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A Brief Biography and Appreciation
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HUP Green, Nicholas St. J. (1), Harvard University Archives

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Nicholas St. John Green, a brilliant lawyer, law teacher, and philosopher of law, died before his great promise could be fulfilled. He was born on March 30, 1830 in Dover, New Hampshire. Family history records suggest that he was called by his middle name, pronounced "Sin-jin." His father, James D. Green, an 1817 graduate of Harvard College, changed from the Congregational to the Unitarian ministry, preached in Lynn and in East Cambridge, Massachusetts, then was elected mayor of Cambridge in 1847, the first Cambridge mayor under its new city form of government, and was re-elected in 1853 and 1861. His mother was the daughter of Judge Daniel M. Durell of Dover, New Hampshire, who at one time served in Congress. His uncle Edward H. Durell practiced law in Mississippi and New Orleans, Louisiana, before the Civil War, served briefly as mayor of New Orleans, and was appointed to a federal district judgeship in Louisiana by President Lincoln, in which post he enforced the Civil Rights Act of 1866 strenuously until he resigned in December 1874, having, he said, lost the people's faith in him.

Green attended Harvard College. After his sophomore year, he was questioned for assaulting a policeman during a conflict between students and police at the inauguration of Jared Sparks as Harvard's president. (Springfield Republican, Jul. 2, 1849, p. 2). Sparks himself and two professors were witnesses to the fight. Nevertheless, Green received his A.B. degree from Harvard College in 1851, where he was a classmate of Christopher Columbus Langdell, later the Dean of Harvard Law School. James Bradley Thayer, later a Harvard law professor, was in the Harvard class of 1852, as was one of Green's closest friends, Joseph H. Choate, who became a leader of the New York bar. After graduation, Green started to study medicine, then switched to law and received his LL.B. degree at Harvard in 1853. He was elected to the Cambridge City Council in 1855 as a Whig Party candidate. Admitted to the bar, he became junior partner with Boston lawyer Benjamin Franklin Butler, with a practice consisting primarily of criminal defense cases. Green's son remembered that Green and Butler "were alike in sympathy for the unfortunate, and in their dislike of the self-styled aristocrats of Beacon Hill, whose pretensions Butler always took delight in puncturing." (Wiener, 9 J. Hist. Ideas 70, 72 (1948).) One notable defense that Green undertook in 1858 was for a publisher indicted for distributing an obscene paper entitled *Life in Boston*. It was, said Green, no more obscene or lewd than paintings and engravings, known as works of art, that filled shops and homes. (Boston Herald, Jan. 22, 1858, p. 2.) On January 24, 1861, Green married Cornelia Henshaw, the daughter of a Boston wholesale druggist.

When the Civil War began in April 1861, Green's law partner Butler immediately joined as

Brigadier General in the Union army. Butler was active in politics in the Democratic Party, and as a general he won political victories but suffered military defeats. In June 1861, Green was with Butler at Fort Monroe in Hampton, Virginia, where Green served as a military Judge Advocate for the trial of five soldiers for robbery. His brother Durell Green served as a Colonel in the Union army. Throughout 1861 and 1862, Green represented plaintiffs in personal injury and defamation cases in Boston. By the end of 1862, Green's former law partner Butler had become one of the most controversial Union generals in the Civil War, called "Beast Butler" by southern whites for his treatment of local whites during military occupation of New Orleans. After Green and his wife had a first child, a daughter, who died in infancy, he enlisted in August 1863 as a paymaster under Butler's command, serving first at Washington, D.C., and then at Norfolk, Virginia. Butler backed Lincoln's re-election in 1864, but after that Lincoln had little use for Butler, and removed him from command in January 1865. Green stayed on as paymaster to the end of the war and resigned in May 1865. Butler was elected to Congress as a Radical Republican, managed the impeachment of President Johnson, and helped draft the Civil Rights Act of 1875.

After the war, Green resumed his law practice. He and Cornelia had a daughter born in 1865, another daughter who died in infancy in 1867, and two sons born in 1868 and 1870. They lived with his father and three sisters at 8 Story Street in Cambridge, off Brattle Street. Green took up the cause of Edward Green, the "Malden murderer," arguing for a stay of his execution in 1866. Thereafter nearly all his cases that drew newspaper attention were criminal defenses in state and federal court. He frequented the Social Law Library in the Boston courthouse, where he befriended a group of scholarly lawyers including John Codman Ropes, John Chipman Gray, Oliver Wendell Holmes, Jr., Melville Madison Bigelow, and Brooks Adams. Of this group, each of whom attained prominence, Green was the eldest. In the sensational murder trial of Daniel McFarland in New York in April 1870, Green testified to his representation in a prior lawsuit between McFarland and his victim, New York *Tribune* editor Albert Richardson, and to McFarland's insanity. In 1871, he argued that a state legislature could not compel a witness before it to incriminate himself by his testimony. In 1873, he proposed a bill in the Massachusetts legislature on peremptory jury challenges in criminal cases.

Green first began teaching in 1870 as an instructor in philosophy and in political economy at Harvard College, where he taught logic, metaphysics, psychology, and political economy. In January 1870, Green published his first article, "Proximate and Remote Cause," anonymously in the *American Law Review*. It was well received, and probably accounts for his appointment as lecturer at Harvard Law School in April 1870. At Harvard, Green was the first to teach a course on Torts. In that year, he also prepared an abridged version of C.G. Addison's 1860 *Treatise on the Law of Torts or Wrongs and Their Remedies* for the use of Harvard law students. Reviewing Green's book in 1871, Oliver Wendell Holmes, Jr., wrote, "We are inclined to think that Torts is not a proper subject for a law book", but added that Green was an "able lecturer" who already "is achieving so deserved a success at Cambridge." (5 Am. L. Rev. 340, 341 (1871).) In the academic year 1870-71, Green taught Torts both for the first-year class

and for the second-year class, and thereafter as a first-year class through 1872-73. In 1871-72 and 1872-73, he also taught Criminal Law at Harvard. He was a tough grader, and in two of the six classes he gave fewer than half the students the minimum passing grade. Of the nine lecturers at Harvard Law School in those years, only Green was accorded a vote along with the three professors of law in faculty decisions. In 1871, Green ran for State Representative as a Democrat, and lost the election to Charles F. Walcott, the Republican. Walcott was a younger man but had served as a brigadier general in the Civil War.

Beginning in 1871 and regularly throughout the year 1872, Green joined in a discussion club with Chauncey Wright, a Harvard instructor in psychology; Charles Sanders Peirce (b. 1839), a logician then working at the Harvard Observatory; Oliver Wendell Holmes, Jr., then a lawyer practicing in Boston; and William James, a graduate of Harvard Medical School interested in psychology. Occasionally joining them were Francis Ellingwood Abbot, a free-thinker found too unchristian for the Unitarian ministry; John Fiske, a journalist, instructor in history and assistant librarian at Harvard; and Joseph Bangs Warner, then a student at Harvard Law School. Of this group, Green was again the eldest. Peirce, who went on to become a leading American philosopher, later named this group "The Metaphysical Club" and credited them with the creation of Pragmatism, that distinctively American school of philosophy. William James's brother Henry, the famous novelist, wrote in February 1872 that William and "various other long-headed youths have combined to form a Metaphysical Club, where they wrangle grimly and stick to the question. It gives me a headache merely to know of it." (letter to Charles Eliot Norton). Peirce reminisced thirty-five years later that Nicholas St. John Green

was one of the most interested fellows, a skillful lawyer and a learned one, a disciple of Jeremy Bentham. His extraordinary power of disrobing warm and breathing truth of the draperies of long worn formulas, was what attracted attention to him everywhere. In particular, he often urged the importance of applying [Scottish philosopher Alexander] Bain's definition of belief, as "that upon which a man is prepared to act." From this definition, pragmatism is scarce more than a corollary; so that I am disposed to think of him as the grandfather of pragmatism.

C.S. Peirce, Letter to the Editor of the Nation (1906 or 1907), in *Collected Papers*, ed. Charles Hartshorne and Paul Weiss, vol. 5 (Harvard UP 1934), paragraph 12.

An early insight of pragmatism as applied to law was the "prediction theory" of law, which Holmes made famous in his 1897 address "The Path of the Law" at Boston University, but Holmes had written as early as July 1872 in an anonymous book review in the *American Law Review* that "The only question for the lawyer is, how will the judges act?" (6 Am. L. Rev. 723, 724.) Green wrote in his anonymous book review on a treatise on slander and libel in a previous issue of the same journal, "The latest decided cases on this subject *make the law*." (6 Am. L. Rev. 593.) John Chipman Gray would later develop the same idea in *The Nature and Sources of the Law* in 1909.

Peirce mentioned in his reminiscence Green's devotion to Jeremy Bentham, the great English

utilitarian philosopher. In a memorial appreciation in 1876, Peirce said that Green “did not much care for Bentham’s systematic works: it was rather his horde of pamphlets, raiding like Cossacks into the legal realm, which delighted him.” (AAAS) Cyrus Cobb, a B.U. student of Green’s, said at a memorial meeting, “We all remember well the manner in which he would emphasize the statement that the rights of man under law were not natural rights, but legal rights,” (Boston Globe, Oct. 25, 1876). Bentham famously wrote, “Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense -- nonsense upon stilts.” (Anarchical Fallacies (1843).)

Edward H. Bennett, Green’s predecessor in teaching Criminal Law at Harvard, had gone across the Charles River to join the faculty of the new Boston University School of Law when it opened in October 1872, and the School advertised that Green would also be on its founding faculty. In 1873, Green accepted a professorship of law at Boston University. Harvard paid more, but Green disagreed with some of the innovations that his classmate Langdell was introducing at Harvard Law School. Green taught Torts and Criminal Law at Boston University, and gave lectures on Kent’s Commentaries. The founding dean, George Hillard, became ill during 1874, and Green served as acting dean from April 1874 to his death in 1876. He continued to practice as a lawyer from the School of Law at 18 Beacon Street in Boston. He also began publishing works for the legal profession: an updated eighth edition of Joseph Story’s *Commentaries on the Law of Agency* in 1874; two volumes of his own selected *Criminal Law Reports* drawn from England and a variety of U.S. jurisdictions, completed in 1874 and 1875; and volumes 112 to 114 of the *Massachusetts Reports* published in 1876 just before his death.

At a memorial meeting after Green’s death, Cyrus Cobb (LL.B. 1874), remembered, “He would come into the lecture-room in his easy way, take off his coat, and open his book with a manner which would seem as if he had no special method or were indeed desultory in his mode of teaching, but when we came to examinations and especially when we came to actual practice in the courts, we realized how much Mr. Green had assisted us in digesting our knowledge, and we found the topics upon which he lectured as clear in our minds as though we had acquired knowledge of them in actual practice.” (Boston Globe, Oct. 25, 1876, p. 2.) Chauncey Wright, Green’s friend since grammar school days and close neighbor, died on September 12, 1875, at the age of 45, and Green was at his deathbed.

Green himself died on September 8, 1876, in Cambridge, Massachusetts, at the age of 46. His wife stated that he came home apparently well the previous night and went to bed. She did not disturb him until noon on September 8th, at which time he was found to be dead. His doctor could not determine the cause of death. The most widely reported account was that he died of an overdose of laudanum. Laudanum was a combination of alcohol and opium, an easily available pain reliever used as a remedy for many ailments in 1876, and sometimes as a means of suicide. A Worcester, Massachusetts, newspaper reported one week after his death both that he “committed suicide by poison” and that he did not poison himself but died from “congestion of the brain.” (Massachusetts Spy, Sept. 15, 1876, p. 3.) Dark hints can be found in the Harvard University Archives that he was an alcoholic and that he

committed suicide. (Louis Menand, *The Metaphysical Club: A Story of Ideas in America* 231 (2001) (citing Harvard University Archives, HUG 300, file for Nicholas St. John Green).) He is buried in Mount Auburn Cemetery.

After his death, Green was remembered by friends, colleagues and former students. Here are a sampling of their impressions of him:

“Since the close of the scholastic year, death had deprived the School of an officer who had been associated with it from the beginning. As Lecturer and Acting Dean, Mr. N. St. John Green rendered services of no ordinary value. He was a profound believer in the need of such a School in Boston, and an earnest worker for its success. His hold upon the students was that of a strong and genial nature, and his memory will long be cherished by them.” (Boston University School of Law, Third Annual Report, 1876, p. 27)

“He was not an orator, or a great strategist in advocacy. It was in the higher field of logical thinking, severe reasoning and elaborate research that he practiced the criminal law. ... He was a bold and independent thinker, and free and outspoken in his opinions. He investigated and thought for himself, and what he honestly believed he feared not to speak in any presence. He was essentially a man of legal genius. His practice has not been in the humdrum line of a mere court lawyer, and still less of the commonplace labors of the mere office practitioner. ... He had a warm heart, and was ready to make any sacrifice to serve a friend.” (Boston Daily Globe Sept. 13, 1876, p. 6)

“As an instructor he taught the principles rather than ceremony, and he regarded justice rather than opinions. No man could evince a higher respect for law, but it was the law of reason and judgment rather than that of technicalities and majorities. He was always patient, generous, and kind, and was ever ready to assist the earnest student even at the sacrifice of much of his own time and pleasure.” (Boston Journal, Oct. 24, 1876, p. 2.)

“Often when you approached him in the Social Law Library for information, when he was studying at his table, he might at first look up with some impatience, and yet before you had finished your question he would either be ready with an answer, or, rising from his chair, would go from one alcove to another until he found the book he wanted, and, returning, would explain the question with all the patience and care required. While going from one verge of the law to the other, seeming to trespass on the department of religion or the sphere of affection, he never passed the line. We could realize that while his intellect clearly and firmly held in view the science to which he was devoted, he never allowed his heart to become calloused or hardened.” (Cyrus Cobb, quoted in Boston Daily Globe, Oct. 25, 1876, p. 2)

“To us Mr. Green never received the consideration which his keen logical mind and eminent abilities justly deserved and merited. ... Mr. Green’s professional life sought only the expression of its inward force and convictions, irrespective of cherished theory or blindly established precedent. To him law was justice and reason. ... but he recognized, as all students who examine many legal

principles and opinions must do, that reason is not always the soul of law, and that law sometimes begins where reason ends. As a lecturer, few have equalled him in the clear, graphic and impressive manner in which he placed his subject before the student. He was not only thoroughly conversant with his subject himself, but had the happy and rare faculty of imparting that knowledge with a directness, simplicity, and interest that the ordinary mind that gave him attention could not fail to understand and appreciate. Often with commonplace illustrations, by imaginary incidents and events, the point that he wished to fix on the mind and memory of the student was so strongly set forth that no one could fail to see its scope and comprehend its application. With students he was always exceptionally popular, and by his courtesy, kindness, patience and geniality, gained not only respectful listeners, but won many warm personal friends and ardent admirers. He was no one's mouthpiece and could give a reason for the faith that was in him. The number, the oppressive dignity of judges, or their apparent opposition against him never awed him into acquiescence of a principle or a decision that he believed wrong or not fully affirmed in the premises and reasonings on which they were claimed to be based. ... He could break, but he could never bend. ... He could not cut and trim his ideas to any formal style, however widely he saw it adopted by his fellow citizens. His nature, like his stature, was erect, independent and unfettered." (Boston Evening Transcript, Jan. 3, 1877, p. 6, perhaps by Holmes)

"He was a most warm-hearted man, with an abounding sympathy for all sorts of people, a great fondness for children, and a love of animals. He had also a fine taste for poetry, of which he had read a great deal. But one did not at first so much note his delicate appreciation of what was real, as his scorn for all that was unreal. He had a quality, which was certainly not roughness, but which, for want of a better appellation, might be called a Socratic coarseness. It was well fitted to be the sturdy support of his realism, and gave one a positive pleasure when one knew him, as if it had been an artistic study." (Peirce, AAAS (May 9, 1877), pp. 289, 291.)

"Mr. Green was a strong character; he was full of earnest endeavor to strengthen the school [Boston University], and fond of his students. His weakness, if he had any, as an instructor, was his contempt for the maxim *stare decisis*. He loved to attack adjudications. He had a great fund of good nature, of which the students often availed themselves during his lectures by questions which were not always relevant to the point at issue, and which he always received pleasantly, and in fact seemed to enjoy." (Swasey, I Green Bag 54, 57-58 (1889).)

"The unique, original, and iconoclastic St. John Green, ... whose breadth of view, contempt for tradition, and scorn of precedent served to clear the atmosphere of the youthful but growing school, and to prevent it from falling into the ruts of slavish adherence to what was ancient and venerable." (Kellen, 1897, pp. 6, 14)

"[An] unusual and striking personality, ... St. John Green was not an 'eccentric,' but big in brain and burly in body, he radiated strength and inspired confidence. He had the 'legal mind.' the power of

lucid and forceful speech, he knew his subjects, and students crowded to hear him and hung upon his words.” (Kellen, B.U. L. Rev. Jan 1924, pp. 7, 10)

Green’s lectures at Boston University School of Law in 1875 to 1876, taken down in lecture notes by his student Takeo Kikuchi, covered courses on Torts, Criminal Law, and Kent’s Commentaries. They were delivered between October 6, and December 18, 1875.

In 1933, during the heyday of legal realism, his older son Frederick Green, a professor of law at the University of Illinois, collected the articles, book reviews, and case notes that Nicholas St. John Green had published in his short life, from 1869 to 1876. Under the title *Essays and Notes on the Law of Tort and Crime*, these were published in 211 pages by George Banta Publishing Co. in Menasha, Wisconsin. Green’s first article, “Proximate and Remote Cause,” was reprinted in the *Kansas City Law Review* in 1937 as a “legal classic,” and again in *Rutgers Law Review* in 1954. In it, he showed that judicial distinctions between proximate and remote causes were meaningless and that what judges should be talking about were reasonably foreseeable effects. In his shorter published writings on torts, Green was a modernizer in other respects. He was dubious about doctrines such as contributory negligence and the fellow-servant rule that employees could not sue their employers for injuries due to the negligence of other employees. Both of these doctrines were replaced in the twentieth century. He did not doubt that fault would remain the basis of tort liability, with an employer’s vicarious liability as a notable exception to that principle. He did not foresee the replacement of fault by a loss-spreading principle. Oliver Wendell Holmes Jr.’s quip about Green’s book in 1871, that Torts was “not a proper subject for a law book,” is better remembered than anything Green wrote on the subject. Torts seemed to Holmes a grab bag of disparate actions, some relating to possession of property, some bordering on criminal law, and others belonging in other chapters. Green’s teaching and writing on torts was crucial to making that subject a coherent, respectable part of the basic law school curriculum.

Green, in his published writings on criminal law, was pro-defendant, an advocate for lenity and mercy rather than punishment for the sake of retribution or general deterrence. He was quite interested in the psychology of diminished subjective intent by reason of insanity, infancy, mistake of fact or law, and coercion. He also published notes about the authority of attorneys to act for their clients, about the legal disabilities of married women, and about comparisons of French law of torts with Anglo-American common law.

Green described, in his Annual Report for the School of Law for 1874 to 1875 (p. 16), his lectures on James Kent’s Commentaries on American Law: “It has been my aim, in the lectures which I have given upon Kent’s Commentaries, to cover the topics not specially lectured upon, and thus to bring the law together as a whole.” He lectured on the twelfth edition of Kent’s Commentaries, an edition published in 1873 and edited by Oliver Wendell Holmes, Jr. Green did not try to cover all 68 of the lectures into which Kent’s four-volume work was divided. The topics covered by Green’s course on Kent’s Commentaries included sources of law, statutory interpretation, constitutional rights, family law

(domestic relations), employment law, personal property, administration of intestate estates, and the law of agency. Some of the cases that Green cited in these lecture notes were not included in the edition of Kent's Commentaries that Green assigned to his students, thus updating that work.

Nicholas St. John Green died far too young, at the height of his intellectual powers, in leadership of the school at which he taught. Already an influential scholar on the law of torts, he could have contributed greatly to that field, to criminal law, and, as these lectures show, to the field of constitutional law. The legal scholarship that he published before his untimely death showed only glimpses of his insights into the fields that he studied. Thanks to the remarkable student notes taken by Takeo Kikuchi, so fortunately preserved in Japan for more than 125 years, these lectures by St. John Green can now be made available to scholars of law, legal history, and the history of legal education. They give us a better appreciation of Green, of Boston University School of Law, and of its first Japanese graduate, Takeo Kikuchi.