Dissenting Voices in American Society: The Role of Judges, Lawyers, and Citizens explores the status of dissent in our institutions and culture. It brings together under the lens of critical examination dissenting voices that are usually treated separately: the protester, the academic critic, the intellectual, and the dissenting judge. It examines the forms of dissent that institutions make possible and those that are discouraged or domesticated.

This book also describes the kinds of stories that dissenting voices try to tell and the narrative tropes on which those stories depend. In what voices and tones do dissenting voices speak? What worlds does dissent try to imagine, and what in the end is the value of dissent? Where does dissent speak out actually speaking? Where do dissenting voices most often go unheard or unrecognized? Do we find dissent wherever we find discontent? Wherever we find expression?

This book is the product of an integrated series of symposia at the University of Alabama School of Law. These symposia bring leading scholars into colloquy with faculty at the law school on subjects at the cutting edge of interdisciplinary inquiry in law.

Austin Sarat is William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst College and Justice Hugo L. Black Senior Scholar at the University of Alabama School of Law. He is author or editor of more than seventy books, including The Road to Abolition? The Future of Capital Punishment in the United States; The Killing State: Capital Punishment in Law, Politics, and Culture; When the State Kills: Capital Punishment and the American Condition; The Cultural Lives of Capital Punishment: Comparative Perspectives, Law, Violence; Possibility of Justice, Pain, Death, and the Law; Mercy on Trial: What It Means to Stop an Execution; When Law Fails: Making Sense of Miscarriages of Justice; and the two-volume Capital Punishment. Sarat is editor of the journals Law, Culture and the Humanities and Studies in Law, Politics and Society. He is currently writing a book titled Hollywood’s Law: Film, Fatherhood, and the Legal Imagination. His book When Government Breaks the Law: Prosecuting the Bush Administration was recognized as one of the best books of 2010 by the Huffington Post. In May 2008, Providence College awarded Sarat with an honorary degree in recognition of his pioneering work in the development of legal study in the liberal arts and his distinguished scholarship on capital punishment in the United States.
Dissenting Voices in American Society

THE ROLE OF JUDGES, LAWYERS, AND CITIZENS

Edited by

Austin Sarat
Amherst College
To Ben, my sweet prince
## Contents

### Contributors

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ix</td>
</tr>
</tbody>
</table>

### Acknowledgments

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>xi</td>
</tr>
</tbody>
</table>

### Dissent and the American Story: An Introduction

*Austin Sarat*

1

### The Ethics of an Alternative: Counterfactuals and the Tone of Dissent

*Ravit Reichman*

19

Comment on Chapter 1: The Role of Counterfactual Imagination in the Legal System: Misplaced Judgment or Inevitable Dissent?

*Suzette M. Malveaux*

42

### American Animus: Dissent and Disapproval in Bowers v. Hardwick, Romer v. Evans, and Lawrence v. Texas

*Susanna Lee*

56

Comment on Chapter 2: Animus-Supported Argument versus Animus-Supported Standing

*Heather Elliott*

92

### Dissent and Authenticity in the History of American Racial Politics

*Kenneth W. Mack*

105

vii
## Contents

Comment on Chapter 3: Dissenters as Dissidents: Charles Hamilton Houston and Loren Miller  
*Tony A. Freyer*  
144

4 The Legal Academy and the Temptations of Power: The Difficulty of Dissent  
*Richard H. Pildes*  
Comment on Chapter 4: Why Dissent Isn’t Free: A Commentary on Pildes’s “The Legal Academy and the Temptations of Power”  
*Bryan K. Fair*  
182

5 Why Societies Don’t Need Dissent (as Such)  
*Mark Tushnet*  
Comment on Chapter 5: Questioning the Value of Dissent and Free Speech More Generally: American Skepticism of Government and the Protection of Low-Value Speech  
*Ronald J. Krotoszynski Jr.*  
209

Index  
231
Contributors

Heather Elliott is Associate Professor at the University of Alabama School of Law.

Bryan K. Fair is Thomas E. Skinner Professor at the University of Alabama School of Law.

Tony A. Freyer is University Research Professor of History and Law at the University of Alabama.

Ronald J. Krotoszynski Jr. is John S. Stone Chairholder of Law and Director of Faculty Research at the University of Alabama School of Law.

Susanna Lee is Associate Professor of French at Georgetown University.

Kenneth W. Mack is Professor of Law at Harvard Law School.

Suzette M. Malveaux is Associate Professor of Law at the Columbus School of Law at the Catholic University of America.

Richard H. Pildes is Sudler Family Professor of Constitutional Law at New York University School of Law.

Ravit Reichman is Associate Professor of English at Brown University.
Contributors

**Austin Sarat** is William Nelson Cromwell Professor of Jurisprudence and Political Science Director at Amherst College, and Justice Hugo L. Black Visiting Senior Scholar at the University of Alabama School of Law.

**Mark Tushnet** is William Nelson Cromwell Professor at Harvard Law School.
Acknowledgments

This volume is the product of a symposium held at the University of Alabama School of Law on April 8, 2011. I thank the colleagues, students, and staff who helped make that such a successful event. I am grateful for the financial support of the University of Alabama Law School Foundation. A special word of thanks to Dean Ken Randall for his unstinting support, for sharing the vision of legal scholarship reflected in these pages, and for making me feel so at home at the law school.