Section 39 of the Dutch Penal Code ("PC") exempts from punishment the defendant to whom a crime cannot be attributed by reason of a mental disorder. In this dissertation the conditions that determine the right to an exemption from punishment under section 39 PC are investigated. The goal is to develop a legal framework for the assessment of non-attributability (ontoerekenbaarheid) that serves legal certainty and legal equality, substantive legal protection and legal development better than current law.

In part I of this dissertation the research question is elaborated. Section 39 PC stipulates two conditions for a successful plea of non-attributability. The defendant has to suffer from mental disorder and a criterion for non-attributability has to be fulfilled. This last condition, however, is not explicit in section 39 PC, but can be derived from legal history. From analysis of legal history, case law of the Dutch Supreme Court ("Hoge Raad") and academic literature, the conclusion is drawn that the substantive scope of both conditions for non-attributability is unclear. Analysis of case law from lower courts shows that judges apply a broad range of different – and sometimes plainly wrong – criteria when deciding on non-attributability. These criteria have a potentially different scope. Moreover, in most cases judges rely on advice by forensic mental health experts on whether or not the crime can be attributed to the defendant. However, in Dutch forensic mental health literature and guidelines no consensus exists on which criteria should be applied when advising on non-attributability. Therefore, the advice of the mental health expert is also governed by criteria that differ in scope. Because of the unclear substantive scope of both conditions for non-attributability, current law is problematic with regard to legal certainty and legal equality, substantive legal protection and legal development. Therefore, a legal framework for judging non-attributability is developed in this research.

Part II is a comparative research on the various tests for the insanity defense in American criminal law: the M’Naghten rules, the irresistible impulse test, the product test and the MPC test. The tests are compared with various frameworks for non-attributability that have been defended in Dutch academic literature. Both the historical development of the tests as well as the application of the tests in case law in several jurisdictions have been
investigated. Firstly, the conclusion is drawn that societal developments –
progress in mental health science and evolution of the views on the insanity
defense by the broader public – put pressure on the scope of an exemption
for mentally disordered defendants. The American tests for insanity allow
for incorporation of societal developments in the legal framework for
insanity, and thus accommodate legal development. Secondly, from the
analysis of the application of the tests for insanity in case law in American
jurisdictions several normative questions are derived that should be taken
into consideration in the development of a framework for a legal exemption
for defendants suffering from mental disorder. These questions are taken
into account in part III of the dissertation.

In part III the research question is answered. Firstly, the scope of mental
disorder – the first condition for non-attributability – is demarcated. Mental
disorder within the meaning of section 39 PC is present if a defendant does
not satisfy the assumptions of the criminal law about normal psychological
functioning. Based on analysis of philosophical and empirical literature and
of the conditions for criminal liability, it is argued that these assumptions are
derived from “folk psychology”. Folk psychology is the way people understand
human behavior in their everyday life. From the three central assumptions
about normal psychological functioning that underlie folk psychology and
that are constitutive for criminal liability, a concept of mental disorder is
derived. A mental disorder within the meaning of section 39 PC is present,
when the mental states (beliefs, desires and emotions) of the defendant or his
practical reason do not function in a normal way, or when his mental states
are not in a normal way connected to his behavior. Furthermore it is argued
that – through a common ground in folk psychology – the conditions that in
psychiatry are recognized as mental disorder, in most cases also are mental
disorder within the meaning of section 39 PC. However, some exceptions
are noted. Second, a criterion for non-attributability is demarcated. It is
argued that defendants should be exempted from punishment under section
39 PC, if there is a legally relevant difference with the “normal” defendant.
(“Normal” defendants are, for the purpose of this research, defendants who
do not suffer from mental disorder within the meaning of section 39 PC.) A
legally relevant difference is present, when – due to the disorder – the rules
for excusing “normal” defendants cannot be fully applied to the disordered
defendant. From analysis of the various ways in which mental disorder within
the meaning of section 39 PC constitutes such legally relevant differences,
two sub criteria for non-attributability are derived. A defendant should be
exempted from punishment under section 39 PC if a mental disorder either
prevented him from appreciating the illegality of his conduct, or if he was
substantially unable to act in accordance with his appreciation of the illegality
of his conduct.