

2015

Educating Judges—Where to From Here?

Livingston Armytage

Follow this and additional works at: <http://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Livingston Armytage, *Educating Judges—Where to From Here?*, 2015 J. Disp. Resol. (2015)

Available at: <http://scholarship.law.missouri.edu/jdr/vol2015/iss1/10>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized administrator of University of Missouri School of Law Scholarship Repository.

Educating Judges—Where to From Here?

LIVINGSTON ARMYTAGE*

In this article, I present a critique of the emerging global practice of judicial education, which has been established and grown substantially over the past thirty years.¹ There are four challenges relating to vision, pedagogy, knowledge and leadership that confront the continuing development of judicial education.²

I. SHARING A VISION?

The quest for a vision for judicial education is more elusive than might first appear. Obviously, there is a consensus the purpose of judicial education is to promote competence—being an aggregate of knowledge, skills and values. The more difficult question still remains: *competence for what?* Without a clearly articulated answer to this question, judicial education has no specified goal; and in the absence of any answer, judicial education lapses into the pursuit of technocratic proficiency. Chief justices who routinely cast judicial education variously holistic, humanistic or reforming roles, implicitly recognize the insufficiency of a purely technocratic goal. This is illustrated in the evolution from substance-based training on law or procedure towards values-based or “social context” education. The evolution is moving towards including normative aspects of the judicial role integral to any notion of the quality of justice. These normative aspects commonly arise in training activities relating to poverty, human rights, gender and minority issues.

This quest for a vision may ultimately be determined by agreement over the purpose of judicial education. Whether this purpose is unitary or ultimately amenable to agreement remains to be seen. Some see judicial education as being primarily about promoting competence for *accountability*—in order to demonstrate the judiciary is concerned about administering the arena of justice effectively and protecting its professional domain.³ Others see judicial education as being primarily about promoting competence for *socialization*—building stronger links between the judiciary and the community so that judges understand the needs of the poor, women, indigenous peoples or minorities.⁴ Yet others see judicial education as being about promoting competence for *reform*—addressing the need to expose

* The author is Adjunct Professor Law at the University of Sydney, and Director of the Centre for Judicial Studies: www.reformingjustice.net.

1. This article builds on and extends a presentation made at the Center for the Study of Dispute Resolution Symposium, *Judicial Education and the Art of Judging*, University of Missouri School of Law (Oct. 9-10, 2014).

2. This argument rests on current research to be published in: LIVINGSTON ARMYTAGE, *EDUCATING JUDGES: A SURVEY OF GLOBAL PRACTICE* (in-press: Brill, 2015) [hereinafter ARMYTAGE, A SURVEY]. This edition will present these research findings, and also re-issue: LIVINGSTON ARMYTAGE, *EDUCATING JUDGES: TOWARDS A NEW MODEL OF CONTINUING JUDICIAL LEARNING* (1996) [hereinafter ARMYTAGE, A NEW MODEL].

3. ARMYTAGE, A NEW MODEL, *supra* note 2, at 5-7.

4. *Id.* at 35.

the judiciary to the shifting needs of the public, and the need to precipitate a process of judge-led change with a view to improving particular aspects of justice so they will be more accessible, fairer, efficient, and cost-effective.⁵ As an emerging professional discourse, we need to explore, discuss and debate our purpose. It is already apparent that our practice will drift and morph without a conversation among peers to steer its direction.⁶ It will remain conceptually impossible to demonstrate success so long as we fail to specify from the outset what success should look like. For these reasons, a purely technocratic vision of judicial education is impoverished.

II. A DISTINCTIVE PEDAGOGY?

As an emerging body of practice, we need a distinctive vision for the continuing education of judges. I have argued that this vision should build on the principles of adult and professional education to address the justice needs of citizens whom the courts are constitutionally mandated to serve.⁷ As judicial educators, we have a challenging but inescapable professional responsibility to look beyond mere competence of judges in order to actively promote the quality of justice—that is, to guide and support the learning of judges towards improving justice both procedurally and substantively (however that is to be defined).

In recent years, there has been an increasing recognition of pedagogy and the importance of taking principles commonly found in adult education and applying those to judicial education. Some considerable energy has been devoted to formalizing what the competencies of judging should look like, defining the principles and setting standards for judicial education, and introducing the notion of curricula to judicial education.⁸ Understanding the application of educational principles generally involves: (a) recognition of the need for a participatory “judge-led” process and Train-the-Trainer (ToT), (b) configuration of the training management cycle (needs assessment, instructional/curriculum design, delivery, evaluation), and (c) application of *Bloom’s* learning typology⁹ and *Kolb’s* learning style inventory.¹⁰ But beyond these principles, there is little systematic adaptation of experience from related disciplines of professional learning. Further, there

5. *Id.* at 35-36.

6. This disciplinary non-coherence is evidenced by the many and varied visions proffered for judicial education. See ARMYTAGE, A SURVEY, *supra* note 2.

7. ARMYTAGE, A NEW MODEL, *supra* note 3, at 105-14.

8. See NAT’L JUDICIAL INST. OF CAN., <https://www.nji-inm.ca/index.cfm/about/about-the-nji/>, (last accessed May 25, 2015); see also NAT’L ASS’N OF STATE JUDICIAL EDUCATORS, PRINCIPLES AND STANDARDS OF JUDICIAL EDUCATION (Dec. 2001), available at <http://nasje.org/resources/principles.pdf>.

9. Bloom classified educational objectives into knowledge, comprehension, application, analysis, synthesis and evaluation; in the practice of professional development practice, this taxonomy has been appropriated to differentiate training approaches for three domains of learning: *cognitive*, *affective* and *psychomotor*—that is, to transfer knowledge, build skills and promote attitudes. BENJAMIN S. BLOOM ET. AL., TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOAL (1956).

10. Kolb argued learning is the process whereby knowledge is created through the transformation of experience; he developed a “*Learning Style Inventory*” where learning occurs in a cycle comprised of four spokes: (a) concrete personal experience, (b) observations and reflection on that experience reworked into (c) abstract concepts and generalization which are (d) tested in new situations. DAVID A. KOLB, EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT 142-45 (1986).

seems to be little curiosity to explore whether judges are distinctive learners and, if so, how this affects any formalized program to facilitate their ongoing learning. This seems odd—at least to me—because it suggests that we are failing as educators to address a central conundrum of judicial training—that is, how can we formalize an organized process to facilitate self-directed learning. As Cross observes:-

A corollary to the assumption that adults are largely problem-orientated learners is that the more sharply the potential learner has managed to define the problem, the less satisfactory traditional classes will be.¹¹

The insights of educational inquiry have direct bearing on the challenge of facilitating judicial learning.¹² The scope and depth of educational understanding is both illuminating and captivating: from the formative work of Knowles who differentiated adults as learners—classically “from pedagogy to andragogy”¹³—to the research of Schon on the role of critical reflection as being core to attaining “professional artistry”—being that exemplary quality that we can immediately recognize but may have difficulty articulating.¹⁴ The lack of any systematic inquiry into the educational dynamics should be spurring the development of judicial education, and highlights our own incapability to understand and guide the process.

Almost twenty years ago, I argued that the principles of adult learning should lie at the foundations for any program of judicial education. These principles recognize adult learning is characterized by its autonomy, self-direction, and preference to build on personal experience, the need to perceive relevance through immediacy of application, its purposive nature, and its problem-orientation.¹⁵ Yet judges as professionals are also distinctive learners. Building on Catlin’s foundational research of judges’ learning preferences, I further argued that judicial learning is a complex process which has distinctive characteristics that have direct and important implications for educators, particularly in the common law tradition.¹⁶ Judges are distinctive learners in a number of ways which arise from (a) the processes and criteria of judicial appointment and the nature of tenure; (b) judges’ preferred learning styles and practices; (c) doctrinal constraints of on judicial independence, the formative nature of the judicial role, and the environment surrounding the judicial office, and (d) judges’ needs and reasons for participating in continuing education.¹⁷

11. K. PATRICIA CROSS, *ADULTS AS LEARNERS* 193 (1981).

12. ARMYTAGE, *A NEW MODEL*, *supra* note 2, at 105-28 (notably referencing the works of Kolb, Cross, Knowles, Houle, Brookfield, Maslow, Tyler and Knox among other experts in adult education).

13. MALCOLM SHEPARD KNOWLES, *THE MODERN PRACTICE OF ADULT EDUCATION: FROM PEDAGOGY TO ANDRAGOGY* (1980).

14. DONALD A. SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983); DONALD A. SCHON, *EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS* (1987).

15. ARMYTAGE, *A NEW MODEL*, *supra* note 2, at 105-28.

16. Dennis W. Catlin, *An Empirical Study of Judges’ Reasons for Participating in Continuing Professional Education*, 7 *JUS. SYS. J.* 236 (1982).

17. ARMYTAGE, *A NEW MODEL*, *supra* note 2, at 149.

To resolve the conundrum posed by Cross, I have argued that judges as learners are characterized as being rigorously autonomous, having an intensely short-term problem-orientation, and being exceptionally motivated to pursue competence for its own sake rather than for promotion or material gain. Those appointed within a merit system may also generally represent a professional elite, possessing extraordinary levels of pre-existing professional competence—at least in the common law tradition.¹⁸ In order to promote effective learning, judicial education should be a voluntary, independent and judge-led process that requires a distinctive model of continuing learning for judges. This model should be independent and judge-led, and emphasize what professional educators call “procedural knowledge” (knowing ‘how’ as distinct from knowing ‘what’)¹⁹ and individualized learning in order to be effective educationally.²⁰

III. BUILDING KNOWLEDGE?

The third challenge springs from the need to enhance pedagogical effectiveness by building our knowledge and understanding of judicial learning. To do so requires a more systematic approach to both research and evaluation. Research on how judges learn should drive our development of more effective pedagogy. Yet most of what we do remains intuitive: yes, we are doubtless learning by doing, and presumably we are doing our best. But we are working with scant empirical data and no explicit educational theory with which to provide direction. Simultaneously, we operate in a silo of judicial independence that tends to insulate experience from parallel disciplines of professional education.

Certainly, judicial education has invested in building knowledge through research—but this research has been erratic. During the 1990s, Judicial Education Reference Information and Technology Transfer Project (JERITT) notably provided an indispensable research facility for judicial educators in the United States.²¹ But funding for research has been constrained in recent years. Another stream of knowledge springs from scholarly research that began in the United States during the 1980s by Dennis Catlin,²² and later sustained by Maureen Con-

18. *Id.* at 130.

19. See RONALD M. CERVERO, JOHN F. AZZARETTO & ASSOCIATES, VISIONS FOR THE FUTURE OF CONTINUING PROFESSIONAL EDUCATION 178 (1990).

20. ARMYTAGE, A NEW MODEL, *supra* note 2, at 152.

21. Among other services, JERITT published 13 monographs: 1) Judicial Education Needs Assessment and Program Evaluation, 2) Mentoring in the Judiciary, 3) Education for Development: Principles and Practices in Judicial Education, 4) Curriculum, Program, and Faculty Development: Managing People, Process, and Product, 5) Program Management: Managing Deadlines, Details, Activities, and People, 6) Education for Development: The Voices of Practitioners in the Judiciary, 7) Professional Education and Development of NASJE Members, 8) Ability-Based Learning and Judicial Education: An Approach to Ongoing Professional Development, 9) Claiming Status in an Emerging Occupation: A Study of State Judicial Education in America, 10) Courts and Judicial Branch Education: Creating Their Future in the New Millennium, 11) Conducting Impact Evaluation for Judicial Branch Education, 12) Preparing Organizations for Distance Learning Technologies, 13) Developing a Court Leadership and Management Curriculum, and 14) An Evaluation of the Judicial Branch Education Programming Response to Contemporary Court Challenges. Monographs, JUDICIAL EDUC. REFERENCE INFO. & TECH. TRANSFER PROJECT, <http://jeritt.msu.edu/monographs.asp> (last accessed May 25, 2015).

22. Catlin, *supra* note 16, at 236.

ner,²³ Charles (Chuck) Ericksen,²⁴ and most recently Geeta Oberoi in India.²⁵ Over the years, there have been fragmentary contributions to professional journals and newsletters.²⁶ Most recently in 2013, the International Organization for Judicial Training (IOJT) has launched a journal “*Judicial Education and Training*” which has published four issues and at the time of this writing is currently working on two more.²⁷ As yet, the best that can be said is that these initiatives offer some promise to cohere into a discernible discourse on judicial education.

On the related issue of evaluation, there currently is no serious effort whatsoever to evaluate the impact of judicial education and training. This is not to suggest there are no evaluative activities in the “Kirkpatrick” sense of reaction, learning, behavior, and results.²⁸ On the contrary, there is often a great deal of activity-based evaluation directed towards assessing a participant’s reaction (satisfaction) and learning. On occasion, there are also programmatic or organizational evaluations. But, crucially, no systematic assessment of behavioral change on the part of judges as learners currently exists. Nor is there any assessment of impact or results in attaining any stated goals of judicial education.²⁹

For more than thirty years, experts from Hudzik to Conner, Tull and Edwards have consistently critiqued the paucity of evaluating judicial education, advocating for improved evaluation—that is, reaching beyond Kirkpatrick’s levels 1 and 2—as a mechanism for continual improvement of both judicial education and

23. See generally MAUREEN E. CONNER, CLAIMING STATUS IN AN EMERGING OCCUPATION: A STUDY OF STATE JUDICIAL EDUCATION IN AMERICA: JERITT MONOGRAPH NINE (1999).

24. See generally CHARLES AARON ERICKSEN, ESSENTIAL CHARACTERISTICS OF AN HIGHLY RESILIENT JUDGE (2010).

25. See generally GEETA OBEROI, DEVELOPING THE JUDICIAL EDUCATION DISCOURSE (2013).

26. In the United States, there was an initial spike of academic interest in the early 1960s. See K. O’Connell, *Continuing Legal Education for the Judiciary*, 16 J. LEGAL EDUC. 405-15 (1963); Robert A. Leflar, *Continuing Education for Appellate Judges*, 15 BUFF. L. REV. 370 (1965); Delmar Karlen, *Judicial Education*, 52 A.B.A. J. 1049 (1966); Daniel Gutman, *An Experiment in Judicial Education*, 52 JUDICATURE 366 (1969). Since then, there has been a steady smattering of articles on judicial education in the literature. Livingston Armytage, *Need for Continuing Judicial Education*, 16 U.N.S.W. L. J. 536 (1993); Charles Claxton, *Characteristics of Effective Judicial Education Programs*, 76 JUDICATURE 11 (1992); Paul M. Li, *How Our Judicial Schools Compare to the Rest of the World*, 34 JUDGES J. 17 (Winter 1995); William W. Schwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129 (1995).

27. In these issues the articles have showcased innovations in aspects of experience from diverse countries around the world promoting a range of topics including building a learning community of judicial educators, research, curriculum development, evaluation, globalization and the application of ODA. Articles were written by chief justices and senior judges, judicial educators and academic researchers. Contributions for the first two issues of this journal came from Australia, Belgium, Canada, the Council of Europe, Germany, Israel, Mongolia, New Zealand, Spain, Singapore, Sweden, Trinidad & Tobago, Vietnam, and the World Bank. The author of this article is the editor of that journal. See JOURNAL OF THE INT’L ORG. FOR JUDICIAL TRAINING, <http://www.iojt.org/journal/page~journal.html> (last visited May 26, 2015).

28. DONALD L. KIRKPATRICK, EVALUATING TRAINING PROGRAMS (1975); DONALD L. KIRKPATRICK & JAMES D. KIRKPATRICK, EVALUATING TRAINING PROGRAMS – THE FOUR LEVELS (3d ed. 2009), available at http://www.bkconnection.com/static/Evaluating_Training_Programs_EXCERPT.pdf.

29. An impact evaluation on judicial training was conducted in Ohio, though the data was confined to assessing impact on *participants’* learning rather than on *results for court users*—i.e., Kirkpatrick levels 1 and 2, but *not* 3 and 4. Anna A. O’Connell & Joy Edington, *Impact Evaluation of Judicial College Education for Juvenile Court Judicial Officers*, 1 J. INT’L ORG. FOR JUDICIAL TRAINING 123 (2013).

performance.³⁰ Despite this, practice remains characterized by the lack of any systematic evaluation of results.³¹ It is dispiriting that we still cannot properly answer the question which is key for financial sponsors and hence sustainability: “Does it work and, if so, how?”

These are startling, serious observations of a nascent practice that aspires to be a professionalizing endeavor. Indeed, it is surprising funding bodies have not already insisted on being provided with evidence of results from their investments. This lack of *any* evaluation arises, at least in part, from the perceived sensitivities surrounding judicial performance, the lack of consensus on how it can be measured, as well as concerns about judicial independence that have morphed from the doctrinal to the dogmatic.³² Notwithstanding these legitimate sensitivities, judicial education will atrophy into an enervating routine and a static ritual that will be unable to either improve or demonstrate its value should this deficiency be permitted to persist.

IV. LEADERSHIP BY WHOM?

This leads to the final issue of leadership. In addressing these challenges, we need to consider the notion of what is described as “*judge-led*” education more closely. There is no question that judicial ownership of its own continuing education is doctrinally fundamental to protect judicial independence, as much as it is important to ensure authenticity. But there is evidently some risk of this notion becoming a shibboleth—a sacred cow—that shelters judges from confronting what might be uncomfortable but nonetheless much needed change. As we have already seen, Schon has identified critical reflection as being indispensable for self-directed professional learning. Yet this critical reflection cannot happen if we stay within the sanctuary of our comfort-zone. It requires judicial educators to responsibly guide and facilitate the learning of judges around the paradox of not knowing what they don’t yet know—in other words, creating awareness that

30. John K. Hudzik & John H. Wakeley, *Evaluating Court Training Programs*, 64 JUDICATURE 369 (1981); JOHN K. HUDZIK, JUDICIAL EDUCATION NEEDS ASSESSMENT AND PROJECT EVALUATION (1991); JUDICIAL EDUC. REFERENCE INFO. & TECH. TRANSFER PROJECT, *supra* note 21; MAUREEN E. CONNER, CONDUCTING IMPACT EVALUATION FOR JUDICIAL BRANCH EDUCATION (2002); C. Tull & A. Goldstein, *Judicial Education Program Evaluation*, 6th International Conference on the Training of the Judiciary (unpublished paper) (2013); Mary Fran. Edwards, *Evaluation of Continuing Judicial Education Programmes*, 1 JUD. EDUC. & TRAINING 113 (2013).

31. I have previously argued that the evaluation of judicial education was generally inadequate, inappropriate, and of limited utility; to rectify these deficiencies, it proposes a systemic judicial performance model that uses indicators of judicial performance including trial disposal, appellate disposal and complaints to contribute means to assess and demonstrate impact without infringing judicial independence. Livingston Armytage, *Evaluating the Impact of Judicial Education*, J. JUDICIAL ADMIN., no. 4, 1994, at 35.

32. For example, Professor T. Brettel Dawson, who is Education Director of the National Judicial Institute of Canada, is discernibly circumspect: “Any form of evaluation must respect judicial independence Of the four levels of evaluation posited by Kirkpatrick (1. Reaction; 2. Learning; 3. Behavioural change; and 4. Results or Impact), only Levels 1 and 2 are considered broadly acceptable and achievable in the Canadian context.” T. Brettel Dawson, *Twenty Principles of Judicial Education: Annotated* (2014) (unpublished paper) (on file with author). Other experts observe there is no consensus on what constitutes good judicial performance and how it can be measured systematically. DORY REILING, LINN HAMMERGREN & ADRIAN DI GIOVANNI, JUSTICE SECTOR ASSESSMENTS: A HANDBOOK (2007), available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JSAHandbookWebEdition.pdf>.

change may need to occur. In practice, judges often understandably shrink from what they call “indoctrination from pressure groups,” no matter how reasoned and worthy those causes may be.³³ This was certainly the case during the 1990s when judiciaries around the world were publicly discredited for unequal treatment and, in particular, failure to protect the rights of women and racial minorities.³⁴

Many judiciaries have responded commendably over the intervening period. But the challenge of proactive, progressive, leadership in ever-changing societies persists—hence the current focus of judicial education on “social context.” It follows that “judge-led” should not be permitted to mean only what judges want—as distinct from what judges may need. In practice, many judges directing programs of judicial education already understand this, but it does raise the question: *if judge-led education is necessary but not sufficient, who else should assume a leadership role?*

The answer to this question lies in the pressing need for educators to contribute more actively in the leadership role—whether from practice or academia. At present, educators are assisting with implementation; but there is little space to lead. The collaboration of educators will enliven judge-led education to attain full potential. Now more than ever there is a need for more collaborative leadership to refine the vision of what judicial education should ultimately aim to achieve. Research and proven methodologies must demonstrably promote meaningful learning. A more rigorous evaluation of our endeavors must be implemented to improve our practice, and to critically assess the measurable impact that judges’ learning is having towards creating a more just society. Addressing these challenges will transform the practice of judicial education.

33. This is an anecdotal observation based on many years of practice educating judges around the world.

34. See, Livingston Armytage, *Judicial Education on Equality*, 58 MODERN L. REV. 160, 160-61 (1995).