Simulations, Jurisprudence, and Critical Thinking: A Case Study

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Simulations and games are utilized to present course material in a manner that encourages students to successfully master certain skills or information. In the Law and Politics course at Central Connecticut State University (CCSU), students review copious information about a criminal case in a fictional world in order to write two appellate court opinions in two distinct jurisprudential styles. The mock world allows students to confront and consider their own judicial preferences and to develop and to demonstrate their critical thinking skills.

The students have access to a wide variety of relevant and irrelevant documents, records, and information in the fictional world of Gaferut. The students must utilize their critical thinking skills to determine which facts and items are relevant to each approach. For example, if the student is writing as a textualist, then the language in the constitution is important, while the legislative intent as presented in the legislative record is not. Thus, the assignment requires the student to not only compose a judicial opinion but to identify the right evidence for that jurisprudential voice. The students tend to begin the assignment with a sense of dread because the nation of Gaferut is one with which they have no familiarity, but the assignment allows students to explore and consider the role of judges and various jurisprudential approaches without the weight of U.S. politics and courts overwhelming those considerations. The results have been promising and demonstrate the utility of simulations in fostering critical thinking skills.

Evolution and Integration of Simulations

Simulations have become a mainstay of political science classrooms (Smith and Boyer, 1996, and Kollars and Rosen, 2013). These pedagogical tools can be short-term one class events or semester-long intensive immersion experiences (Baranowski, 2006,

The benefits of simulations depend in large part on their design and level of engagement (Asal and Blake, 2006). Researchers have found that simulations promote active learning of key concepts, produce cognitive learning outcomes (Stapleton, 2020, Blackstone and Oldmixon, 2019, and Mitchell et al., 2021), alter student attitudes about U.S. institutions (Williams and Chergosky, 2019), improve student interactions and teamwork (Sands and Shelton, 2010) and increase student enthusiasm for course material (Woessner, 2017). While simulations are particularly prevalent in international relations and comparative politics courses, they can also be found increasingly in judicial politics or public law courses. See for example, Fliter 2009, Emenaker, 2014 and Kammerer and Higashi, 2021).

One of the concerns about simulations is effective assessment (Frederking, 2005). Raymond and Usherwood (2013) note that assessment must be tailored to the goals of the simulation which can be knowledge acquisition, affective growth, or even skill mastery. Additionally, Baranowski and Weir (2015) focused on the importance of tying simulations to course learning outcomes and to effective assessment strategies.

The Gaferut Simulation

The Law and Politics (PS 270) course at CCSU is a 200-level course that qualifies for general education credit. However, for years, it was mainly populated by upper-level students. The course was a requirement in the legal studies concentration but was also popular with general political science majors.[1] The divide between the two student populations is not that unusual. Wossner et al. (2016) addressed this very conundrum and found that simulations could be useful in addressing diverse constituencies in an introduction to law course. An additional

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[1] The non-political science majors in the course tended to be interested in law as a possible career path.

inspiration for the simulation came from the fact that students struggled to understand jurisprudence in even the mast basic respects. In fact, Perry and Robichaud (2020). found that a primary campaign management simulation helped students to bridge theory, ethics, and individual decision-making.

Prior to the start of the simulation, the students received an overview of five jurisprudential theories: textualism, originalism, legal realism, pragmatism, and Critical Legal Studies. The students also read selections of U.S. Supreme Court opinions and work in groups to correctly identify the relevant theory present in the opinion. They completed a short quiz of judicial quotes in which they had to correctly identify the appropriate approach embodied in that quote. Finally, students met in groups to discuss the hypothetical legal case that became the basis of their subsequent papers. However, they were yet unaware that there was a larger context to the case. Only after the group discussions were the students introduced to the fictional nation of Gaferut.

The hypothetical case and nation borrow from Lon Fuller's article "The Case of the Speluncean Explorers" (Fuller, 1949). In that article, Fuller presented the views of five judges, in the nation of "Newgarth", tasked with writing a judicial opinion about four cavers who murdered a fifth man to provide sustenance when they became trapped underground. Fuller demonstrated that differing philosophies of law would lead judges to different results for the defendants. As Fuller (1949) noted, "The case was constructed for the sole purpose of bringing into a common focus certain divergent philosophies of law and government" (645) The Gaferut assignment tries to do just that – to help the students bring into focus "divergent philosophies of law and government" as well as to develop their critical thinking skills.

In the Gaferut simulation, the two individuals involved are tried and convicted. Then, they appealed their sentences to the national high court. The students, acting as justices, must review the facts of the case and related documents and write two judicial opinions in two distinct jurisprudential voices. There have been substantial additions and modifications to the "Newgarth" world on which Fuller based his own mock judicial opinions. The students have access to a wealth of documents and information from the nation of Gaferut including:

- a full constitution;
- relevant criminal codes;
- legislative acts and their legislative history;
- judicial precedents;
- a brief history of the nation's founding;
- a national fable;
- media coverage of the incident;
- public polling results;
- photos;
- and personal information on each defendant.

The most difficult task for students is determining which material is relevant based on the jurisprudential style that they are emulating. The selection of documents for each jurisprudential approach requires critical discernment on the part of the students.

The Gaferut simulation, and corresponding written assignment, was first developed in the fall of 2014, after multiple failed attempts to teach jurisprudence in a more traditional format. There were two primary goals for the simulation; first, to encourage student mastery of a variety of jurisprudential approaches and the application of those theories to the larger world; and second, to have the students demonstrate mastery of critical thinking skills. Critical thinking is one of the learning outcomes for general education.

> *Relevant (critical thinking) outcomes include the ability to:* **define a problem; assemble evidence to support a conclusion; assess the validity of a sustained argument; and analyze information to uncover underlying meanings, structures, and patterns** (emphasis added, CCSU General Education).

In order to better assess the general education learning outcomes, the university decided to utilize the American Association of Colleges and Universities (AACU) Critical Thinking Value Rubric. The rubric is utilized to assess student artifacts in general education courses across five domains: explanation of issues; evidence; influence of context and assumptions; student's position; and conclusions and related outcomes. The Gaferut judicial opinion assignment was designed to meet these outcomes.

Additionally, in 2016, students had to respond to two questions: first, why did the student select the two specific jurisprudential approaches for the judicial opinion; and second, I began collecting data on student responses to two questions: 1) Why did they choose the jurisprudential approaches the student had selected; and 2) which jurisprudential approach would the student prefer to see in a U.S. Supreme Court Justice. The addition of these two questions was in direct response to reviewer feedback that the judicial opinions, while providing an opportunity for students to consider all relevant issues, utilize a variety of sources, and review relevant contexts, did not encourage students to state their own perspective and the limits of that position.

Course Results

Student preferences for particular jurisprudential approaches waxed and waned over the years. In the fall of 2016 and 2017, the students generally split their preferences between legal realism and originalism. In 2018 and 2019, pragmatism rose in prominence. In 2020 and 2021, the students' preference for originalism dropped precipitously, although it was never selected by more than thirty percent of the class. (See Table 1 for percentage of respondents selecting each jurisprudential approach.) After the decision in *Dobbs v. Jackson Women's Health Organization* (2022), student preferences did shift, albeit not as expected. Their preference for legal realism waned, coupled with a significant growth in pragmatism and a smaller uptick in originalism. And

their answers displayed a clear understanding of each approach. For example, one fall 2022

student noted that she appreciated the originalist approach, although she would not want to see

any more originalist justices on the Supreme Court.

> *I like how the law is so concrete in the eyes of Originalists, in the way that there is precedents and laws to strictly follow. However, another part of originalism I like is how the interpretation and meaning of those texts are just as important, as you need to find meaning to apply to current cases. It makes something concrete about law seem abstract. Juxtaposed to the limited amount of critical legal theory judges, there is a surplus of originalists in the world, who believe that staying true to the nation's ancestors is vital to keep its consistency and order…. I would want a U.S. Supreme Court justice to adhere to the legal realism approach…. Realists think law is [in] flux and ever-changing, which is normal for a nation that has been under Constitutional law for hundreds of years (sic).*

One of the other students in fall 2022 who wrote a CLS opinion, nonetheless, found pragmatism

more persuasive.

> *I find that there is a lot of truth in the concept of power being inherently inequitable, and I do believe that many of the United States' legal concepts serve to prevent equity. For example, the war on drugs was a nation-wide effort to discriminate against users of a less-expensive version of cocaine…. Powerful people, the people that could afford powder cocaine in disgusting quantities, discriminated against a different version of the same drug, which was disproportionally used by racial minorities. There are good arguments for the statement "power corrupts," but I would not go so far to say that I find no intrinsic truths in the rule of law the way that Critical Legal Theorists might…. I subscribe heavily to concepts of utilitarianism and doing the most good for the largest amount of people (sic).*

In short, the students' responses indicated that they understood the characteristics and limits of

each approach.

Table 1: Percentage of Students Selecting a Given Jurisprudential Approach

	2016 n=23	2017 n=22	2018 n=18	2019 n=18	2020 n=16	2021 n=23	2022 n=16
Pragmatism	9%	9%	28%	44%	13%	9%	25%
Legal Realism	48%	59%	44%	28%	69%	78%	63%
Originalism	30%	23%	22%	22%	6%	9%	13%
Textualism	9%	*	*	*	*	*	*
Critical Legal Studies	4%	9%	6%	6%	13%	4%	*

No students indicated a preference for Textualism after 2016, although it is still covered in class.

Not only did the students' responses indicate that they understood the differences between each jurisprudential approach, but their essays also demonstrated a clear understanding of the potential effect of a particular jurisprudential approach in a particular case. The students who argued that there should be more originalist (or even textualist) justices on the U.S. Supreme Court focused on the importance of the stability of law and the limited role of unelected judges in a democracy. The one right that was mentioned was the right to bear arms and the *D.C. v. Heller* (2007) decision.

> *Originalists look at the original meaning and original intentions when reviewing a case. Originalists are also the only theory that looks at history as well. The relationship between history and law is important, history gives us information on a past cases and events which could be used when solving a similar case. Originalist also focus on following the law, they don't try to determine if it is good or bad, right or wrong, they just follow the law when making a decision.*

> *The originalist jurisprudence approach can limit a judge's ability to be an activist and therefore makes the court less political.*

> *...having a judge whose sole focus is the text and the intent of the text is a good way to ensure that a judge would not decide a case based on his/her personal beliefs. The justices of the Supreme Court were not elected to their positions and those positions are not meant to perform in a legislative capacity which is something that can happen with legal realist or pragmatist judges. While the decisions that are reached by judges with an originalist interpretation can be unpopular, they are brought with the best of intentions. The agent for change in the American government was not meant to be the court but instead the legislature.*
> *Therefore, with judges bound by the constitution, and not looking outside of it..., we would be able to ensure that the personal beliefs of 9 unelected lawyers are not forced upon society without first going through the appropriate legislative channels.*

> *...being a textualist restrains the justice and prevents them (sic) from moving to (sic) far from the 2nd amendment rights for citizens with the <u>D.C. v. Heller</u> decision.*

For those students who preferred legal realist justices, they wanted the law to adapt as society changed and they did not think the legislative branch could provide the necessary changes needed in society. The word flux and variations on skeptical appeared frequently. Additionally, the issues they mentioned most frequently were abortion (*Roe v. Wade, 1973*) and gay marriage (*Obergefell v. Hodges*, 2015).

> *Within our current system, we barely ever see real, big, and meaningful legislation that can provide us with even the bare essentials of government. This has left a gaping hole of governance that the people desperately want to be filled in certain cases and this has resulted in types of legislation through judicial action to make up for that ineptitude of the legislature. We've seen this with the decisions of <u>Roe v. Wade</u> and more recently, <u>Obergefell v. Hodges</u>). That's not to say I dislike those decisions, I don't. I agree with those decisions, I just wish we had a legislature that functioned enough to deal with those issues as they're meant to be doing.*

> *If a U.S Supreme Court wholeheartedly used explicit text from the U.S Constitution a part of the ruling would be out of touch with reality given the stark differences between context of constitutional writing and the dynamic realities facing our society today. Judicial decisions should represent the needs of our society, and not an emphasis on historical interpretation or philosophy. Given the nature of our wavering society, our law ought to be [in] perpetual flux.*

> *Legal realists state that laws are in flux because society is in flux and this is always going to be true. This is true because society will continue to evolve especially with the use of technology.*

> *This approach does not bind itself to the desires of men who have long since died and could not foresee the current state of the world like originalists. Nor does it advocate for radical goals that are impossible to realize like critical legal theorists. Instead, legal realists accept the fact that society and its values are constantly changing, and as such, law needs to be flexible in its interpretation as well. This enables legal realists to make better decisions that utilize relevant standards of rationale, as opposed to outdated rationale like originalists. Furthermore, legal realists also accept that law is in flux and can continuously be defined and reapplied to new concepts. When law can be flexible, it is better suited for an ever changing world (sic). Legal realists also are aware of the fallibility of humans….This manifest as a healthy skepticism which enables better judgement. As legal realists do not merely accept the facts, and instead question them,*

their understanding of the case grows stronger when they debate their evidence, bolstering their ability to render a valid decision for the case.

Those few students who selected Critical Legal Theory were not sure what such an approach might look like on the Supreme Court, but they wanted more substantial change in constitutional interpretation.

> *I think this approach is interesting because it follows the idea that law contributes to an illegitimate hierarchy. While some people argue that the Bill of Rights and Constitution promised certain rights, I think that it promised rights to certain people. In this battle we have over equality, we continuously struggle with providing the same protection to individuals regardless of race, ethnicity, sexual orientation, religious beliefs, etc. Some groups have had to fight harder to earn those protections, while other groups were privileged enough to simply be granted such protections. I think it would [be] nice to see how the opinion of a CLS would differ and how they would add diversity to the court. ...I admire their use of history, psychology, and socio-economic factors to determine how groups benefit from legal decision (sic).*

> *I believe that the U.S. Supreme Court should utilize this approach when translating our constitution because it is a document hundreds of years old, written in an entirely different historical context. Although there are many fair and just sentiments that still translate nicely into today's society, there are still many outdated amendments written by white men for white men who had no way of understanding the technological and social revolutions that would follow in years to come. Somehow, this one amendment [the Second Amendment] yielded many different types of outcomes. Outcomes we are dealing with in the form of increased gun violence as well as mass shootings (sic). The result of the originalist interpretation of the Second Amendment is increased pain, suffering, and death. For these reasons, it is evident that a critical legal perspective is the solution for interpreting obsolete aspects of constitutional law.*

Overall, the student responses indicated that they did understand the broader implications of jurisprudential approaches outside of the Gaferut nation and the students were capable of linking a particular jurisprudence to their own preferences. The simulation appeared to be meeting the related goals of knowledge acquisition and the application of theory to practice.

University Assessment

At CCSU, the Office of Institutional Research and Assessment integrated the AACU Critical Thinking Rubric into the university assessment process. Teams of faculty met and

reviewed student artifacts in relation to the rubric. The university Office of Institutional Research and Assessment collected the Law and Politics student papers from 2014 -2017 for evaluation by teams of faculty from across the university community. These reviewers received training on applying the critical thinking rubric. They graded multiple sample artifacts separately, compared scores, and then outlying scores were calibrated to match a group norm. Grading of all remaining artifacts then occurred. On average, two faculty scored each student submission.[2]

There is evidence that the Gaferut project helped to build critical thinking skills in the students or, at least, provided a robust opportunity for students to demonstrate those skills. The student submissions from Law and Politics from 2014 and 2016 both scored equivalent to or higher than the university average for critical thinking across all five domains: Evidence, Explanation of Issues; Influence of Context and Assumptions; Student's Position; and Conclusions and Related Outcomes. In 2014, in four of the domains, Evidence, Influence of Context and Assumption, Student's Position, and Conclusions and Related Outcomes, the students' overall scores were substantially higher than the university-wide average. Across the campus, students averaged a score of 2.3 in the presentation of evidence, the Law and Politics students had an average of 2.7. On their ability to explain contexts and address their own and others' assumptions, campus-wide the average was 2.0, the students in the legal class had an average of 2.5. Regarding taking and defending a position and presenting a conclusion with related outcomes, the students' scores were again .5 higher than the campus average of 2.2 (i.e., 2.7). See Table 2 below. There were three areas in which one student population did not exceed the university average. The first-year student in the Law and Politics course scored dramatically

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[2] The same two faculty do not grade each submission. Instead, faculty are randomly assigned submissions from many departments. Approximately, eight faculty from across campus served on the critical thinking assessment team.

lower than first-year students in other general education courses in the Explanation of Issues.

The student also scored lower in the Use of Evidence and Taking a Position. The small sample

size makes it difficult to draw any substantive conclusions.

Table 2: Critical Thinking Scores for 2014

	Explanation of Issues		Evidence		Influence of Context and Assumptions		Student's Position		Conclusions and Related Outcomes	
	N	Avg	N	Avg	N	Avg	N	Avg	N	Avg
Fall 2014 University Results	164	2.3	164	2.3	164	2.0	164	2.2	164	2.2
First Year	16	2.1	16	1.8	16	1.7	16	1.8	16	1.7
Sophomore	21	2.1	21	2.1	21	2.0	21	2.0	21	2.0
Senior	127	2.4	127	2.4	127	2.0	127	2.3	127	2.2
PS 270	16	2.4	16	2.6	16	2.5	16	2.7	16	2.7
First Year	1	1.0	1	1.5	1	2.0	1	1.5	1	2.0
Sophomore	5	2.6	5	2.7	5	2.5	5	2.9	5	2.8
Senior	10	2.5	10	2.6	10	2.6	10	2.8	10	2.8

In 2016, the political science students' results were either equivalent to or higher than the

campus average in all five areas. These results indicate the structure of the assignment and the

opportunity to explore a wide variety of evidence may encourage students to display critical

thinking skills in their judicial opinions sufficient to meet the general education requirement.

However, once again, the first-year student performed below the average for first-year students

in other general education courses. Nonetheless, the results of the faculty review of the students'

papers demonstrate that, for most of the students in the course, the simulation does encourage

students to display their abilities across all five domains of the critical thinking rubric.

Table 3: Critical Thinking Score for 2016

	Explanation of Issues		Evidence		Influence of Context and Assumptions		Student's Position		Conclusions and Related Outcomes	
	N	Avg	N	Avg	N	Avg	N	Avg	N	Avg
Fall 2016 University Results	45	2.6	50	2.4	39	2.4	50	2.4	51	2.2
PS 270	13	2.6	16	2.8	16	2.6	16	2.8	16	2.6
First Year	1	1.0	1	1.5	1	2.0	1	1.5	1	2.0
Sophomore	5	2.6	5	2.7	5	2.5	5	2.9	5	2.8
Senior	7	2.8	10	2.4	10	2.4	10	2.8	10	2.5

Considerations

Jurisprudence is a difficult subject to cover in a lower-level general law course. Law and society texts only mention jurisprudence in passing (see for example, Law and Society by Steven Barkan [2018] and Law and Society by Matthew Lippman [2021]) while judicial politics texts may cover jurisprudence in greater detail, they are often promoted as upper-level courses (See "Law and Courts: Sample Syllabi for Judicial Politics"). And yet, introducing jurisprudence to students in a lower-level course may increase their understanding of judicial decision making in upper-level law related courses, may help them to understand their own legal and judicial preferences, and may help to build critical thinking skills. Emmanker (2014) noted that there is difficulty in measuring higher level critical thinking skills in simulations because while the qualitative support may exist, outside validation is limited. In fact, assessment even of cognitive growth can be cumbersome (Robinson and Goodridge, 2018).

The Gaferut simulation attempts to accomplish both goals: to provide some measure of student's critical thinking skills and to increase student knowledge of jurisprudence and its relationship to legal outcomes. However, there are some shortcomings to the endeavor. First, there is no pre-test, nor is there a pro-test. Thus, it is impossible to determine if the students

entered the class with stronger than average critical thinking skills or if they developed them over the course of the simulation. Baranowski and Weir (2015) that simulations include pre and post-assessments that utilize "numerical scale questions with an open-ended one" (400).

Second, Wedig (2010) recommends a group debriefing session after a simulation that "emphasizes learning outcomes from the exercise and serves to connect students with the traditional classroom" (553). The Law and Politics course has always included a debriefing after the students submit their judicial opinions but, because the simulation occurs late in the semester, that session has been one large group discussion and reflection as opposed to the small groups utilized in the pre-simulation phase. It may be useful to utilize those groups for individuals to relate their own approaches to the material and the challenges they faced.

Third, the external review of student submissions by the Assessment Teams halted during Covid. There are plans to restart those efforts, but they have not occurred yet. Ideally, the Assessment Teams would score student artifacts every year, creating a consistent and objective means by which to evaluate the critical thinking skills of the students. There is some indication that that will occur as an assessment retreat was just held in January of 2023.

The goal for fall 2023 is to develop and introduce pre-tests and post-tests that measure student familiarity and knowledge about jurisprudence in order to better evaluate student growth on the papers. These assessment instruments should include numerical scale questions in order to provide for better quantitative analysis of student growth. Additionally, since 2016, the students have provided lengthy explanations for their jurisprudential preferences. Those explanations, some highlighted above, could be a useful avenue for quantitative analysis of student views and themes. Such an examination might illuminate differences between groups of students by the year of the course or the student's year in school. Finally, there needs to be come method for

evaluating the critical thinking skills of the students before the simulation. The current pre-simulation quiz with judicial quotes in which students must identify the jurisprudence embodied by each statement may, with some alteration, be effective in that regard.

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