What is the “Common Law”

- Common law means laws that have been developed through court decisions rather than through statutes.

- Courts are not supposed to “make” new laws. However, common law is applied because:
  - For issues not covered by statutes (like most tort and contract law), courts have to apply some law
  - *Stare decicis* and precedent is enough for courts to apply its “own” law
  - Courts can interpret vague statutes
  - Courts can use analogy to apply other laws to situations in which it’s not obvious that they would apply.
Common Law Analysis

- This means analyzing law from other course decisions, whether those decisions:
  - Apply existing common law
  - Create new common law
  - Interpret statutes

- Remember that common law is only binding if it comes from a court with appellate jurisdiction
Factors in common Law Analysis: Facts

- Common law analysis is facts-dependant.
- The best way to “win” an issue is to show that the case supports your conclusion and that the facts are directly comparable.
- The best way to refute a common law argument is to distinguish a case cited by your opponent (or harmful to your case) from the facts of your case.
Notes About Facts and Case Law

- In writing to a court, you will need to cite binding case law that is on point, even if it hurts your case. In addition, you can assume that if a case is on point, your opponent will find it.

- Therefore, distinguishing facts of a harmful case is an important skill and is always worthwhile when analyzing an issue.

- When distinguishing facts of varying cases, remember that you must explain why all of your distinctions are relevant to the issue at hand. Variances in fact pattern that don’t change the underlying reason for the decision are irrelevant.
Factors in common Law Analysis: Policy

- If a case was decided based on a policy and either:
  - The facts make that policy inapplicable; or
  - The underlying reasons for that policy no longer apply
- That could make the case less relevant.
- However, in the latter case, if there is case law from a binding court, the lower court will be reluctant to “reverse” the previous case. Instead, it will wait for the higher court to decide a similar case under the new circumstances.
- The same “distinguishing” skills applicable to facts apply to policy decisions by courts as well.