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# Delimitation of Unbeatable Fear in Facing the State of Necessity

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## Abstract

This chapter focuses on the study of the limits of unbeatable fear in the state of necessity. Unbeatable fear remains one of the most complex exemptions to interpret, and it stands as a relevant issue both around sacrifice of persons and in cases of violence against women in Chile. Hence, our objective is not a mere analysis of unbeatable fear but rather its delimitation with respect to the state of necessity. The problem has its origin in specifying whether some of the requirements of unbeatable fear are part of the state of necessity. Therefore, the treatment of the nature of this kind of fear, as we have stated, is not peaceful in doctrine and creates insecurity in its interpretation. Therefore, the study of unbeatable fear deserves attention since it entails the analysis of fundamental concepts of the criminal law theory.

**Keywords:** fear, necessity defense, posttraumatic stress disorder, learned helplessness, lesser evil principle

## 1. Introduction

This chapter focuses on the study of the limits of unbeatable insurmountable fear in the state of necessity [1]. This problem is observed in the case of Karina Sepúlveda, RUC N° 1101060685-5, of June 21, 2013, before the Sixth Oral Criminal Court of Puente Alto. The Puente Alto Court determined that Karina's behavior conformed to a decision of the state of necessity of art. 10, N°11. Although, in the first ruling, the court accepted that a possible mental disturbance of Karina (learned helplessness) [2] explains the content of the subsidiarity clause of the state of necessity; the court dismissed it in its second ruling. Karina deliberately made the decision to kill her abuser in order to face the imminent danger she was in, without suffering a disturbance of learned helplessness due to insurmountable fear, according to the judgment of the Sixth Oral Criminal Court of Puente Alto, RUC No. 1101060685-5, June 21, 2013. Hence, our objective is not a mere analysis of unbeatable fear, but rather its delimitation with respect to the state of necessity.

The treatment of unbeatable fear is necessary, especially if we consider that, except for some specialized comments on the subject [3], our doctrine has not performed an analysis of fear with the same intensity as other criminal exemptions. For the same reason, the state of necessity will be treated from the following conceptualization: "the state of necessity is a conflict of interest of adjustable inevitability where the absence of moderation implies its full preponderance. Therefore, the distinction of the effects depends on a weighting of interests that has the essential core of human dignity as a limitation" [4]. This, to delimit the fear of this last exemption.

The question thus arises as to what the nature fear is and what its requirements are. A question that does not allow a single answer because it will depend on the meaning of such a fear. If we focus our attention on dogmatics, we can observe that there are some positions that only include a justifying effect in art. 10, N° 11, displacing the exculpatory effect from the state of necessity to the insurmountable fear. Well, they hold that art. 10, N° 11 includes two forms of state of necessity: the defensive and aggressive state of necessity [5]. This position bases its arguments in that the fourth circumstance of art. 10, N° 11 only indicates that unenforceability excludes the possibility of requiring other conduct, is predominantly personal, and that neither the subsidiarity nor the weighting of evils have space in the exculpatory state of necessity [6]. Hence, the insurmountable fear is a space that would admit these hypotheses of inexplicability. Others point out that the functional equivalent closest to the exculpatory state of necessity of art. 10, N° 11 is found in the insurmountable fear of art. 10, N° 9 [3], because it is part of the *vis compulsiva*, that is, unrelated to a ground for innocence.

Accordingly, it is considered that, regardless of the field of intersection between insurmountable fear and the state of necessity, the overlap is not complete [5]. Thus, it could be explained why irresistible mental force or unbeatable fear, even if we are not in the presence of an objectively present or imminent danger, could exempt liability outside the limits of the state of necessity [5]. The problem described also has its origin in specifying whether some of the requirements of unbeatable fear are part of the state of necessity. Hence, the treatment of the nature of it, as we have stated, is not peaceful in doctrine and creates insecurity in its interpretation. Therefore, the study of it deserves attention since it entails the analysis of fundamental concepts of the general part and sentences that allow to redefine the limits of this exemption in attention to the extensive field of application of art. 10, N° 11, which specifies the demands of subsidiarity and proportionality [7].

In this line, the position presented by Juan Domingo Acosta in the processing of Law 20.480 is inserted as proof of the importance of differentiating fear from the state of necessity. Acosta exposed a series of arguments that common sense judges as characteristic of the insurmountable fear, to later show the differences with the state of necessity. The first is that work began on some modifications regarding art. 10, N° 9 of the Criminal Code in the Bill contained in bulletin N° 5308-18, of September 5, 2007, which sought to replace the phrase “or driven by an insurmountable fear” with the phrase “under the threat of suffering a serious and imminent evil,” and move the “insurmountable fear” to No. 10 of art. 10. This proposal was intended to incorporate, in No. 9, the requirement that whoever acts, violated by an irresistible force, does so under the threat of suffering a serious and imminent evil.

It was thus decided to incorporate this third requirement (under the threat of suffering a serious and imminent evil) in art. 10, N° 9, to establish what the doctrine understood as the exculpatory state of necessity, as stated in the Report of August 6, 2008, of the Constitution, Legislation and Justice Committee of the Chamber. Despite the incorporation of the third requirement in art. 10, N° 9, the Constitution, Legislation, Justice Committee and Regulations of the Senate decided to eliminate it because it constituted a repetition of what was already contemplated in N° 9 of art. 10, as indicated in its second Report of October 13, 2009. In this second report, Acosta emphasized that, although it is convenient to include a rule of exculpation for a state of necessity, the wording of art. 10, N° 9 did not seem appropriate. And the reason for this is that, after the current wording of art. 10, N° 9, the intention was “to conceive an external factor that acts on the will of the subject, such as force or fear, to the point of influencing the subject in an irresistible or insurmountable way to perform a certain conduct, i.e., to the point that another way of proceeding is not required of the subject.”

This interpretation of Acosta undoubtedly implies points of divergence in the Chilean doctrine that, around the nature of fear, can be systematized in three theses. The first thesis establishes that insurmountable fear is an exculpatory state of necessity because it encompasses hypotheses of unenforceability that cannot be contemplated in a state of necessity containing a subsidiarity clause [8]. The second is that insurmountable fear represents a simile of irresistible force. Irresistible force, in which both the *vis absoluta* and *compulsiva* converge in attention to the formulation of the French, Dutch, and Belgian models [9]. Finally, the third maintains that insurmountable fear explains situations of excess in the state of necessity due to the presence of an emotional disturbance. Therefore, how do we know if insurmountable fear is autonomous or functionally equivalent to the state of necessity? It is therefore an issue still under discussion that makes it necessary to redefine the contours of fear. Therefore, our main objective is to determine if insurmountable fear is an autonomous figure and then analyze its limits and scope against the state of necessity. Our conjecture is that insurmountable fear presents particularities that do not respond to the state of necessity and only denote the existence of a dangerous situation in common [10]. Therefore, in the next section, we will discuss some considerations about insurmountable fear that are necessary for the understanding of its meaning.

We will divide the exhibition into two parts. The first part will focus on the theoretical foundations and the state of the art on which our proposal is based, in order to warn of the problem of differentiation of insurmountable fear before the state of necessity, and the second part will focus on the bibliographic discussion around the problem. Finally, this second part proposes how to solve the problem and what is achieved by finding an answer.

## **2. Insurmountable fear in Chilean and comparative doctrine**

When we talk about insurmountable fear, there is consensus in Chilean doctrine to consider it a ground for exculpation [11]. In general terms, it is understood as the emotional disturbance that is a consequence or effect of a serious present or imminent evil which, without excluding the agent's volition, exempts liability. The concept of volition (*willentlich*) implies for us an act of minimum basic freedom, consisting of acting with a minimum alternative (to act or stop acting, to leave inactivity or remain in it). Hence, it is declared that not all coercion is part of the insurmountable fear, and it is even indicated that certain professionals must tolerate insurmountable fears in risky activities [12]. Thus, it is frequently related to the intimidation or threat that certain situations generate. Situations of fear in which insuperability points to external or internal factors affect the agent's conduct. Well, either by affirming that fear is a disturbance that explains excesses in self-defense, or by rightly affirming that it is an analogous form of necessity, a good part of the Chilean doctrine held that, before the state of necessity of art. 10, N° 11, an exculpatory state of necessity was not necessary because the disposition of insurmountable fear was more than enough for these purposes. Likewise, even in the first years of the Code, some authors interpreted insurmountable fear from the logic of the state of necessity, referring to the vagueness and indeterminacy of the term fear in order to accept the state of necessity cases impossible to contemplate in art. 10, N° 7.

But one must not lose sight of the fact that incorporating the exculpatory state of necessity through insurmountable fear makes it difficult to define the nature of both exemptions. Therefore, before art. 10, N° 11, the advisability of incorporating or modifying some of the existing provisions in the Code is discussed to give rise to a broad state of necessity, which would admit new hypotheses of unenforceability.



Thus, it is essential to study the scope and effects of insurmountable fear, because it is unreasonable that it fulfills the same function of the state of necessity. And the argument is that a functional equivalence of both exemptions produces an affectation of the contradiction principle. Well, although there are common elements between insurmountable fear and the state of necessity, the function of fear is, from the dogmatic point of view, independent of the state of necessity. This is why the delimitation of these exemptions, especially in view of the disadvantages of substantiating the state of necessity in an emotional disturbance that explains the selection of the least harmful means [13].

This is a complex but necessary problem that, in the legal Spanish model, translates into three dogmatic positions. The first argues that fear is a mental disturbance that affects a situation of danger. In this context, if the fear that a person suffers is “of pathological origin caused by the schizophrenia he or she suffers [...] fear, as such, cannot be taken into account. Therefore, if the fear exemption cannot be applied, it will be necessary to resort to transient mental disorder” [14]. The second indicates that insurmountable fear is an exculpatory state of necessity. Those who adopt it, as we have seen in the Chilean model, argue that the exculpatory state of necessity, not covered in the justifying state of necessity of art. 20, N° 5 of the Spanish Criminal Code, is in the insurmountable fear of art. 20, N° 6 [15]. Faced with this issue, a third tendency has led to observe, in the insurmountable fear, a mixed nature in some of the Spanish Supreme Court judgments, which, in some cases, confers particular characteristics of a ground for unenforceability and, in other characteristics, a ground for indictment [16].

In this way, an interpretative line of insurmountable fear about the presence or absence of a disturbance and its particularities in situations of necessity is outlined in the Spanish model. In the German legal model, on the other hand, express mention is made of fear in cases of excessive self-defense (§ 33 German Criminal Code). If the agent exceeds the limits of self-defense because of confusion, dread, or fear, he or she will not be punished. This excess in the legitimate self-defense of fear is classified, according to the dominant doctrine—despite its regulation between the grounds for justification of § 32 (legitimate self-defense) and that of § 34 (state of necessity) German Criminal Code—as a ground for exculpation. Fear that requires exceeding the limits of self-defense through an *asthenic outburst*. Hence, non-asthenic outbursts, typical of anger, rage, indignation, or revenge, are not part of this defense. According to the dominant doctrine, fear also comes into consideration when the limits of self-defense are *consciously* violated [17]. However, the applicability of § 33 is denied when the author has been involved in a violent dispute. However, contrary to this interpretation, it is noted that only § 35 (exculpatory state of necessity) has excluded exculpation in case the agent causes the danger (§ 35.1 2), while that limitation would not exist in § 33 [18].

In summary, insurmountable fear seems to require the presence of an asthenic outburst that explains the excess in cases of self-defense. In this sense, in the state of necessity, it seems to us that the idea “that it is typical of man to have an irresistible tendency to save himself, literally, at any price, in the face of the danger of his own extinction” [19]. However, this does not imply rejecting the idea that, in some cases, there may be a mental disturbance that explains the excess in cases of necessity [20]. From this, one might think that fear would have a psychological substrate that would be incompatible with the requirements of the state of necessity. In this sense, some authors indicate that a purely psychological position of the unenforceability that only contemplates the basis of impunity in the author’s exceptional psychological situation is not held, in a way that makes it impossible to behave according to the rule [20]. The very objectifying wording of precepts such as § 35 German Criminal Code speaks against it. Therefore, several authors observe difficulties in its

application in cases of necessity. And, for the same reason, its notion of culpability transforms, acting differently in the sole criterion of imposing a criminal sanction. In contrast, another area of the doctrine maintains that it is possible to apply § 33 by analogy in the justifying state of necessity (§ 34 German Criminal Code), in the defensive state of necessity (§ 228 of the German Civil Code), or in the case of provisional detention of § 127 (German Code of Criminal Procedure) [21]. However, this requires, in fear, a factual situation similar to that set forth in § 34, § 228, and § 127, and an indetermination—not planned—in the regulation [22].

Although, we cannot ignore that § 33 has a hypothesis that restricts fear solely to situations of excessive self-defense [23], the Chilean legal system does not follow this trend. Well, insurmountable fear is a figure that art. 10, N° 9 does not restrict to excesses in legitimate self-defense. However, this problem of analogical application of fear in the state of necessity is rather dogmatic in the German model because it has not had any repercussions (unlike the Chilean system) on jurisprudence [24].

### **3. Discussion around the differentiation of fear and the state of necessity**

In conformity with the general description of the doctrinal, legal, and jurisprudential treatment of insurmountable fear and the state of necessity already carried out in the first section of this chapter, now we must define the legal nature of insurmountable fear and delimit it from the state of necessity, considering the introduction of art. 10, N° 11 in the Criminal Code.

It is easier to clear up some questions about the nature of insurmountable fear in the doctrine of the irresistible impulse. This doctrine delimits the degree of intensity that insurmountable fear requires [25, 26]. Today, we cannot doubt that insurmountable fear is marked by the consequences of this doctrine in jurisprudence. According to this tendency, the Court of Appeals of Santiago, against Ana Medina Soto, of September 30, 1969, established that “fear is a distressing disturbance of the mind caused by a threatening danger or evil, real or imaginary; and it is insurmountable when it superimposes itself on the will in such a way that drives it to the realization of actions that, without it, would not have been executed, dominating the will without constituting a ground for non-imputability, but one of non-enforceability of other conduct and which, generically, is classified among those of culpability.”

Therefore, many of the problems of this doctrine of impulse pertain to insuperability. That is, around how to determine the degree of disturbance that fear requires. In this field, the “irresistible impulse” makes it possible to define the level of disturbance through a graduation that is collected from the psychology of impulses [27]. The agent can only be governed by regulations in the event that his or her ability to control remains unchanged in the situation he or she faces. From which, methodological consequences derive around the psychology of impulses. On the one hand, that the irresistible impulse be treated from a philosophical model that denies the formulation of the irresistible impulse due to its metaphysical assumptions. This presupposes accepting a classical form of psychoanalysis that is incompatible with phenomenology.

In this line, it is indisputable that criminal law is not psychiatry or philosophy, so the adoption of phenomenology as a tool for graduating the irresistible impulse requires foundation. However, in the history of criminal dogmatics, phenomenology initially appears with the theory of finalist action by Hans Welzel and does so in the hands of phenomenological psychologists [28]. However, there is no pronouncement in the Chilean dogmatic that is decisive in the matter. The specific problems posed by insurmountable fear have been attempted in dogmatics since

the well-known case of Karina Sepúlveda. But as we have already explained in the first part of this chapter, it seems inadmissible that the subsidiarity clause of the state of necessity is at the mercy of an asthenic outburst. If, as conjectured here, it is understood that insurmountable fear is an autonomous exemption from the state of necessity, the irresistible impulse may have a role in it.

This seemed to be the case of the Judgment of the Court of Appeals of San Miguel, Case N° 1966-94, of December 20, 1994. In this case, Raúl Enfraín Ortiz is prosecuted for killing a subject and leaving another seriously injured by hammering his head. A situation occurring while these dangerous subjects slept. The motivation of the agent's action focused on protecting his 11-year-old son from these two armed subjects (seasoned criminals) who, escaping from the police, threatened to kill his son if he tried to report them to the police or flee from the place where they were. The judgment of the Court correctly indicated that, although the medical-legal report "concludes that ... the accused would have presented a state of intense emotional alteration ... of explosive and primitive features," and a decrease in the imputability would correspond "to the defendant, in the terms of art. 11, N° 1; in relation to article 10, N° 1 of the Criminal Code, the latter is not binding on the judge, the only one in charge of making legal assessments regarding the verifications of the auxiliary sciences of Criminal Law."

The court came to the conviction that "given the serious situation of previous intimidation that affected the defendant—and that included his eleven-year-old son—by two armed subjects who were fleeing from police harassment, one of which (*El Toro de Quilamuta*) was known to be a highly dangerous criminal, his violent reaction against them was determined by a very strong emotional impetus that dominated his will [for] the psychological environment of anguish he was in." The situation of real danger of intimidation above produces a disturbance in the agent that enhances his or her action on dangerous subjects. The court decided to exempt the defendant from liability, considering his sociocultural and psychological background. Likewise, it considered that the agent's behavior was within the parameters of unenforceability of art. 10, N° 9. The problem of insurmountable fear—raised by the enunciated situations of danger (cases of Karina Sepúlveda and Raúl Enfraín Ortiz)—becomes a question of whether there are other factors of unenforceability, such as, for example, serious mental disturbances, but of less intensity to those of a ground for innocence, which give rise to the action of the necessity and explain the lack of subsidiarity and proportionality in the state of necessity.

What is unquestionable is that, in those cases, there is culpability in the traditional sense and that, if the agent suffers from a serious disorder (foreign to a transient mental disorder), he or she must respond. However, if our hypothesis of insurmountable fear is accepted, it would seem to be correct to extend it to cases of excess in the state of necessity. It can be argued that insurmountable fear could extend the limits of exclusion of liability in cases of necessity. However, such a conjecture is preferable, for its dogmatic clarity, to a theory that confers insurmountable fear on the role of a ground for exculpation of diffuse and general content.

Another problem in insurmountable fear, whose consideration deserves treatment, is that of the reality and unreality of situations of danger. Attempts have already been made to demonstrate that it is a problem present in Chilean and Spanish dogmatics [9]; however, in the context that interests us now, its application would have repercussions in the treatment of situations of unreal danger in insurmountable fear. This possibility has been proposed in the Spanish dogmatics by Cuerda Arnau, who also seeks to exclude culpability and that, in the opposite sense to the conjecture set forth herein, is based on these effects in the following argument: if fear can only understand real evils, then we face two problems. The first one is that accepting only real evils in insurmountable fear would excessively



restrict the application of exemption. The second is that insurmountable fear could not be distinguished from the state of necessity [29]. To escape this idea that insurmountable fear is a space where unreal evils coexist, it would be necessary to prove that the function of the irresistible impulse has rigorous application [30].

In this context, it can be seen in the Anglo-Saxon model that the irresistible impulse is historically known and is integrated into doctrine and jurisprudence. The irresistible impulse is an expression that has its origin in the psychology of impulses and aims to determine if the agent presented an emotional state at the time of the execution of the act. Within the criminal field, the following authors have spoken about this requirement, but in a different way: Michael S. Moore and Joel Feinberg. Thus, the differentiating effect of the irresistible impulse is reserved to estimate the degree of disturbance that the agent suffers at the moment of executing the act and whether this degree of disturbance is a characteristic of insurmountable fear.

Michael S. Moore's approach is a clear rejection of the irresistible impulse, as the basis of a diminished capacity [27]. However, in Feinberg, the requirement of the irresistible impulse demands that the agent act in an emotional delirium, according to the *M'Naghten* rule or the irresistible impulse test. Thus, the agent is only excused if he or she assumed that he or she was innocent or acted on the belief of being covered by a permissive rule. Hence, if a man conjectures, in attention to an emotional delirium, that he is the victim of a deadly attack and kills—in the assumption of a legitimate self-defense—he is excused [30]. Nevertheless, opposition is observed in the Chilean doctrine to the *M'Naghten* rule or the irresistible impulse test, in the line of argument of Michael S. Moore [31].

From what has been said, the insurmountable fear cannot be a simple representation of the principle of unenforceability. It is about determining if, through insurmountable fear, it is lawful to deduce the exclusion of criminal liability, although the legislator does not contemplate such a constellation in art. 10, No. 11. According to a teleological criterion, it is not possible to rule out such a possibility. As is known, the "leading case" is the case of Karina Sepúlveda. However, imagine that Karina had suffered a disorder of learned helplessness and had a support network. According to the traditional criterion, this should respond criminally, because learned helplessness is a non-subsumable posttraumatic stress disorder in art. 10, No. 1. An example of this reasoning can be seen in the Supreme Court ruling, in Case No. 2809-2004, of August 18, 2004. In this judgment, the court granted a defendant the attenuation of diminished imputability because, at the time of committing the crime, he presented "a chronic post-traumatic stress disorder [plus] a major depression with some psychotic symptoms, triggered by the death of his brother, the economic situation, the marriage separation, and the serious illness of his father at risk. Depression that would be the factor that prevented an adequate judgment of reality at the time of committing the crime." The court, before such disorder, established that the agent "was not completely deprived of reason, but [this] is constituent of the attenuating circumstance [of] article 11, N° 1, in relation to article 10, N° 1."

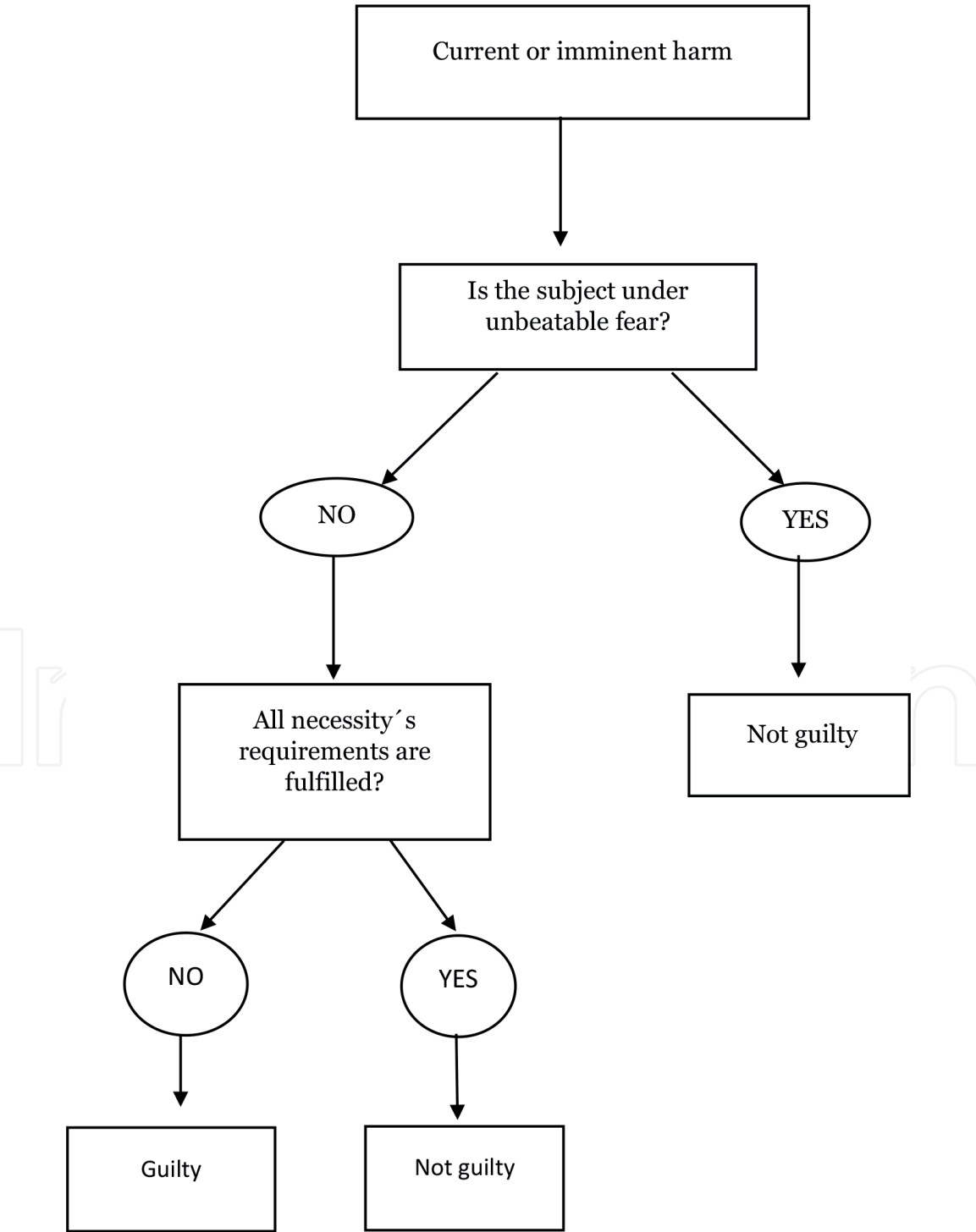
We believe that the correct thing is to affirm that, although the wrongfulness of the act remains in such a case, because the legal system should abide by the meta-rule that nothing can justify the murder of an innocent, nobody can know with certainty if the killing action of the abuser had been prevented with the complaint of the facts to the authority. If this premise is accepted, from a doctrinal point of view, it would be necessary to maintain that there is room for fear in these types of situations of necessity. The determining factor here, as in the other cases of insurmountable fear, is not the moral judgment of the agent; for insurmountable fear, it seems sufficient that the author, objectively in a position to engage in other, less harmful conduct, strays from the requirements of the state of necessity because of the emotional disturbance he or she suffers.



4. Findings of this project

Fear has a subjective basis related to emotional disturbances that cannot be redirected to the state of necessity. The state of necessity implies a deliberate decision that, in a situation of danger, meets the subsidiarity requirement. The last requirement that is foreign to insurmountable fear. For this reason, (a) insurmountable fear is an autonomous figure of the state of necessity; (b) insurmountable fear only includes real evils; and (c) insurmountable fear only demands the requirement of a situation of current or imminent danger in situations of necessity.

The following decision tree provides a consistent basis for criminal lawyers to define, examine, and identify the alternatives to necessity defense and the unbeatable fear.



## 5. Appendices and nomenclature

Learned helplessness is a conduct displayed by an animal or person following frequent adverse stimulations that are away from their control. Over the last years, neuroscience has presented an understanding of learned helplessness. In this context, the subject's brain presumes that control is not present, and the existence of helpfulness is what is learned. Seligman's learned helplessness theory helped in the development of the battered woman syndrome. Battered woman syndrome was discovered by Leonor Walker.

Dogmatics is a system of principles and rules developed by a group of criminal lawyers or criminal philosophers, such as Michael S. Moore, John Feinberg, Claus Roxin, Günther Jakobs, Urs Kindhäuser, Joachim Hruschka, Jan C. Joerden, and Michael Pawlik.

State of necessity or necessity defense is a criminal term used to describe why some extraordinary actions must be justified under the criminal law or exculpated in contravention of the law. Criminal defendants rely on this legal argument to argue that they should not be responsible for their actions because their conduct was the only way to prevent a greater harm when that conduct is not justified under self-defense.

*M'Naghten* rule is a test use to establish an excuse of insanity. *M'Naghten* rule must be demonstrated on a criminal trial at the time of the committing of the crime. The party accused must prove that he was under a defect of reason due to a disease of the mind. In this sense, it must be demonstrated that the party accused did not know what he was doing.

Phenomenology is a logical comprehension around the structures of consciousness and the objects that are perceived through it. Phenomenology can be distinguished from the Cartesian system of analysis. Husserl's conception is initially involved with this philosophical perspective and subsequently with psychology.

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