

MICHAEL J. RAPHAEL*

California's First Felony Murder Opinion

Following the murder of a farmer, a trio of hangings occurred in 1888 and 1889 in El Dorado County, where the Gold Rush began forty years earlier. After he executed the killer, Sheriff James Madison Anderson faced a duty to hang the two accomplices. Throughout their trial, the duo had claimed they were uninvolved in the murder, and Anderson, who interacted with the inmates as they awaited their fate, had to publicly extinguish their lives even after he signed a futile petition seeking clemency.

*Pasadena lawyer M. G. Rawls, Sheriff Anderson's great-great-granddaughter, pursued the forgotten story of this case and has this fall published *Hanging Justice: The Compelling True Tale of the Last Hangings in El Dorado County, California, in 1888 and 1889*. The case spawned a California Supreme Court opinion, and Ms. Rawls asked me to write an afterword for her book to discuss it. As it happens, the opinion presents the first time our state's Supreme Court addressed the felony murder rule as the term is commonly used: persons guilty of murder not because they personally killed or intended the killing, but because they joined the killer in another felony.*

*Following is the afterword, lightly edited to adapt it for this publication. *Hanging Justice* is available on the internet, and Ms. Rawls can be reached at mgrawls@hangingjustice.com.*



M. G. Rawls's intriguing tale of the trio hanged in El Dorado County for the 1888 murder of John Lowell involves a California Supreme Court opinion that offers a fascinating window into the history of our state's murder law.

* Associate Justice, Court of Appeal, Fourth Appellate District, Division 2, State of California. Justice Raphael graduated in 1990 from Rice University and in 1993 from Yale Law School, where he was a senior editor of the *Yale Law Journal* and an editor of the *Yale Journal of Law & Policy*. He began his legal career as a law clerk for the Honorable Nathaniel R. Jones of the United States Court of Appeals for the Sixth Circuit. Justice Raphael also taught writing and advocacy courses as an adjunct professor at the George Washington University School of Law. He was an assistant United States Attorney for several years before his appointment to the Superior Court of Los Angeles and, ultimately, his elevation to the Court of Appeal.

With the killer John Meyers publicly executed only six months after Lowell’s body was found in June 1888—stunning rapidity by today’s standards—Meyers’s cohorts, John Olsen and William Drager, next faced the gallows. They sought aid from our state’s Supreme Court. (The intermediate-level Court of Appeal would not be created until 1904.) The Court, also acting quickly, answered Olsen and Drager on August 3, 1889. It was not the help the condemned men were looking for.

From a twenty-first-century view, two aspects of the Court’s opinion in *People v. Olsen*¹ are jaw-dropping. The case also is a milestone in the development of criminal law.

First, the Court affirmed the convictions and death sentence without seeing any trial evidence. Today, in reviewing death cases, our Supreme Court typically issues opinions exceeding one hundred pages, carefully examining the evidence. But responding to Olsen and Drager’s claim about problematic evidence, the Court wrote, “It may be that the evidence was not only harmful to them but that it was beneficial. We may fairly assume this to be so as against an appellant who does not bring up the evidence for our inspection.”² As to a jury instruction issue, the Court observed, “What the evidence was, or what it proved or tended to prove, we do not know. . .”³

Second, and even more astonishing, the court approved of a felony-murder jury instruction where larceny was the felony. The felony murder theory, which would blossom in twentieth-century California, allows for a murder conviction of accomplices in certain felonies where a victim died, even if the accomplice did not intend to kill or directly participate in the killing. In the doctrine’s most robust form, for instance, when a teller is killed in a bank robbery, all the robbers (gunman to getaway driver) are guilty of murder.

Olsen and Drager’s jury was instructed that if persons “conspire together to commit a felony” in which a victim dies, the law “superadds intent to kill,” such as with the “conspiracy to commit the crime of grand larceny” charged in the case.⁴ The Supreme Court approved, stating with sweeping breadth, “Whenever one, in doing an act with the design of committing a felony, takes the life of another, even accidentally, this is murder.”⁵ The words used in the instruction, and by the Supreme Court, were “a felony”—apparently any felony.

¹ 80 Cal. 122 (1889).

² *Id.* at 124.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 127.

Throughout California's history, the statute from which courts have derived the felony murder theory has contained only a short list of felonies that can support a first-degree murder conviction. At the time of *Olsen*, Penal Code section 189 listed five felonies: "All murder . . . which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree."

Larceny is not on that list. Robbery is the taking of a person's property while they are present, through force or fear, but larceny is theft with no requirement of the victim's presence or of force or fear.⁶ Larceny should not be a predicate crime for first-degree felony murder. I believe that no California case thereafter provides support for such a conviction.

In the twentieth century, some unlisted felonies that were "inherently dangerous" were held to form the basis for second-degree felony murder convictions.⁷ Theft offenses such as larceny were never on *that* list, however, as they are not inherently dangerous.⁸ And in any event, second-degree murder is not a death-eligible offense. Not only was the murder conviction based on a larceny predicate, but *Hanging Justice* suggests that the theft of Lowell's horses and mule probably was not, in fact, a robbery. Indeed, there was reason to conclude that (as Olsen and Drager's attorneys argued to the jury) the trio did not decide to take the livestock until Lowell was dead.

Finally, *Olsen* is a California felony murder landmark. It is the first reported California case where accomplices to the killer were convicted of murder on a felony murder theory.⁹ That is, Olsen and Drager are our first record (at least in the case law) of murder convicts who did not themselves kill or aid the murderer in the killing but instead participated in a different felony with the killer.

Our Penal Code, in fact, did not state that accomplices could be found guilty in this manner. Penal Code section 189, quoted above, is most naturally read as a grading statute; that is, declaring that if a person commits a murder during one of the listed felonies, then it is a first-degree murder. Our Supreme Court read it that way in 1874, stating that the statute "only prescribes a severer punishment where the murder is committed in the attempt to perpetrate arson, rape, robbery or burglary (on account of the enormity of these offenses), than

⁶ Compare Penal Code § 211 & § 484.

⁷ See, e.g., *People v. Mattison*, 4 Cal.3d 177 (1971) (poisoning); *People v. Nichols*, 3 Cal.3d 150 (1970) (arson of a motor vehicle).

⁸ *People v. Phillips*, 64 Cal.2d 574, 683 (1966) (grand theft not a second-degree felony murder predicate).

⁹ This claim is based on my examination of all the California cases cited in Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59 (2004) (*Origins*). There are seven such pre-*Olsen* cases, all cited in the next several footnotes.

where it is committed in carrying out any other felonious design.”¹⁰ Nothing in the text of the statute makes a non-killer responsible for the murder by participating in the felony.

Before *Olsen*, indeed, every reported California case that implicated the felony murder statute involved the actual killer. In those cases, the statute meant that a murder committed during one of the enumerated felonies carried the “conclusive evidence of premeditation” needed for first-degree murder¹¹ such that the prosecution did not need to prove “that a homicide was intended.”¹²

In one El Dorado County case, a deputy sheriff in pursuit of a group of fourteen robbers was shot and killed, yet it appears that only the shooter was charged and convicted of murder.¹³ There, though, the Supreme Court stated broadly that “it is murder in all who are present aiding and abetting in the common design,”¹⁴ and in another case, approved of a jury instruction that said the same, though again where only the shooter was charged.¹⁵ These statements were dicta, declarations from the court but not strictly necessary to decide the case.

Sweeping in accomplices under the felony murder rule was, however, necessary to convict Olsen and Drager of murder. This is a significant development. The scholar Guyora Binder has explained that it is a “myth” that England had a common law felony murder rule that America adopted because “English courts first applied the felony murder rule in the second half of the nineteenth century.”¹⁶ In America, “felony murder liability was a late nineteenth-century phenomenon,”¹⁷ and “there was no general common law rule.”¹⁸ Binder attributes to our state the development of a particular statutory approach to felony murder, which he labels the “California model: Implied malice with enumerated felonies,” adopted by several Western states.¹⁹ California was one of only eleven states that addressed accomplice liability

¹⁰ *People v. Doyell*, 48 Cal. 85, 94–85 (1874).

¹¹ *People v. Sanchez*, 24 Cal. 17, 29 (1864); *People v. Nichol*, 34 Cal. 211, 213–14 (1867).

¹² *People v. Bealoba*, 17 Cal. 389, 398 (1861); see also *People v. Foren*, 25 Cal. 361 (1864).

¹³ *People v. Pool*, 27 Cal. 572 (1867). The killing of the deputy occurred after the robbery of two coaches of the Pioneer Stage Line on June 30, 1864, by a gang led by bushwhacker Rufus Henry Ingram, who presented the stagecoach owner with a receipt indicating the funds were to be used for the Confederate army. The event was infamously known as the Bullion Bend Robbery.

¹⁴ *Id.* at 581.

¹⁵ *People v. Vasquez*, 49 Cal. 560, 563 (1875).

¹⁶ *Origins*, 57 STAN. L. REV. at 102. See also *People v. Aaron*, 299 N.W.2d 304, 312 (Mich. 1980) (“the doctrine is of doubtful origin. Derived from the misinterpretation of case law, it went unchallenged because of circumstances which no longer exist.”).

¹⁷ *Id.* at 133.

¹⁸ *Id.* at 141.

¹⁹ *Id.* at 164, 167.

for felony murder in the nineteenth century,²⁰ with *Olsen* the sole nineteenth-century American case in which the convicted felons did not personally participate in fatal violence but only in a felony that “may necessitate violence, depending on the circumstances.”²¹

The felony murder rule that *Olsen* helped place in California law took firm hold in the twentieth century, such that it became standard to state that “accomplice liability attaches . . . for any killing committed while the accomplice and killer are ‘jointly engaged’ in the robbery.”²² Though applying the rule, our Supreme Court would at times condemn it, arguing that “the felony-murder doctrine expresses a highly artificial concept” that “has been subjected to severe and sweeping criticism.”²³ It stated that the rule “erodes the relation between criminal liability and moral culpability.”²⁴

That sensibility was in the El Dorado County air as Olsen and Drager approached their ends, as the district attorney and 427 other men in 1888 and 1889 signed petitions seeking the commutation of their sentences. Nevertheless, Governor Robert W. Waterman’s contrary view—that the two men were “equally guilty” with the killer Meyers—removed the last legal barrier in the way of their drop from the Placerville gallows on October 16, 1889.

In 2018, the Legislature finally rejected that “equally guilty” view. It tempered the felony murder law such that those guilty of murder when a victim dies during one of the felonies listed in Penal Code 189 are only (1) the actual killer, (2) a person who aids the killer with intent to kill, and (3) a major participant in the felony who acted with reckless indifference to human life. It even made that change retroactive—although only to those convicts still alive and in custody. With such limitations, the California felony murder doctrine, nascent in *Olsen*, entered its twilight.

²⁰ *Id.* at 197–98.

²¹ *Id.* at 200. Nine nineteenth-century American cases involved coparticipants in the violence who were not the killers. Seven cases involved coparticipants who did not participate in the violence but in a felony that “necessarily” involved violence or risk.

²² *People v. Pulido*, 15 Cal.4th 713, 722 (1997).

²³ *People v. Phillips*, 64 Cal.2d 574, 582–83 (1966).

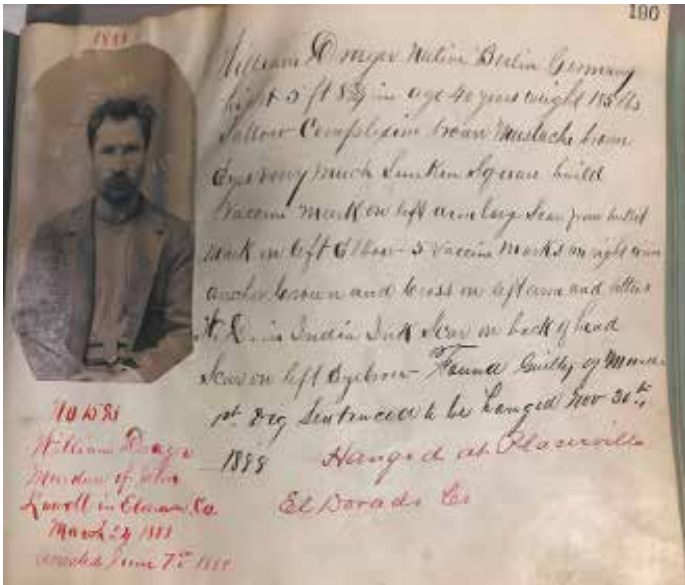
²⁴ *People v. Washington*, 62 Cal.2d 777, 783 (1965).

Mug Shots and Booking Sheets

The actual mug shots and booking sheets for Willam Drager and John Olsen are reproduced below. Note the austere, final red entries in the booking sheets, “Hanged at Placerville El Dorado Co.” A photo of Sheriff James Madison Anderson is also reproduced below.



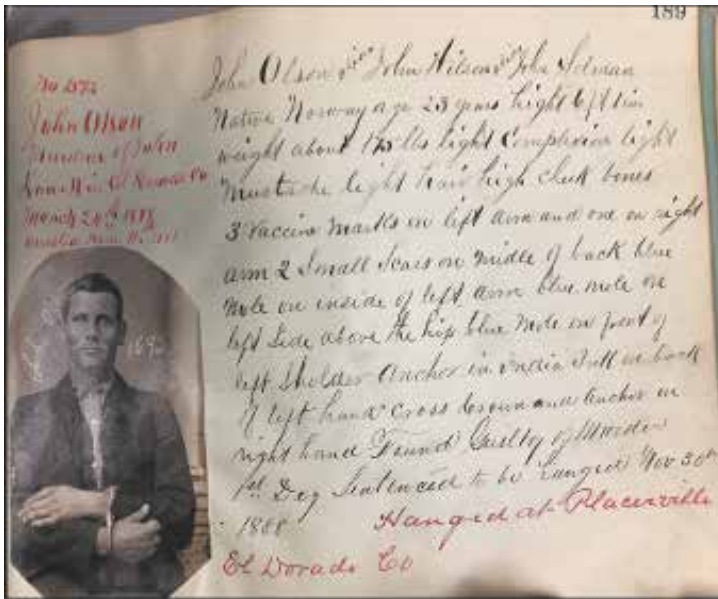
William Drager (close up), Sacramento Police Department Mugbook, 1885–1889, Booking #1593, p. 190. (Photo by M. G. Rawls. Permission to photograph and publish here, Center for Sacramento History.)



William Drager, Sacramento Police Department Mugbook, 1885–1889, Booking #1593, p. 190. (Photo by M. G. Rawls. Permission to photograph and publish here, Center for Sacramento History.)



John Olsen (close up), Sacramento Police Department Mugbook, 1885–1889, Booking #1592, p. 189. (Photo by M. G. Rawls. Permission to photograph and publish here, Center for Sacramento History.)



John Olsen, Sacramento Police Department Mugbook, 1885–1889, Booking #1592, p. 189. (Photo by M. G. Rawls. Permission to photograph and publish here, Center for Sacramento History.)



Sheriff James Madison Anderson, date unknown. (Photo by M. G. Rawls. Permission to photograph and publish here, Collection of David and Patricia Gregg.)

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