Robert Weisberg

The Story of *Rizzo*: The Shifting Landscape of Attempt

Introduction

The iconic opinion is so brief that it is best to review the whole thing before turning to the back story. The opinion opens with the greatest inter-branch-damn-with-faint-praise in American legal history. In the tart, terse words of the New York Court of Appeals:

> The police of the city of New York did excellent work in this case by preventing the commission of a serious crime. It is a great satisfaction to realize that we have such wide-awake guardians of our peace. Whether or not the steps which the defendant had taken up to the time of his arrest amounted to the commission of a crime, as defined by our law, is, however, another matter.[1]

What did the police do wrong? Here were the brief facts summarized by the Court:

> Charles Rizzo, the defendant, appellant, with three others, Anthony J. Dorio, Thomas Milo and John Thomasello, on January 14th planned to rob one Charles Rao of a payroll valued at about $ 1,200 which he was to carry for the United Lathing Company. These defendants, two of whom had firearms, started out in an automobile, looking for Rao or the man who had the payroll on that day. Rizzo claimed to be able to identify the man and was to point him out to the others who were to do the actual holding up. The four rode about in their car looking for Rao. They went to the bank from which he was supposed to get the money and to various buildings being constructed by the United Lathing Company. At last they came to One Hundred and Eightieth Street and Morris Park Avenue. By this time they were watched and followed by two police officers. As Rizzo jumped out of the car and ran into the building all four were arrested. The defendant was taken out from the building in which he was hiding. Neither Rao nor a man named Previti, who was also supposed to carry a payroll, were at the place at the time of the arrest. The defendants had not found or seen the man they intended to rob; no person with a payroll was at any of the places where they had stopped and no one had been pointed out or identified by Rizzo. The four men intended to rob the payroll man, whoever he was; they were looking for him, but they had not seen or discovered him up to the time they were arrested.[2]

The defendants were charged with and convicted of attempted first-degree robbery. Rizzo appealed to the Appellate Division, where he lost by a 2-1 vote, and then won a successful hearing before the Court of Appeals, where, notably, Judge Benjamin Cardozo joined a unanimous opinion by Judge Frederick Crane.

---

[1] People v. Rizzo, 158 N.E. 888, 888 (N.Y. 1927).
[2] *Id.* at 888-89.

The holding was straightforward—though perhaps deceptively so. As the Court of Appeals explained, state law defined attempt as any action "done with intent to commit a crime, and tending but failing to effect its commission." The court added that "the word '*tending*' is very indefinite." Moreover:

> It is perfectly evident that there will arise differences of opinion as to whether an act in a given case is one *tending* to commit a crime. "Tending" means to exert activity in a particular direction. Any act in preparation to commit a crime may be said to have a tendency towards its accomplishment. The procuring of the automobile, searching the streets looking for the desired victim, were in reality acts tending toward the commission of the proposed crime. The law, however, has recognized that many acts in the way of preparation are too remote to constitute the crime of attempt. The line has been drawn between those acts which are remote and those which are proximate and near to the consummation. The law must be practical, and, therefore, considers those acts only as tending to the commission of the crime which are so near to its accomplishment that in all reasonable probability the crime itself would have been committed but for timely interference.[3]

Drawing the line between what we call "preparation" and attempt is a highly contestable enterprise, in part because it elides related but somewhat different concerns: (a) How much sheer temporal or physical proximity to the final act is a public threat?; (b) At what point of interruption of the ultimate crime can we say there was a high enough probability that the crime would have occurred absent the interruption?; and (c) How much action do we need to corroborate independent evidence we have of the defendant's intent to do the crime? Throughout the twentieth century courts proffered a wide variety of doctrines to help resolve these questions, doctrines under such evocative names as the "physical proximity doctrine," the "dangerous proximity doctrine," the "indispensable element test," the "probable desistance test," the "abnormal step approach," and the "unequivocality test," all culminating in the Model Penal Code's "substantial step test."[4] The *Rizzo* court's formulation, full of vague (or flexible) words, is more of a standard than a rule. On its face, it might permit a finding of attempt well before the so-called "last act," but as applied on the *Rizzo* facts, it makes it difficult to prove attempt liability much before that point. On the whole, the movement of recent decades has been to move the line somewhat earlier in time to make conviction easier, and, as discussed below, the Model Penal Code (MPC) formulation exemplifies that trend.[5]

---

[3] *Id.* at 889 (emphasis in original).

[4] United States v. Mandujano, 499 F.2d 370, 373 n.5 (5th Cir. 1974).

[5] Two other major principles of attempt law have remained relatively constant over time. First is the degree of punishment for attempt. How much we punish attempt may depend on the rationale for punishment. As Professor Joshua Dressler explains, a "culpabilty-retributivist would punish a failed attemptor just as severely as a successful one, because he has exhibited the same culpability. A "harm-retributivist" would grade punishment only according to the actual harmful effect of the failed attempt—perhaps in terms of threat to public order and repose. A utilitarian focused on deterrence might punish the attemptor just as much as the successful criminal because ex ante criminals expect to succeed; but some utilitarians might suggest a lesser punishment for attempt so as to give a failed attemptor an incentive to desist from a second effort. *See, e.g.* Joshua Dressler, *Understanding Criminal Law* 381-84 (6th ed. 2012). As if "averaging out" these rationales, American jurisdictions generally punish attempts less severely than successful crimes, often setting the sentence at roughly half that for the completed crime, or, if the penal code grades felonies by degree of punishment, one degree lower than the completed crime. *Id.* at 381. Second, a virtually universal rule is that the attemptor must exhibit purpose with respect to the completion of the crime. Thus, for example, where grossly reckless conduct that results in death can constitute murder, a person who

Rizzo appears in many casebooks because it so piquantly illustrates the significance of the choice among these tests. But *Rizzo* offers further refinements for our understanding of attempt law, as well. It underscores how the substantive criminal law of attempt necessarily relies on various rules of criminal procedure governing when and how the police intervene before the final act or how the police elicit mental state evidence from the suspect or his or her accomplices. So changes in attempt law partly reflect changes in the other realms of legal doctrine, including rules of search and seizure and interrogations, and various in-trial rules of evidence. *Rizzo* also illuminates the venerable issue of "impossible attempts," illustrating how impossibility, often seen as an exotic side issue to the more conventional forms of attempt law, may actually be an inseparable part of the general law of attempt, distinguishable only by rhetorical artifice. Finally, *Rizzo* helps set the stage for the now-dominant MPC rule and particularly the MPC's procedural innovation. Given the unavoidable vagueness of any definitional distinction between preparation and attempt, one way to induce greater rigor and uniformity is through rules governing the trial judge's preliminary decision whether sufficient evidence of attempt exists to even get the question to the jury. The MPC's mechanism for guiding this preliminary decision points a procedural way out of the substantive morass of attempt law that the *Rizzo* court found itself in.

To understand how this eccentric case illuminates the historical evolution of attempt law, a fair amount of reconstruction of the contested facts and issues, as well as the bizarre events at trial, is necessary.

The Story

The setting is mid-winter in the dense urban ethnic world of the Bronx, a maze of streets that play a role in the klutzy meanderings of a gang that could never seem to find a victim. As *The New York Times* for January 15, 1927, reported, the police deserved credit for having "frustrated a payroll holdup" . . . by four men "well supplied with pistols and ammunition."[6] The ring leader was a "boy," Charles Rizzo, whose father Anthony was a partner in the very business whose payroll he allegedly sought to steal. The *Times* reported that the elder Rizzo refused to believe that his son would do such a thing, but, said the *Times*, the younger Rizzo had confessed to the police at the stationhouse, admitting that his $14 per day salary had not satisfied him. And in a virtually literary coincidence, this was not the only successful robbery thwarted by the local police that week. Apparently there had been a string of payroll robbery holdups, and just two days earlier five men were arrested for a failed robbery of the Bronx National Bank. Nor was the Rizzo gang the only extremely feckless one: The same day a youthful would-be robber brandished a pistol at the owner of a used-clothing dealer in the Bronx, using a gun that turned out to be unloaded and dysfunctional, and the victim put up his hands so quickly that he hit the bandit's nose, causing him to drop the gun and flee.[7]

The *Rizzo* trial includes some conflicting narratives that depict the charmingly bumbling incompetence of the parties but also a fair amount of bumbling and cheap drama in the trial itself. Along the way, the trial narrative underscores how now anachronistic investigative and

---

undertakes a grossly reckless act that that by chance does not kill the potential victim is not guilty of "reckless attempted murder" (though there might be liability for some form of reckless endangerment). *Id.* at 492-93.

[6] *Another Robbery Is Foiled In Bronx*, N.Y. Times, Jan. 15, 1927, at 17.

[7] *Id.*

trial procedures made the conviction possible.

The characters: Charles Rizzo was 23, single and living with his parents, and had no priors. He had occasionally worked as a lather and had been a union member since his teens. John Thomasello, 22, was a baker and was married and had some petty larceny priors.[8] Thomas Milo, 23, did some kind of driving for a living, and had, ominously for him as it later turned out, a prior burglary conviction. Anthony Dorio, 20, was a chauffeur with no priors. Rizzo had known the others for varying times, though in all cases fairly casually. Charles Rao was a boss lather in charge of several jobs that day, and he moved from site to bank and back, transporting money for payroll at each site. Frank Previti was a shareholder in the business and occasionally carried payroll himself. Charles Rizzo's father was a shareholder in United Lathing, and Charles Rizzo's brother Joe Rizzo worked for the business as a payroll agent.

On January 18, 1927, the defendants were indicted by a Bronx Grand Jury.[9] At arraignment on January 20, they pleaded not guilty. The indictment contained a count of attempted grand larceny[10] as well as attempted first-degree robbery.[11] The case was then tried in Bronx County Court before Judge Albert Cohn. The trial ran from February 7 through the verdict on February 16 and sentencing the next day.

Although, as discussed below, many of its procedural events now seem anachronistic in light of Warren Court constitutional rulings, one aspect of the case consistent with modern procedural law is that each defendant had separate counsel.[12] Rizzo actually had two key lawyers, John Zoetzl and John DePasquale (the latter argued the appeal). The trial testimony mostly consisted of predictable direct and cross-examination of the officers, and reports of the defendants' statements. The exchanges among the judge, District Attorney Israel Adlerman, and the various defense lawyers were robust and often sarcastic.[13] The trial was a highly spirited affair, hardly

---

[8] The *Times* reported that Thomasello had also been implicated in some hold-ups as part of the "Sheik Gang," although he was not prosecuted for those.

[9] Throughout this chapter, record citations are to the record of Case on Appeal, *People v. Rizzo*, 158 N.E. 888 (N.Y. 1927) [hereinafter, COA], which includes the trial transcript, Appellant's Brief [hereinafter AB], and Respondent's Brief [[hereinafter RB].

[10] The judge ultimately granted a defense motion to dismiss this count. COA, *supra* note 9, at 342-43. Although no explanation was given, the judge might have viewed this as duplicative with the robbery, or possibly even thought that the dollar amount of intended theft was uncertain under the facts.

[11] Under the New York statute, the possible robbery was first-degree both because weapons were used and because each defendant had accomplices. The indictment uses the colorful language of the time, saying that the attempt included weapons "loaded with gunpowder and leaden bullet." COA, *supra* note 9, at 4-5. Confusingly, the indictment also contains language that seems to allege an actual assault on Rao: "feloniously did make an assault…." *Id.* at 4, although that count was later dismissed. Notably, the defendants were never charged with conspiracy, *see infra* text accompanying note 28.

[12] A couple of times the judge requested or allowed one counsel to cover briefly for an absent counsel for another client, at the time of initial appearances of counsel, COA, *supra* note 9, at 17-18, but even for purposes of closing argument, *Id.* at 344, although one defense lawyer did express concern about a possible conflict. *Id.* at 20-21. Of course in cases like this, rife with the possibility (and actuality) of antagonistic defenses and cross-accusations, conflicts can create problems that the Supreme Court would later view as Sixth Amendment violations. Cuyler v. Sullivan, 446 U.S. 335 (1980). As will be evident below, even with separate counsel those problems can affect the case when the defendants are joined in a single trial.

[13] Things quickly became more heated, as in this exchange between defense lawyer O'Brien and the District Attorney:

O'BRIEN: "I have been waiting patiently to hear some evidence."

lacking in adversarialness, with fascinatingly sarcastic exchanges between the District Attorney and Zoetzl, lawyer for Rizzo, and Dorio's lawyer, O'Brien, with barbed expressions of mutual disbelief and brute insult.[14]

Though the key police witness, Officer Walter Sullivan, testified with benefit of hindsight of the supposed confessions, his description of the observable facts was mostly uncontested.[15] He and fellow officer Cronin happened to observe a Paige automobile with four men in it traveling in the opposite direction. Aside from a vague reference to the Paige going slightly fast –though perhaps barely twenty miles per hour—nothing in the record explains the reason for their suspicion. The facts were that the police made a U-turn and followed the Paige for a couple of miles on Southern Boulevard, then Boston Road, then East Tremont Avenue. Along the way, they picked up another officer, Gush, who was on foot patrol, and with Officer Gush in the car, they pulled up next to the Paige when the Paige stopped at the a construction site on 180th Street. Amid some conflicts even among state witnesses, we can discern their story to be: Rizzo jumped out of the Paige and entered the building, possibly through a window. Officer Sullivan followed Rizzo into the building, while Officers Cronin and Gush ordered the others out of the car. Sullivan, unable to locate Rizzo, returned outside. As the three officers grabbed and handcuffed Dorio, Thomasello, and Milo, they extracted loaded revolvers from the latter two. Officer Sullivan struck Thomasello in the head with Milo's gun because Thomasello had dropped his hands and turned threateningly toward Officer Cronin. Officer Sullivan then reentered the building, this time with Officer Cronin, and there they confronted Rizzo, apparently crouching on a pile of debris. When Rizzo failed to keep his hands up as the police demanded, Officer Cronin struck him hard with a blackjack, causing bleeding. Meanwhile Gush managed to maintain control of the others with handcuffs. The arrests were completed by about 2 p.m.. Then the unknowing Rao—the intended robbery victim—showed up, presumably wondering what in the world was going on.[16] The suspects were then driven to the Westchester Avenue station house. For the next three hours, the suspects were detained there and questioned by Police Inspector Duane and District Attorney Adlerman, who would ultimately try the case.

Perhaps the gist of the prosecution case, beyond these facts, came from the statements Dorio, Thomasello, and Milo gave at the station house.[17] The four arrestees had initially met the night

---

DA: "Well, you will hear a lot before you get through."
O'BRIEN: "Not up to the present time."
DA: "Be patient. The worst is yet to come."
O'BRIEN: "Go Ahead."
DA: "Every cloud has a silver lining." COA, *supra* note 9, at 24-25.
Later, Adlerman rephrased a question apologetically, and O'Brien replied, "I object to the apology."
DA:"To the what?"
O'BRIEN: "To the apology."
DA: "I am not apologizing to anyone." *Id.* at 46.
At another point, Zoetzl said to the defendant Rizzo about his injury,:
"They did not take you to the Morgue after you had been hit."'No sir."
Adlerman interrupted: "He is not dead yet, Mr. Zoetzl." *Id.* at 335.

[14] In his closing argument, Adlerman said of O'Brien, that "he represents people when he knows they are a guilty as a dog." When O'Brien understandably objected, the trial judge observed that the comment was "a little outside of the record" but within the "latitude" of acceptable argument. *Id.* at 348-49.

[15] *Id.* at 27-76.

[16] The record does not tell us what Rao said on arrival.

[17] *Id.* at 150-57, 165, 175-79.

before at a cafeteria. Ultimately they all went to Thomasello's nearby apartment, where they played cards. In the course of their conversations, Rizzo told them he had a plan to rob a payroll agent the next day, Rao—or possibly Frank Previti, who also carried payroll. They all agreed to the plan, letting Rizzo take the lead and deciding to split the proceeds evenly, which Rizzo guessed at a figure of several thousand dollars in cash. They would use a Paige automobile that Dorio happened to have stolen a few days earlier and kept available for such opportunities. After Dorio switched plates on the Paige, the four set out in the morning. Alas, Rizzo had miscalculated both time and place. The foursome zig-zagged around the Bronx like a Frogger video game,[18] but whatever jobsite they went to, they found no one carrying any payroll. Perplexed, Rizzo and the other three drove to the bank. Rizzo alone went inside and asked a bank clerk, Palmer, whether the payroll had been picked up by Rao—and was told it had not. The team ultimately went to the jobsite at 180th Street and Morris Park Avenue, where the above events occurred.

Rizzo himself gave a statement at the police station, but later disavowed memory of the statement,[19] claiming that he was dizzy from the earlier blackjacking and from a second blow administered at the station house, this time with sticks. The record confirms that Rizzo was bleeding at the police station and that later that evening he was given medical attention after an ambulance was summoned. As recorded by a stenographer, McMahon, Rizzo's station house confession gave a somewhat different version of the preceding events.[20] He said that in the course of the conversation the evening of January 13, the others became aware that he had connections to and knowledge of the United Lathing Company and its payroll agents and that they implored him to accompany them the next day and to point out the likely robbery victim—Rao. But, said Rizzo, his only self-interest in the event was to meet with some agent who would pay him the $77 he was owed for work past due, or, conversely and at worst, he was a vaguely interested participant in the plan hatched by the others, but had no expectation of any particular payout. The next day, Dorio did the driving; Thomasello and Milo had their own guns. Rizzo denied that he had observed that Dorio had switched plates from another car. Rizzo said that he was indifferent as to the split of any anticipated proceeds: "If I didn't get anything I would not have given a damn either."[21] If that were true, he still might be liable as an accomplice, depending on what version of complicity mens rea rules applied.[22] But Rizzo added that "these guys are supposed to be tough guys and I didn't want anything to do to do with them."[23] By that reckoning, he might have clearly the mens rea for robbery or possibly proffered a duress defense. As a counter-explanation, Rizzo said that when he went to the bank it was solely to inquire about

[18] They traveled to worksites ranging at least from 140th Street in the South Bronx to 204th in the North Bronx, with at least one stop in between. *Id.* at 22.
[19] *See infra* text accompanying note 52.
[20] COA, *supra* note 9, at 183-88.
[21] *Id.* at 187.
[22] In the famous case of *United States v. Peoni*, 100 F.2d 401 (2d. Cir. 1938), Judge Learned Hand said the accomplice is only liable where he participates in the crime with the desire that it succeed, most obviously where he has a material stake in the venture. In a famous opposing case, Judge John Parker held that so long as the defendant knows that his participation will enhance the possibility of success, he is guilty even if he has no personal stake in success. Backun v. United States, 112 F.2d 635 (4th Cir. 1940).
[23] COA, *supra* note 9, at 187. According to Cronin, Rizzo also said that he "thought" the others were going to do a hold up and that "he was kind of suspicious, but that they did not say anything to him about what they were going to do." *Id.* at 83.

his brother, Joe Rizzo, who was a paymaster for the firm.[24]

Then there was Rizzo's actual trial testimony,[25] which amended the story slightly—adding the possible motive that he needed money to pay Thomasello for gambling losses incurred the night before. But in that testimony Rizzo also disavowed—or disavowed any memory of—the station house confession, stressing that at the time he was dazed from the beating (with a blackjack) he received at 180th Street and then the beating (allegedly with sticks) at the station house.[26]

Attempt Law: Procedure And Substance

In cross-examining the key police witness, one of the defense lawyers initiated the following colloquy, which was important both substantively and rhetorically:

> Q. Do you think that is a very peculiar way of attempting to hold up somebody, by going into a cashier or paying teller, into a bank, and saying, "Is John Jones' payroll ready yet?". . .
> A. I do not.
> Q. In the course of your experience as a police officer, that is very common?
> A. No sir.
> Q. . . . You know that in this case in order to get a conviction they must perform some overt act; you know that, don't you? In other words, you cannot be arrested for thinking, can you? . . .
> Q. Until you placed Rizzo under arrest, or placed any of these defendants under arrest on January 14, 1927, did they do anything as far as an attempted hold-up was concerned, outside of riding in a car and one defendant going into an unfinished building . . .?
> A. No, sir.[27]

Obviously, the prosecution's narrative is that this arguably innocent-looking conduct is explained by—and, in turn, corroborates—a nefarious plan to pull off a violent crime. Some attempt cases involve observable conduct more inherently suspicious-looking than this. But *Rizzo* illustrates that in attempt cases the prosecution often must find and rely on more direct evidence of the defendant's thinking and technical mental state. And to do that police and prosecutors may have to rely more heavily on investigative tools than would be the case for proving a completed crime. So examining just how the police got the "intent" evidence in *Rizzo* is important to understanding attempt law.

The only reason the prosecutor was able to convince the New York jury in this case was that the police made an initial temporary seizure, not a true arrest, of the defendants without any need for probable cause. The police were then able to exact confessions from the suspects without the obstacle of the then-inconceivable Fifth Amendment rules we associate with *Miranda*. The

---

[24] This is what Joseph Rizzo said in his own testimony. *Id.* at 246-47.
[25] *Id.* at 273-90.
[26] *Id.* at 287. In addition, the defense put on friendly testimony contradicting evidence that he had ever asked about the whereabouts of any payroll and instead was simply seeking back pay and was asking where he might find his brother, Joe Rizzo, who might have been able to pay him. *Id.* at 225, 230, 386.
[27] *Id.* at 61-62.

prosecutor also did so in a joint trial where the rules of hearsay were applied so loosely that cross-imputation of statements against the four defendants occurred throughout the trial, barely constrained by feckless jury instructions that would become constitutionally insufficient some years later. The case thereby illustrates an unstated and perhaps overlooked reason for the then-very strict level of proof to which the prosecutor was put under the law of attempt: that in the absence of conduct very close to the completion of the crime to corroborate bad intent, the police might resort to legal, but morally questionable, procedures to establish that intent. Conversely, on the very facts of *Rizzo*, a modern prosecutor might have been able to prove attempt under any of the modern definitions of attempt that allow strong proof of intent to make up for any shortage of conduct evidence, and at least would have had a legally sound basis for thwarting a crime for which they had very weak predictive evidence. This is because a key doctrine of Fourth Amendment law, one that had not been articulated in 1927, might have permitted the stop of the car anyway, and, if physical brutality were avoided, might have resulted in evidence sufficient to prove attempt under the more liberal MPC formulation.

Obviously one thing that made it easier for Rizzo's prosecutor was that there were multiple defendants, each providing the best possible source of evidence against the others. I will note below how the prosecution worked this opportunity to its advantage. But one corollary to the multi-actor attempt case is the possibility that the prosecution can seek a conspiracy charge instead of or in addition to attempt. That way, the reports of actions or communications that establish intent toward the ultimate crime might suffice for conviction even if the defendants have stayed well on the safe side of the preparation/attempt boundary. In *Rizzo*, the evidence that supported the conviction would have established the criteria for conspiracy, and that charge was available under New York Law. But it apparently was never contemplated by the prosecutor,[28] presumably because the penalty in New York was relatively trivial[29] and possibly because it might have been deemed mutually exclusive with attempt.[30]

Search and Seizure

Consider the sequence of events that made it at least plausible to try the defendants for attempt. We have, roughly speaking, three categories of evidence: (1) All the conduct observable by the police, which chiefly includes (a) the driving activity, (b) the presence at the

[28] The jury instructions in the case at one point use the term "conspire," but only as a descriptive term in explaining attempt doctrine. *Id.* at 375.

[29] State conspiracy laws are often much more limited than federal conspiracy law, and often, as in New York, may take the form of a unitary crime, the sentence fixed without regard to the possible sentence for the completed crime. So New York Penal Law, Art. 54, Sec. 580 stated: "If two or more persons conspire (1) to commit a crime… each of them is guilty of a misdemeanor." Notably, the "crime" party if conspiracy is in a unitary section with other traditional forms of conspiracy, such as "maliciously to indict another for a crime. . . to cheat or defraud," or to interfere with trade. N.Y. Penal Law of 1909, ch. 88, § 580 (codified at N.Y. Penal Code § 580) (repealed 1965). Only in the case of treason would conspiracy become a felony. N.Y. Penal Law of 1909, ch. 88, § 581 (codified at N.Y. Penal Code § 581) (repealed 1965).

[30] Double jeopardy doctrine does not bar multiple punishment for conspiracy and attempt because while both are inchoate crimes, neither is a lesser-included offense of the other, *e.g.*, State v. Verive, 627 P.2d 721 (Ariz. 1981), but New York law may nevertheless have viewed the two crimes as merging.

location where the intended victim would eventually arrive, and (c) Rizzo's entrance into the building which appears to be flight from officers; (2) the guns found on two of the suspects; and (3) the confessions. So how did the police legally (if so) develop this chain of evidence?

As for the purely observable conduct, here the police means of investigation is obviously the most innocuous. Modern students of criminal procedure can readily parse what the police did. Whatever caused Officers Sullivan and Cronin to be suspicious of the defendants and to turn their car around and follow the Paige, even under modern Fourth Amendment law the police would not have needed to shoulder any burden to justify what they did. Following a car is not a "search" or "seizure" requiring any Fourth Amendment criteria to be proved. But when the police arguably stopped the car by pulling up next to it,[31] and possibly when they entered the building after Rizzo, they may have been undertaking a seizure. Did they have legal grounds for a seizure at that point, based on inferences they drew when they were merely following the car? The defense questioned Sullivan as to just how fast the Paige was going, and the answer that it received, a "great rate of speed," was left fairly unchallenged.[32] Sullivan testified that the driver looked "suspicious," but he said this in a desultory fashion, acknowledging that he drew no inference about what the driver was thinking.[33] Perhaps the rather trivial suspicion they had at that point justified entry into an arguably non-public building, but the key issue is of course the next phase: the physical constraint on Rizzo, the order to put his hands up, the attack on him when he allegedly did not comply, the constraint on the others, the extraction of their weapons, and the striking of Thomasello. These actions were crucial steps in the ultimate case because they led to the discovery of the weapons, and, more importantly, to the later confessions.

These questions hardly troubled the police or ultimately the court, nor were they ever raised by the defense as matters of procedural rights. If anything, there was merely some questioning of police witnesses as to what made them suspect the men were up to no good. Significantly, those questions were viewed as solely relevant to the substantive question of whether the acts and implicit mental state supported the attempt charge. But reflecting on the possible procedural grounds for establishing the substantive elements of the attempt charge is crucial to understanding attempt law in its wider legal context.

Under modern law, the police would have had two legal ways of legitimating these arguable seizures and searches. If we characterize this set of police actions as full arrests and searches, they would be legal—even without a warrant—so long as the police had probable cause to believe a crime had occurred. (That was also the law of New York at the time, under rules that are thoroughly consistent with contemporary constitutional doctrine.[34]) But the question of

---

[31] The facts are somewhat ambiguous as to whether the police car cut the Paige off andforced it to stop, or merely pulled up next to the Paige after the suspects stopped on their own. COA, *supra* note 9, at 93.

[32] *See Id.* at 27-28. Defense counsel did push the point at least rhetorically asking the police witness, "Is that what you saw these defendants on Jan. 14, 1927, speed for a distance of two miles—the car and then one of the defendants goes into an unoccupied building or an incomplete or unfinished building; that is the extent of this evidence, is that right?" *Id.* at 62.

[33] *Id.* at 50-51. In opening argument the District Attorney began to say that as the police followed the car, they "suspected this automobile. . .," but O'Brien interrupted this sentence and said, "You cannot prove suspicion or suspect." The trial judge then observed, "I do not know whether he can or not. It may be that he may be able to prove that some of these defendants were suspected of something." *Id. at* 24.

[34] Under the New York Code of Criminal Procedure, a peace offer could make an arrest without a warrant if a felony has been committed or was happening in his presence, and if he gave notice of intent to arrest and the suspect

probable cause at that point is entangled with the *substantive* question of when preparation morphs into attempt, because even though probable cause is a lesser standard than trial proof beyond a reasonable doubt, the police would have had to have grounds for interpreting the suspects' actions as having already crossed the preparation/attempt divide.

Our modern student of criminal procedure would rightly note that under current law the police had an alternative way of characterizing and thereby justifying their actions under the Fourth Amendment. Since the famous 1968 case of *Terry v. Ohio*[35] we have known that if the police can meet a lesser burden of showing "reasonable cause" to suspect that individuals have committed, are in the process of committing, or even are about to start committing a crime, the police can temporarily detain them and, if they reasonably fear the individuals are armed (a test easily met), they can frisk them for evidence of weapons. And, ironically, the roots of the *Terry* decision significantly lie in the law and practice of New York as they existed at the time of *Rizzo*.[36] Under then-New York law, the prosecutor, if asked, could probably have justified these constraints and the grabbing of weapons as "stops" or "detentions" without any need to establish probable cause for arrest.[37]

Scant 1920s era case law forthrightly addresses in any detail the standards governing stops or frisks. But there was a fairly clear doctrine approving police conduct where the officer "merely detained the person temporarily for the purpose of searching him, presumably to ascertain whether he had a weapon upon his person."[38] The most useful case is *People v. Rivera*.[39] This case was handed down well after the 1920s and just after a new 1964 law, section 180-a,[40] legislatively ratified the New York stop-and-frisk practice. But *Rivera* was expressly decided under pre-section 180 law because it dealt with events that happened before the statute's enactment, and the court there observed a long tradition of permitting detainments under common law doctrine and statutes of other states.[41] As for the "frisk" part of the equation, *Rivera* clarified that an officer may pat down the suspect (to insure the officer's own safety), and if he/she feels a weapon, then can proceed with a search for it.[42] As one expert commentator later observed, "The police also have the right to take investigatory action and frisk a person as an incident to lawful inquiry where the conduct of the person in question is suspicious and the

---

resisted or tried to flee, the officer could use all reasonable means to complete the arrest. N.Y. Crim. Proc. Law of 1881, ch.3-4, §§ 168-77 (codified at N.Y. Code Crim. Proc. §§ 168-77) (current version at N.Y. Crim. Proc. Law 140.10). Although the arrest law does not explicitly address searching the arrestee, the traditional search-incident to arrest doctrine would surely have permitted a fully body and clothing search for evidence or weapons so long as the there was probable cause for the arrest itself.

[35] Terry v. Ohio, 392 U.S. 1 (1968).

[36] *See Id.* at 10-11, nn. 3-5 (discussing New York case law as a source of the holding).

[37] Another way of parsing this under modem law was that if the police were otherwise justified in seizing or searching Rizzo in the building, they were allowed to at least temporarily detain the others in to have them available for arrest if the acts against Rizzo ended up implicating all of them.

[38] People v. Marendi, 107 N.E. 1058, 1060 (N.Y. 1915). *Marendi* relied upon Crim. Proc. Code, Section 167 defining "arrest." The 1928 edition of the annotated code for Section 167 itself cites *Marendi* for the proposition that "merely detaining a person and searching him for concealed weapons does not constitute an arrest." N.Y. Code Crim. Proc. 48 (1928).

[39] 201 N.E.2d 32 (N.Y. 1964).

[40] Act of Mar. 2, 1964, ch. 86, sec. 2, § 180-a, 1964 N.Y. Laws 111 (codified at N.Y. Code Crim. Proc. § 180-a) (current version at N.Y. Crim. Proc. Law § 140.50).

[41] 201 N.E.2d 32 at 34-36.

[42] *Id.* at 35.

policeman suspects he is exposing himself to danger when he stops to question him."[43] Notably, neither this nor any other authority lends any meaning to the term "suspicious."

So assuming the stop-and-frisk doctrine was settled in New York in 1927, [44] the police may have acted legally—so long as the requisite reasonable suspicion was established. The observable conduct up to the point of the car stop seems unlikely to meet the "reasonable suspicion" standard, and if we add the police claims about Rizzo's own allegedly furtive conduct in the building, not much more gets added.[45] So perhaps only the most generous reading of police power made this attempt prosecution possible at all. Worse yet, as noted earlier, if the seizures of the men were deemed to be arrests—and they surely were arrests once the suspects were transported to the station house--then the case would only be salvageable for trial if *probable* cause were evident at that time. Further, as noted above, that probable cause requirement would put even more pressure on the evidentiary value of the men's suspicious

---

[43] Hon. Eugene R. Canudo, Criminal Law of New York 32 (1967). Another commentator observed:

> The court, recognizing that New York's recent stop-and-frisk laws was not in effect at the time of the particular events, stated that the validity of the frisk rested on the initial right to make the summary street inquiry. The authority of the police to stop and question in the circumstances of the case was perfectly clear, since the "business of the police is to prevent crime if they can"; prompt inquiry into suspicious or unusual street action is an "indispensable police power in the orderly government of large urban communities." Comment, Police Power to Stop, Frisk, and Question Suspicious Persons, 65 Colum. L. Rev. 848, 848-49 (1965) (quoting *Rivera*, 201 N.E.2d at 34).

[44] After the new statute was enacted, there was some dispute as to whether the common law stop-and-frisk doctrine of *Marendi*, as described in *Rivera*, was indeed settled law or whether the new statute was really creating the doctrine. Indeed, the new statute was controversial enough that some suggested it violated Article 1, Section 12 of the New York Constitution, the state equivalent of the Fourth Amendment. *See* Note, The "No-Knock" and "Stop and Frisk" Provisions of the New York Code of Criminal Procedure, 38 St. John's L. Rev. 392, 398 (1964).

[45] As reflected in the defense cross-examination of Sullivan, the dispute over this point in the narrative achieved an Abbott and Costello quality:

> DEFENSE: "Did you see Rizzo in the building?"
> SULLIVAN: "At that time?"
> DEFENSE: "At any time you were in the building did you see Rizzo in the building?"
> SULLIVAN: "I did."
> DEFENSE: "Where did you see him?"
> SULLIVAN: "Standing in on a pile of debris, a pile of wood and dirt."
> DEFENSE: "Did you talk to him?"
> SULLIVAN: "Cronin spoke to him?
> DEFENSE: "I thought you left Cronin and this other officer in the car which was parked on the opposite side of the street where this building was."
> SULLIVAN: "I did."
> DEFENSE: "You ran into the building?"
> SULLIVAN: "I ran into the driveway of the building?"
> DEFENSE: "Did you finally get to the building?"
> SULLIVAN: "I did."
> DEFENSE: "When you got into the building you saw Rizzo?"
> SULLIVAN: "Not at that time."
> DEFENSE: "Well, at some point you saw Rizzo on a pile of debris?"
> SULLIVAN: "That is right."
> DEFENSE: "In the corner?"
> SULLIVAN: "That is right."
> DEFENSE: "At the time when you saw Rizzo on this pile of debris, was Cronin there?"
> SULLIVAN: "He was."

COA, *supra* note 9, at 52.

actions to show that they were already well along the way towards completion of a robbery—of a nonpresent victim.

But its odd and questionable facts aside, *Rizzo* illustrates how procedural law informs attempt law. Ultimately, stop and frisk doctrine became embedded in American constitutional law, not just in *Terry* but also (to reinforce the irony) the companion pair of cases called *Sibron v. New York* and *Peters v. New York*.[46] In those cases, the Supreme Court declined to address the facial validity of the New York statute, section 180-a, but, as did *Terry*, cited *Rivera* in declaring the virtues of a flexible, nontechnical standard for situational judgments that police could legitimately make.[47] So for decades now American police have had broad power to undertake invasive investigation even when they merely suspect some crime may be afoot or imminent. And that power has important implications for attempt law. Under a regime of stop-and-frisk, police who encounter what they believe is a crime-in-progress have two ways of helping the prosecution win a conviction for attempt. First, if the observable action appears to cross the preparation/attempt line, they may have probable cause to arrest for the "completed" crime of attempt. But in addition, even if the observable action has not progressed that far, a stop-and-frisk might enable the police to elicit admissions from the suspects, and those admissions might then add to the observable action to establish probable cause for attempt and thus permit arrest at that second point.

The more general point is that the police officers' success getting admissible evidence may depend on where on the continuum the substantive law draws the preparation/attempt distinction. A more liberal attempt actus reus will likely mean that police have a lighter burden in finding probable cause for arrest, while a stricter rule will have the converse result. Of course even if they intervene too early they might still be using their stop-and-frisk power legally and not fret over a foregone lost prosecution, because they will at least be preventing a crime. On the other hand, if, as in the *Rizzo* case, the court draws the preparation/attempt boundary fairly late along the continuum, might the police be tempted to delay intervention to ensure a conviction, thereby taking a risk that they intervene too late to save a victim from harm? In any event, the interaction of attempt doctrine with procedure in these situations surely influences the temptations, incentives, and strategies of law enforcement.

The Confessions

The most obvious procedural anachronism in the case involves the confessions themselves. We can focus on Rizzo's, although similar issues arise with the other defendants'. In 1927, of course, the privilege against self-incrimination was decades away from even being held applicable in state prosecutions,[48] much less construed to require the rules of the *Miranda* decision.[49] In theory, Rizzo might have raised one version of a constitutional attack on the interrogation—under the Due Process Clause. As of 1927, some law indicated that the admission of a truly coerced, involuntary confession would violate defendant's constitutional due

[46] 392 U.S. 40 (1968).
[47] *Id.* at 64.
[48] The privilege was not deemed applicable to the states through the Fourteenth Amendment until Malloy v. Hogan, 378 U.S. 1 (1964), and *Miranda* was decided in 1966.
[49] Miranda v. Arizona, 384 U.S. 436 (1966).

process rights.[50] It would seem that if Rizzo had been struck by the police, his confession would have failed the due process standard, certainly if the beating was done immediately before or with the intent to extract the confession. Even absent facts sufficient to make out a constitutional claim, Rizzo could argue, and did argue, that the effect of the beating rendered his thinking insufficiently clear-headed to make the confession reliable. The police fairly readily admitted to the beatings they administered,[51] while purporting to minimize the effect of the beatings on the suspects' free will.[52] Officer Sullivan found no trouble conceding the beating while insisting that the confessions were voluntary.[53] The prosecution put on the police stenographer, McMahon, who was allowed to read the whole of all the defendants' confessions to the jury. In fact, the only serious objections involved concerns about the accuracy of the stenography, with a vague implication by one of the defense lawyers that the transcript had been cooked.[54] The trial transcript has some indecisive colloquy about just how severe the beatings were,[55] or whether the circumstances of the confession, at least at the station house, were suspicious.[56] Later, after

---

[50] Bram v. United States, 168 U.S. 532 (1897). The major due process case in this vein came a few years after *Rizzo*: Brown v. Mississippi, 297 U.S. 278 (1936).

[51] Officer Cronin admitted he struck Rizzo with a blackjack when the suspect allegedly violated an order to keep his hand up, even after Rizzo announced that he had no gun. COA, *supra* note 9, at 106-07. There was no serious denial that Rizzo visibly bled from the beating. Later, the stenographer who recorded Rizzo's confession at the station house testified that at that point Rizzo did not mention the beating but nevertheless conceded that he saw cuts on Rizzo at that time and that an ambulance was eventually called for him. *Id.* at 192-93.

[52] Defense lawyer O'Brien had the following colloquy with Officer Sullivan:

> DEFENSE: "When you got to the Westchester station house you asked them certain questions?"
> SULLIVAN: "I did."
> DEFENSE: "They responded voluntarily?"
> SULLIVAN: " They did."
> DEFENSE: "Told you the truth?"
> SULLIVAN: "Yes."
> DEFENSE: "Anybody touch them?
> SULLIVAN: "Yes, I hit the defendant Thomasello…I hit the defendants Thomasello with the butt of a gun that I had taken from Milo, on top of the head."…
> DEFENSE: "There was no resistance as far as any of the defendants was concerned in giving up these guns, was there?
> SULLIVAN: "Only that while I was taking the gun from the defendant Milo, the defendants Thomasello dropped his hand and turned toward them." *Id.* at 58-59.

Later, cross-examining Rizzo, Adlerman challenged Rizzo on whether there had been a second beating, at the station house, saying: "Why, don't you know the only time you were hit was on the sidewalk at 180th Street and Morris Park Avenue?" *Id.* at 326.

[53] An exchange on cross-examination:

> DA: "Every question propounded to these defendants, whether it was in the station house or on the way to the station, was answered freely."
> SULLIVAN: "It was." *Id.* at 60.

[54] *Id.* at 181-82.One phrasing imputed to Rizzo might have caused a jury to doubt the authenticity of the reported confession. Asked by the interrogator how Thomasello and Milo might have known about the payroll, "They surmised about it…" *Id.* at 311-12. Historical analysis of linguistic patterns would be necessary to determine whether Rizzo, who had no high school education, would have used the word "surmise."

[55] Officer Sullivan said he was unsure on what part of the body Officer Cronin struck Rizzo. *Id.* at 69.

[56] One of the defense tacks in challenging Rizzo's station house confession was to suggest that the prosecutor may have manipulated the defendant or contrived it, because the key questioning was done by District Attorney Adlerman himself, who had been called to the station. In fact, the defense tried to establish that the police absented themselves from the interrogation room while Adlerman questioned Rizzo. *Id.* at 65, 67-68, 160. The police, argued the defense, played no role on the interrogation and the word "holdup" was never uttered in their presence. *Id.* at 68, 174. In fact, Officer Cronin admitted that the police had never taken steps to book all the arrestees for

Rizzo took the stand in his own defense, he was cross-examined in a bizarre way, Adlerman essentially reading the confession back to him, asking him whether each statement was true.[57] Rizzo's response was that he had no recollection of the contents of his alleged statement because of the beatings he suffered at the crime scene and at the station house.[58] It takes little understanding of Fifth Amendment law to recognize that on the facts alleged about the beatings—indeed on the facts fully admitted by the police, Rizzo's and the others' statements would have violated any reading of *Miranda*. Even if they had been given *Miranda* warnings (an inconceivable requirement at the time),[59] a voluntary waiver of rights after the beating would have been impossible for the State to prove. That does not mean that the defendants had no way to fight the confessions. They had a way, and they tried it. But under the law at the time, except in the rarest instances where the coercion was so brutal as to violate due process, judges tended to allow the confession to be reported to the jury and then give the *jury* a chance the decide whether the defendant's statements were involuntary. Thus, the jurors had several options, at least in theory. They could have chosen to disregard any confession they deemed involuntary—assuming this is psychologically possible for jurors. They could have deemed the confession to be factually false, precisely because it was beaten out of a terrified suspect. Or, even if they had thought the police tactics brutal and unfair, they still could have viewed the confession as factually reliable.

After the jury had in effect twice heard Rizzo's confession, in his summation one of the defense lawyers argued that the "so called admissions were obtained by force or fear."[60] But Adlerman took his turn arguing:

> I trust and hope, gentlemen, that you are not going to be misled in the case because of the attack that has been made upon these police officers in hitting Thomasello and Rizzo. You have heard no complaints from [*sic*] Thomasello's beating. Counselor O'Brien did not say that Thomasello was so badly hurt. Did Thomasello know what he was talking about when he answered his questions and then stated that Rizzo was the man that planned this whole thing?[61]

And then came the judge's charge to the jury, following the judge's own summary of the contents of the confessions:

> Under our law the confession of a defendant. . . can be given in evidence against him unless made under the influence of fear produced by threats. . . but it is not sufficient to warrant his

---

attempted robbery, but that Adlerman had decided to do so. *Id.* at 99. The defense also sought to establish that Rizzo was never made aware of the identity of the questioner, *Id.* at 162, and that Adlerman had "terrorized" the stenographer into testifying in full favor of the prosecution. AB, *supra* note 9, at 67. As a corollary, the defense averred that Adlerman should have taken the stand to rebut the contentions of the bearings at the station house but regrettably could not because of the principle that lawyers should not be themsleves be witnesses in cases where they serve as counsel. *Id.* at 65.

[57] COA, *supra* note 9, at 306-27.

[58] Rizzo testified that when he got to the station house he was beaten with sticks and punched in the jaw. *Id.* at 281.

[59] When defense counsel asked the stenographer whether there was "anything said about any admissions being made by him that night that might be used against him," Adlerman interrupted to say that "There is no law that requires it." *Id.* at 170. Later he added that there was no requirement that after Rizzo's confession he be given a transcript to read and sign. *Id.* at 191.

[60] *Id.* at 347.

[61] *Id.* at 366.

> conviction without additional proof that the crime charged has been committed. It is claimed. . . that any statements obtained from the defendants. . . were taken under the influence of fear produced by threats and preceded by blows struck on two of the defendants. It is for you to say, gentlemen, whether or not these statements or confessions made by each of these defendants were voluntary statements not given under the influence of fear or produced by threats. If the statements were voluntary statements made freely and without any influence of fear produced by threats or bodily harm, then, gentlemen, they are competent evidence in the case. . . . If . . . you are satisfied from the evidence that these statements were obtained or these confession were obtained by under the influence of fear produced by threats, whether express or implied, then, gentlemen, you must under the law disregard those confessions.[62]

Moreover, the judge went on to remind the jurors that the force used by the police was a lawful use of their force if necessary to quell resistance to a lawful arrest.[63] It was left to one of the defense lawyers to make a somewhat obligatory, hopeless pitch before the jury that "these so-called admissions were obtained through force or fear," but that was simply a way of urging the jury to find the confessions unreliable, rather than any kind of suppression motion.[64]

On appeal, Rizzo's attack on the confession shows up in rather desultory fashion under a generic final claim that "For other reasons the defendants did not have a fair trial."[65] But this claim was always really about factual arguments made before the jury; the appeal does not cite any clear rule of law barring admission of the confessions. In its own brief the state re-narrated the facts of the arrests and interrogation of Rizzo himself and proclaimed that the evidence "shows conclusively that the confession taken by the District Attorney was voluntarily made by the defendant[66] and that when the defendant made his confession he was still in full possession of all his faculties."[67]

And so the confession question stood, or, in effect, would have stood. When the Court of Appeals reversed the conviction solely on the ground that the police had interrupted the scheme before Rizzo had crossed the line into attempt, it mooted any possible procedural claim about the confession. But left intact was the power of the state at the time to engage in what now seems like unconscionable tactics to elicit a confession to help boost a "mere preparation" case into an attempt case. Moreover, even the modern *Miranda* restraints on interrogations, the considerable power of police to extract confessions plays a key role in establishing attempt, especially where, as discussed below, the preparation/attempt line has been moved up somewhat earlier along the continuum.

Complicity and its Effects

---

[62] *Id.* at 379-80.
[63] *Id.* at 380-81. If anything, the most litigated issue about the confession involved the venerable corroboration requirement, whereby a conviction cannot rest upon a confession that has not been substantially corroborated by other evidence. The judge's explanation of that rule and the proof of the prosecution's corroborative evidence essentially removed that issue from the case. *Id.* at 379-81.
[64] *Id.* at 347.
[65] AB, *supra* note 9, at 64-69.
[66] RB, *supra* note 9, at 72-78.
[67] *Id.* at 75.

Winning admission of individual confessions was clearly the key to the prosecution's case against Rizzo and his alleged confederates. But equally useful was finding ways that the facts averred in the defendants' individual statements could be summed up into an overall picture and could be used against all the defendants. The interaction of attempt law, accomplice liability, and rules of procedure is thus another important dimension of the case. Of course many cases of attempt involve a single suspect, but the relationship of attempt law and complicity doctrine is mutually revealing. For one thing, at a fairly abstract level, both involve difficult issues of causation. In attempt cases the question is whether the individual is to be punished even where by definition, she never causes the ultimate harm. In complicity cases, the contributory role of any one accomplice may be uncertain as a matter of necessary or sufficient cause of the ultimate harm; hence some of the classic complicity cases turn on drastically easing the causation requirement so as to (arguably) elevate an attempt to aid into full causal responsibility.[68]

But the most practical link between attempt and complicity is simply that accomplices are often the best sources of information about the mental state of each other, and so the cross-admissibility of evidence, especially of confessions, can be crucial in multiple-attempter cases, and the admissibility issue then turns, yet again, on rules of procedure as much as substantive doctrine. *Rizzo*, again, is illustrative.

The first procedural matter is the one of joint trial. Separate trials for the defendants in *Rizzo* might well have accomplished the same result but would have been costly in terms of prosecution resources and the risk that witness testimony would not maintain consistency. The rules of joinder permit a joint trial of alleged accomplices to the same crime.[69] Moreover, under both traditional and current rules, where defendants' cases are initially joined by the prosecutor it would take a heroic argument to persuade a judge to nevertheless grant a motion to sever the cases to avoid undue prejudice resulting from the possibility of mutually inconsistent defenses.[70]

In any event, no such request was ever made in *Rizzo*. Prosecutors have ways of playing off defendants against each other so as to maximize the number or severity of the convictions in the case, and Adlerman was hardly subtle about his goals here. Judges have considerable power, in theory at least, to alert the jury to the dangers of unfair cross-imputation of evidence, but such jury admonitions are of questionable value—and the legal regime of 1927 exhibited much more confidence in the efficacy of these admonitions than would be the case now. The *Rizzo* case was rife with such moments of possible prejudice, and the prosecution certainly took every opportunity to impute any inculpatory facts against all, especially Rizzo. Moreover, the judge may have been unusually disingenuous in assuming the jury instructions would work in this particular case. Some of those moments involved evidence other than confessions or admissions. Thus, when Officer Sullivan described taking a gun from Milo's pocket and produced the gun for the jury, Zoetzl objected to this "as not binding on the defendant Rizzo, there being no evidence that Rizzo was there at the time that this occurrence took place." The trial judge replied that "it is taken subject to connection. I do not know whether the testimony will be adduced to connect

[68] *See* State v. Tally, 15 So. 722 (Ala. 1894) (whether defendant as accomplice to murder for blocking warning message to victim turns on whether "the aid in homicide can be shown to have put the deceased at a disadvantage, to have deprived him of a single chance of life which but for it he would have had . . .").
[69] *See* Fed. R. Crim. P. 8.
[70] *See* Fed. R. Crim. P. 14; Zafiro v. United States, 506 U.S. 534 (1993) (severance only warranted where joinder endangers specific trial-type right of defendant; prospect of antagonistic defenses insufficient).

it."[71] Later, when Adlerman introduced evidence that Dorio had stolen the Paige car some days before his involvement with Rizzo, the judge temporarily allowed this evidence in as part of the "res gestae" of the attempted robbery,[72] but later made clear that the jury deciding the attempted robbery charge should only consider the change of plates (that occurred after Dario's meeting with Rizzo) and disregard the car theft.[73]

But of course the most damning evidence was in the form of out-of-court statements. Even under the law at that time, the hearsay rules provided some limitation against the prejudicial effect of introducing such statements. In that light, it is interesting that while the trial court's rulings, as noted below, seem anachronistic with regard to confessions, the trial judge was extremely punctilious about the risk of hearsay, frequently admonishing witnesses to restate their answers to avoid hearsay problems, even without a lawyer's request.[74] By contrast, when it came to the defendants' admissions to the police (and to Adlerman at the station house), the court relied on limiting instructions rather than ruling those inadmissible. Indeed, the court was forced to give such limiting instructions numerous times because Alderman inserted statements allegedly made by co-defendants as frequently as he could.

Thus, when Adlerman asked Officer Sullivan, "Will you tell this jury what the defendant Dorio said to you before you got into the station house and after you got into the station house?," Zoetzl objected that the testimony would be "incompetent, irrelevant, and immaterial" as against Rizzo. The trial judge then said: "The jury is now instructed that the statements made by Dorio after his arrest are only admissible against Dorio. . . ."[75] When Sullivan testified that Dorio "said, 'I am come into this innocently. I have been gorialled [sic] by these other three men,'" defense counsel again objected, and the trial judge replied, "The same ruling that the Court made before applies with respect to all of this witness' testimony relative to the statement made by Dorio to him."[76] Later still, Officer Cronin testified to statements by Dorio whereby Dorio said he was suspicious about things that Rizzo and the others said to him. Now ritually, Zoetzl objected and the court replied, "Yes, it must be only as against Dorio."[77] More dramatically, when Officer Cronin was reporting on what Dorio said to the police at the station house, O'Brien's objection was met yet again by the court's desultory limiting instruction ("Yes, it is immaterial as to Rizzo, but competent as to Dorio"). But when Cronin then said, "Dorio told me about the job that Milo and Thomasello has done in New Rochelle," O'Brien even asked for a mistrial. The judge then simply repeated the standard limiting instruction.[78]

---

[71] COA, *supra* note 9, at 30-31. The same thing happened when Officer Gush presented one of the guns on the stand. Id. at 124.

[72] *Id.* at 36-37. The term "res gestae" ("things done") refers to the events at issue, or all the steps contemporaneous with part of the conduct constituting the crime, thus marking the scope of potentially relevant evidence. Black's Law Dictionary 1335 (8th ed. 2004).

[73] *Id.* at 355.

[74] When Sullivan began to say "I told Detective Cronin. . ." O'Brien objected and the judge immediately admonished the witness, "Do not say what you told him. What did you do. . .?" *Id.* at 28.

[75] *Id.* at 35.

[76] *Id.* at 36.

[77] *Id.* at 83. Other examples appear throughout the trial transcript. When the stenographer read a statement by Dorio that he recalled Rizzo inquiring about the payroll, Zoetzl objected that it "is not a statement of Rizzo." The court admonished the jury to disregard any possible relevance to Rizzo. *Id.* at 153-54. See also *Id.* at 164 (same in regard to Milo statement); *Id.* at 175 (same in regard to Thomasello statement).

[78] *Id.* at 117-18. Somewhat improbably, Adlerman suggested that the defense had "opened to door" to this

The history of legal doctrine in regard to this issue of cross-imputation is very simple. In 1927, if the defense had pushed harder on the unfairness of allowing the jury to hear one defendant's out-of-court statements as implicating others, the reply would have been that the limiting instructions given by the judge were quite sufficient. As late as three decades later, in *Delli Paoli v. United States*,[79] the Supreme Court held that there was no constitutional problem with this practice, at least as long as the standard jury admonition was given. The defendant in *Delli Paoli* claimed that an out-of-court admission by a co-defendant was not only hearsay against him, but also a violation of the Sixth Amendment's Confrontation Clause. And where such an out of court statement is in effect a confession to a crime, it is devastatingly influential on a jury and therefore hugely prejudicial to the defendant raising the claim. But the Court expressed confidence that a limiting instruction would obviate any Confrontation Clause problem. But just a decade later, the Supreme Court changed its mind in *Bruton v. United States*.[80] Weaving its way through a variety of cases involving confessions and the efficacy of limiting instructions, the Court declared unconstitutional the practice that was used in *Rizzo*:

> In joint trials, . . . when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot "segregate evidence into separate intellectual boxes." . . . It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A.[81]

As for limiting instructions:

> The fact of the matter is that, too often, such admonition against misuse is intrinsically ineffective, in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words, and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell…. The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider, but which they cannot put out of their minds.[82]

The Court also addressed the common argument in favor of joint trials that "the benefits of joint proceedings should not have to be sacrificed by requiring separate trials in order to use the confession against the declarant. Joint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial."[83] But the Court rejected that argument:

---

testimony, and O'Brien replied, "It must be a swinging door."

[79] 352 U.S, 232 (1957).

[80] 391 U.S. 123 (1968).

[81] *Id.* at 130-31 (quoting *People v. Arand*, 407 P.2d 265, 271-72 (Cal. 1965)).

[82] 391 U.S. at 129 (quoting *Delli Paoli v. United States*, 352 U.S. 232, 247-48 (1957) (Frankfurter, J. dissenting).

[83] 391 U.S. at 134.

> We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them. . . . We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high.[84]

In any event, in *Rizzo*, the defendants had to rely on faith in the judge's admonitions. And that faith, especially Rizzo's own, may have been undermined by Adlerman's closing flourish. The District Attorney appears to have been fairly confident of convictions against Thomasello, Milo, and Dorio, so his aim was at Rizzo, especially Rizzo's claim of having been witless or duped or manipulated by the others. Adlerman's acerbic, vitriolic closing argument aimed to depict Rizzo as the mastermind who avoided any risk of being seen holding a gun, but whose information about the payroll route was the absolutely necessary key to success.[85] And at the heart of Adlerman's argument was his unapologetic exploitation of cross-imputation:

> What is the evidence? You cannot separate these statements that have been taken in the Twenty-Third Precinct. You have got to read them together. Who was the directing influence that ordered Dorio to go to these different jobs under consideration? Was it Dorio? No, Dorio did not know where those jobs were being constructed. Was it Thomasello? Thomasello did not know where these jobs were being constructed. The one man that knew it is the man that had the information because of the intimate connection with the United Lathing Company. . . . You have in evidence here a statement made by the defendant Thomasello, the statement made by the defendant Dorio and the statement made by the defendant Milo, and their statements jibe in every particular with the statements made by Rizzo. Their statements stand uncontradicted, undeniable and unquestioned.[86]

Decades after *Rizzo*, a multiple-defendant attempt case might have put the prosecution to a hard choice. It could avoid all these *Bruton* problems at the huge cost of holding separate trials for each defendant. Conversely, It could enjoy the economies of a single trial—and still exploit possible indirect or implicit opportunities of cross-imputation that are outside the scope of *Bruton*—by sacrificing a co-defendant's out-of-court statements that implicate other defendants.[87] Yet another possibility of course, which appeared not to interest Adlerman, would be to cut cooperation deals with the minor players in the scheme in exchange for live testimony against the key villain.[88] But beyond all these particular speculations, the general point is that in

---

[84] Id. at 134-35 (quoting *People v. Fisher*, 164 N.E. 336, 341 (N.Y. 1928) (Lehman, J., dissenting).

[85] COA, *supra* note 9, at 354-56.

[86] *Id.* at 357, 361.

[87] A possible compromise under modern law is to bring in the out-of-court statement against the party who made it, but to redact that part of the statement that implicates others. Gray v. Maryland, 523 U.S. 185 (1998). But that solution requires heroic semantic maneuvers that might not pass court muster.

[88] In *United States v. Jackson*, 560 U.S. 112 (2d Cir. 1977), one of the accomplices in a planned bank robbery turned informer when she was arrested on a separate charge. She began cooperating by faking participation in the bank robbery, and was thereby able to help the police thwart the crime before it was completed and then offered live testimony. By contrast, in *United States v. Buffington*, 815 F.2d 1202 (8th Cir. 1987), the informant was not allowed to testify because the prosecution violated a court order to give timely notice of the witness's appearance. The jury convicted anyway, but the Court of Appeals reversed because the residual physical evidence on which the

cases of equivocal observable action, once again the state of procedural law helps determine whether the attempt conviction can be won.

The Meaning of Attempt

A. The Trial Ruling

Once all the confession evidence came in, the pivotal moment in the trial became the judge's instructions on the definition of attempt. Those instructions merit careful reading:

> To think . . . of a crime, does not constitute an attempt; to prepare for the commission of a crime does not constitute an attempt to commit a crime. If three or four men congregate together in a given place and agree among themselves that they will commit, let us say, the crime of robbery, and if, after having that conference, they stopped, the law says that is not enough to establish the crime of robbery in the first degree, nor does that arise even to the dignity of an attempt to commit the crime of robbery in the first degree.
>
> . . . . The law requires that there be some overt act, some open act committed in pursuance of their prior agreement to carry out the intention which existed in their minds. Whenever the intention exists, followed by acts apparently affording prospect of success and tending to render the commission of the crime effectual, the accused brings himself within the letter and the intent of the statute . . . . In such cases the accused has done his utmost to effectuate the commission of a crime, but fails to accomplish it for some cause not previously apparent to him.
>
> The question whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the consummation of his design. So far as the culprit is concerned the felonious design and action are then just as complete as though the crime could have been or in fact had been committed.[89]

An alternative wording was offered as well:

> Whenever the acts of a person have gone to the extent of placing it in his power to commit the offense unless interrupted in them, but such interruption prevents his present commission of the offense, at least then he is guilty of an attempt to commit the offense, whatever may be the rule as to his conduct before it reached that stage.[90]

If we stop reading at this point, the instructions might seem so vague as to be unhelpful. If we try to align the judge's doctrinal definition with the taxonomy of common law tests noted above, it may appear in the middle along a continuum. The variations among those standards is hard to discern. "Physical proximity" and "dangerous proximity" put more emphasis on how close the acts are toward completion, whereas the "unequivocality test" puts more explicit emphasis on the defendant's mental state.

---

prosecution had to rely was insufficient to support conviction.

[89] COA, *supra* note 9, at 374-75.

[90] *Id.* at 376.

The New York instruction seems to put some emphasis on intent but treats it as a fact independently established, a necessary but not sufficient condition. If this is the case, then the key issue became the degree of movement toward the crime. In effect, the question calls for a thought experiment. Imagine that we are watching the defendant on a videotape, and the tape stops at the instant just before he was interrupted. Would the viewer of the tape at that moment predict a fair likelihood of success for the defendant? In hazarding that prediction, the viewer would have to take into account the range of possible things that could happen between this last observed act and the ultimate goal that might in the ordinary course of events thwart success—including both exogenous events and the possible change-of-mind by the defendant. Thus, the defendant need not have engaged in the *last* act needed to succeed, but he must have crossed what we might consider a point of no return toward completion.

The New York instruction used in *Rizzo* was probably a fair averaging out of all the common law formulas. In that sense, it may seem too vague to give the jury the help it might want. But the substance of the instruction has procedural significance. Imagine that the defense had made more than a superficial effort to dismiss the attempt charge, at the start, middle, or end of the evidence, rather than take its chance on persuading the jury to acquit. It takes a fairly precise set of crime elements for a judge to readily conclude that no reasonable jury could find the elements proved beyond a reasonable doubt. If the standard is as vague as this one is, and if there are facts on both sides of the case—as the admission of the confessions ensured was true here—then the judge has little basis for keeping the issue from the jury.

On the other hand, the judge went on to reframe the instruction in light of the facts of the case. The judge said that if the jurors found that the defendants

> conspired to commit the robbery, . . . to hold up a man who had a payroll in his possession, and that they had secured weapons for the purpose of carrying out that intent which existed in their minds; that the next morning after that conspiracy had been already formed they left 142d street and entered an automobile; that they effected the change of license plates on that automobile; that thereafter they went to several places to seek for an intended victim, the man who carried the payroll, and that if they had not been intercepted by police officers they would have completed the crime of robbery in the first degree but for the interception and interruption by police officers . . . you should find them guilty.[91]

Here the judge might seem to be giving the jury *too much* help, suggesting that the key prosecution facts, if true, necessarily supported the attempt charge. As a result, once the jury heard and believed the confessions, a verdict of guilty may have been unavoidable.

The Appeal

B. Rizzo's argument

Was the jury verdict right? Given the instruction, it seems implausible to deny that there was sufficient evidence to find the defendants guilty beyond a reasonable doubt. The "insufficiency of evidence" test is traditionally so deferential to the trier of fact that Rizzo's best hope would have been to find some way to identify an error of law and not erroneous findings of fact. So

[91] *Id.* at 376.

how did the defense attack the verdict? Rizzo's appellate arguments did not explicitly attack the jury instruction as having stated the wrong legal standard. Rather, the appeal framed the issue as what might best be called a mixed question of law and fact, by which the evidence failed to establish the crime. But to make this claim, defense had to reframe the facts in such a way as to identify a distinct legal boundary around the facts. At the very least he had to classify precedent into affirmed and reversed attempt cases and show that the fact pattern in his case resembled the facts patterns in the reversed group. Better yet, in doing so he had to argue that this classification could generate at least a discernible legal boundary, even if not a crystalline doctrinal difference.

In effect, Rizzo had three possible strategies. First, he could insist that his testimony at trial and the benign version of the evidence argued by his lawyers cast reasonable doubt on whether he, at least, had ever formed the intent to rob anyone. Even if the others had hoped to deploy him as their guide towards finding a vulnerable payroll victim at a conducive time and place, he himself was only dimly aware of being so used and was motivated by the desire to collect his back pay for his own use or at worst to pay off a small gambling debt.

Second, and more fruitfully for the appeal, he could concede the malign version of the facts testified to by the others and not entirely rebutted by his own alleged confession, but then try to interpret the relevant doctrinal precedents as implicitly establishing something close to a last act test. From Rizzo's perspective, the available precedential material was at best equivocal for this purpose. In his way were various cases from New York and elsewhere that endorsed attempt convictions for conduct short of the last or penultimate act. Conversely, even some cases reversing attempt convictions could be read as still not requiring a very late act but just finding a lack of great resolution in the defendant's mind, at a point where a fair amount of action was still needed to go from the final observed act to the necessary ultimate one.[92] The fact-specificity of most of these holdings did not offer Rizzo much help. To draw the doctrinal line that would enhance his cause, the brief focuses on the fact that Rizzo was interrupted before he ever encountered Rao, so that there were still several steps yet to be taken before completion. Thus it avers: "[T]here was much to be done when the defendant was apprehended . . .";[93] It adds: "In the case at bar there were many things that might have happened between the last act of the defendant and the crime intended which would have prevented the crime."[94] Rizzo then cited the famous *Commonwealth v. Peaslee* opinion by Justice Oliver Wendell Holmes as at least implying the requirement of something close to the last act test. [95] By that reckoning, the case might flunk any of the standard phrasings of the preparation/attempt line, at least if those lines were pushed by this interpretation pretty close to the last act test. Even if at the moment of interruption the intent to help rob was in Rizzo's mind, what Holmes in *Peaslee* called a "*locus penitentioe*," an "opportunity for repentance," had not yet been passed.[96] The appellate brief certainly tries this reading of the cases, but this effort requires an artificial enumeration of steps

[92] AB, *supra* note 9, at 34-36.
[93] *Id.* at 36.
[94] *Id.* at 40. The appeal noted that Rizzo might have given up and gone home if Rao had not soon shown up at the 18th Street site. COA, *supra* note 9, at 186-87.
[95] AB, *supra* note 9, at 35, quoting *Commonwealth v. Peaslee*, 59 N.E. 55, 56 (Mass. 1901): "Obviously new considerations come in when further acts on the part of the person who has taken in the first steps are necessary before the substantive crime can come to pass. In this class of cases there is still a chance that the would-be criminal may change his mind."
[96] *Id.*

yet to be taken. After all, had Rao shown up just a moment earlier or the police been just a bit slower, the confederates might have needed just the single step of pulling out their guns to rob him.

Hence, Rizzo had to revert to a third strategy—to draw a qualitative or categorical line through the cases, arguing that no attempt conviction could stand where the circumstances made it literally impossible for the next steps to succeed. Thus, we see in the appellate brief some of the following language:

> But the question here presented, that of the possibility ever committing the crime of attempt to rob where the intended victim is not shown to have been within sight or hearing or range or anywhere near or in proximity to defendant, seems never to have been passed upon in the state.[97]

> How can it possibly be said that there can be an attempt to commit a crime, the essential ingredient or foundation of which is accomplishing the purpose by force or fear, when there is no one present to put in fear or to exercise force against?[98]

> [H]ere defendant is found guilty of doing something which he never intended and which it was wholly impossible for him to do . . .[99]

This was a crucial maneuver by the appellant. The jury instruction did not require that the defendant have committed the last or penultimate possible acts, so that proximity to the final crime could have been a matter of degree. Worse yet, if the confessions about intent were to be believed, a reasonable jury could surely have found that whatever steps were yet to be taken, would have been taken absent interruption by police. So the appellate maneuver was to turn a matter of degree into a categorical distinction: If the crime alleged was supposedly the robbery of Rao at 180th Street, and if Rao was not there, then no matter how many further steps were taken, the crime could not have been succeeded.

To render this impossibility defense less abstract, Rizzo tried to thread his way through key background cases to argue they support this defense. His position was that the physical presence of the victim is the key variable in the cases.[100] This is the meaning of the term "present commission" as derived by the trial judge in this case and inserted into the jury instruction.[101] Thus, in *People v. Sullivan*, Judge Edgar Cullen opined:

> If one with intent to shoot another should procure a pistol for that purpose, that alone might not amount to an attempt to shoot him. It may be that if after procuring the pistol he took a conveyance to the residence of his intended victim, still that would not constitute an attempt. But if after this with his design unchanged he approaches the person he intends to shoot but is seized before he can draw the pistol, I think he is properly punished as having attempted to

---

[97] AB, *supra* note 9, at 23.
[98] *Id.* at 23.
[99] *Id.* at 22.
[100] *Id.* at 34-35.
[101] COA, *supra* note 9, at 376.

commit the crime.[102]

Rizzo, of course, wanted to read *Sullivan* as declaring "impossibility" cases as a wholly separate category, and as making physical proximity the criterion of "possibility." But there is a contrary way of reading *Sullivan* that renders the notion of "impossibility" a misleading distraction, a reading by which finding a sufficient sum of act and intent evidence is a matter of degree, and by which proximity becomes at most a relevant factor, and by no means a decisive one. By that reckoning, factual differences between Rizzo's case and Sullivan's could make affirmance of the former's conviction perfectly consistent with reversal of the latter's.

But then another New York case presented a much greater challenge to Rizzo's lawyers. In *People v. Du Veau*, (the only cited New York case where the charge was attempted first-degree robbery), a defendant was arrested when he and a supposed accomplice (who had turned police informer) arrived at the victim's place of business, where the robbery was to occur.[103] The court upheld Du Veau's conviction, straightforwardly holding that the defendant's solicitation of the accomplice was an act clearly tending, however futilely, toward commission of the crime. A court inclined to be generous to accused attempters could certainly have framed *Du Veau* as an instance of impossibility even more plausibly than Rizzo's, since the sting operation terminated any conceivable chance of success for the crime. Therefore, in upholding the conviction, the *Du Veau* court was rendering the impossibility issue irrelevant and providing strong support to the State. *Du Veau* thus effectively equated sting cases with the more numerous empty pocket cases, where accused pickpockets generally failed to persuade the courts that their cases were really examples of nonpunishable "impossible" attempts.[104]

Thus, Rizzo's problem here was twofold: First, he had little precedent available to support his reading of impossibility doctrine. Second, as a conceptual matter "impossibility" is a very unstable line to draw. On that second score, in trying to reframe his case as one of impossibility, Rizzo was reflecting a common approach to attempt law throughout the twentieth century, and to some extent one continuing today. This approach views conventional attempt cases as ones where the state must establish clear intent to do the crime and sufficient action to meet whatever version of the preparation/attempt doctrine applies, but treats "impossibility" cases as a separate species altogether. Often using such classic examples as the pickpocket with his hand in an empty pocket, or the shooter who aims at a pillow thinking it is his enemy's head, many casebooks insert so-called impossibility cases as a supplementary unit in their attempt chapters[105]

---

[102] 65 N.E. 989.993 (N.Y. 1903). In his effort to seal up the category of spatial place, Rizzo cites *Peebles v. State*, 28 S.E. 920 (Ga. 1897), where the defendant poisoned a well to kill the victim, but the poison was discovered before the victim showed up. As described by Rizzo, the key relevant fact was that "the intended victim was not in insufficient proximity to the danger." AB, *supra* note 9, at 32.

[103] 94 N.Y.S. 225 (N.Y. App. Div. 1905).

[104] AB, *supra* note 9, at 34. Rizzo tried to use physical proximity to distinguish the pickpocket cases as well: "These cases are all distinguishable from the instant one in that in each the proper object or subject of the crime was present and available and close enough to the defendant and in sufficient proximity for him to work his designs upon." *Id.* But phrases like "close enough" seem to concede that these are indeed just matters of degree, and while Rizzo succeeded in 1927, this rationalization, as discussed below, now seems artificial and anachronistic. *See infra* text accompanying notes 128-29.

[105] *See e.g.*, Sanford Kadish, Stephen Schulhofer & Carol Steiker, *Criminal Law and Its Processes: Cases and Materials* 575-88 (8th ed. 2007).

or describe it as a formal defense to an attempt charge.[106] But almost all efforts to make sense of this supposedly separate category come to failure. In the end, the *Rizzo* case thereby at least indirectly helps illustrate the better approach to this issue—to recognize that under a proper understanding of attempt law, impossibility may not be a separate category at all.

The Impossibility Question

Notably, New York actually did have important precedent on the impossibility issue, although it was never cited in the Rizzo pleadings or opinion. In the oft-excerpted case of *People v. Jaffe*,[107] after the police learned of a theft that was to end with selling the stolen goods, a sting was arranged and the putative buyer was caught. The court overturned a conviction for attempted receipt of stolen property because the goods "lost their character as stolen."[108] *Jaffe* was reviewed in the extremely useful case of *Booth v. State*.[109] There on similar facts, another state court ruled that there could be no punishable attempt to receive a stolen coat when the police were already informed of and in control of the situation because the coat had lost its character as stolen. The great value of *Booth* is that it articulates the difficulty that was raised less systematically by the State in *Rizzo*: The impossibility doctrine does not have a coherent definition or boundary.

Booth notes that the impossibility concept goes back at least as far as early Victorian England, where the courts at first rejected liability in the generic pickpocket/empty pocket cases,[110] but later started changing their view in favor of liability.[111] Once imported into American law, impossibility doctrine led to a very questionable sorting of generic situations into supposedly distinct categories called "factual impossibility," where attempt was unsuitable, and "legal impossibility," where it was not. As the *Booth* court lamented:

> What is a "legal impossibility" as distinguished from a "physical or factual impossibility" has over a long period of time perplexed our courts and has resulted in many irreconcilable decisions and much philosophical discussion by legal scholars.
>
> The reason for the "impossibility" of completing the substantive crime ordinarily falls into one of two categories: (1) Where the act if completed would not be criminal, a situation which is usually described as a "legal impossibility," and (2) where the basic or substantive crime is impossible of completion, simply because of some physical or factual condition unknown to the defendant, a situation which is usually described as a "factual impossibility."
>
> The authorities in the various states and the text-writers are in general agreement that

---

[106] *See, e.g.,* Joshua Dressler, *Cases and Materials on Criminal Law* 770-89 (5th ed. 2009) (calling impossibility a "special defense").
[107] 78 N.E. 169 (N.Y. App. Div. 1906).
[108] *Id.* at 169.
[109] 398 P.2d 863 (Okla. 1964).
[110] *See e.g.,* Regina v. McPherson (1857) 169 Eng. Rep. 975; 1 D. & B. C. C. 197.In the words of Baron Bramwell: "The argument that a man putting his hand into an empty pocket might be convicted of an attempt to steal appeared to me at first plausible; but suppose a man, believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could he be convicted of attempting to murder the man he took it to be?"
[111] R. v. Ring [1892] 17 Cox C. C. 491; 66 L. T. N. S. 300.

> where there is a "legal impossibility" of completing the substantive crime, the accused cannot be successfully charged with an attempt, whereas in those cases in which the "factual impossibility" situation is involved, the accused may be convicted of an attempt. Detailed discussion of the subject is unnecessary to make it clear that it is frequently most difficult to compartmentalize a particular set of facts as coming within one of the categories rather than the other.[112]

The *Booth* court concluded that, given this traditional taxonomy, it had to overturn the conviction, but it did so reluctantly: "The defendant in the instant case leaves little doubt as to his moral guilt. The evidence, as related by the self-admitted and perpetual law violator, indicates defendant fully intended to do the act with which he was charged."[113]

The Court therefore quoted with admiration, and urged legislatures to adopt, the then-new Model Penal Code provision on the issue:

> (1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
> (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or,
> (b) when causing a particular result in an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part; or,
>
> (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his

---

[112] *Booth*, 398 P.2d at 870. *Booth* offered these admittedly unhelpful case summaries: Examples of the so-called "legal impossibility" situations [citations omitted] are:

(a) A person accepting goods which he believes to have been stolen, but which were not in fact stolen goods, is not guilty of an attempt to receive stolen goods.
(b) It is not an attempt to commit subornation of perjury where the false testimony solicited, if given, would have been immaterial to the case at hand and hence not perjurious.
(c) An accused who offers a bribe to a person believed to be a juror, but who is not a juror, is not guilty of an attempt to bribe a juror.
(d) An official who contracts a debt which is unauthorized and a nullity, but which he believes to be valid, is not guilty of an attempt to illegally contract a valid debt.
(e) A hunter who shoots a stuffed deer believing it to be alive is not guilty of an attempt to shoot a deer out of season.

Examples of cases in which attempt convictions have been sustained on the theory that all that prevented the consummation of the completed crime was a "factual impossibility" are:

(a) The picking of an empty pocket.
(b) An attempt to steal from an empty receptacle.
(c) Where defendant shoots into the intended victim's bed, believing he is there, when in fact he is elsewhere.
(d) Where the defendant erroneously believing that the gun is loaded points it at his wife's head and pulls the trigger.
(e) Where the woman upon whom the abortion operation is performed is not in fact pregnant. *Id.* at 870-71.

[113] *Id.* at 872.

commission of the crime.[114]

Note that this statutory language renders moot irrelevant any distinct concept of impossibility. So long as the act conceived by the malefactor is one which is condemned by a criminal statute, he can be guilty of attempt if the intent and sufficient act are proved.

The State's Response

In the Respondent's Brief in *Rizzo*, the state lawyers sounded quite confident that an affirmance was on the way. Reviewing all the cases cited by the appellant, the State read them all as straightforward applications of the conventional standards for attempt law reflected in the various verbal formulations of the preparation/attempt distinction, and as perfectly well summarized by the trial judge's "tending to render the commission of the crime effectual" instruction in the case. The State lawyers were happy to recite various versions of the preparation/attempt distinction and then view the various outcomes as case-specific. From that perspective, affirmance of the conviction in this case was close to a simple matter of deference to jury fact-finding under the highly deferential insufficiency-of-evidence standard. The state stressed that various "proximity" tests were all matters of degree, and in particular re-read the *Peaslee* opinion as supporting the view that the act before interruption need not be the last or even penultimate act contemplated:

> But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crimes so probable that the act will be a misdemeanor, although there is still a locus penitentioe, in the need of a further exertion of the will to complete the crime.[115]

The State then confidently tackled the impossibility issue head on by essentially deconstructing it. Its key point was that it was all a matter of a categorization. There was the possibility of "present commission" if we imagine that absent interruption the defendants would have stayed there until Charles Rao arrived or have pursued a payroll elsewhere. The State thereby offers the key logical argyment against any impossibility doctirne: Anything incomplete action can be called "impossible" to complete if we frame the situation narrowly enough. The State's argument thus anticipates the demise of "impossibility" as a distinct legal category or the blending of a broad category of factual impossibility into conventional MPC-type attempt law. "In all probability, under the circumstances, defendant Rizzo and his confederates would have waited for Rao's appearance, had they not been interrupted by the police."[116] As for the pickpocket and other attempted theft cases discussed—and supposedly finessed—by the appellant, the state happily cited the affirmance of convictions in those cases as proof that there is no "impossibility defense" at all.[117]

---

[114] Model Penal Code § 5.01(1) (1985).
[115] Commonwealth v. Peaslee, 59 N.E. 55, 56 (Mass. 1901).
[116] RB, *supra* 9, at 40.
[117] *Id.* at 40-41.The cases range from empty pocket attempted theft cases, *e.g.*, People v. Moran, 25 N.E. 412 (N.Y. 1890) to attempted abortion where the woman turned out not to be pregnant, *Commonwealth v. Taylor*, 132 Mass. 261 (1882). As the brief quoted from *Moran*, 25 N.E. at 412-13:

> Whenever the animo furandi exists, followed by acts apparently affording a prospect of success and tending to

In this regard, the Respondent's brief relies heavily on *Stokes v. State*,[118] a very articulate opinion that underscores the view that attempt doctrine cannot avoid reliance on fairly general, case-sensitive standards:

> It is useless to undertake to reconcile the authorities on the subject of what constitutes an attempt, or what is an overt act, within the meaning of the section in question. It is equally impossible for us to undertake to lay down any rule on this subject which would serve as a guide in all future cases. To a very great extent each and every case must stand on its own facts. The text-books and decisions are noted for their lack of harmony. It is impossible to decide any case on this subject without doing violence to some author or some adjudicated case. Therefore all we can hope to do is to follow the best authorities and to clear up the subject as best we can, so far as the laws of this state are concerned.[119]

The *Stokes* court also stressed that drawing too sharp—and late—a line between preparation and attempt might cause police to risk public safety in order to ensure a righteous arrest:

> Must the citizen be required to imperil his existence up to the time of the actual menace before he can claim the protection of the law and procure the punishment of the offender? The mere buying of the gun would be preparation, and not attempt. The mere buying of a gun and loading it might not constitute an attempt. But when the facts show, in furtherance of the design, that a gun has been procured and loaded, and the party so procuring and loading the gun has armed himself and started out on his mission to kill, but is prevented from carrying out his design by such extraneous circumstances as that the party he intends to kill does not come to the point where he expected to carry out his design, or if the party designing to kill is arrested and prevented from carrying out the design, he is clearly guilty of the attempt. The public welfare and peace are better subserved, and the lives of citizens better protected, by the holding that these acts constitute criminal attempt, as in fact they do, than would any attempted refinement of the law which would result in a contrary view . . . .
>
> But, whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt, and this court will not destroy the practical and common-sense administration of the law with subtleties as to what constitutes preparation and what an act [must be] done toward the commission of a crime. Too many subtle distinctions have been drawn along these lines for practical purposes. Too many loopholes have been made whereby parties are enabled to escape punishment for that which is known to be criminal in its worse sense.[120]

And then the *Stokes* court dismissed the issue of impossibility as a phantom:

> render the commission of the crime ineffectual, the accused brings himself within the letter and intent of the statute. To constitute the crime charged there must be a person from whom the property may be taken; an intent to take it against the will of the owner; and some act performed tending to accomplish it, and when these things occur, the crime has, we think, been committed whether property could, in fact, have been stolen or not . . . .

[118] 46 So. 627 (Miss. 1908).

[119] *Id.* at 628.

[120] *Id.* at 628-29.

> In McClain on Criminal Law, § 226, it is held: Where there is the intent to commit, and an act is done tending to effect the commission thereof, the attempt is punishable, although by reason of extraneous circumstances the actual commission of the crime is impossible . . . .
>
> . . . All the authorities hold, that, in order to constitute an attempt, the act attempted must be a possibility; and counsel for appellant argue from this that the appellant could not have committed this crime at the time he was arrested, because Lane [the intended victim] was not even there, and therefore, they say, no conviction could be had. It was no fault of Stokes that the crime was not committed. He had the gun, and the testimony warrants the conclusion that it had been taken for the purpose of killing Lane. It only became impossible by reason of the extraneous circumstance that Lane did not go that way, and, further, that defendant was arrested and prevented from committing the murder. This rule of the law has application only to a case where it is inherently impossible to commit the crime. It has no application to a case where it becomes impossible for the crime to be committed, either by outside interference or because of miscalculation as to a supposed opportunity to commit the crime which fails to materialize; in short, it has no application to the case when the impossibility grows out of extraneous facts not within the control of the party.[121]

The rhetoric here is elegant, as the court demonstrates that any case of failed criminal effort can be viewed in retrospect as having been impossible to achieve if we take the extraneous interrupting circumstances as fixities in the universe. On the other hand, it tempts us with its throwaway point about some acts being "inherently impossible" to achieve, never telling us what might fall into that category. Traditional law school pedagogy often posits such cases. What if Jane, who is eighteen years old, wrongly thinks she is still seventeen and votes in an election? Has she attempted illegal underage voting? Or is this attempted crime truly impossible because Jane will absolutely never be able to violate this law? Or should we fear that her demonstrable willingness to flout the law might find another feasible criminal goal? As for a law school classic, what if Bill, who believes in voodoo, uses voodoo technique to harm his enemy? If we assume voodoo cannot work, has Bill nevertheless attempted an assault? Might we fear that he will someday realize he needs a more efficacious weapon?[122] What if Zeke misunderstands the First Amendment and believes it is a crime to insult the Mayor. If he publicly shouts that the Mayor is a fool, has he attempted a crime? What crime? These amusing hypotheticals of course make heroic assumptions about the willingness of bad people to announce their intentions or about our ability or desire to explore their mental interiors. But they do put some intellectual pressure on us to decide what the real goal of attempt law is. Is it to punish the morally culpable who take serious steps toward carrying out their illicit desires? Or is it to deploy the tools of law enforcement and prosecution to thwart dangerous people before they commit some irredeemable harm? Or some combination?

But setting aside these intellectual temptations to explore the meaning of the "inherently

---

[121] *Id.* at 629.

[122] The voodoo hypothetical is not entirely hypothetical. *See* John Kaplan, Robert Weisberg & Guyora Binder, Criminal Law Cases and Materials 703 (6th ed. 2008) (citing case from Mississippi where arrest was made in such a case; but cf. Model Penal Code § 5.05(2) providing for mitigation of sentencing in attempt cases where conduct "is so inherently unlikely to result or culminate in commission of a crime that neither such conduct nor the actor presents a public danger").

impossible," the *Stokes* opinion sums up the common sense of the State's position in *Rizzo*. Unfortunately for the State, however, the Court of Appeals in the *Rizzo* case was not persuaded.

Conclusion: The Rizzo *Opinion and After*

In 1927, courts were very divided on how to analyze, much less resolve, the varieties of attempt cases. New York's highest court in *Rizzo* took a distinctly narrow, and pro-defendant, view of attempt law. The opinion recites some of the old chestnut formulations of the preparation/attempt boundary:

> Felonious intent alone is not enough, but there must be an overt act shown in order to establish even an attempt. An overt act is one done to carry out the intention, and it must be such as would naturally effect that result, unless prevented by some extraneous cause."[123]
>
> There must be dangerous proximity to success.[124]
>
> An act, in order to be a criminal attempt, must be immediately, and not remotely, connected with and directly tending to the commission of an offence.[125]
>
> The acts constituting an attempt as coming "*very near* to the accomplishment of the [crime]."[126]

And as those precedents applied to the facts before it, the Court concluded:

> To constitute the crime of robbery, the money must have been taken from Rao by means of force or violence, or through fear. The crime of attempt to commit robbery was committed if these defendants did an act tending to the commission of this robbery. Did the acts above describe come dangerously near to the taking of Rao's property? Did the acts come so near the commission of robbery that there was reasonable likelihood of its accomplishment but for the interference? Men would not be guilty of an attempt at burglary if they had planned to break into a building and were arrested while they were hunting about the streets for the building not knowing where it was. Neither would a man be guilty of an attempt to commit murder if he armed himself and started out to find the person whom he had planned to kill but could not find him. So here these defendants were not guilty of an attempt to commit robbery in the first degree when they had not found or reached the presence of the person they intended to rob.[127]

There is a kind of doctrinal "takeaway" in the opinion. The Court first acknowledges the case-specificity of attempt law: "The method of committing or attempting crime varies in each case so that the difficulty, if any, is not with this rule of law regarding an attempt, which is well understood, but with its application to the facts."[128] But then, following the case-parsing of the

---

[123] People v. Rizzo, 158 N.E. 888, 889 (N.Y. 1927) (quoting *People* v. *Mills*, 70 N.E. 786, 789-90 (N.Y. 1904)).
[124] *Id.* (quoting *Hyde v. United States* 225 U.S. 347, 388 (1912)).
[125] *Id.* (quoting Halsbury, 9 Laws of England 259).
[126] *Id.* (paraphrasing and quoting *Commonwealth v. Peaslee*, 59 N.E. 55, 56 (Mass. 1901))).
[127] People v. Rizzo, 158 N.E. 888, 889 (N.Y. 1927).
[128] *Id.*

Appellant's Brief, the Court speaks in spatial images of "remoteness" and "proximity" and infers from the pattern of cases under this loose doctrine what it calls the "immediate nearness" rule.[129] Without quite committing to a last act or penultimate act test, the Court straightforwardly announces that "nearness" is the key criterion. Of course "nearness" is not only vague, it is ambiguous in that it can be viewed spatially and temporally at the same time. Moreover, the Court never makes any effort to explain *why* this is or should be the rule.

The Court's is clearly loath to punish attempt when, despite the evidence of intent, the perpetrators had not advanced very far along the preparation/attempt continuum. But its abruptly conclusory holding leaves it open to multiple and partly conflicting readings. Did the Court accept that Rizzo and his accomplices were morally repugnant but too incompetent, too feckless, to warrant state intervention? Had the police intervened before the point at which we could be confident that the men had truly resolved to commit the crime? Did it allow the men a margin of error to exhibit Hamlet-like indecision? Less plausibly, was this a civil liberties-focused decision in which, while never condemning the police actions here, the Court wanted to dissuade the police from violating the liberty and autonomy of citizens who had not yet caused any demonstrable harm? Or did the Court, while never using the word "impossibility," accept the idea that this case fell into a distinct category whereby, as framed and frozen at the moment of interruption, this was an instance of "legal impossibility." Finally, since the Court nowhere says that the trial judge had misinstructed the jury on the formal elements of the crime, it implicitly holds that a finding of attempt, whether one calls it a question of fact or a mixed question of fact and law, is one on which a jury may merit little deference. Was the Court rejecting the usually deferential insufficiency standard, ruling, in effect, that the trial judge should have yanked the case from the jury. Did thse facrts so fail the "nearness" test that no reasonable jury could find attempt proved beyond a reasonable doubt.

Whatever the explanation, *People v. Rizzo* stands as a key moment in the history of attempt law—but it ultimately was on the wrong side of history. A generation later, the Model Penal Code formulation was enacted and became fairly dominant across the nation.[130] As noted above, the articulation of the basic elements of attempt under the MPC renders the impossibility doctrine mostly irrelevant. Most cases that could be framed as arguably "impossible attempts" can now be prosecuted as attempts so long as intent and sufficient action are established. Furthermore, the MPC makes it possible to identify punishable attempt at a relatively early stage on the preparation/attempt line. But the MPC accomplishes those goals with some very sophisticated legal innovations.

For those criminal efforts that fail or are interrupted before the last necessary act occurs, the key question under the MPC is whether the person "purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[131] Here the key term is "substantial step." It replaces the old term "overt act," and serves as the MPC's basic definition of the actus reus of attempt. The main role of a "substantial step" is to corroborate

[129] *Id*.
[130] Dressler, *Understanding Criminal Law*, *supra* note 5, at 413.
[131] Model Penal Code § 5.01(1).

intent, and so the focus of MPC attempt law would seem to be on the defendant's mens rea.[132] In that sense, the MPC navigates its way between the moral concern with discerning a culpable state of mind and the instrumental concern with thwarting danger. The drafters thought no greater precision was desirable or even possible, and they make no reference to the last or penultimate act. But the drafters still recognized the need to give further guidance to prosecutors, courts, and juries, and they did so with an unusual combination of substance and procedure. The key innovation in the MPC is that it draws from many of the classic attempt fact patterns a taxonomy of types of conduct that could be fairly viewed as substantial steps, and it enumerates them in some detail, and at the same it declares how application of the substantial step doctrine should be allocated between judge and jury:

> (2) Conduct that May Be Held Substantial Step under Subsection (1) (c). Conduct shall not be held to constitute a substantial step under subsection (1) (c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:
>
> (a) lying in wait, searching for or following the contemplated victim of the crime;
>
> (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
>
> (c) reconnoitering the place contemplated for the commission of the crime;
>
> (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
>
> (e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;
>
> (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
>
> (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.[133]

This rule gives judges three key chief mandates. First, if the prosecutor can make a reasonable preliminary case that one of the classic forms of pre-completion conduct has occurred, the judge must send the case to the jury. Second, the rule *allows* the judge to dismiss the case if none of the forms of conduct can be proved, though it might allow the judge to let the case go forward if some unlisted form of conduct seems "substantial" enough.. Third, once the case does go to a properly instructed jury, the trial judge and any appellate court presumably should let a conviction of attempt stand so long as it meets the traditional sufficiency of evidence test.

And how would Charles Rizzo et al. have fared under the MPC test? We can safely say they would not have fared well. Ironically, the comic narrative of their automobile travels around the

---

[132] In this regard, the drafters of the MPC viewed the proper focus of attempt law as the subjective culpability of the attemper, not on the dangerousness of his actual conduct: "The proper focus of attention is the actor's disposition." American Law Institute, Model Penal Code, Comment to §5.01, at 298 (1985).

[133] Model Penal Code § 5.01(2).

Bronx might establish the searching or following or reconnoitering—or even the lying in wait—under (a), (b), or (c), although if their guns were *legally* possessed perhaps (e) and (f) would not apply. And if those actions were enough to get the case to the jury, and if all the confession evidence were still to come in, then a jury verdict of guilty would be (1) likely and (2) almost surely unassailable on appeal under the usual sufficiency of the evidence standard. On the other hand, changes in procedural rules, most notably the advent of *Miranda*, and, as a fallback, the *Bruton* rules, might have rendered inadmissible any evidence of the nature of, or the possible intent behind, preliminary but arguably substantial steps. Of course, were modern police to encounter the very same circumstances that Sullivan and Cronin saw on the Bronx streets in 1927, they might still choose to exert their *Terry* power to detain the suspects and take steps that might thwart the crime, even if they are unable to develop evidence that could justify arrest or conviction.

A Coda

In 1927, New York's sentencing rules for attempted first-degree robbery were very flexible and severe, and highly contingent on the background, especially the criminal records, of defendants. By virtue of these rules, after a brief hearing on aggravation and mitigation, The trial judge gave Thomasello a sentence of 10 to 20 years, Milo 25 years, and Rizzo and Dorio each 7½ to 15 years. One would think that all of them would have appealed, given the extremely severe sentences, yet history records only the appeal of Rizzo. Perhaps, as the scion of the lathing firm, Rizzo alone had access to funding for the appeal. But when the Court of Appeals reversed Rizzo's conviction, obviously recognizing no retrial was possible because the state had already taken its best shot at proving attempt, the Court took the unusual step of acknowledging a moral dilemma it had no legal power to solve on its own.

> A very strange situation has arisen in this case. I called attention to the four defendants who were convicted of this crime of an attempt to commit robbery in the first degree. They were all tried together upon the same evidence, and jointly convicted, and all sentenced to State's prison for varying terms. Rizzo was the only one of the four to appeal to the Appellate Division and to this court. His conviction was affirmed by the Appellate Division by a divided court, two of the justices dissenting, and we have now held that he was not guilty of the crime charged. If he were not guilty, neither were the other three. As the others, however, did not appeal, there is no remedy for them through the court; their judgments stand, and they must serve their sentences. This of course is a situation which must in all fairness be met in some way. Two of these men were guilty of the crime of carrying weapons, pistols, contrary to law, for which they could be convicted. Two of them, John Thomasello and Thomas Milo, had also been previously convicted, which may have had something to do with their neglect to appeal. However, the law would fail in its function and its purpose if it permitted these three men whoever or whatever they are to serve a sentence for a crime which the courts subsequently found and declared had not been committed. We, therefore, suggest to the district attorney of Bronx county that he bring the cases of these three men to the attention of the Governor to be dealt with as to him seems proper in the light of this opinion.[134]

[134] *Rizzo*, 158 N.E. at 890. Ironically, Adlerman himself prefigured this quandary when he attacked Rizzo as the ringleader-mastermind and said to the jury "if Rizzo is going to be acquitted here, acquit the other three." COA,

The Court of Appeals was not alone in viewing this as a dilemma to be passed on to another branch. According to a dramatically headlined newspaper story (*3 Youths Innocent, But Can't Be Freed*), the head Bronx District Attorney, Mr. McGeehan, admitted that he was "puzzled as to the action he should take . . . . I do not feel that it would be fair to embarrass the Governor with a request for a pardon for these men. . . . I have decided to ask the court in Bronx County to act next week when I will have the men brought down on a writ of habeas corpus."[135]

The equity issue seems to be a kind of accidental aspect of the case, but it indentifies an important point of jurisprudence. Attempt law shares with accomplice law questions of how to impute liability when the harm against which the substantive law is aimed never occurs. Because attempt law then becomes so heavily dependent on mens rea and on preliminary acts that may confirm mens rea, it raises the possibility of differential liability among accomplices to an attempt.

In any event, while we do not know the fate of the District Attorney's habeas corpus maneuver,[136] the moral dilemma was resolved when the fear of embarrassing the state's chief executive proved unfounded. On January 30, 1928, shortly before he became the Democratic Presidential nominee against Herbert Hoover, New York Governor Al Smith announced the pardoning of Thomasello, Milo, and Dorio.[137]

---

supra note 9, at 357.

[135] *3 Youths Innocent, But Can't Be Freed*, N.Y. Times, Dec. 11, 1927, at N1.

[136] Thanks to the colorfully named website politicalgraveyard.com, we do know something of the fate of the District Attorney himself. Adlerman, like many prosecutors, next became a judge (of the City Court in the Bronx), and he died in 1941 at age 62.

[137] Pardon certificates signed by Governor Smith (on file with author).