

### Themes from Friedman

The following provide some themes from Friedman which can guide you in studying for the mid-term. In reviewing these themes, it is important to take note of the intellectual content of the theme and the historical evidence which Friedman employs to analyze the American criminal justice system with respect to the theme. While I will identify various themes for various chapters, many of these themes are treated throughout the book.

#### Intro:

The definition of crime – what is the nature of crime as a legal category and as a social and historical construct.

The functions of the criminal justice system – what are the principal functions of the criminal justice system according to F.

How does the dominant American notion of preserving freedom (and especially individual freedom) impact upon the nature, function and success of the criminal justice system.

#### Chap 1:

What were the features of the common law system of justice in England. How did the early colonists depart from this system of justice in the New World – definitions of crime, the nature of trials, punishment, etc.

F. identifies three elements from which constituted colonial conceptions of criminal justice. What were they

What was the nature of trials for the Puritans. How did criminal trials change during the colonial period.

F. refers to criminal justice in the colonies as “social drama.” What does he mean?

#### Chap 2: The Law of God and Man

F. describes colonial societies as highly stratified and hierarchical. Why? What impact does this social structure have on the criminal justice system (this theme is also treated in chap 1).

In the colonial system, what was the relation between crime and sin. How did prevailing religious doctrine influence and shape the criminal justice system in terms of the definition of crime, the enforcement of crime and the trial of the accused.

What was the relation between the goals of criminal punishment and religious piety/sanctification/ and atonement. How did the relation between crime and sin impact upon the criminalization of various moral offenses that we today would regard as victimless crimes?

What sort of punishment were used in the colonies. How were they administered? What was the goal of criminal punishment? To what extent can colonial conceptions and justifications of criminal punishment be understood in terms of the various theories of punishment that we studied in the first part of the class. (You should be able to discuss the use of the death penalty in the colonial period: why it was used, the sorts of crimes for which it was administered, and the conditions under which it was used or not used. What theory of punishment, if any, that we studied do you think could justify the use of the death penalty in the colonial period.)

How did Colonialists explain the root causes of crime? How did this affect their administration of punishment and correction.

We tend to adopt the idea that many criminals should be incarcerated? Would this view have been adopted in the colonial period? Why or why not?

We insist on due process in the administration of justice. What does this involve. How does the colonial period stack up – from your point of view? From F's?

#### Chap 3 – The Mechanics of Power

F writes that (p 62) in the post revolutionary period three themes stand out:

The impulse to reform the law and make it conform to Republican ideals

The evolution toward professionalism

The influence of American social conditions, esp. increased mobility.

Discuss each of these themes and take note of the historical evidence F. supplies in regard to them.

How was the death penalty used in the post revolutionary period? What sorts of crimes counted as capital offenses? How did this differ from the use of the death penalty in the colonial period?

Why was the penitentiary system adopted? How was the development of the penitentiary linked with explanations of criminal behavior? How did the penitentiary system contrast with the forms and goals of punishment in the colonial period.

#### Chapter 4: Power and its Victims

F. writes that “criminal justice was the strong arm of the stratification system.” What does he mean by this? How does the criminal justice system function as a system of social control and of maintaining the status quo in terms of social stratification and distribution of power.

Discuss the nature of and justification of criminal justice that was directed to slaves and free blacks? To what extent does the treatment of slaves and free blacks seem consistent with a society under a rule of law and an impartial administration of justice. Imagine yourself to be a proponent (morally) of retribution – that people should be punished exactly according to what

they deserve.. To what extent did the administration of justice in regard to blacks and white conform to the principles and ideals of retribution?

How do the poor fare within the American criminal justice system as portrayed in this chapter. To what extent is poverty itself criminalized so that the poor are viewed as a criminal class simply because they are poor (trace the similarities and differences between the criminal justice system and poor laws/poor houses and work houses.

F. argues that the administration of justice in the 19<sup>th</sup> was largely biased in favor of those who held power (White upper class Europeans Protestants WASPS) and against those who were socially different or "deviant." Does he make his case

#### Chapter 6: Morals, Morality and Criminal Justice

What is the distinction between *mala in se* and *mala prohibita*. How was this distinction employed in regard to the criminalization of moral offenses?

What constitutes a "crime against morality." How clear was this idea in the 19<sup>th</sup> C as a category of crimes in contrast to other sorts of crimes?

What is the Victorian Compromise and how did it work? What examples does F provide to illustrate this compromise at work? What tensions or contradictions are contained in the VC in terms of a consistent and impartial administration of justice. How would a retributivist view the enforcement and punishment of "crimes against morality" under the VC?

What links does F draw between the ideology of individualism, self-control and the criminal enforcement of "crimes against morality"?

F. notes that after 1870, the VC began to crumble and that there was a strong somewhat successful move to tighten the laws against vice, sex and victimless crime? What are the origins of this move – ideological and social?

The colonial period traced criminal behavior to moral weakness and sin. How do genetic theories in the late 19<sup>th</sup> C affect the explanation of criminal behavior and the administration of justice.

F. discusses the rise of an insanity defense in the 19<sup>th</sup> C. What was the nature and justification for this defense? Under what sort of conditions could this defense apply? To what extent does such a defense suggest a medicalization of crime: crime as a disease and sickness. If crime is understood this way, to what extent are people responsible for their crimes. To what extent and in what manner should people be punished? If the origins of crime and medicalized, should the treatment for crime be medicalized as well??

#### Chapter 17: The Contemporary Criminal Trial

What is the function of petty courts in the criminal justice system?

How does discovery work? What were arguments for giving or denying it to prosecutors and/or defendants?

Why does the role of the jury trial decline in the 20<sup>th</sup> C. What are "bench trials?" Should guilt be determined by judges rather than juries, by professionals who know the law as opposed to amateurs recruited to serve on juries?

How does plea bargaining arise? To what extent do you think that plea bargaining is consistent with the various theories of punishment that we have studied in class?

How did the insanity defense function in the 20<sup>th</sup> C? How did it change from the 19<sup>th</sup> C? Why does it begin to decline after the 1960s? What is the Durham rule?

F. describes sentencing procedures as "little morality dramas"? Why? What goals and theories of punishment did these procedures seem to follow? How do judicial discretion and mandatory sentencing serve the administration of justice and the punishment of offenders?

#### Chapter 18: Gender and Justice:

We often are told that the administration of justice should be fair and impartial. Many people think that criminals should get what they deserve. Does the treatment of gender and justice in chapter 18 provide evidence for an impartial administration of justice for men and women. If differential treatment of men and women is given, what are the reasons for this treatment? Do you think that they are good reasons? Consider not only the enforcement of the law and the punishment of individuals, but also the specification of what counts as a crime.

How do changes in the laws regarding rape reflect historical differences in the treatment of women under the law?