

CHAPTER SIX

THE *SUNNA*-TERMS

GENERAL OBSERVATIONS ABOUT THE *SUNNA*-TERMS

I indexed forty *sunna*-terms in Yaḥyā ibn Yaḥyā al-Laythī's recension of the *Muwattaʿa*¹ and divide them into five main categories.² The first and numerically largest of these classifications is the term S-XN (the *sunna* among us about which there is no dissent; *al-sunna al-latī lā ikhtilāf fihā ʿindanā*) and its variations, all of which explicitly indicate Medinese consensus by denying the presence of dissenting opinions within the city. I found thirteen terms in Yaḥyā's recension that fall within this grouping.³

The second most common category is that of MḍS (the *sunna* has long been established; *maḍat al-sunna*), including similar expressions that employ the verb "*maḍat*" (to have been long established).⁴ As a corollary of the continued operativeness that it stands for, MḍS is also an explicit legal statement that the *sunna*-precept in question was never repealed. Such repudiation of the possibility of abrogation is often essential to Mālik's use of the term. I classified eight *sunna*-terms within this group.⁵ There is a ninth instance of "the *sunna* has been established, regarding which there is no dissent among us" (*maḍat al-sunna al-latī lā ikhtilāf fihā ʿindanā*),⁶ but I classified it among the S-XN terms because of its explicit denial of dissent.

The third category is that of SM (the *sunna* of the Muslims; *sunnat al-muslimīn*) and its variations. I found it five times in the *Muwattaʿa*.⁷ It occurs once as SM-X (*sunnat al-muslimīn al-latī lā ikhtilāf fihā*) (the *sunna*

¹ I was unable to index Mālik's terminology in the other available recensions, each of which contains conspicuous numbers of terms—often agreeing with Yaḥyā's transmission—but with noteworthy discrepancies here and there.

² See Abd-Allah, "*Amal*," 778–79 for the index of these five categories.

³ *Muw.*, 1:177, 182, 246, 252, 276; 2:502, 568, 586, 713, 765, 775, 804, 879.

⁴ Yasin Dutton notes that the term "*maḍat*" refers to a "continuous practice instituted in the past and still operative in the present." It does not merely indicate the idea of past practice as some Western scholars have presumed (see Dutton, *Origins*, 164).

⁵ *Muw.*, 1:208, 318; 2:507, 569, 692, 722, 724, 725.

⁶ *Muw.*, 1:182.

⁷ *Muw.*, 2:692, 693; 791; 804 (occurs twice here).

of the Muslims regarding which there is no dissent). Again, because of explicit denial of dissent, I classified SM-X with the S-XN terms. In another instance, SM occurs in conjunction with “*maḍat*,” MḍSM (the *sunna* of the Muslims has been long established; *maḍat sunnat al-muslimīn*), which I classified with the MḍS terms.

The fourth classification is SN (the *sunna* among us; *al-sunna ‘indanā*). It occurs ten times.⁸ It appears once in the form SN: ādlb (the *sunna* among us which I found the people of knowledge in our city following; *al-sunna ‘indanā al-latī adraktu ‘alayhi al-nās ‘indanā*). A fifth *sunna*-category is simply S (*al-sunna*) and occurs six times in Yaḥyā’s recension.⁹

The highest percentage of *sunna*-terms occurs in the chapter on the alms tax (*zakāh*), where variations of the term occur seven times,¹⁰ although Mālik’s forty *sunna*-terms are generally dispersed throughout the *Muwaṭṭa’*. They occur both in chapters pertaining to ritual and non-ritual concerns, although MḍS and SM occur exclusively in chapters pertaining to non-ritual matters. Conclusions about the meaning and implications of the *sunna*-terms are given at the end of this chapter.

EXAMPLES OF SUNNA-TERMS

1. S-XN: Zakāh on Gold and Silver

Mālik states the S-XN¹¹ that the alms tax is required on the base sum of twenty pieces of gold and two hundred pieces of silver.¹²

Mālik refers to this precept as S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fihā ‘indanā*) in the recensions of Abū Muṣ‘ab, al-Qa‘nabī, and Yaḥyā. Each of the three transmitters gives essentially the same material with minor variations in wording.¹³ Suwayd’s recension of the *Muwaṭṭa’* lacks this chapter. Instead, Suwayd has a short general chapter on the alms tax (*zakāh*) with mixed legal content. His

⁸ *Muw.*, 1:111, 268, 273, 276; 2:583, 706, 722 (occurs twice here), 770, 843.

⁹ *Muw.*, 1:92, 367, 463; 2:705, 735, 810.

¹⁰ *Muw.*, 1:246, 252, 268, 273, 276 (twice), 280.

¹¹ S-XN stands for “the *sunna* among us about which there is no dissent” (*sunna al-lattī lā ikhtilāf fihā ‘indanā*).

¹² *Muw.*, 1:246; *Muw.* (Dār al-Gharb), 1:336; *Muw.* (Abū Muṣ‘ab), 1:252; *Muw.* (al-Qa‘nabī), 279; *Muw.* (Suwayd), 178–81; *Muw.* (Riwāyāt), 2:233.

¹³ *Muw.* (Dār al-Gharb), 1:336; *Muw.* (Abū Muṣ‘ab), 1:252; *Muw.* (al-Qa‘nabī), 279. Both texts omit the word “in coin” (*‘aynan*), which occurs in the recension of Yaḥyā; cf. Ibn ‘Abd al-Barr, *al-Istidhkār*, 9:33.

cursory chapter includes some of the materials contained in the other recensions, which are distributed in those recensions among a variety of chapters. Since Suwayd does not cite the explicit precept given above, not surprisingly he fails to mention Mālik's S-XN term or an alternative for it.¹⁴ The precept does not occur in the presently available recension of Ibn Ziyād.

In the *Mudawwana*,¹⁵ Saḥnūn does not refer to the precept as an S-XN but as “a continually established *sunna*” (*sunna māḍiya*), an expression equivalent to Mālik's *Muwaṭṭa'* term MḍS (the *sunna* has long been established; *maḍat al-sunna*). The expression reflects the conviction that the precept had Prophetic origins and enjoyed unbroken continuity from the past to the present. In Saḥnūn's eyes as no doubt in Mālik's also, this precept was probably regarded as transmissional praxis, that is, praxis going back to the Prophet.¹⁶ Saḥnūn produces evidence in the *Mudawwana* attesting to the Prophetic roots of the gold standard, which is essential to this precept. He cites *ḥadīths* from Ashhab and Ibn Wahb in which the Prophet established the ratio of one to ten between gold and silver in the alms tax.¹⁷

In adducing such evidence, Saḥnūn's primary concern regarding this precept in the *Mudawwana* was to establish the gold and silver ratio for the alms tax as one to ten. In addition to the *ḥadīths* just mentioned, he produces reports indicating that the base sum of silver rested on the Prophet's statement that no alms tax is required for amounts less than five Prophetic ounces (*ūqiyya*) of silver. He then cites Ibn al-Qāsim's reasoning that one Prophetic ounce was equal to forty pieces of silver (*dirhams*) as indicated by another Prophetic statement that half a piece of gold (*dīnār*) amounted to twenty pieces of silver. On this basis, Ibn al-Qāsim reasons

¹⁴ *Muw.* (Suwayd), 178–81.

¹⁵ This chapter of the *Mudawwana* is a good example of the book's content and genre as compared with the *Muwaṭṭa'*. The bulk of Saḥnūn's material in the chapter comes from Mālik and Ibn al-Qāsim and is interpretative, focusing on atypical problems that required legal interpretation such as whether a man who possessed less than the base sum of gold—for example, ten pieces of gold—for more than a year (the required period for the alms tax to become due) but then sold them for two hundred pieces of silver (the required base sum for that metal) would he be required to pay the alms tax. Ibn Qāsim informs him that he would be immediately required to pay the alms tax in that case (*Mud.*, 1:208–10).

¹⁶ *Mud.*, 1:209; *Mud.* (2002), 2:90. Ibn Rushd reads Mālik's designation of the precept as a *sunna* in this case to indicate its origin in Prophetic legislation (see Abd-Allah, “*Amal*,” 410–15).

¹⁷ *Mud.*, 1:210; *Mud.* (2002), 2:93–95.

that the gold-silver ratio of one to ten for the alms tax is a continually established *sunna*.

Mālik's S-XN precept pertains to setting the base sum (*niṣāb*)¹⁸ of gold and silver for the alms tax. Silver was the common currency of transaction in Arabia during the Prophetic period and the silver standard in the alms tax was universally applied during that era.¹⁹ Consequently, the procedure in collecting alms on silver was a well-known matter of consensus among the jurists. The silver standard in the alms tax had been universally applied during the Prophetic period. Dissent regarding this precept did not concern silver, therefore, but only the definition of the base sum of gold for the alms tax.

Many *ḥadīths* and post-Prophetic reports in 'Abd al-Razzāq, Ibn Abī Shayba, and Ibn 'Abd al-Barr reflect the unchallenged predominance of silver in Arabia during the Prophetic period, although they also give isolated instances of the Prophet dealing with communities that used gold as their common currency. Some of these materials report that the Prophet set a gold standard for the alms tax and indemnities during his lifetime. The reports make it clear, however, that during the reign of 'Umar gold became a common currency parallel to silver because of its prevalence

¹⁸ The "base sum" (*niṣāb*) is the minimal amount upon which the alms tax is due after the passing of a full lunar year.

¹⁹ Numerous early post-Prophetic reports in 'Abd al-Razzāq and Ibn Abī Shayba reflect the predominance of silver in the earliest period. Such reports often give the silver standard exclusively without mentioning gold, indicating that the silver standard spread first, and the gold standard came into widespread use later ('Abd al-Razzāq, *al-Muṣannaf*, 4:83–84; Ibn Abī Shayba, *al-Muṣannaf*, 2:354–356). 'Abd al-Razzāq cites a disconnected *ḥadīth* from Ja'far al-Šādiq, for example, that the Prophet set the base sum of the alms tax at two hundred pieces of silver. Ja'far's *ḥadīth* makes no reference to gold ('Abd al-Razzāq, *al-Muṣannaf*, 4:92).

Ibn al-'Arabī agrees that confusion over the base sum for the alms tax in gold reflects the fact that gold was a little used currency in Medina during the Prophetic period. He asserts that the amount of the base sum in silver, which the Prophet set, was well known because of the currency's predominance. This was not the case with gold, which, although it was present in the markets of Prophetic Arabia, was treated as a commodity (*sil'a*) and not a currency because of its rarity (Abū Bakr ibn al-'Arabī, *Kitāb al-qabas fi sharḥ Muwaṭṭa' Mālik ibn Anas*, 2:457–59). Ibn al-'Arabī holds that the Companions set the base sum of gold by estimating its value in silver at the ratio of one to ten. In Suwayd's recension of the *Muwaṭṭa'*, Mālik reports in his short chapter on the alms tax that the caliph 'Umar set the poll tax (*jizya*) for non-Muslim clients of the state who lived in regions where gold was plentiful at four pieces of gold (*dīnārs*) and for non-Muslim clients in regions where silver was predominant at forty pieces of silver (*dirhams*) (*Muw.* [Suwayd], 179). The report indicates that 'Umar instituted poll tax payments in gold and silver on the same one to ten ratio. The same report occurs in the *Muwaṭṭa'* recensions of al-Qa'nabī, Abū Muṣ'ab, and Yahyā but is cited in their chapters on the poll tax (*Muw.* 1:279; *Muw.* [al-Qa'nabī], 312; *Muw.* [Abū Muṣ'ab], 1:290).

in caliphal regions such as Egypt.²⁰ In light of the early predominance of silver and the later emergence of gold, Ibn al-‘Arabī asserts that the definitive definition of the gold standard was primarily the work of the Companions based on their estimation of parallel values in silver. Thus, this S-XN, although rooted in Prophetic legislation, is a borderline case where the distinction between “transmissional praxis” and “old praxis” (*al-‘amal al-qadīm*), which was based on the legal interpretation of the Companions, is not forthright.

Mālik cites no *ḥadīths* or post-Prophetic reports in support of this ruling. The precept is one of many examples of an Islamic ruling of fundamental importance about which there was dissent but for which relatively few *ḥadīths* existed. Those few that did exist on the gold standard were not classified as being verifiably authentic, although they confirmed the general ruling. Ibn Abī Zayd states that the relevant *ḥadīths* regarding the Prophet’s setting the base sum for alms at twenty pieces of gold are weak. He contends that jurists accepted the precept on the basis of praxis, not textual evidence.²¹ Ibn Rushd and others agree that the base sum required in the alms tax for silver is supported by authentic *ḥadīths* but that no *ḥadīths* of verifiable authenticity establish the minimum amount required for gold. Al-Bāji concurs and gives the unsound *ḥadīths* in question. They can be readily found in ‘Abd al-Razzāq, Ibn Abī Shayba, and Ibn ‘Abd al-Barr.²²

Ibn Rushd confirms the opinion of Ibn Abī Zayd that Mālik derived this *sunna* precept from Medinese praxis.²³ In Mālik’s time, there was virtual consensus among the jurists of Medina, Kufa, and elsewhere on this S-XN

²⁰ See ‘Abd al-Razzāq, *al-Muṣannaf*, 9:295–96; Ibn Abī Shayba, *al-Muṣannaf*, cf. 5:344; Ibn ‘Abd al-Barr, *al-Istidhkar*, 25:12; Ibn ‘Abd al-Barr, *al-Tamhīd*, 14:189–90, 192.

²¹ Ibn Abī Zayd, *al-Nawādir*, 2:107.

²² Ibn Rushd, *Bidāya*, 1:150; al-Bāji, *al-Muntaqā*, 2:95. Ibn ‘Abd al-Barr states that no *ḥadīth* from the Prophet has been soundly transmitted on alms tax for gold. He then gives a *ḥadīth* from ‘Alī which stipulates twenty pieces of gold and notes that Abū Ḥanīfa is believed to have transmitted this *ḥadīth*, although it is not historically established that he did. He states that the masters (*al-ḥuffāz*) transmit the report from ‘Alī as a post-Prophetic report (Ibn ‘Abd al-Barr, *al-Istidhkar*, 9:34). Ibn Abī Shayba cites the post-Prophetic report from ‘Alī that the base sum for the alms tax is twenty pieces of gold (Ibn Abī Shayba, *al-Muṣannaf*, 2:357). ‘Abd al-Razzāq cites that the Prophet directed ‘Alī to take alms from 200 pieces of silver and twenty pieces of gold (‘Abd al-Razzāq, *al-Muṣannaf*, 4:89). Al-Qarāfi cites the *ḥadīth* of ‘Alī. He notes that it has a defective chain of transmission (al-Qarāfi, *al-Dhakhīra*, 3:11–12). Ibn Abī Zayd notes that the *ḥadīth* on the twenty pieces of gold is weak, although the people have accepted it through practice (*al-‘amal*) (Ibn Abī Zayd, *al-Nawādir*, 2:107).

²³ Ibn Rushd, *Bidāya*, 1:150.

precept, but it had not always enjoyed consensus. Al-Ḥasan al-Baṣrī is known for his dissenting position on the issue. He held that the base sum for the alms tax in gold was forty pieces of gold, not twenty.²⁴ Ibn Rushd and others mention that a small party of jurists agreed with al-Ḥasan without specifying who those jurists were.²⁵ According to Ibn al-ʿArabī, al-Ḥasan al-Baṣrī did not accept the one-to-ten ratio that the Companions had set as valid, which led to his dissenting position on the base sums required for the alms tax in gold and silver.²⁶ Al-Bājī contends that after al-Ḥasan's time (the generation before Mālik) complete consensus was reached on the standard opinion that the base sum for gold was twenty gold pieces.²⁷

In this precept as elsewhere, Mālik consistently uses his *sunna*-term for an anomalous precept of law. By invoking the term, he demarcates what he regards to be the proper boundaries of analogy. Significant legal difference existed between the Kufans and Medinese relevant to this S-XN precept on gold and silver ratios. It explains why Mālik cites a *sunna*-term in this case with its independent authority to restrict legal analogy. For the Kufans, the gold and silver ratio in the alms tax of one to ten constituted the standard legal analogy for all relevant legal matters involving stipulated amounts of bullion such as indemnities (*diyāt*) for wounds and manslaughter. The Medinese position held that the ratio of one to ten, as set forth in this S-XN precept, was contrary to analogy. It applied exclusively to the alms and poll taxes (technically acts of ritual) but did not apply to indemnities involving bullion payments (technically non-ritual matters of law) where the ratio was one to twelve.²⁸

²⁴ Ibn Rushd, *Bidāya*, 1:150; al-Bājī, *al-Muntaqā*, 2:95; Ibn ʿAbd al-Barr, *al-Tamhīd*, 7:18–19; idem, *al-Istidhkār*, 9:38–39; Ibn Abī Shayba, *al-Muṣannaf*, 2:357–58; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:86; Ibn al-ʿArabī, *al-Qabas*, 2:459.

²⁵ Ibn Rushd, *Bidāya*, 1:150 (20); al-Bājī, *al-Muntaqā*, 2:95; Ibn ʿAbd al-Barr, *al-Tamhīd*, 7:18–19; idem, *al-Istidhkār*, 9:38–39; Ibn Abī Shayba, *al-Muṣannaf*, 2:357–58.

²⁶ Ibn al-ʿArabī, *al-Qabas*, 2:457–59.

²⁷ Al-Bājī, *al-Muntaqā*, 2:95. Ibn ʿAbd al-Barr and ʿAbd al-Razzāq give evidence that challenges al-Bājī's contention. They report that Mālik's Kufan contemporary Sufyān al-Thawrī agreed with al-Ḥasan (Ibn ʿAbd al-Barr, *al-Tamhīd*, 7:18–19; idem, *al-Istidhkār*, 9:38–39; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:86). Ibn ʿAbd al-Barr also notes that most of the Ḍāhirīs, who were subsequent to Mālik's time, concurred with al-Ḥasan's opinion (Ibn ʿAbd al-Barr, *al-Tamhīd*, 7:18–19; idem, *al-Istidhkār*, 9:38–39).

²⁸ See Abd-Allah, "Amal," 553–54; al-Bājī, *al-Muntaqā*, 7: 68; al-Zurqānī, *Sharḥ*, 5: 137–39; Ibn Rushd, *Bidāya* (Istiḳāma), 2:248. Al-Shāfiʿī also makes reference to the different gold and silver ratios in Medina in his debate with al-Shaybānī. Al-Shaybānī takes the Kufan position that the standard ratio between gold and silver is one to ten. He accuses the Medinese of contradicting themselves by establishing the ratio of one to twelve in the

After stating the precept, Mālik's discussion that follows brings out the anomalous nature of this S-XN. He notes that the basic amounts required for gold and silver in the alms tax are independent of each other and do not correspond to the relative values of either. He states that if a person possessed one hundred and sixty pieces of silver in a city where the rate of exchange between gold and silver was one to eight according to local market value, such that the one hundred and sixty silver coins had the worth of twenty gold coins, that person would still not be required to pay the alms tax on the silver coins until they reached the base sum of two hundred pieces of silver. He emphasizes further that the size of the gold and silver coins as pertains to the requirement to pay the alms tax must be standard. Payment of the alms tax is not required, for example, on twenty gold coins or two hundred pieces of silver coins of substandard weight.²⁹

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

Mālik cites his S-XN term for the precept. He adds a reference to his having heard it from the people of knowledge.³⁰ The precept holds that the alms tax is not levied on any types of fruit such as pomegranates, peaches, and figs. Mālik states further that the alms tax is also not levied on freshly mown provender (*al-qadb*) or various types of edible greens (*buqūl*) nor on the money earned for selling them until that profit has remained in one's possession for the cycle of a full lunar year.³¹

Mālik adds to the *sunna*-term S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fihā 'indanā*) in this precept the observation that he heard it endorsed by "the people of knowledge whom [he] has heard" (*min ahl al-'ilm*). The term occurs with this comment

ratios of gold and silver in indemnities. Al-Shāfi'ī counters that one to twelve ratio is the standard analogy for the Medinese. They follow it in all pertinent matters of law other than the alms tax. They regard the ratio of gold and silver in the alms tax to be contrary to analogy, just as they believe that no analogies apply to the monetary values of the various types of livestock liable to the alms tax tithing. For the Medinese, the base sums required in alms tax for camels, cattle, and sheep are not analogous to each other ([Shāfi'ī Interlocutor], *Ikhtilāf Mālik*, 277–79; for examples, see *Muw.*, 2:833, 850).

²⁹ *Muw.*, 1:246–47.

³⁰ The S-XN term in full is "the *sunna* among us about which there is no dissent and what I have heard transmitted from the people of knowledge (*al-sunna al-lattī lā ikhtilāf fihā 'indanā wa al-ladhī sami'tu min ahl al-'ilm*).

³¹ *Muw.*, 1:276; *Muw.* (Dār al-Gharb), 1:372; *Muw.* (Abū Muṣ'ab), 1:286; *Muw.* (al-Qa'nabī), 309–10; *Muw.* (Dār al-Gharb), 1:372; *Mwt.* (*Riwayāt*), 2:284; Ibn 'Abd al-Barr, *al-Istidhkar*, 9:270.

in the recensions of Abū Muṣ‘ab, al-Qa‘nabī, and Yaḥyā. The chapter’s content is essentially the same in the three editions with slight textual differences.³² The Suwayd edition as it stands does not have this chapter, nor does the precept occur in the present fragment of the *Muwaṭṭa’* of Ibn Ziyād.

Saḥnūn has a short chapter in the *Mudawwana* on this topic, which contains no terminological references. It goes into elaborate detail on the types of fruits and green produce exempted from the alms tax including fruits that can be dried and stored for provision, which is typical of how the *Mudawwana* expands on the *Muwaṭṭa’*. He emphasizes like Mālik in the *Muwaṭṭa’* that no alms tax is due on profits from selling such fruits and produce until a full lunar year has passed over the profit.³³ Saḥnūn adduces post-Prophetic reports confirming the praxis of exempting fruits and green produce from the alms tax. He cites a *ḥadīth* from Ibn Wahb that the Prophet declared that no alms tax was due on green produce (*al-khuḍar*), which he follows with a post-Prophetic report from ‘Umar and ‘Alī to the same effect. He then cites attestations of support from prominent early jurists: al-Layth ibn Sa’d, Rabī‘at al-Ra’y, al-Zuhrī, ‘Aṭā’ ibn Abī Rabāḥ, ‘Aṭā’ al-Khurāsānī, Sufyān ibn ‘Uyayna, and others.³⁴

This precept falls under the category of transmissional praxis. ‘Iyāḍ holds that it was rooted in the Prophet’s deliberate omission (*tark*) of such fruits and green produce from the alms tax. His legal presumption is that the Prophet could not have required the alms tax for these types of produce, since any Prophetic policy to the contrary would necessarily have been known to the people of Medina and incorporated into their praxis.³⁵ Ibn ‘Abd al-Barr, al-Bājī, Ibn al-‘Arabī, and al-Qarāfi agree. They note that Medina was an agricultural settlement in which these types of produce constituted common crops. The city’s people would have inevitably known that the alms tax was required on them, if the Prophet had obliged them to pay it.³⁶

³² *Muw.* (Abū Muṣ‘ab), 1:286; *Muw.* (al-Qa‘nabī), 309–10; *Muw.* (Dār al-Gharb), 1:372; *Mwt.* (*Riwāyāt*), 2:284; Ibn ‘Abd al-Barr, *al-Istidhkār*, 9:270.

³³ *Mud.*, 1:252; *Mud.* (2002), 2:184–87.

³⁴ *Mud.*, 1:253; *Mud.* (2002), 2:185–87.

³⁵ See Abd-Allah, “*Amal*,” 410–15.

³⁶ Ibn ‘Abd al-Barr, *al-Istidhkār* (1971), 1:154; al-Bājī, *al-Muntaqā*, 2:170. Ibn ‘Abd al-Barr cites Medinese praxis in this instance as evidence that the Prophet excused pomegranates, peaches, edible greens, and similar types of produce from collection in the alms tax (*‘afā’ anḥā*) (idem, *al-Istidhkār*, 9:271). Al-Qarāfi notes that the people of Medina would have known well from the time of the Prophet that the alms tax was required in these types of produce, if the Prophet had collected it from them. He cites Mālik’s argumentation to that

This precept of Medinese *sunna* is another example of a fundamental praxis that was a matter of significant dissent with widespread social consequences but for which relatively few if any *ḥadīths* were transmitted. Mālik emphasizes that he heard the precept from the people of knowledge in Medina. He cites no *ḥadīths*, post-Prophetic reports, or other types of textual evidence in its support. Ibn ‘Abd al-Barr and al-Qarāfi assert that no sound *ḥadīth* has been transmitted on this matter.³⁷ Al-Shawkānī states that little textual information ever existed on the topic. Like al-Qarāfi, he adds that al-Tirmidhī held that no *ḥadīth* of verifiable authenticity was ever transmitted regarding this precept.³⁸

The Kufans and Abū Ḥanīfa held a dissenting position.³⁹ They required that the alms tax to be paid on all fruits and green produce. They supported their position with a *ḥadīth* specifying that alms are due for the “greens (*al-khuḍr*) that the earth produces.” Ibn ‘Abd al-Barr states that the *ḥadīth* lacked a sound chain of transmission and originated as a post-Prophetic report of Ibrāhīm al-Nakha‘ī, documentation for which is provided in ‘Abd al-Razzāq.⁴⁰ According to Ibn Rushd, Abū Ḥanīfa based his

effect against Abū Yūsuf in the presence of the Abbasid caliph, and the fact that Abū Yūsuf is reported to have accepted it (al-Qarāfi, *al-Dhakhīra*, 3:74). Ibn al-‘Arabī notes that various types of edible greens were being grown in Medina and its surrounding villages during the Prophet’s time; yet the Prophet never attempted to collect alms from them, nor did the caliphs after him. He adds that pomegranates, peaches, quinces, and similar varieties of fruit were grown in Ta‘if during the Prophet’s time, and he is not known to have collected the alms tax in them either, nor was that done by any of the early caliphs who succeeded him (Ibn al-‘Arabī, *al-Qabas*, 2:459, 472).

³⁷ Ibn ‘Abd al-Barr, *al-Istidhkar*, 9:270–71; al-Qarāfi, *al-Dhakhīra*, 3:74.

³⁸ Muḥammad ibn ‘Alī al-Shawkānī, *Nayl al-awṭār min ḥadīth Sayyid al-Akhyār: sharḥ Muntaqā al-akhbār*, 4: 203–04; al-Qarāfi, *al-Dhakhīra*, 3:74; cf. ‘Abd al-Razzāq, *al-Muṣannaḥ*, 4:119. He cites a *ḥadīth* to the opposite effect that no alms are due on green produce. Footnote one explains that it is not of verified authenticity, although there is a disconnected *ḥadīth* with the same meaning that has been followed in praxis by the people of knowledge.

³⁹ The prominent Kufans Ibrāhīm al-Nakha‘ī, Ḥammād ibn Abī Sulaymān, and Abū Ḥanīfa required collection of the alms tax on all such produce whether it was storable or not (Ibn ‘Abd al-Barr, *al-Istidhkar*, 9:275; ‘Abd al-Razzāq, *al-Muṣannaḥ*, 4:121; Ibn Abī Shayba, *al-Muṣannaḥ*, 2:371–72; al-Bājī, *al-Muntaqā*, 2: 170; al-Ṭahāwī, *Sharḥ*, 2:84–89). Ibn Abī Shayba also attributes the position to Mujaḥid (Ibn Abī Shayba, *al-Muṣannaḥ*, 2:371). Both ‘Abd al-Razzāq and Ibn Abī Shayba also attribute the position to ‘Umar ibn ‘Abd al-‘Azīz (‘Abd al-Razzāq, *al-Muṣannaḥ*, 4:121; Ibn Abī Shayba, *al-Muṣannaḥ*, 2:371). Ibn Abī Shayba states that ‘Umar directed his representatives in Yemen to collect the alms tax on such produce.

⁴⁰ Ibn ‘Abd al-Barr, *al-Istidhkar*, 9:270–71; ‘Abd al-Razzāq cites it as a report from Ibrāhīm (‘Abd al-Razzāq, *al-Muṣannaḥ*, 4:121). ‘Abd al-Razzāq also cites a transmission from Mūsā ibn Ṭalḥa that al-Ḥajjāj ibn Yūsuf sent him to Iraq to collect alms on its green produce. Mūsā told al-Ḥallāj that he possessed a letter (*kitāb*) from Mu‘adh ibn

position not on a specific *ḥadīth* but on the general import (*ʿumūm*) of another well-known *ḥadīth*, which Mālik also transmits in the *Muwattaʿa*, “Take ten percent of what is watered by the sky, springs, and ground water, and five percent from what is irrigated,” which generally agrees with the Kufan *ḥadīth* just mentioned.⁴¹

When taken as an unqualified legal statement, the *ḥadīth* indicates that the alms tax should be required on all agricultural produce.⁴² Ibn ʿAbd al-Barr adds that, in addition to this *ḥadīth*, Abū Ḥanīfa’s position was based on all-inclusive application of the Qurʾānic verse 6:141, which mentions pomegranates and other types of fruit and enjoins that their due be paid on the day of their harvest.⁴³ Abū Ḥanīfa’s reasoning in this instance is an illustration of his principle of the generalization of standard legal proofs (*taʿmīm al-adilla*), which stands at the core of his legal method.

In this precept, Mālik invokes his *sunna*-term to signal that the Medinese position is contrary to analogy with a contrary general rule. As we have seen, Abū Ḥanīfa and prominent Kufan jurists before him adhered strictly to analogy in this case. Once again, the textual evidence in *ḥadīths* is scant, both as regards the Medinese and the Kufan positions alike. The main *ḥadīth* upon which Abū Ḥanīfa probably places reliance and generalizes was shared with the Medinese and other jurists. Their interpretation of it, however, was distinctly different and allowed it to be qualified by contrary ancillary evidence. For Mālik, the Medinese praxis of not collecting alms tax on certain types of agricultural produce was the primary evidence restricting the general application of competing texts. All jurists accept the authenticity of the *ḥadīth* Abū Ḥanīfa relies upon, but the Medinese and most non-Ḥanafī jurists restrict its general implications to apply only to specific types of produce.

Mālik states at the close of the precept that money received from the sale of such non-taxable produce is not subject to the alms tax until a full lunar year has passed from the time of its acquisition. This stipulation appears to be included under the S-XN. Ibn ʿAbd al-Barr knows of no

Jabal on the authority of the Prophet when he deputed him to Yemen, directing him to collect the alms tax from wheat, barley, raisins, and dates but making no mention of green produce. Al-Ḥajjāj acknowledged that it was true (ʿAbd al-Razzāq, *al-Muṣannaf*, 4:119–20; cf. Ibn Abī Shayba, *al-Muṣannaf*, 2:371). Ibn Abī Shayba transmits the account of Muʿādh ibn Jabal and similar reports from ʿAlī and Abū Mūsā al-Ashʿarī (Ibn Abī Shayba, *al-Muṣannaf*, 2:371).

⁴¹ *Muw.*, 1:271; al-Ṭaḥāwī, *Sharḥ*, 2:84–89.

⁴² Ibn Rushd, *Bidāyā*, 1:149; al-Ṭaḥāwī, *Sharḥ*, 2:84–89.

⁴³ Ibn ʿAbd al-Barr, *al-Istidhkā*r, 9:274–275; cf. ʿAbd al-Razzāq, *al-Muṣannaf*, 4:121.

differences among the people of Medina on this aspect of the precept.⁴⁴ Ma‘mar relates from al-Zuhrī, however, that he did not agree with this provision and required alms from non-taxable fruits and green goods, if they were sold for cash which was equal to the base sum required for alms.⁴⁵ If this was in fact al-Zuhrī’s position and he continued to hold it, his dissent would contradict Mālik’s contention that there was complete consensus in Medina on the precept. The Medinese presumably held that al-Zuhrī finally came to agree with the precept.⁴⁶ This is, at least, what Saḥnūn seems to assert in the *Mudawwana* by his report that al-Zuhrī did endorse this position.⁴⁷

3. *SthN-X*:⁴⁸ *Bequests to Heirs*

Yahyā ibn Yahyā states that he heard Mālik relate that the Qur’anic verse, “... if one leaves wealth behind, let him make a bequest for parents and relatives...” (Qur’an 2:180), was repealed by revelation of the Qur’anic verses stipulating the shares of inheritance designated for parents and relatives (Qur’an 4:7, 11–12, 176). Yahyā adds that he heard Mālik cite this S-XN-term while asserting that it is impermissible for a person to make a bequest for an heir unless the other rightful heirs allow it. If some allow it and others do not, the bequest will be subtracted from the shares of those who allowed it but not from the shares of those who did not.⁴⁹

Unlike most S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fihā ‘indanā*) terms, the term in this chapter is

⁴⁴ Ibn ‘Abd al-Barr, *al-Istidhkār*, 9:270.

⁴⁵ ‘Abd al-Razzāq, *al-Muṣannaḥ*, 4:120; cf. Ibn Abī Shayba, *al-Muṣannaḥ*, 2:371. ‘Abd al-Razzāq’s own position on the matter agrees that such produce is not directly subject to the alms tax. He stipulates in contrast to the closing clause of Mālik’s precept that income accrued from selling fruits and green produce should be taxed at the time of sale, if it amounts to the base sum of coins upon which the alms tax is due (‘Abd al-Razzāq, *al-Muṣannaḥ*, 4:118–19). According to Ibn Abī Shayba, this was also the position of Makḥūl (Ibn Abī Shayba, *al-Muṣannaḥ*, 2:372).

⁴⁶ Al-Zuhrī’s opinions are often problematic in assessing Mālik’s assertions of Medinese concurrence. In this case and many others, al-Zuhrī is on record with a dissenting point of view. Al-Layth ibn Sa‘d contended that al-Zuhrī, despite the excellence of his knowledge and considered opinion, frequently changed his opinion in legal matters. Al-Layth adds that one of his associates wrote to al-Zuhrī about a particular matter on several diverse occasions and received three different and contradictory answers (Ibn al-Qayyim, *I‘lām* [Sa‘āda], 3:96).

⁴⁷ *Mud.*, 1:253.

⁴⁸ *SthN-X* in this precept stands for “the firmly established *sunna* among us about which there is no dissent” (*al-sunna al-thābita ‘indanā al-lattī lā ikhtilāf fihā*).

⁴⁹ *Muw.*, 1:765–66; *Muw.* (Dār al-Gharb), 2:315; *Muw.* (Abū Muṣ‘ab), 2:512–13; *Mwt. (Riwāyāt)*, 4:15; Ibn ‘Abd al-Barr, *al-Istidhkār*, 23:55; Ibn ‘Abd al-Barr, *al-Tamhīd*, 13:265.

qualified by an adjective. It reads “the firmly established *sunna* among us about which there is no dissent” (*al-sunna al-thābita ‘indanā al-latī lā ikhtilāf fihā*). I classify it as an S-XN term. Both Yaḥyā and Abū Muṣ‘ab cite the same SthN-X term from Mālik. They also transmit essentially the same legal material with some difference in wording.⁵⁰ The chapter does not occur in the recensions of al-Qa‘nabī, Suwayd, and Ibn Ziyād. In the *Tamhīd*, Ibn ‘Abd al-Barr relates the expression without adjectival qualification as a standard S-XN term, which may be an editorial oversight.⁵¹ Mālik’s insertion of the adjective “firmly established” in the term reflects how his terminology is not absolutely fixed but vacillates between explicit semantic statements and standardized terminological expressions.

Saḥnūn does not provide a full discussion of the precept and gives no citation of terms. His presentation lacks the details of the *Muwaṭṭa’* as regards the basic precept, but, in typical *Mudawwana* fashion, it elaborates a number of important questions of legal interpretation and illustrates how the *Mudawwana* complements the *Muwaṭṭa’* as a compendium of legal interpretation based on the primary precepts set forth in the *Muwaṭṭa’*.⁵² Saḥnūn inserts transmitted materials vindicating Mālik’s S-XN but without stating the term or precept in detail. He cites *ḥadīths* from Ibn Wahb and Ibn Lahī’a declaring that bequests to heirs are not permissible. He cites a *ḥadīth* from Ibn Wahb that the Prophet said in the year of the

⁵⁰ *Muw.* (Dār al-Gharb), 2:315; *Muw.* (Abū Muṣ‘ab), 2:512–13; *Mwt. (Riwāyāt)*, 4:15; Ibn ‘Abd al-Barr gives the same term in *al-Istidhkār*, 23:55 but gives the term S-XN in *al-Tamhīd*, 13:265.

⁵¹ Ibn ‘Abd al-Barr gives the same term as Yaḥyā and al-Qa‘nabī in *al-Istidhkār*, 23:55 but cites it as S-XN in *al-Tamhīd*, 13:265. *Al-Istidhkār* is a more comprehensive commentary of the *Muwaṭṭa’* and follows its text more closely than the *Tamhīd*, which is concerned with the *ḥadīths* of the *Muwaṭṭa’*. The S-XN in the *Tamhīd* is probably an editorial mistake, but it reflects how close the qualified term of this chapter is to S-XN in the editor’s eyes—be that Ibn ‘Abd al-Barr or another editor—and that confusion is understandable.

⁵² *Mud.*, 4:289, 296, 307–09; *Mud.* (2002), 10:149–50, 169–70, 201–05. Saḥnūn provides an application of the principle of preclusion (*sadd al-dharā’i’*) in establishing that heirs cannot give legal testimony in bequests that bring them personal benefit (*Mud.*, 4:289). He asks Ibn al-Qāsim about a man who makes a bequest to his brother who, at the time, is a valid heir. The man making the bequest later has a son who blocks his brother from inheritance. He asks if the earlier bequest will remain valid? Ibn al-Qāsim replies that it shall, because the brother is no longer technically an heir. He informs Saḥnūn that he heard this directly from Mālik. Saḥnūn asks about a bequest to an unrelated woman whom the man making the bequest later marries. Ibn al-Qāsim informs him that the bequest will now be invalid, because the woman has become a technical heir through marriage (*Mud.*, 4:296). Saḥnūn asks about a bequest to an heir to make pilgrimage on the deceased’s behalf, and Ibn al-Qāsim gives an interesting discussion citing an opinion of Mālik that he never changed. Ibn al-Qāsim also gives a personal opinion contrary to Mālik on a related issue (*Mud.*, 4:309, cf. 4:307).

conquest of Mecca that bequests were not allowable to heirs unless the heirs permit them.⁵³ Saḥnūn adds post-Prophetic reports giving the legal interpretations relevant to this precept from Rabīʿat al-Raʿy and Yahyā ibn Saʿīd.⁵⁴ The *ḥadīth* was not regarded as strong by *ḥadīth* scholars.⁵⁵ Ibn ʿAbd al-Barr contends that this *ḥadīth* was originally a post-Prophetic report on the authority of Ibn ʿAbbās, which was inexactly transmitted as a *ḥadīth*.⁵⁶

In the opinions of Ibn Rushd, al-Bājī, al-Zurqānī, and others, this precept falls under the category of transmissional praxis.⁵⁷ Jurists had widespread agreement that bequests should not ordinarily be made to heirs and that the above Qurʾānic verse (Qurʾan 2:180) directing people to make such bequests was repealed.⁵⁸ Technically, “heirs” in Islamic legal parlance are those persons related to the deceased by kinship or marriage who are specifically designated as such by the appropriate Qurʾānic verses. There was consensus among the jurists that other relatives who are not designated for inheritance in these verses are not technically classified as heirs.⁵⁹

It is clear from Mālik’s wording in the *Muwattaʿa* that he regarded the Qurʾānic verse on bequests to have been repealed. The Kufans and many other jurists shared this point of view.⁶⁰ The Yemeni jurist Ṭāwūs and others held, however, that the verse had not been repealed but merely rendered specific (*makhṣūṣ*) by the revelation of the later verses (Qurʾan 4:7, 11–12, 176), which set the stipulated shares of inheritance. In their dissenting view, the later verses restricted the earlier one to bequests for

⁵³ *Mud.*, 4:307–08; *Mud.* (2002), 10:202–04.

⁵⁴ *Mud.*, 4:307.

⁵⁵ See Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:20; al-Bājī, *al-Muntaqā*, 6: 179; al-Zurqānī, *Sharḥ*, 4: 482.

⁵⁶ Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:20.

⁵⁷ Ibn Rushd, *Bidāya*, 2:201; al-Bājī, *al-Muntaqā*, 6:179; al-Zurqānī, *Sharḥ*, 4:482; Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:14; idem, *al-Istidhkār*, 23:20; al-Ṭaḥāwī, *Sharḥ*, 4:219–224; al-Ṭaḥāwī, *Mukhtaṣar*, 5:5–6; al-Qarāfi, *al-Dhakhīra*, 7:15–16.

⁵⁸ Al-Zurqānī, *Sharḥ*, 4:482; see also al-Bājī, *al-Muntaqā*, 6:179; Ibn Rushd, *Bidāya*, 2:201.

⁵⁹ Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:12. In general, heirs receive set percentages according to Qurʾānic stipulations. Bequests fall outside the stipulated allotments of inheritance and are customarily made to non-heirs but may not exceed one third of the overall estate of the deceased at death. Most jurists held that it was highly recommended to make bequests for relatives who are not technically heirs, especially if they are poor (see Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:14–15).

⁶⁰ Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:11–13.

relatives who were not included among the stipulated heirs such as relatives on one's maternal side.⁶¹

Ibn 'Abd al-Barr states that the jurists agreed on the general precept that bequests could not be made to heirs. They differed on the permissibility and procedure involved in such bequests, if the designated heirs permitted them. Most jurists allowed such bequests, when the heirs agreed.⁶² Ṭāwūs, Ibrāhīm al-Nakha'ī, and Qatāda held that legal bequests in general—whether to heirs or non-heirs—were not valid unless the estate of the person making the bequest was sufficiently large such as a thousand or several thousand pieces of silver. They based this on their reading of the Qur'ānic verse of bequests, which directs persons leaving “wealth” (*khayr*) behind to make bequests. Paltry amounts of gold and silver, in their view, did not constitute “wealth.” What little the deceased left in such cases should only go as inheritance to rightful heirs so that they are not left destitute.⁶³ Most jurists disagreed with the limitation of bequests to “wealth” as defined above as “ample wealth.” They held that making bequests was recommended no matter what the size of the deceased's estate as long as the bequests did not exceed one third of the total value and were not made to Qur'ānic heirs. This was the opinion of Mālik, Abū Ḥanifa, al-Thawrī, al-Awzā'ī, al-Shāfi'ī, Ibn Ḥanbal, and Ibn Rāhawayh and is implicit in Mālik's S-XN.⁶⁴

⁶¹ See al-Zurqānī, *Sharḥ*, 4: 482; Ibn 'Abd al-Barr, *al-Istidhkār*, 23:10–11

⁶² Ibn 'Abd al-Barr, *al-Tamhīd*, 13:265; idem, *al-Istidhkār*, 23:18–20; cf. Ibn Abī Shayba, *al-Muṣannaḥ*, 6:209.

⁶³ Ibn 'Abd al-Barr, *al-Istidhkār*, 23:10–11; 'Abd al-Razzāq, *al-Muṣannaḥ*, 9:62–64. 'Alī, Ibn 'Abbās, and 'Ā'isha reportedly held this view also.

⁶⁴ Ibn 'Abd al-Barr, *al-Istidhkār*, 23:11. See also Ibn 'Abd al-Barr, *al-Istidhkār*, 23:19–20; idem, *al-Tamhīd*, 13:265; al-Zurqānī, *Sharḥ*, 4:482; see also al-Bājī, *al-Muntaqā*, 6:179; Ibn Rushd, *Bidāya*, 2:201. Ibn 'Abd al-Barr, Ibn Rushd, al-Bājī, and al-Zurqānī note that dissent existed about the validity of the provision Mālik mentions at the end of this precept regarding whether bequests for non-stipulated heirs are valid when taken from the shares of heirs who agreed to allow it. Ibn Rushd, Bājī, and al-Zurqānī interpret the position of Mālik and others who agreed that bequests could be made to heirs with the permission of the other heirs was based on the fact that their rights were not in danger of being violated in such cases. Ibn Abī Zayd states similarly that laws of bequest are governed by the Qur'ānic principle (4:12) that no mutual harm shall be caused (*ghayr muḍārr*) (Ibn Abī Zayd, *al-Nawādir*, 11:350). The contrary opinion, in Ibn Rushd's view, was predicated on the presumption that the prohibition of bequests to heirs was not rationale-based (*mu'allal*), which put it beyond the scope of legal interpretation. Among later jurists, Dāwūd al-Zāhirī and al-Muzanī, both of whom belonged to the generation after Mālik, took strong positions prohibiting bequests to heirs whether the other heirs permitted or not. Their position was based on the overt meaning of the *ḥadīth* that bequests are not valid for heirs. Ṭāwūs and other early jurists took a similar position unless the estates were large enough to be validly considered as wealth ('Abd al-Razzāq, *al-Muṣannaḥ*, 9:63–64).

Most of the jurists held—as does Mālik in this S-XN—that bequests to heirs were conditional on the permission of the other heirs.⁶⁵ If they permitted them, they were valid. If they did not permit them, they were invalid. They differed as to whether such procedures were to be called bequests or gifts. The difference is not semantic. Defining such transfers of property as gifts involved certain legal prerogatives such as the ability to reclaim them that did not pertain to the more absolute transference of property involved in bequests.⁶⁶

As noted, there is a *ḥadīth* prohibiting bequests for heirs. It is transmitted through several channels, although al-Bājī and al-Zurqānī question the soundness of these channels. Al-Bājī states that despite differences of opinion regarding the validity of this *ḥadīth*, the jurists were always in widespread agreement about the soundness of its application in practice. Al-Zurqānī and others relate a *ḥadīth* permitting bequests to be taken from the shares of heirs who permit it, but they add that there is doubt about the soundness of this *ḥadīth*.⁶⁷ There is no mention of any other significant contrary *ḥadīth* explicitly disallowing such bequests under all circumstances. According to Ibn Rushd, the dissenting opinions were not based on a contrary *ḥadīth* but on a literal reading of the overt meaning of the *ḥadīth* referred to above, “bequests shall not be made to heirs.”⁶⁸

This widely agreed precept is another example of a standard matter of law for which there was limited and inconclusive textual evidence. The weak supporting *ḥadīths* transmitted in the matter were shared by the jurists and generally confirmed the majority point of view. The primary

⁶⁵ Differences on bequests to heirs went back to the earliest period and involved the Medinese as well as others. ‘Alī, Ibn ‘Umar, and Ibn Jubayr took strong positions against bequests made to heirs. In one post-Prophetic report in Ibn Abī Shayba, Ibn ‘Umar is reported to have regarded the making of bequests to heirs as an innovation begun by the early Khārijīs (*al-Ḥarūrīyya*) (Ibn Abī Shayba, *al-Muṣannaf*, 6:209). ‘Abd al-Razzāq relates that ‘Umar ibn ‘Abd al-‘Azīz held that a person could make a bequest (called *ṣadaqa* in this report) to heirs if it was less than one third of the estate. Al-Thawrī made special allowances for bequests to the wife (see ‘Abd al-Razzāq, *al-Muṣannaf*, 9:70). Al-Ḥasan al-Baṣrī held that if a person made a bequest to indigent heirs, they would be allowed to receive “one third of one third” (one ninth) of his estate. Ibn Sirīn held that bequests of less than one third of the estate were generally permissible as long as they did not arouse suspicion of abuse. Ibn al-Musayyab reportedly held a similar position (‘Abd al-Razzāq, *al-Muṣannaf*, 9:95, 83).

⁶⁶ Ibn ‘Abd al-Barr, *al-Istidhkār*, 23:19.

⁶⁷ Al-Bājī, *al-Muntaqā*, 6:179; al-Zurqānī, *Sharḥ*, 4:482; Ibn ‘Abd al-Barr, *al-Istidhkār*, 23:20.

⁶⁸ Ibn Rushd, *Bidāya*, 2:201. Dāwūd al-Zāhiri held it was obligatory to make bequests for non-inheriting relatives; see Ibn ‘Abd al-Barr, *al-Istidhkār*, 23:14–15.

ḥadīth in question is regarded as authentic and has numerous solitary paths of transmission, many of which did not have the same degree of formal authenticity.⁶⁹ As indicated, Ibn ‘Abd al-Barr mentions a *ḥadīth* transmitted from Ibn ‘Abbās stating that the Prophet had allowed such bequests if the heirs agreed. Ibn ‘Abd al-Barr asserts that it is not an authenticated transmission but originated as a post-Prophetic statement of Ibn ‘Abbās.⁷⁰

In Islamic law, bequests are contrary to analogy with other rulings governing disposal of private property. Ordinarily, one is free to dispose of one’s property as one sees fit through commercial transactions, gift giving, charity, and similar exchanges. This is not the case with laws of bequests and inheritance. Heirs have a right over one’s estate once death approaches through conditions such as critical sickness. As a rule, bequests cannot be made to heirs and cannot exceed one third of the total estate. Mālik’s use of the *sunna*-term here fits the pattern of his invoking the *sunna* in precepts that are not in keeping with standard legal analogies.

Mālik apparently relied on Medinese praxis to gloss the relevant Qur’ānic verses and flesh out the fuller scope of this precept. Praxis verifies that the first verse mentioned in the precept was repealed by later inheritance verses. As is often the case with Mālik’s use of the non-textual source of praxis, it establishes legal parameters in cases where nothing explicit is stated in the relevant legal texts (here the later Qur’ānic verses). In this case, praxis indicates that the making of bequests to parents and relatives had been repealed. Primary sources indicate, as we have seen, that dissent on this precept existed in Medina in the earliest period as it did elsewhere. This throws the conclusiveness of Mālik’s denial of dissent in his S-XN into question.

4. *SN and S-XN: Marriage Annulment through Mutual Cursing* (Li‘ān)

Mālik cites a lengthy *ḥadīth* describing how the Prophet administered the ruling of mutual cursing (*li‘ān*) when a spouse accuses his partner of adultery but lacks sufficient evidence. Mālik adds a comment from al-Zuhrī that the Prophet’s precedent in this case became the *sunna* for mutual cursing. Mālik cites a second *ḥadīth* stating that the Prophet once administered the policy of mutual cursing, separated the former spouses, and put the child in

⁶⁹ Ibn ‘Abd al-Barr, *al-Tamhīd*, 13:265; idem, *al-Istidhkā*, 23:13–24; Ibn Abī Shayba, *al-Muṣannaf*, 6:209; ‘Abd al-Razzāq, *al-Muṣannaf*, 9:70; cf. al-Qarāfi, *al-Dhakhīra*, 7:15–16.

⁷⁰ Ibn ‘Abd al-Barr, *al-Istidhkā*, 23:20.

the mother's custody. Mālik cites the Qur'ānic verses that contain the wording of the oaths of mutual cursing (Qur'an 24:6).

Mālik states that it is the SN (the *sunna* among us; *al-sunna 'indanā*) that spouses who perform the act of mutual cursing are perpetually forbidden to remarry. If the former husband later retracts his oath, he shall be flogged for slandering his wife. He will then be permitted to claim paternity (if there was a child), but he will still not be allowed to remarry the mother. Mālik states that this is the S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fihā 'indanā*).⁷¹

I classify Mālik's SN term here as inclusive and overlapping with the S-XN. The SN occurs, however, only in the recension of Yaḥyā. In the recensions of Abū Muṣ'ab and Suwayd, S-XN is the only term cited. Both Abū Muṣ'ab and Suwayd use the word *sunna* without any qualification where Yaḥyā cites the term SN. This strengthens my presumption that SN in Yaḥyā's transmissions stands for S-XN.⁷² The precept does not occur in the present recensions of al-Qa'nabī or Ibn Ziyād.

Similarly to Abū Muṣ'ab and Suwayd, Saḥnūn transmits from Mālik in the *Mudawwana* that it is a *sunna* to separate the husband and wife in the case of mutual cursing and does not invoke the term SN. He notes that the marriage bonds are dissolved, and they may not remarry under any circumstances. Saḥnūn's text does not use the term S-XN as it occurs in the above recensions but a slight variation in wording, "the *sunna* among us about which there is no doubt" (*al-sunna 'indanā al-lattī lā shakk fihā*) which he transmits from Mālik and then through Ibn Wahb

⁷¹ *Muw.*, 2:566–68; *Muw.*, (Dār al-Gharb), 2:76–79; Ibn 'Abd al-Barr, *al-Tamhīd*, 11:231–32; *Muw.* (Abū Muṣ'ab), 1:624–25; *Muw.* (Suwayd), 281; *Muw.* (Riwāyāt), 3:262–65.

⁷² *Muw.*, (Dār al-Gharb), 2:76–79; *Muw.* (Abū Muṣ'ab), 1:624–25; *Muw.* (Suwayd), 281; *Muw.* (Riwāyāt), 3:262–65. He gives the S-XN in the same form as in the recension of Yaḥyā as "the *sunna* about which there is no doubt among us and no difference of opinion." Cf. Ibn 'Abd al-Barr, *al-Tamhīd*, 11:231–32, which also gives the S-XN; cf. Muḥammad ibn al-Ḥasan al-Shaybānī, *Muwaṭṭa' al-Imām Mālik: riwāyat Muḥammad ibn al-Ḥasan al-Shaybānī ma'a al-ta'liq al-mumajjad 'alā Muwaṭṭa' Muḥammad: sharḥ al-'allāma 'Abd al-Ḥayy al-Luknawī*, ed. Taqī al-Dīn al-Nadawī, 2:552–53, henceforth cited as *Muw.* (al-Shaybānī/al-Nadawī).

After this *sunna* precept, Mālik cites two AN-rulings that are connected to it and appear to be the products of legal interpretation. The first of them pertains to a spouse performing mutual cursing after already repudiating his wife a third and final time, when he learns that she is pregnant but claims that he is not the child's father. The second AN-precept states that the application of mutual cursing holds for the Christian or Jewish wife of a Muslim just as it pertains to Muslim wives (slave or free). Saḥnūn relates this last AN-precept from Abū al-Zinād—the transmitter of the Seven Jurists of Medina—who refers to it, however, not as AN but as MḍS (the *sunna* has long been established; *maḍat al-sunna*) (*Mud.*, 2:336).

on the authority of al-Zuhrī, Yaḥyā ibn Saʿīd, and Rabīʿat al-Raʿy.⁷³ Saḥnūn transmits *ḥadīths* on mutual cursing from Ibn ʿUmar and Sahl ibn Saʿīd al-Anṣārī. Sahl states that he was present at a mutual cursing performed in the Prophet's presence. Sahl then adds that the procedure became "the long established *sunna*" (MḍS; the *sunna* has long been established; *maḍat al-sunna*) that the mutual cursors are separated and never allowed to remarry.⁷⁴

This *sunna* precept falls under the classification of transmissional praxis. The *ḥadīth* Mālik cites at the beginning of his discussion relates the precept directly to Prophetic precedent in addition to its being supported by a Qurʾānic verse. The fact that it is transmissional praxis is further corroborated by the *ḥadīths* just mentioned in the *Mudawwana*, the second of which refers to mutual cursing as "the established *sunna*" (MḍS), indicating unbroken continuity with the Prophetic past. Al-Zuhrī explicitly states, "This became afterward the *sunna* regarding those who perform the mutual cursing." Mālik and al-Zuhrī both use the word *sunna* explicitly in this precept to refer to the *sunna* of the Prophet.

This example stands out from the preceding three in that Mālik supports it by referring to two *ḥadīths*. But, as is often the case, the *sunna* precept as set forth in the *Muwattaʿa* provides details that are not explicit

⁷³ *Mud.*, 2:337; *Mud.* (2002), 5:181.

⁷⁴ *Mud.*, 2:338; *Mud.* (2002), 5:182. Saḥnūn's passage illustrates again how the *Mudawwana* corroborates and elaborates on the *Muwattaʿa*. Although Saḥnūn quotes from Mālik directly, he adds supporting information from *ḥadīths* and post-Prophetic reports. He provides extensive legal details from Mālik, Ibn al-Qāsim, and earlier Medinese scholars regarding unusual circumstances. The *Mudawwana* delves into issues such as how mutual cursing works in the case of two Muslim co-wives or a Jewish or Christian wife married to a Muslim freeman. How does it apply to Muslim slaves married to each other or to Muslim slaves married to Jewish or Christian women? Saḥnūn asks about a man who has been long absent from his wife and finally returns home to learn that she has deceased and left a child whom he refuses to recognize as his own. What of a man who marries a woman but does not cohabit with her? Yet she conceives a child and claims that he would meet with her in her family's house secretly? The *Mudawwana* provides the details that Muslims performing mutual cursing do so in the presence of the *imām* and in their central mosques or similar places of religious sanctity. The *Mudawwana* relates that this does not apply to the Christian or Jewish wives of a Muslim. Rather, they take their oaths in their churches or at other religious sites they hold in sanctity. They take the oath in God's name just as Muslims do. Saḥnūn's material clarifies the ruling in the case of a husband who initiates the process of mutual cursing but does not complete it and declares that he has borne false witness against his wife. He raises the question of a boy married to an older woman who accuses her of adultery. Ibn al-Qāsim relates from Mālik that the boy's claim is void because he is under age. Neither is he allowed to perform mutual cursing because of his age, nor is he held guilty of slander for the same reason (*Mud.*, 2:335–38; cf. *idem*, 4:71).

in the *ḥadīth* texts. The first detail is that the spouses must be separated after the act of mutual cursing. The second is that they are never allowed to remarry. Ibn ‘Abd al-Barr states that all the early jurists of Medina, the Hijaz, Syria, and Kufa agreed that mutual cursing takes the place of repudiation and that it is a *sunna* that the husband and wife be separated.⁷⁵ Al-Ṭaḥāwī states, however, that Abū Ḥanīfa and his circle did not hold this position. They contended that mutual cursing did not in itself separate the husband and wife. Rather, it was required that they be officially separated by a judge. He attributes this position to Sufyān al-Thawrī and al-Awzā‘ī.⁷⁶

The second point that spouses separated by mutual cursing are never allowed to remarry is one of the main points of Mālik’s S-XN and was the principal point of dissent. Ḥammād ibn Abī Sulaymān, Abū Ḥanīfa, and al-Shaybānī held that the husband could remarry his former wife on the basis of a new contract, if he repudiated his oath and took the punishment for slander. This opinion is also attributed to Sa‘īd ibn Jubayr, Sa‘īd ibn al-Musayyab, Ibrāhīm al-Nakha‘ī, and al-Zuhrī, although the contrary is also attributed to both al-Zuhrī and al-Nakha‘ī.⁷⁷ There was internal dissent on the matter in Kufa. Abū Yūsuf, Zufar ibn Hudhayl, and al-Thawrī held the Medinese position on this matter. Ibn ‘Abd al-Barr indicates that there was dissent in Medina on this matter.⁷⁸ Despite a supporting *ḥadīth*,

⁷⁵ Ibn ‘Abd al-Barr, *al-Tamhīd*, 11:214; idem, *al-Istidhkār*, 17:202. Al-Shaybānī notes in his recension of the *Muwatta‘a* that the Kufans agree on this matter; *Muw.* (al-Shaybānī/al-Nadawī), 2:552–53.

⁷⁶ Al-Ṭaḥāwī, *Mukhtaṣar*, 2:505. The Basran jurist ‘Uthmān al-Battī did not agree. He held that mutual cursing did not end the bond of marriage until the spouses are divorced. He preferred that a spouse performing mutual cursing repudiate his wife afterwards (Ibn ‘Abd al-Barr, *al-Tamhīd*, 11:214; cf. idem, *al-Istidhkār*, 17:234–36; al-Ṭaḥāwī, *Mukhtaṣar*, 2:505). This stipulation is given vague support by another *ḥadīth*, which Mālik does not cite, according to which the Prophet stated that the husband would have no possibility of taking his wife back after the mutual cursing (Ibn ‘Abd al-Barr, *al-Tamhīd*, 11:213–14; ‘Abd al-Razzāq, *al-Muṣannaf*, 7:119). It is an ambiguous text. Some jurists understood it to mean merely that the Prophet separated the mutual cursers by sundering the marriage bond himself as a judicial act in addition to the act of mutual cursing (Ibn ‘Abd al-Barr, *al-Tamhīd*, 11:213).

⁷⁷ Ibn ‘Abd al-Barr, *al-Istidhkār*, 17:234–36; idem, *al-Tamhīd*, 11:216–17; ‘Abd al-Razzāq, *al-Muṣannaf*, 7:112–14; Ibn Abī Shayba, *al-Muṣannaf*, 4:116, 199; al-Ṭaḥāwī, *Mukhtaṣar*, 2:506–07.

⁷⁸ Abū Ḥanīfa agreed that a husband who retracts his oath of mutual cursing should be flogged for slander and given paternity rights if there is a child, but Abū Ḥanīfa allowed the former husband to remarry his former wife upon retraction of his oath. Ibn Rushd adds that other jurists held that the former wife would immediately become the wife of her former husband, if he admitted to having lied in his oath and submitted to the required flogging, and al-Shāfi‘ī later concurred with this earlier opinion (Ibn Rushd, *Bidāya* [Istiḳāma],

Ibn ‘Abd al-Barr states that this question lacked dependable textual support and was primarily based on analogy (*muqāyasa*) and legal reflection (*nazar*).⁷⁹

From Mālik’s point of view, the precept of mutual cursing is contrary to analogy with the standard precepts concerning repudiation (*ṭalāq*) in that it precludes the possibility of remarriage.⁸⁰ Abū Ḥanīfa and others like him who held it permissible for the husband and wife to remarry after mutual cursing judged it as analogous to repudiation in this regard.⁸¹

5. S-XN and SN: Zakāh on Inheritance

Mālik states it is the S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāfihā ‘indanā*) that heirs who inherit commercial goods, houses, or slaves or the right to collect debts due to the deceased are not required to pay the alms tax (*zakāh*) on their earnings from selling such goods or receiving payment of debts until they have had the money in their

2: 120; Ibn ‘Abd al-Barr, *al-Tamhīd*, 11:217; Ibn Abī Shayba, *al-Muṣannaf*, 5:503–04; cf. *Mud.* 2:337–38).

Sa‘īd ibn al-Musayyab is said to have allowed the husband to remarry if he repudiated himself and took the punishment for slander. Al-Ḥasan al-Baṣrī, Ibrāhīm al-Nakha‘ī, and Ibn Shihāb al-Zuhrī are also said to have held this opinion, although they are reported to have held the contrary opinion as well (Ibn ‘Abd al-Barr, *al-Tamhīd*, 11:216–17; idem, *al-Istidhkār*, 17:234–36; ‘Abd al-Razzāq, *al-Muṣannaf*, 7:112–14).

The dissenting position was also upheld by al-Layth ibn Sa‘d, al-Awzā‘ī, and many of the later jurists, notably al-Shāfi‘ī, Abū Thawr, Ibn Ḥanbal, and Ishāq ibn Rāhawayh (Ibn ‘Abd al-Barr, *al-Istidhkār*, 17:234–36; idem, *al-Tamhīd*, 11:216–17; ‘Abd al-Razzāq, *al-Muṣannaf*, 7:112–14; Ibn Abī Shayba, *al-Muṣannaf*, 4:116, 199; 6:10). The position that the spouses separated by mutual cursing would never be allowed to remarry was said to be the opinion of ‘Umar, ‘Alī, Ibn Mas‘ūd and “most of the jurists among the Successors in Medina” (Ibn ‘Abd al-Barr, *al-Tamhīd*, 11:216; idem, *al-Istidhkār*, 17:234–36; ‘Abd al-Razzāq, *al-Muṣannaf*, 7:112–14).

⁷⁹ Ibn ‘Abd al-Barr, *al-Istidhkār*, 17:237.

⁸⁰ In Islamic law, upon the first and second instances of repudiation, a waiting period (*‘idda*) follows the husband’s declaration of repudiation. During this period, the husband is allowed to take his wife back. If the waiting period transpires before the husband takes back his repudiated wife, she becomes divorced (*bayyina*). He may, however, remarry her on the basis of a new contract and dowry, if she consents to remarry him. Her husband would, however, be prohibited from remarrying his wife, if it were the third repudiation, after which she becomes immediately and irrevocably divorced.

⁸¹ Noting the anomalous nature of mutual cursing, al-Bāji states that some jurists classified it for that reason as an annulment (*faskh*) of marriage and not a repudiation. He personally disagrees with that classification because remarriage is allowed in cases of annulment (see al-Bāji, *al-Muntaqā*, 4:78). Mutual cursing is also contrary to analogy with the rules of evidence for establishing sexual infidelity, which require a minimum of four eyewitnesses. In the case of mutual cursing, there is only a single witness, the repudiating husband. The wife is able to avoid punishment by taking a contrary oath. This much of the ruling is established by Qur’ānic texts and was not a matter of dissent among the jurists.

possession for a full lunar year (*ḥawl*). Mālik adds that it is the SN (the *sunna* among us; *al-sunna 'indānā*) that heirs are not required to pay alms tax on the money they receive as inheritance until they have had that money in their possession for a full lunar year.⁸²

The two *sunna*-precepts cited here from the *Muwatta'* are not identical, although they are similar and overlap. The S-XN (the *sunna* among us about which there is no dissent; *sunna al-lattī lā ikhtilāf fihā 'indānā*) pertains to the inheritance of non-monetary properties such as houses on which the alms tax is not due until the property is sold. It also pertains to money collected as debts. The SN pertains to the inheritance of monetary wealth (gold and silver) and livestock. In the S-XN precept, the alms tax is not paid on the goods themselves but whatever money one accrues by selling the property or collecting the debt. The SN, on the other hand, pertains to money and livestock, which unlike goods and houses fall directly under the purview of the alms tax. It is conceivable that a jurist could agree to the S-XN regarding non-monetary property and collectable debts but disagree on the SN. According to 'Abd al-Razzāq, al-Zuhri held a dissenting position on the SN precept.⁸³

This precept occurs in the recensions of Yaḥyā, al-Qa'nabī, and Abū Muṣ'ab.⁸⁴ It does not appear in the transmissions of either Suwayd or Ibn Ziyād. Al-Qa'nabī uses the same terms as Yaḥyā. Both recensions cite the first precept as SN and the second as S-XN with essentially the same texts. Abū Muṣ'ab employs the term SN for both precepts and does not cite the term S-XN.⁸⁵

Saḥnūn transmits the same precept in the *Mudawwana*, citing material from Mālik's *Muwatta'* through Ibn al-Qāsim. For both precepts, Ibn al-Qāsim—like Abū Muṣ'ab—cites the term SN and does not use the term S-XN.⁸⁶

⁸² *Muw.*, 1:252; *Muw.*, (Dār al-Gharb), 1:343; Ibn 'Abd al-Barr, *al-Istidhkār*, 9:88; *Muw.* (Abū Muṣ'ab), 259; *Muw.* (al-Qa'nabī), 285; *Mwt.* (*Riwayāt*), 2:242–43.

⁸³ 'Abd al-Razzāq, *al-Muṣannaf*, 4:79.

⁸⁴ *Muw.*, 1:252; *Muw.*, (Dār al-Gharb), 1:343; Ibn 'Abd al-Barr, *al-Istidhkār*, 9:88; *Muw.* (Abū Muṣ'ab), 259; *Muw.* (al-Qa'nabī), 285; *Mwt.* (*Riwayāt*), 2:242–43.

⁸⁵ *Muw.* (Abū Muṣ'ab), 259; cf. Ibn 'Abd al-Barr, *al-Istidhkār*, 9:88.

⁸⁶ *Mud.*, 1:231; *Mud.* (2002), 136. Saḥnūn transmits supporting post-Prophetic reports in support of Mālik's precept and shows its continuity within the Medinese tradition. He cites transmissions from Ibn al-Qāsim and Ibn Wahb on Mālik's authority that al-Qāsim ibn Muḥammad, one of the prominent Seven Jurists of Medina, described the precept of not taxing accretions until a full lunar year had passed as the policy of the caliph Abū Bakr. He notes that Abū Bakr would, however, deduct alms taxes that were due from people's allotments (*'atā'*) when he distributed them. Abū Bakr's policy does not contradict Mālik's

In light of the above discrepancies between transmissions, it may be that the terms S-XN and SN are meant to be equivalent in the texts of al-Qa'nabī and Yaḥyā, in which case SN appears to be an inclusive term. As an inclusive term, the semantic range of SN includes precepts upon which there was complete consensus, although it would not be within the semantic range of S-XN to stand for precepts upon which there had been continuous dissent in Medina among those whom Mālik regarded as legitimate constituents of local consensus.⁸⁷

Both *sunna*-precepts were issues of dissent between the Medinese and the jurists of Kufa, including Abū Ḥanīfa, his followers, and Sufyān al-Thawrī.⁸⁸ Their contrary positions were based on the contrasting definitions that the jurists of Medina and Kufa gave to aggregate wealth upon which the alms tax was due. The Kufans defined a person's wealth as a single entity regardless of whether or not it was made up of base capital (*al-aṣl*), profits (*arbāḥ*) on the base capital, or outside accretions (*fawā'id*) (such as inheritance, gifts, wages, and newly born livestock). Mālik and the Medinese made a distinction for purposes of the alms tax between base

precept, since the caliph would not take the alms tax on the allotments themselves if no tax was due on other property. 'Abd al-Razzāq transmits the same account about the caliph Abū Bakr in his *Muṣannaf* and clarifies that Abū Bakr was not taking the alms tax on the allotments themselves but in lieu of other property on which it had become due ('Abd al-Razzāq, *al-Muṣannaf*, 4:75–76; cf. *Mud.*, 1:233). Saḥnūn relates similar information from the caliph 'Uthmān. He transmits a post-Prophetic report from Ibn 'Umar on the principle of not immediately taxing accretions. Ibn Wahb asserts that people of knowledge have transmitted similar information regarding 'Uthmān, 'Alī, Rabī'at al-Ra'y, Yaḥyā ibn Sa'īd, Sālim ibn 'Abd-Allāh ibn 'Umar, and 'Ā'isha. Saḥnūn relates from Ibn Mahdī who corroborates that 'Alī, Ibn 'Umar, and 'Ā'isha upheld this policy (*Mud.*, 1:233).

'Abd al-Razzāq and Ibn Abī Shayba relate information similar to Saḥnūn in the *Mudawwana*. They give post-Prophetic reports establishing the 'Alī, Ibn 'Umar, Nāfi', 'Umar ibn 'Abd al-'Azīz, and others held to the principle of accretions in a manner similar to Mālik (Ibn Abī Shayba, *al-Muṣannaf*, 2:386–87; 'Abd al-Razzāq, *al-Muṣannaf*, 4:75). They indicate that Makḥūl held views similar to Abū Ḥanīfa and the later Kufans, holding that person's possessing the minimum amount upon which the alms tax is due should designate a month of the year in which to pay the alms tax. Accretions should all be taxed with base capital during that month. If one has not designated such a month, the alms tax should be paid on accretions immediately upon receiving them ('Abd al-Razzāq, *al-Muṣannaf*, 4:79). Ibn 'Abbās, Ibn Mas'ūd, Ibn Jurayj, and al-Thawrī also held the position that accretions should be immediately taxed ('Abd al-Razzāq, *al-Muṣannaf*, 4:78–81). Ibn Abī Shayba and 'Abd al-Razzāq relate that al-Zuhri held a similar opinion that accretions should be immediately taxed along with one's aggregate wealth in a manner similar to the Kufans (Ibn Abī Shayba, *al-Muṣannaf*, 2:387; 'Abd al-Razzāq, *al-Muṣannaf*, 4:79).

⁸⁷ For discussion of how Mālik's terms overlap and constitute inclusive and exclusive categories, see Abd-Allah, "Amal," 419–34, 523–29.

⁸⁸ 'Abd al-Razzāq, *al-Muṣannaf*, 4:80–81; al-Ṭahāwī, *Mukhtaṣar*, 1:422–23.

capital and resulting profits, on the one hand, and, on the other, between accretions that had no direct connection to base capital or profits.⁸⁹

According to the Kufans, whenever the amount of a person's wealth reached the base sum (*niṣāb*) upon which the alms tax is due, that person was required to pay the alms tax after one full lunar year had passed over the entirety of his or her personal wealth, which was taken as a single entity, despite earnings and accretions that might have been accrued during a period of less than one lunar year.⁹⁰ The Kufan position diverged in this regard from both Mālik's S-XN and SN.

In contrast to the Kufans, Mālik held that accretions were not taxed along with base capital but were given independent dates according to when they were received. Profits derived from the base capital, on the other hand, should be computed as part of the overall capital upon which the alms tax was due once a full lunar year had passed over the base capital, regardless of whether the profits had been made a full year before the due date or only a single day. Mālik held that the natural increase (accretion) of livestock—camels, cattle, and sheep—was also calculated as part of the entire herd at the time when the alms tax is due, whether the offspring had been born a full year earlier or only a day.

For Mālik, outside accretions to wealth were anomalous. They were only added to the base capital as long as it remained below the minimum level upon which the alms tax was due. If the accretions were sufficiently large to bring the base capital above the minimal level, the beginning of the lunar year period was marked from the time the accretion was received. Additional accretions were not added to one's base capital. Each new accretion, including the money received from inherited property or receipt of an inherited debt, would be assigned its own due date, as reflected in the *sunna*-precepts in the above example.⁹¹

Mālik's commentators define the principle behind the Medinese position as "the right of growth" (*ḥaqq al-tanmiya*). According to their view, the alms tax can only be required once the owner has had a full lunar year's opportunity to increase his or her new capital. The right of growth

⁸⁹ See Ibn Rushd, *Bidāya*, 1:159–61; cf. al-Bāji, *al-Muntaqā*, 2:112; al-Zurqānī, *Sharḥ*, 2:327; al-Ṭaḥāwī, *Mukhtaṣar*, 1:422–23.

⁹⁰ See Ibn Rushd, *Bidāya*, 1:160.

⁹¹ See Ibn Rushd, *Bidāya* 1:159–62; al-Bāji, *al-Muntaqā*, 2:112; al-Zurqānī, *Sharḥ*, 2:327.

is a fundamental principle underlying Mālik's concept of the alms tax in the *Muwaṭṭa'* and *Mudawwana*.⁹²

According to Ibn Rushd, two legal texts of generally accepted authenticity among the early jurists apply in this case to Mālik's S-XN and SN, although neither text explicitly bears out Mālik's position. The first is a *ḥadīth* reporting that the Prophet said that no alms tax was required on wealth until a full lunar year had transpired after its possession. The second text was a post-Prophetic report according to which the caliph 'Umar ibn al-Khaṭṭāb included newly born animals as part of the total herd of livestock upon which the alms tax is due.⁹³

The Medinese and the Kufans shared both set of texts and accepted the validity of the precepts as set forth in them but differed notably on the critical issue of how to define personal wealth in aggregate.⁹⁴ The Kufans regarded all monetary wealth to be analogous to livestock accretions. On this basis, they treated wealth as a single entity, regardless of whether or not increases to the base capital were the result of profits or

⁹² Mālik states, for example, that it is the A-XN (the precept without dissent among us; *al-amr al-ladhī lā ikhtilāf fīhi 'indanā*) that one who loans money is not required to pay the alms tax on it until it is repaid, unless it is repaid before a full year has transpired. Even if the money is not repaid for several years, only a single year's payment of the alms tax is due once it is repaid. Mālik reports that 'Umar ibn 'Abd al-'Azīz made his governors return properties which they had wrongfully expropriated and only required the rightful owners of those properties to pay the alms tax for a single year, since the properties had been uncollectable during the preceding time (*Muw.*, 1:253). Al-Bājī and al-Zurqānī explain that in both cases the owners of the property were excluded from their right to growth because they did not have the ability to augment their wealth during the time that it was loaned or, in the example of 'Umar ibn 'Abd al-'Azīz, during the period it was wrongfully expropriated (al-Bājī, *al-Muntaqā*, 2:113–14; al-Zurqānī, *Sharḥ*, 2:328–30).

The *Mudawwana* relates that Mālik's position on the inheritance of houses, commodities (*silā'*), indemnity payments, and sums paid for the emancipation of slaves was consistent with the above precepts. Saḥnūn focuses extensively on the legal principle of accretion (*al-māl al-fā'id*) and the right of growth. He lists inheritance as a type of accretion and gives numerous illustrations of what constitute accretions to wealth in a manner consistent with the *Mudawwana's* focus on issues of legal interpretation. He cites the case, for example, of a person possessing a large amount of gold upon which the alms tax would have been due and who gives half of it away as a loan but then loses the remainder. Ibn al-Qāsim explains that the alms tax is not due on the debt in this case (*Mud.*, 1:222–26, 229–31). He clarifies that the wages of hired workers and the dowries of married women constitute accretions. These materials on accretions in the *Mudawwana* illustrate the application of precept-based analogy, and Mālik states explicitly that the principle of wealth accretion is the standard analogue (*maḥmal*) of all such cases (*Mud.*, 1:229–30).

⁹³ Ibn Rushd, *Bidāya*, 1:159–61; idem, *Bidāya* (Istiḳāma), 1:263; Ibn 'Abd al-Barr, *al-Istidhkār*, 9:88.

⁹⁴ Ibn Rushd, *Bidāya*, 1:159–61; idem, *Bidāya* (Istiḳāma), 1:263.

accretions. The Medinese, on the other hand, considered the Kufan analogy as valid only for profits from base capital but not outside accretions. As elsewhere, Mālik has applied both *sunna*-terms to restrict the limits of legal analogy.

The *ḥadīth* and the post-Prophetic report Mālik mentions in conjunction with these *sunna*-terms indicate that the precept indexed went back to the earliest period and would constitute transmissional praxis. The question of how accretions were to be treated in the alms tax was by its nature the sort of concern that would have arisen early. Presumably, Mālik regarded the Medinese precepts on accretions to go back to the Prophetic period and also to be part of transmissional praxis. No explicit textual evidence supports Mālik's distinctive position on aggregate wealth or, for that matter, that of the dissenting views in Kufa. The definition of wealth in this precept is another illustration of a fundamental aspect of long-established Medinese praxis regarding which no explicit supporting *ḥadīths* were transmitted either for or against. Once again, Mālik relied on Medinese praxis for essential details of the Prophetic law that are not spelled out in received texts.

6. *MdS: A Plaintiff with One Supporting Witness*

Mālik begins the chapter with a *ḥadīth* stating that the Prophet handed down a verdict on the basis of the oath of a plaintiff supported by the testimony of a single witness. He then cites a post-Prophetic report narrating that 'Umar ibn 'Abd al-'Azīz wrote to his governor in Kufa and directed him to give verdicts on the basis of the oath of the plaintiff supported by the testimony of a single witness. Mālik cites a post-Prophetic report stating that Abū Salama, a highly regarded Medinese judge of the seventh century, and Sulaymān ibn Yasār were asked about the validity of giving verdicts on this basis and held that it was valid.

Mālik states that "the *sunna* has long been established" (MdS; *maḍat al-sunna*) upholding verdicts based on the oath of the plaintiff supported by the testimony of a single witness. He adds that, if the plaintiff refuses to take an oath, the defendant will be asked to take an oath absolving himself of liability. If the defendant takes such an oath, the plaintiff will forfeit his claim. But if the defendant also refuses to take an absolving oath, the plaintiff's claim shall stand.

Mālik adds that this procedure is not valid in legal cases pertaining to Qur'ān-based punishments (*ḥudūd*),⁹⁵ verification of marriage, divorce,

⁹⁵ Qur'ānic-based punishments (*ḥudūd*) are those explicitly set forth in the Qur'ān. They have a counterpart in Islamic law which is extra-Qur'ānic punishments (*ta'zīr*).

emancipation, slander, or theft. Mālik supports his positions by a relatively lengthy legal argument.⁹⁶

The recensions of Yaḥyā, Abū Muṣ‘ab, and Suwayd cite this same term MqS (the *sunna* has long been established; *maḍat al-sunna*). Their three texts are in general agreement. The precept does not occur in the present recensions of Ibn Ziyād or al-Qa‘nabī.⁹⁷

Saḥnūn transmits a text from Ibn Wahb in the *Mudawwana*, according to which al-Zuhrī uses words similar to those of Mālik and invokes the term MqS to corroborate the same precept. In the report, al-Zuhrī clarifies that this procedure had never been used in marriage or divorce from the days of the Prophet and the first rightly-guided caliphs. Saḥnūn adds another post-Prophetic text stating that Sa‘īd ibn al-Musayyab and Rabī‘a upheld the precept. He cites the entirety of the Seven Jurists of Medina as having supported it.⁹⁸ He cites Ibn al-Qāsim as declaring that it was the *sunna* to rule on the basis of an oath and single supporting witness in monetary rights. Ibn al-Qāsim defends the precept by comparing its anomalous nature to collective oaths (*al-qasāma*). He gives the specific wording of the oaths and asserts that the wording and general procedure have been long established parts of Medinese praxis, emphasizing that the custom of the people has always been in conformity with this procedure (*maḍā amr al-nās*).⁹⁹ Saḥnūn transmits that ‘Umar ibn ‘Abd al-‘Azīz wrote to his governors directing them to judge on the basis of the precept. He asserts that the first generation of scholars (*al-salaf*) concurred on its validity in monetary rights.¹⁰⁰

This precept constituted a major point of contention between the Medinese and the non-Medinese, although there was even dissent about it in Medina itself. According to the Shāfi‘ī protagonist in *Ikhtilāf Mālik*, the prominent Medinese jurists ‘Urwa ibn al-Zubayr, one of the Seven Jurists of Medina, and al-Zuhrī expressed their disagreement with it.¹⁰¹ It is

Extra-Qur’anic punishments are based exclusively on the interpretations and assessments of jurists and judges. They have no explicit references in the revealed sources.

⁹⁶ *Muw.*, 2:721–25; *Muw.*, (Dār al-Gharb), 2:263–67; *Muw.* (Abū Muṣ‘ab), 2:472–73; *Muw.* (Suwayd), 230–31; *Mwt. (Riwāyāt)*, 3:529–36.

⁹⁷ *Muw.*, 2:721–25; *Muw.*, (Dār al-Gharb), 2:264; *Muw.* (Abū Muṣ‘ab), 2:472–73; *Muw.* (Suwayd), 230–31; *Mwt. (Riwāyāt)*, 3:532; Ibn ‘Abd al-Barr, *al-Istidhkār*, 22:60.

⁹⁸ *Mud.*, 4:84, 94; *Mud.* (2002), 9:21–23; 56–57. The Shāfi‘ī interlocutor in *Ikhtilāf Mālik* confirms that Rabī‘a supported the validity of this precept ([Shāfi‘ī Interlocutor], *Ikhtilāf Mālik*, 197).

⁹⁹ *Mud.*, 4:70–71; *Mud.* (2002), 8:504–08.

¹⁰⁰ *Mud.*, 4:94; *Mud.* (2002), 9:56–57.

¹⁰¹ [Shāfi‘ī Interlocutor], *Ikhtilāf Mālik*, 196–97.

noteworthy that Saḥnūn's reference to the Seven Jurists above puts 'Urwa ibn al-Zubayr at the beginning of the list of the Seven Jurists supporting this precept, obviously countering the argument of his having been opposed to it.¹⁰² But Ibn 'Abd al-Barr and others give evidence of the dissenting positions of 'Urwa and al-Zuhrī. Both held different points of view about the precept at various times. Al-Zuhrī was well known for his opposition to the precept. He asserted that it was something the people had innovated (*aḥdathahū al-nās*). While working as a judge in Medina, however, al-Zuhrī reportedly applied this precept in his rulings in accordance with Medinese praxis.¹⁰³

As for jurists outside of Medina, Ibn Rushd states that neither al-Awzā'ī, al-Layth ibn Sa'd, nor the majority of the jurists of Iraq held the precept to be valid.¹⁰⁴ As noted earlier, al-Layth contends that this precept never became part of the praxis of the regions beyond Medina. He holds that the Companions never instituted it there, nor did the first rightly-guided caliphs enjoin the peoples of those regions to apply it in law. In contrast to al-Layth's contention, Mālik mentions a post-Prophetic report prior citing that 'Umar ibn 'Abd al-'Azīz wrote to his governor in Kufa directing him to institute the precept there and gave such orders to his other governors. Mālik contends that the Companions did in fact institute the precept in all the various Islamic realms (*fī kull al-buldān*) to which they traveled during their lives.¹⁰⁵ Layth's position in his letter to Mālik was that 'Umar ibn 'Abd al-'Azīz later retracted that position.¹⁰⁶ Although al-Layth (unlike al-Shāfi'ī) does not mention details about the dissenting opinions of the Medinese jurists on this issue, he hints at their internal dissent in his letter to Mālik. Al-Layth refuses to uphold the precept's validity and feels justified in joining the dissenting positions of earlier Medinese scholars, while asserting that he is among the most rigorous of jurists in adhering to the consensus of the Medinese jurists when they do not disagree.¹⁰⁷

Mālik considered this precept as transmissional praxis. He shows its continuity with the Prophetic legacy by citing the *ḥadīth* with which he begins the chapter. His *sunna*-term indicates belief of such continuity,

¹⁰² *Mud.*, 4:84, 94; *Mud.* (2002), 9:21–23; 56–57.

¹⁰³ See *Mud.*, 4:94; *Mud.* (2002), 9:56–57; Ibn Rushd, *Bidāya*, 2:282; al-Rasīnī, "Fiqh," 195; Ibn 'Abd al-Barr, *al-Istidhkār*, 22:53; idem, *al-Tamhīd*, 13:56; Ibn Abi Shayba, *al-Muṣannaf*, 5:4.

¹⁰⁴ Ibn Rushd, *Bidāya*, 2:282.

¹⁰⁵ See Ibn 'Abd al-Barr, *al-Tamhīd*, 1:56; idem, *al-Istidhkār*, 22:51, 55.

¹⁰⁶ See Ibn al-Qayyim, *I'lām*, (Sa'āda), 3:97.

¹⁰⁷ See Abd-Allah, "Amal," 311–14, 321–31.

and Ibn al-Qāsim also refers to the procedure as the *sunna*.¹⁰⁸ In this case again, Medinese praxis adds details of fundamental legal import that are not explicit in the pertinent texts. The most important of these points is that the precept applies exclusively to monetary matters. Transmitters of the *ḥadīth* sometimes mentioned that fact by way of commentary. Al-Shāfi'ī also restricted the *ḥadīth's* application to monetary matters as did Mālik, but those restrictions are not specifically mentioned in the core texts of the various recensions of the relevant *ḥadīths*.¹⁰⁹

Like other *sunna*-precepts discussed so far, this precept is contrary to analogy with related precepts of Islamic law. As a rule, the plaintiff is required to substantiate claims by the supporting testimony of at least two male witnesses of good character or the testimony of one acceptable male and two women of good character as set forth in the Qur'an (2:282).¹¹⁰ As indicated in Mālik's text in the *Muwatta'*, he regards this precept to be a special exception, applicable only to money matters. There is a second procedure, however, which is also followed exclusively in money matters and upon which there was general consensus among jurists in and outside of Medina, as Mālik himself states at the close of his argument in defense of this precept. The second procedure pertains to cases in which the plaintiff has no witness at all. According to that procedure, the defendant is asked to take the first oath (which is the opposite of the procedure set forth in the MqS-precept). If he takes an oath absolving himself of responsibility, the plaintiff's claim will be dismissed. If the defendant refuses to absolve himself by an oath, the plaintiff may lay claim to his right by taking an oath in support of his claim.¹¹¹ Mālik's *sunna* precept is contrary to analogy with this second procedure. In the second procedure, the defendant is given the chance to absolve himself at the outset by taking an oath contrary to the plaintiff's claim. According to the MqS-precept, the plaintiff's claim is deemed sufficiently strong when supported by a single witness that his oath is taken first and the defendant is not permitted to absolve himself from the outset.

Ibn 'Abd al-Barr asserts that none of the Companions was known to have repudiated this precept. The post-Prophetic reports for those Companions, Successors, and early jurists who upheld it are very numerous.

¹⁰⁸ *Mud.*, 4:70.

¹⁰⁹ Ibn 'Abd al-Barr, *al-Tamhīd*, 13:59, 41-56; idem, *al-Istidhkar*, 22:60; see Aḥmad ibn Muḥammad al-Ṭahāwī, *Ikhtilāf al-fuqahā'*, 193.

¹¹⁰ Ibn Rushd, *Bidāya*, 2:282.

¹¹¹ *Muw.*, 2: 724-25.

He reports that Abū Bakr, ‘Umar, ‘Uthmān, ‘Alī (the four rightly-guided caliphs), Ibn ‘Umar, and Ubayy ibn Ka‘b all handed down judgments on its basis.¹¹² It was, however, an issue upon which dissent appeared later and became strong. Al-Sha‘bī, Ibrāhīm al-Nakha‘ī, al-Layth ibn Sa‘d, al-Awzā‘ī, al-Thawrī, Abū Ḥanīfa, his followers, and most of the Kufans repudiated the precept.¹¹³ Although the Cordovan Yaḥyā ibn Yaḥyā transmits the precept in his recension of the *Muwatta‘a*, he later repudiated it in Andalusia on the grounds that al-Layth ibn Sa‘d had objected to it.¹¹⁴

According to Ibn Rushd, those who dissented regarding Mālik’s MḍS-precept did so on the ground that it was contrary to the procedure set forth in the Qur’ān, which is supported by another *ḥadīth* requiring more than one witness.¹¹⁵ Ibn ‘Abd al-Barr notes that many of those who opposed the ruling held that it had been repealed by the Qur’ānic verse calling for two witnesses or one male witness and that of two women. They insisted that oaths were instituted in Islamic law primarily for the benefit of protecting defendants by allowing them to repudiate claims against them in the absence of sufficient evidence. As a rule, oaths are not used in the law to establish claims to rights on behalf of plaintiffs lacking sufficient evidence.¹¹⁶ The Shāfi‘ī protagonist in *Ikhtilāf Mālik* also affirms that those who opposed this precept reasoned on such grounds.¹¹⁷

Mālik’s argument shows that he is aware of the reasoning behind the dissenting position. He points out that the second procedure mentioned above is, like the procedure to which he subscribes in the MḍS-precept, contrary to the Qur’ānic text. Mālik reasons further that if jurists can accept this second procedure, for which there is no explicit Qur’ānic authority, they should regard the well-established *sunna* (MḍS) as sufficiently strong to vouch for the validity of this precept despite its also being contrary to the Qur’an.¹¹⁸ Ibn ‘Abd al-Barr expresses his admiration for Mālik’s extensive awareness of previous dissent on this issue and asserts that his statements regarding the precept show how well aware he

¹¹² Ibn ‘Abd al-Barr, *al-Tamhīd*, 13:56; idem, *al-Istidhkār*, 22:51–53.

¹¹³ Ibn ‘Abd al-Barr, *al-Tamhīd*, 13:57; idem, *al-Istidhkār*, 22:52–53; Ibn Abī Shayba, *al-Muṣannaf*, 5:4; al-Ṭaḥāwī, *Ikhtilāf*, 193; al-Ṭaḥāwī, *Mukhtaṣar*, 3:342–43.

¹¹⁴ Ibn ‘Abd al-Barr, *al-Tamhīd*, 13:57; idem, *al-Istidhkār*, 22:51.

¹¹⁵ Ibn Rushd, *Bidāya*, 2:282; see al-Ṭaḥāwī, *Ikhtilāf*, 193–94; al-Ṭaḥāwī, *Sharḥ*, 3:437; al-Ṭaḥāwī, *Mukhtaṣar*, 3:342–43.

¹¹⁶ Ibn ‘Abd al-Barr, *al-Tamhīd*, 13:57; cf. idem, *al-Istidhkār*, 22:55; al-Ṭaḥāwī, *Sharḥ*, 3:437–39; al-Ṭaḥāwī, *Mukhtaṣar*, 3:342–43.

¹¹⁷ [Shāfi‘ī Interlocutor], *Ikhtilāf Mālik*, 196.

¹¹⁸ *Muw.*, 2:724–25.

was of the dissenting opinions of jurists in the generations before his time including the Kufans.¹¹⁹

The Shāfiʿī protagonist in *Ikhtilāf Mālik* subscribes to this *sunna* precept because of the solitary *ḥadīth* which Mālik transmits in its support. For Mālik, that shared solitary *ḥadīth* serves as an ancillary to praxis. It indicates that Medinese praxis is in conformity with what the Prophet did and must have its origin in his practice. The *ḥadīth* serves as an index of praxis but not as independent proof of its validity. The vital details of the precept, as indicated, are not derived from the legal text but from the non-textual source of local praxis. This is an example of how a solitary *ḥadīth*, which would not otherwise have been authoritative in Mālik's eyes, takes on authority by virtue of its conformity with Medinese praxis and is allowed to delimit standing legal analogies under the aegis of the *sunna*.¹²⁰ That same solitary *ḥadīth* is marginalized by Abū Ḥanīfa because of its incompatibility with contrary standardized proofs. Although the non-Medinese rejected this precept and prominent Medinese such as al-Zuhri expressed dissatisfaction with it, none of them produced or claimed to possess an explicit contrary *ḥadīth* repudiating the principal *ḥadīth* upholding this precept or declaring it to have been repealed.

MĀLIK'S *SUNNA*-TERMS IN SUMMARY

There is a clear connection between Mālik's use of terminology in the preceding *sunna*-terms and the fact that they related to significant matters of dissent among the jurists of the formative period. This link shows that dissent constituted an essential criterion by which Mālik determined when to use his terminology in the *Muwattaʿa*. In each example, his terminology and discussion index and clarify where the Medinese stood on these controversial positions in contrast to the dissenting opinions of other jurists. When the terms relate to precepts with internal Medinese dissent, they indicate where Mālik stood with regard to such local disputes. The differences of opinion within Medina regarding Mālik's use of MqS in this chapter raise the question of to what extent Mālik's *sunna*-terms indicate explicit consensus or veer from it as does the term AN and similar terms in the *Muwattaʿa*.

¹¹⁹ Ibn 'Abd al-Barr, *al-Istidhkār*, 22:57.

¹²⁰ See Abd-Allah, "Amal," 179–84; cf. 484–87.

The *sunna*-terms in this chapter appear to belong to the oldest stratum of transmissional praxis going back to the time of the Prophet and the first generation of the Companions, although that link would sometimes have been open to dispute before and after Mālik's time. As we have seen in the last MāS precept (the *sunna* has long been established; *maḍat al-sunna*), even the prominent Medinese jurist al-Zuhri is on record as doubtful of the origins of the precept.

The presumed antiquity of *sunna*-precepts in the *Muwatta'* appears to apply to the remainder of Mālik's *sunna*-terms that were not studied in this chapter. In some instances Mālik indicates the continuity between his Medinese *sunna*-precepts and the Prophet by citing relevant *ḥadīths* and post-Prophetic reports. In the examples studied, however, there are limited supporting texts for Mālik's *sunna*-precepts as well as for the dissenting positions of his non-Medinese (and occasionally Medinese) adversaries. What texts do exist are not fully explicit and, consequently, do not reveal the full scope of the *sunna* precepts as transmitted in Medinese praxis or the opinions of dissenting jurists. When explicit textual evidence is lacking, Mālik's *sunna*-precepts can only be deemed to be rooted in transmissional praxis on the presumption of continuity (*istiṣḥāb al-ḥāl*), since they pertain to rudimentary aspects of the Prophetic law, such as the collection of the alms tax, which Mālik believed went back to the initial institution of such matters in the Medinese community's praxis during the earliest period.

Fazlur Rahman contends that praxis and the "living *sunna* were virtually identical in the formative period.¹²¹ But Mālik makes a distinction between the *sunna* and Medinese praxis in general, and this distinction will become clearer in the study of the non-*sunna* terms. Mālik's terminology and discussions in the *Muwatta'* and his references to praxis in his correspondence with al-Layth ibn Sa'd reflect his awareness of the different levels of Medinese praxis—practices instituted by Prophetic mandate and others elaborated on the basis of later legal interpretation—Mālik would not have regarded the identity of *sunna* and praxis as being a single "living" development over the course of the formative period as a whole.

In practice, Mālik like some later jurists probably would have distinguished between transmissional praxis, which may be called the "living *sunna*" and was conceived of as having unbroken continuity in Medina

¹²¹ Rahman, *Islam*, 76.

since the Prophet, and between various forms of later interpretational praxis. Praxis per se was a broad concept. It included *sunna* precedents but also contained elements that grew up organically through legal interpretation over the generations. Although Mālik's terminology is preoccupied with the dichotomy between what is analogical and non-analogical in the Prophetic legacy, he clearly distinguishes *sunna* materials from those derived from legal interpretation.

The scarcity of explicit legal texts for or against the *sunna*-precepts in the *Muwatta'* is one of the most significant observations of the chapter and this study as a whole. Even in the case of those precepts for which Mālik cites relevant texts, Medinese praxis was predictably and systematically richer in content than available *hadīths* and post-Prophetic reports. In Mālik's legal reasoning, the living example of praxis always presided over Qur'ānic and other received legal texts. It clarified the meaning of textual language, indicated the historical context of the original message, and provided essential details that are rarely explicit in the texts. When Mālik cites supporting texts, they appear to have essentially the function of indicating the source or continuity of the praxis in question. In this regard, received texts serve as indexes or ancillaries to praxis. The full content of Mālik's precepts, however, comes from praxis, not from relevant texts. Such praxis as relates to the Prophetic legacy behind Medinese praxis was certainly transmissional in Mālik's conceptualization as it was in the eyes of later jurists who coined the term.

The relative paucity of authoritative texts to support the praxis-based precepts of Medina made possible the later criticisms of those like Abū Yūsuf, al-Shaybānī, and al-Shāfi'ī who held that the source and continuity of Medinese praxis were questionable and refused to subscribe to its precepts unless textual support were produced for them. Their insistence upon textual proof distinguishes their legal method from that of al-Layth ibn Sa'd in his letter to Mālik, which recognizes the centrality of Medinese and regional praxis but claims the right to dissent wherever the Medinese have themselves dissented.¹²² Al-Layth does not question the priority of Medina over other cities in matters of transmissional knowledge and continues personally to adhere to Medinese local consensus.¹²³ The paucity of legal texts made it difficult for the Medinese to uphold the validity of their

¹²² For the letter see 'Iyāq, *Tartīb*, 1:64–65; Muḥammad ibn Abī Bakr ibn Qayyim al-Jawziyya, *I'lām al-muwaqqi'īn 'an Rabb al-'ālamīn*, (Cairo: Dār al-Kutub al-Ḥadītha), 3:107–14, henceforth cited as Ibn al-Qayyim, *I'lām* (Dār al-Kutub).

¹²³ See Abd-Allah, "Amal," 321–56.

praxis-based teaching under the ground rules of those who insisted upon legal texts as an exclusive criterion of law. The authority of non-textual Medinese praxis rested upon the reputation of Medina and the integrity of its people of learning as guardians of praxis, not the fact of that praxis had been comprehensively archived in legal *ḥadīths* and post-Prophetic reports.

The reality that much of the substance of Medinese transmissional praxis existed in the absence of explicit texts in *ḥadīths* and post-Prophetic reports conforms in part to Fazlur Rahman's contention that the *sunna* was originally "silent," "non-verbal" praxis. He asserts further that, in each succeeding generation, the notion of *sunna* applied to "the actual content of the behavior of each succeeding generation insofar as that behavior exemplified the Prophetic pattern."¹²⁴ "Non-verbal" and "silent" do not mean the same thing if the former is understood to mean oral and "non-textual." The original *sunna* must certainly have had an ample verbal component, but the paucity of legal *ḥadīths* as compared with the richness of transmissional praxis indicates that the original component of *sunna* that was "lived" and even formally and informally "spoken" was neither fully nor unambiguously textualized by its transmitters.

In Fazlur Rahman's view, praxis was originally rooted in the *sunna* but continued to grow organically in the post-Prophetic period. Its organic growth created a disparity and tension between those parts of praxis that were originally part of the *sunna* in the "pristine period" and the new parts, which had grown up around it. Fazlur Rahman believes that this natural expansion of the *sunna*—without being distinguished from later organic accretions—brought about a "disengagement" between the content of the *sunna* (now mixed with its new additions) and *ḥadīth*, which he believes had originally been consubstantial and coeval with the "living" *sunna* as pristine praxis.¹²⁵

Again, the paucity of *ḥadīths* for many rudiments of transmissional praxis calls Fazlur Rahman's presumption into question. The "living" *sunna* as transmissional praxis and legal *ḥadīth* as textualizations of earlier Prophetic precedent appear never to have been consubstantial or coeval. The latter lagged behind the former, no doubt because there was no imperative to formally textualize everything that was already embodied in praxis.

¹²⁴ Rahman, *Islam*, 54–55.

¹²⁵ Rahman, *Islam*, 58–59.

Praxis was *the* vehicle of transmitting of *sunna*. *Ḥadīths* and post-Prophetic reports were ancillary and only partially complete legal references.

By virtue of the ancillary nature of *ḥadīth*, they often transmit Prophetic precedents that were not *sunna* in the sense of being normative or praxis-generating. Consequently, a substantial core of Islamic positive law till this day is closely associated with normative and non-normative Prophetic precedent and remains a matter of extensive dissent from the early periods. Even more of the content of that dissent was never accompanied by explicit and unequivocal *ḥadīths* but appears to have been transmitted in the greater part of the formative period by praxis or, in the absence of praxis, to have been elaborated on the basis of considered opinion and legal interpretation. Medinese praxis did grow organically, but Mālik, al-Layth, and other jurists of the formative and post-formative periods felt themselves competent to distinguish between what elements of praxis were transmissional—emanating from the “pristine” *sunna*—and which were inference-based—being rooted in post-Prophetic legal reasoning.

It is not the fundamental concern of this study to address questions of historical authenticity and how the concept of Medinese praxis actually affected the development of Islamic law and *ḥadīth* transmission as an objective historical reality on the ground, but it is clear that the content of praxis and how Muslims of the formative period conceived of it is crucial to understanding the process and ultimate historical reality of *ḥadīth* textualization and transmission in history. As a tangible reality on the ground, praxis likely affected the formulation of *ḥadīth* and post-Prophetic narratives in ways not generally taken into consideration. By virtue of its organic thoroughness, the concrete presence of praxis before people’s eyes in their day-to-day lives lessened the imperative of archiving the Prophetic legacy through all-inclusive textual transmission of every detail. For the same reason, Medinese praxis provided Mālik and the scholars of Medina with the missing semantic links of their legal texts.

For early *ḥadīth* transmitters during the formative period both conscious and unconscious reliance upon lived praxis must have affected the material they chose to transmit and often dictated and justified the terse language of their narratives. *Ḥadīths* regarding rituals such as ablutions and daily prayers, for example, assume a semantic context in which the receptor of the *ḥadīth* is not completely ignorant *ab initio* of what is being spoken about but is already generally familiar with the practice being reported. Even with an excellent knowledge of Arabic, it is virtually impossible for a person experientially ignorant of the living content of *ḥadīth* to construe properly from the textual message alone how to perform the

acts of which they speak. Given the highly elliptical and contextual nature of the Qur'ān and *ḥadīth* and their historical reception in the context of a lived praxis and an organically shared experience, awareness of that praxis remains essential to their proper understanding.

Ḥadīths such as the narration that the Prophet handed down verdicts on the basis of the oath of the plaintiff supported by the testimony of a single witness are strikingly ambiguous (from the perspective of their detailed Medinese interpretation) when divorced from their semantic context in praxis. Again, however, that ambiguity would not have been problematic for original transmitters and receptors who were familiar with the lived experience of the precept that the *ḥadīth's* wording sought to reflect. The very terseness of the *ḥadīth* narrative was only semantically possible because of the all-embracing reality of praxis, which constituted its fuller context.¹²⁶ Living within the semantic context of Medinese praxis, transmitters and receptors of individual *ḥadīths* and post-Prophetic reports may not have been conscious of the ambiguities that the texts they transmitted would evoke for future receptors who were not acquainted with the same semantic context that was familiar to them. They would not have recognized the need to clarify their textual transmission in greater detail. As time passed, the texts they transmitted, would become far more ambiguous once divorced from their context in praxis. They would also become more prone to divergent interpretations than they had been within the original context of living praxis.

The relative paucity of explicit legal texts regarding the precepts of Medinese praxis must be gauged against the background that the issues they concerned were highly disputed. All *sunna*-precepts discussed in this chapter constituted major issues of law and crucial controversies among the early jurists, especially those of Kufa and Medina, and, in some cases (such as the MḏS precept above), even between the Medinese themselves. Fabrication of *ḥadīths* undoubtedly took place during the formative period. This is a matter of universal consensus, but the relative paucity of legal *ḥadīths* for these critical questions indicates that such fabrication was hardly as systematic or successful as has been widely presumed. For if *ḥadīth* fabrication had been thoroughly systematic, ample numbers of explicit *ḥadīths* and post-Prophetic reports would have been put into circulation to support these Medinese precepts as well as the dissenting positions of the non-Medinese. Presuming even that solitary *ḥadīths* such

¹²⁶ See Abd-Allah, "Amal," 298–99; cf. 436–48.

as those mentioned by Ibn ‘Abd al-Barr, ‘Abd al-Razzāq, Ibn Abī Shayba, Ibn Rushd, al-Bājī, and al-Zurqānī in support of some of these Medinese precepts were themselves fabricated, it is significant that the later tradition did not recognize them as having established authenticity despite the fact that they supported their agreed position.

Each of the *sunna*-precepts discussed in this chapter is contrary to analogy with related precepts of law. Often they represent points of significant difference with the non-Medinese, precisely because the latter applied relevant analogies to these matters. As we have seen, the Kufans and others treated mutual cursing (*li‘ān*) as analogous to repudiation (*talāq*). Likewise, they treated wealth obtained through accretions as analogous for purposes of the alms tax to wealth accrued from profits or base capital. Mālik’s *sunna*-terms serve as red flags, signaling that there is something distinctive about these precepts, which makes them anomalous and excludes them from the domain of reasoned analogy.