

EQUAL CONSIDERATION AND INFORMED IMAGINING: RECOGNISING AND RESPONDING TO THE LIVED EXPERIENCES OF ABUSED WOMEN WHO KILL

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Equality is a fundamental concern of human existence. Expressed in the principle of equality before the law it requires that those who come before the law are entitled to be treated as being of equal value and to be given 'equal consideration'. In circumstances where those who come before the law are marked by their differences, giving of equal consideration requires that difference be understood and taken into account. The identification of difference does not of itself determine the question of whether different treatment is warranted in the interests of equality. However, this article argues that understanding difference is a precondition for the promotion of true equality and that, in pursuit of understanding difference, it is necessary for us to acknowledge the limitations of our capacity to understand the lived experience of 'others' and to actively work to engage with these experiences. In the context of the criminal justice system, we offer abused women who kill as illustrative of this need, focusing upon the availability and operation of self-defence in England/Wales, Queensland and Victoria. In doing so, we consider the capacity of the law, legal process and legal actors to engage with the lived experiences of these women, highlighting the importance of 'informed imagining'.

CONTENTS

I	Introduction.....	1202
II	Law, Equality and Equal Consideration.....	1205
A	The Principle of Equality before the Law.....	1205

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B	Equal Consideration and the Problematic of Systemic Inequality.....	1207
C	The ‘Less Than’ Question	1209
D	Equal Consideration and the Limited Potential of Intuition	1212
III	An Equality Question: Self-Defence and Abused Women.....	1215
A	Abused Women and Equal Consideration: Self-Defence in England and Wales.....	1216
1	Self-Defence: Subjective and Objective Tests	1217
2	Householders and Conceptualising Reasonable Force	1218
3	Imminency and Reasonably Necessary Force	1221
B	Self-Defence in Australia: Queensland and Victoria	1223
1	Self-Defence and Law Reform in Queensland	1224
2	Self-Defence and Law Reform in Victoria	1227
IV	Recognising and Responding to the Experience of ‘Others’: Abused Women Who Kill and ‘Informed Imagining’	1229
A	Bridging the Divide: ‘Informed Imagining’	1232
V	Conclusion: The Potential of Equal Consideration	1235

I INTRODUCTION

Equality of treatment — understood as treatment of like alike and unlike differently — is a central concern of human existence. And, concern for equal treatment is founded on the principle of equality itself, which holds that despite marked differences and inequalities between people and groups of people, an inherent equality as human beings remains. The principle of equality as human beings is then often formulated as requiring that all persons be treated with ‘equal concern and respect’,¹ as being of ‘equal worth’² and having equal dignity. It can similarly be formulated as a principle requiring that each person’s interests are given equal weight or that ‘all

¹ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) 273; Ronald Dworkin, *A Matter of Principle* (Clarendon Press, 1985) 191. See also Tom Campbell, *Justice* (Macmillan, 1988) 51; Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Clarendon Press, 1990) 4; Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000); Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press, 2011) 2; John Finnis, ‘Equality and Differences’ (2012) 2(1) *Solidarity: The Journal of Catholic Social Thought and Secular Ethics* (online) 1, 9 <http://scholarship.law.nd.edu/law_faculty_scholarship/1084>, archived at <<https://perma.cc/9LC6-2WJB>>.

² Campbell (n 1) 51. See also Kymlicka (n 1) 4–5, 44.

persons should be given equal consideration.’³ As Sen maintains, ‘it is difficult to see how an ethical theory can have general social plausibility without extending equal consideration to all at *some level*.’⁴ In what follows, the expression ‘equal consideration’ will be preferred, but it is taken to be reflective of these various formulations.

In the context of the criminal law, the *principle* of equality before the law is beyond question. But here we are interested in the application of principle and with an interrogation of what an equality principle requires for those who come before the adversarial criminal justice system. The focus is on the experience of battered women who kill and the capacity of the law to engage with their experience in the context of a claim of self-defence, where questions like ‘Why didn’t she just leave?’, ‘Why didn’t she call the police?’, ‘Why did she strike when he was asleep (passed out)?’, ‘Why did she use a weapon?’ or ‘Why did she make a plan to kill?’, fall to be answered by a jury. Though battered women who kill may do so in myriad ways and circumstances, these bear little resemblance to the infliction of lethal force by a ‘typically’ male killer responding to an immediate attack, made so familiar by the ‘imminent’ threat scenarios that grace our television screens night after night. How does equality, and the equal application of the law of self-defence, get a foothold here in the face of these differences?

We argue that equality of treatment in this circumstance and others is fundamentally about recognising, understanding and responding to difference. Our argument is that it is not possible to understand the necessity or reasonableness of her response without a full consideration of her lived experience as a battered woman. And, that the measure of the law’s capacity to treat her equally, in considering her claim to self-defence, is the extent to which it facilitates and enables particular attention being paid to her experience and the experience of battered women in general.

The focus of our analysis is on the substantive law of self-defence and its application. This should not be taken as suggesting that other aspects of the criminal justice system’s treatment of abused women who kill are immune from being measured against an ‘equal consideration’ yardstick.⁵ The purpose

³ Campbell (n 1) 33. See also John Stuart Mill, *Utilitarianism, Liberty, and Representative Government* (JM Dent & Sons, 1910) 58.

⁴ Amartya Sen, *Inequality Reexamined* (Harvard University Press, 1992) 3–4 (emphasis in original); see also at 18, 130.

⁵ For example, questions could be asked about whether prosecutors have given equal consideration to abused women who kill in the exercise of their discretion to prosecute and in the plea-bargaining process, or by judges in the exercise of the sentencing discretion once

is to demonstrate that an entitlement to equal consideration and an understanding of what this requires does in fact operate as a useful evaluative tool. Our restriction enables the question to be asked: to what extent has the law of self-defence and its reform enabled engagement with the reality of abused women? And, to see this question for what it is — an equality question with difference at its heart.

We contend that our intuition provides a necessary but insufficient foundation for engaging with the question of whether a difference will justify or require differential treatment. We look therefore at the importance of imagining ourselves into the shoes of others in moral reasoning, in order to respond to difference and the lived experiences of others, together with the limits on our capacity to actually do so.

We develop this argument over three sections. The first section explores the concept of ‘equal consideration’. A key aspect of this is an understanding of how intuition is both an enabling and a restrictive mechanism. In the second section we turn our focus to the problematic of abused women who kill. We provide an overview of the law of self-defence in England/Wales, Queensland and Victoria, highlighting how the latter has the potential to realise ‘equal consideration’. However, even in Victoria, where reform has gone furthest, challenges remain. In the final section we argue that recognising and responding to the lived experiences of abused women necessitates a process of ‘informed imagining’.

By way of restatement, our underlying premise is that the principle of equality, and specifically, equality before the law, provides an axiomatic foundation from which to consider the treatment of people who come before the law. It is a foundation from which to hold criminal law, criminal process and ‘criminal justice decision-makers’ to account,⁶ and a platform to call for change. Our purpose then is to provide a foundation for continuing engage-

there has been a finding of guilt. We would argue that at each point, equality demands the process and the actors within the process to engage with the lived experience of abused women if anything like equality is to be approached.

⁶ The phrase ‘criminal justice decision-makers’ is used in Luke McNamara, “‘Equality before the Law’ in Polyethnic Societies: The Construction of Normative Criminal Law Standards’ (2004) 11(2) *Murdoch University Electronic Journal of Law* (online) [55] <www.murdoch.edu.au/elaw/issues/v11n2/mcnamara112.html>, archived at <<https://perma.cc/ZK3U-W2GT>>. This category of persons is defined by McNamara to include ‘police officers, prosecutors, defence lawyers, magistrates, judges and juries’. ‘Criminal justice decision-makers’ is used to refer to those whose actions and decisions most clearly impact the treatment of those who come before the criminal courts, in particular, judges, magistrates, legal practitioners, jurors and, one step back, legislators whose actions result in the law and process that shape the operation of criminal law: see at [19]–[20].

ment in progressive legal scholarship that encourages an approach towards what Lacey refers to as ‘an ethical law’.⁷

II LAW, EQUALITY AND EQUAL CONSIDERATION

A *The Principle of Equality before the Law*

The *Universal Declaration of Human Rights* recognises the ‘inherent dignity and ... the equal and inalienable rights of all members of the human family’⁸ and proclaims in art 1 that ‘[a]ll human beings are born free and equal in dignity and rights’. Such instruments accept as foundational the principle that ‘[a]ll human beings are by their nature equal’⁹ leading to another fundamental principle: the entitlement to equality before the law in our criminal justice system, and our legal system more generally. Equality before the law is enshrined in international and domestic law through declarations, conventions, Acts of Parliament and in the common law.¹⁰ In *Green v The Queen*, French CJ, Crennan and Kiefel JJ of the High Court of Australia described the principle of equality before the law as ‘the starting point of all other liber-

⁷ Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing, 1998) 247–8.

⁸ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Preamble para 1 (‘UDHR’).

⁹ Finnis, ‘Equality and Differences’ (n 1) 9. See also John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, 1998) 170 n 166. The principle has deep roots in Western political philosophy spanning far beyond the application of criminal law and criminal process: see, eg, HLA Hart, *The Concept of Law* (Oxford University Press, 1961) 151–80; Aristotle, *Nicomachean Ethics*, tr WD Ross (Infomotions, 2000) bk 5, 55–6 [3].

¹⁰ See, eg, UDHR (n 8); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26. In England and Wales, equality before the law is enshrined in *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) art 14. In Australia, see s 8(3) of both the *Human Rights Act 2004* (ACT) and the *Human Rights and Responsibilities Act 2006* (Vic). See also *Leeth v Commonwealth* (1992) 174 CLR 445, 485–6 (Deane and Toohey JJ); AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 202; Kate Warner, ‘Equality before the Law: Racial and Social Background Factors as Sources of Mitigation at Sentencing’ in Julian V Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 124, 126–43.

ties.¹¹ Indeed, so foundational is the principle that it was described by the Privy Council in *Matadeen v Pointu* as ‘one of the building blocks of democracy.’¹² The Privy Council went further to say ‘that treating like cases alike and unlike cases differently is a general axiom of rational behaviour.’¹³

In this formulation, ‘[j]ustice involves the right to treatment as an equal, not the right to equal treatment.’¹⁴ This is entirely consistent with the principle that like be treated alike because, in the absence of a relevant difference, inequality of treatment could not amount to treatment as an equal.¹⁵ But where relevant differences do exist and laws and legal processes are applied equally, without regard for these differences, people are often not treated as equals.¹⁶ Expressed more forcefully and without qualification, ‘[t]here is no greater inequality than the equal treatment of unequals.’¹⁷ This is where the principle of equality — understood as *an entitlement to equal consideration* — enables us to grapple with the reality of unequal treatment. It requires us to look at the effect of the law or legal process and ask: having full regard for the differences of and between those coming before the law, is this person being treated as less? This is to accept that the ‘equal value’ of human beings may require that ‘what is different ... be treated differently.’¹⁸

Thus the character of the treatment as same or different does not itself determine whether a person is treated as less. The focus must be on the interaction between treatment and the differences between the people treated. In this investigation, close consideration must be given to the identification of ‘relevant differences’ and the nature and effect of these differences.¹⁹ As Rhode puts it, ‘[t]he crucial issue becomes not difference, but the difference difference makes.’²⁰

¹¹ (2011) 244 CLR 462, 472–3, quoting H Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press, 1945) 115.

¹² [1999] 1 AC 98, 109.

¹³ *Ibid.*

¹⁴ Campbell (n 1) 51.

¹⁵ Finnis, ‘Equality and Differences’ (n 1) 9.

¹⁶ Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 1–4.

¹⁷ *Dennis v United States*, 339 US 162, 184 (1950).

¹⁸ *South West Africa Cases (Ethiopia v South Africa) (Second Phase)* [1966] ICJ Rep 7, 305 (Judge Tanaka).

¹⁹ *Postiglione v The Queen* (1997) 189 CLR 295, 301 (Dawson and Gaudron JJ). ‘Equal justice requires that like should be treated alike but that, if there are *relevant differences*, due allowance should be made for them’ (emphasis added). See also *Green* (n 11) 472–3 (French CJ, Crennan and Kiefel JJ).

²⁰ Deborah L Rhode, ‘Feminist Critical Theories’ (1990) 42 *Stanford Law Review* 617, 625.

To take a simple example: it might be thought that all persons within a community have an equal opportunity to enter the local courthouse and thereby physically access an important institution of justice. The door automatically opens if people present themselves before it. Yet, if the door is atop a flight of steps and there is no ramp or lift, then it is apparent that there is a denial of equal access to justice for a mobility-impaired person restricted to a wheelchair. To provide only the same physical opportunity for access in this case — entry at the top of a flight of steps — is to treat the mobility impaired person as less. The mobility impairment is therefore, in this context, a ‘relevant difference’, and equality requires the provision of a ramp or other method guaranteeing true equality of access.

As the above example makes clear, in considering the ‘difference difference makes’, from a foundation of equal respect, equal worth and equal dignity, it is apparent that an equality question cannot be answered in the abstract.²¹ It must be answered by giving close consideration to the concrete circumstances of the person before the law, understood by reference to the lived experiences of the intersecting groups to which that person belongs.²² Thus, answering an equality question is both a comparative and a contextual exercise. As stated by McIntyre J (delivering the reasons of McIntyre and Lamer JJ), in *Law Society of British Columbia v Andrews*, equal justice ‘is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.’²³

B *Equal Consideration and the Problematic of Systemic Inequality*

Focusing on a specific site within the criminal justice process and asking whether one particular group of people who come before the law at this site is accorded equal consideration could mean that there is a risk that the bigger picture of systemic inequality will be obscured. This is not the intention. In the current analysis, understanding the broader social context, including

²¹ Ibid.

²² See, eg, Kimberle Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43 *Stanford Law Review* 1241; Anne Cossins, ‘Saints, Sluts and Sexual Assault: Rethinking the Relationship between Sex, Race and Gender’ (2003) 12 *Social and Legal Studies* 77, 91–2, 96; Anna Carline and Patricia Eastale, *Shades of Grey: Domestic and Sexual Violence against Women* (Routledge, 2014) 238–50.

²³ [1989] 1 SCR 143, 164.

social relationships of power, is a prerequisite for understanding the lived experiences of others such as abused women who kill.

Indeed, it remains the case that seeking to promote equality at one site within a system is of little value unless that objective is seen as part of a broader movement towards a more just system of law and legal process. However, we are assuming that something like 'equality' can be meaningfully approached within the existing criminal justice system, even though the system, and society in which that system exists, is shaped by deep and enduring social inequalities.

MacKinnon argues that when it comes to the equality question we are missing the point if we do not focus on 'dominance' and 'power and powerlessness'.²⁴ This has significant implications for the potential to realise equality before the law within a system which is founded on an unequal distribution of power amongst societal groups and, to a greater or lesser extent, replicates this unequal distribution in allocating decision-making positions. Connell recognises this in the context of the pursuit of gender equality:

[T]he very gender inequalities in economic assets, political power, cultural authority and the means of coercion that gender reforms intend to change currently mean that men (often, specific groups of men) control most of the resources required to implement women's claims for justice.²⁵

The point is that the underpinnings of societal institutions are gendered.²⁶ The structures of the law are not exempt. For example, the gladiatorial features of dispute resolution,²⁷ its language,²⁸ and its definitions of determinative concepts such as credibility,²⁹ are a manifestation of gender power. Even the concept of equality, based on a liberal account of an autonomous and atom-

²⁴ Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 44.

²⁵ Raewyn Connell, *Confronting Equality: Gender, Knowledge and Global Change* (Allen & Unwin, 2011) 7.

²⁶ See generally RW Connell, *Gender and Power: Society, the Person and Sexual Politics* (Polity Press, 1987); Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (Butterworths, 2001) 14; RW Connell, *Gender* (Polity, 2002).

²⁷ Easteal, *Less than Equal* (n 26) 14, quoting Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 1990) 410.

²⁸ See, eg, Patricia Easteal, Lorana Bartels and Sally Bradford, 'Language, Gender and "Reality": Violence Against Women' (2012) 40 *International Journal of Law, Crime and Justice* 324.

²⁹ Jocelyne Scutt, 'The Incredible Woman: A Recurring Character in Criminal Law' in Patricia Weiser Easteal and Sandra McKillop (eds), *Women and the Law: Proceedings of a Conference Held 24–26 September 1991* (Australian Institute of Criminology, 1993) 9–20.

ised human existence, is ripe for interrogation as arising from a patriarchal perspective.³⁰ Achieving full equality, therefore, has to do with transforming existing structures,³¹ and equalising the distribution of social power, encompassing the political, economic and judicial spheres.³²

This understanding can lead to disillusion for the reformist, given that ‘all law reforms empower law’, thereby empowering a key institution of domination.³³ However, despite the undoubted need for ‘radical transformation of the legal and social structure ... there is an ethical responsibility to respond to those within the present, to try to find ways within the existing system to bring about some level of justice, however difficult that may be.’³⁴ This echoes Finley’s call for continued engagement with law reform.³⁵

C The ‘Less Than’ Question

Asking the equality question requires giving ‘consideration’ to the lived experience of those who come before the criminal justice system as ‘equals’ and asking whether they are being treated *as less*.³⁶ This question is a familiar one in feminist thought and scholarship. Indeed, Eastale adopts this question

³⁰ See, eg. Robin West, ‘Jurisprudence and Gender’ (1988) 55 *University of Chicago Law Review* 1.

³¹ See Angela P Harris, ‘The Jurisprudence of Reconstruction’ (1994) 82 *California Law Review* 741, 762.

³² See MacKinnon (n 24) 44; Lacey (n 7) 241, asserting that, ‘as marxists saw, the reconstruction of the legal has to be premised on the reconstruction of economic, social, political relations: on massive changes in the configuration of social power at every level’: at 248.

³³ Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 161, discussed in Carline and Eastale (n 22) 254–5 in relation to ‘[t]he (im)possibility of feminist law reform’.

³⁴ Carline and Eastale (n 22) 256.

³⁵ Lucinda Finley, ‘Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning’ (1989) 64 *Notre Dame Law Review* 886. ‘We cannot get away from law, even if that is what we would like to do. ... [L]aw is such a powerful, authoritative language, one that insists that to be heard you try to speak its language ... Nor can we abandon caring whether the law hears us. Whether or not activists for women look to law as one means for pursuing change, the law will still operate on and affect women’s situations. Law will be present through direct regulation, through nonintervention when intervention is needed, and through helping to keep something invisible when visibility and validation are needed’: at 906.

³⁶ This point is taken from MacKinnon (n 24) 43, though it is acknowledged that MacKinnon was speaking normatively. The original quote is: ‘If sex inequalities are approached as matters of imposed status, which are in need of change if a legal mandate of equality means anything at all, the question of whether women should be treated unequally means simply whether women should be treated as less.’

as both the title and a founding premise for her book *Less than Equal*.³⁷ She begins with her own experience of being ‘placed in certain categories’ and being ‘labelled “different” and “less than equal” in a world dominated by a masculine way of being and doing.’³⁸ She then proceeds to consider the ways in which women are treated as less than equal at various sites in the Australian legal system, exploring how and why this occurs, as well as what can be done in response to it. In doing so, Eastal repeatedly asks ‘the woman question’. As Bartlett argues:

In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women.³⁹

This is a ‘less than’ question insofar as the focus is on disadvantages accruing to, and failures to take into account the lived experience of, women as compared to men. Answering the question requires close consideration be given to the lived experiences of women and the laws and processes applied to them.

Furthermore, it is argued that the woman question is a species of equality question, which can itself be subject to greater specification to take into account the fact that ‘[w]omen are not just women, but also defined in relation to race, sexuality, religion, class, disability and so forth.’⁴⁰ This is to recognise the ‘intersectionality’ of human experience,⁴¹ where ‘intersectionality requires a critical reflection upon the myriad of factors which construct (but are not determinative of) identity and experience, and how these factors interact with law, policy and society.’⁴²

Indeed, no equality question is necessarily primary,⁴³ such that in some contexts and for some people, we may ask how the law fails to take into account women’s experience or, for example, the experience of Indigenous women, Indigenous female children, Indigenous female children who speak

³⁷ See Eastal, *Less than Equal* (n 26) xi.

³⁸ *Ibid.*

³⁹ Katharine T Bartlett, ‘Feminist Legal Methods’ (1990) 103 *Harvard Law Review* 829, 837.

⁴⁰ Margaret Davies, *Asking the Law Question* (Lawbook, 3rd ed, 2008) 17. See also Drucilla Cornell, *At the Heart of Freedom: Feminism, Sex and Equality* (Princeton University Press, 1998) 22.

⁴¹ Crenshaw (n 22).

⁴² Carline and Eastal (n 22) 233.

⁴³ Davies (n 40) 257, 260. See also Cossins (n 22) 89–90.

an Indigenous language as their first language and so forth.⁴⁴ Notice that this is a process of social categorisation, which is accepted as ‘an indispensable part of human thought’ even though ‘attributes such as race, sex, and age lie along a continuum, [such that] social labels are never more than approximations.’⁴⁵ We must acknowledge too that this may involve a drilling down towards subjective experience. But, to be an empirically and politically valuable platform for reform, sub-categorisation must end somewhere.⁴⁶

We must be able, for example, to ask of the law of self-defence, whether it gives equal consideration to the experience of abused women, having regard to the empirically understood lived experience of such women as a group, even while allowing for differences of experience within this group. Indeed, if we ask, ‘Does the law of self-defence give equal consideration to *this* abused woman?’, the question is hardly intelligible without an understanding of the dynamics of family violence more generally and the experience of women exposed to such violence. Subjective experience, and recognising this subjective experience, is thus necessarily entwined with group experience.

Returning to the central point: *true* equality may only be approached through the development of an understanding of what it must really be like to be the person before the court — to be an abused woman. Equality therefore is fundamentally about recognising difference and giving equal consideration to those who come before the law understood by references to these differences, which are reflective of the intersecting groups to which the person belongs.⁴⁷ This comes very close to a principle of ‘equality as respect for

⁴⁴ Cossins refers to the non-‘additive’ study of the intersection and overlap of the socially constructed categories of sex and race as ‘convergence analysis’, being an approach that ‘does not treat sex and race as different categories’: Cossins (n 22) 96; see also at 91–2.

⁴⁵ Scott Plous, ‘The Psychology of Prejudice, Stereotyping, and Discrimination: An Overview’ in Scott Plous (ed), *Understanding Prejudice and Discrimination* (McGraw-Hill, 2003) 3, 7.

⁴⁶ Sen (n 4) 117–18 reflects on the impracticality of taking full account of diversity in the context of discussing distributive equality: ‘It is not unreasonable to think that if we try to take note of all the diversities, we might end up in a total mess of empirical confusion. The demands of practice indicate discretion and suggest that we disregard some diversities while concentrating on the more important ones. That bit of worldly wisdom is not to be scoffed at, and indeed, no serious study of inequality that is geared to practical reasoning and action can ignore the need to overlook a great deal of our immense range of diversities. The question in each context is: What are the significant diversities in *this* context?’ See also Harris (n 31) 783–4, citing Regina Austin, ‘“The Black Community”, Its Lawbreakers, and a Politics of Identification’ (1992) 65 *Southern California Law Review* 1769, 1775.

⁴⁷ In the broader context of distributive justice, Sen maintains that ‘[t]he pervasive diversity of human beings intensifies the need to address the diversity of focus in the assessment of equality’: Sen (n 4) 3. See also Cossins (n 22) 98.

difference' as proposed by Bronitt and McSherry,⁴⁸ drawing upon Lacey's reconstruction of equality in 'broader pluralistic terms'.⁴⁹

Recognising and responding to these differences can be problematic since we can only work with what we see. To adopt a metaphor from Eastale, the inequality and injustice we see is only the tip of the iceberg with the majority of prejudice and discrimination below the surface and not visible.⁵⁰

We must acknowledge the limit of our vision and stretch to perceive the ice beneath the water. This, in turn, brings attention to our capacity to perceive, recognise and understand difference, and the different lived experiences of 'others' who come before the criminal courts. Here then, we turn to the notion of intuition.

D Equal Consideration and the Limited Potential of Intuition

In attempting to make sense of the application of the principle of equal consideration, we must contemplate the limited potential of intuition and experience. This is so because the principle of equality, as a principle of justice, is rooted in our pre-argument intuition and experience.⁵¹ According to Aristotle, '[i]f, then, the unjust is unequal, just is equal, as all men suppose it to be, even apart from argument'.⁵²

Accordingly, our own experience provides a platform to *begin* grappling with what equality requires. It is a beginning only, because our subjective experiences and intuitions, so dependent on our enculturation,⁵³ are also great barriers to perceiving inequality and injustice, and judging what is just for other people.

⁴⁸ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 2nd ed, 2005) 127; see also at 131.

⁴⁹ *Ibid* 127, citing Lacey (n 7) 239–41, 247–8. Bronitt and McSherry hold that '[t]here is considerable scope for the "normative reconstruction" of equality in broader pluralistic terms such as "equality as acceptance" or "equality as respect for difference"'. Harris maintains, in the context of a discussion about critical race theory, that '[t]his claim to equality based not on sameness but rather on difference is at the heart of the politics of difference': Harris (n 31) 761.

⁵⁰ Patricia Eastale, 'Setting the Stage: The "Iceberg" Jigsaw Puzzle' in Patricia Eastale (ed), *Women and the Law in Australia* (LexisNexis Butterworths, 2010) 1.

⁵¹ See Fredman (n 16) 5.

⁵² Aristotle (n 9) 55 [3].

⁵³ The process of enculturation is discussed in detail below. For now it is sufficient to note that enculturation is taken here to mean the process by which each of us learns 'about our culture's way of being, seeing, doing and believing': Eastale, *Less than Equal* (n 26) 2.

Taking the example of siblings born 16 months apart — Jane, and her younger brother, Tom — we can begin considering equality of treatment. As these siblings grow, they receive benefits and take on responsibilities, or burdens, within the family, in education, in the social sphere and later in employment. Equality and difference quickly enter the frame. For example, if pocket money is given to each, then the 16-month gap may or may not be seen as a basis for differential treatment. Almost invariably the younger, Tom, will make a claim to strict equality. The same goes for virtually every benefit, down to the size of a slice of cake, or the number of blocks of chocolate each receives. When it comes to chores, further claims for equality of treatment will arise.

Notably, it is the perceived absence of equality — that is, claims of inequality — that will often shape the terrain, governed by ‘deeply rooted instinctive reactions of resentment which are aroused by “unequal” treatment.’⁵⁴ Thus, equality and justice come to be defined by perceptions of the existence of their opposites, inequality and injustice. As Campbell has noted, ‘there is some basis for the belief that it is the sense of *injustice* or grievance that is at the core of our ideas about justice and explain its powerful emotive force.’⁵⁵

Back to our siblings, equality and difference. Age will invariably be used as a justification for differential treatment at various points within the family. A most obvious example is the timing of commencement of schooling. Insofar as this differential treatment is considered by Jane and Tom to be justified, they are likely to accept that they are not being treated unequally in a sense that will provoke claims of unfairness. This line will be drawn and redrawn as they grow. It will be governed by the norms of their family.

Similarly, as Jane and Tom engage in public life they will measure their experience and the allocation of benefits and burdens against their school peers, co-workers and fellow citizens. Claims of equality and inequality will remain central in that comparative exercise, as will considerations of difference, with concepts such as moral desert, effort, merit, achievement and position entering the picture as justifications for differential allocation.⁵⁶

It is critical to notice here that claims of equality or inequality in these, and any other, contexts require the application of a benefit or burden to more than

⁵⁴ Campbell (n 1) 25.

⁵⁵ *Ibid* 1 (emphasis in original).

⁵⁶ Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Blackwell, 1983) 4.

one person, such that there is both ‘treatment’ and a ‘comparator’.⁵⁷ According to Fawcett, ‘discrimination and non-discrimination are relational terms, so that whether we speak of disadvantage, equality, or advantage, we are speaking of treatment of one person or group as measured by the treatment, or the standard of treatment, of another person or group.’⁵⁸

In other words, we cannot take one child in a family and ask whether they are being treated equally. We need to compare this treatment to that of a person who occupies a space that is sufficiently similar to enable claims to be made.⁵⁹

The more different we may perceive ourselves to be from the person or the experience of the person we endeavour to compare our situation to, the more difficult it will be to ‘intuitively’ engage with the equality question. Indeed, it is worth noting now the problem highlighted by MacKinnon that the deepest inequalities may exist where we cannot readily identify a comparator:

Those who most need equal treatment will be the least similar, socially, to those whose situation sets the standard as against which one’s entitlement to be equally treated is measured. Doctrinally speaking, the deepest problems of sex inequality will not find women ‘similarly situated’.⁶⁰

Notwithstanding this, claims of inequality and the intuitive assessment of equality by reference to real and notional comparators remain central to human existence.

But, whilst an equality intuition may be foundational, it is unlikely to be a sufficient foundation for challenging inequality. Here the question is whether an equality intuition provides an adequate ground from which to judge or challenge inequality of treatment within the criminal justice system. Two problems quickly become apparent. Firstly, if the intuition becomes less useful when there are greater differences between the ‘intuitor’ and the comparator,

⁵⁷ Sen maintains that ‘[e]quality is judged by comparing some particular aspect of a person (such as income, or wealth, or happiness, or liberty, or opportunities, or rights, or need-fulfilments) with the same aspect of another person’: Sen (n 4) 2.

⁵⁸ JES Fawcett, *The Application of the European Convention on Human Rights* (Clarendon Press, 2nd ed, 1987) 299 (citations omitted), quoted in *Maloney v The Queen* (2013) 252 CLR 168, 293 [332] (Gageler J).

⁵⁹ *Law Society of British Columbia* (n 23) 164 (McIntyre J): ‘[equal justice] is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises’.

⁶⁰ MacKinnon (n 24) 44 (citations omitted). We again note MacKinnon’s counsel that a focus on sameness and difference risks obscuring the reality of dominance and power, which themselves construct difference.

differences become a barrier to understanding. Secondly, and relatedly, the formation of the equality intuition is inextricably bound to the formation of beliefs that ground differential treatment. These may be justified, or, on the other extreme, they may be productive of gross and unjustified discrimination.⁶¹

Taking the example of the siblings again, Jane may be encouraged by family and society to consider herself a 'girl' and thereby 'different' to Tom, and she may be allocated increased burdens because she is a girl. For example, if there is a gendered division of labour in the family, it is not unreasonable to presume that Jane will, with varying degrees of resistance, participate in that division. If her mother does the majority of housework, it may well be that Jane is required to do more housework as she grows up than Tom. More subtly, she may come to do so, not as a consequence of strict requirement, but by adoption of a modeled role.⁶² Moreover, Jane and Tom may come to accept this as fair and equal treatment, justified by the gender difference. The limits of intuition and experience as a ground of critique are manifest in both the extremes of discrimination and its ever-present reality.

III AN EQUALITY QUESTION: SELF-DEFENCE AND ABUSED WOMEN

In this section, we develop our analysis further by responding to the key equality question: 'Does the law of self-defence give abused women equal consideration?' Here we have a concrete site, a specific law or legal doctrine, a defined process, and a specific group of people in mind to which the law is applied. The comparator is a man who kills in response to an immediate threat of serious violence.⁶³

The equality issue can be framed as follows:

Women who kill after being subjected to prolonged family violence have struggled to have their experience and actions accepted as reasonable, and hence justified ... The questions: 'Why didn't she just leave?', 'Why didn't she call the police?', 'Why did she use a weapon?' or 'Why did she make a plan to kill?'; no

⁶¹ Fredman (n 16) 1, 5.

⁶² For a real-life example of a teenager whose life has been shaped by sex and gender, used as a 'point of departure' for a broad authoritative discussion of power relations between genders, see Connell, *Gender and Power* (n 26) 1–6.

⁶³ Patricia Easteal and Anthony Hopkins, 'Women and Criminal Law: Defences to Homicide' in Patricia Easteal (ed), *Women and the Law in Australia* (LexisNexis Butterworths, 2010) 109, 116.

doubt, are amongst those that resonate within the jury room or in chambers. Almost invariably those deliberating will resort to assessing the reasonableness of [a woman's] actions against their own values and experiences, which are for the most part unlikely to accord with those of the woman under judgement.⁶⁴

Here the question of 'reasonableness' is critical and the extent to which this 'objective' aspect of the test of self-defence can be understood from the perspective of the woman under judgment. We turn our focus to the law of self-defence in England/Wales, Queensland and Victoria and ask whether reforms in those jurisdictions have enabled the giving of equal consideration to the experience of abused women who kill.

A Abused Women and Equal Consideration: Self-Defence in England and Wales

In England and Wales, self-defence is a common law defence, although its requirements have recently been 'clarified' by statute.⁶⁵ On a basic level, the defence enables a person to 'do what is reasonably necessary' in order to protect him/herself.⁶⁶ It is well established that this embodies a subjective and objective test: the defendant must have genuinely believed that there was a need to use defensive force,⁶⁷ but s/he may only use the level of force that is considered to be reasonable in those (subjectively conceived) circumstances.⁶⁸ It is, however, also well established that force will only be 'reasonably necessary' if it is used in response to an ongoing or imminent attack. It has been argued that the defence embodies male attitudes and responses to violence, and thus fails to respond adequately to the plight of abused women who kill.⁶⁹ Concomitantly, it is important to note that 'there has been no significant case law on the availability of self-defence as a defence for battered women' in England and Wales.⁷⁰

⁶⁴ Ibid 117 (citations omitted).

⁶⁵ See *Criminal Justice and Immigration Act 2008* (UK) s 76.

⁶⁶ *Palmer v The Queen* [1971] AC 814, 831.

⁶⁷ *R v Williams (Gladstone)* [1987] 3 All ER 411.

⁶⁸ *R v Owino* [1996] 2 Cr App R 128.

⁶⁹ Katherine O'Donovan, 'Defences for Battered Women Who Kill' (1991) 18 *Journal of Law and Society* 219; Aileen McColgan, 'In Defence of Battered Women Who Kill' (1993) 13 *Oxford Journal of Legal Studies* 508; Katherine O'Donovan, 'Law's Knowledge: The Judge, the Expert, the Battered Woman, and Her Syndrome' (1993) 20 *Journal of Law and Society* 427.

⁷⁰ Fiona Leverick, *Killing in Self-Defence* (Oxford University Press, 2006) 90.

1 *Self-Defence: Subjective and Objective Tests*

The subjective/objective approach to self-defence was codified by s 76(3) of the *Criminal Justice and Immigration Act 2008* (UK): '[t]he question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be'. Further to this, s 76(7) sets out that 'the following considerations are to be taken into account':

- (a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and
- (b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

Ostensibly, the reference to 'circumstances as D believed them to be' should permit a wider recognition of the impact of an abusive relationship upon a defendant's subjective assessment of harm. Moreover, provided the belief was genuinely held, a defendant is permitted to rely upon a mistaken belief, even if that belief was unreasonable. Accordingly, there is scope to argue that an abused woman genuinely believed that her life was in peril, even if an outsider may have perceived the circumstances as non-life threatening. It is, nevertheless, important to note that s 76(4)(a) states that 'the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it'. While a belief need not be reasonable, the fact that it was unreasonable may be evidence that it was not genuinely held. As such, it has been suggested that 'the fact that a battered woman has been assaulted on many occasions in the past but has *not* been killed might suggest that she is unlikely to be killed by her partner in the future'.⁷¹ Hence, the prosecution may argue that the fact that the victim had not previously utilised violence of a potentially fatal level suggests that the defendant's belief was not genuine. This, however, fails to acknowledge that domestic violence frequently escalates in severity over time. Indeed, a woman's experience of violence renders her acutely aware of any changes in the abuser's behaviour which may indicate that the next beating may be potentially fatal. As the statistics reveal, many female homicide victims suffered years of abuse at the hands of their killer.⁷²

⁷¹ Ibid 91 (emphasis in original).

⁷² R Emerson Dobash et al, 'Not an Ordinary Killer — Just an Ordinary Guy: When Men Murder an Intimate Woman Partner' (2004) 10 *Violence against Women* 577, 582.

A further factor to consider is the relevance of psychiatric disorders, such as post-traumatic stress disorder ('PTSD'). As noted in *Smith and Hogan's Criminal Law*, 'evidence of D's personal characteristics must, in principle, be admissible in so far as they bear upon his ability to be aware of, or to perceive, the circumstances.'⁷³ This may allow the defence to adduce expert evidence in order to explain why a defendant may have genuinely believed that her life was at risk and subsequently why the use of fatal force was not unreasonable. However, the law has long excluded reliance upon (voluntarily induced) drunken mistakes and, following the cases of *R v Martin*⁷⁴ and *R v Oye*,⁷⁵ it appears that a similar approach has been adopted in relation to psychiatric disorders. Thus, in *Martin*, Lord Woolf CJ stated that the psychiatric conditions would not be relevant 'except in exceptional circumstances which would make the evidence especially probative.'⁷⁶ Accordingly, it seems unlikely that self-defence would succeed if it was perceived that the defendant was mistaken as to the reality of the threat, and this mistake was attributable to a psychiatric disorder, such as PTSD. Hence, although a jury may take into account the size and strength of a woman who kills her abusive partner, the history of domestic violence and potentially the *psychological* effect of the abuse, it is questionable whether expert evidence regarding the impact of a *diagnosed psychiatric condition* would be admissible. Undoubtedly, the medicalisation of the abused woman and her self-defensive actions is highly problematical; nevertheless, the exclusion of psychiatric evidence arguably limits the law's ability to recognise and respond to the lived experiences of abused women.

2 *Householders and Conceptualising Reasonable Force*

Prior to 2013, it was well established that if the defendant's force was disproportionate, the objective limb would not be satisfied.⁷⁷ Following the case of *Martin*, however, a momentum for reform developed which ultimately resulted in the enactment of s 43 of the *Crime and Courts Act 2013* (UK).⁷⁸ In

⁷³ David Ormerod, *Smith and Hogan's Criminal Law* (Oxford University Press, 13th ed, 2011) 382.

⁷⁴ [2003] QB 1.

⁷⁵ [2014] 1 WLR 3354.

⁷⁶ *Martin* (n 74) 16 [67].

⁷⁷ *Owino* (n 68).

⁷⁸ See Explanatory Notes, *Crime and Courts Act 2013* (UK) 11 [57]; Sally Lipscombe, 'Householders and the Criminal Law of Self Defence' (Standard Note SN/HA/2959, House of Commons, 10 January 2013).

that case, Tony Martin killed a 16-year-old boy by shooting him in the back during an alleged burglary. Martin claimed that, as he had been burgled a number of times previously, he believed his house was particularly vulnerable to invasion. Martin also argued that his psychiatric illness affected his perception of the risk posed by the burglars.⁷⁹ The Court of Appeal rejected his arguments in relation to self-defence.⁸⁰ Subsequently, his murder conviction was quashed and replaced with a conviction of manslaughter by reason of diminished responsibility.⁸¹

During the report stage of the *Criminal Justice and Immigration Act 2008* (UK), the government introduced section 76, in order to ensure that if a person acted instinctively, reasonably and 'in good faith' in response to a burglary, the law would 'clearly be on their side.'⁸² Despite challenges by numerous Conservative MPs,⁸³ the resulting section maintained the common law position: thus disproportionate force amounted to unreasonable force.⁸⁴ However, the situation arose again for consideration during the passage of the *Crime and Courts Act 2013* (UK). Consequently, s 76 was amended to include the following: 'In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.'⁸⁵ Accordingly, in a householder case, *grossly* disproportionate force would be unreasonable, but all other circumstances, disproportionate force would be classified as unreasonable.⁸⁶

⁷⁹ The foregoing summary of fact is adapted from *Martin* (n 74) 3–5 [10]–[18].

⁸⁰ See *ibid* 16–18 [67]–[74].

⁸¹ *Ibid* 18–19 [74]–[82].

⁸² United Kingdom, *Parliamentary Debates*, House of Commons, 9 January 2008, vol 470, col 347 (Jack Straw, Secretary of State for Justice and Lord Chancellor).

⁸³ *Ibid* cols 346–62.

⁸⁴ *Criminal Justice and Immigration Act 2008* (UK) s 76(6), as enacted.

⁸⁵ *Criminal Justice and Immigration Act 2008* (UK) s 76(5A), as inserted by *Crime and Courts Act 2013* (UK) s 43(2); *Criminal Justice and Immigration Act 2008* (UK) s 76(6), as amended by *Crime and Courts Act 2013* (UK) s 43(3).

⁸⁶ A somewhat similar provision was introduced in South Australia in 2003 by the *Criminal Law Consolidation (Self Defence) Amendment Act 2003* (SA). The enacted provision, s 15C of the *Criminal Law Consolidation Act 1935* (SA), provides that where certain conditions are proved by an accused person on the balance of probabilities, there is no requirement that defensive force used in the context of a home invasion be 'reasonably proportionate to the perceived threat'. Many of the criticisms levelled here in relation to the reform in England and Wales can similarly be levelled at the South Australian reform.

This provision has faced significant criticism.⁸⁷ It is noteworthy that during the course of the parliamentary debates the plight of women who kill their abusive partners was not mentioned. Similarly, during the homicide reform process, self-defence was not seriously considered as a potential defence for abused women. It is argued that this represents a distinct failure to recognise and respond to the lived experiences of abused women. This is particularly so given the development of the partial defence of loss of control, which replaced provocation. The Law Commission noted:

If person, confronted with violence or threatened violence to himself or herself or another, responds with force and does no more than he or she believes to be necessary in the circumstances, it is harsh that he or she should be convicted of murder and sentenced to life imprisonment because on an objective view the degree of force used is judged to have been excessive.⁸⁸

Accordingly, if an abused woman kills her violent partner using disproportionate force due to a loss of self-control triggered by a fear of serious violence⁸⁹ she may be guilty of manslaughter, as opposed to murder, if the jury accept that a person in her circumstances might have reacted in a similar manner.⁹⁰

Given that a victim of burglary, however, can plead self-defence if the force used was excessive (provided it is not grossly so) this demonstrates a significant double standard. Indeed, the failure of the law to provide equal consideration is even more striking when one explores the main arguments presented in support of the reform. Lord McNally introduced the reforms by noting that

⁸⁷ See, eg. United Kingdom, *Parliamentary Debates*, House of Lords, 10 December 2012, vol 741, col 885, where Lord Woolf, who presided over the Tony Martin case, stated: 'I oppose this amendment because I regard it as a very bad example of where statutory interference with the common law is wholly unnecessary'. See also Nicola Wake, 'Battered Women, Startled Householders and Psychological Self-Defence: Anglo-Australian Perspectives' (2013) 77 *Journal of Criminal Law* 433; Lydia Bleasdale-Hill, "'Our Home Is Our Haven and Refuge — A Place Where We Have Every Right to Feel Safe": Justifying the Use of up to "Grossly Disproportionate Force" in a Place of Residence' [2015] 6 *Criminal Law Review* 407.

⁸⁸ Law Commission, 'Partial Defences to Murder' (Consultation Paper No 173, 2003) 14–15 [1.61].

⁸⁹ *Coroners and Justice Act 2009* (UK) s 55(3).

⁹⁰ For a critical analysis of this defence, see Susan SM Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (2010) 74 *Journal of Criminal Law* 223; Barry Mitchell, 'Loss of Control under the Coroners and Justice Act 2009: Oh No!' in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate, 2011) 39; Wake (n 87).

‘attacks by intruders in the home cause the greatest public concern.’⁹¹ Significant emphasis was placed on the victim status of the defendant and the need to protect innocent individuals from acts of violence. For example, Sir Alan Beith argued that ‘[s]omeone who has been attacked in a terrifying way — whose house has been frighteningly invaded — deserves to be treated as a victim of a crime.’⁹² Correlating to these perspectives, the right to feel safe in one’s home was stressed. Damian Green, for example, asserted that ‘[a] home is supposed to be a haven, a refuge, a place where people have every right to feel safe, and that is why we believe that householders deserve special protection.’⁹³

These statements apply equally to abused women. There seems to be little justification for allowing a householder to use disproportionate force in the case of a burglary, but not when trapped within an abusive relationship. Further, it can be argued that gender dimensions underpin the development of the law, particularly given the use of the refrain ‘an Englishman’s home is still his castle’ in order to support reforms.⁹⁴

3 *Imminency and Reasonably Necessary Force*

The experience of the abused woman is further excluded by the requirement that, in order to be ‘reasonably necessary’, the force must be in response to an ongoing or imminent threat of violence.⁹⁵ Whilst the law permits pre-emptive strikes,⁹⁶ a homicide will not be justified if it is committed in response to a threat of some distant future harm, nor if it is committed after the attack has occurred.⁹⁷ Accordingly, if an abused woman kills in a non-confrontational situation, she will be precluded from pleading self-defence, despite the fact that she may have genuinely believed that her life was in peril. In contrast, case law in other jurisdictions and commentators have adopted a hostage

⁹¹ United Kingdom, *Parliamentary Debates*, House of Lords, 10 December 2012, vol 741, col 881.

⁹² United Kingdom, *Parliamentary Debates*, House of Commons, 14 January 2013, vol 556, col 662.

⁹³ *Ibid* col 705.

⁹⁴ *Ibid* col 669 (Shailesh Vara).

⁹⁵ *Beckford v The Queen* [1988] AC 130.

⁹⁶ *Ibid* 144 (Lord Griffiths): ‘a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike.’

⁹⁷ *R v Clegg* [1995] 1 AC 482.

analogy as a means of widening the timeframe of a pre-emptive strike.⁹⁸ This analogy highlights that the law would be unlikely to require a person held hostage, who knows or fears that s/he will be killed or seriously injured in the next few days, to wait until the threat is carried out. Rather, the law would permit him/her to use a pre-emptive strike against his/her captors. Hence, it has been argued that the situation of an abused women is similar to that of a hostage, and that to require her to wait until she is being attacked is to sentence her to murder by instalment.⁹⁹

Nevertheless, during the homicide law reform process, the Law Commission rejected the hostage analogy on the basis that, unlike an abused woman, a hostage is held captive against their will and has no 'access to outside help'.¹⁰⁰ This view, though, is based upon problematic assumptions regarding domestic abuse. It fails to acknowledge the emotional, physical and financial difficulties an abused person could face when asking for help and also assumes that any protection sought will be available and effective.¹⁰¹ Unfortunately, the failure of the law and society to protect women from their abusive partners is well documented, not in the least through numerous Independent Police Complaints Commission ('IPCC') reports.¹⁰² Statistics also indicate

⁹⁸ See, eg, *R v Lavallee* [1990] 1 SCR 852, 889; Patricia Weiser Easteal, *Killing the Beloved: Homicide between Adult Sexual Intimates* (Australian Institute of Criminology, 1993) 136; McColgan (n 69) 519.

⁹⁹ *Lavallee* (n 98) 889.

¹⁰⁰ Law Commission, 'Partial Defences to Murder' (n 88) 205 [10.99].

¹⁰¹ See, eg, Scutt (n 29); Michelle Fugate et al, 'Barriers to Domestic Violence Help Seeking: Implications for Intervention' (2005) 11 *Violence against Women* 290; Jan Bostock, Maureen Plumpton and Rebekah Pratt, 'Domestic Violence against Women: Understanding Social Processes and Women's Experiences' (2009) 19 *Journal of Community and Applied Social Psychology* 95; Carline and Easteal (n 22).

¹⁰² See, eg, IPCC, *IPCC Independent Investigation: Greater Manchester Police Contact with Clare Wood Prior to Her Death* (Commissioner's Report, 11 March 2010) <http://webarchive.nationalarchives.gov.uk/20101224054721/http://www.ipcc.gov.uk/clare_wood_report_final_10_march.pdf>; IPCC, *Learning the Lessons: Gender and Domestic Abuse* (Bulletin No 11, October 2010) <<http://webarchive.nationalarchives.gov.uk/20170914113020/http://www.ipcc.gov.uk/reports/learning-the-lessons/bulletin-11-gender-and-domestic-abuse-october-2010>>; IPCC, *Maria Stubbings (Deceased): Investigation concerning the Actions of Essex Police in 2008* (Independent Investigation Final Report, 30 January 2013) <http://webarchive.nationalarchives.gov.uk/20131010135825/https://www.ipcc.gov.uk/sites/default/files/Documents/investigation_commissioner_reports/Maria%20Stubbings%20-%20Final%20Report%20for%20Publication_1.pdf>; IPCC, *Becky McPhee: Investigation into the Contact between Merseyside Police and Becky McPhee prior to Her Murder on 5 January 2012* (Independent Investigation Final Report, IPCC Reference 2012/000362, 23 January 2014) <<http://webarchive.nationalarchives.gov.uk/20141004144927/http://www.ipcc.gov.uk/>

that attempts to leave an abusive relationship and/or obtain help can escalate the abuse, sometimes to fatal levels. Indeed, a Metropolitan Police analysis of domestic homicide case reviews indicated that in 76% of the cases the victims were killed in circumstances involving termination of the abusive relationship.¹⁰³ Conversely, the fact of previously attempting to access help may, paradoxically, further restrict access to justice. It may erroneously be taken to suggest that potential viable avenues of escape existed, and accordingly that the use of defensive force was not ‘reasonably necessary’.

Overall, it is argued that the law in England and Wales does little to facilitate the presentation of evidence at trial designed to illuminate the experience of battered women who kill. It is this contextual evidence that promotes full consideration of the circumstances in which a victim of abuse finds herself, thereby enabling jurors to consider both the genuineness and reasonableness of her use of fatal force. This sits in stark contrast with law reform which has lowered the reasonableness/proportionality threshold for those who kill in circumstances where their home is being invaded.

B *Self-Defence in Australia: Queensland and Victoria*

In Australia, the common law formulation of the test of self-defence is set out in *Zecevic v DPP (Vic)*.¹⁰⁴ Whilst it no longer applies in Victoria or Queensland, having been overtaken by statutory formulations, this provides a reference against which reform can be measured. *Zecevic* requires that the accused person have a belief based on *reasonable* grounds that it was necessary to do what he or she did.¹⁰⁵ Akin to the test applied in England and Wales, this test has both subjective and objective aspects. And, as it is there, the question of whether a person had ‘reasonable grounds’ has been under-

sites/default/files/Documents/investigation_commissioner_reports/Final%20Report%20Rebecca%20McPhee.pdf>.

¹⁰³ Metropolitan Police, *Findings from the Multi-Agency Domestic Violence Murder Reviews in London* (Report, 26 August 2003) 17, 31 <<http://paladinservice.co.uk/wp-content/uploads/2013/07/Findings-from-the-Domestic-Homicide-Reviews.pdf>>, archived at <<https://perma.cc/6947-QV49>>.

¹⁰⁴ (1987) 162 CLR 645, 661 (Wilson, Dawson and Toohey JJ).

¹⁰⁵ *Ibid*; Anthony Hopkins and Patricia Easteal, ‘Walking in Her Shoes: Abused Women Who Kill in Victoria, Queensland and Western Australia’ (2010) 35 *Alternative Law Journal* 132, 134. See also *Crimes Act 1958* (Vic) s 9AE, inserted by *Crimes (Homicide) Act 2005* (Vic) s 6, then repealed by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) s 3(3). Having regard to the burden of proof, once self-defence is sufficiently raised on the evidence in a trial, it is for the prosecution to prove beyond reasonable doubt that the accused did not hold the belief, or that there were no reasonable grounds for it.

stood as contingent upon subjective perception. This was explained by the Victorian Court of Criminal Appeal in *R v Hendy*:

The question whether the belief was (proved not to have been) based on reasonable grounds is to be determined not by what a reasonable person would have believed but by what the accused person might reasonably have believed in all of the circumstances in which he [or she] found himself [or herself].¹⁰⁶

This common law formulation is no longer constrained by any legal requirement that the threat be ‘imminent’ or that the response to the threat be ‘proportionate’, though each of these will be considerations that bear upon the assessment of the existence and reasonableness of the belief.¹⁰⁷ Moreover, the common law permits the admission of evidence going to an abused woman’s full situational and psychological predicament as relevant to the resolution of each issue.¹⁰⁸ This acknowledges that her actions can only be judged with a full appreciation of the ‘extraordinary circumstances’ that she faced.¹⁰⁹

1 *Self-Defence and Law Reform in Queensland*

In Queensland, the defence of self-defence is contained in ss 271–2 of the *Criminal Code 1899* (Qld). Section 272 applies in circumstances where the accused has provoked the assault that they defend against and will be disregarded here. Section 271(2) applies where the defensive force used is ‘such as is likely, to cause death or grievous bodily harm.’¹¹⁰ It provides that

[i]f the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

Queensland is the last remaining jurisdiction in Australia to require an ‘assault’ as a precondition to the availability of self-defence. Whilst the existence of an ‘assault’ is a precondition of the defence, the Queensland Court of Appeal has held that it is an error to think that self-defence is

¹⁰⁶ (2008) 191 A Crim R 81, 87.

¹⁰⁷ *Zecevic* (n 104) 662; *Osland v The Queen* (1998) 197 CLR 316, 381–2 [172]–[173] (Kirby J).

¹⁰⁸ *Osland* (n 107) 337–8 [56]–[58] (Gaudron and Gummow JJ), 376–8 [167]–[169] (Kirby J).

¹⁰⁹ *Ibid* 375 [164] (Kirby J).

¹¹⁰ *Criminal Code 1899* (Qld) s 271(1).

‘available only in response to an immediate physical threat to the person’.¹¹¹ Instead, McPherson JA has ruled, with McMurdo P and Dutney J agreeing, that the question posed by s 272(2) is in substance the same as the common law, being whether ‘the particular accused believed on reasonable grounds that there was no other way to preserve himself [or herself] from death or grievous bodily harm than resorting to conduct giving rise to the charge’.¹¹² Consistent with the common law, evidence going to the situational and psychological predicament of an abused woman is relevant to answering the question of whether the belief was genuinely held, and as to whether there were reasonable grounds for the belief that it was necessary to do what she did.¹¹³ That the history of a domestic relationship is relevant to self-defence is reinforced, but not elaborated on, by *Evidence Act 1977* (Qld) s 132B(2), which provides that ‘[r]elevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding’.

Notwithstanding this, law reform in Queensland has proceeded on the basis that ‘it is extremely difficult, if not impossible, to apply the defence of self-defence to a woman who kills her sleeping abuser’.¹¹⁴ It has been convincingly argued that the requirement for a ‘precipitating assault’ continues to operate to exclude the experience of abused women who kill in non-confrontational circumstances,¹¹⁵ given the abuser must be found to have had the ‘actual[] or apparent[] present ability’ to carry out the threat.¹¹⁶ This can be understood as a claim that the law of self-defence in Queensland as set out in s 271 continues to exclude the lived experience of these women, a denial of equal consideration.

¹¹¹ *R v MacKenzie* (2000) 113 A Crim R 534, 547–8 (McPherson JA, McMurdo P and Dutney J agreeing). At common law an assault can be constituted by a threat of harm that is not immediate, provided the threat is continuing: see *Zanker v Vartzokas* (1988) 34 A Crim R 11, 16 (White J), though there it was found that there was a ‘present fear of relatively immediate imminent violence’.

¹¹² *MacKenzie* (n 111) 547 [46]–[47], quoting *Osland* (n 107) 378 [169] (Kirby J).

¹¹³ *MacKenzie* (n 111) 547–8 [47]–[48]. In relation to the mixed subjective/objective nature of the ‘reasonable grounds’ formulation, see also *R v Vidler* (2000) 110 A Crim R 77, 82 [26]; *R v Wilmot* (2006) 165 A Crim R 14, 16–17 [4]–[5], 25–6 [38]–[41].

¹¹⁴ Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation* (Report No 64, September 2008) 313 [15.94].

¹¹⁵ Michelle Edgely and Elena Marchetti, ‘Women Who Kill Their Abusers: How Queensland’s New Abusive Domestic Relationships Defence Continues to Ignore Reality’ (2011) 13(2) *Flinders Law Journal* 125, 137–8.

¹¹⁶ *Criminal Code 1899* (Qld) s 245.

In 2010, the law reform process resulted in the enactment of s 304B of the *Criminal Code 1899* (Qld),¹¹⁷ focused specifically on the circumstances of abused persons. The provision provides a partial defence to murder, reducing murder to manslaughter in circumstances where

- (a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; *and*
- (b) the person *believes that it is necessary* for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and
- (c) the person *has reasonable grounds for the belief* having regard to the abusive domestic relationship and all the circumstances of the case.¹¹⁸

Notably, assault is not a precondition of the defence, removing the legal barrier of imminence, though not its consideration as a matter of practicality.¹¹⁹ The equality problem is revealed by the conjunction of the three requirements articulated in the provision. The latter two — that the accused believed on reasonable grounds that it was necessary to do what s/he did — are relevantly identical to the common law formulation of self-defence. But, at common law, this provides a complete defence. Here it is a partial defence directed explicitly, by virtue of the first condition (a), to those who kill their abuser. Killing in these circumstances is not therefore justified, as it would be at common law or indeed under like interstate statutory formulations. Instead, it is only partially excused, resulting in a finding of manslaughter and the avoidance of a mandatory life sentence.¹²⁰

The specific direction contained in (c) for the fact finder to have 'regard to the abusive domestic relationship and all the circumstances of the case' whilst laudable, in so far as it clearly establishes a legislative intent to require the jury to engage with lived experience, does little more than restate the law developed by courts in the application of s 271(2) as discussed above. The real

¹¹⁷ Section 304B of the *Criminal Code 1899* (Qld) commenced on 16 February 2010. The law reform process is discussed in more detail in Edgely and Marchetti (n 115).

¹¹⁸ *Criminal Code 1899* (Qld) s 304B(1) (emphasis added).

¹¹⁹ Edgely and Marchetti rightly identify the absence of assault as the only substantive element that distinguishes s 304B from s 271(2): Edgely and Marchetti (n 115) 139–40.

¹²⁰ See Hopkins and Easteal (n 105) 136, noting that it appears that the introduction of the section was in effect a political compromise to avoid the consequences of a murder conviction and a mandatory life sentence. A mandatory sentence is itself a denial of equality, being a statutory prohibition on considering the individual circumstance of the offence and the offender as they bear upon the purposes of punishment.

equality issue is that this legislative direction applies to the partial defence only, suggesting that the complete defence of self-defence requires some lesser engagement with lived experience than is required under s 304B. Where an abused woman seeks an acquittal, rather than a verdict of manslaughter, the reform does nothing to ensure that the reasonableness of her actions are assessed by reference to all of the situational and psychological circumstances in which she finds herself. Nor, where acquittal is sought, does it remove the barrier of imminence which is an incident of the continued requirement of a precipitating assault, continuing to enshrine a one-off physical attack model of self-defence.

2 *Self-Defence and Law Reform in Victoria*

Victoria is an example of a jurisdiction that has gone further in promoting the realisation of equality of consideration. The test for self-defence, which previously mirrored the common law, has been amended to focus not on the existence of reasonable grounds for the belief, but on whether the 'conduct was a reasonable response in the circumstances as the person perceives them'.¹²¹ Under s 322M(1)(a) the threatened harm does not have to be immediate and under s 322M(1)(b) the response does not have to be proportionate to the use of force that one is responding to. This is more inclusionary than the law reforms in England and Wales, which permit disproportionate force to be used only in householder cases.

Further, ss 322J and 322M of the *Crimes Act 1958 (Vic)*¹²² direct attention to the reality of the experience of abused women. Section 322M provides as follows:

- (2) Without limiting the evidence that may be adduced, in circumstances where self defence in the context of family violence is in issue, *evidence of family violence* may be relevant in determining whether —
 - (a) a person has carried out conduct while believing it to be necessary in self defence; or
 - (b) the conduct is a reasonable response in the circumstances as a person perceives them.¹²³

¹²¹ *Crimes Act 1958 (Vic)* s 322K, inserted by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic)*, which commenced on 1 November 2014.

¹²² Inserted by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic)*, which commenced on 1 November 2014. This legislation is discussed further in the next section.

¹²³ Emphasis added.

Section 322J(1) sets out an inclusive definition of ‘evidence of family violence’, as follows:

- (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
- (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
- (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
- (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
- (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;
- (f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

The *Jury Directions Act*,¹²⁴ was also amended in 2014 to provide for directions to be given to the jury in criminal proceedings where self-defence or duress in the context of family violence is in issue. In such situations, the trial judge must give the jury preliminary directions on family violence (as defined in s 322J(2) of the *Crimes Act*)¹²⁵ if the defence requests such directions, ‘unless there are good reasons for not doing so’.¹²⁶ Furthermore, the trial judge must, if requested by the defence, direct the jury that family violence is not limited to physical abuse, and also discuss the nature of reactions to family violence.¹²⁷ These directions may assist juries in further understanding the reality of family violence, its relevance in determining whether a person believed

¹²⁴ *Jury Directions Act 2015* (Vic) re-enacts *Jury Directions Act 2013* (Vic) with amendments: see *Jury Directions Act 2015* (Vic) s 1(g); Greg Byrne, ‘Simplifying Homicide Laws for Complex Situations’ in Kate Fitz-Gibbon and Arie Freiberg (eds), *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, 2015) 144, 146.

¹²⁵ *Jury Directions Act 2015* (Vic) s 57.

¹²⁶ *Ibid* s 58(2). It has been suggested that the failure to make such directions mandatory in relevant cases represents a missed opportunity: Nicola Wake, “‘His Home Is His Castle. And Mine Is a Cage’: A New Partial Defence For Primary Victims Who Kill” (2015) 66 *Northern Ireland Legal Quarterly* 151, 163.

¹²⁷ *Jury Directions Act 2015* (Vic) s 60.

their conduct was necessary in self-defence and whether the conduct was a reasonable response to the circumstances as the person perceived them.

In combination, these reforms direct attention to the reality of the experience of abused women. Though the legal test of self-defence is the same for all accused persons, focus is given to what will need to be taken into account in the interests of achieving equality of consideration in circumstances of family violence. This does not by itself achieve equality of consideration, but it does further enable its realisation by in effect legislating a direction to give particular attention to the experience of those who kill their abuser. By itself, this is not enough. The legislative provisions can do no more than facilitate the admission of evidence to assist judge and jury to understand the lived experience of abused women who kill. Moreover, unless such evidence, including expert evidence, is admitted, there may be no foundation for the judicial directions designed to foster full consideration.¹²⁸ As we examine next, that evidence must be made available, and must be seen as a platform for imagining what it is really like to live in circumstances of ongoing family violence. This highlights the challenge to which we now turn: the barriers to understanding the experience of ‘others’.

IV RECOGNISING AND RESPONDING TO THE EXPERIENCE OF ‘OTHERS’: ABUSED WOMEN WHO KILL AND ‘INFORMED IMAGINING’

Even where there is a legislative direction to give particular attention to the lived experience of ‘others’, a problem of recognising and responding to difference remains. This prompts us to ask, why do ‘we’ have such trouble understanding the experience of ‘others’? To a large extent, the answer is contained in the question itself. The ‘we’ here is not the ‘other.’ Insofar as a legislator, judicial officer or juror is a member of one (or more) of these groups, they will share a common experience and not need to reach across an experiential divide to understand the other. They *are* the ‘other.’ However, such individuals are likely to be the minority. The challenge for most of us, therefore, is to understand the experience of others with whom we do not share a common ‘social category’.

¹²⁸ For a case-specific example and discussion of the relevance and impact of expert evidence relating to family violence and self-defence in a murder trial, see Charlotte King et al, ‘Did Defensive Homicide in Victoria Provide a Safety Net for Battered Women Who Kill? A Case Study Analysis’ (2016) 42 *Monash University Law Review* 138, 155–60.

As humans, we are socialised to see the world from a particular perspective and from the confines of social categories. The human mind cannot think without the aid of categories.¹²⁹ Categories are essential to survival and to linguistic and social engagement in the world. Indeed, '[t]he distinction between the inside and the outside ... which is absolutely fundamental to law' is itself a function of the categorical thinking inherent in our engagement with the physical and social world.¹³⁰ These categories extend not just to objects in the world but to categories of people. As Plous states, '[s]ocial categories form an indispensable part of human thought.'¹³¹ He cites research on gender recognition, which establishes that 'children typically form social categories within the first year of life' and are, for example, 'often able to discriminate between female and male faces by the age of 9 months, and sometimes as early as 5 months.'¹³² Returning to our siblings, Jane and Tom, this means that each will quickly learn to discriminate male from female. They will come to understand that they fit into one or the other category, and then begin a process of receiving social and cultural signals about what it means to be male or female. According to Barrett, '[t]he process begins at birth, ... infants are subjected to a barrage of cultural influences that are designed to make them think, act and feel like the adult member of the society.'¹³³

As explained by Easteal, this process then acts to obscure our efforts to understand the experience of others.¹³⁴ She uses a kaleidoscope metaphor to explain how our enculturation comes to filter the way we perceive reality: 'our perception is the outcome of our own individual experiences and knowledge which blends to produce "filters" or mirrors that create or reflect or distort a picture at the end of the kaleidoscope cylinder.'¹³⁵

The process is inexorable, subtle and complicated by the intersecting nature of our experience. This means that we come to see ourselves and others

¹²⁹ Gordon W Allport, *The Nature of Prejudice* (Addison-Wesley Publishing, 1954) 20.

¹³⁰ Davies (n 40) 14.

¹³¹ Plous (n 45) 7.

¹³² Ibid 25, citing Mary Driver Leinbach and Beverly I Fagot, 'Categorical Habituation to Male and Female Faces: Gender Schematic Processing in Infancy' (1993) 16 *Infant Behaviour and Development* 317.

¹³³ Richard A Barrett, *Culture and Conduct: An Excursion in Cultural Anthropology* (Wadsworth Publishing, 1984) 54, 64. See also Easteal, *Less than Equal* (n 26) 2.

¹³⁴ Easteal, *Less than Equal* (n 26) 1-3.

¹³⁵ Ibid 1-2.

in terms of intersecting social, racial, political, national, economic and sexual categories, to name just a few.

Regardless of the lenses we are looking through, the fundamental point, as Bartlett states, is that truth is both situated and partial: situated because ‘it emerges from particular involvements and relationships’, and partial because ‘individual perspectives that yield and judge truth are necessarily incomplete’.¹³⁶ In short, the way we perceive reality, and the reality of others, is a function of our limited experience.

It is not simply the lenses of our experience that undermine or distort our efforts to understand the experience of others. It is the fact that we are often not aware that we are looking through ‘kaleidoscopes in the first place’.¹³⁷ This means that we assume that the view through our lenses provides an image of the truth, rather than an image mediated by the lenses. Through a process of cultural amnesia, we forget that our ‘thoughts, behaviours and way of looking at the world were learned’, and learned in our particular context. We begin therefore to think in terms of natural and normal (our way) and unnatural and abnormal (others).¹³⁸

Bringing the focus back to equality, MacKinnon’s point — that ‘[t]hose who most need equal treatment will be the least similar, socially, to those whose situations set the standard against which one’s entitlement to be equally treated is measured’ — can also be understood in kaleidoscopic terms.¹³⁹ By and large, the lenses of legislators, judicial officers and legal practitioners (and jurors) are so different to those of abused women that their reality, as ‘other’ is all but obscured. And, significantly, while this obfuscation may work both ways, in the context of ‘according’ equal justice, it is the view of the criminal justice decision-maker that defines the legal terrain and determines the outcome. The distribution of power, and responsibility for its exercise, never leaves the frame.¹⁴⁰ To ‘accord’ implies there is an institution or person in a position to grant or withhold equality. This takes on emotive and practical content if we envisage the granter as, for example, a well-educated, male judge from a privileged background directing a jury on the application of the law of self-defence in the trial of an abused woman who has killed her violent partner.

¹³⁶ Bartlett (n 39) 880–1.

¹³⁷ Eastal, *Less than Equal* (n 26) 2. A similar point is made in relation to the invisibility of whiteness and the study of whiteness, see, eg, Davies (n 40) 310–16.

¹³⁸ Eastal, *Less than Equal* (n 26) 2.

¹³⁹ MacKinnon (n 24) 44 (citations omitted).

¹⁴⁰ *Ibid.*

But the challenge of understanding is not insurmountable. The experiential divide *can* be bridged. What follows is a general discussion of a standpoint for, and approaches to, engaging with the experience of others. Herein we develop the notion of ‘informed imagining’.

A Bridging the Divide: ‘Informed Imagining’

Reaching across the experiential divide in pursuit of equality requires us to understand the bounded nature of our own experience and actively seek to engage with the experience of others. It places an ethical obligation upon us to acknowledge the barriers to understanding and act positively to surmount them. Engaging with the experience of others starts with a realistic appreciation of the extent to which each of us — including, critically, legislators, judges, magistrates, legal practitioners and jurors — have been socialised to see the world from a situated and limited perspective that obscures the reality of others whose experiences we do not share.

Extending our perspective to engage with and understand the perspective of others requires a combination of information and imagination, conceptualised here as ‘informed imagining’. Bartlett’s description of this as a process of ‘stretching’ our imagination is apt because extending our perspective to engage with the experience of others requires conscious effort.¹⁴¹

Appealing once again to intuition, there is something powerful in asking the question, ‘How would I feel if this were done to me?’ This question is a reflection of what has been termed the ‘Golden Rule’;¹⁴² that is, the principle that *we should do unto others as we would have them do to us*. This is a principle of moral action based in reciprocity ‘found in some form in almost every ethical tradition.’¹⁴³ It requires us to imagine what it would be like to be in the shoes of others. The fact that asking such questions of ourselves has the capacity to shift our deeply held beliefs about others, facilitating an empathic engagement, has been established by psychological research.¹⁴⁴ Plous maintains, in the context of addressing prejudice, stereotyping and discrimination, that in order ‘[t]o become more empathic toward the targets of prejudice, all one needs to do is to consider questions such as *How would I feel in that*

¹⁴¹ Bartlett (n 39) 882.

¹⁴² Simon Blackburn, *Ethics: A Very Short Introduction* (Oxford University Press, 2001) 101.

¹⁴³ *Ibid.*

¹⁴⁴ Plous (n 45) 36.

situation?, How are they feeling right now?, or Why are they behaving that way?¹⁴⁵

Shifting from psychology to philosophy, we note the use of imagination as a device for achieving justice receives concrete and detailed formulation by Rawls in *A Theory of Justice*. The ‘original position’ therein described is a thought experiment, ‘a purely hypothetical situation characterised so as to lead to a certain conception of justice.’¹⁴⁶ The central idea is that principles of distributive justice are those chosen by equals from behind a veil of ignorance. Those behind the veil do not know their place in society, their ‘class position’, ‘social status’, ‘natural assets and abilities’ and so forth.¹⁴⁷ Thus, they must choose principles that will be fair, no matter what their place may in fact be. This necessarily requires them to imagine that they are one of the ‘least advantaged members of society’.¹⁴⁸

Okin strongly critiques Rawls’s failure to engage with gender, and with the family as a social institution to which principles of justice must be applied.¹⁴⁹ Nonetheless she recognises the radical potential inherent in the original position:

The significance of Rawls’s central, brilliant idea, the original position, is that it forces one to question and consider traditions, customs, and institutions from all points of view, and ensures that the principles of justice are acceptable to everyone, regardless of what position ‘he’ ends up in.¹⁵⁰

¹⁴⁵ Ibid (emphasis in original).

¹⁴⁶ John Rawls, *A Theory of Justice* (Belknap Press, 1971) 12.

¹⁴⁷ Ibid 12; see also at 137. However, Okin notes that ‘sex’ does not receive a mention in the ‘list of things unknown by a person in the original position’: Susan Moller Okin, ‘John Rawls: Justice as Fairness — For Whom?’ in John Perry and Michael Bratman (eds), *Introduction to Philosophy: Classical and Contemporary Readings* (Oxford University Press, 2nd ed, 1993) 680, 681.

¹⁴⁸ Rawls (n 146) 15. That this is required is evident from the principles that Rawls says will emerge. For example, ‘inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society’: 14–15.

¹⁴⁹ Okin (n 147) 680–6.

¹⁵⁰ Ibid 686. Cornell maintains that feminists ‘should find an ally in Rawls’: Cornell (n 40) 13. Drawing upon Rawls, she argues for an ‘imaginary domain’ as a place of ‘prior equivalent evaluation that must be imagined no matter what historical and anthropological researchers tell us is “true” about women’s nature’ and stating that ‘[t]he moral demand lies at the heart of the hypothetical situation of the imagination, and it is out of this hypothetical situation that a fair proceduralist conception of justice can be developed’: at 15–16.

However, the idea that we may enter a decontextualised ‘original position’ suggests, contrary to the enculturation thesis, that we can ‘transcend’ our perspective. As has been argued above, this cannot in fact be done, or at least not completely. The trap, which Okin suggests Rawls falls into, is that a male perspective, for example, may be claimed to constitute the decontextualised perspective.¹⁵¹ This limitation does not undermine the importance of imagining ourselves into the shoes of others in pursuit of justice, but it does require us to be reflective about the process. Further, acknowledging the limits of our ability to decontextualise ourselves highlights other problems with imagining, being the limits of our ability to recontextualise ourselves into the shoes of others. Again, this does not devalue imagination as a device for understanding the lived experience of others and thereby facilitating the realisation of equality. But it does require us to understand this as a real positional challenge.

The point here is that we cannot usefully imagine what it would be like to be in another’s shoes without information about their experience and the experience of the relevant group to which they belong. The effort to give ‘equal consideration’ is furthered by the feminist method of ‘consciousness raising’ or ‘making known the unknown’.¹⁵²

We are particularly concerned with *targeted* consciousness raising. At issue are strategies for making the unknown known for criminal justice decision-makers so they can engage with the reality of abused women who kill. Even with an enabling legislative foundation, this requires effort, information and imagination. It is an active process of engaging with *information* (or evidence) about a woman’s experience, the experience of abused women generally and the dynamics of family violence, and then *imagining* ‘what it must really be like to live in a situation of ongoing violence’.¹⁵³ It is only through ‘informed imagining’ that we can gain a full appreciation of the ‘extraordinary circumstances’ that that woman faced. And it is only from this position that the reasonableness or otherwise of her actions becomes intelligible.

¹⁵¹ Okin (n 147) 688.

¹⁵² Patricia A Cain, ‘Feminism and the Limits of Equality’ (1990) 24 *Georgia Law Review* 803. It is not suggested that consciousness-raising is not a strategy adopted by other emancipatory movements; undoubtedly, it must be. However, use of the term here is based on its well-recognised place in feminist thought.

¹⁵³ Rebecca Bradfield, Submission No 17 to Victorian Law Reform Commission, *Defences to Homicide* (13 December 2003), quoted in Victorian Law Reform Commission, *Defences to Homicide* (Final Report, 1 August 2004) 135 [4.18].

This challenge starts with an acknowledgement that ‘an abused woman’s experiences are generally outside the common understanding of the average judge and juror’.¹⁵⁴ This is not the man faced with a ‘one-off physical attack’ who claims he killed in self-defence. His actions can be readily understood — he is the norm, the person against whom other claims of reasonableness are measured. And so, the average judge and juror needs to learn what it is *really* like to live under the constant shadow of abuse. To understand why, for example, the woman could not ‘just leave’.¹⁵⁵ Thus, the promise of equal consideration, even if enabled by the substantive law, remains but a promise without a careful, evidence-based rendering of the abused woman’s real predicament.

This is where contextual and expert evidence comes to the fore. As discussed, the Victorian reforms contained in ss 322M and 322J of the *Crimes Act 1958* (Vic) go furthest towards facilitating this flow of information about the experience of abused women who kill. However, although the specific inclusion of a direction regarding ‘evidence of family violence’ itself has a consciousness-raising potential, the sections are largely facilitative: they merely provide an opportunity for ‘informed imagining’. The task of raising the consciousness of the jurors falls to defence lawyers (and judges). Unless they are conscious of the reality of family violence and how this may affect the presentation of their client and their capacity to tell their story, there is no prospect that the court will be informed of this reality.

V CONCLUSION: THE POTENTIAL OF EQUAL CONSIDERATION

We have argued that a foundation that enables the pursuit of equality before the law is the inherent equality and value of all human beings and the corresponding entitlement to equal respect, equal concern and equal consideration. We have focused on the last as representative of these various formulations, contending that a principle of equal consideration best enables answers to be given to equality questions because of its capacity to focus our attention on the need to take relevant differences into account, and engage with the different experiences of others. This requires us to acknowledge the limitations of our own socially constructed perspective and the barrier this

¹⁵⁴ *Malott v The Queen* [1988] 1 SCR 123, 144 [43] (L’Heureux-Dubé J). See also *Lavallee* (n 98) 871–2, 889; *Osland* (n 107) 337 [55] (Gaudron and Gummow JJ), 376–7 [167] (Kirby J).

¹⁵⁵ Hopkins and Easteal (n 105) 132.

presents to understanding the experiences of those who differ markedly from us.

Using self-defence as a case study, we have argued that the structure of the law and reforms in England/Wales and Queensland do not provide equal consideration for abused women. In England/Wales, this failure transpires most evidently due to reforms which allow disproportionate force to be used in burglary cases, but not in cases involving violent partners. In relation to Queensland, a similar trajectory can be seen: again reforms have focused upon producing a new partial defence as opposed to opening up self-defence to abused women. In contrast, we have argued that the legislature in Victoria has endeavoured to institute reforms that recognise and respond to the lived reality of women who kill their abusers.

We conclude that answering an equality question requires a close contextual focus on the lived experience of those who come before the law. Entailed in an entitlement to *equal consideration* is the necessity for those who have the capacity to promote equality before the law to actively work to 'stretch' their perspective to recognise and respond to others — a process that requires information, imagination and effort. Further, insofar as according equality is concerned, the more distant the decision-maker, be they legislator, judicial officer or juror, in terms of their own experience as compared to the experience of the 'other' under consideration, the greater the level of information, imagination and effort required. Though not discussed here, it is noted that there could be significant variations to the extent that individuals are psychologically capable of empathising with and understanding others, and thereby crossing the experiential divide. However, from whatever original dispositional point one begins with, it is suggested that recognising and responding to the different experience of others is a human capacity and one that can be actively promoted.

The upshot is that the pursuit of equality before the law is an unending task that requires us to repeatedly ask of ourselves, 'What would it be like to be in the shoes of others?', whilst acknowledging the limitation of our capacity to do so. But in doing this, we should notice that something exciting happens. Our perception sharpens and extends beyond the location of analysis. We become open to the broad and ongoing equality conversation. Bringing the iceberg metaphor to bear in the contexts considered in this article, the point can be explained as follows: when we engage with the lived experience of abused women who have killed their violent partners, the iceberg of male violence and domination of women is revealed, together with the resultant power differentials. Equality in the application of the law of self-defence is seen for what it is, part of a much larger goal of gender equality.