CHAPTER NINE

AMR-TERMS SUPPORTED BY LOCAL CONSENSUS

General Observations

Mālik uses a variety of *amr*-terms in the *Muwaṭṭaʾ* to stand for Medinese consensus and praxis. I divide them into two major divisions: 1) those that explicitly indicate total Medinese consensus by stating that there was no dissent about them among the Medinese jurists and 2) those referring only to concurrence (*ijtimāʿ*) without explicit denial of local dissent. The two most common examples of the first division are the terms AMN-X (the agreed precept without dissent among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā wa al-ladhī lā ikhtilāf fīhi*) and A-XN (the precept without dissent among us; *al-amr al-ladhī lā ikhtilāf fīhi ʿindanā*). AMN-X occurs seven times in the *Muwaṭṭaʾ*. In four instances, it occurs with the expression *ådIb* (this is what I found the people of knowledge in our city following; *wa ʿalā hādhā adraktu ahl al-ʿilm bi-baladinā*). The expression A-XN occurs twenty-four times in the *Muwaṭṭaʾ*. It occurs twelve times by itself and another twelve times with slight changes in wording or in various combinations with other terms.[1]

The most common example of the second category of concurrence without explicit denials of dissent is the term AMN (the agreed precept among us; *al-amr al-mujtamaʿ ʿalayhi ʿindanā*).[2] It occurs forty-nine times in the *Muwaṭṭaʾ*, forty-three times by itself and six times in various combinations. AMN is the second most common term in the *Muwaṭṭaʾ*, the most common being AN (the precept among us; *al-amr ʿindanā*), which is discussed in the next chapter. The expression *-zĀIb* (this is the precept that the people of knowledge among us still continue to follow; *wa hādhā al-amr al-ladhī lam yazal ʿalayhi ahl al-ʿilm ʿindanā*), which was discussed earlier, also apparently stands for Medinese consensus and is similar to the *amr*-terms that give specific indication of consensus.[3]

[1] For an index of these references in the *Muwaṭṭaʾ*, see Abd-Allah, "*ʿAmal*," appendix 2.
[2] For the index of AMN terms, see Abd-Allah, "*ʿAmal*," appendix 2.
[3] See Abd-Allah, "*ʿAmal*," 583–85.

The distinction I make between the two categories of *amr*-terms indicating consensus is not definitive. In Mālik's mind, AMN-X, A-XN, and AMN may have been synonymous. As we have seen, his definition of AMN in the report of Ibn Abī Uways identifies it with complete local consensus.[4] But the semantic difference in wording between the two categories deserves special attention. The term AN gives no semantic indication of consensus, and study of the term in context demonstrates its link with matters of local dissent. It is reasonable to presume that the semantic difference in AMN is also meaningful. As indicated earlier, al-Shāfiʿī identified both AMN and AN as lacking the complete consensus of the Medinese jurists.[5] In confirmation of his contention, I have found evidence of AMN precepts about which the scholars of Medina apparently disagreed.[6]

Examples of *Amr*-Terms Indicating Consensus

1. *AMN: Using a Magian's Hunting Dogs*

> Mālik states the AMN that the catch which a Muslim hunter procures by using the hunting dogs of a Magian is permissible to eat (*ḥalāl*), even if the dogs kill the catch before the hunter can reach and slaughter it. Mālik states that this ruling is analogous (*wa innamā mathal dhālika*) to a Muslim's using a Magian's knife to slaughter an animal or his bow and arrow to hunt with. Mālik observes that the catch of a Magian hunter who uses a Muslim's trained hunting dogs is not permissible for a Muslim to eat unless the latter apprehends the catch before it dies and slaughters it properly. Mālik states that this second ruling is analogous (*wa innamā mathal dhālika*) to a Magian's using a Muslim's knife to slaughter an animal or using his bow and arrow to hunt with.[7]

This precept occurs in the transmissions of Yaḥyā, Abū Muṣʿab, and Ibn Ziyād. The AMN term occurs in each of these recensions. Mālik's analogy between this precept and a Magian's using a Muslim's knife or bow also occurs in them all. Abū Muṣʿab and Yaḥyā use the same expression for Mālik's analogy (*wa innamā mathal dhālika*). Ibn Ziyād uses instead the expression that it "has the same status" (*bi-manzilat*) for the analogy.[8]

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[4] See Abd-Allah, "*ʿAmal*," 540–43.

[5] [Shāfiʿī Interlocutor], *Ikhtilāf Mālik*, 202–03, 267; al-Shāfiʿī, *al-Risāla*, 531–32.

[6] See Abd-Allah, "*ʿAmal*," 424–28, 723–25.

[7] *Muw.*, 2:494; *Muw.* (Dār al-Gharb), 1:638; Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:293; *Muw.* (Abū Muṣʿab), 1:196–97; *Muw.* (Ibn Ziyād), 198–224; *Muw.* (*Riwāyāt*), 3:123–27.

[8] *Muw.*, 2:494; *Muw.* (Dār al-Gharb), 1:638; Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:293; *Muw.* (Abū Muṣʿab), 1:196–97; *Muw.* (Ibn Ziyād), 198–224; *Muw.* (*Riwāyāt*), 3:123–27.

Both expressions are commonly used to refer to legal analogies in the *Muwaṭṭa'* and the *Mudawwana*.[9] The precept does not occur in the recensions of al-Qaʿnabī or Suwayd. Mālik's analogy did not originate with him but seems to have been a familiar standard legal analogy for this case. Post-Prophetic reports from Saʿīd ibn al-Musayyab, for example, show him using the same analogy which Mālik cites in the *Muwaṭṭa'* in upholding this precept.[10]

The precept occurs in the *Mudawwana* but without the citation of Mālik's terms. Saḥnūn asks Ibn al-Qāsim about the validity of a Muslim hunting with a dog that a Magian has trained. He is assured that Mālik regarded the game the Muslim takes with the Magian's dog as permissible, and Saḥnūn verifies further through Ibn al-Qāsim that this was indeed Mālik's opinion. Saḥnūn then asks about animals caught in traps and is informed that they must be apprehended before they die.[11]

Ibn ʿAbd al-Barr states that there was no difference of opinion among the jurists regarding the fact that the meat Magians sacrificed or the game they killed was not permissible to Muslims just as it was not permissible for Muslims to marry Magian women.[12] Al-Ḥasan al-Baṣrī regarded it as disliked (*makrūh*) for a Muslim to take game using a Magian's hunting dog, and a number of other early jurists shared this opinion. These included Jābir ibn ʿAbd-Allāh, ʿAṭā', Mujāhid, Ibrāhīm al-Nakhaʿī, al-Thawrī, and Ibn Rāhawayh. According to Ibn ʿAbd al-Barr and reports in Ibn Abī Shayba, their opinion was based on the Qurʾānic verse on hunting dogs (Qurʾān, 5:4), which is addressed to Muslims and speaks of the hunting dogs that they train. Since the verse does not address others who train hunting dogs, they regarded the use of such dogs as disliked (but not forbidden). They also rely on a *ḥadīth* according to which the Companions were prohibited from eating game taken by a Magian's hunting dog. It is reported that al-Ḥasan and Mujāhid disliked the consumption of game killed by a Christian's hunting dog on the same grounds. According to a contrary report in Ibn Abī Shayba, however, al-Ḥasan did not see any harm in using a dog trained by a Christian or Jew.[13] Most of the early jurists held that such game was permissible just as they regarded it permissible to hunt with a Magian's weapon. This was the opinion of Saʿīd ibn al-Musayyab, al-Zuhrī,

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[9] See Abd-Allah, "*ʿAmal*," 211–12; see above 146–47.

[10] Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:294; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:468; Ibn Abī Shayba, *al-Muṣannaf*, 4:242.

[11] *Mud.*, 1:418; *Mud.* (2002), 3:110–11.

[12] Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:294.

[13] Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:294–96; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:468–69; Ibn Abī Shayba, *al-Muṣannaf*, 4:242–43; Ibn Rushd, *Bidāya*, (Istiqāma), 1:448.

and ʿAṭāʾ. It was the opinion of Mālik, Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī, and al-Shāfiʿī. Like Mālik, they held that the dog is merely an instrument (*āla*) of slaughter.[14]

The dissenters regarded it as disliked (*makrūh*) that a Muslim eat the catch he procures by using a Magian's hunting dogs because the Qurʾānic verse on hunting dogs (Qurʾān, 5:4) was addressed to Muslim believers. In their view, the verse pertained specifically to dogs that Muslims had trained for hunting.[15] As Mālik's analogies in the text indicate, his AMN is predicated on the principle that trained hunting dogs are merely instruments of the hunt. The permissibility of the catch is determined by the religious affiliation of the hunter, not by the ownership of the instrument he uses.[16]

No explicit *ḥadīth*s support Mālik's AMN or the dissenting opinions. The ruling was apparently the exclusive product of legal interpretation (*ijtihād*). Mālik's allusion to analogies in the AMN's support is further indication of its root in considered opinion. The dissenting position of Jābir ibn ʿAbd-Allāh and other early jurists, according to Ibn Rushd, was based on their understanding of the implicit implications of the relevant Qurʾānic verse. If this Medinese AMN had its origin in the time of the Companion Jābir ibn ʿAbd-Allah, it presumably belonged to the category of old praxis (*al-ʿamal al-qadīm*), which was based on the legal interpretations of the Companions.[17] Mālik gives no indication in the *Muwaṭṭaʾ* of the ultimate source of this praxis. On the contrary, the information that he deems significant to communicate is that this precept, whatever its ultimate source, has the support of general Medinese concurrence (*ijtimāʿ*).

If the report is accurate that Jābir ibn ʿAbd-Allāh dissented regarding this AMN precept, his disagreement would constitute a significant difference of opinion in Medina. It is plausible that Jābir's dissenting opinion led Mālik to avoid claiming total consensus for this precept by denying any contrary opinions in Medina as in the terms AMN-X or A-XN. Mālik's AMN, in that case, would refer to a preponderant majority consensus of

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[14] Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:294–96; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:468; al-Ṭaḥāwī, *Mukhtaṣar*, 3:194; Ibn Rushd, *Bidāya*, (Istiqāma), 1:448.

[15] Ibn Rushd, *Bidāya*, (Istiqāma), 1:448; Ibn ʿAbd al-Barr, *al-Istidhkār*, 15:294–96; ʿAbd al-Razzāq, *al-Muṣannaf*, 4:468–69; Ibn Abī Shayba, *al-Muṣannaf*, 4:242–43; al-Ṭaḥāwī, *Ikhtilāf*, 59.

[16] See al-Bājī, *al-Muntaqā*, 3:127; al-Zurqānī, *Sharḥ*, 3:404; Ibn Rushd, *Bidāyah* (Istiqāma), 1:44.

[17] See Abd-Allah, "*ʿAmal*," 415–19.

the Medinese people of knowledge, excluding Jābir and anyone else in Medina who followed his opinion.

The analogies in this example are both instances of analogical reasoning based on related precepts of law, not on specific scriptural texts. As we have seen, basing analogies on precepts is a distinctive feature of Mālik's legal reasoning and continued to be espoused by the Mālikī school in later generations.[18] Mālik's wording in the *Muwaṭṭa'* clearly indicates that the Medinese AMN is undoubtedly valid because of the precept-based analogy he invokes. The nature of this AMN precept contrasts with Mālik's *sunna*-precepts. Not only does it appear clearly to be the product of legal interpretation (*ijtihād*) and not rest upon Prophetic authority, but it is analogous to related precepts of law in a manner that is inherently authoritative by force of analogy alone. The *sunna*-precepts derive their cogency strictly from Prophetic authority. As we have seen, Mālik's *sunna*-precepts predictably run contrary to analogy with related precepts. Because the *sunna*-precepts derive their validity from Prophetic authority and no other form of legal reasoning, however, Mālik's citation of them constitutes an implicit acknowledgement of the inherent authority of analogical reasoning. The presumption that seems to underlie Mālik's invocation of the *sunna* in such cases is that, were it not for the prerogative of Prophetic authority to override strict application of analogy, these exceptions would, indeed, have been overruled by their contrary relevant analogies. In drawing exception to analogies, Mālik's *sunna*-terms indicate simulataneously the authority of the *sunna* as well as the dominant jurisdiction of legal analogy in his thought.

2. *AMN: Taking the Testimony of Minors*

> Mālik cites a post-Prophetic report that 'Abd-Allāh ibn al-Zubayr used to hand down legal judgments on the basis of the testimony of minors (*ṣibyān*) regarding injuries and wounds they received from fighting with each other. Mālik states it is the AMN that the testimony of minors is permissible when they inflict wounds and injuries upon each other. Their testimony must be taken before they break up or have the opportunity to speak with adults, who might intimidate them or instruct them to give false witness. The testimony of minors is not permissible in other matters. Mālik adds that the testimony of minors under such circumstances is valid if they give it to reliable (*'udūl*) adult witnesses before breaking up.[19]

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[18] See Abd-Allah, "*'Amal*," 226–34.

[19] *Muw.*, 2:726.

This precept occurs in the recensions of Yaḥyā, Abū Muṣʿab, and Suwayd. Each of them cites the same AMN term with slight textual differences.[20] The precept does not occur in the transmissions of al-Qaʿnabī or Ibn Ziyād.

Saḥnūn treats this precept in the *Mudawwana* and adds important details. He cites Ibn al-Qāsim as explaining that the procedure pertains to wounds and death if witnessed by two or more minors before they separate and have the opportunity to speak to adults. He notes that the witness of a single minor in this case is not adequate nor the witness of women in conjunction with them. Saḥnūn's treatment reflects the preoccupation of the *Mudawwana* with fleshing out detailed legal interpretations, including questions such as accepting the witness formally registered from minors if they reaffirm it after maturity and the acceptance of the testimony of slaves after emancipation or of Christians after becoming Muslims. Saḥnūn substantiates Mālik's opinion regarding the precept by stating that many of his major students including Ashhab supported it. He notes, however, that there was internal Medinese dissent regarding the validity of accepting the witness of women and minors in cases of murder and involuntary manslaughter.[21]

Ibn ʿAbd al-Barr transmits from ʿAbd al-Malik (presumably the Andalusian jurist ʿAbd al-Malik ibn Ḥabīb) that he described this precept as being in continuity with the precept of the people from earliest period and a matter of concurrence according to the opinions of our followers [of the Medinese tradition] (*lam yazal min amr al-nās qadīman wa hūwa mujtamaʿ ʿalayhī min raʾy aṣḥābinā*).[22] I found no similar terminological expressions on the precept in the *Mudawwana*. Saḥnūn transmits from Ibn Wahb that ʿAlī, Shurayḥ, Ibn ʿUmar, ʿUrwa, Ibn Qusayṭ, Abū Bakr ibn Ḥazm, and Rabīʿat al-Raʾy upheld the validity of this precept. He transmits through Ibn Mahdī that Ibrāhīm al-Nakhaʿī and al-Ḥasan al-Baṣrī also endorsed this process. Abū al-Zinād claimed that it was a *sunna*, and ʿUmar ibn ʿAbd al-ʿAzīz held the same position based on a *ḥadīth* of Ibn Wahb.[23]

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[20] *Muw.*, 2:726; *Muw.* (Dār al-Gharb), 2:268–69; Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:77; *Muw.* (Abū Muṣʿab), 2:477–78; *Muw.* (Suwayd), 232–33; *Muw.* (*Rīwāyāt*), 3:538.

[21] *Mud.*, 4:84–85, 80; *Mud.* (2002), 4:23–26; 8–9.

[22] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:77.

[23] *Mud.*, 4:85; *Mud.* (2002), 4:25–26; cf. ʿAbd al-Razzāq, *al-Muṣannaf*, 8:351; Ibn Abī Shayba, *al-Muṣannaf*, 4:364.

This precept constituted a point of extensive dissent. Outside the jurists of Medina, most early Muslim legists held that the testimony of minors was never admissible under any circumstances. The Kufan jurists Abū Ḥanīfa and Sufyān al-Thawrī were among those who upheld the dissenting view in this case.[24] It is reported, however, that ʿAlī applied it on the grounds that the minors' testimony be taken immediately before they were allowed to break up or speak with their families. Saʿīd ibn al-Musayyab, ʿUrwa, Muḥammad al-Bāqir, al-Shaʿbī, Ibn Abī Laylā, al-Zuhrī, and Ibrāhīm al-Nakhaʿī supported the precept, although there is difference of opinion about the consistency of the latter.[25] Ibn ʿAbbās did not support this precept or allow for its application. Abū Ḥanīfa, Abū Yūsuf, al-Shaybānī, Sufyān al-Thawrī, and al-Shāfiʿī regarded the precept as invalid even if the testimony of the minors were taken before they had the opportunity to break up.[26] Shurayḥ, al-Shaʿbī, Ibn Abī Laylā, al-Qāsim ibn Muḥammad, Makḥūl, al-Ḥasan al-Baṣrī, Ibn Ḥanbal, Ibn Rāhawayh, Abū Thawr, and a number of other jurists held, however, that the testimony of the minors should be recorded and preserved until the time of their maturity. After having reached maturity, they were required to validate or repudiate their earlier testimony.[27]

Al-Rasīnī cites this precept as an example of an AMN regarding which there had been differences of opinion in Medina. He contends, as is also indicated above, that al-Qāsim ibn Muḥammad did not agree with this precept, citing a report that he did not regard the testimony of minors as acceptable.[28] The evidence al-Rasīnī gives, however, is not conclusive. The general language of al-Qāsim's opinion appears to pertain to the normative precept, mentioned in Mālik's text and upheld by the Medinese and non-Medinese alike, that the testimony of minors is not generally admissible. More explicit information from al-Qāsim is required to determine whether he actually dissented regarding the AMN and would not allow the testimony of minors as a special provision in the case of wounds they inflict upon each other when fighting.

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[24] Al-Ṭaḥāwī, *Mukhtaṣar*, 3:337–38; al-Zurqānī, *Sharḥ*, 4:387; see also al-Bājī, *al-Muntaqā*, 5:229 and Ibn Rushd, *Bidāya*, 2:279.

[25] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:79; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:350–51; Ibn Abī Shayba, *al-Muṣannaf*, 4:364; al-Ṭaḥāwī, *Mukhtaṣar*, 3:337–38.

[26] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:79–80; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:348–49; Ibn Abī Shayba, *al-Muṣannaf*, 4:364; al-Ṭaḥāwī, *Mukhtaṣar*, 3:337–38.

[27] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:80–81; ʿAbd al-Razzāq, *al-Muṣannaf*, 8:350; Ibn Abī Shayba, *al-Muṣannaf*, 4:364; al-Ṭaḥāwī, *Mukhtaṣar*, 3:337–38.

[28] Al-Rasīnī, "*Fiqh*," 415; see Abd-Allah, "*ʿAmal*," 70, note 2.

Several reports substantiate the widespread agreement of the Medinese jurists on this special AMN provision for the testimony of minors. Mālik himself cites that ʿAbd-Allāh ibn al-Zubayr applied the AMN as a rule of law. Saḥnūn cites a report from Ibn Wahb, according to which ʿAlī ibn Abī Ṭālib, ʿAbd-Allāh ibn ʿUmar, Ibn Qusayṭ, Abū Bakr ibn Ḥazm, and Rabīʿat al-Raʾy upheld this precept as well as the early Iraqi judge Shurayḥ ibn al-Ḥārith al-Kindī (d. 78/697), who was famed for his legendary wisdom. Saḥnūn notes interestingly that Abū al-Zinād ibn Dhakwān and ʿUmar ibn ʿAbd al-ʿAzīz regarded this precept as a *sunna*.[29] It is also reported that Saʿīd ibn al-Musayyab, ʿUrwa ibn al-Zubayr, and al-Zuhrī held the ruling to be valid as well as the caliph Muʿāwiya and the prominent non-Medinese jurists al-Shaʿbī, Ibn Abī Laylā, and Ibrāhīm al-Nakhaʿī. The Companion Ibn ʿAbbās is also said to have agreed with the precept.[30]

The ultimate source of this praxis is unclear. Although Abū al-Zinād and ʿUmar ibn ʿAbd al-ʿAzīz regarded it as a *sunna*, they seem to have stood alone in that claim. Saḥnūn gives no indication of the basis of their claim. None of the sources I consulted cites any *ḥadīth*s in support of this precept. It is noteworthy, however, that their report invokes the authority of the *sunna* to uphold a non-analogical precept, which is typical of Mālik's use of *sunna*-terms. The noted Meccan jurist and scholar, ʿAbd al-Malik ibn Jurayj (d. 150 or 151/767 or 768) asserted that no jurist held to the validity of the AMN prior to ʿAbd-Allāh ibn al-Zubayr's application of it.[31]

This AMN is likely an instance of the legal interpretation of the Medinese Companions, making it an example of old praxis (*al-ʿamal al-qadīm*). Ibn Rushd holds it to be an illustration of Medinese application of the principle of the unstated good (*al-maṣāliḥ al-mursala*). If he is accurate, there would have been no scriptural texts for the ruling.[32] He contends that the Medinese did not regard the testimony of minors in injuries from fighting to be actual testimony (*ḥaqīqa*). It was rather a type of circumstantial evidence (*qarīnat ḥāl*). Ibn Rushd draws attention to Mālik's stipulation in the AMN that the testimony of the minors must be taken before they split up or receive the advice of adults. If their testimony constituted real legal testimony in its own right, there would be no reason for making this stipulation.[33] As indicated earlier in discussion of the unstated good

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[29] *Mud.*, 4:84–85.

[30] Al-Zurqānī, *Sharḥ*, 4: 387; al-Bājī, *al-Muntaqā*, 5: 229; cf. al-Ṭaḥāwī, *Mukhtaṣar*, 3:337–38.

[31] Al-Bājī, *al-Muntaqā*, 5: 229.

[32] See Abd-Allah, "*Amal*," 268–79; by definition, the unstated good applies to areas where the good it legislates is not specifically stated in scriptural texts.

[33] Ibn Rushd, *Bidāya*, 2:279; cf. al-Shāṭibī, *al-Iʿtiṣām*, 2:254.

(*al-maṣāliḥ al-mursala*), Mālikī jurists accepted circumstantial evidence on its basis. As will be seen, Mālik himself accepts circumstantial evidence in the case of collective oaths (*al-qasāma*) on the basis of the general good (*al-maṣlaḥa*).[34]

Al-Bājī highlights the general good (*al-maṣlaḥa*) that he believes is the foundation of this AMN. He points out that minors usually associate with their peers to the exclusion of adults when they play. Furthermore, minors may often engage in types of play and other activities that bring injury upon themselves and, in some cases, even death. If the stipulation were made that the testimony of worthy adults were the only acceptable evidence in cases of injuries to minors, it would become virtually impossible to establish liability in such cases and to award due legal compensation to the injured parties.[35]

Mālik's AMN is a good example of the general paucity of legal *ḥadīth*s as compared to the extensiveness of essential legal doctrine. As Mālik himself and other sources indicate, the testimony of minors in injuries they inflict upon each other was an issue of intense and widespread dissent. It was a critical legal matter directly related to the general good and allocation of potentially large indemnities. Nevertheless, no *ḥadīth*s existed on this issue.

This precept runs contrary to analogy in a manner similar to Mālik's *sunna*-precepts. Although some early juristic authorities regarded it as a *sunna*, Mālik does not classify it that way in the *Muwaṭṭa'*. It lacks the authority of the *sunna* to draw exception to standard analogies. It draws exception, however, through the mandate of the general good (*al-maṣlaḥa*) through application of the principle of the unstated good (*al-maṣāliḥ al-mursala*). The prerogative of this precept to draw exception to the general rule in a manner tantamount to the *sunna* demonstrates the authority of the general good in Mālik's mind and the legal tradition of Medina.

3. *AMN: The Inheritance of an Unknown Son*

> Yaḥyā ibn Yaḥyā states he heard Mālik say it was the AMN that if a man who has more than one son and informs one of them before he dies that a certain person is his [unknown] son, the testimony of that single son will not be sufficient to establish the kinship relation of the newly claimed son to the father [such that he would become a fully legitimate heir]. Nevertheless, the newly claimed son shall receive his proportion of inheritance from the

[34] See Abd-Allah, "*'Amal*," 713–23.
[35] al-Bājī, *al-Muntaqā*, 5:229.

> lot of his legitimate brother who gave testimony in support of his parentage. Mālik gives the example of a man who dies, leaving only two legitimate sons as legal heirs with an estate of six hundred pieces of gold. Customarily, each son would receive three hundred pieces of gold. If one of the two sons gives testimony affirming the birthright of a third, unknown son, the son making the testimony receives only two hundred gold pieces. His unknown brother would receive one hundred pieces taken from the legitimate son's original portion. The second legitimate son, who did not confirm the testimony, receives his original allotment of three hundred pieces of gold. Mālik adds that this ruling is analogous to (*bi-manzilat*) a woman who claims that her deceased father or husband owed a debt in the absence of contrary evidence from her father's other legitimate heirs. The woman pays the creditor the proportion of his debt that corresponds to her proportion of the overall inheritance.[36]

This precept occurs in the recensions of Yaḥyā and Abū Muṣʿab. Both transmissions cite the AMN and mention Mālik's analogy to a woman claiming that her deceased father owed a debt, using the same language for the analogy.[37] Suwayd does not transmit this chapter *per se* but produces the same material which Yaḥyā transmits just before it regarding attribution of paternity.[38] The precept does not occur in the recensions of al-Qaʿnabī or Ibn Ziyād either. I did not find discussion of this precept in the *Mudawwana*.[39]

In contrast to the *sunna*-terms, this AMN conforms to the general analogical pattern of Mālik's legal reasoning. Most examples of the *amr*-terms indicating consensus reflect Mālik's distinctive method of drawing legal analogies on the basis of established precepts of law. This example is especially illustrative. Its basis is rooted in legal interpretation (*ijtihād*) with no apparent scriptural referents. Presumably the precept of the woman's testimony on outstanding debts constituted the analogue of Mālik's AMN precept on unknown sons—not because one precept was more cogent than the other—but because the precedent of the woman's testimony was older and had been incorporated into Medinese praxis at an earlier time.

Mālik's AMN constituted a point of difference between the Medinese and Kufans. The latter held that the legitimate brother giving testimony on behalf of the unknown son's birthright must divide half of his share

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[36] *Muw.*, 2:741–42; *Muw.* (Dār al-Gharb), 2:285–86; Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:196; *Muw.* (Abū Muṣʿab), 2:465–66; *Muw.* (*Riwāyāt*), 3:564–65.

[37] *Muw.*, 2:741–42; *Muw.* (Dār al-Gharb), 2:285–86; Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:196; *Muw.* (Abū Muṣʿab), 2:465–66; *Muw.* (*Riwāyāt*), 3:564–65.

[38] *Muw.* (Suwayd), 224–25.

[39] *Mud.*, 4:69–79; *Mud.* (2002), 8:481–512.

of inheritance (making one hundred and fifty pieces of gold instead of one hundred) with the unknown brother, not a third as in the Medinese position. Like the Medinese, the Kufans held that any other legitimate brothers not giving supporting testimony would receive their original inheritance portions undiminished, as long as no binding evidence was produced to establish the unknown son's birthright.[40]

The jurists agree that the kinship relation of an unknown brother can only be legally established if affirmed by two brothers or all the heirs. Their dissenting positions are not about the validity of the kinship tie but what rights may be due on an heir who affirms that connection while the others do not affirm it.[41] Mālik's opinion as set forth in this precept is regarded as standard, namely that the person affirming the kinship relation is not held responsible for more than his portion of the inheritance that would have been due just as would have been the case with acknowledging a debt. They generally ascribe to the validity of this analogy. Ibn Ḥanbal held an opinion similar to that of Mālik on this question.[42] Ibn ʿAbd al-Barr states that the Kufans dissented regarding this precept and held that a brother affirming his father's paternity of an unknown brother must give him half of his estate. Al-Shāfiʿī held that the brother making the affirmation is not required to give him a share of his estate because the unknown brother's kinship relation cannot be established by the brother's lone testimony. He may, however, allow him to share in his inheritance if he likes. There are differences of opinion about al-Shāfiʿī's adhering consistently to this opinion. Al-Layth ibn Saʿd is said to have held a position similar to that of al-Shāfiʿī.[43]

ʿUthmān ibn Kināna (d. ca. 185/ ca. 801), one of Mālik's most prominent students and his successor after his death as the head of the Medinese school, agreed with the Kufan practice and not with Mālik's AMN as stated in the *Muwaṭṭaʾ*. Al-Bājī and al-Zurqānī register Ibn Kināna's dissenting position but give no indication of whether he disagreed with Mālik during his lifetime or after Mālik's death.[44] If Ibn Kināna dissented during Mālik's lifetime, this AMN would be an interesting illustration of AMN as majority consensus. In this case, the dissenting voice would have been one of Mālik's students. Like Ibn Wahb, Ibn al-Qāsim, and other prominent

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[40] See al-Bājī, *al-Muntaqā*, 6:17; al-Zurqānī, *Sharḥ*, 4:421.
[41] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:198.
[42] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:198.
[43] Ibn ʿAbd al-Barr, *al-Istidhkār*, 22:198–99.
[44] See al-Bājī, *al-Muntaqā*, 6:17; al-Zurqānī, *Sharḥ*, 4:421.

students of Mālik, Ibn Kināna had sufficient credentials during and after Mālik's life to engage in independent legal interpretation (*ijtihād*). If indeed Mālik's AMN refers here to Ibn Kināna's dissent, it would reflect the high regard in which he held his closest students. The dissenting position of Ibn Kināna from his teacher Mālik is an excellent illustration of the phenomenon Wael Hallaq has observed that during the formative period jurists even at the regional level enjoyed considerable personal freedom to dissent and were not bound to the opinions of their teachers or a particular Imām. As Hallaq further observes in this context, "regional schools" as monolithic bodies of localized legal practice and doctrine—after the manner that Schacht and others conceived of them—do not seem to have actually ever existed.[45]

Al-Layth ibn Saʿd reportedly disagreed with this AMN. His opinion was that the newly claimed unknown brother had no rights of inheritance from the father unless binding evidence were produced to establish his kinship. If the father claimed the unknown son on his deathbed, as in Mālik's example, al-Layth would only accept his testimony and give the unknown brother full inheritance rights if there were at least two acceptable witnesses.[46] Al-Layth's dissent is especially significant, since he describes himself in his letter to Mālik as one of the most astute followers of the Medinese legal tradition in matters upon which they had agreed (*fīmā ittafaqū ʿalayhi*), while reserving for himself the right to dissent with the Medinese in any legal opinion in which they themselves disagreed.[47]

None of my sources cites any *ḥadīth*s to support this AMN or any of the contrary opinions of dissenting jurists. The AMN appears to have been an instance of praxis resulting from later Medinese legal interpretation (*ijtihād*). Again, this inference is strengthened by Mālik's resorting to analogy to support the AMN's validity. There is no indication when this legal interpretation was made. As indicated earlier, it is plausible that the AMN's analogue regarding the woman heir who brings one of her deceased father's debts to light was historically prior in Medinese praxis, since Mālik refers to it in support of the present precept. Characteristically, Mālik does not show particular concern in communicating the origin of the AMN but rather the fact that it was supported by the concurrence (*ijtimāʿ*) of the Medinese scholars. In this case, again, they appear to have been a majority

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45 Seev Hallaq, "Regional Schools?," 1–26, Melchert, "Traditionist-Jurisprudents," 400.
46 See al-Bājī, *al-Muntaqā*, 6:17; al-Zurqānī, *Sharḥ*, 4:421.
47 See Ibn al-Qayyim, *Iʿlām* (Saʿāda), 3: 95; Abd-Allah, "'*Amal*," 322–23.

with a dissenting local minority. As before, this precept conforms to the pattern of the general paucity of legal *ḥadīth*s.

4. *AMN and A-XN: Permission to Alter Bequests Other than Deferred Manumission* (Tadbīr)

> Mālik cites the *ḥadīth*, "No Muslim possessing anything in which he makes a bequest (*waṣiyya*) has the right to pass two nights pass without the bequest being put in writing and kept in his possession." Mālik states it is the AMN that a person may alter whatever he likes in his bequest during his lifetime whether in times of health or illness, including the emancipation of slaves. He may [later] discard the bequest altogether or alter it as he sees fit, except in the case of deferred manumission (*tadbīr*).[48] The stipulation of deferred manumission, once given, may never be altered or revoked. Mālik explains the precept by reference to the preceding *ḥadīth*, which stipulates that bequests be put in writing without delay. Mālik reasons that, if it were not possible for the maker of a bequest to alter it, it would necessarily follow that the property entailed in the bequest be impounded (*maḥbūs*) such that it could not be sold or given away at the time that the bequest was made. This is not so except in the case of deferred manumission. Mālik then states that it is the A-XN that the maker of a bequest may change whatever he wants in the bequest except for deferred manumission.[49]

This precept occurs in the recensions of Yaḥyā and Abū Muṣʿab. Both cite the same AMN and A-XN terms.[50] Suwayd transmits the same material with a longer title and begins with the same *ḥadīth* about putting bequests down in writing. He does not transmit Mālik's discussion of the precept or his citation of terms. Suwayd includes a post-Prophetic report that Ibn ʿUmar directed a rich young man to make a bequest for the benefit of

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[48] "Deferred manumission" (*tadbīr*) is a type of irrevocable manumission that is classified as a binding, irrevocable contractual agreement by which a master promises a slave, who is subsequently referred to as a *mudabbar* (a slave to be manumitted belatedly), that he or she will be set free upon the master's death. Deferred manumission is regarded as an exceptional bequest. Like other bequests it pertains to the disposition of the master's property (of which the slave was a legal part) after the owner's death. Like other property under bequest, it exempted the manumitted slave from inheritance by legal heirs. Consonant with other types of bequests, deferred manumission could only be applied to slaves who, in the aggregate, constituted one third or less of the master's total estate. On the other hand, deferred manumission was an exceptional type of bequest in that it could not be revoked; in that regard, it was in keeping with other types of manumission that were perpetually binding. See *Muw.*, 2:814; Ibn Rushd, *Bidāya*, (Istiqāma), 2:381–85.

[49] *Muw.*, 2:761; *Muw.* (Dār al-Gharb), 2:309–10; Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:21; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:247; *Muw.* (Abū Muṣʿab), 2:505–06; *Muw.* (*Riwāyāt*), 4:7–8.

[50] *Muw.*, 2:761; *Muw.* (Dār al-Gharb), 2:309–10; Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:21; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:247; *Muw.* (Abū Muṣʿab), 2:505–06; *Muw.* (*Riwāyāt*), 4:7–8.

a female paternal cousin, since all of his heirs lived far away in Greater Syria. He ends with the unusual term AM (*al-amr al-mujtamaʿ ʿalayhī*) that a person of weak intellect or similar legal disabilities who has clarity or intermittently regains consciousness is allowed to make a bequest if they understand what they are doing at the time. In the transmissions of Yaḥyā and Abū Muṣʿab, this AM occurs as the normal term AMN but is put in the next chapter.[51] The precept does not occur in the recensions of al-Qaʿnabī or Ibn Ziyād as they presently stand.

Saḥnūn transmits in the *Mudawwana* much of the same information as Mālik transmits in this chapter in the *Muwaṭṭaʾ*. As is often the case, the chapter elaborates beyond the core precept by giving details of legal interpretation. Saḥnūn cites Mālik as stating that it is the AMN that bequests may be changed or annulled completely. He then cites the *ḥadīth* with which Mālik begins the chapter.[52] Saḥnūn produces supporting documentation from Ibn Wahb showing that Abū Bakr ibn Ḥazm, Yaḥyā ibn Saʿīd, Ibn Qusayṭ, Ibn Hurmuz, and al-Zuhrī endorsed Mālik's precept. He cites Ibn Qusayṭ and Yaḥyā ibn Saʿīd as stating that "the juridical ruling of the people" (*qaḍāʾ al-nās*) is in accord with the precept. Saḥnūn adds materials from Mālik about deferred manumission (*tadbīr*) being exceptional in this regard in that it cannot be reversed.[53]

There was widespread agreement among the early jurists on the precept that bequests may be altered or discarded during one's lifetime but that the stipulation of deferred manumission cannot be altered. The slave manumitted by deferment was impounded in the sense that he or she could not be sold, given away as a gift, inherited, or otherwise transferred once the stipulation had been made. Al-Zurqānī states that the preponderant majority (*al-jumhūr*) of the early jurists of the Hijaz, Syria, and Kufa held this position.[54] Ibn ʿAbd al-Barr cites that this precept is a matter of general concurrence (*mujtamaʿ ʿalayhi*) except for the point relating to deferred manumission. Some jurists held that promises of deferred manumission could be rescinded and such slaves could be sold. Those who held that slaves under deferred manumission could be sold also held that bequests involving deffered manumission could be altered.[55] Mālik, Abū Ḥanīfa, their followers, al-Thawrī, al-Awzāʿī, and other early jurists held

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[51] *Muw.* (Suwayd), 245–46; cf. *Muw.*, 762; *Muw.* (Abū Muṣʿab), 2:507.
[52] *Mud.*, 4:282–83; *Mud.* (2002), 10:128–32.
[53] *Mud.*, 4:282–83, 298–99; *Mud.* (2002), 10:128–32; 178–80.
[54] Al-Zurqānī, *Sharḥ*, 5: 75.
[55] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:21–22; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:246.

that promises of deferred manumission could not be changed and that bequests involving such promises could not be altered. Ibn ʿUmar, Ibn al-Musayyab, Ibrāhīm al-Nakhaʿī, and al-Zuhrī are said to have disliked the act of selling a slave under promise of deferred manumission.[56] Jābir ibn ʿAbd-Allāh, Mujāhid, ʿAṭāʾ, Ṭāwus, a number of other Successors, al-Shāfiʿī, Ibn Ḥanbal, and Ibn Rāhawayh held that the promise of deferred manumission could be altered.[57] There is an authentically transmitted *ḥadīth* to the effect that the Prophet sold a slave under deferred manumission. A post-Prophetic report transmits similar information from ʿĀʾisha.[58]

Al-Zurqānī does not give details about the dissenting jurists who did not belong to this early preponderant majority. Al-Awzāʿī, who did, of course, belong to Mālik's generation, is reported to have held that one could sell a slave manumitted by deferment to a person who intended to set him free.[59] In the generations after Mālik, al-Shāfiʿī, Ibn Ḥanbal, and the Ẓāhirīs registered their disagreement with this precept.

Abū Ḥanīfa was not fully in agreement with Mālik's AMN precept. Mālik draws a distinction between deferred manumission and other types of bequests, which might also involve other types of manumission which Mālik did not regard as falling under the definition of deferred manumission. Mālik's distinction between deferred manumission and bequests involving other types of manumission is indicated in the wording of his AMN when he refers to bequests that entail manumission but may be altered.[60] Many early jurists agreed with Abū Ḥanīfa's position that no such distinction could be drawn between deferred manumission and any other types of emancipation stipulated in bequests.[61]

It appears from Mālik's discussion of this AMN that he regarded it as transmissional praxis. He observes from the *ḥadīth* cited at the beginning of the chapter that the Prophet required makers of bequests to put them

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[56] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:22; cf. al-Ṭaḥāwī, *Ikhtilāf*, 47–48.

[57] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:22; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:247–48; cf. Ibn Abī Shayba, *al-Muṣannaf*, 6:219.

[58] Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:248; Ibn Rushd, *Bidāya* (Istiqāma), 2:383. Al-Ṭaḥāwī also transmits a *ḥadīth* according to which a Companion freed a slave on the basis of deferred manumission but later needed to sell the slave to meet the Companion's dire financial need. The Prophet asked another Companion to purchase the manumitted slave, give the money to his former owner to meet his need, and presumably keep the slave under the contract of deferred manumission as with the former owner. See al-Ṭaḥāwī, *Ikhtilāf*, 48.

[59] Al-Zurqānī, *Sharḥ*, 5:74–75.

[60] See Ibn Rushd, *Bidāya* (Istiqāma), 2:381; al-Bājī, *al-Muntaqā*, 7:45–47; al-Zurqānī, *Sharḥ*, 5:74–75.

[61] Ibn Rushd, *Bidāya* (Istiqāma), 2:381.

in writing as soon as possible. As a legal corollary of the Prophet's statement, Mālik reasons that ordinary bequests are readily open to alteration and revocation. If that were not the case, the legal consequence would have necessarily followed that all properties designated in bequests be impounded and restricted from being sold, given as gifts, or transferred through other means. In that case there would have been a parallel praxis of impoundment of bequest properties. Mālik indicates in another AMN pertaining to deferred manumission that no such praxis existed.[62]

In this AMN and A-XN, Mālik reasons on the basis of the absence of any contrary praxis restricting the disposal of bequest properties that the Prophet must have generally allowed bequests to be altered or revoked at will. The making and altering of bequests is a matter of general necessity (*ʿumūm al-balwā*), so the question of transferring bequest properties must have arisen at an early time. According to the understanding of ʿAbd al-Wahhāb and ʿIyāḍ, lack of praxis in Medina in certain matters falls within the category of transmissional praxis on the presumption that the absence of such praxis reflects the Prophet's deliberate omission (*tark*), since any contrary praxis would have been well-known if the Prophet had instituted it.[63] This seems to be the kind of reasoning that Mālik has in mind in this case. The Prophet insisted that all bequests be put in writing without delay. Hence, the designation of bequest properties must have been well known. It follows that the legal status of such properties would also have been well known and legally regulated, if the Prophet had required specific regulations. Just as existing praxis often falls under the category of general necessity (*ʿumūm al-balwā*), in this AMN and A-XN, the absence of praxis falls under general necessity, again calling to mind Ibn al-Qāsim's justification of Medinese praxis as a standard by which to judge authentic *ḥadīth*s when they imply a particular praxis, which never came to exist in Medina.[64]

In this example, the terms AMN and A-XN are cited in conjunction with the same precept. They appear to be synonymous. AMN, as indicated earlier, is an inclusive term and may include A-XN. The term A-XN, on the other hand, is exclusive and does not appear to overlap with AMN when the latter indicates majority and not total consensus. But the terms may not be identical in this example. The A-XN is straightforward. It simply states that all bequests may be altered or revoked except in the case of

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[62] *Muw.*, 2:814.
[63] See Abd-Allah, "*ʿAmal*," 410–15.
[64] See Abd-Allah, "*ʿAmal*," 180–81.

deferred manumission. The A-XN wording does not involve Mālik's complex definition of what does or does not fall within the purview of deferred manumission. The AMN, on the other hand, clearly pertains to Mālik's distinction between deferred manumission and other types of emancipation that may be stipulated in bequests but do not fall under the heading of deferred manumission. Abū Ḥanīfa would have agreed with the A-XN. He would not have agreed with the AMN. As we have seen, Abū Ḥanīfa regarded all bequests involving the emancipation of slaves to fall under the heading of deferred manumission.

Mālik's AMN in this example combines elements that are analogous with others that are not. The fundamental precept is analogous as regards types of bequests pertaining to emancipation that do not belong to the category of deferred manumission and are completely in keeping with the standard law of bequests. But the precept is contrary to analogy in its stipulation that deferred manumission, according to Mālik's definition of it, is exceptional and cannot be altered or revoked once it has been pronounced. Mālik regards deferred manumission to be contrary to analogy with general bequests only in this particular detail about their irrevocability. He indicates in his AMN on deferred manumission that the execution of deferred manumission after the master's death is done in the same manner as the execution of all other types of standing bequests.[65]

5. *AMN: Bequests to Free Jointly Owned Slaves*

> Mālik begins with a *ḥadīth* stating that anyone who frees his share of a jointly owned slave and has enough money to pay the slave's total emancipation will be required to pay his partners their shares for the slave [so that the slave may go free]. He stipulates that the values of the shares must be equitably determined. Each shareholder shall receive his due portion, and the slave will be emancipated by the master who initiated the manumission, [which gives him patronage rights (*walā'*) regarding the slave after he or she is freed]. If the person who first frees his share of the slave does not have sufficient money to compensate his partners, only his share of the slave shall be set free. Mālik states it is the AMN regarding a jointly owned slave one of whose masters bequeaths that his share of the slave shall be freed upon the master's death that only his share of the slave will be set free when the master dies. The remaining shares of the slave will not be freed against that master's estate unless the master himself had stipulated that. In that case, as many shares of the slave shall be bought out [from the other owners] as one-third of the deceased master's estate allows. The reason for this, Mālik

[65] *Muw.*, 2:814.

> explains, is that the estate of the deceased master—taken as a whole—ceases to be his property upon his death and devolves to his heirs, except for any specific bequests he made, [which may not exceed one-third of the total value of the estate]. Therefore, to emancipate the remaining shares of the slave from the master's estate would amount to freeing the slave from the property of the rightful heirs, who—Mālik notes—had not initiated the emancipation and, consequently, would receive no rights of patronage, which pertain solely to the initial emancipator. Mālik indicates that to free a slave at the expense of heirs would cause them detriment (*ḍarar*).[66]

This precept occurs in the recensions of Yaḥyā, Abū Muṣʿab, and Suwayd. The chapter is similar in all three transmissions. They all cite the AMN in generally the same format, although Suwayd—as is frequently the case—lacks the same chapter divisions.[67] The precept is missing from al-Qaʿnabī and the Ibn Ziyād fragment.

Saḥnūn relates the same precept from Mālik in the *Mudawwana*, although he gives no citation of terms from Mālik or others. He cites supporting evidence from Rabīʿat al-Raʾy, who based his opinion on a *ḥadīth* similar to the one with which Mālik opens this chapter in the *Muwaṭṭaʾ*. He cites other supporting evidence, including post-Prophetic reports from ʿUmar and Ibn ʿUmar. Saḥnūn asks questions relevant to legal interpretation of the precept in practice such as how it should be applied in the case of a person who is critically sick and understakes the emancipation of a jointly owned slave.[68]

Mālik and the majority of the jurists of the Hijaz and Iraq held that if a person emancipates part of a jointly owned slave, the slave must be completely freed and is not required to exert himself to pay for the remaining portions.[69] Ibn ʿAbd al-Barr clarifies that there was no dissent among the jurists that a person making partial emancipation of a slave is not held accountable for paying the remaining shares of his partners unless he has enough wealth to cover their portions. There was dissent, however, about whether or not the slave should be compelled to earn payment for the remaining portions, if the emancipator is unable to pay them. This dissent was based on differences in transmitted reports and the different opinions of the early jurists. A *ḥadīth* contrary to the one Mālik cites in the *Muwaṭṭaʾ* states, for example, that if the shareholder lacks sufficient

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[66] *Muw.*, 2:772–73.

[67] *Muw.*, 2:772–73; *Muw.* (Dār al-Gharb), Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:131; 2:323–24; *Muw.* (Abū Muṣʿab), 2:399–400; *Muw.* (Suwayd), 335–37; *Muw.* (*Riwāyāt*), 4:29–31.

[68] *Mud.*, 2:381–82; *Mud.* (2002), 5:305–07; cf. ʿAbd al-Razzāq, *al-Muṣannaf*, 9:149–50.

[69] Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:284–85, 288; Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:121.

wealth, the slave should work to earn payment for the remaining shares without undue difficulty being imposed upon him.[70]

Ibn ʿAbbās, al-Awzāʿī, Ibn Abī Laylā, al-Thawrī, Abū Yūsuf, al-Shaybānī, and others held that if a person freeing a jointly owned slave has sufficient wealth for his partner's shares, the slave is not required to exert himself to pay for the remaining portions. If he lacks sufficient wealth, the slave must work to pay off the remaining portions. The slave is technically free, however, from the time that the first portion is set free, although he is required to exert himself to repay the remaining shares.[71]

In the view of Abū Ḥanīfa, if a man with sufficient wealth emancipates a jointly owned slave, his partner is given the choice to share in the emancipation and the rights of patronage (*al-walāʾ*), or he may require the slave to exert himself to pay for the outstanding portion and still share the rights of patronage. He may also force his partner to pay the outstanding portion, and the partner may require the slave to pay him back. If the emancipator is poor, the partner may hold the slave responsible to earn payment for the remaining portion and share patronage rights, or he may free his portion and share such rights. Abū Ḥanīfa regarded the slave who was earning payment of the outstanding shares as tantamount to a contractually emancipated slave (*mukātab*) in all legal rulings pertaining to him. Zufar held that the entirety of the slave is set free against the partner who freed his share. The emancipator is required to pay back the partner's share whether he be rich or poor. Abū Ḥanīfa and Zufar did not follow either of the two *ḥadīth*s transmitted in this matter.[72] Abu Hanifa held that the slave is emancipated in proportion to the portion manumitted and then works (*siʿāya*) to earn the remainder of what is due, regardless of whether the master is wealthy or poor. Abū Yūsuf and al-Shaybānī went against him in this because they did not believe the slave should be required to work off his freedom for the unpaid portions. Most jurists agreed with their position.[73]

Ibn Ḥanbal followed the *ḥadīth* of Ibn ʿUmar and took a position similar to that of al-Shāfiʿī. If the emancipator has sufficient wealth, he is held liable to pay his partner. If he does not have adequate wealth, only that

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[70] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:118–20; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:278–82; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:150–52.

[71] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:123–24; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:284–87; ʿAbd al-Razzāq, *al-Muṣannaf*, 9:149, 152–54.

[72] Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:124; Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:287; al-Ṭaḥāwī, *Sharḥ*, 2:478–79.

[73] Ibn ʿAbd al-Barr, *al-Tamhīd*, 13:288; al-Ṭaḥāwī, *Sharḥ*, 2:479.

portion of the slave is emancipated that was technically set free. The slave remains part free and part slave and is not required to exert himself to earn his freedom.[74]

The Basran Successor Muḥammad ibn Sīrīn (d. 110/729) and Mālik's teacher Rabīʿat al-Raʾy both held irregular (*shādhdh*) opinions on this matter. Ibn Sīrīn contended that whenever a person who owns a slave jointly frees his share of the slave, the remaining shares of the slave shall be freed at the expense of the public treasury (*bayt al-māl*).[75] For Ibn Sīrīn, there would have been no question of the slave being freed at the expense of the master's heirs nor of the slave being freed from one-third of the master's estate, as stipulated in Mālik's AMN. Rabīʿa held, on the contrary, that it is invalid for a person to free his share of a jointly-owned slave without the consent of the other shareholders, because of the detriment (*ḍarar*) to the other shareholders that his action may cause. Rabīʿa also would have dissented on Mālik's AMN and have added the stipulation that the manumitting master may not make such an emancipation bequest without the prior consent of the other shareholders. However, Ibn Rushd doubts the authenticity of this report about Rabīʿa, using the expression "it has been said about Rabīʿa" (*qīla ʿan Rabīʿa*), which is customarily used in traditional Islamic texts to indicate the transmitter's uncertainty about the authority of the report he transmits.[76]

Al-Awzāʿī, Ibn Abī Laylā, Abū Yūsuf, al-Shaybānī, and the majority of Kufans are said to have held that the jointly-owned slave becomes free on the day that the initiating shareholder sets free his share of the slave. If the emancipator is financially unable to compensate his partners, the slave will still be set free, but the newly freed slave will be required to compensate the other shareholders from his or her earnings. The rights of patronage and clientship will go exclusively to the initial emancipator. Ibn Abī Laylā and certain other unspecified jurists also held that the slave could require the shareholder who initiated his emancipation to compensate him for his earnings, which he was required to pay out to the other shareholders, if the emancipator were financially solvable and capable of carrying the expenses.[77]

It may be inferred that al-Awzāʿī, Ibn Abī Laylā, Abū Yūsuf, al-Shaybānī, and the majority of Kufans would have dissented with Mālik's AMN, at

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74 Ibn ʿAbd al-Barr, *al-Istidhkār*, 23:125.
75 Ibn Rushd, *Bidāya* (Istiqāma), 2:362; al-Zurqānī, *Sharḥ*, 5:6.
76 Ibn Rushd, *Bidāya* (Istiqāma), 2:360.
77 Ibn Rushd, *Bidāya* (Istiqāma), 2:360.

least the provision that the jointly-owned slave be declared completely emancipated upon the death of the initial emancipator and be required to compensate the other partners from his own earnings, if sufficient funds were lacking from the master's estate. Abū Ḥanīfa is reported to have held a similar position, although he, unlike the others, held that if the master who first freed his share of the slave had himself compensated the other shareholders from his private wealth, he could require the slave to exert himself and gain earnings through which to compensate the emancipator for his expenses as paid out to the partners.[78]

The source of Mālik's AMN is not evident. It is appended to a *ḥadīth*, but the provisions of the AMN are not explicit in the *ḥadīth*'s text. In Mālik's view, the AMN constitutes a logical legal corollary of the *ḥadīth*. The relevant stipulation in the *ḥadīth* is that a shareholder who frees his share of a jointly-owned slave shall not be required to compensate the other shareholders, if he lacks sufficient wealth to do so. (The Kufans argued that this stipulation was not part of the original *ḥadīth* text but was the personal commentary of Nāfiʿ, the *ḥadīth*'s transmitter, which became interpolated into the original wording.)[79] The AMN differs in that it pertains to the special case of a master freeing his share of a jointly owned slave as part of a bequest (*waṣiyya*).

According to the Islamic law of inheritance and bequests, the entirety of the deceased's estate immediately devolves to the property of his designated heirs, except for those parts of the estate that were specifically set aside as bequests on the condition that their total value not exceed one-third of the overall value of the estate. Mālik explains that, in effect, the master—no matter how wealthy he may have been during his lifetime—no longer possesses sufficient wealth to free the remaining shares of the slave unless he specifically designated such use of his wealth in the bequest and it falls within one-third of his estate.

It is not clear whether the legal corollary embodied in the AMN belonged to transmissional praxis or inference-based praxis resulting from post-Prophetic legal interpretation (*ijtihād*). Characteristically, Mālik gives no indication in the *Muwaṭṭaʾ* of the historical source of this Medinese precept. As before, his primary concern is the fact that the AMN is supported by the concurrence (*ijtimāʿ*) of the Medinese jurists. As in a number of similar cases, that concurrence in this case may well have been a

[78] Ibn Rushd, *Bidāya* (Istiqāma), 2:360.
[79] Ibn Rushd, *Bidāya* (Istiqāma), 2:361.

majoritarian and not a total consensus of the Medinese scholars, possibly excluding, for example, Mālik's teacher, the prominent Successor Rabīʿat al-Raʾy.

The AMN in this example is the direct consequence of the interplay of two well-established Medinese precepts of law: first, concerning the emancipation of jointly-owned slaves and, second, pertaining to the disposition of bequests. Mālik cites a similar AMN later in the *Muwaṭṭaʾ* which sets forth other corollaries regarding the emancipation of jointly-owned slaves when one of the shareholders initiates the slave's emancipation through a contract of contractual emancipation (*mukātaba*). The contractual emancipation AMN obliges all the other shareholders to make a similar contract without obliging the initial emancipator to compensate them.[80] The two AMNs are not strictly analogical, and no concrete analogies are drawn in them. Nevertheless, they are consistent with other well-established precepts of Medinese law and lack the exceptional and anomalous character of Mālik's *sunna*-precepts.

The paucity of legal *ḥadīth* is manifest in this example as in many before. A relevant solitary *ḥadīth* exists on the general topic but does not provide the detailed information contained in the AMN precept, nor did explicit contrary *ḥadīth*s exist to support the contrary positions of dissenting jurists.

6. *AMN and S-XN: The Collective Oath* (Qasāma)

> Mālik cites two *ḥadīth*s pertaining to the collective oath (*al-qasāma*).[81] He states that it is the AMN, what he has heard [transmitted] from those who are acceptable to him (*mimman arḍā*) regarding collective oaths, and the concurrence (*ijtimāʿ*) of the Imāms of early and recent times that the plaintiffs take the first oaths and that collective oaths are only required in two circumstances. Either the victim states before dying that a certain person was responsible for his death or the plaintiffs produce circumstantial evidence (*lawth min bayyina*) indicating the defendant's guilt, even if it is not

[80] *Muw.*, 2:789. In the contract of contractual emancipation (*mukātaba*), the master agrees to allow the slave to work independently in order to earn his or her freedom within a stipulated period. Mālik provides an explanation of his legal reasoning in the contractual emancipation AMN.

[81] The collective oath (*al-qasāma*) was a pre-Islamic custom that carried over into the Prophetic law. It is taken in cases of murder. It establishes guilt of murder or general liability in cases of involuntary manslaughter in the absence of conclusive evidence when there is sufficient circumstantial evidence in the hands of the plaintiffs indicating the guilt or liability of the defendant. The plaintiffs are required to take fifty oaths supporting their certainty of the defendant's guilt; the defendant is then allowed to take fifty oaths affirming his innocence.

> conclusive (*qāṭiʿa*). Mālik adds that this precept is the S-XN and that the praxis of the people continues to be in accordance with (*wa al-ladhī lam yazal ʿalayhi ʿamal al-nās*) the procedure that, in cases of murder and involuntary manslaughter, it is the plaintiffs who take the first collective oaths. He points out that in the *ḥadīth* cited, the Prophet let the plaintiffs take the first oaths.[82]

This precept occurs in the recensions of Yaḥyā and Abū Muṣʿab. The structure of their chapters varies. Abū Muṣʿab subdivides his material on collective oaths into three successive chapters.[83] He does not cite the AMN term but indexes the precept instead as "the precept I found the people following" (*al-amr al-ladhī adraktu al-nās ʿalayhi*). He follows this with the same expression in Yaḥyā that the precept has the concurrence of the Imāms of early and recent times. Abū Muṣʿab follows this with a praxis chapter (*Bāb al-ʿAmal fī al-Qasāma*), in which he cites the S-XN term and precept.[84] This material does not occur in the transmissions of al-Qaʿnabī, Suwayd, or Ibn Ziyād.

Saḥnūn treats collective oaths extensively in the *Mudawwana*, although I found no instance of his citing the same terms for this precept that Mālik uses in the *Muwaṭṭaʾ*. He does cite Mālik as stating that the basic procedure in collective oaths was a *sunna*. Regarding another precept related to collective oaths, Saḥnūn cites Mālik as stating that it is MḌS (the *sunna* has long been established; *maḍat al-sunna*) that collective oaths cannot be administered on the basis of a single valid witness against an accused murderer. Two or more other persons are required, who give fifty oaths among themselves. Ibn al-Qāsim further explains the nature of this *sunna*-based difference between collective oaths and standard legal oaths.[85] Saḥnūn elaborates several details on collective oaths that are not in the *Muwaṭṭaʾ*. Ibn al-Qāsim explains how collective oaths are contrary to legal oaths in general. He gives the exact wording of the oaths according to the established practice of how they were traditionally given on the Prophet's pulpit (*minbar*) in Medina. Saḥnūn asks him to clarify what constitutes circumstantial evidence (*al-lawth min al-bayyina*), and Ibn al-Qāsim gives Mālik's definition as one just witness who had been present at the crime.[86] Saḥnūn includes a citation in which Ibn al-Qāsim makes reference to "what

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[82] *Muw.*, 2:877–79; *Muw.* (Dār al-Gharb), 2:451–55; Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:309; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:256; *Muw.* (Abū Muṣʿab), 2:259–64; *Muw.* (*Riwāyāt*), 4:237–43.

[83] *Muw.*, 2:877–79; *Muw.* (Dār al-Gharb), 2:451–55; Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:309; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:256; *Muw.* (Abū Muṣʿab), 2:259–64; *Muw.* (*Riwāyāt*), 4:237–43.

[84] *Muw.* (Abū Muṣʿab), 2:259–64.

[85] *Mud.*, 4:70; *Mud.* (2002), 8:484–85.

[86] *Mud.*, 4:492–94; *Mud.* (2002), 11:353–60.

Mālik said in his book, the *Muwaṭṭa'*"—an indication, as indicated earlier, that the *Muwaṭṭa'* was compliled and known by its title before the *Mudawwana*.[87] According to transmissions in ʿAbd al-Razzāq and Ibn Abī Shayba, al-Zuhrī referred to collective oaths as belonging to earliest practice (*al-amr al-awwal*).[88]

Ibn ʿAbd al-Barr states that of all legal rulings related from the Prophet, he knows of no case with as much confusion (*iḍṭirāb*) and contradiction (*taḍādd*) as the story of the collective oaths. He notes that there was also extensive dissent among the jurists about their validity, how they are to be performed, and what legal claims may be made on their basis.[89] Some jurists protested that Mālik in this case had made a *sunna* out of something that had nothing to do with the *sunna* at all. They also objected to his stating that this precept was an AMN, that it agreed with what he had heard from those with whom he was content, and that it was a matter of concurrence among the Imāms of early and later times. They questioned how Mālik could have said this when al-Zuhrī transmits a *ḥadīth* that the Prophet began a collective oath with the Jews in Khaybar, who were the defendants.[90]

There are two points in this AMN, each of which constituted an issue of dissent among the early jurists. The first point is that the plaintiffs take the first oaths. The S-XN pertains exclusively to this stipulation. The second point pertains to the nature of the evidence required to use collective oaths. Interestingly, Mālik does not include in this AMN the question of whether or not collective oaths constitute strong enough evidence to justify capital punishment instead of the alternative of accepting a blood indemnity (*diyat al-qatl*). ʿUmar ibn al-Khaṭṭāb and other legal authorities such as ʿUmar ibn ʿAbd al-ʿAzīz held that collective oaths were only valid for blood indemnities and not for capital punishment.[91]

The order of the oaths, which is the point of the S-XN and pertains to the initial wording of the AMN, constituted a point of difference between Mālik and Abū Ḥanīfa. Like many Kufan and Basran jurists, Abū Ḥanīfa held that the defendants and not the plaintiffs must be offered the opportunity to take the first of the collective oaths. If the defendants swear to their innocence under the collective oath, the dissenting Kufan and Basran

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[87] *Mud.*, 4:492; *Mud.* (2002), 11:353. The citation reads, "Mālik said in his book the *Muwaṭṭa'*," which he follows by certain details pertaining to the liabilities of defendants in collective oaths. See above 6–7, 51–57.

[88] ʿAbd al-Razzāq, *al-Muṣannaf*, 10:36, 39–40; Ibn Abī Shayba, *al-Muṣannaf*, 6:15, 5:441–42.

[89] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:307–08.

[90] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:325.

[91] Ibn Rushd, *Bidāya* (Istiqāma), 2:419, 421.

jurists held that they must be immediately exonerated. The plaintiffs may bring no further claim against them as long as they lack more conclusive evidence. This position was based on the consideration that, in the Islamic law of juridical oaths, the plaintiff is required to produce sufficient evidence of guilt, while the defendant is permitted to clear himself by taking an oath in the absence of such evidence. It was on such grounds that Abū Ḥanīfa—consistent with his principle of establishing and adhering to standard legal analogies based on the generalization of foundational texts—dissented from the Medinese position on the order of collective oaths and treated them instead as analogous to the general precepts of oaths in Islamic law despite *ḥadīth*s to the contrary.[92]

Mālik's position on the order of witnesses in collective oaths was followed by al-Shāfiʿī, Ibn Ḥanbal, Ibn Rāhawayh, all of whom adhered to the explicit implications of the *ḥadīth*s on this matter, which go back to Mālik and others. There are, however, contrary *ḥadīth*s according to which the Prophet had the original defendants (the Jews of Khaybar) begin with the oaths and not the plaintiffs as in the case of Mālik's transmission.[93] Al-Zuhrī transmits a *ḥadīth* that the Prophet began with the defendants. He also transmits from Saʿīd ibn al-Musayyab and ʿUmar ibn ʿAbd al-ʿAzīz that collective oaths were first required of the defendants.[94] It was, however, a matter of internal dissent in Medina. ʿAbd al-Razzāq and Ibn Abī Shayba transmit that al-Zuhrī contended that it was the *sunna* of God's Messenger that one began with the defendants in collective oaths in the absence of conclusive evidence. If a single person among the defendants refuses to take the oath of innocence, the plaintiffs are then allowed to take collective oaths to establish the defendants' guilt. If they take fifty oaths among them, they have a right to the indemnity of the dead man. If one of them refuses, they have no right to the indemnity.[95]

Regarding the second point of the AMN, Abū Ḥanīfa held that the statement of a dying person that someone was responsible for his death did not constitute sufficient evidence to warrant collective oaths. Many non-Medinese jurists apparently shared this opinion. Ibn Rushd states that,

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[92] Al-Ṭaḥāwī, *Sharḥ*, 3:96–102; al-Ṭaḥāwī, *Mukhtaṣar*, 5:177–84; al-Bājī, *al-Muntaqā*, 7:55; Ibn Rushd, *Bidāya* (Istiqāma), 2:421; al-Zurqānī, *Sharḥ*, 5:187.

[93] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:304–07, 318, 320; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:247–60; ʿAbd al-Razzāq, *al-Muṣannaf*, 10:27–28.

[94] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:321; ʿAbd al-Razzāq, *al-Muṣannaf*, 10:38; Ibn Abī Shayba, *al-Muṣannaf*, 5:442; cf. al-Ṭaḥāwī, *Sharḥ*, 3:96–102.

[95] ʿAbd al-Razzāq, *al-Muṣannaf*, 10:28–29; Ibn Abī Shayba, *al-Muṣannaf*, 6:15; Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:319–20.

among the non-Medinese jurists, only al-Layth ibn Saʿd shared Mālik's position on the evidence required to warrant collective oaths.[96]

Jurists who regarded collective oaths as valid broke down into two groups. One group—such as Mālik, al-Layth ibn Saʿd, and al-Shāfiʿī—regarded them as an instance of circumstantial evidence, which, although not certain, convinces the intellect and sound opinion (*yaghlibu ʿalā al-ʿaql wa al-ẓann*). They held that collective oaths served the purpose of protecting life and consequently did not require definitive proof. For this reason, they let the plaintiffs take the first oaths. The second group, which was made up of most the Basran jurists and some of the Kufans, required collective oaths and payment of indemnities because the dead person was found under suspicious circumstances among a certain people. They required the defendants, however, to give the first oaths and pay the indemnity.[97]

Al-Thawrī, Abū Ḥanīfa, Zufar, Abū Yūsuf, and al-Shaybānī held that in circumstances requiring collective oaths, fifty men of the suspect place where the victim was found are chosen by the dead man's guardian (*walī*). If they are less than fifty, they repeat the oaths. If they refuse to take the oath, they are required to pay the victim's indemnity. They are also impounded until they either admit to the crime or take the oath. Abū Yūsuf held that they were not to be imprisoned, but the indemnity was required of them and had to be paid over a three-year period.[98] Al-Thawrī transmits a post-Prophetic report that ʿUmar made people from a certain area swear collective oaths that they were not responsible for a man's murder. They took the oaths, but he required them to pay the indemnity all the same.[99]

Another group of jurists rejected collective oaths outright and granted no legal rights on their basis. Abū Qalāba, Sālim ibn ʿAbd-Allāh, ʿUmar ibn ʿAbd al-ʿAzīz, the Meccan jurists, and several others are numbered in this group. ʿUmar ibn ʿAbd al-ʿAzīz is reported to have raised his concerns about collective oaths on his deathbed and called Abū Qalāba to express his objections to it. ʿUmar then wrote to his governors requiring them to demand at least two witnesses in murder cases.[100] Sālim ibn ʿAbd-Allāh

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96 Ibn Rushd, *Bidāya* (Istiqāma), 2:423; al-Bājī, *al-Muntaqā*, 7:52, 56.

97 Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:308, 318–19; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:263–64.

98 Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:312–14; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:264, 266–67.

99 Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:314.

100 Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:326–29; Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:264; ʿAbd al-Razzāq, *al-Muṣannaf*, 10:38–39; Ibn Abī Shayba, *al-Muṣannaf*, 6:11, 5:439–40, 443–45.

expressed his concerns that certain tribes had begun to take collective oaths lightly and should be given exemplary punishment for their attitude towards them. Ibn ʿAbd al-Barr notes that those who rejected collective oaths outright did so on the basis of considered opinion (*raʾy*) because they are contrary to the established *sunna* that defendants are required to take oaths in denial of charges in the lack of substantial evidence.[101] Ibn ʿAbd al-Barr notes that in the various *ḥadīth* narrations on the collective oath, the Prophet handed down no judgment, since the plaintiffs refused to take the oath or accept the oaths of the defendants. According to some of the *Muwaṭṭaʾ* and other transmissions, the Prophet himself paid the indemnity for the Companion slain in Khaybar.[102]

A few early jurists such as al-Ḥasan al-Baṣrī rejected the validity of collective oaths on other grounds. They regarded them to be invalid pre-Islamic customs. Despite the relevant *ḥadīth*s on collective oaths, they did not believe that the *ḥadīth*s proved that the Prophet had actually authorized collective oaths. They noted that the *ḥadīth*s on collective oaths such as those Mālik cites in the *Muwaṭṭaʾ* fail to indicate that the Prophet ever administered collective oaths in fact. He offered the option of taking such oaths to certain of his Companions, whose kinsman had been murdered in Khaybar under suspicious circumstances. But these Companions turned down the option of taking the oaths because they did not want to swear by God regarding matters of which they had no certain knowledge. The dissenting jurists who opposed collective oaths discerned that the Prophet knew that his Companions would refuse to follow the pre-Islamic custom of collective oaths because of the moral principles they had imbibed. The Prophet made them the offer of taking collectives oath to demonstrate by their refusal the superiority of his ethic over the customary practices of the pre-Islamic period.[103]

Those who rejected the validity of collective oaths observed that they run contrary to three established norms of Islamic law. The first, which is referred to in the above paragraph, is that it is not permissible to make a juridical oath in the absence of certain knowledge. The second is that juridical oaths are used in monetary transactions in the absence of

[101] Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:328.

[102] *Muw.*, 2:877–79; *Muw.* (Dār al-Gharb), 2:451–55; Ibn ʿAbd al-Barr, *al-Istidhkār*, 25:307–08.

[103] Ibn Rushd, *Bidāya* (Istiqāma), 2:419–20; cf. Ibn ʿAbd al-Barr, *al-Tamhīd*, 14:255; ʿAbd al-Razzāq, *al-Muṣannaf*, 10:27; Ibn Abī Shayba, *al-Muṣannaf*, 5:441; al-Ṭaḥāwī, *Mukhtaṣar*, 5:184.

conclusive evidence, not in capital crimes.[104] The third principle is that in all other precepts pertaining to oaths, the defendant and not the plaintiff is offered the first opportunity to take the oath and block the plaintiff's oath by technically clearing himself.[105]

Mālik's collective oath precept is contrary to analogy with related precepts of Islamic law within the Medinese and broader Islamic legal traditions. His use of the *sunna*-term S-XN in this example is consistent with his usage of *sunna*-terms elsewhere in the *Muwaṭṭa'* to establish the authority of non-analogous precepts. As with similar usages of *sunna*-terms, the fact that Mālik resorts to them demonstrates the inherent, overarching authority of analogical reasoning in his mind.[106] Ibn Rushd states that Mālik regarded collective oaths to be a unique *sunna* which like many other types of *sunna* drew exception to general precepts of law. He holds that Mālik's justification of collective oaths was essentially a consideration of the general good (*al-maṣlaḥa*) and the imperative to protect life.[107]

Ibn Rushd's observations are supported by the text of the *Muwaṭṭa'*. In Mālik's defense of collective oaths, he supports his position that the plaintiffs have the right to the first oath and that the testimony of a dying man regarding who killed him is sufficient evidence to warrant the use of a collective oath against the accused. Mālik explicitly indicates his conception of the underlying principle of the general good and, on that basis, draws a sharp contrast between the collective oath and contrary analogues in the Islamic law of oaths:

> The difference between the collective oath (*qasāma*) in cases of murder and between oaths in [money] rights is that a person who loans money to another takes steps to establish evidence of his right against the one [to whom he makes the loan]. But when a person desires to kill another person, he does not do it in the midst of a large group of people. Rather he seeks out a secluded place. . . . So if the collective oath is used only when there is established evidence or if one were to follow in it the procedure followed regarding [money] rights, there would be great loss of life (*halakat al-dimā'*). People would dare to take life once they knew what the verdict in the collective oath would be. But the collective oath has been set down for the guardians of the victim (*wulāt al-dam*), who take the first oaths in it, in order to make people refrain from shedding blood and in order that the

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104 See Abd-Allah, "*'Amal*," 141–43.
105 Ibn Rushd, *Bidāya* (Istiqāma), 2:419.
106 See Abd-Allah, "*'Amal*," 576–82.
107 Ibn Rushd, *Bidāya* (Istiqāma), 2:420.

> murderer beware lest he be apprehended in matters like this by his victim's [last] words.[108]

Thus, Mālik unequivocally defended the anomalous nature of the precept of the collective oath against the contentions of dissenting jurists by reference to the principle of the general good, which Abū Zahra holds to be the central concern of Mālik's legal reasoning.[109]

Mālik regarded collective oaths to belong to the category of transmissional praxis (*al-ʿamal al-naqlī*), which is indicated by his citation of the two *ḥadīth*s at the beginning of the chapter. According to these *ḥadīth*s, the Prophet did not, however, actually administer the collective oath. As noted by some of the dissenters, the *ḥadīth*s report only that he first offered the oaths to the plaintiffs, who declined to take them. After his statement of the S-XN and reference to the continuous praxis of the people of Medina, Mālik points out that the procedure of beginning with the plaintiffs is what the Prophet is reported to have done.

The source for the other element of the AMN precept regarding what type of evidence is required for collective oaths is not clear. The definition of evidence was likely the product of Medinese legal interpretation (*ijtihād*), since the *ḥadīth*s that Mālik cites constitute the only instance of collective oaths during the Prophet's life.[110] The victim in that case had been found dead. No one heard his dying words so that his case did not provide a precedent for Mālik's AMN stipulation that the last words of the victim constitute sufficient circumstantial evidence for the application of a collective oath.

AMN in this example appears to be an inclusive term[111] taking in the S-XN. By contrast, the S-XN is exclusive. It does not include the part of the AMN pertaining to evidence. Mālik refers to the concurrence (*ijtimāʿ*) of the Imāms of the past and present in his gloss on the AMN. It seems reasonable to assume that it was the praxis of these Imāms—not transmissional praxis—which provided the Medinese with the stipulations required in circumstantial evidence for collective oaths. Similarly, in an earlier example, Mālik cites an AMN that appears to include an A-XN, but the wording of the A-XN omits a key point of dissent between early jurists,

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[108] *Muw.*, 2:880.

[109] See Abd-Allah, "*ʿAmal*," 269, 205, 83.

[110] See Ibn Rushd, *Bidāya* (Istiqāma), 2:419–20.

[111] For the distinction between inclusive and exclusive terms in Mālik's terminology, see Abd-Allah, "*ʿAmal*," 523–29; see below 4–5, 277–81.

which, however, is affirmed by the AMN.[112] A second example of an AMN in Mālik's chapter on the laws of inheritance also includes a *sunna*-term. The term Mālik cites there is AMN: S-XN: ādIb.[113] One element of that precept—namely, the stipulation that a Muslim may not inherit a non-Muslim relative—is supported by a *ḥadīth*, which Mālik cites. This indicates that it arose from the *sunna*, and Mālik gives other clear indications in that precept that its ruling was derived from the Prophetic *sunna*. An additional element of the precept, however—that a Muslim may not inherit a non-Muslim freedman client (*mawlā*)—is not explicitly indicated by the *sunna*. In that example, Mālik supports this additional element of the AMN precept by the praxis of earlier Imāms, in this case, ʿUmar ibn al-Khaṭṭāb and ʿUmar ibn ʿAbd al-ʿAzīz.[114]

Mālik cites several *amr*-precepts elsewhere in the *Muwaṭṭaʾ* that set forth various particulars about the praxis of the collective oath. Each of them appears to be the product of legal interpretation (*ijtihād*). He cites an AN, for example, that finding a body in a village, near a house, or in some similar location is not sufficient evidence to make a collective oath against the inhabitants of those places, since the body might have been placed there by others.[115] He cites another AN that a minimum of two plaintiffs are required for a collective oath in cases of murder and that they shall repeat their oaths fifty times. (Saʿīd ibn al-Musayyab and al-Zuhrī dissented regarding this matter and held it to be an innovation of Muʿāwiya.)[116] A third AN of Mālik pertains to collective oaths in the case of slaves. With it, he cites an A-XN stating that women are excluded from taking collective oaths when they pertain to murder but not when they relate to involuntary manslaughter.[117] These cases indicate that Mālik's *amr*-term as used in the AMN precept on collective oaths is not strictly anomalous but is used as an analogue in related cases.

In another instance in the *Muwaṭṭaʾ*, however, Mālik upholds application of the ruling contrary to the norm. He indicates that it is not part

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[112] See Abd-Allah, "*ʿAmal*," 707.

[113] This stands for "the agreed precept among us; the *sunna* among us about which there is no dissent; and what I found the people of knowledge in our city following (*al-amr al-mujtamaʿ ʿalayhi ʿindanā wa al-sunna al-latī lā ikhtilāf fihā wa al-ladhī adraktu ʿalayhi ahl al-ʿilm bi-baladinā*).

[114] *Muw.*, 2:519–20.

[115] *Muw.*, 2:871.

[116] *Muw.*, 2:881; al-Rasīnī, "*Fiqh*," 410.

[117] *Muw.*, 2:883, 881.

of normative praxis and cites a praxis-term for it instead of an *amr*-one. In this case, Mālik transmits a report according to which ʿUmar ibn al-Khaṭṭāb once attempted to apply a collective oath in an unusual instance of involuntary manslaughter when a horse belonging to a certain tribesman had been made to bolt. The horse crushed the finger of a man from another tribe, who died afterwards. Neither party would take the collective oaths. Apparently, the plaintiffs were not sure that their tribesman had died as a result of the incident, nor were the defendants sure that the incident had not caused his death. ʿUmar arbitrated an independent settlement between them.[118] The anomalous aspect of this report as far as the collective oath is concerned is that ʿUmar first offered the oaths to the defendants—in contrast to Mālik's S-XN, which Mālik described as reflecting the concurrence (*ijtimāʿ*) of the Imāms of early and later times. Mālik cites the negative praxis term (not in accordance with praxis; *laysa ʿalayhi al-ʿamal*) after this report.[119] He refers back to the precept later as proof that people are held liable for the injuries that the animals cause which they drive, ride, or herd.[120]

This contrary Medinese report about ʿUmar's application of the collective oath conforms with the Ḥanafī position. Mālik might have accounted several ways for the discrepancy in its content, such as its having been a mistake of the transmitter or having been a modification of the general precept that ʿUmar made on the basis of independent legal interpretation (*ijtihād*), given the the special circumstances of the case. Mālik's position regarding it appears consistent with Ibn al-Qāsim's approach in the *Mudawwana*, as noted before, regarding a situation when ʿĀ'isha is reported to have done something contrary to Medinese praxis:

> We do not know what the [correct] interpretation (*tafsīr*) of this is but believe that she appointed someone else to act as her representative. . . . This [report] has come down [to us]. If this *ḥadīth* had been accompanied by praxis such that its [praxis] would have reached those whom we met during our lifetimes and from whom we received [our knowledge] and those whom they had met during their lifetimes, it would indeed be correct (*ḥaqq*) to follow it. But it is only like other *ḥadīth*s that have not been accompanied by praxis. . . . [*Ḥadīth*s such as these] remained [in the state of being] neither rejected as fabricated nor put into practice. . . .[121]

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118 See al-Bājī, *al-Muntaqā*, 7:73.
119 *Muw.*, 2:851.
120 *Muw.*, 2:869.
121 See Abd-Allah, "*ʿAmal*," 188–95.

The issue of collective oaths is an example of significant dissent from the early period over a shared body of *ḥadīth*s on a single Prophetic precedent. Collective oaths were a matter of considerable gravity in a tribal society. In Mālik's time and for generations afterwards, the different positions that the jurists took on collective oaths had extensive implications and involved substantial economic liabilities in the form of the indemnities involved, which fell, at least in part, on the tribal affiliations of the guilty. All dissenting positions, however, revolve around the same legal texts, and juristic parties with divergent views did not produce contrary *ḥadīth*s to support their own positions.

Collective oaths, as noted, are contrary to the norms of evidence in Islamic law. Mālik's position regarding them as well as the dissenting positions of other jurists illustrate how irregular (*shādhdh*), non-normative legal positions were treated in the legal reasoning of the early jurists. All legal opinions regarding the precept were articulated in terms of the broader norms of the Prophetic law. Mālik does this by citing his *sunna*-term, indicating that collective oaths are contrary to Medinese norms but may not be overturned on those grounds because of their basis in the *sunna* and the imperative of protecting the general good (*al-maṣlaḥa*), which would be threatened if normative procedures were followed. Both dissenting positions modify or reject collective oaths on the basis that they are contrary to the norms governing juridical oaths. The Kufans and Basrans modified collective oaths by allowing the defendants to take them first and block the plaintiffs' claims. The other dissenting party of jurists rejected collective oaths because they ran contrary to the standard legal ethic of Islam. They did not reject the transmitted *ḥadīth*s but interpreted them in light of the standing principles of the law. Collective oaths were never administered during the Prophet's life, they contended that he had offered the option of taking them to the plaintiffs with the understanding that they would reject them (as they did) on the basis of their inconsistence with Islamic norms.

Mālik's *Amr*-Terms for Consensus in Summary

I focused exclusively in this analysis on the term AMN and only touched coincidentally on other *amr*-terms such as A-XN. The AMN precepts that I surveyed show the characteristic pattern of Medinese-Kufan difference of opinion, although again jurists from other regions are also frequently involved in the disagreement. Each of these AMN's except for the first

constitutes a point of difference on at least some important point between Mālik and Abū Ḥanīfa. (Abū Ḥanīfa is reported to have agreed with Mālik regarding the first AMN precept, but it still constituted an issue of dissent between Mālik and the Kufan Sufyān al-Thawrī.)[122] Other prominent non-Medinese jurists who are reported to have disagreed with some of the AMN precepts in this chapter are al-Ḥasan al-Baṣrī, the Baṣran Ibn Sīrīn, al-Layth ibn Saʿd, al-Awzāʿī, the Meccans ʿAṭāʾ ibn Abī Rabāḥ and Mujāhid, and the Kufans Ibn Abī Laylā, Abū Yūsuf, and al-Shaybānī.

In four of the AMN's surveyed, prominent Medinese jurists appear to have possibly dissented from Mālik's precept. The Medinese Companion Jābir ibn ʿAbd-Allāh reportedly disagreed with the first AMN. Mālik's teacher Rabīʿat al-Raʾy disagreed with the fifth AMN. His opinion in that matter is said to have been unique and unusual (*shādhdh*) and possibly unauthentic. Mālik's prominent student Ibn Kināna is reported to have dissented from the third AMN, although it is not clear whether he did so during or after Mālik's lifetime. Finally, al-Qāsim ibn Muḥammad may have disagreed with the second AMN precept. In that case, however, not enough is known about the full scope of al-Qāsim's opinion to determine whether he was actually in disagreement with Mālik's AMN or only appears to disagree.

These possibilities of valid internal dissent on precepts of Medinese praxis tend to bear out my thesis that the concurrence (*ijtimāʿ*) Mālik is referring to in his AMN precepts is a majority and not a total local concensus of the Medinese jurists. As frequently noted, such an interpretation of Mālik's AMN term coheres with al-Shāfiʿī's contention that there were differences of opinion in Medina regarding Mālik's AMN's and his AN's.[123] The example of al-Layth ibn Saʿd's disagreement with one of the preceding AMN precepts also bears out that contention, since al-Layth describes himself as consistently following the Medinese in legal issues in which they did not dissent.

The possibility of significant internal dissent among the Medinese jurists regarding Mālik's AMN is contrary to the definition of that term that Ibn Abī Uways relates on Mālik's authority. According to him, Mālik said:

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[122] See Abd-Allah, "*ʿAmal*," 693, 696.
[123] See Abd-Allah, "*ʿAmal*," 343–47.

> What [I used] AMN for constitutes opinions of the people of learning in jurisprudence (*fiqh*) and knowledge upon which concurrence (*ijtimāʿ*) was reached without their having dissented regarding them (*mā ujtumiʿa ʿalayhi min qawl ahl al-fiqh wa al-ʿilm lam yakhtalifū fīhi*).[124]

According to this definition, no apparent difference existed in Mālik's mind between AMN and other *amr*-terms standing for total Medinese consensus which state specifically that no differences of opinion existed among the Medinese such as AMN-X and A-XN. As mentioned earlier, this specification that there was no disagreement among the Medinese jurists regarding Mālik's AMN precepts may have been a reading of later Mālikīs who sought to lend greater authority to his AMN precepts than they were likely to have had if conceived of as majority consensus.[125] The concept of a majority consensus or even of a preponderant majority, although, in practice a much more workable concept than that of absolute consensus, may have appeared tentative in the eyes of later jurisprudents in the light of Shāfiʿī jurisprudential emphasis upon absolute consensus (*ijmāʿ*) as constituting the consensus of the entire community (*umma*).[126]

Mālik's expressions in the *Muwaṭṭaʾ* reflect his concern with delineating authority but not with indicating the sources of his precepts. The sources of the AMN precepts studied in this chapter are often unclear from Mālik's text in the *Muwaṭṭaʾ*. Two appear to belong to the category of transmissional praxis (*al-ʿamal al-naqlī*) as defined by later jurisprudents. Each of them appears, however, to contain additional elements derived from personal legal interpretation (*ijtihād*). The AMN on collective oaths, for example, contains an element that Mālik refers to as S-XN. It also contains a second point regarding the evidence that is required to make collective oaths valid. These laws of evidence appear to be the result of legal interpretation. Mālik refers to the praxis of the Imāms past and present in conjunction with his AMN on collective oaths, and this appears to indicate that those parts of the collective oath that were not derived from transmissional praxis were the products of later interpretational praxis as upheld by successive Imāms, especially ʿUmar ibn al-Khaṭṭāb and ʿUmar ibn ʿAbd al-ʿAzīz.[127]

The presence of elements of personal legal interpretation in Mālik's AMN precepts is supported by the report of Ibn Abī Uways on the meaning

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[124] See Abd-Allah, "*ʿAmal*," 539.
[125] See Abd-Allah, "*ʿAmal*," 543.
[126] See Abd-Allah, "*ʿAmal*," 195–204.
[127] See Abd-Allah, "*ʿAmal*," 719–20.

of Mālik's terminology. Mālik refers to the term AMN in that definition as being constituted by the opinions (*aqwāl*) of the Medinese jurists. Nevertheless, the term AMN is not restricted exclusively to matters of legal interpretation. According to my analysis of Mālik's terminology, AMN serves as an inclusive term. It can be expanded to include Mālik's *sunna*-terms and, hence, transmissional praxis—as in the case of Mālik's AMN on collective oaths and the AMN on inheritance referred to above. It can also include terms such as A-XN, as indicated in the fourth AMN precept of this chapter. But the *sunna*-terms and the term A-XN in the above example are exclusive and do not include the full scope of the AMN. They apply only to a limited part of Mālik's overall AMN precept. In the fourth AMN in this chapter, Abū Ḥanīfa would have found himself in agreement with Mālik's A-XN but would have dissented with the broader wording of the more inclusive AMN in the same chapter.[128]

The origin of the legal interpretation in most of the AMN precepts in this chapter cannot be established on the basis of the information Mālik gives in the *Muwaṭṭaʾ*. In some cases, as for example in the case of the AMN on inheritance just referred to, it is clear that the legal interpretation underlying it goes back as least as far as ʿUmar ibn al-Khaṭṭāb, because it is reported to have been part of his practice. In other cases, the legal interpretation is so closely tied to well-established *sunna*-precepts—such as in the laws regarding bequests—that it is reasonable that the legal interpretation must have gone back to the Companions. Mālik does not appear to have been concerned with communicating a distinction between what later legal theorists referred to as old praxis (*al-ʿamal al-qadīm*), which went back to the legal interpretation of the Companions, and late praxis (*al-ʿamal al-mutaʾakhkhir*), which went back to the legal interpretations of the Medinese Successors.[129] On the contrary, whatever the origin of the legal interpretation of Mālik's AMN, his primary concern is with the authority of the ultimate ruling as supported by the concurrence (*ijtimāʿ*) of the Medinese jurists and occasionally buttressed by personal legal reasoning.

One of the most important characteristics of the AMN precepts in this chapter is Mālik's legal reasoning, which he sets forth in them to defend their conventional authority. He accounts for the first and third AMN's by reference to analogical reasoning. As in earlier examples from

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[128] Abd-Allah, "*ʿAmal*," 707.

[129] See Abd-Allah, "*ʿAmal*," 415–19.

the *Muwaṭṭa'*, his analogies in these examples are examples of the distinctively Mālikī methodology of basing analogical reasoning on established precepts of law instead of specific revealed texts.[130] Furthermore, these AMN's have analogous applications to other precepts of law. They do not have the consistently anomalous nature of the precepts Mālik marks off by his *sunna*-terms.

The fourth and fifth AMN's in this chapter do not contain analogical reasoning but are akin to the AMN's that do contain analogies. In these examples, Mālik accounts for the AMN precepts by reasoning directly from related precepts of law, attempting to demonstrate that the AMN precepts are the necessary legal corollaries of those related precepts. Although they are not the products of analogy, these particular AMN precepts are still contrary to Mālik's *sunna*-precepts, for these AMN's are in keeping with the implications of other established precepts and are not of an anomalous nature.

The second and sixth AMN's are exceptions to general rules. The second, which permits the use of the testimony of minors under certain circumstances, is apparently based on the Medinese concern for the general good as an independent legal proof. It draws exception to the general rules governing testimony not by virtue of the explicit textual authority of the Prophetic *sunna* but on the basis of legal interpretation based on the principle of the unstated good (*al-maṣāliḥ al-mursala*), one of the chief functions of which is to draw such exceptions to general rules.[131] The precept on collective oaths, as amply noted, is contrary to at least three established precepts of Islamic law, and some jurists rejected collective oaths on these grounds. Mālik defends the validity of collective oaths, despite their anomalous nature, by reference to the principle of the general good and responds to the objections of those who dissented from the Medinese position on the same grounds.

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[130] For treatment of this type of analogy and comparison with Abū Ḥanīfa and al-Shāfiʿī, see Abd-Allah, "*ʿAmal*," 216–34; see below 145–57.

[131] See Abd-Allah, "*ʿAmal*," 268–75.