

The Facts Behind the Media Coverage, the Sentence that Launched a Recall

Jeffrey J. Hunt

In March of 2016, a jury convicted Brock Allen Turner of assault with intent to commit rape, sexual penetration of an intoxicated person, and sexual penetration of an unconscious person.¹ The story of Turner's prosecution attracted national attention even before he was sentenced. Turner, then a 19-year-old Stanford University athlete, sexually assaulted 22-year-old Jane Doe 1 while she was unconscious behind a dumpster near a fraternity house on campus.

The media attention escalated to viral status when Turner received the sentencing decision from Judge Aaron Persky, who at the time had been a judge on the Santa Clara County Superior Court for over a decade. The media headlines almost wrote themselves: on the three felony counts, Turner faced up to fourteen years in state prison; but Judge Persky rejected the prosecutor's sentencing recommendation of six years in prison and instead granted Turner probation and sentenced him to a total of six months in county jail.² Under a California law that allows inmates to earn one day off their sentence for each day of good behavior,³ Mr. Turner served a total of only three months, and was released in early September 2016.

But Turner's sentencing was just the beginning of the story for Judge Persky. The Turner sentencing became the subject of fierce public debate. A number of those who felt the sentence was a miscarriage of justice galvanized into a movement seeking to recall Judge Persky from judicial office.⁴ Among the leading recall proponents was Michelle Dauber, a Stanford University law professor who had written a letter to the judge regarding Turner's sentence.⁵ Dauber would eventually become the driving force behind the campaign to recall Judge Persky.

In response, opponents of the proposed recall united in a counter-campaign, arguing that recalling Judge Persky would

be a threat to the independence of the judiciary and would lead to numerous negative consequences, including harsher sentences, particularly for racial minorities.

In June of 2018, the voters of Santa Clara County voted to recall Judge Persky. This article first provides a brief factual and procedural background of the Turner case and then summarizes the positions articulated for and against the recall vote.

OVERVIEW OF THE FACTS OF THE TURNER CASE

Shortly after midnight on January 18, 2015, two Stanford graduate students who were biking to a fraternity house noticed two people on the ground between a basketball court and a wooden shed. The person on top began thrusting in a sexual manner. One of the graduate students noticed that the person on the bottom wasn't moving. Both men got off their bikes and approached the pair, calling out to ask if everything was okay. The man who was thrusting, later identified as Turner, looked at the approaching men, stood up, and backed away. Jane Doe 1 remained on the ground, her dress hiked up around her waist. Turner attempted to flee, but one of the cyclists chased him down and pinned him to the ground until police arrived.

The Santa Clara County District Attorney charged Turner with assault with intent to rape (Pen. Code § 220, subd. (a)(1); count 1); sexual penetration of an intoxicated person (§ 289, subd. (e); count 2); and sexual penetration of an unconscious person (§ 289, subd. (d); count 3). Trial commenced March 14, 2016. After about six and one-half days of testimony, the jury began deliberating. The next day, the jury returned its verdict, convicting Turner of all three counts.

Because of his conviction for assault with the intent to rape, Turner was presumptively ineligible for probation; a down-

Footnotes

1. The factual and procedural background information for this article is taken from the California Court of Appeals' unpublished opinion, *People v. Turner*, No. H043709, 2018 WL 3751731 (Cal. Ct. App. Aug. 8, 2018), available at <http://www.courts.ca.gov/opinions/nonpub/H043709.PDF>.
2. For Turner's conviction for assault with intent to commit rape, the statutory sentencing options were two, four, or six years in state prison. Turner also faced a term of three, six, or eight years in prison for his convictions for Penetration of an Intoxicated Person/Penetration of an Unconscious Person, with the potential for the terms to run consecutively. The district attorney recommended the mid-range sentence on the first count, a four-year sentence, to run concurrently with a six-year sentence—also in the mid-range—for the other count.
3. See Cal. Penal Code Section 4019(b)-(c).
4. In California, "Superior Court judges serve six-year terms and are elected by county voters on a non-partisan ballot. Vacancies that

occur between elections are filled through appointment by the Governor. An appointee serves until the next general election when he or she must stand for election in order to retain the seat." See Santa Clara Superior Court, *Fact Sheet—Judicial Elections* (November, 2006), available at <http://www.sccscourt.org/documents/JudElections.pdf>. At the time of the Turner sentencing, Judge Persky was running unopposed and was a few days away from reelection.

5. In her letter to Judge Persky before the Turner sentencing, Dauber stated that she had been "a professor at Stanford Law School for the past 15 years," and that she had "been deeply involved in efforts to improve Stanford's prevention and response to sexual assault on campus." She also noted that she was the faculty co-chair of the Board of Judicial Affairs from 2011 through 2013, where she "helped lead a process to reform Stanford's sexual assault policies." Additionally, Dauber noted in the letter that "[t]he victim in [the Turner] case has been a close friend of [her] daughter since middle school," and Dauber "kn[e]w her well."

ward departure from the statutory minimum state prison sentence could only be granted if the court makes a finding that the defendant's case is an "unusual case where the interests of justice would best be served" by granting probation.⁶ The Probation Department recommended that the court exercise its discretion to grant this downward departure and conclude that Turner's crimes were "substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence."⁷

The People disagreed with the Probation Department's recommendation. In its sentencing memorandum, the Santa Clara District Attorney noted that the maximum prison sentence for the convictions would be fourteen years and recommended that the judge impose a sentence of six years. The People argued that Turner should not receive probation because his crimes were "more serious than other similar cases demanding a considerable punishment that is commensurate to the global effects of [his] actions."⁸ The People included with their sentencing memorandum a copy of a letter from Professor Dauber discussing the impact of Turner's crimes on the Stanford community. Dauber argued that Turner's case should not be seen as less serious than other sexual assaults.⁹ She also urged that probation not be granted on the basis that Turner was a "youthful" offender, arguing that Turner was the same age as many of the perpetrators of sexual assaults on campus.

At the sentencing hearing, Judge Persky prefaced his remarks about the Turner sentence with an express recognition that the decision was a difficult one¹⁰:

And as I'm sure everyone in the court can appreciate and as was stated several times today, it is a difficult decision. And I just want to, before I give my tentative decision, read something from [Jane Doe 1's] statement, which I think is appropriate — actually, two things from her statement. She gave a very eloquent statement today on the record, which was a briefer version of what was submitted to the Court. Let me just say for the record that I have reviewed everything, including the sentencing memorandum, the probation report, the attachments to the probation report, and the respective sentencing memoranda. And so [Jane Doe 1] wrote in her written statement, [as read] "Ruin a life, one life, yours. You for-

got about mine. Let me rephrase for you. 'I want to show people that one night of drinking can ruin two lives'— you and me.['] You are the cause; I am the effect. You have dragged me through this hell with you, dipped me back into that night again and again. You knocked down both our towers. I collapsed at the same time you did. Your damage was concrete: Stripped of titles, degrees, enrollment. My damage was internal, unseen. I carry it with me. You took away my worth, my privacy, my energy, my time, my safety, my intimacy, my confidence, my own voice, until today." And then later on in her written statement, she writes, [as read] "If you think I was spared, came out unscathed, that today I ride off into the sunset while you suffer the greatest blow, you are mistaken. Nobody wins. We have all been devastated. We have all been trying to find some meaning in all of this suffering." And here — I think this is relevant to the — to the sentencing decision — she writes, [as read] "You should have never done this to me. Secondly, you should never have made me fight so long to tell you you should never have done this to me. But here we are. The damage is done. No one can undo it.

"And now we both have a choice. We can let this destroy us. I can remain angry and hurt, and you can be in denial. Or we can face it head on: I accept the pain; you accept the punishment; and we move on."

Judge Persky then announced his tentative decision was to agree with the Probation Department's recommendation that Turner's case presented unusual circumstances and to grant probation instead of a state prison sentence. Analyzing the factors under California Rule of Court 4.413, Judge Persky concluded that the presumption against probation was overcome because Turner was "youthful" and had "no significant record of prior criminal offenses."¹¹ The judge identified and discussed each of the 17 factors outlined in California Rules of Court, rule 4.414.¹²

Judge Persky then announced his tentative decision was to agree with the Probation Department's recommendation

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6. Cal. Penal Code Section 1203.065(b).

7. See Cal. Rule of Ct. 4.413(c)(1)(A). A copy of the Probation Department report is available at <http://documents.latimes.com/people-v-brock-allen-turner-89/>.

8. A copy of the People's Sentencing Memorandum is available at <http://documents.latimes.com/people-v-brock-allen-turner-59/>.

9. A copy of Professor Dauber's letter to Judge Persky is available at <http://documents.latimes.com/people-v-brock-allen-turner-79/>.

10. A transcript of Judge Persky's sentencing decision is available at <https://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky>.

11. See Cal. Rules of Court 4.413(c)(2)(C), available at http://www.courts.ca.gov/cms/rules/index.cfm?title=four&linkid=rule4_413.

12. See Cal. Rules of Court 4.414(a), (b), available at

http://www.courts.ca.gov/cms/rules/index.cfm?title=four&linkid=rule4_414. The 17 factors are:

(a) Facts relating to the crime

Facts relating to the crime include:

- (1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime;
- (2) Whether the defendant was armed with or used a weapon;
- (3) The vulnerability of the victim;
- (4) Whether the defendant inflicted physical or emotional injury;
- (5) The degree of monetary loss to the victim;
- (6) Whether the defendant was an active or a passive participant;
- (7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely

Outcry over the perceived leniency of the sentence swept the nation.

The judge found the following crime-related criteria to be relevant to his decision:

- the nature, seriousness, and circumstances of the crime as compared to other instances of the same crime
- the vulnerability of the victim
- whether the defendant inflicted physical or emotional injury
- whether the defendant was an active participant in the crime
- whether the defendant demonstrated criminal sophistication.

The judge found the following defendant-related criteria to be relevant to his decision:

- the defendant's prior criminal record
- the defendant's willingness and ability to comply with the terms of probation
- the likely effect of imprisonment on the defendant
- the adverse collateral consequences on the defendant from the felony conviction
- whether the defendant is remorseful
- whether or not the defendant was likely be a danger to others

The Probation Department's report contained two assessment tools that had been used to analyze Turner's dangerousness. Turner had received a score of 3 on the Static-99R, which is an actuarial measure of sexual offense recidivism. This had the effect of placing him in the "Low-Moderate range of risk

relative to other adult male sex offenders."¹³ Turner was also assessed under the Corrections Assessment Intervention System (CAIS), "a standardized, validated assessment and case management system developed by the National Council on Crime and Delinquency [which] assesses a defendant's criminogenic needs and risk to re-offend."¹⁴ Based on the CAIS assessment, Turner would benefit from family therapy, would need to learn new coping skills, and would need to be treated for drug and alcohol abuse.

After announcing his tentative ruling, the judge heard from the prosecutor, defense counsel, and the Probation Department. In the end, Judge Persky granted probation and sentenced Turner to six months in the county jail. The judge did require Turner to register as a sex offender for life and that Turner submit to random drug and alcohol testing.¹⁵

RESPONSE TO THE TURNER SENTENCING

While the Turner case had already made national news even before Turner was convicted, the Turner sentence galvanized public attention. Outcry over the perceived leniency of the sentence swept the nation.¹⁶

Professor Dauber, who as noted above had submitted a letter to Judge Persky strenuously urging that Turner not be granted probation, led the charge of what would become a campaign to recall Judge Persky from the bench: the "Recall Aaron Persky" campaign.¹⁷ Proponents of the recall argued that Judge Persky's sentencing of Turner demonstrated that he was biased and unfit to sit on the bench. They argued that Judge Persky "appeared to favor athletes and other relatively privileged individuals accused of sex crimes or violence against women."¹⁸ Recall pro-

to recur;

- (8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant; and
 - (9) Whether the defendant took advantage of a position of trust or confidence to commit the crime.
- (b) Facts relating to the defendant
- Facts relating to the defendant include:
- (1) Prior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct;
 - (2) Prior performance and present status on probation, mandatory supervision, postrelease community supervision, or parole;
 - (3) Willingness to comply with the terms of probation;
 - (4) Ability to comply with reasonable terms of probation as indicated by the defendant's age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors;
 - (5) The likely effect of imprisonment on the defendant and his or her dependents;
 - (6) The adverse collateral consequences on the defendant's life resulting from the felony conviction;
 - (7) Whether the defendant is remorseful; and
 - (8) The likelihood that if not imprisoned the defendant will be a danger to others.

13. See Probation Department Report, available at

<http://documents.latimes.com/people-v-brock-allen-turner-89/>.

14. See *id.*

15. Turner appealed his convictions to the California Court of Appeals, which affirmed on August 8, 2018. *People v. Turner*, No. H043709, 2018 WL 3751731 (Cal. Ct. App. Aug. 8, 2018), available at <http://www.courts.ca.gov/opinions/nonpub/H043709.PDF>.

16. The Turner sentence was met with a fairly rapid legislative response. Approximately five months after Judge Persky handed down the Turner sentence, California governor Jerry Brown signed a bill that toughens penalties for attacks on unconscious victims. In particular, Assembly Bill 2888 (2016) removes a judge's discretion to grant probation in cases where the victim of a sexual assault is unconscious. See Sarah Larimer, *In the Aftermath of Brock Turner Case, California's Governor Signs Sex Crime Bill*, WASH. POST (Sep. 30, 2016), available at https://www.washingtonpost.com/news/grade-point/wp/2016/09/30/in-aftermath-of-brock-turner-case-californias-governor-signs-sex-crime-bill/?noredirect=on&utm_term=.f728a5799003.

17. The Recall Aaron Persky website is no longer available, but archived versions can be accessed at <https://web.archive.org/web/20180101224233/http://recallaaronpersky.com/>.

18. *Judge Persky's Other Cases*, available at https://web.archive.org/web/20180119094645/http://www.recallaaronpersky.com:80/judge_persky_s_other_cases. The recall proponents referred to the cases of Ikaika Gunderson, Keenan Smith, Robert Chain, and the "De Anza Gang Rape" case. According to the recall proponents, these cases presided over by Judge Persky show that he "has a long-standing pattern of bias in favor of privileged defendants."

ponents did not argue that Judge Persky had violated the law or committed any legal error in the sentencing.

The following “Mission Statement” summarizes the position of the recall proponents:

We are outraged at Judge Persky’s actions, and we don’t just want talk, we want to take him out of office. That is why the Committee to Recall Judge Persky is the only effort in existence that has put together a comprehensive plan and team that can actually take Persky out of office, so that he can no longer shield sex offenders from justice.

Additionally, the Recall Aaron Persky website listed the following under a heading titled, “Why the recall?”

Aaron Persky gave too lenient a sentence to Brock Turner, a former Stanford Swimmer convicted of sexual assault. Turner was only sentenced to six months for his heinous crime, and Persky cited the impact prison would have on Turner’s life in his decision. Persky is unfit to sit on the bench, and as long as he is a judge, predators in Santa Clara County will know they have an ally on the bench.

In response, numerous groups came out publicly against the recall.¹⁹ In particular, one group, called Voices Against Recall, was led by LaDoris Cordell, a former superior court judge in Santa Clara county.²⁰ According to the Voices Against Recall, other opponents of the recall included the Santa Clara

County Bar Association²¹; a group of more than 90 law professors in California²²; district attorneys in Santa Clara County, including Jeffrey Rosen, whose office prosecuted Turner²³; the Santa Clara Public Defender; several retired federal district court judges and California Supreme Court justices; and over 200 current and retired California Superior Court judges. The Voices Against Recall group argued that recalling a judge should be a monumental, and rare, occurrence. The opponents of the recall emphasized the value of an independent judiciary, arguing that a judge who must first assess the political popularity of a decision before rendering it, out of concern for job security, is not fulfilling the proper function of the judiciary. Recall opponents also asserted that the true burden of the recall of Judge Persky would be felt by criminal defendants, particularly those of racial minorities, with judges imposing harsher sentences on defendants out of concern for the political popularity of the decision.

Opponents of the recall also pointed out that the California Commission on Judicial Performance, an “independent state agency responsible for investigating complaints of judicial misconduct,”²⁴ released its findings in December 2016 that after thoroughly evaluating the charges against Judge Persky for judicial misconduct, the CJP concluded that there had been no

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19. Judge Persky himself also brought a lawsuit challenging the recall election in court. See *Persky v. Bushey*, 21 Cal. App. 5th 810, 815, 230 Cal. Rptr. 3d 658, 661 (Ct. App. 2018), review denied (May 1, 2018). Persky argued that the recall election was procedurally defective in a number of respects. See *id.* The recall proponents, including Dauber, intervened as real parties in interest and defended the procedural propriety of the recall election. The court ultimately ruled against Persky and allowed the recall election to proceed, and the California Court of Appeals affirmed. See *id.* Dauber also sought and was awarded attorney’s fees in connection with the lawsuit, under a California statute that provides that a prevailing party may recover attorney’s fees from an opponent when seeking to enforce “an important right affecting the public interest.” Elena Kadvan, *Persky Ordered to Pay Recall Campaign Attorney’s Fees*, PALO ALTO ONLINE (Oct. 25, 2018), available at: <https://www.paloaltoonline.com/news/2018/10/25/persky-ordered-to-pay-recall-campaign-attorneys-fees>.

20. The Voices Against Recall website has since been taken down, but archived versions can be accessed at <https://web.archive.org/web/20180423164925/http://www.voicesagainstrecall.org/>

21. Santa Clara County Bar Association, *SCCBA Statement on Judicial Independence*, SCCBA (June 14, 2016), available at: <https://sccbba.site-ym.com/blogpost/1133925/249782/SCCBA-Statement-on-Judicial-Independence>.

22. *Law Professors’ Statement for Independence of the Judiciary and Against the Recall of Santa Clara County Superior Court Judge Aaron Persky*, available at <https://www.mercurynews.com/wp-content/uploads/2017/08/90-law-professors-statement-for-the>

[independence-of-the-judiciary-and-against-the-petition-for-recall-of-santa-clara-superior-court-judge-aaron-persky-1-docx.pdf](https://www.sccgov.org/sites/da/newsroom/newsreleases/Pages/NR-A2016/DA-on-Turner-Sentence.aspx). The law professors stated that “[t]he mechanism of recall was designed for and must be limited to cases where judges are corrupt or incompetent or exhibit bias that leads to systematic injustice in their courtrooms. None of these criteria applies to Judge Persky.”

23. County of Santa Clara, Office of the District Attorney, *DA Makes Statement on Brock Turner Sentencing* (June 6, 2016), available at <https://www.sccgov.org/sites/da/newsroom/newsreleases/Pages/NR-A2016/DA-on-Turner-Sentence.aspx> (“While I strongly disagree with the sentence that Judge Persky issued in the Brock Turner case I do not believe he should be removed from his judgeship. I am so pleased that the victim’s powerful and true statements about the devastation of campus sexual assault are being heard across our nation. She has given voice to thousands of sexual assault survivors.”).

24. State of California, Commission on Judicial Performance, *Home* (last updated November 28, 2018), available at: <https://cjp.ca.gov/>

The commission’s authority is limited to investigating allegations of judicial misconduct and, if warranted, imposing discipline. Judicial misconduct usually involves conduct in conflict with the standards set forth in the Code of Judicial Ethics. The commission cannot change a decision made by any judicial officer; this is a function of the state’s appellate courts. After investigation, and in some cases a public hearing, the commission may impose sanctions ranging from confidential discipline to removal from office.

misconduct.²⁵ Proponents of the recall, however, challenged the Commission's conclusion in a written "Response to the Commission on Judicial Performance" that criticized the accuracy of the Commission's report.²⁶

In the end, the voters of Santa Clara County voted to recall Judge Persky in June of 2018, with approximately 60% voting yes and 40% voting no.²⁷



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Brodus, an associate at Parr Brown, in preparing this article.

25. *Commission on Judicial Performance Closes Investigation of Judge Aaron Persky*, available at https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Persky_Explanatory_Statement_12-19-16.pdf. The Commission on Judicial Performance explained its conclusion as follows:

First, the [Turner] sentence was within the parameters set by law and was therefore within the judge's discretion. Second, the judge performed a multi-factor balancing assessment prescribed by law that took into account both the victim and the defendant. Third, the judge's sentence was consistent with the recommendation in the probation report, the purpose of which is to fairly and completely evaluate various factors and provide the judge with a recom-

mended sentence. Fourth, comparison to other cases handled by Judge Persky that were publicly identified does not support a finding of bias.

26. *Response to the Commission on Judicial Performance*, available at https://web.archive.org/web/20180101080614/http://www.recallaaronpersky.com:80/response_to_the_commission_on_judicial_performance; see also Elena Kadvan, *Analysis of Judge Persky's "Pattern" Cases*, PALO ALTO ONLINE (Last updated May 15, 2018), available at: <https://paloaltoonline.com/news/2018/05/11/analysis-of-judge-perskys-pattern-cases>.

27. Santa Clara County Registrar of Voters, *Official Final Results* (last updated July 9, 2018), available at http://results.enr.clarityelections.com/CA/Santa_Clara/75369/Web02.203317/#/c/C_2.



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EDITOR'S NOTE

When I started brainstorming for this issue, I was troubled by the extensive national media coverage of a recall election for a trial judge in California, Judge Aaron Persky. I was frustrated that the large volume of coverage had so few facts regarding Judge Persky or the already infamous sentencing decision that underlay the recall effort. While judicial accountability is critical to the credibility of our courts, I was also alarmed by the lack of any coherent communal standards for evaluating whether to recall a judge in our national dialogue. The plan for this issue resulted. We had no idea that the Kavanaugh hearings and the national attention to the Larry Nasser sentencing would only further spotlight community evaluation of judicial officers. How should we judge the judges, and how do we balance the need for impartiality with the need for accountability?

First, we hear from an accomplished lawyer and gifted former journalist, Jeff Hunt. His article gives us the facts we wanted to hear behind the Persky recall. Not surprisingly, the situation raised more challenges, regardless of your perspective, than the media coverage suggested.

In our second article, Justice Barbara Pariente and Melanie Kalmanson give us frontline accounts of efforts to send a message to judges. They discuss the dangers of a judiciary too beholden to popular will and make a case for that apparently pass notion of judicial independence. They also explain objective standards for evaluation of judges.

In our third article, we turn to the other side of the spectrum. Prof. James Gibson and Michael Nelson discuss the critical importance of accountability to the credibility of the judiciary and the risk of being known as The Least Accountable Branch. The authors question the premise that judges should be insulated from the views of the community. They discuss the scope of judicial discretion and question how a judiciary can be accountable if the subjective exercise of that discretion is effectively deemed unreviewable.

Our fourth article from Prof. Jordan Singer provides a broader perspective on the relative roles of accountability and independence for the judiciary. Prof. Singer reviews some history of our attempts in judicial selection systems to balance these sometimes competing elements. In his list of sample retention challenges, you could add one in my state of Colorado last year. A highly regarded trial judge made a ruling that a powerful civil attorney disliked and the attorney funded an advertising campaign against him that our nonpartisan, merit-based system was not equipped to handle. He was retained so, like other examples cited by Prof. Jordan, you may see that as an example of the strength of the current system or a cautionary tale of troubles to come.

Finally, I provide an essay reminding us of a time when the judiciary really was no more than a reflection of the popular prejudices of the day and how some of those influences are still with us. While tied to our topic, my essay is intended more to follow the advice of our psychology experts from issue 54:2 to be mindful of the purpose and value in our work. —David Prince



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The cover photo is the Bent County Courthouse in Las Animas, Colorado. The courthouse opened in 1889 and is currently the oldest functioning courthouse in Colorado. Additionally, the courthouse is on the National Registrar of Historic Places. Cover photo by Mary Watkins.

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