

# **BUTTERFLY POLITICS**



**CATHARINE A.  
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# *Butterfly Politics*



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*for the last woman I talked with  
and the next baby girl born*

## Butterfly Politics

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# Butterfly Politics

You don't see something until you have the right metaphor to let you perceive it.

—Robert Stenson Shaw

“The butterfly effect” was coined in 1972 by Konrad Lorenz in a talk titled “Does the flap of a butterfly’s wings in Brazil set off a tornado in Texas?”<sup>1</sup> It charmingly models (mathematically by many, not by me) how some extremely small simple actions, properly targeted, can come to have highly complex and large effects in certain contexts.<sup>2</sup> Yes: a butterfly opening and closing its wings in Brazil *can* ultimately produce a tornado in Texas, according to chaos theory’s understanding of complex causality in dynamic unstable systems.<sup>3</sup>

Butterfly politics means the right small human intervention in an unstable political system can sooner or later have large complex reverberations. As an organizing metaphor and central conceit for this volume, it coheres forty years of flights of activism that, through recursion in a collective context, have eventuated or are eventuating in storms, sometimes tornados, in gender relations through law.

Encompassing legal and political interventions from 1976 to 2016, this volume collects moments of attempts to change the inequality of women to men and reflections on those attempts. As advocacy, many of the pieces mark the first time a particular idea showed its face in public, an idea that has now become established or at least familiar. The work on substantive equality, torture, and rape as a genocidal weapon are examples.<sup>4</sup> Other pieces initiate or urge changes that are still in process or have yet to take place, for example in the legal approach to prostitution, despite considerable social movement and momentum.<sup>5</sup> This also characterizes the initiatives against pornography and rape, and for a constitutional equality amendment.<sup>6</sup> Many of the discursive moments captured here proved decisively initiatory,



such as the testimony on pornography in Minneapolis.<sup>7</sup> The reverberations set off are still gathering force. Others reflect on and cohere a series of such moments or consider their costs, attempting to grasp the dynamic processes at work.<sup>8</sup> The waves of some moments captured here, especially those involving academia—a sphere more resistant to change than society or law—still reverberate almost silently by most external measures.<sup>9</sup> Some of these talks are closer to pure protest and dissent.

Almost all of these writings were spoken first; the remaining few that were written first were dialogic in conception and written by ear.<sup>10</sup> In terms of their resonating effects, their music—harmonies, dissonances, rhythms—matters as much as their words. They retain the interactive dynamics of their audiences. If the approaches to law in this volume are in some sense deeply American, meaning they come from everywhere, in their travels they have been deeply imprinted by women everywhere, becoming collaborative with the audiences to which they were, in the moments captured here, given. Even the pieces in reflective mode were conceived as moving ripples on an ongoing tide, aiming—hopefully including through this present iteration—not to predict or describe but to alter their world. Some of the changes undertaken here remain in glacial near-stasis, even if tectonic shifts are gathering down deep. Some are in an ongoing process of being accomplished. Some can be considered essentially achieved in the sense of moving in the right direction. The project of every one is change.

I am regularly asked, often with a tone of incredulity, how I do what I do in law. Part of the puzzlement arises because it is apparently difficult to accept that some ideas, especially ideas that have become common currency, had an actual origin. The butterfly theory is a partial response. A butterfly politics highlights crucial dimensions of legal political activism, including the domain of action, strategic choice of moments of initiation, dynamics of intervention and blow-back and its anticipation, and the collaborative effects of collective recursion.

As to the nature of the domain, if any social system is complex and unstable, it is sex inequality. Complex, among other reasons, because of its simultaneous multiple interacting variables including race and class and sexuality and age. Intrinsically unstable, not least because it is predicated on the lie of women's natural inferiority to men and men's natural superiority to women, termed difference in ideological and legal and common parlance. Life, given half a chance, refutes it every day. The extraordinary tenacity of such a system for structuring and distributing power, including hierarchy of status—making it political—in the face of evidence and contestation of its false basis and some acknowledgment of its injustice has, when not taken for granted, frequently baffled analysts and frustrated activists. A major reason for its persistence is that dominant approaches to inequality have misdiagnosed the nature of the system, hence the necessary interventions to change it, including its structures, vectors, and trajectories, its flexible genius for indulgences and deprivations, including its rendering of the social status quo baseline as natural. By taking a different tack, some of the most substantial changes made in sex inequality through law—a number of which this book reflects and reflects upon—have occurred through unconventional and unprecedented approaches and arguments, usually with no institutional backing. A butterfly opening its wings can produce cyclones, or at least thunder claps, worldwide. The legal claim for sexual harassment,<sup>11</sup> with the substantive theory of equality embedded in it and growing out of it, exemplifies this dynamic in spades.

Butterfly politics is one way to understand how critical intervention can affect systemic transformation in the gender system. If the appropriateness of the metaphor is recognizable, its application to legal strategy for social change, specifically to a politics of action toward ending gender inequality through law, is new. Thinking about society and politics scientifically, producing the social sciences, is based on analogy to begin with, adapting to social life tools typically first developed in the physical sciences. Other scientific metaphors, such as evolution or path dependence,<sup>12</sup> have stimulated legal thinking

rather than being used as rigid templates.<sup>13</sup> These metaphors can also help focus overlooked variables. For instance, Paul Ormerod usefully pointed out in his *Butterfly Economics* adaptation of the butterfly theory that existing economic models, because they failed to take account of the influence of consumers on each other, made accurate economic prediction difficult.<sup>14</sup> Relationships matter. They matter and can be overlooked in politics as well, especially given that men and women are often found in relationship with one another. Indeed, change in the patterns of those relationships is the goal of some sex equality initiatives.

If any analysis from the physical sciences resonates with efforts to change sex inequality for those who have engaged in those efforts, rather than observed them from armchairs or towers as bystanders on the sidelines, it is one of orderly disorder in complex systems of nonlinear dynamics producing difficult-to-predict outcomes initiated from unexpected small locales. Chaos does not mean chaotic in the sense of lacking any coherence or pattern. “Chaos here does not mean disorder, but that accurate predictions about where a system is headed are hard.”<sup>15</sup> Complex patterns emerge in what initially appeared to be patternless. Chaos theory regards complexity and nonlinear causality’s difficulty of prediction not as a failure of analysis but as the analysis itself. “Chaos theory does not merely recognize complexity but embraces it as the norm.”<sup>16</sup> In physical science, some phenomena, classically weather patterns, have been more accurately captured as a result. Given that male dominance has historically been regarded as inevitable as weather, and that the weather has been changed by human societies more than male dominance has, there is a certain symmetry here.

Accurately identifying the substance of the system into which intervention is directed is obviously crucial. With weather patterns, it is environmental elements: air, water, temperature, motion, etc. In this respect, again by analogy, much work for sex equality has evidently failed. It has addressed some symptomatic outcomes but few causes. Conventional approaches usually do not face the key dynamic of sexism—hierarchy, specifically of men over women and other men—or its key site in my view, sexuality. Weather models would not work

if scientists ignored small consistent rises in global temperature because they did not like thinking about climate change. Legal strategies that prefer to contend with dynamics that are not what is driving things, on terrain that is not where it is principally driven, because that produces less opposition or is more pleasant, can do some things but cannot hope to alter them, especially when they are structurally entrenched. As Leo Tolstoy once put it, "I know that most men, including those at ease with problems of the greatest complexity, can seldom accept even the simplest and most obvious truth if it be such as would oblige them to admit the falsity of conclusions which they have delighted in explaining to colleagues, which they have proudly taught to others, and which they have woven, thread by thread, into the fabric of their lives."<sup>17</sup> The fact that the career success, often survival, of individual intellectuals, academics, and lawyers, with other possible agents of change is substantially predicated on pleasing power provides a powerful incentive to keep one's wings folded.

Chaos theory's central notion of sensitivity to initial conditions resonates strongly with anyone who has worked hands-on with law to produce social change. Often called "sensitive dependence," it means that for systems of nonlinear nonmechanical dynamics, even the smallest shift in conditions at the outset, such as the facts of particular cases, can eventuate in dramatic changes in results in the long term. "[S]mall differences in initial variables will always produce dramatic variations in final outcomes."<sup>18</sup> As not linear and not mechanical, the common law can be a promising sphere of application for this model of complex recursion because of its rule of precedent. A single breakthrough iterated through many variations can open a complex flood tide in a distinctive direction, even as the precedential system resists an initial breakthrough for which there is no precedent. For agents of social change, acting consciously, knowing that extremely small initial conditions can be amplified exponentially over time through systemic recursion to radically shift the way a system behaves, presents the risk, the caution, and the hope.

The critical role of setting things up right from the beginning can be considered throughout the interventions that this book gathers.

One example is creating sexual harassment as a legal claim for sex discrimination. Making clear it is sexual and that means it is gender-based, because that actually is what the behavior is, rather than something else (say, biological) that the legal system might have more easily digested, means that recursion will be stimulated in the domain the problem actually inhabits. Over legal and political ups and downs, the basic paradigm of sexual harassment has held, changing society and politics.<sup>19</sup> Largely the right outcome will repeat, and it will extend, for example, to gay and lesbian and transgender rights,<sup>20</sup> in which students have participated in the butterfly effect, because the wing flap selected the accurate domain. Essential for accessing this dynamic is addressing in law what the problem actually is in reality. This is one reason abstractions do not work: there is no air under them. The definition of rape internationally predicated on coercion, with consent so irrelevant as not to require mention, has survived repeated attempts to replace it and has expanded its reach.<sup>21</sup> The development of the concept “gender crime” on the international stage, where it is now accepted,<sup>22</sup> further illustrates.

The specific tolerance built into nonlinear processes promotes course correction. “Simply put, a linear process, given a slight nudge, tends to remain slightly off track. A nonlinear process, given the same nudge, tends to return to its starting point.”<sup>23</sup> Constitutional equality in Canada provides an example.<sup>24</sup> Originally accepting the substantive equality theory of hierarchy in historic disadvantage, the Supreme Court of Canada lost its way for a couple of decades, using the old equality model under the name of the new one, but proved capable of course correction, returning to the original breakthrough.<sup>25</sup> Remaining slightly off track is a charitable description of most attempts to change equality law and rape law in the United States. Engaging legal systems with linear strategies that participate in existing power dynamics and concede existing power structures reiterates them, proceeding even more determinately to paint us into a corner. The tendency of legal systems to reinscribe existing structures of power when confronted with challenges that do not actually face their problems could hardly be described more aptly. By contrast, a nudge that en-

gages nonlinear process consciously, correctly begun, can be part of changing it. Any time can be a new beginning.

The theory that emerges from complex causality in the unstable, complex nonlinear nonmechanical system that is the law and politics of gender inequality is thus neither simply deterministic, as much legal realism would have it, nor cynically despairing, as critical legal theory could lead one to believe. By comparison, traditional theories, realism old or new, public choice theory, or pluralism for instance, tend to be reductionist, linear, unreflective of social complexity (which does not happen in a test tube and cannot be captured even in a multiple regression), and unadapted to the substantive realities of male dominance. Bemoaning unintended consequences, for example, reveals an unrealistic, mechanistic, and linear illusion about the nature of social life, legal change, and political activism.

By capturing practice in motion, as it is being engaged in, this collection, in light of its organizing concept, opens onto complicated perceptions and deep understandings in the moment of their unfolding. It may begin to explain how some changes can be ongoing, ready to erupt given sufficient momentum, as with the issue of pornography, even when the inequality it challenges has blocked their authoritative establishment. It exposes patterns where none were visible and may help reveal why certain arguments are persuasive, certain strategies worked, and some changes have seemingly come out of nowhere to suddenly be everywhere, for instance the Swedish model on prostitution, which decriminalizes people sold in prostitution and criminalizes sellers and, most distinctively, buyers.<sup>26</sup> The butterfly metaphor is not intended to apply to everything with complicated, seemingly inscrutable or illogical dynamics, or to be limited to sex inequality exclusively. It is offered as a useful image here, perhaps a heuristic elsewhere, beginning in other settings of inequality.

Butterfly politics, above all, is not an individual dynamic. The preconditions and subsequent pickups and recursions that produce the tornado, if one eventuates, are collective. Many of the pieces in this collection represent initial perturbations, unsettling the waters in what appeared to be an isolated local setting, such as the original proposal

of the civil rights ordinance against pornography.<sup>27</sup> Some reflect later effects and subsequent attempts to amplify them. Some analyze change that has occurred in which prior interventions participated. Some are part of ongoing changes or propose changes that have yet to be realized.<sup>28</sup> Discursive moments in time are collected in which legal, social, and political change are urged or contemplated. Many more such moments occurred behind the scenes confidentially, even as some pieces in this volume discuss some of them through their public emergence.

The butterfly metaphor can animate political activism and support equality advocacy: small actions in a collective context can produce systemic changes. Butterfly politics encourages multidimensional political thinking, precise engagement, principled creativity, imagination, instinct, and adaptability. It inspires interventions, even tiny ones. It opens discussion and debate on strategy and substance as part of a disciplined process of transformation toward equality of the sexes. It envisions and joins hands with old and new forms of organizing. Equality seekers, spread your wings. You're stronger than you think. You never know what can happen.

# I. Change

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