



**The common law, contemporary values
and Sophocles' *Antigone***

Robert French Oration

Hellenic Australian Lawyers' Association (WA Chapter)

**The Honourable Justice Peter Quinlan
Chief Justice of Western Australia**

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It is a great honour to be asked to deliver this year's Robert French Oration to the WA Chapter of the Hellenic Australian Lawyers Association.

May I begin by acknowledging the Whadjuk people of the Noongyar nation, the traditional owners of the land on which we gather tonight, and pay my respects to their Elders past, present and emerging. The importance of such an acknowledgement at the commencement of the Robert French Oration will be obvious to anyone with even a passing knowledge of the contribution made by the Hon Robert French AC to the law in Australia over a legal and judicial career spanning almost 50 years.

As the twelfth Chief Justice of Australia, Robert French was the first Western Australian to hold that office, the highest judicial office in this country. It is fitting, then, that the Robert French Oration should be hosted by the Western Australian branch of the Hellenic Australian Lawyers Association.

Any attempt to summarise or encapsulate a career as diverse, and a contribution as significant, as that of Robert French to the law and the administration of justice would, of course, fall well short of the mark. I do not propose to make such an attempt this evening. It will, I hope, suffice for me to acknowledge Robert French's conspicuous service to the people of Australia over so many decades, including over 30 years as a judge.

That service continues to this day, as Robert French continues to engage with the significant issues facing Australia as a maturing independent nation in the 21st Century. His recent public statements, for example, in

relation to proposals for an Indigenous voice to the Australian Parliament, were an important and timely contribution to the national conversation in relation to the ongoing process of the reckoning of the relationship between our relatively young Nation and the ancient and enduring cultures of its First Peoples.¹

I refer to this contribution in particular, as it reflects perhaps the most conspicuous and enduring theme in Robert French's diverse and varied career, both as a lawyer and judge: that is, recognition of, and engagement with, the many unique legal issues that face Aboriginal and Torres Strait Islander Peoples. That engagement was evident at the very beginning of Robert's legal career, with his instrumental role in the establishment of the Aboriginal Legal Service of Western Australia in 1973. Twenty years later, it was on clear display during his tenure, from 1994 to 1998, as the inaugural president of the National Native Title Tribunal, established under the *Native Title Act 1993*.

The passage of the *Native Title Act*, of course, followed the High Court's decision recognising native title rights under the common law of Australia in *Mabo v Queensland [No 2]*. The recognition of native title rights and interests by the common law, as declared in *Mabo [No 2]*, represents a significant example, perhaps the most significant example, of the theme raised by the title of my address this evening: the intersection of the common law and contemporary values. How Sophocles' *Antigone* fits in to that theme, I shall come to a little later.

Mabo [No 2] therefore provides a useful starting point for my remarks this evening.

In *Mabo [No 2]*, Sir Gerard Brennan (with whom Mason CJ and McHugh J agreed) set out the approach the High Court should take in discharging its duty to declare the common law of this country in light of 'contemporary values'. It was an approach that expressly contemplated the influence of such values, while at the same time charting the limits of that influence. His Honour said this:²

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. ... The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied.

Shortly prior to his own retirement as Chief Justice of Australia, Robert French (speaking extra-judicially) described this judgment of Sir Gerard's as 'a dramatic example of common law reasoning by reference to contemporary values'.³

The immediate questions raised by such reasoning are: 'whose values?' and, importantly, 'how do we know them?'

I am not, of course, asking these questions for the first time. They were a matter of significant comment when *Mabo [No 2]* was delivered in 1992. As Chief Justice French remarked in the address I have just referred to:⁴

There was much controversy after *Mabo* about the invocation of 'contemporary values'. Those invoked by the Court were values which were plainly not shared by all members of the Australian community. Some critics suggested that the idea of contemporary values was too elusive to legitimately apply to judicial decision making. At best, one might discern community attitudes which were themselves capable of change from time to time.

The use of 'contemporary values' in the development of the common law re-emerged in the High Court later in 1992 in *Dietrich v The Queen*. On this occasion Brennan J found himself in the minority, as to whether the Court should hold that the appellant had been denied a fair trial by reason of his lack of legal representation on serious criminal charges. The majority found that Mr Dietrich had been so denied a fair trial - a result which was, at least arguably, contrary to its earlier decision in *McInnis v The Queen*.

Sir Gerard, while remarking that 'changes in the common law are not made whenever a judge thinks a change desirable', confirmed that:⁵

The common law has been created by the courts and the genius of the common law system consists in the ability of the courts to mould the law to correspond with the contemporary values of society. Had the courts not kept the common law in serviceable condition throughout the centuries of its development, its rules would now be regarded as remnants of history which had escaped the shipwreck of time.

Significantly, his Honour went to say something as to the nature of 'contemporary values'. He said this:

The contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community. Even if the perception of contemporary values is coloured by the opinions of individual judges, judicial experience in the practical application of legal principles and the coincidence of judicial opinions in appellate courts provide some assurance that those values are correctly perceived.

Notice a number of things about this passage.

First, the 'contemporary values' to which Brennan J refers are nevertheless said to be 'relatively permanent'. There is, we might think, a certain tension about values that are, at the same time, 'contemporary' (characteristic of the present) and yet 'relatively permanent' (enduring over time).

Secondly, the passage is also notable for what his Honour identified as *not* being included within 'contemporary values': 'transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group'.

While not in so many words, Sir Gerard appears here to be saying that 'contemporary values' are not to be determined by opinion polls. This is not to suggest that his Honour was bringing to bear the elitist notion that 'judicial values' are necessarily to be preferred to 'community values'; a notion that, regrettably, finds currency from time to time in certain legal circles.

Sir Gerard, for example, was, and remains, a strong advocate for the role of juries as an assurance of the community's right to participate in the administration of justice. As he said in 2012:⁶

Community participation in the trial process is one of the important bonds between the courts and the people they serve. To be sure, there can be miscarriages of justice but, when it comes to the determination of the ultimate issues in a trial, the wisdom born of the various life experiences of twelve jurors is likely to be greater than the wisdom of a single judge, however experienced and learned the judge may be. The worldly wisdom of the jury cannot be supplied by a judge.

We can be confident, then, that in distinguishing contemporary values from 'transient notions ... which are inspired by a publicity campaign', Brennan J was not proposing that 'contemporary values' are somehow divorced from community values.

Finally, and to my mind most interestingly in this passage from *Dietrich v The Queen*, is the notion that 'contemporary values' are something which the Court must 'perceive' (as in 'the *perception* of contemporary values').

The words 'perception' and 'perceive' are Latin in origin: from the word *perceptio* (n) and *percipere* (v) (to seize or grasp). Given this evening's audience I should identify the Greek equivalent: αἰσθάνομαι (aisthánomai).

This notion of 'perception' suggests something other than, and prior to, the outcome of some deductive (or even inductive) process of reasoning. No doubt, as modern psychology and philosophy reminds us, perception itself involves complex processing and is not simply the passive reception of

external data.

Nevertheless, to 'perceive' someone or something suggests something more immediate and experiential than a process of logic. It suggests something we grasp from the world about us, rather than from the exercise of conscious mental processes. To me, at least, perception invokes a sense of the visual, even if the faculty of sight is employed as a metaphor (as in: "Yes, I *see* what you mean!").

This is not the only area in which 'perception' is used to describe the way in which we discover legal principles.

Take this example, from the unanimous judgment of the High Court in the *Native Title Act Case*:⁷

In *Giannarelli v Wraith*, Brennan J said:

"In the view of a court sitting at the present time, earlier decisions which are not binding upon it do not necessarily represent the common law of the earlier time, though they record the perception of the common law which was then current."

His Honour went on to say that if a court, because it perceives the common law to be different from what it was earlier perceived to be, so declares it, then effect will be given to that declaration as truly representing the common law.

In this example, it is not merely the contemporary values that are 'perceived'. It is the common law *itself*. And, significantly, this passage lays emphasis on the intentional aspect of perception (in Husserl's sense of the word intention). It suggests that the thing itself - the common law - has

not changed; although the manner in which it appears to the conscious mind may well be different. To extend my visual metaphor, we see the thing in a new way (as if with new eyes).

Or, finally (and again from native title jurisprudence) take the High Court's recognition in *Yanner v Eaton* that native title rights and interests, in addition to being 'artificially defined jural rights', are to be understood (borrowing an expression from Professor Kevin Gray and Susan Gray) as 'a perception of socially constituted fact'.⁸

According to this view, property rights (but perhaps legal rights more generally) are ultimately a perception of facts that are constituted by social and cultural relationships. They reflect, as Professors Gray and Gray put it, the deeply 'anti-intellectual streak in the common law tradition which cares little for grand or abstract theories ... preferring to fasten upon the raw organic facts of human behaviour'.⁹

So how best are we able to perceive ('to see') these facts, particularly when these socially constituted facts are 'contemporary values' that are intended to guide the development, and the application of, the common law?

You will notice that I have included in this sentence reference to the 'application of the law', because even those of us who may not be as free as our brothers and sisters on the High Court to develop the common law (or at least, the correct 'perception' of it), we are nevertheless required in the application of those principles, to a greater or lesser degree, to take account of contemporary values.

This is where Sophocles comes in. And where we might reflect a little on 'seeing' and on what are 'community values'.

For this purpose I have chosen *Antigone*, the third and final instalment in Sophocles' Theban plays (although it was the first of the three to be written).¹⁰

The play opens with Antigone, the daughter of Oedipus, entering the royal palace in Thebes, following an unsuccessful attack on Thebes by the armies of Argos led by her brother Polynices.

Her first line is an exclamation to her sister Ismene:

My own flesh and blood - dear sister, dear Ismene,
How many griefs our father Oedipus handed down!

To understand those griefs we need to go back in the story.

Oedipus was the son of Laius and Jocasta, the king and queen of Thebes. Prior to his birth, the Oracle of Delphi had predicted that Oedipus would kill his father and marry his mother. To avoid the prophecy, Laius and Jocasta planned to have Oedipus killed in infancy. Oedipus was, however, rescued by a shepherd, ended up in Corinth and grew to adulthood unaware of his true parentage.

Years later, in an effort to escape the Oracle's prediction of his fate (of which he had since become aware), Oedipus heads for Thebes. On the way he encounters his father, Laius, on the road, and following a fight over the

right of way, Oedipus kills Laius in an act of road-rage (not knowing of course that by unwittingly killing his father, he has fulfilled the first part of the prophecy).

When he arrives in Thebes, as a reward for freeing its citizens from the Sphinx, Oedipus is made king of Thebes and becomes the husband of queen Jocasta (who is, of course, his mother). Oedipus and Jocasta have four children together: sons Eteocles and Polynices and daughters Antigone and Ismene.

For reasons we need not go into, Oedipus vows to avenge the death of Laius (not realising he, Oedipus, is in fact the murderer) and later gets into a fight with his brother-in-law Creon (Jocasta's brother), who he suspects of being Laius' murderer.

In all of the intrigue that follows, Oedipus and Jocasta discover the truth that Oedipus is Laius' murderer and Jocasta's son. Jocasta hangs herself and Oedipus, discovering her body, blinds himself with the gold pins holding her dress together.

Oedipus is exiled, with his daughters Antigone and Ismene, where he dies at Colonus, a village near Athens.

While Oedipus is in exile, his sons Polynices and Eteocles fight over who is to rule over Thebes now that Oedipus has gone. Eteocles assumes the throne, but is challenged by Polynices, who attacks Thebes with the help of the Argives (the people of Argos). [Polynices' attack on Thebes is not itself depicted in Sophocles' Theban plays, but is the subject of the play by his contemporary Aeschylus: *Seven Against Thebes*.]

In the end, while the Argives are defeated, both Polynices and Eteocles lie dead, having killed each other in battle.

Creon, who all the while has been pulling the strings and sowing discontent, is the last man standing and ends up assuming the throne to become king of Thebes.

Which brings us back to the opening of *Antigone*. With both Polynices and Eteocles lying dead on the battlefield, Creon issues a decree that, while Eteocles is to be buried with full honours, Polynices, the traitor, must be left:

unburied, his corpse
carrion for the birds and dogs to tear,
an obscenity for the citizens to behold!

Creon forbids anyone to bury Polynices under pain of death.

Antigone, the dutiful sister, is having none of this and is determined to bury Polynices.

He is my brother ... [she says]
[Creon] has no right to keep me from my own.

And so, Antigone, in secret, buries her brother and gives him the proper burial rights. When the grave is discovered, Creon is furious: he orders the body uncovered and the culprit found.

So Antigone, in open defiance of Creon's decree, buries Polynices again and crowns him with the ritual libations. This time, however, she is caught in the act and brought before Creon.

When asked by Creon if she had the gall to break his law, Antigone responds:

Of course I did. It wasn't Zeus, not in the least,
who made this proclamation - not to me.
Nor did that Justice, dwelling with the gods
beneath the earth, ordain such laws for men.
Nor did I think your edict had such force
that you, a mere mortal, could override the gods,
the great unwritten, unshakable traditions.
They are alive, not just today or yesterday:
they live forever, from the first of time,
and no one knows when they first saw the light.

Despite this defiant appeal to the natural law over Creon's edict, as far as Creon is concerned the matter is settled: Antigone must die. He orders that she be walled up in a rocky vault. She is, in effect, buried alive.

Creon's determination to punish Antigone also puts him at odds with his son, Haemon, who as it happens, is engaged to be married to Antigone. They argue and Haemon leaves, saying 'you will never set eyes on my face again'.

Eventually the blind prophet Tiresias enters the scene and explains to Creon that the gods are displeased. To put things right Creon must bury Polynices and free Antigone.

When Creon arrives at Antigone's cave, however, it is too late. Antigone has hung herself and Haemon is clinging to her, wailing for his lost bride. In his anger and grief, Haemon attacks Creon, but misses and impales himself on his own sword.

In the meantime, Creon's wife Eurydice, discovering that her son is dead, and overcome with grief, stabs herself to death at the palace altar.

Creon is left alone at the end of the play, surrounded by the devastation his rigid adherence to his unjust law has wrought him.

This brief synopsis of *Antigone* should, I hope, provide some indication of why it has been the subject of endless fascination for lawyers and philosophers of the law over many centuries. It was Hegel's favourite drama¹¹ - whether ancient or modern - and has been described, perhaps hyperbolically, as having an aura that 'envelops the law as no other work of art in the history of Western civilization'.¹²

Whether or not one is prepared to go this far, *Antigone* certainly provides a bracing reflection on the sometimes competing dictates of law and justice, on the challenge to reconcile the positive law with overarching fundamental principles, whether we call them natural law or human rights, and on the role (and courage) of dissidents in the face of despotic rule.

Reading the Theban plays afresh for the purposes of this address, I was also struck by how the Oepidal 'curse', as it is called in the cycle of plays (which runs from Laius to his son Oedipus and then to the whole generation that follows, including Antigone and her brothers) provides a devastating

dramatization of what we now understand to be intergenerational trauma, the causes and effects of which are a pressing and urgent reality in Australia, particularly among the Aboriginal population.

And part of the appeal of *Antigone*, at least for a common lawyer, is that all of these themes are played out in a narrative form, rather than through the sometimes cold logic and metaphysics of the philosophers that followed the tragedians in Athens. The narrative form enables the themes to be presented in their full complexity, enabling us to 'see' new themes and 'perceive' new insights each time the narrative is told.

Which brings me back to the question I posed earlier: what *Antigone* might tell us about how we might be able to 'see' or 'perceive' the contemporary values of the community.

Because, as is common in Greek drama, the community is a character in Sophocles' play: a character that takes the form of the chorus.

And what is most interesting about the chorus (or the community) in *Antigone* is how, and why, its values appear to change throughout the course of the play. Or, at least, how its (and our) *perception* of those values changes.

At the beginning of the play the chorus, elated at the victory over the Argives, and recognising Creon as 'the new man for the new day', embraces the justice of Creon's new law. The leader of the chorus says:

If this is your pleasure, Creon, treating
 Our city's enemy and our friend this way....
 The power is yours ...

And when Creon decrees the death of the mysterious criminal who has defied his decree, the chorus is positively rapturous. They break out in fervent praise of the majesty of human laws, such as that decreed by Creon:

Man the master, ingenious past all measure past all dreams,
 the skills within his grasp -
 he forges on, now to destruction
 now again to greatness. When he weaves in
 the laws of the land, and the justice of the gods
 that binds his oaths together,
 he and his city rise high –
 but the city casts out
 that man who weds himself to inhumanity
 thanks to reckless daring. Never share my hearth
 never think my thoughts, whoever does such things.

The values of the community appear to be clear. Whoever breaks Creon's law is beyond the pale, to be cast out.

But notice this. It is all very lofty and abstract. The 'man who weds himself to inhumanity' is an abstraction. And it is not only an abstraction; it is an inaccurate one at that: little do the chorus know that their abstract criminal is in fact a young woman.

And also notice this. The chorus' enthusiasm comes in response to Creon's own rhetorical program:

if you don't find the man who buried that corpse,
the very man, and produce him before my eyes,
simple death won't be enough for you.

I especially like the repetition here: 'the man', 'the very man', 'produce him'; when the audience knows this 'man' is in fact Antigone.

We might even say that the chorus' enthusiasm here reflects 'transient notions inspired by a publicity campaign' (to use Sir Gerard's phrase). But does it accurately reflect the community's true values?

The cracks begin to appear then Antigone is dragged in by a sentry. The chorus is shocked. It says:

Here is a dark sign from the gods -
What to make of this? I know her,
how can I deny it? That young girl's Antigone!
Wretched, child of a wretched father,
Oedipus. Look, is it possible?
They bring you in like a prisoner –
why?

Of course, the chorus doesn't know why Antigone is in chains. Yet.

But notice the change in perception. It is no longer abstract: the chorus says 'I know her', 'that young girl'. And I can say something about her life and her past: 'child of a wretched father'.

Interestingly, however, the chorus remains quiet while Creon interrogates Antigone.

It is only when she is taken away that they speak.

And when the chorus does speak they still say nothing (yet) as to the quality of Creon's law or his judgment.

Rather, they sing of the way Antigone is a victim of fate (not human laws) inflicted by the gods on the house of her father Oedipus: a house that has been rocked to its foundations 'cresting on and on, from one generation on' like a great mounting tide.

So they now see Antigone, but has the sight of Antigone changed their perception of the justice of Creon's law: their contemporary values (if you will)?

We find that out a little later when Haemon speaks to Creon. 'The man in the street', Haemon says, 'would never say anything displeasing to your face'.

But he goes on, and tells Creon what the community are really saying:

But it's for me to catch the murmurs in the dark,
 the way the city mourns for this young girl.
 "No woman," they say, "ever deserved death less,
 and such a brutal death for such a glorious action.
 She, with her own dear brother lying in his blood –
 she couldn't bear to leave him dead, unburied,
 food for the wild dogs or wheeling vultures.
 Death? She deserves a glowing crown of gold!"
 So they say, and the rumour spreads in secret,
 darkly ...

The community's values appear to have been completely inverted from before. Not only do they see the 'young girl' (as opposed to the abstract 'man wedded to inhumanity'), they question the wisdom of the law itself. They describe a breach of Creon's law as a 'glorious action', deserving a crown of gold.

But, I want to suggest, it is not their values that have changed. Rather, it is a matter of perception. Their values appeared to be one thing when expressed in the abstract; but another when faced with the real and the concrete.

As the action of the play wears on the chorus becomes clearer in its questioning of the justice of Creon's law, and, when Tiresias finally brings news of the gods' displeasure, it is significant that Creon does not reverse the law immediately.

Rather he asks the chorus what he should do.

So, ironically, the tyrannical king now asks the leader of the chorus:

What should I do? Tell me ... I'll obey.

To which the leader responds:

Go! Free the girl from the rocky vault
And raise a mound for the body you exposed.

Which Creon runs to do, although tragically too late.

And so the law has come full circle. Creon's edict is reversed and it is reversed, at least on this reading, in light of the contemporary values of the community.

And those contemporary values came to light, not in the abstract, and not as a result of some form of Athenian opinion poll. Rather, those contemporary values came to light by way of the response of the individual members of the chorus when brought face to face with Antigone in chains. When faced with her full story in all its concrete details. It was not, in the end, a matter of thinking, but a matter of 'seeing' – and, of course, it was a particular kind of seeing, as underscored by the fact that its prophet, Tiresius, is the only character in the play who is physically blind.

To paraphrase William Blake: contemporary values have a human face.

How best then we are able to perceive community values? *Antigone* would suggest, not by slogans or abstract theories, but in the concrete way in which real people respond and behave in real human stories. Which is, of course, the genius of the common law itself, with its preference, as the Grays put it, for the 'raw organic facts of human behaviour' over grand or abstract theories.

But developing that perception, that particular way of seeing, requires patience and it requires humility. It requires humility, because one must be prepared, as Creon ultimately was (albeit too late for him), to adjust our perception in light of the full picture, or as different aspects of that picture are pointed out to us by those around us. It requires patience, because it

can take time – and the telling of many, many stories - for the picture to come fully into focus (as it did for the community of Thebes). And, ultimately, it requires a shared sense of humanity, in which all the individual human stories contribute to the larger human story.

These qualities were, and are, characteristic of the life and work of the Hon Robert French AC, and his unwavering commitment to listen to, observe, and reflect upon our national story over decades of public life.

We have indeed been, and continue to be, fortunate, as lawyers, judges and Australian citizens, to have the benefit of the vision born of that commitment.

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- ¹ French, 'Voice of Reason Not Beyond Us', *The Australian*, 31 July 2019 (<https://www.theaustralian.com.au/commentary/voice-of-reason-not-beyond-us/news-story/1e1715b36c7eeb49f3f1b98c3c377774>).
- ² *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 29-30.
- ³ French, *Law Making in a Representative Democracy: The Durability of Enduring Values* (2017) 19 *Flinders Law Journal* 19, 23-24.
- ⁴ French, *Law Making in a Representative Democracy: The Durability of Enduring Values* (2017) 19 *Flinders Law Journal* 19, 24.
- ⁵ *Dietrich v The Queen* (1992) 177 CLR 292, 319.
- ⁶ Brennan, *Lessons from a life in the law*, Hal Wooten Lecture, 23 August 2012.
- ⁷ *Western Australia v The Commonwealth* (1995) 183 CLR 373, 485.
- ⁸ *Yanner v Eaton* (1999) 201 CLR 351, 373 [38].
- ⁹ K Gray and S F Gray, 'The idea of Property in Land', Bright and Dewar (eds) *Land Law: Themes and Perspectives* (1998) 15.
- ¹⁰ All quotes from *Antigone* are from Robert Fagles' translation, published in *The Three Theban Plays*, Penguin Classics, 1982.
- ¹¹ Stewart, *Hegel's Influence of Kierkegaard's Interpretation of Antigone*, 39 *Persona & Derecho* 195 (1998).
- ¹² Howenstein, *The Tragedy of Law and the Law of Tragedy in Sophocles' Antigone*, 24 *Legal Stud.* F 493 (2000).