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## The Punishment That Leaves Something to Chance

### I

We are accustomed to punish criminal attempts much more severely if they succeed than if they fail. We are also accustomed to wonder why. It is hard to find any rationale for our leniency toward the unsuccessful. Leniency toward aborted attempts, or mere preparation, might be easier to understand. (And whether easy or hard, it is not my present topic.) But what sense can we make of leniency toward a completed attempt—one that puts a victim at risk of harm, and fails only by luck to do actual harm?

Dee takes a shot at his enemy, and so does Dum. They both want to kill; they both try, and we may suppose they try equally hard. Both act out of malice, without any shred of justification or excuse. Both give us reason to fear that they might be ready to kill in the future. The only difference is that Dee hits and Dum misses. So Dee has killed, he is guilty of murder, and we put him to death.<sup>1</sup> Dum has not killed, he is guilty only of attempted murder, and he gets a short prison sentence.

Why? Dee and Dum were equally wicked in their desires. They were equally uninhibited in pursuing their wicked desires. Insofar as the wicked deserve to be punished, they deserve it equally. Their conduct was equally dangerous: they inflicted equal risks of death on their re-

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1. I do not wish to enter the debate about whether the traditional death penalty is ever justified. If you think not, substitute throughout whatever you think is the correct maximum penalty; my argument will go through almost without change.

spective victims. Insofar as those who act dangerously deserve to be punished, again they deserve it equally. Maybe Dee's act was worse than Dum's act, just because of Dee's success; but it is not the act that suffers punishment, it is the agent. Likewise, if we want to express our abhorrence of wickedness or of dangerous conduct, either exemplar of what we abhor is fit to star in the drama of crime and punishment. Further, Dee and Dum have equally engaged in conduct we want to prevent by deterrence. For we prevent successful attempts by preventing attempts generally. We cannot deter success separately from deterring attempts, since attempters make no separate choice about whether to succeed. Further, Dee and Dum have equally shown us that we might all be safer if we defended ourselves against them; and one function of punishment (at any rate if it is death, imprisonment, or transportation) is to get dangerous criminals off the streets before they do more harm. So how does their different luck in hitting or missing make any difference to considerations of desert, expression, deterrence, or defense? How can it be just, on any credible theory of just punishment, to punish them differently?

Here is one rationale for our peculiar practice. If the gods see innocent blood shed, they will be angry; if they are angry, none of us will be safe until they are propitiated; and to propitiate the gods, we must shed guilty blood. Whereas if by luck no innocent blood is shed, the gods will not be angered just by the sight of unsuccessful wickedness, so there will be no need of propitiation.—This rationale would make sense, if its premises were true. And if we put “the public” or “the victim's kin” for “the gods” throughout it still makes sense; and that way, maybe the premises are true, at least sometimes and to some extent. But this rationale does nothing at all to defend our practice *as just*. If our practice is unjust, then the ways of the gods (or the public, or the kin) are unjust, although if the powers that be want to see injustice done, it might be prudent to ignore justice and do their bidding.

A purely conservative rationale is open to the same complaint. Maybe it is a good idea to stay with the practice we have learned how to operate, lest a reform cause unexpected problems. Maybe it is good for people to see the law go on working as they are accustomed to expect it to. Maybe a reform would convey unintended and disruptive messages: as it might be, that we have decided to take murder less seriously than we used to. These considerations may be excellent reasons why it is prudent to leave

well enough alone, and condone whatever injustice there may be in our present practice. They do nothing at all to defend our practice as just.

Another rationale concerns the deterrence of second attempts. If at first you don't succeed, and if success would bring no extra punishment, then you have nothing left to lose if you try, try again. "If exactly the same penalty is prescribed for successes as for attempts, there will be every reason to make sure that one is successful."<sup>2</sup> It cannot hurt to have some deterrence left after deterrence has failed. Maybe the experience of having tried once will make the criminal more deterrable than he was at first.—But why is this any reason for punishing successful attempts more severely? It might as well just be a reason for punishing two attempts more severely than one, which we could do regardless of success. If each separate attempt is punished, and if one share of punishment is not so bad that a second share would be no worse, then we have some deterrence against second attempts.

Another rationale sees punishment purely as a deterrent, and assumes that we will have deterrence enough if we make sure that crime never pays. If so, there is no justification for any more penal harm than it takes to offset the gains from a crime. Then a failed attempt needs no punishment: there are no gains to be offset, so even if unpunished it still doesn't pay.—I reply that in the first place, this system of minimum deterrence seems likely to dissuade only the most calculating of criminals. In the second place, punishment is not just a deterrent. I myself might not insist on retribution *per se*, but certainly the expressive and defensive functions of punishment are not to be lightly forsaken.

Another rationale invokes the idea of "moral luck."<sup>3</sup> Strange to say, it can happen by luck alone that one person ends up more wicked than another. Perhaps that is why the successful attempter, by luck alone, ends up deserving more severe punishment?—I rely, first, that to some extent this suggestion merely names our problem. We ask how Dee can deserve more severe punishment just because his shot hits the mark.

2. John Kleinig, *Punishment and Desert* (The Hague: Martinus Nijhoff, 1973), p. 132. Kleinig does not take this to afford an adequate justification.

3. See Thomas Nagel, "Moral Luck," *Proceedings of the Aristotelian Society*, supp. vol. 50 (1976): 141, repr. in Nagel, *Mortal Questions* (Cambridge: Cambridge University Press, 1979), p. 29. Nagel distinguishes, as he should, between the "moral luck" of the attempter and the different sort of moral luck that makes some genuine difference to how one is and how one acts.

Call that “moral luck” if you will; then we have been asking all along how this sort of moral luck is possible. But, second, it may be misleading to speak of the moral luck of the attempter, since it may tend to conflate this case with something quite different. The most intelligible cases of moral luck are those in which the lucky and the unlucky alike are disposed to become wicked if tempted, and only the unlucky are tempted. But then, however alike they may have been originally, the lucky and the unlucky do end up different in how they are and in how they act. Not so for the luck of hitting or missing. It makes no difference to how the lucky and the unlucky are, and no difference to how they act.<sup>4</sup>

Finally, another rationale invokes the difference between wholehearted and halfhearted attempts.<sup>5</sup> Both are bad, but wholehearted attempts are worse. A wholehearted attempt involves more careful planning, more precautions against failure, more effort, more persistence, and perhaps repeated tries. *Ceteris paribus*, a wholehearted attempt evinces more wickedness—stronger wicked desires, or less inhibition about pursuing them. *Ceteris paribus*, a wholehearted attempt is more dangerous. It is more likely to succeed; it subjects the victim, knowingly and wrongfully, to a greater risk. Therefore it is more urgently in need of prevention by deterrence. *Ceteris paribus*, the perpetrator of a wholehearted attempt is more of a proven danger to us all, so it is more urgent to get him off the streets. So from every standpoint—desert, expression, deterrence, defense—it makes good sense to punish attempts more severely when they are wholehearted. Now, since wholehearted attempts

4. The luck of hitting and missing does make a difference to how their actions of shooting may be described: Dee’s is a killing, Dum’s is not. Dee’s causes harm and thereby invades the victim’s rights in a way that Dum’s does not. (Dee invades the victim’s right not to be harmed, as well as his right not to be endangered; Dum invades only the latter right.) But this is no difference in how they act, since the description of an action in terms of what it causes is an extrinsic description. The actions themselves, events that are finished when the agent has done his part, do not differ in any intrinsic way.

You might protest that a killing is not over when the killer has done his part; it is a more prolonged event that ends with the death of the victim; so there is, after all, an intrinsic difference between Dee’s action of killing and Dum’s action of shooting and missing.—No; an action of killing is different from the prolonged event of someone’s getting killed, even though “the killing” can denote either one.

5. See Lawrence C. Becker, “Criminal Attempt and the Theory of the Law of Crimes,” *Philosophy & Public Affairs* 3, no. 3 (Spring 1974): 288. Becker does not take this to afford an adequate justification.

*The Punishment  
That Leaves  
Something to Chance*

are more likely to succeed, success is some evidence that the attempt was wholehearted. Punishing success, then, is a rough and ready way of punishing wholeheartedness.

I grant that it is just to punish wholehearted attempts more severely—or better, since “heartedness” admits of degrees, to proportion the punishment to the heartedness of the attempt. And I grant that in so doing we may take the probability of success—in other words, the risk inflicted on the victim—as our measure of heartedness. That means not proportioning the punishment simply to the offender’s wickedness, because two equally wicked attempters may not be equally likely to succeed. One may be more dangerous than the other because he has the advantage in skill or resources or information or opportunity. Then if we proportion punishment to heartedness measured by risk, we may punish one attempter more severely not because he was more wicked, but because his conduct was more dangerous. From a purely retributive standpoint, wickedness might seem the more appropriate measure; but from the expressive standpoint, we may prefer to dramatize our abhorrence not of wickedness per se but of dangerous wickedness; and from the standpoint of deterrence or defense, clearly it is dangerous conduct that matters.

So far, so good; but I protest that it is unjust to punish success as a rough and ready way of punishing wholeheartedness. It’s just too rough and ready. Success is some evidence of wholeheartedness, sure enough. But it is very unreliable evidence: the wholehearted attempt may very well be thwarted, the half- or quarterhearted attempt may succeed. And we can have other evidence that bears as much or more on whether the attempt was wholehearted. If what we really want is to punish wholeheartedness, we have no business heeding only one unreliable fragment of the total evidence, and then treating that fragment as if it were conclusive. Suppose we had reason—*good* reason—to think that on average the old tend to be more wholehearted than the young in their criminal attempts. Suppose even that we could infer wholeheartedness from age somewhat more reliably than we can infer it from success. Then if we punished attempters more severely in proportion to their age, that would be another rough and ready way of punishing wholeheartedness. *Ex hypothesi*, it would be less rough and ready than what we do in punishing success. It would still fall far short of our standards of justice.

## II

In what follows, I shall propose a new rationale. *I do not say that it works*. I do say that the new rationale works better than the old ones. It makes at least a *prima facie* case that our peculiar practice is just, and I do not see any decisive rebuttal. All the same, I think that the *prima facie* case is probably not good enough, and probably there is no adequate justification for punishing attempts more severely when they succeed.

Our present practice amounts to a disguised form of *penal lottery*—a punishment that leaves something to chance. Seen thus, it *does* in some sense punish all attempts alike, regardless of success. It is no less just, and no more just, than an undisguised penal lottery would be. Probably any penal lottery is seriously unjust, but it is none too easy to explain why.

By a penal lottery, I mean a system of punishment in which the convicted criminal is subjected to a risk of punitive harm. If he wins the lottery, he escapes the harm. If he loses, he does not. A pure penal lottery is one in which the winners suffer no harm at all; an impure penal lottery is one in which winners and losers alike suffer some harm, but the losers suffer more harm. It is a mixture: part of the punishment is certain harm, part is the penal lottery.

An overt penal lottery is one in which the punishment is announced explicitly as a risk—there might be ways of dramatizing the fact, such as a drawing of straws on the steps of the gallows. A covert penal lottery is one in which the punishment is not announced as a risk, but it is common knowledge that it brings risk with it. (A covert lottery must presumably be impure.)

A historical example of an overt penal lottery is the decimation of a regiment as punishment for mutiny. Each soldier is punished for his part in the mutiny by a one-in-ten risk of being put to death. It is a fairly pure penal lottery, but not entirely pure: the terror of waiting to see who must die is part of the punishment, and this part falls with certainty on all the mutineers alike.

Covert and impure penal lotteries are commonplace in our own time. If one drawback of prison is that it is a place where one is exposed to capricious violence, or to a serious risk of catching AIDS,<sup>6</sup> then a prison

6. See A. Hough and D. M. Schwartz, "AIDS and Prisons," in *Meeting the Challenge: Papers of the First National Conference on AIDS*, ed. Adam Carr (Canberra: Australian Government Publishing Service, 1986), pp. 171–80.

sentence is in part a penal lottery. If the gulag is noted for its abysmal standards of occupational health and safety, then a sentence of forced labor is in part a penal lottery.

### III

What do we think, and what should we think, of penal lotteries? Specifically, what should we think of a penal lottery, with death for the losers, as the punishment for all attempts at murder, regardless of success? Successful or not, the essence of the crime is to subject the victim, knowingly and wrongfully, to a serious risk of death. The proposed punishment is to be subjected to a like risk of death.

We need a standard of comparison. Our present system of leniency toward the unsuccessful is too problematic to make a good standard, so let us instead compare the penal lottery with a hypothetical reformed system. How does the lottery compare with a system that punishes all attempts regardless of success, by the certain harm of a moderate prison term? A moderate term, because if we punished successful and unsuccessful attempts alike, we would presumably set the punishment somewhere between our present severe punishment of the one and our lenient punishment of the other. (Let the prison be a safe one, so that in the comparison case we have no trace of a penal lottery.) Both for the lottery and for the comparison case, I shall assume that we punish regardless of success. In the one case, success per se makes no difference to the odds; in the other case, no difference to the time in prison. This is not to say that every convicted criminal gets the very same sentence. Other factors might still make a difference. In particular, heartedness (measured by the risk inflicted) could make a difference, and success could make a difference to the extent that it is part of our evidence about heartedness.

Now, how do the two alternatives compare?

The penal lottery may have some practical advantages. It gets the case over and done with quickly. It is not a crime school. A prison costs a lot more than a gallows plus a supply of long and short straws.<sup>7</sup>

(Likewise a prison with adequate protection against random brutality by guards and fellow inmates costs more than a prison without. So it

7. This point would disappear if something less cheap and quick than death were the penalty for losers of the lottery.

seems that we have already been attracted by the economy of a system that has at least some covert admixture of lottery.)

Like a prison term (or fines, or flogging) and unlike the death penalty *simpliciter*, the penal lottery can be graduated as finely as we like. When we take the crime to be worse, we provide fewer long straws to go with the fatal short straws. In particular, that is how we can provide a more severe punishment for the more wholehearted attempt that subjected the victim to a greater risk.

From the standpoint of dramatizing our abhorrence of wicked and dangerous conduct, a penal lottery seems at least as good as a prison sentence. Making the punishment fit the crime, Mikado-fashion, is *po-etic* justice. The point we want to dramatize, both to the criminal and to the public, is that what we think of the crime is just like what the criminal thinks of his punishment. If it's a risk for a risk, how can anybody miss the point?

From the standpoint of deterrence, there is no doubt that we are sometimes well deterred by the prospect of risk.<sup>8</sup> It happens every time we wait to cross the street. It is an empirical question how effective a deterrent the penal lottery might be. Compared with the alternative punishment of a certain harm, such as a moderate prison term, the lottery might give us more deterrence for a given amount of penal harm, or it might give us less. Whether it gives us more or less might depend a lot on the details of how the two systems operate. If the lottery gave us more, that would make it preferable from the standpoint of deterrence.

(We often hear about evidence that certainty is more deterring than severity. But to the extent that this evidence pertains only to the uncertainty of getting caught, getting convicted, and serving the full sentence, it is scarcely relevant. The criminal might think of escaping punishment as a game of skill—his skill, or perhaps his lawyer's. For all we know, a risk of losing a game of chance might be much more deterring than an equal risk of losing a game of skill.)

From the standpoint of defense, the penal lottery gets some dangerous criminals off the streets forever, while others go free at once. Moderate

8. See Thomas C. Schelling, "The Threat That Leaves Something to Chance," in his book *The Strategy of Conflict* (Cambridge: Harvard University Press, 1960). Schelling does not discuss penal lotteries as such, but much of his discussion carries over. What does not carry over, or not much, is his discussion of chancy threats as a way to gain credibility when one has strong reason not to fulfill one's threat.

prison terms would let all go free after a longer time, some of them perhaps reformed and some of them hardened and embittered. It is another empirical question which alternative is the more effective system of defense. Again, the answer may depend greatly on the details of the two systems, and on much else that we cannot easily find out.<sup>9</sup>

#### IV

So far we have abundant uncertainties, but no clear-cut case against the penal lottery. If anything, the balance may be tipping in its favor. So let us turn finally to the standpoint of desert. Here it is a bit hard to know what to make of the penal lottery. If the court has done its job correctly, then all who are sentenced to face the same lottery, with the same odds, are equally guilty of equally grave crimes. They deserve equal treatment. Do they get it?—Yes and no.

*Yes.* We treat them alike because we subject them all to the very same penal lottery, with the very same odds. And when the lots are drawn, we treat them alike again, because we follow the same predetermined contingency plan—death for losers, freedom for winners—for all of them alike.

*No.* Some of them are put to death, some are set free, and what could be more unequal than that?

*Yes.* Their fates are unequal, of course. But that is not our doing. They are treated unequally by Fortune, not by us.

*No.* But it is we who hand them over to the inequity of Fortune. We are Fortune's accomplices.

*Yes.* Everyone is exposed to the inequity of Fortune, in ever so many ways. However nice it may be to undo some of these inequities, we do not ordinarily think of this as part of what is required for equal treatment.

*No.* It's one thing not to go out of our way to undo the inequities of Fortune; it's another thing to go out of our way to increase them.

9. This question would have to be reconsidered if something other than death were the maximum penalty, and so the penalty for losers of the lottery. It would remain an empirical question, and probably a difficult one, which is the more effective system of defense.

Yes. We do that too, and think it not at all contrary to equal treatment. When we hire astronauts, or soldiers or sailors or firemen or police, we knowingly subject these people to more of the inequities of Fortune than are found in ordinary life.

No. But the astronauts are volunteers . . .

Yes. . . . and so are the criminals, when they commit the crimes for which they know they must face the lottery. The soldiers, however, sometimes are not.

No. Start over. We agreed that the winners and losers deserve equal punishment. That is because they are equally guilty. Then they deserve to suffer equally. But they do not.

Yes. They do not suffer equally; but if they deserve to, that is not our affair. We seldom think that equal punishment means making sure of equal suffering. Does the cheerful man get a longer prison sentence than the equally guilty morose man, to make sure of equal suffering? If one convict gets lung cancer in prison, do we see to it that the rest who are equally guilty suffer equally? When we punish equally, what we equalize is not the suffering itself. What we equalize is our contribution to expected suffering.

No. This all seems like grim sophistry. Surely, equal treatment has to mean more than just treating people so that *some* common description of what we are doing will apply to them all alike.

Yes. True. But we have made up our minds already, in other connections, that lotteries count as equal treatment, or near enough. When we have an indivisible benefit or burden to hand out (or even one that is divisible at a significant cost) we are very well content to resort to a lottery. We are satisfied that all who have equal chances are getting equal treatment—and not in some queer philosophers' sense, but in the sense that matters to justice.

It seems to me that "Yes" is winning this argument, but that truth and justice are still somehow on the side of "No." The next move, dear reader, is up to you. I shall leave it unsettled whether a penal lottery would be just. I shall move on to my second task, which is to show that our present practice amounts to a covert penal lottery. If the penal lottery is just, so is our present practice. If not, not.

## V

To show that they do not matter, I shall introduce the differences between an overt penal lottery and our present practice one at a time, by running through a sequence of cases. I claim that at no step is there any significant difference of justice between one case and the next. Such differences as there are will be practical advantages only, and will come out much in favor of our present practice.

*Case 1* is the overt penal lottery as we have imagined it already, with one added stipulation, as follows. We will proportion the punishment to the heartedness of the attempt, as measured by the risk of death<sup>10</sup> the criminal knowingly and wrongfully inflicted on the victim. We will do this by sentencing the criminal to a risk equal to the one he inflicted on the victim. If the criminal subjected his victim to an 80 percent risk of death, he shall draw his straw from a bundle of eight short and two long; whereas if he halfheartedly subjected the victim to a mere 40 percent risk, he shall draw from four short and six long; and in this way his punishment shall fit his crime. Therefore the court's task is not limited to ascertaining whether the defendant did knowingly and wrongfully subject the victim to a risk of death; also the court must ascertain how much of a risk it was.

*Case 2* is like *Case 1*, except that we skip the dramatic ceremony on the steps of the gallows and draw straws ahead of time. In fact, we have the drawing even before the trial. It is not the defendant himself who draws, but the Public Drawer. The Drawer is sworn to secrecy; he reveals the outcome only when and if the defendant has been found guilty and sentenced to the lottery. If the defendant is acquitted and the drawing turns out to have been idle, no harm done. Since it is not known ahead of time whether the sentence will be eight and two, four and six, or what, the Drawer must make not one but many drawings ahead of time. He reveals the one, if any, that turns out to be called for.

*Case 3* is like *Case 2*, except without the secrecy. The Drawer announces at once whether the defendant will win or lose in case he is

10. I note a complication once and for all, but I shall ignore it in what follows. The relevant risk is not really the victim's risk of death, but rather the risk of being killed—that is, of dying a death which is caused, perhaps probabilistically, and in the appropriate insensitive fashion, by the criminal's act. Likewise for the criminal's risk in the penal lottery. (On probabilistic and insensitive causation, see my *Philosophical Papers*, vol. II [New York: Oxford University Press, 1986], pp. 175–88.)

found guilty and sentenced. (Or rather, whether he will win or lose if he is sentenced to eight and two, whether he will win or lose if he is sentenced to four and six, and so on.) This means that the suspense in the courtroom is higher on some occasions than others. But that need not matter, provided that the court can stick conscientiously to the task of ascertaining whether the defendant did knowingly and wrongfully subject the victim to risk, and if so how much risk. It is by declaring that a criminal deserves the lottery that the court expresses society's abhorrence of the crime. So the court's task is still worth doing, even when it is a foregone conclusion that the defendant will win the lottery if sentenced (as might happen if he had won all the alternative draws). But the trial may seem idle, and the expression of abhorrence may fall flat, when it is known all along that, come what may, the defendant will never face the lottery and lose.

*Case 4* is like *Case 3*, except that we make the penal lottery less pure. Losers of the penal lottery get death, as before; winners get a short prison sentence. Therefore it is certain that every criminal who is sentenced to the lottery will suffer at least some penal harm. Thus we make sure that the trial and the sentence will be taken seriously even when it is a foregone conclusion that the defendant, if sentenced, will win the lottery.

*Case 1* also was significantly impure. If the draw is held at the last minute, on the very steps of the gallows, then every criminal who is sentenced to face the lottery must spend a period of time—days? weeks? years?—in fear and trembling, and imprisoned, waiting to learn whether he will win or lose. This period of terror is a certain harm that falls on winners and losers alike. *Case 2* very nearly eliminates the impurity, since there is no reason why the Drawer should not reveal the outcome very soon after the criminal is sentenced. *Case 3* eliminates it entirely. (In every case, a defendant must spend a period in fear as he waits to learn whether he will be convicted. But this harm cannot count as penal, because it falls equally on the guilty and the innocent, on those who will be convicted and those who will be acquitted.) *Case 4* restores impurity, to whatever extent we see fit, but in a different form.

*Case 5* is like *Case 4*, except that the straws are replaced by a different chance device for determining the outcome of the lottery. The Public Drawer conducts an exact reenactment of the crime. If the victim in the reenactment dies, then the criminal loses the lottery. If it is a good reen-

actment, the risk to the original victim equals the risk to the new victim in the reenactment, which in turn equals the risk that the criminal will lose the lottery; and so, as desired, we punish a risk by an equal risk.

If the outcome of the lottery is to be settled before the trial, as in Cases 2, 3, and 4, then it will be necessary for the Drawer to conduct not just one but several reenactments. He will entertain all reasonable alternative hypotheses about exactly how the crime might have happened—exactly what the defendant might have done by way of knowingly and wrongfully inflicting risk on the victim. He will conduct one reenactment for each hypothesis. The court's task changes. If the court finds the defendant guilty of knowingly and wrongfully inflicting a risk of death, it is no longer required also to measure the amount of risk. Nobody need ever figure out whether it was 80 percent, 40 percent, or what. Instead, the court is required to ascertain which hypothesis about exactly how the crime happened is correct. Thereby the court chooses which of all the hypothetical reenactments is the one that determines whether the criminal wins or loses his lottery. If the court finds that the criminal took careful aim, then the chosen reenactment will be one in which the criminal's stand-in also took careful aim, whereas if the court finds that the criminal halfheartedly fired in the victim's general direction, the chosen reenactment will be one in which the stand-in did likewise. So the criminal will be more likely to lose his lottery in the first case than in the second.

The drawbacks of a lottery by reenactment are plain to see. Soon we shall find the remedy. But first, let us look at the advantages of a lottery by reenactment over a lottery by drawing straws. We have already noted that with straws, the court had to measure how much risk the criminal inflicted, whereas with reenactments, the court has only to ascertain exactly how the crime happened. Both tasks look well-nigh impossible. But the second must be easier, because the first task consists of the second plus more besides. The only way for the court to measure the risk would be to ascertain just what happened, and then find out just how much risk results from such happenings.

Another advantage of reenactments over straws appears when we try to be more careful about what we mean by "amount of risk." Is it (1) an "objective chance"? Or is it (2) a reasonable degree of belief for a hypothetical observer who knows the situation in as much minute detail as feasible instruments could permit? Or is it (3) a reasonable degree of

belief for someone who knows just as much about the details of the situation as the criminal did? Or is it (4) the criminal's actual degree of belief, however unreasonable that might have been? It would be nice not to have to decide. But if we want to match the criminal's risk in a lottery by straws to the victim's risk, then we must decide. Not so for a lottery by reenactment. If the reenactment is perfect, we automatically match the amount of risk in all four senses. Even if the reenactment is imperfect, at least we can assure ourselves of match in senses (3) and (4). It may or may not be feasible to get assured match in senses (1) and (2), depending on the details of what happened. (If it turns out that the criminal left a bomb hooked up to a quantum randomizer, it will be comparatively easy. If he committed his crime in a more commonplace way, it will be much harder.) But whenever it is hard to get assured match in senses (1) and (2), it will be harder still to measure the risk and get assured match in a lottery by straws. So however the crime happened, and whatever sense of match we want, we do at least as well by reenactment as by straws, and sometimes we do better.

*Case 6* is like *Case 5*, except that enactment replaces *reenactment*. We use the original crime, so to speak, as its own perfect reenactment. If the criminal is sentenced to face the lottery, then if his victim dies, he loses his lottery and he dies too, whereas if the victim lives, the criminal wins, and he gets only the short prison sentence. It does not matter when the lottery takes place, provided only that it is not settled so soon that the criminal may know its outcome before he decides whether to commit his crime.

The advantages are many: we need no Drawer to do the work; we need not find volunteers to be the stand-in victims in all the hypothetical reenactments; the "reenactment" is automatically perfect, matching the risk in all four senses; we spare the court the difficult task of ascertaining exactly how the crime happened. If we want to give a risk for a risk, and if we want to match risks in any but a very approximate and uncertain fashion, the lottery by enactment is not only the easy way, it is the only remotely feasible way.

The drawback is confusion. When a criminal is sentenced to face the lottery by straws, nobody will think him more guilty or more wicked just because his straw is short. And when a criminal is sentenced to face the lottery by reenactment, nobody will think him more guilty just because

the stand-in victim dies.<sup>11</sup> But if he is sentenced to the lottery by enactment, then one and the same event plays a double role: if his victim dies, that death is at once the main harm done by his crime and also the way of losing his lottery. If we are not careful, we are apt to misunderstand. We may think that the successful attempter suffers a worse fate because he is more guilty when he does a worse harm, rather than because he loses his lottery. But it is not so: his success is irrelevant to his guilt, his wickedness, his desert, and his sentence to face the lottery—exactly as the shortness of his straw would have been, had he been sentenced to the lottery by straws.

## VI

I submit that our present practice is exactly Case 6: punishment for attempts regardless of success, a penal lottery by enactment, impurity to help us take the affair seriously even when the lottery is won, and the inevitable confusion. We may not understand our practice as a penal lottery—confused as we are, we have trouble understanding it at all—but, so understood, it does make a good deal of sense. It is another question whether it is really just. Most likely it isn't, but I don't understand why not.

11. If it were known that the victim's risk was fifty-fifty, or if we did not care about matching risks, we could just as well reverse the lottery by enactment: the criminal loses if the victim lives, wins if the victim dies. Certainly nobody will think the criminal is more guilty if the victim *lives*.