

Legal Loopholes Delight in Ben Butler

by Sara A. Murphy, Esq

"I heard a good lawyer can always use convoluted reasoning to find a loophole."

So begins the conversation between fugitive slave Shepard Mallory and Benjamin Butler, a Major General of the Union Army, in *Ben Butler*, a comedy by Richard Strand set to open at Portland Stage on September 25, with performances through October 21. The verbal duel between the runaway slave and the Union officer is at the center of this slice of historical theater — a comedic take on an actual event during the Civil War when a creative legal argument, with the benefit of good timing, opened the door to aid hundreds of thousands of slaves.

For history enthusiasts, as so many lawyers are, the story of *Butler* may be familiar. For others, the play could be viewed as a 90-minute continuing legal education course in managing client relationships, artful negotiation, and the grey area we all find in a legal world that at first often seems black and white.

The play is delightfully simple in its prose. It takes place at Fort Monroe at the beginning of the Civil War, in the heart of newly Confederate territory in recently-seceded Virginia. Butler, played by Ron Orbach, is a former successful trial lawyer from Massachusetts with little military skill, who has recently been assigned the command of the fort when three runaway slaves approach seeking sanctuary. Mallory, played by Cornelius Davidson, is the designated mouthpiece for the three men, and he requests that Butler allow the men to stay as volunteers for the Union Army and not be returned to their owner, a colonel in the Confederate Army.

The request by the fugitive Mallory begins a witty dialogue between the two men, much of which centers on the ability (or inability) of lawyers to solve complex problems. Butler sees the law as black and white, noting that Congress definitively stated in the Fugitive Slave Act that runaway slaves must be returned to their owners. But Mallory argues that the law is irrelevant because, *"You're a lawyer. You can twist the law. You can make the law be anything you want it to be. You can make the law mean opposite of what it's supposed to mean. That's what lawyers do, isn't it?"* Fair point.

In the first act, Butler insists that the law is "explicit" that Mallory must be returned to the South. After all, Union war policy was not to interfere with slavery; President Lincoln had said in his inaugural address that he had no inclination to interfere with the institution of slavery where it existed — going so far as to state that he believed he had no legal right to do so. Remember, too, that Butler has only been in charge of Fort Monroe for mere moments and, therefore, takes his obligation to uphold the letter of the law quite seriously.

But the moral dilemma nags at Butler — if Mallory and his comrades are returned to their master, they will surely be put to death or suffer serious physical abuse at the hands of the Confederate colonel. If they are allowed to live, they will be put to work killing Union soldiers. In Strand's version of events, Mallory and morality ultimately push Butler to do exactly what Mallory requests — twist the law to Mallory's, Butler's, and the Union's advantage.

In the second act, Confederate Major Cary arrives at Fort Monroe on behalf of the slave-owning Confederate colonel to demand that Butler return the fugitive slaves. Butler refuses. By a stroke of luck, Virginia has just ratified an ordinance of secession that declares Virginia to be a sovereign government. Given the new law, Butler reasons that he has no obligation to the newly-seceded Virginia under either the Constitution or the Fugitive Slave Act to return Mallory and his two fellow slaves to their owner.

Furthermore, since the Confederate colonel had treated the three slaves as his property and used them to help build and maintain Confederate fortifications, Butler determines that he can hold the trio as contraband, subject to interception and impoundment under the Articles of War. Aghast at this "lawyer's trick," Cary rides out of Fort



Sara Murphy

"You're a lawyer. You can twist the law. You can make the law be anything you want it to be. You can make the law mean opposite of what it's supposed to mean. That's what lawyers do, isn't it?"

Sara Murphy is an associate in Pierce Atwood's Litigation Practice Group. Currently, she serves on the Executive Committee for the Board of Trustees at the Portland Stage. Before law school, Murphy worked in theater in Los Angeles and Portland. She earned her JD from Maine Law, summa cum laude, and a BFA from USC. Before joining Pierce Atwood, Murphy clerked for Maine SJC Chief Justice Leigh I. Saufley and subsequently for the Hon. D. Brock Hornby of the U.S. District Court for the District of Maine.

— continued next page

Legal Loopholes *continued*

Monroe empty handed, leaving Butler to determine how to handle the consequences of his legal argument — after all, he now has the President, higher-ranking generals, and *his wife* to answer to.

The show is appealing on its own, but even more so because of the way Butler's ethical dilemma brings to mind the sort of morally-charged cases assigned in law school: *Regina v. Dudley & Stephens*, 14 QBD 273 DC (1884), where the castaway defendants turned to cannibalism on the seas and, unsuccessfully, argued that necessity was a defense to murder; *Brandenburg v. Ohio*, 395 U.S. 444 (1969), when the Supreme Court determined that the First Amendment protected Ku Klux Klan members' speech when it did not incite imminent lawless action; *Korematsu v. United States*, 323 U.S. 214 (1944), when the Court upheld the internment of Japanese Americans during World War II; and, most recently, *Trump v. Hawaii*, 585 U.S. __ (2018), where the Court upheld President Trump's travel ban from seven predominately Muslim countries because there was a "sufficient national security justification to survive rational basis review."

Moreover, at a time when we are constantly and inescapably inundated by the collision of morality and the law, *Butler's* relevance can hardly be questioned. In the last few months alone, we've seen a "zero tolerance" immigration policy separating immigrant parents from their children at the border; the confessed violation of federal campaign finance laws to influence a presidential election; repeated examples of racial profiling, often involving excessive and sometimes lethal force by police officers; and who can forget the vacant seat on the Highest Court in the Land that could have a generational effect on women's rights in this country.

On the other hand, we've also seen vehement efforts to expand protections against discrimination for transgender people and others in the LGBTQ community; students demanding comprehensive gun control legislation to better ensure safety in schools; an ongoing country-wide conversation of sexual harassment and assault, in addition to affirmative steps taken to ensure safety and equality in the workplace; and renewed efforts to improve police practices and ban racial profiling, among others.

The advocate's role is the common thread throughout these recent cases, and throughout American history. In the real events on which *Butler* was based, a legal argument over the disposition of property during wartime set a precedent that eventually enabled hundreds of thousands of slaves to seek sanctuary at Union forts, all claiming to be contraband subject to interception and impoundment.

And yet, as told by Strand, the true advocate in *Butler* isn't the Major General at all, although he is often credited with changing the course of history with his novel legal argument. Here, it's Mallory who deserves the glory. He alone persuasively argues the moral and strategic necessity of allowing the fugitive slaves to volunteer for the Union army, and his verbal fencing with a formally-educated white lawyer provokes immediate admiration and respect. It is only because of Mallory's quick wit and his demand to be seen as more than mere property that Butler acquiesces. It is possible to argue that Butler's conscience is the catalyst, but the better argument is that it is Mallory, more than morality, that drives this play to its inevitable conclusion.

In short, and against all odds, *Butler* is both a comment on slavery, one of the darkest marks on American history, and the law, which can be at times utterly baffling; or, as in *Butler*, a simple matter of right versus wrong. *Butler* kicks off Portland Stage's 45th season and runs from September 25 through October 21. On October 10th, from 6-7:30 PM, Portland Stage will be hosting a "Lawyers' Night Out," when Mallory's legal roasting of Butler can be appreciated by the Bench and Bar. I hope to see you all at the theater.