AN UNSUNG HERO

By John S. Caragozian

Few people have heard of California lawyer Daniel Marshall, but he was the sole counsel on a long-shot case that helped change American history.

Marshall was born in 1902 and graduated from Los Angeles's Loyola University in 1926. He then graduated from L.A.'s Jesuit-affiliated St. Vincent's School of Law, later to become Loyola Law School.

Marshall was Roman Catholic, active as a lay leader, and politically liberal. He and his wife Dorothy were parishioners at St. Patrick's church, which – uncommon in Los Angeles in the 1930s, '40s, and '50s – was racially mixed. Marshall also chaired the L.A. Catholic Interracial Council, which met at the same church and was dedicated to improving relations among the races.

Marshall had a general commercial practice as a partner in a five-lawyer L.A. firm. One of the firm's partners, Louis Burke, was a law school classmate of Marshall and later would serve on the California Supreme Court.

After World War II, Marshall also engaged in cause litigation, often allied with leftist organizations. He filed amicus briefs in: (1) a challenge to California's Alien Land Law that barred persons "ineligible for citizenship" (that is, Asian immigrants) from buying or leasing agricultural land, (2) a challenge to California's refusal to issue commercial fishing licenses to Asian immigrants, and (3) a challenge to racial covenants in real property deeds that barred persons of color from buying or leasing homes in "white" neighborhoods. *See People v. Oyama*, 29 Cal. 2d 164 (1946), *rev'd* 332 U.S. 633 (1948); *Takahashi v. Fish & Game Commission*, 30 Cal. 2d 719 (1947), *rev'd* 334 U.S. 410 (1948); *Ex Parte Laws*, 31 Cal. 2d 846 (1948).

Marshall's most famous case arose in 1947 when a former babysitter for the Marshall family, Andrea Perez, and her fiancé Sylvester Davis wished to marry. California, like most states at the time, barred whites and specified persons of color from marrying one another. With Perez classified as white and Davis classified as "Negro," the L. A. County clerk refused to issue the couple a marriage license.

Marshall agreed to represent Perez and Davis in challenging California's interracial marriage bar, but he faced major obstacles. First, the bars were overwhelmingly popular. As late as 1958, for example, a poll of California and other western whites showed that 92 percent opposed mixed-race marriages. In this environment, no one – whether the NAACP, ACLU, or Catholic Interracial Council – was willing to support a challenge to California's laws. Marshall was on his own.

Second, a challenge appeared to have no chance of legal success. An unbroken line of federal and state cases, including one from a unanimous U.S. Supreme Court, had rejected equal protection challenges to interracial marriage bars. *E.g.*, *Pace v. Alabama*, 106 U.S. 583 (1883).

Still, Marshall tried. He filed Perez's and Davis's challenge as a mandamus petition against a public official (namely, the County clerk) and sought the California Supreme Court's original jurisdiction without trial court or intermediate appellate court proceedings. Given the unfavorable precedents, Marshall initially chose not to argue equal protection. Instead, he argued that California's bar infringed on the couple's freedom of religion, in that they were Catholic and the Catholic Church allowed mixed marriages.

The Supreme Court accepted original jurisdiction. After oral argument in 1947, Marshall also argued equal protection in a supplemental brief.

In 1948, the Court ruled 4-3 that California's bar was unconstitutional. The three-justice majority found a 14th Amendment equal protection violation despite the contrary precedents, and the crucial fourth vote was based on Marshall's original freedom-of-religion argument. *Perez v. Sharp*, 32 Cal. 2d 711. (In an earlier column, "Overturning California's Ban on Interracial Marriages," Daily Journal, Apr. 28, 2021, I described the case in greater detail.)

The case was a watershed in civil rights history. It received immediate national and international coverage as, for the first time, an American court struck down an interracial marriage bar. Moreover, the case formed part of the foundation for the U.S. Supreme Court's eventual invalidation of all states' interracial marriage bars and for the California Supreme Court's invalidation of a statutory bar to same-sex marriages. *Loving v. Virginia*, 388 U.S. 1, 13 n.5 (1967); *In re Marriage Cases*, 43 Cal. 4th 757, 781 (2008).

In 1948, the Southern California ACLU honored Marshall for his *Perez v. Sharp* advocacy.

Marshall remained involved in interracial marriage litigation. Despite *Perez v. Sharp*, a California statute required that persons wishing to marry specify their race on the marriage license application. When one couple refused to so specify, Marshall filed a mandamus petition on their behalf to compel the L.A. County clerk to issue a license. The Superior Court denied the petition, and the District Court of Appeal affirmed. The latter court opined that the statute and clerk's refusal imposed "no limitation on the right to marry, "but "merely require[d] … certain information for statistical and identification purposes," such information being potentially useful because "certain races are more susceptible to certain diseases which in turn requires special health precautions." *Stokes v. County Clerk*, 122 Cal. App. 2d 229, 230, 232-34 (1954). The California Supreme Court denied a hearing.

Marshall also continued with other civil rights and civil liberties work. Marshall represented public school teachers who were fired for refusing to answer questions about their communist affiliations and about other suspected communists. *See*, *e.g.*, *Board of Education v. Wilkinson*, 125 Cal. App. 2d 100 (1954). As amicus, he supported the rights of grand jury witnesses to

invoke the privilege against self-incrimination in connection with investigations of communists and other subversives. *See*, *e.g.*, *Alexander v. U.S.*, 181 F. 2d 480 (9th Cir. 1950).

Marshall even had a cameo role before the U.S. Supreme Court as an amicus on behalf of convicted spies Julius and Ethel Rosenberg. Marshall unsuccessfully argued for the Court to stay the Rosenbergs' execution. *See Rosenberg v. U.S.*, 346 U.S. 273, 276 (1953).

Marshall's activities were, however, unpopular during the McCarthy era's anti-Communist hysteria. Marshall's firm expelled him, and he struggled to earn a living. The Los Angeles Archdiocese dissolved the Catholic Interracial Council that Marshall had chaired.

Marshall's family suffered, too. Son Charles Marshall was drafted into the U.S. Army in 1953, but refused to answer loyalty questions on Department of Defense forms used during the era. The Army accused Charles of being "a Communist sympathizer," and the evidence against him included: (a) his father, Daniel Marshall, was a Communist sympathizer and a member of or "affiliated with" the National Lawyers Guild (the nation's first racially integrated bar association, which defended labor leaders and accused radicals) and the Civil Rights Congress (a group often allied with the NAACP in advocating on behalf of African Americans); and (b) his mother, Dorothy Marshall, was "active in Communist Party functions." Despite his father's filing of litigation on his behalf, Charles received an "undesirable discharge" from the Army. *Marshall v. Wyman*, 132 F. Supp. 169, 171-72 (N. D. Cal. 1955).

Daniel Marshall died at age 64 in obscurity over half a century ago. He deserves to be remembered.

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