PEREZ v. SHARP:

A California Landmark Case that Overturned a Century-Old Ban on Interracial Marriage

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EDITOR'S NOTE

The mission of the California Supreme Court Historical Society includes producing educational programs that benefit both the legal profession and the general public. The following is a preview of a program to be offered online by the Society in fall 2022.

— SELMA MOIDEL SMITH

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WELCOME:

Throughout its history, California has been ethnically and racially diverse. As historian Daniel Walker Howe wrote, "California was the first state to be settled by peoples from all over the world [and] it remains the most ethnically cosmopolitan society in existence today."[1]

Unfortunately, this diversity has not always meant tolerance. California's history has included tragic injustices.

This evening's program involves California's laws that, for a majority of our state's history, barred a person of the white race from marrying a person of another race. Lest we think of these laws as ancient history, perhaps some who are alive today were unable to marry someone they loved because of California's race laws.

In 1948, these laws were invalidated in California. As the Reverend Martin Luther King Jr. said decades later, "[T]he arc of the moral universe is long but it bends toward justice." To be sure, the arc here bent toward justice, but it was not inevitable. It needed individuals, most notably bride Andrea Perez and groom Sylvester Davis, their lawyer Daniel Marshall, and four California Supreme Court justices.

FIRST NARRATOR:

As we have heard, California's history includes both diversity and intolerance.

Before statehood, white miners refused to allow Native Americans to claim mining rights, despite many of the mining districts' being on traditional Native American grounds; instead, Native Americans were forced to perform manual labor on whites' claims. Likewise, Chinese immigrants were excluded from many mining districts. People born in what was then Mexican California — people known as Californios, whose equal rights were written into the 1848 Treaty of Guadalupe Hidalgo ending the U.S.–Mexico War — were subject to violence and discrimination in the mines.

After California was admitted as a state in 1850, racist violence and discrimination continued. Even the ending of the Civil War and the adoption of the Fourteenth Amendment to the U.S. Constitution guaranteeing

[1] Daniel Walker Howe, What Hath God Wrought: The Transformation of America, 1815–1848, 821 (2007).

equal rights to all failed to end the violence and discrimination. The state sanctioned murder of Native Americans, adopted a new Constitution in 1879 to prohibit corporations from hiring Asian employees, barred Asian immigrants from owning agricultural land, authorized public schools segregated by race, and on and on. During World War II, just a few years before California's interracial marriage ban was invalidated, state and local officials successfully urged the federal government to summarily imprison all Californians of Japanese ancestry.

Tonight, we will focus on California's statutes barring people of color and whites from marrying each other.

Laws that require segregation of people of different races, also known as "Jim Crow" laws, were critical for institutionalizing racism in the United States after the Civil War. However, as sociologists have long noted, a system of racial segregation breaks down with mixed-race people. Therefore, fundamental components of racial segregation are prohibitions on interracial marriage — sometimes called anti-miscegenation laws — that seek to prevent mixed-race children from being born. In other words, mixed-marriage bans are a foundation for maintaining segregation.

California was not unique in outlawing marriages between whites and people of color. Laws barring interracial marriages existed in America even before nationhood. In 1664, Maryland barred marriages between whites and Native Americans. In 1691, Virginia enacted a law providing that a marriage between a white person and a "Negro, mulatto, or Indian" was an "abomination." By the early 1700s, most British and French colonies in North America barred marriages between whites and African Americans. After the Revolutionary War, most states enacted similar laws.

California became part of this pattern. Indeed, the very first state legislature in 1850 outlawed marriages between whites and "negroes or mulattoes" and further provided criminal penalties for persons who entered into or solemnized such marriages.

In 1872, the California Legislature eliminated the criminal penalties, but re-enacted the prohibitions. Civil Code Section 60 provided, "All marriages of white persons with negroes or mulattoes are illegal and void." Civil Code Section 69 barred county clerks from issuing licenses for such marriages.

These bars to mixed-race marriages were overwhelmingly popular. A 1958 Gallup Poll showed that 92 percent — *92 percent* (!) — of whites in the western states opposed mixed-race marriages. Even after the civil rights era, a 1968 Gallup Poll revealed that, nationwide, 72 percent of the populace disapproved of mixed-race marriages. This public opinion, in turn, was also important in maintaining the anti-miscegenation structure: statutes prohibited interracial marriages, and the cultural habits reinforced the formal prohibitions.

While California's laws were typical of those in the U.S., it is important to note that the U.S. was nearly alone in this regard. Among the world's nations in the twentieth century, only Nazi Germany and South Africa also barred whites from marrying non-whites.

SECOND NARRATOR:

California's diversity complicated the 1850 marriage prohibitions. Californians were not just Blacks and whites, but also Native Americans and increasing numbers of Asians, Hispanics, Pacific Islanders, and other people of color.

The Legislature in those years was unconcerned about whom nonwhites married, so long as it was not whites. Given these racial and ethnic prejudices, the fundamental question was: who should be barred from marrying whom, or, more particularly, whom may whites marry or not marry, and who may marry whites? The original laws quoted above answered: African Americans and "mulattoes."

In 1880 and 1905, the Legislature further answered this question by amending Sections 69 and 60 to add "Mongolians" to the list of persons whites could not marry.

However, California's diversity was still more complex than this amendment. For example, in 1930s Los Angeles, a man of Filipino ancestry, Salvador Roldan, applied for a license to marry a Caucasian woman. The county clerk refused to issue the license on the ground that Mr. Roldan was "Mongolian," but the L.A. Superior Court ruled that Filipinos were not Mongolian. The county appealed.

In 1933, a California Court of Appeal unanimously ruled in favor of this couple in *Roldan v. Los Angeles County*.[2] The Court of Appeal affirmed that Filipinos were "Malays," not "Mongolians." The court cited ethnographers and lexicographers as showing that, when the Legislature added "Mongolians" to California's laws, Malays were not classified as Mongolians. The court also reviewed California's anti-Chinese political history and concluded that "Mongolian" meant "Chinese." With no law barring Filipinos and whites from marrying, the Court of Appeal ordered the license issued. Three California Supreme Court justices voted to accept the county's further appeal, but lacked the necessary fourth vote.

The state legislature reacted quickly to *Roldan*. The same year, the Legislature amended Sections 60 and 69 to add Malays to the persons whites could not marry. As a result, the laws read, "All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void."

So matters stood until World War II. During the war, California became a major manufacturing center, especially of ships, planes, and vehicles. Some employers bowed to the heavy demands of wartime production and relaxed their prior practices of racially segregating workforces. As these workplaces became somewhat more integrated during the war, so did employees' social lives.

One of California's major wartime employers was Lockheed Aircraft's Burbank plant, which included what is now Burbank airport. During the war, the plant eventually employed 90,000, including women and persons of color, working around the clock.

Two Lockheed employees, Mexican American Andrea Perez and African American Sylvester Davis met during the war. Let's learn a bit about Ms. Perez and Mr. Davis.

Andrea Perez grew up in a Los Angeles neighborhood then named Dogtown. Dogtown was north of downtown and along the Los Angeles River. It was predominantly working class and Mexican American. Ms. Perez lived with her parents and they all attended a racially mixed Roman Catholic church, St. Patrick's. Ms. Perez worked as a babysitter for another St. Patrick's Catholic family.

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[2] 129 Cal. App. 267, 18 P.2d 706 (1933). The case is in the MCLE materials.

Sylvester Davis also grew up in Los Angeles, near Central Avenue. This neighborhood was one of the few in L.A. where African Americans were allowed to live. He, too, was Roman Catholic.

In 1941, Mr. Davis got a job with Lockheed in Burbank. A year later, after the U.S. went to war, Lockheed began hiring women, and Ms. Perez got a Rosie-the-Riveter job, also at Lockheed's Burbank factory. Mr. Davis helped to orient her, and soon began to drive her to and from the factory. Mr. Davis was drafted into the U.S. Army, served in France, and then returned to Los Angeles.

Ms. Perez and Mr. Davis resumed their friendship, which turned into a romance, and, in 1946, they decided to marry. However, the couple faced two major obstacles to marriage. First, Ms. Perez's parents opposed the marriage on racial grounds; indeed, they refused to speak to her after she and Mr. Davis announced their engagement.

The second major obstacle was California's statutes prohibiting whites from marrying African Americans. It is important to note here that, during this period and dating back to the 1848 treaty ending the U.S.–Mexico war, Hispanics were legally classified as white. Accordingly, the prospective Perez–Davis marriage was squarely barred by Civil Code Sections 60 and 69. This problem was especially acute in Los Angeles, where the head of the county's marriage license bureau bragged of her "sixth sense" in knowing whether each marriage applicant had accurately described his or her "race" on the application form.[3]

Ms. Perez and Mr. Davis could have followed in the footsteps of other mixed-race couples from California: drive two hours south into Mexico, get married there, and return to California, where the marriage would be recognized as valid. Alternatively, if they wanted to marry in the U.S., they could travel to New Mexico — a state without California's prohibitions — and return to California, where, again, the marriage would be recognized.

However, Ms. Perez wanted to be married at St. Patrick's Catholic Church, which she had attended since childhood, so the couple ruled out the Mexico or New Mexico end-runs.

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[3] *Marriage Recorder Uses "Sixth Sense" to Determine Race*, Los Angeles Sentinel 2 (Dec. 23, 1948).

Fortunately, the parents of the children for whom Ms. Perez had babysat years earlier were Daniel and Dorothy Marshall. Daniel Marshall had earned undergraduate and law degrees from Loyola and was a lawyer committed to racial justice. He chaired the small but dedicated Los Angeles Catholic Interracial Council, which met at the same St. Patrick's Catholic Church. By this time, Mr. Marshall had brought cases challenging racial covenants in real property deeds (which contractually barred current and future owners from selling or renting to non-whites). He had also challenged California's laws restricting Asian immigrants' land ownership. In 1947, he was one of the few California lawyers with some experience trying civil rights cases in California courts.

While Mr. Marshall was willing to represent the couple, he faced daunting odds. Courts had long rejected Fourteenth Amendment equal protection challenges to marriage bars, such as California's law. To be sure, the Fourteenth Amendment provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws." However, the United States Supreme Court, in a case titled *Pace v. Alabama*,[4], decided in 1883, had unanimously upheld a state law outlawing — indeed, criminalizing as a felony — marriage or adultery between African Americans and whites.

Moreover, no other civil rights groups — neither the NAACP, ACLU, nor anyone else — would support Mr. Marshall's challenge to California's statutes. Perhaps they believed that any effort to overturn the statutes would be futile, given the unbroken precedents approving the laws. They may also have been worried that challenging the interracial marriage bars (which, as we noted, were very popular) would ignite a firestorm of counterattacks and set back overall progress on civil rights. Indeed, Ms. Perez and Mr. Davis endured volumes of hate mail once their challenge became public.

Likewise, the L.A. Catholic Diocese's leadership refused to get involved in the matter, even though interracial marriage was permitted by church doctrine.

The bottom line was that Mr. Marshall and his five-lawyer law firm were on their own in a case that would be legally difficult and would cause enormous public controversy.

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[4] 106 U.S. 583.

FIRST NARRATOR:

Mr. Marshall made three strategic decisions before Ms. Perez and Mr. Davis applied for a marriage license and filed the challenge to California's statutes. First, he decided to refrain from questioning whether persons of Mexican ancestry — such as Ms. Perez — were properly classified as white under Sections 60 and 69. He wanted to overturn the statutes altogether, not just argue that they were improperly applied to a particular marriage license applicant.

Second, when, as expected, the county clerk's marriage license bureau rejected the Perez–Davis application, Mr. Marshall decided to ask the state Supreme Court to exercise its original jurisdiction over the mandamus petition (which petition was a procedure for challenging such a decision by a public official), skipping the typical Superior Court and intermediate Court of Appeal stages.

Third, in support of the mandamus petition, Mr. Marshall would argue that Ms. Perez and Mr. Davis were being denied their freedom of religion, namely their right to marry within the Catholic Church. This argument, Mr. Marshall hoped, would avoid the numerous, prior judicial decisions rejecting equal protection challenges.

On August 1, 1947, Ms. Perez and Mr. Davis applied for a marriage license. Per the planned strategy, Ms. Perez correctly wrote on the license application that her race was "white," and Mr. Davis wrote that his race was "Negro." As expected, the Los Angeles County Clerk's marriage license bureau rejected the application as violating California law.

One week later, on August 8, 1947, Mr. Marshall filed with the California Supreme Court a petition for writ of mandamus, along with points and authorities and other paperwork, seeking an order that the county clerk issue a marriage license to Ms. Perez and Mr. Davis.

The mandamus petition alleged that petitioners Ms. Perez and Mr. Davis were over twenty-one years old, had valid health certificates, and met all of the other marriage requirements under California law, save that they were of different races and one of them was white. The petition then alleged that the county clerk had refused a license on the basis of the racial differences.

In keeping with Mr. Marshall's strategy, the petition argued that the clerk's refusal violated the petitioners' freedom of religion, in that the

Catholic Church had no rule against interracial marriage and, therefore, Ms. Perez and Mr. Davis qualified for Catholic marriage. The petition further requested that the Supreme Court exercise its original jurisdiction (a) because of the issue's importance and (b) to avoid delay, whether to petitioners or to other mixed-race couples who wished to marry now.

Five days later, on August 13, the Los Angeles County Counsel, on behalf of the respondent county clerk, filed an opposition to the petition. It noted that, as recently as 1941, a District Court of Appeal had upheld California's mixed-marriage ban, and recited a long line of federal and out-of-state decisions that had upheld such bans throughout the U.S.

The county's response to the freedom-of-religion argument was that while Ms. Perez and Mr. Davis may have had the *right* to marry each other in the Catholic Church, Church doctrine did not require them to do so. Therefore, because they had no *duty* to marry outside of their race, a state bar to the marriage therefore did not restrict Ms. Perez and Mr. Davis' freedom of religion. The county cited prior court precedents that upheld state bans on polygamy, ruling that such bans did not violate the freedom of religion of an adherent to the Mormon Church, which at one time permitted its members to have more than one spouse. In sum, the County argued that states have a fundamental authority to regulate marriage and may punish acts that "have a tendency . . . to corrupt the public morals," notwithstanding religious views regarding such acts.

About two months after this initial exchange of pleadings, the California Supreme Court held oral argument in Los Angeles. Based on a transcript of the October 6 oral argument, it appears that Justice Roger Traynor took the lead in questioning the county's counsel. Justice Traynor also wrote the majority opinion in the case.

We will hear more about oral argument and the majority opinion later. But let's pause to learn a little about Justice Traynor, who played a pivotal role in this case, and later earned national renown as chief justice of California.

Roger Traynor was born in Utah in 1900 and, encouraged by a high school teacher, began college at the University of California at Berkeley. He eventually earned bachelor's and master's degrees, and then, in 1927, simultaneously earned a Ph.D. in political science and a law degree. His focus was illustrated by a comment from a law school friend, "You could

see Roger, but you'd have to look at him through his pipe, and he would keep writing or reading at the same time you talked to him."[5]

A few months after graduation, he joined the Berkeley law faculty as a professor, primarily teaching tax law. After taking a leave of absence to help the U.S. Treasury Department draft tax legislation, Professor Traynor returned to UC Berkeley and became acting dean of the law school. In 1940, Professor Traynor, while still at the law school, also worked as a part-time deputy to then California Attorney General Earl Warren.

Later that same year, Professor Traynor was appointed as an associate justice of the California Supreme Court. How he got on the Court was a bit of an accident. The governor wanted to appoint someone else, but when it became clear that his chosen candidate was not going to be approved, he appointed Professor Traynor, who, as a tax expert, was considered uncontroversial. Professor Traynor was promptly approved. In 1964, he became chief justice.

Justice Traynor's work on the Court reflected policy concepts such as equality and fairness, and made enormous advancements in products liability, family law, criminal law, and corporation law. After Chief Justice Traynor retired in 1970, one prominent legal commentator said, "The justice of Traynor will far outlive Traynor, the Justice."[6] He was called "the ablest judge of his generation,"[7] and, after his death, a major news periodical called him "one of the greatest judges who never sat on the U.S. Supreme Court."[8]

SECOND NARRATOR:

During the oral argument in 1947, Justice Traynor asked the county's counsel if the California statutes violated equal protection under the U.S.

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[5] John R. Wierzbicki, *A Lawyer by Accident: Bernie Witkin's Early Life and Career, Part 1*, California Supreme Court Historical Society Review 30 (Fall/Winter 2020) (quoting Bernard Witkin).

[6] Bernard E. Witkin, *Through Bernie's Binoculars*, California Supreme Court Historical Society Newsletter 2, 4 (Spring/Summer 2007).

[7] Henry J. Friendly, *Ablest Judge of His Generation*, 71 Calif. L. Rev. 1039, 1039–40 (1983).

[8] *The Law: A Pioneer Retires*, Time (Jan. 19, 1970), at https://content.time.com/time/subscriber/article/0,33009,878687-2,00.html.

Constitution's Fourteenth Amendment. Counsel replied that the United States Supreme Court had already answered that question in *Pace v. Alabama*.

Justice Traynor then asked questions that had not been briefed by either side. For example, he asked the county's counsel to tell him who is supposed to be considered a "Negro" and who a "mulatto" under the statute? Counsel eventually admitted that he did not know because neither the California Legislature nor California courts had defined the terms. Justice Traynor then pressed him on what percentage African American ancestry would be needed to be considered a mulatto under the statute: One-sixteenth? One thirty-second? One sixty-fourth? Counsel acknowledged that it would have been better if the Legislature had defined the term, but argued that the statute should still not be declared unconstitutional on this ground.

The county's counsel then began to argue in terms that can only be considered racist, even by the standards of the day, based on the same cultural stereotypes that lay behind the ban's enactment. The counsel claimed that the white race is "superior physically and mentally" and that mixed racial offspring have lessened physical and mental vitality." Justice Traynor asked, "Are there medical men in this country who say such a thing?" The answer by the county's counsel referenced African Americans' likelihood of having sickle-cell anemia.

Perhaps the strongest legal argument of the county's counsel was that, even if experts disagreed on these racist theories, enough evidence — in our modern vocabulary, a "rational basis" — existed for the Legislature to have discretion to make political decisions that courts should not second-guess.

Justice Traynor next asked if the resulting California legislation was a "carfare statute," in that couples could avoid the statute — and its purported bases such as social harmony and single-race children — by simply travelling a few hours to another jurisdiction. The county's counsel acknowledged the point.

On the same day as the oral argument, the county submitted a 121-page supplemental brief that elaborated on its oral arguments. The county reargued its racist biological theories. It claimed that eliminating the ban would further "racial intermingling," which would create "antagonisms and hatreds" between the races. According to the county, these problems would be exacerbated with the increased numbers of African Americans in

California, whose population had doubled since 1940. In light of the threat of racial conflict, according to the county, separation enforced through the marriage ban was vital to maintain social harmony.

Petitioners' counsel Mr. Marshall replied to this 121-page brief the following month with a brief half as long. This reply largely abandoned the freedom-of-religion argument and instead focused on the equal protection issues that Justice Traynor had raised in oral argument. In short, Mr. Marshall did what good trial lawyers do: he paid close attention during the oral argument to the areas in which the judge was interested and was flexible enough to shift his later arguments to focus on those considerations.

Mr. Marshall replied to the county's biological and sociological theories by noting that the California statutes are arbitrary in that they bar only some mixed-race marriages — that is marriages between whites and certain other races — but allow Native Americans to marry anyone (including whites) and allow all other races to marry each other. As for the county's concern about increased numbers of African Americans in California, Mr. Marshall's reply brief explained the positive reason for the increase: African Americans had been recruited into California to work in war industries.

Still, Mr. Marshall's reply brief had to address some difficult legal issues. As for the county's argument that valid bans on polygamy were analogous to bans on mixed marriages, Mr. Marshall wrote that polygamy is outlawed by the "universal judgment of civilized mankind," while anti-miscegenation laws at that time existed only in the U.S.

As for the numerous precedents upholding mixed-marriage bans, Mr. Marshall argued that they were based on outdated and discredited views. He questioned how a California public servant, such as the County Counsel, could possibly espouse white supremacy. When the *Los Angeles Sentinel*, a local African-American newspaper, saw the County Counsel's brief embracing the notion that whites were superior to all others, it was outraged and demanded that the County Board of Supervisors investigate the County Counsel. The board tabled the matter, and no action was ever taken.

Finally, Mr. Marshall addressed the "rational basis" argument made by the county's counsel, that the Legislature has discretion to make policy decisions and could, even if evidence is conflicting, rationally choose to enact a racial ban. He argued that the ban was not rational: that race is a

"hallucination" and that "potentially" weak offspring of mixed marriages and racial "tensions" are insufficient biological and sociological considerations, respectively, to deny the fundamental right of marriage.

FIRST NARRATOR:

For nearly a year after oral argument, no word was heard from the Court. Then, on October 1, 1948, the California Supreme Court ruled four-to-three to invalidate Civil Code Sections 60 and 69. The racial marriage ban was no more.[9] Justice Traynor wrote the majority opinion that the statutes violated equal protection under the U.S. Constitution's Fourteenth Amendment. In so doing, he ignored the county's argument that, traditionally, states had been accorded primacy in regulating marriage. Justice Traynor also largely ignored Ms. Perez and Mr. Sylvester's position that California law infringed on their religion.

Instead, Justice Traynor began by questioning whether a state may restrict individuals "on the basis of race alone" without violating the Fourteenth Amendment's guarantee of equal protection. He then noted that the right to marry someone of one's own choice is "fundamental" and one of the "basic rights of man." Only a "clear and present peril" and the "most exceptional circumstances" should allow race to affect fundamental rights.

Justice Traynor next began an implicit assault on separate but equal, which was still the law of the land. Under his modern view, equal protection applied to individuals, not racial groups. Equal protection is not achieved "through indiscriminate imposition of inequalities," and any racial classifications "must be viewed with great suspicion."

With this new framework, Justice Traynor opined that the Legislature's only purpose in enacting the marriage bans was to prevent "contamination" of the white race. His majority opinion rejected this purpose. The majority opinion added that the laws led to absurdities, especially as applied to persons of mixed ancestry. Did race depend on "physical appearance" or "genealogical research"? The statues did not say, and the opinion continued:

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[9] 32 Cal. 2d 711. The complete case with the majority, concurring, and dissenting opinions is in the MCLE materials.

> If the physical appearance . . . is to be the test, the statute would have to be applied on the basis of subjective impressions . . . . Persons having the same parents and consequently the same hereditary background could be classified differently. On the other hand, if the application of the statute to persons of mixed ancestry is to be based on genealogical research, the question immediately arises what proportions of . . . ancestors govern the applicability of the statute.

Justice Traynor's majority opinion continued by emphasizing some of the statute's "absurd results" in a multi-racial state:

> [A] person with three-sixteenths Malay ancestry might have many so-called Malay characteristics and yet be considered a white person in terms of his preponderantly white ancestry. Such a person might easily find himself in a dilemma, for if he were regarded as a white person under Section 60 he would be forbidden to marry a Malay, and yet his Malay characteristics might effectively preclude his marriage to another white person.

Indeed, Justice Traynor's opinion implicitly questioned the validity of any racial classifications:

> [T]he Legislature has adopted one of the many systems classifying persons on the basis of race. Racial classifications that have been made in the past vary as to the number of divisions and the features regarded as distinguishing . . . each division. The number of races distinguished by systems of classification "varies from three or four to thirty-four."

But what about the United States Supreme Court decision in *Pace v. Alabama*? After all, that decision said, as the county's counsel argued, that such interracial marriage bans did not violate equal protection. How could the California Supreme Court now say that a ban did violate equal protection? Justice Traynor's opinion tried to find a way around it. In *Pace*, while the relevant statute barred interracial marriage and sexual relations, the actual conduct for which the parties were convicted was not marriage, but only "adultery and non-marital intercourse" between people of different races. Because *Pace* did not directly involve marriage, its holding regarding

a marriage ban was dictum, meaning that it did not have to be followed by the California Supreme Court.

Two justices wrote separate concurrences. Justice Jesse Carter quoted the Declaration of Independence, federal Constitution, and then-recent United Nations Charter to the effect that "the matter of race equality should be a settled issue." He also noted that men had died fighting the Civil War to bring about racial equality. Justice Carter then expressly raised World War II's lessons. He quoted Adolf Hitler's book, *Mein Kampf*, which formed a basis for Nazi ideology and warned Germans of the dangers of "blood-mixing" and of the importance of racial purity. Carter then wrote that such views were from "a madman, a rabble-rouser, a mass-murderer . . . . Let us not forget that this was the man who plunged the world into a war in which, for the third time, Americans fought, bled, and died for the truth of the proposition that all men are created equal." Justice Carter's concurrence also included an acute analysis of the U.S. Supreme Court's infamous 1896 *Plessy v. Ferguson* decision, which was the legal foundation for separate-but-equal Jim Crow laws. Justice Carter noted that *Plessy*, even accepting it at face value, required that the laws be "reasonable," and reasonableness may change over time.

Justice Douglas Edmonds' separate concurrence emphasized the original petition's freedom-of-religion argument.

The dissent stated that (a) traditionally, states had primacy in regulating marriage, (b) 30 of the then 48 states had laws barring whites from marrying people of color, and (c) all such laws had been upheld by an "unbroken line" of federal and state courts. The dissent added that racial "amalgamation" proponents should seek redress from the Legislature, rather than from the courts.

Two weeks after the decision, the county petitioned the California Supreme Court for a rehearing. The petition by the County Counsel reprised his earlier arguments, but added two new ones. First, it argued that the statutes' imprecise language — such as how does a clerk determine who is "Mongolian?" — did not invalidate the statutes. Its application in this case was straightforward: on the original marriage license application, Ms. Perez identified herself as "white," and Mr. Davis identified himself as "Negro." The only thing required of the clerk was to apply the law.

Second, the county's petition downplayed the majority opinion's criticism of the arbitrariness of Civil Code Sections 60 and 69. According to

the county's counsel, California was "predominantly white," and therefore the Legislature could rationally choose to allow whites to protect themselves as the "numerically prevailing race."

Mr. Marshall opposed the petition for rehearing. His opposition included a reference to the new U.S. Supreme Court decision in *Shelley v. Kraemer*,[10] which barred states from enforcing racial covenants in real property deeds. Mr. Marshall argued in favor of extending *Shelley v. Kraemer* by suggesting that any racial classifications are unconstitutional per se.

On October 28, 1948, the California Supreme Court denied the petition for rehearing by the same four-to-three vote as in the original decision. The Los Angeles County Board of Supervisors considered asking the U.S. Supreme Court to hear the case, but failed to do so. Thus, the California Supreme Court's *Perez v. Sharp* decision became final.

SECOND NARRATOR:

By this decision, California became the first state to strike down interracial marriage restrictions as violating the federal constitutional right to equal protection. Although a few states had repealed their restrictions by legislation, these could be reenacted at any time. The California case was important because it declared that such bans violated a fundamental right and therefore a new ban could not be enacted.

Newspapers gave the decision prominent coverage. The next day, the *Los Angeles Times* ran a story headlined, "State High Court Rules Out Race as Barrier to Marriage," with a sub-headline that the decision was "close." Statewide coverage was similar. The October 1, 1948 *Oakland Tribune* had a page-1 headline, "Interracial Marriages Ruled Legal." The *Bakersfield Californian*'s banner headline was "MIXED MARRIAGE BAN HELD ILLEGAL." National newspapers, such as the *New York Times*, and foreign newspapers, such as Australia's *Sydney Daily Telegraph*, reported on the decision.

Legal scholars across America also noted the decision. The *Harvard Law Review*'s December 1948 issue reported on *Perez v. Sharp*. The inaugural issue of the *Stanford Law Review* also reported on it. In 1950, the *Yale*

[10] 334 U.S. 1 (1948).

Law Journal speculated whether, under *Perez v. Sharp*, states would be able to continue their long-standing practice of requiring that adoptive parents be of the same race as their adopted children.

It is worth thinking about *Perez v. Sharp*'s broad importance, especially for its time. In 1948, separate-but-equal was still the law of the land; *Brown v. Board of Education* would be decided six years later and could hardly be imagined in 1948. Even after Nazi theories of racial superiority rose and fell in Germany during World War II, postwar California still had segregated public schools, still enforced racial covenants in property deeds, still barred Asian immigrants from owning agricultural land and having commercial fishing permits, and on and on. The *Perez v. Sharp* majority's willingness during this era to question the very notion of racial classifications and to invalidate the foundation of segregation — namely mixed-marriage bans — deserves our respect and thanks 74 years later.

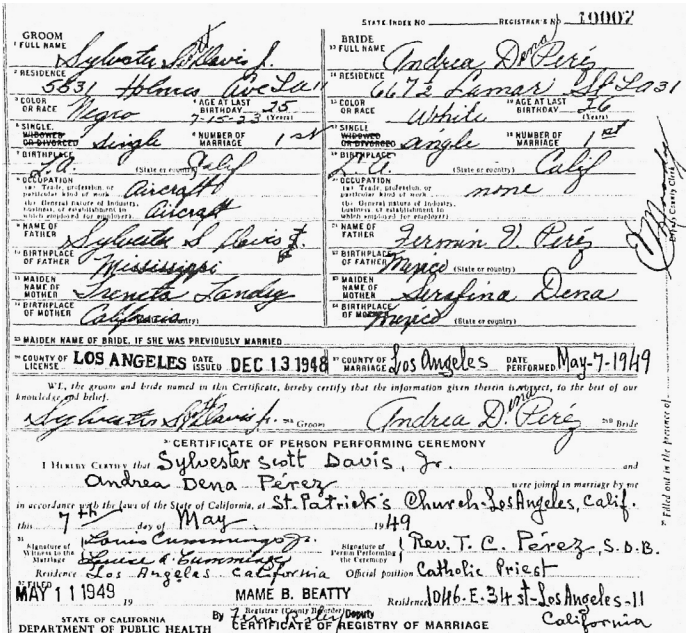
In sum, *Perez v. Sharp* was an early foundation of our modern theory of civil rights.

The immediate real-life impact of the decision, however, was simultaneously uplifting, disheartening, and uneven. The L.A. County Clerk's marriage license bureau refused to issue licenses to mixed-race couples even after *Perez v. Sharp*, until the county counsel stepped in and ordered the bureau to do so. Even then, the bureau continued for a time to require couples' races on the applications.

Across the nation, U.S. Army and Navy veterans returned after their World War II or Korean War service with Asian fiancées or wives. Eventually, over 10,000 veterans — three-quarters of them white — married foreign-born Asian women.

On the international stage, the United Nations' Economic and Social Council in Switzerland, a month before the 1948 California Supreme Court ruling, had condemned racial restrictions on marriage.

Some civil rights advocates hoped that these demographic and social trends, along with some early civil rights case law, would result in the U.S. Supreme Court following *Perez v. Sharp* and invalidating mixed-marriage bans across the nation. The Court, however, repeatedly ducked mixed-marriage cases. Now-opened U.S. Supreme Court archives suggest that the Court was unwilling to take the political heat from a nationwide invalidation.



STATE INDEX NO. _____ REGISTRAR'S NO. 19007

GROOM
1 FULL NAME: Sylvester Scott Davis Jr.
2 RESIDENCE: 5831 Homer Ave La
3 COLOR OR RACE: Negro
4 AGE AT LAST BIRTHDAY: 25 (Years) 7-15-23
5 SINGLE, WIDOWED, OR DIVORCED: Single
6 NUMBER OF MARRIAGE: 1st
7 BIRTHPLACE: Ala. (State or country)
8 OCCUPATION (a) Trade, profession, or particular kind of work: Aircraft
(b) General nature of industry, business, or establishment in which employed (or employer): Aircraft
9 NAME OF FATHER: Sylvester S. Davis Jr.
10 BIRTHPLACE OF FATHER: Mississippi
11 MAIDEN NAME OF MOTHER: Senecta Landy
12 BIRTHPLACE OF MOTHER: California (State or country)

BRIDE
13 FULL NAME: Andrea Dena Pérez
14 RESIDENCE: 6672 Lemari Ave La 31
15 COLOR OR RACE: White
16 AGE AT LAST BIRTHDAY: 16 (Years)
17 SINGLE, WIDOWED, OR DIVORCED: single
18 NUMBER OF MARRIAGE: 1st
19 BIRTHPLACE: Calif. (State or country)
20 OCCUPATION (a) Trade, profession, or particular kind of work: none
(b) General nature of industry, business, or establishment in which employed (or employer):
21 NAME OF FATHER: Jermin D. Pérez
22 BIRTHPLACE OF FATHER: Mexico (State or country)
23 MAIDEN NAME OF MOTHER: Serafina Dena
24 BIRTHPLACE OF MOTHER: Mexico (State or country)

25 MAIDEN NAME OF BRIDE, IF SHE WAS PREVIOUSLY MARRIED: _____

26 COUNTY OF LICENSE: LOS ANGELES DATE ISSUED: DEC 13 1948
27 COUNTY OF MARRIAGE: Los Angeles DATE PERFORMED: May-7-1949

WE, the groom and bride named in this Certificate, hereby certify that the information given therein is correct, to the best of our knowledge and belief.

Sylvester Scott Davis Jr. 28 Groom — Andrea D. Pérez 28a Bride

* CERTIFICATE OF PERSON PERFORMING CEREMONY

I HEREBY CERTIFY that Sylvester Scott Davis, Jr. and Andrea Dena Pérez were joined in marriage by me in accordance with the laws of the State of California, at St. Patrick's Church-Los Angeles, Calif. this 7th day of May, 1949

31 Signature of Witness to the Marriage: Louis Cummings Jr.
Residence: Los Angeles California
Signature of Person Performing the Ceremony: Rev. T. C. Pérez S.D.B.
Official position: Catholic Priest

32 FILED MAY 1 1 1949 19
By MAME B. BEATTY Registrar (County Recorder) Deputy
Residence: 1046 E. 34 st. Los Angeles 11 California

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC HEALTH
CERTIFICATE OF REGISTRY OF MARRIAGE

* Filled out in the presence of: _____

Marriage Certificate of Andrea Perez and Sylvester Davis, married May 7, 1949, in Los Angeles.

Certified copy, Los Angeles County Registrar-Recorder/Clerk.

Similarly, the U.S. Department of Justice refused to file amicus briefs in any federal courts regarding mixed-marriage bans during this time. Even the NAACP as late as 1955 avoided involvement, stating that it took "no position" on race-based marriage restrictions.

It took nearly two decades for the U.S. Supreme Court to invalidate all bans against interracial marriage, which it did in its 1967 decision, *Loving v. Virginia*.[11]

But *Perez v. Sharp*'s legacy did not end there. In 2008, nearly 60 years after Justice Traynor wrote his farsighted opinion, the California Supreme Court repeatedly cited it to strike down California's statutory ban on same-sex marriage in *In re Marriage Cases*.[12] There, *Perez v. Sharp* was cited not so much for its legal reasoning, but for its general historical lesson: long-standing marriage prohibitions — whether interracial or same-sex — may be overturned without catastrophic results. As the *Marriage Cases* held,

11 388 U.S. 1.

12 43 Cal. 4th 757.

"[H]istory alone is not invariably an appropriate guide for determining the meaning and scope of this fundamental constitutional guarantee [of marriage]. The decision in *Perez*, although rendered by a deeply divided Court, is a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized." It is a tribute to Justice Traynor's pioneering majority opinion in *Perez v. Sharp* that, today, we find it hard to imagine racial restrictions on marriage. Indeed, a 2021 Gallup Poll found that 97 percent of Americans in western states now approve of interracial marriage.

FIRST NARRATOR:

As for our story's individual heroes, Andrea Perez and Sylvester Davis finally received their L.A. County marriage license in December 1948. They were married at Ms. Perez's childhood Catholic church on May 7, 1949. Ms. Perez's parents refused to attend, but later reconciled to the couple when their children were born. Mr. Davis used his G.I. Bill benefits to buy a house in the segregated Joe Louis housing tract in Pacoima, California, in L.A.'s San Fernando Valley, where they raised their family. Their marriage lasted for over fifty years, until Ms. Perez's death in 2000. The couple never sought to publicize their legal journey; instead, they viewed their marriage as private and lived quietly.

Justice Roger Traynor was elevated to chief justice in 1964 and served with national distinction until his retirement in 1970. He died in 1983, in Berkeley, California where he lived most of his life.

Our final hero, lawyer Daniel Marshall, continued his civil rights work and civil liberties work, and the Southern California ACLU honored him for his *Perez v. Sharp* advocacy in 1948. However, Mr. Marshall suffered during the McCarthy era. The Roman Catholic Diocese dissolved the Los Angeles Catholic Interracial Council that Mr. Marshall had chaired. His representation of alleged Communists, including teachers who were fired or threatened with firing for communist affiliations, led to his being accused of communist associations. His firm expelled him, and he struggled to earn a living. He died largely forgotten in 1966. Let us remember him now.

We now invite questions from our audience.

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