All the leaves are brown, and a gray sky
Washes (as a mother bathes her little ones)
The ownmost sadness of a dry-eyed day.
Her tears withheld, more triste than any crying,
The wintry seeming of a cold November dusk.

Holding his breath inside, closed up tight,
She had buoyed the knotted nets, been cast out
And hauled in, hand over hardened hand,
Like a hollow ball of cloudy glass, blue-green.
But now her own hands hold her liebchen down.

He asks, Where are the children?
She shows him, for answer, where the splashing
Stopped — shows him sadness untouched
By the categories, forlorn things
all broken by their transit in the sea.

1. Notes to the poem

A mood is set by the opening line, which recalls “California Dreamin’” by The Mamas and the Papas: “All the leaves are brown and the sky is gray.” Together,
“brown” (before the pause in the first line) and “down” (at the close of the second stanza), almost speak the unspeakable word: drown.

Although the poem’s action perhaps matches many cases, one of them – *Commonwealth v. Tempest* – stands out in my memory. I encountered *Tempest* when my colleague Stephen Morse workshopped his paper, “Undiminished Confusion in Diminished Capacity,” which begins with an account of the case and a discussion of the defendant’s mens rea. Stephen quotes from Patricia Tempest’s confession:

I got up quarter to eleven or something like that. My husband had already left to go to work. I gave Gregory his breakfast. He was already up watching T.V. It was the last day for kindergarten. I was packing him a lunch for his picnic. I gave him juice with vitamin E. I told him he had to get a bath. He didn’t want to go right away. He wanted to finish watching his program so I told him to come up after he did. I went upstairs and filled the tub. I filled it more than normal. When he came upstairs he noticed and said it was kind of deep. He got in the tub himself. I washed the front of his body, then I told him to turn around on his stomach. He told me I didn’t wash his face yet. So, I washed his face. I told him to turn on his stomach. When he did I pushed his face down. He struggled and cried, “Mommy you’re drowning me.” He kept fighting for a couple of minutes – it could have been longer. He still tried to move a little but I kept his head under until he stopped. He didn’t move any more so I got out of the tub, I had gotten into the tub to hold him down. I didn’t know how long it would take to drown, so I left him there in the tub. He was on his back. His face was sideways. I sat there and told him, “I had to kill you. I’m sorry.” I went into the bedroom, put the television on and watched the movie. I went downstairs and got a banana and ate it, and also took my medicine. I came back upstairs and watched another program – $20,000 pyramid [sic]. My husband came home at 25 of 4. I told him I killed Greg. I’d drowned him. He went upstairs and came back and looked very sad.

My poem “Sadness and the Criminal Law” considers the truth in Mrs. Tempest’s description: “He went upstairs and came back and looked very sad.” This is a truth in perception: he looked sad to her. It is also a truth in description: her flat description of

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4 *Tempest*, 496 Pa. at 438–39 (quoting Patricia Tempest’s confession), as quoted in Morse, supra note 3, at 2.
her actions is sad. It is as if the sadness in her way of recounting events reflects back to me my own experience encountering her case particularly (and criminal law generally). It is as if Mrs. Tempest were describing my reading of criminal law cases, and (later) my teaching of criminal law. (I went downstairs from my office, so to speak, and came back and looked very sad.)

2. Sadness in the classroom

Long ago, having considered the available Criminal Law casebooks, I chose to teach the course from Lloyd Weinreb’s Criminal Law. The casebook opened with a case study that provided not only the usual judicial opinions, notes, and questions, but also newspaper articles and other sources enabling (I hoped) a wider and deeper look into the human and social contexts within which the criminal law operates. Weinreb’s case study was People v. Chavez. Later, reading Professor Montoya’s account of her experience as a first-year law student in class discussion of the Chavez case, I wondered whether students had found our conversations about the case integrating or alienating.

Each year, as I prepare to teach Professor Montoya’s article to our first-year law students at the University of Southern California, I learn anew how hard it is to face criminal law’s sad stories honestly, without evasion. From her student’s seat, Margaret Montoya questioned otherwise unexamined limits to the inquiry. Why, in our focus on whether the baby was far enough along in the birth process to count as a human being whose killing can be homicide under state law, are we ignoring the young Latina on trial: her poverty, her reasons for concealing her pregnancy from her family? A judicial opinion “sensitive to her story, told in her own words,” would ask unflinching questions.

What did it take to conceal her pregnancy from her familia? With whom did she share her secret? How could she have given birth with “the doors open and no lights… turned on?” How did she do so without waking the others who were asleep? How did she brace herself as she delivered the baby into the toilet? Did she shake as she cut the umbilical cord?

Other questions also cry out for answers. If the mother failed to exercise due care toward the baby, what about the father? Would the baby have lived if there had been a way to surrender the newborn to the care of others? If personhood consists in an integration of the masks we wear, how shall the law understand and vindicate the worth of a baby

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6 176 P.2d 92 (Cal. 1947).
7 Montoya, supra note *, at 204 (citation omitted).
8 Montoya, supra note * at n. 38, (the English word “person” descends from Latin persōna, meaning a character or a mask worn by an actor).
whose very existence was masked from the start, and who died before having any chance
to question, bifurcate, integrate, and braid?

Professor Montoya teaches that not only legal issues but also selves can present hard cases. Like the competing reasons that make issues hard to decide, competing masks or symbols\(^9\) – along with their correlates, competing loyalties and aspirations – complicate selfhood and authenticity or integrity. Shall the student who is grieving for a stillborn child speak up in the class discussion? The student who has had an abortion? The student whose sister is in prison? Is there a way to speak that honors the personal truths bound up with those experiences? How shall I relate myself to the issue without deforming the one or the other?

Though we are not similarly situated with one another in relation to any single criminal law story, I believe that many of us become hard cases unto ourselves as we first read the criminal law, prepare for the class discussions, and choose not only what to say (and what not to say) but what to permit ourselves to feel. Encountering death without any of the devices (such as elegies, eulogies, libations, mourning’s black dress) that express grief in socially recognized ways, we do not know what to do with our sadness. Strange sadness, do you visit me on behalf of the dead baby, or on behalf of the young woman who hid her pregnancy and gave birth in darkness on the toilet? Or do you visit me on behalf of sisters and brothers who never got to say “sister” or “brother,” or on behalf of the hurts and harms of poverty and discrimination? I think you visit me because I have not died to fellow-feeling, and you would not have me die.

Though a form of fellow-feeling, sadness is not the same as compassion. Compassion disposes us to help the sufferer whose suffering we feel as if it were our own. It is a moral disposition, orienting us to act toward others as we would wish others to act toward us. Sadness does not similarly incline us toward action; indeed, sadness sometimes might make all action difficult to undertake. Moreover, sadness is not as centrally ethical as compassion. In the depths of sadness, I do not know what it is to do unto others as I would be done by, because I do not know how I would be done by. Though we emerge from the depths of sadness to carry out the work of justice and judgment, we do not (and should not) break free from sadness altogether. If I am to do the work of judgment and punishment, if I am to accept responsibility for the social distribution of opportunities and harms, I had rather do so in sadness than in anger or cool unfeeling.

Because it is a kind of unknowing, we can speak of the mystery of sadness. Even if we knew everything there is to know about Ms. Tempest, her life, and her family and circumstances; even if we knew everything about Ms. Chavez; we would still live in the

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\(^9\) See id. at 191 (Montoya’s discussion of her ambivalence and unresolved marginality in relation to her own symbols of commitment and identity).
mystery of sadness. And so we confront a problem that is both personal and institutional: how to honor the mystery of sadness without benefit of liturgy. The culture and conventions of the law school classroom afford us no suitable moment of silence, no prayer for the departed, no blessing. All the more, then, should we be aware that each hour in the criminal law classroom we stand within the mystery of sadness: stand there without benefit of devices for averting inappropriate affect, without words for warming our hearts against the cold, without gestures warding off the violence we do ourselves when we deny the very structures of our human existence.