

THE LEGAL FRAMEWORK FOR INDIGENOUS LANGUAGE RIGHTS IN THE UNITED STATES

JAMES FIFE*

“We need not conjecture about the possible implications of culturally and linguistically repressive policies; their tragic results are etched in our nation’s soul”¹

I. INTRODUCTION

The indigenous people, who have occupied the land from time beyond history and memory, constitute just over 0.1% of the national population.² Despite its statistical insignificance in the body politic and a centuries-long history of exclusion, exploitation, and forced assimilation by the dominant culture, today, the indigenous group receives a wide range of economic and cultural support from the national government.³ A former neglect of the native language in the educational system has since been rectified and, although still lacking any official status, the indigenous language is a compulsory subject in all aboriginal schools.⁴ Since 1962 the government has committed to the notion that the native population has “the right to receive instruction . . . which is intended not only to give information but also to awaken respect for the heritage from earlier generations and to imbue

* B.A. Linguistics, University of California, San Diego, 1977; C.Phil. Linguistics, University of California, San Diego, 1983; Ph.D. Welsh, University of Wales, 1985; Dr. Hab. Celtic Linguistics, Katolicki Uniwersytet Lubelski, 1989; J.D., Thomas Jefferson School of Law, 2004. I wish to acknowledge the invaluable advice and encouragement of Professor Bryan Wildenthal. I also want to thank Professor Linda Keller for her insights regarding rights regimes and their application in law.

1. SANDRA DEL VALLE, LANGUAGE RIGHTS AND THE LAW IN THE UNITED STATES 275 (2003).

2. MEIC STEPHENS, LINGUISTIC MINORITIES IN WESTERN EUROPE 675-77 (1978) (discussing the Lapp population in Sweden).

3. See, e.g., STEPHENS, *supra* note 2, at 682-85, 687-88 (discussing provisions fostering Lapp reindeer-breeding and folk art production), 683-87 (discussing establishment of Lapp residential folk high school and other aids to education), 690-91 (discussing efforts to promote Lapp mass media and broadcasting).

4. *Id.* at 685-86.

[students] with a feeling with their own people.”⁵ Weekly classes in the indigenous language were implemented, textbooks and grammars published, and courses in the language offered at national universities and at teacher training institutions.⁶ A newspaper is published for the indigenes partially in their own language, and radio broadcasting in the minority language has been put into operation throughout the group’s territory.⁷

The indigenous population described above is the Sámi, also referred to as the Lapps, and the treatment they are accorded by the Kingdom of Sweden contrasts with the low degree of support for indigenous languages provided in the United States. Compared to that in Western European countries in general, awareness of and support for language rights in America are in a primitive state,⁸ and that underdeveloped condition is reflected in the specific situation of Native American languages. In this Article, I examine the current legal status of indigenous language rights in the United States and the legal framework for governmental support of these communities. Although the protections in place for indigenous languages exceed those provided for other U.S. linguistic minorities,⁹ this Article concludes that these measures are still far short of what is required to promote language maintenance and revival based on scientific principles.

Part I provides a brief survey of the current condition of the indigenous languages in the United States and the concepts of language ecology and linguistic human rights. Part II describes the basis for

5. *See id.*

6. *Id.* at 686.

7. *See id.* at 685-91.

8. *See* Jenning Kohlberger, Note, *Using Principles of International Law to Reshape American Legislation of State Official English Laws*, 29 J. LEGIS. 253, 274-79 (2003). *See generally* Joshua A. Fishman & Gella Schweid Fishman, *Rethinking Language Defense, in* RIGHTS TO LANGUAGE: EQUITY, POWER, AND EDUCATION 23, 24 (Robert Phillipson, ed., 2000) [hereinafter RIGHTS TO LANGUAGE] (noting that U.S. is at lowest level of language defense regimes); DEL VALLE, *supra* note 1, at 4-5, 344 (comparing U.S. and international standards); DANIEL NETTLE & SUZANNE ROMAINE, *VANISHING VOICES: THE EXTINCTION OF THE WORLD’S LANGUAGES* 193-95 (2000) (discussing current U.S. hostility to language minority issues); DAVID CRYSTAL, *LANGUAGE DEATH* 133-35 (2000) (describing in overview the European language rights framework). For complete texts of official provisions relating to language rights in Europe, see EUROPEAN BUREAU FOR LESSER USED LANGUAGES, *VADEMECUM: A GUIDE TO INTERNATIONAL DOCUMENTS ON LESSER-USED LANGUAGES OF EUROPE* (4th ed. 2003) (providing over 500 pages of official documents and other resources promoting European language groups). For an overview of the international language rights framework, see Fernand de Varennes, *The Existing Rights of Minorities in International Law, in* LANGUAGE: A RIGHT AND A RESOURCE 117 (Miklós Kontra et al. eds., 1999).

9. *See infra* Part III.A.

language rights in general under fundamental law—the U.S. Constitution and multilateral human rights instruments—followed by examination of the statutory and treaty bases specifically for indigenous language rights in Part III. Part IV concludes the Article with a critical look at the adequacy of this legal framework.

We may never know precisely how many indigenous languages were in use in the current territory of the United States prior to contact in 1492, but the number probably ran into several hundreds.¹⁰ Today about 175 of these are still spoken, only twenty of which are used as “cradle languages.”¹¹ Barely one-quarter of the surviving languages have speech communities larger than 1,000 souls.¹² Entire families of languages have been reduced to small remnants of users.¹³ Even those with larger bodies of speakers are in precarious straits. Navajo, the indigenous language with the largest number of users (approximately 100,000),¹⁴ nonetheless faces precipitate decline in light of the shrinking number of young speakers: in 1968, 90% of first-graders spoke the language, but now only 30% do.¹⁵ The loss to Hawai’ian speakers illustrates the situation of most indigenous languages. In 1778, the population of the Hawai’ian Islands is estimated to have been 800,000,¹⁶ presumably all native speakers. According to the 1990 Census, slightly more than 8,800 speak the language, of which about 8,200 are bilingual (also speak English well or very

10. Native American Languages Act, S. REP. NO. 102-343, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2954, 2954.

11. Allison M. Dussias, *Waging War with Words: Native Americans’ Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901, 974 (1999).

12. *Id.*

13. Census data from 1990 (the latest with figures broken down by language groups) indicate six Amerindian language families in the United States with 1,000 or fewer speakers; the Tonkawa family of languages reported just three remaining speakers. U.S. CENSUS, AMERICAN INDIAN LANGUAGES SPOKEN AT HOME BY AMERICAN INDIAN PERSONS 5 YEARS AND OVER IN HOUSEHOLDS: 1990, at <http://www.census.gov/population/socdemo/race/indian/ailang3.txt> (last visited Nov. 1, 2004).

14. Ken Hale, *The Navajo Language: I*, in THE GREEN BOOK OF LANGUAGE REVITALIZATION IN PRACTICE 83, 84 (Leanne Hinton & Ken Hale eds., 2001) [hereinafter GREEN BOOK].

15. Dussias, *supra* note 11, at 975.

16. Sam L. No’eau Warner, *The Movement to Revitalize Hawaiian Language and Culture*, in GREEN BOOK, *supra* note 14, at 133.

well).¹⁷ Only eleven people reported being monolingual Hawai'ian speakers.¹⁸

The devastation to human linguistic resources that these figures represent cannot be truly appreciated without considering the great diversity among the indigenous languages of the continent. Compared to Europe, where all the long-established languages fall into six stocks, or super-families, the native languages of North America fall into about one hundred-fifty-stocks, as unrelated to one another as English and Arabic.¹⁹ Nonetheless, the rate of language loss is accelerating, producing what is described as a mass extinction of as many as 90% of currently existing languages.²⁰ In the previous twenty years, the die-out has included the last speakers of several Amerindian languages, such as Roscinda Nolasquez, the last living speaker of Cupeño, and Red Thunder Cloud, the last human being who spoke Catawba Sioux.²¹

Gloomy statistics like these could be easily multiplied. In light of these grim figures, a number of linguists have argued that the “die-off” facing most of the world’s languages is a crisis of global significance.²² They liken the loss of these languages to the rapid loss of wildlife species caused by expanding development and with similar dire consequences. The extinction of species diminishes the biodiversity that sustains the physical ecology; the extinction of languages—the repository of human experience reflecting the myriad ways in which human beings understand the world—constitutes a diminishment of the cognitive resources of humanity. Just as loss of a rare species of rainforest plant may take with it a chemical compound holding out great therapeutic promise, the death of each language means the unique world-view embodied in its lexical and grammatical

17. STATE OF HAWAII DATA BOOK 2001, LANGUAGE SPOKEN AT HOME BY PERSONS FIVE YEARS OLD AND OVER, BY ABILITY TO SPEAK ENGLISH: 1990, at <http://hawaii.gov/dbet/db01/Sec01.html> (last visited Nov. 3, 2004).

18. *Id.* By way of comparison, over 55,000 state residents reported being speakers of the Filipino language Tagalog. *Id.*

19. NETTLE & ROMAINE, *supra* note 8, at 36. The indigenous languages of the Western Hemisphere together comprise about 150 stocks, or well over half the world’s 249 stocks and far in excess of Eurasia with only 28. *Id.* Thus the lion’s share of human linguistic resources exists in the New World languages alone.

20. CRYSTAL, *supra* note 8, at vii, 18.

21. NETTLE & ROMAINE, *supra* note 8, at 2; Dussias, *supra* note 11, at 976.

22. *See generally* CRYSTAL, *supra* note 8; GREEN BOOK, *supra* note 14; NETTLE & ROMAINE, *supra* note 8 (providing good introductions to the rationales and approaches of language ecology outlooks).

structure is gone for all time. Language death represents a largely irrevocable diminishment of human intellectual potential.

Consonant with such views on language ecology is the movement referred to as linguistic human rights (LHR).²³ LHR is a growing interdisciplinary field bringing together linguists, educators, and lawyers for the purpose of developing programs and legal frameworks for protecting and promoting linguistic minorities and their languages. Some of the key goals of the LHR program, as articulated by one of the principal proponents of the discipline, Finnish linguist Tove Skutnabb-Kangas, are: (1) the right to identify with, learn, and use in most official capacities one's mother tongue; (2) the right to become bilingual with one of the official languages of one's country; (3) the right not to be compelled to relinquish one's native language; and (4) the right to profit from the public education system regardless of one's primary language.²⁴ The LHR discipline has an impressive following and literature in the academic and legal communities of Eastern and Western Europe, but has little adherence in the United States, where such an aggressive program of minority language promotion seems nearly inconceivable. For a country in the clutches of chauvinist, English-only attitudes,²⁵ protection—let alone promotion—of linguistic minorities (including all the indigenous languages, even where they are the numerical majority) is fraught with difficulties. As will be seen by turning now to the actual legal framework for indigenous language rights in the United States, there is a long way yet to travel to reach even the minimal standard envisioned by LHR advocates.

23. See generally LANGUAGE: A RIGHT AND A RESOURCE, *supra* note 8; RIGHTS TO LANGUAGE, *supra* note 8.

24. Tove Skutnabb-Kangas, *Human Rights and Language Wrongs—A Future for Diversity*, 20 LANGUAGE SCI. 5, 23 (1998).

25. See DEL VALLE, *supra* note 1, at 54-81; Dussias, *supra* note 11, at 951-63 (discussing the English-only movement).