Sample Exam Answer

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This sample answer is intended to be more comprehensive than necessary, and in particular addresses several issues only to explain why they are irrelevant. Footnotes provide commentary on the answer. Chuck Norris facts stated below came from actual exam answers.

1 Question 1

1.1 Nuisance

Chuck Norris's loud martial arts practice may constitute a nuisance against Emile. As stated in *Puritan Holding*, a nuisance is "the unreasonable, unwarrantable, or unlawful use by a person of his own property, and which produces such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage."[1] Courts typically must balance the property owners' competing uses in evaluating this test; *Sans* suggests that the balancing standard depends on "the simple tastes and unaffected notions generally prevailing among plain people."

Here, Chuck Norris's use of his own property is his martial arts practice, and the annoyance to Emile is the loud early-morning noise. As to material annoyance, Emile would argue that exceptionally loud punching at 5 in the morning annoys him insofar as he can't sleep and has to hide in his basement to avoid the sound. Chuck Norris might respond that noise is common in neighborhoods.

[1] I'm quoting the legal rules here; you don't need to do so on an actual exam. It would be enough to just identify the elements of unreasonable use and material annoyance.

Similarly, with regard to unreasonableness, Emile would say that plain people expect quiet living in residential areas. *While there is certainly a public benefit to Chuck Norris looking badass, this does not outweigh the community's value of not being disturbed in the morning.* Chuck Norris could respond that given that there is a karate dojo nearby, the sounds of martial arts practice are an ordinary and thus reasonable use of property.

Since Emile moved into the house first, Emile did not come to the nuisance; *the nuisance of Chuck Norris's iron-strong fists came to Emile instead.*

Both sides have strong arguments, making it difficult to see who should win, though a court looking at the problem from an economic perspective might be inclined to consider that Chuck Norris could easily move his practice elsewhere, say to a sandy beach common for karate practice; Emile would have to spend more on soundproofing his home. So holding Chuck Norris, as the least cost avoider, liable for nuisance would be reasonable.[2] *Courts may fear Chuck Norris, but fear is not enough to stop them from finding a nuisance.*

It is unlikely that Chuck Norris has a plausible nuisance claim against Emile for the car repossession, as disruptive as it may have been, since Emile (or rather, the bank) was exercising a colorable legal right. Granted, the repossession itself may constitute a conversion of the car, as explained in Question 2.

1.2 Public Nuisance

Although the homeowners' association resolution does not bind Chuck Norris's house (so an analysis of its reasonableness is irrelevant), the resolution suggests a possible cause of action for a public nuisance. For there to be a public nuisance per *Spur Industries*, "the nuisance must affect a considerable number of people or an entire community or neighborhood." The Restatement (Second) of Torts further provides that a public nuisance is that which threatens public health, violates statutory law, or otherwise has a significant effect on a public right.

Here, Chuck Norris's noise affects at least 100 homeowners in Emile's homeowners' association, and thus affects an entire community and a considerable number of people. Given that these people can't sleep, there would be a reasonable argument that the noise threatens public health; one might also contend that quiet at 5 in the morning is a public right. Chuck Norris might respond that

[2]This nuisance discussion is about 275 words long, which is already on the longer side for a single issue analysis. Obviously there is much more that one could say on nuisance given these facts, but be careful to allocate your time and effort across all the issues presented on the exam, rather than dwelling on one issue.

having to wake up early isn't a public health problem (he wakes up that early *to stay healthy* after all). Nevertheless, it seems reasonable to believe that a court would find a public nuisance.

However, for Emile to sue Chuck Norris over the public nuisance, Emile would have to further show a special injury. Perhaps Emile could show a special injury by pointing to his studies of property law, which might require special concentration or quiet beyond others in the neighborhood. Or his house might be closer to Chuck Norris's than the houses of others in the HOA. However, it seems more likely that Emile's irritation about the noise is no different from other homeowners in the area, such that Emile would not be able to show the requisite special injury to bring suit for a public nuisance.

1.3 Covenant

Emile might also assert that Chuck Norris is in violation of the covenant between Alexandra and Francis.[3]

1.3.1 Formation

The initial question is whether the covenant is validly formed. On the assumption that a court would apply the law of equitable servitudes (since the Restatement is not in effect),[4] the elements of a valid covenant are (1) a signed writing complying with the statute of frauds, (2) intent to bind successors, (3) touching and concerning the land, and (4) constructive or actual notice to successors in interest. Here, the covenant is "properly signed and notarized" per the facts, and it says that "the parties intend that this covenant run with the land and bind…successors," so (1) and (2) are satisfied.

[3]Some people addressed all the covenant issues in one go, having a paragraph stating all the rules for formation, racially restrictive covenants, and changed circumstances and then analyzing all the issues together. This is not recommended for two reasons. First, it's hard for someone reading to follow which analyses correspond to each rule. Second, there is a high likelihood that you omit some elements of one of the rules, since the analysis paragraph becomes extremely long.

[4]You could also have applied the law of real covenants here, in which case you would have had to consider horizontal and vertical privity. On the facts here, there is not enough information to determine horizontal privity. Though the requirement differs across states, horizontal privity typically would require a grantor–grantee relationship between the originally covenanting parties, and there is no indication of whether or not such a relationship existed here. This rule was not discussed in the textbook or in class, which is why I recommended against applying it.

As to (3) touch and concern, *Neponsit v. Emigrant* states that the determinative test is: "Does the covenant impose…a burden upon an interest in land, which…increases the value of a different interest in the same or related land?" By contrast, an agreement that affects legal relations of the parties "merely as members of the community in general" does not touch and concern the land. Here, Emile would say that the restriction on martial arts practice does affect interests in land use, namely keeping the neighborhood quiet; Chuck Norris might respond that the apparent effect of the covenant is to restrict certain types of people and martial arts, which are unrelated to land interests. Given, though, that restrictions on land use are fairly common and that prohibition of martial arts practice sounds like a land use, it seems likely that a court would hold this restriction to touch and concern the land.

As to (4) notice, Chuck Norris would argue that the covenant was not recorded and he had no actual knowledge of the covenant. Emile could respond that Chuck Norris could have found the covenant upon a sufficient inspection of the house, since a copy was in the attic. While that argument is at least plausible, it would be concerning if courts routinely required homebuyers to perform extensive searches through the house under the notice element; such a requirement would inhibit the free and efficient transfer of property. Accordingly, a court would probably hold that notice is not satisfied.[5]

Accordingly, a court would likely hold that the covenant was not enforceable against Chuck Norris.

1.3.2 Recordation

The covenant may also not be enforceable in view of the jurisdiction's recordation statute. Typically, an earlier conveyance of property is superior to a subsequent conveyance per *nemo dat*, but in a race-notice jurisdiction (as this one is per the question), a subsequent conveyance takes if (1) the subsequent grantee is a good-faith purchaser and (2) the subsequent grantee records first.

Here, the covenant is the earlier conveyance of a property interest, and Chuck Norris's purchase of 16 Trivette Street is the subsequent conveyance. As noted above, (1) Chuck Norris has a strong argument that he had no notice, and since he bought the house from Alexandra, Chuck Norris is a good-faith purchaser. Furthermore, (2) Chuck Norris's "title agent checked the records when she recorded

[5] *Tulk v. Moxhay* isn't completely clear about this, but notice must occur at the time of the subsequent owner's purchase. So the fact that Chuck Norris later finds out about the covenant does not render the covenant enforceable against him thereafter.

[his] deed of sale," indicating both that Chuck Norris had no constructive notice of the covenant and that he recorded first. Accordingly, Chuck Norris satisfies the requirements of the recordation statute so his interest is superior to the covenant, thereby rendering the covenant unenforceable against him.

1.4 Racial Restriction

Even if the covenant is held valid on its face, Chuck Norris might argue that the covenant is unenforceable as racially restrictive. Under *Shelley v. Kraemer*, judicial enforcement of a covenant in a manner contrary to the Equal Protection Clause of the 14th Amendment is unconstitutional. Following the Supreme Court's general framework for equal protection analysis, a court would first determine whether a suspect classification or fundamental right is involved, and then apply either strict scrutiny or rational basis scrutiny to the law in question.

As to suspect classification, Chuck Norris would argue that the covenant's prohibition on any "practitioner of any Asian martial arts" from living in the house discriminates against Asians as a class, making it a racial classification. Emile could respond that not all Asians are martial artists and not all practitioners of Asian martial arts are Asian, but given that the covenant explicitly names Asians, it is not hard to infer intent to discriminate based on race, suggesting that the covenant discriminates based on a suspect classification.

Applying strict scrutiny to the covenant, a court would consider whether enforcement of the covenant is narrowly tailored to a compelling government interest. There is no suggestion that prohibition of martial arts is a compelling government interest, and enforcement of the covenant would not be narrowly tailored insofar as it would still permit non-Asian martial arts. Accordingly, the covenant is likely unenforceable as racially restrictive.

1.4.1 Changed Circumstances

Even if the covenant is still deemed enforceable, Chuck Norris could argue that changed circumstances in the neighborhood justify terminating the covenant. Per *El Di*, "A court will not enforce a restrictive covenant where [1] a fundamental change has occurred in [2] the intended character of the neighborhood that [3] renders the benefits underlying imposition of the restrictions incapable of enjoyment."

The facts give little information on [2] the intended character of the neighborhood, but from the nature of the covenant and the fact that Emile enjoyed a

quiet life of reading books and learning property law, one might imagine that the intended character was a quiet one devoid of fighting and martial arts. As to [1] a fundamental change, Chuck Norris would point to the recent opening of karate studios just a block away as a fundamental change during the 50 years since the covenant was signed. Given that they opened just recently and are a block away, though, Emile might suggest that the change was not to the exact neighborhood that the two of them live in, and that the change is too recent to be "fundamental."

As to [3] incapability of enjoyment, Chuck Norris would contend that living near martial arts studios makes it now impossible to live in a totally quiet, martial-arts-free area. However, Emile would point out that most martial artists are not as loud or disruptive as Chuck Norris, so keeping the martial arts studios a block away from the residences enables the residents still to enjoy a quiet, fight-free neighborhood.

Given that separation of uses is a key part of zoning, it seems likely that a court does not find a fundamental change to the neighborhood and that a martial arts restriction in residential areas is still capable of enjoyment. Thus, a court would probably hold the covenant not terminated due to changed circumstances.

1.4.2 Restraint on Alienation

The covenant is not invalid under the policy against restraints on alienation. Per *Wills v. Pierce*, "A provision in a deed or will that a fee-simple estate may not be sold is void as repugnant to the estate granted." But it is a "different question if the condition subsequent had been that the premises should be used" in a certain way, because a condition on use does not imply a forbidding of resale. Here, the conditions of the covenant only go to uses: not to use the premises for Asian martial arts, and not to use the premises as the residence of an Asian martial artist. The condition does not forbid *sale of the home* to Chuck Norris or another Asian martial artist; the martial artist must only use it for some purpose other than living or exercising (e.g., renting it out to others).

1.5 Trespass

When Chuck Norris launched himself over Emile's tree, did he trespass over Emile's property? This is a question of the extent of Emile's airspace rights, and under *Hinman*, "Any use of such air or space by others which is injurious

to [the landowner's] land, or which constitutes an actual interference with his possession or his beneficial use thereof, would be a trespass."

Here, Chuck Norris would argue that there was no injury to Emile's land, since Chuck Norris "skimmed" over it. Whether Chuck Norris actually touched the flowers is unclear from the facts, but the rule isn't touching; it is "injurious to" or "interference" with "beneficial use." Emile might contend that there was damage to the flowers at the tips of the trees, had there been any, to justify such interference. But absent any damage, Chuck Norris could respond that the tree just happens to be there, and that his temporary presence in flight caused no injury to or actual interference with Emile's possession or beneficial use. Emile could perhaps suggest that the tree was likely to grow to that height eventually, but it would be difficult to say that future growth is current "beneficial use."

On this analysis, a court would probably hold that no trespass occurred. That said, courts wary of technology like low-flying drones might be wary of the ramifications of holding that skimming just inches over someone's airspace is no trespass, perhaps making this legal result not so easy to predict.

In theory, Chuck Norris has a very minimal claim of trespass against Emile when Emile approached Chuck Norris during the car repossession. This claim is unlikely to result in much relief for Chuck Norris.

1.6 Actions Relating to the Car

There was no need to address actions between Emile and Chuck Norris relating to the car in this question, because (1) the question asked only about real property claims, and (2) the bank, not Emile, was repossessing the car. For completeness of this sample answer, however, those analyses are provided here.

First, one might ask whether Chuck Norris owns the car free of the security interest, under UCC 2-403. Under that statute, nemo dat generally prevails, so by default the bank's security interest on the car would survive the sale to Chuck Norris. The UCC provides an exception, however, that applies when (1) a seller has voidable title and (2) the buyer is a good-faith purchaser, in which case the buyer obtains good title.

Here, (2) there is a reasonable argument that Chuck Norris is a good-faith purchaser, for reasons explained in Question 2's answer. However, no facts support (1) the seller having voidable title, since nothing is known about the manner in which the seller obtained the car. The fact that the seller to Chuck Norris may have practiced a fraud on Chuck Norris is irrelevant to this issue, since voidable title is about the means by which the seller obtained the good (e.g., in *Kotis*

v. Nowlin, the fraud that Sitton practiced on the original watch dealer by passing a bad check). Accordingly, there is insufficient evidence that the UCC exception applies, so the bank's security interest would remain attached to the car.

Second, Chuck Norris might argue that he owns the car free of the security interest, in view of the race-notice recordation statute in the relevant jurisdiction. In such a jurisdiction, with a critical caveat described below, a prior conveyance (including a security interest) prevails over a subsequent conveyance except when (1) the subsequent grantee is a good-faith purchaser without notice of the prior conveyance, and (2) the subsequent grantee records the transaction first.

Here, (1) Chuck Norris is likely a good-faith purchaser without notice, as discussed in Question 2. There are no facts as to whether (2) Chuck Norris has recorded the car purchase. Assuming he did not, then Chuck Norris does not enjoy the exception under the race-notice statute, nemo dat prevails, and the bank's security interest remains. Should Chuck Norris manage to record first (or if he already has recorded), then he will own the car free of the security interest.

However, the above analysis applies *only if the relevant race-notice statute applies to cars.* The exemplary jurisdictional statutes in the textbook only apply to real property interests, not cars. This is one reason why Question 1 was limited to real property causes of action.

2 Question 2

The tow truck company would be liable to Chuck Norris for conversion of the car, per *Williams v. Ford*, or for trespassing on Chuck Norris's land, unless the company had a right to tow the car.

2.1 Mortgage

The tow truck company would contend that its right to tow the car arose from the mortgage taken out on the car and subsequent default. Generally, a default on a security interest (like a car mortgage) gives rise to the mortgagee's right to repossess. So after the seller defaulted, the bank had a right to repossess the car and the seller had mere possession, as in *M&I v. Wilson.* Per the *nemo dat* principle, the sale of the car to Chuck Norris would not have changed the bank's right to repossess. Accordingly, the bank should have the right to repossess Chuck Norris's car unless an exception to *nemo dat* applies.

Whether the car mortgage was a recourse or nonrecourse loan is irrelevant; that only affects the bank's ability to pursue the debtor (that is, the seller to Chuck Norris) in a personal capacity. And any title warranty under UCC 2-312 is also irrelevant since it relates to the unknown car seller's duties, not the bank's.

2.2 Good Faith Purchaser

However, the given statute acts as an exception to the *nemo dat* rule.[6] It provides that "No…security interest in an automobile shall be good and effectual in law or equity against a good faith purchaser for value and without notice." Thus, if Chuck Norris is a good faith purchaser for value without notice, then the bank's security interest is not enforceable against him.[7]

Here, Chuck Norris was a purchaser for value, as he bought the car for less than half of market value. As to the notice element, Chuck Norris apparently had no knowledge of the mortgage, and no mortgage was recorded to provide constructive notice.

As to "good faith," *Kotis* holds that "Good faith means 'honesty in fact in the conduct or transaction concerned.' " Chuck Norris would suggest that his lack of knowledge is sufficient to establish good faith. The towing company, however, would respond that Chuck Norris paid less than half of market value, and per *Kotis*, an "unreasonably low price is evidence the buyer knows the goods are stolen." So a court could infer that Chuck Norris knew the deal was shady, thereby making his purchase not in good faith. On the other hand, *it could have just been Chuck Norris's biceps that got him a great deal.*

Nevertheless, given the frequency of used car transactions and the importance of enabling people to alienate property to reach productive uses, a court would likely hold that Chuck Norris's actual lack of knowledge of impropriety renders him a good-faith purchaser. Accordingly, per the statute, the mortgage on the car cannot be enforced against him.

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[6]The statutory text, incidentally, is analogous to Florida's recordation statute, given in the notes to *Argent v. Wachovia.* Note that the jurisdiction is not race-notice; that applied only to Question 1.

[7]To be clear, this statute does not mean that conveyances to a good-faith purchaser are ineffectual. That would be an extremely strange statute (only bad-faith conveyances are allowed?), and it's inconsistent with the text, which deems a conveyance ineffective "*against* a good faith purchaser." Chuck Norris would not assert the conveyance to himself *against* himself.

2.3 Self-Help Repossession

If the mortgage is determined to be valid and enforceable against Chuck Norris, the next question is whether the towing company was allowed to take the car away by self-help. Per *Williams v. Ford*, when repossessing secured collateral, "a secured party may proceed without judicial process if this can be done without breach of the peace." That case held that breach of the piece requires "force, or threats of force, or risk of invoking violence."

Here, with regard to "breach of the peace," Chuck Norris would argue that *there is always a risk of violence with Chuck Norris.* Putting aside that *Chuck Norris's presence is a threat of violence in itself*, the towing company brought three burly enforcers to the job, suggesting that the company anticipated a fight. And given the close relationship between the repossessing bank and Emile, who knew Chuck Norris to be a martial artist, one could infer that the bank was likely to have known a fight was imminent. The towing company could point out that no violent act or fight occurred or was likely to occur, because *Chuck Norris would never be afraid of violence; violence is afraid of Chuck Norris.* But the lack of violence might just be because *no enforcer is a match for the awesomeness of Chuck Norris*, suggesting a known risk of invoking violence and thus a breach of the peace.

Accordingly, there is a strong argument that there was a high risk of invoking violence when repossessing the car, meaning that there was a breach of the peace, such that the non-judicial repossession was impermissible.

2.4 Finders

Chuck Norris is not a finder of the truck under *Armory* because the truck was not "lost"; it is more likely mislaid in view of *Lawrence v. State* (discussed in *McAvoy*).[8] Even if he is a finder, he would still have to return the truck to the towing company since the towing company is the true owner of the truck.

[8]Just because the facts say that the tow truck is "now-abandoned" in a colloquial sense doesn't mean it's abandoned under the law. The test for abandonment of property is very specific and was not covered in detail in this course. However, as a matter of logic it cannot be the case that a scared person who runs away from their property has "abandoned" it. Otherwise, armed thieves could scare off owners from their property and then take it as "abandoned."

3 Question 3

Whether the Chuck Norris facts infringe upon Chuck Norris's right of publicity depends on the four-element test stated in *White v. Samsung*: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."[9]

As to (3) consent, the exam writer presumably did not ask Chuck Norris for consent to write the exam. That said, one could perhaps argue that Chuck Norris's public approval of other Chuck Norris facts might constitute implied consent to them.

As to (1) use of the plaintiff's identity, the exam's Chuck Norris facts make use of Chuck Norris's name. This certainly cannot be enough, though, since that would preclude news reporting or any discussion of Chuck Norris. *White* suggests, instead, that "identity" refers more to a person's celebrity recognition. Here, one could argue that the Chuck Norris facts do not refer to any specific aspects of Chuck Norris's celebrity but rather to a generic fighting figure, but the response would be that the humor of the facts depends on Chuck Norris's celebrity identity as a Hollywood martial artist. So there are reasonable arguments on both sides of this element.

As to (2) appropriation to defendant's advantage, the classic forms of "advantage" are commercial endorsements of products in advertising, as in *White*. That is plainly not at issue here, as the exam's Chuck Norris facts advertise nothing. Nevertheless, one could respond that there is an "advantage" to an entertaining law school exam, and the rule does say that the advantage may be "commercial or otherwise." Accordingly, there are good arguments in both directions for this element.[10]

As to (4) resulting injury, it is difficult to see what injury Chuck Norris's inclusion on a law school exam would cause. (Indeed, the fact that Chuck Norris apparently likes some Chuck Norris facts suggests that he himself does not perceive much injury from them.)

[9]The introductory material in the Intellectual Property chapter gave a slightly different test. Generally you could use either one, but given that the question specifically identified a case, the rule from that case was the one to use.

[10]Some people thought that the use of Chuck Norris's identity also provided the "advantage" of making it easier to write the exam. Actually, it makes writing the exam *substantially harder*, as I have to fit in the theme and the necessary facts for the doctrinal analyses, all while keeping the fact pattern concise.

Accordingly, although there is much room for debate, the lack of potential injury here makes it unlikely that the Chuck Norris facts constitute an infringement of personality rights. Such a result would generally comport with the idea that property interests, intellectual or physical, ought in many cases to bend or yield to other important constitutional rights like freedom of speech.