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MENTAL ILLNESS AND CRIMINAL JUSTICE: DEALING WITH MENTALLY DISABLED DEFENDANTS DURING THE CRIMINAL PROCESS IN THE UNITED STATES OF AMERICA

Bachelor Thesis

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I hereby declare that I am the sole author
of this Bachelor Thesis and it has
not been presented to any other
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Abbreviations

ABA	American Bar Association
ALI	American Law Institute
CMHS	Community Mental Health Centers
GBMI	Guilty But Mentally Ill
MIOTCRA	The Mentally Ill Offender Treatment and Crime Reduction Act
NAMI	National Alliance on Mental Illness
NGRI	Not Guilty by the Reason of Insanity
NIMH	The National Institute of Mental Health
TJ	Therapeutic Jurisprudence

Introduction

In general the basis for a fair legal proceeding and a competence to stand trial in criminal cases is that the defendant is able to assist and agree his defense and understands the nature of his actions and the guilt or innosence of his thoroughly. It is also a general requirement that the mental element of the crime, *mens rea,* the guilty mind needs to be involved for a crime to be established and the defendant punished. The difficulty arises when the defendant in question has mental disabilities and may not be able to determine and understand his own actions and the nature and further consequenses of them.

It can with no doubt be stated, that how to deal with the mentally ill offenders within the criminal legal system is one of the deepest and most rapidly growing questions concerning the medicolegal issues. The fact that of the individuals in the criminal legal system, roughly 14-16% possesses some level of mental illness tells something about the wideness of the problem.[1]
In all, the National Alliance on Mental Illness (hereinafter NAMI) suggests that 25% of adults suffers of some level of mental issues every year. According to their statistics, serious mental illness, such as schizophrenia occurs with one of seventeen people.[2] This kind of serious mental illness leads very often to the extremely growth risk of committing criminal actions since they usually have severe sympoms such as hallucinations and feelings of being persecuted. In this thesis the author brings out especially the serious mental illnesses relationship with criminal conducts and the criminal justice's approach to them.
The constantly growing percentage of the people with mental illness within the criminal justice system has put legal professionals into a position where they are required to assess and manage with the mentally ill often without any backround, training or education from the field of medicine. The constantly growing percentage of the mentally ill criminal defendants and the rapid need to find an effective system to handle with them properly are the author's reasons of choosing the topic.

[1] Peterson, J., Heinz, K. Understanding Offenders With Serious Mental Illness in the Criminal Justice System, Mitchell Hamline Law Review, 2016, pp 538-562, p 538.
[2] Mental Health Conditions, nami.org/Learn-More/Mental-Health-Conditions, (02.03.2017).

In the United States there has been, and still is, a variety of different ways and tests to assess and define the mental health of the criminal defendant. With this thesis the author aims to answer a question **if the lack of an unilateral way to treat the mentally ill criminal defendants endangers the fair legal process of them.**

The author focuses on the side of Criminal Justice's way to deal with the mentally ill defendants and has a hypothesis that **the absence of an unilateral way of assessing the mental health of a criminal defendant and the lack of exact terminology in the US does endanger the fair legal process of them.** This thesis uses qualitative research methods when aiming to find the underlying reasons in the topic but has also a strong comparative nature when assessing the wide range of different approaches towards mentally ill defendants. The thesis has academic sources from the United States and uses relevant case law to illustrate the topic thoroughly. In addition this thesis has examples from the case law from United Kingdom, illustrating the important concepts that have had a great impact also in the United States.

This thesis consists of five chapters. After the introduction, the author will make a brief look to the history to understand the constitution of the issue in question thoroughly. This part is aiming to explain the formation of the deep stigmas towards mental illness having a great power still today.

Next the author will go through the basic principles of criminal justice and relevant case law concerning them. The author finds it important to understand the most fundamental principles of criminal law in order to understand the constitution of a crime and the fact how deep the problem in question is.

After that the author will go through and compare the different views and definitions of mental illness to explain the grat variety of views and opinions within this medicolegal issue. With this the author aims to present the impact of the significant differences in views and the lack of exact definitions in terminology concerning mental health.

The fourth chapter of this thesis deals with competence to stand trial and presents a landmark case concerning forced medication. The concept of competence to stand trial and the measures used to evaluate it are in crucial role of this thesis when determining if the U.S system provides fair proceedings for the mentally ill defendants.

Part five presents the basics of insanity defense and explains the concept of burden of proof in insanity defense in addition to the concept of guilty but mentally ill.

This part will also go through the four most dominant tests of insanity through the history and by comparing them and using the relevant case law the author aims to find answers to the questions behind this thesis.

Then the author will move from tests of insanity to the modern mental health courts and their function. This part briefly discussess also about the concept of therapeutic jurisprudence.

Finally this thesis will gather together the information gained and answers the research question in a form of a conclusion.

1. A Glance to the History

To understand the path that has resulted to current situation where mentally ill defendants are still and in increasing extent a significant problem of the society, the author sees important to go through the main historical events concerning the issue.

It is a general fact that mental illness has through times been a part of human existence but the main difference comparing to current situation is that during the ancient times the mental illness was only considered as something evil, bad spirits or even a possession of the devil.[3] The author sees important to be aware of these antique approaches towards mental illness to understand the deep taboos that are still linked with mental illness. The stigma attached to mental illness was a result of poor knowledge, fear and negative thoughts towards mentally ill until 18th centyry.[4] Mental illness was seen mainly from the religious point of view, as something that medicine and law did not have anything to do with. It was generally thought that the only way the law could relate to the aspect was to get rid of the mentally ill instead of protecting them.[5] As the “lunatics” were at the time generally characterized as individuals with possession of demons or something else evil, the possibility of medical diseases was ignored quite profoundly.[6]

It was during the 5th and 3rd centuries before Christ when the Greek physician and philosopher Hippocrates first started to change the approach to more medical when suggesting, "illnesses come from natural occurences in the body".[7] The author thinks that the medical approach and study made by Hippocrates made a significant step towards modern views about mentally ill and without him the turning point of views could have took decades more.

The true reversal started to happen in the eighteenth century and was in its high pitch during the nineteenth and twentieth century when the totally new viewpoint to mental illness started to make progress. The medical reasons behind mental illness were slowly understood widely all over the world but the measures to handle them were still elementary, which led mental institutions to be the governing custom to treat the mentally ill. In the 1920's and 1930's the laws of several states of America performed compulsory sterilization to people who were

[3] A Beautiful Mind: The History of the Treatment of Mental Illness, historycooperative.org/a-beautiful-mind-the-history-of-the-treatment-of-mental-illness/ (02.03.2017).
[4] Module 2: A Brief History of Mental Illness and the U.S. Mental Health Care System, uniteforsight.org/mental-health/module2, (02.03.2017).
[5] McLachlin, B. Medicine and the Law: The Challenges of Mental Illness, The Dalhousie Law Journal, 2010, pp 15-33, p 18.
[6] Schnabel, C.J. The Insanity Test, Banker&Bench&B Review, 1910, pp 109-117 p 110.
[7] A Beautiful Mind: The History of the Treatment of Mental Illness, historycooperative.org/a-beautiful-mind-the-history-of-the-treatment-of-mental-illness/ (02.03.2017).

characterized as "mentally insufficient" and then locked into mental institutions.[8] It is noticeable how slow the process have through time been, considering that it was thousands of years since Hippocrates already realized the medical reasons behind mental illnes.

In the case *Buck v. Bell* from 1927[9] the judge of United States Supreme Court stated, "three generations of imbeciles are enough."[10] There were often very questionable reasons to put people into mental institutions. It was for example common to put sane women into institution by the order of their husbands calling them mentally ill because the women had requested a divorce.[11] These examples are to illustrate how the law was, at this point of history, not to support the mentally ill but rather to victimize them.

It was a year 1943 when a Special Committee on the Rights of the Mentally Ill was created in order to co-operate with the American Bar Association (ABA) on the question whether the back then existing laws were properly drafted to protect the rights of the mentally disabled persons. The work done by the Special Committee led to the publication of "The Mentally Disabled and the Law", (1961) being the first compilation of laws concerning mentally ill on a national basis. The need to establish written laws and especially their proper practice was however found already years before publication of "The Mentally Disabled and the Law". In 1957 the chairman of the above mentioned Special Committee, Judge John Biggs Jr. drafted a report to the American Bar Association requesting them to prepare a profound plan how they would in reality gain success in their object to protect the mentally ill within the criminal law system. In 1960 started a study called "Procedures for the Hospitalization and Discharge of the Mentally Ill". The study in question was submitted to the National Institute of Mental Health in 1962 which started the almost a year lasted study on the field.

[8] McLachlin, B. (2010), *supra nota* 5, p 18-19.
[9] United States Supreme Court, *Buck v. Bell,* 274 US 200 (1927).
[10] Three Generations, No Imbeciles, jhupbooks.press.jhu.edu/content/three-generations-no-imbeciles (05.03.2017).
[11] McLachlin, B. (2010), *supra nota* 5, p 18.

It should be noted at this point that there was no endeavor within this study of mental illness and the criminal law to actually modify the legislation but rather to be an "exploratory" study to recognize the problems.[12] Despite its exploratory nature the author sees the study in question as a significant step. Although it did not aim to actual modification of the legislation, the author thinks that recoginzing the significant problem thoroughly in addition to the new medical approach were important steps towards comprehensive changes in both attitudes but also concrete measures.

During the 1960's and 1970's the understanding of the nature of the mental illness was rapidly growing and the abusive ways of treating people came more and more to the knowledge of the public.[13] It was not until 1972 and 2,800 sterilizations later when the Sexual Sterilization Act[14] was annuled and the discriminatory nature of it recognized. It has been later understood that the Act was first of all based on flawed science but also often put into practice without fulfilling the basic requirement of the legislation.[15] The author suggests that the fact that the Sexual Sterilization Act was annuled by only until 1972 tells a lot about the twisted attitudes towards mentally ill and about the slowness of the process for a better treatment of the persons with mental illness.

The official pressure to deinstitutionalize mental health care in the U.S first started in 1961 and in the same year the American mental health care system started to be investigated by the Joint Commission on Mental Illness and Health. They requested the Congress to start transfering and funding the mentally ill from public hospitals to "community-based treatment facilities" and in 1965 the Congress corresponded with legislation authorizing the establishment of community mental health centers (CMHS).[16]

The great transition point in attitudes towards mentally ill was during 1970's and 1980's when the measures still in use today, such as discharge planning, support programs and different treatment plans began to form themselves.[17] The new approaches and measures also constituted some

[12] Bennett, J., Matthews, A. The Dilemma of Mental Disability and the Criminal Law, American Bar Association Journal, 1968, pp 467-471, p 467-468.
[13] McLachlin, B. (2010), *supra nota* 5, p 20.
[14] Alberta Sexual Sterilization Act of 1928.
[15] McLachlin, B. (2010), *supra nota* 5, p 19.
[16] Levesque, S. Closing the Door: Mental Illness, the Criminal Justice System, and the Need for a Uniform Mental Health Policy, Nova Law Journal, 2009-2010, pp 711-738 p 717.
[17] Kurtz, L.F. Historical Perspectives on the Care and Treatment of the Mentally Ill, The Journal of Sociology&Social Welfare, 1987 pp 75-91.

troubles when the medication started to be the primary measure to handle the mentally ill.[18] The so-called "de-institutionalization" unfortunately caused also far-reaching problems when a large number of people with mental illness were released from the institutions and started to be treated with medication. This era of deinstitutionalization led also to a situation of prisons full of mentally ill without protect of mental health system. [19]

The real problem, with which the society is still battling today, was the situation in which people failed to take the medication and were left on their own without any care. Through all these events from history we are still in a situation where mental illnesses are one of the biggest challenges of the law. When in 1920's and a long time after that, the law mainly closed its eyes from the problem, it must now face it in almost everyday practise.

[18] McLachlin, B. (2010), *supra nota* 5, p 20.
[19] Levesque, S. (2009-2010), *supra nota* 16, p 712.

2. Fundamental Principles of the Crime

2.1. The Principles of *Actus Reus* and *Mens Rea*

"*Actus non facit reum mens sit rea*" is a Latin expression meaning that a single act alone does not constitute criminal liability unless the mind also is proven to be guilty.[20] For a crime to be constituted, these both elements are needed, the criminal act (*Actus reus)* and the guilty mind *(Mens rea).*[21] In this part of the thesis the author aims to show the fundamental difficulty of interpretation of the relationship between the physical and the mental element when the one committing the act is not mentally healthy and thus may not be able to determine his actions in a way that healthy, normal individual could.

2.1.1. *Actus Reus*

The first factor required for a crime to be established is the physical factor of the crime, the act itself. However, *actus reus* is not always just the physical act alone but rather all the other factors of the crime but the mental.[22]

Briefly described, *actus reus* is the forbidden (usually by the law), voluntary conducted action. The wording of voluntariness is important in this sense since for a constitution of a crime, the voluntary nature of the act is always required.[23] The author underlines that especially concerning the issue of mentally disabled defendants, a great focus should be on voluntariness of the action.

However, the distinction between preparation and attempt should be noted. Mere preparation can never be enough for a constition of a criminal act but attempt to act always is.[24]

Actus reus can be established also in variety of other ways. Next the author will go through some common situations where actus *reus* may and may not be established.

[20] Sayre, F. Mens Rea, Harward Law Review, 1931-1932, pp 976-1026, p 976.
[21] Hrncirik, V. Actus Reus and Mens Rea (Thabo Meli and Beyond), Common Law Review 2006, pp 8-10, p 8.
[22] Principles of Criminal Liability, lawteacher.net/lecture-notes/criminal-law/actus-reus-lecture.php (14.04.2017).
[23] Actus Reus&Voluntariness, lectlaw.com/mjl/cl050.htm (05.03.2017).
[24] Garton, N. The Actus Reus in Criminal Attempts, Queen's Law Journal, 1973-1974, pp 183-224 p 183.

2.1.1.1. Omission

Generally the criminal responsibility can only be established when one has committed an actual physical act. This means that if a man walks on the street and sees another man falling into a pit but does not go and pull him up, a criminal liability can not be established on grounds of not acting.[25]

However, there exist situations when not doing something can lead to criminal responsibility. The principle is that the person cannot be liable in grounds of omission unless there was an existing legal duty to act. This kind of duty can rise straight from the law, for example the duty to pay taxes derives straight from a law and leaving them unpaid can constitute criminal liability. Duty to act can rise from a specific contracts (especially in contracts of health professions) or just from a parental realtionship.[26] Omission to provide for a child is discussed for example in Oklahoma Statutes §21-852 (2014)[27] which provides that persons responsible of a child are obligied to provide the ”necessary food, clothing, shelter, monetary child support, medical attendance…” to a children when an exeption is not provided by law.[28]

Also in situations where one offers for help but later does not take action leaving the other person in distress, criminal liability can be established.[29]

An example of the case law dealing with omission is *Jones v. United States*[30] from 1962. In this case two defendants were prosecuted of involuntary manslaughter. Jones (defendant) had promised to take care of her friend Shirley Green’s (defendant) two young children. Younger of them was suffering from jaundice and Jones took him to the doctor. The doctor adviced Jones to take the baby to the hospital but Jones only took him back home. Later the authorities visited at Jone’s and found the both children in horrible condition and unfed. The children were taken to the hospital but the younger died on the next day. Both defendants were accused of maltreating and abusing the children but these claims got dismissed. Later they were prosecuted for involuntary manslaughter since they failed to provide the legal duty to care. The biological mother was found innocent but Jones got convicted. She appealed stating that there was no

[25] Criminal Law- Actus Reus& Mens Rea, allaboutlaw.co.uk/stage/study-help/criminal-law-actus-reus-mens-rea (14.04.2017).
[26] Omission as Actus Reus, lectlaw.com/mjl/cl051.htm (14.04.2017).
[27] Oklahoma Statutes §21-852 (2014).
[28] Oklahoma Statutes Title 21. Crimes and Punishments 21-852. Omission to provide for a child-Penalties, law.justia.com/codes/oklahoma/2014/title-21/section-21-852 (14.04.2017).
[29] Actus Reus, www.law.cornell.edu/wex/actus_reus (14.04.2017).
[30] U.S. Court of Appeals for the District of Columbia Circuit-308 F.2d 307, *Jones v. U.S.* (1962).

sufficient evidence that she had a legal duty to care for the children.[31] The court then needed to arrange a new trial to provide the evidence that Jones had one of the four legal duties provided previously (duty rising from a statute, from a contract, certain relationship as parental, voluntary provided help).[32]

The author thinks that the case discussed is a significant example of the difficulties that establishing *actus reus* can bring. In this case it was not unclear that the actions (or failure to act) of Jones caused the death of the young child but the question was about legal duty which is always to be established when seeking for criminal responsibility rising from omission.

[31] Jones v. United States, quimbee.com/cases/jones-v-united-states?ab_suf=false (15.05.2017).
[32] Omissions, Jones v. U.S., scribd.com/document/10075381/Jones-v-U-S (15.04.2017).

2.1.1.2. Non-voluntary actions

There are situations where it is clear that the criminal act did occur but the voluntariness was not present. In these situations the criminal liability can not be established.
The author will now go through some of the possible situations being reflex and spam and hypnosis and also discusses about the actions made under self-induced state.

To illustrate the concept of reflex and spam, it constitutes a non-voluntary act when a person A's foot kicks person B as a result of unexpected nerve disorder and will not create criminal liability to A[33]. But if the person A knowingly kicks person B after B took his pen without permission, *actus reus* is present.[34] The difference illustrated in this example is important to understand when the voluntariness of an action is evaluated.

Despite little lack of consistency within the matter of hypnosis, the general way of thinking is that the acts committed under hypnosis are considered as non-voluntary thus the person committing the act does not know what he is doing and since would not be liable for his actions. The intention is in crucial role within this argument since it can be seen that a person under hypnosis does not do anything intentionally even if he actually knows what his body is doing.[35]
This type of situation needs of course an adequate amount of professional evidence. The concept of hypnosis is in author's opinion very interesting since it could be linked to the actions committed as a result of mental illness. The author claims that if actions made under the influence of hypnosis cannot create criminal liability, neither can the actions committed because of mental illness if it can be proved that one did not know what he was doing.

Another aspect to be keep in mind considering hypnosis, is that although the act under hypnosis was made non-voluntary, an earlier action made voluntary can make the latter punishable.
A common example of this is intoxication. Although it can be suggested that the actions made under drugs or alcohol are non-voluntary, it is a common principle that the voluntary intoxicated individuals are always liable for their actions leading to a fact that intoxication can not be held as a defense.[36] The author finds this point particulary important when distinguishing the criminal acts made under the influence of drugs and from the acts made as a result of mental illness which of the latter would not, in author's opinion, constitute criminal responsibility.

[33] Hrncirik, V. (2006), *supra nota* 21, p 8.
[34] Actus Reus&Voluntariness, lectlaw.com/mjl/cl050.htm (05.03.2017).
[35] Williams, B. The Actus Reus of Dr. Caligari, University of Pennsylvania Law Review, 1993-1994 pp 1661-1673 p 1668.
[36] Hrncirik, V. (2006), *supra nota* 21, p 8.

The author also highlights the fact that this thesis focuses on medical diseases rather than temporary mental states caused intentionally with alcohol or drugs.

2.1.2. *Mens Rea*

Mens Rea the "guilty mind", the mental element of the crime, is commonly used in its simple sense to determine if the wrongful act of a person is "reprehensible enough" for a criminal responsibility and thus a penalty.[37] As noted above, mere preparation is never enough for a crime to be constituted, meaning that guilty mind alone is never punishable. It is only when the criminal intention leads to an actual act when the crime can be constituted. The simple and general sense of the principle in question can be said to mean the mental state of the offender.[38] Even if this narrow sense is quite commonly approved way of thinking especially among lawyers, the exact and spesific meaning and the question of how broadly this principle should be interpreted constitutes some level of dissensions among writers and courts.[39]
The author will limit the research to the general meaning of *mens rea* in order to understand the main topic of the research better since the concept of intention is in siginificant role when determining the criminal responsibility of a mentally ill person.

To summarize the importance of *mens rea,* it has been stated by Henry de Bracton in his book "De Legibus et Consuetudinibus Angliae" that without *voluntas nocedi,* intent to injure, there is no crime.[40] In all legal systems the constitution of for example a murder requires the intent of an action to kill which means that without intetion, killing another person can not constitute as a murder. The doctrine of reasonable person is used when assessing the behavior and acts of an individual.[41]

[37] *Ibid.*
[38] Morse, S.J. Inevitable Mens Rea, Harvard Journal of Law&Public Policy, 2003-2004, pp 51-64, p 51.
[39] Sayre, F. (1931-1932), *supra nota* 20, p 976.
[40] De Bracton, H. De Legibus et Consuetudinibus Angliae, Cambridge University Press, 2012.
[41] Turpin, C.C. Mens Rea in Manslaughter, Cambridge Law Journal, 1962, pp 200-212 p 207.

During the recent years the U.S. Supreme Court has increasingly underlined the importance of *mens rea* in criminal cases and the presence of the principle in question has become even more significant part of Anglo-American law system, Paul Larkin, Jordan Richardson and Johnt-Michael Seibler are suggesting in their article " The Supreme Court on Mens Rea: 2008-2015. In their article they list seven cases from 2008 to 2015 illustrating the growing importance of *mens rea*.[42] The author sees the growing significance of *mens rea* as greatly positive attitude towards assessing the situations concerning unclarity of the intention of the criminal act.

2.1.2.1. Rosemund v. United States

One of the listed, "major *mens rea* cases" was *Rosemund v. United States* from the year 2014.[43] This case elucidated the concept of "aiding an abetting" creating liability in criminal cases. In this case the defendant, Justus Rosemund attended in unsuccessful drug dealing when he was sitting in a car accomppanied with two other men, waiting for a "customer". The dealing went wrong when the "customer" came, hit one of them, took the drugs and escaped. Next one of those three men ran after the thief and shot at him. It remained unclear, which of the three man was the shooter since they all claimed that they did not remember. Rosemund later ended up arrested.

The arrest of Rosemund was based on Title 18, United States Code §2(a)[44] providing that "Who ever commits an offense against United States or aids, abets, counsels, commands, induces, or produces its commission, is punishable as a principal". To establish criminal liability under this section, there are three requirements to be fulfilled; (1) the defendant had an association with the criminal attempt in question (2) the defendant was knowingly part of the criminal attempt (3) the defendant's actions were to support the success of the criminal action.[45] The Supreme Court stated that the above-mentioned requirements were with no doubt fulfilled in this case but the intention of Rosemund left still a little unclear. With the help of precedents stating that "when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the chagred offense", the intent is present and criminal liability can be established. In a light of the precedents the Court ordered that since Rosemund actively attended to the drug dealing process, he had the required intent to aid and abet also the shooting and Rosemund was

[42] The Supreme Court on Mens Rea : 2008-2015, heritage.org/courts/report/the-supreme-court-mens-rea-2008-2015 (14.04.2017).
[43] United States Supreme Court, No. 12-895, *Rosemund v. U.S.* (2014).
[44] Title 18, United States Code §2 (a)
[45] Aiding and Abetting in Violation of 18 U.S.C Section 2, browntax.com/Tax-Law-Library/Aiding-and-Abetting-in-Violation-of-18-U-S-C-Section-2.shtml (15.05.2017).

convicted with firearm- and drug related offenses.[46] Despite the appeal, the Tenth Circuit confirmed the conviction.[47] The author suggests that this case is a great example of the importance of *mens rea* and the significant weight of it when the criminal liability is assessed.

The author stresses the importance of careful interpretation of *mens rea* and suggests that it needs even more attention in real life to focus whether or not the defendant really did have an intention or were the actions committed under other circumstances where the defendant for example did not understand what he was doing. The recent alignment of the U.S Supreme Court is, in authors opinion, significant and leads the U.S. criminal law to the desired direction when talking about achieving the fairest possible legal process to every individual despite their state of mental health.

[46] The Supreme Court on Mens Rea : 2008-2015, heritage.org/courts/report/the-supreme-court-mens-rea-2008-2015 (14.04.2017).
[47] Rosemund v. United States, https://www.oyez.org/cases/2013/12-895 (15.04.2017).

2.2. *Thabo Meli and Others v. The Queen*

A well known case relating to the matter of causation between *actus reus* and *mens rea* in criminal cases, particularly in murder cases is *Thabo Meli v. The Queen* from the year 1954.[48] The case in question is from the United Kingdom but since it had a remarkabe worldwide impact to the topic in question when establishing the continuing act theory, the author finds it as a relevant example to be presented.

The incident behind the case occured in South Africa, Basutoland (a former British colony). The case was about a man named Thabo Meli and three other men who intentionally tried to kill the victim of them by inviting him to a hut, getting him intoxicated and then hitting him to the head. They then made the event look like an accident by throwing the assumedly dead body off the palisades to avoid the criminal liability. They were not aware of the fact that at this point the victim was not dead but only unconscious. It was the autopsy that later revealed that the cause of death was not the hit to the head, nor the throw from the palisades but the exposure of the victim. The question that arose was whether one can be guilty of a murder when an attempt to kill does not work out and the actual death is caused by the act committed without intent to kill.

All four defendants were found guilty of murder by the South African Court, the High Court of Basutoland in March 1953 but appealed to the Privy Council with very interesting defence that made the case known all over the world. The defence lawyers had a remarkable statement to release the defendants from the previous judgment made by the South African Court. The argument of the lawyers included a statement that the defendants would be not guilty of murder since the cause of death was not a direct result of the behavior of the defendants. The base to the defence in question lays in fundamental principles of the crime, *actus reus* and *mens rea*, and the need for their co-existence for a crime to be established. The argument was that in this particular case, there was two separate acts, first the hit into the victim's head and then second separate act being the trowning the assumed body off the palisades and leaving the victim there. The defence suggested that at the time of the first act the intent to kill the victim was present but did not end up in the death of him. At the time of the second act, which resulted to the death of the victim the intent to kill was no longer present but only the need to get rid of the assumed body. Since the

[48] UK Privy Council, Appeal No. 28 of 1953,*Thabo Meli and v The Queen (Basutoland)* (1954).

two elements of the crime need to exist at the same time the lawyers suggested that the defendants could be guilty to not more than a homicide.[49]

The Privy Council ruled that dividing one transaction into two separate acts is something that cannot be done. They stated that the fact that the defendants were not aware of the fact that the intented murder was not successful is not a reason to distribute the acts in order to reduce the penalty to lower than a murder. Rather than separating the acts to individual transactions, they must be seen as a "stream of events" and it does not matter if one of the actions is conducted with the absence of *mens rea.* This theory of the stream of events was introduced in this case and is called as "continuing act theory" which has made a remarkable importance in the courts of common law system. In short, the theory established that the direct correlation between *actus reus* and *mens rea* is not needed for a constitution of a murder charge.[50]

The author suggests that the importance of this case was significant especially because of the establishment of the continuing act theory. The author argues that without this theory the principles of *actus reus* and *mens rea* would have lost their fundamental importance and could easily be abused and ignored if having that kind of loopholes. Although the author highlightes the importance of both elements existing for a constitution of a crime, the requirement of direct correlation would left a dangerous opportunity for a lot of crimes to be left without punishent or with a lesser punishment than what would be given when following the continuing act theory

[49] Causation in Murder Cases: Thabo Meli v The Queen, nswcourts.com.au/articles/causation-in-murder-cases-thabo-meli-v-the-queen/, (04.03.2017).
[50] *Ibid.*

3. Definition of Mental Illness

Although the ethical, legal and moral difficulties concerning mental illness are still not solved thoroughly, the progress in the field of medicine and law has took us a lot further from the times when the mental illness was seen as evil and sinful. In order to achieve a thorough understanding of the topic and the reasons behind the overrepresentation of mentally ill defendants and their variable treatment within the criminal system the author finds it relevant to examine the definitions of mentall illness from both the medical and the legal point of views.
By comparing these, the author aims to establish the impact of the lack of cooperation between medicine and law to the problem of treating the mentally ill in criminal justice system.

3.1. Medical Definitions

Following the knowledge of modern medical views, mental illness is usually described as a medical condition disease locating in human brain, able to evolve and thus not able to have an unchangeable definition. The National Institute of Mental Health (NIMH) lists schizophrenia, bipolar disorder, and forms of severe depression and obsessive-compulsory disorder as the four most remarkable serious mental illnesses.[51] NIHM describes these serious mental illnesses as emotional, mental or behavioral disorders having severe impacts on functioning in all ranges of life.[52] NAMI has a similar approach defining mental illness as a "condition that affects a person's thinking, feeling or mood", able to have an impact on everyday practices and relations to other persons.[53] Since these definitions are current information the author finds it interesting that neither of these definitions include a word "disease" but rather the "conditions" which in author's opinion makes the upcoming battle of mental illness being a disease and mind an organ relatively unnecessary but important to show the great variety of views.

[51] Da Voli, J.I. Still Stuck in the Cuckoo's Nest: Why do Courts Continue to Rely on Antiquated Mental Illness Research?, Tennessee Law Review, pp 987-1050, 2001-2002, p 989.
[52] What is Mental Illness?, psychiatry.org/patients-families/what-is-mental-illness, (02.03.2017).
[53] Mental Health Conditions,.nami.org/Learn-More/Mental-Health-Conditions, (02.03.2017).

3.1.1. Psychiatric View

According to a Hungarian born psychiatrist Thomas S. Szasz, mental illness cannot be characterized as medical disease but rather just a part of terminology used in mental health legislation.[54] This point of view as mental illness being a myth is illustrated also in the popular publication of his called ”The Myth of Mental Illness” (1961).[55] He explains this view by pointing out that that diseases are bodily interferences and the mind cannot be characterized as part of the body and when referring to mental illness, it is always spoken metaphorically.[56]

The author wanted to bring this opinion out to illustrate the significant variability between views but does not fully agree with Mr. Szasz and rather agrees with the more general point of view of mental illness being a real medical disease or rather a condition. Despite the disagreement with Mr. Szasz the author finds his views interesting and somehow usable since all points of views should be noted in order to find an effective and comprehensive solution. The author still believes that if mental illnesses were generally be characterized as myths rather that real diseases or medical conditions the approach towards mentally ill would be quite primitive when comparing to the current situation where they are mostly treated from the medical point of view. It is, as pointed out, important to highlight different opinions to find the points creating the most dissenations.

Another psychiatric statement concerning the mind and body differences and the concept of mental illness as a disease is stated by Dr. Arthur P. Noyes and is as following: "While other branches of medicine deal with parts of the organism, psychiatry or psychobiology studies the individuals as whole, as a biologic unit living in an environment that is essentially social in nature, and deals with the biopsychic life, the total integrated behavior of the human organism. It deals with data from the biologic, social and psychological sciences"[57]

The author sees views of Dr. Arthur P. Noyes more reasonable than Thomas S. Szasz since Noyes has clearly more open approach to the cooperation the mind and body does. The author agrees with the general opinion of mind not being a physical organ but rather thinks the mental illnesses are locating in brain that is, an organ of human body and thus are to be considered as "diseases".

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[54] Szasz, T.S. A Psychiatrist Views Mental Health Legislation, Washburn Law Journal, 1969-1970, pp 224-243, p 224.
[55] Szasz, T.S. *The Myth of Mental Illness*, New York, Harper&Row Publishers,1961.
[56] Szasz, T.S. (1969-1970), *supra nota* 54, p 226.
[57] Weihofen, H. The Definition of Mental Illness, Ohio State Law Journal, 1960, pp 1-16 p 5.

By interpreting the viewpoints of psychiatrists the author aims to illustrate the factors affecting behind the criminal law system. As the psychiatric opinion usually plays an important role when assessing the defendant's mental health, it is important to bring up the variability of individual psychiatrists. Especially in the United States where case law and precedents are in crucial role, the author argues that the opinions and statements of psychiatrist obtain a great influence to the ways that the criminal justice system evolves. In addition to the influence that psychiatrists have to the development of the whole system, they have a significant impact to individual cases when testifying in courts.

3.2. Legal Point of View

As today the assessment of the mental health of criminal defendants, widely lies on the hands of legal authorities, the need for them to follow the medical development is particularly important.[58] The definition of "mental illness" in justice system has however reached so wide nature that Da Voli states in her article that the term has completely lost its meaning.[59]

It should be noted that the definition of mental illness depends a lot on each individual state and their legislation and lacks the one general definition. However, the definition of mental illness or mental disorder (which are usually used as synonyms) is usually quite similar between the states. For example the Revised Code of Washington[60] describes mental disorder as ”any organic, mental, or emotional impairment, which has substansial adverse effects on a person’s cognitive or volitional functions”.

In general, currently almost all states include schizophrenia, bipolar disorder and major depression in their definition of serious mental illness.[61] This listing is quite much in accordance with the statement of the National Institute of Mental Health. The reason behind choosing these to the lists in several states is the finding of the possibility of their symptoms leading to criminal conducts extremely high. Especially a major symptom of schizophrenia, propensity to have hallucinations often leads to the belief of being persecuted and violent actions under these beliefs. Statistics starting from the early 1980's show that out of 9.000 insanity pleas, 43% of the defendants were diagnosed with schizophrenia.[62]

The fact that official legal definitions to mental illness are quite in accordance with current medical knowledge, does not remove the fact that the author still sees the definitions being too wide, missing the exact definitions to reduce the variability of the interpretations between the states and courts. The author author finds the problem in the everyday practices where the terminology is in fact being interpreted among the law professionals often without a help of medical professionals and their knowledge and opinions.

[58] Szasz, T.S. (1969-1970), *supra nota* 54, p 226.p 224.
[59] Da Voli, J.I. (2001-2002), *supra nota* 51, p 989.
[60] Revised Code of Washigton, Title 71, Chapter 71.07.020.
[61] Peterson, J., Heinz, K.(2016), *supra nota* 1, p 544.
[62] *Ibid.*

4. Competence to Stand Trial

Competence to stand trial was defined in *Dusky v. United States*[63] as "sufficient present ability to consult with one's attorney with a reasonable degree of rational understanding and a rational, as well as factual, understanding of the legal proceedings against him." In short, the defendant needs to be able to profoundly understand the nature of his actions and be capable to assist in his own defense. *Dusky* put a basis to immorality of punishing a defendant unable to understand the reasons of the punishment. This is to ensure the fairness of the legal proceeding to the mentally disturbed which author sees as extremely good decision.

The author, however, wants to note that mere understanding of the nature of one's actions and the ability to assist in defense are relatively low requirements for competency leading to a situation where even seriously mentally disturbed individuals can be found competent.

4.1. Forcibly Medicating to Stand Trial

However, when some people are found incompetent, usually because of severe mental illness such as schizophrenia and other delusional disorders, they are usually sent to psychiatric hospitals to receive medical treatment aiming to control the symptoms causing the incompetency. This type of symptoms includes usually hallucinations and feelings of being persecuted. [64] The symptoms such as the above-mentioned are generally treated with anti-psychotic medication, which in general is a positive thing as long as the patient can be along with the decision-making concerning his own medical treatment.

The medical treatment of mentally ill people to stand trial in psychiatric hospitals sounds like and easy option until becomes the question of defendants who resists from taking the medication. Until the year 2003 the US government was able to medicate the criminal offenders against their will solely for them to become competent to stand trial. Forcing the mentally ill within the hospital system to take medication was not permitted under civil procedures but in criminal cases it was possible.[65] This required the defendant to be "mentally ill" and having "serious criminal charges" but was anyway possible under the Constitution. It was stated that the

[63] United States Supreme Court, 362 U.S 402, *Dusky v. U.S.*, (1960).
[64] Medicating the Mentally Ill for Trial and Execution: What Are the Implications of the Supreme Court's Recent Decision?, supreme.findlaw.com/legal-commentary/medicating-the-mentally-ill-for-trial-and-execution.html, (04.03.2017).
[65] *Ibid.*

forcibly medicating was possible under four conditions being the following: it was to be proved that "important government interests" were under question and the forced medication would significantly advance those interests and that the medication was especially needed to support the interests in question. Lastly it was required that the medication in question was appropriate concerning the patient's medical interests. [66] The author finds these requirements also relatively wide concerning the seriousness about the concept. The author believes also that these requirements would have been easy to fulfill and explain even though there would not have been a true need for medicating but mere goal to make the defendant competent for a trial and thus give a punishment. Although the forced medication in order to make one competent was permissible, there existed a great amount of discussion and disagreements whether forcing to medicate on a mere reason to stand a trial, with no danger of the defendant harming others or himself, was reasonable.[67]

4.1.1. *Sell v. United States*

The answer considering the questions relating to the forced medication of incompetent defendants was found in landmark case *Sell v. United States* where the question concerned was whether the government has the right to forcibly medicate an offender refusing from medication on a sole reason for him to become competent to stand a trial.[68] The author sees relevant to go through this case step by step since it serves great examples of how the mentally ill are treated during the legal proceedings from very beginning to the end.

The defendant in the case in question was a former dentist with a sad background of mental illness. In 1982 he told his doctors that the gold he used to fill his patients' teeth was "contaminated" by communists and was put into psychiatric hospital and treated with antipsychotic medication. After being discharged, in 1984 he called a police arguing that he saw a leopard going into a bus and was again hospitalized. This kind of in-and-out hospital routine continued for quite some time.

[66] To stand trial, defendants can be medicated by force, csmonitor.com/2003/0617/p01s01-usju.html, (04.03.2017).
[67] Medicating the Mentally Ill for Trial and Execution: What Are the Implications of the Supreme Court's Recent Decision?, supreme.findlaw.com/legal-commentary/medicating-the-mentally-ill-for-trial-and-execution.html, (04.03.2017).
[68] United States Supreme Court, 539 U.S. 166, *Sell v. U.S., (2003)*.

In 1997 the government charged Sell with fraud and made-up insurance claims. A psychiatric evaluation was organized with a result of a Federal Magistrate Judge stating that Sell was "currently competent" but with a possibility of "psychotic episodes" during the near future and released Sell on bails.

In the beginning of 1998 the Magistrate organized a bail revocation hearing after the government argued that Sell intimidated one of the witnesses during the first hearing. In this latter hearing the Judge described Sell's behavior as "totally out of control, involving screaming and shouting". The judge also stated that Sell's behavior included racist callings and personal insults and that he even spit on judge's face. In this hearing the psychiatrist stated that Sell could not sleep because of a fear of FBI going through his door and an official statement of Sell's worsening mental health was given. On a light of these, the Magistrate revoked the bail.

It was still a year 1998 when yet another charge was made against Sell. This time it was an attempted murder of the FBI agent who arrested Sell of the insurance frauds and a previous employee of Sell’s who was going to testify against him concerning the frauds. A trial was held as a joined case of the previous frauds and these attempted murders.

In the beginning of 1999 United States Medical Center for Federal Prisoners at Springfield, Missouri took Sell for a mental examination after he had requested a new assessment of his competence. Now it was found that Sell was incompetent and was again hospitalized. It was aimed towards restoring his competence in order to continue the trial. As the treatment without antipsychotic medication did not seem to make progress, the hospital staff recommended them to Sell. However, Sell had bad experiences from the previous times taking the antipsychotic medication and strongly refused from starting to take them. The staff requested for involuntary medication which was then given a permission by a psychiatrist assessing the case, on a basis that (1) Sell being mentally ill and in great potential to harm himself and others so the medication would be needed to treat him properly and (2) with the medicine Sell would become competent. The assessment of the psychiatrist in question moved to the hospital where Sell was treated which also, after reviewing the psychiatric statements and reasoning, agreed with the need of forced medication.

In July 1999, Sell himself made a claim to the court opposing the hospital's rights to forcibly medicate him and in September the court hearing was organized by the same Federal Magistrate who first put him into the hospital in question. It was still in 2000 stated that the government had showed a sufficient amount of relevant evidences of the necessity of forcibly medicating Mr.Sell. [69]

In the spring of 2001 the District Court gave its opinion and based on Sell's potential harm ho himself and others, also agreed with the need of the medication. They affirmed that the medication would make Sell competent, be medically appropriate and serve important government interest. These points were agreed by the Court of Appeals, which, however stated that Sell was not potential to harm himself or the others.

The case went lastly to the Supreme Court, which then ordered the lower courts to apply more intense standards for involuntary medication. It stated that ordering Sell to be under forced medication on a mere reason to make him competent was not enough and highlighted the fact that the Court of Appeals itself had stated that Sell was not dangerous.

Sell's lawyer described the decision as "clear victory" since after the decision in question it would be significantly more complex to involuntary medicate the defendants.[70] The importance of *Sell* was huge. The decision made demands especially specific evidence about the absolute need of the medicating and more important, strictly prohibits the involuntary medication solely for a making the defendant competent for a trial. The true need for a medication is always required and demands usually that the patient in question is in risk of harming himself or the others.

The author sees the concept of forced medication as very arguable. Although in the United States it is still under the restricted requirements, possible to force defendant to take medication, the author's personal opinion is that medicated, especially forcibly, defendant cannot be characterized as competent. The author sees the competence to stand trial one of the most important features for a constitution of a fair trial and thinks that when strongly medicated, one is not himself. As the *Dusky* requires rational and factual understanding, the author truly thinks that these are not fulfilled if the defendant is medicated in order to stand the trial.

[69] To stand trial, defendants can be medicated by force, http://www.csmonitor.com/2003/0617/p01s01-usju.html, (04.03.2017).
[70] To stand trial, defendants can be medicated by force, http://www.csmonitor.com/2003/0617/p01s01-usju.html, (04.03.2017).

5. Insanity Defense

In a situation where it is clear that one has committed a criminal act, it is sometimes claimed that the act was committed without responsibility since the act was a result of mental illness as "not guilty by reason of insanity"(NGRI), also called as an excuse defense.[71] When successful, NGRI works as an absolutely affirmative defense leading to acquittal.[72] For example the Illinois Compiled Statutes Criminal Code Art 6 §2 (a) states "A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct.[73]

The history of NGRI goes way back to the thirteenth century when it started to be recognized as a defense in criminal cases. However, at that time it was a custom that the assets of the "madman" were given to the king. In fourteenth century the insane defendants were still convicted but with a "special verdict" the king could pardon them. By 1581 it was recognized that insanity ruled out the criminal responsibility.[74] Still the verdict in question has through the ages been dividing opinions of the law professionals and authorities.[75]

The author believes that the strategy to reach for insanity plea in order to avoid harder punishment has kind of lessen the respect towards the idea of mental illness so the author agrees with the "lost of meaning"-thinking of for example Da Voli who suggested that the meaning of the term "mental illness" has almost lost its meaning.[76] Although the insanity defense is successful in very few cases, also Linda C. Fentiman states in her article that by using insanity defence, criminals are reaching towards softer punishments[77] and authors Ann H. Britton and Richard J. Bennet are stating in their article that the huge media-attention that insanity defence cases usually get is causing twists to the views of the public.[78]

Despite its contradictory nature, the insanity defense has a simple theory behind it, including the statement that a mentally ill individual does not have the required ability to make distinction

[71] Insanity Defence, law.cornell.edu/wex/insanity_defense, (03.03.2917).
[72] Difference Between Insanity Defense and GBMI Finding, A Journey Within, illinoiscaselaw.com/difference-between-insanity-defense-and-gbmi-finding/ (15.04.2017).
[73] 720 Illionois Compiled Statutes Criminal Code 5/6-2 (a)
[74] Fentiman, C.L. "Guilty But Mentally Ill": the Real Verdict is Guilty, Boston College Law Review, 1985, pp 601-653 p 605-606.
[75] Britton, A.H., Bennett R.J., Adopt Guilty but Mentally Ill?-No!, Toledo Law Review, 1983-1984, pp 203-231 p 203.
[76] Da Voli, J.I. (2001-2002), *supra nota* 51, p 989.
[77] Fentiman, C.L. (1985), *supra nota* 74, p 601-602.
[78] Britton, A.H., Bennet, R.J. (1983-1984) *supra nota* 75, p 203.

between right and wrong and if can, he may not have the ability to control the actions of his anyway. The theory sounds simple but the next chapter discussed shows the multiple difficulties that defining insanity brings.[79]

The author reminds that this part of the thesis does not take further stand to the question concerning the need and existence and validity of insanity defense but rather examines the real life application of it in the U.S. and the different ways of interpreting it.

5.1. Insanity Defense in the U.S.-Application

5.1.1. Burden of Proof

The concept of burden of proof has always been controversial when associated with the insanity defense.[80] However, as a term it has been said to have two meanings. Firstly it means the obligation to establish the truth with a sufficient amount of evidence. In criminal cases this means that there must be "proof beyond reasonable doubt". Secondly it means the obligation to produce the evidence.[81]

Originally the burden of proof laid generally on states meaning it was the responsibility of the prosecutor to prove that the defendant was not insane but nowadays a majority of states have the burden of proof on the defense. This means that the defense needs to have a preponderance amount of trustworthy evidence that the defendant really is insane as argued. In states, which still have the burden of proof with the state, the principle of "beyond reasonable doubt" is used.[82] Nowadays out of the 47 states that allow the defense of insanity, 77% have the burden of proof on the defendant and only 23% on the state.[83] This is illustrated in a form of a diagram in annex 2 in the very end of this thesis. The author strongly believes that when the burden of proof lays on the defense, the fair trial of the possibly mentally ill defendant is easier to achieve. The author suggests that when the burden of proof is on the defense, the facts considering the illness of the defendant are more accurate and personal than they would be if it were the responsibility of the state to bring them out.

[79] United States Insanity Defence, lawdigest.uslegal.com/criminal-laws/insanity-defense/7204 (15.03.2017).
[80] *Ibid.*
[81] Burden of Proof in the Defense of Insanity, Virginia Law Review, 1919, pp 209-213 p 209.
[82] United States Insanity Defence, lawdigest.uslegal.com/criminal-laws/insanity-defense/7204 (15.03.2017).
[83] *Ibid.*

5.1.2. The *Hinckley* Trial

The reason behind the great difference between the amount of states having the burden of proof on the defendant to the states having it on the state lays in the case of *United States v. John W. Hinckley Jr.*[84] It was also after this landmark case when four states (Kansas, Idaho, Montana, Utah) rejected the insanity defense as a whole.[85]

John W. Hinckley was a man with severe mental issues such as schizophrenia and depressive disorder. In 1981 he tried to convict an assassination of President Ronald Reagan after having a serious obsession to the well-known movie *Taxi Driver*.[86] In 1982 the District Court of Columbia acquitted Hinckley with a reasoning of not guilty by reason of insanity. Hinckley was hospitalized to St. Elizabeth 's Hospital. The attorney of Hinckley suggested in the end of 1990's that his mental condition was stable and thus he should be returned to his old life. It was no sooner than 1999 when he got a permission to go through the hospital grounds under supervision and even later came the decision that he could, once a week, with no supervision meet his parents.[87]

After the trial, the Congress received more than sixty bills demanding the elimination of insanity defense for federal defendants. This led to the establishment of significantly narrower insanity defense as a part of the Comprehensive Crime Control Act of 1984. The new version of the law made the insanity defense eligible for federal defendants when there exists "clear and convincing evidence".[88] The *Hinckley* trial and its judgment led the four above-mentioned states to eliminate the insanity defense and the states that kept it, reformed their tests of insanity. Two of the biggest reforms were changing the burden of proof from state to the defense and the adoption of defense of "Guilty but Mentally Ill". [89]

[84] United States Court of Appeals, District of Columbia Circuit, No. 97-3094, *John W. Hinckley v. U.S.,* (1998).

[85] United States Insanity Defence, lawdigest.uslegal.com/criminal-laws/insanity-defense/7204 (15.03.2017).
[86] After Hinckley, States Tightened Use of the Insanity Plea, npr.org/sections/health-shots/2016/07/28/486607183/after-hinckley-states-tightened-use-of-the-insanity-plea, (16.03.2017).
[87] Hinckley not guilty by reason of insanity, history.com/this-day-in-history/hinckley-not-guilty-by-reason-of-insanity (19.03.2017).
[88] Fentiman, C.L. (1985), *supra nota* 74, p 603-604.
[89] United States Insanity Defence, lawdigest.uslegal.com/criminal-laws/insanity-defense/7204 (15.03.2017).

5.1.3. Guilty but Mentally Ill

After the *Hinckley* trial, Michigan was the first to establish the guilty but mentally ill (hereinafter GBMI) verdict in 1975 and many other states followed that trend.[90] The reason for aiming to establish a new verdict was the fact that when there existed only the verdicts of guilty, innocent and NGRI, the jury needed to choose between guilty (and ignore the mental illness as a whole) and total acquittal on a reason of insanity.[91] Also the United States Attorney General's Task Force on Violent Crime suggested the use of GBMI as an alternative to NGRI.[92]

When there is a situation where the criminal defendant does not fulfill the requirements of the NGRI but it can be proved that he was mentally ill during the time of the criminal action, the Guilty but Mentally Ill (GBMI) plea is a possible choice. GBMI is mostly used in situations where it is with no doubt proved that the defendant did not have a normal ability to assess the consequences or the wrongfulness of his actions. It is to be noted that since when meeting those two requirements there is usually a possibility of successful NGRI, in GBMI usually only one of those is fulfilled.[93] At this point it is crucial to understand that unlike the NGRI, GBMI is not really a defense at all and does not have the affirmative nature like NGRI does. As the wording of the verdict tells, even when GBMI plea is successful, the defendant is found guilty and ends up in prison. The basic idea of successful GBMI is only to receive mental treatment during the imprisonment. [94] The Illinois Compiled Statutes Criminal Code Art 6 §2 (c) provides that "A person who, at the time of the commission of a criminal offence, was not insane but was suffering from mental illness, is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill".[95] To establish GBMI, the law in question offers two possible ways. First of them is to plead the GBMI in the beginning and the second is to plead NGRI but lost it and have "only" the GBMI. This means that the GBMI cannot be achieved without plea.[96]

[90] Fentiman, C.L. (1985), *supra nota* 74, p 614-615.
[91] Guilty but Mentally Ill, insanityplea.umwblogs.org/guilty-but-mentally-ill/(16.03.2017).
[92]Fentiman, C.L. (1985), *supra nota* 74, p 614-615.
[93] Guilty but Mentally Ill (GBMI) vs. Not Guilty by Reason of Insanity (NGRI): An Annotated Bibliography, thejuryexpert.com/2009/11/guilty-but-mentally-ill-gbmi-vs-not-guilty-by-reason-of-insanity-ngri-an-annotated-bibliography/, (01.04.2017).
[94] Difference Between Insanity Defense and GBMI Finding, A Journey Within, illinoiscaselaw.com/difference-between-insanity-defense-and-gbmi-finding/ (15.04.2017).
[95] 720 Illionois Compiled Statutes Criminal Code 5/6-2 (a)
[96] Difference Between Insanity Defense and GBMI Finding, A Journey Within, illinoiscaselaw.com/difference-between-insanity-defense-and-gbmi-finding/ (15.04.2017).

Linda C. Fentiman strongly criticises GBMI laws in her article suggesting that they "unconstitutionally undercut a criminal defendant's due process right to present an insanity defense" and claims that the existence of GBMI laws incites juries to reach for GBMI verdict to avoid the defendant's access to psychiatric treatment to which they have a constitutional right. She also states that GBMI serves a dual purpose. First its aim is to reduce the amount of defendants from being not guilty on grounds of insanity, thus increase the amount of individuals found "normally guilty" and secondly to provide therapeutic treatment in prison for that kind of defendants who still do have mental issues. However, Fentiman argues that those treatments are often not provided in reality. [97]

According to Britton and Bennet, another problems concerning the GBMI verdict are first of all, once again the vague terminology. They argue that the existence of GBMI verdict only increases the complexity of the vague terminology concerning mental illness and insanity. As a second major problem they list the burden of proof and should it be on a state or on a defense.[98] The author and this thesis does not give further opinions concerning these deep questions but wanted to bring them out to illustrate the significant wideness of the matter of insanity defense.

5.1.4. *People v. Woods*

One of the most significant cases concerning the difficulties that NGRI and GBMI bring, is *People v. Woods*[99] from 2014. In this case the mother of Jonathan Wood (hereinafter the defendant) was found gagged, tied up with electrical cord and dead from her basement in 2008. The body of the mother was covered with pillows. Her car was missing from the yard of hers and the defendant was later arrested when found driving it. The defendant had earlier sent a fax from her mother's address to her job place, to avoid suspicions but the co-workers of the mother got worried and called the police.

The defendant was first found not competent to stand the trial based on his paranoid schizophrenia but by 2010 his condition was found better and competent to stand the trial. However, the defendant refused to attend to a thorough evaluation concerning the state of his mind during the time the offence occurred. He only agreed to a current psychological evaluation that stated that he was completely sane. The doctor who made the evaluation was also the defendant's own doctor and testified this statement in the court.

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[97] Fentiman, C.L. (1985), *supra nota* 74, p 604-605.
[98] Britton, A.H., Bennett R.J. (1983-1984), *supra nota* 75 p 220-221.
[99] Illionois Appelate Court 121408, *People v. Woods* (2014).

This led to a situation where the mentioned psychological statement was the only evidence concerning his mental health during the criminal offence. This meant that the attorney of his could not raise an insanity defense that would have required evidences about the insanity. In addition to this, the defendant, against the advices of his attorney, told to the judge that he did not kill his mother but only "restrained" her because he feared that she would call the police (he had a restraining order to her mother) and did not know that a people could die from what he did.

As previously discussed, there is only two ways to achieve the GBMI verdict. Either defendant can plead it in a first place or plead insanity defense, and when unsuccessful, GBMI can be awarded. In this case the defendant was not going to plead GMBI and it was impossible to plead for NGRI because of the lack of evidence. This led to the situation where the defendant was treated as any other criminal since nothing else was left.

The problem here is easy to see. It was not unclear that the defendant was mentally disabled and would have deserved the verdict of at least guilty but mentally ill. The problem was that the ways to achieve it were blocked with the legislation.[100] The author strongly agrees with the critics discussed above and also suggests that there are major loopholes in legislations concerning the verdict in question. The author thinks that the verdict in its current nature is not to help the mentally ill defendants and by the result of this case it is easy to agree with the statement of Fentiman who suggested that GBMIs are to increase the amount of mentally ill defendants found guilty.[101] Despite the negative approaches to the GBMIs, the author still believes that with a little modification and carried out properly, GBMI could help people convicted as guilty to get the help they need during their imprisonment. The author still considers GBMI as an important fill to the gap in "traditional verdicts" of guilty and NGRI.

[100] Difference Between Insanity Defense and GBMI Finding, A Journey Within, illinoiscaselaw.com/difference-between-insanity-defense-and-gbmi-finding/ (15.04.2017).
[101] Fentiman, C.L. (1985), *supra nota* 74, p 604-605.

5.2. Legal Tests of Insanity

The upcoming part of the thesis will go through the most dominant tests of insanity in chronological order. Throughout the chapter the author goes through both the positive and negative feedback the tests have got and evaluates why the individual tests did or did not survive in use.

5.2.1. *M'Naghten*

During the change of views in the nineteenth century the law started to take more official and science-related approach on the on the issue of mental illness.[102] *M'Naghten's* case from 1843 is one of the most famous cases on the subject, referred in courts still in today.[103] The measures used and the outcome achieved in this case, were to have an impact in similar criminal cases for over hundred years having remarkable impact on common law system. [104] The *M'Naghten* case is also from the nineteenth century England but the test it constituted was and still is, widely in use in the United States.

Daniel M'Naghten was a mentally ill person suffering from paranoia. He had a strong belief that Sir Robert Peel, the Prime Minister of England was a persecutor of his and went to London with a plan to murder him during a procession. His attempt to shoot Sir Robert Peel went horribly wrong when the person getting shot and killed was Mr. Peel's secretary sitting in a convoy.

M'Naghten was prosecuted for murder. The defense of M'Naghten's lawyers was insanity. As the trial was held during an important transition time concerning the ways to handle with mentally ill, the defense leaned tightly to latest psychological perspectives, which at the time had a completely new, modern attitude towards criminal responsibility. The defense impressed the jury, which came into decision of M'Naghten being not guilty due to insanity. [105]

The outcome of the trial created some noise on behalf of the Queen and the whole Victorian London so the Queen gathered together the House of Lords, which then approached the judges with questions concerning the insanity defense used. [106] The response by the fourteen judges is known as *M'Naghten* Rule. It was stated by the Chief Justice Tindal that to establish the insanity

[102] McLachlin, B. (2010), *supra nota* 5, p 21.
[103] House of Lords, 8ER 718, *M'Naghten Case*, (1843).
[104] Dawson, J.R. *M'Naghten:* Right or Wrong for Florida in the 1980s? It Flunks the Test, Nova Law Journal, 1981-1982, pp 125-144, p 125.
[105] House of Lords, 8ER 718, *M'Naghten Case*, (1843).
[106] McLachlin, B. (2010), *supra nota* 5, p 21.

defense, it must be noticeable that the defendant committed the act in such state of mind that he did not know the nature of the action and even if he did know the nature of it, he did not know that the action was wrong.[107] The most important part of the statement in question was the use of term "know" which required the focus to be fully in defendant's cognitive abilities to distinguish right and wrong. By this statement Tindal took back the support of already almost forgotten "right-wrong" test in a form of the *M'Naghten* Rule and the test took a relevant place in courts of every state but New Hampshire, having the only supreme court still strongly leaning on the views of modern psychology and criticism of "right-wrong" test.[108]

When determining the criminal responsibility of a defendant the *M'Naghten* Rule might be the most criticized test. The base for many critics concerning the *M'Naghten* Rule is the fact that it is built on a medical knowledge of nineteenth century. Since all fields of psychology have been developed profoundly from the nineteenth century, the critics are suggesting at least an update of the rule into more modern way to be more in accordance with the current knowledge.[109]

In addition for the rule to be a little outdated, the critic directs also to the difficulty of the work of the jury in practicing the *M'Naghtens* Rule. As the rule allows the establishment of insanity defense only when the defendant did not know or understand that the act committed by him was wrong it is strongly based on the defendants capacity on constituting *mens rea.* The approach of *M'Naghtens* Rule thus ignores the possibility of the intermediates between sanity and insanity, having been referred as "mad or bad" doctrine, which can according to the critics lead to criminal responsibility of persons who fail the test, despite their mental abnormalities.[110]

The author strongly agrees with this critic and believes that there are also situations that cannot be solved solely relying on a defendant's cognitive ability to determine if the act is right or wrong. The author suggests than when relying completely on this type of black and white approach, some mentally ill people are wrongly found responsible and treated same way as healthy ones, the society founds itself in a situation of mentally ill eventually returning back to society with no treatment and the same wheel continues to rotate. The author opposes *M'Naghten Rule* since rather than trying to ensure a fair proceeding for mentally ill it rather closes its eyes of the wideness of the problem and refuses to see the wide picture of it.

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[107] *M'Naghten's Case*, (1843), 8 ER 718 HL.
[108] Dawson, J.R. (1981-1982), *supra nota* 103, p 130.
[109] Silverstein,L. Psychology, Mentall Illness, and the Law, West Virginia Law Review, 1957-1958, pp 133-165, p 143-144.
[110] Dawson, J.R. (1981-1982), *supra nota* 103, p 126.

Hermann Mannheim has written a profound analysis of the *M'Naghten* Rule, which the author finds useful to present. In his article "The Criminal Law and Mentally Abnormal Offenders" he lists eight points concerning the *M'Naghten* Rule, which the author will go through briefly. Many of them are similar to already stated points but this part will collect them together to act as a conclusion. Mannheim stated that the mere right or wrong test closed its eyes profoundly from the emotion and will as an other important elements and suggested that it left psychiatrists in a situation in which their hands were bound when limiting the test to mere insanity and closing fully its eyes from the grey area between sanity and insanity and by that, greatly limited the word of psychiatric opinion and made the outcomes vague and too variable. He described the test as "too narrow and unrealistic", setting aside the fundamental principles of criminal procedure and by complicating the application of the rule to the jury based courts, the test created a "dual-system of criminal justice". [111] The author wanted to give own chapter to views of Mannheim since they reflect profoundly the general critic towards *M'Naghten* Rule.

[111] Mannhem, H. The Criminal Law and Mentally Abnormal Offenders, Brit. J. Criminology, 1960-1960, pp 203-220 p 210-211.

5.2.2. Irresistible Impulse Doctrine

After the wide range of critic towards *M'Naghten*, it was aimed to establish a better definition for the term "insanity" so it would have more elements than just cognitive as in *M'Naghten.* It was pursued towards a test of insanity that would expand the requirement of the defendant's mere knowledge of the wrongful action to focus on whether the defendant in question was able to control their impulses to act wrongfully.[112]

Also called as the Control test, the irresistible impulse test was found in *Parsons v. State*[113] when the court noted that if a defendant suffered from such a mental state that he was unable to make a decision between wrong and right even though he was aware of the difference between them, the resulting wrongful act is clearly a product of mental illness, the criminal responsibility can not be established. Rather than mere "right or wrong" distribution, irresistible impulse test focused on uncontrollable internal impulses produced by a certain state of mind.[114] As the general requirement for criminal responsibility is "ability to choose otherwise", irresistible impulse made a significant improvement from *M'Naghten's* by recognizing the situations when one has no ability to choose because of certain state of mental health.[115] The author agrees completely with this type of approach and also considers irresistible impulse test as a great progress from *M'Naghten.*

Despite its improvements and good ideas, the irresistible impulse test obtained almost as plenty of problems as did *M'Naghten*. One of the most prominent flaws was that it left significant difficulties to the interpretation whether the wrongful act was committed as a result of an impulse that could not have been resisted or was just not resisted. It was also extremely complex to distinguish the actions resulted from a sudden, unexpected impulse from the actions committed by persons suffering from mental diseases that include repeated and long-lasting hallucinations and other symptoms that often lead to criminal commitments.[116]

It was also stated by a variety of courts that such irresistible impulses does not exist at all and there can not be a situation where one knows something to be wrong but still acts because of an

[112] The Irresistible Impulse Test, criminal.findlaw.com/criminal-procedure/the-irresistible-impulse-test.html (01.03.2017).
[113] Alabama Supreme Court, *Parsons v. U.S. (*1887) No. 270.
[114] Dawson, J.R. (1981-1982), *supra nota* 103, p 140.
[115] Abrams, N. Definition of Mental Illness and the Insanity Defense, The Journal of Pychiatry&Law, 1979, pp 441-456, p 444-445.
[116] *Ibid.*

irresistible impulse. In this part the author disagrees and agrees with some opposite views stating that mere legal professionals are not qualified enough to make statements concerning medical issues that only extremely experienced medical professionals can deal with. It has also been stated by medical professionals themselves for example John R. Cavanah, M.D., that this type of irresistible impulses does exist with certain mental illnesses and the irresistible impulse test should, in his opinion, be kept in practice. A lot of medical professionals have also made effort to bring back the irresistible impulse test by testifying about the existence of impulses of this kind in courts. Many courts also supported their decisions of opposing the irresistible impulse by claiming that by not using it the crime rates are held significantly lower than they would be with it.[117]

The courts also brought out the fact that use of the irresistible impulse test would be an opportunity to avoid criminal responsibility by claiming to be acted under the impulse.[118] The author still agrees with the medical point of view that this type of approach would leave the people with real mental illness causing irresistible impulses suffering and laymen in trials should be able to interpret the testimonies in a way that they can recognize the offenders who should be responsible from those who should not.

In addition the irresistible impulse did sadly repeat the mistake made by *M'Naghten* by failing to establish a proper definition for a mental disease. These few but crucial mistakes the irresistible impulse test acquired led to a fundamental lack of clarity and a few states discarded the test immediately.[119] The author believes that despite its good approach, the major mistake irresistible impulse test made was the lack of exact terminology which made the interpretation of "sudden impulses" almost impossible and resulted in a situation of courts totally denying the existence of them. Irresistible impulse test was eliminated in federal crimes after the *Hinckley* trial.[120]

[117] Cetti, C.L. M'Naghten Rule v. Irresistible Impulse Test, Mercel Law Review, 1962-1963, pp 418-426 p 420-422.
[118] Delehanty, T.E. The Insane Irresistible Impulse Doctrine, Peabody Law Review, 1939-1940, pp 28-35 p 28.
[119] Abrams, N. (1979), *supra nota* 114, p 445.
[120] United States Insanity Defence, lawdigest.uslegal.com/criminal-laws/insanity-defense/7204 (15.03.2017).

5.2.3. *Durham*

The third test discussed was established during *Durham v. United States* in the Circuit Court of Appeals for the District of Columbia. Monte Durham was a young man with a history of medical institutions and prisons since the age of 17. He committed a housebreak in 1953, was convicted and then appealed with an insanity plea. Although the court ruled that the attorneys of Durham did not success in proving the Durham's lack of ability to distinguish between wrong and right *(M'Naghten),* the judge decided to make a significant exception and reform the *M'Naghten.*

The Judge Bazelon ruled that criminal responsibility could not be established unless the criminal act of the defendant was a product of mental disease or mental defect. The ruling of *Durham* also defined the terms used as "mental disease" being a changeable mental condition, able to get better or worse and "mental defect" as a unchangeable condition and ruled that if the action of the defendant would not have been happened without the mental disease or mental defect the criminal responsibility could not be established.[121] The ruling in question supported the basic principle of criminal law as *mens rea* being a crucial element for a crime to be established. The fact that the act was solely a product of mental illness would create a significant need for careful interpretation about the existence of *mens rea* and thus criminal responsibility.

As irresistible impulse before, the *Durham* rule override the *M'Naghten'*s focus on cognitive elements completely and diminished greatly the "all or nothing" nature of it. It first had a good reception based on a presupposition that now the range of factors relevant to the assessment of mental health of the defendant would be much wider than before.[122] Overruling the focus on cognitive elements of the defendant and centralizing the determination on the subjective basis[123] it was pursued towards increased voice of psychiatric testimony.[124]

As *M'Naghten* and the irresistible impulse, *Durham* did not survive without criticts.[125] The first failure of the *Durham* rule was that it also lacked the exact definitions and requirements. The general point of view is that the reason why mental illness often abolishes criminal responsibility is their nature of disabling individuals and their actions.[126] As *Durham* intended to move away from the idea of *M'Naghten's* cognitional approach and suggested that the mind only acts as a

[121] DC Circuit Court, No.214 F.2d 862, *Durham v U.S.,*(1954).

[122] Abrams, N. (1979), *supra nota* 114, p 446.
[123] Dawson, J.R. (1981-1982), *supra nota* 103, p 141.
[124] Abrams, N. (1979), *supra nota* 114, p 445.
[125] Dawson, J.R. (1981-1982), *supra nota* 103, p 141.
[126] Abrams, N. (1979), *supra nota* 114, p 446.

whole, it in practice meant that any act was a product of mental illness and it would have been impossible to claim opposite.

In addition to this it failed, as did *M'Naghten* and irresistible impulse, to establish the definitions for the words “mental illness” and “mental defect” properly leading to an inevitable situation where the definition would vary between opinions. The reason for leaving the definitions open was to establish a system, which would last through time and psychiatric development but a good idea ended up as fundamental flaw.[127] Hugh J. McGtee has a intense statement towards *Durham* in his article "Defense Problems Under the Durham Rule" stating that following the rule, any sexual criminal, psychopath or alcoholic could never be punished as long as someone can prove the act was a result of mental illness.[128] Although the author appreciates the basis the *Durham* had, the statement of Mr. McGtee makes to think more about the disadvantages of it. The author thinks that if the wording in rule would have been more exact, it might have survived better. However, eventually *Durham* was also turned down by almost every state[129] and was actually rejected in 1972 by the very same D.C. circuit court that adopted it in the first place.[130]

[127] *Ibid.*
[128] McGee, H.J. Defence Problems Under the Durman Rule, Catholic Lawyer, 1959, pp 35-43 p 35.
[129] Dawson, J.R. (1981-1982), *supra nota* 103, p 141.
[130] Insanity Defense, law.cornell.edu/wex/insanity_defense, (03.03.2017).

5.2.4. American Law Institute Test (ALI)

As the above-mentioned tests of insanity did not survive, after a great amount of time and labor spent, the American Law Institute established the Model Penal Code and the section 4.01 in 1962.[131] The Model Penal Code § 4.01 included a test that (1) a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirement of law; (2) The terms "mental disease or defect" do not include an abnormality manifested by repeated criminal or otherwise antisocial conduct.[132] Although the ALI test had a lot in common with the previous *M'Naghten,* irresistible impulse and *Durham* tests, the most noticeable improvement comparing to previous tests of insanity was the change of wording. The replace of the word "know" used in *M'Naghten* to "appreciate" helped to acknowledge the grey area between sanity and insanity which the *M'Naghten's* had left. [133] In addition the ALI decided to use a term "substantial" to help the difficulty to prove to incapacity of the defendant which had been required as "total" with previous tests. The reform of ALI's that the total incapacity does not need to be total was a significant improvement. By modifying the language to more simply, ALI successfully avoided also the mistakes made especially by *Durham.*

Even ALI test did not avoid critic. One point of view was that trying to avoid the mistakes made with *Durham* by simplifying the requirements to "substantial impairment", it was left too much room for the interpretation of the wording. However, as the amount of critics ALI received remained relatively low and widely replaced the older tests, it is still successfully in use in several jurisdictions.[134] The author thinks that major reason for the success of the ALI test is probably the modern approach of it and the nature, which provides the best premises for the mentally ill defendants to receive the medical treatment they need.

[131] Dawson, J.R. (1981-1982), *supra nota* 103, p 142.
[132] The Model Penal Code §4.01 (final draft 1966).
[133] Dawson, J.R. (1981-1982), *supra nota* 103, 142-143.
[134] *Ibid.*

5.3. Mental Health Courts

It has often been stated that mentally ill defendant's place is not in prisons where their mental health usually only gets worse, resulting to a situation where at the time of the release of them back to society the carousel only continues to turning and sooner or later they are back in the system.

Although there exists no official meaning for a term "mental health court" it generally refers to a court that specializes in mental illnesses and defendants suffering from them. Mental Health Courts are especially for the criminals who do not fulfill the criteria of NGRI but still suffer from severe mental illnesses.[135] By seeking towards mental health courts, the mentally ill defendants can avoid the traditional court system and use the services of a more treatment-based option.[136] The system of mental health courts usually functions in way in which the mentally ill defendants are voluntary participating to supervision and a treatment plan designed together by the mental health professionals and the court. The voluntary defendants participating to this kind of program are then obliged to attend the regular examinations of their mental status according to which their treatment is kept up to date during the process.[137] Although there is some level of variation between the courts, this type of functioning has been found as the most effective way for a mental health courts to work.[138] Concepts of diversion and discharge planning have also been stated to be the most effective measures trying to solve the issue of overrepresentation of mentally ill defendants. It has, however, been also suggested that this type of measures are not sufficient enough to handle and issue so wide of it's nature.[139]

Despite the differences between mental health courts they have a common goal to decrease and prevent recidivism and studies show that the outcomes of their work has been predominantly successful. The first mental health courts were mainly focused on defendants charged with only misdemeanors but later the modern mental health courts have widely expanded their services to defendants charged with also violent felons.[140]

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[135] Special Feature, Mental Health Courts: An Effective Way for Treating Offenders with Serious Mental Illness, Mental&Physical Disability Law Report, 2010, pp 525-530, p 525.
[136] Johnston, E.L. Theorizing Mental Health Courts, Washington University Law Review, 2011-2012, pp 519-579, p 521.
[137] Mental Health Court, courts.mi.gov/administration/admin/op/problem-solving-courts/pages/mental-health-court.aspx (01.03.2017).
[138] *Ibid.*
[139] Levesque, S. (2009-2010), *supra nota* 16, p 712.
[140] Johnston, E.L. (2011-2012), *supra nota* 135, p 521-522.

The United States Congress established a mental health court demonstration program (P.L. 106-515) in 2000[141] and the first official Mental Health Court started in Kings County in 2002. By the beginning of 2017 there is twenty-nine of them with over nine thousand cases solved.[142] Although the first official mental health court started working in the beginning of 2000's the concept has been under discussion since the 1980's[143] and the first mental health specialized court opened its doors in Broward County, Florida in 1997 and has been one of the most imitated mental health courts through the ages.[144] The reason for the development of mental health specialized courts was the evident overrepresentation of mentally ill individuals within the criminal justice system and the need to give them the proper treatment that is identified as "judicially-supervised" and "community-based" treatment. [145] The Mentally Ill Offender Treatment and Crime Reduction Act (MIOTCRA) from the year 2004 delegates and provides the mental health court's federal funding.[146]

The author sees mental health courts as an extremely competent solution for defendants suffering from mental problems. The author suggests that when seeking towards treatment-oriented courts, the mentally ill criminals can have the most effective treatment. The author sees the idea of the concept effective since rather than just punishing the mentally ill criminal it is the best for the whole society to try to cure the problem and also strongly believes on the preventive character of mental health courts.

[141] Position Statement 53: Mental Health Courts, mentalhealthamerica.net/positions/mental-health-courts (01.03.2017).
[142] Mental Health Courts, nycourts.gov/courts/problem_solving/mh/home.shtml (01.03.2017).
[143] Mental Health Court, courts.mi.gov/administration/admin/op/problem-solving-courts/pages/mental-health-court.aspx (01.03.2017).
[144] Johnston, E.L. Theorizing Mental Health Courts, Washington University Law Review, 2011-2012, pp 519-579, p 529.
[145] Mental Health Court, courts.mi.gov/administration/admin/op/problem-solving-courts/pages/mental-health-court.aspx (01.03.2017).
[146] Johnston, E.L. (2011-2012), *supra nota* 135, p 522.

5.3.1. Therapeutic Jurisprudence (TJ)

The therapeutic importance of the mental health courts has been emphasized by various of judges working with mental health courts including the one who found the very first above mentioned mental health oriented court in 1997. By taking advantage of psychological development and using it together with legal system, a much more profound understanding of the law can be achieved when the causal relationship between legal measures and therapeutic outcomes is realized.[147] Therapeutic jurisprudence (TJ) as a concept was established by the work of North American professors David Wexler and Bruce Winick who were determined to study the connection between mental health system and the law. Their goal with the study in question was to find the therapeutic (or anti-therapeutic) nature of the law itself. [148]

David B Wexler himself describes TJ as "a perspective that regards the law as social force that produces behaviors and consequences" from which the consequences sometimes are therapeutic but sometimes anti-therapeutic. The study of TJ made by Wexler aimed to reach towards more therapeutic way to write and use legislation without forgetting the main functions of it to provide justice. In short, TJ can be described as "study of therapeutic and anti-therapeutic consequences of the law". Without trying to push the therapeutic character over everything else, TJ aims towards wider approach of seeing the law.[149] TJ's growing has been significant in the past few decades and it has become a mental health approach to law in general and works also as a theoretical base to the above-mentioned mental health courts.

The author sees the concept of therapeutical jurisprudence as advanced point of view towards the law and the problem of mental illness in addition to the psychological importance concerning the problem of overrepresentation of mentally ill defendants. The author suggests that this kind of approach is what is needed more to completely understand the whole picture of the matter. To find the most effective and just way to treat the mentally ill individuals within the criminal law system, there is a need to modify and develop the system constantly, to prevent getting stuck to a certain way of thinking and operating. By modifying the author does not mean concrete modifying of the system but rather the way that the law sees itself and by that finds the most efficient ways to develop towards more multi-dimensional way.

[147] The Mentally Ill Offender Treatment and Crime Reduction Act, 2004.
[148] Understanding therapeutic jurisprudence, insider.thomsonreuters.co.nz/2016/01/understanding-therapeutic-jurisprudence/ (15.03.2017).
[149] Therapeutic Jurisprudence: An Overview, law2.arizona.edu/depts/upr-intj/intj-o.html, (15.03.2017).

Conclusion

The author has now discussed the most important factors concerning the fair treatment of mentally ill defendants within the criminal justice system of the United States. The author suggests that approaches towards the mentally disabled criminals has through times got better, but too slowly. The fact that overrepresentation of mentally ill defendants is currently still one of the most dominant problems of criminal law, in author's opinion, tells that something is done wrong. As an answer to the main research question, does the lack of an unilateral way to treat the mentally ill criminal defendants endangers the fair legal process of them, the author argues that in its current state, the U.S. system does not serve the fairest possible legal process for the mentally ill defendants and because of its incoherent nature, does endanger the fair legal process of them.

The author suggests that the main problem behind all other problems is definitely the vague and too wide terminology. It is a crucial factor that there exists no comprehensive definition to mental illness between the medicine, psychiatry or the law. As already stated, especially the variability between psychiatric statements has a great impact in individual cases, which creates inconsistency to the system. The author suggests that it is impossible to build a strong system on a base that indefinite. The author understands the complexity of the matter but suggests that after a great amount of work and cooperation, an effective common definition could be found and underlines the importance of co-operation between different fields of science in order to really understand the multidimensionality of the matter.

Since the terminology remains vague, to make the current system more efficient and fair, the author highlights the importance of meticulous interpretation of the most fundamental principles of criminal law to find an effective way to establish criminal responsibility to avoid mistakes. In this sense the author sees current approach of the Supreme Court especially accurate when focusing on extremely definite interpretation of *mens rea.*[150] In author's opinion, intent and voluntariness are one of the most important things to focus when assessing the criminal responsibility of the mentally ill defendant. The author argues that voluntariness should not be established if it can be proved that without mental illness the crime would not have occurred in a first place.

[150] The Supreme Court on Mens Rea : 2008-2015, heritage.org/courts/report/the-supreme-court-mens-rea-2008-2015 (14.04.2017).

The author argues that despite good starting points, almost all of the discussed measures founded to provide fair legal process contain a great amount of loopholes, too easy for misuses. For example competence to stand a trial has, again because of the wide definition, a great danger to find incompetent defendant competent. Especially the narrow but existing possibility to medicate defendants to stand a trial takes creditability of the fair legal process. As already noted, the author does not believe in medication on grounds to make one competent to stand trial and strongly argues that it does not fulfill the requirement of fair legal process.

Insanity defense itself might be the most controversial concept concerning the matter. [151] As some critics argue that the insanity defense should be eliminated as a whole, the author sees it as an important part of criminal justice system and effort to establish a fair legal process despite the mental health of the defendant. However the author reminds about the importance of careful use of the plea in question and suggests that it should be given less media-attention in order for it to have the efficiency it needs.[152]

The author argues that two major problems of insanity defense are (1) the difficulties rising from the legislation to plead it as seen in *People v Woods*[153] in which the defense was unable to plead for NGRI because the defendant refused from assessment of his mental state. (2) The GBMI verdict as a whole. As already stated, the author sees it as an important factor providing wider fairness to the people suffering from mental issues but not "enough" for the NGRI, but only when established right. Considering the current nature of the verdict in question the author regrettably joins the opinions of Britton and Bennett who stated that GBMIs increase the perplexity of already complicated terminology.[154] Another major problem with the GBMI verdict is the difficultness of establishing it. Because of that the author agrees also with Linda C. Fentiman who argues that in their current state, GBMIs are to increase the amount of defendants found guilty.[155] The author suggests that by modifying the process of pleading the GBMI verdict, fair treatment would be established better.

[151] Britton, A.H., Bennett R.J. (1983-1984) *supra nota* 75, p 203.
[152] *Ibid.*
[153] Illionois Appelate Court 121408, *People v. Woods* (2014).
[154] Britton, A.H., Bennett R.J. (1983-1984) *supra nota* 75, p 203.
[155] Fentiman, C.L. (1985), *supra nota* 74, p 604-605.

Concerning the range of different tests of insanity the author suggests that since all of them are lacking the general and exact definitions of mental illness, a trustworthy connection between the mental illness and criminal conduct is very difficult and almost impossible to establish.

The author supports opinion and point of view made by PH.D. Natalie Abrams in her article "Definitions of mental illness and the insanity defense". Abrams has a strong argument that all of these tests are, in light of current knowledge, totally inapplicable. The author would not use the wording "totally" but agrees with the basic idea of Abram's that these tests of insanity are misdirected and highlights especially the first problem presented by Abrams, being the weakness of definitions concerning the mental illness.[156]

As the critic of Abram's stands definitely not alone, as can be seen from the fact that almost all of the tests have been rejected somehow, the author considers the lack of exact definitions as an "umbrella-problem" including the ignorance of the diversity on the field of mental problems. As some of these tests, as M'Naghten, tried to take a specific approach limiting the test to the some particular element and some, as *Durham,* aimed towards generally valid approach, they are all in their own ways escaping from the most important ways to assess the mental state of an individual being the recognition of the enormous elements of insanity and its interpretation. These types of approaches can be seen as elementary with the current psychological knowledge.[157]
The diagrams in annex one and two in the end of this thesis are illustrating the distribution of the use of insanity tests among the states of the U.S. The diagrams are made purely with the information gained from US Legal Law Digest.[158]

It was surprising to the author how popular the M'Naghten and its modified versions still are in the United States. The author argues that the fact that the oldest and probably most criticized test of insanity has the highest percentage has a clear connection to the problem discussed in this thesis. The author suggests that the continuing use of M'Naghten maintains the outdated way to handle with mentally ill defendants and again the significant lack of exact terminology that especially the original M'Naghten obtains, endangers the fair legal process of them. However the author was happy to see that ALI test was also very popular as the author thinks that it is the most trustworthy and realistic of the tests. As it is also the latest test of insanity, it serves a modern approach to the matter.

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[156] Abrams, N. (1979), *supra nota* 114, p 446.
[157] Dawson, J.R. (1981-1982), *supra nota* 103, p 144.
[158] United States Insanity Defence, lawdigest.uslegal.com/criminal-laws/insanity-defense/7204 (15.03.2017).

The author thinks that mental health courts and the concept of therapeutic jurisprudence are measures with which the incoherence of the matter could be reduced in the long term. Especially the mental health courts' focus on crime-prevention is that kind of an approach that the author sees as the most efficient. By aiming to prevent the crimes, the amount of mentally ill defendants could be reduced and it would be easier to focus on the fair treatment of them. The author sees measures like mental health courts as a respect towards the problem and as a true willingness to do something about it.

Overall the author states that the U.S. criminal justice system has good resources to establish a coherent, efficient and unilateral system that provides fair legal process to every individual despite their mental health but in its current state it is far too diffused and creates uncertainty. The author still states that the current approaches are moving in the right direction when the psychological point of view is gaining more and more attention. The author repeats that the co-operation and deep respect between different fields of science is needed to achieve a better system.

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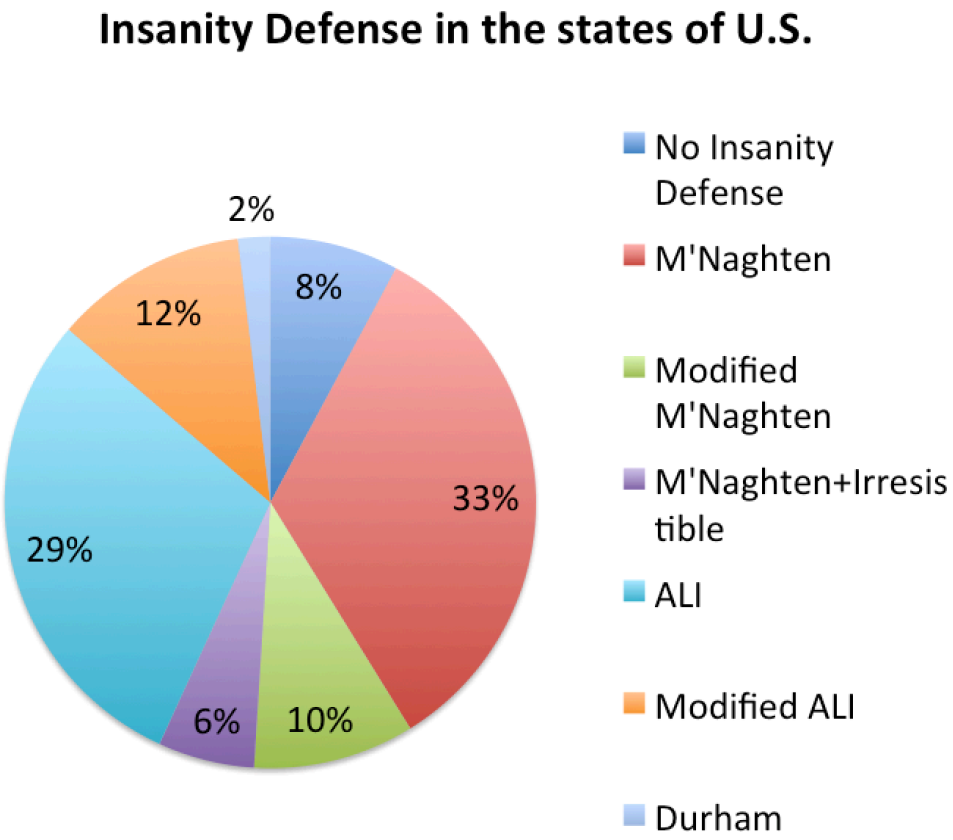
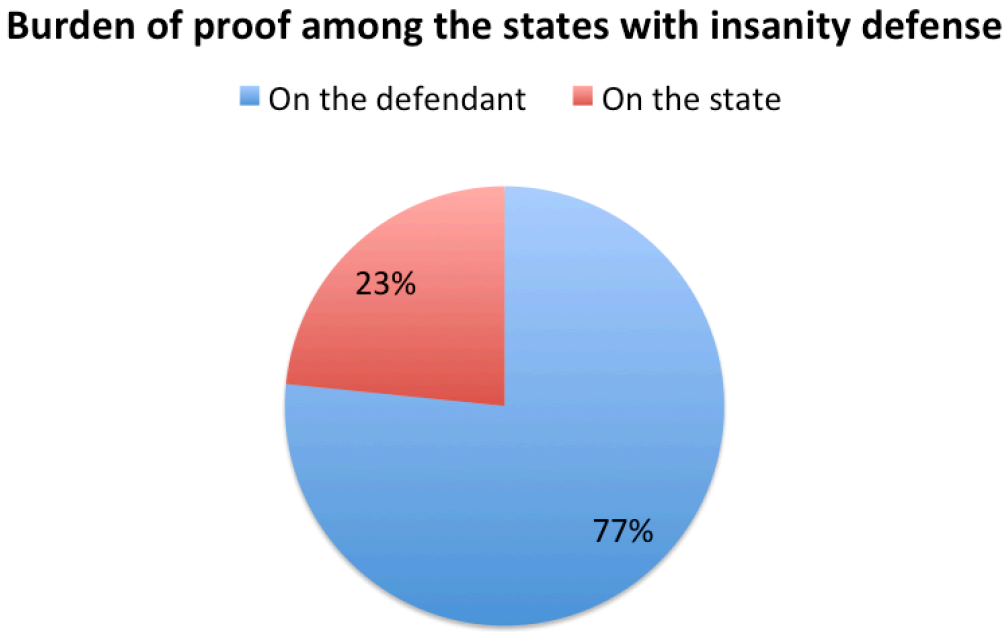
Annexes

Annex 1.



Annex 2.


Burden of proof among the states with insanity defense
On the defendant
On the state
23%
77%