarly, Mālik states later in the report that he follows those opinions of the earlier jurists which he regarded to be preferable. This statement too implies that dissent was part of the local Medinese tradition. Thus, there were opinions that were to be preferred over others regarding identical precepts of law.

If terms in the *Muwaṭṭaʾ* like "this is my considered opinion" (*hādhā raʾyī*) and "I discern this" (*urā hādhā*) refer to opinions of Mālik that are in keeping with the opinions of certain prominent Medinese jurists as opposed to others, the question arises as to what distinction, if any, exists

between these expressions and Mālik's use of AN. I was not able to make a systematic study of the *ra'y*-terms of the *Muwaṭṭa'* or other similar terms expressing the legal judgments that Mālik personally preferred. Occasionally, he speaks of a particular judgment as his personal preference while simultaneously citing the term AN.[49] As a rule, however, Mālik's *ra'y*-terms and other expressions of his personal preference occur in isolation from the *Muwaṭṭa*'s *sunna*- and *amr*-terms. If AN terms refer to local praxis under the aegis of the Mediese judiciary and other mechanisms of social authority—as the report of Ibn Abī Uways and my analysis indicate—a second question arises regarding Mālik's *ra'y*-terms and those of his personal preference. Do they also represent Medinese praxis, or did they refer to Mālik's personal preference in matters of mixed Medinese praxis?

Terminology in the *Mudawwana*

As indicated, the *Mudawwana* contains occasional legal terms similar to those in the *Muwaṭṭa'*. Such terminology in the *Mudawwana* is incidental and does not play the same central role in the text as it does in the *Muwaṭṭa'*.[50] I refer to terminology from the *Mudawwana* whenever I find parallels between it and the select terminological precepts of the *Muwaṭṭa'*, which I studied, paying special attention to noteworthy discrepancies between the terms used in both books on the same or closely related precepts.

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[49] For example, *Muw.*, 2: 502, 661.

[50] I was not able to make a systematic study of the terminology of the *Mudawwana*. As indicated earlier, the work stands in need of further editing and indexing, which would also serve to facilitate such study. Terminology in the *Mudawwana* comes from multiple sources and diverse channels of transmission. Terminological references are sometimes included in the occasional inserts of additional basic information that Saḥnūn adds to the text (see Abd-Allah, "*'Amal*," 107–13). The terminology of the *Muwaṭṭa'* comes primarily from Mālik, although its origins were rooted in the broader Medinese legal tradition, which is occasionally indicated in the *Muwaṭṭa'* itself. Most terms cited in the *Mudawwana* appear to come from Mālik. Sometimes, they are cited verbatim from one of Saḥnūn's transmissions of the *Muwaṭṭa'*. Other citations of terms come from Mālik's teachers al-Zuhrī, Yaḥyā ibn Sa'īd, Rabī'a, Abū al-Zinād, and Ibn Qusayṭ. There are also a few terms attributed to Mālik's students Ibn al-Qāsim and Ashhab (see Abd-Allah, "*'Amal*," 546). Because of the variety of their sources, the terms of the *Mudawwana* do not seem to constitute a single consistent terminology. They do constitute, however, a valuable historical background against which to study Mālik's terminology. They also reflect that, to a considerable degree, Mālik's terms are an archaic Medinese phenomenon, which had parallels elsewhere in the formative period, but seems ultimately to have died out.

Explicit *ʿamal*-terms are not common in the *Muwaṭṭaʾ* or *Mudawwana*, although they may have been more common in Ibn Ziyād's early recension of the work. In Ibn Ziyād's recension, the expression "the praxis among us" (*ʿamal ʿindanā*) occurs where other recensions have the *amr*-term AN (*al-amr ʿindanā*; the precept among us). AN is the predominant term in Ibn Ziyād's recension as it is in the others, but his use of "the praxis among us" (*al-ʿamal ʿindanā*) serves as a further indication that AN did stand for Medinese praxis in Mālik's mind. The fact that AN also stood for praxis in Ibn Ziyād is borne out by his use of the expression "the AN is in accordance with this" (*wa ʿalā dhālika al-amr ʿindanā*).[51]

In the other available recensions of the *Muwaṭṭaʾ, sunna* and *amr*-terms eclipse praxis-terms. *ʿAmal*-terms occur frequently in the *Mudawwana*, but do not seem to outnumber *sunna* and *amr*-terms. Most of them seem to belong to the category of the negative *ʿamal*-terms, which state that the praxis of Medina was not in accordance with the legal issue in question. The *Mudawwana* also contains many *sunna* and *amr*-terms. The former appear to be more common than the latter, while the reverse is true in the *Muwaṭṭaʾ*. Of the *amr*-terms in the *Mudawwana*, AN is the most common according to my readings. This is also the case in the *Muwaṭṭaʾ*. The terms AMN and A-XN occur rarely in the *Mudawwana*. Both are among the standard terminology of the *Muwaṭṭaʾ*, and the handful of examples of them I found in the *Mudawwana* are cited directly from Mālik.[52]

Terms occur in the *Mudawwana* that Mālik does not use in the later recensions of the *Muwaṭṭaʾ*, even though, in some cases, the *Mudawwana* attributes those same terms to Mālik. Among the most notable of these are "the ancient precept" (*al-amr al-qadīm*), "the precept the people follow has been long established" (*maḍā amr al-nās*); "the ancient precept of the people" (*amr al-nās al-qadīm*), "the precept of the Prophet" (*amr al-nabī*), and "the state of affairs" (*al-shaʾn*), which appears to be a synonym of *amr*.[53] Ibn al-Qāsim relates to Saḥnūn, for example, that Mālik told him that the Medinese formula for legal oaths constituted the praxis (*ʿamal*) in accordance with which the precept the people follow had long been established (*maḍā amr al-nās*).[54] The *Mudawwana* states explicitly that for judges to hand down verdicts in the mosque is correct (*min*

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[51] See *Muw.* (Ibn Ziyād), 135; cf. ibid. 155, 173, 181, 199.

[52] *Mud.*, 4:282–83; 4:106; cf. Abd-Allah, "*ʿAmal*," 548.

[53] See *Mud.*, 1:24, 68, 102, 146, 193–95, 281, 293; 4:70–71, 76, 77; cf. Abd-Allah, "*ʿAmal*," 548.

[54] *Mud.*, 4:70–71.

al-ḥaqq) and pertains to the old way in which things were done in the past (*wa hūwa min al-amr al-qadīm*).[55] The expression "the precept of the Prophet" appears in a manner consistent with Mālik's use *amr*-terms in the *Muwaṭṭa'* to include precepts based either on Prophetic authority or on legal interpretation. What is especially distinctive about them is that they are not contrary to analogy with other precepts of law.[56]

[55] *Mud.*, 4:76.
[56] See Abd-Allah, "*'Amal*," 526–27.