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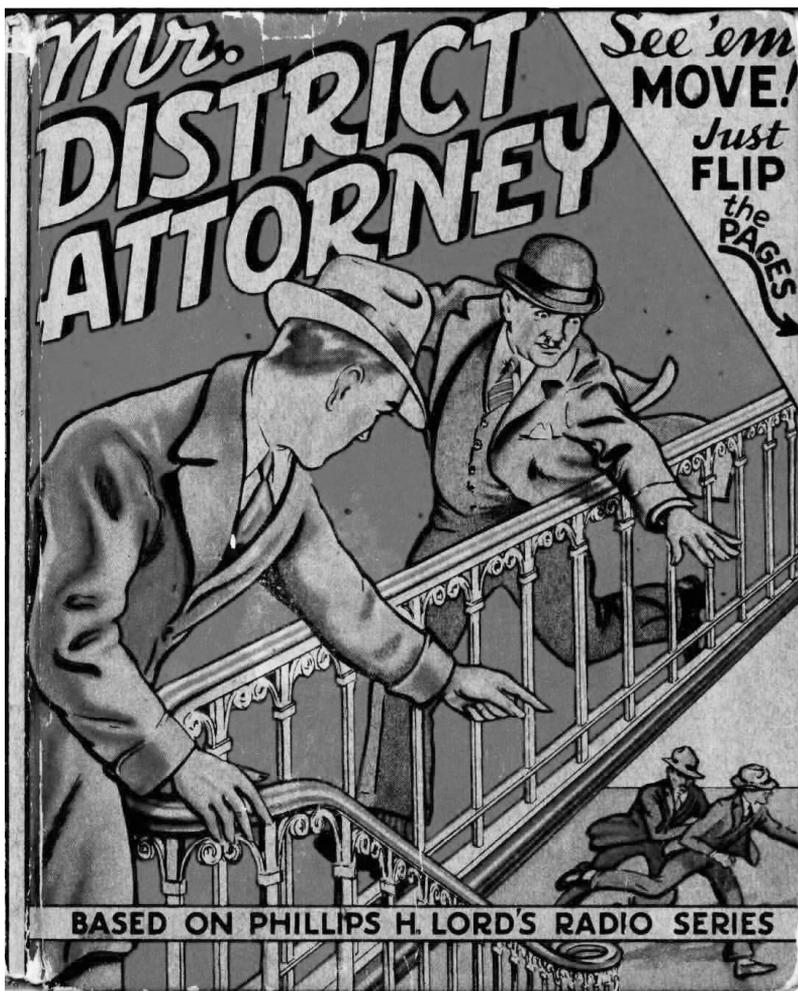
THE POPULAR PROSECUTOR: MR. DISTRICT ATTORNEY AND THE TELEVISION STARS OF AMERICAN LAW

**Ross E. Davies,
George Mason University School of Law**

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FROM THE BAG



[I]t shall be my duty as district attorney not only to prosecute to the limit of the law all persons accused of crimes perpetrated within this county but to defend with equal vigor the rights and privileges of all its citizens

Mr. District Attorney

*quoted in John Dunning, On the Air:
The Encyclopedia of Old-Time Radio 465 (1998)*



THE POPULAR PROSECUTOR

MR. DISTRICT ATTORNEY AND THE TELEVISION STARS OF AMERICAN LAW

Ross E. Davies

WHAT FOLLOWS at pages 69-108 is the second installment of *Mr. District Attorney on the Job* (1941) – the only book of adventures of the fictional prosecutor who starred on radio from the late 1930s to the early 1950s.¹ (He was known only as “Mr. District Attorney” until 1952, when he also became “Paul Garrett.”) He was tremendously popular with the listening public in those days,² as leading modern scholars of law and popular culture have noted.³ Yet, unlike the heroes of some other golden-age radio dramas – Perry Mason, for example, or Joe Friday of *Dragnet* – Mr. District Attorney did not successfully transition to television.⁴ Moreover, in the years since television superseded radio, other fictional lawyers have come to the fore on-screen – Arnie Becker (of *L.A. Law*), Patty Hewes (of

Ross Davies is a professor of law at George Mason University and editor of the *Green Bag*.

¹ See Ross E. Davies, *The Pastiche Prosecutor*, 15 GREEN BAG 2D 303 (2012). For the first installment, see *Smashing the Taxicab Racket*, 15 GREEN BAG 2D 307 (2012).

² Charles L. Burgess, *Mr. District Attorney Is On The Air*, SMASH DETECTIVE CASES #3 at 24-25 (1945); JOHN DUNNING, ON THE AIR: THE ENCYCLOPEDIA OF OLD-TIME RADIO 494 (1998).

³ E.g., DAVID RAY PAPKE ET AL., LAW AND POPULAR CULTURE 4 (2007); Steven D. Stark, *Perry Mason Meets Sonny Crockett*, 42 U. MIAMI L. REV. 229, 241 (1987).

⁴ HAL ERICKSON, ENCYCLOPEDIA OF TELEVISION LAW SHOWS 190-92 (2009).



Damages), Charles Kingsfield (of *The Paper Chase*), Ben Matlock, Ally McBeal, Jack McCoy (of *Law & Order*), Horace Rumpole (of the *Bailey*), and the like. Thus, having survived and not thrived for only a few years on television, Mr. District Attorney has been largely forgotten and is today no more than a radio fossil. His place in the minds of lawyers has been taken over by the moderns. Or has it? Who are, really, the fictional television lawyers whose presence in our legal culture is so significant that it translates into appearances in the works of judges, practitioners, and legal scholars?

The numbers presented on the following pages are not sufficient on their own to support unassailable answers to those questions, but they might be enough to prompt some preliminary thoughts.

FAMOUS ON TV VS. FAMOUS IN LAW

First, a caveat. This conventional little study of appearances by television lawyers in legal writings is just that and nothing more: a quick look at fictional (no Judge Judy on her fantastical but actual bench) television (no Atticus Finch in the film *To Kill a Mockingbird*) lawyers (no one who has not fictionally passed a bar) in traditional legal writings (judges' opinions, practitioners' briefs, and scholars' law review articles).

The tables on pages 63 and 66 are products of a series of simple searches, sorts, and tallies:

1. I started with the list of the "25 Greatest Legal TV Shows" selected by the *ABA Journal* in 2009.⁵

2. I searched for the name of the leading lawyer on each of those 25 television shows in three Westlaw databases containing large collections of traditional forms of legal writing: "allcases" (for judicial opinions), "brief-all" (for briefs by practitioners), and "jlr" (for law review articles by legal scholars).⁶

3. After eliminating bad hits (for example, the Rumpole Corpo-

⁵ Stephanie Francis Ward, *The 25 Greatest Legal TV Shows*, 95 ABA J. 34 (Aug. 2009).

⁶ Yes, yes, judges and practitioners sometimes write articles and academics sometimes write briefs. I choose to respect decisions by professionals in one category to make forays into another.



ration in searches for Horace Rumpole of the Bailey), I added up the number of references by name to those leading lawyers.

4. I ranked them by number of references by judges, with references by practitioners as a first tie-breaker and by scholars as a second. (I do not report results for most ABA-ranked shows after #10 *Night Court* because it would be a waste of space given their nearly identical results – at or near zero hits. The two exceptions are #19 *Matlock* and #23 *Paper Chase*, for an obvious reason: many hits.)

5. Finally, I plugged in Mr. District Attorney at the bottom, to make it easy to compare his numbers with his competitors’.

*All-Time Mentions of ABA-Ranked TV Lawyers
in Opinions, Briefs, and Articles*

ABA rank	TV lawyer	Judicial opinions	Briefs	Law review articles
2	Perry Mason of <i>Perry Mason</i>	256	462	981
19	Ben Matlock of <i>Matlock</i>	27	34	141
6	Ally McBeal of <i>Ally McBeal</i>	11	12	270
7	Horace Rumpole of <i>Rumpole of the Bailey</i>	10	16	178
23	Charles Kingsfield of <i>Paper Chase</i>	4	1	309
1	Arnie Becker of <i>L.A. Law</i>	2	1	55
8	Denny Crane of <i>Boston Legal</i>	1	1	18
4	Jack McCoy of <i>Law & Order</i>	0	3	33
5	Bobby Donnell of <i>The Practice</i>	0	0	16
3	Lawrence Preston of <i>The Defenders</i> ⁷	0	0	7
9	Patty Hewes of <i>Damages</i>	0	0	5
10	Harry Stone of <i>Night Court</i>	0	0	2
na	Mr. District Attorney of <i>Mr. District Attorney</i>	2	3	14 ⁸

⁷ Not to be confused with the new legal comedy of the same name. See www.cbs.com/primetime/the_defenders/.

⁸ Recent mentions in the *Green Bag* not included.



There appears to be a hierarchy within the television bar. Perry Mason is alone at the top. He is mentioned much more often than any other TV lawyer by judges (in their opinions), by practitioners (in briefs), and by academics (in law review articles). After Mason there is his “modern-day clone [Ben] Matlock,”⁹ followed by a motley but exclusive middle tier of three: young American practitioner Ally McBeal, old English practitioner Horace Rumpole, and law professor Charles Kingsfield (who sounds English but is American). And then there are very deep dregs consisting of everyone else who is mentioned almost never in opinions or briefs and only very rarely in articles. Compared to this last group, Mr. District Attorney fares reasonably well. His numbers are low, but still high enough to give him a plausible claim to top-10 status.

This simple-minded approach does have its potential pitfalls, perhaps most significantly the potential for a tilt in favor of shows named for their leading lawyer characters. For them, every mention of the show is a mention of that character as well. Thus it may be that Ben Matlock scores higher than Arnie Becker because the former’s show is called *Matlock* while the latter’s show is called *L.A. Law* rather than *Becker*. There is some merit to that supposition. *L.A. Law* does appear by name in 24 judicial opinions – nearly the same as *Matlock*. But it is also true that some of those hits for *L.A. Law* are based not on the Becker character, but on some other character or aspect of the show for which Becker should not get credit.¹⁰ Then again, that kind of problem can arise for a character-named show as well,¹¹ although as best I can tell it happens only rarely – just once in

⁹ Michael Asimow, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 533, 556 (2000).

¹⁰ See, e.g., *Foster v. Scott*, 2007 WL 196512, at *1 n.1 (Cal. App. 2 Dist.) (“[Susan] French acted in . . . a number of television shows, including *L.A. Law*.”).

¹¹ See, e.g., James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1558 n.128 (1995) (quoting former ATLA President Robert Habush: “Moreover, unlike the old District Attorney in Perry Mason, Hamilton B[u]rger, I don’t have to prove anything to you beyond a reasonable doubt . . .”). For a striking example of the conflation of the *Perry Mason* show with the Perry Mason character, see some of the news reports on this exchange between Senator Amy Klobuchar and Supreme Court nominee Sonia Sotomayor:



the 256 judicial mentions of Perry Mason, for example.¹² This is the case, perhaps, because a character-named show is character-named precisely because that one character is so central to the show. And thus for the same reason that character will nearly always be relevant to any mention of that show, whether it be in an opinion, a brief, or a scholarly article, or anything else for that matter.

A second potential problem is the use of “all-time” numbers based on searches in fairly deep Westlaw databases. The resulting historical view might be interesting, but it might also favor stars of relatively old television shows like *Perry Mason* (1957-66), *The De-*

Klobuchar: “Do you want to talk about maybe a specific example of that in your own career as a prosecutor . . . ?”

Sotomayor: “I was influenced so greatly by a television show in igniting the passion that I had as being a prosecutor, and it was Perry Mason. . . . Mason was one of the first lawyers portrayed on television and his storyline is that in all of the cases he tried, except one, he proved his client innocent and got the actual murderer to confess. In one of the episodes, at the end of the episode, Perry Mason, with the character who played the prosecutor in the case, were meeting up after the case and Perry said to the prosecutor, ‘It must cause you some pain having expended all that effort in your case to have the charges dismissed.’ And the prosecutor looked up and said, ‘No. My job as a prosecutor is do justice and justice is served when a guilty man is convicted and when an innocent man is not.’

“And I thought to myself that’s quite amazing to be able to serve that role; to be given a job, as I was, by [Manhattan D.A. Robert Morgenthau], a job I’m eternally grateful to him for, in which I could do what justice required in an individual case.”

Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, 111th Cong., Sen. Hrg. 111-503, July 13-16, 2009. Sotomayor was recalling the inspiring words and role of the prosecutor, the character named Hamilton Burger, not Perry Mason. Yet NBC reported that “she said an inspiration for her as a young girl was the television lawyer Perry Mason,” and it was nowhere near alone in that mistake. See NBC TODAY SHOW, July 16, 2009, 2009 WLNR 13598579; see also, e.g., Alessandra Stanley, *Legal Inspiration, as Seen on TV*, N.Y. TIMES, July 16, 2009, at A18. Some journalists did get it right. See, e.g., James Gordon Meek, *Al Franken Cracks Up Panel on Bizarre Day at Sonia Hearing*, N.Y. DAILY NEWS, July 16, 2009, at 4 (“The prosecutor ‘lost every week,’ yet inspired Sotomayor to work for Manhattan District Attorney Robert Morgenthau . . .”).

¹² See *Hughes v. Hutchinson*, 2001 WL 34698446, at *7 (D. Md.) (“trial counsel’s comparison of Ms. Hughes to Paul Drake (Perry Mason’s investigator)”).



defenders (1961-65), and *Mr. District Attorney* (1951-55) by including mentions from the many years during which shows of more recent vintage did not exist and therefore could not be mentioned. A more constrained look at just the 21st-century numbers, however, shows that things have not changed much over the decades. Mason is as dominant now as he was in earlier times, and the also-rans – Matlock, McBeal, and Rumpole – have remained pretty stable too. The only changes are among the cellar-dwellers: Crane and Becker switch places, as do Hewes and Preston. The only notable change is in the numbers for Mr. District Attorney, which have dropped enough to move him out of the top 10 and into the dregs.

*Recent (21st Century) Mentions of ABA-Ranked TV Lawyers
in Opinions, Briefs, and Articles*

ABA rank	TV lawyer	Judicial opinions	Briefs	Law review articles
2	Perry Mason of <i>Perry Mason</i>	125	310	534
19	Ben Matlock of <i>Matlock</i>	12	16	70
6	Ally McBeal of <i>Ally McBeal</i>	8	7	174
7	Horace Rumpole of <i>Rumpole of the Bailey</i>	4	8	82
23	Charles Kingsfield of <i>Paper Chase</i>	2	0	195
8	Denny Crane of <i>Boston Legal</i>	1	1	18
1	Arnie Becker of <i>L.A. Law</i>	1	0	16
4	Jack McCoy of <i>Law & Order</i>	0	3	29
5	Bobby Donnell of <i>The Practice</i>	0	0	12
9	Patty Hewes of <i>Damages</i>	0	0	5
3	Lawrence Preston of <i>The Defenders</i> ¹³	0	0	3
10	Harry Stone of <i>Night Court</i>	0	0	1
na	Mr. District Attorney of <i>Mr. District Attorney</i>	0	0	10 ¹⁴

¹³ See note 7 above.

¹⁴ See note 8 above.

The Popular Prosecutor



So, to refer back to the questions posed at the outset, it does indeed appear to be the case that “Mr. District Attorney has been largely forgotten,” but it does not appear to be the case that “[h]is place in the minds of lawyers has been taken over by the moderns.” Instead, his decline has taken him out of the company of the occasionally mentioned stars of a few middle-aged shows – Matlock, McBeal, and Rumpole – and into the large and diverse company of everyone else who is rarely noticed by judges and practitioners. And ancient Perry Mason remains alone at the top.

None of this should be taken to mean, however, that in his day Mr. District Attorney was not an entertaining, inspiring, even influential figure. As Professor David Papke has observed,

More than sixty years have passed since *Mr. District Attorney* premiered [on radio], and anyone who listens to tapes of old broadcasts in the present is likely to find the narrative content of the series unsophisticated and even a bit clownish. *Mr. District Attorney* completely lacks the attention to criminal procedure and courtroom performance so much a part of a current television series featuring prosecutors such as *Law & Order* But during the 1930s and '40s the reaction was different. Radio drama in general was able to engage listeners, and for over a decade *Mr. District Attorney* attracted a large and loyal listenership.¹⁵

And much the same could be said of the Mr. District Attorney television show of the early 1950s. Just try to watch an episode sometime.

In any event, memories of Mr. District Attorney are obviously disappearing. Almost no one writing today recalls him in print or online. If we are going to capture the role of Mr. District Attorney in popular culture during his years on the air, it is going to have to come from the “large and loyal listenership” he enjoyed back in the 1930s, '40s, and '50s. The people who made up that listenership are now mature individuals, well-equipped to reflect intelligently on the place of Mr. District Attorney in the days of their youth. If you

¹⁵ David Ray Papke, *Mr. District Attorney: The Prosecutor During the Golden Age of Radio*, 34 U. TOL. L. REV. 781, 791-92 (2003).



Ross E. Davies

are one of those people, with a recollection of the character or the show and its role in your life or the culture of the time, please let us know.

MEMORIES OF MR. DISTRICT ATTORNEY

Please either (1) mail a completed copy of this form to The Green Bag, 6600 Barnaby Street NW, Washington, DC 20015, or (2) email the information requested in this form to editors@greenbag.org.

Your name: _____

Your email address: _____

Your recollection of Mr. District Attorney:

Multiple horizontal lines for writing a recollection.

