BETTER OFF GUILTY

The following is the text of the Sixth Amendment to the US Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Ironically, when we were arguing in our extradition proceedings that we had no chance of being able to defend ourselves in Texas, counsel for the US Government used exactly this text to demonstrate how under US law we were indeed guaranteed a fair trial. Difficult to argue with his analysis, looking at the above. Certainly it was persuasive with the magistrate, who decided that the expert testimony of a Texas lawyer as to how the system actually worked in practice should be ignored because it all sounded too improbable.

We've all seen the Hollywood films and the TV shows, so we know that the legal system in America is all that one could ever want. And on paper, at least, it is. The practice, however, is staggeringly different, and is what explains why over 95% of defendants choose to plea bargain rather than exercise their constitutional right to jury trial. However improbable it may have sounded to the magistrate, our expert witness in the extradition hearings in 2004, Doug McNabb, was spot on in pretty much every aspect of his testimony.

The American plea bargain system effectively makes the prosecutor judge, jury and executioner in all but the smallest handful of cases. An eminent professor of law at Yale University called John Langbein wrote a paper in the University of Chicago Law Review in 1978 comparing the plea bargaining system to torture, and he has been banging eloquently on about it ever since. I would highly recommend that anyone interested in the subject goes onto Google and searches "John Langbein plea bargain torture", and reads some of the articles that come up. If reading isn't your bag, there is a truly harrowing one hour documentary on the subject which can be viewed online at http://www.pbs.org/wgbh/pages/frontline/shows/plea/view

When we pleaded guilty in November 2007, Martin Wolf of the FT wrote an article entitled "Judicial Torture and the NatWest Three", along similar

lines. I hasten to add that I have never met Martin Wolf, but I congratulate him for being able to see beyond the obvious.

It's not that plea bargaining is bad per se. On the contrary, there has to be a place for a system which encourages the guilty to plead early. It is to everyone's benefit. The problem is that the combination of the United States Federal Sentencing Guidelines, the plea bargaining system, the method of bringing charges (either criminal complaint or indictment), and the sheer cost of bringing a complex case to trial all combine to produce a mismatch in arms between defendant and accuser roughly equivalent to that of the Iraqi Army versus the US and British Army forces in 2003.

It ain't rocket science. I testified in the magistrates' hearing in London in 2004 that if extradited to America, we would be "insane" not to enter into a plea bargain, because we had substantially no chance of being able to defend our case, when all of our witnesses and evidence were to be found in London. Even then I underestimated the challenges that we faced in practice once we arrived in Houston.

The following five paragraphs are taken direct from Wikipedia, simply because I thought that the description could not be bettered!

The Federal Sentencing Guidelines are rules that set out a uniform sentencing policy for convicted defendants in the United States federal court system. The Guidelines are the product of the United States Sentencing Commission and are part of an overall federal sentencing reform package that took effect in the mid-1980s.

The package was intended to provide determinate sentencing. This refers to sentencing whose actual limits are determined at the time the sentence is imposed, as opposed to indeterminate sentencing, in which a sentence with a maximum (and, perhaps, a minimum) is pronounced but the actual sentence is determined by a parole commission or similar administrative body after the person has started serving their sentence.

In general, indeterminate sentences are believed to support the rehabilitation and specific deterrence models of sentencing while determinate sentences are believed to support the general deterrence and just deserts models of sentencing. The federal effort followed guidelines activities in several states, notably Minnesota.

Minnesota's Sentencing Guidelines Commission, however, initially sought consciously not to increase prison capacity through guidelines. That is, Minnesota assumed that the legislature should determine how much would be spent on prisons and that the sentencing commission's job was to

allocate those prison beds in as rational a way as possible. The federal effort took the opposite approach. It determined how many prisons would be needed and essentially Congress was then required to fund those beds.

The Guidelines determine sentences based primarily on two factors: the conduct associated with the offense, which produces an "offense level", and the defendant's criminal history. A Sentencing Table in the Guidelines Manual shows the relationship between these two factors; for each pairing of offense level and criminal history category, the table specifies a sentencing range, in months, within which the court may sentence a defendant.

Consequently, a prosecutor can establish with a fair degree of certainty that if defendant A pleads guilty to offense B, then his sentencing range should fall within a determinate range C. Take the example of Andy Fastow. He was originally indicted on 78 counts, each of which carried a certain statutory maximum penalty. His original indictment was superseded in April 2003 by a new indictment which added another 20 counts.

The theoretical maximum sentence that he faced if convicted on all charges would be the statutory maximum sentence for each count, aggregated, which would have been hundreds of years. In practice, the probation department would perform a guidelines calculation to come up with the appropriate range of sentence, in months, and as long as this range was not greater than the statutory maximum sentence for the crimes for which he had been convicted, then he would almost certainly be sentenced within the guidelines range.

In Fastow's case, he could kiss goodbye to seeing his young children grow up, and possibly kiss goodbye to the rest of his life. There is no parole in the Federal system, so a sentence of 100 years means 100 years in prison, less only a small discount for "good time", which might amount to 15% of your sentence. When Bernie Madoff was sentenced in June 2009 to 150 years in prison, it guaranteed that he would die inside; The Bureau of Prisons' anticipated release date for Madoff is November 2139.

As an alternative, Fastow could plead guilty to (say) two counts out of the 98 or so that he faced. This would leave him exposed to a maximum of 10 years in prison. Still a hefty whack, but a whole lot better than going to trial on 98 counts, where even if he defeated 90% of the charges against him, the other 10% would still be enough to see him spend the rest of his days in the pokey.

Prosecutors effectively have two distinct means of bargaining. The first is "charge bargaining". Fastow's plea was an example of this, where in exchange for a guilty plea on one or two counts, a number of others, which

could have racked up the sentence, are dismissed. Alternatively, the prosecutor can agree to a lesser charge than the most serious one indicted. An example would be allowing a plea to manslaughter in lieu of a trial on murder charges. Or pleading guilty to possession of some drug as opposed to possession with intent to supply. Having agreed which charge to plead guilty to, the judge will then be restricted in any sentence by the statutory maximum available for that crime.

The second form of bargaining is "sentence bargaining", where the prosecution can agree to recommend a reduced sentence to the judge, based on a specified level of co-operation. This is called a motion for downwards departure, where the prosecutor is essentially asking the judge to give a sentence outside the guidelines range, to take into account how much help the defendant has been.

In rare cases, the prosecutors can actually tie the judge to a specific sentence, such that he either agrees to accept the plea, in which case he is bound to award the sentence recommended, or he rejects the plea deal in its entirety, in which case the defendant can elect to walk away from the agreement. Ours was such a plea bargain, but they are extremely unusual.

White collar cases are much more susceptible to abuse by prosecutors than (say) crimes of violence or single acts. White collar cases enable the prosecutors to charge multiple counts on the same offence, thus ratcheting up the potential maximum sentence. So in our case, the original single count of wire fraud (statutory maximum sentence 5 years) in the criminal complaint became 7 counts of wire fraud (maximum sentence thus 35 years) when we were indicted in September 2002. Same facts. Same alleged conspiracy. Same amount of money involved. But a much greater incentive not to go to trial.

Had we gone to trial and lost, and assuming that the prosecutors had pushed for the maximum sentence, the sentencing guidelines were capable of producing results far in excess of five years on each count. The judge would then have had the decision as to whether to impose concurrent sentences, in which case he could have awarded an aggregate sentence longer than five years but less than thirty five years, or consecutive sentences.

As indictments are brought through the Grand Jury system, it is the prosecutor who controls the process. The defendant may not even be aware it is going on. So the prosecutor brings his indictment charging multiple counts of X, Y and Z. In bringing these counts, he is able to set the upper limit of sentence, because each carries a statutory maximum. Through plea bargaining, he is then able to offer to put a ceiling on the maximum prison

time. And through co-operation agreements, he is able to offer the carrot of an even greater reduction in sentence, through a motion for downwards departure at the sentencing hearing. And did you see the involvement of a judge at any stage in the above, prior to the sentencing hearing when the prosecutor will tell him how much help the defendant has been? No, that's right. No judge, and no jury. Just the prosecutor and the defendant. And the prosecutor holds all the cards.

But if that weren't enough, there is more. Any defense attorney worth his salt will tell you that a criminal trial is the most stressful thing you will ever go through in your life. And for a white collar case, involving mountains of documents, it may well bankrupt you. And even if you win, you cannot recover the money spent on legal fees. So the prosecutor has this to beat you over the head with. He can drown you and your attorneys in documents, knowing that you cannot afford to pay the fees to do the necessary work. Oh yes, and when crimes involve money, as many white collar cases do, the Federal Sentencing Guidelines ratchet up the sentence massively as the amount of money goes up.

So it's bad news all round for the defendant, even if you ignore the possibility of prosecutorial abuse such as hiding evidence, bullying potential witnesses and threatening corporations with indictment if they fund their employees' defense fees. I may be a little unfair here, but there seems to be something that pervades the US psyche about "shock and awe". You can never throw too many resources at the problem, in whatever field of life the problem presents itself. If the Department of Justice is the four hundred pound gorilla that they throw you into the ring with, they like to ensure that not only are your hands and feet tied behind your back, but preferably you are blindfolded as well. Just to make sure.

And by the way, contrary to popular belief, very few judges like trying cases either, so they can become effectively complicit in the process by denying motions, extending trial dates and generally making life as difficult for the defendant as possible, as we would find out when we arrived in Texas.

Now all of this works really well for the guilty. If you are up to your neck in crimes, you will be only too happy to accept a smaller number of counts to plead guilty to. Equally, you will be over the moon to have the opportunity to reduce your exposure even further by spilling the beans on others. And if there are no attorneys present, you can happily testify to whatever the Government wants you to say when you know that in court it may come down to "he said, she said". The irony of course is that the real

criminals are likely to be the ones with the least qualms about lying on the stand.

In summary, there are three things about the system that I really don't like. The first is that because the prosecutor alone is responsible for selecting the charges to indict, and which to agree to let the guy plead to, he wields awesome power. The disparity in sentencing between going to trial and losing, and entering into a plea agreement can be so enormous that no rational person would ever pursue the former course, even if totally innocent of all charges. This was what I testified in our extradition hearings.

The second thing I don't like is that co-operation agreements put tremendous pressure on people to "mis-remember" things, in a manner which is favourable to the Government.

But the thing that I find utterly scandalous is that if you are innocent, you've got nowhere to go. If you cannot give evidence of any crimes, even truthfully, because you simply don't have any evidence, then you're stuffed. You have nothing to offer the Government, so they have nothing to offer you in return. Gary frequently observed that it would have been so much easier for us if we had actually done what it was that they alleged. Maintaining your innocence can be a costly and very destructive business.

It would be worth comparing what happened to Michael Kopper to what happened to us. He pleaded guilty to a litany of crimes, of which he was the architect. He had spent a period of four years devising numerous ways to steal money from his employer, and consistently lying to people. The sums of money involved were prodigious. When Enron was teetering on the edge of bankruptcy, he destroyed all his files and put his computer in a dumpster. He then pleaded the Fifth Amendment and refused to talk to any investigators, and maintained this position until the day the criminal complaint against us was filed, at which point he decided that his best course of action lay elsewhere.

He ran to the prosecutors, agreed to tell them everything he knew, and to testify to whatever they wanted against whomever they wanted. His reward was thirty seven months in prison (two years in practice because he got a substantial discount for attending a drugs and alcohol rehabilitation course, something that is not available for foreign defendants), being allowed to hold on to $9 million of ill-gotten gains, and protecting his partner Mr Dodson from prosecution.

For our part, at exactly the time that Kopper was destroying his files and throwing his computer into a dumpster, we were going forward to the authorities, telling them everything we knew, providing them with

mountains of documents, and offering unconditionally to help in any investigation. We would never be interviewed by any US regulatory or prosecuting authorities. We maintained our innocence when charged for a period of over five years, during which we spent nearly two years on bail in a country five thousand miles from home and our families, and incurred legal fees running into millions of dollars. We eventually pleaded guilty to not informing our employer of the opportunity to make an investment, a "crime" entirely unrelated to the one for which we had been extradited, and were sentenced to thirty seven months in prison.

Who were the mugs?

But as with many things in life, there's no sense getting bent out of shape about it. Shit happens. You just have to get on with it. In any event, what happened in our case paled into insignificance compared to the experience of certain others, and not just at the hands of the Enron Task Force.