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A NEWSLETTER ABOUT LAW AND DIVERSITY

Marriage by Any Other Name

by Phyllis Raybin Emert

On October 25, 2006, the New Jersey Supreme Court ruled that same-sex couples have a right to the same privileges and benefits of marriage that opposite-sex couples have, but disagreed over the use of the word marriage. Seven same-sex couples, each in a committed relationship of more than 10 years, had challenged the constitutionality of New Jersey's marriage laws in June 2002 after being denied marriage licenses.

With a 4-3 majority vote in *Lewis v. Harris*, the Court decided that the legislature would have 180 days to either expand the current marriage law to include homosexual couples, or come up with a new law and a new term such as civil unions, to provide equal financial and legal benefits.

In his **majority opinion**, Justice Barry T. Albin wrote, "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution... and violates the equal protection guarantee of Article 1, Paragraph 1... The name to be given to the statutory scheme that provides full rights and benefits to same-sex couples, whether marriage or some other term, is a matter left to the democratic process."

The New Jersey Legislature would eventually decide to use the term civil union.

Domestic partnerships

The New Jersey Legislature attempted to remedy the gap between the rights of married couples and same-sex couples in 2004 with the Domestic Partnership Act. The Act made certain rights and benefits of married couples available to same-sex couples (and opposite-sex couples age 62 and older). Covered by the Act were tax benefits, visitation rights, health and pension benefits, funeral arrangements, guardianship and inheritance rights. Other rights and benefits, however, were still *>continued on page 2*

Black History — Not Just for February Anymore

by Barbara Sheehan

You can't change history. But you can change the way it's taught. That has been the subject of some debate in New Jersey and in other states as some push to revamp the way African-American history is presented in our schools.

The issue came to the forefront in New Jersey about five years ago when the legislature passed a law, mandating that New Jersey schools integrate African-American history into the K-12 curriculum rather than concentrate it into February's Black History Month. The law, sponsored by Newark Assemblyman William D. Payne, is known as Amistad Legislation. The legislation was named after a group of enslaved Africans who reportedly overthrew the crew of the "Amistad" cargo ship that was transporting them in 1839. Later the Africans would win their freedom in a hearing before the U.S. Supreme Court.

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denied to same-sex couples including survivor benefits and back wages owed to a deceased spouse. In addition, an employer was not required to provide health insurance coverage for a domestic partner.

Justice Albin addressed domestic partnerships in his majority opinion. "Even though they are provided fewer benefits and rights," he wrote, "same-sex couples are subject to more stringent requirements to enter into a domestic partnership than opposite-sex couples entering into marriage."

Albin also noted that domestic partners must share a home and prove there are joint financial arrangements or joint ownership of property. He declared, "the economic and financial inequities that are borne by same-sex domestic partners are borne by their children too... those children are disadvantaged in a way that children in married households are not."

In New Jersey there are more than 16,000 same-sex couples in committed relationships, many with children. Albin wrote, "There is something distinctly unfair about the State recognizing the right of same-sex couples to raise natural and adopted children and placing foster children with those couples, and yet denying those children the financial and social benefits and privileges available to children in heterosexual households."

The dissenting opinion

Former Chief Justice Deborah Poritz wrote the **dissenting opinion** in *Lewis v. Harris*, which was the last opinion she authored before retiring from the Court. The former chief justice was

joined in her dissent by Justices Virginia Long and James R. Zazzali. Former Chief

Justice Poritz agreed with the majority in giving same-sex couples the same rights and benefits of opposite-sex couples, however she is in favor of calling it marriage.

"I can find no principled basis... on which to distinguish those rights and benefits from the right to the title of marriage..." former Chief

Justice Poritz wrote. "Under the majority opinion, it appears that

persons who exercise their individual liberty interest to choose same-sex partners can be denied the fundamental right to participate in a state-sanctioned civil marriage."

In effect, the former chief justice stated that members of the gay community now have equal rights and benefits, except to the right to marriage and that's a violation of their **due process rights**.

"They have asked simply to be married," former Chief Justice Poritz declared in her dissent and explained that marriage is a personal commitment to another person that carries respect and symbolic significance in our society today.

"We must not underestimate the power of language. Labels set people apart as surely as physical separation on a bus or in school facilities. Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law." The former chief justice added, "By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant



as 'real' marriage, and that such lesser relationships cannot have the name of marriage."

The arguments

While for thousands of years, the institution of marriage has been a fundamental right between one man and one woman, Justice Albin noted in his opinion that marriage has changed over the years. For example, in the past a married woman had no separate legal identity from that of her husband. If a woman had money or property, the husband would take control of it after marriage. The Married Women's

Property Act of 1852 changed that, giving women the right to own property and enter into contracts.



Justice Albin wrote. "The Legislature has played a major role, along with the courts, in ushering marriage into the modern era."

Tradition is important but, as former Chief Justice Poritz noted in her dissent, same-sex couples cannot marry because there is no history or tradition of them marrying. The reasoning is circular or indirect. In other words, they can't marry, because traditionally and by definition they can't marry.

Former Chief Justice Poritz declared, "Had the U.S. Supreme Court followed the traditions of the people of Virginia [in 1967] the Court would have **sustained** the law that barred marriage between members of racial minorities and caucasians. The Court nevertheless found that... an interracial couple, could not be deprived of 'the freedom to marry [that] has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men'... the *>continued on page 7*

Gay Marriage Across the Nation and Around the World

A Quinnipiac University Poll of New Jersey voters, conducted from October 30 through November 5, 2006 found that 56 percent of respondents said they believed gay couples should have the same rights as married couples. They preferred civil unions 51 to 28 percent with 21 percent undecided, and opposed same-sex marriages 50 percent to 41 percent with nine percent undecided.

In other parts of the country, 11 states placed measures on their ballots for the November elections of 2004 that would ban same-sex marriages. All 11 states voted in favor of the ban. The closest race was in Oregon where 57 percent of the voters approved the ban. The margins were greater in Arkansas, Georgia, Kentucky, Michigan, Montana, North Dakota, Oklahoma, Ohio and Utah. Mississippi had the greatest margin with 86 percent of voters approving the ban. While the amendments in Mississippi, Montana and Oregon forbid same-sex marriage only, the other eight states also banned civil unions.

In November 2006, eight states had measures on their ballots to amend their state constitutions to recognize marriage as only between a man and a woman. For the first time, a state rejected the ban. Arizona defeated the proposed amendment by 51 percent of the vote to 49 percent. Arizona, however, already had an existing law against same-sex marriage. The other seven states including, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin, passed amendments that would add language to their state constitutions defining marriage as between a man and a woman only. In some states the margins by which these amendments passed are noticeably smaller than those in 2004. The amendment passed with 56 percent of the vote in Colorado, 52 percent in South Dakota, 57 percent in Virginia, and 59 percent in Wisconsin.

While this is the outlook for same-sex marriage nationally, internationally there are five countries around the world (Belgium, Canada, the Netherlands, Spain and South Africa) that allow same-sex couples to marry. In November 2006, Mexico City's Assembly voted to legally recognize same-sex civil unions with benefits equal to those of opposite-sex couples. In addition, Israel's Supreme Court ruled that the government must recognize same-sex marriages performed outside the country.

—Phyllis Raybin Emert

Why a law?

In a *USA Today* article, Assemblyman Payne recalled an experience he had as a kindergartner in the 1940s hearing *The Story of Little Black Sambo*. First published in 1899, the story tells the tale of a young boy, depicted in colorful illustrations with dark skin and red lips, who gets the better of a group of clothes-stealing tigers. The book has generated controversy over the years mostly because of the word “Sambo,” which can be a racial slur, and the illustrations, which some people believe reinforce unflattering stereotypes of African-Americans.

“You grow up with these subliminal messages that everything good is white,” Assemblyman Payne told *USA Today*. “It is so hurtful that these things were sanctioned by the Board of Education.”

Assemblyman Payne believes that distorted images of African-Americans and their contributions to our country remain today and was chief among the reasons he originally proposed the Amistad bill. Now a law, his legislation aims to change that by broadening the content of African-American history discussed in the classroom.

For example, in addition to covering slavery, the civil rights movement, and other subjects that have historically been the focus of African-American history units, school curriculums will now also offer more insight into the positive accomplishments of famous black scientists, military leaders, and other figures who, some complain, have been left out of many history lessons in the past.

With the Amistad Legislation, there will be “an experience of learning the truth early on,” Assemblyman Payne told *DiversityInc Magazine*. “This will work to eliminate built-in prejudice in the workforce. There will be more harmony because people will know this [United States] belongs to all of us.”

What other states are doing

Since the passage of the New Jersey law in 2002, the first of its kind in the nation, other states have

signed on to similar reforms. According to *USA Today*, New York and Illinois have passed laws similar to New Jersey’s and “several others are either considering them or have passed statutes that encourage, but do not require, teachers to address black history.”

In 2005, Philadelphia became the first major U.S. city to require that all the city’s high school students take a year-long class in African-American history as a condition for graduation.

Are reforms really needed?

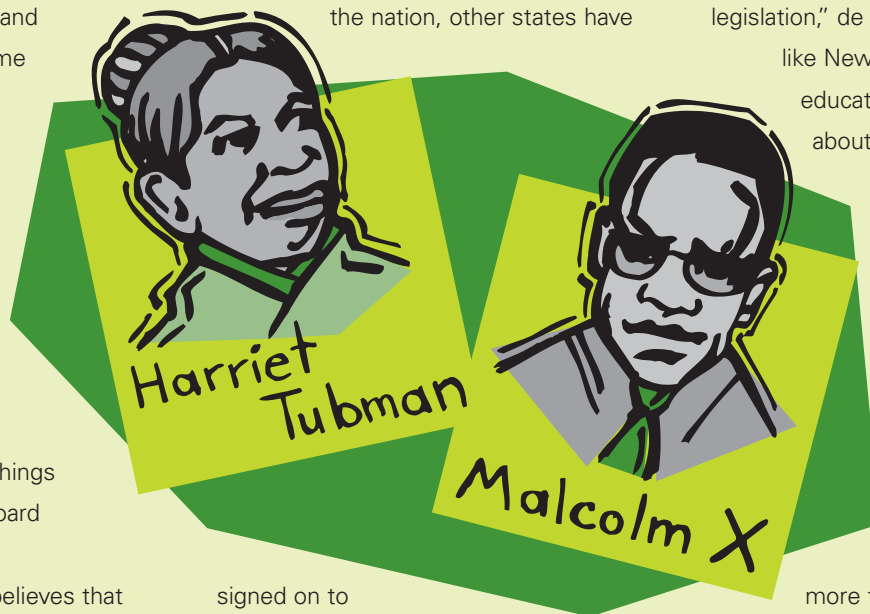
While some have cheered these changes, others, like Candace de Russy, have openly challenged them.

For starters, de Russy, a trustee of the State University of New York and a writer on academic issues, disagrees that African-American history has not gotten proper coverage in U.S. textbooks and school curriculums. And she firmly supports the notion that scholarly interpretation of history should be left to professional historians.

“It seems to me that these kinds of laws are going to open the door to endless group-advocacy oriented legislation,” de Russy says of reforms like New Jersey’s. “We can’t have education by group opinion about history... It will make educational policy even more politically charged than it already is.” While recognizing the need for minority groups in the United States to learn about their heritage, de Russy says she believes there should be more focus on “what unites us, not what divides us.”

Schools, she believes, should concentrate more on the basic American narrative and fundamentals like the Constitution, the Declaration of Independence, rule by law and fundamental democratic principles — concepts and basic historical facts that in de Russy’s opinion are not adequately grasped by young people today.

Speaker of the Pennsylvania House of Representatives John M. Perzel raised a similar concern when Philadelphia passed its African-American history course mandate. According to *The New York Times*, Perzel said he was concerned the mandate “will divide, rather than unite” the city and “thereby erode the positive learning environment.”



Where's the beef?

While there has been talk on both sides of the debate on the pros and cons of the Amistad Legislation, few could argue that the hands-on changes in New Jersey classrooms have been slow in coming. *USA Today* reported that some educators in New Jersey don't even know the law exists.

"A law that isn't enforced is like no law at all," Jerome Carr, a parent in the Montgomery Township School District, told *USA Today*. Carr reportedly pleaded with school officials in his district to comply with the Amistad legislation, but was ignored.

In an effort to address some of these concerns bills are pending in the New Jersey Legislature that, among other things, would strengthen the New Jersey statute by requiring that all new teachers obtain black history training and require students to pass a social studies exam before graduation. In addition, the bills, which are also sponsored by Assemblyman Payne, would increase the number of legislators on the Amistad Commission. The Commission was established to help implement the Amistad Legislation, and the bill would increase the commission's powers. As defined in the original legislation, the Amistad Commission includes on its membership the Secretary of State, the Commissioner of Education, the Chair of the Executive Board of the President's Council, and 16 public members.

Acknowledging that the members of the Commission have their "work cut out for them," Dr. Karen Jackson-Weaver, executive director of the Amistad Commission, said they are making progress and that by the end of this year the Commission will have had a chance

to visit every county in the state and look at its lesson plans.

Jackson-Weaver further asserts that New Jersey's Commission is unique in that it has representation from scholars, historians and educators as well as community members. She said they are making a very conscious effort to make sure that what they're doing represents what the teachers need.

State updates social studies standard

In October 2004, the New Jersey Department of Education, which among other things issues the state's Core Curriculum Content Standards, adopted

an updated Social Studies standard that reflects input provided by the Amistad Commission and a number of other ethnic heritage groups.

John Dougherty, a coordinator of Social Studies for the New Jersey Department of Education, explained that the Core Curriculum Content Standards outline all the things that students are expected to know, especially at the end of grades 4, 8 and 12. Dougherty further noted that the new Social Studies standard aims to blend important concepts from black history into American history and now provides more specifics in these areas. *>continued on page 8*

Complement Your Black History Lesson Plans with a Video

To comply with the current legislation, a video may be just the thing to complement a lesson plan on Black History. The New Jersey State Bar Foundation's Video Loan Library stocks more than 250 videos on a variety of law-related topics including the following titles that target African-American studies and civil rights.

"Race-The Power of an Illusion" — This three-part program questions the idea of race as biology. The first episode, *The Difference Between Us*, uses contemporary science to examine the assumption that humans can be categorized into different groups according to physical traits. The *Story We Tell*, the second episode, uncovers the roots of the race concept in North America and episode three, *The House We Live In*, explores how race resides in politics, economics and culture. (Each episode is approximately 56 minutes)

"Scottsboro: An American Tragedy" — This Oscar-nominated documentary recounts the 1931 Alabama case of nine black teenagers who were falsely accused of rape by two white women. The trial would yield two momentous Supreme Court decisions. (90 minutes)

"Blacks and the Constitution" — Hosted by NBC News correspondent Norma Quarles, this 60-minute program discusses the impact the Constitution has had on black Americans and the integral part the Supreme Court plays in pursuing the safeguards provided by the Constitution.

"Murder in Mississippi" — This program retraces the murders of three young men by the Ku Klux Klan, which shocked the nation and changed the course of the civil rights movement. The program recounts the events leading to the murders, explores the volatile atmosphere following the discovery of the bodies and the long process involved in seeking justice in a place where segregation was part of the state Constitution. (52 minutes)

For information on how to obtain videos or for a complete list of available videos visit our Web site at www.njsbf.org.

Does the Right to Free Speech Protect Intolerance?

by Dale Frost Stillman

The First Amendment to the U.S. Constitution guarantees the right to free speech for everyone. Does that give someone the right to be intolerant of others?

Two Georgia Institute of Technology students think that it does and sued the university over its tolerance policy, claiming it infringes on their right to express their own religious beliefs. The students sued in federal court for the right to speak freely against **homosexuality**.

Georgia Tech's community guide, also known as *Technically Speaking*, lists acts of intolerance that the university considers unacceptable. This includes putting down others because of their sexual orientation. According to the lawsuit, violation of the community guide results in "disciplinary action, ranging from warnings to dismissal from the Institute."

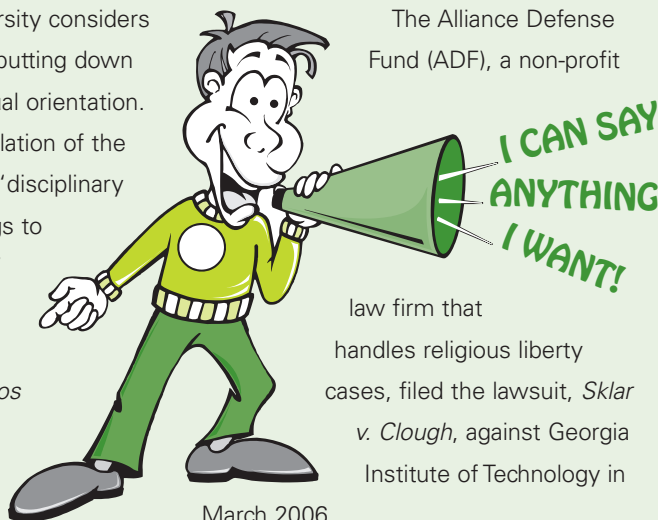
One of the plaintiffs in the case, Ruth Malhotra, a Southern Baptist, told *The Los Angeles Times* that her faith "compels her to speak out against homosexuality."

While Malhotra graduated in May 2006, she still attends Georgia Tech as a graduate student. Orit Sklar, co-plaintiff in the case, is a Jewish student at Georgia Tech.

This lawsuit is not the first time Malhotra has openly expressed her views. *The Los Angeles Times* reported that she protested a campus production of "The Vagina Monologues" with an anti-feminism display and also sent a letter on behalf of the Georgia Tech College Republicans to gay activists on campus referring to the gay rights group Pride Alliance as a "sex club... that can't even manage to be tasteful."

The students alleged in their lawsuit that their First Amendment rights to freedom of speech and expression and Fourteenth Amendment right to due process of law were violated because of Georgia Tech's speech code. Malhotra and Sklar consider Georgia Tech's community guide a speech code, while the university considers it an anti-harassment policy. In addition, the plaintiffs alleged violation of their First Amendment right to freedom of expression and freedom of association based on Georgia Tech's conduct and funding policies.

The Alliance Defense Fund (ADF), a non-profit



law firm that handles religious liberty cases, filed the lawsuit, *Sklar v. Clough*, against Georgia Institute of Technology in March 2006.

In a statement, David French, ADF senior legal counsel, who represented the students, said, "The university has indicated with these policies that people who have the 'acceptable' viewpoint should have more rights to speak than those with the 'unacceptable' viewpoint, which is fundamentally contrary to the First Amendment."

Decision on speech codes

David Hudson, a research attorney for the First Amendment Center at Vanderbilt University, a **nonpartisan** organization that studies free-expression issues, including freedom of speech, of the press and of religion, has written about speech

codes on college campuses. According to his essay, *Hate Speech and Campus Speech Codes*, public colleges and universities instituted speech codes to regulate hate speech. Hudson points out in his essay that the courts have always held that any statute which punishes speech exclusively on the grounds that it is offensive, is judged to be overbroad and unconstitutional.

"We have to come to grips that there is inherent tension sometimes between the equality principals of the 14th Amendment and the liberty principals of the First Amendment, and somehow we have to find a way to protect both," Hudson told *Southern Voice*, a Georgia newspaper. "You don't want harassment, but you don't want to silence viewpoints either."

In August 2006, a federal judge ordered Georgia Tech to revise its community guide, removing wording that prohibits students from any attempt to "injure, harm or malign a person because of race, religious belief, color, sexual orientation, national origin, disability, age or gender." The order also includes a provision that "prohibits the university from changing its new student speech policy without court approval for the next five years."

French hailed the order as a "tremendous victory for free speech." He said in a press statement, "The First Amendment applies to all students on campus, including religious students and students who hold conservative political beliefs."

While ADF claimed victory, Georgia Tech spokesman David Terraso pointed out that the changes in the policy do not affect the Institute's overall student code of conduct.

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fundamental right to marry no more can be limited to same-race couples than it can be limited to those who choose a committed relationship with persons of the opposite sex. By imposing that limitation on same-sex couples, the majority denies them access to one of our most cherished institutions simply because they are homosexuals.”

The former chief justice is referring to the 1967 case of *Loving v. Virginia*. That case involved an interracial couple, Richard Loving and Mildred Jeter, who were married in 1958 in Washington D.C. When they returned to their rural home in Caroline County, Virginia, they were arrested, prosecuted and sentenced to a year in jail. Caroline County Circuit Court Judge Leon Bazile suspended the sentence, but ordered them to leave the state for 25 years. In his ruling, Judge Bazile declared, “Almighty God created the races, white, black, yellow, Malay and red, and placed them on separate continents, and but for the interference with His arrangement there would be no cause for such marriages. The fact that He separated the races shows that He did not intend the races to mix.”

It would take nine years, but the U.S. Supreme Court’s decision in *Loving v. Virginia* put an end to the ban on interracial marriage in 15 states.

The former chief justice explained in her dissent that experience has taught “laws once thought necessary and proper in fact serve only to oppress.” The traditional argument that was once used for slavery, segregation, and limitation to the right to vote, for example, has no place in society today. The former chief justice questioned whether same-sex couples can be completely equal to opposite-sex couples with regard to rights and benefits, but still unequal when it comes to using the term marriage.

“Our role is to stand as a bulwark of a constitution that limits the power of government to oppress minorities...” former Chief Justice Poritz wrote. “I would extend the Court’s mandate to require that same-sex couples have access to the ‘status’ of marriage and all that the status of marriage entails,” she concluded.

A flawed law?

The law establishing civil unions in New Jersey went into effect on February 19, 2007. According to New Jersey Department of Health and Senior Services statistics, as of April 2007, 575 couples had applied to form civil unions. Steven Goldstein, chair of Garden State Equality, a gay-rights organization, explained to *The Star-Ledger* that the low number of applications is due to the law being flawed.

“This law is a civil rights outrage,” Goldstein told *The Star-Ledger*. “If this law were a person, it would be in jail.”

Most of the problems with the law so far have been because of health insurance, with issues of filing taxes close behind. A Human Rights Campaign Foundation study reported that more than half of the companies on the Fortune 500 offered benefits to domestic partners. Some companies, however, are using federal laws as a means of denying coverage to same-sex couples.

According to an article in *The Star-Ledger*, New Jersey’s Department of Banking and Insurance advised employers and unions that if coverage is provided to their employee’s spouses, then they must provide coverage to civil union partners. In its bulletin, however, the Department also stipulated that

New Jersey’s law “does not alter federal law, which only confers marriage rights and privileges to opposite-sex married couples.”

Confusion about the law remains even when a couple receives insurance coverage. *The New York Times* reported an incident of a woman whose insurance company told her she was likely going to be denied coverage for her mammogram. It seems when she added her partner to her policy, the insurance company changed her designation to male because there was no spot on the forms to indicate that her partner is a “civil union spouse.”

The New York Times also reported that gay-rights advocates have collected enough discrimination complaints that will lay the groundwork for a challenge of the civil union law in the courts. Essentially, they would re-petition the New Jersey Supreme Court for same-sex marriage. The Supreme Courts of Connecticut and California are considering similar cases, according to *The New York Times*. ■



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“This is not a campus-wide speech code,” Terraso said. “This is a very narrow set of guidelines by the Department of Housing.”

Case still pending

The judge denied a request from Georgia Tech that the case be dismissed, so the other aspects of the case are still pending. For example, Malhotra and Sklar are fighting against the exclusion of religious activities from student fee funding.

Jon Cassady, a constitutional attorney in West Orange said, “Private colleges can do whatever they want with money from student fees. What they can’t do is use federal funds to promote religion.”

Cassady contends that the issue at Georgia Tech, a public school, is not an economic one. “For these plaintiffs, the principle of the thing is the issue,” he said.

The students’ lawsuit also alleges violation of the First Amendment’s establishment clause based on the Georgia Tech’s Safe Space Program. Founded in 2003, the university’s Safe Space Program is a voluntary training program that offers Georgia Tech

students the opportunity to learn about gay issues, which includes information on how different religions view homosexuality.

Malhotra and Sklar allege in their lawsuit that the program encourages participating students to have an “automatic response to the issue of homosexual behavior and morality.” The lawsuit claims that giving the differing religious views of homosexuality violates the separation of church and state.

Malhotra told *Southern Voice*, “It is not the university’s role to evaluate religions and this program presents a skewed picture based on the agenda they are trying to promote.”

Georgia Tech maintains that the program teaches interested students and staff about gay, lesbian, bisexual and transgender issues. A spokesman for Georgia Tech told *Southern Voice* that its Safe Space Program does not have a religious purpose as alleged by Malhotra and Sklar and the program is not funded by tax dollars or student activity fees.

It is uncertain when a decision regarding the other issues of this case will be decided. ■

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Dougherty points out that resources are available to teachers on the Amistad Commission’s website (www.theamistadcommission.com), and he said that the state is working with the Commission to produce additional teacher materials and special lessons to support the Amistad initiative.

An educator’s perspective

One New Jersey educator who welcomes the initiatives of the Amistad legislation is Jeffrey Ballin, district supervisor for Social Studies in the Township of Union Public School District. Like Assemblyman Payne, Ballin believes African-American history has not gotten a fair shake in the classroom, and he firmly supports the notion of integrating it into the yearlong curriculum.

While recognizing that America is made up of many different minorities, not just African-Americans, Ballin observes that African-Americans

are a unique group because of their long history in this country, beginning with slavery and moving on through the Jim Crow era to the present.

Further, Ballin, whose district he said includes a significant minority population, welcomes opportunities to educate students about some of the African-American figures and contributors — such as scientists, inventors, and musicians — which exemplify different periods in American history.

That said, Ballin cautioned against over-politicizing history lessons and focusing too much on political correctness, a problem which he acknowledges he has seen occur in some instances.

“I don’t think it should be political,” Ballin noted. “I don’t think it should be sociological. I think it should be history.” ■

Glossary

dissenting opinion — a statement written by a judge that disagrees with the opinion reached by the majority of his or her colleagues. **due process rights** — basic rights of fairness against government actions which threaten a person’s right to life, liberty or property. **majority opinion** — a statement written by a judge that reflects the opinion reached by the majority of his or her colleagues. **nonpartisan** — not adhering to any established political group or party. **sustained** — maintained or preserved.