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Greening the Desert

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REPORT

Greening The Desert

Strategies and Innovations
to Recruit, Train, and Retain
Criminal Law Practitioners for
STAR Communities

FROM THE DIRECTOR

Initiatives for small, tribal, and rural (“STAR”) criminal justice communities are core aspects of the Deason Center’s mission. Like their urban counterparts, STAR communities deserve fair, compassionate, and sustainable justice systems. This requires work. Counties and states must rethink their allocation of criminal resources. Funders must commit themselves to equitable justice investments that do not depend on demographics. And research, policy, and advocacy organizations—like the Deason Center—must turn their attention to STAR communities. To that end, we are developing a series of policy briefs for practitioners and policymakers who are committed to improving the criminal legal system in small, tribal, and rural America.

In *Greening the Desert*, we bring a criminal justice lens to the phenomenon of legal deserts in STAR communities—vast areas with few, if any, attorneys. This report summarizes the unique challenges that STAR justice systems face in recruiting and retaining expert criminal law practitioners, and describes strategies and programs designed to address this problem. But initiatives often involve risk, and many of these initiatives have not been fully studied. Therefore, we also include several notes of caution. Each note highlights important issues that STAR communities should consider as they explore similar strategies.

We hope that *Greening the Desert* will provide policymakers and practitioners with tools to support the recruitment and retention of expert criminal practitioners in STAR communities.

Sincerely,

Pamela R. Metzger

Director

TABLE OF CONTENTS

<i>Pg</i>	<i>Section</i>
4	Introduction
6	Financial Incentives
7	Regional Offices and Circuit Riders
8	Educational Pipelines
9	Training
10	Technology
11	Law Clinics
12	Challenges for Criminal Judges
13	Conclusions
14	Endnotes

INTRODUCTION

Criminal Law and Legal Deserts in Small, Tribal, and Rural Communities

Our country's small, tribal, and rural ("STAR") communities suffer from an overall shortage of attorneys.¹ While nearly 20% of the population lives in non-metropolitan areas, fewer than 7% of law practices are located in those communities.² Graying local populations and below-market salaries can discourage rural law practice, especially among newer lawyers who carry large student debt loads.³ Lawyers who are young and single may be reluctant to move to small or remote areas where broadband is scarce and local nightlife is sleepy.⁴ STAR communities cannot attract two-career couples unless they can provide professional opportunities for both partners.⁵ Meanwhile, experienced rural and smalltown lawyers are retiring without any replacement in sight.⁶

This means that STAR criminal justice systems struggle to recruit and retain criminal lawyers who can serve as judges, prosecutors, public defenders, and private defense

DATA SNAPSHOT

Legal Deserts in Rural Counties⁷

Non-metro Areas



20% of population



7% of law practices



Metropolitan Areas



80% of population



93% of law practices



counsel.⁸ When justice systems have low caseload volumes and tight budgets, few STAR lawyers can afford to practice criminal law full-time.⁹ Instead, most STAR lawyers are jacks-of-all-trades: criminal cases simply round out diverse practices that include matters like contracts, family law, and landlord tenant disputes.¹⁰

As a result, STAR systems have too few criminal law experts. Part-time judges and prosecutors are common,¹¹ and staffed public defender offices are rare.¹² STAR courts and counties often engage private lawyers to prosecute and defend criminal cases on a contract or per-appointment basis.¹³ But low rural compensation rates discourage lawyers from accepting these agreements,¹⁴ particularly since contract employees are often ineligible for health insurance or retirement benefits.¹⁵

The promise of rapidly acquiring courtroom skills may lure new criminal attorneys to small, rural, or tribal areas,¹⁶ but lawyer scarcity limits their opportunity for training and mentorship about that courtroom practice.¹⁷ Lawyers who begin criminal law careers in STAR areas may hone their skills in local courts and then flee to higher-paying jobs in suburbs and cities, taking their expertise with them.¹⁸ Experienced city lawyers, who might otherwise be willing to practice in STAR communities, may be deterred by low salaries, poor benefits, and long driving distances.¹⁹ As a result, there is a dire shortage of small-town, rural, and tribal lawyers who are experienced in handling serious felony cases or managing specialized practice areas, such as juvenile law, sex crimes, environmental crime, and capital defense.²⁰

Whether their criminal work is full or part-time, lawyers and judges in STAR systems often lack the resources necessary to support best practices.²¹ Small budgets and limited access to forensic and social services mean that STAR criminal practitioners may lack paralegal, investigative, and expert support that is taken for granted in urban jurisdictions.²² In tribal communities, where criminal law practice does not always require formal legal training, a “byzantine tapestry of state, federal, and tribal laws” complicates the acquisition of criminal legal expertise for lawyers and lay advocates alike.²³ And because there are so few legal practitioners in STAR systems, conflicts of interest are both frequent and difficult to resolve.²⁴

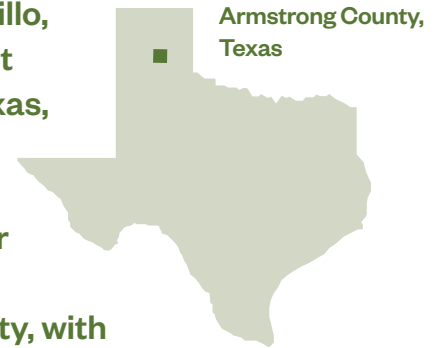
CASE STUDY

A Criminal Law Desert in Rural West Texas

Drive from Amarillo, one of the biggest cities in West Texas, to Armstrong County, Texas, and you will enter a different world.

Armstrong County, with fewer than 2,000 people, is largely agricultural and, like many rural counties, substantially poorer than its urban neighbor with a small local budget to match.

Of the three judges in Armstrong County that hear misdemeanor cases, only one is a lawyer. The felony court judge comes in for three weeks each year with his own court clerk, bailiff, and transcriber in tow. There are no prosecutors in Armstrong County. And just a handful of law enforcement officers patrol the highways. Only two lawyers have their practices registered in the county. One is dead. The only criminal defense lawyers who practice there must drive almost an hour, without additional pay, to appear in the Armstrong County court.



Financial Incentives

Financial incentives may be necessary to encourage attorneys to practice criminal law in STAR communities. Depressed local salaries and skyrocketing law school debt make STAR practice daunting for new lawyers.²⁵ Meanwhile, residency requirements for “public officers”—requiring prosecutors or public defenders to live in-county—make practice in STAR areas financially impractical for lawyers with more experience.²⁶

To address these economic barriers, some places are developing loan repayment programs,²⁷ offering higher full-time criminal law salaries,²⁸ and increasing the hourly rates for appointed counsel.²⁹ Loosening local residency requirements may allow more lawyers to work in STAR areas, increasing the availability of experienced practitioners.³⁰ Providing insurance and retirement benefits to county attorneys, public defenders, and contract attorneys who prosecute and defend criminal cases may also decrease their economic burdens, allowing lawyers to pay down existing loan balances.³¹ Some states, such as Oregon and Montana, have considered using differential or scaled contract rates to attract practitioners to remote sites.³² Others have considered differential caseload obligations.³³ South Dakota’s Rural Attorney Recruitment Program makes incentive payments of up to \$60,000 to lawyers who agree to practice in rural counties for at least five years.³⁴

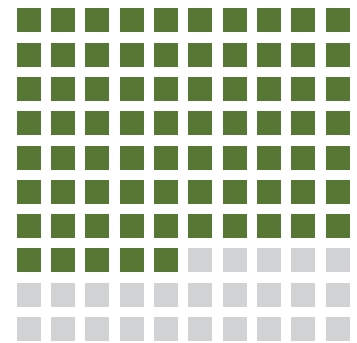
One emerging recruitment strategy has been the creation of small business incubator programs for lawyers who establish new practices in STAR communities. In Montana, the Rural Incubator Project for Lawyers offers two years of training and support for attorneys who develop new law practices in rural communities.³⁵ Wishek, North Dakota (pop. 1002) recruited two lawyers to their small town with the promise of free office space and reimbursement of business expenses.³⁶ And the William H. Bowen School of Law helps to incubate private law offices for Bowen alumni who are launching their practices in underserved rural areas of Arkansas.³⁷ While these incubator programs do not exclusively target criminal lawyers, they all have the potential to increase the number of STAR lawyers who can handle criminal cases.³⁸

DATA SNAPSHOT

Law School Debt Loads Are Large And Prevalent

Percent of Law School Graduates Who Borrowed (2018) ³⁹

75%



Average Amount Borrowed (2018) ⁴⁰

\$115,481



Regional Offices and Circuit Riders

In some states, district attorney and public defender offices serve multicounty areas. These regional or multijurisdictional offices provide lawyers to areas that do not have enough work or population to justify a full-time organization.⁴¹ For example, prosecutors, defense attorneys, and judges use mobile courtrooms to handle low-level criminal cases in towns across the 2.8 million acres of the Cheyenne River Sioux Reservation.⁴² Offices that serve more than one county or region may be able to offer full-time government employment to their attorneys and staff.⁴³ If a central statewide agency hires public defenders or district attorneys, reassigning personnel may be a viable strategy.⁴⁴

The National Association of Counties and the American Bar Association endorse the creation of multicounty or regional offices that employ full-time public defenders who ride circuit across a broad geographic area.⁴⁵ Research suggests that regional defender offices may increase the availability, accountability, and quality of public defense services while simultaneously saving public funds and stabilizing local budgets.⁴⁶ Multijurisdictional and regional offices can also provide expert representation in highly specialized areas of law, such as juvenile justice, environmental prosecution, and capital defense.

⚠ CAUTION: Practicing criminal law across county lines may be difficult.⁴⁷ The close-knit nature of STAR communities may disadvantage lawyers who are unfamiliar with local practice norms.⁴⁸ And circuit riders may be seen as unwelcome outsiders or as “carpet-baggers...accountable to no one.”⁴⁹ Meanwhile, regionalization also places prosecutors and defense attorneys farther from victims, witnesses, and clients, making it essential that these attorneys develop reliable and robust communication strategies.

CASE STUDY

Rural prosecutors may lack the forensic resources and subject-matter expertise necessary to successfully prosecute environmental crimes. To address this problem, in 1998 the California District Attorneys Association worked with the California Environmental Protection Agency to create the California Environmental Circuit Prosecutor Project (“ECPP”). The ECPP employs a team of expert environmental law prosecutors who “ride circuit,” handling environmental prosecutions for local prosecutors who are overwhelmed, under-resourced, or understaffed. ECPP prosecutors discourage environmental violators from seeking safe haven in rural areas and help provide California’s rural residents with the same environmental protections as their urban neighbors. Indiana, Nevada, and South Carolina have experimented with similar programs.

Educational Pipelines

To address the shortage of lawyers in small, tribal, and rural areas, universities and bar organizations are recruiting undergraduate and law students to set up shop in STAR communities across America.⁵⁰ For example, Nebraska's Rural Law Opportunities Program provides undergraduate scholarships and provides automatic acceptance to the University of Nebraska College of Law.⁵¹ The program includes immersive and experiential learning opportunities. Students watch court proceedings, attend networking events, observe law school classes, and work as legal interns. Similarly, Kansas' Rural Legal Practice Initiative allows pre-law students at Kansas State University to attend classes at Washburn University Law School and to intern with Washburn alumni who practice in rural areas.⁵² And a partnership between SUNY Cobleskill and Albany Law School provides undergraduate students with legal programming and mentor-practitioners who encourage them to consider rural law practice.⁵³

There are a growing number of rural recruitment programs for law students. Some programs use externship placements and summer job opportunities to encourage law students to consider rural practice. For example, the Rural Justice Program at the University of North Dakota School of Law provides stipends to students who secure summer legal employment in rural communities.⁵⁴ The University of Maine School of Law's Rural Lawyer Project awards fellowships for rural summer jobs and adds a mentorship component, pairing fellows with rural lawyers who can offer guidance about rural law careers.⁵⁵ Similar programs can be found in Indiana, Iowa, Kansas, Nebraska, and Ohio.⁵⁶

⚠ CAUTION: Educational pipeline programs will be of limited efficacy unless the lawyers they produce continue practicing in STAR communities. It is therefore important to study recruitment and retention outcomes.

DATA SNAPSHOT

Pathways to STAR Legal Practice



Undergraduate Recruitment

- Scholarships
- Pre-acceptance to law school
- Legal internships
- Observing law school classes or court room proceedings



Law Student Recruitment

- Externships
- Summer stipends
- Fellowships
- Mentoring programs
- Networking Opportunities
- Clinical Practice



Training

Along with lawyer shortages come limited opportunities for training and mentorship, leading some STAR areas to seek more training opportunities. Some public defender systems offer quid pro quo training opportunities for inexperienced private attorneys—free continuing legal education credits in exchange for accepting court appointments to indigent defense cases in remote and underserved areas.⁵⁷ Montana expands the ranks of private counsel who are qualified to provide defender services by offering substantive training in criminal law and procedure for attorneys who relocate to rural Montana.⁵⁸ The United States Department of Justice’s National Indian Country Training Initiative offers special programs for tribal prosecutors.⁵⁹ In addition, the Bureau of Justice Assistance’s Tribal Civil and Criminal Legal Assistance Program offers training and technical assistance to support criminal practice in tribal justice systems.⁶⁰

Law schools have also invested in STAR criminal law training. For example, to meet the challenge of preparing lawyers to practice in native communities, Lewis and Clark Law School offers its students an intensive summer training in Indian law.⁶¹ And, in Colorado, the General Assembly is cooperating with the Colorado Department of Higher Education to offer rural prosecution fellowships to new graduates of Colorado law schools. The new DA Rural Fellowships will provide these new lawyers with training in trial advocacy and then place them in rural jurisdictions, where they will work as deputy district attorneys.

⚠ CAUTION: Criminal practice in tribal communities can be daunting. Criminal law practitioners working in Indian country must be highly trained in state, federal, and tribal law.⁶² For that reason, they also need deep expertise in choice-of-law issues.

CASE STUDY

New lawyers who take on the unique challenges of STAR legal practice are often in dire need of training and support. To tackle this problem, the Colorado Attorney Mentoring Program and Colorado Bar Association’s Modern Law Practice Initiative created the Rural Virtual Practice Program (“RVPP”). The RVPP uses established rural lawyers to train recent law graduates who live in Denver. The program’s mentoring curriculum offers office management and entrepreneurial strategies, as well as traditional training in counseling and advocacy. Through a combination of virtual legal practice and regular travel to their mentors’ rural law offices, the new lawyers have the opportunity to sample rural practice. Their relationships with established practitioner-mentors help the new lawyers learn about local norms and establish professional reputations in the community. Meanwhile, mentoring lawyers can size up their mentees and decide whether to offer them permanent employment or include them in their law practice succession plans.

Technology

In STAR jurisdictions that spread for hundreds of miles or include challenging terrain, technological adaptations may be seen as attractive alternatives to in-person appearances and client meetings. Using video technology, incarcerated defendants can “appear” in court via video feed, saving law enforcement and corrections staff from lengthy round trips to court.⁶³ Similarly, prosecutors can “confer” with witnesses and defense counsel can “meet” with their incarcerated clients via videoconference.⁶⁴

Reduced travel obligations associated with videoconferencing may increase the likelihood that skilled urban and suburban practitioners will agree to handle criminal cases in remote areas. But videoconferencing also creates a difficult dilemma for defense attorneys. They can either appear at the remote site, where they can freely confer with their client but will have reduced access to the court, or they can appear in court, where they will have less access to their clients but greater access to the court.⁶⁵ Prosecutors with remote witnesses may face similar challenges.

Online resolution of criminal matters similarly promises reductions in time and transportation costs. Commercial vendors that specialize in court innovation promote online dispute resolution (“ODR”) as an effective way of resolving low-level criminal cases in remote and rural areas.⁶⁶ To the extent that ODR promotes *pro se* case resolution, it may lessen the demand for criminal law practitioners.⁶⁷

Unfortunately, a digital divide may prevent small, tribal, and rural communities from using technologies that require broadband services.⁶⁸ Without steady high-speed internet access, STAR attorneys may struggle to meet new court administrative requirements like appearing by videoconference. Worse still, STAR attorneys may need to rely on cellphone data hotspots for their practice—a decidedly impractical solution.⁶⁹

⚠ CAUTION: There are important unanswered questions about the quality and efficacy of technological adaptations in criminal justice. More research must be conducted to assess whether these adaptations limit the privacy and quality of attorney-client communications,⁷⁰ or interfere with the fairness and accuracy of court proceedings.⁷¹

DATA SNAPSHOT

The Digital Divide: Rural and Tribal Communities Have Less Access to Broadband Services

Population per 100 that lacks access to broadband internet ⁷²

Urban Areas

1.5



Rural Areas

22.3



Tribal Areas

27.7



Law Clinics

In remote and underserved areas, law clinics may help alleviate criminal law practitioner shortages.⁷³ Across the country, clinical law students have served as tribal public defenders and prosecutors.⁷⁴ For example, the Defender Aid Clinic at the University of Wyoming College of Law has handled up to 25 percent of Wyoming’s public defense appeals.⁷⁵ And the Family Violence Clinic at Missouri University represents domestic violence survivors in 45 rural counties.⁷⁶ An Idaho law clinic has even assisted rural county prosecutors in developing and implementing a policy for handling low-level misdemeanor offenses.⁷⁷

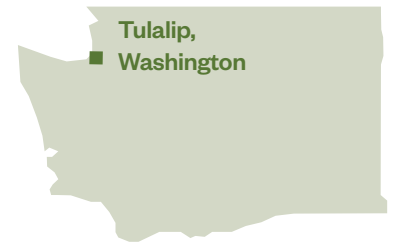
Clinic-community collaborations may help meet rural communities’ criminal law needs. For example, the Caprock Regional Public Defender Office and Clinic is a collaboration between Texas Tech Law School and rural indigent defense providers.⁷⁸ Combining features of a staffed public defender’s office with those of a law school clinic, Caprock provides public defense services in 16 rural Texas counties.⁷⁹

Pop-up law school programs can also provide valuable legal services to meet criminal law needs. For example, students at the University of Tennessee College of Law recently created a weekend expungement clinic for rural Tennessee residents. With participation by local judges, the clinic expunged 190 criminal charges in a single weekend.⁸⁰

⚠ CAUTION: State and local politicians may press law clinics to help alleviate the shortage of STAR criminal law practitioners. However, the primary goal of a law school clinic is to provide experiential learning opportunities that help prepare law students for practice. Clinical law students require intensive faculty supervision. Clinics, therefore, are ill-suited to handle a high volume of criminal cases.⁸¹

CASE STUDY

In 2002, the Tulalip Tribes of Washington State partnered with the University of Washington School of Law’s Tribal Court Clinic (“TCC”) to address the problem of criminal lawyer scarcity. The clinic’s seasoned faculty and staff serve as public defenders in the Tulalip Tribal Court. Under their supervision, TCC students have handled more than 3,000 cases—meeting with clients, interviewing witnesses, negotiating with prosecutors, drafting motions, and appearing at court hearings. In recognition of the program’s contribution to criminal justice, the Legal Foundation of Washington gave the Tribal Court Public Defense Clinic its 2017 Presidential Award.






Challenges for Criminal Judges

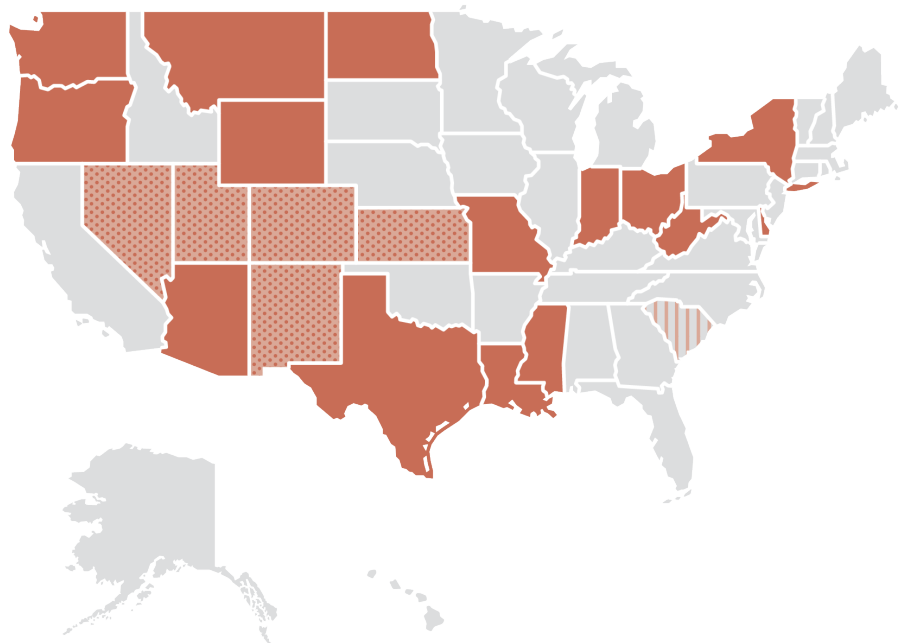
In STAR justice systems, criminal judges may lack access to resources, training, and support. Often, they deliver justice without the benefit of the administrative and legal infrastructure that other judges take for granted, such as automated case management systems, law-clerk researchers, and robust rehabilitative and treatment services.⁸² Many STAR judges work part-time, are paid very little, and have limited institutional support for resolving complex legal issues.⁸³ Further, like other STAR practitioners, criminal judges may have close relationships with those entering their courts. These relationships create potential ethical pitfalls. As a result, STAR judges may be required to distance themselves from the communities they serve.⁸⁴

For lay judges—judges without legal training—these problems are particularly acute. Lay judges confront the challenges of STAR criminal dockets without any formal legal training to draw upon.⁸⁵ In many of America’s small towns, tribal communities, and rural areas, these non-lawyer judges preside over alarmingly serious criminal matters, even though judges elsewhere in their home states are required to have law degrees.⁸⁶ For example, in large cities and very populous counties across Colorado, Missouri, Nevada, New Mexico, New York, North Dakota, Utah, and Washington, judges must have a law degree to impose a jail sentence.⁸⁷ But in those states’ least populous counties and towns, a non-lawyer—whose education may have ended in high school—can sentence people to jail.⁸⁸

DATA SNAPSHOT

No Law Degree, No Problem⁸⁹

-  = 1 state in which judges with only a college degree can impose jail sentences
-  = 5 states in which judges with only a high school diploma can impose jail sentences
-  = 15 states in which judges without a high school diploma or GED certificate can impose jail sentences



Conclusion

Like their urban and suburban neighbors, STAR communities want fair process, equal justice, safe streets, and limited government intrusion. Yet, there has been far too little study of STAR justice communities. We do not know enough about the challenges that they face or the successes that they have achieved. It is time for researchers, policymakers, and advocates to turn their attention to these underexamined and overlooked areas. Promising initiatives and innovative programs aimed at recruiting and retaining STAR criminal attorneys have been implemented across the country, but more work needs to be done. To improve access to high-quality criminal legal representation, we must study these programs to identify their successes and their weak points. The potential to green America's STAR legal deserts is there—we can no longer leave these justice systems untended.



Endnotes

Introduction

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Financial Incentives

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lage, town, or local district court); N.D. Cent. Code § 40-18-01(1)-(2) (may be a lay judge if serving a municipality with a population of less than 5,000, or if there is no licensed attorney available to practice law in the municipality, regardless of its size); Utah Code Ann. § 78A-7-106(1), 78A-7-201(2)(b) (may be a lay judge if serving a county with a population of less than 31,000); Wash. Rev. Code § 3.34.060, 3.50.020, 3.50.40 (may be a lay judge if serving a district or municipality with a population of less than 5,000).

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About the Deason Center

The Deason Criminal Justice Reform Center takes a Stats and Stories approach to criminal justice reform. The Stats: we collect, analyze, and assess qualitative and quantitative data about our criminal justice system. The Stories: we uncover, recount, and amplify the experiences of people who live and work in that system. Together, these Stats and Stories make a compelling case for compassionate criminal justice reform.

The Deason Center's STAR Criminal Justice Campaign supports criminal justice reform in America's small, tribal, and rural communities. The Center's STAR Justice Network provides STAR practitioners with a virtual practice community and with online STAR criminal justice resources. To connect STAR justice practitioners with policymakers, researchers, and non-profit organizations, the Deason Center convenes webinars, panel discussions, and an annual summit. Together, members of the STAR Campaign community will ensure that small, tribal, and rural communities are equal partners in the national criminal justice reform movement.