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The United States vs. Lawrence Brose: A Butterfly on the Wheel

by William C. Altreuter

The Mac notebook computer sat on a desk in the studio on Huron Street. Because it was a Mac it didn't have antivirus software installed; Mac owners like to boast that they don't need it. The computer was not password protected, and the wireless internet network it was connected to was unsecured. The computer belonged to Lawrence Brose, and Brose rented the studio. Over the years visiting artists from the organization where Brose was director had access to both. The computer was a tool for work, the studio was a place where work was done. Like a shovel in a shed, the computer could be used by anyone who was in the studio. Unlike a shed, the network in the studio could be easily broken into by anyone happening by. Like a shovel, the computer could be used for many things, by anyone who happened to pick it up.

Before the ICE agents came to his door, Lawrence Brose was a well-respected leader in the Western New York arts community, the director of the CEPA Gallery, and an award-winning filmmaker. All that changed on the day after Thanksgiving, 2009, when the United States Attorney for the Western District of New York announced that Brose had been indicted. Police authorities in Germany had advised US law enforcement that images of child pornography had been sent to an IP address which was subsequently identified as the internet address that Brose's computer was on. The world that Brose thought he lived in, the friends he thought he had, and the life he thought he was living all changed. For the past three years he has found himself in a strange twilight place.

The first thing that happened was that he was quickly unemployed. The CEPA Gallery asked him to leave the position he'd had for years. He had built CEPA into a well-funded, highly regarded institution, but all that was the day before the ICE agents came. People who he'd known for years pretended not see him on the street. Emails to friends went unanswered. The next thing that happened was that he found himself being called out in the press. "I don't know Lawrence Brose," one *News* columnist wrote, "but..." Even people who were ostensibly defending him engaged in unhelpful speculation: "Perhaps it was for research for his work," mused the late Jim Rolls in the *Buffalo News*. Brose's work had involved explorations into queer themes, but never child pornography. Even so, this particular theory gained traction, and added to the speculation surrounding the case. People asked, in print and on the street, "If it isn't true, why doesn't he deny it?"

Of course, Brose has denied the charges. He entered a plea of not guilty at his arraignment, and that's what a plea of not guilty is—a denial. Beyond that, Brose cannot tell anyone details about his case. Anyone who has ever seen a cop show knows that someone accused of a crime has the right to remain silent and that anything the accused says can be used against him. The right to remain silent is embedded in the Fifth Amendment, and is premised on the understanding that it falls to the prosecution to prove its case beyond a reasonable doubt. The theory is that there should be no inference drawn from invoking this right, but the reality is that the people expect frequent loud denials—even though public comment is almost always prejudicial to the defense. What this means as a practical matter is that Brose has been unable to talk to anyone other than his attorneys about the charges. This social isolation is an important part of how prosecutors operate.

Horribly, though, the nature of the charges is such that public opinion immediately outran the reality. The overwhelming majority of cases involving the possession of child pornography result in admissions, confessions and guilty pleas, but in a case like Brose's, where the charges are denied, that denial is given no weight.

The criminal justice system is a big, slow-moving machine. It only moves in one direction, and it grinds up everything in front of it. Prosecutors never change their

minds, and they never apologize. When you are caught in the gears of the system you have two choices: fight or fold. Brose has been fighting, but the law doesn't make it easy, and the public opprobrium he has encountered makes it even harder. Brose can't talk, and the prosecution can and does. It is necessary to dig into the court records to learn what really happened, and what is happening in this case.

Time is on the prosecution's side. The United States government has unlimited resources; Brose, unemployed, does not. We think of criminal cases as wrapping up in an hour or so, with time out for commercials, but the reality is that this case is still in its early stages. In the two years since the indictment was handed down, Brose's lawyers have made multiple motions to dismiss, and from the papers submitted in those motions, and the testimony given at various pretrial hearings, we now know the following. On June 22, 2011 Magistrate Judge Jeremiah J. McCarthy recommended that the indictment be dismissed on the grounds that the grand jury that issued the indictment was not asked what images found on the hard drive were the basis for the indictment. We know that the images that the ICE agents were looking for were not on Brose's computer. We know that several of the images that the prosecution claims are contraband are actually from Brose's film *De Profundis*, which has never been accused of being pornographic, and contains no images of children.

In an affidavit submitted in support of one of the pending motions, Brose has stated under oath that at the time his computer was seized by ICE, an ICE agent told him that he was being targeted because he is an artist. We know that a computer forensics expert found that a remote access Trojan virus has been operating on Lawrence's computer since 2005, allowing remote access to the computer by other unknown users, and that many of the image files that are contained in the indictment were downloaded while Lawrence was traveling (without the computer) and even while he was out of the country.

Brose's expert witnesses have only limited access to the hard drive that is claimed to hold the claimed contraband images. It is only available during business hours, at the offices of the United States Attorney here in Buffalo. This means that forensic analysis of the drive is time-consuming and expensive—and it means that the prosecution is able to tell what the defense expert has examined. Uniquely, in

cases where someone is accused of possessing images of child pornography, the prosecution gets a virtual roadmap of the defense strategy, something that is unheard of in any other type of criminal prosecution.

There are other things we know. We know that the case has gone on for nearly three years, and that there is no end in sight. We know that McCarthy recommended that the indictment against Brose be dismissed, but District Court Judge William Skretny rejected that recommendation. We know that there are motions pending, and that the court is continuing the hearings on the validity of the search conducted by ICE some time down the road. The next time the case is on the court's docket is December 11, 2012. We know that Brose has been fortunate enough to be represented by Paul Cambria, the best equipped lawyer for this sort of case in the country. We know that when the only person someone can talk to charges by the hour, and the case has gone on for three years with no end in sight, that things can get expensive.

In order to get a conviction, the prosecution must prove beyond a reasonable doubt that Brose knowingly possessed images that meet the definition of child pornography. At some point down the road, the case will come to trial. In the meanwhile, Brose waits. Because he is presently under the jurisdiction of the United States Department of Probation, he is subject to random home visits and random drug and alcohol testing. He cannot have a cellphone, or even a wireless phone in his home. His computer is monitored—the government reads every email he sends and every email he receives. Brose was recently invited to give an artist's talk at Harvard University. Because his travel is restricted to the geographical confines of the Western District of New York, it was necessary for him to incur legal expenses so that his lawyers could ask the court for permission for him to travel.

The only thing Brose could do to put a stop to this madness would be to plead guilty. As a matter of policy, the Department of Justice will only accept guilty pleas to the top count of an indictment, and the Rules of Federal Criminal Procedure and the Federal Sentencing Guidelines place the sentencing penalties with the court. There is no real room for negotiation on sentencing—the judge gives defendants who plead guilty the sentence the guidelines provide for—in this case,

five years of prison, plus some other punishments.

There is, in other words, no way to negotiate sanity into the process. The assumption of innocence amounts to living like a man already convicted. Brose denies the charges, as any innocent person would, and his reward is this meat grinder he now lives in. Best case, in a year or so, when the hearings have all been concluded and the trial has been held, Brose will be acquitted, and the damage this prosecution has done to his life and reputation will linger forever, along with crippling debt from his legal expenses. Worst case? Prison, and the damage this prosecution has done to his life and reputation will linger forever. He will be classified as a sex offender, with all of the restrictions that apply to that classification. And the crippling debt. This isn't how we think the system is supposed to work, but it is working like this for Lawrence Brose.

Brose's film *De Profundis* takes its name from Oscar Wilde's famous letter from prison, but Brose's case really calls to mind a question asked by an earlier poet, Alexander Pope: "Who breaks a butterfly upon a wheel?" Faced with a weak case, the United States Attorney's office seems to be determined to crush Lawrence Brose, one way or another, and to crush the cause of artistic freedom along with him.

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