[1980] 2 SCR 513 (Sup Ct of Canada). Dissociation and depersonalisation, which overlap with PTSD, are mentioned by Dr Shea (pp 92–93); but none of the foregoing cases on PTSD or "psychological blow" are referred to in the book.

5. See N J Mullany & P R Handford *Tort Liability for Psychiatric Damage* (Sydney: Law Book Co, 1993) 33–42; and the chapter by G Mendelson in Freckelton & Selby supra n 3, ¶¶ 51.720–51.820.
6. Dr Shea refers readers principally to Bluglass & Bowden supra n 3, 166, where a similar "wish list" appears. However, that work, like Dr Shea's, does not explain how implementation of the "wish list" would ameliorate present problems.
7. See WA Law Reform Commission *Report on the Criminal Process and Persons Suffering from Mental Disorder* (Perth, 1991), 104–107. Another example: Dr Shea calls for reform of the diminished responsiblity defence (p 139) but does not cite the recent reports of the WA and Victorian Law Reform Commissions which have come to different conclusions regarding the desirability of introducing a defence of diminished responsibility in those States.

Review of M A Stephenson & Suri Ratnapala (eds), *Mabo: A Judicial Revolution*, St Lucia: University of Queensland Press, 1993. pp 1-225. $29.95.

One of the best features of this volume is the foreword and one of the worst is the title. The volume consists of a collection of essays prepared, in the main, by members of the Law School of the University of Queensland. The essays seek to examine aspects of the High Court decision in *Mabo v State of Queensland (No 2)* (1992) 66 ALJR 408, which declared the concept of native title to be part of the common law of Australia. The title chosen for the volume is "Mabo: A Judicial Revolution". The title suggests that the decision was a dramatic change in the common law. Such was not the case. Prior to *Mabo* the common law of Australia was unsettled. And any examination of the only prior common law native title decision, *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 14 and of the common law jurisprudence from everywhere else in the world, would have suggested the near inevitability of the High Court decision. The decision was in accord with established common law precedents, yet the expression "Judicial Revolution" suggests a departure from traditional common law reasoning and opens the Court to public attack.

The High Court is not immune from criticism in contributing to the impression of dramatic change. The emphasis upon the "rejection" of the doctrine of terra nullius certainly suggests change. The only problem is that the Court did not reject the doctrine of terra nullius — and, in any event, since when was terra nullius a doctrine of the common law? Former Chief Justice, Sir Harry Gibbs, rightly points out in the foreword that terra nullius was not a doctrine of the common law. He goes on to observe that "public understanding is not assisted when the principles are described

by a phrase which is misleading and perhaps emotive". The foreword in two pages goes to the heart of much of the confusion surrounding the decision and its rationale.

A principal problem with the volume is the failing of so many of the essays to get beyond the language of the judgments. If ever a decision required more than a superficial exposition of the reasons offered by different members of the Court *Mabo* does. Essential to fathoming the rationale and the exploration of its implications is an examination of the common law jurisprudence from the rest of the world and a willingness to challenge the professed reasons for the decision. For example, if the Court rejected terra nullius in international law then is not the Crown's sovereignty over Australia in question? Far from it said the Court. Nor did the Court alter the accepted understanding of Australia as a settled country. All that the Court did was to recognise as part of the common law of Australia a concept long accepted everywhere else in the common law world — hardly a revolution.

The essays of Moens, Stephenson, Forbes and Puri all fail to place *Mabo* in its common law context and accordingly fail to address the implications of the decision in an effective way. Moens begins with the false proposition that "in a number of previous court decisions, it had been held that annexation effected the extinction of pre-existing native title" (p 48). From that beginning he attacks the Court's decision as essentially "political" and therefore inappropriate. His critique is flawed throughout. Stephenson provides a description of the reasoning of the decision but the lack of inquiry as to the fundamental rationale undermines her comments as to how the Court's conclusions are arrived at (eg, extinguishment without compensation). Stephenson indicates a lack of appreciation of jurisprudence elsewhere by suggesting that Australia is in a "*new* category of settled inhabited colony" (p 104). Puri's comment is similarly weakened, most symbolically by his grievously erroneous observation that terra nullius is a "well established concept of the common law" (p 146).

Professor Lumb in his essay recognises that there was "no binding precedent" of the High Court and goes on to provide a valuable critique of the Court's reasoning. In particular he focuses on the uncertain rationale of the Court — whether it was founded on recognition of traditional Aboriginal law or traditional connection with the land. He explores the consequence in the important area of the status of reserve lands and the relationship to legislative controls.

Brennan, Puri and Mulqueeny all tackle the question of the extent to which the decision recognises Aboriginal traditional laws today — that is, sovereignty. Brennan explicitly addresses that and other implications of the decision in a most articulate exposition. He draws heavily on statutory land rights developments in Australia in explaining the nature of native title and provides a useful insight into the origin of the Court's focus on traditional laws. This emphasis is not without its problems and has a tendency to favour statutorily imposed solutions, whether in the form of land claims tribunals or the payment of compensation. This emphasis reflects the sources relied on by Brennan; it would be useful to have his commentary on other common law jurisdictions which have not relied upon statutorily imposed determinations to resolve native title.

Puri, his "tacked on" case note on *Mabo* apart, provides an interesting discussion of the inadequacies of the protection of Aboriginal community interests in folklore and traditional art. He points out the limits and the inappropriateness of much of

Australia's intellectual property law. The essay's connection to *Mabo* rests on the survival of traditional Aboriginal law, but he does not offer more than a superficial explanation of the rationale of *Mabo*. In support, Mulqueeny examines traditional Aboriginal law in the context of the criminal law. He examines the uncertainties surrounding the decision and provides a useful opinion as to the degree to which *Mabo* may connote recognition of traditional law. Neither Puri nor Mulqueeny ever address the issue in its most cogent form — Aboriginal sovereignty.

O'Hair's article searches for a "golden thread" and in doing so points to the difficulties of reconciling any principles of law with the "mess" of the history of settlement. He suggests that property concepts applicable "to all" should be applied and offers an interesting argument for determining when compensation for dispossession is payable. He perhaps does not appreciate how closely his explanation follows that of Marshall CJ in *Johnson v McIntosh* (1823) 21 US 601.

Ken-Cohen, counsel in the *Mabo* case, Forbes and Reynolds all focus on narrow aspects of the concept of native title. Ken-Cohen has an obvious knowledge and appreciation of the place of *Mabo* in common law jurisprudence. He draws on that knowledge to provide a valuable consideration of the evidentiary problems in proving native title. He focuses on the use of traditional or historical evidence as an exception to the hearsay rule and provides a useful collection of references to jurisdictions where it has been relied on.

Reynolds provides a discussion of the historical relationship of colonial measures to protect native title with the question of extinguishment of native title. He begins with a useful account of the legal opinions of the 1840's that asserted that native title was a part of the common law. He uses this context to examine the origin of the clauses in pastoral leases reserving rights to Aboriginal people to use the land for traditional purposes. Reynolds asserts that their maintenance thereafter can be ascribed to Imperial enactment. Historically that may be so, but legally it is less than clear.

Forbes provides a critical commentary on *Mabo* from the perspective of the mining industry. He seeks to emphasise the uncertainty and problems presented by the decision. He observes that the decision "unsettles rather than settles the law". The analysis is superficial, particularly with respect to extinguishment and mineral ownership and makes no reference to the wealth of common law jurisprudence upon which the High Court relies. Reference to that authority removes much of the uncertainty. A more fundamental problem is the overall impression left by the article that such uncertainties and problems are wholly unacceptable, despite the fundamental historical question to which *Mabo* was directed, and that any such difficulties should be resolved immediately in favour of the mining industry.

Noel Pearson, the Director of the Cape York Land Council, provides a counter to the approach of Forbes. He raises particular questions as to the denial of compensation for extinguishment at common law and the failure to clearly recognise native title as equivalent to beneficial ownership. He points to the recognition of original sovereignty of Aboriginal peoples as a finding which raises issues as to the place of Aboriginal people in Australia today. Most significantly he emphasises that Aboriginal people are no longer subjects of political charity but are possessed of enforceable rights which require that non-Aboriginal Australians "sit down with indigenous people" to negotiate land, compensation and jurisdiction.

This volume provides a range of views on the High Court's decision. Not all are as helpful as one might have hoped, but it is a start and intellectually critical analysis of judicial reasoning is always to be welcomed.

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Review of John Hostettler, *The Politics of Criminal Law Reform in the Nineteenth Century*, Chichester: Barry Rose Law Publishers Ltd, 1992. pp i-xiii, 1-238. $128.00.

The content of student textbooks and casebooks dealing with the Criminal Law has changed radically over the past 20 years. Before then it was standard practice for such books to give a detailed historical account of the development of the major crimes and also of criminal procedure.

But more recently this historical perspective has gradually been phased out so that modern textbooks and casebooks on the Criminal Law deal more or less exclusively with the law as it now stands. This anti-historical bias is also mirrored in the way that criminal law is taught to undergraduates at universities and colleges. The result is that many students now emerge from law school with no knowledge of who Coke, Hale, Stephen, Macaulay, Livingston and Griffith were. Nor have they any conception of how the leading crimes, like murder and treason, evolved, fascinating though the story is.

The same fate has been suffered by the principal institutions of the criminal law, like the court of criminal appeal and the jury. Modern textbooks tend to deal exclusively with the current structure and role of these institutions whilst their history is ignored. Thus few students today would realise that it took the best part of 100 years of strenuous political agitation in order to establish a proper system of appeals in criminal cases. And probably none would be aware that in the late eighteenth century the average length of a jury trial was five minutes and that juries frequently heard cases in batches (often seven or eight at a time) before retiring to consider their verdicts on all of them. Over the past two decades facts like these have been gradually expunged from textbooks and lecture courses on the Criminal Law with the result that students now graduate from law school with no knowledge of them.

A new book by John Hostettler, *The Politics of Criminal Law Reform in the Nineteenth Century*, if given to students as introductory or background reading, could do much to redress this lamentable absence of historical training. It is true that the book focuses primarily on reforms to procedure and substantive criminal law in